

1990

Vitamin Products Inc. v. Spectummedical Inc., J.E. Dressel and Patricia M. Wolf : Brief of Appellant

Utah Court of Appeals

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Dale M. Dorius; Attorney at Law; Attorney for Appellee.

Brenda L. Flanders; Attorney at Law; Attorney for Appellant.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 208CA IN THE COURT OF APPEALS

FOR THE STATE OF UTAH

VITAMIN PRODUCTS, INC.	:	
Appellee/Plaintiff,	:	
v.	:	Case No. 900208-CA
SPECTRUMEDICAL, INC., a Utah	:	Argument Priority
Corporation, J. E. DRESEL and	:	Classification No. 16
PATRICIA M. WOLFF,	:	
Appellant/Defendants.	:	

BRIEF OF APPELLANT

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FILED

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COURT OF APPEALS

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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; . . . (5) the judgment is void; . . . or (7) any other reason justifying relief from the operation of the judgment.

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(2) Written notice as applied in Subsection 7-15-1(2) shall take substantially the following form:

Date: _____

To: _____

You are hereby notified that the check(s) described below issued by you has been returned to us unpaid:

Instrument date: _____

Instrument number: _____

Originating institution: _____

Amount: _____

Reason for dishonor (marked on instrument): _____

This instrument, together with a service charge of \$15 must be paid to the undersigned within seven days from the date of this notice in accordance with Section 7-15-1, Utah Code Annotated 1953, or appropriate civil legal action may be filed against you for the amount due and owing together with service charges, interest, court costs, attorneys' fees, and actual costs of collection as provided by law.

In addition, the criminal code provides in Section 76-6-505, Utah Code Annotated 1953 that any person who issues or passes a check for the payment of money, for the purpose of obtaining from any person, firm, partnership, or corporation, any money, property, or other thing of value or paying for any services, wages, salary, labor, or rent knowing it will not be paid by the drawee and payment is refused by the drawee, is guilty of issuing a bad check.

The civil action referred to in this notice does not preclude the right to prosecute under the criminal code of the state of Utah.

(Signed) _____
Name of Holder: _____
Address of Holder: _____
Telephone Number: _____

§ 78-4-11, Utah Code Annotated 1

Except as otherwise directed by Section 78-2-2, appeals from final civil and criminal judgments of the circuit courts are to the Court of Appeals. The county attorney shall represent the interests of the state as public prosecutor in any criminal appeals from the circuit court. City attorneys shall represent the interests of municipalities in any appeals from circuit courts involving violations of municipal ordinances.

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COURT OF APPEALS
FOR THE STATE OF UTAH

VITAMIN PRODUCTS, INC.	:	
Appellee/Plaintiff,	:	
v.	:	
SPECTRUMEDICAL, INC., a Utah	:	
Corporation, J. E. DRESEL and	:	
PATRICIA M. WOLFF,	:	Case No. 900208-CA
Appellant/Defendants.	:	

BRIEF OF APPELLANT

Appellant, J.E. Dresel, respectfully submits his Brief of Appellant as follows:

STATEMENT OF BASIS OF APPELLATE JURISDICTION

Appellate jurisdiction over this matter is provided by § 78-4-11, Utah Code Annotated.

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Does Rule 60(b), Utah Rules of Civil Procedure, empower the Circuit Court to set aside its prior judgment?

2. Did Dresel file his motion to set aside the judgment in a timely manner?

3. Was the judgment entered against Dresel in a manner coming within the confines of Rule 60(b), Utah Rules of Civil Procedure?

4. Whether Dresel has a meritorious defense, i.e., one that sets forth specific and sufficiently detailed facts, which, if proven, would result in a judgment different from the one entered?

5. Did the plaintiff fail to give proper notice to defendant?

6. Did plaintiff's failure to give proper notice to defendants result in the need to set aside the lower court's judgment?

STANDARD OF REVIEW ON APPEAL

For any question of fact, the standard of review in this appellate proceeding is abuse of discretion. For any question of law, the standard of review is de novo. This case involves a number of questions of fact and law. Further, this case involves a confused docket and the need for more particular procedures to protect defendants in positions similar to that of J.E. Dresel.

