

1998

Mary M. Tuck v. The Beehive House, a Utah Limited Partnership, and S. Chad Godfrey, and individual : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Tuck v. The Beehive House*, No. 980118 (Utah Court of Appeals, 1998).
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IN THE UTAH COURT OF APPEALS

MARY M. TUCK,

Plaintiff/Appellee,

vs.

Appeal No. 980118-CA
(Civil No. 950908242CN)

THE BEEHIVE HOUSE, a Utah
Limited Partnership, and S. CHAD
GODFREY, an individual,

(Argument Priority: 15)

Defendants/Appellants.

BRIEF OF APPELLANT

On Appeal from the Third Judicial District Court of Salt Lake County
Judge Anne M. Stirba

**UTAH COURT OF APPEALS
BRIEF**

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**ORAL ARGUMENT
REQUESTED**

FILED
Utah Court of Appeals

OCT 20 1998

Julia D'Alesandro
Clerk of the Court

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Rule 3(a), Utah Rules of Appellate Procedure. This Court has already determined that the Order from which Mr. Godfrey appeals constitutes a final judgment and that jurisdiction is proper. (See Order Withdrawing Sua Sponte Motion for Summary Disposition.)

ISSUES PRESENTED FOR REVIEW

Did the trial court abuse its discretion by entering the ultimate discovery sanction of default judgment against Mr. Godfrey when: (1) Mr. Godfrey, in fact, complied with the discovery requests by producing documents relating to him personally; (2) he, as well as employees of the other defendant, The Beehive House, made diligent, good-faith efforts to locate and produce the bank records requested of The Beehive House; (3) the documents not produced were those of The Beehive House and not of Mr. Godfrey personally; (4) the method by which the documents were requested was not procedurally correct; and (5) the trial court never ordered Mr. Godfrey to produce the documents at issue, even though its sanction of default judgment was based on the incorrect assumption that it had. (R. at 461-66.)

The standard of review for imposition of discovery sanctions is abuse of discretion. See Preston & Chambers, P.C. v. Koller, 943 P.2d 260 (Utah Ct. App. 1997). It should be noted, however, that “[w]hen the sanction imposed is that of a default judgment, the most severe of sanctions, the trial court’s range of discretion is more

narrow than when the court is imposing less severe sanctions.” Utah Dept. of Transp. v. Osguthorpe, 892 P.2d 4, 8 (Utah 1995).

DETERMINATIVE PROVISIONS

Rule 30(b)(5), Utah Rules of Civil Procedure

Rule 34(b), Utah Rules of Civil Procedure

Rule 37(b)(2)(A through C), Utah Rules of Civil Procedure

Rule 37(d), Utah Rules of Civil Procedure

(Copies are set forth in the Addendum)

STATEMENT OF THE CASE

A. Nature of the Case.

This case involves a dispute over whether defendant S. Chad Godfrey is obligated to repay in full certain funds given him by the plaintiff. (R. at 1-32, 71-85.) During the proceedings below, the trial court entered default judgment against Mr. Godfrey, for the entire amount plaintiff claimed in her Complaint, as a discovery sanction because the other defendant, The Beehive House, was unable, after good-faith efforts, to locate certain of its bank records prior to a scheduled deposition. (R. at 461-64; R. at 548, pp. 15-20.) Whether the trial court erred in entering said default judgment is the issue in this appeal.

B. Course of Proceedings and Disposition Below.

Based on plaintiff’s Motion for Sanctions for Failure to Make Discovery, the trial court struck the pleadings of Mr. Godfrey and entered default judgment against him for

approximately \$490,000.00. (R. at 225-27, 461-64.) Mr. Godfrey timely filed a Notice of Appeal from that judgment. (R. at 465-67.) Claims still remain against The Beehive House. (R. at 461-64.)

This Court filed a Sua Sponte Motion to Dismiss, which it later withdrew based on the fact that the nature of the issues on appeal differ in substance from the underlying facts of the remaining claims.

C. Statement of Facts.

1. On November 29, 1995, plaintiff filed her Verified Complaint in this action, naming as defendants The Beehive House, a Utah limited partnership, and S. Chad Godfrey, an individual who, during the relevant period of this litigation, was employed as the marketing director of Beehive Health, Inc., an affiliated company of The Beehive House. (R. at 1-9, 323; R. at 548, p. 17.)

2. On August 7, 1996, with no prior notice to Brad Merrill, who served as counsel for both defendants at that time, plaintiff noticed the deposition of Mr. Godfrey for August 19, 1996. (R. at 117, 141-42.) The Notice of Deposition included a request that Mr. Godfrey bring certain documents to the deposition. (R. at 86-88.) A copy of the Notice of the August 19, 1996 Deposition is attached hereto in Addendum "B".)

3. Together with the Notice of Deposition, plaintiff's counsel delivered a letter to Mr. Merrill that stated: "If August 19th creates a problem for you, please let me know; however, we would like to complete the deposition as soon as possible." (R. at 117, 133.)

4. After receiving the Notice of Deposition and the letter, Mr. Merrill contacted plaintiff's counsel and informed him, as he had done several times prior, that Mr. Godfrey was out of state and would not be able to return until at least the middle of September, 1996. Mr. Merrill explained that Mr. Godfrey's whereabouts were confidential,¹ but that he would nonetheless be available for deposition the following month. (R. at 117, 142.)

5. Plaintiff's counsel refused to postpone the deposition in spite of Mr. Merrill's representation that Mr. Godfrey would be available in September, 1996. (R. at 117, 142.)

6. On August 15, 1996, Mr. Merrill again contacted plaintiff's counsel and explained that because his wife was prematurely in labor and hospitalized, he would not be able to file a Motion for Protective Order before the noticed deposition date. Plaintiff's counsel agreed to allow Mr. Merrill at least an extra week to file such a motion or to reach some other resolution of the dispute. Plaintiff's counsel stated that, in any event, he had already canceled the deposition arrangements for August 19. (R. at 118, 142-43.)

7. On August 20, 1996, upon returning to work, Mr. Merrill contacted plaintiff's counsel in an attempt to resolve the scheduling of Mr. Godfrey's deposition.

¹ Mr. Godfrey was incarcerated in a federal penitentiary at the time. For a variety of obvious personal reasons, Mr. Godfrey wanted to keep that fact as private as possible. (R. at 548, p. 13.)

Mr. Merrill again explained that Mr. Godfrey would not be available until at least the middle of September 1996, but that, to provide assurances of this, Mr. Godfrey would agree to stipulate that if he did not appear for his deposition at that time, sanctions would be entered against him. No agreement, however, was reached. (R. at 118, 143.)

8. Without any further contact, plaintiff's counsel delivered a proposed Stipulation to Mr. Merrill on August 22, 1996. The Stipulation proposed that Mr. Godfrey would be deposed on September 12, 1996, and that if he did not appear, both he and The Beehive House would agree to default judgment against them. (R. at 118-19, 136-39, 143.)

9. Upon receiving the proposed Stipulation, Mr. Merrill telephoned plaintiff's counsel and explained that Mr. Godfrey would not be available until September 19, 1996. Mr. Merrill also explained that The Beehive House would not stipulate to default judgment against it should Mr. Godfrey not appear at his deposition because The Beehive House had no control over him. Mr. Merrill indicated the proposed Stipulation was otherwise agreeable, but that if these issues were not resolved, he would need to seek a protective order. (R. at 119, 143.)

10. On August 26, 1996, plaintiff's counsel delivered a letter stating that although he would agree to depose Mr. Godfrey on September 20, plaintiff would not agree to delete from the proposed Stipulation the provision for default judgment against

The Beehive House in the event Mr. Godfrey did not attend his deposition. (R. at 120, 140, 144.)

11. Upon receiving the August 26, 1996 letter, Mr. Merrill again informed plaintiff's counsel that The Beehive House would not agree to judgment against it based on someone else's conduct. Mr. Merrill suggested that the parties should nevertheless proceed with Mr. Godfrey's deposition because they had finally agreed to a date, and that, in the unlikely event Mr. Godfrey did not appear, plaintiff could then move for sanctions against The Beehive House and allow The Beehive House an opportunity to respond. (R. at 120, 144.)

12. On the morning of August 28, 1996, plaintiff's counsel faxed a letter to Mr. Merrill stating that plaintiff had elected to pursue a Motion for Sanctions against both Mr. Godfrey and The Beehive House. Before Mr. Merrill was able to file a motion for a protective order on behalf of the defendants, plaintiff's counsel served the Motion for Sanctions on Mr. Merrill at approximately 11:00 a.m. that same day. (R. at 120-21, 144.)

13. Despite the facts outlined above, plaintiff's Motion for Sanctions was based solely on the grounds that Mr. Godfrey did not appear at the deposition originally scheduled for August 19, 1996 (which plaintiff's counsel himself admitted he had canceled), and that Mr. Godfrey failed to file a motion for a protective order. (R. at 100-01, 118, 142-43.)

14. In plaintiff's Motion for Sanctions and accompanying memorandum, no mention was made of the above-described negotiations between counsel nor of the agreement to depose Mr. Godfrey on September 20, 1996. (R. at 99-113.)

15. On March 28, 1997, plaintiff's Motion for Sanctions came on for hearing before the trial court. At the hearing, the parties agreed that Mr. Godfrey was available and that his deposition would be taken forthwith. (R. at 546, pp. 2-6.) In an Order dated April 21, 1997, the court imposed as sanctions against Mr. Godfrey the attorneys' fees and costs plaintiff incurred in connection with the Motion for Sanctions. (R. at 217-18.) No order was issued compelling Mr. Godfrey to produce any documents. (R. at 217-18.) A copy of the court's April 21, 1997 Order is attached hereto in Addendum "B".)

16. Thereafter, on June 4, 1997, plaintiff filed a Notice of Deposition scheduling Mr. Godfrey's deposition for July 11, 1997. The Notice also scheduled the deposition of B. Ralph Godfrey, a representative of The Beehive House, for July 10, 1997. The Notice requested that these deponents bring certain documents to their depositions "to the extent such documents [were] in their possession or under their control or [were] otherwise accessible to them." One of the requested items was bank records, statements, canceled checks, etc., of The Beehive House (the "Bank Records"). (R. at 221-23.) A copy of the second Notice of Deposition is attached hereto in Addendum "B".

17. Upon receipt of the second Notice of Deposition, Mr. Godfrey and various employees of The Beehive House searched diligently for the documents requested. Their efforts, as more fully described in the Argument section below, included several searches for the Bank Records of the Beehive House that had been placed in storage and subsequently moved to different locations. (R. at 314-29.) In addition, The Beehive House issued a subpoena to its bank, requesting copies of the Bank Records. (R. at 548, p. 16.) Despite these efforts, The Beehive House was unable to locate the bank records plaintiff had requested.² (R. at 315-18.)

18. At the appointed time on July 11, 1997, Mr. Godfrey was at the premises where the deposition was scheduled, awaiting the instruction to come to the specific room where the deposition was being conducted. His counsel appeared and delivered to plaintiff's counsel all the documents Mr. Godfrey had been able to locate responsive to the requests directed to him.³ The Beehive House also appeared with all the documents it was able to locate. Mr. Godfrey was prepared to be sworn and deposed. Plaintiff's counsel, however, chose not to depose Mr. Godfrey at that time, opting instead to review the documents he had brought with him and await production of The Beehive House's bank records before deposing Mr. Godfrey. (R. at 315, 324.)

²During the time Mr. Godfrey was imprisoned, he exercised no control over and had nothing to do with the documents plaintiff requested. (R. at 315, 324.)

³At this point, Mr. Godfrey had retained the Snow, Christensen & Martineau as separate counsel. The Beehive House was still represented by Mr. Merrill. Mr. Merrill has subsequently withdrawn because of conflicts. The Beehive House is now represented by Dennis K. Poole.

19. On July 14, 1997, plaintiff filed a Motion for Sanctions for Failure to Make Discovery against both The Beehive House and Mr. Godfrey on the ground that they had not produced all the documents requested. (R. at 225-26.) In response to plaintiff's Motion, Mr. Godfrey asserted that he had in fact produced all the requested documents he could find that were in his possession or control. (R. at 314-25.)

20. This second Motion for Sanctions came on for hearing before the trial court on September 4, 1997. (see Transcript of Hearing, R. at 548, pp. 1-42, a copy of which is attached hereto in Addendum "C".) At the hearing, the trial court granted plaintiff's Motion and authorized sanctions against both defendants.

