

1982

Mavor Jean Carnes v. Cliff Carnes : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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MAVOR JEAN CARNES, :

Plaintiff-Respondent, :

v. :

Case No. 18,370

CLIFF CARNES, :

Defendant-Appellant. :

---oooOooo---

RESPONDENT'S BRIEF

Appeal from the Judgment of the Third District Court
in and for Salt Lake County
The Honorable David B. Dee, Presiding

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Plaintiff-Respondent,	:	
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CLIFF CARNES,	:	Case No. 18,370
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RESPONDENT'S BRIEF

NATURE OF THE CASE

This is an action based upon a Florida judgment for delinquent alimony.

DISPOSITION IN LOWER COURT

On September 15, 1981, the district court, the Honorable G. Hal Taylor presiding, entered an order that, upon the filing by plaintiff of proof of service in the Florida action judgment would be entered against the defendant. That proof was filed with the district court on January 22, 1982, and, after two further hearings, the district court, the Honorable David B. Dee presiding, entered judgment against

defendant. The defendant appealed only from the judgment of March 5, 1982. Thereafter, on April 29, 1982, the district court, the Honorable David B. Dee again presiding, entered its Order making the entire Decree of the Florida court the decree of the district court. No appeal has been taken from that ruling.

RELIEF SOUGHT ON APPEAL

Respondent Mavor Jean Carnes respectfully requests that this Court affirm in all respects the judgment entered against appellant Cliff Carnes by the district court.

STATEMENT OF FACTS

Plaintiff-respondent (hereinafter "Mrs. Carnes") deems it necessary to present a statement of the facts of this case since the statement presented by defendant-appellant (hereinafter "Mr. Carnes") fails to reflect accurately all of the relevant facts and procedural history of this case.

Based upon a complaint for divorce filed by Mr. Carnes in the Circuit Court for Brevard County, Florida, a Decree of Divorce was entered by the Florida court on July 28, 1978. (R. at 7-8.) That Decree provided inter alia that Mr. Carnes was to pay alimony of \$60 per week and that the Florida court retained jurisdiction of both "the cause and the parties" and that service of any further proceedings could be by

mail. (Id.) Mr. Carnes never made a single payment to Mrs. Carnes and she, acting through Florida counsel, filed a motion for an arrearage judgment in the Florida proceedings. (R. at 28.) Notice of the motion for an arrearage judgment was served upon Mr. Carnes by the Salt Lake County sheriff's department on October 22, 1980. (R. at 26-27 and 32-34.) The Florida court entered an arrearage judgment against Mr. Carnes on November 10, 1980, in the amount of \$5,640.05, noting that he had paid none of the alimony directed by the court. (R. at 9.)

On April 28, 1981, Mrs. Carnes filed a complaint with the District Court in Salt Lake County, seeking enforcement of the Florida arrearage judgment on "full faith and credit" grounds and seeking to have the on-going alimony provisions of the original Florida Decree recognized by the Utah District Court for enforcement purposes. (R. at 2-12.) Mr. Carnes filed an Answer raising two basic defenses: first, that he was entitled to a claimed off-set against Mrs. Carnes and, second, that the Florida alimony law was unconstitutional and the Florida court, therefore, had no personal jurisdiction. (R. at 15-16.)

On August 26, 1981, Mrs. Carnes filed a motion for judgment on the pleadings pursuant to Rule 12(c) of the Utah Rules of Civil Procedure. (R. at 17-18.) Significantly, Mr. Carnes filed nothing in opposition to that motion, which was heard before the late Honorable G. Hal Taylor on September 4, 1981. Judge Taylor ruled that the claimed off-set and alleged unconstitutionality of Florida's alimony statutes

were insufficient to constitute a defense, noted that Mr. Carnes had submitted himself to the jurisdiction of the Florida court, and entered his order that upon the filing by Mrs. Carnes of a Proof of Service of her Florida motion for an arrearage judgment, she would be granted judgment in the amount of \$5,640.05. (R. at 21-22.) Mr. Carnes neither filed nor preserved an appeal from that Order.

