

1957

Warren M. O'Gara v. Archie Findlay : Brief of Appellant

Utah Supreme Court

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Peter M. Lowe; Attorney for Appellant;

Recommended Citation

Brief of Appellant, *O'Gara v. Findlay*, No. 8711 (Utah Supreme Court, 1957).
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**IN THE SUPREME COURT OF THE
STATE OF UTAH**

FILED

OCT 3 0 1957

WARREN M. O'GARA, Executor
of the Estate of NANCY E. HIRAGARAY,
Deceased,

Clerk, Supreme Court, Utah

Appellant,

— vs. —

Case
No. 8711

ARCHIE FINDLAY,

Respondent.

APPELLANT'S BRIEF

PETER M. LOWE,
Attorney for Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

WARREN M. O'GARA, Executor
of the Estate of NANCY E. HIRIGARAY,
Deceased,

Appellant,

— vs. —

ARCHIE FINDLAY,

Respondent

Case
No. 8711

APPELLANT'S BRIEF

STATEMENT OF FACTS

In this case the trial court made its decision as recorded in its Minute entry of February 16, 1956, as follows:

“The court find there was a valid delivery of deed in question in the above entitled case and finds the issues in favor of the defendant and against the plaintiff and grants defendant judgment only as prayed with costs.”

The only pleading filed in the case by the defendant is an "answer" which has the following prayer:

"Wherefore, the defendant demands that the plaintiff take nothing by his complaint, and that the title to said property, together with all water rights, be quieted in the defendant, and that the plaintiff or any other person be forever precluded from asserting any interest therein adverse to the defendant."

The Complaint of the plaintiff sought to set aside and have declared void the deed of plaintiff's testator which has the following description in it:

"The South half of the North half of the Northwest quarter of Section 18, Township 4 North, Range 1 West, Salt Lake Meridian, containing, less highway, 38.12 acres, more or less.

"Together with water rights, improvements and appurtenances thereunto appertaining.

Subject to existing rights of way of record."

The decree signed and entered by the trial court on March 21, 1956, contains the following description of the property:

"The South half of the North half of the Northwest Quarter of Section 18, Township 4 North, Range 1 West, Salt Lake Meridian, containing, less highway, 38.12 acres, more or less.

Together with water rights, improvements and appurtenances thereunto appertaining, including 12 shares of water in the Davis and Weber Canal Company, subject to existing rights of way of record." (Underscoring added.)

The transcript of the trial of this case is absolutely devoid of any mention whatsoever of "12 shares of water in the Davis and Weber Canal Company". The only water stock held by the plaintiff corresponding in any way to the item included in the decree is a stock certificate #6318 issued to Peter Hirigaray and Nancy E. Hirigaray by the Davis and Weber Counties Canal Company, (a corporation). The books of the company reflect this ownership. The certificate in question has not been endorsed by either Peter Hirigaray nor Nancy E. Hirigaray, and defendant's name does not appear thereon.

The plaintiff considering that since the trial of this matter did not involve the certificate #6318 and that no evidence of any kind was adduced in the trial relative to defendant having any rights in this certificate, and that the decree in respect to the phrase "including 12 shares of Water in the Davis and Weber Counties Canal Company" was void filed a Motion for an order nunc pro tunc striking out of the description to the property the phrase included in quotation marks above.

No objection was made in the hearing on said Motion to the propriety of the plaintiffs motion. The trial court denied plaintiff's motion on May 23, 1957. On June 14, 1957, upon motion by the attorney for defendant the trial judge signed an order directing plaintiff to deliver certificate #6318 (there is no other certificate corresponding to the courts order) to defendant. The apprehension of plaintiff became a reality and therefore plaintiff has brought this appeal to seek relief from the effect of the courts denial of his motion and the issuance of its order of June 14, 1957.

STATEMENT OF POINTS

Point 1.

THE DECREE OF THE TRIAL COURT INSOFAR AS IT INCLUDES THE PHRASE "INCLUDING 12 SHARES OF WATER IN THE DAVIS AND WEBER COUNTIES CANAL COMPANY" IS VOID.

