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In Re Estate of Donald Bret Kouns, Decedent, Greg Torgerson, Plaintiff and Appellant, v. Estate of Donald Bret Kouns, Defendant and Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

IN RE ESTATE OF DONALD BRET KOUNS,	)	
	)	
Decedent,	)	
	)	
GREG TORGERSON,	)	
	)	**PUBLIC**
Plaintiff and Appellant,	)	
v.	)	**Case No. 20160758**
	)	
ESTATE OF DONALD BRET KOUNS,	)	
	)	
Defendant and Appellee.	)	

BRIEF OF APPELLANT

Appeal from a Judgment of the Sixth District Court
In and For Sevier County, State of Utah
Honorable Wallace A. Lee

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In Re Estate of Sharp, 537 P.2d 1034, 1037 (Ut.1975). Found on pages 10, 14.

Jones v. Layton/Okland, 2009 UT 39, 214 P.3d 859, 863 (Ut.2009). Found on pages 9, 10.

Rules and Statutes:

Utah Code Ann. § 75-3-804(2). Found on page 5.

Utah Code Ann. §§ 78A-3-102 & 78A-4-103. Found on page 3.

Utah Rules of Civil Procedure , Rule 60. Found on pages 3-4, 10-11.

Statement of Jurisdiction

This Court has jurisdiction under Utah Code Ann. §§ 78A-3-102 & 78A-4-103 to review the District Court's decision and order denying Plaintiff/Appellant, Greg Torgerson's (hereinafter "Torgerson") Rule 60 Motion for Relief from Judgment or Order.

Issues Presented for Review

1. Did the District Court abuse its discretion when it denied Torgerson's Rule 60 Motion for Relief from Judgment or Order?

Standard of Review

A district court's decision to grant or deny a motion to set aside a default judgment is reviewed under an abuse of discretion standard. *Bodell Construction v. Robbins*, 2014 UT App. 203, 334 P.3d 1004, 1007 (Ut.Ct.App.2014).

Preservation of the Issues

The issues raised in Torgerson's brief were preserved in Torgerson's Rule 60 Motion for Relief from Judgment or Order, Defendant/Appellee, Estate of Bret Kouns' (hereinafter "Kouns Estate") response thereto, Torgerson's reply briefs and the hearing held on said motion.

Determinative Statutes, Rules, and Ordinances

Rule 60. Relief from judgment or order.

(a) Clerical mistakes. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the

record. The court may do so on motion or on its own, with or without notice. After a notice of appeal has been filed and while the appeal is pending, the mistake may be corrected only with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon just terms, the court may relieve a party or its legal representative from a judgment, order, or proceeding for the following reasons:

(b)(1) mistake, inadvertence, surprise, or excusable neglect;

(b)(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(b)(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation or other misconduct of an opposing party;

(b)(4) the judgment is void;

(b)(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or vacated, or it is no longer equitable that the judgment should have prospective application; or

(b)(6) any other reason that justifies relief.

(c) Timing and effect of the motion. A motion under paragraph (b) must be filed within a reasonable time and for reasons in paragraph (b)(1), (2), or (3), not more than 90 days after entry of the judgment or order or, if there is no judgment or order, from the date of the proceeding. The motion does not affect the finality of a judgment or suspend its operation.

(d) Other power to grant relief. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Statement of the Case

On April 19, 2016, the District Court for the Sixth District Court, State of Utah, Sevier County issued judgment permitting the Kouns Estate to lease certain real property in which Torgerson claims an interest to an individual named Josh Talbot. The judgment was a default judgment in that Torgerson was not present at the April 18, 2016 hearing held by the District Court. The judgment effectively terminated Torgerson's interest in the real property in question.

Torgerson immediately filed a motion for relief from the default judgment under Rule 60 of the Utah Rules of Civil Procedure. The motion was fully briefed by the parties and a hearing was held before the Honorable Wallace A. Lee on July 11, 2016. The District Court issued its decision denying Torgerson's motion on August 15, 2016.

