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Board of Education of the Granite School District v. Rex H. Cox and Wilmina Cox : Petition for a Rehearing and Brief in Support Thereof

Utah Supreme Court

Dahl & Sagers; Attorneys for Appellant;
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

PETITION FOR A REHEARING AND BRIEF IN SUPPORT THEREOF

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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The defendant and appellant, Rex H. Cox, in the above entitled action respectfully petitions the Court to grant a rehearing in the above entitled cause for the reason and upon the grounds that in its opinion heretofore rendered the Court erred in the following particulars:

POINT ONE

THE COURT ERRED IN ITS RULING IN REFUSING TO SET ASIDE THE LOWER COURT'S ORDER UNDER RULE 60(b)(1).

POINT TWO

THE COURT ERRED IN ITS RULING IN REFUSING TO SET ASIDE THE LOWER COURT'S ORDER UNDER RULE 60(b)(7).

The undersigned attorneys for the Defendant and Appellant, Rex H. Cox, herein, certify that in our opinion there is merit to the foregoing claims and that the court committed errors in the particulars above specified.

DAHL & SAGERS
Everett E Dahl
Victor G. Sagers
Attorneys for Defendant-
and Appellant

ARGUMENT

POINT ONE

THE COURT ERRED IN ITS RULING IN REFUSING TO SET ASIDE THE LOWER COURT'S ORDER UNDER RULE 60(b)(1).

It is not counsel's purpose to further quote extensively from previous decisions of this court nor to reite-

rate what has already been said in our original and reply briefs. However, the lower court definitely abused its discretion in not setting aside the judgment under Rule 60(b)(1) of our Utah Rules of Civil Procedure and this court erred in affirming said lower court's order.

We believe the Utah General Rule of Law applicable to Rule 60(b)(1) to be that the court views a default judgment with a careful eye but in doing so we acknowledge that a trial court is endowed with considerable latitude of discretion in granting or denying a motion to set aside a judgment. However, it is an abuse of discretion to refuse to vacate a judgment where there is reasonable justification for the defendant's failure to appear and answer and the court will grant relief in doubtful cases so that a party may have a hearing. *Mayhew v. Standard Gilsonite Company,* 14 Utah 2d 52, 376 P 2d 951; *Ney v. Harrison,* 5 Utah 2d 217, 299 P 2nd 1114; *Warren v. Dixon Ranch Co.,* 260 P 2nd 741; *Petersen v. Crosier,* 29 Utah 255, 81 P. 860.

This court in its decision states:

> " . . . the court was not obliged to believe the somewhat feeble excuse he gave him for not paying attention to the summons: that he thought it required a judge's signature."

This in itself may be one thing, but we submit that the entire pleadings and fact situation must be reviewed as one rather than an isolated statement. The record will bear out that the defendant was thoroughly con-

fused and of course was somewhat frightened because of his response to questions propounded to him. In the instant case the defendant's home is involved, the defendant was definitely under the impression that no contract had been entered into, and rightfully so, no money had been paid him, negotiations had not been completed and had been extended over a period of approximately eighteen months, therefore, these reasons, coupled with other reasonable statements contained in the record along this line would make it very obvious that the defendant did not understand the effect of his failure to answer the complaint. It is inconceivable to believe that if the defendant had understood the effect of his failure to answer the complaint and that by his not answering that he would be deprived of an opportunity to present his side of the case to the court and to have the issues litigated that he would not have done so.

Certainly any of the foregoing reasons would appear to be justification for the judgment to be set aside and one in which the interest of justice and fair play would be involved.

It is an obvious abuse of discretion, and a sad commentary, I might add, where a decision is returned on the basis that the court does not like the demeanor of the defendant on the witness stand as was done in the instant case. The general rule, of course, is that the court should be inclined to allow justice and fair play and allow the defendant a full and complete opportunity for a hearing on the merits of the case.

POINT TWO

THE COURT ERRED IN ITS RULING IN REFUSING TO SET ASIDE THE LOWER COURT'S ORDER UNDER RULE 60(b)(7).

The court in its decision, the subject of this Petition for Rehearing, states as follows:

> "In his reasons for setting the judgment aside the defendant has specifically set out number one above and evidently in an effort to qualify under the second category has asserted the following additional reasons: (1) the judgment entered was based upon a void contract for the reason that the same did not comply with the Statute of Frauds; (2) the purported contract was void for lack of consideration; (3) the judgment is inequitable."

The very essence of Rule 60(b)(7) is that the judgment may be set aside for any other reason justifying relief from the operation of the judgment. Certainly if the judgment is void on its face, or if it is inequitable, which of course is the very essence of an equity proceeding, then of course this in itself is sufficient to set aside the judgment.

