

1987

John Swenson v. Garth Boswell : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Harold D. Mitchell; attorney for respondent.

Jeffrey B. Brown; attorney for appellant.

Recommended Citation

Brief of Respondent, *John Swenson v. Garth Boswell*, No. 870167 (Utah Court of Appeals, 1987).
https://digitalcommons.law.byu.edu/byu_ca1/427

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

BRIEF

UTAH
DOCUMENT
KFU

50

.A10

DOCKET NO. 870167-CA

IN THE UTAH COURT OF APPEALS

JOHN SWENSON,

Plaintiff/Respondent,

vs.

GARTH BOSWELL,

Defendant/Appellant.

:
:
:
:
:
:
:
:
:
:
:
:

Case No. 870167-CA

BRIEF OF THE RESPONDENT

An appeal from Judgment of Judge E. Patrick McGuire

Eighth Circuit Court, State of Utah

Utah County, Provo Department

Jeffrey B. Brown
Attorney for Appellant
175 East 400 South, Suite 401
Salt Lake City, Utah 84111

Harold D. Mitchell
Attorney for Respondent
P. O. Box 151
Springville, Utah 84663-0151

RECEIVED
SEP 28 1987

COURT OF APPEALS

TABLE OF CONTENTS

<u>HEADING</u>	<u>PAGE NUMBER</u>
I. Table of Authorities	ii
II. Jurisdiction	1
III. Nature of Proceedings	1
IV. Statement of the Issues	1
V. Determinative Provisions	2
VI. Statement of the Case	2-4
VII. Summary of the Argument	4
VIII. Detail of Argument	4-7
IX. Conclusion	7,8
X. Certificate of Service	9

I. TABLE OF AUTHORITIES

<u>AUTHORITY CITED</u>	<u>PAGE NUMBER</u>
Rule 2.5, Rules of Practice	2, 5
Rule 2.8(b), Rules of Practice	2, 5
Rule 15.5, Rules of Practice	6
Rule 4(a), Rules of the Utah Court of Appeals	7

II. JURISDICTION

Jurisdiction is conferred upon this court by Rule 3, Utah Rules of Appellate Procedure and Rule 3, Rules of the Utah Court of Appeals;

III. NATURE OF PROCEEDINGS

This is an appeal by Mr. Garth Boswell, who was a defendant and counterclaimant in the case of John Swenson v. Garth Boswell, which was filed in the Eighth Circuit Court, the State of Utah, Utah County, Provo Department. This proceeding appeals and seeks to reverse the order of Judge E. Patrick McGuire, which denied defendant's motion to set aside the default judgment and reinstate the counterclaim.

IV. STATEMENT OF THE ISSUES

1. Whether the judge acted properly in granting a default judgment when, although defendant's counsel had withdrawn, plaintiff had properly notified defendant of the need to obtain new counsel or else represent himself, and defendant had spoken to the judge about the motion, but defendant did not respond to the motion in a legally recognizable way for over three months after it was made, and the motion was ruled on 19 days after it

was made?

2. Whether the judge acted properly in denying a motion to set aside the judgment referred to above, when the motion was made three months after judgment was entered and there was not even a suggestion that any facts or circumstances had changed since the judgment had been entered?

V. DETERMINATIVE PROVISIONS.

Rule 2.5, Rules of Practice of the District Courts and Circuit Courts of the State of Utah:

When an attorney withdraws as counsel of record, written notice of the withdrawal must be served upon the client of the withdrawing attorney and upon all other parties not in default and a certificate of service must be forthwith filed with the court. An attorney may not withdraw without an order of the court where such withdrawal would result in a delay of trial. If a trial date has been set, the notice of withdrawal served upon the client shall include a notification of the trial date.

When an attorney dies or is removed or suspended or withdraws from the case or ceases to act as an attorney, the party to an action for whom such attorney was acting, must before any further proceedings are had against him, be required by the adverse party, by written notice to appoint another attorney or to appear in person.

Rule 2.8(b), Rules of Practice of the District Courts and Circuit Courts of the State of Utah:

The responding party shall file and serve upon all parties within 10 days after service of the motion, a statement of answering points and authorities and counter-affidavits.

VI. STATEMENT OF THE CASE

This case was initiated when John Swenson filed a complaint against Garth Boswell on April 1, 1986. Mr. Boswell's attorney, Sheldon R. Carter, filed an answer and counterclaim, but in June withdrew from representing Mr. Boswell.

Pursuant to Rule 2.5 of the Rules of Practice of the District Courts and Circuit Courts of the State of Utah, counsel for plaintiff notified Mr. Boswell of the need for him to appoint new counsel or else appear in person. This notice, dated June 24, 1986, also informed Mr. Boswell that plaintiff intended to move for dismissal of the counterclaim and for summary judgment if Mr. Boswell did not take some action within ten days of the date of the notice.

On July 10, 1986, (sixteen days after the notice), after no response from Mr. Boswell, plaintiff moved for the court to strike the answer and counterclaim and enter default judgment in favor of Mr. Swenson. Notice of this motion was mailed to Mr. Boswell on the same day.

