1982

Gardiner & Gardiner Builders et al v. Reid Swapp and Tanglewood SLC Associates : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GARDINER & GARDINER BUILDERS, et al., Plaintiffs, vs. REID SWAPP, a/k/a REID SWAPP CONSTRUCTION COMPANY, GARY G. BANKS, LAWRENCE C. POTTER, JOSEPH M. FRIEDHEIM, and TANGLEWOOD SLC ASSOCIATES, LTD., Defendants.	Civil No. C-80-4429
REID SWAPP, Crossclaimant-Appellant, vs. TANGLEWOOD SLC ASSOCIATES, LTD., Crossclaimant-Respondent.	Appeal No. 18-079

BRIEF OF CROSSCLAIMANT-RESPONDENT TANGLEWOOD SLC ASSOCIATES, LTD.

AN APPEAL FROM AN ORDER ISSUED IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE G. HAL TAYLOR, DISTRICT JUDGE, PRESIDING.

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NATURE OF THE CASE

The portion of the lawsuit on appeal concerns Cross-Claims between Crossclaimant-Appellant Reid Swapp ("Swapp") and Crossclaimant-Respondent Tanglewood SLC Associates, Ltd. ("Tanglewood"), arising out of construction work performed by Swapp on property owned by Tanglewood.

DISPOSITION IN LOWER COURT

As a result of the failure of Swapp to respond to discovery requests made by Tanglewood and to comply with an Order compelling Swapp to respond to such discovery requests, on July 1, 1981, Judge James S. Sawaya entered an Order striking the Cross-Claim of Swapp against Tanglewood, and striking the Answer of Swapp to the Cross-Claim of Tanglewood. Further, on July 1, 1981, after strking the pleadings of Swapp, Judge Sawaya entered Judgment in favor of Tanglewood and Joseph M. Friedheim ("Friedheim") against Swapp, as requested in the Cross-Claim of Tanglewood and Friedheim.

Thereafter, on October 9, 1981, Swapp moved the Court to set aside the Judgment, and a hearing on the Motion was held on October 19, 1981, before Judge G. Hal Taylor. On October 26, 1981, Judge Taylor entered an Order denying the Motion.

RELIEF SOUGHT ON APPEAL

Tanglewood seeks affirmance of the Order of Judge

Taylor denying the Motion of Swapp to set aside the Judgment entered against Swapp.

STATEMENT OF FACTS

On June 10, 1980, plaintiff Gardiner & Gardiner Builders, a Utah corporation, filed a Complaint against defendants Swapp, Tanglewood, Friedheim and others seeking to recover sums for work performed on property owned by Tanglewood and to foreclose a lien for said sum. (Record ("R."), p. 2). Answers to the Complaint were duly filed by the defendants. Swapp filed a Cross-Claim against Tanglewood (R., p. 46) and Tanglewood and Friedheim filed a Cross-Claim against Swapp. (R., p. 141). In the Cross-Claim of Swapp, he sought to recover sums for work he performed and to foreclose a lien for said sum. In the Cross-Claim of Tanglewood and Friedheim, they sought to have the lien of Swapp declared void and to recover from Swapp sums paid to Swapp for work which was not performed or performed inadequately. Answers to the Cross-Claims were filed by the respective parties. (R., p. 97 and 175).

On or about May 8, 1981, Tanglewood served on Swapp Interrogatories (R., p. 207) and Request for Production of Documents (R., p. 204). On May 29, 1981, Tanglewood served on Swapp a Notice of Deposition scheduling the deposition of Swapp for June 12, 1981. (R., p. 230). On June 11, 1981, Swapp and Tanglewood, through their respective attorneys, entered into a

Stipulation and Motion to Extend Discovery Period (R., p. 247), which provided that Swapp would respond to said Interrogatories and Request for Production of Documents by June 17, 1981, and the deposition of Swapp was continued to June 30, 1981. An Order was entered on said Stipulation and Motion by Judge Sawaya on June 11, 1981.

On June 19, 1981, Tanglewood filed a Motion to Compel Swapp to respond to the Interrogatories and Request for Production of Documents, as required by the Order entered by Judge Sawaya on June 11, 1981. A hearing was scheduled for June 25, 1981 on said Motion to Compel. (R., p. 254). The Motion to Compel was granted and an Order was entered (R., p. 267), which provided additional time for Swapp to respond to the discovery requests. The Order further provided that the pleadings of Swapp would be stricken if Swapp failed to comply with the Order.

