

1964

Hardy Seuring v. Dennis Cook : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

John Elwood Dennett; Attorney for Plaintiff and Appellant;

Alfred C. Van Wagenen; Attorneys for Defendant and Respondent;

Recommended Citation

Brief of Respondent, *Seuring v. Cook*, No. 10097 (Utah Supreme Court, 1964).

https://digitalcommons.law.byu.edu/uofu_sc1/4546

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE

STATE OF UTAH

FILED

OCT 5 - 1964

HARDY SEURING, a minor by)	Supreme Court, Utah
and through his guardian ad)	
litem, GERDA SEURING,)	
Plaintiff and Appellant,)	RESPONDENT'S
)	BRIEF
vs.)	Case No. 10027
)	10097
DENNIS COOK,)	
Defendant and Respondent)	

Appeal from the Judgment of Dismissal
entered by the Third District Court of Salt
Lake County

Honorable Aldon J. Anderson, Judge

UNIVERSITY OF UTAH

APR 23 1965 Alfred C. Van Wagenen
40 South 125 East
Clearfield, Utah
LAW LIBRARY Attorney for Defendant and Respondent

John Elwood Dennett
1243 East 2100 South, No. 600
Salt Lake City 6, Utah
Attorney for Plaintiff and Appellant

TABLE OF CONTENTS

	Page
Statement of The Kind of Case.....	1
Disposition in Lower Court.....	2
Relief Sought on Appeal.....	4
Statement of Facts.....	4
Argument.....	12

THE COURT LACKED JURISDICTION OF
THE PERSON OF THE DEFENDANT BE- .. 14
CAUSE THERE WAS NO SERVICE OF
SUMMONS ON THE DEFENDANT, NEITHER
WAS THERE A VALID VOLUNTARY APPEAR-
ANCE ON THE PART OF THE DEFENDANT,
AND DISMISSAL OF PLAINTIFF'S
COMPLAINT BY THE TRIAL COURT WAS
THE PROPER REMEDY.

Conclusion.....	24
-----------------	----

TEXTS CITED

5 Am. Jr. 2d, Appearance, Sec. 9....	13
43 C.J.S., Infants, Sec. 103.....	15
7 Am. Jr. 2d, Attorneys at Law, Sec. 34.....	19

TABLE OF CONTENTS (Con't.)

Page

TEXTS CITED. (Con't.)

6 C.J.S., Appearances, Sec. 13	22
--------------------------------------	----

STATUTES AND RULES CITED

Utah Code Annotated, 1953, 78-45-3 ...	2
--	---

Utah Rules of Civil Procedure, Rule 17(b)	15
--	----

Canons of Professional Ethics of The American Bar Association, Canon 9	19
--	----

CASES CITED

Marie Jacobs v. Honorable A. H. Ellet, 108 Ut. 162, 158 P2d 555, 159 ALR 108	16
--	----

IN THE SUPREME COURT
OF THE STATE OF UTAH

HARDY SEURING, a minor by and through his guardian ad litem, GERDA SEURING,

Plaintiff and Appellant,

vs.

DENNIS COOK,

Defendant and Respondent.

Case No.

10027

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

This action was filed in the District Court of the Third Judicial District at the instance of the plaintiff, without the consent and understanding of the defendant, in an effort to obtain support for the plaintiff

under the terms of the Uniform Civil Liability for Support Act, as appears in Utah Code Annotated, 1953, Title 78-45-3.