21. In its Order on Plaintiff's Motion for Sanctions for Failure to Make Discovery, dated November 18, 1997 (the "Default Order"), the trial court struck the pleadings of Mr. Godfrey and entered default judgment against him for the following sums: (a) \$381,700.00, representing the principal amount of plaintiff's claim; (b) \$109,322.30, representing prejudgment interest through September 15, 1997; (c) \$170.00, representing plaintiff's costs; and (d) postjudgment interest on the foregoing amounts until paid in full. (R. at 461-64.) A copy of the Default Order, from which Mr. Godfrey appeals, is attached hereto in Addendum "B".

22. In imposing the sanction of default judgment against Mr. Godfrey, the trial court relied heavily on the assumption that it had previously ordered Mr. Godfrey to produce the missing documents and that Mr. Godfrey was under a continuing obligation,

pursuant to the original Notice of Deposition filed in August 1996, to produce the records in question. (R. at 548, pp. 28-29, 33-34.) No such order was in place, however. The trial court had simply ordered the deposition to be rescheduled. (R. at 217-220; R. at 546, pp. 1-10.) In addition, the August 1996 Notice of Deposition simply requested that Mr. Godfrey bring certain documents to his deposition, which did not occur and which Plaintiff's counsel himself canceled. (R. at 86-89; 118, 142-43.)

23. Pursuant to the trial court's Default Order, The Beehive House again undertook to locate the documents. After extensive efforts, The Beehive House located the documents and produced them to the plaintiff.

24. On December 17, 1997, Mr. Godfrey filed a Notice of Appeal of the Default 1997 Order and as to the default judgment entered against him. (R. at 465-66.)

SUMMARY OF THE ARGUMENT

The trial court abused its discretion in entering the most severe sanction of default judgment against Mr. Godfrey. First, it was improper to enter default judgment against Mr. Godfrey for the failure of the other defendant, The Beehive House, to produce its bank records. Mr. Godfrey did not have control over or possess the bank records; The Beehive House did. Moreover, Mr. Godfrey produced all the documents he was able to locate that were responsive to the requests directed to him, personally.

In addition, the trial court's decision to enter default judgment against Mr. Godfrey was based on a number of incorrect assumptions and procedural flaws. For instance,

contrary to the trial court's belief, there was no prior order in place compelling Mr. Godfrey to produce the records requested. Plaintiff's first Notice of Deposition merely requested that Mr. Godfrey bring certain documents to his deposition. Plaintiff's counsel canceled that deposition, and there was no continuing obligation on Mr. Godfrey to produce anything. Furthermore, at the hearing on plaintiff's first Motion for Sanctions, the trial court did not set a specific date by which Mr. Godfrey was to produce the requested records; rather, the court simply stated that his deposition needed to be rescheduled, which it was. Thus, the only obligation of Mr. Godfrey was to attend his July 11, 1997 deposition with the documents he could locate. The documents were produced and delivered to plaintiff's counsel, and Mr. Godfrey was prepared to be sworn in and deposed. Nonetheless, the trial court entered the most severe discovery sanction against him. It was an abuse of discretion to do so.

ARGUMENT

"[D]efault judgment is an unusually harsh sanction that should be meted out with caution." Darrington v. Wade, 812 P.2d 452, 456 (Utah Ct. App. 1991). Entry of default judgment as a discovery sanction requires a showing of willfulness, bad faith, or fault, such as the intentional failure to comply with a court order compelling discovery. See Utah Dept. of Transp. v. Osguthorpe, 892 P.2d 4, 8 (Utah 1995). Judgments by default "are disfavored by the law," and whenever possible, cases should be decided on the merits. Wright v. Wright, 941 P.2d 646, 649 (Utah Ct. App. 1997).

In Utah, the trial court has discretion to select which discovery sanction to impose. That wide grant of power is abused, however, if there is ““an erroneous conclusion of law or no evidentiary basis for the trial court’s ruling.”” Morton v. Continental Baking Co., 938 P.2d 271, 274-75 (Utah 1997) (citing Askew v. Hardman, 918 P.2d 469, 472 (Utah 1996)). In this case, for the reasons set forth below, the trial court’s selection of default judgment as a discovery sanction against Mr. Godfrey was based on several erroneous conclusions of law, misperceptions of the evidence, and incorrect recollections of the record. It was therefore an abuse of discretion to enter any sanction against Mr. Godfrey, particularly the ultimate sanction of default judgment.

I. THE TRIAL COURT ABUSED ITS DISCRETION BY DEFAULT-
ING MR. GODFREY FOR THE INABILITY OF THE OTHER
DEFENDANT, THE BEEHIVE HOUSE, TO LOCATE THE
BANK RECORDS.

Default judgment should not be entered against one defendant for another defendant’s inability to timely locate requested documents.

In spite of this simple principle, in the present case, the trial court entered default judgment against Mr. Godfrey when it was The Beehive House’s bank records at issue. These two defendants are separate. (R. at 323; R. at 548, p. 20.) At the September 4, 1997 hearing on plaintiff’s Motion for Sanctions, counsel for the defendants emphasized that the bank records which had not been produced were in the “possession, custody and control of the Beehive House”—not Mr. Godfrey. (R. at 548, p. 15.) The bank records in question were stored and maintained by the Beehive House. In addition, throughout the

relevant period, Mr. Godfrey was incarcerated out of state; he obviously did not work at The Beehive House during that time, nor did he have access to the documents at issue. (R. at 548, pp. 17, 20.) In fact, The Beehive House, recognizing its responsibility to locate the bank records prior to the July 11, 1997 deposition date, subpoenaed its bank for copies of the bank statements. (R. at 548, p. 16.)

At one point during the hearing, the trial court seemed to recognize that it was the responsibility of The Beehive House, not Mr. Godfrey, to produce the bank records. The court stated, “All right. And at the time that the requests were made for the documents, that the documents, whatever documents there were, were at the—under the control of the Beehive House; isn’t that correct?” (R. at 548, p. 18.) Nonetheless, in issuing its ruling, the court explained that default would be entered against Mr. Godfrey because he had not “requested or subpoenaed documents from the bank himself. He’s relied on the Beehive House to do his work for him.” (R. at 548, p. 34.).

The court contradicted itself: The defendants were requested to produce those documents that were within their respective possession or control; the Beehive House had control over and maintained the Bank Records, which were in fact bank records of the Beehive House and not of Mr. Godfrey; the Beehive House undertook to find and produce the Bank Records; yet the court sanctioned Mr. Godfrey for relying on the Beehive House to produce the Bank Records and for not issuing a subpoena for the records himself.

The logic of the ruling is even more perplexing, and further reveals that the court abused its discretion, in light of the court's subsequent statement. In explaining the decision to impose attorneys fees and costs as sanctions against The Beehive House, the trial court stated, "I'm also troubled by the fact that the Beehive House allowed a nonemployee to search for the records, and a codefendant in the case, and have [sic] not maintained 100 percent control over the documents in question." (R. at 548, p. 38.) Thus, in the span of one hearing, the trial court sanctioned Mr. Godfrey for not searching for The Beehive House's Bank Records, and then sanctioned the Beehive House for allowing Mr. Godfrey to search for those same records. According to the trial court's logic, no matter what the defendants did, they would be sanctioned. Defendants should not be placed in such an impossible conundrum. This, by itself, demonstrates that the court abused its discretion.

Mr. Godfrey was under no duty to produce the Bank Records of The Beehive House. Rule 34 clearly indicates that a party's responsibility is to produce only those documents in the party's "possession, custody, or control." The Bank Records were documents pertaining solely to The Beehive House, not to Mr. Godfrey. Accordingly, the trial court erred in sanctioning him for failing to produce them.

In Cochran Consulting, Inc. v. Uwatec USA, Inc., 102 F.3d 1224 (Fed. Cir. 1996), the Federal Circuit faced a similar situation and reversed the district court's imposition of discovery sanctions. There, Uwatec, the defendant in a patent infringement case, was

served with document requests seeking the computer code for the allegedly infringing device. Uwaterc did not own the code, but under threat of sanctions from the district court, it sued Dynatec, the purported owner of the code in Switzerland in order to establish ownership. The Swiss court ruled against Uwaterc and held that Dynatec was the sole owner of the code. In spite of this ruling, the district court in the patent litigation imposed harsh injunctive sanctions anyway.

In reversing, the Federal Circuit explained that “[i]n imposing upon Uwaterc ... the duty to produce the [computer] code although they did not possess it and had no right to obtain it, the district court applied incorrect legal standards.” *Id.* at 1230. The circuit court first reviewed Uwaterc’s good faith efforts to obtain and produce the code, including filing suit against the author of the code in a foreign country. Second, the circuit court reviewed the simple standard of Rule 34, which requires that before sanctions may be imposed, a party must have “ownership, custody, or control” of a requested document. “Control” is then defined “not only as possession but as the legal right to obtain the documents requested upon demand.” *Id.* at 1229-30. Because Uwaterc ultimately had no right to the computer code, it had no ownership or control. Without such control, the circuit court therefore held that it would be impossible for Uwaterc to produce the code. Because “Rule 37 is not a legal requirement to do the impossible,” the court vacated the sanctions.

The present case is similar. Mr. Godfrey and The Beehive House undertook good faith efforts to locate and produce the Bank Records. More importantly, Mr. Godfrey was under no duty to produce those records. He lacked the legal right to obtain those documents, upon demand, from either The Beehive House or its bank. The trial court emphasized that fact when it reprimanded The Beehive House for allowing Mr. Godfrey to assist in the search. The trial court also implied that Mr. Godfrey had a duty to subpoena the Bank Records directly from The Beehive House's bank. The plaintiff could have just as easily done this and obtained the information it sought through alternative means. The trial court lacked the authority to compel Mr. Godfrey to produce the Bank Records, to sanction him for failing to produce them, or to sanction him with default judgment.

II. THE TRIAL COURT MISPERCEIVED THE EVIDENCE BEFORE IT: MR. GODFREY DID NOT ENGAGE IN CONDUCT WARRANTING ANY SANCTIONS, LET ALONE DEFAULT JUDGMENT.

There was no factual or evidentiary basis warranting the severe sanction of default judgment against Mr. Godfrey. He made good-faith discovery efforts and produced the documents within his possession and control.

The type of conduct for which default judgment as a discovery sanction has been affirmed is well illustrated in Utah Dept. of Transp. v. Osguthorpe, 892 P.2d 4, 8 (Utah 1995). In that case, the defendant failed numerous times to respond to discovery requests,

even after promising on many different occasions to comply by certain dates. The plaintiff made several formal discovery demands, but the defendant did nothing. After nine months of such noncompliance, the plaintiff moved to compel discovery responses. The motion was served on the defendant, but he did not respond. Three weeks later, the plaintiff filed a notice to submit the motion to compel for decision and a proposed order. These documents were also served on the defendant, but he again failed to respond. The court thus granted the motion and sent a copy of the order compelling discovery to the defendant. Nearly seven months later, the defendant still had not answered the discovery requests and, as a result, the plaintiff moved to strike the defendant's pleadings and enter default. The motion, coupled with the prior order compelling discovery, was served on the defendant, but with no response. A few weeks later, the plaintiff filed a memorandum in support of its motion to strike, a notice to submit the motion, and a proposed order. All of these documents were served on the defendant, but again he made no response. Finally, over a year and a half after the initial discovery requests were served on the defendant, default judgment was entered against him. See 892 P.2d at 5; see also Morton v. Continental Baking Co., 938 P.2d 271, 272-73 (Utah 1997) (describing similar nonresponsive and dilatory tactics which provided adequate basis for entry of default judgment as a discovery sanction).

In no manner does the conduct of Mr. Godfrey resemble that of the nonresponsive parties in either Osguthorpe or Morton. Plaintiff's first discovery request of Mr. Godfrey

was in the form of a Notice of Deposition, dated August 7, 1996, which requested that he bring certain documents to his deposition scheduled for August 19, 1996. Mr. Godfrey, however, was incarcerated in a federal prison at that time. Although plaintiff was not informed of the reason for Mr. Godfrey's unavailability, Mr. Godfrey's counsel engaged in good-faith negotiations with plaintiff's counsel to postpone the deposition to a mutually feasible time. The fact that Mr. Godfrey could not be deposed in August 1996 was not concealed at all; in fact, just when it appeared that counsel for both parties had agreed to depose Mr. Godfrey in late September of that year, plaintiff filed her first Motion for Sanctions.

That motion was based on the fact that Mr. Godfrey was not deposed on August 19, 1996, as originally scheduled, and on the fact that Mr. Godfrey had not moved for a protective order. The motion was indeed unexpected: not only did Mr. Godfrey's counsel believe the parties had agreed not to pursue the August 19 deposition, but plaintiff's counsel had expressly stated prior to that date that he had canceled the arrangements for that deposition.

