1983

Joseph Mascaro And Shely Taylor v. John S. Davis, Charley Joseph, Curtis Baum, Individuals, and Chatillion Inc., A Utah Corporation : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

JOSEPH MASCARO and SHELBY TAYLOR,	:	
Plaintiffs-Appellants,	:	Case No. 19024
v.	:	
JOHN S. DAVIS, CHARLEY JOSEPH, CURTIS BAUM, individuals, and CHATILLION INC., a Utah corporation,	:	
Defendants-Respondents.	:	

APPELLANTS' BRIEF

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APPELLANTS' BRIEF

NATURE OF THE CASE

Appellants obtained a default judgment against respondents Davis and Joseph which was then later declared to have been satisfied as to the claims of appellant Shelby Taylor by reason of the transfer of certain property, notwithstanding the fact that several conditions precedent agreed to by the parties had not been fulfilled, and then modified and otherwise set aside as to appellant Mascaro notwithstanding the fact that two prior motions to set aside the default judgment based on the same grounds had been denied by two other district court judges.

DISPOSITION OF THE CASE IN THE LOWER COURT

A default judgment was taken against respondent-defendants John S. Davis and Charley Joseph in favor of appellant-plaintiff Joseph Mascaro for the sum of $205,869.16

and in favor of appellant-plaintiff Shelby Taylor for the sum of $85,706.00.

Respondents Davis and Joseph thereafter brought a motion to set aside the default judgment on January 21, 19[illegible] before the Honorable James Sawaya. This motion was denied by Judge Sawaya, whose order is dated February 13, 1981.

After respondent Charley Joseph obtained new counsel, he brought another motion to set aside the default judgment, which motion was denied by the order of Judge Dean Conder dated January 28, 1982.

After again changing counsel, respondent Charley Joseph brought a motion for a Rule 62(h) stay of execution which was granted by Judge Dee's order signed March 16, 1982.

After a settlement conference before Judge Sawaya involving all the parties to the action, respondent Charley Joseph brought a motion before Judge Dee to enforce the settlement agreement, which motion was granted by Judge Dee's order and judgment signed November 5, 1982.

Respondent Charley Joseph next brought a third motion to set aside appellants' default judgment, which motion was heard before the Honorable David Dee on January 5, 1983. Judge Dee modified in part and set aside in part appellants' default judgment and in the same ruling held that respondent Charley Joseph did not participate in and was not responsible for any embezzlement of funds from the partnership.

RELIEF SOUGHT ON APPEAL

Appellants seek a reversal of Judge Dee's order modifying in part and setting aside in part appellants' default judgment, a reversal of Judge Dee's order enforcing a settlement agreement and a reversal of Judge Dee's order staying appellants from executing against respondent Joseph on their default judgment.

STATEMENT OF FACTS

Partnership Formation and Initial Transactions. Sometime prior to April 1978, appellant Joseph Mascaro entered into an informal partnership with respondent Charley Joseph for the purpose of obtaining and developing real property. On or about April 1, 1978, the Mascaro-Joseph partnership obtained an option from appellant Shelby Taylor to purchase approximately eighteen acres of land in Lehi, Utah County, State of Utah, for the sum of $96,000.00. (Davis June 1981 Deposition, p. 19, R. 2.)

On September 11, 1979, the Mascaro-Joseph partnership having found a buyer for the Lehi property, simultaneously exercised its option with Taylor and sold that property along with some other land to the new buyer, defendant Chatillion, Inc., for the sum of $140,914.09 in cash and an agreement to deed to the partnership eight lots worth $30,000 each in Plain City, Utah. (Joseph June 1981 Deposition, p. 18, R. 4.)

Conversion of Partnership Funds by Davis and Joseph. The funds received from Chatillion, Inc., which was represented

at all times by its major shareholder and president, defendant Baum, were taken by respondent Davis, the attorney for the Mascaro-Joseph partnership, and placed in his trust account. (Davis June 1981 Deposition, pp. 58-59.) Thereafter, without the knowledge or approval of appellant Mascaro, respondent Joseph obtained from Davis $38,000.00 of the partnership funds and converted said funds to his own use. (Joseph September 1981 Deposition, pp. 8-9 R. 165.) Attorney Davis thereafter withdrew from his trust account the remainder of the funds and converted them to his own use. (R. 136, 165-166.)

Defrauding of Joseph Mascaro. Both Charley Joseph and John Davis continued to represent to appellant Mascaro that the funds from the Chatillion transaction were in Davis' trust account and would be disbursed to the partnership after the transaction had been completed and Chatillion had tendered the promised real property. Davis, June 1981 Deposition, pp. 58-59.)

