

1989

# Johnson v. Commercial Security Bank : Brief of Appellant

Utah Court of Appeals

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Robert G. Norton; Moore, McDonough & Norton; attorney for appellant.

Bryan W. Cannon; Beesley & Fairclough; attorneys for respondent.

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 89-0506

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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STEPHANIE H. JOHNSON, fka  
STEPHANIE H. PARCELL,

Defendant and Appellant,

v.

COMMERCIAL SECURITY BANK,

Plaintiff and Respondent.

BRIEF OF APPELLANT

Appeal from Memorandum  
Decision entered by  
L.H. Griffiths, Judge,  
Murray Circuit Court

Civil No. 853008061

Ut.Ct.App.No. 890506-CA

---

Priority 1413

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Attorneys for Respondent

DEPOSITED BY THE  
STATE OF UTAH  
AUG 17 1990

FILED

JAN 22 1990

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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STEPHANIE H. JOHNSON, fka  
STEPHANIE H. PARCELL,

Defendant and Appellant,

v.

COMMERCIAL SECURITY BANK,

Plaintiff and Respondent.

BRIEF OF APPELLANT

Civil No. 853008061

Ut.Ct.App.No. 890506-CA

---

STATEMENT SHOWING JURISDICTION OF THIS COURT  
AND DESCRIBING NATURE OF PROCEEDINGS BELOW

Section 78-2a-3, Utah Code Annotated, (1953, as amended) confers jurisdiction of this matter on the Court of Appeals and jurisdiction is therefore proper in the Utah Court of Appeals.

Stephanie H. Johnson, a joint obligor on a debt, has sought review of a Memorandum Decision of the Fifth Circuit Court, Murray Department in response to her Motion to Dismiss which cited failure of plaintiff/respondent to comply with applicable rules of civil procedure. The Memorandum Decision of the court below held in pertinent part that "Rule 71B(a) states that '.... the Plaintiff may ....' proceed as provided in the rule. The wording is not mandatory. Plaintiff may elect to proceed either under Rule 4(b) or 71B of URCP."

### STATEMENT OF ISSUES PRESENTED FOR REVIEW

In this brief the Appellant presents the following issues for review:

1. Does Respondent's failure to summon a named party prior to trial or entry of judgment against a co-defendant, compel Respondent to proceed against Appellant by Order to Show Cause under Rule 71B(b) of the Utah Rules of Civil Procedure?

2. Does entry of a "judgment by default" have the same procedural effect as a "trial" as that term is used in Rule 4(b) of the Utah Rules of Civil Procedure?

### DETERMINATIVE CASES, STATUTES AND RULES

Interpretation of the following cases, rules of civil procedure and official references are determinative of the issues raised in this brief:

Hoyt v. Upper Marion Ditch Company, 76 P.2d 234 (Utah 1938);  
McKean v. Mountain View Memorial Estates, 411 P.2d 129 (Utah 1966);

Watson v. State, 694 P.2d 560 (Oregon 1985);

Section 104-3-17 Revised Statutes of Utah (1933);

Section 104-5-17 Revised Statutes of Utah (1933);

Section 104-31-1 Revised Statutes of Utah (1933);

Rule 4(b) of the Utah Rules of Civil Procedure;

Rule 71B(a) - (e) of the Utah Rules of Civil Procedure;

## STATEMENT OF THE CASE

### A. Nature of the Case and Course of Proceedings

This is an appeal as of right wherein Appellant seeks review of a Memorandum Decision entered by the Fifth Circuit Court of the State of Utah, Salt Lake County, Murray Department. The Memorandum Decision of the court below was dated and entered July 21, 1989. [R. 79]

This is a case of first impression before the Court of Appeals, calling for an interpretation of Rule 71B of the Utah Rules of Civil Procedure, as pertaining to the procedure necessary to commence an action against a person jointly indebted upon an obligation, where such joint obligor was not originally served with process prior to judgment being taken against a co-defendant/co-obligor who had been served with process and duly defaulted.

The underlying civil action was filed on the 22nd day of November 1985, by Commercial Security Bank, now known as Key Bank, naming Martin Parcell and Stephanie Johnson as parties Defendant. [R. 1-3] On the 26th day of November 1985, Defendant Martin Parcell was joined as a party when he was served with a summons and complaint. [R. 4] Stephanie Parcell was not summoned until several years after a judgment by default had been entered against her former spouse/co-defendant. [R. 13]

The basis of Respondent's claim against Appellant is a joint credit card obligation allegedly owed by Appellant and her former husband, Martin Parcell. [R. 79]



On the 13th day of January 1986, Default judgment was entered in favor of Plaintiff and against Defendant Martin Parcell. [R. 13] On October 13, 1988, Defendant Stephanie Johnson was for the first time served with the Summons and original Complaint in this matter. [R. 51]

