12-18-1983

Broyles v. Ft. Lyon Canal Co.

SUPREME COURT, STATE OF COLORADO

Case No. 83 SA 456

DEC [illegible]

BRIEF FOR APPELLANT

JAKE O. BROYLES,

Plaintiff and Appellant

vs.

1. FT. LYON CANAL COMPANY,

2. SOUTHEASTERN COLORADO WATER CONSERVANCY DISTRICT,

3. ROBERT JESSE, Division Engineer for Water Division No. 2,

4. STATE OF COLORADO NATURAL RESOURCES SECTION,

Defendants and Appellees.

APPEAL FROM ORDER FOR SUMMARY JUDGMENT ENTERED SEPTEMBER 19, 1983 BY THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 2, STATE OF COLORADO

HONORABLE JOHN R. TRACEY
WATER JUDGE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

COLORADO RULES OF CIVIL PROCEDURE

STATEMENT OF THE ISSUE

I.

WHETHER THE DECISION IN DEBEQUE VS. ENEWOLD REQUIRES DISMISSAL OF THE APPLICATION

STATEMENT OF THE CASE

Appellant will be referred to as "Broyles"; Appellees Southeastern Colorado Water Conservancy District as "Southeastern", the Fort Lyon Canal Company as "Fort Lyon" and Robert W. Jesse, Division Engineer for Water division No. 2, will be referred to as "Division Engineer".

Broyles, together with his former wife, Mary A. Broyles, obtained a Decree in the Division 2 Water Court on February 14, 1975 which awarded Broyles and his wife Absolute and Conditional Water rights to five wells located in Bent County, Colorado. The Decree provided that as to any Conditional Water Right awarded, the owners should file an Application for Quadrennial Finding of Reasonable Diligence with the Water Clerk during the month of February, 1979 (Record, Vol. 1. pg. 151 ff.).

Pursuant to C.R.S. 1973, 37-92-305(7), the Clerk of the Water Court gave Notice that the Applicants should file an Application for Quadrennial Finding of Reasonable Diligence during the month of February, 1979, (Record, Vol. 1, pg. 155). The Notice was mailed by certified mail, return receipt requested, to the Applicants, and by regular mail to their attorney (Record, Vol. 1, pg. 156). The certified mail was receipted for by Mary A. Broyles, one of the Applicants at that time, and as indicated, the former wife of Broyles, (Record, Vol. 1, pg. 157). For the reasons hereinafter discussed, no Application for Quadrennial Finding of Reasonable Diligence was filed during February, 1979 and on March 15, 1979, the then Water Judge, the Honorable John C. Statler, entered an Order Cancelling the Conditional Water rights (Record, Vol. 1, pg. 158).

Applicants, on April 3, 1979, pursuant to C.R.C.P. 60(b) filed a Motion for Relief from the Judgment cancelling the Water Rights on the grounds of inadvertence, excusable neglect, and for the further reason that Broyles suffered from a medical condition which prevented him from normally attending to his business in that he had no recollection of the Notice from the Court, no recollection of seeing it, and no recollection of any conversations with his attorney with regard to the Notice (Record, Vol. 1, pg. 159). Judge Statler, on April 17, 1979, considered the Motion, and entered an Order Setting Aside the Order of Cancellation which he had entered on March 15, 1979 and ordered that Applicants should have to and including May 10, 1979 within which to file an Application for the Quadrennial Finding of Reasonable Diligence or to make Conditional Water Rights Absolute, as the case may be (Record, Vol. 1, pg 164). Broyles and his wife then filed the Application to make Absolute the Conditional Water Right, and an Application for Quadrennial Finding of Reasonable Diligence, which is case No. 79CW73.

The original Decree entered February 14, 1975, the Notice from the Clerk, the Order Cancelling the Conditional Water Rights, and the Order Setting Aside the Order of Cancellation were all entered in Case No. W-2695. None of the Objectors had entered any appearance of any nature whatsoever in that case; it was only after Broyles and his wife filed their Application to Make Absolute the Conditional Water Rights and for Quadrennial Finding of Reasonable Diligence in Case No. 79CW73 that any of them appeared.

The Statement of Opposition filed on behalf of Southeastern in Case No. 79CW73 does not raise the defense or objection of Statute of Limitations or of any objection under Section 37-92-301(4), C.R.S. (Record, Vol. 1, pg. 35 ff.). Similarly, the Statement of Opposition filed by Fort Lyon (Record, Vol. 1, pg. 41 ff.), says nothing about the Statute of Limitations nor Section 301(4).

