

1977

Jack H. Pitts and Sandra J. Pitts v. Kimberly B. McLachlan and Craig McLachlan : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

JACK H. PITTS and SANDRA J. PITTS,	:	
	:	
Plaintiffs and Appellants,	:	
	:	
vs.	:	Case No. 15010
	:	
KIMBERLY B. McLACHLAN and CRAIG McLACHLAN,	:	
	:	
Defendants and Respondents.	:	

BRIEF OF APPELLANTS

NATURE OF CASE

Appeal from Order of District Judge, Honorable
Marcellus K. Snow, denying plaintiff's Motion for Relief
under Rule 60(b)(7).

DISPOSITION OF CASE IN LOWER COURT

Plaintiffs obtained a Summary Judgment against the
defendants on May 6, 1976, for the balance of principal plus
interest, attorneys' fees, taxes and costs upon a real estate
contract attached to the Amended Complaint (R. 22), which
Judgment recites that the defendants did not appear. Writ
of Execution issued October 15, 1976 (R. 29), and a sale was

made to the plaintiffs on November 16, 1976 (R. 32). Plaintiffs on December 6, 1976, filed a Motion for Relief from Summary Judgment under Rule 60(b)(7) setting forth that the defendant Craig McLachlan was a substantial judgment debtor; that the buyer under the Uniform Real Estate Contract was Kimberly B. McLachlan and asking that the Summary Judgment be amended to show Kimberly B. McLachlan as the person to whom title passed by reason of the judgment and Craig McLachlan as surety (R. 33-34). A proposed Amended Summary Judgment was attached to the Motion and it is admitted that this was inadvertently signed by the Court (R. 46). Contradictory minute entries were made (R. 47 and 48) and it is admitted that the minute entry at R. 47 was made inadvertently. The ruling of the Court is contained in the Order Denying Motion for Relief from Summary Judgment signed January 18, 1977 (R. 49). It is from this Order Denying Relief that the appeal was taken (R. 51).

NATURE OF RELIEF SOUGHT

By this appeal plaintiffs-appellants ask this Court to rule that the District Court's Order Denying Relief was made and entered wrongfully, both because the Motion was properly filed under subdivision (7) of Rule 60(b) and because the Court did have before it a subject matter upon which to act, namely the Judgment of May 6, 1976, despite the fact of an execution

sale. The District Court should be directed either to grant the Motion or reconsider it under subdivision 60(b)(7).

STATEMENT OF FACTS

At the threshold appellants ask this Court to ignore portions of the file transmitted by the Clerk of the District Court, not included in the Designation of Contents of Record on Appeal and not properly before the District Court at the time of the hearing on the Motion for Relief on December 15, 1976. These documents are:

1. The Execution issued May 14, 1976 (R. 23).
2. The Sheriff's notice of May 19, 1976 (R. 24).
3. The publication of notice by the Sheriff of June 7, 1976 (R. 25).
4. The cancellation of the Sheriff's sale (R. 26).
5. The Execution of September 24, 1976 (R. 27).
6. Another copy of the Sheriff's notice of May 19, 1976 (R. 28).
7. A letter from David M. Bown to Judge Snow dated December 16, 1976 (R. 38).
8. Agreement for Cancellation of Execution Sale of June 14, 1976 (R. 39-42).
9. Additional copy of Uniform Real Estate Contract (R. 43-44).

The Statement of Facts will not include references to any of the foregoing documents.

The parties entered into a Uniform Real Estate Contract on October 7, 1975 reciting the plaintiffs as Seller and Kimberly B. McLachlan as Buyer (R. 4), with a provision in Paragraph 19 that

"The Seller on receiving the payments herein reserved to be paid at the time and in the manner above mentioned agrees to execute and deliver to the Buyer or assigns, a good and sufficient warranty deed * * * ."

At the end of the contract Kimberly B. McLachlan signed and below that was the signature admitted to be Craig McLachlan and below the second signature was the word "Buyer".

The Amended Complaint alleges that defendants made certain payments and that on the due date of the balance, January 8, 1976, the balance owing was \$29,333.57 plus taxes and interest (R. 9). The Answer was a general denial (R. 11).

