2000

Calvin E. Carman, Brent Nielsen and Kristy Nielsen v. Bert slavens, et al. : Brief of Appellant

Utah Supreme Court

S. Rex Lewis; Howard, Lewis, and Petersen; Attorneys for Defendant and Appellant, Bert Slavens.
Robert M. McRae; Hatch, McRae, and Richardson; Attorneys for Plaintiffs and Respondents.

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

CALVIN E. CARMAN, BRENT NIELSEN and KRISTY NIELSEN, Plaintiffs and Respondents,	)	Case No. 14,046
vs.	)	
BERT SLAVENS, et al., Defendant and Appellant.	)	

APPELLANT'S BRIEF

AN APPEAL FROM THE DEFAULT PARTIAL SUMMARY JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH, BEFORE THE HONORABLE ALLEN B. SORENSEN, JUDGE.

S. Rex Lewis
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84601
Attorneys for Defendant and Appellant, Bert Slavens

Robert M. McRae
HATCH, MC RAE & RICHARDSON
370 East Fifth South
Salt Lake City, Utah 84111
Attorneys for Plaintiffs and Respondents

TABLE OF CONTENTS

CASES CITED

OTHER AUTHORITIES CITED

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

CALVIN E. CARMAN, BRENT NIELSEN and KRISTY NIELSEN,	)	
Plaintiffs and Respondents,	)	
vs.	)	Case No. 14,046
BERT SLAVENS, et al.,	)	
Defendant and Appellant.	)	

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a default partial summary judgment granted for failure of one of the defendants, Bert Slavens, to appear for a deposition and thereat to produce documents.

DISPOSITION OF LOWER COURT

On March 10, 1975, the Court ordered defendant Slavens' answer to be stricken for his failure to appear at his deposition and thereat to produce requested documents. Accordingly, the Court granted a default partial summary judgment in favor of the plaintiffs against defendant Slavens.

RELIEF SOUGHT ON APPEAL

Defendant Slavens seeks a reversal of the default partial summary judgment against him and an order remanding the dispute for trial.

STATEMENT OF FACTS

This appeal involves a default partial summary judgment which was rendered in a construction contract dispute in which a defendant failed to appear at a deposition after being noticed and also failed to produce the requested documents. In March of 1974 suit was commenced against two partners, who were doing business as P.S. Construction Company. (Tr. 36) The partners, Bert Slavens and Clinton Perry, had both agreed to construct a six-unit apartment building and a residence, both to be located in Duchesne, Utah. (Tr. 4) The price of the apartments was $71,025.00 and the house $19,000.00. (Tr. 4) Plaintiffs claim to have paid these amounts and, subsequently, there have been mechanic's liens filed against the property by subcontractors. The plaintiffs claim to have also paid some of these later claims. (Tr. of pretrial 3)

On March 14, 1974, service of process was obtained in Green River, Wyoming, on defendant Slavens. (Tr. 7) On March 27, 1974, notice was given to defendant Slavens that he was to appear at 10:00 o'clock on April 26, 1974, at the office of Hatch, McRae & Richardson, 370 East 5th South Street, Salt Lake City, Utah, (Tr. 9) to have his deposition taken. On March 27, 1974, Slavens' attorney, Gary Stott, was also served with a demand for production of specified documents (Tr. 13), which documents were to be produced at the scheduled deposition to be held April 26, 1974.

Defendant Perry appeared and was deposed (Tr. 53), however, defendant Slavens failed to appear and also failed to produce the requested documents. (Tr. 17) On April 29, 1974, Gary Stott, who had been counsel for Slavens, withdrew as attorney for Slavens but continued to represent defendant Perry. No notice to appoint counsel nor to appear in person was ever given to Slavens.

