Bullard v. Zimmerman Et Al.

88 Mont. 271 (1930) | Cited 17 times | Montana Supreme Court | October 24, 1930

Rehearing denied November 17, 1930.

Submitted October 3, 1930.

Judgments — Setting Aside as Fraudulent — Inherent Power of Court of Equity — Complaint — Sufficiency — Surplusage — Attorney Violating Oral Stipulation — District Judge and Attorney as Witnesses — Mileage and Per Diem — When Proper. Judgments — Court of Equity has Inherent Power to Set Aside Judgment Procured by Fraud — "Extrinsic Fraud" — Definition. 1. Though the power of a court of equity to set aside a judgment obtained by fraud is inherent, it may be exercised only for fraud which is extrinsic or collateral to the matter tried by the court, i.e., when the effect of the fraudulent acts of the guilty party was to prevent the innocent one from having a trial or from presenting his case fully, it being immaterial, however, whether the fraud was actual or constructive. Same — Setting Aside Fraudulent Default Judgment — Evidence — Sufficiency — Attorney Violating Oral Stipulation. 2. Evidence in a suit to set aside a judgment secured by fraud, showing that upon the strength of an oral stipulation entered into between the attorneys for plaintiff and the attorney of defendant that the former would not be required to answer in an action for the foreclosure of a mechanic's lien until the propriety of an order in the proceeding had been determined by the supreme court on an appeal he intended to take but which was not taken, no answer was filed within the time allowed by order of court; that notwithstanding such stipulation defendant's attorney caused plaintiff's default and the judgment complained of to be entered, held sufficient to warrant a decree setting the judgment aside for fraud. Same — Complaint to Set Aside Default Judgment Procured by Fraud — Actual and Constructive Fraud — When Allegations of Actual Fraud Surplusage. 3. Where the complaint in a suit to set aside a judgment for fraud sets forth sufficient facts showing constructive fraud, the fact that it also alleged actual fraud, not sustained by the evidence, does not render a decree setting aside the judgment open to the objection of failure of proof of the allegations of the complaint; in such a case, the allegations of actual fraud may be treated as surplusage. Same — Setting Aside Fraudulent Judgment — Fact That Attorney Relied on Oral Stipulation Instead of Insisting on Written One not Cause for Refusing Relief. 4. The right to relief from a fraudulent judgment secured under the circumstances set forth in paragraph 2 above does not depend upon the validity of the oral stipulation (court rules requiring stipulations of that nature to be in writing), but upon the question whether it was relied upon by plaintiff and made use of by defendant to obtain an unjust judgment. Same — Fraudulent Default Judgment — Complaint — Sufficiency. 5. Complaint in a suit to set aside a judgment by default secured through fraud, held not insufficient as not showing that plaintiff, as a member of a mining association, did not have a meritorious defense to the action in which the objectionable judgment was rendered. Costs —

Witness Fees — When District Judge Entitled to Fees. 6. A district judge whose district is composed of more than one county and who, while at the county seat of a county in his district other than that of his residence on judicial business, is called as a witness in a cause and remains there for the purpose of giving his testimony, is entitled to witness fees. Same — Nonresident Attorney Subpoenaed as Witness Entitled to Mileage from State Line to Place of Trial, When. 7. An attorney, nonresident of Montana at the time he was subpoenaed as a witness for plaintiff in a suit to set aside a fraudulent default judgment, who had acted as plaintiff's counsel in the action out of which the equitable suit arose but was not representing him therein, held properly entitled to mileage from the state line to the place of trial and return, under section 4936, Revised Codes 1921.

It is a generally recognized principle of law that in order to obtain relief from judgment in equity, in addition to the fraud being extrinsic, it must be actual and intentional as distinguished from constructive fraud or fraud in law. (34 C.J. 471; Parsons v. Weis, 144 Cal. 410, 77 P. 1007; Ohio & W. etc. Trust Co. v. Carter, 9 Kan. App. 621, 58 P. 1040; Amador Canal etc. Co. v. Mitchell, 59 Cal. 168; Burke v. Northern Pacific Ry. Co., 86 Wn. 37, Ann. Cas. 1917B, 919, 149 P. 335; Ross v. Wood, 70 N.Y. 8; Cayce v. Powell, 20 Tex. 767, 73 Am. Dec. 211.)

The fraud alleged in the complaint was actual fraud. The proof goes no further than to establish certain alleged promises for an indefinite extension of time, which were not fulfilled. The plaintiff failed to prove the allegations of his complaint relative to actual fraud. The elements necessary to establish actual fraud are enumerated by this court in its opinion in the case of Lee v. Stockmen's National Bank, 63 Mont. 262. Nor can it be said that actual fraud was established by proof of the making of a promise without any intention of performing it, under the provisions of subdivision 4 of section 7480, Revised Codes 1921. This court has held under that section of the statute that to merely prove the making of a promise and the failure to perform it does not prove fraud. (Howe v. Messimer, 84 Mont. 304, 275 P. 281; International Harvester Co. v. Merry, 60 Mont. 498, 199 P. 704; Cuckovich v. Buckovich, 82 Mont. 1, 264 P. 930.)

