5-28-2008

Bach v. Miller Appellant's Brief Dckt. 31716

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN N. BACH,

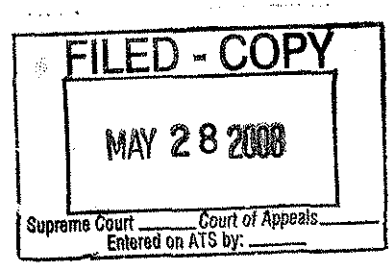
Plaintiff / Respondent,

v.

ALVA A. HARRIS, et al.,

Defendants / Appellants.

Supreme Court No. 31716



APPELLANTS' BRIEF

Appealed from the District Court of the Seventh Judicial District for Teton County
Honorable Richard T. St. Clair, District Judge

Appellant and Attorney for Appellants
Alva A. Harris, Esq.
PO Box 479
Shelley, Idaho 83274

For Respondent
John N. Bach, *Pro Se*
PO Box 101
Driggs ID 83422

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case arises as a result of a lawsuit filed by Plaintiff John N. Bach against numerous Defendants alleging a laundry list of allegations against numerous Defendants. An initial Complaint alleged that there was damaged property, racketeering and allegations of threats of batteries. The Amended Complaint contained the allegations and sought damages in excess of one million dollars and sought punitive damages in excess of five million dollars. Appellants filed a Notice of Appearance and a Motion to Dismiss. While the Motion to Dismiss was pending, the Court Clerk entered a Default against Appellants. Afer the Motion to Dismiss was denied, without any additional notice, Plaintiff submitted an Application For Entry Of Default pursuant to IRCP 55(a) which default was entered by the Court Clerk. Without having received notice of the application for default, and approximately four hours after the default had been entered by the Court, the Appellants filed their Answer in this matter. Appellants thereafter moved to set aside the default which the Trial Court denied. Thereafter the Trial Court entered Judgment against the defaulted Defendants. From these orders, Appellants Appeal.

B. COURSE OF PROCEEDINGS

On July 23, 2002, Plaintiff filed his Complaint seeking among other things damage to his property and person and alleging allegations of racketeering and seeking an injunction and damages in excess of a million dollars and punitive damages in excess of five million dollars. See Clerk's Record (hereinafter "R"), Vol. 1, p. 1. The Appellants Alva Harris on his own behalf, and on behalf of Defendants Bob Fitzgerald, Ole Oleson, and Blake Lyle submitted a Notice of Appearance on August 5, 2008. See R, Vol. 1, p. 16. The Trial Court ordered Plaintiff to file an Amended

Complaint that properly set forth the allegations. See R, Vol. 1, p. 45. Therefater, on September 27, 2002 Plaintiff filed his First Amended Complaint. On November 8, 2002, Appellants filed a Motion to Dismiss asking the Court to strike the First Amended Complaint and consolidate this case with another Teton County Case.

On January 22, 2003, Appellants filed a Motion to Dismiss pursuant to IRCP 12(b)(8) requesting the Court to dismiss the pleadings because of a pending case in the Federal Court (CV-01-266-E-TGN). The Clerk of the Court entered a Default against the Appellants on January 27, 2003. See R, Vol 3, p. 446. On March 4, 2003, the Trial Court denied the Motion to Dismiss in its Eighth Order on Pending Motions. See R, Vol. 2, p. 246, at 256. Thereafter on March 19, 2003, Appellants filed an Answer and Demand for Jury Trial. See R, Vol. 2, p. 317, at 319. The Answer asserted defenses of statute of limitations, failure to state a cause of action upon which relief may be granted, that the Plaintiff was more responsible for his comparative negligence than were Defendants, that any alleged damages were a result of third parties, that the defendant is barred by the doctrines res judicata, judicial estoppel, collateral estoppel, waiver, failure to exhaust judicial remedies, doctrine of qualified immunity, unclean hands, misrepresentation, and requested a jury trial.

