

1980

Mark Robert Gilleland v. Sandwich World, Inc., A Corporation; and George Jacobs, An Individual : Brief of Appellant, George Jacobs

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

* * * * *

MARK ROBERT GILLELAND, :
Plaintiff-Respondent, :
vs. : Case No. 16888
SANDWICH WORLD, INC., a :
corporation; and GEORGE :
JACOBS, an individual, :
Defendant-Appellant. :

* * * * *

BRIEF OF APPELLANT, GEORGE JACOBS

* * * * *

Appeal from Judgment
of the Second Judicial District Court
for Weber County, Utah
Hon. John F. Wahlquist, Judge

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I.

STATEMENT OF THE NATURE OF THE CASE

This is a civil action in which Respondent, Mark Robert Gilleland, seeks a money judgment against defendant, Sandwich World, Inc., a Utah corporation, and George Jacobs, an individual.

II.

DISPOSITION IN THE LOWER COURT

On August 29, 1979, the Honorable John F. Wahlquist granted a default judgment against defendant, Sandwich World, Inc., (hereinafter Sandwich World) and defendant-appellant, George Jacobs (hereinafter Appellant). On October 22, 1979, Appellant filed a motion to vacate the default judgment which was entered against Appellant in his individual capacity. Appellant also challenged Respondent's complaint on the basis of improper jurisdiction, defective summons, and improper venue.

In a decision handed down November 20, 1979, Judge Wahlquist denied Appellant's motion to vacate the default judgment, and concluded that there was no excusable neglect on Appellant's part in failing to answer the complaint within the 20-day period of time. The court further found that the Appellant intentionally participated in a "definite program" which was designed to stall any collection efforts and that such was "proved by circumstantial evidence beyond any reasonable doubt be his intent." (R. 54: 2). The court also denied Appellant's objections to jurisdiction, improper

summons, and venue. (R. 54) On December 31, 1979, Judge Wahlquist reheard Appellant's motions and issued a memorandum decision affirming his earlier ruling.

III.

RELIEF SOUGHT ON APPEAL

Appellant seeks a decision of this court vacating the default judgment on the basis of appellant's excusable neglect and inadvertence. No injustice would result if a trial on the merits were held to determine Appellant's individual liability. Appellant also seeks a decision of this court vacating the default judgment and ordering a change of venue to the Third Judicial District Court for Salt Lake County, state of Utah.

IV.

STATEMENT OF FACTS

On September 2, 1977, Respondent entered into a "Franchise Agreement" with Sandwich World. (R. 4). At that time, Appellant, had no interest in Sandwich World. Almost one and one-half years later -- in January of 1979 -- Appellant purchased an ownership interest in Sandwich World, and became its president (R. 86: 14-23; 85: 1-6).

During the spring of 1979, Sandwich World received demands from Respondent by and through Respondent's attorney, Mr. Darrell Renstrom, for monies which Respondent claimed were owed by Sandwich World. Appellant, acting as president of Sandwich World, rejected Respondent's demands. (R.44). On May 17, 1979,

Respondent initiated a lawsuit for breach of contract against Sandwich World. (R. 1) The suit was initiated in the district court of Weber County, state of Utah (R. 1). Attached to the Respondent's complaint was a copy of the "Franchise Agreement" which Respondent claimed was breached by Sandwich World, Inc. (R. 4-12). Paragraph 17 of that agreement states:

Venue of all proceedings relating to
the provisions hereof shall be Salt
Lake County, state of Utah.

(R. 10: 17)

Later, on June 28, 1979, Respondent filed an "Amended Complaint" naming Appellant in his individual capacity as a defendant to be liable to Respondent for the debts of Sandwich World. (R.14-16). On August 7, 1979, a Salt Lake County deputy sheriff served a summons and amended complaint upon Appellant. (R. 17)

On or about August 20, 1979, Appellant delivered the summons and amended complaint to Richard J. Lawrence, Esq., and requested that Mr. Lawrence file an answer. (R. 33: 1). Before the 20-day period in which to answer had expired, Mr. Lawrence telephoned Respondent's counsel, Mr. Renstrom, on two or three occasions and left messages with counsel's secretary to the effect that Mr. Lawrence desired an extension of time in which to file the answer on behalf of Appellant with a request that Mr. Renstorm's secretary return Mr. Lawrence's call should there be any problems. (R. 118; 19-26; 117: 28-30; 112: 9-14; 33: 3)

