

1969

Bill S. Woody D.B.A. Woody Drilling Co. v. Bert Rhodes and Vaughn Rhodes : Brief of Respondent Vaughn Rhodes

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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,

vs.

BERT RHODES and
VAUGHN RHODES,

Defendant and Respondent.

Case No.
11780

BRIEF OF RESPONDENT VAUGHN RHODES

Appeal from the Judgment of the First District Court for
Box Elder County
Honorable Lewis Jones, Judge

RICHARD F. GORDON
of Mann & ~~McDonald~~
35 First Security Bank Building
Brigham City, Utah
Attorneys for Respondent
Vaughn Rhodes

TED S. PERRY
61 West 1st North
Logan, Utah
Attorney for Appellant

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Clk. Eugene Cook, Utah

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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,

vs.

BERT RHODES and
VAUGHN RHODES,

Defendant and Respondent.

Case No.
11732

BRIEF OF RESPONDENT VAUGHN RHODES

STATEMENT OF THE KIND OF CASE

In this action a Nevada well-driller sued two brothers upon a promissory note and an alleged oral contract and for attorneys fees, and obtained a default judgment against one brother, which judgment was set aside because there was no valid service of a summons upon the defendant.

DISPOSITION IN LOWER COURT

The lower court granted the motion of defendant Vaughn Rhodes, to set aside and vacate the default judgment for the reason that there was no valid service of summons upon him. However, the court did not dismiss the complaint of plaintiff, but, instead, granted plaintiff an extension of time in which to answer the counterclaim of the defendant, Vaughn Rhodes, so that matter could be set for a trial on its merits.

RELIEF SOUGHT ON APPEAL

Defendant-respondent Vaughn Rhodes seeks to have the appellate court affirm the lower court in its decision to set aside and vacate the default judgment. However, the defendant-respondent Vaughn Rhodes agrees with and consents to appellant's request that the matter be remanded to the lower court so that it may be heard upon its merits inasmuch as the matter has never been dismissed by the lower court.

STATEMENT OF FACTS

Plaintiff filed suit in February, 1967, in the First District Court in Box Elder County, Utah, against the two defendants claiming that he was entitled to \$4,000.00 upon a promissory note, \$1500.00 upon an alleged oral contract and \$800.00 for attorney's fees (R.15). In attempting service upon the defendants a

member of the Box Elder County Sheriff's Department served a copy of the complaint and a summons at the home of the defendant Vaughn Rhodes, in Tremonton, Box Elder County, State of Utah, by leaving a copy of the complaint and summons with the wife of Vaughn Rhodes. (R.18, Defendant's Ex. 3).

The deputy sheriff wrote upon the copy of the summons left at the home that he:

“served this summons and complaint on the within named defendant *Bert Rhodes* on the 20 day of February, 1968, at Tremonton, Box Elder County, Utah.” (Defendant's Ex. No. 3).

However, upon the sheriff's Return of the Summons, deposited with the court, the deputy wrote that he had served said summons:

“upon the therein named *Vaughn Rhodes*” (R. 18).

No other service was ever made upon either of the named defendants (R.24).

When Vaughn Rhodes later returned to his home in Tremonton, his wife showed him the summons and stated that it was for his brother, as indicated by the writing of the deputy sheriff (R.24). Vaughn Rhodes had never before received a summons, and believed what he read. Bert Rhodes is not a resident of the State of Utah but rather is a resident of Nevada (R.19,21,24) but happened to be in Tremonton on that day because of the funeral of a family member (R.24). He took the summons and complaint with him back to Nevada where

he contacted an attorney who advised him that inasmuch as he was not a Utah resident he need not be concerned about the matter. (Plaintiff's Exhibit No. 1, R.24). However, the Nevada attorney, James L. Wadsworth, wrote a letter to counsel for plaintiff in Logan, Utah, in an attempt to explain the erroneous service, (Plaintiff's Exhibit No. 1) but in the letter he, like the deputy, erroneously reversed the names of the two brothers, *Bert* and *Vaughn*, and indicated that *Vaughn* was the Nevada resident and *Bert* was the Utah resident. (Plaintiff's Exhibit No. 1). Then plaintiff became the third party to reverse the brothers names when he prayed for a default to be entered against *Bert Rhodes*, who is and was a Nevada resident. (R.19,20). In his Precipe and Default plaintiff requested that the action against the defendant *Vaughn Rhodes* be dismissed, wrongly stating that he resided in Nevada (R. 19). The names of the two brothers were later switched on the court records in five different places to release *Bert Rhodes* and to allow plaintiff to obtain his default judgment against the defendant *Vaughn Rhodes*. (R. 19,20). On April 2, 1968, the judgment by default was entered against *Vaughn Rhodes*, for approximately \$7,000.00, (R.21) but no notice of the judgment was ever brought to his attention (R. 25).

