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Pacer Sport and Cycle v. Frank Myers and Carl W. Myers : Brief of Appellant

Utah Supreme Court

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IN THE

SUPREME COURT OF THE STATE OF UTAH

PACER SPORT & CYCLE, INC.,
Respondent-Plaintiff,

vs.

FRANK MYERS and CARL W. MYERS,
Appellant-Defendant.

Case No. 13839

APPELLANTS' BRIEF

Appeal from Order of the Third District Court
for Salt Lake County, M. D. Jones, Judge, Pro Tem

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vs.

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STATEMENT OF THE KIND OF CASE

This is an action on an Installment Sale and Security Agreement (motor vehicle) for the purchase of a motorcycle.

DISPOSITION IN LOWER COURT

The Third District Court, M. D. Jones, Judge Pro Tem, denied defendant, Carl W. Myers' motion to set aside default judgment against him, which motion was brought pursuant to the provisions of Rule 60(b) of the Utah Rules of Civil Procedure.

RELIEF SOUGHT ON APPEAL

Defendant, Carl W. Myers, seeks justice and equity

by a reversal of the order of the Lower Court denying his motion to set aside the default judgment against him, and an opportunity to have all of the issues presented to the Court in conformity with law and justice.

STATEMENT OF FACTS

The appellant-defendant, Carl W. Myers, is the father of the other named defendant, Frank Myers. Prior to April 3, 1972, Frank Myers, the son of appellant, entered into an agreement with Robert Reeves, an officer of Pacer Sport & Cycle, Inc., respondent-plaintiff, to race the Maico brand of motorcycle marketed and sold by respondent-plaintiff. Under this arrangement, defendant, Frank Myers, was to race the motorcycle under the name of Pacer Sport & Cycle, Inc.; Pacer Cycle was to furnish Frank Myers, a new Maico motorcycle for which he was to sign a security agreement. No payments were contemplated to be made in that Pacer Cycle was to retake possession of the motorcycle every ninety (90) days and resell the same and replace it with a new motorcycle; and Pacer Cycle was to pay all costs of repairs to the motorcycle during the time that Frank Myers was racing the same under the name of plaintiff.

Appellant-defendant, Carl W. Myers, was made aware of this agreement and was present at the time the agreement was entered into between defendant, Frank Myers, and plaintiff, Pacer Cycle. At the time Frank Myers signed the Installment Sale and Security Agreement, appellant-defendant, Carl W. Myers, was requested

to co-sign the agreement with his son as additional security for the return of the motorcycle placed in the possession of defendant, Frank Myers. Appellant-defendant, Carl W. Myers, signed the Installment Sale and Security Agreement, which is the basis of the default judgment against him, in reliance upon the representation of Robert Reeves, the officer of Pacer Cycle, that no payments were expected to be made under the arrangement with his son, Frank Myers, as stated.

The Installment Sale and Security Agreement was signed by appellant-defendant, Carl W. Myers, on or about April 3, 1972, and possession of the motorcycle described therein was given to defendant, Frank Myers. Frank Myers did in fact race the motorcycle under the name of Pacer Sport & Cycle pursuant to agreement. In the latter part of April, 1972, the motorcycle failed and needed repair. Defendant, Frank Myers, returned the cycle to plaintiff, Pacer Cycle, for repair under the agreement, at which time Pacer Cycle refused to repair the cycle as agreed. Defendant, Frank Myers, thereafter terminated his relationship with Pacer Cycle by reason of their refusal to repair the cycle as agreed and at that time considered his arrangement with Pacer Cycle to be terminated.

The date on the Installment Sale and Security Agreement, a copy of which was attached to plaintiff's complaint as an Exhibit (R. 49), was changed and the contract was then sold or assigned to Zions First National Bank by endorsement on the reverse side thereof.

The motorcycle was subsequently repossessed by Zions First National Bank on or about January 3, 1973, as shown by the affidavit attached to plaintiff's complaint (R. 50). Plaintiff, Pacer Cycle, commenced a suit on July 11, 1973. Summons was served on appellant-defendant, Carl W. Myers, only, on July 11, 1973, but the return of summons was not filed with the Court until July 1, 1974, approximately one (1) year later, the same day default judgment was taken against appellant-defendant, Carl W. Myers, July 1, 1974.

