1983

John D. Dove, Jr. v. Howard Cude And Etta May Cude : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN D. DOVE, JR.,

Plaintiff and Respondent,

vs.

HOWARD CUDE and ETTA MAY CUDE, his wife,

Defendants and Appellants.

No. 19294

APPELLANTS' BRIEF

Appeal from the Judgment of the Seventh Judicial District Court for Duchesne County
Honorable Richard C. Davidson

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN D. DOVE, JR., Plaintiff and Respondent, vs. HOWARD CUDE and ETTA MAY CUDE, his wife, Defendants and Appellants,	)	No. 19294

APPELLANTS' BRIEF

STATEMENT OF NATURE OF CASE

Plaintiff sued as defendants, individuals identified as Cudd, for damages resulting from alleged negligent use of irrigation water. However, inasmuch as plaintiff misnamed or misspelled the defendants' names (Cudd instead of Cude) in both the summons and the pleadings, defendants believed they had no duty to answer, plaintiff received a default judgment against Cudd. Plaintiff then sought to execute on defendants Cudes' property. Defendants sought to stay proceedings, claiming in the alternative, that because of the misnomer, the court had no jurisdiction over them, or that the default should be set aside, and that the case proceed to a trial on the merits.

DISPOSITION IN LOWER COURT

Plaintiff originally brought suit alleging negligence on the

part of Howard Cudd and Etta Mae Cudd in failing to control irrigation water. Process was served on Etta Mae Cudd. As indicated, defendants did not answer because of the misnomer, and plaintiff secured a default judgment and sought to execute on property belonging to Howard Cude and Etta May Cudd. The Cudes did not receive notice of the default judgment.

Defendants' objected to plaintiff's actions (see Record, Pg. 21), and requested the court to stay proceedings. Plaintiff responded by asking leave to either amend or to correct the spelling of defendants' names (Record, pages 23-27). Defendants responded to plaintiff's motion on September 1, 1981 (Record, page 31).

Plaintiff was subsequently allowed to amend the spelling of defendants' names on the summons and pleadings to indicate that the defendants were Howard Cude and Etta May Cude (Record, page 30, and page 34). Plaintiff filed amended Findings of Fact (Record, page 35), Amended Default Certificate (Record, page 37), Amended Complaint (Record, page 38), Amended Return Service (Record, page 40), and an Amended Summons (Record, page 41). Defendants timely filed an Answer rising meritorious defenses (Record, page 42), a Motion to Set Aside Amended Default (Record, page 47), together with supporting Memorandum of Points and Authorities (Record, page 45). Defendants' motion was supported by Affidavit (Record, page 52). Defendants motion to set aside the default judgment was denied by the trial court. Upon indication that defendants would appeal that action, plaintiff

filed a stipulation to set aside the default judgment (Record, page 60), which stipulation remained for approximately six (6) months. Meanwhile plaintiff attempted to garnish defendants' pay check, etc. (Record, page 62-65), but was reminded of the stipulation. Plaintiff then sought to withdraw the stipulation (Record, page 66). Defendants objected to the withdrawal (Record, page 67), and requested the court to rule and set the matter for trial (Record, page 68). Plaintiff supported its motion to set aside the stipulation with an Affidavit and Memorandum (Records, pages 69-79). Defendants responded to the same with Memorandum and Affidavit (Record, pages 80-83). The trial court allowed the plaintiff to withdraw the stipulation to set aside the judgment (Record, page 86). From said action, defendants have appealed.

RELIEF SOUGHT ON APPEAL

As appellants, defendants seek in the alternative to either have the judgment dismissed for lack of personal jurisdiction, or that failing, to have the amended default judgment set aside, the stipulation re-instated, and the case remanded to the trial court for an evidentiary hearing on the merits.

STATEMENT OF FACTS

Plaintiff filed a complaint on May 6, 1981, alleging that defendants' Cudds' negligent use of irrigation water caused plaintiff's yard and basement to flood. As indicated above, the

defendants were named or identified as Howard Cudd and Etta May Cudd in all of the pleadings. Process was served on Etta May Cudd. The Cudes believed that inasmuch as the complaint, summons and other documents served did not correctly name them as party defendants (see Return of Service, Record, page 3), they did not have to respond.

Default judgment was entered for plaintiff against defendants Cudd, on June 8, 1981. The Cudes did not receive notice of the Default Judgment of June 8, 1981. Plaintiff then sought to execute on property belonging to Howard and Etta May Cude.

