

2009

Western Surety Company v. Idaho Auto Auction : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WESTERN SURETY COMPANY,
Plaintiff/Appellee,

vs.

IDAHO AUTO AUCTION,
BRIGHTON BANK, GREATER
NEVADA AUTO AUCTION, UTAH
AUTO AUCTION, T.S. RIDEOUT,
INC. DBA COTTONWOOD
MOTORS, NATHAN COULTER,
SANDRA COULTER, PEDRO BOIX,
SILVIA BOIX, MICHAEL
TOSCANO, TELISA TOSCANO, and
DOES 1-100,

Defendants/Appellents.

No. 20090618 CA

BRIEF OF APPELLANTS
MICHAEL TOSCANO and TELISA TOSCANO

On Appeal from the Third Judicial District Court, Salt Lake County
Case No. 050906722, Honorable Joseph C. Fratto

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ORAL ARGUMENT IS REQUESTED

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ORAL ARGUMENT IS REQUESTED

Appellants Michael and Telisa Toscano submit this Brief of Appellants in support of their appeal of the orders and judgment of the Third District Court for Salt Lake County, Utah entered in favor of Appellee Nathan Coulter.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j), as this matter has been transferred to the Court of Appeals from the Supreme Court.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

The issue on this appeal is whether the Trial Court erred in failing to set aside a default judgment that was deficient in several respects. One set of defects relates to the failure of the appellee, Nathan Coulter, (“Coulter”) and the Trial Court to follow Utah R. Civ. P. 5 and 55 in seeking and entering the default. Specifically, Coulter did not properly serve the request for default and related papers (the “default papers”) on the appellants Michael and Telisa Toscano (“the “Toscanos”) and the Trial Court did not hold a hearing to determine damages prior to entering the default judgment. Both of these flaws deprived the Toscanos of notice that default was being sought. The second set of flaws relate to the fact that the default is based upon a cross claim (the “Cross-Claim”) that does not state a claim against the Toscanos. Each of the deficiencies provides an independent reason to set aside the judgment.

Although this case involves a motion to set aside a default, it turns largely on issues that are not within the Trial Court’s discretion. The Trial Court does not have discretion to deviate from the Rules of Civil Procedure, even when addressing a party in default. *Russell v. Martell*, 681 P.2d 1193, 1195 (Utah 1984). Therefore, the Trial Court’s application of and adherence to the Rules of Civil Procedure should be reviewed for correctness. *Fibro Trust, Inc. v. Brahman Fin., Inc.*, 974 P.2d 288, 295 (Utah 1999) (proper application of law reviewed for correctness). Moreover, a default judgment

based on a cross claim that fails to state a claim is invalid. *Skanchy v. Calcados Ortope SA*, 952 P.2d 1071, 1076 (Utah 1998). The Trial Court has no discretion in determining whether to set aside an invalid judgment.

If this Court rules that the default judgment is void but the default certificate is not¹, then the Trial Court erred by not considering whether to set aside the default certificate under the “good cause” standard of Utah R. Civ. P. 55(c). However, because this case is clear cut, it would be an abuse of discretion to not set aside the default certificate for good cause.

The decision of whether to set aside a default is largely within the discretion of the Trial Court. *Pitts v. Pine Meadow Ranch*, 589 P.2d 767, 769 (Utah 1978). This discretion should be exercised liberally in favor of the defaulting party in order to provide him his day in court.² *Id.* “It is an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification for the defendants' failure to . . . answer.” *Board of Educ. v. Cox*, 384 P.2d 806, 807 (Utah 1963). In addition, because

¹ This potential result can be reached only in limited circumstances. Specifically, if the Court finds that there was no error in Coulter’s failure to serve the default papers on the Toscanos’ counsel, and that the Cross-Claim does state a claim, but that the Trial Court did err in entering a default judgment prior to holding a hearing to determine damages and giving the Toscanos notice of that hearing, the proper result may be to set aside the judgment and not the certificate. Under this outcome, fairness would require that the Toscanos be given opportunity to set aside the default certificate under the “good cause” standard of Utah R. Civ. P. 55(c).

² The interests of the plaintiffs should also be taken into consideration, and the court should take care not to work an injustice or inequity to them. *Pitts*, 589 P.2d at 769. *Pitts* involved a case in which the plaintiff had relocated to England and would have been severely inconvenienced by being required to come to the United States to litigate the matter. *Id.* at 768. The record in this case states no reason why it would be unjust to require Coulter to prove his claims.

this case involves a failure to follow the procedures for notice when seeking a default, the Trial Court's discretion should be limited. *See Deutz-Allis Credit Corp. v. Smith*, 785 P.2d 682, 684 (Idaho Ct. App. 1990)(“a court's usual discretionary authority to grant or deny [a motion to set aside a default] may be greatly narrowed where certain procedural safeguards were not strictly complied with in obtaining the judgment”). Therefore, even if this Court were to conclude that the only reversible error was the Trial Court's failure to consider the good cause standard, this Court should simply remand with directions to set aside both the default judgment and certificate.

CONSTITUTIONAL OR STATUTORY PROVISIONS

This case turns on application of Utah Rules of Civil Procedure 5, 55 and 60. The relevant subsections of those rules are stated below.

1. **Utah Rule of Civil Procedure 5(a) and (b)** provide, in relevant part as follows:

(a) Service: When required.

(1) Except as otherwise provided in these rules or as otherwise directed by the court, every judgment, every order required by its terms to be served, every pleading subsequent to the original complaint, every paper relating to discovery, every written motion other than one heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties.

(2) No service need be made on parties in default except that: . . . (B) a party in default for any reason other than for failure to appear shall be served with all pleadings and papers; (C) a party in default for any reason shall be served with notice of any

hearing necessary to determine the amount of damages to be entered against the defaulting party;

...

(b) Service: How made.

(1) If a party is represented by an attorney service shall be made upon the attorney unless service upon the party is ordered by the court. If an attorney has filed a Notice of Limited Appearance under Rule 75 and the papers being served relate to a matter within the scope of the Notice, service shall be made upon the attorney and the party.

2. **Utah Rule of Civil Procedure 55 (a) through (e)** provide, in relevant part, as follows:

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter the default of that party.

(b) Judgment. Judgment by default may be entered as follows:

(1) By the clerk. Upon request of the plaintiff the clerk shall enter judgment for the amount claimed and costs against the defendant if: (A) the default of the defendant is for failure to appear; (B) the defendant is not an infant or incompetent person; (C) the defendant has been personally served pursuant to Rule 4(d)(1); and (D) the claim against the defendant is for a sum certain or for a sum that can be made certain by computation.

