

Case No. 20-735

In The Supreme Court of the United States

Case No.19-56187

ARTEM KOSHKALDA,

Petitioner

v.

SEIKO EPSON CORPORATION, ET. AL.,

Respondent

On Petition For A Writ Of Certiorari To The United
States Court Of Appeals For The Ninth Circuit

**REPLY
ISO PETITION FOR A WRIT OF CERTIORARI**

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Appearing *Pro Se*
December 31, 2020

REPLY

In the Opening Brief ("OB") Koshkalda made the following points:

- Trustee was not a party to the CA Action.
- Trustee as a non-party filed a Notice for Voluntary dismissal pursuant to FRCP Rule 41(a)(1)(A)(i) while Trustee never filed a motion pursuant to FRCP 25c to substitute a true Plaintiff, Petitioner herein.
- Notice of Voluntary Dismissal, effective immediately upon filing, which deprived Koshkalda from his property without any notice in violation of the Koshkalda's constitutional due process right to receive a notice and an opportunity to respond in violation of U.S. Const. amend. XIV, § 2, and U. S. Const. amend. V.
- The Bankruptcy's Court order authorized Trustee to dismiss different case and there was no record before the CA Court that it was a clerical error.

In the Response Brief ("RB") Epson did not dispute that:

- Trustee never filed, let alone served FRCP 25c Motion.
- the Bankruptcy's Court order authorized Trustee to dismiss a different case and not the CA Court case.
- proof of service filed by Trustee was delivered to Koshkalda several days later after Notice of Voluntary dismissal was filed, thus deprived Petitioner from his property rights without an opportunity to object.

- The Koshkalda's constitutional due process rights were violated when Koshkalda was deprived from his property without any notice, let alone, reasonable calculated under all circumstances.

The only part Epson disputed was that Koshkalda never raised these arguments before, thus the Petition should be denied.

Seiko Epson Corporation's and Epson America, Inc's., (hereinafter collectively "Epson") Response Brief ("RB") is limited to two points: (i) that appellate courts do not review issues raised for the first time on appeal, and (ii) trustee had an uncontested authority to dismiss CA Court case. As a result, Epson believes that this case does not satisfy the standard to grant further review set forth in the Supreme Court Rule 10.

Koshkalda respectfully disagrees for the following reasons.

First, Epson seems to conflate two different orders:

- (i) The Notice of Voluntary Dismissal with prejudice which is considered a final order adjudicated on the merits which Koshkalda challenges in this Petition; and
- (ii) CA Court orders denying Rule 60(b) Motions affirmed by the Ninth Circuit Court of Appeal.

Koshkalda challenges the Notice of Voluntary Dismissal "with prejudice". Both, the CA Court and the Ninth Circuit Court of Appeal erred affirming it.

Second, Koshkalda was not offered an opportunity to respond due to the immediate effect of the Notice of Voluntary Dismissal "with prejudice". Koshkalda was

deprived from the Wrongful Seizure claim, which was a property of Koshkalda in violation of the Koshkalda's constitutional right to due process. U.S. Const. amend. XIV, § 2, and U. S. Const. amend. V prohibits deprivation of a "*property*" without a notice "reasonable calculated under all circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane.¹

The Trustee deprived Koshkalda from his property without any notice, let alone reasonable calculated under all circumstances. Unlike regularly noticed motion The Notice of Voluntary Dismissal "with prejudice" filed electronically by Trustee was effective immediately upon filing. The proof of service states that Koshkalda was served with the Notice of Dismissal several days later after CA Court case was dismissed by non-party, the Trustee. As a result, Koshkalda had no opportunity to be heard prior to depriving Koshkalda from his property. ("Rule 60(b)(4) applies only in the rare instance where... violation of due process deprives a party of notice or the opportunity to be heard.") United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 271, 130 S. Ct. 1367, 1377 (2010). ("Espinosa") (emphasis added).

