1965

Harriet W. Blake v. Earnest E. Blake, Leta R. Blake : Brief of Respondent

IN THE SUPREME COURT
of The
STATE OF UTAH

HARRIET W. BLAKE,)
Plaintiff and Respondent.

vs.) CASE NO. 10344

EARNEST E. BLAKE, LETA R. BLAKE, his wife, et al,
Defendants and Appeallants)

BRIEF OF RESPONDENT

Appeal from the Judgement of the Fifth District Court for Washington County.

Honorable C. Nelson Day, Judge

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STATEMENT OF THE NATURE OF CASE

This was an action filed by the Respondent to set aside a certain Contract of Sale, Escrow Agreement, and Warranty Deed for the sale of certain real property by the Respondent to the Appellants on the grounds of misrepresentation and fraud.

DISPOSITION IN THE LOWER COURT

At trial the Court found the issues in favor of the Respondent and against Appellants and declared that the Contract of Sale, Escow Agreement and Warranty Deed executed by Respondent to Appellants were null and void be-

cause of fraud and misrepresentation on the part of the Appellants and granted judgement against Appellants and in favor of Respondent for $290.00 damages

RELIEF SOUGHT ON APPEAL

Plaintiff and Respondent seeks affirmance of the lower court's ruling.

STATEMENT OF FACTS

Because of significant omissions and differences the Respondent does not agree with the Statement of Facts of Appellants.

The Plaintiff and Respondent will be referred to as the Respondent and the Defendants and Appellants will be referred to as the Appellants.

On or about the 4th day of June, 1964 the Respondent filed in the District Court of the Fifth Judicial District and for Washington County a complaint against the Appellants and the Bank of St. George requesting that a certain Contract of Sale, Escrow Agreement and Warranty Deed entered into between Respondent and Appeddants be declared null and void on the grounds of fraud and misrepresentation practiced upon Respondent by Appellants (R. 1 to R. 10) Thereafter and on or about July 8, 1964 the Appellants answered said Complaint and "Counter-claimed" against one Roberta Blake Barnum. a person not a party to the original action, alleging undue influence performed by her upon the Respondent resulting in the action of Respondent and further requesting a monetary judgment against said third party for damages caused in the course of dealing previous to the one involved herein. The

Answer and Counterclaim was signed by Appellants who were evidently acting as their own attorney. (R. 16 to 19)

Thereafter, on September 28, 1964 Charles M. Pickett, Pickett and Pickett, attorneys of St. George made an appearance in the action for and in behalf of Appellants and filed a Motion to Bring in a Third Party Defendant. (R. 24) The Motion was duly heard by the court with Mr. Pickett present representing the Appellants and on the 13th day of October, 1964 the court entered its Order joining the third party. (R.25) The Order contained a provision that service upon the third party (Roberta Blake Barnum) should be expedited as the Court intended to set the matter for trial in the near future. As far as can be ascertained process was duly issued but was never served upon Roberta Blake Barnum, the third party.

On October 21, 1964 the Court set the matter for trial and at that time gave notice to the attorneys for both parties that the trial date was set for November 30, 1964 to follow other cases. (R.27) Thereafter the matter was called for trial on the morning of December 1, 1964 with the Respondent, her attorney and several witnesses for the Respondent being present and Mr. Pickett, the attorney for the Appellants being present. The Appellants were not present and did not appear during the course of the trial which was continued several times over a period of several days to allow the Appellants time to appear.

The case was continued until the afternoon of December 1, 1964 to allow the Appellants to appear and then the testimony of the Respondent and her witnesses, after stipulation by counsel, was taken by the Court in the presence of Appellants' attorney

In brief, the Respondent and her witnesses testified that on or about the 6th day of December 1963 the Appellant, Earnest E. Blake, approached Respondent and requested her to sign certain papers stating that she was witnessing his signature on certain water rights. Respondent, relying on these statements, signed them and they were taken to a Notary Public and executed by her. Thereafer the Respondent learned that she had in reality executed a Contract of Sale, an Escrow Agreement and a Warranty Deed that had the effect of selling her home to Appellants. The Respondent testified that she did not have her glasses and could not read the papers without them and therefore, had to rely on the statements of the Appellant and her son. The Respondent is an elderly woman of approximately 75 years of age. The Respondent further testified that she did not intend to enter into said agreements and was tricked into signing them and upon learning that she had signed them she went to an attorney and the present action resulted. Trial Trans. Pages 16 to 30)

