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John R. Jenner and Marjorie E. Jenner v. Real Estate Services et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN R. JENNER and MARJORIE
E. JENNER, his wife,

Plaintiffs/
Respondents,

vs.

REAL ESTATE SERVICES, a Utah
corporation, JOSEPH C. FRANICH)
and CAROLYN M. FRANICH, his
wife; and LARRY J. NIELSON
and KAY NIELSON, his wife,

Defendants,

CASE NO. ~~17048~~

18100

RONALD JOHNSON,

Intervenor/
Appellant.

BRIEF OF APPELLANT

Appeal from a Final Order of the Third Judicial Court
In and For Salt Lake County, State of Utah
Honorable G. Hal Taylor, District Judge

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Appellant.

NATURE OF THE CASE

The Appellant brought a Motion to Intervene and a Motion to Set Aside Plaintiffs' Default Judgment granted upon Plaintiffs' Unlawful Detainer action to obtain possession of their real property after having exercised their forfeiture rights under a Uniform Real Estate Contract.

DISPOSTION IN THE LOWER COURT

The Third Judicial District Judge, Honorable G. Hal Taylor, denied Appellant's Motion to Intervene and further

denied Intervenor's Motion to Set Aside Plaintiffs' Default Judgment. Each Motion was denied without comment.

RELIEF SOUGHT ON APPEAL

The Appellant, Ronald Johnson, seeks the right to intervene and enter a defense to Plaintiffs' Unlawful Detainer action by a reversal of the Lower Court's denial of his Motion to Intervene and Motion to Set Aside Plaintiffs' Default Judgment.

STATEMENT OF THE FACTS

The Plaintiff, Sellers, under a Uniform Real Estate Contract in October 1978, elected to rescind said Contract under Paragraph 16(a), because the Buyers (assignees of the original Buyers) were three months delinquent in payments of \$749 per month. Plaintiffs' attempted to enforce said rescission and forfeiture by an Unlawful Detainer action filed August 19, 1981. Default Judgment was granted on September 23, 1981. The Appellant was not named in nor had any notice of the commencement of said lawsuit.

Appellant had a prior undisclosed interest in the concerned real property per the March 27, 1979 agreement with Joseph C. Franich, one of the named defendants. Subsequently, Appellant purchased all of the Defendants',

Joseph C. Franich and Carolyn M. Franich, interest (one-half interest) in the concerned real property by paying \$5,000 cash and giving a \$5,000 Note on September 15, 1981. A Quitclaim Deed was recorded on September 15, 1981, evidencing that purchase. At no time did Defendant, Joseph C. Franich, indicate to the Appellant that there were any delinquencies or lawsuits with the concerned property, as per Intervenor's Affidavit.

Appellant's interest was not known to Plaintiffs prior to the commencement of their lawsuit and not of record until the 15th day of September, 1981.

Appellant had no notice of the delinquencies, the Contract termination, nor the Unlawful Detainer action until after September 25, 1981. Immediately after receiving notice, Appellant offered to bring the Contract current and pay all accruing court costs and attorney's fees, which the Plaintiffs' rejected. Appellant filed his Motions to intervene and set aside the Default Judgment on October 6, 1981.

Appellant's Motions to Intervene and to Set Aside the Default Judgment were denied by the District Court Judge at the hearing of October 14, 1981. At that hearing the Intervenor tendered the sum of \$6,500, (alleged by Plaintiff attorney to be the total sum due and owing including all costs and attorney's fees) to reinstate the Contract.

ARGUMENT

POINT I. INTERVENOR HAS THE RIGHT TO INTERVENE IN ANY LAWSUIT IN WHICH HIS INTEREST MAY NOT BE ADEQUATELY REPRESENTED OR THE RULING ON WHICH WILL ADVERSELY AFFECT THE DISPOSITION OF HIS PROPERTY RIGHTS, EVEN THOUGH INTERVENOR (a) ACQUIRES A PROPERTY RIGHT AFTER AN ACTION IS COMMENCED, (b) HAS AN UNDISCLOSED PROPERTY RIGHT WHEN THE ACTION IS COMMENCED, or (c) IS A JOINT VENTURER WITH A DEFENDANT.

