

1989

Jerry Gillespie dba Jerry's Drywall and Pamela Gillespie v. John Pizzello : Brief of Respondent

Utah Court of Appeals

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BRIEF

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DOCKET NO.

890387-CA

IN THE UTAH COURT OF APPEALS

JERRY GILLESPIE dba JERRY'S
DRYWALL and PAMELA GILLESPIE

Plaintiff and
Respondents,

vs.

JOHN PIZZELLO,

Defendant and
Appellant.

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Case No. 890387-CA

Category 14(b)

BRIEF OF RESPONDENT

Appeal from the order denying motion to set aside default
of the Third Judicial District Court, Salt Lake County
Honorable Scott Daniels

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OCT 25 1999

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PARTIES TO THE PROCEEDING

Plaintiffs and Respondents:

Jerry Gillespie dba Jerry's Drywall
Pamela Gillespie

Defendant and Appellant:

John P. Pizzello

Other Defendants, not parties to this appeal:

Dale W. Geurts
Sprinklers, Sod & Such

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JURISDICTIONAL STATEMENT AND NATURE OF PROCEEDINGS

Jurisdiction lies with this Court pursuant to Utah Code Ann. § 78-2a-3(2)(j) (Supp. 1989). On March 21, 1989, an order (R. 74-75; Addendum A hereto) was entered in the Third Judicial District Court of Salt Lake County, the Honorable Scott Daniels presiding, denying the Motion to Set Aside Default Judgment made by the defendant John P. Pizzello ("Pizzello"). The defendant's appeal is from the order entered March 21, 1989.

STATEMENT OF ISSUES

1. Whether the trial court was within its discretion in denying the defendant's motion to set aside the default judgment in favor of the plaintiffs.

2. Whether the trial court was within its discretion in concluding that there had been valid service of process on the defendant.

3. Whether the trial court was within its discretion in concluding that the defendant had not shown excusable neglect in failing to respond to the Amended Complaint in this action.

4. Whether due process prohibits requiring a showing of meritorious defense as a prerequisite to setting aside a default judgment, where valid service of process has been obtained, and if not, whether the defendant has clearly shown a meritorious defense. (For reasons stated in Point IV, infra, the plaintiff contends that this issue need not be reached.)

DETERMINATIVE AUTHORITIES

Rule 4, Utah Rules of Civil Procedure, copy attached as Addendum B.

Rule 60, Utah Rules of Civil Procedure, copy attached as Addendum C.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings and Disposition in the Court Below.

The plaintiffs agree with the defendant's description of the nature of the case, the course of proceedings and the disposition in the Court below.

Statement of Facts.

The plaintiffs submit that the following facts, in addition to those stated by the defendant, are relevant and material to this appeal:

1. In addition to attesting as described in ¶7 of the brief of the defendant and in the Affidavit of Service filed with the original Summons (R. 36-37 incl. back; Addendum D hereto), the plaintiffs' process server, David T. Holland, attested in his sworn affidavit filed February 2, 1989 (R. 68-72; Addendum E hereto) as follows concerning his service of the defendant:

(a) As Mr. Holland first approached the door to the apartment identified as Pizzello's, the person later served parked a vehicle in the apartment complex parking area and walked toward the stairway to Pizzello's apartment. Upon seeing Mr. Holland, the same person returned to the parking area and drove away in the vehicle in which he had arrived, not returning for

approximately one hour, after which he passed through the parking area and exited three times within a short span of time before returning and parking. (R. 68-72, Addendum E hereto, ¶¶ 6, 7, 8, 9.)

(b) After the person had returned yet again, parked the vehicle in which he was driving, and gone into the apartment identified as Pizzello's, Mr. Holland knocked on the door, announced his status as an officer of the court and that he was attempting to serve a summons and complaint upon Pizzello. Mr. Holland yelled and knocked on the door for approximately ten minutes, making a commotion loud enough to disturb the neighbors, but received no response. (R. 68-72, Addendum E hereto, ¶¶ 12, 13, 14, 15.)

(c) After the person inside the apartment had failed to respond to Mr. Holland's knocking and yelling, Mr. Holland then announced in a loud voice that he was an officer of the court, that service of the summons and complaint which he had brought had been accomplished, and that Mr. Holland was leaving copies thereof outside the apartment door. Mr. Holland left copies of the Summons and Amended Complaint in front of the apartment door, specifically observing that there were no other documents or other paraphernalia in the area. Within less than five minutes thereafter, Mr. Holland observed the same person whom he had earlier observed entering the apartment, exit from the apartment, bend down and pick up something, return to the same vehicle in which he had arrived and drive away. (R. 68-72, Addendum E hereto, ¶¶ 16, 17, 18, 19[1].)

(d) Mr. Holland then waited several minutes and returned to the doorway of the apartment at which he had previously left copies of the Summons and Amended Complaint, and verified that they were no longer there. No other persons had passed in front of the apartment doorway in the interim. (R. 68-72, Addendum E hereto, ¶ 19[2].)

(e) Mr. Holland identified, from a photograph, the person whom he had served as the defendant Pizzello. (R. 68-72, Addendum E hereto, ¶ 22.)

(f) The person whom Mr. Holland had served had parked the vehicle which he was driving in a space correlated by written description with Pizzello's apartment. (R. 68-72, Addendum E hereto, ¶ 10.)

(g) The vehicle driven by the person whom Mr. Holland had served was later identified as registered to Pizzello. (R. 68-72, Addendum E hereto, ¶ 20.)

2. Pizzello has placed on the record no sworn statement or other evidence that he was not in fact placed in possession of copies of the Summons and Amended Complaint in this action.

3. Default judgment in favor of the plaintiffs was entered pursuant to hearing on September 20, 1988. In order to appear at the hearing, it was necessary that the plaintiffs drive to Salt Lake City from Las Vegas, Nevada. (R. 39, 40-41, 51, 53.)

