

1986

Mark A. Wood v. Harry M. Weenig and Erma P. Weenig, his wife : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 860304 IN THE SUPREME COURT

STATE OF UTAH

* * * * *

MARK A. WOOD,

Plaintiff and
Respondent,

vs.

HARRY M. WEENIG and ERMA P.
WEENIG, his wife,

Defendants and
Appellants.

APPELLANT'S BRIEF

Case No. 19978

860304-CA

* * * * *

APPEAL FROM THE DISTRICT COURT, THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY, STATE OF UTAH (FREDERICK, J.)

* * * * *

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FILED
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Clerk, Supreme Court, Utah

IN THE SUPREME COURT

STATE OF UTAH

* * * * *

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)	
Plaintiff and)	
Responcent,)	APPELLANT'S BRIEF
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vs.)	Case No. 19978
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WEENIG, his wife,)	
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* * * * *

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Plaintiff and)	APPELLANT'S BRIEF
Respondent,)	
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vs.)	
)	
HARRY M. WEENIG and ERMA P.)	
WEENIG, his wife,)	
)	
Defendants and)	
Appellants.)	

* * * * *

NATURE OF THE CASE

This is an appeal from the refusal of the trial court to set aside a default judgment entered against appellant in February of 1980.

DISPOSITION IN TRIAL COURT

Plaintiff filed an action against defendant Harry M. Weenig and appellant Erma P. Weenig on July 30, 1979 (R. 2-4)

claiming that Harry's conveyance of all of his interest in the family home to Erma was fraudulent. The complaint was purportedly served on Mrs. Weenig on August 9, 1979, when, according to the constable's return of service, a copy of the complaint and summons was left with Jane Doe, an unidentified person who the constable stated was a person of suitable age residing at the usual place of abode of appellant within the meaning of Utah Rule of Civil Procedure 4(e)(1). An amended complaint was filed on August 28, 1976 (R. 15-20); no copy of that complaint was ever served upon appellant.

A default judgment was taken against Mrs. Weenig on February 6, 1980. (R. 36 & 37). The plaintiff made no attempt to enforce this judgment until the Spring of 1984. Appellant by affidavit stated that she first learned of the default judgment when her attorney, Clifford V. Dunn, investigated a praecipe taped to the window of her home on April 11, 1984. Six days later, on April 17, 1984, Mrs. Weenig, through counsel, filed a motion to set aside the default judgment on the ground that process had never been served upon her (R. 44-67).

The motion to set aside the default judgment was thereafter heard by the trial court on May 2, 1984, the Honorable J. Dennis Fredrick presiding. After hearing the testimony proffered by the parties, the trial court denied

appellant's motion (R. 101, 110-118). Appellant thereupon filed a notice of appeal on May 7, 1984 (R. 104), and present counsel for the appellant filed a protective notice of appeal (R. 124-125) on June 26, 1984.

NATURE OF RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the judgment of the district court denying her motion to set aside the default judgment, and requests that this Court dismiss the action against her based on the non-service upon her. Alternatively, appellant requests that this Court vacate the judgment against appellant and remand this matter to the district court and direct that court to permit her to file her answer and hear her defenses to the complaint against her.

STATEMENT OF FACTS

On July 30, 1979, Mark Wood, respondent in this action, filed a complaint against Harry M. Weenig and appellant Erma M. Weenig, his wife, seeking to set aside as fraudulent the transfer by quitclaim deed, nearly three years earlier, of all of Harry M. Weenig's right, title, and interest in the family's residence at 4464 Covecrest Drive, Salt Lake City, Utah to appellant (R. 2-4). Appellant contends that this transfer was made for good and valuable consideration. Mr.

Wood pursues this action in an effort to collect on a \$200,000 judgment obtained against Harry Weenig over five years earlier in an Indiana state court (R. 2), which was later entered as a judgment in the Third District Court for the State of Utah (R. 22-23).

