1965

Federated Security Insurance Co. v. Isaac Obsen Burton and Horace J. Knowlton : Respondents' Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

John F. Piercey; Attorney for Appellant;
Joseph S. Knowlton; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

FEDERATED SECURITY INSURANCE COMPANY, A Utah Corporation, *Plaintiff and Appellant,*

vs.

ISAAC ORSEN BURTON, aka ORSEN BURTON, and HORACE J. KNOWLTON,

Defendants and Respondents.

Case No. 10135

RESPONDENTS' PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

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Comes now the defendant Horace J. Knowlton and petitions the above entitled Court for a rehearing of the above entitled matter for the purpose of requesting the removal of paragraph three of its decision in the above entitled matter filed January 19th, 1965.

In support of this petition the defendant respectfully represents:

Point 1. The provisions of paragraph three of the decision go beyond the jurisdiction of the Court.

Point 2. The findings in paragraph three of the decision are contrary to the facts as revealed by the record on appeal in the above entitled matter.

Point 3. The effect of paragraphs three and four of the decision is to deprive the defendant of the right to proceed to trial in the above entitled matter.

Horace J. Knowlton, Attorney per se.

BRIEF IN SUPPORT FOR REHEARING

POINT NO. 1

THE PROVISIONS OF PARAGRAPH THREE OF THE DECISION GO BEYOND THE JURISDICTION OF THE COURT.

The provisions of Rule 76(c) under the heading of "Effect of Dismissal of an Appeal" provide as follows:

> "The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal."
>
> "The dismissal of an appeal . . . as a general rule, vacates the proceedings and leaves the decree of the subordinate court in full force." 3 Am. Jur. 758 at page 327.
>
> "A dismissal for want of prosecution remands the case to the lower court in the same condition as before the appeal was taken." Newman v. Moyers, 40 S. Ct. 478, 253 U.S. 182 at page 186.

"Where appeal was dismissed by the Supreme Court because it has been taken from a non-appealable order dismissal left case with superior court . . . just as it stood on date the attempted appeal was taken . . . " In Re Brady's Estate, 213 P2 125.

"Where trial court granted defendant's motion for new trial and plaintiff's appeal therefrom was dismissed on ground that motion for new trial was not an appealable order, effect was to leave action of trial judge sustaining motion for new trial in full force and effect." Simons v. Kiser, 137 N.E. 2 599 (Ohio).

"On dismissal of an appeal, cause stands in trial court as if no appeal had ever been taken and decree or order appeal from becomes final." Sewell v. Detroit Electric, 75 NW 2 845 (Mich.)

"Where appeal from order of District Court granting defendant motion to dismiss was denied as premature by court of appeals, which order remained in full force as law of case." Hilton v. W. T. Grant, 212 F. Supp. 126 (Pa.).

"Dismissal of appeal leaves lower court's judgment undisturbed." Red Ball Motor Freight v. Southern, 358 SW 2 955 (Tex.)

POINT NO. 2

THE FINDINGS OF THE ABOVE ENTITLED COURT AS EXPRESSED IN PARAGRAPH THREE OF ITS DECISION FILED JANUARY 19, 1965, IN THE ABOVE ENTITLED CASE ARE CONTRARY TO THE

FACTS AS SHOWN BY THE RECORD ON APPEAL IN THE ABOVE ENTITLED MATTER.

The defendant's motion for a modification of the decree which was before the lower court seems to have been completely overlooked by the above entitled court in rendering its decision and particularly with reference to the provisions of the said Paragraph Three.

This is an appeal from the District Court of the Third Judicial District from an order modifying a former judgment, which former judgment dismissed this defendant's counterclaim. (R. 30-32).

A motion to modify and amend this order was duly served, filed and called up for hearing. (R. 44-45). The heading is entitled "Motion and Notice of Hearing." The body of the motion refers to the remedy sought as "modifying and amending the order." The notice calling the matter up for hearing refers to it as "his motion for a reconsideration and for a modification of the Court's Order of Dismissal." This motion in other respects followed verbatim the provisions of Rule 59 (a) of the Utah Rules of Civil Procedure and was accompanied by an affidavit. (R. 46-47). It was also, however, accompanied by an instrument which was captioned "Defendant's Objections to Order of Dismissal," which was also called up for hearing at that time, (R. 34-35), which three documents were served, filed and heard at precisely the same time and were fully before the Court at the time of the hearing January 31, 1964,

(R. 48) and at the time of the Court's decision (R. 38) which is the order appeal from and which three documents the lower Court referred to in its "Supplemental Memorandum Decision" (R. 38) as "Defendant's Objections to Order of Dismissal."