Appellant Mascaro made repeated requests to respondents Joseph and Davis for an accounting of the funds received, but such requests were uniformly denied. (R. 5, 47-48.) Even after the default judgments against Joseph and Davis had been entered and the initial effort to set them aside had been denied, both Davis and Joseph claimed in their depositions that to their knowledge the funds received by the partnership were in the trust account of respondent Davis. Both respondents Davis and Joseph continued to claim that they had not individually received any funds from the trust account. (R. 136.)

Discovery of Conversion. After the June depositions of John Davis and Charley Joseph, appellants were able to obtain an order from the court allowing the discovery of Davis' trust account. That discovery disclosed that there were no funds in the account and there had been none since before the filing of the lawsuit. (R. 119, 136.) Thereafter in the September deposition of Charley Joseph, his memory refreshed by seeing copies of two checks from his attorney Davis' trust account made out to him as payee for the sum of $18,000.00 and $20,000.00, Joseph admitted that he did receive $38,000.00 from the funds received by the partnership (Joseph September 1981 Deposition, pp. 8-9, R. 165) and that the distribution of this sum to him was done without authority from or the knowledge of his partner, Joseph Mascaro. (Joseph September 1981 Deposition, pp. 18-19.)

The remaining approximately $100,000.00 of funds had been embezzled by John Davis. (R. 136, 165-166.)

The Obligation To Shelby Taylor. The agreement between appellant Shelby Taylor and the Mascaro-Joseph partnership was that the cash proceeds from the sale of the Lehi property would be used to purchase some income producing property for appellant Shelby Taylor. After the receipt by the Mascaro-Joseph partnership of the approximately $140,000.00, Joseph Mascaro proceeded to attempt to fulfill the partnership's obligations to Shelby Taylor. Some income producing property acceptable to Taylor was located and Joseph Mascaro

paid in excess of $10,000.00 of his own monies as a down-payment on this property. (Davis June 1981 Deposition, pp. 37-38; Joseph September 1981 Deposition, pp. 17-18.) The funds previously received by the Mascaro-Joseph partnership had been specifically set aside to repay Joseph Mascaro the sums that he had put forward and to make the balance of the payments on the property. Due to what can only be characterized as an embezzlement from the partnership by respondents Davis and Joseph, no such funds were available. Therefore, the income property for appellant Taylor was foreclosed on and the funds invested by appellant Mascaro out of his own pocket were lost. (Davis June 1981 Deposition, p. 38.)

Commencement of Litigation. On May 1, 1980, appellants Mascaro and Taylor filed a complaint in the above-entitled action; (R. 2-9) and on June 5, 1980 a default judgment against respondents Davis and Joseph was signed by District Judge Bryant H. Croft.

On February 6, 1981, respondents Davis and Joseph brought a motion to set aside the default judgment which was heard by the Honorable James S. Sawaya. This motion was denied by Judge Sawaya's order dated February 13, 1981. (R. 89.)

After obtaining new counsel (by reason of an order of the court requiring him to do so), respondent Joseph again brought a motion to vacate the default judgment, which was heard this time by the Honorable Judge Dean E. Conder. (R. 163-164.) This motion to vacate the default judgment was

likewise denied by Judge Conder with an order dated January 28, 1982. (R. 245.)

Ruling by Judge Dee on a Motion For Stay Of Execution. On February 19, 1982, respondent Charley Joseph brought a motion for a Rule 62(h) stay of execution on the default judgment which was heard before the Honorable Judge David Dee. (R. 258-259.) Over the objections of appellants (R. 348-355), on March 16, 1982 Judge David Dee signed an order which included the following language:

> 3. This court retains continuing jurisdiction over this case.
>
> 4. Although this case has been brought in the posture of a debt owing, as between Joseph Mascaro and Charley Joseph, it is, in fact, more correctly viewed as a dissolutionment of their partnership.
>
> 5. That this court, therefore, intends to treat the matter as a dissolution of the partnership, intending to become fully appraised of both the partnership debts and the partnership assets.
>
> 6. That this court intends to require payment of all legitimate partnership debts out of the partnership assets and to divide the partnership profits equally among the partners. Therefore, all partnership assets acquired by the plaintiffs and Charley Joseph are to be preserved until dispersed by order of this court.
>
> 7. This court views that the embezzlement of approximately $100,000.00 by attorney John S. Davis to be crux of this dispute.
>
> 8. That as John S. Davis was the attorney for the partnership at the time of this embezzlement, each partner will share equally what loss is realized from said embezzlement after John Davis' assets had been exhausted through counsel's efforts to execute on the judgment against him. (R. 359-360.)

This order signed by Judge Dee had the effect of completely changing the posture of the case and virtually lifting the judgment against respondent Charley Joseph.

