

1987

Monty Higley and Jonnie Higley v. Ralph L. Walker : Petition for Rehearing

Utah Supreme Court

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Cook and Wilde, P.C.; Robert H. Wilde; Attorneys for Respondents.

Ralph L. Walker; Appellant Pro Se.

Recommended Citation

Petition for Rehearing, *Higley v. Walker*, No. 870456.00 (Utah Supreme Court, 1987).

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BRIEF

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DOCKET NO. 870456 ~~IN THE SUPREME COURT OF THE STATE OF UTAH~~

MONTY HIGLEY and JONNIE)	
HIGLEY,)	
)	Case No. 870456
Plaintiffs/Respondents,)	
)	
vs.)	
)	
RALPH L. WALKER,)	
)	
Defendant, Appellant.)	

PETITION FOR REHEARING

ON APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT OF
CACHE COUNTY, STATE OF UTAH
HONORABLE VENOY CHRISTOFFERSEN
DISTRICT JUDGE

COOK & WILDE, P.C.
ROBERT H. WILDE
6925 Union Park Center
Suite 490
Midvale, Utah 84047
Telephone: (801) 255-6000
Attorneys for Respondents

RALPH L. WALKER
8753 Wildrose Court
Highland Ranch, CO 80126
Appellant Pro Se

FILED
MAR 11 1988

MONTY HIGLEY and JONNIE
HIGLEY,

Plaintiffs/Respondents,

vs.

RALPH L. WALKER,

Defendant, Appellant.

This is an appeal from the First Judicial District Court's denial of the Motion of Defendant/Appellant Ralph Walker (Walker) to vacate a judgment. Judgment was granted on November 20, 1986, and entered on November 28, 1986. On September 23, 1987, Walker moved to vacate the Judgment. He did so by filing a "Motion to Vacate Judgment" which was accompanied by a "Memorandum of Points and Authorities in Support of Defendant's Motion to Vacate Judgment. These pleadings are attached as Exhibits 1 and 2 hereto. The Plaintiffs/Respondents, Monty and Jonnie Higley (Higleys) filed a Memorandum in response to

Defendant's Motion, Exhibit 3 hereto. Thereafter Walker filed a response to Plaintiff's Memorandum, Exhibit 4. The Court denied Walker's Motion in its Memorandum Decision dated the 23rd of October, 1987, Exhibit 5. Walker appealed.

In an Order, signed by the Clerk of this Court, dated March 3, 1988, Exhibit 6 this Court summarily reversed the lower court on the grounds that the action was allegedly stayed by the bankruptcy petition. In so doing, the Court failed to take into consideration that there is no factual documentation in the record on appeal which supports any of Walker's allegations. It should be noted that, in a collateral proceeding in the Bankruptcy Court for the District of Colorado, the Honorable Roland J. Brumbaugh found that the Higleys did not receive timely notice of Walker's filing of the bankruptcy, a transcript of the Court's findings in that action is attached as Exhibit 7.

THE FOLLOWING ARE POINTS OF LAW AND FACT THE COURT OVERLOOKED AND MISAPPREHENDED.

I.

THE RECORD ON APPEAL IS DEVOID OF THE FACTS WALKER MUST SHOW TO SUPPORT HIS MOTION.

The contents of the record on appeal pertaining to Walker's Motion to Vacate the Judgment are a Motion and two Memoranda. In his Memorandum in support of his Motion Mr. Walker categorizes his first section as a "Statement of Facts". Facts may not come before the Court in this manner. Despite Walker's characterization of these items as facts, they are merely statements of counsel, or statements of the party. In order for these statements to rise to the level of the facts they would have to be in the form of an Affidavit (sworn testimony), a deposition (testimony given under oath), or some exception thereto, which could have been accomplished by providing a certified copy of court records pursuant to Rule 902 of the Utah Rules of Evidence.

Such evidence is required to raise the issues Walker attempted to raise in his Motion. In Chapman v. Chapman, 728 P.2d 121, 122 (Utah 1986) this Court said, "Typically, factual disputes are raised by sworn statements." "Because these 'answers' are outside the record, we cannot consider them." The Chapman Court cited the cases of In re: Cluff, 587 P.2d 128 (Utah 1978) and Watkins v. Simonds, 14 Utah 2d 406, 385 P.2d 154 (1963) which also require facts.

