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N.A.R., LC. v. Doug Larsen : Petition for Rehearing

Utah Court of Appeals

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

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BRIEF

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DOCKET NO. 950584-CV

IN THE UTAH COURT OF APPEALS

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

PETITION FOR REHEARING

RESPONSIVE PLEADING TO THE MARCH 7, 1996,
MEMORANDUM DECISION OF THE UTAH COURT OF APPEALS

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.

FILED
MAR 21 1996
COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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

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INTRODUCTION

Pro-se defendant Douglas E. Larsen hereby submits his petition for rehearing of appeal pursuant to Rule 35, Utah Rules of Appellate Procedure. Defendant states that this petition is presented in good faith and is not interposed for delay and relies upon specific material facts and points of law which defendant believes the court must further consider.

IV

MATERIAL FACTS

1. This appeal stems from a default judgment that was issued in case No. 940013590-CV in the Circuit Court in favor of plaintiff N.A.R., LC. on or about December 7, 1994. (Ref. Appellant's Brief, Exhibit "C".)

2. That default judgment was taken unbeknown to defendant Larsen after plaintiff N.A.R., LC. and Mr. Larsen entered into a negotiated settlement of the matter and Larsen had forwarded a full and final settlement payment on October 20, 1994. (Ref. Appellant's Brief, Exhibit "D".)

3. That plaintiff accepted the final settlement payment which specifically denominated settlement terms and cashed the money order by depositing it into the N.A.R., LC. bank account. (Ref. Appellant's Brief, Exhibit "A".)

4. That plaintiff fraudulently altered the settlement terms by "blacking out" the restrictive terminology contained on the postal money order prior to depositing it into the N.A.R., LC. account. (Ref. Appellant's Brief, Exhibit "B".)

5. That plaintiff N.A.R., LC. hid the fact that the money order had been altered from defendant Larsen, thereafter. (Ref. Appellant's Brief, Exhibit "D".)

6. That plaintiff had failed to ever properly serve summons and complaint to defendant Larsen and failed to complete proper service even though it was advised of that fact. (Ref. Appellant's Brief, Exhibit "D".)

7. Plaintiff further proceeded with its pattern of negligent behavior by intentionally forwarding notice of default judgment to an incorrect address. (Ref. Appellant's Brief, Exhibit "G".)

8. The Circuit Court refused to set aside default judgment without hearing on July 6, 1995. (Ref. Appellant's Brief, Exhibit "K".)

9. The Utah Court of Appeals upheld the Circuit Court's default judgment, without hearing, based solely upon the review of the service of process question on March 7, 1996. (Ref. March 7, 1996, Appellate Court Decision.)

V

ARGUMENT

POINT I

THE APPELLATE COURT DECISION WAS BASED SOLELY UPON THE SERVICE OF SUMMONS QUESTION.

The Appellate Court rendered its decision based upon the assertion that service of process was adequate under Rule 4(j), U.R.C.P., which involves "refusal of copy." In fact, defendant Larsen did not refuse to accept a copy of the process, as is suggested. Defendant Larsen was never properly served (Ref.

Appellant's Brief, Exhibit "D", para. 3), that when he became aware of the complaint he settled the claim (Ref. Appellant's Brief, Exhibit "D", paras. 4, 5, 6, 7 and 9), that he never personally received any document from N.A.R., LC. until the motion and order in supplemental proceedings was served upon him in May, 1995, (Ref. Appellant's Brief, Exhibit "D", para. 8).

Plaintiff's process server admits the following in affidavit:

1. That she attempted service at the office building of defendant on October 24, 1994, and October 26, 1994. (Ref. Appellant's Brief, Exhibit "F", paras. 1 and 2.)

2. That the office was not open to the public and "someone" unknown to her was seen inside the premises. (Ref. Appellant's Brief, Exhibit "F", para. 3.)

3. That Ms. Draper did not approach anyone, no one conversed with Ms. Draper and no one either accepted or refused service. (Ref. Appellant's Brief, Exhibit "F", paras. 3 and 4.)

4. That Ms. Draper dropped the papers in the mail slot at the office address. (Ref. Appellant's Brief, Exhibit "F", para. 4.)