On April 15, 1976, plaintiffs filed a Motion for Summary Judgment supported by an Affidavit setting forth the balances owing, the taxes and raising an issue as to payment of attorneys' fees, to be reserved or resolved by the parties (R. 13 and 15). The Summary Judgment reflects agreement between the parties on the matter of attorneys' fees and withholding of entry of the Judgment for a week and is dated May 6, 1976 (R. 22). This Judgment recites

"That the plaintiffs have judgment against the defendants jointly and severally in the amount of \$29,333.57 principal * * *."

The Sheriff's Certificate of Execution Sale discloses that the price bid by the plaintiffs included all of the principal of the Judgment plus interest and also two items of \$250 and \$750, which are not explained (R. 32). Plaintiffs-Appellants admit that the full amount of the Judgment was bid for the property.

Plaintiffs then filed a Motion for Relief from the form of the Summary Judgment, pointing out that Craig McLachlan had many judgment creditors, one of whom had commenced an action upon the theory that the entry of the Summary Judgment as above described passed title to the real estate involved in the Uniform Real Estate Contract to both of the defendants and not just to Kimberly B. McLachlan. This Motion also alleges that the result of the requested action would give the defendants additional time to pay for the property, would avoid a windfall to the judgment creditors of Craig McLachlan "at the expense of plaintiffs" and that correction of the Judgment would perform the contract "in the manner contemplated by the contract and the parties at the time the contract was entered into." Attached to the Motion for Relief was a form of Amended Summary Judgment, which was inadvertently signed (R. 46). The proposed relief

was that the plaintiffs have judgment

"* * * against the defendant Kimberly B. McLachlan as purchaser under the Uniform Real Estate Contract and the defendant Craig McLachlan as unsecured guarantor of the said Real Estate Contract * * *."

This Motion was argued before the District Judge on December 15, 1976, with appearances by Richard Bird, David Bown and Stephen McCaughey (R. 45) and taken under advisement by the Court. Conflicting minute entries were made as to disposition of the matter on December 28, 1976 (R. 47-48), and on January 18, 1977 the Court signed an Order Denying the Motion of plaintiffs

"* * * for the reasons that the basis for the motion apparently falls under Subparagraph (1) and is not timely and for the further reason that the judgment has been satisfied and is no longer subject to the action of this Court."
(R. 49)

Appellants urge the following issues before this Court:

1. Rule 60(b)(1) is not the exclusive remedy where inadvertence is one factor.
2. The execution sale did not preclude relief to plaintiffs.
3. Subdivision (7) of Rule 60(b) should be applied to plaintiffs' motion.

ARGUMENT

POINT I

RULE 60(b)(1) IS NOT THE EXCLUSIVE REMEDY WHERE INADVERTENCE IS ONE FACTOR

The Motion for Relief which plaintiffs filed (R. 33)

admits inadvertency by alleging in Paragraph 2:

"Plaintiffs were not aware of the existence of judgment creditors of Craig McLachlan * * *."

Inadvertence is here used broadly, there appearing to be no value in distinguishing between "mistake, inadvertence, surprise, or excusable neglect" as set out in subdivision (1).

The Motion for Relief also alleges the filing of an action by a judgment creditor of Craig McLachlan, that modifying the Summary Judgment would give defendants additional time in which to perform the contract, that amending the Summary Judgment would avoid a windfall to the defendants and the judgment creditors of Craig McLachlan at the expense of plaintiffs, and would give performance of the contract in the manner contemplated by the parties. Plaintiffs submit that these are reasons independent, or partly independent of the "inadvertence" in not discovering the judgment creditors of Craig McLachlan (R. 35 and 36).

The introductory language to Rule 60(b) requires a liberal construction:

"Upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative * * *."

A liberal construction would mean that courts would not endeavor to place reasons under the restrictions of subdivisions (1), (2) and (3), but would incline to place the reasons under subdivision (7) (subdivision (6) in the Federal Rules) so as to

avoid the time limitation. The time limitation from the first subdivisions are one (1) year under the Federal Rules of Civil Procedure and three (3) months under the Utah Rule, thus exerting additional pressure for a liberal construction to afford relief in the interests of justice.

