

1988

Michael L. Miller v. Gordon E. Johnson : Brief of Respondent

Utah Court of Appeals

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Gordon E. Johnson; Pro Se for Appellant.

Michael L. Miller; Attorney for Respondent.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

880324-CA

IN THE COURT OF APPEALS OF THE STATE OF UTAH

MICHAEL L. MILLER,

Plaintiff / Respondent,

vs.

GORDON E. JOHNSON,

Defendant / Appellant.

:
:
:
:
:
:
:
:
:

Case No. 880324-CA

RESPONDENT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE FIRST CIRCUIT COURT
OF BRIGHAM CITY, BOX ELDER COUNTY, STATE OF UTAH, THE
HONORABLE ROBERT W. DAINES, CIRCUIT JUDGE, PRESIDING

Michael L. Miller, Esq.
Attorney for Respondent
20 South Main Street
P.O. Box 399
Brigham City, Utah 84302

Gordon E. Johnson
Pro Se for Appellant
216 West 100 North
Brigham City, Utah 84302

FILED

DEC 1 1988

COURT OF APPEALS

IN THE COURT OF APPEALS OF THE STATE OF UTAH

MICHAEL L. MILLER,	:	
	:	
Plaintiff / Respondent,	:	
	:	Case No. 880324-CA
vs.	:	
	:	
GORDON E. JOHNSON,	:	
	:	
Defendant / Appellant.	:	

RESPONDENT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE FIRST CIRCUIT COURT
OF BRIGHAM CITY, BOX ELDER COUNTY, STATE OF UTAH, THE
HONORABLE ROBERT W. DAINES, CIRCUIT JUDGE, PRESIDING

Michael L. Miller, Esq.
Attorney for Respondent
20 South Main Street
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216 West 100 North
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JURISDICTIONAL STATEMENT

The above court has jurisdiction to hear this appeal pursuant to Utah Code Annotated, Section 78-2a-3(2)(d).

STATEMENT OF ISSUES

I. Did the trial court abuse its discretion in refusing to set aside a default and default judgment where the court had previously ordered that Defendant's pleadings be stricken for being handwritten, and ordered that the Defendant file an appropriate responsive pleading within ten days; and where the Defendant, having notice of the requirement that he file an appropriate answer, failed to do so.

II. Was the Defendant entitled to prior notice of the entry of default and default judgment, other than service of the proposed order striking his pleadings and ordering him to file an appropriate responsive pleading within ten days.

DETERMINATIVE STATUTES

Rule 60(b), Utah Rules of Civil Procedure:

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, 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 3 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.

Rule 55(a)(2), Utah Rules of Civil Procedure:

Notice to party in default. After the entry of the default of any party, as provided in Subdivision (a)(1) of this rule, it shall not be necessary to give such party in default any notice of action taken or to be taken or to serve any notice or paper otherwise required by these rules to be served on a party to the action or proceeding, except as provided in Rule 5(a), in Rule 58A(d) or in the event that it is necessary to conduct a hearing with regard to the amount of damages of the nondefaulting party.

STATEMENT OF THE CASE

The Defendant appeals from the order of the First Circuit Court denying his motion to set aside default and default judgment.

A transcript of the hearing on Defendant's motion to set aside the default and default judgment has been obtained and references to that transcript shall be made by the page and line number of that transcript. All other facts are based upon the record, ie. the pleadings, papers, etc., which are contained in the court file.

Plaintiff, an attorney, filed a complaint seeking damages for unpaid services arising out representation of Defendant in a civil action. Upon being served, the Defendant filed a handwritten answer and subsequently a handwritten counterclaim. Following this the Defendant filed a handwritten motion to amend his counterclaim and for summary judgment and a handwritten points and authorities. The basis for the amendment to the counterclaim was that the process server who served the summons and complaint was a female who had to serve the Defendant in his bedroom due his physical condition. Plaintiff thereafter filed a motion to strike Defendant's handwritten pleadings upon the grounds that the carbon copies which were being sent to Plaintiff were illegible (T-Pg.3-L.24). A hearing was scheduled and notice was sent to the Defendant. Defendant did not attend the hearing. At the hearing the court granted Plaintiff's motion. Plaintiff prepared a proposed order, submitted the original to the court and sent a copy to the Defendant by mail. The court then directed Plaintiff to amend the order to include that Defendant have ten days to file the appropriate responsive pleading and that if he failed to do so, default and default judgment would be entered (T-Pg.4-L.7). This order was signed by the court on December 3, 1987. Defendant filed a typed crossclaim and motion for summary judgment on November 2, 1987. Plaintiff objected to this motion upon the grounds that the Defendant had not yet filed an appropriate

