

1994

Ka Ae Park v. Paul K. Jun and Ester Young Ja Jun : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KA AE PARK,	:	
plaintiff/appellee,	:	
vs.	:	Case No. 940556-CA
	:	Priority classification 15
PAUL K. JUN and ESTER YOUNG	:	
JA JUN,	:	
defendants/appellants.	:	

BRIEF OF PLAINTIFF/APPELLEE KA AE PARK

APPEAL FROM JUDGMENT OF THIRD DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE RICHARD H. MOFFAT, DISTRICT JUDGE

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FILED
Utah Court of Appeals

DEC 28 1994

Marilyn M. Branch
Clerk of the Court

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I. JURISDICTION OF THE UTAH COURT OF APPEALS

The Court of Appeals lacks jurisdiction to determine this appeal due to the failure of defendants/appellants Paul K. Jun and Ester Young Ja Jun (hereafter defendants) to file a timely notice of appeal. Had defendants timely filed their notice of appeal, the court would have proper appellate jurisdiction pursuant to Utah Code Ann. §§ 78-2-2(4) and 78-2a-3(2)(k).

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does this court lack jurisdiction to determine this appeal due to defendants' failure to file a timely notice of appeal?

2. If jurisdiction is proper, did the district court abuse its discretion by denying defendants' request to defer their payment of an amount imposed by the court as a condition to granting defendants relief from the judgment previously entered against them? The standard of review is whether the district court's ruling has no reasonable basis, Crookston v. Fire Insurance Exchange, 860 P.2d 937 (Utah 1993) or was so unreasonable that it can be classified as arbitrary and capricious, Kunzler v. O'Dell, 855 P.2d 270 (Utah App. 1993).

III. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an action by plaintiff/appellee Ka Ae Park (hereafter plaintiff) to collect an obligation owing from defendants.

B. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

Following defendants' failure to answer plaintiff's interrogatories, the district court granted plaintiff's motion to compel and required defendants to answer the interrogatories within ten days and to pay plaintiff \$250 plus her attorney's fees incurred in bringing the motion. Following defendants' failure to answer the interrogatories and to pay the sanction imposed by the district court, the court granted appellee's motion for sanctions, struck defendants' answer, dismissed their counterclaim, and entered judgment against them as prayed for in appellee's complaint. Defendants filed a motion for relief from the judgment, and that motion was denied by the district court. Defendants filed a second motion for relief from the judgment which the district court granted, provided that defendants comply fully with two conditions no later than December 15, 1993. Defendants complied with one of the two conditions but failed to comply with the second. By the terms of the district court's order, defendants' failure to comply fully with both conditions by December 15, 1993 meant that their "second motion for relief from judgment or order

shall, without further notice or hearing, be deemed denied and the judgment previously entered shall stand and remain in full force and effect, and no further motion for relief from the judgment and order shall be considered by the court." Defendants filed a motion to defer their obligation to comply with the second condition imposed by the district court. The court denied that motion by order dated February 8, 1994.

C. STATEMENT OF FACTS

1. October 29, 1992 -- Plaintiff filed her complaint initiating the present action. Record (hereafter R.,) at pps. 2 - 10.

2. December 7, 1992 -- Judge Ronald H. Moffat of the Third District Court entered default judgment against defendants. R., at pps. 25 - 28. Later that same day, defendants filed an answer and counterclaim. R., at pps. 19 - 22.

3. January 7, 1993 -- Pursuant to stipulation, Judge Moffat entered an order granting defendants relief from the default judgment. R., at pps. 35 - 37.

4. February 2, 1993 -- Plaintiff served a set of interrogatories on defendants. R., at p. 41.

5. March 26, 1993 -- Plaintiff filed a motion to compel discovery due to defendants' failure to answer plaintiff's

interrogatories, despite a stipulated extension of time to answer. R., at pps. 44 - 48.

6. May 24, 1993 -- The district court entered an order requiring defendants to answer plaintiff's interrogatories within 10 days and to pay the sum of \$250 plus any fees incurred by plaintiff in bringing her motion. R., at pps. 53 - 54. Defendants never opposed plaintiff's motion to compel and never claimed that the court's imposition of the financial sanction was improper due to their impecuniosity.

