1971

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

IN THE SUPREME COURT OF THE STATE OF UTAH

W. P. HARLIN CONSTRUCTION COMPANY,

vs.

THE CONTINENTAL BANK & TRUST CO.,
Cross Claimant and Respondent,

vs.

GEORGE STANLEY,
Appellant.

Case No. 12180

APPELLANT'S REPLY BRIEF

Appeal from a Judgment of the Third Judicial District Court of Salt Lake County, Utah
Honorable Stewart M. Hanson, Judge

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The facts are adequately stated in the Appellant's Brief and will not be repeated here.

STATEMENT OF POINTS

This reply brief will discuss the following points argued in the Respondent's Brief.

1. The doctrine of *res judicata* has no application to this case.

2. Liberalized rules of pleading have not supplanted basic jurisdictional requirements.

3. Rule 59 (e) has no application to a void judgment and the appellant has complied with Rule 60 (b).

4. There was no trial of the issues raised by the cross-claim.

ARGUMENT

1.

THE DOCTRINE OF *RES JUDICATA* HAS NO APPLICATION TO THIS CASE.

The doctrine of *res judicata* is that an existing final judgment or decree on the merits by a court of competent jurisdiction, *on matters within its jurisdiction* is conclusive of the rights of the parties or privies in all actions or suits in any tribunal of concurrent jurisdiction on points and matters in the first suit.

50 C.J.S. section 592, p. 11

Matthews v. Matthews, 102 Utah 428, 132 P.2d. 111

Virginia Ry and Power Co. v. Leland, 143 Va. 920, 129 S.E. 700

The doctrine has no application to this case because the court had no jurisdiction of the person of George Stanley on the cross-claim or of the subject matter of the cross-claim. In the original suit of W. P. Harlin Con-

struction Company v. The Continental Bank & Trust Company, et al, George Stanley was named in the complaint, was served with a summons and he litigated in the trial court and on appeal the rights of the plaintiff against him, but there are no pleadings, no service of process and there has been no litigation of the issues of *the distinct and separate case* between the bank and George Stanley personally on the cross-claim. There were no findings of fact on the issues raised by the cross-claim against Stanley Title Company and, of course, there were none against George Stanley personally because he was not a party (R. 181-187). The transcript in the original case shows conclusively that the only issues tried were those created by the complaint of Harlin, the answers and counterclaims of the defendants Stanley Title Company and George Stanley and the answer of the bank. The findings of fact in the main case cover issues between Harlin and the bank and Harlin and Stanley Title Company and George Stanley. The findings and the decree entered thereon relate only to the main case and do not cover the only issue pleaded on the cross-claim which is the unjust enrichment of Stanley Title Company (R. 19). This pleading contained only a conclusion of law and did not state a cause of action against anyone.

2.

LIBERALIZED RULES OF PLEADING HAVE NOT SUPPLANTED BASIC JURISDICTIONAL REQUIREMENTS.

It is argued in the respondent's brief, p. 6, that George Stanley's motion to vacate the judgment was on the sole ground that the court lacked jurisdiction over the person. It states, "no claim was then made that the court lacked jurisdiction over the subject matter . . ." The motion states:

> "Comes now George Stanley, also known as George B. Stanley, and appearing specially for the purpose of this motion and not otherwise, moves to vacate that certain Judgment in the above cause dated February 26, 1970 in favor of the Continental Bank and Trust Company, cross-claimant, and against George Stanley for the sum of $11,082.60 together with costs and accrued interest upon and ground and for the reason that this court had no jurisdiction of the person of George Stanley upon the cross-claim of the Continental Bank and Trust Company and said cross-claim does not name George Stanley as a cross-defendant herein.
>
> "This motion will be based upon the files and records of this case." (R. 669)

The concluding clause in the motion, ". . . and said cross-claim does not name George Stanley as a cross defendant herein," states in substance, the lack of jurisdiction of the subject matter. The rule is as follows:

> "In order for a court to have jurisdiction of the subject matter, the particular issue determined must be properly brought before it in the particular proceeding for determination."

21 C.J.S. sec. 23, p. 37.

As stated in West v. Shurtliff, 28 Utah 337, 79 P. 180 this Court said:

> "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 formation of a regular issue?"

The statement in the motion to vacate that ". . . said cross-claim does not name George Stanley as a cross-defendant herein," clearly pleads lack of jurisdiction of the subject matter.

Further, a judgment is absolutely void if it is shown that there was *either* lack of jurisdiction of the person *or* of the subject matter. See citations in appellant's brief, p. 10.

The liberalized rules of civil procedure do not write out of the law the basic jurisdictional requirements discussed in the case of West v. Shurtliff, supra. It is said that:

> "Jurisdiction is distinguished from procedure in that 'jurisdiction' relates to the court or forum that may hear and determine a controversy and 'procedure' relates to the form or manner of conducting the suit."

Mahoning Valley R. Co. v. Santoro, 93 Ohio St. 53, 112 N.E. 190.

21 C.J.S. sec. 15 c., p. 33.

On the principle that jurisdiction must be invoked according to proper procedure, this court stated in State v. Telford, 93 Utah 228, 72 P.2d. 626 at 627:

> "A tribunal may have jurisdiction of a subject matter but the right to proceed under that jurisdiction may depend upon a condition precedent. Put it another way, the court may have jurisdiction of the subject matter but its jurisdiction should be properly invoked.
>
> "There are many cases where courts have jurisdiction of a subject matter but that jurisdiction must be invoked according to a certain procedure. In invoking the jurisdiction of the district court on matters wherein it has original jurisdiction, it requires a complaint, petition or application. One cannot invoke the jurisdiction by simply stating orally one's complaint."