4. In seeking to have the default judgment in the plaintiffs' favor set aside, Pizzello argued that he had not responded because "defendant did not feel that he had any responsibility with regards to the accident" (R. 45) and that "he felt he had no responsibility" (R. 63).

SUMMARY OF ARGUMENT

1. The determination of whether to set aside a default judgment is within the broad discretion of the trial court, and may be set aside only if an abuse of discretion is clearly shown. There is nothing on the record to indicate an abuse of discretion by the trial court.

2. The trial court's conclusion that Pizzello had been properly served was based on credible evidence on the record, and no contrary evidence was submitted by Pizzello. The decision whether or not to believe the plaintiffs' evidence was a decision to be made by the trial court rather than the appellate courts. The factual findings of the trial court may only be disturbed if they are clearly against the weight of the evidence. The trial court having found that Pizzello was served, and its finding having been based on uncontroverted evidence, its finding may not be reversed on appeal.

3. In the District Court, Pizzello sought to have the default judgment against him set aside on a theory of excusable neglect. In order to show excusable neglect, a defendant seeking relief from a default judgment must show both (i) that he or she exercised due diligence, and (ii) that he or she was prevented

from appearing by circumstances over which he or she had no control. Pizzello's argument that he believed that he did not need to respond to the complaint in this action failed to satisfy either requirement, is opposed to Utah case authority, and is unsupported by any evidence on the record. Therefore, the trial court's conclusion that Pizzello had not proven excusable neglect was clearly within its broad discretion.

4. No basis exists for presuming that the District Court ever reached the issue of whether or not Pizzello had shown a meritorious defense. The meritorious defense issue would only have been reached if Pizzello had first persuaded the court of his excusable neglect. A ruling by the District Court is to be affirmed if there exist any grounds for affirmance, and the District Court's ruling should be affirmed on the basis of Pizzello's failure to show excusable neglect. Therefore the issue of whether Pizzello had shown a meritorious defense, and the issue of whether Pizzello could constitutionally have been required to make such a showing, need not be reached.

5. Even if it be assumed arguendo that the District Court reached the issue of whether or not Pizzello had shown a meritorious defense, and decided that he had not, the District Court's ruling should be affirmed. The due process clause, as interpreted by the United States Supreme Court, only mandates that a meritorious defense may not be required where valid service was never obtained. Because valid service was obtained in this instance, it would have been proper to require that a

meritorious defense be shown before the default judgment could be set aside.

ARGUMENT

POINT I

THE DISTRICT COURT'S DETERMINATION NOT TO SET ASIDE A DEFAULT JUDGMENT MAY NOT BE REVERSED ON APPEAL UNLESS AN ABUSE OF DISCRETION HAS BEEN CLEARLY SHOWN. THE DEFENDANT HAS SHOWN NO ABUSE OF DISCRETION IN THIS CASE.

The Utah Supreme Court has repeatedly held that the determination of whether to set aside a default judgment is one within the broad discretion of the trial court, and a default judgment is to be set aside by the appellate courts only when an abuse of discretion is clearly shown. Katz v. Pierce, 732 P.2d 92 (Utah 1986); Russell v. Martell, 681 P.2d 1193 (Utah 1984); Gardiner and Gardiner Builders v. Swapp, 656 P.2d 429 (Utah 1982); Airkem Intermountain, Inc. v. Parker, 30 Utah 2d 65, 513 P.2d 429 (1973); Masters v. LeSeuer, 13 Utah 2d 293, 373 P.2d 573 (1962); Warren v. Dixon Ranch Co., 260 P.2d 741 (Utah 1953).

In Katz v. Pierce, supra, the Court said:

[B]efore we will interfere with the trial court's exercise of discretion, abuse of that discretion must be clearly shown. Russell v. Martell, 681 P.2d 1193 (Utah 1984). That some basis may exist to set aside the default does not require the conclusion that the court abused its discretion in refusing to do so when facts and circumstances support the refusal. Cf. Wilson v. Miller, 198 Kan. 321, 424 P.2d 271, 273 (1967).

Id. at 93, citations in original. In Russell v. Martell, supra, cited in the foregoing, the Court said:

Broad discretion is accorded the trial court in ruling on relief from a judgment; and, this Court will reverse that ruling only if it is clear the trial court abused its discretion.

Id. at 1194.

The decision of whether or not to accept Pizzello's arguments was within the sound discretion of the trial court. In Airkem Intermountain, Inc. v. Parker, supra, the Court stated the standard of review as follows:

[T]his court will not reverse the determination of the trial court merely because the motion could have been granted.

Id. at 431. The determination made by the District Court was within the broad discretion normally given to the District Court in this area. Therefore, the District Court's determination should be upheld.

POINT II

THE TRIAL COURT'S DETERMINATION THAT VALID SERVICE WAS OBTAINED WAS A FACTUAL DETERMINATION, BASED ON CREDIBLE AND UNCONTROVERTED EVIDENCE, WHICH IS PROPERLY WITHIN THE PROVINCE OF THE TRIAL COURT AND IS THEREFORE NOT SUBJECT TO REVERSAL ON APPEAL.

Rule 4(i) of the Utah Rules of Civil Procedure provides:

Refusal of copy. If the person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the same shall state the name of the process and offer to deliver a copy thereof.

Pizzello misstates the record in two important respects in arguing that service was not valid under the quoted provision. Pizzello incorrectly states that "at no time was this individual

[the person served] identified as defendant Pizzello" (Brief of Appellant, page 21). To the contrary, the affidavit of the plaintiffs' process server, David T. Holland, demonstrates his identification of Pizzello from a photograph, the fact that the motor vehicle driven by the individual served was registered to Pizzello, and the correlation between the parking space used by the individual served and Pizzello's apartment. (Affidavit of David T. Holland, R. 68-72, Addendum E hereto, ¶¶ 10, 20, 22.)