DISPOSITION IN LOWER COURT

On February 10, 1964, the time set for the defendant to show cause why judgment for support arrearages and an order for continuing support should not be entered, the defendant's counsel made an oral motion in open court (plaintiff's counsel having no objection) to dismiss plaintiff's complaint on the grounds that the court had no jurisdiction over the person of the defendant. The court at said time and place granted the motion of defendant and dismissed plaintiff's complaint holding that it had no jurisdiction over the person of the defendant in that no summons had ever

been issued in said case, defendant had filed no Entry of Appearance or Waiver of time to file an Answer, and defendant had made no appearance so as to confer jurisdiction over him. The Court further held that the Answer, although signed by defendant and filed on the same date as the Complaint, could not be considered an Answer or an appearance so as to grant jurisdiction because it did not bear the same title as the Complaint; it was executed by defendant on February 8, 1963, prior to there being a cause of action before the court, (said Complaint having been filed July 30, 1963) and at a time when there were no parties plaintiff (Hardy Seuring being a minor and no guardian ad litem having been appointed until July 30, 1963); said Answer

was prepared by John Elwood Dennett, counsel for plaintiff, executed at his office, at his direction and request, bears his signature as Notary Public, and was filed in court by him; all such action by plaintiff's counsel being "inimical to the adversary proceedings prescribed by our system of justice".

RELIEF SOUGHT ON APPEAL

The defendant seeks to have the decision of the lower court affirmed, and to recover his costs incurred in the original action and the costs of this appeal.

STATEMENT OF FACTS

The defendant denies as untrue and totally unsubstantiated by any testimony or evidence, all of the first paragraph of plaintiff's Statement of Facts, with the exception of the fact that the defendant

was stationed with the American Military Forces in Germany during part of 1961 and 1962. Much of the remainder of plaintiff's statement of facts are controverted by the defendant as set forth in the subsequent paragraphs.

The plaintiff, Hardy Seuring, allegedly was born October 19, 1962, in Moenchengladbach, Germany. His mother is alleged to be Gerda Seuring. The defendant was acquainted with Gerda Seuring while he was stationed in 1961 in Germany but was not engaged to her on December 27, 1961, nor on any other date, nor was a wedding date ever set. The defendant testified that the last time he was with her was in September, 1961, (Transcript page 18 lines 1 - 3) that thereafter he only saw her on two occasions in January,

1962, at which time she was in the company of another man. The defendant further testified that he could not possibly be the father as alleged (Dennis Cook Affidavit, paragraph 5).

The defendant returned to America in March, 1962, and was apprised of the alleged birth of the plaintiff and the charge that he was the father, by letter of February 2, 1963, from plaintiff's counsel. (Said letter is it, correctly set forth on page 4 of plaintiff's brief.) As a result of said letter, the defendant, Dennis Cook, and his wife, Sharon, Cook, arranged an appointment with plaintiff's counsel, and went to his office at the appointed time. (Transcript page 3, 2-6; Dennis Cook Affidavit, paragraphs 3 and 4, Sharon Cook Affidavit, paragraphs 3 and 4).

A conversation took place in the office of plaintiff's counsel, in which Mr. Dennett informed the defendant that Gerda Seuring had named him as the father of Hardy Seuring, born October 19, 1962. The defendant admitted having relations with Gerda Seuring in September, 1961, but none since that time, and denied that he could have been or was the father of said child. (Dennis Cook Affidavit, paragraph 5; Sharon Cook Affidavit, paragraph 5.)

Said conversation covered a considerable period of time and at one time Mr. Dennett read a paper to the defendant and his wife which indicated that the defendant was the father of Hardy Seuring. Whereupon the defendant stated he was not the father, and didn't want to sign the paper. Mr. Dennett

stated that if the defendant would sign the paper he would avoid all the expenses of court. Mr. Dennett further stated that if the defendant would sign the paper he would check with the German authorities and see what could be done. (Dennis Cook Affidavit, paragraph 6; Sharon Cook Affidavit, paragraph 6; Transcript page 21, lines 26-30, page 22, 1-13.) Mr. Dennett further stated that if Dennis Cook would sign the paper admitting he was the father, he would help the defendant contest the matter at a later time if the defendant desired him to do so. Plaintiff's counsel said that he would help the defendant if he wanted him to, and that if he did, there could be blood tests run, and if it could be shown that Gerda Seuring had been with other men, the court would not hold the

defendant responsible. (Dennis Cook Affidavit, paragraph 7; Transcript page 22, lines 14-22, 28-30, page 23, 1-8.)

