

2007

Jimmy Zufelt, an individual v. Haste, Inc., a Utah Corporation and Harry Gounaris, an individual : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JIMMY ZUFELT, an individual,

Plaintiff/Appellee,)

v.) Appellate Court No.: 20070140-CA

HASTE, INC., a Utah Corporation, and
HARRY GOUNARIS, an individual,

)
)
)
)
)

Court and judge below:
Fourth Judicial District, Utah County
Judge: Hon Fred D. Howard

Defendants/Appellants.) Trial Court No.: 00 04 03084

Court and judge below:
Fourth Judicial District, Utah County
Judge: Hon Fred D. Howard

APPELLANTS' OPENING BRIEF

APPEAL

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(Oral Argument and Published Decision Requested)

FILED
UTAH APPELLATE COURT
NOV 13

IN THE UTAH COURT OF APPEALS

JIMMY ZUFELT, an individual,)	
)	
Plaintiff/Appellee,)	
)	
v.	)	Appellate Court No.: 20070140-CA
)	
HASTE, INC., a Utah Corporation, and	)	Court and judge below:
HARRY GOUNARIS, an individual,)	Fourth Judicial District, Utah County
)	Judge: Hon Fred D. Howard
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Pursuant to Utah Rule of Appellate Procedure 24(e) defendants-Appellants Haste, Inc., (“Haste”) and Harry Gounaris (“Gounaris”) collectively “Appellants”, by and through their counsel Nick J. Colessides, hereby submit the following Opening Brief:

LIST OF PARTIES

Jimmy Zufelt, Plaintiff and Appellee

Haste Inc., and Harry Gounaris, Defendants and Appellants

Not a Party to this Appeal

Stephen W. Rupp, Trustee of the Bankruptcy Estate of Steve Kallinikos, Intervenor

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JURISDICTION OF APPELLATE COURT

Jurisdiction. The Utah Supreme Court has jurisdiction pursuant to Utah Code Annotated §78-2a-3(2)(j)(2002) over this case, which was transferred from the Utah Supreme Court under Utah Code Ann. §78-2-2(4)(2002). The Supreme Court had original jurisdiction pursuant to Utah Code Ann. §78-2-2(3)(j)(2002) (appeal from final judgment).

ISSUE AND STANDARD OF REVIEW

Issue: Did the trial court erroneously conclude that it was not necessary to require the return of the sequestered funds in the amount of \$64,144.90¹, to the Court's Registry, once it dismissed Zufelt's complaint. The trial court so ruled on January 11, 2007; (R. 0053-001157) (Addendum: Exhibit 1).

Standard of review: "A trial court's ruling on a motion to dismiss is a question of law." *State v. Mower*, 2005 UT App 438, ¶6, 124 P. 3d 265. The trial court's determination of refusing to require the return of the \$64,144.90, (less one half of that

¹Gounaris does not seek a review of the trial court's decision to award Bankruptcy Trustee Rupp one half of the sequestered money. This appeal does not seek the return of the one half of the \$64,144.90 received by Intervenor Rupp. It is not an issue in this appeal. For purposes of this appeal Gounaris claims are limited to the recovery of \$32,072.45. That was the amount that Zufelt and his attorney kept from the sequestered funds.

For purposes of this appeal defendants Haste Inc., and Harry Gounaris shall be collectively referred to as "Gounaris."

amount which was the entitlement of Bankruptcy Trustee Rupp) is a question of law, when it granted plaintiff's motion to dismiss plaintiff's complaint. This Court reviews such questions for correctness, according no particular deference to the trial court. State v. Taylor, 884 P.2d 1293 (Utah Ct. App. 1994). Each of the issue arises from legal determination and conclusions of the trial court; the Court of Appeals reviews the same under a correctness standard, granting no deference to the trial court's decision. Under a correctness standard, "the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law." State v. Pena, 869 P.2d 932, 936 (Utah 1994).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF CENTRAL IMPORTANCE TO THIS APPEAL

The following are the Constitutional provisions of central importance to this Appeal: United States Constitution Amendment XIV, § 1; Utah Constitution Art. I, § 7.

STATEMENT OF THE CASE

This is a case in which the trial court threw out [again] the baby with the bath water.

This time the trial court allowed \$32,072.45 to be removed from the Court's Registry and to be given to Zufelt. Zufelt had a windfall of \$32,072.45; Zufelt did not have to prove one element of his claims against Gounaris. Zufelt obtained \$32,072.45 without having the trial court passing upon the sufficiency of his claims against

Gounaris.

This Court on August 3, 2006, entered its decision reversing the trial court; see: 2006 UT App 326; (R. 001103-001106). Remittitur was issued on October 6, 2006. (R. 001107).

Zufelt filed a motion to dismiss its own complaint; Zufelt's motion is dated October 4, 2006, and entered of record in the files of the trial court on October 10, 2006. (R. 001108-001109). The basis of Zufelt's motion to dismiss Zufelt's complaint is the fact that he lost interest in the case, and that Gounaris did not file a counterclaim. (R. 001111).

Gounaris filed no objection to Zufelt's motion for a dismissal with prejudice.

However, on October 23, 2006, Gounaris filed a response to Zufelt's motion asking the trial court to return back to the jurisdiction of the trial court the \$59,584.55; Gounaris asked the court to order Zufelt to return the removed monies to the court's Registry; it was the money that was delivered to Zufelt as of that date. (R. 001121-001126). As of the date of Zufelt's motion to dismiss, Zufelt had removed from the trial court's Registry the sum of \$64,144.90.

Upon the matter being remanded to the trial court pursuant to the decision of this Court, on October 23, 2006, Gounaris also filed the following: A motion to rescind all prior orders of the Court and for the return of the monies. (R. 001130-001133). A

memorandum accompanied Gounaris' motion. R. 001134-001139. A request for hearing was also made by Gounaris; on Zufelt's motion to dismiss R. 001127-001129. And, upon Gounaris' motion for disgorgement; R. 001140-001142.

The Court did not to grant a hearing on any requested matter, and entered its Ruling on January 11, 2007. (R. 001153-001157).

This appeal ensued.

STATEMENT OF FACTS

1. Zufelt filed his complaint against Steven Kallinikos and Haste, Inc., on September 27, 2000. (R. 025). Gounaris is not a named defendant.

2. Zufelt files his amended complaint on January 25, 2001. Again Gounaris is not a named defendant. (R. 068-073).

3. Zufelt files his Second Amended Complaint on February 14, 2001. Kallinikos having filed bankruptcy on February 13, 2001, is dismissed as a party defendant, and Gounaris is named as a substituted named defendant. (R. 115-119).

