1960

Bish's Sheet Metal Company v. Chris J. Luras dba Liberty Bell Bakery Co. : Brief of Appellant

Utah Supreme Court

H. G. Metos; Attorney for Defendant and Appellant;

IN THE SUPREME COURT
of the
STATE OF UTAH

BISH'S SHEET METAL COMPANY,
a Corporation,

Plaintiff and Respondent,

vs.

CHRIS J. LURAS, d/b/a LIBERTY BELL BAKERY COMPANY,

Defendant and Appellant.

Case No. 9309

APPELLANT'S BRIEF

H. G. METOS
Attorney for Defendant and Appellant

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STATEMENT OF THE CASE

The above cause was originally filed in the City Court of Salt Lake City and County, Utah. A trial was had before one of the City Judges and the Judge orally decided the issues in favor of the defendant. On February 3, 1960, before judgment was entered, the plaintiff served on defendant its Notice of Appeal of the case to the District Court of Salt Lake County (R. 3). Judgment was entered in the City Court on February

4, 1960 (R. 6). A pre-trial order was entered by the District Court, and one of the issues was whether the Appeal was prematurely taken and did the District Court have jurisdiction (R. 12). A trial was held in the District Court before the Honorable Ray Van Cott, Jr., and judgment was entered against the defendant. The trial court refused to make any findings as to whether the City Court Appeal was prematurely taken and whether the Court had jurisdiction. Defendant submitted proposed findings on this issue but the same were rejected by the Court (R. 17-18).

STATEMENT OF POINTS UPON WHICH DEFENDANT RELIES

Point I.

That the plaintiff's appeal from the City Court to the District Court was prematurely taken, and that the District Court had no jurisdiction to hear said cause.

Point II.

The Court erred in denying and overruling defendant's proposed amendments and objections to the Findings of Fact, Conclusions of Law, and Judgment.

ARGUMENT

Point I.

THAT THE PLAINTIFF'S APPEAL FROM THE CITY COURT TO THE DISTRICT COURT WAS PREMATURE-

LY TAKEN, AND THAT THE DISTRICT COURT HAD NO JURISDICTION TO HEAR SAID CAUSE.

Rule 73 (h) of the Rules of Civil Procedure relating to appeals from the Justice or City Court to the District Court provides as follows:

> "An appeal may be taken to the district court from a final judgment rendered in a city or justice court within one month after notice of the entry of such judgment, or within such shorter time as may be provided by law. The party appealing shall within the time allowed, serve upon the adverse party a notice of appeal and file the same, together with a copy thereof, either in the court from which the appeal is taken or in the district court to which the appeal is taken; provided that such notice shall show on its face the title of the court in which it is filed. The appeal shall be dismissed by the district court to which taken upon motion and notice, unless at the time of filing the notice of appeal the party appealing shall deposit into court the fees required by law to be paid in connection therewith, including both the fees for the lower court and for docketing the appeal in the district court."

The service of the Notice of Appeal in this case was made by mailing. The question naturally arises, When was the service of the Notice of Appeal completed in this case?

Rule 5 (b) (1) of the Rules of Civil Procedure provides,

> " . . . Service by mail is complete upon mailing."

The plaintiff mailed its notice of appeal on February 3, 1960. The service was therefore made on February 3, 1960. At that time no final judgment had been rendered by the City Court, and hence there was no judgment from which to appeal.

It has been repeatedly held by the Court in this State that an appeal can not be taken from an oral judgment and where such an appeal has been taken, the same was dismissed as being prematurely taken. In the case of Watson vs. Odell, 53 Utah, 96, 176 Pac. 619, the court verbally ordered a non-suit and dismissal, but no formal judgment of dismissal was entered at the time the appeal was taken. After an appeal was taken, a formal judgment was entered. The defendants moved to dismiss the appeal. The court granted the motion of dismissal and stated:

> "This court has held that an order similar to the one made by the district court on August 29, 1917, is not a final and appealable judgment. Lukich v. Utah Construction Co., 46 Utah, 452, 160 Pac. 270, it was further held that the time for an appeal begins to run from the actual entry of the judgment of dismissal. Those cases have repeatedly been followed by this court in rulings from the bench, and numerous appeals have been dismissed because no formal judgment of dismissal had been entered. The rule laid down in those cases has thus become the settled practice of this court. Counsel for neither side question the soundness of those cases, and we can see no reason why the rule shoudl not be adhered to. It is the only safe course to pursue. No one should be left in doubt respecting the record of a judgment nor where it is entered or can be found."

Rule 81 (c) of the Rules of Civil Procedure relating to procedure in City Courts and Justice Courts, is as follows:

> "These rules shall apply to civil actions commenced in the city or justice courts, except insofar as such rules are by their nature clearly inapplicable to such courts or proceedings therein."

Rule 58A of the Rules of Civil Procedure relating to when judgment is deemed to have been entered, is as follows:

> "A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket."

A case in point is in re Pringle's Estate (Wyo.) 67 P.2nd 204, where it was held that the appeal was prematurely taken and the court was without jurisdiction to consider the case, the court stating:

> " . . . Appellant's notice of appeal in this case is dated the 27th of May, 1935, and it was served on opposing counsel on May 28, 1935. It is apparent from the record that the judgment appealed was not entered until at least the 29th of May. Under the foregoing cited decisions, this court is without jurisdiction to consider the appeal thus prematurely taken and it must be dismissed."

It should be noted that Rule 73 (h) specifically provides that the party appealing shall *"serve upon the adverse party a Notice of Appeal and file the same."* This procedure applies specifically to appeals from Justice and City Courts and is not applicable to appeals from the District Court to the Supreme Court.

The reason for this procedure is probably due to the fact that justice courts do not have clerks and the justices themselves are working on a part-time basis, and that the authors of Rule 73 (h) felt, and justly so, that notices of appeal shall be served upon the adverse party rather than merely filing

them with the Justice of the Peace, so that there would be no question of the opposition being advised of an appeal.

Point II.

THE COURT ERRED IN DENYING AND OVERRULING DEFENDANT'S PROPOSED AMENDMENTS AND OBJECTIONS TO THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT.

The trial court refused to make and enter any findings of fact relating to the issue of jurisdiction and whether the plaintiff's appeal was prematurely taken as defined in the pre-trial order (R. 12). Defendant submitted proposed findings of fact and conclusions of law relating to this issue (R. 17). The trial court denied the same. Since the facts concerning the appeal are undisputed, this court can correct this matter in its decision. The argument set forth herein in support of appellant's Point I applies with equal force to appellant's Point II, and, therefore, no further space need be devoted to this issue.

CONCLUSION

In 1943, the Utah Supreme Court was given full rule-making power by the Legislature, and in 1950 it exercised that power by the adoption of the Civil Rules of Procedure, virtually the same as the Federal Rules. These rules are simple, clear, just, and speedy to bring about an inexpensive determination of every action. Rule 73 (h), supra, states that an appeal may be taken from the Justice or City Court from a "*final judgment*"

by serving upon the adverse party a Notice of Appeal. A final judgment is one that has determined the rights of the parties, signed by the Judge, and entered as provided by the rules. The plaintiff appealed before a judgment was entered. Under the rules and decisions of this court, the appeal was prematurely taken and the District Court was without jurisdiction and the action should have been dismissed.

It is respectfully submitted that the judgment of the District Court should be set aside and plaintiff's appeal dismissed.

Respectfully submitted,

H. G. METOS

Attorney for Defendant and Appellant