

2006

Kenneth Davis v. Dennis Goldsworthy : Brief of Appellee

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS
STATE OF UTAH**

KENNETH DAVIS,

Plaintiff/Appellant,

vs.

DENNIS GOLDSWORTHY,

Defendant/Appellee.

**APPELLEE BRIEF
OF APPELLEE
DENNIS GOLDSWORTHY**

Appellate Case No. 20060924

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STATEMENT OF JURISDICTION

Utah Code Ann. § 78-2a-3(2)(j) confers jurisdiction on this Court to decide this appeal.

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court properly set aside a default judgment under Rule 60(b) and under equitable principles where the Appellee was suffering a divorce and business failure, prior counsel failed to give notice of the status of the case, Appellant ineffectively mailed Notice to Appear or Appoint, and where Appellee presented a meritorious defense pursuant to the statute of frauds?

1. Standard of Review: The trial court generally has wide discretion in deciding whether a default judgment should be set aside. Granite Board of Education v. Cox, 14 Utah 2d 385, 807 (1963). However, the trial court's discretion is not unlimited. Discretion must be exercised in furtherance of justice and the court will incline toward granting relief in a doubtful case to the end that the party may have a hearing. Warren v. Dixon Ranch, 260 P.2d 741, 743 (1953). Furthermore, discretion must be exercised in accordance with Rule 60(b) of the Utah Rules of Civil Procedure, which allows a party to be relieved from default judgment because of mistake, inadvertence, excusable neglect, or any other reason justifying relief from the judgment. Lund v. Brown, 2000 UT 75, ¶ 10, 11 P.3d 277. For example, a trial court would abuse its discretion if it “refuse[d] to vacate a default judgment where there is reasonable justification for the defendants’ failure to appear and answer” Granite Board of Education, 14 Utah 2d at 807. A trial court would also abuse its discretion if its determination was “arbitrary, capricious, or not based on

adequate findings of fact or on the law” May v. Thompson, 677 P.2d, 1109, 1110 (1984).

2. Issue Preserved At: [R. 374:4-16, Transcript for Hearing on February 27, 2006, attached in Appellant’s Brief as Addendum “1,” pg. 4-16].

STATEMENT OF THE CASE

1. Nature of the Case: This case involves Appellant Kenneth Davis’ claims to real property located in American Fork, Utah County. Mr. Davis’ claims are based on an alleged oral agreement between himself and his ex-wife, Edna Davis, whom he claims agreed to transfer the property to him upon her death. Appellee Dennis Goldsworthy is the present title owner of the property. Mr. Goldsworthy received the property from Edna Davis in 1999 (R. 32). Edna passed away in 2003 (R. 32).

2. Course of Proceedings and Disposition Below: Davis filed the present action on December 23, 2003. (R. 6). Goldsworthy filed an Answer to Davis’ Amended Complaint on February 6, 2004. Goldsworthy did not appear at a scheduled deposition, and Davis filed a Motion to Compel Goldsworthy’s attendance (R. 66, 89). Before the hearing scheduled on the motion, Goldsworthy’s counsel requested to withdraw from his representation (R. 108).

Davis’ counsel then mailed a Notice to Appear or Appoint to Goldsworthy’s last known address, although knowing that Goldsworthy no longer lived there (R. 130, 374:11-13). After Goldsworthy did not appear at the rescheduled hearing on Davis’ Motion to Compel on October 14, 2005, the court struck Goldsworthy’s pleadings and entered default against him on November 7, 2006. (R. 134).

The court set hearing on damages and equitable relief for February 3, 2006 (R. 136). Before the hearing, Gregory Hansen filed an appearance of counsel for Goldsworthy and filed a Motion to Continue the Damages Hearing on January 27, 2006 (R. 148, 150). Goldsworthy's counsel then filed a Motion and Memorandum to Set Aside Default Judgment on February 2, 2006 (R. 156). The court then granted a continuance of the damages hearing until after the hearing Motion to Set Aside Default on February 27, 2006.

At the hearing on Goldsworthy's Motion to Set Aside default, the court heard all the issues that were raised in Goldsworthy's Memorandum in Support of Motion to Set Aside Default and his Reply Memorandum in Support of Motion to Set Aside Default, including the fact that Goldsworthy never receive Notice to Appear and Appoint from Davis' counsel (R. 218, 222, 374:4-15). At the hearing, the Court decided to grant Goldsworthy's motion to set aside default judgment, but also granted Davis' request for attorney's fees (R. 374:16). Davis then filed a Motion for Reconsideration of the court's decision (R. 275). Goldsworthy then filed a Motion to Dismiss, which was granted by the court on September 8, 2006 (R. 364, 370). Davis then filed a Notice of Appeal on October 5, 2006 (R. 373).

