1970

W. P. Harlin Construction Company v. The Continental Bank & Trust Company : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

W. P. HARLIN CONSTRUCTION COMPANY,

vs.

THE CONTINENTAL BANK & TRUST COMPANY,
Cross Claimant and Respondent,

vs.

GEORGE STANLEY,
Appellant,

Case No. 12180

APPELLANT'S BRIEF

Appeal from District Court of Salt Lake County, Utah
Honorable Stewart M. Hanson, Judge

SKEEN AND SKEEN
E. J. Skeen
536 East 4th South
Salt Lake City, Utah
Attorneys for Appellant

FABIAN & CLENDENIN
800 Continental Bank Building
Salt Lake City, Utah
Attorneys for Respondent
and Cross-Claimant

TABLE OF CONTENTS

AUTHORITIES CITED

CASES CITED

STATUTE AND RULES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

W. P. HARLIN CONSTRUCTION COMPANY,

vs.

THE CONTINENTAL BANK & TRUST COMPANY,
Cross Claimant and Respondent,

vs.

GEORGE STANLEY,
Appellant,

Case No 12180

APPELLANT'S BRIEF

STATEMENT OF NATURE OF CASE

Cross-claim by Continental Bank and Trust Company against George Stanley to recover sum paid on check.

DISPOSITION IN LOWER COURT

George Stanley's motion to vacate the bank's judgment on its cross-claim upon the ground that the court had no jurisdiction of the subject matter and the person was denied.

RELIEF SOUGHT ON APPEAL

George Stanley seeks an order directing the district court to grant his motion to vacate the bank's judgment against him.

STATEMENT OF FACTS

This case arises out of the case of *W. P. Harlin v. Continental Bank and Trust Company* previously considered by the Court, 23 Utah 2d 422, 464 P2d 585. The Court affirmed the judgment in favor of Harlin and against the bank, Stanley Title Company and George Stanley and in favor of the bank and against Stanley Title Company and George Stanley on the bank's cross-claim.

On February 26, 1970, the bank on ex parte application and without notice to George Stanley obtained a judgment of the District Court for $11,082.60 against the Stanley Title Company and George Stanley personally on its cross-claim. (R.652)

The cross-claim alleges as follows:

"As a cross claim against defendant Stanley Title Company, defendant, The Continental Bank and Trust Company alleges:

1. On or about September 6, 1966, the proceeds of the check, a copy of which is identified as Exhibit A to the complaint, were paid by this defendant to defendant Stanley Title Company.

2. Plaintiff claims said proceeds were wrongfully paid by this defendant to the defendant Stanley Title Company.

3. If plaintiff recovers judgment against The Continental Bank and Trust Company by reason of such payment, Stanley Title Company has been unjustly enriched thereby and The Continental Bank and Trust Company is entitled to recover the amount of any judgment by plaintiff against it from defendant Stanley Title Company.

WHEREFORE, The Continental Bank and Trust Company prays:

1. That plaintiff take nothing by its complaint.

2. That if plaintiff recover judgment against it, The Continental Bank and Trust Company have judgment against Stanley Title Company in such amount as the court may award plaintiff against The Continental Bank and Trust Company.

3. For its costs in this action and such other relief as

the court may deem appropriate in the circumstances." (R.19)

An answer to the cross-claim was filed by Stanley Title Company (R.53). No answer was filed by George Stanley because he was not named as a cross-defendant.

The cross-claim was never amended. George Stanley was not a party and, of course, was not served with summons.

On April 20, 1970, George Stanley appearing specially filed a motion in the district court to vacate the judgment upon the ground that the court had no jurisdiction on the subject matter or the person. (R.669) This motion was granted on May 21, 1970, (R.676). Thereafter the bank moved for reconsideration of the order granting the motion (R.673) and on June 22, 1970, the district court made an order setting aside and vacating the order dated May 21, 1970, and reinstating the judgment of February 26, 1970, in favor of the bank and against George Stanley (R.683). This appeal is from such order.

STATEMENT OF POINTS

1. A cross-claim constitutes the assertion of an alleged distinct and separate cause of action.

2. The judgment is void because the court had no jurisdiction of the subject matter and the person.

3. A void judgment may be set aside on motion at any time.

4. The order of the court reinstating the judgment is void.

ARGUMENT

1. A CROSS-CLAIM CONSTITUTES THE ASSERTION OF AN ALLEGED DISTINCT AND SEPARATE CAUSE OF ACTION.

Rule 13(f) of the Utah Rules of Civil Procedure permits the filing of a cross-claim to assert a claim by one party against a co-party. The rule is substantially the same as sectoin 104-9-7, Utah Code Annotated, 1943, and Federal rule 13(g).

