1979

Empire Corporation v. Empire Credit, Inc : Brief of Appellants

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

EMPIRE CORPORATION, Plaintiff and Respondent, vs. EMPIRE CREDIT, INC., Defendant, ED T. OLSEN and MARLENE SINE, Defendants and Appellants.	)	Case No. 16237

BRIEF OF APPELLANTS

Appeal from a Judgment of the District Court
of Salt Lake County

Honorable G. Hal Taylor, Judge

Bryce E. Roe
Roe and Fowler
340 East Fourth South
Salt Lake City, Utah 84111
Attorneys for Appellants

Ronald C. Barker
2870 South State Street
Salt Lake City, Utah 84115
Attorney for Respondent

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TABLE OF CONTENTS

AUTHORITIES CITED

Cases

Rules

Treatise

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NATURE OF THE CASE

This is an action on a promissory note executed by defendant Empire Credit, Inc., in favor of Valley Bank and Trust Company, claimed by respondent, Empire Corporation, to have been sold and assigned to it. Defendants and appellants, Ed T. Olsen and Marlene Sine, were joined as defendants in the action on the theory that Empire Credit, Inc., was their alter ego and that they were liable because they were trustees of the assets of the defendant corporation and had misapplied those assets.

DISPOSITION IN LOWER COURT

The case has not been tried. On October 19, 1976, on the ground that defendants had failed to comply with discovery submitted by the plaintiff and to obey various orders of the court compelling compliance, the court entered findings of fact and conclusions of law and a judgment in favor of the plaintiff and against all of the defendants for $84,788.78, including interest and attorneys' fees.

Following entry of the judgment, various orders were entered conditionally vacating the judgment and staying execution until, on September 13, 1978, Honorable G. Hal Taylor entered an order ratifying and affirming the judgment and directing execution to issue. Subsequently, in an order of January 8, 1979, Judge Taylor entered an order denying a motion to vacate the judgment.

RELIEF SOUGHT ON APPEAL

Defendants and appellants, Ed T. Olsen and Marlene Sine, seek reversal of the trial court's order denying their motion to vacate the judgment, and remand of the case to the District Court of Salt Lake County with directions to vacate the judgment and set the matter for trial.

STATEMENT OF FACTS

On August 21, 1972, approximately two weeks before the action would have been barred by the statute of limitations, Empire Corporation filed a complaint against Empire Credit, Inc., Ed T. Olsen, and Marlene Sine, in which it was averred that Empire Credit, Inc., had executed a $50,000 note in favor of Valley Bank and Trust Company, that only a small amount had

been paid on it, and that prior to the commencement of the action Valley Bank and Trust Company had sold and assigned to Empire Corporation all of the bank's right, title and interest in the note.

In a second claim, Empire Corporation averred that defendants Olsen and Sine were "officers, directors and sole stockholders" of Empire Credit, and that Empire Credit was the alter ego of the individual defendants, making them jointly and severally on the note.

In a third claim, Empire Corporation averred that defendants Olsen and Sine having caused or permitted the corporate charter of Empire Credit to be suspended and having withdrawn the assets of the corporation for their own benefit, they were liable to Empire Corporation, as a creditor, for the amount of the note. Judgment was demanded for $45,500, with interest at 7 percent per annum from October 10, 1966, and for a reasonable attorney's fee in the sum of $8,000, and for costs (R. 2-4).

During the course of the proceedings, motions to dismiss, for leave to file a third party complaint, to dismiss the third party complaint, together with an answer to the complaint were filed, but the 446 page record, which does not include any transcript of testimony, is made up almost entirely of interrogatories, answers to interrogatories, and motions for sanctions, and of judgments, motions, and memorandums related to them.

The incidents leading to this appeal began on November 9, 1972, when the plaintiff served a set of interrogatories upon the defendants. The interrogatories were not answered, and nothing was done to advance the case for more than a year. Then, on January 14, 1974, counsel for Empire Corporation filed a motion for sanctions, including striking of the motion to

dismiss and awarding judgment by default, on the ground that the defendants had not answered those interrogatories (R. 49). Two days later, David E. Yocom withdrew as defendants' counsel (R. 52), and on February 4, Jay D. Edmunds entered his appearance (R. 54).

On January 18, 1974, the motion for sanctions was continued without date (R. 53) and lay dormant until January 9, 1975, when counsel for Empire Corporation filed a notice of hearing on the motions to dismiss and for sanctions (R. 55). The motions were set for hearing on January 17, but counsel for defendants did not appear. An order was entered denying the motion to dismiss and granting the motion for sanctions (R. 56). The defendants were ordered to answer the interrogatories and produce the documents within 20 days of January 27, 1975, and the order provided that in the event they did not comply, judgment would be entered on ex parte application of counsel for Empire Corporation (R. 58).

