1982

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

Utah Supreme Court

Backman, Clark & Marsh; Attorneys for Appellant;
Earl D. Tanner; Attorney for Respondents;

IN THE SUPREME COURT OF THE STATE OF UTAH

- -

DAVID RUSSELL and EILEEN
RUSSELL, his wife,

Plaintiffs-Respondents,

vs. No. 18160

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

Defendants-Appellants.

- -

BRIEF OF RESPONDENTS

- -

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

- -

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NATURE OF THE CASE

This action was commenced by Plaintiffs-Respondents against various Defendants for collection of a promissory note, foreclosure of an equitable loan, and for damages arising from various violations of state securities law.

DISPOSITION IN LOWER COURT

Defendant Grant C. Mills failed to answer Plaintiffs' Complaint and a default judgment was taken against him in July of 1981. In December of 1981 he requested that the judgment be set aside. This motion was denied by the lower court.

RELIEF SOUGHT ON APPEAL BY RESPONDENTS

Plaintiffs-Respondents seek affirmance of the lower

court judgment and the order of the lower court declining to set aside the default judgment.

STATEMENT OF FACTS

The "Statement of Facts" submitted by Appellant fails to include several facts which are pertinent to this appeal. In addition, Appellant has distorted other facts in his own favor rather than correctly reciting the actual event as evidenced by the record. For these reasons, therefore, Respondents shall briefly restate the facts.

On July 1, 1981 this action was initiated in a Complaint filed in the Third Judicial District Court of Salt Lake County. Plaintiffs David Russell and Eileen Russell brought an action against numerous defendants based upon several theories of law including collection of a promissory note, foreclosure of an equitable lien, and violation of various state securities laws. (R. 2-17).

On July 7, 1981 defendant Grant Mills was duly served and a constable's return was filed with the District Court. (R. 22-23). On July 29 a default certificate was entered by the Clerk against Grant C. Mills for failing to answer the Complaint. (R. 38). Concurrently, a hearing was held before the District Court at which time a judgment was entered against the defendant Grant C. Mills in the amount of $63,266 together with attorneys' fees of $5,000, and costs of the action. (R. 39). The District Court executed an order

stating there was no just reason for delay in the entry of final judgment. (R. 36).

On December 4, 1981 Grant C. Mills filed a motion to set aside the default. (R. 53-54). At this time affidavits of Mr. Mills, Annette VomDorp and Ron Stenger were also filed. (R. 56-64).

Subsequently, on December 9, 1981 affidavits were filed on behalf of Plaintiffs by Plaintiffs' attorneys David Hardy and Earl Tanner and by plaintiff David Russell. (R. 42-48).

A hearing was held by the District Court on December 10, 1981 and the motion to set aside was denied. It is from this order that the present appeal is taken. (R. 78).

The Affidavits filed by both parties describe a series of events which occurred in the litigation and which were considered by the lower court in the motion to set aside the default judgment. The chronological sequence of events as described in these affidavits are as follows:

Appellant Grant C. Mills was served with a Summons and Complaint on July 7, 1981. (Mills Affidavit, R. 56). Mills then contacted Ronald Stenger, an attorney in Provo, Utah who instructed him to forward a copy of the Summons and Complaint to his office so that the same could be reviewed for preparation of an Answer to the Complaint. (Mills Affidavit, R. 56). Mills stated that he forwarded a copy of the Summons and Complaint to Stenger by mail. (Mills

Affidavit, R. 57).

The attorney, Ronald Stenger, in his affidavit agreed that he had been contacted by Mills and that he had told him to send him a copy of the Summons and Complaint. Stenger stated he did not recall receiving the Summons and Complaint but that "circumstances in Affiant's office at the time might have contributed to confusion regarding the necessity of response to said Complaint." (Stenger Affidavit, R. 62). Stenger stated that the confusion may have resulted because Stenger was representing other defendants in the same lawsuit. "At any rate Affiant's office failed to file an Answer on Mr. Mill's behalf." (Stenger Affidavit, R. 36). Stenger stated he did not inform Mills that an Answer had not been filed on his behalf. (Stenger Affidavit, R. 63).

