1965

Harriet W. Blake v. Earnest E. Blake, Leta R. Blake : Appellant's Brief Statement of the Kind of Case

IN THE SUPREME COURT

OF THE

STATE OF UTAH

HARRIET W. BLAKE,)

Plaintiff-Respondent,

vs.)

EARNEST E. BLAKE, LETA P. BLAKE, His wife, et al,

Defendants-Appellants)

CASE No. 10344

BRIEF OF APPELLANT

Appeal from the Judgment of the

Fifth District Court for Washington County

Hon. C. Nelson Day

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vs.) CASE No.

EARNEST E. BLAKE, LETA R. BLAKE, his wife, et al, 10344

Defendants-Appellants)

APPELLANTS' BRIEF

STATEMENT OF THE KIND OF CASE

This was an action filed by the plaintiff to set aside a certain contract of sale, escrow agreement, and warranty deed for the sale of certain real property from the plaintiff to the defendants on the ground of misrepresentation and fraud.

DISPOSITION IN LOWER COURT

The case was set for trial before the court setting without a jury and tried in the

absence of the defendants personally but with an attorney who purported to represent the defendants. The Lower court found from the plaintiff's evidence alone that the contract of sale and warranty deed was signed by the plaintiff by mistake as to the nature of what she was signing and as a result of the defendants fraud and misrepresentation and the court, by reason thereof, declared said contract and warranty deed to be null and void and of no legal force and effect. That the court also awarded the plaintiff damages for her court costs and attorney's fee in the sum of $290.00. The defendants duly filed a motion for an order vacating said judgment and for a new trial, both of which said motions were overruled and denied.

RELIEF SOUGHT ON APPEAL

Defendants-Appellants seek a reversal of

the judgment of lower court and for a new trial.

STATEMENT OF FACTS

The plaintiff, a resident of St. George, Utah, is the mother of the defendant, Earnest E. Blake, who is a resident of Las Vegas, Nevada. That the plaintiff is an elderly woman, approximately 75 years of age. That on or about December 6, 1963, the defendant, Earnest E. Blake, after allegedly discussing the matter with his mother, the plaintiff, went to an attorney in St. George, Utah, to have prepared a conditional contract of sale, escrow agreement and warranty deed for the purpose of entering into said contract with the plaintiff, whereby the plaintiff would sell her home in St. George, Utah, to the defendant on the terms and conditions of said contract (R. 5-6). There is also an allegation

in the pleadings of the trial of this matter (Page 13, lines 1 thru 8) that the parties had contemplated the same arrangements previously.

That on said date the defendant, Earnest L. Blake, delivered said documents to the plaintiff and they were then, and each of them, signed by the plaintiff and defendant Earnest L. Blake. The signature of the parties to said agreements were thereafter notarized by one E. J. Pickett of St. George, Utah, and approximately six weeks later were placed in escrow at the Bank of St. George, St. George, Utah. The defendants thereafter paid said contract according to its terms. On or about June 4, 1964, the plaintiff filed her action to set aside the contract and deed by and thru her attorney of record, Phillip L. Foremaster. The defendants, representing themselves, filed an answer and counter-claim answering the

plaintiff's complaint and counter-claiming against one Roberta Blake Barnum, daughter of the plaintiff and sister to the defendant on the theory that the said Roberta Blake Barnum had damaged the defendant by exerting undue influence on the plaintiff in persuading the plaintiff to break the agreement between herself, the plaintiff, and the defendants. It should here be noted, that all of the pleadings of defe ants, except a motion to join the said Roberta Blake Barnum, were all prepared, possibly with some advise from others, and signed by the defendants personally. The filing of the motion to join Roberta Blake Barnum was done by one Charles M. Pickett, Attorney at Law, of St. George, Utah, who later also appeared in their behalf at the hearing on said motion. Again after the Order to join Roberta Blake Barnum was entered (R.25) the defendants still prepared and signed their own pleadings.

The minute entry of the courts proceedings (R.27) dated December 1, 1964, indicates that the court gave notice of a trial setting for December 1, 1964, to follow other cases in order on October 21, 1964, but the record does not disclose how the notice was given or to whom it was given.

On December 3, 1964, the matter came on for hearing although the third party defendant, Roberta Blake Barnum had not been served and although the defendants Earnest E. Blake and his wife were not personally present although purportedly represented by Charles M. Pickett, Attorney at Law. The record did disclose that Charles M. Pickett claimed to have given notice to the defendants to appear and the court so concluded. Without any further procedural delay, the plaintiff was allowed to put on her proof. The court delayed the matter for an additional day on the statement of Mr. Pickett

that he expected his clients at any time. No witnesses were sworn for the defendants and none testified. On December 5, 1964, the court ruled in favor of the plaintiff on her complaint and against the defendants. Mr. Charles M. Pickett then made a motion to withdrew as attorney for the defendnats, which motion was granted by the court.