A cross-claim (referred to in section 104-9-7, Utah Code Annotated, 1943, as a cross-complaint) initiates a separate and distinct cause of action.

In the case of *Alexander v. Superior Court,* 170 C.A.2d 54, 338 P2d 502, the court said:

> "A cross complaint constitutes an assertion of an alleged distinct and independent cause of action and when one is properly interposed there are two sumultaneous actions pending in the latter of which the defendant in the original action becomes a plaintiff who must by his cross complaint allege facts which give him the right to maintain his action. Case v. Kadota Fig Assn. 35 Cal2d 596,603, 220 P2 912, Pacific Finance Corp. v. Superior Court, 219 Cal. 179, 182, 25 P2d 983, 90 AL.R.384."

A cross-claim must contain all essential allegations and should be pleaded as fully as the original cause of action and should be sufficient in itself without recourse to other pleadings.

Lakey v. Caldwell, 72 Idaho 52, 237 P2d 610.
Key v. Clements, 133, Mont. 344, 323 P2d 603.

In this case the defendant bank filed a cross-claim, set out in full above, but did not name George Stanley as a cross-defendant. The only cross-claim pleaded was against the Stanley Title Company.

This Court held in the case of *West v. Shurtliff,* 28 Utah 337, 79 P. 180, that in order to obtain a judgment against a cross-defendant a defendant must file a cross-complaint demanding relief and make proper service.

As indicated above, there is no cross pleading against George Stanley personally and of course no service.

2. THE JUDGMENT IS VOID BECAUSE THE COURT HAD NO JURISDICTION OF THE SUBJECT MATTER AND THE PERSON.

It is basic law that a court must have jurisdiction of the subject matter and of the person of the party against whom the judgment is rendered.

The rule is clearly stated in American Jurisprudence.

"It is essential to the proper rendition of a judgment that the court have jurisdiction of the subject matter. A judgment rendered without jurisdiction of the subject matter is void. The operation of the rule is not affected by any judicial discretion possessed by the Court. In order to confer jurisdiction on a court to render judgment, the subject must be presented for its consideration in some mode sanctioned by law." 46 Am. Jur. 2d sec. 24 pp. 329, 330.

"It is essential to the proper rendition of a judgment in personam that the court have jurisdiction of the parties, even though such parties have knowledge, as distinguished from notice, of the action and indeed even though they are present at the trial. . . . A personal judgment rendered without such jurisdiction is in violation of the due process clause of the United States Constitution, and is not merely voidable, but is void." 46 Am. Jur. 2d, section 25, p. 330.

To the same effect see *Freeman on Judgments,* 5th Edition, section 226; 49. C.J.S. pp. 45-49. See also *West v. Shurtliff,* 28 Utah at p. 344. *In re Christiansen,* 17 Utah 412, 425, 53 P. 1003; *Cooke v. Cooke,* 67 Utah 371, 428; 248 P. 83.

In the case of *West v. Shurtliff* this Court said:

"The main question for the court to determine upon this appeal is whether the nisi prius court in the original case had jurisdiction under the pleadings to render judgment in favor of defendant Larsen against his co-defendant, Shurtliff, the said defendant Larsen not having filed nor served any cross-complaint, nor filed any pleading in the case asking for affirmative relief, but, on the con-

trary, only having filed an answer duly verified, disclaiming any interest in the notes or mortgage in question, and demanding to be dismissed with his costs. Section 2974 of our Revised Statutes of 1898 provides that: 'When a defendant has a cause of action affecting the subject matter of the action against a co-defendant, he may, in the same action, file a cross-complaint against the co-defendant. The defendant thereto may be served as in other cases, and defense thereto shall be made in the manner prescribed in the original complaint.' Under the above provisions, in order to have obtained a judgment in his favor against respondent, defendant, Larsen should have filed a cross-complaint or demanded affirmative relief, making proper service. A number of authorities have been cited by the learned counsel for the appellant relative to the power of courts to establish and determine the respective interests of each party to the suit; but the authorities almost uniformly hold that a decree between codefendants can only be based upon the pleadings and proof. Black on Judgments, section 184, we think, states the correct rule as follows. 'It is not enough that the parties are properly in court. That does not give the tribunal power to adjudicate any and all matters of difference between them. When we speak of jurisdiction of the subject-matter, we do not mean merely cognizance of the general class of actions to which the action in question belongs, but we also mean legal power to pass upon and decide the particular contention which the judgment assumes to settle, and how can a court acquire jurisdiction of the particular contention except it be clearly marked out and precisely defined by the pleadings of the parties? And how can that be done in any mode known to the law

save by the formation of a regular issue? There is therefore plausible grounds for holding that, if the record fails to show an issue to be determined, the judgment will be void on its face.' Persons by becoming suitors do not place themselves for all purposes under the control of the court. It is only over those particular interests which they choose to bring in issue by proper pleadings that the power of jurisdiction arises."

