

1982

# David Russell and Eileen Russell v. Sterling B. Martell : Brief of Appellant

Utah Supreme Court

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Backman, Clark & Marsh; Attorneys for Appellant;

Earl D. Tanner; Attorney for Respondents;

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In The  
SUPREME COURT  
Of The  
STATE OF UTAH

---

DAVID RUSSELL and EILEEN RUSSELL,  
his wife,

Plaintiffs-  
Respondents,

Supreme Court  
No. 18160

vs.

STERLING B. MARTELL d/b/a MARTELL  
HOLDING COMPANY, et al, and  
GRANT C. MILLS,

Defendant-  
Appellant.

---

APPELLANT'S BRIEF

---

Appeal from the Third Judicial District Court  
Of Salt Lake County, Honorable G. Hal Taylor, Judge

---

BACKMAN, CLARK & MARSH  
Ralph J. Marsh  
500 American Savings Building  
61 South Main Street  
Salt Lake City, Utah 84111  
Attorneys for Appellant

EARL D. TANNER, SR.  
2000 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111  
Attorney for Respondents

FILED

JUN - 1 1982

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Clark, Supreme Court, Utah

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Ralph J. Marsh  
500 American Savings Building  
61 South Main Street  
Salt Lake City, Utah 84111  
Attorneys for Appellant

EARL D. TANNER, SR.  
2000 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111  
Attorney for Respondents

TABLE OF CONTENTS

	Page
NATURE OF THE CASE . . . . .	1
DISPOSITION IN LOWER COURT . . . . .	1
RELIEF SOUGHT ON APPEAL . . . . .	1
STATEMENT OF FACTS . . . . .	2
ARGUMENT . . . . .	4
POINT I.    THE LOWER COURT ABUSED ITS DISCRETION IN REFUSING TO SET ASIDE THE DEFAULT JUDGMENT . . . . .	4
POINT II.   THE JUDGMENT IN THIS CASE IS VOID SINCE NOT BASED UPON PROPER EVIDENCE IN ACCORDANCE WITH RULE 55(b)(2). IN ANY EVENT THE JUDGMENT IS OBVIOUSLY FOR THE WRONG AMOUNT, WHICH IS A REASON JUSTIFYING RELIEF THEREFROM . . . . .	11
CONCLUSION . . . . .	15

Rules Cited

Rule 55(b), Utah Rules of Civil Procedure . . . . .	11,13,15
Rule 60(b), Utah Rules of Civil Procedure . . . . .	4,7,8,9,10,11,15

Statutes Cited

§61-1-1, Utah Code Annotated . . . . .	12
§61-1-14(2)(a), Utah Code Annotated . . . . .	13
§61-1-14(2)(e), Utah Code Annotated . . . . .	13
§61-1-22(1)(b), Utah Code Annotated . . . . .	12,14

Cases Cited

Airkem Intermountain, Inc., v. Parker, 30 U. 2d 65, 513 P. 2d 429, 431 (1973) . . . . .	4
Bish's Street Metal Co. v. Luras, 11 U. 2d 357, 359 P. 2d 21, 22 (1961) . . . . .	11
Central Finance Co. v. Kynaston, 22 U. 2d 284, 452 P. 2d 316, 318 (1969) . . . . .	5,11

Interstate Excavating, Inc. v. AGLA Development Corporation, 611 P. 2d 369, 371 (Utah, 1980).	5,11
Kessimakis v. Kessimakis, 546 P. 2d 888 (Utah, 1976)	10
Mayhew v. Standard Gilsonite Company, 14 U. 2d 52, 376 P. 2d 951, 952 (1963)	5
Ney v. Harrison, 5 U. 2d 217, 299 P. 2d 1114 (1965)	10
Pacer Sport and Cycle, Inc. v. Myers, 534 P. 2d 616, 617 (Utah, 1975)	4
Pitts v. McLachlan, 567 P. 2d 171 (Utah, 1977)	10
Pitts v. Pine Meadow Ranch, Inc., 589 P. 2d 767 (Utah, 1978)	14
Security Adjustment Bureau v. West, 20 U. 2d 292, 437 P. 2d 214 (1968)	14
Stewart v. Sullivan, 29 U. 2d 156, 506 P. 2d 74 (1973)	10
Warren v. Dixon Ranch Co., 123 Utah 416, 260 P. 2d 741, 743 (1953)	4,5
Westinghouse Electric Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P. 2d 876,.879 (Utah, 1975)	4

