

1987

Kathy's Food Stores, Inc., dba Time Out Food Stores, a Utah corporation, and Jay Slaughter and Vaughn Nelson, individuals v. Equitable Life and Casualty Insurance Company, a Utah corporation : Response to Petition for Rehearing

Utah Supreme Court

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Daniel W. Anderson, Gary E. Jubber, Patrick L. Anderson; Fabian and Clendenin; Attorneys for Defendant/Respondent.

Michael A. Neider; Richard L. Halliday; Neider and Hutchison; Attorneys for Plaintiffs/Appellants.

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IN SUPREME COURT
BRIEF

IN
DOCUMENT
OF
S.O.
SO

DOCKET NO. **870394**

IN THE SUPREME COURT OF THE STATE OF UTAH

KATHY'S FOOD STORES, INC.	:	
d/b/a TIME OUT FOOD STORES,	:	
a Utah corporation, and JAY	:	
SLAUGHTER and VAUGHN NELSON,	:	Supreme Court No. 870394
individuals,	:	
	:	
Plaintiffs/Appellants,	:	
	:	
vs.	:	
	:	
EQUITABLE LIFE AND CASUALTY	:	
INSURANCE COMPANY, a Utah	:	
corporation,	:	
	:	
Defendant/Respondent.	:	

ANSWER TO PETITION FOR REHEARING OF A PORTION OF
PER CURIAM DECISION

APPEAL FROM INTERLOCUTORY ORDER OF THE THIRD JUDICIAL DISTRICT
COURT FOR THE COUNTY OF SALT LAKE, STATE OF UTAH, HONORABLE
HOMER F. WILKINSON, DISTRICT JUDGE

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KATHY'S FOOD STORES, INC. :
d/b/a TIME OUT FOOD STORES, :
a Utah corporation, and JAY :
SLAUGHTER and VAUGHN NELSON, :
individuals, :
 :
 :
Plaintiffs/Appellants, :
 :
 :
vs. :
 :
 :
EQUITABLE LIFE AND CASUALTY : Supreme Court No. 870394
INSURANCE COMPANY, a Utah :
corporation, :
 :
 :
Defendant/Respondent. :
 :

Equitable Life and Casualty Insurance Company ("Equitable") hereby responds to plaintiffs' Petition for Rehearing of a Portion of Per Curiam Decision ("Plaintiffs' Petition for Rehearing") filed on March 17, 1988 in the Supreme Court of the State of Utah.

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STATEMENT OF THE CASE

Plaintiffs' Petition is the result of this Court's March 3, 1988 per curiam decision, wherein this Court granted Equitable's Motion to Dismiss on the ground that the order appealed from was not a final judgment and, therefore, this Court had no jurisdiction. Furthermore, a majority of the Court granted sanctions pursuant to Rule 33 of the Rules of the Utah Supreme Court on the grounds that the appeal was frivolous and was brought for delay. Plaintiffs have only petitioned this Court for a rehearing and redetermination of that portion of the per curiam decision relating to sanctions.

This case arose as a dispute between Equitable and plaintiffs over the validity of an alleged lease. Plaintiffs tendered a rental payment to Equitable in the amount of \$3,000 on or about January 2, 1987. Equitable refused the tender, however, as payment was conditioned upon Equitable's recognition of the alleged lease. In an attempt to protect its financial interests in its property, Equitable filed a Motion for Rents to be Paid Into Escrow on August 12, 1987. Equitable's Motion for Rents to be Paid Into Escrow was heard on August 28, 1987, at which time the District Court ruled that plaintiffs must pay all back rent since December 17, 1986 into escrow, as well as future rent as it

becomes due on the first of each month in the amount of \$3,000 per month.

On September 8, 1987, plaintiffs filed an objection to the proposed order, and were successful in postponing the date of payment from September 28, 1987 (30 days after the District Court's ruling) to October 15, 1987. The District Court entered an order on September 29, 1987 requiring payment as outlined above.

