

CHAVEZ V. ATKINSON, 1967-NMCA-005, 78 N.M. 130, 428 P.2d 985 (Ct. App. 1967)

MANUEL CHAVEZ, Plaintiff-Appellant
vs.
GAYNOR E. ATKINSON, PRESTON STRUNK a/k/a PRESTON COLBY and
WESTERN SURETY COMPANY, a corporation,
Defendants-Appellees

No. 28

COURT OF APPEALS OF NEW MEXICO

1967-NMCA-005, 78 N.M. 130, 428 P.2d 985

May 29, 1967

Appeal from the District Court of Bernalillo County, Reidy, Judge

COUNSEL

ROZIER E. SANCHEZ, EUGENE E. KLECAN, Albuquerque, New Mexico, Attorneys for Appellant.

JOHN P. DUFFY, FARLOW & DUFFY, Albuquerque, New Mexico, Attorneys for Appellees Atkinson and Western Surety Co.

PRESTON STRUNK, pro se.

JUDGES

WOOD, Judge, wrote the opinion.

WE CONCUR:

E. T. Hensley, Jr., C.J., Waldo Spiess, J.

AUTHOR: WOOD

OPINION

WOOD, Judge.

{1} Atkinson is a justice of the peace and Western Surety Company is his surety. Atkinson issued a writ of execution directed against the goods and chattels of plaintiff. The writ was given to Strunk for service. The amended complaint seeks damages for

assault, battery and false arrest alleged to have been committed by Strunk while serving the writ. It is alleged that Atkinson acted beyond the scope of his authority in giving the writ to Strunk for service and that Atkinson knew or should have known that Strunk was not authorized to serve the writ.

{2} Summary judgments were entered in favor of Atkinson and Western Surety Company. The action against Strunk is pending in the trial court.

{3} Plaintiff seeks reversal of the summary judgments. He contends that Atkinson and his surety are liable for the alleged wrongful and illegal actions of Strunk because Atkinson's actions were in excess of his authority as a justice of the peace.

{4} We do not reach this contention. If there can be any liability on the part of Atkinson and his surety under the facts alleged, such liability would be dependent upon the establishment of the acts alleged to have been committed by Strunk; thus, determination of the issues between plaintiff and Strunk will affect the final determination {131} of the issues between plaintiff and the dismissed defendants.

{5} In this situation, the present appeal is premature. The summary judgments are not presently appealable because they are not final judgments (§ 21-2-1(5)(1), N.M.S.A. 1953) nor orders which practically dispose of the merits of the action (§ 21-2-1(5)(2), N.M.S.A. 1953). *Klinchok v. Western Surety Company of America*, 71 N.M. 5, 375 P.2d 214 (1962); *Lopez v. Hoffman*, 77 N.M. 396, 423 P.2d 429 (1967); *Platco Corp. v. Colonial Homes, Inc.*, 78 N.M. 35, 428 P.2d 9.

{6} The appeal is dismissed.

{7} IT IS SO ORDERED.

WE CONCUR:

E. T. Hensley, Jr., C.J., Waldo Spiess, J.