1979

David K. Robinson v. Morris Myers : Brief of Respondent

Utah Supreme Court

Morris Myers; Appellant;
Robinson, Guyon, Summerhays & Barnes; Attorneys for Respondent;

IN THE SUPREME COURT

OF THE STATE OF UTAH

DAVID K. ROBINSON, A Utah Professional corporation, Plaintiff and Respondent, vs. MORRIS MYERS, Defendant and Appellant.	)	Case No. 16153

RESPONDENT'S BRIEF

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I.

NATURE OF THE CASE

The Defendant is being sued for attorney's fees for services rendered by the Plaintiff in the amount of $920.56. (R 2,3) No responsive pleading was filed and a default judgment was taken (R 17). The Defendant subsequently filed a motion to set aside default which was denied.

II.

DISPOSITION IN THE LOWER COURT

The lower court denied the Defendant's motion to set aside default judgment.

III.

RELIEF SOUGHT ON APPEAL

The Respondent seeks affirmation of the court's order denying the Defendant's motion to set aside default.

IV.

PLAINTIFF'S STATEMENT OF THE FACTS

The Plaintiff differs with the Defendant's Statement of the Facts in several material respects:

Plaintiff's Complaint was filed (R 2)	April 19, 1978
The Defendant was served (R 8)	April 19, 1978
No responsive pleading was filed and a judgment by default was entered against the Defendant (R 17)	June 12, 1978
The Defendant subsequently filed a motion to dismiss on (R 18)	June 27, 1978
The Defendant filed a motion to set aside default on 114 days after the default judgment was entered (R 23)	October 19, 1978
The court denied the Defendant's motion on (R 54)	October 25, 1978

V.

STATEMENT OF POINTS

A.

The Defendant is precluded from bringing a Motion to Set Aside Default on the grounds of inadvertance, surprise or excusable neglect.

The issues in the case are governed by the provision of Rule 60(b) of the Utah Rules of Civil Procedure. The Rule provides as follows:

> "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, surprise

> 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. 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 to 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."

Normally, the type of motion filed by Defendant would be on the grounds of mistake, inadvertance, surprise or excusable neglect under subsection (1) of Rule 60(b). This is particularly true since it is apparent from Defendant's affidavit that he failed to ever mail the original of his motion to dismiss to the court prior to the default date (R page 26, paragraph 11) although he apparently intended to. The facts are undisputed that so such

motion was received timely by the court (R 18) or by Plaintiff (R 40, 41). Defendant's motion was received by the court on June 27, 1978 although it bares the date of May 11, 1978 and an affidavit of mailing of May 11, 1978. These conflicting dates render the document suspect.

The Defendant is precluded from alleging mistake, inadvertance, surprise, or excusable neglect under subsection (1) of Rule 60(b) because he didn't file the motion for 114 days after the default was entered since Rule 60(b) provides:

> "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 proceedings was entered to taken."

Defendant, therefore, attempts to ground his motion to set aside default on subsection 7 of the rule which he cannot do.

B.

There is no other reason justifying relief from the operation of the judgment.

Subsection (7) provides:

> "Any other reason justifying relief from the operation of the judgment."

The Defendant claims that the Plaintiff is not the real party in interest and therefore the judgment cannot stand on that ground (Defendant's Brief 4, 5 and 6). That this is not a valid ground

for setting aside a default jugment is demonstrated by two Utah cases.

In the case of Board of Education of Granite School District vs. Cox, 14 Utah(2d) 385, 384 P.2d 806, the Utah Supreme Court held that the trial judge did not abuse his descretion in refusing to set aside a default judgment under subsection (7) where the Defendant asserted that he thought the summons was invalid and therefore paid no attention to it.

In that case, the Defendant also claimed that the judgment was based upon a void contract for the reason that the contract did not comply with the statute of frauds. The Supreme Court held that such an assertion went to the merit of the case and could not be considered on a motion to set aside a judgment.

Subsection (6) of the Federal Rule 60(b) contains identical language to that of subsection (7) of the Utah Rules of Civil Procedure Rule 60(b).

In discussing this clause (6) in the Federal Rules, Moore's states:

> "It is important to note, however, that clause (6) contains two very important internal qualifications to its application: first, the motion must be based upon some reason other than those stated in clauses (1) - (5); and second, the other reason urged for relief must be such as to justify relief.

> "In reference to the first qualification, the very cast of the Rule and the language of clause (6) indicate that this residual clause is dealing with matters not covered in the preceeding five clauses. Further, the maximum time limitation of one year (3 months in Utah parense material added) that applies to clause (1), (2) and (3) would be meaningless, if after the year period had run the movant could be granted relief under clause (6) for reasons covered by clauses (1), (2) and (3). Klapport so recognized and held. Moores Volume 7, pages 343 and 344. (Klapport vs. United States [1949] 335 U.S. 601, 336 U.S. 942, 69 S. Ct. 384, 93 L.Ed. 266)."

The same reasoning applies to this case and since Defendant should have brought his motion under clause or subsection (1), he cannot bring it under subsection (7).

