

1967

Security Adjustment Bureau, Inc., A Corporation v. Henry E. West, Jr., Dba Skyline Air Taxi Company : Appellant's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

SECURITY ADJUSTMENT BUREAU
INC., a CORPORATION,

Plaintiff Respondent

vs.

HENRY E. WEST, JR., d/b/a

SKYLINE AIR TAXI COMPANY,

Defendant Appellant

APPELLATE

Appeal from Superior Court

Third Judicial District Court

Hon. Marshall E. [unclear]

FILED

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Register, Room 200

530 East Fifth Street

Salt Lake City, Utah

Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

SECURITY ADJUSTMENT BUREAU,
INC., a CORPORATION,

Plaintiff-Respondent,

vs.

HENRY E. WEST, JR., d/b/a
SKYLINE AIR TAXI COMPANY,
Defendant-Appellant.

Case No.

10928

APPELLANTS' BRIEF

STATEMENT OF THE KIND OF CASE

The action in the lower Court was brought by the assignee of a written contract who commenced suit against Defendant for breach of said contract and for Defendant's insufficient funds check.

DISPOSITION IN LOWER COURT

A Default Judgment was granted against Defendant in the Third Judicial District Court for Salt Lake County. The Defendant moved to set the Default Judgment aside. The

said Court, the Honorable Marcellus K. Snow presiding, denied the motion.

The Appellant-Defendant seeks to have the Default Judgment set aside and be granted opportunity to present his defense which he believes to be meritorious and legally sufficient.

STATEMENT OF FACTS

After commencement of the Plaintiff's action in the spring of 1965, Defendant engaged James A. Murphy of Salt Lake City, Utah, as his counsel. Plaintiff was represented by Robert M. McRae of Salt Lake City, Utah. McRae withdrew as counsel for Plaintiff on or about October 13, 1965, and Ephraim H. Fankhauser became counsel for Plaintiff. Murphy entered Defendant's answer to Plaintiff's Complaint about February 4, 1966.

Fankhauser served Interrogatories on Defendant about October 10, 1966. Three days later, on October 13, 1966, Murphy withdrew as counsel for Defendant and so notified Fankhauser and sent notice of his withdrawal to Defendant at Defendant's last business address, 530 East Fifth South, Salt Lake City, Utah. Defendant had, however, previously terminated his employment at that address and did not receive the notice, and had not received it or the Interrogatories prior to November 28, 1966. Plaintiff's counsel, Fankhauser, who knew that Defendant's counsel, Murphy, had withdrawn, did not send Defendant a written notice requiring Defendant to appoint another counsel or

appear in person as required by statute. U.C.A. 78-51-36 (1953).

Without further notice or communication to Defendant, E. H. Fankhauser, on or about November 16, 1966, filed a Motion to Strike Defendant's Answer and enter a Default Judgment against Defendant and a Notice of Hearing on said motion. The ground for said motion was that Defendant had not answered the said Interrogatories of October 10, 1966. Fankhauser mailed a copy of said motion and notice to 530 East Fifth South, Salt Lake City, Utah, which was the address at which Defendant had been previously only an employee, but from which Defendant had then moved and the copy of motion and notice was never delivered or forwarded to Defendant.

On November 28, 1966, the Third District Court, the Honorable Stewart M. Hanson presiding, made an order striking Defendant's answer and granting Default Judgment against Defendant. The said Judgment provides for punitive damages inasmuch as Plaintiff's Complaint prays for such damage. Neither Defendant nor his counsel were present at these proceedings and were wholly ignorant of the action at that time. Defendant engaged other counsel, Stephen M. Hadley, who after learning about the Default Judgment, on December 20, 1966, contacted E. H. Fankhauser who agreed in writing to stipulate that the Court could set the Default Judgment aside.

Defendant's counsel accordingly prepared a stipulation as per the above said agreement to set the Default aside, but on January 9, 1967, E. H. Fankhauser notified Stephen M.

