

1962

Harry G. Heathman v. Fabian and Clendenin : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Heathman v. Fabian & Clendenin*, No. 9643 (Utah Supreme Court, 1962).
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IN THE SUPREME COURT
OF THE
STATE OF UTAH

HARRY G. HEATHMAN,

Plaintiff and Appellant,

vs.

FABIAN AND CLENDERIN, Law Firm
of the following partners:

HAROLD P. FABIAN
RENDRELL E. NABBY
STANFORD H. STODDARD
BULLEY AROSS
E. J. WOLDSWORTH
ALLEN KENT SNEAKER

BEVERLY S. CLENDERIN
PETER W. BILLINGS
ALBERT J. COLTON
RALPH E. MILLER
BRYCE E. ROE
SHIRLEY P. JONES, JR.

and

KATHLEEN CHOLLEY,

Defendants and Respondents.

CASE NO.

9843

FILED

SEP 10 1962

Clerk, Supreme Court, Utah

BRIEF OF APPELLANT

Appeal from the Final Order of the
Third District Court for Salt Lake County
Hon. Ray Van Cott, Jr., Judge

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IN THE SUPREME COURT
OF THE
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HARRY G. HEATHMAN,
Plaintiff and Appellant,
vs.
FABIAN AND CLENDENIN, Law Firm,
and KATHLEEN CHOLLEY,
Defendants and respondents.

CASE NO.
9843

BRIEF OF APPELLANT

NATURE OF CASE

This is an action brought by the appellant to recover expenses, costs, and damages from the defendants for their willful, negligent and fraudulent misrepresentation to the court in falsely representing facts to the court and for willfully withholding witnesses properly subpoenaed by the plaintiff.

DISPOSITION IN LOWER COURT

Plaintiff's amended complaint was dismissed after a hearing February 5, 1962. Plaintiff's motion to file a second amended and supplemental complaint was denied and a judgment of dismissal was granted and signed by the Honorable Ray Van Cott, Jr., February 6, 1962.

RELIEF SOUGHT ON APPEAL

Plaintiff respectfully requests the Honorable Court to:

Reverse the judgment of dismissal (R. 21), that plaintiff be allowed leave to file an amended and supplemental complaint, and that plaintiff be awarded his costs and disbursements on this appeal.

STATEMENT OF FACTS

The facts relied upon by plaintiff in the prosecution of this appeal are that defendants, in the course of presenting their defense in behalf of their client Attorney Sumner J. Hatch, against whom plaintiff had filed suit for malpractice, did

(1) willfully call District Judge A. H. Ellett and discuss plaintiff's entering default certificate against defendant's client Sumner J. Hatch; and did willfully misrepresent facts to the Honorable A. H. Ellett and succeeded in obtaining his consent to orally order Clerk of the Court to refuse to sign and enter plaintiff's default judgment in the Register of Actions and Judgment Docket;

(2) did refuse to produce properly subpoenaed witness in court;

(3) did willfully interrupt plaintiff's cross examination of defendant Cholley at a critical point;

(4) did willfully file a false affidavit in court;

(5) did willfully and knowingly maintain said false affidavit in court to plaintiff's detriment;

(6) did willfully obtain Judge Maurice Harding's order on plaintiff's voluntary dismissal in District Court Case No. 128599 after defendant's motion and request for same had been denied by Judge Ellett.

The above acts being actionable and contrary to the statutes of the State of Utah and having damaged plaintiff by the acts and doings described in above facts, plaintiff seeks relief prayed for.

ARGUMENT

POINT I

THAT THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE A SECOND AMENDED AND SUPPLEMENTAL COMPLAINT BY GRANTING DEFENDANT'S MOTION TO DISMISS.

Defendant's motion to dismiss (R. 8) recites two grounds.

Plaintiff submits facts recited in his amended complaint (R. 4) and statement of facts recited in this brief completely vacates defendant's first point, and falls well within the many previous rulings of this court requiring the district courts to freely allow leave to file an amended complaint and that the court should refrain from dismissing a complaint as stated in Liquor Control Commission v. Athas, 121 U 453-4, 243 P2d 441(1952), and many other cases:

"A motion to dismiss should not be granted unless it appears to a certainty that plaintiff would be entitled to no relief under any state of facts that could be proved in support of its claim."