Moreover, Mr. Godfrey's counsel had stated several times that if an agreement was not reached concerning the situation, he would need to seek a protective order. Knowing this, plaintiff's counsel nonetheless filed the Motion for Sanctions the same morning he notified Mr. Godfrey's counsel that he would be pursuing sanctions rather than

continuing the negotiations. Mr. Godfrey was in effect ambushed, and had no opportunity to seek a protective order.

While one might argue Mr. Godfrey should have allowed his whereabouts at that time to be disclosed, it can hardly be said that he wilfully and in bad faith frustrated the judicial process. Through his counsel, Mr. Godfrey simply sought to reschedule his deposition to a date when he would be available, which was shortly after the deposition date originally designated. Nonetheless, the trial court relied heavily on Mr. Godfrey's nonappearance at the originally scheduled deposition in determining later that default judgment against him was warranted. (R. at 548, pp. 28-29, 33-34.)

When Mr. Godfrey returned to Utah in November 1996, counsel for both parties had agreed discovery would be postponed until after the Motion for Sanctions had been decided. (R. at 548, pp. 19-20, 27.) The motion was argued March 28, 1997, and the order assessing costs and attorneys' fees against Mr. Godfrey was entered April 21, 1997. Soon thereafter, on June 4, 1997, plaintiff filed another Notice of Deposition, which scheduled a deposition for Mr. Godfrey and The Beehive House on July 11, 1997. The Notice requested that Mr. Godfrey bring certain documents to his deposition. The Notice also requested that The Beehive House bring documents, including the Bank Records.

Pursuant to the Notice, Mr. Godfrey located and produced all the documents in his possession or control that pertained to him personally. In addition, he helped The Beehive House in its good-faith efforts to locate the Bank Records. Mr. Godfrey

personally searched for the documents and instructed various employees to search through all records and files to locate them. (R. at 323-34.)

More specifically, in the middle of June 1997, Mr. Godfrey asked DeeAnn Schaugaard, Office Manager of The Beehive House, to locate the Bank Records. (R. at 324, 335-36.) Schaugaard earlier had placed the Bank Records in a box and moved them to the office of Beehive Home Health, Inc., a company affiliated with The Beehive House. (R. at 335.)

The box with the Bank Records remained at Beehive Home Health from March 1997, until approximately May 1997. (R. at 335.) Some time during May 1997, the Bank Records and numerous other boxes of documents were moved to a storage facility. Schaugaard, together with several others moved numerous boxes of records and documents to the storage facility. Schaugaard taped closed the box containing the Bank Records, affixed an identifying label, and moved the box out of the office of Beehive Home Health. (R. at 253-55, 257, 273, 335-36.)

When Mr. Godfrey asked Schaugaard to locate the bank records in June 1997, she was not overly concerned with immediately locating them because she assumed they would be readily accessible at the storage facility. (R. at 336.) Prior to the end of June 1997, Schaugaard asked Ralph Godfrey to retrieve the box containing the bank records. She described the box and its label. Ralph Godfrey however was unable to find the Bank Records. (R. at 253-57, 273, 336.)

Prior to the end of June 1997, Schaugaard also requested Mary Woodland, an employee of the Beehive House, to retrieve the Bank Records. Schaugaard described the box, but Ms. Woodland was also unable to locate it. (R. at 336.)

Shortly after that time, Schaugaard left on vacation, returning to work on July 10, 1997--the day before the records were to be produced. (R. at 336.). Mr. Godfrey immediately requested that Schaugaard search all possible locations for the Bank Records. (R. at 336.) Schaugaard, with the help of Mr. Godfrey and Ralph Godfrey, searched The Beehive House, the Beehive Home Health corporate office, the storage facility, and other locations. The search continued well into the evening of July 10, 1997. (R. at 253-57, 273, 336.) Notwithstanding all of the foregoing efforts, the Bank Records were not found prior to July 11, 1997.⁴ (R. at 337.)

These facts reveal that both Mr. Godfrey and The Beehive House undertook diligent efforts to locate the Bank Records prior to the date of the scheduled deposition, but were simply unable to find them at that time. There is no evidence of destruction, fraud, or purposeful concealment as is generally required to uphold entry of default judgment as a discovery sanction. See, e.g., Marshall v. Marshall, 915 P.2d 508, 515 (Utah Ct. App. 1996) (upholding default judgment against defendant where he actively mislead the court and the opposing party by secreting approximately \$180,000 of his

⁴ After extensive efforts, The Beehive House subsequently located the Bank Records and produced them to the plaintiff.

income while insisting to the court he lacked funds to pay additional child support); see also Moore's Federal Practice 3D, § 37.50[2][b] (1998) ("[D]efault sanctions are likely to be reversed if the failure that occasioned the sanction was inadvertent, isolated, no worse than careless, or not a cause of serious inconvenience or prejudice.").

The D.C. Circuit Court of Appeals explained, in a similar context, that as long as a party conducts a "diligent search" for the requested documents and produces the best evidence it can find, its inability to produce the "missing" documents is not sanctionable. See Shepherd v. American Broadcasting Companies, Inc., 62 F.3d 1469, 1481 (D.C. Cir. 1995). In the present case, the bank records had been moved twice; their precise whereabouts were uncertain prior to the time Mr. Godfrey and others began searching for them. Ms. Schaugaard, however, was confident that the documents could be readily located. Employees of The Beehive House unsuccessfully searched for the documents at various times during June 1997. When Ms. Schaugaard returned from vacation on July 10, all involved, including Mr. Godfrey, intensified the search for the bank records but were still unsuccessful. In light of these good-faith efforts to comply with plaintiff's requests, it was inappropriate to impose on Mr. Godfrey the extreme sanction of default judgment.

III. SEVERAL SERIOUS PROCEDURAL ERRORS DEMONSTRATE THAT DEFAULT JUDGMENT SHOULD NOT HAVE BEEN ENTERED AGAINST MR. GODFREY.

The ultimate discovery sanction of default judgment should not be imposed unless the discovery requests were procedurally correct and, significantly, a prior order compelling discovery has been entered and subsequently breached. See Rule 37(b), Utah R. Civ. P. These prerequisites were lacking in this case, and it was an abuse of discretion for the trial court to impose default judgment against Mr. Godfrey in their absence.

First and foremost, the trial court's entry of default judgment against Mr. Godfrey as a discovery sanction was premised on the erroneous assumption that a prior order was in place compelling Mr. Godfrey to produce the Bank Records. The trial court incorrectly concluded that in conjunction with its Order on plaintiff's first Motion for Sanctions, it had issued a deadline for discovery responses with which Mr. Godfrey had not complied. At the hearing on plaintiff's second Motion for Sanctions, the trial court stated, "I set a deadline for discovery responses in the first order, but I haven't reviewed that particular order, but that's my practice ... Mr. Godfrey has done virtually nothing to attempt to comply with the Court's previous order." (R. at 548, at p. 33.) The trial court did not verify whether it had, in fact, issued such an order. Rather, the trial court, from the bench, proceeded on its incorrect assumption and authorized default judgment against Mr. Godfrey.

A review of the trial court's order on the first Motion for Sanctions, and of the transcript of the hearing on that motion, reveals that the trial court imposed no such deadline or order. (R. at 217-220; R. at 546, pp. 1-10.) To the contrary, the trial court ordered Mr. Godfrey to pay plaintiff's attorney fees and costs in bringing the motion, which he paid, and simply stated that the court would "permit the deposition to be rescheduled." (R. at 546, p. 7.) The most that can be said is that the trial court, by implication, ordered Mr. Godfrey to appear at the rescheduled deposition. Thus, contrary to the trial court's assumption, there was no court order in place compelling Mr. Godfrey to produce documents.

That no such order was in place is significant: Rule 37(b) sanctions may not be imposed unless, pursuant a preliminary discovery violation, a court order or direction is in place compelling such discovery and such order or direction is not followed.

Two things are required as conditions precedent before the gears of the sanction machinery of Rule 37(b) may be engaged: (1) a court order or direction must be in effect, and (2) that order or direction must be violated. The absence of a prior order or direction compelling discovery precludes Rule 37(b) sanctions.

Moore's Federal Practice 3D, § 37.42[1] (1998). See also Attorney General v. The Irish People, Inc., 684 F.2d 928, 951 n. 129 (D.C. Cir. 1982), cert denied, 459 U.S. 1172 (1983) (holding that "[a] production order is generally needed to trigger Rule 37(b)."); Jamie S. Gorelick, Stephen Marzen & Lawrence Solum, Destruction of Evidence §3.4

(1989 & Supp. 1995) (“[f]ederal court decisions ... unanimously agree that sanctions pursuant to Rule 37 may not be awarded absent violation of a court order.”).

The trial court’s decision to enter default judgment against Mr. Godfrey was based on the erroneous conclusion that he had violated a prior discovery order. That alone provides an adequate basis for reversing the default judgment entered against Mr. Godfrey.

In addition, the trial court relied heavily on Mr. Godfrey’s alleged noncompliance with the original Notice of Deposition in August of 1996. The facts indicate, however, that plaintiff’s counsel himself canceled that deposition date beforehand. In fact, counsel for both parties were in the process of resolving the discovery issues, and had agreed to depose Mr. Godfrey on September 20, 1996, when plaintiff unexpectedly filed her first Motion for Sanctions.

The trial court’s ruling also incorrectly assumes that the deposition scheduled for August 19, 1996 was properly noticed and that Mr. Godfrey failed to comply with a proper discovery request at that time. The notice served upon Mr. Godfrey’s attorney was styled “Notice of Deposition,” and was dated August 7, 1996. In the notice, plaintiff requested Mr. Godfrey to produce certain documents at the deposition, which plaintiff scheduled for less than two weeks later, on August 19, 1996. The request was apparently pursuant to Rule 30(b)(5), Utah Rules of Civil Procedure, which expressly requires compliance with the procedures outlined in Rule 34 (governing requests for production of

documents), namely, that the party upon whom the request is served must be given thirty (30) days to file a written response. Plaintiff's "Notice of Deposition" was thus deficient on its face; it did not allow the requisite thirty days to respond. As a result, Mr. Godfrey had no obligation to appear or produce any documents on August 19, 1996, and he had no obligation thereafter to produce any documents, as the trial court incorrectly assumed.

In short, the trial court's decision to enter default judgment against Mr. Godfrey was premised on erroneous conclusions of law, misconceived evidence, and incorrect recollection of the record of the case. It was therefore an abuse of discretion to enter default judgment as a discovery sanction.

CONCLUSION

Based on the foregoing, Appellant S. Chad Godfrey respectfully requests that this Court reverse and vacate the trial court's November 18, 1997 Default Order (Order on Plaintiff's Motion for Sanctions for Failure to Make Discovery), as to him, and vacate the entry of default judgment against him.

DATED this 20 day of October, 1998.

SNOW, CHRISTENSEN & MARTINEAU

By


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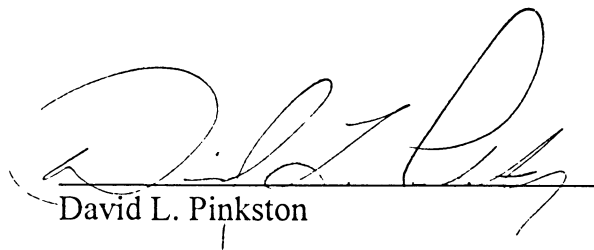


CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing Brief of Appellant to be served by first class mail, postage prepaid, on October 20, 1998, to the following:

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Addendum B

- ▶ First Notice of Deposition dated August 7, 1996
- ▶ Order on Plaintiff's Motion for Sanctions for Failure to Attend Deposition and Defendant's Motion for Protective Order, dated April 21, 1997
- ▶ Plaintiff's Second Notice of Deposition, dated June 4, 1997
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- ▶ Reporter's Transcript of Proceeding, hearing dated September 4, 1997 on Plaintiff's Second Motion for Sanctions for Failure to Make Discovery

ADDENDUM A

rogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) *Use of deposition.* If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in any court of this state, in accordance with the provisions of Rule 26(d) [Rule 32(a)].

(b) *Pending appeal.* If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in such court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

(c) *Perpetuation by action.* This rule does not limit the power of a court to entertain an action to perpetuate testimony.

Rule 28. Persons before whom depositions may be taken.

(a) *Within the United States.* Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. The term "officer" as used in Rules 30, 31, and 32 includes a person appointed by the court or designated by the parties under Rule 29.

(b) *In foreign countries.* In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name of country]." Evidence obtained in response to a letter rogatory need not be

excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(c) *Disqualification for interest.* No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

Rule 29. Stipulations regarding discovery procedure.