Such factual information was required to be submitted with the Motion in order to properly address the Rule 60 argument. See In re: Snyder, 701 P.2d 153 (Colo. Ct. App. 1985). This factual information is required of Walker since he has the burden of proof in this matter pertaining to an automatic stay claim. See In re: Lanham Manufacturing Co. Inc., 31 BR 195, 199 (S.D. Bankr. 1983) The court apparently relied upon assertions in the pleadings to support allegations that:

1. Walker filed bankruptcy;
2. The date of the filing;
3. Higleys' received notice of the bankruptcy; and
4. Higleys' actions violated the stay.

As shown hereafter the mere filing of bankruptcy by Walker is not conclusive as to whether or not Higleys' actions violated the stay and/or the Judgment was void.

11.

THE JUDGMENT MAY BE VOIDABLE BUT IT IS NOT VOID.

Walker asserts that Higleys' Judgment is void per se. This is not the law. The Court In re Fuel Oil Supply and Terminaling, Inc., 30 BR 360, 361 (N.D.Tex. Bankr. 1983) clarified the status of post stay judicial activity:

Moreover, the characterization of every violation of § 362 as being absolutely void is inaccurate and overly broad. For example, certain good faith actions under §§ 542(c) and 549(c) of the Bankruptcy Code are protected although they may be technical violations of the stay. This is also true for certain acts permitted under § 546 of the Code. More accurately, stay violations may be voidable at the debtor's or trustee's instance rather than absolutely void. (emphasis added).

Walker has initiated an action to address these sorts of issues in the bankruptcy court. This court should defer to that court's expertise, especially where Walker failed to properly prepare the lower court's record for appeal by failing to include necessary factual information.

In re Manitta, 1 BR 393, 395 (C.D.Cal. Bankr. 1979) is a case with striking similarity to this case. The case is well summarized in its ruling:

Defendant suggested that the making of findings and the entry of judgment on March 14, 1979 were in violation of the automatic stay. But neither the plaintiffs nor their attorneys were scheduled by the bankrupts as creditors, and the defendant gave no notice of the bankruptcy filing to the state court or to plaintiffs or to plaintiffs' attorneys. It is common practice for the Clerk of this Court, at the request of a bankrupt, to issue a formal notice of stay which can be served on creditors immediately. That was not done in this case.

Under the circumstances, the signing of the findings and judgment after bankruptcy, memorializing a decision rendered before bankruptcy was no more than voidable, certainly not void. (emphasis added)

The Higleys' actions were addressed before Judge Roland Brumbaugh of the Colorado Bankruptcy Court on the Higleys' Motion for Change of Venue of Walkers bankruptcy adversary proceedings on the automatic stay violation allegations. After a full hearing Judge Brumbaugh returned the action to Utah and noted that it appeared that Higleys did not in fact have notice. See page 3, line 21 of Exhibit 6 hereto.

Since Higleys' Judgment is at best voidable, and not void, summary disposition is inappropriate.

III.

IF ACTION ON THE JUDGMENT IS INAPPROPRIATE IT IS ONLY INAPPROPRIATE AS TO WALKER, NOT THE REAL ESTATE RECOVERY FUND.

The relevant automatic stay provisions of the Bankruptcy Code are found at 11 U.S.C. § 362. They stay proceedings against the debtor or property of the bankruptcy estate. The application of the stay to co-defendants was addressed in Neubauer v. Owens-Corning Fiberglass Corp., 26 BR 644, 646 (E.D.Wis. Bankr. 1983). The court said,

" . . . those cases that have carefully considered whether § 362 operates to stay proceedings against nonbankrupt codefendants have unanimously held that it does not . . . The legislative history demonstrates that the purpose of the stay is to "give[] the debtor a breathing spell from his creditors," Extending the stay to nonbankrupt codefendants furthers neither of these purposes, and refusing to stay proceedings against nonbankrupt codefendants impairs neither of these purposes. (citations omitted).

