

1999

Southland Construction, Plaintiff/Appellee, vs.
Ghazaleh Semnani and Khosrow B. Semnani,
Defendants/Appellants : Brief of Appellee

Utah Court of Appeals

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Randy B. Birch; Bertch & Birch; Attorney for Appellee.

Gary A. Weston; D. Scott Crook; Nielsen & Senior; Attorneys for Defendants/Appellants.

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UTAH COURT OF APPEALS
BRIEF

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990193-CA

IN THE COURT OF APPEALS OF THE STATE OF UTAH

SOUTHLAND CONSTRUCTION,

Plaintiff/Appellee,

vs.

GHAZALEH SEMNANI and
KHOSROW B. SEMNANI,

Defendants/Appellants.

APPELLEE'S BRIEF

Court of Appeals No. 990193-CA
District Court No. 960004927

PR15

Gary A Weston, USB No. 3435
D. Scott Crook, USB 7495
Nielsen & Senior, P.C.
1100 Eagle Gate Plaza
60 East South Temple
Salt Lake City, Utah 84111

Attorneys for Defendants/Appellants

Randy B. Birch
Bertch & Birch - East
Post Office Box 763
Heber City, Utah 84032
Telephone (435) 654-4300

Attorney for Plaintiff/Appellee

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COURT OF APPEALS

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**Gary A Weston, USB No. 3435
D. Scott Crook, USB 7495
Nielsen & Senior, P.C.
1100 Eagle Gate Plaza
60 East South Temple
Salt Lake City, Utah 84111**

Attorneys for Defendants/Appellants

**Randy B. Birch
Bertch & Birch - East
Post Office Box 763
Heber City, Utah 84032
Telephone (435) 654-4300**

Attorney for Plaintiff/Appellee

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STATEMENT OF JURISDICTION

The Utah Supreme Court had jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2-2(3).(j) It subsequently assigned the appeal to the Utah Court of Appeals, which has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2).(j)

DETERMINATIVE STATUTES AND RULES

Utah R. Civ. P. 60(b)

(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) the judgment is void; (5) 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 (6) 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), or (3), 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.

STATEMENT OF THE CASE

I. Nature of the Proceeding

See appellant's brief.

II Course of Proceedings & Disposition in the Trial

See appellant's brief.

II Statement of Relevant Facts

On May 17, 1996, Southland filed a complaint against Mr. And Mrs Semnani alleging breach of contract and quantum meruit and seeking to foreclose a mechanic's lien. R. at 1 On may 24, 1996 a Summons was served upon a person, who would not identify himself, at the Mulholland Property. See Summons and Affidavits of Service, R. at 6-9 (Exhibit A of Appellant's addendum). Soon after the Summons was served one of the Defendant's called Ann Garza of Southland and indirectly questioned her about the lawsuit See Affidavit of Ann Garza ¶ 4 (Exhibit D of Appellant's addendum).

On April 9, 1998, Default Judgment was entered against Defendants. See Default judgment, R. at 25-26 (Exhibit C of Appellant's addendum) On or about August 31, 1998, Defendant's were served with a Writ of Execution. On December 3, 1998, Defendants filed a Motion to Vacate Default Judgment and Quash Writ of Execution claiming no knowledge of the lawsuit. R at 37, 44-46 (Exhibit B of Appellant's Addendum)

The Third District Court, Judge Michael K. burton, denied Defendant's Motion to

Vacate Judgement and Quash Writ of Execution on February 23, 1999. R. at 61-62
(Exhibit E of Appellant's Addendum)

SUMMARY OF ARGUMENTS

By contacting Plaintiff within days of being served and referring to this lawsuit,,
Defendant's actions speak louder than their self serving affidavits and show that
Defendant's were properly served and that Defendants intentionally did not respond.

Further defendant's have not shown that they has a meritorious defense to this
action which is a prerequisite to having it set aside.

ARGUMENT

The facts clearly show that Defendant's were properly served with the Summons
in this case. First is the fact that this is where the Defendant's were known to live.
Second is the person who was served not identifying himself to the process server. This
does not tend to show that the service was not accomplished, but rather that the person
was one of the people who was being served and was trying to avoid service if possible.
Third is the fact that right after service of process, one of the Defendant's contacted Ann
Garza of Southland and referred to the lawsuit.

On the other side is only Defendant's self serving statements that they were not
served.

To require only the self serving statements of losing defendants to overturn valid
judgments would set a bad precedence in the legal system and weaken the validity of
many of the judgments that exist today.

In order for defendant to be relieved from the default judgment, he must not only show that the judgment was entered against him through excusable neglect (or any other reason specified in Rule 60(b)), but he must also show that his motion to set aside the judgment was timely, and that he has a meritorious defense to the action. *Downy State Bank v. Major-Blakeney Corp.*, 545 P.2d 507 (Utah 1976). Defendant has failed to demonstrate any meritorious defense.

CONCLUSION

In this case, the Defendants claim that they were not served and did not know about the lawsuit. For the reasons set forth in the Affidavit of Ann Garza, (Exhibit D in Appellants Addendum), the district Court found that the Defendants knew about the lawsuit, were actually served, and that good cause did not exist to set aside the default judgment.

Plaintiff requests that the Court deny the Defendants Motion.

Defendants should not be rewarded for being difficult and refusing to cooperate with the process server by now denying that they received service.

Dated this 19th day of July, 1999.

BERTCH AND BIRCH – EAST




Randy B. Birch

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, I caused two true and correct copies for the foregoing Appellee's brief to be served via United States Mail, postage prepaid, addressed to:

Gary A Weston
D. Scott Crook
Nielsen & Senior, P.C.
1100 Eagle Gate Plaza
60 East South Temple
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "G.A. Weston", is written over a horizontal line.