On May 21, 1974, the plaintiffs filed a Motion for Summary judgment, which motion was based partially on Slavens' failure to appear and his failure to produce documents at the April 26th deposition. (Tr. 18 and Tr. 9 of pretrial hearing) The motion had been made under the authority of sanctions authorized by Rule 37 of the U.R.C.P. (Tr. 9 of the pretrial hearing), in which plaintiffs sought, among other relief, to strike Slavens' answer. (Tr. 17) Defendant Perry filed an objection to plaintiffs' Motion and defendant Slavens, who, at this time was not represented by counsel, failed to respond. (Tr. 17) On June 4, 1974, the motion for summary judgment was denied. (Tr. 24) However, almost a year later, on March 10, 1975, the Court reversed itself and ordered this previous denial set aside. (Tr. 52) On December 20, 1974, a pre-

trial conference was held (Tr. 28), at which time S. Rex Lewis entered an appearance as counsel for defendant Slavens. At this pretrial hearing, the plaintiffs' motion for a summary judgment, previously denied, was discussed. (Tr. 28) The Court said it would re-examine the plaintiffs' motion for summary judgment (Tr. 8 of pretrial hearing) and the Court also allowed counsel, S. Rex Lewis, to file an amended pleading for defendant Slavens, which the Court agreed to consider. (Tr. 28)

On December 24, 1974, an amended answer and counterclaim supported by counter-affidavits in response to plaintiffs' affidavits were filed by counsel for Slavens. (Tr. 37) The clerk allowed this answer and counterclaim to be filed although the Court had not granted approval. On December 30, 1974, a counterclaim was also filed by defendant Perry. (Tr. 29)

On February 7, 1975, oral argument was held on plaintiffs' motion for a summary judgment and defendant Slavens' counsel's motion to amend his pleadings. (Tr. 28) The Court orally pronounced from the bench that Slavens' answer be stricken and a default partial summary judgment was granted. Later, on March 10, 1975, a default partial summary judgment was formally entered against defendant Slavens because the file contained no justification for Slavens' nonappearance nor any justification for his failure to produce the requested documents. (Tr. 51) Slavens' answer was ordered stricken, his default entered therein, and a default partial summary judgment of $3,841.66 (Tr. 65) was rendered against him, (Tr. 51) with the Court reserving the right to enter further judgment against Slavens.

The action is still proceeding as to the defendant Perry

based upon the complaint and defendant Perry's counterclaim, which is the same as the counterclaim of defendant Slavens.

POINT I

SLAVENS NON-APPEARANCE AT HIS DEPOSITION AND HIS FAILURE TO PRODUCE DOCUMENTS WAS NOT WILLFUL, THEREFORE, IT WAS ERROR FOR THE COURT TO ENTER SUCH A DRASTIC SANCTION AS A DEFAULT JUDGMENT.

Judge Sorensen ordered the answer of defendant Slavens stricken because of his failure, after being properly noticed, to appear at a deposition in a law suit filed in Utah County, which deposition was scheduled for April 26, 1974, in Salt Lake City, apparently for the convenience of plaintiffs' counsel at a time when Slavens was residing in Wyoming. Slavens also failed to produce certain requested documents at this scheduled deposition. The court's authority to impose such a drastic sanction, as a default judgment, was invoked under Rule 37 of the U.R.C.P.

Changes have recently been made in both Utah Rule 37 and Federal Rule 37. Rule 37 imposes the necessary sanctions in order to effectuate discovery. The 1970 amendments to the Federal Rule replaced the term "refused" with the term "failure" throughout Rule 37. This was done in order to emphasize that imposing sanctions did not require willfullness but merely a failure to comply. After the 1970 amendments, Federal Rule 37 now provides that any failure to appear at a deposition or to answer questions to interrogatories or to respond to requests for production will subject one to any one or more of the numerous sanctions in what is now (b)(2) of Federal Rule 37. Effective June 1, 1972, Utah Rule 37, which imposes sanctions, was also changed so as to be identical to the previously changed Federal Rule 37. Judge Sorensen made his ruling under the authority of Rule 37, U.R.C.P., which is now and was identical to the Federal Rule on sanctions. Therefore, it is appropriate for an

appellate court to examine how other courts have interpreted Federal Rule 37 as a guide to whether Judge Sorensen committed error.