Pretrial Settlement Conference. On May 11, 1982, a pretrial settlement conference was held before the Honorable James S. Sawaya. (R. 402.) At this settlement conference, defendants Curtis Baum and Chatillion, Inc. agreed to tender to the Mascaro-Joseph partnership eight lots of real property in Plain City, Utah. Appellant Taylor agreed to accept four of the eight lots in full satisfaction of his judgment, provided certain improvements (i.e., streets, curb and gutter, etc.) were installed by Baum and Chatillion and provided that evidence could be produced that the lots in question were selling for cash and in an amount of at least $30,000.00 per lot. Appellant Mascaro agreed to accept two of these lots in partial satisfaction of his judgment based on the same conditions. The final two lots were to be held in escrow with the court pending a resolution of the remainder of the judgment against respondent Joseph. Defendants Baum and Chatillion, Inc. were required by the settlement agreement to install the required improvements and provide documentary evidence of sales in the area. (R. 522-525.)

Judge Dee's Ruling Enforcing Settlement Agreement. The required improvements were never made. When documentation on sales of adjacent lots was produced, it showed that several lots in the area had been traded and bartered. There was,

however, no evidence of any lots being sold for cash. (R. 524-525.) In the meantime, the eight lots were tendered into court by defendants Baum and Chatillion. As the appellants did not believe that the property tendered by Baum and Chatillion, Inc. could have been sold for $30,000.00 per lot in cash, appellants refused to accept said lots as satisfaction of their judgment.

On November 5, 1982 Judge David Dee signed an order enforcing a settlement agreement in the above-entitled matter which required that appellant Taylor accept as complete satisfaction of his judgment four of the lots, and requiring that appellant Mascaro, in partial satisfaction of his judgment, accept two of the lots. (R. 579-586.) This order was signed notwithstanding the fact that the improvements were never made as required and that the lots did not have a proven cash value of $30,000.00 each. Defendant Chatillion, Inc. is now in bankruptcy and the lots in question are tied up in that proceeding.

Joseph's Third Motion to Vacate Default Judgment. On January 5, 1983, respondent Joseph for the third time brought a motion before the court to vacate the default judgment against him. (R. 482-487.) This motion was also heard by the Honorable Judge David Dee. Judge Dee then signed an order modifying in part and setting aside in part the default judgment. The order by its language eliminated the remainder of appellants' default judgment as against respondent Joseph.

The court determined that the claims of appellant Taylor had been fully and completely compromised and settled by the transfer of the four lots, and therefore Taylor's action was dismissed with prejudice or otherwise declared satisfied, even though to this date appellant Taylor has never personally received any of the lots, regardless of their value, nor received any other consideration for his judgment. The order further had the effect of determining that respondent Joseph did not participate in the embezzlement of the funds, despite the fact that the only evidence before the court was to the contrary. The order did, however, attempt to compensate Joseph Mascaro for the more than $10,000 he paid out of pocket as well as for the $38,000.00 taken by Charley Joseph from the partnership by granting to Mascaro the two said lots. The remainder of his judgment as against respondent Joseph was lifted. (Judge Dee's Order Not in Record.) Thus, the case has been fully ruled upon as to every claim, either by a judgment or by a dismissal, and the case is ripe for appeal.

ARGUMENT

POINT I

JUDGE DEE ERRED IN GRANTING DEFENDANT-RESPONDENT CHARLEY JOSEPH'S MOTION TO VACATE AND SET ASIDE THE DEFAULT JUDGMENT BECAUSE THE SAME MOTION, BASED ON THE SAME ARGUMENTS, HAD BEEN DENIED ON TWO PREVIOUS OCCASIONS BY OTHER DISTRICT COURT JUDGES

It is well-established law in the State of Utah that one District Court Judge may not overrule the rulings of

another District Court Judge. State v. Morgan, 527 P.2d 225 (Utah 1974); Peterson v. Peterson, 530 P.2d 821 (Utah 1974); In re Estate of Mecham, 537 P.2d 312 (Utah 1975); Madsen v. Salt Lake School Board, 645 P.2d 658 (Utah 1982). Section 78-7-19, Utah Code Ann. (1953), specifically provides that:

> If an application for an order, made to a judge of a court in which the action or proceeding is pending, is refused in whole or in part, or is granted conditionally, no subsequent application for the same order can be made to any other judge, except of a higher court; . . .

The statutory law and case law of this state are consistent in holding that a District Court Judge may not overturn the rulings of another District Court Judge.

A. The Claim That Attorney John Davis Perpetuated Fraud On The Court Was Argued By Attorney Dale Potter In Defendant Joseph's Second Motion To Vacate The Default Judgment.

