

2009

Western Surety Company v. Idaho Auto Auction;  
Brighton Bank, Greater Nevada Auto Auction,  
Utah Auto Auction, T.S. Rideout, Inc. Cottonwood  
Motors, Nathan Coulter, Sandra Coulter, Pedro  
Boix, Silvia Boix, Michael Toscano, Telisa Toscano,  
and Does 1-100 : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WESTERN SURETY COMPANY, )

Plaintiff, )

vs. )

APPELLEE'S BRIEF

IDAHO AUTO AUCTION; BRIGHTON )

BANK, GREATER NEVADA AUTO )

AUCTION, UTAH AUTO AUCTION, )

T.S. RIDEOUT, INC. COTTONWOOD )

MOTORS, NATHAN COULTER, )

SANDRA COULTER, PEDRO BOIX, )

SILVIA BOIX, MICHAEL TOSCANO, )

TELISA TOSCANO, and DOES 1-100 )

Defendants. )

NATHAN COULTER, )

Cross-claimant/Appellee. )

vs. )

Appellate No. 20090618-CA

MICHAEL TOSCANO and TELISA )

Trial Ct. No. 050906722

TOSCANO, )

Cross-claim Defendants )

and Appellants )

THIS IS AN APPEAL FROM THE THIRD DISTRICT COURT OF THE STATE OF UTAH  
SALT LAKE COUNTY, STATE OF UTAH

FILED

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## **STATEMENT OF JURISDICTION**

The Utah Supreme Court has jurisdiction over this appeal under § 78A-3-102(3)(k) U.C.A. and has transferred this matter to the Utah Court of Appeals pursuant to § 78A-3-102(4) U.C.A. The Utah Court of Appeals has jurisdiction over this appeal pursuant to § 78A-4-103(j) U.C.A.

## **STATEMENT OF ISSUES FOR REVIEW and STANDARD OF REVIEW**

### **1. Did the trial court abuse its discretion in not setting aside the default ?**

Standard of Review: The denial of a motion to set aside a default judgment is reviewed under an abuse of discretion standard. *Swallow v. Kennard*, 183 P.3d 1052, ¶ 19 (Ut.App. 2008). The appeal of a Rule 60(b) denial addresses only the propriety of the denial and does not reach the merits of the underlying judgment. *Id.* at ¶ 19.

### **2. After defaulting on the Crossclaim for failure to answer, are the Toscanos entitled to receive notice of default on the Crossclaim ?**

Standard of Review: The interpretation of a rule of procedure is a question of law reviewed for correctness. *Brown v. Glover*, 16 P.3d 540, ¶ 15 (Utah 2000). Failure to give notice does not invalidate a default judgment. *Lincoln Benefit Life Ins. Co. v. D.T. Southern Prop.*, 838 P.2d 672, 675 (Ut.App. 1992).

### **3. If the Toscanos are entitled to notice of default on the Crossclaim did they receive sufficient notice of the default through personal service?**

Standard of Review: The interpretation of a rule of procedure is a question of law reviewed for correctness. *Brown v. Glover*, 16 P.3d 540, ¶ 15 (Utah 2000).

**4. Did the trial court abuse its discretion in holding a hearing only on the amount of damages under Rule 55(b)(2) and not liability ?**

Standard of Review: The trial court has broad discretion to proceed under Rule 55(b)(2) as it deems necessary to enter a judgment or to carry it into effect. *Amica Mutual Ins. Co. v. Schettler*, 768 P.2d 950 (Ut.App. 1989). Therefore, the trial court may consider only the amount of damages at a Rule 55(b)(2) hearing without hearing evidence on the issue of liability. *Id.*

**5. Does the Cross-claim state a legal claim sufficient to support a default judgment ?**

Standard of Review: Whether a pleading states a legal claim for relief is a question of law reviewed for correctness. Under the liberal pleading standard of fair notice, a party is only required to submit a short and plain statement . . . showing that the pleader is entitled to relief and a demand for relief. A dismissal for failure to state a claim will be affirmed only if it appears the pleader cannot prove any set of facts in support of its claim. *MBNA America Bank, N.A. v. Goodman*, 140 P.3d 589, ¶s 4-6 (Ut.App. 2006).

### **STATEMENT OF THE CASE**

Nature of the Case: This case involves a default entered against the Defendants Michael and Telisa Toscano because of their admitted failure to answer a Cross-claim filed against them by the Defendant and Cross-claimant, Nathan Coulter.

After a Default Certificate was entered against the Toscanos for failing to file an answer, a Default Judgment was also entered for \$73,880.00, the amount alleged



in the Cross-claim for two returned checks, plus costs and fees. The Toscanos filed a motion to set aside the default under the residuary clause of Rule 60(b)(6) based on their counsel's failure to give them notice of the Crossclaim, which the court denied. The trial court however, did rule that since more than the amount of \$73,880.00 was alleged in the Cross-claim, a hearing should be held under Rule 55(b)(2) to determine the proper amount of damages.

