1979

Interstate Excavating, Inc v. Agla Development Corporation : Respondent's Brief

Utah Supreme Court

SUPREME COURT OF UTAH

STATE OF UTAH

INTERSTATE EXCAVATING, INC., :

Plaintiff-Respondent, :

vs. : Case No. 16599

AGLA DEVELOPMENT CORPORATION, :

Defendant-Appellant. :

RESPONDENTS BRIEF

APPEAL FROM DEFAULT JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT OF SALT LAKE COUNTY
THE HONORABLE JAY E. BANKS, PRESIDING

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RESPONDENTS BRIEF

STATEMENT OF KIND OF CASE

Respondent, Interstate Excavating, Inc., brought suit against appellant for sums due for labor and materials for construction of sewer and water systems in two subdivisions. Appellant Counterclaimed for back-charges.

DISPOSITION IN THE LOWER COURT

The Third District Court, Judge Jay E. Banks, entered a default judgment against appellant at trial and dismissed appellant's counterclaim. Appellant's Motion to vacate the judgment was denied by Judge Banks, after hearing, on June 18, 1979.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Order denying its Motion to vacate the default judgment.

STATEMENT OF FACTS

Respondent, Interstate Excavating Inc., commenced an action against appellant, Agla Development Company on May 16, 1978 after appellant refused to pay for labor and materials for construction of the water and sewer systems in two subdivision (Falcon Hurst #1 and Falcon Hurst #2) located in Salt Lake County, State of Utah. (R.2-7) Prior to the action being brought, respondent, by agreement and in reliance thereon that payment would be made by appellant, released 66 lots in Falcon Hurst #1 and 55 lots in Falcon Hurst #2, under its materialmans lien. (R.15-16)

An answer and counterclaim was filed to respondent's complaint on behalf of appellant by its attorney, Robert J. Haws. (R.10-14) A reply was made to the counterclaim. (R.21-22) The case was set for trial on May 7, 1979, pursuant to notice that was served on each of the parties by the Clerk of the Court by mailing to the respective attorneys. (R.24) A pre-trial settlement conference was held before Judge Hal G. Taylor on April 16, 1979, pursuant to order and notice from the Clerk of the Court duly served by mailing on each of the parties. (R.25-28) A notice of withdrawal of counsel was filed with the Court on April 13, 1979, by Robert J. Haws, attorney for the appellant. (R.27) At the pre-trial settlement conference, appellant's counsel requested that he be allowed to withdraw and was granted permission to do so by Judge Taylor. (R.28) Respondent's attorney

was instructed by Judge Taylor to notify the appellant that his counsel had withdrawn, to appoint new counsel, and of the trial setting of May 7, 1979. (R.28) Notice was sent to the appellant, at its business offices the same day of the pre-trial settlement conference, April 16, 1979, by respondent's attorney, as instructed. (R. 29)

Respondent appeared at trial on May 7, 1979, prepared to prove its claims. Appellant failed to appear at trial, either by corporate officer or counsel. A judgment by default was granted in favor of respondent after evidence was presented at the request of the Court by respondent in support of its claims. The counterclaim of appellant was dismissed with prejudice on Motion of respondent. (R.30-34) A copy of the judgment and decree of foreclosure was served upon appellant by mailing to its corporate offices on May 14, 1979. (R.34)

After receiving a copy of the judgment, appellant obtained counsel and filed a verified motion to vacate the judgment. (R.35-36) The motion of appellant was denied by Judge Banks at a hearing held thereon, June 18, 1979. (R.37) A copy of the order denying appellant's motion was mailed to Mr. DeLand, appellant's counsel on June 18, 1979 and was signed by Judge Banks on July 6, 1979. (R.38) Appellant appealed the order denying its motion to vacate the judgment by notice of appeal filed July 19, 1979. (R.39)

The statement of appellant, in its brief under "Statement of Facts," that "no notice of the trial date was received until

a copy of the default judgment was received" is not supported by the facts in this case. Appellant received two notices of the trial setting prior to the trial, the first from its attorney, Mr. Haws, and the second from respondents counsel. Both the notice of withdrawal of counsel (R.27) and the notice to appoint counsel (R.29) which were mailed to appellant at its corporate offices, gave appellant notice of the trial date. The receipt of the notice of withdrawal of counsel is not denied by appellant and the receipt of the notice to appoint counsel is admitted by Lafe Brown, appellant's President.

