1982

Robert L. Frazier v. East Millard Recreation District : Brief of Appellant

Utah Supreme Court

Harold D. Mitchell; Strong & Mitchell; Attorneys for Appellant;
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IN THE SUPREME COURT

STATE OF UTAH

ROBERT L. FRAZIER, Plaintiff-Appellant, -v- EAST MILLARD RECREATION DISTRICT, Defendant-Repsondent.	)	Case No. 18201

APPELLANT'S BRIEF

Appeal from Judgment of Fifth Judicial District Court of Millard County,

Honorable J. Harlan Burns, District Judge, Presiding

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STATEMENT OF NATURE OF THE CASE

This is a contract action by an architect for fees due from defendant for work done prior to cancellation of the written contract between the parties.

DISPOSITION IN THE LOWER COURT

The case was dismissed with prejudice before trial and with no motion for dismissal or other hearing.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the District Court's judgment of dismissal and a remand of the case for trial or other appropriate proceedings so that a resolution may be made of the issues presented in the action.

STATEMENT OF FACTS

This action was brought by plaintiff, an architect licensed by the State of Utah, for collection of an amount claimed to be due under a written contract for architectural services with East Millard Recreation District. Plaintiff requested that the matter be set for trial and a pretrial hearing was held in the District Court on March 17, 1981. No pretrial order was entered and counsel was instructed that a pretrial order would be held in abeyance (Transcript March 17, 1981, hearing, page 7). At the conclusion of the pretrial conference, both parties were given leave to file motions for summary judgment within 20 days (Transcript,

pp. 6-7). Neither party did so. The matter was placed on the monthly law and motion calendar in Millard County for July 14, 1981, (Record p. 18) without notice to either party. No one appeared and the case was continued. On September 1, 1981, counsel for plaintiff called the court's attention to the case by letter requesting a trial date (Record p. 23). The matter was again placed on the Millard County law and motion calendar for September 15, 1981, (Transcript September 15, 1981, hearing; Record p. 19), again without notice to counsel and again neither party appeared. At that time the court ruled that the case should be dismissed with prejudice. On November 24, 1981, counsel for plaintiff received from the trial court administrators a notice of a trial in the matter set for April 21, 1982 (Record p. 22) although that notice was apparently not filed by the administrator with the county clerk and is not part of the record. On December 2, 1981, the court signed a judgment of dismissal which had been prepared by counsel for defendant (Record p. 20). A copy of that judgment was mailed by the clerk's office to counsel for plaintiff and was received by him on December 22, 1981 (Record p. 22).

ARGUMENT

POINT I: DISMISSAL OF THE CASE WAS AN ABUSE OF THE TRIAL COURT'S DISCRETION.

Discretion, by its very nature, is difficult of precise definition and to precisely classify it is a difficult undertaking. The standard for determining whether a court has abused its discretion is not a hard and fast rule. Abuse of discretion "arises from action beyond the bounds of fair discretion, exceeding the bounds of reason. It has been defined as 'an erroneous conclusion and judgment, one clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 23, 60 ALR2d 1354 at 1365 (1956), citing McFarlan v. Fowler Bank City Trust Co., 214 Ind. 10, 12 N.E.2d 752, 754. Abuse of discretion does not necessarily imply a dishonest motive or act but only that the trial court made an unreasonable ruling.

The ruling of the trial court to dismiss plaintiff's action with prejudice is plainly an abuse of discretion under the standard as set forth above. The reasons given by the court in its September 15, 1981, ruling from the bench show that the court's discretion was abused. The court dismissed the case for "failure of counsel for plaintiff to submit a pretrial order", for failure to submit briefs, for failure to file motions for summary judgment, because "both parties have abandoned their lawsuit", and because "there is no legal entity, East Millard Recreation District" (Transcript, September 15, 1981, pp. 1-2). None

of these reasons is an adequate justification for the court's judgment of dismissal. First, counsel for plaintiff was specifically directed at the pretrial hearing that the pretrial order would be held in abeyance (Transcript, March 17, 1981, p. 7). Second, filing of briefs was discretionary with counsel or was replaced by the granting of leave to file motions for summary judgment (Transcript, March 17, 1981, pp. 5-7). In any event, neither party filed such a brief. Plaintiff should not be the only party punished for any such failure. Third, the court at no time required counsel to submit motions for summary judgment but only granted leave to do so within a specific time (Transcript, March 17, 1981, pp. 6-7). Fourth, plaintiff had certainly not abandoned the litigation but was waiting for the matter to be set for trial so that the issues presented by the complaint could be resolved. Plaintiff had requested a trial setting. In fact, with no knowledge that the matter was even on the court's law and motion calendar for September 15, 1981, plaintiff's counsel wrote to the court on September 1, 1981, to remind the court that the matter should be set for trial (Record p. 23). The court knew, or should have known that plaintiff was still pursuing the matter. Fifth, the existence or non-existence of a legal entity known as East Millard Recreation District is one of the fundamental issues of the litigation and cannot be resolved by the court in such an offhand manner. It involves factual questions on which the

court has as yet heard no evidence.

Plaintiff had certainly not failed to prosecute his case. Plaintiff had requested a trial setting, had attended the pretrial conference, and then had waited approximately 4 1/2 months after the court's discretionary period for filing motions for summary judgment before reminding the court that the case still needed to bet set for trial. That certainly is not a failure to prosecute so as to justify the court's dismissal of the action. This Court has ruled that to dismiss an action after much longer delays than that was an abuse of discretion. Polk v. Ivers, 561 P.2d 1075 (Utah 1977); Utah Oil Co. v. Harris, 565 P.2d 1135 (Utah 1977); Johnson v. Firebrand, Inc., 571 P.2d 1368 (Utah 1977).