answer, among other reasons. The court scheduled a hearing and sent notice to the parties. Defendant again failed to attend this hearing and the court denied Defendant's motion. Plaintiff prepared a proposed order denying summary judgment and again sent a copy to the Defendant by mail. This order was signed on December 7, 1987. On December 22, 1987 Judge Daines signed the default judgment, awarding Plaintiff the amounts prayed for in the complaint. Defendant who thereafter obtained counsel, filed a motion to set aside the default and default judgment. This matter came on for hearing on April 27, 1988. Defendant did not appear, but his counsel was present. The court denied the motion and this appeal ensued.

SUMMARY OF ARGUMENT

The trial court is vested with considerable discretion in determining whether or not to vacate a default judgment. The decision not to grant this relief will not be overturned on appeal unless the trial court has abused its discretion. The Defendant has the burden of proving that the trial court abused its discretion in denying the motion to set aside the default judgment. Not only has the Defendant not shown any abuse of discretion, but none exists. The Defendant was served with a copy of the court's order directing him to file an appropriate responsive pleading within ten days. The Defendant was clearly aware of this order, but instead chose to file a motion for

summary judgment which he then failed to prosecute. The court was correct in holding that there was no excusable neglect on the part of the Defendant which would justify setting aside the default judgment.

The Defendant was not entitled to receive notice that the court was going to enter default, other than the notice he did receive in the form of the order striking his pleadings and ordering him to file a responsive pleading within ten days.

ARGUMENT

POINT I.

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

Rule 60(b), Utah Rules of Civil Procedure states:

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, 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 3 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 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.

In Heath v. Mower, 597 P.2d 855 (Utah, 1976) the court at page 858 stated that:

Whether a trial court should set aside a default judgment is largely a discretionary matter, and we will reverse a court's ruling only if it is clear that the court abused that discretion.

See also Warren v. Dixon Ranch Co., 123 Utah 416, 260 P.2d 741 (1953); Airkem Intermountain, Inc. v. Parker, 30 Utah 2d 65, 513 P.2d 429 (1973); and Pitman v. Bonham, 677 P.2d 1126 (Utah, 1984). The Defendant in his brief does not demonstrate how the court abused its discretion in denying the motion to set aside default judgment; and furthermore the record itself does not reveal that the trial court clearly abused its discretion in refusing to do so. The basis for entering a default judgment was a previous order of the court striking Defendant's pleadings upon the grounds that they were handwritten and that the Defendant was sending carbon copies to the Plaintiff which were illegible (T.-Pg.3-L.24). The motion to strike was heard on October 21, 1987. A proposed order was submitted to the court on October 22, 1987. That same day a copy of that order was served on Defendant by mailing it to him. Subsequently, the court instructed Plaintiff to amend the order to allow the Defendant ten days to file an

appropriate responsive pleading before default judgment would be entered (T.-Pg.4-L.7). This order was submitted to the court on November 3, 1987. Again a copy was served on the Defendant by mail. On November 2, 1987 the Defendant filed a typed pleading entitled cross complaint, motion for summary judgment. On November 12, 1987, after receiving the amended order striking pleadings, the Defendant filed a pleading entitled points and authorities. In this pleading the Defendant states:

A motion for summary judgment may be made by the defendant with or before (emphasis added) the filing of his answer.

It is clear from this pleading that the Defendant was aware of the court's order to file an appropriate answer; and that the Defendant was electing not to do so, but rather to file a motion for summary judgment. The Defendant failed to prosecute this motion by filing any affidavits in support thereof, or to even attend the hearing set by the court. Following this hearing on November 25, 1987 an order was prepared and submitted to the court, and a copy was served on the Defendant. This order was signed on December 7, 1987. The default and default judgment were submitted to the court on December 4, 1987 and the default was entered on December 18, 1987 and the default judgment signed on December 22, 1987. The court in its order of May 11, 1988 found that there was no excusable neglect on the part of Defendant which would justify setting aside the default judgment. This finding is

amply supported by the record. The Defendant chose not to file an answer knowing that the court had ordered him to do so or default would enter. The Defendant was actually given more than the ten days set forth in the order to do so; but again, he chose to file a motion for summary judgment instead. A motion which he then failed to prosecute.

