1982

Valley Leasing v. Richard W. Houghton : Brief of Respondent

Utah Supreme Court

Frank T. Mohlman; Vernon & Mohlman; Attorney for Appellant;
Allen Sims; BIele, Haslam & Hatch; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

VALLEY LEASING, a Division of
Intermountain Loan Corporation,
a Utah Corporation,

Plaintiff-Respondent,

vs.

Case No. 18259

RICHARD W. HOUGHTON,

Defendant-Appellant.

BRIEF OF RESPONDENT

Appeal from the Order of the Third District
Court for Salt Lake County, State of Utah,
Honorable James S. Sawaya, District Judge

ALLEN SIMS
BIELE, HASLAM & HATCH
50 West Broadway, Suite 400
Salt Lake City, Utah 84101

Attorney for Respondent

FRANK T. MOHLMAN
VERNON & MOHLMAN
275 South Main Street
Tooele, Utah 84074

Attorney for Appellant

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FRANK T. MOHLMAN
VERNON & MOHLMAN
275 South Main Street
Tooele, Utah 84074

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES

STATEMENT OF THE NATURE OF THE CASE

This is a civil action instituted by Respondent for damages for breach of lease on September 12, 1980, after trial, judgment was entered on behalf of Respondent; on November 3, 1981, Appellant moved, pursuant to Rule 60(b)(1)&(7), for relief from the judgment.

DISPOSITION IN LOWER COURT

The Third Judicial District Court, the Honorable James S. Sawaya presiding, denied Appellant's motion for relief from the judgment.

RELIEF SOUGHT ON APPEAL

Respondent seeks an Order affirming the decision of the District Court.

STATEMENT OF MATERIAL FACTS

Respondent, Valley Leasing, a Division of Intermountain Loan Corporation, a Utah corporation, is engaged in the commercial leasing of equipment. It carries no inventory of equipment, but instead, purchases equipment preselected by a prospective lessee and then enters into a lease agreement. TR. R. p. 4, lines 16-22. In 1980, Appellant had selected certain equipment from an equipment dealer that he wanted to lease. The dealer referred Appellant to Respondent. TR. R. p. 4, lines 11-15, p. 6, lines 1-15. On January 23, 1980, Valley Leasing and Mr. Houghton discussed the lease of a backhoe and Valley Leasing ran a credit check on Mr. Houghton who was self-employed in the contruction business. TR. R. p. 5, line 1-25. The backhoe was purchased by Respondent from Century

Equipment for lease to Mr. Houghton. TR. R. p. 6, lines 11-15. A lease was executed on January 25, 1980.

The closing on the lease took place in St. George, Utah, at the place of business of Appellant and Appellant paid by check the sum of $2,984.43, which represented a security deposit and the first month's lease payment. TR. R. p. 6, lines 16-25, p. 7, lines 1-8. The lease executed by Mr. Houghton commenced January, 1980, for a term of forty-two months. The check initially given to Valley Leasing by Mr. Houghton bounced and never was made good. No other payments were ever made by Mr. Houghton. Mr. Houghton was in possession of the equipment for approximately three months. TR. R. p. 7, lines 2-12, p. 9, lines 2-8. At the time of the closing on the lease, Mr. Houghton had taken delivery of the equipment, and, at the closing, signed a delivery and acceptance certificate indicating satisfaction with the equipment so delivered. In April, 1980, Respondent retook possession of the equipment. TR. R. p. 6, lines 1-10, p. 8, lines 4-13.

On September 19, 1980, Respondent filed suit in the Third Judicial District Court for the County of Salt Lake, State of Utah, seeking damages for breach of lease. On or about October 7, 1980, counsel appeared on behalf of Appellant and filed an Answer to Respondent's Complaint. On October 14, 1980, Respondent filed a Request for Trial Setting, and, on November 26, 1980, the matter was set for a non-jury trial on October 1, 1981.

