1965

John B. Garside and Betty B. Garside v. De Loyd Hillstead : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTA

JOHN B. GARSIDE and
BETTY B. GARSIDE,
Plaintiffs and Respondents,

—vs—

LOYD HILLSTEAD,
Defendant and Appe

APPELLANT'S

APPEAL FROM THE O
JUDICIAL DISTRICT
LAKE COUNTY, ST
HONORABLE M
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—vs—

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Case No.
10364

APPELLANT'S BRIEF

NATURE OF THE CASE

This is an appeal from an order denying defendant's motion to set aside a default judgment obtained against him on the basis of service of process under the provisions of the Utah Non-Resident Motorist Statute, when defendant did not receive copies of the Summons and Complaint nor have notice that any law suit had been initiated against him until after the matter had gone to judgment by default.

DISPOSITION IN THE LOWER COURT

On November 10, 1964, the Lower Court granted a default judgment in favor of plaintiff John B. Gar-

side and against defendant for the sum of $7,330.87 and in favor of plaintiff, Betty B. Garside, and against defendant for the sum of $11,072.38. Upon learning of the default judgment defendant filed his answer to plaintiffs' complaint and at the same time made a motion to have the judgment set aside and the matter litigated upon its merits. Defendant's motion was denied.

RELIEF SOUGHT ON APPEAL

Defendant seeks an order vacating the default judgment and order rewarding the case to the District Court for trial on its merits.

STATEMENT OF FACTS

On August 12, 1961, defendant De Loyd Hillstead was the driver of an automobile that was involved in an accident on U. S. Highway 189, in Hoytsville, Summit County, Utah, with an automobile driven by John B. Garside and in which Betty B. Garside was a passenger. At that time defendant was a resident of the State of California residing at 9612 Alowood, Garden Grove, California.

Three years later on September 8, 1964, plaintiffs filed a complaint in the District Court of Salt Lake County seeking judgment against defendant for property damage and personal injury resulting from the automobile accident (R-1). With their complaint, plaintiffs filed an affidavit alleging that a copy of ther summons and complaint was mailed to defendant at 9612 Alwood, Garden Grove, California (R. 4-5). Copies of the Sum-

mons and complaint were also served upon the Secretary of State of the State of Utah (R. 60).

The copies of the summons and complaint which plaintiffs mailed to defendant were never received by him and consequently he had no notice that an action had been intiated against him nor did he have an opportunity to defend in said action (R. 18).

On November 10, 1964, the District Court of Salt Lake County, Marcellus K. Snow, Judge, granted judgment in favor of plaintiffs and against defendant for the aggregate sum of $18,403.25 (R. 7,8). No notice of the granting or entry of the judgment was ever mailed to defendant. (See record). It was not until January 1, 1965, that plaintiffs' attorney sent a letter to defendant at 12201 Peacock Avenue, Apartment #2, Garden Grove, California, advising him that judgment had been taken against him. This letter was received by defendant who immediately thereafter contacted his insurance carrier of the filing of the lawsuit and the resulting $18,403.25 default judgment.

Upon receiving the information the insurance carrier contacted counsel in Utah requesting that action be taken to have the default judgment vacated and the matter disposed of upon its merits. Accordingly, on February 25, 1965, an answer to plaintiffs' complaint on a motion to set aside the default judgment was filed stating that defendant had no knowledge of the legal action because he had never received notice of its initiation (R. 18). The motion was argued before the Honor-

able Marcellus K. Snow, on the basis and with the understanding of the facts set forth herein. After being "fully advised in the premises," Judge Snow denied defendant's motion to vacate the judgment against him. (R. 20)

It is from the denial of defendant's motion to set aside plaintiffs' judgment against him that this appeal is taken.

ARGUMENT

POINT I.

THE COURT ABUSED ITS DISCRETION AND WAS IN ERROR AS A MATTER OF LAW IN NOT SETTING THE DEFAULT JUDGMENT ASIDE.

Rule 56 (c) Utah Rules of Civil Procedure declares:

> For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60 (b).

The pertinent provisions of Rule 60 (b) are as follows:

> 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, inadvertance, surprise, or excusable neglect; . . . (7) any other reason justifying relief from the operation of the judgment.

The rule then goes on to say:

> The motion shall be made with a reasonable time and for reasons (1), (2), (3) or (4) not more than 3 months after the judgment, order or proceeding was entered or taken.

It should be noted that no time limitation is prescribed for relief sought under reason number (7) of the rule.

The Rules of Civil Procedure referred to are codification of the attitude and policy of this State relative to the setting aside of default judgments with the purpose of setting up guide lives for the trial Court in the exercise of the sound discretion in such matters. One of the reasons for the adoption of the Rules was to remove many of the technical difficulties envoked in pleading and to avoid the inequities resulting from a failure of a party or his legal representative to properly adhere to the rather sturgent rules of code pleading by which many cases were won and lost.

As a general rule, the courts incline toward granting relief from defaults and default judgments and will attempt to grant judgment upon the merits of a claim unless the default is the result of inexcusable neglect of the party in default or where it would be inequitable to set it aside. *Cutler vs. Haycock,* 32 U. 354, 90 P. 897.