Under the old Federal Rule 37, which had contained the term "refusal" rather than "failure", courts had trouble formulating any clear definition of "willfulness" in regards to conduct. Under the old rule in 1962, the Fourth Circuit, in Weston & Brooker Co. v. Continental Casualty Co., 303 F.2d 91 (4th Cir. 1962), had interpreted willfulness under (d) of Rule 37 as a "conscious or intentional failure to act as distinguished from an accidental or a voluntary noncompliance." The Fourth Circuit stated:

> The sanctions authorized by Rule 37(d) should not be applied in the absence of wilful failure to comply with the provisions regarding discovery; however 'wilful failure' does not necessarily include a wrongful intention to disobey the rule. A conscious or intentional failure to act, as distinguished from an accidental or involuntary non-compliance, is sufficient to invoke the penalty. Id. at 92-93.

In 1970, amendments deleted the word "willful", however, even after these 1970 amendments to Federal Rule 37, willful conduct was still required by courts before imposing such a severe sanction as a default judgment. There exists extensive authority that a willful refusal to appear at a deposition or to produce documents is a necesary prerequisite to the imposition of such a severe sanction as a judgment by default. The Supreme Court of the United States in a case decided in 1958, in Societe Internationale v. Rogers, 357 U.S. 197 (1958), held that willfulness continues to play a role along with various other factors in imposing sanctions. Even after the 1970 amendments to Federal Rule 37, courts still continued to require a standard of "willful conduct" as a prerequisite to imposing the severe sanctions provided for in (d)(2) of Rule 37. As authority, Slavens cites the case of Flaks v.

Koegel, 504 F.2d 702 (2nd Cir. 1974), in which the Second Circuit, In September, 1974, said:

> The argument that willful refusal to obey an order to respond to interrogatories or to appear for a deposition is not a necessary prerequisite to the imposition of any sanction under Rule 37 is premised on the position that the 1970 amendments to Rule 37 eliminated from the Rule the term "willful," which had previously been employed to characterize the conduct which would trigger the sanctions of the Rule. We do not accept this argument. The 1970 amendments were intended to authorize the court, where it deemed appropriate, to impose more flexible and softer sanctions for Rule 37 violations than theretofore provided. However, there was no intent to eliminate the willfulness element when the harsh sanction of the dismissal of a complaint or the striking of an answer was ordered. This is made clear in the note of the Advisory Committee on the Rules. The Committee stated:
>
> > Two related changed are made in subdivision (d): the permissible sanctions are broadened to include such orders "as are just"; and the requirement that the failure to appear or respond be "wilful" is eliminated. Although Rule 37(d) in terms provides for only three sanctions, all rather severe, the courts have interpreted it as permitting softer sanctions than those which it sets forth. . . . The rule is changed to provide the greater flexibility as to sanctions which the cases show is needed.
> >
> > The resulting flexibility as to sanctions eliminates any need to retain the requirement that the failure to appear or respond be "wilful.". . . "Willfullness" continues to play a role, along with various other factors, in the choice of sanctions. Thus, the scheme conforms to Rule 37(b) as construed by the Supreme Court in Societe Internationale v. Rogers, 357 U.S. 197, 208 [78 S.Ct. 1087, 2 L.Ed.2d 1255] (1958).
>
> Notes of Advisory Committee on Rules, 28 U.S.C.A. Rule 37, at 45, 47 (Supp. 1974) (citations omitted). (emphasis added) Id. at 708.

Professor Moore, a leading authority on procedure, believes

that no court should impose such a drastic sanction as a default judgment, which is authorized by Rule 37, unless willfulness has been shown. 4 Moore, Federal Practice, §33.28, n. 2; §37.04 n. 2 (2nd Ed. 1950). For further support that such sanctions are imposed only for willful conduct, see Herald v. Computer Components International, Inc., 252 S.2d 576 (Fla. 1971), in which the Florida court said:

> The sanctions provided under this rule, particularly the striking of pleadings and dismissal of a cause should be imposed only in the exceptional case. The federal courts in interpreting the federal counterpart to Rule 1.380 have had considerable difficulty in delineating exceptional cases. There have been indications that the exceptional case is where the recalcitrant party has acted in wilful disregard of or with gross indifference to an order of the court requiring discovery. . . Id. at 577.

