2010

Rodaric Group, LLC,; Action Investment Services, LLC; Lee Jackson; and Richard Jackson v. W. Kelly Ryan : Brief of Appellant

Utah Court of Appeals

Nathan E. Burdshall; Hutch U. Fale; Attorney for Appellant.
Keith W. Meade; Bradley M. Strassberg; Attorneys for Appellees.

IN THE UTAH COURT OF APPEALS

RODARIC GROUP, LLC,; ACTION INVESTMENT SERVICES, LLC; LEE JACKSON; and RICHARD JACKSON,	)	Appellate Case No. 20101003 – CA
Plaintiffs/Appellees	)	District Court Civil No. 070402054
v.	)	
W. KELLY RYAN	)	
Defendant/Appellant		

BRIEF OF APPELLANT

Appeal form a Final Order of the Fourth Judicial District Court
Utah County, State of Utah
Honorable Steven Hansen

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PARTIES

The Plaintiffs in the action below are Rodaric Group, LLC, Action Investment Services, LLC, Lee Jackson and Richard Jackson. The Defendants below are Frank J. Gillen, W. Kelly Ryan, Shauna Badger, Michael W. Devine, Gregory Haerr, Michael Vanderhoof, Kevin Dortery, and Jonathan Moore. Only Defendant W. Kelly Ryan appeals the trial court's decision. Accordingly, W. Kelly Ryan (hereinafter "Ryan") is listed as the sole appellant, with Plaintiffs being listed as the Appellees.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this matter under Utah Code Ann. § 78A-4-2(j).

ISSUES PRESENTED

1. Whether a trial court commits reversible error when it enters a default judgment against a defendant for failure to appear where the defendant appears at trial through counsel, and where the trial court never instructed or ordered that the defendant could not appear via counsel.

Preservation of Issue: R. 2922.

Standard of Review: *Correctness.* A trial court's application of the rules of procedure presents a question of law that is reviewed for correctness, with no deference to the trial court's decision. Drew v. Lee, 250 P.3d 48, 50 (Utah 2011).

2. Whether a trial court commits reversible error when it does not apply the doctrine of *res judicata*, but allows a party to pursue claims the party previously raised in a bankruptcy action where the bankruptcy court has already entered a final order regarding such bankruptcy.

Preservation of Issue: R. 2601-23; 2724-34.

Standard of Review: *Correctness.* Whether a party's claims are precluded by the doctrine of *res judicata* presents a question of law that is reviewed for correctness. Mack v. Utah State Dep't of Commerce, 221 P.3d 194, 202 (Utah 2009).

3. Whether a party may properly pursue an action for securities fraud against directors or officers of a company without naming that company as a party in the action.

Preservation of Issue: R. R. 2601-23; 2724-34.

Standard of Review: *Correctness*. The interpretation and application of a statute presents a question of law that is reviewed for correctness. Gen. Constr. & Dev., Inc. v. Peterson Plumbing Supply, 248 P.3d 972, 973 (Utah 2011).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES

Utah Rules of Civil Procedure, Rule 55(a):

> Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter the default of that party.

Utah Rules of Civil Procedure, Rule 16(d):

> Sanctions. If a party or a party's attorney fails to obey a scheduling or pretrial order, if no appearance is made on behalf of a party at a scheduling or pretrial conference, if a party or a party's attorney is substantially unprepared to participate in the conference, or if a party or a party's attorney fails to participate in good faith, the court, upon motion or its own initiative, may take any action authorized by Rule 37(b)(2).

Utah Code Ann. § 61-1-1:

> It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly to:
>
> (1) employ any device, scheme, or artifice to defraud;
>
> (2) make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
>
> (3) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Utah Code Ann. § 61-1-22(1)-(4):

> (1) (a) This Subsection (1) applies to a person who:

(i) offers or sells a security in violation of:

(A) Subsection 61-1-3(1);

(B) Section 61-1-7;

(C) Subsection 61-1-17(2);

(D) a rule or order under Section 61-1-15, which requires the affirmative approval of sales literature before it is used; or

(E) a condition imposed under Subsection 61-1-10(4) or 61-1-11(7); or

(ii) offers, sells, or purchases a security in violation of Subsection 61-1-1(2).

(b) A person described in Subsection (1)(a) is liable to a person selling the security to or buying the security from the person described in Subsection (1)(a). The person to whom the person described in Subsection (1)(a) is liable may sue either at law or in equity to recover the consideration paid for the security, together with interest at 12% per year from the date of payment, costs, and reasonable attorney fees, less the amount of income received on the security, upon the tender of the security or for damages if the person no longer owns the security.