Defendant signed the Answer prepared by plaintiff's counsel based on Mr. Dennett's representations and because he wanted to save costs of a lawsuit and attorney's fees inasmuch as he and his wife were unemployed at the time. (Dennis Cook Affidavit, paragraph 8; Sharon Cook Affidavit, paragraph 8.)

During the course of the conversation in Mr. Dennett's office, he asked the defendant if he wanted to adopt the baby, to which the defendant replied that he definitely did not want to adopt the child since he was not the father. (Transcript page 19, 3-28; page 22, 24-27; Dennis Cook transcript paragraph 9; Sharon Cook transcript, paragraph 9.)

The defendant and his wife testified that during the entire confrontation Mr. Dennett only showed the defendant the paper he signed; this being the Answer filed in this matter. At no time did Mr. Dennett explain or show any Complaint, Summons, or papers regarding guardianship. In fact, the defendant testified that all Mr. Dennett's explanation was to the effect that if he signed the requested paper there would be no court action. (Dennis Cook Affidavit, paragraph 10; Sharon Cook Affidavit, paragraph 10; Transcript page 20, 2-30, page 21, 1-8, 12-22).

After leaving Mr. Dennett's office the defendant heard nothing further regarding the matter until he received a letter from Mr. Dennett, dated July 22, 1963. (This letter

is correctly set forth on page 10 and 11 of plaintiff's brief.) Upon receipt of said letter, the defendant's wife telephoned Mr. Dennett and asked why her husband, the defendant, was supposed to pay anything at all when Miss Seuring had married and also when Mr. Dennett had stated in his office that he would take care of everything and that she and her husband should not worry about anything. (Sharon Cook Affidavit, paragraph 11.)

~~EXCERPT~~

OF PERSON

On February 3, 1964, defendant was served with an Order to Show Cause why judgment for support arrearages and an Order for continuing support should not be entered. On February 7, 1964, defendant requested Alfred C. Van Wagenen, attorney at law, to represent him. On February 10, 1964, at the time and place for the hearing of the Order to Show Cause, defendant and his

counsel, Alfred C. Van Wagenen, appeared. Mr., Van Wagenen made a motion to dismiss plaintiff's complaint on the grounds that there was no jurisdiction over the person of the defendant. The court granted said motion and dismissed the complaint as heretofore specifically set forth in the section of this brief entitled "Disposition of Lower Court".

ARGUMENT

THE COURT LACKED JURISDICTION OF THE PERSON OF THE DEFENDANT BECAUSE THERE WAS NO SERVICE OF SUMMONS ON THE DEFENDANT, NEITHER WAS THERE A VALID VOLUNTARY APPEARANCE ON THE PART OF THE DEFENDANT, AND DISMISSAL OF PLAINTIFF'S COMPLAINT BY THE TRIAL COURT WAS THE PROPER REMEDY.

Personal jurisdiction over a defendant can be obtained only by following certain pre-

scribed methods. 5 American Jurisprudence 2nd, Appearance, Section 9, page 486, states:

"In order to render a valid personal judgment, the court must have jurisdiction of the person of the defendant. Only in two ways can the court acquire personal jurisdiction: (1) by service of process on the defendant, whereby he is brought in against his will, or, (2) by defendant's voluntary appearance and submission. If, therefore, the defendant is not served with process, or if the process with which he is served is defective, his voluntary appearance is essential in order that a valid personal judgment may be rendered against him".

At no time was the defendant in this matter served with a summons. At no time did the defendant accept or acknowledge receipt of a copy of a summons or waive the requirements that a summons be served upon him. Therefore, because of the failure to have process served on the defendant, jurisdiction over the defendant could only be upheld if he had entered a voluntary appearance in the case. After

considering the time and circumstances under which the defendant's Answer was prepared, executed and filed, it is apparent that the defendant did not make a voluntary appearance so as to grant personal jurisdiction over him. Several reasons exist and are set forth below which prohibit the Answer from acting as a general voluntary appearance.