INTRODUCTION

The events in this case, regarding those as shown by the docket, are somewhat perplexing. The Summary Judgment was allegedly entered on October 10, 1989. Yet, the docket shows it as having been entered on January 25, 1990. J.E. Dresel filed his Motion to Set Aside the Summary Judgment on November 20, 1989. Upon a telephone conference with the Court, counsel for J.E. Dresel was informed that the Motion to Set Aside had been denied. Due to the lack of notice thereof, the Court executed an Order extending the time within which to file an appeal. To the contrary, however, the Order denying the Motion to Set Aside was not executed by the Honorable Floyd Gowans until April 30, 1990. This is the Order from which J.E. Dresel filed his appeal. If the timeliness is at issue, as it may be, however, J.E. Dresel will include argument on the merits of the entry of the Summary Judgment. The questions

regarding this timeliness issue were raised only upon examination of the actual Court docket sheet.

STATEMENT OF FACTS AND CASE

1. On or about August 26, 1986, Vitamin Products obtained default judgment against Spectrumedical, Inc. in the amount of six thousand three hundred seventeen dollars and thirteen cents (\$6,317.13) principal, sixty four dollars and fifty three cents (\$64.53) interest, and fifty six dollars and seventy five cents (\$56.75) costs, for a total of six thousand four hundred thirty eight dollars and forty one cents (\$6,438.41). Default Judgment, Docket Sheet Entry (DSE) No. 2.

2. Judgment against Spectrumedical was based on a claim of payment by Spectrumedical to Vitamin Products "for merchandise and/or services purchased or rendered from Plaintiff" paid by a check written on an account with insufficient funds. Complaint, DSE No. 1.

3. Being unable to collect judgment against Spectrumedical, because Spectrumedical had long been out of business, Vitamin Products amended its complaint to add J.E. Dresel and Patricia M. Wolff as party defendants. Amended Complaint, DSE No. 13.

4. As with its complaint against Spectrumedical, Vitamin Products sought judgment against Dresel and Wolff for six thousand three hundred seventeen dollars and thirteen cents (\$6,317.13) "for merchandise and/or services purchased or rendered form Plaintiff" paid by check written on an account with insufficient funds. Amended Complaint, DSE No. 13.

5. On September 22, 1987, Dresel wrote Dale M. Dorius, attorney for Vitamin Products, stating that the shipment of merchandise in question "was transacted prior to my employment with Spectrumedical". See Letter Dated 9-22-87.

6. On May 26, 1988, Vitamin Products filed a motion for summary judgment against defendants Dresel and Wolff. On May 31, 1988, Dale M. Dorius, attorney for Vitamin Products, filed an affidavit stating that defendants Dresel and Wolff signed the Spectrumedical checks at issue in the case. See DSE No. 18 and No. 19, Motion For Summary Judgment and Affidavit of Dale M. Dorius.

7. On May 30, 1989, Vitamin Products filed its first set of requests for admissions to defendant J.E. Dresel individually. See DSE No. 24, Requests For Admissions.

8. On or about September 20, 1989, Vitamin Products filed its second motion for summary judgment against defendant Dresel together with a memorandum of points and authorities and a request for ruling. See DSE No. 25, Request for Ruling on Motion for Summary Judgment.

9. Apparently on October 10, 1989, the Court granted Vitamin Products' motion for summary judgment against defendant Dresel. Although the Court's order granting Vitamin Products' motion for summary judgment appears on the docket sheet, no minute entry or order signed by the Court appeared in the file maintained by the Court at that time. See DSE No. 26, reference to order of Court on docket.

10. Throughout the above proceedings, Dresel was told by Vitamin Products that Vitamin Products would not proceed further against defendant Dresel. In particular, on or about September 25, 1989, defendant Dresel spoke with a Ron Groberman, president of plaintiff Vitamin Products. Dresel was informed by Mr. Groberman that Vitamin Products was not interested in pressing the matter further and had not requested its attorney to send the requests for admissions dated September 20, 1989. See DSE No. 30, Affidavit of J.E. Dresel, ¶¶ 2, 3 and Letter, dated September 25, 1989.

11. Relying on the representations made by Vitamin Products, Dresel did not respond to the discovery requests served on him by Vitamin Products. See DSE No. 30, Affidavit of J.E. Dresel, ¶ 4.

12. The Spectrumedical checks to Vitamin Products, signed by Dresel, were signed by him in his corporate capacity and not individually. See DSE No. 30, Affidavit of J.E. Dresel, ¶ 6.

13. The Spectrumedical checks were replaced by subsequent checks and Vitamin Products thereby was paid. See DSE No. 30, Affidavit of J.E. Dresel, ¶ 5.

14. Dresel did not receive notice in the form required by § 7-15-2(2), Utah Code Annotated, prior to Vitamin Products filing its complaint against him. See DSE No. 30, Affidavit of J.E. Dresel, ¶ 7.