Notice of trial setting was sent to counsel for Respondent and counsel for Appellant. On or about December 15, 1981, attorneys for Appellant withdrew as counsel, filing a Withdrawal of Counsel pursuant to Utah Rules of

Civil Procedure and stating the date in which the matter had been set for trial in their notice. This motion was mailed to Appellant at his address at 513 North 500 West, St. George, Utah 84770. This was at the time, and presently is Appellant's permanent address.

On September 11, 1981, the Honorable James S. Sawaya, Judge of the Third Judicial District of Salt Lake County, entered an order for pre-trial settlement conference and appearance of counsel and parties. The order was mailed to counsel for Respondent and previous counsel for Appellant. On September 16, 1981, Respondent mailed to Appellant, Notice to Appoint New Counsel.

On September 25, 1981, Mr. Thomas N. Arnett, Jr., who formerly represented Appellant, wrote to Appellant at the same address to which he addressed his Withdrawal of Counsel, indicating that he had withdrawn, that trial had been set for October 1, 1981, and that they had received a pre-trial order for September 22, 1981. Mr. Arnett, in his letter noted that he would not be appearing on behalf of Appellant on October 1, 1981 for the reason that Appellant "failed to ever provide us with a retainer". Further, said letter detailed the fact that Mr. Houghton had made no contact with the firm since he first brought the Summons and Complaint to them nor had he ever answered their letters. Mr. Arnett advised Mr. Houghton to obtain counsel or appear on his own behalf at the trial.

At the pre-trial hearing counsel for Respondent appeared, but neither Appellant nor any counsel for Appellant appeared.

On October 1, 1981, Respondent appeared for trial, but neither Appellant nor any attorney representing Appellant appeared. Appellant's wife did appear,

apparently at Appellant's request, for the purpose of representing him, but was not allowed to do so as she was not a party to the action nor an attorney.

The Court took testimony of Respondent and after said testimony, judgment was entered against Appellant for a total sum of $15,681.56.

On November 3, 1981, Appellant filed a Motion for Relief from Judgment. Subsequently, after submission of affidavits from Appellant and oral argument, this Motion was denied by the District Court. Appellant now prosecutes this Appeal from that denial.

ARGUMENT

POINT I

APPELLANT IS LIMITED TO RELIEF UNDER RULE 59, UTAH RULES OF CIVIL PROCEDURE.

Rule 59, Utah Rules of Civil Procedure, provides that, subject to the provisions of Rule 61, a new trial may be granted only in a limited number of circumstances. Appellant has not pled compliance with Rule 59 and claims that Rule 59 is not applicable to this case.

It is clear from the facts of the case that Appellant filed an Answer which was never withdrawn. The matter was set for trial on October 1, 1981 and came on for a pre-trial conference just prior to trial. When Appellant failed to appear for the pre-trial conference, the Court indicated that it would be willing to handle the matter as a default matter in terms of the burden placed on Respondent in presenting evidence at trial. It should be noted, however, that no default was entered against Appellant at the pre-trial conference, nor was any default entered subsequently.

Respondent appeared for trial and produced evidence. Findings of Fact and Conclusions of Law and Judgment were entered after trial. At no time was the Answer of Appellant stricken, nor any default judgment entered. The Court had before it facts sufficient for the entry of judgment upon trial. While the trial Court may have indicated a willingness to handle the case on a default basis, nothing in the record indicates that it, in fact, did so. Indeed, the trial transcript is fully consistent with the entry of judgment upon trial, not a default judgment.

It is Respondent's contention, therefore, that Rule 59 applies and that Rule 60(b) is not applicable to this action.

POINT II

APPELLANT HAS FAILED TO ESTABLISH SUFFICIENT BASIS TO SET ASIDE THE LOWER COURT'S ORDER DENYING HIS MOTION FOR RELIEF UNDER RULE 60(b), UTAH RULES OF CIVIL PROCEDURE

Appellant has moved, pursuant to Rule 60(b)(1) & (7), for this Court to reverse the judgment of the trial Court in refusing to vacate a judgment entered after trial. It is well established law that a trial court may be reversed only if an abuse of discretion is clearly shown in the record. Warren vs. Dixon Ranch Company, 260 P. 2d 741 (Utah, 1953), Salt Lake Hardware Company vs. Nelson Land and Water Company, 134 P. 911 (Utah, 1913). Pursuant to Rule 61(b)(1), Appellant must show that excusable neglect exists and that it was so clearly established that it was an abuse of discretion for the trial Court to refuse to set aside the judgment.

