

1996

Mary C. Fogarty v. Lynn E. Elliott, Jean H. Elliott,  
Terra Domus, Corp., Lynn Edward Elliott, A.I.A.,  
P.C. : Brief of Appellee

Utah Court of Appeals

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MARY C. FOGARTY,

**VS.**

Appeal No. 960122-CA  
Priority 16

BRIEF OF APPELLEE

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**FILED**

Utah Court of Appeals

JAN 03 1997

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**I. Jurisdiction of the Court.**

The jurisdiction of this Court is pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1996 Supp.).

**II. Nature of the Proceedings.**

The Defendants appeal the Trial Court's denial of their Motion for Relief from Judgment Pursuant to Rule 60(b), Utah R. of Civ. P.

**III. Statement of the Issues and Standard of Review.**

Did the District Court abuse its discretion in denying the Defendants' Motion for Relief from Judgment, where said motion was filed more than ninety (90) days after entry of judgment? The Trial Court has discretion in ruling on Utah R. Civ. P. 60(b) motions for relief from judgment and that discretion will only be set aside where there has been an abuse of discretion. Birch v. Birch, 771 P.2d 1114 (Utah App. 1989). See also Larsen v. Collina, 684 P.2d 52 (Utah 1984).

**IV. Statement of the Case.**

**A. Nature of the Case.**

The pending matter involves a civil action filed by Plaintiff to renew and enforce a judgment taken against the Defendant Lynn E. Elliott in the amount of \$89,518.00, which judgment was entered by the Supreme Court of Oneida County, State

of New York, on or about October 14, 1982, and thereafter filed as a foreign judgment with the Fifth Judicial District Court of Washington County, Utah.

**B. Course of Proceedings and Disposition Below.**

The Plaintiff filed her Motion for Summary Judgment on February 14, 1995. (R. at 34, 64). When the Defendants did not respond to Plaintiff's Motion for Summary Judgment, the Plaintiff filed its Notice to Submit for Decision on March 27, 1995 (R. at 72, 73), and the Court thereafter granted Plaintiff's Motion for Summary Judgment on April 20, 1995. (R. at 77).

Defendants thereafter filed a Motion for Relief from Judgment on September 4, 1995. The Defendants' Motion for Relief From Judgment was denied by the District Court on the grounds that the Defendants' Motion for Relief from Judgment was not timely, and that Defendants had made no good faith argument for a meritorious defense on the merits. (R. at 127, 128).

**C. Statement of Facts.**

The Plaintiff was granted judgment against the Defendant Lynn E. Elliott on October 14, 1982 by the Supreme Court of Oneida County, State of New York, in the amount of \$89,518.00. (R. at 53-55). Plaintiff's judgment was filed as a foreign judgment in the Fifth District Court of Washington County on October 31, 1985. (R. at 52). Plaintiff's foreign judgment was later filed with the clerk of the Fifth Judicial District Court of Iron County on October 19, 1989. (R. at 52).



Plaintiff moved to renew her judgment on October 4, 1993, and complained of Defendants alleging certain fraudulent conveyances and alleging that the Defendants' professional corporation known as Lynn Edward Elliott, A.I.A., P.C., was the alter ego of the Defendant Lynn E. Elliott. (R. at 8).

On January 3, 1995, the District Court dismissed the Plaintiff's Complaint when neither Defendants nor Plaintiff appeared at the scheduling conference. (R. at 21). On or about January 13, 1995, Plaintiff moved to set aside the dismissal and reschedule the scheduling conference. (R. at 24). Plaintiff's motion was submitted for decision on or about January 26, 1995, there being no response to the Plaintiff's motion by the Defendants. (R. at 26). On January 31, 1995, the matter was set for scheduling conference to be held February 21, 1995. (R. at 32).

After the Court had set the matter for a Scheduling Conference, Plaintiff filed her Motion for Summary Judgment with accompanying memorandum on February 14, 1995. (R. at 34, 64). At the time of the scheduling conference, the court ordered that within 30 days Defendants respond to the Plaintiff's Complaint, and file a response to the pending Motion for Summary Judgment. (Transcript of November 6, 1995 hearing on Defendants' Motion for Relief from Judgment, pp. 8-10.)

