

2010

Mary Ann Jenkins and Gary D. Jenkins v.
ADVANTAGE PAWN RENTAL, dba
ADVANTAGE RENTAL and/or ADVANTAGE
RENTAL & TRADING POST, and BIG BUBBA'S
TRAILER MFG., dba BIG BUBBA'S TRAILER
SALES and/or BIG BUBBA'S TRAILER SALES &
MFG., : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

W. Scott Lythgoe; Deven J. Coggins; Addison D. Larreau; Coggins, Larreau & Lythgoe PC;
Attorneys for Appellees.

Andrew D. Wright; A. Joseph Sano; Strong & Hanni; Attorneys for Appellant.

Recommended Citation

Brief of Appellant, *Jenkins v. Advantage Pawn Rental*, No. 20100774 (Utah Court of Appeals, 2010).
https://digitalcommons.law.byu.edu/byu_ca3/2514

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

MARY ANN JENKINS and
GARY D. JENKINS,

Plaintiffs/Appellees,

VS.

ADVANTAGE PAWN RENTAL,)
dba ADVANTAGE RENTAL and/or)
ADVANTAGE RENTAL &)
TRADING POST, and BIG)
BUBBA'S TRAILER MFG., dba)
BIG BUBBA'S TRAILER SALES)
and/or BIG BUBBA'S TRAILER)
SALES & MFG.,)

Defendants/Appellants.

BRIEF OF APPELLANT BIG BUBBA'S TRAILERS

CASE NO. 20100774-CA

**APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT,
WEBER COUNTY, STATE OF UTAH
HONORABLE MICHAEL D. DIREDA**

W. Scott Lythgoe, USB No. 7928
Deven J. Coggins, USB No. 7703
Addison D. Larreau, USB No. 8546
COGGINS, LARREAU &
LYTHGOE, P.C.
289 24th Street, Suite 150
Ogden, Utah 84401
Attorneys for Plaintiffs/Appellees

Andrew D. Wright, USB No. 8857
A. Joseph Sano, USB No. 9925
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, Utah 84180
Attorneys for Defendant/Appellant
Big Bubba's Trailers

ORAL ARGUMENT AND PUBLISHED DECISION REQUESTED
UTAH APPELLATE COURTS

JAN 21 2011

IN THE COURT OF APPEALS OF THE STATE OF UTAH

MARY ANN JENKINS and)
GARY D. JENKINS,)

Plaintiffs/Appellees,)

VS.)

ADVANTAGE PAWN RENTAL,)
dba ADVANTAGE RENTAL and/or)
ADVANTAGE RENTAL &)
TRADING POST, and BIG)
BUBBA'S TRAILER MFG., dba)
BIG BUBBA'S TRAILER SALES)
and/or BIG BUBBA'S TRAILER)
SALES & MFG.,)

Defendants/Appellants.)

BRIEF OF APPELLANT BIG BUBBA'S TRAILERS

CASE NO. 20100774-CA

**APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT,
WEBER COUNTY, STATE OF UTAH
HONORABLE MICHAEL D. DIREDA**

W. Scott Lythgoe, USB No. 7928
Deven J. Coggins, USB No. 7703
Addison D. Larreau, USB No. 8546
COGGINS, LARREAU &
LYTHGOE, P.C.
289 24th Street, Suite 150
Ogden, Utah 84401
Attorneys for Plaintiffs/Appellees

Andrew D. Wright, USB No. 8857
A. Joseph Sano, USB No. 9925
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, Utah 84180
Attorneys for Defendant/Appellant
Big Bubba's Trailers

ORAL ARGUMENT AND PUBLISHED DECISION REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iv
JURISDICTION.....	1
STATEMENT OF THE ISSUES ON APPEAL.....	1
STANDARD OF REVIEW.....	1
STATEMENT OF THE CASE.....	2
A. NATURE OF THE CASE.....	2
B. COURSE OF PROCEEDINGS.....	3
C. DISPOSITION OF THE COURT.....	3
STATEMENT OF FACTS.....	4
A. Facts Asserted In Support Of Motion To Set Aside Default Certificate.....	4
B. The Trial Court’s Ruling On Big Bubba’s Motion To Set Aside Default Certificate	4
C. Additional Relevant Facts.....	5
SUMMARY OF ARGUMENT.....	6
ARGUMENT.....	7
I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED BIG BUBBA’S MOTION BASED SOLELY ON THE AMOUNT OF TIME THAT HAD PASSED SINCE THE FILING OF THE AMENDED COMPLAINT.....	7
1. Big Bubba’s Failure To Timely Answer The Amended Complaint Was Not Willful.....	12

2. Big Bubba’s Has Alleged Meritorious Defenses.....	13
3. Big Bubba’s Acted Expeditiously To Correct The Default.....	16
4. Plaintiff Will Not Be Prejudiced If The Default Is Set Aside.....	17
5. The Public Interest Supports Setting Aside The Default In This Case.....	19
II. THE TRIAL COURT’S DECISION WILL LEAD TO CONFUSION AND CREATE A RISK OF INCONSISTENT JUDGMENTS.....	22
CONCLUSION.....	24
CERTIFICATE OF SERVICE.....	25
ADDENDUM A	

TABLE OF AUTHORITIES

Page

Cases Cited

<u>Beitel v. OCA, Inc. (In re OCA, Inc.),</u> 551 F.3d 359 (5th Cir. 2008).....	10
<u>Bunting Tractor Co. v. Emmett D. Ford Contractors, Inc.,</u> 272 P.2d 191 (Utah 1954).....	8
<u>CJC Holdings, Inc. v. Wright & Lato, Inc.,</u> 979 F.2d 60 (5th Cir. 1992).....	11
<u>Cody v. Mello,</u> 59 F.3d 13 (2d Cir. 1995).....	20
<u>Coon v. Grenier,</u> 867 F.2d 73 (1st Cir. 1989).....	9, 11, 13, 18
<u>Davis v. Goldsworthy,</u> 2008 UT App 145, 184 P.3d 626.....	1, 8
<u>Davis v. Goldsworthy (Davis II),</u> 2010 UT App 78, 233 P.3d 496.....	19
<u>Davis v. Musler,</u> 713 F.2d 907 (2d Cir. 1983).....	17
<u>Dennis Garberg & Assocs., Inc. v. Pack-Tech Int’l Corp.,</u> 115 F.3d 767 (10 th Cir. 1997).....	9
<u>Enron Oil Corp. v. Diakuhara,</u> 10 F.3d 90 (2d Cir. 1993).....	17, 21
<u>Falk v. Allen,</u> 739 F.2d 461 (9th Cir. 1984).....	11
<u>Frow v. De La Vega,</u> 82 U.S. 552 (1872).....	22

