2010

Vilma Estrada v. Robin Mendoza, Fred W. Almanza, Feria Access LLC, Southern Management Professional Limited Liability Company, Does 1-50 : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

VILMA ESTRADA, Plaintiff/Appellant, vs. ROBIN MENDOZA, FRED W. ALMANZA, FERIA ACCESS, LLC, SOUTHERN MANAGEMENT PROFESSIONAL LIMITED LIABILITY COMPANY; DOES 1-50, Defendants/Appellees.	**APPELLEES' BRIEF** 20100418 Civil No. 090402579

APPELLEES' BRIEF

APPEAL FROM A JUDGMENT CERTIFIED AS FINAL BY THE FOURTH DISTRICT COURT, HORORABLE CLAUDIA LAYCOCK

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STATEMENT OF JURISDICTION

This court has jurisdiction over this appeal by virtue of the provisions of Utah Code Ann. § 78A-4-103(j).

STANDARD OF REVIEW

Appellate review for a motion for judgment on the pleadings is one of correctness. *Miller v. Gastronomy, Inc.*, 2005 UT App 80, ¶6 (Utah Ct. App. 2005).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah R. App. P. 11(e)(2)

> *Transcript required of all evidence regarding challenged finding or conclusion.* If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion. Neither the court nor the appellee is obligated to correct appellant's deficiencies in providing the relevant portions of the transcript.

Utah Code § 13-11-3, -4, -5, Utah Consumer Sales Practices Act

> See Appellants addendum

Utah Rules of Small Claims Procedure

> See Addendum.

Utah R. Civ. P. 64D

> See Addendum.

Utah R. App. P. 24(a)(5)

> (a)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and
>
> > (a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or
> >
> > (a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

SUMMARY OF ARGUMENTS

Appellants failed to provide a complete record to this Court as required by Utah R. App. P. 11(e)(2) when they failed to provide a transcript of a telephonic hearing which was held on March 11, 2010, and therefore the judgment is presumed to be valid.

Appellants are challenging the findings and conclusions of the trial court, and yet Appellants have failed to marshal the evidence supporting the trial court's finding and conclusions, and therefore the appeal should be denied.

Appellants' appeal argues that the trial court erred when it allowed Appellees to raise numerous issues for the first time in a reply memorandum or at oral argument, however, with regard to two of those issues, Appellants failed to properly preserve those issues for appeal, having failed to object. Furthermore, Appellants' appeal also makes arguments with regard to preemption, however, not only did Appellants fail to preserve the issue for appeal, Appellants never made arguments in that regard at the trial level.

Appellants original Complaints argued that Appellees had violated the Utah Consumer Sales Practices Act ("UCSPA"). The actions of Appellees upon which Appellants based their claims were neither deceptive nor unconscionable, and therefore not actionable under the UCSPA.

Where the Appellants undertook an action which as a matter of law was not available to them, there are no circumstances which would enable Appellants to correct a deficiency and refile, and therefore the trial court's dismissal with prejudice was appropriate.

ARGUMENT

I. APPELLANTS FAILED TO PROVIDE THE COURT WITH A COMPLETE RECORD, AND THEREFORE THE JUDGMENT IS PRESUMED TO BE VALID

The Utah Rules of Appellate Procedure require the appellant to provide a transcript of all relevant evidence.

> *Transcript required of all evidence regarding challenged finding or conclusion.* If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion. Neither the court nor the appellee is obligated to correct appellant's deficiencies in providing the relevant portions of the transcript.

Utah R. App. P. 11(e)(2) (emphasis in original). Appellants failed to provide a transcript of all relevant evidence, and this Court has held that in such situations the judgment being appealed is presumed to be valid. "Since counsel failed to provide this court with all relevant evidence bearing on the issues raised on appeal, as required by Utah R. App. P. 11(e)(2), we can only presume that the judgment was supported by sufficient evidence." *State v. Nine Thousand One Hundred Ninety-Nine Dollars*, 791 P.2d 213, 217 (Utah Ct. App. 1990) (citing *Intermountain Power Agency v. Bowers-Irons Recreation Land & Cattle Co.*, 786 P.2d 250, 252 (Utah Ct. App. 1990); *Bevan v. J.H. Constr. Co.*, 669 P.2d 442, 443 (Utah 1983)); *see also State v. Cramer,* 2002 UT 9, ¶¶26-28 (Utah 2002).

On February 16, 2010, the trial court held oral arguments for Appellees' Motion for Judgment on the Pleadings. At the conclusion of that hearing, the trial court indicated it would issue an oral decision telephonically. On March 11, 2010, the trial court held a telephonic hearing wherein the trial court delivered its oral decision ("Tele-hearing").

