

2010

Mike Meguerditchian v. Max Smith : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS, STATE OF UTAH

MIKE MEGUERDITCHIAN, an
individual,

Plaintiff/Appellee/Cross-Appellant,

vs.

MAX SMITH, individually and as Trustee
of The Smith Family Living Trust, u/a/d
March 19, 1991

Defendant/Appellant/Cross-Appellee.

Case No. 20100850-CA

BRIEF OF APPELLEE AND CROSS-APPELLANT

Appeal and Cross-Appeal from the Order of the Sixth District Court of Sanpete County,
State of Utah, The Honorable Marvin Bagley, Granting in Part and Denying in Part
Defendant's Motion to Set Aside Sheriff's Sale

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LIST OF PARTIES

The following are parties to this appeal:

1. Plaintiff/Appellee/Cross-Appellant Mike Meguerditchian (“Plaintiff”);
2. Defendant/Appellant/Cross-Appellee Max Smith, individually and as Trustee of the Smith Family Living Trust, u/a/d March 19, 1991 (“Defendant”).

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STATEMENT OF JURISDICTION

On November 15, 2010, the Utah Court of Appeals received this case via pour-over from the Utah Supreme Court. Jurisdiction is proper in this case under Utah Code Ann. §78A-4-103(2)(j).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

ISSUE I: As presented in the Appeal and framed by the Defendant:

“The trial court incorrectly interpreted the holding in *Pyper v. Bond*, 224 P.3d 713 (Utah App., 2009) in concluding that the only standard for setting aside the Sheriff’s sale is demonstrating both inadequacy of price and irregularities attending the sale.”

Plaintiff argues that the standard applied by the District Court from *Pyper v. Bond*, 2009 UT App 331, 224 P.3d 713, *cert. granted*, 225 P.3d 880 (Utah 2010), is the appropriate standard to set aside a sheriff’s sale, and that said standard was correctly found to require both inadequacy of price and irregularities attending the sale.

PRESERVATION OF ISSUE: Plaintiff does not dispute Defendant’s contention that this issue was preserved below in Defendant’s closing argument, in Defendant’s Reply Memorandum in Support of Motion to Set Aside Sale, and in the District Court’s Findings of Fact and Conclusions of Law. (R. 1089, 157:1-9; R. 859-860; R. 1048, ¶ 1).

STANDARD OF REVIEW: This issue presents a question of law that is reviewed for correctness. *Pyper v. Bond*, 2009 UT App 331 at ¶ 9.

ISSUE II: As presented in the Appeal and framed by the Defendant:

“The trial court committed error in concluding that there were no irregularities involving the sale of the real property at the Sheriff’s Sale.”

Plaintiff argues that the District Court was correct in finding that there were no irregularities involving the sale of the real property at the Sheriff’s sale. The District Court found correctly that the Plaintiff was not required to sell personal property of the Defendant to satisfy his judgment, because insufficient personal property could be found and the Defendant objected to the sale of personal property, directing that it not be sold, as set forth more fully hereafter.

PRESERVATION OF ISSUE: Appellee does not dispute that this issue was preserved below in the District Court’s Findings of Fact and Conclusions of Law. (R. 1047, ¶ 8).

STANDARD OF REVIEW: Defendant alleges that this issue presents a mixed question of law and fact. This issue appropriately treated as a question of fact, which this Court reviews “for clear error, reversing only where the finding is against the clear weight of the evidence,” or if the Court is otherwise able to “reach a firm conviction that a mistake has been made.” *Dev. Corp. v. Mattson*, 943 P.2d 247, 255 (Utah Ct. App. 1997).

ISSUE III: The Subject of the Cross-Appeal:

The sheriff’s sale of the Defendant’s interest in Water Right #51-224 was set aside in error by the District Court. The description of that particular water right utilized by the

Sanpete County Sheriff's office in conducting the Sheriff's sale, as the Defendant's interest in Water Right # 51-224, was sufficient and as specific as reasonably possible. In setting aside the sheriff's sale of the Defendant's interest in other unspecified water rights, the District Court committed error by also setting aside the sale of Water Right # 51-224 that was described with specificity.

PRESERVATION OF ISSUE: This issue was preserved below in the District Court's Findings of Fact and Conclusions of Law. (R. 1047 to 1050).

STANDARD OF REVIEW: Equitable issues related to setting aside the Sheriff's sale are generally mixed questions of law and fact. The factual findings of the trial are set aside if there is clear error, but the appellate court reviews the trial court's legal conclusions for correctness. "Claims based on equitable doctrines 'are mixed questions of fact and law.' Accordingly, we defer to a trial court's factual findings unless there is clear error but review its legal conclusions for correctness." *Richards v. Brown*, 2009 UT App 315, ¶ 11, 222 P.3d 69, *cert. granted*, 225 P.3d 880 (Utah 2010) (citations omitted).

However, the trial court's Order on which the ruling is based is a question of law which is reviewed for correctness. Rule 69B(d), Ut. R. Civ. P., which requires parcels of real property to be sold separately, does not require that the Defendant's interest in Water Right #51-224 be otherwise described or sold. That conclusion of law should be reviewed by the appellate court for correctness. Matters of statutory interpretation by the

trial court are subject to "review on appeal for correctness." " *ABCO Enterprises v. Utah State Tax Com'n*, 2009 UT 36, ¶ 7, 211 P.3d 382, *reh'g denied* (June 12, 2009) (citations omitted).

CONSTITUTIONAL OR STATUTORY PROVISIONS

Rule 69B(c), Ut. R. Civ. P.:

(c) Postponement. If the officer finds sufficient cause, the officer may postpone the sale. The officer shall declare the postponement at the time and place set for the sale. If the postponement is longer than 72 hours, notice of the rescheduled sale shall be given in the same manner as the original notice of sale.

Rule 69B(d), Ut. R. Civ. P.:

(d) Conduct of sale. All sales shall be at auction to the highest bidder, Monday through Saturday, legal holidays excluded, between the hours of 9 o'clock a.m. and 8 o'clock p.m. at a place reasonably convenient to the public. Real property shall be sold at the district courthouse of the county in which the property is located. The officer shall sell only so much property as is necessary to satisfy the amount due. The officer shall not purchase property or be interested in any purchase. Property capable of delivery shall be within view of those who attend the sale. The property shall be sold in such parcels as are likely to bring the highest price. Severable lots of real property shall be sold separately. Real property claimed by a third party shall be sold separately if requested by the third party. The defendant may direct the order in which the property is sold.

Rule 69C, Ut. R. Civ. P.:

RULE 69C. REDEMPTION OF REAL PROPERTY AFTER SALE

(a) Right of redemption. Real property may be redeemed unless the estate is less than a leasehold of a two-years' unexpired term, in which case the sale is absolute.

(b) Who may redeem. Real property subject to redemption may be redeemed by the defendant or by a creditor having a lien on the property junior to

that on which the property was sold or by their successors in interest. If the defendant redeems, the effect of the sale is terminated and the defendant is restored to the defendant's estate. If the property is redeemed by a creditor, any other creditor having a right of redemption may redeem.

(c) How made. To redeem, the redemptioner shall pay the amount required to the purchaser and shall serve on the purchaser:

(c)(1) a certified copy of the judgment or lien under which the redemptioner claims the right to redeem;

(c)(2) an assignment, properly acknowledged if necessary to establish the claim; and

(c)(3) an affidavit showing the amount due on the judgment or lien.

(d) Time for redemption. The property may be redeemed within 180 days after the sale.

(e) Redemption price. The price to redeem is the sale price plus six percent. The price for a subsequent redemption is the redemption price plus three percent. If the purchaser or redemptioner files with the county recorder notice of the amounts paid for taxes, assessments, insurance, maintenance, repair or any lien other than the lien on which the redemption was based, the price to redeem includes such amounts plus six percent for an initial redemption or three percent for a subsequent redemption. Failure to file notice of the amounts with the county recorder waives the right to claim such amounts.

(f) Dispute regarding price. If there is a dispute about the redemption price, the redemptioner shall within 20 days of the redemption pay into court the amount necessary for redemption less the amount in dispute and file and serve upon the purchaser a petition setting forth the items to which the redemptioner objects and the grounds for the objection. The petition is deemed denied. The court may permit discovery. The court shall conduct an evidentiary hearing and enter an order determining the redemption price. The redemptioner shall pay to the clerk any additional amount within seven days after the court's order.

(g) Certificate of redemption. The purchaser shall promptly execute and deliver to the redemptioner, or the redemptioner to a subsequent redemptioner, a certificate of redemption containing:

(g)(1) a detailed description of the real property;

(g)(2) the price paid;

(g)(3) a statement that all right, title, interest of the purchaser in the property is conveyed to the redemptioner; and

(g)(4) if known, whether the sale is subject to redemption.

The redemptioner or subsequent redemptioner shall file a duplicate of the certificate with the county recorder.

(h) Conveyance. The purchaser or last redemptioner is entitled to conveyance upon the expiration of the time permitted for redemption.

(i) Rents and profits, request for accounting, extension of time for redemption.

(i)(1) Subject to a superior claim, the purchaser is entitled to the rents of the property or the value of the use and occupation of the property from the time of sale until redemption. Subject to a superior claim, a redemptioner is entitled to the rents of the property or the value of the use and occupation of the property from the time of redemption until a subsequent redemption. Rents and profits are a credit upon the redemption price.

(i)(2) Upon written request served on the purchaser before the time for redemption expires, the purchaser shall prepare and serve on the requester a written and verified account of rents and profits. The period for redemption is extended to five days after the accounting is served. If the purchaser fails to serve the accounting within 30 days after the request, the redemptioner may, within 60 days after the request, bring an action to compel an accounting. The period for redemption is extended to 15 days after the order of the court.

(j) Remedies.

(j)(1) For waste. A purchaser or redemptioner may file a motion requesting the court to restrain the commission of waste on the property. After the estate has become absolute, the purchaser or redemptioner may file an action to recover damages for waste.

(j)(2) Failure to obtain property.

(j)(2)(A) A purchaser or redemptioner who fails to obtain the property or who is evicted from the property because the judgment against the defendant is reversed or discharged may file a motion for judgment against the plaintiff for the purchase price plus amounts paid for taxes, assessments, insurance, maintenance and repair plus interest.

(j)(2)(B) A purchaser or redemptioner who fails to obtain the property or who is evicted from the property because of an irregularity in the sale or because the property is exempt may file a motion for judgment against the plaintiff or the defendant for the purchase price plus amounts paid for taxes, assessments, insurance, maintenance and repair plus interest. If the court enters judgment against the plaintiff, the court shall revive the plaintiff's judgment against defendant for the amount of the judgment against plaintiff.

(j)(2)(C) Interest on a judgment in favor of a purchaser or redemptioner is governed by Utah Code Section 15-1-4. Interest on a revived judgment in favor of the plaintiff against the defendant is at the rate of the original judgment. The effective date of a revived judgment in favor of plaintiff against defendant is the date of the original judgment except as to an intervening purchaser in good faith.

(k) Contribution and reimbursement. A defendant may claim contribution or reimbursement from other defendants by filing a motion.

Rule 24(a)(9), Utah R. App. P:

(a)(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

STATEMENT OF THE CASE

1. On December 8, 2008, the District Court entered final judgment, pursuant to Plaintiff's Second Cause of Action, against the Defendant and in favor of the Plaintiff in the amount of \$54,690.92, plus post-judgment interest, attorney's fees and costs. See the certified record of the District Court (hereinafter "R"), at 609-611.

2. Seeking satisfaction of that judgment, on March 26, 2009, Plaintiff filed application for writ of execution, with praecipe, listing personal property, real property and water rights believed to be held or owned by the Defendant. R. at 617-626.

3. On April 1, 2009, the writ of execution was issued by the District Court. R. at 621 to 623.

4. On June 5, 2009, the Defendant filed a request for hearing and objection to the writ of execution, claiming that the personal property listed in the writ of execution was exempt from execution, as tools of the trade. R. at 628-629, a copy of which is attached in the Addendum hereto under Tab 1.

5. On June 16, 2009, the Sanpete County Sheriff's Office executed its Affidavit of Posting of Notice of Sale, together with a copy of said Notice of Sale dated June 16, 2009, all of which were filed with the District Court on June 17, 2009. R. at 634-636, a copy of which is attached in the Addendum hereto under Tab 2.

6. Said Notice of Sale scheduled the sheriff's sale for 11:00 a.m. on July 7, 2009. *Id.*

7. Said Notice of Sale listed four items that would be sold at said sheriff's sale:

a. The Defendant's interest in two parcels of real property, being Serial numbers 20232X1 and 20221, as more particularly described therein. Said parcels of real property are referred to herein as the "Real Property." Defendant's appeal to this Court seeks to reverse the District Court's denial of Defendant's motion to set aside the sale of this Real Property.

b. The Defendant's interest in Water Right Number 51-224, and other unspecified water rights of the Defendant in Sanpete County, Utah. Plaintiff's appeal to this Court seeks to reverse the District Court's grant of Defendant motion to set aside the sale of Water Right Number 51-224 only, without affecting the District Court's ruling as to unspecified water rights.

8. In a status and scheduling conference on June 17, 2009, regarding Defendant's objection to the writ of execution, Plaintiff informed the Court and the Defendant that the personal property was not included in the sheriff's notice of sale because, the Plaintiff had been informed, the sheriff could not locate serial numbers for the subject personal property. Further, since the Defendant had objected to the sale of personal property as exempt, that the Plaintiff would proceed only against the other assets of the Defendant. See the District Court's minutes of said conference, R. at 632 to 633, a copy of which is attached in the Addendum hereto under Tab 3. Since the Defendant's

stated objection to the writ of execution was that the personal property was exempt, and the Plaintiff was proceeding without executing on personal property, the Court allowed the Plaintiff to proceed, over the Defendant's objections.

9. On June 22, 2009, Defendant filed a "Motion to Set Aside Summary Judgment and Quash Writ of Execution" with the District Court, with memorandum in support thereof. R. at 637 to 647, a copy of which is attached in the Addendum hereto under Tab 4.

10. In Defendant's memorandum in support of his motion to quash the writ of execution, Defendant argued that the writ of execution should be quashed as to any personal property of the Defendant, in that said property constituted tools of the trade for the Defendant and "should be exempt from execution." R. at 642.

11. In a hearing on June 24, 2009, the District Court ordered additional argument to be held on Defendant's motion to quash the writ of execution. The District Court ordered additional oral argument to be held on July 8, 2009. Inasmuch as the sheriff's sale was then set for July 7, 2009, Plaintiff informed the District Court and Defendant that the sale could be postponed. See the minutes of said hearing, at R. 648, a copy of which is attached in the Addendum hereto under Tab 5.

12. On July 8, 2009, the District Court heard oral argument and denied Defendant's motion to quash the writ of execution. R. at 723.

13. On July 9, 2009, the Defendant filed a Notice of Appeal of the District Court's Order denying his motion to set aside the judgment in favor of the Plaintiff and to quash the subject writ of execution, together with a Motion for Temporary Stay of Execution. R. at 733 to 741, copies of which are attached in the Addendum hereto under Tab 6.

