

2000

Valery Volostnykh and Nellya Volostnykh v. Dorothy Duncan : Brief of Appellant

Utah Court of Appeals

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Dorothy Duncan; Pro Se.

Shawn D. Turner; Larson, Turner, Fairbanks and Dalby; Attorney for Plaintiff/Appellant.

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STATE OF UTAH

**VALERY VOLOSTNYKH and
NELLYA VOLOSTNYKH**
Appellants/Plaintiffs,

VS.

DOROTHY DUNCAN
Appellee/Defendant

APPELLANT'S BRIEF

Case No. 20000288-~~5~~A
Appeal from the Third Judicial District Court
Salt Lake County, State of Utah
Judge Sandra N. Peuler

Dorothy Duncan
1720 North Beck Street, #4
Salt Lake City, Utah 84116

Shawn D. Turner (5813)
LARSON, TURNER, FAIRBANKS & DALBY
Attorney for Plaintiff/Appellant
4516 South 700 East, Suite 100
Salt Lake City, Utah 84107

LIST OF PARTIES

THE CAPTION OF THE CASE CONTAINS THE NAMES OF ALL PARTIES

FILED
Utah Court of Appeals

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IN THE COURT OF APPEALS

STATE OF UTAH

VALERY VOLOSTNYKH and	:	APPELLANT'S BRIEF
NELLYA VOLOSTNYKH	:	
Appellants/Plaintiffs,	:	
vs.	:	
DOROTHY DUNCAN	:	Case No. 20000288-SA
Appellee/Defendant	:	Appeal from the Third Judicial District Court
	:	Salt Lake County, State of Utah
	:	Judge Sandra N. Peuler

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to Utah Code Annotated § 78-2a-3(j) (1953 as amended).¹

NATURE OF THE PROCEEDINGS

This case is an appeal from a final order from the Third Judicial District Court of Salt Lake County, State of Utah, entered by the Honorable Sandra N. Peuler, on March 7, 2000.

STATEMENT OF ISSUES PRESENTED AND APPROPRIATE STANDARDS OF REVIEW

1. Did the Court err in failing to grant Plaintiff's Motion for Relief From Order under Rule 60(b)(1).

A review of the trial court's denial of a motion under Rule 60(b) is made under an abusive of discretion standard. Larsen v. Collina, 684 P.2d 52(Utah 1984).

2. Did the Trial Court err in its finding that adequate notice of the hearing had been given to the Plaintiffs.

Determination of whether notice was adequate is a mixed question of law and fact which the Court should review for correctness. Gramlich v. Munsey, 838 P.2d 1131, 1132 (Utah 1992).

DETERMINATIVE CONSTITUTIONAL PROVISION STATUTE AND RULES

The determinative constitutional provisions and rule in this case are reproduced herein as Addendum "B".

¹Hereafter all references to the Utah Code Annotated shall be to the 1953 code as amended unless otherwise noted.

STATEMENT OF THE CASE

This action began as a simple eviction brought pro se by the Plaintiff against the Defendant on September 14, 1999 in the Third Judicial Court. R.1. On September 16, 1999 a cost bond was tendered and a motion to set amount of cost bond was filed with the court. R.3. On or about September 21, 1999 the Defendant filed an answer. R.7. The parties thereafter agreed to go to mediation to resolve their dispute. R.16. The result of the mediation was an agreement by the parties which agreement was approved by the court. R.18. The Defendant failed to keep her obligations under the terms of the mediation.

On or about October 15, 1999 by virtue of an order of the Honorable Steven L. Henriod in Case No. 990905653 a receiver was put in control of the property in place of the Plaintiffs.

The address for the Plaintiffs as listed on the complaint was 3719 South 3375 West, No. D, West Valley City, Utah. R.1. This was the address of the on site managers obtained by the Plaintiffs. With the appointment of the receiver these individuals were no longer considered the managers of the complex. On October 27, 1999 the court entered an order setting a time for the Defendant to receive her personal property. R. 37.

On November 1, 1999 the Defendant filed a motion requesting a hearing claiming that she had suffered damages as a result of certain items that turned up missing from her property. R.38. On November 2, 1999 the court sent notice that the hearing on the Defendant's motion was scheduled for November 16, 1999 R.42.

The notice was sent to 3705 South 3375 West, West Valley City, Utah. This was not the address of the Plaintiffs nor the address which they had listed at the time the complaint was filed. R.42. That notice was returned to the court as being undeliverable. R.44.

In spite of the fact that Plaintiffs received no notice of the hearing, the hearing was held as scheduled and judgment was granted to the Defendant in the amount of \$3,450.00.