Stenger claimed to have had a conversation with Plaintiff's attorney, Earl Tanner, who indicated that Plaintiffs' primary interest was in obtaining a judgment against the corporate defendants and that he was less concerned with obtaining judgment against the individual defendants. (Stenger Affidavit, R. 63). This conversation was denied in an affidavit filed by Mr. Tanner. (Tanner Affidavit, R. 45). This dispute, however, is immaterial to this appeal.

The plaintiff David Russell declared in his affidavit that on or about July 15, 1981 he had a conversation with defendant Grant C. Mills at which time Mills informed Russell

that Mills intended to take no action on the Summons and Complaint filed by Russell. (Russell Affidavit, R. 47). This is not contradicted by Mills and must, therefore, be taken as true.

Tanner stated in his affidavit that on August 10, 1981 in a conversation with attorney Stenger the latter advised him that he would represent only defendants Robert L. Moody, Thomas S. Taylor, Gene Thurman, Merrill G. Moody, G. David McKell, and James C. Hill. Tanner agreed not to enter a money judgment against these clients if Stenger would consent to a judgment clearing them from the title, which was done. (Tanner Affidavit, R. 45).

An associate of Mr. Tanner also filed an affidavit. David Hardy stated in his affidavit that on August 18, 1981 he received a telephone call from defendant Grant C. Mills and that during the course of the conversation Hardy specifically reminded Mills that a default judgment had been taken against him to which defendant Mills replied that he did not feel "he was legally obligated to the plaintiffs and therefore did not feel motivated by the lawsuit filed against him by Plaintiffs to address Plaintiffs' claims." (Hardy Affidavit, R. 42). This statement, also, was not denied by Mills.

Appellant Mills in his affidavit stated that he was not informed by Mr. Stenger that he had not undertaken the defense and had assumed that an Answer had been filed on his behalf.

He stated that he initiated steps to determine that his defense had in fact been undertaken by Stenger and that no judgment had been entered against him by instructing his employee Annette Vom Dorp to contact the Salt Lake County Clerk to inquire whether or not a judgment had been entered against him. (Mills Affidavit, R. 57).

Annette Vom Dorp in her affidavit stated that on September 4, 1981 she contacted the Salt Lake County Clerk's office and was told that no judgment had been entered against Mills but that judgment had been entered against other defendants. (Vom Dorp Affidavit, R. 60).

Mills then stated that he relied upon the representations of the Salt Lake County Clerk and assumed that Stenger had undertaken his defense. Mills makes no claim that he ever directly asked Stenger if an Answer had been filed or whether he was in default. Mills stated further that he first learned that a judgment had been entered against him when he received a copy of the Writ of Execution issued by the Third District Court on November 24, 1981. (Mills Affidavit, R. 57).

He then stated that he made a second inquiry to the Salt Lake County Clerk's office on November 25, 1981 and was again informed that no judgment had been entered against him. He instructed his new attorney, Jeffrey L. Silvestrini to investigate the matter and learned that a judgment had

indeed been entered on July 29, 1981. (Mills Affidavit, R. 57).

Defendant Mills in his affidavit claimed that the judgment itself was incorrect in that interest had not been computed in determining the final amount of judgment. He stated in his affidavit that in a conversation with Mr. Tanner, Tanner admitted that the amount may be wrong but would not correct the amount of the judgment since the extra amount would be used to compensate the plaintiffs for money which they were required to pay for counsel. (Mills Affidavit, R. 58-59). This statement was denied by Mr. Tanner. (Tanner Affidavit, R. 45).

The remaining portions of the Affidavits filed recited conclusions drawn by the various affiants as to the effects of the default. For example, attorney Stenger stated that he believed it would be unjust for the default judgment to stand due to the fact that Mr. Mills acted in good faith in contacting him and in forwarding the Summons and Complaint to his office. In his opinion Mills had a good defense to Plaintiffs' claim. Further, he stated that there would be no prejudice by allowing the default to be set aside since other actions against the remaining defendants were still pending. (Stenger Affidavit, R. 63-64).