On June 16, 2009 a hearing was held to determine the proper amount of damages under Rule 55(b)(2), and the parties were entitled to present evidence, *e.g.*, introduce exhibits, call witnesses, cross-examine witnesses, and present oral argument, on the issue of damages. The court at the hearing did not revisit the issue of liability; and after the hearing entered judgment against the Toscanos on July 9, 2009, in the amount of \$188,598.62 plus interest.

The Toscanos did not file a motion to set aside this final judgment, but instead filed a notice of appeal, appealing the denial of their renewed motion to set aside the default, and the court's entry of the Judgment for \$188,598.62, on July 9, 2009.

**Course of Proceeding and Disposition in Trial Court:** Coulter filed a Cross-claim against the Toscanos in the case, which was properly served on them through their counsel, Mr. Bruce Oliver. (Rec. 112-123) The Toscanos originally filed a motion to set aside the default under Rule 60(b)(6) claiming that they lacked notice of the Cross-claim because it was not provided to them by their counsel. (Rec. 586-588) The Toscanos

claimed that they never heard anything about the Cross-claim from Mr. Oliver and that they were unable to contact him. (Rec. 592, 586-597).

The court held that service on their attorney was satisfactory as their agent; and furthermore, that such circumstances do not fall under the residuary clause of Rule 60(b)(6). (Rec. 639) It was undisputed that there was no answer filed to the Cross-claim; and therefore, the Default Certificate on the Cross-claim was properly entered by the trial court on February 4, 2008. (Rec. 588-578).

Later, on July 25, 2008, the Toscanos filed a renewed motion to set aside, under Rule 60(b)(6), not Rule 60(b)(4), claiming that the default papers, although personally served on them, were not mailed to their attorney, Mr. Oliver, pursuant to Rule 5 of the Utah Rules of Civil Procedure. The Toscanos also claimed that the court should have held a hearing to determine the amount of damages, since more than a sum certain was sought in the Cross-claim. (Rec. 640-642) There was no hearing on this renewed motion to set aside, but a Minute Entry, dated September 24, 2008, was entered denying the renewed motion to set aside the default, but directing that a hearing be set on the amount of damages under Rule 55(b)(2). (Rec. 746).

After the court's September 24, 2008, Minute Entry, the Toscanos filed another renewed motion to set aside, this time seeking to set aside the Default Certificate for good cause under Rule 55(c). (Rec. 750-752) A hearing on this motion was held on November 13, 2008. The trial court again denied the renewed motion to set aside the

default; and directed the clerk to schedule a hearing to determine the amount of damages under Rule 55(b)(2). (Rec. 837-840).

On June 16, 2009, an evidentiary hearing was held to determine the amount of damages pursuant to Rule 55(b)(2). The parties were present and were able to present evidence, call witnesses, cross-examine witnesses, and make oral argument, on the issue of damages. (See hearing transcript, Rec. 1033) The court did not revisit the issue of liability at the damage hearing. After the evidentiary hearing, based on the evidence presented, the trial court entered Findings of Fact and Conclusions of Law (Rec. 970-974) along with a Judgment in the amount of \$188,598.62, plus interest. (Rec. 975-977).

The Toscanos did not file a motion to set aside this final judgment, but instead filed a Notice of Appeal, appealing the trial court's denial of their renewed motion to set aside the default via minute entry of December 8, 2008, and the Findings of Fact and Conclusions of Law and Judgment, entered on July 9, 2009. (Rec. 1001-1003).

### **STATEMENT OF FACTS**

1. On July 1, 2005, Coulter filed a Cross-claim against the Toscanos.<sup>1</sup> The Toscanos through their attorney, D. Bruce Oliver, were served with Coulter's Crossclaim, but failed to file an answer to the Crossclaim. (Rec. 112-123)

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<sup>1</sup>The pleading clearly states that it contains a Crossclaim in its heading and this was recognized by the court clerk who entered the pleading on the docket as an Answer, Counterclaim and Crossclaim, on July 1, 2005. See Court Docket. (Rec. 112-123).

2. No answer was ever filed to the Crossclaim by the Toscanos and so on February 4, 2008, the trial court properly entered a Default Certificate against the Toscanos on the Crossclaim. (Rec. 577-578).

3. The trial court also entered a Default Judgment against the Toscanos on February 6, 2008, for \$73,880.00, the amount alleged in the Crossclaim for two returned checks, plus costs and fees. (Rec. 583-585).

4. The Toscanos were personally served with a copy of the Default Certificate and a Default Judgment, which was mailed to their last known address in January of 2008. The Toscanos received the default papers by late March of 2008. (Affidavit of Michael Toscano, Rec. 611, ¶ 10).

5. On May 12, 2008, the Toscanos filed their first Motion to Set Aside the Default Judgment, not under Rule 60(b)(1); but under Subsection (6), the residuary clause of Rule 60(b); claiming that they lacked notice of the Crossclaim, because their attorney failed to forward it to them. (Rec. 586-597).