Judge Dee in his order modifying in part and setting aside in part the default judgment against Charley Joseph stated that:

> This court having determined that the default judgment previously entered in this matter on June 5, 1980 was entered as a result of the intentional, deliberate and malicious fraud of attorney John S. Davis, an officer of the court, which fraud so completely thwarted the process of justice that the default judgment, in fairness and good conscious, should not be permitted to stand; . . .

That claim of respondent Joseph that his attorney, respondent Davis, intentionally perpetuated a fraud on the court was argued by respondent Joseph's second attorney, Dale

Potter, in Joseph's second motion to vacate default judgment on October 14, 1982. In his motion dated September 27, 1981, attorney Potter argued on behalf of Joseph as follows:

> This motion is made on the ground that the default judgment herein was taken against Joseph through the fraud, misconduct and intentional negligent and violation of fiduciary duty by Davis, Joseph's attorney, whose actions of embezzlement placed his interest in opposition to Joseph's. As a result of this fraud perpetuated by co-defendant Davis, defendant Joseph has been denied a fair opportunity to have his position heard on the merits.

In his supporting memorandum attorney Potter stated as one of his three major points that:

> The Judgment Was Obtained By The Fraud Of John Davis, An Agent To Joseph. Mr. Joseph Was Unaware And Did Not Share In Davis' Fraud Or Negligence.

This claim, which was argued to and considered by Judge Conder, is exactly the same claim which was argued by attorney Joseph Tesch in respondent Joseph's third motion to vacate the default judgment. In his memorandum in support of the motion to set aside the default judgment, attorney Tesch stated his point as follows:

> Attorney John S. Davis in his capacity as an officer of the court and as a fiduciary, deliberately perpetrated fraud on the court which justifies relief under Rule 60(b)(7) U.R.C.P.

Judge Conder in the hearing in which he denied respondent Joseph's motion to vacate had heard the arguments of attorney Dale Potter that respondent Charley Joseph had only recently learned of the embezzlement by John Davis of the

partnership funds. It had been further argued that Davis' conduct created a conflict of interest between John Davis and Charley Joseph which was the reason why attorney Davis had never answered the complaint and why he had waited so long to make a motion to set aside the default judgment. (Transcript of January 18, 1982 hearing.) Judge Conder, however, asked attorney Potter:

> Now, what has the plaintiff done that has prevented Mr. Joseph from getting his day in court? What you're saying is that his attorney, that is, Mr. Joseph's own attorney was the one that perpetuated the misrepresentation or fraud on Mr. Joseph and failed to file. Isn't that malpractice? Isn't that where the attorney is liable?
>
> (Transcript of January 18, 1982 hearing, pp. 53-54.)

Judge Conder refused to consider what attorney Potter considered as new evidence since the three month time period had passed. (Transcript of January 18, 1982 hearing, p. 56..)

Judge Conder, after listening to the arguments and reading the memorandum submitting by counsel, stated his ruling from the bench as follows:

> You knew the lawsuit was pending in 1980, in January or February of 1980, and I don't remember which. And here it is 1982 and that's almost two years that have gone by since that time. I understand that you have had negotiations and tried to work it out. But I have a very difficult time because the law says, "Let's put these things to rest within a certain time element" and sets up statutes of limitation and says in a lawsuit it can be brought and can't even be brought after certain times because of this. We say that you can't bring a motion for mistake, inadvertence, surprise, or excusable neglect or newly discovered evidence or fraud after three months after a judgment has been entered.

> And it seems to me those are all the elements that we're talking about here. And that he knew or should have known that Mr. Davis was not doing the job for him that he thought he was. He was relying upon negotiations taking place without protecting his lawsuit that was pending at that time. He knew the lawsuit was pending and then the fact that the court has already ruled on it I have some grave difficulty.
>
> The only thing I can do is deny the motion.
>
> (Transcript of January 18, 1982 hearing, pp. 57-58.)

In addition to the claim that Davis committed fraud on the court, Judge Dee in his order modifying in part and setting aside in part the default judgment stated as his second reason for setting aside the judgment:

> It being determined that defendant Charley Joseph was not a participant in the fraud perpetrated on the court by attorney John S. Davis, but rather was a victim thereof, and by reason of said fraud of attorney John S. Davis, was fraudulently prevented from asserting otherwise meritorious defenses and claims and litigating the issue on the merits; . . .

This claim that defendant Joseph did not participant in attorney Davis' fraud was also made by attorney Potter in respondent Joseph's second motion to vacate the default judgment. However, Judge Conder, in his ruling, specifically ruled that Charley Joseph "knew or should have known" that attorney Davis was not protecting his interests. Pursuant to the court's ruling, it is reasonable to assume that, even if Charley Joseph did not participate in the fraud, his inaction certainly allowed the fraud to take place.

