

1977

Sheila F. Brande v. The City of Toole, State of Utah : Appellant's Brief

Utah Supreme Court

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STATEMENT OF THE KIND OF CASE

This is an action for injuries to property arising from faulty or defective sewer lines on plaintiff's property.

DISPOSITION IN LOWER COURT

A default judgment was entered against the defendant. The defendant subsequently filed a motion to set aside the judgment. From a denial of this motion by the district court, defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the denial of the Motion to Set Aside Default Judgment, and an Order permitting a trial on the merits.

STATEMENT OF FACTS

The defendant, the City of Tooele (hereafter City), is a municipal corporation organized and existing under the laws of the State of Utah. The plaintiff, Shiela F. Brande (hereafter Brande), is a resident thereof.

On or about June 3, 1975, Brande informed the City that her property was experiencing a sewer back-up, apparently caused by an obstruction in the sewer lateral. The City flushed the main sewer line near Brande's property for the purpose of clearing any obstructions, but the line was running freely. Subsequently, the City again flushed the lines and found them to be free of obstructions. It concluded that the blockage must exist in the service lateral from the main line to the Brande residence. Although the City made numerous efforts to locate this service lateral, its agents could not locate it.

Brande then employed a private contractor to excavate around the perimeter of the property until the lateral was located. By tracing it to the main line, the contractor discovered a break in the lateral on plaintiff's property several feet prior to the point where it connected to the City main. Plaintiff remedied the damage at this time.

On January 24, 1977, the Tooele City Mayor was served with a summons and complaint in this cause of action. These items were forwarded to the City Attorney for review.

By some mistake, inadvertence, or excusable neglect, these documents were filed with investigatory materials in a city file, rather than being mailed to the City's insurance carrier. No answer was immediately filed by the City because of this oversight, and the problem was not apparent until

March 4, 1977, when the City Attorney first received notice that on February 17, 1977, Brande had taken a default judgment against the City.

The default order was taken only 23 days after the date of service of the complaint, with no prior notice of the action having been given to the City, either orally or in writing, and no notice having been given to the insurance carrier handling plaintiff's claim against the City.

On March 17, 1977, the City filed a motion to set aside the default judgment, only thirteen days after receiving notice of the court clerk's entry of the default judgment. From denial of this motion, defendant brought this appeal.

ARGUMENT

POINT ONE

THE TRIAL COURT ABUSED ITS DISCRETION
BY FAILING TO SET ASIDE THE DEFAULT
JUDGMENT WHERE THE CIRCUMSTANCES DID NOT
SUPPORT THE AVOIDANCE OF TRIAL ON A LEGAL
TECHNICALITY.

The failure of the City to file an answer within the statutory twenty-day period after service of summons resulted from mere mistake, inadvertence or excusable neglect

and not from an intentional wrongdoing. According to the affidavit filed in support of the Motion to Set Aside Default, when the mayor of the City received a copy of the summons and the complaint he forwarded them to the City Attorney for his inspection. The documents were then to be sent on to the City's liability carrier so that the carrier's attorneys could prepare and file an answer in behalf of the City. Due to a clerical or filing error or some other inadvertence, the items were instead placed with investigatory materials in a city file. This mistake did not become apparent until after the default judgment was entered because the plaintiff did not contact the defendant concerning the lack of an answer on file. Without giving notice of any kind, the plaintiff immediately moved for default judgment within a matter of days after the statutory period had passed. Had defendant been aware of the error, an answer could have been routinely filed within the period specified on the summons.

Based upon these facts, it is evident that neither the City nor its agents intentionally took any action to impede the progress of the law suit, to hinder the fair and impartial trial of the case on the merits, or to commit any other wrongdoing. The record is devoid of any fact or circumstance which justified the harsh position taken by the lower court in refusing to vacate the default judgment.