After various motions and hearings, the court entered an amended order on April 29, 1975, giving defendants until April 30, 1975, at 5:00 o'clock p.m. to answer the interrogatories or have judgment entered against them (R. 61), and on April 30, 1975, at 4:03 p.m., answers to the interrogatories were filed (R. 62). On that same day, a formal order was entered giving the defendants until April 30 to file the answers to interrogatories (R. 89).

On May 29, 1975, Empire Corporation served interrogatories, requests for admissions, and requests for production of documents upon the defendants. These discovery documents contained four pages of definitions, plus another four pages of definitions attached as Appendix "A". The term "identify" occupied two and one-half pages of the text, and in the interrogatories the defendants were asked to "identify" numerous items and transactions (R. 90).

On June 6, 1975, a minute order granted the plaintiff's motion to strike the answer and enter judgment, but there is no indication in the file that any notice of a hearing on this motion had been sent, and only the plaintiff's counsel appeared (R. 116). On June 19, 1975, defendants filed a motion for extension of time to comply with discovery, referring to the documents served upon them on May 29 (R. 118).

On July 7, 1975, plaintiff's counsel filed another motion for judgment or sanctions, claiming that the defendants had not fully answered Interrogatories 5(a)(3) through 5(a)(13) of the interrogatories that had been served in November of 1972 and answered in April of 1975 (R. 140).

A hearing on this motion was set for July 21. Plaintiff's counsel appeared but counsel for defendant did not, and Honorable Bryant H. Croft entered a minute order granting the motion for judgment (R. 141). This was followed by a formal order dated July 30, 1975 (R. 147) in which the answer of the defendants were stricken, their default entered, and judgment entered for $45,500, plus $27,992.97 interest, $5,000 attorneys' fees, and $28.50 costs for a total judgment of $81,521.49.

A motion to set aside this judgment was made on August 11, 1975 (R. 149), which motion was finally heard on September 9, 1975, at which time Honorable Marcellus K. Snow entered a minute order granting the motion to set aside the judgment, gave defendants 15 days to answer, and awarded plaintiffs an attorney's fee of $50.

Nothing further appears to have been done until April 20, 1976, when plaintiff's counsel filed a motion to strike the minute order (R. 155). Argument on this motion was continued a number of time, but on August 17, 1976, Judge Snow signed an order vacating the judgment and giving the defendants 15 days to answer the interrogatories (R. 166).

On September 22, 1976, plaintiff's counsel filed a motion to st defendant's answer and to enter a default judgment (R. 167), which argued before Judge Snow on October 6, and taken under adviser (R. 170). On October 13, 1976, defendants served objections to interrogatories and a motion for an extension of time, setting a hearing October 22, (R. 171), but on October 19, Judge Snow entered findings fact and conclusions of law, and a default judgment against the defenda for $84,788.78 (R. 174-179).

Entry of the judgment was followed by various motions for stays execution, to set aside the judgment, to strike affidavits, for imposition attorneys' fees. By a minute order of November 22, 1976 (R. 204) all moti were continued to November 24, 1976, at 2:00 o'clock p.m., at which time motion to set aside the judgment was taken under advisement by Judge Sn (R. 205).

At about this time Joseph H. Bottum and Clyde C. Patterson filed th appearance as co-counsel for defendants (R. 215), and affidavits were fi respecting the illness of the defendants' then counsel, Jay D. Edmunds, a the illness of defendant Ed T. Olsen (R. 216).

No minute order appears to have been entered, but on December 1976, Judge Snow signed and entered an order (prepared by plaintif counsel) requiring payment of $1,000 attorneys' fees to plaintiff and provid that the judgment entered on October 19, 1976, would be vacated and aside

> . . . at such time as defendants have fully answered interrogatories and requests for admissions submitted by plaintiff, and have produced the documents required to be produced under the terms of plaintiff's request for production of documents, and have fully complied with the terms of prior

orders entered in this matter requiring the defendants to answer interrogatories and/or requests for admissions and to produce documents (R. 272).

The order also provided in paragraph 2 as follows:

> In the event that defendants fail to fully comply with the conditions imposed under the terms of Paragraph # 1 above within 30 days after entry of this order, then defendants' motion to vacate and set aside the judment entered herein on or about the 24th day of November, 1976, is hereby denied (R. 273).

On the following day Judge Snow entered an order "Setting Aside Default Judgment and Imposing Terms," which had been prepared by Joseph H. Bottum and Clyde C. Patterson (R. 274-275). That order provided as follows:

> It is hereby ordered that the default judgment in favor of the plaintiff, Empire Corporation, and against the defendant, Empire Credit, Inc., heretofore entered by this court be and the same hereby is dismissed and set aside subject to the payment by the defendant of the sum of $1,000 in attorneys' fees to the plaintiff for the use and benefit of the plaintiff's attorney, Ronald Barker.
>
> IT IS FURTHER ORDERED, that the said $1,000 in attorneys' fees shall be paid within 30 days of the signing and filing of this order by the court and that in the event the said $1,000 is not paid within the said 30 days from the date of signing and filing of this order, the defendants' motion to set aside default judgment shall be considered to be denied and the default judgment heretofore entered in favor of the plaintiff and against the defendant shall be reinstated.

