

1993

Lowell E. Potter v. Century 21 Mining : Brief of Appellee

Utah Court of Appeals

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DOCKET NO. 930179

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Court

LOWELL E. POTTER,

BRIEF OF APPELLEE

Case No. 930187-CA

Argument Priority 15

Argument Priority 15

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TABLE OF CONTENTS

	<u>Page</u>
COVER PAGE.....	i.
TABLE OF CONTENTS.....	ii.
TABLE OF AUTHORITIES.....	iii.
JURISDICTION OF THE COURT.....	1
STATEMENT OF ISSUES PRESENTED.....	1
STANDARD OF APPELLATE REVIEW.....	1
DETERMINATIVE AUTHORITIES.....	2
STATEMENT OF THE CASE	
A. <u>Nature of the case and course of proceedings</u> <u>below</u>	2
B. <u>Statement of facts</u>	3
SUMMARY OF ARGUMENT	
POINT I C-21 had adequate opportunity to submit in a timely manner a motion to set aside default judgment and failed to do so; the trial court in reviewing all evidence before it on C-21's motion did not err in denying the motion.....	3
POINT II C-21 did not demonstrate to the trial court that any basis under the applicable Utah Rules of Civil Procedure was met, nor did C-21 show that it had a meritorious defense to the original promissory note action, and therefore the trial court did not abuse its discretion in denying the motion.....	3
ARGUMENT - POINT I & POINT II.....	3
CONCLUSION.....	7

TABLE OF AUTHORITIES

	<u>Page</u>
1. <u>Amica Mut. Ins. Co. v. Schettler</u> , 768 P.2d 950 (Utah Ct. App. 1989).....	6
2. <u>Bowen v. Olson</u> , 246 P.2d 602 (1952).....	6
3. <u>Christenson v. Jewkes</u> , 761 P.2d 1375 (Utah 1988).....	1
4. <u>Fackrell v. Fackrell</u> , 740 P.2d 1318 (Uath App. 1987).....	1
5. <u>Heath v. Mower</u> , 597 P.2d 855 (Utah 1979).....	6
6. <u>Larsen v. Collina</u> , 684 P.2d 52 (Utah 1984).....	5
7. <u>Lincoln Ben. Life v. D. T. Southern Prop</u> , 838 P.2d 672 (Utah App. 1992).....	6
8. <u>Miller v. Brocksmith</u> , 825 P.2d 690 (Utah App. 1992).....	5
9. <u>Spica v. Garczynski</u> , 78 F. R. D. 134 (E. D. Pa. 1978).....	1
10. <u>State of Utah, et al. v. Musselman, et al.</u> , 667 P.2d 1053 (Utah 1983).....	5
11. <u>Workman v. Nagle Construction, Inc.</u> , 802 P.2d 749 (Utah App. 1990).....	6
12. <u>Utah Rules of Civil Procedure</u> , Rule 55 (c)....	2
13. <u>Utah Rules of Civil Procedure</u> , Rule 60(b).....	2
14. <u>Utah Code Ann.</u> , Section 78-2a-3(2)(k).....	1
15. <u>Utah Code Ann.</u> , Code of Judicial Administration, Rule 4-501.....	2

JURISDICTION OF THE COURT

This is an appeal by the Defendant/Appellant from a final Order dated January 15, 1993, wherein the Third Judicial District Court, Honorable Judge Richard H. Moffat presiding, denied Defendant/Appellant's Motion to Set Aside Default Judgment. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(k).

STATEMENT OF ISSUES PRESENTED

1. Did the Third Judicial District Court err in denying Defendant's Motion to Set Aside Default Judgment?

2. Did the Third Judicial District Court abuse its discretion in denying Defendant's Motion to Set Aside Default Judgment?

STANDARD OF APPELLATE REVIEW

The decision of a trial court to deny a motion should not be reversed unless it is shown that there was an abuse of discretion. [See, Christenson v. Jewkes, 761 P.2d 1375 (Utah 1988); Fackrell v. Fackrell, 740 P.2d 1318 (Utah 1987); Spica v. Garczynski, 78 F.R.D. 134 (E.D. Pa. 1978) (interpreting Rules 55(c) and 60(b) of the Federal Rules of Civil Procedure)]. The standard of appellate review in this matter is abuse of discretion of the trial court.

