

1958

Whitney D. Hammond v. Zelf S. Calder : Brief of Respondent

Utah Supreme Court

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In the
Supreme Court of the State of Utah

FILED

DEC 15 1958

WHITNEY D. HAMMOND, Adminis-
trator of the Estate of Jim Eskridge,
Deceased,

Plaintiff and Respondent,

vs.

ZELPH S. CALDER,

Defendant and Appellant.

Supreme Court, Utah

Case No.
8827

BRIEF OF RESPONDENT

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WHITNEY D. HAMMOND, Adminis-
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Plaintiff and Respondent,

vs.

ZELPH S. CALDER,

Defendant and Appellant.

Case No.
8827

BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

The parties herein will sometimes be designated in this brief as follows: Plaintiff and respondent, Whitney D. Hammond, Administrator of the Estate of Jim Eskridge, deceased, as the "respondent," original plaintiff Jim Eskridge as "plaintiff," and Zelfh S. Calder, defendant and appellant, as "appellant." Emphasis has been supplied.

STATEMENT OF THE FACTS

We deem it essential to a proper disposition of this case that all of the facts be fully presented. Because we believe that the brief of the appellant does not do so we will undertake to set forth concisely the essential facts. Reference to the record will be designated as "R," and references to the transcript of proceedings as "T.P."

Appellant owns property located on Diamond Mountain in Uintah County approximately thirty-five miles north east of Vernal, Utah. On September 26, 1950, appellant entered into a written lease with plaintiff, a resident of the State of Colorado, under the terms of which plaintiff obtained the right to farm part of appellant's land and agreed to pay appellant one-fourth of the crops produced thereon. The lease had a primary term of eight years beginning November 1, 1950 (R. 2). At the time the lease was executed none of the leased land had been cleared and it was necessary for plaintiff to clear the land before crops could be planted. Plaintiff subsequently cleared approximately 658 acres (T.P. 19).

The lease provided that appellant was to have grazing rights on the lands, but that plaintiff was to have the exclusive right to say when appellant could graze his livestock on the growing grain. Appellant was to maintain fences around the premises in a condition that would prevent range stock from damaging the crops (R. 2). On numerous occasions appellant permitted his livestock to go upon the land farmed by plaintiff without permission, causing considerable damage to the crops growing thereon. On October 13

1955, plaintiff filed a complaint against appellant in the Fourth Judicial District Court of the State of Utah in and for Uintah County, praying for a temporary restraining order restraining appellant from further trespassing, grazing or damaging the crops and for damages in the amount of Five Thousand Five Hundred Dollars (\$5,500.00) (R. 1).

On October 18, 1955, appellant served a notice demanding that plaintiff file a nonresident cost bond (R. 7). Plaintiff was killed in an airplane accident on October 29, 1955 (R. 84). A motion for an extension of time for filing the cost bond in order that an administrator of plaintiff's estate could be appointed was filed and granted on November 15, 1955 (R. 9 and 10). Appellant filed a motion to dismiss with prejudice for failure to file a nonresident cost bond on December 17, 1955 (R. 11).

On January 9, 1956, plaintiff's widow who had been appointed administratrix of his estate in the State of Colorado filed a motion asking the court to deny appellant's motion to dismiss on the ground that she had filed a petition asking for the appointment of Whitney D. Hammond, a Utah resident, as Administrator of the Estate of Jim Eskridge in the State of Utah, and a motion praying for his substitution as party plaintiff in place of her deceased husband in the proceedings against appellant. She further alleged that an ancillary administrator of the estate of a nonresident deceased plaintiff who has been substituted as a party plaintiff should not be required to file a nonresident cost bond (R. 12). Appellant's motion to dismiss was denied on January 12, 1956 (R. 13). Letters of Adminis-

tration were issued to Whitney D. Hammond on February 7, 1956, (R. 86) and an order substituting Whitney D. Hammond, administrator, as party plaintiff was entered the same day (R. 16). Appellant filed an answer and counterclaim February 29, 1956 (R. 19). Plaintiff's reply was filed April 3, 1956. The case was set for trial June 25, 1956. On the date set for trial appellant and respondent through their respective counsel entered into a stipulation of settlement in the presence of the trial Judge, Honorable Maurice Harding (R. 35).

