

1964

Federated Security Insurance Co. v. Isaac Obsen Burton and Horace J. Knowlton : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

FEDERATED SECURITY IN-
SURANCE COMPANY, A Utah
Corporation, *Plaintiff and Appellant,*

vs.

ISAAC ORSEN BURTON, aka
Orsen Burton, and HORACE J.
KNOWLTON,
Defendants and Respondent.

FILED

1 - 1964

Supreme Court

Case No.
10135

RESPONDENT'S BRIEF

Appeal from Order of the Third District Court
for Salt Lake County
Hon. Merrill C. Faux, Judge

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ISAAC ORSEN BURTON, aka
Orsen Burton, and HORACE J.
KNOWLTON,
Defendants and Respondent.

Case No.
10135

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an appeal from an order of the Lower Court granting a motion for a new trial and denying a motion to strike.

DISPOSITION IN LOWER COURT

On the 20th day of March, 1964 the Lower Court made and entered an order reopening its order of November 14, 1963, to enable it to consider such evidence

as might be developed from the deposition of Frank Williams, and denied the plaintiff's motion to strike. (R 38).

RELIEF SOUGHT ON APPEAL

Defendant seeks to have the order of the Lower Court sustained, the plaintiff's appeal dismissed, and to have the case remanded for further discovery and for trial.

STATEMENT OF FACTS

The processes of discovery in this case have not yet been completed. The appeal is brought from an Order reopening a former order of dismissal of defendant's counterclaim to permit further discovery. November 14, 1963, an order was entered dismissing defendant's counterclaim. (R 33). On Monday, the 25th day of November, 1963, a "Motion and Notice of Hearing," "under the provisions of Rule 59 (a) of the Rules of Civil Procedure," now a part of this record on appeal (R 44) accompanied by "Defendant's Objections to Order of Dismissal" and an "Affidavit," (R. 46), was filed. To this pleading the plaintiff filed its Motion to Strike on the 12th day of December, 1963. (R 36). The matter was heard by the Lower Court on the 31st day of January, 1964 and the following Minute Entry was made:

"The defendant's motion for a new trial comes now on regularly before the Court for hearing,

the Plaintiff appearing through John F. Piercey as counsel and the Defendant appearing in person and represented by Joseph S. Knowlton as counsel. Thereupon the matters in issue are argued before the Court, submitted and the Court having considered now grants Defendant's request for leave to file a certain affidavit within ten (10) days and also grants request of Plaintiff to file Plaintiff's counter-affidavit within ten (10) days thereafter and it is further ordered that the matter of the Court's decision on Defendant's motion for a new trial in this case be and the same taken under advisement." (R. 48).

In compliance with this Order the affidavit of the defendant was filed February 10th, 1964. (R 49-57).

The Plaintiff filed no Counter-Affidavit, and on the 20th day of March, 1964, the Lower Court made and entered its order appealed from, which is as follows:

"Having considered Defendant's Objections to Order of Dismissal, filed November 25th, 1963, as a motion for new trial, the court will reopen the order of November 14, 1963 and will consider such evidence as may develop from the deposition of Frank Williams within the general terms of the order of June 3, 1963.

"The parties are directed to confer relative to time and place for such deposition and stipulate therefor, if possible. Otherwise, the court will make an appropriate order upon motion therefor.

"Plaintiff's motion to strike is denied." (R 38).

From this order the plaintiff filed its notice of appeal which is as follows:

“Pursuant to Rules 72 and 73, Utah Rules of Civil Procedure, plaintiff appeals to the Utah Supreme Court from the Court’s denial of the plaintiff’s Motion to Strike defendant Horace J. Knowlton’s Objections to Order of Dismissal which denial was entered March 20, 1964. This appeal is taken as to all questions of fact and law raised by said denial.” (R 39).

ARGUMENT

POINT I.

THE ORDER APPEALED FROM IS NOT AN APPEALABLE ORDER.

The plaintiff, by its motion to strike (R 36), seeks to eliminate the defendant’s “Objections to Order of Dismissal” and two paragraphs of the defendant’s “Motion to modify and amend the Order of Dismissal.”

The Motion to Strike seems by its terms to recognize the existence of the defendant’s Motion, which by its terms is brought “pursuant to the provisions of Rule 59 (a) of the Rules of Civil Procedure,” and also the defendant’s Affidavit as well as the defendant’s Objections to Order of Dismissal, the three documents which were served and filed together and at the same time, November 25th, 1963, though in its designation of the record on appeal it mentioned only the defendant’s Objections to the Order of Dismissal as item 9, and in its brief discusses only the Objections with no reference whatever to either the Motion or the Affidavit.

The Lower Court in its order of March 20th, 1964, appealed from, obviously refers to the Motion as the defendant's "Objections to the Order of Dismissal," all three documents being before the Court and all three, as stated above, having been filed and served at the same time.

The Motion itself concludes with this paragraph: "The motion will be supported by the affidavit of the defendant, served and filed herewith and evidence to be produced at the time of the hearing." (R 44).

Suppose that the Lower Court had granted the Plaintiff's Motion to Strike. Without the Objections, which are as harmless as a Memorandum of Authorities, attached to a motion, and the two paragraphs of the defendant's motion, as well, there would still have been good reason for the order reopening the order of dismissal.

The refusal to grant the plaintiff's motion to strike is determinative of nothing and is not appealable.

POINT II.

THERE IS NO ERROR IN THE RULING OF THE LOWER COURT AND ITS RULING SHOULD BE SUSTAINED.

Suppose, on the other hand, as seems obvious, that the Lower Court considered all three documents, the

Objections, the Motion and the Affidavit as an application for relief from the Order of Dismissal, then the only question is, did the Lower Court abuse its discretion in granting the motion of the defendant?

“It is axiomatic in this state that the granting or refusing of motions for new trials is a discretionary matter. *Uptown Appliance and Radio Co., Inc., v. Flint*, 122 Utah 298, 249 P 2. 836.

“The granting of a new trial is reviewal in the Supreme Court only on the question of abuse of discretion.” *Crellin v. Thomas*, 122 Utah 122, 247 P 2 264.

It is nowhere claimed by the plaintiff that the Lower Court abused its discretion in granting the defendant's motion, as indeed it did not.

POINT III

THERE ARE GENUINE ISSUES OF MATERIAL FACT WHICH TO OBTAIN SUBSTANTIAL JUSTICE BETWEEN THE PARTIES SHOULD BE HEARD.

By refusing to file a counter-affidavit, the plaintiff admits all of the material facts set out in the affidavit of the defendant filed on the 10th day of February, 1964. (*R 49-57. Frederick May & Co., Inc. v. Dunn*, 13 Utah 2nd 40, 368 P 2 266.

CONCLUSION

The appeal of the plaintiff should be dismissed, the ruling of the Lower Court should be sustained and the case should be remanded to the Third Judicial District Court for further discovery and for trial.

Respectfully submitted,

Horace J. Knowlton

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