

2000

Wells Fargo Bank, N.A., v. Michael J. Kearns : Reply Brief

Utah Court of Appeals

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Mark A. Larsen; Joleen S. Mantas; Larsen and Mooney; Attorney for Appellant.

Mark S. Swan; Richer, Swan and Overholt; Attorneys for Appellee.

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IN THE UTAH COURT OF APPEALS

WELLS FARGO BANK, N.A.,

Plaintiff and Appellee,

v.

MICHAEL J. KEARNS,

Defendant and Appellant.

Appellate Court No. 20000271

Civil No. 990908206

Priority No. 10

REPLY BRIEF OF APPELLANT MICHAEL J. KEARNS

On Appeal from the Judgment of
the Third Judicial District Court
for Salt Lake County, State of Utah
Honorable Sandra N. Peuler, District Judge

Mark A. Larsen
Joleen S. Mantas
Larsen & Mooney Law
Attorneys for Appellant
Michael J. Kearns
50 West Broadway, Suite 100
Salt Lake City, Utah 84101

Mark S. Swan
Richer, Swan & Overholt
Attorneys for Appellee
Wells Fargo Bank, N.A.
6925 Union Park Ave., Suite 450
Salt Lake City, Utah 84047

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Mark A. Larsen
Joleen S. Mantas
Larsen & Mooney Law
Attorneys for Appellant
Michael J. Kearns
50 West Broadway, Suite 100
Salt Lake City, Utah 84101

Mark S. Swan
Richer, Swan & Overholt
Attorneys for Appellee
Wells Fargo Bank, N.A.
6925 Union Park Ave., Suite 450
Salt Lake City, Utah 84047

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ARGUMENT

POINT I

MR. KEARNS' INABILITY TO ANSWER THE COMPLAINT WAS DUE TO EXCUSABLE NEGLIGENCE

Wells Fargo claims that Mr. Kearns "made a conscious decision to not answer the Complaint and knowingly accepted the consequences." Br. of Appellee p. 18. In support of this factually unsupported assertion, Wells Fargo launches into a personal attack on Mr. Kearns' integrity by questioning whether Mr. Kearns' son was in fact ill, draws attention to the trivial distinction between "several" days and three days, and imputes knowledge of the Complaint between unrelated firms on matters that are beyond the scope of representation.

Wells Fargo attacks Mr. Kearns' integrity by questioning whether Mr. Kearns' son was even ill. By affidavit, both Miriam Kearns and Mr. Kearns testified that their newborn suffered from severe allergies and complications with his digestive system (R. 95-100). Each of the ailments Mr. Kearns' son suffered was life threatening. It is not only inappropriate, but also distasteful, for Wells Fargo to question whether Mr. Kearns' son was in fact ill.

Wells Fargo even goes to the extent of misconstruing case law to suggest that "inconvenience or press of personal or business affairs does not constitute excusable neglect." Br. of Appellee at 19, fn. 1. In *Valley Leasing v. Houghton*, 661 P.2d 959 (Utah 1983), the Court stated "[n]either inconvenience or the press of personal or business affairs is not deemed as an excuse for failure to appear at trial." *Id.* at 960 (citing *Peterson v.*

Crosier, 81 P. 860 (1905)). Contrary to Wells Fargo's interpretation of the *Valley Leasing v. Houghton* decision, presenting an excuse for failure to appear at trial is not equated with demonstrating excusable neglect for purposes of setting aside a default judgment.

Additionally, Wells Fargo questions Mr. Kearns' integrity on the basis of the distinction between "several" days and three days. Paragraph 4 of Mr. Kearns' Affidavit provides: "Once Mrs. Kearns alerted me to the Complaint, I failed to file an answer or bring it to my attorney's attention due to my own preoccupation with my son's condition." (R. 96) Wells Fargo alleges that this statement is false given Mr. Kearns' Affidavit submitted in conjunction with his Trust dispute, dated August 26, 1999. This distinction is trivial, at best and does not amount to an inaccurate statement. Several is commonly understood to consist of an indefinitely small number that is more than two but less than many. Given the widely used and accepted meaning of the word "several," Mr. Kearns correctly articulated the facts in paragraph 4 of his Affidavit.

Similarly, Wells Fargo alleges that Mr. Kearns' statement that he failed to bring the Complaint to his attorney's attention is false. Wells Fargo misconstrues the fact that Mr. Kearns informed the attorneys at Kirton & McConkie, who represented Mr. Kearns in the Thomas Kearns Trust Action, and equates that with informing his attorneys at Larsen & Mooney Law, the only firm he retained to represent him in matters stemming from the entry of the Default Judgment. In the Thomas Kearns Trust Action only, Mr. Kearns was represented by Eric C. Olson ("Mr. Olson") and Matthew K. Richards ("Mr. Richards") of Kirton & McConkie. That firm has never been retained in nor asked to represent Mr. Kearns in this matter. In the present litigation, Jerome H. Mooney ("Mr. Mooney") and

Mark A. Larsen ("Mr. Larsen") of Larsen & Mooney Law represent Mr. Kearns. Neither Mr. Mooney nor Mr. Larsen communicated with Mr. Olson or Mr. Richards regarding this Complaint, and neither firm is imputed with knowledge that is beyond the scope of their representation.

In short, rather than address the substantive issue of whether Mr. Kearns demonstrated excusable neglect, Wells Fargo chose to launch an unfounded personal attack on Mr. Kearns' integrity.

POINT II

MR. KEARNS' MOTION TO SET ASIDE THE DEFAULT JUDGMENT WAS TIMELY PURSUANT TO RULE 58A OF THE UTAH RULES OF CIVIL PROCEDURE

Wells Fargo's argument that Mr. Kearns' Motion to Set Aside Default Judgment is untimely is without merit and is unsupported by the record below. Rule 58A(c) of the Utah Rules of Civil Procedure provides, in relevant part:

When judgment entered; notation in register of actions and judgment docket. A judgment is complete and shall be deemed entered for all purposes . . . when the same is **signed and filed** as herein above provided. The clerk shall immediately make a notation of the Judgment in the register of actions and the judgment docket.

(Emphasis added) U.R.C.P. 58A(c)(1999). Under Rule 58A(c) "a judgment is complete and deemed entered for all purposes when the same is signed and filed."

In re Bundy's Estate v. Bundy, 241 P.2d 462, 467 (Utah 1952).

The court docket in this case reflects that even though Judge Peuler signed the Default Judgment on September 23, 1999, it was not filed by Judge Peuler's clerk nor entered into the registry of judgments until September 27, 1999.

Considering that the Default Judgment was not deemed "entered" pursuant to Rule 58A of the Utah Rules of Civil Procedure until September 27, 1999, Mr. Kearns had until December 27, 1999, to file a motion to set aside the entry of default. Mr. Kearns' Motion to Set Aside Default Judgment was filed on December 27, 1999, and, therefore, within the three-month time period required under U.R.C.P. Rule 60(b).¹

Wells Fargo's argument that the language of Rule 58A suggests that "once the Judge signs the Judgment and gives it to the court clerk (i.e., files it) that it is a final judgment regardless of when it is entered in the register of actions and the judgment docket" is not supported by any case law and contrary to U.R.C.P. 58A(c).