On or about December 12, 1964, the defendant, Earnest E. Blake, contacted the Sheriff of Washington County at St. George, Utah, to see if his sister Roberta Blake Barnum had been served and he was then informed that a trial had already been held in the matter and the court had ruled against him.

The defendant promptly filed a motion (on his own) to vacate the judgment and for a new trial. At this hearing the defendant was represented by a Nevada attorney, and in substance and effect testified that he had not,

nor had his wife, received notice in any form as to the trial setting or hearing until approximately one week after its conclusion when he spoke with the Sheriff.

The motion to vacate the judgment and for a new trial was overruled and denied.

ARGUEMENT

POINT I

THE DEFENDANTS WERE NOT GIVEN NOTICE OF THE TRIAL SETTING AND WERE DENIED DUE PROCESS OF LAW BY REASON OF THEIR NOT BEING PRESENT TO PROSECUTE AND DEFEND IN THIS CAUSE OF ACTION. AND THE LOWER COURT ABUSED ITS DISCREATION IN NOT GRANTING A NEW TRIAL.

If the defendants were bound by the lower court decision based on the fact, concluded by the lower court, that they were represented by an atterney, they would have no real standing before this court as the record of the lower court is devoid of procedural steps to protect the defendants record, except for the Motion to Vacate said judgment and for a New Trial which was duly filed. But it is the position of the defendants that they were not given notice of the trial setting, not represented by an atterney they had selected at the time of the trial, and by reason thereof the defendants have not had their day in court, which is a basic and fundamental theory of our law. One of the

most important elements for the basis of appeal of this cause is whether or not defendants were given notice of the trial and if they were in fact represented by a person at said hearing, authorized to act for them and in their behalf in their absence. Let's examine the record below including the transcript of the trial hearing and the motion to vacate and for a new trial in some detail.

All of the pleadings filed by the defendants were in fact prepared and signed by the defendants, except for the Motion to Bring in Third Party Defendant (R.24) signed by Charles Pickett, Attorney at Law, St. George, Utah. The record also discloses that the defendants address was variously described as Las Vegas, Nevada, St. George, Utah, and 4393 Swandale Street, Las Vegas, Nevada (R.5, 10-13, 14, 21, 23) up to the date of trial, December 3, 1964. Yet at the time for hearing on this matter Mr.

Charles Pickett who purported to represent the defendants stated at the hearing on December 3, 1964, that the defendants were residents of Henderson, Nevada (Page 3, line 7-9). Again on Page 15, line 11 thru 28, Mr. Pickett stated that he had called neighbors and several places in Henderson, Nevada, to locate the defendants. On page 39 starting with line 7 Mr. Pickett stated that he had left word at Mr. Blake's place of employment and then concluded with "I don't know his address, telephone number or anything else." (Page 39 line 11 and 12). Then in response to the court's question, page 39 line 13 thru 15, THE COURT: "In any event, you personally advised him on Sunday before the trial setting and also a week previous to that?" MR. PICKETT: "That's correct, your honor."

The defendant, Earnest E. Blake, testified at the hearing on his Motion to Vacate

Judgment and for a New Trial held February 19, 1965, page 5 lines 4 thru 17, that he was not informed of the trial date and that the first occasion he was aware of the fact that a trial had been held was on December 12, 1964, when he asked the Sheriff of Washington County if the counter-claim had been served. The defendants denied throughout their testimony that they received any word from anyone concerning the trial setting. Page 11, line 12; Page 12 line 20-23; Page 13 line 9-15; Page 16 lines 18-20. Mr. Pickett also stated that he had advised the defendant of the trial setting the weekend prior to trial in his office at St. George, Utah, and also a week prior to this, The defendant admits a conversation with Mr. Pickett on November 27, 1964, in the outer room of the Pickett Law Office but the only discussion with respect to the case was to the service of the counter-claim.

Page 14 lines 20 thru 27; page 28 lines 23 thru 27. Mr. Blake also testified that he was unemployed at the time of trial and was at the Union Hall (Page 12 line 13) and could not have been called at his place of employment.

There is also the question of Mr. Pickett's authority to act and represent the defendants at the trial of this matter, The defendant, Earnest E. Blake, testified that he originally sought to retain Mr. Ellis Pickett to obtain the order joining Roberts B. Barnum, Page 4 lines 26-30 and page 5 line 1-3. Again, under cross-examination by Mr. Foremaster, attorney for the plaintiff, Mr. Blake testified that although, Charles Pickett had not been asked to withdraw his authority was limited to obtaining the joinder and service of pleading's on Roberts B. Barnum, page 11, lines 3-11.