<u>Gold Kist, Inc. v. Laurinburg Oil Co., Inc.,</u> 756 F.2d 14 (3d Cir. 1985).....	11
<u>Gold Standard, Inc. v. Am. Barrick Res. Corp.,</u> 805 P.2d 164 (Utah 1990).....	9
<u>Gulf Coast Fans, Inc. v. Midwest Elecs. Imps., Inc.,</u> 740 F.2d 1499 (11th Cir. 1984).....	23
<u>Heathman v. Fabian & Clendenin,</u> 377 P.2d 189 (Utah 1962).....	8, 19
<u>Heber v. United States,</u> 145 F.R.D. 576 (D. Utah 1992).....	10, 11
<u>Heller v. Tex. Real Estate Comm’n (In re Marinez),</u> 589 F.3d 772 (5th Cir. 2009).....	18
<u>Herrera v. Springer Corp.,</u> 508 P.2d 1303 (N.M. Ct. App. 1973).....	13
<u>Hunt v. Ford Motor Co.,</u> 65 F.3d 178 (10th Cir. 1995).....	10
<u>In re: CRS Steam, Inc.,</u> 233 B.R. 901 (B.A.P. 1st Cir. 1999).....	11
<u>In re First T.D. & Invest., Inc.,</u> 253 F.3d 520 (9th Cir. 2001).....	23
<u>Jackson v. Beech,</u> 636 F.2d 831 (D.C. Cir. 1980).....	11
<u>Keegel v. Key West & Caribbean Trading Co.,</u> 627 F.2d 372 (D.C. Cir. 1980).....	11, 13
<u>Kirtland v. Fort Morgan Auth. Sewer Serv., Inc.,</u> 524 So.2d 600 (Ala. 1988).....	12

<u>Kryzak v. Dresser Indus.</u> , 118 F.R.D. 12 (D. Me. 1987).....	14
<u>Lund v. Brown</u> , 2000 UT 75, 11 P.3d 277.....	7, 8
<u>Marziliano v. Heckler</u> , 728 F.2d 151 (2d Cir. 1984).....	11
<u>May v. Thompson</u> , 677 P.2d 1109 (Utah 1984).....	7
<u>Meehan v. Snow</u> , 652 F.2d 274 (2d Cir. 1981).....	11, 20
<u>McKean v. Mtn. View Mem. Estates, Inc.</u> , 411 P.2d 129 (Utah 1966).....	8
<u>Menzie v. Galetka</u> , 2006 UT 81, 150 P.3d 480.....	17
<u>Miller v. Brocksmith</u> , 825 P.2d 690 (Utah Ct. App. 1992).....	7, 8, 9, 10, 21
<u>Pretzel & Stouffer, Chartered v. Imperial Adjusters, Inc.</u> , 28 F.3d 42 (7th Cir. 1994).....	11
<u>Robinson v. Griffith</u> , 108 F.R.D. 152 (W.D. La. 1985).....	18
<u>Roth v. Joseph</u> , 2010 UT App 332, ___ P.3d ___,	10, 19
<u>SEC v. McNulty</u> , 137 F.3d 732 (2d Cir. 1998).....	12
<u>TCI Group Life Ins. Plan v. Knoebber</u> , 244 F.3d 691 (9th Cir. 2001).....	11, 12, 15

<u>United Coin Meter Co., Inc. v. Seaboard Coastline R.R.</u> , 705 F.2d 839 (6th Cir. 1983).....	11, 17, 18
<u>United States v. One Parcel of Real Prop.</u> , 763 F.2d 181 (5th Cir. 1985).....	9, 11, 18
<u>Utah Dep’t of Transp. v. Osguthorpe</u> , 892 P.2d 4 (Utah 1995).....	20
<u>Wilson v. Lambert</u> , 613 P.2d 765 (Utah 1980).....	8-9
<u>Winegar v. Slim Olson, Inc.</u> , 252 P.2d 205 (Utah 1953).....	8

Statutes and Rules Cited

Federal Rules of Civil Procedure Rule 55(c).....	<i>passim</i>
Utah Code Annotated § 78A-3-102(4).....	1
Utah Code Annotated § 78A-4-103(2)(j).....	1
Utah Rules of Appellate Procedure Rule 5(a).....	1
Utah Rules of Appellate Procedure Rule 42(a).....	1
Utah Rules of Civil Procedure Rule 55(c).....	<i>passim</i>
Utah Rules of Civil Procedure Rule 60(b).....	5, 17

Other Authorities Cited

Wright, Miller & Kane § 2690.....	23
-----------------------------------	----

JURISDICTION

The Utah Supreme Court transferred this case to the Utah Court of Appeals pursuant to Utah Code Ann. § 78A-3-102(4) and Rule 42(a) of the Utah Rules of Appellate Procedure. This Court has jurisdiction over this matter pursuant to Utah Code Ann. § 78A-4-103(2)(j) and Rule 5(a) of the Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUES ON APPEAL

1. Did the district court err in denying Big Bubba's Motion to Set Aside Default Certificate based solely on the length of time that had elapsed between service of the Amended Complaint and the filing of Big Bubba's Motion to Set Aside? (R. 52, 72, 133, 197.)

2. Did the district court err in denying Big Bubba's Motion to Set Aside Default Certificate without making findings of fact regarding the relevant factors to be considered in determining whether "good cause" exists under Rule 55(c) of the Utah Rules of Civil Procedure? (R. 133, 197.)