Appellants have provided a transcript of the February 16, 2010, hearing, but Appellants have failed to provide this Court with a transcript of the March 11, 2010 Tele-hearing.[1]

Appellants have identified eight (8) issues on appeal (Pla. Brief, 1-4). Issue No. 1 (timeliness) was only briefly referenced during the Tele-hearing, and Issue No. 8 (dismissal with prejudice) was not discussed. However, each of the other six issues on appeal was discussed extensively during the Tele-hearing. Indeed, the Tele-hearing was an extensive analysis by the trial court applying the facts to the law and drawing the appropriate conclusions. Appellants now come before this Court, questioning the appropriateness of the trial court's ruling and analysis, the findings and conclusions, and yet Plaintiff fails to provide this Court with all relevant evidence.

With regard to Issue Nos. 2-3 (preemption), as argued below in Section IV, Appellants have injected the discussion of "preemption" into this appeal, despite the fact that neither the parties nor the trial court discussed preemption. Nonetheless, the trial court took considerable time at the Tele-hearing to analyze how the Utah Rules of Small Claims Procedure and Rule 64D of the Utah Rules of Civil Procedure affected Appellants' claims under the UCSPA.

With regard to Issue No. 4 (civil conspiracy), the trial court took considerable time at the Tele-hearing to analyze the claim of civil conspiracy, both generally and specifically, and included a discussion of the case law which the trial court relied upon.

---

[1] At the conclusion of the March 11, 2010 Tele-hearing, the trial court instructed counsel for Defendants to prepare findings, conclusion, and an order consistent with the trial court's ruling. To assist with that task, counsel for Defendants requested an audio recording of the Tele-hearing. (R. 261). The Tele-hearing was 20 minutes and seven seconds in duration (20:07). Counsel for Defendants prepared an informal written transcript for its own purposes, and the result was a six-page transcript (1" margins, 12 point font, single spaced).

Appellees will not include any additional argument in response to this issue because Appellants failed to provide the portion of the record upon which Appellees would need to rely.[2]

With regard to Issue Nos. 5-7 (UCSPA), the trial court took considerable time at the Tele-hearing to analyze the facts and how they applied to the elements of the UCSPA regarding both deceptive and unconscionable acts, which analysis included responses to questions from Appellants' counsel. Appellees will discuss these claims more in detail below in Section V.

Appellants argue that the trial court's conclusions were unsupported and contrary to the facts before it. Accordingly, Appellants' failure to provide a complete record results in a presumption "that the judgment was supported by sufficient evidence." *Id.* Accordingly, Plaintiff's appeal should be denied.

II. APPELLANT FAILED TO MARSHAL THE EVIDENCE, AND THEREFORE THE APPEAL SHOULD BE DENIED

This Court has held that "[t]he challenging party must marshal all relevant evidence presented at trial which tends to support the findings and demonstrate why the findings are clearly erroneous." *Bell v. Elder*, 782 P.2d 545, 547 (Utah App. 1989). This Court has "shown no reluctance to affirm when the appellant fails to adequately marshal the evidence." *West Valley City v. Majestic Investment Company*, 818 P.2d 1311, 1313 (Utah App. 1991).

[2] Furthermore, an element of civil conspiracy requires is an unlawful, overt act. If Appellants claims under the Utah Consumer Sales Practices Act do not survive, then the civil conspiracy claim could not survive.

In *West Valley City*, Judge Orme held that "[a]fter marshaling the evidence supporting the trial court's findings, the City must then show that these same findings are so lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous. *Id.* at 1315 (citation and internal quotations omitted). West Valley City had presented the Court of Appeals with a brief that contained extensive quotes from the record. The Court found this an inadequate marshaling and explained,

> The marshaling concept does not reflect a desire to merely have pertinent excerpts from the record readily available to a reviewing court. The marshaling process is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous. Appellants often overlook or disregard this heavy burden.

West Valley City, 818 at 1315. The Court acknowledged that there was a "general catalogue of evidence," but that "[w]hat the City has not done is to correlate particular items of evidence with the challenged findings and convince us of the court's missteps in application of the evidence to its findings." *Id.* Because of this, the Court of Appeals could not find the findings of facts to be clearly erroneous. "The challenge to the legal conclusions rises and falls with the factual findings sought to be challenged." *Id.*

Appellants' Brief fails in this regard. Appellants have not marshaled the evidence. While Appellants outline what the original facts, and the procedural history, they do not become the devil's advocate. The Appellants do not show the Appellees' argument and

evidence and then ferret out flaws in the same argument and evidence, showing against the clear weight of the evidence why it is clearly erroneous. The Appellants have failed to marshal the evidence and therefore this Court should deny their appeal.