The question of broad or narrow interpretation of Federal Rule 60(b)(6) was the subject of an annotation in 61 Yale Law Journal starting at page 76, entitled "Federal Rule 60(b): Relief from Civil Judgments." Starting at page 82, the annotator draws these conclusions:

"But the Court's principle that 60(b)(6) and other clauses of 60(b) are mutually exclusive has not been adhered to in practice. Court interpretations of the excusable neglect provisions in 60(b)(1) have been so broad that, when read together with 60(b)(2) through (5), apparently few fact situations remain to call 60(b)(6) into play. Nevertheless, courts immediately resorted to 60(b)(6) as a mandate 'to accomplish justice.' In many situations they ignored entirely the mutual exclusiveness of 60(b)(6) and other clauses of 60(b). On other occasions, even where the principle was announced, it was given only lip service. Consequently, almost every grant of relief under 60(b)(6) could have fallen under 60(b)(1) or other clauses of 60(b).

"The effect of the cases under 60(b)(6) establishes the clause as a way of circumventing the one year time limit in 60(b)(1), (2), and (3)."

In United States v. Karahalias, (2nd Cir. 1953), 205 F.2d 331, the defendant brought a motion for relief under Rule 60(b) claiming that the illness of his wife and his inability

to return to the United States from Greece had prevented him from taking this step earlier. Judge Learned Hand discussed the relationship of subdivisions (1), (2) and (3) to subdivision (6) and said:

"We think that it was meant to provide for situations of extreme hardship, not only those, if there be any, that subsections (1), (2) and (3) do not cover, but those that they do. In short--to put it quite baldly--we read the subsection as giving the court a discretionary dispensing power over the limitation imposed by the Rule itself on subsections (1), (2) and (3)
* * * ." (Page 333)

On rehearing it was pointed out that the United States Supreme Court had applied the Rule more strictly and so Judge Hand changed the classification of the conduct from "excusable neglect" to other reasons as covered by subdivision (6) but still granted the relief.

In Civil Procedure Cases and Materials by Cound, Friendenthal and Miller at page 918, this summary comment is made:

"The proper scope of Rule 60(b)(6) has been the subject of considerable litigation. It frequently has been held that the Rule must have been intended to cover only matters outside the scope of Rules 60(b)(1) to (5). [Cases cited] Otherwise the specific time limits on motions under Rule 60(b)(1), (2) and (3) would be meaningless. But it is the existence of these very limits that have pressured many courts, in the interests of justice, to find that errors ostensibly falling

within Rule 60(b)(1), (2) or (3) are somehow so special that they come within Rule 60(b)(6) and hence are not subject to a specific time limitation."

This Court has also found the need to interpret Rule 60(b) in a manner which promotes justice. In Ney v. Harrison, 5 Utah 2d 217, 299 P.2d 1114 (1956), a default judgment was entered when the defendant failed to answer a Complaint and eleven months later she made application for relief, which was granted by the District Court. On appeal one of the questions raised was whether that defendant had been properly relieved of the default. This Court reviewed Rule 60(b) and noted that because eleven months had elapsed before the default was set aside, the only basis for the relief would be subdivision (7), although her affidavit alleged that she had mistakenly believed that she was protected against personal liability by a divorce decree. This Court adverted to the policy of the courts to permit trials on the merits as against defaults and then made this comment at page 220:

"The trial court could well regard this as among the class of cases that Rule 60(b)(7) was intended to govern and to permit Alda to justify her failure to answer on the ground that the divorce decree required her husband to bear the obligation and required him to defend the action for her."

Ney was considered by this Court again in Kessimakis v. Kessimakis, 546 P.2d 888 (Utah 1976). A default judgment

had been entered in a divorce action and after five and two-thirds months the defendant moved to set it aside for fraud and the District Court held that the motion was not in time under subdivision (3). This Court affirmed the refusal of the District Court to set the default aside, found that the appellant had other remedies available, and then reviewed the Ney case, in contemplation of the dissenting opinion in Kessimakis, and observed that even though the Ney case was decided "upon a basis not urged in the trial of the case, that is no reason to overrule it here." This seems to leave the law in Utah available for relief to promote justice, even though the strict time limits have passed under the first three subdivisions, and free to impose the time limits where justice does not require relief. Relief was granted by this approach in Bros Incorporated v. Grace Mfg. Co., 320 F.2d 594 at 609; Steuart, Inc. v. Matthews, 329 F.2d 234 at 235 (App. D.C. 1964); Simons v. Schiek's Inc., 145 N.W.2d 548 at 552 (Minn. 1966).

