1962

Harry G. Heathman v. Fabian and Clendenin : Defendants-Brief of Respondents

Utah Supreme Court

John H. Snow; Attorney for Defendants-Respondents
Harry G. Heathman;

IN THE SUPREME COURT
of the
STATE OF UTAH

HARRY G. HEATHMAN,

Plaintiff-Appellant,

v.

FABIAN & CLENDENIN, Law Firm of the following partners:

HAROLD P. FABIAN, BEVERLY S. CLENDENIN, RENDELL N. MABEY, PETER W. BILLINGS, SANFORD M. STODDARD, ALBERT J. COLTON, DUDLEY AMOSS, RALPH H. MILLER, K. J. HOLDSWORTH, BRYCE E. ROE, ALLEN KENT SHEARER, SHIRLEY P. JONES, JR., and Kathleen Cholley,

Defendants-Respondents.

Case No. 9643

DEFENDANTS-RESPONDENTS' BRIEF

Appeal from the District Court of Salt Lake County,
Ray Van Cott, Jr., Judge,

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NATURE OF THE CASE

Plaintiff sued the defendant law firm, and one of its secretaries, for money damages allegedly sustained as a result of the manner in which defendants conducted a portion of the defense against plaintiff's earlier suit against Sumner J. Hatch, a Salt Lake City attorney.

DISPOSITION IN LOWER COURT

The District Court of Salt Lake County, Ray Van Cott, Jr., Judge, granted defendants' motion to dismiss plaintiff's amended complaint and denied plaintiff's motion for leave to file a second amended complaint, all as shown by the judgment of February 6, 1962 (R. 21).

RELIEF SOUGHT ON APPEAL

Plaintiff asks this Court to reverse the judgment of dismissal and to grant him permission to file a second amended complaint.

STATEMENT OF FACTS

To understand plaintiff's contentions on this appeal, it is necessary to refer to a portion of the record on appeal in the earlier case of *Harry G. Heathman v. Sumner J. Hatch,* Supreme Court Case No. 9593, which record is still in this Court.

References to that record will be by case number and page of that record (for example, No. 9593, R. 100). All other record references will refer to the lower court record in the instant case.

Plaintiff sued Sumner J. Hatch in the District Court of Salt Lake County, Civil No. 128599, and when the file

revealed no appearance on behalf of the defendant, the clerk entered a default certificate (No. 9593, R. 118).

On the same day, Hatch's attorneys, the defendants herein, filed a motion to dismiss the complaint (No. 9593, R. 119) and the next day they filed a notice of motion, with affidavit attached, giving notice that they would, on the day set forth in the notice, move the court for an order striking the default certificate and setting aside the default, it being represented by the affidavit that a copy of the motion to dismiss had been mailed to plaintiff by defendants on the day prior to the default (No. 9593, R. 120).

The hearing on these matters, in which the court received evidence and heard argument, came on before District Court Judge Aldon J. Anderson on January 19, 1961, as shown by the transcript thereof (No. 9593, R. 178, et seq.). On January 24, 1961, Judge Anderson signed an order striking the default certificate and setitng aside the default, the defendant "having satisfied the court and having shown good cause that said entry of default should be set aside in accordance with the provisions of Rule 55 (c) of the Utah Rules of Civil Procedure." In the same order the court also denied plaintiff's motion for default judgment (No. 9593, R. 147).

Three days later, plaintiff commenced the instant suit by his complaint (R. 1), which was followed, before a responsive pleading was due or filed, by an amended complaint (R. 4, 5 and 6).

In the amended complaint, plaintiff claimed the affidavit attached to the notice of motion (No. 9593, R. 120) in *Heathman v. Hatch* was false and that this "false pleading" was thereafter "maintained" by the defendants up to and including the date of the hearing before Judge Anderson. It was further alleged some of defendants discussed the default certificate and the motion to dismiss with other District Judges prior to that hearing.

Plaintiff then contended that this alleged conduct by defendants prevented him from "getting default judgment signed" and violated "rights and privileges", not otherwise specified, to which plaintiff claims he is entitled by the Constitution and laws of this state (R. 6).