The stipulation provided in part that the respondent would be permitted to harvest the grain growing on the south and middle units of the Calder property and sell the estate's share of the wheat under appellant's wheat allotment and appellant would be given immediate possession of the north unit (R. 35). Subsequently, a dispute arose as to whether the respondent had the right to sell the estate's share of the wheat under appellant's wheat allotment free from the penalty incurred when appellant harvested the volunteer wheat on the north unit, thereby causing the total acreage harvested on the Calder property to exceed the acreage allotment set by the Uintah County Stabilization Committee and subjecting all of the wheat to a penalty. Judge Harding ruled that under the terms of the stipulation, the respondent had the right to sell the estate's share of the wheat free from penalty and so ordered (R. 12).

The stipulation also provided that appellant would pay respondent two-sevenths of the cost of clearing the land. The cost of clearing was to be determined by two people, one selected by the appellant and one by the respondent.

The persons so selected found that the cost of clearing was Twelve Dollars (\$12.00) per acre (R. 36). This figure included the cost of the first plowing by which plaintiff broke the ground for the first time and cut or broke the brush loose so it could be raked into piles for burning (T.P. 10 and 11). Appellant refused to accept this figure claiming that the cost of the first plowing should not have been included as a part of the cost of clearing the land. After hearing evidence, the trial court ruled that the parties intended that the cost of the first plowing should be included in the cost of clearing at the time they entered into the stipulation and that the cost of clearing the land was Twelve Dollars (\$12.00) per acre (T.P. 37 and 38) and ordered appellant to pay two-sevenths of the cost of clearing plus costs (R. 71).

Appellant filed a pleading designated "Defendant's Request for Claim against Plaintiff" on January 21, 1958, praying for judgment against the respondent in the amount of Two Thousand Five Hundred Dollars (\$2,500.00) for damages arising from the removal of a steel granary which plaintiff had placed on the Calder premises to be used in storing grain thereon (R. 77). Appellant presented no evidence regarding this claim and the court below denied appellant's "Request" (R. 78).

Appellant now appeals from the following:

1. Court's order denying appellant's motion to dismiss with prejudice for failure of ancillary administrator to file nonresident cost bond.

2. Court's order requiring appellant to permit respondent to sell estate's share of wheat under appellant's wheat allotment without penalty in accordance with the terms of the Stipulation of Settlement.

3. Court's finding that the cost of clearing was Twelve Dollars (\$12.00) per acre.

4. Court's award of costs to respondent.

5. Court's denial of appellant's "Request for Claim Against Plaintiff."

STATEMENT OF POINTS

POINT I.

THE COURT PROPERLY DENIED APPELLANT'S MOTION TO DISMISS WITH PREJUDICE FOR FAILURE TO FILE NONRESIDENT COST BOND.

POINT II.

COURT HAS AUTHORITY TO ENFORCE TERMS OF STIPULATION OF SETTLEMENT.

POINT III.

COURT PROPERLY ENTERED ORDER PERMITTING RESPONDENT TO SELL WHEAT WITHOUT PENALTY.

POINT IV.

COURT'S FINDING AS TO COST OF CLEARING LAND WAS PROPER.

POINT V.

COURT PROPERLY DENIED APPELLANT'S CLAIM AGAINST RESPONDENT FOR REMOVAL OF GRANARY.

POINT VI.

COURT PROPERLY AWARDED COSTS TO RESPONDENT.

ARGUMENT

POINT I.

THE COURT PROPERLY DENIED APPELLANT'S MOTION TO DISMISS WITH PREJUDICE FOR FAILURE TO FILE NONRESIDENT COST BOND.

Appellant contends that the court erred in denying his motion to dismiss with prejudice for failure to file a nonresident cost bond. In this regard it should be noted that plaintiff filed the complaint in the instant case on October 13, 1955. Plaintiff died on October 29, 1955. Whitney D. Hammond, a Utah resident, was subsequently appointed ancillary administrator of plaintiff's estate in Utah and substituted as party plaintiff.

Rule 12 (j), Rules of Civil Procedure, Utah Code Annotated, 1953, provides that plaintiffs who reside outside the state or are foreign corporations must file cost bond upon demand. Rule 12 (j) provides that a nonresident plaintiff shall have thirty days after service of notice requesting security for costs to file a cost bond. This period had not elapsed at the time of plaintiff's death. Therefore at that time the court below had no power to dismiss for failure to file the cost bond.