The Defendant failed to set out either in his motion or affidavit that he had a meritorious defense. This showing is a prerequisite to relief under subsection 7. Moore's Volume 7 at page 351 states:

> "Supplementing the reason for relief, the moving party must ordinarily show a meritorious claim or defense. Citing Sebastiano vs. United States (ND Ohio 1951) 108 F. Supp 278, 15 F.R. Serv 60 b. 29, Case 2, aff'd (CA 6th, 1952) 195 F2d 184, and United States vs. Williams (WD Ark. 1952) 109 F.Supp 456, 18 FR Serv 60 b. 31, Case 1."

The Plaintiff in any event is the real party in interest. It had merely changed its name. The same entity at all times was the Plaintiff and also the entity which rendered the services. (R 39, 40, 41).

VI.

CONCLUSION

Since the trial court has broad discretion regarding the setting aside of default judgments (Warren vs. Dixon Ranch Co., 123 U.416, 260 P.2d 741 and Mayhew vs. Standard Gilsonite Co., 14 U. (2d) 52, 376 P.2d 951. The decision of the lower court should be affirmed.

RESPECTFULLY SUBMITTED this 23rd day of February, 1979.

ROBINSON, GUYON, SUMMERHAYS & BARNES

By Lowell V. Summerhays
Lowell V. Summerhays

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that I delivered two copies of the foregoing brief to the Defendant this 23rd day of February, 1979 by leaving them at his home address of 1395 Chandler Drive, Salt Lake City, Utah 84103.

Melodie J. Millgan

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IN THE SUPREME COURT OF THE

STATE OF UTAH

CATHERINE BORGER,)

Plaintiff-Respondent,)

vs.) Case No. 16154

LEE RAY BORGER,)

Defendant-Appellant.)

RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action for divorce and division of property based on the respondent, Catherine Borger's Complaint against the appellant, Lee Ray Borger, and on the appellant's counter-claim against the respondent.

DISPOSITION IN LOWER COURT

The trial of this action was had without a jury, the Honorable VeNoy Christoffersen, District Judge, presiding in the first Judicial District Court, Box Elder County, State of Utah. The District Court granted the respondent a divorce against the appellant and granted the appellant a divorce against the respondent. The District Court also made a Decree dividing the parties' properties.

RELIEF SOUGHT ON APPEAL

The respondent seeks to have this court affirm the decision of the trial court judge.

STATEMENT OF FACTS

The parties to this action were married in Elko, Nevada on the 10th day of March, 1970. They did not have any children of this marriage. The respondent was previously married to a Mr. Reeder and was divorced from him in 1964. There were two children of this marriage who are presently 16 and 18 years of age whose custody was awarded to the respondent. (T.4) At that time, the respondent was awarded the home belonging to the parties and Mr. Reeder was given a lien for one-half interest in said home. (T.24) At the time of the marriage of the parties to this action, there were no financial obligations against the home belonging to the respondent except for the lien owing to the ex-husband. (T.7) Shortly after their marriage, the appellant invested $300.00 of the money he had prior to this marriage in the home for carpet and painting. (T.7)

In 1972, additional improvements were made to the home. Two rooms and a carport were added and the home was covered with aluminum siding and brick. This was financed with a first mortgage placed on the home in the sum of $6,500.00. This mortgage was paid off by both the appellant and the respondent from their joint income during the marriage and the balance

owing on said mortgage as of the time of the divorce was between $3,000.00 and $3,700.00. (T.9) In 1972, the respondent contacted her ex-husband and made arrangements to buy out his interest in the home for the sum of $2,500.00. The appellant had nothing to do with this arrangement. However, the appellant did give the $2,500.00 to the respondent and she paid that to her ex-husband. (T.34) The respondent places the value of the home at the time at $12,000.00 and the appellant claims that it was worth $10,000.00. (T.34, 49)

The appellant claims in his brief and at the time of the trial that he contributed the labor for the improvements made on the home in 1972. However, the appellant admitted under questioning that during the time he was working on the home the respondent was maintaining a joint business owned and operated by the parties and that the respondent contributed as much time working in the business and at home as did the appellant in working on the home. (T.52) The parties went into a joint business known as Ray and Cathy's Cafe which was opened in 1971 and closed in October, 1977. This cafe was jointly operated by the parties during their marriage. (T.12) The appellant also admits that any and all costs of improving the home were obligations against the home that have been paid off with joint income or are still owing against said home. (T.53)

During the marriage, the parties purchased a 19-foot mobile home which was disposed of by the appellant in 1978 and from which he received $3,000.00 which he reinvested in a truck and camper. Six Hundred Dollars of the respondent's money from an inheritance was invested in the mobile home as well as the payments made on it out of the joint income earned by the parties during their marriage. (T.13, 14, 16) The parties also owned a 1966 Hydro-Swift 16-foot boat which the respondent values at $1,500.00 and a 1973 Pontiac which the respondent values at $950.00. The furniture belonging to the parties was owned by the respondent prior to the marriage with the exception of a TV, washer and dryer. (T. 15, 16) During the time the parties were married, the appellant received the use of the home and furniture belonging to the respondent free of any charge except for the labor and the payments made on the mortgage incurred for the new improvements. (T.7, 35)

Judge Christoffersen awarded to the appellant the truck and camper and the boat. The court awarded to the respondent the 1973 Pontiac and the furniture. The respondent was also awarded the home subject to a lien in favor of the appellant in the sum of $1,225.00.