In addition, Pizzello incorrectly states that "[t]here is nothing in the record to suggest that the defendant Pizzello refused to be served" (Brief of Appellant, page 21). To the contrary, the affidavit of Mr. Holland shows Pizzello's failure to come to the door and accept service of process despite some ten minutes of yelling and knocking by Mr. Holland. (Affidavit of David T. Holland, R. 68-72, Addendum E hereto, ¶ 14.) Pizzello attempts to distinguish between the affirmative verbal refusal ruled upon in Wood v. Weenig, 736 P.2d 1053 (Utah App. 1987), and his own silence and failure to answer the door. Pizzello cites no authority for the proposition that silence or inactivity may not constitute a refusal.

It is undisputed that a person identified as Pizzello entered the apartment before Mr. Holland attempted to serve him and did not leave the apartment until afterward. (Affidavit of David T. Holland, R. 68-72, Addendum E hereto, ¶¶ 12, 19.) The obvious inference, which the District Court was free to draw, is that Pizzello was inside his apartment at the time. The District

Court was also free to find a refusal in Pizzello's failure to come to the door despite a commotion loud enough to disturb the neighbors. (Affidavit of David T. Holland, R. 68-72, Addendum E hereto, ¶ 14.) If the District Court were not free to draw such an obvious conclusion, but were only permitted to find a refusal when the refusal was verbally stated, then the "degrading game of wiles and tricks" referred to with disapproval in Wood v. Weenig, supra, at 1055, could be carried to new extremes simply by maintaining silence.

Finally, there is no basis in the record to conclude that copies of the Summons and Amended Complaint were not in fact placed in Pizzello's possession. According to the affidavit of Mr. Holland, Pizzello opened the door within a few minutes after copies of the Summons and Amended Complaint had been left in front of his door (no other documents or objects having been in the area), picked up something and studied it, went to his car and drove away. Mr. Holland then verified that the copies which he had left were no longer on Pizzello's doorstep, although no other persons had passed in front of Pizzello's doorway. (Affidavit of David T. Holland, R. 68-72, Addendum E hereto, ¶¶ 17, 19, 19 [sic].) The obvious inference, which the District Court was free to draw and which is not contradicted by any evidence placed on the record, is that Pizzello picked up the copies of the Summons and Amended Complaint which had been placed on his doorstep and took them with him. Service was therefore complete under Rule 4(e)(1), Utah Rules of Civil Procedure, which provides for personal service:

Upon a natural person of the age of 14 years or over, by delivering a copy thereof to him personally...

Pizzello filed no affidavit saying that he had not received copies of the Summons and Amended Complaint. Indeed, Pizzello argued in the District Court that he had not responded because "defendant did not feel that he had any responsibility with regards to the accident" (R. 45) and that "he felt he had no responsibility" (R. 63), theories which he would only have had occasion to reflect upon if he had in fact been placed in possession of copies of the Summons and Amended Complaint. However, Pizzello nonetheless seeks to have this Court rule, as a matter of law, that service did not occur.

The determination of disputed facts is the province of the trial court and not the appellate courts. Taylor v. Turner, 27 Utah 2d 39, 492 P.2d 1343 (1972). The factual findings of the trial court may only be disturbed if they are clearly against the weight of the evidence. Ute-Cal Land Development v. Intermountain Stock Exchange, 628 P.2d 1278 (1981); Farrell v. Turner, 25 Utah 2d 351, 482 P.2d 117 (1971). The District Court found the uncontroverted affidavit submitted by the plaintiffs credible, and drew the obvious inferences therefrom. Therefore, the District Court's factual finding that Pizzello had been served may not properly be reversed on appeal.

POINT III

THE TRIAL COURT'S DETERMINATION THAT THE DEFENDANT HAD NOT DEMONSTRATED EXCUSABLE NEGLIGENCE WAS PROPERLY WITHIN THE DISCRETION OF THE TRIAL COURT AND IS THEREFORE NOT SUBJECT TO REVERSAL ON APPEAL.

Pizzello relies upon Rule 60(b)(1), Utah Rules of Civil Procedure, which permits the District Court, within its discretion, to set aside a default judgment on grounds of "mistake, inadvertance, surprise, or excusable neglect". Pizzello argued before the District Court that "defendant did not feel that he had any responsibility" (R. 45) and that "he felt he had no responsibility" (R. 63). Pizzello's argument was very similar to that rejected by the Court in Russell v. Martell, 681 P.2d 1193 (Utah 1984). In Russell, one of the defendants, Mills, had failed to answer the complaint because he "felt no legal obligation to [the plaintiff] and did not feel motivated by the lawsuit to address [the plaintiff's] claims." Id. at 1194. In affirming the District Court's refusal to set aside the default judgment entered against Mills, the Utah Supreme Court said:

[H]is undenied statements that he felt no legal obligation to respond to the plaintiffs' claims support the trial court's denial of his motion.

Id. at 1195, emphasis added.

In effect, Pizzello argues that the District Court should have believed his theory that his neglect in failing to respond in this matter was excusable because he was merely a partner with the driver of the vehicle which collided with the plaintiff's vehicle. (Brief of Appellant, page 11.) However,

the decision of whether or not to accept Pizzello's theory was within the sound discretion of the trial court. Katz v. Pierce, 732 P.2d 92 (Utah 1986); Russell v. Martell, 681 P.2d 1193 (Utah 1984); Gardiner and Gardiner Builders v. Swapp, 656 P.2d 429 (Utah 1982); Airkem Intermountain, Inc. v. Parker, 30 Utah 2d 65, 513 P.2d 429 (1973); Masters v. LeSeuer, 13 Utah 2d 293, 373 P.2d 573 (1962); Warren v. Dixon Ranch Co., 260 P.2d 741 (Utah 1953).

In order to demonstrate that his or her neglect was excusable, a defendant seeking to have a default set aside must make two separate showings. As stated by the Utah Supreme Court in Airkem Intermountain, Inc. v. Parker, supra:

The movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control.