On January 18, 1977, defendants filed an answer to the complaint (R. 276), and on January 27, they filed supplemental answers to Interrogatories No. 1 and No. 5 of those served on November 9, 1972 (R. 292-300), and answers to the interrogatories of May 25, 1975 (R. 301-310), as well as an amended answer to the complaint (R. 311).

On March 28, 1977, Judge Snow entered an order striking the order entered on December 31, 1976, which had been presented by Joseph Bottum,

and affirming the order of December 30, 1976, which had been presented by Ronald Barker (R. 336).

At this point, things began to deteriorate. On June 2, 1977, plaintiff filed a "Motion to Strike Stay Order and to Confirm Judgment" (R. 340-342), taking the position that defendants had violated the court's prior order by objecting to some of the interrogatories rather than answering them. This motion was heard by Honorable Dean E. Conder on June 22, 1977, at which time he entered a minute order denying the motion in part and requiring the defendants to furnish income tax returns from 1972 forward (R. 355). This minute order ultimately became the basis for three separate orders presented to Judge Conder by the plaintiff's counsel on three separate occasions, all of them signed by Judge Conder.

On July 18, 1977, Judge Conder signed the following order (R. 356-357):

> ORDERED, as follows:
>
> 1. That the defendant shall, within 20 days from the date of said hearing fully answer interrogatory # 10 of the interrogatories submitted by plaintiff about May 27, 1975.
>
> 2. The defendants shall, within ten days after the date of said hearing, produce for inspection and copying the counsel for plaintiff, copies of income tax returns for the years 1972 and thereafter. As to tax returns of which the defendants have no copies defendants are to within ten days from the date of said hearing order copies of said tax returns from the Utah Tax Commission and from the Internal Revenue Service, and shall furnish copies of said returns to counsel for plaintiff upon receipt therefrom from said taxing authorities.
>
> 3. Plaintiff's motion to strike the stay order and to confirm the judgment herein is denied in part without prejudice.

[On July 22, 1977, the defendants filed an answer to Interrogatory No. 10, and served notice upon plaintiff's counsel that the tax returns would be available for inspection on July 27 at 11:00 a.m.]

On November 30, 1977, long after Interrogatory No. 10 had been answered, Judge Conder's second order (prepared by plaintiff's counsel) was entered. It provided, in pertinent part, as follows (R. 361-362):

> ORDERED, as follows:
>
> That defendants shall furnish to plaintiff for inspection and copying the income tax returns for the years 1972, 1973, 1974, 1975 and 1976 filed with Internal Revenue Service and the Utah State Tax Commission by each of the defendants. To the extent that defendants do not have copies of said tax returns in their possession or available to them they are ordered to forthwith apply for and to obtain copies thereof from the governmental agency with whom said tax returns were filed. Defendants are order to make those tax returns available to counsel for plaintiff within 30 days.
>
> 2. That defendants shall fully, completely, truthfully and accurately answer interrogatory # 10 of the interrogatories dated May 27, 1975, within 20 days. Plaintiff's motion to compel answers to interrogatories # 2, 8, 9 and 12 is denied.
>
> 3. Plaintiff's motion to strike the stay of enforcement of the judgment entered herein, which stay order is dated about October 20, 1977, is denied at this time upon condition that defendants fully comply with all of the terms of this order. In the event that defendants fail to fully comply with the terms of said order plaintiff's motion to strike stay order and to confirm judgment is granted. (Emphasis added.)

On December 8, 1977, plaintiff's counsel sent to Judge Conder a third order based on the minute order of June 22, 1977. As submitted, this order was identical with the one entered on November 30, 1977, but as signed by Judge Conder there was a significant change. Paragraph 2 was amended by striking from it the words "fully, completely, truthfully and accurately," so that the paragraph in the order as signed by Judge Conder reads as follows:

> The defendant shall answer interrogatory # 10 of the interrogatories dated May 27, 1975, within 20 days. Plaintiff's motion to compel answers to Interrogatories # 2, 8, 9 and 12 is denied.

The foregoing orders are of importance, because the asserted failure of defendants to obey the order of Judge Conder appears to be the primary basis for plaintiff's subsequent motion that execution issue, and for the court's granting of that motion.

On May 9, 1978, plaintiff's counsel served upon the defendants additional interrogatories and requests for admissions (R. 363), which patently were designed to establish the fact that in answering Interrogatory No. 10 the defendants had failed to list all real property that they owned or had owned, that they had not complied with Judge Conder's order, and that plaintiffs therefore should retain their $85,000 judgment without having to try the matter on its merits.