By not allowing the trial to proceed on its merits, the district court failed to follow the guidelines set forth in numerous prior cases. This Supreme Court has consistently advised the lower courts to exercise caution in ordering default judgments. *McFearn v. Mountain View Memorial Estates*, 17 Utah 2d 323, 411 P. 2d 129 (1966). They are not favored because they constitute a denial of the litigant's opportunity to have a full and complete hearing on the merits of the cause, contrary to fundamental principles of our judicial process. In this respect, their effect is adverse to the interests of justice and fair play. *Heathman v. Fabian and Clendenin*, 14 Utah 2d 60, 377 P. 2d 189 (1962). For this reason, the reported cases have quite uniformly regarded as an abuse of discretion a refusal to vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to act and timely application is made by the party in default to set the judgment aside. *Central Finance Co. v. Kynaston*, 22 Utah 2d 284, 452 P. 2d 316 (1969). The district courts must be indulgent toward permitting full inquiry and knowledge of disputes so they can be settled advisably and in conformity with law and justice. The "harsh and oppressive" remedy of a default judgment should not be arbitrarily imposed. *Mayhew v. Standard Gilsonite Company*, 14 Utah 2d 52,

376 P. 2d 951 (1962).

By failing to follow these guidelines, the trial court abused its discretion in refusing to allow the defendant to defend the claim in open court. The court's highly technical application of Rule 55 of the Utah Rules of Civil Procedure does not advance the interests of justice or fair play and should not be condoned.

The real function of judgment by default is to clear court calendars of cases where either litigant has indicated disinterest in the process or outcome of adjudication. In justification of admission of service requirements, this Court stated, in *Locke v. Pearson*, 3 Utah 2d 415, 285 P.2d 1111 (1955) at 1112:

"It is undoubtedly true that this requirement is purposed to safeguard against entering the default of persons except where it satisfactorily appears that they have consented thereto."

The defendant herein has never in any way consented to default judgment being entered against itself and in fact has strenuously objected to it ab initio. Yet the plaintiff insists on her "right" to the default judgment over the defendant's objections. Since the requirement for service is intended to prevent unintentional defaults, the allowance of 20 days for an answer must also be so intended. Yet both provisions are fictions in this regard. A mere admission of service and the passage of twenty days without an answer does not

establish the defendant's consent to judgment against himself. The 20-day period is merely an arbitrary limit beyond which the defendant must be prepared to give a reasonable account for his delay. The defendant herein is so prepared.

To enforce the 20-day limit here, in the face of lack of notice of the Motion for Default Judgment and of defendant's intense diligence upon discovery of the error, would indeed be a "harsh and oppressive" result. The 20-day limit is concededly also intended to bring litigation to a speedy conclusion. Nevertheless, justice sure, if not so swift, must certainly be preferred over justice swift, but not so sure. To bind the defendant's entire defense on the merits to its initial, unintentional and unperceived failure to respond on time would be purely arbitrary.

Certainly, the delay involved here is dubiously small, at most. In *Lock v. Peterson*, *supra*, at 1113, this court pointed to its "declared policy that in case of uncertainty, default judgments should be set aside to allow trial on the merits." This court first most fully expressed that policy in the analogous case, *Utah Commercial and Savings Bank v. Trumbo*, 17 Utah 198, 53 P. 1033 (1898), at 1036 where it stated:

"The power of the court to set aside judgments by default is recognized and conferred in section 3005, Rev. St. 1898, and should be

liberally exercised, for the purpose of directing proceedings and trying causes upon their substantial merits; and where the circumstances which led to the default are such as to cause the court to hesitate, it is better to resolve the doubt in favor of the application, so that a trial may be secured on the merits."

Thus, it is clear that the "liberal" doctrine in questionable cases is long-established in Utah law. In *Utah Commercial and Savings Bank v. Trumbo*, *supra*, the defendant, believing that he had adequately retained counsel to represent him, left the state and did not become aware of his default until three days after entry of judgment. The court relieved him of his default there, stating, at 1036:

"...courts do not favor judgments by default. The policy of the law is that every man shall be entered against him and where a judgment by default has been entered, and within the proper time, a good defense to the action to which the judgment was rendered is made to appear, and it is shown that the default was entered through excusable neglect or mistake, the default will be vacated, and the judgment set aside, to permit a trial on the merits. It is true that ordinarily the setting aside of a judgment by default rests within the sound legal discretion of the court, and the appellate court will not interfere, but where, as in this case, it is made clearly to appear that there was such an abuse of discretion, through inadvertence or otherwise, as to render the action erroneous and unlawful, the appellate court will control such discretion, and set aside the illegal action."