Unlike Espinosa where the creditor filed its Rule 60(b)(4) motion years later as a substitution of not timely filed appeal, here Koshkalda sought review of the CA Court Order by way of timely filed appeal before the Ninth Circuit Court of Appeal. ("Rule

¹ See Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 70 S. Ct. 652 (1950);

60(b)(4) is not a substitute for a timely appeal.”). Rule 60(b)(4) arguments are warranted here because the Ninth Circuit Court of Appeal erred when affirmed a void order which is Notice of Voluntary Dismissal filed by a non-party Trustee (“A judgment may also be void if the court that awarded it lacked jurisdiction over the subject matter or the parties or entered a decree which was not within the court’s powers.”) In re Four Seasons Securities Laws Litigation, 502 F.2d 834, 842 (10th Cir.), cert. denied, 419 U.S. 1034 (1974);²

Next, Epson argued that “all of his [Koshkalda’s] arguments before this Court are based on Federal Rule of Civil Procedure (“Rule”) 25(c) and 60(b)(4) or defective service, were never argued in the lower courts.” RB at 2. In support Epson cited Singleton v. Wulff, 428 U.S. 106, 120 (1976)³ for the proposition that appellate courts do not review issues raised for the first time on appeal.

The analysis of facts suggests that Singleton supports the Koshkalda’s position. Singleton court stated: “*We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence.*”

Here, similarly to Singleton Court, Koshkalda had no opportunity to provide any evidence or object against the Trustee’s Notice of Dismissal because the Notice of Dismissal was effective immediately, thus

² 11 C. Wright & A. Miller, Federal Practice and Procedure § 2862 at 198-200 (1973);

³ Epson also cited different cases for the same proposition;

Koshkalda was deprived from his property rights immediately, while Koshkalda was served with a notice several days later via regular mail.

Further, Singleton Court states that: "*Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt or where "injustice might otherwise result.*" The deprivation of the Koshkalda's property rights without any notice, let alone reasonably calculated notice, certainly falls within Singleton characterization "*where the proper resolution is beyond any doubt*" and "*injustice may otherwise result.*"⁴

Here, in its Respondent's Brief ("RB") Epson completely omitted the fact that before substitution of a party FRCP 25(c) requires a service of a noticed hearing to afford an opportunity to oppose/object. In addition, that allegedly proper service by Trustee was done via mail and delivered several days later after the Notice of Dismissal was on file, thus effective immediately before Koshkalda had a chance to oppose or object.

The combination of facts that (i) the Bankruptcy Court never authorized Trustee to file a dismissal "with prejudice" and (ii) the Bankruptcy Court abandoned all rights to the CA Action right after the CA Action was dismissed "with prejudice" — evidences that if the Motion would have been properly brought with a reasonable notice for Koshkalda to

⁴ These examples are not intended to be exclusive. Singleton v. Wulff, 428 U.S. 106, 121 n.8, 96 S. Ct. 2868, 2877 (1976)

objection, as required by a due process right, then the dismissal "with prejudice" would certainly be avoided, or at the minimum "could" be avoided.

Next, the Epson's arguments that Koshkalda's counsel signed stipulation "that clearly set forth the basis for the Trustee's appearance and undisputed authority in the action" lacks merit. RB at 7. A brief review of the stipulation suggests that the stipulation did not extend to anything beyond providing an extension to file an answer. Nowhere in that stipulation was stated that Trustee was authorized to file a Notice of Voluntary Dismissal "with prejudice" or any other documents.

Rule 60(b)(6) is warranted here. The dismissal "with prejudice" was filed in the litigation against Epson by the Epson's lawyers acting on behalf of Trustee,. Such behavior of counsels should not be promoted or incentives by allowing such dismissals with prejudice to stand.

Therefore, Koshkalda respectfully request this Court to grant this petition.

DATED: December 31, 2020

By: Artem Koshkalda
Artem Koshkalda, Petitioner