1956

Echo Ney, Trustee, Wasatch Homes, Inc. v. G. T. Harrison and Alda J. Harrison : Brief of Appellant

Utah Supreme Court

Gordon I. Hyde; Counsel for Plaintiff-Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

ECHO NEY, TRUSTEE,
WASATCH HOMES, INC.,
a corporation,
Plaintiff and Appellant,

— vs. —

G. T. HARRISON and
ALDA J. HARRISON,
Defendants and Respondents.

Case No.
8437

Appellant's Brief

GORDON I. HYDE,
Counsel for Plaintiff-Appellant
863 First Security Bldg.
Salt Lake City, Utah

TABLE OF CONTENTS

AUTHORITIES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

ECHO NEY, TRUSTEE,
WASATCH HOMES, INC.,
a corporation,
Plaintiff and Appellant,

— vs. —

G. T. HARRISON and
ALDA J. HARRISON,
Defendants and Respondents.

Case No.
8437

Appellant's Brief

STATEMENT OF FACTS

This is an action to recover a real estate commission. The claim was assigned to the plaintiff, Echo Ney. Wasatch Homes, Inc., a real estate broker's firm, obtained purchasers for the Snow Apartments, an apartment house owned by Alda J. Harrison and G. T. Harrison, the defendants herein. No listing agreement was signed; however, an earnest money receipt and agree-

ment admitted as Exhibit P-1 was executed, providing for the payment of a commission and for the payment of a reasonable attorney's fee in the event of a breach of the contract. The sellers and buyers performed the earnest money agreement, except that the sellers refused to pay the real estate commission provided for in said agreement. The sale was consummated and transfer of title made to the buyers.

The district court ruled that the plaintiff could not recover because there was no listing agreement ever executed between the sellers and the real estate broker and, therefore, there existed no contract upon which the broker could recover. A judgment by default was obtained against Alda J. Harrison on December 9, 1953.

On September 21, 1954 a notice of the judgment and demand for payment was sent to Mrs. Harrison, and she replied by letter refusing to pay the judgment and stating that she would ignore any further efforts to collect the judgment. (See Ex. 3-P.)

On the 30th day of October Alda J. Harrison filed a motion to set aside the judgment, and said motion was granted solely upon the affidavit on file in this case.

From the order setting aside the judgment against Alda J. Harrison, and from the final judgment of the trial court, the appellant appeals.

POINT I.

THE TRIAL COURT ERRED IN SETTING ASIDE THE JUDGMENT AGAINST THE DEFENDANT, ALDA J. HARRISON.

The defendant, Alda J. Harrison, was duly served

with the summons and complaint in this action on the 12th day of November, 1953 (R. 8). This defendant did not answer the complaint, and on December 9, 1953 judgment by default was granted against this defendant (Tr. P. 4). A demand for payment of this judgment was received by the defendant on September 21, 1954 and the defendant replied by letter dated September 26, 1954 (See Ex. 3-P). In this letter the defendant stated:

> "I am taking no action whatever in regard to it, so please don't bother me any more about it, as I am a very busy woman and would ignore any more efforts on your part to collect from me."

On the 25th day of October, 1954 a garnishment was issued against First Security Bank, and on October 28, 1954 the garnishee replied that it owed this defendant $2,608.97.

On October 30, 1954 the defendant filed a motion to set aside the judgment. This motion was supported solely by the affidavit of Alda J. Harrison pleading that she had failed to plead in the action because she felt that she was protected by a divorce decree directing her husband to pay the commission on the sale of the Snow Apartments and therefore had no liability (R. 16). No other evidence or justification for relief from the judgment was offered by the moving party. The trial court granted the motion and set aside the plaintiff's judgment solely on the strength of this affidavit.

These facts present the narrow question of whether or not a belief on the part of a defendant served with process that he has no liability at law to the plaintiff, or that he has a good defense to the action is a justifica-

tion for not pleading to the complaint.