In Societe Internationale, supra, the United States Supreme Court said that "willfulness was relevant to the selection of sanctions." As late as September, 1974, the Second Circuit had once again affirmed willfulness as a necessary element for the imposition of such a severe sanction as a default judgment. In Hart v. Wolff, 489 P.2d 114 (Alaska 1971), the Alaska Supreme Court said:

> The next question is whether dismissal was a proper sanction for refusal to comply with the order to produce the documents. First, it should be noted that application of Rule 37 sanctions against a party who has failed to make discovery is not proper unless the court finds that there has been a "willful refusal on the part of a party ordered to make discovery***." Oaks v. Rojcewicz, 409 P.2d 839, 840 (Alaska 1966) (emphasis added by court) Id. at 118.

For further support that willfulness is the required standard of conduct necessary in order to impose such a severe sanction as a default judgment, see Marriott Homes v. Hanson, 50 F.R.D. 396 (W.D. Mo. 1970), Morton v. Retail Credit Co., 128 Ga.App. 446,

196 S.E.2d 902 (1973); Cinelli V. Radcliffe, 317 N.Y.S.2d 97 (1970); Robison v. Transamerica Ins. Co., 368 F.2d 37 (10th Cir. 1966); Patterson v. C.I.T. Corp., 352 F.2d 333 (10th Cir. 1965); Gill v. Stolow, 240 F.2d 669 (2nd Cir. 1957); Foster v. Brooks, 7 Ariz.App. 320, 438 P.2d 952 (1968); Oaks v. Rojcewicz, 409 P.2d 839 (1966); Z Zakroff v. May, 8 Ariz.App. 101, 443 P.2d 916 (1968).

The Utah Supreme Court has never directly ruled on whether the standard of conduct in imposing sanctions is one of willfulness. However, in dictum, in Tucker Realty Inc. v. Nunley, 16 Utah2d 97, 396 P.2d 410 (1964), the Utah Supreme Court clearly indicated that any such conduct must be willful in order to impose such a severe sanction.

Not only must the conduct be willful, but the trial record must clearly reveal such willfulness. The record on appeal in the instant case fails to show any such willful misconduct by defendant Slavens.

A case which is similar to the instant case was Swindle v. Reid, 242 So.2d 751 (Fla. 1971), in which a plaintiff-taxpayer sought to enjoin the assessment and collection of certain intangible personal property taxes levied in Palm Beach, Florida. The defendant-tax assessor initiated extensive discovery procedures, including a motion to produce certain documents. The motion was granted and the plaintiff-taxpayer was ordered to produce the requested documents. She failed to produce certain documents and an order of dismissal was entered from which an appeal was taken. The Florida court said:

> We deem it important to note that the order of dismissal in this case did not contain any finding by the trial court that the

> plaintiff's failure to fully comply with the order to produce was due to a refusal to do so. Instead, the court merely found that the plaintiff had shown an insufficient excuse for her failure to comply, a distinction which we feel to be significant. The record before us is certainly susceptible of the reasonable interpretation that plaintiff's failure to produce the documents was occasioned by events beyond her control. Since the trial court did not expressly find, and the record does not conclusively reveal, that the plaintiff's failure to produce was a refusal to obey, we hold that the court abused its discretion in dismissing the complaint with prejudice. Id. at 753.

In the instant case, the trial court likewise found the file contained no justification for Slavens' failure to comply. Judge Sorensen failed to find Slavens' non-appearance was willful because of a failure to comply. The absence of any justification in the record is not equivalent to willfulness. This is a very meaningful distinction. The record in the instant case fails to show any willful refusal whatsoever by Slavens to comply with discovery and the absence of any justification in the record certainly cannot be equated with a willful refusal. For further support that the record must clearly reveal willful misconduct, see Gill v. Stolow, 240 F.2d 669 (2nd Cir. 1957), in which the Second Circuit said the record failed to show any willful default for failure to attend the deposition.