Defendants filed a motion to dismiss upon the ground that the amended complaint failed to state a claim on which relief could be granted against the defendants or any of them, and upon the further ground that the amended complaint constituted a collateral attack on the order of Judge Anderson dated January 24, 1961 (R. 8).

Defendants' motion was heard and granted by Judge Ray Van Cott, Jr., February 5, 1962. Plaintiff then

moved in open court for leave to file a second amended complaint, which motion was denied. These rulings were formalized by a judgment of dismissal made and entered by the lower court February 6, 1962 (R. 21).

From this judgment plaintiff appeals.

ARGUMENT

POINT 1.

THE LOWER COURT CORRECTLY GRANTED DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT AND ITS JUDGMENT SHOULD THEREFORE BE AFFIRMED.

The amended complaint is based entirely upon the alleged improper conduct of the defendants during the time the parties in the case of *Heathman v. Hatch* were concerned with the problem of the default certificate which had been entered by the clerk at the request of the plaintiff.

Because of this alleged conduct, plaintiff claims he was deprived of a default judgment, and it is his apparent contention, as revealed more fully from his brief, that he was entitled to a default judgment as a matter of right and as a part of the privileges and rights under the organic and statutory law of this state. As admitted by

plaintiff in his brief (Page 2), he had sued Mr. Hatch for alleged malpractice, and his complaint against Hatch revealed a demand for unliquidated damages for such alleged malpractice. (No. 9593, R. 114-a.)

As is shown by Rule 55 (a) (2), Utah Rules of Civil Procedure, such a claim for damages, not being for a sum certain or for a sum which can be made certain by computation, cannot be reduced to judgment until application is made to the District Court which "may conduct such hearings or order such references as it deems necessary and proper."

It is thus seen that plaintiff had no "right" to a judgment by default without proceeding further than is shown by this record.

Even if plaintiff had an absolute right to a judgment by default, under the circumstances he has set forth, he has alleged no facts, nor can facts be inferred from his pleading, that show that any conduct of the defendants prevented such judgment.

Instead, his amended complaint is replete with broad and sweeping accusations, all of which had been fully aired, and decided adversely to plaintiff, by the District Court only a few days prior to the institution of the instant suit.

Although plaintiff has the burden of showing that his alleged claim entitles him to relief, he has cited no case, and none has been found by defendants, holding that lawyers who prevail on behalf of one party in a proceeding thereby become liable to the opposing party, particularly where the claim by the loser of improper conduct by the lawyers has been expressly considered and rejected by a court of competent jurisdiction.

The mere statement of the proposition reveals its absurdity. A holding to the contrary would render meaningless the exercise of wise discretion by trial courts whose duty it is to supervise the conduct of counsel who appear before them.

Further, lawyers whose conduct is examined and approved by the trial courts should not thereupon be subjected to irresponsible attack by the opponents of their clients, for to permit such attack would endanger every citizen's right to the wise and aggressive representation by counsel of his choice.

It is therefore clear that plaintiff's amended complaint does not state a claim on which relief can be granted and the trial court's ruling to that effect was proper. But, as will be seen, the decision of the trial court can be, and should be, upheld on a further ground.

The facts, as shown by this record and the record in No. 9593, reveal that District Judge Aldon J. Anderson, after a full hearing, concluded that the default certificate ought to be set aside (No. 9593, R. 231). The ruling of the court was made under the provisions of Rule 55 (c), Utah Rules of Civil Procedure, it having appeared to the court that "good cause" had been shown as required by the rule (No. 9593, R. 147).

Judge Anderson's ruling was made from the bench January 19, 1961 (No. 9593, R. 231). The formal order (No. 9593, R. 147) was signed January 24, 1961, and on that same day plaintiff filed a second amended complaint in the same case (No. 9593, R. 141-146), again complaining, among other things, about the same allegedly false affidavit filed by defendant and "allowed to stand against plaintiff."