III. APPELLANTS FAILED TO PROPERLY PRESERVE ALL OF THEIR OBJECTIONS RELATED TO ISSUES RAISED IN AN UNTIMELY FASHION BY APPELLEES

In Appellants' Statement of Issues for Appeal, Appellants attempt to cite to the record to show where Appellants preserved the issue for appeal, as required by Utah R. App. P. 24(a)(5)(A). Issue No. 1 deals with whether Appellees raised issues for the first time in their Reply Memorandum or during oral argument, which Appellant argues deprived them of an opportunity adequately respond. (Pla. Brief, 1, 17). Neither the Statement of Issues nor Appellants argument ever identifies what those specific issues are. However, as part of the statement of facts and statement of the case, Appellants identify four arguments which Appellees made for the first time in their Reply Memorandum: (a) "failure to challenge the writs of garnishment timely barred any UCSPA or Civil Conspiracy claims," (Pla. Brief, 6, 13), (b) failure to have properly pled the claim of civil conspiracy, (Pla. Brief, 6, 13), (c) the "UCSPA does not apply to lawsuits to collect consumer debts," (Pla. Brief, 13), and (d) "Defendants alleged conduct vis a vis the inflated and wrongful garnishments was not 'deceptive' or 'unconscionable' [under the UCSPA]." (Pla. Brief, 14).[3]

[3] Appellees concede that these four issues were not raised in Appellees' Memorandum in Support of Motion for Judgment on the Pleadings. However, Appellants' Memorandum in Opposition to Motion for Judgment on the Pleadings argued that the factual allegations of the Complaints met the elements of the UCSPA, and included citations to the UCSPA. In reply thereto, Appellees analyzed the UCSPA and its application to the facts, and therefore such arguments were properly before the trial court.

Appellants have not preserved any objection to the last two issues. Statement of Issue No. 1 states that Appellants' objections of untimeliness were preserved during the oral argument on February 16, 2011. (Pla. Brief, 1). A review of the transcript pages identified by Appellants shows that Appellants did object to the garnishment and civil conspiracy arguments being raised for the first in a reply memorandum. However, at no point in those cited pages, or at any point in the hearing, did Appellants object to the untimeliness of the arguments related to the application of the UCSPA to collection activities, and especially to the 'deceptive' or 'unconscionable' determination. "Under ordinary circumstances, we will not consider an issue brought for the first time on appeal unless the trial court committed plain error or exceptional circumstances exist." *State v. Pinder,* 114 P.3d 551, 561 (Utah 2005) (quoting *State v. Nelson-Waggoner*, 94 P.3d 186 (Utah 2004)).

IV. THE ISSUE OF PREEMPTION WAS NEVER ARGUED BEFORE THE TRIAL COURT, AND THEREFORE WAS NOT PRESERVED FOR APPEAL

The Statement of Issues includes two items related to preemption, Issues Nos. 2-3. For these two issues, Appellants cite to the transcript of the oral argument held on February 16, 2010. Within the transcript, Appellants cite to pages 17-34, an 18-page spread. Such a large citation is inconsistent with the intent of Rule 24(a)(5)(A).[4] The Court, and appellees, should not be required to re-read the entire transcript to find where Appellants properly raised the issue. A review of the transcript shows that Appellants essentially cited to the pages where Appellants' counsel was making his argument; in

[4] With the exception of Issue No. 1, the other seven issues on appeal cite to this same large spread. Issue No. 1 actually provides pin-point citations. The other seven issues on appeal should not be considered by this Court because Appellants' Brief fails to conform to Rule 24(a)(5)(A).

other words, Appellants *cannot* provide a pin-point citation because Appellants never preserved the issue for appeal. Instead, Appellants are asking this Court to either do the work for them and locate the actual citation, or Appellants are hoping the Court will hold that the issue was raised by implication.

An actual reading of the transcript reveals that at no point did Appellants' counsel ever argue, or raise by implication, the issue of preemption. "Under ordinary circumstances, we will not consider an issue brought for the first time on appeal unless the trial court committed plain error or exceptional circumstances exist." *Id.* Appellants' Brief fails to conform to Rule 24(a)(5), Appellants failed to preserve this issue below, and Appellants failed to argue plain error, and therefore any arguments relating to preemption should be disregarded, and the appeal should be denied.

