

2016

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

Utah Court of Appeals

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10/21 (#3)

IN THE UTAH COURT OF APPEALS

RETAMCO OPERATING INC.

Case No. 20150544X-CA

Appellee/Plaintiff,

vs.

DAVID SWETT and ALBERTA
GAS COMPANY,

Appellants/Defendants.

BRIEF OF APPELLEE

Appeal from a Final Judgment of the Eighth Judicial
District Court of Uintah County, Utah
Honorable Edwin T. Peterson

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UTAH APPELLATE COURTS

MAR 21 2016

IN THE UTAH COURT OF APPEALS

RETAMCO OPERATING INC.

Appellee/Plaintiff,

vs.

DAVID SWETT and ALBERTA
GAS COMPANY,

Appellants/Defendants.

Case No. 201505444-CA

BRIEF OF APPELLEE

Appeal from a Final Judgment of the Eighth Judicial
District Court of Uintah County, Utah
Honorable Edwin T. Peterson

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None.

STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction in this case pursuant to Utah Code Ann. § 78A-3-101(j). The case was assigned to the Utah Court of Appeals pursuant to Utah Code Ann. § 78A-4-103(2)(j).

ISSUES PRESENTED FOR REVIEW WITH STANDARDS OF REVIEW

1. Did the trial court abuse its discretion when it denied the Defendants' Rule 60(b) motion to set aside the default judgment, where the facts showed that the Defendants ignored the summons and complaint and also ignored the motion to enter judgment, the affidavit and other documents given to them over a four-month period, informing them that the court was going to enter a default judgment?

The standard of review is abuse of discretion. The trial court's findings of fact are reviewed under a clear error standard of review, and the conclusions of law are reviewed for correctness. The review is limited in scope because such an appeal must only address the propriety of the denial not the correctness of the underlying judgment. Bodell Const. Co. v. Robbins, 2014 UT App 203, ¶5, 334 P.3d 1004.

2. Did the trial court comply with Rules 54 and 55 of the Utah Rules of Civil Procedure where it based the default

judgment on an affidavit submitted by Plaintiff and where Defendants did not object to the amount and calculations set forth in the affidavit or request a hearing?

Whether an evidentiary hearing is required on the issue of damages is a question of law to which no deference is given to the trial court. Shewell v. Xpress Lube, 2013 UT 61, ¶17, 321 P.2d 1080.

3. Have Defendants preserved their issue on appeal that the court should have granted an evidentiary hearing based on the paragraph 3 of the Amended Default Judgment and Order, where the Defendants have not filed an accounting and have not requested that the trial court amend the judgment based on the accounting? Whether an issue was preserved is a decision of law which is reviewed for correctness. Yuanzong Fu, aka Frank Fu v. Rhoades, 2015 UT 59, ¶13, 355 P.2d 995.

APPLICABLE STATUTORY PROVISIONS

None.

STATEMENT OF THE CASE

Nature of the Case: Plaintiff, Retamco Operating Inc. (herein referred to as Retamco), owns an overriding royalty interest and a working interest in an oil and gas well named the Federal 1-33 well, which well is located in Uintah County,

Utah. Defendant Alberta Gas Company was the operator of the Federal 1-33 well, pursuant to an Operating Agreement dated January 15, 2001. Defendant David Swett is the sole shareholder, officer and director of Alberta Gas Company. Alberta Gas Company's status as a corporation expired in 2009 for its failure to file annual reports. David Swett continued to operate the Federal 1-33 well using the name of Alberta Gas Company. Defendants failed to provide accountings and to pay royalties as required by the Operating Agreement. After numerous requests by Retamco for accountings and payment were ignored by the Defendants, Retamco filed this lawsuit seeking an accounting and payment. R. 1-36.

Proceedings Below: The complaint was filed on October 7, 2014, seeking an accounting, judgment for the amounts owed, removal of the Defendants as operator, foreclosure of the contractual lien and reimbursement of legal fees and costs as provided for in the operating agreement. R. 1-36. Defendants were personally served, on October 9, 2014, with the summons and complaint. R. 38-47. When Defendants failed to respond to the summons, their default was entered on October 31, 2014. R. 54-56.

