

1988

# Michael L. Miller v. Gordon E. Johnson : Unknown

Utah Court of Appeals

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Gordon E. Johnson.

Michael L. Miller; Attorney for Respondent.

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In Propria Persona

**FILED**

**MAR 28 1989**

Mary T. Nor  
Clerk of the Co  
Utah Court of Appeals

UTAH COURT OF APPEALS

MICHAEL L. MILLER, )  
Respondent/Plaintiff, )

vs. )

GORDON E. JOHNSON )  
Appellant/Defendant )

Civil 880324-CA

**UTAH COURT OF APPEALS**

**FILE**

March 30, 1989; 9:00 A.M.

UTAH

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DOCKET NO.

880324-CA

In the file is an affidavit by appellant that he is on S.S.I. and house-bound. Therefore, he requests the court consider this written argument in lieu of oral argument.

Attorney Miller knew of defendant's incompetency from the antecedent lawsuit and took advantage of it in the present lawsuit.

A default judgment normally must be viewed as available only when the adversary process has been halted because of an essentially unresponsive party. NRCP 55(b)(2). Christy vs. Carlisle (Nevada, 1978) 584 P. 2d 687.

In the case at bar defendant believed the typed ruling of the Utah State Bar Fee Arbitration Committee was a sufficient answer, and he was responding with interrogatories before the default judgment was discovered. The adversary process had not halted.

The defendant in Ney vs. Harrison (1956) 6 Utah 2d 217, 299 P. 2d 1114 believed her divorce decree protected her from a default.

In McKean vs. Mountain View Memorial Estates (1966) 17 Utah 2d 323, 411 P. 2d 129 defendant's answer was stricken because counsel was 27 minutes late. The resulting default judgment was vacated even though a hearing was held as to the averments and damages.

Footnote 5 of said case cites Hovey vs. Elliott 167 U.S. 409, 17 S. Ct. 841, 42 L. Ed. 215 which holds the Court of the District of Columbia had no right to strike the answer and treat the case as in default and give judgment without evidence.

Typically a hearing is necessary to determine the value of goods and services. Lynch vs. Bencini (1941) 17 Cal. 2d 521, 110 P. 2d 662. Here, the complaint is for attorney fees and not an action arising upon contract for the recovery of money or damages only.

The default judgment of respondent's addendum does not say that evidence was heard and must be reversed. Russell vs. Martell (Utah, 1984) 681 P. 2d 1193.

Defendant "did not fail to plead or otherwise defend" but was defaulted on a technicality. McKean, Supra. Therefore, it was inappropriate for the clerk to enter defendant's default per U.R.C.P. 55 (a)(1).

It should have been apparent to the clerk that the arbitration opinion was in the file which was "timely and

challenging." Interstate Excavating, Inc. vs. Agla Development Corp. (Utah, 1980) 611 P. 2d 369.

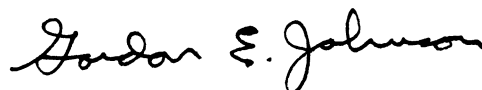
"The two hooks upon which the majority opinion depends, (1) that the defendant having answered, a default judgment could not be taken against him;..." Bass vs. Hoagland 172 F. 2d 205, 213.

No one has an inalienable or constitutional right to a judgment by default without a hearing on the merits. The courts in the interest of justice and fair play, favor, where possible, a full and complete opportunity for a hearing on the merits of every case. Heathman vs. Fabian (1962) 14 Utah 2d 60, 377 P. 2d 189.

The trial court did not find that Mr. Miller's copies were illegible. That is only what he claimed at oral argument.

Fee arbitration is the only practical, economical remedy for a client sued by his attorney and should not be ignored.

Dated March 24, 1989 at Brigham City, Utah

A handwritten signature in cursive script, reading "Gordon E. Johnson". The signature is written in dark ink and is positioned above a horizontal line.

Gordon E. Johnson

Proof of Service By Mail

I hereby certify that on March 26, 1989 I mailed a copy of the foregoing, postage prepaid, to Michael L. Miller, Attorney At Law, 20 South Main Street, Brigham City, Utah 84302.

A handwritten signature in dark ink, appearing to read "Mary Alice Hobbs", written over a horizontal line.

Mary Alice Hobbs  
6396 South Emporia Circle  
Englewood, Colorado 80111