2008

Dixon Building v. Jefferson : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DIXON BUILDING, L.L.C., Plaintiff/Appellee vs. ADRIAN JEFFERSON, and ROSAE L. JEFFERSON, Defendants, BAD BOYS BAILS BONDS, INC., Defendant/Appellant.	**BRIEF OF THE APPELLANT** Appeal Case No. 20081062-CA Oral Argument Requested

A DIRECT APPEAL FROM AN ORDER AND JUDGMENT ENTERED IN
THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE ROBERT P. FAUST, JUDGE, PRESIDING

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STATEMENT OF JURISDICTION

The court below entered an *Order for Payment of Possession Bond* in this matter on July 14, 2008. R. at 192 et seq. On July 25, 2008, counsel for Defendant/Appellant Bad Boys Bail Bonds ("Bad Boys") filed a *Motion to set Aside Judgment, For Joinder of Bad Boys Bail Bonds, and Exoneration of Bond*. R. at 198 et seq. The Honorable Faust, J., in a Minute Order dated August 25, 2008, denied Bad Boys' *Motion* in its entirety. R. at 230 et seq. On October 9, 2008, Bad Boys filed a motion to reconsider the previous denial. R. at 247 et seq. In the interim, Plaintiff had filed a *Motion for Order to Show Cause* against Bad Boys. R. at 241, Bad Boys response at R. 254. All of the pending motions were heard by Judge Faust on November 19, 2008, with the matters taken under advisement. R. at 274. Plaintiff's motion was granted and Bad Boys' reconsideration denied in a *Memorandum Decision* of November 24, 2008. R. at 275. A Judgment entered against Bad Boys on December 29, 2008, rendering the matter final. R. at 287. The matter was timely appealed. The Utah Supreme Court had jurisdiction under UTAH CODE ANN. § 78A-3-102(3)(j). The Supreme Court transferred this case to the Court of Appeals under UTAH CODE ANN. § 78A-4-103(2)(j). Pursuant to these statutes and UTAH R. APP. P. 3(a), this Court has jurisdiction.

STATEMENT OF THE ISSUES

ISSUE 1: Whether the trial court erred in denying Bad Boys' motion for joinder.

STANDARD OF REVIEW: This issue presents a question of law, whereby the Court will review the decision of the trial court for correctness. A review for correctness "ced[es] no deference to the [trial] court." *Moss v. Pete Suazo Utah Athletic Comm'n*, 2007 UT 99 at ¶8, 175 P.3d 1042 (*citing Oakwood Vill. LLC v. Albertsons, Inc.,* 2004 UT 101 at ¶9, 104 P.3d 1226). Bad Boys' motion was made under the Utah Rules of Civil Procedure; the trial court's decision necessarily involved a reading of the same. "Matters of statutory construction are questions of law that are reviewed for correctness." *Encon Utah, LLC v. Fluor Ames Kraemer, LLC*, 2009 UT 7, ¶11, 622 Utah Adv. Rep. 23.

Preservation in the record: R. at 198 et seq.; R. at 247 et seq.; R. at 306 (internal pagination).

ISSUE 2: Whether the trial court erred in granting a judgment to Plaintiff of $10,000.00 on the surety appearance (bail) bond posted by Bad Boys as if it were a statutory possession bond.

STANDARD OF REVIEW: This issue presents two questions of law, involving contract interpretation and statutory interpretation. The Court of Appeals accords "a trial court's interpretation of a contract no deference and

reviews it for correctness." *Encon*, 2009 UT 7, ¶11, 622 Utah Adv. Rep. 23. "Matters of statutory construction are questions of law that are reviewed for correctness." *Id.* However, after this Court interprets the contract, an analysis in equity on the contract will be required in order to assess the trial court's ruling. This will require challenging findings of fact of the trial court. A trial court's factual findings are reviewed for "clear error" and this Court "will overturn a factual finding only if it is against the clear weight of the evidence." *Id.* (internal citation omitted).

Preservation in the record: R. at 198 et seq.; R. at 247 et seq.; R. at 306 (internal pagination).

ISSUE 3: Whether the trial court erred in denying Bad Boys' Rule 60(b) Motion to Set Aside.

STANDARD OF REVIEW: This issue presents a mixed question of law and fact. In "the context of a denial of a rule 60(b) motion, [the Court] review[s] a district court's findings of fact under a clear error standard of review, while [the Court] review[s] a district court's conclusions of law for correctness." *Swallow v. Kennard*, 2008 UT App 134, ¶19, 183 P.3d 1052 (internal citations omitted for clarity). A review for correctness "ced[es] no deference to the [trial] court." *Moss v. Pete Suazo Utah Athletic Comm'n*, 2007 UT 99 at ¶8, 175 P.3d 1042 (*citing Oakwood Vill. LLC v. Albertsons, Inc.,* 2004 UT 101 at ¶9, 104 P.3d 1226).

Assailing findings of fact requires that an appellant "first marshal all the evidence in support of the findings and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings." *Encon*, 2009 UT 7, ¶46, 622 Utah Adv. Rep. 23 (citing *Ockey v. Lehmer*, 2008 UT 37, ¶34 n.32, 189 P.3d 51).

Preservation in the record: R. at 198 et seq.; R. at 247 et seq.; R. at 306 (internal pagination).

ISSUE 4: Whether the trial court erred by refusing to exonerate the surety appearance (bail) bond posted by Bad Boys after Bad Boys had fully performed its obligations thereunder.

STANDARD OF REVIEW: Bail bonds and their exoneration are governed by UTAH CODE ANN. § 77-20b-101 et seq. This issue therefore again presents a question of statutory interpretation. "Matters of statutory construction are questions of law that are reviewed for correctness." *Encon Utah, LLC v. Fluor Ames Kraemer, LLC*, 2009 UT 7, ¶11, 622 Utah Adv. Rep. 23. A review for correctness "ced[es] no deference to the [trial] court." *Moss v. Pete Suazo Utah Athletic Comm'n*, 2007 UT 99 at ¶ 8, 175 P.3d 1042 (*citing Oakwood Vill. LLC v. Albertsons, Inc.,* 2004 UT 101 at ¶9, 104 P.3d 1226).

Preservation in the record: R. at 198 et seq.; R. at 247 et seq.; R. at 306 (internal pagination).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

UTAH CODE ANN. § 31A-5-504

Failure to pay bail bond forfeiture -- Grounds for suspension and revocation of bail bond surety license

(1) As used in this section:

(a) "Company" means a bail bond surety company.

(b) "Judgment" means a judgment of bond forfeiture issued under Section 77-20b-104.

(2) (a) (i) A company shall pay a judgment not later than 15 days following service of notice upon the company from a prosecutor of the entry of the judgment.

(ii) A company may pay a bond forfeiture to the court prior to judgment.

(b) A prosecutor who does not receive proof of or notice of payment of the judgment within 15 days after the service of notice to the company of a judgment shall notify the commissioner of the failure to pay the judgment.

(c) If notice of entry of judgment is served upon the company by mail, three additional days are added to the 15 days provided in Subsections (2)(a), (2)(b), and (2)(d).

(d) A prosecutor may not proceed under Subsection (2)(b) if a company, within 15 days after service of notice of the entry of judgment is served:

(i) files a motion to set aside the judgment or files an application for an extraordinary writ; and

(ii) provides proof that the surety has posted the judgment amount with the court in the form of cash, a cashier's check, or certified funds.

(e) As used in this section, the filing of the following tolls the time within which a company is required to pay a judgment if the motion or application is filed within 15 days after the day on which service of notice of the entry of a judgment is served:

(i) a motion to set aside a judgment; or

(ii) an application for extraordinary writ.

(3) The commissioner shall suspend the license of the company not later than five days following receipt of notice from a prosecutor of the company's failure to pay the judgment.

(4) If the prosecutor receives proof of or notice of payment of the judgment during the suspension period under Subsection (3), the prosecutor shall immediately notify the commissioner of the payment. The notice shall be in writing and by the most expeditious means possible, including facsimile or other electronic means.

(5) The commissioner shall lift a suspension under Subsection (3) within five days of the day on which all of the following conditions are met:

(a) the suspension has been in place for no fewer than 14 days;

(b) the commissioner has received written notice of payment of the unpaid forfeiture from the prosecutor; and

(c) the commissioner has received:

(i) no other notice of any unpaid forfeiture from a prosecutor; or

(ii) if a notice of unpaid forfeiture is received, written notice from the prosecutor that the unpaid forfeiture has been paid.

(6) The commissioner shall commence an administrative proceeding and revoke the license of a company that fails to meet the conditions under Subsection (5) within 60 days following the initial date of suspension.