On December 16, 2014, Retamco filed and served on

Defendants a Motion to Enter Default Judgment, R. 61-63, which motion was supported by the Affidavit of Joe Glennon, R. 64-72, setting forth the basis for and the amount owed by Defendants to Plaintiff. When no response to the Motion to Enter Default Judgment and the supporting Affidavit was received from Defendants, a Notice to Submit was filed on December 30, 2014. R. 75. An Amended Affidavit of Joe Glennon was filed and served on the Defendants on January 12, 2015. R. 89-97. The Amended Affidavit of Joe Glennon corrected a mathematical error in paragraphs 12 and 14 of the affidavit (\$415,628.00 should have been \$465,628.00). The trial court signed the Amended Default Judgment and Order on January 12, 2015. R. 115. A signed copy of the Amended Default Judgment and Order was served on Defendants on January 12, 2015. Notice of Entry of Amended Default Judgment and Order was served on the Defendants on January 21, 2015. R. 127.

enough time for a response?
Served?

On February 20, 2015, Defendants filed a Motion to Set Aside Default and Default Judgment, R. 147, relying on Rule 60(b)(1) of the Utah Rules of Civil Procedure and claiming excusable neglect. The motion was briefed by the parties and then the motion was submitted to the trial court for decision. R. 485, 509.

Disposition at the Trial Court: On May 6, 2015, the trial court entered its Ruling and Order denying the Defendants' Motion. R. 513-517. On May 25, 2015, the court signed its Order denying the Defendants' Motion to Set Aside Default and Default Judgment. R. 522. This appeal then followed.

FACTS

Plaintiff owns both an overriding royalty interest and a working interest in an oil and gas well known as the Federal 1-33 well, which well is located in Uintah County, Utah. Defendant Alberta Gas Company was the operator of the well. Defendant Alberta Gas Company was solely owned by Defendant David Swett. Alberta Gas Company's status as a corporation expired in 2009 for failure to file annual reports. Defendant David Swett, as the sole shareholder of Defendant Alberta Gas Company, upon the expiration of the corporation, became the holder of its assets, including the well in question and the monies derived therefrom, and, to the extent of the assets received, is liable for the debts of Alberta Gas Company. Utah Code Ann. § 16-10a-1408. Defendant David Swett has continued to operate the well since the expiration of Alberta Gas Company's corporate status using the DBA of Alberta Gas Company. R. 1-36.

Defendants operated the Federal 1-33 well pursuant to the terms of an Operating Agreement, dated January 15, 2001, a copy of which is attached to the complaint. R. 1-36. Defendants failed to account to Retamco and failed to pay Retamco the royalties owed for the production from the Federal 1-33 well.

On June 28, 2013, James L. Drought, legal counsel for Retamco, sent a letter to Mr. David Swett and Alberta Gas Company requesting an accounting. The letter was not returned and no response was received to the letter. R. 459; Drought Affidavit ¶¶ 4 and 5; Exhibit 1 to Drought Affidavit. On July 1, 2013, Mr. Drought sent another letter to Mr. David Swett and Alberta Gas Company referencing the June 28, 2013 letter and asking for an accounting. The letter was not returned and no response was received to the letter. R. 459; Drought Affidavit ¶¶ 6 and 7; Exhibit 2 to Drought Affidavit. *3 days later,*

On March 20, 2014, Mr. Drought sent a third letter to Mr. David Swett and Alberta Gas Company. The letter was not returned and no response was received to the letter. R. 459; Drought Affidavit ¶¶ 8 and 9; Exhibit 3 attached to Drought Affidavit. *9 mos later*

On April 4, 2014, Mr. Drought sent a fourth letter *~ 2 wks later*

attached as Exhibit 4 to Mr. Drought's affidavit, R. 459, to Mr. Swett and Alberta Gas Company seeking a response to the prior letters. The letter was not returned and no response was received. R. 459; Drought Affidavit ¶¶ 10 and 11.

3.5 mo
late

On July 22, 2014, Mr. Drought sent a fifth letter to Mr. David Swett and Alberta Gas Company, at 933 E. 2000 N., Vernal, Utah, the same address to which all the letters were sent and where the summons was served, referencing the prior 4 letters, and giving them 10 days to respond or Retamco would initiate litigation. The letter was not returned and no response was received. R. 459; Drought Affidavit ¶¶ 12 and 13; Exhibit 5 attached to Drought Affidavit.