14. In Defendant's Motion for Stay of Execution and at ¶ 15 of his Memorandum in support of said motion, Defendant noted that the sheriff's sale, as postponed with prior notice as aforesaid, was then scheduled for July 19, 2009 at 11:00 a.m. R. at 733 and 737, respectively, Tab 6 in the Addendum hereto.

15. On September 9, 2009, this Court dismissed the Defendant's appeal of the District Court's Order denying Defendant's motion to set aside the judgment and quash the writ of execution, for failure of the Defendant to file the docketing statement within the time permitted Utah R. App. P. 9. R. at 758.

16. On July 15, 2009, the Sanpete County Sheriff's Office issued its Certificate of Sale, wherein it was established that the Plaintiff Mike Meguerditchian was the successful and only bidder at the sheriff's sale conducted on July 10, 2009, purchasing the interest of the Defendant in real property and water rights as follows:

- a. \$3,000 for the Defendant's interest in tax parcel 20232X1;

b. \$30,000 for the Defendant's interest in tax parcel 20221 (the sale of the Defendant's interest in said parcels of real property is the subject of the Defendant's Appeal);

c. \$30,000 for the Defendant's interest in Water Right No. 51-224 (the District Court's ruling setting aside the sheriff's sale as to this water right is the subject of the Plaintiff's Cross-Appeal); and

d. \$3,000 for the Defendant's interest in other, unspecified water rights in Sanpete County. The order of the District Court setting aside the sale of these unspecified water rights is not challenged in the subject Appeal or Cross-Appeal.

R. at 808 to 809, a copy of which is attached in the Addendum hereto under Tab 7.

17. On December 9, 2009, the Defendant filed his Motion to Set Aside Sale, arguing only that the sheriff's sale should be set aside exclusively because "more real property and water rights were sold and the sheriff's sale than was necessary to satisfy amounts due" to the Plaintiff. R. at 763. A copy of said motion and memorandum in support thereof, R. at 759 to 763, is attached in the Addendum hereto at Tab 8.

Defendant made no payment of tender of payment in redemption of the items sold at the sheriff's sale, and has not moved for the extension of the redemption period.

18. On September 15, 2010, the District Court issued its Findings of Fact Conclusions of Law and Order, Denying in Part and Granting in Part Defendant's Motion

to Set Aside Sheriff's Sale. R. 1045 to 1059, a copy of which is attached in the Addendum hereto under Tab 9.

19. The District Court found that the prices bid at the sheriff's sale for both the real property and water rights were inadequate, as compared to their fair market value. The District Court found that the real property had a fair market value of \$505,000, for which the Plaintiff had bid a total of \$33,000.00. R. at 1046, ¶¶ 2 and 3.

20. The District Court found that the water rights had a value of \$7,500.00 per acre foot, for which the Plaintiff had bid a total of \$33,000.00. The District Court did not find the total number of acre feet or other water rights of the Defendant, but noted that the Defendant held in excess of 20 acre feet of water. R. at 1047, ¶¶ 4 and 5.

21. The District Court found that there were no irregularities in the sale of real property, and on that basis, denied the Defendant's motion to set aside the sheriff's sale of real property. R. at 1048 to 1050.

22. The District Court found that because the Notice of Sale did not describe water rights that had been previously severed from Water Right #51-224, and did not specifically describe the other water rights of the Defendant in Sanpete County, said descriptions were inadequate, constituting an irregularity in the sale of water rights, and set aside the sheriff's sale all water rights on that basis, including the rights of the Defendant in the water right specifically described as Water Right #51-224. *Id.*

SUMMARY OF ARGUMENT

In attempting to satisfy a judgment in his favor that had accrued to approximately \$66,000.00, the Plaintiff requested that the sheriff proceed by writ of execution to cause four items to be sold, the Defendant's interest in two parcels of real property, the Defendant's interest in one particular water right, and the Defendant's interest generally in other water rights in Sanpete County, Utah. Prior to the time set for said sale, multiple hearings were conducted by the District Court, pursuant to various motions filed by the Defendant objecting to the sale of personal property, moving to quash the writ of execution generally, and moving for a temporary stay of execution. The sheriff's sale was validly postponed at the Defendant's instance and with full notice to the Defendant. The Defendant was informed prior to the sale that the Plaintiff and sheriff could not adequately locate and identify personal property in order for it to be sold. The Defendant did not oppose the failure to sell personal property, indeed, the Defendant demanded that personal property not be sold.

The District Court correctly applied the two part test re-affirmed by this Court in *Pyper v. Bond*, requiring both inadequate price and irregularities in the sale, in ruling on the Defendant's motion to set aside the sale. The District Court found no irregularities in the sale of the real property and refused to set aside the sheriff's sale as to said real property. The Defendant has failed and refused to avail himself of the remedy of redemption, at the same time complaining that the purchase price paid was unreasonably

low. Further, the Defendant claims primarily that the failure of the sheriff to first sell personal property constitutes irregularity in the sale, even though the Defendant had notice and opportunity to direct the first sale of personal property and failed to do so. Indeed the Defendant demanded that personal property not be sold.

The District Court found that the failure to specifically describe the individual water rights of the Defendant constituted an irregularity, and set aside the sale of water rights on that basis. However, in doing so, the District Court also set aside the sale of Water Right # 51-224 that was specifically and individually identified and sold.

This Court should affirm the two-part test articulated in *Pyper v. Bond* as the correct standard for the District Court to apply in considering a motion to set aside the sheriff's sale. In doing so, the District Court's ruling refusing to set aside the sheriff's sale as to the real property sold should be affirmed, and the District Court's ruling setting aside the sale of Water Right # 51-224 should be set aside to that limited extent.

ARGUMENT

I. The District Court Correctly Applied the Two Prong Test of Both Inadequacy of Price and Irregularities Attending the Sale in Determining the Appropriateness of Setting Aside the Sheriff's Sale

Defendant argues that the two-part test affirmed in *Pyper v. Bond* is not the applicable standard for allowing the District Court to set aside a sheriff's sale. Defendant contends that a sheriff's sale may be set aside if the sale price is inadequate, "even if there

are no irregularities in the sale.” Brief of Appellant, p. 10. In support of that proposition, Defendant refers to dicta in the 1894 Utah Territorial case of *Young v. Schroeder*, 10 Utah 155, 37 P. 252, (1894) aff’d, 161 U.S. 334, 16 S. Ct. 512, 40 L. Ed. 721 (1896), stating vaguely that “it may well be doubted whether every such case would be beyond the power of a court of equity to receive against.” *Id.* at 254. “Every such case” referred to by the Court was “[i]f the inadequacy is so gross as at once to shock the conscience of all fair and impartial minds, if the sacrifice is such that every honest man would hesitate to take advantage of it,” *Id.* (emphasis added). No standard to invoke that theoretical construct has been proffered, and no case has applied it. Every case setting aside a sheriff’s sale has relied upon irregularities related to the sheriff’s sale or the redemption process in order to grant that equitable relief.

Young v. Schroeder was “not a case which rests on mere inadequacy of price alone, but one where the sales complained of were attended by such substantial irregularities as must have prevented a sale at a fair sum.” *Id.* at 254. That court noted that even in the case of great inadequacy of price at the sheriff’s sale, there still must be at least “slight circumstances of unfairness in the conduct of the party benefitted by the sale to raise the presumption of fraud.” *Id.*, citing *Graffam v. Burgess*, 117 U.S. 180, 192, 6 S. Ct. 686, 692, 29 L. Ed. 839 (1886).

The *Young v. Schroeder* court went further to confirm the necessity of a two-part test, i.e., inadequate price and irregularities attendant to the sale, holding that:

“All the cases unite in the doctrine that on gross inadequacy of price, coupled with irregularities attending the sale, ... it is the duty of the courts to set the sale aside, unless the complaining party is estopped by his own laches.”

Id. (emphasis added). As set forth more fully below, in addition to the lack of any irregularities in the sheriff's sale, the Defendant here should be equitably estopped from objecting to the conduct of the sheriff's sale based on his own actions.

The dicta in the 1894 case of *Young v. Schroeder* was based on other dicta, not the holding, of the 1856 case of *Byers v. Surget*, 60 U.S. 303, 15 L. Ed. 670 (1856). Even the *Byers* opinion required both elements of inadequacy of price and irregularities in the sale to set aside the sheriff's sale, it was not decided on mere inadequacy of price alone. The Appellant in *Byers*, in proceedings to satisfy a claim of \$39.00, caused the Sheriff to sell 14,000 acres of land worth \$40,000.00 to \$70,000.00. Appellant's bid at that sheriff's sale was nine dollars and thirteen and one-half cents. The Appellant himself demanded to post the notices, not allowing the Sheriff to do so, and then refused the debtor's proffer of the redemption price, among other irregularities. *Id.* at 306. The Court there noted these irregularities in holding that the sale could be set aside, as follows:

“Thus, when we advert to the irregular and extraordinary character of the judgment procured through the agency of the appellant-to his eagerness, that could not await the action of the officer of the court-his assumption of the functions of the clerk, in taxing the costs, and in writing out the execution-his preparation and delivery to the sheriff of a description and list of the lands of the appellee, amounting to more than fourteen thousand acres-his requisition of a seizure of the whole of those lands in satisfaction of the sum of thirty-nine dollars-his inflexible demand upon the sheriff, under threats of prosecution, to expose to sale the entire levy-his purchase

of all these lands for the sum of nine dollars and thirteen and a half cents-and his refusal after the sale and purchase to accept, in redemption of these lands so sacrificed, a sum of money tendered to him much more than equal to the costs, with all the expenses incident to the judgment: when all these acts on the part of the appellant are adverted to, they impel irresistibly to the conclusion, that the gross inadequacy of consideration in the sale and purchase of these lands was the premeditated result which the proceedings by the appellant were put in practice to insure. ...

Upon the whole case, we are constrained to view the entire transaction impeached by the appellee as one that cannot be sustained without the subversion of the principles and rules either of legal or moral justice.

Byers v. Surget, 60 U.S. 303 at 311-12 (emphasis added). It should be noted that the Defendant in the instant case before this Court did not proffer any redemption price, he sought only to set aside the sheriff's sale in its entirety.

The holding of the case in *Pender v. Dowse*, 265 P.2d 644 (Utah 1954), relied upon by the Defendant, was specifically based on the Court's finding that both elements of inadequate price and irregularities attending the sale were present. The Court held that:

"In the instant case there can be no doubt of the gross inadequacy of the consideration and from the facts that Dowse knew that the judgment for costs could easily have been satisfied from a levy of personal property known by him to be owned by Pender, and which he was very careful not to direct the sheriff to levy upon and sell, plus his and his attorney's studious silence after the quitclaim deed had been received about their intention to collect the judgment for costs even though they saw Pender and his attorney on several occasions before and after the execution sale, justified the court in concluding the sale was attended by unfairness and was tainted with fraud. It therefore did not err in setting aside the sale and cancelling the sheriff's deed."

Id. at 648 (emphasis added).

The case of *Bangerter v. Petty*, 2010 UT App 49, 228 P.3d 1250, relied upon by the Defendant, made no ruling that a sheriff's sale could be set aside in the absence of irregularities. There, the Court overturned the grant of summary judgment in favor of the judgment creditor, and remanded the case to the District Court for an evidentiary hearing to determine if any irregularities were involved in the sheriff's sale. That Court ruled that:

“¶ 19 The trial court will be required to hold an evidentiary hearing because many of the relevant facts are not in the record. Bangerter's brief contends that she did not have notice of the sale and thus did not have the opportunity to challenge it or protect her rights at the execution sale. However, Bangerter filed no affidavit stating she never received notice of the sale at her home where she was residing, and because the trial court did not hold an evidentiary hearing, there are no facts in the record supporting her contentions.

¶ 20 However, the record makes clear that, at least according to his sworn documents, the sheriff served all the appropriate notices. The trial court on remand will be required to determine whether Bangerter had notice of the sheriff's sale.”

Id. at ¶¶ 19 and 20.

This Court in *Bangerter v. Petty* concluded specifically that there must be both inadequate price and irregularities in the sale, and even if those two elements existed, the Defendant's own actions may bar the equitable relief of setting aside the sale. That conclusion was as follows:

“¶ 23 In sum, we remand to the trial court for a factual hearing on whether the sale should be voided, or if the sale ‘moves the conscience of the court,’ such that equitable redemption should apply, which, following *Young and Pyper*, will involve a balancing of whether the sale price was grossly

inadequate, whether there were gross irregularities in the proceedings, and whether Bangerter is barred by her own laches”

Id. at ¶ 23.

There is no binding precedent, cited by the Defendant or otherwise, that has involved facts where mere inadequacy of price was found sufficient to set aside a sheriff's sale. No authority has been cited for over-ruling the two part test applied in *Pyper v. Bond*. It is well settled that in Utah, in light of the substantial period of redemption allowed to the judgment debtor, a sheriff's sale must be sustained unless it is manifestly unfair. “‘There is a general policy to sustain a sheriff's sale’ unless ‘[it is] manifestly unfair ... especially ... in Utah which has a substantial period of redemption.’” *Beesley v. Hatch*, 863 P.2d 1319, 1322 (Utah 1993).” *Bangerter v. Petty*, 2010 UT App 49 at ¶ 15. As borne out by all of the applicable caselaw, that unfairness must be demonstrated by more than merely inadequate price.

The Defendant's remedy for an inadequate sale price is redemption, under Rule 69C, Ut. R. Civ. P. A low purchase price at a sheriff's sale benefits a judgment debtor, by making the property easy to redeem. Conversely, requiring a high purchase price makes the equity of redemption more costly to the debtor, and may leave the judgment creditor without a remedy. It would be inequitable to require a judgment creditor of modest means and judgment amount, faced with a wealthy judgment debtor holding only large, valuable assets, to be required to bid in full fair market value for any asset presented at the sheriff's sale. That would be impossible for many judgment creditors,

leaving them without a remedy against wealthy judgment debtors. The rule of law must allow the collection and enforcement of judgments rendered in our courts, otherwise, judicial decisions become meaningless.

The standard articulated in *Pyper v. Bond* requiring a two-part test should be upheld, as equitably addressing the interests of both parties and being consistent with the intent of the redemption right granted to judgment debtors by Rule 69C, Ut. R. Civ. P. This Court, in the *Pyper v. Bond* decision, noted the judgment creditor's concern that relying on inadequate price alone would "make it almost impossible to effectively lien property to collect a judgment because 'every creditor would have to analyze their purchase price against the value of the property being sold to determine whether there is a gross inadequacy of price.'" *Pyper v. Bond*, 2009 UT App 331 at ¶ 19. The Court addressed that concern by noting that the District Court properly relied upon "both inadequacy of price and the unfair actions" of the judgment creditor. *Id.* The *Young v. Schroeder* standard requiring both gross inadequacy of price and irregularities attending the sale, recognized and applied in *Pyper v. Bond*, should be upheld in the instant case. See *Pyper v. Bond*, 2009 UT App 331 at ¶ 11.