STANDARD OF REVIEW

A trial court's ruling on a motion to set aside a default certificate involves the trial court's discretionary power and will be overturned only if it has abused its discretion. See Davis v. Goldsworthy, 2008 UT App 145, ¶ 10, 184 P.3d 626.

STATEMENT OF THE CASE

A. Nature of the Case.

Plaintiff Mary Ann Jenkins, along with her husband, Gary D. Jenkins, filed this lawsuit seeking damages for personal injuries allegedly sustained in an accident involving one of Big Bubba's trailers. Plaintiff alleges that after removing a locking pin securing one of the trailer's two ramps in an upright position, the ramp fell and struck her on the head. There are no known witnesses to the accident and Plaintiff has given conflicting accounts to her medical providers as to how she was injured. Plaintiff has filed this lawsuit against Big Bubba's claiming that the trailer it manufactured was unreasonably dangerous. Plaintiff has also named as a defendant in the case the equipment rental company from which her husband rented the trailer, Advantage Rental, claiming that the trailer it rented was unreasonably dangerous.

In July of 2009, Big Bubba's was served with a summons and a copy of Plaintiff's Amended Complaint. At that time, Big Bubba's was in the process of moving its business to another location. Through the mistake and inadvertence of one of its employees, the summons and Amended Complaint were misplaced and forgotten. Unbeknownst to Big Bubba's, on October 27, 2009, a certificate of default was entered, signifying that Big Bubba's had failed to timely file an answer to Plaintiff's Amended Complaint.

During the week of April 19, 2010, a representative of Advantage Rental contacted Big Bubba's and informed it that a default had been entered against it. Big Bubba's immediately notified its insurance agent and, by the end of that same week, counsel had been retained for Big Bubba's who filed both an answer to the Amended Complaint and a motion to set aside the default certificate.

B. Course of Proceedings.

On April 1, 2009, Plaintiff filed this lawsuit against Big Bubba's and Advantage Rental. (R. 1.) The next day, on April 2, 2009, Plaintiff filed an Amended Complaint. (R. 7.) On July 10, 2009, Big Bubba's was served with a summons and copy of the Amended Complaint. (R. 16.) On October 27, 2009, a Default Certificate was entered against Big Bubba's. (R. 32.) On April 23, 2010, counsel for Big Bubba's served Notice of Entry of Appearance, Answer to Amended Complaint, and Motion to Set Aside Default Certificate with supporting memorandum. (R. 37, 39, 50, 52, respectively.)

After briefing on the motion was completed, the trial court heard oral argument on August 19, 2010. (R. 106.) Following oral argument, the trial court denied Big Bubba's Motion to Set Aside Default Certificate. (R. 133.)

C. Disposition of the Court.

On September 9, 2010, the trial court entered an order denying Big Bubba's Motion to Set Aside Default Certificate. (R. 133.)

STATEMENT OF FACTS

A. Facts Asserted In Support Of Motion To Set Aside Default Certificate.

1. On July 10, 2009, Big Bubba's was served with a summons and a copy of the Amended Complaint. (R. 16.)

2. Days before, on July 1, 2009, Big Bubba's moved its business location from 123 W. 12th St. to 1751 W. 12th St., in Ogden, Utah. (R. 3, ¶ 3.)

3. Through the mistake and inadvertence of one of Big Bubba's employees, the summons and Amended Complaint were misplaced and forgotten. (R. 3, ¶ 4.)

4. During the week of April 19, 2010, a representative of Advantage Rental contacted Big Bubba's and informed it that a default had been entered against it. (R. 3, ¶ 5.)

5. By the end of that same week, counsel for Big Bubba's had entered an appearance, filed an answer, and moved to have the certificate of default set aside. (R. 37, 39, 50, 52, respectively.)

B. The Trial Court's Ruling On Big Bubba's Motion To Set Aside Default Certificate.

6. On August 19, 2010, the trial court heard oral argument on Big Bubba's Motion to Set Aside Default Certificate. (R. 106, 197.)

7. In their briefing to the trial court, the parties' arguments focused on a dispute over the proper rule to be applied by the court in considering the motion; Big Bubba's argued that Rule 55(c) of the Utah Rules of Civil Procedure applied, while Plaintiff argued that Rule 60(b) applied. (R. 63-64, 73-74.)

8. During the hearing, the trial court agreed that Rule 55(c) was the applicable rule and acknowledged that the default certificate could be set aside for "good cause." (R. 197, pp. 5-7.)

9. To determine whether there was "good cause," the trial court reviewed the factors set forth in Rule 60(b). (R. 197, pp. 6-7.)

10. While acknowledging that the three (3) month time limit imposed under Rule 60(b) did not apply, the trial court held that too much time had elapsed between service of the Amended Complaint and the filing of Defendant's Motion to Set Aside to constitute "good cause" under Rule 55(c). (R. 197, pp. 24-25.)

11. On September 9, 2010, the trial court entered an Order denying Big Bubba's Motion to Set Aside Default Certificate. (R. 133.)

C. Additional Relevant Facts.

12. While Plaintiff alleges in her Amended Complaint that she was injured by a ramp from a Big Bubba's trailer that had fallen, striking her on the head, an Emergency Room report from McKay-Dee Hospital from the day of the alleged accident indicates that Plaintiff was seen for injuries secondary to a fall.

HISTORY OF PRESENT ILLNESS: The patient is a 49-year-old female who has had some chronic back pain. She stood up, had back pain and then felt weak, fell forward, hit the right side of head. She now presents because she has had an increased amount of headache, confusion, and neck pain. Nothing seems to make it better or worse.

(See McKay-Dee Hosp. Ctr., Emergency Dep't Report, April 2, 2007, attached as Ex. 10 to Pet. for Interlocutory Appeal.)

13. While Plaintiff alleges in her Amended Complaint that the trailer built by Big Bubba's was improperly manufactured/designed, Plaintiff's safety expert, F. David Pierce, has expressed no opinions that would support such allegations. (R. 179-80.)