In its decision, the District Court held that Torgerson failed to establish sufficient diligence to warrant relief under Rule 60 and that Torgerson did not have a meritorious defense to the Kouns Estate's position in that Torgerson's claim to the real property in question was barred by Utah Code Ann. § 75-3-804(2), which requires a claimant in a probate matter to commence an action to enforce the claim within sixty (60) days after the claim has been denied by the probate estate.

Torgerson timely appealed the District Court's decision to this Court.

Statement of Facts

The following facts are relevant to this appeal:

1. Bret Kouns passed away on June 10, 2015. (Record on Appeal ("ROA") #000001);
2. Prior to his passing, Mr. Kouns entered into a series of agreements with Torgerson, which gave Torgerson certain leasehold and ownership rights to real property owned by Mr. Kouns at that time of his passing. (ROA #000027-29 & #000294-300);
3. On June 19, 2015, Pam Peterson (hereinafter "Peterson") filed an Application for Infomal Probate of Will and Appointment of Personal Representative. (ROA #000001-4);
4. Peterson was appointed Personal Representative of the Kouns Estate on July 8, 2015. (ROA #000016-17);
5. Torgerson filed a claim against the Kouns Estate on October 7, 2015 asserting a leasehold/ownership interest in property owned by the Kouns Estate. (ROA #000027-29);
6. Torgerson's claim was filed *pro se*;
7. The Kouns Estate filed a denial of Torgerson's claim on October 9, 2015. (ROA #000030-31);
8. The Kouns Estate filed a Petition for Court Approval of Agriculture Lease and Option to Sell Estate Property (hereinafter "Petition") on March 10, 2016 seeking

to lease and sell property in which Torgerson claims an interest to an individual named Josh Talbot. (ROA #000032-45);

9. Torgerson, by and through his newly retained attorney, Lloyd Rickenbach, filed a Complaint for Declaratory Judgment on March 24, 2016 seeking a declaration from the District Court that Torgerson had a leasehold/ownership interest in the real property that was the subject of the Kouns Estate's Petition;
10. The District Court treated the Declaratory Judgment Act Complaint as an objection to the Petition. (ROA #000313);
11. The District Court scheduled a hearing on the Petition for April 18, 2016. (ROA #000063-64);
12. Torgerson was not given notice of the April 18, 2016 by the District Court. (ROA #000064);
13. Torgerson's attorney, Lloyd Rickenbach, was not given notice of the April 18, 2016 hearing by the District Court. (ROA #000064);
14. On Saturday, April 16, 2016, Lloyd Rickenbach, while filing an Entry of Appearance on behalf of Torgerson in the Kouns Estate case, discovered that a hearing had been set for April 18, 2016. (ROA #000301);
15. Lloyd Rickenbach resides in the State of Arizona and was in Arizona when he discovered the April 18, 2016 hearing date. (ROA #000351);
16. Lloyd Rickenbach had a prior family commitment scheduled for April 18, 2016 in Arizona and was not able to attend the hearing in Richfield, Utah. (ROA #000302);

17. Lloyd Rickenbach immediately filed a Motion to Continue the April 18, 2016 hearing. (ROA #107-09);

18. The Motion to Continue was filed on April 16, 2016, the day Lloyd Rickenbach discovered the existence of the April 18, 2016 hearing date. (ROA #000107-09);

19. The District Court held the hearing on April 18, 2016, denied the Motion to Continue and granted a default judgment on the Petition in favor of the Kouns Estate. (ROA #000111-13 & #000122-23);

20. The Default Judgment was entered by the District Court on April 19, 2016. (ROA #000122-23);

21. The Default Judgment effectively terminated Torgerson's rights to the subject real property;

22. Torgerson, by and through Lloyd Rickenbach, filed a Rule 60 Motion for Relief from Judgment or Order on April 19, 2016 asserting, *inter alia*, that proper notice of the April 18, 2016 hearing was not given. (ROA #000126-29);

23. In its opposing brief, the Kouns Estate, in an affidavit executed by the Kouns Estate's attorney's assistant, Jill Miles, asserted that notice had been given to Lloyd Rickenbach via a mailing dated March 30, 2016. (ROA #000229-30);