7. June 10, 1993 -- Plaintiff filed a motion for sanctions due to defendants' failure to comply with the court order requiring them to answer plaintiff's interrogatories within 10 days. In her motion for sanctions, plaintiff requested the court to strike defendants' answer and to render default judgment or to impose such other sanctions as may be appropriate. R., at pps. 60 - 62.

8. July 15, 1993 -- By minute entry, Judge Moffat imposed sanctions for defendants' failure to comply with the court's previous order. The court entered defendants' default and indicated that the counterclaim should be dismissed and judgment granted pursuant to the prayer of plaintiff's complaint. The court further awarded attorney's fees and an additional sum of \$500 as a sanction against defendants. R., at pps. 65 - 66. Defendants never opposed plaintiff's motion for sanctions and never claimed

that imposition of a financial sanction was improper due to their impecuniosity.

9. July 26, 1993 -- Defendants filed a "Motion for Relief From Judgment or Order" with an unsigned affidavit from defendants' counsel. R., at pps. 68 - 70. Defendants did not argue that imposition of the financial sanctions was improper due to their impecuniosity.

10. August 9, 1993 -- Pursuant to the July 15, 1993 minute entry, the Third District Court entered judgment in favor of plaintiff against defendants. R., at pps. 81 - 83.

11. September 9, 1993 -- The district court ruled by minute entry on defendants' motion for relief from judgment or order. The court stated in part as follows:

The Court is convinced that the defendants are simply playing games with the plaintiff and with the Court. This matter has been set aside once and the defendants have totally failed to participate in the pre trial discovery and preparation of this case. The Court sees the current Motion simply as an additional way of forestalling the plaintiff's claims against the defendants. The defendants have been afforded more than sufficient opportunity to protect their interest in this matter but have failed to do so and it appears to this Court have done so wilfully. Under the circumstance [sic] the Court has not choice [sic] and believes it is only fair and equitable to deny the Motion.

R., at pps. 88 - 89.

12. September 20, 1993 -- Defendants filed a second motion for relief from judgment or order. R., at pps. 91 - 124.

Defendants never argued that imposition of the financial sanctions was improper due to their impecuniosity.

13. November 15, 1993 -- The district court entered an order with respect to defendants' second motion for relief from judgment or order that provided in part as follows:

Provided defendants comply fully with the conditions set forth below no later than December 15, 1993, their second motion for relief from judgment or order dated July 26, 1993 shall be granted and defendants shall be granted relief from the judgment previously entered herein on August 9, 1993.

The two conditions the court imposed were that defendants provide full and complete answers to the outstanding interrogatories and that they pay plaintiff the sum of \$1,335 in attorney's fees and sanctions. The order further stated as follows:

If defendants have not fully complied with both conditions set forth above by December 15, 1993, defendants' second motion for relief from judgment or order shall, without further notice or hearing, be deemed denied and the judgment previously entered shall stand and remain in full force and effect, and no further motion for relief from the judgment and order shall be considered by the court.

R., at pps. 138 - 140.

14. December 15, 1993 -- Defendants submitted their answers to the outstanding interrogatories but failed to pay any of the \$1,335 the court had ordered them to pay as a condition to obtaining relief from the default judgment. Defendants filed a "Motion to Defer Payment of Sanctions" and an unsigned affidavit of

defendant Paul K. Jun and argued for the first time that "through no fault of their own, [defendants] exhausted their capital and are unable to pay the sanction amount." R., at pps. 141 - 152.

15. By minute entry, Judge Moffat ruled on defendants' motion to defer payment of sanctions. The minute entry stated in part as follows:

The motion is denied. The court is of the opinion that the allegations of reasons for failure to satisfy the sanctions which were imposed are not sufficient. In addition the court notes that this case has been one continual delay after another on behalf of the defendants and the court has little faith in the credibility of the allegations of the defendants. It should be further noted that the affidavit of Paul K. Jun as filed with the court is neither signed nor notarized and therefore is legally not sufficient and cannot be considered.

R., at pps. 166 - 168.

16. February 8, 1994 -- The district court entered an order denying defendants' motion to defer payment of sanctions. R., at pps. 170 - 171.

17. March 10, 1994 -- Defendants filed an ex parte motion to extend the time to file their notice of appeal. R., at p. 172.

18. April 11, 1994 -- Defendants filed their notice of appeal. R., at pps. 174 - 175.

IV. SUMMARY OF ARGUMENTS

1. Defendants failed to file a timely notice of appeal, and this court lacks jurisdiction to determine the appeal.

2. Defendants may not raise an equal protection argument for the first time on appeal.

3. This court should not consider the conclusory arguments of defendants involving pivotal issues made without citation to any cases of any significance.