In business associate Murleen Hewitt's letter to plaintiff, dated October 27, 1994, are the following statements:

1. That Ms. Hewitt had been at a trade show during the prior two (2) days and discovered the summons on the office floor on October 27th. (Ref. Appellant's Brief, Exhibit "E", para. 1.)

2. That Douglas Larsen was out of town prior to October 24, 1994, and would not return until November 7 or 8, 1994. (Ref. Appellant's Brief, Exhibit "E", para. 1.)

3. That Ms. Hewitt suggested that service should be completed upon Mr. Larsen's return after November 8, 1994. (Ref. Appellant's Brief, Exhibit "E", para. 1.)

The facts of the matter fail to make any showing that plaintiff completed service or even attempted service pursuant to Rule 4(e)(1) and 4(g). Further, no material facts of any sort exist to support Rule 4(j) claims wherein it must be shown that Mr. Larsen refused to accept a copy of process. In fact, a showing was made that Mr. Larsen wasn't even in Salt Lake City at the time Ms. Draper allegedly saw "someone" in the office and dropped the summons through a mail slot.

POINT II

THE EVIDENCE SHOWS THAT PROPER SERVICE WAS NEVER ATTEMPTED.

Rule 4(e)(1), U.R.C.P., calls for service of an individual "At the individual's dwelling house or usual place of abode with some person of suitable age and discretion there residing, or by delivering a copy of the summons and/or complaint to an agent authorized by appointment or by law to receive service of process."

In fact, no attempt was made to serve Mr. Larsen at his dwelling house or usual place of abode, no person of suitable age or discretion was served and no agent was authorized by appointment or by law to receive service of process. By definition, this complaint involved a claim for the performance of dental work upon Mr. Larsen and clearly calls for personal service.

POINT III

RULE 4(g), U.R.C.P. SQUARELY ADDRESSES THE ISSUES WHICH CONTROL THE MATTER.

While references were made to New York state and federal case law, Rule 4(g), U.R.C.P., directly addresses plaintiff's allegation that the person to be served was avoiding service of process instead of Rule 4(j). Under Rule 4(g), "Where there exists good cause to believe that the person to be served is avoiding service of process, the party seeking service of process may file a motion supported by affidavit requesting an order allowing service by publication, by mail or by some other means. The supporting affidavit shall set forth the efforts made to identify, locate or serve the party to be served, or the circumstances which make it impractical to serve all of the individual parties."

The rules clearly and specifically call for actions under Rule 4(g) that were not undertaken by plaintiff in this instance and thereby invalidate the faulty service that was undertaken. By its own terms under Rule 4(g), this paragraph "permits the court to fashion means of service reasonably calculated to apprise the parties of the pendancy of this action" and the requirement of a specific court order of substituted service "must itself be served so that the party served will be able to determine the sufficiency of service and the time as of which his or her response is due." This case reflects a classic example of what transpires when the applicable rules of civil procedure are ignored.

POINT IV

THE REFERENCED CASE LAW DEFINES DIFFERENT CIRCUMSTANCES.

While the Errion v. Connell case as cited does support Rule 4(j), U.R.C.P., this decision is different from the action at bar. In the Errion case personal service was deemed to have been completed pursuant to the Federal Rules of Civil Procedure, at the defendant Amy Errion's dwelling house or usual place of abode, that defendant Amy Errion personally refused service, and the process server advised defendant's brother, identified as Fred Errion, (a person of suitable age and discretion) that he was completing service upon defendant by leaving summons with Fred Errion.

In the current action, the undisputed evidence submitted to the court reflects the facts that the process server approached the business offices of Mr. Larsen rather than his residence address, specifically identified no one, communicated with no one, and pushed the papers through a mail slot. No evidence exists to show that Mr. Larsen ever refused service or that service was ever attempted upon any person of suitable age and discretion. In fact, evidence exists to show that Mr. Larsen was not even in Salt Lake City at the time service was attempted.

The Denney, Inc. vs. I.S. Laboratories, Inc. and Bossuk v. Steinberg cases also address service of process matters where defendants were approached in person, identified by the process server, and slammed the door upon the process server, thus knowingly and willfully refusing to accept process.