6. On July 23, 2008, a hearing was held and the court denied the Toscanos' Motion to Set Aside Default, finding that Toscanos' attorney, as their agent, was properly served with the Crossclaim under the Rules of Civil Procedure and there was no dispute but that Toscanos' attorney failed to file an answer to the Crossclaim. Such circumstances do not fall under the residuary clause of Rule 60(b)(6). (Minute Entry, dated September 24, 2008, Rec. 639) The Toscanos are not appealing the trial court's denial of their first

Motion to Set Aside Default brought under Rule 60(b)(6). (See Notice of Appeal, Rec. 1001-1003; and Docketing Statement, top of pg. 5).

7. On July 25, 2008, the Toscanos filed a Renewed Motion to Set Aside Default with new arguments, including: Coulter's failure to serve the default papers on their counsel under Rule 5 (although Toscanos personally received notice); the failure of the trial court to hold a hearing to determine the amount of damages; and the failure of the Crossclaim to state a claim for relief. (Rec. 640-656). This was filed under Rule 60(b)(6), not Rule 60(b)(4).<sup>2</sup> (Rec. 640).

8. The Crossclaim filed against the Toscanos alleges that Coulter loaned money to the Toscanos as Auto One Principals, so they could purchase cars to resell to the public, wherein he was to be repaid the principal amount loaned, plus interest, as the cars were sold. Coulter performed under this agreement by loaning money to the Toscanos to purchase the cars. After the cars were sold Coulter was not paid back the money as promised. Two checks were issued for a total of \$73,300.00, but these were rejected for insufficient funds. Coulter has been damaged as a result of Toscanos' breach in the total amount of the money loaned plus interest. (See Rec. 120-122).

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<sup>2</sup>Toscanos' claim that the judgment is void for lack of notice under Rule 60(b)(4) on page 27 of their brief, cannot be raised for the first time on appeal. *438 Main St. v. Easy Heat, Inc.*, 99 P.3d 801, ¶ 51 (Utah 2004). Furthermore, Utah courts have addressed the alleged lack of notice of a default judgment under Rule 60(b)(1). *Lincoln Benefit Life Ins. Co. v. D.T. Southern Prop.*, 838 P.2d 672 (Ut.App. 1992).

9. There was no hearing on the Renewed Motion to Set Aside Default. In a Minute Entry, dated September 24, 2008, the trial court denied Toscanos' Renewed Motion to Set Aside the Default, but held that a hearing should be held on the amount of damages pursuant to Rule 55(b)(2) of the Utah Rules of Civil Procedure. The court directed the clerk to schedule a hearing for this purpose. (See Minute Entry, dated September 24, 2008, Rec. 746).

10. After the court's September 24, 2008, Minute Entry, the Toscanos filed another motion to set aside, this time seeking to set aside the Default Certificate based on the good cause standard of Rule 55(c) of the Utah Rules of Civil Procedure. (See Motion to Set Aside, Rec. 750-761).

11. A hearing was held on this motion on November 13, 2008. The trial court denied the Motion to set aside the Default Certificate and again directed the clerk to schedule a hearing to determine the amount of damages pursuant to Rule 55(b)(2). (See December 8, 2008 Order, Rec. 837-840).

12. On June 16, 2009, an evidentiary hearing was held to determine the amount of damages pursuant to Rule 55(b)(2). The parties were able to present evidence, e.g., introduce exhibits, call witnesses, cross-examine witnesses, and present oral argument to the court, on the issue of damages. (See hearing transcript, Rec. 1033).

13. After the hearing on July 9, 2009, the trial court entered its Findings of Fact and Conclusions of Law from the evidence presented at the hearing; and a Judgment was

entered against the Toscanos in the amount of \$188,598.62 plus interest. (See Findings of Fact and Conclusions of Law, Rec. 970-974; and Judgment, Rec. 975-977).

14. Afterwards the Toscanos did not file a motion to set aside the Findings of Fact and Conclusions of Law, or to set aside the Judgment under Rule 60(b); but instead filed a Notice of Appeal, appealing (1) the Minute Entry signed on September 24, 2008, (2) the Order Denying Toscanos' Motion to Set Aside Default Certificate, via Minute Entry of December 8, 2008, (3) the Findings of Fact<sup>3</sup> and Conclusions of Law entered on July 8, 2009, and (4) the Judgment entered on July 9, 2009. (Rec. 1001-1003).

### **SUMMARY OF ARGUMENT**

First, the Default Certificate was properly entered against the Toscanos in this case because they did not file an answer to the Crossclaim, which was properly filed and served on the Toscanos *via* counsel. This fact is undisputed and is a matter of record. Therefore, regardless as to whether the default papers filed, were properly served after the time to answer had expired; the Default Certificate was properly entered by the trial court on the Crossclaim on February 4, 2008.

Furthermore, since the Toscanos did not appear on the Crossclaim by filing a formal answer with the court; they were not entitled to receive notice of the default on the Crossclaim, pursuant to Rule 5 of the Utah Rules of Civil Procedure. *Arbogast Family*

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<sup>3</sup>The Toscanos in their brief have not marshaled the evidence in support of the facts, nor have they argued or attempted to demonstrate, that the findings are clearly erroneous. *Kealamakia, Inc. v. Kealamakia*, 213 P.3d 13, ¶ 10 (Ut.App. 2009).

