1960

William K. Howard et al v. Mildred M. Howard et al : Brief of Respondent

Utah Supreme Court

Backman, Backman & Clark; Attorneys for Defendant and Respondent;

IN THE SUPREME COURT
of the
STATE OF UTAH

WILLIAM K. HOWARD, et al.
Plaintiffs and Appellants,

vs.

MILDRED M. HOWARD, et al.
Defendants and Respondents,

Case
No. 9223

BRIEF OF RESPONDENT

BACKMAN, BACKMAN & CLARK
Attorneys for Defendant
and Respondent
1111 Deseret Bldg.
Salt Lake City, Utah

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AUTHORITIES CITED

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STATEMENT OF CASE

Many of the Statement of Facts contained in Appellants' brief go to the issues made by the pleadings in the original case, the recital of such facts is not important to this appeal except possibly to show how very wrong the lower court was in granting judgment on the pleadings.

To add to the Statement of Facts made by Appellants it is important to point out the fact that not only did Respon-

dent file the instrument designated "Notice of Intention to Move for A New Trial" within the required period of time but Respondent also filed within the required time, in fact the very day the judgment was signed by the court, an instrument titled "Defendant Mildred M. Howard's Objections to Proposed Judgment on Pleadings and Motion to Assign Case for Trial and To Amend Cross-Complaint" which motion has not been acted on or ruled on by the court.

It is trusted that Respondent is not out of order in stating why the long delay has come about in the courts not having ruled on these motions. On July 9th, 1958 upon counsel for Respondent being served with a copy of the proposed Judgment on Pleadings and before the said Judgment was signed by the court, counsel prepared and presented to Honorable A. H. Ellett, Respondent's objections to the proposed Judgment on Pleadings and Motion to Assign the Case for trial and to Amend Respondent's Cross-Complaint, at which time Judge Ellett advised counsel for Respondent that counsel for Appellant herein was leaving that day for Europe and provided counsel for Respondent could get counsel for Appellant to appear before departing for Europe that day Judge Ellett would hear argument on the objections and Motion. Thereupon counsel for Respondent contacted the office of counsel for Appellant by telephone and was advised that Mr. Jensen had left for home, upon calling the home of Mr. Jensen counsel for Respondent was advised by Mrs. Jensen that Mr. Jensen had not arrived home but that she and Mr. Jensen were leaving at 3 p.m. for Europe and she knew Mr. Jensen could not appear in court before his departure from the city. Upon counsel for Respondent so advising Judge Ellett he suggested that the

matter be held in abeyance until Mr. Jensen's return from Europe.

A portion of the property involved in the action is rental property. Respondent, named as grantee in the deed affected by the original action, has been in possession of the property and has collected rental therefrom, managed the property and paid taxes thereon each month and year since the recording of the deed and Respondent has not been disturbed in possession of the properties.

ARGUMENT

In answer to Appellants' Point I, this action for declaratory judgment is not brought by Appellants seeking a new form of relief nor is it brought for the purpose of determining the validity of the judgment entered in the former action, its only purpose is to determine the finality of the former judgment. There is no rule which permits this proceeding for such purpose. It is unnecessary to resort to the declaratory judgment procedure in this case inasmuch as the judgment entered in Civil No. 108689 declared the rights of the parties to this action.

As is said by this Honorable Court in Gray v. Defa, 103 U. 339, 135 P2d, 251, at page 255:

> "Our Constitution, Art. 8, Sec. 19, provides that there shall be but one form of civil action. The declaratory judgment statutes do not set up a new form of action but merely authorize a new form of relief."

Appellants by this action are not seeking a new form of relief but simply ask the court to declare the judgment entered in the former case to be a final one.

As to Point 2, reference is made to Rule 73a which provides in part:

> "The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules, to amend or make additional findings of fact, whether or not an alteration of judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59."

The judgment entered in the original case was not supported by findings, the same being a judgment on the pleadings, but objections to the proposed judgment on pleadings having been filed and Motion to permit Respondent to Amend her Cross-Complaint and to have the case Assigned for Trial, in addition to the Motion for New Trial it is Respondent's contention that the above rule applies in this case.

And Rule 52 b permits one to move to amend the judgment.

The record in the original case shows that there has not been a ruling by the court on either Respondent's objections to the proposed judgment, on Respondent's Motion to Permit Respondent to Amend her Cross-Complaint and to Have the Case Assigned for Trial which Motion was included in the same instrument with the objections to the proposed judgment, or on Respondent Motion for New Trial. Therefore the appeal period has not yet commenced to run.