Likewise, Mills stated, in his opinion, he had valid defenses to the action and that it would be unjust to allow

the judgment to stand since he had in good faith tendered the defense to his licensed attorney and felt that the matter had been answered by Stenger based upon his inquiries with the Clerk's office. (Mills Affidavit, R. 58). He felt that to allow the judgment to stand would work an injustice upon him. (Id.)

Finally, attorney Tanner stated that Plaintiffs would be greatly prejudiced by the setting aside of the default since Mills had sold securities of approximately $2 million similar to those involved in the instant case and therefore many persons may have a cause of action against defendants which would prejudice the plaintiffs in collection of the judgment if it were set aside. (Tanner Affidavit, R. 45).

The lower court reviewed these affidavits together with legal memoranda submitted by both parties and denied the motion to set aside the judgment. (R. 72). An order to stay the execution of the Mills property was entered by the lower court on December 15, 1981. (R. 74).

ARGUMENT

POINT I

THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO SET ASIDE THE DEFAULT JUDGMENT.

Appellant in his brief states what he believes to be the applicable standard of review in an appeal based upon a failure to set aside a default judgment. (Appellant's Brief, pp. 4-5). Respondents believe that a clearer statement

of this standard was recited in this Court's opinion of Heath v. Mower, 597 P.2d 855, 856 (Utah 1979). This Court stated the following rules applicable to these types of cases:

> While we agree that trial courts 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, . . . each case must nevertheless depend upon its own peculiar facts and circumstances. "No general rule can be laid down respecting the discretion to be exercised in setting aside or refusing to set aside a judgment by default. . . but the discretion should always be so exercised as to promote the ends of justice. . . ." (Citations omitted).

Appellant and Respondents both agree that the decision of whether to set aside a default judgment is a discretionary matter. This Court recognized that the lower court discretion would only be reversed "if it is clear the court abused that discretion."

This Court in Heath then quoted with approval the language contained in Airkem Intermountain, Inc. v. Parker, 513 P.2d 429 (Utah 1973), where the balancing of interests is explained together with the concept that the balancing initially is left to the lower court. That decision stated:

> The trial court must balance two valid considerations; on the one hand, to relieve the party of the judgment vitiates the effect of res judicata and it creates a hardship for the successful litigant by causing him to prosecute more than once his action and subjecting him to possible loss of collecting his judgment. On the other hand, the court

> desires to protect the losing party who has not had the opportunity to present his claim or defense. The rule that the courts will incline towards granting relief to a party, who has not had the opportunity to present his case, is ordinarily applied at the trial court level, and this court will not reverse the determination of the trial court merely because the motion could have been granted. 597 P.2d at 858.

Appellant suggests several questions to be determined on the appeal based upon the standard of appellate review. Respondents, however, disagree that these are the relevant questions to be determined on appeal. Rather, Respondents submit that this Court should direct its attention solely to these questions:

(1) Did the appellant make timely application to have the judgment set aside?

(2) Did the lower court abuse its discretion in finding that Appellant's conduct did not justify vacation of the judgment?

A. The Lower Court Properly Denied Appellant's Motion to Set Aside the Judgment Since Such Motion was Not Timely Made.

Appellant states in his brief that the circumstances of this case "obviously do not fall within subparagraph (2), (3), (4) or (6) of Rule 60(b) and while it is less obvious, they do not fall within subparagraph (1) either." Appellant then states:

> 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). (Appellant's Brief, pp. 7-8).

Thus, Appellant attempts to argue that his grounds for relief are pursuant to subparagraph (7) of Rule 60(b) and not subparagraph (1). The obvious reason for this argument is simply the fact that paragraphs 1, 2, 3, and 4 require a party to move for vacation of the default judgment within three (3) months after the judgment was taken. There is no such time limitation as to subdivision (7).