Hadley that Fankhauser's client, the Plaintiff, would not allow him to so stipulate. Defendant's counsel then filed a motion to set the Default Judgment aside, which motion was heard by the Honorable Marcellus K. Snow, on May 4, 1967. The said Court denied the motion.

ARGUMENT

POINT I.

THAT LOWER COURT COMMITTED PREJUDICIAL ERROR IN NOT SETTING DEFAULT JUDGMENT ASIDE WHEN IT WAS INFORMED THAT PLAINTIFF HAD NOT DEMANDED THAT DEFENDANT APPOINT NEW COUNSEL OR APPEAR IN PERSON AS PLAINTIFF WAS REQUIRED TO DO BY A MANDATORY STATUTE WHEN PLAINTIFF KNEW THAT DEFENDANT'S COUNSEL HAD PREVIOUSLY WITHDRAWN.

Section 78-51-36 U.C.A. (1953) reads as follows:

When an attorney . . . ceases to act as such, a party to an action or proceeding for whom he was acting as attorney must before any further proceedings are had against him be required by the adverse party by written notice, to appoint another attorney or to appear in person.

The obvious intent of the statute is to prevent one party who is represented by counsel from taking unjust advantage of the other party who may believe that he is also represented by counsel when in fact he is not, or who may be

ignorant of necessary legal procedure. In other words, the statute requires the one party to notify the other prior to taking further action. There is no specific requirements as to the type or form of the notice except that it be written. Certainly this is not such an onerous burden that its neglect can be excused in view of its obvious benefit to a party who may be ignorant of his rights and proper legal procedure or who may be ignorant that he is not then represented. Moreover, such notice would be of advantage to the one giving it in that it would add some invulnerability to a Judgment obtained after giving such notice.

In the instant case it is without contradiction that the Plaintiff did not give Defendant the required notice and that Defendant was wholly ignorant of the default hearing. Defendant states in his affidavit that he in fact did not have notice of the hearing and that he had not then received or heard of the interrogatories upon which the judgment was based. In addition, Defendant has previously moved from the address to which the copies of said motion and hearing were sent and said papers were never sent or forwarded on to Defendant. Moreover, Plaintiff's counsel had received the notice that Defendant's former counsel had withdrawn more than one month previous to the sending of the copy of said motion for default judgment.

This case clearly appears to be one to which the statute was designed to apply. It is submitted that the lower court erred in not ruling that default judgment was not proper when it appeared that the Plaintiff had not complied with the above statute.

POINT II.

THAT LOWER COURT COMMITTED PREJUDICIAL ERROR IN SUSTAINING AWARD OF PUNITIVE DAMAGES IN ABSENCE OF PROOF THEREOF WHEN IT UPHELD DEFAULT JUDGMENT BECAUSE PUNITIVE DAMAGES ARE THE SAME AS EXEMPLARY DAMAGES WHICH MUST BE PROVED.

The plaintiff's Second Cause of Action includes a prayer for punitive damages based on an allegation of Defendant's fraud. Rule 55 of the Utah Rules of Civil Procedure, section (b) (2) requires the court to take proof of the value of a claim for unliquidated damages. It is submitted that attorney fees, punitive or exemplary damages, or defination of unliquidated damages. *Hurd v. Ford*, 74 Utah 46, 276 Pac. 908, requires the court to take proof of unliquidated damages.

Although there are very few cases found on this point, the Colorado Supreme Court in *Valdez v. Sams*, 307 P.2d 189, 191 (1957), stated that

Exemplary damages . . . cannot be awarded in the absence of a specific finding, based upon evidence, that the special circumstances which warrant the extraordinary remedy were in fact present.

Under the circumstances of this case, it is submitted that the rule as laid down by the Colorado Court is good law and is consistent with the rule laid down by this Court in the *Hurd* case.

POINT III.

