

1991

Vera O. Gass, Vera O. Hunting v. Robert Lile Hunting : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

VERA O GASS, Formerly
VERA O. HUNTING,

Plaintiff-Respondent,

vs.

ROBERT LILE HUNTING, aka
LILE HUNTING,

Defendant-Appellant.

Case No. 14642

BRIEF OF RESPONDENT

An Appeal From the Judgment of the District Court
of the Fourth Judicial District, the Honorable
Allen B. Sorenson, Judge

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STATEMENT OF CASE AND DISPOSITION OF LOWER COURT

The issue of this case is whether or not Section 78-12-35, UCA, as amended, tolled the Statute of Limitations while the Defendant was out of the State of Utah. Respondent claims it did. Appellant claims it did not.

Respondent filed her suit against the Appellant within a short time after he returned to Utah, seeking Judgment on what she alleged was due her. There is no dispute regarding the facts. The lower Court awarded Judgment to the Respondent and the Appellant appealed.

RELIEF SOUGHT BY RESPONDENT

Respondent seeks to have Judgment of Trial Court sustained.

STATEMENT OF FACTS

There is no dispute as to the material facts in this case, which are:

1. Respondent obtained three Judgments against the Appellant which were entered in the records of the Fourth Judicial District Court of the State of Utah, in and for Uintah County, in Civil No. 4472, wherein Appellant was Plaintiff and Respondent was Defendant. These Judgments were entered on June 30, 1964, October 6, 1964, and December 22, 1964.
2. The Respondent by executions duly issued, obtained a few small payments on on of the Judgments due her from her former husband, but other attempted executions failed.
3. The Appellant, according to his own testimony, left the State of Utah on June 30, 1965, and returned to Utah on June 25, 1974, being out of the state, except for intermittent visits, for nine years, less five days.
4. On April 4, 1975, after Appellant returned to Utah and within the term limited by the statute after his return, Respondent filed this action, a new case, and Summons was issued and served on the Appellant in Uintah County, State of Utah. Said suit was brought on three Judgments (not to execute on the Judgments) to obtain a new Judgment based on the old Judgments.

5. Respondent's position was that the Appellant's absence from the State of Utah for the nearly nine year period, tolled the Statute of Limitation and she was entitled to Judgment on her new cause of action.

6. The Respondent testified that she was unable to locate the Appellant during the period of time he was out of the State of Utah and did not know of his visits in Uintah County except for one occasion when he came to the County to attend the funeral of his mother. On this occasion Respondent testified she felt it inappropriate to serve him with Summons at that time.

7. Upon learning of the Appellants return to Utah, Respondent filed a new suit against him (this case) based on the three old Judgments.

8. The lower Court gave Judgment to the Respondent for the amount of the Judgments plus legal interest thereon, from which Appellant makes this appeal.

ARGUMENT

Respondent contends that the statute of limitations with reference to a suit based on existing Judgments is tolled during the time the Judgment-debtor is out of the state.

Section 78-12-35, UCA, as amended, provides:

"Effect of Absence from state-If when a cause of action accrues against a person when he is out of the state, the action may be commenced within the term herein limited after his return to the state; and if after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

We find no case in the State of Utah which provides otherwise. Appellant cites Rule 69 (a) which Respondent urges has no application in this case but involves a Writ of Execution. The case now before this Court and tried by the lower Court was not brought for the purpose of executing on the old Judgments, but was a suit to renew the old Judgments and not to enforce the payment of it. The Appellant was out of the State of Utah for nine years, lacking a few days, which Appellant admits. Respondent contends that under the provisions of Sec. 78-12-35, the statute of limitations was tolled during the time Appellant was absent from the state.

The Trial Court held in the case now before this Court, that Rule 69 (a) provides a limitation on the use of execution to enforce a Judgment not upon a suit brought upon Judgment. (See Memorandum Decision). Respondent contends that this is the law.

51 AmJur 2d, 162 quoting a Missouri case, states:

"In determining whether a case is within a statutory exception which is that the Plaintiff should not lose his right of action by the bar of the statute of limitations if during any substantial period of time during which the statute otherwise would have been running, the Defendant had departed from, or resided out of, the state, so that ordinary legal process such as would afford a foundation for a personal Judgment against the Defendant could not be served upon him.

Shortly after his return to the State of Utah, Respondent filed suit and obtained Judgment well within the period the statute was tolled.

In the case of Snyder v. Clune, 15 Utah 2d 254, 390 P 2d 915, this Court held;

"The objective of the statute providing that the limitations are tolled if the Defendant departs from the state was to prevent Defendant from depriving Plaintiff of opportunity of suing while absenting himself from the state during limitation period."

This case also held:

"It is obvious that the objective of the statute 'tolling the statute of limitations in the premises' above quoted was to prevent a Defendant from depriving a Plaintiff of the opportunity of suing him by absenting himself from the state during the period of limitation"

The Court then cited UCA 1953, 78-12-35 as the law in Utah.

The case of Buell v. Duchesne Mercantile Company, 64 Utah 391, 231 P 123 held:

"Where the Defendant was out of the state for a period of five months. His absence tolled the statute for this period, notwithstanding he maintained residence in state with persons residing in Utah, upon whom service of process might be made."

We have found no case holding to the contrary.

The law has long been established that a debtors absence from the state tolls the statute of limitations while he is out of the state.

In the case of Keith O'Brien Company v. Snyder, 51 Utah 227, 169 P 954 held:

"When the cause of action against a debtor accrues against a person, he is out of the state, the action may be commenced within the term limited after his return to the state."

This rule was followed by the Trial Court in the case now before the Court, the Judgment Appellant appeals from.

There are numerous other Utah cases upholding the Utah statute, Section 78-12-35, which sustains Respondents contention but need not be cited.

The basic reason for the statute tolling the statute of limitations is to prevent a Judgment-debtor, as in this case, from leaving the state purposely in order to prevent the Judgment-creditor from bringing suit within the period of limitation.

Appellant apparently is attempting to consider this case as an Execution rather than a suit on the old Judgments and cites Section 78-12-22, which applies to the situation where the Judgment-creditor is endeavoring to enforce the Judgment but, certainly for the reasons above stated, does not apply where the statute has been tolled.

CONCLUSION

Under the facts of this case, which both parties agree to, the statute of limitations was tolled for over eight years. Respondent brought suit soon after Appellant returned to the State of Utah, well within the tolled period, suing on the old Judgments for her cause of action. The Trial Court gave her Judgment as prayed for. This Judgment followed the law and the cases and should be sustained.

Respectfully submitted:

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