1963

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

Utah Supreme Court

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McKay and Burton; Attorneys for Respondent;

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

BRIEF OF RESPONDENT

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

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BRIEF OF RESPONDENT

Statement of the nature of the case and disposition in lower court are adequate as stated in appellant's brief.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks sustainment of the lower court's order denying defendant Rex H. Cox' motion to set aside the default judgment.

STATEMENT OF FACTS

The following facts should be considered in addition to the statements made in defendants' brief. On or about the 20th day of February, 1961, defendants gave a written offer to the plaintiff for the sale to plaintiff of the property described in the Complaint for the sum of $43,500.00. (R. 72-Ex 1-D). This offer was rejected and a counter offer of $40,000.00 made by the plaintiff, and on the 17th day of April, 1961, defendants, by written communication, rejected the said offer of $40,000.00 made by the plaintiff and stated, "We wish to compromise and accept the sum of $42,000.00." This was signed by "Rex H. Cox". (R. 72, Ex 2-D).

After numerous attempts to have defendants convey said property, the plaintiff, through one of its attorneys, tendered to the defendants a check (R. 34) for the purchase price of $42,000.00 less revenue stamps and prorated taxes. Defendants refused to execute the deed. Thereafter, the plaintiff's attorney informed the defendant, Rex H. Cox, that in the event a transaction could not be completed amicably, he was instructed by the Board of Education of the Granite School District to bring suit against the defendants. The defendant, Rex H. Cox, informed this attorney for plaintiff that he should go ahead and bring suit. (R. 35). Complaint was filed August 31, 1962 and a copy of the Summons together with a copy of the Complaint was served personally upon the defendants Wilmina Cox and Rex H. Cox by leaving a copy with Wilmina Cox, the defendant's wife (R. 6).

ARGUMENT

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE MOTION OF DEFENDANT REX H. COX TO SET ASIDE DEFAULT JUDGMENT.

As stated by the court in Quely vs. Willardson, 35 Utah 414, 100 P 930,:

> "All that the court could pass on at the hearing on the motion was whether appellants had presented a meritorious defense in their answer and whether they had shown sufficient excuse for not presenting such defense at the proper time."

Defendant Rex H. Cox does not comply with either requirement. No defense was presented and no proposed answer for defendant Rex H. Cox has been submitted.

Defendant Rex H. Cox admits that he was told by plaintiff's attorney that plaintiff had instructed him to bring suit if the defendants refused to execute the deed tendered. (R. 35). He admitted that he saw the Summons and the copy of the Complaint that were served on him (R. 35, 44, 45 and 46) and admitted that he did not neglect but he just refused to do anything about this matter by asking advice of an attorney or otherwise and at no time had any intention to do so. (R. 35, 44, 45 and 46). Defendant further admits that he knew that there had been two letters sent by certified mail, returned receipt requested, that had been waiting in the post office, addressed to him and his wife, and had failed, neglected, and refused to pick up the said letters. (R. 35 and 36). All of this

seems to fit in with the pattern of defendant's previous conduct in which he agreed to sell the property but did nothing and refused to complete the transaction. At the time of service, defendant Rex H. Cox discussed this matter with his wife and, according to his testimony, "I smoothed it over and made her feel better about it." (R. 44). This defendant's inaction was deliberate. The court summed it up in the following words, "Accordingly, I can't believe his testimony and I think what he did in failing to make his appearance or get counsel and respond to the Summons was deliberate on his part." (R. 54).

Although the State of Utah has always had a very liberal policy in setting aside default judgments, all cases have required a showing of inadvertance, surprise, or excusable neglect, none of which appears in this case.

In the case of *Chrysler vs. Chrysler,* 5 Utah 2d 415, 303 P2nd 995, the court says in part as follows:

> "Certain it is that under usual circumstances it is inequitable and unjust to condemn a party unheard and that doubts should be resolved in favor of setting aside a default judgment to permit the parties to have their day in court. The authorities are uniform to that effect. It will be found, however, that these cases are *predicated upon the hypothesis that there has been some mistake or excusable neglect on the part of the movant from which, in justice and equity, he should be relieved.* The pertinent inquiry here is whether plaintiff met that requirement." (Emphasis added)

Certainly the defendant has not met the requirement as stated above. It is recognized that the moving party

should be diligent and show that he is prevented from avoiding a default judgment because of circumstances over which he had no control. In this regard the court states in *Warren vs. Dixon Ranch Company,* et al (cited by defendant), 123 Utah 416, 260 P2d 741 and 743:

> "Discretion must be exercised in furtherance of justice and the court will incline toward granting relief in a doubtful case to the end that the party may have a hearing. *Hurd v. Ford,* 74 Utah 46, 276 P 908. However, the movant must show that *he has used due diligence and that he was prevented from appearing by circumstances over which he had no control. Peterson v. Crosier,* 29 Utah 235, 81 P 860." (Emphasis added)

The court goes on to say in the same case, *Warren vs. Dixon Ranch Company*:

> "In order for this court to overturn the discretion of the lower court in refusing to vacate a valid judgment, *the requirements of public policy demand more than a mere statement that a person did not have his day in court when full opportunity for a fair hearing was afforded to him or his legal representative.*" (Emphasis added)

Attention is invited to the fact that in the case of *Warren v. Dixon Ranch Company* cited in appellant's brief, this court sustained the lower court's order denying the motion to set aside the default judgment. The defendant there had much more to support his motion than exists in this case. There is not a single case that has been decided wherein the defendant has with full knowledge

of the service of Summons with the contents of the Summons and the contents of the Complaint and has refused to take any action and then has been successful in having the judgment set aside. In each instance where default judgment has been set aside there has been some special circumstance that has shown excusable neglect. See *Kelly vs. Scott,* 5 Utah 2d 159, 298 P2d 821, *Ney vs. Harrison,* 5 Utah 2d 217, 299 P2d 1114, *Utah Commercial Savings Bank vs. Trumbo,* 17 Utah 198, 53 P 1033, and *Locke vs. Peterson,* 3 Utah 2d 415, 285 P2d 1111.

Taylor vs. E. M. Royle Corporation 1 Utah 2d 175, 264 P2d 279 (cited in defendants' brief as 264 P2d 880), does not support the question before the court.

Plaintiff in that case sued on an express contract and without proof the lower court allowed recovery on quantum meruit. The Supreme Court held an injustice would result if the rule were interpreted to charge the defendant with liability under quantum meruit, an issue he was never called upon to meet.

The case of *E. J. Mayhew vs. Standard Gilsonite Company* and *Beaver Dam Sales Company vs. Standard Gilsonite,* 14 Utah 2d 52, 376 P2d 951, was cited in defendants' brief. Service of Summons was made on the former president of defendant corporation who informed the person serving that he was not an officer of the defendant corporation. The following excerpt from Justice Crockett's opinion is significant:

> "It is important to keep in mind that we are not here concerned with the rights of R. J. Pinder

> personally, but with those of stockholders in the corporation who seek an opportunity to assert their rights and protect their interests."

Heathman vs. Fabian and Clendenin, 377 P2d 189, cited in defendants' brief is not in point as the question of the right of the court in its discretion to set aside a default judgment was not directly involved. The court stated immediately following the portion quoted as follows:

> "It was clearly the duty of the law firm to do what it could, acting fairly and openly, to prevent the court from entering a default judgment against Hatch without hearing its claim that the default certificate was obtained on account of excusable neglect."

Attention is also invited to the following cases:

McWhirter vs. Donaldson et al, 36 Utah 293, 104 P 731. In this case the defendant's attorney claimed that he had a verbal stipulation with the plaintiff's attorney to give additional time to answer. The court denied the motion to set aside judgment and this was affirmed on appeal.

Peterson vs. Crozier, 29 Utah 235, 81 P 860. Defendant in this case was also represented by an attorney who filed an answer but did not appear for trial. Defendant at one time apparently intended to abandon his defense but thereafter tendered an amended answer and moved to set aside the judgment. The lower court denied the motion to set aside the judgment and this was

affirmed on appeal. The court on appeal said in part as follows:

> "In order to bring a case within the foregoing provision of the statute, the moving party must show that he has used due diligence to prepare and appear for trial and present his defense and that he was prevented from doing so because of some accident, misfortune or combination of circumstances over which he had no control. *If, however, the record discloses mere carelessness, lack of attention or indifference to his rights on the part of applicant or his counsel, he cannot expect an opportunity to redeem the past. If the party's negligence is without excuse or justification, he must abide the consequences.*" (Emphasis added)

Bylund vs. Crook, 60 Utah 285, 208 P 504. The defendant bank's motion to set aside default judgment was denied and this was affirmed on appeal. This was a foreclosure suit in which the bank joined as a defendant because it held a second mortgage. It appeared that the bank knew of and encouraged the plaintiff in the foreclosure proceedings right up to and including the sale of the property.

The case of *Masters vs. LeSuer,* 13 Utah 2d 293, 373 P2d 573. The defendant was represented by an attorney who thought he had filed an answer. It appeared that before default judgment plaintiff's attorney called the defendant's attorney's attention to the fact that the matter was in default and that default judgment would be taken unless something was done. The order denying the motion to set aside default judgment was affirmed.

CONCLUSION

In conclusion it is submitted:

That the trial court properly exercised its discretion in denying the Motion to Set Aside Judgment as to defendant Rex H. Cox. There is not a shred of evidence to show that there was any mistake, inadvertence, surprise or excusable neglect. As a matter of fact, defendant Rex H. Cox, by his own admission, had full knowledge of the bringing of suit, he had knowledge in the first place that it was going to be brought and yet he deliberately refused to carry out the direction in the Summons and present a defense. This is deliberate defiance of the court and now he asks the court to exercise its discretion in setting it aside.

The judgment of the lower court refusing to set aside the default judgment against Rex H. Cox should be sustained.

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