If the original plaintiff was not obligated to file a cost bond prior to his death, the only question which remains is whether a Utah resident who is subsequently appointed and qualified as ancillary administrator of plaintiff's estate in the State of Utah and substituted as party plaintiff should be required to file a cost bond. There are no Utah statutes that so provide.

The courts have long held that the right to require security for costs is a creature of statute, and unless the obligation of furnishing security has been imposed by legislative enactment, a party may not be required to file a cost bond or guarantee the payment of costs. *Honduras v. Soto*, 172 N. Y. 310, 19 N. E. 845; Ann: 24 Eng. Rul. Cas. 31. As indicated in *Outlaw v. Pearce*, 11 S. E. 2d 600, 603, 176 Va. 458, the purpose of such statutes is to insure to the defendant and to the officials of the court the payment of costs which may be awarded against a nonresident plaintiff against whom the court has no means of enforcing a collection, and to insure that the court will have some financially responsible person within reach of process. *State ex rel Tangon v. District Court*, 111 Mont. 178, 107 P. 2d 880, 881

It would, therefore, appear clear that there is no need for an ancillary administrator who is an officer of the court to post a cost bond to insure payment of costs. This is especially true in the instant case where the administrator has filed a corporate surety bond in the amount of Two Thousand Dollars (\$2,000.00) (R. 85½) and there are considerable assets in the Utah estate (R. 87).

The Utah Supreme Court has on several occasions held that the provisions requiring cost bonds should be construed so as to permit litigants to have every reasonable opportunity to be heard on the merits of the case. In discussing this problem the court in *Bunting Tractor Co. v. Emmett D. Ford Contractors*, 2 Utah 2d 275, 272 P. 2d 191, said that:

“The objection raised by defendant that security for costs was not filed within one month after notice is at best but a technical one. The only legitimate advantage defendant was entitled to was protection from loss of costs. * * *”

and that

“* * * The general philosophy of the new Rules of Civil Procedure is that liberality should be indulged ‘to secure the just, speedy, and inexpensive determination of every action.’ In construing and applying these rules it should be the purpose of the courts to afford litigants every reasonable opportunity to be heard on the merits of their cases. This policy is not an innovation to our law. It has long been embodied both in the statutes and decisions that deviation from form and procedure shall not work a forfeiture of substantive rights in the absence of prejudice to the opposing party.”

There would appear to be absolutely no basis upon which the Utah statute could be construed so as to require an ancillary administrator to file a cost bond. Therefore the court below had no alternative but to deny appellant's motion to dismiss.

POINT II.

COURT HAS AUTHORITY TO ENFORCE TERMS OF STIPULATION OF SETTLEMENT.

On the date set for trial, appellant and respondent through their respective counsel after considerable discussion of all aspects of the case entered into a stipulation of settlement in the presence of the court. Appellant thereafter failed to perform in accordance with the terms of the stipulation and under Point II of his brief questions the authority of the court below to enforce the terms of the stipulation.

In view of the decisions of the Utah Supreme Court, there can be no question as to the law regarding this question in Utah. The court was confronted with almost exactly the same question in *Johnson v. Peoples Finance and Thrift Co.*, 2 Utah 2d 246, 272 P. 2d 171, where the court stated that:

“* * * However, when the parties failed to perform in accordance with their stipulations, the court was not powerless to require them to abide by their agreement. It would indeed be a serious reflection upon our system of jurisprudence if parties could stipulate an agreement of settlement but refuse with impunity from performing. Courts are not impotent when one or more parties to a stipulation becomes recalcitrant. * * *”

This is in accord with the rule generally accepted elsewhere. It is, therefore, clear that the court below had authority to enforce the terms of the stipulation of settlement.

POINT III.

COURT PROPERLY ENTERED ORDER PERMITTING RESPONDENT TO SELL WHEAT WITHOUT PENALTY.

