1983

Doris C. Rucker v. Dale E. Rucker : Appellant's Reply Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

DORIS C. PUCKER, Plaintiff-Respondent,	)	
vs.	)	Case No. 18991
DALE E. PUCKER, Defendant-Appellant.	)	

APPELLANT'S REPLY BRIEF

Appeal from Judgment and Decree and the adverse ruling on Appellant's Motion to set aside judgment on the Fourth Judicial District in and for Utah County

Honorable George E. Ballif, Judge

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CASES CITED

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DALE E. RUCKER, :

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APPELLANT'S REPLY BRIEF

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ARGUMENT

POINT I

CASES CITED IN POINT I OF RESPONDEENT'S BRIEF ARE DISTINGUISHABLE FROM THE PRESENT CASE AND SHOULD NOT BE RELIED ON AS CONTROLLING PRECEDENTS IN THE INSTANT MATTER.

Respondent attempts to show that Appellant is invoking Rule 60(b) without requisite good faith and clean hands. To do this Appellant cites Chrysler vs. Chrysler, 303 P.2d 951, 14 Utah 2d 52 (1962) for the definition of "good faith and clean hands"; Warren vs. Dixon Ranch Co., 260 P.2d 741, 123 Utah 416 (1953), for the proposition that equitable issues also come into play in deciding Rule 60(b) issues; and Airkem Intermountain Inc. vs. Parker, 513 P.2d 429, 30 Utah 2nd 65 (1973) to show that Appellant did not use due diligence. Respondent's cases are distinguishable

from the present case and thus have no stare decisis value in the present case.

Respondent relies on Chrysler, supra, for the definition of "bad faith and unclean hands" when seeking relief under Rule 60(b). She then claims that the instant case is similar to Chrysler. However the Chrysler case is not on point in the following particulars. In that case, Appellant Chrysler initiated a divorce action in Utah. In the instant action Appellant husband is, and always has been, the Defendant.

After Appellant Chrysler initiated his divorce proceeding, he was served with an Order to Show Cause by his wife. He then fled to Nevada, established residency, and initiated divorce proceedings there. In the instant action, Appellant has never fled the state to avoid service, nor has he attempted to establish residency in another state so as to initiate a divorce action in a foreign jurisdiction.

In Chrysler, the Utah Supreme Court stated:

> "When he found a contest there, <Utah> he fled from it and has tried by devious conduct to circumvent the effects of the action he commenced, and to defeat the jurisdiction of the Court from which he now seeks consideration." 303 P.2d at 997

Appellant Rucker has never tried to defeat the jurisdiction of the Court.

At the hearing upon the Motion to set aside the judgment neither Appellant Chrysler nor his Nevada attorney appeared for cross-examination upon the facts alleged in their Affidavits.

ever though the trial judge denied the Motion on the basis of the showing made, he suggested that should Chrysler show his good faith by setting aside the Nevada divorce and then filing another Motion, the Court would entertain it. Chrysler, however, spurned the Court's suggestion and elected to stand upon the Order denying the Motion and to attack it by taking an appeal. In the instant case, Appellant appeared in person at his Motion to set aside judgment, and never showed bad faith by filing a foreign divorce action.

The Chrysler Court stated that a prime requisite precedent to granting Rule 60(b) relief is that the movant demonstrate that he comes before the court with clean hands and in good faith. That Court then reviewed Appellant Chrysler's actions and declared that his conduct fell outside the bounds of good faith. Appellant Rucker on the other hand simply relied on information from two different officers of the Court.

Respondent makes much of an alleged gas turning off incident in trying to establish Appellant's unclean hands. (Page 6 Respondent's Brief) Two points are to be made concerning this attempt. The first being that this allegation has never been proved in any adversial hearing. It is a self-interested statement the truth of which has never been proved. Secondly, the alleged incident has absolutely nothing to do with the clean hands doctrine espoused in Rule 60(b). It does not show bad faith by the Appellant in requesting relief under Rule 60(b).

Respondent also makes much of her sworn testimony [illegible] knowledge concerning Appellant's knowledge of the new trial [illegible]. However, Appellant has never had the opportunity to cross-examine the Respondent in an adversarial setting, nor have these [illegible] serving statements been proven in any adversarial hearing. Appellant has steadfastly denied that he knew, and has filed affidavits and other material in support of that denial.

Respondent would also have this Court believe that Warren vs. Dixon Ranch Co., supra, is directly on point. That suit was one to quiet title. On May 26, 1951, Appellant Arnold Dixon was served with process individually and as a Director and Trustee of the Dixon Ranch Company. He failed to answer or notify the stockholders of the pending suit, and a default was entered against him and the company on July 11. Appellant Paul Dixon, another stockholder first received notice of the litigation on August 15, through publication of summons upon another Defendant. He then employed counsel and filed an Answer and Counterclaim on September 13, sixty-four days after default had been entered. In the Warren case, the Director and Trustee was served with process and failed to notify the other stockholders. In the present case Appellant states in his sworn Affidavit that he never received notice of the change in trial dates. In Warren Appellant filed an Answer sixty-four days after default had been entered. In the present case the Appellant moved the Court to set aside the Decree ten days after it had been rendered.

Respondent contends that Warren propounds that equities come into play when deciding Rule 60(b) issues. Appellant agrees and states that it was inequitable for the lower court to deprive him of property by judicial decree when, through no fault of his own, he was not present and was unable to defend his interests in court.

Finally, Respondent relies on Airkem, supra, toshow that Appellant did not use due diligence in ascertaining when his trial date was. In that case the Court ruled that the Defendant should have been responsible for getting in touch with his attorney, and his failure to do so did not show reasonable diligence. In the present case Appellant contacted two different attorneys who both told him his court date was on January 5, 1983. Respondent claims through sworn testimony and knowledge that Appellant knew of the new court date; yet Appellant's sworn Affidavit states that he never received such notice, and that he did not know of the new court date.

CONCLUSION

In the Chrysler case the totality of Appellant's action showed a lack of good faith and clean hands. In the instant case, Appellant relied on two attorneys' statements as to when his court date would be. In Warren, the Director and Trustee of a company received service of process and failed to act, or notify the stock holders of the impending action. In the instant case, Appellant states in a sworn Affidavit that he never received notice of the change in court dates. Appellant also pleads equity in that his

property has been taken from him without an opportunity to be heard in the matter. Finally, Appellant pleads that he used due diligence according to the Airkem, standard in that he contacted two different attorneys to ascertain his court date.

Respectfully Submitted,

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MAILING CERTIFICATE

Mailed 2 copies of the foregoing Appellant's Reply Brief to Richard L. Maxfield, Attorney for Respondent, 60 East 100 South, Suite 100, Provo, Utah 84601, this 19th day of August, 1983.

Diane Peabody