14. Around the same time as the hearing on Big Bubba's Motion to Set Aside Default Certificate, Plaintiff approached the defendants asking whether they would stipulate to amending the Scheduling Order so as to allow additional time for discovery. (R. 137.) The parties agreed and the trial court amended the Scheduling Order accordingly. (Id.)

SUMMARY OF ARGUMENT

Under Rule 55 of the Utah Rules of Civil Procedure, a trial court may set aside an entry of default for "good cause." Utah R. Civ. P. 55(c). Rule 55 provides no test or formula for determining what constitutes "good cause." However, courts applying the federal counterpart of Rule 55 generally hold that

determining “good cause” is a multifaceted and case-specific inquiry. Factors often considered by courts include whether the default was willful, whether the defendant has alleged a meritorious defense, and whether any prejudice will result to the nondefaulting party if relief is granted.

In this case, the trial court denied Big Bubba’s Motion to Set Aside Default Certificate based solely on the amount of time that had passed since the service of the Amended Complaint, finding that a nine (9) month delay was too lengthy to constitute “good cause” under Rule 55(c). Under the circumstances of this case, the trial court’s application of a rigid time-based test constitutes an abuse of discretion and should be reversed.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED BIG BUBBA’S MOTION BASED SOLELY ON THE AMOUNT OF TIME THAT HAD PASSED SINCE THE FILING OF THE AMENDED COMPLAINT.

While a trial court has broad discretion in deciding whether to set aside a default, that discretion is not unlimited. See Lund v. Brown, 2000 UT 75, ¶ 9, 11 P.3d 277. “As a threshold matter, a court’s ruling must be ‘based on adequate findings of fact’ and ‘on the law.’” Id. (quoting May v. Thompson, 677 P.2d 1109, 1110 (Utah 1984) (per curiam)). “The setting aside of a default under Rule 55(c) lies within the sound discretion of the trial court, applying a standard of liberality and resolving all doubts in favor of the defaulting party.” Miller v. Brocksmith,

825 P.2d 690, 693 (Utah Ct. App. 1992) (internal citations and quotations omitted). “A decision premised on flawed legal conclusions, for instance, constitutes an abuse of discretion.” Lund, 2000 UT 75, ¶ 9, 11 P.3d 277; see also, Davis, 2008 UT App 145, ¶ 11, 184 P.3d 626.

Utah courts have long disfavored the entry of default against litigants because they are contrary to the purpose and intent of a system of adversarial litigation. See Heathman v. Fabian & Clendenin, 377 P.2d 189, 190 (Utah 1962); see also, McKean v. Mtn. View Mem. Estates, Inc., 411 P.2d 129, 130 (Utah 1966). It is the policy of the law to favor the resolution of disputed issues on substantial rather than technical grounds. See McKean, 411 P.2d at 130; see also Bunting Tractor Co. v. Emmett D. Ford Contractors, Inc., 272 P.2d 191, 192 (Utah 1954).

Rule 55(c) of the Utah Rules of Civil Procedure, like its federal counterpart, governs the setting aside of a default prior to the entry of judgment, and states that “for good cause shown the court may set aside an entry of default.” Miller, 825 P.2d at 693 (citing Fed. R. Civ. P. 55(c); Utah R. Civ. P. 55(c)). Since the Utah Rules of Civil Procedure were fashioned after the Federal Rules of Civil Procedure, the Utah Supreme Court has encouraged the examination of cases decided under the federal rules in determining the meanings of the Utah rules. See Winegar v. Slim Olson, Inc., 252 P.2d 205, 207 (Utah 1953); see also Wilson v.

Lambert, 613 P.2d 765, 767, n.2 (Utah 1980) (recognizing the applicability of federal interpretations of rules that are nearly identical to state rules). With respect to Rule 55(c) specifically, the Utah Court of Appeals has stated, “[s]ince Rule 55(c) of the Utah Rules of Civil Procedure and Rule 55(c) of the Federal Rules of Civil Procedure are substantively identical, ‘we freely refer to authorities which have interpreted the federal rule.’” Miller, 825 P.2d at 693 (quoting Gold Standard, Inc. v. Am. Barrick Res. Corp., 805 P.2d 164, 168 (Utah 1990)).

The “good cause” standard of Rule 55(c) has been described as being a mutable one, varying from situation to situation. See Coon v. Grenier, 867 F.2d 73, 76 (1st Cir. 1989). “It derives its shape both contextually and in comparison with the more rigorous standard applicable to attempts to vacate judgments under Fed. R. Civ. P. 60(b); the ‘good cause’ threshold for Rule 55(c) relief is lower, ergo more easily overcome, than that which obtains under Rule 60(b).” Id.; see also, United States v. One Parcel of Real Prop., 763 F.2d 181, 183 (5th Cir. 1985) (explaining that although a motion to set aside a default under Rule 55(c) is somewhat analogous to a motion to set aside a judgment under Rule 60(b), the standard for setting aside a default decree is less rigorous than setting aside a judgment for excusable neglect); Dennis Garberg & Assocs., Inc. v. Pack-Tech Int’l Corp., 115 F.3d 767, 775 n.6 (10th Cir. 1997) (“[I]t is well established that the good cause required by Fed.R.Civ.P. 55(c) for setting aside entry of default poses a

lesser standard for the defaulting party than the excusable neglect which must be shown for relief from judgment under Fed.R.Civ.P. 60(b).”) While it may be appropriate to consider the factors described in Rule 60(b) in determining whether “good cause” exists for setting aside a default certificate, see Miller, 825 P.2d at 693, the standards are not the same.

Rule 55(c) does not define “good cause.” Nevertheless, courts applying Rule 55 have relied on multiple factors in determining whether “good cause” has been shown. Citing to federal appellate case law, this Court recently explained:

Factors relevant to whether good cause has been shown could include [1] whether the default was willful, [2] whether the defendant alleges a meritorious defense, [3] whether the defendant acted expeditiously to correct the default, [4] whether setting the default aside would prejudice the plaintiff, and [5] the extent, if any, to which the public interest is implicated.