THAT LOWER COURT COMMITTED PREJUDICIAL ERROR IN FAILING TO SET DEFAULT JUDGMENT ASIDE BASED ON DEFENDANT'S FAILURE TO ANSWER PLAINTIFF'S INTERROGATORIES BECAUSE SUCH GROUND IS TECHNICAL RATHER THAN SUBSTANTIAL.

This Court has many times stated that Default judgments should be set aside if justice requires. In *McKean v. Mountain View Memorial Estates*, 17 Utah 2d 323, 325, 411 P.2d 128 (1966), the Court stated that

it is the policy of the law to favor a trial on the merits and to afford both sides a full opportunity to present their evidence and contentions as to disputed issues so they may be disposed of on substantial rather than on technical grounds.

In this case the counsel for Plaintiff agreed to set the Default Judgment aside, but then later refused to honor his agreement on the ground that his client, the Plaintiff, would not allow him to do so. Further, it is without contradiction that Defendant's present counsel acted with reasonable dispatch to protect Defendant's rights after he was engaged by Defendant. The Plaintiff's counsel was aware that Defendant might not have received notice of the motion for Judgment and the Notice of Hearing of the same, and said counsel also knew that Defendant's former counsel had withdrawn.

It is also without dispute that Defendant had not received the Interrogatories on which the judgment was based. Thus, it would seem that such a ground for a Default Judgment is technical and not substantial and therefore is in direct opposition to this Court's avowed policy.

POINT IV.

THAT LOWER COURT COMMITTED PREJUDICIAL ERROR IN FAILING TO SET DEFAULT JUDGMENT ASIDE WHEN DEFENDANT TESTIFIED BY AFFIDAVIT THAT DEFENDANT DID NOT IN FACT HAVE NOTICE OR KNOWLEDGE OF DEFAULT HEARING.

It is uncontradicted that Defendant did not have knowledge of the notice of the Default hearing nor of the hearing itself, and that he was not represented by counsel at the time. Moreover, it is clear that Plaintiff's counsel had knowledge of these facts. Since Defendant's Affidavit stands uncontradicted the Court must conclude that notice by the Defendant was not in fact received and since an answer was previously interposed, Default Judgment was clearly improper.

CONCLUSION

The decision of the lower Court not to set the Judgment aside is manifest error and should be reversed in the inter-

ests of justice to allow the Defendant to have his day in Court and present evidence which he feels is meritorious and legally sufficient.

Respectfully submitted,

RIGTRUP, HADLEY, LIVINGSTON & NEWMAN

Stephen M. Hadley

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Salt Lake City, Utah 84102

Counsel for Appellant

of the defendant and was never returned to plaintiff's counsel thus giving rise to the presumption that defendant did, in fact, have notice. It is also uncontradicted that the Notice of Default Judgment mailed to the defendant at his last known address, 530 East 5th South, Salt Lake City, Utah was, in fact, received by defendant. The record clearly supports the action of the trial court and the judgment against the defendant was proper as well as the denial of defendants motion to set aside the judgment.

CONCLUSION

The decision of the lower Court denying defendant's Motion to Set Aside the Judgment was proper for plaintiff was under no requirement to serve notice upon defendant to appoint new counsel or in the alternative, to appear in person, for the withdrawal of his former attorney was a voluntary withdrawal, and not a withdrawal contemplated under the provisions of 78-51-36, Utah Code Annotated, 1953, and the record before the Court at the time of hearing of defendant's Motion to Set Aside the Judgment was sufficient to sustain the Judgment rendered in favor of plaintiff against defendant.

Respectfully submitted,

E. H. Fankhauser
430 Judge Building
Salt Lake City, Utah

Counsel for Respondant

of the trial court in granting the judgment against defendant and denying the Motion of the defendant to set the judgment aside.

POINT IV.