On August 29, 1979, Respondent obtained a default judgment against Sandwich World, and Appellant in his individual capacity. (R. 22) Later that same day, Mr. Renstrom telephoned Mr. Lawrence long-distance and at his own expense. Mr. Lawrence was with clients and unable to take the call. Mr. Renstrom did not feel like pursuing the matter further. (R. 118: 5-8; 118: 14-19)

On or about September 4, 1979, Mr. Lawrence telephoned counsel for Respondent and was informed that Respondent had obtained a default judgment against Appellant. (R. 40: 13) During that conversation, Mr. Lawrence requested that Mr. Renstrom vacate the default judgment. Mr. Renstrom refused. (R. 40: 13) Mr. Lawrence thereupon transferred the case to the litigation department of the law firm with which he had recently become associated. (R 112: 19-26).

On October 4, 1979, a supplemental order was issued by the district court requiring Sandwich World and Appellant to appear in court and answer questions under oath concerning their assets. Before the supplemental order was served, Appellant, filed a motion to vacate the default judgment dismiss Respondent's amended complaint, and change venue to the District Court for Salt Lake County. (R. 23-34) Four days later, the supplemental order was served upon Sandwich World and Appellant. (R. 36)

On October 24, 1979, Appellant filed a motion to continue the supplemental order for the reason that the district court

had not yet rendered a decision on Appellant's prior motions to vacate the default judgment and dismiss the complaint. (R. 37)

On October 29, 1979, the Honorable John F. Wahlquist denied Appellant's motion to continue the supplemental order. (R. 46; 106: 18-22) During the supplemental hearing, Appellant was required to answer questions regarding his personal assets and the assets of Sandwich World. At that time, it was agreed between counsel that Appellant's prior motion to vacate the default judgment, dismiss the complaint and change venue would be decided by the district court based upon the affidavits and papers which had previously been filed with the district court. (R. 46-107: 7-13)

On November 13, 1979, Judge Wahlquist issued findings of fact and conclusions of law (R. 47-49) and on November 20, 1979, issued a memorandum decision denying Appellant's motion to vacate the default judgment, dismiss and change venue. (R. 50-54) Appellant thereupon made a motion for a rehearing which was granted by the district court. (R. 57-58)

On December 31, 1979, Appellant's motion for rehearing of Appellant's prior motions was heard. In a memorandum decision dated January 8, 1980, Judge Wahlquist affirmed his prior denial of appellant's motions to vacate the default judgment and to dismiss the complaint. (R. 63-66). Later, on January 21, 1980, Judge Wahlquist issued his corresponding findings of fact and conclusions of law. (R. 67-70)

ARGUMENT I.

THE DISTRICT COURT ABUSED ITS DISCRETION
IN REFUSING TO SET ASIDE THE DEFAULT JUDGMENT

In Heathman v. Fabian & Clendenin, 377 P.2d 189, 190 (Utah 1962), this court stated:

Judgments by default are not favored by the courts nor are they in the interest of justice and fair play.

That same year, in Mayhew v. Standard Gilsonite Co., 376 P.2d 951, 952 (Utah 1962), this court added:

It is fundamental to our system of justice that each party to a controversy should be afforded an opportunity to present his side of the case. For that reason, it is quite uniformly regarded as an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to appear, and timely application is made to set it aside. (Emphasis added)

- A. Appellant has a reasonable justification or excuse for failing to file an answer within the 20-day time period.

Applying the language of Mayhew v. Standard Lutsonite Co., supra, Appellant contends that he was reasonably justified or excused for failing to appear within the 20-day period of time in which to answer the complaint. On August 7, 1979, Appellant was served with a summons and amended complaint. (R.17) On or about August 20, 1979, Appellant contacted Richard Lawrence, Esq., for the purpose of answering Respondent's amended complaint. (R. 33: 1) In an affidavit, Mr. Lawrence stated

that he contacted counsel for Respondent, Mr. Darrell Renstrom, to "request an extension of time in which to file an answer to plaintiff's amended complaint and left messages to that effect." (R. 33: 3) In a hearing before the district court, Mr. Lawrence stated:

I had called two or three times prior to the time when a default could have been taken and left messages for my calls to be returned. They were not. Then, even another time I called prior to the time when a default could have been taken and left a message of what the call was about and indicated to the secretary to contact me if there was a problem with that. That was prior to the time the default could have been taken.

(R. 118: 19-26; see also R. 117: 28-30; 112: 9-14.)

Mr. Renstrom challenged part of Mr. Lawrence's statements by declaring:

I received a call from Mr. Lawrence at Salt Lake with none of the information indicated.

