1975

George W. Flick v. Glen Van Tassell and Van's Service Inc : Brief of Respondent

Utah Supreme Court

Bruce Findlay; Nielsen, Conder, Henroid and Gottfredson; Attorneys for Respondents.
Fullmer and Harding; Attorneys for Appellants.

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

GEORGE W. FLICK,	*	
Plaintiff and Respondent,	*	
vs.	*	Case No.
GLEN VAN TASSELL and VAN'S SERVICE, INC., a Utah corporation,	*	14154
Defendants and Appellants.	*	

RESPONDENTS' BRIEF

Appeal from the Judgment of the Second Judicial District Court for Davis County, the Honorable Ronald O. Hyde, Judge.

Bruce Findlay
NIELSEN, CONDER, HENRIOD & GOTTFREDSON
Attorneys for Respondents
410 Newhouse Building
Salt Lake City, Utah 84111

FULLMER & HARDING
Attorneys for Appellants
540 East 500 South, Suite 203
Salt Lake City, Utah 84102

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RESPONDENTS' BRIEF

STATEMENT OF THE KIND OF CASE

This is an action to recover monies advanced by the Plaintiff to the Defendants.

DISPOSITION IN LOWER COURT

Judgment was entered for the Plaintiff on April 2, 1975, against the Defendants, jointly and severally. Appeal was not taken from the judgment. The Defendants appeal from an adverse decision upon their motion under Utah Rules of Civil Procedure 60(b)(1) to set aside the judgment.

RELIEF SOUGHT ON APPEAL

The Defendants request that the Court reverse the trial judge, that the Court dismiss the judgment against Van's Service or reduce the amount of the judgment. None of these forms of relief

are within the jurisdiction of the Court in this matter, because no appeal was taken timely from the judgment entered herein. The relief available to the Defendants on this motion is limited solely to a review of the exercise of the trial Court's discretion denying the motion of the Defendants under Rule 60(b).

STATEMENT OF FACTS

This action was filed in December of 1973. (R-1) An appearance was duly entered for the Defendants by Boyd M. Fullmer, who continued to represent the Defendants as counsel of record until March 19, 1975, (R-159), at which time he was permitted to withdraw. The record shows that Mr. Fullmer participated in depositions and other discovery; that he appeared in opposition to motions of the Plaintiff and that he was personally involved as counsel at every stage of the preceedings, including pretrials, up to the date set for the trial in the matter below. (R-1 to R-160) On February 28, 1975, Plaintiff notified Defendant of the impending trial date and because Plaintiff had heard that Defendants were replacing their counsel, the notice requested Defendants to get new counsel prior to the trial. (R-149, R-150) On March 4, 1975, Mr. Fullmer requested permission from Judge Thornley Swan at a hearing on a motion filed by Mr. Fullmer for permission to withdraw as counsel for Defendants. Then or shortly thereafter, Mr. Fullmer filed a written motion for permission to withdraw. (R-152). Judge Swan advised Mr. Fullmer that the motion to withdraw would be denied if it meant that a continuance of the trial date would be necessary. Based on the March 4, hearing,

a written order was issued by the Court, of which Mr. Fullmer had due notice, ordering that the trial proceed on March 19, and giving the Defendants until March 14, to respond to certain interrogatories and requests for admissions served upon them months earlier by the Plaintiff. (R-155). No responses to the interrogatories have ever been tendered by the Defendants and the requests for admissions were deemed admitted on March 14, for the failure of Defendants to respond. (R-160 et seq.). At the trial, Plaintiff appeared with his counsel and Boyd M. Fullmer appeared for the sole purpose of withdrawing, although he was still counsel of record for the Defendants. Fullmer stated in open Court that he no longer had the file and didn't want to try the case from memory. (Transcript of Trial, March 19, 1975, hereinafter Trial Tr. at 3). He stated that Glen Van Tassell and his replacement counsel, J. Reed Tuft, were fully aware of the trial setting for that morning, and that Tuft may have reviewed the file as early as the 28th of February, 1975. (Trial Tr. 3). Mr. Fullmer then withdrew from the courtroom and the Plaintiff put on his evidence, leading ultimately to a judgment for the Plaintiff against the Defendants jointly and severally, entered April 2, 1975. The time for appeal from the judgment ran on May 2, 1975, and was not extended by a motion under Rules 52 or 59. (R-178).

