1963

Board of Education of the Granite School District v. Rex H. Cox and Wilmina Cox : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

BOARD OF EDUCATION OF THE GRANITE SCHOOL DISTRICT, a Statutory corporation,

Plaintiff-Respondent,

vs.

REX H. COX and WILMINA COX, his wife,

Defendants-Appellant.

Case No. 9844

APPELLANT'S BRIEF

Appeal from the Judgment of the Third District Court for Salt Lake County Honorable Merrill C. Faux, Judge

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TABLE OF CONTENTS

AUTHORITIES CITED

CASES

Statutes

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STATEMENT OF THE NATURE OF THE CASE

This is an action by which plaintiff seeks to take appellant's property by way of an alleged contract, OR in the alternative, by way of condemnation proceedings. Said action having been filed in two separate causes of action, respectively.

DISPOSITION IN LOWER COURT

The lower court granted a default judgment on the first cause of action against both defendants. Both defendants moved the lower court to set aside the Default Judgment. Defendant Rex H. Cox appeals from an order denying his motion to set aside the Default Judgment. Defendant Wilmina Cox does not join in this appeal as the lower court granted her motion.

RELIEF SOUGHT ON APPEAL

Defendant Rex H. Cox seeks reversal of the lower court's order denying his motion to set aside the default judgment, and the right to have a trial upon the merits of the case.

STATEMENT OF FACTS

The plaintiff caused the defendants to be served with a copy of its Summons and Complaint on or about September 10, 1962. The plaintiff pleading its case in two causes of action; one, requesting to take defendants' property by way of an alleged contract and two, by means of condemnation proceedings. The Salt Lake County Clerk executed a default certificate on or about October 2, 1962. Judge Merrill C. Faux granted default judgment against both defendants on or about October 5, 1962 on plaintiff's first cause of action. The defendants were served notice of said judgment on or about November 9, 1962 and contacted counsel as soon

after as appointment could be made. Defendants' counsel immediately contacted plaintiff's counsel. Negotiations were pending for a period of approximately ten days between respective counsel and their respective clients without success. Defendants filed a Motion to Set Aside the Judgment as well as a Motion and Order to Stay Proceedings and Stay Execution of Judgment with the lower court and plaintiff's counsel, on or about November 28, 1962, pursuant to the Utah Rules of Civil Procedure as follows:

1. Due to mistake, inadvertence, and excusable neglect.
2. That the judgment was based upon a void contract for the reason that the same did not comply with the Statute of Frauds.
3. That the purported contract, the subject of said judgment, is void or voidable for failure of consideration.
4. That the judgment is inequitable.

The proceedings and execution of judgment being stayed as of that date until further order of the court.

Defendants' motion was called up for hearing before the Honorable Merrill C. Faux on December 4, 1962, all parties being present and being represented by counsel. At this time testimony was adduced by both sides and the lower court took the matter under advisement and to see if the parties could not resolve their differences. The motion was further argued to the lower court by respective counsel and submitted for decision.

The lower court granted the motion to set aside the judgment as to Wilmina Cox but denied same as to Rex H. Cox. Findings of Fact, Conclusions of Law and an Order were filed and both plaintiff and defendant Rex H. Cox filed respective motions to have the lower court reconsider its Order and the court denied same. This appeal was then made on behalf of the defendant Rex H. Cox, and defendant Wilmina Cox has filed her Answer to plaintiffs' Complaint on file. Said case now is pending before the lower court.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT'S, REX H. COX'S MOTION TO SET ASIDE THE DEFAULT JUDGMENT.

The defendant's motion to set aside the default judgment was based upon the following grounds: (R. 13).

1. Due to mistake, inadvertence, and excusable neglect.
2. That the judgment heretofore entered was based upon a void contract for the reason that same did not comply with the Statute of Frauds.
3. That the purported contract, the subject of said judgment, is void or voidable for failure of consideration.
4. That the judgment is inequitable.

Rule 55 (c) U.R.C.P. states:

> "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)."

Rule 60 (b) U.R.C.P. states, among other things, that the court, on motion and upon such terms as are just and in the furtherance of justice, may relieve a party or his legal representative from a final judgment, order or proceeding.

The statutory authority of trial courts to set aside judgments obtained by default has been liberally construed to the end that there be trials on the merits, beginning with our earliest decisions. *Utah Commercial & Savings Bank v. Trumbo,* 17 Utah 198, 53 P. 1033 (1898).

The court will incline toward granting relief in doubtful cases so that the party may have a hearing. *Warren v. Dixon Ranch Co., et al,* 123 Utah 416, 422, 260 P. 2nd 741, 744 (1953). The Utah Supreme Court in this case 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. * * * Equity considers factors which may be irrelevant in actions at law, such as the * * *

> hardship in granting or denying relief. Although an equity court no longer has complete discretion in granting or denying relief, it may exercise wide judicial discretion in weighing the factors of fairness and public convenience * * * ."

The above view was also affirmed in *Hurd v. Ford,* 74 Utah 46, 276 P. 908 (1929), as well as other Utah cases.

Under Rule 1 (a) U.R.C.P., a defendant must be extended every reasonable opportunity to prepare his case and to meet an adversary's claims. This rule has been affirmed many times by our Utah Supreme Court and as is set forth in *Taylor v. E. M. Royle Corp.,* cited in 264 P. 2nd 880, as follows:

> "It is true that our new rules should be 'liberally construed' to secure a 'just * * * determination of every action', * * * a defendant must be extended every reasonable opportunity to prepare his case and to meet an adversary's claims. Also he must be protected against surprise and be assured equal opportunity and facility to present and prove counter contentions, —else unilateral justice and injustice would result sufficient to raise serious doubts as to constitutional due process guarantees."