(R. 118: 3-5.)

In light of Mr. Lawrence's testimony, Appellant alleges that it is very possible that the secretary that took the messages for Mr. Renstrom may not have written down the full extent of Mr. Lawrence's message regarding the request for an extension of time.

After the default was obtained, Mr. Renstrom attempted to contact Mr. Lawrence. However, Mr. Lawrence was not available to take the call. (R. 40: 12). Mr. Renstrom stated that, "The

long-distance call was at my expense and I didn't feel like pursuing whatever he was calling about." (R. 118: 5-8).

It was not until September 4, 1979, that the parties were able to communicate. It was on that occasion that Mr. Lawrence was informed that a default judgment had been obtained against Appellant. (R. 40: 13) During the whole period of time during which Mr. Lawrence was attempting to contact Mr. Renstrom, and in which Mr. Lawrence was leaving messages with Mr. Renstrom's secretary, it was Mr. Lawrence's belief that an extension of time would be granted. (R. 112: 15-18)

The case is one of a classic communication problem between counsel. The communication problem was one of excusable neglect and inadvertence as defined by Rule 60(b) of the Utah Rules of Civil Procedure. Mr. Lawrence acted reasonably in a belief that his client would be given an extension of time to file an answer. Certainly, it would be unfair to saddle the Appellant with an \$11,000 judgment without a trial where Appellant has an excellent defense to the theory of liability presented by Respondent (i.e. that Respondent's contract was with Sandwich World and was executed prior in time to Appellant's involvement with Sandwich World. Appellant never entered into a contract with Respondent.)

B. Appellant made timely application to vacate the default judgment.

The second consideration articulated in Mayhew v. Standard Gilsonite Co., supra, is that the motion to vacate the default judgment must be filed in a timely fashion. Appellant filed a motion to vacate the default judgment on October 11, 1979. (R. 23) The motion to vacate the default judgment was filed approximately 40 days after the judgment was rendered. This is well within the three month time requirement provided in Rule 60(b) of the Utah Rules of Civil Procedure.

C. Respondent will not be substantially prejudiced and no injustice would result if a trial on the merits were held to determine appellant's liability.

In Westinghouse Electric Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P.2d 876, 879 (Utah 1975) this court stated:

The very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them. In conformity with that principle, the courts generally tend to favor granting relief from default judgments where there is any reasonable excuse, unless it will result in substantial prejudice or injustice to the adverse party.

For reasons already articulated in Argument I.A. above, Appellant has shown a reasonable excuse for failing to file an answer within the 20-day period of time. Certainly, Respondent would not be substantially prejudiced and no injustice would

result if the default judgment rendered against Appellant were vacated. At no time has Appellant become individually involved in any manner whatsoever with Respondent. Respondent entered into a "Franchise Agreement" with Sandwich World, and not with Appellant. (R. 4) Over one and one-half years after Respondent executed this agreement, Appellant became involved with Sandwich World, Inc. (R. 86: 14-18) This fact was understood by counsel for Respondent. (R. 85: 1-6) In spite of counsel's understanding, counsel referred to Appellant as a "franchise artist," and accused him of "ripping off Respondent." (R. 116: 24-28) However, Appellant, at no time "guaranteed or promised to perform any obligations or assume any debt or obligation in connection with the agreement entered into between plaintiff Respondent and Sandwich World, Inc." (R. 32: 7)

Appellant became president of Sandwich World long after Respondent was "ripped off." (R. 86: 14-18) In a short six months' time, Appellant lost \$25,000-\$30,000 as a result of misrepresentations of the prior president of Sandwich World (Douglas Goff), who sold the corporation to Appellant. (R. 101: 6-23)

Given these facts, it would be patently unfair to allow a default judgment to remain intact against Appellant in his individual capacity. Respondent would not be substantially prejudiced if a trial on the merits were held to determine if Appellant is individually liable to Respondent. Throughout this case, Respondent has failed to show and cannot now show

any injustice or substantial prejudice which would be perpetrated upon him if these issues are determined at a trial on the merits.

ARGUMENT II.

THE DISTRICT COURT'S FINDINGS ARE NOT SUPPORTED BY THE EVIDENCE.

In determining whether to grant a motion to set aside a default judgment, the Utah courts are to resolve all doubts in favor of the moving party so that cases may be decided on their merits. In Utah Commercial & Savings Bank v. Trumbo, 53 P. 1033, 1036 (Utah 1898) this court stated:

Where the circumstances which led to the default are such as to cause the court to hesitate, it is better to resolve the doubt in favor of the application, so that a trial may be secured on the merits.

