

1983

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

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

POINT I

THE STATEMENT OF FACTS RECITED BY RESPONDENT'S BRIEF IS INACCURATE AND MISLEADING.

The respondent's in his brief spend approximately ten pages setting out a very detailed statement of facts. It should be noted that the case at bar deals with setting aside of a default judgment and that there has only been one evidentiary hearing in this matter. It should also be noted that none of the respondents' citations are to that evidentiary hearing. In many instances, the so-called "facts" are merely respondents' version of what he believes the facts should have been based on the respondents' own affidavits. Nor are these so-called "facts" in many instances supported by the record.

A. Mascaro, Not Joseph, Paid \$10,000 Of Out-of-Pocket Expenses For the Partnership.

On page 2 of his brief, respondent states:

In fact, in 1977 and 1978 defendant-respondent, Joseph, expended over \$10,000.00 in out-of-pocket expenses in this effort . . .

Respondent supports this contention by a citation to pages 301 to 303 of the record. Respondent's citation to a rather self-serving affidavit of Charley Joseph. Nevertheless, an examination of this affidavit makes it clear that appellant Joseph Mascaro, not respondent Charley Joseph, was the one who expended the over \$10,000 in out-of-pocket expenses on behalf of the partnership. The pertinent part of respondent's affidavit provides as follows:

Shortly after John Davis received the funds in his trust account, he worked with Joe Mascaro and Shelby Taylor to purchase an apartment building in Utah County for Shelby Taylor. While I knew of this transaction, I was not directly involved with it; it was something worked out by John Davis, Joe Mascaro, and Shelby Taylor for Shelby Taylor's benefit. Instead of providing funds that were available from his trust account as down payment on the property being purchased for Mr. Taylor, John Davis persuaded Joe Mascaro to personally pay \$10,000 down and personally sign a promissory note for an additional \$10,000 on the purchase price of the apartment building.

The fact that it was appellant Joseph Mascaro, not respondent Charley Joseph, who paid the \$10,000 down payment on the property purchased by the partnership on behalf of Shelby Taylor is further supported by the record. (R. 5, Davis Deposition, June 1981, pp. 37-38; Joseph Deposition, September 1981, pp. 17-18.)

B. All Of The \$140,000 Received By The Partnership
Was Embezzled. Davis Took \$102,000, And Joseph Took \$38,000.

Respondent throughout his brief focuses on the amount of \$100,000 which was paid to the Mascaro-Joseph partnership rather than the total amount of \$140,000, which was actually paid to the partnership. (R. 4, January 18, 1982 hearing, p. 19.) Respondent desperately wishes to focus the attention of the court on this \$100,000 sum because this sum was egregiously embezzled by attorney John S. Davis. Respondent does not wish the court to focus on the full \$140,000 amount because the remaining \$38,000 was converted by respondent Charley Joseph to his own use without the knowledge or authorization of his partner, Joseph Mascaro. (R. 662, 663.)

On page 4 of respondent's brief, respondent claims:

The original \$100,000.00 cash payment was placed by attorney Davis into his trust fund. (R. 300, 450) Of that amount, defendant-respondent, Joseph, directed attorney Davis to give \$40,000.00 to Taylor, \$20,000.00 to plaintiff-appellant, Mascaro, \$20,000.00 to himself (Joseph), and to retain the balance in trust in the event of potential legal disputes threatened by Tanner.

Throughout this litigation, respondent Joseph has given several explanations of why he received \$38,000 when his partner received nothing, which explanations have not been consistent with the facts nor with themselves. The facts, as established by the record, are that on June 5, 1979 a check was paid from the trust account of John Davis to Charley Joseph. (P. 455.) No checks were drawn at that time for either Mascaro

or Taylor. Again, on August 19, 1979, a second check was drawn on the trust account of John Davis for \$18,000, which was paid to Charley Joseph. (R. 456.)

In his deposition taken on June 18, 1981, Charley Joseph could not recall whether he himself had ever received any of the original \$100,000 deposited in John Davis's trust account. (R. 183-184.) Respondent Joseph did claim that some of the funds went to pay expenses and taxes. (R. 184.) The fact is, however, that an examination of the checks drawn on the trust account of John Davis show no checks drawn for expenses or taxes.

In the September 1981 deposition of Charley Joseph, when confronted with the checks for \$18,000 and \$20,000, respondent recalled receiving said amounts. But in his deposition, respondent claimed that he was assured "that the balance of the funds was held in trust by Davis and would be distributed to Mascaro and myself upon the resolution of the pending transactions." (R. 165.) It is clear from this statement that respondent Joseph knew that the balance of funds received by Davis were in his trust fund and that nothing had been distributed to Mascaro or Taylor.

