1969

# Bill S. Woody D.B.A. Woody Drilling Co. v. Bert Rhodes and Vaughn Rhodes : Appellant's Brief

# THE SUPREME COURT OF THE STATE OF UTAH

[redacted] d.b.a.
[redacted] Drilling Co.,
*Plaintiff and Appellant*,

v.

[redacted] RHODES and
[redacted] RHODES,
*Defendants and Respondents*.

APPELLANT'S [redacted]

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# IN THE SUPREME COURT OF THE STATE OF UTAH

BILL S. WOODY d.b.a.
Woody Drilling Co.
*Plaintiff and Appellant*

v.

BERT RHODES and
VAUGHN RHODES
*Defendant and Respondent*

No. 11732

## APPELLANT'S BRIEF

### STATEMENT OF THE KIND OF CASE

This is an action on a promissory note upon which Judgement by Default was obtained and fourteen months later the judgement was set aside and the matter dismissed.

### DISPOSITION IN LOWER COURT

The lower Court granted the defendant's motion to set aside a judgement by default and also dismissed the matter even though an answer had been filed by the defendant.

## RELIEF SOUGHT ON APPEAL

Plaintiff, Appellant, seeks reversal of the order setting aside the Default Judgement or in the alternative an order reversing the dismissal of the matter so that the case may be tried on its merits.

## STATEMENT OF FACTS

Plaintiff filed a complaint on a promissory note on February 15, 1968 and on February 20, 1968 the sheriff reported that he had served the defendant Vaughn Rhodes by leaving him a copy of the Summons and Complaint with Mrs. Vaughn Rhodes (See Sheriff's Return). An attorney, James L. Wadsworth, from Pioche, Nevada, wrote plaintiff's attorney and said he represented Vaughn Rhodes and asked for a delay until April 1, 1968 in which to plead. No pleadings were received from defendant Vaughn Rhodes and his default was entered on April 1, 1968and Judgement by default was taken on April 2, 1968 and a copy of the judgement was mailed to Attorney Wadsworth. (The action against Bert Rhodes was dismissed without prejudice since he was a non-resident of Utah.)

According to Defendant Vaughn Rhodes on February 20, 1968 he did see the summons and complaint left with his wife but he did not learn that judgement had been taken until January 1969, at which time he contacted an attorney. Over three months later on April 29, 1969 a motion to set aside the default was filed together with an Answer and Counterclaim. The motion was based on Rule No. 55 of the Utah Rules of Civil Procedure and defendant Vaughn Rhodes asked for an order setting the matter for trial.

At the hearing on the motion on May 13, 1969, no testimony was presented in support of the motion but defendant offered what purported to be the summons served on Mrs. Vaughn Rhodes which carried a notation that the summons was served on "Bert Rhodes" the 20th day of February, 1968.

On June 17, 1969 the District Court signed an order setting aside the Default Judgement on the grounds that the deputy sheriff crroneously wrote the wrong defendant's name on the summons left with defendant's wife and thus failed to provide defendant with notice required under Utah Rules of Civil Procedure. The District Court also entered an order dismissing the matter even though defendant had filed an Answer and Counterclaim and had asked that the matter be set for trial.

## ARGUMENT

### POINT 1: THE DISTRICT COURT ERRED IN SETTING ASIDE A DEFAULT JUDGEMENT ENTERED MORE THAN ONE YEAR PRIOR TO THE TIME OF FILING THE MOTION TO SET ASIDE ON THE GROUNDS OF A DEFECTIVE PERSONAL SERVICE OF SUMMONS.

Plaintiff concedes that the Utah rule with regard to setting aside judgements obtained by default has been liberally construed to the end that there may be trial on the merits. But limitations of time have been established where a motion is made under certain circumstances. (See Rule 60(b) (1), (2), (3), and (4).)

That there should be some limitation of time is apparent from some background information in this case

which is not now being cited as evidence, but only to show a reason for a time limitation.

