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John Shaw v. Frances Shaw Pilcher and Walter F. Pilcher : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

JOHN SHAW,
Plaintiff and Appellant,

—vs.—

FRANCES SHAW PILCHER and
WALTER F. PILCHER,
Defendants and Respondents.

BRIEF OF APPELLANT

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UNIV. OF UTAH

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—vs.—		
FRANCES SHAW PILCHER and WALTER F. PILCHER,		
<i>Defendants and Respondents.</i>		

BRIEF OF APPELLANT

NATURE OF THE CASE

The only question presented on appeal is the meaning of an “independent action” within the purview of Rule 60-B of the Utah Rules of Civil Procedure.

STATEMENT OF FACTS

The facts are not in dispute. The action was not tried upon its merits and no evidence was taken. Since the only question involved is one of law relating to the procedural propriety of the action commenced in the court below, we will simply set forth a sufficient background of the facts to frame the issue to be decided on appeal.

Through a previous marriage, appellant John Shaw and respondent Frances Shaw Pilcher had born to them a daughter, Candace Lee Shaw, now twelve years of age. Upon their divorce, custody of the child was awarded to Frances Shaw, who subsequently married respondent Walter Pilcher. After the latter marriage, respondent Walter Pilcher desired to adopt Candace Lee Shaw, and appellant gave his consent to such adoption after having been assured by respondents that they were financially able and morally fit to provide a proper home for the child, and that such adoption would be in the best interests of the child. The adoption was granted on November 17, 1956 in the Third Judicial District Court in and for Salt Lake County, State of Utah (Decree).

On August 5, 1957 respondents plead guilty to the crime of embezzlement in the United States District Court for Utah and were sentenced to a prison term at Terminal Island Federal Penitentiary (Answer). On February 29, 1958 respondents were released on probation and parol and returned to Salt Lake City (Answer). Appellant discovered that respondents had plead guilty to a series of embezzlements and that respondents had probably been committing the crime of embezzlement from day to day over a protracted period of time, including the time when the adoption proceedings were taking place in 1956. Appellant, concluding that the adoption had been procured by fraudulent representations made by respondents to the court, thereupon decided to attempt to vacate the adoption and to secure to himself the custody of Candace Lee Shaw so that he could insure to

her proper care, comfort, instruction and security in his home.

Accordingly, on March 31, 1958 appellant filed a Motion and Order which opened for inspection and copying the adoption file of Candace Lee Shaw, Probate No. 39215. On April 21, 1958 appellant, using the same Probate Case Number, filed a Petition to vacate the adoption and an Order requiring respondents to appear and show cause why the adoption should not be vacated. The action thus commenced was based upon two grounds; namely (1) the adoption was not procured by following the proper statutory procedures and was therefore void, and (2) the adoption was procured by fraud upon the court and should therefore be vacated (Petition). The Petition was accompanied by a Summons. A copy of the Summons, Petition, and Order to Show Cause were personally served upon respondents. Respondents engaged an attorney to answer the Petition, and, consequently, the Order to Show Cause was dismissed by appellant's attorney so that the action could be prepared for trial and determined upon its merits.

At the pre-trial conference, respondents filed an Amended Answer alleging that the question of fraud upon the court could only be tried by an independent action since the action pending had not been brought within three months after the adoption had been granted. The Amended Answer relied on Rule 60-B of the Utah Rules of Civil Procedure.

In order to determine the meaning of Rule 60-B in advance of a trial upon the merits, a special hearing was

held to determine whether the action thus commenced by appellant was proper for determining whether the adoption had been obtained through fraud upon the court. The lower court held that since more than three months had elapsed between the adoption and the petition to vacate the adoption, the question of fraud upon the court could only be tried by an independent action. The lower court then concluded that Rule 60-B must be strictly construed, and that the action commenced by appellant was not an independent action within the meaning of the Rule.

When appellant attempted to institute a new independent action it was discovered that respondents had left Utah and were residing in California. Since it was thus impossible for appellant to obtain new service of process over respondents, the present appeal was taken challenging the lower court's construction of Rule 60-B.

