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Vera T. Callister v. Lucy C. Callister : Petition for Rehearing and Supporting Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

VERA T. CALLISTER,
Plaintiff-Respondent,

vs.

LUCY C. CALLISTER, individually and as Executrix of the Estate of Alfred Cyril Callister, deceased,
Defendant-Appellant.

No. 10013

PETITION FOR REHEARING AND SUPPORTING BRIEF

Appeal from a Judgment of the Third District Court
For Salt Lake County
Honorable A. H. Ellett, Judge

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PETITION FOR REHEARING

Defendant-Appellant respectfully moves the court for a rehearing in the above entitled case.

The rehearing should be granted for the following reasons:

1. The court mistook the nature of the proceedings from which this appeal was t aken.

2. The decision creates doubt as to future procedures in the trial court:

3. The decision overlooks important provisions of the probate code as adopted by the Utah Legislature.

4. The fiduciary relationship between Lucy and Vera, if it ever existed, ended prior to negotiation of the settlement agreement.

SUPPORTING BRIEF

I.

THE COURT MISTOOK THE NATURE OF THE PROCEEDINGS FROM WHICH THIS APPEAL WAS TAKEN.

Inasmuch as affirmance of the trial court's decision is grounded, at least in part, upon the proposition that "a probate judge must be allowed some discretion in supervising its officers," it is fair to conclude that the court regarded this case as one involving the plenary power of a probate judge.

Actually, no probate judge as such was involved in the proceeding below. The original action to set aside the transfers to Lucy was a garden-variety civil action in which Vera was plaintiff and Lucy was defendant. Moreover, it was merest coincidence that Judge Ellett, the pretrial judge in Civil No. 133656, heard the motions for summary judgment in Civil No. 145149.

If Vera had proceeded under Rule 60(b) Utah Rules of Civil Procedure—which, according to Rule

81(b), applies to probate matters after joinder of issue —it would have been different, but Rule 60(b) was not an available avenue of relief because (1) Vera waited too long, and (2) she sought relief from something in addition to a "final judgment, order, or proceeding," viz., a duly executed and acknowledged absolute release of Vera's claims against Lucy as an individual or as executrix.

Rule 60(b) provides, in part, as follows:

> "On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: * * * (3) *fraud* (whether heretofore denominated intrinsic or extrinsic), *misrepresentation, or other misconduct of an adverse party* * * *. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4) not more than three months after the judgment, order, or proceeding was entered or taken. * * * The procedure for obtaining any relief from a judgment shall be by motion as prescribed by these rules or by an independent action."

The rule was based upon Federal Rule 60(b), except that the three-month period was taken from a prior Utah statute, 104-14-4 Utah Code Annotated 1943. The earlier statute and Rule 60(b) regulate and restrict the plenary power of a court to act upon its own judgments. See *In re Goddard's Estate,* 73 Utah 298, 273 P.2d 961. If Rule 60(b) had been in the case, "judicial discretion" would have been. See 7 Moore's

Federal Practice, para. 60.19, p. 223, commenting on Federal Rule 60(b):

> "If the district court has the power to grant relief, then its discretion to grant or deny relief normally involves a discretionary appraisal of the facts of the particular case and the relief, if any, to be granted: this matter, then, is largely within the judicial discretion of the trial court."

But this could not have been a proceeding under Rule 60(b). See *Shaw v. Pilcher,* 9 Utah 2d 222, 341 P.2d 949, in which the court, speaking through Justice Henriod, said:

> "Pilchers attack the whole proceeding as being violative of Rule 60(b), Utah Rules of Civil Procedure, with its three-month limitations feature relating to entertaining motions for relief because of mistake, newly discovered evidence and the like. A reading of the rule makes it apparent that a motion for relief based on the grounds enumerated therein is ineffective if made three months after the decision in which relief is sought. The proceeding here, although captioned a 'petition' was in fact a motion made in the original action, and was primarily on an allegation of 'fraud upon the court.' We believe in whole that where 'fraud upon the court' is the gravamen of the proceeding, such proceeding must be pursued in an independent action by filing a separate suit, paying the statutory filing fee therefor (which was not done here), and the statutory issuance and service of process."

