

2012

Express Recovery Services, Inc. v. Luonda Davis : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

EXPRESS RECOVERY)
SERVICES, INC.,)
A Debt Collection Agency,)

Plaintiffs/Appellee,)

vs.)

LUONDA DAVIS)

Defendant/Appellant.)
)
)
)

Case No. 20120284

District Court No. 110418042

BRIEF OF APPELLEE EXPRESS RECOVERY SERVICES, INC.

**APPEAL FROM THE THIRD DISTRICT COURT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
JUDGE BRUCE LUBECK**

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UTAH APPELLATE COURT
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JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to *Utah Code Ann.* Section 78-2a-3(2)(4) as this is an appeal of a final order of the Third Judicial District Court.

STATEMENT OF ISSUES RAISED ON APPEAL

APPELLANT ISSUE NO. 1: Did the District Court err in denying Appellant's Motion to Set Aside Judgment by finding Appellant had failed to set forth a basis of "excusable neglect" as required by Rule 60(b) *Utah Rules of Civil Procedure*.

STANDARD FOR REVIEW FOR ISSUE NO. 1: This is an issue of law as the facts are undisputed. Defendant was served with a Summons and Complaint by means of a ten day Summons served upon a resident of the property where defendant resided at the time of service. The Complaint in the matter was filed with the Court timely. Defendant failed to file an Answer to the Complaint and Default Judgment was entered against defendant January 10, 2010. The Court reviews issues of law for correctness and no deference need be given the lower court. *MacKay v Hardy*, 973 P. 2d 941, 944 (Utah 1998).

APPELLANT ISSUE NO. 2: Did the District Court err in denying Appellant's Motion to Set Aside Judgment by finding Appellant had failed to set for a "meritorious defense" to the claims in the Complaint as required by Rule 60(b) *Utah Rules of Civil Procedure*.

STANDARD FOR REVIEW FOR ISSUE NO. 2: This is an issue of law as defendant disputes that medical bills resulting from medical services provided to her now deceased husband are a “family expense” as set forth in 30-2-9 *Utah Code Ann.* The Court reviews issues of law for correctness and no deference need be given the lower court. MacKay v Hardy, 973 P. 2d 941, 944 (Utah 1998).

CONSTITUTIONAL PROVISIONS AND STATUTES

DETERMINATIVE OF APPEAL

Rule 60(b) *Utah Rules of Civil Procedure* governing the setting aside of Default Judgments and the criteria necessary to enter an order setting aside judgment.

Utah Code Ann. 30-2-9- Family Expenses-Joint and several liability.

The expenses of the family and the education of the children are chargeable upon the property of both husband and wife or either of them, and in relation thereto they may be sued jointly or separately.

STATEMENT OF THE CASE

Express Recovery Services, Inc. (hereinafter “Express”) brought action to recovery for medical expenses incurred on behalf of defendant’s husband during the course of the marriage. Defendant’s husband is now deceased and action was brought against defendant only as the spouse of the patient at the time of services. Express caused defendant to be served by service upon a person over 18 years of age at the residence of the defendant. Defendant failed to file any responsive pleading to the Complaint and Default Judgment was entered January 10, 2012. Defendant subsequently

filed a Motion to Set Aside Judgment in the matter on or about February 22, 2012 which Motion was heard April 3, 2012 before the Honorable Bruce Lubeck who found that defendant had failed to show either excusable neglect for her failure to file a timely responsive pleading or that defendant had a meritorious defense to the claims brought by Express.

STATEMENT OF FACTS

1. Defendant was married to the patient receiving medical services from Express' assignor at the time services were rendered to the patient.
2. The charges for the medical services remain unpaid.
3. The charges were assigned to Express for purposes of collection and Express attempted to recover the money owed.
4. To attempt to collect the money owed for the services rendered to defendant's husband Express brought suit against defendant in Third District Court.
5. Plaintiff served the Summons and Complaint upon a person of over 18 years of age at the residence of defendant.
6. No responsive pleading was filed by defendant and Default Judgment was entered in favor of Express and against defendant on January 10, 2012.
7. Defendant filed a Motion to Set Aside Judgment pursuant to Rule 60(b) *Utah Rules of Civil Procedure* February 22, 2012.
8. The Motion was heard by the Court on April 3, 2012 and the Court denied defendant's Motion finding that defendant had failed to show either excusable neglect in

her failure to file a responsive pleading and also that defendant had failed to set forth a meritorious defense to the claims of Express.

SUMMARY OF ARGUMENT

Service on the defendant was made on a person over the age of 18 years at the defendant's place of residence. *See* Page 7-Appellant's brief. Said service was sufficient to give defendant notice of the action. Defendant did not show excusable neglect in setting forth her reasons for failing to respond to the Summons and Complaint.