Rule 24(a)(2) and (3) of the Utah Rules of Civil

Procedure states as follows:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action:... (2) when the representation of the Applicant's interest by existing parties is or may be inadequate and the Applicant is or may be bound by a judgment in the action; or (3) when the Applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

All persons claiming property rights from the named Defendants in Plaintiffs' lawsuit will have any property rights which they hold adversely affected by said judgment. Mr. Johnson, the Intervenor, claims rights to said property through the Defendants, Joseph C. Franich and Carolyn M. Franich, from two different transactions. First, in order of time but not importance, would be his contract right with the Defendant, Joseph C. Franich, entered into on March 27, 1979, under which funds were placed with Mr. Franich so that he could invest in real property. These funds subsequently

became part of the downpayment Mr. Franich used to purchase the subject real property. By the terms of the Contract, the Appellant was the owner of one-half interest in the subject real property. Second, Appellant purchased from Defendants, Joseph C. Franich and Carolyn M. Franich, all of their right, title and interest in and to said real property (specifically the other one-half interest, that Johnson didn't already own) by paying the sum of \$10,000 in the form of a \$5,000 Cashier's check and a Promissory Note for \$5,000 on September 15, 1981. If there was any objection to the Intervenor having the right under Rule 24 to intervene, when his only property interest was an undisclosed or dormant partner's interest, no question as to that right can be raised after the September 15th purchase.

My review of Rule 24 in Utah law and in the cases and treatises published on the subject, reveal no cases or articles in point. Commerce Block Realty Company v. United States Fidelity & Guaranty Company, 83 Utah 414, 28 P2d 1081 (1934), an early Utah case sets the standard for intervention which has carried over to today as follows:

The test usually applied to the right to intervene is whether a person seeking to intervene may gain or lose by a direct legal operation and the effect of the judgment.
(Page 1083)

Appellant will lose all property rights (whether undisclosed, joint or direct and whether acquired before or after the commencement of the suit), if the Plaintiff is

successful. Certainly the Appellant in this case has the right to intervene under the Commerce Block Realty test.

The case at hand also presents the different circumstance of requesting to intervene after a Default Judgment has been granted. This question was raised in Martin v. Pickering, 85 Wash.2d 241, 533 P2d 380 (1975). This case, although being decided against the Intervenor, directs us to the type of reasoning we should consider as follows:

In considering the question of timeliness, all the circumstances should be considered, including the matter of prior notice of the lawsuit and the circumstances contributing to the delay in moving to intervene. (Page 382)

The case further refers us to N.A.A.C.P. v. New York, 413 U.S. 345, 93 S.Ct. 2591, 37 L.Ed. 2d 648 (1973); and Pellegrino v. Nesbit, 203 F.2d 463 (9th Cir.1953) as support for their reasoning. Martin v. Pickering concerns a Motion to Intervene after judgment. The case concludes after considering all the circumstances, the Intervenor's actual notice from the beginning of the lawsuit and, in fact, its earlier appearance and then withdrawal from the lawsuit, was not sufficient to allow intervention after judgment.

Mr. Johnson, the Intervenor in our suit, had no knowledge whatsoever of the lawsuit and the subsequent Default Judgment, granted only some eight (8) days after the Intervenor's acquisition of Defendant Franich's remaining real property interest. Immediately upon discovering that

delinquencies existed in the afore-referred to Contract, and the existence of this lawsuit, requests were made to the Plaintiffs to reinstate and motions to join the lawsuit were filed. The motions were filed October 6, 1981, thirteen (13) days after the Default Judgment and between six (6) and eleven (11) days after actual notice thereof. Appellant could have done nothing else to preserve his rights in a more timely manner. Further, his actions in a timely manner as described above, are not injured or made faulty by any claimed constructive notice attributed to him as a result of service upon the Defendant Franich, when Johnson was his undisclosed partner. Regardless of constructive notice, his timely action, as soon as he had actual knowledge of the lawsuit entitles him to intervene. The issues surrounding constructive notice are discussed in detail in Point II, which also should be incorporated herein. The Trial Court Judge erred in failing to apply Rule 24(a) correctly and should be overturned by this Court.