When the Defendants did not respond to the Plaintiff's Motion for Summary Judgment within 30 days, the Plaintiff filed a Notice to Submit for Decision on or about March 27, 1995, and on that same date caused to be mailed in the United States

first class mail, postage prepaid, a true and correct copy of the Notice to Submit for Decision to counsel for Defendants. (R. at 72-73). The court thereafter granted Plaintiff's Motion for Summary Judgment on April 20, 1995. (R. at 77).

Counsel for Plaintiff filed a Notice of Entry of Order Granting Summary Judgment on or about June 14, 1995, and mailed a true and correct copy of the Notice of Entry of Order Granting Summary Judgment in the U.S. Mail, postage prepaid, to counsel for Defendant. (R. at 82-83).

Defendants thereafter filed their Motion for Relief from Judgment approximately three months later on September 14, 1995 on the grounds of mistake, inadvertance, surprise or excusable neglect. (R. at 104). Following oral argument on Defendants' Motion for Relief from Judgment, the court ruled that Defendants' Motion for Relief under Rule 60 was filed untimely, and that the Defendants' arguments on the merits were erroneous, contrary to law, and that no good faith argument existed for a meritorious defense. (R. at 127-128).

V. **Summary of Arguments.**

The District Court properly denied the Defendants' Motion for Relief from Judgment. The District Court has considerable discretion in rulings made pursuant to Rule 60(b), Utah R. Civ. P. That rule requires that any motion be made within a reasonable time, and for reasons (1), (2), (3), or (4), not more than three months after judgment. In the present case, the Defendants' Motion for Relief from Judgment was filed pursuant to

Rule 60(b)(1), but was filed more than three months after entry of judgment. In fact, the Defendants did not file their Motion for Relief from Judgment until the eve of three months after receiving the Notice of Entry of Judgment. As a result, the Defendants' motion is barred by the express provisions of Rule 60(b), Utah R. Civ. P.

### Argument

#### The District Court Correctly Denied the Defendants' Motion for Relief From Judgment.

The District Court properly denied the Defendants' Motion for Relief from Judgment<sup>1</sup>. In support of their Motion for Relief from Judgment, the Defendants had the

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<sup>1</sup>The trial court is vested with discretion in granting or denying a Motion for Relief from Judgment. In fact, Utah Supreme Court had stated as follows:

The trial court is endowed with considerable latitude of discretion in granting or denying a motion to relieve a party from the final judgment under Rule 60(b)(1), U.R.C.P., and this Court will reverse the trial court only where an abuse of this discretion is clearly established.... The rule that the courts will incline towards granting relief to a party who has not had the opportunity to present his case, is ordinarily applied at the trial court level, and this court will not reverse the determination of the trial court merely because the motion could have been granted.

State By and Through the Dept. of Social Serv. v. Musselman, 667 P.2d 1053, 1055 (Utah 1983), quoting Airkem Intermountain Inc. v. Panker, 513 P.2d 429 (Utah 1973). See also Birch v. Birch, 771 P.2d 1114 (Utah App. 1989) (trial court is afforded broad discretion ruling on a Motion for Relief from Judgment under Utah R. Civ. P. 60(b), and its determination will not be disturbed absent an abuse of discretion.

burden to show that their failure to defend Plaintiff's Motion was the result of excusable neglect, that their Motion to Set Aside Judgment was timely, and that they have a meritorious defense to the action. State By and Through the Depart. Social Serv. v. Musselman, 667 P.2d 1053, 1055 (Utah 1983). Because the Defendants have demonstrated no excusable neglect, because Defendant's Motion for Relief from Judgment was not timely, and because the Defendants have not demonstrated a meritorious defense to Plaintiff's action, the Defendants' motion was appropriately denied.

A. Failure to Show Mistake or Neglect.

Defendants have utterly failed to establish any mistake, inadvertence, or excusable neglect. Defendants simply argue that they did not receive the Plaintiff's Notice to Submit its Motion for Summary Judgment for Decision, and further that the Plaintiff did not provide Notice of Entry of Judgment timely. However, as demonstrated below, the Plaintiff did properly submit the matter for decision with appropriate notice to the Defendant, and Plaintiff and Defendants had more than sufficient time following receipt of the Notice of Entry of Judgment to move for relief from judgment within the time period prescribed by Rule 60(b). Because Defendants wholly failed to comply with Rule 60(b), and have offered no explanation whatever for their failure to do so, the Defendants' Motion for Relief from Judgment was properly denied by the Court.