LOWER COURT DID NOT COMMIT PREJUDICIAL ERROR IN REFUSING TO GRANT DEFENDANT'S MOTION TO SET ASIDE THE JUDGMENT OF PLAINTIFF AGAINST DEFENDANT WHERE SUCH MOTION WAS BASED UPON THE AFFIDAVIT OF DEFENDANT, THAT DEFENDANT HAD NO NOTICE OR KNOWLEDGE OF THE DEFAULT HEARING.

Defendant in his Motion to Set Aside the Default Judgment of plaintiff against defendant based such motion on the failure of plaintiff to comply with the provisions of Section 78-51-36 Utah Code Annotated, 1953. The withdrawal of defendant's counsel, Mr. Murphy, was voluntary and not a withdrawal contemplated or within the meaning of the statute relied upon by the defendant in the bringing of his motion to set the judgment aside. Further, the defendant admitted in his affidavit in support of his motion that he received the notice of withdrawal of Mr. Murphy. Under these circumstances the lower court had no alternative but to deny defendant's motion absent a showing of abuse of discretion on the part of the trial court in granting the default judgment, or that the action of the trial court was not supported by the record.

It is uncontradicted that the Motion of Plaintiff to take Default Judgment against the defendant and Notice of Hearing thereon was mailed to the last known address

the answer of the defendant and entering a Default Judgment against defendant, and did so properly.

In *Tucker Realty Inc., v. Nunley*, 16 U. (2d) 97, 396 Pac. 2d 410 (1964) this court stated as follows:

“We first note the basic premise on appeal: that the Judgment is presumed to be correct, and that the burden of establishing its invalidity is upon the party attacking it. Inasmuch as no transcript of what transpired before the trial court . . . has been brought to us, it is to be presumed that the preceeding supports the Judgment.”

This court in upholding the action of the trial court in the *Tucker Realty Inc.*, case (supra) recognized that the granting of a judgment against a party solely for failure to cooperate in discovery procedure was a stringent measure. This court also recognized that the question of whether the failure to comply with the discovery procedure was wilful and such as to justify the action taken is primarily for the trial court to determine; and unless it is shown that the court abused its discretion or its action is without support the judgment should not be disturbed. The defendant has made no showing that the trial court abused its discretion under the provisions of Rule 37(d) of the Utah Rules of Civil Procedure or that its action was without support in granting judgment to the plaintiff inasmuch as no transcript of what transpired before the trial court on November 29, 1966, has been brought before this court. Absent such a showing the judgment on appeal should not be disturbed. The record before the court clearly sustains the actions

visions of Rule 55(b)(2) of the Utah Rules of Civil Procedure were not applicable, as contended by defendant.

POINT III.

THE LOWER COURT DID NOT COMMIT PREJUDICIAL ERROR IN REFUSING TO SET ASIDE THE DEFAULT OF PLAINTIFF AGAINST DEFENDANT FOR DEFENDANT'S FAILURE TO ANSWER INTERROGATORIES PROPOUNDED BY PLAINTIFF AS PRESCRIBED BY THE UTAH RULES OF CIVIL PROCEDURE.

Defendant urges under point 3 of his brief that the lower court committed error in failing to set the Default Judgment against defendant aside in that the basis upon which such judgment was granted is technical rather than substantial. Nowhere in the pleadings certified for record, more particularly defendant's Motion to Set Aside the Default Judgment, has defendant raised the issue which he seeks to raise here. As a general rule, grounds of defense or opposition not asserted and relied on in the lower court will not be considered or given any weight on review.

It is undisputed in the record that the defendant was served properly with Interrogatories under Rule 33 of the Utah Rules of Civil Procedure and that defendant failed to answer them within the time prescribed. Further, defendant in his Motion to Set Aside the Default Judgment proceeded under section 78-51-36 of the Utah Code as opposed to Rule 60 (b) of the Utah Rules of Civil Procedure. The trial court proceeded under Rule 37(d) of the Utah Rules of Civil Procedure in striking

damages.