Unless the court orders otherwise, the parties may by written stipulation

(1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and

(2) modify the procedures provided by these rules for other methods of discovery.

Rule 30. Depositions upon oral examination.

(a) *When depositions may be taken.* After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in Subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) *Notice of examination; general requirements; special notice; non-stenographic recording; production of documents and things; deposition of organization; deposition by telephone.*

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when he was served with notice under this Subdivision (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken and the manner of recording, preserving, and filing the deposition and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at his own expense. Any objections under Subdivision (c), any changes made by the witness, his signature identifying the deposition as his own or the statement of the officer that is required if the witness does not sign, as provided in Subdivision (e), and the certification of the officer required by Subdivision (f) shall be set forth in a writing to accompany a deposition recorded by nonstenographic means.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This Subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For the purposes of this rule and Rules 28(a), 37(b)(1), and 45(d), a deposition taken by telephone is taken at the place where the deponent is to answer questions propounded to him.

(c) *Examination and cross-examination; record of examination; oath; objections.* Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Utah Rules of Evidence. The officer before whom the deposition is to be taken shall put the witnesses on oath and shall personally or by someone acting under his direction and in his presence record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with Subdivision (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, or to the conduct of any party and any other objection to the proceedings shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition, and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) *Motion to terminate or limit examination.* At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the

order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) *Submission to witness; changes; signing.* When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefore; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(c)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) *Record of deposition; certification and delivery by officer; exhibits; copies.*

(1) The transcript or other recording of the deposition made in accordance with this rule shall be the record of the deposition. The officer shall sign a certificate, to accompany the record of the deposition, that it was duly sworn and that it is a true record of the testimony given by the witness. Unless otherwise ordered by the court, the officer shall securely seal the record of the deposition in an envelope endorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly send the sealed record of the deposition to the attorney who arranged for the transcript or other record to be made. If any party in the action is not represented by an attorney, the record of the deposition shall be sent to the clerk of the court for filing unless otherwise ordered by the court. An attorney receiving the record of the deposition shall store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to the record of the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them that person may (A) offer copies to be marked for identification and annexed to the record of the deposition and to serve thereafter as originals, if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the originals may be used in the same manner as if annexed to the record of the deposition. Any party may move for an order that the originals be annexed to and returned with the record of the deposition to the court, pending final disposition of the case.

(3) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any depositions taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the record of the deposition to any party or to the deponent.

(g) *Failure to attend or to serve subpoena; expenses.*

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party

(4) *As to completion and return of deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

(d) *Publication of deposition.* Use of a deposition under Subsection (a) of this rule shall have the effect of publishing the deposition unless the court orders otherwise in response to objections.

Rule 33. Interrogatories to parties.

(a) *Availability; procedures for use.* Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers and objections, if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) *Scope; use at trial.* Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the Rules of Evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(c) *Option to produce business records.* Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, including a compilation, abstract, or summary thereof and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

(a) *Scope.* Any party may serve on any other party a request

(1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or

(2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) *Procedure.* The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) *Persons not parties.* This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

Rule 35. Physical and mental examination of persons.

(a) *Order for examination.* When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party is in controversy, the court in which the action is pending may order the party or person to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) *Report of examining physician.*

(1) If requested by a party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the person examined and/or the other party a copy of a detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any exami-

nation, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the report cannot be obtained. The court on motion may order delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of any other examiner or the taking of a deposition of an examiner in accordance with the provisions of any other rule.

(c) *Right of party examined to other medical reports.* At the time of making an order to submit to an examination under Subdivision (a) of this rule, the court shall, upon motion of the party to be examined, order the party seeking such examination to furnish to the party to be examined a report of any examination previously made or medical treatment previously given by any examiner employed directly or indirectly by the party seeking the order for a physical or mental examination, or at whose instance or request such medical examination or treatment has previously been conducted. If the party seeking the examination refuses to deliver such report, the court on motion and notice may make an order requiring delivery on such terms as are just; and if an examiner fails or refuses to make such a report the court may exclude the examiner's testimony if offered at the trial, or may make such other order as is authorized under Rule 37.

Rule 36. Request for admission.

(a) *Request for admission.* A party may serve upon any other party a written request for the admission, for purpose of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. The request for admission shall contain a notice advising the party to whom the request is made that, pursuant to Rule 36, the matters shall be deemed admitted unless said request is responded to within 30 days after service of the request or within such shorter or longer time as the court may allow. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit

or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) *Effect of admission.* Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subverted thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

Rule 37. Failure to make or cooperate in discovery; sanctions.

(a) *Motion for order compelling discovery.* A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or incomplete answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of expenses of motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) *Failure to comply with order.*

(1) *Sanctions by court in district where deposition is taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by court in which action is pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) an order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in Paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) *Expenses on failure to admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document

or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) *Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under Paragraphs (A), (B), and (C) of Subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) *Failure to participate in the framing of a discovery plan.* If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

PART VI. TRIALS

Rule 38. Jury trial of right.

(a) *Right preserved.* The right of trial by jury as declared by the constitution or as given by statute shall be preserved to the parties.

(b) *Demand.* Any party may demand a trial by jury of any issue triable of right by a jury by paying the statutory jury fee and serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

(c) *Same: specification of issues.* In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party, within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) *Waiver.* The failure of a party to pay the statutory fee, to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

ADDENDUM B

FILED

2017-07-17 PM 1:00

CLERK
S. L. KOCH

Ronny L. Cutshall (USB #0793)
Vincent C. Rampton (USB #2684)
JONES, WALDO, HOLBROOK & McDONOUGH
Post Office Box 45444
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

MARY M. TUCK,	:	
	:	
Plaintiff,	:	NOTICE OF DEPOSITION
	:	
vs.	:	
	:	
THE BEEHIVE HOUSE, a Utah Limited	:	Case No. 950908242CN
Partnership, and S. CHAD GODFREY, an	:	
individual,	:	Judge Anne M. Stirba
	:	
Defendants.	:	

**TO THE DEFENDANTS, S. CHAD GODFREY AND THE BEEHIVE HOUSE, AND
THEIR COUNSEL:**

Notice is hereby given that the deposition of S. Chad Godfrey in the above-entitled action will be taken before a certified shorthand reporter at the offices of Jones, Waldo, Holbrook & McDonough, 1500 First Interstate Plaza, 170 South Main, Salt Lake City, Utah, on Monday, August 19, 1996 commencing at 10:00 a.m.

Pursuant to Rule 30(b)(5) and 34, Utah Rules of Civil Procedure, defendant Godfrey is requested to bring with him the following documents to his deposition:

1. All bank statements or other records of deposit indicating what disposition The Beehive House or S. Chad Godfrey made of funds paid by plaintiff Mary M. Tuck through tender of the checks attached to the complaint herein as exhibits 1-8 and 10-11.
2. Any and all cancelled checks, check registers, ledgers, accounting records, or other documents of any nature or description reflecting the disposition which S. Chad Godfrey or The Beehive House made of any of the funds transferred by means of the checks attached to plaintiff's complaint herein as exhibits 1-8 and 10-11.
3. Any and all contracts, letters of intent, memoranda of understanding or other written agreements (or written memoranda of verbal agreements) between plaintiff and The Beehive House and/or S. Chad Godfrey.
4. Any copies of the Policies and Procedures of The Beehive House bearing plaintiff's signature.

5. Copies of any and all notices to pay or quit, notices of delinquency, or other written communication whether between S. Chad Godfrey and/or The Beehive House, and plaintiff, in connection with plaintiff's alleged failure to pay rent as set out at paragraph 6 of your counterclaim herein.

6. Copies of any billings, accountings, or itemizations, or other documents of whatever nature setting out the services and tasks performed on plaintiff's behalf by S. Chad Godfrey and/or The Beehive House, as set out at paragraph 9 of the counterclaim.

DATED this 7th day of August, 1996.

JONES, WALDO, HOLBROOK &
McDONOUGH

By

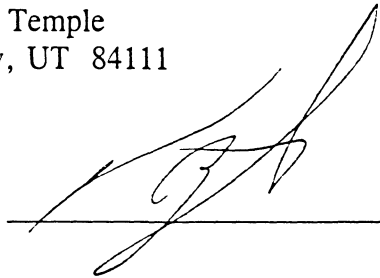
Vincent C. Rampton

Date the 7th
unless you want
this hand-delivered
today!

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of August, 1996, I caused to be hand delivered a true and correct copy of the foregoing NOTICE OF DEPOSITION, to the following:

Brad W. Merrill
PARRY, MURRAY & WARD
1270 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111



Ronny L. Cutshall (USB #0793)
Vincent C. Rampton (USB #2684)
JONES, WALDO, HOLBROOK & McDONOUGH
Post Office Box 45444
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200

APR 21 1997
SALT LAKE COUNTY

JUDGEMENT

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

MARY M. TUCK,

Plaintiff,

vs.

THE BEEHIVE HOUSE, a Utah Limited
Partnership, and S. CHAD GODFREY, an
individual,

Defendants.

: 2214802
: 4-23-97- 8:01 am
: ORDER ON PLAINTIFF'S MOTION
: FOR SANCTIONS FOR FAILURE TO
: ATTEND DEPOSITION AND
: DEFENDANTS' MOTION FOR
: PROTECTIVE ORDER
:
: Case No. 950908242CN
:
: Judge Anne M. Stirba

Plaintiff's Motion for Sanctions for Failure to Attend Deposition, and
defendants' Motion for Protective Order, in the above-entitled matter came on for hearing
before the Court on Friday, March 28, 1997, at 8:30 a.m. Plaintiff was represented by his
counsel of record, Vincent C. Rampton of Jones, Waldo, Holbrook & McDonough.

Defendant S. Chad Godfrey was represented by his counsel of record, Kim R. Wilson of
Snow, Christensen & Martineau. Defendant Beehive House was represented by its counsel
of record, David M. McGrath of Parry, Murray & Ward.

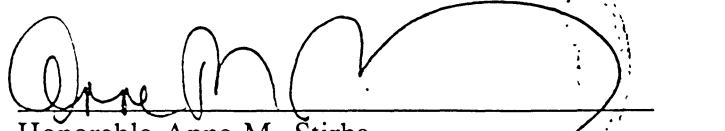
The Court having reviewed the moving papers and submittals of the parties, having heard oral argument of counsel, and being fully advised in the premises, and good cause appearing therefor,

IT IS HEREBY ORDERED AS FOLLOWS:

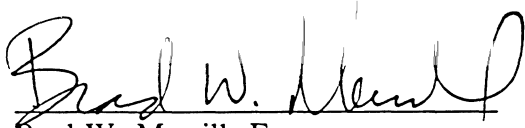
1. Plaintiff's Motion for Sanctions is granted to the extent hereinafter stated as to defendant S. Chad Godfrey only.
2. Defendants' Motion for Protective Order is denied.
3. Defendant S. Chad Godfrey is ordered to pay to plaintiff's counsel the sum of \$ 4195.00 *AMK*, representing plaintiff's costs and attorneys' fees incurred in the filing and arguing of its Motion for Sanctions, and in defending against Defendants' Motion for Protective Order. Said sum shall be paid on or before May 1, 1997.
4. In the event that sanctions are paid, in the amount and by the time specified above, the parties shall thereafter schedule the deposition of S. Chad Godfrey at a time and place agreeable to counsel.

DATED this 21st day of April, 1997.

BY THE COURT:


Honorable Anne M. Stirba
Third District Court Judge

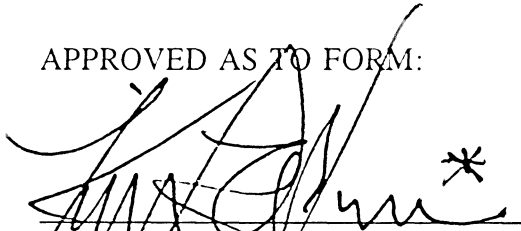
APPROVED AS TO FORM:



Brad W. Merrill, Esq.

Attorney for The Beehive House

APPROVED AS TO FORM:



Kim R. Wilson, Esq.