4. Gounaris files an answer to Zufelt's Second Amended Complaint setting forth therein defendants' answer and affirmative defenses. (R. 140-151)

5. After almost 4 years of litigation in the district court, Zufelt makes a motion to strike the pleadings and for the entry of judgment based on a lack of standing by Gounaris to assert defenses on behalf of Haste.

6. On October 28, 2004, the trial court entered its Order granting Zufelt's motion to strike or dismiss or enter judgment for lack of standing, holding that Gounaris had no standing to act for or on behalf of Haste, Inc.. (R. 935-936).

7. The trial court's Order granting Zufelt summary judgment on October 28, 2004, was reversed by this Court on August 3, 2006.

8. On November 24, 2004, Gounaris filed its Notice of Appeal to the Utah Supreme Court. (R. 937-938).

9. On January 15, 2005, Zufelt made an Ex-Parte Motion and obtained an Order Granting [Ex parte] Motion to Authorize Disbursement of Funds, From Court's Registry. (R. 1055-1056)

10. This Court on August 3, 2006, entered its decision reversing the trial court; see: 2006 UT App 326; (R. 001103-001106). Remittitur was issued on October 6, 2006. (R. 001107).

11. On October 10, 2006, Zufelt filed a motion dated October 4, 2006, to dismiss its own complaint. (R. 001108-001109).

12. The basis of Zufelt's motion to dismiss Zufelt's complaint is that Zufelt had lost interest in the case, and that Gounaris did not file a counterclaim. (R. 001111).

13. Gounaris filed no objection to Zufelt's motion for a dismissal with prejudice.

14. However, on October 23, 2006, Gounaris requested the trial court to return

back to the jurisdiction of the trial court [Registry] the \$59,584.55; it was the money that was delivered to Zufelt as of that date. (R. 001121-001126).

15. As of the date of Zufelt's motion to dismiss, Zufelt had removed from the trial court's Registry the sum of \$64,144.90.

16. Upon the matter being remanded to the trial court pursuant to the decision of this Court, on October 23, 2006, Gounaris filed the following with the trial court:

- a. A motion to rescind all prior orders of the Court and for the return of the monies. (R. 001130-001133).
- b. A memorandum accompanied Gounaris' motion. (R. 001134-001139).
- c. A request for hearing was also made by Gounaris on Zufelt's motion to dismiss R. 001127-001129; and, upon Gounaris' motion for disgorgement and for the return of the monies to the Registry of the Court; (R. 001140-001142).

17. The Court did not to grant a hearing on any requested matter, and entered its Ruling on January 11, 2007. (R. 001153-001157).

SUMMARY OF ARGUMENT

The district court again erroneously concluded that Gounaris lost his money which was being accumulated in the Court's Registry. On the day that this Court

entered its decision reversing the trial court, Zufelt had the legal obligation to prove before the trier of fact, each and every element of either one of the first or second cause of action contained in his Second Amended Complaint; only then, after the submission of proof would Zufelt be entitled to part of the sequestered money.

Gounaris never had an opportunity to contest in a court of law Zufelt's allegations. Zufelt did not discharge his obligation to prove by preponderance of the evidence that he was entitled to receive Gounaris' money. Zufelt filed his complaint against Steven Kallinikos and Haste Inc.. Zufelt obtained \$32,072.45 in the absence of any legal process. There is no pleading on file which would show that Zufelt is entitled to receive \$32,072.45.

The anomaly created by Judge Howard's earlier order of release of the funds, while the case was on appeal, created this inequitable result; it gave Zufelt an undeserved \$32,072.45. Gounaris had a right to the \$32,072.45; it was his money; and not Zufelt's.

ARGUMENT

**THE DISTRICT COURT AGAIN IMPROPERLY
DISREGARDED THE MANDATE OF THIS COURT
AND DID NOT ORDER THE MONIES TO COME
BACK TO THE REGISTRY OF THE COURT FOR
SUBSEQUENT HEARINGS AS TO THE MONIES' DISPOSITION.**

It is axiomatic that a reversal of judgment of a lower court places the case in a

position that it was before the lower court rendered judgment. The applicable law in this case is as follows. A reversal of judgment of a lower court places the case in the position that it was before the lower court rendered judgment. **It vacates all proceedings and orders dependent upon the decision which was reversed.** A decision of an Appellate Court reversing a trial court judgment automatically sets aside the prior decision of the trial court, when the decision of the Appellate Court was filed in trial court. *Phebus v. Dunford*, 198 P.2d 973 (Utah 1948).

This area of the law is well settled in Utah. It arose the first time in 1948; and, since 1948 no other case in the State of Utah has dealt with a similar issue. On August 6, 2006, the trial court was reversed upon appeal; the matter was remanded to the trial court for further proceedings consistent with the Appellate decision. Upon its remand the law demands that all prior proceedings and orders of the trial court, dependent upon the reversed decision be vacated.

The trial court failed to vacate its prior orders. The trial court failed to require Zufelt to return to the Registry the withdrawn money. Zufelt did not have any legal or equitable right in the money being collected and accumulated in the Registry of the trial court. Except as to the money which was given to the Bankruptcy Trustee, the money so collected in the Registry did not belong to Zufelt. Zufelt had no color of right to, or title to the monies.

The district court has failed to exercise its unique ability to fashion an equitable remedy by ordering Zufelt to return the funds it withdrew from the Registry of the Court. Parduhn v. Bennet, 2005 UT 22 ¶23, 112 P.3d 495. Under the “law of the case” doctrine, when an appellate court makes a pronouncement on a legal issue, the lower court must not depart from the mandate, and any change with respect to the legal issue governed by the mandate must be made by the appellate court that established it, even if the lower court believes that the issue could have been better decided in another fashion. Jensen v. IHC Hospitals, Inc., 486 Utah Adv, Rep. 60 Utah 2003. Gildea v. Guardian Title Co. Of Utah, 31 P.3d 543, Utah 2001. The law of the case doctrine was developed to promote the obedience of inferior courts as well as to avoid the delays and difficulties in repetitious contentions and reconsideration of rulings on matters previously decided in the same case. Gildea v. Guardian Title Co. Of Utah, 31 P.3d 543, Utah 2001. The decision of the Supreme Court approving finding is binding on parties and on trial court. Schulder v. Ellis, 286 P. 620. Utah 1930.