II. The District Court Properly Concluded That There Were No Irregularities Involving the Sale of Real Property at the Sheriff's Sale

The District Court found that there were no irregularities involving the sale of real property by the sheriff, and upheld the validity of the sheriff's sale on that basis. That

factual determination by the District Court must be upheld here unless that finding is “against the clear weight of the evidence,” or if the Court is otherwise able to “reach a firm conviction that a mistake has been made.” *Dev. Corp. v. Mattson*, 943 P.2d 247, 255 (Utah Ct. App. 1997).¹ Defendant alleges three instances of irregularities in the sheriff’s sale, as follows:

“The irregularities in the sale are: 1) Meguerditichian’s failure to sell Smith’s personal property known to him and of sufficient value to cover the judgment; 2) the Notice of Sale which publicly advertised the Sheriff’s Sale for July 7, 2009, but conducting the sale on July 10, 2009; and 3) Meguerditichian’s attorney had formed an LLC with Meguerditichian for the development of the real property as a subdivision and exercised direction and control of whether and how much of the real property, water rights and non-exempt personal property would be sold at the sale.

Brief of Appellant, p. 8. Those alleged irregularities shall be addressed below in reverse order.

A. Alleged Irregularity No. 3: Plaintiff’s Subsequent Formation of a Limited Liability Company with Counsel to Hold the Real Property.

Defendant has the burden of first marshalling the evidence supporting the challenged finding of the District Court that there were no irregularities in the sheriff’s sale of the real property, pursuant to Rule 24(a)(9), Utah R. App. P. , as correctly noted by

¹ As a threshold matter, this Court should note that the Defendant’s motion to set aside the sheriff’s sale was made exclusively on the basis that “more real property and water rights were sold and the sheriff’s sale than was necessary to satisfy amounts due” to the Plaintiff. R. at 763. See Statement of the Case, *supra*, at ¶ 17. Defendant did not allege or preserve the issue that there were any irregularities in the sheriff’s sale in his initial motion to the District Court to set aside said sale.

the Defendant, citing *Horton v. Gem State Mut. of Utah*, 794 P.2d 847 (Ut. Ct. App. 1990). Brief of Appellant at p. 12. The only evidence supporting this allegation of irregularity is that the Plaintiff, subsequent to the sheriff's sale, formed a limited liability company with the assistance and participation of counsel to hold the property purchased at the sheriff's sale.

It is undisputed that the Plaintiff personally was the purchaser at the sheriff's sale. See the Sheriff's Certificate of Sale, R. 1057-1059, a copy of which is attached hereto in the Addendum under Tab 7. There is no evidence that any limited liability company had been formed by the Plaintiff at the time of the sheriff's sale (it had not). There is no evidence that the Defendant made any attempt subsequent to the sheriff's sale to redeem the property, he did not. There is no evidence presented that any attempts to redeem the property by the Defendant were in any way compromised or restricted by the subsequent formation of a limited liability company by the Plaintiff. Certainly the advice of counsel with the Plaintiff after the fact related to the appropriate method of holding real property cannot be seen as inappropriate, were that the case, essentially all sheriff's sales would be set aside for irregularity. Defendant's attempt to color the advice and participation of Plaintiff's counsel after the fact as being somehow prejudicial to the Defendant is without merit or justification. Defendant has failed to demonstrate how this fact supports a ruling that the District Court's finding is against the clear weight of the evidence, i.e., that this did not constitute an irregularity in the conduct of the sheriff's sale.

B. Alleged Irregularity No. 2: The Sheriff's Sale Was Conducted on July 10, 2008, Instead of July 7, 2008 as Originally Noticed.

As set forth in the Statement of Facts, *supra*, the sheriff's sale was postponed to July 10, 2008, with notice to the Defendant, and at the instance of the Defendant's motion to quash the sheriff's sale. Rule 69B(c), Ut. R. Civ. P., provides authority for the sheriff to postpone the sheriff's sale, as follows:

“(c) Postponement. If the officer finds sufficient cause, the officer may postpone the sale. The officer shall declare the postponement at the time and place set for the sale. If the postponement is longer than 72 hours, notice of the rescheduled sale shall be given in the same manner as the original notice of sale.”

The sheriff's sale, originally set for July 7, 2008, was postponed to July 10, 2008, to accommodate oral argument on the Defendant's motion. Since the postponement was not for more than 72 hours, no additional written notice needed to be provided.

The sheriff's sale was postponed at the instance of the Defendant, to accommodate additional oral argument on the Defendant's motion to quash the sheriff's sale and set aside the judgment in favor of the Plaintiff. See Statement of the Case, *supra*, at ¶¶ 11 and 12. The Defendant was fully aware and informed that the sale had been postponed, in accordance with the relevant procedural rule as set forth above. See the Defendant's acknowledgment of the postponed date of the sale, in Defendant's motion for stay of execution filed with the District Court, Tab 6 in the Addendum hereto. R. 737 at ¶ 12. The postponement of the sheriff's sale was appropriate under Rule 69B(c), Ut. R. Civ. P., was done at the instance of the Defendant himself, and with full and acknowledged notice

to the Defendant. Defendant cannot claim, and did not claim at the District Court, that the postponement of the sheriff's sale constituted an irregularity in that sale.

C. Alleged Irregularity No. 1: Plaintiff's Failure to Sell Personal Property in Satisfaction of the Judgment.

The District Court did not make any factual findings, after completion of an evidentiary hearing, that the Plaintiff or the sheriff knew of or could locate and identify sufficient personal property to satisfy the Plaintiff's judgment. The District Court found that there was insufficient information available as to the identity and value of any personal property. See the transcript of the District Court's ruling following said evidentiary hearing, attached as an exhibit to the District Court's Findings of Fact and Conclusions of Law, Tab 9 in the Addendum hereto, at R. 1053 to 1054.

It is undisputed that the Defendant did not appear at the sheriff's sale or otherwise identify personal property and request that certain personal property be first seized and sold. To the contrary, the Defendant demanded that all personal property not be sold, as set forth in more detail below, claiming that all personal property was exempt from execution. Defendant cannot now claim that the Plaintiff's failure to first cause said personal property to be sold constitutes an irregularity in the sheriff's sale.

In marshalling all of the evidence that supports and refutes the District Court's finding that there was no irregularity in the sheriff's failure to sell personal property, the best evidence that the Defendant can produce is that the sheriff did not sell the personal property because serial numbers and model numbers were not available, and he did not

know the location of the personal property. Brief of Appellant at p. 13, items 1 and 3.

There is no evidence that the sheriff failed to exercise reasonable diligence in obtaining that information, there is similarly no evidence that the Plaintiff had access to that information and failed to provide it to the sheriff's office. There is absolutely no evidence, certainly no "clear weight of evidence," that the District Court erred in finding that the sheriff proceeded appropriately without execution on personal property.

In multiple hearings prior to the sheriff's sale, first in the Defendant's objection to the writ of execution and Request for Hearing, and then Defendant's motion to quash the writ of execution, Defendant demanded that personal property not be sold by the sheriff, claiming that it was all exempt from execution as tools of the trade. Statement of the Case, *supra*, ¶¶ 4, 8 and 10, see also, Defendant's Request for Hearing on the writ of execution and motion to quash the writ of execution, in the Addendum hereto under Tabs 2 and 4. Defendant had full notice and opportunity to attend the sheriff's sale, and direct the order of the sale of personal property. Defendant failed to avail himself of that right, and conversely, demanded that personal property not be sold. The sale was conducted by the sheriff's following multiple hearings at which the Defendant was informed that any personal property would not be sold.

The Defendant's inaction at the sheriff's sale, and pre-sale multiple demands that personal property not be sold, invoke the equitable doctrines of laches and estoppel, preventing the Defendant from prevailing on his claim that the failure to sell any personal

property constitutes an irregularity in the sheriff's sale. As set forth above, the standard established by the Court in *Young v. Schroeder*, as applied in *Pyper v. Bond*, allow the Court to set aside a sheriff's sale, if the two-prong test of inadequate price and irregularities in the sale are met, only if the Defendant is not equitably estopped by his own conduct. The District Court found no evidence that the sheriff or Plaintiff could identify personal property of sufficient value to satisfy the Plaintiff's judgment. Even if that were the case, the Defendant's own actions and demands cause that he be estopped from claiming irregularity in the conduct of the sheriff's sale on the basis that personal property was not sold first.

III. The District Court Committed Error in Concluding That There Were Irregularities Involving the Sale of the Water Right #51-224 at the Sheriff's Sale

The District Court noted that the Plaintiff's bid at the sheriff's sale was \$30,000.00 for Water Right # 51-224, and \$3,000.00 for other, unspecified water rights in Sanpete County, Utah. R. at 1047, ¶ 6 of the District Court's Findings of Fact. The District Court then found that said total price of \$33,000.00 was inadequate, based on the testimony of the overall value of said water rights. *Id.*

The District Court found irregularity in the description of the water rights generally in order to set aside the sheriff's sale as to water rights. Plaintiff's Cross-Appeal seeks to reverse the District Court's order only as it applies to Water Right # 51-224 specifically. Since that water right was described specifically there can be no

irregularity as to the sale of that specific water right, according to the District Court's rationale. Therefore, the District Court's order should be overturned to that limited extent, and on that basis alone.

Although not necessary to overturn the District Court's ruling as it applies to Water Right # 51-224, it should be noted that the price paid individually for said water right, \$30,000.00, was more than the value of said water right according to the testimony of the Defendant. The District Court found that the applicable water had a fair market value of \$7,500.00 per acre foot. *Id.* at ¶ 4. In Defendant's Reply Memorandum in support of his motion to set aside the sale, the Defendant stated that he had 3.275 acre feet of water remaining in Water Right # 51-224 at the time of the sheriff's sale. By that analysis ($3.275 \times \$7,500 = \$24,562.50$, less than the \$30,000.00 paid by the Plaintiff), the Plaintiff paid more than fair market value, and cannot be said to have paid an inadequate price.

However, the District Court's ruling turned on its conclusion that there were irregularities in the description of the water rights, fulfilling the second prong of the test affirmed in *Pyper v. Bond*. In marshalling the evidence that would support the District Court's finding of an irregularity in that description, all evidence goes to the insufficiency of the description of water rights other than Water Right # 51-224, which were not identified separately, or described and sold separately at the sheriff's sale.

The District Court ruled that the subject water rights were real property, and must be described and sold separately, pursuant to Rule 69B(d), Ut. R. Civ. P. R. at 1037, transcript of the District Court's ruling at the hearing on Defendant's motion to set aside the sale. The District Court found that water rights owned by the Defendant, that had been previously severed from Water Right # 51-224, had been given separate water right numbers and those numbers were not specifically identified at the sheriff's sale. R. at 1048, ¶ 9 of the District Court's Findings of Fact.

There is no evidence or finding that Plaintiff or the sheriff failed to adequately describe the Defendant's interest in Water Right # 51-224. Plaintiff does not appeal the District Court's ruling as it applies to other, unspecified water rights that the Defendant may have held in Sanpete County, Utah. However, the District Court erred when it set aside the sale of Defendant's interest in the specific Water Right #51-224. There is no evidence that said right was not adequately identified for purposes of the sheriff's sale. Therefore, the District Court's ruling setting aside the sheriff's sale of Water Right # 51-224 should be reversed, "for clear error, ... against the clear weight of the evidence," *Dev. Corp. v. Mattson*, 943 P.2d 247, 255 (Utah Ct. App. 1997).

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the District Court's ruling denying the Defendant's motion to set aside the sale of real property be upheld. Further, Plaintiff requests that the District Court's ruling setting aside the sale of Water Right # 51-224 only, without regard to the sale of other unspecified water rights, be reversed, to that limited extent. The Defendant's proper remedy was redemption of the property which he claims was sold for an unreasonably low price. Having failed and refused to avail himself of that proper remedy, the sheriff's sale should be affirmed as set forth above.

RESPECTFULLY SUBMITTED this 30th day of June, 2011.

HOOLE & KING, L.C.

By: 

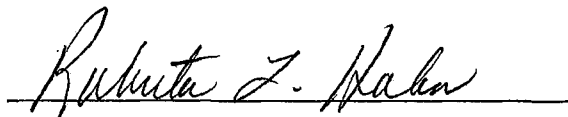
Paul M. King

Attorneys for Appellee/Cross-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this the 30th day of June 2011, a true and correct copy of the foregoing **BRIEF OF APPELLEE AND CROSS-APPELLANT** was served upon the following by U.S. Mail, postage prepaid, as follows:

Darwin C. Fisher
40 North. 300 East, Suite 101
St. George, Utah 84770

A handwritten signature in cursive script, reading "Rubeta Z. Hahn", is written over a horizontal line.

Tab 1

ADDENDUM TO BRIEF OF APPELLEE AND CROSS-APPELLANT

IN THE COURT OF APPEALS, STATE OF UTAH

MIKE MEGUERDITCHIAN, an individual,
Plaintiff/Appellee/Cross-Appellant,

vs.

MAX SMITH, individually and as Trustee of The Smith Family Living Trust,
Defendant/Appellant/Cross-Appellee.

Case No. 20100850-CA

TAB 1

**Defendant's Request for Hearing and
Objection to Sale of Personal Property**

Kent Fillmore #5693
820 West 200 South
Salt Lake City, UT 84104
Phone: 801-808-5893
Fax: 801-410-4365
Attorney for Defendant

SIXTH DISTRICT COURT.

CLERK L. Brown

2009 JUN -5 PM 4:37

IN THE SIXTH JUDICIAL DISTRICT COURT FOR THE STATE OF UTAH

IN AND FOR SANPETE COUNTY, MANTI DEPARTMENT

160 North Main, Manti, Utah 84642

MIKE MEGUERDITCHIAN, an individual,

Plaintiff,

vs.

MAX SMITH, individually and as Trustee of
The Smith Family Living Trust, u/a/d March
19, 1991

Defendant.

REQUEST FOR HEARING

Civil No. 050600136.

Judge David L. Mower



050600136 SMITH, MAX

1. Complete paragraph one if you claim the property executed upon is exempt:

☒ (a) The property which has been executed upon is exempt from execution because it is (Check applicable boxes):

- ☐ Homestead up to the amount allowed by law
- ☐ A motor vehicle used in my trade or business and having a value below that allowed by law
- ☒ Tools of the trade
- ☐ Social Security Benefits
- ☐ Supplemental Security Income (SSI)
- ☐ Veterans' Benefits
- ☐ Unemployment Benefits
- ☐ Worker's Compensation Benefits
- ☐ Public Assistance (Welfare)
- ☐ Alimony or Child Support
- ☐ Pensions
- ☐ Wages or other earnings from personal services
- ☐ Owned by another person
- ☐ Only partly owned by me
- ☐ Certain tools of the trade below the value allowed by law

- ☐ Certain furnishings and appliances
- ☐ Certain musical instruments
- ☐ Certain heirlooms
- ☐ Other (describe): _____

☐ (b) Check if applicable: I have attached copies of the documents that show that the property is exempt.

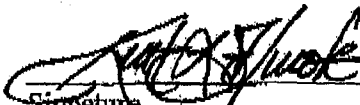
2. Complete paragraph two if you believe the Writ of Execution was improperly issued:

- ☒ (a) I believe that the Writ of Execution was issued improperly.
(Explain) Insufficient notice of proceedings was given to Defendant. There is insufficient performance under the contract to justify attorney fees.
- ☐ (b) Check if applicable: I claim ownership of all or part of the property taken and I am not one of the persons against whom a judgment has been entered.
- ☐ (c) Check if applicable: I do not own the property taken.

I REQUEST THAT THIS MATTER BE SET FOR A HEARING.