Point 2

THE COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR AN ORDER STRIKING OUT PART OF THE JUDGMENT.

ARGUMENT

Point 1

THE DECREE OF THE TRIAL COURT INSOFAR AS IT INCLUDES THE PHRASE "INCLUDING 12 SHARES OF WATER IN THE DAVIS AND WEBER COUNTIES CANAL COMPANY" IS VOID.

It is generally held that a valid judgment cannot be rendered where there is a want of necessary parties. In this case if the certificate #6318 covers the water shares mentioned in the decree, then there is a want of an indispensable party to this action in order to render the judgment valid (49 CJS 67).

It is also generally held that proper pleadings are essential to support the judgment of a court of record. In this case the defendant did not plead that there had been a conveyance to him to certificate #6318 by the record owners. There exists no counter-claim in the pleadings to support the judgment in question.

See: *Cooke v. Cooke*, 248 P. 83, 67 U. 371, *Stockyards Nt. Bk. v. Bragg*, 245 P. 966, 67 U. 60, 49 CJS 95.

In the case of *Upper Blue Bench Irr. Dist. v. Continental Nat. Bk.*, 72 P2d 1048, 93 U. 325, this court held: page 1053,

“mere possession of power to act in respect to a specific subject matter is of no consequence unless that power is properly invoked. An entire failure to invoke the Courts jurisdiction over the subject matter or an attempt to do so in a manner wholly inadequate to bring the court’s powers into activity would prevent any valid determination of the case.”

In the case of *Nat. Farmers Union v. Thompson*, 4 Utah 2d 7, 286 P2d 249, this court said:

“notwithstanding all of our efforts to eliminate technicalities and liberalize procedure, we must not lose sight of the cardinal principle that under our system of justice, if an issue is to be tried and a party’s rights concluded with respect thereto, he must have notice and an opportunity to meet it.”

(See also *Rem. Rand Inc., v. O’Neil, et al*, 4 U2d 270, 293 P2d 416.)

In the case at hand the pleadings failed to raise and frame any issue as to the ownership of certificate #6318 by way of Counter-claim and reply, or by any other appropriate pleading.

Further, as a general rule the evidence must sustain the judgment, proof being as essential to the support of a judgment as pleading (49 CJS, 103. See: *Todaro v. Gardner*, 285 P2d 839, 3 U2d 204). In this case it is not a matter of insufficiency of the evidence to sustain

the judgment, there is a total lack of any evidence whatsoever concerning certificate #6318. There is also a lack of a demand for affirmative relief in respect to the water stock certificate.

The case in the lower court proceeded throughout its entire course upon a single issue as to whether or not there had been a legal delivery of the deed by the grantor to the grantee. However, in the description of the land set out in the decree the phrase "included 12 shares of water in the Davis and Weber Counties Canal Company" was tucked inside the description set out in the deed in such manner as to appear to be a continuous part of that description. The offending phrase was not in the grantors deed; it is not in the courts Conclusions of Law; it was not included in the trial court's Minute entry, nor in the defendant's prayer of his answer; it was not included in the trial of the case as an issue, nor was one single bit of evidence introduced in the case concerning water stock certificate #6318; the certificate also stands in the name of a person not a party to this action. Certainly in view of all of these facts together with the provisions of Section 73-1-10, U.C.A. 1953 (which statute raises the presumption that water stock is not appurtenant to land), the judgment must be considered void insofar as the phrase complained of is concerned.

Point 2

THE COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR AN ORDER STRIKING OUT PART OF THE JUDGMENT.

After the first appeal in this matter the defendant's attorney made a demand upon the appellant to deliver

stock certificate #6318 to him as being included in the Courts judgment. The appellant demurred and filed a motion to strike out part of the judgment upon the basis that it was void and was not in accordance with the minute entry of the Court and the prayer of the defendant's "answer". The appellants motion asks that the order be made nunc pro tunc in line with the general authority on the subject as follows: 67 CJS, p2

"Literally 'now for then'. The phrase is used to express that a thing is done at one time which ought to have been performed at an earlier time. It signifies an entry now for something previously done, and it is made to make the record speak now what was actually done then."