Appellant-defendant, Carl W. Myers, filed his motion to set aside the default judgment entered against him on July 31, 1974, well within the three (3) month requirement of Rule 60(b) of the Utah Rules of Civil Procedure. The motion was argued to the Court on August 12, 1974, with Salt Lake City Judge, M. D. Jones, sitting as Judge Pro Tem. The motion of appellant-defendant, Carl W. Myers, was denied on or about August 19, 1974, although the order on record appears to have been signed on August 10, 1974, (R. 29), two days before the motion was actually heard. The defendant, Frank Myers, was never served with summons in this action. He entered the action voluntarily by filing an answer and counterclaim to the complaint of plaintiff-respondent, and no trial or hearing has been held in connection therewith.

ARGUMENT

POINT I.

DENIAL OF APPELLANT-DEFENDANTS'

MOTION TO SET ASIDE DEFAULT JUDGMENT WAS CONTRARY TO LAW, JUSTICE AND EQUITY.

The provisions of Rule 60(b) of the Utah Rules of Civil Procedure provides as follows:

> "On motion and upon such terms as are just, *the Court may in the furtherance of justice relieve a party * * * from a final judgment*, order or proceeding for the following reasons (1) *mistake, inadvertance, surprise, or excusable neglect; * * * (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* 3 *months after the judgment*, order, or proceeding was entered or taken." (Emphasis added.)

Under the provisions of the above cited Rule, the trial Court has considerable latitude of discretion in granting or denying motions to set aside default judgments, *but it cannot act arbitrarily and should be generally indulgent toward permitting full inquiry and knowledge of disputes so that they can be settled advisedly and in conformity with law and justice. It is ordinarily an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for defendant's failure to appear and timely application is made to set aside the default judgment.* (*Mayhew* vs. *Standard Gilsonite Company*, 14 U. 2d 52, 376 P. 2d 951.) (Emphasis added.) There is no dispute that the

motion of appellant-defendant was timely made after default notice was received by him. It is the contention of appellant-defendant that the Lower Court abused its discretion and acted arbitrarily in that there was reasonable justification for setting aside the default judgment against appellant-defendant under the facts and circumstances that existed.

The affidavit of plaintiff's attorney, admits in part that there existed a valid dispute on the question of liability between plaintiff and appellant-defendant. Counsel for plaintiff states in his affidavit:

> "However, there was some mention during the course of this conversation that Pacer was to service and repair the motorcycle in exchange for Frank C. Myers racing the motorcycle under the Pacer name" (R. 35).

It is undisputed that appellant-defendant denied liability under the contract from the time a demand letter was allegedly sent to him by plaintiff's counsel (R. 34). The facts and circumstances clearly indicate that the appellant-defendant was mislead or lulled into thinking that he was not liable under the contract and that he had convinced plaintiff's attorney accordingly. This is evidenced by the fact that plaintiff's attorney delayed in taking a default judgment against appellant-defendant for approximately one (1) year after the service of summons upon appellant-defendant and after he had held telephone conversations both prior

to suit and shortly after service of summons upon appellant-defendant (R. 34-36).

In addition to the above situation, other circumstances existed which would constitute reasonable justification for setting aside the default judgment in that repossession of the motorcycle which occurred on or about January 3, 1973, approximately six (6) months before the action was commenced; There has been no sale or disposition of the motorcycle repossessed and retaken by Zions First National Bank; There is no indication on the Installment Sale and Security Agreement that the same was reassigned or repurchased by plaintiff giving rise to the question as to whether or not Pacer Sport & Cycle, Inc., was the real party and interest in this action; and the apparent alteration of the date of the contract. Plaintiff's complaint (R. 47-48) is silent as to the sale and assignment of the Installment Sale and Security Agreement to Zions First National Bank, the repossession of the motorcycle, the disposition of the motorcycle, if any, and the purchase back or reassignment of the Installment Sale and Security Agreement from Zions First National Bank to plaintiff, Pacer Cycle (R. 47-48).

In the case of *Warren* vs. *Dixon Ranch Company, et al.*, (123 U. 416, 260 P. 2d 741), this Court stated:

> "On motion to vacate a default judgment, *discretion must be exercised in furtherance of justice and the Court will incline toward granting relief in a doubtful case so that party may have a hearing.*" (Emphasis added.)