Thus, before it can be determined whether Appellant timely filed to set aside the default judgment it must first be determined whether his asserted grounds for relief comes under subdivision (1) or subdivision (7). Respondents submit that without question, and in spite of Appellants' attempt to the contrary, any excuse which Appellant can now assert would have come within the meaning of subsection (1) in that the conduct would have been constituted, at most, as "mistake, inadvertence, surprise or neglect."

Viewing the allegations of Appellant most favorably to him reveals that the main thrust of his claim to set aside the judgment was simply that he relied upon Mr. Stenger to file an Answer on his behalf but that Mr. Stenger did not do

so. However, there are really two subparts to this assertion. First, what effect does the conduct of Appellant's attorney have upon the setting aside of a default judgment? Second, did Appellant's own actions, independent of his attorney's, justify relief from judgment.

If it is assumed that Mr. Stenger forgot to file an Answer on behalf of Appellant (even though Stenger never admits to having received the Summons and Complaint) the conduct of Appellant's attorney (even assuming that there was an attorney-client relationship) would clearly come under subdivision (1) of Rule 60(b).

In Cockerham v. Zikratch, 619 P.2d 739 (Ariz. 1980) the Supreme Court of Arizona dealt with the identical question as to whether the alleged neglect of a party's attorney constituted a subdivision (1) or subdivision (7) claim. [It should be noted that Utah's Rule 60(b) is contained as 60(c) in the Arizona code and that subsection (7) is subsection (6) in the Arizona Rules of Civil Procedure.] The Arizona Supreme Court stated the following:

> Defendants also claim that the default judgment should have been set aside due to gross neglect of their counsel under Rule 60(c)(6): "[A]ny other reason justifying relief from the operation of the judgment". . . . Under Rule 60(c) the neglect of their attorney is attributed to defendants "and only when the attorney's omission or failure to act is legally excusable may relief be obtained." Treadaway v. Meador, 103 Ariz. 83, 84, 436 P.2d 902, 903 (1968). Defendants' contention that after the time has expired for making a motion for relief

> from a judgment for excusable neglect under Rule 60(c)(1), a motion may still be made under Rule 60(c)(6) for relief from a judgment due to gross neglect, or neglect which is not excusable, is illogical. We hold that motions for relief from final judgments based upon neglect must be filed under Rule 60(c)(1), not Rule 60(c)(6). Accord., Clamprott v. United States, 335 U.S. 601 (1949). 619 P.2d at 744.

In Tahoe Village Realty v. Desmet, 590 P.2d 1158 (Nev. 1979) the defendants asserted that they believed their attorney had filed a responsive document to plaintiff's complaint and therefore the failure of the attorney was excusable neglect. The Nevada Supreme Court held that the district court was not bound to declare the conduct of appellants' attorney as "excusable" pursuant to Section 60(b)(1) of the Nevada Rules of Civil Procedure.

Likewise, any conduct of appellant himself would also fall under the subsection (1) category. It should be observed that Appellant never states in his affidavit that he contacted Stenger in order to determine whether Stenger had received the Summons and Complaint mailed or whether an Answer had been filed. Rather, he contacted the Salt Lake County Clerk's office in September, nearly two months after he had been served, to determine whether the case had yet gone to judgment. Had the appellant made proper inquiry from the person he claimed to be his own attorney, he would have discovered the "mistake" in failing to file an Answer within the three-month statutory period. It is clear that both the conduct of Stenger

and the conduct of Appellant, based upon their own affidavits, must be classified under subsection (1) of Rule 60(b).

This Court in Pitts v. McLachlan, 567 P.2d 171 (Utah 1977) rejected a similar attempt of a party to urge subsection (7) rather than (1) when the time for objecting had expired. This Court stated the following:

> It seems inescapable, also, to conclude that Rule 60(b)(1) is applicable here in the letter and spirit of rules governing procedure and practice and the doctrine of the exercise of diligence in the presentation of ones rights, failing which they are amenable to a limitation statutory feature looking to repose of litigation after a reasonable time, interdicted here to be three months under Rule 60(b)(1).

