1988

Timpanogos Village v. Dennis McDonald dba Mac Builders: Brief of Respondent

Utah Court of Appeals

Gary H. Weight; Aldrich, Nelson, Weight and Esplin; Attorney for Appellant.
Taylor D. Carr; Attorney for Respondent.

IN THE UTAH COURT OF APPEALS

TIMPANOGOS VILLAGE, Plaintiff-Respondent, vs. DENNIS McDONALD d/b/a MAC BUILDERS, Defendant-Appellant,	Case No. 880111-CA Category No. 14 B

BRIEF OF RESPONDENT

APPEAL FROM AN ORDER DENYING DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT JUDGMENT FROM THE FOURTH CIRCUIT COURT OF UTAH COUNTY STATE OF UTAH, JUDGE JOSEPH DIMICK

GARY H. WEIGHT
ALDRICH, NELSON, WEIGHT & ESPLIN
43 East 200 North
P.O. Box "L"
Provo, Utah 84603-0200

Attorney for Appellant

TAYLOR D. CARR
350 South 400 East, Suite 114
Salt Lake City, Utah 84111

Attorney for Respondent

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Attorney for Appellant

TAYLOR D. CARR
350 South 400 East, Suite 114
Salt Lake City, Utah 84111

Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

AUTHORITIES

COURT RULES AND STATUTES

STATEMENT SHOWING JURISDICTION OF COURT OF APPEALS

This is an appeal from a final order of the Eighth Circuit Court of Utah County, State of Utah, denying Defendant's Motion to set aside the Default Judgment taken in the subject case and is taken pursuant to Rules of the Utah Court of Appeals, Title II, Rule 3(a), U.C.A.

STATEMENT SHOWING NATURE OF PROCEEDINGS

The nature of the proceedings herein are an appeal by the Defendant-Appellant from a final order entered by the Eighth Circuit Court, Utah County, State of Utah, Judge Joseph Dimick denying Defendant's motion pursuant to Rule 60(b) for an order setting aside the Default Judgment taken by Plaintiff against Defendant.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

The determinative rule is Rule 60(b), Utah Rules of Civil Procedure, stated verbatum as follows on page iv.

RELIEF FROM JUDGMENT OR ORDER

(a) **Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and 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 proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) 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; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than three months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This Rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these Rules or by an independent action.

STATEMENT OF ISSUES PRESENTED ON APPEAL

Plaintiff/Respondent (hereafter "Timpanogos") submits that the only issue presented on appeal is whether the trial court abused its discretion in denying Defendant's motion to set aside the default judgment entered herein. Defendant-Appellant (hereafter "McDonald") has stated that an additional issue should be considered that Timpanogos is not the true party in interest and would receive unjust enrichment on the apparent belief that Timpanogos would receive double payment, having been reimbursed by the subrogee insurer, Utah Farm Bureau Insurance Company. Timpanogos submits that this is not an issue.

STATEMENT OF FACTS

1. The Defendant, Dennis McDonald dba Mac Builders was personally served with a Summons and Complaint in this matter on September 19, 1987. (Addenda attached hereto, P. 1, 2, 3).

2. The Defendant did not respond to said Summons and Complaint and a Judgment was taken on or about October 27, 1987, thirty eight (38) days after personal service was effected. (Addenda attached to Appellant's brief, third and fourth page).

3. After said Judgment had already been taken the Defendant called Plaintiff's counsel concerning the Judgment and at that time stated that he was aware that he had been served but had forgotten about the matter because he was busy

with other business matters. (Affidavit of Taylor D. Carr, attached to Appellant's brief addendum, Pages 16 through 19).

4. McDonald claims in his Affidavit that he called Timpanogos attorney before the twenty (20) day period was up, however, Timpanogos attorney denies this (Affidavit of Taylor D. Carr, Appellant's addendum, supra).

5. Nowhere in McDonald's Affidavit does McDonald state that he was told at any time that he did not have to file an answer to the Complaint herein.

SUMMARY OF ARGUMENT

There is no showing that the lower court abused its discretion in refusing to set aside the Default Judgment. Defendant sets forth a lengthy statement of his meritorious defense, but has failed to show the threshold requirements for setting aside a default pursuant to Rule 60(b) U.R.C.P. as set forth in State by and through D. of S. S. vs. Musselman, 667 P. 2d 1059 (Utah 1983).