Id. at 431, emphasis changed. Pizzello has not stated any facts that indicate any diligence, or any efforts whatsoever, in attempting to determine the correctness or incorrectness of his belief that he was not required to respond. Moreover, he has cited no "circumstances over which he had no control" which might have prevented him from answering the Amended Complaint.

In addition, the District Court was free to consider the hardship and prejudice to the plaintiffs which would have resulted from setting aside the default judgment in their favor. Katz v. Pierce, supra; Airkem Intermountain, Inc. v. Parker, supra; Warren v. Dixon Ranch Co., supra. The plaintiffs had gone to considerable time and expense in driving to Salt Lake City for the hearing on the default judgment which took place on September 20, 1988.

In Airkem Intermountain, Inc. v. Parker, supra, the Court said the following with respect to the District Court's broad discretion in ruling on the defendant's claim of excusable neglect:

[T]his court will not reverse the determination of the trial court merely because the motion could have been granted.

Id. at 431. In the present case, the determination made by the District Court was clearly well within its broad discretion.

POINT IV

THE CONSTITUTIONAL ISSUE RAISED BY THE DEFENDANT NEED NOT BE REACHED, BECAUSE THERE IS NO INDICATION THAT THE DISTRICT COURT REACHED THE ISSUE OF WHETHER OR NOT A MERITORIOUS DEFENSE HAD BEEN SHOWN, AND BECAUSE THERE ARE SEPARATE GROUNDS FOR AFFIRMANCE.

In an apparent concession that he has not shown a meritorious defense, Pizzello argues that the District Court's ruling was a denial of due process because it allegedly was based on a requirement that Pizzello show a meritorious defense before the default judgment could be set aside. Pizzello makes his constitutional argument for the first time on appeal, after having argued in the District Court that his defense was in fact meritorious. An issue raised for the first time on appeal, which was not raised before the trial court, should not be considered on appeal. Heath v. Mower, 597 P.2d 855 (Utah 1979); Nelson v. Newman, 583 P.2d 601 (Utah 1978).

Pizzello disputes the constitutionality of the requirement of a meritorious defense as stated by the Utah

Supreme Court in State By and Through Department of Social Services v. Musselman, 667 P.2d 1053 (Utah 1983). However, in making his argument Pizzello necessarily glosses over the fact that there is nothing in the record to indicate that the District Court in the present action did base its ruling on the requirement of a meritorious defense. In Musselman, the Utah Supreme Court stated the sequence to be followed by the District Court:

[T]he policy in this jurisdiction requir[es] that the lower court consider and resolve the question of excusable neglect (when the motion to vacate the default judgment is based on excusable neglect) prior to its consideration of the issue of whether a meritorious defense exists.

Id. at 1056, emphasis added.

In the present case, as in Musselman, the issue of whether a meritorious defense existed would only have been reached if excusable neglect had already been shown. Although Pizzello states that he argued that there was excusable neglect, and that he argued that valid service was not made (Brief of Appellant, pages 12-13), Pizzello has cited nothing in the record to indicate that the District Court was persuaded by either of his arguments, and nothing in the record to indicate that the District Court even reached the issue of whether or not Pizzello had shown a meritorious defense. A ruling by the District Court is to be affirmed if there exist any grounds for affirmance. Global Recreation, Inc. v. Cedar Hills Development Company, 614 P.2d 155 (Utah 1980); Jespersion v. Jespersen, 610 P.2d 326 (Utah

1980); Allphin Realty, Inc. v. Sine, 595 P.2d 860 (Utah 1979); Goodsel v. Department of Business Regulation, 523 P.2d 1230 (Utah 1974). Pizzello's failure to demonstrate that service was improper or his neglect excusable (discussed supra, Points I-III) provides adequate grounds for refusing to set aside the District Court's ruling.

POINT V

A REQUIRMENT THAT A MERITORIOUS DEFENSE BE SHOWN WOULD NOT VIOLATE THE DEFENDANT'S RIGHT TO DUE PROCESS BECAUSE VALID SERVICE OF THE SUMMONS AND AMENDED COMPLAINT HAD BEEN OBTAINED.

As discussed supra (Point IV), the ruling of the District Court may be affirmed without reaching the issue of whether or not Pizzello demonstrated a meritorious defense. However, even if it be assumed arguendo that it is necessary to reach the issue of whether or not a meritorious defense existed, Pizzello's constitutional argument must fail.

Pizzello argues that the requirment of a showing of a meritorious defense, as set forth in the opinion of the Utah Supreme Court in State By and Through Department of Social Services v. Musselman, 667 P.2d 1053 (Utah 1983), discussed supra, constitutes an unconstitutional denial of due process. Pizzello relies on the opinion of Judge J. Thomas Greene in Gary Facio v. The Hon. Maurice Jones and Collection Management Agency, Inc., No. 88-C-965G (D. Utah 1989), which in turn is based on Peralta v. Heights Medical Center, Inc., 108 S.Ct. 896, 99 L.Ed.2d 75 (1988). The critical fact in Peralta, which is not present in this case, was that:

Citation issued, the return showing personal,
but untimely, service.

Id. at 897, emphasis added. As the Court further elaborated:

Here, we assume that the judgment against him [Peralta] and the ensuing consequences occurred without notice to appellant, notice at a meaningful time and in a meaningful manner that would have given him an opportunity to be heard.

Id. at 899. It is clear that the Court's holding in Peralta arose from the fact that Peralta had never been properly served, and therefore never had proper notice. The Court found a violation of due process where the Texas courts had required a showing of a meritorious defense in addition to a showing of improper service.

In Musselman, by contrast, it was undisputed that service had been proper. The defendant's attack on the default entered against him was based solely on a theory of excusable neglect, and the Court held that if excusable neglect were shown, a meritorious defense would need to be shown in addition. Musselman and Peralta may be reconciled by stating the rule to be that where service is improper or notice has not been given, the defendant may not be separately required to show a meritorious defense, but where the defendant seeks to have a default set aside on the basis of his own excusable neglect, he must also demonstrate a meritorious defense.