On June 29, 1981, a motion to stay all action as to the Cudes was filed based on the grounds that the court had no jurisdiction over the Cudes. The plaintiff responded by filing a motion to amend the pleading on August 14, 1981. By Minute Entry, on January 2, 1982, the court allowed plaintiff to amend the summons, pleadings and judgment, changing the names of defendants to Howard Cude and Etta May Cude. That entry was later formalized by an order (Record, page 34).

Defendants then timely filed an answer and a motion to set aside the default judgment on February 3, 1982. In their answer, defendants denied any negligence in handling irrigation water, and alleged plaintiff's damage was occasioned by plaintiff's own meddling with the neighbors irrigation water. The defendants' motion to set aside the default was denied on March 16, 1982, and later formalized with an order.

On April, 1982, defendants' indicated to plaintiff's counsel, their intention to appeal. In response thereto, on June 28, 1982, plaintiff voluntarily filed with the court, his motion to set aside the default judgment and proceed to trial. On July 27, 1982, plaintiff once again attempted to execute (garnish) on property belonging to defendants. On September 21, 1982, plaintiff gave notice of his withdrawal of the stipulation. Defendants objected to the withdrawal on October 6, 1982. On May 13, 1983, the court allowed plaintiff to withdraw the stipulation.

Defendants filed a notice of appeal on May 19, 1983.

ARGUMENT

I. THE TRIAL COURT HAD NO JURISDICTION OVER THE CUDES

Process must be served in accordance with the statutes or rules in order for a court to have the power to adjudicate the issues in question. Service must give each defendant notice that he/she personally is being sued and that he/she must personally appear and defend or suffer a default judgment. Meyers v. Intermountain Corporation, Utah 632 P.2d 879 (1981), Murdock v. Blake, 26 Utah 2d 22, 484 P.2d 164 (1971). Without proper service, the court does not have personal jurisdiction over a defendant, and without personal jurisdiction, to support a default certificate, then the default judgment is void on its face. Farmer's Union Co-operative Royalty Co. v. Woodward,

Okla., 515 P.2d 1381 (1973).

A defendant must be sued by his true Christian name and surname in full, if it is known or can be ascertained by plaintiff. Generally, erroneous christian names and initials are considered irrevelant, unless they are misleading, see 6 ALR3d 1179 and 49 C.J.S. §75 d. A misnomer generally cannot be taken advantage of after judgment. "However, it is recognized that if the error in name is such as to mislead the defendant so that he is not fairly apprised that he is the party the action was intended to affect, he may be relieved of his default." 59 AmJur 2d §258. (Emphasis added).

In Woody v. Rhodes, 23 Utah 2d 249, 461 P.2d 465 (1965), the court held that an incorrect name on the endorsement by the deputy sheriff on the summons left with defendant's wife, "would surely tend to mislead defendant . . . as to whether or not he was the person required to answer." [461 P.2d at 466.] The court held that because the name was incorrect the service was fatally defective and the judgment entered was without force and effect. The court went on to hold that by filing an answer and a counterclaim the defendant submitted to the court's jurisdiction and the court should proceed with a trial on the merits.

In this case, plaintiff denoted defendants as Howard Cudd and Etta Mae Cudd. Defendants did not know that "Cudd" meant "Cude." (See Affidavit of Howard Cude, Record, page 52). The misspelling of May added to their confusion. The exhibits were not attached to the complaint served, creating still more

confusion as to who the parties were and what the nature of the charges were. Because of this confusion, the summons and complaint for Cudd were not adequate to give defendants Cudes notice that they were being sued and must appear and defend or suffer a default judgment. Therefore, the default judgment is void on its face for lack of personal jurisdiction over the defendants.