McDonald further claims that Timpanogos is not the true party in interest and would receive double recovery if awarded this judgment, however, this claim is unmeritorious because this is a subrogation action on behalf of Utah Farm Bureau.

ARGUMENT

POINT I

THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO SET ASIDE THE DEFAULT JUDGMENT

McDonald asserts that he should be given relief from the Default Judgment entered against him pursuant to Rule 60(b), U.R.C.P., however, McDonald does not make it clear which section of that rule should apply. It appears from McDonald's Affidavit that he would rely on Rule 60(b)(1) which concerns excusable neglect, mistake, inadvertance or surprise. McDonald also sets out a lengthy statement of what his defense would be. It is clear that McDonald must show the elements of excusable neglect (or any other reason specified in Rule 60(b)) before the Court can consider his contention that he has a meritorious defense. State, by and through D. of S. S. vs. Musselman, supra. The lower court failed to find the necessary elements pursuant to Rule 60(b) and denied McDonald's motion to set aside the default. The lower court is given a broad latitude of discretion in ruling on such motions and this court should not reverse the lower court's decision unless an abuse of discretion can be shown. Mayhew vs. Standard Gilsonite Co. 376 P. 2d 951 (Utah 1962); Board of Education of Granite School District vs. Cox, 384 P. 2d 806, (Utah 1963), stating that a "patent abuse" of discretion must be shown. The lower court did not abuse its discretion in denying Defendant's motion to set aside the

Default Judgment. What appears to be one of the most recent Utah cases discussing all of the issues presented here is Musselman, supra. In that case the Utah Supreme Court made it clear that a Defendant under these circumstances must first show cause why the Default Judgment should be set aside before he can show that he has a meritorious defense. In the Musselman case the lower court did find sufficient cause under Rule 60(b) to set aside the judgment but went on to rule that the Defendant had not shown a meritorious defense. The Supreme Court in discussing the case, however, discussed both requirements in setting aside a default judgment and made it clear that the threshold issue of excusable neglect must be shown before the Court will consider whether the Defendant has a meritorious defense. The court in this connection stated that while they are in accord generally with the doctrine that the courts should be liberal in granting relief against default judgments, they also acknowledge the existence of the broad latitude of discretion which is accorded the trial court on ruling on such motions citing Mayhew vs. Standard Gilsonite, supra. The court further in quoting from Air Chem Intermountain Inc. vs. Parker 513 P. 2d 429 (Utah 1973) stated as follows:

> The trial court is endowed with considerable latitude of discretion in granting or denying a motion to relieve a party from a final judgment under Rule 60(b)(1), U.R.C.P., and this court will reverse the trial court only where an abuse of this discretion is clearly established .... the rule that the courts will incline towards granting relief to a party, who has not had the opportunity to present his case, is ordinarily

> applied at the trial court level, and this court will not reverse the determination of the trial court merely because the motion could have been granted. For this court to overturn the discretion of the lower court in refusing to vacate a valid judgment, the requirement of public policy demand more than a mere statement that a person did not have his day in court when full opportunity for a fair hearing was afforded him or his legal representative. 667 P. 2d at 1055. (Emphasis added).

In applying this rule of law to the case at hand, one must read through McDonald's Affidavit on file to determine which statements in the Affidavit apply to his assertion that he is entitled to the first element required to set aside a default under Rule 60(b). He Must show therein the elements of excusable neglect or any other reason set forth in Rule 60(b). It appears that there are three statements set forth in McDonald's Affidavit which would apply to this issue. They are as follows:

1. After being personally served with the Summons and Complaint in this matter McDonald called Timpanogos' attorney during the twenty (20) day period to find out what the action was about. (Although Timpanogos' attorney denies that this call ever took place).

2. After the judgment was entered against him, McDonald called Timpanogos' attorney again and discussed the case;

3. That McDonald is not trained in the law nor has he been involved in litigation and is not schooled in the Rules of Civil Procedure and was unaware of the requirements with respect to filing an answer to complaints.