Recently, in Olsen v. Cummings, 565 P.2d 1123, 1124 (Utah 1977), this court rearticulated the same rule:

Relief in doubtful cases generally will be granted so a party may have a hearing.

Notwithstanding this general rule, the district court consistently refused to resolve doubts in favor of Appellant's motion to vacate the default judgment. Instead, all doubts were resolved in the Respondent's favor.

A. Doubts regarding Mr. Lawrence's attempts to obtain an extension of time for filing an answer on behalf of Appellant were not resolved in favor of Appellant.

The court erroneously concluded that no excusable neglect existed and that Appellant's failure to file an answer before the default judgment was obtained "was deliberate, in an attempt to frustrate the proceedings". (R. 69: 2) In fact the court found in its first decision that Jacob's attempts to "stall collection efforts" were "provided by circumstantial evidence beyond any reasonable doubt." (R. 54:2). The facts, however, are not as clear as the district court stated. Numerous doubts arise from the testimony of Mr. Renstrom and Mr. Richard Lawrence regarding Mr. Lawrence's attempts to gain an extension of time in which to file an answer on behalf of appellant. The court failed to resolve these doubts in favor of Appellant's motion to vacate.

Mr. Lawrence testified that he called Mr. Renstrom's office on two or three occasions prior to the time when the default judgment could have been rendered and left messages for calls to be returned. Mr. Lawrence testified that on at least one occasion, he left a message regarding the nature of his call, and instructed Mr. Renstrom's secretary to contact Mr. Lawrence if there was any problem regarding the grant of an extension of time in which to file an answer. (R. 118: 19-26; see also R. 117: 26-30; 112: 9-14; 33: 3). In contrast, Mr. Renstrom indicated that he received only one telephone message from Mr.

Lawrence and that this message was received on August 29, 1979.
(R. 40: 12; 118: 3-6)

There was a substantial controversy regarding the number of telephone calls which Mr. Lawrence made to Mr. Renstrom and whether Mr. Lawrence left messages with Mr. Renstrom's secretary regarding the nature and purpose of Mr. Lawrence's telephone call. The importance of this factual resolution relates to whether excusable neglect or inadvertance existed on Mr. Lawrence's part in not filing the answer within the twenty day period. The court resolved all doubts in favor of Respondent and against Appellant's motion to vacate the default judgment. (R. 68: 7)

B. The court erroneously found that Mr. Renstrom called Mr. Lawrence "collect" and that Mr. Lawrence "refused the call."

The court erroneously found that "the plaintiff's attorney did attempt to return the call to the defense attorney. The plaintiff's attorney's offices is in Ogden, Utah and he placed the return call 'collect' to the defense attorney. The defense attorney refused the call." (R. 68: 7)

Mr. Renstrom himself testified that his return call to Mr. Lawrence was not "collect" but was rather "at my expense and I didn't feel like pursuing whatever he was calling about." (R. 118: 7-8; R. 119: 9-10) Nowhere in the record does Mr. Lawrence state that Mr. Renstrom's call was collect.

The finding that the defense attorney refused the call is also unsupported by the evidence. The court specifically asked

Mr. Lawrence, "Did you refuse to take the call when it was tendered to you?" Mr. Lawrence responded, "No, your honor, I was not aware that a call came in until later when I received a slip from the secretary that a call had been made." (R. 118: 12-16) Mr. Lawrence's testimony on the issue is absolutely corroborated by Mr. Renstrom. (R. 119: 10-15)

The significance of these findings of fact is that they provided a basis upon which the court issued its conclusions of law that there was no excusable neglect and that the failure of Appellant to answer was deliberate and in an attempt to frustrate the proceedings. (R. 69: 2-3) These underlying findings were erroneous, as well as the court's conclusions of law.

C. Doubts regarding intentional delay by Appellant were not resolved in Appellant's favor.

The district court's findings of fact and conclusions of law are replete with findings that Appellant intended to frustrate the proceedings and acted concertedly with that intent. (See R. 67: 3; 67: 5; 68: 9; 68: 11; 69: e-f; 69: 13; 69: 3)

The court, in referring to a May 1, 1979 telephone conversation between Appellant and Mr. Renstrom, found that "the individual defendant informed plaintiff's attorney that if such a suit were filed, the individual defendant would see to it that the lawsuit was frustrated, and that no recovery would be had." (R. 67: 3) The court makes no mention of the fact

that the Appellant denied ever making such a statement to respondent's attorney. (R. 90: 18-23).