Reference Abbreviations

Record on Appeal . . . . . R.-

In The  
SUPREME COURT  
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DAVID RUSSELL and EILEEN RUSSELL,  
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Defendant-  
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APPELLANT'S BRIEF

---

NATURE OF THE CASE

While the merits of this action involve the collection of a promissory note, the foreclosure of an equitable lien and allegations of securities law violations against numerous parties, this appeal concerns only a motion to set aside a default judgment against the appellant, Grant C. Mills.

DISPOSITION IN LOWER COURT

The lower court denied the motion to set aside the default judgment without stating the grounds therefor.

RELIEF SOUGHT ON APPEAL

Mills seeks to have the lower court's denial of the motion reversed and to have the default judgment set aside so that the case can be considered on its merits.

## STATEMENT OF FACTS

The appellant, Grant C. Mills, (hereinafter "Mills") was served with a summons and complaint in this action on July 7, 1981. He immediately contacted Ronald Stanger, the attorney who had previously represented Mr. Mills and other defendants named in this action, and was instructed by him to forward the summons and complaint to him for response. He assumed that having the same attorney represent all defendants would save expense. Mills heard nothing further from Stanger and he assumed an answer or other appropriate pleading had been filed on his behalf. Mills also contacted David Russell, one of the plaintiffs, (hereinafter "Russell") who informed Mills that he was not after him but only wanted a judgment against the other defendants. Mr. Stanger failed to file an answer to the complaint for Mills although he did file answers for other defendants (R.20). Because of this failure, a judgment by default was entered against Mills on July 29, 1981 (R. 39), just 22 days after the service of summons.

Later Mills, through his employee, inquired of the Salt Lake County Clerk to determine if any judgment had been entered against him. His employee was informed that no judgment had been entered against him but that a judgment had been entered against two other defendants (R. 57,60). He, therefore, assumed Mr. Stanger had answered the complaint on his behalf. On November 24, 1981, Mills received in the mail a copy of a Writ of Execution issued against his property to collect the judgment entered against him. This was the first



notice he had of the fact that a judgment had been taken against him. He then contacted the Salt Lake County Clerk and was again informed that no judgment had been entered against him. He immediately contacted a new attorney who, upon investigation, learned of the judgment entered on July 29, 1981. It later became apparent that the employee in the clerk's office had located the judgment against other defendants (R.50) but had overlooked the separate judgment against Mills (R.39).

Mills' new attorney prepared the necessary documents and filed a Motion to Set Aside Default Judgment on December 4, 1981 (R.53). The motion was supported by affidavits of Mills (R.56), his employee (R.60) and his former attorney, Ronald Stanger, (R.62), and by a proposed Answer to the Complaint (R.66). Mr. Stanger confirmed that he represented Mills on other matters, including a related case involving the plaintiff's brother (R. 64), that Mills had contacted him about representation in this action and had sent the summons and complaint to him and that he failed to file an answer for Mills due to some confusion in his office (R.62-3).

The motion was heard by the lower court on December 10, 1981 and denied without specification of the reasons therefor (R.72). A formal order denying the motion was never entered but this appeal was taken and a supersedeas bond filed on December 14, 1981 in order to stay the execution sale of Mills' property scheduled for December 15, 1981 (R.74).