NO NOTICE OF ENTRY OF JUDGMENT

No notice of entry of the judgment has ever been given. In the original case, therefore the judgment in this case is not final and operative.

In Bullen v. Anderson, 81 U. 151, 155, 27 P2d 213 this court said:

> "In absence of notice of entry of judgment, appeal taken more than six months after its entry is in due time, notwithstanding that judgment debtor had knowledge of its entry, so that contention that appeal from city court to district court was barred by lapse of time, where no notice was given of entry of default judgment in city court, was without merit."

This case is annotated in Vol. 9, UCA 1953 at page 521.

And in Everett v. Jones, 32 U. 489, 91 P. 360 the court said:

> "Party intending to move for new trial has right to wait for notice in writing of decision from adverse party *before giving notice of intention* to move for new trial, though he was present in court when decision was rendered and waived findings."

Provided the strict construction of the rules were to be applied in this case as plaintiff would have the court apply same, then the court must apply the same strict construction of Rule 77 (d) providing for Notice of Judgments which Rule is as follows:

> "At the time of presenting any written order or judgment to the court for signing, the party seeking such order or judgment shall deposit with the clerk

> sufficient copies thereof for mailing as hereinafter required. *Immediately upon the entry* of an order or judgment, *the clerk shall mail* in the manner provided for in Rule 5 a copy thereof, or if such order is by minute entry a notice thereof showing the date of entry, to every party affected thereby who is not in default, and shall make a note in the register of actions of such mailing."xx

Now it is noted that the closing sentence to the above rule said "Lack of notice of the entry of judgment by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed."

But it would appear from the case of Lundberg v. Backman, decided by this Honorable Court on May 1, 1959, 9U 2d 58, 337 P2d 433 and also from the above cited cases that one has a right to wait for such notice before filing his Motion for New Trial,

In the Lundberg case the court said:

> "Had the prevailing party in the previous action seen fit to comply with the provision of Rule 77d and deposit an additional copy of the judgment with the clerk of the court for service by mail on respondent, it is probable that the motion for a new trial would have been filed in time and, no doubt, the instant action never commenced. It is obvious that unless our practitioners *comply with this important rule* on contested cases, other attorneys will be found representing themselves, instead of clients, in negligence actions." (Italics added)

As to Appellants' Point 3. Even if Respondent were required to rely on the instrument titled "Notice of Intention

to Move for a New Trial" in the original case as staying the running of the time for appeal without relying on the objections to the judgment and motion to assign the case for trial and to permit the amendment of Respondent's Cross-complaint, still that instrument was sufficient to stay the running of the time for appeal.

The Motion for New Trial filed by Respondent in Civil No. 108689 shows without any question of doubt that which the instrument is. While it is titled "Notice of Intention to Move for New Trial," the instrument follows the suggested form of Motion in stating the grounds on which the motion is made and the last paragraph clearly shows that Respondent intended the instrument to be her Motion for New Trial in the following words:

> "Said *motion* with respect to the cause mentioned in the first ground *is made* upon affidavit, herewith attached and served upon you and upon the minutes of the court, and in respect to the second ground *said motion is made* upon the minutes of the court and upon all of the records in this case." (Italics supplied.)

Affidavit was attached to and made a part of the motion. Appellant could not have been misled as to the purpose for which the instrument was made and filed. The instrument carries the word "Notice," and the same was filed within the time required by the rules therefore the same did conform to rule 60, true the time for the hearing of the motion was not included. It appears that it is not the practice in this county to set the time for hearing of Motions for New Trial. The court is usually consulted and fixes a time before the notice of the time for the hearing is given.

The title given the instrument if defective is not fatal, it is not a part of the pleading, nothing but the caption.

In 71 CJS, Pleading, Sec. 65, at page 161 the following statement of law is found:

> "The title or caption of plaintiffs pleading is the heading or introductory clause which shows the names of the parties, the name of the court, the number of the case on the docket or calendar etc. The introductory paragraph in the body of the petition itself is not a part of the caption or title. It has been generally held that a defective caption, or the absence of a caption is merely a formal defect and not fatal."

Under the above rule of law the Utah case of Lund vs. Third District Court is cited which case is also cited by Appellants in their brief, 90 U-433, 442, 62 P2d 278.