1. The Answer does not bear the same title as the Complaint. In the title and body of the Answer it shows Geurda Seuring as a plaintiff in her own right and Hardy Seuring as plaintiff also. In the actual Complaint, Hardy Seuring is the only plaintiff. If it were not for the fact that plaintiff's counsel filed said Answer at the same time he filed the Complaint and other papers in the instant case, this Answer would not have been and should not have been

filed in the same action.

2. At the time defendant executed the Answer there was no cause of action before the court and no party plaintiff existed that was competent and had the legal capacity to institute suit against the defendant.

That plaintiff needed a guardian ad litem appointed in order to commence a valid suit is clearly indicated in 43 Corpus Juris Secundum, Infants, section 103, page 265:

"The fact that a person is an infant does not in any way prevent his suing or being sued, either at law or in equity. An infant, however, cannot bring or defend a legal proceeding in person, he must sue or be sued by next friend or guardian ad litem, ..."

This requirement is emphatically expressed in Rule 17(b) of the Utah Rules of Civil Procedure:

"When an infant or an insane or incompetent

person is a party, he must appear either by his general guardian, or by a guardian ad litem appointed in the particular case by the court in which the action is pending ..."

Defendant executed the Answer prepared by plaintiff's counsel on February 8, 1963, at a time when Hardy Seuring was a minor and no guardian ad litem had been appointed. Plaintiff was non sui juris and had no capacity whatsoever to commence suit in his name. Thus an Answer executed by defendant under such circumstances could not act as an appearance even though it were withheld and not filed until such a time as a guardian had been appointed and the complaint filed in court.

This case is distinguished from the case of Merle Jacobs v. Honorable A. H. Ellett, 108 Ut. 162, 158 P2d 555, 159 ALR 108, wherein this Court held that a Voluntary Appearance

Consent and Waiver executed prior to the filing of the Complaint was effective as of the date it was filed. In that case the defendant had received a copy of the Complaint which was verified under oath by the plaintiff. Based upon such information the defendant entered his general appearance and waived time to answer the Complaint. In the instant case defendant had not received a copy of the Complaint or been apprised that one existed. The pleading executed in the instant case was not a voluntary Appearance Consent and Waiver of time to answer, but was in fact entitled "answer". While it is generally held that any written pleading which goes to the merits of the case constitutes a general appearance, it is argued that where an Answer is executed prior to the existence of a valid complaint, at a time when

no plaintiff exists who is competent to institute an action, there would be in fact no merits to plead to, and the Answer could not effect an appearance on the part of the defendant.

3. The improper and irregular conduct of plaintiff's counsel in preparing the Answer, obtaining the signature of the defendant upon it, filing it with the court many months later, and misrepresenting to the defendant and his wife that there was nothing to worry about, prevents said Answer from operating as a general voluntary appearance on the part of the defendant.

The trial judge, after receiving the affidavits, hearing testimony, considering the pleadings, and the arguments of counsel, ruled that the actions of Mr. Dennett, plaintiff's counsel, were "inimical to the adversary proceedings prescribed by our system of justice".

The judge ruled that even if all the facts were actually as plaintiff's counsel claimed them to be, counsel ought not to have represented both sides. (Transcript, page 24, 17-25.)

The general rule that attorneys should not represent conflicting interests is accepted by all authorities and in all jurisdictions;

-9-

it is specifically set forth in 7 American Jurisprudence 2nd, Attorneys at Law, Section 34;

"The Canons of Professional Ethics of the American Bar Association state that it is unprofessional to represent conflicting interests, except by express consent given by all concerned after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when in behalf of one client it is his duty to content for that which duty to another client requires him to oppose..."