24. There was no Certificate of Service evidencing the March 30, 2016 mailing filed contemporaneously with the District Court;

25. The only evidence of said mailing was Jill Miles affidavit filed in response to Torgerson's Rule 60 motion;

26. Lloyd Rickenbach, in an affidavit executed in support of a Reply Brief filed by the undersigned counsel, asserted that he did not receive the alleged mailing from Jill Miles. (ROA #000301-02);

27. A hearing was held on Torgerson's Rule 60 motion on July 11, 2016. (ROA #000304-307);

28. Lloyd Rickebach testified in open court on July 11, 2016 that he did not receive the alleged mailing from Jill Miles. (ROA #000351);

29. The District Court issued its decision denying Torgerson's Rule 60 motion on August 15, 2016. (ROA #000309-331);

30. Torgerson timely appealed the District Court's decision. (ROA #000334-35).

Summary of Argument

In its decision, the District Court held that: (1) Torgerson did not exercise sufficient diligence to warrant relief under Rule 60; and (2) Torgerson does not have a meritorious defense to the Kouns Estate Petition because his claim is time barred under the Utah Probate Code. The District Court's decision is in error.

The diligence required under Rule 60 does not rise to the level of "due diligence" or "perfect diligence." *Jones v. Layton/Okland*, 2009 UT 39, 214 P.3d 859, 863 (Ut.2009). All that is required is that the moving party show some diligence. *Id.* The facts in this case more than demonstrate the requisite diligence under Rule 60.

It is unquestioned that neither Torgerson nor his attorney, Lloyd Rickenbach, received notice of the April 18, 2016 hearing. (ROA #000064). It is also unquestioned that Lloyd Rickenbach moved to continue the hearing immediately after filing his Entry

of Appearance in the Kouns Estate matter. (ROA #000107-109). To counter these unquestioned facts, the District Court relies almost exclusively on the Jill Miles alleged March 30, 2016 mailing. Such reliance is, however, misplaced.

The only proof of the March 30, 2016 mailing is Jill Miles' self-serving affidavit attached to the Kouns Estate's opposition to Torgerson's Rule 60 motion. (ROA #000229-30). There is no contemporaneously filed Certificate of Service and there is no proof of receipt from either the United States Post Office or any other postal courier. In short, the only proof of the mailing is Jill Miles' after-the-fact statement. Her statement stands in stark contrast to the statements made by Lloyd Rickenbach, an officer of the court, in both an affidavit and in open court, that the alleged mailing was not received.

The District Court also erred when it held that Torgerson's claim to the subject real property was time barred. Torgerson's claim is a claim for specific performance. He is asserting that he has a right to continue leasing the property and, thereafter, purchase the same. "The term 'claim' found in [the Probate Code] does not include a claim for specific performance. . . ." *In Re Estate of Sharp*, 537 P.2d 1034, 1037 (Ut.1975). Torgerson's claim cannot, therefore, be time barred by the Probate Code.

Argument

I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED TORGERSON'S RULE 60 MOTION FOR RELIEF FROM JUDGMENT OR ORDER

A. Torgerson's acted with sufficient diligence to warrant relief under Rule 60

Torgerson brought his Rule 60 motion for relief under Rule 60(b) of the Utah Rules of Civil Procedure. "For a district court to set aside a default judgment pursuant to Rule 60(b), 'a defendant must show: (i) that the judgment was entered against him through excusable neglect (or any other reason specified in Rule 60(b)), (ii) that his motion to set aside the judgment was timely, and (iii) that he has a meritorious defense to the action.'" *Bodell Construction v. Robbins*, 334 P.3d at 1007. "A district court has broad discretion to rule on a motion to set aside a default judgment under Rule 60(b)" *Id.* This discretion is not, however, unlimited. *Davis v. Goldsworthy*, 602 UT App. 145, 184 P.3d 626, 629 (Ut.Ct.App.2008).