The only actions taken by Higleys, once they learned of Walker's bankruptcy, was to seek recovery from the Real Estate Recovery Fund. Recovery from the Fund, where covered persons have bankrupted, is clearly contemplated by the code. See Utah Code Ann. 61-2a-5(4).

The Real Estate Recovery Fund was not named as a defendant in the underlying action because the procedure set forth in Utah Code Anno. 61-1-1 et seq. dictates otherwise. This does not mean that the Fund was not a quasi co-defendant. Claimants in the Higleys position have recovered from Real Estate Recovery Funds before.

In In re Phillips, 40 BR 194 (Colo. Bankr. 1984) claimants with actions against a bankrupt Real Estate Broker were allowed to proceed to collect against the Colorado Real Estate Recovery Fund despite the debtor's

claims that their action was stayed. See also In re Sam Daily, 57 BR 83 (Hawaii Bankr. 1985).

Walker shows no facts to support a necessary allegation to his claim, to wit: that Higleys are proceeding against him or against property of the estate. Even if the Judgment is ultimately deemed void as to Walker it is not void as to the Real Estate Recovery Fund.

IV.

HIGLEYS' ACTIONS PRIOR TO FILING ARE NOT STAYED OR VOID.

Walkers argument implies that the actions taken at trial are void because he had allegedly told counsel and the court that he would be filing bankruptcy. It is no surprise to anyone that a large number of people who are sued respond by threatening to file bankruptcy, few ultimately do.

Relief granted by the automatic stay commences at the time of filing, not at the time of threatening to file, 11 U.S.C. 362. Not surprisingly case law supports this position. The court in In re Wheeler, 5 BR 600,603 (Ga. Bankr. 1980) said, "It first must be noted that a petition does not operate as a stay until it is filed."

This reasoning is of significance because the court had granted Higleys judgment against Walker before Walker filed bankruptcy. It can be argued that Higleys had obtained a judgment against Walker as required by 61-2a-5(1), that the proceedings had been terminated (by bankruptcy) and that the Recovery Fund was liable to Higleys without the benefit of the docketing of the Judgment.

CONCLUSION

In order to qualify under Rule 60(b)(5) Walker must present facts which show the judgment to be void. He has not done so. If the Judgment is to be voided he must follow proper procedure in the Bankruptcy Court. He has sought to short circuit that procedure by filing this appeal collateral to his automatic stay litigation now pending in that court.

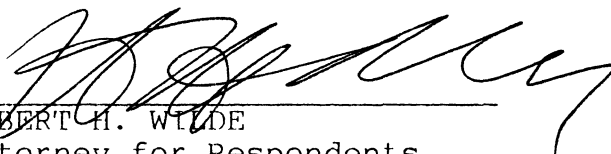
His appeal will ultimately fail because the record on appeal does not support his allegations that:

1. The Judgment is void. On the contrary the record in his Bankruptcy proceeding (of which this court may take judicial notice) shows lack of proper notice to Higley's rendering the judgment at most voidable.

2. Higleys have pursued him or the Bankruptcy estate. On the contrary the record shows only actions against the Real Estate Recovery Fund.

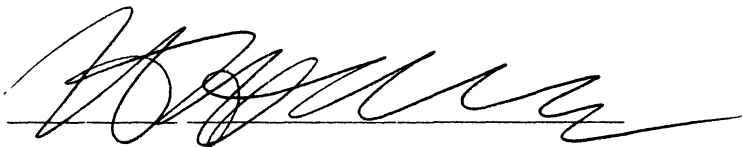
Summary Reversal in this action is inappropriate and this court's prior order should be vacated.

DATED this 17 day of March, 1988.



ROBERT H. WILDE
Attorney for Respondents

MAILED, postage prepaid, four true and correct copies of the foregoing Petition for Rehearing to Ralph L. Walker, 8753 Wildrose Court, Highland Ranch, Colorado 80126 this 17 day of March, 1988.



EXHIBIT

Ralph L. Walker, Pro Se
8753 Wildrose Court
HIGHLANDS RANCH, COLORADO 80126
(303) 791-8285

IN THE FIRST DISTRICT COURT OF CACHE COUNTY, STATE OF UTAH

MONTY HIGLEY, AND JONNIE
HIGLEY,

Plaintiffs,

vs.