Proof of constructive fraud does not sustain allegations of actual fraud. This court has held that where actual fraud is alleged, such allegations cannot be held established by proof of fraud in law. (Finch v. Kent, 24 Mont. 268, 61 P. 653; Pittsmont Copper Co. v. O'Rourke, 49 Mont. 281, 141 P. 849.)

Fraud, in order to warrant equitable relief from judgment, must be unmixed with negligence. It was incumbent upon the plaintiff in order to recover in this case to show not only that the judgment was obtained as a result of extrinsic, actual fraud but also that the judgment was obtained without negligence on the part of the plaintiff.

It is the contention of appellants in this case that the plaintiff, or rather his attorney, Jones, was negligent in that the alleged stipulation for an extension of time within which to answer was not reduced to writing or incorporated in the minutes of the court. (Subd. 1, sec. 8974, Rev. Codes 1921.) The attorney was negligent in not securing a stipulation in writing extending the time within which

answer might be filed. It was incumbent upon the plaintiff to show that he was free from negligence or due attention to his case. (34 C.J. 433, 444, 473; Boley v. Griswold, 2 Mont. 447; Hockaday v. Jones, 8 Okla. 156, 56 P. 1054; Anderson v. State, 65 Utah, 512, 238 P. 557; Marine Ins. Co. v. Hodgson, 7 Cranch (U.S.), 332, 3 L.Ed. 362; Venner v. Denver Union Water Co., 40 Colo. 212, 122 Am. St. Rep. 1036, 90 P. 623; Koehler v. Reed, 1 Neb. (Unof.) 836, 96 N.W. 380; Phelps v. Peabody, 7 Cal. 50.)

Mere violation of an oral stipulation does not entitle plaintiff to equitable relief. In the state of Alabama it appears they have the same statute (sec. 8974, supra) and an identical court rule as in Montana. The supreme court there has repeatedly held that violations of such agreements do not constitute extrinsic fraud, and therefore equitable relief is denied. (Norman v. Burns, 67 Ala. 248; Collier v. Falk, 66 Ala. 223.)

Mr. C.A. Spaulding and Mr. W.C. Husband, for Respondent, submitted an original and a supplemental brief and argued the cause orally.

This is a suit in equity brought by plaintiff to vacate and annul a judgment recovered against him by defendant Zimmerman, in the district court of Wheatland county, upon the ground of extrinsic fraud.

The complaint alleges the commencement of an action by Zimmerman against plaintiff herein and numerous other persons, to recover from defendants therein for services alleged to have been rendered them and to foreclose a mechanic's lien upon property situated in Wheatland county, which will hereafter be referred to as cause numbered 1334; that service of summons was had on plaintiff and one C.F. Williams; that plaintiff herein appeared in that action by demurrer which was by the court overruled on October 15, 1924, and plaintiff given thirty days within which to answer; that previously defendant O'Sullivan had entered the default of Williams and as a result of an application the default was set aside by an order made on October 15, 1924; that O'Sullivan, as attorney for Zimmerman, represented to Jones & Jones, then plaintiff's attorneys, that he intended to take the matter of setting aside the default of defendant Williams to the supreme court, and stipulated and agreed that in the event the supreme court reversed the district court in that matter, he, O'Sullivan, would collect the claim due Zimmerman from Williams, and should the supreme court sustain the action of the lower court, the remaining defendants would be required to answer only after such ruling by the supreme court; that plaintiff herein would not be required to file an answer in the cause until such time as a decision was obtained from the supreme court on the ruling of the district court setting aside the default of Williams and until it had been finally determined whether such default would be permitted to stand, and that plaintiff should have until such time to file an answer in that action. It is alleged that no decision of the supreme court has been had; that O'Sullivan made and filed in the district court a motion to vacate and set aside the order of October 15, 1924, which motion is still pending and undetermined. It is then alleged "that said representation, stipulations and agreements of the said defendant Emmett O'Sullivan were false and known by him to be false and untrue, and were made with the purpose and intent to persuade and induce the said Jones and Jones not to further appear or answer in said cause number 1334 for this plaintiff, and were made