II. THE TRIAL COURT ERRED IN ALLOWING PLAINTIFF TO AMEND THE SUMMONS, COMPLAINT AND JUDGMENT AFTER THE DEFAULT JUDGMENT HAD BEEN GRANTED

As a general rule, amendments to the pleadings are favored and should be liberally permitted in the furtherance of justice. On Appeal, the trial judge's determination will be overturned only when there is an abuse of discretion. Restrictions on the power of the court to permit amendments requires only that the amendments not substantially change the cause of action or affect substantive rights of the opposing party. The policy of permitting amendments with liberality is meant to promote trials on the merits rather than on mere technicalities. Haas v. Preferred Risk Mutual Life Insurance Co., 214 Kan. 747, 522 P.2d 438 (1974), Frank v. Sullivan, 94 Ariz. 55, 381 P.2d 591 (1965), F-P Funds, Inc., v. Fox, Colo. App., 640 P.2d 257 (1981), Gillman v. Hansen, 26 Utah 2d 1965, 486 P.2d 1049 (1971), Meyers v. Inter-West Corp., Utah, 632 P.2d 879 (1981)

Tardy amendments to the pleading should be permitted where the interests of justice so requires, and the adverse party is

given a fair opportunity to meet the newly raised matter. Consideration should be given to the disadvantage or prejudice suffered by the adverse party as a result of the amendment. Thomas J. Peck & Sons, Inc. v. Lee Rock Products, Inc., 30 Utah 2d 187, 515 P.2d 466 (1973), Lewis v. Moultree, Utah 627 P.2d 94 (1981).

In this matter, by allowing the amendment, i.e., to change defendants from Cudd to Cude, the trial court placed defendants Cude in an extremely prejudicial situation. They were suddenly parties to a suit in which a default judgment had already been entered. When the defendants were Cudd, Cudes were not parties. When defendants were Cude, then suddenly they were parties and they were not given an opportunity to answer or litigate the case on its merits. This result was extremely prejudicial to defendants Cude. Because of the extreme prejudice suffered by the defendants Cude, the plaintiff's amendment either should not have been allowed, or defendants Cudes' answer should have been entered and the dispute heard on its merits.

The policy behind liberally permitting amendments is to promote a trial on the merits. In this case, the opposite result was achieved. The decision was made on a technicality rather than on the merits of the case. Therefore, the policy behind permitting amendments with liberality would, in this case, either favor denying plaintiff's motion to amend, or upon allowing it, would grant the defendants Cude the opportunity to answer the same and a trial of the issues.

III. IMPROPER AMENDMENT AFTER JUDGMENT

The general rule is that when a judgment has been entered, the court is without authority to change it. Dairy Distributors, Inc., v. Local Union 976, Etc., 16 Utah 2d 85, 396 P.2d 47 (1964), In Re Vilm's Estate, Colo., 299 P.2d 513 (1956), Malone v. Swift Fresh Meats Co., 91 N.M. 359, 574 P.2d 283 (1978), Houston v. Young, 94 N.M. 308, 610 P.2d 195 (1980).

The only means by which a trial court may thereafter alter, amend or vacate a valid judgment is by an appropriate motion under the Rules 59 and 60 U.R.C.P. Duponte v. Duponte, Hawaii, 488 P.2d 537 (1971), Corturiendt v. Corturiendt, Colo., 361 P.2d 767 (1961). Rule 59 (e) U.R.C.P., requires that the motion be served within 10 days after entry of judgment. Rule 60(a) U.R.C.P. concerns the correction of clerical errors and (b) concerns fraud, etc. Neither the provisions of Rules 59 or 60 would seem to apply to this unusual fact situation. Plaintiff did not make his motion to amend within 10 days, the error was not clerical in nature, and plaintiff did not seek to be relieved from the judgment, yet the trial court allowed plaintiff to amend the judgment. Because the customary time for amendments as allowed under the U.R.C.P., had passed, plaintiff should not have been allowed to amend the judgment.

IV. THE TRIAL COURT ERRED IN REFUSING TO SET ASIDE THE DEFAULT JUDGMENT

Default judgments are not favored by the law and the courts

have a policy in favor of granting relief from default judgments where there is any reasonable excuse, uncertainty or confusion, unless it will result in prejudice or work an injustice to the adverse party. Courts favor affording disputants a full and complete opportunity for a hearing on the merits. Westinghouse Electrical Supply Co., v. Paul L. Larsen Contractor, Inc., Utah, 544 P.2d 876 (1975), Heathman v. Fabian and Clendenin, 14 Utah 2d 60, 377 P.2d 189 (1962), Utah Commercial & Saving Bank v. Trumbo, 17 Utah 198, 53 P.1033 (1899), Locke v. Peterson, 3 Utah 2d 415, 285 P.2d 1111 (1955).