Other jurisdictions have ruled similarly. A judgment after it was reversed was without any validity, force or effect. Keller v. Hall, 111 F.2d 129, C.A. Ariz., 1940. Reversed judgment is nullity, and after reversal matter stands as if no judgment had been rendered. Bondy v. Harvey, 62 F.2d 256, C.A. 10 Okla., 1932. The reversal of a judgment restores the parties to the condition in which they stood before it was

rendered. Harvey v. Richards, 11 F.Cas. 740, C.C. Mass., 1814. An unqualified reversal, without direction to the Court, is effective to remand the case for new trial and places the parties in the same position as if the case had never been tried. Gospel Army v. City of Los Angeles, 67 S. Ct. 1428, U.S. Cal., 1947.

I. The trial court erroneously failed to consider defendants' claims consistent with the Utah Court of Appeals mandate in the Appellate Court's opinion issued on August 3, 2006.

On August 3, 2006, in reversing the trial court the Utah Court of Appeals remanded the case to the district court for further proceedings consistent with this opinion." (R. 001103-001106). Gounaris should have been given an opportunity to litigate the issue of his stock ownership in Haste, Inc.. Zufelt elected to move to dismiss his claims against both Haste Inc., and Gounaris. Nobody questions Zufelt's right to dismiss his own complaint against the defendants.

Upon the issuance of the Remittitur on October 10, 2006, (R. 001107) all prior orders and proceedings were nullified. The Remittitur set aside all prior orders and proceedings had before the trial court. Phebus v. Dunford, 198 P.2d 973 (Utah 1948). The trial court had the obligation to require Zufelt to bring the \$32,072.45 back into the Registry of the Court.

The legal effect of obtaining a dismissal like the one at bar is that Zufelt has obtained \$32,072.45 which was not his; Zufelt did not have a right to that money. Zufelt

did not prove that he was entitled to \$32,072.45. Zufelt did not have a money judgment against any of the Gounaris. It was Gounaris' money; the money was subject to Zufelt's lawsuit. Zufelt did not offer any evidence to the trial court that Zufelt was entitled to the money on deposit with the Registry of the Court. The only reason that Zufelt was able to remove the money from the Registry was because the trial court had granted his motion for summary judgment. But that judgment was reversed by this court. How can Zufelt keep the money in view of this court's mandate in reversing the legal basis for obtaining the judgment. Gounaris did not consent that Zufelt should get the money. Zufelt did not prove that he was entitled to the money.

Zufelt was not entitled to the \$32,072.45. No order or ruling was made or entered by the trial court to the effect that Zufelt had prevailed upon the merits of Zufelt's Second Amended Complaint against Gounaris. The trial court did not enter any order granting judgment to Zufelt against Gounaris for any amount whatsoever.

The trial court failed to "fashion and equitable remedy" after its decision was reversed. Instead of ordering the funds to be returned to the court's Registry, it allowed Zufelt to keep them; it disregarded the Appellate mandate. The removal by Zufelt and the keeping of the \$32,072.45 without first obtaining a money judgment order, constitutes constructive trust upon the funds so removed.

The practical effect of the trial court's refusal to order the bringing back of the

monies to the court's Registry, for proper disposition, pursuant to proof and after appropriate hearing, violates the sense of fairness and fair play. It is a basic question of fairness. The trial court's refusal to consider the ramification of its failure to order the return of the funds to the court's Registry is fundamentally unfair to the defendants.

The trial court's failure to vacate its prior order, and to not order the return of the monies to the court's Registry constitutes reversible error. This Court should enter judgment against Zufelt ordering him to return to the court's Registry the \$32,072.45.

II. The trial court erroneously failed to require the return of the withdrawn funds by Zufelt in the sum of \$64,144.90 to the Registry of the Court.

Zufelt did not present any evidence to the trial court meeting his burden of proof that he was entitled to any of the funds owed by the Nuttalls on the Note. Under the best possible interpretation of the facts of this case Zufelt was nothing more than a creditor of Kallinikos. Furthermore, under the best case scenario as it relates to Zufelt's claims against Haste Inc., Zufelt has made some unproven allegations that Haste was an obligor under a lease agreement. That was only an inchoate claim subject to proof by Zufelt; and, subject to the defenses that Gounaris, the other one half shareholder, had against Zufelt. Gounaris had not had an opportunity to present his claims and defenses against Zufelt's claims. Yet Zufelt was allowed to keep \$32,072.45 without presenting a scintilla of evidence showing that he was entitled to judgment.

There was no legal basis whatsoever for Zufelt to be allowed to keep the money that it obtained from the Court's Registry. The trial court's order to allow Zufelt to keep the money is an error. This Court should order that the money should be returned to the trial court's Registry, and that the same be withdrawn by Gounaris.

III. Gounaris was denied Due Process of Law. The trial court erred in refusing to order the return of the withdrawn funds of \$64,144.90 back to the Registry of the trial court.

It is submitted that when the trial court refused to order the return of the funds to the Court's Registry, it violated Gounaris' rights to "substantive due process." The trial court's refusal to order the return of the funds to the Court's Registry, deprived Gounaris of their right to trial, and to Gounaris' day in court, under the "Due Process and Open Courts Clauses of the Utah Constitution. By not ordering the funds be returned to the Court's Registry, the trial court allowed Zufelt to receive \$32,072.45 without the benefit of any judgment awarding any money to Zufelt.

The trial court's erred in refusing to order the return of the withdrawn funds of \$64,144.90 back to the Registry of the trial court; it thus deprived the defendants of their right to trial, and to their day in court, under the "Due Process and Open Courts Clauses" of the Utah Constitution. The trial court allowed plaintiff to receive \$32,072.45 without the benefit of any judgment awarding any money to plaintiff.

The focus of the inquiry is directed to what process was due to Gounaris before

the trial court could dispose of the monies in the court Registry. In this instance, the issue of whether Gounaris was afforded adequate due process is a question of law which this Court examines without extending deference to the district court. "[I]ssues, including . . . due process, are questions of law which we review for correctness." *D.A. v. State* (*State ex rel. S.A.*), 2001 UT App 307, ¶8, 37 P.3d 1166 (internal quotation marks omitted); *see also State v. Holland*, 921 P.2d 430, 433 (Utah 1996) ("[T]he ultimate question of whether the trial court strictly complied with constitutional and procedural requirements . . . is a question of law that is reviewed for correctness.").

In the instant case Gounaris was deprived of his rights under the Substantive Due Process theory. Gounaris was denied his day in court and that was a "substantive due process denial."