with the intent on the part of the defendant Emmet O'Sullivan that said Jones and Jones should believe the same and act thereon and thereby permit him, the said Emmet O'Sullivan, to thereafter take the default of this plaintiff in said cause numbered 1334 and prevent him from setting up in said cause a defense to the cause of action set forth in the complaint of the defendant Zimmerman; that William E. Jones believed the said representations, stipulations and agreements of the defendant Emmet O'Sullivan and, relying thereon, did not file an answer for this plaintiff in said cause numbered 1334 within the time fixed by said order of October 15, 1924," and thereafter, upon a praecipe filed by O'Sullivan, the default of plaintiff was entered on February 20, 1925; that no notice was given Jones & Jones that the stipulations and agreements theretofore made had been abandoned and repudiated or that O'Sullivan had decided to no longer adhere thereto or be bound thereby; that his motion to set aside the default was denied by the district court "upon the sole and only ground that such stipulations and agreements so made by the said Emmet O'Sullivan was not in writing and therefore not protected by the rules of said district court"; that thereafter judgment was entered against plaintiff herein for the amount sued for, together with costs and attorney's fees. Facts tending to show that plaintiff has complete defense in cause numbered 1334 are set forth in detail. It is alleged that a transcript of the judgment was filed in Lewis and Clark county which constitutes a cloud upon real estate owned by plaintiff in that county.

The defendants answered, admitting the commencement of the action by Zimmerman, the appearance of plaintiff by demurrer, the entry of the orders of October 15, 1924, and that O'Sullivan had caused the default of defendant Williams to be entered on July 26, 1924; that application was made to set aside the default and that on October 15 the default was set aside. It is alleged that Zimmerman made application to this court for a writ of supervisory control for the purpose of setting aside that order, which writ was denied by this court on October 24, 1924. The entry of plaintiff's default and subsequent entry of judgment against him are admitted. All other allegations of the complaint are denied.

The cause was tried before the court and judgment entered awarding plaintiff the relief prayed for. Defendants appeal from the judgment.

It is contended "that in order to obtain relief from a judgment in equity that in addition to the fraud being extrinsic, it must also be actual and intentional as distinguished from constructive fraud or fraud in law," and that at most the evidence shows only constructive fraud and the judgment cannot stand.

The power of a court of equity to grant relief from a judgment

obtained by fraud is inherent; it does not depend upon statute. (Hoppin v. Long, 74 Mont. 558, 241 P. 636.) But, as stated by this court in Clark v. Clark, 64 Mont. 386, 210 P. 93, 94, "not every fraud committed in the course of a judicial determination will furnish ground for such relief. The acts for which a judgment or decree may be set aside or annulled have reference only to fraud which is

extrinsic or collateral to the matter tried by the court, and not to fraud in the matter on which the judgment was rendered. * * * What, then, is meant by the expression `fraud which is extrinsic or collateral to the matter tried by the court?' It is extrinsic or collateral within the meaning of the rule, when the effect of it is to prevent the unsuccessful party from having a trial or from presenting his case fully." The record discloses ample evidence to bring this case within the rule announced.

"Fraud being the arch enemy of equity, a judgment obtained through fraud practiced in the very act of getting it will be set aside by a court of equity upon seasonable application. Indeed, the power of a court of equity to grant such relief is inherent. (Clark v. Clark, 64 Mont. 386, 210 P. 93; 15 R.C.L. 760, 762.) The conscience of the chancellor moves quickly to right the wrong when it is shown that through imposition practiced upon the court by a litigant an unfair advantage has been gained by him and thus it has been made an instrument of injustice. (15 R.C.L. 761; Dowell v. Goodwin, 22 R.I. 287, 84 Am. St. Rep. 842, 51 L.R.A. 873, 47 A. 693.) * * * In the language of Lord Chief Baron Pollock in Rogers v. Hadley: `Fraud cuts down everything. The law sets itself against fraud to the extent of breaking through almost every rule, sacrificing every maxim, getting rid of every ground of opposition. The law so abhors fraud that it will not allow technical difficulties of any kind to interfere to prevent the success of justice, right and truth.' (Variously reported in 9 Law Times Reports, 292, 9 Jurist, 898, 32 L.J. Exch. 248.)" (State ex rel. Sparrenberger v. District Court, 66 Mont. 496, 33 A.L.R. 464, 214 P. 85, 86.)

"It has frequently happened that one of the parties litigant has failed to present his claim or defense because he relied upon some agreement or understanding between himself and his adversary which, if observed, rendered such presentation unnecessary. And with more than occasional frequency, if we may judge from the reports, these agreements have been designed to lull a party into security and inactivity in order that some unconscionable advantage could be taken of him. In all such cases, courts of equity, when asked to do so, have invariably restored the injured party to his rights under the agreement, and have wrested from his opponent all those fruits he had hoped to harvest and enjoy through fraud and duplicity." (3 Freeman on Judgments, 5th ed., 2587.)

