

1982

Devar C. Pack and Carolyn Pack v. Hull Development Co. Inc. : Appellant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

DEVAR C. PACK and)
CAROLYN PACK,)

Plaintiff-Respondent,)

vs.)

Case No. 18,136

HULL DEVELOPMENT CO., INC., a)
Utah Corporation,)

Defendant-Appellant.)

APPELLANT'S REPLY BRIEF

Appeal from the denial of Motions for a new trial
and to amend the findings of fact, conclusions of law and the
judgment, The Honorable Judge George E. Ballif presiding.

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Appellant wishes to reply to the Respondent's brief in the following respects:

Point I

APPELLANT SHOULD BE GRANTED RELIEF UNDER RULE 59 AND, OR 60 DUE TO "MISTAKE, INADVERTENCE OR EXCUSABLE NEGLIGENCE."

In this dispute over an agreement for the sale of real property, the trial court rendered judgment for the buyer based on evidence presented at trial to the court and on stipulation of counsel. A motion was timely made under Utah Rules Civil Procedure, 52 and 59 for new trial and amended judgment, findings of fact and conclusions of law, pointing out aspects of the court's actions which were inconsistent with law or unsupported by evidence. Defendant made an additional timely motion under Utah Rules Civil Procedure, 60(b)(7) for relief from judgment and for a new trial, based on evidence not presented at trial, which, if not controverted by plaintiff, would require the trial court to completely reverse its judgment. Both motions were addressed to the court's discretion, and the court denied both. Because the issues raised under the Rule 52 and 59 motion are rendered moot if the Rule 60 motion is granted, the essential issue in this appeal is whether the trial court abused its discretion in denying the motion under Rule 60(b)(7).

Rule 60(b)(7) permits a court to relieve a party from a final judgment or order for "any other reason justifying

relief from the operation of the judgment," if an appropriate motion is timely made. Reasons for relief from judgment not covered by Rule 60(b)(7) but included in other parts of Rule 60(b) are mistake, inadvertence, surprise, excusable neglect, newly discovered evidence which by due diligence could not have been discovered in time to move under Rule 59, fraud, misrepresentation, misconduct, failure of service, void judgment or a judgment that is satisfied, inequitable or otherwise no longer sound. This appeal concerns evidence that could have been discovered and presented at trial, but was first raised by motion after trial. Failure of counsel to present such evidence may have been the result of mistake, inadvertence or excusable neglect, in which case the motion is properly brought under Rule 60(b)(7). In either case, the motion was timely made and the discretion of the court is addressed in the furtherance of justice.

The new evidence made available to the court consisted of testimony from defendant's agent who had almost all of the firsthand dealings with the plaintiffs and was directly involved in events producing the termination of the contract at issue in this case. Counsel for both parties were aware of that person's involvement, but neither made any effort to obtain that information in the discovery process or to present it at trial. Both apparently believed that the available written documents presented a complete picture of the pertinent facts.

Both counsel also produced a stipulation (R. 57) as to some matters of fact, which stipulation contains several material representation which are controverted by the new evidence offered by motion (R. 96-7). In fact, the stipulation, which is essential to maintenance of plaintiffs' position, is probably fictional in several important respects.

Other matters indicate an inadequate presentation of this case. Counsel for defendant took one position on the issue of the uniform real estate contract at trial (Tr. 12-14), then took the opposite view in his subsequent trial brief (R. 70). Counsel for plaintiffs, in his trial brief (R. 59-60), quotes language from the very important letter of October 23, 1979, (Ex. 4) which language does not exist at all in that letter, and then perpetuated that error in his reply brief before this court (Reply Brief p. 2, p. 3). Neither the parties counsel nor the court understood industry practice regarding sewer connections in subdivisions; thus plaintiffs were represented at trial as justifying their many protracted delinquencies on the basis of defendant's one false default that actually ceased to be an issue between the parties long before the trial.

All of these irregularities at trial are proper bases for granting the motion under Rule 60(b)(7). Although there are no Utah cases guiding exercise of judicial discretion in timely 60(b)(7) motions for non-default cases, some

federal authority is available. As summarized in a leading treatise on federal procedure:

"Thus courts have held that the motion must be made within a 'reasonable time', even though the stated time limit has not expired. They have been unyielding in requiring that a party show good reason for his failure to take appropriate action sooner. They have prevented the needless protraction of litigation by requiring the moving party to show a good claim or defense. They have been diligent to consider the hardship that a reopening of the judgment might cause to other persons, and have denied relief when many actions have been taken on the strength of the judgment, or when a party would be unable to obtain his witnesses for a new action, or when many persons had relied on the judgment." 11. Wright and A. Miller, Federal Practice and Procedure §2857, pp. 160-162.

In federal practice, reasons for granting motions under Rule 60(b)(6)--counterpart of Utah's Rule 60(b)(7)--are considered mutually exclusive from reasons justifying relief under other provisions of Rule 60(b), "although when the motion is timely it is not crucial to determine whether the reason is contained in any of the preceding clauses; and attention may be focussed on a determination as to whether the reason justified relief." 7 J. Moore, Moore's Federal Practice 60.27(2), p. 353. According to this same authority, courts in this context "have shown considerable sympathy for the plight of the diligent litigant with an incompetent or sloppy lawyer." 7 Moore at pp. 265-66. This is illustrated in the case of King v. Mordowanec 46 F.R.D. 474 (D. R. I., 1969), in which the gross neglect of plaintiff's counsel

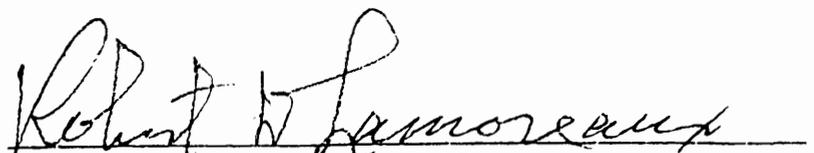
coupled with the absence of neglect on the part of the plaintiff constituted more than the "excusable neglect; referred to in Rule 60(b)(1) and permitted relief under Rule 60(b)(6).

Even with due regard for the necessity for reaching finality in litigation, justice clearly requires a trial court to grant Rule 60 relief when the result of a trial given very cursory attention by counsel for both sides could very likely be reversed by evidence brought promptly to the court's attention. The alternative left to the litigant, to seek relief against its former attorney, seems inadequate and less than fair when the quality of the trial resulted from efforts of both parties' counsel.

CONCLUSION

Appellant respectfully submits that his points are well taken and that judgment should be granted in his favor.

DATED this 21st day of May, 1982.


ROBERT D. LAMOREAUX
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MAILING CERTIFICATE

I hereby certify I mailed a true and correct copy of the foregoing Brief to John G. Mulliner, Attorney for Respondent, 42 No. University Avenue, Suite 4, Provo, Utah, 84601, postage prepaid this 21st day of May, 1982.