As a general rule, punitive or exemplary damages are awarded in addition to actual or compensatory damages and are in nature a punishment for the wrong done by the defendant, and in cases of fraud or deceit, punitive or exemplary damages can be assessed in addition to actual damages. (24 Am Jur. Fraud and Deceit S 222). Awards of punitive damages have been allowed and recognized by the Utah Courts ,and it is only when an award of punitive damages is disproportionate to the award of actual damages will the court refuse to sustain such an award. (*Nance et al v. Sheet Metal Workers International Association*, 12 U. (2d) 233, 364 P. 2d 1027)

The defendant does not contend that the award of punitive damages was disproportionate to the claim of plaintiff in its Second Cause of Action. Nor has defendant shown, in the record before the Court, that the lower Court did not comply with law in assessing damages against defendant. In a case of a Default Judgment where the action is for unliquidated damages, presumption on appeal, in absence of showing to the contrary, is that the Court below complied with law and properly assessed the damages. (*Walker Brothers v. Continental Insurance Co. of New York*, 2 Ut. 331). The lower court proceeded properly under Rules 55(a)(1) and 55(b)(1) of the Utah Rules of Civil Procedure in awarding punitive damages against defendant in that the claim of plaintiff was for a sum certain and was supported by written instruments. Under these circumstances the pro-

POINT II.

THE LOWER COURT DID NOT COMMIT PREJUDICIAL ERROR IN SUSTAINING THE JUDGMENT OF PLAINTIFF FOR PUNITIVE DAMAGES WHEN IT DENIED DEFENDANT'S MOTION TO SET ASIDE THE JUDGMENT OF PLAINTIFF AGAINST DEFENDANT.

Defendant, for the first time in the proceedings of the case before the court, seeks to attack the judgment against defendant, pursuant to plaintiff's Second Cause of Action, specifically the award of punitive damages, as being improper. Defendant did not raise this issue in his Motion to Set Aside the Judgment of plaintiff against defendant, nor was this issue raised in defendant's Answer to plaintiff's Complaint. Thus it would appear that the defendant waived this particular issue under rules 8(c) and 12(h) of the Utah Rules of Civil Procedure, and under familiar principles of appellant review, a point or issue may not be raised for the first time on appeal. (*Tigeson vs. Magna Water Co.*, 13 U. (2nd) 397, 375 P. 2nd 456.)

Defendant contends Rule 55(b)(2) of the Utah Rules of Civil Procedure requires that the Court must take proof of the value of a claim for unliquidated damages; and that punitive or exemplary damages are within the definition of unliquidated damages. As authority for this position defendant cites the Utah case of *Hurd v. Ford*, 74 Utah 46, 276 pac. 908. A reading of the case cited by defendant in support of his contention reveals that the rule set down by the Utah Spreme Court applies to actions for reasonable value of attorney's services and has no application to an award of punitive or exemplary

The action before the Court was commenced against defendant on or about June 21, 1965. Numerous extensions were afforded to defendant, by and through his then counsel, Mr. Murphy, by both plaintiff's attorneys, Mr. McRae and Mr. Fankhauser, in which to file his answer to the Complaint, of plaintiff. The Answer of defendant to plaintiff's Complaint was filed by Mr. Murphy on or about February 7, 1966, only after Mr. Murphy was given ample opportunity to examine all documents in writing upon which plaintiff's action was based. The withdrawal of Mr. Murphy came at precisely the time plaintiff attempted to put the case at issue and to reach a termination of the long pending litigation by serving Interrogatories upon defendant. This situation clearly appears to be one that would come within the contemplation of the Utah Court in deciding the *VanCott v. Wall* case (*Supra*) by refusing to give the statute the construction contended by the defendant and stating,

“... It might be made the means of serious mischief if it could have such a construction.”