THE STATEMENTS MADE IN THIS REQUEST ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

DATED this 5th day of June, 2009.


Signature

Kent L. Fillmore
Name Printed

820 W. 200 S. SLC Utah 84104
Address

(801) 808-5893
Telephone Number

Tab 2

ADDENDUM TO BRIEF OF APPELLEE AND CROSS-APPELLANT

IN THE COURT OF APPEALS, STATE OF UTAH

MIKE MEGUERDITCHIAN, an individual,
Plaintiff/Appellee/Cross-Appellant,

vs.

MAX SMITH, individually and as Trustee of The Smith Family Living Trust,
Defendant/Appellant/Cross-Appellee.

Case No. 20100850-CA

TAB 2

Notice of Sheriff's Sale

IN THE SIXTH JUDICIAL DISTRICT COURT FOR THE STATE OF UTAH
IN AND FOR SANPETE COUNTY, MANTI DEPARTMENT

-----oo0oo-----

MIKE MEGUERDITCHIAN, an individual

Plaintiff

Vs.

Notice of Sale
Civil No. 050600136

MAX SMITH, Individually and as Trustee
Of The Smith Family Living Trust, u/a/d
March 19, 1991

Defendant(s)

-----oo0oo-----

To be sold at a Sheriff's Sale which will be held at the Sanpete County
Courthouse located at 160 North Main, Manti, Utah on July 7, 2009 at 11:00
a.m. all rights, title and interest of the above named defendant, in and to the
following described real property:

Beginning at the Southwest corner of Section 31, Township 12 South,
Range 4 East, Salt Lake Base and Meridian; thence North 88deg 59'57" East
1288.94 feet; thence North 79deg56'18" East 710.82 feet; thence North
59deg13'01" East 819.26 feet; thence North 58deg52'40" East 428.89 feet;
thence North 25deg47'50" East 129.558 feet; thence South 424.763 feet; thence
South 60deg18'17" West 788.156 feet; thence South 79deg29'31" West 504.635
feet; thence West 1935.19 feet to the point of beginning.
Containing: 9.42 acres, more or less (S#20232X1)

Oaker Hills Plat 4 (Phase IV) (Tax Serial #20221) more specifically described as:

Beginning at the Northeast corner of Section 30, Township 12 South,
Range 4 East, Salt Lake Base and Meridian, said point of beginning being on
Section Line and being on the boundary line between Oaker Hills and Elk Ridge
Subdivision; thence South 89deg43'46" west 1642.58 feet to the centerline of the
Oaker Hills access road and the following 14 courses; South 266.85 feet; thence
South 12deg56'35" East 282.88 feet; thence south 38deg25'13" East 274.87 feet;
thence South 44deg31'02" East 210.10 feet; thence South 70 deg 54'52" East
244.38 feet; thence South 63deg 38'47" East 237.37 feet; thence South 43 deg
36'34" East 204.14 feet; thence South 25 deg 21'18" East 209.58 feet; thence
South 08 deg 56'10" West 208.94 feet; thence South 32 deg 06'46" West 173.63
feet; thence South 75 deg 26'28" West 292.16 feet; thence North 89 deg 02'18"
West 234.57 feet; thence South 48 deg 04'38" West 112.48 feet; thence South
26 deg 52'33" West 394.85 feet; thence leaving said road centerline, South 61
deg 33'22" East 226.25 feet; thence South 00deg 45'39" West 299.14 feet to a

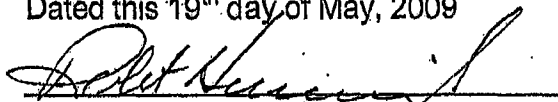
fence corner and sixteen (1/16) corner; thence North 89deg 24'38" East 2615.95 feet; thence North 00 deg 00'36" East 2675.36 feet; thence South 89 deg 43'47" West 1323.29 feet to the point of beginning.

Water Rights:

- (1) All rights of the Defendants in water right number 51-224, and all other rights of the Defendants in water coming from and the well producing said water, said to be located approximately North 950 feet East 300 feet from the Southwest corner, Section 4 Township 12 South Range 4 East, Salt Lake Basin Meridian.
- (2) Other rights of the Defendants in water rights and/or interests in water wells located in Sanpete County, Utah.

Terms of payment. Cash or certified funds only. Checks will be accepted when accompanied by a letter from maker's bank that certifies funds are available through two weeks after sale. A credit bid will be considered the same as a cash bid when submitted by plaintiff or plaintiff's representative.

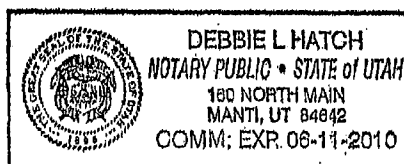
Dated this 19th day of May, 2009


Robert Henningson, Deputy
Sanpete County Sheriff's Department

On the 19th day of May, 2009 before me, a Notary Public, in and for the County of Sanpete, State of Utah, personally appeared Robert Henningson, Deputy Sheriff of Sanpete County, personally known to me to be the person described in and who executed the foregoing instrument, and who acknowledged to me that he executed the same as such, freely and voluntarily, and for the uses and purposes as provided for by law.

WITNESS my hand and seal this 19th day of May, 2009.


Debbie L Hatch
Notary Public



Sanpete County Sheriff's Office
Affidavit of Posting

SIXTH DISTRICT COURT
CLERK *M. L. Lued*
2009 JUN 17 PM 2:54

STATE OF UTAH

: SS

COUNTY OF SANPETE

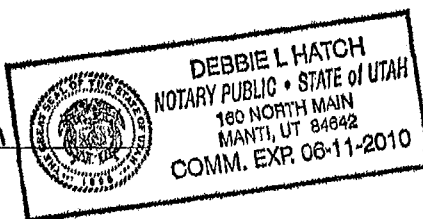
Robert Henningson, having been first duly sworn upon oath, deposes and says as follows:

1. That I am a United States citizen 21 years of age, residing in Sanpete County, State of Utah.
2. That on the 15th day of June, 2009 affiant completed posting conformed copies of the Notice of Sheriff's Sale, a copy of which is attached hereto as an exhibit and incorporated herein, at the following places within the city or county wherein the property described in said Notice is located:
 - 1) Address of Property:
Approximately 6700 East 33000 North, Fairview, UT
 - 2) Manti City Building, 50 S Main, Manti, UT
 - 3) Mt. Pleasant City Hall, 115 W Main, Mt. Pleasant, UT
 - 4) Fairview Post Office, 50 West Center, Fairview, UT
 - 5) Sanpete County Courthouse located at 160 North Main, Manti, Utah.

Robert Henningson
this 16th Day of June, 2009

SUBSCRIBED AND SWORN before me

Debbie L Hatch
Notary Public



Sanpete County Sheriff's Office Affidavit of Posting



VD28061584

pages: 3

CANNED

Tab 3

ADDENDUM TO BRIEF OF APPELLEE AND CROSS-APPELLANT

IN THE COURT OF APPEALS, STATE OF UTAH

MIKE MEGUERDITCHIAN, an individual,
Plaintiff/Appellee/Cross-Appellant,

vs.

MAX SMITH, individually and as Trustee of The Smith Family Living Trust,
Defendant/Appellant/Cross-Appellee.

Case No. 20100850-CA

TAB 3

**District Court Minutes of
Status/Scheduling Conference.**

SIXTH JUDICIAL DISTRICT-MANTI
SANPETE COUNTY, STATE OF UTAH

MIKE MEGUERDITCHIAN,	:	MINUTES
Plaintiff,	:	STATUS/SCHEDULING CONFERENCE
	:	
vs.	:	Case No: 050600136 MI
MAX SMITH Et al,	:	Judge: MARVIN BAGLEY
Defendant.	:	Date: June 17, 2009

Clerk: selmaj

PRESENT

Plaintiff's Attorney(s): PAUL M KING

Defendant's Attorney(s): KENT L FILLMORE

Audio

Tape Number: West Ctr Tape Count: 9:32-9:47

HEARING

TAPE: West Ctr COUNT: 9:32-9:47

Mr. King is present by phone. Court noted that Judge Mower has previously entered a judgment and there has been a Writ of Execution issued, and that there was a request for a hearing filed on the Writ. Mr. King received the Writ of Execution.

Mr. Fillmore stated that he understood that we were here today to schedule a hearing for this motion, not to hear it today, but he explained reasons for motion. One reason is the attorney's fees section in the Writ of Execution that is not supported by

the contract, and given there's no statutory or contractual basis for the attorney's fees they will have to challenge that part of the Writ. Mr. Fillmore then addressed the "tools of the trade" issued on some heavy equipment that he feels should be

exempt as well. Mr. Fillmore would like to schedule a hearing to address these issues.

Mr. King feels that a hearing may not be needed because the Sheriff's levee has excluded any personal property and equipment, so the "tools of the trade" exemption is not an issue. With regard to the attorney's fees, the judgment itself calls for

additional attorney's fees incurred in execution efforts. Mr. King stated that if a hearing is needed, he would like to see it happen before the Sheriff's Sale.

Mr. Fillmore addressed a Writ of Praecipe that included some personal property. Court reviewed that the Writ of Praecipe did order that the personal property be sold first before the real estate.

Mr. King stated that the Sheriff's declined to include any personal property in the levee for the reason that they did not have access to serial numbers of some of the equipment. Mr. King

Case No: 050600136

Date: Jun 17, 2009

stated that they are content to proceed on the real property and related interests, and not execute on any personal property.

Mr. Fillmore is not content in going forth. He stated that he is not against post judgment attorney's fees, but the judgment calls for attorney's fees, so the amount their pursuing is based on incorrect facts.

Mr. King stated that those issues are not before the court, the defendant has not made a motion to set aside the judgment.

Court reviewed the judgment, paragraph 2. Court asked if there has been an affidavit to augment the judgment. Mr. King said "no". Court advised Mr. Fillmore that if he wanted to file a motion to augment the judgment, then he will consider it, and if

there's not been a levy on the personal property, then there's nothing before the Court.

Mr. Fillmore stated that there have been some progress on negotiations, and he would like a week to file a motion. Mr. King agreed, but expressed some concern about motion being filed before the Sheriff's Sale on July 10, 2009.

Court ordered Mr. Fillmore to file the motion by Friday, June 19, 2009, giving Mr. King time to respond. Status/Scheduling Conference is scheduled on June 24, 2009. Both counsel may appear by phone.

Tab 4

ADDENDUM TO BRIEF OF APPELLEE AND CROSS-APPELLANT

IN THE COURT OF APPEALS, STATE OF UTAH

MIKE MEGUERDITCHIAN, an individual,
Plaintiff/Appellee/Cross-Appellant,

vs.

MAX SMITH, individually and as Trustee of The Smith Family Living Trust,
Defendant/Appellant/Cross-Appellee.

Case No. 20100850-CA

TAB 4

**Defendant's Motion to Set Aside Summary
Judgment and Quash Writ of Execution**

SIXTH DISTRICT COURT
CLERK *CR*
2009 JUN 22 AM 8:09

Kent Fillmore #5693
820 West 200 South
Salt Lake City, UT 84104
Phone: 801-808-5893
Fax: 801-410-4365
Attorney for Defendant

Motion to Set Aside Summary Judgment and Quash Writ



VD29088354

pages: 2

050600136 SMITH, MAX

**IN THE SIXTH JUDICIAL DISTRICT COURT FOR THE STATE OF
UTAH
IN AND FOR SANPETE COUNTY, MANTI DEPARTMENT**

MIKE MEGUERDITCHIAN, an
individual,
Plaintiff,

vs.

MAX SMITH, individually and as a
Trustee of the Smith Family Living
Trust u/a/d March 19th, 1991,
Defendant

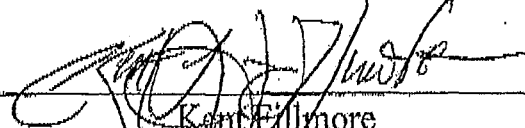
MOTION TO SET ASIDE SUMMARY
JUDGMENT AND QUASH WRIT OF
EXECUTION

CASE NO.: 050600136

JUDGE: MARVIN BAGLEY

COMES NOW DEFENDANT, by and through his attorney of record and respectfully moves this court to set aside summary judgment and quash the writ of execution in this instant case, pursuant to Rules 60 and 64 Utah Rules of Civil Procedure.

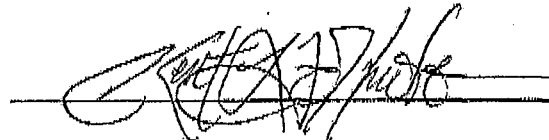
Respectfully submitted this 19th day of June, 2009.


Kent Fillmore
Attorney for the Defendant

SCANNED

CERTIFICATE OF DELIVERY

THIS IS TO CERTIFY ON THIS 19th DAY OF JUNE, 2009 I DID CAUSE TO BE MAILED A TRUE AND CORRECT COPY OF THIS MOTION TO SET ASIDE SUMMARY JUDGMENT AND QUASH WRIT OF EXECUTION TO THE OFFICE OF PAUL M. KING, HOOLE AND KING, L.C. AT (801) 272-7557.

A handwritten signature in black ink, appearing to read "Kent L. Fillmore", is written over a horizontal line.

Kent L. Fillmore
Attorney for Defendant

SIXTH DISTRICT COURT

CLERK *CR*

2009 JUN 22 AM 8:09

Kent Fillmore #5693
 820 West 200 South
 Salt Lake City, UT 84104
 Phone: 801-808-5893
 Fax: 801-410-4365
 Attorney for Defendant

Memorandum In Support of Motion to Set Aside Summar



VD29083446

pages: 6

050600136 SMITH,MAX

**IN THE SIXTH JUDICIAL DISTRICT COURT FOR THE STATE OF UTAH
 IN AND FOR SANPETE COUNTY, MANTI DEPARTMENT**

MIKE MEGUERDITCHIAN, an
 individual,

Plaintiff,

vs.

MAX SMITH, individually and as a
 Trustee of the Smith Family Living
 Trust w/a/d March 19th, 1991,
 Defendant

MEMORANDUM IN SUPPORT OF
 MOTION TO SET ASIDE SUMMARY
 JUDGMENT AND QUASH WRIT OF
 EXECUTION

CASE NO.: 050600136

JUDGE: MARVIN BAGLEY

COMES NOW DEFENDANT by and through his attorney of record and respectfully submits the following Memorandum in Support of Defendants' Motion to Set aside Summary Judgment and Quash Writ of Execution.

STATEMENT OF FACTS

1. Defendant was represented in this instant case by D. Christopher Van Campen until Mr. Van Campen was suspended from practice on April 17th, 2008.

2. Mr. VanCampen failed to notify Defendant of his suspension from the Bar and has had no further contact with Defendant since then.
3. Defendant has received no notice of process since before the suspension of Mr. VanCampen until the Writ of Execution was served.
4. Defendant was not notified of motions and hearings to establish the value of lot 349 or to contest the Application for Writ of Execution.
5. Defendant reached settlement with Plaintiff by conveying half interest in a 9.45 acre lot on the county road with telephone and electrical access, reasonably valued at between \$75,000.00 and \$80,000.00. This settlement is not factored into the judgment.
6. Plaintiff paid \$5,000.00 for Lot No. 349.
7. The value of lot No. 349 is far less than \$27,000.00.
8. Defendant continued to develop Plat 4 as per agreement between the parties
9. Defendant rented a bulldozer from Red Z to fill a wash.
10. Defendant has been cutting and graveling roads to further the agreement to develop the 77.25 acres of Plat 4.
11. Defendant has built a vinyl fence to decorate entry to north side of 77.25 acres of Plat 4.
12. Defendant has installed gates to 77.25 acres of Plat 4.

