2010

# White Cap Construction Supply, Inc. v. Star Mountain Construction, Inc., et al. : Reply Brief

Utah Court of Appeals


Matthew G. Cooper; Mel S. Martin; Attorney at Law; Attorney for Appellee.
Joseph M. Chambers; Josh Chambers; Maybell Romero; Harris, Preston and Chambers; Attorneys for Appellants.

| IN THE UTAH COURT OF APPEALS | |
|---|---|
| WHITE CAP CONSTRUCTION SUPPLY, INC.,<br><br>Plaintiff,<br><br>v.<br><br>STAR MOUNTAIN CONSTRUCTION, INC., *et al.*,<br><br>Defendants. | Case No. 20101007-CA<br><br>Appeal from<br>Third Judicial District Court<br>Summit County, Utah<br>District Case No. 050500453<br>Hon. Bruce B. Lubeck<br>Hon. Keith Kelly |
| SHAMROCK PLUMBING, LLC,<br><br>Cross-Claim Plaintiff and Appellee/Cross-Appellant<br><br>v.<br><br>SILVER BARON PARTNERS, L.C., DAEDALUS USA, INC., *et al.*,<br><br>Cross-Claim Defendants and Appellants. | |

# REPLY BRIEF OF APPELLEE/CROSS-APPELLANT SHAMROCK PLUMBING, LLC FROM THE DECISION OF THE THIRD JUDICIAL DISTRICT COURT


Joseph M. Chambers (0612)
Josh Chambers (11045)
Maybell Romero (11270)
Harris, Preston & Chambers, P.C.
31 Federal Avenue
Logan, UT 84321
Telephone: 435-752-3551
Attorneys for Appellants
Silver Baron Partners, L.C. and
Daedalus USA, Inc.

Matthew G. Cooper (5268)
Attorney at Law
Mel S. Martin (2102)
Mel S. Martin, P.C.
5286 S. Commerce Dr., Suite A-136
Murray, UT 84107
Telephone: 801-263-1493
Attorneys for Appellee/Cross-Appellant
Shamrock Plumbing, LLC

| IN THE UTAH COURT OF APPEALS | |
|---|---|
| WHITE CAP CONSTRUCTION SUPPLY, INC.,<br><br>Plaintiff,<br><br>v.<br><br>STAR MOUNTAIN CONSTRUCTION, INC., *et al.*,<br><br>Defendants. | Case No. 20101007-CA<br><br>Appeal from<br>Third Judicial District Court<br>Summit County, Utah<br>District Case No. 050500453<br>Hon. Bruce B. Lubeck<br>Hon. Keith Kelly |
| SHAMROCK PLUMBING, LLC,<br><br>Cross-Claim Plaintiff and Appellee/Cross-Appellant<br><br>v.<br><br>SILVER BARON PARTNERS, L.C., DAEDALUS USA, INC., *et al.*,<br><br>Cross-Claim Defendants and Appellants. | |

# REPLY BRIEF OF APPELLEE/CROSS-APPELLANT SHAMROCK PLUMBING, LLC FROM THE DECISION OF THE THIRD JUDICIAL DISTRICT COURT


Joseph M. Chambers (0612)
Josh Chambers (11045)
Maybell Romero (11270)
Harris, Preston & Chambers, P.C.
31 Federal Avenue
Logan, UT 84321
Telephone: 435-752-3551
Attorneys for Appellants
Silver Baron Partners, L.C. and
Daedalus USA, Inc.

Matthew G. Cooper (5268)
Attorney at Law
Mel S. Martin (2102)
Mel S. Martin, P.C.
5286 S. Commerce Dr., Suite A-136
Murray, UT 84107
Telephone: 801-263-1493
Attorneys for Appellee/Cross-Appellant
Shamrock Plumbing, LLC

## LIST OF PARTIES

**Pleadings:**

| | |
|---|---|
| **Defendant and Cross-Claim Plaintiff:** | **Shamrock Plumbing, LLC** |
| **Defendants and Cross-Claim Defendants:** | **Silver Baron Partners, L.C.**<br>**Daedalus USA, Inc.** |

**At Trial:**

| | |
|---|---|
| **Plaintiff:** | **Shamrock Plumbing, LLC** |
| **Defendants:** | **Silver Baron Partners, L.C.**<br>**Daedalus USA, Inc.** |

**On Appeal:**

| | |
|---|---|
| **Appellants:** | **Silver Baron Partners, L.C.**<br>**Daedalus USA, Inc.** |
| **Appellee/Cross-Appellant:** | **Shamrock Plumbing, LLC** |

## TABLE OF CONTENTS


Page

INTRODUCTION ..... 1

ARGUMENT ..... 1

**I. The trial court abused its discretion in setting aside Shamrock's default judgment against Owner and Contractor.** ..... 1

**II. The trial court erred by arbitrarily reducing Shamrock's damages, without considering Shamrock's *quantum meruit* claim.** ..... 7

**A. The trial court erred by reducing Shamrock's judgment by the cost estimated to replace a boiler and venting that continue to work and benefit the defendants.** ..... 7

**B. Shamrock preserved its issue of *quantum meruit* in the trial court.** ..... 8

**III. Shamrock's failure to give written notice of the owner's and contractor's defective design was not a material breach of a contract when actual notice was given before the contract was signed, and lack of written notice didn't damage defendants.** ..... 11