*Trust v. River Crossings*, 191 P.3d 39, ¶ 16 (Ut.App. 2008).

Moreover, regardless as to whether the Toscanos were entitled to notice of the default papers under Rule 5, after they failed to appear on the Crossclaim; default papers were served on them personally in accordance with Rule 5(b)(1)(A)(iv). They admit they received the default papers by late March of 2008. (Aff. Micheal Toscano, Rec. 611, ¶ 10). Therefore, they admit they received actual notice of the default in time to file a motion to set aside the default for “mistake, inadvertence, surprise, or excusable neglect” under Rule 60(b)(1), but failed to do so. Filing a motion under Rule 60(b) is the same step they would have had to take, even if a copy of the default papers would have also been sent to their attorney, Mr. Oliver.<sup>4</sup> See *Amica Mutual Ins. Co. v. Schettler*, 768 P.2d 950, 969 (Ut.App. 1989). (Once a default judgment has been entered it can only be set aside in accordance with Rule 60(b) of the Utah Rules of Civil Procedure).

The Toscanos claim, without any rule of procedure or case law in support, that if their counsel had received the default papers, they would have had time to cure their default prior to the entry of the Default Certificate. However, this is not provided for under the Utah Rules of Civil Procedure. In fact, Rule 55(a) directs that the court *shall*

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<sup>4</sup>Actually, notice of the default was more effectively given in this case by sending a copy directly to the clients rather than mailing a copy to their counsel, Mr. Oliver. As the Toscanos testified, they never learned of the Crossclaim from Mr. Oliver, and they had not heard from him, nor had been able to contact him. (Rec. 586-597, 592). The court can allow service directly on a party under Rule 5, by mailing a copy to the party’s last known address. Rule 5(b)(1)(A)(iv).



enter default when a party has failed to answer.

The Toscanos claim that the trial court erred in ruling that they were not entitled to notice of default on the Crossclaim, although they failed to appear or file an answer on the Crossclaim, because they had earlier filed an answer to the complaint. However, there are no cases cited to support this position; and Rule 12(a) of the Utah Rules of Civil Procedure requires that a separate answer be filed to a crossclaim even if an answer or counterclaim may have been filed to a complaint. “A party served with a pleading stating a cross-claim shall serve an answer thereto within twenty days after the service.” Rule 12(a) Utah Rules of Civil Procedure. Therefore, the Toscanos were required to make an appearance in court on the Crossclaim, which they failed to do. In the case of *Arbogast Family Trust v. River Crossings*, 191 P.3d 39 (Ut.App. 2008) the Court made it clear that a formal appearance in court is required for a party to make “an appearance,” as required for notice under Rule 5. *Id.* at ¶ 16.

The facts in *Lund v. Brown*, 11 P.3d 277 (Utah 2000) cited by Toscanos are not the same as in this case and *Lund v. Brown* does not support their argument. *Lund v. Brown* dealt with the plaintiff’s failure to file an answer to a counterclaim. The Court in *Lund v. Brown* found that the complaint was a formal appearance for purposes of the counterclaim, which involved the same issues and same parties as the counterclaim. This is different than making an appearance on a crossclaim which is a separate pleading between two different parties. Furthermore, even if notice was required under Rule 5,

sufficient notice was given by direct service on the Toscanos under Rule 5(b)(1)(A)(iv).<sup>5</sup> Furthermore, failure to give notice under Rule 5 alone is not grounds to invalidate a default judgment, *Lincoln Benefit Life Ins. Co. v. D.T. Southern Prop.*, 838 P.2d 672 (Ut.App. 1992); and direct service on a party, several weeks after judgment, but within time to file a motion under Rule 60(b)(1), has been held as sufficient notice. *Id.* at 675.

Moreover, the Toscanos would not have been able to show that the Default Certificate should be set aside for “good cause” under Rule 55(c). The “good cause” standard is not simply a free pass, or do-over because of an attorney’s mistake or oversight. The moving party is still required to show some excusable neglect in order to establish “good cause” under Rule 55(c). *See Miller v. Brocksmith*, 825 P.2d 690, 693 (Ut.App. 1992). To show excusable neglect a party must provide specific details that demonstrate “due diligence in spite of uncontrollable circumstances.” The claim that Toscanos’ prior counsel was negligent does not constitute “due diligence in spite of uncontrollable circumstances,” sufficient to establish “good cause” under Rule 55(c). *Stevens v. LaVerkin City*, 183 P.3d 1059, ¶s 27 & 28 (Ut.App. 2008).

As far as Toscanos’ claim that the trial court failed to follow Rule 55(b)(2), the trial court did schedule and hold a hearing, after giving sufficient notice, under Rule

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<sup>5</sup>The appellate court may affirm an order appealed from, if it is sustainable on any legal ground or theory apparent on the record, even though that ground or theory was not identified by the lower court as the basis for its ruling. *Busche v. Salt Lake County*, 26 P.3d 862, ¶ 7 (Ut.App. 2001).

