

2001

Joseph Mascaro v. John S. Davis : Petition for Rehearing

Utah Supreme Court

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THE COURT

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IN THE SUPREME COURT OF THE STATE OF UTAH

19024

JOSEPH MASCARO and SHELBY
TAYLOR, individuals,

Plaintiffs,

v.

Civil No. 19024

JOHN S. DAVIS, CHARLEY JOSEPH,
CURTIS BAUM, individuals, and
CHATILLION, INC. a Utah
corporation,

Defendants.

PETITION FOR REHEARING

APPEAL FROM AN ORDER FROM
THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
THE HONORABLE DAVID B. DEE, JUDGE, PRESIDING

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FILED

JUL 21 1987

IN THE SUPREME COURT OF THE STATE OF UTAH

| | | |
|--|---|------------------------|
| JOSEPH MASCARO and SHELBY TAYLOR, individuals, | : | |
| | : | |
| Plaintiffs and Appellants | : | PETITION FOR REHEARING |
| | : | |
| v. | : | Civil No. 19024 |
| | : | |
| JOHN S. DAVIS, CHARLEY JOSEPH, CURTIS BAUM, individuals, and CHATILLION, INC. a Utah corporation, | : | |
| | : | |
| Defendants and Respondents: | : | |

Plaintiffs/appellants respectfully petition the Court for a rehearing of one portion of the Court's decision, namely remanding the case back to the district court for a determination of respondent Joseph's independent action. It is submitted that in light of the Court's upholding of the default judgment, that independent action has thus become moot.

ARGUMENT

The Court in its decision has determined that Judge Dee was not permitted to overrule Judge Conder's denial of the motion to set aside the default judgment entered against respondent Joseph. Thus, the judgment entered against respondent Joseph still stands except for the amounts which the Court has now held to have been satisfied by reason of the settlement with defendants Chatillion and Baum.

The suggestion that the independent action brought by respondent Joseph might be the basis for setting aside the remainder of appellant Mascaro's judgment against respondent

Joseph flies in the face of the Court's ruling that the default judgment against Joseph should stand. The language contained in the independent action itself identifies it as an attack on the default judgment entered against respondent Joseph. In short, it is an attempt to do indirectly what could not be done directly, namely overturn the default judgment. Thus, by reason of this Court's decision, respondent Joseph's so called independent action has been fully and completely defeated with regard to appellants.

This Court's decision has reaffirmed so much of appellant's judgment against Joseph as is not offset by the settlement agreement with Chatillion and Baum. It should not force any further legal action on that same subject. In other words, the entire controversy between appellants and respondent Joseph should now be at an end without further recourse to any kind of an independent action. Respondent Joseph has obtained a judgment against defendant Davis and the claims against Baum and Chatillion have been discharged by bankruptcy. The only aspect of Joseph's independent action which could go forward is a matter which has already been decided by this Court. If nothing else, respondent Joseph's claims are eliminated by reason of res judicata or collateral estoppel.

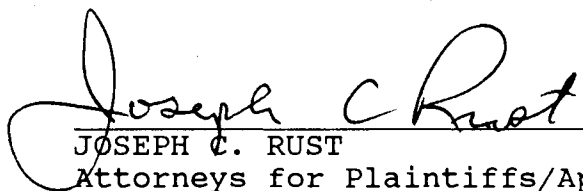
This Court has already reduced appellants' judgment against Joseph by some \$180,000.00 by reason of forcing them to accept unimproved and encumbered land which has now been totally lost to them. This Court has held that the conditions precedent

of improvements, value, and release of mortgages did not affect the settlement. This Court's decision now offers a possibility of further reduction when this Court has already held that the default judgment should stand. At the very least, this Court's suggestion as to further proceedings on the "independent action" adds delay and further legal expense. Now is the time to bring a final halt to this case and let a judgment entered over seven years ago finally stand.

In summary, then, what remains of appellants' judgment against Joseph should be declared to be final and there should be no further proceedings whereby the validity of the default judgment which has been sustained by this Court should be further impaired.

It is certified that this petition is presented in good faith and not for delay this 20 day of July, 1987.

KESLER & RUST



JOSEPH C. RUST
Attorneys for Plaintiffs/Appellants

CERTIFICATE OF MAILING

I hereby declare that I caused to be mailed four true and correct copies of the foregoing Petition for Rehearing in Civil No. 19024, postage prepaid, this 20th day of July, 1987, to each of the following:

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