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Burrows v. Greene

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IN THE SUPREME COURT
IN AND FOR
THE STATE OF COLORADO

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.

MEMORANDUM BRIEF IN SUPPORT OF PETITION
FOR ISSUANCE OF A WRIT OF PROHIBITION

COME NOW the above named Petitioners, by and through their counsel, J.
REID LICHTENFELS, COPLAN AND LICHTENFELS, and offer the following Memorandum
Brief in Support of their Petition for the Issuance of a Writ of Prohibition.

I. WRIT OF PROHIBITION IS AN APPROPRIATE REMEDY
WHEN INFERIOR COURT HAS ACTED IN EXCESS OF IT'S JURISDICTION

That a Writ of Prohibition is the proper remedy when an inferior tribunal
has acted or is threatening to act in excess of its jurisdiction is undisputed
in Colorado. Carlson v. District Court, 116 Colo. 330, 180 P.2D 525 (1947).
Kellner v. District Court, 127 Colo. 320, 256 P.2D 887 (1953). Bustamante v.
District Court, 138 Colo. 97, 329 P.2D 1013. Treadwell v. District Court,
133 Colo. 520, 297 P.2D 891 (1956).

II. THE DISTRICT COURT LACKS JURISDICTION OVER THE SUBJECT MATTER
AND THE PERSONS OF THE DEFENDANTS IN THIS ACTION

In a proceeding under Article 40 of the Colorado Revised Statute, 1973
as amended, service of the summons must be made in compliance with 13-40-112,
C.R.S. as amended. That statute does provide a means by which the Court may
acquire jurisdiction over the subject matter of the action without requiring
jurisdiction over the person(s) of the Defendant, through utilization of service
by posting, providing same is done by the Sheriff of the County. No such service
by posting was effected in this case. In lieu of such service by the Sheriff,
the only way that the Court may acquire jurisdiction over the persons of the
Defendant and over the subject matter of the action is by personal service in
accordance with Rule 4 of the Colorado Rules of Civil Procedure. Rule 4 C.R.C.P.
requires that personal service upon a natural person over the age of eighteen

(18) years may be obtained "...by delivering a copy or copies thereof to him personally, ..., or at his usual place of business with his stenographer, bookkeeper, or chief clerk; or by delivering a copy to an agent authorized by appointment or by law to receive service of process;". In the instant case the return of service indicates that service was had personally on one Gary Lavoie, Petitioner herein, and that the service which allegedly brings the Defendant, John Burrows, within the jurisdiction of the Court was also had on said Gary Lavoie. Gary Lavoie is a maintenance man who does not and has never occupied a position as stenographer, bookkeeper, or chief clerk. Further, Gary Lavoie is not an agent authorized by appointment. Gary Lavoie testified on April 9th, 1979, to all the above facts.

The Court likewise did not obtain jurisdiction over the subject property, in that its service was not in compliance with 12-40-112. Testimony on April 9th, 1979, reflected that Gary Lavoie, the only party who was personally served with any process in this action, owns no interest in the subject property, does not live at subject property, and merely works there as an employee of Petitioner, John R. Burrows.

The Court, Hon. Richard D. Green, despite being apprised of the jurisdictional defects which existed in the instant case, failed to make any findings of jurisdictional facts prior to proceeding with its hearing on April 9th, 1979, and subsequently entering judgment thereon. The Court was specifically made aware of the defects, yet refused to consider them due to a strained, inequitable, and arbitrary interpretation and enforcement of a local Court rule. That the Court must find jurisdictional facts prior to proceeding to trial is also undisputed in Colorado. Guthrie v. Barda et al., 188 Colo. 124, 533 P.2nd 487 (1975).