Apparently as a result of receiving notice of this motion, on July 14, Mr. Boswell spoke to the Circuit Judge and told him that he intended to obtain new counsel to represent him in this matter. Neither Mr. Swenson nor his attorney were given notice of this conversation until well after it had occurred. This discussion was apparently Mr. Boswell's only attempt at responding to the motion before the court. Mr. Boswell did not

file an appearance of counsel or pro se or provide any notice to plaintiff's attorney.

On July 29, (19 days after the motion was filed), the Circuit Judge granted the motion to strike the answer and counterclaim, and on July 31 an order and judgment was entered in favor of Mr. Swenson.

Three months later, on October 31, Mr. Boswell (now acting through Jeffrey B. Brown) moved for the court to set aside the order and judgment of July 31. After considering memorandums from both parties, the judge denied this motion on November 24 in a Minute Entry, with an order being entered on December 19, 1986.

Mr. Boswell filed a Notice of Appeal on January 12, 1987, claiming error both in the granting of the motion to strike the answer and counterclaim, and in the judge's refusal to set the resultant order and judgment aside.

VII. SUMMARY OF THE ARGUMENT

Plaintiff notified Mr. Boswell of the need for defendant to obtain new counsel or else represent himself. Plaintiff notified Mr. Boswell of the motion pending before the court. Mr. Boswell took no legally recognizable action in response to the motion. The motion was properly granted. There was no tenable argument offered for setting aside the judgment and the Circuit Judge did not abuse his discretion in refusing to do so.

VIII. DETAIL OF ARGUMENT

Defendant has mistakenly framed this case in terms of possible violations of Rule 2.5. All that this rule requires is that, when a party's counsel withdraws, opposing counsel must notify the party that he needs to obtain new counsel or else proceed on his own. No one doubts that plaintiff did just that.

Indeed, plaintiff went beyond the minimum requirements and voluntarily informed Mr. Boswell of what to expect should he fail to take prompt action to get the litigation back on track. When Mr. Boswell made no apparent effort to expedite his affairs, plaintiff did as he said he would, and moved to strike the answer and counterclaim. This was not done, however, until Mr. Boswell had had 16 days in which to take action to appoint counsel or appear in person.

When a motion is pending before the court, a party wishing to respond to it must "file and serve upon all parties within ten (10) days after service of the motion, a statement of answering points and authorities and counter-affidavits." Rules of Practice, 2.8(b). There is an affirmative duty to act in a particular way if a person wants to have a voice in the decision.

When Mr. Boswell spoke to the judge, he apparently believed he satisfied some ambiguous requirement for him to "appear in person", but he did not do what is required by the rule to validate his presumed objection to the motion before the court.

In fact, a careful reading of Rule 2.5 seems to indicate that the only consequence of appearing in person is to free opposing counsel to continue proceedings against him.

The judge now had before him what amounted to a motion to grant default judgment. The ten day response period allowed by Rule 2.8(b) had expired on July 20. As pointed out appellant's brief, Rule 15.5 of the Rules of Practice grants power to waive strict compliance with the rules in order to prevent injustice, and that is apparently what occurred. The motion was not granted until Mr. Boswell had been given an additional nine days to respond to the motion, making it over a month since he had been notified of the need to obtain new counsel.

Thus, the motion was granted not because Mr. Boswell failed to secure new counsel within 10 days, but because he failed to properly respond to the motion while it was under consideration by the judge. To characterize the court's action as a "sanction" against Mr. Boswell and "abuse of its discretion" suggests a misunderstanding of the law. Plaintiff did not attempt to require Mr. Boswell to obtain new counsel within 10 days, he merely informed defendant of what his next move would be if defendant failed to do so.

Defendant's arguments in appealing the judge's denial of his motion to have the order and judgment set aside are the same arguments made in defense of his position that the motion should not have been granted in the first place, and as discussed above, are legally indefensible. Even if the arguments had any merit,

the fact that the motion to set aside the judgment was not made until three months (to the day) after the order and judgment were entered suggests that, absent some compelling new developments, this case should not be re-opened, but the law should achieve a sense of finality and let the parties get on with their lives.

It is worth noting that had defendant attempted the more judicially efficient path of simply appealing the default judgment, he would have been barred by the thirty day time limit of Rule 4(a) of the Rules of the Utah Court of Appeals.

IX. CONCLUSION

The only real issue in this case deals with the propriety of a ruling on a motion when one side has failed to respond in a legally recognizable way. The extreme positions a judge could take would be (1) put the motion on hold until the unresponsive party decides to take some action on it, or (2) go by the letter of the law and rule as soon as the ten day response time is over.

In this case, the defendant had informed the judge that he was going to obtain new counsel in this matter, so the judge gave him extra time to do so. When defendant did not do so, the motion of plaintiff was granted.

The trial court had a responsibility to protect the interests of both parties. To force plaintiff to wait until Mr. Boswell finally took action (over four months after the notice to obtain new counsel), would have placed plaintiff under an undeserved hardship. The court waited a reasonable time after

that required by the law, and then ruled in the only way that would be legally defensible.

DATED this _____ day of September, 1987.

Harold D. Mitchell
Attorney for plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of September, 1987, I mailed true and correct copies of the foregoing Brief of the Respondent, first class, postage prepaid, to:

Jeffrey B. Brown
Attorney for Appellant
175 East 400 South, Suite 401
Salt Lake City, Utah 84111