J. Reed Tuft, who had filed a motion for permission to appear prior to the trial, filed a motion under Rule 60(b) to vacate the April 2, judgment. (R-180). The grounds alleged in the said

motion were as follows: Defendant, Van Tassell, had business interests outside of the state, which led to communication problems between himself and his attorney, and to dissatisfaction on the part of Van Tassell with the services of Boyd Fullmer; Fullmer sought to withdraw unsuccessfully and Tuft, Van Tassell's replacement counsel, refused to appear until Fullmer was released; therefore Van Tassell was allegedly without counsel at the March 19, hearing; Tuft had not been familiar with the file on March 19, but at the time of the Rule 60(b) hearing, he was ready to proceed; and Van Tassell had an unspecified defense.

At the hearing on the motion under Rule 60(b), held April 24, 1975, the trial court heard evidence regarding further grounds. (Transcript of April 24, 1975, hearing, hereinafter Tr. of Apr. 24 hearing). Van Tassell testified that although he was not fully aware of the differences between a trial and a pretrail, Fullmer had stated that the March 19 hearing was a pretrial and the Van tassell need not attend. Van Tassell also testified, however, that Fullmer had told him that the March 19, hearing was a trial. (Tr. of Apr. 24, hearing at 13). Fullmer testified, in turn, that he doubted he had told Van Tassell that the hearing was a pre-trial. Fullmer stated that he had told Van Tassell prior to the hearing that he would do nothing more at the trial hearing than appear and withdraw. Fullmer further testified that the order on the hearing of March 4, would have been forwarded to his clients as part of his usual practice to forward all orders when received. Fullmer testified that Van Tassell had

notice and full understanding of the requests for admissions and unanswered interrogatories prior to March 14, and with time to respond. (Tr. of Apr. 24, hearing at 19-28).

Based on the testimony and the record, the Court denied the Rule 60(b) motion by memorandum decision entered on the 15th day of May, 1975. The Court signed an order on its memorandum opinion on June 10, 1975, and this appeal was commenced by notice filed June 19, 1975, by Boyd M. Fullmer, who again represents Defendants as their counsel on this appeal.

POINT ONE

The Court Should Dismiss all of Defendant's Appeal Except That Part Pertaining to the Denial of Defendant's Motion Under Rule 60(b).

Utah Rules of Civil Procedure 73(a) provides as follows:

> "When an appeal is permitted from a district court to the Supreme Court, the time within which an appeal may be taken shall be one month.... The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry in the minutes of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b), or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59".

Notice of appeal is a prerequisite to the jurisdiction of the reviewing court. In the case of In re Estate of Ratliff, 19 Utah 2d 346, 431 P.2d 571 (1967), this court held it had no jurisdiction because appellant had failed to tender the fee for

filing the notice of appeal within a month after judgment. Furthermore, no relief from failure of appellant to file his appeal on time may be granted under Rule 6(b) which permits extension of time in general on the ground of excusable neglect, or under Rule 60(b) which applies to relief from judgments on the gound of excusable neglect. Anderson vs. Anderson, 3 Utah 2d 277, 280, 282 P.2d 845, 847 (1955). See generally Galanis vs. Mayes, 16 Utah 2d 181, 397 P.2d 998 (1965).

Judgment was entered below on April 2, 1975, (R-178), and the Notice of Appeal bears the filing stamp of the Davis County Clerk of June 19, 1975, 78 days later. (R-237). Clearly Defendants failed to appeal from the judgment and thereby lost that portion of their appeal. To hold otherwise would give the trial court power to confer jurisdiction upon the Supreme Court after appellate jurisdiction has been lost. Cf. Holbrook vs. Hodson, 24 Utah 2d 120, 123, 466 P.2d 843 (1970).