(c) Damages are an amount calculated as follows:

(i) subtract from the amount that would be recoverable upon a tender under Subsection (7)(b) the value of the security when the buyer disposed of the security; and

(ii) add to the amount calculated under Subsection (1)(c)(i) interest at:

(A) 12% per year:

(I) beginning the day on which the security is purchased by the buyer; and

(II) ending on the date of disposition; and

(B) after the period described in Subsection (1)(c)(ii)(A), 12% per year on the amount lost at disposition.

(2) The court in a suit brought under Subsection (1) may award an amount equal to three times the consideration paid for the security, together with interest, costs, and attorney fees, less any amounts, all as specified in Subsection (1) upon a showing that the violation was reckless or intentional.

(3) A person who offers or sells a security in violation of Subsection 61-1-1(2) is not liable under Subsection (1)(a) if the purchaser knew of the untruth or omission, or the seller did not know and in the exercise of reasonable care could not have known of the untrue statement or misleading omission.

(4) (a) Every person who directly or indirectly controls a seller or buyer liable under Subsection (1), every partner, officer,

> or director of such a seller or buyer, every person occupying a similar status or performing similar functions, every employee of such a seller or buyer who materially aids in the sale or purchase, and every broker-dealer or agent who materially aids in the sale or purchase are also liable jointly and severally with and to the same extent as the seller or purchaser, unless the nonseller or nonpurchaser who is so liable sustains the burden of proof that the nonseller or nonpurchaser did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

STATEMENT OF THE CASE

Nature of the Case. The instant appeal concerns the propriety of a default judgment entered by the court below after it refused to commence trial because the Defendant, Ryan, was present via counsel but not in person. Ryan's counsel assured the trial court that Ryan was ready to immediately proceed with trial, but the trial court wanted Ryan's actual body to be in the courtroom before Plaintiffs presented their four-day case seeking recovery for securities fraud.

Prior to defaulting Ryan for appearing via counsel and not in person, the trial court never ordered or otherwise instructed Ryan that he could not attend via counsel while Plaintiffs presented their case. Accordingly, Ryan planned to appear via counsel while Plaintiffs presented their case and then, due to limited finances as an out-of-state litigant and the need for him to remain employed to support his family, he could attend the trial in person the following week, when it was Ryan's turn to present his defenses.

Rather than let Plaintiffs begin to present their evidence and call their witnesses to prove their case against Ryan, and rather than let Ryan's counsel then cross-examine such witnesses; the trial court ignored Ryan's appearance via counsel and the representations

that the trial could commence the trial without any further delay, and struck Ryan's pleadings and entered a default judgment against Ryan.

Ryan appeals the default judgment entered by the trial court and respectfully requests that this Court find that where a defendant appears at trial via counsel, ready to proceed with trial, and where the trial court has not issued an order requiring personal attendance, it is reversible error for the trial court to enter a default judgment against such defendant.

Procedural History.

In June of 2007, the Investors initiated the lawsuit that is the subject of this appeal. Notably, HomeNet Communications, Inc. and HomeNet Corporation (Faraday) are not named parties in this lawsuit.

In a Motion for Summary Judgment, the trial court determined that Defendants probably could not be secondarily liable due to Plaintiffs' failure to name the Companies as parties to the lawsuit. The trial court based this ruling on the plain language of Utah Code Ann. § 61-1-22(4).

At the final pretrial, Kelly Ryan, who resides in Washington was not able to personally attend but attempted to appear telephonically. The trial court refused to allow this appearance.

Trial was set in this case for August 2, 2010. Kelly Ryan appeared for trial on this date personally. However, under motion by another defendant, the trial was postponed and scheduled for eight days spread out over two weeks, beginning on November 8, 2010.

On November 8, 2010, Kelly Ryan was unable to attend trial. However, he planned to appear the second week of trial to give testimony. On the scheduled day of trial, the Plaintiffs continued the proceeding one day to accommodate potential settlement. All defendants except for Ryan were able to reach a settlement in this case. In anticipation of his inability to reach a settlement with Plaintiffs, Ryan retained Nathan E. Burdsal to act as his attorney and instructed him to proceed with trial. On the day of trail, Nathan E. Burdsal made his appearance which was accepted over the Investors' objection.