**B. Statement of Facts**

1. Appellant was named as a co-defendant with her former husband, Martin M. Parcell (hereinafter "Parcell") in a lawsuit filed against them by Commercial Security Bank on or about November 20, 1985. [R. 1-3]

2. Summons was duly served on Parcell, but not on Appellant. [R. 4]

3. Judgment was recovered against Parcell, as a person jointly indebted upon an obligation, but not against Appellant. [R. 13] The judgment against Parcell was taken by default and duly entered on January 13, 1986. [R. 13]

4. Appellant was not served, nor did she otherwise receive notice of the original action, until she received personal service of summons and a copy of the original complaint on October 13, 1988, nearly three years after judgment had been entered against Parcell, who had by then left the jurisdiction. [R. 51]

5. On April 18, 1989, the court below heard oral arguments on Appellant's Motion to Dismiss. Memoranda in support of, and in opposition to, appellant's Motion to Dismiss were submitted by counsel. [R. 57-67]

6. On July 21, 1989, the court below denied Appellant's Motion to Dismiss finding in pertinent part that "Rule 71B of the Utah Rules of Civil Procedure is not an exclusive remedy for Plaintiff to pursue against Defendant Johnson, [and that] Plaintiff may elect to proceed either under Rule 4(b) or 71B of URCP." [R. 79]

#### SUMMARY OF ARGUMENT

I. Rules 4(b) and 71B of the Utah Rules of Civil Procedure are mutually exclusive remedies or procedures in that Rule 4(b) governs the timing of service of summons prior to trial and Rule 71B sets forth the procedure for binding a judgment against a party not originally served, but jointly obligated on a debt.

II. Entry of a "Judgment by Default" has the same procedural effect as a "Trial" as that term is used in Rule 4(b), Utah Rules of Civil Procedure. Therefore, if plaintiff fails to summon a co-defendant prior to entry of a default judgment against another co-defendant, plaintiff is precluded from proceeding under Rule 4(b) and if plaintiff is to proceed against the defendant not summoned, he must do so under Rule 71B(b).

## ARGUMENT

### POINT ONE

RULES 4(b) AND 71B OF THE UTAH RULES OF CIVIL PROCEDURE ARE MUTUALLY EXCLUSIVE REMEDIES/PROCEDURES AND THE COURT BELOW ERRED IN HOLDING THAT PLAINTIFF-BANK MAY ELECT TO PROCEED AGAINST DEFENDANT-APPELLANT HEREIN UNDER EITHER RULE 4(b) OR RULE 71B.

Both Rule 4(b) and Rule 72B of the Utah Rules of Civil Procedure provide for bringing a defendant before the Court in situations wherein multiple defendants are involved. More specifically, the aforementioned Rules of Civil Procedure set forth in pertinent part, as follows:

#### RULE 4(b)

.... The summons must be served within one year after the filing of the complaint or the action will be deemed dismissed, provided that in any action brought against two or more Defendant's in which personal service has been obtained upon one of them within a year the others may be served or appear at any time before trial.

#### RULE 71B

(a) .... Where the action is against two or more defendants and the summons is served on one or more, but not all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants.

(b) .... When a judgment has been recovered against one or more, but not all, of several persons jointly indebted upon an obligation, the Plaintiff may require any person not originally served with the summons to appear and show cause why he should not be bound by the judgment in the same manner as though he had been originally served with process.

(c) .... Plaintiff shall issue a summons,

describing the judgment, and requiring the defendant to appear within the time required for appearance in response to an original summons, and show cause why he should not be bound by such judgment....

(d) .... The pleadings shall consist of plaintiff's affidavit, .... a copy of the original Complaint and Judgment shall be included.

Accordingly, while both of the above cited rules provide a mechanism for serving process upon a co-defendant and/or haling him into Court, the rules are mutually exclusive. That is, Rule 4(b) is to be utilized to bring a party before the court "at any time before trial," whereas Rule 71B is to be utilized after a trial or "[w]hen a judgment has been recovered against one . . . but not all of several persons jointly indebted upon an obligation . . . ." Thus, the respective rules are to be used at different times, depending upon what has transpired in any particular cause of action. The extent to which a proceeding has progressed dictates which of the rules is the appropriate mechanism for haling a defendant into court.

