

1965

Loris Marsh v. Utah Homes, Inc. : Appellant's Brief

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IN THE SUPREME COURT
of the
STATE OF UTAH

LOUIS MARSH,

Plaintiff and Respondent,

vs.

UTAH HOMES, INC.,

a corporation

Defendant and Appellant.

Case No.
10,370

APPELLANT'S BRIEF

DEFENDANT'S APPEAL FROM JUDGMENT
OF DISTRICT COURT

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IN THE SUPREME COURT
of the
STATE OF UTAH

JOE MARSH,

Plaintiff and Respondent.

vs.

UTAH HOMES, INC.,

Corporation

Defendant and Appellant.

Case No.
10,370

APPELLANT'S BRIEF

NATURE OF CASE

This is a contest to determine whether or not Plaintiff's appeal should have been dismissed by the District Court for the cause of Defendant's having failed to pay fees as specified in the pleadings.

DISPOSITION IN THE LOWER COURT

Judgment was entered for the Plaintiff and against the Defendant on the 10th day of December, 1964, as prayed by the Plaintiff, and the counter-claim was dismissed.

Defendant appealed to the District Court of Weber County on the 7th day of January, 1965, together with proper notice thereof, and the Plaintiff moved to dismiss the appeal because of the fail-

ure of the Defendant to file a bond for costs to pay the fees for docketing the case with the District Court. This motion was denied by the Court. Thereafter, on the 9th day of February 1965, (after the fees were paid and the appeal filed) the Plaintiff moved the District Court for an order dismissing the appeal on the same grounds. This motion was heard by the District Court on two occasions; whereupon, under date of April 1, 1965, the Court dismissed the appeal.

RELIEF SOUGHT ON APPEAL

From this final order, the Defendant appeals to the Supreme Court for relief and for an order remanding the case for trial before the District Court.

STATEMENT OF FACTS

Plaintiff brought an action against the Defendant in January of 1964 for the sum of \$3500.00 interest and costs, on a claim for materials furnished and services rendered. Defendant denied that the materials were furnished or that the services were rendered, and in fact, counter-claimed for over-payments to the Plaintiff arising out of a contract between the parties (see transcript for details of contract).

ARGUMENT

POINT I

PAYMENT OF FEES FOR FILING AND DOCKETING ARE NOT JURISDICTIONAL.

Appellant cites the case of *Penman vs. E.*

Appellate, 196 P.2d 984, 11 Ut. 2d 16, which was filed pursuant to Title 104-77-9, Utah Code Annotated 1943, as amended, the applicable statute which was subsequently correlated with the new Code 73-100. In that matter, the Court specified that the payment of fees was not jurisdictional, and that it was within the discretion of the District Court to allow the appeal to be heard even though the filing fees were not paid within a 30-day period, as required by the statute.

In reading the case of *Tooele Meat Co. vs. U.S.*, cited in 136 P.2d 965, 43 Ut. 515, it appears that a substantial compliance with the statute is all that is necessary. It should be noted that in cases of appeal in the District Court to the Supreme Court, the nonpayment of fees at the time of filing of the notice is not fatal to the appellant's case.

POINT II

TIME FOR FILING NOTICE OF APPEAL AND PAYMENT OF FEES COMMENCES WITH SERVICE OF NOTICE OF ENTRY OF JUDGMENT.

The word "entry" in the foregoing point of argument has been emphasized to point out wherein the Plaintiff has failed to set into motion the commencement of the running of time. What the Plaintiff did was to send the Defendant a carbon copy of the judgment on the 9th day of December, 1964, even though the said judgment had not been entered at that time, and which judgment in fact was not entered until the following day. After the entry

of judgment, the Plaintiff wholly failed to communicate with the Defendant or its counsel regarding the same.

Accordingly, the Plaintiff has failed to meet the test as required by Rule 73(h) in specifying that there must be communicated a "Notice of Entry of Judgment." Obviously, one cannot give notice of the entry of judgment until after the same has been entered. This Court has treated the matter as such under our former Title 78-5-4, and under our present Rules of Civil Procedure. The question of notice has been construed not only regarding Rule 73(h), but respecting all of the rules which require notice. The service of notice of entry is not an essential prerequisite to the right of an appeal, but it is an essential prerequisite to the commencement of the time within which an appeal must be filed. See *Forsyth vs. Third District Court*, 123 P. 621, 41 Ut. 16.

Notice of entry of judgment must be given to start the running of the 30 days (1 month) in which to appeal even in cases of default judgments. See *Bullen vs. Anderson*, 27 P.2d 213, 81 Ut. 151.

In the case of *Buckner vs. Main Realty Co.*, 27 P.2d 786, 4 Ut. 2d 124, the Court found clear that despite the fact that the language of Rule 73(h) is not as precise as that of the statutes which preceded it, it appears that the intent was to enact the procedures which pertain to appeals from city and justice courts prior to 1950, and further that the commencement of the time for filing notice of appeal commences with the entry of judgment.

CONCLUSION

Accordingly, inasmuch as the Plaintiff failed to notify the Defendant of the fact that the judgment had been entered, the 30-day period did not commence to run on December 9th or any other date. The filing by the Defendant of the appeal and the subsequent payment of fees perfecting the same were both accomplished prior to the commencement of any 30-day period. It is clear that the District Court should have permitted the trial de novo to be held, and that the appeal should not have been dismissed on this point alone. The question of the jurisdiction of the Court has been treated as cited in the *Penman* case, and there has been some dicta by the Court in the subsequent case of *Bish's Sheet Metal vs. Louras*, 359 P.2d 21, 11 Ut. 2d 357, in which this Court expressed a contrary opinion. It is urged here, however, that the District Court would not have been precluded from allowing the appeal to be heard even if the notice of entry of the judgment had been filed, and further, even if the fees were not paid or tendered within a month thereafter.

Respectfully submitted,

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