Gounaris was also deprived of his rights under the "Procedural Due Process" theory of his case. The January 11, 2007, trial Court Ruling was granted summarily. The district court did not hear argument of counsel. It found that there were briefing inadequacies; it found that applicable authorities as to the disposition of the funds were not provided to the Court. The undersigned attorney apologizes to the trial court for the undersigned's failure to provide the legal authority expected by the trial court. The trial court thought it necessary so that it may have ordered the return of the monies to the court Registry for further disposition. Fundamentally however, Zufelt had the

burden of proof to prove the elements of each and every cause of action that he has plead in his Second Amended Complaint; before Zufelt was going to be allowed to keep the \$32,072.45. Zufelt presented no proof to the trial court. The trial court decided not to put Zufelt to the proof of his evidence. No evidence was taken by the Court as why Zufelt was entitled to any money.

Gounaris was deprived of his “due process” entitlement. On matters of constitutional and procedural requirements it is submitted that Gounaris should be provided with a modicum of his “due process” safeguards for his rights. In the Brigham Young University v. Tremco Consultants et. al., 2007 UT 17, 570 Utah Adv. Rep. 66 (2007) case the Utah Supreme Court deciding a similar argument stated the following:

[n]o opposition to the motion was made by anyone on behalf of SoftSolutions, Inc. and therefore the dispositive facts set forth in BYU's memoranda in support of the motion are deemed admitted pursuant to Rule 4-501(2)(B) of the Utah Rules of Judicial Administration and/or pursuant to Rule 56 of the Utah Rules of Civil Procedure.

To the extent that our nondeferential due process analysis requires us to review the facts, we will do so guided by our standards for reviewing appeals from summary judgment and indulge inferences emanating from the facts in a manner favorable to Duncan et al. *Spor v. Crested Butte Silver Mining, Inc.*, 740 P.2d 1304 (Utah 1987). *Id.* at ¶26.

Gounaris has been denied his requisite measure of due process when the district court deprived him of \$32,072.45 which was part of the proceeds in the court's Registry. Zufelt had the burden of proof to prove that he was entitled to one half of the proceeds

on deposit with the Court Registry. Gounaris was not given an opportunity to present any evidence to counter any of the unproven allegations contained in the Second Amended Complaint.

The Utah Supreme Court further said:

No principle is more fundamental to the integrity of a society that claims allegiance to the rule of law than the principle that a person may not be deprived of his property without first being afforded due process of law. This guarantee is enshrined in both the United States Constitution and the Constitution of Utah. U.S. Const. amend. XIV, §1; Utah Const. art. I, §7. That due process of law is owed in every instance is a self-evident proposition. Measuring the amount of process that is due in any particular setting is more difficult. Nevertheless, "[w]e long ago succinctly summarized the fundamental features of due process, observing that it requires that notice be given to the person whose rights are to be affected. It hears before it condemns, proceeds upon inquiry, and renders judgment only after trial." *Pangea Techs., Inc. v. Internet Promotions, Inc.*, 2004 UT 40, ¶8, 94 P.3d 257 (internal quotation marks omitted). The bare essentials of due process thus mandate adequate notice to those with an interest in the matter and an opportunity for them to be heard in a meaningful manner. See *Chen v. Stewart*, 2004 UT 82, ¶68, 100 P.3d 1177. *Id.* at ¶28

It also appears from the January 11, 2007 Ruling of the trial court, that the court bases its refusal to order the return of the monies to the Court's Registry, because Gounaris has not filed a counterclaim in this matter. Gounaris filed an Answer and provided no less than 26 affirmative defenses.

The reasoning of the trial court in ruling as it did, on the narrow grounds of failure to file a counterclaim is also reviewed on a correctness standard.

Viewing the trial court's requirement for a counterclaim it appears that the trial

court erred again. There was no reason for Gounaris to assert a counterclaim because he had no counterclaim against Zufelt. Gounaris was not entitled to legally assert a counterclaim against Zufelt under the Rules of Civil procedure.

When Zufelt filed its Second Amended Complaint (R. 096-119) he asserted 2 causes of action. His first cause of action alleged a "Breach of Contract" Action (R. 117) against Kallinikos²; Zufelt's allegations in his First Cause of Action against Kallinikos could not be the basis of judgment against Gounaris. There was no nexus between the claims asserted against Kallinikos and Gounaris. Zufelt could not obtain a judgment against Gounaris under his first cause of action.

Zufelt's second cause of action was a "Fraudulent Conveyance U. C. A. Section 25-1-1" cause of action against Gounaris personally. That cause of action was properly preempted by the Bankruptcy Court. The Bankruptcy Trustee asserted his claims against Gounaris. Gounaris is not complaining because the Trustee is receiving one half of the proceeds of the large note. That part of the trial court's rulings is not being appealed in this appeal.

Furthermore, it is clear that if the complaint (Second Amended Complaint) is dismissed the underpinning of any claim by plaintiff is gone. Zufelt voluntarily asked

²When Zufelt filed his Second Amended Complaint on February 14, 2001, Kallinikos was no longer a named defendant in this action. Kallinikos had filed bankruptcy.

for his Second Amended Complaint to be dismissed. Zufelt's express purpose to dismiss his complaint was that he [Zufelt] lost interest; and the fact that Gounaris had not asserted a counterclaim. Once the case is voluntarily dismissed by Zufelt there are no pendent claims by Zufelt against the monies in the court's Registry.

The trial court adopted Zufelt's position and thus denied Gounaris his constitutional due process rights.

The issue of Gounaris' failure to assert a counterclaim is not viable under any set of facts or circumstances. Gounaris was not entitled to file a counterclaim under the applicable provisions of Rule 13 of the Utah Rules of Civil Procedure. The complaint attempts to allege causes of action against Gounaris, for monies which rightfully belong to Gounaris. Gounaris can only assert his affirmative defenses against Zufelt claims. After all it was Gounaris' money. The proceeds of the Note from Nuttall legally belonged to Gounaris. Zufelt was claiming that he was entitled to the funds. Utah state law does not allow a counterclaim under the state of the pleadings in this matter.

The trial court thought it best to rule in Zufelt's favor and to deprive Gounaris of his right to the monies. It is an error which should be remedied again by this Court.


CONCLUSION

This Court should enter its judgment ordering Zufelt to return to the Registry of the trial court the sum of \$32,072.45. In the event that Zufelt refuses to promptly return

the funds so ordered, this Court should direct the trial court to enter an order of judgment against Zufelt directing that the sum of \$32,072.45 be returned to the trial court's Registry. Thereafter, the trial court should release the funds to the defendants.

Defendants should be awarded their attorney's fees and costs in connection with all proceedings before the trial court and this Court.

