

1984

Valley Asphalt, Inc. v. Eldon J. Stubbs Construction, Inc., Fashion Cabinets & Mfg., Entrada Industries, Inc., W. Trent Ridd, Tawna Ridd, Geneva Rock Products, Ashrock, Inc., Robert J. Wilson, Dorene Wilson, Provo Land Title Co., United Savings & Loan Assoc., Southam & Warburton Aluminum Corp., Douglas B. Worthen, Cheryl Worthen, Bart J. Weaver, Laurie Weaver, Scott Glenn, Glenn Thornock, Cavalier Enterprises, Inc., Michael L. Carter, Carol Carter, Fts Enterprises, Inc., And Frank T. Santos : Appellants' Brief

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

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. Harold D. Mitchell; Attorneys for Appellant

Recommended Citation

Brief of Appellant, *Valley Asphalt v. Stubbs Construction*, No. 19404 (1984).
https://digitalcommons.law.byu.edu/uofu_sc2/5178

This Brief of Appellant 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 (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT

STATE OF UTAH

VALLEY ASPHALT, INC.,)
)
Plaintiff-Appellant,)

-v-)

ELDON J. STUBBS CONSTRUCTION,)
INC., FASHION CABINETS & MFG.,)
ENTRADA INDUSTRIES, INC., W.)
TRENT RIDD, TAWNA RIDD, GENEVA)
ROCK PRODUCTS, ASHROCK, INC.,)
ROBERT J. WILSON, DORENE)
WILSON, PROVO LAND TITLE CO.,)
UNITED SAVINGS & LOAN ASSOC.,)
SOUTHAM & WARBURTON ALUMINUM)
CORP., DOUGLAS B. WORTHEN,)
CHERYL WORTHEN, BART J.)
WFAVER, LAURIE WEAVER, SCOTT)
GLEN THORNOCK, SHEILAGH GLENN)
THORNOCK, CAVALIER ENTERPRISES)
INC., MICHAEL L. CARTER, CAROL)
CARTER, FTS ENTERPRISES, INC.,)
and FRANK T. SANTOS,)

Case No. 19404

Defendants-Respondents)

APPELLANT'S BRIEF

Appeal for Order of Dismissal of Fourth Judicial
District Court of Utah County,

Honorable George E. Ballif, District Judge, Presiding.

Harold D. Mitchell
STRONG & MITCHELL
Attorneys for Appellant
197 South Main Street
Springville, UT 84663

Ray M. Harding
HARDING & HARDING
Attorneys for Respondents
13 South Main Street
Pleasant Grove, UT 84062

TABLE OF CONTENTS

	Page
STATEMENT OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	1
ARGUMENT	
I: PLAINTIFF COMPLIED WITH RULE 4(b) OF THE UTAH RULES OF CIVIL PROCEDURE IN CAUSING SUMMONS TO BE SERVED ON RESPONDENTS	2
II: RULE 4(b) OF THE UTAH RULES OF CIVIL PROCEDURE DOES NOT PROVIDE THAT AN ACTION IS DISMISSED FOR FAILURE TO ISSUE SUMMONS WITHIN THREE MONTHS AFTER FILING A COMPLAINT	5
III: THE DISTRICT COURT'S INTERPRETATION OF RULE 4(b) IS INCONSISTENT WITH OTHER RULES WHICH ALLOW ADDITIONAL DEFENDANTS TO BE BROUGHT BEFORE THE COURT IN VARIOUS CIRCUMSTANCES	6
CONCLUSIONS	8

CASES AND AUTHORITIES CITED

Drake v. Clark, No. 15162 (Utah, January 3, 1982, LEXIS State Library, Utah file)	7
Mason v. State, 656 P.2d (Utah 1982)	8
Bedman Warehousing Corp. v. Clearfield City Corp., No. 15159 (Utah, January 4, 1978, LEXIS State Library, Utah file)	4
Rule 4(a), Utah Rules of Civil Procedure	3
Rule 4(b), Utah Rules of Civil Procedure	2-8

Rule 15(a), Utah Rules of Civil Procedure . . .	7-8
Rule 15(c), Utah Rules of Civil Procedure . . .	8

STATEMENT OF THE NATURE OF THE CASE

This is an action for foreclosure of a mechanic's lien pursuant to Utah Code Annotated 1953, Title 38, Chapter 1. Plaintiff is a contractor who built certain street improvements in a subdivision. Defendants are the subdivision developer and those holding and claiming various property interests in the property improved.