55(b) to determine the amount of damages to be entered on the default. The Toscanos received notice of this hearing and participated therein. Therefore, the trial court complied with both Rule 5(a)(2)(C) and Rule 55(b)(2) in having a hearing on damages.

Furthermore, under Rule 55(b)(2) once the default of a party has been entered, the court has broad discretion to conduct such further proceedings as necessary to enter a judgment *or carry it into effect*. *Amica Mutual Ins. Co. v. Schettler*, 768 P.2d 950 (Ut. App. 1989). This includes considering only the issue of damages at the hearing rather than hearing evidence on the issue of liability. *Id.*

Finally, the Crossclaim does state a claim for breach of contract against the Toscanos. It alleges that Coulter loaned money to the Toscanos as principals of Auto One (“Auto One Principals”) so they could purchase motor vehicles to sell to the public.<sup>6</sup> Coulter was to be repaid the principal amount loaned, plus interest, when the cars were sold. Coulter was never paid as agreed. Auto One actually issued two checks to repay Coulter, totaling \$73,300.00, but they never cleared banking channels. Under the liberal notice standard, Coulter provided a short and plain statement showing that he is entitled to relief and made demand for such relief. This is sufficient to state a legal claim for breach of contract. *America Bank, N.A. v. Goodman* 140 P.3d 589, ¶s 4-6 (Ut.App. 2006)

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<sup>6</sup>The extent of their participation as Auto One principals goes beyond the facts as alleged in the pleading and the narrow scope of review of an alleged failure to state a claim. *Ashby v. Ashby* 191 P.3d 35 (Ut.App. 2008).

## ARGUMENT

### **I. THE DEFAULT CERTIFICATE WAS PROPERLY ENTERED ON THE CROSS-CLAIM BECAUSE THERE WAS NO ANSWER FILED TO THE CROSS-CLAIM.**

It is undisputed in this case that after Coulter's Crossclaim was filed and served on the Toscanos; that the Toscanos failed to file an answer or any type of response to the Crossclaim. Therefore, the trial court did not error in entering the Default Certificate against the Toscanos on February 4, 2008. Rule 55(a) of the Utah Rules of Civil Procedure provides that if an answer is not filed to a pleading as required under the rules the court *shall* enter the default of that party. There is no requirement that the court wait any period of time to allow the party the opportunity to cure the default by filing an answer, before entering the default.

Therefore, the Default Certificate was properly entered against the Toscanos for failure to answer the Crossclaim on February 4, 2008, regardless of any alleged failure to serve the default papers or lack of opportunity to cure the default.

### **II. THE TOSCANOS IN DEFAULT ON THE CROSSCLAIM WERE NOT ENTITLED TO NOTICE OF DEFAULT ON THE CROSSCLAIM UNDER RULE 5.**

As stated above there is no dispute to the fact that the Toscanos failed to file a response or answer to the Crossclaim, and thus, were in default on the Crossclaim on February 4, 2008. Therefore, the default judgment entered against them is not "void"

under Rule 60(b)(4).<sup>7</sup>

The fact that no pleading was filed, or formal appearance made in court, on the Crossclaim, means that the Toscanos were not entitled to notice under Rule 5 of the Utah Rules of Civil Procedure. In *Arbogast Family Trust v. River Crossings*, 191 P.3d 39, ¶ 16 (Ut.App. 2008), the Utah Court of Appeals in dealing with this issue, did not simply follow the federal line of cases, but citing two Utah Supreme Court cases, stated as follows:

... , Arbogast argues that unless a party enters a formal appearance through a pleading in the trial court it has not appeared and is not entitled to service under rule 5 of the Utah Rules of Civil Procedure. Because we believe Central Bank & Trust and Lund dictate this result. We agree. *Id.* at ¶ 16.

Therefore, since the Toscanos never filed any formal answer or response in court on the Crossclaim; they never made a “formal appearance” on the Crossclaim entitling them to notice of default on the Crossclaim pursuant to Rule 5. *Id.* at ¶ 16.

The Toscanos claim that although they did not file an answer or a response to the Crossclaim, they were entitled to notice of default on the Crossclaim under Rule 5, because they had filed an answer to the Complaint.

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<sup>7</sup>Toscanos’ claim that the judgment is “void” for lack of notice under Rule 60(b)(4) on page 27 of their brief, cannot be raised for the first time on appeal. *438 Main St. v. Easy Heat, Inc.*, 99 P.3d 801, ¶ 51 (Utah 2004). Furthermore, the courts have addressed the issue of notice under Rule 60(b)(1) *Lincoln Benefit Life Ins. Co. v. D.T. Southern Prop.*, 838 P.2d 672 (Ut.App. 1992). While Utah courts have held a judgment “void” under Rule 60(b)(4) for lack of jurisdiction, no court has held a judgment “void” under Rule 60(b)(4) for lack of notice; but in fact have held the opposite, *i.e.*, that the failure to give notice does not invalidate a default judgment. *Lincoln Benefit, supra*, at 675.

