

1957

Remington Rand, Inc. v. Thurman E. O'Neil et al : Brief of Respondents

Utah Supreme Court

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In the Supreme Court of the State of Utah

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REMINGTON RAND, INC.,
a corporation,

Appellant and Plaintiff,

vs.

THURMAN E. O'NEIL and LOIS S.
MACHADO, fdba A-1 Typewriter Com-
pany,

Defendants,

vs.

DALE E. GRANT and UTAH CASH
REGISTER EXCHANGE, INC., a cor-
poration,

Respondents and Garnishee Defendants.

Clk, Supreme Court, Utah

No. 8598

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

STATEMENT OF FACTS

Appellants have substantially stated the Facts of the Case in their brief on appeal. But to further clarify respondents' argument a few additional facts are inserted to supplement those previously stated by appellants.

This matter was previously before this court under the same title in Case No. 8379, and the decision which was handed down is found at 293 Pac. 2d 416 (R. 162).

Shortly subsequent to the time that the lower court granted Summary Judgment to respondents, appellant made a Motion to Amend Judgment (R. 179). Thereafter, pursuant to Stipulation of respondents, (R. 182), the Second Amended Judgment was signed and entered by the court, which contained the following provisions significant to this appeal (R. 183-184):

IT IS FURTHER ORDERED that pursuant thereto, any and all demands and claims of Plaintiff against Garnishee Defendants based upon or arising out of any alleged claimed indebtedness of Garnishee Defendants to Thurman E. O'Neil, Defendant in the above entitled action, prior to the date of Garnishee Defendants' Answers to Garnishments made by Garnishee Defendants on the 30th day of July, 1956, shall not be further maintained against Garnishee Defendants by way of garnishment proceedings.

FURTHER ORDERED, that the Motion of Plaintiff for leave to file an Amended Reply to the Answer of said Garnishees to the Writ of Garnishment issued March 17, 1955, be and the same is hereby denied;

FURTHER ORDERED, that the following personal property is adjudged to be the property of Defendant Thurman E. O'Neil:

- 3 Cole Steel Cabinets (1 damaged)
- 1 Air Compressor (Par M15 A17994)
- 3 Parts cabinets with parts
- 1 Supreme Power Cleaner
- 1 Remington Cash Register 41882 A 339
- 1 National Cash Register 2924392 1722E
- 1 Used National Cash Register, Service Station Model 1082 with grey, slick finish (only service station model on premises)

The provision of the judgment relating to the aforesaid properties is not found in the original Summary Judgment

(R. 177-178), but was inserted in the Second Amended Judgment prepared by appellant. It should also be noted at this point that all of the said properties were originally seized by Remington Rand, Inc. (appellant herein) prior to the former appeal in this matter and that they have retained possession and control of the properties at all times since and up to the present time, and that it was not until on or about Nov. 13, 1956, that the other tangible personal properties of these respondents were returned to them (some 9 months after the decision in the prior appeal.) Appellant has never returned the money seized from respondents' bank accounts. (See R. 188, 189, 190, 191).

The instructions which appellant furnished to the Sheriff of Salt Lake County (R. 188-189) excepted the foregoing personal properties from being delivered to respondents. These properties were the same items to which at all times during proceedings in the cause respondents disclaimed any ownership.

STATEMENT OF POINTS

I. THE DISTRICT COURT CORRECTLY SUSTAINED GARNISHEES' MOTION FOR SUMMARY JUDGMENT BECAUSE APPELLANT FAILED TO SERVE ITS REPLY WITHIN THE TIME PROVIDED BY STATUTE.

II. BY ACCEPTING THE RELIEF AND RETAINING THE PROPERTY AS PROVIDED BY RULE 64 D(i), APPELLANT IS PRECLUDED FROM TAKING FURTHER ACTION.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY SUSTAINED GARNISHEES' MOTION FOR SUMMARY JUDGMENT BECAUSE APPELLANT FAILED TO SERVE ITS REPLY WITHIN THE TIME PROVIDED BY STATUTE.

Although the prior decision in this case was handed down on February 15, 1956 (R. 162), it was not until July 25, 1956 (R. 160) that appellant re-served garnishments identical in scope and time to the ones previously served, thereby seeking to re-trace steps taken by it over a year previously. In its Motion for Summary Judgment before the lower court, garnishees successfully argued that the prior Supreme Court Decision and the effect of Rule 64 D (h) and (i) had concluded the matter insofar as further proceedings by way of garnishments were concerned.