In addition to the fact that Wells Fargo's timeliness issue lacks merit and is not supported by the record, Wells Fargo incorrectly suggests that the timeliness issue

¹ Section 30-3-7 of the Utah Code lends further support for Mr. Kearns position. Utah Code Anno. § 30-3-7(1)(a)(1994) provides, in pertinent part, that a decree of divorce becomes absolute: "[O]n the date it is signed by the court and entered by the clerk in the register of actions. . . ."

was not a basis of the trial court's ruling. (Br. of Appellee p. 14) The timeliness issue was specifically addressed in Mr. Kearns' Objection to Wells Fargo's Proposed Orders (R. 209-222) and in Wells Fargo Bank, N.A.'s Response to Mr. Kearns' Objection to Wells Fargo Bank's Proposed Orders (R. 223-231).²

Wells Fargo submitted two proposed orders and Mr. Kearns objected to the proposed orders because: (1) Wells Fargo's proposed order including an award of attorneys' fees was not in conformity with the trial court's ruling because Wells Fargo was not awarded any attorney's fees; (2) Wells Fargo's proposed Order containing attorneys' fees were clearly in excess of a reasonable fee; (3) Pursuant to U.R.C.P. 58A, Mr. Kearns' Motion to Set Aside Default Judgment was timely considering the Default Judgment was signed by Judge Peuler on September 23, 1999, but it was neither filed by Judge Peuler's clerk nor entered into the Registry of Judgments until September 27, 1999.

After considering the arguments advanced by the parties, Judge Peuler agreed with Mr. Kearns' position as evidenced by the fact she signed the Order Denying Defendant's Motion to Set Aside Default Judgment which did not include

² Wells Fargo's Proposed Orders are attached as Addendum No. 1, Mr. Kearns' Objection to Wells Fargo Bank's Proposed Orders is attached as Addendum No. 2, and Wells Fargo Bank, N.A.'s Response to Michael J. Kearns' Objection to Wells Fargo Bank's proposed Orders is attached as Addendum No. 3.

an award of attorneys' fees, combined with the interlineated changes she made on the Order Denying Defendant's Motion to Set Aside Default Judgment (R. 242). Paragraph 1 of the signed Order Denying Defendant's Motion to Set Aside Default Judgment provides:

On December 27, 1999, Defendant filed a Motion to Set Aside Default Judgment which Judgment was signed by this Court **September 23, 1999, and filed on September 27, 1999.** Defendant's Motion was accompanied by a supporting Memorandum of Defendant Michael Kearns.

(Emphasis added to designate Judge Peuler's interlineations)³

Accordingly, Wells Fargo's statement that the timeliness issue was not a basis of the Trial Court's decision is clearly erroneous and designed to mislead this Court.

POINT III

WELLS FARGO MISCONSTRUED THE APPLICABLE STANDARD OF REVIEW FOR DETERMINING WHETHER A DEFENSE IS MERITORIOUS

Wells Fargo mischaracterized this Court's decision in *Black's Title, Inc. v. Utah State Ins. Dep't*, 991 P.2d 607 (Utah Ct. App. 1999), to suggest that the applicable standard of review in determining whether a defense is meritorious is really an abuse of discretion. Wells Fargo misconstrued this Court's decision in *Black's Title* and suggested that "this particular correctness standard has been applied so the Trial

³ A copy of the Order Denying Defendant's Motion to Set Aside Default Judgment is attached as Addendum No. 4

Court's decision will not be interfered with unless there is a clear showing of an abuse of its considerable discretion." Br. of Appellee at 3.

Contrary to the present appeal, the parties in *Black's Title* did not dispute "that Black made a timely motion and asserted a meritorious defense." *Black's Title, Inc. v. Utah State Ins. Dep't*, 991 P.2d at 610. The sole purpose of the review in *Black's Title* was to determine whether the "Commissioner erred in concluding that Black's default did not occur for reasons described in Rule 60(b)." *Id.* Given that the only issue involved on appeal was whether Black's default was due to excusable neglect, the appellate court was reviewing a question of fact and accordingly the applicable standard of review was abuse of discretion.

If the sole issue in the present appeal was whether Mr. Kearns demonstrated excusable neglect, or defaulted for one of the other reasons described in Rule 60(b), then the applicable standard of review would be abuse of discretion. However, given that the parties in the subject appeal dispute whether Mr. Kearns' Rule 60(b) motion was timely, demonstrated excusable neglect, and that he had a meritorious defense, the standard of review articulated by this Court in *Black's Title, Inc. v. Utah State Ins. Dep't* does not provide any guidance for the standard of review when determining the specific issue of whether a defense is meritorious, which presents a question of

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If the sole issue in the present appeal was whether Mr. Kearns demonstrated excusable neglect, or defaulted for one of the other reasons described in Rule 60(b), then the applicable standard of review would be abuse of discretion. However, given that the parties in the subject appeal dispute whether Mr. Kearns' Rule 60(b) motion was timely, demonstrated excusable neglect, and that he had a meritorious defense, the standard of review articulated by this Court in *Black's Title, Inc. v. Utah State Ins. Dep't* does not provide any guidance for the standard of review when determining

the specific issue of whether a defense is meritorious, which presents a question of law.⁴

Wells Fargo's statement of the applicable standard of review for determining whether a defense is meritorious is inherently incompatible and contrary to the Utah Supreme Court's designation of this issue as a question of law. In *State v. Pena*, 869 P.2d 932 (Utah 1994), the Utah Supreme Court clarified the distinction between the standard of review for issues of fact and questions of law:

When it comes to reviewing trial court determinations of law, however, the standard of review is not phrased as "clearly erroneous." Rather, appellate review of a trial court's determination of the law is usually characterized by the term "correctness." Controlling Utah case law teaches that "correctness" means that the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law. *State v. Deli*, 861 P.2d 431, 433 (Utah 1993); see *Kennecott Corp. v. State Tax Comm'n*, 858 P.2d 1384, 1383 (Utah 1993). This is because appellate courts have traditionally been seen as having the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction. Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 779 (1957); see *State v. Thurman*, 846 P.2d 1256, 1266 (Utah 1993). In other words, one can visualize the traditional standard-of-review scheme as a continuum of deference anchored at

⁴ *Katz v. Pierce*, 732 P.2d 92 (Utah 1986), does not lend any support for Wells Fargo's interpretation of the applicable standard of review. The *Katz* decision preceded the Utah Supreme Court's decision in *Erickson* by eight years. For obvious reasons, the precedent set forth in *Erickson* provides controlling authority and dictates that the applicable standard of review for deciphering whether a defense is meritorious is a question of law, which the appellate court reviews for correctness.

either end by the clearly erroneous and correction-of-error standards, which correspond with whether the issue is characterized as one of fact or of law.

State v. Pena, 869 P.2d at 936.

In *Erickson v. Schenkers Int'l Forwarders, Inc.*, 882 P.2d 1147 (Utah 1994), the Utah Supreme Court clearly articulated the applicable standard of review for determining whether a defense is meritorious. "[T]he proper legal standard to be used by trial courts in determining whether a defense is meritorious **is a question of law, which we review for correctness.**" *Id.* at 1148 (Emphasis added)(citing *State v. Pena*, 869 P.2d 932, 936 (Utah 1994))("Appellate courts have traditionally been seen as having the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction)).

In summary, whether a defense is meritorious is a question of law, which the appellate court reviews for correctness. Wells Fargo's contention that the applicable standard of review is abuse of discretion is unsupported by Utah case law and inherently incompatible. Mr. Kearns's meritorious defense is described in detail in the Brief of Appellant of Michael J. Kearns at 14-15.