## ARGUMENT

### POINT I

#### THE LOWER COURT ABUSED ITS DISCRETION IN REFUSING TO SET ASIDE THE DEFAULT JUDGMENT

In arriving at a decision as to whether or not to relieve a party from a final judgment pursuant to Rule 60(b), Utah Rules of Civil Procedure, the court must balance the need for finality of judgments against the need to resolve controversies on their merits after a presentation of all the evidence. The standards for this balancing process have been stated, on the one side, as whether granting relief would result in substantial prejudice or injustice to the judgment creditor, Westinghouse Electric Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P. 2d 876, 879 (Utah, 1975), or in "hardship for the successful litigant by causing him to prosecute more than once his action and subjecting him to the possible loss of collecting his judgment" and, on the other side, the desire "to protect the losing party who has not had the opportunity to present his claim or defense" who "must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control." Airkem Intermountain, Inc. v. Parker, 30 U. 2d 65, 513 P. 2d 429, 431 (1973); Warren v. Dixon Ranch Co., 123 Utah 416, 260 P. 2d 741, 743 (1953). And while the lower court has discretion in applying these standards, Pacer Sport and Cycle, Inc. v. Myers, 534 P. 2d 616, 617 (Utah, 1975), that "discretion must be exercised in furtherance of justice and the

court will incline toward granting relief in a doubtful case to the end that the party may have a hearing." Warren, supra, at 743. See also Interstate Excavating, Inc. v. AGLA Development Corporation, 611 P. 2d 369, 371 (Utah, 1980). This court has further stated, in Mayhew v. Standard Gilsonite Company, 14 U. 2d 52, 376 P. 2d 951, 952 (1963):

[T]he court cannot act arbitrarily in that regard, but should be generally indulgent toward permitting full inquiry and knowledge of disputes so they can be settled advisedly and in conformity with law and justice. To clamp a judgment rigidly and irrevocably on a party without a hearing is obviously a harsh and oppressive thing. 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.

See also Central Finance Co. v. Kynaston, 22 U. 2d 284, 452 P. 2d 316, 318 (1969).

Based on these standards, the questions to be determined on this appeal are (1) would an order setting aside the default judgment in this case result in substantial prejudice, injustice or hardship for Russells; (2) was there reasonable justification for Mills' failure to answer; and (3) did he use due diligence and make timely application to have the judgment set aside. The court must then balance the answers to these questions to arrive at a result which is fair and just to both parties.

1. Would an order setting aside the default judgment in this case result in substantial prejudice, injustice or hardship for Russells?

While setting aside the judgment would prejudice Russells in the sense that they could not enforce a judgment which now exists in their favor, that does not necessarily result in injustice or hardship to them. It has yet to be determined whether a judgment in their favor is just since no evidence has been presented from which that determination can be made. In fact, a hearing on the merits may show that Russells are not entitled to any judgment at all and that no injustice results from setting aside the default judgment. Furthermore, judgment was entered in this case only against Mills and further proceedings are necessary to resolve the matter as against other defendants. Therefore, to set aside the judgment against Mills and allow the case to go to trial against him and the other defendants at the same time does not prejudice or result in any hardship for Russells. And, because of cross-claims existing among the defendants, judicial economy also argues for one proceeding to resolve all issues.

2. Was there reasonable justification for Mills' failure to answer?

One might ask what more Mills should have done to properly defend himself in this action. After being served with process, he immediately contacted the attorney who had represented him and other defendants previously. He was told

to forward the summons and complaint to the attorney, which he did, by mail, since the attorney was located in Provo. Mills then depended on the attorney to handle the matter for him. The attorney failed to do so although he did file a response for Mills in a related case filed about the same time (R.64, ¶ 14). Mills himself did inquire of the County Clerk as to whether a judgment had been entered against him and was twice informed that it had not. Mills could justifiably assume that his attorney had filed an answer for him. There would be no reason for him to take any further action until notified by his attorney. The attorney verified that his failure to answer for Mills was the result of confusion in his office because of the existence of other cases involving the same or related parties and, incidentally, the same attorneys on both sides. Why Russells' attorneys would enter default judgment against Mills and issue an execution thereon in one case when they had an answer in hand from Mills in the related case, is somewhat puzzling. In any event Mills acted reasonably under the circumstances and should not be deprived of an opportunity to present his case by circumstances beyond his control.