During the last few days of January, an abstracter discovered the default judgment against the name of the defendant *Vaughn Rhodes* and brought it to his attention (R.25). *Vaughn Rhodes* immediately con-

tacted an attorney and requested him to attempt to remove the default judgment. But when no motion had been filed at the end of two months he contacted a new attorney to represent him. A motion to set aside and vacate the default judgment was filed in his behalf on April 29, 1969, within three months from the date he received notice of the judgment. (R. 25,27). Defendant Vaughn Rhodes also filed an Affidavit in Support of Motion and an Answer and Counterclaim to the complaint of the plaintiff on that date. (R.22,31).

On May 13, 1969, a hearing was held before the Box Elder County Court on the motion (R.33). In presenting his grounds for his motion, defendant Vaughn Rhodes attempted to show the judgment was void when taken because of lack of jurisdiction, and other grounds, as set out in his affidavit. However, the court restricted its inquiry to the single issue of whether or not the defendant had received valid service (TR.1-14). At the conclusion of the hearing the court stated it intended to set aside the judgment but allowed the parties to file briefs in support of their positions (TR.12). On June 17, 1969, the court entered its Findings of Fact and Order setting aside and vacating the default judgment on the ground that the defendant did not receive the required legal notice by summons. (R.33) On June 24, 1969, the court issued a further order granting plaintiff an extension of time to July 21, 1969, in which to answer the counterclaim of the defendant, Vaughn Rhodes, but did not dismiss the ac-

tion (R.35). On July 3, 1969, plaintiff filed notice of appeal.

ARGUMENT

POINT I

THE DISTRICT COURT DID NOT ERR IN SETTING ASIDE THE DEFAULT JUDGMENT UPON THE GROUND THAT THE DEFENDANT, VAUGHN RHODES, DID NOT RECEIVE VALID SERVICE OF A SUMMONS.

In its order of June 17, 1969, the District Court stated in its Findings of Fact and Order:

“That the deputy sheriff in attempting to serve a copy of the summons upon the defendant petitioner did erroneously write the wrong defendant’s name upon the summons left at the petitioner’s home and failed to provide this petitioner and defendant with the notice required under the Utah Rules of Civil Procedure.” (R.33)

The law has long been settled in Utah that where there is no valid service of a summons upon a defendant, a default judgement is void. See *State Tax Commission vs. Larsen*, 100 Utah 699, 110 P2d 558. And, the requirements for a valid service of a summons have been well defined by the courts. In *National Farmers Union Property and Casualty Co. vs. Thompson*, 4 Utah 2d 7, 286 P2d 249 (1956) this court expressed the frequently quoted guide-line:

“Notwithstanding all of our efforts to eliminate technicalities and liberalize procedure, we must not lose sight of the cardinal principle that under our system of justice, if an issue is to be tried and a party’s rights concluded with respect thereto, he must have notice thereof and an opportunity to meet it.” (p.13).

That and other decisions of the Utah Supreme Court have clearly determined that the essential requirement of service is that it must provide a party with such notice as to alert him to the fact that he must respond or waive his rights. The service in this matter did not meet that exacting standard, where the notation of the deputy on the summons expressly stated that he had served *Bert Rhodes*, yet he later informed the court in his affidavit that he had served *Vaughn Rhodes*.

The California Supreme Court, in the case of *Petersen v. Vane*, 57 C.A.2d 58, 134 P2d 6, strongly expressed its view that such service does not meet the requirements of the law. There a defendant who was served as a “fictitious” defendant, appealed from a default judgment. The court there stated:

“Of course, if the process server fraudulently misleads the person served by telling him that the summons is for someone else, equity may possess the power to set aside a judgment based on such service.”

