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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ZIONS FIRST NATIONAL BANK, a National Association, :

Plaintiff and Appellant, :

-vs- :

M-S COMMODITIES, INC., M-S COMMODITIES OF UTAH, INC., PRISCILLA SECREST, MAURIE SCHNEIDER, J. MORONI STOOF, EDWARD DALLIN BAGLEY, DAL-RON ENTERPRISES, a corporation, : Case No. 14017

Defendants and Respondents. :

BRIEF OF RESPONDENTS M-S COMMODITIES, INC. AND MAURIE SCHNEIDER

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FILED

Clerk, Supreme

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Defendants and Respondents. :

BRIEF OF RESPONDENTS M-S COMMODITIES, INC. and MAURIE SCHNEIDER

NATURE OF THE CASE

This is an appeal from questions raised in post-judgment proceedings to force a credit against judgment in favor of Zions First National Bank against Defendant Maurie Schneider for $25,000.00 judgment granted to Defendant M-S Commodities, Inc. The appeal deals only with post-judgment procedures and has no relationship to the issues and claims leading up to the judgment and is in no way related to the issues set forth in the appeal of Clark Tank Lines in The Supreme Court Case No. 13669.

DISPOSITION IN THE LOWER COURT

The Court below denied in all particulars the motions of Plaintiff Appellant, Zions First National Bank to vacate or set aside the Execution, to quash the Order to Show Cause, to set-off the M-S judgment against the judgment of Zions First National Bank

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and to quash the Attorney's Lien.

RELIEF SOUGHT ON APPEAL

The Defendants Respondents urge this Court on the appeal to affirm the actions of the trial court.

STATEMENT OF FACTS

The facts as set out in the brief of the Plaintiff Appellant are correct insofar as they set out the judgment entered at the close of the trial and insofar as they set out the Execution and motions relating thereto. Otherwise, they are misleading and incomplete.

It is true that Clark Tank Lines filed a Notice of Appeal of the third party judgment entered against it in favor of Zions First National Bank. In that appeal, they called into question the validity of the judgment entered in favor of Zions First National Bank against Clark Tank Lines. Zions First National Bank, however, did not appeal the judgment of M-S Commodities, Inc. against Zions nor did M-S Commodities, Inc. or Maurie Schneider appeal the judgment of Zions First National Bank against each of them respectively.

The implications in the Plaintiff Appellant's statement of facts that M-S Commodities, Inc. and/or Maurie Schneider are in any way involved or will be affected by the outcome of Clark Tank Lines appeal is improper and will be met briefly by argument hereafter.

It is also asserted that the facts stated by Plaintiff Appellant to be incorporated by reference into this appeal from its

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brief as Respondent in Case No. 13669 is a further attempt on its part to force M-S Commodities, Inc. and Maurie Schneider into that appeal through the back door and is improper in this appeal.

In addition to other facts as set out by Plaintiff Appellant the following are relevent to the issues before the Court in this appeal:

Following the entry of judgment as set out in Plaintiff Appellant's Statement of Facts, a motion was filed on behalf of M-S Commodities, Inc. and Maurie Schneider to amend the judgment so as to reflect an off-set of the $25,000.00 judgment and asking the Court to amend the judgment so as to reflect a net judgment against M-S Commodities, Inc. in the amount of $13,505.08 and against Maurie Schneider in the amount of $13,505.08. (No designation of record on appeal has been made by Plaintiff Appellant in this appeal, however, since a portion of the record of this case was previously forwarded to the Court in Appeal No. 13669 and is currently in possession of the Clerk of the Court, it could not be again forwarded as part of the record in the case now before the Court if designated. Accordingly, where appropriate, reference will be made to that portion of the record which is before the Count in Case No. 13669. The motion on behalf of M-S Commodities, Inc. and Maurie Schneider just referred to is found in the record on appeal in Case No. 13669 at Page 675 and 676.)

