

1978

K. E. Sovereign v. Terri Meadows : Brief of Appellant

Utah Supreme Court

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File 11

IN THE SUPREME COURT
OF THE STATE OF UTAH

K. E. SOVEREEN, :
Plaintiff/Respondent, :
v. :
TERRI MEADOWS, :
Defendant/Appellant. :

Case No. 15782

BRIEF OF APPELLANT

APPEAL FROM THE ORDERS OF THE THIRD
JUDICIAL DISTRICT COURT FOR SALT LAKE
COUNTY, THE HONORABLE DAVID K. WILSON
PRESIDING.

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FILED
JUL 1 1982

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IN THE SUPREME COURT
OF THE STATE OF UTAH

K. E. SOVEREEN,	:	
	:	
Plaintiff/Respondent,	:	
	:	
v.	:	
	:	Case No. 15782
TERRI MEADOWS,	:	
	:	
Defendant/Appellant	:	
	:	

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an action for unlawful detainer arising out of the landlord/tenant relationship between the parties.

DISPOSITION IN LOWER COURT

The Plaintiff obtained a default judgment. From said judgment, and from unsuccessful attempts to obtain relief from said judgment, Defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment and remand to the District Court for trial.

After 10 days

Defendant paying \$150.00 in attorney's fees to Plaintiff within 30 days of the date of the order (Record, pg. 30). A Notice of Intention to Appeal was timely filed (Record, pg. 21).

Subsequently, Defendant filed a Motion to Stay Order Granting Attorney's Fees or in the Alternative Payment of Attorney's Fees into Court. Plaintiff's counsel responded by sending an ex parte letter to the judge assigned to hear the motion opposing the relief sought (Record pg. 22). In support of said Motion was an Affidavit of Impecuniosity executed by Defendant (Record pg. 29). The court, heard the Motion on March 20, 1978. Neither Plaintiff nor his attorney appeared. The Court ordered Defendant to pay the previously-ordered \$150.00 into court instead of to Plaintiff (Record, pg. 33).

On March 13, 1978, Defendant's Answer and Counterclaim was filed (Record pg. 23-26). The Counterclaim alleged that on January 6, 1978, Plaintiff confiscated all personal property of Defendant located in the apartment. The legal theories alleged were conversion, noncompliance with the exemption statute, wrongful attachment, and deceptive or unconscionable act or practice. Pursuant to the Counterclaim, a Motion for Writ of Replevin was filed (Record, pg. 31-32). It was supported by an Affidavit of Defendant in compliance with Rule 64B of the Utah Rules of Civil Procedure. The

STATEMENT OF FACTS

Plaintiff (landlord) and Defendant (tenant) entered into an oral rental agreement for an apartment located in Salt Lake City, Utah at \$135.00 per month rent. According to Plaintiff's Complaint, an eviction notice was served upon Defendant on November 3, 1977 (Record, pg. 4). Plaintiff filed a Complaint on December 12, 1977, alleging that Defendant was in unlawful detainer on the basis of nonpayment of rent, and obtained a Judgment by Default on January 5, 1978. Said judgment included treble damages accruing from November 6, 1977 until the premises were vacated, plus costs and attorneys fees (Record, pg. 17-18). Defendant vacated the premises on January 6, 1978, after she was served with a writ of restitution on that date.

A Motion to Set Aside Default Judgment was filed on January 16, 1978, listing several reasons in support of the motion (Record, pg. 9-10). Said motion was accompanied by an Affidavit of Defendant, alleging that she first received a copy of the Complaint after the default judgment was obtained, and that she disputed the amount and nature of relief granted in said judgment (Record pg. 15-16).

The Motion to Set Aside Default Judgment was heard on March 3, 1978. The court granted the Motion subject to

Affidavit also described the items of personal property taken, and expressed the belief that said property was exempt within the meaning of the provisions of Utah Code §78-21-1.

The Motion for Writ of Replevin was heard on March 30, 1978. Said Motion was opposed by Plaintiff on the theory that Defendant could not proceed until she had paid \$150.00 into court. Defendant attended the hearing, and offered to testify as to her financial inability to pay any amount. The court denied the Motion.

On April 13, 1978, the Court, based upon the non-payment of \$150.00 by Defendant within 30 days of its previous order, entered an Order denying Defendant's Motion to Set Aside Default Judgment.

ARGUMENT

POINT I

PORTIONS OF THE JUDGMENT BY DEFAULT
ARE CONTRARY TO APPLICABLE UTAH LAW,
AND THUS ARE VOID.