Despite Nathan E. Burdsal's assurance that he was ready for trial and prepared to move forward, the Court struck Ryan's Answer and entered default against him holding that he is secondarily liable for securities fraud based on the October loan. As a result, the Investors were able to procure a judgment for approximately $1,250,000.00 against a party that was represented and ready to go to trial.

Disposition at Trial Court. As discussed above, at trial, Ryan appeared via counsel, ready to proceed with trial. However, despite accepting the appearance of counsel in Ryan's behalf, the trial court proceeded to strike Ryan's pleadings and enter a default judgment against Ryan for "failure to appear."

STATEMENT OF FACTS

General Background Information

1. On June 26, 2007, Rodaric Group, LLC, Action Investment Services, LLC, Lee Jackson, and Richard Jackson (hereinafter "Investors") filed a Complaint against Frank J. Gillen, W. Kelly Ryan, Shauna Badger, Michael W. Devine, Gregory Haerr,

Michael Vanderhoof, Kevin Dorty, and Jonathan Moore (collectively "Officers and Directors"), the officers and directors of Faraday Financial, Inc. ("Faraday") and its surviving entities and subsidiaries. (R. 1-18.)

2. In their Complaint, Investors allege that they were induced to invest in Faraday and its surviving entities and subsidiaries through fraudulent misstatements constituting Securities Fraud under Utah Code Ann. § 61-1-22. (R. 1-18.)

3. Only one set of the investments occurred while Kelly Ryan was an officer or director of Faraday and its surviving entities and subsidiaries; an investment made in October of 2004 (the "October Investment"). (R. 1-18.)

4. At no time have the investors brought a suit against Faraday or its surviving entities or subsidiaries for the securities fraud. (R. *In toto.*)

October Investment

5. In August of 2004, HomeNet Utah, Inc. (a subsidiary of Faraday Financial) entered into a merger agreement whereby HomeNet Utah, Inc. merged with VIB and changed its name to HomeNet Communications, Inc. ("HomeNet Communications").

6. In September of 2004, Faraday Financial changed its name to HomeNet Corporation. (R. 1771.)

7. In its Proxy, HomeNet Corporation states that HomeNet Communications Inc. is a wholly owned operating subsidiary of HomeNet Corporation. (R. 1771.)

8. As of October, 2004, Kelly Ryan ("Mr. Ryan") was the Chief Executive Officer of HomeNet Corporation. (R. 1771.)

9. On October 13, 2004, Investors entered into Secured Loan Agreements with HomeNet Corporation and HomeNet Communications. (R. 1770.)

10. Pursuant to the Secured Loan Agreements, Investors agreed to provide collectively $450,000.00. (R. 1770.)

11. The Investors allege that these loans were funded by October 19, 2004. (R. 1770.)

12. The October loans were purported to be secured solely by the assets of HomeNet. (R. 1437-1458; 1460-1477; 1769.)

13. On November 19, 2004, Investors signed a "Security Agreement" as an ancillary to their October loans. The Security Agreement purports to be effective between HomeNet Communications, Inc., Harrison Horn as collateral agent, and the Investors. (R. 1769.)

14. The Security Agreement purports to "create a security interest in favor of the Collateral Agent for the benefit of the [Investors]." (R.1769.)

15. Although Harrison Horn never signed the Security Agreement, the Investors never spoke or attempted to speak with Harrison Horn, and that the Security Agreement was entered into more than a month after the Investors agreed to fund and actually did fund the October Notes, the Investors purport that Harrison Horn's presence as a Collateral Agent was integral to the Investors' decision to enter into the October loans. (R. 1912-1913.)

Actions Subsequent to the October Loans

16. In December of 2004, Harrison Horn entered into a note with HomeNet Corporation that was materially different to Investors' notes. (R. 1768.)

17. Specifically, Harrison Horn requested that the Investors personally guarantee the performance of his note and provide collateral for his note. (R. 2604.)

18. HomeNet Corporation and HomeNet Communications, Inc. subsequently defaulted on its obligations to Harrison Horn as well as its other debtors. (R. 2604.)

19. In late 2005, HomeNet Communications, Inc. was forced into involuntary bankruptcy in Washington State. (R. 361.)

20. The Investors participated in that bankruptcy proceeding, but never initiated an adversary proceeding against HomeNet Communications, Inc. (R. 361.)