ARGUMENT

DENIAL OF APPELLANTS MOTION TO VACATE JUDGMENT WAS WITHIN SOUND DISCRETION OF THE TRIAL COURT.

The Motion of appellant to vacate the judgment was made pursuant to Rule 60(b)(1) of the Utah Rules of Civil Procedure, the only provisions of law justifying the setting aside of a default judgment. This rule provides relief from a final judgment for reasons of "mistake, inadvertance, surprise or excusable neglect".

It is apparent from the uncontroverted facts, that none of these grounds exist in the instant case. For this reason, the denial of the motion to vacate the judgment was a proper exercise of the discretion of the trial Court.

Since Lafe Brown, President of Agla Development, the appellant, was specifically informed as to his obligation to appoint counsel, after his counsel had withdrawn, (he having fired his counsel) and had received at least two notices of the trial

date, (notice of withdrawal of counsel and notice to appoint counsel) and was given ample time in which to act, there are no grounds whatsoever to reasonably argue that his failure to appoint counsel and appear at the scheduled trial was by reason of mistake, inadvertance, surprise or excusable neglect. Lafe Brown, as President of Agla Development, the appellant, had ample notice to appoint counsel and appear at the scheduled trial but willingly chose to ignore the notices he received under the state of the circumstances.

The sole excuse for failing to appoint new counsel and appearing at the scheduled trial, is the claim that the notice to appoint counsel was misplaced with numerous pleadings served upon defendant at its office by mail. If this constitutes neglect, it is far from "excusable neglect" since Lafe Brown, appellant's President, had fired Mr. Haws, was informed of the trial date and the requirement that he appoint new counsel at least three weeks prior to the scheduled trial. Having failed to take any action to appoint new counsel and appear at the trial after admittedly receiving notice in ample time to do so, constitutes willful conduct on the part of the appellant. Willful conduct cannot constitute "neglect". It follows with even greater force that willful conduct cannot constitute "excusable neglect". The claim of Lafe Brown, President of appellant, "that the notice of trial was not received until a certificate of mailing of the judgment of foreclosure, under date of May 14, 1979, was served", is clearly not supported by the facts and is contradicted by

the verified motion of Mr. Brown.

The situation involved in the instant case has some simila to that involved in Heath v. Mower, 597 P.2d 855 (1979). In that case, the attorney for the defendant, Mower, filed a notice of withdrawal of counsel with a certification that a copy of the withdrawal had been sent to the defendants last known address. Later, an amended notice of withdrawal of counsel was sent to the defendant after his attorney learned of his current address. The deputy clerk of the District Court prepared a notice of pre-trial indicating that pre-trial was set for April 20, 1978. Copies of this document were sent to defendant's attorney, as well as the defendant by mailing. In addition to the notice of pre-trial sent by the deputy clerk, the plaintiff's attorney mail a copy of the notice of pre-trial by certified mail to the defendant which was returned "unclaimed". Plaintiff appeared for the scheduled pre-trial. Defendant, Mower, did not appear an was not represented by counsel. The Court received into evidence by proffer the notice of pre-trial which had been sent by certified mail to the defendant and returned "unclaimed" and docu ments relating to the substantive allegations of the plaintiff's amended complaint and granted a default judgment in favor of plaintiff against defendant Mower for fraudulent misrepresentatio in the amount of $13,225.63 plus costs and interest. The defenda contacted an attorney and timely filed a motion to set aside the default judgment on the basis of "excusable neglect" claiming that he had never received a notice of pre-trial which was sent certified mail and returned "unclaimed" and that he became aware

of the pre-trial hearing through a telephone conversation with his former wife. Defendant made no specific mention of whether he had received the notice of pre-trial mailed by the deputy clerk of the District Court approximately one month prior to the scheduled pre-trial and that he did not know of the withdrawl of his attorney until seven days before the scheduled pre-trial. The trial Court denied the motion to set aside the default judgment after finding that defendant knew about the pre-trial date, that he had received timely notice, and that the withdrawl of his attorney had taken place months prior to the date of pre-trial. This Court upheld the action of the trial Court and refused to set aside the default judgment. The basis of the decision was as follows:

> "In the case before us, the defendant did not offer the trial Court a reasonable excuse for his non-appearance so as to bring him under the rule that the Court should liberally excersise their power to set aside default judgments. Repeated attempts were made by the Court, by counsel for the adverse party and by Mower's own attorney to contact him regarding the status of the law suit he knew was pending. Despite the fact that Mower's first attorney certified that he had sent a notice of withdrawl of counsel to Mower's Washington State residence on March 2, Mower claimed he did not learn of the withdrawl until April 12th. Despite the fact that the District Court Clerk's office sent Mower a notice of pre-trial to his Washington State residence on March 8th and despite the fact that plaintiff's counsel mailed a copy of the same notice by certified mail to Mower's Washington residence, Mower claimed he didn't learn of the pre-trial hearing until March 18th.
>
> "Moreover, neither defendant's mail-gram nor his affidavit in support of his motion to set aside the second default judgment offers a full and

> complete enough explanation for defendant's non-appearance sufficient to mandate a trial Court setting aside the judgment.****Mower also incorrectly stated in his affidavit that this mail-gram indicated to the Court "he had received no notice of the hearing and that he did not have time to retain another attorney or to prepare for the hearing". Aside from these vague and sometimes incorrect statements, Mower's affidavit does not attempt to explain the reasons for his failure to appear at the pre-trial hearing".

In the instant case, notice to appoint counsel was sent directly to Lafe Brown, President of appellant, at the instruction of Judge Taylor, and clearly states he was to appoint new counsel to represent defendant in that Mr. Haws had withdrawn and placed appellant on notice that the case was set for trial on May 7, 1979 at 10:00 a.m. Receipt of this notice was acknowledged by Mr. Brown in his verified motion to vacate the judgment. Mr. Haws sent notice on April 12, 1979 directly to Mr. Brown at the offices of Agla Development of his withdrawal, which notice also contained notice of the trial date. The Clerk of the Court routinely called each of the parties the day before trial to inform them of the Judge to which the case had been assigned. Mr. Brown, having fired his attorney Mr. Haws, could not deny that he had notice of the withdrawl of his counsel. The Court was not obliged to believe the somewhat questionable excuse given by Mr. Brown in the verified motion to vacate the default judgment, that the notice to appoint counsel was misplaced and that he had no notice of the trial date until May 14, 1979. (R.35-36) In view of these facts, the trial Courts conclusion that Mr. Brown's failure to heed the notices received was his

"deliberate choice" does not seem unreasonable. The conclusion to the contrary is unreasonable and therefore does not constitute excusable neglect. The instant case has a much stronger basis for denial of the motion to vacate the default judgment under a claim that notice to appoint counsel was not received or was misplaced since, unlike the Mower case, the defendant had fired its attorney, and was clearly placed on notice of the trial setting and of its obligation to appoint counsel. That the failure of the defendant to respond was due to carelessness and negligence on the part of defendant's President, Mr. Brown.

"Carelessness" is not synonymous with "excusable neglect" on the basis of which a default judgment may be set aside. Beyerle Sand and Gravel, Inc. v. Martinez (Arz. 1977) 574 P.2d 853. In this case the Arizona Court determined the fact that the Vice-President of the Corporation had been careless in failing to retain an attorney to file an answer in an action for breech of lease was not "excusable neglect" on the basis of which a default judgment could be set aside. Excusable neglect with respect to failure to appear for trial involves a situation where failure to act resulted from circumstances which would cause a reasonably careful person to neglect his duties, but failure to act do to carelessness and negligence is not "excusable neglect" that would entitle one to have a judgment against him set aside. Watered Down Farms v. Rowe (Colo. 1977) 566 P.2d 710.