On October 15, 1987 (the date payment was to be made into Court), plaintiffs filed a Notice of Appeal in the District Court. Next, on October 19, 1987, plaintiffs filed a Petition for Interlocutory Appeal of the District Court's Order. On November 6, 1987, this Court summarily denied plaintiffs' Petition for Interlocutory Appeal, Case No. 870385. Then, on November 18, 1987, plaintiffs filed a Motion to Revise the September 29, 1987 Order, or in the Alternative, a Motion for an Order Certifying the September 29, 1987 Order as a Final Order in the District Court. On December 31, 1987, the District Court denied plaintiffs' Motion to Revise the September 29, 1987 Order, and also denied plaintiffs' Motion for an Order Certifying the September 29, 1987 Order as a Final Order.

Plaintiffs have made three attempts to dispute the validity of the September 29, 1987 Order, and now have filed this

Petition for Rehearing, in an attempt to avoid sanctions for their duplicitous approach.

STATEMENT OF RELAVANT FACTS

1. On December 17, 1986, Equitable purchased the property located at 502 East 2100 South, Salt Lake City, Utah, at a bankruptcy trustee's sale. (Plaintiffs' Complaint, ¶ 11).

2. On or about January 2, 1987, plaintiffs tendered a check in the amount of \$3,000 to Equitable as payment for rent under a purported lease. (Nelson Depo. at 63:17-22).

3. Equitable refused the tender asserting that plaintiffs did not have a valid leasehold interest in the property. (Plaintiffs' Amended Complaint, ¶ 12).

4. Plaintiffs have made no tenders of rent to Equitable since the January, 1987 tender referred to in paragraph 2, above. (Nelson Depo. at 67:14-17, 146:8-12).

5. Despite several demands and notices to plaintiffs to vacate the property, and a Notice to Quit served on March 10, 1987, plaintiffs refused to vacate the property. (Plaintiffs' Amended Complaint, ¶ 2; Answer to Counterclaim, ¶ 7).

6. Plaintiffs filed an Amended Complaint on June 10, 1987, wherein they seek enforcement of an alleged lease. It is undisputed that plaintiffs have claimed in their Amended Complaint that they (all three plaintiffs) were in sole possession

of the property since it was acquired by Equitable. (Plaintiffs' Amended Complaint, ¶ 2).

7. Equitable filed a Motion for Rents to be Paid Into Escrow on August 12, 1987, and the motion was heard on August 28, 1987. The District Court ruled that plaintiffs must pay all back rent since December 17, 1986 into escrow, as well as future rent as it becomes due on the first of each month in the amount of \$3,000 per month, pending adjudication of this matter on the merits. On September 8, 1987, plaintiffs filed an objection to the proposed order, and the District Court postponed the date of payment to October 15, 1987. A copy of the District Court's September 29, 1987 Order is attached hereto as Addendum "A."

8. On October 15, 1987 (the date payment was to be made into Court), plaintiffs filed a Notice of Appeal in the District Court. A copy of plaintiffs' Notice of Appeal is attached hereto as Addendum "B."

9. On October 19, 1987, plaintiffs filed a Petition for Interlocutory Appeal of the District Court's Order, Case No. 870385.

10. On November 5, 1987, plaintiffs filed a Docketing Statement in this case.

11. On November 6, 1987, this Court summarily denied plaintiffs' Petition for Interlocutory Appeal, Case No. 870385. A copy of this Court's Order is attached hereto as Addendum "C."

12. On November 16, 1987, Equitable filed a Motion to Dismiss plaintiffs' appeal filed in this case.

13. On November 18, 1987, plaintiffs filed a Motion to Revise Order, or in the Alternative, for an Order Certifying Final Order, wherein plaintiffs sought certification of the September 29, 1987 District Court's Order as a final Order pursuant to Rule 54(b) of the Utah Rules of Civil Procedure. A copy of plaintiffs' Motion to Revise Order, or in the Alternative, for an Order Certifying Final Order, is attached hereto as Addendum "D."

14. On December 31, 1987, the District Court denied plaintiffs' Motion to Revise Order, and plaintiffs' Motion to Certify the Order as a Final Order. (Addendum "D"). A copy of the District Court's Order Granting Motion for Partial Summary Judgment is attached hereto as Addendum "E."

