1973

Airkem Intermountain, Inc., And Francis M. Hickey v. Ardell L. Parker : Respondent's Brief

In The Supreme Court of the State of Utah

AIRKEM INTERMOUNTAIN, INC., and FRANCES M. HICKEY,
Plaintiffs and Respondents,

vs.

ARDELL L. PARKER,
Defendant and Appellant.

Case

RESPONDENT'S BRIEF

Appeal from a Default Judgment
Third Judicial District Court of Salt
State of Utah
Honorable Stewart M. Hanson,

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In The Supreme Court of the State of Utah

AIRKEM INTERMOUNTAIN, INC., and FRANCES M. HICKEY,
Plaintiffs and Respondents,
vs.
ARDELL L. PARKER,
Defendant and Appellant,

Case No. 13148

RESPONDENT'S BRIEF

INTRODUCTION

In the interests of clarity and continuity, the plaintiffs in this matter, Airkem Intermountain, Inc., and Frances M. Hickey, will be referred to in this brief as Respondents and the defendant, Ardell L. Parker, will be referred to as Appellant.

STATEMENT OF THE NATURE OF THE CASE

This appeal arises from the refusal of the District Court to vacate judgment against the Appellant and to grant him a second trial.

DISPOSITION IN THE LOWER COURT

The case was tried to the Court. Plaintiffs, their counsel and witnesses were present at the time appoint-

ed for trial. Defendant and his counsel failed to appear. Judgment was granted as prayed in favor of Respondents. Appellant moved for a second trial and the District Court denied his motion.

RELIEF SOUGHT ON APPEAL

Respondents seek to have the trial court's order affirmed.

STATEMENT OF FACTS

Trial of the matter was schedule and held on September 21, 1972 in the District Court of Salt Lake County before the Honorable Stewart M. Hanson, pursuant to notice mailed to counsel for each of the parties on May 5, 1972 (R-27, 34). Plaintiffs and their counsel were present at the time and place appointed for trial. Defendant and his counsel failed to make any appearance. Counsel for Appellant attempted to withdraw from the case by mailing a copy of his Withdrawal of Counsel to counsel from Respondents on September 20, 1972 and by filing the original of the same with the Clerk of the Court on the morning of the trial (R-25). Permission to withdraw was denied pursuant to Rule 10 of the Rules of Practice of the Third Judicial District Court (R-17, 19, 34). Trial of the matter resulted in a judgment for plaintiffs and the Court made and entered its Findings of Fact and Conclusions of Law (R-17) and Judgment (R-19) on September 22, 1972. Copies of the Findings of Fact and

Conclusions of Law and the Judgment signed by the Court had been mailed to counsel for Appellant on September 21, 1972 (R-25). On October 16, 1972, a motion entitled Motion to Vacate Default Judgment and Set Aside Default was filed with the Court (R-12) together with the Affidavit of the defendant (R-9, 14). On November 1, 1972, defendant's motion was heard by the trial court. On November 6, 1972, the Order of the trial court denying defendant's motion was made and entered.

ARGUMENT

POINT I

APPELLANT HAS FAILED TO SUSTAIN HIS BURDEN IN ATTACKING THE JUDGMENT OF THE TRIAL COURT.

Appellant seeks relief under the provisions of Rule 60(b), Utah Rules of Civil Procedure. Under that Rule, the Court may relieve a party of a final judgment ". . . in the furtherance of justice . . .". It is well established in Utah that on appeal the decision of the trial court will be presumed to be correct and the burden of rebutting that presumption lies with the party attacking the judgment. *Leithead v. Adair*, 10 Utah 2d 282, 351 P2d 957 (1960). This burden has two elements. First, where a trial has been held, the attacker must show a "reasonable likelihood" *Hales v. Peterson*, 11 Utah 2d 411, 360 P2d 822 (1961), that the result of a second trial would be different. Second, where he is seeking relief from his own neglect, the attacker must

show that vacating the judgment will not result in prejudice to the judgment holder. *Utah Sand and Gravel Products Corp. v. Tolbert*, 16 Utah 2d 407, 402 P2d 703 (1965).

