

1979

# Interstate Excavating, Inc v. Agla Development Corporation : Appellant's Brief On Appeal

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH  
STATE OF UTAH

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INTERSTATE EXCAVATING, INC., :  
Plaintiff-Respondent, :  
vs. : Case No. 16599  
AGLA DEVELOPMENT CORPORATION, :  
Defendant-Appellant. :

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APPELLANT'S BRIEF ON APPEAL  
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An appeal from a default judgment of  
the Third Judicial District Court of  
Salt Lake County, State of Utah, ~~vs.~~  
Honorable Jay E. Banks, Judge

-----  
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Clerk, Supreme Court

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IN THE SUPREME COURT OF UTAH  
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INTERSTATE EXCAVATING, INC., :  
Plaintiff-Respondent, :  
vs. : Case No. 16599  
AGLA DEVELOPMENT CORPORATION, :  
Defendant-Appellant. :

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APPELLANT'S BRIEF ON APPEAL  
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STATEMENT OF THE NATURE OF THE CASE

Defendant-Appellant, Agla Development Corporation, was sued by plaintiff-respondent, Interstate Excavating, Inc., for breach of contract and defendant counter claimed for breach of contract and slander of title.

DISPOSITION IN THE LOWER COURT

The Honorable Jay E. Banks rendered a default judgment in the amount of \$46,101.70 and decree of foreclosure in favor of respondent and dismissed appellant's counterclaim with prejudice when appellant was not present at trial scheduled for May 7, 1979. Appellant's subsequent motion to have the default judgment set aside was denied by Judge Banks on June 18, 1979.

### RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the lower court's order denying the motion to set aside judgment and the right to have a trial upon the merits of the case.

### STATEMENT OF THE FACTS

Since, the time of this writing, no transcript of the proceedings held on June 18, 1979 pursuant to appellant's motion to set aside judgment is available, appellant's statement of the facts and argument is based solely on the record as manifested by the District Court file and pleadings.

This controversy arises from two contracts entered between the parties whereby respondent contracted to provide water line and sewer improvements to two subdivisions owned by appellant. Subsequently, there arose several disagreements and difficulties between the parties which culminated in the filing of a suit by respondents, who alleged breach of contract.

Appellant filed an Answer setting forth several affirmative defenses and counterclaimed alleging a breach of contract and slander of title. On April 16, 1979, the matter came before the Honorable G. Hal Taylor for pre-trial settlement conference. At this time, appellant's counsel, Robert J. Haws, was given permission to withdraw as counsel. That same day, counsel for respondent mailed a Notice to Appoint Counsel to appellant's office at 12655 South Redwood Road, Riverton, Utah. Said notice included the information that the case had been set for trial on May 7, 1979.

On May 7, 1979, appellant failed to appear through corporate officer or attorney and a judgment by default in the amount of \$46,101.70 was entered infavor of respondent and appellant's counterclaim was dismissed with prejudice. Appellant, in the sworn statement accompanying his Motion to set aside specifically states that no notice of the trial date was received until a copy of the default judgment was received.

Upon learning of the default judgment, appellant immediately contacted its present counsel, Robert M. McRae, to represent it in this matter. Pursuant to Rule 60(b)(1), Utah Rules of Civil Procedure, appellant filed a motion in the trial court to set aside the judgment on May 31, 1979. This motion was based on the sworn statement of Lafe Brown, President of the appellant, Agla Development Corporation, wherein he stated that appellant has no notice of the trial date, that the notice to appoint counsel was misplaced among numerous pleadings served on appellant's office by mail, that appellant's then counsel, Robert J. Haws, withdrew from a number of cases simultaneously, and that appellant was substantially prejudiced in that a meritorious defense and counterclaim existed.

This motion to set aside was heard by the trial court on June 18, 1979, and was denied on July 6, 1979.

Notice of appeal was given by appellant on the 19th day of July, 1979.



### ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN  
DENYING DEFENDANT'S MOTION TO SET ASIDE THE  
DEFAULT JUDGMENT.

Defendant's motion to set aside the default judgment  
was made pursuant to Rule 60(b) of the Utah Rules of Civil  
Procedure which reads 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.... 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..."

It is well settled that the rules of civil procedure are  
to be liberally construed with a view to promote justice. Rule 1,  
Utah Rules of Civil Procedure, 68-3-2, Utah Code Anno. (1953).  
In this regard, then Justice Crockett in Utah Sand & Gravel  
Products Corp. v. Tolbert, 402 P.2d 703 (1965) stated:

"It is true that our new rules of civil procedure  
were intended to eliminate undue emphasis on  
technicalities and to provide liberality in pro-  
cedure to the end that disputes be heard and  
determined on the merits.... Liberality in their  
interpretation and application should be indulged  
where no prejudice or disadvantage to anyone results..."