Counsel for the Defendant argued in the motion to set aside default judgment that the Defendant, while representing himself, was naive of the legal process; and that the Defendant would be represented by counsel from then on. In J.P.W. Enterprises, Inc., v. Naef, 604 P. 2d 486 (Utah, 1979) the court, under a somewhat similar situation, held that the fact the defendant may have been naive as to the legal process did not justify setting aside the default judgment when it was apparent that the defendant was aware of the requirement of filing an answer. The fact that the Defendant was represented by counsel did not change the Defendant's conduct. The Defendant continued to file pro se pleadings even after his counsel had entered his appearance. The fact of the matter is that the record in the trial court and even the record in the Court of Appeals indicate that the Defendant has always done things his way no matter what the law required him to do.

The Defendant also argues on appeal that the court should not have entered his default in as much as the pleadings which he had

filed should have been sufficient to place the matter at issue. Not only is this inconsistent with the order of the court that the Defendant file an appropriate responsive pleading; but it is not a sufficient reason to set aside the default judgment. The court in Katz v. Pierce, 732 P.2d 92 (Utah, 1986) at page 93 stated:

That some basis may exist to set aside the default does not require the conclusion that the court abused its discretion in refusing to do so when the facts and circumstances support refusal.

In this case the court had clearly determined that the Defendant's pleadings were not acceptable. The court ordered that the Defendant file an appropriate responsive pleading; and the Defendant, being aware of this requirement, determined not to do so, but rather to file a motion for summary judgment which he then failed to prosecute. Clearly these facts and circumstances support the court's refusal to vacate the default judgment.

POINT II.

THE DEFENDANT RECEIVED NOTICE OF THE COURT'S INTENTION TO ENTER DEFAULT AND DEFAULT JUDGMENT IF A RESPONSIVE PLEADING WAS NOT FILED. THE DEFENDANT WAS NOT ENTITLED TO RECEIVE ANY FURTHER NOTICE UNTIL AFTER JUDGMENT HAD BEEN ENTERED.

The Defendant argues that he should have received notice prior to the time that the court entered default and default judgment. The record clearly shows that the Defendant was served with a copy of the order striking his pleadings and giving him ten days within which to file an appropriate answer or default would be entered. This is all of the notice to which the Defendant was

entitled. There is no requirement under Utah law that a defendant receive some special three day notice before a default is entered. Rule 55(a)(2), Utah Rules of Civil Procedure states:

Notice to party in default. After the entry of the default of any party, as provided in Subdivision (a)(1) of this rule, it shall not be necessary to give such party in default any notice of action taken or to be taken or to serve any notice or paper otherwise required by these rules to be served on a party to the action or proceeding, except as provided in Rule 5(a), in Rule 58A(d) or in the event that it is necessary to conduct a hearing with regard to the amount of damages of the nondefaulting party.

Rule 58A(d) requires only that once a judgment has been entered, notice thereof be sent to the defendant. The Defendant did receive notice of judgment. Defendant's notion that he is somehow entitled to three day advance notice is apparently based upon the law in another jurisdiction.

CONCLUSION

The Defendant has failed to demonstrate and the record does not reflect that the trial court clearly abused its discretion in refusing to set aside a default judgment. On the contrary the record reveals ample evidence to sustain the decision of the trial court. The Defendant elected not to file an answer when he knew that it was required. Instead he filed a motion for summary judgment which was denied when the Defendant failed to prosecute it. The Defendant received all of the notice to which he was entitled under Utah law. The decision of the trial court should be affirmed.

DATED this 12th day of December, 1988.

LS/
Michael L. Miller
Plaintiff / Respondent

CERTIFICATE OF SERVICE

I hereby certify that I served four copies of the foregoing on the Defendant by mailing them postage prepaid to:

Gordon E. Johnson
216 West First North
Brigham City, Utah 84302

DATED this 12th day of December, 1988.