21. On April 21, 2008, the bankruptcy court entered a final order in the bankruptcy action for HomeNet Communications, Inc. (R. 2680, 2703)

SUMMARY OF THE ARGUMENT

This Court should overturn the default judgment entered by the trial court because no rule of law or procedure allows a court to enter the default of a party in a civil action where the party is present via counsel and ready to proceed with trial. Importantly, a trial court is even more limited in its opportunity to grant a default judgment where the trial court encourages a defendant to obtain counsel for trial, the defendant follows the trial court's advice, but the trial court never advises the defendant that failure to appear in person would result in default. Accordingly, the trial court's application of the rules of procedure concerning default judgment was erroneous and reversible.

Importantly, after reversing the trial court's default judgment, this Court need not remand the matter to the trial court because the record presents this Court with sufficient evidence to hold that, as a matter of law, Investors cannot recover against Ryan.

ARGUMENT

This Court should overturn the trial court's default judgment entered against Ryan and order that the trial court enter judgment in Ryan's favor.

On November 9, 2010, Ryan appeared in Court via counsel, ready for trial and eager to defend the allegations asserted against him. However, despite the appearance of his counsel, the Court entered the Default Judgment "[b]ased upon the non-appearance of Ryan." (*See* Default Judgment at p. 3.) Because the Court entered a default judgment for hundreds of thousands of dollars against a party who had answered the initial complaint, who appeared via counsel at trial for a civil matter, and who was ready to proceed with trial without any delay, there was no basis in law or in fact upon which default judgment could have been entered. Accordingly, the Default Judgment is improper and voidable. *See* P&B Land, Inc. v. Klungervik, 751 P.2d 274, 277 (Utah Ct. App. 1988)(stating that, "[t]he entry of a default judgment by a court with jurisdiction over the parties and the subject matter, where there is no default in law or in fact, is regarded as improper or illegal, and voidable.")

Finally, the Court need not remand the instant case back to the trial court for a trial because, as a matter of law, Ryan has adequate defenses that preclude any recovery against him in this action.

I. THIS COURT SHOULD OVERTURN THE TRIAL COURT'S ENTRY OF DEFAULT JUDGMENT BECAUSE (1) RYAN PROPERLY FILED RESPONSIVE PLEADINGS, (2) RYAN DID APPEAR AT TRIAL VIA COUNSEL, AND (3) RYAN'S APPEARANCE AT TRIAL VIA COUNSEL DID NOT VIOLATE ANY COURT ORDER.

This Court should overturn the entry of default. Rule 55 of the Utah Rules of Civil Procedure controls the entry of default judgment against a defendant in a civil action. Pursuant to Rule 55, entry of default may only occur, "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules." In the case at hand, Ryan did not fail to plead or otherwise defend." In fact, Ryan actually filed pleadings with the trial court, he actually appeared at trial via counsel, and was actually ready to proceed with trial. Thus, Ryan neither failed to plead nor failed to otherwise defend against Investors' claims.

Accordingly, there is no basis, in fact or in law, for the Court's entry of the Default Judgment and the Court should set aside the Default Judgment.

A. Default under Rule 55 is improper because Ryan did not fail to plead.

Under Rule 55, if a defendant in a civil action fails to plead, the Court may enter a default against such party. Conversely, if a defendant has filed a responsive pleading such as an answer, default may not be properly entered against such defendant. *See* Utah R. Civ. Pro. 12.

In the instant matter, Ryan filed his Answer to the underlying Complaint on or about August 20, 2007. (R. 59.) Furthermore, Ryan also filed a second Answer on October 27, 2008, in response to Investors' Third Amended Complaint. (R. 1051.) As stated in Rule 7, upon the filing of an answer, no further pleadings are allowed unless

there is a counter-claim or third-party complaint. Thus, no further pleadings were required of Ryan beyond the filing of the two separate Answers filed by Ryan in August of 2007 and in October of 2008.

Accordingly, there is no basis, in law or in fact, for the entry of default pursuant to a failure to plead.

B. Default under Rule 55 is improper because Ryan defended against Investors' claims.

The second and final ground for entering a default under Rule 55 is when a party has "otherwise failed to defend as provided by [the Utah Rules of Civil Procedure]." At the time the Court entered the default judgment, Ryan had not "failed to defend" against Investors' claims.

Presumably, the Court entered the default against Ryan because he was not personally present at trial. However, nowhere in the rules of procedure is a defendant in a civil trial required to be personally present at trial. This is especially if the defendant is represented by counsel at the trial and is ready to go to trial. Indeed, a corporation or other business entity often appears at trial with only the attorney present. To require an individual to appear, but allow other legal entities to proceed without appearing would be to favor corporate entities and penalize individuals for being natural persons.