This multiple motion together with various other motions was

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called for hearing before the trial court on March 18, 1974 and strongly opposed by Counsel for Plaintiff Appellant. The Court specifically denied both motions by minute entry dated March 25, 1974 (record on appeal Case No. 13669 Page 687). The Findings of Fact and Conclusions of Law were amended by interlineation and the judgment, the full text of which appears at Page 713, 714 and 715 of the record on appeal in Case No. 13669 was allowed to stand unaltered. This judgment was drafted by Counsel for Plaintiff Appellant.

After entry of the judgment, the Notice of Appeal was filed by Clark Tank Lines. At that time Counsel for M-S Commodities, Inc. and Maurie Schneider approached Counsel for Zions First National Bank and requested a set-off allowing credit to both judgments in the sum of $25,000.00 and advising that, if a set-off were not stipulated to, an Execution would be issued to force such a set-off. Counsel for Zions First National Bank requested that action be withheld pending the filing of briefs by Clark Tank Lines and no further action was taken at that time as an accommodation to Counsel.

In January of 1975 Counsel for Defendants M-S Commodities, Inc. and Maurie Schneider was advised that Zions First National Bank was attempting to enforce collection in Illinois against both M-S Commodities, Inc. and Maurie Schneider for the full sum of $38,505.08. Counsel for Defendants M-S Commodities, Inc. and Maurie Schneider contacted Counsel for Zions First National Bank and demanded an immediate set-off. When this demand was refused,

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an Execution was issued with the intention of forcing the set-off. It was then that the Execution and Motion set forth in the Statement of Facts in the brief of Plaintiff Appellant took place.

It is further significant, as a matter of fact, that throughout the argument before the Court below, Counsel for Zions First National Bank took the position that an off-set would constitute payment of $25,000.00 toward the judgment of Zions First National Bank against M-S Commodities, Inc. only and the full amount of $38,505.08 would still be enforceable as against the Defendant Maurie Schneider. Because of this position on the part of the Counsel of Zions First National Bank,the Defendant M-S Commodities Inc. had, prior to the proceedings herein appealed from, made an assignment of its judgment to the Defendant Maurie Schneider for valuable consideration.

ARGUMENT

POINT I

THE APPEAL OF PLAINTIFF APPELLANT SHOULD BE DISMISSED FOR FAILURE TO FILE A DESIGNATION OF RECORD ON APPEAL.

Rule 75(a) Utah Rules of Civil Procedure requires filing of a designation of record on appeal within ten days of the date of filing of Notice of Appeal. No such designation of record on appeal has been filed to this date. Rule 73(a) Utah Rules of Civil Procedure does not make such a failure a jurisdictional matter but does give the Supreme Court the right to provide a

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remedy including dismissal of the appeal Holton v. Holton 121 Utah 451, 243 P2d 438 (1952). In the case of Nunley v. Stan Katz Real Estate, Inc. 15 Utah 2d 126, 388 P2d 798 (1964) a designation of record on appeal which was 27 days late was held to be fatal and the appeal was not allowed to stand.

POINT II

THESE DEFENDANTS RESPONDENTS ARE NOT PARTIES RESPONDENT TO THE APPEAL IN CASE NO. 13669 AND THE OUTCOME OF THAT APPEAL WILL IN NO WAY AFFECT THE RELATIONSHIP OF ZIONS FIRST NATIONAL BANK AND M-S COMMODITIES, INC. AND MAURIE SCHNEIDER.

Counsel for Zions First National Bank has heretofore attempted to effect a consolidation of this appeal with Appeal No. 13669 which Motion for Consolidation was denied by this Court. It is clear law and should not require a citation of authority that failure to appeal from a final order of court terminates the proceedings as between the parties so affected and the rights of the parties as covered by that order are finally determined. In George A. Lowe and Company v. Leary 49 Utah 506, 164 Pac 1052 (1917) this Court stated at Page 1053 of the Pacific Reporter as relates to non-appealing claimants:

> "All of those claimants thus have adopted the decision of the District Court as law of the case, and hence have waived their rights to participate in the fund left in the hands of the school district. We can only help those who have attempted to help themselves. Nor is the trustee in bankruptcy in a position to help those claimants out of the dilemma in which they have placed themselves by acquiescing in the decision of the District Court. So far as they are concerned, therefore, that Court's decision is the law of this case. (e.a.)