Appellant here has shown no facts giving rise to a reasonable likelihood that the result of a second trial would be different from the present judgment. Beyond the bare legal conclusions stated in his answer (R-28) and his affidavit (R-9) Appellant has made no representation of facts nor shown any errors of law in the Court's prior determination. Thus, the Appellant has failed to bear the initial burden.

Had Appellant met his initial burden, however, the injustice and inequity of setting aside the judgment in this matter which was lawfully and properly obtained by the Respondent the time and money expended in the preparation for trial and being present at the trial of the case with witnesses and counsel and the preparation and filing of the judgment and supporting documents as well as the Court's time is wasted if the judgment is set aside. From defendant's own sworn statements in the record, it is apparent that the retention of the priority of the judgment is critical in determining collectibility of the amount due. In his sworn affidavit dated October 11, 1972, (R-9), defendant states that "defendant is a property owner . . .". On December 6, 1972, less than two months later, the defendant again under oath (R-6), solemnly swears "that due to my poverty, I am unable

to bear the expenses of the appeal . . .". If defendant's own statements are to be believed, he has, between Octobr 11, 1972 and December 6, 1972, lost his property, the job he speaks of in his affidavit (R-9), and is now impoverished The present judgment constitutes a lien against the real property which defendant owned or may have owned when judgment was entered against him. Loss of this preferred position would result in both a substantial prejudice and a disadvantage to the Respondents.

A close reading of the case cited by defendant and other cases where this Court has set aside judgments reveal that in most of the cases some action on the part of plaintiff caused an unfair result or confusion to the defendant. This element is not present in the case now before the Court. The Respondent herein appears before this Court after having obtained judgment against Appellant through the proper use of each and every procedural step designed to grant both sides of a controversy an equal chance to present their case.

This Court has been concerned with problems similar to the mattter now before the Court on several occasions. In the case of *Utah Sand and Gravel Corp. v. Tolbert,* Supra., this Court said

> "It is true that our new Rules of Civil Procedure were intended to eliminate undue emphasis on technicalities to provide liberality and procedure to the end that disputes be heard and determined on their merits. However, this does

not mean that procedure before the Courts has become entirely "without form and void." The law itself is a system of rules designed to safeguard rights and preserve order, and administration of justice under it must necessarily be carried on with some degree of order. This can be accomplished only by compliance with the Rules established for that purpose. 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.*" (Citing Cases) (Emphasis added)

It is respectfully submitted that if the judgment of the trial court is vacated and the Respondents lose the benefits of their judgment lien on Appellant's property and is compelled to retry this case, Respondents would suffer substantial prejudice and disadvantage. Additionally, the Appellant has failed to show any reasonable likelihood that the result of a second trial would be different from that of the first and has utterly failed to show that justice would be furthered by allowing him a second trial.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT DEFENDANT A SECOND TRIAL.

This Court has, on many occasions, considered the matter of setting aside default judgments.

"The Utah decisions . . . recognize the firmly established principle that it is largely within the discretion of the trial Court whether a default should be relived, which discreion will not be disturbed unless there is a patent abuse thereof." *Ney v. Harrison*, 5 Utah 2d 217, 299 P2d 1114 (1956). See also, to the same effect, *Peterson v. Crosier*, 29 Utah 255, 81 P 860 (1905); *Warren v. Dixon Ranch Company*, 123 Utah 416, 260 P2d 741 (1953); *Board of Education of the Granite School District v. Cox*, 14 Utah 2d 385, 384 P2d 806 (1963); *Masters v. LeSeuer*, 13 Utah 2d 293, 373 P2d 573 (1963); *Mayhew v. Standard Gilsonite Company*, 14 Utah 2d 52, 376 P2d 951 (1962).

In order to determine whether an abuse of discretion has occurred, inquiry must be made into the definition of abuse of discretion. Appellant, in his brief (P-5), cites the case of *Ordway v. Arata*, 150 Cal. Ap. 2d 71, 309 P2d 919 (1957), for the proposition that ". . . one of its essential elements is that it must plainly appear to effect injustice." Appellant has failed to show how the decision of the District Court will serve to effect any injustice.