(2) By the court. In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

(c) Setting aside default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

3. **Utah Rule of Civil Procedure 60(b)**, provides, in part, for relief from default judgments as follows:

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of

an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

A. Factual Background Of Claims That Gave Rise To The Lawsuit.

Pedro Boix was the owner of an automobile dealership known as Auto One. From early 2003 to February, 2004, Michael Toscano was a co-owner of Auto One along with Mr. Boix.³ In or about February, 2004, Mr. Toscano resigned his position with Auto One. Around the time of Mr. Toscano's resignation, Mr. Boix asked Sandra Coulter,

³ Telisa Toscano has never been an owner or employee of Auto One. She was a signer on the Auto Owners bond at issue before the Trial Court. Similarly, though it does not appear Nathan Coulter was ever an owner of Auto One, he was also a signer on the bond.

who was married to Nathan Coulter, to be his co-owner in Auto One.⁴ Nathan Coulter gave or loaned substantial sums of money to Pedro Boix in conjunction with his wife's involvement in Auto One.

As owner of Auto One, Pedro Boix defrauded a number of people and then fled the United States on or about September of 2004.⁵ Western Surety, which had issued a payment bond on behalf of Auto One, filed a lawsuit interpleading bond funds and asserting claims for indemnification against Pedro Boix, Sylvia Boix, the Toscanos, Nathan Coulter and Sandra Coulter. The Toscanos appeared through counsel, D. Bruce Oliver, and answered the complaint. Coulter subsequently answered and asserted a cross claim against the Toscanos and Pedro and Sylvia Boix. The Toscanos and their counsel overlooked the Cross-Claim and did not answer it.

The Cross-Claim contained eleven numbered paragraphs. It mentioned various causes of action, though it did not set forth the elements of any cause of action in any coherent or organized fashion, if it states them at all. Though it mentioned fraud, unjust enrichment and conversion, it clearly did not state the elements of these causes of action. The only cause of action for which the elements are even arguably stated is breach of contract. However, this cause of action only alleges that money was loaned to Auto One.

⁴ Coulter may dispute whether his wife actually became a partner with Boix. However, his testimony on the record indicates that he and his wife had understood she would become Mr. Boix's partner in the future.

⁵ The Toscanos were not involved in Mr. Boix's fraud. The Toscanos do not know whether Sandra Coulter was involved in Pedro Boix's frauds. Mr. Boix's activities are mostly immaterial to this appeal.

It does not allege that money was loaned to the Toscanos. Therefore, it does not state a claim against the Toscanos.

The Toscanos and Coulter unsuccessfully defended themselves against Western Surety's claim. Summary judgment was entered in favor of Western Surety on the indemnification claim. The Toscanos retained the law firm of VanCott, Bagley, Cornwall and McCarthy to represent them on the appeal of the judgment in favor of Western Surety. Though a notice of appeal was filed, the Toscanos ultimately settled with Western Surety and a satisfaction of judgment was entered with respect to those claims.

B. History Of The Default.

The default involves a long and somewhat complicated procedural history. Nonetheless, because that history is important to understanding the matters on appeal, it will be repeated here.

Approximately two and one-half years after filing the cross claim and several months after the Toscanos and Coulter satisfied the judgments against them, Coulter sought a default against the Toscanos on the Cross-Claim. Though he had been in contact with the Toscanos shortly before seeking the default, he did not inquire regarding their failure to answer. Similarly, though the Toscanos had appeared through counsel, Coulter's counsel did not attempt to contact the Toscanos' counsel. For unknown reasons, Coulter's counsel chose to mail the default papers only to a residential address for the Toscanos. This address was incorrect. Though a default judgment was entered on

February 6, 2008, the Toscanos did not receive the default papers for approximately four to eight weeks after this date.

Upon receiving these papers, the Toscanos contacted their attorneys at the VanCott firm. Due to several miscommunications and uncertainty regarding the nature of Coulter's claims upon which the default was based, the Toscanos did not file a motion to set aside the default judgment until May 12, 2008. That motion was based upon Utah R. Civ. P. 60(b)(6). However, the Trial Court ruled that that motion should have been filed under Utah R. Civ. P. 60(b)(1), and that it was therefore time barred because it was filed six days after the expiration of the three month time limit for setting aside judgments under that provision.

Before an order was entered on the motion to set aside, the Toscanos' counsel filed a renewed motion to set aside the default judgment. This motion was based upon the claims presented on this appeal, namely that the Cross-Claim failed to state a claim, Coulter had failed to properly serve the papers, and Coulter and the Trial Court had failed to follow the two-step procedure required when a party seeks a default judgment for other than a sum certain.

The Trial Court did not hold a hearing on this motion and instead issued a minute entry stating that, because the Cross-Claim did not seek a sum certain, a hearing should have been held to determine the amount of damages. The Toscanos, correctly reasoning from established precedent that the Trial Court's ruling implied that there was no valid judgment in place, filed a motion to set aside the default certificate under the good cause standard of Utah R. Civ. P. 55(c). The Trial Court declined to consider whether to set

aside the default certificate under Rule 55(c), ruling that, by its minute entry, it had not implied that there was no valid judgment in place.

The Trial Court subsequently held a hearing to determine the amount of damages.⁶ At that hearing the Trial Court struggled to find a cause of action in the Cross-Claim. It also was presented with copious evidence demonstrating that Michael Toscano was not an owner or principal of Auto One at the time Coulter made the loans in question and that Telisa Toscano had never been an owner, principal, or employee of Auto One. Nonetheless, the Trial Court entered judgment against the Toscanos in the amount of \$188,598.62.

C. Significance Of The Errors Made By Coulter And The Trial Court.

The Toscanos demonstrated their interest in defending themselves in this case. They answered the complaint and opposed summary judgment. They maintained contact with their co-defendant, Coulter. Nonetheless, when Coulter made his belated decision to seek a default against the Toscanos, he did not make significant efforts to insure that the Toscanos were aware he was seeking a default. Rules 5 and 55 require that default papers be served on counsel when a party has appeared in the action through counsel.⁷

⁶ A motion to reconsider was filed and heard prior to the hearing on damages. In addressing the motion to reconsider, the Trial Court added more detail to its ruling. Specifically, in relation to the claim that Coulter had failed to serve the Toscanos, the Trial Court stated that the Toscanos were not entitled to service because, though they had appeared through counsel by answering the complaint, they had not appeared for purposes of the cross claim.

⁷ Counsel would have been more likely than the Toscanos to understand the significance of a default being sought against his clients.

The procedure chosen by Coulter not only failed to comport with the Rules, it also failed to provide timely notice to the Toscanos.

Coulter and the Trial Court compounded this problem by failing to hold a hearing prior to entry of a default judgment. Had they followed this process, the Toscanos would have been entitled to notice of hearing on the default judgment under Utah R. Civ. P. 5(a)(2)(C). This notice would have allowed them to seek to have the default certificate set aside under Rule 55(c) before a judgment was entered.

When the Trial Court was informed of its error in failing to hold a hearing, it attempted to correct the matter by holding a hearing. However, it treated the judgment as if it were still valid and immune from challenge under Rules 55(c) and 60(b)(1). In effect, the Trial Court entered a judgment before holding a hearing. This approach violates Rule 55.