V. THE ALLEGED ACTIONS OF APPELLEES WERE NEITHER DECEPTIVE NOR UNCONCSIONABLE

The three main factual allegations made by Appellants at the trial court level were that Appellees made unlicensed loans, filed a lawsuit in an inconvenient forum, and excessively garnished the Appellants. (R. 238-239). None of the actions fits within the definition of deceptive under the UCSPA. To be actionable under the UCSPA, an act must first be committed as part of a "consumer transaction," which is defined in Utah Code § 13-11-3. The section dealing with deceptive acts then states as follows: "(1) A deceptive act or practice by a supplier in connection with a consumer transaction violates this chapter whether it occurs before, during, or after the transaction. (2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier

knowingly or intentionally:" and then goes on to list 23 different acts that would be considered deceptive. Utah Code § 13-11-4. This is an exhaustive list. The qualifier in Subsection (2), "[w]ithout limiting the scope of Subsection (1)", does not expand the 23 items listed in Subsection (2), it only refers to the timing of the act, whether "before, during, or after the transaction." None of the three factual allegations (unlicensed loan, inconvenient forum, excessive garnishments) made by Appellants fall within the 23 listed acts.

If an act does not fall within the list of deceptive, a claimant may still be afforded relief if the court determines an act was unconscionable. Utah Code § 13-11-5. "Substantive unconscionability examines the relative fairness of the obligations assumed; it requires terms 'so one-sided as to oppress or unfairly surprise an innocent party.'" *Wade v. Jobe*, 818 P.2d 1006, 1017 (Utah 1991) (citing *Resource Management Co. v. Weston Ranch and Livestock Co.,* 706 P.2d 1028, 1041 (Utah 1985). Furthermore, unconscionable act would be one which "no decent, fair-minded person would view . . . without being possessed of a profound sense of injustice." *Id.*

In the present case, Appellants voluntarily came to the business of Appellees and voluntarily entered into a loan agreement. Whether or not Appellees had the proper business license at that time does not change the balance of the negotiating power. The loan agreement had a venue provision calling for venue to be in Utah County. Appellants are deemed to have knowledge of that provision when they signed it. This is not unconscionable. Ultimately, small claims actions were filed. Small claims procedure is very simple. The Appellants were only required to appear at one hearing. Holding a

venue provision in a contract as unconscionable would undermine decades of jurisprudence on the matter. Finally, Appellants allege that they were excessively garnished. If Appellees had been allowed to over-garnish with no notice or warning to Appellants, then that would shock the conscience. However, Rule 64D of the Utah Rules of Civil Procedure requires notice, and a debtor has a right to a hearing to contest any aspect of the garnishment. There has been no allegation that Appellees failed to follow Rule 64D, and therefore Appellees actions cannot and should not be held unconscionable.

VI. DISMISSAL WITH PREJUDICE WAS APPROPRIATE

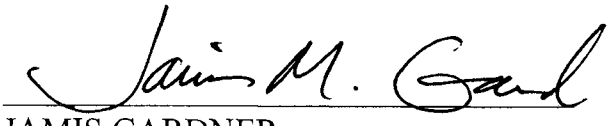
In *Arndt v. First American,* 991 P.2d 584 (Utah 1999), the Utah Supreme Court upheld a district court's dismissal with prejudice on a motion for judgment on the pleadings when the claims were brought by the incorrect parties. Where the Appellants undertook an action which as a matter of law was not available to them, there are no circumstances which would enable Appellants to correct a deficiency and refile. Appellants cannot change the facts. The trial court's dismissal of the Complaints with prejudice was appropriate.

CONCLUSION

This Court should affirm the trial court's decision, and deny Appellants' appeal.

RESPECTFULLY SUBMITTED this 1st day of March, 2011.

ROBINSON, SEILER & ANDERSON, LC

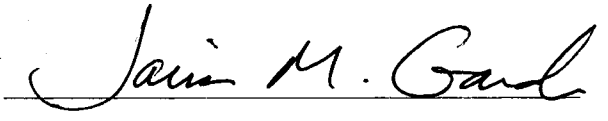


JAMIS GARDNER
Attorney for Defendants/Appellees

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was provided to the following by placing a copy thereof in the U.S. mail, first class postage prepaid, this 1st day of March, 2011, addressed as follows:

Brian W. Steffensen
Steffensen Law Office
448 East 400 South, Suite 100
Salt Lake City, UT 84111



ADDENDUM

1. Utah Rules of Small Claims Procedure.

2. Utah R. Civ. P. 64D.

Addendum Item No. 1

Utah Rules of Small Claims Procedure.