The Toscanos do not cite any case law to support this position, *i.e.* that by answering a complaint a party has made a formal appearance on any crossclaim that may be filed against him by another party. Furthermore, the Utah Rules of Civil Procedure require that a separate answer be filed to a crossclaim other than an answer or counterclaim that has been filed to a complaint. Rule 12(a) of the Utah Rules of Civil Procedure specifically provides, “[a] party served with a pleading stating a cross-claim shall serve an answer thereto within twenty days after the service.”

The case of *Lund v. Brown*, 11 P.3d 277 (Utah 2000), cited by the Toscanos does not support their position. *Lund v. Brown* dealt with the plaintiff’s failure to file an answer to a counterclaim. The court in *Lund v. Brown* found that by filing the complaint the plaintiff had made a formal appearance on the counterclaim, which involved the same issues and same parties as in the complaint. This is different from making a formal appearance on Cross claim, which is a separate pleading between two different parties.

Furthermore, in *Lund v. Brown*, 11 P.3d 277 (Utah 2000), the court did not set aside the default judgment based solely on a lack of notice under Rule 5, but for “mistake, inadvertence, or surprise” pursuant to the defendants’ Rule 60(b)(1) motion, which the Toscanos never filed in this case.

Regardless, even if notice was required under Rule 5, sufficient notice was given by direct service on the Toscanos as allowed under Rule 5(b)(1)(A)(iv). In Utah, an appellate court may affirm an order appealed from, if it is sustainable on any legal ground

or theory apparent on the record, even though that ground or theory was not identified by the lower court as the basis for its ruling. *Busche v. Salt Lake County*, 26 P.3d 862, ¶ 7 (Ut.App. 2001). Therefore, regardless of the trial court's ruling that the Toscanos were not entitled to notice under Rule 5 of the Utah Rules of Civil Procedure; this Court can find that serving the clients directly with the default papers at their last known address (which they admit they received) is sufficient notice under Rule 5 of the Utah Rules of Civil Procedure.

### **III. THE DEFAULT PAPERS WERE SERVED ON THE TOSCANOS PERSONALLY, GIVING THEM NOTICE OF THE DEFAULT SUFFICIENT UNDER RULE 5.**

The Tocabos were personally served with the default papers filed in this case by delivery at their last known address. The Toscanos admit that they received actual notice of the default papers by late March of 2008. (Rec. 611, ¶ 10) This was in plenty of time to file a motion to set aside for "mistake, inadvertence or surprise" under Rule 60(b)(1), which the Toscanos failed to do. Filing a motion to set aside the default under Rule 60(b) is the same step that they would have had to take, even if a copy of the default papers had been sent to their counsel. *Amica Mutual Ins. Co. v. Schettler*, 768 P.2d 950 (Ut. App. 1989) (once a default judgment has been entered it can only be set aside in accordance with Rule 60(b) of the Utah Rules of Civil Procedure).

Furthermore, service on the Toscanos directly in this case, gave them more effective notice of the default than mailing a copy to their counsel, as the Toscanos had

not heard from their counsel, Mr. Oliver, and had not been able to contact him. (Rec. 592, 586-597) Therefore, the Toscanos were not harmed or prejudiced in any way by receiving notice of the default directly, rather than being informed through counsel, after service of the papers upon him.

In *Lincoln Benefit Life Ins. Co., v. D.T. Southern Properties*, 838 P.2d 672, 675 (Ut.App. 1992) the defendants made the same argument as the Toscanos in this case, *i.e.*, that the plaintiffs failed to mail a copy of the default judgment to their counsel as required by Rule 5 of the Utah Rules of Civil Procedure. The Utah Court of Appeals affirmed the denial of defendants' motion to set aside the default stating "notwithstanding the argument that Lincoln and Allstate failed to give notice, Hogle received notice of the default on July 18, 1990, when he was personally served with the court's order in supplemental proceedings. This notice, which Hogle received approximately seven weeks after the court entered default judgment, provided him adequate opportunity to timely move to set aside the default judgment under Rule 60(b)(1). *Id.* at 675.

Similar to the defendants in *Lincoln Benefit Life Ins. Co., v. D.T. Southern Properties*, the Toscanos in this case received personal notice of the default filed against them by the end of March 2008. This is approximately seven weeks after the default was entered in February of 2008, and in plenty of time for them to file a motion to set aside the default under Rule 60(b)(1) for "mistake, inadvertence, or surprise," which they failed to do. Therefore under the ruling of *Lincoln Benefit Life Ins.*, the Toscanos received



adequate notice of their default.

Furthermore, the Utah Court of Appeals in *Lincoln Benefit Life Ins.*, recognized that failure to give such notice does not itself, invalidate a default judgment, citing Rule 58A(c) of the Utah Rules of Civil Procedure, which states “[a] judgment is complete and shall be deemed entered for all purposes, except the creation of lien on real property, when the same is signed and filed as herein provided.” *Id.* at 675. Therefore, the failure to give notice to counsel under Rule 5 does not itself invalidate the default judgment.<sup>8</sup> *Id.* at 675.

