

2000

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

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

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

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

Mark S. Swan; Mark E. Medcalf; Richer, Swan & Overholt; Attorneys for Appellee.

Recommended Citation

Brief of Appellant, *Wells Fargo Bank v. Kearns*, No. 20000271 (Utah Court of Appeals, 2000).
https://digitalcommons.law.byu.edu/byu_ca2/2702

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

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

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

FILED

Utah Court of Appeals

JUN 16 2000

Julia D'Alessandro
Clerk of the Court

**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**

TABLE OF CONTENTS

| | |
|---|----|
| JURISDICTION | 1 |
| STATEMENT OF THE ISSUES PRESENTED FOR REVIEW AND THE STANDARDS OF REVIEW | 1 |
| DETERMINATIVE RULE | 3 |
| STATEMENT OF THE CASE | 3 |
| A. Nature of the Case | 3 |
| B. Course of Proceedings | 4 |
| C. Disposition at Trial Court | 5 |
| SUMMARY OF THE ARGUMENT | 6 |
| ARGUMENT | 7 |
| POINT I The Trial Court Abused its Discretion in Ruling That Mr. Kearns Failed to Show That the Judgment Entered Against Him Was Due to Excusable Neglect Considering That His Wife Had Recently Given Birth to Their First Child, Combined with the Fact That His Newborn Son Suffered from Life Threatening Conditions Ranging from Severe Allergies to Complications with His Digestive System | 7 |
| POINT II The Trial Court Erred in Ruling That Mr. Kearns Failed to Show a Meritorious Defense Given the Express Language in the Agreement That the Only Form of Dispute Resolution Is Binding Arbitration | 11 |
| A. Mr. Kearns' Motion to Set Aside Default Judgment Was Timely under Rule 58a of the Utah Rules of Civil Procedure | 13 |

| | | |
|------------------|---|----|
| B. | Mr. Kearns Has a Meritorious Defense to this Action, Rooted in the Express Language of the Agreement, That Binding Arbitration Is the Only Form of Dispute Resolution To Which These Parties Agreed, and Wells Fargo's Filing of the Complaint in the Third District Court Was Improper | 14 |
| CONCLUSION | | 15 |
| ADDENDUM NO. 1 | Order Denying Defendant's Motion to Set Aside Default Judgment | |
| ADDENDUM NO. 2 | Notice of Appeal | |

TABLE OF AUTHORITIES

CASES

| | |
|---|---------|
| <i>Airkem Intermountain, Inc. v. Parker</i> , 513 P.2d 429, 431 (Utah 1973) | 7 |
| <i>Blyth & Fargo Co. v. Swenson</i> , 49 P. 1027, 1028 (Utah 1897) | 1 |
| <i>Board of Education of Granite School District v. Cox</i> , 384 P.2d 806 (Utah 1963) | 13 |
| <i>DeHoney v. Hernandez</i> , 595 P.2d 159 (Utah 1979) | 12 |
| <i>Downey State Bank v. Major-Blakeney Corp.</i> , 545 P.2d 507 (Utah 1976) | 12 |
| <i>Gardiner & Gardiner Builders v. Swapp</i> , 656 P.2d 429 (Utah 1982) | 7, 8 |
| <i>Heathman v. Fabian & Clandenin</i> , 377 P.2d 189 (Utah 1962) | 9 |
| <i>In re Bundy's Estate v. Bundy</i> , 241 P.2d 462, 467 (Utah 1952) | 13 |
| <i>Kennecott Corp. v. State Tax Comm'n</i> , 858 P.2d 1381, 1383 (Utah 1993) | 2 |
| <i>Larsen v. Collina</i> , 684 P.2d 52 (Utah 1984) | 1 |
| <i>Mason v. Mason</i> , 597 P.2d 1322, 1323 (Utah 1979) | 8, 12 |
| <i>Mayhew v. Standard Gilsonite Co.</i> , 376 P.2d 951 (Utah 1962) | 8, 9 |
| <i>Russell v. Martell</i> , 681 P.2d 1193 (Utah 1984) | 1 |
| <i>State v. Deli</i> , 861 P.2d 431, 433 (Utah 1993) | 2 |
| <i>State v. Musselman</i> , 667 P.2d 1053, 1055-56 (Utah 1983) | 12, 13 |
| <i>State v. Pena</i> , 869 P.2d 932, 936 (Utah 1994) | 2 |
| <i>Utah Commercial & Savings Bank v. Trumbo</i> , 53 P. 1033, 1037 (Utah 1898) | 8, 9 |
| <i>Warren v. Dixon Ranch Co.</i> , 260 P.2d 741 (Utah 1953) | 8, 10 |

Westinghouse Electric Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P.2d 876, 879 (Utah 1975) 9