The ultimate sanction, dismissal of the action for failure to appear, "is the most severe sanction that a court may impose that its use must be tempered by careful exercise of judicial discretion." Durgin v. Graham, 372 F.2d 130 (5th Cir. 1969). In Firoved v. General Motors Corp., 277 Minn. 278, 152 N.W.2d 364 (1967), the Minnesota Supreme Court said:

> An order of dismissal on procedural grounds runs counter to the pri-

> mary objective of the law to dispose of cases on the merits. Since a dismissal with prejudice operates as an adjudication on the merits, it is the most punitive sanction which can be imposed for noncompliance with the rules or order of the court or for failure to prosecute. It should therefore be granted only under exceptional circumstances. Id. at 368.

Also see Scherrer v. Plaza Marina Commercial Corp., 16 Cal. App.3d 520, 94 Cal.Rptr. 85 (1971), in which the California court said:

> The ultimate sanction of default against a litigant who wilfully fails to appear for the taking of his deposition is a drastic penalty which should be sparingly used; ordinarily, it should be used only when lesser sanctions have failed (Crummer v. Beeler, 185 Cal. App.2d 851, 8 Cal.Rptr. 698). As the court said in Caryl Richards, Inc. v. Superior Court, 188 Cal.App.2d 300, 303 10 Cal.Rptr. 337, 379:
>
> "One of the principal purposes of the Discovery Act (Code Civ. Proc., §§2016-2035) is to enable a party to obtain evidence in the control of his adversary in order to further the efficient, economical disposition of cases according to right and justice on the merits. [Citations omitted.] Its purpose is not 'to provide a weapon for punishment, forfeiture and the avoidance of a trial on the merits.'" (emphasis by court) Id. at 87.

The drastic sanction of dismissal has been invoked in the instant case as, in fact, a weapon for punishment in which a trial on the merits has been avoided. This inference is especially evident when such a severe sanction is invoked against a defendant for a single failure to comply. It is not proper that litigation be treated as a game, but rather litigation should be disposed of wherever possible on its merits.

In Rapoport v. Sirott, 418 Pa. 50, 209 A.2d 421 (1965), a default judgment was taken against the defendant in a trespass action

for failure to appear at the taking of his deposition. On appeal, the Pennsylvania Supreme Court reversed the default judgment stating:

> The entry of a default judgment by way of sanction for failure of a party to appear for the taking of his deposition is a drastic remedy and should be entered only in the clearest of cases. Unless the failure of a party to appear for the taking of a deposition is wilful, i.e., deliberate and intentional, and his duty to appear is clear and the record clearly and unequivocally reveals such to be the case, a default judgment should not be entered. Id. at 423.

It was error for a default judgment to be entered against defendant Slavens for failure to appear at his deposition because invoking such a drastic sanction is proper only in the clearest of cases in which evidence conclusively establishes that a party has willfully frustrated the discovery process and even then, such willfulness must be clearly set forth in the record. The standard of conduct for dismissal of an action is one of willfulness, which must be clearly evidenced in the record. Neither is present in the instant case, therefore, it was error for the court to enter a default judgment.

POINT II

IT WAS ERROR TO ENTER A DEFAULT JUDGMENT BECAUSE ANY SUCH SEVERE SANCTION IS PROPER ONLY AFTER A PATTERN OF REPEATED AND PERSISTANT DEFIANCE OF DISCOVERY AND SLAVENS' SOLE FAILURE TO APPEAR AT A DEPOSITION FAILS TO ESTABLISH ANY SUCH DEFIANT PATTERN.

Even where there has been clear non-compliance by failure to appear for the taking of a deposition or a failure to produce specified documents, the party who has so failed to comply is

usually allowed at least another opportunity to comply before a default judgment is entered. See Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 Colum.L.Rev. 480 (1958), which states:

> So ingrained has become this practive of granting a second chance that in Gill v. Stolow, the recusant defendant could argue, with fair justification, that in no case had a federal court defaulted a defendant for a first failure to appear for pretrial examination.[73]

[73]Brief for Defendant-Appellant, pp. 30-31, Gill v. Stolow, 240 F.2d 669 (2d Cir. 1957); see e.g., Mooney v. Central Motor Lines, Inc., 222 F.2d 569 (6th Cir. 1955); Delphy v. Bernuth, Lembcke Co., 217 F.2d 301 (2d Cir. 1954); Dictograph Products, Inc. v. Kentworth Corp., 7F.R.D. 543 (W. D. Ky. 1947).