In addition, the Toscanos would not have been able to show that the Default Certificate should be set aside for “good cause” under Rule 55(c). The “good cause” standard is not simply a free pass, or do-over, because of an attorney’s mistake or oversight. The moving party is still required to show some “excusable neglect” in order to establish “good cause” under Rule 55(c). *Miller v. Brocksmith*, 825 P.2d 690, 693 (Ut. App. 1992). To show “excusable neglect” a party must provide specific details that demonstrate “due diligence in spite of uncontrollable circumstances.” The fact that Toscanos’ counsel was negligent does not constitute “excusable neglect” for good cause under Rule 55(c). *Stevens v. LaVerkin City*, 183 P.3d 1059, ¶¶ 27 & 28 (Ut.App. 2008).

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<sup>8</sup>In *Lund v. Brown*, 11 P.3d 277 (Utah 2000), the Court did not set aside the default judgment based solely on a lack of notice under Rule 5, but for “mistake, inadvertence, surprise, or excusable neglect” pursuant to defendants’ Rule 60(b)(1) motion, which the Toscanos never filed in this case.

**IV. THE TRIAL COURT ACTED WITHIN ITS DISCRETION  
IN HOLDING A HEARING ONLY ON THE AMOUNT OF  
DAMAGES UNDER RULE 55(b)(2) AND NOT LIABILITY.**

The Toscanos cannot complain that the court entered a judgment without a hearing on the amount of damages. The trial court did schedule a hearing under Rule 55(b)(2) to determine the amount of damages and the Toscanos received notice of this hearing and fully participated therein. They were allowed to introduce evidence, present exhibits, call witnesses and cross-examine Coulter's witnesses. (See hearing transcript, Rec. 1033) On appeal the Toscanos have failed to marshal all the evidence in support of the trial court's factual findings and show that they are clearly erroneous.<sup>9</sup> Therefore, there is no basis for this Court to set aside the factual findings entered by the trial court. *Kealamakia, Inc. v. Kealamakia*, 213 P.3d 13, ¶ 10 (Ut.App. 2009).

The Toscanos complain that the trial court did not reconsider the issue of liability at the damage hearing. However, under Rule 55(b)(2) the court has broad discretion to conduct such further proceedings as necessary to enter a judgment, *or carry it into effect*. *Amica Mutual Ins. Co. v. Schettler*, 768 P.2d 950 (Ut.App. 1989). This includes holding a hearing only on the issue of damages after default, and not the issue of liability. After default has been entered, the defendants, as a matter of law, are deemed to

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<sup>9</sup>Although the Toscanos refer to some of the evidence they provided at the hearing on pages 19 & 20 of their brief, they fail to marshal all the evidence presented in support of the trial court's findings, such as Toscano's dealings with Coulter as a partner, his actions as a partner at the time, and his continuing transactions with Auto One, after Coulter had made his loans. (See Trans. Rec. 1033; Def's Ex. 6, Pltff's Exs. J, F, I & K).

be liable to the plaintiff. Rule 55(b)(2) provides the means whereby the plaintiff can establish the amount of recoverable damages and costs he claims, without litigating the issue of liability. *Id.* at 965.

Therefore, the trial court did not abuse its discretion in holding a hearing only on the amount of damages under Rule 55(b)(2); and the Toscanos have failed to marshal all the evidence in support of such findings and establish that the findings are clearly erroneous, to have them set aside on appeal. *Kealamakia, Inc. v. Kealamakia*, 213 P.3d 13, ¶ 10 (Ut.App. 2009).

**V. THE CROSS-CLAIM DOES STATE A LEGAL CLAIM  
FOR BREACH OF CONTRACT SUFFICIENT TO SUPPORT  
A DEFAULT JUDGMENT.**

In considering whether a claim for relief has been stated, the court is only to consider the allegations as alleged in the pleading, and it is to treat such allegations, as if they are true. *Ashby v. Ashby* 191 P.3d 35 (Ut.App. 2008). The elements for breach of contract are “(1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages. *MBNA America Bank, N.A., v. Goodman*, 140 P.3d 589, ¶ 6 (Ut.App. 2006).

The Crossclaim alleges (1) a contract, Coulter agreed to loan money to the Toscanos as “Auto One Principals”<sup>10</sup> to purchase cars for sale to the public, wherein he

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<sup>10</sup>The allegations in the pleading are deemed true. The extent of their participation as Auto One Principals, goes beyond the facts as alleged in the pleading and the narrow scope of review for failure to state a claim. *Ashby v. Ashby* 191 P.3d 35 (Ut.App. 2008).

was to be repaid the principal amount loaned, plus interest, as the cars were sold. (2) performance, Coulter performed under this agreement by loaning money to the Toscanos to purchase cars, (3) a breach by the other party, after cars were sold Coulter was not paid back the money as promised, two checks were issued for a total of \$73,300.00 but these were rejected for insufficient funds, and (4) damages, Coulter has been damaged as a result of Toscanos' breach of their agreement, in the total amount of the money loaned plus interest. (See Rec. 120-123).