POINT II. SETTING ASIDE A DEFAULT JUDGMENT FOR EXCUSABLE NEGLIGENCE IS ALLOWABLE FOR AN INTERVENOR, WHO HAD NO PERSONAL KNOWLEDGE OF THE ACTION, TOOK TIMELY ACTION AFTER OBTAINING SAID PERSONAL KNOWLEDGE; EVEN THOUGH OTHER DEFENDANTS HAD ACTUAL KNOWLEDGE AND SOME OF THOSE DEFENDANTS MAY HAVE BEEN ASSOCIATES, JOINT VENTURERS, OR PARTNERS OF THE INTERVENOR.

Rule 60(b)(1), of the Utah Rules of Civil Procedure is and has been espoused by numerous cases to provide

equitable relief from a Default Judgment to any defendant that has proper grounds - - mistake, inadvertence, surprise, or excusable neglect.

A person that fails to enter a defense to a lawsuit that would materially effect him, neglects his duty. However, if he fails to enter that appearance as a result of his lack of knowledge, his neglect can be classified as excusable. His timely action upon obtaining notice thereof, especially if within three months after the Judgment has been entered, would qualify him for relief under the Rule. Even if you contribute constructive notice to said person, and with said constructive notice he fails to act, he may be classified as being negligent. If, however, he acts immediately upon receiving actual notice, his action would certainly fall within the doctrine of excusable neglect. In E.J. Mayhew v. Standard Gilsonite Company, 14 Utah 2d 52, 376 P2d 951 (1962) the court found excusable neglect for parties attempting to defend a corporation that had failed to answer the suit even though proper service had been made upon the President of the corporation. Although the President had attempted to resign, he was a valid person to serve for process on the corporation. Therefore, service was proper and notice was given to the corporation and constructive notice to the officers, directors and shareholders of the corporation. However, the court felt that where the shareholders were attempting to reorganize

and moved with dispatch to set aside the Default Judgment, excusable neglect was found. Constructive notice did not invalidate their neglect. The court goes on to state:

It is fundamental in our system of justice that each party to a controversy should be afforded an opportunity to present his side of the case. For that reason it is quite uniformly regarded as an abuse of discretion to refuse to vacate a Default Judgment where there is reasonable justification or excuse for the defendant's failure to appear, and timely application is made to set it aside. (Pg 952)

All of the shareholders in the above case had constructive notice of the lawsuit. They were still able to set aside the Default Judgment and defend the action. Even assuming the Intervenor, Ronald Johnson, in this case had constructive notice by service of his partner (Defendant Joseph Franich), his timely action to set aside the Default Judgment after receiving actual notice on the 30th day of September, 1981, should be allowable under excusable neglect.

Filing a motion to set aside the Default Judgment on October 6th, when notice was first actually received between six (6) and eleven (11) days earlier, is timely. Further, the Motion was filed within thirteen (13) days of granting the Default Judgment. Appellant had no opportunity to act. He was in a similar situation as the shareholders in E.J. Mayhew. The E.J. Mayhew reasoning should also apply to the question of Appellants opportunity and timely action to

intervene as discussed in Point I, hereof. The failure of the Trial Court Judge to see this is an abuse of his discretion under Rule 60(b) and Rule 24. If there was any question, the question or doubt should be decided in favor of setting it aside. Interstate Excavating v. Agla Development, 611 P2d 369 (Ut.1980), Locke v. Peterson, 3 Utah 2d 415, 285 P2d 1111 (1955); Cutler v. Haycock, 32 Utah 354, 90 Pac.897 (1907); Heathman v. Fabian Clendenin, 14 Utah 2d 60, 377 P2d 189 (1962). An additional factor that needs to be considered is that because of the willingness of the Appellant to assume all contract obligations as well as his willingness to pay all delinquencies, including costs and attorney fees, the Plaintiffs are in a situation where their rights are not injured or compromised by the setting aside of the Default Judgment. Plaintiffs' Contract was only two and one-half (2½) months delinquent, when they terminated it. Appellant offered to also correct other contract deficiencies. If, however, the Default Judgment is not set aside the Appellant loses valuable property rights with little hope of recoupment.