Defendants pray for relief pertaining to the merits of the judgment below, yet it is clear that Rule 60(b) is no substitute for appeal. (Meadows vs. Cohen, 409 F.2d 750, 752, (5th Cir. 1969); Schildhaus vs. Moe, 335 F.2d 529, 531 (2d Cir. 1964); McDowell vs. Celebrezze, 310 F.2d 43, 44 (5th Cir. 1962); Well-Mixed, Inc. vs. City of Anchorage, 471 P.2d 408 (Alaska 1970). The reason for this rule was stated in Horace vs. St. Louis Southwestern Railroad Co., 489 F.2d 632, 633 (8th Cir. 1974) where appellants had allowed the time for appeal to run and later appealed from a denial of Rule 60(b) motion as follows:

"Rule 60(b) is addressed to the sound discretion of the trial judge and is not available as a substitute for appeal... It provides for extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances..."

489 F.2d at 633.

Therefore, although the Defendants seek modification or reversal of the judgment entered April 2, 1975, herein they are entitled to neither form of relief, because appeal from an order denying a Rule 60(b) motion brings up only the order and not the judgment. Lee vs. Brown, 210 Kan. 168, 499 P.2d 1076 (1972); Neagle vs. Brooks, 203 Kan. 323, 454, P.2d 544 (1969).

POINT TWO

The Defendants made No Attack on the Merits of the Judgment Entered Herein at the Time of Their Motion Under Rule 60(b), and Their Contentions Attacking the Judgment Should Not Be Reviewed On This Appeal.

Utah Rule of Civil Procedure 60(b), which is patterned after Federal Rule of Civil Procedure 60(b), provides extraordinary relief from a judgment. Like all motions, however, it is limited by the provisions of Utah Rule of Civil Procedure 7, which requires that grounds for a motion be stated with particularity in the motion. The purpose for this requirement is to create a record upon which a decision may be made, and if a party deems it advisable, to appeal from the decision on the record. Under familiar principles, the record made in the written motion may also include matters heard in evidence pursuant to Rule 43.

The record on which the Defendants' Motion for Relief

Pursuant to Rules 55 and 60(b) is based is expressed in the written motion and the transcript of the hearing on the motion. Contentions outside of this record were not before the trial court below when he ruled on the Defendants' Rule 60(b) motion and should hot be a bisis for appeal here.

Several recent Utah Supreme Court decisions present reasoning which sheds light on the principles governing matters raised for the first time on appeal. Dallof vs. Robinson, 520 P.2d 191 (Utah 1974) was an appeal in which the appellant claimed for the first time on appeal that the judgment was barred by the workman's compensation statute. In Patton vs. Lloyd, 28 Utah 2d 57, 497 P.2d 1382 (1972), appellants claimed for the first time on appeal that their attorney below had acted unethically. The jury found for the defense in Simpson vs. General Motors Corp., 24 Utah 2d 301, 470 P.2d 399 (1970) and on appeal for the first time appellant demanded that the principle of strict liability apply to the case. In all of thes cases the court refused to review the new matter on appeal. In Simpson, the Court reasoned as follows:

> "The contention relating to strict liability is an attempt to inject that doctrine into this case for the first time on appeal. It was dealt with neither in the plaintiff's complaint, nor in the pretrial conference, nor at the trial. It is therefore not appropriate to address such a contention to this court. Orderly procedure, whose proper purpose is the final settlement of controversies, requires that a party must present his entire case and his theory or theories of recovery to the trial court; and having done so, he cannot thereafter change to some different theory and thus attempt to keep in motion a merry-go-round of litigation".
> 24 Utah 2d 301 at 303.

Wasatch Mines Co. vs. Hopkinson, 24 Utah 2d 70, 465 P.2d 1007 (1970)

was a case where the defendant had failed to properly plead the statute of limitations, and thus could not have review of his contentions based on limitations. And the failure to make a proper record below was relied on by the court in American Oil Co. vs. General Contracting Corp., 17 Utah 2d 2d 330, 411 P.2d 46 (1966) to refuse review of matters wholly foreign to the record on appeal because not mentioned in the pleadings nor in the findings of the court below and not raised by motion to amend the memorandum decision of the court below nor by request for findings.

