1980

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

Utah Supreme Court

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Neils E. Mortenson; Attorney for Defendant-Respondent;

IN THE SUPREME COURT OF THE

STATE OF UTAH

ADRIANA CORNELIA PEARSON)

Plaintiff-Appellant)

vs.) CASE NO. 17094

KIMBER LEE PEARSON)

Defendant-Respondent)

RESPONDENT'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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AUTHORITIES CITED

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RESPONDENT'S BRIEF

NATURE OF CASE

A Motion by a divorced husband to set aside Default Judgment entered in the Decree of Divorce was granted by the Court and from the granting of that Motion this Appeal has arisen.

DISPOSITION IN A LOWER COURT

The Honorable Kenneth Rigtrup set aside the Decree of Divorce previously entered pursuant to a Default.

RELIEF SOUGHT BY RESPONDENT

Defendant-Respondent seeks to have this Appeal dismissed due to the fact that there is no final Judgment or in the alternative, for an Order upholding and sustaining the Order entered by Judge Rigtrup setting aside the Decree of Divorce.

STATEMENT OF FACTS

The parties were husband and wife and initially filed a Divorce Complaint in 1977 and later reconciled.(R-2).

An Amended Complaint for Divorce was filed in February of 1979. (R-16) Defendant-Respondent went to the Law Office of Plaintiff's attorney and, at that visit, accepted and signed an Acceptance of Service and Consent to Default. Defendant understood that the purpose of signing the Acceptance of Service Form was to eliminate the need for him to appear in Court. After he had accepted service of the Summons and Complaint, Defendant-Respondent, Plaintiff and Plaintiff's attorney did have a discussion in Plaintiff attorney's law office and an agreement was reached between the parties settling all the terms and conditions of the Divorce. Said agreement was substantially different from the allegations contained in the Amended Complaint (R-35). Defendant never executed a Stipulation, Waiver and Property Settlement Agreement setting forth the exact terms and conditions of the agreement between the parties and never received a copy of the Decree of Divorce, even though one had been requested. (R-35).

At the time the Defendant-Respondent was preparing to enter into another marriage in July of 1979 he reviewed the Divorce file and discovered that the Decree did not conform to the agreement between the parties and had been taken on a Default basis and based solely upon those allegations in the Amended Complaint. (R-35 & R-28). Defendant-Respondent had no knowledge of the discrepancy between the Decree as granted

and the agreement between the parties prior to July 26, 1979. (R-36) Defendant-Respondent immediately contacted an attorney, a Motion to Set Aside the Decree or to modify the same was brought before the Court and that Motion was granted. (R-39, R-54).

At no time did the Defendant agree to the specific terms and conditions of the Amended Complaint. And at no time was a Stipulation, Waiver and Property Settlement Agreement prepared and entered into by the parties.

After this Appeal was filed Defendant-Respondent filed a Motion to Dismiss based upon the fact that there was no final Judgment from which Plaintiff-Appellant could appeal.

That Motion was tentatively denied by this Court with final ruling differed until hearing on the merits.

ARGUMENT

POINT I

GRANTING OF A MOTION TO SET ASIDE A DEFAULT JUDGMENT IS NOT A FINAL RULING FROM WHICH APPEAL CAN BE TAKEN AND THEREFORE THIS APPEAL SHOULD BE DISMISSED.

The right to appeal is specifically set forth in Rule 72 of the Utah Rules of Civil Procedure, and provides as follows:

RULE 72

RIGHT OF APPEAL; SCOPE OF REVIEW; PARTIES

a. From final (Orders and) Judgments. An appeal may be taken to the Supreme Court from all final Orders and Judgments in accordance with these rules; ....

Defendant submits that the granting of a Motion to Set Aside a Default Judgment and a Decree of Divorce is not

a final order or a Judgment which can be appealed from. At this point in time there is not an Order of the Court specifically changing the terms and conditions of the original Decree and therefore the requisite finality has not been met.

The general rule is set forth in 4 Am. Jur. 2d, Section 126 at 641 in which it is indicated:

> "Insofar as an Order granting such a Motion is concerned, the weight of the authority appears to be that, ordinarily, Appeal or Writ of Error will not lie to an Order merely vacating a former Judgment, such an Order not being final."

