1980

Adriana Cornelia Pearson v. Kimber Lee Pearson : Brief of Appellant

Utah Supreme Court

Randy S. Ludlow; Attorney for Plaintiff-Appellant;
Neils E. Mortenson; Attorney for Defendant-Respondent;

IN THE SUPREME COURT

OF THE STATE OF UTAH

ADRIANA CORNELIA PEARSON,	)	
Plaintiff-Appellant,	)	
-vs-	)	No. 17094
KIMBER LEE PEARSON,	)	
Defendant-Respondent.	)	

APPELLANT'S BRIEF

Appeal from the Judgment of the District
Court of Salt Lake County, State of Utah

Honorable Kenneth Rigtrup, Judge

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APPELLANT'S BRIEF

NATURE OF CASE

This is an action by a divorced husband, respondent, to set aside or vacate the Decree of Divorce previously entered by the Honorable James S. Sawaya.

DISPOSITION IN LOWER COURT

The Honorable Kenneth Rigtrup set aside the Decree of Divorce entered by the Honorable James S. Sawaya.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the order of Judge Rigtrup reversed and the original Judgment and Decree of Divorce reinstated.

STATEMENT OF FACTS

An Amended Verified Complaint was filed on March 7, 1979, by the appellant (R-16-19). The respondent thereafter came to the offices of the attorney for the appellant where he was presented with a copy of the Amended Verified Complaint, which Complaint was explained to the respondent. The respondent thereupon agreed to the terms of the Amended Verified Complaint (Deposition of Diana Tulpinski p. 3-7). Respondent was presented with the Acknowledgment of Service of the Amended Verified Complaint, Waiver and Consent to Default which he willingly signed (R-20, 47-54; D-4 the Deposition of Diana Tulpinski p. 3-7). The appellant obtained a divorce on May 1, 1979, with the Decree of Divorce being signed by Judge James S. Sawaya on May 11, 1979 (R-20-30).

The respondent obtained a copy of the Findings of Fact and Decree of Divorce on July 26, 1979 (R-36).

The appellant got an Order to Show Cause against the respondent to have the respondent comply with the terms of the Decree of Divorce (R-32, 37-38), which Order to Show Cause was presented to the Court on October 30, 1979, and served upon the respondent on November 8, 1979. At the hearing in front of the Honorable Christine Durham on November 29, 1979, respondent, through his attorney, presented the appellant with his Motion to Set Aside the Judgment, along with the accompanying Affidavit (R-34-36, 39-42).

Respondent was seeking to have the Decree of Divorce set aside under Rule 60(b) and in particular Rule 60(b)(3), based upon an alleged fraud and misrepresentation (R-35-36 and 39).

Respondent's Motion was heard on April 4, 1980 by Judge Rigtrup who set aside the Decree of Divorce (R-46, 54-57).

ARGUMENT

POINT I

THE DISTRICT COURT ABUSED ITS DISCRETION IN SETTING ASIDE THE DECREE OF DIVORCE

Rule 60(b) of the Utah Rules of Civil Procedure provides as follows:

> "On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons (1) mistake, inadvertence, surprise, or excusable neglect; (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 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."

The Motion to Set Aside the Decree of Divorce in the above entitled action had been brought under Rule 60(b)(1) and (3) where the respondent represented there had been a mistake, inadvertence, surprise or excusable neglect and/or fraud or misrepresentation in this action (R-35). The argument as to the fraud charge was reputed by the Affidavit of the appellant (R-50), her attorney (R-47), the Affidavit of Susan McCarthy (R-52), and the deposition of Diana Tulpinski, all of whom specifically stated that the respondent had come to the offices of the appellant's attorney, he was presented with the copy of the Amended Verified Complaint, and he had willingly, freely and voluntarily signed the Waiver and Acknowledgment of Service and Consent to Default (R-20). The respondent states in his Affidavit that he had obtained a copy of the Decree of Divorce on approximately July 26, 1979, which was one and on-half months after the Decree of Divorce had been entered (R-36, 28). (It should be noted that the attorney for the appellant represented to the Court that the respondent had set approximately three appointments with said attorney to pick up copies of the Decree of Divorce, but that he had failed to keep said appointments, and further had refused

to give the attorney for the appellant an address where copies could be sent to said respondent.) Even though a copy had been obtained by the respondent on July 26, 1979, the respondent failed to act or take any action until November 20, 1979, a period of almost four full months after the date that the respondent had obtained a copy of the Decree of Divorce. This was clearly beyond the time period allowed under Rule 60(b) which requires that a party seek its relief within three (3) months after the Judgment or Order has been entered.

In McGavin v. McGavin, 27 U2d 200, 494 P2d 283 (1972), an action involving a claim by a former husband that his former wife had perpetrated a fraud on the divorce court claiming that the former husband was the father of a child that was unborn at the time of the divorce, this court held that after the period of time of 14½ months had elapsed since the Decree of Divorce had been entered that the former husband had to pursue his possible remedies in a separate action and could not attempt to set aside the Decree of Divorce in that action. This court required that there must be compliance with the 3-month procedure set forth in Rule 60(b) of the Utah Rules of Civil Procedure. Since there was no compliance with this rule, this court rejected the claim of the former husband. In the case before this court, the respondent had failed to

act within the prescribed time period, and if he is to attack the Decree, he must do so in a separate action and not in this particular case.