Three days later, plaintiff filed a third amended complaint, in which he amended the allegation concerning the affidavit, so that it was then contended that Mr. Hatch "through his attorneys" (the defendants in the instant case) filed the claimed false affidavit (No. 9593, R. 152).

25 days later plaintiff voluntarily dismissed the suit against Mr. Hatch and, on the same day, filed a new action aginst him under another case number in the District Court. The new action, civil case No. 129540, again asserted the contention that Hatch through his attorneys

(the defendants in the instant case) filed and maintained a false pleading with an annexed affidavit (No. 9593, R. 1).

Plaintiff then amended his new complaint twice, but the new pleadings contain no reference to the claimed false pleading or affidavit, and an examination of plaintiff's brief and the record in Case No. 9593 reveals that plaintiff did not thereafter pursue the point.

From the foregoing factual recitation, and from the statement of facts previously set forth, it is clear that:

(1) The claims made by plaintiff in the instant case are the same as those he unsuccessfully maintained before Judge Anderson in the hearing of January 19, 1961.

(2) The order by Judge Anderson signed January 24, 1961, constituted a formal ruling that the court had rejected the very claims that plaintiff now asserts in the instant suit.

(3) Plaintiff did not ask Judge Anderson to reconsider his ruling by motion or otherwise, and he did not attempt, throughout his appeal, to obtain a reversal thereof.

(4) Instead, he asserted the same claim by amended pleadings but thereafter abandoned the claim in each of the suits against Mr. Hatch.

(5) By the present suit, therefore, plaintiff seeks to avoid and evade the effect of the ruling of the court, and as such, his action constitutes a collateral attack upon Judge Anderson's order and should not be countenanced by this court.

The law has provided a method by which a litigant may obtain relief against an erroneous or improper judgment. In *Intermill v. Nash* (1938), 94 Utah 271, 75 P.2d 157, this court outlined the course a dissatisfied litigant must follow:

> "If he does not test the soundness of the judgment by the methods law has provided for that purpose, he cannot question or assail the same for errors in the judgment, or the proceeding in which it was entered when in another proceeding it is pleaded or produced in evidence against him."

The reason for the rule is clearly stated by this court:

> "The courts, functioning to determine and settle property rights, upon which persons may rely and the security of society be built, should enjoy, in their formal pronouncements, every possible degree of conclusiveness. To permit

> their determinations to be lightly regarded or easily evaded would render them nugatory, and be a source of litigation and friction rather than to put an end thereto."

Tested by the foregoing rules, it is clear that plaintiff now seeks to obtain damages upon contentions which have already been rejected by a court in another proceeding, which rejection he did not choose to attack directly, and he cannot now, under cover of this proceeding, ask this or any court to grant him relief which would have the effect of overturning the considered judgment of a District Judge in another proceeding.

In the *Intermill* case this court quoted with approval from other courts which have held:

> "When the direct purpose and aim of the proceeding is to attain relief other than the setting aside or modifying of the judgment, and the attack upon the judgment is involved merely incidentally, the attack is collateral."

Plaintiff's present action clearly falls within the scope of that definition.

CONCLUSION

In this appeal, plaintiff has the burden to show affirmatively that the judgment of which he complains

was erroneous. The rule is as stated by this court in *Burton v. Zions Cooperative Mercantile Institution* (1952), 122 Utah 360, 249 P.2d. 514:

> "There is a presumption that the judgment of the trial court was correct, and every reasonable intendment must be indulged in favor of it; the burden of affirmatively showing error is on the party complaining thereof."

Tested by this rule, and even allowing for the fact that plaintiff is not represented by a lawyer, it is obvious that plaintiff has not shown how or in what manner he might be entitled to relief under any statement or implication of fact in his amended complaint, and he has presented nothing to this court to avoid the obvious conclusion that his present suit constitutes a collateral attack upon an earlier proceeding in the District Court.

Under these circumstances, the judgment of the District Court of Salt Lake County should be affirmed and this oppressive litigation thereby terminated.

Respectfully submitted,

John H. Snow

Attorney for Defendants-Respondents