Attorney for S. Chad Godfrey

**subject to final
determination of arbitrator
in paragraph 3.*

CERTIFICATE OF SERVICE

I hereby certify that on the 11 day of April, 1997, I caused to be transmitted via telefax, and mailed via first-class mail, postage prepaid, a true and correct copy of the foregoing form of ORDER ON PLAINTIFF'S MOTION FOR SANCTIONS FOR FAILURE TO ATTEND DEPOSITION AND DEFENDANTS' MOTION FOR PROTECTIVE ORDER to the following:

Brad W. Merrill, Esq.
PARRY, MURRAY & WARD
1270 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

Kim R. Wilson
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place #1100
Salt Lake City, Utah 84111



FILED
COURT
JUL 1 1994
M. M. Tuck

Ronny L. Cutshall (USB #0793)
Vincent C. Rampton (USB #2684)
JONES, WALDO, HOLBROOK & McDONOUGH
Post Office Box 45444
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

MARY M. TUCK,	:	
	:	
Plaintiff,	:	NOTICE OF DEPOSITION
	:	
vs.	:	
	:	
THE BEEHIVE HOUSE, a Utah Limited	:	Case No. 950908242CN
Partnership, and S. CHAD GODFREY, an	:	
individual,	:	Judge Anne M. Stirba
	:	
Defendants.	:	

TO THE DEFENDANTS, S. CHAD GODFREY AND THE BEEHIVE HOUSE, AND
THEIR COUNSEL:

Notice is hereby given that the depositions of Ralph Godfrey and S. Chad Godfrey in the above-entitled action will be taken before a certified shorthand reporter at the offices of Jones, Waldo, Holbrook & McDonough, 1500 First Interstate Plaza, 170 South Main, Salt Lake City, Utah, on the dates and at the times indicated below:

1. Ralph Godfrey - Thursday, July 10, 1997 at 10:00 a.m.
2. S. Chad Godfrey - Friday, July 11, 1997 at 10:00 a.m.

Pursuant to Rule 30(b)(5) and 34, Utah Rules of Civil Procedure, deponents are requested to bring with them the following documents to their depositions, to the extent such documents are in their possession or under their control or otherwise accessible to them:

1. All bank statements or other records of deposit indicating what disposition The Beehive House or S. Chad Godfrey made of funds paid by plaintiff Mary M. Tuck through tender of the checks attached to the complaint herein as exhibits 1-8 and 10-11.
2. Any and all cancelled checks, check registers, ledgers, accounting records, or other documents of any nature or description reflecting the disposition which S. Chad Godfrey or The Beehive House made of any of the funds transferred by means of the checks attached to plaintiff's complaint herein as exhibits 1-8 and 10-11.

3. Any and all contracts, letters of intent, memoranda of understanding or other written agreements (or written memoranda of verbal agreements) between plaintiff and The Beehive House and/or S. Chad Godfrey.

4. Any copies of the Policies and Procedures of The Beehive House bearing plaintiff's signature.

5. Copies of any and all notices to pay or quit, notices of delinquency, or other written communication whether between S. Chad Godfrey and/or The Beehive House, and plaintiff, in connection with plaintiff's alleged failure to pay rent as set out at paragraph 6 of your counterclaim herein.

6. Copies of any billings, accountings, or itemizations, or other documents of whatever nature setting out the services and tasks performed on plaintiff's behalf by S. Chad Godfrey and/or The Beehive House, as set out at paragraph 9 of the counterclaim.

DATED this 3rd day of June, 1997.

JONES, WALDO, HOLBROOK &
McDONOUGH

By 

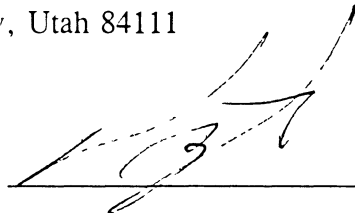
Vincent C. Rampton

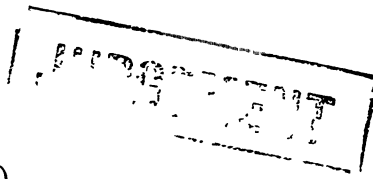
CERTIFICATE OF SERVICE

I hereby certify that on the 35 day of June, 1997, I caused to be hand delivered a true and correct copy of the foregoing NOTICE OF DEPOSITION, to the following:

Brad W. Merrill
PARRY, MURRAY & WARD
1270 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111

Kim R. Wilson
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place #1100
Salt Lake City, Utah 84111





FILED DISTRICT COURT
Third Judicial District

Ronny L. Cutshall (USB #0793)
Vincent C. Rampton (USB #2684)
JONES, WALDO, HOLBROOK & McDONOUGH
Post Office Box 45444
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200
Attorneys for Plaintiff

NOV 18 1997

SALT LAKE COUNTY
[Signature]

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

MARY M TUCK,

Plaintiff,

vs.

THE BEEHIVE HOUSE, a Utah Limited
Partnership, and S. CHAD GODFREY, an
individual,

Defendants.

: 2219087
: 11-20-97-8:05 am
: ORDER ON PLAINTIFF'S MOTION
: FOR SANCTIONS FOR FAILURE TO
: MAKE DISCOVERY
:
:
:
: Case No. 950908242CN
: Judge Anne M. Stirba
:
:

Plaintiff's Motion for Sanctions for Failure to Make Discovery in the above-entitled matter came on for hearing before the Court on Thursday, September 4, 1997 at 9:00 a.m. Plaintiff was represented by his counsel of record, Vincent C. Rampton of Jones, Waldo, Holbrook & McDonough. Defendant S. Chad Godfrey was represented by his counsel of record, David L. Pinkston of Snow, Christensen & Martineau. Defendant Beehive House was represented by its counsel of record, Brad W. Merrill of LeBoeuf, Lamb, Green & MacRae.

The Court reviewed the moving papers and submittals of the parties, heard oral argument of counsel, and stated a bench ruling granting plaintiff's motion as set out herein.

Plaintiff's counsel submitted a form of order accompanied by an affidavit of attorney's fees, to which defendant Beehive House registered an objection, resulting in a hearing held on November 14, 1997. The court having heard argument on the objection filed by defendant Beehive House, having reviewed the affidavit of plaintiff's counsel, being fully advised in the premises, finding hereby that final judgment as set out herein may and should be entered, there being no just cause for delay, and good cause appearing,

IT IS HEREBY ORDERED AS FOLLOWS:

1. Plaintiff's Motion for Sanctions is granted as to defendant S. Chad Godfrey.
2. The pleadings of S. Chad Godfrey herein are stricken, and judgment by default is hereby entered in favor of plaintiff Estate of Mary Tuck, and against defendant S. Chad Godfrey, as prayed in plaintiff's complaint, as follows:

- a. \$381,700.00, representing the principal amount of plaintiff's claim herein;
- b. \$109,322.30, representing prejudgment interest on plaintiffs' principal claim at the legal rate of ten percent (10%) per annum accrued through September 15, 1997;
- c. \$170.00, representing plaintiff's costs herein; and
- d. Interest on the foregoing at the postjudgment rate from September 15, 1997 until paid in full.

The foregoing order shall constitute entry of a final judgment under Rule 54, Utah Rules of Civil Procedure, there being no just cause for delay.

3. Plaintiff's Motion for Sanctions against defendant Beehive House is granted in part and taken under advisement in part, as follows:

a. Defendant Beehive House shall pay to plaintiff, on or before the fifth (5th) day following entry of this Order, the sum of \$1,600.00, representing plaintiff's reasonable attorneys fees incurred in pursuing this Motion for Sanctions;

b. On or before September 15, 1997, defendant Beehive House shall produce the following documents to plaintiff's counsel:

(1) All bank statements or other records of deposit indicating what disposition The Beehive House or S. Chad Godfrey made of funds paid by plaintiff Mary M. Tuck through tender of the checks attached to the complaint herein as exhibits 1-8 and 10-11; and

(2) Any and all cancelled checks, check registers, ledgers, accounting records, or other documents of any nature or description reflecting the disposition which S. Chad Godfrey or The Beehive House made of any of the funds transferred by means of the checks attached to plaintiff's complaint herein as exhibits 1-8 and 10-11.


In the event the Beehive House is unable to locate and produce said documents, defendant the Beehive House shall, on or before September 15, 1997, produce reasonable evidence that it can obtain copies of said documents from its bank or other sources.

4. In the event defendant Beehive House does not make payment as prescribed herein, and/or fails to produce documents as set out above, the Court will entertain a renewal

of plaintiff's motion to strike the pleadings of defendant Beehive House and enter judgment against it as prayed in plaintiff's complaint herein.

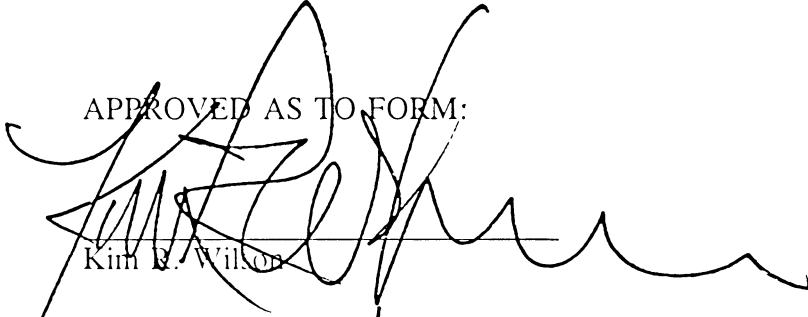
DATED this 18th day of November, 1997.

BY THE COURT:

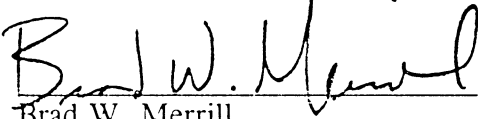


Honorable Anne M. Stirba
Third District Court Judge

APPROVED AS TO FORM:



Kim R. Wilson



Brad W. Merrill

ADDENDUM C

THIRD JUDICIAL DISTRICT COURT
THIRD JUDICIAL DISTRICT

MAY 1, 1998

SALT LAKE COUNTY

IN THE THIRD JUDICIAL DISTRICT COURT 5.17.16

OF SALT LAKE COUNTY, STATE OF UTAH

* * *

MARY M. TUCK,

Plaintiff,

-v-

Case No. 950908242CN

THE BEEHIVE HOUSE, a

Utah Limited

Partnership, and S.

CHAD GODFREY, an

individual,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDING

BEFORE THE HONORABLE ANNE M. STIRBA

SALT LAKE CITY, UTAH

SEPTEMBER 4, 1997

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A P P E A R A N C E S

For the Plaintiff:

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For the Beehive House:

Brad W. Merrill
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For S. Chad Godfrey:

David L. Pinkston
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Salt Lake City, Utah 84145

1 P R O C E E D I N G S

2
3 THE COURT: This is the matter of Tuck
4 versus Beehive House, Case No. 950908242. This is
5 the time set for argument on the motion for
6 sanctions.

7 Counsel, would you state your state
8 your appearances.

9 MR. RAMPTON: Vincent Rampton of Jones,
10 Waldo for the estate of Mary Tuck.

11 MR. MERRILL: Brad Merrill of LeBoeuf,
12 Lamb, Greene & Macrae for the Beehive House. And
13 we'd make the Court aware that that firm is a
14 change as of this week, prior to that, the firm was
15 Perry, Lawrence and Moore.

16 THE COURT: Thank you.

17 MR. PINKSTON: David Pinkston
18 representing Chad Godfrey.

19 THE COURT: Thank you very much,
20 Counsel. I have read all of the pleadings. I am
21 familiar with the case because this is not the
22 first time they sent a motion for sanctions. And I
23 feel well informed of the background and factual
24 background involved here. And I will tell you that
25 I think that there is no question that there -- in

1 my mind, at this point, that sanctions are
2 appropriate. The question is, what sanctions?

3 And before I'd ordered attorney's fees
4 and costs to be paid, and that approximately is
5 \$1,000, and so the question in my mind is: What is
6 the appropriate sanction here? Because clearly,
7 based on the facts that have been presented in
8 motion there has been failure to -- well, to
9 provide a discovery and it seems to -- I'm not
10 aware of any basis in which the defendant is -- or
11 rather -- strike -- well, yes, that the defendant
12 is responsible for having failed to produce
13 discovery -- strike that. Mr. Rampton's client,
14 excuse me.

15 MR. RAMPTON: The plaintiff.

16 THE COURT: Yes, the plaintiff. I got
17 the parties just backwards. But in any event, so
18 I'd like to get focused on that. Having said that,
19 if you think that there is something that is not in
20 the pleadings that you need to bring to my
21 attention regarding the merits of the motion
22 itself, then you can feel free to do so, or if you
23 think that something has been overlooked as you've
24 heard my comments here this morning. But with that
25 understanding, you may proceed. Mr. Rampton.

1 MR. RAMPTON: Your Honor, as a
2 preliminary matter, we received on the evening of
3 August 29th an affidavit of S. Chad Godfrey. This
4 Court has ordered that all submittals in this
5 matter be in place by July 29th. We believe it's
6 untimely and ask that it be stricken.