CONCLUSION ..... 13

ADDENDUM

A-1 Volostnykh v. Duncan, Case No. 20000288-CA, Unpublished (UT App 2001)
A-2 Affidavit of Alan Wright - March 19, 2009 (R. 309-313)
A-3 Ruling and Order - April 23, 2009 (R. 363-368)
A-4 Corrected Judgment - March 19, 2009 (R. 293-295)

# TABLE OF AUTHORITIES

## Cases

Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (UT 1998) ..... 8

Interstate Excavating, Inc. v. Agla Dev. Corp., 611 P.2d 369 (Utah 1980) ..... 2, 3

Jones v. Layton/Okland, et al., 214 P.3d 859 (Utah 2009) ..... 3, 4, 5

Katz v. Pierce, 732 P.2d 92 (Utah 1986) ..... 3

Richards Contracting Company v. Fullmer Brothers, 417 P.2d 755 (UT 1966) ..... 8

Uhrhahn Construction & Design, Inc. v. Hopkins, 179 P.3d 808, 814 (Utah App 2008) ..... 8

Valcarce v. Fitzgerald, 961 P.2d 305, 319 (Utah 1998) ..... 14

Volostnykh v. Duncan, Case No. 20000288-CA, unpublished (UT App 2001) ..... 1

## Statutes

U.C.A. § 14-2-2 (3) ..... 14

U.C.A. § 78B-5-826 ..... 14

## Rules

U.R.A.P. 30(f) ..... 1

U.R.C.P. 60(b) ..... 3, 5, 6

## INTRODUCTION

Shamrock previously cited the case of Volostnykh v. Duncan, Case No. 20000288-CA, unpublished (UT App 2001) for the proposition that a litigant has a duty to keep himself apprised of ongoing court proceedings. Pursuant to U.R.A.P. 30(f), a copy of an unpublished opinion is to be provided when first cited. A copy is attached hereto as A-1. Counsel apologizes to the Court and counsel for failing to provide a copy with its first Brief.

## ARGUMENT I

**The trial court abused its discretion in setting aside Shamrock's default judgment against Owner and Contractor.**

Daedalus and Silver Baron argue that Shamrock failed to marshal the evidence in support of the trial court's decision to set aside default judgment. However, Shamrock provided this Court with every bit of evidence of excusable neglect that Daedalus and Silver Baron offered to the trial court. The evidence consisted entirely of the Affidavit of Alan Wright. The evidence he provided is set forth verbatim on pages 21-23 of Shamrock's Brief. The entire Affidavit was attached as A-2. Another copy is attached hereto as A-2 for the Court's reference.

Neither Daedalus nor Silver Baron offered any other evidence to show excusable neglect. Despite the fact that both parties requested oral argument, the trial court ruled without a hearing; based solely on Wright's Affidavit. (Addendum A-2)

The court's decision was clearly against the weight of the evidence in this matter. The defendants defaulted early in the case. In their motion to set aside their default, they told the court they hadn't read their mail.

After their initial default was set aside, the defendants prosecuted a counterclaim for years. They knew they were in a lawsuit. They knew their law firm was going to withdraw. They again chose not to read their mail, which they admit was received. Notices and multiple pleadings were ignored. They offered no credible evidence that they did anything to keep themselves apprised of the case, or to avoid default judgment being entered.

Daedalus and Silver Baron argue that the case of Interstate Excavating, Inc. v. Agla Dev. Corp., 611 P.2d 369 (Utah 1980) supports the trial court's setting aside judgment. It does not. In the Interstate case, the defendants claimed they didn't receive a notice of trial setting or their attorney's withdrawal. When they learned judgment had been entered, they immediately moved to set it aside. There weren't multiple pleadings as in this case. And, the defendants in the Interstate case read their mail.

In the present case, the defendants admit they received notices and pleadings but chose not to read them. Each defendant received a notice of withdrawal, and a notice to appoint counsel. In addition, they each received not less than 8 additional pleadings and notices. They simply state that it was their decision not to read items received by regular mail. That, Shamrock submits, does not constitute excusable neglect.

Daedalus and Silver Baron cite the Court's general discussion in the Interstate case, concerning the setting aside of default judgments. However, they omitted the Court's preface to the quotation relied upon. The Court said:

> It is not to be questioned that in appropriate circumstances default judgments are justified; and when they are, they are invulnerable to attack. Interstate Excavating, 611 P.2d at 371

Moreover, the Court did not suggest that lack of diligence can satisfy the excusable neglect required by U.R.C.P. 60(b).

Daedalus and Silver Baron insist that Utah case law provides for the court to balance equities when deciding whether or not to set aside a default judgment. They direct the Court's attention to the case of Katz v. Pierce. 732 P.2d 92 (Utah 1986) However, the Court in the Katz case did not suggest that equitable considerations can displace the requirement for excusable neglect required by U.R.C.P. 60(b). It said "the court should be generally indulgent toward setting a judgment aside where there is reasonable justification or excuse ..." Katz, 732 P.2d 92

A fairly recent case by the Utah Supreme Court directly considered the requirements for setting aside a judgment under U.R.C.P. 60(b). In the case of Jones v. Layton/Okland, et al., 214 P.3d 859 (Utah 2009), the trial court granted summary judgment after the plaintiff failed to respond, and its default was entered. The Utah Supreme Court stated their analysis began with addressing "the appropriate test for determining whether a judgment should be set aside for excusable neglect." Id., 214 P.3d at 862

With respect to balancing equities, the Court reaffirmed the Rule's requirement, and said the parties' equities do not eliminate the need for diligence. The Court said:

> This does not mean, however, that a moving party is entitled to relief on the ground of excusable neglect anytime such relief might be equitable. We affirm the basic principle upon which *Airkem* and similar decisions rested: that excusable neglect requires some evidence of diligence in order to justify relief. In other words, while the district court's discretion to grant relief under rule 60(b) for excusable neglect is broad, it is not unlimited. A district court must exercise its broad discretion in furtherance of the ultimate goal of the excusable neglect inquiry: determining whether the moving party has been sufficiently diligent that the consequences of its neglect may be equitably excused. Id., 214 P.3d at 863
>
> ...
>
> But while a party need not be perfectly diligent in order to obtain relief, some diligence is necessary. To grant relief on the ground of excusable neglect where a party has exercised no diligence at all, but simply because other equitable considerations might favor it, subverts the purpose of the excusable neglect inquiry. Rule 60(b)'s use of "excusable" as a modifier of "neglect" makes clear that mere neglect alone is an insufficient justification for relief. The neglect must be excusable upon some basis.
>
> It would be impermissible, for example, to grant relief for excusable neglect under rule 60(b) solely because the moving party would be severely prejudiced by a refusal to grant relief while the nonmoving party would only suffer the inconvenience incident to delay of the litigation. Although considerations of prejudice and good faith are relevant to the excusable neglect inquiry, to grant relief under rule 60(b) simply because there might be some equitable basis for doing so, absent any diligence by the moving party, would allow relief based on mere neglect alone. We decline to read the word "excusable" out of the rule in this manner.

> Therefore, we hold that, in deciding whether a party is entitled to relief under rule 60(b) on the ground of excusable neglect, a district court must determine whether the moving party has exercised sufficient due diligence that it would be equitable to grant him relief from the judgment entered as a result of his neglect. In making this determination, the district court is free to consider all relevant factors and give each factor the weight that it determines it deserves. Id., 214 P.3d, at 864 (emphasis added)

In this case, Daedalus and Silver Baron failed to exercise any diligence whatsoever. On page 6 of their Response Brief, they state: "As the trial court made a finding that there was due diligence and excusable neglect on the part of contractor ..." (Appellant's Brief, page 6) Their argument is disingenuous. Indeed, it is false. The trial court did not even hint that Daedalus or Silver Baron had exercised due diligence. The only attention given by the court was to the contrary, that the evidence showed a lack of diligence by Daedalus and Silver Baron. The court said:

> Defendants here seem, at least in this case, to be less than concerned at times about this case. It has been lengthy litigation and the court is hard-pressed to really understand how so many pleadings could be overlooked. However, given the situation with counsel and the lack of personal contact and a long-term relationship, the court will again excuse defendants' failures. (Addendum A-3) (emphasis added)

There is nothing to even suggest the slightest diligence was exercised by Daedalus or Silver Baron. The court was puzzled that they overlooked so many pleadings. And, the court recognized that this was the second time the defendants' default was excused. But, the court failed to apply the correct standard required by U.R.C.P. 60(b). There was no finding of excusable neglect.

This is not a case of setting aside a simple default only. Judgment had been duly entered. It could only be set aside in accordance with U.R.C.P. 60(b). Daedalus and Silver Baron chose not to read any of the pleadings or notices they received.

Shamrock had the right to rely upon enforcement of Utah Rules of Civil Procedure. Multiple notices and pleadings were properly sent. Shamrock had the right to rely upon the finality of judgments. Utah's rules are designed to protect all parties to litigation.

Daedalus received their attorney's notice of withdrawal. They received Shamrock's notice to appear or appoint counsel. Shamrock followed the rules by sending 8 additional pleadings and notices to Daedalus and Silver Baron. However, they chose not to read any of them.

There was no diligence exercised by the defendants. It was clearly error for the trial court to set aside Shamrock's default judgment, without finding there was excusable neglect. Shamrock asks the Court to reverse the trial court's setting aside the default judgment, and to reinstate the corrected default judgment. By doing so, all other issues raised in this appeal will be moot.

## ARGUMENT II

**The trial court erred by arbitrarily reducing Shamrock's damages, without considering Shamrock's *quantum meruit* claim.**

Daedalus and Silver Baron argue that Shamrock did not preserve the issue of q*uantum meruit* because the trial court found that an express, integrated contract existed. Second, that Shamrock failed to preserve this issue at the trial court.

A. The trial court erred by reducing Shamrock's judgment by an amount estimated to replace a boiler and venting that continue to work and benefit the defendants.

Shamrock did not design the mechanical, HVAC, or plumbing for the Project. (R. 669-670) The mechanical system was entirely designed by the Project's engineer, Colvin Engineering. (R. 899, p. 194) Daedalus provided Colvin's design and specifications to Shamrock for installation. (Contract, Addendum to Shamrock's First Brief, A-1)

When Shamrock discovered a design defect in the specifications (fluing for the boiler and water heaters was incompatible), Shamrock orally advised their Daedalus contact, Roy Bartee. Bartee told Shamrock "to work it out" with Colvin. This they did. A boiler with compatible fluing was substituted. Daedalus and Silver Baron continue to use the boiler to service the subject building, and an adjoining building they constructed after the Project.

Paragraph 10 of the Contract allowed Daedalus "to make changes to drawings and in the Subcontract Work." Shamrock was to proceed with the changes. A change only

needed to be put in writing if it affected the price of Shamrock's contract. The substituted boiler did not change the price of Shamrock's contract.