DETERMINATIVE AUTHORITIES

No determinative authorities are contended, however, Utah Rules of Civil Procedure, Rules 55(c) and 60(b) are applicable and decisive as applied by the trial court.

STATEMENT OF THE CASE

A. Nature of the case and course of proceedings below.

Plaintiff/Appellee (hereinafter referred to as "Potter") filed a complaint against Defendant/Appellant (hereinafter referred to as "C-21") on or about September 13, 1988. (R. 2-5). The Summons and Complaint were served upon C-21 on October 24, 1988 by serving a company representative, Mr. Leonard Nielson, who is an attorney at law. (R. 10-12). Potter, after notice and hearing, obtained a default judgment against C-21 on December 15, 1988, no appeal having been taken. (R. 19-22). Potter thereafter attempted to negotiate a settlement of the judgment with C-21. (R. 73). Approximately fifteen months later a motion was filed by C-21's counsel entitled Motion To Set Aside Judgment, (R. 23-25). Potter responded to C-21's motion in a timely manner. (R. 56-77). With the exception of an answer being filed by C-21 two and one-half (2 1/2) years too late, no other action was taken by any of C-21's attorneys until Potter filed a request for decision under Utah Code Ann., Code of Judicial Administration, Rule 4-501. (R. 89-90). The trial court then ruled upon C-21's motion and denied the same. (R. 91-95). C-21 filed the instant appeal. (R. 98).

B. Statement of facts. The facts explicit and implicit in Section A, Nature of the case and course of proceedings below, above, are the material facts upon which this appellate court can determine whether or not the trial court abused its discretion in denying C-21's motion to set aside the default judgment. The facts as stated in C-21's "Statement of facts relevant to issues presented for review" are not the facts to be considered by the appellate court as such facts are beyond the scope of review in this Court raising collateral issues by way of alleged defenses.

SUMMARY OF ARGUMENT

POINT I. C-21 had adequate opportunity to submit in a timely manner a motion to set aside default judgment and failed to do so; the trial court in reviewing all evidence before it on C-21's motion did not err in denying C-21's motion.

POINT II. C-21 did not demonstrate to the trial court that any basis under the applicable Utah Rules of Civil Procedure was met, nor did C-21 show that it had a meritorious defense to the original promissory note action, and therefore the trial court did not abuse its discretion in denying C-21's motion.

ARGUMENT

POINT I & POINT II

C-21, in its "Brief of Appellant", pages 6 through 12 attempts to rehash alleged facts which are not relevant to the issues presented to this appellate court. They are the same facts as presented in the Motion to Set Aside Judgment, and the subsequent memoranda in support of such motion that C-21

presented to the trial court and which the trial court fully reviewed.

The trial court made it clear in its minute entry the basis for the denial of C-21's motion and did not err nor abuse its discretion in doing so. The facts upon which the trial court based its decision are as follows:

1. Previous counsel for Potter properly took judgment against C-21 when C-21 failed to Answer Potter's Complaint after proper service of Summons and Complaint. (R. 20-22).

2. Potter's previous counsel has no recollection of any conversation with C-21's counsel regarding an alleged stipulation that no further proceedings would occur. (R. 70-71).

3. Potter's judgment was based upon a valid promissory note which was acknowledged by C-21 in a Report of Examination prepared by Certified Public Accountant, Scott L. Jensen, for C-21 on February 28, 1986, and noted that the note, payable on demand, would not be demanded until 12 months from that time (February 28, 1987). (R. 21-22).

4. After the judgment was taken on December 15, 1988, Potter began discussions with C-21, and its successors in interest, for payment of such judgment. (R. 73).

5. Negotiations had been ongoing through about January of 1990 for payment of the judgment. (R. 71-74).

6. The allegations set forth in C-21's Memorandum in Support of Motion to Set Aside Judgment are over broad and have nothing

to do with the promissory note and judgment thereupon. Such allegations are designed to cast a shadow upon Potter's character and raise issues that are beyond the scope of the issue of the promissory note. (R. 26-60).

7. It is simply too late for C-21 to raise issues that are counterclaim issues to the judgment based upon a promissory note. The judgment was issued on December 15, 1988. C-21 had not filed the motion to set aside until February 26, 1990, nearly fifteen (15) months after the judgment, and, more significantly, more than a year after Potter began negotiations on settlement of judgment with C-21 and its successors in interest. (R. 73).