While in our case there is no evidence that the deputy’s misleading statement was intentional, the effect is just as harsh and deprived the defendant of his day in court, the same as if the process server had acted fraudulently.

In the recent Utah case of *Rees vs. Scott*, 8 Utah 2d 134, 328 P2d 877, a situation strikingly similar to ours arose. There a deputy sheriff in serving the defendant failed to write the date of service on the copy of the summons left with the defendant, but did write the date of service upon the copy returned to the court. When that service was challenged the Utah Supreme Court wisely held that the summons was insufficient and that the defect could not be disregarded as a mere irregularity under Rule 61. When the plaintiff appealed to the court that the omission was inconsequential the court stated, concerning Rule 61:

“The above rule is salutary where applicable. But it cannot be used as a catch-all to cover up defects, errors, or omissions upon which the rights and duties of adverse parties depend.” (p.135)

It would be difficult indeed to find a fact situation more closely in line with the facts of this case or to find a circumstance where the rights of a party are more dependent upon the requirements of fair notice.

In the earlier Utah case of *Columbia Trust Company vs. Steiner*, 71 Utah 498, 267 P 788, the Supreme Court insisted that the technical requirements in serving a defendant must be strictly complied with. There a defendant was served, as in our case, by a copy of the summons being left with the defendant's wife at his home. A default judgment entered against him was appealed on the ground that the summons was not valid. The court ruled in his favor and concluded that the

affidavit and proof of service were defective in three particulars: That the affidavit failed to show that the person making the service was of qualified age on the date of service, even though it showed he was on the date when he made proof of service; that the affidavit failed to show the summons which was served at defendant's home was delivered to his "usual place of abode"; and third, that the affidavit did not state that the wife of the defendant was over 14 years of age even though she was a married woman. The obvious intent of the court was to require a full compliance with the rules and to allow the parties their day in court.

In an often cited California case, *City of Los Angeles vs. Morgan*, 105 C.A. 2d 726, 234 P2d 319, where it was determined that an affidavit of service was fraudulent, the court stated:

"Under the due process clause of the federal constitution a personal judgment rendered without service of process on, or legal notice to, a defendant is not merely voidable, but void, in the absence of a voluntary appearance or waiver."
(p.321)

The court then quoted an earlier California decision, holding:

"It has long been established that a false affidavit of service constitutes extrinsic fraud. A party is thus prevented from having his day in court. Courts of equity will relieve a party from an unjust judgment rendered against him when, without service of process, either actual or con-

structive, no opportunity has been given him to be heard in his defense.” (p.322).

The failure of proper service in our case denied the defendant Vaughn Rhodes an opportunity to be heard. For that reason the court properly set aside the default judgment.

In the recent Utah case of *Utah Sand and Gravel Products Corp. vs. Tolbert*, 16 Utah 2d 407, 402 P2d 703 (1964) the defendant appealed a lower court's refusal to set aside a default judgment entered following service of a summons which was obviously invalid in its face. The Supreme Court unanimously reversed the lower court and set aside the judgment. There Justice Crockett, writing for the court, stated:

“It is true that our new rules of civil procedure were intended to eliminate undue emphasis on technicalities and to provide liberality in procedure to the end that disputes be heard and determined on their merits . . . Liberality in their interpretation and application should be indulged where no prejudice or disadvantage to anyone results, but where failure to comply with the rules will result in some substantial prejudice or disadvantage to a party, they should be adhered to with fidelity.

The proper issuance and service of a summons which is the means of invoking the jurisdiction of the court and of acquiring jurisdiction over the defendant, is the foundation of a lawsuit . . .” (emphasis added) (p.409)

The court concluded with a strong expression that whenever possible the merits of a case should be determined.

“Another point raised by the defendant deserves comment. Even if the defect in the summons had been some mere irregularity which could be cured by amendment, it would be difficult indeed to understand the trial court’s failure to set aside the default judgment. It is in accordance with our rules, and our decisional law, that where a default has been taken against a party and there is any justifiable excuse, the court should be indulgent in setting aside the judgment to afford him an opportunity for a trial on merits, and any doubt about such a matter should be resolved in favor of doing so . . .” (p.410)

The court there reemphasized its attitude expressed in *Taylor vs. E. M. Royle Corp.*, 1 Utah 2d 175, 264 P2d 279, where it said:

“It is true that our new rules should be ‘liberally construed’ to secure a ‘just . . . determination of every action, but they do not represent a one-way street down which but one litigant may travel . . .’