Further, in his September 1981 deposition, Charley Joseph had a different story concerning how he received the \$20,000. At that time he claimed that he was badly in need of money and asked attorney Davis for a loan from the proceeds. (P. 648.) In his September 1981 deposition, Charley Joseph

made no mention of his alleged instruction to give Mascaro \$20,000 and Taylor \$40,000 at the same time he received the \$20,000 from Davis's trust account.

C. The Only Evidentiary Hearing In This Matter Resulted In The Denial Of Joseph's Second Motion To Vacate Default Judgment.

It should be noted that the only full evidentiary hearing that occurred in this case occurred on January 18, 1982 before Judge Dean Conder. (R. 227.) The result of this evidentiary hearing was Judge Conder's refusal to set aside the default judgment. (R. 245.)

POINT II

RESPONDENT'S BRIEF FAILS TO RESPONDENT TO APPELLANTS' ARGUMENT THAT THE LOWER COURT ERRED IN GRANTING DEFENDANT-RESPONDENT CHARLEY JOSEPH'S MOTION TO VACATE AND SET ASIDE DEFAULT JUDGMENT BECAUSE THE SAME MOTION BASED ON THE SAME ARGUMENTS HAD BEEN DENIED ON TWO PREVIOUS OCCASIONS BY OTHER DISTRICT COURT JUDGES.

Respondent's brief completely fails to address appellants' argument that pursuant to Utah case law and Section 78-7-19, Utah Code Ann. (1953) that Judge Dee did not have the power to grant respondent's motion to vacate and set aside default judgment because the same motion based on the same arguments had been denied on two previous occasions by other district court judges.

The record is clear that respondent brought a motion to vacate default judgment before Judge Sawaya on February 6,

1981, which was denied. (R. 89.) A second motion to vacate default judgment was brought before Judge Dean Conder on January 18, 1982 which was denied. (R. 227, 245.) Appellant refers the court to the appellants' brief, pages 10-16, wherein appellant demonstrates that the motion heard before Judge Conder involved the same issues and the same arguments as respondent's third motion to set aside default judgment heard before Judge Dee.

Appellant should be granted the relief sought for on appeal based upon this uncontested error.

POINT III

RESPONDENT'S BRIEF FAILS TO RESPOND TO APPELLANT'S ARGUMENT THAT THE LOWER COURT ERRED IN GRANTING DEFENDANT-RESPONDENT CHARLEY JOSEPH'S MOTION TO VACATE DEFAULT JUDGMENT BECAUSE JOSEPH HAD FAILED TO USE DUE DILIGENCE AS REQUIRED BY UTAH LAW.

Respondent in his brief has failed to respond to appellants' argument that respondent failed to use due diligence as required by Utah law. The respondent in his brief on page 6 state:

Mr. Joseph in fact did believe that attorney Davis was defending him and representing his interests. Mr. Joseph was a trucker who has little education or sophistication in legal matters, did not personally know what was necessary to properly defend and represent him, but he fully believed that his attorney had done and was doing whatever was necessary and most advantageous in protecting his interest.

The fact is that Charley Joseph had notice on numerous occasions that attorney John Davis was not protecting his interests. (See appellant's brief pp. 16-19.)

In the evidentiary hearing held on February 18, 1982 before Judge Dean E. Conder, the Judge focused on the issue of respondent Charley Joseph's due diligence. The court stated as follows:

But if Mr. Joseph knew about that in 1979, well you've got to show me that in September of 1981, when he files a motion to set aside this default judgment, that he had good reason not to have done it before that time because he didn't know about it. He didn't know there was even a transaction or didn't know for some reason that he was being sued. He has been sued by Mr. Mascaro and Mr. Taylor and that was served on him in 1980. (Transcript of January 18, 1982 hearing, p. 15.) . . . (3) if Mr. Davis did something that would warrant Mr. Joseph thinking that he had no reason to take action, then Mr. Joseph may have a claim for setting aside the default . . . I am concerned why Mr. Joseph hasn't taken this action prior to this time? (Transcript of January 18, 1982 hearing, p. 17)

After Judge Conder had clearly indicated to Charley Joseph and his counsel that they would have to demonstrate to the court some reason why Charley Joseph had not brought his motion to set aside the default judgment at an earlier date, Charley Joseph was allowed to present testimony to the court. After the presentation of evidence by Charley Joseph, the Judge in denying the motion to set aside the default judgment stated:

And that he (Joseph) knew or should have known that Mr. Davis was not doing the job for him that he thought he was.

