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Burrows v. Greene

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IN THE SUPREME COURT
IN AND FOR
THE STATE OF COLORADO
79SA163

FILED IN THE
SUPREME COURT
OF THE STATE OF COLORADO
APR 16 1979
David W. Beggs

JOHN BURROWS and
GARY LAVOIE,

Petitioners,

vs.

THE HON. RICHARD D. GREENE,
Judge and
THE DISTRICT COURT IN AND
FOR THE COUNTY OF ARAPAHOE
AND STATE OF COLORADO,

Respondent.

REPLY TO PETITION FOR THE
ISSUANCE OF A WRIT
OF PROHIBITION

COMES NOW the respondent above named, the Honorable Richard D. Greene, Judge, and the District Court in and for the County of Arapahoe and State of Colorado, and replies to the Petition for the issuance of a Writ of Prohibition. The respondent has authorized the undersigned attorney, Philip A. Rouse, who was the attorney for the plaintiff in the lower court, to represent him in this matter.

The petitioner asks for a Writ of Prohibition, to prohibit the issuance of a writ of restitution by the Respondent Court. The Petition for the Writ of Prohibition is grounded upon the contention that the Respondent Court did not have jurisdiction over both defendants in the lower court action.

INTRODUCTION

The presentation by the petitioners of the proceedings in the lower court (Respondent Court) is misleading. For an accurate reference to the record, we have obtained a certified copy of the clerk's record in the Respondent Court. The certified copy is filed with respondent's reply herein. We have been unable to obtain within five days a complete transcript of the proceedings, but we have obtained a partial transcript

relating to the general appearance of both defendants and the act of eviction by one defendant under the direction of the other defendant, who lives in California. The partial transcript is filed with the records.

NATURE OF THE ACTION

Automatic Laundry Company, hereinafter referred to as plaintiff, commenced an action on March 27, 1979 by serving upon the defendants a verified Complaint with lease attached for Injunctive Relief, a Motion for Preliminary Injunction, a Notice for Setting of the Motion for Preliminary Injunction, and Summons as further shown by the return of service. The Notice for Setting specified appearance in the Respondent Court for April 2, 1979 at 2:00 o'clock P.M. By this verified Complaint, the plaintiff alleged that the defendant-owner and his agent, Gary Lavoie, had threatened to evict the plaintiff with force and without recourse to law or to the courts of this county and state. The verified Complaint further alleged that the defendants threatened to move the plaintiff's equipment into the street adjoining the property and to deny the plaintiff possession of the leased property. The plaintiff's lease under which plaintiff claimed possession was attached to each Complaint as shown in the return of service of process.

At trial the defendant, Gary Lavoie, acknowledged receiving the Summons together with all documents attached on March 27, 1979, and calling the defendant-owner who resides in California. Two days after receiving the Summons and documents, the defendants carried out their threats and forcibly evicted the plaintiff and its 24 laundry washers and dryers and miscellaneous property from the three laundry rooms.

The defendants' acts defeated the motion by the plaintiff to determine the possessory rights of the plaintiff upon a hearing

for a preliminary injunction. Since the defendants did in fact forcibly evict the plaintiff and its equipment on March 29, 1979, a setting for a hearing on the preliminary injunction on April 2, 1979 was moot. .

Thereupon, in the same action, the plaintiff filed an Amended Complaint alleging a forcible entry and detainer by the defendants and asking for possession on its first claim and for damages on its second claim. A Summons was issued by the Clerk of the Respondent Court on March 30, 1979 commanding the defendants to appear in Division 4 of the Respondent Court at 9:00 o'clock A.M. on the 9th day of April, 1979 for trial. The Summons and Amended Complaint and lease exhibit attached were served upon the defendants on April 2, 1979 as shown by the return of service.

There was no communication by the defendants or their attorney with the Respondent Court or his Clerk and no communication with the plaintiff's attorney prior to the time the Amended Complaint came on for trial in the Respondent Court at 9:00 o'clock on April 9, 1979. The defendants' attorney asserts that certain documents were hand delivered to the plaintiff's attorney. These documents were not hand delivered to the plaintiff's attorney, but may have been hand delivered to the mail slot of the office of the plaintiff's attorney after normal business hours on the Friday evening before the scheduled trial the next Monday.

The forcible entry and detainer trial for possession as previously set was called up for trial by the Respondent Court on April 9, 1979. At that time, the defendants' attorney orally stated that he was appearing generally for the defendant, Gary Lavoie, and desired to appear specially for defendant John Burrows. The Respondent Court noted that there had been no appearance entered by either defendant and there was nothing

in the Court file indicating his representation. The defendants' attorney then offered to submit a copy of his motion to the Court and asked for a forthwith hearing without any prior notice to the Court or to the attorney for the plaintiff. The Court found and ruled that the defendants' offer did not comply with the Colorado rules or the local rules of the Court. The attorney for the defendants indicated his desire to participate in the trial on the merits and thereupon entered a general appearance for both defendants. Having accepted the general appearance of both defendants by the defendants' attorney, the Respondent Court proceeded on the basis of general jurisdiction over all parties including both defendants.

The matter proceeded to trial on the merits for possession. The defendants' attorney participated in the trial on the merits on behalf of both defendants. He conducted voir dire of exhibits. He made objections. He cross-examined the plaintiff's witness. He called a rebuttal witness. He participated in the final argument.

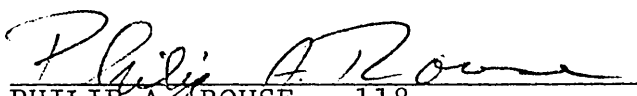
The evidence upon trial showed that the defendant-owner had notice of the plaintiff's lease; that he had been delivered a copy of the plaintiff's lease at the time he purchased the subject property; that he had accepted the monthly rental payments paid pursuant to the lease terms since he purchased the property in November of 1977. The plaintiff had recently installed substantial leasehold improvements consisting of new ducts for their equipment. Other evidence established that the plaintiff had fully complied with all terms of the lease to be performed by it. The testimony established that the defendants had not served a written notice to vacate of any kind at any time upon the plaintiff.

Defendant Lavoie testified that the defendant Burrows had specifically authorized and directed him to evict the plaintiff

and its equipment from the three laundry rooms before he was served with the first Complaint. Having received the Complaint, defendant Lavoie again talked to the defendant Burrows, who again authorized and directed him to evict the plaintiff and its equipment. Defendant Lavoie testified that defendant Burrows was his boss and that he carried out the eviction of the plaintiff and personally removed the equipment pursuant to the authority and instructions of the defendant Burrows. Defendant also testified concerning possession to the effect that he had reviewed the files of the defendant Burrows and that he did not find the plaintiff's lease in the files. At the conclusion of the trial and following oral argument to the Respondent Court, the Court announced findings and conclusions from the bench and entered judgment for the plaintiff for possession. The Writ of Restitution was stayed pursuant to this Court's order..

The Petition for the Issuance of a Permanent Writ of Prohibition should be denied and the temporary Writ should be dissolved.

Respectfully submitted,


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