Since leaving the state in the mistaken belief that counsel

had been retained was held sufficiently excusable in *Utah Commercial Savings Bank v. Trumbo, supra*, the mistaken belief of the mayor, as nominal head of the defendant-city herein, that the summons had been transmitted to the defendant's insurer-counsel, is also sufficiently excusable. The plaintiff here also did not have the excuse for not notifying the defendant of the Motion for Default Judgment that the plaintiff in *Trumbo, supra*, had; the defendant-city here did not leave the state.

Even in *Utah Sand and Gravel Products Corporation v. Tolbert*, 16 Utah 2d 407, 402 P. 2d 703 (1965), where there was a jurisdictionally defective copy of the summons, the defendant's counsel at least had notice of the pendency of some action. Here the defendant's counsel had no notice at all, and thus is completely innocent of even the slightest inadvertence. In *Utah Sand and Gravel Products Corporation vs. Tolbert, supra*, the court stated, at 705:

"It is in accordance with our rules, and our decisional law, that where a default has been taken against a party and there is any justifiable excuse, the court should be indulgent in setting aside the judgment to afford him an opportunity for a trial on merits, and any doubt about such a matter should be resolved in favor of doing so."

While never having decided a case with facts quite like the one at bar, this court should hold, in keeping with the tenor

of the above decisions, that a minor, unperceived, inadvertent act of a clerical employee is a "justifiable excuse."

This case is at the other end of the spectrum from *Airkem Intermountain Inc., v. Parker*, 30 Utah 2d 65, 513 P.2d 429 (1973), wherein this court stated, at 431:

"The movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control." [emphasis added]

There, the delay involved was intentional and of seven months duration. Here, on the other hand, the delay was minimal and the "due diligence" of defendant's counsel was adequate. Certainly the unwitting misdirection of the summons by a clerical employee is one of those foreseeable circumstances sufficient to pass the standard of *Airkem Intermountain Inc. v. Parker, supra*.

A holding that the inadvertence here is a "justifiable excuse" would be consonant with decisions in other states. In *Montez v. Tonkawa Village Apartments*, 215 Kan. 29, 523 P. 2d 351 (1974), the Supreme Court of Kansas held that a litigant should not be unnecessarily penalized for the simple neglect of his agent which results in a default judgment. There, the employee of the defendant that received service inadvertently misplaced the papers, just as they were misplaced by an employee here. In both cases, the

principal was in ignorance of the fact that nothing was being done about the suit. One can easily imagine the defendant herein in surprised dismay, echoing the words of the defendant to his attorney in *Utah Commercial and Savings Bank v. Trumbo*, *supra*, at 53 P. 1035: "Haven't you been attending to that...case?" In *Martez v. Tonkawa Village Apartments*, *supra*, the court held that the error of the employee was "excusable" to the defendant-employer, and, therefore, held that the trial court's denial of motion to vacate was an abuse of discretion. The court stated, at 523 P. 2d 356:

"It may be observed that despite the wording of the rule the federal courts will refuse relief only where the neglect can be branded as "inexcusable." Such terminology is closely akin to our own phrase 'reckless indifference.' ...It implies something more than the unintentional inadvertence or neglect common to all who share the ordinary frailties of mankind."

The latter is all that is involved here.

A few other cases concerning agents of the defendant bear examination here. In *Moqui, Inc. v. Ambrose and Rosenfield and Co.*, 21 Ariz. App. 565, 521 P. 2d 1143 (1974), the first process was served on an agent of the defendant who did not inform the defendant or his counsel. Upon the direct receipt of a second summons, the counsel immediately responded. The court there held the neglect to be "excusable," and it

reopened the default judgment accordingly. Similarly, in *Marquez v. Rapid Harvest Co.*, 99 Ariz. 363, 409 P. 2d 285 (1965), the receiving agent for the defendant quit within a few days after service without forwarding the summons. The court there held that the neglect to answer caused by that situation was "excusable," especially since the court noted that no intervening rights had attached in reliance upon the judgment.