The District Court held that Torgerson failed to establish excusable neglect. "[T]here is no specific legal test for excusable neglect." *Jones v. Layton/Okland*, 214 P.3d at 863. "The equitable nature of the excusable neglect determination requires that a district court be free to consider all facts it deems relevant to its decision and weigh them accordingly." *Id.* The excusable part of excusable negligence imposes upon the moving party "some evidence of diligence in order to justify relief." *Id.* The diligence required under Rule 60 does not, however, rise to the level of "due diligence" or "perfect diligence." All that is required is that the moving party show some diligence. Torgerson demonstrated the level of diligence required to obtain relief under Rule 60(b).

The objective facts in this case show that: (1) neither Torgerson nor his attorney, Lloyd Rickenbach, were given notice of the April 18, 2016 hearing; and (2) immediately upon filing his Entry of Appearance in the Kouns Estate case, Lloyd Rickenbach, on behalf of Torgerson, filed a motion to continue the hearing. The significance of these

facts is that there was no way for either Torgerson or his attorney to know of the hearing absent Jill Miles' disputed alleged March 30, 2016 mailing.

The alleged March 30, 2016 mailing is suspect, at best. The only proof of the disputed mailing is Jill Miles' after-the-fact affidavit. There was no Certificate of Service filed by the Kouns Estate contemporaneously with the alleged mailing and the alleged and disputed mailing was not sent via any means requiring proof of service on the recipient. Logic would dictate that if the Kouns Estate mailed the notice "out of an abundance of caution," as the District Court states, some steps would have been taken to prove that the notice was actually mailed and received by Torgerson or his attorney. No such steps were taken and the alleged and disputed mailing stands in direct contrast to the affidavit and testimony of Lloyd Rickenbach, an officer of the court, that he did not receive any such delivery.

Absent the alleged mailing, there is no evidence that Torgerson, either personally or through his attorney, had notice of the April 18, 2016 hearing. The District Court implies that by virtue of the filing of the Declaratory Judgment Act Complaint, Torgerson and his attorney would have been put on notice of the hearing. This implication ignores the reality of the District Court's electronic filing system. A notice of hearing in the Kouns Estate would not have been apparent in the Declaratory Judgment Act case and Torgerson's attorney would not have had access to the Kouns Estate case until his Entry of Appearance was actually filed, on April 16, 2016.

The District Court also states that Lloyd Rickenbach had ample opportunity to attend the hearing, even if notice of said hearing was received on April 16, 2016. This

statement ignores two important facts. One, two days would have been insufficient for an adequate defense to the Kouns Estate Petition to be mounted by Torgerson. Two, a fact apparently lost on the District Court, Lloyd Rickenbach resides in the State of Arizona and was in Arizona on April 16, 2016. It would have been virtually impossible for Lloyd Rickenbach to arrange transportation to Richfield and prepare for the hearing in less than a day and a half, notwithstanding that Lloyd Rickenbach had a prior commitment in Arizona scheduled for the 18th.

It should also be noted that the District Court stated in its decision that it set the hearing after it had become aware of the Declaratory Judgment Act case and the purpose of the hearing was to give all parties an opportunity to be heard. Given this purpose, it would seem imperative that the District Court should take all necessary steps to insure all parties received notice, and upon finding out that such notice was not given, taken steps to remedy the error. In this case, grant Torgeron's Rule 60 motion.

Under the circumstances described herein, Torgerson more than demonstrated the diligence required to obtain relief under Rule 60.

B. Torgerson has a meritorious defense to the Kouns Estate Petition.

The purpose of the Kouns Estate Petition was to obtain authorization from the District Court to lease and sell certain real property owned by the Estate to an individual named Josh Talbot. The property to be leased and sold was the same property in which Torgerson claimed an interest via the agreements between Mr. Kouns and Torgerson executed when Mr. Kouns was still alive. Togerson's claim was a claim for specific

performance of the agreements and the Kouns Estate Petition was an attempt to quiet title. The default judgment in question quieted title in favor of the Kouns Estate.