The reasons for the distinction are obvious. Where service has not occurred a default judgment is required to be set aside because the judgment has been entered without jurisdiction,

whereas the setting aside of a default judgment on the basis of excusable neglect is within the broad discretion of the trial court, which has jurisdiction. Moreover, where no service or notice was given the error was one which could only have been prevented by the plaintiff, but where the defendant's failure to respond arose from excusable neglect, the fault, although excusable, was that of the defendant and beyond the plaintiff's control.

The present case clearly falls under Musselman and not Peralta. The fact of proper service was accepted by the District Court (discussed supra, Point II), which apparently believed the affidavit of the plaintiffs' process server. Therefore, even if the District Court had found Pizzello's neglect to be excusable, it could have properly required, in addition, a showing by Pizzello that he had a meritorious defense.

CONCLUSION

The District Court determined, based on the sworn affidavit of the plaintiffs' process server, that Pizzello had been validly served with the Summons and Amended Complaint. The District Court based its factual determination on credible and uncontroverted evidence, which showed valid service despite Pizzello's deliberate attempts to avoid service. Therefore, the District Court's determination should be upheld on appeal.

Valid service having been obtained, Rule 60(b) places the determination of whether or not to set aside a default judgment within the broad discretion of the trial court. The

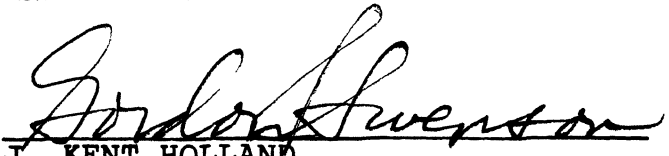
defendant having failed to persuade the District Court of his theory of excusable neglect, the discretionary ruling of the District Court should be affirmed.

The defendant apparently concedes that a meritorious defense was not shown. However, the due process argument which he makes instead for the first time on appeal has no application to this case. The District Court's ruling may properly be affirmed without any determination of whether or not the defendant has shown a meritorious defense. Moreover, a requirement of a meritorious defense is only prohibited as a violation of due process where proper service has not been obtained.

The District Court was within its province in choosing to believe the plaintiffs' process server, particularly because his affidavit was uncontroverted. The District Court made its determinations based on credible evidence and within its proper range of discretion. Accordingly, the plaintiff respectfully requests that this Court affirm the District Court's denial of the defendant's Motion to Set Aside Default Judgment.

RESPECTFULLY SUBMITTED this 25th day of October, 1989.

ANDERSON & HOLLAND


J. KENT HOLLAND
GORDON J. SWENSON
Attorneys for
Plaintiffs/Respondents

CERTIFICATE OF MAILING

I hereby certify that on this 25th day of October, 1989, four (4) true and correct copies of the foregoing Brief of Respondent were hand-delivered to:

Joseph J. Joyce
STRONG & HANNI
Sixth Floor Boston Building
Salt Lake City, Utah 84111

Gordon Swenson

ADDENDUM A

FILED DISTRICT COURT
Third Judicial District

J. KENT HOLLAND, #1520
ANDERSON & HOLLAND
623 East First South
P.O. Box 11643
Salt Lake City, Utah 84147-0643
Telephone: (801) 363-9345

MAR 21 1989

SALT LAKE COUNTY
By Loren Bush
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

GILLESPIE, JERRY
Plaintiff,

vs.

GEURTS, DALE W.

Defendant.

O R D E R

Civil No. C87-4401

Judge Scott Daniels

THE COURT having received Defendant John P. Pizzello's Motion to Set Aside Default Judgment, having considered the memoranda and Affidavits filed by the parties, having considered the pleadings and papers of record, and otherwise being fully advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. That Defendant's Motion to Set Aside Default Judgment be denied.

DATED this 21 day of March ~~February~~, 1989.

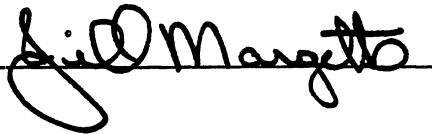
BY THE COURT:

Scott Daniels
Judge Scott Daniels
Third Circuit Court Judge

CERTIFICATE OF MAILING

I the undersigned do hereby certify that on the 28th day of February, 1989 I mailed a true and correct copy of the foregoing ORDER, postage prepaid to the following:

Joseph J. Joyce
STRONG & HANNI
Sixth Floor Boston Building
9 Exchange Place
Salt Lake City, Utah 84111

A handwritten signature in cursive script, appearing to read "Jill Margello", is written over a horizontal line.

ADDENDUM B

Rule 4. Process.

(a) **Issuance of summons.** The summons may be signed and issued by the plaintiff or his attorney. A summons shall be deemed to have issued when placed in the hands of a qualified person for the purpose of service. Separate summonses may be issued and served.

(b) **Time of issuance and service.** If an action is commenced by the filing of a complaint, summons must issue thereon within three months from the date of such filing. The summons must be served within one year after the filing of the complaint or the action will be deemed dismissed, provided that in any action brought against two or more defendants in which personal service has been obtained upon one of them within the year, the other or others may be served or appear at any time before trial.

(c) **Contents of summons.** The summons shall contain the name of the court, the names or designations of the parties to the action, the county in which it is brought, be directed to the defendant, state the time within which the defendant is required to answer the complaint in writing, and shall notify him that in case of his failure to do so, judgment by default will be rendered against him. If the summons be served without a copy of the complaint, or by publication, it shall briefly state the sum of money or other relief demanded, and in case of publication of summons such summons as published shall contain a description of the subject matter or res involved in the action. Where the summons is served without a complaint, it shall note therein that a copy of said complaint will be served upon or mailed to defendant within ten days after such service or that if the address of defendant is unknown, the complaint will be filed with the clerk of the court within ten days after such service.

