

1965

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

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IN THE SUPREME COURT
of the
STATE OF UTAH

LORIS MARSH,
Plaintiff and Respondent

vs.

UTAH HOMES, INC.
a corporation
Defendant and Appellant

Case No.
10370

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

Plaintiff is in agreement with defendant's statement of facts in this case.

ARGUMENT

POINT I

PAYMENT OF FEES FOR FILING AND DOCKETING NOTICE OF APPEAL IS JURISDICTIONAL.

Unless the clerk of the lower court is paid the fees upon the leaving the Notice of Appeal for filing, he is unable to comply with the statute requiring him to mail copy of such notice, with the fees, to the appeal court. Also the clerk is unable to transmit the record from lower court to district court.

Following this reasoning we further contend that under Rule 73(h) Rules of Civil Procedure the payment of the fees within the one month period is jurisdictional.

Among other things 73(h) provides as follows:

The appeal shall be dismissed by the district court with which taken upon motion and notice, unless at the time of filing notice of appeal the party appealing deposits into the court the fees for the lower court for docketing the appeal in the district court.

Also Rule 73(k) Rules of Civil Procedure provides that at the time of filing the notice of appeal the appellant shall file with such notice a bond for costs on appeal in accordance with the provisions of Rule 73(c).

In the case of *Moses vs Lundahl* 92P2d 340, 97 Utah it is stated that in absence of some showing, as mistake or accident why appellant failed to file appeal bond within required time, and had not filed such until after respondent moved to dismiss the appeal, the court would dismiss the appeal.

In 78-4-20 Utah Code Annotated, 1953, the clerk of the city court is directed to collect in advance the fees, and mail the transcript with certificate thereof to the appellate court.

In reading the case of *Johnson vs. Geary* 33 P2d 751, 85 Utah 47, we find that in order for the appellant to invoke jurisdiction of a cause he must show that he perfected an appeal, and in order to do so he must affirmatively show that he not only filed a notice of appeal, but that he filed an undertaking for costs, or secured waiver thereof.

The ruling in *Jacobsen vs. Jeffries* 47 P2d 892, 86 Utah 587 states that leaving a paper with a filing officer, a fee for the filing of which is by the statute required to be paid

ADVANCE, IS NOT A FILING REQUIRED TO GIVE APPELLANT COURT JURISDICTION.

The *Penman vs. Elmco* case, 196 P2d 984, 4 Ut 2d 16, cited by appellant in his brief, Point I, can readily be distinguished from the case at bar. In that case fees were offered the clerk who refused them, and promised to notify the attorney of the correct amount, and failed to do so. There are no such facts as these in the case at bar.

The appellant's argument, therefore, that payment of fees in filing Notice of Appeal is not jurisdictional, must fail.

POINT II

NOTICE OF ENTRY OF JUDGMENT WAS SERVED ON DEFENDANT'S ATTORNEY IN SUBSTANTIAL COMPLIANCE OF THE STATUTE.

On 9th December, 1964, the City Judge signed the judgment. On the same day this judgment was left with the office of the city clerk for filing. However, the judgment was not stamped until 10 December, 1964. A duplicate copy of this judgment was mailed to the attorney for Defendant, certificate of which is shown on the bottom of original judgment.

It appears that the statute is silent with respect to the kind or character of notice of entry of judgment to be given. The duplicate copy of the judgment served on Defendant's attorney fully measures up to the requirements of the statute. It apprised this attorney of name of court where judgment secured, name of parties, date and amount of judgment. From the inspection of this duplicate copy of judgment Defendant's attorney could easily prepare the notice of appeal.

This is verified by the language in the case of *Meat & Storage vs. Morse*, 136 P.965, 43 Ut 515, where the court stated:

Only a substantial compliance with Comp. L. 1907, Sec. 1744 requires notice of entry of judgment to be given by the successful party, either personally or by publication, is required. It is generally sufficient if the notice proceeds from an authentic source, and fully informs the party to be notified of the substance of the matter to be noticed.

CONCLUSION

Therefore, by Defendant failing to perfect its appeal within the one month period by not paying the fees for filing the notice of appeal, and by failing to leave cost bond with the city clerk, its appeal was properly dismissed by the district court, and it must fail in this court. Rule 73 of the Rules of Civil Procedure is conclusive on this point. It is substantiated by the *Johnson vs. Geary* case, 33 P2d 757, 43 Ut. 47.

Substantial compliance of the statute was accomplished in serving notice of entry of judgment in the form of a duplicate judgment. Defendant's attorney was completely informed, and, from it well able to draw and file notice of appeal.

Certainly the district court committed no error in dismissing the appeal, for Defendant should have been precluded from a new trial after failing to perfect its appeal.

RESPECTFULLY SUBMITTED,

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