1978

Melvin A. Cook and Wanda O. Cook v. Noel L. Cook : Brief of Respondents

Utah Supreme Court

Robert F. Orton; Hansen and Orton; Attorneys for Respondents;
Noel L. Cook; Pro Se;

IN THE SUPREME COURT

OF THE STATE OF UTAH

MELVIN A. COOK and WANDA G. COOK, his wife,

Plaintiff and Respondents,

vs.

NOEL L. COOK, et al,

Defendant and Appellant.

Case No. 15811

BRIEF OF RESPONDENTS

Appeal from the Judgment of the First Judicial District Court of Box Elder County, Honorable VeNoy Christoffersen, District Judge

---

ROBERT F. ORTON
HANSEN AND ORTON
Attorneys for Respondents
2020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

NOEL L. COOK, ~~ESQ.~~
PRO SE
144 West Center Street
Logan, Utah 84321

LAW OFFICES OF
HARRIS, PRESTON & GUTKE
31 FEDERAL AVENUE
LOGAN, UTAH 84321

TELEPHONE 752-3551
AREA CODE 801

PRESTON & HARRIS 1937-1962
PRESTON, HARRIS, HARRIS & PRESTON 1962-1976

OF COUNSEL
M. C. HARRIS

October 26, 1978

FILED

OCT 30 1978

15811

Clerk, Supreme Court, Utah

Clerk, Supreme Court
State Capitol Bldg.
Salt Lake City, Utah 84111

Re: Melvin A. Cook and Wanda G. Cook vs.
Noel L. Cook, et. al. #15811

Dear Sirs:

I am in receipt of a Brief filed by the Respondents, Melvin A. Cook and Wanda G. Cook who were Judgment Creditors of the Appellant, Noel Cook. After having reviewed the Brief of the Respondents, it is my opinion that filing of a Brief on behalf of my clients would serve no useful purpose inasmuch as we would agree completely with the position set forth by the Respondents. For this reason, I will not be filing a Brief. I sincerely hope this meets with the approval of the Court.

Thank you for your assistance.

Very truly yours,

HARRIS, PRESTON & GUTKE

Robert W. Gutke

RWG:cm
cc: Gary M. Anderson
Robert F. Orton
Noel L. Cook

TABLE OF CONTENTS

CASES CITED

RULES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

MELVIN A. COOK and WANDA G. COOK, his wife,

Plaintiffs and Respondents,

vs.

NOEL L. COOK, et al,

Defendant and Appellant.

Case No. 15811

NATURE OF THE CASE

This is an action by Plaintiffs-Respondents, hereinafter referred to as Plaintiffs, in two counts, to-wit: in Count I they seek to foreclose a mortgage on real property securing an indebtedness of Defendant-Appellant Noel L. Cook, hereinafter referred to as Defendant, to them in the amount of Thirteen Thousand Dollars ($13,000.00); in Count II they seek to recover Three Thousand Nine Hundred Forty-Four Dollars ($3,944.00) which Plaintiffs loaned to Defendant.

DISPOSITION IN THE LOWER COURT

The Trial Court found that Defendant was indebted to Plaintiffs in the amount of Thirteen Thousand Dollars

($13,000.00), that said indebtedness was due and payable, that notwithstanding Plaintiffs' demands, Defendant had failed to make payment as agreed and was in default and that Plaintiffs held a valid real estate mortgage securing the aforesaid indebtedness of Defendant and were entitled as a matter of law to foreclose upon it. The Court also granted Plaintiffs' Motion for Summary Judgment on Count II of their Complaint. Defendant moved for a new trial, but his motion was denied. An appeal to this Court followed, Case No. 14976, and the judgment of the lower Court was affirmed. Defendant moved for an order vacating the judgment which motion was denied on the 29th day of March, 1978. This appeal followed.

RELIEF SOUGHT ON APPEAL

Defendant seeks a new trial on all issues and requests that this Court consider newly discovered evidence. Plaintiffs seek affirmance of the judgment below.