The Utah Rules of Civil Procedure (Rule 5a) provides that all parties not in default are entitled to receive notice of any order affecting them, which of course would include a notice of trial setting. Rule 5 (b) provides that notice may be mailed to the attorney of record or to the last known address of the party. The question then remains if notice was in fact given in accordance with the rules. Were the defendants represented by an attorney upon whom service of notice could be made or were they entitled to personal notice? The defendant denies notice and there is considerable evidence to support his position. The defendants deny authority in the attorney to accept notice of trial or to represent them at the trial of the matter and there is evidence to support this contention. Although no case directly in point has been found it has been held that the unauthorized appearance of an

attorney is grounds for a direct attack upon a judgment or order entered. In the case of Hirsch Bros. Co. vs. R. E. Kennington Co., 155 Miss. 244, 124 So. 344, 88 ALR 1, a case involving the unauthorized appearance of an attorney representing a garnishee debtor, where the appearance was clearly unauthorized, the court held, "To permit a judgment taken without authority of an attorney to represent the person and make it become final and conclusive on such person seems to be throughly repugnant to all the principles of due process of law and it would be clearly the taking of property without due process of law, in that the party had no opportunity or notice to appear and be heard before the judgment was finally rendered against him." Admittedly, the cases are usually dealing with lack of jurisdiction for lack of or improper service but the same principle would apply to this case.

Rule 60 (b) of the Utah Rules of Civil Procedure provides for relief from the entry of judgment, upon motion seasonably made for various reasons, including the following: (1) Mistake, inadvertence, surprise or excusable neglect; (5) the judgment is void; or (7) any other reason justifying relief from the operation of the judgment. This motion was made within 20 days of the entry of the judgment in this matter (R. 38-45).

This particular type of proceedings, namely an action based on fraud and misrepresentation, is not a pleasant matter and particularly when it involves members of a family. It is, however, of such a nature that a person accused should be afforded the opportunity to be heard. In view of the fact that the defendants filed a verified pleading denying the accusation of the complaint and asserting other reasons for

the complaint and in view of the fact that the question of notice to the defendants is in serious doubt and the further question of the unauthorized appearance of an attorney was questioned, it is submitted that it was an abuse of the courts discretion not to relieve the defendants from the judgment rendered and to permit the defendants to be heard and to have their day in court.

POINT II

THE PLAINTIFF WAS NOT ENTITLED TO DAMAGES BEYOND HER COSTS OF COURT AS PRAYED FOR IN HER COMPLAINT.

Rule 8 (a) of the Utah Rules of Civil Procedure provides that the original claim must state the basis for relief and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

The plaintiff asked to have the instruments in question declared null and void, for their return for costs of the action and for such other and further relief as to the Court may seem fitting and proper. The court awarded the plaintiff $290.00 damages, being $29.40 court costs and $260.00 as and for attorneys fees. The plaintiff did not ask for damages in any amount other than court costs nor did she ask for attorneys fees.

It is true that Rule 54 (c) (1) permits the awarding of the relief to which the prevailing party is entitled even though not demanded in the pleadings, but the rule is limited to matters contested and it is the position of the appellant that this action was in the nature of a default judgment.

There is no contractual or statutory authority for the court to award attorneys fees.

POINT III

CASE WAS NOT COMPLETELY AT ISSUE AS AN INDESPENSIBLE PARTY HAD NOT BEEN SERVED.

The court, by order dated October 13, 1964, (R.25) joined Roberta Blake Barnum as a third party defendant and she was an indespensible party in view of the allegations of the defendants answer and counter-claim setting forth her participation in the transaction and defendants claim for damage, and more specifically because the outcome of the action could effect her property rights as it may have the effect of terminating the joint tenancy she held with her mother in the property in question.

It is true that no objection was raised to the fact that the court intended to proceed with the matter even though no service had been had on Roberta B. Barnum, but the same was true of the entire trial of the matter.

The defendant was deligent in attempting to obtain service as shown by his contacts with the Sheriff and others as to her whereabouts. The time involved in attempting to obtain service was not long, approximately six weeks, as indeed was the short duration the matter was pending before trial, approximately six months. The defendant had not previously requested a continuance nor is their any evidence in the record of any intentional delay by the defendant at any stage of the proceedings.

The court should have extended the time within which service might have been obtained on Roberta B. Barnum and the trial delayed for this purpose.

C O N C L U S I O N

The record of this matter is conflicting in many respects. There is dispute as to whether notice was given to these defendants.

A question of the authority of an attorney to act for these defendants. A question of whether or not a son took unfair and undue advantage of an aging mother or possibly only that a daughter exerted undue influence on the mother to the extent of breaking an otherwise valid agreement. But there is one thing that seems to be quite clear and that is that it cannot be said in all sincerity that these defendants ever really had their day in court on this matter, a right we all should enjoy and respect. The defendants are entitled to their DAY IN COURT.

Respectfully Submitted,

ROBERT L. GARDNER