It matters not whether the fraud be actual or constructive; we must look to the effect and determine if the result is the consequence of fraud, as found by the trial court. If by fraud, actual or constructive, defendants have gained an unfair advantage over plaintiff in cause numbered 1334 and the court in that case was made an instrument of injustice, equity will intervene to prevent them from reaping the benefits of the advantage thus unfairly gained. (Klabunde v. Byron-Reed Co., 69 Neb. 120, 95 N.W. 4, 98 N.W. 182; Arnou v. Chadwick, 74 Neb. 620, 104 N.W. 942.)

It would subserve no useful purpose to review the evidence.

Suffice it to say that plaintiff's witnesses testified to the agreement and stipulation substantially as alleged, and defendants' witnesses denied that any agreement or stipulation existed. After a careful study of the record we think the judgment is amply supported by the evidence. There is sufficient in

the record to warrant the conclusion that plaintiff suffered a wrong which equity will relieve against. There is at least constructive fraud.

But it is insisted that the complaint alleged actual fraud,

while the evidence tends at most to establish constructive fraud which wholly fails to establish the allegations of the complaint. It seems clear that some of the allegations of the complaint charge actual fraud. However, in our opinion, these allegations may be treated as surplusage and, without them, the complaint sets forth a state of facts from which the conclusion of constructive fraud must flow. Having supported these with ample proof, the failure to prove actual fraud is unimportant. (Pittsmont Copper Co. v. O'Rourke, 49 Mont. 281, 141 P. 849.)

It is next contended that in order to recover, plaintiff must

show that the judgment was obtained without negligence on his part, and since the evidence establishes negligence on the part of plaintiff's attorney in not reducing the stipulations for an extension of time to writing or incorporating them in the minutes of the court as required by subdivision 1, section 8974, Revised Codes 1921, and by the rules of the district court, plaintiff is not entitled to equitable relief. The contention is not tenable. The right to relief does not depend upon the validity of the stipulations but on the question whether they were relied upon by plaintiff and made use of by defendants to obtain an unjust judgment. (Blakesley v. Johnson, 13 Wis. 592; Pettibone v. LaCrosse R.R. Co., 14 Wis. 479.) The oral stipulations were relied upon in good faith by plaintiff's attorneys and furnish ground for relief from the judgment taken in violation of their terms. (14 Cal. Jur. 1032; McGowan v. Kreling, 117 Cal. 31, 48 P. 980; Chamberlin v. Del Norte Co., 77 Cal. 150, 19 P. 271; Koehler v. Ferrari & Co., 29 Cal.App. 487, 156 P. 69; 3 Freeman on Judgments, 5th ed., 2591.)

There is not any merit in defendants' contention that the

complaint fails to show that plaintiff, as a member of the Big Elk Dome Syndicate, an association, has a meritorious defense to cause numbered 1334. The complaint, in substance, denies that plaintiff is indebted to plaintiff in cause 1334, and alleges that plaintiff in that cause was employed by Whittekind and Daniels "and by no one else, nor did he ever work at said well for anyone else. That the complaint of said J.C. Zimmerman in said cause numbered 1334 disclosed on its face that the said Zimmerman did not have and did not claim a cause of action against this plaintiff, in that said complaint shows by the exhibit attached thereto that his claim, if any, was against the persons who entered into a contract of hiring with him, to-wit, the said H.E. Whittekind and Earl Daniels." The testimony tends to support these allegations, and we think it clear that Bullard, individually and as a member of the Big Elk Dome Syndicate, an association, shows a prima facie defense to cause numbered 1334.

Finally, defendants assail the ruling of the trial court in not granting defendants' motion to retax costs in its entirety. The items not stricken are the per diem of Judge Wm. L. Ford, and mileage and per diem of William E. Jones.

The record shows that Judge Ford was in the city of Harlowton,

performing his duties as a district judge. It is argued that since section 8824, Revised Codes 1921, provides that the expenses of a district judge of a judicial district composed of more than one county, when he goes to a county of his judicial district other than the county in which he resides, on judicial business, are paid, Judge Ford is not entitled to witness fees. While it is true that Judge Ford was in Harlowton on judicial business, he was called as a witness for plaintiff. It appears that on the day he was called as a witness he had no official business to transact in Harlowton and that he remained there for the purpose of giving his testimony in the cause. He was not called as a witness in the performance of his official duties, and the court correctly denied defendants' motion.

The witness Jones attended the trial under subpoena issued out

of the district court of Wheatland county. He traveled from his home in Chicago to Harlowton, and was allowed mileage from the state line. He was not attorney for plaintiff and had never represented him in this cause, and the fact that he undertook to show that as attorney in cause 1334 he had been misled by O'Sullivan is not sufficient reason to deny him the fees and mileage provided for by section 4936, Revised Codes 1921.

For the reasons given the judgment is affirmed.

MR. CHIEF JUSTICE CALLAWAY and MR. JUSTICE ANGSTMAN concur.

ASSOCIATE JUSTICES MATTHEWS and GALEN, being absent, did not hear the argument and take no part in the foregoing decision.