STATEMENT OF FACTS

Plaintiffs agree with that portion of Defendant's statement of facts admitting that he was in debt to Plaintiffs in the sum of Thirteen Thousand Dollars ($13,000.00)

and that said indebtedness was secured by a mortgage executed by the said Defendant. However, because of the misleading nature of other allegations made in Defendant's statement of facts, and the fact that said statement is not supported by the Record, Plaintiffs deem it necessary to supplement and explain said statement as follows:

On April 13, 1976, Defendant filed an answer to Plaintiffs' Complaint wherein he admitted all allegations made by Plaintiffs in Count I thereof. Record at 25. Among other things Defendant admitted that on May 22, 1972, he executed a promissory note to Plaintiffs in exchange for their loan to him of Twelve Thousand Five Hundred Dollars ($12,500.00), which note was secured by a mortgage on certain real property. Record at 2-3, 25. He further admitted that on June 29, 1972, following the loan to him of an additional Five Hundred Dollars ($500.00), he executed and delivered to Plaintiffs a real estate mortgage on the same property which was to replace the first and serve as security for both the $12,500.00 and the $500.00 debts. Record at 3, 25. Defendant also admitted that the promissory note for $12,500.00 and the indebtedness of $500.00 were both due and owing, and that despite Plaintiffs' demands for payment he had paid no part of either obligation. Record at 3, 25.

In addition to the admissions made by Defendant in his answer to Plaintiffs' Complaint herein, he failed to raise any affirmative defenses. Record at 25. Despite the fact that eight months passed between the time the Defendant filed his answer, as aforesaid, and the time of trial (December 14, 1976) at no time did he amend or seek leave to amend his answer to include any affirmative defenses.

At the time of trial, though Defendant was present in person and was represented by counsel, he at no time contested the accuracy, authenticity or validity of the documents and testimony presented by Plaintiffs in evidence of their claims, nor did he take exception to the findings of the Court. Record at 90-97, 166-68. Moreover, Defendant, through his attorney Omer J. Call, stated in open Court that he had no objection to the granting of Plaintiffs' Motion for Summary Judgment on Count II of their Complaint and to the filing and docketing of that judgment in its proper position with respect to other judgments and liens so that it could be paid out of any foreclosure sale. Record at 2-3, 75-83, 86-87; Transcript at 48.

On February 4, 1977 following entry of the summary judgment and the decree of foreclosure on December 27, 1976,

and January 10, 1977, Defendant moved for a new trial, alleging as grounds therefore the discovery of new evidence and witnesses and other grounds which he raises on this appeal. Record at 110-144. Among other things he sought to introduce for the first time the affirmative defense of waiver. Record at 123. On March 30, 1977, Defendant's Motion for a new trial was denied. Record at 164-173. An appeal to this Court followed and the judgment of the lower Court was affirmed in all respects. Record at 178-180. No petition for rehearing was filed.

On January 24, 1978, Defendant filed in the lower Court a petition to "set aside the Supreme Court verdict for further investigation of a willful tort or more specifically fraud" and on February 14, 1978, a motion to vacate judgment was filed. Record at 191, 212-214. On March 29, 1978, an order denying said motions was entered. Record at 311-313.

On March 31, 1978, a "writ of injunction" signed by Defendant only was filed, Record at 314-315; on April 11, 1978, a "request extension of time to make motion for new trial" was filed, Record at 318; on April 13, 1978, an "amendment on motion for a new trial and to correct the judgment" was filed, Record at 319-321; on April 17, 1978,