Defendant's second point of his motion to dismiss (R. 8) alleges a collateral attack upon the ruling of the Honorable Aldon J. Anderson. This is not so. The court's attention is respectfully called to the following, taken from the official transcript of testimony and proceedings on motion to strike entry, page 54A, lines 7 through 11:

THE COURT: The court believes that under the rules and under the evidence that has been here submitted, that this is an instance in which the rule provides for relief from excusable neglect and this is such an instance when that rule should be exercised.

Defendant's original motion was based solely upon the false affidavit of Kathleen Cholley. Defendant's allegations to the District Judges, and to Judge Ellett in particular, causing Judge Ellett to instruct the Clerk of the Court not to comply with the Rules of Civil Procedure governing default judgments and defendant Roe's allegations to the Honorable Stewart M. Hanson, were based solely upon defendant's declaration of the authenticity of the alleged false affidavit. The court's attention is directed to the following taken from aforementioned official transcript, page 30, lines 17 to 30; page 31, line 1 to 15, incl.; and page 115, lines 20 to line 30, incl.:

Q. I want to call your attention, Mrs. Cholley, to your affidavit and in this affidavit you state that this envelope which was mailed to me was bearing the correct amount of uncanceled United States postage stamps, and I want also to call your attention to the fact that in this affidavit that you make affidavit that you properly sealed, stamped and addressed it as given below, and that you deposited this in the post office of Salt Lake City. By your own testimony -

THE COURT: What you ought to do -

Q. Did you "yes" or "no" deposit this in the post office, this mail?

A. No sir.

Q. Then your affidavit is incorrect, is that right?

A. I think so.

Q. You believe so?

A. Yes.

Q. Do you wish to withdraw your affidavit?

MR. JONES: I object to that, it is immaterial.

MR. HEATHMAN: Well, Your Honor, she says it isn't true.

THE COURT: It is sustained. The affidavit will remain in the file regardless of what people want to do with it, it is there as a record and it is kept there as a record.

MR. HEATHMAN: It was a nice try on my part.

THE COURT: Its being there won't lend it any more validity than it is entitled to by being there, it is a record and it is so kept."

TESTIMONY OF BRYCE ROE, Official Transcript, Page 15, lines 20 to 30, inclusive:

Q. You went to the back door of one of the judges - did Mr. Jones question Mrs. Cholley in connection with the mailing of this instrument or was it you?

A. I questioned her, I don't know whether Mr. Jones questioned her -- I assume he did.

Q. At that time did she voluntarily say that she remembered the mailing?

A. She did.

Q. She did, now she don't, is that it?

A. That appears to be it, Mr. Heathman.

MR. HEATHMAN: Thank you very much, Mr. Roe.

In support of plaintiff's allegation and cause of action arising out of defendant's willfully withholding witness from plaintiff, the court's attention is called to aforesaid official transcript, page 8, lines 15 through 30, and page 9, lines 1 through 26, inclusive:

THE COURT: Is it presumed, Mr. Jones, when the return was made by the Sheriff it was regularly made pursuant to Rule, unless it is contrarily made to appear?

MR. JONES: I think that is so, even on the first summons it shows on the front of it "no fee" on the first subpoena, and Harry Walker stated yesterday when a demand was made on him he would so endorse it on the return.

THE COURT: It is not so endorsed?

MR. JONES: Could I see that?

THE COURT: There is a designation on the front "no fee", it is written twice in two different hands and without evidence I would be bound to presume the service was regularly made.

MR. JONES: That would involve a matter of Mrs. Cholley on an order to show cause. Might I say if Mr. Harry Walker is down there, I made it explicit with him to show what happened and I think I could get him here.

MR. HEATHMAN: I have no objection to paying the fee, to have her brought down.