15. On March 3, 1988, this Court granted Equitable's Motion to Dismiss this matter on the ground that the Order appealed from was not a final judgment and that this Court had no jurisdiction. A copy of this Court's per curiam decision is attached hereto as Addendum "F."

16. Furthermore, on March 3, 1988, this Court granted sanctions pursuant to Rule 33, Rules of the Utah Supreme Court, on the ground that this appeal is frivolous and was brought for delay. (Addendum "F").

17. On March 17, 1988, plaintiffs filed a Petition for Rehearing of a portion of the per curiam decision ("Plaintiffs' Petition for Rehearing") seeking a redetermination of the portion of the per curiam decision granting sanctions.

18. Plaintiffs' Petition for Rehearing does not seek reconsideration of this Court's grant of Equitable's Motion to Dismiss this matter on the ground that the Order appealed from was not a final judgment, and that this Court had no jurisdiction.

SUMMARY OF ARGUMENT

Equitable contends that this Court's per curiam decision, filed March 3, 1988, was correct in granting sanctions pursuant to Rule 33 of the Rules of the Utah Supreme Court on the grounds that this appeal is frivolous and was brought for delay. The Order appealed from was clearly interlocutory, and plaintiffs' filing of the Notice of Appeal was without merit and inappropriate. (See Equitable's Memorandum in Support of Motion to Dismiss Plaintiffs' Appeal, Case No. 870394). In plaintiffs' Petition for Rehearing, plaintiffs have pointed to no fact or law

that was overlooked or misapprehended by this Court. (See plaintiffs' Docketing Statement, Case No. 870394; plaintiffs' Petition for Interlocutory Appeal, Case No. 870385; and plaintiffs' Memorandum in Opposition to Motion to Dismiss Plaintiffs' Appeal, Case No. 870394).

Plaintiffs' three separate attempts to challenge the District Court's Order has burdened this Court, and was done for no other purpose than delay. Previously, plaintiffs have represented that the basis for their appeals was their poor financial circumstances and inability to pay pursuant to the District Court's Order. Thus, plaintiffs' inability to comply with the Order somehow makes a purely interlocutory Order into a final order that is appealable as a matter of right. Yet, plaintiffs have cited no case law that supports this position. Now, in an attempt to avoid sanctions, plaintiffs make the self-serving statement that they did not file a supercedas bond with their Notice of Appeal as evidence that they did not bring the appeal for delay. This allegation ignores plaintiffs' poor financial condition and their ability to obtain a supercedas bond.

Equitable has been forced to respond to three separate attempts to appeal the District Court's Order, and now submits its fourth response to this issue. The awarding of sanctions was appropriate and should be upheld by this Court.

ARGUMENT

I. PLAINTIFFS' APPEAL WAS FRIVOLOUS.

In Cady v. Johnson, 671 P.2d 149, 151 (Utah 1983), this Court equated "frivolous" with being without merit. In O'Brien v. Rush, 67 Utah Adv. Rpt. 18 (Utah 1987), the Utah Court of Appeals stated that "since a party has already been to court once, and has had the benefit of one ruling, the decision to appeal should be reached only after careful consideration by the party and counsel." Id. (emphasis added). In this case, there is simply no reasonable basis for claiming that the Order appealed from was final, and that plaintiffs could appeal as a matter of right. By claiming such a right, the plaintiffs have attempted to mislead this Court.

A review of the case authority cited in Equitable's Memorandum in Support of its Motion to Dismiss, as well as plaintiffs' Docketing Statement, illustrate that the District Court's Order was clearly interlocutory. Furthermore, as the Court of Appeals pointed out in O'Brien, a party's decision to appeal should be reached after "careful consideration." Id. Merely because three separate approaches exist for a party to appeal an

order¹ does not mean that a party and counsel should not carefully consider which avenue is appropriate. For example, if plaintiffs were so concerned with their meritorious claims, the proper procedure to have followed would have been to seek Rule 54(b) certification in the first instance, and/or file a Petition for Interlocutory Appeal.