Roth v. Joseph, 2010 UT App 332, ¶16, ___ P.3d ___ (citing Beitel v. OCA, Inc. (In re OCA, Inc.), 551 F.3d 359, 369 (5th Cir. 2008)) (brackets added).¹ These factors are similar to the ones that have been applied by numerous other courts. See

¹ The Roth decision was released on November 26, 2010, some three months after the trial court denied Big Bubba’s Motion. In its Petition for Permission to Appeal Interlocutory Order, Big Bubba’s focused its discussion on the three factors it perceived to be the most commonly applied by the federal courts in determining “good cause.” See Heber v. United States, 145 F.R.D. 576 (D. Utah 1992); see also, Hunt v. Ford Motor Co., 65 F.3d 178, *3 (10th Cir. 1995). Those three factors (willfulness, meritorious defenses, and prejudice) were presented to the trial court for consideration during the hearing on Big Bubba’s Motion. (R. 197, p. 7.) Roth added two additional factors (expeditious corrective action and public interest). An analysis of all five factors is set forth below.

Marziliano v. Heckler, 728 F.2d 151, 156 (2d Cir. 1984); Meehan v. Snow, 652 F.2d 274, 277 (2d Cir. 1981); Keegel v. Key West & Caribbean Trading Co., 627 F.2d 372, 373 (D.C. Cir. 1980); Jackson v. Beech, 636 F.2d 831, 835 (D.C. Cir. 1980); United Coin Meter Co., Inc. v. Seaboard Coastline R.R., 705 F.2d 839, 845 (6th Cir. 1983); Gold Kist, Inc. v. Laurinburg Oil Co., Inc., 756 F.2d 14, 19 (3d Cir. 1985); Coon, 867 F.2d at 76; CJC Holdings, Inc. v. Wright & Lato, Inc., 979 F.2d 60, 64 (5th Cir. 1992); Pretzel & Stouffer, Chartered v. Imperial Adjusters, Inc., 28 F.3d 42, 46-47 (7th Cir. 1994); Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984) (per curiam); TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 696 (9th Cir. 2001); In re: CRS Steam, Inc., 233 B.R. 901 (B.A.P. 1st Cir. 1999); Heber v. United States, 145 F.R.D. 576 (D. Utah 1992).

With respect to the denial of a motion to set aside default under Rule 55(c), the United States Court of Appeals for the First Circuit has stated, “notwithstanding the deference due to this - as other - discretionary decisions, . . . a reviewing tribunal should not stay its hand if the district court errs by reading ‘good cause’ too grudgingly.” See Coon, 867 F.2d at 76 (citing One Parcel of Real Prop., 763 F.2d at 183) (internal citations omitted). “Nor does ‘an abuse of discretion need [to] be glaring to justify reversal’” Id. (quoting Keegel, 627 F.2d at 373-74) (alterations in original).

Applying the above factors to this case, it is apparent that the trial court abused its discretion in denying Big Bubba's Motion.

1. Big Bubba's Failure To Timely Answer The Amended Complaint Was Not Willful.

Willfulness in the context of a default refers to conduct that is more than merely negligent or careless. See SEC v. McNulty, 137 F.3d 732, 738 (2d Cir. 1998). In this regard, courts will often ask whether the defendant's conduct is culpable. See TCI Group Life Ins., 244 F.3d at 697. "The usual articulation of the governing standard, oft repeated in our cases, is that 'a defendant's conduct is culpable if he had received actual or constructive notice of the filing of the action and *intentionally* failed to answer.'" Id. (emphasis in original; internal citations omitted). "Willful and bad faith conduct is conduct characterized by incessant and flagrant disrespect for court rules, deliberate and knowing disregard for judicial authority, or intentional non-responsiveness." Kirtland v. Fort Morgan Auth. Sewer Serv., Inc., 524 So.2d 600, 608 (Ala. 1988). "Such conduct justifies a finding of culpability and thus militates against an exercise of discretion in favor of the defaulting party." Id. "However, a defaulting party's reasonable explanation for inaction and non-compliance may preclude a finding of culpability." Id.

In this case, Big Bubba's did not willfully fail to answer the Amended Complaint. As previously set forth, Big Bubba's was served with the summons and a copy of the Amended Complaint at the same time it was moving the location

of its business. Through the mistake and inadvertence of one of its employees, the summons and Amended Complaint were misplaced and forgotten. It was not until Big Bubba's was notified by a representative of Advantage Rental that it realized its mistake. Once the mistake was realized, Big Bubba's took immediate action by answering the Amended Complaint and moving to have the default set aside.

Plaintiff never challenged, and the trial court never questioned, Big Bubba's explanation for the default. The trial court made no findings of fact that would support or even suggest that Big Bubba's default was anything other than an honest mistake. In fact, the trial court accepted Big Bubba's explanation and specifically incorporated the same as a finding of fact in its Order. (R. 133.) Under the circumstances, Big Bubba's default cannot be considered willful.

2. Big Bubba's Has Alleged Meritorious Defenses.

A meritorious defense means a defense worthy of presentation, not one which is necessarily assured success. See Herrera v. Springer Corp., 508 P.2d 1303, 1314 (N.M. Ct. App. 1973), aff'd in relevant part, rev'd in part, 510 P.2d 1072 (N.M. 1973). "The 'meritorious defense' component of the test for setting aside a default does not go so far as to require that the movant demonstrate a likelihood of success on the merits." Coon, 867 F.2d at 77 (quoting Keegel, 627 F.2d at 374). "Rather, a party's averments need only plausibly suggest the existence of facts which, if proven at trial, would constitute a cognizable defense."

Id.; see also, Kryzak v. Dresser Indus., 118 F.R.D. 12, 14 (D. Me. 1987) (recognizing both compliance with industry standards and comparative negligence as meritorious defenses).