The complaint in the fraudulent conveyance action was purportedly served upon Mrs. Weenig by delivering a copy of it to Jane Doe, the unidentified daughter of the appellant, at the family residence on August 9, 1979 (R. 12). The return of service was signed by Frank E. Spriggs, Deputy Constable Murray Precinct (R. 12). At the evidentiary hearing on appellant's motion to set aside the default judgment, Mr. Spriggs testified that he took the summons and complaint to the Weenig home, rang the doorbell, and had a conversation with an unseen, unnamed person over an intercom system who allegedly identified herself as the appellant's daughter (R. 161). After describing several minutes of conversation during which the unseen person continued to refuse to identify herself by name and declined to open the door, Mr. Spriggs testified:

After about 10 minutes of this going on, I got upset and told the person that I was going to fill a summons and complaint out and leave it on the porch, and they [sic] said that they [sic] did not have to accept it and I just said, you are served. And I left.

(R. 161, emphasis added).

Less than one page later, Mr. Spriggs contradicted his earlier testimony:

Q Was there any communications with you and the person behind the door as to what the papers were that you had for Mrs. Weenig?

A No. I just said they were legal papers, and I didn't tell them that, you know, it was a warrant or summons or anything. I just said I have some legal papers that I had to deliver.

(R. 162, emphasis added).

Mrs. Weenig and her two daughters also testified at the hearing. Mrs. Weenig testified that she had never been served with any papers in the case (R. 138, 140-41), and her daughters testified that they had never received papers and had never gone through the experience described by the constable (R. 142-45).

Plaintiff filed an amended complaint on August 29, 1979, naming not only Harry M. Weenig and Erma P. Weenig, but also the Lockhart Company and Prudential Federal Savings and Loan Association, as defendants (R. 15-20). That complaint was served upon the finance company defendants, but no service was even attempted on appellant (R. 24-28). All of the defendants, except appellant, conceded to having received process and entered appearances.

A default judgment was entered against Mrs. Weenig on February 6, 1980, pursuant to a minute entry of the Honorable

Homer F. Wilkinson, Third District Court Judge (R. 36). The judgment declared void the quitclaim deed between the Weenigs and "granted a Writ of Execution upon the property so conveyed" (R. 37).

The plaintiff made no attempt to enforce this judgment until the Spring of 1984. Appellant, on the 17th day of April, 1984, filed a motion to set aside the default judgment (R. 66), declaring in an affidavit that she first learned of the judgment taken against her in her absence on April 11, 1984, when a praecipe was taped to the window of her home informing her that her home was to be sold at a Sheriff's Sale less than a month later. (R. 56 & 62-63.) The praecipe captioned the case in controversy as Mark Wood vs. Harry M. Weenig. No other defendants were listed (R. 56).

The motion to set aside came before the Third Judicial District Court for Salt Lake County, the Honorable J. Dennis Fredrick presiding, on May 2, 1984. After hearing the testimony of the parties and examining the exhibits introduced into evidence, the court denied the motion (R. 175-76). This appeal followed.

ARGUMENT

POINT I. THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION TO SET ASIDE THE DEFAULT JUDGMENT IN LIGHT OF THE RECOGNIZED POLICY IN FAVOR OF GRANTING SUCH MOTIONS.

This Court has long recognized the general policy that "courts should be liberal in granting relief against judgments

taken by default to the end that controversies may be tried on the merits." Mason v. Mason, 597 P.2d 1322, 1323 (Utah 1979). Although this Court has also noted that the decision whether to grant a motion to set aside is left to the discretion of the trial court, see Airkem Intermountain, Inc. v. Parker, 30 Utah 2d 65, 67-68, 513 P.2d 429 (1973), appellant contends that the trial court gave insufficient weight to this presumption in favor of setting aside default judgments and, consequently, abused its discretion. Indeed, appellant contends that the trial court's decision on the service of process issue was erroneous as a matter of law.

POINT II. THE TRIAL COURT ERRED IN REFUSING TO SET ASIDE THE DEFAULT JUDGMENT ON THE GROUNDS THAT THERE HAD BEEN NO SERVICE OF PROCESS.

In Utah State Department of Social Services v. Musselman, 667 P.2d 1053 (Utah 1983), this Court held that

In order for [a] defendant to be relieved from [a] default judgment, he must not only show that the judgment was entered against him through excusable neglect (or any other reason specified in Rule 60(b)), but he must also show that his motion to set aside the judgment was timely, and that he has a meritorious defense to the action.