STATEMENT OF FACTS

The relevant facts of this case concern the disposition and ownership of real property located in American Fork, Utah County. (R. 12). In 1988, Ms. Edna Davis purchased the American Fork property (R. 43). On November 3, 1989, in apprehension of

their divorce, Ms. Davis and Mr. Davis voluntarily transferred the property to Mr. Davis' parents (R. 5). The couple divorced in 1989. On July 31, 1991, Davis' parents transferred the property solely to Edna Davis. (R. 43:12). Mr. Goldsworthy was the friend and co-worker of Ms. Davis since 1988 (R. 43:8-10). Goldsworthy gave Ms. Davis rides to work from 1988 until 1992 and personally made repairs and paid for improvements to her house from 1989 until her death in November, 2003 (R. 43:10). After years of friendship and service, Ms. Davis conveyed her interest in the property to Goldsworthy on June 25, 1999 (R. 43:13).

Davis alleges that the transfer of land to his parents was based on an oral agreement between himself and Ms. Davis, in which Davis would receive the property upon Ms. Davis's death (R. 5). Davis further claims that the transfer from Davis' parents back to Ms. Davis was conditional upon the express reaffirmation of the agreement between Davis and Ms. Davis (R. 11). The alleged agreement between Davis and Ms. Davis is not evidenced in writing, but only by Davis' own oral assertions (R. 5, 275:30). The only written document in existence regarding the disposition of the property is Davis' stipulated Decree of Divorce, which states that the property in question is not a marital asset (R. 198). By Davis' own stipulation and the court's Decree of Divorce, Ms. Davis had the right to dispose of all "future acquisitions of property . . . unless specifically provided for" (R. 197-196).

Based on the above allegations, Davis filed a Complaint and an Amended Complaint against Goldsworthy on December 23, 2003 (R. 12:2). Goldsworthy's counsel filed an answer on February 6, 2004 (R. 24). Goldsworthy failed to appear at a deposition

on June 13, 2005 (R. 66:1, 166:2). At the time this litigation began, Goldsworthy was going through a tumultuous divorce (R. 210). During the first week of June, Goldsworthy moved to Colorado, at the same time when the Subpoena Duces Tecum was served on Goldsworthy's counsel (R. 210). However, Goldsworthy had not been able to communicate with his former counsel since May of 2005, before the Subpoena Duces Tecum was served (R. 209).

After his move to Colorado in June, Goldsworthy was forced to shut down his business in Utah, which had been his only stable address (R. 209). Goldsworthy did not have a steady home address, and had no forwarding address to provide (R. 210-209). Because of the divorce, his subsequent move, and business failure, Goldsworthy's attention was consumed and he neglected to attend to this lawsuit (R. 209).

In September 2005, Goldsworthy's counsel withdrew from this litigation without informing Goldsworthy of the status of his case (R. 122). Goldsworthy did not receive Davis' subsequent Notice to Appear or Appoint Counsel (filed with the court on September 20, 2005), because Davis' counsel mailed it to an address they knew was obsolete. (R. 130, 218). When Goldsworthy did not appear or appoint counsel at the continued hearing on October 14, 2005 on Davis' Motion to Compel, the Court struck all of Goldsworthy's pleadings and his counter-claim and entered default judgment against him. (R. 131, 134:1). Davis' counsel then requested a hearing on damages, (R. 136), which was set for February 3, 2006 (R. 139).

Upon discovering from his ex-wife that default judgment had been entered in this case, Goldsworthy wrote a letter, received by the court on January 20, 2006, to let the

court know that he had previously not known the status of the case, and requested a continuance of the hearing on damages to give him time to retain counsel and get time off to work to come to Utah for the hearing (R. 146). Goldsworthy immediately retained counsel and proceeded with diligence to set aside the default judgment and pursued a defense on the merits (R. 209). Goldsworthy's counsel then filed a Motion to Continue the Damages Hearing and a Motion to Set Aside Default Judgment (R. 150, 156).

In the hearing on the Motion to Set Aside Default Judgment on February 27, 2006, the Court heard all of Goldsworthy's arguments explaining that he excusably neglected to respond to the litigation because of his divorce, business failure, his subsequent move to Colorado, his inability to contact his attorney, and the failure of Davis to serve Notice to Appear or Appoint to Goldsworthy (R. 374: 4-16). After hearing all of these arguments, the court granted Goldsworthy's Motion to Set Aside Default Judgment (R. 374:16). Davis' counsel argued at the hearing that if the court dismissed default judgment, it would reward those who evade litigation (R. 374:13). The court awarded default judgment nevertheless, but stated that excuses only get Goldsworthy "so far," and awarded the Davis' attorney fees. (R. 375).