When the Defendants continued to ignore the letters, this lawsuit was filed, and, on October 9, 2014, Mr. Swett was personally served with the summons and complaint both for himself and as agent for Alberta Gas Company. R. 38-47. Defendants ignored the summons and the complaint, so their default was entered. R. 54, 56. A motion for entry of a default judgment supported by the Affidavit of Joe Glennon was filed and served on the Defendants. R. 61 and R. 64. No response was received. A notice to submit was filed. R.101. Again, there was no response. The Default Judgment was signed

on January 12, 2015. R. 115. A notice of entry and a copy of the signed Default Judgment were mailed to Defendants on January 21, 2015. R. 127.

The Defendants then filed their motion to set aside on February 20, 2015, some 40 days after the entry of the judgment, claiming excusable neglect. R. 147.

SUMMARY OF ARGUMENT

1. Retamco, over a period of two years, tried, thru legal counsel, to obtain an accounting from the Defendants regarding the production of an oil and gas well in which Retamco had both an overriding royalty and a working interest. Those efforts were ignored by the Defendants. Retamco then filed this lawsuit and the summons and complaint were personally served on the Defendants. The summons and complaint were ignored. A motion to enter judgment with an affidavit and a proposed judgment were sent to Defendants. Those were ignored. More than three months passed from the time the Defendants were served before the court entered the judgment. The signed judgment and a notice of entry were served on Defendants. Defendants still waited another month before seeking to set aside the judgment claiming excusable neglect. The trial court properly exercised its discretion in

finding that Defendants were not diligent, that the excuses given were not supported by the facts and declining to set aside the default judgment.

2. The default judgment was based on the Affidavit of Joe Glennon and the mathematical calculations of the amount of oil and gas produced, and the price for those products multiplied by the interest owned by Retamco as set forth in that Affidavit. The Defendants did not object to the Glennon affidavit and the proposed judgment and did not request an evidentiary hearing. Rule 55 did not require an evidentiary hearing in this case, and, even if a hearing would have been required, the Defendants waived that hearing by failing to object to the affidavit or request a hearing.

* 3. Defendants did not file an accounting or request the trial court to amend the judgment based on the nonexistent accounting. That issue was, therefore, not preserved for appeal, and, since the precondition of filing an accounting has not occurred, the issue is not ripe for appeal.

ARGUMENT

I. The Trial Court Did Not Abuse its Discretion When it Denied the Defendants' Claim of Excusable Neglect, Finding that the Defendants Were Aware of the Claims and the Lawsuit and Chose Not to Respond to the Summons and Complaint, and That the Facts Did Not Support the Defendants' Excuses for Not Responding.

Defendants, when arguing that the trial court abused its discretion, ignore the facts relied on by the court regarding whether Defendants' failure to respond was excusable neglect. Defendants' arguments about whether the amount of the judgment is correct are not relevant to the issue of excusable neglect, and constitute an argument Defendants may raise in the future once they have provided an accounting as provided in paragraph 3 of the Amended Default Judgment and Order. R. 109; Addendum B. The review on appeal is limited in scope, because such an appeal must only address the propriety of the denial not the correctness of the underlying judgment. Bodell Const. Co. v. Robbins, 2014 UT App 203, ¶5, 334 P.3d 1004.

hard to agree

true?

In Shamrock Plumbing v. Silver Baron Partners, 2012 UT App 70, ¶5, 277 P.3d 649, this Court held that, while the trial court has discretion in ruling on a Rule 60(b) motion, discretion is not unlimited, and that excusable neglect requires evidence of diligence in order to justify relief notwithstanding any other equitable considerations. The Court then, in Bodell Const. Co. v. Robbins, 2014 UT App 203, ¶10, 334 P.3d 1004, set forth the following requirements to show excusable neglect.

Whether excusable neglect exists is an equitable inquiry.

Jones v. Layton/Okland, 2009 UT 39, ¶17, 214 P.3d 859. However, "diligence on the part of the party claiming excusable neglect is an essential element of that inquiry, and relief may not be, granted based on other 'equitable considerations' 'where a party has exercised no diligence at all'." White Cap Constr. Supply, Inc. v. Star Mountain Constr., Inc., 2012 UT App 70, ¶5, 277 P.3d 649 (quoting Jones, 2009 UT 39, ¶23, 214 P.3d 859); see also Mini Spas, Inc. v. Industrial Comm'n, 733 P.2d 130, 132 (Utah 1987) (per curiam) (defining excusable neglect as "the exercise of due diligence by a reasonably prudent person under similar circumstances" (quoted authority and internal quotation marks omitted)). Thus, "in determining whether a party has exercised due diligence" sufficient "'to justify excusing it from the full consequences of its neglect'" under Rule 60(b), "the trial court must consider whether the actions of the party seeking relief were 'sufficiently diligent and responsible, in light of the attendant circumstances.'" White Cap Constr., 2012 UT App 70, ¶5, 277 P.3d 649 (quoting Jones, 2009 UT 39, ¶22, 214 P.3d 859).