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Likewise, it is also clear that relief not sought by a party cannot be obtained by another party to the action through their appeal. In the Montana Case of Wyoming Farm Bureau Mutual Insurance Company v. Walter E. Mondale 160 Mt 243, 502 P2d 37 (1972) the Court stated at Page 38 of the Pacific Reporter:

> "Thus it appears that this Court should grant no relief to non-appealing Defendants, and an appealing Defendant cannot seek relief on their behalf." (e.a.)

Thus, it is clear that Clark Tank Lines Company cannot make M-S Commodities, Inc. or Maurie Schneider parties respondent in their appeal in Case No. 13669 by naming them as respondents and the various efforts of Zions First National Bank to pull M-S Commodities, Inc. and Maurie Schneider into the appeal in Case No. 13669 through the back door should be laid to rest. Neither M-S Commodities, Inc. nor Maurie Schneider are parties to that appeal nor can tney, at this stage of the proceedings, be made parties.

POINT III

ZIONS FIRST NATIONAL BANK HAD A NET LOSS OF $38,505.08 AND JUDGMENTS IN THAT AMOUNT AGAINST THE VARIOUS PARTIES ARE JOINT AND SEVERAL JUDGMENTS, AND SATISFACTION IN WHOLE OR IN PART BY ONE OF THE DEFENDANTS CONSTITUTES SATISFACTION TO THAT EXTENT ON JUDGMENTS AGAINST CO-DEFENDANTS.

Zions First National Bank suffered an overdraft on the account of M-S Commodities, Inc. as the result of the activities of the Defendant, J. Moroni Stoof in the amount of $38,505.08. All of the judgments granted by the Court in favor of Zions First National Bank with the exception of the judgment against Dal-Ron Corporation and the judgment against Clark Tank Lines Company were based on

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that overdraft. The judgment against Clark Tank Lines arose out of a different set of facts. Though related in time and in principals involved, the facts were decisively different and do not relate to the $38,505.08 judgments. Any payment by any of the parties against whom judgment was rendered on that $38,505.08 overdraft will result in a credit toward the judgments against all other defendants imburdened with the same judgment. Section 15-4-3 Utah Code Annotated, 1953, as amended reads as follows:

> "PAYMENTS BY CO-OBLIGOR. The amount or value of any consideration recieved by the Obligee from one or more of several Obligors, or from one or more of joint or joint and several Obligors, in whole or in partial satisfaction of their obligation shall be credited to the extent of the amounts received on the obligations of all Co-obligors to whom the Obligor or Obligors giving the consideration did not stand in the relation of a surety."

The law is further stated in Am Jur as follows:

> "The satisfaction of one of two separate judgments obtained on the same demand or cause of action against different Obligors discharges both. Thus, although separate judgments may be entered against joint tort feasors, there can be but one satisfaction. The general rule is that judgments against joint tort feasors are deemed satisfied by satisfaction of a judgment against one of the joint tort feasors." (47 Am Jur 2d Judgments, Section 994 Page 90)

The position is also stated clearly in the following cases: Larson v. Anderson 108 Wash 157, 182 Pac 957 (1919); Erickson v. Grande Ronde Lumber Co. 162 Or 556, 94 P2d 139 (1939); County of Los Angeles v. State Department of Public Health 158 CA2d 425, 322 P2d 968 (1958); The White Pass Company v. W. Scott St. John, et al 71 W2d 156, 427 P2d 398 (1967).

Surely Zions First National Bank cannot be heard to complain

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on the one hand that an off-set should be granted while asserting on the other that they are entitled to enforce the full amount of the judgment in disregard of the off-set against the Defendant Maurie Schneider while at the same time attempting to enforce both judgments in their full amounts in Illinois as against both Defendants Respondents.