After the hearing, Davis filed a Motion for Reconsideration and an Amended Motion for Reconsideration, arguing that Davis had properly served the Notice to Appear or Appoint to Goldsworthy, even though it was knowingly mailed to Goldsworthy's former address (R. 273). The court denied the Motion for Reconsideration, holding that the motion did "not present arguments that could not have been made in connection with

the motion.” (R. 275). Davis has since appealed to this Court to overrule the trial court’s decision to set aside default judgment.

SUMMARY OF ARGUMENT

The trial court acted within its direction and properly set aside the default judgment. Mr. Goldsworthy met the requirements of Rule 60(b) of the Utah Rules of Civil Procedure by offering evidence of excusable neglect and other justifications, including the Appellant’s failure to afford Mr. Goldsworthy notice to appear or appoint. Further, the trial court based its decision on adequate findings of fact and of the law. Mr. Goldsworthy also presented a meritorious defense based on the Appellant’s inability to meet the requirements of the statute of frauds should this case be heard on the merits. Accordingly, this Court should affirm the trial court’s decision to set aside default judgment.

ARGUMENT

The trial court did not abuse its discretion when it set aside default judgment because Mr. Goldsworthy met the requirements of Rule 60(b) of the Utah Rules of Civil Procedure by offering evidence of excusable neglect and other justifications, and by presenting and succeeding on his meritorious defense. The court has broad authority to accept reasonable justifications for the defendant’s failure to respond to litigation under 60(b) and should generally act with indulgence toward the defendant. Katz v. Pierce, 732 P.2d 92, 93 (1986). Rule 60(b) allows defendants who through mistake, excusable

neglect, or any other justifiable reason failed to respond to pending litigation to find relief from default judgment. In order to obtain relief from default judgment under Rule 60(b), the defendant must meet 3 requirements: 1) he must make a timely motion; 2) he must meet one of the six reasons offered in 60(b) for failure to respond; and 3) he must have a meritorious defense. Utah R. Civ. P. 60(b), Lund v. Brown, 11 P.3d 277, 283 (2000).

Because the parties do not dispute that Mr. Goldsworthy made a timely motion, this brief focuses solely on whether Mr. Goldsworthy failure to respond occurred based on one of the reasons in 60(b), and whether Mr. Goldsworthy has a meritorious defense.

The standard of review for overruling a trial court's decision to set aside default judgment is abuse of discretion. Granite Board of Education v. Cox, 384 P.2d 806, 807 (1963). This court should find that the trial court did not abuse its discretion in setting aside default judgment because: 1) Mr. Goldsworthy showed excusable neglect under Rule 60(b)(1) brought on by the circumstances of his emotionally draining divorce, his sudden business failure, and his subsequent relocation to Colorado; 2) Mr. Goldsworthy showed reasonable justification for his failure to respond to Davis' motions due to a lack of communication with his attorney and the Appellant's failure to effectively afford Mr. Goldsworthy notice; and finally, 3) Mr. Goldsworthy demonstrated a meritorious defense -- that the Appellant cannot meet the requirement of the statute of frauds to prove a contract existed if his case were to be heard on the merits.

A. The Trial Court Acted Within its Discretion When it Set Aside Default Judgment Because Mr. Goldsworthy Satisfied 60(b)(1) Excusable Neglect and 60(b)(6) Other Reasons Justifying Relief.

In order for failure to respond to a complaint to be considered excusable neglect

under Rule 60(b), the excuse need only be reasonable. Granite Board of Education, 384 P.2d at 807. In fact, it would be an abuse of discretion if a court “refuse[d] to vacate a default judgment where there is a reasonable justification or excuse for the defendant’s failure to appear, and timely application is made to set it aside.” Helgesen v. Inyagumia, 636 P.2d 1079, 1081 (1981) (quoting Mayhew v. Standard Gilsonite Co., 376 P.2d 951, 952 (1962)). Although one court may consider an excuse reasonable where another would not, where a court, after considering the totality of the circumstances, uses its discretion to set aside or affirm the judgment, the appellate court should not reverse, or “substitute its discretion for that of the trial court” even if another motion could have been granted. *See* Warren v. Dixon Ranch Co., 260 P.2d 741, 744 (1953) (finding that even though the trial court could have granted the motion to set aside default judgment, since all elements were considered by the court, the appellate court could not reverse).