Looking at the facts presented in a light most favorable to appellant-defendant and assuming from the affidavit (R. 37-38) that he was induced into signing the Installment Security Agreement on the representations allegedly made by Robert Reeves, as set forth in the statement of facts herein, coupled with the repossession of the motorcycle without any sale or disposition thereof, certainly qualifies this case as one that should be given full hearing in the furtherance of justice and equity. Adding to these facts, the honest belief of appellant-defendant, Carl W. Myers, that he had no liability under the Installment Agreement and that the agreement was a nullity, the long delay before default judgment was taken against him, which added to his belief that he was not liable under the contract, would constitute reasonable justification or excuse for his failure to appear. (See *Ney* vs. *Harrison*, 5 U. 2d 217, 299 P. 2d 114; *Chrysler* vs. *Chrysler*, 5 U. 2d 415, 303 P. 2d 995; *Central Finance Company* vs. *Kynaston*, 22 U. 2d 284, 452 P. d 316.)

It is the contention of appellant-defendant, Carl W. Myers, that this case is patently one that Rule 60(b) contemplated and the Lower Court abused its discretion in failing to grant his motion to set aside the default judgment against him in that there existed reasonable justification for doing so. The ends of justice and equity require that the order denying defendant's motion to set aside the default judgment be reversed and a trial of the issues be held.

POINT II.

THE LOWER COURT ERRED IN DENYING APPELLANT-DEFENDANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT IN THAT RESPONDENT-PLAINTIFF FAILED TO COMPLY WITH LAW.

The respondent-plaintiff, through its agent, Zions First National Bank, repossessed from defendant, Frank Myers, the motorcycle purportedly sold under the Installment Sale and Security Agreement, which is the subject of this action, on or about January 3, 1973 (R. 50). Suit was commenced approximately six (6) months later after repossession and the record is void of what, if any, disposition was made of the motorcycle in accordance with the provisions of Title 70A-9-501 et seq. of the Utah Code Annotated 1953 as amended. Title 70A-9-503 of the Utah Code grants to the secured party the right to take possession of collateral upon default of the debtor. Title 70A-9-504 grants to the secured party after default the right to sale, lease, or otherwise dispose of any of the collateral and directs how the proceeds of any such disposition shall be applied. Title 70A-9-504(1)(b) requires the secured party to apply proceeds of the disposition of collateral to satisfaction of the indebtedness secured by the security interest under which any disposition is made. Under the provisions of 70A-9-504(3) the secured party is required to give notice to the debtor of any public or private sale in connection with the disposition of collateral. The provisions are as follows:

"(3) *Disposition of the collateral may be by public or private proceeding and may be made by way of one or more contracts* * * * Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, *reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor.* * * *" (Emphasis added.)

70A-9-505(2) provides:

"(2) In any other case involving consumer goods or any other collateral, *a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor* * * *. If the debtor or other person entitled to receive notification objects in writing within thirty (30) days from the receipt of the notification or if any other secured party objects in writing within thirty (30) days after the secured party obtains possession, the secured party must dispose of the collateral under Section 70A-9-504. *In the absence of* such written objection [redacted] the secured party may retain the collateral and satisfaction of the debtor's obligation." (Emphasis added.)

The facts and record clearly show that the respondent-plaintiff, Pacer Cycle, has totally failed to comply with the provisions of the Uniform Commercial Code in retaking possession of the motorcycle and the disposition made thereof, if any. If in fact the respondent-plaintiff

has disposed of the collateral it repossessed, it has failed to give the notice required to be given under the provisions of 70A-9-504(3) and should be precluded from having a deficiency judgment against defendants. (*Atlas Thrift Co.* vs. *Horan* (Cal.), 104 Cal. Rptr. 315; ..... Cal. App. 3rd .....)

Where, as in this case, the secured party fails to comply with the above cited provisions in the retaking and disposition of collateral under a security agreement, the debtor is granted a remedy under the provisions of 70A-9-507(1), which provides as follows:

> "If it is established that the secured party is not proceeding in accordance with the provisions of this part, disposition may be ordered or restrained on appropriae terms and conditions. If the disposition has occurred the debtor * * * has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part. *If the collateral is consumer goods, the debtor has a right to recover in any event, an amount not less than the credit service charge plus ten percent of the principal amount of the debt or the time price differential plus ten percent of the cash price.*" (Emphasis added.)