At common law all judgments become final after the close of term. Our rule 60(b) is in derogation of this rule. In *Bickerstaff vs. Harmonica Fire Insurance Co.*, 133 S.W. (2d) 890 the court analyzed the effect of 60(b) and said:

> "The statute to vacate judgments by this proceeding is in derogation, not only of the common law, but of the very important policy of holding judgments final after the close of the term. *Citizens must have confidence* in the judgments of our official tribunals, as settlements of their controversies; and there should be some end to them. Unless the case be clearly within the spirit and policy of the act, the judgment should not be disturbed.

Rule 60(b) is intended to grant relief in certain cases from judgments that would have become unassailable at common law. Does the affidavit of the defendant, Alda Harrison, which was the sole basis for setting aside the judgment come within the provisions of Rule 60(b)? The affidavit sets forth two reasons why the court should set aside the judgment against her:

1. She believed that she was not liable to the plaintiff.
2. No notice of judgment was given her.

The second basis is entirely without foundation. No notice of judgment is required in the district court and the defendant was not entitled to any notice. However, in this instance she was sent a notice of judgment to which she replied that she intended to take no action whatever in regard to the judgment and would not be

bothered any more about it (See Ex. 3-P). This was in reply to a letter notifying her of the judgment on September 21. Her motion to set aside the judgment was not made until October 30.

The only other ground in her affidavit is based upon the mistaken notion that her divorce decree had absolved her of all liability for the real estate commission. She refused to consult counsel, saying:

> "I would not bother my lawyer about it, nor will I pay any part of the commission." (Ex. P-3).

Is this a reason that justifies relief from a judgment? Does the law permit a person who so scorns the process of the court and refuses to "bother" her lawyer with process duly served upon her, to come into court with no more showing than this affidavit and set aside a judgment entered against her nearly one year before? The cases all deny such a right. The courts even deny relief where the fault is the attorney's and not the person served.

In all of the following California cases, the trial court set aside default judgments and the appellate court held the trial court abused its discretion in so doing and reinstated the judgments. In *Sharman vs. Jorgensen,* 39 P. 863, the attorney thought he had filed the answer, but inadvertently failed to do so. In *Durbow vs. Chesley,* 141 P. 631, the defendant attorney failed to file an appearance due to a mistaken understanding that the case was consolidated with other actions. In *Ross vs. San Diego Glazed Pipe Co.,* 194 P. 1059, attorney forgot to answer counterclaim.

In *Coleman vs. Rankin,* 37 Calif. 247, the defendant lost the summons and failed to answer it on time. The court refused to set aside the default judgment. In *Weinberger vs. Cummings,* 123 P. (2d) 531 the court in refusing to set aside a default judgment said:

> "All persons in possession of their normal faculties, capable of engaging in business transactions, must conform with, and be guided by, the rules and regulations of legal procedure."

The controlling Utah cases concur in the rulings of the California courts. In *Peterson vs. Crosier,* 29 Utah 235; 81 P. 860 the court held that a default judgment would not be set aside because of mere carelessness, lack of attention, or indifference on the part of the defendant or her attorney. Mrs. Harrison not only scorned the service of process and refused to even "bother" her attorney, but ignored the notice sent her of the judgment entered against her. In the *Crosier* case the court denied the defendant's motion to set aside the judgment on the ground that his attorneys neglected to appear. The court said:

> "The moving party must show that he used due diligence to prepare and appear for trial and was prevented from doing so because of some accident, misfortune, or combination of circumstances over which he had no control. If, however, the record discloses mere carelessness, lack of attention, *or indifference* to his rights on the part of the applicant or his counsel, he cannot expect an opportunity to redeem his past." Peterson vs. Crosier, 81 P. 860, 862.

In the case of *McWhirter vs. Donaldson,* 36 Utah 293, 104 P. 731 the court affirmed and expounded this

rule denying relief. It is hard to conceive of a fact situation which impels the denial of relief more than the case of Alda J. Harrison. There is no mistake or excusable mistake. She simply scorned the process and refused to "bother" her lawyer. Surely if the error or neglect of an attorney resulting in a judgment against an innocent person is not grounds for relief, the refusal to even consult an attorney or answer a complaint is not a ground for relief.