4. The district court did not abuse its discretion in denying defendants' request to defer payment of sanctions imposed by the court.

V. ARGUMENT

POINT I

THIS COURT LACKS JURISDICTION SINCE DEFENDANTS' NOTICE OF APPEAL WAS NOT TIMELY FILED

Defendants failed to file a timely notice of appeal of any final, appealable order. This court lacks jurisdiction and should dismiss this appeal.

Rule 3 of the Utah Rules of Appellate Procedure states that an appeal may be taken "from all final orders and judgments" of the district court by filing a notice of appeal "within the time allowed by Rule 4." Rule 4 requires the notice of appeal to be filed "within 30 days after the date of entry of the judgment or order appealed from."

Following entry of the judgment against them on August 9, 1993, defendants filed two post-judgment motions for relief under Rule 60(b). An order denying relief under Rule 60(b) is a final appealable order. Amica Mutual Insurance Co. v. Schettler, 768 P.2d 950 (Utah App. 1989). Under Rules 3 and 4, defendants had 30 days after the denial of their second motion for relief to file their notice of appeal.

Pursuant to the terms of the district court's November 15, 1993 order, defendants' second motion for relief was deemed denied on December 15, 1993 when defendants failed to comply fully with the two conditions imposed by the court for granting relief from the judgment. The order stated as follows:

Provided defendants comply fully with the conditions set forth below no later than December 15, 1993, their second motion for relief from judgment or order dated July 26, 1993 shall be granted....

If defendants have not fully complied with both conditions set forth above by December 15, 1993, defendants' second motion for relief from judgment or order shall, without further notice or hearing, be deemed denied and the judgment previously entered shall stand and remain in full force and effect, and no further motion for relief from the judgment and order shall be considered by the court.

R., at pps. 138 - 140.

Defendants did not file their notice of appeal until April 11, 1994, long after the 30-day period for filing a notice of appeal

had elapsed.¹ Defendants having failed to file a timely notice of appeal with respect to the order denying their second Rule 60(b) motion for relief, this court lacks jurisdiction to hear the appeal of that order.

Defendants claim that the order they are appealing is the order of February 8, 1994 denying their motion to defer payment of sanctions and that their notice of appeal was, therefore, timely filed. That order is not, however, a final, appealable order. The rights of the parties had already been fully resolved by the denial of defendants' second motion for relief from judgment. Their motion to defer the payment of sanctions and the order denying that motion were merely tangential to the essential issues between the parties. The order denying defendants' motion to defer payment of sanctions has none of the indicia of a final, appealable order. See generally 47 Am Jur. 2d, Judgments, §1053. See also Hase v. Hase, 775 P.2d 943 (Utah App. 1989) where the court held that an order that "wholly disposed of all remaining claims between the parties" constituted the final order from which an appeal could be taken and that a later consolidated decree and order merely

¹Under Rule 4(e) of the Utah Rules of Appellate Procedure, as late as February 14, 1994 defendants could have also requested the trial court for an extension of time to file their notice of appeal. They did not file their ex parte motion for an extension until March 10, 1994. The late motion and the trial court's order pursuant to that late motion should be ignored in determining whether defendants filed a timely notice of appeal.

reiterating what the court had previously ordered could not be used to extend the time for appeal. Id., at p. 945.²

Defendants did not file a timely notice of appeal of any final, appealable order or judgment. This court lacks jurisdiction to hear this appeal and should dismiss it.

POINT II

THIS COURT SHOULD NOT CONSIDER DEFENDANTS' EQUAL PROTECTION ARGUMENT RAISED FOR THE FIRST TIME ON APPEAL

Defendants' brief contains an argument based on the Equal Protection Clause of the United States Constitution. This argument was not presented in the district court and should be disregarded by this court.

At no point in the district court proceedings did defendants ever raise an argument based on the Equal Protection Clause of the United States Constitution. It is axiomatic that an issue not raised in the trial court will not be addressed by the appellate court. E.g., Wurst v. Department of Employment Security, 818 P.2d 1086 (Utah App. 1991) (Stating that the reviewing court will not address an issue raised for the first time on appeal.)