This procedure was also unfair. Coulter's improper service had already deprived the Toscanos of notice he was seeking a default before it was entered. By entering a judgment before holding a hearing, the Court deprived them of another opportunity (to which they were entitled by the Rules) to contest the default judgment before it was entered.

The Toscanos had originally missed, by only six days, the three-month deadline for seeking to have the default judgment set aside under the excusable neglect standard of Utah R. Civ. P. 60(b)(1). Had Coulter properly served the default papers, or had the Court held a hearing before entering a default judgment, the Toscanos would have known of the default before it was entered and could have challenged it under the "good cause"

standard of Rule 55(c). At a bare minimum, they would have been entitled to have their motion to set aside addressed under the “mistake or excusable neglect” standard of Utah R. Civ. P. 60(b)(1).

D. The Judgment Is Void Because the Cross Claim Fails To State A Claim.

Lastly, procedural issues aside, the inadequacy of the Cross-Claim cannot be overlooked. It simply does not state a claim against the Toscanos. If the Trial Court was inclined to liberally construe the Cross-Claim, it should have, at the very least, considered the evidence to determine whether a default judgment was proper based upon the Cross-Claim. A promissory note presented by Coulter to the Trial Court before he sought the default demonstrated that his loan had been to Pedro Boix, not the Toscanos. Evidence presented at the default judgment hearing demonstrated that Michael Toscano was not involved with Auto One at the relevant times and that Coulter’s wife was involved with the company at that time. Perhaps most tellingly, the evidence showed that Telisa Toscano had never been involved with Auto One and that Coulter knew she was not so involved. Nonetheless, the Trial Court chose to disregard this evidence and entered a default judgment against both Michael and Telisa Toscano. In doing so, the Trial Court deliberately ignored the power granted to it by Utah R. Civ. P. 55 to “to establish the truth of any averment by evidence or to make an investigation of any other matter,” prior to entering a default judgment. This failure to consider the pleadings and the facts to insure that its ruling achieved substantial justice was a final instance of clear error by the Trial Court.

STATEMENT OF THE FACTS

1. Western Surety Company initiated this lawsuit by filing a complaint against Nathan Coulter, Sandra Coulter, Michael Toscano, Telisa Toscano and others on April 12, 2005. Trial Court Record ("Rec.") 1-9. The complaint asserted claims interpleading amounts Western Surety owed under a bond and seeking indemnification of those amounts from Nathan Coulter, Sandra Coulter and the Toscanos. However, the substance of those claims is not relevant to this appeal.

2. An amended complaint was filed on May 9, 2005. Rec. 40-48.

3. The Toscanos answered the amended complaint filed against them in this matter on June 10, 2005. Rec. 104-109.

4. D. Bruce Oliver appeared as attorney of record for the Toscanos when he answered the amended complaint on their behalf. Id.

5. D. Bruce Oliver never filed a notice of withdrawal as the Toscanos' counsel. See, generally, docket for *Western Surety Co. v. Idaho Auto Auction, et al*, Civil No. 050906722 and Trial Court Record.

6. Coulter answered the amended complaint on July 1, 2005, and submitted with his answer the Cross-Claim against the Toscanos. Rec. 112-123.

7. Coulter's Cross-Claim is contained on the final two pages of an eleven page document, and the heading of the document gives no indication the Cross-Claim is directed at the Toscanos. Rec. 112 & 120-122.

8. The Cross-Claim, which was not submitted pro se, consists of eleven numbered paragraphs and does not contain titles listing the causes of action being pursued. Rec. 120-122.

9. The Cross-Claim alleges, in paragraph 6, that Coulter previously made a demand on Auto One for “breach of contract, unjust enrichment, and fraud.” However, in paragraph 7 it alleges losses resulting from “breach of contract, conversion and fraud.” Rec. 121.

10. The Cross Claim does not describe any misrepresentation supporting a fraud claim. Rec. 120-122.

11. The Cross Claim references loans made to Auto One. Rec. 121, ¶ 4.

12. Though the introductory sentence of the Cross Claim refers to Pedro Boix, Sylvia Boix, Michael Toscano and Telisa Toscano as “the Auto One Principals”, Coulter has not plead that they actually were principals of Auto One at the time he made his loan to Auto One. Rec. 120-122.

13. The Cross-Claim does not state the amount loaned under any contract, and instead states only that Coulter loaned “certain sums of money to Auto One.” Rec. 121.

14. The Toscanos and Coulter both filed memoranda contesting summary judgment sought by the plaintiff. Rec. 210-218 & 241-252.

15. On December 4, 2006, this Court entered an order granting summary judgment in favor of Western Surety against Coulter, the Toscanos and others. Rec. 492-495.

16. Satisfaction of Western Surety's judgments against the Toscanos and Coulter were entered on August 2 and August 13, 2007, respectively. Rec. 535-540.

17. Shortly before those satisfactions of judgment were entered, Coulter and Michael Toscano discussed potentially working together to satisfy Western Surety's judgments against them. During these conversations, Coulter did not mention his lingering Cross-Claim against the Toscanos.⁸ Rec. 610, ¶ 5.

18. In a pleading filed with the Trial Court on November 13, 2006, before he sought to default the Toscanos, Coulter had submitted a copy of the contract evidencing his loans to Auto One, which reflected the loan was to be repaid by Pedro Boix and not the Toscanos. Rec. 455. He also submitted checks written to him from "Pedro Boix dba Auto One." Rec. 457. None of these documents referenced the Toscanos.

19. On January 17, 2008 Coulter mailed a default certificate and default judgment (the "default papers") to 9738 South Tayside Dr. in South Jordan, Utah in an apparent attempt to serve those documents on the Toscanos. Rec. 568-569.⁹

20. Coulter did not attempt to serve the default papers on the Toscanos' counsel of record, D. Bruce Oliver. Rec. 568-569; see also Coulter's Memorandum in Support of Motion for Summary Disposition ("Coulter's Supp. Mem."), filed with this Court on or about August 19, 2009, p. 3.

⁸ Michael Toscano alleged this fact, and other relevant facts, in his second affidavit. None were challenged in by Coulter before the Trial Court, despite numerous opportunities to do so, including the opportunity to cross exam Mr. Toscano during the June 16, 2009 hearing. June 16, 2009 Hearing Trans., Rec. 1033, p. 63.

⁹ The Toscanos believe the default papers were initially submitted to the Trial Court on January 17, 2008, however the record is unclear.

21. The Toscanos did not reside at 9738 S. Tayside Dr. in January of 2008 and the default papers mentioned were not forwarded to them. Rec. 611, ¶ 11.

22. The Trial Court entered a default certificate on February 4, 2008 and a default judgment in the amount of \$73,880.00 on February 6, 2008. Rec. 577-578 & 583-585.

