

1995

N.A.R., LC. v. Doug Larsen : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS
DOCKET NO. 950584-CV
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N.A.R., L.C.,)	
)	
Plaintiff/Appellee)	Case No. 950584-CV
)	
v.)	Civil No. 940013590
)	
DOUG LARSEN,)	Priority No. 15
)	
Defendant/Appellant.)	
)	

BRIEF OF APPELLEE

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

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FILED
Utah Court of Appeals
NOV 28 1995
Marilyn M. Branch
Clerk of the Court

PARTIES TO THIS PROCEEDING

The parties to this proceeding are NAR, LC and Douglas E. Larsen.

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Section 78-2a-(3)(d), Utah Code Annotated.

**ISSUES PRESENTED FOR REVIEW,
STANDARD OF REVIEW,
WHERE ISSUES WERE RAISED**

ISSUES

Did the court abuse its discretion in denying the defendant's motion when the defendant failed to allege any grounds for relief from the judgment pursuant to Rule 60(b), Utah Rules of Civil Procedure?

STANDARD FOR REVIEW

The standard of review is whether the trial court abused its discretion. It is within the discretion of a trial court whether to grant relief from a default judgment and that discretion should not be disturbed unless there is a patent abuse thereof. See Board of Education of Granite School Dist. v. Cox, 384 P.2d 806 (1963).

WHERE ISSUES WERE RAISED

The foregoing issue was raised in the defendant's Memorandum in Support of Motion for Relief of Judgment, dated May 24, 1995.

**DETERMINATIVE, CONSTITUTIONAL PROVISIONS,
STATUTES, ORDINANCES, RULES AND REGULATIONS**

The determinative statutes and rules are:

- (a) Rule 4 of the Utah Rules of Civil Procedure;
- (b) Rule 8 of the Utah Rules of Civil Procedure;
- © Rule 58A of the Utah Rules of Civil Procedure;
- (d) Rule 60 of the Utah Rules of Civil Procedure;

SUMMARY OF ARGUMENT

The court did not abuse its discretion in denying the Defendant's Motion for Relief of Judgment because the defendant failed to allege any grounds under which relief could be granted.

Rule 60(b) of the Utah Rules of Civil Procedure enumerates specific grounds for which the court may grant relief from the judgment. In his Motion for Relief of Judgment, the defendant sought relief under two of the enumerated reasons: first, that the judgment has been satisfied and, second, any other reason justifying relief from the operation of law. However, the defendant never alleged that he satisfied the judgment, only that he satisfied the underlying debt prior to commencement of this case. Such an allegation is required to be raised as an affirmative defense, a step the defendant failed to take. As for his second prayer for relief under the catch all "any other reason," the only grounds which the defendant raised was an allegation that the plaintiff failed to give him notice of the default judgment pursuant to Rule 58A. Even if the allegation was true, failure to give notice of the default would only constitute grounds for tolling the time restrictions on filing Rule 60(b) motions, not grounds for granting the motion itself.

ARGUMENT

The court did not abuse its discretion in denying the Defendant's

**Motion for Relief of Judgment because the defendant failed
to allege any grounds under which relief could be granted.**

The defendant moved to set aside the default judgment pursuant to Rule 60, Utah Rules of Civil Procedure. (Appellant's Exhibit "L"). In his Memorandum in Support of Motion for Relief of Judgment ("Memorandum"), the defendant stated that his motion should be granted pursuant to two subsections of Rule 60(b). Specifically, he moved pursuant to Rule 60(b)(6): that the judgment has been satisfied, and Rule 60(b)(7): any other reason justifying relief from the operation of law. However, a review of the record will reveal that the defendant never alleged that he satisfied the judgment, and that he never put forth any reasons whatsoever why his motion should be granted pursuant to Rule 60(b)(7).

The defendant alleged in his Memorandum that he satisfied the underlying debt by way of accord and satisfaction prior to commencement of the case, not that he satisfied the judgment as required by Rule 60(b)(6). Under Rule 8, accord and satisfaction is an affirmative defense which the defendant should have pleaded in his answer. Because he did not raise the defense (or any defense), he is barred from raising it at this late date. See Hintze v. Seach, 437 P.2d 202 (1968).

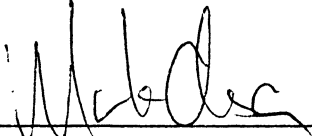
The remainder of the Memorandum repeatedly makes the same allegation: that the plaintiff did not give the defendant notice of the judgment. Failure to give notice pursuant to Rule 58A does not void the judgment; judgment is entered when it is signed and filed, and not when notice is received by the parties. See In re Bundy's Estate, 241 P.2d 462 (1952). Even if the plaintiff had not met the statutory requirement of Rule 58A, that fact would only go toward extending the time limits on filing a Rule 60B motion. See Workman v. Nagle Constr., Inc., 802 P.2d 749 (Utah Ct. App. 1990). If the defendant's motion was made timely, he still must have

grounds for the Rule 60B motion over and above the fact that notice of default was not given. In this case, the defendant failed to allege any grounds whatsoever in his original filings.

In his appeal, the defendant appears to raise a new reason why his motion should have been granted: that the defendant was never properly served. This allegation could conceivably be a reason for setting aside the judgment under Rule 60(b)(4) which states the relief may be granted, "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."

However, the defendant failed to move the court under this rule and is barred from raising the issue on appeal. Even had the defendant raised the argument h would have failed, because personal service was made on the defendant pursuant to Rule 4(e)(1) despite the defendant's attempt to evade service. (See Defendant's Exhibit "F," Affidavit of Cary Draper)

DATED this 27th day of November, 1995.



Mark T. Olson
Attorney for Plaintiff/Appellee

CERTIFICATE OF MAILING

I hereby certify that on the ___ day of November, 1995, I caused to be mailed a true and correct copy of the foregoing Answer to the address listed below by depositing a copy in the United States Mail, postage prepaid:

Douglas E. Larsen
1817 South Main Street #8
Salt Lake City, UT 84115

