1-3-1975

CF & I Steel Corp. v. Robb

IN THE SUPREME COURT
OF THE STATE OF COLORADO

No. 26629

CF&I STEEL CORPORATION, a Colorado Corporation,

Petitioner,

vs.

RICHARD D. ROBB, District Judge and the DISTRICT COURT in and for the Tenth Judicial District of the State of Colorado,

Respondents.

REPLY TO RESPONSE TO ORDER TO SHOW CAUSE

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Pursuant to previous Order of this Court, Petitioner hereby files a Reply to the Response to the Order to Show Cause.

I. BRIEF SUMMARY OF THE HISTORY OF THE CASE AS SHOWN BY THE RECORD NOW FILED WITH THIS COURT

The original pleading against the Petitioner, CF&I Steel Corporation, was filed April 24, 1974.

The Return of Service was filed May 8, 1974, showing that service had been obtained on the Defendant, CF&I Corporation, in Denver, Colorado, on April 29, 1974. The Response would have been necessary by May 20, 1974.

Motion for Default was filed on May 22, 1974. Default was entered on the same date.

The then attorney for the CF&I Steel Corporation filed a Motion to Strike and a Brief in Support of the Motion to Strike on the same date the default was entered. Although the file does not reflect the fact of time, it is presumed that these matters were within hours of each other on May 22, 1974.

On May 28, 1974, the Plaintiff filed a Motion to strike the Motions which were filed by the CF&I Steel Corporation.

On June 12, 1974, the CF&I Steel Corporation, through its then attorneys, tendered an Answer which was filed and a Motion to vacate the trial on the damages as had been previously set with an Affidavit of Excusable Neglect. Among other things in said Affidavit of the then counsel for the CF&I Steel Corporation, it stated that the docket was checked the date the Motion to Strike was filed and the Clerk indicated that nothing had been filed except the Complaint and Return of Summons. The Motions were then accepted by the Clerk.

The Court denied the Motion to set aside the default on the 26th of June, 1974, and set the matter for Hearing on Damages on August 23, 1974.

On July 8, 1974, after learning that the Default Judgment on Liability had been entered, but no Judgment on Damages had been entered, the then counsel for the CF&I Steel Corporation filed a Motion to Set Aside the Default Judgment under Rule 55(c), which Motion was received by the Court.

The Court had set July 17, 1974, for the time in which to file a Reply Brief, which Brief was filed.

At this point, the CF&I Steel Corporation employed the present law firm of RECTOR, MELAT & WHEELER, p.c., in the case and the said law firm filed on July 18, 1974, a Supplementary Motion to Set Aside the Default. This Motion contained the additional defense of the Colorado Workmans Compensation Act, which was set out in a tendered Answer to the Court raising the question of jurisdiction of the Court to enter Judgment.

The law firm of PETERSEN & FONDA withdrew on July 18, 1974, from further participation in the case.

The above and foregoing constitutes a supplemental history of the filings in this case which are deemed by the Petitioner to be essential in the consideration of the Motions and Briefs filed by the

parties in consideration of the matter of whether or not the Writ of Prohibition heretofore entered should be made absolute.

II. ISSUES

(1) Whether or not, pursuant to Rule 106(a)(4) of the Colorado Rules of Civil Procedure, the District Court in and for the State of Colorado and County of Pueblo, and presided over by District Judge Richard D. Robb, exceeded its jurisdiction in failing to grant Defendant's Motion to Set Aside Default Heretofore Entered and Motion to Dismiss for Lack Jurisdiction of the Subject Matter, and there is no plain, speedy and adequate remedy which the Defendant can otherwise pursue.

(2) Whether or not, pursuant to Rule 106(a)(4) of the Colorado Rules of Civil Procedure, the District Court in and for the State of Colorado and County of Pueblo, and presided over by District Judge Richard D. Robb, abused its discretion in failing to set aside the default heretofore entered by the District Court pursuant to the Defendant's Motion to Set Aside Default Heretofore Entered, and there is no plain, speedy and adequate remedy which the Defendant can otherwise pursue.

III. ARGUMENT

Petitioner is of the opinion that it has adequately presented the question of jurisdiction in its original Brief, and therefore will only discuss briefly the second issue regarding abuse of discretion, except as the question of jurisdiction relates to the second issue.