In the instant case, the plaintiffs sold their home under contract requiring in effect that it be paid for some four months later. It is plain from the record that the defendants have not paid for the house and that all the plaintiffs wanted was to get their home back and so the full amount of their judgment was bid at execution sale. If, by reason of the Summary Judgment the title in the home passed to

both defendants, subjecting a portion of it to the claims of the creditors of Craig McLachlan, the plaintiffs would be deprived of a portion of their property in favor of a windfall to persons not parties to the proceedings and not purchasers in any sense, as well as getting Craig a substantial unearned and unjustly enriching credit on his judgments.

"In the furtherance of justice" a case is made out, as in Ney to grant relief even though inadvertence is a factor in appellants' predicament.

POINT II

THE EXECUTION SALE DID NOT PRECLUDE RELIEF TO PLAINTIFFS

Rule 69(g) (2), U.R.C.P., permits a purchaser at execution sale who does not obtain the property for which he bid to file a motion to revive the judgment. This relief is similar to, but not identical with, the relief being sought by the appellants. The effect of the Rule is that although a judgment may have been satisfied by execution, it is not gone forever but is dormant and may be revived.

Continental National Bank & Trust Co. v. J. H. Seely & Sons Co., 94 Utah 357, 77 P.2d 355, 115 A.L.R. 543 (1938), was brought under Section 104-37-38, U.C.A. (1933) and contains a provision similar to what is now Rule 69(g) (2). In that case a judgment was obtained which supported an execution sale of

personal property and the judgment was satisfied. The sale was held to be void and upon application of the plaintiff, the judgment was revived and thereafter a transcript was obtained and filed in Emery County upon which an execution issued and a sale of real property was held. The defendants moved to set aside the sale in Emery County as being void because the judgment had been satisfied by the original execution sale and:

"In support of such position it is argued that 'the satisfaction of the original judgment extinguished it entirely and forever.' Plaintiff, on the other hand, takes the position that a revival order made pursuant to that statute does just as the words imply; that is, it reinstates the original judgment in full force and effect * * * ." (Pages 360-361)

The court held that the original judgment was revived and that it had not been extinguished by the first execution sale. This Court went on to consider the writ of scire facias as affording comparable relief and which had not been extinguished by statute in the State of Utah and which affords similar relief, observing:

"In this State, as in most of the states which have adopted reformed Codes of Civil Procedure, the objects sought by scire facias may generally be accomplished by some other remedy." (Page 366)

The annotation which follows Continental v. Seely at 115 A.L.R. 549, finds this statute to be not unusual and "being of a remedial nature, should receive a liberal construction." (Page 550) And citing a Tennessee case at page 553, states:

"Likewise, under the Tennessee statute, it is held that the fact that the purchaser is also the plaintiff in the execution makes no difference with respect to his statutory right to have the judgment revived, so long as his conduct is not such as to repel him from the court."

A comparable analysis of the law on failure of title of an execution purchaser is contained in Section 1038 of 47 Am.Jur.2d.

The language of Rule 69(g)(2) does not quite fit appellants' position in this case, but this Rule offers relief comparable to the relief which appellants seek; thus bearing out not only the persistence of the judgment against the claim of extinction but supporting the general equitable principle that a purchaser at execution sale who is disappointed in the result and finds his expected purchase in part diminished may have relief. This is a strong evidence of "another reason" justifying relief under subdivision (7) of Rule 60(b).

POINT III

SUBDIVISION (7) OF RULE 60(b) SHOULD BE APPLIED TO PLAINTIFFS' MOTION

Appellants submit that the entry of the Summary Judgment whether it be called an election of remedies, a performance of the contract, or a payment of the price of the land, if it accomplished the transfer of title at all transferred it to Kimberly B. McLachlan. There was an equity in Kimberly B. McLachlan as the Buyer under the original contract and under

the language of the contract, Paragraph 19 (R. 5), upon payment of the price, the title was to go to Kimberly B. McLachlan or her assigns. None of the process of litigation amounted to an assignment by Kimberly B. McLachlan; therefore, anything that passed by reason of the Summary Judgment passed to her.