The respondent attempted to have the Judgment set aside under Rule 60(b) and in particular Rule 60(b)(1) and (3). The court denied allowing the judgment to be set aside under either of those two rules. The court thereafter, however, set the Judgment aside under Rule 60(b)(7) on its own motion and without ever having been requested by respondent or his counsel. Such a setting aside was totally an abuse of discretion by the court and without merit.

In Kessimakis v. Kessimakis, 546 P2d 888 (1976), this court held in a case where the defendant had made a Motion to Set Aside Default Judgment in a divorce action 5-2/3's months after the Judgment had been entered, that the trial court had no jurisdiction to set aside the Judgment. In Kessimakis, the defendant attempted to have the court relieve him of a financial burden which had been placed upon him as being an inequity against him. This court held that that was not a reason for setting aside the Judgment. The trial court in this matter was without jurisdiction to set aside the property agreement; six months had elapsed, leaving the trial court without jurisdiction. In setting aside the Judgment, the trial court in the instant case has abused its discretion and said Judgment should be re-instated and affirmed by this court.

POINT II

THE CONTRACTING WAIVER OF RIGHTS SHOULD BE GIVEN SANCTION BY THE COURT

It is clearly established by the Affidavit of the appellant

(R-50), the Affidavit of the attorney for the appellant (R-47), the deposition of Diana Tulpinski, and the Affidavit of Susan McCarthy (R-52), that the respondent had voluntarily and freely, of his own will and volition, agreed to the terms that were set forth in the Amended Verified Complaint, and that such Amended Verified Complaint was the only Amended Complaint which was prepared in this matter, the only one presented to the respondent, the only one filed with the Clerk of the Court, and the only one upon which the respondent made his agreement, and further, the one upon which the respondent thereafter signed the Waiver of Service, Acknowledgment and Consent to Default (R-20). The respondent took no action of any type contesting the Amended Verified Complaint or the Decree of Divorce until the date upon which the Order to Show Cause hearing filed by the appellant was held to require the respondent to comply with the terms and conditions of the Decree of Divorce. It is reasonable to believe that no action would ever have been taken by the respondent had not the appellant taken action to have the Decree of Divorce complied with by the respondent.

The Amended Verified Complaint contains the exact provisions as the Decree of Divorce, with the exception of a minor modification as to specifically naming utility bills. The respondent had in this matter contracted away his rights and privileges, and as such he should not be given the oppor-

tunity to have the property settlement that had been agreed to by him set aside. In Land v. Land, 605 P2d 1248 (1980), this court held, in an attempt by the husband to have the Decree of Divorce modified, which modification was denied,

> ". . .when a Decree is based on a property settlement agreement, forged by the parties and sanctioned by the court, equity must take such agreement into consideration. Equity is not available to re-instate the rights and privileges voluntarily contracted away simply because one has come to regret the bargain it made. Accordingly, the law limits the continuing jurisdiction of the court where a property settlement agreement has been incorporated into the Decree .. ." p.1250

In this particular case there was no compelling reason for the setting aside of the Decree of Divorce. The respondent had apparently come to regret his decision, and was attempting through means, "whether by hook or by crook", to have the Decree set aside, which the trial court allowed. There was no inequity shown or proven by the respondent, or as previously stated, any compelling reason why the Decree of Divorce should be set aside. Rule 60(b) limits the bringing of actions to three months for setting aside of Judgments and Decrees. The reason for such rule is that there must be some period of time upon which Judgments and Decrees can no longer by challenged so as to give vested property rights in individuals. To allow such agreements as have been made in this particular case to be set aside upon any whim would mean that at no time would any party be secure in the rights and privileges

which they have been awarded by a Decree. It could very easily be seen as preventing the transferring of any real or personal property rights at any time. Courts need to give sanctity to a Decree in order to give credence and credibility to the rulings and decisions by the court for the protection of the society and the contracting of rights by individual parties.

CONCLUSION

The trial court was without jurisdiction to set aside the Decree of Divorce in this action. The respondent had failed to meet any of the requirements or provisions of Rule 60(b) of the Utah Rules of Civil Procedure. This action should be remanded to the trial court with directions that the original Decree of Divorce be re-instated for failure to comply with Rule 60 (b) and further to protect vested property rights.

Respectfully submitted,

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MAILING CERTIFICATE

I certify that I delivered ten (10) copies of the foregoing Brief to the Utah Supreme Court, State of Utah, this 5 day of November, 1980. I also certify that I mailed two (2) copies of the foregoing Brief to Mr. Neils E. Mortenson, 66 Exchange Place, Salt Lake City, UT 84111, postage prepaid, this _____day of November, 1980.