The Trial Court Judge abused his discretion when he denied Appellant's Motion to set aside the Default Judgment. However, he may not have addressed this issue, feeling the Appellant lacked standing when he denied his Motion to Intervene.

POINT III. THE HARSH REMEDY OF FORFEITURE OF A

UNIFORM REAL ESTATE CONTRACT, ENFORCED BY DEFAULT JUDGMENT IN AN UNLAWFUL DETAINER ACTION SHOULD NOT BE ALLOWED TO STAND; WHERE AN UNINFORMED PROPERTY RIGHT CLAIMANT ACTS QUICKLY TO (a) INTERVENE, (b) SET ASIDE THE DEFAULT JUDGMENT AND (c) CURE ALL DELINQUENCIES THEREIN.

The importance of the Trial Court's decision and whether he abused his discretion, is re-emphasized by the type of lawsuit at issue - an Unlawful Detainer action to enforce the non judicial termination and forfeiture of a Uniform Real Estate Contract. Intervenor's rights accrued both as an undisclosed joint venturer and as an after acquirer of Defendant's rights claimed through a Uniform Real Estate Contract. Without actual notice to the Intervenor, even though done unknowing and without malice, the Contract had been terminated and all property rights returned to the Seller. In Interstate Excavating v. Agla Development, previously cited, the Court states as follows in talking about a Default Judgment:

However, they are not favored in the law, especially where a party has timely responded with challenging pleadings. When that has been done some caution should be observed to see that the party is not taken advantage of. Speaking generally about such problems, it is to be kept in mind that access to the Courts for the protection of rights and the settlement of disputes is one of the most important factors in the maintenance of peaceable and well ordered society....The uniformly acknowledged policy of the law is to accord litigants the opportunity for a hearing

on the merits, where that can be done
without serious injustice to the other
party. (Pg 371)

The Court has long recognized the harshness of Default Judgments. The Court should recognize the greater harshness of default judgments, when the substance of the case being supported by that Default Judgment will further create acknowledged harsh results. This situation should be reviewed with the careful eye found in a trial rather than summarily deduced by Default Judgments. Perkins v. Spencer, 121 Ut.468,243 P2d 446 (1952).

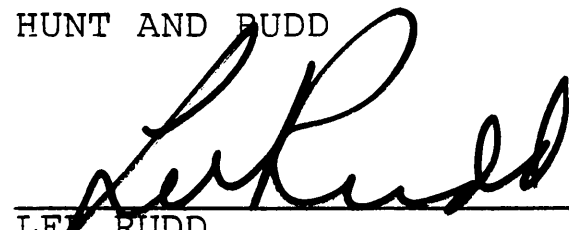
CONCLUSION

The Lower Trial Court's orders should be reversed and Ronald Johnson should be granted the right to intervene and file responsive pleadings to Plaintiffs' Unlawful Detainer action. The Appellant had a right to intervene, as an individual whose property rights were being adversely affected by Plaintiffs' suit. He timely filed his Motion for Intervention after acquiring said property rights and actual notice of the lawsuit. Now being a party of the suit, he timely filed a Motion to set aside the previously granted Default Judgment because he failed to have actual notice of the lawsuit. His lack of actual knowledge under the circumstances constituted excusable neglect recognizable by the Rules of Procedures of the State of Utah. Whereupon,

the Appellant may openly defend and have litigated to the scrutiny of the Trial Court Judge the harsh remedy of forfeiture and Unlawful Detainer requested by the Plaintiff.

Respectfully submitted this 16th day of February, 1982.

HUNT AND BUDD



LEE RUDD
Attorney for Appellant

CERTIFICATE OF DELIVERY

I hereby certify that I hand-delivered two copies of the Brief of Appellant to Allen Swan of Kirton, McConkie & Bushnell, attorneys for Respondents, 330 South Third East, Salt Lake City, Utah, this 16th day of February, 1982.