8. C-21 had not raised a meritorious defense to the promissory note based judgment. (R. 91-95).

9. If C-21 wishes to sue Potter on the extraneous issues which are raised in its motion, which are issues constituting an alleged counterclaim not based upon the promissory note, then C-21 could have done so. However, the judgment is valid and should not be set aside based upon such extraneous allegations. (R. 92).

The trial court properly noted that in order for C-21 to be relieved from the default judgment, it must not only show that judgment was entered against it through excusable neglect, but must also show that its Motion to Set Aside was timely, and that it has a meritorious defense to the action. [See, State of Utah, et al. v. Musselman, et al., 667 P.2d 1053 (Utah 1983); see also, Larsen v. Collina, 684 P. 2d 52 (Utah 1984); Miller v.

Brocksmith, 825 P.2d 690 (Utah App. 1992); Lincoln Ben. Life v. D. T. Southern Prop., 838 P.2d 672 (Utah App. 1992); Home Sav. & Loan v. Aetna Cas. & Sur., 817 P.2d 341 (Utah App. 1991)].

In this case C-21 claims there was a stipulation between counsel that C-21 would not be required to answer the complaint. Potter's counsel has no recollection of such a stipulation. (See Affidavit of Richard J. Leedy, R. 70-70A).

C-21's Motion was not timely. Nearly fifteen months expired from the time the judgment was rendered until the time the Motion was filed. During that period of time Potter negotiated with C-21, and its successor in interest, for payment and/or settlement of the judgment. (see Affidavits of Lowell Potter and Thomas Potter, R. 71-77). C-21 clearly had actual knowledge of the judgment almost immediately after entry thereof.

Further, in denying a motion to set aside the default judgment entered against a defendant for fraudulent misrepresentation, the Utah Supreme Court determined that the trial court did not abuse its discretion in denying defendant's motion and stated that each case must be looked at on its own peculiar facts and circumstances, and no general rule can be laid down respecting discretion to be exercised by the Judge. [See, Heath v. Mower, 597 P.2d 855 (Utah 1979)]. The lower Court reviewed the facts of this case extensively, and made its findings based upon those facts rendering a proper decision to leave the default judgment intact. [See, Workman v. Nagle Construction, Inc., 802 P.2d 749 (Utah App. 1990)].

Notice of entry of the default judgment was not and is not a requirement of the Utah Rules of Civil Procedure in circumstances such as these. [See, Lincoln Ben. Life v. D. T. Southern Prop., 838 P.2d 672, 675 (Utah App. 1992)]. In any event, C-21 had actual notice of the judgment and acted upon it by negotiating with Potter for settlement before filing its motion to set aside the default judgment. (R. 71-74).

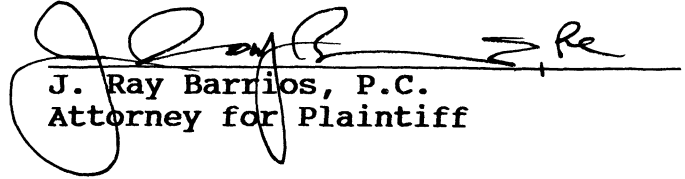
The default judgment in this case was based upon a promissory note. The amount was certain. The Court granting the default judgment was apprised of all pertinent facts and circumstances by counsel for Potter in a default hearing before the court. C-21 now raises collateral issues that cannot be the basis for a collateral attack upon the judgment. [See, Bowen v. Olson, 246 P.2d 602 (1952)]. Such collateral issues raised ostensibly as a defense are not sufficient to set aside a judgment by default. [See, Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950 (Utah Ct. App. 1989)].

CONCLUSION

The trial court reviewed all the evidence before it, which is the same evidence before this appellate court. The trial court did not err in denying C-21's motion; and, further, did not abuse its discretion in the denial of C-21's motion.

For the reasons as set forth above, and as adequately supported by the record, C-21's appeal must fail and the trial court's decision of January 13, 1993 and Order of January 15, 1993 must be affirmed.

Dated this 29th day of June, 1993.


J. Ray Barrios, P.C.
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) true and correct copies of the foregoing BRIEF OF APPELLEE, postage prepaid, to the following, this 29th day of June, 1993:

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