The plaintiff herein will suffer no prejudice, either. In *B.D.M., Inc. v. Sageco, Inc.*, 529 P. 2d 1147 (Hawaii 1976), the court held that merely having to prove his case in an adversary setting is not an element toward establishing "prejudice" to the non-defaulting party. Finally, in *Green v. Caro*, 114 CA 2d 35, 249 P. 2d 573 (1952), the defendants gave the summons to their insurer, who assigned the case to an adjuster, who merely contacted the plaintiff's attorney, and did nothing to officially answer the complaint. The court there held that the default should be set aside.

Another case concerning an insurance carrier is *Phillips v. Findlay*, 19 Ariz. App. 348, 507 P. 2d 687 (1973). There the insurer was not notified of the service on the defendant insured. The court held that this created excusable neglect on the part of the defendant's counsel-insurer, sufficient to reopen the default judgment against the defendant-insurer.

Internal corporate confusion has also been held sufficient excuse for inaction in default. *Mead v. Citizen's Automobile Inter-Insurance Exchange*, 78 Ida. 63, 297 P. 2d 1042 (1956). Here, as in *Mead*, the usual processing of suit papers became temporarily confused, and thus should be excused.

Similar to *Kennedy v. Meyer Co., Inc.*, 218 Kan. 387, 543 P. 2d 937 (1975), the employee involved here had no regular summons processing function. Therefore, as in *Kennedy v. Meyer Co., Inc.*, *supra*, the mishandling of the summons ought to be held an excusable neglect. The court in *Kennedy v. Meyer Co., Inc.*, *supra*, also held that defaults obtained as a surprise to the defaulting party, such as is the case here, ought to be vacated.

Good faith inaction on the part of the defendant, sincerely believing no further action on his part is required, is consistently held to be excusable neglect. *Riskin v. Towers*, 24 Cal. 2d 274, 148 P. 2d 611 (1944); *Nomellini Construction Co. v. Deane*, 160 CA 2d 57, 324 P. 2d 654 (1958); *Martin v. Rossi*, 18 Ariz. App. 212, 501 P. 2d 53 (1972). In *Martin v. Rossi*, *supra*, the court pointed out that the mistake need not be "completely explainable" to constitute grounds to reopen a default judgment. Here, the defendant obviously believed that no more action was required on its part. Moreover, the failure of the summons to reach defendant's counsel-insurer is not only completely explained, it is com-

pletely understandable.

In *Singleton v. LePak*, 425 P. 2d 974 (Okla. 1967), a factor given importance by the court in reopening a default judgment was that the defendant acted with dispatch to correct the error upon its discovery. The defendant here also acted with utmost dispatch once the omission was uncovered.

Thus, by all standards applied by cases in other jurisdictions similar to the case at bar, the defendant's error is an "excusable mistake"; and thus the default judgment entered against him should have been vacated. As in *Monte Tonkawa Village Apartments, supra*, the denial of defendant's motion to vacate was an abuse of discretion.

POINT TWO

EQUITY DICTATES THAT THE PLAINTIFF BE
REQUIRED TO PROVE THE CASE ON ITS MERITS.

Although Rule 55 of the Utah Rules of Civil Procedure purports to allow a default judgment to be entered in every case where a party fails to plead or otherwise defend, it is quite evident that this rule has as its primary purpose the expeditious disposition of undisputed or stale claims. In all reported cases where the failure to plead was based

upon mere mistake or excusable neglect, the courts have reinstated the party's right to trial on the merits, unless he was grossly negligent and the opposing party was harmed or prejudiced in some manner by the failure to act.

This court stated in *Westinghouse Electric Supply Co. v. Paul W. Larsen Construction, Inc.*, 544 P. 2d 876 (Utah 1975) at 879:

"It is indeed commendable to handle cases with dispatch and to move calendars with expedition in order to keep them up to date. But it is even more important to keep in mind that the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them. In conformity with that principle the courts generally tend to favor granting relief from default judgments where there is any reasonable excuse, unless it will result in substantial prejudice or injustice to the adverse party."

The mere necessity to go ahead with proof in an adversary setting is not a prejudice or injustice to the adverse party in vacation of a default judgment. *B.D.M. Inc. v. Sageco, Inc.*, *supra*.