In this case, Big Bubba's alleged meritorious defenses in its Answer. Among others, Big Bubba's alleged that Plaintiff's injuries were not proximately caused by any act or omission by Big Bubba's; that Plaintiff's own negligence or fault was the proximate cause of her injuries and damages; that Plaintiff's own negligence or fault exceeds the fault of the defendants; and, that the trailer was built in accordance with industry standards and is presumed to not be defective under Utah law. (R. 43-48.) In fact, while Plaintiff alleges in her Amended Complaint that the trailer built by Big Bubba's was improperly manufactured/designed, Plaintiff's own safety expert, F. David Pierce, has expressed no opinions that would support such allegations. (R. 179-80.)

In this case, it is critical that Big Bubba's be allowed to defend itself on the merits, especially because Plaintiff has given conflicting and contradictory accounts of how she was injured. In her Amended Complaint, Plaintiff alleged:

On or about April 2, 2007, Plaintiff, MARY ANN JENKINS attempted to lower the ramp by pulling the locking pin, wherein the ramp immediately fell and struck her on the head, knocking her unconscious onto the ground.

(R. 8, ¶ 9.) However, an Emergency Room report from McKay-Dee Hospital from that day indicates Plaintiff was seen for injuries secondary to a fall. The report states:

HISTORY OF PRESENT ILLNESS: The patient is a 49-year-old female who has had some chronic back pain. She stood up, had back pain and then felt weak, fell forward, hit the right side of head. She now presents because she has had an increased amount of headache, confusion, and neck pain. Nothing seems to make it better or worse.

(McKay-Dee Hosp. Ctr., Emergency Dep't Report, April 2, 2007, attached as Ex. 10 to Pet. for Interlocutory Appeal.)

All that is necessary to satisfy the “meritorious defense” requirement is that the defendant allege sufficient facts that, if true, would constitute a defense. See Keegel, 627 F.2d at 374 (explaining that a defendant’s allegations are meritorious if they contain “even a hint of a suggestion” which, if proven at trial, would constitute a complete defense); see also, TCI Group Life Ins., 244 F.3d at 700 (stating that “the question whether the factual allegation [is] true” is not to be determined by the court when it decides a motion to set aside default). Clearly, Big Bubba’s has alleged meritorious defenses, and the trial court made no findings to suggest otherwise. (R. 133.)

3. Big Bubba's Acted Expeditiously To Correct The Default.

The third factor, “whether the defendant acted expeditiously to correct the default,” is one that appears to have received little individual analysis from appellate courts. Nevertheless, a practical and commonsense application of this factor demonstrates that this too supports setting aside the default against Big Bubba's.

The Default Certificate in this case was signed October 27, 2009. (R. 32.) Plaintiff never notified Big Bubba's that a default had been entered against it. Instead, it was the co-defendant, Advantage Rental, who contacted Big Bubba's and informed it of the default. (R. 134, ¶ 6.) Big Bubba's received notice of the default from Advantage Rental during the week of April 19, 2010. (See id.) Immediately, Big Bubba's contacted its insurance agent and, by the end of that same week, on April 23, 2010, counsel was retained and filed Big Bubba's Answer and Motion to Set Aside Certificate of Default with the trial court. (R. 134, ¶ 7.)

While it is true that nearly six months had passed between the time the default was entered and the time Big Bubba's filed its motion to set the default aside, the question of whether Big Bubba's acted expeditiously to correct the default must be decided by looking to when Big Bubba's received notice of the default. Because it is undisputed that Big Bubba's took immediate action to correct the default as soon as it received notice that a default had been entered, Big

Bubba's acted expeditiously. See Menzie v. Galetka, 2006 UT 81, ¶ 69, 150 P.3d 480 (holding that even though sixteen months had passed before the defendant filed a memorandum in support of his 60(b) motion, defendant's motion was timely under the circumstances where defendant was unaware of his prior counsel's failure to file the memorandum and his new counsel took prompt corrective action).

4. Plaintiff Will Not Be Prejudiced If The Default Is Set Aside.

Federal courts construing this requirement suggest that the prejudice to the nondefaulting must be substantial to justify the denial of a motion to set aside a default. See United Coin, 705 F.2d at 845 ("Mere delay in satisfying a plaintiff's claim, if it should succeed at trial, is not sufficient prejudice to require denial of a motion to set aside a default judgment."); Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 98 (2d Cir. 1993) ("[D]elay standing alone does not establish prejudice."); Davis v. Musler, 713 F.2d 907, 916 (2d Cir. 1983) (holding that delay alone is insufficient; delay must result in loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud).

In this case, Plaintiff would suffer no substantial prejudice if the default certificate is set aside. In its memorandum opposing Big Bubba's Motion, Plaintiff made no claim of prejudice whatsoever. (R. 63-64.) During oral argument on Big Bubba's Motion, Plaintiff argued that she would be prejudiced in two ways if the

default was set aside, first, by having to establish liability, and second, by delay. (R. 197, pp. 19-20.) The trial court made no findings that Plaintiff would suffer any prejudice if the default was set aside (R. 133-34), nor could it under the facts of this case.

With respect to Plaintiff's first argument, the federal courts have explained that setting aside a default and requiring a party to litigate does not amount to prejudice. See One Parcel of Real Prop., 763 F.2d at 183 (stating that "requir[ing] the [plaintiff] to litigate the action is insufficient prejudice to require the default decree to stand"); see also, Coon, 867 F.2d at 77; Robinson v. Griffith, 108 F.R.D. 152, 156 (W.D. La. 1985) (rejecting the argument that the plaintiff would be prejudiced by the setting aside of the default and stating "[a] party who requests a judgment by default is not entitled to one as a matter of right"); Heller v. Tex. Real Estate Comm'n (In re Marinez), 589 F.3d 772, 778 (5th Cir. 2009) ("There is no prejudice to the plaintiff where the setting aside of the default has done no harm to plaintiff except to require [him] to prove [his] case.") (brackets original; additional citations omitted).

