1996

Dwane L. Sykes Et Al. v. Howard F. Hatch : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS
STATE OF UTAH

960561-CA

DWANE L. SYKES ET AL.	***REPLY BRIEF OF APPELLEE***
PLAINTIFFS, APPELLEES, CROSS-APPELLANT	
v.	
HOWARD F. HATCH	NO. 960561-CA
	Priority Number 15
DEFENDANT, APPELLANT CROSS-APPELLEES	

REPLY BRIEF OF APPELLEE / CROSS APPELLANT

Reply brief in opposition to appeal from order granting Sykes' motion to amend judgment and altered and amended judgment.

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ARGUMENT PRESENTED BY MR. HATCH

1) Mr. Hatch argues that a default of Mr. Sykes was justified because:

a) The witness list presented by Mr. Sykes was too long,

b) Mr. Sykes was defaulted once before when he failed to appear for a final pre-trial conference,

c) Mr. Sykes sent in motions and orders that were not according to form,

2) Mr. Sykes was not denied due process because he was allowed to participate in the case.

ARGUMENT

Mr. Hatch makes a point that Mr. Sykes had been defaulted "Months ago on the issues, their only defense was to mitigate damages." That is simply untrue. The chronology of events is as follows:

2 February 1995 Order Regarding Court Availability (R 1757).

This is the order which defaulted Mr. Sykes. It was filed on the Thursday before the trial. Trial changed to one day bench trial limited only to the issue of damages.

6 February 1995 Trial on the issue of damages

The Court changed the trial once again from a one day bench trial to a three day jury trial. Mr. Sykes was granted without a moment to prepare, the opportunity to cross examine witnesses.

Mr. Sykes was not defaulted months before the trial on the issue of damages. Mr. Sykes was defaulted ***FOUR DAYS*** before the trial was scheduled (R 1757).

Mr. Sykes also was not defaulted because he was defaulted before or because he sent in documents to the Court which were not according to form. The Court was quite definite on why Mr. Sykes was defaulted (R 1757):

> **"Mr. Sykes has filed two witness lists, the first on January 9, 1995 and the second on January 27, 1995 The first list contains 64 names or titles of people. The second contains 73. These numbers exceed the limit. In fact these numbers greatly exceed the limit. *That excess is the reason for this order*"**

The Court defaulted Mr. Sykes because his witness list was too long. Apparently the Court simply did not realize that there had never been a limit imposed on the total number of witnesses that could be on the witness list. The trial Court specifically stated:

> **"The plaintiffs and the defendant are limited to six character witnesses. There is no limit for the amount of fact witnesses, provided they are named on the final witness list.**
>
> **The clerk is to advise Judge Mower on January 10, 1995, the total number of witnesses who will be called to testify at trial. This will assist Judge Mower to determine if additional trial time is required." (Minute entry, 9/2/94 [R 1363]).**

There was never a limit placed on the number of witnesses that were to be included on the witness list. Mr. Sykes did not at any time violate an order of the Court. It is standard practice in civil litigation to name witnesses on a witness list that may not be called. The underlying assumption is that, if necessary these people will be called but if not, or if time runs out, then they will not. A simple warning from the trial Court at the beginning of the trial such as:

> **"Mr. Sykes you may use your time as you wish but you only have 17 hours in which to present your case."**

would have been sufficient and infinitely less draconian. Instead of a simple warning, or to cut off Mr. Sykes' delivery of evidence when the time had expired, Mr. Sykes was defaulted by the Court. To default Mr. Sykes without warning and in direct contradiction of the prior order of the Court was an abuse of discretion.

Mr. Hatch does not dispute the assertion that:

> **No party should be defaulted unless the grounds upon which such default is authorized are clearly and authoritatively established and are in such clear and certain terms that the party to be defaulted can know, without question, that he is subject to default if he does not act in a certain fashion.**

See Wright, Federal Practice and Procedure, §2681, p.5 (1983).

It is undisputed that the Court stated that the number of witnesses on the witness list was unlimited. Mr. Sykes did not have a clue that he was subject to default because his witness list was too long. There were no clear and certain terms to rely on. There was no clear and authoritative statement to look to. The default of Mr. Sykes arrived in the mail as a bolt out of the blue three days before the trial was to start.

MR. SYKES WAS DENIED DUE PROCESS

Mr. Hatch contends that Mr. Sykes was not denied due process because he was allowed to "participate" in the trial. Mr. Hatch concedes that if the Thursday order of default of Mr. Sykes had been allowed to stand, that an argument could be made that due process had been denied. (See Brief of Appellant / Cross Appellee page 8.) The circumstances of Mr. Sykes participation are such that, for all intents and purposes, Mr. Sykes was denied the opportunity to defend.

Under the Thursday order of default the Court stated:

> **"Consequently , this order is the default of Mr. Sykes.** ***He will not be allowed to appear and defend this action [emphasis added]"***

When Mr. Sykes appeared in Court on 6 September 1995, he was present as a spectator. This fact is indicated by the record. The Court, in addressing the jury at the beginning of the trial, stated:

> **"You'll notice that this table right over here where the defendant would usually be is not occupied by anybody, and there's lots of reasons for that. As far as you're concerned, you don't need to know that at this point." [R2638]**

When Mr. Sykes arrived in Court he discovered that the case had been changed from a bench trial to a jury trial [R2644]. In further discussion Mr. Sykes was allowed to cross examine witnesses but was allowed to call only two. Mr. Sykes did not even begin participating in the trial until after jury selection was complete and Mr. Hatch was half way into his opening statement [R2701]. Mr. Sykes has proven that he is *not* the most skilled litigator that Utah has ever seen. But, even the best of trial lawyers would find himself at a tremendous disadvantage if he were forced to try a case with no preparation and with an extremely limited ability to call witnesses. Plus, Mr. Sykes had already been defaulted as to the issue of liability and his only defense would be to mitigate damages. Such a defense would require a very skillful presentation and a thorough knowledge of the underlying law. Mr. Sykes was not prepared in either area. So, as Mr. Hatch has himself admitted, if the Thursday order of default was allowed to stand, Mr. Sykes was constitutionally impaired. The trial Court's last minute reversal on the issue of a jury trial and on the question of Mr. Sykes' participation in the trial did not give Mr. Sykes sufficient time to prepare an adequate defense. Mr. Sykes was denied due process.