UTAH CODE ANN. § 31A-35-102(1)-(4), (10)

As used in this chapter:

(1) "Bail bond" means a bond for a specified monetary amount that is:

(a) executed by a bail bond producer licensed in accordance with Section 31A-35-401; and

(b) issued to a court, magistrate, or authorized officer as security for the subsequent court appearance of the defendant upon the defendant's release from actual custody pending the appearance.

(2) "Bail bond producer" means an individual who:

(a) is appointed by:

(i) a surety insurer that issues bail bonds; or

(ii) a bail bond surety company licensed under this chapter;

(b) is appointed to execute or countersign undertakings of bail in connection with judicial proceedings; and

(c) receives or is promised money or other things of value for engaging in an act described in Subsection (2)(b).

(3) "Bail bond surety" means a person that:

(a) (i) is a bail bond surety company licensed under this chapter; or

(ii) a surety insurer; and

(b) issues bonds to secure:
(i) the release of a person from incarceration; and

(ii) the appearance of that person at court hearings.

(4) "Bail bond surety company" means any sole proprietor or entity who:

(a) (i) is the agent of a surety insurer that issues a bail bond in connection with judicial proceedings;

(ii) pledges the assets of a letter of credit from a Utah depository institution for a bail bond in connection with judicial proceedings; or

(iii) pledges personal or real property, or both, as security for a bail bond in connection with judicial proceedings; and

(b) receives or is promised money or other things of value for a service described in Subsection (4)(a).

(10) "Principal" means an individual or corporation whose performance is guaranteed by bond.

UTAH CODE ANN. § 77-20-7(1)(a)

The principal and the sureties on the written undertaking are liable on the undertaking during all proceedings and for all court appearances required of the defendant up to and including the surrender of the defendant in execution of any sentence imposed irrespective of any contrary provision in the undertaking. Any failure of the defendant to appear up to and including execution of sentence when required is a breach of the conditions of the undertaking or bail and subjects it to forfeiture irrespective of whether or not notice of appearance was given to the sureties.

UTAH CODE ANN. § 77-20b-101

The text of this statute is reproduced in its entirety in the Addendum.

UTAH CODE ANN. § 77-20b-102

The text of this statute is reproduced in its entirety in the Addendum.

UTAH CODE ANN. § 77-20b-104

Forfeiture of bail

(1) If a surety fails to bring the defendant before the court within the time provided in Section 77-20b-102, the prosecuting attorney may request the forfeiture of the bail by:

(a) filing a motion for bail forfeiture with the court, supported by proof of notice to the surety of the defendant's nonappearance; and

(b) mailing a copy of the motion to the surety.

(2) A court shall enter judgment of bail forfeiture without further notice if it finds by a preponderance of the evidence:

(a) the defendant failed to appear as required;

(b) the surety was given notice of the defendant's nonappearance in accordance with Section 77-20b-101;

(c) the surety failed to bring the defendant to the court within the six-month period under Section 77-20b-102; and

(d) the prosecutor has complied with the notice requirements under Subsection (1).

(3) If the surety shows by a preponderance of the evidence that it has failed to bring the defendant before the court because the defendant is deceased through no act of the surety, the court may not enter judgment of bail forfeiture and the bond is exonerated.

(4) The amount of bail forfeited is the face amount of the bail bond, but if the defendant is in the custody of another jurisdiction and the state extradites or intends to extradite the defendant, the court may reduce the amount forfeited to the actual or estimated costs of returning the defendant to the court's jurisdiction. A judgment under Subsection (5) shall:

(a) identify the surety against whom judgment is granted;

(b) specify the amount of bail forfeited;

(c) grant the forfeiture of the bail; and

(d) be docketed by the clerk of the court in the civil judgment docket.

(5) A prosecutor may immediately commence collection proceedings to execute a judgment of bond forfeiture against the assets of the surety.

UTAH CODE ANN. § 78B-6-808

Possession bond of plaintiff -- Alternative remedies

(1) At any time between the filing of the complaint and the entry of final judgment, the plaintiff may execute and file a possession bond. The bond may be in the form of a corporate bond, a cash bond, certified funds, or a property bond executed by two persons who own real property in the state and who are not parties to the action.

(2) The court shall approve the bond in an amount which is the probable amount of costs of suit and damages which may result to the defendant if the suit has been improperly instituted. The bond shall be payable to the clerk of the court for the benefit of the defendant for all costs and damages actually adjudged against the plaintiff.

(3) The plaintiff shall notify the defendant of the possession bond. This notice shall be served in the same manner as service of summons and shall inform the defendant of all of the alternative remedies and procedures under Subsection (4).

(4) The following are alternative remedies and procedures applicable to an action if the plaintiff files a possession bond under Subsections (1) through (3):

(a) With respect to an unlawful detainer action based solely upon nonpayment of rent or other amounts due, the existing contract shall remain in force and the complaint shall be dismissed if the defendant, within three calendar days of the service of the notice of the possession bond, pays accrued rent, all other amounts due, and other costs, including attorney fees, as provided in the rental agreement.

(b) (i) The defendant may remain in possession if he executes and files a counter bond in the form of a corporate bond, a cash bond, certified funds, or a property bond executed by two persons who own real property in the state and who are not parties to the action.

(ii) The form of the bond is at the defendant's option.

(iii) The bond shall be payable to the clerk of the court.

(iv) The defendant shall file the bond prior to the later of the expiration of three business days from the date he is served with notice of the filing of plaintiff's possession bond or within 24 hours after the court sets the bond amount.

(v) Notwithstanding Subsection (4)(b)(iv), the court may allow a period of up to 72 hours for the posting of the counter bond.

(vi) The court shall approve the bond in an amount which is the probable amount of costs of suit, including attorney fees and actual damages which may result to the plaintiff if the defendant has improperly withheld possession.

(vii) The court shall consider prepaid rent to the owner as a portion of the defendant's total bond.

(c) If the defendant demands, within three days of being served with notice of the filing of plaintiff's possession bond, the defendant shall be granted a hearing within three days of the defendant's demand.

(5) If the defendant does not elect and comply with a remedy under Subsection (4) within the required time, the plaintiff, upon ex parte motion, shall be granted an order of restitution. A constable or the sheriff of the county where the property is situated shall return possession of the property to the plaintiff promptly.

(6) If the defendant demands a hearing under Subsection (4)(c), and if the court rules after the hearing that the plaintiff is entitled to possession of the property, the constable or sheriff shall promptly return possession of the property to the plaintiff. If at the hearing the court allows the defendant to remain in possession and further issues remain to be adjudicated between the

parties, the court shall require the defendant to post a bond as required in Subsection (4)(b) and shall expedite all further proceedings, including beginning the trial no later than 30 days from the posting of the plaintiff's bond, unless the parties otherwise agree.

(7) If at the hearing the court rules that all issues between the parties can be adjudicated without further court proceedings, the court shall, upon adjudicating those issues, enter judgment on the merits.

UTAH R. APP. P. 30(a)

Decision of the court: dismissal; notice of decision.

(a) Decision in civil cases. The court may reverse, affirm, modify, or otherwise dispose of any order or judgment appealed from. If the findings of fact in a case are incomplete, the court may order the trial court or agency to supplement, modify, or complete the findings to make them conform to the issues presented and the facts as found from the evidence and may direct the trial court or agency to enter judgment in accordance with the findings as revised. The court may also order a new trial or further proceedings to be conducted. If a new trial is granted, the court may pass upon and determine all questions of law involved in the case presented upon the appeal and necessary to the final determination of the case.

UTAH R. APP. P. 29(a)

(a) In general. Oral argument will be allowed in all cases unless the court concludes:

(a)(1) The appeal is frivolous; or

(a)(2) The dispositive issue or set of issues has been recently authoritatively decided; or

(a)(3) The facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

UTAH R. APP. P. 34(a) and (c)

(a) To whom allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment or order is affirmed, costs shall be taxed against appellant unless otherwise ordered; if a judgment or order is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment or order is affirmed or reversed in part, or is vacated, costs shall be allowed as ordered by the court. Costs shall not be allowed or taxed in a criminal case.

(c) Costs of briefs and attachments, record, bonds and other expenses on appeal. The following may be taxed as costs in favor of the prevailing party in the appeal: the actual costs of a printed or typewritten brief or memoranda and attachments not to exceed $3.00 for each page; actual costs incurred in the preparation and transmission of the record, including costs of the reporter's transcript unless otherwise ordered by the court; premiums paid for supersedeas or cost bonds to preserve rights pending appeal; and the fees for filing and docketing the appeal.

UTAH R. CIV. P. 19

Joinder of persons needed for just adjudication.

(a) Persons to be joined if feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of action shall be joined as a party in the action if

> (1) in his absence complete relief cannot be accorded among those already parties, or
>
> (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may
>
> > (i) as a practical matter impair or impede his ability to protect that interest or
> >
> > (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by court whenever joinder not feasible. If a person as described in Subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading reasons for nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in Subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of class actions. This rule is subject to the provisions of Rule 23.