Id. at 1055-56. The trial judge in the case at bar concluded that appellant had failed to establish the elements articulated in Musselman (R. 175-76). Indeed, in the findings of fact and conclusions of law prepared by plaintiff-respondent's attorney

and adopted by the district court, that court concluded that appellant's motion to set aside was untimely as a matter of law, that appellant had failed to raise a meritorious defense, and that, as a matter of law, service of process was proper (R. 116-117). These conclusions of law are erroneous.

Initially, it is necessary to recognize that, presuming the invalidity of service of process, appellant's apparent untimeliness under Rule 4 and her alleged failure to raise a meritorious defense before the trial court are irrelevant. If service of process was not properly effectuated, the trial court failed to obtain jurisdiction over appellant and any judgment rendered below is, of necessity, void. This court so held in Murdock v. Blake, 26 Utah 2d 22, 484 P.2d 164 (1971). In Murdock the court held void a judgment entered against a corporation on the grounds that process was not properly served upon the corporation's designated agent. Id. at 166-167. The Court found it irrelevant that the corporation may have had actual knowledge of the suit against it, stating:

Service of summons in conformance with the mode prescribed by statute is deemed jurisdictional, for it is service of process, not actual knowledge of the commencement of the action, which confers jurisdiction. . . . The proper issuance and service of summons is the means of invoking the jurisdiction of the court and acquiring jurisdiction over the defendant; these cannot be supplanted by mere notice by letter, telephone or any other such means.

Id. at 167.

An example of the application of this concept -- that the other two elements of the Musselman standard are irrelevant if process was not properly served -- is found in this Court's decision in Woody v. Rhodes, 23 Utah 2d 249, 461 P.2d 465 (1969). In that case, the Court upheld the trial court's decision setting aside a judgment by default despite the fact that the motion to set aside was not filed until over a year after the entry of the default judgment. The Court stated:

It is the plaintiff's contention here that the provisions of Rule 60(b), Utah Rules of Civil Procedure, required that the defendant file his motion within a period of not more than three months after entry of the judgment. It is quite apparent in this case that the facts show an invalid service of summons. . . . The service of summons being fatally defective, the judgment entered pursuant thereto is without force or effect and the court acted properly in setting it aside. The three-months provision provided for in Rule 60(b) has no application to this situation.

Id. at 466. See also Stan Katz Real Estate, Inc. v. Chavez, 565 P.2d 1142, 1143 n.2 (Utah 1977).

Waiver of the timeliness requirement in this case, in addition to being legally compelled under Woody v. Rhodes, is warranted on equitable grounds. As noted above, plaintiff delayed over four years in attempting to execute the default judgment he had obtained. Appellant testified that she did not learn of the default judgment until notice was given of the Sheriff's sale. Her motion to set aside the judgment was filed

six days later. The law can hardly require clairvoyance of defendants who are never served and against whom execution of judgment is not sought within the three-month period. See, e.g., Tonelson v. Haines, 2 Ariz. App. 127, 406 P.2d 845, 846 (1965) (delay in filing Rule 60(b) motion to set aside excused when plaintiff made no effort to execute the judgment until more than six months thereafter).

It is clear that if appellant is successful in prevailing on her contention that service of process was never made upon her within the meaning of Rule 4, the default judgment entered against her must be vacated and appellant must be given a chance to pursue her defenses on the merits, regardless of the untimeliness of her motion or her alleged failure to assert a meritorious defense before the trial court. Service of process was not properly made in this case.

Rule 4(e) of the Utah Rules of Civil Procedure provides that:

Personal service within the state shall be as follows:

- (1) Upon a natural person of the age of 14 years or over, by delivering a copy thereof to him personally, or by leaving such a copy at his usual place of abode with some person of suitable age and discretion there residing; or by delivering a copy to an agent authorized by appointment or by law to receive service of process.

Appellant submits that, as a matter of law, no valid service of process was made upon her even assuming the substantive validity of the constable's testimony.

The cases cited by plaintiff in the trial court, Business and Professional Adjustment Co. v. Baker, 62 Or. App. 237, 659 P.2d 1025 (1983), and United Pacific Insurance Co. v. Discount Co., 15 Wash. App. 559, 550 P.2d 699 (1976), are clearly distinguishable from the case at bar. In Baker, a deputy sheriff approached the defendant's residence in order to serve process upon him, knocked on the door and, there being no response, called the defendant's name. A voice from within the house, which the sheriff recognized to be the voice of the defendant as a result of an interview he had with the defendant earlier, responded "go away, leave me alone." The deputy immediately announced in a loud voice that the defendant had been served and placed the papers between the door and the door jam of the residence. Id. at 1026. In this case, conversely, the constable's alleged conversation occurred with an unnamed and unrecognized member of the household, concededly not the defendant herself. The constable merely left the papers on the front porch, not fixed to the door or under anything that would prevent the papers from being blown away or destroyed. See id. at 1027. (R. 166).