It is largely within the discretion of the trial court whether to relieve a party from a default judgment. Absent an abuse of that discretion, the trial court's determination will not be disturbed. However, doubts should be resolved in favor of setting aside the default judgment. Generally it is considered an abuse of discretion for the court to refuse to vacate a default judgment where there is any reasonable excuse or justification for the failure to answer, and in the absence of prejudice to the opposing party. Chrysler v. Chrysler, 5 Utah 2d 415, 303 P.2d 955 (1956), Mayhew v. Standard Gilsonite Co., 14 Utah 2d 52, 376 P.2d 951 (1962), Westinghouse Electrical Supply Co., v. Paul L. Larsen Contractor, Inc., Utah 544 P.2d 876 (1975), Cutler v. Haycock, 32 Utah 354, 90 P. 897 (1907), Warren v. Dixon Ranch Co., __ Utah __, 260 P.2d 741 (1953). The Utah Rules of Civil Procedure should be liberally construed to the end that there be a trial on its merits. Ney v. Harrison, 5 Utah 2d

217, 299 P.2d 1114 (1956).

Because of plaintiff's error in naming parties, defendants Cudé did not answer the complaint and therefore suffered a default judgment because they reasonably believed that inasmuch as the summons and complaint served on them did not correctly name them as party defendants, they did not have to respond. This constitutes good cause for setting aside the default under Rule 55 (c) U.R.C.P.

Because of plaintiff's misnomer, the lack of exhibits attached to the plaintiff's complaint served by plaintiff on Cudés, and the resultant confusion, the default judgment, in all fairness, should be set aside on the grounds of excusable neglect. [See Rule 60(b) U.R.C.P., Heatherman v. Fabian & Clendenin, 14 Utah 2d 60, 337 P.2d 189 (1962), Locke v. Peterson, 3 Utah 2d 415, 285 P.2d 1111 (1955).]

Defendants Cudé filed an answer with the motion to set aside the default judgment which sets forth a valid defense, which defense would justify a trial on the merits. Downey State Bank v. Major-Blakeney Corporation, Utah, 545 P.2d 507 (1976). Plaintiff will not be prejudiced by defendants presenting their legitimate defenses. Defendants Cudé have been prejudiced by being misnamed and their defenses being ignored.

Because of the facts of this case, it is in the interests of justice and equity to set aside the default judgment and afford defendants Cudé the opportunity for a hearing on the merits. (Rule 60(b) U.R.C.P.)

V. THE TRIAL COURT ERRED IN ALLOWING PLAINTIFF TO WITHDRAW HIS STIPULATION TO SET ASIDE THE DEFAULT JUDGMENT

Courts are generally bound by stipulations between parties unless points of law requiring judicial determination are involved. As with other agreements, parties are bound by their stipulations, unless because of extenuating circumstances, etc., the court sets aside the stipulation, or the parties mutually agree to withdraw the stipulation. A court has the power to set aside a stipulation entered into inadvertently or for justificable cause. First of Denver Mortgage Investors v. C.N. Zundel, Utah, 600 P.2d 521 (1979), Klein v. Klein, Utah, 544 P.2d 472 (1975), Thompson v. Turner, Idaho, 558 P.2d 1071 (1977).

Plaintiff offered no justification for withdrawing the stipulation other than to "clarify the record," that there was "never an order entered based on upon the stipulation" and that neither party would "be prejudiced by allowing the withdrawal." Defendants Cude were prejudiced by the withdrawal. Defendants Cude believed their answer and defense would now be heard on its merits, and the court allowing the withdrawal changed that. As plaintiff's justification for withdrawing the stipulation was inadequate to constitute justifiable cause, and defendants did not agree to the withdrawal, the stipulation to set aside the default should be re-instated and the case remanded for trial.

SUMMARY

Based upon the foregoing arguments, the appellants feel that justice and equity will best be served by remanding the matter to the trial court, with directions to set aside the default, the default judgment, accepting defendants' answer, and proceeding to hear the controversy on its merits.

DATED this 7th day of September, 1983.

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CERTIFICATE OF MAILING

I do hereby certify that on the 7th day of September, I mailed a true and correct copy of the foreging APPELLANTS' BRIEF, postage prepaid, to JoAnn B. Stringham, McRae & DeLand, Attorney for Respondent, 1680 West Highway 40, Suite 1190, Vernal, Utah 84078, by depositing the same in the United States Post Office at Roosevelt, Utah.

Secretary