There is one exception to the principle set down in the above cases, arising from In Re Woodward, 14 Utah 2d 336, 384 P.2d 110 (1963), in which the court decided, over a vigorous dissent, that if the liberty of the appellant is jeopardized then constitutional issues not heard below may be raised on appeal. That case has no application to this appeal.

Defendants demand that the judgment be reduced in amount or modified as to Van's Service, Inc. These contentions are wholly foreign to the record in their Rule 60(b) proceedings and should not serve as a basis for review on this appeal.

POINT THREE

The record justifies the trial court's denial of Defendants' Rule 60(b)(1) Motion.

This court considered a denial of a Rule 60(b)(1) motion in Airkem Intermountain, Inc. vs. Parker, 30 Utah 2d 65, 513 P.2d 429 (1973) and stated that---

> "The trial court is endowed with considerable latitude of discretion in granting or denying a motion to relieve a party from a 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". (footnote omitted)

30 Utah 2d 65 at 67. The court reasoned as follows in sustaining the denial:

> "For this court to overturn the discretion of the lower court in refusing to vacate a valid judgment, the requirements of public policy demand more than a mere statement that a person did not have his day in court when full opportunity for a fair hearing was afforded to him or his legal representative. The movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control". (Emphasis in the original. Footnote omitted) 30 Utah 2d 65 at 68.

With respect ot he due diligence of the Defendants, the records show the following:

(a) Defendant Glen Van Tassell, failed to appear twice at his duly scheduled and noticed deposition, and was only induced to appear under threat of sanctions from the court pursuant to Rule 37. (R-4, R-8, R-11, R-13, R-18, and R-21). When he did appear, he failed to produce documents listed in Requests for Production incorporated in the Notices of Deposition, to which he never responded. (R-36, 37).

(b) In June, 1974, Plaintiff served Interrogatories upon Glen Van Tassell. (R-38) These were not answered for various insufficient reasons and were the subject of orders, beginning September 30, 1974 (R-74). Defendant was ordered to answer again on December 19, 1974, (R-120). No written answers to any of these interrogatories were ever served.

(c) On October 17, 1974, Plaintiff served requests of admisssions on Defendant. (R-79 through R-89). The time for defendant to respond to these requests was extended by the Order of December 19, and again by the Order of March 10. (R-120, R-153). The time for responding ran prior to the trial date of March 19, 1975. No response to any of the requests was ever made, and pursuant to the March 10, 1975, order the requests were deemed admitted at the time of trial. No motion has been filed for relief from the effect of these admissions, and therefore the Defendant Glen Van Tassell is bound by them. Utah Rules of Civil Procedure 36.

(d) Plaintiff heard a rumor late in February, 1975, that Boyd M. Fullmer was about to withdraw as counsel for Defendants. Therefore, on February 28, 1975, a notice was served on Mr. Fullmer and by mail to the last known address of Glen Van Tassell, urging the defendant to obtain new counsel in time for the trial scheduled herein for March 19, 1975. (R-149, R-150). Mr. Fullmer did request permission to withdraw a few days later, which request was denied by Judge Swan. (R-181)(Tr. of Apr. 24, hearing at 23, and 24). On march 17, 1975, J. Reed Tuft served a Petition to Appear as Counsel for the defendants, by ordinary mail. The petition was expressly contingent on the granting of Fullmer's petition to withdraw. (R-156). Tuft's position was tantamount to a refusal to go ahead on March 19 as ordered, because Judge Swan had stated that Fullmer had to stay on the case if his withdrawal would necessitate a continuance. Tuft did not ask for a continuance, in order

to prepare for the trial, nor did he later attack the jdugment entered as a result of the March 19, hearing on the merits, by motion for new trial or to amend the judgment or findings.

(e) Plaintiff made repeated motions for sanctions against the Defendant for his failure to discover. (R-36, R-66, R-102, R-155) A detailed Memorandum was filed by Plaintiff supporting these Motions. (R-104 through 112). The court took the matter under advisement from time to time, but at the trial ultimately granted relief in part as a response to these motions, duly renewed at the trial. (R-160, 161).