In the instant case it is clear that plaintiff-Bank has not properly complied with the Utah Rules of Civil Procedure in its action against defendant Stephanie Johnson. Simply put, for plaintiff to properly proceed against co-defendant Stephanie Johnson in this matter, plaintiff must serve defendant pursuant to Rule 71B. This is so for two reasons. First, pursuant to Rule 4(b), because the instant action was brought against two defendants and personal service has been obtained only upon one of them (appellant's former husband), "the other may be served or

appear at any time before trial (emphasis added). Since a default judgment has been entered against a co-defendant (appellants husband), this plaintiff is foreclosed from utilizing Rule 4(b) at this juncture. This is because a default judgment has the same procedural effect as a "trial," as that term is used in Rule 4(b). See, argument at Point II, infra. Thus, if Rule 4(b) is to be used, it must be implemented prior to trial or judgment. Second, pursuant to the express provisions of Rule 71B, if a plaintiff wishes to pursue an action against a joint obligor in a situation wherein a judgment has already been recovered against a person jointly obligated, he must proceed--if at all--in accordance with the provisions of Rule 71B.

A review of the Collateral References to Rule 71B gives the correct and consistent interpretation of Rule 71B. Section 270 of 59 Am Jur 2d, Parties, as cited under Rule 71B, states the following:

When, however, the Plaintiff neglects to join a necessary or indispensable party Defendant or all those who are liable upon the cause of action sued upon, particularly where that liability is joint, the Defendant sued has a valid ground for objection for which he or she should be permitted to obtain relief. This objection is very generally regarded as of dilatory nature to be presented promptly and in the method prescribed by local practice. 59 Am Jur 2d, Section 270, page 804.

This reference clearly shows that the entire purpose of Rule 71B is to compel plaintiff to proceed in a manner which permits the defendant to promptly in a non-dilatory manner come before the court and show why the defendant was an indispensable or

necessary party to the action on the joint obligation and should have been joined prior to the time judgment was taken against the other defendant. The language of Rule 71B does not allow plaintiff a choice as to whether to proceed under either Rule 71B or Rule 4(b). Rule 71B governs the form of the pleadings, requiring a Summons to Appear and Show Cause, Affidavit of Plaintiff and copy of the original Complaint; whereas the reference to Rule 4(b) is made merely to show that plaintiff can serve a Summons and Affidavit upon a co-defendant at any time prior to trial. In short, in this case if plaintiff is to proceed at all, it must proceed in compliance with Rule 71B.

It is noteworthy that the substance of 71B has been a part of Utah law for a very protracted period of time. As early as 1933 the substance of Rule 71B was a part of the Revised Statutes of Utah. Section 104-31-1 of the 1933 Revised Statute of Utah set forth as follows:

**104-31-1. Joint Debtors Not Served to Show Cause Why They Should Not Be Bound by Judgment.**

When a judgment is recovered against one or more of several persons jointly indebted upon an obligation, by a proceeding as provided in section 104-5-17, those who were not originally served with the summons and did not appear in the action may be summoned to show cause why they should not be bound by the judgment in the same manner as if they had been originally served with the summons. (C.L. 17, Sect. 6874.)

Thus, one is compelled to ask the question, "Why was Section 104-31-1 enacted as law and retained as a rule of civil procedure (Rule 71B) if a party plaintiff could accomplish the same result

under Rule 4(b)?" Again, the purpose of Section 104-31-1, Revised Statutes of Utah, 1933 and Rule 71B is to compel plaintiff to proceed against a defendant/joint obligor in a manner allowing such defendant to promptly and in a non-dilatory manner show cause why she should not be bound by the judgment rendered against the co-obligor (plaintiff's husband). Because plaintiff did not proceed pursuant to Rule 71B in a non-dilatory fashion, reversible error was committed and the Memorandum Decision issued by the Court below should be reversed.

The only Utah case appellants are aware of concerning Rule 71B and/or Section 104-31-1, Revised Statutes of Utah (1933) is Hoyt v. Upper Marion Ditch Company, 76 P.2d 234 (Utah 1938). Hoyt clearly supports appellants position that, in the instant case, plaintiff must proceed against appellants--if at all--in accordance with Rule 71B. The Supreme Court of Utah set forth the following:

In this case it is true that had there been no security Hoyt could have obtained judgment against the Lemons, the endorers, without summoning the makers or could have later pursued the makers. This results from fitting together sections 104-5-17, 104-31-1, 104-3-17, R.S. 1933.

76 P.2d at 239.

Thus, the clear implication from the aforementioned language is that if plaintiff desires to pursue a co-defendant who was not an indispensable party, the appropriate procedure would be the utilization of Sections 104-31-1, and 104-5-17, R.S. 1933. Similarly, in the instant action, if plaintiff Bank wishes to

pursue an action against appellant herein, it must do so in compliance with Rule 71B of the Utah Rules of Civil Procedure.

#### POINT TWO

ENTRY OF A "JUDGMENT BY DEFAULT" HAS THE SAME PROCEDURAL EFFECT AS A "TRIAL" AS THAT TERM IS USED IN RULE 4(b), UTAH RULES OF CIVIL PROCEDURE, AND THEREFORE PLAINTIFF'S FAILURE TO SERVE DEFENDANT PRIOR TO ENTRY OF THE DEFAULT JUDGMENT PRECLUDES PLAINTIFF FROM PROCEEDING UNDER RULE 4(b).