UTAH R. CIV. P. 20

Permissive joinder of parties.

(a) Permissive joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact

common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) Separate trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

UTAH R. CIV. P. 60

Relief from judgment or order.

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

1. This case began as an action for unlawful detainer by Plaintiff/Appellee Dixon Building, LLC against Defendants Adrian and Rosae Jefferson, filed on May 9, 2008. R. at 1. The Jeffersons are not party to this appeal.

2. A Hearing on Immediate Occupancy was held on June 9, 2008 before the Honorable Judge Dever, Third Judicial District Court. R. at 81.

3. The Minute Entry reflects the following: "Court orders defendant is to pay amount owed or defendant has to post a $10,000.00 bond in order to stay. Court gives 72 hours to post bond or must leave the premises." R. at 81.

4. Defendants Jefferson approached Defendant/Appellant Bad Boys about posting the bond. Aff. Larry Nowak, R. at 251 et seq.

5. Bad Boys is a Utah corporation in the sole business of posting surety appearance bonds (bail bonds) and is duly licensed for the same by the State of Utah. *Id.*

6. Mr. Nowak, a principal of Bad Boys, told the Jeffersons that he did not believe that he could post such a bond. *Id.*

7. The Jeffersons persisted, however, and Mr. Nowak checked with Judge Dever's clerk, Darla Cruz, to verify that he could in fact post an appearance

bond in such a situation. *Id.*, *see also* Tr. of November 19, 2008 Order to Show Cause Hearing, R. at 306, pp.7-9, 12-13 ("Tr. OSC").

8. Ms. Cruz supplied Mr. Nowak with a copy of the Minute Order specifying only the $10,000.00 bond and after speaking with Judge Dever assured Mr. Nowak that an appearance bond was permissible in satisfaction of the Court's Order. *Id.*

9. Mr. Nowak specifically testified that he relied on the minute order: "…it never specifies 'cash only' or 'property bond' on that docket. So that's one of the—one of the things we base posting it on, is it says a $10,000 bond in order to stay. It doesn't say property possession." Tr. OSC, R. at 306, p.25.

10. Upon approaching the office of the Clerk of the Court, Mr. Nowak again reiterated his doubts as to the permissible use of an appearance bond in such a situation to Deputy Court Clerk Kapiolani Vehikite. R. at 252, Tr. OSC, R. at 306, p.13.

11. Clerk Vehikite also doubted the permissibility and checked with her supervisor, Deputy Clerk Marlene Bills, who reconfirmed that the appearance bond was acceptable in satisfaction of the Minute Order. R. at 252, Tr. OSC, R. at 306, p.13-14.

12. Clerk Vehikite did not post the bond, but Clerk Lori Harpring did. *Id.*

13. Clerk Harpring also questioned the use of an appearance bond in these circumstances and conferred with her supervisor, Assistant Clerk of the Court Chris (last name Daylies or Davies), who again reconfirmed the permissible use of the appearance bond to satisfy the Minute Order. *Id.*

14. Relying in good faith on the representation of five (5) court clerks, including two (2) supervisors, and having reiterated that as to the nature of the bond, "if it's anything other than appearance, I do not want to post this bond…. I just want to guarantee the appearance," (Tr. OSC, R. at 306, p.14), Mr. Nowak on behalf of Bad Boys posted an appearance bond on June 11, 2008 in this case. R. at 82-83.

15. The bond is titled "Undertaking of Bail," and is executed by "State of Utah Bail Bond License No. 104643 Bad Boys Bail Bonds, Inc., Larry Nowak, Attorney-In-Fact." R. at 82.

16. The bond is clearly and unambiguously by its terms an appearance bond, Bad Boys undertaking that the Jeffersons "will appear and answer the charge mentioned above in whatever court it may be presented…." *Id.*

17. The appearance bond was filed with a power of attorney for American Surety Company. R. at 83.

18. The power of attorney clearly states "Authority of such Attorney-in-Fact is limited to appearance bonds." *Id.*

19. Bad Boys posted the appearance (bail) bond on behalf of the Jeffersons on June 11, 2008. R. at 82-83.

20. On June 11, 2008, Dever, J., signed an "Order to Post Bond or Restore Premises." R. at 88-89.

21. That Order directed the Jeffersons to "execute and file a possession bond in the amount of $10,000.00, in the form of a cash bond or property bond, payable to the clerk of the court for the benefit of the Plaintiff Dixon Building, L.L.C…." *Id.*

22. Counsel for Plaintiff reports "corresponding w/ Court re: possession bond & challenging sufficiency; due diligence research on quality of bond" on June 12, 2008. R. at 180.

23. On June 13, 2008, Counsel for Plaintiff reports "corresp w/ Court re: possession bond & Judge's decision…." *Id.*

24. Plaintiff then requested an evidentiary hearing on the underlying unlawful detainer claim. R. at 90.

25. On June 16, 2008, that hearing was scheduled for June 30, 2008. R. at 92.

26. The minute entry from the June 30, 2008 evidentiary hearing reports that both Defendants, Rosae Jefferson and Adrian Jefferson, were present at the hearing. R. at 181.

27. Judgment was had against Defendants Jefferson in the amount of $19,343.53, which entered on July 1, 2008. R. at 187.

28. That June 30, 2008 minute entry also contains a notation that: "The posted bond is forfeited to the plaintiff." *Id.*

29. The record then reflects three different "Order for Payment of Possession Bond" documents. The first is dated July 1, 2008 (R. at 185), the second dated July 7, 2008 (R. at 190), and the third dated July 14, 2008 (R. at 192).

30. However, in its own *Order to Show Cause Against Bad Boys Bail Bonds, Inc.*, signed by Faust, J. on October 28, 2008, Plaintiff designates the July 7, 2008 payment Order as controlling. R. at 267-68. Plaintiff being master of its action, Bad Boys will therefore consider the July 7, 2008 Order (R. at 190) controlling for purposes of this appeal.

31. The July 7, 2008 *Order for Payment of Possession Bond* signed by Hilder, J. for Faust, J., orders as follows: "…that Bad Boys Bail Bonds shall forfeit to Craig Mecham of Dixon Building, L.L.C. the sum of $10,000.00, to be paid from the Possession Bond filed with the Court by Adrian Jefferson and Rosae L Jefferson on or about June 11, 2008." R. at 190.

32. The Certificate of Service attached to the July 7 Order does not reflect any service upon Bad Boys. R. at 191.

33. On July 25, 2008, counsel for Bad Boys filed a *Motion to set Aside Judgment, For Joinder of Bad Boys Bail Bonds, and Exoneration of Bond*. R. at 198-212.

34. Plaintiff filed an opposition to Bad Boys' motion on August 11, 2008. R. at 215.

35. The Honorable Faust, J., in a Minute Order dated August 25, 2008, denied Bad Boys' *Motion* in its entirety. R. at 230 et seq.

36. On October 9, 2008, Bad Boys filed a motion to reconsider the previous denial. R. at 247 et seq.

37. In the interim, Plaintiff had filed a *Motion for Order to Show Cause* against Bad Boys. R. at 241, Bad Boys response at R. 254.

38. All of the pending motions were heard by Judge Faust, including testimony of witnesses subpoenaed by Bad Boys, on November 19, 2008, with the matters taken under advisement. R. at 274. The transcript for this hearing has been referenced above as "Tr. OSC" and is found at R. 306.

39. Plaintiff's motion was granted and Bad Boys' reconsideration denied in a *Memorandum Decision* of November 24, 2008. R. at 275.

40. A Judgment entered against Bad Boys on December 29, 2008, rendering the matter final. R. at 287.

FACTS OF THE CASE

41. All of the foregoing numbered paragraphs constitute facts of this case.

42. Of particular note, however, are some specificities in fact and law as found by the trial court, to wit:

43. On August 25, 2008, the trial court found that "Bad Boys is in the business of issuing bonds…." R. at 231.

44. In the same decision, the trial court also found that "Bad Boys is not left without a remedy because it can pursue one against the Defendants in this case." *Id.*

45. The court also found that Bad Boys "had the opportunity to seek to intervene in this action prior to the Court entering Judgment against the Defendants." R. at 230.

46. Continuing after that sentence, from that same decision by the trial court, "Bad Boys failed [to timely intervene] and cannot now seek to join this action as a Defendant. Indeed, Bad Boys currently has no standing to advance its Motion." R. at 230-31.

47. Lastly from that decision, "the Court agrees with the Plaintiff's Objection in that Bad Boys was or should have been aware that this is a civil lawsuit dealing with unlawful detainer and not a criminal action, which is apparently the typical forum where Bad Boys issues bonds." R. at 231.