In Petitioner's original Brief, it was stated that CF&I Steel Corporation's then attorneys, PETERSEN & FONDA, filed a Motion to Strike one day after the default was entered. From review of this matter, it should be noted that this Motion was filed the same day the default was entered and not more than two days after the time for an Answer was due. In fact, when the then attorneys for the Defendant filed the Motion, the Assistant District Clerk checked the docket and indicated that nothing had

been filed previously except for a Complaint and Return of Summons. See Clerk's record, "Affidavit of Excusable Neglect and some facts regarding the accident." P. 34.

Respondent relies strongly on the issue that on June 26, 1974, and on that day, Respondent refused to set aside the default, did Petitioner show "excusable neglect" and "a meritorious defense"? It will be noted that the defense pertaining to the Colorado Workmans Compensation Act was raised for the first time by the second counsel which were employed. This defense was submitted to the Court prior to a resolution of the second Motion to Set Aside the Default Judgment. The Court should then have taken the view that in order to promote substantial justice, the default should be set aside and the new defense of the Colorado Workmans Compensation Act, Section 81-3-2 and 81-9-2, as amended, be considered.

It is quite obvious from all of the pleadings that there has not been any allegation that the client itself contributed in any way to the fact that an Answer was not filed within the twenty day limit. This fact being true, the case falls clearly within the cases which allow greater leniency where the client is not at fault as distinguished from those cases in which the client's negligence combined with that of the lawyer produces the default. As much as the case at hand is one in which the client was not at fault, it is felt that it falls within the rule of Coerber v. Rath, 435 P2d 235, Temple v. Miller, 30 Colo. App. 49, 488 P2d 352, Byer v. Peterson, 92 Colo. 462, 21 P2d 1115, and Hawkins v. Smalley, 88 Colo. 227, 294 P 534. Without such construction to the case at hand, Petitioner would be denied its day in Court through no fault of its own. In addition, the intend of the Colorado Rules of Civil Procedure would not be fulfilled, that being, to promote substantial justice, rather than just procedural justice.

It is asserted, even if one assumes that a question of jurisdiction is not involved, still Casaus has failed to assert any claim upon which relief can be granted, and as such, this matter should be dismissed on that basis, or at least remanded to allow the Petitioner to so plead the defense of the Colorado Workmans Compensation Act.

It should be noted that the Respondent in its Order entered September 5, 1974, found in part, among other things:

> This Court's findings of fact, conclusions of law and Order entered June 26, 1974, were correct and proper, and although Defendant has now subsequently shown it may have had a meritorious defense to Plaintiffs' claim, it made no such showing prior to the entry of this Court's Order on June 26, 1974. There has been no additional showing that the failure to file a responsive pleading initially in this matter was due to excusable neglect.

This shows that the Respondent was aware that there was a meritorious defense prior to the entry of the Order denying CF&I's Motion for Relief filed by the second counsel in the case. The basis for the Court's Order was a misinterpretation of the Petitioner's defense, the Court construing a defense as a plea in bar, when in fact, it was jurisdictional and also a failure to state a cause of action. The Complaint as filed on its face alleges each and every necessary allegation to display to thle Court that it was within the Colorado Workmans Compensation Act which absolutely abolish the cause of action. The Complaint alleges the CF&I Steel Corporation was the owner of the premises, the decedent was an employee of a subcontractor, and that Workmans Compensation was obtained.

It is submitted that the provisions of C.R.S. Section 81-3-2 and Section 81-9-2, as amended, go not only to the question of jurisdiction, but also to the requirement that in order to sustain a judgment by default, the pleadings must state a cause of action. As asserted previously, the Respondent abused its discretion by not setting aside the Default Judgment when, in fact, the default was not justified by the pleadings pusruant to the Colorado Workmans Compensation Act.

In Fidelity Finance Company v. Groff, 124 Colo. 225, 235 P2d 994, Plaintiff had applied to the Court for cancellation of a Promissory Note on the grounds that it had been obtained by fraud. A default was entered on the Complaint after the time for an Answer had expired. The Complaint did now, however, restore the consideration which was obtained for the Note from the Fidelity Finance Company. In its findings, the Court held that inasmuch as the Complaint failed to offer restitution, that a Default Judgment was entered upon a case which failed to state a cause of action on its face. In 47 Am. Jur. 2d, Section 1175 (1969), the rule is stated succinctly as follows:

> Although after the entry of a Judgment by Default, formal defects in the mode of pleadings are not regarded as material, it is a general rule that a Judgment by default must be justified by the pleadings. Such a Judgment may not be rendered where the pleadings of the Plaintiff omit averments essential to the showing of a cause of action, and it has even been said that a Plaintiff knowingly to procure a Court to enter Judgment under such circumstances is an irregularity in obtaining a Judgment amounting to fraud. P. 198.