> It is interesting to note that the instrument in question in the Lund case was captioned "Notice of Intention to Move the Court for a New Trial," That case was an original certiorari proceeding by Lund against the Third Judicial District Court and Hon. Herbert M. Schiller, Judge, and others, to review proceedings of the trial court in granting new trial in an action by Lund against the Sharman Automobile Co., and others. The judgment granting the new trial was affirmed and the matter was remanded to the trial court. In that case suit was brought by plaintiff against defendant and tried to the court sitting with a jury. A verdict was rendered in favor of plaintiff and judgment entered thereon on April 17, 1935. Five days later defendants filed a Notice of Intention to Move the Court for a New Trial. The motion was heard by the court on April 27, 1935 and

it was denied. On May 21, 1935 the defendants filed a petition and motion setting forth the proceedings had in the cause and alleging that at the time of filing the motion for a new trial, defendants had no knowledge or information that among the jurors impaneled and sworn there was a juror who had been convicted of a felony . . .

A petition and motion, supported by affidavits as to the facts, were prepared and filed on May 21, 1935 and on May 28th, 1935, defendants filed what is denominated "Amended Petition for Leave to File Motion" which document and its supporting affidavits are of similar import to the petition and motion filed on May 21st, except that there was added to the latter document a prayer for leave to file their motion for a new trial, and that the 'petition be permitted to stand as and for such motion for a new trial.' On October 22, 1935 the court granted the amended petition. And on October 29, 1935 plaintiff filed objections to the order which was proposed and which granted a new trial. At the hearing had on said objections defendants made a motion to amend the amended petition filed on May 21st, and over objection, defendants were permitted to amend the prayer to read, "And that the foregoing petition be permitted to stand as and for such motion for a new trial." The court continued the hearing to November 9, 1935 and permitted the amended petition to stand as a motion for a new trial and granted a new trial to the defendants.

The question presented on the appeal was whether the trial court exceeded its jurisdiction in making its order granting defendants a new trial.

It will be noted that the document under and by which the court granted the new trial was that titled "Amended

Petition for Leave to File Motion" which was by oral motion amended in the prayer of the petition by interlineation to read "And that the foregoing petition be permitted to stand as and for such motion for a new trial."

In commenting as to this proceeding the Supreme Court speaking through Mr. Justice Moffat said:

> "The particular wording of a caption or title heading a document may or may not be complete or descriptive of the subject-matter included in the document. It is the subject-matter of a pleading, order, judgment, or decree that determines what it is regardless of the caption of the document, helpful though its titled description may be. It has been held that a defective caption or no caption at all is merely a formal defect, but the court in which the action is brought should be stated with substantial accuracy."

And in McDowell v. Geoken, (Idaho), 252 P2d 1056 the court held that the substance of a pleading rather than the title given it by the pleader determines the purport thereof.

In 41 Am. Jr. Pleading, Sec. 64, page 334 we find the following:

> "Terms are to be read in connection with other parts of the pleading, and the true meaning is determined, not by the form or signification in the abstract, but by the context. The rule of strict construction cannot be allowed to amplify or contradict the terms employed in the pleading. A construction of pleading which will give effect to all of its material allegations is to be preferred, where

> reasonably possible. And where an expression is capable of different meanings, that is taken which will support the pleading.

And at Sec. 65 it is stated:

> "Contrary to the common-law rule, under the rule of liberal construction every reasonable intendment and presumption must be made in favor of the pleader, and the pleading must be fatally defective before it will be rejected as insufficient."

Regarding Point 4.

As to the matter of Respondent not having called her motion for new trial up, we have no rule as does some states, prescribing the time within which such motions must be acted upon. Even in those states having a rule requiring the court to act and rule upon a Motion for New Trial withing a prescribed time it has been held that such a rule is directory only and that a failure on the part of the judge to comply with it does not deprive the court of jurisdiction subsequently to pass upon it. See 48 ALR page 364—III—Determining motion.

Regarding the noticing up of such motions it is said in Jones v. Williamson, 50 U 444,, 168 P. 110, the purpose of the notice is to give the adverse party an opportunity to appear and resist the motion for new trial.

CONCLUSION

The Honorable court has construed this question in the Lund case above quoted from and therefore it is felt

that to analyze those cases relied upon by Appellant will add nothing.

As is evident from Respondent's statement of facts herein, Respondent has never abandoned either her objection to the proposed judgment on pleadings and Motion to assign case for trial and to amend cross-complaint, or her Motion for New Trial. No intention to abandon the same is evident and especially is this true when Respondent continues in possession of the property, and exercises all rights of ownership over same.

As to Point 5, the lower court had before it the files and records of the former case and stated in its judgment only the reason for the entry of the summary judgment in favor of Respondent as has been directed by this Honorable Court, therefore the finding of the court as to the appeal period not having expired in the original case is proper.

The judgment of the lower court should be affirmed.

Respectfully submitted,

M. V. BACKMAN OF BACKMAN,
BACKMAN & CLARK,
Attorneys for Respondent.