On August 15, 1978, plaintiff's counsel filed a "Motion for Order Directing Clerk to Issue Execution" (R. 382-385). In support of the motion, the plaintiff set out some of the foregoing history, then referred specifically to the order of Judge Conder:

> 6. About June 1, 1977, plaintiff filed a motion to strike Judge Snow's order staying enforcement of the judgment (see paragraph No. 2 above).
>
> 7. That motion was heard by Judge Conder about June 22, 1977. Judge Conder ordered defendants to produce certain income tax returns within 30 days. Those tax returns were not made available within said period. Defendants filed a pleading dated July 20, 1977, wherein they stated that the tax returns would be made availabe for inspection July 27, 1977, at 11:00 a.m., however they were not in fact made available at that time. See also letter of November 9, 1977, Exhibit "I" attached hereto, wherein counsel for defendants indicate that they will thereafter produce the tax returns (which they eventially did do).
>
> 8. Judge Conder also ordered the defendants "fully, completely, truthfully and accurately answer interrogatory # 10 of the interrogatories dated May 27, 1975, within 20 days." Under date of July 21, 1977, the defendants Marlene Sine and Ed Olsen filed sworn answers to said Interrogatory No. 10

stating that the information furnished in that answer disclosed all interests in real property that the defendant then "have or have had . . . during the discovery period."

9. Further investigation by plaintiff disclosed that the defendants had not "fully, completely, truthfully, or accurately" answered that interrogatory (# 10 of the May 27, 1975, interrogatories) as had been ordered by Judge Conder. Under date of May 8, 1978, plaintiff caused requests for admissions and interrogatories to be submitted to defendants requiring them to admit that they owned interests in approximately 8 parcels of real property which had not been disclosed by their answers to said Interrogatory # 10. Attached to said request for admissions as exhibits were title reports showing the ownership and/or financial interest of the defendants in and to various parcels of real property in Salt Lake and Summit Counties. Defendants did not deny those requests for admissions within the time required under Rule 36, URCP, or at all, and accordingly said request for admissions are deemed admitted as provided in said Rule 36, URCP.

10. Judge Conder conditionally denied plaintiff's Motion to Strike the Order of Judge Snow Staying Enforcement of the Judgment (paragraph # 2 above), and ordered that in the event that defendants failed to fully comply with the terms of the order that plaintiff's motion to strike the stay order and to confirm the judgment was granted. * * *

11. Under the terms of Judge Conder's order and in view of the admissions by defendants that they owned interests in approximately 8 parcels of real property which were not disclosed in their answer to said Interrogatory # 10 (dated May 27, 1975), the stay order has been vacated, the judgment has been confirmed, and the clerk should be directed to issue execution and other process in aid of enforcement and collection of that judgment.

Hearing on this motion was set for September 5, 1978, but on that date by a minute order Judge Taylor continued the hearing to September 12. On September 11, 1978, Jay D. Edmunds, who was plaintiff's counsel, filed a motion for leave to withdraw, noticing a hearing for October 3, 1978 (R. 389), and sending a copy to the defendants. On September 12, 1978, the date set for hearing the motion for execution, the court also considered the application of Mr. Edmunds to withdraw as counsel, and Judge Taylor

granted the motion for leave to withdraw at the same time that he granted the motion for issuance of execution (R. 391). On September 13, 1978, Judge Taylor entered a formal order that execution issue and that the judgment be ratified and confirmed (R. 393).

Thereafter, new counsel appeared for the defendants and moved the court to vacate the judgment and to stay the execution (R. 397-400). These matters were heard by the court on December 11, at which time Judge Taylor denied the motion to vacate. Following that, an appeal was filed by defendants Marlene Sine and Ed T. Olsen (R. 419) and a supersedeas bond was filed (R. 435).

ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO VACATE THE JUDGMENT.

Other disciplines have names for it. In genetics it would be a mutation; in physics, an uncontrolled reaction; in psychology, a derangement; in logic or semantics, a paradox; in printing, pied type. American jurisprudence has no established term for it, but "procedure run amuck" seems appropriate. Here, because of neglectful counsel, use of discovery for harassment, iffy judgments and orders, and an unmanageable record, the appellants are the victims of an oppressive judgment in spite of a meritorious defense.

The judgment is one which should not have been entered, which was vacated conditionally, in which the conditions were met, but which the trial court finally "ratified and reaffirmed." Under all the facts and circumstances, the appellants should have relief from that judgment, having timely moved to vacate it pursuant to Rule 60(b), Utah Rules of Civil Procedure, which provides:

> 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), misrepresenation, 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. * * *

When was the "judgment, order or proceeding" entered or taken? Was it October 19, 1976, when first entered by Judge Snow, or September 13, 1978, when it was ratified and reaffirmed by Judge Taylor? If the former, the first four reasons for vacation of the judgment may not be available; if the latter, they are. We believe it was the latter, but, in any event, relief may be granted under subdivision (7), which permits the vacation of a judgment for "any other reason justifying relief from the operation of the judgment." The subdivision has been broadly applied by this and other courts.