In this case, Defendants were served with the summons and complaint on October 9, 2014. Defendants also received copies

of the motion to enter the default judgment, the affidavits, the proposed judgment and the notice of entry of the judgment. The Defendants did nothing in response to the complaint until February 20, 2015, when they filed their Rule 60(b) motion. The excuses the Defendants gave for not responding were first that they thought the Plaintiff had abandoned its interest in the well, and second they thought a potential purchaser was going to provide the defense. The facts did not support either excuse.

Defendants' first excuse is similar to the one advanced in Bodell Const. Co. v, Robbins, 2014 UT App 203, ¶12, 334 P.3d 1004. In the present case, Defendants received five (5) letters, from an attorney, over a two-year period asking for an accounting and payment prior to the lawsuit being filed. That hardly supports a claim that Retamco had abandoned its interest in the well. In addition, the complaint made it clear that Retamco was pursuing its interest in the well and had not dropped its claims. As the Court in Bodell pointed out, "Bodell's willingness to expend the time and resources necessary to carry out such an appeal undermines Robbin's claim that he reasonably believed Bodell had dropped its claims." 2014 UT App 203, ¶10.

*Agreed
ditto*

The Defendants provided nothing to support their second excuse that some third party was going to provide their defense, and that claim is contrary to the first excuse. This alleged contact with some third party was prior to being served with the summons and complaint, and Defendants provided no information to the trial court claiming they provided the summons and complaint to the prospective purchaser or that the prospective purchaser agreed to represent Defendants. Swett Declaration ¶11; R. 150. Defendants further give no explanation as to why they did not respond to the motion to enter the default judgment, the affidavits, the notice to submit, the proposed judgment and the signed judgment and entry of judgment in a timely manner.

The trial court carefully considered those claims and the facts regarding the claims. The trial court stated:

The Court finds that the Defendant failed to act to the lawsuit with due diligence. Even if Defendant believed Plaintiff had waived its interest in the well in 2009, and believed there was an understanding concerning the payments after the July 2, 2012, phone call, it was unreasonable to assume Plaintiff was foregoing their claims after receiving three additional letters from counsel concerning the payments, and after receiving a Summons and Complaint. Clearly, the Defendant should have realized the Plaintiff was pursuing the claim to the payments at least the point in time in which he was served the Summons and Complaint. Defendant's failure to act on the Summons and Complaint was not

diligent or responsible. Furthermore, the Defendant's belief that a nonparty, potential purchaser of the well, would deal with the lawsuit is unreasonable. Even if it was reasonable to believe the potential purchaser would resolve the lawsuit, it was not reasonable to continue that belief after the Defendant received notice of his default and the Motion for Default Judgment. The Court finds that the Defendant was aware of the claims, and the lawsuit and chose not to respond. Consequently, the Defendant has not shown that his non-response was due to excusable neglect. R.513, Addendum A.

The facts fully support the trial court's decision that the Defendants have not shown that their non-response was due to excusable neglect.

Tend to agree - No excusable neglect. Now what?

II. The Trial Court Followed U.R.C.P. Rule 55 When it Entered the Default Judgment. That Rule Does Not Require the Court to Have an Evidentiary Hearing as Alleged by the Defendants. In Addition, the Defendants Waived any Right to a Hearing by Failing to Object to the Affidavit and Failing to Request a Hearing.

Defendants argued to the trial court that the trial court was required to hold an evidentiary hearing concerning the amount of damages pursuant to Rule 55(b)(2) of the Utah Rules of Civil Procedure. The trial court rejected that argument ruling that whether a hearing is required is within the discretion of the trial court, that the affidavit provided the evidence needed by the court and that the Defendants had failed to object to the affidavit. The court stated that:

Rule 55(b)(2) states in part:

If, in order to enable the court to enter judgment . . . it is necessary to take an account or to determine the amount of damages . . . the court may conduct such hearings or order such references as it deems necessary and proper.

