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IN THE SUPREME COURT

OF THE STATE OF UTAH

PARK CITY UTAH CORPORATION, a corporation, and CITY DEVELOPMENT CORPORATION, a corporation,	:	
Plaintiffs-Respondents,	:	
v.	:	No. 15410
ENSIGN COMPANY, a limited partnership,	:	
Defendant-Appellant.	:	

APPELLANT'S REPLY BRIEF

Appeal from the Partial Summary Judgment
of the Third District Court for Summit County
The Honorable James S. Sawaya, Judge
And the Prior Interlocutory Order of April 8,
1975 of the Fourth District Court for Summit County
The Honorable Maurice Harding, Judge

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FILED

SEP 8 1978

Clerk, Supreme Court, Utah

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INTRODUCTION

Initially it should be noted that respondents have made no attempt to meet most of appellant's arguments. Thus appellant argued in its Main Brief at 12-15 that it cannot be bound by an order of which it had no notice. Respondents' only response was to assert (erroneously) that appellant failed to raise the issue below (Resp. Br. 24). Appellant argued the meaning of the Judgment on Stipulation of July 23, 1971, on which all subsequent proceedings were based, in its Main Brief at length because of its importance. (App. Main Br. at 18-30). Respondents never mention the meaning of that crucial document. Appellant argued that the April 8, 1975 "order" is without factual support in the Record. (App. Main Br. at 31-35). Respondents failed to point to any specific portions of the Record which support the "order." Appellant argued that the April 8, 1975 "order"

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violated its due process rights by failing to afford appellant notice and hearing. (App. Main Br. at 35-37) Respondents ignored this entirely.

Despite respondents' failure to join argument on the merits appellant believes a Reply Brief is necessary to (a) refute respondents' main contention that the April 8, 1975 "order" was a final order from which appellant did not timely appeal, (b) refute certain factual assertions made by respondents that are without specific Record support, and (c) briefly respond to respondents' arguments on the merits of the judgment from which appellant appeals.

I. THE APRIL 8, 1975 "ORDER" WAS NOT FINAL AND HENCE WAS NOT APPEALABLE.

The bulk of respondents' argument (Resp. Br. 9-17) is devoted to the proposition that the April 8, 1975, "order" should have been appealed or preserved for appeal (by filing a notice of intention to appeal) within 30 days of its entry. While respondents sometimes misconceive this argument as involving the principle of res judicata*/ (Resp. Br. 10) the basic issue involved is whether the April 8, 1975 "order" was final within the meaning of Rule 72(a), Utah Rules of Civil Procedure.

The issue of finality revolves around two Utah Rules of Civil Procedure, Rules 72(a) and 54(b). The two rules are but opposite sides of the same coin, implementing this Court's long-standing policy against hearing appeals piecemeal. Rule 72(a),

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*/ Res judicata is aptly illustrated by Krofcheck v. Downey State Bank, 580 P.2d 243 (Utah 1978).

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governing appeals as of right (as opposed to discretionary appeal from interlocutory orders), provides that appeals lie "from all final orders and judgments . . . ." Rule 72(a) recognizes two types of final orders and judgments. The first and most obvious is the judgment or order that wholly terminates the proceedings in the lower court. Such an order or judgment is final because nothing remains to be done in the lower court. If he desires review, an appellant must timely file a notice of appeal.

The second type of final judgment Rule 72(a) recognizes is one that wholly terminates certain claims in an action even though other claims remain to be determined. In that case, the judgment is nevertheless final with regard to the claims wholly determined, and an appellant, to preserve his right of appeal, must timely file a notice of intent to appeal after determination of the remaining claims. A judgment or order disposing of some claims while others remain to be determined is not, however, final unless the lower court makes a specific finding that there is no just reason for delay and expressly directs the entry of a final judgment. Rule 54(b) provides:

> Judgment Upon Multiple Claims and/or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however

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> designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. (emphasis supplied)

Rule 54(b) also makes it plain that the term "claim" as used in Rule 72(a) means a claim for relief or cause of action.

Thus, the April 8, 1975 "order" cannot be final within the meaning of Rule 72(a). It was not a final judgment or order of the first type because it did not completely terminate the proceedings in the lower court. It was not a final judgment or order of the second type because it did not wholly dispose of one claim and, furthermore, the lower court did not make the express determination required by Rule 54(b) for such an order or judgment to be final.

