1981

Corroon & Black v. Mountain West Transportation Company, a Utah Corporation, and Salt Lake Transportation Company, A Utah Corporation : Respondent's Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

CORROON & BLACK,	:	
	:	
Plaintiff-Respondent,	:	
	:	
-vs-	:	
	:	Case No. 17371
MOUNTAIN WEST TRANSPORTATION	:	
COMPANY, a Utah corporation,	:	
and SALT LAKE TRANSPORTATION	:	
COMPANY, a Utah corporation,	:	
	:	
Defendants-Appellants.	:	
	:	
	:	

RESPONDENT'S BRIEF

BLACKHAM & BOLEY
Mikel M. Boley, Esq.
3535 South 3200 West
West Valley City, Utah 84119
Attorney for Respondent

WATKISS & CAMPBELL
E. Barney Gesas, Esq.
310 South Main St., Suite 1200
Salt Lake City, Utah 84101
Attorney for Appellants

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West Valley City, Utah 84119
Attorney for Respondent

WATKISS & CAMPBELL
E. Barney Gesas, Esq.
310 South Main St., Suite 1200
Salt Lake City, Utah 84101
Attorney for Appellants

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CASES CITED

STATEMENT OF FACTS

On 3-18-80, respondent filed a suit against appellant for the recovery of earned but unpaid insurance premiums. Defendants were thereafter properly served with process. Prior to the initiation of the action, respondent, through its attorney, wrote to appellant Mountain West Transportation Company demanding the amount due and gave appellants until 3-7-80 to pay or make arrangements to pay the unpaid insurance premiums. (R. 39) No response was received from appellants. (R. 37) After the filing of the action, an agent of appellant, David Stannard, met with Steven Wiseman of respondent. (R. 32) According to Wiseman, the two parties did agree as to an amount due unless several checks issued by appellant to respondent in fact cleared appellant's bank, which they did not. (R. 32, 33, 35 and 36) Pursuant to instructions from Wiseman, respondent's attorney wrote another letter to Stannard on or about 3-21-80. (R. 40-42) Said letter specifically stated that respondent was going to move forward expeditiously with its legal action against appellants unless certain minor details were worked out with respondent's attorney. (R. 42) Respondent's attorney was never contacted. (R. 37) Therefore, a default judgment was entered 5-7-80.

In response to appellants' Motion To Set Aside Default Judgment an untranscribed hearing was held 8-28-80 before the Honorable Kenneth Rigtrup. Appellants' motion was argued to and denied by Judge Rigtrup by order dated 9-8-80.

Steven Wiseman in his affidavit (R. 32-33) and respondent's attorney in his affidavit (R. 37-38) both denied ever agreeing to or stating that the lawsuit would not be pursued, which fact is substantiated by copies of respondent's attorney's letters mentioned above.

ARGUMENT

THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO SET ASIDE THE DEFAULT JUDGMENT

A great number of cases have been previously decided by this court regarding the setting aside of default judgments. It is not the intent of this brief to exhaustively review or research this area of the law, inasmuch as the court is very familiar with the general law regarding these cases. The case law is very clear in showing that the lower court in the case at bar did not abuse its discretion in refusing to vacate respondent's judgment.

A closer look at the cases cited in appellant's brief shows that the Utah Supreme Court has only overruled the discretion of trial courts in cases of obvious error. For example, in Locke v. Peterson, 3 Utah 2d 415, 285 P.2d 1111, this court overturned the lower court in a case where confusion was created by a defendant's not being served with an exact copy of the original summons. In that case, the Utah Supreme Court stated, "It is our declared policy that in case of uncertainty, default judgments should be set aside to allow trial on the merits." Id. at 1113 of P.2d. There was no uncertainty in the case at bar other than that created by appellants' failure to respond to the clear language of the summons (R. 5-8) and of the letters sent by respondent's attorney.

In 1962, in the case of Mayhew v. Standard Gilsonite Company, 14 Utah 2d 52, 376 P.2d 951, a case also cited in appellant's brief, this court held that the default judgment should have been set aside by the lower court where there was a showing that process was served upon a party who had previously sent notices of resignation of his corporate capacity to other parties involved with the corporate defendant. As with the previously discussed case, there was a potential problem with process. This court stated the general rule that trial courts are endowed with considerable discretion in these matters as long as they do not act arbitrarily. Id. at 952 of P.2d. Judge Rigtrup did not act arbitrarily. Appellants merely chose to put their respective heads in the sand and to disregard written notices and summons.

