

1964

John Galanis v. Donald H. Boyes and Betty Moyes : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN GALANIS,

Plaintiff and Appellant,

vs.

DONALD H. MOYES and BETTY
MOYES, his wife,

Defendants and Respondents.

Case

No.

10134

FILED
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RESPONDENT'S BRIEF

Appeal from the Order of Dismissal of the
Third District Court in and for Sale Lake County
Honorable Ray Van Cott, Jr., Judge
and

Cross Appeal from Order Extending Time for Appeal
Honorable Aldon J. Anderson, Judge

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RESPONDENT'S BRIEF

STATEMENT OF KIND OF CASE

The respondents agree with the statement of the appellant relating to this case, but point out that there is one additional point of law raised by the respondents regarding the commencement of a second action in the district court following the dismissal of this action, the dismissal of the second action, and the subsequent appeal of this action.

DISPOSITION IN LOWER COURT

This action was dismissed in the lower court as is stated in the appellant's brief. It should be noted, however, that immediately subsequent to such dismissal, the

appellants filed a second action alleging the identical claimed cause of action as is herein stated (R 20-22). A motion to dismiss the subsequently filed action was granted by the Honorable Aldon J. Anderson, Judge, on the grounds that the issues were res judicata by reason of the dismissal of the first action.

RELIEF SOUGHT ON APPEAL

The respondents seek a dismissal of the appellant's appeal for the reason that the same was not timely made, but was made only after the attempted refiling of the same complaint had been dismissed.

STATEMENT OF FACTS

The respondents agree with the statement of facts as set out in the brief of the appellant, but assert the following to be additional facts which justify the dismissal of the appellant's appeal. Following the dismissal of this action by the Honorable Ray Van Cott, Jr., on February 21, 1964, (R 5), a subsequent action was filed on February 28, alleging identical facts to those recited in the complaint which had been dismissed (R 20-22). Apparently, the appellant sought this means to avoid an appeal, as he alleges no new or additional facts in the second complaint. To the second complaint, a motion to dismiss was argued, and the same was granted by the Honorable Aldon J. Anderson on the grounds that the issues raised by the second complaint were res judicata by reason of the prior ruling of Judge VanCott (R 23-24). Immediately following the dismissal of the second action,

the appellant filed his motion to extend the time for the appeal of the first, or this, action (R 6), supported by the affidavit of his counsel, which recited that counsel had not received a copy of the notice of the order of dismissal of this action (R 13-14). The Motion to Extend the Time for Filing the Notice of Appeal was granted by Judge Anderson (R 8), from which ruling and granting of such extension these respondents filed their cross appeal.

STATEMENT OF POINTS RELIED UPON

Appellants Point on Appeal:

IN SEEKING CONTRIBUTION AND REIMBURSEMENT, A JUDGEMENT DEBTOR IS NOT LIMITED TO RULE 69(h) OF THE UTAH RULES OF CIVIL PROCEDURE. THE CONVENIENCE PROVIDED FOR BY THE CLERK OF THE COURT IN SAID RULE IS NOT AN EXCLUSIVE REMEDY. THE JUDGMENT DEBTOR MAY SEEK CONTRIBUTION FROM HIS CODEFENDANTS WHO ARE LIABLE FOR THEIR PORPORTION OF THE DEBT IN TWO ALTERNATIVES. HE HAS THE ALTERNATIVE TO ACT UNDER THE CONVENIENCE OUTLINED IN THE AFORESAID RULE WITHIN ONE MONTH AFTER PAYMENT, OR SECONDLY BY FILING A SEPARATE AND INDEPENDENT ACTION WITHIN FOUR YEARS AFTER THE PERSON TO BE REIMBURSED HAS PAID THE JUDGMENT.

Respondents Point on Cross Appeal:

THAT THE AFFIDAVIT OF COUNSEL FOR THE PLAINTIFF, IN SUPPORT OF HIS MOTION TO DETERMINE APPEAL TIME AND MOTION TO EX-

TEND TIME FOR APPEAL, TOGETHER WITH HIS TESTIMONY AT THE HEARING OF THE MOTION TO EXTEND TIME FOR APPEAL DO NOT, AS A MATTER OF LAW, ASSERT SUFFICIENT GROUNDS UPON WHICH TO EXTEND THE TIME FOR APPEAL, AND THE TRIAL COURT, HONORABLE ALDON J. ANDERSON, PRESIDING, ERRED IN GRANTING THE PLAINTIFF'S MOTION TO EXTEND THE TIME FOR APPEAL.

ARGUMENT

Appellant's Point on Appeal

The respondent cannot agree with the contention of the appellant that the rule as stated in Rule 69(h), Utah Rules of Civil Procedure, should be construed as cumulative rather than exclusive. The language of the rule seems plain when it states:

“The person entitled to contribution or reimbursement *shall, within one month after payment* file in the court where the judgment was rendered a notice of such payment and his claim for contributions or reimbursement.” (*Italics added.*)

The language is plain and unambiguous, and the word “shall” appears to be used in a directory sense and not a permissive one. The logic of requiring a notice to be filed within thirty days under this rule would appear to be sound, in that once the principal claim has been adjudicated, subsequent claims growing out of the original claim as among defendants should be disposed of.