The trial court erred by reducing Shamrock's compensation by the cost estimated to remove the substituted boiler and associated venting designed by Colvin. Such would constitute a redesign of Daedalus' system, something that was never part of Shamrock's contract.

It is the law in Utah that parties to construction contracts frequently make changes to the project as originally agreed upon. And, parties waive written provisions orally or by conduct and create implied-in-fact contracts. *See*, Uhrhahn Construction & Design, Inc. v. Hopkins, 179 P.3d 808, 814 (Utah App 2008)

Similarly, the Utah Supreme Court has held that even when contracts require changes to be in writing, the parties can waive or modify those provisions. See Richards Contracting Company v. Fullmer Brothers, 417 P.2d 755 (UT 1966) ("A contract with specific terms cannot remain hypertechnically specific after the parties decide on extras … in which event another contract arises based on a so-called *quantum meruit* theory.")

B. Shamrock preserved its issue of *quantum meruit* in the trial court. In order to preserve an issue for appeal, an issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue. *See* Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (UT 1998) Specific factors to consider that help determine whether the trial court had such an opportunity were specified by the court in Badger:

(1) The issue must be raised in a timely fashion;
(2) The issue must be specifically raised; and
(3) A party must introduce supporting evidence or relevant legal authority. (Id.)

In this case, the third cause of action pled in Shamrock's cross-claim against Daedalus and Silver Baron was for *quantum meruit*. (R. 46) Prior to trial, Shamrock provided the following to the trial court in its trial memorandum:

> Shamrock's Third Cause of Action is for *quantum meruit*. This claim is in the alternative to the Second Cause of Action. *Quantum meruit* is a contract implied in fact and is established by the parties' conduct. It requires a request for work, the performance of work, that the performing party expected to be paid, and that the receiving party knew or should have known that the performing party expected compensation. E & M Sales West, Inc. v. Bechtel v. Diversified, 2009 UT App. 299 (UT App. 10/22/09) Daedalus requested, and Shamrock performed all work as agreed. (R. 604)

At trial, Shamrock showed how its performance was in accordance with the written and oral plans and specifications given it from Daedalus. The only difference from the written specifications was Shamrock's substitution of the incompatible boiler.

Daedalus told Shamrock orally to resolve the boiler design defect with the Project's mechanical engineer. This Shamrock did.

In closing argument, Shamrock's counsel argued:

> The third cause of action is for *quantum meruit*. If the court were to find that some of Shamrock's work was not under contract, an implied contract in fact was established by the parties' conduct. Daedalus required Shamrock to perform all the work that Shamrock performed. Shamrock expected to be paid. Daedalus and Silver Baron knew or should have known that Shamrock

> expected to be paid for the work that Daedalus requested and that Shamrock performed.
>
> They only performed what they were asked to do. They only invoiced them for what was done. There was an $18,000 overcharge that has been corrected and the numbers given by Mr. Barrus are correct. They are asking less than the amount Daedalus shows were contained in the six Change Orders, three of which they did not provide to Shamrock. (R. 901, pp. 27-28)

The trial court found that Shamrock did the work and was not paid. (R. 784, ¶ 1) The system they installed at Daedalus' instruction worked and continues to work now, 7 years later. (R. 783, ¶ 1)

Daedalus and Silver Baron were not damaged by Shamrock's performance. They claim the judgment was appropriately reduced because Shamrock failed to give written notice of a design defect, and because a mixer valve wasn't installed until February 2005.

However, it is undisputed that Shamrock gave actual notice of the design defect early in the work, in the Spring of 2004, before the contract was signed. The defendants had the same protection they would have received from a written notice.

Shamrock substantially completed its work in December 2004. Thereafter, a Temporary Occupancy Certificate was issued, and two months later, in February, the mixer valve issue was resolved. Daedalus didn't even have a final walk-through with its subcontractors until May 2005.

At trial, neither Daedalus nor Silver Baron offered any credible evidence of damages they suffered as a result of not receiving written notice of the design defect. And, except for two months of heat fluctuations, the mixer valve didn't cause any

damages. The trial court found Shamrock was not responsible for any delay damages or lost rent. (R. 689-690)

What the court found, was that Daedalus and Silver Baron weren't happy with the system they received, and that Shamrock didn't have the right to substitute the boiler even though the boiler Daedalus asked for could not be installed, and even though Daedalus' Roy Bartee told Shamrock to "work it out" with the Project's mechanical engineer.

Because Shamrock raised the *quantum meruit* issue in the trial court, it was preserved for appeal. And, it was clearly erroneous for the trial court to arbitrarily reduce Shamrock's damages when the defendants weren't damaged.

## ARGUMENT III

**Shamrock's failure to give written notice of the owner's and contractor's defective design was not a material breach of a contract when actual notice was given before the contract was signed, and lack of written notice didn't damage defendants.**

Daedalus and Silver Baron argue Shamrock failed to marshal evidence relied upon by the trial court. The undersigned believed that it did marshal the evidence appropriately. Shamrock admitted the parties' contract required written notice of design defects in Daedalus' plans and specifications. Shamrock admits it did not give written notice of the defect at the time it was discovered.

The contract was not signed at the time Shamrock gave actual notice of the design defect. When notified, Daedalus' Roy Bartee instructed Shamrock to "work it out" with the Project's mechanical engineer. Shamrock did just that.