Judge Christoffersen found that the appellant did not purchase a one-half interest in the home when he contributed the $2,500.00 which was used to pay off the ex-husband's lien.

He also found that the joint monies used to retire the mortgage and the joint effort which went into improving the home was offset by the free use of the home given to the appellant during the marriage. The court found that the appellant should receive a credit for the $2,225.00 paid to the respondent's ex-husband, for the $300.00 invested in the carpet and paint during the time of the marriage and for one-half of the value of the automobile which would be $425.00 making a total of $3,225.00. The court found that the respondent was entitled to a credit of one-half of the equity obtained from the sale of the mobile home and invested into the appellant's truck and camper amounting to $1,500.00 and one-half of the equity in the boat as estimated by the appellant amounting to $500.00 for a total of $2,000.00 credit. The court then deducted the $2,000.00 from the $3,225.00 and gave the appellant a lien against the home in the sum of $1,225.00 (T.58-62)

ARGUMENT

THE LOWER COURT'S DECISION WAS SUPPORTED BY THE WEIGHT OF EVIDENCE PRODUCED AT THE TRIAL.

As indicated in the Statement of Facts, the court awarded the home to the respondent with a lien in favor of the appellant in the sum of $1,225.00. The court awarded to the appellant the truck and camper which the court valued at $3,000.00 and the boat which the court

valued at $1,000.00. The respondent was awarded the automobile which was valued at $950.00 and the furniture which she owned prior to the marriage. The court indicated that no value had been placed on the TV which was purchased during the marriage, and consequently, the court was unable to use that value at reaching any judgment. The court did not award the respondent any alimony, but did require the appellant to pay the respondent's attorney's fees in the sum of $350.00. The evidence indicated that the appellant had a take-home income of approximately $700.00 per month and that the respondent had a take-home income of approximately $550.00 per month.

Counsel for the appellant in his brief, claims that the trial court's judgment was improper because the appellant purchased a one-half interest in the home in 1972. This position of the appellant is totally unsupported by the evidence. The evidence is clear that the respondent negotiated with her ex-husband and was able to convince him to accept the sum of $2,500.00 for his one-half interest in the home. At that time, the home was worth approximately $12,000.00. Therefore, it is obvious that the $2,500.00 was not for the purpose of purchasing the one-half interest in the home. The appellant did advance the money that was used to pay off the ex-husband. The respondent has always acknowledged that the appellant was entitled to a credit for the money he advanced. At the ti the ex-husband gave

up his interest in the home, the deed was placed in the joint names of the appellant and the respondent. The testimony at the trial was that at that time, the parties had no reason to believe their marriage was in trouble and were not concerned about who owned what. Probably about 90% of married couples in the state of Utah place their home in joint tenancy and it cannot be concluded from this that the appellant was acquiring a one-half interest. It would be ridiculous to believe that the respondent would be willing to give the appellant a $6,000.00 interest for $2,500.00.

The appellant also contends that he should have an interest in the home because he performed certain work on the home. It is true that the appellant, in 1972, performed labor on the home that made a significant improvement in the home. However, during this time, the appellant and the respondent were making their living from a cafe which was jointly owned by them. In order for the appellant to have enough time to work on the home, the respondent had to work extended hours on the job for which she received no additional compensation. The appellant reluctantly admitted at the time of the trial that the respondent had contributed as much time in running the business and taking care of the home as he did in running the business and doing the work on the home. (T.52, line 15) It should also be noted that the appellant lived in the home from 1970 until the time of the divorce in 1978. During these eight years he used

the home and the furniture belonging to the respondent without making any payments whatsoever with the exception of the work he performed and the retirement of the first mortgage which was paid out of the monies earned jointly by the parties.

It is the position of the respondent that the trial court was totally justified in the decision that it made and in fact did make a fair and equitable distribution of the property belonging to the parties. The appellant has contributed $2,800.00 in cash plus some services for a period of eight years and yet wishes to walk away with one-half of the assets acquired by the respondent prior to the marriage and with a majority of the assets acquired by the parties during the marriage. This certainly would not be an equitable result and consequently the respondent prays for the court to uphold the lower court's decision.

CONCLUSION

The lower court's decision was totally supported by the evidence and consequently should be upheld by this court.

DATED this ____ day of April, 1979.

Respectfully submitted,

ROBERT A. ECHARD
Attorney for Plaintiff-
Respondent

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing Respondent's Brief to the attorney for the Plaintiff-Appellant, Jack H. Molgard, Esq., at P. O. Box 461, Brigham City, UT 84302, on this the 24th day of April, 1979.

Jeannine C. Dameworth

JEANNINE C. DAMEWORTH
Secretary to Robert A. Echard