Furthermore, where an attorney appears in Court on behalf of a client, the attorney is fully authorized to act as the client's agent such that the attorney's knowledge and actions are imputed to the client. *See* Von Hake v. Thomas, 858 P.2d 193, 195 (Utah Ct. App. 1993)(holding that, "an attorney is the agent of the client and knowledge of any

material fact possessed by the attorney is imputed to the client.") Therefore, when Ryan's attorney appeared at trial on November 9, 2011, the legal effect of such appearance was that the attorney was Ryan's agent, and for all intensive purposes, given that the matter was a civil trial, the trial court could proceed as if Ryan were there personally.

Importantly, where Investors adamantly represented to the trial court that they needed at least four days, maybe even five, to present their case, Ryan reasonably believed that he would not be able to present his defense until at least the fourth day of trial, maybe even the fifth. (R. 2920 – 25:10-11.) Ryan then planned to appear via counsel while Investors presented their case, only appearing in person when it was time to present his defenses. (R. 2922 – 9:8-13.)

Accordingly, the Court improperly determined that Ryan's appearance via counsel and being ready to proceed without any delay constituted a failure to defend under Rule 55 and default should not have been entered.

C. Default under Rule 16(d) is improper because the Court never entered a scheduling or pre-trial order instructing Ryan that he must appear *pro se* and that he could not have counsel appear on his behalf.

Beyond Rule 55, a trial court may, as a severe and harsh sanction, strike pleadings and enter default pursuant to Rule 16(d), which rule authorizes the sanctions set forth in Rule 37(b)(2) for failure to abide by a scheduling or pretrial order of the trial court. Rule 16(d) specifically states that:

> If a party or a party's attorney fails to obey a scheduling or pretrial order, if no appearance is made on behalf of a party at a scheduling or pretrial conference, if a party or a party's attorney is substantially unprepared to participate in the conference, or if a party or a party's attorney fails to participate in good faith, the

> court, upon motion or its own initiative, may take any action authorized by Rule 37(b)(2).

Investors cannot point to any order of the trial court promulgated under Rule 16 that instructed Ryan that he was required to appear *pro se* and could not appear via counsel. (*See* R. 1-2922.) The Court ***never*** ordered Ryan to refrain from hiring counsel and ***never*** ordered him to appear personally instead of via counsel. In fact, the trail court strongly encouraged Ryan to obtain counsel for trial. (R. 2922 – 5:24-25; 6:1.) Ryan appeared via counsel, as was his right and as encouraged by the trial court, and as is acceptable under the plain language of Rule 16(d).

The only possible support in the record for a determination that Ryan was ordered to appear in person and that Ryan was warned of the risk of default for failure to appear in person is a reference in the trial court's docket concerning the hearing on November 9, 2010. In the court's docket for November 9, 2010, there is a statement saying that, "Mr. Ryan was informed he needed to be at the bench trial, if he failed to appear, judgment would be entered against him." However, this statement is insufficient to support the entry of a default judgment under Rule 16(d).

First, assuming that the statement is accurate, the statement merely instructed Ryan to appear, which Ryan did, via counsel. The statement does not inform Ryan he cannot hire an attorney and have that attorney represent him and act in his behalf. Second, while the statement is present in the court docket, the statement is not found anywhere in the official transcript of the hearing held on November 9, 2010. (R. 2922.) Third, the remainder of the court record is completely devoid of any written order

instructing Ryan to appear in person for trial and not via an attorney. Importantly, the trial court refused to let Ryan appear at the pre-trial conference via telephone[1], so there is no way the trial court could have issued an order to Ryan orally during such pre-trial conference.

Finally, Rule 16(d) cannot apply to the instant matter because the trial court never referenced or cited to Rule 16(d) as a basis for entering the default judgment. (R. 2771-73.) The default judgment entered by the court merely states that the default judgment was entered for a failure to appear, not as a sanction for disobeying an order of the trial court under Rule 16. (R. 2771-73.)

For the foregoing reasons, the trial court committed reversible error when it entered a default judgment against Ryan after Ryan appeared at trial via counsel, especially where the trial court never instructed Ryan that he could not appear via counsel.

II. AFTER OVERTURNING THE DEFAULT JUDGMENT, THE COURT NEED NOT REMAND THE INSTANT MATTER BECAUSE, AS A MATTER OF LAW, INVESTORS ARE PRECLUDED FROM RECOVERING AGAINST RYAN.

A. As a matter of law, Investors cannot recover against Ryan because Investors failed to name the company as a party to the underlying action.