It is submitted that the lower Court did not error in refusing to grant defendant's Motion to Set Aside the Judgment of plaintiff against defendant where such Motion was based upon plaintiff's noncompliance of Section 78-51-36 U.C.A. (1953) in that the withdrawal of defendant's counsel was voluntary and the provisions of the quoted statute had no application to this case.

to practice in the Courts and does not apply to situations where a voluntary withdrawal of counsel, for any reason occurs.

In a later California case, *De Recat Corp. v. Dunn*, 242 Pac. 936, 42 ALR 1343, the Court quotes the New York law which reads virtually the same as the Utah law in that the need for advising the defendant to appoint new counsel only is required where the attorney shall cease to act or shall be put out on the role of attorney. In other words, the fact that the attorney withdraws from the case in point but is not disqualified from practicing law within the state, does not require notice on the part of plaintiff to the defendant to appoint new counsel or to appear in person.

In a New York case, *Hendry v. Hilton*, 127 N.Y.S. 2d 454, in which the attorney was discharged by the client, the New York Court made the following statement in discussing the New York statute, which is identical in most respects to the Utah statute, to-wit:

“That section (240) does not relate to the removal or suspension of any attorney from the case, or his disability to proceed therein, when such removal, suspension or disability is caused by the voluntary act of the attorney or client or both. This section relates solely to a removal, suspension or disability which is involuntary, which is personal to the attorney, and which effectually prevents him from continuing to act — assuming his willingness to continue. It connotes a force majeure, . . .”

apply where an attorney merely withdraws from a case, and does not wholly cease the practice of law. (Emphasis added.) The Supreme Court discusses the section of law in question in the VanCott case and also examines decisions of other states dealing with identical sections of their own laws. The Utah Supreme Court, in quoting from a Michigan case, said:

“In *Coon v. Plymouth Plank Road Co.*, 32 Mich. 248 it was contended, as it is here, that the withdrawal of the attorney took from the court the right to proceed with the trial of the case. Mr. Justice Cooley, after stating the contention of the appellant, and after setting forth the Michigan statute, which is like ours, in the course of the opinion said:

‘We do not understand this to apply to a case where a practicing attorney for any reason declines to go on with a particular case while still continuing in practice. It might be made the means of serious mischief if it could have a construction. The plain meaning of the statute is to provide for cases in which the attorney or solicitor, by reason of death, disability, or other cause, has ceased to practice in the court. His refusal to proceed in a particular case is not ceasing to act as such attorney or solicitor,’” (Emphasis added).

The court clearly indicates that the statute in question is to apply to situations in which the attorney, by reason of death, disability or other cause, has ceased

counsel for plaintiff to take any action with respect to giving notice to the defendant to appoint another attorney where the attorney for the defendant had withdrawn from the case voluntarily without disqualification or disability.

Section 78-51-36 U.C.A. (1953) provides as follows, to wit:

"Notice to appoint successor.—When an attorney dies or is removed or suspended or ceases to act as such, the party to an action or proceeding for whom he was acting as attorney, must, before any further proceedings are had against him, be required by adverse party by written notice to appoint another attorney or to appear in person."

Defendant does not dispute the fact that the withdrawal of Mr. Murphy was voluntary and not a result of death, or the removal or suspension of Mr. Murphy from the rolls as an attorney, or that Mr. Murphy ceased to act or practice as an attorney at the time of the withdrawal. Therefore, the withdrawal of Mr. Murphy does not come within the provisions of the statute in question and the requirement of notice contained therein did not attach to plaintiff as contended by the defendant.

In an early Utah case, *VanCott, et al, v. Wall*, 53 U. 282, 178 P. 42, the Utah Supreme Court in considering a case in which defendant fired his attorney and directed him to withdraw from the case, stated that *the provisions of the above quoted section of the Utah Code did not*

ample opportunity at that time to confer with his client, the plaintiff, concerning the request of Mr. Hadley.