B. Judge Conder Only Consented To Have Judge Dee Hear Defendant Joseph's Motion To Vacate Default Judgment If Judge Dee Found That It Was Brought On Different Grounds Than The Motion To Vacate Default Judgment Heard And Ruled Upon By Judge Conder.

Judge Dee's order modifying in part and setting aside in part default judgment states that:

> The Honorable Judge Conder having previously denied defendant Charley Joseph's motion to set aside default, but having subsequently for reasons of judicial economy relinquished all authority and jurisdiction in this matter; . . .

It should be noted that there is nothing in the record to support the foregoing portion of Judge Dee's order that Judge Conder relinquished all authority and jurisdiction in this matter. There is no specific assignment of the case and neither judge was at the time the chief judge for the purpose of assigning a permanent judge to the case. In fact, since the taking of this appeal, Judge Croft has been assigned this case for all future matters. Further, counsel for appellants and counsel for respondent Charley Joseph met personally with Judge Conder on the matter. Judge Conder instructed counsel that Judge Dee could rule upon respondent Joseph's motion to vacate the default judgment only if Judge Dee found that the motion was brought on different grounds than the motion which had been heard by Judge Conder.

Even assuming arguendo that Judge Conder had "relinquished all authority and jurisdiction" in the matter, a claim

that Judge Dee could overturn the decision of Judge Conder goes directly contrary to the statutory language of Section 78-7-14 which states without any exceptions that:

> If an application for an order, made to a judge of a court in which the action or proceeding is pending, is refused in whole or in part, or is granted conditionally, no subsequent application for the same order can be made to any other judge, except of a higher court;. . .

This language admits of no exceptions, particularly as claimed by respondent Joseph.

POINT II

JUDGE DEE ERRED IN GRANTING RESPONDENT CHARLEY JOSEPH'S MOTION TO VACATE THE DEFAULT JUDGMENT BECAUSE JOSEPH FAILED TO USE DUE DILIGENCE AS A REQUIRED BY UTAH LAW.

The record shows that on May 5, 1980 respondent Joseph was personally served with a summons in this action which he turned over to his attorney Davis to answer. The complaint served upon respondent Joseph alleges among other things that Davis had breached his fiduciary duties which he owed to both appellant Mascaro and to respondent Joseph and also alleged that respondent Davis had commingled the partnership escrow funds with his own monies and converted said escrow funds to his own use. Respondent Joseph was clearly put on notice of the possibility that his own attorney Davis had embezzled a substantial portion of the partnership funds. Joseph was also put on notice of the fact that there could be a serious conflict of interest between himself and Davis.

In the motion to set aside the default judgment heard by Judge Conder on January 18, 1982, Judge Conder specifically

found that respondent Charley Joseph "knew or should have known" that his attorney John Davis was not adequately protecting his interests. In his deposition respondent Joseph claimed that he was "flabbergasted" when he found out that a default judgment had been taken against him, but he still did not take any action to change his attorney. (Joseph September 1981 deposition, pp. 31 and 32.)

In the affidavit submitted to the Third District Court on behalf of respondent Joseph, his wife Trudy Joseph states that in a conversation she had with attorney John Davis she was told that he had filed an answer on behalf of the Josephs and that they had nothing to worry about. Clearly, when Joseph learned of the default judgment taken against him, he must have been aware that the repeated assurances given to him that Davis would file an answer on his behalf were lies. He thus knew he should have replaced his attorney at that time.

On June 18, 1981 respondent Joseph attended the taking of the deposition of respondent Davis. At that deposition, respondent Joseph heard respondent Davis perjure himself when Davis testified that he had approximately $130,000.00 in his trust account from monies he received as part of the real estate closing. Respondent Joseph knew the statement of respondent Davis was untrue since Joseph himself had taken $38,000.00 of the approximately $140,000.00 received by the partnership and he was aware that he had authorized attorney Davis to take some amount for his fees. (Joseph September 1981

deposition, pp. 55 and 56.) But after hearing Mr. Davis commit perjury, respondent Joseph claims that he still did not believe anything was wrong. (Joseph September 1981 deposition, p. 57.) Nevertheless, respondent Joseph should have been put on notice that something was amiss with his attorney John Davis. But still he did not take any action to investigate or to replace Davis as his attorney.

After the deposition referred to above, respondent Joseph approached Davis for a clarification as to the money he claimed was in his trust account but was told "I don't have to tell anybody where that money is." (Joseph September 1981 deposition, p. 58.) The money placed in Davis' trust account did not belong to Davis, but belonged to the partnership of respondent Joseph and appellant Mascaro. Thus, Davis' answer to Joseph, which was essentially "I don't have to tell you where <u>your</u> money is," should have put respondent Joseph on notice that something was wrong concerning the partnership funds.