Initially, Investors cannot establish that Ryan is secondarily liable for any of the loans because, even if everything that Investors allege is true, Investors have elected to

[1] The trial court refused to allow Ryan to appear telephonically even though Ryan resides out-of-state and even though such telephonic appearance is authorized by rule. *See* Rule 16(b), Utah Rules of Civil Procedure, stating that, "[t]he attorneys and unrepresented parties shall appear at the scheduling and management conference in person or by remote electronic means."

not sue the parties who are primarily responsible. As such, Investors are precluded from ever recovering against Ryan for Investors' involvement in HomeNet.

In asserting their claims, Investors asked the trial court to order that with regards to statutory violations of securities fraud by HomeNet, "such [security] violations have been shown." In essence, Investors asked the trial court, and the trial court acquiesced, to enter an order that some non-party that is beyond the trial court's jurisdiction and that has not had the opportunity to defend itself committed securities fraud. This is an improper and unjustified application of the law.

The statute under which Investors filed their suit establishes that an officer or director is secondarily liable for the actions of a company **only if** the company is first held liable. Utah Code Ann. § 61-1-22(4). However, Investors have not obtained any court order finding liability against any company in which Ryan was involved. Investors have never alleged that they have any sort of privity with Ryan. (*See* Third Amended Complaint.) Further, Investors cannot prove privity because they have not sued the primary responsible parties. (*See* Third Amended Complaint.)

In the court below, Investors claimed that Steenblick v. Lichtfield, 906 P.2d 872 (Utah 1995), justified their claims that the trial court could properly hold Ryan secondarily liable for securities fraud without even naming the underlying company in the same lawsuit. However, Investors' reliance on Steenblick is without merit. Steenblick does not stand for the proposition that an officer or director is secondarily liable for the actions of a company even if the company is not named or held liable for the fraud. In Steenblick, the underlying Corporation for which the officer worked **was** held liable for

Securities Fraud by the district court. Thus, where Steenblick went up on appeal, it is logical that where the company was named and found liable below, the Utah Supreme Court simply concluded that "a partner, an officer, a director, a person of similar status or function, or a seller of securities is liable for **violations committed by the entity** unless that person proves the affirmative defense that he lacked knowledge of the unlawful acts." Id. at 876 (emphasis added). The Steenblick Court did not say that an officer or director is liable for presumptive violations committed by a corporation where no lawful court has ever established such liability. Id. In fact, no court has made such a ruling.

Courts in Connecticut have also concluded that liability under a primary violation is required to maintain a secondary suit in a securities fraud statute similar to Utah's. Conn. Nat'l Bank v. Giacomi, 699 A.2d 101, 120 (Conn. 1997). Furthermore, Utah courts generally dismiss secondary causes of action when the primary cause of action cannot be established. See also, Coroles v. Sabey, 79 P.3d 974, 982 (Utah Ct. App. 2003).

Without naming, suing, and obtaining a judgment against the underlying companies, no judgment may be obtained against any officer or director of those companies. Utah Code Ann. § 61-1-22(4). To hold otherwise would be a violation of both State and Federal Constitutional Due Process Rights. (US Const. Amend. 14; Utah Const. Art I § 7.) Additionally, this Court would lack the jurisdiction to find that persons who are not before the court have engaged in illegal behavior. "For a court to acquire jurisdiction, there must be a proper issuance and service of summons." Jackson Constr. Co. v. Marrs, 2004 UT 89, ¶ 10, 100 P.3d 1211. "Service of process implements the procedural due process requirement that a defendant be informed of pending legal action

and be provided with an opportunity to defend against the action." Carlson v. Bos, 740 P.2d 1269, 1271 (Utah 1987). Additionally, such a conclusion would be contrary to the express language of the Utah statute that provides that an individual secondarily liable is limited and expressly tied to the liability of the primary violator; this provision of Utah law does not create an independent action against an officer or director of a company. Utah Code Ann. § 61-1-22(4) ("every, partner, officer, or director of a seller or buyer . . . are also liable jointly and severally **with and to the same extent as** the seller or purchaser.") (emphasis added). By not naming the Companies, no other party can carry secondary liability because no party carries primary liability.

Ryan can only be secondarily liable if the companies are liable. The only way the companies can be liable is if they are sued in open court, given the opportunity to defend themselves, to object to the discovery of attorney-client privileged information, and be given the opportunity to bring and assert off-sets, counterclaims, cross-claims, and other defenses. None of these due process protections are available in this case.