Plaintiffs have abused the appeal process. Indeed, by filing a Notice of Appeal, plaintiffs have represented to this Court that the Order was a final appealable order. On the other hand, by filing the Petition for Interlocutory Appeal and subsequently seeking Rule 54(b) certification (all of which occurred during the pendency of this appeal), they have indicated that the Order was interlocutory in nature and not appealable as a matter of right. Meanwhile, Equitable has been required to go to considerable expense to defend plaintiffs' three-part approach to the appeal process.

II. THE APPEAL WAS FILED FOR THE PURPOSE OF DELAY.

An appeal brought for delay is one marked by dilatory conduct or conduct designed to mislead the Court and which

1 The three approaches are as follows: to seek Rule 54(b) certification of an interlocutory order as a final order so an appeal is appropriate; to file a Petition for Interlocutory Appeal; and to file a Notice of Appeal of a final order.

benefits only the Appellant. O'Brien v. Rush, 67 Utah Adv. Rpt. 18 (1987). Plaintiffs contend that the Order was onerous and burdensome, and that they could not comply due to their poor financial condition. However, the fact that a party cannot comply with an Order is no basis for an appeal. This appeal is nothing more than an attempt to prolong the litigation in the hope that plaintiffs could continue to have rent-free use of Equitable's property.

The circumstances surrounding this appeal indicate that this action was taken primarily for the purpose of delay. The Notice of Appeal was filed on the same day (October 15, 1987) that the plaintiffs were required by the District Court's Order to pay approximately \$31,000 into Court for back rent. It is curious that plaintiffs sued Equitable for the right to pay rent pursuant to an alleged lease, and then appeal an Order which provides them a right to do so.


Now, plaintiffs' attempt to circumvent their delay motive by alleging to this Court that their reason for not posting a supercedeas bond was to allow the proceeding below to continue. However, this self-serving assertion is inconsistent with their financial oppression argument, and is more consistent with their inability to obtain a supercedeas bond. Indeed, this direct contradiction of plaintiffs' prior position in an attempt

to avoid sanctions should lead this Court sua sponte to impose additional sanctions for the filing of this Petition for Rehearing.

CONCLUSION

This Court should uphold its per curiam decision, filed March 3, 1988, granting sanctions pursuant to Rule 33 of the Rules of the Utah Supreme Court on the ground that this appeal was frivolous and was brought for delay. Furthermore, this Court should consider sua sponte additional sanctions for the inconsistent and self-serving representations made in plaintiffs' Petition for Rehearing.

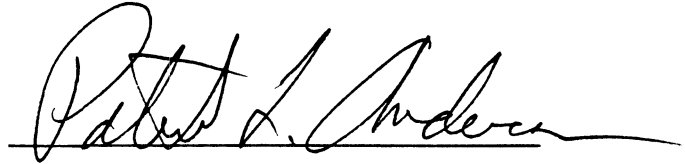
DATED this 22nd day of April, 1988.


Daniel W. Anderson
Gary E. Jubber
Patrick L. Anderson
FABIAN & CLENDENIN,
a Professional Corporation
Attorneys for Equitable Life
and Casualty Insurance Co.

CERTIFICATE OF SERVICE

This is to certify that on this 22nd day of April, 1998, I caused to be mailed a true and correct copy of the foregoing Answer to Petition for Rehearing of a Portion of Per Curiam Decision, postage prepaid, to Michael A. Neider, Esq., Neider &

Hutchison, 7050 South Union Park Avenue, Suite 570, P.O. Box
7005, Salt Lake City, Utah 84107.

A handwritten signature in black ink, appearing to read "Robert L. Anderson", is written over a horizontal line.