Earlier in the spring of 1981, R. Dale Potter, who was then handling some other matters as attorney for respondent Joseph, suggested to Joseph that he might use some attorney other than Davis to represent him in this litigation. But respondent Joseph simply ignored this advice. (Joseph September 1981 deposition, p. 33 and 34.) When an attorney employed by respondent Joseph gave him as his professional advice that

he should employ a different attorney than Davis in representing him, respondent Joseph should have been put on notice that something was amiss. However, he failed to take any action.

This Court has ruled that in order for a petitioner to be successful in his motion to vacate a default judgment, "the movant must show that he has used due diligence and that he has been prevented from appearing by circumstances over which he had no control." Warren v. Dickson Ranch Co., 123 Utah 416, 260 P.2d 741 (1953). See also, Airkem Intermountain Investment v. Parker, 30 Utah 2d 65 513 P.2d 429 (1973). It is clear from the facts stated above that if respondent Joseph was not a party to the fraud which he claims has been perpetrated on the court, then the lack of due diligence was a factor in allowing this fraud to occur.

Assuming, without admitting, that Davis perpetrated a fraud on the court and that respondent Joseph was not a party to such fraud, it is clear that on repeated occasions, respondent Joseph received notice of the possibility of such fraud whereas appellants had no indication of any such fraud. Since respondent Joseph, by using due diligence which is required under Utah law, could have prevented in large part or at least greatly mitigated the results of any such fraud on the court, equity would require that the burden of such fraud should fall on the party whose actions caused or allowed such fraud to occur and not on an innocent party.

A. Because Defendant Joseph Chose Davis As His Attorney With Full Knowledge Of The Allegations By Appellants That John Davis Had Embezzled Partnership Funds, Joseph Should Be Estopped From Claiming That The Judgment Should Be Set Aside And Vacated On The Basis Of The Actions On His Attorney.

Respondent Joseph was not required to have attorney Davis represent him. Joseph knew from the time that he requested Davis to answer his summons that Davis had also been served and was a co-defendant in this action. The complaint served upon Joseph alleged, among other things, that appellant Mascaro on at least three occasions had demanded from Davis an accounting of the escrow funds, but each demand was refused. The complaint alleged further that Davis had commingled the escrow funds with his own and diverted such funds to his own use. Appellants' complaint alone should have placed Joseph on notice of the possibility of a conflict of interest between himself and Davis. Respondent Joseph engaged Davis to represent him regardless of his reading the complaint.

In the case of Link v. Wabash Railroad Co., 370 U.S. 362 (1962), the United States Supreme Court refused to overturn a District Court's dismissal of an action for failure to prosecute. The petitioner in that case argued that he should not be bound by the errors of his attorney. The court, however, in rejecting that argument held as follows:

> There certainly is no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct, imposes an

> unjust penalty on the client. Petitioner voluntarily chose his attorney as his representation in the action and cannot now avoid the consequences of the acts or omissions of this freely chosen agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer/agent and is considered to have notice of all facts, notice of which can be charged upon the attorney.
>
> [Emphasis added.]

In footnote No. 10 of this case, the court noted as follows:

> Clients have been held by their counsel's inaction in cases in which inferences of conscientious acquiescence have been less supportable than they are here and when the consequences have been more serious, e.g., see United States Exrel. Read v. Richmond, 2 Cir. 295 F.2d 83, 89 through 90; Egan v. Teets, 9th Cir. 251 F.2d 571, 577 N.9; United States v. Sorrento, 3rd Cir. 175 F.2d 721. Surely if a criminal defendant may be convicted because he did not have the presence of mind to repudiate his attorney's conduct in the course of a trial, a civil plaintiff may be deprived of his claim if he failed to see to it that his lawyer acted with dispatch in the prosecution of his lawsuit. And if his attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. But the keeping of this suit alive merely because the plaintiff should not be penalized by the admissions of his own attorney would be visiting the sins of the plaintiff's lawyer upon the defendant.
>
> [Emphasis added.]

Since respondent Joseph had notice from the beginning of the potential conflict of interest between himself and his attorney Davis and chose to have attorney Davis represent him anyway, it was inequitable for Judge Dee more than two years after the default judgment had been entered to set it aside on

the basis of the failure of attorney Davis to act in the best interests of respondent Joseph. As cited above, the remedy, respondent Joseph is an action for malpractice and not to set aside the default judgment. Setting aside the default judgment penalizes the appellants for the sins of Davis, which sins should instead be visited on the head of respondent Joseph.