R.46 Plaintiffs subsequently learned of the entry of the judgment and retained counsel in an effort to have the judgment set aside. A motion to set aside the judgment was filed on January 25, 2000. R.57. The Plaintiffs' motion was denied March 7, 2000 and subsequently this appeal was brought. R.68, R.71.

STATEMENT OF FACTS

1. On September 14, 1999 a complaint for eviction was brought by the Plaintiffs pro se in the Third Judicial District Court. R.1.
2. On September 16, 1999 a cost bond was tendered and a motion to set the amount of cost bond was filed with the court. R.3.
3. The address on the complaint was 3719 South 3375 West #D, West Valley City, Utah. R.1.
4. On or about September 21, 1999 an answer was filed. R.7.
5. Thereafter the parties agreed to mediation. R.16.
6. The parties entered a settlement which was reported by the mediator and approved by the court. R.18
7. Defendant failed to comply with the terms of the mediation.

8. On October 28, 1999 the court entered an order setting a time for the Defendant to retrieve her personal property. R.37
9. On November 1, 1999 the Defendant filed a motion requesting a hearing in order to determine damages she claimed as a result of missing or damaged items. R.38.
10. On November 2, 1999 the court sent notice for a hearing on the Defendant's request for November 16, 1999. R.42.
11. The notice was sent to 3705 South 3375 West, West Valley City, Utah. R.42.
12. The notice was returned to the court as undeliverable. R.44.
13. The hearing proceeded as scheduled with Plaintiffs not being present and judgment was granted to the defendant in the amount of \$3,450.00. R.46.
14. A motion to set aside the judgment was filed on January 25, 2000. That motion was denied March 7, 2000. R.57, R.68.

SUMMARY OF THE ARGUMENT

The fundamental underpinnings of our legal system are the rights guaranteed in the United States and Utah Constitution to due process. "Timely and adequate notice and an opportunity to be heard in a meaningful way are at the very heart of procedural fairness." In re Worthen, 926 P.2d 853, 876 (Utah 1996). That very fundamental right has been denied the Plaintiffs in this action. The court held a hearing resulting in a judgment and forfeiture in favor of the Defendant where the Plaintiffs never received notice. In fact, the court was aware that the Plaintiffs never received notice as the notice sent by the court was delivered to the wrong address had been returned as undeliverable.

When the Plaintiffs discovered the judgment entered against them they timely moved under Rule 60 of the Utah Rules of Civil Procedures for relief from that order. The very reason for the creation of the rule was to provide relief in situations like the one before this court. Where any reasonable excuse is offered by a defaulting party, the court generally tends to favor granting relief from a default judgment, unless it appears that to do so would result in substantial injustice to the adverse party. Westinghouse Electric Supply Company v. Paul W. Larsen Contracting, 544 P.2d 876 (Utah 1975).

There was no showing or finding by the court that any injustice, let alone a substantial injustice would have been incurred by requiring the Defendant to have a full and fair hearing.

The sole basis for the court's ruling in this case appears to have been that the Plaintiffs had not updated their address at the time they had been relieved of possession of the property by Judge Henriod.

The modest amount of inconvenience that vacating the judgment would cause compared with the harsh result that has been rendered constitutes a clear abuse of discretion. Accordingly the order of Judge Peuler should be overturned and providing the Defendant desires to continue with her claim a full and fair hearing should be had thereon.

ARGUMENT

I. THE TRIAL COURT'S ORDER DENIES THE PLAINTIFFS DUE PROCESS.

Utah's due process clause provides, "no person shall be deprived of life, liberty, or property, without due process of law." Utah Const. Art. I, Sec. 7. In the case of In re Worthen, 926 P.2d 853 (Utah 1996) the Utah Supreme Court addressed the concept of due process. The court stated:

In Untermeyer v. State Tax Commission, we held that Utah's constitutional guarantee of due process is substantially the same as the due process guarantees contained in the 5th and 14th Amendments to the United States Constitution. Untermeyer at 102 Utah 214, 129 P.2d 881, 885 (1942). We have delineated these requirements in a variety of contexts, for "due process is flexible and calls for the procedural protections that the given situation demands." Labrum v. Utah State Board of Pardons, 870 P.2d 902, 911 (Utah 1993) quoting In re Whitesel, 111 Wash. 2d 621, 763 P.2d 199, 203 (1988)). At a minimum timely and adequate notice and an opportunity to be heard in a meaningful way are at the very heart of procedural fairness" Nelson v. Jacobsen, 669 P.2d 1207, 1211 (Utah 1993); accord Plum v. State, 809 P.2d 734, 743 (Utah 1990); See also Provo River Water Users Association v. Morgan, 857 P.2d 927, 934 (Utah 1993). We have also held that "every person who brings a claim in a court or at a hearing held before an administrative agency has a due process right to receive a fair trial in front of a fair tribunal." Bunnell v. Industrial Commission, 740 P.2d 1331, 1333 (Utah 1987). In re Worthen at 876.