B. As a matter of law, the doctrine of res judicata preclude Investors from recovering from Ryan.

"The doctrine of res judicata embraces two distinct branches: claim preclusion and issue preclusion." Mack v. Utah State Dep't of Commerce, 221 P.3d 194, 203 (Utah 2009. "Claim preclusion is premised on the principle that a controversy should be adjudicated only once." Id. (internal quotations and references omitted).

It is claim preclusion that applies to the instant motion. In Utah, whether a claim or assertion is precluded from re-litigation depends on a three-part test. Id. As set forth in

Mack, 221 P.3d at 203, this three-part test, is as follows:

> First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

As discussed below, each part of the three-part test is present in the instant action. Accordingly, Investors' attempts to prove claims against HomeNet are barred.

i. Both the bankruptcy case and the instant case involve the same parties or their privies.

The first prong is easily met. Investors and HomeNet were involved as parties in the bankruptcy case. Investors and HomeNet are also involved in the instant action as Investors seek to prove that HomeNet is liable to Investors for securities fraud. (See Investors' Third Amended Complaint.)

ii. Investors' claims against HomeNet could have been raised in the bankruptcy action.

With regards to the second prong of the test for claim preclusion, the Utah Supreme Court stated that, "[c]laims or causes of action are the same as those brought or that could have been brought in the first action if they arise from the same operative facts, or in other words from the same transaction." Mack, 221 P.3d at 203 (referencing Restatement (Second) of Judgments § 24 (1982).

In Mack, the Utah Division of Securities sought to obtain sanctions against Mack through an administrative action. Id. at 197-98. However, prior to pursuing the administrative action, the Division filed an action in district court, which action was then dismissed. Id. The trial court did allow the Division an opportunity to file an amended

complaint within thirty days of the dismissal, if such amendments remedied the defects in the initial complaint. Id. However, the Division elected not to file an amended complaint, but pursued an administrative action instead. Id. The Utah Supreme Court held that because the transaction complained of in the administrative action was the same as the transaction addressed in the court action, and because of the Division's decision not to file an amended complaint, claim preclusion barred the Division from pursing the same claims against Mack in another forum. Id. at 203-05. Accordingly, the trial court's decision to grant a permanent injunction against the Division was affirmed, halting any further administrative action against Mack. Id. at 205.

In the instant matter, as with the Division of Securities in Mack, Investors had every opportunity to present their claims for securities fraud against HomeNet to the bankruptcy court, but they elected not to do so. Investors were aware of the bankruptcy case and actually participated in that action. Specifically, in the bankruptcy case, Investors raised claims based upon the same loan transaction complained of here. Indeed, the only reason Investors participated and were involved in the bankruptcy case was because of the underlying transaction Investors now complain of here. A claim of fraud against HomeNet based upon the transaction Investors complain of now would have been directly relevant to the bankruptcy case and should have been raised in that forum. Investors' refusal to assert a claim against HomeNet while HomeNet was in bankruptcy should not be rewarded by allowing Investors to now assert the same overdue claim against HomeNet, especially when HomeNet is not a named party in the instant action and is not present to defend itself. Indeed, a main objective of the doctrine of res judicata

is to prevent inequities such as the one Investors promote here.

For the foregoing reasons, the Court should find that Investors could have filed their claims against HomeNet in the bankruptcy case, but willfully elected not to do so. Accordingly, the Court should find that the second prong of claim preclusion is also met.

iii. The bankruptcy case has resulted in a final order.

On April 21, 2008, the bankruptcy court entered an order closing HomeNet's bankruptcy case and eliminating all existing claims against HomeNet. This order resolved all existing claims against HomeNet, with particular application to the claims listed in the Schedules filed with the bankruptcy court. Additionally, the bankruptcy court gave specific notices regarding the deadline for filing any claims against HomeNet not listed. Investors did not file an adversarial proceeding against HomeNet, nor did Investors file any other objections or claims. Accordingly, the final order of the bankruptcy court constitutes a final order and judgment that eliminates any and all claims against HomeNet that could have been raised, but were not.

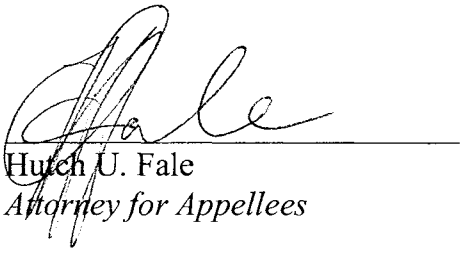
As discussed above, all three prongs of the test for claim preclusion are met. Accordingly, the doctrine of res judicata, or more specifically, claim preclusion, bars Investors from presenting evidence or argument regarding the liability of HomeNet in the instant action.