THE SECONDARY REASONS GIVEN FOR THE DEFAULT OF MR. SYKES ARE "AFTER THE FACT" ATTEMPTS AT JUSTIFICATION

Mr. Hatch quotes at length from the "order of default" (R 2059) issued by the trial court ***three months after the trial*** and three months after Mr. Sykes had been defaulted. The reasons given by the court and quoted by Mr. Hatch are that (R2059):

1) Mr. Sykes had been defaulted before,

2) The time deadlines were not properly complied with,

3) The court received a myriad of motions that did not meet the form requirements set down by the rules,

4) Mr. Sykes exhibited a manifest intention of subverting the judicial system.

PRIOR DEFAULTS ARE IRRELEVANT

Mr. Sykes previously being defaulted does not justify a default now. The defaults mentioned are a failure to answer the original complaint and an amended complaint. These are probably the least significant of all defaults. Indeed, it is probably improper for the Court to default a party at all for failure to answer an amended complaint. The importance of an answer is, first and foremost, to demonstrate the intent to defend the action and second to clarify any points of disagreement.

> " **However, almost any response by the defendant will be enough to preclude entry of default and, at the very least, shift an attempt for summary disposition to a motion for judgment on the pleadings or for summary judgment. Thus if a defendant, acting without legal counsel, responds to service of summons and complaint by writing a letter to the court which addresses at least some of the issues in the complaint, the court will probably not permit entry of default or default judgment. Even if the defendant in that instance has not submitted a pleading that meets the requirements for either form or content of pleadings, the court must consider that an appearance has been made and that it is possible to try the case on**

the merits. Once a responsive pleading or motion has been submitted and is not subsequently stricken or withdrawn, then a default judgment is no longer the method for obtaining summary disposition of the case.

See Utah Civil Practice ,David A. Thomas The Michie Company 1992 page 202.

So the lack of response of Mr. Sykes to an amended complaint is not the proper vehicle to force a default. But, the previous default had nothing to do with the actual reason that Mr. Sykes was defaulted. The previous decisions could either stand on their own merits or they could not.

MISSED DEADLINES DO NOT SUPPORT DEFAULT

The Court does not explain the failure to meet time deadlines very clearly. The court does mention the witness and exhibit list. If the Court is saying that Mr. Sykes was defaulted because the witness list was late then it is just substituting one abuse of discretion for another. Late witness lists seem to be a rule rather than the exception in civil litigation. But, if the witness list was late, where was the prejudice to Mr. Hatch? The case was 15+ years old. Discovery had been concluded long before. We had already once been before the Court of Appeals, when the trial Court dismissed the claims of Mr. Hatch, which the Appeals Court reversed. Where was the "subversion" of the judicial process? The most onerous sanction that one would expect from a late witness list would be the exclusion of those witnesses or perhaps money sanctions. But, a complete default of Mr. Sykes for a late witness list is simply unjustified and an abuse of discretion.

INFORMAL DOCUMENTS DO NOT JUSTIFY DEFAULT

The next reason given by the Court is that Mr. Sykes sent in a myriad of documents

which were not correct as to form. Again, the total default of Mr. Sykes for this reason is far more draconian than is justifiable. A simple denial of all such motions would have disposed of the problem. But a review of the record will show that both Mr. Sykes and Mr. Sykes contributed numerous redundant documents to the Court. If this was the reason for the default, then both parties should have been defaulted together.

THERE WAS NO SUBVERSION OF THE JUDICIAL PROCESS

There is little to no evidence of an attempt by Mr. Sykes to subvert the judicial process. Indeed, the trial court had already ruled against Mr. Hatch (and in favor of Mr. Sykes) in a summary judgment which was subsequently reversed by this court. If Mr. Sykes were truly subversive of the judicial process then such a ruling would not have been appropriate at all.

So, even the justification attempted by the Court three months after the initial default is not appropriate grounds for the most severe sanction of default. But truly these [R2059] after the fact justifications are an attempt to justify the unjustifiable. The true reason for the default of Mr. Sykes was given in the original order of default [R1757]. The Court felt that Mr. Sykes witness list was too long. That is the opinion given at the time. That is the explicit reason given for Mr. Sykes' default in the order. Counsel for Mr. Hatch is correct in attempting to justify the default by the use of [R2059]. Certainly [R1757] can not stand on its own. But even those three month delayed justifications are insufficient to justify a complete default of Mr. Sykes 4 days before the trial..

CONCLUSION

The Court was very clear in its order (R1757) that Mr. Sykes was being defaulted for having a witness list that is too long. Three months after the trial the Court issued (R 2059) which added additional reasons. None of these reasons justify the actions of the Court. Mr. Sykes was denied due process and the Court abused its decision in refusing to allow him to defend himself. The last second acquiescence of the Court in allowing Mr. Sykes to cross examine witnesses did not cure this abuse. Mr. Sykes could not possibly defend himself in any reasonable manner given no time at all to prepare.

Mr. Sykes deserves his day in court. Mr. Sykes asks this Court to vacate the verdict of the Court and to remand for a new trial.

Sam Primavera

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the within and foregoing brief to be mailed, postage prepaid, this 15 day of Feb, 1997, to the following:

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