23. The Toscanos did not receive the default papers until late March or early April of 2008. Rec. 611, ¶ 10. The papers he received were unsigned. Rec. 615.

24. Miscommunications between the Toscanos and their counsel, uncertainty regarding the nature of the default judgment, Coulter's counsel's failure to return a call from the Toscanos' counsel, and the Toscanos being out of communication with their attorneys for the week of May 5-9, 2008 delayed the Toscanos' response to the motion to dismiss. Rec. 611, ¶¶ 11-14; Rec. 615, ¶¶ 4-7.

25. On May 12, 2008, three months and six days after entry of the default judgment, the Toscanos filed a motion to set aside the default judgment, arguing, in part, that, because their counsel never forwarded the Cross-Claim to them, they had no notice of it. Rec. 586-597.

26. During a hearing on July 23, 2008 the Trial Court indicated it would deny this motion, reasoning in part that the motion should have been brought under Utah R. Civ. P. 60(b)(1) rather than 60(b)(6) and that it was therefore time-barred because it was filed six days late. Rec. 639.

27. On July 25, 2008, the Toscanos filed a Renewed Motion to Set Aside Default Judgment (the "Renewed Motion"). In this motion they asserted as grounds for

setting aside the default that: (1) Coulter and his counsel had failed to follow the Rules of Civil Procedure by failing to serve the default papers upon the Toscanos' counsel, despite the fact that the Toscanos were not in default for failure to appear; (2) Coulter failed to follow the Rules of Civil Procedure by failing to apply for a default judgment after entry of the default certificate due to the fact that the Cross-Claim was not for a sum certain; (3) The Court failed to hold a hearing to determine the amount of the default judgment, rendering the judgment invalid; and (4) the default judgment was invalid because it failed to state a claim against the Toscanos. Rec. 640-656.

28. On August 1, 2008, the Trial Court entered an order denying the original motion to set aside default. Rec. 670-672.

29. No hearing was held on the Renewed Motion. However, in a minute entry dated September 24, 2008, the Trial Court held “[G]iven that the amount sought by Mr. Coulter was not for a sum certain, in accordance with Rule 55(b)(2) of the Utah Rules of Civil Procedure, the Court finds a hearing on the issue of damages is necessary.” Rec. 746.

30. Because this ruling carried with it the conclusion that the default judgment was not valid, the Toscanos filed a motion to set aside the default certificate based upon the good cause standard of Utah Rule of Civil Procedure 55(c). The grounds asserted in that motion were that (1) the Cross Claim failed to state a claim; and (2) the default was

the result of mistakes by the Toscanos' former counsel and failures to follow the Rules of Civil Procedure by Coulter's counsel. Rec. 750-761.

31. On November 13, 2008, the Trial Court heard the Motion to Set Aside the Default Certificate. Rec. 836, November 13, 2004 Hearing Trans.

32. In an Order dated December 8, 2008, the Trial Court ruled that, although it had failed to hold a hearing to determine damages prior to entry of the Default Judgment in its September 23, 2008 Minute Entry, it had not intended to set aside the Default Judgment as to liability but had only intended to recognize that a hearing was necessary to determine damages. Therefore, it directed the clerk and counsel to determine a hearing date. Rec. 838-839, ¶ 2 & 5.

33. The Toscanos subsequently submitted a motion for reconsideration, requesting that the Trial Court reconsider its determination that, although it had not held a hearing on damages, the default judgment remained valid and could not be set aside. Rec. 828-835.

34. On April 27, 2009 the Trial Court heard the motion for reconsideration and ruled that though the Toscanos had appeared in the case by answering the Complaint, "they have not appeared in the cross-claim," and were "not entitled to be served." Rec. 921. April 27, 2009 Hearing Transcript, Rec. 921, pp. 34-35. On this basis, the Trial Court found no error in Coulter's failure to mail the default papers to the Toscanos' counsel. Id.

35. The Court held a hearing on June 16, 2009 to determine the amount of damages for the default judgment. See Rec. 1033, June 16, 2009 Hearing Trans.

36. At that hearing the Toscanos submitted a memorandum arguing that, due to the deficiencies in the Cross-Claim and in light of the related underlying facts, the Court should set damages at zero dollars. Rec. 978-985. The Toscanos requested, in light of the deficiencies in the Cross-Claim and the evidence in the record indicating that the Toscanos cannot be held liable for the debts that were alleged, that the Trial Court expand the scope of the July 9, 2009 hearing on damages, and consider whether the Toscanos could be held liable for the debts of Auto One at issue. *Id.*; see also June 19, 2009 Hearing Trans., Rec. 1033, pp. 124-128.

37. During the hearing on June 16, 2009, the Toscanos presented evidence to demonstrate that:

a. Nathan Coulter (“Coulter”) loaned the money that is the subject of his cross-claim to Pedro Boix and that Pedro Boix guaranteed Coulter that this money would be repaid (Rec. 927 and Rec. 1033¹⁰ pp. 41-44);

b. At the time of this loan, Michael Toscano had resigned as a member of Auto-One (the company to which Coulter alleges he loaned the money) (pp. 55-56);

¹⁰ Rec. 1033 is the June 19, 2009 hearing transcript.

c. Telisa Toscano's only association with Auto One was being married to Michael Toscano, and Coulter had never met Telisa Toscano,¹¹ (Rec. 1035, pp. 50 and 100);

d. Coulter knew (or, in light of the evidence, should have known), when making the loan to Auto-One, that the Toscanos were not members of that company at that time; therefore (See Rec. 1033, pp. 38-51 and 61).

38. During the hearing on June 16, 2009, the Trial Court acknowledged that it was difficult to determine the causes of action being pursued, stating "One should not have to guess, I suppose, what causes of action are actually alleged in the Complaint, quite frankly." June 19, 2009 Hearing Trans., Rec. 1033, p. 23. The Trial Court then noted that "there seems to be no disagreement, however, that the cross-claim alleges breach of contract," and that "[the Court] will need to make a decision as to what are the causes of action alleged in the cross claim." Id.

39. Nonetheless, at the conclusion of that hearing, the Court ruled that liability had been conclusively established by the default and entered damages in the amount of \$188,598.62. Rec. 973, ¶¶ 1-3.

SUMMARY OF ARGUMENT

There are four flaws inherent in the default judgment at issue. Each provides a separate ground for reversal of the Trial Court's decision not to set aside the default

¹¹ The only evidence offered by Coulter of Telisa Toscano's involvement in Auto One was that she was a signer on the Western Surety Bond. Rec. 50. Mr. Coulter also admits he signed a similar bond but denies he was an owner of Auto One. Rec. 51.

judgment at issue. Three of the flaws in the judgment (numbered (1), (2), and (4), below) relate to the procedure followed by Coulter and the Trial Court. The fourth flaw (number (3), below) is simply that the default is void because it is based upon a cross-claim that fails to state a claim against the Toscanos. The four grounds for setting aside the default judgment are:

(1) Coulter failed to follow the Utah Rules of Civil Procedure in seeking the default certificate and the default judgment by failing to serve the default papers on the Toscanos' counsel when Coulter first sought the default by filing those documents with the Trial Court. This failure renders the default invalid. The Trial Court incorrectly ruled that Coulter was not required to serve the default papers on the Toscanos because, though the Toscanos had answered the complaint and appeared in the case, they had not appeared for purposes of the Cross-Claim. This holding is reversible error.