Appellants have not been able to find a case precisely in point and refer the Court to Houston Oil Co.v. Randolph, (Tex. 1923). 251 S.W. 794, 28 A.L.R. 926. It is there stated:

"A vendor who obtains a judgment for the unpaid purchase money will be presumed to have received full satisfaction of his debt thereby."

The judgment there obtained was against the principal and his sureties on the note, the execution sale involving property of the principal. The court held that by reason of the execution sale for the unpaid purchase money, the title passed to the principal and not to the sureties. The intent of the parties is plain from the documents here involved that Kimberly B. McLachlan was the buyer and she and her husband both signed as performers of the contract.

On the assumption that an interest in the land passed to Kimberly B. McLachlan only, appellants are entitled to consideration under subdivision (7) of Rule 60(b) for two reasons: (a) to avoid multiplicity of actions, and (b) such relief is just and equitable and gives the defendants further time to complete

their purchase of the property.

If appellants are wrong in taking the position that Craig McLachlan received no interest in the property, then relief should be granted for two additional reasons: (c) to prevent a windfall to the creditors of Craig McLachlan, and (d) in furtherance of justice to the appellants not to deprive them of their asset as anticipated in the execution sale.

A.

To Avoid Multiplicity of Actions

The Motion for Relief alleges that one action has been filed by a judgment creditor of Craig McLachlan (R. 33) and Exhibit A attached to the Motion shows that this judgment is for \$20,045.40 and that there are five additional judgment creditors whose claims total more than \$27,762.70. It is plain that all of these claims would have to be litigated, either by interpleading them in the action already filed or by waiting until the other judgment creditors file similar claims. Granting the relief prayed for would eliminate these actions, and undoubtedly eliminate the one which has already been filed since modification of the judgment to accord with the contract would undoubtedly avoid trial in the action already filed.

Avoidance of multiplicity of actions is one of the classic grounds for equitable relief. 27 Am.Jur.2d, Equity

¶¶ 46, 47 and 192.

B.

Such Relief is Just and Equitable to the Defendants

It appears from the Affidavit of plaintiffs in support of the Motion for Summary Judgment that the defendants had made some payments on the contract, one of them dated December 15, 1975 (R. 15). And it also appears from the Summary Judgment itself that the attorney for the defendants had conferred with attorney for the plaintiffs and had not contested the motion, provided an additional week's time was given to the defendants (R. 22).

If the Motion for Relief were granted, it would automatically give the defendants additional time, since the modification of the Summary Judgment would undercut the execution sale, requiring further proceedings and giving the defendants that additional time.

There would be further equity in favor of defendants, in that the price of purchase would be \$31,119.40 (R. 32) instead of the original purchase price of \$32,500.

It appears that equitable treatment of the other party is contemplated by the requirements of Rule 60(b) that the relief be in furtherance of justice.

C.

To Prevent a Windfall to the
Creditors of Craig McLachlan

If the interpretation of the original contract of sale and of the Summary Judgment as entered should be that title to the property has passed to both of the defendants, subject to the judgment liens of the creditors of Craig McLachlan as to his interest, there would obviously be a substantial loss and damage to the plaintiffs with unjust enrichment to Craig McLachlan through being relieved of a portion of his judgments and a windfall or unjust enrichment to the creditors of Craig McLachlan. 27 Am.Jur.2d, Equity, § 28 indicates that this is a ground for equitable relief.

American Employers v. Sybil Realty, (E.D. La. 1967) 270 F.Supp. 566, 11 F.R.Serv.2d 60(b)28, case 1, involved a motion under subdivision (5) of Federal Rule 60(b) seeking relief because of a mistake in the date of a transaction, which, as originally testified and applied, resulted in a large recovery under a writ of garnishment. The relief sought was to correct the date and therefore eliminate from the effectiveness of the garnishment approximately \$8,000. It was argued that the garnishee was not entitled to this relief because subdivision (5) has language indicating that

it can have only prospective application. The court applied subdivision (6) of the Federal Rule and modified the judgment so as to reduce the amount of judgment taken by the writ of garnishment. This is a parallel situation as to relief, because the basis of the motion was a mistake but the result of the mistake and action was a windfall and unjust enrichment.