(f) The trial date was duly set by court order, served upon Defendant's counsel of record, and mailed notice was sent to defendant personally. (R-146, R-149, R-150). Notice was given before Fullmer had formally requested leave to withdraw, and no reasons are given why defendant should not be bound by this notice. Defendant claimed at the April 24, hearing on the Rule 60(b)(1) motion that he had not realized the importance of the March 19, date, (Tr. of Apr. 24, hearing at 16), but Fullmer claimed that he had given notice of the trial setting to his client and had warned that he would again attempt to withdraw. (Tr. of Apr. 24, hearing at 21, 25 and 28). The trial court's finding with respect to this evidence is reflected in his Memorandum Decision of May 13, 1975, as follows:

> "This matter was set for trial for March 19, 1975, by Judge Swan. Defendant was advised March 19, was a "firm setting". Defendant was aware of this setting and of Judge Swan's order.

"...Further, the defendant was advised by his counsel, Mr. Fullmer, what would happen if he did not appear". (R-216)

(g) Boyd M. Fullmer, who was allegedly discharged by Van Tassell and whose attempted withdrawal from this case occasioned Van Tassell's claim that relief should be granted under Rule 60(b)(1), is now again counsel for defendants, raising an inference perhaps that the differences between him and Van Tassell which originally led to the attempted withdrawal were not as deep-seated as alleged in Defendants' motion under Rule 60(b)(1). (R-181 at paragraphs four and five). Mr. Fullmer's lack of care is no ground for relief under Rule 60(b)(1). Hoffman vs. Celebrezze, 405 F.2d 833 (8th Cir. 1969) (Government lawyer allowed judgment against United States for interest and later attacked it under Rule 60(b)(1) on the Ground he hadn't realized that the type of claim was non-interest bearing).

In the fact of the record, as set out above, Defendant Glen Van Tassell has set out to show that he exercised due diligence and that judgment was entered because of factors beyond his control, as he must under Airkem Intermountain Inc. vs. Parker, supra; Warren vs. Dixon Ranch Co., 123 Utah 416, 420, 260 P.2d 741 (1953); and Peterson vs. Crosier, 29 Utah 235, 81 Pac. 860 (1905). The court below made the following findings in its Memorandum Decision at R-216:

"The facts of this case do not establish excusable neglect but rather an attitude of non-participation on the part of the defendant....The defendant had his day in Court and the judgment was rendered after a hearing despite defendant's

non-participation. Ends of justice are not served if a party may obtain delay and frustrate the proceedings of the Court by simply failing to prepare and failing to appear".

Glen Van Tassell's conduct was like that of the appellant in Pacer Sport & Cycle Inc. vs. Myers, 534 P.2d 616 (Utah 1975), who had told plaintiff's counsel that he had sued the wrong defendant and then taken no further action. Such conduct does not approach reasonable neglect, as the court held in Myers.

The cases cited by Defendants in their brief are not to the contrary. Security Adjustment Bureau, Inc. vs. West, 20 Utah 2d 292, 437 P.2d 214 (1968) was a case where punitive damages had been assessed without evidence and the defendant claimed he had received no notice of the motion for entry of default. In the present matter, the Defendants made no attack on the merits of the judgment in their Rule 60(b)(1) motion, and the trial judge found, as recited above, that defendants had notice of the proceeding. Chrysler vs. Chrysler, 5 Utah 2d 415, 303 P.2d 995 (1956), cited by Defendants for the benefit of some favorable dicta, is an affirmance of a denial of a Rule 60(b)(1) motion from a judgment entered in a hearing at which the defendant chose not to participate, despite due notice to his counsel. The Chrysler case lends support to the ruling below, by the following passage:

> "It is claimed the plaintiff did not personally receive notice of the trial date until...the same morning.... Even if true, this circumstance would appear to be quite immaterial. His attorney had notice, and plaintiff's conduct there was entirely inconsistent with any bona fide intention to pursue this action in Utah".
> 5 Utah 2d 415 at 417

Mayhew vs. Standard Gilsonite Co., 14 Utah 2d 52, 376 P.2d 951 (1962), does not support the Defendants' position, because it was a default judgment entered prior to any proceedings, on the basis of the failure of the defendant to file an answer, and set aside at the behest of the stockholders of the defendant company, who had no actual notice of the matter. No similar claims are made herein by either Defendant.