Utah Rules of Small Claims Procedure

Rule 1. General provisions.

(a) These rules constitute the simplified rules of procedure and evidence in small claims cases required by Utah Code Section 78-6-1 and shall be referred to as the Rules of Small Claims Procedure. They are to be interpreted to carry out the statutory purpose of small claims cases, dispensing speedy justice between the parties.

(b) These rules apply to the initial trial and any appeal under Rule 12 of all actions pursued as a small claims action under Utah Code Section 78-6-1 et seq.

(c) If the Supreme Court has approved a form for use in small claims actions, parties must file documents substantially similar in form to the approved form.

(d) By presenting a document, a party is certifying that to the best of the party's knowledge it is not being presented for an improper purpose and the legal and factual contentions are made in good faith. If the court determines that this certification has been violated, the court may impose an appropriate sanction upon the attorney or party.

Rule 2. Beginning the case.

(a) A case is begun by plaintiff filing with the clerk of the court either:

(a)(1) an affidavit stating facts showing the right to recover money from defendant; or

(a)(2) an interpleader affidavit showing that plaintiff is holding money claimed by two or more defendants.

(b) The affidavit qualifies as a complaint under Utah Code Section 78-12a-2 and Section 78-27-25.

(c) Unless waived upon filing an affidavit of impecuniosity, the appropriate filing fee must accompany the small claims affidavit.

(d) In an interpleader action, plaintiff must pay the money into the court at the time of filing the affidavit or acknowledge that it will pay the money to whomever the court directs.(e) Upon filing the affidavit, the clerk of the court shall schedule the trial and issue the summons for the defendant to appear.

Rule 3. Service of the affidavit.

(a) After filing the affidavit and receiving a trial date, plaintiff must serve the affidavit and summons on defendant. To serve the affidavit, plaintiff must either:

(a)(1) have the affidavit served on defendant by a sheriff's department, constable, or person regularly engaged in the business of serving process and pay for that service; or

(a)(2) have the affidavit delivered to defendant by a method of mail or commercial courier service that requires defendant to sign a receipt and provides for return of that receipt to plaintiff.

(b) The affidavit must be served at least 30 calendar days before the trial date. Service by mail or commercial courier service is complete on the date the receipt is signed by defendant.

(c) Proof of service of the affidavit must be filed with the court no later than 10 business days after service. If service is by mail or commercial courier service, plaintiff must file a proof of service. If service is by a sheriff, constable, or person regularly engaged in the business of serving process, proof of service must be filed by the person completing the service.

(d) Each party shall serve on all other parties a copy of all documents filed with the court other than the counter affidavit. Each party shall serve on all other parties all documents as ordered by the court. Service of all papers other than the affidavit and counter affidavit may be by first class mail to the other party's last known address. The party mailing the papers shall file proof of mailing with the court no later than 10 business days after service. If the papers are returned to the party serving them as undeliverable, the party shall file the returned envelope with the court.

Rule 4. Counter affidavit.

(a) Defendant may file with the clerk of the court a counter affidavit stating facts showing the right to recover money from plaintiff.

(b) Unless waived upon filing an affidavit of impecuniosity, the appropriate filing fee must accompany the counter affidavit.

(c) Any counter affidavit must be filed at least 15 calendar days before the trial. The clerk of the court will mail a copy of the counter affidavit to plaintiff at the address provided by plaintiff on the affidavit.

(d) A counter affidavit for more than the monetary limit for small claims actions may not be filed under these rules.

Rule 5. No answer required.

No answer is required to an Affidavit or Counter Affidavit. All allegations are deemed denied.

Rule 6. Pretrial.

(a) No discovery may be conducted but the parties are urged to exchange information prior to the trial.

(b) Written motions and responses may be filed prior to trial. Motions may be made orally or in writing at the beginning of the trial. No motions will be heard prior to trial.

(c) One postponement of the trial date per side may be granted by the clerk of the court. To request a postponement, a party must file a motion for postponement with the court at least 5 business days before trial. The clerk will give notice to the other party. A postponement for more than 45 calendar days may be granted only by the judge. The court may require the party requesting the postponement to pay the costs incurred by the other party.

Rule 7. Trial.

(a) All parties must bring to the trial all documents related to the controversy regardless of whose position they support.

(b) Parties may have witnesses testify at trial and bring documents. To require attendance by a witness who will not attend voluntarily, a party must subpoena the witness. The clerk of the court or a party's attorney may issue a subpoena pursuant to Utah Rule of Civil Procedure 45. The party requesting the subpoena is responsible for service of the subpoena and payment of any fees. A subpoena must be served at least 5 business days prior to trial.