(d) **By whom served.** The summons, and a copy of the complaint, if any, may be served:

(1) Within the state, by the sheriff of the county where the service is made, or by his deputy, or by any other person over the age of 21 years, and not a party to the action; provided, that this rule shall not abrogate the provisions of chapter 28, Laws of Utah, 1945.

(2) In another state or United States territory by the sheriff of the county where the service is made, or by his deputy, or by a United States marshal or his deputy.

(3) In a foreign country, either:

(A) in the manner prescribed by the law of the foreign country; or

(B) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or

(C) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(D) as directed by order of the court.

Service under (B) or (D) above may be made by any person who is not a party and is not less than 21 years of age or who is designated by order of the court.

(e) **Personal service in state.** Personal service within the state shall be as follows:

(1) Upon a natural person of the age of 14 years or over, by delivering a copy thereof to him personally, or by leaving such copy at his usual place

of abode with some person of suitable age and discretion there residing; or by delivering a copy to an agent authorized by appointment or by law to receive service of process.

-- (2) Upon a natural person under the age of 14 years, by delivering a copy thereof to such person and also to his father, mother or guardian; or, if none can be found within the state, then to any person having the care and control of such minor, or with whom he resides, or in whose service he is employed.

(3) Upon a natural person judicially declared to be of unsound mind or incapable of conducting his own affairs, by delivering a copy thereof to his legal guardian.

(4) Upon any corporation, not herein otherwise provided for, upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy thereof to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. If no such officer or agent can be found in the county in which the action is brought, then upon any such officer or agent, or any clerk, cashier, managing agent, chief clerk, or other agent having the management, direction or control of any property of such corporation, partnership or other unincorporated association within the state. If no such officer or agent can be found in the state, and the defendant has, or advertises or holds itself out as having, an office or place of business in this state, or does business in this state, then upon the person doing such business or in charge of such office or place of business.

(5) Upon an incorporated city, by delivering a copy thereof to the mayor or recorder; upon an incorporated town, by delivering a copy thereof to the president or clerk of the board of trustees.

(6) Upon a county; by delivering a copy thereof to a county commissioner or to the county clerk of such county.

(7) Upon a school district or board of education, by delivering a copy thereof to the president or clerk of the board.

(8) Upon an irrigation or drainage district, by delivering a copy to the president or secretary of its board.

(9) Upon the state of Utah, in such cases as by law are authorized to be brought against the state, by delivering a copy thereof to the attorney general.

(10) Upon a natural person, nonresident of the state of Utah, doing business in this state at one or more places of business, as set forth in Rule 17(e), by delivering a copy thereof to the defendant personally or to one of his managers, superintendents or agents.

(11) Upon a department or agency of this state, or upon any public board, commission or body, subject to suit, by delivering a copy thereof to any member of its governing board, or to its executive employee or secretary.

(12) Upon an individual incarcerated or committed at a facility operated by the State or any of its political subdivisions, by delivering a copy to the person who has the care, custody or control of the individual to be served, or to that person's designee or to the guardian or conservator of

the individual to be served if one has been appointed, who shall, in any case, promptly deliver the process to the individual served.

(f) Other service.

(1) Service by publication. Where the person upon whom service is sought resides outside of the state, or has departed from the state, or cannot after due diligence be found within the state, or conceals himself to avoid the service of process, or where such party is a corporation having no officer or other agent upon whom process can be served within this state, or where in an action in rem some or all of the defendants are unknown, service of process may be made by publication, as follows:

The party desiring service of process by publication shall file a motion verified by the oath of such party or of someone in his behalf for an order of publication. It shall state the facts authorizing such service and shall show the efforts that have been made to obtain personal service within this state, and shall give the address, or last known address, of each person to be served or shall state that the same is unknown. The court shall hear the motion ex parte and, if satisfied that due diligence has been used to obtain personal service within this state, or that efforts to obtain the same would have been of no avail, shall order publication of the summons in a newspaper having general circulation in the county in which the action is pending. Such publication shall be made at least once a week for four successive weeks. Within ten days after the order is entered, the clerk shall mail a copy of the summons and complaint to each person whose address has been stated in the motion. Service shall be complete on the day of the last publication.

(2) Alternative to service by publication. In circumstances described in (1) above justifying service of summons by publication, if the party desiring service of summons shall file a verified petition stating the facts from which the court determines that service by mail is just as likely to give actual notice as service by publication, the court may order that service of summons shall be given by the clerk mailing a copy of the summons and complaint to the party to be served at his address, or his last known address. Service shall be complete ten days after such mailing.

(3) Service outside of state. Personal service of a copy of the summons and complaint outside of this state is equivalent to service by publication and deposit in the post office, and shall be complete on the day of such service.

(g) Manner of proof. Within five days after service of process, proof thereof shall be made as follows:

(1) if served by a sheriff or United States marshal, or a deputy of either, by his certificate with a statement as to the date, place, and manner of service.

(2) if by any other person, by his affidavit thereof, with the same statement.

(3) if by publication by the affidavit of the publisher or printer or his foreman or principal clerk, showing the same and specifying the date of the first and last publication; and an affidavit by the clerk of the court of a deposit of a copy of the summons and complaint in the post office as prescribed by Subdivision (f) of this rule, if such deposit shall have been made.

(4) by the written admission or waiver of service by the person to be served, duly acknowledged, or otherwise proved.

(h) **Amendment.** At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(i) **Refusal of copy.** If the person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the same shall state the name of the process and offer to deliver a copy thereof.

(j) **Time of service to be endorsed on copy.** At the time of service, the person making such service shall endorse upon the copy of the summons left for the person being served, the date upon which the same was served, and shall sign his name thereto, and, if an officer, add his official title.

(k) **Designation of newspaper for publication of notice.** In any proceeding where summons or other notice is required to be published, the court shall, upon the request of the party applying for such publication, designate the newspaper and authorize and direct that such publication shall be made therein; provided, that the newspaper selected shall be a newspaper of general circulation in the county where such publication is required to be made and shall be published in the English language.