On March 19, 2003, the same day Appellants filed their Answer, but apparently earlier that day, the Plaintiff submitted a Clerk's Default and Affidavit, Application of Default which Clerk's Default was entered by the Clerk. See R, Vol. 2, p. 320-322. Appellants timely filed a Motion to Set Aside Default. See R, Vol. 2, p. 324. Thereafter, Appellants filed a Notice of Hearing on the Motion to Set Aside Default and to reinstate the Answer and supported it with an Affidavit. See R, Vol. 4, p. 540A-E. The Trial Court denied the Motion to Set Aside and entered Default Judgment

against the Appellants following an evidentiary hearing. See R, Vol. 7, p. 1101, Vol. 8, p. 1367. The Trial Court thereafter entered a Final Judgment. See R, Vol. 9, p. 1505.

II. ISSUES PRESENTED ON APPEAL

1. Did the Court err as a matter of law in allowing the Clerk's Default to be entered when a prior default had already been entered and an Answer filed?

2. Did the Court err in exercising its discretion when it refused to set aside the Clerk's Default?

3. Did the Court err when it imposed a monetary Judgment that was based on speculation?

III. ARGUMENT

Appellants assert that the Trial Court erred in having a default entered and failing to set aside the default and subsequently for entering a default judgment.

A. CLERK'S DEFAULT

IRCP 12(a) provides that a Defendant shall have twenty (20) days after service of Summons and Complaint to file an answer or other permitted motion. In the event the Court denies the motion, the responsive pleading shall be served withing ten (10) days after notice of the court's action. In this case, the Appellants filed a Notice of Appearance and multiple motions, including a Motion to Dismiss. The Trial Court Clerk entered a default in this matter on January 27, 2003, even though a pending Motion to Dismiss was filed. Thereafter, that default was not set aside until the Trial Court's order on June 2, 2003 (See R, Vol. 4, p. 563), approximately two and a half months after an Answer had been filed.

IRCP Rule 55(a)(1) stated in 2003 as follows:

> When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the court, or the clerk thereof, shall enter default against the party.

In 2004, the rule was amended to clarify that the Court was to enter an Order ordering the default and also requiring a 3-day written notice of the application of any default, effectively making as a rule what had been the practice.

IRCP 55(a)(1)(as amended in 2004) provides as follows:

> When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the court, shall order entry of default against the party. Default shall not be entered against a party who has appeared in the action unless that party (or, if appearing by representative, the party's representative) has been served with three (3) days written notice of the application for entry of such default.

In this matter, it is clear that although the Appellants had appeared in the case and filed multiple motions, that no notice was given to Appellants of any intended default. The Affidavit submitted by Plaintiff in connection with his default does not state or attest that any notice was given to the Appellants of the intended default. The Trial Court's refusal to vacate the entry of default should be reversed.

This Court has clearly stated the policy that defaults are not favored and should be set aside in doubtful cases. See Suitts v. Nicks, 141 Idaho 706, 708 117 P.3d 120, 122 (2005) ("Because judgments by default are not favored, a trial court should grant relief in doubtful cases in order to decide a case on the merits.);Johnson v. Pioneer Title Co. of Ada County, 104 Idaho 727, 732, 662 P.2d 1171, 1176 (1993) ("Judgments by default are not favored, and the general rule in doubtful cases is to grant relief from the judgment in order to reach a judgment on the merits.") This Court

has set forth the overriding other policy that "[p]rocedural rules, other than those which are jurisdictional, should be applied to promote the disposition of causes upon their merits." Id. Furthermore, this Court stated "In determining whether to set aside a default judgment, we must apply a standard of liberality rather than strictness and give the party moving to vacate the default the benefit of a genuine doubt." Id. at 733, 662 P.2d at 1177.