a "motion for amendment continuance and to correct the judgment" was filed, Record at 333; on April 25, 1978, a "supplemental amendment and motion to correct judgment" and a "notice of appeal" were filed, Record at 336-347; on the 1st day of May, 1978, a "motion for deletion and addition to supplemental amendment" was filed, Record at 348-358; on May 2, 1978, a "motion to strike or delete from a filed appeal" was filed, Record at 359; on May 4, 1978, a "motion on estoppel in pais or equitable estoppel," a "motion to set aside satisfaction of the judgment" and a "bill of illegality" were filed, Record at 360-362; on May 9, 1978, a "motion to correct a statement in the supplemental amendment or to add a statement" was filed, Record at 367; and on May 15, 1978, a letter from Defendant to the Box Elder County Sheriff's Office wherein Defendant represents that Mr. Justice Maughn of this Court, speaking for the body of justices, had offered a mandamus or compelling document on behalf of Defendant and an "objection of sheriff sale position of sustained occupancy and possession" were filed, Record at 385-386. All of the foregoing documents were filed by Defendant with the Clerk of Box Elder County and none of the motions was ever noticed.

ARGUMENT

Point I

THIS APPEAL FROM THE PARTIAL SUMMARY JUDGMENT ENTERED ON DECEMBER 27, 1976 WAS NOT TIMELY FILED.

This appeal is taken by Defendant "from the judgment entered into this action on March 27, 1978 and partial judgment entered on December 27, 1976." Record at 347. Since there was no judgment entered on March 27, 1978, Plaintiffs assume that Defendant is referring to the order denying motion of Defendants Noel L. Cook and Helen Cook to vacate judgment and order vacating temporary restraining order and preliminary injunction which was entered on March 29, 1978. Record at 311-313. The "partial judgment" entered on December 27, 1976, is the partial summary judgment in favor of Plaintiffs and against Defendant Noel L. Cook on Count II of Plaintiffs' Complaint which was entered on December 27, 1976. Record at 086-088.

Rule 73(a) of the Utah Rules of Civil Procedure provides in relevant part:

> When an appeal is permitted from a district court to the Supreme Court, the time within which an appeal may be taken shall be one month from the entry of the judgment or order appealed from unless a shorter time is provided by law, except that upon a showing of excusable neglect

> based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding one month from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry in the minutes of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b), or granting or denying a motion for judgment under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

Each motion referred to in Rule 73(a), as aforesaid, to be timely, must be filed within ten days after entry of the judgment or order in question.

The partial summary judgment from which Defendant now appeals was entered on December 27, 1976 and an order denying Defendant's motion for a new trial was entered on March 30, 1977. None of the other motions referred to in Rule 73(a) was timely filed by Defendant and the time for Defendant to appeal from said partial summary judgment expira

on May 2, 1977, a Monday. Since this appeal was not filed until April 25, 1978, it was not timely and should be dismissed for lack of jurisdiction. Ratliff, Estate of, v. Conrad, 19 Utah 2d 346, 431 P.2d 571.

Point II

THIS COURT HAS ALREADY HELD THAT THE SUMMARY JUDGMENT ON COUNT II OF PLAINTIFFS' COMPLAINT WAS PROPERLY GRANTED.

In Count II of their Complaint Plaintiffs allege:

> Defendant Noel L. Cook owes Plaintiffs $3,944.68 for money lent by Plaintiffs to said Defendant on or about the 1st day of June, 1974, and the 14th day of November, 1974. Record at 004.

In his answer to Plaintiffs' Complaint Defendant alleges:

> Defendant denies having received $3,944.00 in June or November, 1974, as this case has gone to appeal. Record at 025.

On December 1, 1976, Plaintiffs filed a motion for partial summary judgment against Defendant on Count II of their Complaint and supported their motion with an affidavit and memorandum of points and authorities. Record at 075-083. No counter-affidavits or memoranda were filed by Defendant and during the trial of this action Defendant, through counsel, stated that he had no objection to the

granting of the motion. Transcript at 48. On Defendant's first appeal, this Count, relying on Rule 56(e) of the Utah Rules of Civil Procedure and Clegg v. Lee, 30 Utah 2d 242, 516 P.2d 348 (1973), observed and held,

> Plaintiff Melvin moved for summary judgment on his cause of action for $3,944 and filed an affidavit in support thereof. Before the motion was heard trial began, at which time the motion was renewed. Noel, who was represented by counsel at trial, did not object, nor did he file an affidavit or offer anything in opposition to plaintiff's contention. The judgment on that count was therefore properly granted. Record at 179.