ARGUMENT I

Pursuant to Rule 60(b)(1) upon motion and under such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for mistake, inadvertence, surprise or excusable neglect.

On April 17, 2008 Defendant's lawyer, Christopher Van Campen, was suspended from the practice of law in the State of Utah. Defendant was not informed of any subsequent proceedings in this case by his former lawyer or by the Plaintiff. Defendant was specifically uninformed on the issue of damages that had been reserved by Judge Mower in his order following the hearing on Summary Judgment.

Contrary to Mr. VanCampen's affidavit, Defendant has not changed his address. Defendant has maintained the same address for 20 years, and could have been contacted if Mr. VanCampen had made any effort to do so.

Defendant strenuously objects to the \$27,000.00 value assigned to Lot 349 in the adjudication of Plaintiff's Second Cause of Action. The judgment should be modified to reflect the actual value of damages through qualified appraisals.

The Judgment should be modified to eliminate pre-judgment attorney fees. Under the agreement between the parties no attorney fees were to be awarded without first resorting to mediation. Plaintiff failed to initiate mediation and should not be granted attorney fees in contradiction with the contract between the parties, paragraphs 7 & 8.

ARGUMENT II

Quash Writ of Execution

Pursuant to Rule 64(d)(2) the court should enter an order directing the officer to release the property, on grounds that the writ was wrongfully obtained, and that the property is exempt from seizure.

The order of the court, dated December 17th 2007, specifically declined to dissolve the contract between the parties for the development of 77.25 acres. The Writ of Execution (Section C) seeks to accomplish that through the sale of those

acres which re the subject of that contract. The Writ of execution (Section D) also seeks water rights which are committed to the development of the subject of the parties intact agreement. Plaintiff should not be able to gain by the Writ of Execution what he was denied by the summary judgment.

Exempt Properties:

Writ of Execution (Section C) also seeks to sell parcels of land (Lots 401-412) which have been sold or encumbered. (See Affidavit of Max Smith.)

Writ of Execution (Section A) lists personal property necessary for the development of the property, that is, tools of the trade and as such should be exempt from execution. This equipment is necessary for the continuing contract to develop the 77.25 acres that are the subject of the parties continuing agreement.

Section B of the Writ of Execution, seeking to sell the 9.45 acre lot, is legitimate subject and uncontested by Defendant. However, Plaintiff should not be enriched twice to compensate him for the same lost piece of land. If the Plaintiff sells those 9.4 acres to satisfy the judgment, all funds in excess of the judgment should be returned to Defendant.

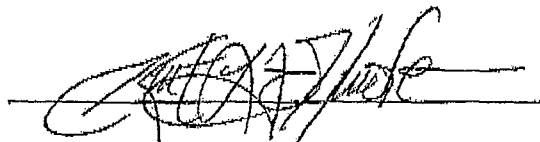
CONCLUSION

The interests of justice would be best served by settling the judgment on the actual facts and in accord with the previous orders of this court, and that exempt property be excluded from the Writ of Execution.

WHEREFORE, Defendant prays that

1. The Judgment be stayed until an accurate value is determined for compensation to Plaintiff for the loss of lot no. 349.
2. That the Judgment be modified to reflect the real value of Plaintiff's damages.
3. That the plat 4 development and any water rights be exempt from execution of the judgment so that the contract between the parties may be fulfilled.
4. That those parcels of land sold or encumbered be excluded from the Writ of Execution.
5. That this case be held over for an evidentiary hearing value of lot no. 349.
6. That prejudgment attorney fees be eliminated from the judgment.
7. Any other orders which this court finds to be in the interest of justice.

Respectfully submitted this 19th day of June, 2009.

A handwritten signature in dark ink, appearing to read 'Kent Fillmore', is written over a horizontal line.

Kent Fillmore
Attorney for the Defendant

CERTIFICATE OF DELIVERY

THIS IS TO CERTIFY ON THIS 17th DAY OF JUNE, 2009 I DID CAUSE TO BE A TRUE AND CORRECT COPY OF THIS MEMORANDUM IN SUPPORT OF MOTION TO SET ASIDE SUMMARY JUDGMENT AND QUASH WRIT OF EXECUTION TO BE FAXED TO THE OFFICE OF PAUL M. KING, HOOLE AND KING, L.C., 4276 SOUTH HIGHLAND DRIVE, SALT LAKE CITY, UTAH 84124 AT (801) 272-7557.

A handwritten signature in black ink, appearing to read "Kent L. Fillmore", is written over a horizontal line.

Kent L. Fillmore
Attorney for Defendant

SIXTH DISTRICT COURT
 CLERK CR
 2009 JUN 22 AM 8:09

Kent Fillmore #5693
 820 West 200 South
 Salt Lake City, UT 84104
 Phone: 801-808-5893
 Fax: 801-410-4365
 Attorney for Defendant

Affidavit of Max Smith



VD29088449

pages: 3

050600136 SMITH,MAX

IN THE SIXTH JUDICIAL DISTRICT COURT FOR THE STATE OF
 UTAH
 IN AND FOR SANPETE COUNTY, MANTI DEPARTMENT

MIKE MEGUERDITCHIAN, an
 individual,
 Plaintiff,

vs.

MAX SMITH, individually and as a
 Trustee of the Smith Family Living
 Trust u/a/d March 19th, 1991,
 Defendant

AFFIDAVIT OF MAX SMITH

CASE NO.: 050600136

JUDGE: MARVIN BAGLEY

Affidavit of Max L. Smith in support of Defendants Motion to Set Aside Summary
 Judgment and to Quash the Writ of Execution.

I, Max Smith, do attest and affirm that I am competent to testify to the matters
 stated herein and that the following facts are true and correct from my own personal
 knowledge.

1. I hired D. Christopher VanCampen to defend this suit.

2. Mr. VanCampen failed to notify me of proceedings in the case after the hearing for Plaintiff's Motion for Partial Summary Judgment Aug 22nd, 2007.
3. I reached settlement with Mike Meguerditchian by exchanging his interest in Lot No. 349 for half interest in a 9.45 acre lot on the county road with telephone and electrical access, reasonably valued \$75,000.00 and \$80,000.00 in an exchange based on the estimated value of comparable lots adjacent to that parcel.
4. Plaintiff paid \$5,000.00 for Lot No. 349.
5. The value of lot No. 349 is far less than \$27,000.00.
6. I continued to develop Plat 4 as per agreement between me and Mike Meguerditchian after the initial Summary Judgment.
7. I rented a bulldozer from Red Z to fill a wash.
8. I have been graveling roads to access 77.25 acres of Plat 4.
9. I have been widening and completing road access to 77.25 acres of Plat 4.
10. I have built a vinyl fence to decorate the entry to the north side of 77.25 acres of Plat 4.
11. I have installed gates on 77.25 acres of Plat 4.

Pursuant to UCA 46-5-101 I declare under criminal penalty of the State of Utah that the foregoing is true and correct from my best recollection of personal experience.

So sworn this _____ day of June, 2009.

Max Smith
Defendant

CERTIFICATE OF DELIVERY

THIS IS TO CERTIFY ON THIS _____ DAY OF _____, 2009 I
DID CAUSE A TRUE AND CORRECT COPY OF THIS AFFIDAVIT IN
SUPPORT OF MOTION TO SET ASIDE DEFAULT JUDGMENT TO THE
OFFICE OF PAUL M. KING, HOOLE AND KING, L.C., 4276 SOUTH
HIGHLAND DRIVE, SALT LAKE CITY, UTAH 84124

Kent L. Fillmore
Attorney for Defendant

SIXTH JUDICIAL DISTRICT-MANTI
SANPETE COUNTY, STATE OF UTAH

MIKE MEGUERDITCHIAN, : MINUTES
Plaintiff, : LAW AND MOTION
vs. : Case No: 050600136 MI
MAX SMITH Et al, : Judge: MARVIN BAGLEY
Defendant. : Date: June 24, 2009

Att: kriso

PRESENT

Defendant(s): MAX SMITH
Plaintiff's Attorney(s): PAUL M KING
Defendant's Attorney(s): KENT L FILLMORE
Audio
Tape Number: west Tape Count: 9:34/10:26

HEARING

TAPE: west COUNT: 9:34/10:26

Mr. Fillmore presents argument regarding the Defendants previous counsel being suspended by the bar. Mr. Fillmore would like to have time to file a counterclaim.

Mr. Fillmore believes the Judgement on this case should be different then what it is previously set at.

TIME: 10:31 AM Mr. King gives argument that an appraisal has been completed by a certified appraiser. Mr. King argues the issue of attorneys fees.

TIME: 10:41 AM Mr. Fillmore gives argument over the damages.

TIME: 10:45 AM Judge has not had a chance to read the affidav that were filed this morning. Judge Bagley would like time to them. Court asks how that would effect the sale.

TIME: 10:46 AM Mr. King can put a stay on the sale.

TIME: 10:48 AM Mr. Fillmore gives argument

TIME: 10:49 AM This hearing be continued to July 8, 2
:15 A.M.

INUED ORAL ARGUMENTS is scheduled.

Date: 07/08/2009

Time: 09:15 a.m.

Location: West Courtroom

160 North Main

P O Box 100

Manti, UT 84642-0100

before Judge MARVIN BAGLEY

Tab 5

ADDENDUM TO BRIEF OF APPELLEE AND CROSS-APPELLANT

IN THE COURT OF APPEALS, STATE OF UTAH

MIKE MEGUERDITCHIAN, an individual,
Plaintiff/Appellee/Cross-Appellant,

vs.

MAX SMITH, individually and as Trustee of The Smith Family Living Trust,
Defendant/Appellant/Cross-Appellee.

Case No. 20100850-CA

TAB 5

**Minutes of Initial District Court Hearing on
Defendant's Motion to Quash Writ of Execution**

SIXTH JUDICIAL DISTRICT COURT
JANUARY 2009

MIKE MEGUERDITCHIAN,
Plaintiff,

vs.

MAX SMITH Et al,
Defendant.

Clerk: kriso

PRESENT

Defendant(s): MAX SMITH

Plaintiff's Attorney(s): PAUL M KING

Defendant's Attorney(s): KENT L FILLMORE

Audio

Tape Number: west Tape Count: 9:34/10:26

HEARING

TAPE: west COUNT: 9:34/10:26

Mr. Fillmore presents argument regarding the Defendants previous counsel being suspended by the bar. Mr. Fillmore would like to have time to file a counterclaim.

Mr. Fillmore believes the Judgement on this case should be different then what it is previously set at.

TIME: 10:31 AM Mr. King gives argument that an appraisal has been completed by a certified appraiser. Mr. King argues the i of attorneys fees.

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TIME: 10:46 AM Mr. King can put a stay on the sale.

TIME: 10:48 AM Mr. Fillmore gives argument

TIME: 10:49 AM This hearing will be continued to Jul 9:15 A.M.

CONTINUED ORAL ARGUMENTS is scheduled.

Date: 07/08/2009

Time: 09:15 a.m.

Location: West Courtroom

160 North Main

P O Box 100

Manti, UT 84642-0100

before Judge MARVIN BAGLEY

Tab 6

ADDENDUM TO BRIEF OF APPELLEE AND CROSS-APPELLANT

IN THE COURT OF APPEALS, STATE OF UTAH

MIKE MEGUERDITCHIAN, an individual,
Plaintiff/Appellee/Cross-Appellant,

vs.

MAX SMITH, individually and as Trustee of The Smith Family Living Trust,
Defendant/Appellant/Cross-Appellee.

Case No. 20100850-CA

TAB 6

**Defendant's Notice of Appeal and Motion
for Temporary Stay of Execution**

SIXTH DISTRICT COURT

CLERK *McLund*

2009 JUL -9 PM 12:21

Kent Fillmore #5693
820 West 200 South
Salt Lake City, UT 84104
Phone: 801-808-5893
Fax: 801-410-4365
Attorney for Defendant

IN THE SIXTH JUDICIAL DISTRICT COURT FOR THE STATE OF UTAH
IN AND FOR SANPETE COUNTY, MANTI DEPARTMENT

MIKE MEGUERDITCHIAN, an
individual,
Plaintiff,

vs.

MAX SMITH, individually and as a
Trustee of the Smith Family Living
Trust u/a/d March 19th, 1991,
Defendant

NOTICE OF APPEAL

CASE NO.: 050600136

JUDGE: MARVIN BAGLEY

Comes now Defendant, by and through his attorney of record and respectfully submits this Notice of Appeal in this instant case of the Order dated July 8, 2009, denying Defendant's Motion to Set Aside Summary Judgment and Quash Writ of Execution. This appeal is taken from the Sixth Judicial District Court for The State of Utah in and for Sanpete County, Manti Department to the Utah Court of Appeals.

Respectfully submitted this 9th day of July, 2009.

Kent Fillmore
Kent Fillmore
Attorney for the Defendant

Notice of Appeal



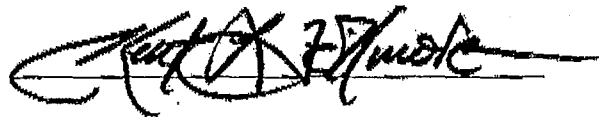
VD29225666

pages: 2

050600136 SMITH,MAX

CERTIFICATE OF DELIVERY.

THIS IS TO CERTIFY ON THIS 9th DAY OF JULY, 2009 I DID CAUSE
TO BE FAXED A TRUE AND CORRECT COPY OF THIS NOTICE OF APPEAL
TO THE OFFICE OF PAUL M. KING, HOOLE AND KING, L.C. AT (801) 272-
7557.

A handwritten signature in black ink, appearing to read "Kent L. Fillmore", written over a horizontal line.

Kent L. Fillmore
Attorney for Defendant

SIXTH DISTRICT COURT

CLERK: CR

2009 JUL -9 PM 4:16

Kent Fillmore #5693
 820 West 200 South
 Salt Lake City, UT 84104
 Phone: 801-808-5893
 Fax: 801-410-4365
 Attorney for Defendant

Motion for Temporary Stay of Execution



VD29226822

pages: 7

050600136 SMITH,MAX

**IN THE SIXTH JUDICIAL DISTRICT COURT FOR THE STATE OF UTAH
 IN AND FOR SANPETE COUNTY, MANTI DEPARTMENT**

MIKE MEGUERDITCHIAN, an
 individual,
 Plaintiff,

vs.

MAX SMITH, individually and as a
 Trustee of the Smith Family Living
 Trust u/a/d March 19th, 1991,
 Defendant

MOTION FOR TEMPORARY STAY
 OF EXECUTION

CASE NO.: 050600136

JUDGE: MARVIN BAGLEY

COMES NOW DEFENDANT, by and through his attorney of record pursuant to Rule 62 Utah Rules of Civil Procedure and respectfully moves this court to delay the execution of Judgment on the sale of property currently scheduled for July 10th, 2009 for 17 to July 27 days to allow Defendant to raise sufficient funds to satisfy the judgment or to post a bond for the full amount of any bond required for a stay of execution pending Defendant's appeal of denial of Defendant's to set aside Judgment and Quash Writ of Execution.