Counsel for respondent had originally recognized that Rule 60(b) relief was not available. An inde-

pendent action was initiated by a complaint filed on August 27, 1963; a new filing fee was paid; a summons was issued; and process was served. Motions for summary judgment were made, and the question before this court was not whether the trial court properly exercised its discretion, but *whether there was any genuine issue as to any material fact* (Rule 56, Utah Rules of Civil Procedure).

II.

THE DECISION CREATES DOUBT AS TO FUTURE PROCEEDINGS IN THE TRIAL COURT.

In its decision the court quoted language used by Judge Ellett at the hearing of the motions for summary judgment, but it apparently overlooked some of the language in the judgment itself:

> "The stipulation for dismissal and the judgment of dismissal in Civil No. 133656, and the release executed by Vera T. Callister on October 10, 1962, are hereby set aside, annulled, and vacated, and Civil Action No. 133656 is hereby consolidated with the above entitled action, Civil No. 145149."

The above language purports to decide the whole controversy with respect to the enforceability of the compromise and settlement; yet this court's decision suggests that some of the equitable defenses may yet be alive:

> "Does [the Beless] letter suggest a settlement to perhaps promote the misleading of the tax authorities? Is Vera the culprit and Lucy the misled? *The letter is unquestionably capable of such an interpretation,* but it is also capable of being interpreted as a plea for Lucy to abandon an erroneous position for her own good. *The court below has not finally ruled on the suggestion that Vera's 'hands are unclean'* and should not have the aid of the court. *This issue may well yet be tried.* But regardless of the determination of that matter, it does not indicate the court below erred in rejecting Lucy's conduct as unworthy of approval, and not desired in the public intest. *After the court below determines the facts in dispute,* such as the intent of the doctor, the good faith of Vera's counsel in writing the letter, *and other contests that may develop,* then *justice and equity will be dealt* between them." (Emphasis added.)

It is universally recognized that an action to set aside a judgment is an equitable action and is subject to equitable defenses. Defendant-Appellant has raised equitable defenses which should be presented for consideration by a fact finder (whether court or judge) as fact finder — not as judicial administrator exercising discretion to control "court officers" for misconduct in some prior term.

In cases such as this, where the claimed misconduct occurred, if at all, months before relief was sought, full hearing and due deliberation appear to be more desirable than to dispatch. Nothing is likely to happen to a court's ability to maintain respect pending a trial of

the issues. As written, the decision permits a trial court to deprive a litigant of valuable property rights without a trial or hearing of any kind and in a situation in which a need for speed is not apparent.

III.

THE DECISION OVERLOOKS IMPORTANT PROVISIONS OF THE PROBATE CODE AS ADOPTED BY THE UTAH LEGISLATURE.

The probate code recognizes the difference between the obligations of a personal representative with respect to assets "belonging to the estate" and assets transferred by the decedent (even if wrongfully) prior to his death. As pointed out in 2 ***Bancroft's Probate Practice*** (2d ed.) §474, an obligation of a personal representative to pursue assets which had been fraudulently conveyed is strictly statutory. It didn't exist in common law because the personal representative was in the same position as the decedent, and one who transfers property in fraud of creditors cannot get it back.

A Utah personal representative has no obligation to recover fraudulently conveyed assets except upon application of creditors who will agree to pay costs of the suit or put up such security as may be ordered by the court (75-11-14 Utah Code Annotated 1953). No application of this sort was ever made by Vera.

Inasmuch as Lucy had no duty to Vera until the proper application had been made, she could not have been a fiduciary. Moreover, the suggestion that Lucy "should have resigned" seems to place a disability upon the fiduciary rather than protect the beneficiary from possible misconduct by the fiduciary. If Lucy had resigned, Vera's position would not have been helped; she wouldn't have acted any differently, and she wouldn't have been entitled to get any information from Lucy. Neither would the new personal representative. Her position would have been exactly the same. Duties of fiduciaries should be determined on the basis of causal relationships, rather than upon purely formal ones which have nothing to do with motivations upon which parties act.