042088A:PLA

ADDENDUM "A"

Daniel W. Anderson, A0800
Gary E. Jubber, A1758
Patrick L. Anderson, A4787
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Attorneys for Equitable Life and
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Twelfth Floor
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Salt Lake City, Utah 84111
Telephone: (801) 531-8900

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

KATHY'S FOOD STORES, INC.	:	
d/b/a TIME OUT FOOD STORES,	:	
a Utah corporation, and JAY	:	
SLAUGHTER, and VAUGHN NELSON,	:	ORDER
Individuals,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
EQUITABLE LIFE AND CASUALTY	:	
INSURANCE COMPANY, a Utah	:	Civil No. C87-2981
corporation,	:	(Judge Homer F. Wilkinson)
	:	
Defendant.	:	
	:	

This matter came before this Court for hearing on August 28, 1987, pursuant to Equitable Life and Casualty Insurance Company's Motion for Rents to be Paid Into Escrow. At the hearing, Equitable Life and Casualty Insurance Company ("Equitable") was represented by Gary E. Jubber and Patrick L. Anderson, and plaintiffs Kathy's Food Stores, Inc. d/b/a Time-Out Food Stores, Jay Slaughter, and Vaughn Nelson were represented by

Michael A. Neider. The Court having considered the memoranda and arguments of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. Plaintiffs shall deposit with the clerk of the Court the amount of \$31,354.84 which amount represents the payment of \$3,000.00 per month from January 1, 1987 through October 31, 1987, and a pro-rated payment at the rate of \$3,000.00 per month from December 17, 1986 to December 31, 1986. Said amount shall be paid into Court on or before October 15, 1987.

2. In addition, plaintiffs shall pay into Court the amount of \$3,000.00 per month for each month thereafter, commencing November 1, 1987, until further order of this Court. Said monthly payments shall be deposited into Court on or before the first day of each succeeding month.

3. The clerk of the Court shall deposit all money paid into Court pursuant to this Order into an interest bearing account, pending disposition of this litigation.

4. All money deposited into Court will be distributed or released only pursuant to and upon order of this Court.

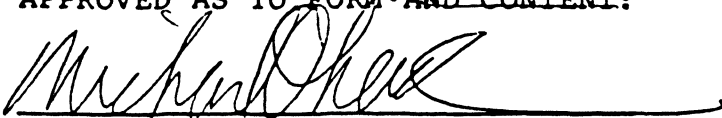
DATED this 29th day of September, 1987.

BY THE COURT:



Homer F. Wilkinson
District Court Judge

APPROVED AS TO FORM ~~AND~~ CONTENT:



Michael A. Neider, Esq.
Neider & Hutchison
Attorneys for Plaintiffs

CERTIFICATE OF HAND-DELIVERY

This is to certify that on this 18th day of September, 1987, I caused to be hand-delivered a true and correct copy of the foregoing Order to Michael A. Neider, Esq., Neider & Hutchison, 7050 South Union Park Avenue, #570, Salt Lake City, Utah 84107.



090187A:PLA

FILED IN CLERK'S OFFICE
SALT LAKE CITY, UTAH

OCT 15 4 06 PM '87

BY *James Petros*

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KATHY'S FOOD STORES, INC.)
d/b/a TIME OUT FOOD STORES, a)
Utah corporation and JAY) NOTICE OF APPEAL
SLAUGHTER, and VAUGHN)
NELSON, individuals,)

Plaintiffs/Appellants,)

vs.)

Civil No. C-87-2981

EQUITABLE LIFE AND CASUALTY)
INSURANCE COMPANY, a Utah)
corporation,) Judge Wilkinson

Defendant/Respondent.)

Notice is hereby given that Plaintiffs, and each one of them, hereby appeal to the Supreme Court of the State of Utah from that certain Order entered by the Third Judicial District Court in the above-entitled action on the 29th day of September, 1987.

DATED this 15th day of October, 1987.

NEIDER & HUTCHISON

Michael A. Neider

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Notice of Appeal to Daniel W. Anderson, Gary E. Jubber and Patrick L. Anderson, Fabian & Clendenin, Twelfth Floor, 215 South State Street, Salt Lake City, Utah 84111, postage prepaid, this 15th day of October, 1987.

Michael Schneider

ADDENDUM "C"

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

November 6, 1987

OFFICE OF THE CLERK

Daniel W. Anderson
Gary E. Jubber
Patrick L. Anderson
FABIAN & CLENDENIN
Twelfth Floor
215 South State Street
Salt Lake City, UT 84111

Kathy's Food Stores, Inc.
dba Time Out Food Stores, a
Utah corporation and Jay
Slaughter, and Vaughn
Nelson, individuals,
Plaintiffs and Appellants.

v.