It would clearly appear under the provisions of the above cited statute that the appellant-defendant and his son both have a claim against the respondent-plaintiff for its failure to comply with law. This in and of itself should have been reasonable justification for the Court to grant

appellant-defendant's motion to set aside the default judgment and allow all of the issues to be presented to the Court for determination so that the case may be determined advisedly and in conformance with law and justice.

A review of the cases that have been decided under Title 70A-9-507 from other jurisdictions indicates that the remedy provided by this Section is not exclusive, and therefore, does not preclude barring a deficiency judgment when a sale of collateral has not been properly conducted or where the party conducts himself in a manner so unfair or so unreasonable as to amount to a retention of the collateral in satisfaction of the obligation. (*Atlas Thrift Company* vs. *Horan* (supra); *Harris* vs. *Brower* (Md.), 295 A. 2d 870.) In the case of *Leasco Data Processing Equipment Corporation* vs. *Atlas Shirt Company*, (N. Y. 323, N. Y. S. 2d 13), the Court stated:

> "When a creditor fails to give notice to a debtor of resale of collateral, he may be barred from obtaining a deficiency judgment."

Further, the California Court in the case of *Atlas Thrift Company* vs. *Horan* (supra), stated:

> "As U. C. C. 9-507 does not expressly declare that it provides an exclusive remedy, the pre-Code law continues under which a creditor failing to sell the collateral properly was barred from obtaining a deficiency judgment."

In the case of *Bradford* vs. *Lindey Chevrolet*, (Ga. 161 S. E. 2d 904), the Court stated:

> "If the creditor repossesses the collateral and retains it without any excuse for not selling it without demand for payment for fifty (50) days before suit and for over sixteen (16) months from the time of filing suit to date of trial, *such conduct constitutes a recision and satisfaction of the contract and the creditor cannot recover any deficiency from the debtor.*" (Emphasis added.)

Also, in the case of *Northern Trust Company* vs. *Krykendall*, (Ill. 273 N. E. 2d 526), the Court stated:

> "Under consumer protection statute it may be held that the *giving of proper notice is essential to a proper sale of collateral and that a proper sale of collateral is a condition precedent to liability for a deficiency judgment*, with result that when proper notice is not given, the creditor is not entitled to a deficiency judgment." (Emphasis added.)

The law is opposed to the creditor taking possession of the collateral and then delaying unreasonably before disposing of it as required by law. To continue to hold the collateral would certainly depreciate its value, and thus, lessen the amount of recovery that could be applied to the obligation owing by the debtor. (See *U. S.* vs. *Perrnie* (D. C. Neb.), 339 F. Supp. 702.)

It is the contention of appellant-defendant, Carl W. Myers, that respondent-plaintiff, Pacer Cycle, has failed to comply with the requirements of law in retaking possession of collateral as a secured party and making proper disposition thereof. That by reason of its failure to comply with law, Pacer Cycle should be deemed to have elected to retain possession of the collateral in full satisfaction of the claimed obligation. The default judgment against appellant-defendant, Carl W. Myers, should be set aside as having no force and effect in law, and further the respondent-plaintiff, Pacer Sport & Cycle should be barred from taking a deficiency judgment against either of the defendants in the action.

CONCLUSION

Appellant-defendant, Carl W. Myers, contends that the Lower Court abused its discretion in denying his motion to set aside the default judgment entered against him where there existed ample and reasonable justification for so doing. Further, the fact that the respondent-plaintiff, Pacer Sport & Cycle, Inc., has failed to comply with law in failing to make a proper disposition of the motorcycle repossessed by it as a secured party, and under the provisions of Title 70A-9-501 et seq., the default judgment against Carl W. Myers should be set aside as a matter of law, and the respondent-plaintiff be precluded from taking a deficiency judgment against either defendants in this action. For the foregoing rea-

sons, the order of the Lower Court denying the motion of appellant-defendant should be reversed and the default judgment against him be set aside.

Respectfully submitted,

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