It is undisputed that defendant's husband received medical services during his marriage to defendant. Medical services are a family expense pursuant to 30-2-9 *Utah Code Ann.* and as the wife of the recipient of the services defendant is liable the medical expenses incurred.

ARGUMENT

I. SERVICE WAS SUFFICIENT TO GIVE DEFENDANT NOTICE OF THE ACTION AND DEFENDANT FAILED TO RESPOND TO THE COMPLAINT

Service of a summons and complaint is required to be made upon the "individual personally, or by leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion there residing." Rule 4(d)(1)(A) *Utah Rules of Civil Procedure*. Defendant contends that service on a person of suitable age at her residence is somehow insufficient. She acknowledged service was made at her residence address. The purpose of service of a Summons and Complaint is to allow the opposing party the opportunity to respond. Service upon a party other than the defendant

in a matter is acceptable under the Rule as stated in its language. Further, since the likelihood of a person appearing at the place of service in the near future, without a permanent residence elsewhere is sufficient to uphold service, *See, Reed v Reed*, 806 P.2d 1182 (Utah 1991) it is reasonable that service on a person of suitable age at the residence of a party is sufficient service. If service is proper and defendant gave no reason in court other than that she had not received it from the recipient the Court is correct in determining, after hearing the argument of defendant, that service was proper and that defendant failed to make a showing of excusable neglect sufficient for relief under Rule 60(b).

II. DEFENDANT FAILED TO SHOW A MERITORIOUS DEFENSE TO PLAINTIFF'S CLAIM

Assuming the Court does not agree that the Defendant failed to show excusable in her failure to respond to the summons and complaint in a timely manner her Motion under Rule 60(b) *Utah Rules of Civil Procedure* fails for her lack of showing a meritorious defense to the underlying action. The Utah Supreme Court has established a three prong test with regard to the granting of relief from a default judgment. "In order for a defendant to be relieved from the default judgment, he must not only show that the judgment was entered against him through excusable neglect... that his motion...was timely, and that he has a meritorious defense to the action." Department of Social Services v. Musselman, 667 P. 2d 1053 (Utah, 1983). Defendant claims that medical expenses incurred by her spouse during their marriage are not "family expenses" as

contemplated by 30-2-9 *Utah Code Ann.* In her brief defendant acknowledges that her husband received services from Express' assignor and the charges for said services are unpaid. She contends that family expenses and medical expenses are separate items and that the medical bills for her late husband do not fall under the statute. We disagree. Defendant seeks to narrow the scope of what is a family expense by limiting what qualifies. She further argues that since Utah does not have a statute creating spousal liability for "necessaries" that she is not liable. The Court has regularly ruled that, as the statute states, "expenses of the family... are chargeable upon the property of both husband and wife." This has included clothing and even legal fees incurred as they related to the custody of the minor children of spouses that later reconciled after having filed a divorce action. *See, Berow, v. Shields*, 48 Utah 270, 159 P. 538 (1916). It would appear that while not all family expenses are necessaries that necessaries are family expenses. The Court went on to state "all that is required by the statute is that the things purchased are legitimate or proper family expenses." *Id.* At 539. The Court also held that whether the expenses are or are not a necessity is immaterial. *Id.* At 539. To rule otherwise would be to find that the preservation of life, medical care for a family member, or any other action taken on behalf of a spouse or child are not recoverable except by the person receiving the services providing the care. Defendant acknowledges that her husband received medical care from Express' assignor. She acknowledges that they were husband and wife at the time services were provided. To argue that attempts to

preserve the life, or to provide care, comfort or other related services to a family member are not a family expense is contrary to both the language and intent of the law.

CONCLUSION

The trial court did not err in its finding that defendant failed to meet her burden of proof under Rule 60(b) *Utah Rules of Civil Procedure* both by her failure to show excusable neglect as to why she failed to respond to the complaint in a timely manner and her failure to raise a meritorious defense to the underlying claim. This Court should affirm the District Court decision and allow Express to continue with its collection efforts.

DATED this 15 day of August, 2012.

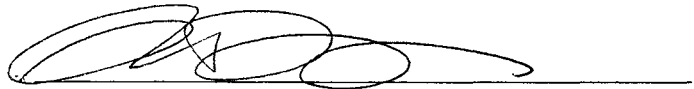


Edwin B. Parry
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the forgoing **BRIEF OF APPELLANT EXPRESS RECOVERY SERVICES, INC.** by United States Mail, first class postage prepaid this 15 day of August, 2012 to:

Luonda Davis
5340 Polaris Ct.
Kearns, Utah 84118

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end, positioned above a solid horizontal line.