If illness is not excusable neglect, Warren v. Dixon Ranch Co. 123 Utah 416, 260 P.2d 741 (1953), certainly carelessness in

failing to appoint new counsel and appear at trial where due notice has been given does not constitute excusable neglect. Moreover, it has been specifically held that a party trying to set aside a default judgment "must show that he has used due deligence, and he was prevented from appearing by circumstance over which he had no control." (Emphasis added) AirKem Intermoun tain Inc., v. Parker, 513 P.2d 429, (1973). Where notice of trial had been communicated to the adverse party in sufficient time to enable appearance and to defend the action, there is no claim for excusable neglect.

The question is one presented to the discretion of the trial Judge, and will be set aside only if there is a clear abuse discretion. Warren v. Dixon Ranch Co., (Supra); Board of Educatio of Granite School District v. Cox, 14 Utah 2d 385, 384 P.2d 806 (1963); AirKem Intermountain Inc., v. Parker (supra 1973). The facts before the Court give no basis for a finding that the trial Court abused its discretion in these circumstances. It is apparent that the trial Court did not believe the statements of Lafe Brown as contained in the verified motion to vacate the default judgment and found that the failure to appoint new counsel and to appear at trial after adequate notice was given was carelessness and negligence on appellant's part. (T.4,line 19 to T.5 line 25) Generally, this Court will not substitue its discretion for that of the trial Court. The rule that Courts will incline towards granting relief to a party requesting relief from a final judgment to one who has not had opportunity to present his case, is ordinarily applied at the trial Court level,

and the Supreme Court will not reverse the determination of the trial Court merely because the motion to vacate the judgment could have been granted. AirKem Intermountain Inc. v. Parker (Supra 1973); Warren v. Dixon Ranch Co. (Supra 1953). Only where there is a clear abuse of this discretion will the trial Court be reversed and each case must be determined on its own facts and circumstances as they appear at the trial Court level. Heath v. Mower (Supra 1979).

Respondent has never taken issue with the timeliness of appellant's motion to vacate the default judgment. The argument of appellant on page 7 of its brief that it provided reasonable grounds for the failure to be present at trial as constituting "excusable neglect", is not supported by the facts. The claim of appellant that notice was never received of the trial date prior to the trial is clearly contradicted by the verified affidavit of Mr. Brown, President of appellant, and the record that was before the trial Court.

The appellant, raises on appeal for the first time, pursuant to motion to supplement the record, additional statements by affidavit of Lafe Brown, appellant's President. Statements which were not before the trial Court and are based primarily upon information and belief. Matters that are stated upon information and belief are not proper matters for affidavits. Where the statements contained therein are raised for the first time on appeal, this Court should decline to decide the issue before the Court on such statements. Nelson v. Newman, Utah, 583

P.2d 601 (1978).

CONCLUSION

The issue before the Court is whether the circumstances surrounding the defendants failure to appoint new counsel and appear at the scheduled trial constitute excusable neglect. The record before the trial Court clearly sets forth facts that appellant was given adequate notice of the trial setting, both by its attorney, Mr. Haws pursuant to the notice of withdrawa of counsel and the notice sent by respondents counsel to appoint new counsel. Further, the Clerk of the Court notified the parties the day before trial as to the Judge to which the case was assigned for trial. That the notice to appoint counsel and of the trial setting was in fact received by appellants President, Mr. Brown, but was put aside, ignored and then claimed to have been misplaced. These facts demonstrate that the trial Court did not abuse its discretion in finding there was no excusable neglect justifying the setting aside of the default judgment.

DATED this 27 day of November, 1979.

RESPECTFULLY SUBMITTED,

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MAILING CERTIFICATE

I hereby certify that I mailed two copies of the Respondent's Brief, pstage prepaid, to Robert W. McRae, McRae & DeLand, Attorney's for Appellant, 72 East Fourth South #355, Salt Lake City, Utah 84111 this 27 day of November, 1979.