

MICHIGAN SUPREME COURT

Rose v. Palmer

74 Mich. 332 (Mich. 1889) · Decided April 12, 1889

SUMMARY

The case of Rose v. Palmer involves a petition for mandamus to require a circuit judge to grant a new trial in the case of Luton v. Rose. The original suit was commenced by attachment and resulted in a default judgment for \$1,525.25. The plaintiff was allowed to remit the excess above the ad damnum, but the defendant argued that the judgment should be limited to the amount stated in the affidavit. The court ultimately decided that the judgment should be reduced to the amount sworn to in the affidavit for the writ of attachment.

CASE DETAILS

COURT	Michigan Supreme Court
WRITING FOR THE COURT	Sherwood, C.J.; Champlin, J.; Morse, J.; Campbell, J.
JURISDICTION	Michigan
DECIDED	April 12, 1889
DISPOSITION	writ_granted
PROCEDURAL POSTURE	Rose petitioned for mandamus requiring the circuit judge to grant a new trial in the underlying attachment action, in which a default judgment had been entered against Rose.
STANDARD OF REVIEW	The Supreme Court reviewed whether the circuit judge committed legal error in denying a new trial and whether mandamus was appropriate to compel correction of the judgment.
PRECEDENTIAL VALUE	Published Michigan Supreme Court opinion
PARTIES	Rose (relator) v. Palmer (respondent)

TOPICS

- default judgment
- default
- damages
- remedies
- civil procedure

PRACTICE AREAS

- Civil procedure
- Remedies

QUESTIONS PRESENTED

1. Whether the default judgment in an attachment action could exceed the amount stated in the affidavit supporting the writ of attachment.
2. Whether mandamus should issue to require a new trial when the circuit judge denied relief from a default judgment exceeding the sworn amount of the claim.
3. Whether the plaintiff's defective affidavit of nonappearance required reversal or a new trial.

HOLDINGS

1. When the defendant has not appeared and the default is entered for failure to appear and plead, the judgment should be reduced to the amount sworn to in the affidavit supporting the attachment. If the plaintiff will not consent to the reduction, a new trial must be granted.
2. Mandamus lies to compel the granting of a new trial when a default judgment in an attachment action exceeds the amount sworn to in the attachment affidavit and the plaintiff refuses to remit the excess.

KEY QUOTATIONS

“The defendant would not be likely to expect that the plaintiff would take judgment for more than the balance defendant owed him, which plaintiff had already sworn to, and we do not think the circuit judge should have allowed him to do so without a trial.” (74 Mich. at 333)

“It does not appear that plaintiff ever served the defendant with a copy of the declaration, or gave him any notice of assessment of damages, and, under the circumstances, we think justice requires that the judgment taken by plaintiff should be reduced to the amount sworn to in the affidavit for the writ of attachment, and, if the plaintiff fails to consent to this reduction, a new trial should be granted, and mandamus must be granted as prayed.” (74 Mich. at 334)

FACTUAL BACKGROUND

Luton commenced an attachment action against Rose, levied the writ on land, and personally served Rose. Rose did not appear or plead, and a default was entered; the resulting judgment was \$1,525.25, although the declaration stated an ad damnum of \$1,000 and the attachment affidavit stated that the claim was \$640.25. The circuit court permitted the plaintiff to file a properly sworn nonappearance affidavit nunc pro tunc and denied Rose's motion for a new trial.

PROCEDURAL HISTORY

In the Newaygo circuit court, Luton obtained a default judgment against Rose for \$1,525.25 in an attachment action. The circuit judge denied Rose's motion for a new trial despite the fact that the affidavit supporting the attachment stated a claim of only \$640.25. Rose then sought mandamus from the Michigan Supreme Court.

DISPOSITION

writ_granted

REMAND INSTRUCTIONS

The judgment must be reduced to the amount sworn to in the affidavit supporting the attachment, \$640.25, unless the plaintiff refuses to consent to the reduction; if the plaintiff refuses, a new trial must be granted.

OPINION

SHERWOOD, J.

Sherwood, C. J. The petition in this case is for mandamus to require the circuit judge to grant a new trial in the case of Luton v. Rose, tried in the Newaygo circuit, wherein a judgment was obtained by default for \$1,525.25.

The suit was commenced by attachment, which was levied upon land, and the writ was also personally served upon the defendant. 13381 *333The declaration was upon the common counts, the ad damnum being stated at \$1,000.

The plaintiff, against the objection of defendant, was allowed to remit the excess above the ad damnum. It was then ascertained that a draft of an affidavit of non-appearance of defendant had been filed before entering the default, which was not sworn to, and contained no jurat.

The plaintiff, upon motion, was allowed to file an affidavit of nonappearance, properly sworn to, nunc pro tunc. The affidavit upon which the writ issued stated the amount of plaintiff's claim at \$640.25, and the relator, on the argument of Ms motion for a new trial, offered to allow judgment to stand against him for that amount.

The circuit judge denied the motion for a new trial, and we think he committed error in so doing. The grounds relied upon to obtain from this Court the order prayed for by relator are— 1. That Luton failed to file a proper affidavit of nonappearance of the defendant. 2. That, the judgment being taken by default, the recovery upon the assessment of damages should have been limited to' the amount stated in the affidavit.

It must be recollected there was no appearance in the case by the defendant, and the default entered was for not appearing and pleading. The defendant would not be likely to expect that the plaintiff would take judgment for more than the balance defendant owed him, which plaintiff had already sworn to, and we do not think the circuit judge should have allowed him to do so without a trial.

It does not appear that plaintiff ever served the defendant with a copy of the declaration, or gave him any notice of assessment of damages, and, under the circumstances, we think justice requires that the judgment taken by plaintiff should be reduced to the amount sworn to in the affidavit for the writ of attach*334ment, and, if the plaintiff fails to consent to this reduction, a new trial should be granted, and mandamus must be granted as prayed.

Champlin, Morse, and Campbell, JJ., concurred. Long, J., did not sit.

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