The court's Finding of Fact No. 8 is absolutely and clearly erroneous. That Finding states:

The defense took no action at all until there was served a "supplemental proceeding" on the individual defendant to advance collection of the judgment against both the corporation and himself

R. 68: 8

Nothing could be further from the truth. The Respondent's motion and order in supplemental proceedings was signed by the district court on October 4, 1979. (R. 36) Before the supplemental order was served upon Appellant, Appellant filed a motion to vacate judgment, dismiss the complaint and change venue. This motion was filed on October 11, 1979. (R. 23) Four days later, on October 15, 1979, Appellant was personally served with the supplemental order. (R. 36) Appellant first received notice of the supplemental proceedings on the day on which he was served, October 15, 1979. Since Appellant's motion was filed before Appellant was served with the supplemental order, the district court's Finding No. 8 is clearly erroneous and without justification.

The court's Finding No. 9 is also erroneous. Finding No. 9 states:

Immediately on the time for the scheduled supplemental proceeding, the individual defendant filed a motion to delay the supplemental proceeding and a further motion to set aside the default on the grounds of excusable neglect.

R. 68: 9.

As already indicated above, Appellant filed a motion to set aside the default, as well as a motion to dismiss and change venue, on October 11, 1979 - eighteen days before the scheduled hearing of the supplemental proceeding. This motion to set aside the default and the motion to dismiss were not filed "immediately on the time for the scheduled supplemental proceeding" as erroneously stated by the court in its Finding No. 9.

The court also erroneously concluded in Finding No. 9 that "immediately on the time for the scheduled supplemental proceeding, the individual defendant filed a motion to delay the supplemental proceeding." (R. 68: 9) It is true that Appellant filed a motion for continuance of the supplemental proceedings. This motion, however, was received by the district court on October 24, 1979, five days before the scheduled supplemental proceedings. (R. 37) Further, the motion for continuance of the supplemental proceeding was based upon the grounds that Appellant's motion to vacate judgment and dismiss the complaint was presently pending before the district court and had not been formally ruled upon. (R. 37) The rationale of counsel for Appellant was that it would be improper and premature for the court to explore the assets of Appellant until the court had formally ruled upon Appellant's motion to vacate judgment and dismiss the complaint. It was never the intent of the Appellant or his counsel to delay and frustrate the proceedings.

The court's Finding No. 11-e was also resolved in favor of Respondent, even though substantial doubts were raised. That Finding states:

There was an effort made by defendant's attorney to cause it to appear that there was some justification for failure to file a timely answer, whereas none in fact exists.

R. 69: 11

For reasons enunciated in Argument I. A. above, Appellant asserts that this finding is improper and that Appellant had a reasonable excuse for failing to file the answer within the 20-day period.

Finding 11 f is also improper. Finding 11-f states:

The individual defendant's actions throughout the supplemental proceedings have been designed to frustrate the plaintiff's efforts to collect the judgment against the corporation defendant and against the individual defendant himself. This action has been a refusal to bring to court in a timely fashion materials subpoenaed, failure to answer questions that would normally be answerable by an informed corporation official, and a failure to timely disclose where such records were kept.

R. 69: 11 f.

The supplemental order which was served upon Appellant required Appellant to bring with them all records reflecting the assets of the parties which each has owned since September 30, 1977, including accounts receivable, contracts, or any other document or evidence showing assets owned since said date, or at the present time, or assets either defendant is entitled to

receive in the future." R. 35-36. The provisions of the Utah Rules of Civil Procedure which address supplemental proceedings, do not mention or seem to allow for this type of order. (See Rules 69, k, l, m, n, U.R.C.P.)

However, assuming that the order was proper, Appellant did not have the Sandwich World records in his possession and experienced difficulty in obtaining them. Appellant stated, "I just did not have any records available to bring." (R. 89: 2-3) Appellant explained that the corporation was abandoned, the corporate records were left at the corporate headquarters, and the Appellant "hurriedly" left the corporation headquarters. (R. 89: 16-30) Appellant stated that at the time he abandoned the corporate headquarters that he was in a "panicky" state of mind and that "everything was upside down" and "we weren't thinking exactly on a corporate level." (R. 90: 14-17) Appellant explained that at the time,

It wasn't a case of clear thinking, Mr. Renstrom. We were absolutely destitute. We had put all of what we owned - we had hocked our own jewelry to try to keep the company alive And at that time there was no thinking about corporate records or corporate checks or corporate anything. We just gave up. I have a coronary condition. I have had medical problems. And all of a sudden I am 54 years old and found out I've been taken, Mr. Renstrom.