On January 22, 1982, Mrs. Carnes filed with the Court a certified and exemplified copy of a duplicate Affidavit of out-of-state service signed by Salt Lake County sheriff's deputy Grant Peterson, attesting to the service of the notice and motion of the Florida arrearage proceedings upon Mr. Carnes. (R. at 25-26.) Mrs. Carnes also filed a motion for judgment based upon that proof of service and Judge Taylor's earlier ruling. (R. at 23-24.) In opposition to that motion, Mr. Carnes filed nothing.

Thereafter, on February 16, 1982, an Affidavit of Grant Peterson was filed, also attesting to the service upon Mr. Carnes. That Affidavit differed from the Proof of Service only in the location at which the service was stated to have taken place. Both the Affidavit and the Proof of Service attested to personal service. Another hearing was held before the District Court, the Honorable David B. Dee presiding, on February 19, 1982. At that time, Judge Dee took the matter under advisement. (R. at 35.)

It was not until February 26, 1982, some six months after Mrs. Carnes first moved for the entry of judgment based upon the Florida arrearage judgment, that Mr. Carnes filed any Affidavit with the court in opposition. In that Affidavit, he claims that on the date Deputy Peterson served the Notice of the Florida arrearage proceeding, Mr. Carnes did not reside at the address stated by Deputy Peterson in his Proof of Service. Mr. Carnes also makes the conclusory statement that he was "never served at any time". (R. at 46.) Significantly, he does not state any of the facts upon which that conclusion could have been based (e.g., no papers were ever left with him, he never spoke with a sheriff's deputy).

Mrs. Canes having fully complied with Judge Taylor's Order of September 15, 1981 (that Proof of Service upon Mr. Carnes in the Florida arrearage proceeding be filed), Judge Dee entered judgment against Mr. Carnes on March 5, 1982. (R. at 59.) The Affidavit of Mr. Carnes having been filed six months late, Judge Dee acted well within his discretion and was bound to follow Judge Taylor's unconditional Order that, upon the filing of a Proof of Service, judgment would be entered in favor of Mrs. Carnes.

Thereafter, on April 16, 1982, Mrs. Carnes filed a motion for judgment on the pleadings with respect to the recognition by the Utah court of the Florida Decree's on-going alimony provisions. (R. at 110.) Although Mr. Carnes filed an "objection" to that motion (R. at 114), he

again failed to file any Affidavit in opposition to the motion. The only ground raised in the "objection" was that the district court lacked jurisdiction due to this appeal. On April 29, 1982, Judge Dee entered an Order granting full faith and credit to the on-going alimony provisions of the Florida Decree. (R. at 118.) No appeal has been taken from that Order.

It is to be noted that nowhere and at no time has Mr. Carnes ever disputed that he has failed to pay any of the alimony ordered by the Florida court. He has never denied that Mrs. Carnes is entitled to judgment, he has merely quibbled over procedural technicalities. Since the district court has now recognized the underlying Florida Decree, with its on-going alimony provisions, the present appeal is, in a very real sense, moot. Mr. Carnes is presently earning approximately \$2,700 per month (R. at 132, 134, and 136); in equity and good conscience he should not be permitted to avoid the alimony obligation decreed by the Florida court upon the basis of moot technicalities.

ARGUMENT

POINT I. THE AFFIDAVIT FILED BY MR. CARNES WAS UNTIMELY AND DOES NOT RAISE A MATERIAL ISSUE OF FACT.

The Order entered on September 15, 1981, by the late Honorable G. Hal Taylor was based upon a motion filed by Mrs. Carnes on August 26, 1981. Mr. Carnes filed no Affidavit, or indeed any other materials, in

opposition to that motion until he filed his own Affidavit six months later on February 26, 1982. Had he wished to challenge the service of process in connection with the Florida arrearage proceedings, his Affidavit could just as easily have been filed in August of 1981. The Affidavit upon which Mr. Carnes relies was filed six months too late. The district court was entirely justified in entering judgment irrespective of it.