Dated this 13th day of November, 2007.



NICK J. COLESSIDES
Attorney for Appellants
Haste, Inc., and Harry Gounaris

ADDENDUM

- Exhibit 1. Trial Court Ruling, dated January 11, 2007 (R. 001103-001106)
- Exhibit 2. Second Amended Complaint, dated February 14, 2001 (R. 96-119)-*sans* attached exhibits.
- Exhibit 3. Defendants' Answer to Second Amended Complaint Dated March 2, 2001. (R. 140-151)
- Exhibit 4. Order Granting [Ex parte] Motion to Authorize Disbursement of Funds, From Court's Registry, dated January 15, 2005, (R. 1055-1056)

Exhibit 1

FILED
Fourth Judicial District Court
of Utah County, State of Utah
1/11/07 MBT Deputy

**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

JIMMY ZUFELT, an individual, Plaintiff, vs. HASTE, INC.; a Utah corporation; and HARRY GOUNARIS, an individual, Defendants.	RULING RE: PLAINTIFF'S MOTION TO DISMISS Case # 000403084 Judge Fred D. Howard Division 5
--	---

This matter comes before the Court on Plaintiff's Motion to Dismiss and Intervener's Response to the Plaintiff's Motion to Dismiss. Defendants have responded to the Motion with a request that the Plaintiff return the sum of \$59,584.55 heretofore paid into the Court. The Court, having reviewed the file and being fully advised in the premises, hereby issues the following:

RULING

Plaintiff seeks to dismiss its case against the Defendant. Utah Rule of Civil Procedure 41(a)(1) allows a Plaintiff to dismiss his claims unilaterally unless and until an answer is filed. The Defendant has not plead or filed a counterclaim. The Defendants maintain that they have no objection to the dismissal of this suit provided, however, that Plaintiff, Jimmy Zufelt, and his counsel of record, return to the Court, the \$59,584.55 that has been distributed from the Registry of the Court. In support of this the Defendant asserts that the Utah Court of Appeals' August 3, 2006 mandates the return of the monies. Importantly, however, the Defendants do not point the Court to any language from the opinion of the Court of Appeals to support this assertion. The

001157

Court has reviewed the Appellate Court's decision and the Court cannot identify the language upon which the Defendants base their assertion relative to the return of the money. Simply put, the Defendants' briefing is inadequate and fails to cite any legal authorities. The Defendants have requested among other things, to vacate the Court's prior orders, to order Plaintiff to return monies, and to award Defendants' attorney fees. Yet, none of these requests are founded upon legal authority, nor have the Defendants set forth any authority that would suggest the Plaintiff is somehow precluded from dismissing this case pursuant to Utah Rule of Civil Procedure 41(a)(1).

Given the nature of the pleadings filed in this case the Court takes this opportunity to address the adequacy of the briefing and argument provided by counsel. The Utah Supreme Court requires that attorneys appearing before it must provide more than "just bald citation to authority but (the attorney must also provide) development of that authority and reasoned analysis based on that authority." *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998). The Court has also stated that it is "not a depository in which the appealing party may dump the burden of argument and research." *State v. Gamblin*, 1 P.3d 1108 (Utah 2000). In *Gamblin*, the Utah Supreme Court also noted that "instead of providing this court with meaningful legal analysis, defendant's brief merely contains one or two sentences stating his argument generally, quotes favorable portions of the record, and then broadly concludes that he is entitled to relief." *Id.* Additionally, the Court noted that the *Gamblin* defendant did "not analyze (the) cases . . . (but rather) simply cites to these cases as support for his general argument." *Id.* Those statements could well apply to the present case.

Like the Utah Supreme Court, this Court is inundated with claims of every kind - many with complex legal issues and histories that fill multiple court files. At any one time the Court is

assigned to some 500 different cases - each of which requires this Court's attention and effort.

This Court's responsibility is to analyze the arguments set before it by the parties and render judgments that are consistent with the law. However, it is not this Court's duty to "flesh out" inadequate arguments, assign meaning to evidence, or to conduct in-depth research to support a particular legal position. These duties are the purview of attorneys and are part and parcel to the zealous advocacy that each party is entitled to when represented by counsel.

This Court appreciates the professional and personal demands that are placed on an attorney's time. However, an attorney cannot externalize those pressures onto the Courts in the form of inadequate briefing and argument hoping that the Courts will "fill in the gaps" that exist in the case. Indeed the Utah Rules of Professional Conduct state that a lawyer must "pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience (and to) act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." *See*, Ut. R. Prof. Conduct 1.3, comment 1. This Court interprets that statement to mean, at the very least, that the attorney must set forward thorough and accurate pleadings and argument. In this Court's view the Defendants have failed to comply with these requirements and have, by their over-broad and generalized pleadings, left the Court to divine what the Defendant's arguments *should* be and how it *should* connect law or evidence with argument.

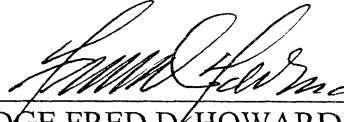
In conclusion, Utah Judicial Canon 3(B)(8) requires that the Court "dispose of all judicial matters promptly, efficiently and fairly." In order to comply with that requirement this Court must demand thorough and professional work from the attorneys that appear before it.

That is the same demand made of attorneys by the Utah Rules of Professional Conduct and by the very nature of the profession itself.

Respectfully, for the reasons stated above the Court grants the Plaintiff's Motion to Dismiss. Additionally the Court will not require the return of the \$59,584.55 as requested by the Defendants.

Dated this 1/12 day of January, 2007.

BY THE COURT:



JUDGE FRED D. HOWARD
District Court Judge



CERTIFICATE OF DELIVERY

I certify that true copies of the foregoing Ruling were delivered on the 11 day of January, 2007 to the following in the manner indicated, to wit:

by U.S. first class mail

Attorney for Plaintiff:


Steven F. Allred
Troon Park, 584 S. State Street
Orem, UT 84058

Attorneys for Defendant:

Nick Colessides
466 South 400 East, Suite 100
Salt Lake City, UT 84111

Stephen W. Rupp
McKay Burton & Thurman
Suite 600, Gateway Tower East
10 East South Temple Street
Salt Lake City, UT 84133

John Martinez
2974 East St. Mary's Circle
Salt Lake City, UT 84108



Deputy Court Clerk

Exhibit 2

Steven F. Allred (Bar No.5437)
Law Office of Steven F. Allred, P.C.
Attorney for Plaintiff
Troon Park, 584 S. State Street
Orem, Utah 84058
Telephone: (801) 431-0718

01 FEB 14 PM 2:46

IN THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR

UTAH COUNTY, STATE OF UTAH

JIMMY ZUFELT, an individual,)	
	)	SECOND AMENDED COMPLAINT
Plaintiff,)	
)	
v.	)	Civil No. 000403084
)	
HASTE, INC.; a Utah corporation; and	)	Judge Taylor
HARRY GOUNARIS, an individual,)	
)	
Defendant.)	