A material breach of contract is defined as:

> "A substantial breach of contract, usually excusing the aggrieved party from further performance and affording it the right to sue for damages." Black's Law Dictionary 7th Edition

In this case, the parties' contract was not signed at the time Shamrock gave actual notice of the design defect. Daedalus received the same level of protection they would have received had they been given written notice at that time, or as the trial court observed, at the time the contract was later signed.

Daedalus instructed Shamrock to "work it out" with the Project engineer. They could have suspended work until a written notice was presented, or they could have suspended work after the issue was put in writing in October 2004. They did nothing. To presume they would have done something different if they had received written notice would be pure speculation.

Both parties continued to perform. In fact, Daedalus insisted that Shamrock continue to do additional work for more than a year after being notified of the design defect. Shamrock substantially completed its work in December 2004. Daedalus orally requested additional work into the early months of 2005.

Shamrock's failure to give written notice in the spring of 2004 did not damage Daedalus or Silver Baron. It did not defeat the object of the contract. And, the trial court found that it did not damage them or delay the project.

As discussed on page 41 of Shamrock's first Brief, the trial court said the failure to give written notice was not a dependent or reciprocal obligation tied to payment (R. 785, ¶ 2, A-6, p. 5, ¶ 2)

Daedalus had the opportunity under its agreement to notify Shamrock that it had breached the contract, and to have terminated further service. However, there were no damages upon which they could have sued. A material breach of contract by definition includes the right to sue for damages. When there are none, it should not be a material breach.

## CONCLUSION

Shamrock asks the Court to reverse the trial court's setting aside the default judgment, and to reinstate the corrected default judgment. (Addendum A-4) By doing so, all other issues raised in this appeal will be moot.

If the Court decides the trial court set aside the default judgment in accordance with U.R.C.P. 60(b), then Shamrock asks the Court to reverse the trial court's arbitrary reduction of Shamrock's judgment by an amount required to change the system designed by Daedalus and Silver Baron.

The trial court's award of prejudgment interest should be affirmed because Daedalus and Silver Baron received the system they designed, and required Shamrock to build. They have had the use and benefit of the system since December 2004.

Shamrock asks the Court to award Shamrock a reasonable attorney fee for this appeal. The basis for an award of fees against Daedalus is paragraph 17 of the parties'

contract that allows an award of attorney fees to the contractor (Daedalus) to enforce the contract. That entitlement is made reciprocal by U.C.A. § 78B-5-826 which provides: A court may award costs and attorney fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney fees.

An award of attorney fees and costs against Silver Baron would be based upon U.C.A. § 14-2-2 (3) which provides:

> In an action for failure to obtain a bond, the court shall award reasonable attorneys' fees to the prevailing party. These attorneys' fees shall be taxed as costs in the action.

In this case, Silver Baron failed to obtain a bond for the Project. (R. 688) They didn't even apply for one. (R. 900 p. 249) An award of Shamrock's fees on appeal would also be appropriate against Silver Baron because the trial court awarded Shamrock fees as the prevailing party. The Utah Supreme Court has held:

> We stated in *Salmon v. Davis County*, 916 P.2d 890, 895 (Utah 1996), "This court has interpreted attorney fee statutes broadly so as to award attorney fees on appeal where a statute initially authorizes them." In addition, when a party who received attorney fees below prevails on appeal, "the party is also entitled to fees reasonably incurred on appeal." *Utah Dep't of Social Servs. v. Adams,* 806 P.2d 1193, 1197 (Utah Ct. App. 1991) Valcarce v. Fitzgerald, 961 P.2d 305, 319 (Utah 1998)

Dated this 22d day of July, 2011.

Mel S. Martin,
Attorney for Appellee/Cross-Appellant
Shamrock Plumbing, LLC

**CERTIFICATE OF MAILING**

I hereby certify that on the 22nd day of July, 2011, I caused to be mailed, first-class postage pre-paid, two (2) copies of the foregoing **REPLY BRIEF OF APPELLEE/CROSS-APPELLANT SHAMROCK PLUMBING, LLC**, to the following:

Joseph M. Chambers
Josh Chambers
Maybell Romero
Harris, Preston & Chambers, P.C.
31 Federal Avenue
Logan, UT 84321

Jeremy Sink
McKay Burton & Thurman
170 S. Main Street, #800
Salt Lake City, UT 84101

# Addendum: A-1

IN THE UTAH COURT OF APPEALS
----ooOoo----

Valery Volostnykh
and Nellya Volostnykh,
Plaintiffs and Appellants,

v.

Dorothy Duncan,
Defendant and Appellee.

MEMORANDUM DECISION
(Not For Official Publication)

Case No. 20000288-CA

F I L E D
February 01, 2001
2001 UT App 26

---

Third District, Salt Lake Department
The Honorable Sandra Peuler

Attorneys:
Shawn D. Turner, Salt Lake City, for Appellants
Dorothy Duncan, Salt Lake City, Appellee Pro Se

---

Before Judges Jackson, Billings, and Orme.

PER CURIAM:

Trial courts have considerable discretion under Utah Rule of Civil Procedure 60(b) to grant or deny motions to set aside default judgments. See Katz v. Pierce, 732 P.2d 92, 93 (Utah 1986). Consequently, we will not interfere with a trial court's decision unless an abuse of discretion is clearly shown. Id.

The trial court did not abuse its discretion under the circumstances of this case. First, plaintiffs did not provide the trial court with sufficient support for their request to set aside the judgment. They filed a one page motion with no supporting memorandum, no citation to case law, and no analysis of Rule 60(b).