The nonfinality of the April 8, 1975 "order" is dramatically accented by Judge Leary's order of June 21, 1977 in which he restrained the issuance of executions until after notice and hearing, and restrained the sheriff from executing on defendant's property until a proper money judgment had been entered, after notice of hearing.

Thus as of June 21, 1977, the April 8, 1975, "order" was at best an order determining liability alone reserving the question of amount. Such an order is not final. Wheatland Irr. Dist. v. Two Bar-Muleshoe Water Co., 431 P.2d 257 (Wyo. 1967); Texas Pacific Oil Co. v. A.D. Jone Estate, Inc., 78 N.M. 348,

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431 P.2d 490 (1967); Clear v. Marvin, 83 Idaho 399, 363 P.2d 355 (1961); Tuscon Telco Federal Credit Union v. Bowser, 6 Ariz.App. 10, 429 P.2d 501, reh. den., 6 Ariz.App. 190, 431 P.2d 85 (1967); Hontz v. White, 58 Wash.2d 538, 348 P.2d 420 (1960). See Klafta v. Smith, 17 Utah 2d 65, 404 P.2d 659 (1965), in which this Court granted an interlocutory appeal under Rule 72(b) of a summary judgment on liability alone, recognizing that summary judgments on liability alone are interlocutory in nature. Whatever the April 8, "order" and the order of June 21, 1977 taken together may be called, their effect is precisely identical to a summary judgment on the issue of liability alone.*/ Indeed, Rule 56(c) itself classifies a summary judgment on the issue of liability alone as interlocutory:

> A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages. (emphasis added)

Thus the April 8 "order" as modified by the June 21 order was "interlocutory in character" and was not appealable.

In the federal system, which, like Utah, has a policy against piecemeal review, determinations of liability reserving the issue of damages are not final and not appealable. Catlin

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*/Similarly, an order determining liability and requiring an accounting as to amount of damages has long been considered nonfinal. Standard Steam Laundry v. Dole, 20 Utah 469, 58 P. 1109 (1899). See Attorney General v. Pomeroy, 93 Utah 426, 73 P.2d 1277 (1937), approving Standard Steam Laundry v. Dole, supra, and disapproving Wheelwright v. Roman, 50 Utah 10, 165 P. 513 (1917).

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v. United States, 324 U.S. 229 (1945); Petrol Corp. v. Petroleum Heat & Power Co., 162 F.2d 327 (2d Cir. 1947); United States v. Burnett, 262 F.2d 55 (9th Cir. 1959).

The April 8, 1975 "order" was not final. Because it was not final, the appellants were not required to file a notice of appeal or notice of intent to appeal under Rule 72(a).

The real question confronted by this appeal is not the finality of the April 8, 1975 "order," but its validity both in terms of whether it correctly interpreted the earlier Judgment on Stipulation and whether it was entered in violation of appellant's due process rights. Respondents have not even mentioned these issues.

II. RESPONDENTS' ASSERTIONS OF FACT SHOULD BE EXAMINED IN LIGHT OF THE RECORD.

Counsel for appellant must call this Court's attention to respondents' misstatements of the Record and vague citations to it. A typical example of respondents' treatment of the Record is found on page 3 of Respondents' Brief where the Record citation reads "Record: All documentation during period August 1971, to March 1, 1975." This reference is to hundreds of pages. The supposed "facts" said to be supported by this reference are (1) that appellant was in default of the July 23, 1971 Judgment on Stipulation, (2) that appellant allowed funds belonging to respondents to be used for appellant's own benefit, and (3) that these funds amounted to at least $200,000. Not only does the Record fail to support these assertions, it specifically shows

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that respondents' attempts to establish these positions before the lower court were failures. After presentation to the lower court, Judge Harding found on November 6, 1974, that

> [i]t is not shown that the [appellants] have received any proceeds from third-party purchasers which should have been applied to discharge the obligation sued upon in the aforesaid foreclosure actions . . . or that any such proceeds had been diverted to other channels. (R. 405, App. 38).