Swapp failed to comply with the Order, and on June 30, 1981, Tanglewood and Friedheim filed a Motion to Strike the pleadings of Swapp. (R., p. 276). On June 1, 1981, Judge Sawaya entered an Order striking the pleadings of Swapp (R., p. 272), and a Default Certificate and Judgment were then entered. (R., p. 271 and 279).

On July 9, a Motion for Supplemental Order was made (R., p. 283), and on July 10, 1981, a Supplemental Order was

issued. (R., p. 288). There is no indication in the Record if such Order was served. However, a second Supplemental Order was issued August 12, 1981. (R., p. 290). According to the Return, the Motion and Supplemental Order were served at the home of Swapp on September 3, 1981. (R., p. 292). Swapp failed to appear at the hearing on the Supplemental Order (R., p. 293), and an Order to Show Cause was issued and served personally on Swapp on September 22, 1981. (R., p. 296). The hearing on the Order to Show Cause was held October 2, 1981, and Swapp personally appeared. (R., p. 297).

On October 9, 1981, the Motion to Set Aside the Judgment and supporting documents were prepared, and were filed with the Court on October 13, 1981. (R., p. 298-311). The hearing on the Motion was scheduled and held on October 19, 1981. (R., p. 310). After argument, Judge Taylor entered an Order denying the Motion to Set Aside the Judgment. (R., p. 313).

In the Brief of Swapp, it is stated that Swapp first became aware of the Judgment on October 1, 1981, when an Execution was served. (Swapp Brief, p. 5). As noted above, Swapp was served with a Supplemental Motion and Order on September 3, 1981, and the Supplemental Motion specifically states that a Judgment was entered against Swapp. (R., p. 283). Further, an Order to Show Cause was issued and served on Swapp on September

22, 1981. (R., p. 294-296). It is also noted that the Execution (R., p. 321), according to the Return, was served on Swapp on September 22, 1981. (See the back side of page 322 of the Record).

ARGUMENTS

POINT I

THIS COURT SHOULD DEFER TO THE TRIAL COURT'S DECISION DENYING SWAPP'S MOTION TO SET ASIDE THE DEFAULT.

The Utah Supreme Court has held repeatedly that a trial court's decision on a motion to set aside a default judgment should be afforded great deference, and should only be reversed when an abuse of discretion is clearly shown.

> The trial court is endowed with considerable latitude of discretion in granting or denying a motion to relieve a party from a final judgment under Rule 60(b)(1), U.R.C.P., and this court will reverse the trial court only where an abuse of this discretion is clearly established. . . . [T]his court will not reverse the determination of the trial court merely because the motion could have been granted.

Airkem Intermountain Inc. v. Parker, 30 Utah 2d 65, 513 P.2d 429, 431 (1973). Accord, Heath v. Mower, 597 P.2d 855 (Utah 1979); Central Finance Co. v. Kynaston, 22 Utah 2d 284, 452 P.2d 316 (1969); and Mayhew v. Standard Gilsonite Co., 14 Utah 2d 52, 376 P.2d 951 (1962).

POINT II:

THE TRIAL COURT PROPERLY DENIED SWAPP'S MOTION BECAUSE, UNDER UTAH RULES OF CIVIL PROCEDURE 60(b) IT WAS NOT TIMELY.

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

> Upon 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; . . . 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 three months after the Judgment, Order, or proceeding was entered. (Emphasis added).

Swapp moved to set aside the default judgment more than three months after judgment was entered against him, although he knew of the Judgment within said three month period. Nonetheless, he now argues that his Motion was not time barred under Rule 60(b). The substance of his argument is that his motion falls into the category of Rule 60(b)(7), rather than 60(b)(1), and that the three month limit does not apply under Rule 60(b)(7). In other words, to avoid the time limitations of 60(b)(1), Swapp argues that the grounds for setting aside the default against him do not involve "mistake, inadvertence, surprise, or excusable neglect" (60(b)(1)), but rather "any other reason justifying relief from the operation of the judgment" (60(b)(7)). This argument is without foundation based

upon the facts of this case.

The only justifications Swapp assets for relieving him from the default judgment is that he should be excused for his original attorney's neglect. As set out in Point III below, the neglect of an attorney is imputed to the client, and accordingly, the arguments of Swapp fall squarely in 60(b)(1). However, Swapp seeks to obscure this rule of law by stressing the magnitude of his original attorney's alleged negligence. Regardless of the degree of negligence, however, the argument is still covered by 60(b)(1) and the time limitations applicable thereto. Swapp is merely trying to use 60(b)(7) to circumvent the three month time limit that applies to motions under 60(b)(1).