This statutory and judicial policy of liberality has been especially  
evident in those decisions in which the interpretation of Rule 60(b)  
has arisen in the context of a default judgment. From the earliest  
decisions of this Court, it has been emphasized that default

judgments are viewed with suspicion and that the authority of the trial court to set aside judgments obtained by default is to be liberally applied so that there might be a decision on the merits. Utah Commercial & Savings Bank v. Trumbo, 53 P. 1033 (1890).

This suspicion and disfavor arises from the recognition that it is a harsh and oppressive action to place a judgment rigidly and irrevocably on a party without a hearing and that it is fundamental to our system of justice that each party to a controversy be given an opportunity to present his side of the controversy. Mayhew v. Standard Gilsonite Co., 376 P.2d 951 (1962). Illustrative of the following language from Heathman v. Fulran and Clendenin, 377 P.2d 189 (1962):

"Judgments by default are not favored by the courts nor are they in the interest of justice and fair play. No one has an inalienable or constitutional right to a judgment by default without a hearing on the merits. The courts, in the interest of justice and fair play, favor, where possible, a full and complete opportunity for a hearing on the merits of every case..."

Rule 60(b) and its statutory predecessors<sup>1</sup> are of long standing and have been construed by this Court on numerous occasions. These decisions have uniformly embraced several general propositions, the first of which is that the trial court's determination involving a motion to set aside a default judgment is

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<sup>1</sup>Comp. Laws, 1876, § 1293; Rev. Stat. 1898, § 3005; Comp. Laws, 1917, § 6619; 104-14-4 Rev. Stat., 1933; 104-14-4 Utah Code Anno. 1943.

largely or discretionary matter, and as a concomitant, that this Court will reverse such a determination only in the event of an abuse of that discretion. For example, see Board of Education of Granite School District v. Cox, 384 P.2d 806 (1963). Although it is true that no general rule can be promulgated respecting the exercise of discretion in setting aside or refusing to set aside a default judgment since each case must necessarily turn on its own peculiar facts and circumstances, Trumbo, supra, Heath v. Mower, 597 P.2d 855 (1979). This Court has, however, been careful to define the scope of that discretion, and has by no means given the trial courts a free hand to refuse to set aside default judgments. Thus, in Chrysler v. Chrysler, 303 P.2d 995 (1956), then Justice Crockett, writing for a unanimous court stated:

"We are entirely in accord with the authorities cited by plaintiff to the effect that it is generally regarded as an abuse of discretion for a trial court to refuse to vacate a default judgment where timely application is made and there is any reasonable grounds for doing so, to the end that cases may be decided on their merits."

This two pronged requirement of timeliness and reasonable justification has been subsequently cited with approval in many decisions. Mayhew, supra; Board of Education, supra; Westinghouse Electric Supply Co. v. Larsen, 544 P.2d 876 (1975); and Olsen v. Cummings, 565 P.2d 1123 (1977).

An examination of the factual setting reveals that appellant did in fact satisfy both of the requirements cited above,

that is, that the motion to set aside was both timely filed and based on reasonable grounds. As such, the trial court's refusal to set aside the default judgment constitutes an abuse of discretion.

That the motion was timely is clear. Rule 60(b) imposes a three month time limitation when the motion to set aside is neglect. As soon as appellant became aware of the entering of the default judgment through service by mail of the Judgment and Decree of Foreclosure dated May 14, 1979, he immediately contacted present counsel who prepared a Motion to Vacate Judgment on May 18, 1979 (only four days after the notice of judgment was placed in the mail), which motion was filed May 31, 1979 (seventeen days after mailing of notice of judgment). This motion was not noticed up for hearing until June 18, 1979 due to the illness of the trial court, a fact which is not brought out in the record, but which can be verified. In any event, appellant acted with dispatch and well within the three month framework provided by Rule 60(b).

Furthermore, appellant provided reasonable grounds for the failure to be present on the trial date, which grounds constitute excusable neglect. Appellant never received notice informing of the date that had been set for trial. Appellant's conduct prior to and subsequent to the default militates against any other conclusion. Appellant, upon the service of the Complaint which initiated this action, promptly answered interposing several

mertorious defenses and also filed a counterclaim. Once again, upon learning of the default judgment, appellant moved with dispatch in seeking to have the judgment set aside. Never has appellant manifested an intention to abandon this action. To the contrary, appellant has shown the diligence of one who is being sued for a substantial amount of money in damages (over \$46,000) and who is counterclaiming for damages in excess of \$150,000. The showing made by appellant is sufficient to require the exercise of discretion in its behalf to set aside the default judgment.

It is apparent that in exercising its discretion to set aside a default judgment the trial court is engaged in a balancing process between two valid considerations. Warren v. Dixon Ranch Co., 260 P.2d 711 (1953). In that case this Court stated:

"A rule which would permit the re-opening of cases previously decided because of error or ignorance during the progress of the trial would in large measure vitiate the effects of res judicata and create a hardship to the successful litigant in causing him to prosecute his action more than once and possibly lose the ability to collect his judgment; on the other hand, the court is anxious to protect the losing party who has not had the opportunity to present his claim or defense."

