

1987

# Lewis & Guymon, Inc. v. Steve Christiansen : Brief of Appellant

Utah Court of Appeals

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Lewis and Guymon; Pro Se.

William L. Schultz; Attorney for Appellants.

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## Recommended Citation

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DOCKET NO. 870134-CA

UTAH COURT OF APPEALS

STATE OF UTAH

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Lewis & Guymon, Inc.,

Plaintiff and Respondent,

v.

Steve Christiansen,

Defendant and Appellant.

---

No. 870134-CA

Priority 14 B

BRIEF OF APPELLANTS

APPEAL FROM FINAL JUDGMENT  
OF THE OREM SMALL CLAIMS COURT

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**MAY 27 1987**

**Court of Appeals**

UTAH COURT OF APPEALS

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## STATEMENT OF ISSUES

1. Should the Small Claims Court have set aside a default judgment to allow Defendant to proceed to a determination on the merits.

## STATEMENT OF CASE

### NATURE OF THE CASE

The matter deals with payment the liability of Defendant for the installation of goods at his residence which was rented from a third party.

### COURSE OF PROCEEDINGS AND DISPOSITION IN LOWER CASE

This matter was defaulted on February 23, 1987 by Judge pro tem Riches of the Orem Small Claims Court. A hearing on Defendants Motion to set aside default was held March 30, 1987. No formal Order was entered on the denial of that Motion.

## STATEMENT OF FACTS

Defendant ordered the installation of a furnace at the residence where he resided. Defendant alleged the costs of the furnace and installation were to be paid by the home owner.

After being served with a Summons by Plaintiff, Defendant sought the advice of an attorney who was assisting him in another matter concerning the home. Defendant was advised to join the home owner into the action. Defendant assumed attorney would handle this matter, although no agreement was reached between the parties.

At the time of trial, neither attorney nor Defendant appeared. Plaintiff was awarded a default judgment.

Defendant's motion to set aside was later denied by the Court. See Affidavit of Steve Christense, R-11.

#### SUMMARY OF ARGUMENT

The lower courts denial of Defendants Motion to Set Aside Default is contrary to Utah Supremem Court guidelines that dictate that such relief should be liberally granted.

#### ARGUMENT

THE UTAH RULES OF CIVIL PROCEDURE, AND THE DECISIONS RENDERED IN THE CONNECTION THEREWITH, INDICATE THAT THIS COURT SHOULD BE LIBERAL IN GRANTING THE RELEIF SOUGHT IN DEFENDANTS' MOTION.

Rule 55 (c) of the Utah rule of civil procedure provides that " For a good cause shown the court may set aside a entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60 (b)." Rule 60 (b) provides that:

On motion upon such terms as are just the Court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or preceeding, for the following reasons;.....(1) mistake, inadvertance, surprise, or excusable neglect;.....(3) fraud (whether heretofore denominated intrensic or extrensic), misrepresentation, or other misconduct of an adverse party; (3) when, for any cause, the summons in an action has not been personally served upon the defendant as required by rule 4 (e) and the defendant has failed to appear

in said action; (7) any other reason justifying relief from the operation of the judgment.

Utah Courts, in construing these sections of the Utah Rules of Civil Procedure, have established a long standing rule that "the Court should be liberal in granting relief against judgments taken by default to the end that controversies might be tried on there merits." Mason v. Mason, 597 p 2nd 1322, 1323 (Utah 1979). The importance of this rule has been emphasized in two resent decisions of the Utah Supreme Court. In the first such decision the Supreme Court said: "The Court should be generally indulgent toward setting a judgment aside where there is resonable justification or excuse for the defendants failure to answer and when timely application is made." Katz v. Pierce, 41 UAR 12, 13 (September 10, 1986). In the second decision that Court said "We are in a court generally with the doctrine urged by Defendant that the Court should be liberal in granting relief against judgments taken by default to the end that controversy may be tried on the merits." State ex Rel. Utah State department of Social Services be Musselman, 667 P 2nd 1053, 1055 (Utah 1983), citations omitted. In Musselman, the Utah Supreme Court adopted a three part test to guide other courts in applying Rule 60 (b); first, the moving party must show that the motion to set aside judgment was timely filed; second, the motion must be based upon one or more of the serveral subsections in Rule 60 (b); and third, the moving party must have "maritourious defense to the action." Id., at 1058. In the recent case of Garcia v Garcia, 712 P 2nd 288 (Utah 1986) the Utah Supreme Court has held that



the third element is not a requirement where the judgment is void. In that case the Court stated (quoting with approval from Wright and Miller, federal practice and procedure; Civil Section 2862:

Rule 60 (b) (iv) [the equivalent the Rule 60 (b) (vi)] authorizes relief from void judgments. Necessarily emotion on this part of rule differs markedly from motions under the other clauses of Rule 60 (b). There is no question of degression on the part of the Court when a motion is under Rule 60 (b) (iv) nor is there any requirement, as there usually is when the default judgments are attacked under Rule 60 (b), that the moving parties show that he has a maritorious defense. Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the Court must act accordingly.

By the same token, there is no time limit on an attack on a judgment as void. The one year [3 month in Utah] limit applicable to some Rule 60 (b) motion is expressly inapplicable, and even the requirement thaty the motion be made in a resonable time which seems literally to apply to motions under Rule 60 (b) (iv), cannot be enforced with this class of motion. A void judgment cannot aquire validity because of latches on the part of the judgment debtor.