B. Timeliness of Motion.

The Defendant's Motion for Relief from Judgment was made under Utah R. Civ.

P. 60(b)(1), alleging mistake, inadvertence, surprise or excusable neglect. (R. at 104).

Rule 60(b), Utah R. Civ. P., states in pertinent part as follows:

**(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect;

. . . .  
The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken . . .

In the present case, the Plaintiff's Motion for Summary Judgment was granted on April 20, 1995 (R. at 77) after submitting its Motion to Submit for Decision. (R. at 72-73). The Defendants did not move for relief from judgment until September 14, 1995. Thus, the Defendants did not file their Motion for Relief from Judgment until one hundred sixty-seven (167) days following entry of judgment, and ninety-two (92) days following the Notice of Entry of Order Granting Summary Judgment. As a result, the Defendants' Motion for Relief from Judgment is barred by the express provisions of Rule 60(b), requiring that any motion for relief from judgment based on mistake, inadvertence, or excusable neglect, be brought within three months after entry of judgment.

Defendants' request is further barred by Rule 60(b)'s requirement that any motion be brought within a reasonable time, where the Defendants waited ninety (90) days following Notice of Entry of Judgment to file their motion. As a result, the Defendants' Motion for Relief from Judgment was properly denied.

The case law cited by Defendants, for the proposition that their Motion for Relief from Judgment was improperly denied, actually supports the District Court's denial of the Plaintiff's Motion. In Workman v. Nagle Construction Inc., 802 P.2d 749 (Utah App. 1990) the Court of Appeals held that the prevailing parties' failure to notify opponents of the entry of judgment did not make the judgment ineffective. The Defendants argued that the judgment was not validly entered because the prevailing party did not notify them of the entry of judgment pursuant to Utah R. Civ. P. 58A(d). Id. at 751. While the court did hold that the failure to give the required notice of entry of judgment is an important factor in determining the timeliness of a post-judgment proceeding, the court held that the failure to give such notice is only a factor "where an exact time limit is not prescribed" by Rule 60(b). Id. Therefore, the court held that if a losing party has remained ignorant of a judgment in part because the prevailing party has not complied with Rule 58(d), "the resulting delay is more reasonable *for purposes of Rule 60(b)(5) -(7).*" Id. (Italics added). Because Rule 60(b)(1) contains an exact time limit of 90 days, the basis for the

court's relief from the order in Workman is not applicable to the present case.<sup>2</sup> Thus, where judgment was entered on April 20, 1995, and the Defendants did not file their Motion for Relief from Judgment until September 14, 1995 (approximately 167 days later) the Defendants cannot be relieved from judgment pursuant to Rule 60(b).

The District Court's denial of the Defendants' Motion for Relief from Judgment is also supported by the fact that Notice of Entry of Judgment was provided on or about June 14, 1995 and Defendants still failed to file their Motion for Relief from Judgment within the three month time frame, although the Defendants still had until July 20, or 36 additional days, following entry of judgment, to file their motion within the 90 day time limit. Thus, notwithstanding the 3 month time limit under Rule 60(b), the Defendants did not file their motion within a reasonable time after receiving Notice of Entry of Judgment. See Heath v. Heath, 541 P.2d 1040 (Utah 1975) (trial court justified in denying Rule 60(b) relief because of the lack of a timely request and long passage of time before making such request.)

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<sup>2</sup> See also In re Bundy's Estate, Goddard et al. vs. Bundy, 121 Utah 299, 241 P.2d 462 (1952), wherein the court rejected the Appellant's contention that the lower court erred in denying Appellant's motion under Rule 60(b) where appellant's counsel was out of town and received no notice or copy of the findings from the court clerk who evidently failed to mail such notice and findings to counsel's office. Rejecting the Appellant's contention that they should be granted additional time in which to bring their motion, the court stated: "[U]nder Rule 58A(c) a judgment is complete and is deemed entered for all purposes when the same is signed and filed, not when notice is received by the parties."

In short, the trial court properly held that the Defendants' Motion for Relief from Judgment was not timely.