Point III

THIS COURT HAS ALREADY PROPERLY HELD THAT DEFENDANT CANNOT AVAIL HIMSELF OF THE DEFENSES OF WAIVER AND IMPROPER ACCELERATION OF THE MORTGAGE DUE DATE AND THAT DEFENDANT'S CLAIM THAT THE TRIAL COURT ERRED IN DENYING HIS MOTION FOR A NEW TRIAL WAS WITHOUT MERIT.

Although Defendant states in his Notice of Appeal that he appeals from the order denying his motion to vacate judgment which was entered on March 29, 1978, he argues in his brief that Plaintiffs waived their right to collect on the obligation described in Count I of their Complaint, that acceleration of the mortgage due date was improper and that the Trial Court erred in denying his motion for

a new trial on March 30, 1977, all of which he argued on his first appeal. Brief of Defendant - Appellant at 6-17; Brief of Defendant - Appellant on first appeal.

In Count I of their Complaint, Plaintiffs allege that the sum of Thirteen Thousand Dollars ($13,000.00), together with interest, attorney's fees and costs, is now due and payable by Defendant to Plaintiffs, that no part thereof has been paid notwithstanding the fact that Plaintiffs have demanded payment and that the Court should determine the amount due and owing, order that Plaintiffs' security interest be foreclosed and that the property be sold as provided by law to satisfy said amount and accruing costs. Record at 001-005. In his answer to Count I of Plaintiffs' Complaint Defendant concedes all of the allegations thereof. Record at 025.

In this appeal, as in the first appeal, Defendant claims that Plaintiffs waived prompt payment when due and that acceleration of the mortgage due date was improper. In affirming the judgment of the Trial Court on the first appeal, this Court observed and held:

> On this appeal defendant attacks the judgment and decree of foreclosure on two grounds: (1) that plaintiffs had previously waived prompt payments when due and (2) that acceleration of the mortgage due date was improper.

> Concerning those contentions these observations are pertinent: In his answer to the mortgage foreclosure count, the defendant had not only stated "Conceded" but had failed to plead the two affirmative defenses he now attempts to raise. Inasmuch as those issues were neither presented nor tried in the district court, there is no basis upon which we could consider them on appeal. Record at 179.

In his first appeal, Defendant contended that the Trial Court erred in denying his motion for a new trial, having based his motion on claims of irregularity in the proceedings of the Trial Court, or adverse party, accident or surprise which ordinary prudence could not have guarded against, and newly discovered evidence which could not with reasonable diligence have been discovered and produced at trial. Brief of Defendant - Appellant on first appeal at 11. On this claim this Court held:

> Defendant's claim that the trial court erred in denying his motion for a new trial is without merit. He failed to meet any requirement of Rule 59, U.R. C.P. requisite to the granting of a new trial. Record at 179.

Defendant reasserts on this appeal that he should have been given a new trial and bases his assertion on the same claims. Brief of Appellant - Defendant at 15. In support of his claims he states that the Trial Court abused its discretion in the following particulars:

a. Judge refused to accept an only amendment which violates the spirit of the federal rules of civil procedure.

b. At no time was Appellant permitted to take witness stand to present an available defense.

c. The judge refused the Appellant opportunity sought to cross-examine the Respondent in set-aside hearing on fraud without a jury where the sole purpose was to obtain permission of Respondent for certain subpoena information essential to his defense.

d. The judge made little effort at simple construction of circumstantial evidence in possible fraud which violates the principal duty of courts of equity dealing with real property.

e. Early in the hearing the judge stated that he was ready at that time to rule on the case thus pointing up possible bias, prejudice and which he was not able to overcome.