We will treat (1) and (2) referred to above together. The facts and evidence show that exhibits 1-D, 2-D, 3-D, and 4-D were placed into evidence by mutual consent and were actually obtained from plaintiff's counsel at the time of the hearing by the lower court. Exhibit 1-D, dated February 20, 1961, is a carbon copy of a purported option to purchase in the sum of $43,-

500.00. There is no question that this offer was rejected. Exhibit 2-D dated April 17, 1961, signed by the defendant, is a rejection of a purported verbal offer of $40,000.00 and a proffer of a compromise of $42,000.00. This offer, signed only by the defendant, Rex H. Cox, was also rejected verbally by the plaintiff and negotiations continued. Exhibit 3-D is an offer by this defendant to sell only a portion of his property for the sum of $35,000.00 and said letter is dated June 6, 1962, some fourteen months later than Exhibit 2-D, which, of course, is evidence that the proposal set forth in Exhibit 2-D was rejected. Exhibit 4-D dated August 3, 1962, is still another offer and, of course, it is evident that this was rejected inasmuch as a law suit was instituted. The foregoing is conclusive evidence that there was never any meeting of the minds and that no valid contract exists.

The judgment must be in conformity with the pleadings and proof. *Miller v. Johnson,* 43 Utah 468, 134 P. 1017, 48 L.R.A. (N.S.) 294. The complaint of the plaintiff (R. 1-4) states that on April 17, 1961 the defendants offered to sell plaintiff certain real property located in Salt Lake County, but plaintiff does not attach any offer nor specify any amounts or terms in connection with said offer. The plaintiff further states in its complaint, above referred to, that the Board of Education accepted and offer on April 18, 1961, but does not refer to what offer or the terms, etc., and, of course, it is an erroneous allegation as it is very evident by the evidence set forth in the record and as Exhibits

3-D and 4-D bear out. Also the Judgment By Default (R. 8-9) does not even specify any certain contract of sale or terms and we quote from the record at page 8:

> "That the said plaintiff be and it is hereby granted specific performance of the agreement to sell that certain property located in Salt Lake County . . . "

The above does not refer to any specific contract or any amount and the complaint was void of same also. The entry of default (R. 10) as well as statements and admissions made by counsel at the previous hearing of this cause, upon invitation by members of the court, definitely shows that no contract of any nature, kind, or date was produced at the time the default was taken nor was any contract of any kind ever reduced to judgment at the time of granting said default judgment or any time thereafter. How in good conscience can any court permit such an injustice to stand and to deprive this defendant of his day in court and a trial of the case upon its merits?

A law-making power cannot validate void judgments and the same rule would apply to our court. *In Re Christiansen,* 17 Utah 412, 53 P. 103, 41 L.R.A. 504, 7 Am. St. Rep. 794. If the judgment is void on its face or is void from the record and the evidence, then this alone is sufficient grounds to set aside the judgment as to let it stand would be highly inequitable, to say the least. Furthermore, the court on its own motion could set aside judgment if it had not properly granted it, as was done here.

The inequities alone as created by the judgment as it now stands is sufficient basis under which to set aside the judgment. The lower court has created a two-headed monstrosity incapable of enforcement to say the least, so ambiguous that the parties will be back up before this court upon attempting to enforce the judgment if it is allowed to stand as such. The judgment as now rendered does not clearly define the parties' respective interests. Since the judgment against Wilmina Cox has been vacated does this mean that Rex H. Cox now has a judgment for $42,000.00 for his interest in the property, $20,000.00, $5,000.00, or some other amount, i.e.—just what are the defendants' individual rights under the judgment rendered by the lower court?

CONCLUSION

We believe Justice Wade in his dissenting opinion sets forth the position of the defendant, Rex H. Cox, and we therefore quote his dissenting opinion in its entirety and adopt same as our conclusion.

> "I think it obviously an abuse of discretion for the trial court to refuse to set aside this default. The purpose of courts is to decide questions of law and facts on their merit after a fair and impartial trial, and promote justice under the law. Decisions on procedural defects should not be encouraged. Here the defendants were served with summons, they were not lawyers and obviously did not understand that the effect of their failure to answer the complaint would be to deprive them of an opportunity to present their

side of the case to the court and have the issues litigated. As I understand the facts the trial court did set the judgment aside as against the wife and she will be allowed to have a hearing on the merits although the property in question is owned as joint tenants by the husband and wife. To me it seems that the court in making this kind of a decision went a long way to prevent a trial on the merits against a layman who obviously did not appreciate the effect of his failure to consult a lawyer and file an answer. For the same issues as to the wife's interest must be tried, although the interests of the husband and wife are generally so closely connected that the failure to vacate the judgment as against the husband must seriously affect the interests of the wife in this property."

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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and Appellant