In the instant action, the process server left the summons at an office complex wherein Mr. Larsen was only one of many people who utilized the building, service was not specifically attempted or completed upon either Mr. Larsen or a person of suitable age or discretion and when noticed of these facts, plaintiff failed to complete proper service.

The Federal Court held in Milligen v. Meyer, 311 U.S. 457, 463, 61 S. Ct. 339, 342, 85 L. Ed.2d 278 (1940), that the governing constitutional principle is the due process requirement that the mode of service be "reasonably calculated to give defendant actual notice of the proceedings and an opportunity to be heard, or more specifically, that the means of notice must be such as one desirous of actually informing the defendant might reasonably adopt to accomplish it. See Graham v. Sawaya, 632 P.2d 851, 854 (Utah 1981), wherein it was held that the due process clauses of the United States and Utah Constitutions require notice to a party before his or her rights are affected by a judgment. A requirement of actual notice must be shown for an in personam judgment, not just a showing that the means of notice employed was the best available in the circumstance.

In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), it was held that:

> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

Objective review of this action reflects the fact that, upon determining that a claim was going to be initiated, Mr. Larsen not only did not seek to avoid the matter, but contacted N.A.R.,

LC. directly, negotiated a settlement with plaintiff and forwarded full and final payment of the debt on October 20, 1994, six (6) days prior to the attempted service of summons. Mr. Larsen relied upon the settlement agreement and acceptance of payment by N.A.R., LC. thereafter and had no reason to suspect that plaintiff would initiate a scheme to undertake double recovery.

In the Mullane v. Central Hanover Bank & Trust Co. case, 339 U.S. at 314, it was determined that the heart of the due process clause is the individual's right not to be deprived of property or liberty without an opportunity to present a defense and that right has little remedy or worth unless one is informed that the matter is pending and can choose for himself whether to appeal or default, acquiesce or contest.

POINT V

SET ASIDE OF DEFAULT JUDGMENT IS JUSTIFIED.

Defendant believes the larger issue in this appeal involves the appropriateness of setting aside default judgment based upon the matters of double jeopardy, fraudulent alteration of a U.S. money order, and a pattern of plaintiff's wrongful conduct, in addition to the question of proper service of summons.

The Utah courts have consistently held that default judgments are not lightly taken as they do not resolve matters based upon merit. Downey State Bank v. Major-Blakeney Corp., 545 P.2d 507 (Utah 1976); Heathman v. Fabian & Clendenin, 377 P.2d 189 (Utah 1962).

Under these circumstances, valid questions of material fact exist to justify the set aside of default judgment in this action that must not be ignored by the Court of Appeals. Case law reflects the fact that relief from default judgment has routinely been granted upon any reasonable excuse of a defaulting party. See Westinghouse Elect. Supply Co. v. Paul W. Larsen Contracor, 544 P.2d 876 (Utah 1975); Downey State Bank v. Major-Blakeney Corp., 545 P.2d 507 (Utah 1976). In this instance, defendant Larsen has factually supported substantial questions of material fact which call for set aside of the default judgment in this matter.

VI

CONCLUSION

There is no question that based upon the facts of the matter, the applicable rules of civil procedure and case law, that defendant Douglas E. Larsen is entitled to set aside of the default judgment in this matter. Careful review of the facts, as alleged by the parties in this action, clearly reflect the fact that defendant has not fully and fairly received his due process rights in this action when one considers either reasonable and equitable grounds or the technical aspects of the law. Utah courts have consistently rendered such decisions on the side of defendants wherein contentious issues of material fact exist, especially in regard to default judgments.

Defendant respectfully requests the court to reconsider defendant's appeal based upon this information.

DATED this 21 day of March, 1996.

Douglas E Larsen

DOUGLAS E. LARSEN
Defendant/Appellant Pro Se

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing PETITION FOR REHEARING was mailed first class, postage prepaid, to plaintiff/appellee's attorney, Mark T. Olson, 10 West Broadway, Suite 500, Salt Lake City, Utah 84101, this 21 day of March, 1996.

Douglas E Larsen