48. At the November 19, 2008 hearing, the trial court repeatedly asked counsel for Bad Boys to find fault in Plaintiff's behavior such that Plaintiff should be denied recovery on the appearance bond. Tr. OSC, R. at 306, pp.16-17.

49. Robert Herrera, attorney with the State Insurance Commission, testified that the State was unable to collect against Bad Boys under UTAH CODE ANN. § 31A-5-504, which allows the State to collect against bail bonds issuers whose bonds are forfeited and who refuse to pay. Tr. OSC, R. at 306, p.24.

50. In its Memorandum Decision of August 25, 2008, the trial court found that "The fact remains that Bad Boys was uniquely qualified to discern the difference between various types of bonds." R. at 275-76.

51. The trial court continued: "Clearly Bad Boys understood that it was posting a bond in the context of a civil case and not a criminal case." *Id.*

52. Finally from that decision: "[Bad Boys'] failure to seek counsel and its purported reliance on court personnel does not relieve Bad Boys of its obligations under the bond." *Id.*

SUMMARY OF ARGUMENT

I. The Trial Court erred in Denying Bad Boys' Motion for Joinder.

Rules 19 and 20 of the Utah Rules of Civil Procedure govern the procedures and requirements for joinder of parties in a civil action. Rule 19 controls mandatory joinder, or "Joinder of persons needed for just adjudication," UTAH R.

CIV. P. R. 19, and Rule 20 regulates "Permissive joinder of parties." These rules are subjected to plain language interpretation. Plain reading of the language of both rules supports only an affirmative finding of joinder for Bad Boys, though the trial court denied joinder. In this the trial court erred and ought be reversed. Bad Boys should be ordered joined as a necessary party, or in the alternative, permissively.

II. The Trial Court Erred in Granting a Judgment to Plaintiff of $10,000.00 on the Surety Appearance (Bail) Bond Posted by Bad Boys as if it Were a Statutory Possession Bond.

This issue brings by far the greatest complexity to the fore of this appeal, though it need not have been so. Statutes and contracts, which properly construed would have appropriately disposed of this issue at the trial level, are subjected to plain language analysis. That analysis can only reveal that the June 11, 2008 bond posted by Bad Boys on behalf of Defendants Jefferson was a surety appearance, or bail, bond. There is no dispute that the trial court ordered in its written Order, and the unlawful detainer statute requires, a possession bond. There is also no dispute that the possession bond statute expressly requires that such a bond be cash or property, as the trial court ordered. Bad Boys posted a surety appearance bond. Plaintiff Dixon Building simply had no claim against the bond *ab initio*.

Further, the evidence shows that Dixon Building knew of this deficiency in the bond at least as early as June 12, 2008 and did not object or take any action to

remedy the situation. Not only did Dixon Building not act on this knowledge at its earliest opportunity, but by June 30, 2008, the date of the evidentiary hearing—when the bond was ordered forfeited—Dixon still had done nothing to correct the deficiency in the bond. Dixon Building has therefore acted with unclean hands, in absence of good faith, without due diligence, and without reasonable reliance, all while being in a position superior to that of Bad Boys. Dixon Building can clearly not claim any equitable remedy in this matter.

Because the bond posted by Bad Boys and ordered forfeited to Dixon Building was an appearance bond, not a cash or property possession bond, Dixon had no claim on the bond. The judgment on the bond in the amount of $10,000.00 in favor of Dixon Building was therefore in error by the trial court and should be vacated.

III. The Trial Court Erred in Denying Bad Boys' Rule 60(b) Motion to Set Aside.

Provided the motion is timely made, a party may obtain relief from a judgment under Rule 60(b) of the UTAH R. CIV. P. The rule provides various avenues for relief, such as mistake, surprise, inadvertence, and excusable neglect (all together under subparagraph two (2) of the rule). Also available is relief from a judgment that is void, under subparagraph four (4). Under the facts as the trial court found them, Bad Boys was undeniably entitled to relief under subparagraph four (4), and yet it also made a valid claim under subparagraph two (2). Because

Bad Boys met the requirements for relief under Rule 60(b), the trial court's ruling to the contrary was error and should be reversed.

IV. The Trial Court Erred by Refusing to Exonerate the Surety Appearance (Bail) Bond Posted by Bad Boys After Bad Boys Had Fully Performed its Obligations Thereunder.

Chapters 20 and 20b of the Utah Code of Criminal Procedure, Title 77, UTAH CODE ANN., control bail and bail forfeiture in Utah's judicial system. In this case, none of the forfeiture procedures were followed, and in fact they could not have been followed. Under the law, the surety undertakes to guarantee the principal's appearance at all court appearances, to and including presentation at the jail or prison for service of sentence in the criminal context. The law provides that once the surety's obligations have been fully performed, the bond is to be exonerated.

Bad Boys fully performed its obligation on the bail bond of the Defendants Jefferson. Bad Boys undertook on June 11, 2008 to guarantee the Jeffersons' appearance at all future court hearings. On June 30, 2008, that obligation was fully satisfied and discharged. Bad Boys is entitled to exoneration of its bond in this case, and the trial court's refusal to so do is error. The judgment of the trial court should be reversed and the bond in this case ordered exonerated.

ARGUMENT

I. The Trial Court erred in Denying Bad Boys' Motion for Joinder.

Rules 19 and 20 of the Utah Rules of Civil Procedure govern the procedures and requirements for joinder of parties in a civil action. Rule 19 controls mandatory joinder, or "Joinder of persons needed for just adjudication," UTAH R. CIV. P. R. 19, and Rule 20 regulates "Permissive joinder of parties." "Under our rules of statutory construction, we look first to the statute's plain language to determine its meaning." *State v. Moreno*, 2009 UT 15, ¶10, 203 P.3d 1000 (citing *Sill v. Hart*, 2007 UT 45, ¶7, 162 P.3d 1099). Plain reading of the language of both rules supports only an affirmative finding of joinder for Bad Boys, though the trial court denied joinder. In this the trial court erred and ought be reversed. Bad Boys should be ordered joined as a necessary party, or in the alternative, permissively.

A. Bad Boys met all statutory requirements necessary for mandatory joinder.

In order to be subject to mandatory joinder, a person must be subject to process and the person's joinder must not serve to deprive the court of its subject matter jurisdiction. UTAH R. CIV. P. R. 19. Bad Boys was at all material times subject to process and its joinder would not have perturbed the trial court's jurisdiction over the unlawful detainer action against the Jeffersons. This is critical, because the language of rule 19 proceeds to *require* that a person so qualified be joined if either of two subsequent conditions are met.

If in the absence of the person sought to be joined, "complete relief cannot be accorded among those already parties," the person *shall* be joined. UTAH R. CIV. P. R. 19(a)(1). Disjoined from this first qualifier, the rule continues to instruct that as to that person, if "he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may…as a practical matter impair or impede his ability to protect that interest…", "the court *shall order* that he be made a party." UTAH R. CIV. P. R. 19(a)(2).

In *Hiltsley v. Ryder*, 738 P.2d 1024, 59 Utah Adv. Rep. 35 (Utah 1987), the Utah Supreme Court succinctly stated a rule: "the general principle [is] that a trial court may not render judgment in favor of a non-party." *Hiltsley* at 1024. Justice Hall continued, "Courts can generally make a legally binding adjudication only between the parties actually joined in the action." *Id.* Although judgment in *Hiltsley* went in favor of the non-party, it stands equally to reason that a judgment may not be had against a non-party. This position has been taken by the Utah Supreme Court as well. In a case where no judgment had been entered against a corporation that was non-party to the suit, the court observed non circularly: "no judgment could have been so entered for the reason that the corporation was not before the court." *R.M.S. Corp. v. Baldwin*, 576 P.2d 881, 883 (Utah 1978).

If the *Baldwin* and *Hiltsley* decisions are to be given any force—and well they should—then the conclusion is inescapable that the instant trial court could

not render any judgment against Bad Boys, who was not a party before the court. Indeed, if Plaintiff was to have any judgment against Bad Boys, it should have been *Plaintiff* moving for Bad Boys' joinder.

With respect to the second prong of mandatory joinder analysis, where a person must be joined who would otherwise be rendered incapable in defending his interests in the suit, Bad Boys also qualifies. While the trial court ruled that Bad Boys' motion for joinder was untimely (R. at 230-31), this is inconsistent with the factual and legal posture of the case at that time—and not only because it should have been Plaintiff moving for Bad Boys' joinder *prior* even to the entry of judgment against Bad Boys. As will be explained at length below, Bad Boys had no defensible interest at stake in the litigation between Plaintiff Dixon Building and Defendants Jefferson. Until the trial court ordered Bad Boys to forfeit to Plaintiff $10,000.