In Dixon v. Dixon, 121 Utah 259, 240 P.2d 1211, 1213 (1952), the trial court had entered a minute order providing for temporary custody and other matters during the pendency of the action. Thereafter, it signed a formal order along the lines of the temporary order, but proporting to be a permanent order with respect to custody and distribution of property. A motion to vacate the formal order was filed more than three months after entry of the order, but this court approved the action of the trial court in vacating the formal order. The court said:

> It is therefore apparent that counsel who presented the order of March 8, 1950, had prepared it with no recollection of the provisions of the stipulation, and that the judge signed the formal order under a mistaken belief that it conformed to an order theretofore made.

In Ney v. Harrison, 5 Utah 2d 217, 299 P.2d 1114 (1956), one of the defendants, Alda Harrison, failed to answer the complaint because she believed her former husband would handle the matter, and a default judgment was entered against her. Almost 11 months later, she moved for vacation of the judgment and the relief was granted by the trial court. This court held that the asserted ground for relief properly came within the provisions of subdivision (7) of Rule 60(b). The court said:

> The statutory authority of trial courts to set aside judgments obtained by default has been liberally construed to the end that there be trial on the merits, beginning with our earliest decisions. In the recent case of Warren v. Dixon Ranch Co. [Utah, 260 P.2d 741, 742], we had occasion to review the policy considerations and reaffirmed the attitude of liberal construction, thus:
>
> > "The allowance of a vacation of judgment is a creature of equity designed to relieve against harshness of enforcing a judgment, which may occur through procedural difficulties, the wrongs of the opposing party, or misfortunes which prevent the presentation of a claim or defense. * * * Equity considers factors which may be irrelevant in actions at law, such as the * * * hardship in granting or denying relief. Although an equity court no longer has complete discretion in granting or denying relief it may exercise wide judicial discretion in weighing the factors of fairness and public convenience, and this court on appeal will reverse the trial court only where an abuse of discretion is clearly shown."
>
> The trial court could well regard this as among the class of cases that Rule 60(b)(7) was intended to govern and to permit Alda to justify her failure to answer on the ground that the divorce decree required her husband to bear the obligation and required him to defend the action for her.

In Stewart v. Sullivan, 29 Utah 2d 156, 506 P.2d 74 (1973), the court entered orders in two consolidated cases dismissing them with prejudice on the ground that the plaintiff had failed to answer interrogatories. The attorney for the plaintiff was subsequently suspended from practice, new counsel was obtained, and more than a year after the judgment had been entered the court vacated it and entered a new judgment dismissing the actions without prejudice. In holding that the order vacating the judgment had properly been entered by the trial court, this court considered a number of circumstances. The court said:

> There are certain circumstances in connection with this matter that should be noted. The plaintiff had answered interrogatories submitted to him by the defendant Richard Monk Allen prior to the consolidation of the two cases. The interrogatories and the answers are substantially the same as those submitted to the plaintiff by the defendant Sullivan. After the consolidation of the cases that information was available to all parties. At the time the first order of dismissal was entered it appears that the court and counsel for the defendant Allen were of the impression that the order made was a dismissal without prejudice. In a telephone conversation between counsel for the defendant Allen and counsel for the plaintiff, Allen's counsel informed counsel for the plaintiff that the dismissal was without prejudice. Plaintiff had no knowledge of the dismissal and subsequent motions made in respect thereto. It was not until several months after his counsel became incapacitated to represent him and the plaintiff had employed other counsel he learned what had transpired.
>
> In view of the above recited circumstances and the fact that there was no disposition of the case on the merits, we are of the opinion that the court below did not abuse its discretion in its determination that the action should be dismissed without prejudice. The provisions of Rule 60(b)(7) are sufficiently broad to permit the court to set aside its former order which appeared to have been entered upon an erroneous assumption and to enter a new order based upon the record before it.

Other courts have found additional situations which come within the "catch-all" portion of Rule 60(b). Our subdivision (7) is the same as subdivision (6) of Rule 60(b) of the Federal Rules of Civil Procedure. L. P.

Steuart, Inc. v. Matthews, 329 F.2d 234 (D.C. Cir. 1964), is a case somewhat similar to the present one. In that case the plaintiff's counsel badly mishandled the suit. In October 1960, the complaint was dismissed, after notice to plaintiff's then counsel, for failure to prosecute. Two years later, on October 22, 1962, the plaintiff by new counsel moved to reinstate the suit. The district court granted the motion, defendant appealed, and the judgment was affirmed by the Court of Appeals of the District of Columbia.

