1958

Agnes Lundberg v. Le Grand P. Backman : Brief of Respondent

Utah Supreme Court

M. V. Backman; Attorney for Respondent;

IN THE SUPREME COURT
of the
STATE OF UTAH

AGNES LUNDBERG,
Plaintiff and Appellant,

vs.

LE GRAND P. BACKMAN,
Defendant and Respondent.

Case No. 8896

BRIEF OF RESPONDENT

M. V. BACKMAN,
Attorney for Respondent

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STATEMENT OF FACTS

Much of the contents of appellant's statement of the case consists of recitals which are not evidence in the case, respondenet's position is amply reflected by the record, particularly is this true of the statements found on page 3, second paragraph and page 4, last paragraph of appellant's brief.

The issues are framed by the pleadings and affidavits.

Respondent was retained by appellant to represent her in an action to quiet tite, to partition real property involved,

for the sale of the property and for judgment for reasonable rental value thereof. Respondent timely filed answer to the complaint and followed this filing up with an amended answer and a counterclaim praying that title be quieted in appellant and against the plaintiff in said action. Respondent appeared at the trial of the case having briefed the issues raised by the pleadings, and in all respects acted in the interest of appellant. The trial court ruled against appellant.

The record in this case shows by affidavit of respondent that appellant became abusive to respondent and slandered his character and reputation. This is uncontroverted. The record also shows that appellant paid nothing whatsoever to respondent on acount of attorney's fees. This is also uncontroverted.

The trial court had before it in this case the record of the action complained of. Respondent and appellant each filed affidavits in support of and in objection to the motion for summary judgment, therefore, a full dress trial could add nothing material which was not already before the court.

Judge Larson did not rule on respondent's motion from the bench but took same under advisement and considered same for a considerable length of time, not only once but on two different occasions having heard arguments the second time when Judge Larson again took the matter under advisement and then later denied the motion to re-open the case.

ARGUMENT

Point I

Respondent adopts the authorities cited by appellant under point I in support of the judgment in this case.

An examination of appellant's complaint reveals the fact that appellant has not stated a cause of action against respondent. No facts whatever are pleaded, nothing but bare legal conclusions. Appellant has not alleged, neither could she have proven if she had alleged, that she could have prevailed in the action which gives rise to this case, had respondent represented appellant in a manner other and different from that which he did, neither did appellant so assert in her affidavit in objection to respondent's motion for summary judgment.

Appellant having been sued in a quiet tittle action elected to defend the action. Having been named a defendant in the action filed and having elected to defend the action appellant was in a much different position that she would have been had she been encouraged to file an action by which she incurred heavy expenses and large attorney's fees and then had an adverse judgment entered against her. Nothing could be added as evidence which was not already before the court in the pleadings and in the case file out of which this action arises, together with the affidavits of appellant and respondent.

The cases have repeatedly held that an attorney is not an insurer of successfully defending an action. He is not answerable to his client for every error or mistake and he will be protected as long as he acts honestly and in good

faith to the best of his skill and knowledge, or with at least reasonable skill and learning and an ordinary degree of attention or care.

Appellant has not charged respondent with inattention to the case under her first cause of action but seeks to recover for that which she considers error of judgment.

In 34 Am. Dec. 89, 90 the law is stated:

> "It is well settled that an attorney who acts in good faith and in an honest belief that his advise and acts are well founded and in the just interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law."

And in 45 ALR2d 13 in the case of Seymour vs Cager (NY) the Court said:

> "A mere failure of success in the law-suit is not prima facie evidence of negligence or want of proper skill on the part of the attorney."

While respondent has not filed answer to the complaint it is clearly evident that there can be no genuine issue as to any material fact.

Point II

There is nothing in the record, nor is it shown by affidavit or otherwise wherein respondent failed to exercise ordinary skill and care.

Appellant contends that had respondent examined the files in his own office, he would have advised the appellant that the asserted claims were valid and unimpeachable. This

argument is nothing more than a bare legal conclusion fully unsupported by facts. Here is a situation where hindsight is better than foresight, especially after the case has been decided against appellant.

There is a serious question whether the decree of distribution mentioned in the former action vested title to property which had already been deeded out. This was the position taken by respondent. Judge Larsen had a right to assume that with respondent having the information in his office and having handled the previous case, respondent was aware of the condition of the title and still honestly believed that the deed conveying title from the surviving joint tenant to appellant took precedence over the decree of distribution.

Now for the first time appellant contends that she could have settled the case for $3,000.00 had she been properly advised by respondent. There is no such assertion in appellant's affidavit, neither did appellant so allege in her complaint nor is there any evidence in the record to this effect. Here is another case of looking back after an adverse decision.

The contention of appellant as to this matter is wholly speculative and not factual.

Point III

For the second cause of action appellant seeks to recover a second $8,500.00 for loss of a $7,800.00 property after seeking judgment in her first cause of action for $8,500.00 because as appellant contends, respondent failed to appeal the case.