POINT III

JUDGE DEE ERRED IN GRANTING RESPONDENT CHARLEY JOSEPH'S MOTION TO VACATE AND SET ASIDE THE DEFAULT JUDGMENT BECAUSE THE MOTION WAS BROUGHT WELL AFTER THE THREE MONTH LIMITATION IMPOSED BY RULE 60(b) OF THE UTAH RULES OF CIVIL PROCEDURE.

Rule 60(b) of the Utah Rules of Civil Procedure provides that:

> On motion and upon such terms as are just, the court may in furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; . . .

Charley Joseph's third motion to vacate the default judgment was based upon an allegation of fraud upon the court brought by his own attorney, John Davis. Rule 60(b) provides that a motion to set aside a default judgment shall "be made

within a reasonable time and for reasons of (1), (2), (3) or (4) not more than three months after the judgment, order, or proceeding was entered or taken." Although the third motion of respondent Charley Joseph to vacate the default judgment was brought under Rule 60(b)(7) of the Utah Rules of Civil Procedure, to which the three month limitation does not apply, it is clear that respondent Joseph's motion fits in the category of Rule 60(b)(3). This Court has previously ruled that a motion which could have been brought under Rule 60(b)(1), (2), (3), or (4) cannot be brought under Rule 60(b)(7) merely because the three month statute of limitations has passed.

In respondent Charley Joseph's second motion to set aside the default judgment, his attorney Dale Potter argued before Judge Conder that the newly discovered embezzlement and fraud of attorney John Davis could properly form the basis of a motion to dismiss under Rule 60(b)(7). Judge Conder, however, rejected this argument and stated:

> I have a very difficult time because the law says let's put these things to rest within a certain time element and sets up statutes of limitation and says in a lawsuit it can be brought and it can't be brought after certain times because of this. We say that you can't bring a motion for mistake, inadvertence, surprise, or excusable neglect or newly discovered evidence or fraud after three months after a judgment has been entered.
>
> And it seems to me those are all the elements that we're talking about here.
>
> (Transcript January 18, 1982 Hearing, p. 57.)

POINT IV

JUDGE DEE ERRED IN GRANTING RESPONDENT CHARLEY JOSEPH'S MOTION TO VACATE AND SET ASIDE THE DEFAULT JUDGMENT BECAUSE THE DEFAULT JUDGMENT WAS SUPPORTED BY THE EVIDENCE DEVELOPED THROUGH DISCOVERY.

It is an important point that there has been no trial and no evidentiary hearings in this matter. The judgment rendered against respondent Charley Joseph was a default judgment. However, the facts as developed through discovery in this case clearly show that both respondents Davis and Joseph were involved in the embezzlement of partnership funds and that Davis was simply able to embezzle more than respondent Joseph did.

When his deposition was taken in June 1981, respondent Joseph was asked if he had personally received any of the $140,000.00 paid by Mr. Baum. Joseph at first tried to avoid directly answering the question. When his evasive answer was not accepted and he was again asked if he had received any monies from that paid by Mr. Baum, he answered that he could not remember. (Joseph June 1981 Deposition, pp. 21 and 22.) Later, in September when respondent Joseph was confronted with two checks made out to him by Davis for a total of $38,000.00, which funds had come from monies paid by Mr. Baum, respondent Joseph was caught in his lie.

Respondent Joseph did not have the partnership authorization to take the $38,000.00. He never even told his partner Mascaro he had taken the money. At the point in time that the

$38,000.00 was taken by Joseph, it was supposedly earmarked to buy appellant Taylor's new property. When the $38,000 is combined with the "$4-, $5- or $6,000," respondent Joseph admits that he authorized defendant Davis to take as "attorney's fees" (Joseph September 1981 Deposition, p. 55.), enough of the partnership's ready cash had been dissipated so that even if John Davis had not embezzled one penny, the property being purchased by plaintiff Taylor could not have been paid in full with such ready cash.

It should also be noted that nowhere in the record is there any indication respondent Joseph was acting in the best interests of the partnership by taking the $38,000. Thus, there is no basis in law or fact for Judge Dee's ruling that Joseph was free from fraud or that Mascaro had to participate on a 50-50 basis in the loss sustained by the partnership. At best that was a subject which could only be determined at trial.

POINT V

IT WAS AN ERROR FOR JUDGE DEE IN HIS RULING ON A RULE 62(h) MOTION FOR STAY OF EXECUTION SIGNED ON MARCH 16, 1982 TO DEPRIVE THE APPELLANTS OF THE BULK OF THEIR DEFAULT JUDGMENT.