POINT IV

PURSUANT TO RULE 24(a)(7) OF THE UTAH RULES OF APPELLATE PROCEDURE, MR. KEARNS SET FORTH A STATEMENT OF FACTS WITHIN HIS DESCRIPTION OF THE COURSE OF PROCEEDINGS

Contrary to Wells Fargo's accusation that Mr. Kearns failed to set forth a statement of facts as required by U.R.C.P Rule 27(a)(7), which obviously is an incorrect reference, Mr. Kearns' Brief included a statement of facts, contained in his description of the course of proceedings, which referenced the proceedings below and were supported with citations to the record. U.R.A.P. Rule 24(a) addresses the form and content for appellant's brief. Rule 24(a)(7) provides:

A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

U.R.A.P. 24(a)(7).

Mr. Kearns concedes that his Brief did not include a separately designated statement of the facts, but it did include a recitation of the relevant facts in his description of the course of proceedings. Mr. Kearns's facts correctly referenced the proceedings below and were supported with citations to the record.

In addition to falsely accusing Mr. Kearns of omitting a statement of facts, paragraph 14 of Wells Fargo's recitation of the facts is not supported by the record. The Default Judgment was signed by Judge Sandra Peuler on September 23, 1999, but was not filed by the clerk nor entered into the Registry of Judgments until September 27, 1999. (R. 242) The trial court docket further supports Mr. Kearns' position that the Judgment was not filed by the clerk, nor entered into the Registry of Judgments until September 27, 1999.⁵

In short, Wells Fargo falsely accused Mr. Kearns of failing to set forth a statement of facts and paragraph 14 of Wells Fargo's recitation of the facts is not supported by the record.

POINT V

MR. KEARNS' APPEAL IS WORTHY OF CONSIDERATION AND SHOULD NOT BE SUBJECT TO THE CHILLING EFFECT OF RULE 33(a) SANCTIONS

Contrary to Wells Fargo's claim, Mr. Kearns' appeal is grounded in fact, warranted by existing law, and was not submitted for purposes of delay. In other words, Mr. Kearns' appeal is worthy of consideration and should not be subject to Rule 33(a) sanctions. Rule 33(a) of the Utah Rules of Appellate Procedure provides, in pertinent part:

⁵ A copy of the court docket is attached as Addendum No. 5.

[I]f the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

U.R.A.P. 33(a)(1999). Subsection (b) defines the critical terms of frivolous and for delay as follows:

For purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

U.R.A.P. 33(b)(1999).

Sanctions for frivolous appeals should only be imposed in egregious cases, to avoid chilling the right to appeal erroneous lower court decisions. However, Rule 33(a) sanctions should be imposed when an appeal is obviously without any merit and has been taken with no reasonable likelihood of prevailing. *Porco v. Porco*, 752 P.2d 365 (Utah Ct. App. 1988); *Maughan v. Maughan*, 770 P.2d 156 (Utah Ct. App.

1989); see also *Brigham City v. Mantua Town*, 754 P.2d 1230 (Utah Ct. App. 1988).

Mr. Kearns' appeal should be granted. It is not an egregious case that warrants Rule 33(a) sanctions. Mr. Kearns' appeal is meritorious, factually based, and warranted by existing law. Moreover, Mr. Kearns' appeal was not filed for purposes of delay. Mr. Kearns has clearly demonstrated a proper motivation for filing this appeal; Mr. Kearns has counterclaims against Wells Fargo stemming from this dispute which may be precluded under the doctrines of res judicata or collateral estoppel if the default judgment is not set aside.⁶

Wells Fargo's request for Rule 33(a) sanctions is yet another example of its repeated attempt to improperly collect costs and attorneys' fees from Mr. Kearns. Illustrative of this point is the fact that Wells Fargo improperly submitted an Order to the Trial Court including an award of attorneys' fees despite the fact that Judge Peuler's Court's Minute Entry did not award any attorneys' fees (R. 238-40).

⁶ Several policy arguments favor the view that default judgments should not be given collateral estoppel/res judicata effect: (1) to do so misconceives the nature of default judgment, which "only admits for the purpose of the action the legality of the demand or claim in suit: and "does no make the allegations of the . . . complaint evidence in an action upon a different claim." *Cromwell v. County of Sac*, 94 U.S. 351, 356 (1877); (2) the defendant should not be compelled to defend a suit which he otherwise would choose not to defend because of fear of its effect on future litigation; and (3) application of collateral estoppel in a default situation is unjust if it cannot be said that the parties could have reasonably foreseen the conclusive effect of their actions. These policy concerns are applicable to the present case.

Wells Fargo's improper tactics should not be condoned. Accordingly, this Court should find that Mr. Kearns' appeal is worthy of consideration and should not be subject to Rule 33(a) sanctions.

CONCLUSION

The trial court's denial of Mr. Kearns' Motion to Set Aside Default Judgment should be reversed and remanded, with instructions to set aside the default judgment and allow Mr. Kearns an opportunity to file an Answer or other appropriate response.

Dated: August 9, 2000.

LARSEN & MOONEY LAW

A handwritten signature in black ink, appearing to read "Joleen S. Mantas", is written over a horizontal line.

Mark A. Larsen
Joleen S. Mantas
Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

I certify that on August 10, 2000, two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT MICHAEL J. KEARNS** were mailed, postage prepaid, to the following:

Mark S. Swan
RICHER, SWAN & OVERHOLT, P.C.
6925 South Union Park Center, Suite 450
Midvale, Utah 84047



Tab 1

Mark S. Swan - 3873
Shane W. Norris - 8097
RICHER, SWAN & OVERHOLT, P.C.
6925 South Union Park Center, Suite 450
Midvale, Utah 84047
Telephone: (801) 561-4750

Attorneys for Plaintiff
Wells Fargo Bank, N.A.

IN THE THIRD DISTRICT COURT OF THE STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

WELLS FARGO BANK, N.A.

Plaintiff,

v.

MICHAEL J. KEARNS,

Defendant.

**ORDER DENYING DEFENDANT'S
MOTION TO SET ASIDE DEFAULT
JUDGMENT**

Civil No. 990908206

Judge Sandra Peuler

Defendant's Motion to Set Aside Default Judgment came before this Court as a result of the parties' Notice to Submit. Plaintiff filed a principal Memorandum and Affidavit, Defendant filed a Responsive Memorandum and Plaintiff filed a Reply Memorandum. Though oral argument was requested, the Court finds that oral argument would not substantially assist the Court in making a ruling on Defendant's Motion. Therefore, the Court having fully reviewed Defendant's Motion and the resulting pleadings, along with the Court record in this matter, the Court hereby enters the following ruling:

1. On December 27, 1999, Defendant filed a Motion to Set Aside the Default Judgment, which Judgment was signed by this Court December 23, 1999. Defendant's Motion was accompanied by a supporting Memorandum of Defendant Michael Kearns.

2. Defendant asserted that his failure to respond to Plaintiff's Complaint in a timely fashion was due to excusable neglect as that term is set forth in Rule 60(b), Utah Rules of Civil Procedure.

3. Defendant has failed to show excusable neglect.

4. Defendant has further failed to show that he has a meritorious defense to the matters raised in Plaintiff's Complaint. Particularly, the Defendant's claim that the matter should have been arbitrated is not persuasive as the arbitration provision under the Note sued upon by Plaintiff required a formal election of arbitration to be made by Defendant before the Court in the civil action, which did not occur in this case.

5. Defendant's Motion to Set Aside the Default Judgment is Denied.

6. Defendant's Motion having been brought without merit and contrary to the facts known to Defendant, and therefore being in bad faith, entitles Plaintiff to its attorney's fees in the sum of \$5,404.00, which are hereby awarded to Plaintiff as an additional Judgment against Defendant.