In addition to the statement in his Affidavit that he had not resided at the address given by Deputy Peterson in his Proof of Service, Mr. Carnes offers the conclusion of law that he "was not served at any time". (R. at 46.) Even if timely filed, this conclusory generalization could not have provided the basis for a "question of fact" upon which the motion for summary judgment could have been denied by the District Court. Rule 56(e) of the Utah Rules of Civil Procedure mandates that any Affidavit submitted in opposition to a motion for summary judgment state facts on the basis of personal knowledge:

Supporting and opposing affidavits shall be on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . .

Rule 56(e), U.R.C.P. Whether or not "service" of a legal document has occurred is a question of law to be determined on the basis of the underlying facts.

This Court affirmed a motion for summary judgment granted by the trial court notwithstanding the defendant's affidavit containing numerous conclusions and opinions without supporting facts in Walker v. Rocky Mountain Recreation Corporation, 29 Utah 2d 274, 508 P.2d 538 (1973). This Court noted and rejected the defendant's contention that its conclusory affidavit had created questions of fact precluding summary judgment, holding:

Defendant . . . asserts that there were material, disputed issues of fact which precluded the trial court from granting summary judgment. The opposing affidavit submitted by defendant did not comport with the requirements of Rule 56(e), U.R.C.P., i.e. such an affidavit must be made on personal knowledge of the affiant, and set forth facts which would be admissible in evidence and show that the affiant is competent to testify to the matters stated therein. . . . Hearsay and opinion testimony that would not be admissible if testified to at trial may not properly be set forth in an affidavit.

A review of defendant's opposing affidavit reveals no evidentiary facts but merely reflects the affiant's unsubstantiated opinions and conclusions in regard to the transactions.

508 P.2d at 542 (emphasis added, footnotes omitted). In the present action, the Affidavit of Mr. Carnes fails to state a single fact in support of his conclusion that he was "never served at any time".

Moreover, the only factual allegations of the Affidavit relate to the issue of where deputy Grant Peterson actually served Mr. Carnes. It is not material to valid service where Mr. Carnes was served since the service was effected upon him personally. This Court has frequently recognized the fundamental principle that only a genuine dispute as to a material fact will justify the denial of a motion for summary judgment. For example, in Heglar Ranch, Inc., v. Stillman, 619 P.2d 1390 (Utah 1980), the district court granted summary judgment notwithstanding that a vigorous factual dispute existed as to a matter which, even if resolved in favor of the persons against whom the summary judgment was entered, would not have constituted a valid defense. In affirming the summary judgment entered by the trial court, this Court noted:

Summary judgment is appropriate if the pleadings and all other submissions show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The foregoing rule does not preclude summary judgment simply whenever some fact remains in dispute, but only when a material fact is genuinely controverted.

619 P.2d at 1391 (emphasis added, footnotes omitted). In the present case, whether Mr. Carnes was served at his home, at his work, or anywhere else within the state of Utah, is absolutely irrelevant. If he was personally served at all, the Florida judgment is valid and is entitled to the full faith and credit of the district court. Therefore,

the district court was entirely correct in entering judgment notwithstanding any dispute which may have existed with respect to where Mr. Carnes had been served in connection with the Florida action.

Similarly, in FMA Financial Corporation v. Build, Inc., 17 Utah 2d 80, 404 P.2d 670 (1965), this Court affirmed the granting of summary judgment notwithstanding the existence of a vigorous dispute as to matters which, even if they had been resolved in favor of the losing party, would not have precluded judgment. In that case, as in the present action, the defendant attempted to assert in defense of a motion for judgment matters not raised in the Answer. The court held that even if the Answer were deemed amended, and even if the defendant prevailed on the factual disputes, the plaintiff would still have been entitled to summary judgment, noting:

[T]he dispute as to whether the defendant did or did not receive statements from the Cook Realty is not of critical concern. This is the answer to defendant's contention that the summary judgment should not have been granted because of the disagreement about that fact. Mere dispute as to some question of fact does not preclude the granting of summary judgment. The issue in dispute must be one which is material in the sense that resolving it is necessary to determine the legal rights of the parties.