III. CONCLUSION

Without the granting of the requested Writ of Prohibition, mandating the vacating of the void judgment entered by the District Court in and for the County of Arapahoe, and prohibiting execution thereon, the Petitioner, John R. Burrows, will be subjected to forcible removal of his personal property from his own real property. Gary Lavoie, as testimony indicated on April 9th, 1979, bears no relationship other than that of an employee, to John R. Burrows, and owns no interest in the property. If the judgment for possession is

said judgment and directing the Clerk of the Court to issue a Writ of Restitution upon the expiration of forty eight (48) hours from the date of judgment. Counsel herein renewed his Motion to Quash Service, and moved to dismiss the complaint as against the Defendant, Gary Lavoie. The Court, Hon. Richard D. Greene, refused to grant either motion and recessed the Court.

II. Circumstances Which Render It Necessary and Proper
That the Supreme Court Exercise Its Original Jurisdiction

The District Court in and for the County of Arapahoe and State of Colorado, Hon. Richard D. Greene, has proceeded to enter judgment upon which execution will issue on the 11th day of April, 1979, even though it had no jurisdiction over the subject matter or the parties in the action before it. Execution on said judgment will result in the Clerk of the District Court in and for the County of Arapahoe issuing a Writ of Restitution directing the Sheriff for the County of Arapahoe to forcibly remove from the premises which are described in the complaint, personal property belonging to the Petitioner John R. Burrows, with a value in excess of \$12,000.00 and will do irreparable harm to the Petitioner. The Petitioners have no adequate or speedy remedy at law, and their only possible relief will be that in the nature of the issuance of a Writ of Prohibition, and or Mandamus, as the case may be.

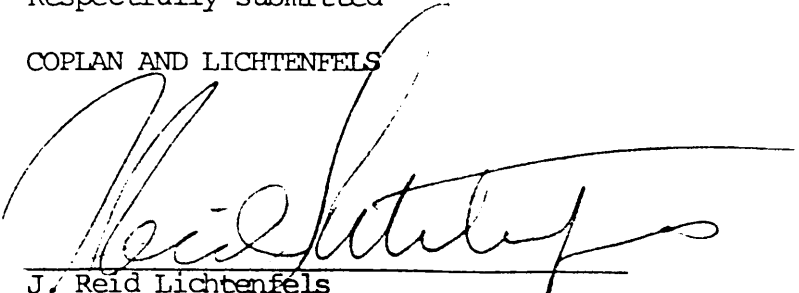
III. Type of Relief Sought

The Petitioners request this Honorable Supreme Court to issue a Writ of Prohibition requiring that the District Court in and for the County of Arapahoe, Hon. Richard D. Greene, vacate the void judgment for possission hereinbefore entered, prohibiting the Clerk of the District Court in and for the County of Arapahoe and State of Colorado from issuing any Writ of Restitution pursuant to the void judgment hereinbefore entered, and requiring the Clerk of that Court to rescind and revoke any Writ of Restitution which may have heretofore and hereafter issue. Further, Petitioners request that this Honorable Court order that Petitioner Gary Lavoie be allowed to file an answer to the Complaint, and that the alleged service of Process on John Burrows, Petitioner herein be quashed

DATED this 10th day of April, 1979.

Respectfully submitted

COPLAN AND LICHTENFELS


J. Reid Lichtenfels

AFFIDAVIT

I, Virginia Byrnes, being duly sworn upon my oath, depose and say:

That I have examined thoroughly the Court's file in Civil Action No. 79CV505, wherein John Burrows and Gary Lavoie are Defendants and Automatic Laundry is Plaintiff, and the attached Summonses and Returns of Service thereon are the only Summonses and Returns in said file.

Dated April 10, 1979

Signed Virginia Byrnes

The above named Virginia Byrnes, personally known to me, appeared before me this 10th day of April, 1979, and subscribed this affidavit and swore to the truth of the matters herein.

My Commission Expires March 23, 1983

Robert J. Healey
Notary Public

MAR 30 AM: 38

IN THE DISTRICT COURT

IN AND FOR

CLERK COUNTY OF ARAPAHOE

AND STATE OF COLORADO

Civil Action No. 79-1505 Div.

AUTOMATIC LAUNDRY COMPANY,
a Colorado corporation,

Plaintiff.....

vs.

