1984

David Russell and Eileen Russell v. Sterling B. Martell : Answer to Respondents' Petition 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.

ANSWER TO RESPONDENTS' PETITION FOR REHEARING

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

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Rules Cited

Statutes Cited

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This Court's decision in this case held that the Russells, in seeking a default judgment, did not submit evidence as required by Rule 55(b)(2), Utah Rules of Civil Procedure, to show damages sustained under Section 61-1-22(1)(b), U.C.A. That section requires the submission of evidence as to the "consideration paid for the security," "reasonable attorney's fees" and "the amount of any income received on the security." The Court's opinion stated that "although it appears that a hearing was held, it dealt only with the reasonableness of the attorney's fees to be awarded the plaintiffs." Based on the failure to submit evidence on "the consideration paid for the

security" and the "income received on the security" and the failure to determine damages based on such evidence, this court reversed the judgment entered below and remanded the case for further proceedings.

The Respondents' Petition for Rehearing is based upon their claims that:

1. The lower court actually heard evidence as to the amount paid for the note and the income received thereon; and

2. The amount paid for the note was $55,200.00 because the note recites that amount as the principal which is to be paid.

The first claim made by respondents is absolutely contrary to the prior statements of respondents' attorney that "the question of attorney's fees was the only matter which required the taking of evidence." A reading of the Brief of Respondents, pages 20 through 23, makes it very clear that respondents produced no evidence as to any matter other than attorney's fees. It is stated there that "respondents went before a district court judge to obtain their judgment and to make a proper showing on attorney's fees," "at the hearing it was necessary to produce evidence as to attorney's fees," "the question of attorney's fees was the only matter which required the taking of evidence," "the only amount claimed in the complaint requiring evidence was attorney's fees," "the record shows that a hearing was held and evidence was taken as to the reasonableness of attorney's fees," and "a hearing in fact was held as to attorney's fees and their exists in the present

record no evidence that the court falsely stated it had taken evidence, or that the amount awarded is not reasonable." Respondents' attorney also states in the Brief of Respondents that "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 the default judgment." It is quite clear from these statements that respondents submitted only evidence as to attorney's fees and did not submit evidence as to any other matter because they considered it unnecessary.

No reporter was present and no record was made of the evidence submitted by respondents. Yet, respondents' attorney now claims, contrary to all prior statements in this case, that evidence was presented to the court as to the amount paid for the note and the income received thereon. This claim is based upon the affidavit of David Eccles Hardy (Exh. D to Respondents' Petition for Rehearing) stating that he, the attorney, produced for the judge the original promissory note and that he "testified" that "to the best of my information and belief" $55,200.00 had been paid by respondents for the note and that his "understanding" was that no income had been received on the note. He also testified that $5,000.00 was reasonable for attorney's fees. One might have questioned whether the attorney's fee was reasonable on a default judgment but, at least, Mr. Hardy was competent to testify as to attorney's fees. He was definitely not competent to testify as to the amount paid for the note and the income received thereon.

In the first place, as the attorney for the respondents, he is restricted from testifying in the case. Code of Professional Responsibility, Cannon 5, E.C. 5-9 and 5-10. If he had firsthand knowledge of the facts to which he claims to have testified, he should have resigned from the case before becoming a witness. In the second place, it is quite obvious that he did not have firsthand knowledge of these facts since he based his testimony on "information and belief" and his "understanding" and, at best, his testimony was hearsay. The intent of Rule 55(b)(2) is not to have the attorney tell the judge what he thinks or what others have told him, but to have the plaintiffs come in and be sworn and testify and show evidence of what they paid and what they received.

Furthermore, if the judge saw and read the promissory note, it would have been obvious that the so-called "testimony" of Mr. Hardy was false. The note provides that the maker promises to pay $55,200.00 on maturity of the note. It does not say that $55,200.00 was paid for the note--only that $55,200.00 is to be paid on maturity. In the blank in the upper right-hand corner of the note, where it is customary to set forth the amount of a note, as was obviously the intent on this particular note, the figure of $48,000.00 is typed. Underneath this blank are the words "Six Months", which one would reasonable interpret to be the term of the note. When one applies the stated interest rate of thirty (30%) percent per annum, or two and one-half (2.5%) percent per month, to $48,000.00 for six months, the result is $7,200.00, which, when added to the $48,000.00, is

$55,200.00. While one might reasonably question the validity of such a note on the grounds of vagueness, one can only conclude that the amount paid for the note was $48,000.00 and the amount to be repaid in six months, by the maker, was $55,200.00. What other possible meaning does the figure $48,000.00 have? There is none.

Thus, the "information and belief" and the "understanding" of Mr. Hardy were false and, therefore, his testimony was false. His incompetent, hearsay evidence was contrary to the only competent "best evidence" before the judge. The best evidence was the note itself which recites that $48,000.00 was the amount paid for the note.

Why respondents assert that $55,200.00 was paid for the note and try to support that by the uncertain, vague and incompetent affidavit of Mr. Hardy, when it is known to the parties and their attorneys that only $48,000.00 was paid for the note, is beyond belief. The attempt to "create" a record, where none existed, has emphasized the contradiction between respondents' present claims and the facts.

Likewise, the parties and their attorneys know that respondents received $16,800.00 as income on the note and did not disclose that fact to the lower court. The injustice of the procedure followed by the respondents is clear. They, however, justify themselves by stating, on page 14 of their Petition for Rehearing:

> The great risk of defaulting is that the amount claimed in the Complaint and the amount found as damages may be a sum greater than would have been awarded had the trial court had the benefit of the defendant's knowledge by way of countervailing testimony.

In other words, the plaintiff may take advantage of you if you don't answer the complaint. That risk has now become a reality. The purpose of Rule 55(b)(2), in requiring testimony to support the plaintiffs' claims of damages, even on a default judgment, could not be better highlighted than it is by the actions of the respondents in this case.

Respondents further state, on page 13 of their Petition for Rehearing, that:

> If defendant Mills had not defaulted . . ., he may very well have placed before the trial court evidence that less than $55,200.00 had been paid by the Russells, or that some income had been received by the Russells.

Indeed, Mills could have done so and would have done so but the plaintiff, David Russell, told Mills "that he wasn't after me but was just after Sterling Martell and Martell Holding Corp." and agreed that Mills should not have to take any action. (See Affidavit of Mills attached to Appellant's Petition and Brief for Rehearing).

This court's reversal of the judgment was entirely appropriate under these circumstances. However, with the numerous affidavits which have been filed in this case, attempting to assert what was said or done on various occasions in the case, it should be obvious that the only way to fairly and properly consider all of the facts is to order a full hearing

on the merits. Therefore, appellant requests this court to deny Respondents' Petition for Rehearing and to grant Appellant's Petition for Rehearing in order to allow this case to go to trial.

Respectfully submitted,

BACKMAN, CLARK & MARSH

By 

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