Also see 4 Moore, Federal Practice, §37.03, n. 35:

> . . .most cases in which dismissal or default judgment is ordered under Rule 37(d) are ones in which there has been repeated and aggravated refusal to make discovery. (emphasis added)

In practice, courts have invested themselves with a wide range of discretion under subdivision (d) of Rule 37. In a large number of the motions brought under this subdivision, the courts have ordered conditional dismissals or defaults. The typical order will grant a motion for dismissal or default unless the party appears for deposition or responds to interrogatories, within a prescribed period.

Defendant Slavens argues that it is a most unusual case in which a default judgment will be entered without first giving the delinquent party another opportunity to respond. The courts have almost uniformly exhibited a generous attitude to the recusant party and have deemed it better to withhold the thunder bolt of a default judgment on condition of future compliance rather than to foreclose a determination of the matter on its merits. Expressions

are very frequent that the drastic provision of a default judgment should be invoked only when a deliberate or flagrant attitude is demonstrated. The Second Circuit in Gill v. Stolow, 240 F.2d 669 (2nd Cir. 1957), stated:

> In final analysis, a court has the responsibility to do justice between man and man; and general principles cannot justify denial of a party's fair day in court except upon a serious showing of willful default. Id. at 670

In Schacht v. Javits, 53 F.R.D. 321,(S.D. N.Y. 1971), the court said sanctions may be invoked "when there has been a pattern of abuse." In Goldstein v. Goldstein, 284 S.2d 227 (Fla. 1973), the Florida court stated in regard to invoking such a sanction for a single failure to perform that:

> The sanctions are set up as a means to an end, not the end itself. The end is compliance. The sanctions should be invoked only in flagrant cases, certainly in no less than aggravated cases, and then only after the Court has given the defaulting party a reasonable opportunity to conform after originally failing or even refusing to appear. This is unmistakably the trend of judicial thinking in Florida on the 'sanction' Rule. Id. at 227.

In Lizak v. Zadrozny, 4 Ill.App. 1023, 283 N.E.2d 252 (1972), a party failed to appear at a deposition after receiving a proper notice. A default judgment was entered. On appeal, the appellate court stated "some further effort to obtain compliance should have been made before imposing a severe penalty." For additional support that Slavens should be given one more additional chance to redeem himself before such a drastic sanction as a default judgment is entered, see the following case authority: Housing Authority of City of Alameda v. Gomez, 26 Cal.App.3d 366, 102 Cal.Rptr. 657 (1972); Goldstein v. Goldstein, 284 S.2d 227 (Fla. 1973); Cinelli v. Radcliffe, 35 A.D.2d 829, 3317 N.Y.S.2d 97 (1970); Bender

v. Pfotenhauer, 21 Ill.App.3d 127, 315 N.E.2d 137 (1974); Rapoport v. Sirott, 418 Pa. 50, 209 A.2d 424 (1965); Beal v. Reinertson, 298 Minn. 542, 215 N.W.2d 57 (1974).

Slavens failure to appear once certainly does not constitute any such pattern of defiance. It was error to enter a default judgment for this single failure to comply with discovery because the overwhelming case authority accords a recusant party a second change, or at most, the court should only enter a conditional default judgment.

POINT III

IT WAS ERROR TO ENTER A DEFAULT JUDGMENT BECAUSE THE BASIC PREMISE OF THE UTAH RULES OF CIVIL PROCEDURE IS THAT DISPUTES SHOULD BE RESOLVED ON THEIR MERITS RATHER THAN UPON TECHNICALITIES.