(l) **Service of process by telegraph or telephone.** A summons, writ, order or other process in any civil action or proceeding, and all other papers requiring service, may be transmitted by telegraph or telephone for service in any place within this state, and the telegraphic or telephonic copy of such process or paper so transmitted may be served or executed by the officer or other person to whom it is sent for that purpose, and returned by him, if return is required, in the same manner and with the same force and effect as the original thereof; and the officer or person serving or executing the same has the same authority, and is subject to the same liabilities as if the copy were the original. The process or paper, when a writ or order, must be filed in the court from which it was issued, and a certified copy thereof must be preserved in the telegraph or telephone office from which it was sent. The operator sending the message may use either the original or a certified copy of the process or paper. Whenever any document to be sent by telegraph or telephone bears a seal, either private or official, it is not necessary for the operator in sending the same to telegraph or telephone a description of the seal, or any word or device thereon, but the same may be expressed in the telegraphic or telephonic copy by the letters "L.S.," or by the word "Seal."

(m) **Service by constable.** All writs and process, including executions upon judgments, issued out of a district, city or justice court in a civil action or proceeding may be served by any constable of the county.

(Amended, effective March 1, 1988.)

Amendment Notes. — The 1988 amendment added Subdivision (e)(12).

Compiler's Notes. — This rule generally follows Rule 4, F.R.C.P.

Laws 1945, ch. 28, referred to in Subdivision (d)(1), appears as § 12-1-8, relating to actions by collection agencies.

The reference, in Subdivision (e)(5), to the "president or clerk of the board of trustees" of an incorporated town seems incorrect. Accord-

ing to §§ 10-2-110 and 10-3-106, the governing body of an incorporated town consists of a council and mayor.

Cross-References. — Collection agencies, process server in actions by, § 12-1-8.

Condominium association or ownership, service of process on person designated in declaration, § 57-8-33.

Constable, service of process by, §§ 17-22-25, 17-25-1.

ADDENDUM C

Rule 60. Relief from judgment or order.

(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** 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 3 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 or 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.

Compiler's Notes. — This rule is patterned after, and similar to, Rule 60, F.R.C.P.

Cross-References. — Fee for filing motion

to set aside judgment, §§ 78-3-16.5, 78-4-24, 78-6-14; Appx. G, Code of Judicial Administration.

ADDENDUM D

FILMED

DATE SERVED April 21, 1988

9:45 P.M.

KENNETH A. BRONSTON, #4470
ANDERSON & HOLLAND

Attorneys for Plaintiff

623 East First South

Salt Lake City, Utah 84102

Telephone: (801) 363-9345

WHOM SERVED John P. Pizzello

WHERE SERVED 6960 Well Spring Road #2

SERVED BY David T. Helms

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

JERRY GILLESPIE dba JERRY'S
DRYWALL and PAMELA GILLESPIE,

Plaintiffs,

vs.

DALE W. GEURTS, JOHN P.
PIZZELLO, and SPRINKLERS, SOD
& SUCH,

Defendants.

S U M M O N S

CIVIL NO. C87-4401

JUDGE SCOTT DANIELS

THE STATE OF UTAH TO THE ABOVE-NAMED DEFENDANT JOHN P. PIZZELLO:

YOU ARE HEREBY summoned and required to file an Answer in writing to the attached Amended Complaint with the Clerk of the above-entitled Court, and to serve upon or mail to KENNETH A. BRONSTON, Plaintiff's attorney, 623 East First South, Salt Lake City, Utah 84102, a copy of said Answer, within twenty (20) days after service upon you.

If you fail so to do, Judgment by Default will be taken against you for the relief demanded in said Complaint, which has been filed with the Clerk of said Court and a copy of which is hereto annexed and herewith served upon you.

DATED this 6th day of April, 1988.

Kenneth A. Bronston
KENNETH A. BRONSTON

PLEASE SERVE:

JOHN P. PIZZELLO

6960 WELL SPRING ROAD 5X

MIDVALE, UTAH 84047

AFFIDAVIT OF SERVICE

STATE OF Utah :

:SS.

COUNTY OF Salt Lake :

David T. Holland, being first duly sworn

deposes and says: That he/she is a citizen of the United States;

that he/she is a resident of the State of Utah

County of Salt Lake; that he/she is over the age

of 21 years and that he/she is not a party to the action; that

on the 21 day of April, 1988, he/she served

upon John P. Pizzello, a full, true and correct

copy of the annexed Summons and Complaint ^{amended D.K.}; by

delivering to, and leaving with said John P. Pizzello

the same copies at 6960 Well Spring Road #5X

that upon the said copy affiant endorsed the date and place of service and signed his/her name.

Date: April 21, 1988

David T. Holland

SUBSCRIBED AND SWORN to before me this 21st day of

April, 1988.

Cynthia E. Prokop
Notary Public

Commission Expires 9-8-90

Residing in Salt Lake City, Utah.

Service Fee:	\$	<u>750</u>
Mileage 11.1 :	\$	<u>335</u>
Notary Fee :	\$	
Locate Fee :	\$	
TOTAL :	\$	<u>1085</u>

I observed Mr. Pizzello going into my apartment, I then went to his apartment, pounded on the door, rang the doorbell, and yelled that I had a court summons ^{and amended complaint.} for him. ^{A.H.} There was no answer, and no one opened the door. I continued to pound on the door and ring the doorbell for approx. 10 minutes, with no response from Mr. Pizzello. I then announced that as an officer of the S.L. Court, I was leaving his court summons and ^{amended} ^{D.H.} complaint at the front door of his apartment, and that he had been served. Approx. 5 minutes later I saw Mr. Pizzello drive away in his vehicle. I then went back to his apartment, and noticed the summons and ^{amended} ^{A.H.} complaint I had left by his door was gone.