(c) The judge will conduct the trial and question the witnesses. The trial will be conducted in such a way as to give all parties a reasonable opportunity to present their positions. The judge may allow parties or their counsel to question witnesses.

(d) The judge may receive the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their business affairs. The rules of evidence shall not be applied strictly. The judge may allow hearsay that is probative, trustworthy and credible. Irrelevant or unduly repetitious evidence shall be excluded.

(e) After trial, the judge shall decide the case and direct the entry of judgment. No written findings are required. The clerk of the court will serve all parties present with a copy of the judgment.

(f) Costs will be awarded to the prevailing party and to plaintiff in an interpleader action unless the judge otherwise orders.

Rule 8. Dismissal.

(a) Except in interpleader cases, if plaintiff fails to appear at the time set for trial, plaintiff's claim will be dismissed.

(b) If defendant has filed a counter affidavit and fails to appear at the time set for trial, defendant's claim will be dismissed.

(c) A party may move to dismiss its claim at any time before trial.

(d) Dismissal is without prejudice unless the judge otherwise orders. The appearing party shall serve the order of dismissal on the non-appearing party.

Rule 9. Default judgment.

(a) If defendant fails to appear at the time set for trial, the court may grant plaintiff judgment in an amount not to exceed the amount requested in plaintiff's affidavit.

(b) If defendant has filed a counter affidavit and plaintiff fails to appear at the time set for trial, the court may grant defendant judgment in an amount not to exceed the amount requested in defendant's counter affidavit.

(c) The appearing party shall serve the default judgment on the non-appearing party.

(d) In an interpleader action, if a defendant fails to appear, a default judgment may be entered against the non-appearing defendant.

Rule 10. Set aside of default judgments and dismissals.

(a) A party may request that the default judgment or dismissal be set aside by filing a motion to set aside within 15 calendar days after entry of the judgment or dismissal. If the court receives a timely motion to set aside the default judgment or dismissal and good cause is shown, the court may grant the motion and reschedule a trial. The court may require the moving party to pay the costs incurred by the other party.

(b) The period for moving to set aside a default judgment or dismissal may be extended by the court for good cause if the motion is made in a reasonable time.

Rule 11. Collection of judgments.

(a) Judgments may be collected under the Utah Rules of Civil Procedure.

(b) Upon payment in full of the judgment, including post-judgment costs and interest, the judgment creditor shall file a satisfaction of judgment with the court. Upon receipt of a satisfaction of judgment from the judgment creditor, the clerk of the court shall enter the satisfaction upon the docket. The judgment debtor may file a satisfaction of judgment and proof of payment. If the judgment creditor fails to object within 10 business days after notice,

the court may enter satisfaction of the judgment. If the judgment creditor objects to the proposed satisfaction, the court shall rule on the matter and may conduct a hearing.

(c) If the judgment creditor is unavailable to accept payment of the judgment, the judgment debtor may pay the amount of the judgment into court and serve the creditor with notice of payment in the manner directed by the court as most likely to give the creditor actual notice, which may include publication. After 30 calendar days after final notice, the debtor may file a satisfaction of judgment and the court may conduct a hearing. The court will hold the money in trust for the creditor for the period required by state law. If not claimed by the judgment creditor, the clerk of the court shall transfer the money to the Unclaimed Property Division of the Office of the State Treasurer.

Rule 12. Appeals.

(a) Any party may appeal a final order or judgment within 30 calendar days after entry of judgment or order or after denial of a motion to set aside the judgment or order, whichever is later.

(b) To appeal, the appealing party must file a notice of appeal in the court issuing the judgment. Unless waived upon filing an affidavit of impecuniosity, the appropriate fee must accompany the notice of appeal.

(c) Upon the receipt of the notice of appeal, the clerk of the district court shall schedule the new trial and notify the parties. All proceedings on appeal will be held in accordance with these rules, except that the parties will not file an affidavit or counter affidavit.

(d) The district court shall issue all orders governing the new trial. The new trial of a justice court adjudication shall be heard in the district court nearest to and in the same county as the justice court from which the appeal is taken. The new trial of an adjudication by the small claims department of the district court shall be held at the same district court.

(e) A judgment debtor may stay the judgment during appeal by posting a supersedeas bond with the district court. The stay shall continue until entry of the final judgment or order of the district court.