There is no support in the record or in fact for the foregoing. If it is Defendant's position that he should be given a new trial on the hearing on his motion to vacate judgment, then his position is wholly without merit. No motion for a new trial was ever filed, and if the motions filed on and after April 11, 1978, are construed as motions for a new trial they were not timely filed under Rule 59 of the Utah Rules of Civil Procedure since they were filed more than ten (10) days after entry of the order denying the motion to

vacate judgment on March 29, 1978. Only the "writ of injunction" filed by Defendant on March 31, 1978, would be timely and no request is made therein for a new trial.

Point IV

DEFENDANT FAILED TO SEEK EQUITABLE RELIEF FROM THE FINAL JUDGMENT OF THE TRIAL COURT WITHIN THREE MONTHS AFTER THE JUDGMENT WAS ENTERED AND IS AFFORDED NO REMEDY UNDER THE UTAH RULES OF CIVIL PROCEDURE, AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO VACATE JUDGMENT.

On February 13, 1978, Defendant filed with the Trial Court, a motion to vacate judgment pursuant to Rule 60(b) (3) and (7) of the Utah Rules of Civil Procedure alleging as grounds therefor that fraud and misrepresentation had been committed by Plaintiffs in obtaining the judgment. Record at 212-214. The judgments from which Defendant sought relief consisted of the partial summary judgment in favor of Plaintiffs and against Defendant Noel L. Cook on Count II of Plaintiffs' Complaint which was entered on December 27, 1978, and the decree of foreclosure which was entered on January 10, 1977. Record at 086-088 and 099-105.

Rule 60(b) of the Utah Rules of Civil Procedure provides:

> On motion and upon such terms as are just, the court may in furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, suprise, 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. (Emphasis added)

This Court has held that such Motions are ineffective if made more than three months after the judgment is entered. McGavin v. McGavin, 27 Utah 2d 200, 494 P.2d 283 (1972); Shaw v. Pilcher, 9 Utah 2d 222, 341 P.2d 947 (1959).

The last judgment in this action was entered January 10, 1976, the date on which it was signed and filed. Record at 099-105. Rule 58A (c) of the Utah Rules

of Civil Procedure provides that a "judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as hereinabove provided." Thus, for purposes of Rule 60(b), Defendant had until April 10, 1977 to file his motion. By failing to do so, his February 13, 1978 motion was ineffective and was properly denied.

Defendant argued to the Trial Court that his filing of a timely appeal tolled the running of the time within which a Rule 60(b) motion could properly be filed. Rule 60 of the Utah Rules of Civil Procedure was modeled after Rule 60 of the Federal Rules of Civil Procedure. A distinction between the two rules is that the Federal Rule affords parties one year in which to attack a judgment on the grounds of mistake, newly discovered evidence, or fraud. Yet, in all other ways material to this action, the two rules are identical. In construing Rule 60 of the Federal Rules of Civil Procedure, Federal Courts have unanimously held that the filing of an appeal does not toll the period of time in which parties may attack a final judgment. Carr v. District of Columbia, 543 Fed. 2d 917 (D.C. Cir., 1976); Greater Boston Television Corporation v. F.C.C., 463 Fed. 2d 268 (D.C. Cir., 1971); Gulf Coast Building and Supply Company

Inc. v. International Brotherhood of Electrical Workers, Local No. 458, A.F.L.-C.I.O., 460 Fed. 2d 105 (5th Cir., 1972); Lairsey v. Advance Abrasures Company, 542 Fed. 2d 928 (5th Cir., 1976). Under these decisions, a party attacking a final judgment pursuant to Rule 60(b) (3) (fraud) must file his motion within one year of the entry of the final judgment by the trial court or his motion is untimely. Moreover, it has been held that Clause 6 (which is identical to Clause 7 of the Utah Rule) and the first five clauses of Rule 60(b) are mutually exclusive with the result that Clause 6 affords no basis for relief at any time if available under either of the earlier clauses. Carr v. District of Columbia, supra.