David T. Holland

ADDENDUM E

J. KENT HOLLAND, #1520
KENNETH A. BRONSTON, #4470
ANDERSON & HOLLAND
623 East First South
P.O. Box 11643
Salt Lake City, Utah 84147-0643
Telephone: (801) 363-9345

FILED
DISTRICT COURT

FEB 2 11 25 AM '88

Theresa J. [Signature]
BY [Signature] DEPUTY CLERK

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

JERRY GILLESPIE dba JERRY'S
DRYWALL and PAMELA GILLESPIE,

Plaintiffs,

vs.

DALE W. GEURTS, JOHN P.
PIZZELLO, and SPRINKLERS,
SOD & SUCH,

Defendants.

A F F I D A V I T

Civil No. C87-4401

Judge Scott Daniels

COMES NOW David T. Holland, Affiant, and deposes,
swears, and states under oath as follows:

1. That Affiant is the individual who served Summons and Amended Complaint upon Defendant John P. Pizzello in the above captioned matter on April 21, 1988 and subsequently signed before a Notary the Affidavit of Service, the reverse side of which Affiant wrote a description of the manner of his service upon Defendant, John P. Pizzello.

2. That at the time Affiant made said service upon Defendant Pizzello, Affiant was employed full-time as a process server.

3. That Affiant has a particularly clear recollection of his service of Summons and Amended Complaint upon Defendant Pizzello as fully set forth hereinbelow.

4. That on April 21, 1988 Affiant drove in his automobile to 6960 Wellspring Road, an apartment complex, pursuant to the direction of Plaintiffs' Attorney.

5. Upon Affiant's arrival at the apartment complex, Affiant left his car in a parking space and ascended steps to a second level and approached apartment number 5X designated by Plaintiffs' attorney as that belonging to Defendant Pizzello.

6. That in the process of attempting to serve Summons and Amended Complaint at the door of Defendant Pizzello's apartment, he observed an automobile being driven into the apartment complex parking area, come to a stop, and a man exit from said automobile and start to approach the stairway.

7. As Defendant approached the stairway he looked up at Affiant attempting to serve process, giving Affiant opportunity to look directly into Defendant's face. Affiant felt that said individual immediately acted in a suspicious manner upon seeing Affiant by changing his apparent direction and returning to his automobile and driving away.

8. Immediately thereafter, Affiant returned to his automobile, wherein he sat for approximately one hour.

9. Toward the end of the period during which Affiant remained in his automobile, Affiant observed the automobile referenced hereinabove return to the apartment complex and proceed through the parking areas and then exit and then return three times within a brief span of time.

10. Following the automobile's last course through the parking areas of the apartment complex, Affiant observed said automobile being parked in a space correlated by written description with Defendant Pizzello's apartment.

11. It was raining at the time of the events described

herein, and to better observe Defendant Pizzello's progress towards his apartment, Affiant exited his automobile to gain a better view.

12. From his vantage point Affiant observed the individual who had exited the automobile climb the stairs to the second level of the apartment complex and enter apartment number 5X.

13. Immediately thereafter, Affiant approached the apartment which the individual hereinabove referenced entered, and attempted to serve Summons and Amended Complaint upon said individual by Affiant's announcing Affiant's status as officer of the court and that Affiant was offering to serve Summons and Amended Complaint upon Defendant Pizzello at that very moment.

14. That in aid of Affiant's attempt to serve Summons and Amended Complaint, Affiant yelled through the door and pounded upon it for approximately ten minutes with such vigor that several neighboring apartment lights went on and neighbors appeared at their doorways questioning the commotion being made.

15. That throughout his attempt to serve Summons and Amended Complaint, no individual made his presence known from within the apartment, nor did Affiant hear any sound from within.

16. That following his futile efforts to place Summons and Amended Complaint in the hands of the individual within the apartment, Affiant announced again in a loud voice that he was an officer of the court, that service of the Summons and Amended Complaint had been accomplished and that Affiant was leaving a copy of Summons and Amended Complaint outside the apartment door.

17. Affiant left a copy of the Summons and Amended Complaint outside the apartment door and in so doing specifically observed that there were no other documents or other paraphernalia outside the apartment door.

18. Thereafter, Affiant returned to his automobile and maneuvered it into a position from which he could observe, without obstruction, the Defendant's apartment doorway.

19. Within less than five minutes of Affiant's return to his automobile, Affiant observed the same individual whom Affiant had earlier observed and described hereinabove, exit from the apartment bend down and pick up something and briefly study it. Said individual then returned to the same vehicle in which he had arrived and drove away.

19. Affiant waited several minutes and then returned to the apartment at which he had attempted service of process and discovered that the Summons and Amended Complaint were missing. From the time Affiant left process at the doorway until Affiant's discovery that process was missing, Affiant was in a position to observe, and did so in fact note, that no persons passed by the doorway in question.

20. Subsequently, Affiant personally made inquiry at the Utah State Department of Motor Vehicles wherein he discovered that the vehicle driven by the individual who had refused service of process as hereinabove described was registered to Defendant Pizzello.

21. That in Affiant's opinion, the individual whose movements are described hereinabove, intentionally and deliberately refused service of process upon him.

22. That Affiant has examined a verified copy of Defendant's Utah driver's license, including photograph of Defendant and is positive that the photograph depicts the individual he served process upon on April 21, 1988 as herein set forth.


FURTHER Affiant sayeth naught.



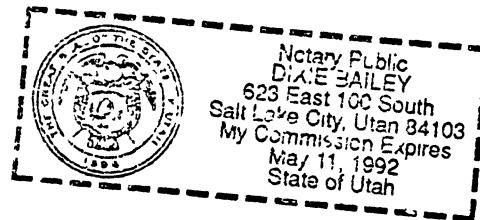
DAVID T. HOLLAND
Affiant

STATE OF UTAH)
 : ss
COUNTY OF SALT LAKE)

SUBSCRIBED AND SWORN to before me this 27th day of January,
1989.



Notary Public



code:hollaff