On February 19, 1982, Charley Joseph's motion for a Rule 62(h) stay of execution on the default judgment was heard before the Honorable Judge David Dee. Over the objections of appellants, on March 16, 1982 Judge David Dee signed an order which included the following language:

3. This court retains continuing jurisdiction over this case.

4. Although this case has been brought in the posture of a debt owing, as between Joseph Mascaro and Charley Joseph, it is, in fact, more correctly viewed as a dissolutionment of their partnership.

5. That this court, therefore, intends to treat the matter as a dissolution of the partnership, intending to become fully appraised of both the partnership debts and the partnership assets.

6. That this court intends to require payment of all legitimate partnership debts out of the partnership assets and to divide the partnership profits equally among the partners. Therefore, all partnership assets acquired by the plaintiffs and Charley Joseph are to be preserved until dispersed by order of this court.

7. This court views that the embezzlement of approximately $100,000.00 by attorney John S. Davis to be crux of this dispute.

8. That as John S. Davis was the attorney for the partnership at the time of this embezzlement, each partner will share equally what loss is realized from said embezzlement after John Davis' assets had been exhausted through counsel's efforts to execute on the judgment against him.

[Emphasis added.]

This order signed by Judge Dee had the effect of completely changing the posture of the case. Prior to the motion there was a judgment jointly against John S. Davis and Charley Joseph for their defrauding the plaintiffs and having taken partnership assets. After the motion, all the culpability for the fraud was shifted to John S. Davis, Charley Joseph was exonerated, the bulk of the default judgment against him was virtually lifted and he was given a right to one-half of the partnership profits.

Since the only motion that Judge Dee was asked to rule upon was a Rule 62(h) stay of execution, the above-described paragraphs in Judge Dee's order go well beyond the scope of ruling upon a motion for a stay of execution. The motion was noticed up as a motion for a Rule 62(h) stay of execution. The appellants came prepared to argue the merits of the court imposing a Rule 62(h) stay of execution upon the appellants to keep them from executing upon their default judgment against Joseph. It was clearly improper for Judge Dee to expand the scope of the motion and give a ruling which went to the validity and merits of the appellants' judgment rather than to the validity and merits of a stay of execution. Moreover, and probably as important, the only evidence as such before Judge Dee was in favor of appellants and not respondent Joseph. Judge Dee therefore could not have ruled as he did absent a trial on the merits.

POINT VI

JUDGE DEE ERRED IN GRANTING DEFENDANT CHARLEY JOSEPH'S MOTION TO ENFORCE THE SETTLEMENT AGREEMENT BECAUSE THE REQUIRED PRECONDITIONS HAD NOT BEEN MET.

On November 5, 1982, Judge Dee signed an order enforcing a settlement agreement in the above-entitled matter. This settlement agreement which had been reached as part of a pretrial conference, required the appellants to take as partial settlement of their judgments certain lots of real property on

the basis defendants Baum and Chatillion would install certain improvements and that the lots had a cash value of $30,00 each. However, the terms of Judge Dee's order ignored the conditions precedent stipulated to by the parties at the pretrial conference before Judge Sawaya. The improvements were never made and the documentation did not show that the lots had a cash value of $30,000.00. These condition precedent had not been met at the time of the order and have not been met as of this date.

Further, the eight lots in Plain City as required by the settlement agreement are now tied up in bankruptcy, which makes the likelihood of Chatillion and Baum clearing the title to said lots even more remote. These facts notwithstanding, Judge Dee ordered that the appellants accept these lots as a partial settlement of their judgment against respondent Joseph and otherwise dismissed appellants' claims with prejudice as if such lots had been properly tendered and accepted.

CONCLUSION

It was error for Judge Dee to grant respondent Charley Joseph's third motion to vacate the default judgment obtained by appellants two years earlier because this same motion based on the same grounds had been previously brought before two other District Court Judges and had been denied by them. The motion was not timely since the three month statute of limitations period had long since run and since respondent Joseph had failed to use due diligence as required by Utah law.

It was error for Judge Dee to sign the order granting respondent Charley Joseph's motion for a Rule 62(h) stay of execution because the order as prepared by counsel for Joseph went well beyond granting a stay of execution and had the effect of determining ultimate facts in favor of respondent Joseph which in fact there had been no trial on the merits and when the only established facts before the court were in favor of appellants.

It was error for Judge Dee to grant respondent Joseph's motion to enforce the settlement agreement since the conditions precedent required by appellants had never been met by defendants Baum.

In short, appellants respectfully request this Court to reinstate their default judgment as against respondent Joseph and lift the stay on their right to execute on that judgment.

DATED this 8 day of June, 1983.

KESLER & RUST

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CERTIFICATE OF DELIVERY

I hereby declare that I caused to be delivered two true and correct copies of the foregoing APPELLANTS' BRIEF in Civil No. 19024, this 8th day of June, 1983 to:

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