1995

N.A.R., LC. v. Doug Larsen : Reply Brief

Utah Court of Appeals

Douglas E. Larsen; Defendant/Appellant Pro Se.
Mark T. Olsen; Attorney for NAR, LC.

IN THE UTAH COURT OF APPEALS

N.A.R., LC., Plaintiff/Appellee, vs. DOUG LARSEN, Defendant/Appellant.	Case No. 950584-CV Civil No. 940013590 Priority No. 15

APPELLANT'S REPLY BRIEF

APPEAL FROM THE FINAL ORDER AND DEFAULT JUDGMENT OF THE THIRD CIRCUIT COURT FOR THE STATE OF UTAH, SALT LAKE COUNTY, SALT LAKE CITY DEPARTMENT, THE HONORABLE PHILIP K. PALMER, PRESIDING

DOUGLAS E. LARSEN
1817 South Main Street, #8
Salt Lake City, Utah 84115
Telephone: (801) 484-1344
Defendant/Appellant Pro Se

Mark T. Olson
10 West Broadway, Suite 725
Salt Lake City, Utah 84101
Telephone: (801) 328-3560
Attorney for N.A.R., LC.

I

TABLE OF CONTENTS

II

TABLE OF AUTHORITIES

III

SUMMARY OF ARGUMENT

Defendant Douglas E. Larsen's responsive argument provides the court with references and case law which support the fact that he identified reasons justifying set aside of the Default Judgment in the lower court, that his claims are consistent with Rule 60(b)(6) and (7), U.R.C.P., that his claim of accord and satisfaction is valid and that defendant raised issues involving Rule 4(e), U.R.C.P., in the lower court.

IV

ARGUMENT

POINT I

DEFENDANT IDENTIFIED REASONS JUSTIFYING SET ASIDE OF DEFAULT JUDGMENT.

While plaintiff alleges that defendant failed to identify any reason justifying relief from the Default Judgment pursuant to Rule 60(b), U.R.C.P., such is not the case. Mr. Larsen specifically addressed those issues in the lower court under his Memorandum in Support of Motion for Relief of Judgment (Appellant's Brief - Exhibit "L"), Defendant's Affidavit in Support of Motion (Appellant's Brief - Exhibit "D"), and in his Reply to Plaintiff's Memorandum in Opposition to Motion for Relief of Judgment (Exhibit "A").

The fact that the parties settled this matter, that defendant was denied proper service of process, that plaintiff fraudulently altered the terms of payment, that plaintiff failed to comply with Rule 58A(d), U.R.C.P., in regard to notice of

default, each constitute grounds for Rule 60(b) relief. See Laub v. South Cent. Utah Tel. Ass'n, 657 P.2d 1304 (Utah 1982).

POINT II

DEFENDANT'S CLAIMS WERE CONSISTENT WITH RULE 60(b) SUBSECTIONS (6) and (7).

Plaintiff incorrectly argues that the verbage contained under Rule 60(b)(6), U.R.C.P., precludes defendant's claims. In fact, (b)(6) does apply, to-wit:

> The judgment has been satisifed, released, or discharged, or the prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

Final settlement, as reached and acknowledged by the parties, justified the set aside of the Default Judgment.

Defendant would further point out that Mr. Larsen claimed and established an undisputed lack of due process of law which entitled him to relief from judgment under subdivision (b)(7) of Rule 60, U.R.C.P., even after the expiration of three (3) months, because a lack of due process is not expressly provided for by this rule. Ref. Bish's Sheet Metal Co. v. Luras, 359 P.2d 21 (Utah 1961).

POINT III

CLAIM OF ACCORD AND SATISFACTION CONSTITUTES VALID ARGUMENT.

Plaintiff argues that satisfaction of the underlying debt prior to commencement of the case does not constitute satisfaction of the subsequent judgment obtained in regard to the identical matter (Appellee's Brief, page 3). In other words, plaintiff asserts that he is justified in collecting twice under the same claim provided that he can effectively manipulate the

court and the parties. Defendant disagrees. Plaintiff's course of improper conduct in this matter not only calls for set aside of the Default Judgment, but for summary disposition of the matter in defendant's favor.

It was held in Sugarhouse Fin. Co. v. Anderson, 610 P.2d 1369 (Utah 1980), that the issue of accord and satisfaction may be raised seeking direct judicial sanction of satisfaction by motion under Rule 60(b)(6), U.R.C.P.

POINT IV

DEFENDANT RAISED ISSUES IN THE LOWER COURT PURSUANT TO RULE 4(e), U.R.C.P.