JOHN BURROWS and GARY

LAVOIE,

Defendant.s.....

SUMMONS

THE PEOPLE OF THE STATE OF COLORADO
TO THE ABOVE NAMED DEFENDANT.....S., GREETINGS:

You are hereby summoned and required to file with the clerk an answer to the complaint within 20 days after service of this summons upon you. If you fail so to do, judgment by default will be taken against you for the relief demanded in the complaint.

If service upon you is made outside the State of Colorado, or by publication, or if a copy of the complaint be not served upon you with this summons, you are required to file your answer to the complaint within 30 days after service of this summons upon you.

Warning: If this summons does not contain the docket number of the civil action, then the complaint may not now be on file with the clerk of the court. The complaint must be filed within ten days after the summons is served, or the court will be without jurisdiction to proceed further and the action will be deemed dismissed without prejudice and without further notice. Information from the court concerning this civil action may not be available until ten days after the summons is served.

This is an action* as more fully set forth in the attached Complaint
for injunctive relief.

Dated March 27, 1979

Clerk of said Court

By

Deputy Clerk

Attorney for Plaintiff

PHILIP A. ROUSE - 118
1000 Capitol Life Center

Address of Attorney

Denver, CO 80203 861-1100

(Seal of Court)

*This summons is issued pursuant to Rule 4, C.R.C.P., as amended. If the summons is published or served without a copy of the complaint, after the word "action" state the relief demanded. If body execution is sought the summons must state, "This is an action founded upon tort."

STATE OF }
County of } ss.

I hereby certify that I have duly served the within summons this day of
....., 19, by*

STATE OF COLORADO }
City and County of Denver } ss.

..... Kenneth B. Elazier, the affiant, being sworn, says:
that affiant is over the age of eighteen years and is not a party to this action; and that affiant has duly
served the within summons by* handing and delivering to GARY LAVOIE personally, a
true and correct copy of the within Summons, together with a true and correct
copy of Complaint, Exhibit, Motion for Preliminary Injunction, and Notice fo
Setting, attached thereto; at 8851 East Florida Avenue, County of Arapahoe, State
of Colorado, on March 27, 1979, at 2:34 PM.

.....
Kenneth B. Elazier

Subscribed and sworn to before me this 28th day of March, 19 79

My commission expires October 25, 1981.

(Seal of Notary)

.....
Notary Public.

*State date, place, and manner of service.

EXPENSE OF SERVICE

Fees \$ 9.00

Mileage \$ 9.00

Total \$ 18.00

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IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF ARAPAHOE
FILED

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FILED IN THE
DISTRICT COURT
ARAPAHOE COUNTY, COLORADO

79 MAR 30 AID 38

EILEEN J. HARRIS
CLERK

IN THE DISTRICT COURT

IN AND FOR

COUNTY OF ARAPAHOE

AND STATE OF COLORADO

Civil Action No. 79CV505 Div.

AUTOMATIC LAUNDRY COMPANY,
a Colorado corporation,

Plaintiff.....

vs.

JOHN BURROWS and GARY

LAVOIE,

Defendants.....

SUMMONS

THE PEOPLE OF THE STATE OF COLORADO
TO THE ABOVE NAMED DEFENDANT.....S., GREETINGS:

You are hereby summoned and required to file with the clerk an answer to the complaint within 20 days after service of this summons upon you. If you fail so to do, judgment by default will be taken against you for the relief demanded in the complaint.

If service upon you is made outside the State of Colorado, or by publication, or if a copy of the complaint be not served upon you with this summons, you are required to file your answer to the complaint within 30 days after service of this summons upon you.

Warning: If this summons does not contain the docket number of the civil action, then the complaint may not now be on file with the clerk of the court. The complaint must be filed within ten days after the summons is served, or the court will be without jurisdiction to proceed further and the action will be deemed dismissed without prejudice and without further notice. Information from the court concerning this civil action may not be available until ten days after the summons is served.

This is an action* as more fully set forth in the attached Complaint for injunctive relief.