Mr. Jones: If there is a point to it p-

THE COURT: I think, Mr. Jones, particularly when you are dealing with a man not a professional man in this field, you would be particular to see what should be done and check the file and if it is presumptive of particular service you should have the witness here rather than have us conclude it was done as between the court and the lawyers. Even if it were proper in a matter of this kind, you ought to rely on the merit principally, you come here relying on the technicality, you can't rely on it because she was properly served.

MR. JONES: I think it is before the court on Mr. Heathman's statement no fees were paid.

THE COURT: If you want to borrow on his statement you better borrow on your statement to have it done properly.

We better take a recess for fifteen minutes.

MR. JONES: Do you want to have the secretary or the Sheriff here?

THE COURT: Both, you better, if you want to make a point of no service, have Mr. Holly or Mr. Walker, certainly you ought to have the girl here.

Plaintiff respectfully submits that trial court erred in not fully considering plaintiff's almost insurmountable legal obstacles and in not making allowances for plaintiff's inexperience and not learned efforts at law to construct his complaint and erred in failing to exercise court's discretion in behalf of plaintiff.

The particulars of an important part of plaintiff's requested supplement and amendment denied by the trial court is described as follows: plaintiff submits that order entered May 26, 1961, in Case No. 128599 in the middle of proceedings held in this cause, Case No. 129540, was a trick of defendant and attorney to obtain an order of the court dismissing plaintiff's cause in Case No. 128599, and a direct violation of Title 78-7-19, REPEATED APPLICATION FOR ORDERS FORBIDDEN, and that the attorney well knew he was taking advantage of plaintiff and well knew the impropriety of taking the matter before Judge Harding after his motion had been denied by Judge Ellett.

Defendant and his attorney were obviously taking advantage of the fact that said hearing was not reported as this plaintiff had requested and demanded of Clerk of the Court, and defendant and attorney well knew the impropriety of bringing the subject matter before the court without motion being properly noticed and properly before the court and particularly during the proceeding of another hearing.

The official record of transcript of testimony and proceedings on motion to strike entry of default, District Court Case No. 128599, page 25, lines 17 through 30, can best describe Attorney Jones' interruption of plaintiff's cross examination of adverse witness Cholley. Docket 213 was subpoenaed by plaintiff. Attorney Jones interrupted the court. No one from the Clerk's office, except adverse witness Vickers, was in the court room:

Q. (By Mr. Heathman): Isn't it true that you had just testified you had a lot of mail and that Mrs. Roberts or Mrs. Neilson was going to stamp it for you?

A. She asked to stamp it for me.

Q. Then isn't it true it wasn't stamped?

A. No sir, it isn't true.

THE COURT: Let me interrupt, the Clerk's office is in need of Docket 213, there has been a subpoena for it, do you have further need for it?

MR. JONES: We would like the Court to look at it and examine what it shows.

THE COURT: If you do let's drop her examination for a minute, then put the record in so we can return it.

CONCLUSION

It is indeed a preposterous defense that the firm name of Fabian and Clendenin is too holy and sacred at law to be mentioned and associated with such irresponsible conduct or that the partners of this firm are blameless because of the acts and doings of other partners.

A reasonably prudent man, and especially an attorney who objected to being associated with such disgraceful conduct at law or was concerned with his name and reputation being injured or to being an innocent victim of such deplorable actions of his partners would instigate corrective measures or take a positive position relative to his associates' acts and doings instead of condoning such conduct by consent and forbearance for the sake of fees, then depending upon political and economic influence to hold themselves above the reach of our laws and courts.

The flagrant, deliberate contempt exhibited by the members of this law firm to the canons of ethics prescribed by the American Bar Association and their complete disregard of the Utah Code Annotated 1953 governing conduct of attorneys is appalling, not to mention the violation of the rights, privileges and feelings of this plaintiff.

Dated this 8th day of September, 1962.

Respectfully submitted,

S/
Harry G. Heathman
P. O. Box 15285
Salt Lake City, Utah
Attorney per se for Appellant

Served two copies of this Brief upon defendants by mailing said copies to the law firm of Skeen, Worsley, Snow and Christensen, Attention: Attorney John Snow, 701 Continental Bank Building, Salt Lake City, Utah, this 8th day of September, 1962.

S/
Harry G. Heathman