After said testimony was presented the matter was taken under advisement by the court until December 1964 to give Appellants more time to appear. On December 3 it became apparent that Appellants would not appear and the Court granted judgement in favor of Respondent and against Appellants for the relief as set forth herein previously. Thereafter and on or about the 14th day of December 1964 the Court duly entered its Findings of Fact and Conclusions of Law and Judgement and notice of the same was sent to the Appellants. (R. 30,34 & 37)

On or about the 21st day of December, 1964 the Appellants filed a motion for a new trial and the same was denied

after taking of testimony of both the Appellants and Mr. Charles M. Pickett. (R.48)

ARGUMENT

POINT I

THE DEFENDANTS WERE GIVEN NOTICE OF THE TRIAL SETTING AND WERE NOT 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 DID NOT ABUSE ITS DISCRETION IN NOT GRANTING A NEW TRIAL.

The Appellants' contention in Point I of their brief apparently can be divided into two general areas, namely that (1) they were not represented by an attorney they had selected at the time of trial as the authority of the attorney that had made an appearance for and in their behalf prior to the trial setting was limited and (2) that they were not given notice of the trial setting.

The law is quite clear regarding the appearance of an attorney before a court for and behalf of a client. An attorney who appears for a party is presumed to represent him. Lowe v. Bank of Vernal, 110 U. 496, 175 P. 2nd 484 (1946) Blyth & Fargo Co. v. Swenson, et al 15 U. 345, 49 P. 1027 (1897)

That Charles M. Pickett of Pickett and Pickett, attorneys, appeared as attorney for the Appellants is without question (R.24,25,26,27; Trial Trans. Page 1, lines 24 to 26) Section 78-51-34, U.C.A., 1953 states that an attorney may be changed as set forth therein. Section 78-51-35 U.C.A. 1953 provides when an attorney is changed accord-

ing to Section 78-51-34 that a written notice must be [illegible] to the adverse party and until then "... **he must recognize** [illegible] **former attorney**." This court in the case of Salina [illegible] Coal Company v Klemm et al, 76 U 372, 290 P [illegible] in construing a predecessor statute to Section [illegible] reading substantially the same, said:

> "Our statutes seem to imply that an attorney [illegible] has appeared for a party may be treated as [illegible] by opposing counsel until opposing counsel [illegible] notified of a dismissal or change of attorney

It would seem proper and logical that a trial court [illegible] also treat an attorney of record as the attorney for the party until he is removed or withdraws

The record shows no attempt to substitute or dismiss Mr. Pickett. On the contrary, the Appellant testified he did not ask Mr. Pickett to withdraw (Trans of Motion page 10, line 26) Because of this and because of the applicable law one can only conclude that Mr. Pickett did appear as the attorney for the Appellants, did in fact have the permission to act as their attorney, (Trans. of Motion pages 4, 5 & 9) and,therefore, is presumed by law to have been the attorney for the Applellants up to and including the trial of the case before the District Court

Appellants place great stress upon the fact that the authority of Charles M. Pickett to act as their attorney was limited. In regard to this point, the law seems to be that the entry of appearance of an attorney is presumptive evidence of his authority to represent the person for whom he appears. State ex rel. Coleman v. District Court of the Judicial District in and for Beaverhead County et al (Mont

20 Mont. 372. 186 P. 2nd 91 (1947); 7 Am. Jur. 117. In addition, the law is clear that any limitation on the authority of the attorney may not be asserted by the client against one who had no knowledge of the limitation 7Am. Jur. 2nd 102.