RALPH L. WALKER,
MARSHA M. WALKER, and
DAVID WALKER

Defendants

MOTION TO VACATE JUDGEMENT

Civil No. 24175

COMES now Ralph L. Walker , Defendant and moves the court to vacate the judgement entered on November 28, 1986 as the court lacked jurisdiction over the defendant. This motion is accompanied by a Memorandum of Points and Authorities.

Dated this 10th day of September, 1987

Ralph L. Walker, Pro Se

C E R T I F I C A T E O F M A I L I N G

I hereby certify that a true and correct copy of the foregoing

MOTION TO VACATE JUDGEMENT

was mailed, postage prepaid, to:

Robert H. Wilde, Attorney for Plaintiff
6925 Union Park Center, suite 490
Midvale, UT. 84047

Dated this _____ day of September 1987.

Ralph L. Walker, Pro Se

EX6

EXHIBIT

2

Ralph L. Walker, Pro Se
8753 Wildrose Court
HIGHLANDS RANCH, COLORADO 80126
(303) 791-8235

IN THE FIRST DISTRICT COURT OF CACHE COUNTY, STATE OF UTAH

MONTY HIGLEY, AND JONNIE
HIGLEY, >
Plaintiffs, >

vs. >

RALPH L. WALKER, >
MARSHA M. WALKER, and >
DAVID WALKER >

Defendants >

Memorandum of Points and
Authorities in support of
defendants motion to vacate
judgement

>
>
>
> Civil No. 24175

STATEMENT OF FACTS

1) Ralph L. Walker, the defendant in the instant action informed the counsel for the plaintiff and the court that a bankruptcy petition would be filed on November 21, 1986 on behalf of the defendant.

2) The defendant filed a petition for a chapter 7 bankruptcy on November 21, 1986. Thereafter the First District Court lacked jurisdiction over the defendant Walker.

3) The counsel for the plaintiff was made aware of the filing and has continued to violate the stay imposed by the Bankruptcy Court.

1. Case No. 86 B 11242 C UNITED STATES BANKRUPTCY COURT DIST OF COLORADO

4) A judgement was entered on November 28, 1986, issued from the First District Court against the defendant Walker.

STATEMENT OF LAW

- 1) A judgement is void and subject to a motion to vacate on the ground that the court entering the judgement lacked jurisdiction over the defendant Ralph L. Walker. *Brimhall v. Mecham*, 27 Utah 2d 222, 494 P.2d 525 (1972)
- 2) The federal court has exclusive jurisdiction over all matters of the defendant from the time of filing. 28 U.S.C. 1334
- 3) All actions against the defendant were stayed by 11 U.S.C. 362. The continuation of the case was improper and subject to sanctions under the code for all who knowingly continue litigation after the filing.

ARGUMENT

1) The court lacked jurisdiction over the defendant as the filing of the bankruptcy occurred on the 21st day of November 1986 and all proceedings against the defendant were automatically stayed. The judgement was entered on November 28, 1986 and hence should be vacated as the court lacked jurisdiction. The defendant has been harassed by the plaintiff on numerous occasions including a motion for a supplemental hearing to be held in February of 1987, months after the defendant filed for relief under the bankruptcy code. All actions of the plaintiff and his counsel have been in direct violation of the automatic stay.

Dated this _____ day of September, 1987

C E R T I F I C A T E O F M A I L I N G

I hereby certify that a true and correct copy of the
foregoing

Memorandum of points and authorities

was mailed, postage prepaid, to:

Robert H. Wilde, Attorney for Plaintiff
6925 Union Park Center, suite 490
Midvale, UT. 84047

Dated this _____ day of September 1987.