Concerning Plaintiff's second argument, while mere delay is insufficient to establish prejudice, see United Coin, 705 F.2d at 845, this case is unique in that there would be no delay at all if the default was set aside. Despite Big Bubba's absence, this case has been in active litigation since Plaintiff filed her Amended

Complaint. Defendant Advantage Rental has conducted discovery by gathering records and taking depositions, and Big Bubba's has no intention of duplicating these efforts. This point was made by Big Bubba's during oral argument to the trial court. (R. 197, p. 21.) Ironically, at the same time as the hearing on Big Bubba's Motion, Plaintiff approached the defendants asking whether they would stipulate to amending the Scheduling Order so as to allow additional time for discovery. (R. 137.) Big Bubba's and Advantage Rental both agreed to the amendment and the parties are currently moving forward to complete expert discovery, albeit with some uncertainty as to the scope of Big Bubba's participation in the same. Clearly, Plaintiff will suffer no prejudice if the default against Big Bubba's is set aside.

5. The Public Interest Supports Setting Aside The Default In This Case.

A default certificate is "a first step" towards obtaining a default judgment. Roth v. Joseph, 2010 UT App 332, ¶ 17, ___ P.3d ___ (quoting Davis v. Goldsworthy (Davis II), 2010 UT App 78, ¶ 10 n.4, 233 P.3d 496). Under Utah law, judgments by default are not favored by the courts nor are they in the interest of justice and fair play. Heathman v. Fabian & Clendenin, 377 P.2d 189, 190 (Utah 1962). "The courts, in the interest of justice and fair play, favor, where possible, a full and complete opportunity for a hearing on the merits of every case." Id. "The striking of pleadings, entering of default, and rendering of

judgment against a disobedient party are the most severe of the potential sanctions that can be imposed upon a nonresponding party.” Utah Dep’t of Transp. v. Osguthorpe, 892 P.2d 4, 12 (Utah 1995).

In this case, the public interest favors setting aside the default certificate and allowing Big Bubba’s to litigate this case on the merits. If not overturned, a default judgment will eventually be entered against Big Bubba’s - the most severe sanction recognized in civil litigation. Big Bubba’s understands and appreciates the need for trial courts to be able to manage busy calendars and enforce compliance with rules intended to ensure orderly judicial administration, but for the trial court to have denied Big Bubba’s Motion without even considering a less harsh alternative was clearly erroneous. See Osguthorpe, 892 P.2d at 15 (“When the sanction imposed is that of a default judgment, the most severe of sanctions, the trial court’s range of discretion is more narrow than when the court is imposing less severe sanctions.”); Meehan, 652 F.2d at 277 (“While courts are entitled to enforce compliance with the time limits of the Rules by various means, the extreme sanction of a default judgment must remain a weapon of last, rather than first, resort.”); see also, Cody v. Mello, 59 F.3d 13, 15 (2d Cir. 1995) (“[D]ismissal is a harsh remedy to be utilized only in extreme situations.”)

Respectfully, Big Bubba’s submits that the trial court abused its discretion when it failed to adequately consider or apply the appropriate factors

underlying the “good cause” standard of Rule 55(c). Instead, the trial court simply found that the nine (9) month delay in answering the Amended Complaint “was too lengthy to be considered good cause under Rule 55(c).” (R. 197, p. 25.) The trial court made no other findings in support of its decision. (R. 197.) Had the trial court focused on the appropriate factors, as set forth above, it would have found that “good cause” exists for setting aside the default certificate in this case.

Even without having applied the factors analyzed above, the trial court expressed that whether to set aside the default in this case was a “close call.” (R. 197, p. 23.) Under both Utah and federal case law applying Rule 55(c), the trial court was to resolve all doubts in favor of Big Bubba’s. See Miller, 825 P.2d at 693 (“The setting aside of a default under Rule 55(c) lies within ‘the sound discretion of the trial court, applying a standard of liberality and resolving all doubts in favor of the defaulting party.’”) (internal citations omitted); see also, Enron Oil, 10 F.3d at 96 (“[B]ecause defaults are generally disfavored and are reserved for rare occasions, when doubt exists as to whether a default should be granted or vacated, the doubt should be resolved in favor of the defaulting party.”) In this case, it is clear the trial court did not resolve all doubts in favor of Big Bubba’s.

II. THE TRIAL COURT'S DECISION WILL LEAD TO CONFUSION AND CREATE A RISK OF INCONSISTENT JUDGMENTS.

Based on the trial court's decision denying the motion to set aside the default certificate, liability against Big Bubba's is now established; the only issue yet to be decided is damages. This presents a host of complications and unintended consequences. The Amended Complaint asserts claims against Big Bubba's alleging that the trailer it manufactured was unreasonably dangerous. (R. 10.) The Amended Complaint also asserts claims against the co-defendant, Advantage Rental, alleging that it rented an unreasonably dangerous trailer, something Advantage Rental has denied. (R. 9, 18, respectively.) If liability is now established against Big Bubba's, then the jury will not likely understand that Plaintiff must still prove the trailer was unreasonably dangerous as to Advantage Rental. Having liability established against one defendant, where there are two defendants facing liability under the same general theory, will cause confusion, uncertainty, and potentially inconsistent verdicts. This is a legitimate concern in cases involving multiple defendants and has even led some federal courts to hold that a default judgment cannot be entered against one defendant if it would be inherently inconsistent with a judgment entered against a similarly situated co-defendant. See e.g., Frow v. De La Vega, 82 U.S. 552 (1872).

In Frow, the United States Supreme Court explained that when one of several defendants who is alleged to be jointly liable defaults, judgment should not be entered against that defendant until the matter has been adjudicated with regard to all defendants or all defendants have defaulted. 82 U.S. at 554. The Court stated:

If the court in such a case as this can lawfully make a final decree against one defendant separately, on the merits, while the cause was proceeding undetermined against the others, then this absurdity might follow: there might be one decree of the court sustaining the charge of joint fraud committed by the defendants; and another decree disaffirming the said charge, and declaring it to be entirely unfounded, and dismissing the complainant's bill. And such an incongruity, it seems, did actually occur in this case. Such a state of things is unseemly and absurd, as well as unauthorized by law.