FACTS

1. This court ordered that Defendant's Motion to Set aside Default Judgment and Quash writ of Execution be denied on July 8th, 2009..

2. Defendant's Counterclaim remains in process and has not been adjudged.

3. Some properties subject to sale the Writ of Execution are already sold under contract to third parties. Affidavit of Max Smith

4. Defendant's submitted a property evaluation which contained critical information that contradicted the value the appraised value of property which is the subject of the Judgment ~ to wit: the non-existence of a well on the property.

5. Contrary to the appraisal attached as Exhibit A to Plaintiff's memorandum in Support of Motion for final Judgment Pursuant to Rule 54(b) Utah Rules of Civil procedure: There is no well on the property. There for Plaintiff's appraisal is inaccurate and the amount awarded in the judgment is likewise accurate.

Defendant's Appraisal.

6. Defendant's Property Appraisal was submitted to the court as quick as possible; timeliness of submission was beyond control of Defendant and his Attorney.

7. The Judgment in question awarded a Principle Judgment in the amount \$27,000.00 which was based on the appraised value of a lot of land as of 9/24/08 .

8. The the interest in the Judgment in question is calculated from 1/10/2000.

9. Defendant was represented in this instant case by D. Christopher Van Campen until Mr. Van Campen was suspended from practice on April 17th, 2008.

10. Mr. VanCampen failed to notify Defendant of his suspension from the Bar and has had no further contact with Defendant since then.

11. Defendant has received no notice of process since before the suspension of Mr. VanCampen until the Writ of Execution was served.
12. Defendant was not notified of motions and hearings to establish the value of lot 349 or to contest the Application for Writ of Execution until the Writ of Execution was served.
13. Defendant's Motion to Set Aside Judgment was denied on 7/8/09.
14. Defendant's appeal of that decision was submitted on 7/9/09.
15. A Sheriff's sale insatisfaction of the partial Judgment is scheduled for 11:00 AM of 7/10/09

REASONS FOR RELIEF REQUESTED

ARGUMENT I:

Defendant Seeks Sufficient Time To Capitalize A Bond For Satisfaction Or Appeal

Defendant seeks 17 days to raise the capital for satisfaction of judgment or for an appellate bond for a permanent stay of judgment pending appeal. In the meanwhile Defendant is willing to submit a bond to cover the inconvenience of 17 days delay in the Sheriff's sale. Defendant has sufficient assets to arrange for a full, permanent bond to cover the Plaintiff's risk during appeal, but that process will take about two weeks. Rather than lose the profit from a land development project into which Defendant has expended considerable time and effort, defendant should be allowed sufficient time to conduct his appeal or raise the money for satisfaction of judgment.

ARGUMENT II:**Final Judgment In This Case Remains Subject To Defendant's Counterclaim,
Which Has Not Been Adjudged.**

Defendant's counterclaim is still in effect. The final judgment in this case should reflect an accurate accounting of the claims and damages to both parties before assets of the partnership are liquidated. Wherefore, a final judgment in inappropriate at this time and execution should be delayed.

ARGUMENT III**Execution of Judgment at this point in time
would contradict previous orders of this court.**

Execution of Judgment at this point in time would contradict previous orders of this court to maintain the partnership between the parties, which is based on the ownership of properties sought to be sold for satisfaction of partial judgment.

In his Memorandum Decision on Plaintiff's Motion for Partial Summary Judgment and Defendant's motion For Withdrawal and Amendment of Admissions Judge Mower refused to dissolve the partnership between Plaintiff and Defendant. The effect of the current Judgment, however, would dissolve that partnership by alienating the subject of the partnership, to wit: the land to be developed.

ARGUMENT IV**Aspects Of Judgment Are Subject To Defendant's Appeal.**

Some aspects of the judgment are subject to Defendant's appeal, to wit: Attorney fees, value of property, and the proper application of interest to the principle award. These are easily demonstrable facts. It is an elemental miscarriage of justice to base a decision on incorrect perceptions rather than take the time to make a judgment based on the truth.

ARGUMENT V:

The Judgment Is Defective For Allowing Inaccurate Measure Of Damages

Paragraph 2 of Plaintiff's Memorandum in Support of Motion for Final Judgment Pursuant to Rule 54(b) for Plaintiff's Second Cause of Action asserts that "the value of Lot 347 [*sic*] was not less than \$27,000.00 as demonstrated in that certain land appraisal report, a copy of which is attached hereto as Exhibit A and incorporated herein by reference". That "certain land appraisal report" purports to establish the value of the property "as of 9-24-08".

The Judgment is defective for allowing an evaluational of damages as of Plaintiff's appraisal, dated September 24th, 2008, which allows for measure of damages as ascertained by the Judgment on December 8th, 2008, AND for "interest" supposedly accruing over 8 years since January 10th, 2000, the date of the original agreement.

There is no evaluation for the property at the time the original agreement was signed from which interest may be accurately calculated. Plaintiff should not be awarded the appreciated value of the assets in question plus interest based on this value retroactively covering the duration of appreciation. To calculate interest retroactively for eight years based on a 2008 appraisal, which includes appreciated value, is improper and does a disservice to the interest of justice.

ARGUMENT VI:

Pursuant To Rules 6(b) And 60(b) Ut. R. Civ. P. Defendant's Motion To Set Aside Judgment And Quash Writ Of Execution May Be Considered Timely

This court upheld Plaintiff's claims that Defendant's Motion to Set Aside Judgment and Quash Writ of Execution is not timely pursuant to the prescription of

Rule 60(b) URCP that such motion is to be submitted within 3 months of entry of Judgment.

However, Defendant's Motion to Set Aside Judgment and Quash Writ of Execution may be considered timely according to the court's discretion and good cause pursuant to Rules 6(b) and 60(b) URCP.

Pursuant to Rules 6(b)(2) the Court may "upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rule... 60(b), except to the extent and under the conditions stated in them."

Rule 60(b) allows such exception where the court is not limited in its power "to entertain an independent action to relieve a party from a judgment, order or proceeding" notwithstanding the 3 month limit for such Motion prescribed earlier in the Rule.

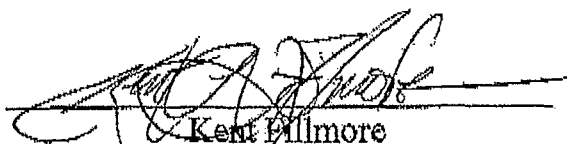
It remains a fact that Defendant was not informed of the proceedings against him due to suspension of his lawyer from the practice of law. This motion continues therefor to be timely made given Defendant's tardy notice of the Judgment via his notice of the impending Sheriff's sale of the property in question.

CONCLUSION

Allowing this temporary stay of execution is in the best interests of justice since it will allow a a just resolution without harm or risk to Plaintiff either by satisfaction of judgment or a determination of the actual facts underlying Plaintiff's judgment.

The District Court had and has the duty to prevent obvious and preventable miscarriages of justice when the facts are easily adjudicable, discretion of court. Defendant is entitled to that most basic right of due process: his right to be heard in court before his property is taken from him.

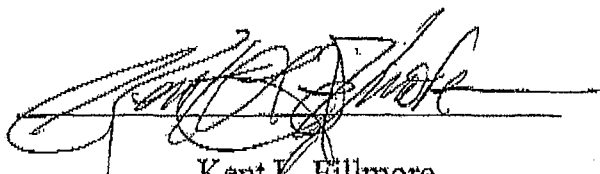
Respectfully submitted this 9th day of July, 2009.



Kent E. Fillmore
Attorney for the Defendant

CERTIFICATE OF DELIVERY

THIS IS TO CERTIFY ON THIS 9th DAY OF JULY, 2009 I DID CAUSE TO BE FAXED A TRUE AND CORRECT COPY OF THIS MOTION FOR TEMPORARY STAY OF EXECUTION TO THE OFFICE OF PAUL M. KING, HOOLE AND KING, L.C. AT (801) 272-7557.



Kent E. Fillmore
Attorney for Defendant

SIXTH DISTRICT COURT
CLERK *M. Lund*
2009 JUL 10 AM 10:34

PAUL M. KING (5500)
HOOLE & KING, L.C.
4276 South Highland Drive
Salt Lake City, Utah 84124
Telephone (801) 272-7556
Facsimile (801) 272-7557
Email paul.king@hooleking.com

Attorneys for Mike Meguerditchian

Supplemental Affidavit of Attorney's Fees and Costs to A



VD29229608

pages: 6

050600136 SMITH, MAX

IN THE SIXTH JUDICIAL DISTRICT COURT FOR THE STATE OF UTAH

SANPETE COUNTY, MANTI DEPARTMENT

MIKE MEGUERDITCHIAN, an individual,

Plaintiff,

vs.

MAX SMITH, individually and as Trustee of
The Smith Family Living Trust, u/a/d March
19, 1991

Defendant.

**SUPPLEMENTAL AFFIDAVIT OF
ATTORNEY'S FEES AND COSTS TO
AUGMENT JUDGMENT**

Civil No. 050600136

Judge Marvin Bagley

The Plaintiff has incurred the following described additional attorney's fees and costs subsequent to the entry of judgment in his favor. Pursuant to paragraph two of the Court's Judgment entered in favor of the Plaintiff on or about December 8, 2008, said judgment is augmented in the amount of said fees.

In support of said fees and augmentation, Affiant states as follows:

1. I am a duly licensed member of the Utah State Bar authorized to practice law in the State of Utah and an attorney with the law firm of HOOLE & KING, L.C.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.

Machine-generated OCR, may contain errors.

SCANNED

2. I have been responsible for the prosecution of the above-entitled action for and on behalf of Plaintiff, and am familiar with the nature and extent of legal services provided for the Plaintiff and the legal fees billed to Plaintiff for said services.

3. The law firm of HOOLE & KING, L.C. has provided not less than the following services to Plaintiff during the period from the entry of judgment through Sheriff's Sale, July 10, 2009:

<u>Date</u>	<u>Description</u>	<u>Duration/ Quantity</u>	<u>Billed Amount</u>
4/1/09	Research defendant's assets, prepare application for writ of execution, writ of execution itself and praecipe. Arrange for service on defendant.	3.5 hours	\$787.50
5/1/09	Confer with sheriff's office regarding sale pursuant to writ of execution.	.5 hours	\$112.50
6/17/09	Telephone conference with judge regarding request for hearing filed by defendant. Review file.	.5 hours	\$112.50
6/25/09	Review opposing counsel's motion, prepare documents, obtain same from title company, prepare memo in opposition, deliver to opposing counsel. Travel to Manti, argue motion.	12.5 hours	\$2,812.50
7/1/09	Review defendant's motion for enlargement of time to file appraisal. Coordinate with opposing counsel's office to obtain appraisal submitted.	.8 hours	\$180.00
7/8/09	Prepare order denying defendant's motion to set aside judgment and quash writ of execution. Prepare supplemental affidavit of fees and costs.	1.5 hours	\$337.50
7/8/09	Review appraisal submitted by defendant, research qualifications of appraiser and assumptions in report. Research caselaw regarding Rule 60(b) and related matters. Prepare for telephone conference with court. Participate in telephone hearing with court.	4.5 hours	\$1,012.50

Tab 7

ADDENDUM TO BRIEF OF APPELLEE AND CROSS-APPELLANT

IN THE COURT OF APPEALS, STATE OF UTAH

MIKE MEGUERDITCHIAN, an individual,
Plaintiff/Appellee/Cross-Appellant,

vs.

MAX SMITH, individually and as Trustee of The Smith Family Living Trust,
Defendant/Appellant/Cross-Appellee.

Case No. 20100850-CA

TAB 7

Sheriff's Certificate of Sale

15

WHEN RECORDED RETURN TO:

Mike Meguerditchian
P.O. Box 651
Salt Lake City, Utah 84165

IN THE SIXTH JUDICIAL DISTRICT COURT FOR THE STATE OF UTAH SANPETE
COUNTY, MANTI DEPARTMENT

---00000---

MIKE MEGUERDITCHIAN, an individual,
Plaintiff(s)

vs.

CERTIFICATE OF SALE
Case No: 050600136

MAX SMITH, individually and as Trustee of The
Smith Family Living Trust, u/a/d/ March 19, 1991
Defendant(s),

I, Robert Henningson, Deputy Sheriff of Sanpete County, do hereby certify
that I received the Writ of Execution, issued by the above-mentioned court, and by
virtue of the same, I did notice for sale all rights, title and interest of the defendant(s) in
the following described property:

Beginning at the Southwest corner of Section 31, Township 12 South, Range 4
East, Salt Lake Base and Meridian; thence North 88deg 59'57" East 1288.94 feet;
thence North 79deg56'18" East 710.82 feet; thence North 59deg13'01" East 819.26
feet; thence North 58deg52'40" East 428.89 feet; thence North 25deg47'50" East
129.558 feet; thence South 424.763 feet; thence South 60deg18'17" West 788.156
feet; thence South 79deg29'31" West 504.635 feet; thence West 1935.19 feet to the
point of beginning.

Containing: 9.42 acres, more or less (S#20232X1)

Oaker Hills Plat 4 (Phase IV) (Tax Serial #20221) more specifically described as:

Beginning at the Northeast corner of Section 30, Township 12 South, Range 4
East, Salt Lake Base and Meridian, said point of beginning being on Section Line and
being on the boundary line between Oaker Hills and Elk Ridge Subdivision; thence
South 89deg43'46" west 1642.58 feet to the centerline of the Oaker Hills access road
and the following 14 courses; South 266.85 feet; thence

Page 2
Certificate of Sale
Meguerditchian vs. Smith

South 12deg56'35" East 282.88 feet; thence south 38deg25'13" East 274.87 feet; thence South 44deg31'02" East 210.10 feet; thence South 70 deg 54'52" East 244.38 feet; thence South 63deg 38'47" East 237.37 feet; thence South 43 deg 36'34" East 204.14 feet; thence South 25 deg 21'18" East 209.58 feet; thence South 08 deg 56'10" West 208.94 feet; thence South 32 deg 06'46" West 173.63 feet; thence South 75 deg 26'28" West 292.16 feet; thence North 89 deg 02'18" West 234.57 feet; thence South 48 deg 04'38" West 112.48 feet; thence South 26 deg 52'33" West 394.85 feet; thence leaving said road centerline, South 61 deg 33'22" East 226.25 feet; thence South 00deg 45'39" West 299.14 feet to a fence corner and sixteen (1/16) corner; thence North 89deg 24'38" East 2615.95 feet; thence North 00 deg 00'36" East 2675.36 feet; thence South 89 deg 43'47" West 1323.29 feet to the point of beginning.

Water Rights:

- (1) All rights of the Defendants in water right number 51-224, and all other rights of the Defendants in water coming from and the well producing said water, said to be located approximately North 950 feet East 300 feet from the Southwest corner, Section 4 Township 12 South Range 4 East, Salt Lake Basin Meridian.
- (2) Other rights of the Defendants in water rights and/or interests in water wells located in Sanpete County, Utah.