404 P.2d at 673 (emphasis added, footnote omitted). In its decision,

this Court also noted the fact that, wisely used, summary judgments play a vital and important role:

The trial court concluded that in spite of anything contended for by the defendant, the plaintiff was entitled to judgment as a matter of law. The granting of the summary judgment under those circumstances had the salutary effect of saving time, effort and expense which would have been involved in having a trial, which could have served no useful purpose.

Id. at 671 (footnote omitted). This observation is equally applicable to the facts of the present case.

Similarly, in Allen's Products Company v. Glover, 18 Utah 2d 9, 414 P.2d 93 (1966), this Court held that the district court

not only can but should grant a motion for summary judgment if he feels certain that he would rule that way no matter what proof a party could produce in support of his contentions.

414 P.2d at 94. And in Pioneer Savings and Loan Association v. Pioneer Finance and Thrift Company, 18 Utah 2d 106, 417 P.2d 121 (1966), this Court emphasized that summary judgment

must be granted and upheld by this court if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law
. . . .

417 P.2d at 123.

POINT II. ANY DEFECTS IN THE SERVICE UPON MR. CARNES, OR IN ITS RETURN, WERE INSUBSTANTIAL AND NOT SUFFICIENT TO PRECLUDE THE JUDGMENT GRANTED BY THE DISTRICT COURT.

The only substantial, timely-raised issue relates to the difference in the location of the service upon Mr. Carnes stated by Deputy Peterson in his Proof of Service as opposed to his Affidavit. Under the decisions of this Court, that difference is not deemed sufficient to constitute a valid ground to refuse entry of judgment.

In Redwood Land Company v. Kimball, 20 Utah 2d 113, 433 P.2d 1010 (1967), the defendant sought to quash service of the summons because proof of service was not provided within the prescribed five-day period of time. In affirming the trial court's denial of this motion, this Supreme Court stated:

We are in accord with the view adopted by the trial court in denying the motion; that the defect she complains of is not jurisdictional. It is with respect to the correctness of the summons itself, and the due service thereof, which notifies the defendant that he is being sued, and by which jurisdiction over him is acquired, that there must be strict compliance. [Citations omitted.] However, proof of the fact that such service has been made, also referred to as the return of the summons, is something of a different character. Its only purpose is to supply the information to the court,

the interested parties and their attorneys
that the defendant has been so served.

. . .

When the procedure described for the
acquisition of jurisdiction of the
defendant has been properly carried out,
that is where there has been a correct
service of a proper summons, a mistake or
irregularity of the kind here shown in
the proof of service does not destroy the
validity of the service itself.

433 P.2d at 1010-1011.

The same rule is followed in Florida. For example, in Klosenski v. Flaherty, 116 So. 2d 767 (Fla. 1959), the court held that an officer's return of service is no part of the service but merely evidence to enable the trial judge to determine whether jurisdiction over the defendant has been acquired. An irregularity in the proof of service as demonstrated by the Affidavit filed by Mr. Carnes is not jurisdictional.

This sound rule was also applied in Brandt v. Daman Trailer Sales, Inc., 116 Ariz. 421, 569 P.2d 851 (1977), in which it was held that defects in a return of service do not deprive the court of jurisdiction, which is acquired by the service itself.

Additionally, Section 17-22-12, Utah Code Annotated (1953 as amended), provides:

The return of the sheriff upon process or notice is prima facie evidence of the facts in such return stated.

