1995

Ernest G. Clark and Verda Clark v. Morris Myers, Royal K. Hunt, et al. : Reply Brief

Utah Court of Appeals

Royal Hunt; Pro Se.
Randy M. Lish; McCullough, Jones, Ivins; Attorney for Appellant.

950526-CA

RANDY M. LISH (3823)
MCCULLOUGH, JONES & IVINS
Attorneys for Plaintiffs and Plaintiff in Substitution
930 South State, Suite 10
Orem, Utah 84058
Telephone: (801) 224-2119

IN THE UTAH COURT OF APPEALS

---ooo0ooo---

ERNEST G. CLARK and VERDA CLARK, Plaintiffs, and JOHN HARR, SR., Plaintiff in Substitution,	:	PLAINTIFF'S REPLY BRIEF
vs.	:	No. 950526-CA
MORRIS MYERS, ROYAL K. HUNT, et al.,	:	
Defendants.	:	

---ooo0ooo---

Appeal from Order of Third District Court of
Salt Lake County

Hon. Anne M. Stirba

Randy M. Lish (3823)
McCullough, Jones & Ivins
853 W. Center
Orem, UT 84057
Attorneys for Appellant

Royal K. Hunt
356 S. 200 E., No. 9
St. George, UT 84770
Appellee
Attorney Pro Se

Morris Myers
400 East Creekside Circle, #E
Murray, UT 84107
Appellee
Attorney Pro Se

TABLE OF CONTENTS

Page

CASES CITED

Page

STATUTES CITED

RANDY M. LISH (3823)
MCCULLOUGH, JONES & IVINS
Attorneys for Plaintiffs and Plaintiff in Substitution
930 South State, Suite 10
Orem, Utah 84058
Telephone: (801) 224-2119

IN THE UTAH COURT OF APPEALS

---ooo0ooo---

ERNEST G. CLARK and VERDA CLARK, Plaintiffs, and JOHN HARR, SR., Plaintiff in Substitution,	:	PLAINTIFF'S REPLY BRIEF
vs.	:	No. 950526-CA
MORRIS MYERS, ROYAL K. HUNT, et al.,	:	
Defendants.	:	

---ooo0ooo---

ARGUMENT

The Defendants have again raised the issue of the appropriateness of the Notice of Appeal. In looking at the Notice originally filed, it is clear that the parties are named, the court from which the appeal is being taken is named, and that portion of the lower court's order which is being appealed. The case law cited by Defendants states very clearly the position of other courts regarding defective notices of appeal, but the Defendants misstate why the appeals in those cases were upheld. In Torres v. Oakland Scavenger Co., 4487 U.S. 312, 101 L.Ed.2d 285, 108 S.Ct. 2405 (1988),

The appellant never named one of the parties in the appeal, and attempted to add the party later. The Court held that allowing an amendment under such circumstances would be the same as extending the time to appeal, and that therefore no appropriate notice of the appeal was given. What the Defendants in the present case have failed to bring to the attention of this Court is the fact that after the Torres decision, Rule 3(c) of the Federal Rules of Appellate Procedure was changed to prevent appeals from being lost by certain technical defects. See Cole v. Ruidoso Municipal Schools, 43 F. 3d 1373 (10th Cir., 1994).

In the Notice of Appeal, the Plaintiff was attempting to narrow the issues to be briefed by stating very clearly the order of Judge Anne Stirba which was being appealed from, and the issues which were behind the part of the order being appealed. Obviously, Defendants would have preferred that Plaintiff not try to narrow the issues as much as possible. Relying on the Cole case, cited above, Plaintiff maintains that, if Rule 3(c) was amended to allow the addition of a party to a previously-filed notice of appeal, then such an interpretation would certainly cover the present case, where Plaintiff was trying to notify Defendants of the specific issue being appealed. Unluckily, there is no Utah case law on

the matter. The Notice of Appeal was very clear as to which issue was to be addressed, and does not believe that Defendants were prejudiced by the information contained in the appeal. Further, Plaintiff was merely using a form for the notice of appeal that has been used by at least two other attorneys, without problems being raised.

Regarding Defendants' argument against overturning the lower Court's decision, Plaintiff needs to point out that Defendants are relying solely on 11 U.S.C. 506(d), and completely ignoring 11 U.S.C. 522(f). Further, Plaintiff insists that he is not attempting to enforce a judgment personally against any of the Defendants. On the contrary, the facts of the case contradict such a claim. Defendant Royal K. Hunt signed a quit-claim deed transferring his interest in the property on May 12, 1994; Defendant Hunt has had no interest of any kind in the property involved in this case since that date. Any attempt by Plaintiff to enforce a lien is clearly not an attempt to enforce a personal judgment, but merely an attempt to enforce a lien that runs with the real estate. Defendants whole argument is completely without merit. Based on Defendant's quit-claim deed, he also has no standing to challenge the enforecment of a lien on property to which he has no legal interest.

Defendants also rely heavily on In Re Duncan, 60 B.R. 345 (Bkrtcy. M.D. Ala. 1986) in their attempt to claim that the bankruptcy completely discharges the lien on the property. however, they fail to recognize that Duncan, as cited above, deals only with the issue of property acquired after the bankruptcy is filed, and the subsequent effects on said property. It does not deal at all with property that is already owned by the debtor at the time the bankruptcy is filed. Accordingly, whatever it has to say about the effects of bankruptcy on liens attaching to real property is irrelevant, particularly in light of the decisions of the U.S. Supreme Court cited in Plaintiff's brief on appeal.

Based on the above case arguments, Plaintiff believes that the Defendants' Motion to Dismiss the Appeal should be dismissed, and that the decision of the lower court in granting the Motion to Vacate the Plaintiff's Execution and Levy should be overturned.

DATED the 29th day of September, 1995

MCCULLOUGH, JONES & IVINS

Randy M. Lish
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of September, 1995, I mailed ~~four~~ two true and correct copies of the foregoing Brief Of Appellant to Royal K. Hunt, Appellee, at 356 S. 200 E., No. 9, St. George, UT 84770, and Morris Myers, Appellee, 400 East Creekside Circle, #E, Murray, UT 84107.

Randy M. Lish