DATED this ____ day of February, 2000.


BY THE COURT:

HONORABLE SANDRA N. PEULER
Third Judicial District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 10 day of February, 2000, I caused a true and unsigned correct copy of the foregoing to be served upon the following by placing the same in the United States mail, postage prepaid and addressed as follows:

Mark A. Larsen
Jerome H. Mooney III
LARSEN & MOONEY LAW
50 West Broadway, Suite 100
Salt Lake City, Utah 84101



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Mark A. Larsen
Jerome H. Mooney III
LARSEN & MOONEY LAW
50 West Broadway, Suite 100
Salt Lake City, Utah 84101

Mark S. Swan
RICHER, SWAN & OVERHOLT, P.C.
6925 South Union Park Center, Suite 450
Midvale, Utah 84047-4139

Mark S. Swan - 3873
Shane W. Norris - 8097
RICHER, SWAN & OVERHOLT, P.C.
6925 South Union Park Center, Suite 450
Midvale, Utah 84047
Telephone: (801) 561-4750

Attorneys for Plaintiff
Wells Fargo Bank, N.A.

IN THE THIRD DISTRICT COURT OF THE STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

WELLS FARGO BANK, N.A.

Plaintiff,

v.

MICHAEL J. KEARNS,

Defendant.

**ORDER DENYING DEFENDANT'S
MOTION TO SET ASIDE DEFAULT
JUDGMENT**

Civil No. 990908206

Judge Sandra Peuler

Defendant's Motion to Set Aside Default Judgment came before this Court as a result of the parties' Notice to Submit. Plaintiff filed a principal Memorandum and Affidavit, Defendant filed a Responsive Memorandum and Plaintiff filed a Reply Memorandum. Though oral argument was requested, the Court finds that oral argument would not substantially assist the Court in making a ruling on Defendant's Motion. Therefore, the Court having fully reviewed Defendant's Motion and the resulting pleadings, along with the Court record in this matter, the Court hereby enters the following ruling:

1. On December 27, 1999, Defendant filed a Motion to Set Aside the Default Judgment, which Judgment was signed by this Court December 23, 1999. Defendant's Motion was accompanied by a supporting Memorandum of Defendant Michael Kearns.

2. Defendant asserted that his failure to respond to Plaintiff's Complaint in a timely fashion was due to excusable neglect as that term is set forth in Rule 60(b), Utah Rules of Civil Procedure.

3. Defendant has failed to show excusable neglect.

4. Defendant has further failed to show that he has a meritorious defense to the matters raised in Plaintiff's Complaint.

5. Defendant's Motion to Set Aside the Default Judgment is Denied.

DATED this ____ day of February, 2000.

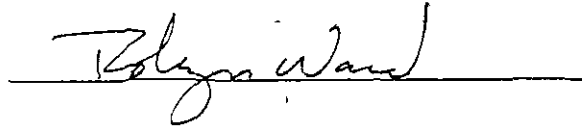
BY THE COURT:

HONORABLE SANDRA N. PEULER
Third Judicial District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 23 day of February, 2000, I caused a true and unsigned correct copy of the foregoing to be served upon the following by placing the same in the United States mail, postage prepaid and addressed as follows:

Mark A. Larsen
Jerome H. Mooney III
LARSEN & MOONEY LAW
50 West Broadway, Suite 100
Salt Lake City, Utah 84101



CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of February, 2000, I caused a true and signed correct copy of the foregoing to be served upon the following by placing the same in the United States mail, postage prepaid and addressed as follows:

Mark A. Larsen
Jerome H. Mooney III
LARSEN & MOONEY LAW
50 West Broadway, Suite 100
Salt Lake City, Utah 84101

Mark S. Swan
RICHER, SWAN & OVERHOLT, P.C.
6925 South Union Park Center, Suite 450
Midvale, Utah 84047-4139

Tab 2

MARK A. LARSEN (3727)
JEROME H. MOONEY III (2303)
LARSEN & MOONEY LAW
50 West Broadway, Suite 100
Salt Lake City, UT 84101
Telephone: (801) 364-6500

Attorneys for Defendant

COPY

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

WELLS FARGO BANK, N.A.,

Plaintiff,

v.

MICHAEL J. KEARNS,

Defendant.

MR. KEARNS' OBJECTION TO
WELLS FARGO BANK's PROPOSED
ORDERS

(Oral Argument Requested)

Civil No. 990908206

Judge Sandra Peuler

Pursuant to Rule 4-504(2) of the Utah Rules of Judicial Administration, Defendant Michael J. Kearns ("Mr. Kearns") submits the following Objection to Wells Fargo Bank's Proposed Orders:

INTRODUCTION

On February 10, 2000, Plaintiff Wells Fargo Bank, N.A. ("Wells Fargo") submitted a proposed Order Denying Defendant's Motion to Set Aside Default Judgment, and simultaneously submitted an alternative proposed order which included an award of

attorneys' fees despite the fact that this Court's Minute Entry did not award attorneys' fees. A copy of the Court's Minute Entry, dated January 31, 2000, is attached as Exhibit A.

Not only is it improper for Wells Fargo to submit an Order including attorneys' fees, considering that it is not in conformity with this Court's ruling, the amount requested is clearly in excess of a reasonable fee.

Additionally, Mr. Kearns objects to paragraph 1 because the Default Judgment was signed by this Court on September 23, 1999, not December 23, 1999, as stated in paragraph 1 of the proposed Orders. Further, paragraph 1 should reflect, in accordance with the court docket in this case, that the Default Judgment was not **filed** until September 27, 1999. A copy of the relevant portion of the court docket in the present case is attached as Exhibit B.

Moreover, Mr. Kearns objects to paragraph 4 on the basis that Mr. Kearns was not required to formally elect binding arbitration of this dispute. Rather, the Binding Arbitration provision expressly provided that all disputes were required to be resolved by binding arbitration rather than in court. Further, Mr. Kearns objects to paragraph 4 because he does in fact have a meritorious defense predicated upon lender liability, which if successful, would have resulted in a judgment different from the one entered against him.

Accordingly, Mr. Kearns objects to the proposed Orders Denying Defendant's Motion to Set Aside Default Judgment.

ARGUMENT

POINT I

WELLS FARGO's PROPOSED ORDER INCLUDING AN AWARD OF ATTORNEY'S FEES IS NOT IN CONFORMITY WITH THIS COURT's RULING BECAUSE WELLS FARGO WAS NOT AWARDED ANY ATTORNEY'S FEES

Rule 4-504(2) of the Utah Code of Judicial Administration provides, in pertinent part:

"In all rulings by a court, counsel for the party
... obtaining the ruling shall ... file with the court
a proposed order ... *in conformity with the
ruling.*"

(Emphasis added).

Wells Fargo's proposed Order including attorney's fees is not in conformity with this Court's ruling. This Court ruled, in its Minute Entry, dated January 31, 2000, "[t]he defendant's Motion is denied for the reasons and upon the bases as set forth in plaintiff's Memorandum." The ruling did not award Wells Fargo its attorneys' fees and is silent as to Plaintiff's procedurally improper request for sanctions pursuant to Rule 11 of the Utah Rules of Civil Procedure.