Ralph L. Walker, Pro Se

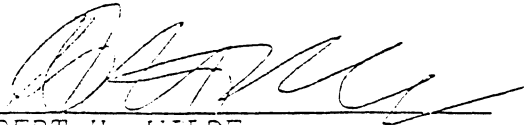
ROBERT H. WILDE, USB # 3466
COOK & WILDE, P.C.
Attorneys for Respondents
6925 Union Park Center, Suite 490
Midvale, Utah 84047
Telephone (801) 255-6000

IN THE SUPREME COURT OF THE STATE OF UTAH

MONTY HIGLEY and JONNIE)	MEMORANDUM IN RESPONSE TO
HIGLEY,)	APPELLANT'S MOTION FOR
)	SUMMARY DISPOSITION
Plaintiffs/Respondents,)	
)	
vs.)	
)	Supreme Court No. 87045
RALPH L. WALKER,)	
)	
Defendant, Appellant.)	

Respondents reply to Appellant's Motion for Summary Disposition by directing the Court's attention to the fact that the record on Appeal is completely devoid of any evidence which would support the arguments made in the Appellant's Motion. The record below contains nothing more than bald argumentative assertions contained in memoranda submitted on the Appellant's part. There are no affidavits, documents under seal or other evidence which would support the Appellant's position.

DATED this 6th day of January, 1987.


ROBERT H. WILDE
Attorney for Plaintiffs/Respondents

MAILED, postage prepaid, a true and correct copy of
the foregoing Memorandum in Response to Appellant's Motion
for Summary Disposition to Ralph L. Walker, Pro Se, 8753
Wildrose Court, Highlands Ranch, Colorado 80126 this 10th
day of January, 1988.

Julie H. Harty

EXHIBIT

4

Ralph L. Walker, Pro Se
8753 Wildrose Court
HIGHLANDS RANCH, COLORADO 80126
(303) 791-8285

IN THE FIRST DISTRICT COURT OF CACHE COUNTY, STATE OF UTAH

MONTY HIGLEY, AND JONNIE
HIGLEY,
Plaintiffs,

vs.

RALPH L. WALKER,
MARSHA M. WALKER, and
DAVID WALKER

Defendants

>
>
> RESPONSE TO PLAINTIFF'S
> MEMORANDUM
>

> Civil No. 24175
>
>
>

I.

DEFENDANT'S MOTION IS TIMELY.

Defendant's motion to vacate the judgement is brought under Rule 60 (a) and (b). The rule provides:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

The court may void the judgement as the court did not have jurisdiction over the defendant after November 21, 1986. Rule 60 (b) does not apply to the instant case as the three month deadline applies only to reasons (1), (2), (3), and (4). Reason

(5) which is that the judgement is void does not have a limit on it. The Rule further states that:

This rule does not limit the power of a court to entertain independent action to relieve a party from a judgement, order proceeding or to set aside a judgement for fraud upon the court

The plaintiff has brought fraud upon the court by continuing the litigation after the prior notice and the subsequent filing of the bankruptcy. Counsel for the plaintiff knew at all times of the filing and continued to violate the automatic stay and thereby committed fraud upon the court.

The proceedings against the defendant were automatical frozen in the First District Court, any action by the court after November 21, 1987 was void and thereby should be vacated.

II.

THE COURT HAS NO JURISDICTION OVER THE DEFENDANT

The plaintiff's claim that an action can be continued in state court is without merit. The law is very clear on this matter. An action can be continued only with leave from the United States Bankruptcy Court. Relief from the stay was not requested nor granted.

III.

PLAINTIFF'S CLAIMS WERE NOT DISCHARGED.

The defendant has not alleged that the plaintiff's claims have been discharged. The claims must be made in the proper court and if the court were to find for the plaintiff then the plaintiff would be a secured creditor of the debtor and in the

event that the estate could not pay the judgement then the plaintiff would be able to recover from the recovery fund.

IV.

PLAINTIFF RECEIVED PROPER NOTICE OF THE BANKRUPTCY

The plaintiff has perjured himself and his client by stating that they weren't aware nor were they notified of the filing of the bankruptcy petition. The defendant called the plaintiff and the court before the trial and stated that he was sorry for the inconvenience but that because of other matters the defendant would file for a chapter 7 on November 21, 1987. The plaintiff was listed on every creditor list submitted to the bankruptcy court by the defendant, in care of the counsel for the plaintiff at his address. He acknowledges the receipt of the discharge. These notices to the creditors were mailed from the same list at the bankruptcy court and were mailed to the plaintiff. The plaintiff has no basis for his claim. Regardless of when he received the various notices, the automatic stay was in place and precludes the court from continuing the litigation.