A claim will be insufficient only if it appears that the pleader cannot prove any set of facts in support of his claims. *MBNA America Bank, N.A., v. Goodman*, 140 P.3d 589, ¶ 6 (Ut.App. 2006). Under the liberal pleading standard of fair notice, Coulter did submit a short and plain statement, showing that he is entitled to relief, and made a demand for relief, sufficient to state a claim for breach of contract. *America Bank, N.A. v. Goodman*, 140 P.3d 589, ¶s 4-6 (Ut.App. 2006).

### CONCLUSION

The Default Certificate was properly entered against the Toscanos, because they did not file an answer to the Crossclaim, which was served on them. This fact is undisputed. Therefore, regardless as to whether the default papers were properly served on their counsel after the time to answer expired; the Default Certificate was properly entered by the trial court on the Crossclaim on February 4, 2008.

Since there was no formal answer or response filed to the Crossclaim the Toscanos “failed to appear” on the Crossclaim; and therefore, they were not entitled to notice of default on the Crossclaim under Rule 5. *Arbogast Family Trust v. River Crossings*, 191 P.3d 39, ¶ 16 (Ut.App. 2008).

Furthermore, regardless as to whether the Toscanos were entitled to notice of their default on the Crossclaim under Rule 5, the default papers were personally served on them in compliance with Rule 5, by late March of 2008. Therefore, Toscanos received actual notice of the default in time to move to set aside the default for “mistake, inadvertence, or surprise ” under Rule 60(b)(1), which they failed to do. This is the same step they would have been required to take, even if a copy of the default papers would have been sent to their attorney, Mr. Oliver. Therefore, the Toscanos did receive notice of the default and were not prejudiced in any way by receiving notice personally, rather than having notice sent to their counsel, who was no longer in contact with them.

Moreover, the failure to give notice does not itself, invalidate a default judgment, which must be set aside in accordance with Rule 60(b) of the Utah Rules of Civil Procedure. *Lincoln Benefit Life Ins. Co., v. D.T. Southern Properties*, 838 P.2d 672, 675 (Ut.App. 1992).

The Toscanos claim that if their counsel had received a copy of the default papers, they would have had time to cure the default prior to the court’s entry of their default. However, this is not provided for under the rules. Rule 55(a) does not require

the court to wait any period of time before entering a party's default for failure to answer; but to the contrary, directs that the default *shall* be entered.

Even if given the chance, the Toscanos would not have been able to show that the Default Certificate should be set aside for "good cause" under Rule 55(c), as they would not be able to demonstrate "due diligence in spite of uncontrollable circumstances" to establish "good cause" under Rule 55(c). *Miller v. Brocksmith*, 825 P.2d 690, 693 (Ut. App. 1992). Counsel's negligence does not constitute "due diligence in spite of uncontrollable circumstances." *Stevens v. LaVerkin City*, 183 P.3d 1059, ¶s 27 & 28 (Ut.App. 2008).

The trial court did not violate Rule 55(b). The trial court did schedule and hold a hearing, after notice, under Rule 55(b)(2) to determine the amount of damages to be entered. The Toscanos received notice of this hearing and participated fully therein. Therefore, the court complied with both Rule 5(a)(2)(C) and Rule 55(b)(2) in providing notice and allowing the Toscanos to be heard on the amount of damages.

Under Rule 55(b)(2) the court has broad discretion to conduct such further proceedings as necessary to enter a judgment, or carry it into effect. This includes holding a hearing only on the amount of damages. *Amica Mutual Ins. Co. v. Schettler*, 768 P.2d 950 (Ut.App. 1989).

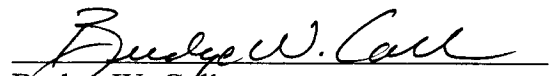
Finally, the Crossclaim does state a claim for breach of contract. It alleges that Coulter loaned money to the Toscanos as "Auto One Principals," so they could

purchase motor vehicles to sell to the public. Coulter was to be repaid the principal amount loaned plus interest when the cars were sold. Coulter was never paid as agreed and was damaged as a result. Under the liberal pleading standard of fair notice, Coulter provided a short and plain statement showing that he is entitled to relief, sufficient to state a legal claim for breach of contract. *America Bank, N.A. v. Goodman*, 140 P.3d 589, ¶s 4-6 (Ut.App. 2006).

Therefore, based on the forgoing, the trial court's denial of Toscanos' motions to set aside, and the Findings of Fact and Conclusions of Law, entered by the trial court, should not be overturned on appeal; and the Judgment entered based on those Findings of Fact and Conclusions of Law, should be affirmed.

DATED this 6 day of January, 2010.

BOND & CALL L.C.

  
Budge W. Call  
*Attorney for Appellee, Nathan Coulter*

**MAILING CERTIFICATE**

I hereby certify that on the 6<sup>th</sup> day of January 2010, I did mail, U.S. First Class, postage pre-paid, a true and correct copy of the foregoing **APPELLEE'S BRIEF**, to the following:

John Snow  
Robert H. Scott  
Van Cott, Bagley, Cornwall & McCarthy  
36 South State Street, Suite 1900  
Salt Lake City, Utah 84111

Jodi Walker