Wells Fargo's request for Rule 11 sanctions against Mr. Kearns was without merit and procedurally improper under the Utah Rules of Civil Procedure. Rule 11(1)(A) of the Utah Rules of Civil Procedure provides, in relevant part:

A motion for sanctions under this rule shall be
made separately from other motions or
requests **and shall describe the specific
conduct alleged to violate subdivision (b).** It
shall be served as provided in Rule 5, but **shall
not be filed with or presented to the court**

unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

(Emphasis added) U.R.C.P. 11(1)(A)(1999).

Wells Fargo improperly combined its Memorandum in Opposition to Mr. Kearns' Motion to Set Aside Default Judgment with its Request for Attorneys' Fees. Additionally, Wells Fargo immediately filed the motion with this Court rather than waiting the mandatory 21-day time period. Given these significant deficiencies, combined with the fact that the Court's ruling does not include an award of attorneys' fees, it is absurd for Wells Fargo to submit the proposed Order including attorneys' fees.

Wells Fargo's proposed Order, containing an award of attorneys' fees, is yet another example of its repeated tactics to harass Mr. Kearns. This Court should not condone this harassment and should sustain Mr. Kearns' objections to the proposed Order containing an award of attorneys' fees.

POINT II

**IN ADDITION TO FAILING TO CONFORM
WITH THIS COURT'S RULING, WELLS
FARGO'S PROPOSED ORDER CONTAINING
ATTORNEYS' FEES IS CLEARLY IN EXCESS
OF A REASONABLE FEE**

Wells Fargo's proposed Order, containing attorneys' fees, requests attorneys' fees and costs in the sum of \$5,404.00. This amount is clearly excessive. Rule 1.5 of the

Rules of Professional Conduct requires attorneys to charge reasonable fees for the services rendered. Rule 1.5(a) provides, in pertinent part:

A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of the fee include the following:

- (1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly

R. of Prof'l Conduct 1.5(a).

Wells Fargo's attorney expended a total of 39.80 hours to prepare a memorandum in opposition to Defendant's Motion to Set Aside the Default Judgment. This is not a reasonable amount of time for such legal services. A lawyer of ordinary prudence would conclude that the time Wells Fargo's counsel spent on preparing this memorandum was not reasonable. Additionally, a lawyer of ordinary prudence would conclude that \$31.00 for certified copies was both unreasonable and unnecessary.

POINT III

WELLS FARGO's PROPOSED ORDERS CONTAINS FACTUALLY INCORRECT STATEMENTS TO WHICH MR. KEARNS OBJECTS

A. Mr. Kearns Specifically Objects to the Factually Incorrect Statements in Paragraph 1 of Wells Fargo's Proposed Orders

Mr. Kearns objects to paragraph 1 because the Default Judgment was signed by this Court on September 23, 1999, not December 23, 1999, as stated in paragraph 1 of the proposed Orders.

Further, paragraph 1 should reflect, in accordance with the court docket in this case, that the Default Judgment was not **filed** until September 27, 1999. Rule 58A(c) of the Utah Rules of Civil Procedure provides, in relevant part:

*When judgment entered; notation in register of actions and judgment docket. A judgment is complete and shall be deemed entered for all purposes . . . when the same is **signed and filed** as herein above provided. The clerk shall immediately make a notation of the Judgment in the register of actions and the judgment docket.*

(Emphasis added) U.R.C.P. 58A(c)(1999). Under Rule 58A(c) "a judgment is complete and deemed entered for all purposes when the same is signed and filed." *In re Bundy's Estate v. Bundy*, 241 P.2d 462, 467 (Utah 1952).

The court docket in this case reflects that even though Judge Peuler signed the Default Judgment on September 23, 1999, it was not filed by Judge Peuler's clerk nor entered into the registry of judgments until September 27, 1999.

Considering that the Default Judgment was not deemed "entered" pursuant to Rule 58A of the Utah Rules of Civil Procedure until September 27, 1999, Mr. Kearns had until December 27, 1999, to file a motion to set aside the entry of default. Mr. Kearns' Motion to Set Aside Default Judgment was filed on December 27, 1999, and, therefore, within the three month time period required under Rule 60(b) of the Utah Rules of Civil Procedure.

B. Mr. Kearns Specifically Objects to the Factually Incorrect Statements in Paragraph 4 of Wells Fargo's Proposed Orders

First, Mr. Kearns objects to paragraph 4 of Wells Fargo's proposed Orders on the basis that the *Binding Arbitration* provision contained in the *Loan Agreement* did not require Mr. Kearns to formally elect binding arbitration. Instead, the *Binding Arbitration* provision expressly provided that the only form of dispute resolution these parties agreed to was binding arbitration. The *Loan Agreement* contains the following binding arbitration provision:

(1) Binding Arbitration. You agree that any Dispute not resolved informally, regardless of when it arose, will be settled in accordance with the terms of the Arbitration Program at the election of any party. A "Dispute" shall include any dispute, claim or controversy of any kind involving you or us, whether in contract or in tort, legal or equitable, now existing or hereafter arising, relating in any way to this Agreement or any related agreements (the "Documents"), or any past, present or future loans, services, agreements, relationships, incidents or injuries of any kind whatsoever relating to or involving the Private Banking Group or any successor group or department of Lender. Any party to a Dispute may by summary proceeding bring any action in court to compel arbitration of any Dispute. Any party who fails to submit to binding arbitration following a lawful demand by the opposing party shall bear all costs and expenses incurred by the opposing party in compelling arbitration of any Dispute. The parties agree that by engaging in activities with or involving each other

as described above, they are participating in transactions involving interstate commerce. **THE PARTIES UNDERSTAND THAT THEIR DISPUTES SHALL BE RESOLVED BY BINDING ARBITRATION RATHER THAN IN COURT, AND ONCE DECIDED BY ARBITRATION NO DISPUTE CAN LATER BE BROUGHT, FILED OR PURSUED IN COURT BEFORE A JUDGE OR JURY.**

Secondly, Mr. Kearns objects to paragraph 4 because he does in fact have a meritorious defense predicated upon lender liability which, if successful, would have resulted in a judgment different than the one entered against him. The lead opinion in *Musselman* held, "A meritorious defense is one which sets forth specific and sufficiently detailed facts which, if proven, would have resulted in a judgment different from the one entered." *State ex rel. Dep't of Soc. Serv. v. Musselman*, 667 P.2d 1053 (Utah 1983)(plurality opinion)(quoting *Lopez v. Reserve Ins. Co.*, 525 P.2d 1204, 1206 (Colo. Ct. App. 1974).

Although Mr. Kearns has never refuted that he owed Wells Fargo \$250,000.00, plus interest, he does dispute the Wells Fargo's choice of venue as well as the attorneys' fees and court costs. Further, the amount of money Mr. Kearns owed to Wells Fargo may be offset in whole or in part, or may even be exceeded, by Mr. Kearns's lender liability claims against Wells Fargo.

CONCLUSION

Mr. Kearns objects to Wells Fargo's proposed Orders for the following reasons:

- ▶ Wells Fargo's proposed Order including attorneys' fees is not in conformity with this Court's ruling;

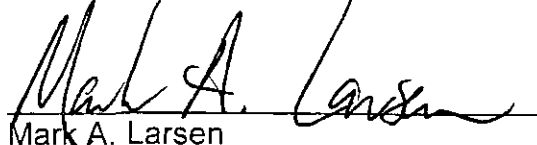
- ▶ Wells Fargo's proposed Order containing attorneys' fees is clearly in excess of a reasonable fee;
- ▶ Mr. Kearns objects to paragraph 1 because the Default Judgment was signed by this Court on September 23, 1999, not December 23, 1999, as stated in paragraph 1 of the proposed Orders;
- ▶ Paragraph 1 should reflect, in accordance with the court docket in this case, that the Default Judgment was not filed until September 27, 1999;
- ▶ Mr. Kearns objects to paragraph 4 of Wells Fargo's proposed Orders on the basis that the Binding Arbitration provision contained in the Loan Agreement did not require Mr. Kearns to formally elect binding arbitration; and
- ▶ Mr. Kearns further objects to paragraph 4 because he does in fact have a meritorious defense predicated upon lender liability, which, if successful, would have resulted in a judgment different than the one entered against him.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 4-501(3)(b) of the Utah Code of Judicial Administration, Mr. Kearns requests oral argument on his Objection to Wells Fargo Bank's Proposed Orders.