The default judgment obtained by Plaintiff (Record, pg. 17-18) awarded damages of \$479.00, plus treble damages in the amount of \$13.50 per day from November 6, 1977 to the date on which the premises were vacated, costs in the amount of \$27.90, attorney's fees in the amount of \$100.00, all

amounts to draw interest at 8%, and a writ of restitution. The total amount of the judgment is \$1,443.90, plus 8% interest accruing from January 6, 1978. Substantially all of said default judgment is contrary to Utah statutory and case law, and thus should be declared void or modified accordingly.

A. DEFENDANT WAS NOT IN UNLAWFUL DETAINER, AND THUS IT WAS ERROR TO AWARD TREBLE DAMAGES AND A WRIT OF RESTITUTION.

Utah's unlawful detainer statute, Utah Code §78-36-1 et seq., governs actions by a landlord to evict a tenant. This Court has reviewed this statute on a number of occasions, and has repeatedly ruled that, due to the summary procedure and severe remedy involved, the statute must be strictly complied with before the cause of action provided may be maintained to enforce the obligations imposed by it; see Perkins v. Spencer, 121 U.468, 243 P.2d 446 (1952), and Van Zyverden v. Farrar, 15 U.2d 367, 393 P.2d 468 (1964). In addition, this Court has established tort liability for noncompliance with the statute; see King v. Firm, 3 U2d 419, 285 P.2d 1114 (1955).

Prior to the filing of an unlawful detainer action, an appropriate eviction notice must be served upon the tenant. In the present case, the unlawful detainer action was based upon nonpayment of rent. The provisions of Utah Code §78-36-3(3) govern what constitutes unlawful detainer and what the eviction notice must provide in the case of nonpayment of rent:

A tenant ... is guilty of an unlawful detainer:

...

(3) When he continues in possession ... after default in the payment of rent and after a notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, shall have remained uncomplished with for a period of three days after service thereof ...

In other words, the eviction notice must state that the tenant has the alternative of paying the rent owed or vacating the premises within three days after service of the eviction notice.

The eviction notice in this case (Record, pg. 4) did not provide the alternative to the tenant to pay the rent owed within three days, and therefore did not comply with the statute. In the case of American Holding Co. v. Hanson, 23 U.2d 432, 464 P.2d 592 (1970), this Court considered a factual situation where the unlawful detainer action was based on nonpayment of rent, and the eviction notice did not provide the alternative of paying the rent

owed. This Court held that the statutory requirements were not complied, and that the landlord was not entitled to maintain an action for unlawful detainer. In Jacobson v. Swan, 3 U.2d 59, 278 P.2d 294 (1954), the eviction notice served was simply an unconditional notice to quit premises with no alternative provided to pay the rent owed. This Court ruled that the landlord's damages should not have been trebled, but should have been limited to the amount of rent prescribed in the rental agreement. In the present case, under American Holding Co. and Jacobson, Plaintiff was not entitled to treble damages or restitution of the premises, since the eviction notice did not comply with the statute.

In Perkins v. Spencer, supra, the landlord did not comply with the statute providing the manner in which the eviction notice must be served. This Court ruled that under such circumstances the landlord was entitled to nominal damages only, and thus could not maintain an action for unlawful detainer when the statutes were not followed. Thus, in the present case, Plaintiff was entitled to only nominal damages, and was not entitled to either treble damages or restitution of the premises.

In the present case Plaintiff improperly executed upon the writ of restitution, by having it served one day after the obtaining of the default judgment. The provisions

of Utah Code §78-36-10, as interpreted in the case of Monter v. Kratzers Specialty Bread Co., 29 U.2d 18, 504 P.2d 40 (1972), provides that in an unlawful detainer action for nonpayment of rent, execution upon a judgment shall not issue until five days expire after the entry of the judgment, in which period the tenant may satisfy the judgment and be restored to the premises. Again, it is clear that Plaintiff did not comply with applicable law.

For all the above reasons, Defendant was never in unlawful detainer. Based upon the noncompliance with the statutes, those portions of the default judgment awarding in excess of nominal damages are void.

B. PLAINTIFF WAS NOT ENTITLED TO
RECOVER ATTORNEY'S FEES.

Statutory authority does not appear in Utah's unlawful detainer statute authorizing the recovery of attorneys fees in an eviction action. This is due in part to the treble damage provision in Utah Code §78-36-10, which operates as a statutory penalty in the landlord's favor where a tenant is found to be in unlawful detainer. Therefore, the recovery of attorney's fees must be based on another legal theory. However, such a theory is not discernable from the record. Plaintiff never alleged any agreement or other statutory authority providing for the recovery of attorney's fees. In the absence of such an agreement or statutory

authority, the common law rule that attorneys fees are not recoverable applies. Therefore, that portion of Plaintiff's default judgment providing for attorney's fees is void.