(2) The default judgment was invalid because Coulter and the Trial Court failed to follow the two-step process for entry of default judgment set forth in Utah R. Civ. P. 55(b)(2). When the Trial Court recognized that it should have held a hearing regarding the amount of damages prior to entry of the judgment, it should have also recognized that there was no valid judgment in place until such a hearing was held, and thus should have considered whether "good cause" exists to set aside the default

certificate under Utah R. Civ. P. 55(c). The Court's failure to consider the "good cause" standard for setting aside the default certificate was reversible error.¹²

(3) The default is void because it is based upon a cross-claim that failed to state a claim against the Toscanos. The Trial Court committed reversible error by finding that the Cross-Claim stated a claim for breach of contract against the Toscanos.

(4) In light of the deficiencies in the Cross-Claim o, including the fact that it does not state a claim, the Trial Court should have, at a minimum, considered additional facts pursuant to Utah R. Civ. P. 55(b)(2) prior to entering a default judgment. Those facts, as demonstrated by the facts shown at the July 19, 2009 hearing, many of which were in evidence prior ton the hearing, demonstrated that any doubt regarding the Cross-Claim should have been resolved against Coulter and in favor of setting aside the judgment.

ARGUMENT

I. THE DEFAULT JUDGMENT SHOULD BE SET ASIDE BECAUSE COULTER AND THE TRIAL COURT FAILED TO FOLLOW THE RULES OF CIVIL PROCEDURE IN ENTERING THE DEFAULT CERTIFICATE AND DEFAULT JUDGMENT.

A. Coulter Failed To Follow The Utah Rules Of Civil Procedure In Seeking The Default Certificate And The Default Judgment By Failing To Serve The Default Papers On The Toscanos' Counsel.

¹² The facts of this case meet the requirements of the "good cause" standard found in Rule 55(c). This Court could remand the case for consideration of whether the default certificate should be set aside under the good cause standard. However, because that standard is low, and because the facts, including Coulter's failure to properly serve the default papers as stated in section I C, below, clearly demonstrate that good cause exists to set aside the default certificate, this Court can and should simply set aside both the default judgment and the default certificate.

Coulter's failure to give notice to the Toscanos' counsel prior to entry of the judgment as required by Utah R. Civ. P. 5(a)(2) and (b)(1) deprived the Toscanos of notice of the impending default, denying them due process and rendering the default certificate and judgment void. If this flaw is ignored, then the Rules of Civil Procedure become mere suggestions. Parties seeking a default would be encouraged to behave surreptitiously in seeking defaults and to provide any required notice in the manner least likely to apprise the other party that a default was being sought.

1. The Trial Court erred by ruling that a party who has appeared by answering the complaint has not appeared for purposes related to a cross-claim in the same action.

The Trial Court incorrectly ruled that, though the Toscanos had appeared in the case by answering the Complaint, "they have not appeared in the cross-claim." An appearance is an indication 'in some way [of] an intent to pursue a defense;' it is 'a relatively low threshold.' *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 142 (5th Cir. La. 1996)(citation omitted). When deciding which parties have appeared and are thus entitled to notice, our Supreme Court distinguishes between a party who has "elected to participate at some level in an action" (emphasis added) and "a party who has declined to participate in any regard by simply ignoring previous notice given in the form of the complaint." *Lund v. Brown*, 11 P.3d 277, 282 (Utah 2000); *see also Plaza del Lago Townhomes Ass'n v. Highwood Builders, LLC*, 148 P.3d 367, 370 (Colo. Ct. App. 2006)(finding that one appears when one engages in conduct "sufficient to indicate to the trial court that the defendant had an interest in participating in the litigation").

In *Lund v. Brown*, the Supreme Court ruled that a party who has filed a complaint, but not answered a counterclaim, has appeared in the action and thus is entitled to service. *Id.* at 281-283. When service is not properly made upon a party who has appeared in accordance with Utah R. Civ. P. 5, the default should be set aside. *Id.* There is no basis for distinguishing between failure to answer a cross claim and failure to answer a counter claim. If a party has participated in the litigation, it has appeared.

The position of Coulter and the Trial Court that appearance in the action by answering the complaint does not constitute appearance for the purposes of a cross-claim is illogical. Utah R. Civ. P. 5(a)(1) provides that, with limited exceptions, every paper filed in the lawsuit “shall be served upon each of the parties.” However, according to Coulter and the Trial Court, default papers related to a cross-claim need not be served upon a party who has answered the complaint but failed to answer a cross-claim. This position creates the absurd result that, where a defendant/cross-defendant has answered a complaint but failed to answer a cross-claim, that party is entitled to service of every paper, except for papers through which the cross-claimant seeks a default against the cross-defendant. Though parties who are not directly involved in the cross-claim (i.e. the plaintiff) would be entitled to notice that the cross-claimant seeks a default against the cross-defendant, the cross-defendant himself would be denied such notice.

Moreover, the risk that a cross-defendant will not be aware of a cross-claim is greater than the risk that a defendant will not be aware of a complaint. A defendant is entitled to service of a complaint and summons under Utah R. Civ. P. 4. This notice is crucial to our concept of due process, as it is highly likely to insure notice. However, a

cross-claim may be served upon counsel under Rule 5(b)(1). In multi-party litigation, counsel often receives numerous papers relating only to other parties. Particularly where, as here, the heading of the Cross-Claim does not mention the Cross-Defendant by name, there is a risk that counsel will overlook the Cross-Claim (as happened here). If counsel is entitled to no other notice of the cross-claim or an impending default prior to its entry, then a party may have liability established against it prior to ever having received actual notice of the cross-claim. In short, the rule and procedure advocated by Coulter and the Trial Court are grossly unfair and greatly increase the risk that a party who has, in good faith, undertaken involvement with a lawsuit will learn, after the fact, that due to a simple oversight by counsel, a default has been entered against it. The Court should decline adopt the absurd and unfair position advocated by Coulter and the Trial Court.

2. Coulter failed to follow Utah Rule of Civil Procedure 5 which requires that all papers be served upon counsel for a party who has appeared in the case through counsel.

Utah Rule of Civil Procedure 5(a)(1) requires that every motion, demand and similar paper must be served upon each party. Rule 5(a)(2)(B) requires that all pleadings and papers be served upon a party in default for any reason other than failure to appear. Rule 5(b)(1) requires that, if a party is represented by an attorney, service must be made upon the attorney.