Another case cited by Defendants, McKean vs. Mountain View Memorial Estates, 17 Utah 2d 323, 411 P.2d 129 (1966), was a default entered because counsel had been 27 minutes late to a trial of which he had received only two days notice. Counsel was anxious to proceed when he arrived but the court had entered a default and would not hear him with respect to the issue of liability. Below, however, counsel voluntarily left the proceedings, having made no motion for continuance, stating that it would be a disservice to his client to try the matter without the file. The trial herein had been noticed up by regular notice and subsequent court order and the trial date had been a matter of negotiation for some time before that.

Russo vs. Aucoin, 7 So.2d 744 (La. App. 1942) was a lower appeal court decision in Louisiana. It is difficult to assess its relevance because it was decided under a different jurispurdence than our own common law and rules modeled after the Federal Rules of Civil Procedure. Nevertheless it is pertinent to show that Defendants have apparently not published the deposition cited by them in their brief, referring to the Russo case, and the

deposition testimony of Plaintiff with respect to that matter is by no means as clear as Defendants argue in their brief. Furthermore, this matter was explored at the March 19, 1975, hearing. Findings of Fact 2, 3, 9, 15, 53, 54 (R-160 et seq.) and Plaintiff's Exhibit "D". (R-158).

Defendants have failed to explain why they discharged their counsel practically upon the eve of trial and failed to have an authorized representative at the trial, after due notice of the trial date. Defendant Van Tassell's verified motion states:

> "That prior to moving his residence to Idaho, the defendant Glen Van Tassell was required to devote so much personal attention to the ranching operations in Idaho that he was required to be away from his home in Utah (where his business records were situated) for extensive periods of time, and was for long periods of time unable to be reached by phone". (R-180).

The rule is stated by 46 Am.Jur. 2d Judgments, §718 as follows:

> "Parties are not justified in neglecting their cased merely because of the stress or importance of their own private business, and such neglect is ordinarily not excusable". (footnotes omitted).

The Verified Motion of Van Tassell admits neglect of the inexcusable variety. The Court below properly refused to grant the relief he requested.

POINT FOUR

Defendants Did Not Move For a Continuance of the March 19, Trial Date and Should Therefore Not Be Heard To Complain About the Judgment Entered Thereon.

A major underpinning of Defendants' argument on appeal is the holding of Finch vs. Wallberg Dredgind Co., 281 P.2d 136

(Idaho 1955) where counsel refused to try the case and replacement counsel, with short notice, sought a continuance. In the case below, however, replacement counsel, apparently with notice of at least two weeks, (Tr. of Apr. 24, hearing at 19) made no effort to salvage the situation in a timely manner. The court in Brunson vs. Hamilton Ridge Lumber Corp., 122 S.C. 436, 115 S.E. 624 (1923), reasoned as follows:

> "If a party to the action can force a continuance by the willful discharge of his attorney just before the time for trial, and then secure a continuance, there would be no way in which the trial of a case can be forced".

No continuance can be reasonably expected where the court specifically rules that in case of a withdrawal there will be no continuance and orders the attorney to go forward, as occurred in the present case. Slaughter vs. Zimman, 105 Cal. App. 2d 623, 234 P.2d 94 (1951). (Defendant failed without reasonable excuse to obtain counsel after permitting his attorney to withdraw after notice that no continuance would be allowed).

Where the Defendant hired a new attorney five days before trial and then sought a continuance at trial, the court in Flynn vs. Fink, 60 Cal. App. 670, 213 Pac. 716 (1923), reasoned:

> "parties litigant have no absolute right to insist upon a change of counsel at the last moment before the time set for the commencement of the trial, where such change of counsel requires a continuance in order that the case may be properly prepared for trial. Such a course, if permitted and if persisted in, might and probably would in many cases work the destruction of private rights of the opposing litigant and would be subversive of the 'prompt administration and execution of the laws, upon which depends largely their effectiveness'".