See also, Robinson v. Myers, 599 P.2d 513 (Utah 1979); J. P. W. Enterprises, Inc. v. Naef, 604 P.2d 486 (Utah 1979) where this Court rejected other attempts to use subdivision (7) in place of subdivision (1).

Thus, it can be assuemd without much doubt that the three-month statutory time period for setting aside a default as provided in Rule 60(b)(1) was applicable to this case. The default was taken on July 29, 1981. The motion to set aside the default was filed on December 4, 1981 which was clearly beyond the three-month time period, and the affidavits of Appellants themselves clearly show that either Appellant or his counsel neglected to pay timely attention to the case.

Appellant seems to argue that even if it is assumed that

the three-month period is applicable that Appellant is still timely. Appellant submits that "reasons suggest that the three-month limitation would not begin to run until the judgment debtor has notice of the entry of the judgment. . . . " (Appellants' Brief, p. 9). Appellant asserts that it was the obligation of Respondents to notify him of the default and that until such notification was made the three-month time period did not begin to run. (Appellant's Brief, pp. 9-10).

This argument is completely void of merit. There was no obligation on the part of Respondents to notify Appellant that a default judgment had been taken against him. Rule 55(b) U.R.C.P. specifically provides in subsection (2) the following:

> Notice to Party in Default. After the entry of the default of any party, as provided in Subdivision (a)(1) of this Rule, it shall not be necessary to give such party in default any notice of action taken or to be taken or to serve any notice or paper otherwise required by these Rules to be served on a party to the action or proceeding, ...

Since Respondents were not obligated to inform Appellant of the default judgment, even if Appellant claims that notification did not occur until after the three-month time period had elapsed were true, it would be immaterial. However, this is not true.

The undisputed affidavit of Plaintiffs' attorney reveals that on August 18, 1981 he told Appellant that a default judgment had been taken against him but that Appellant replied

he did not believe he was legally obligated to respond and therefore was not going to do anything. (R. 42-43).

The Utah Rules of Civil Procedure puts the burden on Appellant to monitor the litigation after he has been served with notice that the lawsuit has been commenced against him.

The cases relied upon by Appellant to support his contention are inappropriate. (Appellant's Brief, pp. 10-11). In Bish's Sheet Metal Co. v. Luras, 359 P.2d 21 (Utah 1961) the court held that if a showing were made that the district court had reversed the decision of the city court on an appeal without due notice of such appeal or the proceedings in the district court, that the prevailing party in the city court could establish lack of due process of law and would be entitled to relief from judgment of the district court. The instant case, of course, does not involve an appeal or lack of notice of the appeal.

In Central Finance Co. v. Kynaston, 452 P.2d 316 (Utah 1969) the court remanded that case to the lower court to determine whether the district court clerk had failed to notify the defendant's attorney of the time of trial in violation of a specific court rule of that district. This Court observed that in the absence of a specific rule of court, attorneys are not entitled to rely upon clerks of courts to give them notice of trial settings. Again, the instant case does not involve the failure of the parties to attend

a trial and, in fact, Rule 54(b)(2) specifically states that no notice is required as to defaults.

Finally, in Interstate Excavating, Inc. v. Egla Development, 611 P.2d 369 (Utah 1980) a similar question as to notification of a trial date was presented after the defendant claimed that his attorney had withdrawn and that he never received notice of the date from the opposing counsel or the court clerk.

Obviously, these cases do not stand for the proposition that "notice" in a default judgment must be given to the defaulting party, and even if they did, actual notice was in fact given in the instant case.

Thus, the lower court correctly denied Appellant's motion to set aside the judgment, ruling that Appellant had failed to file the motion within the applicable time limit. Appellant's affidavits show neglect on the part of both Mills and Stenger. Whether the neglect was excusable or unexcusable, matters not. The only grounds supported by affidavit fall under subdivision (1) of Rule 60 and, therefore, any motion based on these excuses must be brought within the three-month time period. Appellant's failure to do so precludes any relief.