No. 870385

Equitable Life and Casualty
Insurance Company, a Utah
corporation,
Defendant and Respondent.

THIS DAY, Petition for an interlocutory appeal having been heretofore considered, and the Court being sufficiently advised in the premises, it is ordered that an interlocutory appeal be, and the same is, denied.

Geoffrey J. Butler, Clerk

ADDENDUM "D"

NEIDER & HUTCHISON
Michael A. Neider #2375
Richard L. Halliday #4588
Attorneys for Plaintiffs
7050 South Union Park Avenue
Suite 570
P.O. Box 7005
Salt Lake City, Utah 84107
Telephone: (801) 566-3688

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

KATHY'S FOOD STORES, -INC.)	
d/b/a TIME OUT FOOD STORES, a)	
Utah corporation and JAY)	MOTION TO REVISE ORDER,
SLAUGHTER, and VAUGHN)	OR IN THE ALTERNATIVE,
NELSON, individuals,)	FOR AN ORDER CERTIFYING
)	FINAL ORDER
Plaintiffs,)	
vs.)	
)	Civil No. C-87-2981
EQUITABLE LIFE AND CASUALTY)	
INSURANCE COMPANY, a Utah)	
corporation,)	Judge Wilkinson
Defendant.)	

Pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, Plaintiffs hereby move the Court to revise the Order entered by this Court on September 29, 1987 which requires certain back rents and future rents to be paid into Court or an escrow account. Plaintiffs request the Order be revised as follows:

1. That the Order requiring back rent be altered to require no back rent on the ground that the Plaintiffs have no funds or other credit to comply with such order.

2. That the Order be modified to allow payments directly to the Defendant.
3. That the rental payment be \$2,500 per month.
4. That the rental payments begin December 1, 1987.
5. That the Order not be an order against all Plaintiffs, but only the corporate Plaintiff which is the only party in possession of the property and the only party subject to a judgment for the reasonable rental value.

In the alternative, Plaintiffs request that this Court certify that the September 29, 1987 Order is a final order under Rule 54(b) of the Utah Rules of Civil Procedure.

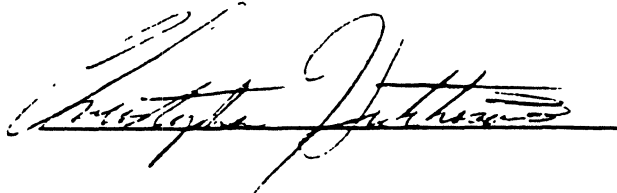
DATED this 18th day of November, 1987.

NEIDER & HUTCHISON


Michael A. Neider

CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand delivered a true and correct copy of the foregoing Motion to Revise Order to Daniel W. Anderson, Gary E. Jubber and Patrick L. Anderson, Fabian & Clendenin, Twelfth Floor, 215 South State Street, Salt Lake City, Utah 84111, this 18th day of November, 1987.



ct kathequi.mt2

ADDENDUM "E"

Daniel W. Anderson, A0800
Gary E. Jubber, A1758
Patrick L. Anderson, A4787
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Attorneys for Equitable Life and
Casualty Insurance Company

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

KATHY'S FOOD STORES, INC.	:	
d/b/a TIME OUT FOOD STORES,	:	
a Utah corporation, and JAY	:	
SLAUGHTER, and VAUGHN NELSON,	:	ORDER GRANTING MOTION
Individuals,	:	FOR PARTIAL SUMMARY
	:	JUDGMENT
Plaintiffs,	:	
	:	
vs.	:	
	:	
EQUITABLE LIFE AND CASUALTY	:	
INSURANCE COMPANY, a Utah	:	Civil No. C87-2981
corporation,	:	(Judge Homer F. Wilkinson)
	:	
Defendant.	:	
	:	