CONCLUSION

For the foregoing reasons, this Court should overturn the trial court's default judgment against a Party who was present and ready to proceed with trial. This Court should also issue an order granting judgment on behalf of Ryan.

RESPECTFULLY SUBMITTED this 15th day of August, 2011.

AVERY BURDSAL & FALE, PC



Hutch U. Fale
Attorney for Appellees

CERTIFICATE OF SERVICE

I, Hutch U. Fale, certify that on this 15th day of August, 2011, I served two copies of the foregoing Brief of Appellant upon counsel for the Appellees in this matter by mailing such copies via first class US mail, postage prepaid, to the following:

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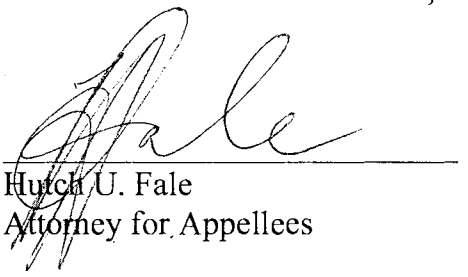

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ADDENDUM

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IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY

STATE OF UTAH

RODARIC GROUP, LLC, ACTION INVESTMENT SERVICES, LLC, LEE JACKSON, and RICHARD JACKSON, Plaintiffs, vs. FRANK J. GILLEN, W. KELLY RYAN, SHAUNA BADGER, and MICHAEL W. DEVINE, Defendants.	**JUDGMENT** **(W. KELLY RYAN)** Civil No. 070402054 Judge Steven L. Hansen

This matter came on for trial on Monday, November 8, 2010 at 8:30 a.m. The plaintiff was represented by counsel, Keith W. Meade and Bradley M. Strassberg of Cohne, Rappaport & Segal, P.C. The defendant Frank Gillen was present, pro se. Curt Wenger appeared on behalf of Michael W. Devine. Nate Burdsal of Fale, Burdsal and Avery, P.C. appeared with Shauna Badger.

The parties stated to the court at the end of morning of November 8, 2010, that a tentative settlement had been reached, and requested an adjournment until 1:30 p.m. on November 9, 2010, at which time the trial would commence if settlement was not completed.

The plaintiffs and the defendants Gillen, Badger and Devine have reached settlements, and appropriate orders have been entered. The sole remaining defendant is W. Kelly Ryan. Mr. Ryan did not appear either on November 8 or November 9, 2010. He was present in the court when the trial was originally scheduled on August 2, 2010, and was then advised of the new trial date, to which he agreed.

Based on Ryan's failure to appear for trial, his answer is stricken and his default is entered.

Based upon the documents submitted and received into evidence, including in particular Exhibits 8 (a form 13 D filed by Mr. Ryan showing that he was principally employed as an officer of the borrower, HomeNet Communications), 24, 73, 74, 79, 81, and 92, the court finds that Mr. Ryan was an officer and a director of HomeNet Communications in October, 2004.

In addition, the plaintiffs proffered their testimony regarding the significance of the involvement of Harrison Horn as the collateral agent in connection with their October, 2004 loans of $250,000 (Action Investments, LLC) and $200,000 (Rodaric Investments, LLC) to HomeNet Communications, Inc. (the "October loans") made while Ryan was an officer and director of the company. It was also proffered that Harrison Horn would testify that he never agreed to be a collateral agent, and that he was never even approached to be a collateral agent.

Based upon the non-appearance of Ryan, and his failure to demonstrate that he did not know and in the exercise of reasonable care could not have known of the facts by reason of which the liability is alleged to exist,

JUDGMENT is hereby entered against W. Kelly Ryan and in favor of Action Investments in the amount of $250,000.00, plus interest at 12% from October 13, 2004, until paid; and against W. Kelly Ryan and in favor of Rodaric Investments, LLC in the amount of $200,000.00 plus interest at 12 % per annum from October 13, 2004; plus in favor of both plaintiffs and against Mr. Ryan, all attorneys fees reasonably incurred both prior to judgment, and in the collection of the judgment, all as allowed by UCA §61-1-22(1)(a).

DATED this 9th day of November, 2010.

BY THE COURT:

Honorable Steven L. Hansen
District Court Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **JUDGMENT (W. KELLY RYAN)** was mailed, postage fully prepaid, on the 7 day of November, 2010, to the following:

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