After the Statements of Opposition were filed, the decision in DeBeque v. Enewold, 199 Colo. 110, 606 P.2d 48 (1980) was announced and then Southeastern filed a Motion for Summary Judgment (Record, Vol. 1, pg. 60 ff.) in which for the first time it was alleged that Applicants failed to file their application for Reasonable Diligence within the "Statute of Limitations".

The Motion for Summary Judgment filed by Southeastern came on for hearing before Judge Tracey on September 13, 1983, after which he entered the Order for Summary Judgment (Record, Vol. 1, pg. 116 ff.) and in which he dismissed the Application which Judge Statler had permitted Broyles to file.

Broyles appeals this Order for Summary Judgment.

SUMMARY OF THE ARGUMENT

I.

WHETHER THE DECISION IN DEBEQUE vs. ENEWOLD REQUIRES DISMISSAL OF THE APPLICATION

The case of DeBeque vs. Enewold was announced in February 1980 - a period of ten months after Broyles had obtained an order from the Water Court setting aside the order cancelling his conditional water rights; yet the rule announced in the case was retroactively applied by the present Water Judge to dismiss an Application for Diligence that the former Water Judge gave Broyles permission to file.

It was improper for the present Water Judge to review and reverse the order entered by the previous Water Judge.

Even if DeBeque should be applied, the facts and the law in the case at bar distinguish it from those in the DeBeque case.

Decisions of the Supreme Court should be prospectively and not retroactively applied.

If DeBeque is applied as a statute of limitations, the statute of limitations is tolled or not strictly applied when a person is unable to manage his business.

ARGUMENT

I.

WHETHER THE DECISION IN DeBEQUE v. ENEWOLD REQUIRES DISMISSAL OF THE APPLICATION

The decision in DeBeque v. Enewold, 199 Colo. 110, 606 P.2d 48 (1980) was announced on January 21, 1980 and a rehearing was denied February 25, 1980, a period of some ten months after the order of April 17, 1979 was entered by Judge Statler in which he extended to May 10, 1979 the time for Broyles to file his application in 79CW73.

Broyles respectfully contends that DeBeque should not control the case at bar for two reasons: (1) the decision was announced after Broyles had obtained an order permitting him to file an application for diligence; and (2) the facts and the statute are different.

The decisions of the highest court in the State must be prospective in nature rather than retroactive. Countless times a decision will be entered which will clarify or interpret the law upon a given point, but it must surely not be the law that when a decision is announced it should be used to retroactively correct every decision that might already have been erroneously entered in every case under a different interpretation. If the new decision can be used to retroactively correct every erroneous judgment previously entered, how far back can the new decision be applied? The Court sometimes "specifically overrules" a decision upon which the bench and bar have relied for years; does this mean that all those cases which have been decided under the rule which is now "specifically overruled" are to be re-done?

Broyles respectfully calls attention to the dissent by Justice Groves in Southeastern Colorado Water Conservancy District, et. al., vs. Shelton Farms, Inc., 187 Colo. 181 at 192, 529 P.2d 1321 (1975) wherein he served notice that if the General Assembly did not act within a reasonable time he hoped the matter would be brought to the Court again at which time he would urge a reversal. If that should happen, would it be proper for the present water judge to reverse the decision there and decree the water rights?

In Kelly Ranch vs. Southeastern Colorado Water Conservancy District, et. al., 191 Colo. 65, 550 P.2d 297 (1976), Southeastern argued that Senate Bill No. 7, although adopted law, should not apply to the case because it was adopted after the hearings commenced. Here, however, Southeastern argues that a pronouncement of the Supreme Court should retroactively be applied to set aside a judgment entered ten months previously.

In the case at bar, Judge Statler had entered a decision permitting Broyles to file his application. The decision had become final under any applicable rules. In discussing it, Judge Tracey simply says:

> . . . The Order in W-2695 setting aside the concellation was made ex parte and before the decision . . .

in DeBeque.

Broyles respectfully submits that Judge Tracey was without jurisdiction to rule upon Southeastern's Motion for Summary Judgment, at least insofar as that Motion called into question the correctness of Judge Statler's entering the Order Setting Aside the Order of Cancellation. It is not controverted that, at the time the Order Setting Aside the Order of Cancellation was entered, the Court had jurisdiction of the parties and the subject matter; therefore, "every presumption is indulged in favor of the regularity of the entry of its judgment. ...If the judgment is erroneous it may be corrected by review on writ of error." Cherry Hill vs. The Benevolent League of Colorado Travelers Association, 133 Colo. 349, 295 P.2d 231 (1956) at 350. The Court in Cherry Hill, supra, then continued, stating:

> The jurisdiction of a district court is fixed by Constitution, which gives it original jurisdiction of all cases at law and equity and such appellate jurisdiction as may be conferred by law. This appellate jurisdiction does not extend to a review of the decision and judgments of a court of co-ordinate jurisdiction or of a judge of such court.