As set forth in Point One hereinabove, for a plaintiff to hale a co-defendant into Court pursuant to Rule 4(b), he must serve process upon said co-defendant prior to trial. Inasmuch as appellant (co-defendant) herein was not served prior to the default judgment being entered, plaintiff must necessarily proceed according to the provisions of Rule 71B. The reason for this is that a default judgment is tantamount to a judgment entered after trial.

47 American Jurisprudence 2nd, Judgments, Section 1193 supports the position that a judgment by default is tantamount to, and has the same effect as a judgment rendered after a trial on the merits.

The circumstance that the defendant let the matter go uncontested to judgment does not impair the effect of a judgment by default, which is ordinarily accorded similar effect, and is as much a verity, as a judgment rendered in a contested proceeding. Although it has been declared that such a judgment may be regarded as a conditional judgment, especially where a rule of court for opening or striking off the same, the general rule is that even where a party has the right to have a judgment by default set aside, such judgment must, until set aside, be regarded as a subsisting and regular judgment.



Further, see McKean v. Mountain View Memorial Estates, 411 P.2d 129 (Utah 1966) wherein the Utah Supreme Court iterated the following:

The purpose of a default judgment is to conclude litigation when defendant fails to plead or otherwise defend an action.

411 P.2d at 130.

See also Watson v. State, 694 P.2d 560 (Oregon 1985) wherein it was set forth as follows:

Judgments entered after default . . . have the same solemn character as judgments entered after trial.

694 P.2d at 562.

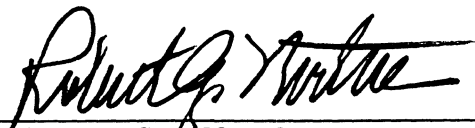
Accordingly, a default judgment has the same purpose and effect as does a trial on the merits--to wit--to conclude the litigation.

#### CONCLUSION

For the reasons stated hereinabove, the Memorandum Decision of the court below should be reversed and remanded with instructions that plaintiff must proceed against Appellant in accordance with the provisions of Rule 71B if it is to proceed at all.

DATED this 16th day of January, 1990.

MOORE, McDONOUGH & NORTON

  
\_\_\_\_\_  
ROBERT G. NORTON

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing BRIEF OF APPELLANT, postage fully prepaid, this 17<sup>th</sup> day of January, 1990, to the following:

Stephanie Johnson  
1837 North 300 West  
Mapleton, Utah 84664

Bryan W. Cannon, Esq.  
BEESLEY & FAIRCLOUGH  
40 East South Temple, #300  
Salt Lake City, Utah 84111

  
\_\_\_\_\_

**ADDENDUM**

Excerpts from the Record  
as cited in Appellant's Brief

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Telephone (801) 263-3344

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IN THE FIFTH CIRCUIT COURT, STATE OF UTAH

SALT LAKE COUNTY, MURRAY DEPARTMENT

\* \* \* \* \*

COMMERCIAL SECURITY BANK,  
A Banking Corporation,

Plaintiff,

vs.

MARTIN M. PARCELL and  
STEPHANIE H. PARCELL,

Defendants.

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)  
)  
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)  
)  
)  
)  
)  
)

COMPLAINT

20-6-11-8261

Civil No. \_\_\_\_\_

\* \* \* \* \*

Plaintiff complains of Defendants and for cause of  
action alleges as follows:

1. The damages claimed in this action are less than  
\$10,000.00, exclusive of costs.
2. Plaintiff is a banking corporation authorized to do  
business in Salt Lake County, State of Utah.
2. Defendants are residents of Salt Lake County, State  
of Utah.
3. Plaintiff and Defendants entered into a contract  
pursuant to which the Plaintiff agreed to extend credit to  
Defendants on an open account through the use of a Commercial

Security Bank Master Charge Account under Account No. 5413-7543-5020-4766.

4. Defendants agreed to pay Plaintiff all amounts charged by Defendants on said Master Charge Account, together with interest at the rate of twenty-one percent (21%) per annum until paid.

5. Plaintiff has fulfilled all of its obligations pursuant to said contract but Defendants have defaulted on said contract in that they have failed and refused and to continue to fail and refuse to pay the amounts due and owing by them.

6. As a result of the actions of Defendants the Plaintiff has been damaged in the sum of \$3,560.46, together with interest at the rate of twenty-one percent (21%) per annum from and after September 6, 1983.


7. Pursuant to said contract the Defendants agreed that in the event of collection by legal process said Defendants would pay costs and reasonable attorney's fees incurred by the Plaintiff. As a result thereof, Plaintiff is entitled to such reasonable attorney's fees as this Court deems proper.