Dated March 27, 1979

Clerk of said Court

By Deputy Clerk

Philip A. Rouse
Attorney for Plaintiff
PHILIP A. ROUSE - 118
1000 Capitol Life Center
Address of Attorney
Denver, CO 80203 861-1100

(Seal of Court)

STATE OF _____ }
County of _____ } ss.

I hereby certify that I have duly served the within summons this _____ day of _____, 19____, by*

STATE OF _____ COLORADO _____ }
City and County of _____ Denver _____ } ss.

Kenneth B. Elazier _____, the affiant, being sworn, says: that affiant is over the age of eighteen years and is not a party to this action; and that affiant has duly served the within summons by* handing and delivering to GARY LAVOIE personally, as Agent for JOHN BURROWS, as an individual, a true and correct copy of the within Summons, together with a true and correct copy of Complaint, Exhibit, Motion for Preliminary Injunction, and Notice for Setting, attached thereto; at 8851 East Florida Avenue, County of Arapahoe, State of Colorado, on March 27, 1979, at 2:54 PM. Gary LaVoie being over the age of eighteen years.

Kenneth B. Elazier
Kenneth B. Elazier

Subscribed and sworn to before me this 28th day of March, 1979.

My commission expires October 25, 1981.
(Seal of Notary)

Samona K. King
Notary Public.

*State date, place, and manner of service.

EXPENSE OF SERVICE	
fees	\$ 9.00
fileage	
total	\$ 9.00

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IN THE DISTRICT COURT IN AND FOR THE

COUNTY OF ARAPAHOE

STATE OF COLORADO

Civil Action No. 79CV505 Div. 4

FILED

APR 9 1979

EILEEN M. MANNING
CLERK OF THE DISTRICT COURT
ARAPAHOE COUNTY, COLO.AUTOMATIC LAUNDRY COMPANY,
a Colorado corporation,

Plaintiff,

vs.

JOHN BURROWS and GARY
LAVOIE,

Defendants.

MOTION TO QUASH SERVICE OF
PROCESS

COME NOW the Defendants, by and through their attorneys, COPLAN AND LICHTENFELS, and appearing specially and for purpose of this Motion only, move this Honorable Court to quash, set aside, and hold void the purported summons and service thereof, and as grounds therefore, state, allege and aver as follows:

1. That defective service was obtained by means of serving an improper party or representative of a party to this action.
2. That this defective service was obtained by means of tendering to a maintenance man on the premises of Sundance Apartments a copy of the Summons and Complaint in this action.
3. That said service is faulty on the basis of C.R.C.P. four (e) (1) which states that personal service upon a natural person shall be made by delivering a copy thereof to him personally, or by leaving a copy thereof at his home with some member of his family, or at his place of business, with his stenographer, bookkeeper, or chief clerk; or by delivering a copy to an agent authorized by appointment or by law to receive service of process.
4. That service upon a maintenance person at a place of business does not qualify as perfect service under said rule, and that therefore service was not obtained upon the Defendant, and that the attempted service thereof is void and of no effect.

WHEREFORE, having fully stated the grounds for their Motion to Quash Service of Process, the Defendants hereby move to quash said Service of Process.

Respectfully submitted,

COPLAN AND LICHTENFELS

By J. Reid Lichtenfels
J. Reid Lichtenfels #5819
Attorney for Defendants
50 South Steele Street, Suite 750
Denver, Colorado 80209
Telephone: 399-7002

CERTIFICATE OF HAND DELIVERY

I hereby certify that I have on this 6th day of April, 1979, hand delivered a true and correct copy of the Motion to Quash Service of Process to the following:

Philip A. Rouse
1000 Capital Life Center
Denver, Colorado 80203

Virginia Bynnes

FILED

IN THE DISTRICT COURT IN AND FOR THE

APR 9 1979

COUNTY OF ARAPAHOE

STATE OF COLORADO

EILEEN M. MANNING
CLERK OF THE DISTRICT COURT
ARAPAHOE COUNTY, COLO.