The court's suggestion that Lucy should not have undertaken to act as executrix or that she should have resigned is in contravention of the declared policy of the Legislature. Under the provisions of 75-4-1 Utah Code Annotated 1953 those persons having the most direct interest in the property of a decedent are the ones who are preferred to act as administrators. This is as it should be, for if the interested person cannot act, who would? The fact that there may be conflicts of interest between the executor and the other heirs or creditors did not concern the Legislature. Where the conflict of interest prevents a personal representative from properly performing his duties, other interested persons can have him removed. *Farnsworth v. Hatch,* 47 Utah 62, 151 Pac. 537.

Some courts have even rejected the view that the adverse interest of the fiduciary is ground for removal. In *Fry v. Fry*, 155 Iowa 254, 135 N.W.1095, in which removal of an administratrix was sought on the ground that she was claiming all of the assets alleged to belong to the estate were hers under a prior gift by the decedent, the court said:

> "It is true that the administratrix is claiming practically all of the estate after the payment of debts, funeral and other expenses, including monument and burial lots; but her claims have been open and above board and she has asserted them in a proper manner, both by petition to the court in which she made plaintiff herein a party, and by application for the appointment of a special administrator to pass upon her claims as is authorized by §3346 of the Code. True, her claims are in hostility to the interest which plaintiff is claiming as father to the decedent, but no more so than any other claim against the estate would be. *Defendant can take nothing without an order of the court, and has no advantage over the plaintiff in virtue of her appointment as administratrix.*" (Emphasis added.)

In the instant case Lucy had no advantage over Vera by virtue of her appointment as the executrix.

IV.

THE FIDUCIARY RELATIONSHIP BETWEEN LUCY AND VERA, IF IT EVER EXISTED, ENDED PRIOR TO NEGOTIATION OF THE SETTLEMENT AGREEMENT.

The cases cited under Point I of Appellant's Brief and Point III of the Appellant's Reply Brief indicate that when the parties choose to deal with each other at arm's length, notwithstanding the fiduciary relationship, they should be treated like any other parties. See *Collins v. Collins,* 48 Cal.2d 325, 309 P.2d 420; *Waddy v. Grimes,* 154 Va. 615, 153 S.E. 807; and *In re Blodgett's Estate,* 93 Utah 1, 70 P.2d 742 (in which the *holding* supports Lucy's position); *Pepper v. Litton,* 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281; *Western Grain Company Cases,* 264 Ala. 145, 85 So.2d 395.

CONCLUSION

If this case had been treated as an independent action to set aside a judgment, as it should have been, Vera would have had the burden of establishing grounds for intervention of a court of equity—of showing that *she,* not a prior term's probate or trial judge, is entitled to relief. She would have to establish that *she* was wrongfully induced to enter into a compromise and settlement agreement; and Lucy would have had the right to show that Vera's own conduct precludes equitable relief.

But the court's mistaken assumption that the case involved a trial or probate court's plenary power over its own judgments apparently led it to the conclusion that the myriads of cases that have dealt with contracts, lawsuits and settlements between fiduciaries and their beneficiaries had no bearing upon the validity of the

trial court's action, since the inquiry, under the theory adopted by the court, was whether it had abused its discretion. The cited cases are not controlling upon the question of whether a court has abused its discretion in exercising its plenary power, but they are indisputably relevant to an independent action to set aside a stipulation, judgment, and release.

Conferring upon a trial judge the power to vacate judgments long after they are entered, without a hearing, merely because misconduct of a "court officer" is asserted, has implications far beyond future conduct of personal representatives. Attorneys are also officers of the court, and their activities are involved in virtually every judgment entered.

Respectfully submitted,

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