The Utah Supreme Court has rejected a similar attempt to circumvent Rule 60(b)(1) in Pitts v. Mclachlan, 567 P.2d 171 (Utah 1977). Other cases have similarly held that the residual provisions of 60(b)(7) cannot be used to circumvent the time limitations under Rule 60(b)(1), and the provisions of subparts (1) and (7) are mutually exclusive. Goland v. Central Intelligence Agency, 607 F.2d 339, 372-73 (D.C. Cir., 1978), and Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 701-02 (2d Cir., 1972), cert. denied, 409 U.S. 1029. Also see, Wright & Miller, Federal Practice and Procedure, Civil, § 2864, p. 217. Since 60(b)(7) is a catch-all provision it could encompass any

argument that would be more aptly categorized under 60(b)(1), (2), (3) or (4). If Swapp's negligence argument can be subject to the indefinite time limit applicable to motions under 60(b)(7), then so can any other claim that would be more at home in a different category. This result would destroy the purpose and certainty of a definite three month time limit.

Even if Swapp is correct that Rule 60(b)(7) is the proper basis for its motion to set aside the default judgment, Rule 60(b), whether under subpart (1) or (7), still requires that the motion he brought "within a reasonable time." Swapp failed to do even this. In the Brief of Swapp, it is stated at page 5 that he first learned of the Judgment on October 1, 1981. However, at page 15 of the Brief, it is stated Swapp learned of the Judgment on September 20, 1981. According to the Record, Swapp should have learned of the Judgment on September 3, 1981, when Swapp was served with a Supplemental Order. In any event, the Motion to Set Aside the Judgment was not prepared until October 9, 1981. The delay in bringing the Motion hardly shows prompt attention to the matter on the part of Swapp. Under the circumstances of this case, Judge Taylor found that Swapp did not bring the Motion within a reasonable time, and this Court should uphold the finding of Judge Taylor, whether the Motion was under Rule 60(b)(1) or 60(b)(7).

POINT III:

EVEN HAD IT BEEN TIMELY, SWAPP'S MOTION TO SET ASIDE THE DEFAULT WOULD HAVE BEEN WITHOUT MERIT BECAUSE SWAPP MUST BE HELD RESPONSIBLE FOR HIS ATTORNEY'S NEGLECT AND BECAUSE SWAPP WAS GUILTY OF NEGLECT HIMSELF.

Swapp makes no claim in this case that his attorney was not guilty of neglect or that his attorney's neglect was excusable. Swapp cannot therefore prevail on a motion under Rule 60(b) if this Court ascribes his attorney's conduct to him.

In general, a client is held responsible for his attorney's negligence and cannot use such negligence as an excuse to escape a default judgment. The Supreme Court of Nevada stated this rule recently in Tahoe Village Realty v. DeSmet, 590 P.2d 1158 (Nev. 1979). There, defendants' attorney withdrew from the case without ever filing an answer and without informing defendants of his withdrawal. Approximately a month after defendants' attorney withdrew, a default judgment was entered in favor of plaintiffs. Defendants appealed the trial court's denial of their motion to set aside the default judgment. The Nevada Supreme Court stated:

> Appellants only remaining argument is that their attorneys nonfeasance should not be imputed to them. We have previously considered and resolved this issue: 'It is a general rule that the negligence of an attorney is imputable to his client and that the latter cannot be relieved from a judgment taken against him in consequence of the neglect, carelessness, forgetfulness, or

attention of the former.' Guardia v. Guardia, 48 Nev. 230, 233-234, 229 P. 386, 387 (1924). Tahoe Village Realty v. DeSmet, 590 P.2d at 1161.

Similarly, in Southern Bonding Co. v. Teel, 550 P.2d 571 (Okl. 1976), an attorney failed to file an answer for more than year while assuring his client that the "matter was being taken care of." Id. at 574. The Supreme Court of Oklahoma held that: "[a]n attorney's negligence while representing a client is imputable to client as client's negligence and does not constitute 'unavoidable casulty and misfortune' justifying vacation of judgment under statute." Id. at 575. The Supreme Court sustained the trial court's rejection of the motion to vacate the default.