Rule 64 D(g), URCP, provides that after the garnishee files a verified answer to the plaintiff's interrogatories—

“ . . . the garnishee shall be relieved from further liability in the proceedings unless his answer shall be successfully controverted as hereinafter provided.”

In order to successfully controvert the answers Rule 64 D(h), URCP, states:

“ . . . the plaintiff may, within 10 days after the expiration of the time allowed for the filing of such answer, *serve* upon the garnishee and file a reply to the whole or any part thereof, . . . ”

Rule 64 D(i) then provides that if the plaintiff fails to reply to the answer of the garnishee, he shall be deemed to

have accepted it as correct, and judgment may be entered thereon.

Rule 5(a), URCP, provides that every order required by its terms to be served and every paper requiring service *shall* be served upon each of the parties affected thereby. By using the word "shall" the legislature has made the failure to serve when required a jurisdictional defect.

As this Court held in the prior action:

"The very purpose of the rule requiring service of an 'Answer to Reply of Garnishee' which can set forth new matter charging a garnishee with liability is to avoid such a situation as occurred in the instant case."

In garnishment proceedings more so than in almost any other proceeding the rights of the parties thereto are concluded by the parties themselves through their interchange of interrogatories and answers. By not receiving a reply to his answers a garnishee has every right to expect that in accordance with Rule 64 D(i), URCP, the judgment entered upon the basis of his answers will conclude the matter.

Where the statute or rule requires, as does Rule 64 D(h), that the answers to the interrogatories contained in the garnishment be contested within a specified time, it is incumbent upon the plaintiff to make a proper issue within the time allowed (*Phelps v. Schmuck*—Kansas, 1940, 100 Pac. 2d 67). In this case the answers were not properly contested within the specified time. Thus, in the Phelps case where another summons was issued one year after a similar summons the garnishee was upheld in its defense that it had filed its answer

to the previous summons and that within 20 days thereafter plaintiff did not serve upon the garnishee a notice in writing that plaintiff elected to take issue on the answer, and that as provided by the statute the answer became conclusive of the truth of the facts stated and that thereafter plaintiff was barred and had no further right to proceed against the garnishee.

The court in the Phelps case further held that—

“ . . . the plaintiff, having instituted proceedings in garnishment by filing her affidavit thereof on June 25, 1937, is not in a position to question the sufficiency of her own pleading and does not do so. The affidavit then filed properly started a proceeding to determine the liability of the garnishee.”

See also *Septer v. Boyles*, 147 Kan. 356, 76 P. 2nd 771. In *Roman vs. Montgomery Iron Works et al.*, (Alabama 1908), 47 So. 136, 19 L.R.A. (NS) 604, the court held:

“ . . . the failure of the creditor to contest the answer and who in the meantime permits the court to proceed to judgment is unlike the mere dismissal of the garnishment, but is in effect an admission of the recitals of the answer. And a judgment rendered thereon for the plaintiff, if the answer admitted indebtedness, would be conclusive between the immediate parties, and one rendered for the garnishee, when the answer denied indebtedness, would also be conclusive as between the creditor and the garnishee.”

And from 5 Am. Jur., Attachment & Garnishment, Sec. 763, p. 61:

“If issue is not taken on the statements of the garnishee, such statements must be taken as admitted, and the answer of the garnishee is then the sole test of his indebtedness or liability.”

Appellant has cited two cases in support of its position that a judgment such as was handed down in the previous garnishment proceeding is not a judgment on the merits and therefore not *res judicata*. The first case so cited, *Lyon v. Pittsburgh Allegheny and Manchester T. Co.*, (Penn. 1933), 169 A. 229, can be distinguished on two grounds: (1) That there was no statute similar to the Utah garnishment rules requiring service of a reply to the garnishee's answer in force in Pennsylvania at the time of that case, and (2) the court there pointed out that the garnishees could not on their own showing prevent a summary judgment, this being conclusive proof in that case on the important question of whether the second writ was vexatious in nature. However, in the case at bar the garnishee has obtained not only a summary judgment but also a prior ruling of this court, thereby making it most evident that it is continuously being harassed by vexatious tactics.