A reading of the record in this matter will show that had the trial court been convinced that Respondents would suffer no injury; that some excuse existed for the conduct of counsel for Appellant in failing to appear at the trial of the matter and in failing to observe

the Rules of practice of the Third Judicial District Court, and if Appellant had shown facts indicating a reasonable probability that the outcome of a second trial would have been different, Appellant's motion could have been granted. The fact that under some circumstances (not shown to exist here) the motion could have been granted will not suffice to allow a reversal of the trial court. In the case of *Warren v. Dixon Ranch Company*, Supra., the Court stated:

> ". . . this Court will not reverse the trail court where it appears . . . that all elements were considered, merely because the motion could have been granted. This Court will not substitute its discretion for that of the trial court in a case such as this."

The instant matter differs from the usual default matter where the trial court is asked to set aside a judgment where a lay person has failed to take the steps necessary to protect himself legally for some reason. It is apparent that where lay persons are involved adhering rigidly to a set procedure could work an injustice. To avoid such injustice, this Court has adopted procedural rules whereby such judgments may be reviewed by the trial court which, having all of the facts before it, including argument of counsel on the motion to set aside the judgment, may review the matter fully and set aside the judgment if justice requires it. In the case presently before the Court, the Appellant has been represented by counsel at all stages of the proceeding. Thus, if the Court accepts Appellant's excuse

that the illness of his wife and his work were sufficient excuse for him not to appear, the record is still silent as to why defendant did not appear through his counsel to try the matter or to ask for a continuance pursuant to Rule 11 of the Rules of Practice of the Third Judicial District Court. The record is clear that counsel was notified of the trial date setting on May 5, 1972 (R-27, 34) that counsel was aware of the trial date at least ten days in advance thereof as indicated in his motion (R-12), that counsel mailed his attempted withdrawal on September 20, 1972, (R-25) the day before the trial and that no motion was made for a continuance.

It is certainly not unreasonable to expect counsel to follow Rules of Practice adopted by a court or to know and understand the consequences of failing to appear for trial. When counsel fails to notify the Court of the inability of his client to appear and fails to appear himself, the Court has almost no alternative to granting judgment in favor of the party who does appear, unless that party, having the burden of proof, cannot meet its burden. To assume that the unexplained failure of counsel for Appellant to appear is sufficient excuse to relieve Appellant of this judgment would not only create a hardship on the Respondents herein by making them bear the expense of a second trial and causing them to lose their status as a judgment creditor for a time, but would seriously restrict the ability of the District Courts to dispose of their case loads in an orderly fashion.

This Court has dealt with the failure of agents and attorneys to act in other cases. In the case of *Masters v. LeScuer*, Supra, counsel for defendant neglected to file an answer after having been reminded by opposing counsel that an answer was due. This Court refused to set the judgment aside. In the case of *Warren v. Dixon Ranch Company*, Supra., this Court refused to set aside a default judgment where illness of the defendant's agent for service of process was claimed as an excuse. The Court in that case said:

> "A basic requirement of an action which can lead to a valid judgment is that a procedure should be adopted which in the normal case will give to the parties an opportunity for a fair trial which is reasonable in view of the requirements of public policy in the particular type of case. If this requirement is met, a judgment awarded in an action is not void merely because the particular individual against whom it was rendered did not in fact have an opportunity to present its claim or defense. Restatement of Judgments, Section 118. And although a judgment may be erroneous and inequitable, *equitable relief will not be granted to a party thereto on the sole ground of the negligence of the attorney, agent, trustee or other representative of the present complainant prevented a fair trial.* Restatement of Judgments, Section 126." (Emphasis Added)

At page 744, the Court continued,

> "In order for this Court to overturn the discre-

> tion of the lower court in refusing to vacate a valid judgment, the requirements of public policy demands more than a mere statement that a person does not have his day in Court when full opportunity for a fair hearing was afforded to him or his legal representative."

It is respectfully submitted that the Appellant has not only failed to show the trial court has abused its discretion in this matter, but that the record is clear that the decision of the trial court was proper and correct.

CONCLUSION

The desired end of a procedural system should be that both sides are afforded a real and meaningful opportunity to present their case. Once that opportunity has been given, as it was in this matter, the decision thus obtained should be final absent a patent error on the part of the Court or the prevailing party or unless giving finality to such a judgment would result in an obvious injustice. Additionally, the party seeking redress should be required to show due diligence on his part and on the part of his counsel. None of the foregoing elements exist in this matter and the judgment of the trial court should be affirmed.

Respectfully Submitted,
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