Appellant contends that the court erred in permitting the respondent to sell the estate's share of the wheat harvested on the Calder property in the fall of 1956 under appellant's wheat allotment without penalty. In this regard it should be noted that in order to participate in the U. S. Department of Agriculture Commodity Stabilization Program the plaintiff could harvest grain from only part of land which he was farming. Therefore, during the fall of 1955 plaintiff planted grain in only the south and middle units of the Calder property but planted nothing in the north unit. Some volunteer grain was growing on the north unit at the time appellant and respondent entered into the stipulation of settlement. The stipulation provided in part that the respondent would harvest the grain then growing on the south and middle units and give appellant one-fourth of grain harvested (R. 35). The respondent knew that if the volunteer grain growing on the north unit was harvested the acreage allotment established by the County Stabilization Committee could not be complied with, and the grain harvested on the south and middle units could not be sold under appellant's wheat allotment without a

penalty. Prior to entering into the stipulation this problem was discussed at great length in the presence of the court with appellant and his counsel. The respondent did not care what happened to the volunteer wheat on the north unit so long as it was not used in a manner that would prevent respondent from selling the estate's share of the wheat under appellant's wheat allotment. It was under these circumstances that the respondent agreed to give appellant immediate possession of the north unit and the appellant agreed that "the plaintiff (respondent) shall have the right to sell his share of the wheat under appellant's wheat allotment" (R. 35). In spite of that understanding, appellant proceeded to harvest the volunteer wheat growing on the north unit. As a result, the Agricultural Stabilization Committee for Uintah County ruled that none of the wheat harvested on the Calder property could be sold under defendant's wheat allotment without penalty. Appellant refused to permit the respondent to sell the estate's share of the wheat without penalty. On October 23, 1956, Judge Harding ruled that under the terms of the stipulation the respondent was entitled to sell his share of the wheat under appellant's wheat allotment without penalty and ordered the appellant to refrain from taking any action which would prevent the respondent from obtaining the necessary authority to do so.

Appellant now contends that the trial judge was in error in so ruling. Judge Harding was present throughout the discussion which led up to the stipulation of settlement and was present at the time it was entered into. It is fundamental that stipulations must be construed in light of

the circumstances surrounding the parties at the time they entered into the stipulation and in view of the result which they were attempting to accomplish. *People v. Nolan*, 33 Cal. App. 493, 496, 165 P. 2d 715, 716; *Hengel v. Hengel*, 329 Mo. 571, 46 S. W. 2d 157. Judge Harding who was fully apprised of the circumstances surrounding the making of the stipulation ruled that the parties intended that the respondent would be able to sell the estate's share of the wheat under appellant's wheat allotment free of penalty and ordered appellant to take whatever action necessary to obtain that result. To adopt appellant's contention would render the last phrase of the stipulation meaningless.

As indicated in the discussion under Point II above, it was within the power of the trial court to construe the provisions of the stipulation and enforce the terms thereof.

POINT IV.

COURT'S FINDING AS TO COST OF CLEARING LAND WAS PROPER.

Appellant in Point III of his brief contends that the court's finding as to the cost of clearing the land was not substantiated by the evidence. In this regard it should be noted that the primary term of the Eskridge lease was eight years beginning November 1, 1950 (R. 2). At the time the lease was executed, none of the property had been cleared. Plaintiff subsequently cleared 658 acres of the Calder property. When the parties entered into the stipulation of agreement, appellant agreed to pay the respondent two-sevenths of the cost of clearing the premises and

respondent agreed that the lease would be terminated after the grain had been harvested in the fall of 1956 (R. 35).

In clearing the land plaintiff had experimented with several methods of clearing. The one he found most satisfactory and which he used to clear the most of the land consisted of first plowing the land with a specially designed machine to cut the brush and break the soil, then either raking or harrowing to gather the brush into piles for burning and finally burning the brush. After the brush had been burned, it was necessary to plow the land again and in some cases go over it with a leveler in order to prepare the seed bed (T.P. 10 and 11).

Appellant and respondent agreed that two persons would be selected to determine the cost of clearing the land. Appellant selected Wayne Goodrich and the respondent selected Raymond Searle (R. 35). Searle and Goodrich agreed that the cost of clearing the land was Twelve Dollars (\$12.00) per acre and filed a report to that effect (R. 36). This figure included the cost of the plaintiff's initial plowing which he used to cut the brush and loosen the soil. Appellant refused to accept this figure claiming that the term "clearing" as used in the stipulation was not intended to include the cost of the first plowing.