The court noted that the former counsel had been "beset with personal problems" which involved the serious illness of his wife and recent deaths of his parents, that the plaintiffs and others in plaintiffs' behalf had made numerous inquiries of the counsel who refused to answer them and who assured the plaintiff from time to time that the case was proceeding although there was no foundation for counsel's reassuring statements. When the plaintiff learned by personally checking the court records that the case had been dismissed for failure to prosecute, his former counsel told him steps would be taken to reinstate the case, but no action was taken. On appeal of the district court's order vacating the judgment, the appellant claimed that the motion to reinstate the judgment was barred by the one-year time limit in Clause (1), concerning excusable neglect, which corresponds in the Federal Rules with the three-month time limit in the Utah Rules. The court of appeals said:

> But the district court did not act on the theory of excusable neglect. On the contrary, it expressly applied the "'catch-all' rule" 60(b)(6). Counsel's neglect was not excusable and the court, by clear implication, so found. The judge felt "that in this particular case the client, plaintiff, a person unfamiliar with court procedures, should not be penalized by the action of his counsel, who admittedly did not attend to the matter when he received notice of the contemplated dismissal."

> On the part of Matthews [plaintiff] himself there was no neglect. * * * Clause (1) of Rule 60(b) is not and Clause (6) is broad enough to permit relief when as in this case personal problems of counsel cause him grossly to neglect a diligent client's case and mislead the client. Clause (6) "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."

The holding and reasoning of the Steuart case was followed in King v. Mordowanec, 46 F.R.D. 474 (D.C. R.I. 1969), vacating a judgment because of the neglect of counsel, though the motion to vacate was not filed for approximately a year and nine months after dismissal of the suit.

In the present case there is a strange conglomeration of circumstances. There was attorney neglect, much of it inexcusable. A set of interrogatories was served upon defendants' counsel on November 9, 1972, but between that date and January 14, 1974, some 14 months later, nothing had been done with respect to answering the interrogatories or arguing the motion to dismiss the complaint, and within two days after service of the motion for sanctions, plaintiff's then attorney resigned and was replaced by Jay D. Edmunds. Then, on January 18, 1974, the motion for sanctions was continued without date, and nothing more was done in the case until January 9, 1975, 11 months later, when plaintiff's counsel set a hearing for the motions to dismiss and the motion for sanctions. Defendant's counsel did not appear; the motion to dismiss was denied, and the motion for sanctions was granted. An order was entered that the discovery would be complied with within 20 days of January 27, 1975. Nothing was done, and on April 22, 1975, some three months later, plaintiff's counsel filed a notice of motion for judgment.

On June 6, 1975, plaintiff's counsel appeared before the Honorable Maurice Harding at which time Judge Harding granted plaintiff's motion to strike defendants' answer and enter judgment. Defendants' counsel was not

present. On July 7, 1975, a notice was sent out that plaintiff's motion for judgment or sanctions would be heard on July 21, 1975. Defendants' counsel did not appear and plaintiff's motion for judgment was granted. On August 28, 1975, the parties appeared and argued a motion to set aside the judgment. The court granted the motion and gave the defendants 15 days within which to answer. Counsel did not prepare an order for the judge's signature and did not prepare any answers as required, and on April 20, 1976, more than seven months later, plaintiff's counsel moved to strike the minute entry. Arguments on this motion were continued several times and finally, on June 29, 1976, it was continued without date.

Finally, on October 19, 1976, after argument, Judge Snow entered findings of fact and conclusions of law and a judgment for $84,788.78. A motion to set the judgment aside was filed by counsel, set for argument on October 29, and again continued several times, finally to be heard on November 24, 1976.

At this point, affidavits were filed indicating that defendants' counsel had been ill between August 28 and late September or early October and it was impossible for him to carry on a professional practice. At about this same time, Joseph H. Bottum and Clyde C. Patterson appeared as co-counsel for the defendants, but the basis for their appearance is not clear and it may be inferred from the file that they were retained by Mr. Edmunds to help him out of his predicament. There is no indication that the new counsel were in contact with the defendants, or were retained by the defendants. They were never heard from again.

On August 15, 1978, plaintiff's counsel moved for an order directing the clerk to issue execution on the judgment that had been entered on

October 19, 1976, and conditionally vacated thereafter. The matter was set for hearing on September 5 at which time Mr. Edmunds "moved the court for an order continuing hearing on this matter for one week to give defendants an opportunity to employ new counsl." This motion was granted on condition that the defendants pay to counsel for plaintiff the sum of $100 as attorneys' fees. But it was not until September 11, 1978, the day before that set for hearing of the motion for execution, that a notice of the motion for leave to withdraw as counsel was mailed to the defendants, and on the following day, counsel for plaintiff having "waived time for hearing of that motion," the court granted the motion to withdraw in the same breath that it granted the motion for execution. This was hardly an atmosphere in which the defendants' counsel would be expected to devote his best efforts to resisting the plaintiff's motion for issuance of execution.

The record contains 24 minute orders which were entered during the tenure of Mr. Edmunds as counsel for the defendants. In ten of those 24 either no counsel is listed as having been present for the defendants, or Mr. Edmunds's name is followed by "NP"--not present.

