1983

David Russell and Eileen Russell v. Sterling B. Martell : Supplemental Memorandum

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,	:	
Defendant-Appellant.	:	

SUPPLEMENTAL MEMORANDUM

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SUPPLEMENTAL MEMORANDUM

INTRODUCTION

Since Respondents have filed their Brief herein, this Court has decided several cases involving issues similar or identical to those in this appeal. In each the issue was whether the lower court abused its discretion when it denied a motion of defendant-appellant premised on Rule 60(b), U.R.C.P., to set aside a judgment theretofore entered.

Respondents contend that the referenced decisions, reaffirming the principles of law theretofore set out by this Court and applying them to the facts of the particular cases, compel the conclusion that under the facts herein the judgment below should be sustained and Respondents awarded their costs

and attorney's fees incident to the post-judgment proceedings herein, including this Appeal.

ARGUMENT

POINT I

RECENT PRONOUNCEMENTS OF THIS COURT SUPPORT RESPONDENTS' CONTENTION THAT THE DECISION OF THE LOWER COURT REFUSING TO SET ASIDE THE DEFAULT JUDGMENT HEREIN SHOULD NOT BE DISTURBED.

Respondents will not reargue matters set forth in their Brief heretofore filed except to point out the pertinent chronology supporting their contention as shown either by the undisputed record or by unrebutted portions of the affidavits filed below by Respondents. These and Appellant's affidavits were considered by the lower court. Said dates and the events occurring are:

July 7, 1981	Summons and Complaint Served on Appellant Mills
July 15, 1981	Conversation between Appellant Mills and Respondent Russell in which Mills informed Russell that Mills intended to take no action on the said Summons and Complaint. (Resps.' Brief, pp. 4 and 5.)
July 29, 1981	Default Judgment entered.
August 18, 1981	Respondents' Associate Counsel, Hardy, specifically told Mills that a Default Judgment had been taken against him. (Resps.' Brief, p. 5.)
December 4, 1981	Mills' new attorney filed Rule 60(b) motion.

December 10, 1981 Rule 60(b) motion heard and denied.

The pertinent decisions of this Court published (and, in one instance, promulgated but unpublished) since Respondents' Brief was filed are:

1. Calder Bros. Company v. Ross L. Anderson, et al., 652 P.2d 922 (Utah, August 24, 1982), reinforcing the proposition that one who should have filed under Rule 60(b)(1) within three months after the entry of judgment, but failed to do so, may not rely on the provisions of Rule 60(b)(7) under circumstances where the failure to make a timely (within three months) motion to set aside the judgment was the result of a mistake in law.

2. Gardiner and Gardiner Builders v. Swapp, 656 P.2d 431 (Utah, November 2, 1982), reaffirming in a per curiam decision that the negligence, if any, of appellant's attorney is attributable through the rules of agency to the appellant; that failure of a client to communicate with his attorney is negligence, whether the fault be that of the client or of the attorney; that a motion to set aside a judgment premised on negligence must be brought within the three-month time limit of Rule 60(b); and that the provisions of Rule 60(b)(7) may not be used to circumvent the time limitation of Rule 60(b)(1).

Even if the challenged allegations of the affidavits adduced by Appellant below were taken as true, they

would make out a case very similar to the contentions of appellant Swapp in the foregoing decision, which contentions were rejected by this Court.

3. Laub v. South Central Utah Telephone Association, Inc., 657 P.2d 1304 (Utah, December 29, 1982), holding that where relief is sought from a judgment rendered by "mistake, inadvertance, surprise, or excusable neglect," it must be pursued by motion made within three months of the judgment and that this is true even though the judgment involved includes previously compensated damages and may, therefore, be excessive.