Here an out of state plaintiff comes to Utah to obtain a judgement on a promissory note. In a country where it is estimated that one-fifth of our population moves every year, this is not an uncommon occurrence. Plaintiff recognized that in this particular case there may be a trial on the question of consideration for the note and witnesses were located and statements taken showing the completion of the work contracted for, the existence of an undisclosed principal who has a contractor's license under which plaintiff is operating by agreement and similar matters. Suit is filed, but the defendant does not answer even though defendant admits he received a copy of the summons and complaint and the sheriff's return is valid on its face. Default Judgement is taken and as required by Rule 5(b) (1) a copy of the judgement is mailed to a person purporting to be defendant's attorney.

In looking for assets on which plaintiff can enforce judgement it appears that a homestead exemption may be claimed if execution is issued immediately so plaintiff decides to give defendant an opportunity to enlarge his estate before judgement is collected. Since the judgement is regular on its face and not void, nor has it been satisfied, released or discharged, there appears to be no reason to keep in touch with witnesses after expiration of the three month period allowed for setting aside defaults on other grounds.

Over a year after the judgement has been filed plaintiff is told defendant wants it set aside. Plantiff, who is a non-resident, is unable to understand why a defendant in Utah is given the right to wait until he perhaps decides

to sell his real estate, so that no judgement can be enforced, and then have a judgement set aside so that if Plaintiff eventually is able to prevail his judgement will be worthless. It seems that a diligent plaintiff should have some date on which he can say his judgement is valid in absence of a fraud upon the court or a void judgement where plaintiff has a lien on real estate.

Another reason for a time limitation on motions to set aside default judgements is the running of the statute of limitations. Or one might consider the situation under the new Uniform Consumer Credit Code where heavy penalities are imposed upon a lender for failure to make proper disclosures. If default judgements can be set aside without time limitation under the reasons listed in Rule 60(b) (1), (2), (3), or (4) the present time limitation on retention of disclosure statements is extended from two years to an indefinite time.

Of course the fact that the rule was enacted with a time limitation should be reason enough for its enforcement. "Otherwise, the rule would not make much sense." (Shaw v. Pilcher, 9 Utah 2d 222, 341 P2d 949.)

This case seems to clearly fall within the provisions of Rule 60(b) (4). There is no question but that the sheriff's return shows service and that the Summons actually served was in accordance with the provisions of Rule 4(j). There appears to be no requirement in the rules that the sheriff write the name of the person served on the summons and there was no evidence presented in the District Court as to who or at what time the name of Bert Rhodes was written on the summons. But since the lower court held for defendant we must assume that the deputy sher-

iff did write the brother's name on the summons when it was handed to Vaughn Rhodes' wife and that this invalidated the personal service of the summons under Rule (4). This then is a case where for any cause the defendant was not personally served, but this is not a case where the defendant lacked actual notice that a complaint had been filed in which he was named as a defendant. The summons clearly indicated Vaughn Rhodes was a party defendant and he admits that he saw the Summons in his affidavit filed with his motion. The record shows a letter from an attorney purporting to represent Vaughn Rhodes indicating that an attorney was contacted. This then seems to be a case which clearly would fall within Rule 60 (b) (4) for the Court's consideration "when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4 (e) and the defendant has failed to appear in said action."

But Rule 60 (b) says the Court may not consider a motion made under this section since it must be made within three months after the judgement was entered. The Rule puts the burden of making inquiry on the defendant. No inquiry was made. The defendant admits he saw the summons the day it was served, February 20, 1968. The defendant's attorney was mailed a copy of the judgement in April 1968, and the defendant himself admits in his affidavit that he learned of the judgement in January 1969. Even if we excuse the defendant for the apparent failure of his attorney to make contact, his own admission makes it more than three months after learning of the judgement until he files his motion to set the same aside and almost 13 months after judgement was actually taken.

Rule 6 (b) says the District Court has no power to extend the time limit provided by Rule 60 (b) and the Utah Supreme Court has also so stated. See Shaw v. Pilcher, 9 Utah 2d 222, 241 P. 2d 949 where the Court said that a motion based on the grounds enumerated " is ineffective if made three months after the decision from which relief is sought." There the Court required the filing of a new action and the paying of a filing fee and the service of process if the judgement was to be attacked. If the defedant is dilatory in preserving his rights, he should have the burden of seeking the other party in his own jurisdiction, and not compel him to again come over 500 miles with his witness to prove what he wanted to prove when he first filed his complaint.