7 THE COURT: Which matter was received
8 at --

9 MR. RAMPTON: The affidavit of S. Chad
10 Godfrey dated August 29th.

11 THE COURT: All right.

12 MR. PINKSTON: In response to that
13 motion, Your Honor, we attached an unsigned copy of
14 the affidavit to our memorandum in opposition to
15 the motion, which was indeed timely filed, as we
16 explained to the Court in our telephone conference
17 on the motion for enlargement of time. Mr. Godfrey
18 was in Europe at the time. We faxed the affidavit
19 to him in two different cities in Europe, one in
20 France and one in Italy. Mr. Godfrey was unable to
21 find anyone in Italy who was willing to notarize
22 the affidavit.

23 Apparently it's kind of a lengthy
24 bureaucratic process to get something notarized in
25 that country and he simply wasn't able to get it

1 notarized and returned to us.

2 Upon his return to the country, we had
3 it signed and notarized and filed and delivered to
4 counsel. We realize that you or the Court was --
5 that the motion being opposed -- that the deadline
6 for opposing the motion was the 29th of -- excuse
7 me, either the 27th or 29th of July. Our motion
8 was -- our memorandum was filed timely. But
9 because of the difficulties of getting something
10 notarized in Europe and sent back in a timely
11 fashion, the actual signed copy of the affidavit
12 was not submitted until late August.

13 THE COURT: All right. What prejudice,
14 again, are you claiming, Mr. Rampton?

15 MR. RAMPTON: (Inaudible) the Court's
16 order, Your Honor.

17 THE COURT: I see.

18 MR. RAMPTON: I can confirm that
19 getting an affidavit notarized in Italy is quite an
20 ordeal.

21 THE COURT: I wouldn't know but I'll
22 certainly take your representation. I think under
23 the circumstances, I'll not grant the motion to
24 strike. Where there's no prejudice, I don't want
25 to -- for this to be unduly technical. If

1 memoranda were to be submitted, that conflicts, of
2 course, any affidavit that was before. Given the
3 practical problems here, I will consider the
4 affidavit. (Inaudible) to the plaintiff.

5 MR. RAMPTON: Thanks, Your Honor.

6 Based on the Court's opening observations in this
7 matter, I'm going to address myself in the time we
8 have directly to the nature of sanctions which are
9 appropriate in this matter.

10 First of all, a couple of facts that
11 have transpired since our pleading for files in
12 this matter. We've received the affidavit of
13 Deanne Shogard, I hope I'm saying that right.

14 MR. MERRILL: Skougard.

15 MR. RAMPTON: Skougard, thank you, who
16 is apparently a bookkeeper and records keeper at
17 the Beehive House, establishing some facts which I
18 think are pertinent in the circumstances.

19 The Court is reminded that we asked for
20 the bank records which are now the subject of this
21 motion, first in August of 1996. We've been trying
22 to get them for over a year.

23 At that time, according to Mrs.
24 Skougard's affidavit, those records were being
25 regularly kept, regularly compiled and regularly

1 placed in a labeled box of which she had personal
2 custody and knew exactly where it was. When Mr.
3 Chad Godfrey failed to appear for his deposition
4 the first time, those had already been made the
5 subject of our request for production and Beehive
6 House was well aware that we expected them to be
7 produced.

8 Now we find in her affidavit that
9 sometime in the spring of this year, that box has
10 mysteriously disappeared. That disappearance
11 coincides, incidentally, with the reappearance of
12 Mr. S. Chad Godfrey as the managing agent of the
13 Beehive House following release from a federal
14 prison facility, which is apparently where he was
15 the last time he didn't show up for his deposition.

16 I have no proof of the boxes, that the
17 disappearance of this box was intentional,
18 deliberate or an act of S. Chad Godfrey at all. It
19 simply is very convenient that a box which has been
20 the subject of written discovery requests for over
21 a year and was identifiable and known as to its
22 location and contents at the time the request was
23 first made has now suddenly vanished now that Mr.
24 Godfrey is back.

25 All I can say is that's a convenient

1 situation but I don't know the actual
2 circumstances. However, the actual circumstances
3 don't change the plight that I'm now in. This case
4 has from the beginning been about what happened to
5 this money. We know they got it, we know they got
6 the checks that were labeled loans or investments,
7 we know that they didn't pay it back. What
8 happened to the money?

9 I've met the burden of proof on that.
10 I have to establish in front of this Court at trial
11 that the money was taken, diverted to an authorized
12 purpose and not returned. I've got to know where
13 the money was spent. It's as simple as that. And
14 now they're saying, well, gosh, we lost the box so
15 I guess you lose your case. That's unfortunate,
16 isn't it? That box has been the subject of
17 discovery for over a year now and I don't want to
18 place to the blame on any particular person because
19 I really don't -- by the nature of the situation, I
20 have no facts to do that. But the fact remains
21 that I'm now without the documents that I need.

22 Now, proposing --

23 THE COURT: Are those documents as part
24 of your position?

25 MR. RAMPTON: Pardon?

1 THE COURT: Do you have your documents
2 as part of your position?

3 MR. RAMPTON: Concerning -- well, no,
4 that's not exactly true. Concerning the
5 disposition of funds, I have no documents to
6 establish that. I have no bank records, with the
7 exception of certain records which were delivered
8 to my office at 4:30 yesterday afternoon. Opposing
9 counsel seeing the situation, sent out a subpoena
10 duces tecum through the bank itself to obtain
11 records. I received yesterday copies of bank
12 statements.

13 In my brief review of those bank
14 statements last night, I've established that these
15 checks in fact did go into that account. I see no
16 evidence on the face of the bank statements
17 themselves that the money ever left in lump sums
18 but the bank statements don't tell me where the
19 money went because there are no checks. I don't
20 know what they did with it.

21 I'm in the same position I was when we
22 filed this action. Depending on what happened to
23 that money, I may have causes of action I haven't
24 even pled in this case yet. We're still at the
25 filling out the pleadings stage. And now they're

1 telling me they've lost the records and so we'll
2 never know exactly what happened. And yet, the
3 Beehive House has taken the position that they have
4 no responsibility because Chad Godfrey put the
5 money in, he must have done something with it so
6 don't look to us.

7 If we don't have adequate records,
8 which we have been asking for from the beginning of
9 the case, we are severely prejudiced in this
10 matter. We are unable to put on our case and we're
11 simply bound by their unsubstantiated (Inaudible)
12 statements, we don't what it was, we don't know
13 where it went, we don't know anything about it so
14 go away.

15 We would request under these
16 circumstances that the only viable remedy is to
17 start pleadings and enter (Inaudible).

18 THE COURT: Thank you. Mr. Merrill,
19 (Inaudible)?

20 MR. MERRILL: Your Honor, let me take
21 issue with a couple of points made by Mr. Rampton
22 and I too will direct my comments based upon
23 (Inaudible) indications prior to argument that the
24 Court's inclined to make sanctions.

25 If that's the Court's inclination, it's

1 our position that at a minimum default is not an
2 appropriate sanction for this particular discovery
3 problem. And that at most, the (Inaudible)
4 financial sanctions entered.

5 The first item that I dispute from Mr.
6 Rampton is that there have been no disputes since
7 the beginning of this litigation that the money
8 that was paid to Chad Godfrey went into these
9 certain accounts. We've had documentation of that
10 from the time the complaint was filed. The checks
11 clearly indicate what account the money was
12 deposited into.

13 There seems to be clear facts that have
14 come forth through the limited discovery that's
15 taken place that that money was lent to Chad
16 Godfrey and Chad Godfrey only. Mary Tuck, in her
17 own deposition, indicated that she only expected
18 Chad -- that the money was loaned to Chad and that
19 she expected Chad to pay it back.

20 There's also been affidavit testimony
21 in the case that she's -- that Mary Tuck indicated
22 to other people that she did not believe she lent
23 any of that money to the Beehive House itself. And
24 so at the beginning of this case, much of the
25 discovery was focused upon Chad Godfrey. And I

1 understand the Court's concern and Mr. Rampton's
2 concern that this case has been going on a long
3 time, and that's not disputed.

4 One of the things that I would take
5 issue with, however, is that I don't believe that
6 some of the discovery problems are entirely the
7 fault of defendants. In this case, it took quite a
8 while for an initial discovery action or request to
9 even take place. And that when it did take place,
10 in August of last, it was focused toward Chad
11 Godfrey who was at that point not employed by the
12 Beehive House, the other defendant in this case,
13 out of state in a federal prison facility. And at
14 that point, he had elected, understanding
15 consequences, that he did not want to disclose his
16 whereabouts.

17 As counsel for him at that time, I
18 advised him of the difficulties of that decision
19 but that's the decision he made, and I was
20 obligated to go with that. And I understood that
21 the Court was displeased by that and did not
22 appreciate Mr. Godfrey not disclosing his
23 whereabouts. And as a result, a motion for
24 sanctions was filed, an initial motion for
25 sanctions, and sanctions were entered against Mr.

1 Godfrey.

2 I believe that the circumstances
3 surrounding the present motion for sanctions are
4 completely different. Discovery requests were
5 submitted for depositions for Chad Godfrey and for
6 Ralph Godfrey. The first request for a deposition
7 of an employee of the Beehive House was the
8 deposition request for Ralph Godfrey. At that
9 point also Chad Godfrey was now working for the
10 Beehive House again.

11 At that point, the Beehive House made
12 efforts to try to locate the documents that were
13 requested in the subpoena duces tecum. The
14 affidavits are clear, the efforts that were
15 undertaken to do so. And it wasn't a matter of
16 deliberately not appearing at a noticed deposition,
17 deliberately not producing documents. Efforts were
18 made to locate those documents, both parties
19 appeared at their deposition as noticed, prepared
20 to testify. Plaintiff's counsel made the
21 determination that it did not want to proceed
22 with the deposition because the documents weren't
23 there. I'm not going to question his decision on
24 that regard. Documents were produced at that
25 time --

1 THE COURT: But not near -- (Inaudible)
2 that could be considered full and complete.

3 MR. MERRILL: And I certainly
4 acknowledge that, Your Honor. But -- and the Rules
5 of Civil Procedure are clear, that a party under
6 Rule 34 is responsible to produce documents in its
7 possession, custody and control.

8 Now, I don't dispute that those
9 documents at a time were in possession, custody and
10 control of the Beehive House. At the time they
11 tried to locate them, they were not. There's
12 nothing that we can do if we cannot find or locate
13 documents that have been requested. We tried to do
14 everything -- once it became clear that those --
15 that the box of documents that appears to be the
16 critical documents in this case could not be
17 located where they thought they were, we
18 double-checked it, triple-checked it. We served a
19 subpoena upon the bank to produce at least the bank
20 statements because we knew we had those.

21 Mr. Rampton contends that he can't
22 prove his case because there's no documents
23 available, we've taken them, and certainly implied
24 that they've been intentionally taken, which I
25 don't -- obviously, there's no evidence of that.

1 Now, I -- I do not see the merit of
2 that argument for a couple of reasons. First of
3 all, the bank documents can be recovered. We've
4 recovered the bank statements, we can determine
5 which checks that Mr. Rampton would like to produce
6 and either he can pursue a subpoena or we can to
7 recover those checks.

8 Obviously, if Mr. Godfrey or anybody
9 else had desired to intentionally dispose of
10 documents --

11 THE COURT: All right. Do you know
12 for a fact that there is some alternative way of
13 providing this information?

14 MR. MERRILL: I have no reason to
15 believe that a subpoena to the bank would not
16 produce every banking record that we --

17 THE COURT: Well, why haven't you done
18 that?

19 MR. MERRILL: We did do a subpoena to
20 request the bank statements. We did not request
21 cancelled checks because of the voluminous nature
22 of that --

23 THE COURT: All right. Go ahead, I'll
24 wait until you're done.

25 MR. MERRILL: My feeling on that, Your

1 Honor, was that once we got the bank statements, we
2 could determine if there were specific checks that
3 were relevant or at issue, that we could then
4 request those specific checks.

5 THE COURT: (Inaudible) talking about
6 this? This was already, as I recall, the subject
7 of the first Motion to Compel, was it not?

8 MR. MERRILL: Your Honor, in a sense,
9 yes, the first Motion to Compel dealt with Chad
10 Godfrey's failure to attend his deposition. At
11 that point, Mr. Godfrey did not work at the Beehive
12 House and we were focusing on Chad. He did not
13 have access to those documents.

