

2016

**Retamco Operatinrg Inc., Plaintiff/Appellee vs. David Sweet and
Alberta Gas Company; Defendants/Appellants**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

RETAMCO OPERATING INC.,

Plaintiff/Appellee,

vs.

DAVID SWETT AND ALBERTA
GAS COMPANY,

Defendants/Appellants.

Case No. 20150544-CA

REPLY BRIEF OF APPELLANTS

Appeal from a Final Order
in the Eighth District Court, Uintah County
Honorable Edwin T. Peterson presiding

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ARGUMENT

I. Excusable Neglect Standard under Rule 60(b).

The Utah R. Civ. P. 60(b)(1) portion of the Defendant's argument in its initial brief was challenged by the Plaintiff only on the basis that there was no excusable neglect shown. The Plaintiff has not challenged Defendant's arguments that the other bases in Defendant's brief for relief under Utah R. Civ. P. 60(b)(1), i.e. timeliness, meritorious defense, and abuse of discretion, have been shown by Defendant.

In the Utah Supreme Court case of *Menzies v. Galetka*, 150 P.3d 480, 517 (Utah 2006), the Court stated, "[I]n considering a rule 60(b) motion, the district court must take into consideration all of the attendant circumstances in order to determine whether rule 60(b) relief is equitable." The Court also states that "it is an abuse of discretion for a district court to deny a 60(b) motion to set aside a default judgment if there is a reasonable justification for the moving party's failure and the party requested 60(b) relief in a timely fashion." *Id.* at 502. And, as stated in Defendant's initial brief, the Court in *Menzies* stated the following:

[A] district court's ruling on a motion to set aside a default judgment must be based on adequate findings of fact and on the law. We review a district court's findings of fact under a clear error standard of review. We review a district court's conclusions of law for correctness, affording the trial court no deference. **If a district court's ruling on a 60(b) motion is based on clearly erroneous factual findings or flawed legal conclusions, the district court has likely abused its discretion.**

Id. (citations omitted, emphasis added).

The district court in the case at hand found that if the Defendant was reasonable in his belief after being served the complaint, he was not reasonable in his belief after being served the default and motion for default judgment. See p. 13-14 of Appellee's Brief.

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This analysis by the district court is not adequate in the spirit of the *Menzies* case, in that such a finding is clearly arbitrary. Thus, fully looking at the circumstances in this case requires a determination that Defendant's Utah R. Civ. P. 60(b) motion should have been granted.

II. Hearing Requirement under Utah R. Civ. P. 54(c)(2) and 55(b)(2).

Contrary to the Plaintiff's argument, the Defendant believes that a hearing is required when circumstances contemplated under Utah R. Civ. P. 55(b)(2) are present as is the case in this matter. This is consistent with the case law laid out in Defendant's initial brief. See *Russell v. Martell*, 681 P.2d 1193, 1195 (Utah 1984).

Indeed, the Defendant is arguing, as stated in his initial brief, that the Court should have considered this under more standards than that set forth under Utah R. Civ. P. 60(b)(1), as in *State v. Sixteen Thousand Dollars U.S. Currency*, 914 P.2d 1176, 1178 (Utah App. 1996), where the court determined that the failure by the district court to following Utah R. Civ. P. 54 and 55 was a basis to set aside a default judgment under the Utah R. Civ. P. 60(b)(7) standard where there is no need to show excusable neglect.

Furthermore, the judgment indeed found a different amount than requested in the complaint. The complaint did not request an amount or show how the amount should be

calculated. Thus a hearing under Utah R. Civ. P. 55 was necessary to the point that the entry of a judgment without a hearing as the district court determined in this case is an abuse of discretion. *Russell*, 681 P.2d at 1195. Furthermore, the Plaintiff argues that the submission of the affidavit by the Plaintiff in support of the default judgment was sufficient in the spirit of Utah R. Civ. P. 55. In light of all of the evidence submitted by the Defendant to the district court in his motion to set aside, which clearly shows the great injustice to the Defendant that would be likely if the court relied solely on the Plaintiff's affidavit, there was clearly enough information presented for the court to determine that the evidence presented by Plaintiff in support of default judgment did not comply with the requirements of Utah R. Civ. P. 55.

Finally, there is no standard under Utah R. Civ. P. 55 or any of the supporting case law that a defendant may waive the Utah R. Civ. P. 55 requirements by non-action as suggested by the Plaintiff. Indeed, the Defendant properly asserted this argument in his Utah R. Civ. P. 60 motion showing that the Defendant did not waive the Utah R. Civ. P. 55 requirement for a hearing, and the district court ruled on that issue in its Ruling and Order on May 7, 2015.

III. The Provision allowing for Amendment of the Judgment Renders the Judgment a Non-Final Judgment.

Plaintiff's argue that the Defendant did not preserve the issue for appeal of the nature of the judgment as a non-final judgment. However, this issue is preserved by the nature of the judgment itself. Because the judgment is amendable on it face, it is by

Then non-finality?

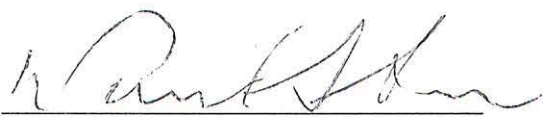
definition a non-final judgment within the meaning of Utah R. Civ. P. 54(b) and *Bradbury v. Valencia*, 5 P.3d 649, 651 (Utah 2000), and it is impossible for the Defendant to waive its non-finality by non-action. This is a matter the parties and the trial court should have taken into consideration at the time the Utah R. Civ. P. 60 motion was being argued. This would have likely led to a different conclusion by the trial court and likely would have alleviated the need for an appeal. Because the judgment is non-final, the trial court erred in not allowing the Defendant a hearing as requested in his Utah R. Civ. P. 60 motion.

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendant respectfully asserts that the Ruling and Order dated May 7, 2015, and the Order dated May 25, 2015, should be reversed, and the Defaults entered on October 31, 2014, and the Amended Default Judgment dated January 12, 2015, should be set aside.

Dated this 16 day of May, 2016.

SAM & REYNOLDS, P.C.



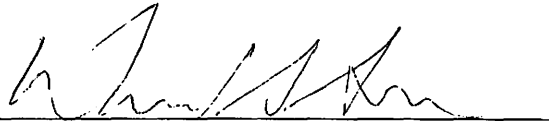
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Counsel for Defendants/Appellants

CERTIFICATE OF COMPLIANCE

I, Daniel S. Sam, certify that this brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 1,331 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B). This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Word Perfect 11 in font size 13 and style Times New Roman.

DATED this 16 day of May, 2016.

SAM & REYNOLDS, P.C.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two (2) true and correct copies of the foregoing BRIEF OF APPELLANT were served by U.S. Mail on May 16, 2016, as follows:

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