§17-22-12, Utah Code Annotated (1953 as amended.) In the face of this

prima facie evidence of personal service upon him, Mr. Carnes only demonstrated technical defects in the Proof of Service. He submitted no timely Affidavit and even his Affidavit filed six months after the motion contained no factual statements to support his conclusion that he "was never served". Thus, Mr. Carnes never successfully refuted the presumption of service.

That a defective or inconsistent return of service of process is not a jurisdictional defect is further established by Rule 4(h) of the Utah Rules of Civil Procedure, which provides:

At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the service is issued.

Rule 4(h), U.R.C.P. Permitting an amendment of the Proof of Service supplied by Deputy Peterson did not prejudice Mr. Carnes, for the place of service does not change the fact of personal service. In Federal Land Bank of Berkley v. Brenton, 106 Utah 149, 146 P.2d 200 (1944), the Utah Supreme Court held:

The fact that service has been made, by the weight of authority, may be proved or a defective proof of service may be amended after judgment. It is held that it is the fact of service that gives jurisdiction, not the proof of it.

146 P.2d at 201 (emphasis added). Where process has been properly

served, a technical defect in the paperwork that can be readily corrected to speak the truth should not be allowed to interfere with substantial justice. The District Court's decision to enter judgment based upon unpaid alimony that Mr. Carnes never denied should be affirmed.

CONCLUSION

Mrs. Carnes complied fully with the Order of the late Judge Taylor, providing a certified and exemplified copy of Proof of Service in the Florida arrearage proceedings. She also went beyond the requirements of Judge Taylor's order and provided an Affidavit of Deputy Peterson, again establishing personal service.

Some six months after the filing of the motion for judgment against him, Mr. Carnes filed a conclusory Affidavit, claiming that he was "never served" but utterly failing to state any factual allegations upon which that conclusion could be based. Moreover, he has never, to this day, presented any evidence or argument that the alimony arrearage upon which the present judgment is based is not, in fact, due. He now earns approximately \$2,700 per month and should not be permitted to benefit from procedural technicalities or delay which he has created.

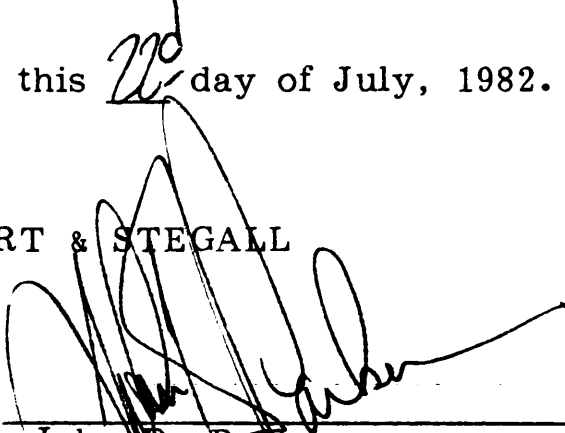
In view of the fact that the District Court has now recognized the on-going alimony provisions of the Florida Decree and Mr. Carnes has

filed no appeal from that Order, his argument that the judgment entered against him should be reversed is, in a very real and practical sense, absolutely moot. The judgment entered against appellant Cliff Carnes should be affirmed.

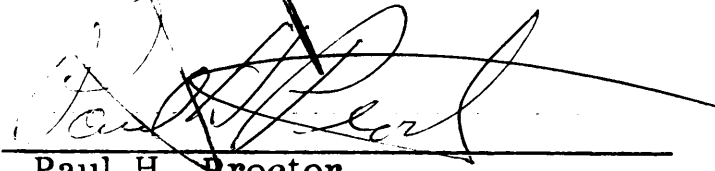
RESPECTFULLY SUBMITTED this 22nd day of July, 1982.

DART & STEGALL

By


John D. Parken

By


Paul H. Proctor

MAILING CERTIFICATE

I certify that on this 31 day of July, 1982, I mailed with postage prepaid two copies of the foregoing Brief to Edward K. Brass, attorney for Appellant, 321 South 600 East, Salt Lake City, Utah 84102.

Y.B. Blanchard