Dated: February 17, 2000.

LARSEN & MOONEY LAW

A handwritten signature in black ink, appearing to read "Mark A. Larsen", is written over a horizontal line.

Mark A. Larsen

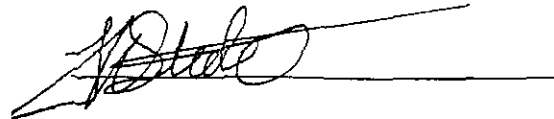
Jerome H. Mooney

Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify that on February 17, 2000, a true and correct copy of **MR. KEARNS'**
OBJECTION TO WELLS FARGO BANK's PROPOSED ORDERS was mailed, postage
prepaid, to the following:

Mark S. Swan
RICHER, SWAN & OVERHOLT, P.C.
6925 South Union Park Center, Suite 450
Midvale, Utah 84047

A handwritten signature in black ink, appearing to read "Mark S. Swan", is written over a horizontal line.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WELLS FARGO BANK, N.A.,	:	MINUTE ENTRY
Plaintiff,	:	CASE NO. 990908206
vs.	:	
MICHAEL J. KEARNS,	:	
Defendant.	:	

Before the Court is a Notice to Submit for Decision on defendant's Motion to Set Aside Default Judgment. The Court having reviewed the pleadings filed in this matter, now enters the following ruling.

The defendant's Motion is denied for the reasons and upon the bases as set forth in plaintiff's Memorandum. Although oral argument was requested, the Court has reviewed all of the pleadings filed in connection with this lawsuit and oral argument would not substantially assist the Court in rendering its ruling.

Counsel for plaintiff is directed to prepare an Order consistent with this ruling.

Dated this 31 day of January, 2000.



SANDRA N. PEULFER
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 1 day of ^{Feb} ~~January~~, 2000:

Mark S. Swan
Shane W. Norris
Attorneys for Plaintiff
6925 S. Union Park Center, Suite 450
Midvale, Utah 84047

Mark A. Larsen
Jerome H. Mooney III
Attorneys for Defendant
50 W. Broadway, Suite 100
Salt Lake City, Utah 84101

K. G. Golepas

Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: GARNISHMENT

Amount Due: 20.00
Amount Paid: 20.00
Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: WRIT OF EXECUTION

Amount Due: 20.00
Amount Paid: 20.00
Amount Credit: 0.00
Balance: 0.00

SEE NOTE

PROCEEDINGS

-09-99 Case filed by jamess	jamess
-13-99 Judge PEULER assigned.	jamess
-13-99 Filed: Complaint 10K-MORE	jamess
-13-99 Fee Account created	jamess
-13-99 COMPLAINT 10K-MORE	jamess
<p style="text-align: right;">Total Due: 120.00 Payment Received: 120.00</p>	
Note: Code Description: COMPLAINT 10K-MORE	
-03-99 Filed return: Summons (20 day) on return	devonyag
Party Served: KEARNS, MICHAEL J	
Service Date: August 23, 1999	
-22-99 Filed: Affidavit of Attorney's Fees and Costs	devonyag
-22-99 Filed: Default Certificate	devonyag
-22-99 Default Judgment sent to Judge Peuler	devonyag
-23-99 Filed order: Default Judgment	kathyg
Judge speuler	
Signed September 23, 1999	
-23-99 Case Disposition is Jdmt default clerk	kathyg
Disposition Judge is SANDRA PEULER	
-27-99 Judgment #1 Entered	kathyg
Creditor: WELLS FARGO BANK NA	
Debtor: MICHAEL J KEARNS	
266,351.85 Principal	
5,094.18 Interest	
944.00 Attorneys Fee's	
272,390.03 Judgment Grand Total	
-27-99 Filed judgment: Default Judgment @	alicew
Judge speuler	
Signed September 23, 1999	
-30-99 Issued: Abstract of Judgment	nancyka
Clerk nancyka	



Tab 3

Mark S. Swan - 3873
Shane W. Norris - 8097
RICHER, SWAN & OVERHOLT, P.C.
6925 South Union Park Center, Suite 450
Midvale, Utah 84047
Telephone: (801) 561-4750

Attorneys for Plaintiff
Wells Fargo Bank, N.A.

IN THE THIRD DISTRICT COURT OF THE STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

WELLS FARGO BANK, N.A.

Plaintiff,

v.

MICHAEL J. KEARNS,

Defendant.

WELLS FARGO BANK, N.A.'s
RESPONSE TO MICHAEL J.
KEARNS' OBJECTION TO WELLS
FARGO BANK's PROPOSED
ORDERS

Civil No. 990908206

Judge Sandra Peuler

Plaintiff WELLS FARGO BANK, N.A. ("Wells Fargo") hereby submits the following Response to Defendant Michael J. Kearns ("Defendant") Objection to Wells Fargo Bank's Proposed Order:

INTRODUCTION

On January 31, 2000, this Court entered a Minute Entry denying Defendant's Motion to Set Aside Default Judgment. This Court indicated that the Motion to Set Aside Default Judgment was denied based upon "the reasons and upon the bases as set forth in plaintiff's Memorandum."

Defendant is attempting to again argue the merits of his Motion to Set Aside Default Judgment in his Objection to Wells Fargo's proposed Orders.

In its original memorandum relied upon by the Court, Wells Fargo set forth three separate reasons to deny Defendant's Motion to Set Aside. The first was that Defendant's failure to answer the subject complaint was not due to excusable neglect. The second reason was that Defendant did not have a meritorious defense to the subject action. The third reason was the Defendant failed to file the Motion to Set Aside Default Judgment within three months in violation of Rule 60(b), U.R.Civ.P. and even if timely filed, Defendant failed to file the motion within a reasonable time. The proposed order submitted to this Court accurately reflects the reasons and bases set forth in Plaintiff's memorandum which were adopted by this Court.

Additionally, Wells Fargo claimed in its Memorandum that Defendant's Motion to Set Aside Default Judgment was brought in bad faith and requested an award of attorney's fees and sanctions based upon Defendant filing a sworn Affidavit which was filled with inaccuracies, falsifications of facts and outright deception. The Minute Entry did not deny Wells Fargo's request for attorneys fees, but did not indicate whether attorney's fees were awarded. Therefore, Wells Fargo submitted two orders to this Court to allow for the award of attorneys fees if this Court determined sanctions were in order, and in the alternative a separate order not including attorneys. Plaintiff believes Defendant intentionally attempted to deceive and mislead this Court and an award of attorneys fees is still appropriate in this matter.

Plaintiff will address Defendant's objections to the proposed form of the Order in Defendant's order of argument.