Civil Action No. 79CV505 Div. 4

AUTOMATIC LAUNDRY COMPANY,
a Colorado corporation,

Plaintiff,

vs.

JOHN BURROWS and GARY
LAVOIE,

Defendants.

MEMORANDUM BRIEF IN SUPPORT
OF MOTION TO QUASH SERVICE OF PROCESS

MEMORANDUM BRIEF

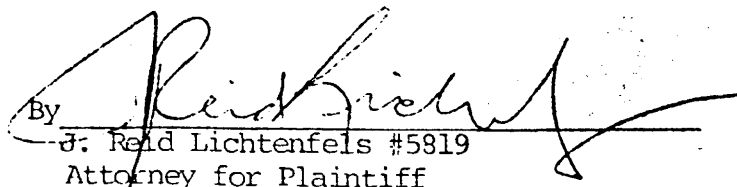
COME NOW the Defendants, by and through their attorneys, COPLAN AND LICHTENFELS, and submit unto this Court their Memorandum Brief in Support of their Motion to Quash Service of Process:

The service of a summons and complaint upon one who does not qualify as the person named as a party to the action, a member of his family over the age of eighteen (18) years, or with his stenographer, bookkeeper or chief clerk, or an authorized agent does not constitute perfect service under Rule 4, C.R.C.P., which states: "Personal service within the state shall be as follows: Upon a natural person over the age of eighteen (18) years by delivering a copy or copies thereof to him personally, or by leaving a copy or copies thereof at his dwelling house or usual place of abode, with some member of his family over the age of eighteen (18) years, or at his usual place of business, with his stenographer, bookkeeper, or chief clerk; or by delivering a copy to an agent authorized by appointment or by law to receive service of process . . ." The service upon a maintenance person at the business residence of the Defendants is therefore void.

Respectfully submitted,

COPLAN AND LICHTENFELS

By


J. Reid Lichtenfels #5819

Attorney for Plaintiff

50 South Steele Street, Suite 750

Denver, Colorado 80209

Telephone: 399-7002

CERTIFICATE OF HAND DELIVERY

I hereby certify that I have on this 6th day of April,
1979, hand delivered a true and correct copy of the Memorandum Brief in
Support of Motion to Quash Service of Process to the following:

Philip A. Rouse
1000 Capital Life Center
Denver, Colorado 80203

Virginia Byrnes

IN THE DISTRICT COURT IN AND FOR THE

FILED

COUNTY OF ARAPAHOE

APR 9 1979

STATE OF COLORADO

Civil Action No. 79CV505 Div. 4

EILEEN M. WANNING
CLERK OF THE DISTRICT COURT
ARAPAHOE COUNTY, COLO.

AUTOMATIC LAUNDRY COMPANY,
a Colorado corporation,

Plaintiff,

vs.

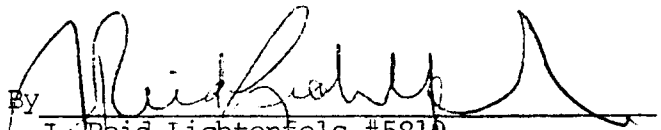
JOHN BURROWS and GARY
LAVOIE,

Defendants.

NOTICE OF FORTHWITH HEARING

COME NOW the Defendants, by and through their attorneys, COPLAN AND LICHTENFELS, and hereby give notice to the parties to the action of a forthwith hearing to be held at 9:00 a.m. on April 9, 1979, on Plaintiff's Motion to Quash Service of Process, when and where you may be present if you so desire.

COPLAN AND LICHTENFELS

By 
J. Reid Lichtenfels #5810
Attorney for Defendants
50 South Steele Street, Suite 750
Denver, Colorado 80209
Telephone: 399-7002

CERTIFICATE OF HAND DELIVERY

I hereby certify that I have on this 6th day of April, 1979, hand delivered a true and correct copy of the Notice of Forthwith Hearing to the following:

Philip A. Rouse
1000 Capital Life Center
Denver, Colorado 80203