Added to the neglect of counsel in this case is the tactic of plaintiff's counsel with respect to the use of discovery. A review of the file shows that the plaintiff's counsel was among those who have been using the discovery methods for the purposes of harassment rather than as legitimate devises to aid in the preparation for trial. The definitions employed by the plaintiff's counsel make it almost impossible for one to answer the interrogatories as fully as demanded, at least not within the current year.

The various orders as presented to and signed by the judges with respect to judgments and conditional vacations of those judgments were such

as to leave anyone confused as to the status of the case. It is impossible to tell from reading of the file whether there was a judgment or not at any particular time--a fact attributable in large measure to the method used by plaintiff's counsel in the preparation of orders. For example, in the court's order of December 30, 1976 (R. 272-273), paragraph 1 provided that the judgment would be vacated and set aside upon the performance of certain conditions such as the payment of $1,000 and compliance with discovery. Paragraph 2 provided that in event the defendants failed to fully comply with the conditions "then defendants' motion to vacate and set aside the judgment entered herein on or about the 24th day of November, 1976, is hereby denied," creating confusion as to when the effective date of the denial would be.

In Judge Conder's order of November 29, 1977--the second in the series--the plaintiff's motion to strike the stay of enforcement of the judgment was denied upon condition, following which there was a provision that:

> In the event that defendants fail to fully comply with the terms of said order plaintiff's motion to strike stay order and to confirm judgment is granted.

Then there is the same language in the court's third order of December 9, 1977. Orders so phrased make it impossible for counsel to determine whether there is a judgment or whether there isn't; whether there is a stay of exeuction or whether there isn't; and whether the judgment has been confirmed or whether it hasn't. Orders of this type contribute to the general disarray pervading this record.

Finally, the court committed other serious errors. Much of the material that is found in the record and which has been set out in the brief is valuable to this court in considering the history of the case, but the matter

directly affecting the point raised on this appeal center around the three orders entered by Judge Conder, and the plaintiff's motion for an order directing execution.

The events leading directly to this appeal began on June 2, 1977, when the plaintiff filed a motion to strike a stay order previously issued and to confirm the judgment which had been entered on October 19, 1976. This matter was heard by Judge Conder on June 22, 1977, at which time he entered a minute order denying the motion in part and directing the defendants to furnish income tax returns and to answer Interrogatory No. 10. This minute order was followed by a formal order, signed by Judge Conder on July 18, 1977, that the defendants would answer Interrogatory No. 10 within 20 days of May 27, 1975, and produce income tax returns.

On July 22, 1977, defendants' counsel mailed to plaintiff's counsel a notice that the tax returns would be available on July 22 and also sent an answer to Interrogatory No. 10. Four months later, on about November 30, 1977, plaintiff's counsel presented to the court an order which was substantially different from that signed by Judge Conder on July 18. This one directed the defendants to answer Interrogatory No. 10 (which had already been answered) "fully, completely, truthfully, and accurately." Thereafter a third order, identical to the second, was presented to Judge Conder by plaintiff's counsel, but when he signed the third order on December 9, 1977, Judge Conder struck the words "fully, completely, truthfully, and accurately" in directing an answer to Interrogatory No. 10.

Nevertheless, when the plaintiff filed its motion for an order directing the clerk to issue execution, no mention was made of the conflicting orders of Judge Conder, and reference was made only to the language in the order of

November 30 that the defendants would answer Interrogatory No. 10 "fully, completely, truthfully and accurately." It was not pointed out in the motion, or thereafter to Judge Taylor so far as the record appears, that there had been a subsequent order by Judge Conder eliminating those words. And the factual basis for the motion, presented to Judge Taylor and apparently relied upon by him, was that the defendants had not answered Interrogatory No. 10 "truthfully" because they had failed to list some parcels of real property that were then or had once been in their names. Thus, as in Stewart v. Sullivan, 29 Utah 2d, 156, 506 P.2d 74 (1973), cited above, both the court and counsel were suffering under a misapprehension as to the contents of the record and the status of the case. The misapprehension is understandable, considering the record that has been generated, but to be understandable is not justification for imposing upon a party an unwarranted judgment and refusing to vacate it when the true facts are pointed out.

In considering the plaintiff's motion for an order directing the clerk to issue execution, the trial court erred in another significant respect. It was improper for the trial court to consider the withdrawal motion of attorney Edmunds at the same hearing at which Mr. Edmunds was supposed to be protecting the interests of his clients. Rule 2.5 of the Rules of Practice in the District Courts and Circuit Courts of the State of Utah provides:

> When an attorney * * * withdraws from the case or ceases to act as an attorney, the party to an action for whom such attorney was acting, must before any further proceedings are had against him, be required by the adverse party, by written notice to appoint another attorney or to appear in person.