Section 127 of the same authority indicates the following:

> "The Courts agree that an Order setting aside or refusing to set aside a default where Judgment has not been entered is not a final Order and therefore is not appealable unless it falls within the scope of a statutory provision allowing direct appeal from certain types of interlocutory decision."

Defendant submits that no Judgment has been entered from which Plaintiff-Appellant can appeal and pursuant the general rule such an appeal can only be timely after the entry of such a Judgment. Defendant further submits that the nature of this appeal does not lend itself to an interlocutory appeal nor has permission been granted for such an appeal.

This Court in the case of Baer v. Young, 25 U2d 198, 479 P. 2d 351 (1971) indicated that an appeal from an Order setting aside a Default Judgment was interlocutory in nature and could not be appealed under Rule 72a of the Utah Rules of Civil Procedure.

The setting aside of a Default Judgment entitles the Defendant to another hearing on the merits in order to obtain a final Judgment or a Decree based upon that hearing. Therefcre, the granting of a Motion to Set Aside Default Judgment is directly analoygous to the granting of a Motion for a new trial. The same general rules, as applied in a new trial situation apply in the granting of a Motion to Set Aside a Default. 4 Am. Jur. 2d Section 123 at 638 states the general rule as follows:

> "In the absence of statute requiring a different result, the general rule seems to be that there is no direct appeal from an Order denying or granting a Motion for a new trial. The holding that an Order denying or granting a Motion for a new trial is not directly appealable has usually been based on the ground of lack of finality of the particular decision."

This Court has unheld the general rule and has so stated in the case of Haslam v. Paulsen, 15 U 2d 185, 389 P. 2d 736 (1964), inwhich the Court stated as follows:

> "The Order granting a new trial is not a final Judgment, it but sets aside the verdict and places the parties in the same position as if there had been no previous trial."

Defendant submits that the Plaintiff's appeal should be dismissed based upon the settled law in the State of Utah that an appeal under Rule 72a of the Utah Rules of Civil Procedure cannot be made from a Motion granting relief from a Default. Plaintiff's only alternative would have been to seek an interlocutory appeal.

POINT II

THE COURT HAS SUFFICIENT GROUNDS TO SET ASIDE THE DEFAULT DIVORCE ENTERED IN THIS SITUATION UNDER RULE 60(b) 7 OF THE UTAH RULES OF CIVIL PROCEDURE.

Defendant brought this Motion under Rule 60(b) of the Utah Rules of Civil Procedure and the Court specifically found that there were sufficient grounds under Rule 60(b)7, which provide relief from a Default may be had for "any other reason justifying relief from the operation of the Judgment."

The Court after hearing the facts and circumstances and argument in this particular regard concluded that the facts and circumstances surrounding this Default did justify setting aside the Divorce Decree in numerous particulars and of the Decree of Divorce appeared to be inequitable upon its face.

This Court has stated the standard for granting of a Rule 60(b) Motion in the case of Warren v. Dixon Ranch Company, 123 Utah 416, 260 P. 2d 741,(1953) as follows:

> "The allowance of a vacation of a Judgment is a creature of equity designed to relieve against harshness of enforcing a Judgment, which may occur through procedural difficulties, the wrongs of the oposing party, or misfortunes which prevent the presentation of a claim or defense. . . . (A)n Equity Court . . . . may exercise wide judicial discretion in weighing the factors of fairness and public convenience, and this Court on appeal will reverse the trial Court only where an abuse of discretion is clearly shown".

The Court heard argument in this particular regard and was convinced that there was sufficient grounds under the notion of equity to set aside this Judgment. The

Decree of Divorce specifically awards the entire interest in the home of the parties to the Plaintiff, awards her majority of the personal property and obligates the Defendant to pay the majority of the debts and obligations of the parties. These factors considered in light of the fact that Defendant alleges that after the acceptance of the Summons and Complaint a discussion was had and an agreement reached substantially differing from the obligations in the Complaint gave the Court sufficient and substantial cause to set aside the Judgment entered herein.

This Court in a recent case of Boyce v. Boyce No. 16342 (filed March 5, 1980) indicated that :

> "A liberal standard for the application of Rule 60(b) in Divorce cases is justified by the Doctrine of Continuing Jurisdiction that a Divorce Court has over its Decrees. Clearly, a Court should modify a prior Decree when the interests of equity and fair dealing with the Court and the opposing parties so require".