Point II of this Brief will address the impropriety of conditioning the setting aside of a default judgment upon the payment of attorneys fees. It is indeed ironic that, in a case where attorney's fee could not have been recovered had the matter been contested, the setting aside of a default judgment could be conditioned upon payment of attorney's fees. For this additional reason, the awards of attorneys fees, both in the default judgment and in the conditional order setting aside the judgment, should be considered void.

C. PLAINTIFF WAS NOT ENTITLED TO
RECOVER COSTS.

It is not the position of Defendant that costs are not recoverable in an unlawful detainer action, but instead that costs are not recoverable under the facts and circumstances of this case. In order for a party to recover costs, an affidavit must be submitted, pursuant to Rule 54(d)(2) of the Utah Rules of Civil Procedure, as follows:

How Assessed. The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiants' knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or

In using the word "must", the language of the Rule is clear that such a memorandum of costs is mandatory and must be submitted in accordance with the time provision in order for a party to recover costs.

In the present case, it is apparent from the record that no such memorandum of costs was ever submitted. Therefore, Plaintiff is not entitled to recover costs, and that portion of the default judgment awarding costs is void.

POINT II

THE LOWER COURT COMMITTED REVERSIBLE
ERROR IN CONDITIONING THE GRANT OF AN
ORDER SETTING ASIDE A DEFAULT JUDGMENT
UPON THE PAYMENT OF ATTORNEY'S FEES

The statutory authority for setting aside default judgments is found in Rules 55(c) and 60(b), Utah Rules of Civil Procedure. In addition, this Court has rendered numerous decisions interpreting the statutory provisions. These cases support Defendant's position that the condition of paying attorney's fees, under the facts and circumstances of this case, was an abuse of discretion and therefore constituted reversible error.

Several principles have been repeatedly cited by this Court as to setting aside of default judgments. First,

it is the declared policy of the court that in cases of uncertainty, default judgments shall be set aside to allow trial on the merits; Locke v. Peterson, 3 U2d 415, 285 P.2d 1111 (1955). Second, it is an abuse of discretion to refuse to vacate a default if there is a timely application and there are reasonable grounds to do so, and doubts should be resolved in favor of setting aside default judgments; Chrysler v. Chrysler, 4 U2d 415, 303 P.2d 995 (1956). Third, trial courts should be generally indulgent in permitting full inquiry, and it is an abuse of discretion to refuse to vacate a default judgment where there are reasonable grounds and excuse for Defendant's failure to appear, and a timely application is made to set it aside; Mayhew v. Standard Gilsonite, 14 U2d 52, 376 P.2d 951 (1962). Fourth, default judgments are not favored by the courts nor are they in the interest of fair play; Heathman v. Fabian and Clendenin, 14 U2d 60, 377 P.2d 189 (1962). Fifth, courts should be somewhat indulgent in setting aside defaults; McKean v. Mountain View Memorial Estates, 17 U2d 323, 4 U P.2d 129 (1966). Sixth, courts should be liberal in allowing parties to get to the merits of the case; Barber v. Calder, 522 P.2d 700 (Ut. 1974).

The decision of this Court closest in point is Stan Katz Real Estate, Inc. v. Chavez, 565 P.2d 1142 (Ut. 1977). In that case the motion to set aside the default judgment was based upon an uncontroverted affidavit of the defendant stating he had not been served with the Complaint. The Court reversed the denial of the motion, the concurring opinion of Justice Crockett focused on the fact that the affidavit in support of the motion was unrefuted. The language of the opinion is significant:

In the absence of a challenging pleading of equal dignity with his affidavit, there is no basis upon which the court could find contrary to his averment. In accordance with what has been said above, and with the declared policy of the law to be liberal in setting aside a default judgment to the end that a party may have his day in court, I would remand for that purpose. Id., at 1144.

The holding of this case only remanded the matter for an evidentiary hearing on whether the Defendant was personally served. In the present case the uncontroverted affidavit of defendant (Record, pg. 15-16) alleges that she was never served with the Complaint. Plaintiff's affidavit also disputes the amount and nature of the default judgment, and much of this Brief addresses other improprieties in Plaintiff's actions and in the default judgment. Therefore it is appropriate for this Court to reverse and set aside the default judgment in its entirety.