Canon number 9 of the Canons of Professional Ethics of the American Bar Association also

states:

"...It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.."

In plaintiff's brief, counsel has spoken at great length about assisting the defendant regarding foreign language, foreign correspondence, visas, passports, et. These matters are of little or no importance. What is important is that plaintiff's counsel not only prepared the Complaint, but also prepared the Answer and gave counsel and advice to the defendant. Mr. Dennett, as plaintiff's attorney, owed a duty to plaintiff to strive to obtain a judgment holding the defendant as the father of the plaintiff and to obtain support for said child. Mr. Dennett's conduct was unethical, misleading and reprehensible when he took it

upon himself to advise the defendant as to the law, to prepare an Answer for him, to request and direct the execution of said Answer, and to notarize and file the Answer; when he advised the defendant to admit liability as the father of the plaintiff in order to avoid the financial costs of court and an attorney, in return for Mr. Dennett's promise to consult the German Authorities to see what could be done, and the assurance that he would later help him contest the matter if the defendant desired. It is true that Mr. Dennett was certainly obtaining the goal he was seeking to achieve for the plaintiff, but he was also misleading and unethically advising the defendant.

When a complaint and an answer admitting liability are prepared by one and the same counsel, under a situation where the defendant

actually desires to oppose the claims propounded by the plaintiff, such conduct is contrary to the canons of ethics prescribed by the legal profession.

It need not be argued whether plaintiff's counsel was also defendant's counsel, what the terms or scope of employment were, or what the fee arrangement was, the crucial factor which needs to be decided is whether the conduct and advice of plaintiff's counsel with regard to the defendant was so misleading as to prevent the defendant from understanding the true nature of the proceedings and taking the voluntary action he desired.

In order for a defendant to make a voluntary appearance in a matter so as to confer jurisdiction over his person he must recognize that the case is before the court. In 6

Corpus Juris Secundum, Appearances, Section

13, page 43, it is stated:

"...although an act of defendant may have some relation to the cause, it does not constitute a general appearance, if it no way recognizes that the cause is properly pending or that the court has jurisdiction and no affirmative relief is sought from the court..."

It is contended that defendant in the instant case in no way recognized that this matter was pending before the court or that the court had jurisdiction over it. On the contrary it would appear that defendant felt that if he did as plaintiff's counsel directed there would be no court action. Defendant was not served with summons or other pleadings, never received or saw a copy of the Complaint, and only saw the Answer long enough to sign it. Defendant signed the Answer, the allegations of which he denied as being true at the time of execution, based upon the representations of plaintiff's


counsel that he would check with the authorities to see what could be done, and that he would assist the defendant in contesting the matter at a later date if it were necessary. It would be difficult to stretch imagination and justice to the point of holding that the defendant made a voluntary appearance in this matter.

CONCLUSION

The trial court properly dismissed plaintiff's Complaint for lack of jurisdiction over the person of the defendant. There was no service of process on the defendant nor was there a valid voluntary appearance upon his part. Although an answer was signed by the defendant and later filed by plaintiff's counsel, because it was titled differently than the Complaint, and executed at a time when the plaintiff was non sui juris, it was invalid to

act as an appearance in this matter. Said Answer was further incompetent to act as a voluntary appearance of the defendant based upon the fact that the defendant had been misled by plaintiff's counsel.

It is respectfully submitted that the decision of the trial court should be affirmed and that defendant is entitled to costs of court incurred in the District Court, and the costs of this appeal.


Alfred C. Van Wagenen
Hess, Palmer & Van Wagenen
Attorney for Defendant and
Respondent
40 South 125 East
Clearfield, Utah

CERTIFICATE OF MAILING

Mailed two copies of the foregoing
Respondent's Brief to Mr. John Elwood Dennett,

-26-

Attorney for plaintiff, 1243 East 2100 South,
Salt Lake City, Utah, October 5, 1964.

Alfred C. Van Wagenen