“Be that as it may, a defendant must be extended every reasonable opportunity to prepare his case and to meet an adversary’s claims. Also he must be protected against surprise and be assured equal opportunity and facility to present and prove counter contentions — else unilateral justice and injustice would result sufficient to raise serious doubts as to constitutional due process guarantees.”

Based upon all of the foregoing authorities it is clear that the lower court followed excellent legal precedent when it set aside the judgment based upon an invalid service.

However, appellant contends that the court was limited by Rule 60(b) (4) to a three month period following the entry of the judgment in which to set it aside, and could not apply Rule 60(b) (7) and enforce equity. Appellant contends that the subsections are mutually exclusive, but that view is clearly contrary to the law. Rule 60(b) (7) reads:

“On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: . . . (7) any other reason justifying relief from the operation of the judgment.
. . .

The Utah Supreme Court has expressly defined the scope of Rule 60(b) (7) on several occasions. In the 1956 case of *Ney vs. Harrison*, 5 Utah 2d 217, 299 P2d 1114, a default judgment was set aside 11 months after its entry on the ground that a mistake had occurred. The court explained:

“Rule 60(b) of the Utah Rules of Civil Procedure lists the instances in which a court may, in the furtherance of justice, open a judgment obtained by default. Six specific categories are set forth: . . . In addition, subsection (7) permits the judgment to be opened for ‘any other reason justifying relief from the operation of

the judgment.' Relief upon the first four grounds must be sought within three months from entry of the judgment; and upon the others' within a reasonable time.' Defendant Alda did not request relief until nearly 11 months had elapsed, and hence the only applicable section of Rule 60 (b) upon which she could rely was (7).” (p.218)

The court then explained that the appellant's basis for her motion was mistake, which is expressly provided for in subsection (1). Then, answering an argument very similar to appellant's in our case, the court said:

“Plaintiff urges that this type of mistake is a mistake of law and not within the purview of Rule 60 (b), and argues that if relief be justified in this type of case, it will destroy the firmly established policy that judgments should be final so that confidence can be reposed in this. Plaintiff points out that Rule 60 (b) is in derogation of the common law rule that all judgments become final after the close of the term, and places reliance on the rule that statutes in derogation of the common law must be strictly construed. We are aware of such a rule but it has no application in the law of this state.

“Our civil code expressly provides:

‘The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state . . .’

“The statutory authority of a trial court to set aside judgments obtained by default has been liberally construed to the end that there be trial

on the merits, beginning with our earliest decisions . . .

“The allowance of a vacation of judgment is a creature of equity designed to relieve against harshness of enforcing a judgment, which may occur through procedural difficulties, the wrongs of the opposing party, or misfortunes which prevent the presentation of a claim or defense . . .’

“The trial court could well regard this as among the class of cases that Rule 60(b) (7) was intended to govern . . .

“The Utah decisions relied upon by plaintiff recognize the firmly established principle that it is largely within the discretion of the trial court whether a default should be relieved, *which discretion will not be disturbed unless there is a patent abuse thereof.*” (emphasis added.)

An even more recent interpretation of the application of 60(b) (7) is found in *Board of Education of Granite School District vs. Cox*, 16 Utah 2d 20, 395 P2d 55 (1964). Where a default judgment was entered against a husband and wife, the Supreme Court affirmed the lower court’s decision to set aside the default judgment in favor of the wife where the husband and wife were jointly sued but only the husband was served. Justice Callister, writing for the court, there explained that the District Court was empowered to set aside the judgment against the wife by virtue of authority granted it in Rule 60(b) (7), and affirmed the trial court.

Utah’s Rules of Civil Procedure are patterned upon the Federal Rules of Civil Procedure. Federal Rule

60(b) subsection (6) is identical to Utah's Rule 60(b) subsection (7). In the authoritative treatise by Barron and Holtzoff, *Federal Practice and Procedure*, Wright Revision (1958), Volume 3, p. 420, this very problem is commented upon:

"The most difficult question with regard to Rule 60(b) (6) is whether relief can be had thereunder for reasons which are mentioned in the first five clauses of Rule 60(b), or whether the reference to 'other reason' makes this clause and the first five mutually exclusive. The question is important because of time limitations on moving for relief . . ."