Rule 60(b) lists the grounds upon which relief from a judgment may be granted. The circumstances of this case obviously do not fall within subparagraphs (2), (3), (4) or (6) of that rule and, while it is less obvious, they do not fall within subparagraph (1) either. Mills' actions do not constitute mistake, inadvertence, surprise or neglect. Rather, he did everything reasonably expected of him and perhaps more.



But despite his diligence, he has not had an opportunity to present his case, through no fault of his own. That certainly constitutes "any other reason justifying relief from the operation of the judgment," within subparagraph (7) of Rule 60(b).

3. Did he use due diligence and make timely application to have the judgment set aside?

When Mills learned of the judgment against him, he took immediate action to have the judgment set aside. He received the writ of execution on November 24, 1981 and retained a new attorney who filed the motion to set the judgment aside on December 4, 1981. Thus, within ten days, the motion, three affidavits and a proposed answer to the complaint were prepared and filed. That certainly constitutes due diligence.

The question of timely application for relief requires an interpretation of Rule 60(b). The rule states that a motion under this rule should be brought within three months after the judgment if the motion is based on the first four subparagraphs but within a reasonable time after the judgment if based on the latter three subparagraphs. The three-month limitation on the first four grounds is obviously based on the assumption that the party against whom the judgment is entered has knowledge that a judgment has been entered. If he has such knowledge and fails to take any action within three months, the rule assumes he has no grounds to have the judgment set aside

or that he has knowingly waived such grounds. However, if he has no such knowledge within the three-month period, it is impossible for him to take any action to obtain relief from the judgment within that period and it cannot be said that he has knowingly waived his rights. Therefore, reason suggests that the three-month limitation would not begin to run until the judgment debtor has notice of the entry of the judgment or that the last ground stated ("any other reason justifying relief") was intended to cover such situations. Otherwise, it would be possible for a plaintiff to cause a judgment to be entered against a defendant who does not answer because of fraud, misrepresentation, misconduct, mistake, inadvertence, surprise, excusable neglect or improper service (all grounds for relief from the judgment if asserted within three months) and intentionally fail to notify the defendant of the entry of the judgment until three months had expired, thereby depriving the defendant of his rights under the rule. It is interesting that in this case, Russell's took no action to enforce the judgment, which was entered July 29, 1981, until November 24, 1981, after the three months had expired. It is not claimed that such delay was intended to deprive Mills of his rights under Rule 60(b)(1)-(4). But, whether intentional or not, the effect is the same, unless the three-month period runs only from the time of notice to the judgment debtor or unless Rule 60(b)(7), the "any other reason" ground, covers this situation. This interpretation is required to prevent the fraud or injustice which Rule 60(b) is designed to prevent. Mills application for



relief from the judgment within ten days after notice to him of the entry of the judgment and within five months of the entry of the judgment itself was more than reasonable and, therefore, timely within the requirements of the rule.