See also, In re Rogers' Estate, 75 Utah 290, 284 P. 992.

In view of the foregoing, the respondent's argument that Rule 15(b) of the Utah Rules of Civil Procedure has supplanted the definitions of jurisdiction over the subject matter is patently unsound. The rule relates to procedure and not to jurisdiction.

3.

RULE 59(e) HAS NO APPLICATION TO A VOID JUDGMENT AND THE APPELLANT HAS COMPLIED WITH RULE 60 (b).

The respondent contends that the appellant failed to take timely action to set aside the judgment against him citing Rule 59(e) of the Rules of Civil Procedure. This rule provides:

> "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

The rule obviously refers to alteration and amendment of valid judgments, and is not intended to and indeed does not supersede the well settled rule that a judgment void on its face may be *vacated* on motion at any time. See cases cited appellant's brief pp. 9, 10.

The respondent cites Rule 60(b) to support its contention that the motion to vacate the judgment should have been filed within a "reasonable time" after entry of the judgment. The judgment in the main case was contingent upon the payment of the amount due by Continental Bank. A motion filed to set aside the conditional judgment before payment would have been premature. The judgment in the main case was appealed and was not affirmed until January 22, 1970. The conditional judgment was not made absolute until February 26, 1970, by entry of the judgment on the cross-claim. George Stanley appeared specially and moved to vacate this judgment less than two months thereafter. This is, of course, less than the three month time limit provided in Rule 60(b) for seeking to set aside judgments for such reasons as mistake, newly discovered evidence, and fraud. The motion was also filed within three

months after the affirmance of the judgment in the main case. (Judgment affirmed January 22, 1970—motion filed April 20, 1970.)

We submit there has been full compliance with Rule 60(b).

4.

THERE WAS NO TRIAL OF THE ISSUES RAISED BY THE CROSS-CLAIM.

We have found in the record only two references to the cross-claim. The first reference was at the time the attorneys stated who they represented. We quote:

> "Mr. Colton: Albert J. Colton. I represent the defendant, Continental Bank; defendant and cross claimant." (R. 218)

The second reference was made at the close of the plaintiff's evidence in connection with the bank's motion to dismiss.

> "Mr. Colton: If the Court please, I would like at this time to move to dismiss on behalf of the defendant, Continental Bank, on the basis of the testimony that has been admitted to date on behalf of plaintiff's case. The Court is aware the bank's position is a multiple one.
>
> "First of all, of course, we see ourselves as a middleman. Resolution of course that that is if Mr. Harlin recovers against Mr. Stanley we would contend that we would, therefore, be entitled if he were to recover against us we would be en-

> titled to cross claim against Mr. Stanley and recover from him or if indeed Mr. Stanley is successful in his defense, there would be no damage and we would be eliminated, of course. *That I can see that particular defenses would depend on how the Court finds the facts at the end of the case.*" (Emphasis added.) (R. 417)

As indicated by Mr. Colton's statement, the intention was to consider the issues on the cross-claim *after the court made findings of fact* on the main case. If, as he stated, the court had decided the issues in the main case in favor of Stanley, there would have been no damage to Continental and it would have dropped out of the case.

There was no evidence offered in support of the cross-claim, designated by counsel as such, and therefore there was no occasion to attack the legal sufficiency of the pleading or to raise a question as to the parties.

When the trial court decided the main case in favor of the plaintiff and against all of the defendants, an appeal was taken to the Supreme Court. The issue in the main case was not finally decided until the Supreme Court affirmed. There was no consideration given by anyone to the cross-claim until Continental paid the judgment. Then, without notice to George Stanley or to the Stanley Title Company, the bank presented to the court a form of judgment against Stanley Title Company and George Stanley. Until such payment the alleged contingent claim in favor of the bank had not ripened into an actionable claim and nobody—attorneys

or trial court—had paid any attention to the sufficiency of, or the parties to, the cross-claim.

As indicated by Mr. Colton in his statement to the court, quoted above, there was no issue to try on the cross-claim until the final determination of the main case. He correctly stated the law. The case of Greene et al v. Knox et al, Adams v. Continental National Bank, 71 Utah 217, 263 P. 928 is in point. It involved a cross-claim against Continental Bank for damages which might in the future be sustained by the cross-claimant on bonds signed for the benefit of the bank. The Court said:

> ". . . It is certainly essential as a ground of recovery upon such a contract of indemnity to show a loss by the complaining party. In appellant's own brief when discussing the statute of limitation (a point not here urged by respondent), his counsel say:
>
> " 'Until the amount of Adams' liability on the bond is established, of course he cannot sue the bank. If he were never sued upon this bond, no cause of action could accrue to him as against the bank. When Adams is sued, he can demand that the security be applied according to the contract with the bank. But, until he has suffered damages, he has no cause of action against the bank.' "

There was no issue to try on the cross-claim until the final decision on the main case, there were no pleadings naming George Stanley as cross-defendant, and there was in fact, no trial. Respondent's argument that George Stanley personally participated in the trial on

the cross-claim is entirely unsupported by the record and is without merit.

CONCLUSION

The Continental Bank's judgment against George Stanley was absolutely void because of lack of service of process and the lack of a cross-claim naming him as a defendant. The first ruling of the trial court vacating the judgment was correct and the second order reinstating the void judgment is erroneous and should be reversed.

Respectfully submitted,

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