DISPOSITION IN THE LOWER COURT

The complaint was dismissed as against respondents who are the owners of certain subdivision lots under Rule 4(b) of the Utah Rules of Civil Procedure because the summons served on them was not issued within three months after filing the original complaint.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the district's order of dismissal and remand of the case for further proceedings.

STATEMENT OF FACTS

On August 24, 1931, plaintiff filed in the office of the Utah County Recorder a Notice of Mechanic's Lien pursuant to Utah Code Annotated 1953 38-1-1 et seq., asserting a lien on certain subdivision lots for work done and materials furnished in improving streets in the

subdivision. Plaintiff filed a complaint for foreclosure of that lien on June 17, 1982, in the Fourth Judicial District Court of Utah County. Summons was issued on August 5, 1982, by placing the same in the hands of a qualified person for service, and was served on August 10, 1982, on defendant Eldon J. Stubbs Construction, Inc. Defendants United Savings & Loan and Provo Land Title were served October 12, 1982. Respondents were served in April, 1983. The district court granted respondents' motion to dismiss under Rule 4(b) on the basis that the summons served upon them had not been issued within three months of filing the original complaint.

ARGUMENT

POINT I

PLAINTIFF COMPLIED WITH RULE 4(b) OF THE UTAH RULES OF CIVIL PROCEDURE IN CAUSING SUMMONS TO BE SERVED ON RESPONDENT.

Rule 4(b) of the Utah Rules of Civil Procedure reads as follows:

If an action is commenced by the filing of a complaint, summons must issue thereon within three months from the date of such filing. The summons must be served within one year after the filing of the complaint or the action will be deemed dismissed, provided that in any action brought against two or more defendants in which personal service has been obtained upon one of them within the year, the other or others may be served or appear at any time before trial.

This action was commenced by the filing of a complaint

on June 17, 1982. Summons was issued as provided by Rule 4(a) by placing it in the hands of a qualified person for service on August 5, 1982. Defendant Eldon J. Stubbs Construction was served on August 10, 1982. Summons was thus issued some 49 days after filing the complaint, well within the three month period specified by the first sentence of Rule 4(b). It was served 54 days after filing of the complaint, well within the one year period specified by the second sentence of Rule 4(b). Service was made on defendants United Savings & Loan and Provo Land Title on October 12, 1981, and on respondents in April, 1983, also within a year after the complaint was filed. Plaintiff was thus in strict compliance with the rule.

The district court ruled that the action be dismissed as against respondents because the summons which was served upon them was not issued within three months of filing the complaint. That consideration is, however, irrelevant. A summons was issued within the three months and was served within one year. Once plaintiff has accomplished that, there is an ongoing action before the court. Under the second part of the second sentence of Rule 4(b), plaintiff may then cause other defendants such as respondents to be served at any time prior to trial. The rule nowhere

requires that a separate summons for each defendant be issued within three months of filing the complaint.

This court considered facts similar to those in this case in Redman Warehousing Corp. v. Clearfield City Corp., No. 15159 (Utah, January 4, 1978, LEXIS States Library, Utah file): In that action proper service had been made upon Clearfield City and Whirlpool Corp. Freeport Center Associates, an additional defendant, challenged service on it as untimely under Rule 4(b), having been made some three years after commencement of the action. The court noted proper service upon two defendants and stated that "[S]ince there had not been a trial before the service of summons upon Freeport, it would appear that Freeport was properly brought before the court."

Plaintiff is thus in strict compliance with Rule 4(b). Summons was issued within three months. Service of summons was made within one year. Additional defendants, respondents here, were served prior to trial.

Plaintiff also met the spirit and intent of Rule 4(b). It is plainly intended to require a plaintiff to prosecute an action with reasonable diligence rather than simply filing a complaint in order to meet a statute of limitations deadline and then allowing the matter to sit with no action

toward a resolution. Plaintiff did take action in this case to have the complaint served shortly after it was filed.