It is interesting to note that of four Utah cases in which the motion for relief from a judgment was made after the three months expired and based on Rule 60(b)(7), one case denied the relief because the real ground upon which relief was sought was the judgment creditor's own inadvertence, and, therefore, Rule 60(b)(1) applied, Pitts v. McLachlan, 567 P. 2d 171 (Utah, 1977), (the plaintiff sought to set aside his own judgment seven months after judgment and the defendant opposed the motion), one case denied relief because the asserted ground was misrepresentation under Rule 60(b)(3), Kessimakis v. Kessimakis, 546 P. 2d 888 (Utah, 1976), (motion brought six months after judgment), but the other two cases granted the relief under Rule 60(b)(7) even though the real ground upon which relief was sought was mistake to which Rule 60(b)(1) applies, Stewart v. Sullivan, 29 U. 2d 156, 506 P. 2d 74 (1973) (motion brought 13 months after judgment); Ney v. Harrison, 5 U. 2d 217, 299 P. 2d 1114 (1965), (motion brought 11 months after judgment). This indicates an inclination to grant relief for grounds within subparagraphs (1) through (4) even though the motion is brought after three months if the moving party can show reasonable excuse.

This court has also stated in dictum that Rule 60(b)(7) is available to afford relief in cases of lack of due process arising from lack of notice of a hearing at which an

adverse judgment was rendered. Bish's Street Metal Co. v. Luras, 11 U. 2d 357, 359 P. 2d 21, 22 (1961). The court later did afford relief from judgments rendered at hearings of which the losing party had no notice. Central Finance Co. v. Kynaston, 22 U. 2d 284, 452 P. 2d 316 (1969); Interstate Excavating, Inc. v. Agla Development Corp., 611 P. 2d 369 (Utah, 1980). The motions in these cases were brought within three months from the judgment but lack of notice was the basis for the decisions, thus coming within the dictum of Bish that lack of due process is "any other reason" within Rule 60(b)(7). In both cases the losing party acted immediately to have the judgment set aside.

In the same spirit, Mills, in this case, was deprived of his right to bring a motion within three months by lack of notice to him that a judgment had been entered. There was no way he could act sooner than he did. This lack of notice to him and his due diligence in making immediate application to the court should constitute "any other reason" within Rule 60(b)(7). Because he has not had an opportunity to present his case and no substantial injustice or hardship would result to Russells, the lower court abused its discretion in refusing to set aside the default judgment.

## POINT II

THE JUDGMENT IN THIS CASE IS VOID SINCE NOT BASED UPON PROPER EVIDENCE IN ACCORDANCE WITH RULE 55(b)(2). IN ANY EVENT THE JUDGMENT IS OBVIOUSLY FOR THE WRONG AMOUNT, WHICH IS A REASON JUSTIFYING RELIEF THEREFROM.

Rule 55(b), Utah Rules of Civil Procedure, provides that judgment by default may be entered by the clerk when the claim is for "a sum certain". Otherwise, the judgment by default must be entered by the court upon application thereto and "if, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of an averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper."

This action is basically an action to collect a promissory note signed by other defendants and not by Mills. The claims against Mills are based on allegations that he acted as a securities agent without being registered as such (R.6) and that he made untrue representations to Russells by means of a written pledge (R.6-7,13), which was not signed by Mills, in violation of the securities laws (§61-1-1, U.C.A.), thereby causing damage to Russells. Such claims are not for sums certain and could not be established without taking evidence to establish both the truth of those averments and the amount of damages resulting therefrom. This would require the presentation of evidence, under §§61-1-1, and 66-1-22, U.C.A., as to:

- (1) Whether Mills was in fact a licensed securities agent;
- (2) Whether the note constituted a security requiring registration;

- (3) Whether there existed any exception from such registration, for example, as an isolated transaction [§61-1-14(2)(a)] or as secured indebtedness [§61-1-14(2)(e)];
- (4) Whether any representations were made to Russells by Mills;
- (5) Whether those representations were true or false;
- (6) Whether Russells knew of the untruth of the representations;
- (7) Whether Mills knew, or in the exercise of reasonable care could have known, of the untruth of the representations;
- (8) What amount was paid by Russells for the note;
- (9) What amount of income Russells received on the note;
- (10) What damages were caused as a result of the alleged violations;
- (11) What amount of attorney's fees were incurred by Russells and whether they are reasonable.