The situation in the instant case now before the bar is patently one of the very kind which the above referred to rules were designed to grant relief. The Honorable Utah Supreme Court has handed down several decisions in the past few months directly in point. In the cases of *E. J. Mayhew v. Standard Gilsonite Company*

and *Beaver Dam Sales Company v. Standard Gilsonite Company*, cited in 14 Utah 2d 52, 376 P. 2d 951, Justice Crockett, speaking in connection with Rule 60 (b) U.R.C.P., stated as follows:

> "On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party * * * from a final judgment * * * for the following reasons: (1) mistake, *inadvertence,* surprise, or *excusable neglect* * * * . The motion shall be made * * * not more than 3 months after the judgment * * * was entered * * * ." (Emphasis added.)

Justice Crockett speaking further in the same case said:

> "It is undoubtedly correct that the trial court is endowed with considerable latitude of discretion in granting or denying such motions. However, it is also true that the court cannot act arbitrarily in that regard, but should be generally indulgent toward permitting full inquiry and knowledge of disputes so they can be settled advisedly in conformity with law and justice. To clamp a judgment rigidly and irrevocably on a party without a hearing is obviously a harsh and oppressive thing. It is fundamental in our system of justice that each party to a controversy should be afforded an opportunity to present his side of the case. For that reason it is quite uniformly regarded as 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 it aside."

Chief Justice Wade in the very recent case of *Heathman v. Fabian & Clendenin,* cited in 377 P. 2d 189, reaffirming the above views, states as follows:

> "Judgments by default are not favored by the courts nor are they in the interest of justice and fair play. No one has an inalienable or constitutional right to a judgment by default without a hearing on the merits. The courts, in the interest of justice and fair play, favor, where possible, a full and complete opportunity for a hearing on the merits of every case."

Several other cases in which our court has affirmed the decisions of the above cases are: *Ney v. Harrison,* 5 Utah 2d 217, 220, 209 P. 2d 1114, 1116 (1956), and *Bylund v. Crook,* 60 Utah 285, 288, 208 P. 504, 505 (1922).

In the case at bar the defendant had no knowledge of the default judgment until November 9, 1962 and immediately thereafter contacted counsel, who attempted to negotiate the matter with plaintiff's attorney for approximately 10 days. When an agreement could not be reached, Motions to Set Aside the Judgment and to Stay Proceedings were filed which of course shows no undue delay in moving the court to set aside the judgment. (R. 25).

It is very apparent from the record that the defendant misunderstood legal proceedings, that he had a misconception as to what a Summons was, and the reason for not replying to same, and as to what his rights were. (R. 25, 26, 44, 46).

It is not our purpose to quote extensively from the record but it is very evident from the entire record of the testimony of both of the defendants that there has been considerable misunderstanding both as to the lawsuit and an alleged contract. It is also very evident from the testimony of both of the defendants that there has been no acceptance of the purported contract, no meeting of the minds to say the least, that even though the alleged original offer recites consideration both of the defendants testified that no consideration was received by them and that the alleged offer, as represented by Exhibit 1, does not now appear to be as displayed to them. Furthermore, said offer was withdrawn or rejected as is admitted in the record by all parties; therefore, said purported contract, or a subsequent one, which we expressly deny, must fail for failure of consideration, no acceptance, and because same does not comply with the statute of frauds because not in writing as required. Certainly there is a big issue as to whether a contract does exist and one in which the issues should be tried.

We invite the court's attention to the fact that this case is not the usual contract type of case but is one in which the defendant's home is being taken without due process of law and in a manner that will cause extreme hardship not only upon this defendant but on the other defendant (his wife) and their family.

It is the intent of our laws to consolidate cases rather than separate them. To require the defendant

to sell his joint interest in the family residence for a price set by the plaintiff and to require the other defendant to separately litigate her interest in the same property certainly is not in the interest of justice and fair play and is in violation of our statutes. To compel the defendant to accept one sum of money established by the plaintiff for his equity in the family residence and the other defendant to accept an arbitrated price (to be set through litigation) for her equity in the same residence certainly is grossly inequitable and unjust and one which will create serious tax consequences to all parties concerned. Furthermore, to compel the defendant to accept a "below market price" for his share in the property, as set forth in the record by both defendants, without a complete opportunity for a hearing on the merits of the case, is grossly inequitable, against public policy, and to say the least, against justice and fair play.

The record and the above cited cases bear out the fact that one or more of the reasons for setting aside a default judgment as set out in Rules 55 (c) and 60 (b), U.R.C.P., has been so thwarted that equity and good conscience demand that the judgment against the defendant be set aside.

The lower court was uncertain as to what to do as is evidenced by the statement found in the record as follows: "It is difficult to see where the end result of my ruling will be." (R. 54). The lower court further indicated that he did not like the demeanor of the defendant and we quote from the record as follows: " * * * his demeanor on the witness stand" (R. 53) and further,

as follows: " * * * and as to his testimony I was impressed with what appeared to be a lack of veracity, a lack of straightforwardness." (R. 54). It is apparent from the foregoing that the court acted arbitrarily and capriciously and abused its discretion in refusing to vacate the default judgment. The record bears out the fact that there was misunderstanding and confusion surrounding all the dealings and therefore all parties should have an opportunity to present their cases and have their day in court.

CONCLUSION

The trial court erred in dismissing defendant's motion. Accordingly, it can only be concluded that the case at bar is one of the very kind for which Rule 55 (c) and 60 (b) of our U.R.C.P. were designed to grant relief, one in which the interests of justice and fair play require that the motion to set aside the default judgment be granted and the defendant afforded the right to litigate his case on the merits at the same time with the other defendant, his wife.

The judgment of the lower court refusing to set aside the default judgment as to this defendant should be reversed.

Respectfully submitted,

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