Plaintiff, Jimmy Zufelt, (hereinafter "Plaintiff" or "Zufelt") by and through his counsel, the Law Office of Steven F. Allred, P.C., hereby complains of Defendants, Haste, Inc., (hereinafter "Haste") and Harry Gounaris (hereinafter "Gounaris") as follows:

PARTIES

1. Plaintiff is an individual whose residence is in Utah county.
2. Haste is a Utah corporation whose principal place of business is in Utah County.
3. Gounaris is upon information and belief a resident of Illinois whose residence is 474 N. Lillian Lane, Des Plaines, Illinois 60016.
4. Haste's principal, Steven Kallinikos (hereinafter "Kallinikos") filed for relief

under Chapter 7 of the United States Bankruptcy Code on or about February 13, 2001 and by virtue of the automatic stay Plaintiff hereby amends its complaint and no longer intends to pursue any claims against Kallinikos in this action without first obtaining relief from the stay.

JURISDICTION AND VENUE

5. The above entitled court has jurisdiction over the subject matter of this lawsuit pursuant to Utah Code Annotated (hereinafter "U.C.A.") Section 78-3-4.

6. Venue is proper in the above-entitled court pursuant to U.C.A. Section 78-13-4(2).

7. In this action, Plaintiff seeks to recover monies due and owing from Defendants pursuant to a written contract and to avoid certain fraudulent conveyances by Defendants to other co-defendants, insiders or creditors.

GENERAL ALLEGATIONS

8. On or about March 30, 1998, Haste, through its principal, Kallinikos, personally executed a Lease Agreement (hereinafter "Agreement") with World Plaza, LLC., (hereinafter "World") of which Plaintiff was a member. A copy of the Agreement is attached to the original Complaint as Exhibit "A."

9. Haste abandoned the leased premises to Plaintiff on or about June, 1999.

10. On October 19, 1999, Kallinikos executed a Promissory Note, (hereinafter "Note") a copy of which is attached hereto as Exhibit "B."

11. The Note is secured with any and/all personal or business assets that maker owns now or receives in the future. See Exhibit "B," paragraph 6, pg. 2.

12. The Note was executed as a compromise of Kallinikos personal guarantee and

Haste's obligations to Plaintiff under the Agreement.

13. Kallinikos made four (4) payments on the Note in the respective amounts of \$1600, \$400, \$200 and \$300 on March 13, March 13, June 21 and June 21, 2000, respectively.

14. Upon information and belief Haste previously owned a restaurant known as Burger Supreme located at 1796 North University Parkway.

15. On or about November, 1997, Haste sold Burger Supreme on contract to Mr. Richard Nuttall. (hereinafter "Nuttall.")

16. Haste received at least two (2) promissory notes (hereinafter "Notes") from Nuttall requiring payment to Haste in the amount of \$1102.09 per month. Copies of the Notes from Nuttall to Haste are attached hereto as Exhibit "C."

17. By virtue of the bankruptcy of Kallinikos, Plaintiff only seeks to recover the proceeds due under the large note (hereinafter "Large Note") payable to Haste, Inc.

FIRST CAUSE OF ACTION
(Breach of Contract)

18. Plaintiff realleges each preceding paragraph and incorporates the same by reference herein.

19. Kallinikos breached the Note by failing among other things to make timely monthly payments thereunder.

19. As a result of Kallinikos' breach of the Note, the entire amount due and owing under the Agreement including, principal, interest, costs, late fees and attorney's fees are now due and owing by Haste.

20. As of October 31, 2000, the principal amount owing is \$26,300 plus interest at

the rate of 18% per annum in the amount \$3,945 plus late fees in the amount \$2630 for a total amount due and owing of \$32,875 plus attorney's fees.

SECOND CAUSE OF ACTION
(Fraudulent Conveyance U.C.A. Section 25-1-1)

21. Plaintiff realleges each preceding paragraph and incorporates the same by reference herein.

22. On or about November 27, 2000, Kallinikos' former partner, Harry Gounaris (hereinafter "Gounaris") corresponded with Nuttall and represented that he had purchased the Notes as of February 25, 2000, for the sum of \$12,000 and \$3,000 and directed Nuttall to pay all future amounts owing to Gounaris. A copy of Gounaris' correspondence to Nuttall is attached hereto as Exhibit "D."

23. The Gounaris letter was accompanied by the last page of each of the Notes, which Notes were dated, signed and purported to assign said Notes to Gounaris from Haste and Kallinikos for consideration. Copies of the assignment are attached hereto as Exhibit "C."

24. The assignment of the Notes by Haste and Kallinikos to Gounaris was for an amount disproportionately small in comparison to the value of the Notes.

25. The assignment of the Notes by Haste and Kallinikos to Gounaris rendered Kallinikos and Haste insolvent or they became insolvent as a result of the conveyance.

26. The assignment of the Large Note by Haste to Gounaris is fraudulent as to creditors and Plaintiff within the meaning of U.C.A. Sections 25-6-5 and 25-6-6.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for entry of a judgment against Defendants in favor of


Plaintiff as follows:

1. For judgment against Haste and Gounaris in an amount to be proven at trial, for attachment and execution upon the Large Note and for an injunction against further disposition by Haste or its transferee, Gounaris, of any assets or proceeds of Haste and for turnover of all Haste proceeds received by or in the possession of Gounaris.

2. For interest, late fees, costs and attorney's fees as allowed by contract in the Agreement; and

3. For such other relief as is just and equitable under the circumstances.

DATED this 14th day of February, 2001.



