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Robert D. Radcliffe v. Sia Akhavan and Does 1 through 10 : Reply Brief

Utah Court of Appeals

Richard D. Burbidge; Douglas H. Holbrook; Burbidge & Mitchell; Attorneys for Appellee.
Paul M. Durham; G. Richard Hill; Durham, Evans & Jones; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

Robert D. Radcliffe, Plaintiff, v. Sia Akhavan, an individual; Joel M. Lasalle, an individual; General Display Corporation, a Utah corporation; and Does 1 through 10, inclusive, Defendants and Appellee	Case No. 920883-CA Priority No. 15

Sia Akhavan, Counterclaimant and Appellee, v. Robert D. Radcliffe; Republic International Corporation; Roland Kaufmann; and Does 1 through 10, inclusive, Counterclaim Defendants and Appellant.	

REPLY BRIEF OF APPELLANT

Appeal from a Judgment of the Third Judicial District Court of Salt Lake County, State of Utah. Honorable James S. Sawaya, District Judge.

Richard D. Burbidge, Esq.
Douglas H. Holbrook, Esq.
BURBIDGE & MITCHELL
139 East South Temple, Suite 2001
Salt Lake City, Utah 84111
Telephone: (801) 355-6677
Attorneys for Appellee

Paul M. Durham, Esq.
G. Richard Hill, Esq.
DURHAM, EVANS & JONES
1200 Beneficial Life Tower
Salt Lake City, Utah 84111
Telephone: (801) 538-2424
Attorneys for Appellant

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DETERMINATIVE PROVISIONS OF LAW

The issue relating to the finality of the default judgment in favor of Akhavan for purposes of appeal is governed by Rule 60(b) of the Utah Rules of Civil Procedure.

INTRODUCTION

Akhavan has raised several new matters in his principal brief which will be considered in the order presented. At the outset, however, it is important to note that the central focus of this appeal is not whether the trial court was justified in exercising personal jurisdiction over Roland Kaufmann, but whether Kaufmann was unreasonably denied a fair opportunity to contest and rebut Akhavan's one-sided testimony not only on jurisdiction, but on liability and damages as well. Brief of Appellant at 26-36. The outcome of the trial held in Kaufmann's absence vividly demonstrates the degree to which he was prejudiced by the court's denial of his motion for continuance. Brief of Appellant at 39-44.

ARGUMENT

I. Motion for Continuance.

A. Standard of Review

Akhavan mistakenly claims that Kaufmann has ignored the standard of review on motions for continuance in this case. Brief of Appellee at 11. On the contrary, it is not the standard of review, but its proper application that is involved. The question is what factors should be considered by a reviewing court to determine whether a lower court has abused its discretion by acting unreasonably under the circumstances.

Kaufmann respectfully submits that the relevant factors to be considered on appellate review are to be drawn from the particular facts and circumstances of the case itself. See, e.g., Griffiths v. Hammon, 560 P.2d 1375, 1376 (Utah 1977); 17 Am. Jur.

2d Continuance §4 (1990). In this instance, one of the circumstances not present in Hill v. Dickerson, 839 P.2d 309 (Utah App. 1992) (relied upon by Akhavan) is the issue of personal jurisdiction under the Utah long-arm statute. Another is the status of the appealing party as a foreign, nonresident defendant (not plaintiff) residing thousands of miles from the forum. Others include the obvious breakdown of the attorney-client relationship shortly before trial, together with Kaufmann's attempts to remedy the situation as best he could. See generally, Brief of Appellant at 33-36. In short, this is not a case in which the moving party lived across the street from the courthouse. Kaufmann should not be disadvantaged by the mechanical application of a single Utah case which is so different from the particular facts and circumstances of his own.

B. Request for Evidentiary Hearing

Akhavan further claims that Kaufmann should be precluded from raising the issue of his due process right to an evidentiary hearing on appeal because he failed to request such a hearing below. Brief of Appellee at 3. Such a claim ignores the clear statement on pre-trial procedure by the Utah Supreme Court in these cases:

> When jurisdiction turns on the same facts as the merits of the case, an evidentiary hearing is inappropriate because it infringes on the right to a jury trial and is an inefficient use of judicial resources (hearing the same evidence twice); in such cases--if the plaintiff has made a prima facie showing--jurisdiction is determined by trial on the merits.

Anderson v. American Society of Plastic and Reconstructive Surgeons, 807 P.2d 825, 827 (Utah 1990), cited in Brief of Appellant at 29-31.