Defendant submits that under the liberal standards set forth in the foregoing cases and the law in the State of Utah there was no abuse of discretion in setting aside this Decree.

Plaintiff-Respondent sites the case of McGavin v. McGavin, 27 U 2d 200, 494 P. 2d 283 (1972) in support of the proposition that there was an abuse of discretion by the District Court. Defendant submits that the McGavin case dealt specifically with the issue of paternity and fraud based upon that paternity. This Court indicated that in a situation of that nature a separate action could more readily handle the situation then a Motion to Set Aside the Decree of Divorce. Defendant submits that that is not the situation presently confronting

The issues are specifically those issues contained in the Decree of Divorce and not paternity issues as in the McGavin case. Defendant also reinterates that this Motion was granted under Rule 60(b) 7 and therefore the three (3) month provision relating to Rule 60(b) 1 through 4 is not applicable.

Plaintiff-Appellant also argues that Defendant's Motion was denied under 60(b)(1)through(3). There is nothing in the record indicating said denial and, in fact, it is contrary to the ruling of the Court. Defendant alleged numerous grounds entitling him to relief under Rule 60(b) and the Court granted his Motion under Rule 60(b) 7.

POINT III

THE SITUATION IN THE PRESENT CASE IS SUBSTANTIALLY DIFFERENT FROM THE SITUATION IN WHICH THE PARTIES TO A DIVORCE HAVE EXECUTED AND SIGNED A STIPULATION WAIVER AND PROPERTY SETTLEMENT AGREEMENT SPECIFICALLY CONTRACTING AND AGREEING TO ALL THE TERMS AND CONDITIONS OF THE DIVORCE.

In the present case no Stipulation, Waiver and Property Settlement Agreement was executed between the parties setting forth the specific terms and conditions to be incorporated in the Decree. Defendant was merely presented with a copy of the Summons and Complaint and he alleges that thereafter an agreement was reached between himself, his wife and his wife's attorney substantially modifying the terms contained in the Complaint.

It was his understanding that the Acceptance of Service was merely for the purpose of eliminating his need to appear in Court.

Plaintiff-Appellant cites the cases of Kessimakis v. Kessimakis, 546 P. 2d 888 (1976) and Land v. Land, 605 P. 2d

1248 (1980) in support of their argument that the Court abused its discretion in this case. Defendant submits that in both the Kessimakis and the Land case specific stipulations had been entered into. In both of those cases a Stipulation, Waiver and Property Settlement Agreement had been executed outlining all the specific terms and conditions of the Divorce and these same terms and conditions were then incorporated in the Decree. In that type of situation Plaintiff's argument concerning a contract between the parties bears substantial weight. In the present situation the Acceptance of Service by the Defendant certainly cannot be granted the same contractual weight as in those other cases. Even the quotation cited by Plaintiff-Appellant in regard to the Land case indicates :

> ". . . . when a Decree is based on a property settlement . . . ."

Therefore the principals enunciated in those cases do not apply to a situation in which no property settlement was arrived at. Defendant has alleged that a separate agreement was reached between the parties at the time he accepted service, but that agreement was not incorporated in the Decree of Divorce and that the Decree was inequitable and should be set aside.

CONCLUSION

Defendant hereby submits that Plaintiff's Appeal should be dismissed for lack of a final judgment from which

to appeal. The law is clear that an appeal of the nature attempted by Plaintiff is untimely and without basis in law.

The District Court did not abuse its discretion in setting aside the Default Judgment. Sufficient grounds were alleged and the Court, in the interest of justice, after hearing the facts and circumstances, certainly was well within the standards set forth by this Court.

Plaintiff's Appeal should be dismissed or in the alternative an Order from this Court should uphold the ruling of Judge Rigtrup and remand this matter for further hearing to the District Court.

Respectfully submitted this 15th day of January, 1981.

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I hereby certify that on the 18th day of January, 1981, I mailed, postage prepaid, a true and correct copy of the above and foregoing Respondent's Brief to Randy Ludlow Attorney at Law, 325 South Third East, Salt Lake City, Utah 84111.

Neils E. Mortenson