This interpretation of Rule 55 is exemplified by comparing two cases which reached contrasting results. In *Mayhew v. Standard Gilsonite Company*, 14 Utah 2d 52, 376 P. 2d 951 (1962), the court set aside a default judgment where the defendant had employed an attorney two days after the twenty-day period for filing had passed and then asked leave to file

his pleadings. It appears that the original action was brought against a financially distressed company which had no adequate or legally acting management. In an effort to protect their rights, certain stockholders of this company attempted to form a reorganization committee and hired attorneys to accomplish this end. The attorneys asked leave of court to file a late answer but the trial court refused to grant the request. On appeal, the Supreme Court set aside the default judgment, labeling the default judgment a "harsh and oppressive thing." (476 P. 2d 953) Noting that the defendant's attorneys moved with dispatch to have the defaults set aside, the court concluded that the late filing was due to excusable neglect.

In contrast, the case of *Masters v. LeSeuer*, 13 Utah 2d 293, 373 P. 2d 573 (1962), is an illuminating example of why Rule 55 is necessary. There the Supreme Court held as proper the denial of a motion to set aside a default judgment on the grounds of inadvertence and excusable neglect where the attorney representing the plaintiff contacted the defendant's attorney several days before the default could be taken and called his attention to the fact that a default would be taken unless an answer was filed. In addition, the plaintiff, an elderly woman, had traveled from Seattle, Washington, to Utah for the trial and presented an accounting at the default.

hearing; independent witnesses had been called; and there was a possibility that the passage of time would increase the damages. Based upon all of these factors, the court concluded that the trial court had not abused its discretion.

In the present case, the facts concerning excusable neglect of the defendant are similar to *Mayhew v. Standard Gilsomite Company*, 14 Utah 2d 52, 376 P. 2d 951 (1962). The default was entered within four days after the statutory period for filing had passed. Within two weeks of the entry of the judgment, defendant's counsel moved to have the judgment set aside. Thus, the failure to file was totally inadvertent, and the defendant acted promptly and well within the ninety day period allowed under Rule 60(b) to have the default judgment set aside. In contrast, there is no evidence in the record that the failure to file harmed the plaintiff in any manner as illustrated in *Masters v. LeSeuer*, 13 Utah 2d 293, 373 P. 2d 573 (1962). The plaintiff, a local resident of the city, was seeking specified and constant damages for an alleged prior breach of the city's duty to maintain the sewer lines. Furthermore, if plaintiff's counsel had notified the city of its failure to timely file an answer, this situation could have been easily avoided. Although Rule 55 does not require notice to be given after the entry of the judgment, fairness and justice dictate that it should be given before the default judgment is entered. Reported

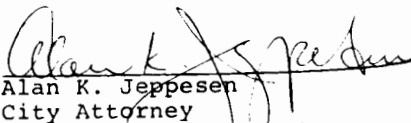
cases constantly scrutinize the record to determine whether prior notice was given. (See *Security Adjustment Bureau, v. West*, 20 Utah 2d 292, 437 P. 2d 214 (1968).)

The purpose of a default judgment is to conclude litigation when a defendant fails to plead or otherwise defend an action. It was never meant to be used as a means for punishing a party for negligence or inadvertence of the party's attorney. *McKean v. Mountain View Memorial Estates, Inc.*, 17 Utah 2d 323, 411 P. 2d 129 (1966). Nor was it meant to be used as a device where the plaintiff could avoid the burden of proving her claim by resort to a technicality. Justice and equity demand that the City be allowed its day in court. The plaintiff will not be disadvantaged by being required to prove her case on its merits.

CONCLUSION

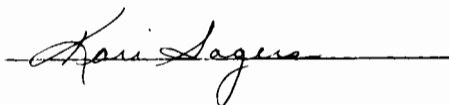
For the foregoing reasons, it is respectfully requested that the decision of the district court denying the setting aside of the default judgment be reversed and that the plaintiff be ordered to proceed to trial on the merits of the case.

Respectfully submitted,


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MAILING CERTIFICATE

I hereby certify that a copy of the foregoing Appellant's Brief was mailed postage prepaid this 22nd day of June, 1977, to Fred W. Finlinson, Attorney for Appellant, Finlinson & Finlinson, 721 Kearns Building, Salt Lake City, Utah, 84111.

A handwritten signature in cursive script, reading "Kari Rogers", is written over a horizontal line.