The District Court acknowledged that Torgerson was not required to prove his case on a Rule 60 motion. The District Court also acknowledged the existence of photocopied checks, two short lease agreements and other available evidence that Torgerson would rely upon to prove his right to the real property in question. The District Court held, however, that this evidence was irrelevant because of the "elephant in the room." The "elephant in the room," according to the District Court, was Torgerson's failure to commence an action to enforce his claim within sixty (60) days after the Kouns Estate denied the claim. The District Court held that this failure permanently barred Torgerson's claim leaving him without a meritorious defense to the Kouns Estate Petition.

There was no "elephant in the room." While the Probate Code does require the timely commencement of an action to enforce a claim, the claim being asserted by Torgerson is not subject to this requirement. "The term 'claim' found in [the Probate Code] does not include a claim for specific performance, but refers to debts or demands against the decedent which might have been enforced in his lifetime, by personal actions for the recovery of money; and upon which only a money judgment could have been rendered." *In Re Estate of Sharp*, 537 at 1037.

Torgerson's claim is one of specific performance in that he is seeking to force the Kouns Estate to honor his right to continue to lease and, ultimately, purchase the real property in question. In short, Torgerson is seeking to force the Kouns Estate to honor

the wishes of Mr. Kouns and sell the subject property to Torgerson. Torgerson's *pro se* "claim" filed in the probate case does not, by virtue of the filing, transform his claim for specific performance into a claim subject to the time requirements set forth in the Probate Code.

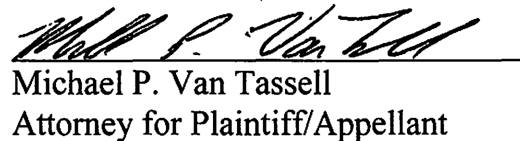
The sole basis for the District Court's determination that Torgerson did not have a meritorious defense to the Kouns Estate Petition was that Torgerson's claim was time barred by the provisions of the Probate Code. As set forth herein, Torgerson's claim for specific performance is not subject to the time requirements of the Probate Code. Accordingly, Torgerson's claim is not time barred and his meritorious defense to the Petition is available and needs to be considered.

Conclusion

A dispute clearly existed between the Kouns Estate and Torgerson with regard to the subject property that needed to be resolved before the proposed lease to Josh Talbot could be executed. The preferred method under Utah law to resolve the dispute between the Kouns Estate and Torgerson would be for the Court to hear evidence presented by both parties and, based upon this evidence, determine the rights of the parties in the subject property. Basically, provide each party with their "day in court." Both parties were not, however, given their "day in court." Due to circumstances beyond his control, Torgerson was not given proper notice of the scheduled April 18, 2016 hearing and did not, therefore, appear, either personally or through counsel. Default judgment was entered against him and his rights in the subject property were terminated.

"The law disfavors default judgments . . . [and courts] . . . should incline towards granting relief in a doubtful case to the end that the parties may have a hearing." *Davis v. Goldsworthy*, 184 P.3d at 629. Rule 60 is the mechanism that courts utilize to relieve parties from undesired default judgments. The circumstances surrounding Torgerson's failure to appear at the April 18, 2016 are such that entitle him to relief from the default judgment in question. Accordingly, and for the reasons to be set forth herein, the District Court's decision should be reversed and the case remanded to allow Torgeron to present evidence of his entitlement to the property to the District Court.

Respectfully submitted by,



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Certificate of Compliance With Rule 24(f)(1)

I, Michael P. Van Tassell, certify that this document, Brief of Appellant, complies with the Court's type-volume limitations and contains 3,872 words according to the word processing software used to prepare this document.

Michael P. Van Tassell

No Addendum

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of Plaintiff/Appellant's Brief was served on the attorney of the Defendant/Appellee by placing two copies in the U.S. Mail, first-class, postage prepaid, this 16th day of February, 2017, at the address listed below.

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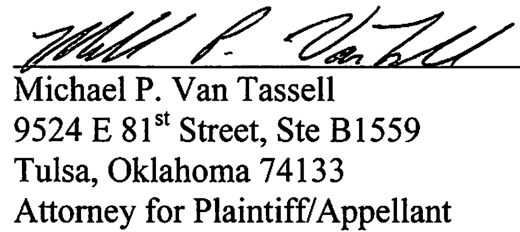

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