At no place in the record is there any notice that the authority of Mr Pickett was limited simply to obtaining the order of a third party as now alleged by the Appellants. In fact the Appellant, Ernest E. Blake, testified that he did not ask Mr Pickett to withdraw after he received notice that the order joining a third party had been obtained, (Trans. of Motion page 11, lines 3 to 11) and in fact did not restrict Mr. Pickett's authority (Page 9, lines 21-23) Because of the applicable law and because of the general appearance of Mr. Pickett at the request of Appellants with no apparent limitation of his authority, it can only be found that Mr. Pickett's authority was not limited to obtaining the Order joining the third party, at least as far as the trial court and the Respondent are concerned. To hold otherwise would allow a person to retain an attorney to represent him, fail to appear at the trial of the matter, deny that the attorney had authority to represent him at trial if the trial court's decision went against him, and then obtain a dismissal or reversal of the trial court's decision in an appellant court.

The contention of the Appellants that they did not receive notice of the trial setting is with out merit. Rule 5 (b) U.R.C.P. provides that orders, notices, etc. **Shall** be served upon a party represented by an attorney by service upon the attorney. Notice to an attorney is effective as notice to the client. 7 Am. Jur. 2nd 102. In case of Sherman v. Panno. (Calif) 129 C.A. 2nd 375. 277 P. 2nd 80 (1954) the court said:

". . . during the course of a proceeding servi
of papers on the attorney of record, where se
vice upon the attorney is proper, binds the clien
until the attorney is discharged or substitute
out of the case in the manner provided by la

There is ample evidence in the record that notice t
the attorneys for both parties was given by the court (R.
The trial judge in a statement to both counsel at the ti
stated that notice had been given to counsel on Octobe
21, 1964, that that the case was set for trial on Novembe
30, 1964 to follow other cases and was actually called
hearing on Tuesday, December 1, 1964 (Page 38, lines
to 13) Mr. Pickett himself testified under oath at the hea
ing of the Appellants' motion for a new trial that he receive
notice of the trial setting from the court. (Page 24, line
14 to 19). It cannot be controverted that the attorney f
Appellants received such notice and that because of the
applicable law such notice to their attorney consti
tuted notice to the Appellants and was binding upon them

Although the evidence is in dispute the record show
that the Appellants were given notice of the trial setting b
their attorney. Mr. Pickett, a practicing attorney and a
member of the Utah Bar, stated to the trial court at the
time of trial that he had given notice to the Appellants
on the Sunday prior to the trial setting and in fact a week
prior to that. (page 39, lines 1 to 6). Mr. Pickett also state
that he made many attempts to contact Appellants bu
was unable to do so. At the hearing of Appellants motion
for a new trial. Mr. Pickett testified under oath that he gav
the Appellants notice of the trial within a two or three
week period prior to the trial setting. (page 24, lines 2 -

Mr Pickett further testified that Appellants stated they would be present (page 25, lines 1,2, & 3). The record further shows that Mr. Pickett and Mr. Blake discussed the matter several times prior to the trial. (Page 26, Lines 25,26 & 27) The record shows that the matter was set for trial on November 30, 1964 to follow other matters, that notice was given to all parties, that it was actually called December 1 1964 and that the Respondent was present with her attorney and the Appellants' attorney was present, that the matter was continued until December 3, 1964 to enable Mr Pickett to contact the Appellants and that he tried to do so Because of these facts it is apparent that ample notice of the trial setting was given to all parties including the Appellants.

It is true that a person should be entitled to his day in court. The law must be such, however, to require that orders of a court be followed and that trials and other legal procedures not be delayed because one or both of the parties do not desire to follow the rules and orders of a court of proper jurisdiction. It is respectfully submitted that the trial court did not abuse its discretion in finding that the Appellants were represented by an attorney lawfully entitled to represent them and that they had adequate notice of the trial setting and were not denied due process of law

POINT II

THE PLAINTIFF WAS ENTITLED TO DAMAGES BEYOND HER COSTS OF COURT, THE PRAYER FOR DAMAGES BEING INCLUDED IN THE GENERAL PRAYER FOR RELIEF CONTAINED IN HER COMPLAINT

Rule 54 (c) (1), U.R.C.P., permits the granting ... relief to a party who is entitled to it even if the party ... not demanded such relief in his pleadings. Based ... this provision, the trial court granted to Respondent ... judgment for damages that included attorneys fees ... though the complaint filed by the Respondent did ... specifically request the same. In this regard it should ... pointed out that Respondents' Complaint, in paragraph 4 of its prayer, requested general relief (R.4). This court in Wheelwright v. Romain, 50 U. 10, 165 P. 513, 19... said:

> ". . . in case general relief only is asked, ... relief that is supported by the pleadings and ... evidence may be granted . . ."