At that point, the "subject of the action" shifted. The subject of the action, which had previously been limited to possession of the premises unlawfully detained by the Jeffersons and damages therefrom, grew to include a claim on the surety appearance bond that Bad Boys had posted. When the trial court ordered the bond forfeited (R. at 181, 190), that bond became part of the subject of the action and Bad Boys' interest became real. At that point, without joinder and with an interest in the subject of the action, Bad Boys' ability to protect that interest was

impaired and impeded. Rule 19(a)(2) is therefore satisfied. Rule 19's conditions for mandatory joinder are stated in the disjunctive. Satisfying either subparagraph (a)(1) or (a)(2) is sufficient to invoke mandatory joinder of the affected person. Bad Boys satisfies both, and it was error for the trial court to conclude otherwise. Bad Boys should be ordered joined.

B. Bad Boys met all statutory requirements necessary for permissive joinder.

Although Bad Boys clearly met the requirements for mandatory joinder, Bad Boys also sought in its motion for joinder to be joined under Rule 20, UTAH R. CIV. P., "Permissive joinder of parties." The rule reads in part:

> All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A…defendant need not be interested in…defending against all the relief demanded.

Reading this rule to its plain language yields one result: Bad Boys' motion for joinder should have been granted. A claim was asserted against them, arising out of the litigation between Dixon Building and the Jeffersons. R. at 181, 190. While that claim was for only $10,000 and Dixon had been awarded a judgment of over $19,000 against the Jeffersons, that is no bar to joinder as rule 20 clearly states that a defendant need not be interested in defending against all the relief demanded.

Bad Boys seeks only to defend its alleged $10,000 liability. The only argument against joinder of Bad Boys under rule 20 is as was seen against rule 19, where the trial court held that Bad Boys, by waiting until after the judgment had entered, had bereft itself of the opportunity to join. R. at 230-31. Prior to that entry of judgment, however, there existed no claim against Bad Boys. There existed no potential liability or interest to be defended against. Before that order of forfeiture, there was no demand of relief against Bad Boys. When reading statutes, the courts "prefer the reading that avoids absurd results." *Encon*, 2009 UT 7, ¶73, 622 Utah Adv. Rep. 23.

To read either rule 19 or rule 20 the way that Dixon Building and the trial court would have it, a person must move to join itself before the claim against it has arisen. Were a person to do so, the adverse party would certainly object and rightly so that the person seeking joinder had no standing and was not a real person in interest. The trial court has read an absurdity into rules 19 and 20 of the UTAH R. CIV. P. Bad Boys clearly met the plain language requirements for joinder under both rules and should have been joined. The trial court should be overruled and Bad Boys joined.

II. The Trial Court Erred in Granting a Judgment to Plaintiff of $10,000.00 on the Surety Appearance (Bail) Bond Posted by Bad Boys as if it Were a Statutory Possession Bond.

This issue brings by far the greatest complexity to the fore of this appeal, though it need not have been so. Statutes and contracts, which properly construed would have appropriately disposed of this issue at the trial level, are subjected to plain language analysis. That analysis can only reveal that the June 11, 2008 bond posted by Bad Boys on behalf of Defendants Jefferson was a surety appearance, or bail, bond. There is no dispute that the trial court ordered in its written Order, and the unlawful detainer statute requires, a possession bond. There is also no dispute that the possession bond statute expressly requires that such a bond be cash or property, as the trial court ordered. Bad Boys posted a surety appearance bond. Plaintiff Dixon Building simply had no claim against the bond *ab initio*.

Further, the evidence shows that Plaintiff knew of this deficiency in the bond at least as early as June 12, 2008 and did not object or take any action to remedy the situation. Not only did Plaintiff not act on this knowledge at its earliest opportunity, but by June 30, 2008, the date of the evidentiary hearing—when the bond was ordered forfeited—Plaintiff still had done nothing to correct the deficiency in the bond. Plaintiff has therefore acted with unclean hands, in absence of good faith, without due diligence, and without reasonable reliance, all while

being in a position superior to that of Bad Boys. Plaintiff can clearly not claim any equitable remedy in this matter.

Because the bond posted by Bad Boys and ordered forfeited to Plaintiff was an appearance bond, not a cash or property possession bond, Plaintiff had no claim on the bond. The judgment on the bond in the amount of $10,000.00 in favor of Plaintiff was therefore in error by the trial court and should be vacated.

A. Bail bonds are contracts.

The Utah Supreme Court has written that "The effect of furnishing a bail bond is the entering into a contract to guarantee that the principal will appear in court as required." *State v. Nelson*, 436 P.2d 792, 793, 20 Utah 2d 229 (Utah 1968). As will be shown in the following subsection, the bond posted in this case on June 11, 2008, in response to the trial court's order of June 9, 2008, was a bail bond. It should therefore be interpreted according to the standard principles of contract interpretation and enforced according to general principles of contract law.

B. The June 11, 2008 bond was a surety appearance (bail) bond, not a statutory possession bond.

Contracts, like statutes, are subjected to plain language analysis. *Café Rio, Inc. v. Larkin-Gifford-Overton, LLC*, 2009 UT 27, ¶25, 629 Utah Adv. Rep. 21 ("Where the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law.") (quoting *Green*

River Canal Co. v. Thayn, 2003 UT 50, ¶17, 84 P.3d 1134) (internal quotation marks omitted). On a question of contractual interpretation such as the one before the Court, the reviewing court "review[s] a district court's interpretation of a written contract for correctness, granting no deference to the court below." *Café Rio*, 2009 UT 27, ¶21 (citing *Home Sav. & Loan v. Aetna Cas. & Sur. Co.*, 817 P.2d 341, 347 (Utah Ct. App. 1991)).

Analysis as to the parties to this contract will follow below at (C), but it is also essential to determine the very nature of this contract: what it is that is promised. The contract in this case is clear and unambiguous within its four corners. Found at R. 82 is a document entitled "Undertaking Of Bail." Supplemented by the Power of Attorney found at R. 83, this is the contract at issue in this appeal. From the very title, it is clear that the bond posted is a bail bond. Moreover, the language of the bond reinforces this conclusion:

> [the surety] hereby undertake that the defendant, Adrian Jefferson will appear and answer the charge [of eviction] in whatever court it may be presented, and will at all times hold himself amenable to the orders and process of the court, and if convicted, will appear for judgment and render himself in execution thereof, of if he fails to perform any of these conditions, that we will pay to SLC UT the sum of $ Ten Thousand Dollars….

R. at 82. The bond was executed by Larry Nowak as attorney in fact for Bad Boys and the surety. *Id.*

The Power of Attorney is equally enlightening. The surety authorizes Larry Nowak to "execute, and deliver for and on its behalf, as surety, a *bail bond only*." R. at 83 (emphasis added). Continuing: "Authority of such Attorney-in-Fact is *limited to appearance bonds*. No authority is provided…to guarantee…other payments *of any kind* on behalf of [Adrian Jefferson]." *Id.* (emphasis added). Adrian Jefferson was ordered on June 9, 2009 "to post a $10,000.00 bond in order to stay." *Minutes Immediate Occupancy*, R. at 81. It was upon this information that Bad Boys relied in posting the bond in this case—*see* III-B, *infra*.

All of this language is consistent with language used by Utah courts in examining and defining the scope and nature of the obligation undertaken by sureties on bail bonds. Interpreting UTAH CODE ANN. § 77-20-7, Justice Howe wrote for the Supreme Court: "The statute extends liability for all appearances up to and including surrender of the defendant in execution of the sentence imposed" and "the bondsman is liable only for all appearances required of the defendant." *H.C. Heninger v. Ninth Circuit Court*, 739 P.2d 1108, 1110, 61 Utah Adv. Rep. 18 (Utah 1987).

Despite the fact that the possession bond statute, Utah Code Ann. § 78B-6-808, at subsection (4)(b)(i), expressly requires that a possession bond be either cash or property, from the four corners of the bond contract in this case, it is clear

that Bad Boys posted, the Court accepted, and Plaintiffs did not object to, a surety appearance bond—a bail bond—and nothing more or different.

C. Plaintiff is not a party to the bail contract, and cannot claim third party beneficiary status.

"A contract is an agreement between two parties that imposes obligations on each." *Guardian Title Co. of Utah v. Mitchell*, 2002 UT 63, ¶18, 54 P.3d 130 (citing BLACK'S LAW DICTIONARY, 318 (7th ed. 1999)). Where "Plaintiffs are attempting to enforce provisions of a contract to which they are not a party…[t]he essential question is whether [the parties to the contract] intended to create enforceable rights in third party beneficiaries of the agreement[]." *Wagner v. Clifton*, 2002 UT 109, ¶9, 62 P.3d 440.