By posting written notice of time, date and place of sale and particularly describing and posting said property twenty-one (21) days on the property to be sold at the place of sale, the Sanpete County Courthouse and three (3) public places in the precinct where the property is located. Notice of Sale was also advertised in the Sanpete Messenger for three (3) issues once a week for three (3) successive weeks prior to the sale.

Tab 8

ADDENDUM TO BRIEF OF APPELLEE AND CROSS-APPELLANT

IN THE COURT OF APPEALS, STATE OF UTAH

MIKE MEGUERDITCHIAN, an individual,
Plaintiff/Appellee/Cross-Appellant,

vs.

MAX SMITH, individually and as Trustee of The Smith Family Living Trust,
Defendant/Appellant/Cross-Appellee.

Case No. 20100850-CA

TAB 8

**Defendant's Motion to
Set Aside Sheriff's Sale**

SIXTH DISTRICT COURT

CLERK *m. Lund*

2009 DEC -9 AM 10:54

DARWIN C. FISHER, #1080
A Professional Corporation
40 N. 300 East, Suite 101
St. George, UT 84770
Telephone No. (435) 688-1170
Attorney for Defendant

Motion to Set Aside Sale



VD30417416

pages: 2

050600136 SMITH,MAX

IN THE SIXTH JUDICIAL DISTRICT COURT

IN AND FOR SANPETE COUNTY, STATE OF UTAH

MIKE MEGUERDITCHIAN, an individual,

Plaintiff,

vs.

MAX SMITH, individually and as Trustee of
the Smith Family Living Trust, u/a/d March
19, 1991,

Defendant.

MOTION TO SET ASIDE SALE

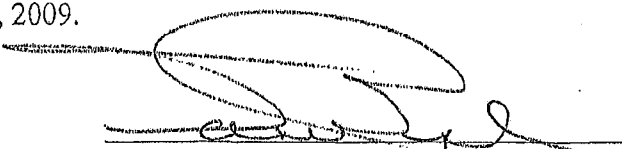
Civil No.: 050600136

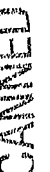
Judge: David L. Mower

COMES NOW Defendant Max Smith, individually and as Trustee of the Smith Family Living Trust, and moves the Court for an order setting aside the sheriff's sale of 9.42 acres, Phase IV of Oaker Hills, and all of water right number 51-224.

This motion is based on Rule 69B(d) of the Utah Rules of Civil Procedure. A Memorandum in support of this Motion is filed herewith.

DATED this 8th day of December, 2009.


DARWIN C. FISHER
Attorney for Defendant

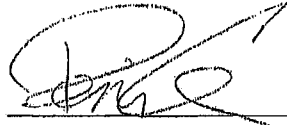


CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of December, 2009, I caused to be served by the method indicated below a true and correct copy of the attached and foregoing **MOTION TO SET ASIDE SALE** to the following:

☐ VIA FACSIMILE
☐ VIA HAND DELIVERY
☒ VIA U.S. MAIL

Paul M. King
HOOLE & KING, L.C.
4276 South Highland Drive
Salt Lake City, UT 84124-2634
Attorneys for Plaintiff



SIXTH DISTRICT COURT
CLERK *M. Lund*
2009 DEC -9 AM 10: 54

DARWIN C. FISHER, #1080
A Professional Corporation
40 N. 300 East, Suite 101
St. George, UT 84770
Telephone No. (435) 688-1170
Attorney for Defendant

Memorandum in Support of Motion to Set Aside Sale



VD30417517

pages: 38

050600136 SMITH,MAX

IN THE SIXTH JUDICIAL DISTRICT COURT
IN AND FOR SANPETE COUNTY, STATE OF UTAH

MIKE MEGUERDITCHIAN, an individual,

Plaintiff,

vs.

MAX SMITH, individually and as Trustee of
the Smith Family Living Trust, u/a/d March
19, 1991,

Defendant.

MEMORANDUM IN SUPPORT OF
MOTION TO SET ASIDE SALE

Civil No.: 050600136
Judge: David L. Mower

COMES NOW Defendant Max Smith, individually and as Trustee of the Smith Family Living Trust, and submits this Memorandum in support of his Motion to set aside the sheriff's sale.

INTRODUCTION

Plaintiff, Mike Meguerditchian ("Meguerditchian") obtained judgment against Max Smith ("Smith") in the sum of \$54,690.92. On July 7, 2009, Plaintiff was the only bidder at the sheriff's sale and purchased real property and water rights belonging to the Smith Family Trust.

The sale should be set aside because the officer conducting the sale sold more property and water rights than necessary to satisfy the amount due.

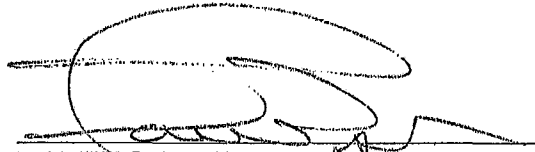
FACTS

1. On December 8, 2008, Merguerditchian obtained judgment against Smith in the sum of \$54,690.92. (Exhibit 1, Judgment.)
2. On May 19, 2009, Merguerditchian gave notice of sheriff's sale (Exhibit 2, Notice of Sale.)
3. The Notice of Sale provided that 9.42 acres, more or less, would be sold at the sheriff's sale. (Exhibit 2 at p. 1.)
4. The Notice of Sale further provides that Phase IV of Oaker Hills, containing approximately 145 acres, would be sold. (Exhibit 2 at p. 1.)
5. The Notice of Sale also provided that water right number 51-224 and all other rights of Smith in water coming from and the well producing said water would be sold at the sheriff's sale. (Exhibit 2 at p. 2.)
6. Lastly, the Notice of Sale provided that all other rights of the Defendant in water rights and/or interests in water wells located in Sanpete County, Utah would be sold at the sheriff's sale. (Exhibit 2 at p. 2.)
7. On July 7, 2009, Merguerditchian was the only bidder on the property and obtained title to the 9.42 acres, Phase IV of Oaker Hills, all of water right number 51-224.
8. The value of the 9.42 acres, the 155 acres of Oaker Hills Phase IV, and water right number 51-224, is \$505,000. (Exhibit 3, Appraisal, p. 1.)

ARGUMENT

Rule 69B(d) of the Utah Rules of Civil Procedure provides "The officer shall sell only so much property as is necessary to satisfy the amount due." The amount owed Merguerditchian is the sum of \$54,690.92. The value of the real property and water rights sold at the sheriff's sale is \$505,000. Since more real property and water rights were sold at the sheriff's sale than was necessary to satisfy the amount due Merguerditchian, the sale should be set aside.

DATED this 8th day of December, 2009.



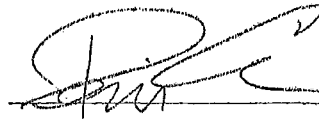
DARWIN C. FISHER
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of December, 2009, I caused to be served by the method indicated below a true and correct copy of the attached and foregoing **MEMORANDUM IN SUPPORT OF MOTION TO SET ASIDE SALE** to the following:

____ VIA FACSIMILE
____ VIA HAND DELIVERY
X VIA U.S. MAIL

Paul M. King
HOOLE & KING, L.C.
4276 South Highland Drive
Salt Lake City, UT 84124-2634
Attorneys for Plaintiff



Tab 9

ADDENDUM TO BRIEF OF APPELLEE AND CROSS-APPELLANT

IN THE COURT OF APPEALS, STATE OF UTAH

MIKE MEGUERDITCHIAN, an individual,
Plaintiff/Appellee/Cross-Appellant,

vs.

MAX SMITH, individually and as Trustee of The Smith Family Living Trust,
Defendant/Appellant/Cross-Appellee.

Case No. 20100850-CA

TAB 9

**District Court's Findings of Fact, Conclusions of Law
and Order, Granting in Part and Denying in Part
Defendant's Motion to Set Aside Sheriff's Sale**

SIXTH DISTRICT COURT

CLERK *ml*

2010 SEP 15 PM 5:01

PAUL M. KING (5500)
HOOLE & KING, L.C.
4276 South Highland Drive
Salt Lake City, Utah 84124
Telephone (801) 272-7556
Facsimile (801) 272-7557
Email paul.king@hooleking.com

Attorneys for Mike Meguerditchian

IN THE SIXTH DISTRICT COURT FOR THE STATE OF UTAH

IN AND FOR SANPETE COUNTY, MANTI DEPARTMENT

MIKE MEGUERDITCHIAN, an individual,

Plaintiffs,

vs.

MAX SMITH, individually and as Trustee
of The Smith Family Living Trust, u/a/d
March 19, 1991

Defendant.

**FINDINGS OF FACT CONCLUSIONS
OF LAW AND ORDER, DENYING IN
PART AND GRANTING IN PART
DEFENDANT'S MOTION TO SET
ASIDE SHERIFF'S SALE**

Civil No. 050600136

Judge Marvin Bagley

At ^{an evidentiary} ~~a~~ hearing held before the above captioned court on the 9th day of July, 2010, beginning
at 10:00 a.m., all parties appearing through counsel, the Court having received the memoranda
of counsel and being fully advised of the premises, the Court heard oral argument concerning the
Defendant's Motion to Set Aside the Sheriff Sale previously conducted in this matter in execution

of the judgment in favor of the Plaintiff previously rendered herein. Accordingly, as to the subject Motion to Set Aside Sheriff's Sale, the Court makes the findings of fact, conclusions of law and order set forth below.

A complete transcript of the Court's ruling made in Court at said date and time is attached hereto as Exhibit "A" and incorporated herein by this reference. A copy of the Certificate of Sale issued by the Sanpete County Sheriff's Office, documenting the Sheriff's Sale which is the subject of the Defendant's Motion to Set Aside Sheriff's Sale, is attached hereto as Exhibit "B" and incorporated herein by this reference.

FINDINGS OF FACT

1. The fair market value of the real property included in the Sheriff's Certificate of Sale, consisting of two parcels of real property, items 1 and 2 in the Sheriff's Certificate of Sale, tax parcels 20232X1 and 20221, respectively, is \$505,000.00.

2. All parties presented expert reports prepared by qualified appraisers, the Court found both appraisers to be qualified and competent. The Court found that the appraiser and expert report relied upon by the Defendant in this matter to be more compelling and more accurately reflected the fair market value of the property, which was found to be \$505,000.00 as set forth above.

3. The price bid at the Sheriff's Sale for the aforementioned two parcels of real property, a total of \$33,000.00, was found by the Court to be inadequate, and the difference

between \$33,000.00 bid and the \$505,000.00 fair market value of the property found by the Court shocks the conscience of the court.

4. With regards to the water rights included in the Sheriff's Certificate of Sale, being items number 3 and 4 in said Certificate, water right number 51-224 and other un-named water rights of the Defendants in Sanpete County, Utah, respectively, the Court found that the fair market value of said water rights are \$7,500.00 per acre foot.

5. Without testimony of the exact number of acre feet of water owned by the Defendant included in said Sheriff's Certificate of Sale, the Court found that the Defendant's held in excess of 20 acre feet of water subject to that certificate.

6. The bid amount for said water shares, being \$30,000.00 and \$3,000.00 respectively for a total of \$33,000.00, is less than the fair market value of said water shares found by the Court, to the extent that the Court found that price to be inadequate and that difference shocks the conscience of the Court.

7. The officer conducting the Sheriff's Sale, being unable to find sufficient personal property, acted appropriately in selling real property of the Defendants listed in said Certificate of Sale.

8. The Court finds that there was nothing misleading regarding the sale of real property included in the Sheriff's Certificate of Sale, and no unfairness in the conduct of the purchasing party with respect to the two parcels real property included in said Certificate of Sale. The Court found that there was nothing irregular in the sale of real property at said Sheriff's Sale.

9. The Court finds that the Notice of Sheriff's Sale described the first portion of water rights as simply the rights to the Defendants in water right #51-224, however, the fact that several of the rights included in said water right have been severed off and have individual water right numbers made said description insufficient.

10. The description of the second part of the water rights sold at said Sheriff's Sale (item #4) was simply other water rights of the Defendant in Sanpete County, Utah.

11. The Court finds that these descriptions of the water rights of the Defendants are insufficient, leading to confusion, which would have the effect of discouraging bidders at the sale and which would have a direct effect of lowering the price at the Sheriff's Sale.

CONCLUSIONS OF LAW

1. The proper standard for setting aside the Sheriff's Sale in this matter is that standard outlined in *Pyper v. Bond*, 224 P.3d 713 (UtahAapp., 2009). The standard set out in that case is that two elements must be satisfied; first there must be a gross inadequacy of the purchase price as compared to value of the property sold; and second, there must be irregularities attending the sale, especially if the irregularities have a distinct tendency to prevent the realization of a fair price for the property sold unless the complaining party is estopped by his or her own laches or failure to act.

2. The purchase price for the two parcels of real property sold at the Sheriff's Sale, was grossly inadequate, shocking the conscience of the Court meeting the first element required by the *Pyper v. Bond* standard.

3. There were no irregularities involving the sale of real property at the Sheriff's Sale, therefore, the second element of the *Pyper v. Bond* standard is not met as it applies to the sale of real property at the Sheriff's Sale.

4. The purchase price for the sale of water rights was grossly inadequate, shocking the conscience of the Court, and meeting the first element of the *Pyper v. Bond* case standard for setting aside the Sheriff's Sale as it relates to said water rights.

5. The Court rules as a matter of law that the water rights sold constituted real property and were inadequately described in the Notice of Sheriff's Sale. Therefore, the Court finds that there were irregularities attending the sale of water rights at the Sheriff's Sale, and both elements of the *Pyper v. Bond* case standard were met as they relate the to the sale of water rights at the Sheriff's Sale.

6. The Court rules that under Utah Code Ann. § 73-1-11, because the water rights sold were not shares of stock in an irrigation company, the water rights constituted real property not personal property, and therefore were inadequately described as set forth above, because rule 69B(d) of the Ut. R. Civ. P. requires that parcels of real property be sold separately and be described separately.

ORDER

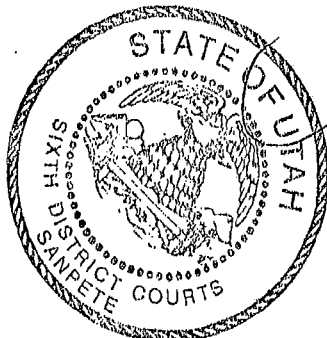
1. The Sheriff's Sale of the two parcels of real property, being items one and two listed in the Sheriff's Certificate of Sale, parcels 202323X1 and 20221, at Sanpete County, Utah, is affirmed. Defendants' Motion to Set Aside the Sheriff's Sale as to the parcels of real property is denied.

2. The Sheriff of Sanpete County, Utah, is authorized to issue its final Sheriff's Deed transferring both parcels of real property to the bidder at said Sheriff's Sale.

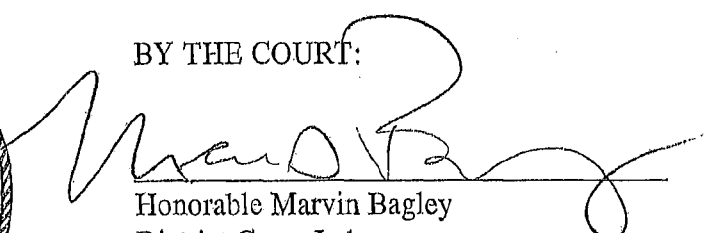
3. Defendant's Motion to Set Aside the Sheriff's Sale as it applies to the water rights sold, items number three and four in the Sheriff's Certificate of Sale, being water right number 51-224 and all other water rights of the Defendants in Sanpete County Utah, is granted. The Sheriff's Sale and the Sheriff's Certificate of Sale as it applies to said water rights only is hereby set aside.