Plaintiff's assertion that issues involving Rule 4(e), U.R.C.P., were not raised in the lower court are incorrect. Defendant raised these matters under Defendant's Reply to Plaintiff's Memorandum in Opposition to Motion for Relief of Judgment (Exhibit "A"), Defendant Larsen's Affidavit (Appellant's Brief - Exhibit "D", paras. 3, 4, 5, 7, 8, and 9), as well as in Defendant's Memorandum in Support of Motion for Relief of Judgment (Appellant's Brief - Exhibit "L", Point I), the responsive Affidavit of Cary Draper (Appellant's Brief - Exhibit "F"), further supports defendant's contentions in this regard.

In this instance, plaintiff has never disputed the failure of proper service of Summons and Complaint pursuant to Rule 4(e), U.R.C.P., as alleged by defendant. In Garcia v. Garcia, 712 P.2d 288 Utah 1986), it was held that where judgment is void because of a fatally defective service of process, the time limitations under Rule 60(b) have no application. See Woody v. Rhodes, 461 P.2d 465 (Utah 1969). Given the facts of this matter, default

could be set aside pursuant to Rule 60(b)(1)(3) and (4), as well as (6) and (7), U.R.C.P.

The court held in Fibreboard Paper Prods. Corp. v. Dietrich, 475 P.2d 1005 (Utah 1970), that Default Judgment was properly set aside where the trial court failed to obtain jurisdiction over defendant for failure to properly issue Summons and Complaint.

V

CONCLUSION

Based upon the foregoing argument and that contained in Appellant's Brief, there is no question that defendant is entitled to the granting of his appeal. Defendant Larsen respectfully requests the court to find that the Circuit Court erred in failing to set aside the Default Judgment based upon the existence of a prior settlement, that unilateral alteration of the money order by plaintiff did not justify further litigation, that plaintiff's subsequent failure to notice defendant of actions taken pursuant to Rule 58A(d), U.R.C.P., justified consideration for setting aside default and that failure of proper service of Summons and Complaint justifies set aside of default.

The Default Judgment as entered must also be set aside to avoid the prospect of allowing the plaintiff to succeed in an improper and wrongful attempt to collect twice under the same claim.

DATED this 21 day of December, 1995.

Douglas E. Larsen

DOUGLAS E. LARSEN
Defendant/Appellant Pro Se

MAILING CERTIFICATE

I hereby certify that two (2) true and correct copies of the foregoing APPELLANT'S REPLY BRIEF was mailed first class, postage prepaid, to plaintiff/appellee's attorney, Mark T. Olson, 10 West Broadway, Suite 725, Salt Lake City, Utah 84101, this 21 day of December, 1995.

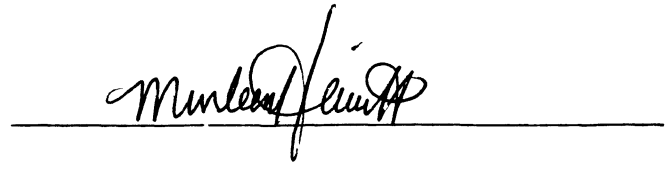

EXHIBIT "A"

DOUGLAS E. LARSEN
Defendant Pro-Se
1817 South Main Street, Suite 8
Salt Lake City, Utah 84115
Telephone: (801) 484-1344

IN THE THIRD CIRCUIT COURT, STATE OF UTAH

IN AND FOR SALT LAKE COUNTY, SALT LAKE DEPARTMENT

N.A.R., LC., Plaintiff, vs. DOUG LARSEN, Defendant.	**DEFENDANT'S REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION FOR RELIEF OF JUDGMENT** Civil No. 940013590CV Judge Phillip K. Palmer

Defendant Douglas E. Larsen hereby submits the following reply to Plaintiff's Memorandum in Opposition to Defendant's Motion for Relief of Judgment.

MATERIAL FACTS

The following supplemental facts are submitted for the consideration of the court, based upon plaintiff's response:

1. The affidavit of Cary Draper confirms the fact that she appeared at 1817 South Main Street for service of Summons and Complaint and improperly issued those papers by pushing them through a mail slot to "someone" behind a door. (Ref. - affidavit at para. 4.)

2. Plaintiff acknowledges that "plaintiff crossed out the restrictive language on the face of the money order" and cashed it. (Ref. - plaintiff's memo.)

3. That plaintiff, having sent a third party to serve Summons and Complaint at 1817 South Main Street, Salt Lake City, Utah, on October 26, 1994, and acknowledging a telephone communication with Mr. Larsen's secretary at that address, later mailed Notice of Default and Default Judgment to Mr. Larsen's former address at 225 South 200 East, Salt Lake City, Utah, on December 7, 1994. (Exhibit "A".)

4. That plaintiff acknowledges that its mailing of Notice of Default and Default Judgment, which were mailed to the incorrect address, were returned marked "forwarding order expired." (Ref. - plaintiff's memo. in opposition.)