Notwithstanding the foregoing, the Trial Court read and examined the affidavits, memoranda and other documents and papers in the file, heard argument of counsel and concluded that there was no fraudulent representation or conduct on the part of the Plaintiffs or any other reason for which the judgment entered on January 10, 1977, should be vacated, and denied Defendant's motion. Record at 311-313.

The burden was upon the Defendant to prove fraud by clear and convincing evidence and the question as to

whether the evidence is clear and convincing is usually determined by the trier of the facts. Pace v. Parrish, 247 P.2d 273, 122 Utah 141 (1952); Condas v. Adams, 388 P.2d 803, 15 Utah 2d 132 (1964). Fraud is a wrong of such nature that it must be shown by clear and convincing proof and will not lie in mere suspicion or innuendo. Lundstrom v. Rodeo Corporation of America, 405 P.2d 339, 17 Utah 2d 114 (1965). The long standing rules of appellate procedure require this Court to view the evidence in a light most favorable to the prevailing party below and not to substitute its judgment for that of the trial court below on issues of fact determined from competent admissible evidence. Schwartz v. Tanner, 576 P.2d 873 (Utah, 1978). The Trial Court below properly ruled in this case that there was no fraud committed by Plaintiffs and no other reason for which the judgment should be vacated.

Point V

PLAINTIFFS SHOULD BE AWARDED ATTORNEY'S FEES ARISING AS A RESULT OF THE DEFENSE OF THIS APPEAL.

In the instant case the Defendant agreed to pay reasonable attorney's fees necessitated by legal action to enforce the note and to foreclose the mortgage. Record at

6, 8, 11. As the record clearly shows, the Plaintiffs brought suit in good faith to pursue their legal rights and prevailed in the lower court. Defendant's motion for a new trial was denied and this Court affirmed the judgment of the Trial Court on the first appeal. Defendant's motions following the first appeal and this second appeal constitute tactics calculated to delay and to deny Plaintiffs their legal rights and have resulted in burdening the Plaintiffs with the expenses necessary to defend Defendant's actions.

An award of attorney's fees on appeal is discretionary with the Court. Swain v. Salt Lake Real Estate and Inv. Co., 3 Utah 2d 121, 279 P.2d 709 (1955). Upon the facts of this case it would be proper to award the Plaintiffs reasonable attorney's fees.

CONCLUSION

The appeal from the partial summary judgment entered on December 27, 1976, was not timely filed and this Court has already held that said judgment was properly granted. This Court has already properly held that Defendant cannot avail himself of the defenses of waiver and

improper acceleration of the mortgage due date and that Defendant's claim that the Trial Court erred in denying his motion for a new trial was without merit. Defendant failed to seek equitable relief from the final judgment of the Trial Court within three months after the judgment was entered and is, therefore, afforded no remedy under Rule 60 of the Utah Rules of Civil Procedure. Moreover, the Trial Court did not abuse its discretion in denying Defendant's motion to vacate judgment. The decision of the Trial Court should, therefore, be affirmed with costs and reasonable attorney's fees to the Plaintiffs.

RESPECTFULLY SUBMITTED this 19th day of October, 1978.

Robert F. Orton
HANSEN & ORTON
Attorneys for Plaintiffs and Respondents
2020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing Respondent's Brief this 19th day of October, 1978, to Noel L. Cook, 149 West Center, Logan, Utah 84321.

Robert F. Orton

Two copies of the foregoing Respondent's Brief were also mailed this 19th day of October, 1978, to each of the following attorneys for the other Defendants in this case:

David Bean
Bean, Bean, Smedley and Starkweather
190 South Fort Lane, Suite 2
Layton, Utah 84041

Robert Gutke
Preston, Harris, Harris, and Preston
31 Federal Avenue
Logan, Utah 84320

Gary Anderson
Hillard, Gunnell and Lowe
175 East 1st North
Logan, Utah 84320

Robert F. Orton