There are many other cases on point, most of them citing identical or similar principles to the ones already mentioned; see, for example, Egan v. Egan, 560 P.2d 704 (Ut. 1977); Bowen Trucking, Inc., v. Public Service Comm., 559 P.2d 954 (1977); Dynapac, Inc., v. Innovations, Inc., 550 P.2d 191 (Ut. 1976); Westinghouse Electric Supply Co., v. Paul W. Larsen Contractor, Inc., 544 P.2d 876 (Ut. 1975); Fibreboard Paper Products Corp. v. Dietrich, 25 U2d 65, 475 P.2d 1005 (1970), Bowen v. Olson, 246 P.2d 602 (Ut. 1952); and Dixon v. Dixon, 240 P.2d 1211 (Ut. 1952); Woody v. Rhodes, 23 U2d 249, 461 P.2d 465 (1969); Utah Sand & Gravel Products Corp. v. Tolbert, 16 U2d 407, 402 P.2d 703 (1965); Ney v. Harrison, 5 U2d 217, P.2d 1114 (1956); Kelly v. Scott, 5 U2d 159, 298 P.2d 821 (1956).

Defendant's motion to set aside the default judgment was filed eleven (11) days after its entry. The motion was supported by an affidavit of defendant (Record, pg. 15-16) and was uncontroverted by counteraffidavit. As shown in Point I, substantial portions of the default judgment are void. In particular, Point I.B. demonstrates why attorneys fees were not recoverable, and therefore should not have been granted. Yet the order granting the motion to set aside default judgment was conditioned upon the payment of additional attorneys fees.

A second affidavit, also uncontroverted by counter-affidavit, was submitted to the court (Record, pg. 29), stating that defendant was impecunious, and, owing to her poverty, was unable to bear the expenses of the legal proceedings commenced, and that she believed she was justly entitled to the relief sought. A third affidavit of defendant, again uncontroverted by counteraffidavit, alleged wrongdoing by plaintiff in the execution of the default judgment (Record, pg. 37-38).

In three hearings conducted in the lower court, all before the same judge, the arguments contained in this Brief were presented, and the affidavits of defendant submitted. In conditioning the grant of an order setting aside the default judgment upon the payment of attorney's fees, the lower court abused its discretion and thus committed reversible error.

The practical consequences of conditioning relief on the payment of money by an impoverished individual should be considered. Obviously, an impecunious person who cannot afford even the basic court costs of maintaining or defending a lawsuit cannot pay the sum of \$150.00. Thus the order of the court, as applied to a poor person, is the functional equivalent of unconditionally denying her motion. As applied to the facts and circumstances of this case, the effect of

the court's ruling is that defendant is not entitled to relief merely because of her poverty. This result, with its precedential effect, must not be permitted by this Court on appeal.

Viewing the facts and circumstances of his case in light of the statutory and case law, the lower court should have set aside the default judgment. First, it is questionable whether defendant was properly served with the Complaint, and thus, whether the lower court had jurisdiction to enter its judgment. The uncontroverted affidavit of defendant (Record pg. 15-16) alleges that she was never served with the Complaint. Plaintiff's affidavit also disputes the amount and nature of the default judgment, and this Brief addresses other improprieties in Plaintiff's actions and in the default judgment. This Court in Stan Katz Real Estate, Inc. remanded the matter on much the same basis.

Second, the motion to set aside the default judgment was timely filed pursuant to Rule 60(b), Utah Rules of Civil Procedure. The basis for the motion, as stated in several uncontroverted supporting affidavits, demonstrates reasonable grounds and excuse for the failure of defendant to appear and defend the lawsuit.

Defendant's affidavits reveal substantial uncertainty regarding the appropriateness of the provisions of the default

judgment. Those provisions and the subsequent actions by Plaintiff, show that it would not be just or equitable to allow the judgment to stand. In the interest of fair play, defendant should be afforded the opportunity to defend her case on the merits.

Finally, the lower court's decision is contrary to the liberal and indulgent position taken by this Court in setting aside default judgments by conditioning its ruling upon a requirement that a litigant cannot meet. There is no reason, based upon the previously enunciated principles, for the court to deny defendant's motion. There only remains the condition of paying attorney's fees -- a condition unsupported by law or equity.

CONCLUSION

Based upon the foregoing, Defendant requests this Court to reverse the decision of the lower court, to Order the default judgment be set aside, and to remand the matter to District Court for a hearing on the merits.

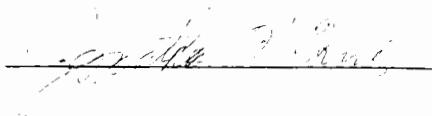
Respectfully submitted,



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CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that I hand-delivered two copies of the foregoing Brief of Appellant to Wendell E. Bennett, Attorney for Respondant, 370 East 500 South, Suite 100, Salt Lake City, Utah 84111, on this 23rd day of June 1978.

A handwritten signature in dark ink, appearing to read "Wendell E. Bennett", is written over a horizontal line.