The writers then recite the history of the Rule and fully answer the question they pose by listing numerous cases where subsection (6) has been held to include relief also available under the first five subsections, had the motion been made within the statutory time limit. The authors then conclude:

"[This judicial interpretation] is striking evidence of what a flexible device for avoiding the time limits of Rule 60(b) clause (6) provides to a strong court.

"Thus cases of *extreme hardship or injustice* may be brought within a more liberal dispensation than a literal reading of the rule would allow. And indeed, there is little reason why a motion or application for relief from a judgment should not be considered in the same broad perspective as an independent action to vacate or set aside the judgment." (emphasis added) (p. 426)

Obviously the Federal interpretation of the scope of the rule is identical with that of the Utah Supreme Court. Both allow equity in this kind of case.

Finally, appellant claims defendant had notice of the entry of the default. In his brief on page 2 he claims that he mailed a copy of the judgment to Attorney Wadsworth in Nevada. At the hearing he introduced as an exhibit (Plaintiff's Ex. No. 2) a copy of the letter he claimed to have mailed (TR.8). However, that exhibit is clearly dated April 9, 1969, a full year after the alleged mailing. Further, Attorney Wadsworth has sworn in an affidavit that he never received any communication from plaintiff or his counsel at any time.

From all the foregoing authorities it is clear that the district court followed established precedent and correctly set aside and vacated the default judgment entered following an invalid service of summons, and acted pursuant to authority granted it in the Utah Rules of Civil Procedure.

POINT II

THE DISTRICT COURT DID NOT DISMISS THE ACTION BY THE PLAINTIFF AT ANY TIME.

On June 24, 1969, one week following the order of June 17, 1969, vacating the default judgment appealed from, the lower court entered a second order, granting the plaintiff-appellant additional time in

which to answer the counterclaim of this defendant. That order is the final order of the court, and was entered nine days prior to plaintiff-appellant's appeal on July 3, 1969. The order of June 24, 1969, reads (R.35) :

“Upon the request of Ted S. Perry, Esquire, counsel for plaintiff, for additional time in which to answer the counterclaim in this action, plaintiff hereby is granted an extension of time until July 21, 1969, in which to answer the counterclaim of the defendant Vaughn Rhodes for the reason that the counsel for plaintiff has indicated to the court that it may be necessary for him to withdraw as counsel for the plaintiff, necessitating the employment of new counsel by plaintiff; and notice is hereby given that unless the plaintiff files some additional pleadings or motions to show he is diligently prosecuting this action before July 21, 1969, his complaint may be dismissed without prejudice.”

The order is obviously an attempt to prompt the parties to file the necessary pleadings so that the matter could be set for trial upon its merits. The determination of the court to move the matter forward timely is further evidenced by its statement that:

“ . . . unless the plaintiff files some additional pleadings or motions to show he is diligently prosecuting this action before July 21, 1969, his complaint may be dismissed without prejudice.”

The court was attempting to prevent the foreseeable problems of the defendant obtaining a default judgment on his counterclaim against the plaintiff which would further complicate matters. A motion for default was

anticipated by the court since 57 days had then passed since the counterclaim was filed. By the court's order the plaintiff was granted a total of 83 days in which to answer the counterclaim instead of the normal period of 20 days. It is evident that the appeal upon this point is not well taken and should be immediately dismissed by this court. Plaintiff's counsel was mailed two copies of the court's order (R.35,42), neither of which were returned undelivered, so plaintiff was certainly aware of it.

Respondent, Vaughn Rhodes, is eager to have the matter set for trial so that the issues may be determined upon their merits. In his original Motion to set aside the judgment (R.27) and in his Affidavit in Support of Motion (R.26) he expressly requested a trial setting, as he did in his Answer and Counterclaim (R.28).

For all of the foregoing reasons, respondent Vaughn Rhodes respectfully urges the court to affirm the judgment of the lower court in vacating and setting aside the judgment, and to remand the matter for a trial upon its merits.

Respectfully submitted,

RICHARD F. GORDON
Mann and Hadfield
Attorneys for Respondent
Vaughn Rhodes

Attorney for Respondent