1. Mr. Goldsworthy Meets the Requirements of 60(b)(1) Because he Excusably Neglected the Lawsuit Based on the Attending Circumstances in his Life.

A motion to set aside a default judgment is equitable in nature, and therefore the “conscience of the court” requires that the court consider “all of the attendant facts and circumstances” surrounding the reasons the defendant offers for excusable neglect. Granite Board of Education, 384 P.2d at 808. In this case, the attendant facts of Mr. Goldsworthy’s situation show that he reasonably and excusably neglected to respond to the Appellant’s motion for default judgment based on the uncontrollable circumstances in his life. At the time this litigation began, Goldsworthy was going through a tumultuous divorce (R. 210). He did not have a steady home address and had to move during the first

week of June 2005 to Colorado (R. 210-209). After the Goldsworthy's move to Colorado, he was forced to shut down his business in Utah, which had been his only stable address, and had no forwarding address to provide (R. 209). Because of the divorce, his subsequent move, and business failure, Mr. Goldsworthy's attention was entirely consumed and he neglected to attend to this lawsuit (R. 209).

The failure of a marriage can create serious emotional and mental strain on a person. But compounding an emotionally draining divorce with an almost immediate business failure would overwhelm any person, and would reasonably lead to that person's neglect of his other affairs, even pending litigation. Because Mr. Goldsworthy reasonably neglected to respond to litigation under the aforementioned circumstances, this court should affirm the trial court's ruling to set aside default judgment under 60(b)(1).

2. Mr. Goldsworthy Meets the Requirements of 60(b)(6) Because He Had Other reasons Justifying His Failure to Respond to Litigation, Including a Lack of Communication With His Attorney and a Failure to Receive Notice to Appear or Appoint.

Other factors support the finding of excusable neglect in the instant case, or in the alternative, meet Rule 60(b)(6), which acts as a catch-all by accepting "any other reason justifying relief from the operation of the judgment." In Interstate Excavating v. Agla Development Corp., the court set aside default judgment where the defendant did not receive notice of the trial date from his attorney after the attorney's withdrawal from the case 611 P.2d 369, 370-71 (1980). Upon receipt of notice of the default judgment, the defendant immediately contacted his present counsel who thereafter proceeded with diligence to oppose default judgment Id.

In this case, Goldsworthy moved during the first week of June 2005, which was when the Subpoena Duces Tecum was served on his former counsel (R. 210). Similar to Interstate Excavating, Goldsworthy's counsel did not inform him of the Subpoena or the deposition, and then withdrew in September 2005 without informing him of the status of the case. In fact, Goldsworthy had not been able to communicate with his former counsel since May of 2005, before the Subpoena Duces Tecum was served (R. 209). Goldsworthy also did not receive Notice to Appear or Appoint Counsel because it was mailed to an address which Davis' counsel knew was obsolete (R. 218). Because the defendant was going through a divorce at the time this litigation began, he did not have a steady home address and had all his mail sent to his business address (R. 210-209). However, after Goldsworthy's move to Colorado, he was forced to shut down his business in Utah and had no forwarding address (R. 209). However, Goldsworthy, upon discovering that default judgment had been entered in this case, promptly retained counsel and proceeded with diligence to set aside the default judgment (R. 209).

The Appellant argues that because Goldsworthy did not specify that these events were "outside his control," that none of the reasons he supplied show excusable neglect (Appellant's Brief, 18). However, that Goldsworthy moved to Colorado without having a forwarding address, that he had no contact with his attorney, that his attorney withdrew without informing him of the status of the case, and that he did not receive notice to Appear or Appoint counsel, shows that he was unable to protect his rights. Appellant cited Sierra Wholesale Supply L.L.C. v. Radiant Technologies, 2005 UT App. 540, to support the argument that due diligence requires the defendant to show he was unable to

protect his rights (Appellant's Brief, 16). However, unlike Sierra, this case does not deal with sophisticated parties. In that case, a president of a corporation failed to take any steps to protect the rights of the corporation. This case deals with an unsophisticated individual. Mr. Goldsworthy was sued personally, and at the beginning of litigation, was diligent in hiring a lawyer to protect his rights. It was not until his life began to fall apart that he excusably neglected to follow through with the lawsuit.