In *Warren vs. Dixon Ranch Co.*, 29 Utah 235; 260 P. (2d) 741, the court refused to set aside a default judgment resulting from the company's process agent's neglect in failing to notify the company of the service of the summons. The court said: ". . . 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" (P. 743). Certainly there were no circumstances preventing Alda J. Harrison from "bothering" her lawyer or answering the process. If a plaintiff can be deprived of a judgment on these facts, then no plaintiff can rely on a default judgment obtained from our courts and every person is free to ignore process with safety.

The lower court's order setting aside the judgment obtained against Alda J. Harrison should be reversed and the judgment reinstated.

POINT II.

THE COURT ERRED IN FINDING THAT THERE WAS NO CONTRACT BETWEEN WASATCH HOMES, INC. AND THE DEFENDANTS.

The court in announcing its judgment in this case ruled against the plaintiff on the sole ground that since there was no listing agreement between the real estate broker and the defendants, there was never a contractual relationship between them which could support recovery.

The testimony of the defendants themselves firmly establishes the plaintiff's case. Mrs. Harrison testified as follows:

1. Mrs. Harrison asked the real estate company to sell the Snow Apartments for her.

> "Q. Who did you ask if they would help you?
>
> "A. This Wasatch Homes; I think they call it 'Wasatch.'
>
> "Q. That Mr. Dean Parry?
>
> "A. Yes." (R. 22)

2. Mrs. Harrison signed the earnest money receipt and agreement (Ex. 1) twice after being signed by all parties to the receipt and agreement. It contained all the writing at the time she signed that is now upon it.

> "Q. In any event, all the writing above your signature was on the paper at the time you signed here beneath the name of G. T. Harrison?
>
> "A. Well, as far as I know." (R. 25)

3. Mrs. Harrison went to the offices of Wasatch Homes, Inc., the real estate broker, and executed the final papers in accordance with the terms of the earnest money receipt and agreement, and accepted payment from the buyers.

> "Q. Mrs. Harrison, after Exhibit 1 was signed, you came to the offices of Wasatch Homes for the purpose of signing the final documents,

didn't you, and your husband refused to come; is that correct?

"A. Yes, I think that was correct." (R. 26)

* * *

"Q. And you remember meeting with Mr. and Mrs. Asp and going over the closing?

"A. Yes.

"Q. —and signing the final papers?

"A. Yes.

"Q. —the final contract of sale; don't you? Don't you remember that?

"A. Yes, I think I remember that." (R. 27)

Mr. Harrison's testimony also establishes the plaintiff's case.

1. When the earnest money receipt and agreement was signed by G. T. Harrison, the agreement was signed by Dean Parry for Wasatch Homes.

"Q. Was there anything else that wasn't on there when you signed it?

"A. Yes.

"Q. What is that?

"A. Let me see — well, I think it is substantially the same otherwise." (R. 77)

2. G. T. Harrison himself wrote in the clause on the earnest money agreement, agreeing to the commission and specifying the amount to be paid the real estate broker.

3. G. T. Harrison executed the final papers closing the sale with the buyers supplied by the real estate company. (R. 87) (R. 90)

The plaintiff submits that the earnest money agree-

ment (Ex. 1) is a sufficient memorandum to take the transaction out of the Statute of Frauds. It is a complete written agreement between the buyer, seller, and real estate broker. The broker is entitled to recover the commission and a reasonable attorney's fee in accordance with the terms of the agreement.

CONCLUSION

The judgment of the lower court should be reversed. The judgment against the defendant, Alda J. Harrison, should be reinstated and judgment entered against G. T. Harrison. The lower court should be directed to assess a reasonable attorney's fee against the defendant, G. T. Harrison.

Respectfully submitted,

GORDON I. HYDE,
Counsel for Plaintiff and Appellant

863 First Security Bldg.
Salt Lake City, Utah