The Rule does not require an evidentiary hearing. The Court accepted the sworn affidavit of Joe Glennon concerning the amount of damages. Therefore, an evidentiary hearing on the amount of damages is unnecessary. Furthermore, the Defendant received the affidavit and Proposed Default Judgment for review prior to the entry of judgment and did not object. The Court denies the Defendant's request for an evidentiary hearing. R. 513, Addendum A.

The Defendants have adjusted their argument on appeal, arguing that the amount of damages set forth in the Joe Glennon affidavit failed to take into account public information that would have given the court a "more realistic estimate of gross revenue", and, therefore, the court failed to follow Rule 54(c) and Rule 55(b) and acted outside its authority. Defendants no longer seem to take the position that an evidentiary hearing is always required, and Defendants do not address the fact they did not object to the Glennon affidavit or request a hearing. Appellant's Brief at 23.

Defendants, while arguing that the court failed to follow Rules 54(c) and 55, fail to show how the court failed to follow Rule 54(c) and Rule 55(b). Rule 54(c) provides that a judgment may not exceed the amount prayed for in the

complaint. The complaint in this case prays for an accounting, judgment "for all amounts found owing together with interest", removal of the Defendant as operator, fees and costs and a lien provided for in the operating agreement. The Amended Default Judgment does not provide any different relief than what was prayed for in the complaint. ¹

Defendants also fail to show how the trial court did not follow Rule 55(b). The incarnation of Rule 55(b) which was in effect when the judgment was entered states that "the court may conduct such hearings or order such references as it deems necessary and proper." Retamco submitted to the court an affidavit of Mr. Joe Glennon which set forth the information and calculations of the amount owed, including production of oil and gas, price received and the Plaintiff's percentages. That was the best information available, since Defendants had ignored the complaint and not provided the requested accounting. The Joe Glennon affidavit was mailed to

¹
Defendants in their fact statement of their Brief, page 8, paragraph 13, suggest that because the complaint stated that the Plaintiff "believes this to be a Tier 2 case" and since the damages exceeded \$300,000.00 that violated Rule 54(c). That argument however was not developed or pursued in the argument section of the Defendants' brief, and, therefore, will not be discussed by Retamco.

Defendants. Defendants did not object or make any response or ask for a hearing. Therefore, there was no need for the court to conduct any hearings. If the Defendants disagreed with the amount requested in the affidavit and motion, Defendants should have filed an objection with the court to allow the court the opportunity to consider Defendants' arguments.

The procedure followed in this case is like that approved in Synergetics v. Marathon Ranching Co. LTD, 701 P.2d 1106, 1113 (Utah 1985) and Amica Mutual Insurance Co. v. Schettler, 768 P.2d 950, 963 (Utah App. 1989). In Amica, the court stated:

"Finally Schettler argues that even if he does not have a right to a jury trial, it was error to submit the issue of damages on affidavits. This issue is controlled by the Utah Supreme Court's holding in Synergetics v. Marathon Ranching Co. Ltd, 701 P.2d 1106 (Utah 1985)..... The court also found that assessing damages based 'upon filing of affidavits concerning punitive and actual damages' was not error." Id. at 963.

In Sewell v. Xpress Lube, 2013 UT 61, ¶37, 321 P.3d 1080, the court also held that when the damages are liquidated and can be precisely determined, an evidentiary hearing is not required. In this case, the affidavit of Joe Glennon set forth the information for a precise calculation of the damages. No objection was received from the Defendants.

↓
maybe not,
but are
they
determinable
w/ precision?

The cases relied on by Defendants do not support their position. None of those cases requires the trial court to hold an evidentiary hearing on every default judgment. In Pitts v. Pine Meadow Ranch Inc., 589 P.2d 767 (Utah 1978) the trial court had not based the default judgment on any evidence, but rather issued a large judgment to encourage the Defendants to come to court. In J.P.W. Enterprises Inc. v Naef, 604 P.2d 486 (Utah 1979) there was no evidence provided to the trial court in any form to support the judgment. In Katz v. Pierce, 732 P.2d 92 (Utah 1986), the judgment exceeds the amount requested in the complaint. Notably, however, the appellate court did not reverse since the issue was not presented to the trial court. In Russell v. Martell, 681 P.2d 1193 (Utah 1984), the court held that the calculation of damages under the Utah Uniform Securities Act required a hearing.