The plaintiff moved to strike the "Defendant's Objections to Order of Dismissal" (R. 36) which motion was by the Court's order of March 20, 1964, denied, and it was solely from "the Court's denial of the plaintiff's motion to strike" that the appeal was taken. (R. 39).

The expressed opinion of the above entitled Court is to give a liberal interpretation of the pleadings so as to promote justice.

> Randy Rivas v. Pacific Finance Company, 397 P.2d 990 @ 992 :
>
> "The desirable objective in administering justice under law is for the court to see that any person who has a cause with any merit whatsoever is afforded the privilege of a trial. And where doubts exist they should be resolved in favor of fulfilling such objective." (The Utah citation not given).
>
> Baur v. Pacific Finance Corp., 14 U.2 283; 383 P.2d 397:
>
> "As we have heretofore declared, the granting of a motion to dismiss, which deprives the party of the privilege of presenting his evidence, is a harsh measure which courts should grant only when it clearly appears that taking the view most

favorable to the complaint and any facts which might properly be proved thereunder, no right to redress could be established; and unless it so clearly appears, doubt should be resolved in favor of allowing him the opportunity to present his proof. Samms v. Eccles, 11 U.2 289, 358 P2 344." Also 13 U.2 339; 374 P.2d 254.

Howard v. Howard, 356 P.2 275; 11 P.2 148:

"The basic requirements of a pleading are to advise the opponent and the court of the issues raised." Rule 1(a) UCA 1953. 68-3-2.

Page 152:

"The determinative question of their appeal is whether the instrument we have quoted above entitled 'Notice of Intention to Move for a New Trial' was in fact a motion for new trial. It is conceded that if the substance of the instrument is in fact a motion for a new trial, the fact that it is improperly captioned would not affect the intent of the instrument. Lund v. Third Judicial District Court, 904.433; 62 P.2 278.

Page 153:

"Counsel contends that this motion was a nullity because it did not follow the form set out by Rule 59(a). However, this document met the basic requirements of a pleading: that is, to advise the opponent and the court of the issues raised. This is in accord with the requirements of Section 68-3-3, Utah Code Annotated 1953, which provides that "(T)he statutes establish the laws of this State . . . and all proceedings under them are to be liberally construed . . . to promote justice. Also, our Rules of Civil Pro-

cedure, (Rule 1(a) provide that "(T)hey shall be liberally construed to secure the just, speedy and inexpensive determination of any action."

To this effect see also 1 U.2 175; 264 P.2 219; 120 U. 545; 236 P.2 451; and 26 ALR.d 947.

POINT NO. 3

THE EFFECT OF PARAGRAPHS THREE AND FOUR OF THE DECISION IS TO DEPRIVE THE DEFENDANT OF THE RIGHT TO PROCEED TO TRIAL IN THE ABOVE ENTITLED MATTER.

Paragraph Four of the decision of the above entitled court is a directive for the lower court to proceed in accordance with the conclusions expressed in Paragraph Three of the decision and it does in effect direct the lower court to disregard the defendant's motion for a modification of its judgment. (R. 30-32). This is especially true since the motion for modification together with the affidavit suppporting it (R. 44-47) was considered by the lower court as part of the "Defendant's Objections to Order of Dismissal." This would make the lower court's order of November 12, 1963, (R. 30-32) final and would close the door to any further proceedings in the matter.

This would cause great and irreparable injury to the defendant and would be contrary to the views of

the above entitled court expressed in the Rivas, the Baur and the Howard cases heretofore referred to.

The effect of Paragraph Three and this part of Paragraph Four of the decision of the above entitled Court is to grant the plaintiff's appeal while denying the plaintiff's appeal. These provisions in the decision make it inconsistent and it would deprive the defendant of his cause of action against the plaintiff.

CONCLUSION

It is respectfully submitted that Paragraph Three should be removed from the decision of the above entitled court filed in the above entitled matter on January 19, 1965.

Respectfully submitted,

HORACE J. KNOWLTON
Attorney for Respondent