In the case of *Byland vs. Crooke* et al, m 208 P. 504, the Utah Supreme Court stated on page 505:

> Our trial courts are usually very liberal in vacating and setting aside default judgments entered against a defaulting party by a reason of a mistake, inadventure, or excusable neglect, or in

> cases where there has been fraud or deceit practiced. Under our practice it is generally regarded as an *abuse* of *discretion* for the trial court not to vacate and set aside a default judgment *when there is any reasonable grounds for doing so, and timely application is made.* (Emphasis added)

It is recognized that the moving party should be diligent and show that he was prevented from avoiding the default judgment because of circumstances over which he had no control. This concept is stated in *Warren vs. Dixon Ranch Company et al.,* 260 P. 2d 741, at page 743:

> Discretion mus tbe exercised in furtherance of justice and the court will incline toward granting relief in a doubtful case to the end that a party may have a hearing: *Hurd vs. Ford,* 74 Utah 46, 276 Pac. 908. However, the movant must show tha the has used due diligence and that he was prevented from appearing by circumstances over which he had no control. *Peterson vs. Crozier,* 29 Utah 235, 81 Pac. 860.

The case of *Cutler vs. Haycock,* supra, involves a different kind of lawsuit than the instant case but the statments therein by our Superem Court are of assistance in the consideration of default matters generally. At page 900 of the Pacific Reporter the Court said:

> As has been well said in all doubtful cases the general rule of courts is to incline towards granting relief from the default and to bring about judgment on the merits.

Continuing the Court went on to say:

> This rule, as appears from the authorities, is of almost universal application, and is defeated only in cases where the default is the result of

inexcusable neglect of the party in default, or where it would be inequitable to set it aside. (Emphasis added)

The Court went to state that the trial court had abused its discretion in not setting aside the default because of the following reasons:

1. Defendant had made reasonable efforts to comply with the law.
2. The case arose in a sparsely settled country when communications were slow.
3. Good faith and reasonable effort to make a defense are always elements to be considered in each case.
4. There was no indication that plaintiff would have suffered either inconvenience or loss of any kind by setting aside the default.
5. Plaintiff had not gone to great expense and sacrifice of time to prepare for trial which effort and expense would have to be duplicated if the other party was permitted to defend.

In considering what has been said thus far and comparing other cases and the applicable rules to the instant case the inequities are forceably brought to appellant's attention. In the year 1961 while a resident of California, as the driver of an automobile, was involved in an accident in Utah. At that time he gave plaintiffs his address in California. In 1964, plaintiffs filed suit in Utah against defendant and mailed copies of the summons and complant to him at the place of his residence in 1964. Defendant never received the copies of the summons and complaint which plaintiffs mailed to him. Naturally, because he had no notice of the suit,

no pleadings were filed on defendant's behalf nor was any appearance made by him or on his behalf. Again, naturally judgment by default was taken against him. Interestingly enough no notice of any kind relative to the judgment was made to defend until some 60 days after it was taken and this was in the form of a letter mailed to a different address than the summons and complaint were mailed to. This letter advised defendant that plaintiffs were judgment creditors of his in the total aggregate sum of $18,403.25. Upon receiving this intelligence defendant responded immediately by contacting his insurance carrier of the policy under which he has an omnibus insured. Every reasonable effort was taken thereafter for defendant to defend himself against plaintiffs' claims.

Certainly the equities in this case are on the side of defendant. To be considered are the following items:

a. The lapse of 3 years from the time of the accident to the commencement of the lawsuit against defendant.

b. The mailing of copies of a summons and complaint to defendant at an address plaintiffs knew was three years old.

c. The withholding of notice to defendant of judgment against him until two month time had elapsed.

d. The sending of a letter to defendant at a completely different address than where the summons and complaint were mailed advising defendant of the judgment.

e. The distance of approximately one thousand miles between defendants residence and the place where the lawsuit was commenced.

f. The fact that defendant had not actual notice of the suit until judgment had been taken against him.

g. The filing of the motion to have the default set aside and the filing of an answer in an effort to protect defendant against the claims of plaintiffs and to have this matter disposed of on the merits.

b. The fact that plaintiffs' knew defendant had not responded to their summons and complaint and consequently they and their attorney did not sacrifice a great time and expense to obtain their judgment which would have to be duplicated if defendant is allowed to defend in this action.

i. The fact that although several months time elapsed before defendant took action in an attempt to protect himself from the judgment by default, defendant did act quickly and reasonably after becoming aware of his position.

It is appellant's position that these facts coupled with the law of this State and the attitude of he Courts relative to default matters establishes that the District Court in the instant case abused its discretion in not setting aside the default judgment against defendant and in not permitting him to defend against plaintiffs' claims.