This matter came before this Court for hearing on November 25, 1987, pursuant to Equitable Life and Casualty Insurance Company's ("Equitable") Motion for Partial Summary Judgment and Plaintiffs' Motion to Revise Order, or in the Alternative, for an Order Certifying Final Order, and Motion to Amend Amended Complaint. Judge Wilkinson ruled on the above motions on December 4, 1987. This matter again came before this Court for hearing on November 18, 1987, pursuant to plaintiffs'

objection to order, motion to certify order as final, and motion to set supersedeas bond amount. At the hearings, Equitable was represented by Gary E. Jubber and Patrick L. Anderson, plaintiffs Kathy's Food Stores, Inc. d/b/a Time Out Food Stores, Jay Slaughter and Vaughn Nelson were represented by Michael A. Neider, and plaintiff Kathy's Food Stores, Inc. d/b/a Time Out Food Stores was also represented by David Ward. The Court having considered the various motions, supporting memoranda and arguments of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. Plaintiffs' Motion to Revise the September 29, 1987 Order is denied.

2. Plaintiffs' Alternate Motion for An Order Certifying the September 29, 1987 Order as a final order is denied.

3. Plaintiffs' Motion to Amend Their Amended Complaint, is denied; however, plaintiffs' Motion to Amend may be noticed for hearing if the proposed amendment has not been disposed of by the other rulings contained herein.

4. Those claims for relief set forth in plaintiffs' Amended Complaint which deal with the possession of the property located at 502 East 2100 South, Salt Lake City, Utah are disposed of by this Order and dismissed with prejudice.

5. Equitable's Motion for Partial Summary Judgment is granted based upon the grounds specified therein.

6. That a writ of restitution shall issue entitling Equitable to immediate possession of the property located at 502 East 2100 South, Salt Lake City, Utah.

7. Plaintiffs' Motion to Certify this Order as a final order is granted.

8. This order shall be stayed pending appeal only upon the posting by the plaintiffs of a supersedeas bond in the amount of \$144,000.00.

JUDGMENT

Based on the foregoing Order granting Equitable's Motion for Partial Summary Judgment,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered entitling Equitable to immediate restitution of the property located at 502 East 2100 South, Salt Lake City, Utah.

IT IS FURTHER ORDERED that this Judgment shall be enforced by the issuance of a Writ of Restitution upon entry of this Order and Judgment.

DATED this 31 day of December, 1987.

BY THE COURT:

S/
Homer F. Wilkinson
District Court Judge

APPROVED AS TO FORM:

Michael A. Neider, Esq.
Neider & Hutchison
Attorneys for Plaintiffs

CERTIFICATE OF HAND-DELIVERY

This is to certify that on this 22nd day of December, 1987, I caused to be hand-delivered a true and correct copy of the foregoing Order Granting Motion for Partial Summary Judgment to Michael A. Neider, Esq., Neider & Hutchison, 7050 South Union Park Avenue, #570, Salt Lake City, Utah 84107.

Carol Riddle

PLA:122187A

ADDENDUM "F"

IN THE SUPREME COURT OF THE STATE OF UTAH

-----ooOoo-----

Kathy's Food Stores, Inc.,
dba Time Out Food Stores,
a Utah corporation, and Jay
Slaughter and Vaughn Nelson,
individuals,
Plaintiffs and Appellants,

No. 870394

v.

F I L E D
March 3, 1988

Equitable Life and Casualty
Insurance Company, a Utah
corporation,
Defendant and Respondent.

Geoffrey J. Butler, Clerk

Third District, Salt Lake City
The Honorable Homer Wilkinson

Attorneys: Richard L. Halliday and Michael A. Neider, Midvale,
for Appellants
Daniel W. Anderson, Patrick L. Anderson, and
Gary E. Jubber, Salt Lake City, for Respondents

PER CURIAM:

Respondent's motion to dismiss this matter is hereby granted on the ground that the order appealed is not a final judgment and this Court has no jurisdiction. See Utah R. Civ. P. 54(b).

A majority of the Court is in favor of granting sanctions pursuant to Rule 33, Rules of the Utah Supreme Court, on the ground that this appeal is frivolous and was brought for delay. This matter is remanded for the purpose of taking evidence on the amount of reasonable attorney fees awardable to respondent for bringing the motion for summary disposition.

Stewart, Associate Chief Justice, and Howe, Justice, dissent from the ruling on sanctions.