Appellant Mr. Davis also relies heavily on Hawley v. Union Pacific Railroad, 2005 UT App 368 in his brief and in his denied Motion for Reconsideration, arguing that a lack of notice to Appear or Appoint does not entitle the defendant to relief from default judgment where the defendant does not exercise due diligence. (See Appellant's Brief, 15-16, R. 234). However, this reliance is misguided for several reasons. First, Hawley is not a case regarding the setting aside of a default judgment; rather, it is a case about a defendant seeking relief from summary judgment. Unlike a default judgment, the court in a summary judgment proceeding hears the merits of the case and rules based on the finding of the facts. Unlike Hawley, Goldsworthy did not have the opportunity to have his defense heard on the merits, and, never having received notice to appear, would lose in default. Unlike summary judgment, the law generally disfavors default judgment because it can foster injustice, as none of the merits of the case are heard. Wright v. Wright, 941 P.2d 646, 649 (1997). Second, the defendant in Hawley does not claim that he lacked notice to appear or appoint counsel to the court proceedings (as in this case), but that he failed to receive notice only of the final judgment. Third, unlike Mr. Goldsworthy, the defendant in Hawley offers no extenuating circumstances under 60(b), other than the lack

of notice of the final judgment, to show excusable neglect or another legitimate reason to qualify relief from judgment. Therefore Hawley is inapplicable to the present case and should be ignored.

The Appellant also argues that because the court raised the issue of notice *sua sponte* that the Appellant was not able to effectively argue the issue of notice in connection with the Defendant's Motion to Set Aside Default Judgment (Appellant's Brief, 15). However, in the Defendant's Reply Memorandum in Support of Motion to Set Aside Default, submitted by Goldsworthy before the hearing on February 27, 2006 (where the motion to set aside default was discussed), Mr. Goldsworthy raised this issue himself in his discussion of the reasons to set aside default under Rule 60(b) (R. 213, stating that Mr. Goldsworthy "did not receive the Notice to Appear or Appoint Counsel because it was not mailed to him").

Despite the Appellant's arguments to the contrary, all of the attendant circumstances in this case -- Goldsworthy's divorce, his sudden business failure, his abrupt move, his lack of communication with his attorney, and the fact that he did not receive notice to Appear or Appoint Counsel -- prove that he had a reasonable justification for his failure to appear and respond to the litigation. As stated in Helgeson, the trial court in this case would have committed an abuse of discretion had it failed to set aside default judgment once it considered the all of Mr. Goldsworthy's extenuating circumstances. Although Davis may quibble with what is reasonable and argue that the attendant circumstances in this case do not meet the standard of excusable neglect, as in Warren, this court should not substitute its decision for that of the trial court where the trial court acted reasonably based on the

facts of the case, even if another court may have reached a different conclusion. Because the trial court acted within its discretion in finding that the requirements of Rule 60(b) were satisfied, this court should affirm the trial court's decision to set aside default judgment.

B. The Trial Court Properly Set Aside the Default Judgment Based on Adequate Findings of Fact And Law.

In general, an appellate court should not reverse a trial court's motion to set aside default judgment unless the court's decision was "arbitrary, capricious, or not based on adequate findings of fact or on the law." May v. Thompson, 677 P.2d 1109, 1110 (1984). The Appellant argues in his brief that the court's decision to set aside default judgment was not based on adequate findings of fact (Appellants Brief, 16). Rule 24(9)(a) of the Utah Rules of Appellate Procedure requires that "A party challenging a fact finding must first marshal all record evidence that supports the challenged finding." *See also State v. Clark*, 2005 UT 75, ¶ 17, 124 P.3d 235. To meet this threshold, a party must "marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." Clark, 2005 UT 75, ¶ 17 (internal quotation marks omitted).

Viewed in the light most favorable to the court below, there is enough factual evidence to support the court's legal finding that the requirements of Rule 60(b) are satisfied, and therefore the trial court did not abuse its discretion. In a hearing on the Motion to Set Aside Summary Judgment on February 27, 2006, the court heard all Goldsworthy's arguments explaining why he met the requirements of Rule 60(b),

including Mr. Goldsworthy's divorce, business failure, subsequent move to Colorado, his inability to contact his attorney, and the failure of Davis to serve Notice to Appear or Appoint. (R. 374:4-16). Only after hearing all of these arguments did the court grant Goldsworthy's Motion to Set Aside Default Judgment (R. 374:16).