Respondents next attempted to establish their factual assertions by filing the affidavit of Robert Major (R. 441-598) and causing a hearing to be held on February 27, 1975. But as appellant has pointed out (App. Main Br. 31-34), Judge Harding properly determined that the affidavit and Major's testimony were incompetent hearsay and ruled only that more discovery was in order. Thus respondents' factual assertions upon examination turn out to be just assertions, without basis in the Record.*/

Another example is respondents' assertion (Resp. Br. 5) that pursuant to the April 8, 1975 "order" the current monetary amount due was determined. Understandably, there is no Record citation for this statement. The terms of the April 8 "order" required defendants to "certify in writing to this court" the amount currently due or upon failure of defendants so to certify, that the amounts certified by the purchase money obligees "shall be taken as correct" (R. 800-801, App. 59-60). The Record contains no such certification.

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*/Respondents on p. 11 of their Brief once again repeat this assertion without citations.

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III. REPLY TO SPECIFIC REFUTATIONS.

As noted above, at pp. 1-2, Respondents have, with only minor exceptions, failed to argue the merits of this appeal. Respondents specifically meet appellant's argument on only two points. The first is whether appellant had notice of the July 23, 1971 Stipulation on Judgment. The second is whether appellant's factual recitation are material.

A. Appellant Did Raise Lack of Notice Timely.

Contrary to respondents' assertion, appellant properly raised in the lower court its lack of knowledge of the Stipulation on Judgment (R. 812-815, esp. 814-815, App. 64-67, esp. 67). Thus this issue is not being raised for the first time on appeal.

B. Respondents' Argument That the Facts Are Immaterial Misses the Point.

Respondents, beginning on p. 24 of their Brief, attempt to dismiss the facts recited by appellant as immaterial. The facts, respondents say, are immaterial because the issue was decided adversely to appellant below after "evidentiary hearings" (Resp. Br. 26) or "full evidentiary hearings" (Resp. Br. 27).

This Court should notice that respondents do not use the word "trial," and correctly so for no trial was ever held. Similarly, "evidentiary hearing" and "full evidentiary hearing" are misnomers. As the Record reflects, what actually happened by way of "evidentiary hearings" is that respondents obtained an order to show cause, which was thereafter brought on for hearing, at

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which time respondent (Krofcheck) alone testified. Additionally, the files of this case were offered as evidence. The result was a finding that respondents had proved no material fact and an order dismissing the order to show (R. 404-405; App. 37-39).

The next event below was a December 8, 1974 motion by respondents "to have final decrees herein enforced" (R. 601, App. 53), in support of which Major's affidavit was filed. That motion was called up, and, as set forth in appellant's Main Brief at 32, Major's attempt at that hearing to repeat his hearsay affidavit was abruptly terminated by the trial court (Tr. 10).

These were the "full evidentiary hearings." Manifestly they were not trials. Equally manifest is the fact that they were not "full evidentiary hearings" but were instead summary hearings on respondents' motions during which respondents offered evidence the court below expressly found to be insufficient to support the motions.

Apparently respondents so characterize these hearings in an attempt to shift from the summary judgment rule (the moving party having to show affirmatively that there is no genuine issue of fact) to the rule governing this Court's review of factual findings upon trial (viewing the evidence in the light favorable to the victor below). There never having been a trial or a "full evidentiary hearing" below, the authority cited by respondents (Resp. Br. 25-26) is inappropriate.

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CONCLUSION

The whole point of this appeal is to afford appellant the "full evidentiary hearing" that it was denied by the summary judgment entered against it. Appellant is now before this Court because the lower court entered an ex parte "order" purporting to determine appellant's liability without notice to appellant and without a hearing. The district judges who were subsequently involved in the case could not overrule a fellow district judge, and ultimately converted the April 8, 1975 "order" into the summary judgment from which this appeal is taken. This Court is not foreclosed by a district judge's "order" and has the power, and indeed the duty, to set aside the April 8, 1975 "order" and subsequent summary judgment so that this case can be determined on its merits after due notice to all parties.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on the 5th day of September 1978, postage prepaid, I mailed two true and correct copies of the foregoing Appellant's Reply Brief to Don R. Strong, Attorney for Respondents, P. O. Box 124, Springville, Utah 84663.

Nila MacFarlane

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