C. Defense to Plaintiff's Action.

In addition to demonstrating that a judgment was entered against the Defendants through excusable neglect and that their Motion to Set Aside the judgment was timely, the Defendants must also demonstrate a meritorious defense to Plaintiff's action. Musselman, 667 P.2d at 1055. Because the Defendants' Motion for Relief from Judgment entirely fails to establish any such defense, the Defendants' Motion for Relief from Judgment was properly denied.

The Defendants' Motion for Relief from Judgment, together with the Defendants' argument on appeal, sets forth two bases upon which the Defendants allege a defense to the Plaintiff's action, namely, that Plaintiff's claim is barred by the statute of limitations and, that the court's allowance of attachment to the property of Defendant Jean H. Elliott is inappropriate based on the allegation that Defendant Lynn E. Elliott never owned an interest in said property. Because the above defenses, as alleged by the Defendants, are unmeritorious the court appropriately denied the Defendants' Motion for Relief from Judgment.

1. Statute of Limitations.

Defendants argue that the effect of the summary judgment entered by the court was the renewal of an 11-year old foreign judgment entered in the State of



New York, and that the filing in Utah as a foreign judgment does not extend the underlying statute of limitations. The Defendants' argument is without merit.

Plaintiff was granted judgment against the Defendant Lynn E. Elliott on October 14, 1982, by the Supreme Court of Oneida County, State of New York. Plaintiff's judgment was then filed as a foreign judgment in the Fifth District Court of Washington County on or about October 31, 1985. Plaintiff's foreign judgment was later filed with the Clerk of the Fifth District Court of Iron County on October 19, 1989. Plaintiff moved to renew its judgment on October 4, 1993. Pursuant to Utah Code Ann. §§ 78-22a-2(2) and (3) (1992), the Plaintiff's Judgment is not barred by the statute of limitations. Utah Code Ann. §§ 78-22a-2(2) and (3) (1992) state as follows:

\* \* \*

(2) A copy of a foreign judgment authenticated in accordance with an appropriate act of Congress or an appropriate act of Utah may be filed with the clerk of any district court in Utah. The clerk of the district court shall treat the foreign judgment in all respects as a judgment of a district court of Utah.

(3) A foreign judgment filed under this chapter has the same effect and is subject to the same procedures, defenses, enforcement, satisfaction, and proceedings for reopening, vacating, setting aside, or staying as a judgment of a district court of this state.

Because a foreign judgment is subject to the same procedures, defenses and proceedings of a judgment of the district court of this state, and is subject to enforcement and satisfaction in like manner, the foreign judgment is governed by the Utah statute of limitations, which statute of limitations begins to run upon filing of the foreign judgment.

See Pan Energy v. Martin, 813 P.2d 1142 (Utah 1991). In Pan Energy, the Supreme Court stated that § 78-22a-2(2) "requires foreign judgments to be treated as if they were local judgments once they have been filed with the clerk of the district court. Once filed, the foreign judgment is subject to the same procedures to attack or enforce it as a Utah judgment. Thus, because foreign judgments properly filed in Utah essentially become Utah judgments under the Utah Foreign Judgment Act, *the Utah Statute of Limitations applies to the enforcement of those judgments in Utah.*" Id. at 1144. (Italics added). The court went on to hold that:

We agree with the approach taken by the Federal Courts and hold that, at least for purposes of enforcement, the filing of a foreign judgment under § 78-22a-2(2) creates a new Utah judgment which is governed by the Utah Statute of Limitations. Because Utah Code Ann. § 78-12-22 (1987) establishes an 8-year statute of limitations for the enforcement of judgments, foreign judgments in Utah must also be governed by the 8-year statute of limitations, which runs from the date of filing. (emphasis added).

**Id.**

The Defendants' contention that the method of enforcing a foreign judgment must be the same as the foreign state's method,<sup>3</sup> was expressly rejected by the

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<sup>3</sup> Defendants' argument also fails because the New York Statute of Limitations for the collection and enforcement of a money judgment is 20 years. See N.Y. C.L.S. C.P.L.R. § 211.

court in Pan Energy. Id. (rejecting the notion that the method of enforcing a foreign judgment is based on the foreign state's method.)