There is an overall policy that the function of procedural rules is to reach the merits of a dispute. Literally, the first rule of the Utah Rules of Civil Procedure provides that all the rules of procedure are to be "liberally construed to secure the just, speedy, and inexpensive of every action." The Utah rules are, in fact, saturated with the premises that they exist to aid, not abort, the determination of legal controversies on their merits. The Utah Rules of Procedure reduce to a minimum the number of snares over which litigants might trip on their way to the trial courtroom. The Supreme Court of Florida has expressed the same idea in Cabot v. Clearwater Construction Co., 89 S.2d 662 (Fla. 1956):

> "* * *No longer are we concerned with the 'tricks and technicalities of the trade'. The trial of a lawsuit should be a sincere

> effort to arrive at the truth. It is no longer a game of chess in which the technique of the maneuver captures the prize." Id. at 664.

Also see Vac-Air, Inc. v. John Mohn & Sons, Inc., 53 F.R.D. 320 (Ed. Wis. 1971).

The Utah Rules of Procedure are to be construed as a unit. The Utah Rules are designed to secure the just, speedy, and inexpensive determination of every action on its merits. It was error to enter a default judgment against Slavens for failure to appear at a deposition because any such default judgment resolves the dispute upon a technicality, and not upon the merits of the controversy, therefore, any such default judgment is fundamentally contrary to the basic premise upon which the Utah Rules of Civil Procedure are founded.

POINT IV

IT WAS ERROR TO ENTER A DEFAULT JUDGMENT BECAUSE ANY SUCH DEFAULT JUDGMENT ENTERED WITHOUT A HEARING ON ITS MERITS IS A DENIAL OF PROCEDURAL DUE PROCESS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

There exists a constitutional "due process" limitation on the sanctions imposed under Rule 37, when such sanctions terminate either an action entirely or partially. The Second Circuit discussed these constitutional limitations in Flaks v. Koegel, 504 F.2d 702 (2nd. Cir. 1974), stating:

> The Rule has constitutional limitations which were noted in Mr. Justice Harlan's opinion for the Court in Societe Internationale v. Rogers, 357 U.S. 197, 209, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958), in which he stated:
>
> The provisions of Rule 37 which are here involved must be read in light of

> the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in Hovey v. Elliott, 167 U.S. 409 [17 S.Ct. 841, 42 L.Ed. 215] and Hammond Packing Co. v. Arkansas, 212 U.S. 322 [29 S. Ct. 370, 53 L.Ed. 530]. These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations. See Notes of Advisory Committee on Rules, Rule 37, 28 U.S.C. (1952 ed.), p. 4325.
>
> On the record before it, the Court decided that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.

356 U.S. at 212, 78 S.Ct. at 1096 (footnote omitted). Id. at 708 and 709.

Thus, although the United States Supreme Court, in form, avoided any direct resolution of the due process question, still the construction placed upon Rule 37(b) by the United States Supreme Court clearly indicates that a dismissal of the complaint or the entry of a default judgment for failure to comply with the discovery rules would be improper unless the circumstances of the noncompliance afford a reasonable basis to presume an admission by one of a lack of merit in the claim or defense. As a practical matter, therefore, any reasonable belief that one's claim or defense has merit would doubtless be found to exist whenever failure to comply with discovery was shown not to be willful. The record in the instant case, standing alone, would certainly sup-

port any finding that Slavens' failure to appear did not arise through willful defiance, therefore, the court's imposing the ultimate sanction of a default judgment against Slavens is a denial of his procedural due process rights under the Fourteenth Amendment of the United States Constitution.

CONCLUSION

The appellant respectfully submits that the default partial summary judgment should be reversed and the controversy decided on its merits.

Respectfully submitted,

S. REX LEWIS, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Defendant-Appellant,
Bert Slavens
120 East 300 North
Provo, Utah 84601

MAILING CERTIFICATE

I, S. Rex Lewis, Attorney for Defendant-Appellant, Bert Slavens, certify that I mailed two (2) copies of the foregoing brief to Robert M. McRae, Hatch, McRae & Richardson, 370 East Fifth South, Salt Lake City, Utah 84111, this 28th day of May, 1975.

S. Rex Lewis