1984

David Russell and Eileen Russell v. Sterling B. Martell : Appellant's Petition and Brief for Rehearing

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,

Supreme Court
No. 18160

vs.

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

Defendant-
Appellant.

APPELLANT'S PETITION AND BRIEF FOR REHEARING

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

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Appellant respectfully petitions this court for a rehearing in this matter on the grounds set out in the points which follow and in support thereof submits these facts.

STATEMENT OF FACTS

A more complete statement of facts is found in appellant's original brief but most of the facts important to this petition are briefly given here.

A default judgment was entered against appellant, Grant C. Mills (hereinafter "Mills") on July 29, 1981. Mills filed a motion to set aside the default judgment on December 4,

1981, and the motion was heard by the lower court on the morning of December 10, 1981. The respondent, David Russell (hereinafter "Russell") filed an affidavit, at the end of the day on December 9, 1981, in which he stated that Mills told him that he (Mills) intended to take no action on the summons and complaint. Because the affidavit was filed just prior to the hearing on the motion to set aside the default judgment, Mills had no opportunity to deny or otherwise respond to Russell's statement. In fact, Mills did not even see Russell's affidavit prior to the hearing on the motion to set aside the default judgment.

Mills' statement to Russell that he intended to take no action on the summons and complaint was made after Russell told Mills that he (Russell) "wasn't after me but was just after Sterling Martell and Martell Holding Corp."

Russell's attorney, Mr. Hardy, filed an affidavit, also at the end of the day on December 9, 1981, in which he stated he had informed Mills of the default judgment against him. Mills also did not see this affidavit until after the hearing and did not have an opportunity to deny or respond to that statement. The fact is that Mills, in response to that information from Mr. Hardy, contacted the clerk of the court on two different occasions and was told by the clerk that no judgment had been entered against him but that a judgment had been entered against two other defendants.

The lower court denied the motion to set aside the default judgment without specification of the reasons therefor and this appeal followed.

ARGUMENT

POINT I

THIS COURT ERRED IN RELYING ON "UNDENIED STATEMENTS" OF PLAINTIFFS SINCE MILLS HAD NO OPPORTUNITY TO RESPOND TO OR DENY THOSE STATEMENTS.

This court's refusal to set aside the default of Mills was based upon Mills' "undenied statements that he felt no legal obligation to respond to the plaintiffs' claims [which] evince a complete indifference by him and negate any diligence on his part in pursuing the opportunity to defend." (Supreme Court Opinion, pages 2-3) This statement by the court overlooks the fact that Mills had no opportunity to deny those statements because those statements were made in affidavits submitted by plaintiffs at or just prior to the hearing on the motion to set aside the default judgment.

The hearing on Mills' motion was heard on the morning of December 10, 1981. Plaitiffs' affidavits in opposition to the motion were signed on December 9, 1981, and hand-delivered to the office of Mills' attorney at the end of that day. Rule 6(d), Utah Rules of Civil Procedure, requires opposing affidavits to be served "not later than 1 day before the hearing." Rule 2.7(e) of the Rules of Practice in the District

Courts and Circuit Courts of the State of Utah (and its predecessor rule) provides that "affidavits not filed within the time required by any rule of civil procedure shall not be received except on stipulation of the parties or for good cause shown." The purpose of these rules is obviously to allow a certain minimal time for parties to review and respond to affidavits. "Not later than 1 day" must be taken to mean "1 full day" or the purpose of the rule becomes meaningless. Mills had no opportunity to respond to those affidavits and they were received and ruled upon by the lower court in violation of the rules.

The statements upon which this court relies in refusing to set aside the default represent only half of the story. Mills' version of those conversations is set out in his affidavit attached to this petition. Mills was told by the plaintiff, David Russell, that "he (Russell) wasn't after me (Mills) but was just after Sterling Martell and Martell Holding Corp." Under this circumstance it would be natural for Mills to respond that he intended to take no action on the summons and complaint. His actual response was that "then I shouldn't have to take any action, should I?" Russell agreed that he should not. However, Russell obviously misrepresented his intent to Mills because he did take a judgment against Mills.

Plaintiffs' attorney, Mr. Hardy, stated in his affidavit that he informed Mills by telephone that a default judgment had been taken against him. It was in response to this

statement that Mills checked with the clerk's office and was informed that no judgment had been taken against him but only against Martell and Martell Holding Corp. This was in accordance with what Russell had told Mills he would do and, therefore, confirmed to Mills that he had no reason for concern. Had the clerk discovered the second judgment against Mills in the file and reported that to him, he would have immediately taken action to have it set aside. As it was, Mills had the assurance of Russell that he wasn't after him and the assurance of the clerk that no judgment had been taken against him.

With this full view of the facts, it can hardly be said that Mills showed a complete indifference to those facts. Instead, he acted very naturally, relying on the statement of Russell, who had been a long-time friend and associate. We must remember that he was a layman, unaware of the legal rules of procedure, who was misled by the plaintiff and by the clerk of the court.

POINT II

RULE 60(b)(7) WAS INTENDED TO COVER THESE FACTS. OTHERWISE, THERE IS NO POSSIBLE RELIEF FOR A DEFENDANT WHO IS THE VICTIM OF FRAUD, MISREPRESENTATION OR MISCONDUCT AND HAS NO NOTICE THEREOF FOR MORE THAN THREE MONTHS.

Rule 60(b) states that a motion under the 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. In this case Russell misrepresented to Mills that he was not after him and then took a judgment against him but took no action to enforce the judgment, which was entered July 29, 1981, until November 24,

1981, after the three months had expired. Thus, 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, Russell is rewarded for the very "fraud, misrepresentation, misconduct" the rule is designed to prevent.

Why did Russell wait for three months to expire before taking action to enforce his judgment? Why did Russell move so slowly before the three months had expired and so quickly afterwards? The potential for abuse of that rule is obvious and the court should set aside the default of Mills and allow this case to be heard on its merits in order to prevent any abuse of that rule.

POINT III

THE COURT ERRED IN NOT GIVING DIRECTION TO THE LOWER COURT AS TO THE EXTENT OF THE HEARING REQUIRED ON REMAND.

This court has directed the lower court to conduct further proceedings in conformity with its opinion. Directions are given specifically to "ascertain the amount of damages to which the plaintiffs were entitled" and the "amount of income . . . received on the security" but, no direction is given concerning preliminary issues as to whether plaintiffs are entitled to any damages at all. Unless evidence is produced on each of the following issues, implicit in plaintiffs' complaint, it cannot be determined that plaintiffs are entitled to any damages at all:

(1) Whether Mills was in fact a licensed securities agent;

(2) Whether the note constituted a security requiring registration;

(3) Whether there existed any exemption 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; and

(7) Whether Mills knew, or in the exercise of reasonable care could have known, of the untruth of the representations.

In order to consider that kind of evidence, the lower court should conduct a full hearing and must allow Mills to participate in and present his own evidence at that hearing. The plaintiffs' complaint does not contain any allegations with respect to items 3, 6 and 7, above, and, therefore, even if all allegations of the complaint were taken to be true, plaintiffs have not established a prima facie case.

CONCLUSION

Since the court's opinion is based upon an untrue assumption that Mills had an opportunity to deny or respond to the statements of plaintiffs and since the matter of the fraud, misrepresentation or misconduct of plaintiffs without notice of a judgment to Mills and of the extent of the hearing required

on remand were not considered by the court, a rehearing is necessary to consider these issues.

Appellant requests that the court set aside his default and allow a full hearing on the merits to be held. Otherwise, the very fraud, misrepresentation and misconduct, that Rule 60(b) was designed to prevent, will have been condoned by the court.

Respectfully submitted,

BACKMAN, CLARK & MARSH

By 

Ralph J. Marsh
Attorney for Defendant-Appellant

In The
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Of The
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DAVID RUSSELL and EILEEN RUSSELL, his wife, Plaintiffs-Respondents, vs. STERLING B. MARTELL d/b/a MARTELL HOLDING COMPANY, et al, and GRANT C. MILLS, Defendant-Appellant.	AFFIDAVIT Supreme Court No. 18160

STATE OF UTAH)
:ss
County of Salt Lake)

GRANT C. MILLS, being first duly sworn, on oath, deposes and says as follows:

1. That I am one of the defendants and the appellant in the above-entitled case.

2. That some time in July 1981 I had a conversation with the plaintiff David Russell in which Russell said that he wasn't after me but was just after Sterling Martell and Martell Holding Corp.

3. My response to him was "then I shouldn't have to take any action, should I?" He agreed that I should not.

4. That in August of 1981 I was informed by David Eccles Hardy that a judgment had been taken against me. I responded that I did not feel legally obligated to the plaintiffs.

5. However, in response to the statement by Mr. Hardy, I contacted the clerk of the court and inquired if a judgment had been entered against me. The clerk responded that no judgment had been taken against me but that a judgment had been taken against Sterling Martell and Martell Holding Corporation.

6. I did not understand the effect of a judgment and did not know my responsibility with respect thereto but had sent the summons and complaint to my attorney and assumed that appropriate responses had been filed.

7. I attended the hearing on the motion to set aside the default judgment on the morning of December 10, 1981, but did not see the affidavits filed by plaintiff in opposition to the motion until after the hearing was completed. I wanted to say something during the hearing in response to claims the plaintiffs were making but was told that I could not.

DATED this 21st day of February, 1984.

GRANT C. MILLS

SUBSCRIBED AND SWORN to before me this 21st day of February, 1984.

NOTARY PUBLIC

My commission expires: 9/24/76 Residing at Salt Lake City, Utah.