14 THE COURT: All right. So at the time,
15 he had been the employee of the Beehive House;
16 correct?

17 MR. MERRILL: I'm sorry, at the time
18 that he was served with the first notice of
19 deposition?

20 THE COURT: At any time, was he the
21 employee of the Beehive House? Chad Godfrey.

22 MR. MERRILL: During what time period?

23 THE COURT: Any time period.

24 MR. MERRILL: Yes, he has been an
25 employee.

1 THE COURT: Okay. And at what time --
2 and if I understood Mr. Rampton correctly, he was
3 saying that the records were available at the
4 Beehive House according to the Skougard, the
5 bookkeeper at the Beehive House.

6 MR. MERRILL: I believe that's correct,
7 Your Honor.

8 THE COURT: All right. And at the time
9 that the requests were made for the documents, that
10 the documents, whatever documents there were, were
11 at the -- under the control of the Beehive House;
12 isn't that correct?

13 MR. MERRILL: I believe that's correct.

14 THE COURT: All right. And at some
15 point, that box turned up missing.

16 MR. MERRILL: That's also correct.

17 THE COURT: All right. But at least at
18 the time the requests were made, the box containing
19 the documents was located at the Beehive House and
20 within the power of the Beehive House to make
21 available or photocopy --

22 MR. MERRILL: I don't know if
23 that's --

24 THE COURT: -- or in response to a
25 discovery request made in August of last year.

1 MR. MERRILL: I don't know if that's
2 entirely correct for a couple of reasons. The
3 first reason was the discovery request in August
4 was for Chad Godfrey and Chad did not make an
5 effort, at least that I'm aware of, because he did
6 not plan on attending his deposition. He elected
7 to chose to not appear, although --

8 THE COURT: Wasn't he incarcerated --

9 MR. MERRILL: He was incarcerated;
10 right.

11 THE COURT: And when he elected not to
12 appear, it was not made known to the plaintiff --

13 MR. MERRILL: That's correct.

14 THE COURT: -- that he was
15 incarcerated?

16 MR. MERRILL: That's correct, Your
17 Honor.

18 THE COURT: All right. When was the
19 discovery request made on the Beehive House?

20 MR. MERRILL: I believe there was an
21 initial notice of deposition served for Ralph
22 Godfrey in November-December of last year. And
23 through discussions with counsel, it was determined
24 that that would be continued until after the motion
25 for sanctions had been decided, the original

1 motion. And so then a new notice of deposition was
2 issued after the motion for sanctions was entered.

3 THE COURT: But you're telling me that
4 even though the Beehive House had the box of
5 documents in August of 1996 and the lawsuit was
6 pending, and the Beehive House was part of it at
7 that time, that somehow that box of documents was
8 not under the control of the Beehive House?

9 MR. MERRILL: No, Your Honor, that's
10 not what I'm saying. What I'm saying is that up
11 until really after the motion for sanctions was
12 decided, all the discovery was focused on Chad
13 Godfrey. And the position that we were taking and
14 indeed the position I think that's the proper
15 position was that Chad Godfrey at that point was
16 incarcerated, he was out of the state, he was not
17 employed by the Beehive House and was a separate --
18 completely separate defendant than the Beehive
19 House.

20 The discovery was focused towards him.
21 He was unable to comply, elected not to comply, and
22 as a result, although Ms. Skougard believed in her
23 affidavit that was filed for this motion, believed
24 that the documents at that point were available, I
25 don't believe she looked at that point. And so

1 there's no way to know whether they were -- she
2 thought they were. In fact, I think one of the
3 facts that she makes aware in her affidavit is that
4 she believed that the documents are all where she
5 thought they would be and didn't think there'd be a
6 problem to locate them. And she made efforts to do
7 so, asked a bunch of people to look for them and
8 they just couldn't find them.

9 THE COURT: All right. So, at what
10 point did the Beehive House learn that it did not
11 have the box?

12 MR. MERRILL: It would have been
13 mid-June of this year.

14 THE COURT: All right. And the
15 discovery requests were due on July 10th.

16 MR. MERRILL: That's correct.

17 THE COURT: And on July 10 it was
18 discovered that the box was not available, or was
19 it in July?

20 MR. MERRILL: Well, that's an
21 interesting question, Your Honor, and it probably
22 has a number of answers. Based upon the affidavits
23 that have been filed, they first began looking for
24 that box in mid-June. And from what we understand,
25 Ms. Skougard directed some employees to go certain

1 places where she thought the box could be looked
2 for. They reported to her they didn't see it
3 there, they weren't able to find it. She says,
4 Well, it's got to be there.

5 And eventually, in the beginning of
6 July, after she had been gone on vacation and some
7 other personal leave, she went and looked, she
8 couldn't find it. And during that whole period of
9 time she believed that it was easily accessible,
10 just other people were missing it. As the
11 deposition became -- day became closer and got
12 nearer, she went out and looked again, other people
13 went out and looked again and were unable to find
14 it. And so I guess the answer to your question,
15 Your Honor, is they still believed that they could
16 find it up until the day of the deposition, up
17 until the date of the 10th and 11th. They spent
18 hours looking again to see if they could locate
19 that box.

20 THE COURT: All right. When was your
21 answer filed? And is there a counterclaim?

22 MR. MERRILL: There is.

23 THE COURT: All right. When was your
24 answer and counterclaim filed?

25 MR. MERRILL: I believe it was filed in

1 March of '96.

2 THE COURT: I don't see March. I see
3 May 13 of '96 and that answer and counterclaim was
4 filed --

5 MR. MERRILL: That may be correct, Your
6 Honor. I don't have that file with me.

7 THE COURT: When was Mr. Godfrey's
8 answer and counterclaim filed?

9 MR. PINKSTON: At the same time.

10 THE COURT: They were filed together?

11 MR. MERRILL: Yes, Your Honor.

12 THE COURT: I see. So there had to be
13 a good faith basis for asserting the allegations of
14 the answer and counterclaim.

15 MR. MERRILL: That's correct.

16 THE COURT: But nobody thought it was
17 important to look at the documents before filing
18 that?

19 MR. MERRILL: Your Honor, the position
20 that my clients were taking at that point was that
21 the money was loaned to Chad Godfrey, that he could
22 do whatever he wanted with it. If he deposited it
23 in the Beehive House account, it was his money to
24 do that with. But it was loaned to him, the
25 checks were made out to him, the checks indicated

1 that they were loaned to him. And for future
2 discovery, a deposition with Mary Tuck indicated
3 that that's what she thought the -- where the money
4 was going.

5 We did not believe, based upon the
6 allegations put forth in the answer and
7 counterclaims that the money was ever intended to
8 go the Beehive House by Mary Tuck, and she never
9 expected the Beehive House to pay her back. So we
10 don't dispute that the money was deposited there.
11 We believe it was loaned to Chad Godfrey and he
12 could have done what he wanted to with that check.

13 THE COURT: All right. Thank you, Mr.
14 Merrill. Mr. Pinkston?

15 MR. PINKSTON: May I have a moment to
16 confer with Mr. Merrill?

17 THE COURT: A moment.

18 (Discussion off the record.)

19 MR. PINKSTON: Thank you, Your Honor.
20 In listening the Court's questioning of both Mr.
21 Merrill and Mr. Rampton, I sense the Court's
22 concern that the request for documents has been in
23 place since August of '96 and the concern I sense
24 from the Court is that why didn't somebody do
25 something while the documents were still sitting

1 there in the office.

2 THE COURT: A concern, yes.

3 MR. PINKSTON: Yes, it is one of the
4 Court's concerns. And this would be our --

5 THE COURT: Well, and we would also
6 talk about following the order and granting the
7 first Motion to Compel, although I understand it
8 related to the deposition but it also had to do
9 with the -- with the production of documents as
10 well.

11 MR. PINKSTON: Correct. Mr. Godfrey,
12 as has been explained, was incarcerated in August
13 of '96, during the first --

14 THE COURT: That he did not choose to
15 make known to the plaintiff for a substantial
16 period of time.

17 MR. PINKSTON: That's correct. And at
18 that point, we did not represent Mr. Godfrey, as
19 Mr. Merrill has represented to the Court, Mr.
20 Godfrey's rationale for so doing.

21 When Mr. Godfrey returned in November
22 of '96, I suppose we could say, well, why didn't
23 you gather up the documents at that point and
24 return them? The only explanation, Your Honor, is
25 that upon his return to work, I imagine he had

1 other things that he wanted to take care of, make
2 sure that his employment was secure, just get back
3 on his feet and get things going. It may simply be
4 a case of out of sight out of mind, upon his return
5 from prison back to normal life.

6 The second request was issued in June
7 of this year, as is set forth in the affidavit
8 testimony, when the notice of deposition was
9 received, the employees of the Beehive House
10 undertook search to locate the records. According
11 to Ms. Skougard, in May of '97 those records were
12 moved to what was supposed to be -- they were
13 supposed to have been moved to the (Inaudible)
14 facility. She remembers having seen the box, she
15 remembers putting it in the car, remembers seeing
16 it drive away, she does not remember seeing it --

17 THE COURT: What steps did your client
18 take to obtain those records?

19 MR. PINKSTON: He instructed Deanne
20 Skougard to look for the records as soon as he --

21 THE COURT: Well, he was no longer an
22 employee of Beehive, so he made a phone call,
23 called her up and said, would you look for these
24 documents, something to that effect?

25 MR. PINKSTON: That's correct. I'm not

1 sure whether it was a phone call or whether it was
2 a face-to-face discussion, but he asked Deanne
3 Skougard to look for those records.

4 As Ms. Skougard indicates she --

5 THE COURT: And he did that when?

6 MR. PINKSTON: That would have been the
7 middle of June, upon receipt of the notice of
8 deposition. She looked --

9 THE COURT: Okay, when was the order
10 granted, the order issued granting the first Motion
11 to Compel?

12 MR. PINKSTON: I'm not certain, Your
13 Honor.

14 THE COURT: Let's see, when did he get
15 out of prison?

16 MR. PINKSTON: He was released in
17 November of '96.

18 THE COURT: All right. I can see this
19 here. Let's see, March 28, '97, so that's when the
20 oral argument was held, the first Motion to Compel,
21 and the order on that was entered on April 20th.
22 And so he waited until June to begin looking for
23 the documents?

24 MR. PINKSTON: Upon receipt of the
25 notice of deposition. That's our understanding,

1 Your Honor. The records being requested or the
2 records at issue in this motion are the records of
3 Beehive House. At the time of the deposition in
4 July of this year, Mr. Godfrey produced all of the
5 documents in his control, custody or possession
6 responsive to the request that related to him. Mr.
7 Godfrey produced those documents, was available to
8 be sworn in and participated in his deposition.
9 The plaintiff chose not to depose him at that time.

10 THE COURT: Was the plaintiff still
11 waiting for the documents?

12 MR. PINKSTON: I believe plaintiff was
13 still waiting for the documents from the Beehive
14 House but there were no documents --

15 THE COURT: Well, wait. Your client is
16 a party to the litigation. There was a discovery
17 request served on him a long time ago. He chose to
18 make himself -- his whereabouts unknown. Then the
19 Court issued a bench ruling in April, April 28,
20 requiring him to pay attorney's fees and costs,
21 which I understand he did, for failing to produce
22 the discovery, and (Inaudible) deposition. Then he
23 -- there's the order on that on April 20. He --
24 he -- out of sight out of mind, as has been stated
25 before, doesn't do anything for two months,

1 approximately, until he receives a notice of
2 deposition. Although he was under the obligation,
3 of course, to produce the discovery, since it was
4 first filed in the fall. But obviously, also,
5 reinforced by the order of sanctions first entered
6 from his failure to do so to that point. And then,
7 he just does nothing until he gets served with a
8 deposition notice as if that's supposed to be a
9 signal to him that he needs to actually pay
10 attention to the Court's order. Isn't that about
11 what happened, Mr. Pinkston?

12 MR. PINKSTON: That's a difficult
13 question to answer, Your Honor, but I --

14 THE COURT: It's all right. It may
15 remain rhetorical.

16 MR. PINKSTON: Thank you. I appreciate
17 that.

18 Let me just address the Court's concern
19 in this fashion. What plaintiffs are asking for is
20 the sanction of default, basically, the ultimate
21 drop-dead sanction in this case. We do not dispute
22 that the first motion for sanctions was
23 appropriate, particularly since Mr. Godfrey did not
24 disclose his whereabouts.

25 THE COURT: I've already ruled on that

1 anyway. Go ahead.