1. Contract formation analysis shows the bail contract is between the court and the principal.

A contract is formed with a manifestation of mutual assent, offer and acceptance, and consideration. *See, e.g., Heideman v. Wash. City*, 2007 UT App 11, ¶24, 155 P.3d 900; *see also McKelvey v. Hamilton*, 2009 UT App 126, ¶28 ("Contract formation requires two necessary elements: offer and acceptance.") (citation omitted). Consideration might best be defined as some bargained-for exchange of detriments and benefits and is otherwise rather nebulous, avoiding bright line rulemaking by courts. *See, e.g.,* BLACK'S LAW DICTIONARY, "consideration" (8th ed. electronic version) (giving definition as "Something (such

as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee; that which motivates a person to do something, esp. to engage in a legal act.").

Following this line of analysis, we can see that in the context of the bail bond contract, the trial court suffers a detriment in that it gives up actual physical custody of the principal in exchange for the principal's promise to appear. "'Principal' means an individual…whose performance is guaranteed by the bond." UTAH CODE ANN. § 31A-35-102(10). The principal, for his part, promises to either appear or be held liable for the amount of the appearance bond. This is the consideration which supports the bail bond contract, and it identifies the parties: (1) the trial court, and (2) the principal. Although appearance bonds have been required in the context of civil litigation, *see Von Hake v. Thomas*, 759 P.2d 1162, 1164, 86 Utah Adv. Rep. 5 (Utah 1988), the adverse party in the action is not party to the bail contract. In this case, then, Plaintiff Dixon Building is not a party to the bail contract, and cannot benefit therefrom. *See Wagner v. Clifton*, 2002 UT 109, ¶13, 62 P.3d 440 ("One of the most basic principles of contract law is that, as a general rule, only parties to the contract may enforce the rights and obligations created by the contract." (citing 17A AM.JUR. 2d CONTRACTS § 421)).

2. Not a party, Plaintiff would need third party beneficiary status; Plaintiff cannot sustain a claim to third party beneficiary status.

Because Plaintiff Dixon Building is not a party to the contract, and yet seeks to avail itself of the benefits therein, this is precisely the situation contemplated in *Wagner v. Clifton*, cited *supra* at II-C. Dixon Building would that it were a third party beneficiary to the bail contract between Defendants Jefferson and the trial court. "The existence of third party beneficiary status is determined by examining a written contract." *Wagner*, 2002 UT 109, ¶11 (quoting *Am. Towers Owners Assoc., Inc. v. CCI Mech., Inc.*, 930 P.2d 1182, 1188 (Utah 1996) (internal quotation marks omitted)). "The written contract must show that the contracting parties clearly intended to confer a separate and distinct benefit upon the third party." *Wagner* at *id.* (quoting *Broadwater v. Old Republic Sur.*, 854 P.2d 527, 536 (Utah 1993) (internal quotation marks omitted)).

This Court must look at the contract—the bail bond agreement—under the same plain language, four corners approach outlined *supra* at II-B. Asking of the contract this third party beneficiary status question, the contract speaks clearly for itself. Just as Dixon Building is not a party by the terms of the contract, by those same terms Dixon Building is also not a third party beneficiary. Nowhere in the language of the contract can any verbiage be found meeting the requirements set forth in *Wagner*. There is no clear intent to confer a separate and distinct benefit upon Dixon Building. The principal, Defendants Jefferson, agreed to appear as

required by the trial court or be held liable for the bond amount on a failure to appear. The trial court agreed not to hold Defendants Jefferson in physical custody until such appearances. That is the whole extent of the promises made and benefits conferred under the bail contract.

Dixon Building is therefore not a third party beneficiary to the bail contract, and as such cannot seek to enforce any of the contractual provisions for Dixon's own benefit.

D. Plaintiff would therefore require equitable reformation to benefit under the bail contract, yet it cannot succeed with this argument either.

The only readily perceived argument which Dixon Building could make to entitle itself to benefits under the bail contract would seem to be some kind of equitable reformation, making itself a third party beneficiary. Dixon Building did not raise this argument below, and there exists some question whether a non-party can make a claim to equitable reformation, but the analysis is presented here in the interest of completeness. A case of mutual mistake arises "when both parties, at the time of contracting, share a misconception about a basic assumption or vital fact upon which they based their bargain." *Warner v. Sirstins*, 838 P.2d 666, 669 (Utah Ct. App. 1992) (quoting *Robert Langston Ltd. v. McQuarrie*, 741 P.2d 554, 557 (Utah Ct. App. 1987) (internal quotation marks omitted)).

It has been shown above that the bail contract at issue in this appeal is unambiguous on its face, and the Utah Court of Appeals has held that "The presumption that an unambiguous written document is accurate and binding requires a party to provide clear and convincing evidence of mistake to invoke the equitable remedy of reformation." *West One Trust Co. v. Morrison*, 861 P.2d 1058, 1061, 221 Utah Adv. Rep. 12 (Utah Ct. App. 1993). Additionally, the *West One* court wrote: "If the mutual mistake is established by clear and convincing evidence, a document may be reformed." *Id.* Had Dixon Building argued for some kind of equitable reformation below, which it did not, then the trial court's analysis would be subjected to some kind of a deferential review by this Court. Bad Boys would be required to marshal the evidence in support of the trial court's finding and then explain how the trial court's finding was against the clear weight of that evidence. *See, e.g., Encon*, 2009 UT 7, ¶46, 622 Utah Adv. Rep. 23.

As already noted, this argument was not presented by Dixon to the trial court. Concordantly, there is no record evidence to marshal to support such a finding of mutual mistake. Just as at III-B below, addressing the nature of Bad Boys' business and experience, what record evidence there is supports the contrary conclusion. The presumption that the unambiguous bail contract is accurate and binding cannot therefore be overcome. By the terms of the contract, Dixon Building is not party to the contract, does not have third party beneficiary status,

and cannot succeed on an equitable reformation argument to gain third party beneficiary status.

E. If Plaintiff were to gain third party beneficiary status through equitable reformation, Bad Boys would most certainly be entitled to equitable rescission.

Even if Dixon Building *were* entitled to equitable reformation, Bad Boys would be entitled to equitable rescission. Equitable rescission is available as a remedy under certain circumstances, even if the mistake at hand is unilateral. *Guardian State Bank v. F.C. Stangl III*, 778 P.2d 1, 113 Utah Adv. Rep. 9 (Utah 1989). The *Guardian State Bank* quoted *Corbin on Contracts*:

> There is practically universal agreement that, if the material mistake, of one party was caused by the other, either purposely or innocently, or was known to him, or was of such character and accompanied by such circumstances that he had reason to know of it, the mistaken party has a right to rescission.

778 P.2d at 12. Justice Stewart then added, "In truth, Utah law is in accord." *Id.* at 13. In short, "a mistake in [the contract] may not be exploited by one party to take advantage of the other. Principles of common honesty are not foreign to law and equity." *Id.* at 14.

This appeal presents precisely this circumstance. Bad Boys erred in posting an appearance bond on behalf of Defendants Jefferson. Dixon Building now seeks to avail itself of that mistake (even though it is not a party to or third party beneficiary of the contract). Record evidence shows, however, that counsel for

Dixon Building knew as early as June 12, 2008, the day after Bad Boys posted the bond, that said bond was a surety appearance bond. On that date, counsel for Dixon Building billed the client (Dixon) one and one-half hours for "corresponding w/ Court re: possession bond & challenging sufficiency; due diligence research on quality of bond…." R. at 180. The only reasonable inference from this evidence is that counsel for Dixon Building knew that the bond posted by Bad Boys was a surety appearance bond and that counsel had concerns over the "recoverability," as it were, of the bond posted. Yet there is no record evidence of any formal challenge to the bond as insufficient under the Order of the trial court, or as insufficient under the possession bond statute.

Therefore, even if Dixon Building were to attain third party beneficiary status, in equity Bad Boys would be entitled to rescission of the bail contract and would not be liable for the bond amount of $10,000.00 to Dixon Building.

F. In equity, Bad Boys clearly and overwhelmingly prevails over Plaintiff.

At this point, the argument is focused entirely on equitable considerations. It is perhaps not entirely untoward in that bent, as all of Dixon Building's arguments below sound wholly in equity, without citation to legal authority. As shown immediately above, Dixon Building knew of the facial deficiency in the bond at least as early as June 12, 2008 and did not object or take any action to remedy the situation. Moreover, not only did Dixon Building not act on this

knowledge at its earliest opportunity, but by June 30, 2008, the date of the evidentiary hearing—when the bond was ordered forfeited—Plaintiff still had done nothing to correct the deficiency in the bond. Dixon Building in pursuing judgment and collection against the appearance bond posted by Bad Boys has acted with unclean hands, in absence of good faith, without true due diligence, and without reasonable reliance, all while being in a position superior to that of Bad Boys.