In the present case, the Defendants were provided the affidavit of Joe Glennon with the motion to enter the judgment and the proposed judgment. The Defendants did not object or ask for a hearing. The trial court acted properly under Rule 55, which gives the trial court discretion by saying the court "may conduct such hearings or order such references as it deems necessary and proper." The court's reliance on the

What effort does the
have have?
OK to find out where
who hearing where
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Golden?

affidavit of Joe Glennon was appropriate. In addition, Defendants waived any right to a hearing by not objecting and requesting a hearing. Brinkerhoff v. Schwendemin, 790 P.2d 587, 589 (Utah Ct. App. 1990).

III. The Defendants Have not Filed an Accounting Which is a Precondition for the Trial Court to Amend the Judgment nor Have the Defendants Requested the Court to Amend the Judgment Based on Paragraph 3 of the Amended Default Judgment and Order. That Issue was not Preserved for Appeal.

Defendants, for the first time on appeal, argue that the trial court should have had an evidentiary hearing on damages based on paragraph 3 of the Amended Default Judgment and Order. This issue was not preserved by the Defendants and was never addressed with the trial court. See State v. Sixteen Thousand Dollars, 914 P.2d 1176, 1179 (Utah Ct. App. 1996); Yuanzong Fu, aka Frank Fu v Rhoades 2015 UT 59, ¶26, 355 P.2d 995 (requiring that the issue be addressed with the trial court before it can be raised on appeal).

Paragraph 3 of the Amended Default Judgment and Order provides that:

Defendants are ordered to provide an accounting to Plaintiff as required by the operating agreement during the time period the Defendants were operating the well. The judgment entered herein may be amended based on the information provided in that accounting.

Defendants have never provided the required accounting

which is a precondition to the court's amending the judgment. No accounting has been filed and no request has been made by the Defendants to amend the judgment based on the information provided in the nonexistent accounting. This issue is not ripe for appeal.

CONCLUSION

It is requested that the decision of the trial court be affirmed.

DATED this 16 day of March, 2016.

ALLRED, BROTHERRSON & HARRINGTON, P.C.
Attorneys for Appellee/Plaintiff

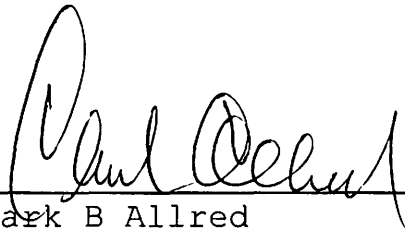
By: _____

Clark B Allred

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16 day of March, 2016, two copies each of the foregoing BRIEF OF APPELLEE/PLAINTIFF were served via U.S. Mail, postage prepaid, on the following:

DANIEL S. SAM (5865)
SAM & REYNOLDS, P.C.
23 E. Main St.
Vernal, UT 84078



Clark B Allred

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 24(f)(1)(C) of the Utah Rules of Appellate Procedure, I hereby certify that this Brief contains 4,268 words, exclusive of the items set forth in Rule 24(f)(1)(B), and therefore complies with the type-volume count function in WordPerfect X5 to perform this calculation. This Brief complies with the typeface requirements of Utah R. App.P. (27(b)) because this Brief has been prepared in a proportionately spaced typeface using WordPerfect X5 in font size 13 and style Courier New.


Clark B Allred

ADDENDUM

Addendum A - Ruling and Order dated May 6, 2015

Addendum B - Amended Default Judgment and Order

ADDENDUM A
(Ruling and Order dated May 6, 2015)

IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

Retamco Operating, Inc.,

Plaintiff,

vs.

David Swett and Alberta Gas Company,

Defendant.

RULING AND ORDER

Case No. 140800129

Judge EDWIN T. PETERSON

This matter is before the Court on the Defendant David Swett's Motion to Set Aside Default Judgment.

The Defendant requests that the default judgment entered against him be set aside pursuant to Rule 60(b)(1) based on excusable neglect. Alternatively, the Defendant requests an evidentiary hearing on the amount damages the Plaintiff is entitled to.