The crux of this case is that the Plaintiffs were never given an opportunity to have a fair hearing. They never received notice of the hearing that was held and were not present. The Plaintiffs sought to remedy that situation by filing the motion under Rule 60 for relief from the order of judgment. That motion was denied by the court solely on the basis that the court felt that the notice as sent was adequate.

Where notice was ambiguous or inadequate to inform a party of the nature of the proceedings against him . . . a party is deprived of due process." Nelson, 669 P.2d at 1212. Thus, to satisfy due process, a hearing "must be prefaced by timely notice which adequately informs the parties of the specific issues that they must prepare to meet." id at 1213 (quoting State v. Gibbs, 94 Idaho 908, 500 P.2d 209, 215 (1972)). Moreover, "'due process' is not a technical concept that can be reduced to a formula with a fixed content unrelated to time, place, and circumstances. Rather, 'the demands of due process rest on the concept of basic fairness of procedure and demand a procedure appropriate to the case and just to the parties involved.'" id. (Quoting Rupp v. Granstville City, 610 P.2d 338, 341 (Utah 1980)) In re Worthen at 877.

The facts of this case are that the Plaintiffs filed an eviction action against the Defendant. The complaint set forth an address for the Plaintiff. After an answer by the

Defendant the matter went to mediation where a settlement was entered into by the parties and read into and accepted by the court.

Defendant violated her obligations under the terms of the mediation. At that point the Plaintiffs were under no form of notice that any additional proceedings would be held in the court save any proceedings that they themselves had brought for deficiencies against the Defendant

By virtue of a separate proceeding unrelated to the action before this court the Plaintiffs were temporarily divested of control of their property. During that time of divestiture the court entered an order allowing the Defendant to remove her property from her apartment and further entered an order in this case awarding the Defendant judgment for damages allegedly incurred through damaged or missing items in her apartment.

Setting aside the fact that the Plaintiffs were not in control of the property at the time of the alleged problem, and the fact that by judicial order they had no authority or control over the property, the basic fact is that notice was not sent to the proper address and the Plaintiffs never received notice of the hearing. The address on the complaint was 3719 South 3375 West, #D, West Valley City, Utah. The individuals residing at that address continued to reside there even after the change in control of the property took place. They would have forwarded the information to the Plaintiffs had they received it. The notice from the court was sent to 3705 South 3375 West, West Valley City, Utah. Where the notice was sent to an address that was not the same as that on the complaint and where the court knew that notice had not been received, as it was returned to the court, it was improper to hold the hearing. It was even more improper to refuse to set aside the order once the problem was clearly discovered and brought

to the court's attention. Because the orders of the court in this matter violate the due process rights of the plaintiffs the order should be reversed and the judgment in favor of the Defendant vacated.

II. PLAINTIFF'S RULE 60 MOTION SHOULD HAVE BEEN GRANTED.

Rule 60 of the Utah Rules of Civil Procedure exists to provide relief from judgments or orders "in the furtherance of justice." There are six specific reasons enumerated in the current version of the rule. The first five reasons must require the motion for relief to be brought within three months after the judgment is entered while the 6th basis allows for the filing in a reasonable time. The current Rule 60 motion could have been brought under either the first basis for mistake, inadvertence, surprise or excusable neglect, or under the 6th basis under the violation of the plaintiffs' rights to due process. See Bish's Sheet Metal Company v. Luras, 11 Utah 2d 357, 359 P.2d 21 (1961). In any event the motion in this instance was brought within the 90 day period of time and therefore would be timely. The Utah Supreme Court has found that where any reasonable excuse is offered by a defaulting party, the courts generally tend to favor granting relief from a default judgment, unless it appears to do so would result in a substantial injustice to the adverse party. Westinghouse Electric Supply Company v. Paul W. Larson Contractor, 544 P.2d 876 (Utah 1975). The rule makes it clear and the courts have long held that a default judgment can be set aside upon the grounds of excusable neglect. Heathman v. Fabian & Clendenin, 14 Utah 2d 60, 377 P.2d 189 (1962).