Id. This rule has been subsequently extended and applied to defendants who have closely related defenses. See Wright, Miller & Kane § 2690 at 75. See also, Gulf Coast Fans, Inc. v. Midwest Elecs. Imps., Inc., 740 F.2d 1499, 1512 (11th Cir. 1984) (vacating default judgment against exporter because plaintiff failed on its related claims against importer); In re First T.D. & Invest., Inc., 253 F.3d 520, 531-32 (9th Cir. 2001) (stating that “[i]t would likewise be incongruous and unfair to allow the Trustee to prevail against Defaulting Defendants on a legal theory rejected by the bankruptcy court with regard to the Answering Defendants in the same action”).


In this case, setting aside the default and allowing Big Bubba's to defend itself against Plaintiff's claims together with Advantage Rental will prevent confusion and will eliminate the risk of inconsistent verdicts.

CONCLUSION

For the reasons set forth above, Big Bubba's respectfully requests that the decision of the trial court denying its Motion to Set Aside Default Certificate be reversed.

DATED this 21st day of January, 2011.

STRONG & HANNI

By 

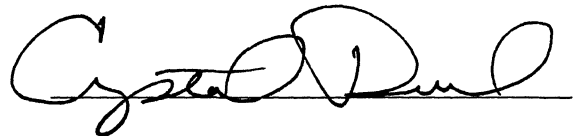
Andrew D. Wright
A. Joseph Sano
Attorneys for Defendant/Appellant
Big Bubba's Trailers

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of January, 2011, a true and correct copy of the foregoing **Brief of Appellant Big Bubba's Trailers** was served by the method indicated below, to the following:

W. Scott Lythgoe	(x)	U.S. Mail, Postage Prepaid
Deven J. Coggins	()	Hand Delivered
Addison D. Larreau	()	Overnight Mail
COGGINS, LARREAU & LYTHGOE	()	Facsimile
289 24th Street		
Ogden, UT 84401		

Dale J. Lambert	(x)	U.S. Mail, Postage Prepaid
CHRISTENSEN & JENSEN	()	Hand Delivered
15 W South Temple, #800	()	Overnight Mail
Salt Lake City, UT 84101	()	Facsimile



Tab A

W.Scott Lythgoe, UBN 7928
Deven J. Coggins, UBN 7703
Addison D. Larreau, UBN 8546
COGGINS, LARREAU & LYTHGOE, P.C.
289 24th Street, Suite 150
Ogden, Utah 84401
Telephone: (801) 393-5555
Facsimile: (801) 392-1637

2010 SEP -9 PM 4: 10

SEP - 9 2010

Attorneys for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT
WEBER COUNTY, STATE OF UTAH
2525 Grant Avenue, Ogden, UT 84401

<p>MARY ANN JENKINS and GARY D. JENKINS, husband and wife,</p> <p>Plaintiff,</p> <p>vs.</p> <p>ADVANTAGE PAWN RENTAL, dba ADVANTAGE RENTAL and/or ADVANTAGE RENTAL & TRADING POST, and BIG BUBBA'S TRAILER MFG., dba BIG BUBBA'S TRAILER SALES and/or BIG BUBBA'S TRAILER SALES & MFG., and JOHN DOES I-IV,</p> <p>Defendant.</p>	<p>ORDER ON DEFENDANT'S, BIG BUBBA'S TRAILER MFG, MOTION TO SET ASIDE DEFAULT CERTIFICATE</p> <p>Case No.: 090902023</p> <p>Judge: Michael Direda</p>
---	--

THE COURT, having considered Defendant's, Big Bubba's Mfg, ("Defendant") Motion to Set Aside Default Certificate on August 19th, 2010, having reviewed the pleadings filed by the parties, heard their oral arguments, having considered additional case law, and for good cause shown, now makes the following findings:

1. U.R.Civ.P. 55(c) is the determinative rule and standard and that Defendant must show good cause for the court to set aside an entry of default.

000133


2. The court used U.R.Civ.P 60(b) for guidance to determine “good cause”, which the court considered, and Defendant argued, to be excusable neglect.
3. Plaintiffs properly served a summons and complaint upon Defendant on July 10th, 2009, during a time that Defendant was in the process of changing its business location.
4. Through the mistake and inadvertence of one of Defendant’s employees, the summons and amended complaint were misplaced and forgotten.
5. On October 27, 2009, Plaintiff obtained a Default Certificate from the court’s clerk.
6. During the week of April 19, 2010, Defendant Advantage Pawn Rental notified Defendant Big Bubba’s that a default certificate had been entered against it.
7. By the end of the week, on April 23, 2010, counsel had been retained to represent Defendant Big Bubba’s, and an Answer and Motion to Set Aside Certificate of Default was filed with the court.
8. Defendant’s answer was filed nine months after Defendant had been served.
9. Defendant’s affidavit establishes that it failed to answer Plaintiffs’ complaint for nine months because the summons and complaint was lost during Defendant’s business relocation.

NOW HAVING MADE THE PREVIOUS FINDINGS, the Court makes the following ruling:

1. Based upon Utah Rules of Civil Procedure and applicable case law, notably *Miller v. Brocksmith*, 825 P.2d 690, 693 (Utah App. 1992), Defendant has failed to show sufficient grounds to establish good cause or excusable neglect for filing its answer to Plaintiff’s complaint nine (9) months after service.


THEREFORE, THE ORDER OF THIS COURT denies Defendant's motion to set aside
Plaintiff's default certificate.

DATED this 9th Sept day of ~~August~~, 2010.



MICHAEL DIREDA
Second District Court Judge

APPROVED AS TO FORM:



A. JOSEPH SANO

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of Aug July 2010, I mailed a true and correct copy of
the foregoing Order on Motion to Set Aside Default Certificate to the following:

Andrew D. Wright
A. Joseph Sano
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, UT 84180
Attorney for Defendant Big Bubba's Trailer Sales, Inc.
Telephone: 801-532-7080
Facsimile: 801-596-1508

Dale J. Lambert
CHRISTENSEN & JENSEN
15 West South Temple, Suite 800
Salt Lake City, UT 84101
Attorneys for Defendant Advantage Pawn
Telephone: 801-355-3431