It should be noted that at the time Appellants petitioned the Court to set aside the default, there had been no judgment entered. The Idaho Court of Appeal's decision in McFarland v. Curtis, 123 Idaho 931, 854 P.2d 274 (Ct. App. 1993), noted that the burden to set aside a default is less stringent then the Rule 60(b) standard to set aside a default judgment. Id. at 936, 854 P.2d at 279. Defaults are to be set aside if god cause is shown. See IRCP 55(c). Appellants assert that good cause existed to set aside the default. Appellants submitted an Answer to this matter on the same day an Application for Default was filed. There was no notice of an intent to take default provided to Appellants. Appellants did not receive a copy of the Affidavit for Entry of Default until he received it in the mail on March 31, 2003. See R, Vol. 4, p. 540d. Plaintiff would not have ben prejudiced by the setting aside of a default. In the present case, the Trial Court found no facts. Because no facts were found by the Trial Court, this Court is "at liberty to form our own impressions from the record and to exercise our own discretion in deciding whether the Default Judgment should have been set aside." Johnson v. Pioneer Title Co. of Ada County, 104 Idaho 727, 732, 662 P.2d 1171, 1176 (1983). Appellants also plead facts that would constitute a defense to the suit. In the Answer filed by Appellants (See, R, Vol. 2, p. 317-319), the Appellants asserted defenses of statute of limitations, comparative negligence, acts by third parties, doctrines res judicata, judicial estoppel, collateral estoppel, waiver, failure to exhaust judicial remedies, doctrine of qualified immunity,

unclean hands, and misrepresentation. In Johnson, the Court analyzed whether sufficient facts had been plead which would constitute a defense. To determine the facts which had been plead to constitute a defense, the Johnson Court reviewed the answer and analyzed the defenses asserted. Id. at 733, 662 P.2d at 1177. The Court determined that the Answer could establish a defense and set aside the Default Judgment. Appellants herein assert that a meritorious defense has been shown here, and the default should be vacated.

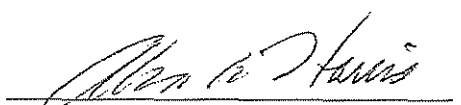
Appellants assert that the amount of damages simply was not proven in this matter to any degree of certainty. This Court has held that damages have to proven with reasonable certainty. This requires that they be taken out of the realm of speculation. See Griffith v. Clear Lakes Trout Co., Inc., 143 Idaho 733, 740, 152 P.3d 604, 611 (2007). In the present case, although there was a hearing set for the testimony on February 3, 2004, there was no meaningful substantive testimony given. Plaintiff rested on his exhibits. See Clerk's Transcript at p. 1461-1464. Appellants assert that the Affidavits did not contain sufficient facts to take the damages out of the realm of speculation. See Exhibits 81-1 to 81-6, 83-86. For example, Plaintiff wholly failed to establish ownership of the real property, which is a prerequisite for an award of damages for slander of title.

IV. CONCLUSION

Appellants assert the Trial Court erred in not setting aside the default. As previously set forth, an Answer was filed within hours of when the Clerk's Default was entered. Because defaults are not favored and there is a public policy of getting to the merits of cases, the Trial Court should have set aside the default and allowed the pled defenses to be tried. Appellants assert that the Court erred as a matter of law when it vacated a default and imposed a subsequent default when an Answer had been filed. Additionally the Court abused its discretion in not allowing the default to be set aside

where good cause was shown as well as a meritorious defense. Further, the Court erred when it entered a Default Judgment where there was insufficient evidence presented to take the amount of damages out of the realm of speculation.

RESPECTFULLY SUBMITTED this 27th day of May, 2008.



Alva Harris, Esq.
Appellant and Attorney for Appellants

CERTIFICATE OF SERVICE

I certify that on this 27th day of May, 2008, I served a two (2) true and correct copies of the following-described document on the person(s) listed below by the method indicated.

Document Served: **APPELLANTS' BRIEF**

Person(s) Served:		
	John N. Bach, *Pro Se* PO Box 101 Driggs ID 83422	(✓) Mail
	Anne Broughton, *Pro Se* 1054 Rammell Mountain Rd Tetonia ID 83452	(✓) Mail
	Gregory W. Moeller RIGBY ANDRUS & MOELLER PO Box 250 Rexburg ID 83440	(✓) Mail
	Jason D. Scott HAWLEY TROXELL ENNIS & HAWLEY PO Box 1617 Boise ID 83701-1617	(✓) Mail
	David H. Shipman HOPKINS RODEN CROCKETT HANSEN & HOOPES, PLLC PO Box 51219 Idaho Falls ID 83405-1219	(✓) Mail
	Galen Woelk RUNYAN & WOELK, P.C. PO Box 533 Driggs ID 83422	(✓) Mail
	Jared M. Harris BAKER & HARRIS 266 West Bridge St Blackfoot ID 83221	(✓) Hand Delivery

Alva Harris