ARGUMENT

THE LOWER COURT ERRED IN HOLDING THAT THE ACTION COMMENCED BY APPELLANT WAS NOT AN INDEPENDENT ACTION WITHIN THE MEANING OF RULE 60-B OF THE UTAH RULES OF CIVIL PROCEDURE.

Rule 60-B of the Utah Rules of Civil Procedure permits the court, in certain situations, to relieve a party, upon motion, from a final judgment, order, or proceeding. But Rule 60-B concludes:

“This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to

set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.”

If a motion under Rule 60-B asserts that a prior judgment was void, then such motion must be made within a “reasonable” time; whereas, if the motion asserts that an adverse party committed fraud, misrepresentation or misconduct, then such motion must be made within three months from entry of the judgment, order or proceeding. Of course, these limitations do not prevent an independent action from challenging a judgment on the ground of fraud upon the court. The action commenced by appellant asserted (1) that the adoption was void because the necessary statutory steps were not followed, and (2) that the adoption should be vacated since it was obtained by fraud upon the court. The first issue was properly triable by motion since it merely need be brought within a reasonable time, but the second issue was properly triable by an independent action. The question before this court on appeal is whether the action commenced by appellant was proper for the purpose of determining the question of fraud upon the court as well as the question of failure to follow statutory steps.

It seems that the Utah Supreme Court has not yet construed Rule 60-B for the purpose of distinguishing between a motion and an independent action. The only authority which has been found on the precise point under discussion involves the construction of Rule 60-B of the

Federal Rules of Civil Procedure. There are one or two minor differences between the Federal Rule and the Utah Rule, but, for purposes of the present analysis, the differences do not have any significance. Therefore, the construction applied to the Federal Rule is helpful in construing the corresponding Utah Rule.

Professor James W. Moore states that there are no significant procedural differences between a motion and an independent action under Rule 60-B. Professor Moore explains that the independent action is expressly excluded from the time limitations applying to several of the motions under Rule 60-B because the rule did not intend to limit or preclude a separate action for fraud upon the court. Thus, stresses Professor Moore, if an action is one properly triable by an independent action, but is brought by motion, the motion should be considered as an independent action, and *vice versa*. The following quotations from *Moore, Federal Practice*, Vol. 7, are helpful:

At page 642:

“Where the adverse party is not prejudiced an independent action for relief from a federal judgment may be treated as a 60(b) motion; and, conversely, a 60(b) motion may be treated as the institution of an independent action.”

At page 623:

“This independent action to enjoin or otherwise obtain relief from a federal judgment need not be brought in the district court which rendered the judgment; but it may be and, when it is,

there is not much procedural difference between it and a motion for relief under 60(b) and hence, disregarding nomenclature, the court, unless a party would be adversely affected, may treat a motion as the institution of an independent action and an independent action as a motion for relief."

At page 502:

"And since nomenclature is unimportant a proceeding for relief under 60(b) may in an appropriate case be treated as an independent action; and similarly an independent action may be treated as a proceeding under 60(b)."

This same conclusion is set forth in *Barron and Holtzoff, Federal Practice and Procedure, Rules Edition* § 1330, page 269.

The cases have also reached the same conclusion as that suggested by Professor Moore. Perhaps the leading case on the very point at issue is *Hadden v. Rumsey Products, Inc.*, 196 F. 2d 92 (2nd Cir. 1952). In the *Hadden* case the plaintiff reduced to judgment in the United States District Court in Ohio certain cognovit notes which had been executed by the defendant New York debtors. Plaintiff then forwarded to the Clerk of the United States District Court in New York a copy of the Ohio judgment for registration. Upon learning of such registration, the defendant New York judgment debtors filed a petition for a show cause order in the United States District Court in New York asserting that they had valid defenses to the notes upon which the Ohio judgment had been based. One of the questions on appeal was whether the petition for a show cause order was an

independent action within the meaning of Rule 60-B. In concluding that the petition should be considered as an independent action, the distinguished Second Circuit ably stated the spirit and purpose of the Federal Rules of Civil Procedure:

“Rule 60 (b) expressly provides that the rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment. The appellees’ several petitions to the New York court may be treated as an independent action to obtain equitable relief from the Ohio judgment. Although Rule 3 states that an action is commenced by filing a complaint it would be quite out of harmony with the spirit of Rule 1 to hold the appellees bound by the labels placed on the papers submitted to the district court. Nor is it necessary that a summons should have been issued and served as contemplated by Rule 4, provided the appellant took action equivalent to entering his general appearance.”

A similar result was reached in *Haggar Co. v. United States* (U.S. Ct. Claims, 128 F. Supp. 404, February 8, 1955). In the *Haggar* case plaintiff brought an action against the government in the Court of Claims arising out of a contract whereby plaintiff had manufactured for the government certain items of clothing. Plaintiff sought to recover the contract price, but the government defended on the ground that plaintiff had defectively manufactured the clothing and that it was worthless to the government, and was scrapped. The Court of Claims ruled against plaintiff. Two or three years later, plaintiff discovered that the government had used the clothing

in question and that the prior judgment had been obtained by fraud upon the court in that the government had submitted false affidavits. Accordingly, plaintiff filed a new petition in the same case in the Court of Claims alleging fraud upon the court in the prior judgment. One of the issues considered by the Court of Claims was whether plaintiff's petition should be treated as an independent action within the meaning of Rule 60-B (Rule 54-B in the U.S. Court of Claims Rules). The court concluded that it should be so considered, saying:

"If the plaintiff practices a fraud in the prosecution of proof of his case in our court, he forfeits his claim no matter how meritorious his claim might otherwise have been, or how supererogatory may have been his attempted fraud. We cannot tolerate being misled into unjust judgments by answers to our calls which give us false impressions as to material facts. We assume that the writer of the communication in question had no intention to mislead his associates, and we are sure that his superiors, in responding to our call, had no intention to mislead the court. But, if the plaintiff's present contentions are valid, the communication was, in its effect, a false representation to the plaintiff and to the court.

"We think that the most economical procedure, in the circumstances, is for us to treat the plaintiff's present suit as an independent action to be relieved of the former adverse judgment. Under the Federal Rules of Civil Procedure, the courts have been liberal in treating pleadings as what they should have been, rather than what they were called by the pleader."

It seems clear that there is even more justification

for considering the case at bar as an independent action. The action was instituted by filing a petition and serving respondents personally with the petition and summons. The name of the case was different, although the same case number as the adoption was used. Respondents engaged an attorney and were represented by counsel throughout the entire proceeding, and respondents thus filed an answer to appellant's petition and proceeded to prepare the case for trial. Depositions were taken. A Notice of Readiness for Trial was filed, and a pre-trial conference was held. It was at the pre-trial conference that respondents first urged any procedural defects in the action commenced by appellant. Under such procedure, which was identical to an independent action in every material respect, it is difficult to see how the lower court could conclude that Under Rule 60-B the action was nothing more than a motion. Such a holding is contrary to reason, and is in direct conflict with the unanimous declarations of the courts and treatise writers.

Furthermore, the decision of the lower court is directly contrary to the spirit and purpose of the rules of civil procedure in that such decision would require two separate trials for appellant to attempt to set aside the adoption. This is so because appellant's contention that the adoption was void because the necessary statutory steps were not followed can only be tried by motion, whereas appellant's contention that fraud was committed upon the court can only be tried by an independent action. For the lower court to conclude that the motion and independent action must be strictly construed to be mu-

tually exclusive under Rule 60-B is to complicate and hamstring judicial procedure in Utah.

CONCLUSION

It is respectfully submitted that the decision of the lower court was erroneous, and that the Order dismissing appellant's action should be reversed to allow a trial upon the merits.

Respectfully submitted,

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