As a result, the Utah Foreign Judgment Act "simply requires that foreign judgments filed in this State be treated as local judgments in all respects, including the applicable statute of limitations regarding enforcement." Id. As a result, the Defendants' argument that filing of a foreign judgment cannot extend the statute of limitations is in error. See Carter v. Carter, 349 S.E.2d 95 (Va. 1986). (The statute of limitations imposed a limitation of 10 years for bringing an action on a foreign judgment, and 20 years for enforcing a domestic judgment. However, the court noted that once an action is brought on a foreign judgment, it becomes a domestic judgment; thus, a foreign judgment creditor may have as many as 30 years to enforce the judgment.) In short, the Defendants have no meritorious defense to the renewal of judgment.

## 2. Fraudulent Transfer.

Defendants contend that the District Court's order that the transfer of property by Lynn H. Elliott to his wife Jean H. Elliott is void, permitting the Plaintiff to attach to the real property of Jean H. Elliott, cannot be complied with as no transfer was made between these defendants. See Corbett v. Fitzgerald, 709 P.2d 384 (Utah 1985).

Defendants' position misconstrues the trial court's Order and the basis of that Order. The trial court found that the Defendant Lynn E. Elliott transferred property to Defendant Jean H. Elliott when the Defendant Lynn E. Elliott signed an Earnest

Money Purchase Agreement, but thereafter caused the property to vest solely in the name of his wife, Defendant Jean H. Elliott. Furthermore, the Defendant Lynn Elliott caused his wife, Defendant Jean Elliott, to become the sole obligee under the terms of the Trust Deed Note used to finance the purchase of the property at issue. Therefore, pursuant to the Uniform Fraudulent Transfer Act, the District Court found that the Defendant Lynn Elliott had transferred his beneficial interest in the property at issue. The District Court's Finding is supported by Utah Code Ann. § 25-6-2(12) (1995) (defining transfer as "every mode, direct or indirect, absolute or conditional, or voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance"). See also Ned J. Bowman & Co. v. White, 369 P.2d 962 (Utah 1962) (transfers between near relatives are subject to rigid scrutiny).

The Defendants' argument that the District Court's Order is impossible to comply with, because no transfer took place, is incorrect. Defendant Lynn E. Elliott transferred property to his wife in violation of the Uniform Fraudulent Transfers Act, based on the parties' joint agreement to purchase the property at issue, and where the Defendant Lynn E. Elliott attempted to avoid his obligation to the Plaintiff by causing the property to vest and be titled solely in the name of his wife, Defendant Jean H. Elliott.

Because Defendants have not demonstrated a meritorious defense to Plaintiff's action, the Court properly denied the Defendants' Motion for Relief from Judgment.

### CONCLUSION

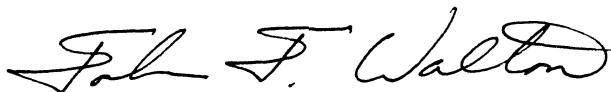
The District Court properly denied the Defendants' Motion for Relief from Judgment on the basis that Defendants have not demonstrated mistake, excusable neglect or inadvertence, and that Defendants did not file their Motion for Relief from Judgment until 167 days following Entry of Judgment, and 92 days following the Notice of Entry of Order Granting Summary Judgment. On that basis, this Court should uphold the District Court's finding that the Defendants' Motion pursuant to Rule 60(b) was not timely.

Defendants have not established the existence of a meritorious defense to the Plaintiff's Claims. Plaintiff did move to renew her judgment within the applicable eight year statute of limitations, and on the further basis that the Defendants did cause property to be transferred to Defendant Jean H. Elliott in order to defraud creditor's pursuant to the Uniform Fraudulent Transfer Act.

Based on the foregoing, the Plaintiff respectfully requests that this Court uphold the District Court's denial of the Plaintiff's Motion for Relief from Judgment and affirm the decision of the District Court.

DATED this 3 day of January, 1997.

JONES, WALDO, HOLBROOK, & McDONOUGH



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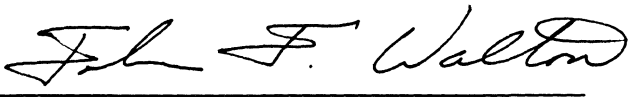
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CERTIFICATE OF SERVICE

I hereby certify that on the 3 day of January, 1997, I caused to be mailed, postage prepaid, true and correct copies of the foregoing **BRIEF OF APPELLEE**, to the following:

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