Even assuming that this matter does not go to a jurisdictional defect, it is quite obvious that the Respondent abused discretion in failing to set aside the default and dismissing the action since the pleading failed to state a cause of action. A failure to state a cause of action is not tantamount to an affirmative defense and therefore is not subject to Rule (a)(c) of the Colorado Rules of Civil Procedure. See also 84 C.J., Section 386.

In Cragin v. Lovell, 109 U.S. 194, 27 LEd 903, 3 S Ct. 132 (1883), the Plaintiff filed an action against the Defendant, Lovell. Plaintiff alleged that Defendant was the owner of real property and liable to Plaintiff on certain Promissory Notes. Plaintiff further alleged that one Fisk had purchased the real property and had in fact been the one who executed the Promissory Notes to her. The Plaintiff subsequently alleged Defendant was liable on said Notes because Fisk in executing the Notes was

acting as agent of Defendant. In this action, the Defendant defaulted. The Court held that no cause of action existed against the Defendant since Plaintiff's only action here was agaist Fisk. No legal obligation was shown to exist between the Plaintiff and Defendant. The Court held that the Judgment having been rendered on default upon a declaration setting forth no cause of action, may be reversed on Writ of Error. Again, in Adamsen Construction Co. v. Altendorf, 152 NW2d 576 (1967), held that a Complaint which sought recovery for labor and materials furnished by Plaintiff to Defendant for repair work done on property owned by the Defendant and Co-Defendant and which alleged a contract between the Plaintiff and Defendant, but which failed to allege that Defendant was a partner of the Co-Defendant, and that Defendant was acting as agent of the Co-Defendant or that the Defendant had no knowledge that improvements were being made failed to state a claim against the Co-Defendant. The Supreme Court of North Dakota in reversing Judgment against Co-Defendant cited both Am Jur. and C.J., which authorities have been above cited. The Court noted that this rule was based on the proposition that a default admits nothing more than what is alleged in the Complaint. The Court cited a rule of law that generally one co-tenant (Defendant) cannot bind his co-tenants (Co-Defendant) by his sole contract. This case parallels the case at hand, in that the Supreme Court of North Dakota looked to what the law concerning the Complaint actually was and dismissed the matter because no cause of action was stated pursuant to the law. The Petitioner submits that this same analysis should take place in the case at hand. The Supreme Court of Colorado should look to what the law actually is and thereby determine that no cause of action exists for and on behalf of Casaus.

The Petitioner still asserts that not only does the rule of Fidelity Finance Company go to the question of abuse of discretion, but also to jurisdiction. In Hobson v. O'Keeffe, 71 Mont. 322, 229 P 722,733,

Judgment was entered after default, and the Court stated that:

> When a Complaint does not state facts sufficient to constitute a cause of action, the Court does not have jurisdiction to render a Judgment upon it. When the Judgment rule upon its face shows the Court was without jurisdiction to render the particular Judgment, its pronouncement is not in fact a Judgment.

See also Apple v. Edwards, 211 P2d 138 (1949). Also in Crawford v. Pierse, 185 P 315 (1919), the Court stated that jurisdiction does not attach unless the allegations state a cause of action. A Judgment based upon such a pleading is invalid.

IV. CONCLUSION

It is respectfully submitted by the Petitioner that in view of the sizeable prayer for damages and the sizeable Judgment which is prospective in the event the default is permitted, the Petitioner states that the Respondent abused its discretion in failing to set aside the default or entirely dismissing the matter for one of jurisdiction and also for Respondent's failure to state a cause of action upon which relief could be granted. It is also submitted that since a relatively short period of time, only a matter of hours, passed between the time the Default Judgment on Liability was entered and the original Defendant filed its Answer, that no real injustice, prejudice or irreparable injury would result to the Plaintiff if the Default Judgment in question was opened.

Respectfully submitted,

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BY: _____

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply to Response to Order to Show Cause was deposited in the U.S. Mails, with sufficient postage affixed thereto, this 3rd day of January, 1975, addressed to:

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