Surprisingly, however, no evidence on any of these issues was presented to the court. The default judgment was merely signed by the lower court upon presentation by Russells' attorney without hearing any evidence or making any findings of any kind (R.39). Russells' complaint does not contain allegations with respect to items (3), (6), (7), (8), (9) and (11) above and, therefore, even if all allegations of the complaint were taken to be true, they have not established a prima facie case. A judgment based on a complaint which does not state a claim on its face and a judgment which, on its face, was not based on evidence, as required by Rule 55(b), is void. Even if evidence had been taken, it must support the



judgment or the judgment should be set aside. Pitts v. Pine Meadow Ranch, Inc., 589 P. 2d 767 (Utah, 1978); see also Security Adjustment Bureau v. West, 20 U. 2d 292, 437 P. 2d 214 (1968).

Since the claims against Mills allege violations of the Utah Uniform Securities Act, any judgment against him must be based on §61-1-22(1)(b), U.C.A., which provides for recovery of "the consideration paid for the security, together with interest at 8% per year from the date of payment, costs, and reasonable attorney's fees, less the amount of any income received on the security."

An examination of the promissory note (R.11), which is the basis of Russells' entire claim, will disclose the lack of support for the judgment entered. The note shows that the amount paid for the note was apparently \$48,000.00. No maturity date appears in the note yet the amount to be repaid includes the principal and interest at 30% per annum for six months. Russells actually received 14 monthly interest payments on the note or a total of \$16,800.00 (R.58). Thus, if evidence had been taken by the court and a violation by Mills of the securities laws established, the judgment should have been entered for "the consideration paid for the security" of \$48,000.00, "together with 8% per year from the date of payment," that is from October 1, 1979 to July 29, 1981, of \$7,006.68, "less the amount of any income received on the security" of \$16,800.00, or a total of \$38,206.68. Instead, judgment was entered for \$63,266.00 plus \$5,000.00 attorney's

fees. Therefore, the amount of the judgment is obviously in error even if the alleged violations are taken to be true. The injustice of this situation becomes more apparent when it is considered that the Russells' attorney was made aware of this error and admitted that it was an error but refused to make any correction in the judgment! (R.58). Certainly the law and the rules of procedure provide the means to relieve Mills from such injustice. Rule 55(b) was designed to prevent such injustice and the failure of the Russells or the lower court to follow Rule 55(b) should be corrected on this appeal. There are clearly "other reasons" justifying relief from the default judgment, within Rule 60(b)(7), and the refusal to grant such relief was an abuse of discretion by the lower court.

#### CONCLUSION

In this case Mills acted reasonably under the circumstances. He entrusted the response to the complaint to his attorney. He had no knowledge of a judgment against him until four months after the entry of that judgment. Upon learning of the judgment, he took action immediately to have it set aside. No substantial hardship or injustice would have resulted to Russells if the lower court had vacated the judgment. Mills has valid defenses to the claims against him. Under these conditions, it was an abuse of the lower court's discretion to refuse to set aside the judgment and allow those claims to be determined on their merits after full opportunity to present evidence on both sides.

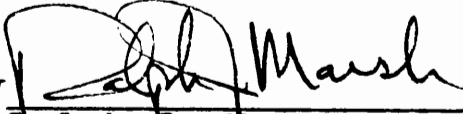


The default judgment in this case was entered without the presentation of any evidence as to the truth of Russells' allegations or as to the amount of damages. It is apparent from the record that judgment was entered for nearly twice the amount to which Russells would be entitled even if the alleged volations were proved. The lower court committed error when it entered judgment without hearing any evidence to support it and it committed error again when it refused to set aside that judgment.

Under such circumstances, Mills is entitled to an opportunity to present his defenses and his evidence and to have the case against him decided on its merits. The default judgment against him should, therefore, be set aside.

Respectfully submitted,

BACKMAN, CLARK & MARSH

By   
\_\_\_\_\_  
Ralph J. Marsh  
Attorney for Defendant-Appellant