5. That plaintiff subsequently served its Order in Supplemental Proceedings to defendant's correct 1817 South Main Street address in April, 1995.

6. That plaintiff failed to advise defendant of its action in unilaterally modifying the demonination of full and final payment on that document prior to cashing it or after, until the memorandum in opposition was submitted to the court on June 5, 1995.

ARGUMENT

POINT I

Plaintiff's action in either knowingly and willfully or erroneously forwarding Notice of Default and Default Judgment to defendant's prior address of 225 South 200 East, Salt Lake City, Utah, clearly and specifically violates Rule 58A(d), Utah Rules of Civil Procedure. In admitting that its mailing was subsequently returned, marked "forwarding order expired", plaintiff should have looked at the mailing address to verify its correct-

ness. Failing that, plaintiff should have called defendant's working telephone number that plaintiff had previously used, to advise defendant. As it stands, plaintiff proceeded with the express knowledge that it failed to meet the requirement under Rule 58A(d), and did nothing about it. Plaintiff's actions also violate Rule 4-504(2)(4)(8), Code of Judicial Administration in regard to fundamental notice requirements.

POINT II

Plaintiff knowingly and willfully altered defendant's full and final payment by crossing out the restrictive language contained on the money order, without defendant's express knowledge. The money order, as forwarded by Mr. Larsen, constituted full and final settlement of claim and plaintiff's action in modifying that payment, cashing the check and then proceeding with the complaint, all without noticing defendant, constitutes a pattern of improper and deceitful conduct.

POINT III

Not only did plaintiff act to defendant's damage and detriment in secretly altering defendant's payment and failing to notify him of that fact, plaintiff hid the fact that default was entered until April, 1995, when the Order in Supplemental Proceedings was served at Mr. Larsen's correct address. Plaintiff, with the knowledge that Rule 60(b)(1)(2)(3)(4), Utah Rules of Civil Procedure, provides that a Motion for Relief from Judgment must be entered within ninety (90) days of judgment, waited from December 7, 1994, to April 14, 1995, to notice defendant of any action having been taken in order to diminish his ability to contest the matter.

POINT IV

Defendant agrees with the principal of accord and satisfaction in this matter in that, "The condition that if it is accepted, it is to be in full satisfaction, and the condition must be such that to whom the offer is made is bound to understand that if he accepts it, he does so subject to the conditions imposed . . . the accord is the agreement and the satisfaction is the execution or performance of such agreement . . . Cannon v. Stevens School of Business, Inc., 560 P.2d 1383 (1977). The money order, as delivered, was in full satisfaction of plaintiff's claim, plaintiff accepted it and executed payment by cashing it, thereby acknowledging full and final acceptance. Plaintiff's unilateral and secret modification of the terms and conditions included does not legally alter discharge of the claim.

POINT V

Rule 11, Utah Rules of Civil Procedure, provides that every pleading, motion and other paper represented by an attorney constitutes a certification by him that he has read the pleading, motion or paper, that to the best of his knowledge and belief, formed after reasonable inquiry is well grounded in fact and warranted by existing law and that it is not interposed for any improper purpose such as to harass, delay or impose needless increase in the cost of litigation. As a businessman in this community, defendant is aware that it has become a routine event for attorneys, especially those affiliated with the collection agencies, to act improperly, using the courts, to abuse the

public in the same fashion as plaintiff's counsel has proceeded against him. Not only has plaintiff and/or its attorney ignored any fundamental rights under the law, they have proceeded in a deceitful manner in doing so. While defendant also understands that the courts seldom issue sanctions under Rule 11, which would go a long way to stopping attorney's wrongful use of the system in order to protect fellow members of the Bar, Mr. Larsen asks the court to consider Rule 11 sanctions at this time. See Clark v. Booth, 168 Utah Adv. Rep. (1991); Taylor v. Estate of Taylor, 770 P.2d 163 (Utah Ct. App. 1989); Walker v. Carlson, 740 P.2d 1372 (Utah Ct. App. 1987).

CONCLUSION

Based upon the foregoing facts and applicable law, defendant asks the court to grant defendant's Motion for Relief from Judgment, and for sanctions pursuant to Rule 11, Utah Rules of Civil Procedure.

DATED this 12 day of June, 1995.

Douglas E. Larsen

DOUGLAS E. LARSEN
Defendant Pro Se

HAND DELIVERY CERTIFICATE

I hereby certify that a true and correct copy of the foregoing DEFENDANT'S REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION FOR RELIEF OF JUDGMENT was hand-delivered to Mark T. Olson, Attorney for Plaintiff, 10 West Broadway, Suite 500, Salt Lake City, Utah 84101, this 12 day of June, 1995.

Douglas E. Larsen