LS/
Carol M. Christensen

ADDENDUM

Order Denying Motion to Set Aside Default and Default Judgment

Order Striking Defendant's Pleadings

Second Order Striking Defendant's Pleadings

Default and Default Judgment

Defendant's Points and Authorities

Michael L. Miller
Attorney at Law
P.O. Box 399
Brigham City, Ut.
84302
1) 723-1784

IN THE FIRST CIRCUIT COURT, STATE OF UTAH
BOX ELDER COUNTY, BRIGHAM CITY DEPARTMENT

MICHAEL L. MILLER,	:	
	:	ORDER DENYING MOTION TO
Plaintiff,	:	SET ASIDE DEFAULT AND
	:	DEFAULT JUDGMENT
vs.	:	
	:	
GORDON E. JOHNSON,	:	Civil No. 87 CV 60
	:	
Defendant.	:	

BE IT KNOWN that this matter having come on for hearing before the above-entitled court on the 4th day of May 1988; and the Plaintiff having been present in person and Defendant not having been present in person, but represented by counsel; and the court having heard the argument of both parties; and having reviewed the pleadings on file in this matter; and having found that there was no excusable neglect on the part of Defendant which would justify setting aside default and default judgment; now

WHEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's motion to set aside default and default judgment be denied.

DATED this 11 day of May, 1988.


Robert W. Daines-Circuit Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing to the attorney for Defendant, postage prepaid, at:

Michael L. Miller
Attorney at Law
Salt Lake City, Utah
Box 399
Main
723-1784

D. Aron Stanton
Attorney at Law
255 East 400 South, Suite 101
Salt Lake City, Utah 84111

DATED this 5th day of May, 1988.


Michael L. Miller

Michael L. Miller
Attorney at Law
Box 399
Brigham City, Utah
723-1784

IN THE FIRST CIRCUIT COURT, STATE OF UTAH
BOX ELDER COUNTY, BRIGHAM CITY DEPARTMENT

MICHAEL L. MILLER,	:	
	:	
Plaintiff,	:	ORDER STRIKING DEFENDANT'S
	:	PLEADINGS
	:	
vs.	:	
	:	
GORDON E. JOHNSON,	:	Civil No. 87 CV 60
	:	
Defendant.	:	

BE IT KNOWN that this matter having come on regularly for hearing on the 21st day of October, 1987 before the above-entitled court, the Honorable Robert W. Daines presiding; and the Plaintiff having been present and the Defendant not having been present; and the court having reviewed the court file in this matter and heard the argument of Plaintiff; and being fully advised in the premises; now

WHEREFORE IT IS HEREBY ORDERED that Defendant's pleadings previously filed in this matter are hereby stricken. No further pleadings or papers from the Defendant which do not conform to Rule 2.3, Utah Rules of Practice for District and Circuit Courts, shall be accepted.

DATED this _____ day of _____, 1987.

BY THE COURT:

ROBERT W. DAINES - CIRCUIT JUDGE

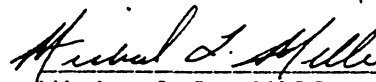
Michael L. Miller
Attorney at Law
300 Main
Box 399
Brigham City, Utah
84302
723 1784

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing to the Defendant, postage prepaid, at:

Gordon E. Johnson
216 West 100 North
Brigham City, Utah 84302

DATED this 22nd day of October, 1987.



Michael L. Miller

Michael L. Miller
Attorney at Law
250 S. Main
Box 399
Brigham City, Ut.
84302
723-1784

IN THE FIRST CIRCUIT COURT, STATE OF UTAH
BOX ELDER COUNTY, BRIGHAM CITY DEPARTMENT

MICHAEL L. MILLER,	:	
	:	ORDER STRIKING DEFENDANT'S
Plaintiff,	:	PLEADINGS
	:	
vs.	:	
	:	
GORDON E. JOHNSON,	:	Civil No. 87 CV 60
	:	
Defendant.	:	

BE IT KNOWN that this matter having come on regularly for hearing on the 21st day of October, 1987 before the above-entitled court, the Honorable Robert W. Daines presiding; and the Plaintiff having been present and the Defendant not having been present; and the court having reviewed the court file in this matter and heard the argument of Plaintiff; and being fully advised in the premises; now

WHEREFORE IT IS HEREBY ORDERED that Defendant's pleadings previously filed in this matter are hereby stricken. No further pleadings or papers from the Defendant which do not conform to Rule 2.3, Utah Rules of Practice for District and Circuit Courts, shall be accepted. Defendant shall have ten (10) days from the date of this order within which to file the appropriate responsive pleadings, and failing to do so, default and default judgment may be entered.