Excusable neglect has been reviewed by this Court in detail before. In Warren vs. Dixon, the Court stated: "In order for this Court to overturn the discretion of the lower Court in refusing to vacate a valid judgment, the requirements of public policy demand more than a mere statement that a person did not have his day in court when full opportunity for a fair hearing was afforded to him or his legal representative". At page 744.

A review of the cases cited by Appellant in his brief where this Court has reversed the lower court is instructive.

In Helgesen vs. Inyangumia, 636 P. 2d 1079 (Utah, 1981) an insurance adjuster in negotiation with plaintiff's counsel, failed to turn over the Summons and Complaint to his attorney before entry of default for the reason that he was awaiting further information promised by plaintiff's counsel and expected to negotiate further on the claim. The default was taken without prior notice to the trusting adjuster.

In Mayhew vs. Standard Gilsonite Company, 376 P. 2d 951 (Utah, 1962), plaintiff served the just resigned president of a financially troubled corporation, having about 3,000 shareholders, whose affairs were in a caotic state. Other than the just resigned president, there was no other in state, responsible officer and, before the shareholders were able to hire local counsel, a default judgment had been entered.

In these cases, defendants could be said to have exercised due diligence with regard to the suits filed and no substantial delay was caused to plaintiff when the motion for relief from the judgment was filed. In Mayhew, events beyond control of the shareholders of the corporation caused the default. In Helgesen, counsel for plaintiff gave less than the usual courtesies when taking a default

without notice to an agent of defendant who was waiting for further information from that attorney.

Contrast this with the cases cited by Appellant in his brief where the lower court's ruling was not disturbed.

In Airkem Intermountain Inc., vs. Parker, 513 P. 2d 425 (Utah, 1973), defendant was sued on January 26, 1972 and filed an Answer through counsel on February 8, 1972. However, he failed to contact his attorney from February, 1972 to September 21, 1972, the date of trial. Defendant knew that he was difficult to contact because of his working hours, but in an affidavit, claimed he had a terminally ill spouse who was in a nursing home for three months just prior to trial. Just before trial, defendant's counsel attempted to withdraw, which was denied. Neither defendant nor his counsel appeared for trial. The Court noted: "His failure to contact his counsel under such circumstances from February to September 21, 1972, could reasonably be considered as not constituting due diligence by the trial court... Since defendant's conduct was not entirely inexcusable, the trial court did not abuse its discretion by refusing to relieve defendant of the judgment". At page 431.

In Warren vs. Dixon Ranch Company, one Arnold Dixon was served with process. At the time of service he was ill. He failed to file an Answer. Another shareholder, well after default was entered, attempted to file an Answer and Counterclaim. This Court noted that, while discretion of the lower court should be exercised in defendant's behalf in doubtful cases: "The movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control". At page 743. Illness

at the time of service of process, under these circumstances, was not "excusable neglect". See also, Peterson vs. Crosier, 81 P. 860 (Utah, 1905) and Airkem Intermountain, Inc., at page 431.

Appellant's case fits the pattern of Airkem Intermountain Inc. and Warren.

(1) Appellant had a full opportunity for a fair hearing. Appellant was afforded a trial on October 1, 1981, notice of which was given to his former counsel and to him by his counsel in a letter, addressed to him at his then current and now current address.