Also cited in appellants' brief was the case of Central Finance Company v. Kynaston, 22 Utah 2d 284, 452 P.2d 316. Both parties were represented by counsel but defendant's counsel and defendant failed to appear for a trial and a default was accordingly entered. The issue was whether or not the clerk had properly notified the defendant and his attorney of the trial date. There are none of the glaring problems in the case at bar as with the previously discussed cases.

This court in June of 1979 handed down a decision which sets forth clear guidelines for decisions such as this. Heath v. Mower, 597 P.2d 855, was a case in which the defendant moved the lower court to set aside a default judgment entered against him for fraudulent misrepresentation. The actual facts of the case differ markedly from the case at bar, but the court in

upholding the lower court's refusal to set aside the default judgment in its dicta set clear criteria for deciding this matter. The court stated,

> Whether a trial court should set aside a default judgment is largely a discretionary matter, and we will reverse a court's ruling only if it is clear the court abused that discretion... Id. at 858 of P.2d.

The court also quoted one of its previous decisions (Airken Intermountain, Inc. v. Parker, 30 Utah 2d 68, 513 P.2d 431) in putting the burden on the moving party to set aside a default. The moving party "must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control." Id. at 859. (Emphasis in the original). Appellants in the case at bar did not use "due diligence" and were in no way prevented from appearing. In fact, respondent gave appellants more warnings than required by statute.

Warren v. Dixon Ranch Co., 123 Ut. 416, 260 P.2d 741, was a case in which this court upheld the lower court's refusal to set aside a default judgment in a quiet title action. The court held that more was needed than a statement by the moving party that defenses were available and that the moving party had lost his day in court. Id. at 744 of P.2d. In that case, this court felt that the lower court very well could, in its discretion, have set aside the default, but in refusing to reverse the lower court's refusal to set aside the default the court held as follows:

> Appellants' conduct is not entirely inexcusable and the trial court could have, in its discretion, set aside the judgment; but, on the other hand, respondent and the trial court were justified in believing that appellants had abandoned their defense. The rule that the courts will incline towards granting relief to a party who has not had opportunity to present his case is ordinarily applied at the trial court level, and this court will not reverse

> the trial court where it appears...that all elements were considered, merely because the motion could have been granted. This court will not substitute its discretion for that of the trial court in a case such as this. Id, at 744 of P.2d.

Appellants are asking this court to exercise equitable powers available only to the lower court. As in the Warren, supra, decision, there has been no abuse of discretion and this court's equitable judgment should not be substituted for that of Judge Rigtrup.

CONCLUSION

Plaintiff-respondent respectively concludes that the foregoing cases clearly show that defendant-appellant failed both before the lower court and particularly before this court to carry its burden of setting aside the default judgment. That is particularly true where no transcript of the trial court proceedings was made. Respondent warned appellant through two different letters of its intention of moving forward. Appellant chose to ignore these warnings. In fact, it was not until a Writ of Execution was served upon Mr. Charles A. Boynton, president of both defendants, that any action at all took place by appellants. (R. 14). This fact further supports respondent's claims, because appellants did nothing from the meeting in March until 5-15-80, despite appellant's claim that ongoing negotiations were taking place.

There was no abuse of discretion by the lower court. It is submitted that this court should not substitute its judgment for that of Judge Rigtrup,

even if the judges of this court might have come to a different conclusion had they been sitting in Judge Rigtrup's chair on August 28, 1980.

Therefore, the lower court's ruling should be upheld and the judgment should not be set aside.

Respectfully submitted,

Mikel M Boley

Mikel M. Boley
BLACKHAM & BOLEY
Attorney for Respondent
3535 South 3200 West
West Valley City, Utah 84119

MAILING CERTIFICATE

I hereby certify that two (2) true and correct copies of the foregoing Respondent's Brief were mailed, postage prepaid, this 26th day of January, 1980, to:

WATKISS & CAMPBELL
E. Barney Gesas
310 South Main, 12th Floor
Salt Lake City, Utah 84101
Attorney for Defendants-Appellants

Mikel M. Boley

Mikel M. Boley