Steven F. Allred
Attorney for Plaintiff

Plaintiff's Address:

275 S. Aspen Drive
Mapleton, Utah 84664

Exhibit 3

FILED
CLERK OF DISTRICT COURT
UTAH COUNTY, STATE OF UTAH
2001 APR -5 AM 11:31

NICK J COLESSIDES (# 696)
Attorney at Law
466 South 400 East, # 100
Salt Lake City, Utah 84111-3325
Tele: (801) 521-4441

Attorney for defendants
Haste, Inc., and Harry Gounaris

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY
STATE OF UTAH

JIMMY ZUFELT,	:	
an individual,	:	
	:	ANSWER TO SECOND
Plaintiff,	:	AMENDED COMPLAINT
	:	
v.	:	
	:	
HASTE, INC., a Utah	:	
corporation, and	:	Case No.: 00 04 03084
HARRY GOUNARIS	:	
	:	
Defendant,	:	Judge: Taylor

Defendant above named, Haste, Inc., ("Haste"), and Harry Gounaris (Gounaris) by and through their attorney of record, Nick J. Colessides, in answer to plaintiff's second amended complaint admits, denies, and alleges as follows:

I. AFFIRMATIVE DEFENSE

In answer to the enumerated paragraphs of plaintiff's complaint defendant alleges as follows:

1. In answering paragraph 1 defendants admit the allegations contained therein.

2. In answering paragraph 2 defendants admit the allegations contained therein.

3. In answering paragraph 3 defendants admit the allegations contained therein.

4. In answering paragraph 4 defendants admit the allegations contained therein.

JURISDICTION AND VENUE

5. In answering paragraph 5 defendants admit the allegations contained therein.

6. In answering paragraph 6 defendants admit the allegations contained therein.

7. Deny paragraph 7.

GENERAL ALLEGATIONS

8. In answering paragraph 8 defendants admit that a lease agreement was executed (the "Lease") by Kallinikos, deny all other allegations of said paragraph 8, and affirmatively allege that any and all references relating to the Lease speak for themselves, and that the entire Lease is in evidence, and it contains Landlord's and Kallinikos'

agreements. Furthermore, defendant Haste alleges that the execution of the Lease by Kallinikos was not a corporate act, was not supported by any resolution of the board of directors nor by the shareholders of Haste, Inc., affirming the same, and it was only a personal act by Kallinikos, and not binding upon Haste nor Gounaris. The execution of the Lease in the manner in which it was executed by Kallinikos was without any authority, approval, or ratification whatsoever by the board of directors or the shareholders of Haste, Inc.. Defendant Gounaris also affirmatively alleges that he is not a signatory party to the Lease, and further he is not bound by the unauthorized acts of Kallinikos.

9. In answering the allegations of paragraph 9, defendants admit that Kallinikos vacated the subject premises with the express approval of the Landlord, and that Landlord terminated the Lease. All other allegations of said paragraph 9 are denied by defendants.

10. In answering paragraph 10, defendants admit that Kallinikos executed a promissory note due and payable to an individual known as Jimmy Zuffelt, and affirmatively allege that Exhibit "B" speaks for itself.

11. Deny paragraph 11.

12. Deny paragraph 12.

13. Admit paragraph 13.

14. Admit paragraph 14.

15. Admit paragraph 15, and further allege that Gounaris and Kallinikos were also the seller in the therein stated therein.

16. Deny paragraph 16, and affirmatively allege that Gounaris and Kallinikos were also the named payees in the promissory note.

17. Admit paragraph 17.

FIRST CAUSE OF ACTION
(Breach of Contract)

18. Defendants re-allege the answers set forth hereinabove in paragraphs 1 through 17, and by this reference the same are incorporated herein and made a part hereof.

19. Admits paragraph 19.

20. [19] Deny paragraph 20.

21. [20] Deny paragraph 21.

SECOND CAUSE OF ACTION
(Fraudulent Conveyances U.C.A. § 25-1-1)

22. [21] Defendants re-allege the answers set forth hereinabove in paragraphs 1 through 21, and by this reference the same are incorporated herein and made a part hereof.

23. [22] Admit that Gounaris sent a letter to Nuttall, and further allege that exhibit "C" speaks for itself, and deny the balance of the allegations contained therein.

24. [23] In answer to the allegations contained therein defendants admit the existence of Exhibit "C", affirmatively allege that said exhibit speaks for itself, and deny the balance of the allegations contained therein. Gounaris further affirmatively alleges that he paid good, sufficient, and adequate consideration for the assignment set forth therein.

25. [24] Deny paragraph 25.

26. [25] Deny paragraph 26.

27. Any other allegations contained in plaintiff's complaint which have not expressly admitted hereinabove, are denied by defendant.

II. AFFIRMATIVE DEFENSE

Plaintiff's complaint fails to state a cause of action or a claim against defendants and either of them, upon which relief can be granted.

III. AFFIRMATIVE DEFENSE

Defendants affirmatively allege that the underlying obligations arising out of that certain lease agreement was settled and compromised by having Steven Kallinikos execute and deliver to Zumfelt a personal promissory note. Zumfelt accepted the promissory note in exchange of all prior obligations pursuant to and under the Lease, agreed to accept Kallinikos' credit from all past Lease obligations, and failed to reserve any of Zumfelt's rights as against any other obligor for the Lease rents, and therefore plaintiff has no claims against defendants hereunder.

IV. AFFIRMATIVE DEFENSE

Defendants affirmatively allege that plaintiff has not suffered any economic loss, and is not entitled to a money judgment.

V. AFFIRMATIVE DEFENSE

Plaintiff's claims and remedies as against defendants are barred or diminished by virtue of plaintiff's

failure to give to defendants the requisite notices, and further, in the event any notices were given to defendants, said notices were defectively submitted.

VI. AFFIRMATIVE DEFENSE

Plaintiff's claims are barred or diminished by the statute of limitations (UCA §25-6-10), and the applicable doctrines of accord and satisfaction, novation, waiver, laches, estoppel, mistake, duress, estoppel, fraud, misrepresentation, and plaintiff's unclean hands.

VII. AFFIRMATIVE DEFENSE

If Plaintiff has suffered any loss, such loss was caused by plaintiff's failure to exercise care to mitigate its damages, and in fact plaintiff failed to mitigate his/its damages, both under the Lease, and under the promissory note.

VIII. AFFIRMATIVE DEFENSE

As and for an additional affirmative defense defendants allege that plaintiff had a duty to deal with defendants fairly and in good faith and plaintiff, having breached that duty, is precluded from maintaining this action.

IX. AFFIRMATIVE DEFENSE

Plaintiff has failed to ascertain certain facts readily available to him/it upon reasonable inquiry. To the extent that plaintiff has suffered any loss, such loss was due to market conditions, was a result of plaintiff's own informed decision, negligence, lack of due diligence, failure to exercise the duty of ordinary care and reasonable inquiry, and/or nonfeasance or malfeasance of plaintiff.