4. The judgment in favor of the Plaintiff previously rendered herein remains unsatisfied as to the \$33,000.00 credit bid of the Plaintiff for the water rights purchased, which purchase is set aside pursuant to this Order.

DATED this 15th day of September, 2010.



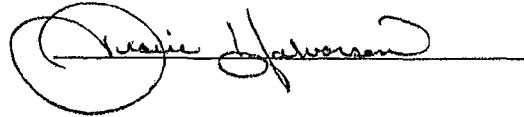
BY THE COURT:


Honorable Marvin Bagley
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER, DENYING IN PART AND GRANTING IN PART
DEFENDANT'S MOTION TO SET ASIDE SHERIFF'S SALE** was mailed by first-class mail,
postage prepaid, on this 26th day of August, 2010 to the following:

Darwin C. Fisher
40 N. 300 East, Suite 101
St. George, UT 84770

A handwritten signature in cursive script, appearing to read "Kristie Halverson", is written over a horizontal line.

Meguerditchian v. Smith, et al.

Case No. 050600136

Evidentiary Hearing - Defendants' Motion to Set Aside Sheriff's Sale

July 9, 2010

Transcript of Judge's Ruling

From recording made at hearing by court personnel;

Transcript prepared by the staff of Hoole & King, L.C.

Judge: We are back on the record in Meguerditchian versus Smith case 050600136. I've gone back and reviewed my notes and looked up some provisions of the law and have this decision.

This case is here on a Motion to Set Aside a Sheriff's Sale following entry of a judgment in favor of the Plaintiff against the Defendant. The proper standard for setting aside a Sheriff's Sale is what's outlined in the Pyper case and as I interpret the Pyper decision requirement. First there must be a gross inadequacy of the purchase price as compared to the value of the property being sold, and there must be irregularities attending the sale. And especially if the irregularities have a distinct tendency to prevent the realization of a fair price for the property sold unless the complaining party is estopped by his or her own laches or failure to act.

In this case, I find that there were two parcels of ground, real property, that were sold. One 9.42 acres that sold for \$3,000.00, one 155 acre parcel that sold for \$30,000.00. There were also rights that were...water rights that were sold as defined as rights in water right 51-224 that sold for \$30,000.00, and \$3,000.00 for other rights in San...other water rights in Sanpete County.

I find that the fair market...well as to the fair market value of the land, there were two appraisals, Mr. Kjar, Kjar testified that the property was worth \$151,000.00 and he included enough water for essentially one, one residence. Ms. Denbow testified that her value was \$505,000.00 without water. Mr. Kjar appraised the pasture as ag-land, or excuse me, he appraised the property equivalent as a pasture with ag-land and Ms. Denbow appraised as property with the potential for development. I find that both appraisers are credible, that both appraisers are qualified and that I accept the appraisals based upon both appraisers. I find that they were both correct, however, they both appraised it differently.

Ms. Denbow appraised on a highest and best use of a potential for development. Mr. Kjar appraised it as, just raw land. And so I believe the issue before me is what is the highest and best use of the property so I that I know which appraisal to accept. I find that the highest and best use of the property is as it was appraised by Ms. Denbow.

The reason I find that is because it was partially developed, there was some testimony

that there had been up to \$200,000.00 of development costs already into it, that there are roads and other improvements. I also find that the parties are in the subdivision business, that they have been developing subdivisions in the area for some time, that they got preliminary approval for the larger parcel as to phase 4 of a subdivision, that it was their clear intent that that what they intended to do with the property, and that the property was not being used as ag-land, it was not on the green belt, that is was there in the process of being developed. So I find that the property does have a fair market value without water of \$505,000.00. The bid price for that ground was \$33,000.00. I find that the difference between \$33,000.00 and \$505,000.00 is inadequate, it's a sufficient difference to shock the conscience, particularly when you consider the potential value if this subdivision was completed. Ms. Denbow testified that she did not value, did not appraise the property as a completed subdivision but only as a something with the potential. And so if it is completed, and there was some testimony that it could be completed with as little as \$10,000.00 more dollars; however, there is still not approval and there are a lot of "if's". I just find that given all the facts before me, all the evidence that I have heard, that \$33,000.00 for \$505,000.00 worth of property is too inadequate and it shocks my conscience.

With regard to the water rights, they sold for a total of \$33,000.00. The evidence that I have is that they water rights are valued at \$7,500.00 per acre foot, I accept that because that is the evidence before me. However, I actually believe and firmly believe that that is undervalued based on judicial notice of other cases that I am familiar with. When, when those acre feet of water are divided into .25, which they are in this case, it is an indication that there is .25 acre foot per future building lot and so that I think that they usually sale for four times that amount. \$7,500.00 would be the price for .25 acre feet of water for an individual lot. However that is not the evidence before me but I still believe and firmly believe that's true. We don't have a firm number of shares but there are in excess of 20 shares based on the evidence that before me. Unless that I find the value of the water shares is also in excess of what the price brought and it is also is inadequate and shocks the conscience as well.

With regard to prong number 2, that there has to be...when one prong is not sufficient there has to be a satisfaction of both prongs. There has to be alleged irregularities or there has to be irregularities in the sale. The first allegation is that the personal property should have been sold first. Under Rule 69 A(a), the law requires a seizure of property before the sale. Under that rule, the Sheriff is, or whoever is doing the seizing, is required to seize the personal property first and then if sufficient personal property can not be found, then to seize the real property. The only testimony that I have as to what the sheriff did in seizing the property was he said he didn't have sufficient information to know that the property was. There weren't numbers provided and there was no evidence that he didn't do his job, there was no evidence that he didn't act in good faith. So I find that the officer acted appropriately, I find that he couldn't find sufficient personal property, so seizing on the real property was sufficient. Now I realize that there is a lot of hand-holding that

goes on when a sheriff is asked to seize property, but usually in my experience there is not enough hand-holding. It should be the responsibility of the lawyers to dot all the 'i's' and cross all the 't's'. Whenever, in my practice as lawyer, if I ever had a sheriff's sale and seizure, I would make all the arrangements. Don't leave anything up to the sheriff's office. You arrange for storage, you arrange for what is to be picked up and numbered and for whatever reason, that wasn't done, and I don't, I don't fault the Sheriff in this case and I do find that he was unable to find sufficient personal property and so the seizure of the real property was appropriate.

Also there was contradictory evidence as to ownership of the tractor and the brush hog and really no value as to any other specific item of, of personal property. With regard to the real property, there were two descriptions, one of the smaller parcel and one of the larger parcel. The larger parcel was described...well both of them were described in metes and bounds but in addition the larger parcel, parcel was described as Phase 4 of Oakerhills Plat 4. I find that there was nothing misleading about that. I could not find any unfairness in the conduct of the purchasing party with respect to the two parcels of real property. I didn't find anything that was irregular in that sale. With regard to the sale of the water rights, I do find that there were irregularities. Rule 69B(d) requires that severable lots of real property be sold separately. Also Rule 69B(b)(3) requires that the notice of sale contain a particular description of real property to be sold. I find that the notice in this case did not give a particular description. It was described as all rights of Defendants in water right 51-224; however, the evidence before me is that several of those rights have been severed off and have their individual water rights numbers. I also find that the other description of the other waters was other water of the Defendants in Sanpete County. That is just an insufficient description, I think it leads to confusion and would have a effect of discouraging bidders at the sale which would have a direct effect of lowering the price.

Exhibit 6 shows several different water numbers of water rights; however, part of the them are, or all of them were originally severed from 51-224, plus I that think the description was misleading and was insufficient and did not describe the water separately. I find that the water rights are real property. Section 73-1-11 Utah Code Annotated distinguishes between shares of stock in an irrigation company, which my understanding of Utah law is those are personal rights as to other water rights, which are not shares of stock in an irrigation company. I know that there has been, the Utah law...went, there were different cases several years ago, I believe that the most recent Utah Supreme Court case, and I believe that the legislature resolved that a few years ago. And water rights that are not in an irrigation company are real property, water rights in an irrigation company are personal property. The rights in this case are not shares of stock in an irrigation company so I find that they are real property. Also, water rights, such as these are transferred by Warranty Deed, they are also recorded in the Office of the State Engineer, but there is also a requirement that there be a backup of a conveyance document, which usually is in the form of a Warranty Deed. I believe that is the law in the State of Utah, and if its not, if I am

wrong on that, in this case I believe that it is appropriate because the water rights in this case are sufficiently closer to being real property than they are personal property, and as such I believe that Rule 69B(d) requires that they be sold separately and described separately.

In addition I think the sale of the water rights is, just smacks of unfairness. I think \$7,500 per acre foot is very low compared to if they are divided into .25 acre feet and sold for individual lots. Also, I think it was unfair by the way that the water rights were described, appears to smack of unfairness.

So in this case I set aside the Sheriff's Sale as it relates to the sale of the water rights. I do not set aside the sale as it relates to the ground. There still remains a portion of the judgment outstanding that is not paid, and the Defendant is still the record title owner of the water rights. I do not extend the redemption period because that was not what was requested in the motion, but the request was to set aside the sale. That's my decision. Neither party prevailed outright, and the rule requires that I request the prevailing party to prepare the order. I think that neither party is the prevailing party so I am going to ask counsel who wants to volunteer to prepare the order.

Fisher: I'll do it.

Judge: Alright, Mr. Fisher, I order you to prepare the order. I think that the case was well tried, I appreciate the courtesy of counsel and their preparation and that's my Order.

15
Ent 166499 Dk 595 Pl 842
Date: 26-OCT-2009 9:53AM
Fee: \$15.00 Check
Filed By: TAJ
REED D HATCH, Recorder
SANPETE COUNTY CORPORATION
For: HOOLE & KING LC
31-12-46 30-12-45

WHEN RECORDED RETURN TO:

Mike Meguerditchian
P.O. Box 951
Salt Lake City, Utah 84165

Paul M. King
4276 Highland Dr.
SLC UT 84124

IN THE SIXTH JUDICIAL DISTRICT COURT FOR THE STATE OF UTAH SANPETE
COUNTY, MANTI DEPARTMENT

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MIKE MEGUERDITCHIAN, an Individual,
Plaintiff(s)

vs.

CERTIFICATE OF SALE
Case No: 050600136

MAX SMITH, Individually and as Trustee of The
Smith Family Living Trust, u/a/d/ March 19, 1991
Defendant(s),

I, Robert Henningson, Deputy Sheriff of Sanpete County, do hereby certify
that I received the Writ of Execution, issued by the above-mentioned court, and by
virtue of the same, I did notice for sale all rights, title and interest of the defendant(s) in
the following described property:

Beginning at the Southwest corner of Section 31, Township 12 South, Range 4
East, Salt Lake Base and Meridian; thence North 88deg 59'57" East 1288.94 feet;
thence North 79deg56'18" East 710.82 feet; thence North 59deg13'01" East 819.26
feet; thence North 58deg52'40" East 428.89 feet; thence North 25deg47'50" East
129.558 feet; thence South 424.763 feet; thence South 60deg18'17" West 788.156
feet; thence South 79deg29'31" West 504.635 feet; thence West 1935.19 feet to the
point of beginning.

Containing: 9.42 acres, more or less (S#20232X1)

Oaker Hills Plat 4 (Phase IV) (Tax Serial #20221) more specifically described as:

Beginning at the Northeast corner of Section 30, Township 12 South, Range 4
East, Salt Lake Base and Meridian, said point of beginning being on Section Line and
being on the boundary line between Oaker Hills and Elk Ridge Subdivision; thence
South 89deg43'46" west 1642.58 feet to the centerline of the Oaker Hills access road
and the following 14 courses; South 266.85 feet; thence

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Certificate of Sale
Meguerditchian vs. Smith

South 12deg56'35" East 282.88 feet; thence south 38deg25'13" East 274.87 feet; thence South 44deg31'02" East 210.10 feet; thence South 70 deg 54'52" East 244.38 feet; thence South 63deg 38'47" East 237.37 feet; thence South 43 deg 36'34" East 204.14 feet; thence South 25 deg 21'18" East 209.58 feet; thence South 08 deg 56'10" West 208.94 feet; thence South 32 deg 06'46" West 173.63 feet; thence South 75 deg 26'28" West 292.16 feet; thence North 89 deg 02'18" West 234.57 feet; thence South 48 deg 04'38" West 112.48 feet; thence South 26 deg 52'33" West 394.85 feet; thence leaving said road centerline, South 61. deg 33'22" East 226.25 feet; thence South 00deg 45'39" West 299.14 feet to a fence corner and sixteen (1/16) corner; thence North 89deg 24'38" East 2615.95 feet; thence North 00 deg 00'36" East 2675.36 feet; thence South 89 deg 43'47" West 1323.29 feet to the point of beginning.

Water Rights:

- (1) All rights of the Defendants in water right number 51-224, and all other rights of the Defendants in water coming from and the well producing said water, said to be located approximately North 950 feet East 300 feet from the Southwest corner, Section 4 Township 12 South Range 4 East, Salt Lake Basin Meridian.
- (2) Other rights of the Defendants in water rights and/or interests in water wells located in Sanpete County, Utah.

By posting written notice of time, date and place of sale and particularly describing and posting said property twenty-one (21) days on the property to be sold at the place of sale, the Sanpete County Courthouse and three (3) public places in the precinct where the property is located. Notice of Sale was also advertised in the Sanpete Messenger for three (3) issues once a week for three (3) successive weeks prior to the sale.

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Certificate of Sale
Meguerditchian vs. Smith

On the 10th day of July, 2009 at the Sanpete County Courthouse, 160 North Main Manti, Utah at the hour of 11:00 a.m. I did sell the interest of Max Smith, individually and as Trustee of The Smith Family Living Trust, u/a/d March 19, 1991 to Mike Meguerditchian. Paul M. King, counsel of record for and in behalf of Mike Meguerditchian placed the highest and only bid, a credit bid in the amount of \$66,000.00. There were four items offered for sale, those being listed in order as they appear on the "Notice of Sale".

Item #1 was sold on Credit Bid for \$ 3,000.00

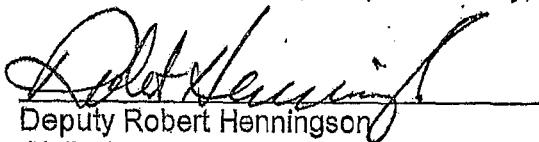
Item #2 was sold on Credit Bid for \$30,000.00

Item #3 was sold on Credit Bid for \$30,000.00

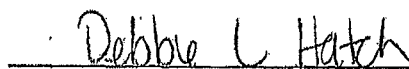
Item #4 was sold on Credit Bid for \$ 3,000.00

Sale of real property is subject to redemption as provided for by law.

Dated at Manti, Sanpete County, State of Utah this 15th day of July, 2009.


Deputy Robert Henningson
Civil Division

On the 15th day of July 2009 personally appeared before me, Deputy Robert Henningson, the signer of the within instrument, who duly acknowledged to me that he executed the same.


Notary Public