Furthermore, plaintiff's counsel cannot be expected to appear at any hearing of which he has received no notice. In spite of the recitation to the contrary in the judgment of dismissal (Record p. 20), no order to show cause nor any other notice was served upon plaintiff's counsel and the record does not reflect that any such notice was given. To act without such notification to counsel is the worst abuse of the court's discretion. That action violates all standards of justice and fair play which our judicial system is to guarantee.

POINT II: DISMISSAL OF THE LITIGATION WAS CONTRARY TO THE PROVISIONS OF RULES 5(a) AND 41(b) OF THE UTAH RULES OF CIVIL

PROCEDURE.

Rule 41(b) of the Utah Rules of Civil Procedure specifies when a matter may be dismissed. Such a dismissal with prejudice may be granted to defendant only upon defendant's motion for one of three grounds: failure of plaintiff to prosecute, failure of plaintiff to comply with the Rules of Civil Procedure, or failure to obey any order of court. There was no such motion made by defendant in this action, or at least it does not appear in the record. If such a motion was made, it did not comply with Rule 5(a). The latter rule requires that notices and motions be in writing and be served upon all parties. The record shows that no such service was made on counsel for plaintiff. In fact, there was no notice at all of hearings held July 14, 1981, and September 15, 1981.

Nor can plaintiff be charged with notice of the hearings under the Fifth Judicial District's special rule which reads: "Motions on file five days prior to a motion day are considered set for hearing without notice on such motion day, unless request is made for a later hearing." In this case, there was no motion pending and therefore no reason for the case to be on the monthly law and motion calendar without notice to the parties.

Even if the court has authority under Rule 41(b) or some other inherent authority to dismiss the case without a motion by defendant, it, too, must comply with Rule 5(a) and

give notice to plaintiff. That rule, by its own terms, is as binding upon the court as on an adverse party. In addition, the dismissal with prejudice must be based on one of the grounds specified in Rule 41(b). As shown under Point I above, plaintiff had not failed to prosecute his case. Polk v. Ivers, supra; Utah Oil Co. v. Harris, supra; Johnson v. Firebrand, Inc., supra. There has been no violation by plaintiff of the Rules of Civil Procedure nor has plaintiff violated any order of court. There is no justification under the rule for the dismissal.

POINT III: DISMISSAL OF THE CASE WITHOUT NOTICE AND AN OPPORTUNITY TO BE HEARD IS A DEPRIVATION OF PLAINTIFF'S PROPERTY WITHOUT DUE PROCESS OF LAW.

The United States Constitution, Amendment 14, provides that no state "shall... deprive any person of life, liberty, or property, without due process of law...." The Utah Constitution, Article I, §7, contains a similar provision: "No person shall be deprived of life, liberty, or property, without due process of law." Plaintiff's right under the contract for architectural services to receive compensation for his services is a property right and as such is entitled to protection under these constitutional provisions. McGrew v. Industrial Commission, 96 Utah 203, 85 P.2d 608 (1938).

The action of the court in dismissing the action is a clear violation of procedural due process to which plaintiff

is entitled. Due process involves notice of the proceeding, an opportunity to be heard, and the rudimentary requirements of fair play. Mayberry v. Pennsylvania, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971); Hannah v. Larche, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960); Vernon v. State, 245 Ala. 633, 18 So.2d 388 (1944). The record is clear that no notice was given to plaintiff, that there was no opportunity to be heard, and that the court made an arbitrary decision with no grounds therefor. Plaintiff has been deprived of his "day in court" which is necessary to accord due process. Christiansen v. Harris, 109 Utah 1, 163 P.2d 314 (1945).

The trial court also violated Article I, §11 of the Utah Constitution which requires: "All courts shall be open, and every person, for an injury done to him in his... property... shall have remedy by due course of law, which shall be administered without denial or unnecessary delay...." By its arbitrary action, the trial court has closed itself to plaintiff and denied him his remedy by due course of law.

POINT IV: ENTRY OF THE JUDGMENT OF DISMISSAL WAS IN VIOLATION OF THE RULES OF PRACTICE.

Rule 2.9(a) of the Rules of Practice in the District Courts and Circuit Courts of the State of Utah requires that an order be prepared and submitted to the court within fifteen days of a ruling. In this matter the ruling was made on

September 15, 1981 (Transcript, September 15, 1981) but no formal order was submitted for more than two months. The Judgment of Dismissal (Record p. 20) was not signed by the court until December 2, 1981, and was not filed in the clerk's office until December 8, 1981. During that entire period of time, counsel had absolutely no notice that the case had been dismissed or even had been on the court's calendar for any type of hearing.

Entry of the judgment also violated Rule 2.9(b) of the Rules of Practice. That rule requires a proposed order to be submitted to opposing counsel before being presented to the court. Counsel for plaintiff did not receive a copy of the order prior to its filing with the clerk, let alone before it was presented to the judge. Neither the judgment itself (Record p. 20) nor any other part of the record show that the rule had been complied with. It was error on the part of the court to execute the order without a mailing certificate showing that counsel for defendant had furnished a copy to counsel for plaintiff. It was also error for counsel for defendant to submit the order to the court with no notice to opposing counsel. Plaintiff's counsel was thus denied the right and opportunity to object to the obvious errors contained in the order: (1) It was not made after an order to show cause. None was served and no such order appears in the record. (2) It was not made after a regular hearing. Plaintiff had been given no notice of the hearing.

(3) It does not reflect that no one representing defendant appeared at the hearing.

SUMMARY

Dismissal of the case by the District Court was an abuse of the court's discretion and was done in violation of rule and constitution. The dismissal should be reversed and the matter remanded to the trial court so that plaintiff may have an opportunity to present his case at a trial.

Respectfully submitted,

Harold D. Mitchell

Harold D. Mitchell
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