

1996

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

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Michael R. Shaw; Jones, Waldo, Holbrook & McDonough; attorney for respondent.

J. Bryan Jackson, P.C.; attorney for appellants.

Recommended Citation

Reply Brief, *Mary C. Fogarty v. Lynn E. Elliott, Jean H. Elliott, Terra Domus, Corp., Lynn Edward Elliott, A.I.A., P.C.*, No. 960122 (Utah Court of Appeals, 1996).

https://digitalcommons.law.byu.edu/byu_ca2/92

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

I.

REPLY TO ARGUMENTS RAISED IN BRIEF IN OPPOSITION

**THE DISTRICT COURT ERRONEOUSLY DENIED THE APPELLANTS
MOTION FOR RELIEF FROM JUDGMENT.**

The Appellants assert that they have met their burden to set aside judgment. That is, they have demonstrated mistake, inadvertence, or excusable neglect, filed their motion within a reasonable period of time after receiving notice of entry of judgment and set forth a meritorious defense to Respondent's action.

A.

A SHOWING OF MISTAKE, INADVERTENCE OR EXCUSABLE NEGLIGENCE.

The Appellants argue that the facts in this case clearly show mistake, inadvertence or excusable neglect. In this case, there was confusion at the time that this action was dismissed and prior to reinstating when Plaintiff's initial motion for summary judgment was filed. At the scheduling conference, the Appellants were allowed additional time to amend their answer to the Complaint. There was no discussion as to the Motion for Summary Judgment. The matter was either inadvertently overlooked, excusable neglected because of the circumstances involved, or mistaken in their belief that notice of motion for summary judgment would be renewed once Appellants had filed their amended answer. The amended answer raised a significant defense to the action, namely the statute of limitations issue. The issue on the statute of limitations was never addressed by the Court. In addition, there were issues of fraudulent conveyance. While factually, there have been no transfer of property from the prior judgment debt or to the other

Co-Defendants, the Court's summary judgment attempts to set aside transfers that never took place and create a lien in interest that never belonged to the judgment debtor. Appellants believe that the mistake, inadvertence or excusable neglect is clearly manifested in the circumstances of this case and have been set forth with particularity in Appellants' brief.

B.

THE MOTION FOR RELIEF FROM JUDGMENT WAS TIMELY.

The Appellants argue that the motion for relief from judgment was timely in that it was made within a reasonable time after notice of entry of judgment. The Respondent failed to provide promote notice as required by Rule 58a, Utah Rules of Civil Procedure before giving the notice of entry of summary judgment. This is compounded by the fact that Appellants were never given notice that summary judgment was submitted as required under Rule 4-501(d) of the Code of Judicial Administration. Appellants moved from relief from judgment within three (3) months after being notified that summary judgment had been entered. The Appellants contend that it would circumvent the intent and fairness of the rule to allow one party to be dilatory in providing notice promptly and foreclose the other party from being able to challenge the same having made its motion in a reasonable period of time.

C.

APPELLANTS HAVE DEMONSTRATED A MERITORIOUS DEFENSE.

The Appellants argue that it is not their burden to prove whether or not they would have prevailed at the time of trial on their defense but simply whether or not they have demonstrated a

meritorious defense to Plaintiff's action. In this case, the defense is actually two fold: The issue as to the application of the statute of limitations in this case and the issue of fraudulent transfer.

1. **STATUTE OF LIMITATION:** Appellants argue that the facts and circumstances of this case demonstrate a meritorious defense with regard to the application of Utah Code Annotated Section 78-22a-2 et seq. (1953, as amended), where Plaintiff's action attempted to renew an eleven (11) year old foreign judgment entered in the State of New York. The question becomes as required under subsection 3, whether the appropriate procedures, defenses, enforcement, satisfaction and other proceedings for reopening, vacating, setting aside or staying as a judgment had been properly followed in order to be entitled to summary judgment. In other words, Appellants assert that they are entitled to a review of the facts and circumstances involved in this case for the same protection that subsection 3 provides.

2. **THERE WAS NO FRAUDULENT TRANSFER:** The Appellants contend that they have provided sufficient evidence to establish a meritorious defense regarding any fraudulent transfer. The second conclusion of law found in the order granting summary judgment that the Defendant LYNN ELLIOTT transferred of property to his wife, JEAN H. ELLIOTT should be voided and that the Plaintiff be permitted to attach real property transferred by the Defendant LYNN ELLIOTT to JEAN H. ELLIOTT is clearly an error since no such transfer exists. Had this matter gone to trial, the evidence would have established that LYNN ELLIOTT was never the record title

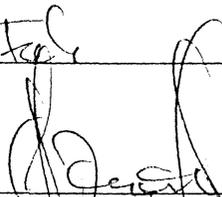
holder the property in question and that there has been no transfer of property by him to his wife. The Appellants contend that this issue alone is sufficient to demonstrate a meritorious defense that would warrant setting aside summary judgment. The Appellants further assert that the trial court was in error in assuming facts not present under the circumstances of this case in entering its summary judgment.

II.

CONCLUSION

For the reasons stated above, the Appellants assert that the trial courts order granting summary judgment should be reversed and the matter remanded for trial on all issues.

DATED this 32 day of Feb, 1993.



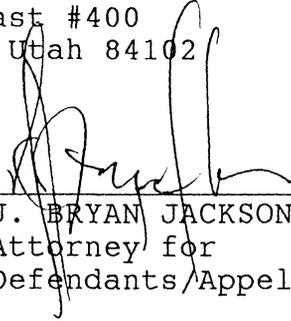
J. BRYAN JACKSON
Attorney for
Defendant/Appellants

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and complete photocopy of the REPLY OF APPELLANTS, by way of U.S. mail, postage fully prepaid thereon, this 3rd day of Feb, 1997, to the following:

MICHAEL R. SHAW
JONES, WALDO, HOLBROOK & MCDONOUGH
149 East Tabernacle, Suite 200
St. George, Utah 84770

UTAH COURT OF APPEALS
230 South 500 East #400
Salt Lake City, Utah 84102



J. BRYAN JACKSON
Attorney for
Defendants/Appellants