WHEREFORE, Plaintiff prays Judgment against Defendants as follows:

1. For Judgment against Defendants, jointly and severally, in the sum of \$3,560.46, together with interest thereon accruing at the rate of twenty-one percent (21%) per annum from the 6th day of September, 1983, and for a reasonable attorney's fee as determined by the Court.

2. For Plaintiff's costs incurred herein.
3. For such other and further relief as the Court deems just and proper in the premises.

DATED this 20<sup>th</sup> day of November, 1985.

  
BRYAN W. CANNON  
POOLE, CANNON & SMITH  
Attorneys for Plaintiff

Plaintiff's Address:  
P. O. Box 27445  
Salt Lake City, Utah

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85 EE-4 P2:11

IN THE FIFTH CIRCUIT COURT, STATE OF UTAH  
SALT LAKE COUNTY, MURRAY DEPARTMENT

\* \* \* \* \*

COMMERCIAL SECURITY BANK,  
A Banking Corporation,

Plaintiff,

vs.

MARTIN M. PARCELL and  
STEPHANIE H. PARCELL,

Defendants.

SUMMONS

Civil No. 85-cvm-8061

\* \* \* \* \*

THE STATE OF UTAH TO THE ABOVE-NAMED DEFENDANT MARTIN M. PARCELL:

You are hereby summoned and required to file an answer in writing to the attached Complaint with the Clerk of the above entitled Court, and to serve upon, or mail to BRYAN W. CANNON, Plaintiff's attorney, 306 Prowswood Plaza, 4885 South 900 East, Salt Lake City, Utah 84117, a copy of said answer within 20 days after the service of this Summons upon you.

If you fail to do so, judgment by default will be taken against you for the relief demanded in said Complaint, which has been filed with the Clerk of said Court and a copy of which is hereto annexed and herewith served upon you.

DATED this 20<sup>th</sup> day of November, 1985.  
DATE 26 Nov 85 TIME 1100 AM

SUBS RES 75E 7200 50

UPON person

SINDT CONSTABLE MURRAY PREC, S.L. COUNTY, UTAH

DEPUTY.

Bryan W. Cannon  
BRYAN W. CANNON  
POOLE, CANNON & SMITH  
Attorneys for Plaintiff

Serve Defendant At:  
854 East Marion Village Road (850 E. 8175 S.)  
Sandy, Utah  
OR POB: Colletts Home Furnishings  
75 East 7200 South  
Midvale, Utah

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~~LEGAL COUNSEL FIRM~~  
Attorneys for Plaintiff  
4885 South 900 East, Suite 306  
Salt Lake City, Utah 84117  
Telephone: (801) 263-3344

# Circuit Court, State of Utah

SALT LAKE COUNTY, MURRAY DEPARTMENT

COMMERCIAL SECURITY BANK,  
a Banking Corporation,

Plaintiff

vs.

MARTIN M. PARCELL and  
STEPHANIE H. PARCELL,

Defendant(s)

DEFAULT

AND DEFAULT

JUDGMENT

Civil No.

85-CVM-8061

## DEFAULT

In this action, defendant(s) **MARTIN M. PARCELL** having been regularly served with summons and complaint, and having failed to appear and answer plaintiff's complaint, and the time allowed by law for answering having expired, the default of said defendant(s) is hereby entered according to law.

Dated

Clerk of the Circuit Court

By

Deputy Clerk

## DEFAULT JUDGMENT

The defendant(s) **MARTIN M. PARCELL** or otherwise defend in this action and default has been entered.

has failed to plead

IT IS ORDERED that plaintiff **COMMERCIAL SECURITY BANK** judgment against said defendant(s) in the amount of:

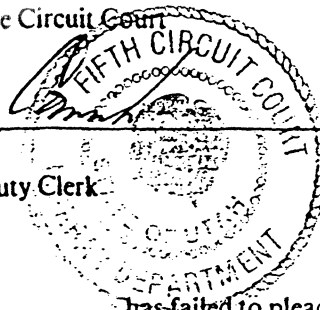
be awarded

\$ 3,560.46 Principal,  
\$ 1,742.50 Accrued interest to date of judgment,  
\$ 36.25 Accrued costs to date of judgment,  
\$ 700.00 Attorney's fees, and  
\$ 6,039.21 TOTAL JUDGMENT,

with interest on the total judgment at 12 % per annum as provided by law from the date of this judgment until paid, plus after-accruing costs.

Dated

**FILED**  
JAN 13 1986  
CLERK OF THE CIRCUIT COURT  
Deputy



*L. H. Griffiths*



~~Attorneys for Plaintiff~~  
40 East South Temple, #300  
Salt Lake City, Utah 84111  
Telephone: (801) 538-2100 *88* *13* *10120* *10120*

IN THE CIRCUIT COURT, STATE OF UTAH  
SALT LAKE COUNTY, MURRAY DEPARTMENT

COMMERCIAL SECURITY BANK,  
a Banking Corporation,

Plaintiff,

vs.