Second, many of the issues raised by plaintiffs on appeal were not raised below and, thus, are not properly before us. See State v. Gibbons, 740 P.2d 1309, 1311 (Utah 1987) (stating "[u]nder ordinary circumstances, appellate courts will not consider an issue, including a constitutional argument, raised for the first time on appeal unless the trial court committed plain error"). For example, plaintiffs did not inform the trial court that the property was held by a receiver, nor did they ask that the receiver be made a party to the lawsuit.

Third, contrary to plaintiffs' argument, the court successfully sent them notice of the October 27, 1999 hearing to the 3705 South 3375 West address, though notice had been returned from the 3719 South 3375 West address.

Plaintiffs did not notify the court of their changed address until after the default judgment was entered, even though they had a duty to inform the court of their location and keep themselves apprized of ongoing court proceedings. See, e.g., District Court Rule 83-1.3(b) (requiring "[i]n all cases, counsel and parties appearing pro se [to] notify the clerk's office of any change in address or telephone number").

Plaintiffs have not shown that the trial court abused its discretion. "That some basis may exist to set aside the default does not require the conclusion that the court abused its discretion in refusing to do so when facts and circumstances support the refusal." Katz, 732 P.2d at 93.

Accordingly, the trial court is affirmed.

Norman H. Jackson,
Associate Presiding Judge

Judith M. Billings, Judge

Gregory K. Orme, Judge

# Addendum: A-2

Joseph M. Chambers (0612)
HARRIS, PRESTON & CHAMBERS, P.C.
*Attorney for Defendants Silver Baron Partners and Daedalus USA, Inc.*
31 Federal Avenue
Logan, Utah 84321
Telephone: (435) 752-3551
Facsimile: (435) 752-3556

**IN THE THIRD JUDICIAL DISTRICT COURT**
**SUMMIT COUNTY, STATE OF UTAH, PARK CITY DEPARTMENT**
**6300 North Silver Creek Rd., Park City, UT 84098**

| | |
|---|---|
| WHITE CAP CONSTRUCTION SUPPLY, INC.,<br><br>Plaintiffs,<br><br>vs.<br><br>STAR MOUNTAIN CONSTRUCTION, INC., ED ZITE, SILVER BARON PARTNERS, L.C., DAEDALUS USA, INC FRED W. FAIRCLOUGH, JR., CHRISTINE FAIRCLOUGH, THOMAS STREBEL dba RESORT CONSTRUCTION DRYWALL, IDAHO PACIFIC LUMBER COMPANY, INC., BINGGELI ROCK PRODUCTS, INC., WESTERN STATES EQUIPMENT CO., INC., SHAMROCK PLUMBING, LLC, AND JOHN DOES 1-5,<br><br>Defendants. | **AFFIDAVIT OF ALAN E. WRIGHT**<br><br>Civil No.: 050500453<br><br>Judge Bruce C. Lubeck |
| SHAMROCK PLUMBING, LLC,<br><br>Cross-Claim Plaintiff,<br><br>vs.<br><br>SILVER BARON PARTNERS, L.C., DAEDALUS USA, INC., FRED W. FAIRCLOUGH, JR., and CHRISTINE FAIRCLOUGH, | |

STATE OF UTAH )
:ss
COUNTY of Summit )

Allen E. Wright being first duly sworn upon oath states and represents as follows:

1. I am over the age of 21.

2. The information provided below is based on my personal information.

3. If called to testify in this matter I would testify as follows:

4. I am a member of the Defendant Silver Baron Partners, L.C. and also a shareholder and officer of Daedalus USA, Inc. In my capacity as an officer of Daedalus USA, Inc., I was responsible for oversight of the construction of the Silver Baron Lodge, a large condominium project. The Cross-Claimant Shamrock Plumbing, Inc., acted as a subcontractor on the project and was responsible for the plumbing and HVAC installation. As alleged in the answer to the Cross-Claim and the Counterclaim asserted by both the owner of the project (Silver Baron Partners) and the general contractor (Daedalus, USA), the contract was breached by Shamrock resulting in significant damages to Silver Baron Partners, L.C. and Daedalus USA, Inc., as outlined in the discovery which is submitted and attached hereto as Exhibit A.

5. With respect to Silver Baron's and Daedalus' failure to submit a notice of appearance through a licensed member of the Utah State Bar, we would offer the following explanation: The attorney at Jones Waldo whom had represented Daedalus and Silver Baron Partners in the Shamrock matter was Lewis Francis. Mr. Lewis has represented us on various matters for over 10 years during which time we[1] had been fully satisfied with his representation. When we needed