It is interesting to note that although McDonald claims

he had two conversations with Timpanogos' attorney, not once does he state that he was told he did not have to file an answer to the Summons and Complaint which was served upon him. The Summons and Return of Service are attached hereto as Addendum 1 and 2, showing that McDonald was personally served and that the Summons clearly states that he must file an answer in writing within twenty (20) days of the date of service. Default was not taken until thirty eight (38) days after service of process and although Timpanogos' attorney denies that he ever had any conversation with McDonald prior to the time of the default, even taking McDonald's assertions at face value, he has not set forth sufficient cause under the case law to show that the lower court abused its discretion in refusing to set aside the Default. For example in Musselman the defendant was hospitalized or convalescing during a three week period after he was served. The only evidence in this case for McDonald's excuse is that he is not schooled in the law and did not think he had to file an answer after calling Timpanogos' attorney. (Timpanogos' attorney states in his Affidavit that what McDonald really said was that after he was served he became so busy he forgot about the matter).

In Warren vs. Dixon Ranch Co., 260 P. 2d 741 (Utah 1953), the fact situation is somewhat similar to the case at hand, although the defendant in Warren had even a stronger argument. In Warren the defendant stated that after the

default was taken plaintiff's attorney made an oral promise that the defendant could have more time to answer. Furthermore, Dixon claimed to have been ill at the time of service, and finally, the defendant stockholders claimed that they received no notice of the action in time to defend their interests. The court found that such was not sufficient excusable neglect so as to allow the vacation of the default judgment, stating that "... 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". 260 P. 2d at 743. (Emphasis added). Also in Warren the Supreme Court stated that illness alone is not sufficient to make neglect in defending one's action excusable.

With respect to McDonald's claim that he is not schooled in the law, and thus should be relieved from the judgment, we find the case of Board of Education of Granite School District, supra, where the defendant's excuse for setting aside the default was that he thought the summons was invalid and, therefore, paid no attention to it. The court refused to set aside the default based upon that excuse.

ARGUMENT

POINT II

THIS IS A SUBROGATION ACTION AND MAY BE BROUGHT IN THE NAME OF THE SUBROGOR. THERE WILL BE NO UNJUST ENRICHMENT.

McDonald states that if he were required to pay this judgment that Timpanogos would be unjustly enriched by receiving double payment. This argument needs little

discussion because it is clear that this is a subrogation action which has been brought in Timpanogos' name by the subrogree, Utah Farm Bureau Ins. Co. The two letters from Utah Farm Bureau to McDonald which are attached as addendum to his brief make this clear. The right, in fact the requirement, under the strict rule of common law of the subrogee to bring an action in the name of the subrogor is almost universal. 73 Am Jur 2d Subrogation, Section 137. In the event of recovery such would go to the subrogee insurance carrier who stands in the shoes of the subrogor after payment is made and, therefore, there would be no double recovery by Timpanogos as asserted by McDonald.

CONCLUSION

Based upon the case law cited herein as well as the facts of this case, there has been no showing that the lower court abused its discretion in refusing to set aside the default judgment. Furthermore, there is no showing that Plaintiff would be unjustly enriched. Therefore, Plaintiff respectfully requests that the lower court ruling be affirmed.

DATED and SIGNED this 17th day of June, 1988.

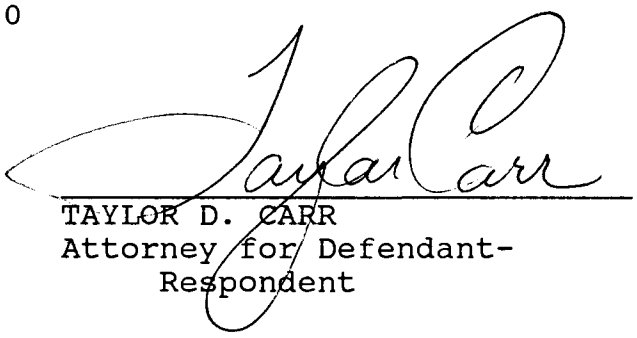
TAYLOR D CARR

TAYLOR D. CARR
Attorney for Defendant-
Respondent

MAILING CERTIFICATE

I do hereby certify that I mailed four copies of the above and foregoing RESPONDENT'S BRIEF, postage prepaid, this 17th day of June, 1988, to:

Gary H. Weight, Esq.
Aldrich, Nelson, Weight & Esplin
43 East 200 North
P.O. Box "L"
Provo, Utah 84603-0200



TAYLOR D. CARR
Attorney for Defendant-
Respondent

ADDENDUM

PLACE SERVED
DATE & TIME 9.20.87
CAPACITY SERVED Defendant
PROCESS SERVER

TAYLOR D. CARR
Attorney for Plaintiff
350 South 400 East, Suite 114
Salt Lake City, Utah 84111
Telephone: (801) 363-0888

IN THE CIRCUIT COURT, STATE OF UTAH

UTAH COUNTY, PROVO DEPARTMENT

TIMPANOGAS VILLAGE,

Plaintiff,

vs.

DENNIS McDONALD dba MAC BUILDERS,

Defendant.

SUMMONS

Civil No. 873002481CV

YOU ARE HEREBY SUMMONED and required to file an Answer in writing to the attached Complaint with the Clerk of the above entitled Court and to serve upon or mail to Plaintiff's attorney, Taylor D. Carr, 350 South 400 East, Suite 114, Salt Lake City, Utah 84111, a copy of said Answer within twenty (20) days after service of this Summons upon you. If you fail to do so, Judgment by default will be taken against you for the relief demanded in said Complaint, which has been filed with the Clerk of the above entitled Court and a copy of which is hereto annexed and herewith served upon you.

DATED this 19 day of September, 1987.

TAYLOR D. CARR
Attorney for Plaintiff

SERVE: Dennis McDonald
627 West 1700 North
Orem, Utah 84057

AFFIDAVIT OF PROOF OF SERVICE

STATE OF UTAH)
: SS. Dennis McDonald dba Nice Buildings
COUNTY OF)

I James Pio, being first duly sworn on oath deposes and says:

I am a citizen of the United States over the age of 21 years at the time of service herein, and not a party to or interested in the within action and that I received the within and hereto annexed, Summons & Complaint on the 19 day of September, 1987, and served the same upon, Dennis McDonald the, within named defendant, by delivering to and leaving a true copy of the said Summons & Complaint with Dennis McDonald a suitable person over the age of 14 years, at the following address, 627 West 1700 North Orem, Utah.

I further certify that on the document/s served, I endorsed the date, place of service, and added my name and official title, if any, thereto at the time of such service.

Dated this 28 day of September, 1987

James Pio

Subscribed and sworn before me this 28 day of September, 1987.

My commission expires:
Oct 4, 1988

NOTARY PUBLIC Residing in Salt Lake County

DELOY PORTER NOTARY PUBLIC STATE OF UTAH

Service	$ 3.50
Milage	$ 16.50
Other	$ 2.50
Total	$ 22.50

TAYLOR D. CARR
Attorney for Plaintiff
350 South 400 East, Suite 114
Salt Lake City, Utah 84111
Telephone: (801) 363-0888

IN THE CIRCUIT COURT, STATE OF UTAH

UTAH COUNTY, PROVO DEPARTMENT

TIMPANOGAS VILLAGE, Plaintiff, vs. DENNIS McDONALD dba MAC BUILDERS Defendant.	COMPLAINT Civil No. _____

Plaintiff above named complains of defendant and for cause of action alleges:

1. The amount in controvery is less than $10,000.00 and the damage complained of occurred in Utah County, State of Utah.

2. Prior to the 9th day of February, 1986, Defendant caused to be installed in or near the attic of plaintiff's commercial building located at 560 South State, Orem, Utah, a certain copper water line.

3. Defendant in performing the duties of installation of said water line, did so in a negligent and unworkmanlike manner such that on or about the 9th day of February, 1986, said water line froze and burst causing damage to Plaintiff's building.

4. As a direct and proximate result of the aforesaid

negligent, careless and unworkmanlike conduct on the part of Defendant, Plaintiff was damaged in the sum of $4,Ø29.46.

WHEREFORE, Plaintiff demands judgment against Defendant in the sum of $4,Ø29.46 together with costs incurred herein and such other and further relief as the Court deems just in the premises.

DATED this 19 day of September, 1987.

TAYLOR D. CARR
Attorney for Plaintiff