V.

THE DEFENDANT DID NOT SLEEP ON HIS RIGHTS

The jurisdiction of the court is not dependant upon the defendant sleeping or not sleeping on his rights. The court either had jurisdiction or it did not, the actions of the defendant does not effect the jurisdiction of the court. The

defendant was aware that the bankruptcy court would provide notices to the plaintiff of the bankruptcy. The plaintiff was aware of the filing and instead continued to harass the defendant in violation of the automatic stay. The plaintiff ignored the filing and didn't attempt to collect from the estate, instead slept on his right to file a claim because he knew that the federal court would not recognize the judgement as it was after the filing of the defendant's petition. Instead of filing a claim the plaintiff has attempted to collect money from the recovery fund and continue to commit fraud upon the state courts.

VI.

THE PLAINTIFF'S ARE NOT SEEKING AN ACTION AGAINST PROPERTY OF THE BANKRUPTCY ESTATE

The defendant agrees that no attempt has been made to collect from the bankruptcy court. The reason is clear, the judgement would be ignored as it was obtained after the stay was in place. The fraudulent attempt to collect from the state courts and the recovery fund with a judgement obtained by violating the federal bankruptcy code should be barred and the judgement against the defendant must be vacated.

Dated this _____ day of September, 1987.

C E R T I F I C A T E O F M A I L I N G

I hereby certify that a true and correct copy of the
foregoing

RESPONSE TO PLAINTIFF'S MEMORANDUM

was mailed, postage prepaid, to:

Robert H. Wilde, Attorney for Plaintiff
6925 Union Park Center, suite 490
Midvale, UT. 84047

Dated this _____ day of September 1987.

Ralph L. Walker, Pro Se

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE
STATE OF UTAH

MONTY HIGLEY and JONNIE
HIGLEY,

Plaintiff

v.

RALPH L. WALKER; MARSHA WALKER;
DAVID WALKER, STEVE BROWN,
and LOLA JENSEN dba HEARTLAND
HOMES and RLW DEVELOPMENT,

Defendant

)
) MEMORANDUM DECISION

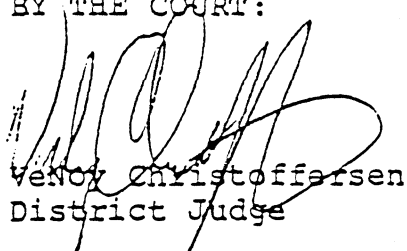
)
) Civil No. 24175

Defendant Ralph Walker has filed a Motion to Vacate the
Judgement entered on November 28, 1986. The Motion was not filed
until September 23, 1987. Defendant does not state the grounds
under which he requests a vacation of the judgment. However, it
appears that it be under Rule 60(b) which must be made three months
after the entry of judgment.

Therefore, the defendant's motion is not timely made and is
denied. Counsel for plaintiff to prepare the appropriate order.

Dated this 23rd day of October, 1987.

BY THE COURT:


Venoy Christoffarsen
District Judge

SALT LAKE CITY, UTAH

March 3, 1988

EXHIBIT

6

OFFICE OF THE CLERK

Robert H. Wilde
Attorney at Law
6925 Union Park Center, Suite 490
Midvale, UT 84047

Monty Higley and Jonnie
Higley,
Plaintiffs and Respondents,

v.

No. 870456

Ralph L. Walker, Marsha M. Walker,
and David Walker,
Defendants and Appellant.

Appellant's motion for summary reversal of the order appealed is hereby granted. Under Section 362 of the federal Bankruptcy Code, the action against appellant was automatically stayed when he filed a petition in bankruptcy. The judgment against him is therefore void. The district court order denying vacation of the void judgment on the ground that the motion to vacate was not filed within three months of the entry of the judgment is manifestly in error, since a motion under Rule 60(b)(5) Utah R. Civ. P. is not required to be brought within three months. This matter is remanded for the purpose of vacating the void judgment.