MARTIN M. PARCELL and  
STEPHANIE H. JOHNSON fka  
STEPHANIE H. PARCELL,

Defendants.

SUMMONS

Civil No. 85-CVM-8061

THE STATE OF UTAH TO THE ABOVE-NAMED DEFENDANT STEPHANIE H. JOHNSON:

You are hereby summoned and required to file an answer in writing to the attached Complaint with the Clerk of the above entitled Court, and to serve upon, or mail to Bryan W. Cannon Plaintiff's attorney, at 40 East South Temple, #310, Salt Lake City, Utah 84111, a copy of said answer within twenty (20) days after the service of this Summons upon you.

If you fail to do so, judgment by default will be taken against you for the relief demanded in said Complaint, which has been filed with the Clerk of said Court and a copy of which is hereto annexed and herewith served upon you.

DATED this 5<sup>th</sup> day of October, 1988.

*Bryan W. Cannon*  
BRYAN W. CANNON  
BEESLEY & FAIRCLOUGH  
Attorneys for Plaintiff

Serve Defendant At:  
1837 North 300 West  
Mapleton, Utah

BRYAN W. CANNON  
BEESLEY & FAIRCLOUGH  
Attorneys for Plaintiffs  
40 East South Temple, #800 JAN 23 A7:50  
Salt Lake City, Utah 84111  
Telephone: (801) 538-2100

FILED  
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CLERK OF THE CIRCUIT COURT  
SALT LAKE DEPARTMENT

IN THE CIRCUIT COURT, STATE OF UTAH  
SALT LAKE COUNTY, ~~SALT LAKE DEPARTMENT~~

COMMERCIAL SECURITY BANK,  
a Banking Corporation,

Plaintiffs,

vs.

MARTIN M. PARCELL and  
STEPHANIE H. JOHNSON fka  
STEPHANIE H. PARCELL,

Defendants.

MEMORANDUM IN OPPOSITION  
TO DEFENDANTS' MOTION TO  
DISMISS

Civil No. 85-CVM-8061

COME NOW the Plaintiff, Commercial Security Bank nka  
Key Bank, by and through its attorney, Bryan W. Cannon, and  
hereby submit the following Memorandum in Opposition to the  
Motion of Dismissal of Defendant.

STATEMENT OF FACTS

1. The above entitled action was filed on the 22nd  
Day of November, 1985 by Commercial Security Bank now known as  
Key Bank vs. Martin M. Parcel and Stephanie H. Parcell.

2. On the 26th day of November, 1985, Defendant  
Martin Parcell was served with the Summons and Complaint.  
Stephanie H. Parcell was not served because Plaintiff did not  
know of her whereabouts.

3. On the 13th day of January, 1986, Default Judgment was entered in favor of Plaintiff and against Defendant, Martin Parcell.

4. Stephanie H. Parcell has never been dismissed from the said legal action.

5. In October of 1988, Plaintiff learned of the whereabouts of Defendant, Stephanie H. Parcell, and of her new married name, Stephanie H. Johnson. Thereupon Defendant was served with the Summons and Complaint on the 13th of October, 1988.

#### QUESTIONS PRESENTED

Is the Plaintiff permitted to pursue Judgment on a joint obligation against a person not originally served with Summons when a Judgment has been recovered against the other joint obligor?

#### PLAINTIFF'S RESPONSE TO QUESTION

Rules 12(b)(4)(6) and (7) and Rule 71B(b) of the Utah Rules of Civil Procedure do not restrict and in fact expressly permit the requiring of a person not originally served with a Summons and Complaint to appear and show cause why they should not be bound by the Judgment in the same manner as though they have been originally served with process, even though a Judgment has been recovered against a person jointly indebted upon the obligation.

### ARGUMENT

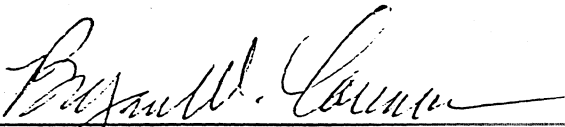
Defendant, Stephanie H. Johnson fka Stephanie H. Parcell (Johnson) has brought the Motion to Dismiss. However, the Motion was not accompanied by any Memorandum or Points and Authorities to support the Motion. A mere reference is made to Rule 12B and Rule 71B of the Utah Rules of Civil Procedure. Nothing in those rules supports Johnson's position. Defendants merely state that these provision of the Utah Rules of Civil Procedure justify dismissing the Summons and Complaint "on the grounds that Plaintiff, having taken a Judgment against Defendant, Martin Parcell, on an alleged joint obligation prior to joining Defendant, Stephanie H. Johnson, is required to proceed in accordance with Rule 71B Utah Rules of Civil Procedure." However, Rule 70(b) reads as follows:

"When a Judgment has been recovered against one or more, but not all, of several persons jointly indebted upon an obligation, the plaintiff may require any person not originally served with the Summons to appear and show cause why he should not be bound by the Judgment in the same manner as though he had been originally served with the process."