X. AFFIRMATIVE DEFENSE

Plaintiff's action as filed herein is retaliatory in nature and its purpose is to force and coerce defendants to submit to the demands of the plaintiff, and therefore, is in violation of Rule 11 of the Utah Rules of Civil Procedure.

XI. AFFIRMATIVE DEFENSE

Defendant affirmatively alleges that plaintiff is in material breach under the agreements heretofore made between plaintiff and Kallinikos, and as a result thereof, all or some of plaintiff's claims and remedies are barred or diminished.

XIII. AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in that it has failed to perform its respective duties under the terms of the Lease, and various agreements reached between plaintiff and Kallinikos, which duties and responsibilities were conditions precedent to any claim which plaintiff may have had.

XIII. AFFIRMATIVE DEFENSE

Plaintiff's complaint is without merit and is not brought and asserted in good faith, and defendant is entitled pursuant to § 78-27-56 Utah Code Annotated, 1953 as amended, to an award of his attorney's fees in connection with the defense of plaintiff's complaint.

XIV. AFFIRMATIVE DEFENSE

As a separate and affirmative defense, defendant defendants alleges that the damages, if any, which plaintiff may have suffered were caused by parties, persons, events, or conditions over whom defendant had no control or right to control.

XV. AFFIRMATIVE DEFENSE

As a separate and affirmative defense defendant

alleges that plaintiff's own negligence was the sole proximate cause or intervening proximate cause of the damages complained of by plaintiff.

XVI. AFFIRMATIVE DEFENSE


If plaintiff has suffered any loss, such loss was the result of its own negligence or the conduct of other person and entities over whom defendant had no control or right to control, and no duty to exercise control.

XVII. AFFIRMATIVE DEFENSE

If plaintiff is successful defendant Gounaris nevertheless is not required to return any consideration having been received by him prior to the date of the filing of this complaint.

WHEREFORE, defendants prays that plaintiff's complaint and each cause thereof be dismissed, no cause of action, upon its merits and with prejudice, and that defendants be awarded their attorney's fees and costs, in connection with the defense hereof, and for such other and further relief as the Court deems proper in the premises.

Dated this 2nd day of March, 2001.


NICK J. COLESSIDES
Attorney for defendants

MAILING CERTIFICATE

Filed the original of the foregoing to:

DISTRICT COURT CLERK
FOURTH JUDICIAL DISTRICT
125 NORTH 100 WEST
PROVO UT 84601-2849

and served a copy thereof to the attorney for plaintiff
addressed as follows:

MR STEVEN F. ALLRED ESQ
ATTORNEY AT LAW
TROON PARK
584 SOUTH STATE
OREM UTAH 84058

_____ via hand delivery

_____ via fax: 801.

X _____ via first class mail, postage prepaid

this 2nd day of ^{April}~~March~~, 2001.



Exhibit 4

Steven F. Allred (Bar No.5437)
Law Office of Steven F. Allred, P.C.
Attorney for Plaintiff
Troon Park, 584 S. State Street
Orem, Utah 84058
Telephone: (801) 431-0718

FILED
Fourth Judicial District Court
of Utah County, State of Utah

3/15/05 WHS Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR
UTAH COUNTY, STATE OF UTAH

JIMMY ZUFELT, an individual,	)	ORDER GRANTING
	)	MOTION TO AUTHORIZE
Plaintiff,	)	DISBURSEMENT OF FUNDS,
	)	FROM COURT'S REGISTRY
v.)	
)	
HASTE, INC.; a Utah corporation; and	)	Civil No. 000403084
HARRY GOUNARIS, an individual,)	
	)	Judge Howard
Defendant.)	

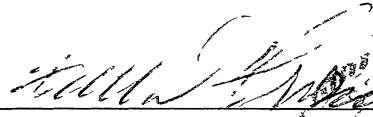
Upon consideration of an ex parte motion (hereinafter "Motion") to authorize disbursement of funds from the court's registry and after proper notice and a hearing thereon conducted on Wednesday, January 5, 2005 and good cause appearing,

IT IS HEREBY ORDERED that the Motion is granted; and

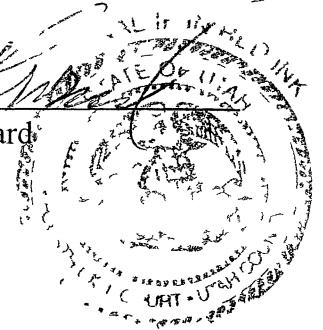
IT IS FURTHER ORDERED that Defendant Gounaris post a supersedeas bond in the amount of \$20,000 within forty-eight hours (48 hours) of the Court's oral ruling (January 5, 2005, 11:30 a.m.); and

IT IS FURTHER ORDERED that in the event that such a bond is not timely obtained all funds held by the Court in the registry may be immediately, summarily and entirely disbursed to the Plaintiff.

DATED this 5 day of January, 2005



Honorable Fred D. Howard



CERTIFICATE OF SERVICE

Filed eight copies of the foregoing, one containing an original signature with the Clerk of the Utah Court of Appeals:

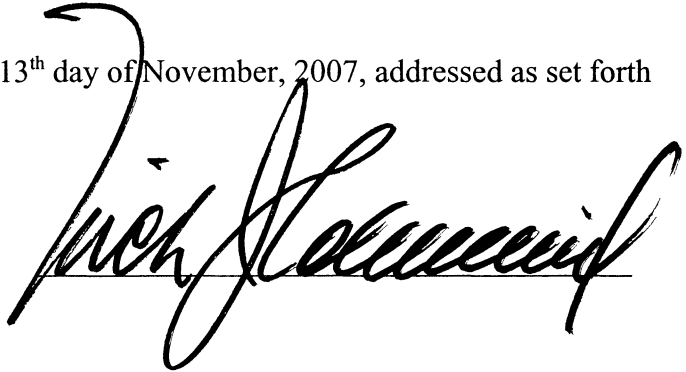
Office of the Clerk of the Court
Utah Court of Appeals
450 South State Street, Fifth Floor
Salt lake City, Utah 84114-0230

and served two copies of the foregoing upon each of the following:

Mr. Steven F. Allred, Esq.
Attorney at Law
Law office of Steven F. Allred
Troon Park
585 South State Street
Orem, Utah 85058

Mr. Steven W. Rupp, Esq.
Attorney at law
McKay Burton & Thurman
170 South Main Street Suite 800
Salt Lake City, Utah 84101

via first class mail, postage prepaid, this 13th day of November, 2007, addressed as set forth hereinabove.

A handwritten signature in black ink, appearing to read "Rich L. Lamm", is written over a horizontal line. The signature is fluid and cursive.