The federal courts follow a similar rule in applying the provisions of rule 60(b) of the Federal Rules of Civil Procedure: "Appellant . . . claims that the judgment should have been set aside under rule 60(b)(1) for 'mistakes, inadvertence, surprise or excusable neglect' because he did not personally consent to his attorney's failure to appear. We find his contention to be wholly frivolous." Nederlandsche Handel-Maat Shappij v. Jay Emm, Inc., 301 F.2d 114, 115 (2nd Cir. 1962). See Williams v. Five Platters, Inc., 510 F.2d 963 (C.C.P.A. 1975).

The holdings of the Utah Supreme Court have been consistent with the rule that the Oklahoma and Nevada Supreme

Courts articulated in Tahoe Village Realty and Southern Bonding Co. The Utah case that is most closely analogous to the situation this appeal presents is Airkem Intermountain, Inc. v. Parker, 30 Utah 2d 65, 513 P.2d 429 (1973). Defendant in Airkem appealed the rejection of his motion to set aside a default, pleading that his attorney failed to appear for trial after attempting unsuccessfully to reach him and inform him of the trial date ten days prior to trial. He explained his attorney's failure to reach him by stating that he was away at work from 7:30 a.m. to 6:30 p.m. and that he visited his terminally ill wife at the hospital during the evenings. The Supreme Court sustained the trial court's refusal to set aside the default.

The Supreme Court found that the decision of the trial court was defensible on two grounds. First, the defendant may have been negligent in failing to maintain contact with his attorney. Second, the attorney may have been negligent in his belated attempt to reach his client. In endorsing this second ground, the Supreme Court recognized that an attorney's negligence is properly charged to the client in considering whether to uphold a default judgment.

Under the rule of Tahoe Village Realty, Southern Bonding Co., and Airkem, there can be no basis for overruling the trial court and setting aside the default in this case.

Swapp's attorney inexcusably neglected to file papers that had to be filed to avoid default. This was exactly the situation in both Tahoe Village Realty and Southern Bonding Co.

Swapp argues that negligence is different from abandonment and that his attorney abandoned him. Whenever an attorney neglects a case to the point of default, however, this argument can be made with equal force. If this court adopts Swapp's abandonment theory, no default will be secure and delay and default will be without an effective deterrent.

Even if Swapp is not held responsible for his attorney's negligence, the trial court's decision upholding the default should stand. Like the defendant in Airkem, Swapp was negligent in failing to maintain contact with his attorney to ascertain whether his interests were being guarded. The recitation of facts in Swapp's own brief on this appeal makes no reference to any communciation between Swapp and his attorney in the year and a half between the time Swapp filed his answer and the time the default judgment was entered. By itself, this should be enough to support the trial court's decision.

The only Utah case Swapp cites to support his position is Interstate Excavating, Inc. v. Agla Development Corp., 611 P.2d 369 (Utah 1980), which is completely irrelevant to this situation. In Interstate Excavating, the defendant's attorney withdrew from the case with court approval and sent

notice to his client. The client failed to get a new attorney and appear at trial. The trial court entered a default judgment against him. Defendant moved to have the default set aside on the ground that he had never received notice of his attorney's withdrawal. He speculated that the notice might have been lost in his office in a large packet of mail from the same attorney. The trial court denied the motion to set aside the default. The Supreme Court reversed holding that defendant's failure to appear was the result of excusable negligect in misplacing the notice of his attorney's withdrawal.

There was no question in Interstate Excavating about the propriety of the behavior of defendant's original attorney. The court merely held that defenant was not inexcusably negligent in misplacing the notice of his attorney's withdrawal. It did not hold that a client can escape the consequences of inexcusable neglect by blaming his attorney.

There is also an obvious practical distinction between Interstate Excavating and this case. If the Supreme Court had let the default stand in Interstate Excavating, the defendant would have been liable for the amount of the judgment without any hope of indemnification for that amount. Unlike the original attorney in Interstate Excavating, however, Swapp's original attorney was negligent in handling his case. Thus Swapp has a cause of action for malpractice against his

original attorney which may shift the burden of the default judgment.

The cases from other jurisdictions that Swapp cites to support of his position in this appeal do not serve that purpose any better than Interstate Excavating. In Stafford v. Dickson, 46 Haw. 52, 374 P.2d 665 (1962), which Swapp relies on, the attorney in that case properly withdrew and notice somehow failed to reach his client. This resulted in a default. The holding in Stafford is almost identical to the holding in Interstate Excavating and is just as irrelevant to this case.