(f) Within 10 business days after filing the notice of appeal, the justice court shall transmit to the district court the notice of appeal, the district court fees, a certified copy of the register of actions, and the original of all papers filed in the case.

(g) Upon the entry of the judgment or final order of the district court, the clerk of the district court shall transmit to the justice court that rendered the original judgment notice of the manner of disposition of the case.

(h) The district court may dismiss the appeal and remand the case to the justice court if the appellant:

(h)(1) fails to appear;

(h)(2) fails to take any step necessary to prosecute the appeal; or

(h)(3) requests the appeal be dismissed.

Rule 13. Representation.

A party in a small claims action may be self-represented, represented by an attorney admitted to practice law in Utah, represented by an employee, or, with the express approval of the court, represented by any other person who is not compensated for the representation.

Addendum Item No. 2

Utah R. Civ. P. 64D.

Rule 64D. Writ of garnishment.

(a) Availability. A writ of garnishment is available to seize property of the defendant in the possession or under the control of a person other than the defendant. A writ of garnishment is available after final judgment or after the claim has been filed and prior to judgment. The maximum portion of disposable earnings of an individual subject to seizure is the lesser of:

(a)(1) 50% of the defendant's disposable earnings for a writ to enforce payment of a judgment for failure to support dependent children or 25% of the defendant's disposable earnings for any other judgment; or

(a)(2) the amount by which the defendant's disposable earnings for a pay period exceeds the number of weeks in that pay period multiplied by thirty times the federal minimum hourly wage prescribed by the Fair Labor Standards Act in effect at the time the earnings are payable.

(b) Grounds for writ before judgment. In addition to the grounds required in Rule 64A, the grounds for a writ of garnishment before judgment require all of the following:

(b)(1) that the defendant is indebted to the plaintiff;

(b)(2) that the action is upon a contract or is against a defendant who is not a resident of this state or is against a foreign corporation not qualified to do business in this state;

(b)(3) that payment of the claim has not been secured by a lien upon property in this state;

(b)(4) that the garnishee possesses or controls property of the defendant; and

(b)(5) that the plaintiff has attached the garnishee fee established by Utah Code Section 78A-2-216.

(c) Statement. The application for a post-judgment writ of garnishment shall state:

(c)(1) if known, the nature, location, account number and estimated value of the property and the name, address and phone number of the person holding the property;

(c)(2) whether any of the property consists of earnings;

(c)(3) the amount of the judgment and the amount due on the judgment;

(c)(4) the name, address and phone number of any person known to the plaintiff to claim an interest in the property; and

(c)(5) that the plaintiff has attached or will serve the garnishee fee established by Utah Code Section 78A-2-216.

(d) Defendant identification. The plaintiff shall submit with the affidavit or application a copy of the judgment information statement described in Utah Code Section 78B-5-201 or the defendant's name and address and, if known, the last four digits of the defendant's social security number and driver license number and state of issuance.

(e) Interrogatories. The plaintiff shall submit with the affidavit or application interrogatories to the garnishee inquiring:

(e)(1) whether the garnishee is indebted to the defendant and the nature of the indebtedness;

(e)(2) whether the garnishee possesses or controls any property of the defendant and, if so, the nature, location and estimated value of the property;

(e)(3) whether the garnishee knows of any property of the defendant in the possession or under the control of another, and, if so, the nature, location and estimated value of the property and the name, address and phone number of the person with possession or control;

(e)(4) whether the garnishee is deducting a liquidated amount in satisfaction of a claim against the plaintiff or the defendant, a designation as to whom the claim relates, and the amount deducted;

(e)(5) the date and manner of the garnishee's service of papers upon the defendant and any third persons;

(e)(6) the dates on which previously served writs of continuing garnishment were served; and

(e)(7) any other relevant information plaintiff may desire, including the defendant's position, rate and method of compensation, pay period, and the computation of the amount of defendant's disposable earnings.

(f) Content of writ; priority. The writ shall instruct the garnishee to complete the steps in subsection (g) and instruct the garnishee how to deliver the property. Several writs may be issued at the same time so long as only one garnishee is named in a writ. Priority among writs of garnishment is in order of service. A writ of garnishment of earnings applies to the earnings accruing during the pay period in which the writ is effective.

(g) Garnishee's responsibilities. The writ shall direct the garnishee to complete the following within seven business days of service of the writ upon the garnishee:

(g)(1) answer the interrogatories under oath or affirmation;

(g)(2) serve the answers on the plaintiff; and

(g)(3) serve the writ, answers, notice of exemptions and two copies of the reply form upon the defendant and any other person shown by the records of the garnishee to have an interest in the property.