Coulter did not serve his papers requesting default upon the Toscanos' counsel of record, D. Bruce Oliver. When Coulter, either by mistake or by design, sent the documents to a residential address for the Toscanos rather than to their counsel, he bore the risk that his notice would be ineffective or untimely.

The rule requiring service upon counsel for a party who has appeared exists for good reasons. A client may relocate without notifying the court of his new address. A client may not realize the significance of a proposed default; he may not know the best strategies for avoiding its entry; he may assume his attorney has received the documents and is prepared to handle the situation; or he may not realize that the document has actually been filed and requires action.

Coulter's error resulted in the Toscanos receiving the documents in late March or early April of 2008, at least three months after the documents were filed with the Trial Court and approximately one to two months after entry of default judgment. Therefore, the Toscanos were, in fact, deprived of any notice of an impending default prior to entry of a default judgment and never had the opportunity to cure the failure to answer the Cross-Claim.

This failure was compounded by Coulter's counsel failure to follow the Utah Standards of Professionalism and Civility. "Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected." Utah Standards of Professionalism and Civility, Rule 16. Had Coulter's counsel observed either the Rules of Civil Procedure or the Civility Standard, the Toscanos' counsel would have had notice of a pending default prior to its entry and could have sought to avert it by filing an answer and opposing entry of the default.

3. Coulter's failure to follow Utah R. Civ. P. 5 renders the default judgment void and requires that it be set aside.

Utah Rule of Civil Procedure 60(b)(4) requires a court to set aside a judgment that is void. Coulter's failure to give notice to the Toscanos' counsel creates a significant flaw in the default, rendering it void. Failure to follow the rules of civil procedure regarding notice in seeking a default renders the default void. *Richins v. Delbert Chipman & Sons Co.*, 817 P.2d 382, 385 (Utah Ct. App. 1991)(noting that a default judgment is void "if the court acted in a manner inconsistent with due process"); *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 143 (5th Cir. La. 1996)(failure to serve default papers on party in default is a violation of due process rendering default judgment void); *Deutz-Allis Credit Corp. v. Smith*, 785 P.2d 682, 684 (Idaho Ct. App. 1990)(finding that a default judgment is voidable if entered without giving the opposing party requisite notice of an application and hearing for default judgment). As mentioned above, in *Lund v. Brown*, Utah's Supreme Court recognized that failure to serve default papers related to a counter-claim upon a party who filed a complaint but failed to answer the counter claim requires setting aside a default judgment. *Id.* at 281-283.

The requirement of service and notice are founded on concerns of due process. Under circumstances similar to those in this case, the Fifth Circuit determined the lower court erred in refusing to vacate a judgment granted against a party when service of notice of a motion for summary judgment did not comply with the requirements found in

Rule 5. *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 143 (5th Cir. 1996).¹³ A party had appeared in the case, but had a default certificate entered against him for failing to answer the complaint. *Id.* at 140. His co-defendant sought summary judgment on a cross-claim made against him, but mailed the summary judgment papers to an invalid address. *Id.* at 140. The trial court entered summary judgment when the party in default failed to respond.

The Court of Appeals for the Fifth Circuit found that because the defaulting party had made an appearance in the case, “he was entitled under Rule 5(a) to service of all papers in the suit, including the motion for summary judgment.” *Id.* at 142. Where service had been mailed to an invalid address, the mailing did not satisfy the notice requirements of Rule 5. *Id.* The judgment was void because the defaulting party lacked notice of the impending judgment and was denied due process. *Id.* at 143.

Accordingly, the court ruled that the lower court “erred in refusing the [sic] vacate the judgment under Rule 60(b)(4).” *Id.* The judgment was set aside, though the default certificate, which apparently had been properly served by the original plaintiff, remained in place. In the instant case, there is no question that Coulter failed to properly serve both the request for a default certificate and the request for a default judgment. Thus both should be set aside.

¹³ Utah’s Supreme Court has relied on *New York Life* in prior decisions, noting that “The federal interpretation [of Rule 5] is persuasive in light of the fact that our rule 5 is “substantially similar” to federal rule 5.” *Lund v. Brown*, 11 P.3d 277, 283 (Utah 2000).

B. The Default Judgment Was Invalid Because Coulter and the Trial Court Failed To Follow The Two-Step Process For Entry Of Default Judgment Set Forth In Utah R. Civ. P. 55(b)(2).

“A default judgment is a two-step process. . . . If a party fails to plead or otherwise defend, the clerk of the court makes an entry of default. After the clerk makes the entry of default, the nondefaulting party must move to have default judgment entered. [In cases in which the judgment is not for a sum certain] the nondefaulting party must apply to the court for an entry of default judgment”. *Pennington v. Allstate Ins. Co.*, 973 P.2d 932, 940 (Utah 1998). The Utah Supreme Court has ruled that a judgment entered without following this two step process must be reversed. *Russell v. Martell*, 681 P.2d 1193, 1196 (Utah 1984); *see also Deutz-Allis Credit Corp. v. Smith*, 785 P.2d 682, 684 (Idaho Ct. App. 1990)(finding that a default judgment is voidable if entered without giving the opposing party requisite notice of an application and hearing for default judgment).

It is undisputed that, prior to entering the default judgment, the Trial Court did not follow the two-step process for entering a default judgment. It simply entered a default judgment for \$73,880.00 based upon Coulter’s request that it do so, without reviewing the Cross-Claim to determine whether it stated a claim or whether it was for a sum certain. When the Toscanos pointed out that the Cross-Claim was not for a sum certain, the Trial Court recognized that it had erred, but failed to cure its error. Instead, it ruled that the default judgment was still in place, and immune from challenge, and subsequently held a hearing to determine the amount of damages.

Had the Trial Court followed the Rules of Civil Procedure, it would have been required to serve notice of a default judgment hearing upon the Toscanos prior to a judgment being entered against them. Utah R. Civ. P. 5(a)(2)(C).¹⁴ This notice would have given the Toscanos an opportunity to seek to have the default certificate set aside under Utah R. Civ. P. 55(c) prior to entry of a judgment. Even had it been briefly delayed, it would have provided the Toscanos with notice of the default several weeks earlier than the first notice they actually received. Given that the Toscanos missed the deadline for challenging the default under the “mistake of excusable neglect” standard of Utah R. Civ. P. 60(b)(1) by only six days, one must assume that, had they received notice of the default four to six weeks earlier, their motion to set aside the default would have been filed at least six days earlier than it was, and would have been within the time period for setting aside a default judgment under the “mistake or excusable neglect” standard of Rule 60(b)(1).¹⁵

C. The Toscanos Were Prejudiced By The Failure Of Coulter and the Trial Court To Follow The Rules Of Civil Procedure.

Had the Toscanos been given notice of an impending default, they could have cured the default prior to entry of the default certificate. Had Coulter served the default

¹⁴ Rule 5(a)(2)(C) applies to all parties, regardless of whether or not they have appeared in the case. Therefore, the error under this rule does not hinge on whether the Trial Court was incorrect when it ruled that a party who has answered a complaint has not appeared for purposes of a cross-claim.