Geoffrey J. Butler, Clerk

1 IN THE UNITED STATES BANKRUPTCY COURT
2 FOR THE DISTRICT OF COLORADO

3 Case No. 87 J 0938

4 EXHIBIT

5 In the matter of:)
6 RALPH L. WALKER,)
7 Debtor.)

Courtroom C
400 Columbine Building
1845 Sherman
Denver, Colorado

February 19, 1988

12 Proceedings had before the HONORABLE ROLAND
13 J. BRUMBAUGH, Judge of the United States Bankruptcy
14 Court, commencing at the hour of 1:15 p.m., this date.

16 APPEARANCES:

17 RALPH L. WALKER,
18 Pro Se.

19 ROBERT H. WILDE,
20 BRUCE ANDERSON,
21 Attorneys at Law,

22 For Robert Wilde, Monty Higley and
23 Jonnie Higley.

1 (Whereupon, the following proceedings were
2 had in open court following other proceedings not
3 transcribed pursuant to ordering counsel.)

4 THE COURT: Well, this particular adversary
5 was commenced by the filing of a, quote, "motion,"
6 unquote, which was treated as a complaint because
7 such is needed in order to bring an action for
8 violation of the automatic stay. In the complaint,
9 part of the allegations are that the defendants have
10 continued with collection efforts with an order for a
11 supplemental hearing in Salt Lake City in February,
12 1987, and have held hearings to have the Utah real
13 estate broker's license revoked and receive payment
14 from the Utah Real Estate Recovery Fund.

15 I take it the parties have admitted that,
16 indeed, payment has been made from that fund and Mr.
17 Walker's license has been revoked; is that correct?

18 MR. WALKER: That's true.

19 THE COURT: In that case the damages that
20 you seek require the presence of the Utah Real Estate
21 Recovery Fund as a party. They are an indispensable
22 party. I would also note that in the debtor's
23 underlying case, 86 11242 C, he did indicate that in
24 February of 1986, he filed a Chapter 11 case and that
25 it was dismissed.

1 So it's the order of the Court that the
2 motion for change of venue is granted in this
3 adversary, and likewise, sua sponte, ordered that the
4 entire underlying case is transferred to the District
5 of Utah.

6 Mr. Wilde, I'm going to tender you back the
7 matrix that you submitted. You may need that in some
8 other evidentiary matter.

9 MR. WILDE: Thank you, Your Honor.

10 THE COURT: Mr. Wilde, I will appreciate it
11 if you would prepare a form of order for my signature.
12 Thank you.

13 THE COURT: Court will be a recess.

14 (Whereupon, these proceedings were
15 concluded.)

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1 It is my understanding that that case was
2 dismissed for several reasons: failure to pay filing
3 fees, failure to attend 341 meetings, and failure to
4 file proper schedules.

5 MR. WALKER: That wasn't the case, Your
6 Honor. It was settled with the creditors and
7 determined that that was the easiest way to settle
8 the case.

9 THE COURT: Well, I talked to the clerk in
10 the Utah bankruptcy case before lunch, Mr. Walker,
11 and that's what the file shows, and I would note that
12 all but one de minimus creditor in this estate is in
13 Utah and if I apply the standards of the Macon
14 Uplands Venture case, which I intend to do -- found
15 at 24 BR 444 -- it is my opinion, and I'm so ruling,
16 that not only is this adversary case transferred to
17 the District of Utah, but the entire underlying case
18 is. That's where all the creditors are. That's
19 where they should have had an opportunity to be heard.

20 Sure, there's been a discharge entered here,
21 but at least this one creditor had no notice. At
22 least that's what's alleged, and so I'm going to let
23 the locals in Utah have their chance to receive
24 notice and be heard over there rather than dragging
25 everybody over here.

C E R T I F I C A T E

I, TRISA COOPER, a Court Reporter, do hereby
certify that the foregoing proceedings were
stenographically reported by me at the time and place
herein set forth and that said proceedings were
thereafter reduced to typewritten form by me, as per
the foregoing transcript, the same being a full, true
and correct transcription of my stenograph notes then
and there taken.

DATED this 23rd day of February, 1988.



TRISA COOPER, Court Reporter
and Notary Public

My Commission Expires January 10, 1990.