Rule 60(b) of the Utah Rules of Civil Procedure provides in part:

On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect;

"A district court has broad discretion to rule on a motion to set aside a default judgment under Rule 60(b) of the Utah Rules of Civil Procedure." *Menzies v. Galetka*, 2006 UT 81, ¶ 54, 150 P.3d 480. The party seeking to set aside the default judgment "must show that he used due diligence and that he was prevented from appearing by circumstances over which he had no

control.” *Heath v. Mower*, 597 P.2d 855, 858 (Utah 1979). “In determining whether a party has exercised due diligence, the trial court must consider whether the actions of the party seeking relief were ‘sufficiently diligent and responsible, in light of the attendant circumstances, to justify excusing it from the full consequences of its neglect.’” *Shamrock Plumbing, LLC, v. Silver Baron Partners, LC*, 277 P.3d 649, 651 (Utah App. 2012); quoting *Jones v. Layton/Okland*, 214 p.3d 859, 864 (Utah 2009).

The Defendant argues he did not respond to the Complaint because he believed the Plaintiff’s claim was invalid. The Defendant contends he believed the Plaintiff no longer had an interest in the well based on a conversation held in 2009. Second, the Defendant argues that he did not respond because he believed the potential purchasers of the well would deal with the Complaint. The Defendant argues his actions, and the circumstances surrounding the lawsuit, supports a showing of excusable neglect.

Before filing this lawsuit, counsel for the Plaintiff sent five letters to the Defendant dating from June 28, 2013, to July 22, 2014. The letters concerned the issue of royalties and the working interest amounts owed to the Plaintiff from the well. The Defendant spoke with counsel on the phone concerning the payments and claims he believed there was an understanding concerning the Plaintiff’s claim for payment. Counsel for Plaintiff agrees Defendant spoke to him once on July 2, 2013, but alleges that the Defendant merely stated he would speak to Joe Glennon personally. No further response was received from the Defendant, and no response was received concerning the additional letters. The Defendant was served personally with the Summons and Complaint on October 9, 2014. He did not respond and his default was entered on October 31, 2014. A Motion for Default Judgment was sent to the Defendant on December 16,

2014. The Defendant did not respond and a Notice to Submit for Decision was filed on December 30, 2014. An Amended Affidavit and a Proposed Default Judgment were sent to the Defendant on January 12, 2015. The Defendant did not respond. A Notice of Entry of Judgment was sent to the Defendant on January 21, 2015. The Defendant's first response to this lawsuit was made February 20, 2015, with the filing of his Motion to Set Aside Default Judgment.

The Court finds that the Defendant failed to act to the lawsuit with due diligence. Even if Defendant believed Plaintiff had waived its interest in the well in 2009, and believed there was an understanding concerning the payments after the July 2, 2012, phone call, it was unreasonable to assume Plaintiff was foregoing their claims after receiving three additional letters from counsel concerning the payments, and after receiving a Summons and Complaint. Clearly, the Defendant should have realized the Plaintiff was pursuing the claim to the payments at least the point in time in which he was served the Summons and Complaint. Defendant's failure to act on the Summons and Complaint was not diligent or responsible. Furthermore, the Defendant's belief that a nonparty, potential purchaser of the well, would deal with the lawsuit is unreasonable. Even if it was reasonable to believe the potential purchaser would resolve the lawsuit, it was not reasonable to continue that belief after the Defendant received notice of his default and the Motion for Default Judgment. The Court finds that the Defendant was aware of the claims, and the lawsuit and chose not to respond. Consequently, the Defendant has not shown that his non-response was due to excusable neglect.

Alternatively, the Defendant argues the Court is required to hold an evidentiary hearing concerning the amount of damages pursuant to Rule 55(b)(2) of the Utah Rules of Civil Procedure. Rule 55(b)(2) states in part:

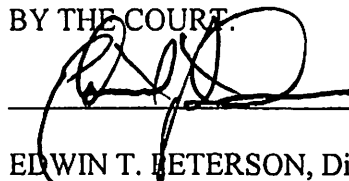
If, in order to enable the court to enter judgment . . . it is necessary to take an account or to determine the amount of damages . . . the court may conduct such hearings or order such references as it deems necessary and proper.

The Rule does not require an evidentiary hearing. The Court accepted the sworn affidavit of Joe Glennon concerning the amount of damages. Therefore, an evidentiary hearing on the amount of damages is unnecessary. Furthermore, the Defendant received the affidavit and Proposed Default Judgment for review prior to the entry of judgment and did not object. The Court denies the Defendant's request for an evidentiary hearing.

The Defendant's Motion to Set Aside Default Judgment is denied.

Dated this 6th day of May, 2015.

BY THE COURT.