¹⁵ The Idaho Supreme Court has ruled that a trial court did not abuse its discretion in ignoring a similar (though shorter) deadline for vacating judgments found in Idaho’s Rule 60(b) where the party in default was not given required notices prior to the entry of the default. *Radioear Corp. v. Crouse*, 547 P.2d 546, 549 (Idaho 1976).

papers on the Toscanos' counsel when he filed them with the Trial Court on January 19, 2008, the Toscanos would have had until February 6, 2008 (the date the Trial Court entered the default and default judgment) to file an answer and avoid entry of the default.¹⁶ Even if the Toscanos had responded later, they would have been able to challenge the default certificate under the "good cause" standard of Rule 55(c) prior to the hearing to determine damages. At the very least, they would have had significantly more time than they had to seek to set aside the default judgment under the "mistake or excusable neglect" standard of Rule 60(b)(1).

The Toscanos could meet both the Rule 55(c) standard and the Rule 60(b)(1) standard. The "good cause" standard encompasses those facts that would justify relief under the "excusable neglect" standard of Utah R. Civ. P. 60(b)(1); however, "good cause" may also be met by facts that do not justify relief under the "excusable neglect" standard. See *Dennis Garberg & Assocs. v. Pack-Tech Int'l Corp.*, 115 F.3d 767, 775 (10th Cir. 1997) ("the good cause required by Fed. R. Civ. P. 55(c) for setting aside entry of default poses a lesser standard for the defaulting party than the excusable neglect which must be shown for relief from judgment under Fed. R. Civ. P. 60(b)"); *Sonus Corp. v. Matsushita Electric Industrial Co.*, 61 F.R.D. 644, 647 (D. Mass. 1974) ("The

¹⁶ As stated in section I.A., above, the default and default certificate are actually void due to Coulter's failure to provide notice, so the prejudice is not necessarily relevant. The Toscanos identify the prejudice here because it may be relevant if the Court determines that the Trial Court's error in entering a judgment before holding a hearing can be corrected by remanding to the Trial Court for consideration under the "good cause" standard of Rule 55(c).

standard for setting aside a final order or a judgment by default is more stringent than that for setting aside an entry of default”).

“[C]ourts generally tend to favor granting relief from default judgments where there is any reasonable excuse, unless it will result in substantial prejudice or injustice to the adverse party.” *Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, Inc.*, 544 P.2d 876, 879 (Utah 1975). “It is quite uniformly regarded as an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to appear, and timely application is made to set it aside.” *Lund*, 11 P.3d at 280; *Helgesen v. Inyangumia*, 636 P.2d 1079, 1081 (Utah 1981). Court should incline towards granting relief from a default judgment in order to give the parties a chance to have their case heard. *Helgesen*, 636 P.2d at 1081; *Heathman v. Fabian & Clendenin*, 377 P.2d 189, 190 (Utah 1962) (“The courts . . . favor, where possible, a full and complete opportunity for a hearing on the merits of every case”).

In this matter, the Cross-Claim was contained on the final two pages of an eleven page document, with no notice in the heading that it was directed against the Toscanos. As a result, the Toscanos’ counsel did not see it. This case involved over twelve parties, resulting in a large number of documents being filed. In light of all of the circumstances, it is understandable that the Toscanos’ counsel overlooked these two pages. Default “was never intended to be used as a means of disciplining attorneys who may be derelict in the performance of their duties.” *McKean v. Mountain View Memorial Estates*, 411 P.2d 129, 131 (Utah 1966). More importantly, when a party has appeared, he or she should not be defaulted without being given some notice of his error and a chance to cure it. *See*

McKean, 411 P.2d at 130 (noting that, where a party has appeared and shown an interest in defending, courts should be “somewhat indulgent” in setting aside defaults and allowing a case to be decided on the merits). Here, the Toscanos’ and their counsel were given no notice that a default might be entered until four to six weeks after entry of the default judgment. The result is contrary to the Rules of Civil Procedure and is discouraged by the Rules of Civility.

Lastly, under the Rule 60(b) standard, in order to set aside a default judgment the moving party must establish that it has a meritorious defense to the claims on which the default was based. *Lund*, 11 P.3d at 283. However, a party need not actually prove its proposed defenses in order to show that it has a meritorious defense. *Id.*, citing *Erickson v. Schenkers Int’l Forwarders, Inc.*, 882 P.2d 1147, 1148 (Utah 1994). As set forth in section II. B., below, there is significant evidence in the record that Coulter gave money to Pedro Boix, and not to the Toscanos, and that he was not under the impression that the Toscanos would be responsible for repaying any of the money given to Boix. In fact, if Coulter did in fact make loans to Auto One in June of 2004, the principals and owners of Auto One at that time were Pedro Boix and Coulter’s wife, Sandra. Thus, not only do the Toscanos have a meritorious defense, they are very likely to prevail in this action.

II. THE DEFAULT JUDGMENT MUST BE SET ASIDE BECAUSE IT IS BASED UPON A CROSS CLAIM THAT FAILED TO STATE A CLAIM AGAINST THE TOSCANOS.

A. The Cross Claim Fails To State A Claim Against The Toscanos.

“A default judgment is valid only if the well-pled facts show that the plaintiff is entitled to judgment as a matter of law.” *Skanchy v. Calcados Ortope SA*, 952 P.2d 1071,

1076 (Utah 1998); *Pennington v. Allstate Ins. Co.*, 973 P.2d 932, 940 (Utah 1998) *Stevens v. Collard*, 837 P.2d 593, 595 (Utah Ct. App. 1992)(“A trial court asked to render a judgment by default must first conclude that the uncontroverted allegations of an applicant's petition are, on their face, legally sufficient to establish a valid claim against the defaulting party”). Because Coulter’s Cross-Claim fails to state a claim against the Toscanos, any default judgment based upon it would be invalid. Therefore, the entire default must be set aside.

In his Cross-Claim, Coulter does not state causes of action with any clarity, nor does he state sufficient facts to support any causes of action. In paragraph 6 of the Cross-Claim, he states that he previously made a demand on Auto One for “breach of contract, unjust enrichment, and fraud.” However, in paragraph 7 he states that he has suffered losses resulting from breach of contract, conversion and fraud. He does not otherwise address the claims for fraud or conversion. For example, the Cross-Claim contains no allegation of “a representation . . . concerning a presently existing material fact which the representer . . . either . . . knew to be false, or . . . made recklessly” as required to plead a claim of fraud, nor does he identify any specific property that has been converted. *See Secor v. Knight*, 716 P.2d 790, 794 (Utah 1986)(setting forth elements of fraud claim).