Nevertheless this is respectfully submitted that defendant needs all of the test and requirements.

First, rule 60 (b) provides that "the motion shall be made with a resonable time and for reasons (1), (2), (3), or (4) not more than three months after the judgment, order, or proceeding was entered or taken." Defendants motion was timely filed under this rule.

Second, defendants motion for relief is based upon section 1, 3, 4, 5, and 7 which are different subsections of Rule 60 (b), any of which are sufficient to grant the relief sought subparagraph (7) of Rule 60 (b) allows this court to grant relief where equity so requires and where the other subparagraphs 1 through 4 do not apply. Land v Smith Central Utah Telephone Association, 657 P 2nd 1304, 1306 (Utah 1982). Equity, in this case, requires that Plaintiff not benefit from its own failure to properly serve defendants herein and, /or from the defendants failure to respond, and equity further requires that this matter be reopened and that a full and fair hearing be had on the merits of all claims and defenses of the parties. Defendants have also alleged adequate mistake, inadvertance, surprise or excusable neglect, and in addition there was not adequate service upon the corporation pursuant to Utah Rule of Civil Procedure 4 (e) (iv), thus making the judgment void under subsection 5 of Rule 60 (b).

Third, defendant processes defenses of ostensible merit against the allegations contained in Plaintiffs complaint which meet the third test requirement set forth in Musselman for granting relief under Rule 60 (b). Plaintiff generally alleged that Defendant is liable for breach of a contract entered into with the Plaintiff. Defendants deny that the condition precedance to there performance of that contract have been met and further deny that they owe any money to Plaintiff. (See affidavit of Thomas Neeleman.)

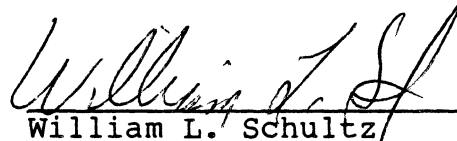
For purposes of this motion, the court is not required to conduct "a mini trial" to determine if these defenses are or sufficient merit in and of themselves to warrant a reversal of the

default judgment; it is sufficient that such defenses are offered in good faith. Musselman, Supra, at 1056.

CONCLUSION

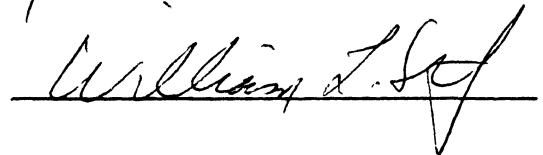
Defendant seeks to have the lower courts denied of his Motion to Set Aside Default Judgment reversed and the matter remanded for hearing on the merits.

Respectfully submitted this 27th day of May, 1987.

  
\_\_\_\_\_  
William L. Schultz  
Attorney for Appellant

MAILING CERTIFICATE

This is to hereby certify that I mailed 24 copy of the foregoing to Lewis and Guymon, 883 Industrial Park Rd., Orem, Utah 84057 this 27 day of MAY, 1987.

  
\_\_\_\_\_

# Eighth Circuit Court, State of Utah

Orem DEPARTMENT

Lewis and Guymon, Inc.  
883 N. Industrial Park Dr.  
Orem, Utah 84057

Plaintiff,

vs.

Steve Christiansen  
362 W. 700 N.  
Orem, Utah 84057

Defendant(s).

MINUTE SHEET  
and JUDGMENT

Case No.

874000069

Date 2-23-87 JUDGE Riches Clerk jp

Tape 8759 Counter No. 359

## MINUTES

### TRIAL CONDUCTED:

- ( ) Plaintiff present. ( ) with counsel, \_\_\_\_\_  
( ) Defendant present. ( ) with counsel, \_\_\_\_\_  
( ) Both parties present and testify on their own behalf.

### DISMISSAL:

- ( ) Neither party present, case dismissed ( ) with prejudice ( ) without prejudice  
( ) Plaintiff moves for dismissal, motion granted. Case dismissed.  
( ) Plaintiff not present, case dismissed ( ) with prejudice ( ) without prejudice

### DEFAULT JUDGMENT:

- ( ) Defendant appears and admits indebtedness.  
(~~xx~~) Default of defendant for failure to appear.  
( ) Judgment entered in favor of plaintiff and against defendant.

### CONTINUANCE:

- ( ) Case continued by order of the Court to \_\_\_\_\_  
( ) Case continued on motion of the \_\_\_\_\_ to \_\_\_\_\_

## JUDGMENT

- ( ) The court finds NO CAUSE FOR ACTION. CASE IS DISMISSED.  
(~~xx~~) IT IS HEREBY ORDERED that Plaintiff recover from Defendant the following:

\$ 322.00 Principal,  
\$ \_\_\_\_\_ Interest at \_\_\_\_\_ % per annum from date \_\_\_\_\_  
\$ 21.00 Court costs to date and post judgment costs.  
\$ 343.00 TOTAL JUDGMENT

IT IS FURTHER ORDERED that this Judgment shall be paid in installments of \_\_\_\_\_  
per \_\_\_\_\_, beginning on \_\_\_\_\_

ATED 2-24-87

BY

W. Riches  
Circuit Court Judge Pro Tempore

3/20<sup>th</sup>  
11:00 AM.