In this case the case was originally styled, Commercial Security Bank vs. Martin M and Stephanie H. Parcell. Stephanie was not later joined in the action but was a party from the outset. Under the above stated rule, the Plaintiff is entitled to require Johnson to appear and show cause why she should not be bound by a Judgment as though she had been originally served with

process prior to the time when Judgment was taken against Martin Parcell. There is nothing in Rule 12B or Rule 71B which supports the position of Defendant, Johnson. The Plaintiff, having taken a Judgment against Martin Parcell, is allowed to proceed on the uncollected judgment against the joint obligor, Johnson.

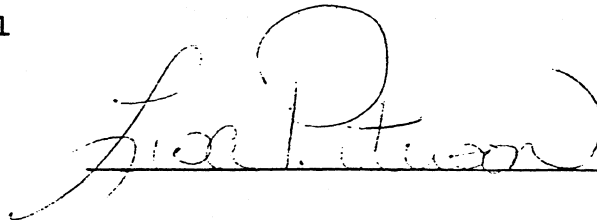
RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of January, 1989.

  
BRYAN W. CANNON  
BEESLEY & FAIRCLOUGH  
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I do hereby declare that I caused to be mailed a true and correct copy of the foregoing Memorandum, postage prepaid this 17 day of January, 1989 to the following:

Robert G. Norton, Esq.  
Attorney for Defendant, Johnson  
275 East 2nd South, #150  
Salt Lake City, Utah 84111



ROBERT G. NORTON (USB #5118)  
Attorney for Defendant  
275 East 2nd South, Suite 150  
Salt Lake City, Utah 84111  
(801) 359-8400

IN THE CIRCUIT COURT, STATE OF UTAH  
SALT LAKE COUNTY, MURRAY DEPARTMENT

COMMERCIAL SECURITY BANK,  
a Banking Corporation,

Plaintiff,

v.

MARTIN M. PARCELL and  
STEPHANIE H. JOHNSON, fka  
STEPHANIE H. PARCELL,

Defendants.

MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS AND  
IN REPLY TO DEFENDANT'S  
MEMORANDUM IN OPPOSITION  
TO MOTION TO DISMISS.

Civil No. 85-CVM-8061

DEFENDANT Stephanie H. Johnson, fka Stephanie H. Parcell, submits the following memorandum in support of her motion to dismiss and in reply to Plaintiff's Memorandum in opposition to Motion to dismiss:

STATEMENT OF FACTS

1. The above entitled action was filed on the 22nd day of November 1985, by Commercial Security Bank now known as Key Bank, naming Martin Parcell and Stephanie Johnson as parties of Defendant.

2. On the 26th day of November 1985, Defendant Martin Parcell was joined as a party when he was served with a summons and complaint. Stephanie Parcell was not joined as a party because she was not served with process and not properly brought before this court.

3. The basis of Plaintiff's claims against these Defendant's is a joint credit card obligation.

4. On the 13th day of January 1986, Default judgment was entered in favor of Plaintiff and against Defendant Martin Parcell.

5. On October 13, 1988, Defendant Stephanie Johnson was served with the Summons and original Complaint in this matter.

#### QUESTION PRESENTED

Contrary to the statement in Plaintiff's Memorandum, the question presented is: Has the Plaintiff properly complied with the Utah Rules of Civil Procedure in proceeding on it's claim against joint obligor Stephanie Johnson when she was not originally joined as a party until after a judgment was obtained against joint obligator Martin Parcell?

#### DEFENDANT'S RESPONSE TO THE QUESTION

Rule 71B of the Utah Rules of Civil Procedure, in part, reads as follows:

(b) .... When a judgment has been recovered against one or more, but not all, of several persons jointly indebted upon an obligation, the Plaintiff may require any person not originally served with the summons to appear and show cause why he should not be bound by the judgment in the same manner as though had been originally served with process.....

(c) .... Plaintiff shall issue a summons, describing the judgment, and requiring the defendant to appear within the time required

for appearance in response to an original summons, and show cause why he should not be bound by such judgment....

(d) .... The pleadings shall consist of plaintiff's affidavit, .... a copy of the original Complaint and Judgment shall be included.