Kaufmann's due process right to an evidentiary hearing is clearly relevant as one of the factors involved in his motion for continuance. The issue was raised several times below and never waived by stipulation or otherwise. Brief of Appellant at 17-18; 28-31; 39-41. Since jurisdiction turns on the same facts as the merits of this case, the issue was properly reserved until trial.

II. Default Judgment.

Akhavan claims that Kaufmann is barred from appealing the default judgment entered against him because he failed to file a post-trial motion to set it aside under Rule 60(b) of the Utah Rules of Civil Procedure. Brief of Appellee at 14-15. This statement of the law governing finality of default judgments is erroneous.

Rule 60(b) of the Utah Rules of Civil Procedure provides 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, inadvertence, surprise, or excusable neglect; (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); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been

> satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), and (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. 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.

(Emphasis added.)

As the plain wording of the text indicates, a Rule 60(b) motion is properly taken from a final judgment and does not affect the finality of the judgment itself for purposes of appeal. The rationale is based upon the extended time periods applicable to such motions. 7 Moore's Federal Practice ¶60.29 (1993).

In this connection, the parallel federal rule has been analyzed as follows:

> An application for relief from a judgment under Rule 60(b) also does not extend the time for taking an appeal. Even if the court hears and denies the motion before the appeal time would have run, the appeal must be taken with the prior period measured from the date of the judgment, not from denial of the motion. If, however, the court grants the motion and enters a new judgment, the time for appeal will date from the entry of that judgment.

11 Wright & Miller, Federal Practice and Procedure §2871 (1973) (footnotes omitted).

The same result has been reached in Utah. In Fackrell v. Fackrell, 740 P.2d 1318 (Utah 1987), for example, the Utah Supreme Court flatly stated: "A Rule 60(b) motion does not extend or toll the thirty-day period in which appeals in the original action must be taken." Id. at 1319. And in Amica Mutual Insurance Co. v. Schettler, 768 P.2d 950 (Utah App. 1989), relied upon by Akhavan in support of his position, the court's opinion dealt with a consolidation of three appeals: (1) Summary judgment dismissing Schettler's counterclaim and third-party complaints; (2) Entry of default judgment as a sanction together with an award of compensatory and punitive damages; and (3) Denial of motion to set aside the foregoing default judgment under Rule 60(b). Id. at 953. The court affirmed the trial court's rulings in all three appeals, but vacated the awards of general and punitive damages in certain respects and remanded for further proceedings below. Id. Rather than treating the Rule 60(b) motion as a condition of appeal, the court dealt with the underlying default judgment as a final judgment from which an appeal properly could be taken. Id. at 961.

Akhavan has cited no case or other authority in support of his position, other than those supporting the rule that a default judgment may only be set aside at the trial level by a Rule 60(b) motion. Such a motion is not a condition of appeal of the original default judgment itself.

III. Finding of Fact on Jurisdiction.

Akhavan goes to great lengths to justify the court's assertion of personal jurisdiction over Kaufmann in this case.

Brief of Appellee at 16-20. Nowhere in his brief, however, does he address Kaufmann's contention that the court's finding and conclusion on personal jurisdiction based upon a voluntary stipulation of the parties is clearly erroneous. The indisputable fact is that no such stipulation exists.

IV. Damages.

Akhavan wholly fails to address Kaufmann's contention that the court's award of consequential damages in this case constituted a double recovery contrary to law. Consequently, there is no need to reply on this point.

CONCLUSION

Akhavan's assertions that Kaufmann is barred from raising issues with respect to his due process right to an evidentiary hearing and the court's entry of default judgment against him in connection with this appeal are completely without merit. The judgment of the lower court should be reversed and the case remanded for trial.

DATED this 2ND day of June, 1993.

Respectfully submitted,

DURHAM, EVANS & JONES

By: G. Richard Hill

Paul M. Durham, Esq.
G. Richard Hill, Esq.
1200 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
(801) 538-2424
Attorneys for Appellant
Roland Kaufmann

CERTIFICATE OF MAILING

I certify that I caused two true and correct copies of the foregoing Reply Brief of Appellant to be mailed, first-class postage prepaid, to the following this 2nd day of June, 1993:

Richard D. Burbidge, Esq.
Douglas H. Holbrook, Esq.
BURBIDGE & MITCHELL
139 East South Temple #2001
Salt Lake City, Utah 84111

G Richard Hill

grh\kaufmann.003