The California Court, in Knox v. Wolfe, 73 C.A. 2nd 6... 167 P. 2nd 3, (1946) said:

> "Under a prayer for general relief in an equitable proceeding, after an Answer has been filed, the Court may grant any relief conformable to the case made by the pleadings and the evidence although it may not be the relief asked by special prayer."

The transcript of the trial contains ample testimony to the fact that fraud, misrepresentation and deceit were practiced on the Respondent (page 18, lines 17 to 30; page 19, lines 1 to 8; page 19, lines 16 to 19, etc.). The trial court found that the acts of the Appellants were such (page 41: R. 30, 31, 32, 33). It goes without saying that such fraud and misrepresentation put Respondent to the expense of litigation including the hiring of an attorney.

Appellants in their brief make some reference to the ... that the action in the trial court was in the nature of ... default judgment, thus exempting it from the provisions ... Rule 54 (c) (1). An examination of the record, how-... will show that the attorney for the Appellants was ... present at the trial, had the opportunity to cross examine ... Respondent's witness and in fact did so, and also had ... opportunity to present evidence for and in behalf of ... Appellants if he had so desired. In a situation such as ... where an attorney is present and representing a par-... it is difficult to see how a decision of a trial court, at ... hearing, could be construed as a default judgment.

The allegation of Appellants that there was no con-...ractual, statutory or other authority for the court to award ...ttorneys fees is equally without merit. An examination ... the record will show that the Respondents' attorney ...ees were taxed as damages (R.35; Trial Tans. page 42, ...nes 6 to 13). In cases where a tortious act has caused a ...erson to incur legal expenses in an action against a third ...arty incident to the tortious act, the authorities usually ...ave held that the damaged person can recover costs, in-...luding attorneys fees, in a subsequent action against the ...rongdoer. 45 A.L.R. 2nd, 1183. We have in this case, ...owever, an initial action against the so-called wrong ...oer wherein attorneys fees were taxed as damages. In ...his regard, the Court's attention is called to the New Jer-...ey case of Feldmesser et al. v. Limberger, ... N.J. ....., ...27 A 815, 41 A.L.R. 1153 (1925). In this case the court ...eld a lower court decision granting to the Plaintiff-Respondent judgment for the costs and expenses of a suit ...r specific performance of a fraudulent contract, said con-

tract made between the Appellant and Respondent at Appellants' instigation. In arriving at this decision the New Jersey Court made the following statement

> "It is the boast of our common law that for every wrong there is a remedy, and upon this foundation is built the splendid structure of our jurisprudence."

It is the contention of the Respondent, therefore, that the trial court had every right to assess damages under the prayer for general relief contained in Respondents Complaint, said assessment to include the assessment of attorneys fees as damages. Because of the acts of Appellants Respondent was put to the necessity of taking legal action which resulted in the outlay of money to her damage. The trial Court was certainly in a position to ascertain the amount of damages as the damages awarded consisited only of coasts and attorneys fees which a trial Court is empowered by law to ascertain.