ARGUMENT

I. WELLS FARGO IS ENTITLED TO ATTORNEYS FEES BASED UPON DEFENDANT'S ATTEMPT TO DECEIVE AND MISLEAD THIS COURT.

While the Court adopted Plaintiff's memorandum in denying Defendant's Motion, the Minute Entry does not address the attorney's fees requested as a sanction for Defendants attempt to deceive this Court through his sworn affidavit. Therefore, Wells Fargo provided this Court with two Orders, one including the award of attorneys fees and one excluding the award of attorneys fees. Defendant is now attempting to argue the merits of the award of attorneys fees after this Court has already ruled on the failed Motion to Set Aside Default Judgment, and is again attempting to mislead this Court by misrepresenting the substance of Wells Fargo's request for attorneys fees.

Defendant claims that Wells Fargo requested attorneys fees only under Rule 11, and such request was procedurally improper. In reality, Wells Fargo requested attorneys fees under §78-27-56(1) Utah Code Ann., Rule 11, U.R.Civ.P., and under this Courts' inherent power to impose monetary sanctions on a litigant for wasting judicial resources. Although Rule 11 does carry some procedural aspects with the imposition of attorneys fees, Wells Fargo did not limit its request for attorneys fees to this rule, and did not indicate in the proposed order that attorneys fees were awarded under Rule 11. In fact, Wells Fargo indicates in the proposed order that the attorneys fees were based upon Defendant's Motion having been brought without merit, and contrary to the facts known to Defendant and in bad faith. Under Utah law, this Court has authority to award attorneys fees because of Defendant's meritless action.

Not only does this Court has authority to award attorneys fees under §78-27-56(1) Utah Code Ann., and Rule 11, U.R.Civ.P., but also under this Courts' inherent powers to impose monetary

sanctions for a wasting of judicial resources. The Utah Supreme Court recently held that a judge “did not purport to act under rule 11, but rather exercised the **court’s inherent powers to impose monetary sanctions on an attorney for wasting judicial resources when he granted attorney fees. . . .**” Griffith v. Griffith, 376 Utah Adv. Rep. 23, 25 (1999) (emphasis added) (holding that Judge Dever had inherent authority to award attorneys fees outside of Rule 11 because a motion was without merit). The Utah Supreme Court held that, although Rule 11 sanctions were requested in the matter, because Judge Dever changed the order to state that the motion was without merit, this was an exercise of the court’s inherent powers to award attorneys fees for sanctions and did not fall under Rule 11. Id. Therefore, regardless of Defendant’s attempt to mislead this Court into believing that Wells Fargo’s request for attorneys fees was procedurally improper, this Court has inherent authority to award attorneys fees in light of Defendant’s egregious behavior, and should do so.

II. WELLS FARGO’S ATTORNEYS FEES INCURRED IN OPPOSING DEFENDANT’S BASELESS AND DECEPTIVE MOTION TO SET ASIDE DEFAULT JUDGMENT ARE REASONABLE.

Defendant claims in his Objection to Wells Fargo Bank’s Proposed Orders that the attorneys fees incurred by Wells Fargo in responding to Defendant’s Motion to Set Aside Default Judgment are not reasonable. Plaintiff believes they are reasonable. Although the amount of hours spent responding to Defendant’s Motion to Set Aside are higher than normal for responding to a motion of this type, Wells Fargo’s attorneys were forced to spend an excessive amount of time attempting to dispute the deceptions which were contained throughout the Motion to Set Aside and the accompanying Affidavit of Michael Kearns. Wells Fargo was forced to obtain numerous pleadings from a separate action which the current attorneys had no involvement in, and exhaustively restate

the facts and law to counter the false statements which were throughout Defendant's Motion to Set Aside. Further, Plaintiff had to present to the Court a five-month course of conduct by Defendant which was not part of the court record. These efforts were absolutely necessary to provide a true picture in showing that there was no excusable neglect and no meritorious defense. Defendant's objection to the costs incurred for certified copies is also meritless, as these copies, which were provided to the Court, contained the very evidence of Defendant's misrepresentation regarding the facts.

In light of being forced to dispute numerous inconsistencies and falsehoods which were contained in Defendant's Motion, Affidavit and Memorandum, the amount of time spent by Wells Fargo's attorneys in preparing a comprehensive Opposition to the Motion to Set Aside was reasonable under the circumstances. Therefore, this Court should find that fees incurred in this matter were reasonable.

III. THE DEFAULT JUDGMENT WAS SIGNED BY THIS COURT ON SEPTEMBER 23, 1999.

Defendant's Point III claims that there is a factually incorrect statement in Wells Fargo's proposed Order. The language in the proposed Order refers to the date that the underlying default judgment was "signed". There is no reference in the proposed Order to the word "filed". There can be no dispute that the underlying Default Judgment was in fact signed on September 23, 1999, and the reference in the proposed Order to that date is merely an identification of the Order which Defendant was moving to set aside. Thus, it is not quite clear why Defendant objects to this statement in the Order. A finding regarding the timeliness of Defendant's objection was not made part of the proposed Order. Consequently, Plaintiff believes the Court should ignore this objection

by Defendant as being non-meritorious and another attempt by Defendant to deflect this Court from the simple issues involved in this matter.

Notwithstanding this, Defendant's argument with the Oder is also without substantive merit. Plaintiff believes the default judgment was signed and "filed" by September 23, 1999. Defendant alleges that the default judgment was not entered into the "registry of judgments" until September 27, 1999. However that has no bearing on when the default judgment was "filed" by this Court¹. Rule 58A(c) of the Utah Rules of Civil Procedure state that "[a] judgment is complete and shall be deemed entered for all purposes. . . when the same is signed and filed as herein above provided." The default judgment is stamped as filed by this Court on September 23, 1999. Therefore, Defendant did not file the Motion to Set Aside within three months as required and this Court could choose to make that a basis for denying Defendant's Motion.²

IV. DEFENDANT DOES NOT HAVE A MERITORIOUS DEFENSE TO THE SUBJECT ACTION.

Defendant is again attempting to argue the merits of his Motion to Set Aside Default Judgment in Objecting to the proposed orders submitted to this Court. As stated above, this Court indicated in its Minute Order that Defendant's Motion to Set Aside Default Judgment "is denied for the reasons and upon the bases set forth in plaintiff's Memorandum." Wells Fargo claimed in the

¹ The reference to registry of judgments has been clarified by § 78-22-1.5, Utah Code Ann., as the time a judgment becomes a lien on real property as the result of a Judgment Information Statement. However, for finality purposes, the Default Judgment is entered when stamped by the court as being filed. Rule 58A(c), U.R.Civ.P.

² Defendant correctly points out that Wells Fargo mistakenly stated that the Default Judgment was signed by this Court on December 23, 1999. Wells Fargo is including a revised Order which indicates the correct date of September 23, 1999.

Opposition to Defendant's Motion that Defendant did not have a meritorious defense to the subject claim. Since this Court has already found that Defendant does not have a meritorious defense to the subject claim, Defendant's argument with the Order must be without merit, unless it goes solely to the form of the Order.

Presumably, Defendant objects to the proposed Order because it makes reference to the arbitration provision. If this is an unnecessary reference, then Plaintiff has submitted with this Memorandum proposed Orders that eliminates this reference. Plaintiff believes that the reference in the proposed Order is correct. Even in the language the Defendant quotes regarding the arbitration provision on page 7 of his Memorandum states that "any Dispute. . . will be settled in accordance with the terms of the Arbitration Program at **the election of any party**. . . Any party to a dispute may by summary proceeding bring any action in Court to compel arbitration of any dispute." Thus, contrary to Defendant's current representation to the Court, the Order is not factually incorrect because the contract between the parties provides that the arbitration provision only comes into effect when an election is made by a party. Defendant never made such an election and cannot belatedly make an election after the default judgment has been entered.