This was not done in this case. Indeed the trial court permitted withdrawal at the same moment that he was considering final disposition of the case. Although plaintiff's counsel argued that Joseph Bottum and Clyde C.

Patterson were co-counsel and that no such notice was necessary, it is apparent from the record that their appearance was for a single purpose. After appearing on an early motion to vacate a judgment, because Mr. Edmunds had been ill and not attending to business, they never thereafter appeared on any pleadings or papers in the case, except notices sent by Mr. Barker. When Mr. Edmunds appeared before the court on September 5, 1978, the time set for the hearing of plaintiff's motion for execution, it was represented that time was needed in order to permit defendants to obtain new counsel, nothing being said by any party or by the court about the fact that somewhere in the record the names of Joseph Bottum and Clyde C. Patterson can be found.

This case has some of the elements that were present in Westinghouse Electric Supply Company v. Paul W. Larsen Contractor, Inc., 544 P.2d 876 (Utah 1975), in which this court found that a trial court had abused its discretion in refusing to vacate a judgment. In that case, considerable time had been used in connection with discovery procedures; the defendant claimed that the plaintiff had failed to produce invoices and records as requested, and that the failure to provide the information substantially impaired the defendant's ability to defend the action. The defendant filed a request for the production of voluminous documents in September of 1973. They were not produced within the time required by the rule and counsel for the plaintiff telephoned the defendant's counsel in May, 1974, and left a message that the records were at the plaintiff's office, and because of their volume, defendant's counsel should come there to examine them. Thereafter, while some discovery was still pending, the trial court on February 27, 1975, granted defendant's motion to dismiss for failure to prosecute the action.

The dismissal was with prejudice. The plaintiff moved under Rule 60(b) to vacate the order, the motion was denied by the trial court, and the plaintiff appealed, contending that the court had abused its discretion.

This court considered that the question on review was whether the granting of the motion to dismiss with prejudice was an abuse of discretion. In holding that there was an abuse of discretion and that the judgment should be vacated, the court, speaking through Mr. Justice Crockett, said:

> * * *these observations are pertinent: although there was unusual delay in getting this case to trial, this was due in large part to the unusual circumstances delineated above. Further, we are not impressed that the defendants themselves were overly diligent or manifest any particular haste in getting the pretrial discovery procedures completed and on with the trial. They did not do so in responsive action to Westinghouse's having assembled records, nor to the latter's messages concerning their availability, nor did they seek any assistance from the court.
>
> It is indeed commendable to handle cases with dispatch and to move calendars with expedition in order to keep them up to date. But it is even more important to keep in mind that the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them. In conformity with that principal the courts generally tend to favor granting relief from default judgments were there is any reasonable excuse, unless it will result in substantial prejudice or injustice to the adverse party.

CONCLUSION

This is a case in which the defendants are being subjected to a substantial and burdensome judgment because of a commingling of counsel's neglect, abuse of the discovery processes, procedural obfuscations, misrepresentations to the court, and, ultimately, the trial court's misconception of the tenor of an order previously entered. It is a case that should be tried on the merits since the defendants have raised a defense,

which if established, is meritorious, i.e., that they gave to the president of Empire Corporation money with which to pay off the Valley Bank and Trust Company note and that instead of paying it off he caused it to be transferred to Empire Corporation; and that it was the president and managing officer of Empire Corporation who, if anyone, was the alter ego of Empire Credit, Inc.

It seems clear that if Judge Taylor had been aware of the character of the order entered by Judge Conder in this case that he would not have denied the motion to vacate the judgment. Moreover, his order of September, 1978, was influenced by a misconception of the law of discovery. While one of the orders signed by Judge Conder required that the Interrogatory No. 10 be answered "truthfully," it has been held that failure of a party to answer an interrogatory truthfully is not ground for imposition of the sanctions of Rule 37, but may be only a ground for initiating a perjury complaint. See 4A Moore's Federal Practice (2d Ed), ¶ 37.06, p. 37-103, note 29.

Because of the misconception of counsel and court as to the duties placed on defendants by Judge Conder's order of December 9, 1977; because of the confusing nature of the record, because of the neglect of counsel; and because of the refusal of the court to follow its own rules with respect to withdrawal of counsel, the defendants in this case were denied a trial on the merits. The court's refusal to vacate the judgment of October 29, 1976, or of September 13, 1978 (whichever was the "judgment"), was an abuse of discretion and this court should reverse and remand the case to the trial court with directions to permit the parties to proceed to trial.

Respectfully submitted,

Bryce E. Roe
ROE AND FOWLER
340 East Fourth South
Salt Lake City, Utah 84111
Attorneys for Defendants
and Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of April, 1979, I served the attached Brief of Appellants upon Ronald C. Barker, Esq., attorney for respondent, by depositing copies thereof in the United States mails, postage prepaid, addressed as follows:

Ronald C. Barker, Esq.
2870 South State Street
Salt Lake City, Utah 84115