The garnishee may amend answers to interrogatories to correct errors or to reflect a change in circumstances by serving the amended answers in the same manner as the original answers.

(h) Reply to answers; request for hearing.

(h)(1) The plaintiff or defendant may file and serve upon the garnishee a reply to the answers, a copy of the garnishee's answers, and a request for a hearing. The reply shall be filed and served within 10 days after service of the answers or amended answers, but the court may deem the reply timely if filed before notice of sale of the property or before the property is delivered to the plaintiff. The reply may:

(h)(1)(A) challenge the issuance of the writ;

(h)(1)(B) challenge the accuracy of the answers;

(h)(1)(C) claim the property or a portion of the property is exempt; or

(h)(1)(D) claim a set off.

(h)(2) The reply is deemed denied, and the court shall conduct an evidentiary hearing as soon as possible and not to exceed 14 days.

(h)(3) If a person served by the garnishee fails to reply, as to that person:

(h)(3)(A) the garnishee's answers are deemed correct; and

(h)(3)(B) the property is not exempt, except as reflected in the answers.

(i) Delivery of property. A garnishee shall not deliver property until the property is due the defendant. Unless otherwise directed in the writ, the garnishee shall retain the property until 20 days after service by the garnishee under subsection (g). If the garnishee is served with a reply within that time, the garnishee shall retain the property and comply with the order of the court entered after the hearing on the reply. Otherwise, the garnishee shall deliver the property as provided in the writ.

(j) Liability of garnishee.

(j)(1) A garnishee who acts in accordance with this rule, the writ or an order of the court is released from liability, unless answers to interrogatories are successfully controverted.

(j)(2) If the garnishee fails to comply with this rule, the writ or an order of the court, the court may order the garnishee to appear and show cause why the garnishee should not be ordered to pay such amounts as are just, including the value of the property or the balance of the judgment, whichever is less, and reasonable costs and attorney fees incurred by parties as a result of the garnishee's failure. If the garnishee shows that the steps taken to secure the property were reasonable, the court may excuse the garnishee's liability in whole or in part.

(j)(3) No person is liable as garnishee by reason of having drawn, accepted, made or endorsed any negotiable instrument that is not in the possession or control of the garnishee at the time of service of the writ.

(j)(4) Any person indebted to the defendant may pay to the officer the amount of the debt or so much as is necessary to satisfy the writ, and the officer's receipt discharges the debtor for the amount paid.

(j)(5) A garnishee may deduct from the property any liquidated claim against the plaintiff or defendant.

(k) Property as security.

(k)(1) If property secures payment of a debt to the garnishee, the property need not be applied at that time but the writ remains in effect, and the property remains subject to being applied upon payment of the debt. If property secures payment of a debt to the garnishee, the plaintiff may obtain an order authorizing the plaintiff to buy the debt and requiring the garnishee to deliver the property.

(k)(2) If property secures an obligation that does not require the personal performance of the defendant and that can be performed by a third person, the plaintiff may obtain an order authorizing the plaintiff or a third person to perform the obligation and requiring the garnishee to deliver the property upon completion of performance or upon tender of performance that is refused.

(l) Writ of continuing garnishment.

(l)(1) After final judgment, the plaintiff may obtain a writ of continuing garnishment

against any non exempt periodic payment. All provisions of this rule apply to this subsection, but this subsection governs over a contrary provision.

(l)(2) A writ of continuing garnishment applies to payments to the defendant from the effective date of the writ until the earlier of the following:

(l)(2)(A) 120 days;

(l)(2)(B) the last periodic payment;

(l)(2)(C) the judgment is stayed, vacated or satisfied in full; or

(l)(2)(D) the writ is discharged.

(l)(3) Within seven days after the end of each payment period, the garnishee shall with respect to that period:

(l)(3)(A) answer the interrogatories under oath or affirmation;

(l)(3)(B) serve the answers to the interrogatories on the plaintiff, the defendant and any other person shown by the records of the garnishee to have an interest in the property; and

(l)(3)(C) deliver the property as provided in the writ.

(l)(4) Any person served by the garnishee may reply as in subsection (g), but whether to grant a hearing is within the judge's discretion.

(l)(5) A writ of continuing garnishment issued in favor of the Office of Recovery Services or the Department of Workforce Services of the state of Utah to recover overpayments:

(l)(5)(A) is not limited to 120 days;

(l)(5)(B) has priority over other writs of continuing garnishment; and

(l)(5)(C) if served during the term of another writ of continuing garnishment, tolls that term and preserves all priorities until the expiration of the state's writ.