A handwritten signature in black ink, appearing to read 'Edwin T. Peterson', is written over a horizontal line.

EDWIN T. PETERSON, District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 140800129 by the method and on the date specified.

MAIL: CLARK B ALLRED 148 S VERNAL AVE STE 101 VERNAL, UT 84078

MAIL: ANDREW R HALE 50 W BROADWAY STE 700 SALT LAKE CITY UT 84101

05/07/2015

/s/ BRIAN LITTON

Date: _____

Deputy Court Clerk

ADDENDUM B
(Amended Default Judgment and Order)

The Order of Court is stated below:

Dated: January 12, 2015
02:27:42 PM

/s/ EDWIN T PETERSON
District Court Judge



CLARK B ALLRED - 0055
MICHAEL D. HARRINGTON - 12540
ALLRED, BROTHERRSON & HARRINGTON, P.C.
Attorneys for Plaintiff
148 South Vernal Ave. Suite 101
Vernal, Utah 84078
Telephone: (435) 789-7800

IN THE EIGHTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY

STATE OF UTAH

RETAMCO OPERATING, INC., Plaintiff, vs. DAVID SWETT and ALBERTA GAS COMPANY, Defendants.	AMENDED DEFAULT JUDGMENT and ORDER (Tier 2 Case) Case No.: 140800129 Judge: Edwin T. Peterson
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The above case came before the Court on the Plaintiff's Motion to Enter a Default Judgment. The Defendants were both personally served and failed to respond to the Complaint. The Defendants' defaults have been entered. The Plaintiff's Motion was supported by the Affidavit of Joe Glennon the vice president-lands of Plaintiff, Retamco Operating Inc.

Based on the facts set forth in the Affidavit, the Operating Agreement attached to the Complaint, the relief

requested in the Complaint, to which the Defendants failed to respond, the Court grants the Plaintiff's motion and

Orders, Adjudges and Decrees that:

1. Plaintiff is awarded judgment against the Defendants in the amount of \$465,628.00.

2. Defendant Alberta Gas Company appears to be insolvent, has let its corporate status expire and has failed to account for its performance as operator or to pay monies owed as required by the operating agreement. There is good cause to remove Defendant, Alberta Gas Company, as operator. Therefore based on the terms of the Operating Agreement, Defendant, Alberta Gas Company is removed as the operator of the Federal 1-33 well located in Section 33, Township 5 South, Range 19 East in Uintah County Utah, effective immediately.

3. Defendants are ordered to provide an accounting to Plaintiff as required by the operating agreement during the time period the Defendants were operating the well. The judgment entered herein may be amended based on the information provided in that accounting.

4. The Operating Agreement grants to the Plaintiff a security interest to secure the payment and performance of

Defendant, Alberta Gas Company under the operating agreement which security interest is secured by Alberta Gas Company's interest in the subject well (Federal 1-33) and leases. The leases involved in this well are Federal Lease UTU 3575 (561.66 gross acres), a State of Utah lease ML 46685 (7.82 acres), fee leases (616.52 acres) and additional HBP lands. The communitized area which relates to the Gusher Federal 1-33 Well is all of Sections 32 and 33 in Township 5 South Range 19 East SLM and all of Section 5 in Township 2 South Range 2 East USM being a total acreage of 608.73 acres.

The security interest in the well and leases as set forth above is to be foreclosed and the interest of Alberta Gas Company in the Federal 1-33 well and the above leases is to be sold pursuant to the terms of the Utah Commercial Code with the proceeds applied to the costs of sale and then to the amounts owing to Plaintiff as set forth in the judgment entered herein. Plaintiff may bid at the sale and offer a credit bid based on its judgment. *Signed and dated as of the date indicated by the official seal and electronic signature of the Court located on the first page of this document.*

MAILING CERTIFICATE

Debbie Reed, legal assistant of Allred, Brotherson & Harrington, P.C., attorneys for Plaintiff, certifies that she served the attached DEFAULT JUDGMENT AND ORDER upon Defendants by placing a true and correct copy in an envelope addressed to:

David Swett, Agent or DBA of Alberta Gas Company
933 E. 2000 N.
Vernal, Utah 84078

David Swett
933 E. 2000 N.
Vernal, Utah 84078

and deposited the same, sealed, with first class postage prepaid thereon, in the United States Mail at Vernal, Utah, on the 12th day of January, 2015.

/s/Debbie Reed
Debbie Reed