This general proposition, that a district court does not have authority to set aside a judgment of the same or another equal court, unless that judgment be void, has many times been adhered to by this Court. See, for example, DeBoer vs. District Court, 184 Colo. 112, 518 P.2d 942 (1974); Estate of Bonfils vs. Davis, 190 Colo. 70, 543 P.2d 701 (1975).

There being no question that Case No. W-2695 was properly before the court, the judgment therein entered was not void, and could only properly be reviewed by the Supreme Court. In effect, Judge Tracey's Order allowing Summary Judgment in 79CW73 is an appellate review and reversal, albeit sub silentio, and should not be allowed.

DeBeque involved conditional water rights that had been decreed in 1959, but no application for reasonable diligence was made until 1977, a period of 18 years. DeBeque could have applied under a different statute then in effect in any one of those years. Under the statute governing the case at bar Broyles could have applied only in February, 1979 - a period of one month.

There was no order entered by the Court, as here, extending the period within which the application might be made.

In DeBeque, the Court said that it was for the "General Assembly and not the courts to remedy the situation which was done in 1975." referring to the 1975 Amendment to Section 37-92-305(7) which provides:

> Prior to the cancellation or expiration of a conditional water right granted pursuant to a conditional decree, the court wherein such decree was granted shall give notice. . .

The Court said that DeBeque's

> . . . argument that Section 305(7) is meaningless, if, at the time of its enactment, a conditional water rights holder had no right to an evidentiary hearing prior to any judicial cancellation of such right, is not without merit under a different factual situation.

Broyles submits that his case presents such a "different factual situation". Although the Court had entered the judgment cancelling his rights, the judgment was set aside when the Court learned the true situation, and Broyles was given a further time within which to file his application.

If the Court had the authority to enter the order cancelling the water rights, it surely had the authority to set its order aside. Bannerot v. McClure, 39 Colo. 472 at 479, 90 Pac. 70, (1907) states:

> A motion to vacate and set aside a default is addressed to the sound discretion of the court, and the order of the trial court will not be disturbed unless it clearly appears that there was an abuse of such discretion.

The summary judgment entered herein characterizes Section 301(4) as a statute of limitations; this follows DeBeque's holding that it can be "considered" as such. Following that line of thought, Broyles respectfully submits that a statute of limitations is tolled for a period while a person is under a disability. Section 13-81-103(1) provides that a statute of limitations does not immediately commence to run against a person under a disability and Section 13-81-101 defines a "person under disability" to include "minors, mental incompetents, and a person under any other legal disability". The disability of Broyles was pointed out to Judge Statler in the Motion for Relief from Judgment (Record, Vol. 1, pg. 159 ff.).

The Court has held in Browne v. Smith, Conservator, 119 Colo. 469, 205 P.2d 239 (1949) that, to show a tolling of the statute, it is not necessary to show insanity, and that if one is unable to manage his affairs, the statute should be tolled. In this case, Broyles made a verified motion setting forth his condition and requested, in the alternative, relief from the judgment, or an opportunity to be heard on the motion. The Court thereupon entered the order without requiring further proof.

Further, the statute of limitations is not strictly applied in a case where to do so would violate equitable concepts. Klamm Shell v. Berg, 165 Colo. 540, 441 P.2d 10 (1968)

CONCLUSION

It is respectfully submitted that the Honorable Water Judge should not have applied the reasoning of DeBeque to the case at bar and if applicable, the question of the tolling of the "statute of limitations" should have been considered because of the "medical condition" of Broyles. The Summary Judgment entered on September 19, 1983 should be reversed.

Respectfully submitted:

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SUPREME COURT, STATE OF COLORADO

Case No. 83 SA 456

CERTIFICATE OF MAILING

JAKE O. BROYLES,

Plaintiff and Appellant,

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3. ROBERT JESSE, Division Engineer for Water Division No. 2,

4. STATE OF COLORADO NATURAL RESOURCES SECTION,

Defendants and Appellees.

The undersigned does hereby certify that he has on this 18 day of December, 1983, placed in the United States mail, postage prepaid, a copy of the within enclosed Brief for Appellant and Certificate of Mailing relative to the captioned matter and addressed as follows to the following:

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