²Likewise, defendants' motion to defer payment of sanctions is not one of the motions enumerated in Rule 4(b) of the Utah Rules of Appellate Procedure which extend the time for filing the notice of appeal until after the denial of such a motion.

Defendants failed to present any argument to the district court regarding the Equal Protection Clause. Their argument on that issue, raised for the first time on appeal, should be disregarded.

POINT III

THIS COURT SHOULD NOT CONSIDER
DEFENDANTS' CONCLUSORY ARGUMENTS
MADE WITH VIRTUALLY NO CITATION
TO ANY CASES OF ANY SIGNIFICANCE

Like their arguments presented to the trial court in support of their motion to defer payment of sanctions, defendants in their brief present only conclusory arguments not supported by any cases of any significance. Their argument should be disregarded and their appeal dismissed.

Defendants have attempted to raise serious issues regarding due process and equal protection and their application to allegedly impecunious parties allegedly unable to pay sanctions imposed by the court. Defendants' argument, however, is merely conclusory in nature and totally devoid of any meaningful citation to relevant cases, leaving both opposing counsel and this court to speculate as to the basis and legal authority of their claims.

This court has stated that it will not consider conclusory arguments on pivotal issues made by parties to an appeal without citation to either the record or applicable case law. Marchant v. Park City, 771 P.2d 677 (Utah App. 1991). Defendants' argument in

this case presents such a situation, and this court should not consider the conclusory argument set forth by defendants in their brief. The court should dismiss the appeal.

POINT IV

THE DISTRICT COURT DID NOT
ABUSE ITS DISCRETION
IN DENYING DEFENDANTS' MOTION
TO DEFER PAYMENT OF SANCTIONS

As set forth under Point I above, this court lacks jurisdiction to hear this appeal. Even if the court has jurisdiction, however, it should affirm the district court's order denying defendants' motion to defer payment of sanctions as a proper exercise of the district court's discretion.

An abuse of discretion occurs when there is "no reasonable basis for the [district court's] decision", Crookston v. Fire Insurance Exchange, 860 P.2d 937, 938 (Utah 1993) or where the court's ruling "is so unreasonable that it can be classified as arbitrary and capricious", Kunzler v. O'Dell, 855 P.2d 270, 275 (Utah App. 1993).

The facts of this case plainly demonstrate that the trial court had ample reason to deny defendants' request to defer paying the sanctions previously imposed by the court and did not abuse its discretion. Defendants had a long history of, as the district court put it, "playing games" (R., at p. 88) and ignoring their obligation to respond appropriately to discovery requests and court

orders. By the time it ruled on defendants' motion to defer payment of sanctions, the court was well justified in its conclusion that it had "little faith in the credibility of the allegations of the defendants." R., at p. 166.

Even if the defendants' allegations of impecuniosity were believable and legitimate, impecuniosity alone should not be a sufficient basis for relieving recalcitrant and neglectful parties from proper sanctions imposed by the court for the parties' failure to respond to prior court orders. Even impecunious litigants who file an affidavit of impecuniosity pursuant to Utah Code Ann. § 21-7-3 are not relieved of all financial burdens with respect to litigation. E.g., Roberts v. Erickson, 851 P.2d 643 (Utah 1993) (The fees and costs excused by the filing of an affidavit of impecuniosity do not include the costs of preparing transcripts.)

The trial court did not abuse its discretion in denying defendants' motion to defer payment of sanctions. The court should affirm the district court's denial of that motion.

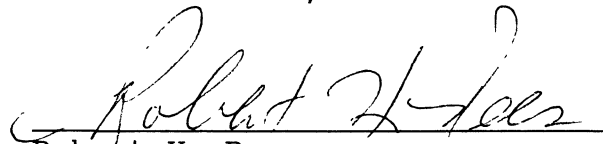
VI. CONCLUSION

For the foregoing reasons, plaintiff/appellee Ka Ae Park respectfully requests this court to dismiss this appeal for lack of jurisdiction, or, in the alternative, if jurisdiction is proper, to

affirm the district court's denial of defendants' motion to defer payment of sanctions.

Dated this 28th day of December, 1994.

ROBERT H. REES, P.C.


Robert H. Rees
Attorney for plaintiff/appellee

CERTIFICATE OF HAND DELIVERY

I certify that on the 28th day of December, 1994, two true and correct copies of the foregoing Brief of Plaintiff/Appellee were hand delivered to the following:

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