The trial court found that Bad Boys is "in the business of issuing bonds," R. at 231, and that "Bad Boys was uniquely qualified to discern the differences between various types of bonds." R. at 275-76. As noted *infra* at III-B, there is no record evidence in support of these contentions—only unsupported, factually inaccurate assertions by Dixon Building, like Bad Boys is "a bond company—a company whose entire business is premised on posting bonds…." R. at 219. All available record evidence, including the Affidavit of Larry Nowak, R. at 251 et seq., and the testimony heard by the trial court at the November 19, 2008 hearing, R. at 306 (internally paginated), establishes only the contrary position. Bad Boys is a *bail* bond company, and that is the extent of its business. Larry Nowak acting on behalf of Bad Boys expressly, several times, reiterated that he wished only to guarantee the appearance of Defendants Jefferson, and continually vocalized his doubts as to the suitability of a bail bond in a situation such as that below. Further,

Mr. Nowak relied upon the only court information available at the time he posted the bond, the publicly available docket sheet, which showed that a $10,000.00 bond was required.

Dixon Building, with counsel experienced in legal affairs, who had heard the Court's verbal order of a cash or property possession bond, who doubtless knew the statutory requirements of a cash or property possession bond, who knew on June 12, 2008 that a surety appearance bond had been posted in this matter, of whom it can be reasonably inferred that he had doubts as to the sufficiency and quality of the posted bail bond, who prepared the written Order of the court requiring a cash or property possession bond, nonetheless did nothing to actually challenge the use by Defendants Jefferson of a bail bond. Dixon has thus acted with unclean hands, in absence of good faith, without true due diligence, and without reasonable reliance, and should be deemed to have waived any challenge to the sufficiency of the bail bond posted June 11, 2008 in this case. Dixon in equity should not now be allowed to exact from Bad Boys the price of Dixon's own legal and procedural shortfalls and missteps below.

III. The Trial Court Erred in Denying Bad Boys' Rule 60(b) Motion to Set Aside.

Provided the motion is timely made, a party may obtain relief from a judgment under Rule 60(b) of the UTAH R. CIV. P. The rule provides various avenues for relief, such as mistake, surprise, inadvertence, and excusable neglect

(all together under subparagraph two (2) of the rule). Also available is relief from a judgment that is void, under subparagraph four (4). Under the facts as the trial court found them, Bad Boys was undeniably entitled to relief under subparagraph four (4), and yet it also made a valid claim under subparagraph two (2). Because Bad Boys met the requirements for relief under Rule 60(b), the trial court's ruling to the contrary was error and should be reversed.

A. Bad Boys satisfied, under the facts as found by the trial court, the conditions of 60(b)(4) for relief from the judgment as void.

"On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party…from a final judgment, order, or proceeding," when the judgment is void. UTAH R. CIV. P. R. 60(b)(4).[1] While a trial court has discretion in addressing rule 60(b) motions, *Swallow*, 2008 UT App 134, ¶19, 183 P.3d 1052, "when a motion to vacate a judgment is based on a claim of lack of jurisdiction, the district court has no discretion: if jurisdiction is lacking, the judgment cannot stand without denying due process to the one against whom it runs." *Jackson Constr. Co., Inc. v. Marrs*, 2004 UT 89, ¶8, 100 P.3d 1211. When a court lacks jurisdiction, a judgment entered there "is void and must be vacated." *Id.* at ¶23 (citing *Garcia v. Garcia*, 712 P.2d 288, 290 (Utah 1986)).

[1] Curious, indeed, in light of argument section "I" *supra*. There it is argued that a judgment may only be had against a party, and here only a party may be granted relief from a judgment.

After entering judgment against Bad Boys on July 7, 2008 (R. at 190), the trial court found on August 25, 2008 that Bad Boys was "currently not a party to this action," (R. at 230), and that "Bad Boys currently ha[d] no standing to advance its Motion." *Id.* If Bad Boys were not a party, then Bad Boys were without the jurisdiction of the court. The record reflects there had been no motion, no stipulation, no order dismissing Bad Boys as a party from the action between July 7, 2008, when the judgment entered, and August 25, 2008, when the trial court found Bad Boys not a party and without standing. Bad Boys was not only "not currently" a party on August 25, 2008, it had never been a party. It had never been under the jurisdiction of the trial court, and thus the judgment entered against it was and is void. The trial court erred in denying Bad Boys' motion to set aside. The judgment against Bad Boys should be set aside as void.

B. Bad Boys also satisfied the requirements for relief from the judgment under the rule 60(b)(2) grounds of mistake.

The Utah Supreme Court has generalized the four forms of relief under rule 60(b)(2), Utah R. Civ. P., as "unintentional conduct" on the part of the movant, *Fisher v. Bybee*, 2004 UT 92, ¶12, 104 P.3d 1198, and has applied a standard of due diligence to the evaluation of such claims. *Mini Spas, Inc. v. Industrial Comm'n*, 733 P.2d 130, 132 (Utah 1987); *see also Davis v. Goldsworthy*, 2008 UT App 145, ¶14, 184 P.3d 626, *Stevens v. LaVerkin City*, 2008 UT App 129, ¶27, 183 P.3d 1059. All of these cases hold that a person claiming 60(b)(2) relief must

exercise the due diligence expected of a reasonably prudent person under similar circumstances.

Applying this standard to the conduct of Mr. Nowak, Bad Boys' representative at all material times, the analysis again comes back positive. Mr. Nowak repeatedly expressed his concern over posting an appearance bond in the civil setting. Mr. Nowak followed his standard procedure in checking the docket, which told him it needed to be a $10,000 bond, saying nothing of "cash," "property," or "possession." This is the initial information upon which Mr. Nowak relied. Mr. Nowak further relied on the affirmations of five court clerks, two of whom were supervisors. At all times Mr. Nowak continued to make clear that he wished to be bound to guarantee the Jeffersons' appearance only.

The trial court decided that this was insufficient, holding that "Bad Boys should have sought legal counsel about the potential implications of posting a bond for an unlawful detainer action." R. at 276. This holding is incongruous with reality. Mr. Nowak exercised the due diligence expected of a reasonably prudent person in similar circumstances—he checked the docket, and he checked with the court clerks, again and again. Plaintiff repeatedly asserts that Mr. Nowak should have checked the Order in the court's file, not the widely, publicly available docket sheet. R. at 215 et seq. That Order was not even signed until June 11, 2008, a fact on which this Court can impose judicial notice to find that *even if* Mr. Nowak had

taken the extraordinary step of checking the court's physical file in this case, the Order would not have been bound into the file at that time.

Plaintiff also alleges that Bad Boys is "a bond company—a company whose entire business is premised on posting bonds…." R. at 219. This is not particularly accurate; Bad Boys *Bail* Bonds is a *bail* bond company—a company whose entire business is premised on posting *bail* bonds. That is the limit of its business practices, which is adequately evidenced in the record except for Plaintiff's allegations and the findings of the trial court which seems to have adopted wholesale Plaintiff's claims in the face of overwhelming evidence otherwise. In its August 25, 2008 findings, the trial court wrote in part, "Bad Boys is in the business of issuing bonds and, again, should have been aware that a possession bond is very different from a bail bond." R. at 231. This finding is not supported by the evidence; Mr. Nowak made quite clear that he did not even know that a possession bond was expected on the case, and not an appearance bond.

In the face of even stronger evidence of Mr. Nowak's knowledge, relevant acts, and experience, the trial court again on November 24, 2008 wrote, "The fact remains that Bad Boys was uniquely qualified to discern the differences between various types of bonds." R. at 275-76. Bad Boys would marshal the evidence in support of these findings in order to show they are clearly against the weight of that evidence, *Encon*, 2009 UT 7, ¶46, 622 Utah Adv. Rep. 23, but there simply is

no evidence in support of the findings, other than Plaintiff's assertions at R. 215 et seq. and other places. *All* of the available record evidence supports precisely the contrary conclusion: Bad Boys did not know a possession bond was expected, Bad Boys *Bail* Bonds was not "uniquely qualified" and knowledgeable in the issuing of "bonds," and Bad Boys *Bail* Bonds is not "in the business of issuing bonds." Mr. Nowak issues *bail* bonds and bail bonds only on behalf of Bad Boys *Bail* Bonds. Mr. Nowak made that clear to everyone in a position of authority and expertise at the court with whom he came in contact.

This is precisely the due diligence expected of a reasonably prudent person in similar circumstances. It was error for the trial court to find otherwise, and the trial court should be reversed. Bad Boys' rule 60(b) motion should be granted and the judgment against it set aside.

IV. The Trial Court Erred by Refusing to Exonerate the Surety Appearance (Bail) Bond Posted by Bad Boys After Bad Boys Had Fully Performed its Obligations Thereunder.