There are no Utah cases interpreting this Rule and there is no comparable Federal Rule. The Compilers Notes, Cross References and Collateral References found under Rule 71B, refer the reader to Rule 4(b) of the Utah Rules of Civil Procedure and several sections contained in Am Jur 2d and to Corpus Juris Secundum (CJS) under the heading Parties. A thorough review of these references brings to light the purpose of Rule 71B and it's applicability in this situation.

Rule 4(b) of the Utah Rules of Civil Procedure provides in pertinent part:

.... provided that in any action brought against two or more Defendant's in which personal service has been obtained upon one of them within a year the others may be served or appear at any time before trial.

At first impression, this Rule would appear to allow Plaintiff to proceed against Stephanie Johnson in the manner in which it has, i.e., by simply serving her the original Summons and Complaint. However, upon further examination this seems illogical because it renders Rule 71B meaningless. One is compelled to ask the question "Why was 71B drafted when a party Plaintiff could do the same thing under Rule 4(b)?"



An answer that immediately comes to mind is that the permissive language of 71B allows a party plaintiff to proceed under summons and complaint under Rule 4(b), or by the more expedient Order to Show Cause under Rule 71B, requiring defendant to show cause why he or she should not be bound by the former judgment entered.

Again, upon more thorough examination of the history of this rule, this explanation becomes illogical because it would be inconsistent with the principles of res judicata, it does not explain why Rule 71B specifically is limited to joint obligations, and the provisions allowing a full trial on the merits again renders Rule 71B redundant as to Rule 4(b).

However, a review of the Collateral References gives the correct and consistent interpretation of Rule 71B. Section 270 of 59 Am Jur 2nd, Parties, as cited under Rule 71B, states the following:

When, however, the Plaintiff neglects to join a necessary or indispensable party Defendant or all those who are liable upon the cause of action sued upon particularly where that liability is joint, the Defendant sued has a valid ground for objection for which he or she should be permitted to obtain relief. This objection is very generally regarded as of dilatory nature to be presented promptly and in the method prescribed by local practice. 59 Am Jur 2d, Section 270, page 804.

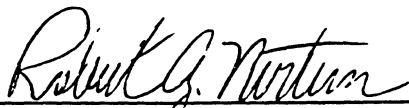
This reference clearly shows that the entire purpose of Rule 71B is to compel Plaintiff to proceed in a manner which permits the Defendant to promptly in a non-dilatory manner come

before the court and show cause why the Defendant was an indispensable or necessary party to the action on the joint obligation and should have been joined prior to the time judgment was taken against the other Defendant. The permissive language of Rule 71B is not interpreted to allow Plaintiff a choice as to whether to proceed under either Rule 71B or Rule 4(b). Rule 71B governs the form of the pleadings, requiring a Summons to Appear and Show Cause, Affidavit of Plaintiff and copy of original Complaint; whereas the reference to 4(b) is made merely to show that Plaintiff can serve a Summons and Affidavit in compliance with Rule 71B at any time prior to trial. In short, in this case if Plaintiff is to proceed at all, it must proceed in compliance with rule 71B.

#### CONCLUSION

In the instant case Plaintiff clearly has not complied with Rule 71B (c), (d), in that Plaintiff has not served Defendant with a Summons to Appear and Show Cause, Affidavit of Plaintiff and copy of original Complaint. Accordingly, Plaintiff's service of process is insufficient and Plaintiff has failed to state a cause of action against Defendant upon which relief may be granted, and pursuant to Rules 12B(4) and 12B(6) of the Utah Rules of Civil Procedure the matter should be dismissed.

DATED this 13<sup>th</sup> day of February, 1989.

  
\_\_\_\_\_  
ROBERT G. NORTON  
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a copy of the foregoing REPLY MEMORANDUM to the following, this 13<sup>th</sup> day of February, 1989.

Bryan W. Cannon, Esq.  
BEESLEY & FAIRCLOUGH  
40 East South Temple, #300  
Salt Lake City, Utah 84111

Robert G. Norton

IN THE CIRCUIT COURT OF THE STATE OF UTAH  
SALT LAKE COUNTY, MURRAY DEPARTMENT

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COMMERCIAL SECURITY BANK,  
a Banking Corporation,

Plaintiff,

vs.

MARTIN M. PARCELL and  
STEPHANIE H. JOHNSON, fka  
STEPHANIE H. PARCELL,

Defendants.

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MEMORANDUM DECISION


Civil No. 853008061

Defendant Stephanie M. Johnson's Motion to Dismiss is denied.

The Court finds that Rule 71B of the Utah Rules of Civil Procedure is not an exclusive remedy for Plaintiff to pursue against Defendant Johnson.

Rule 71B(a) states that " ..... the Plaintiff may ..... " proceed as provided in the rule. The wording is not mandatory. Plaintiff may elect to proceed either under Rule 4(b) or 71B of URCP.

DATED this 21st day of July 1989.

  
  
L. H. Griffiths, Judge