B. Assuming Arguendo that the Motion was Timely, the Lower Court Still did not Abuse its Discretion in Failing to Set the Judgment Aside.

Appellant asserts, "One might ask what more Mills should

have done to properly defend himself in this action?" (Appellant's Brief, p. 6). Respondents can easily answer this question.

The attorney-client relationship between Appellant and Stenger, based upon the affidavits of both individuals, showed no existence of a firm arrangement whereby Stenger undertook to represent Mills. The fact that Stenger specifically filed an answer for other defendants in this case, but not Mills, would indicate that he was not representing Mills. Further, the undisputed affidavit of Tanner says that Stenger told him that he did not represent Mills, due to an apparent conflict of interest.

There is nothing in the record to ever show that Mills had any more discussions with Stenger after the initial conversation. A reasonable person would certainly have talked to his attorney to see if he received the pleadings and accepted the case. That conduct sounds more like deliberate or reckless disregard of judicial process than mere negligence. Even after three months of silence, Mills chose to call the Clerk's office to find out whether a judgment had been entered against him rather than calling Stenger to see if his interests had been represented.

Respondents submit that the affidavits of Stenger and Mills have been written in such a manner to preclude any assertion that Stenger actually represented Mills or that

Stenger had been contacted by Mills as his client after the initial conversation.

If, on the other hand, Stenger indeed failed to represent Appellant in the proceeding after agreeing to do so, then the action lies against Stenger and not against Respondents. As noted earlier, the neglect of an attorney is imputed to the client. Cockerham v. Zikratch, 619 P.2d 739 (Ariz. 1980). If Stenger neglected to properly represent Mills then an action against Stenger should be brought. However, this "mistake" or "inadvertence" of Stenger cannot be imputed to Respondents. In Jennings v. Stoker, No. 17634 (Utah, July 28, 1982) this Court held that the alleged malpractice of a plaintiff's attorney does not justify the granting of a new trial as against the opposing party. This same principle is applicable here. Appellant's sole remedy at this point in time is against Stenger, not Plaintiffs.

Thus, either Appellant's purported attorney Stenger or Appellant himself was negligent in failing to respond to the Complaint properly served by Plaintiffs. Even if it were assumed that the lower court had the power to consider the question of Appellant's negligence, it cannot be said under the affidavits here present that the lower court abused its discretion in concluding that the neglect or mistake shown was not "excusable".

For this reason, also, therefore, the decision of the

lower court must be sustained.

POINT II

THE JUDGMENT IN THIS CASE IS PROPER AND WAS TAKEN IN ACCORDANCE WITH RULE 55(b)(2).

Appellant next argues that even if the default should not have been set aside, the judgment itself is void since the lower court failed to take evidence on the issues presented to the court. (Appellant's Brief, pp. 12-15). Appellant lists eleven items upon which the lower court supposedly should have taken evidence before rendering the default judgment.

Again, this argument is not supported by any legal theory. Rule 55(b)(2) provides, as stated by Appellant, that in cases where it is necessary to determine the amount of damages or to establish the truth of any averment, the court may conduct hearings or order such references as it deems necessary and proper.

A review of the Complaint filed in this action clearly shows that the amount of damages sought were clear and subject to mathematical calculation. (R. 2-10). Because of this, had Respondents desired they could have gone to the Clerk alone for a judgment on the fixed sum of the Complaint. [Rule 55(b)(1)]. However, Respondents went before a district court judge to obtain their judgment and to make a proper showing on attorneys' fees.

At the hearing it was necessary to produce evidence as

to attorneys' fees. The court will note that the order for final judgment specifically states "that testimony had been taken" and thereafter granted an award of attorneys' fees of $5,000 in addition to the money judgment prayed for in the Complaint. (R. 36).

The question of attorneys' fees was the only matter which required the taking of evidence. All other items listed by Appellant were conceded when Appellant failed to answer the Complaint. It is not necessary for a court to take evidence as to the merits of the case since to do so would require a trial on a default judgment. The only requirement of an evidentiary hearing concerns unliquidated damages such as claims of general damages or punitive damages in which the amounts cannot be ascertained from the pleadings themselves. Pitts v. Pine Meadows Ranch, Inc., 589 P.2d 767 (Utah 1978).