Chapters 20 and 20b of the Utah Code of Criminal Procedure, Title 77, UTAH CODE ANN., control bail and bail forfeiture in Utah's judicial system. These chapters define surety appearance (bail) bonds, who may issue them, and what the procedures are for forfeiting and exonerating them. In this case, none of the forfeiture procedures were followed, and in fact they could not have been followed. Under the law, the surety undertakes to guarantee the principal's

appearance at all court appearances, to and including presentation at the jail or prison for service of sentence in the criminal context. Plaintiff below made much of this being the civil, not criminal, legal setting—something that appears to have attracted the attention of the trial court. However, there is nothing in the law—case or code—that prohibits the use of bail bonds in the civil setting to guarantee a party's appearance. In fact, they have been required before in the civil setting, as the following analysis will show. The law provides that once the surety's obligations have been fully performed, the bond is to be exonerated.

Bad Boys fully performed its obligation on the bail bond of the Defendants Jefferson. Bad Boys undertook on June 11, 2008 to guarantee the Jeffersons' appearance at all future court hearings. On June 30, 2008, that obligation was fully satisfied and discharged. Bad Boys is entitled to exoneration of its bond in this case, and the trial court's refusal to so do is error. The judgment of the trial court should be reversed and the bond in this case ordered exonerated.

A. Bad Boys has fully performed its obligations on the appearance bond posted in this case and is entitled to exoneration of the bond.

This portion of the argument presents a question of the reading of statutes. "Matters of statutory construction are questions of law that are reviewed for correctness." *Encon Utah, LLC v. Fluor Ames Kraemer, LLC*, 2009 UT 7, ¶11, 622 Utah Adv. Rep. 23. A review for correctness "ced[es] no deference to the [trial] court." *Moss v. Pete Suazo Utah Athletic Comm'n*, 2007 UT 99 at ¶8, 175

P.3d 1042 (*citing Oakwood Vill. LLC v. Albertsons, Inc.,* 2004 UT 101 at ¶9, 104 P.3d 1226). The full text of Utah Code Ann. § 77-20-7(1)(a), which delineates the scope of the bail bondsman's obligation to the trial court, is reproduced at the head of this brief. A case already cited and examined above, *Heninger*, 739 P.2d 1108 (Utah 1987), has expounded this statute. As seen in *Von Hake*, cited above at II-C-1, it is not without antecedent that Defendants Jefferson post an appearance bond in a civil case. Without repeating all of the analysis laid before the Court *supra* at II-B, the *Heninger* court held that "the bondsman is liable only for all *appearances* required of the defendant." 739 P.2d at 1110.

Bad Boys undertook a bail bond, or surety appearance bond, on behalf of Defendants Jefferson, on June 11, 2008. R. at 82-83. Pursuant to the terms of that bail contract, and pursuant to the governing statutes, Bad Boys undertook to guarantee that the Jeffersons would appear at any future court dates. The only future court date where Defendants Jefferson were required to appear was the evidentiary hearing held June 30, 2008. The minutes of that hearing clearly reflect that both Rosae and Adrian Jefferson were present. R. at 181. Therefore, on June 30, 2008, the obligation of Bad Boys on the June 11, 2008 appearance bond was completely, wholly, and fully performed, satisfied, and discharged.

The Utah Supreme Court in *Heninger* wrote: "Where no further appearance is required of the defendant, the bondsman has fulfilled his contractual and

statutory obligation and is entitled to exoneration of the bond." 739 P.2d at 1110. Defendants Jefferson appeared at the June 30, 2008 hearing. No further appearance was required of them. The bond contract and the statutes are satisfied here, just as they were in *Heninger*. It was therefore error for the trial court to refuse to follow the statutes and *Heninger* in refusing to exonerate the appearance bond posted by Bad Boys on June 11, 2008. The trial court should be reversed and the June 11, 2008 bail bond ordered exonerated.

CONCLUSION

WHEREFORE, based upon the foregoing, Respondent respectfully submits that this Court:

1. order Bad Boys joined in the matter,
2. vacate the December 29, 2008 Judgment in the amount of $10,000.00 in this matter against Bad Boys,
3. order the appearance (bail) bond posted by Bad Boys on June 11, 2008 on behalf of Defendants Jefferson exonerated,
4. award costs under UTAH R. APP. P. R. 34(c) to Bad Boys, and
5. grant Bad Boys any other further such relief as this Court deems appropriate.

DATED this 6th day of July, 2009.

_____

C. DANNY FRAZIER
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of July, 2009, I hand delivered a true and accurate copy of the foregoing Brief of the Appellant to the following parties:

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ADDENDUM

UTAH CODE ANN. § 77-20b-101

Entry of nonappearance -- Notice to surety -- Release of surety on failure of timely notice

(1) If a defendant who has posted bail fails to appear before the appropriate court when required and the court chooses to order forfeiture of the bail, the court shall issue a bench warrant that includes the original case number. The court shall also direct that the surety be given notice of the nonappearance. The clerk of the court shall:

(a) mail notice of nonappearance by certified mail, return receipt requested, within 30 days to the address of the surety or its agent as listed on the bond;

(b) notify the surety or its agent as listed on the bond of the name, address, telephone number, and fax number of the prosecutor;

(c) deliver a copy of the notice sent under Subsection (1)(a) to the prosecutor's office at the same time notice is sent under Subsection (1)(a); and

(d) ensure that the name, address, and telephone number of the surety or its agent as listed on the bond is stated on the bench warrant.

(2) The prosecutor may mail notice of nonappearance by certified mail, return receipt requested, to the address of the surety or its agent as listed on the bond within 37 days after the date of the defendant's failure to appear.

(3) If notice of nonappearance is not mailed to a surety or its agent as listed on the bond, other than the defendant, in accordance with Subsection (1) or (2), the surety is relieved of further obligation under the bond if the surety's current name and address or the current name and address of the surety's agent are on the bail bond in the court's file.

(4) (a) (i) If a defendant appears in court within seven days after a missed, scheduled court appearance, the court may reinstate the bond without further notice to the bond company.

(ii) If the defendant, while in custody, appears on the case for which the bond was posted, the court may not reinstate the bond without the consent of the bond company.

(b) If a defendant fails to appear within seven days after a scheduled court appearance, the court may not reinstate the bond without the consent of the surety.

(c) If the defendant is arrested and booked into a county jail booking facility pursuant to a warrant for failure to appear on the original charges, the surety may file a motion with the court to exonerate the bond. The surety shall deliver a copy of the motion to the prosecutor.

(d) Unless the court makes a finding of good cause why the bond should not be exonerated, it shall exonerate the bond if:

(i) the surety has delivered the defendant to the county jail booking facility in the county where the original charge is pending;

(ii) the defendant has been released on a bond secured from a subsequent surety for the original charge and the failure to appear;

(iii) after an arrest, the defendant has escaped from jail or has been released on the defendant's own recognizance, pursuant to a pretrial release, under a court order regulating jail capacity, or by a sheriff's release under Section 17-22-5.5;

(iv) the surety has transported or agreed to pay for the transportation of the defendant from a location outside of the county back to the county where the original charge is pending, and the payment is in an amount equal to government transportation expenses listed in Section 76-3-201; or

(v) the surety demonstrates by a preponderance of the evidence that:

(A) at the time the surety issued the bond, it had made reasonable efforts to determine that the defendant was legally present in the United States;

(B) a reasonable person would have concluded, based on the surety's determination, that the defendant was legally present in the United States; and

(C) the surety has failed to bring the defendant before the court because the defendant is in federal custody or has been deported.

(e) Under circumstances not otherwise provided for in this section, the court may exonerate the bond if it finds that the prosecutor has been given reasonable notice of a surety's motion and there is good cause for the bond to be exonerated.

(f) If a surety's bond has been exonerated under this section and the surety remains liable for the cost of transportation of the defendant, the surety may take custody of the defendant for the purpose of transporting the defendant to the jurisdiction where the charge is pending.

UTAH CODE ANN. § 77-20b-102

Time for bringing defendant to court

(1) If notice of nonappearance has been mailed to a surety under Section 77-20b-101, the surety may bring the defendant before the court or surrender the defendant into the custody of a county sheriff within the state within six months of the date of nonappearance, during which time a forfeiture action on the bond may not be brought.

(2) A surety may request an extension of the six-month time period in Subsection (1), if the surety within that time:

(a) files a motion for extension with the court; and

(b) mails the motion for extension and a notice of hearing on the motion to the prosecutor.

(3) The court may extend the six-month time in Subsection (1) for not more than 60 days, if the surety has complied with Subsection (2) and the court finds good cause.

THE JUNE 9, 2008 MINUTE ENTRY

THE BOND

THE POWER OF ATTORNEY

AUGUST 25, 2008
MINUTE ENTRY

MEMORANDUM DECISION
NOVEMBER 24, 2008

TRANSCRIPT OF HEARING
NOVEMBER 19, 2008