The decision in Shaw v. Pilcher, supra., is in agreement with the uniform rule in the Federal Courts from which most of Rule 60(b) was taken. See 6 Moore's Federal Practice, p. 1837-1838, motion made after time limitation must be denied as a matter of law.

There is no comparable rule to 60 (b) (4) in the Federal Rules but it appears that this subsection was taken from the California Civil Procedure. See Section 473a of the California Rules of Civl Procedure.

The cases cited in California all hold that the motion made under this provision (i.e. where for any reason the defendant is not personally served and he fails to appear) must be made within one year as provided in the California rule or the court is without jurisdiction to hear a motion to set aside the default. When the Utah Supreme Court adopted the California rule the time limitation was reduced to three months and it is submitted that it was not intended to give the defaulting defendant any more

time in view of the following decisions of the State of California interpreting their rule: People v. Davis, 77 Pac. 651, and 77 Pac. 1132 (The court has no power to set aside a judgement not void upon its face after the expiration of one year.); People v. Wrin, 76 Pac. 646; People v. McAllister, 76 Pac. 1127; Washko v. Stewart, 112 P.2d 306; E. E. Young v. Fernstrom, 79 P. 2d 1117; Macbeth v. Macbeth, 25 P. 2d 11; Vaughn v. Pine Creek Tungeston Co., 265 Pac. 491.

In fact the rule in Californa seems to be that where the defendant had actual notice that the suit had been commenced and he did nothing but refer the matter to an attorney, he cannot even ask that the default be set aside within the one year period because of his laches. See Hiltbrand v. Hiltbrand, (Calif.) 23 P. 2d 277; Pierson v. Fischer, (Calif.) 280 P. 2d 491; and see the discussion of the rule in Brockman v. Wagenbach, (Calif.) 313 P.2d 659 where the court did not find laches. The lower court did not make a finding that the default judgement was void, or that it had been satisfied, released or discharged, which is necessary if there is to be no time limitaion of three months as provided in Rule 60 (b) (5) and (6). The lower court did not find "any other reason" than the defect in personal service of summons which is necessary to avoid the three month time lmitation and proceed under Rule 60 (b) (7). Rule 60 (b) (7) requires a reason other than the defect in personal service of summons or the other reasons listed in Rule 60 (b) (1) through (6) before it can be used by the Court. See Bish's Sheet Metal Co. v. Luras, 11 Utah 2d 357, 359 P. 2d 21.

POINT II. THE DISTRICT COURT ERRED IN DISMISSING THE ACTION AFTER THE FILING OF A

MOTION TO SET ASIDE THE DEFAULT JUDGEMENT WHERE THE DEFENDANT HAS FILED AN ANSWER WITHOUT ORDERING A TRIAL ON THE MERITS OF THE ACTION.

Naturally plaintiff prefers a decison under point I because under the precedents set in California it appears that the District Court had no jursdiction to hear a motion made under Rule 60 (b) (4) after the expiration of the period of three months after the judgement had been entered. But if the Court agrees with the District Court that this Rule may be set aside on some equitable principle, and holds that the trial court can disregard the time limitation notwithstanding the provisions of Rule 6(b), then plaintiff submits that the same equity should permit a trial on the merits. The Court dismissed the matter under Rule 55(c) and 60 (b). Plaintiff has read and re-read these rules and the decisions made thereunder, but has found no authority for a trial court to dismiss an action on a motion to set aside a default. Surely plaintiff is entitled to his day in Court even though he is a non-resident. Perhaps the District Court felt that because there was no personal service of summons under Rule 4, the complaint must be dismissed under Rule 4(b). But, if so, the Court overlooked the fact that defendant filed an answer and counterclaim on April 29, 1969 and no defense under Rule 4(b) is raised in the answer.

And it is not clear whether the Court's dismissal is with or without prejudice. Plaintiff should be entitled to consideration for the results of his labor in drilling the well for defendant and should be entitled to his day in court to present his evidence proving such consideration where he has proved a prima facie case before the Court and obtain-

ed a judgement, even if the Court should decide that Rule 60 (b) (4) is not applicable to this situation.

Respectfully submitted,

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Attorney for Plaintiff-Appellant