Davis' counsel argued at the hearing on the Defendant's Motion to Set Aside Default Judgment that if the court dismissed default judgment it would be rewarding those who evade litigation (R. 374:13). Such a statement is simply false. The motion to set aside default judgment does not need to be denied in order to show Goldsworthy that the court does not award failure to respond to litigation. After the court heard all Goldsworthy's reasons under 60(b) to set aside default judgment (R. 374:16), the court stated that these excuses only get Goldsworthy "so far," and that Davis was awarded attorney fees. (R. 375). Mr. Goldsworthy bore the consequences of his actions by shouldering Davis' attorney fees. Most importantly, however, Mr. Goldsworthy presented a reasonable justification for his untimely behavior as required in Granite v. Board of Education and rule 60(b). Therefore, the court, based on the findings of fact, properly allowed him the chance to have his case heard on the merits by setting aside default judgment.

C. The Trial Court Properly Granted Relief From Default Judgment Based on Mr. Goldsworthy's Meritorious Defense.

In order to show that Mr. Goldsworthy has a meritorious defense for the purpose of setting aside default judgment under 60(b), Goldsworthy need not prove his meritorious defense, but must present a "clear and specific proffer of a defense that, if

proven, would preclude total or partial recovery by the claimant or counter-claimant...”

Lund v. Brown, 2000 UT 75, ¶ 29. In this case, the Goldsworthy has met the meritorious defense requirement by maintaining his Statute of Frauds defense, that if proven would preclude recovery by Davis because Davis’ claim of an oral agreement between he and Ms. Davis fails to meet the requirement of the Statute of Frauds.

1. Mr. Goldsworthy Has Met the Meritorious Defense Requirement Because the Davis Has Failed to Meet the Statute of Frauds.

Mr. Goldsworthy presented evidence and argument in the trial court that Davis’ alleged interest in the property is barred by the Statute of Frauds. U.C.A. § 25-5-1. Davis claims that he and Ms. Davis voluntarily transferred the property in question to Davis’ parents in apprehension of divorce, and that he and Ms. Davis had an oral agreement that Davis would receive the property upon Ms. Davis’s death (R. 5). Davis claims further that the transfer from his parents back to Ms. Davis was conditional upon express reaffirmation of the agreement between Davis and Ms. Davis (R. 11).

Under the Statute of Frauds, an interest in real property may only be created if there is a writing signed by the party creating the interest. U.C.A. 25-5-1. The Davis’ alleged reversionary interest is not evidenced in writing, but only by his own oral assertions (R. 5, 275:30). Moreover, the only written document in existence regarding the disposition of the property in question controverts rather than establishes the agreement. Davis’ stipulated Decree of Divorce orders that the property in question is not a marital asset (R. 198). By Davis’ own stipulation and by the court’s Decree, Ms. Davis had the right to dispose of all “future acquisitions of property . . . unless specifically provided for”

(R. 197-196). At the time of divorce, the property belonged to Davis' parents (R. 5). If there was an oral agreement to return the property to Davis upon Ms. Davis' death, Davis should have specifically provided for it, as he stipulated to in the divorce proceedings.

Davis also argued below that because there has been partial performance on the alleged oral agreement, an exception to the Statute of Frauds applies. (Section 25-5-8 of the Statute of Frauds provides that a Court may specifically perform an agreement that has been partially performed.) However, Davis' part performance must meet two requirements set forth in Martin v. Scholl, 678 P.2d 274 (Utah. 1983). First, "the oral contract and its terms must be clear and definite." Id. at 275. Second, the action must be clearly and unambiguously an action in furtherance of the proposed agreement. Ravarino v. Price, 260 P.2d 570 (Utah, 1953), Martin, 678 P.2d at 275. In other words, where Davis' alleged acts of part performance may also be explained by other motivations or reasons, the court will hold that the oral contract did not meet the Statute of Frauds and will be unenforceable. Martin, 678 P.2d at 278-279 (finding that because the plaintiff's work on his employer's ranch could be explained either by an oral contract to transfer the land to the employee in exchange for his work *or* by the fact that his work on the ranch fulfilled his job requirement, that his actions would not be construed as part performance).

In this case, Davis fails to meet the first part of the Martin test because he has not provided or alleged any clear or definite terms of the contract. It is clear that the Davis' parents owned the home for a time, and then transferred it back to Ms. Davis. However,

no other terms have been alleged as to the when, where, and how of the execution of the contract, which leaves much to speculation as to how this contract was to take place.