On November 26, 1957, the trial judge heard evidence pertaining to the cost of clearing. At the hearing Raymond Searle testified that he had cleared land in the vicinity of the Calder property for eighteen or twenty years (T.P. 4). That in his opinion such land could not be cleared properly without first plowing it because otherwise you could not

obtain a good kill on the brush (R. 10). That the first plowing was much more difficult and expensive than subsequent plowings because the soil in the area of the Calder property is very hard and it is necessary to cut or break the brush loose, so that it can be raked and burned (R. 12). He further explained that after the brush is broken or cut loose it is necessary to rake or harrow it into piles for burning and then the brush must be burned (T.P. 10 and 11). After the burning, the land must be plowed again and in many cases leveled before seeds can be planted (T.P. 11). He testified that he was familiar with the Calder land and plaintiff's methods of clearing it and that in his opinion it cost plaintiff a minimum of Twelve Dollars (\$12.00) per acre to clear the land and that it probably cost him substantially more (T.P. 7 and 15). This figure included only the costs of the first plowing, raking and burning operations and did not include the cost of subsequent operations necessary to prepare the soil for planting.

Mr. Wayne Goodrich did not appear at this hearing and defendant's only witnesses were himself and his brother, Leo Calder.

The court after hearing the evidence ruled that “* * * the clearing included the plowing, that that was included within the contemplation of the parties at the time the stipulation was made * * *” (T.P. 37), and that the cost of clearing the ground was Twelve Dollars (\$12.00) per acre (T.P. 38).

It is submitted that in addition to the evidence outlined herein the transcript of proceedings of the hearing held

for the purpose of determining the cost of clearing discloses substantial evidence in support of Judge Harding's finding as to the cost of clearing. The arguments with reference to the trial court's authority to construe the stipulation and enforce the terms thereof presented under Points II and III above are also applicable here.

POINT V.

COURT PROPERLY DENIED APPELLANT'S CLAIM AGAINST RESPONDENT FOR RE- MOVAL OF GRANARY.

On January 21, 1958, appellant filed a pleading designated "Defendant's Request for Claim Against Plaintiff" praying for judgment against plaintiff in the amount of Two Thousand Five Hundred Dollars (\$2,500.00) plus costs for damages arising from the removal of a granary which plaintiff had placed on the Calder property. It is difficult to determine just what this pleading is but it appears to be more closely related to a counterclaim than anything else. There are no provisions in the Utah statutes which would permit the filing of a pleading such as this.

Appellant presented no evidence with relation to his "Request." The minute entry dated January 21, 1958, states that "the motion for hearing claims in this matter was denied" (R. 78). It is not clear whether this entry refers to appellant's "Request." If it does, there is nothing to indicate whether the court considered the "Request" on its merits or denied the motion upon other grounds. In view

of the present state of the record, we submit that there is nothing properly before the court.

In this regard it should also be noted that the burden is upon the appellant to affirmatively show error. The Utah Supreme Court has adopted the rule that judgments of courts are presumed to be correct, if nothing in the record appears to the contrary. *Burton v. Zions Co-op Mercantile Institution*, 122 Utah 360, 249 P. 2d 514; *Johnson v. Peoples Finance and Thrift Co.*, supra.

POINT VI.

COURT PROPERLY AWARDED COSTS TO RESPONDENT.

Rule 54 (d) (1), Rules of Civil Procedure, Utah Code Annotated, 1953, provides that “* * * costs shall be allowed * * * to the prevailing party. * * *” In the instant case judgment was rendered in favor of the respondent and he was awarded costs as the prevailing party (R. 72).

Appellant's failure to comply with the term of the stipulation resulted in additional hearings and expenses and finally a judgment against appellant.

Appellant now contends on page 19 of his brief that since the court rendered a judgment against him, the equitable thing to do would be to assess costs against the respondent. We submit that such a contention has no merit whatsoever.

CONCLUSION

We submit that the trial court's actions with regard to this matter were proper in all respects. The original plaintiff was not obligated to file a cost bond prior to his death and the ancillary administrator who was substituted as party plaintiff is not required to file a cost bond. Therefore, the trial court had no alternative other than to deny appellant's motion to dismiss with prejudice for failure to file a cost bond. The trial court was familiar with the circumstances surrounding the making of the stipulation of settlement and the results the parties intended to achieve thereby. The construction given to the disputed provisions in the stipulation was in accord with the language used in the stipulation, and the court was authorized to enforce the terms thereof. The court's finding as to the cost of clearing is fully supported by the evidence. There is nothing properly before this court regarding appellant's claim for damages arising from the removal of a granary. Rule 54 (d) (1), Rules of Civil Procedure, expressly provides that costs may be awarded to the prevailing party.

For the reasons set forth herein we respectfully submit that the judgment and the various orders of the trial court should be affirmed.

Respectfully submitted,

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