15. On April 12, 1990, Dresel filed a Motion to Stay Time for Filing Appeal, an Affidavit of Brenda L. Flanders in support of the Motion and a proposed order. The stay was requested due to the lack of notice given by Vitamin Products of the purported entry of an order denying the Motion to Set Aside Summary Judgment filed by Dresel. See DSE No. 38, Motion to Stay Time for Filing Appeal, Affidavit of Brenda L. Flanders and Order.

16. Also on April 12, 1990, Dresel filed his Notice of Appeal from the Order denying the Motion to Set Aside Summary Judgment. See DSE No. 38, Notice of Appeal.

SUMMARY OF ARGUMENT

Argument I: Rule 60(b), Utah Rules of Civil Procedure, provides authority and power, jurisdiction, for the District Court to set aside its grant of summary judgment. To obtain this relief, the judgment debtor must show compliance with Rule 60(b), provide a meritorious defense to the action and file a motion to set aside in a timely manner.

Argument II: Dresel filed a motion to set aside the summary judgment in approximately one month after the judgment purportedly was entered, and thus, the motion was timely.

Argument III: Dresel has demonstrated compliance with Rule 60(b). The judgment was entered on the basis of excusable neglect, misrepresentation and the evidence and pleadings do not support the judgment.

Argument IV: Dresel has provided several meritorious defenses to the claims asserted by Vitamin Products, including the failure of Vitamin Products to give Dresel proper notice in accordance with § 7-15-2(2), Utah Code Annotated, Dresel's execution of the check

in question in a corporate capacity coupled with the lack of the afore-referenced proper notice, the evidence (the requests for admissions) does not support the judgment, and the "bad checks" were replaced in the ordinary course of business.

ARGUMENT I

THE COURT HAS JURISDICTION TO SET ASIDE ITS SUMMARY JUDGMENT

Rule 60(b), Utah Rules of Civil Procedure, provides that

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; . . . (5) the judgment is void; . . . or (7) any other reason justifying relief from the operation of the judgment.

Where a reasonable excuse is offered by the judgment debtor, courts generally tend to favor granting relief from judgment unless it appears that to do so would result in substantial injustice to the judgment creditor. Westinghouse Electric Supply Co. v. Paul W. Larsen, Contractor, 544 P.2d 876 (Utah 1975).

To relieve a judgment debtor from the judgment, he must show not only that the judgment was entered against him through any reason specified in Rule 60, subdivision (b), but also that his motion to set aside the judgment was timely and that he has a meritorious defense to the action. A meritorious defense is one that sets forth specific and sufficiently detailed facts which, if

proven, would result in a judgment different from the one entered.
State ex rel. Utah State Department of Social Services v.
Musselman, 667 P.2d 1053 (Utah 1983).

ARGUMENT II

DRESEL FILED HIS MOTION TO SET ASIDE THE JUDGMENT IN A TIMELY MANNER

Rule 60(b) provides that a motion to set aside must be filed not more than three (3) months after the judgment, order, or proceeding was entered or taken. Dresel complied with this requirement of Rule 60(b) by filing his motion approximately one month after the judgment purportedly was entered.

ARGUMENT III

THE JUDGMENT WAS ENTERED AGAINST DRESEL THROUGH A REASON SPECIFIED IN RULE 60 SUBDIVISION (b)

Excusable neglect is present due to the representations made to Dresel by Vitamin Products and its counsel of record. Throughout the proceedings, Dresel spoke with Vitamin Products and Vitamin Products' counsel regarding the checks at issue in this case. During such discussions, defendant Dresel was told that Vitamin Products did not intend to proceed further against Dresel on the disputed checks. Relying on the representations made by Vitamin Products, Dresel believed that the matter would be resolved

without further participation on his part and, therefore, Dresel did not respond or answer the discovery requests submitted to him by Vitamin Products. Defendant Dresel was not represented by counsel and did not understand the implications of his failure to respond to the discovery propounded by Vitamin Products. Dresel's actions constitute excusable neglect under Rule 60(b).

Further, other reasons justify relief from the operation of the judgment, including entry of a judgment in an amount substantially greater than the sum claimed to be owing by Vitamin Products. Furthermore, the judgment appears to be based on the failure of Dresel to respond to Vitamin Products' interrogatories and requests for admissions. Contrary thereto, however, the interrogatories and requests for admissions do not support the judgment. Request for Admission No. 3 states as follows:

Defendant J.E. Dresel is requested to admit there is due and owing to the Plaintiff the sum of \$8,000 represented by the insufficient fun checks marked Exhibit "A" and "B" attached hereto and by this reference incorporated herein.