Williams v. United States, 138 U.S. 514, 34 L.Ed. 1026, 11 S.Ct. 457, is cited in 27 Am.Jur.2d, Equity, § 28, and is authority for a holding that even without the presence in the action of the third party who holds title (in that case the State of Nevada) in whom the title reposed by reason of the mistake involved in the relief sought, the court can grant equitable relief by correcting a deed, thereby divesting the State of Nevada of the parcel of property and vesting it in the person entitled thereto, who was the moving party.

It appears that no interest has accrued to the judgment creditors of Craig McLachlan through the entry of the Summary Judgment in this case and there would be no inequity to those judgment creditors if the Summary Judgment were corrected to make plain that it is Kimberly McLachlan and not Craig McLachlan to whom the interest was transferred.

D.

In Furtherance of Justice to the Appellants Not to Deprive Them of Their Asset as Anticipated in the Execution Sale

As previously pointed out, relief is given under Rule 69(g) (2) to a purchaser at an execution sale, including the judgment creditor, if the property which he buys in and for which he tentatively commits his valuable judgment is not realized. This is also consistent with the relief indicated in 77 Am.Jur.2d, Vendor and Purchaser, § 523, that in an action by a vendor for purchase money under a real estate contract, the judgment given should adjust equities so as to do substantial justice. If the defendants had resisted this action on the merits and if all of the facts now known had been disclosed to the trial court, it would have been the trial court's duty under this Rule to make such judgment as would have done justice to the positions of all parties.

An old case cited in this section of Am.Jur.2d is Ziegler, Baker & Co.'s Appeal, 69 Pa. 471 (1871). There a purchaser paid some purchase money, went into possession and improved the property. The vendor took a note for the unpaid purchase money and conveyed the legal title to a third party. The vendor obtained judgment and the property was sold at execution sale. In distributing the proceeds of sale, it appeared that there was a mechanic's lien which antedated the judgment and the holder of which made a claim. The court held that since

the judgment was a purchase money judgment, the judgment creditor was protected against the intervening lien, and the court observed:

"Vendors are usually regarded as the most meritorious creditors, and it would be refining against reason so to apply the Rule as to protect other creditors, and cut out vendors."

The court further reasoned:

"In the present case, therefore, the judgment of Gress for the purchase money fastened upon the legal estate the instant he conveyed to Thomas his vendee. The equitable and legal titles united and merged, and Gress' security expanded with the enlargement of his vendee's estate. What harm was done to the mechanics' lien creditors? They had a lien only on Thomas' equitable estate when Gress entered his judgment. Had they, or any other creditor, sold the equitable interest before the legal title was added, they would have sold subject to the vendor's purchase money, by virtue of his retained legal title, and the bid at the Sheriff's sale would have been diminished to the same extent, and the vendor could have taken nothing under his judgment. * * * Thus, the adding of the deed to the vendee's interest did the appellants neither good nor harm, and certainly ought not to work an injury to the vendor." (Pages 473, 474)

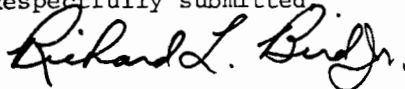
CONCLUSION

Appellants presented to the District Court, and now present to this Court a case involving more than inadvertence. There are involved equitable principles of unjust enrichment, circuity of action and multiplicity of actions, an unsolicited windfall to third parties and serious injury to the appellants within the meaning of Rule 69(g) (2). Rule 60(b) (7) should

be liberally interpreted in furtherance of justice and the Court should not inequitably limit appellants to the three months' period of Rule 60(b)(1). The defendants were wrong in arguing, and the Court was misled in the second reason given, namely that the Court did not have power to revive the judgment, which is plainly established by Rule 69(g)(2).

This Court could and should make the decision that the basis for relief under subdivision (7) was made out and instruct the trial court to grant the Motion for Relief.

Respectfully submitted



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CERTIFICATE OF SERVICE

The foregoing Brief of Appellants was served on the respondents this 11th day of March, 1977, by mailing true and correct copies thereof, postage prepaid, to David M. Bown and Stephen R. McCaughey, attorneys for respondents, 321 South 600 East, Salt Lake City, Utah 84102.