Thus, the court, in exercising its discretion to refuse to set aside a default judgment must weigh between the advantage of enforcing the effect of res judicata and the disadvantage of not

conducting a hearing on the merits. While a contested action yields a judgment wherein the value of res judicata is greatest, a default judgment followed by a delayed appearance, as in the instant case, carries with it a very low value of finality, that is,

"There has been no examination of the merits or, usually, matters of abatement such as the statute of limitations, and no substantial investment of judicial time and authority. At the same time, the appearance itself, even though delayed, indicates that the defaulting party wishes to contest the justness of the plaintiff's claim. Indeed, the only purpose the default has served is that of enforcing the rules concerning time appearance."

Restatement, Second, Judgments, Tentative Draft No. 6, pg. 19.

It appears that the concerns manifested by this Court in Warren, supra, with respect to vacating judgments are outweighed by the benefits that would be bestowed by a hearing on the merits in the instant case. That is, the value of res judicata is low since there has been a minimal investment of judicial time and authority and since respondent would not be substantially prejudiced by a setting aside of the default and a re-hearing on the merits. Respondent will not be prejudiced in his ability to collect the judgment and any costs and attorney fees incurred by respondent in taking the default judgment can be made a condition precedent to the setting aside of the judgment. Thus, respondent would in no way be prejudiced by a setting aside of the default judgment. Furthermore, it is well established that

in all doubtful cases, the court should resolve any doubt in the balancing process towards granting relief from the default so as to bring about a trial on the merits. Cutler v. Haycock, 90 P. 897 (1907), Hurd v. Ford, 276 P. 908 (1929), Trumbo, supra. Additionally, the Court in Culter made the point that when a difference of opinion exists between the trial court and the appellate court as to whether a reasonable basis exists for setting aside the default judgment, then the judgment shall be set aside:

"...While as we have already stated, the mere difference of judgment between this court and the trial court may not be conclusive, still it raises a serious doubt, and in such a case a reasonable doubts is always resolved in favor of granting a trial upon the merits where none was had..."

It should not be forgotten that the allowance of a vacation of judgment is a creative of equity and the equity takes into consideration factors which may be irrelevant in actions at law, such as the unfairness of a party's conduct, his delay in bringing or continuing the action and the hardship in granting or denying relief. Warren v. Dixon Ranch, 260 P.2d 741 (1959). Similarly, Professor Moore cites the following factors as being relevant to the exercising of discretion:

- 1) the general desirability that a final judgment should not be lightly disturbed;
- 2) the Rule should be liberally construed for the purpose of doing substantial justice;

3) whether, although the motion is made within the maximum time provided by the Rule, the motion is made within a reasonable time;

4) if the relief is sought from a default judgment, whether in the particular case the interest of deciding cases or the merits outweighs the interest in orderly procedure and in the finality of judgments;

5) whether there is merit in the defense or claim;  
and

6) whether there are any intervening equities which make it inequitable to grant relief. 7 Moore's Federal Practice, § 60.19.

With reagrd to these above cited factors, the above statement can be made concerning the instant case:

1) The motion was made with dispatch and in a reasonable time (17 days) well within the three month limitation imposed by Rule 60(b);

2) Appellant has meritorious defenses and a meritorious counterclaim involving substantial sums of money which will cause appellant severe economic hardship if the motion is not granted;

3) No prejudice will result to respondent if a trial on the merits is ordered since respondent will have no greater difficulty enforcing a subsequent judgment and the reimbursement of any costs or attorney's fees incurred by respondent in obtaining the judgment can be made a condition precedent to the setting aside



of the default;

4) The value of the trial judgment is minimal in the default situation since little judicial energy was exhausted in entering the default; and

5) Justice requires the Rule to be liberally construed and any doubt should be resolved in favor of setting aside the default.

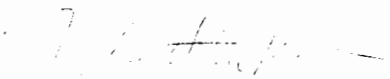
#### CONCLUSION

"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."

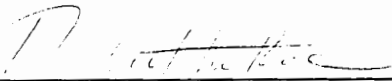
Westinghouse Electrice Supply v. Larsen, 544 P.2d 876 (1975).

The refusal of the lower court to set aside the default judgment constituted an abuse of discretion. Appellant did timely file his motion to set aside supported by reasonable grounds. Disputed issues should be disposed of on substantive, rather than technical grounds in the interest of justice and fair play.

Respectfully submitted this 26th day of October, 1979.

  
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MAILED OR DEVLIERED personally a copy of the foregoing  
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Attorneys for Plaintiff-Respondent, Judge Building, #430, Salt  
Lake City, UT 84111, this 26th day of October, 1979.

  
\_\_\_\_\_  
Robert M. McRae