If the Court proceeds with the trial on the date set in the

absence of defendants and no proper motion for continuance is before the court, there is no error in denying a continuance. Nahas vs. Nahas, 135 Cal. App. 2d 440, 287 P.2d 381 (1955). In Nahas counsel had made a motion for a continuance when the case was called. The motion was not supported by affidavits required by statue. No evidence was presented for defendants. Judgment was rendered on the evidence, as in the case at bar, and sustained against the attack upon the denial of the continuance.

In ruling against a continuance, it is deemed relevant that the defendant may have had a prior continuance. Dodd vs. Cowgill, 85 Nev. 705, 463 P.2d 482 (1969). Defendant obtained a continuance herein to postpone the trial from March 12, 1975, to March 19, 1975, on the ground that his then counsel, Mr. Fullmer, had a conflicting court appointment on March 12. (R-138, R-146)

See generally Benson vs. Benson, 66 Nev. 94, 204 P.2d 316 (1949) (inability of new counsel to prepare no ground for continuance where party and attorney could have prepared for trial by exercise of reasonable diligence).

POINT FIVE

The Default Entered on the Ground of Failure to Answer Interrogatories Should be Sustained.

Plaintiff served certain interrogatories in June, 1974, to which Defendants never responded. At the time of trial Plaintiff's motion for Default judgment under Rule 37, which had been pending since March 4, 1975, was called up for a hearing before the trial

judge. A lengthy memorandum already on file supports said motion. Defendants have never shown any good cause for failing to answer the interrogatories. An inference ought to be drawn that the answers, if made, would support the entry of judgment. See Baltimore & O. Ry. Co. vs. Carrier, 426 S.W.2d 938 (Kentucky). (Trial date set one day after answers were due; motion for extension of time denied 16 days previously; trial date had been requested eight months previously). Plaintiff requested a trail date July 12, 1974, a little more than eight months before the trial date.

POINT SIX

No Relief Should Be Granted to the Corporate Defendant on This Appeal.

No deficiencies in the judgment against the corporate Defendant were raised in the Rule 60(b)(1) proceedings below, and therefore as argued previously the Court should not entertain such issues on this appeal. Upon the withdrawal of Boyd M. Fullmer at the trial, default was entered against the corporation, and judgment was entered under Utah Rules of Civil Procedure 55. Defendants make no objection to any of these procedures and did not appeal timely from them. Airkem International, Inc. vs. Parker, 30 Utah 2d 65, 513 P.2d 429 (1973) supports the entry of default under these circumstances.

Furthermore, the record shows that Van Tassell used the corporation as part of his scheme to get money from Plaintiff,

(Tr. of Mar. 19, 1975, hearing at 5, 6, 7 & 8) Van Tassell had control of the books and records of the corporation, (Trial Tr. 8) he controlled the issuance of stock therein, (Trial Tr. 8) and that Van Tassell dealt with property in the name of the corporation. (Trial Tr. 20, 21) These factors show that the court did not abuse its power under Rule 55 to enter judgment against the corporation.

CONCLUSION

Plaintiff respectfully urges the Court to sustain the trial court, on the ground that Defendants have failed to prove due diligence or extenuating circumstances supporting their claim under Utah Rules of Civil Procedure 60(b)(1), thus failing to show an abuse of discretion below, and have failed to appeal in time from the judgment on file herein, thus losing the opportunity to challenge the merits of that judgment on this appeal.

Respectfully submitted,

Bruce Findlay
NIELSEN, CONDER, HENRIOD & GOTTFREDS
410 Newhouse Building
Salt Lake City, Utah 84111

Attorneys for Plaintiff - Responden

SERVED two (2) copies of the foregoing Brief by Mail on this _____ day of November, 1975, addressed to--

BOYD M. FULLMER
Attorney at Law
540 East Fifth South Street
Salt Lake City, Utah 84102

_____