(2) Appellant's clear neglect of his rights and responsibilities was the cause of his failure to appear at trial. Appellant's former counsel mailed to Appellant its Withdrawal of Counsel noting the time of trial, on December 15, 1980. Also, the letter of former counsel, dated September 25, 1981, (addressed to the same address, which Appellant acknowledges as having received), makes clear that former counsel had mailed him not only the Withdrawal of Counsel notice and had advised him of the October 1, trial setting, but, in addition, that they had sent other letters since they first appeared on his behalf and that he had never answered their letters or contacted them since the initial contact. Appellant was mailed a Notice to Appoint New Counsel in this case on September 16, 1982. None of these letters and notices prompted Appellant to either appear at trial or hire an attorney to represent him.

Appellant claims in his Affidavit that he requested his wife to go to the courtroom on October 1, 1981 to present his case. In that Affidavit he gave no reason for not appearing at trial. Mrs. Houghton was not a party to

the action. In a supplemental Affidavit filed by Mr. Houghton on November 18, 1981, Appellant stated that, "Notice was insufficient to allow him to arrange his business and travel to Salt Lake City". It is to be noted that Mr. Houghton, as a self-employed contractor, is presumably capable of arranging his work as he wishes. More to the point, he still failed to give any specific reasons why he was unable to appear for trial. Apparently, Appellant felt it was inconvenient for him to appear and he sent his wife to represent him. Appellant's affidavits, it is submitted, fall far short of establishing the statutory standard required of Appellant to exercise due diligence.

Indeed, Appellant's position recalls the language of this Court in Peterson vs. Crosier:

> A party cannot thus intentionally remain away from a trial to which he is a party for the purpose of giving his attention to and performing other business duties of a purely private character, and, after judgment has been rendered against him, have the same set aside and the case reopened on the ground of excusable neglect. If courts and judicial proceedings were thus conducted only as they might suit the convenience and caprice of litigants, but few cases would ever be brought to a successful termination.

The neglect of Appellant is apparent in the record from the inception of the relationship between Valley Leasing and Mr. Houghton. Respondent did not seek out Appellant for lease of equipment until such time as Appellant had indicated a desire to enter into an equipment lease. It was only after initial contact and investigation that Respondent purchased the equipment for leasing specifically to Mr. Houghton. Respondent maintains no inventory of equipment and would not have purchased the equipment but for Mr. Houghton's desire to

obtain possession of it. Mr. Houghton retained possession of the equipment for more than three months after giving Respondent a rubber check. Appellant has never paid any money to Valley Leasing in this transaction. Respondent was required to file an action in this matter and was required in normal course to wait for more than a year for the matter to come up for trial.

After causing significant losses and damage to Respondent by the issuance of his bad check and the total breach of his lease agreement, and after neglecting his rights and his responsibilities with regard to his counsel and the Court, Appellant wants the judgment set aside.

Appellant has simply not shown that he exercised due diligence of a man in his position or was prevented from appearing at trial because of circumstances over which he had no control. He failed to contact or pay his attorneys, to take any action during the year the case was pending in Court, and failed to appear at trial even though it was possible for him to do so.

CONCLUSION

As to Point I, nothing in this case indicates that Appellant's Answer was stricken and a default judgment entered. Therefore, Appellant's rights are limited to Rule 59 of Utah Rules of Civil Procedure and he has failed to show that he is entitled to relief under Rule 59.

Assuming arguendo that Rule 60(b) applies, Appellant has failed to establish that excusable neglect exists in this case. Certainly the record reflects much neglect by Appellant, but little, if any, appears to be excusable. Critical to Appellant's position on Appeal, is showing in the record that Appel-

lant exercised "due diligence". It is submitted, that any such showing on the part of Appellant is lacking.

Absent a showing by Appellant that excusable neglect is clearly established in the record, the refusal of the trial judge to set aside the judgment was not an abuse of discretion and his Order should not be set aside.

DATED this 3rd day of June, 1982.

Respectfully submitted,

BIELE, HASLAM & HATCH

Allen Sims
Attorney for Respondent

MAILING CERTIFICATE

The undersigned certifies that two (2) two and correct copies of the foregoing Respondent's Brief were mailed, postage prepaid, to Frank T. Mohlman, Attorney for Appellant, 275 South Main Street, Tooele, Utah 84074, on the 3rd day of June, 1982.