The second case cited by appellant is *Marsh, Jr. v. Phillips, Jr. and Coe*, 77 Georgia 436, and can be distinguished from the instant action on two grounds: (1) There was no statute similar to the Utah garnishment rules in force in Georgia in 1886, and (2) the court in that case pointed out that where the question is can a garnishment be served again on the same garnishee after the judgment discharged him, the discharge is a judgment for him on the merits and cannot be tried again and re-opened except as all other judgments may be, that is, for fraud in procuring it or other legal reason.

In the very recent decision of *Glenn v. Ferrell et al.* (Nov. 1956), 304 Pac. 2d 380, at pages 382 and 383, Justice Crockett spoke for the Utah Supreme Court in a unanimous decision:

“Although this court has indicated that statutes relating to attachment and garnishment should be liberally construed to effect their purpose, it has also recognized that where there is a defect which is jurisdictional in nature, it must not be disregarded.

“We agree with the holding of the trial court that the failure to serve the corporation in accordance with the requirements of Rule 64C renders the attachment defective. Accordingly, the subsequent proceedings and judgment were properly set aside.”

In conclusion it might be said that “. . . in a proper case where the first garnishment is *premature*, *Mutual Bldg. & Loan Assn. of Long Beach v. Corum*, 16 Cal. App. 2nd 212, 60 Pac. 2nd 316), or where the answer to the first summons shows plaintiff’s *claim exceeds garnishee’s indebtedness* (*Johnson v. Atlanta Furniture Co.*, 47 Ga. App. 124, 169 S. E. 767), *and under a permissive statute*, successive writs of garnishment may be issued from time to time during the pendency of the proceedings.” 38 C. J. S. (Garnishment 151).

The case at bar is neither a proper case for, nor is there a Utah statute authorizing and permitting, successive writs of garnishment!

II. BY ACCEPTING THE RELIEF AND RETAINING THE PROPERTY AS PROVIDED BY RULE 64 D(i), APPELLANT IS PRECLUDED FROM TAKING FURTHER ACTION.

As set forth in the preceding Statement of Facts, appellant has for nearly two years retained the personal properties disclaimed by these respondents in their original garnishment answers. And to fortify its hold on those properties appellant

secured the Second Amended Judgment (R. 183-184) specifically setting those properties apart as belonging to O'Neil. Appellant then expressly excepted those properties from being delivered to respondents in its instructions to the Sheriff of Salt Lake County (R. 188-189).

Although appellant may contend otherwise by some method of attenuated reasoning, by retaining dominion over the properties disclaimed by respondents it has for all practical purposes fully accepted the relief granted under Rule 64 D (i) and in the decision of the court in its Second Amended Judgment.

By accepting and retaining the properties appellant's attempt to again pursue the procedure of Rule 64 D(h) is wholly inconsistent with its claim that it has been denied its garnishment rights by being refused permission to re-open garnishment proceedings involving the same identical time and matters previously involved in a matter where it failed to serve its Reply within the permitted time.

It should be noted that garnishment proceedings are provisional and special in nature and should be strictly followed. Furthermore, appellant has not once suggested that it does not have other legal remedies to pursue if these respondents actually owe any amounts to O'Neil, and the lower court's decision (R. 184) specifically barred further garnishment proceedings only. But the remedy by garnishment proceedings has been lost through its own errors and omissions which have prevented the lower court from being in a position to acquire jurisdiction.

CONCLUSION

What appellant would have this court do is to nullify the main portions of the very same Second Amended Judgment whereby it has sought to retain to itself all of its beneficial provisions. To by-pass and disregard the 10-day requirement of service set forth in Rule 64 D(h) would make the jurisdictional requirement therein a mockery and meaningless. Litigation should be concluded in respect of special proceedings more so than in other cases. If in this state garnishments can be re-commenced merely because the moving party failed to serve its reply within the allowable 10-day period, then we can expect the courts and litigants to be perpetually harassed by the very manner of doings which have plagued these respondents for two years.

4 Am. Jur., Attachment & Garnishment, Sec. 42, p. 575, has well summarized respondents' contentions:

"A rule, generally observed, is that the authority of the court to proceed in attachment or garnishment is to be limited strictly, like the courts of special or limited jurisdiction, and that it will not enjoy any presumption in its favor. This rule is a corollary of the rule that attachment and *garnishment statutes are to be construed strictly against the attaching or garnishing creditor* because they are statutory remedies in derogation of the common law." (Italics added.)

The decision of the Third Judicial District Court should be affirmed.

Respectfully submitted,

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By: Glen E. Fuller

Attorneys for Respondents