Swapp also relies on Rogers v. Sheppard, 192 P.2d 643 (Okl. 1948). Swapp's reliance could not be more misplaced. In the Rogers case, an attorney suffered a heart attack, and he was unable to attend to his business which resulted in a default. The Oklahoma statute permitted vacation of default judgments that resulted from "unavoidable casulty or misfortune." Id. at 645. The court held:

> The failure of counsel to prosecute or defend a cause through no fault of the attorney or client, resulting in a default judgment being rendered against the client constitutes . . . unavoidable casulty or misfortune. In 49 C.J.S. Judgments, §280, the rule applicable here is stated as follows: "The illness of party's counsel so severe as to prevent him from appearing in trying the case is good ground for vacating the judgment, provided such party did not know that in time to retain other counsel or

> was prevented in some other way fron doing so. Id. at 645-46. (Emphasis added).

This holding has nothing to do with Swapp who is trying to escape the consequences of his attorney's inexcusable neglect.

Swapp leans heavily on Buckert v. Briggs, 15 Cal. App. 3rd 296, 93 Cal. Rptr. 61 (1971). Buckert stands for the proposition that where an attorney goes beyond negligence and acts in such a way as to negate the attorney-client relationship, the general rule that the client is chargable with his attorney's negligence should not apply.

> As a general rule the accident or mistake authorizing relief [from a default judgment] may not be predicated upon the neglect of the party's attorney unless shown to be excusable . . . because the negligence of the attorney . . . is imputed to his client and may not be offered by the latter as a basis for relief. . . . The exception is premised upon the concept the attorney's conduct, in effect, obliterates the existence of the attorney-client relationship and for this reason his negligence should not be imputed to the client. Id. at 63-64.

The court in Buckert stressed that the attorney acted and spoke as though there were no attorney-client relationship between him and the defaulting parties. Id. at 64.

The Buckert rule is irrelevant to this case. Although Swapp's original attorney failed to protect his client's interests, he never indicated that he did not represent Swapp. In fact, he filed answers to the Complaint and Cross-Claim, and entered stipulations concerning the timing of responses to

discovery requests. He acted as Swapp's attorney even though he may have done so inadequately. Buckert adds nothing to Swapp's argument on this appeal.

In St. Vrain Development Co. v. F & S Development Co., 470 P. 49 (Colo. App. 1970), which Swapp also cites, the Court held that the trial court acted within its discretion in vacating a default which resulted from the negligence of the defaulting party's attorney. Such a holding merely illustrates the wide scope appellate courts typically give a trial court's decision on a motion to set aside a default. St. Vrain may be authority for the proposition that the trial court could have granted Swapp's motion, but "this court will not reverse the determination of the trial court mainly because the motion could have been granted." Airkem Intermountain, Inc. v. Parker, 513 P.2d at 431.

Finally, Swapp relies on Treadway v. Meador, 103 Ariz. 83, 436 P.2d 902 (1968), and Coerber v. Rath, 164 Colo. 294, 435 P.2d 228 (1968). In the former case a default was entered against Mr. and Mrs. Treadway. They retained counsel, who assured them that he would answer certain Interrogatories. When the Interrogatories were not answered, a default was entered. The court held that the Treadways should not be subject to default for relying on such assurances. Similarly, in Coerber v. Rath, the Coerbers requested and received

assurances from their attorney that he was properly taking care of their case. Swapp by contrast makes no allegation whatsoever that he ever sought to determine the status of this case. Unlike appellants in Treadway and Coeber, Swapp was guilty of negligence on his own account in failing to maintain contact with his attorney.

CONCLUSION

There is nothing that sets this case apart from most other cases resulting in default. Swapp failed to respond to a discovery request even after a motion to compel, and the trial court entered a default and refused to set it aside. Its decision is entitled to deference on appeal. This court cannot overturn that decision without destroying the finality of all default judgments. Any defaulting party that can convincingly blame the default on its attorney has the same claim for relief that Swapp puts forward. Swapp should seek relief from the affect of the default judgment by suing his former attorney.

This Court should affirm the Order of the Third Judicial District Court upholding the default and award costs on this appeal against Crossclaimant-appellant Reid Swapp.

RESPECTFULLY SUBMITTED this 20th day of January, 1982.

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CERTIFICATE OF MAILING

THIS IS TO CERTIFY that a copy of the foregoing Brief of Crossclaimant-Respondent Tanglewood SLC Associates, Ltd. was mailed this 20 day of January, 1982, postage prepaid, to:

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