The United Pacific Insurance case is similarly distinguishable. In United Pacific Insurance the process

server went to the defendant's house and saw the defendant face to face. When the defendant learned of the process server's identity and purpose, she slammed the door in the server's face, knocking the papers from his hand. The server yelled to defendant that she had been legally served and left the papers on the porch. Id. at 700. This case is again distinguishable from the case at bar in that the server dealt with the defendant herself, not another person. In addition, the process server had visually identified the person with whom he dealt, and knew of a surety that the defendant was in the vicinity when he declared that she had been legally served.

The importance of the identified distinctions between the cases cited by plaintiff in the trial court and the case at bar is demonstrated by examining an analogous case from the Court of Appeals of Arizona -- Tonelson v. Haines, 2 Ariz. App. 127, 406 P.2d 845 (1965). In that case, the process server testified that he went to the defendant's home and conversed with the defendant's wife. He claimed that when he informed the woman of his purpose she slammed the door in his face. As the door was being closed in his face, "the process server testified that . . . he stated in a normal tone of voice, 'Lady, you have been served,' that he left the summons and complaint between the wooden door and the screen door of the home; and that thereafter he went on his way without noticing

where the papers lay." Id. at 846. The defendant's wife testified before the trial court that she was unaware at the time of the incident that service was being attempted or that the summons and complaint had been left on the doorstep. Id. The Court of Appeals of Arizona upheld the trial court's decision setting aside the default judgment, holding that "in order for there to be a ' . . . leaving . . . with . . . ' a person a copy of the summons and complaint, as required by Rule 4[(e)], . . . such person must be aware of the 'leaving.'" Id. at 847.

The Arizona Court's reasoning should control this case. Indeed, the facts in the Arizona case provide a much stronger basis for a conclusion that the person served was aware of the papers being left than the facts at bar. In Tonelson the process server viewed the person with whom service was left face to face. The woman undoubtedly saw the papers in the server's hand, and must have been within hearing distance at the time he declared, "Lady, you have been served." In addition, the server placed the papers between the screen and the door, not loose on the porch where they could be blown away. Id. at 846. The occupant of the defendant's home on the day in question had much less opportunity to know that the papers had been left than did the defendant's wife in Tonelson. Constable Spriggs never saw the person with whom he

allegedly left the papers. He had no way of knowing whether the occupant was within hearing distance when he became frustrated, announced his conclusion that in his mind legal service had been made, and left the premises. Indeed, depending on which version of the constable's story one believes (see supra, pp. 4-5), it is not clear whether the occupant would have been aware that a summons and complaint were left even if she had been within hearing distance. It is uncontroverted that the papers were simply left on the porch, not put inside the door or underneath a mat (K. 166).


The key element of Rule 4(e), as interpreted by the Arizona court, "that the person 'with' whom the papers are left must have knowledge that the papers are so left," Id. at 847, has not been established in this case. Indeed, no finding of fact was made on this issue by the trial court. The case should at least be remanded to the trial court to make such a finding.

CONCLUSION

This court must vacate the default judgment entered against the appellant in the court below. Where a judgment has been taken upon invalid service, the court has never acquired jurisdiction, and a valid judgment cannot be entered. Accordingly, the trial court abused its discretion in refusing to set

aside the default judgment entered against Mrs. Weenig in this case.

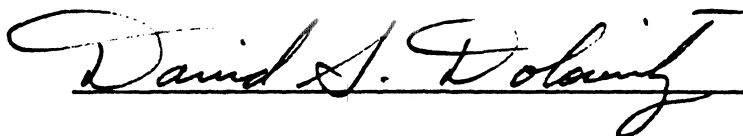
RESPECTFULLY SUBMITTED this 19 day of September, 1984.


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MAILING CERTIFICATE

I hereby certify that I caused to be mailed, postage prepaid, two true and correct copies of the foregoing brief to the following on this 19 day of September, 1984:

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