Plaintiff's attorney, E. H. Fankhauser, notified defendant's attorney, Stephen M. Hadley, on January 9, 1967, by letter that he would be unable to stipulate to the setting aside of the Default Judgment to plaintiff against defendant. Mr. Hadley then filed a Motion to Set Aside the Default Judgment on plaintiff against defendant, on or about January 12, 1967. This Motion was not noticed for hearing by defendant until May, 1967.

Defendant admits receiving Notice of the Withdrawal of his counsel, James A. Murphy, the Notice of Withdrawal having been mailed to defendant at 530 East Fifth South, Salt Lake City, Utah, the same address to which all future Notices were mailed by plaintiff. (J Affidavit of defendant paragraph No. 1.)

ARGUMENT

POINT I.

THE LOWER COURT DID NOT COMMIT PREJUDICIAL ERROR IN REFUSING TO GRANT DEFENDANT'S MOTION TO SET ASIDE THE JUDGMENT OF PLAINTIFF AGAINST DEFENDANT UNDER THE PROVISIONS OF CHAPTER 78-51-36 UTAH CODE ANNOTATED, 1953 AS AMENDED.

It is the contention of plaintiff-respondent that the only issue to be decided upon appeal is whether or not the provisions of Section 78-51-36 U.C.A. (1953) required

tiff or plaintiff's counsel, after such mailing to the last known address of defendant at 530 East Fifth South, Salt Lake City, Utah. That the Notice of Hearing of the Motion to Strike Defendant's Answer and enter a Default Judgment against defendant was in fact subsequently forwarded to the defendant. (f. Motion and Judgment by Default and Notice and mailing certificate therein.) (g. The Order and mailing certificate contained therein.)

Defendant engaged other counsel, Stephen M. Hadley, who contacted plaintiff's counsel, E. H. Fankhauser, on or about December 6, 1966, with regard to the Default Judgment entered against defendant. Mr. Hadley represented to plaintiff's counsel, E. H. Fankhauser, that he had been contacted by the defendant with regard to the Judgment entered against defendant by plaintiff and that he was inquiring as to the nature and extent of said action. Mr. Hadley represented to plaintiff's counsel, at that time, that he did not know if he would represent the defendant and would notify plaintiff's counsel at some future time. Mr. Hadley, as defendant's attorney, again contacted plaintiff's attorney, by letter, dated December 20, 1966, requesting that plaintiff's attorney stipulate to the setting aside of the Default Judgment of plaintiff against defendant. Defendant's attorney then assumed that plaintiff's attorney agreed in writing to stipulate to the setting aside of such Default Judgment; however, defendant's attorney was mistaken in that plaintiff's attorney, E. H. Fankhauser, had not had

ing, to commence suit against defendant for non-payment of such purchases and repairs to defendant's airplanes; and for a check drawn by defendant, payable to plaintiff's assignor, drawn against insufficient funds.

DISPOSITION IN LOWER COURT

A default Judgment was granted plaintiff against defendant in the Third Judicial District Court in and for Salt Lake County for defendant's failure to answer Interrogatories propounded and served upon defendant by plaintiff in compliance with the Utah Rules of Civil Procedure. The defendant, pursuant to provisions of Chapter 78-51-36, filed a Motion to have the Default Judgment against defendant set aside, and the Third District Court in and for Salt Lake County, the Honorable Marcellus K. Snow presiding, denied defendant's Motion.

The appellant-defendant appealed from the Order of the said Court denying defendant's Motion to Set Aside the Judgment of plaintiff against defendant.

STATEMENT OF FACTS

The respondent is not entirely in agreement with the Statement of Facts set forth in the appellant's brief. The Motion of plaintiff filed on or about November 16, 1966, to Strike Defendant's Answer and enter a Default Judgment against defendant and Notice of Hearing on said Motion was mailed to defendant and his former attorney, Mr. Murphy, and was never returned to plain-