[1]Throughout this Affidavit "we" refers to both Silver Baron

someone to file a lien foreclosure action, Mr. Francis said that this was not his area of expertise, and recommended Mr. Mike Kelly from his firm to handle those matters for us. After an initial period of representation by Mr. Kelly in which he filed several lawsuits on our behalf, we determined that he acted in a grossly unprofessional manner on numerous occasions and consequently we could not allow him to continue to represent Daedalus. We telephoned Mr. Francis and had what we felt was a productive discussion with him regarding Mr. Kelly's behavior and our dissatisfaction with Mr. Kelly's representation. We indicated that the situation as to Mr. Kelly was not acceptable and we requested an audience with the firm's president to resolve the matter. Within a few days of the call, we received a very terse email from Mr. Kelly indicating that we didn't know what we were talking about, that he was correct in all matters, and we were wrong and that he was firing us, not the other way around. He then indicated that he had saved us the time of writing a letter to the firm's president by copying him on the email. Importantly we never received any further communication from Mr. Lewis regarding his representation in the Shamrock matter. We understood that Mr. Kelly's involvement was being terminated but not Mr. Lewis' involvement. To us it appeared that Mr. Lewis was deliberately avoiding getting involved in a very explosive situation with another member of his firm. While we were waiting to be contacted by Jones Waldo's president in response to Mr. Kelly's email, and unbeknownst to us, both Mr. Kelly and Mr. Francis withdrew their representation of Daedalus (and Silver Baron Partners) in their respective matters, and informed us via regular mail. There was no further communication via email or voice and we never heard from nor were we granted a meeting with the president of Jones Waldo. Neither Mr. Kelly nor Mr. Francis contacted us and explained what the legal effect of their withdrawal would be or what we needed to do to protect ourselves.

We receive a significant volume of "client copies" from our legal representation in various active lawsuits. Normally any legal matter, particularly one that our staff was under the impression was being handled by the attorney (Mr. Francis), would not be routed to an officer but would be filed as a matter of course. If a matter comes in through personal service or registered mail it goes directly to the Office Manager, who then is responsible for reviewing the matter in-house and bringing it to the attention of the appropriate officer. Because both of the pleadings, the Notice of Withdrawal and Notice to Appoint came in via regular mail the staff member responsible for opening the mail did not realize that the practical effect of the pleadings was that we no longer had legal representation on this matter. We understood the mail which we received to be the typical client copies normally sent to us and that the legal case was still being handled by Mr. Lewis. Mr. Lewis never contacted us to orally inform us that he was withdrawing or what effect this would have on us.

In addition we would ask the Court to take note that as to the underlying dispute Shamrock has been paid $1,084,384.45 on their original subcontract sum of $1,119,083.00. The remainder of the dispute involves change orders and other matters which are legitimately disputed by Daedalus, and are set forth in the Answer to the Cross-claim filed by Shamrock and the Counterclaim we filed against Shamrock.

We would ask the Court to accept this as excusable neglect, inadvertence or other just cause on our part.

Both Daedalus USA, Inc. and Silver Baron Partners, L.C., have a meritorious defenses to the action and we would ask to be allowed to proceed to have this heard by the Court on the merits of the claims.

DATED this 19th day of March, 2009.

ALAN E. WRIGHT

Subscribed and sworn to before me on the 19th day of March, 2009.

Notary Public

C:\docs\jmc\S\Silver Baron Partners\Shamrock Plumbing\affidavit of alan e wright.wpd

# Addendum: A-3

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

| | |
|---|---|
| WHITE CAP CONSTRUCTION SUPPLY, INC,<br><br>Plaintiff,<br><br>vs.<br><br>STAR MOUNTAIN CONSTRUCTION, et.al.,<br><br>Defendants,<br><br>SHAMROCK PLUMBING, LLC,<br><br>Cross Claim plaintiff,<br><br>vs.<br><br>SILVER BARON PARTNERS, LC, et.al.<br><br>Cross claim defendants. | **RULING and ORDER**<br><br>Case No. 050500453<br><br>Judge BRUCE C. LUBECK<br><br>DATE: April 23, 2009 |

The above matter came before the court for decision on motion of cross claim defendants Silver Baron and Daedalus (defendants) to set aside a default judgment.

The motion was filed March 23, 2009. Cross claim plaintiff Shamrock (Shamrock) filed an opposition response on April 6, 2009. Defendants filed a reply April 21, 2009. Each party filed a request to submit April 22, 2009, and requested oral argument.

The court has reviewed the pleadings and determined oral is

not necessary. The issues are authoritatively resolved by clear law. The court has a good deal of discretion in such matters. Oral argument would not benefit the court. The court will decide the issues based on the pleadings.

ARGUMENTS

Defaults were entered March 5, 2009. Counsel for defendants, who had represented defendants for over 10 years, withdrew but did not personally contact and advise defendants of such. A notice to appoint or appear was filed by Shamrock but defendants claim they did not receive that or it was inadvertently overlooked by staff. The answer and counterclaim were stricken and judgment entered because of the failure to appoint or appear. The affidavit of Wright, a member of defendant. It alleges long-term counsel withdrew by regular mail and that correspondence was simply filed and not brought to the attention of an officer.

Shamrock opposes the motion. After service originally in 2005 a default was entered February 15, 2006. That was set aside by the court on April 18, 2006. Discovery then proceeded and counsel withdrew on January 9, 2009, three years later. Defendants did not respond to the notice of withdrawal. Shamrock sent, to the same address, a notice to appear or appoint. It

notified defendants that a default and dismissal of claims may occur if counsel were not appointed. After notice of entry of judgment in February, defendants did not respond. A proposed order was sent to defendants and they did not respond, nor did they respond to a request to submit mailed to them. After the judgment was signed March 5, Shamrock moved to correct it and gave notice to defendants. No response followed. This motion followed.

Shamrock claims that getting notice in the mail, even if regular mail, and ignoring it is not due diligence. Defendants are familiar with litigation, knew their attorney had withdrawn, but did nothing. Defendants got notice to appoint counsel, a default certificate, a proposed order and request to submit. All were ignored. This lawsuit at that time was over three years old. A previous default was set aside based on the claim of defendants, through Wright, that it was received by certified mail and this claim is that the notices were by regular mail.

Further, there is no meritorious defense.

