2001

First Equity Federal Inc., on its own behalf and on behalf of Aspen Meadows Homeowners Assoc. v. Phillips Development, LC., Peter O. Phillips, Lydia Phillips, Alden B. Turnbow, Larry Andrews, John E. Phillips, and Gregory Skabelund : Reply Brief

Utah Supreme Court

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Graden P. Jackson; Strong and Hanni; Attorneys for Appellees.

IN THE UTAH SUPREME COURT

FIRST EQUITY FEDERAL, INC., on its own behalf and on behalf of ASPEN MEADOWS HOMEOWNERS ASSOC.,	:	
Plaintiff and Appellee,	:	Case No.20010417-SC
vs.	:	Priority 10
PHILLIPS DEVELOPMENT, LC., PETER O. PHILLIPS, LYDIA PHILLIPS, ALDEN B. TURNBOW, LARRY ANDREWS, JOHN E. PHILLIPS, and GREGORY SKABELUND,	:	
Defendants and Appellants.	:	

REPLY BRIEF OF APPELLANT GREGORY SKABELUND

Interlocutory Appeal from the Memorandum Decision Denying Defendant Gregory Skabelund's Motion to Dismiss by the Honorable Gordon J. Low, in and for the First Judicial District Court, Cache County, State of Utah

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First Equity has offered no convincing reason why the plain lanugage of Rule 41(a) does not apply to bar First Equity's claims. First Equity's argument breaks down with the repeated assertion that it had no choice but to move for dismissal of its second-filed Federal court action. For instance, First Equity variously claims:

> As a result of the dismissal of the bankruptcy First Equity lacked subject matter jurisdiction to proceed in Federal court and was **compelled to move the court** to dismiss the action.

(Appellee's Brief at 4, emphasis added).

> In its federal court case, First Equity did not have the option that the plaintiffs in Braffett's heirs had, to file and elect whether to proceed. Instead First Equity was **forced to dismiss** when it lost jurisdiction.

(Appellee's Brief at 7, emphasis added).

> First Equity was thereby **compelled** because of the dismissal from bankruptcy court **to file a necessary motion for dismissal** because of lack of subject matter jurisdiction rather than a voluntary notice of dismissal.

(Appellee's Brief at 9-10, emphasis added).

First Equity ignores the fact that it had a perfectly viable option in the second-filed case: pursue the motion to remand which it had filed with the Federal court. Instead, for its own reasons, First Equity voluntarily abandoned its pending motion for remand in favor of a motion to dismiss.

Another aspect of this case's procedural history which remains unexplained by First Equity is why First Equity chose to dismiss its first-filed action in state court and file

the second action in Federal court. Clearly, First Equity could have pursued a motion to lift stay in the Phillips bankruptcy proceeding, permitting the first-filed action to go forward. Instead, First Equity voluntarily dismissed the first-filed state action in order to file its second action in Federal court. The only plausible explanation for this procedural course is that First Equity believed pursuing the second-filed action in Federal court would gain some strategic advantage. When dismissal of the bankruptcy case appeared to eliminate that possibility, First Equity again chose what it thought would be the most expedient method of pursuing its claims, instead of the procedurally correct course dictated by Utah Rule of Civil Procedure 41(a).

First Equity's opposing brief places undue reliance on the case Poloron Products, Inc. v. Lybrand Ross & Montgomery, 534 F.2d 1012 (2nd Cir. 1976). In Lake at Las Vegas Investors Groups, v. Pacific Malibu Development Corp., 933 F.2d 724, 727 (9th Cir. 1991) the court recognized the limitations of the Poloron decision, noting "[the Poloron court's] holding, when followed, has been limited to its facts and does not preclude application of the bar where the voluntary dismissal is unilateral."[1]

Likewise, First Equity's reliance on Thiele v. Anderson, 975 P.2d 481 (Utah App. 1999) is unavailing. Thiele merely notes the general purpose of Rule 41(a)(1) as being to "guard potentially adverse parties from being harassed and prejudiced by dismissal of an action - - e.g., being inconvenienced and investing time and financial resources for naught",

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[1]The Lake at Las Vegas court distinguished between unilateral and stipulated voluntary dismissals. First Equity's dismissal of its Federal court action was not by stipulation, but rather was unilaterally pursued by First Equity.

citing 8 James W. Moore, *Moore's Federal Practice* § 41.10, at 41-18 (3d ed. 1997). The Thiele court does not address this Court's comment in Thomas v. Braffett's Heirs, 305 P.2d 507, 513 (Utah 1956) that:

> One may wonder how [Rule 41(a)] dismissals could vex or annoy a defendant who had not appeared or whether the rule is good or bad in its overall effect. However, we are here concerned only with the rule as it is, and whether the two dismissals act as an adjudication and preclude further litigation.

Id. at 513.

First Equity also falls short in its effort to distinguish the Thomas case. First Equity claims that Thomas may be distinguished on three grounds: first that the case "involved complaints and dismissals that were all filed in the same court rather than First Equity's action where complaints and dismissals were filed in both state and federal courts." (Appellee's Brief at 11). However, Rule 41(a) specifically provides that "a notice of dismissal operates as adjudication upon the merits when filed by plaintiff who has once dismissed **in any court of the United States or of any state** an action based on or including the same claim." (Emphasis added).

First Equity's second attempt to distinguish Thomas argues that in that case there was "no basis for dismissal . . . whereas in First Equity's action, the federal court ordered dismissal of the action because First Equity had lost subject matter jurisdiction when the bankruptcy was dismissed." (Appellee's Brief at 11) First Equity offers no citation for its contention that there was no basis for dismissal of the second-filed action in the Thomas case. The Thomas opinion does not state anything regarding the basis of the second

dismissal. It merely recites that "upon [two of the plaintiffs'] request that action was dismissed by the trial judge on October 10, 1949." Thomas at 509.

First Equity's final attempt to distinguish Thomas is equally unconvincing. First Equity returns to the argument adopted by the trial court which attempts to distinguish between perfunctory and non-perfunctory dismissals. As stated in Skabelund's opening brief, the Thomas court suggests that "perfunctory" means not giving adverse parties in the case notice of plaintiff's request for dismissal by motion or otherwise and not directing the attention of the court specifically to that issue. *Id.* at 513-514. The trial court in this case erred in labeling First Equity's second dismissal perfunctory, because it appears from the record below that First Equity's Notice of Dismissal in the first case and motion and order of dismissal in the Federal case were not served on any opposing party. Thomas' discussion of "perfunctory" dismissals does not support First Equity's argument.

CONCLUSION

First Equity has offered no convincing reason why the plain language of Rule 41(a) should not bar their action in this case. First Equity's Complaint should be dismissed with prejudice.

DATED this 4 day of December, 2001.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, this 4th day of December, 2001, a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT GREGORY SKABELUND, to the following:

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