2 MR. PINKSTON: That's correct. In this
3 case, Your Honor, where the employees of the
4 Beehive House did undertake a search, granted it
5 was after receiving the notice of deposition and
6 those documents were not readily located, we do not
7 believe that the sanction of default would be
8 appropriate, particularly where the documents or
9 the information contained in those documents is
10 accessible through an alternate source. We would
11 make the following proposal, Your Honor:

12 Plaintiff's anxious to receive this
13 information. There are means whereby the
14 information could be located. If we are granted an
15 --

16 THE COURT: Well, how do I know that?
17 There's nothing in the records to that effect.
18 This motion has been pending for some time. I
19 denied expedited consideration of the motion so
20 that there could be reading on this. Your client's
21 had every opportunity to attempt to obtain the
22 documents that would truly show what would be an
23 effective substitution of documents that are no
24 longer available, evidently, and yet he has not
25 produced any affidavit from the bank indicating

1 that the bank has the checks. Banks sometimes
2 return checks, sometimes banks keep checks. How do
3 we know? What evidence is there in the record that
4 the bank even has this documentation?

5 Now, what it seems to me you're
6 requesting is that some additional time to see if
7 the bank has the documentation and we don't know
8 that they do. The time for consideration of these
9 [Inaudible] is today. It has been submitted for
10 decision, there's been every opportunity for him to
11 have -- well, even by his own account, since the
12 documents could not be located some time in July.
13 Here we are in September and they still aren't
14 available and we still don't even know if they
15 might be available. It's too late to talk about
16 that in my opinion.

17 MR. PINKSTON: I understand, Your
18 Honor. I believe that the Beehive House has
19 subpoenaed documents from the bank.

20 THE COURT: But your client hasn't.

21 MR. PINKSTON: Mr. Godfrey has not,
22 that's correct, the Beehive House has subpoenaed
23 those documents. It seem a harsh sanction to
24 default both defendants when there are some
25 documents that have been produced from the bank,

1 could be reviewed to determine whether that would
2 be sufficient and to determine whether the bank has
3 additional documents.

4 THE COURT: Okay. Mr. Pinkston, I
5 appreciate your argument, thank you.

6 MR. PINKSTON: Thank you.

7 THE COURT: With regard to Mr. Godfrey,
8 in all due respect, I think all that I've heard Mr.
9 Godfrey has ever done to try to obtain these
10 documents is either telephone or in a face-to-face
11 meeting with Ms. Skougard ask the Beehive House to
12 obtain these documents. He has not subpoenaed the
13 bank, he has not subpoenaed any records from the
14 Beehive House. He has done virtually nothing in
15 over a year. Is there some inaccuracy about that
16 statement?

17 MR. PINKSTON: No, Your Honor. I just
18 wanted to insert that Mr. Godfrey did himself
19 attempt to look for the documents. I just want to
20 clarify that with the Court, that he did himself go
21 to the storage facilities and look for the
22 documents.

23 THE COURT: Oh, he went to the storage
24 facilities of Beehive House?

25 MR. PINKSTON: Correct, at the Beehive

1 House and the storage facilities at which the
2 Beehive House --

3 THE COURT: All right. He --

4 MR. PINKSTON: He --

5 THE COURT: -- did that on July 10 or
6 11?

7 MR. PINKSTON: I'm not sure exactly
8 what the date was but he did indeed participate in
9 searching.

10 THE COURT: I appreciate that. That is
11 nonetheless too little too late. Mr. Godfrey has
12 obstructed discovery, it appears to me, by first,
13 when these documents -- the evidence is that these
14 documents were available by failing to make his
15 whereabouts unknown (sic) and about -- has -- and
16 then he did nothing for two months when discovery
17 responses were due and I set a deadline for
18 discovery responses in the first order, but I
19 haven't reviewed that particular order, but that's
20 my practice. (Inaudible) typical practice, clearly
21 they were due in compliance with the Rules of Civil
22 Procedure which are -- do not exceed 30 days. And
23 it seems to me that Mr. Godfrey has done virtually
24 nothing to attempt to comply with the Court's
25 previous order.

1 Accordingly, it seems to me that this
2 case was filed in November of 1995. These issues
3 were in dispute at the time of filing of the answer
4 and counterclaim in May of 1996. It is
5 inappropriate and unreasonable for parties to fail
6 to take prompt action in the face of discovery
7 requests.

8 Insofar as Mr. Godfrey is concerned, I
9 think the motion for sanctions is well taken. I
10 think that it wasn't enough for the Court to order
11 him -- order sanctions before, he did not
12 appropriately respond, he didn't timely respond and
13 he could have prior -- as well as prior to today
14 and he still hasn't requested or subpoenaed
15 documents from the bank himself. He's relied on
16 the Beehive House to do his work for him and there
17 wasn't even an attempt by him to get even the bank
18 statements themselves let alone the checks. So I
19 have no record on which to base any conclusion that
20 there might be alternative documents and I'm not
21 going to reach beyond the record to do so.

22 I think the request for his pleadings
23 to be stricken in this default judgment, the
24 default entered against him is appropriate and I so
25 order.

1 Mr. Rampton, you may respond then with
2 regard to the Beehive House. Go ahead. Do you
3 have any reply to the arguments that have been
4 made?

5 MR. RAMPTON: Your Honor, just briefly.

6 Mr. Merrill has punctuated in his argument
7 (Inaudible) Beehive House is concerned.

8 THE COURT: I'm sorry, I didn't hear
9 part of that.

10 MR. RAMPTON: Because I was mumbling.
11 I'm sorry, Your Honor.

12 He has punctuated the nature of the
13 dilemma that I face as far as our claims against
14 the Beehive House. Well, it belongs to Chad
15 Godfrey. What he did with the money is his
16 business. We know it went into our account but
17 what do we know about that?

18 Well, the answer to that is: Who spent
19 the money? Over whose signature? For what
20 purpose? For whose benefit? That's where the
21 checks come in. We have got to have those checks
22 to know what they say.

23 Now, it's established by Deanne
24 Skougard's affidavit, at least implicitly, that she
25 was searching for cancelled checks which means that

1 checks in this case came back to the Beehive House,
2 they're not kept by the bank. The best the bank is
3 going to have is microfilmed copies.

4 Now, I've been down this road very
5 recently. A handwriting expert can make nothing of
6 a microfilmed signature. They want to say, Well,
7 we didn't really spend that money, that's a
8 forgery. I have no means of challenging that
9 without the original checks in my hands.

10 THE COURT: When was your discovery
11 made on Beehive House for these documents?

12 MR. RAMPTON: When was my request made?
13

14 THE COURT: Was it the fall of '96?

15 MR. RAMPTON: No, that was a request
16 made to Mr. Godfrey.

17 THE COURT: Okay.

18 MR. RAMPTON: My deposition request was
19 made in June -- yeah, June 3rd of 1997 for these
20 documents to be produced by July 10th.

21 Mr. Ralph Godfrey, by his own
22 deposition testimony, established that no
23 meaningful effort was made to recover these
24 documents until July 10th. That was his testimony
25 on the record. It was their responsibility to

1 produce documents before that time.

2 We simply have no place to go without
3 those records. It's as simple as that. I'm not
4 going to place blame, I'm not going to point
5 fingers. That box was in their possession at the
6 time when all the defendants in this case knew we
7 needed those records, we had asked for them. Not
8 of the Beehive House but of Mr. Godfrey, granted,
9 but they knew we needed them.

10 It's my position that those records
11 should have been in their counsel's office within
12 30 days of that first request for review but they
13 were not, and now they've vanished through
14 mysterious means, even though they were admittedly
15 under control of the Beehive House at the time that
16 the request was first made. It's a dilemma I see
17 no way out and we submit it on that basis.

18 THE COURT: All right. With regard to
19 the motion for sanctions insofar as the Beehive
20 House is concerned, I am prepared to rule also. I
21 am very troubled by the comment of the Beehive
22 House first in failing to timely comply with the
23 discovery request that was made in June. It was
24 over 30 days before any attempt was even made to
25 look for the files. Beehive House knew -- had to

1 have a good faith basis to file its answer and
2 counterclaim in May of 1996 and well knew as a
3 party to the case that the documents were critical
4 to the issue and failed to take adequate measures
5 to preserve what they say they had in their
6 possession.

7 I'm also troubled by the fact that the
8 Beehive House allowed a nonemployee to search for
9 the records, and a codefendant in the case, and
10 have not maintained 100 percent control over the
11 documents in question. I also have a problem with
12 the Beehive House not timely taking steps to
13 subpoena all bank records, not just the bank
14 statements, pertaining to this account. And
15 especially since it's been at least by July 10th
16 that they knew that there was a problem and still
17 there is no evidence, again, before me that there
18 is an alternative way of securing such documents.

19 The Beehive House has not been the
20 subject of a previous sanction order and it does
21 stand in some different footing from that of Mr.
22 Godfrey. I am going to do this by way of
23 sanctions. Obviously, the motion to compel was
24 granted as to the Beehive House. Also, the Beehive
25 House shall pay all reasonable attorney's fees and

1 costs incurred in connection with this matter and
2 -- or with this motion, argument and post-attorney
3 time in connection with the preparation of the
4 order on the motion; and shall produce on or before
5 September 15 the bank records, any evidence that
6 there may be there that there is an alternative
7 source of information.

8 Now, with regard to counsel's concern
9 about whether a handwriting expert can read a
10 microfiche, I think that's jokingly done a little
11 bit. I will -- however, I will consider that if
12 that becomes a specific issue down the road. If
13 the Beehive House fails to provide this information
14 on or before September 15, then Tuck may file a
15 motion to strike the answer and counterclaim of the
16 Beehive House and have its default entered against
17 it as well.

18 I am taking under advisement, if you
19 will, whether any additional sanction might be
20 appropriate, and specifically whether to strike the
21 answer and counterclaim of the Beehive House and
22 enter its default. And then it's largely because
23 it may not be necessary to do that if there are
24 actually alternate documents that can be provided
25 otherwise that would effectively take the place of

1 the documents the Beehive House had under its
2 control and no longer can locate.

3 So there must be compliance with this
4 order in a timely fashion. If not, as I said, Tuck
5 will file a motion and -- against seeking this
6 relief. So, that is the order. I'd like Mr.
7 Rampton to prepare an order consistent with the
8 Court's rulings here today. Are there any
9 questions about the nature of the Court's order?

10 MR. MERRILL: Thank you, Your Honor,
11 just a question about the Court's order. I want to
12 make certain that I'm absolutely clear what type of
13 evidence the Court is asking the Beehive House to
14 produce.

15 THE COURT: Go ahead, ask your
16 question.

17 MR. MERRILL: Are you asking us to
18 serve another subpoena and produce microfilm copies
19 of checks or affidavits from the bank saying that
20 those documents will be available? I just want to
21 make certain that I comply -- that the Beehive
22 House will comply adequately.

23 THE COURT: Well, you obtain documents
24 that are available on or before that date. As
25 (Inaudible) the bank's able to respond to that

1 subpoena in a timely fashion is a separate issue.
2 If that becomes an issue, you'd better provide
3 evidence as best you can as to exactly what that
4 bank has, in what form it is and how readable it is
5 and give me some basis on which to not enter
6 default against your client.

7 So, the way this is all supposed to
8 work is: A request is made and the parties are
9 just supposed to comply. It's not incumbent upon
10 an opposing party to have to go to Court three
11 times to get information it's entitled to under the
12 Rules of Civil Procedure.

13 Also, the payment of attorney's fees
14 and costs, I want Mr. Rampton to prepare an
15 affidavit of those fees and costs and they must be
16 reasonable and necessarily incurred and those
17 attorney's fees and costs are to be paid within
18 five working days of the date I approve the
19 attorney's fees and costs by order. Does that
20 answer your question with regard to what you need
21 to do? You need to do what it takes to get --

22 MR. MERRILL: No, I understand that. I
23 understand that, Your Honor, and I appreciate the
24 clarification.

25 THE COURT: Okay.

1 MR. MERRILL: Thank you.

2 THE COURT: The Court's going to take a
3 brief recess before the next hearing. I know we're
4 starting a little late this morning but we need to
5 take a brief recess while these counsel leave and
6 you folks get settled.

7 (Concluded.)
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C E R T I F I C A T E

STATE OF UTAH :
: ss.
COUNTY OF SALT LAKE :

I, THERESA BLAIR, do hereby certify that the foregoing pages, numbered 1 through 42, contain a true and accurate transcript of the electronically recorded proceedings held in connection with Mary Tuck vs. The Beehive House and S. Chad Godfrey held on September 4, 1997. And was transcribed by me to the best of my ability from the cassette tapes furnished to me.

Dated this 30th day of April, 1998.

Theresa Blair
Theresa Blair, Transcriber

I, RENEE L. STACY, Certified Shorthand Reporter, Registered Professional Reporter and Notary Public for the State of Utah, do hereby certify that the foregoing transcript prepared by Theresa Blair was transcribed under my supervision and direction.

Renee L. Stacy

RENEE L. STACY, CSR, RPR

My Commission expires:

