

1972

Raymond Stewart v. John L. Sullivan And Richard Monk Allen : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

RAYMOND STEWART,
*Plaintiff and
Respondent,*

vs.

JOHN L. SULLIVAN and
RICHARD MONK ALLEN,
*Defendants and
Appellants.*

Case No.
12958

BRIEF OF APPELLANT

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

RAYMOND STEWART,
*Plaintiff and
Respondent,*

vs.

JOHN L. SULLIVAN and
RICHARD MONK ALLEN,
*Defendants and
Appellants.*

Case No.
12958

BRIEF OF APPELLANT

STATEMENT OF KIND OF CASE

This is an action filed by plaintiff, respondent, claiming that he was injured by the willful misconduct of the driver of the vehicle in which he was a passenger and by the negligence of the defendant Richard Monk Allen, the driver of the vehicle which collided with the vehicle in which plaintiff was a passenger.

STATEMENT OF FACTS

On November 22, 1968 at or about 4:00 P.M. the plaintiff, Raymond Stewart, was riding as a car pool

passenger in a car being driven by the defendant John L. Sullivan. They were proceeding South on U.S. Highway 91. The defendant Richard Monk Allen was driving a car which was proceeding on the same highway in the same direction.

The Allen vehicle collided with the rear end of the Sullivan vehicle and the resulting collision overturned the Sullivan vehicle.

The plaintiff Raymond Stewart on March 20, 1969 brought action against John L. Sullivan, the driver of his vehicle alleging willful misconduct and against Richard Monk Allen, the driver of the other vehicle which collided with the rear of the vehicle in which the plaintiff was a passenger.

John L. Sullivan filed a separate action against Richard Monk Allen for personal injuries and damages to his vehicle.

DISPOSITION IN LOWER COURT

The defendant Richard Monk Allen moved to consolidate the two cases for trial. Originally the motion was denied without prejudice to renew after further discovery. The motion was made again on November 17, 1969 and was heard on November 26, 1969. The motion was granted December 2, 1969 by the Honorable Merrill C. Faux. R.33.

On the 24th day of September, 1970, the defendant John L. Sullivan served written Interrogatories upon the plaintiff, R. 35. The plaintiff did not an-

swer the Interrogatories of the defendant and on the 12th day of January, 1971 almost 4 months later the defendant John L. Sullivan moved for an Order compelling answers to the Interrogatories and for a striking of the trial setting. The motion was heard on January 19, 1971 by the Honorable Aldon J. Anderson who granted the motion and ordered as follows:

1. "That plaintiff answer the Interrogatories submitted by defendant John L. Sullivan dated September 24, 1970 within 15 days of the date of service of a copy of this Order upon counsel for plaintiff." R. 42.

The plaintiff did not answer the Interrogatories and on March 4, 1971 a motion was made by the defendant John L. Sullivan to dismiss the plaintiff's Complaint. The defendant Richard Monk Allen made a similar motion. The motions were noticed for hearing before the Honorable Aldon J. Anderson on April 2, 1971. Due to a change in scheduling, the law and motion calendar was transferred to the Honorable Stewart M. Hanson who granted the defendants' motions to dismiss. The Order provided the following:

"... And the Court having considered the matter and good cause appearing,

IT IS HERBEY ORDERED that plaintiff Raymond Stewart's Complaint as against both defendant John L. Sullivan and Richard Monk Allen be and it is hereby dismissed." R. 50, 51.

A copy of the Order of Dismissal was served upon plaintiff's attorney on April 2, 1971.

On the 19th day of April, 1971, the Complaint of defendant John L. Sullivan against Richard Monk Allen in the other action was dismissed without prejudice pursuant to a mutual stipulation of the parties, R. 52, 53.

On the 14th day of May, 1971, the attorney for the plaintiff was suspended from the practice of law in the State of Utah.

The plaintiff obtained a new attorney and on the 16th day of March, 1972, without notice to any of the parties and ex parte, the plaintiff's new attorney obtained an amended Order of Dismissal which contained the following language:

"A clerical error having been made in the drafting of the Order of Dismissal herein in that said Order omitted the words "without prejudice" as directed by the Court, and said error having come to the attention of the Court,

NOW, THEREFORE, pursuant to Rule 60 (a), Utah Rules of Civil Procedure, the Court on its own initiative corrects said error by amending the Order of Dismissal to read as follows:

IT IS HEREBY ORDERED, that plaintiff, Raymond Stewart's Complaint as against both defendants, John L. Sullivan and Richard Monk Allen, be and it is hereby dismissed without prejudice." R. 55.

Having learned of the amended Order of Dismissal, both defendants filed their Motions to Set Aside the Amended Order of Dismissal together with

Affidavits. The Affidavits clearly disclose that the Court did not, on any occasion state that the original Order of Dismissal was without prejudice and no memorandum was made that said Order of Dismissal was without prejudice.

On April 7, 1972 the plaintiff filed a Motion To Amend Order of Dismissal on Additional Grounds, R. 65, supported by an Affidavit, R. 67, in which the plaintiff set forth in detail the procedures he had followed with his client and the attorney for Richard Monk Allen concerning the settlement offer to be made. The Affidavit established that contact had not been made with the attorney for John L. Sullivan until shortly before the attorney for the plaintiff had its original amended Order of Dismissal entered, R. 70, 71.

The Motions were heard upon notice and by stipulation of the parties on April 13, 1972 by the Honorable Stewart M. Hanson who then set aside the amended Order of Dismissal and denied plaintiff's Motion to Amend Order of Dismissal on Additional Grounds. The Order provided as follows:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that defendants' Motion to set aside the Amended Order of Dismissal is hereby granted and plaintiff's Motion to Amend the Order of Dismissal on Additional Grounds is hereby denied. The former entry of Dismissal previously on file in this case is hereby reinstated." R. 97, 98.

On April 24, 1972, the plaintiff filed a Motion

for Further Hearing Before Ruling of the Court. R. 88.

The Motion was heard pursuant to notice and a stipulation by the Honorable Stewart M. Hanson, who granted plaintiff's Motion. Said Order provided as follows:

"... and the Court having reviewed all of the files and records and affidavits herein and hearing the arguments of counsel and having found sufficient grounds to relieve plaintiff from the final judgment of dismissal herein and being fully advised in the premises,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff's Motion to Amend the Order of Dismissal herein is hereby granted and IT IS ORDERED that plaintiff's Complaint as against both defendants be and is hereby dismissed "without prejudice."

2. The order of May 3, 1972, granting defendants' Motion to Set Aside the Amended Order of Dismissal herein is hereby set aside." R. 103.

Both defendants filed their notices of appeal from said Order and the matter is now before this Court on appeal.

RELIEF SOUGHT ON APPEAL

The defendant and appellant John L. Sullivan, seeks a reversal of the Order entered by the District Court, which Order changes the original Order of

Dismissal with prejudice to an Order of Dismissal without prejudice.

POINT I

THE TRIAL COURT ORIGINALLY ENTERED A DISMISSAL OF PLAINTIFF'S COMPLAINT WITH PREJUDICE.

It is without dispute that plaintiff had not filed its Answers to the Interrogatories of the defendant even after the trial Court had entered its Order (R. 42), that said Interrogatories be answered.

A subsequent Motion was made by both defendants pursuant to Rule 37 (b) (2) (iii) and Rule 41 (b) to dismiss plaintiffs Complaint for failure to answer the Interrogatories.

The trial Court granted defendants' Motions and entered a dismissal of plaintiff's Complaint. It is without dispute that the trial Court did not specify that the dismissal was without prejudice. The Order signed and entered by the Court was as follows:

"IT IS HEREBY ORDERED that plaintiff Raymond Stewart's Complaint as against both defendant John L. Sullivan and Richard Monk Allen be and it is hereby dismissed." R. 51.

Rule 37 (b) (2) (iii) provides that for failure of a party to answer designated questions, the Court may make such Orders which include the following:

"(iii) an Order . . . dismissing the action . . ."

Rule 41 (b) of the Utah Rules of Civil Procedure provides:

“For failure of the plaintiff to prosecute or to comply with these rules or any order of the Court, a defendant may move for a dismissal of an action or of any claim against him . . . Unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule . . . operates as an adjudication upon the merits.”

Whether or not the trial Court Judge in his mind wanted to specify the dismissal to be without prejudice is of little significance at this point. At no time was this desire, alleged by plaintiff, expressed either orally in Court, in the minutes or in the written Order.

In the case of *Blankenship v. Royalty Holding Co.*, (10th Cir. 1953) 202 F.2d 77 where a Motion to Dismiss (for failure to state a claim) was granted by the trial Court, the Circuit Court held:

“Courts possess the inherent power to correct errors in the records evidencing the judgment pronounced by the Court so as to make them speak the truth by actually reflecting that which was in fact done. They do not, however, possess the power to correct an error by the Court in rendering a judgment it did not intend to render and by such an Order change a judgment actually but erroneously pronounced by the Court to one the Court intended to record.”

The allegation of plaintiff (as to the trial

Court's intention to render a dismissal without prejudice) appears to be without substance as evidenced by the fact that upon notice and Motion of the defendants, the trial Court immediately reinstated its former Order of Dismissal with prejudice.

POINT II

THE UTAH RULES OF CIVIL PROCEDURE
DO NOT ALLOW OR PROVIDE FOR A MOTION
FOR FURTHER HEARING BEFORE RULING
OF THE COURT.

After plaintiff's counsel contacted counsel for John L. Sullivan and discovered, as alleged by plaintiff that the dismissal was with prejudice the following events took place.

1. Counsel for plaintiff approached the trial Court ex parte, without notice to either defendant and presented to the Court and the Court signed an "Amended Order of Dismissal which contained the following language:

"A clerical error having been made in the drafting of the Order of Dismissal herein in that said Order omitted the words "without prejudice" as directed by the Court, and said error having come to the attention of the Court,

NOW, THEREFORE, pursuant to Rule 60(a), Utah Rules of Civil Procedure, the Court on its own initiative corrects said error by amending the Order of Dismissal to read as follows:

It is hereby ordered that plaintiff, Ray-

mond Stewart's Complaint as against both defendants, John L. Sullivan and Richard Monk Allen, be and it is hereby dismissed without prejudice." R. 55.

2. Upon learning of this Order, counsel for both defendants immediately upon notice and motion requested the Court to reinstate its former Order of Dismissal.

Plaintiff then moved the Court to amend the Order of Dismissal on additional grounds pursuant to Rule 61 (b) (7). R. 65. The Court granted defendants' Motion and denied plaintiff's Motion, thereby reinstating the original order of dismissal with prejudice.

3. Plaintiff then filed its Motion for further hearing before the Court. The only new allegations of substance made in writing were that the previous attorney for the plaintiff had been suspended from the practice of law in the State of Utah on May 14, 1971, a month and 12 days after the Order of Dismissal had originally been entered.

The trial Court granted plaintiff's Motion to amend the Order of Dismissal to a dismissal without prejudice.

Concerning a "Motion to Reconsider" this Court stated:

"We are unaware of any such a Motion under our rules . . .

We think the Motion to Reconsider the

Motion to vacate the judgment is abortive under the rules . . ." *Utah State Employees Credit Union v. Riding*, 24 U. 2d 211, 469 P.2d 1.

Obviously to allow a party to have two or more chances at the same Motion without a showing of extraordinary circumstances is not appropriate under the Rules.

The result of all the foregoing is that the trial Court has changed the original dismissal three times to read as follows: 1. without prejudice, 2. with prejudice, 3. without prejudice.

POINT III

A PARTY MOVING FOR RELIEF FROM A JUDGMENT PURSUANT TO THE PROVISIONS OF RULE 60 (b) OF THE UTAH RULES OF CIVIL PROCEDURE MUST STATE WITH PARTICULARITY THE GROUNDS AND FACTS UPON WHICH THE MOTION IS BASED.

Plaintiff's Motions do not specify the grounds upon which the Motions are based. The first Motion contains the following language:

"The Court in the above entitled case having acted upon its own initiative under Rule 60 (a) Utah Rules of Civil Procedure to correct a clerical error to amend the Order of Dismissal herein showing the same to be without prejudice, plaintiff acknowledges the correctness of the Court's ruling and moves that the same relief also be granted on the additional ground as set forth in Rule 60 (b) (7), Utah Rules of Civil Procedure, which Rule likewise entitles plaintiff to the relief sought.

This motion is based upon the files and records herein together with the Affidavit of Neil D. Schaerrer, showing that plaintiff is clearly entitled to said relief." R. 65, 66.

The Affidavit states generally that in September, 1971 (at least five months after the Order of Dismissal) that plaintiff contacted new counsel and said: plaintiff could not get his attorney Lambert Gibson to explain to him the status of the case. Neil D. Schaerrer, plaintiff's second attorney, obtained the file and apparently relied upon the statement of Mr. Winder (attorney for defendant Richard Monk Allen) that the case had been dismissed without prejudice. In reliance upon this statement, Neil D. Schaerrer took no further steps to amend the judgment until he contacted Jack L. Schoenhals (attorney for defendant John L. Sullivan) and was informed the dismissal was with prejudice.

The entire Affidavit appears to be one reciting some facts and some conclusions which all relate to the "mistake, inadvertance, or neglect" of the counsel for the plaintiff.

The second Motion filed by plaintiff (R. 88) appears to be similar in nature to the first but apparently includes an additional theory, to wit: that plaintiff himself was unaware of the Order of Dismissal and the Order of Suspension of his attorney from the practice of law until the latter part of September, 1971.

The Affidavit of Lambert Gibson, R 85 (plain-

tiff's first attorney) states generally that he relied upon the statement of Mr. Winder that the dismissal was without prejudice.

In the case of *United States v. \$3,216.59 in United States Currency*, 41 F.R.D. 435 the Court stated:

“ . . . liberality cannot extend to granting relief, where there is no evidentiary showing of a “reason” under the rule and a meritorious defense . . . “such an application for extraordinary relief must be fully substantiated by adequate proof and its exceptional character must be clearly established * * *.”

The Court said the mistake of counsel must be set forth clearly showing the nature of the mistake with particularity. Having failed to do so the Motion is denied.

In *Ledwith v. Storkan* (D.C. Neb. 1942) 2. F.-R.D. 539, the Court held the grounds of excusable neglect must be set forth with particularity.

In *Frank v. New Amsterdam Casualty Co.*, 27 F.R.D. 258 (1961) the Court stated:

“The leading case of *Ledwith v. Storkan*, supra, enunciates the basic proposition that the moving party must articulate the specific reasons which constitute excusable neglect. The defendant has only offered a general conclusion, it has not offered any extenuating circumstances or reasons surrounding counsel's failure to follow instructions.”

This Court has stated the same principles, where-
in this Court said:

“We are not told the nature of the illness and it does not appear that appellant . . . was so incapacitated that he could not have called an attorney to have his rights and the rights of the corporation protected.” *Warren v. Dixon Ranch Co.*, 123 U. 416, 260 P.2d 741.

It is obvious from reading the Motions and Affidavits filed by plaintiff that in no way does plaintiff explain or set forth the reasons why he did not discover until the later part of September, 1971, that the Order of Dismissal had been entered or that his attorney had not answered the Interrogatories served upon him in September of 1970, or that his attorney had been suspended from the practice of law in May of 1971. The Affidavits and Motions of Plaintiff are void of any details whatsoever concerning these very important points. They set forth no details explaining plaintiff's attorneys' mistaken reliance upon the belief that the dismissal was without prejudice and their failure over the several months to read the Order of Dismissal and determine its effect.

POINT IV

THE TRIAL COURT WAS WITHOUT AUTHORITY TO AMEND THE ORDER OF DISMISSAL UPON PLAINTIFF'S MOTION AND THE TRIAL COURT ABUSED ITS DISCRETION IN AMENDING SAID ORDER.

A. THE TIME LIMITATION OF THREE MONTHS BARRED THE GRANTING OF THE MOTION.

Rule 60 (b) of the Utah Rules of Civil Proceed-

ure provides:

"On motion . . . the Court may in the furtherance of justice relieve a party or his legal representative from a final judgment . . . for the following reasons: (1) mistake, inadvertance, surprise, or excusable neglect . . . (7) any other reason justifying relief from the operation of the judgment. The Motion shall be made within a reasonable time and for reasons (1), (2), (3) or (4), not more than three months after the judgment, Order or proceeding was entered or taken." (In substance this is the same as Rule 60 (b) of the Federal Rules of Civil Procedure except the time limitation in the Federal Rule is one year instead of three months.)

Plaintiff filed its Motions to amend the Order of Dismissal on April 7, 1972 (R. 65) and on April 24, 1972 (R. 88). Both Motions were filed more than one year after the entry of the original Order of Dismissal (April 2, 1971). (R. 51).

Neither of the two Motions were filed within the three month time limitation nor were they filed within a reasonable time.

In *Shaw v. Pilcher*, 9 U 2d 222, 341 P.2d 949, this Court stated:

"Pilchers attacked the whole proceedings as being violative of Rule 60 (b), Utah Rules of Civil Procedure, with its three month limitations feature relating to entertaining Motions for relief because of mistake, newly discovered evidence and the like. A reading of the rule makes it apparent that a Motion for relief

based on the grounds enumerated therein is ineffective if made three months after the decision from which relief is sought.

* * * *

The attack here being based on fraud upon the Court, and having been leveled some 17 months after the adoption decree, must have been pursued in an independent action, and not by way of Motion in the original action otherwise, the rule would not make much sense."

This Court clearly established that Motions based upon the reasons (1-6) in Rule 60 (b) must be made within the three month limitation period.

That Motions based upon the reasons set forth in Rule 60 (b) (1-6) must be made within the time limitations specified is a rule clearly established by the Courts. *Wallace v. United States* (2nd Cir) 142 F.2d 240, *Rinieri v. News Syndicate Co.*, (2nd Cir. 1967) 385 F 2d 818, *United States v. Karahalias* (2nd Cir. 1953) 205 F 2d 331, *Klapprott v. United States*, 335 U.S. 601, 69, S.Ct. 384, 93 L Ed. 266, *Carrethers v. St. Louis - San Francisco Railway Co.*, (D.C. Okl. 1967) 264 F. Supp. 171.

B. THE PROVISIONS OF RULE 60 (b) (1-6) and (7) ARE MUTUALLY EXCLUSIVE AND THE LATTER CANNOT BE USED TO AVOID THE TIME LIMITATION OF THE FORMER PROVISIONS (1-6).

In *Rinieri v. News Syndicate Co.*, (2nd Cir. 1967) 387 F 2d 818, the Court stated:

"... Rule 60 (b) (6) (same as Utah Rule

60 (b) (7)) is not a *carte blanche* to cast adrift from fixed moorings and time limitations guided only by the necessarily variant consciences of different judges . . . and may be relied upon only in "exceptional circumstances."

Thus it is settled that Rule 60 (b) (1) and 60 (b) (6) are not *pari passu* and are mutually exclusive, and that the latter section cannot be used to break out from the rigid time restriction of the former . . . we are convinced that Rinieri has failed to bring himself within the "extremely meagre" scope as Judge L. Hand referred to it of Rule 60 (b) (6)."

In *United States v. Karahalias*, (2nd Cir. 1953) 205 F 2d 331, the Court stated:

"In this Petition for a rehearing the United States raises two points, the first of which is that we were wrong when we said that as to Karahalias "there is no doubt that his ground for relief is 'excusable neglect;'" and also when we said subsection (6) of the Rule 60 (b) should be read "as giving the Court a discretionary dispensing power over the limitation imposed by the Rule itself on subsections (1), (2) and (3)." Both these statements, the Petition says, were contrary to the opinion of the Supreme Court in *Klapprott v. United States*, 335 U.S. 601, 69 S. Ct. 384, 93 L Ed. 266, and we agree . . . we must also retract the construction put upon subsection (6), and hold that no "neglect" however excusable, will survive the limitation of Rule 60 (b)."

As has been previously cited in this Brief (*Shaw v. Pilcher*, *supra*) this Court has ruled that a motion based upon Rule 60 (b) (3) must be brought within

three months, "otherwise, the rule would not make much sense."

Although plaintiff would like to characterize its Motions as being grounded upon facts which bring it within the provisions of Rule 60 (b) (7), it is obvious that the basis of the Motions is "neglect, mistake or inadvertance," clearly all within the bounds and three month limitation of Rule 60 (b) (1) and therefore excluded from the provisions of paragraph (7).

It was clearly beyond the authority of the Court and it constituted an abuse of discretion for the trial court to amend the Order of Dismissal based upon plaintiff's Motions and Affidavits.

C. THE "NEGLECT" SPECIFIED IN RULE 60 (b) (1) MUST BE EXCUSABLE AND IS SUBJECT TO THE THREE MONTH LIMITATION PERIOD. INEXCUSABLE NEGLIGENCE IS NOT GROUNDS FOR RELIEF UNDER RULE 60 (b) (7).

1. The Motions and Affidavits of plaintiff must of necessity refer to two or more acts of neglect. The first act of neglect by plaintiff's counsel was its failure to answer the Interrogatories. Concerning this neglect, the plaintiff's Affidavits merely state that plaintiff's attorney was busy and apparently just did not get around to answering the Interrogatories. The Affidavits do not disclose any "excusable" neglect. This Court stated in *Warren v. Dixon Ranch Co.*, 123 U 416, 260 P 2d 741:

"We are not told the nature of the illness and it does not appear that appellant Arnold Dixon was so incapacitated that he could not have called an attorney to have his rights and the rights of the corporation protected. . . .

And although a judgment may be erroneous and inequitable, equitable relief will not be granted to a party thereto on the sole ground that the negligence of the attorney, agent, trustee or representative of the present complainant prevented a fair trial."

This Court refused to reverse the trial Court's ruling which denied a Motion to set aside a default judgment where the plaintiff's attorney knew of the trial setting but did not appear. *Chrysler v. Chrysler*, 5 U 2d 415, 303 P 2d 995. See also *Masters v. Le-Seuer*, 13 U 2d 293, 373 P 2d 573.

In *Frank v. New Amsterdam Casualty Co.*, 27 F.R.D. 258 (1961) where the attorney failed to file a Motion for a new trial or an appeal the Court said:

"Defendant contends that its counsel's omission constitutes excusable neglect within the term of . . . 60 (b) (1). The Court finds that the defendant's view is untenable. An omission or any carelessness on the part of counsel does not automatically constitute "excusable neglect" as the term is employed in Fed. R Civ. P. 60 (b) (1).

* * * *

The leading case of *Ledwith v. Storkan*, supra, enunciates the basic proposition that the moving party must articulate the specific reasons which constitute excusable neglect. The defendant has only offered a general con-

clusion; it has not offered any extenuating circumstances or reasons surrounding counsel's failure to follow instructions. This Court therefore concludes that this omission, without a further showing of extenuation, does not constitute "excusable neglect" within the purview of Fed. R. Cir. P. 60 (b) (1)."

See also *Dalrymple v. Pittsburgh Consolidation Coal Company*, (D.C. Penn. 1959) 24 F.R.D. 260, where the Court said you must show neglect is excusable. See also *Ohliger v. United States* (2nd Cir. 1962) 308 F 2d 667, where the Court found no excusable neglect and stated that mere ignorance of Court's rules of procedures does not constitute excusable neglect. For other cases with similar rulings see the following: *Hoffman v. Celebreeze* (8th Cir. 1969) 405 F 2d 833; *In Re Wright* (D.C. Mo. 1965) 247 F Supp. 648; and *Federal Enterprises v. Frank Allbritten Motors*, (D.C. Mo. 1954) 16 F.R.D. 109.

2. The second act of neglect specified by plaintiff was the failure of its first and second attorney to understand the nature of the dismissal — that it was with prejudice; and there is an inference that the two attorneys somehow relied on the statement of Mr. Winder that "he thought" the case was dismissed without prejudice.

Concerning this concept of "neglect," where a moving appellant employed an attorney who called plaintiff's attorney and was told "he would be allowed a longer time in which to file his Answer." This Court said:

“Such a promise, if given, could in no way bind a client who already had a judgment.”
Warren v. Dixon Ranch Co., 123 U 416, 260 P 2d 741.

It must be observed that this “reliance” theory of plaintiff is founded upon conversations with Mr. Winder which occurred sometime after the entry of the judgment of dismissal with prejudice.

In *Geigel v. Sea Land Service, Inc.* (D.C. Puerto Rico 1968) 44 F.R.D. 1, the plaintiff’s Complaint had been dismissed for failure to answer Interrogatories. The Court stated:

“The useful purpose of the principle of finality of judgments requires that the Court scrutinize the Motion for relief and the grounds upon which it is based. If judgments are vacated on tenuous and insignificant grounds they will lack finality and there will be no end to litigation.

Petitioner voluntarily chose the attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer — agent and is considered to have notice of all facts, notice of which can be charged upon the attorney.”

In *Ledwith v. Storkan*, (D.C. Neb. 1942) 2F.-R.D. 539 the Court said:

“Carelessness and negligence is not akin to excusable neglect . . .

Negligence of counsel is imputed to his client."

In *Ohlinger v. United States*, (2nd Cir. 1962) 308 F 2d 667 the Court held that ignorance of Court's rules of procedure is not excusable neglect.

In *Carrethers v. St. Louis - San Francisco Railway Co.*, (D.C. Okl. 1967) 264 F. Supp. 171, the Court held that inexcusable neglect was not available as grounds for relief under Rule 60 (b) (6) (same as our (7)) and should not be given special treatment. The Court made the following observation:

"If "excusable neglect" cannot be raised except within a year (3 months under our rules) then certainly *inexcusable neglect* should not be given more favorable treatment and thus cannot be said to be "any other reason justifying relief" under Rule 60 (b) (6). In other words, inexcusable neglect which here also amounts to contributory fault by the plaintiff will not provide the necessary extraordinary circumstances to warrant the extraordinary relief afforded by Rule 60 (b) (6)."

Why the plaintiff himself did nothing about his legal action for almost one year is not explained in the Affidavits but we can only assume was the result of inexcusable neglect upon his part, amounting to contributory negligence.

CONCLUSION

The plaintiff and his attorney for some unexplained reason, failed to answer the Interrogatories served upon them on September 29, 1970 (even after

Order of the trial Court), allowed a dismissal to be entered and failed to read the Order to determine its effect. One year after the Interrogatories had been served the plaintiff retained a new attorney who, with his attorney, waited until a year after the dismissal had been entered before any attempt was made to attack the Order. On the part of both the plaintiff and his attorneys it is obvious they were extremely neglectful. Having failed to show their neglect was excusable and having filed their motions more than three months after the entry of dismissal had been entered, they were not entitled to attack the Order of Dismissal with Prejudice. The trial Court was without authority to change the original Order and abused its discretion in disturbing the year old Order. This Court should correct the error of the trial Court and reinstate the original Order of Dismissal with Prejudice.

Respectfully submitted,

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