Even assuming, arguendo, that Dresel admitted Request No. 3, such an admission would not entitle Vitamin Products to judgment against Dresel individually. Request No. 3 does not, in any way, request Dresel to admit who is liable for the amount of the checks. Dresel could admit Request No. 3 on the basis that some person, other than Dresel, owes the money which is the subject of Request No. 3. In

at least one telephone conversation with Vitamin Products' counsel, Dresel stated that the checks which are the subject of Request No. 3 were replaced by sufficient checks and that Vitamin Products continued to do business with Spectrumedical well into 1986. Furthermore, the hand written letter from Dresel to Vitamin Products' counsel dated September 22, 1987, -- which apparently was treated as an answer to Vitamin Products' amended complaint filed September 28, 1987, -- states that he is not liable on the insufficient checks because the transactions supporting the checks took place prior to his employment with Spectrumedical.

ARGUMENT IV

**DRESEL HAS PROVIDED A MERITORIOUS DEFENSE, I.E.,
ONE THAT SETS FORTH SPECIFIC AND SUFFICIENTLY DETAILED
FACTS, WHICH, IF PROVEN, WOULD RESULT IN A JUDGMENT DIFFERENT
FROM THE ONE ENTERED**

Dresel, relying on representations made to him by Vitamin Products that Vitamin Products would not proceed further against Dresel, failed to take any action in defense to Vitamin Products' claim. Dresel, however, has the following defenses which, if allowed to be presented to the court, may give merit to a dismissal of Vitamin Products' action or success on the merits.

Point 1: Failure to give proper notice.

First, Vitamin Products failed to provide the mandatory notice pursuant to § 7-15-2(2), Utah Code Annotated. Section 7-15-2(2) provides that notice in substantially the form set forth in subparagraph (2) shall be given to the defendant prior to bringing action against him. Such a notice was never given to Dresel. Vitamin Products's failure to give Dresel sufficient notice requires that Vitamin Products' complaint be barred.

Point 2: Due to the lack of notice, Vitamin Products cannot hold Dresel liable for corporate checks .

Due to the lack of notice under § 7-15-2(2), Vitamin Products is not entitled to the advantages given by Chapter 15 of Title 7, Utah Code Annotated. Accordingly, because the checks Dresel signed were executed in his corporate capacity, as an officer of the corporation, he has no individual liability for them. No claim is made by Vitamin Products that the checks at issue were signed by Dresel in his individual capacity. Vitamin Products does not allege that the Court should pierce Spectrumedical's corporate veil, nor does Vitamin Products give any justification for doing so.

Point 3: The Requests for Admissions do not support the judgment.

As argued above, the Summary Judgment apparently was based on the failure of Dresel to respond to the Requests for Admissions, however, even deemed admittance does not, and cannot, base the judgment that was entered against Dresel. In no way did Dresel admit that he was liable for this debt.

Point 4: The checks draw against insufficient funds were replaced during the substantial subsequent business relationship between the parties.

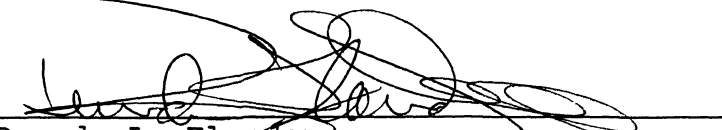
The record in this case demonstrates that Dresel informed Vitamin Products and Vitamin Products' counsel that Spectrumedical and Vitamin Products continued to do business together for a period substantially subsequent to dishonor of the checks on which Vitamin Products bases its claims against Dresel. Application of general accounting principles results in the finding that these checks were replaced and cannot base Vitamin Products' claims.

CONCLUSION

Dresel has satisfied the requirements of Rule 60(b), Utah Rules of Civil Procedure. Dresel's reliance on the representations made to him by Vitamin Products has precluded any opportunity to

defend against Vitamin Products' claim. To allow Vitamin Products to obtain judgment against Dresel without Dresel having an opportunity to defend the action constitutes an injustice that should not be allowed by this Court. The Circuit Court erred in failing to set aside the summary judgment entered against Dresel in the above-captioned matter. The Summary Judgment should be set aside and this matter should be remanded for trial or further proceedings in accordance therewith.

RESPECTFULLY SUBMITTED the 29th day of June, 1990.


Brenda L. Flanders
Attorney for Appellant, J.E. Dresel

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of June, 1990, I served a copy of the foregoing Brief of Appellant on the following, by depositing a copy thereof in the United States Mail, postage prepaid, addressed as follows:

Dale M. Dorius
P.O. Box U
29 South Main Street
Brigham City, Utah 84070

with amendment on
July 11, 1990.