R. 92: 5-13.

It would be manifestly unfair to do as the district court has done - refuse to vacate a default judgment against the Appellant because the Appellant was not "a normally informed

corporation official" and because Appellant abandoned the corporate records when he "hurriedly" left the corporate offices.

In response to counsels questions, Appellant candidly admitted that he did not make his best efforts in obtaining the corporate documents once he had received the supplemental order. (R. 101: 24-29) However, Appellant did make some efforts to obtain the corporate records. He contacted Mr. Korth (R. 89: 6-9). Appellant was unable to contact the previous president of Sandwich World, Mr. Goff, because Mr. Goff had been in New York training for another job. (R. 89: 9-12)

At the hearing, Appellant promised to exercise his best efforts in immediately obtaining the corporate documents. (R. 102: 3-11) At the next hearing on December 31, 1979, Appellant personally appeared in court and brought into court numerous corporate records. The corporate records were so voluminous that Mr. Renstrom attempted to have the records impounded for his prolonged investigation. (R. 121: 22-26)

At the first hearing, Appellant was also required to answer questions regarding his personal property and assets. This Appellant did, in spite of the fact that the district court had not formally ruled upon his motion to vacate the default judgment. (R. 107-111) Appellant stipulated to an order that he would not divest himself of any real property which he owned in the state of California pending resolution of this case. (R. 111: 12-16)

The above discussion shows that important factual doubts were not resolved in Appellants favor as mandated by law. Important factual doubts were systematically resolved in favor of Respondent. Should the doubts be resolved in favor of Appellant, the district court's conclusions the Appellant's failure to file timely answer was deliberate and that Appellant attempted to frustrate the proceedings are without foundation.

III.

THE LOWER COURT WRONGFULLY REFUSED TO VACATE JUDGMENT AND ORDER A CHANGE OF VENUE

Clause No. 17 of the "Franchise Agreement" to which Respondent is a signatory, states:

Venue of all proceedings relating to
the provisions hereof shall be Salt
Lake County, state of Utah.

R. 10: 17.

The Franchise Agreement makes no mention that the contract was to be performed in Weber County, state of Utah. In spite of the specific contract provision that venue was proper only in Salt Lake County, state of Utah, and in spite of the contract's failure to delineate Weber County as the place of performance, Respondent brought a lawsuit against Sandwich World and Appellant in the District Court for Weber County. Appellant is not a resident of Weber County but rather is a resident of Salt Lake County (R. 31: 2).

At no time has Appellant waived his right to demand a change of venue. On October 11, 1979, Appellant moved the court for an order changing venue to Salt Lake County.

(R.28). Appellant made his demand upon his first appearance in the action. Section 78-13-8, Utah Code Ann. 1953; Rudd v. Crown International, 488 P.2d 298, 301 (Utah 1971).

Venue was improper in the District Court for Weber County. The court erroneously denied Appellant his rights to have all matters concerning this lawsuit to be tried in the Third Judicial District Court for Salt Lake County. On that basis, the default judgment in the district court for Weber County is void and should be vacated pursuant to Rule 60 (5) and (7) U.R.C.P. with an order that venue should be in the Third Judicial District Court for Salt Lake County.

CONCLUSION

The district court abused its discretion in refusing to set aside the default judgment which was rendered against Appellant in his individual capacity. Appellant has a reasonable excuse for failing to file his answer within the 20-day period. Respondent can show no prejudice or injustice if a trial on the merits were held to determine whether Appellant is individually liable to Respondent. Many of the important factual doubts arising in this matter were not resolved in Appellant's favor. If those doubts were resolved in Appellant's favor the district court's refusals to vacate the default judgment would have been without any foundation. Finally, the district court erred in

refusing to order a change of venue to the Third Judicial
District Court for Salt Lake County, state of Utah.

DATED this 15th day of April, 1980.

SENIOR & SENIOR

By Kent B. Scott
Kent B. Scott

By Michael L. Hutchings
Michael L. Hutchings

Attorneys for Appellant-
George Jacobs

MAILING CERTIFICATE

I hereby certify that a true copy of the foregoing Brief of Appellant has been mailed, this 18th day of April, 1980, to Mr. Darrell G. Renstrom, Suite 1, Richards Building, 2640 Washington Boulevard, Ogden, Utah, 84401, attorney for respondent.

Michael J. Hekking