POINT III

THE CASE WAS COMPLETELY AT ISSUE AS THE THIRD PARTY MENTIONED IN THE RECORD WAS NOT AN INDESPENSIBLE PARTY AND HER PRESENCE IN THE ACTION WAS NOT NECESSARY TO DETERMINE THE ISSUES BETWEEN THE APPELLANTS AND RESPONDENT

Rule 14 (a), U.R.C.P. sets forth the situations wherein a defendant may bring in a third party. This rule states in part that a derendant may move ex parte for leave to join a thirdparty ". . . who is or may be liable to him for all or part of the plaintiff's claim against him." Rule 1

URCP states in effect that the Court shall order the presence of other parties when their presence is required for the granting of complete relief in the determination of counterclaim or cross-claim. While the question as to whether or not Roberta Blake Barnum, the alleged third party defendant or "cross-defendant" was properly joined in the trial Court is moot as far as the issues before this Court are involved it would appear that rule 14 (a) would not apply to her as the record shows that no claim for relief was made in Respondent's Complaint for which she would be liable to the Appellants and Rule 13 (g) would not apply as no counterclaim was filed by Appellants against Respondent in which any claim for relief was requested against Respondent thereby requiring the presence of another party to enable the court to grant complete relief. The issue raised herein by Appellants, therefore, would appear to be whether or not the presence of Roberta Blake Barnum in the litigation between the Appellants and Respondent was necessary to do substantial justice and to properly settle all issues raised by the original litigation.

The action brought by Respondent requested that certain instruments be declared null and void. (R. 1 to 10). Appellants there upon answered the Complaint (R. 16-17) and "counterclaimed" against both the Respondent and Roberta Blake Barnum **but requested relief therein only against Roberta Blake Barnum.** It should be noted that although the Appellants alleged undue influence against Roberta Blake Barnum for allegedly encouraging Respondent in filing her original action, the prayer for relief against Mrs. Barnum was for damages **incurred in a previous course of events** with no connection to the present litigation. It is, therefore, submitted that the pleadings do

not give rise to a situation wherein Mrs. Barnum become a necessary party to the action as set forth in Rule U.R.C.P. Mrs. Barnum did not have a joint interest in the instruments involved in the litigation and while the Appe ants may have had a claim against her for damages b cause of some previous course of action, this claim woul not appear to be sufficiently connected to the prese litigation to render Mrs. Barnum an indispensible par Rather, it would appear that any relief to be obtained b Appellants in this regard should be handled in a separa action not involving the Respondent.

It should be noted that the Appellants, in paragrap 3 of the prayer contained in the Conuterclaim (R line 32, etc.) prayed for relief that sounds in the nature a quiet title action against Mrs. Barnum. Again it is ap parent that such an action has no connection with the lawsuit filed by the Respondent and would be better han led in a separate action involving the Appellants and Mr Barnum only. In any event if the Respondent prevailed i her lawsuit, it would appear that the void instruments in volved would have no effect upon the real property de cribed therein or upon any interest Mrs. Barnum may have therein.

In addition to the fact that Mrs. Barnum was not an in dispensible party to the action, it should be noted that in the order granting permission to join Mrs. Barnum the court directed that service of process upon her be expedite as it intended to set the matter for trial in the near future (R.25). The Order shows that notice of this was mailed t counsel for both parties. This Order was dated October 1964. The record shows that the trial of the matter wa

set for November 30, 1964 to follow other matters and that notice of such was given to counsel on October 21, 1964 (Trial Trans., page 38, lines 5 to 11). The Appellants were given over six weeks to obtain process on Mrs. Barnum and were given approximately six weeks notice of the trial setting. At no place in the record does there appear any evidence that Appellants or their counsel would not be ready for trial if Mrs. Barnum were not properly brought into the action. It would appear that if Appellants seriously desired to obtain her joinder in the matter that they would have either had process served upon her or requested a continuance of the trial setting until the same could be obtained

It is submitted that Mrs. Barnum was not an indispensable party to the trial of the issues raised by Respondent's Complaint and Appellants' Answer and Counterclaim against Respondent and that the trial Court had every right to try the issues then before the Court. It is further submitted that Appellants were neither diligent in obtaining service of process upon Mrs. Barnum nor diligent in requesting a continuance so that the same could be obtained even though they were given adequate notice that the case had been set for trial.

CONCLUSION

While a party to litigation is entitled to its "DAY IN COURT", it is apparent that Appellants were offered such a 'day' but failed to take advantage of it for reasons known only to themselves. It is apparent that there are no grounds for reversal. This court should affirm.

Respectfully submitted,

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