DATED this _____day of November, 1987.

Michael L. Miller
Attorney at Law
P.O. Box 399
Brigham City, Utah
84302
723-1784

BY THE COURT:

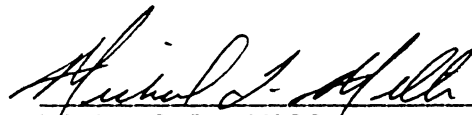
ROBERT W. DAINES - CIRCUIT JUDGE

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing to the Defendant, postage prepaid, at:

Gordon E. Johnson
216 West 100 North
Brigham City, Utah 84302

DATED this 2nd day of November, 1987.


Michael L. Miller

Michael L. Miller
Attorney at Law
Main
Box 399
Brigham City, Ut
723 1784

IN THE FIRST CIRCUIT COURT, STATE OF UTAH
BOX ELDER COUNTY, BRIGHAM CITY DEPARTMENT

MICHAEL L. MILLER,	:	
	:	DEFAULT AND DEFAULT JUDGMENT
Plaintiff,	:	
	:	
vs.	:	
	:	
GORDON E. JOHNSON,	:	Civil No. 87 CV 60
	:	
Defendant.	:	

BE IT KNOWN that in this matter the defendant having been personally served with a summons and complaint; and thereafter having filed an answer; and plaintiff having moved to strike said answer; and the court having granted said motion and ordered that defendant file an appropriate responsive pleading within ten days; and defendant having failed to file such a responsive pleading; now

WHEREFORE the default of defendant is hereby entered as a matter of law.

DATED this _____ day of December, 1987.

By the Clerk of the Court:

Deputy Clerk

DEFAULT JUDGMENT

BE IT KNOWN that in this matter the defendant having been personally served with a summons and complaint; and thereafter

ael L. Miller
ney at Law
. Main
Box 399
am City, Ut.
723 1784

having filed an answer; and plaintiff having moved to strike said answer; and the court having granted said motion and ordered that defendant file an appropriate responsive pleading within ten days; and defendant having failed to file such a responsive pleading; and the default of defendant having been entered as a matter of law; now

WHEREFORE IT IS HEREBY ORDERED that plaintiff be and is hereby awarded judgment against the defendant as follows:

\$1,168.75 in principal,

~~\$1,168.75~~ \$54.47 in interest accrued to the date of judgment,

\$22.00 in costs accrued to the date of judgment,

\$1,345.22 total judgment, together with interest thereon at the rate of 18% per annum until collected and any costs of the court which accrue hereafter.

DATED this 22nd day of December, 1987.

By the Court:

/s/
Robert W. Daines - Judge

NOV 12 1987

Gordon E. Johnson
216 West 1st North
Brigham City, Utah 84302
Tel. 801 723-3677
In Propria Persona

FIRST CIRCUIT COURT OF UTAH
FOR BOX ELDER COUNTY

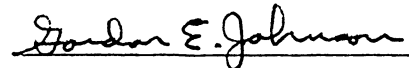
MICHAEL L. MILLER, Civil No. 87-60
Plaintiff and Cross-defendant, Points and Authorities
vs. November 25, 1987

GORDON E. JOHNSON,
Defendant and Cross-Complainant.

A motion for summary judgment may be made by defendant with or before
(emphasis added) the filing of his answer. Gifford vs. Traveler's
Protective Assn. (1946) 153 F.2d 209.

If this motion is denied, defendant incorporates by reference the fee
arbitration committee's decision on file herein as his answer. This decision
is relevant as it indicates Mr. Miller's action is meritless.

Dated Nov. 5, 1987


Gordon E. Johnson

Proof of Service

I hereby certify that on the following date I mailed a copy of the
foregoing to Michael L. Miller, 20 South Main St., Brigham City, Utah 84302

Dated Nov. 9, 1987 at Denver, Colorado


Mary Alice Hobbs