It makes no difference how payment is made. A set-off of a judgment is a valid consideration and is a giving of consideration equal in its effect to a cash payment. There is no question but that if Maurie Schneider were to pay $25,000.00 in cash a credit in that amount would be given to M-S Commodities, Inc. and Ron Stoof. It likewise should make no difference whether the judgment is set-off or whether the judgment is executed upon, cash obtained and cash paid over to Zions First National Bank.

POINT IV

THE JUDGMENT SHOULD STAND AS FILED BY THE LOWER COURT.

A. Plaintiff Appellant opposed the Motion by Defendants Respondents for entry of a net judgment and should not be allowed now to reverse their positions.

Following the signing of the judgment by the trial court, motion was made by the Defendants Respondents to amend the judgment as to each Defendant Respondent so as to reflect a net judgment of $13,505.08. Counsel for Plaintiff Appellant opposed that motion and was successful in the opposition and the final judgment as filed was allowed to stand by the Court. It would seem incomprehensible that the Plaintiff Appellant having prevailed in its

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opposition to a set-off should now at a later date when it appears advisable to it to have such a set-off, be allowed to reverse its position and be granted, as they argued before the Court below, a set-off as to Zions judgment against M-S Commodities, Inc. only, with no appropriate credit to the judgment of Maurie Schneider.

B. No appeal was taken by the Plaintiff Appellant on the judgment filed against it in favor of M-S Commodities, Inc. and that judgment is now final.

The judgment entered against Zions First National Bank in favor of M-S Commodities, Inc. was a final order appealable under Rule 72(a) Utah Rules of Civil Procedure as amended, it being in the form of a final judgment disposing of all issues of the case then existing. An appeal from a final judgment is required under Rule 73(a) Utah Rules of Civil Procedure to be taken within one month of the entry of judgment or one month from the entry in the minutes of an order denying the motion to amend the judgment. Such a minute entry was entered March 25, 1974. (See Page 684,685,686,687 of record on appeal in Case No. 13669). Failure to appeal timely is fatal. Blythe & Fargo Company v. Swenson 15 Utah 345, 49 Pac 1027 (1897).

Sustaining the order of the Court below will not result in an inequitable result since as soon as the Execution is honored by the Zions First National Bank, it in turn can serve an Execution upon the Constable to regain the funds subject only to the Attorney's Lien which attached to the funds at the

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time of the Execution. Thus, the process of the Execution will result in a forced credit by Zions First National Bank against both judgments in that a cash payment on a joint and several judgment arising out of the same obligation will result in a credit to both Obligors, M-S Commodities, Inc. and Maurie Schneider. A simple Stipulation between Counsel could have accomplished the same effect.

POINT V

THE LOWER COURT DID NOT ERR IN REFUSING TO TREAT THE JUDGMENT AS BEING OFF-SET.

A. The lower Court upheld the position of the trial Court in refusing to treat the judgments as being off-set.

As heretofore stated, motion was made by the attorney for M-S Commodities, Inc. and Maurie Schneider to amend the judgment so as to reflect the net judgment after off-set in the amount of $13,505.08. That motion was specifically denied by the trial Court upon the insistence of Counsel for Plaintiff Appellant. Thus, in refusing to off-set the judgments, the Court below merely upheld the trial Court as this Court has recently reaffirmed it should do. Estate of Charles H. Mecham, et al, v. William P. Mecham ______ U2d ______, 537 P2d 312 (1975).