(Transcript of January 18, 1982 hearing, p. 57.)

It is clear from the transcript of the January 18, 1982 hearing that Judge Conder was concerned with the lack of due diligence of Charley Joseph in bringing a motion to set aside the default judgment. The judge, after hearing the evidence, determined that Charley Joseph either knew or should have known that John Davis was not protecting his interests and yet failed to take any action to replace Mr. Davis or otherwise protect his legal position.

Appellant should be granted the relief sought for on appeal based upon this uncontested error.

POINT IV

THE ISSUE OF WHETHER ATTORNEY DAVIS COMMITTED A FRAUD UPON THE COURT TURNS UPON THE ISSUE OF DAVIS'S INTENT WHICH IS A FACTUAL ISSUE WHICH WOULD HAVE TO BE RESOLVED IN AN EVIDENTIARY HEARING.

Under Utah law, the question of whether or not a fraud has been committed turns upon the intent of the party alleged to have committed the fraud. The question of such a party's intent is a factual question. Condas v. Adams, 15 Utah 2d 132, 388 P.2d 803 (1964); Kelly v. Salt Lake Transportation Co., 100 Utah 436, 116 P.2d 383 (1941).

As noted above, the only evidentiary hearing which has ever occurred in this case took place before Judge Dean Conder on January 18, 1982, the result of which was Judge Conder's denial of respondent's second motion to vacate default judgment. For Judge Dee to establish that attorney Davis committed

a fraud upon the court would require that the Judge hold an evidentiary hearing at which evidence of Davis's fraud could be presented to the court. Since no such hearing was ever held, Judge Dee's setting aside of the default judgment based upon fraud was improper.

POINT V

THE COMPLAINT GAVE RESPONDENT JOSEPH ADEQUATE NOTICE OF THE AMOUNT OF THE DEFAULT JUDGMENT THAT WOULD BE TAKEN AGAINST HIM IN THE EVENT HE FAILED TO RESPOND TO THE SUMMONS.

Respondent in his brief rely heavily upon the case of Hurd v. Ford, 78 Utah 49, 276 P.2d 908 (1924), for the proposition that a default judgment admits a plaintiff's right to recover something but does not admit the amount that he is entitled to recover. Respondent's claim that the judgment obtained by appellant was voidable because no evidentiary hearing had been conducted to establish the amount of damages.

It should be noted that Hurd v. Ford was decided by this court prior to the adoption of the current Utah Rules of Civil Procedure which were patterned after the Federal Rules of Civil Procedure. The purpose of the modern Rules of Civil Procedure is to provide "notice pleadings." The issue in determining whether the amount of a default is proper under the circumstances depends on whether the defendant received appropriate notice of the amount being claimed by the plaintiff. Columbia Valley Credit Exchange Inc. v. Lampson, 533 P.2d 152

(Wa. 1975); Becker v. S.P.V. Construction Co. Inc., 165 Cal. Reporter 825, 612 P.2d 915 (Ca. 1980); Purington v. Sound West, 566 P.2d 795 (Mont. 1977).

It should be further noted that in Hurd v. Ford the prayer of the complaint was for the reasonable value of the services rendered. The complaint of appellant in this matter was very specific in praying for a certain amount of money. Further, the case of Hurd v. Ford has only been used by this court in connection with attorneys' fees and has never been used to invalidate a default judgment as requested by the respondent herein.

CONCLUSION

For the reasons set forth above, the statement of facts provided by respondent in his brief are inaccurate and misleading. Further, respondent's brief has failed to respond to two critical arguments set forth by appellants in their brief, namely that Judge Dee overstepped the bounds of his authority when he granted respondent's motion to vacate a default judgment which two previous District Court judges had refused to vacate and that Judge Dee erred in granting respondent's motion to set aside default judgment because the respondent had not used due diligence as required by Utah law. Since this two points are uncontested in respondent's brief, appellants should be granted a reversal of Judge Dee's order modifying in part and setting aside in part appellants' default judgment.

DATED this 11th day of November, 1983.

KESLER & RUST

By Charles W. Hanna
Charles W. Hanna
Attorneys for Appellants

CERTIFICATE OF MAILING

I hereby declare that I caused to be mailed two true and correct copies of the foregoing Appellants' Reply Brief in Civil No. 19024, postage prepaid, this 14th day of November, 1983 to M. Shane Smith, Joseph E. Tesch, Attorneys for Respondent, 353 East 400 South, Suite 100, Salt Lake City, Utah 84111.

Debra Savage