More importantly, Davis cannot meet the second part of the Martin test, because the transfer of the property to his parents, and the subsequent transfer to Ms. Davis are not acts which are exclusively referable to the alleged oral agreement. Davis' Complaint states that the property was transferred in apprehension of divorce, which raises numerous other possible and valid reasons for the transfer of the property to Davis' parents other than Davis' alleged oral agreement. (R. 5, 11). For instance, the parties may have transferred the property to Davis' parents based on a misunderstanding of the law, or because the parties settled their financial affairs outside of court and did not want to worry about selling the house, or perhaps because the parties jointly owed Davis' parents a sum of money equal to the value of the home and wished to take care of their marital debts prior to their divorce, or perhaps because the Davis' parents privately agreed to purchase the home and divide the money with Davis and Ms. Davis to avoid realtor fees, or perhaps because Davis and Ms. Davis desired to hide their assets from creditors.

Further, that Davis' parents held the property for several years and then transferred it back to Ms. Davis raises even more possible reasons for such actions other than Davis' alleged partial performance. For instance, Davis' parents could have transferred the property back to Ms. Davis because that was, in fact, the real oral agreement, or because Davis' parents did not want their son to sue them over the property for whatever reason, or perhaps the threat from creditors was over and so they gave the home back to Ms.

Davis as they all had originally agreed to do, or perhaps because Davis relinquished any interest in the home and did not want to be bothered any further from Ms. Davis.

Finally, the stipulated Decree of Divorce provides written documentary proof of the disposition of the home contrary to Davis' claims, and effectively eliminates all possibility that the alleged acts of partial performance are exclusively referable to the alleged oral contract. The Divorce Decree specifically identifies the property, states that it is not to be considered a marital asset, and provides that Ms. Davis may dispose of all future acquisitions of the property. The language of the Decree provides a reasonable alternate explanation for the alleged acts of partial performance; i.e. that the parties had agreed to transfer the property to Davis' parents who would then transfer the property back to Ms. Davis at a future date. Indeed, the actions of the individuals in this case more easily correspond with that type of agreement than with Davis' alleged oral contract.

Davis' allegations fail the test set forth in Martin because the terms of the alleged oral agreement are not clear and definite, and the alleged acts of partial performance are not exclusively referable to the alleged agreement. The lower court held that Davis' claims were barred by the Statute of Frauds, and dismissed the case. Here, since Davis' entire claim is based on an alleged oral contract which is clearly barred by the Statute of Frauds, Goldsworthy has met the meritorious defense requirement.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's ruling setting aside default judgment.

DATED this 14 of June, 2007

DUVAL HAWS & MOODY, P.C.



GREGORY HANSEN,
Attorney for Appellee Dennis Goldsworthy

ADDENDA

1. Order dated September 8, 2006 dismissing Davis' Complaint because Davis' claim is barred by the Statute of Frauds.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 2007 I mailed a true and correct copy of the foregoing Appellee Brief of Dennis Goldsworthy, postage prepaid, to the following:

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FILED
Fourth Judicial District Court
of Utah County, State of Utah
9-8-06 Deputy

IN THE FOURTH DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH

Kenneth Davis,

Plaintiff,

v.

Dennis Goldsworthy,

Defendant.

ORDER

Case No.030405431

JUDGE: James R. Taylor

This matter having come before the court on a hearing on July 21, 2006 at 11:00 a.m. pursuant to Defendant's Motion to Dismiss and Plaintiffs' Motion for Attorney's Fees. The court heard oral argument from counsel on the motion to dismiss, and both parties agreed to submit the matter of attorneys fees on the pleadings. Therefore, and for good cause, the court hereby enters the following FINDINGS and ORDER:

FINDINGS OF FACT:

- 1) This case was originally filed in January, 2004.
- 2) Plaintiff obtained a default judgment, and the court scheduled a hearing on damages.
- 3) Defendant obtained new counsel, and moved to continue the hearing on damages, and

also moved to set aside the default.

4) Defendant's motions were granted, but with an award of attorneys fees to Plaintiff.

5) The attorneys fees awarded relate to three specific instances of misconduct; 1) Defendant's failure to appear at the deposition properly scheduled and noticed by Plaintiff, 2) Defendant's failure to respond to the notice to appear in a timely fashion which resulted in the entry a default, and 3) Defendant's failure to appear and timely prepare for the damages hearing.

6) However, Plaintiff's claim for the amount of attorneys fees expended in this matter is unreasonably excessive for the work involved in this case.

7) Plaintiff should be awarded attorneys fees in the amount of \$4,417.65.

8) Concerning Defendant's Motion to Dismiss, the court finds that Plaintiffs claims for conversion and chattel trespass have been resolved in that the Defendant never made any claim to Plaintiff's personal property and has attempted or arranged for the surrender of that property.