4. Kanzee v. Kanzee, No. 17918 (Utah, January 20, 1983), involving a motion for relief from judgment under Rule 60(b), subsections (1) ("mistake or excusable neglect"), (3) ("fraud or misrepresentation"), or (7) ("any other reasons justifying relief"). This Court held that the appellant was out of time with respect to his motion grounded on Rules 60(b)(1) and (3) because he did not file within three months of the entry of decree and that he was not, under the circumstances therein presented, entitled to use Rule 60(b)(7) to circumvent the three-month limitation.

5. Jenner v. Real Estate Services, 659 P.2d 1072 (Utah, March 2, 1983), cited with approval in Starzel below.

6. Valley Leasing v. Houghton, 661 P.2d 959 (Utah, March 24, 1983), a case where counsel for defendant-appellant

withdrew and gave his client notice, the client did not appoint new counsel or appear in person or through an authorized representative at the trial, and contended that his neglect, if any, was excusable. The motion was timely brought and was denied below. This Court reiterated its commitment to the principle that broad discretion is accorded the trial court in ruling on such matters as due diligence and excusable neglect, and declined to substitute its discretion for that of the lower court.

7. Starzel v. Jaramillo, 663 P.2d 77 (Utah, April 14, 1983), citing Airkem Intermountain with approval for the proposition that (a) due diligence, (b) circumstances beyond the control of movant, and (c) a strong showing of entitlement or of such unusual or compelling circumstances as will justify failure to seek relief earlier, must be shown under the applicable provisions of Rule 60(b) and affirming the trial court's denial of appellant's motion. Among the decisions cited with approval was the Jenner case set forth above.

8. State of Utah v. Musselman, et al., No. 18161 (Utah, June 14, 1983), reaffirming Airkem Intermountain and the principles (1) that broad latitude of discretion is accorded the trial court in ruling on motions under Rule 60(b), (2) that the movant must not only show excusable neglect (or any other reason specified in Rule 60(b)), but must, in addition, show that his motion to set aside the

judgment was timely and that he has a meritorius defense to the action. In its analysis of the application of these principles to the facts of that case, this Court agreed that a finding as to the existence or nonexistence of a meritorius defense necessarily implied that the court had concluded there to have been a sufficient showing of reasonable excuse. This portion of the decision has no application to the instant case since no findings or conclusions of law were entered by the lower court with respect to its decision to deny Appellant's 60(b) motion, and no findings or conclusions were requested by Appellant.

9. Christenson v. Christenson, (Utah, June 24, 1983), unpublished, referring to the principles previously pronounced and reiterating that granting relief in such cases (Rule 60(b) motions) is "within the sound discretion of the trial judge, unless his conclusion is so unreasonable under the circumstances as to approach or constitute unconscionability." (Underlining added.)

CONCLUSION

Cases involving principles respecting treatment of lower court decisions on Rule 60(b) motions have come before this Court with surprising frequency of late and been addressed in several decisions propounded since the filing of Respondents' Brief herein. In each instance the decision of this Court has reinforced the position of Respondents herein

who contend that, under the circumstances of this case as revealed by the affidavits filed by the parties, there is no tenable ground for disturbing the decision of the lower court denying Appellant's motion to vacate the default judgment theretofore entered. Appellant's affidavits themselves demonstrate negligence on his or his attorney's part. Respondents' affidavits show that Appellant had knowledge of the entry of the default judgment shortly after its entry; and the court file shows that Appellant failed to make his Rule 60(b) motion within the three-month limit of said Rule.

Since this case is one in which Respondents are entitled to reasonable attorney's fees and were awarded such below, it is appropriate for this Court, if it declines to reverse the lower court's decision, to award costs and attorney's fees to Respondents and return the case to the District Court for the sole purpose of determining reasonable fees for post-judgment services of Respondents' attorneys herein.

Respectfully submitted,

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MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing SUPPLEMENTAL MEMORANDUM to Ralph J. Marsh, Backman, Clark & Marsh, 500 American Savings Building, 61 South Main Street, Salt Lake City, Utah 84111, this _____ day of August, 1983.

_____