For example, whether Mills was in fact a licensed securities agent, whether the note constituted a security, whether any representations were made to the Russells by Mills, whether the representations were true or false, etc. are all questions which were conceded when Appellant failed to answer the Complaint.

Likewise, if the Complaint stated an incorrect amount as to the amount owing on the note and failed to take into account alleged payments which had been made, this too was waived by Appellant when he failed to answer. It must be

assumed that the amount stated in the Complaint is conceded to by the party in default or otherwise even amounts which are stated as a sum certain would require evidence contrary to Rule 55(b).

The only amount claimed in the Complaint requiring evidence was attorneys' fees. The record shows that a hearing was held and evidence was taken as to the reasonableness of attorneys' fees. The language of a judgment is deemed to be correct in the absence of contrary evidence. Hutcheson v. Gleave, 632 P.2d 815 (Utah 1981). The Appellant has failed to produce any evidence disputing the reasonableness of the attorneys' fees or evidence showing that an evidentiary hearing was not in fact held. It is the burden of the appellant to support his allegations with evidence or at least with a record of the lower court proceedings. Garrand v. Garrand, 615 P.2d 422 (Utah 1980). It must therefore be assumed that the lower court conducted a proper hearing and concluded that $5,000 was in fact a reasonable attorneys' fee based upon the numerous circumstances in the litigation.

In any event, even if the lower court improperly failed to take evidence as to the amount of damages the remedy is to remand for a further evidentiary hearing not to vacate the judgment. Pitts v. Pine Meadow Ranch, Inc., 589 P.2d 767 (Utah 1978); J. P. W. Enterprises, Inc. v. Naef, 604 P.2d 486 (Utah 1979).

The plaintiffs in this case properly followed the procedure for obtaining a default judgment based upon an ascertained sum. A hearing in fact was held as to attorneys' fees and there exists in the present record no evidence that the court falsely stated it had taken evidence, or that the amount awarded is not reasonable. Therefore, Appellants' claim that Rule 55(b) was not followed is without merit.

CONCLUSION

The rules providing for defaults were formulated to provide an expedient method of obtaining judgment when no contest of issues is present. The rules developed to relieve a party of judgment were likewise engineered to prevent injustice to a defaulting party while, at the same time, providing safeguards to the party taking the default.

Here, the affidavits filed by Appellant establish a course of conduct that did not allow relief from the default judgment entered against him. His supposed reliance upon his attorney to answer the allegations does not allow him relief as against Plaintiffs--his relief is against his attorney.

Similarly, his own conduct showed a reckless indifference to the judicial process by his failure to consult with his attorney or to take any steps to ascertain that his interests were being protected. The uncontroverted affidavits show

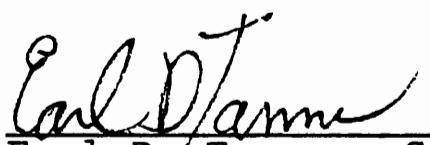
that Appellant did not believe he was liable to Plaintiffs and therefore was going to do nothing about the lawsuit in spite of warnings from Plaintiffs and their attorneys.

In any event, however, the application for "excusable" conduct was not timely made and this reason alone disposes of any substantive arguments as to the actions of Appellant. Under Rule 60(b)(1) the application for relief must be made within three months of judgment--here, it was not.

Finally, the judgment itself was valid since the lower court properly entered judgment for a fixed sum as plead in Plaintiffs' Complaint and took evidence as to attorneys' fees. Neither the Utah Rules of Civil Procedure nor simple logic dictate that a full evidentiary trial must be held for each default judgment.

The decision of the lower court should be affirmed.

Respectfully submitted,



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MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing Brief of Respondents to Ralph J. Marsh, Backman, Clark & Marsh, 500 American Savings Building, 61 South Main Street, Salt Lake City, Utah 84111 this 24 day of August, 1982.