Lastly, Defendant attempts to claim that the so called lender liability claims against Wells Fargo constituted a meritorious defense is another improper objection. Defendant never set forth any facts which would support his alleged claim of lender liability and barely mentioned the claim in his Motion to Set Aside Default or in his reply. Defendant's feeble attempt to oppose the form of the proposed Order by arguing a meritorious defense after failing with the Arbitration defense in objecting to the proposed order is absurd. This Court has held that Defendant did not have a

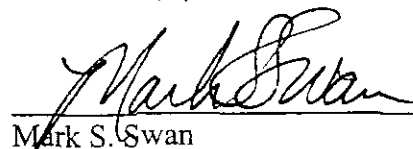
meritorious defense to the subject matter. Therefore, Defendant's newest attempt to convince this Court of an adequate defense is improper and should be denied.

CONCLUSION

Defendant's objections to the Proposed Orders submitted by Wells Fargo are all baseless and without merit. This Court held in the Minute Entry that Defendant's Motion to Set Aside is denied based upon the reasons set forth in Wells Fargo's Opposition. The Proposed Orders simply set forth the reasons which were given in the Opposition. As an accommodation to resolving the Order as soon as possible, Plaintiff has also deleted the reference to the arbitration provision in the Order. Plaintiff requests the Court to deny Defendant's objections to the Order, and sign and enter the Order. The only question properly before this Court is whether attorneys fees should be awarded. Because the Court's Minute Entry was silent on the issue, Wells Fargo again submits two Proposed Orders for this Court convenience on this issue. Plaintiff urges the Court to award attorneys fees in light of the deceptive nature of Defendant's Motion to set Aside the Default Judgment.

DATED this 23rd day of February, 2000.

RICHER, SWAN & OVERHOLT, P.C.



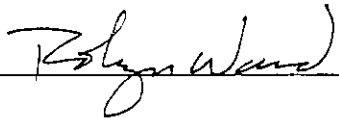
Mark S. Swan

Attorney for Wells Fargo Bank, N.A.

CERTIFICATE OF SERVICE

I hereby certify that on the 23 day of February, 2000, I caused a true and correct copy of the foregoing to be served upon the following by placing the same in the United States mail, postage prepaid and addressed as follows:

Mark A. Larsen
Jerome H. Mooney III
LARSEN & MOONEY LAW
50 West Broadway, Suite 100
Salt Lake City, Utah 84101



Tab 4

MAR - 2 2000

SALT LAKE COUNTY

By _____ Deputy Clerk

Mark S. Swan - 3873
Shane W. Norris - 8097
RICHER, SWAN & OVERHOLT, P.C.
6925 South Union Park Center, Suite 450
Midvale, Utah 84047
Telephone: (801) 561-4750

Attorneys for Plaintiff
Wells Fargo Bank, N.A.

IN THE THIRD DISTRICT COURT OF THE STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

WELLS FARGO BANK, N.A.

Plaintiff,

v.

MICHAEL J. KEARNS,

Defendant.

**ORDER DENYING DEFENDANT'S
MOTION TO SET ASIDE DEFAULT
JUDGMENT**

Civil No. 990908206

Judge Sandra Peuler

Defendant's Motion to Set Aside Default Judgment came before this Court as a result of the parties' Notice to Submit. Plaintiff filed a principal Memorandum and Affidavit, Defendant filed a Responsive Memorandum and Plaintiff filed a Reply Memorandum. Though oral argument was requested, the Court finds that oral argument would not substantially assist the Court in making a ruling on Defendant's Motion. Therefore, the Court having fully reviewed Defendant's Motion and the resulting pleadings, along with the Court record in this matter, the Court hereby enters the following ruling:

1. On December 27, 1999, Defendant filed a Motion to Set Aside the Default Judgment, which Judgment was signed by this Court ~~December~~ ^{Sept} 23, 1999, ^{and filed on 9/27, 1999} Defendant's Motion was accompanied by a supporting Memorandum of Defendant Michael Kearns.

2. Defendant asserted that his failure to respond to Plaintiff's Complaint in a timely fashion was due to excusable neglect as that term is set forth in Rule 60(b), Utah Rules of Civil Procedure.

3. Defendant has failed to show excusable neglect.

4. Defendant has further failed to show that he has a meritorious defense to the matters raised in Plaintiff's Complaint. Particularly, the Defendant's claim that the matter should have been arbitrated is not persuasive as the arbitration provision under the Note sued upon by Plaintiff required a formal election of arbitration to be made by Defendant before the Court in the civil action, which did not occur in this case.

5. Defendant's Motion to set Aside the Default Judgment is denied.

DATED this 1 day of ~~February~~ ^{March}, 2000.

BY THE COURT:

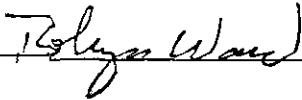


HONORABLE SANDRA N. PEULER
Third Judicial District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 10 day of February, 2000, I caused a true and unsigned correct copy of the foregoing to be served upon the following by placing the same in the United States mail, postage prepaid and addressed as follows:

Mark A. Larsen
Jerome H. Mooney III
LARSEN & MOONEY LAW
50 West Broadway, Suite 100
Salt Lake City, Utah 84101



CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of February, 2000, I caused a true and signed correct copy of the foregoing to be served upon the following by placing the same in the United States mail, postage prepaid and addressed as follows:

Mark A. Larsen
Jerome H. Mooney III
LARSEN & MOONEY LAW
50 West Broadway, Suite 100
Salt Lake City, Utah 84101

Mark S. Swan
RICHER, SWAN & OVERHOLT, P.C.
6925 South Union Park Center, Suite 450
Midvale, Utah 84047-4139

Tab 5

Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: GARNISHMENT
Amount Due: 20.00
Amount Paid: 20.00
Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: WRIT OF EXECUTION
Amount Due: 20.00
Amount Paid: 20.00
Amount Credit: 0.00
Balance: 0.00

SE NOTE

PROCEEDINGS

9-09-99 Case filed by jamess	jamess
9-13-99 Judge PEULER assigned.	jamess
9-13-99 Filed: Complaint 10K-MORE	jamess
9-13-99 Fee Account created	jamess
9-13-99 COMPLAINT 10K-MORE	jamess
Total Due: 120.00	
Payment Received: 120.00	
Note: Code Description: COMPLAINT 10K-MORE	
9-03-99 Filed return: Summons (20 day) on return	devonyag
Party Served: KEARNS, MICHAEL J	
Service Date: August 23, 1999	
9-22-99 Filed: Affidavit of Attorney's Fees and Costs	devonyag
9-22-99 Filed: Default Certificate	devonyag
9-22-99 Default Judgment sent to Judge Peuler	devonyag
9-23-99 Filed order: Default Judgment	kathyg
Judge speuler	
Signed September 23, 1999	
9-23-99 Case Disposition is Jdmt default clerk	kathyg
Disposition Judge is SANDRA PEULER	
9-27-99 Judgment #1 Entered	kathyg
Creditor: WELLS FARGO BANK NA	
Debtor: MICHAEL J KEARNS	
266,351.85 Principal	
5,094.18 Interest	
944.00 Attorneys Fee's	
272,390.03 Judgment Grand Total	
9-27-99 Filed judgment: Default Judgment @	alicew
Judge speuler	
Signed September 23, 1999	
9-30-99 Issued: Abstract of Judgment	nancyka
Clerk nancyka	