In reply defendants again urge the standard and presumption of law in favor of decisions on the merits. Defendants agree they will assume the attorney fees for Shamrock in obtaining the default judgment and in this motion.

DISCUSSION

The court is aware of the strong presumption in favor of decisions on the merits rather than by default. The court first looks to determine if there has been excusable neglect before it turns to an examination of whether there is a meritorious defense.

Defendants here seem, at least in this case, to be less than concerned at times about this case. It has been lengthy litigation and the court is hard-pressed to really understand how so many pleadings could be overlooked. However, given the situation with counsel and the lack of personal contact and a long-term relationship, the court will again excuse defendants failures.

This motion was filed within weeks of the default judgment. There is a cross claim and significant discovery and litigation which the court believes fills the meritorious defense element. While a close call, the court first finds and concludes that under all the circumstances, the failure to appoint new counsel amounts to excusable neglect.

Given the short time and given that attorney fees of Shamrock will be paid by defendants, there is no prejudice to Shamrock in resolving this case on the merits.

The motion to set aside the March 5 and corrected order of

March 18, 2009, is GRANTED.

Defendants are to prepare an order in compliance with Rule 7 which incorporates this ruling and awards attorney fees to Shamrock in obtaining the default and in responding to this motion.

DATED this 23 day of April, 2009.

BY THE COURT:

BRUCE C. LUBECK
DISTRICT COURT JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050500453 by the method and on the date specified.

MAIL: JOSEPH M CHAMBERS 31 FEDERAL AVE LOGAN, UT 84321
MAIL: JOSH M CHAMBERS 31 FEDERAL AVE LOGAN UT 84321
MAIL: MATTHEW G COOPER 5282 S COMMERCE DR # D-292 MURRAY UT 84107
MAIL: LEWIS M FRANCIS 170 S MAIN ST STE 1500 SALT LAKE CITY UT 84101-1644
MAIL: MELVIN S MARTIN 5282 S COMMERCE DR STE D-292 MURRAY UT 84107
MAIL: HAROLD C VERHAAREN 5217 S STATE ST 4TH FLR SALT LAKE CITY UT 84107

Date: April 23, 2009

Deputy Court Clerk

STATE OF UTAH THIRD DISTRICT COURT SUMMIT COUNTY

# Addendum: A-4

Matthew G. Cooper, Bar No. 5268
5282 South 320 West, Suite D-292
Murray, UT 84107
Telephone: 801-284-7242
Facsimile: 801-284-7313

MEL S. MARTIN, P.C.
Mel S. Martin, Bar No. 2102
5282 S. Commerce Drive, Suite D-292
Murray, UT 84107
Telephone: 801-263-1493
Facsimile: 801-284-7313
*Attorneys for Cross-Claim Plaintiff*

**IN THE THIRD JUDICIAL DISTRICT COURT**
**SUMMIT COUNTY - STATE OF UTAH - PARK CITY DEPARTMENT**
**6300 N. Silver Creek Road, Park City, Utah 84098**

| | |
|---|---|
| WHITE CAP CONSTRUCTION SUPPLY, INC.,<br><br>Plaintiff,<br><br>vs.<br><br>STAR MOUNTAIN CONSTRUCTION, INC., ED ZITE, SILVER BARON PARTNERS, L.C., DAEDALUS USA, INC. FRED W. FAIRCLOUGH, JR., CHRISTINE FAIRCLOUGH, THOMAS STREBEL dba RESORT CONSTRUCTION DRYWALL, IDAHO PACIFIC LUMBER COMPANY, INC., BINGGELI ROCK PRODUCTS, INC., WESTERN STATES EQUIPMENT CO., INC., SHAMROCK PLUMBING, LLC, AND JOHN DOES 1-5,<br><br>Defendants. | **CORRECTED JUDGMENT**<br><br>Civil No.: 050500453<br><br>Judge Bruce C. Lubeck |

| | |
|---|---|
| SHAMROCK PLUMBING, LLC,<br><br>Cross-Claim Plaintiff,<br><br>vs.<br><br>SILVER BARON PARTNERS, L.C., DAEDALUS USA, INC., FRED W. FAIRCLOUGH, JR., and CHRISTINE FAIRCLOUGH,<br><br>Cross-Claim Defendants | |

This Judgment corrects a typographical error in the Judgment entered on March 5, 2009.

This matter came before the Court, without hearing, the Honorable Bruce C. Lubeck presiding, upon the Motion of Shamrock Plumbing, LLC for default judgment. The Court, having reviewed the pleadings and file in this matter, and good cause appearing therefore, now orders and adjudges:

**JUDGMENT**

That Shamrock Plumbing, LLC recover of Cross-Claim defendants Daedalus USA, Inc. and Silver Baron Partners, L.C., the sum of FOUR HUNDRED EIGHTEEN THOUSAND NINETY-FIVE DOLLARS AND SEVENTY-ONE CENTS ($418,095.71), with interest thereon at the rate of 2.40% as provided by law.

Dated this 18 day of March 2009.

BY THE COURT:

/s/

## CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of March, 2009, I mailed a true and correct copy of the foregoing, **CORRECTED JUDGMENT,** via first-class mail, postage prepaid, to the following:

Silver Baron Partners, L.C.
2900 Deer Valley Drive
P.O. Box 1937
Park City, UT 84060

Daedalus USA, Inc.
2900 Deer Valley Drive
P.O. Box 1937
Park City, UT 84060

M Kowalczyk