In this case like in the West case there was no cross-claim against George Stanley which would invoke the jurisdiction of the court. He was not served with summons. The fact that he was personally present at the trial of the main case did not subject him to the court's jurisdiction.

Lee v. School District, 149 Iowa 345, 128 N.W. 533.

The judgment for $11,082.60 was rendered against George Stanley on ex parte application without notice and under the rules and cases discussed above it was clearly void.

3. A VOID JUDGMENT MAY BE SET ASIDE ON MOTION AT ANY TIME.

Courts have inherent power to vacate their own judgments. 49 C.J.S. 478.

The rule is well settled that a judgment, void on its face, may be vacated on motion at any time.

49 C.J.S. sec. 267, pp. 480-482*Los Angeles v. Morgan,* 105 C.A.2d 726, 234 P2d 319

Michels v. Clemens, 140 Colo 82, 342 P2d 693

Meek v. Ames, 177 Kan. 565, 280 P2d 957

Laurer v. Eighth Dist. Ct., 62 Nev. 78, 140 P2d 953

Preston v. Denkins, 94 Ariz. 214, 382 P2d 686

Heckathorn v. Heckethorn, 77 N.M. 369, 423 P2d 410

Hughes v. Aetna, 234 Or. 426, 383 P2d 55

A judgment is void on its face when the judgment roll affirmatively shows that the trial court lacked either jurisdiction of the person or jurisdiction over the subject matter or judicial power to render the particular judgment.

Town of Watonga v. Crane Co., 189 Okl 184, 114 P2d 941

Caraway v. Overholser, 182 Okl 357, 77 P2d 688

In this case the record shows that George Stanley was not named as a cross-defendant in the cross-claim so it affirmatively shows on the record that the judgment of February 26, 1970, was void on its face. The motion to vacate it was therefore timely filed.

4. THE ORDER OF THE COURT REINSTATING THE JUDGMENT IS VOID.

As indicated in the statement of facts, George Stanley made a motion to vacate the judgment dated February 26, 1970, (R.669) and the motion was granted (R.676). Thereafter the bank filed a motion to reconsider the motion to vacate (R.673).

The court heard the motion, made a written decision concluding that it was in error without stating any reasons (R.677) and made an order reinstating the judgment dated February 26, 1970 (R.683).

It has long been the law in this state and elsewhere that the manner in which a court decision may be reviewed are prescribed by statute and the courts are not at liberty to substitute other procedures in their place.

> *Luke v. Coleman*, 38 Utah 383, 113 P. 1023
>
> See citations of many cases from other states, 38 Utah at p. 387.
>
> *Drury v. Lunceford*, 18 Utah 2d 74, 415 P2d 662
>
> *Utah Sand and Gravel v. Tolbert*, 16 Utah 2d, 407, 402 P2d 703

In the Luke case the district court denied the plaintiff's motion for a new trial and thereafter the plaintiff "petitioned and moved the court to grant a rehearing and reargument of the plaintiff's motion, This Court said:

> "We think the district court had not the power to entertain such a motion. It is unknown to our practice."

See also *Hanson v. Hanson,* 3 Cal. Unrep. 66, 20 P. 736, in which the trial court reconsidered an order, as in this case, setting aside a void judgment. The court said:

> "The court, therefore, had power to make an order setting aside the decree; and such order was

made after hearing and consideration. This being the case, the court had no power to vacate it because subsequent reflection had induced it to believe that it was erroneous. Litigation must have some end."

Neither the statutes nor the Rules of Civil Procedure authorized the court to entertain a motion to reconsider its order vacating the judgment. The court was, therefore, without power to make an order reinstating the judgment dated February 26, 1970.

CONCLUSION

The trial court did not have jurisdiction of George Stanley on the cross-claim nor of the subject matter because George Stanley was not named as a cross-defendant and there was no issue by any pleading which invoked the jurisdiction of the court. There was no service of summons on George Stanley in the distinct and separate cause instituted by filing the cross-claim. The judgment of February 26, 1970, on ex parte application was, therefore, void, not merely voidable. The trial Court properly granted the appellant's motion, on special appearance, to vacate the judgment, but erred in reconsidering its order and reversing its decision.

Respectfully submitted,

SKEEN AND SKEEN
E. J. Skeen
Attorneys for Appellant