B. There have been intervening equities which would make it inequitable to off-set the judgments at this time.

Unless the Order of off-set were to include an Order specifying that the off-set would result in a credit to all judgments based upon the overdraft of $38,505.08 so as to prevent the Plaintiff Appellant from prosecuting collection efforts against Maurie Schneider

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and M-S Commodities in Illinois for the full $38,505.08 gross inequities would result. Also, Zions First National Bank initially opposed off-set and between the time they initially opposed Defendants Respondents motion for off-set and the time of the motion by Zions First National Bank to require off-set, several intervening equities have occurred. An assignment of the judgment was made by M-S Commodities, Inc. to Maurie Schneider. There has been no attempt by Zions First National Bank to even question the validity of that assignment. Also, there has been a filing of an Attorney's Lien which Zions First National Bank made a motion to quash but it did not provide any evidence of any kind by way of testimony, exhibits, affidavits or even proffer of proof to the effect that said Lien was invalid. There has also been an intervening Execution and an attachment on property of Zions First National Bank and the refusal of Zions First National Bank whether contemptuous of the Court's authority or not, in no way invalidates the effectiveness of that Execution. The Kansas case of Alexander v. Clarkston 100 Kan 294, 164 Pac 294 (1917) stated at Page 295 of the Pacific Reporter:

> "Since the trustee of the Cowley County National Bank had secured an assignment of Clarkston's judgment against Alexander and it was also subjected to a timely lien before Alexander acquired an assignment of the First National Bank's judgment against Alexander, we see no way to set off these respective judgments against each other."

The Kansas Court then quoted its own opinion in Schuler v. Collins 63 Kansas 372, 65 Pac 662 (1901) as follows:

> "The existence of mutual judgments does not entitle a party to have one set off against the other arbitrarily as a matter of right. Whether application for set off is by motion or

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by a proceeding in equity, it is to be determined upon equitable considerations and is only allowed when it will promote substantial justice."

It would certainly not constitute justice to allow a set-off as claimed by Zions First National Bank as between the judgments of M-S Commodities, Inc. and Zions First National Bank and allow Zions First National Bank to continue to pursue collection efforts in Illinois for the full amount of $38,505.08 against the Co-defendant Maurie Schneider ignoring the Assignment, Lien and Execution in the process.

The Execution is valid as having been issued upon a judgment in compliance with Rule 69(a) Utah Rules of Civil Procedure as amended and Rule 62(a) Utah Rules of Civil PRocedure as amended. Thus, the Execution has the full force and effect of the Court behind it and should have been honored by the bank. No grounds have been shown on the basis of which the Execution could be quashed and the Order of Court below refusing to quash the Execution should stand. Likewise, the Court's Order to Show Cause why the bank should not be held in contempt for failure to comply with the lawful Order and Execution of the Court is also valid and whether the bank and its officer can show cause or not is irrelevant. The only issue before the trial court was whether or not the Order to Show Cause itself should be dismissed.

POINT VI

REMANDING THE CASE TO THE ORIGINAL TRIAL JUDGE WOULD BE IMPROPER AT THIS POINT IN THE PROCEEDINGS.

There is no motion pending before the original trial judge which would affect the validity or invalidity of the judgment or

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otherwise. No appeal has been taken from any order of the original trial judge and the order of the court below merely sustained the position of the original trial judge. It is therefore impossible to see upon what basis the original trial judge would have any jurisdiction over the issue now before this Court. It is not the decision of the original trial judge which is in issue here before this Court on appeal but is rather the decision of the law and motion judge which is in issue.

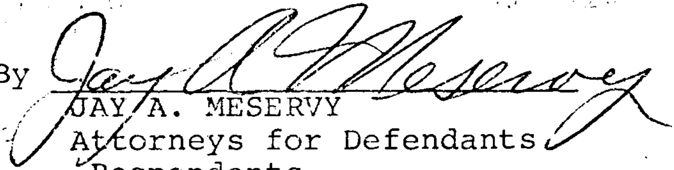
CONCLUSION

This Court should enter its Order dismissing the appeal for failure of the Plaintiff Appellant to file its designation of record on appeal.

Should the Court in its discretion determine not to order a dismissal of the appeal, it is the position of the Defendants Respondents that the Order of the Court below was proper and should be upheld.

Respectfully submitted,

VERHAAREN & MESERVY

By 
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