9) Further, Defendant's motion to dismiss points out several significant legal impediments to Plaintiff's claims to the real property at issue in this case, whether those impediments are characterized as a motion to dismiss, a challenge to standing, or a motion for summary judgment.

10) The Plaintiff is not an heir of Edna Davis and is not otherwise authorized by any principle of agency or law to assert claims of fraud or undue influence on her behalf.

11) Plaintiff's causes of action concerning the real estate all depend on Plaintiff's possession of a cognizable interest in the title.

13) The critical facts concerning the real estate are undisputed, which are as follows.

14) Kenneth Davis and Edna Davis were husband and wife until October 31, 1990.

15) During their marriage they resided in a home which is the subject of this action.

16) That home, identified as 369 East 200 North in American Fork, Utah, was transferred by warranty deed signed by both Kenneth and Edna to Charles and Shirley Clausen, who were the parents of the Plaintiff.

17) In the October 1990 decree of divorce, the only reference to the home, then owned by the Plaintiff's parents, was that it would not be considered marital property.

18) After the divorce, in July 1991, Charles and Shirley Clauson transferred the property to Edna Davis by quitclaim deed.

19) In 1999, Ms. Davis transferred the property to the Defendant.

20) None of the conveyances made any mention of the divorce, a reservation of a life estate, or any other contract involving Ms. Davis, the Plaintiff, or the Plaintiff's parents.

21) The parents of the Plaintiff have not been joined or named in this case.

22) The Plaintiff asserts that he and Edna agreed that the property would be transferred to his parents to avoid sale as part of the contemplated divorce and that Edna was to live in the home until her death when the property would revert to Plaintiff.

23) *If there is an enforceable agreement to preserve a life estate in the property with a reversionary interest for the Plaintiff, the Clausons would necessarily be parties to the contract and yet neither they nor their estates are joined in this suit.*

24) An even more significant problem is presented by the Statute of Frauds, U.C.A. § 25-5-1, in that an interest in real property may only be created by a writing signed by the party

creating the interest.

25) Although Plaintiff argues that the life estate resulted from an agreement which was partially performed, and the court may in general specifically enforce an partially performed agreement, the Utah courts have carefully limited the doctrine of part performance as a counter to an assertion of the statute of frauds.

26) Part performance must be a clear an unambiguous action in furtherance of the proposed agreement (*Ravarino v. Price*, 260 P.2d 570 (Utah 1953) and *Martin v. Scholl*, 678 P.2d 274 at 275 (Utah, 1983)).

27) In this case, the only available evidence beyond the mere assertion of the Plaintiff controverts rather than establishes the agreement.

28) The claimed life estate supposedly created in contemplation of the divorce was not mentioned in the divorce although the property was excluded from consideration.

29) The parents, necessary parties to the enforcement of the agreement, are not joined and acted in contravention of any agreement by transferring the property to Edna.

30) Edna acted contrarily to such an agreement by deeding the property to the Defendant, a stranger.

31) The only conduct alleged by the Plaintiff is that he divorced Edna, without involving the property previously transferred by him to his parents without written limitation, and that he left personal property at the home and stayed away until after Edna's death.

32) Those actions fall far short of conduct which could clearly and unambiguously support the existence of a life estate for Edna with a reversionary interest in himself.

33) This court concludes that even if the Plaintiff were able to prove all of the conduct alleged in his complaint, the reversionary interest he now asserts is barred by the Statute of Frauds and not protected by part performance.

34) On the uncontroverted facts and law before the Court, the Plaintiff cannot prevail as a matter of law.

ORDER:

1) Plaintiff is awarded attorneys fees in the amount of \$4,417.65.

2) Defendant's Motion is granted, and Plaintiff's Complaint is hereby dismissed with prejudice.

DATED this 8 day of ^{Sept.} ~~August~~, 2006.

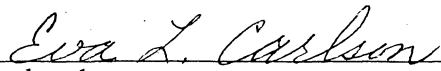
BY THE COURT:


DISTRICT COURT JUDGE

NOTICE AND CERTIFICATE OF SERVICE

Please take notice that the foregoing Order will be submitted to the Fourth District Court for signature five (5) days from the date of this Notice, plus three (3) days for mailing, unless you contact this office by telephone or file a written objection prior to that time, pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure. I hereby certify that on this 24 day of August, 2006 I mailed a true and correct copy of the foregoing Order, postage prepaid, to the following:

Justin Heideman
Lorelei Naegle
ASCIONE HEIDEMAN & MCKAY LLC
2696 N UNIVERSITY AVE STE 180
PROVO, UT 84604



Paralegal