As the right to contribution demands as one prerequisite, payment of the principal obligation by the

person seeking contribution, the interpretation called for by the argument of the appellant could lead to extreme protraction of the period during which such a suit might be instituted. If as in the present case, the original agreement with the judgment creditor and giving rise to the liability upon which contribution is sought were in writing, the parties would be subject to suit for six years. After judgment was entered, an additional eight years might elapse before the judgment creditor was able to extract payment from one of the judgment debtors. To this period of fourteen years, the appellant argues that an additional four years in which to seek his contribution should be added. By this argument, three statutes of limitations could be appended consecutively, the first being the statute upon the original agreement, the second being the statute during which payment of a judgment could be enforced by judgment creditor, and a third whereby the judgment debtor could bring an action for contribution. It is submitted that the ruling of Judge VanCott is proper, and that the remedy of a judgment debtor seeking contribution from another judgment debtor is set out in Rule 69(h), Utah Rules of Civil Procedure, and that such remedy is exclusive.

Respondent's Point on Appeal

It will be noted from the record that, following the dismissal of this action by Judge VanCott, that the appellants immediately refiled a new complaint, stating the same cause of action as that recited in the complaint dismissed (R 20-22). This complaint was dismissed by Judge Aldon Anderson April 6, 1964, (R 23), and a copy

mailed to counsel for the appellant on the same date (R 24). The next day, April 7, counsel returned to this, the original action filed, and moved to extend the time for appeal (R 6). This motion was based on the affidavit of counsel for the appellant (R 13, 14) wherein it was recited that he first received knowledge on April 3, 1964, that the order of dismissal of this action had been entered on February 21, 1964. However, it is clear from the record (R 20, 21, 22) that counsel had abandoned the complaint in this action following its dismissal, and on February 28, 1964, refiled the identical claimed action. Surely counsel did not intend that two identical actions be pending at the same time. Further, at the hearing of the Motion to Extend Time in which to file this appeal, Mr. Frandsen, appellant's counsel, testified as follows (R 17, L 29 to R 18, L 12):

Q: And in the case, second case, you resisted the motion to dismiss April 3; is that correct?

A: That's correct.

Q: Now, did you intend, if that motion to dismiss had been denied by the court, did you in that event, intend to appeal the first case?

A: I always wanted to appeal the first cause of action, but my client didn't think that was the wisest path to follow, and so I didn't have — I hadn't made up my mind one way or the other.

Q: Did your plans (Client prefer) to refile a complaint to appealing?

A: Yes. He favored filing a new complaint rather than appealing.

Mr Hobbs; That's all.

The respondents submit that it is clear from the record that following the dismissal of this action, the appellant and his counsel discussed the matter, that the alternatives of appealing this action or refileing a new complaint were discussed between them, and that the client, the appellant herein, "favored filing a new complaint rather than appealing." (R 18, L 10, 11). Only after counsel for the appellant realized that the second dismissal, based on res judicata by the dismissal of this instant action, from which no appeal had been then taken, was proper, did counsel seek the only avenue of escape, the affidavit (R 13) reciting that he did not receive the order of dismissal of this action. The question occurs, if counsel did not know of the dismissal of the first complaint, what was the purpose of filing the second? Notwithstanding the lack of knowledge, the testimony of counsel is clear that the alternative of filing a new complaint versus appealing the dismissal of this action were discussed, and that the appellant prevailed on his counsel to seek the course of refileing. Certainly the conversation between appellant and his counsel, as related by counsel for the appellant (R 18, L 2 to 12) presupposes knowledge in both the appellant and his counsel that this cause had been dismissed, and that the next step in this action, if they elected to pursue it rather than refileing, was an appeal. Mr. Frandsen stated (R 18, L 5 "*I always wanted to appeal the first cause of action, but my client didn't think that was the wisest path to follow. . .*" (Italics added.) In other words, counsel preferred to appeal the dismissal of this action, but his client preferred to refile a new complaint. This was necessarily prior to February 28, the date the second

action was filed. One month and ten days following this date, one month and seventeen days following the date of the entering of the order of dismissal (R 5), and after the second action had been dismissed as *res judicata*, counsel belatedly advised the court that he had always intended to appeal this action, but that he was not aware that it had been dismissed. See *Anderson vs. Anderson*, 3 Utah 2nd 277, 282 Pac. 2nd 845, and cases therein cited. See also *Holton vs. Holton*, 243 Pac 2nd 438, wherein the court stated:

“Although the new rules of civil procedure were intended to provide liberality in procedure, it is nevertheless expected that they will be followed, and unless reasons satisfactory to the courts are advanced as a basis for relief from complying with them, parties will not be excused from so doing.”

It is submitted that the record in this case clearly discloses that the failure of appellant to file a timely appeal in this action was in no way based upon any failure to learn of the entry of judgment, but was based on counsel's decision to follow the advice of his client, notwithstanding that he preferred to do otherwise, and to attempt to commence the identical action a second time, rather than file a timely appeal.

CONCLUSION

It is respectfully submitted that the ruling of Judge VanCott in this action was proper, and should be affirmed, and in the alternative that the appeal was not taken within the time and in the manner required by the applicable rules of procedure and case law, that the order of Judge Aldon Anderson extending the time for appeal should be reversed, and that the appeal should be dismissed.

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