The facts of this case show the Plaintiffs have a reasonable excuse for their failure to receive notice and to fail to appear at the hearing. The first reasonable excuse is that the notice was not sent to the address the Plaintiffs listed as their address on the summons and complaint.

The second basis is that the Plaintiffs were precluded from returning to the property by virtue of another order of the court. Impossibility of compliance with a court order, such as the order that the Plaintiff return property . . . is an appropriate basis for amendment of the order. Corbett v. Fitzgerald, 709 P.2d 384 (Utah 1985). Where the Plaintiffs' performance under the demands of the court had become a legal impossibility at the time that the order was entered by virtue of another order of the Third District Court it would be inappropriate for the trial court in this action not to relieve the Plaintiff from the claim. Indeed the claim should properly have been asserted against the receiver, M&M Management Company, which had possession and allegedly had control of the Defendant's property at the time the problem was alleged to have occurred.

CONCLUSION

Whether under standard analysis of Rule 60 or under the heightened scrutiny which should be afforded to the rule at the time it has been used in a fashion to deny due process to a party it is plain that the trial court's order denying the motion for relief under Rule 60 was an abuse of discretion and this Court should reverse the same.

Respectfully Submitted.

DATED this 8th day of September, 2000.

LARSON, TURNER, FAIBANKS & DALBY LC



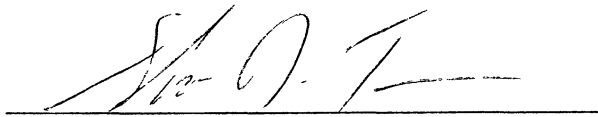
Shawn D. Turner

DUNCANAP BKE

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2000, I mailed, postage prepaid, a copy of the foregoing to the following:

Dorothy Duncan
1720 North Beck Street, #4
Salt Lake City, Utah 84116

A handwritten signature in cursive script, appearing to read "S. J. F.", is written above a horizontal line.

ADDENDUM A

COPY OF ORDER APPEALED FROM

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

VALERY VOLOSTNYKH and	:	MINUTE ENTRY
NELLYA VOLOSTNYKH,	:	
Plaintiffs,	:	CASE NO. 990909105
vs.	:	
DOROTHY DUNCAN,	:	
Defendant.	:	

Before the Court is a Notice to Submit for Decision on plaintiffs' Motion to Set Aside Judgment. The Court having reviewed the pleadings filed, now enters the following ruling.

The plaintiffs' Motion to Set Aside Judgment is denied. The plaintiffs' basis for the Motion is that the Court failed to send notice to the proper address. In fact, it appears that the Court mailed notice to the plaintiffs at the last address provided to the Court by the plaintiffs before the time of the hearing. The Court docket does provide an address change, but that address was provided on January 19, long after the hearing held in this matter. Since it is the plaintiffs' responsibility to keep the Court and opposing parties advised of a current address, the Court determines that notice was provided in accordance with the rules.

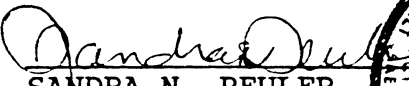
VOLOSTNYKH V. DUNCAN

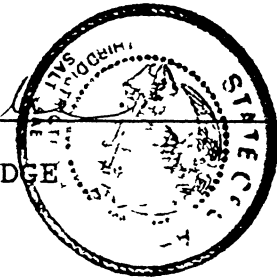
PAGE TWO

MINUTE ENTRY

This Minute Entry will constitute the Order of the Court and no further Order is required to be prepared in the matter at this time.

Dated this 7 day of March, 2000.


SANDRA N. PEULER
DISTRICT COURT JUDGE



VOLOSTNYKH V. DUNCAN

PAGE THREE

MINUTE ENTRY

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 7 day of March, 2000:

James H. Deans
Attorney for Plaintiffs
440 South 700 East, Suite 101
Salt Lake City, Utah 84102

Dorothy Duncan
1729 N. Beck Street #4
Salt Lake City, Utah 84116

_____

ADDENDUM B

DETERMINATIVE STATUTES AND RULES

CONSTITUTION OF UTAH
ARTICLE I. DECLARATION OF RIGHTS
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Publishing companies. All rights reserved.
Current through End of 2000 General Session

§ 7 [Due process of law.]

No person shall be deprived of life, liberty or property, without **due process** of law.

UTAH RULES OF

Utah Rules of Civil Procedure, **Rule 60**

WEST'S UTAH RULES OF COURT
UTAH RULES OF CIVIL PROCEDURE
PART VII. JUDGMENT

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Current with amendments received through 11-1-1999

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. 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; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) 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), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

[Amended effective April 1, 1998.]