The Trial Court appeared to struggle to find a claim for relief stated in Cross-Claim. In the end, it arrived at the conclusion that “the cross claim alleges breach of contract.” However, the Trial Court failed to recognize that, even if the Cross-Claim alleged sufficient facts to state a claim for breach of contract against Auto One, it does not allege sufficient facts to state a claim against the Toscanos.

As the apparent basis for the contract claim, the Cross-Claim states that “Mr. Coulter engaged in a commercial transaction whereby he loaned certain sums of money to *Auto One* [emphasis added].” Though Michael and Telisa Toscano are referred to as “the Auto One Principals”¹⁷ in the opening paragraph of the Cross-Claim, Coulter has not pled that they actually were principals of Auto One at the time he made his loan, nor has he pled that he loaned any money to or had a contract with “the Auto One Principals”. Coulter has also failed to allege whether Auto One is a corporation, LLC, partnership or other form of business entity. Thus, even if the allegations of the Cross-Claim were deemed admitted, one still could not know whether the Toscanos would be personally liable for any obligation of Auto One.

Because Coulter does not allege facts that, if taken as true, would entitle him to a judgment against the Toscanos, the Cross-Claim fails to state a claim against the Toscanos and the default judgment based upon it is invalid. *Skanchy*, 952 P.2d at 1076.

B. Even If The Trial Court Were Inclined To Construe The Cross Claim To State A Claim Against The Toscanos, It Should Have Considered Other Facts Necessary To Insure An Appropriate Judgment.

To construe the Cross-Claim as stating a claim against the Toscanos requires the assumed existence of facts not pled in the Cross-Claim, such as that the Toscanos were

¹⁷ Using a term such as “principals” as shorthand for certain parties cannot be a substitute for well-pled allegations of facts demonstrating that they were principals. Otherwise, every plaintiff, in order to insure that he could overcome a motion to dismiss for failure to state a claim would simply define the defendants as “the Liable Parties” or some similar term in the opening of his complaint in order to overcome any deficiencies in the substantive allegations.

somehow associated with Auto One at the time Coulter loaned money to it. However, in a pleading filed with the Trial Court before he sought to default the Toscanos, Coulter had submitted a copy of the contract in question, which reflected that Pedro Boix, not to the Toscanos, would repay the loans. Thus, at the time the Trial Court entered the default judgment in February of 2008, it had facts in front of it that would cast serious doubts on the legitimacy of Coulter's claims. The Toscanos requested, in light of the deficiencies in the Cross-Claim and the evidence in the record indicating that the Toscanos cannot be held liable for the debts that were alleged, that the Trial Court expand the scope of the July 9, 2009 hearing on damages, and consider whether the Toscanos could be held liable for the debts of Auto-One at issue.

Numerous cases, as well as the plain language of Utah R. Civ. P. 55, permit the Court to "establish the truth of any averment" or "to make an investigation of any other matter" in order to "reach an appropriate and fair resolution in granting a default judgment." Utah R. Civ. P. 55(b)(2); *Express Recovery Servs. v. Shewell*, 171 P.3d 451, 453 (Utah Ct. App. 2007)(Holding that the trial court was correct in determining during a default judgment hearing under Rule 55(b)(2) that it could not enforce a collection commission provision because the provision amounted to a contractual penalty).

McGarvin-Moberly Constr. Co. v. Welden, 897 P.2d 1310, 1314–17 (Wyo. 1995) (holding that in a hearing under Rule 55(b)(2) of the Wyoming Rules of Civil Procedure, which corresponds with the Utah rule, a trial court may permit the defaulting party to litigate proximate cause and comparative negligence); *Burge v. Mid-Continent Cas. Co.*,

933 P.2d 210 N.M. 1996 (holding a defaulting party may contest the percentage of his negligence) (New Mexico's rule for default judgment is identical to U.R.C.P. 55).

During the hearing to determine damages, the Toscanos introduced evidence that Coulter loaned money only to Auto-One, that Telisa Toscano had never been affiliated with Auto-One, that Michael Toscano had resigned his position with Auto-One prior to Coulter making his loan, and that Coulter's wife (emphasis added) was Pedro Boix's partner in Auto-One at the time of the loans in question.¹⁸ The Trial Court heard this evidence, but ultimately declined to make any determination necessary to insure that the judgment it was entering had some basis in fact. Though the Toscanos believe that the defects in the Cross-Claim render the default void, at a bare minimum, they required that the Trial Court make some investigation into the facts before entering the default judgment. The Trial Court's failure to do so was clear error and an abuse of any discretion it might possess.

CONCLUSION

The Toscanos appeared in this case through counsel, D. Bruce Oliver. As a result of submitting themselves to this action, they were entitled to at least two notices before a default judgment could be entered against them – notice that Coulter had filed default papers and notice that a hearing would be held prior to entry of a default judgment. They received neither, and the contention their participation in the action is not an appearance

¹⁸ The Toscanos have requested a transcript of this hearing for the record. To date, no transcript has been received.

for purposes of the Cross-Claim borders on absurd. Had they received either of these required notices, they would have had multiple opportunities to avoid the default.

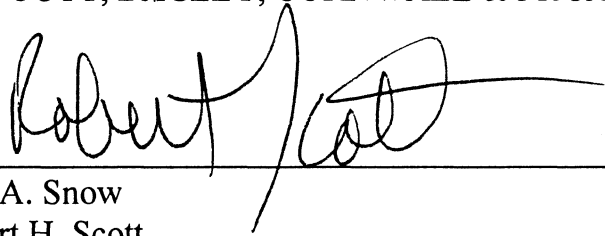
Instead, the Toscanos not even learn that default was being sought until one or two months after entry of a judgment against them. As a result, they missed the opportunities to avoid the default, or to have it set aside under the lenient “good cause” standard of Rule 55(c). When the Toscanos finally received notice that Coulter was seeking a default, they had to determine whether a default was actually being sought, and to what claims it related. They had little time to make this determination and, as a result, they barely missed, by six days, the opportunity to oppose it under the slightly more difficult standard of Utah R. Civ. P. 60(b)(1).

The Trial Court refused to correct its errors and Coulter’s errors which led to the default, instead imposing the burden of those errors on the Toscanos. Moreover, when confronted with a deficient Cross-Claim and facts highlighting the deficiencies, the Trial Court once again forgave Coulter’s errors.

The result of all of the foregoing is a process and judgment that are astoundingly unfair to the Toscanos. The Toscanos request that the default be set aside and the case be remanded so that they may defend this case on the merits.

Respectfully submitted December 4, 2009.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

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

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CERTIFICATE OF SERVICE

I hereby certify that I caused two (2) true and correct copies of the within and foregoing **BRIEF OF APPELLANTS MICHAEL TOSCANO AND TELISA TOSCANO** to be mailed, postage prepaid, this 4th day of December, 2009, to the following counsel of record:

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