Respondent's affidavit states that he received no fee for his services either prior to or at the time of the trial of the

case, that appellant was abusive toward respondent and slandered respondent, that respondent withdrew as appellant's attorney when an appeal could have been taken although the notice of withdrawal was not filed until January 24, 1955. It is to be noted that the withdrawal bears date of December 1, 1954 and while the notice of the motion for new trial bearing date December 3, 1954 was not filed until December 6, 1954, respondent by affidavit states that appellant had consulted both Wilford W. Kirton, Jr. and Hugh B. Brown prior to the withdrawal and that appellant had ample time to retain other counsel and to file notice of motion for new trial and an appeal. Appellant by her affidavit denies that the respondent withdrew on or about Decemebr 1, 1954 and avers that the withdrawal was not filed until January 24, 1955 but appellant does not deny that she consulted Mr. Kirton and Mr. Brown in time to have appealed or that she was aware of the withdrawal of the respondent as her attorney in ample time to have timely appealed.

No where in the record does it appear nor does appellant assert that at the time she engaged the services of respondent she retained him to prosecute the case through the supreme court if unsuccessful in the trial court.

Appellant having been a defendant, the entry of final judgment terminated the attorney-client relationship. No notice of withdrawal was necessary in the absence of an allegation or statement by affidavit that respondent had been employed and paid respondent to perfect an appeal.

Our own Supreme Court has had occasion to speak on this subject in the case of Sandall vs Sandall, 57U-150, 193 P 1093, 15 ALR 620. This case involved an action for a

divorce in which defendant was represented by the firm of Halverson and Pratt. The plaintiff having prayed for alimony in her complaint abandoned same in the trial. Judgment was entered without providing for alimony. After entry of judgment, plaintiff filed a motion for modification of the decree. A notice of the motion was served by mail on Halverson and Pratt which notice set October 4, 1919 as the day for hearing of the motion. Upon the attorneys for plaintiff appearing on the motion neither defendant nor his attorneys appeared, the clerk called Halverson by telephone and inquired if he intended to appear in said cause, and Halverson answered he "did not." The court then proceeded with a hearing on the motion and entered a modification of the decree. Notice of this order was served upon the defendant himself. Thereafter Halverson appeared as attorney for defendant and moved the court to vacate the order which motion was denied and an appeal was taken from the ruling on the motion on the ground that defendant was never served with the motion for modification and therefore the court acquired no jurisdiction.

It is contended that notice served on Halverson and Pratt was not sufficient in as much as they were not defendant's attorneys in the case, having been paid off.

The court speaking through Mr. Justice Thurman said:

> "The authorities support the proposition that an attorney's relation to his client ceases upon the rendition of judgment and satisfaction thereof, unless there are disturbing events or a special arrangement continuing the relation. The following excerpt from 6 C. J. p.. 672, 184, illustrates the trend of authority:

"In the absence of disturbing events the employment of an attorney continues as long as the suit or business upon which he is engaged is pending, and ordinarily comes to an end with the completion of the special task for which the attorney was employed. Where the evidence as to the continuance of the relation is conflicting, it is a question for the jury.

"It is always a presumption that an attorney is employed to conduct the litigation to judgment, and no further; the relation of attorney and client and the general powers of the attorney cease upon the rendition and entering of the judgment. There is a distinction in this connection, however, between cases in which the attorney is retained to represent plaintiff, and those in which he represents defendant; in the latter case, the entry of final judgment *always* terminates the relation and the attorney's authority; in the former case it is generally the rule that the attorney's authority lasts until satisfaction of the judgment, and that he may take the ordinary and usual steps to secure such satisfaction."

"See also 3 Am. & Eng. Enc. Law, 327; 4 Cyc. 593; 2 R. C. L. 1004.

"There is no evidence in this case of any disturbing events or special arrangement between Halverson & Pratt and the defendant, continuing their relation after the entry of final decree in favor of plaintiff in July 1910. Nothing further being required of them in connection with the case, it seems conclusive that their professional relation with defendant ceased at that time."

In the instant case appellant retained respondent to defend the action which respondent did, judgment was entered against appellant and upon entry thereof the relationship of attorney and client ceased.

Appellant contends that the trial court committed a reversible error in assessing appellant with rent for appellant's use of the property involved in the action and seeks to recover damages against respondent for error committed by the court.

The position of counsel is not only rediculous but regrettable when a member of the bar is required to face the humiliation of an action financed by our own State Bar having no more merit than the instant case has.

Appellant's contention that respondent failed in his duty to represent appellant properly at the trial of the case and that resondent failed to prosecute an appeal, appear to be directly in conflict for had respondent made such a record at the trial of the case that a reversal could have been had had an appeal been prosecuted then respondent most certainly did not fail to properly represent appellant at the trial of the case.

No error was committed by the court in granting the respondent's motion inasmuch as it is clearly evident from the files and records in this case that there is no triable issue.

Respectfully submitted,

M. V. BACKMAN,
Attorney for Respondent