In *Ney vs. Harrison,* 5 U. 2d 217, 299 P. 2d 1114, the Court asserted:

> The statutory authority of trial courts to set aside judgments obtained by default has been literally construed to the end that there be tried on the merits, beginning with our earliest decisions. In the recent case of Warren vs. Dixon

Ranch Co., we had occasion to review the policy considerations and reaffirmed the attitude of liberal construction, thus:

> "The allowance of a vacation of judgment is a creature of equity *designed to relieve against harshness of enforcing a judgment,* which may occur through procedural difficulties, the wrongs of the opposing party, or misfortunes which prevent the presentation of a claim or defense!" (Emphasis added)

And in *Mayhem vs. Standard Gilsonite Company,* 14 U. 2d 52, 376 P. 2d 951, it was held that it is an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to appear and timely application is made to set aside.

Let it be understood that the conduct of plaintiffs and their counsel in delaying two months before sending defendant a letter advising of the default judgment when they knew defendant was not aware that a suit had been filed against him was the cause of the time lapse between the granting of the judgment and defendant's motion to have it set aside. However, upon receipt of information of what had occurred defendant application to set the default judgment was timely. Because of the equities of the case and because the allowance of a vacation of a default judgment is a creature of equity as stated in *Ney vs. Harrison,* supra, the trial court abused its discretion as per the court's declaration in *Mayhern vs. Standard Gilsonite Company,* supra.

In order to fully appreciate defendant's position in this matter it is felt that the certain aspects of the Utah Non-Resident Motorist Statute should be discussed.

The pertinent provisions of Title 41, Section 12, Paragraph 8, Utah Code Annotated, 1953, are as follows:

> The use and operation by a nonresident or his agent of a motor vehicle upon and over the highways of the State of Utah shall be deemed an appointment by such nonresident of the Secretary of State of the State of Utah to be his true and lawful attorney upon whom may be served all legal processes in any action or proceeding against him growing out of such use or operation of a motor vehicle. . . . Service of such process shall be made by serving a copy thereof upon the Secretary of State — and such service shall be sufficient service upon the said nonresident provided, that notice of such service and a copy of the process be within ten days thereafter sent by mail by the plaintiff to the defendant at his last known address.

The Record indicates that plaintiffs adhered to the statutory provisions but also show that defendant did not receive the copy of the summons and complaint which plaintiffs' mailed to him. Whether or not a defendant is entitled to actual notice under this statute is important to this inquiry.

Nonresident motorist acts generally provide that specified notice of the substituted service, or a copy of the summons and complaint be sent to the defendant by mail. Many statutes require that the notice be sent to defendant by registered mail with return receipt re-

quested. Some courts have construed such provision to mean that defendant must have actual notice of the pendency of the action before jurisdiction over him is acquired. *Alexander vs. Bush,* 199 Ark. 562, 134 SW 2d 519, *Muncie vs. Westcraft Corporation,* 58 Wash. 2d 36, 360 P. 2d 744. However, other courts have held that there is no absolute requirement to good and valid service that the defendant actually receive notice.

Most such statutes usually provide, as does the Utah Non-Resident Motorist Statute, that notice of the subsituted service of process be mailed to the defendant's last konwn address. This does not mean necessarily the last address known to plaintiff, but the last known address of defendant which is reasonably certain to ascertain. 8 *Am. Jur.* 2d, *Automobiles and Highway Traffic,* Section 870, and the cases these cited.

Statutory provisions relating to the mailing of notice to defendant's last known address are calculated to give defendant adequate notice of the pendancy of the action or proceeding and to make it reasonably certain that notice will reach defendant. 61 *C.J.S. Motor Vehicles, Section* 502.

Alexander vs. Bush, supra, held that the statute providing for constructive notice on nonresident motorists by service of process on the Secretary of State required "actual value" of the pendency of an action to bes given to the defendant before jurisdiction over him was acquired. See Annotation 138 ALR 1476.

Although there is no Utah case covering the exact point in question here, our Supreme Court has commented on the provision of of the Utah nonresident Motorist Statute. In construing the substituted service statute in question, Mr. Justice Henriod's separate concurring opinion in *Teague vs. District Court of the Third Judicial District In and For Salt Lake County,* 4 U. 2d 147, 289 P. 2d 331 (1955), state:

> It is my opinion that the statute for substituted service involved in this case, very carefully should be administered, since, admittidly assigned to protect our own residents against transient hit-run non-residents, it would be used as an instrument for oppression if one having a poor or unmeritorious case could refrain from serving process personally, having ample opportunity so to do, and then wait until he reasonably is sure defendant is far and away, and unable to return to defend himself, before substituted service is accomplished.

Appellant agrees with the principles stated by Justice Henriod. In doing so appellant does not take the position that the conduct of plaintiff was the result of design in waiting three years before filing the suit aganst plaintiff and then sending notice thereof to a three year old address of defendant without making any effort to ascertain defendant's present address and in waiting two months before advising defendant by mail of the filing of the suit and the resulting default judgment against him. But even though plaintiffs may not have accomplished what they did by design the result of their action was to make an instrument of oppression of the nonresident Motorist Statute against defendant.

CONCLUSION

Appellant urges upon the Court that the Trial Court erred in failing to set aside plaintiffs' default judgment and allowing defendant to answer the Complaint and have his "day in Court" and to have the matter fairly heard on its merits.

Respectfully submitted,

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