21 CJS, p422

"An entry nunc pro tunc is an entry of something which was previously done, to have effect as of the former date, the function, object or purpose of such entry being to make the record speak the truth."

21 CJS, p423

"A Court is authorized to correct its own records by an entry nunc pro tunc."

21 CJS, p424

"Entries nunc pro tunc may be made at any time. A nunc pro tunc entry after an appeal is valid."

No objection was made as to the propriety of this motion at its hearing. Rule 60 (b) U.R.C.P. was cited to the Court as authority for this motion of appellant. The rule reads in part as follows:

“On motion . . . the court may . . . relieve a party or his legal representative from a final judgment . . . for the following reasons: . . . (5) the judgment is void; . . . (7) any other reason justifying relief from the operation of the judgment”

In Barron & Holtzoff, Federal Practice and Procedure, Vol. 3, P. 249, it is said:

“Rule 60 (b) as amended represents an effort to codify the practice with respect to the correction of judgments after the time for appeal has expired. . . . A void judgment may be set aside at any time. . . . A 6th reason for which relief from a judgment may be granted, is, ‘any other reason justifying relief from the operation of a judgment’. For this no time limit is prescribed but of course the motion must be made within a reasonable time.”

In the case of *In re Cremidas’ Estate*, D.C. Alaska 1953, 14 F.R.D. 15, the court said:

“The power vested in courts under Rule 60 (b) (6) to grant relief from judgment for any reason justifying relief from the operation thereof is sufficient to enable them to vacate judgments whenever such action is appropriate to accomplish justice.”

In the case of *Ferrell v. Trailmobile, Inc.*, C.A. 5th 1955, 223 F2d 697, the court said:

“The District court retained jurisdiction to consider motion for relief from judgment even after Movant had perfected appeal, and reviewing court, on appeal, could consider both the original final judgment and the judgment denying relief from judgment and denying motion to vacate satisfaction of judgment.”

The new rules of civil procedure in Rule 60 (b) would appear to cover the function of the old procedure which recognized the power of the court to enter an order nunc pro tunc. However, the order requested by appellant is of the same character whether entered nunc pro tunc or entered as of the time it was heard, namely the motion sought to eliminate from the judgment the phrase "including 12 shares of water in the Davis and Weber Counties Canal Company".

The appellant considers it a striking thing that whereas the entire litigation concerned whether a certain deed to real estate had been validly delivered to the defendant, that the judgment was so drawn that the description of the land (purportedly taken from the deed) was rearranged in its sentence structure and punctuation to include the phrase complained of. The water stock is personal property and was not in the name or possession of the defendant but is jointly owned by two people, one of whom was not a party to the action below.

Therefore, the appellant considered the judgment void in respect to certificate #6318 for the reasons set forth previously, and is of the further opinion that the ends of justice require that the phrase complained of be stricken from the judgment. To hold otherwise would, in the opinion of appellant, encourage the practice of parties attempting to slip past court and counsel matters which were not litigated in the court proceeding. It is common knowledge that courts frequently rely upon counsel to draft the judgments which they sign and enter, and many are signed and entered without being carefully read and analyzed. The defect of which the appellant complains is not readily picked up, and a fraction of a second distraction could

easily cause court and counsel from seeing the phrase inserted in the description of the land. The water stock is separate personal property which, under our law, must be dealt with in a separate issue of fact, law and pleading. It cannot be deemed as an inconsequential incidental. Until appellant filed his motion to correct the judgment herein it was not determined whether or not certificate #6318 existed in fact, nor whether it had been endorsed, pledged or transferred to some third party by some other method. The respondent is required through adequate pleading and proof to establish his right to certificate #6318. This he has not done, and the refusal of the trial court to strike the offending phrase from the judgment is error as a matter of law.

Respectfully submitted,

Peter M. Lowe,

Attorney for Appellant