Furthermore, respondents were not prejudiced by the fact that the summons served upon them was not issued until more than three months after the original complaint was filed. Even if the summons had been issued within that time, there was still no requirement that it be served upon them any sooner than it was actually served. A summons issued within the three month period could have been held by the process server until April, 1983, before serving it on defendants. Even under the district court's interpretation of Rule 4(b) such service would be permitted. Respondents would then be in exactly the same position as they are in this case.

POINT II

RULE 4(b) OF THE UTAH RULES OF CIVIL PROCEDURE DOES NOT PROVIDE THAT AN ACTION IS DISMISSED FOR FAILURE TO ISSUE SUMMONS WITHIN THREE MONTHS AFTER FILING A COMPLAINT.

Even if Rule 4(b) is interpreted to require issuance of a summons for respondents within three months of the commencement of the action, the rule does not provide for dismissal for failure to do so. The first sentence of the rule requires issuance within that period. It is only the second sentence, however, which deals with service which

provides that "summons must be served within one year . . . or the action will be deemed dismissed" In interpreting the rule as it did to grant respondent's motion to dismiss, the district court ignored the period between the two sentences and applied the penalty of dismissal to failure to issue a summons. Once the district court ignored the distinction between the two sentences, it then disregarded the second portion of the second sentence which allows subsequent service on other defendants.

POINT III

THE DISTRICT COURT'S INTERPRETATION OF RULE 4(b) IS INCONSISTENT WITH OTHER RULES WHICH ALLOW ADDITIONAL DEFENDANTS TO BE BROUGHT BEFORE THE COURT IN VARIOUS CIRCUMSTANCES.

The district court's interpretation of Rule 4(b) would require that all summons served on all defendants be issued within three months after filing of a complaint. Such an interpretation would severely limit the scope of other rules which allow for later amendment, joinder, naming unknown defendants and interpleader. Such a result is obviously not intended by Rule 4(b).

In many actions, a quiet title action, for instance, unknown defendants are listed in the complaint as "John Doe". The identity of those defendants is frequently not

ascertained until more than three months after the complaint was filed. If the trial court's interpretation of Rule 4(b) were applied to such a situation, it would be impossible to serve such a defendant. Such a result would necessitate the filing of a separate action against the additional defendants, a procedure not in keeping with a desire for judicial efficiency or economy.

The district court's interpretation of Rule 4(b) is also inconsistent with Rule 15(a) of the Utah Rules of Civil Procedure which allows pleadings to be amended under various circumstances, including amending a complaint to include additional defendants. Rule 15(a) does not require such an amendment to be made within three months of filing the original complaint. If, however, the district court's interpretation of Rule 4(b) stands, all amendments to add an additional party would have to be made within the three month period because no summons could be issued after that time.

This court held in Drake v. Clark, No. 15162 (Utah, January 3, 1982, LEXIS States Library, Utah file), that the time periods specified in Rule 4(b) did not start running again from the time an amendment to a complaint is filed. The court stated that to allow a new running of Rule 4(b)

"would run counter to Rule 15(c), which indicates that matters in amendments relate back to the original pleading." The court emphasized that "if a simple amendment could start a new starting point under Rule 4(b), such rule would be emasculated by repeated amendments." Conversely, the district court's interpretation of Rule 4(b) would have the same effect on Rule 15. It would seriously limit the ability to amend a complaint to the period of three months following the filing of the original complaint.

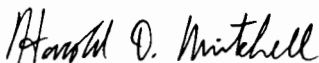
In Mason v. State, 656 P.2d 465 (Utah 1982), this court reiterated the long standing rule of construction that "courts will attempt to give two or more statutes which ostensibly conflict an interpretation that will give meaning and effect to each of them." That rule should be applied in this case in interpreting Rule 4(b). The rule required issuance of summons within three months. Once that has been done, a summons must be served within one year. Other defendants may be served at any time prior to trial. Such an interpretation is consistent with the actual language of the rule and does not conflict with Rule 15.

CONCLUSION

The district court erred in its interpretation of Rule 4(b). Plaintiff complied with the requirements of the rule.

A summons was issued within three months of filing the complaint. That summons was served within one year of filing the complaint. Other defendants were then served prior to trial. For that reason, the order of dismissal made by the district court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

A handwritten signature in black ink that reads "Harold D. Mitchell". The signature is written in a cursive style with a large initial "H".

HAROLD D. MITCHELL
Attorney for Appellant