White v. Holm, 438 P.2d 581 (Utah 1968) 12

STATUTES

Utah Code Ann. § 78-2-2(3)(j) 1

Utah Code Ann. § 78-2-2(4) 1, 7

RULES

Utah R. Civ. P. 58A 13

Utah R. Civ. P. 58A(c) 13

Utah R. Civ. P. 60(b)(1) (1999) 3, 7, 14

JURISDICTION

An order denying a motion to set aside a judgment is regarded as a final judgment and appealable. *Blyth & Fargo Co. v. Swenson*, 49 P. 1027, 1028 (Utah 1897). Accordingly, under Utah Code Ann. § 78-2-2(3)(j), the Supreme Court has appellate jurisdiction in this matter. Pursuant to Utah Code Ann. § 78-2-2(4), the Supreme Court transferred this matter to the Utah Court of Appeals for disposition.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW AND THE STANDARDS OF REVIEW

Issue #1

Did the trial court abuse its discretion in ruling that Mr. Kearns failed to show that the judgment entered against him was due to excusable neglect considering that his wife had recently given birth to their first child, combined with the fact that his newborn son suffered from life threatening conditions ranging from severe allergies to complications with his digestive system?

Issue Preserved for Appeal: On June 24, 2000, Appellant filed a Notice of Appeal (R. 244-46) specifically preserving this issue for review on appeal.

Standard of Review : The standard of review in determining whether a movant has demonstrated “mistake, inadvertence, surprise, or excusable neglect” is abuse of discretion. See *Larsen v. Collina*, 684 P.2d 52 (Utah 1984); *Russell v. Martell*, 681 P.2d 1193 (Utah 1984).

Issue #2

Did the trial court err in ruling that Mr. Kearns failed to show that he has a meritorious defense, given the express language contained in the Agreement and the potential offset based upon Wells Fargo's breach of its fiduciary duties it owed Mr. Kearns?

Issue Preserved for Appeal: On June 24, 2000, Appellant filed a Notice of Appeal (R. 244-46) specifically preserving this issue for review on appeal.

Standard of Review: The determination of whether a defense is meritorious is a question of law, and accordingly, the appellate court reviews the trial court's finding for correctness. Under decisive Utah case law, "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. See *State v. Pena*, 869 P.2d 932, 936 (Utah 1994); *State v. Deli*, 861 P.2d 431, 433 (Utah 1993); *Kennecott Corp. v. State Tax Comm'n*, 858 P.2d 1381, 1383 (Utah 1993).

DETERMINATIVE RULE

Rule 60(b)(1) of the Utah Rules of Civil Procedure provides, in pertinent part:

On motion and upon such terms as are just, the court may in furtherance of justice relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect

Utah R. Civ. P. 60(b)(1) (1999).

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the denial of Mr. Kearns' Motion to Set Aside Default Judgment.

The pivotal issue in this case is whether the trial court abused its discretion in ruling that Mr. Kearns failed to show that the judgment entered against him was due to excusable neglect considering that his wife, who was served with the Complaint, had recently given birth to their first child, combined with the fact that his newborn son suffered from life threatening conditions ranging from severe allergies to complications with his digestive system.

Rather than considering and resolving the question of excusable neglect prior to any consideration of the issue as to whether a meritorious defense existed, the trial court simultaneously determined that Mr. Kearns failed to show excusable neglect *and* failed to demonstrate that he had a meritorious defense to the matters

raised in Wells Fargo's Complaint. This ruling was in spite of the express language in the Agreement which provided that the exclusive remedy for resolving any disputes stemming from the Agreement was binding arbitration. Not only was filing the Complaint in the Third Judicial District Court improper, but the judgment against Mr. Kearns provided for court costs and attorneys' fees which would have been avoided altogether had Wells Fargo abided by the parties' express intention that their disputes be resolved by binding arbitration rather than in court.

Further, the refusal to set aside the default may have some negative impact upon Mr. Kearns' lender liability claims, which may offset all or a significant portion of the Judgment. Wells Fargo was acting as the Trustee of a trust in which Mr. Kearns was the primary beneficiary and breached its fiduciary duties to Mr. Kearns by the pursuit of this lawsuit.

B. Course of Proceedings

On August 9, 1999, Plaintiff Wells Fargo Bank, N.A. ("Wells Fargo") filed a Complaint against Mr. Kearns stemming from a dispute arising from a Line of Credit Agreement (the "Agreement") entered into between Mr. Kearns and Wells Fargo. (R. 1-12). Despite knowing that Mr. Kearns was represented by counsel in another case involving Wells Fargo, on August 23, 1999, Wells Fargo opted to serve the Complaint and Summons upon Miriam C. Kearns ("Mrs. Kearns"), Mr. Kearns' wife. (R. 15). When the Complaint was served upon Mrs. Kearns she had recently given birth to their son. (R. 99 ¶ 3). Unfortunately, the newborn suffered from many

ailments ranging from severe allergies to complications with his digestive system. (R. 99 ¶ 3; R. 96 ¶ 2). Needless to say, Mrs. Kearns thoughts, emotions and efforts were expended on caring for her son and she neglected to immediately give the Complaint to Mr. Kearns. (R. 99 ¶ 4; R. 96 ¶ 3). Once alerted to the Complaint, Mr. Kearns failed to answer the Complaint or bring it to his attorney's attention given his own preoccupation with his son's condition. (R. 96 ¶ 4).

On September 22, 1999, Wells Fargo filed a Default Certificate as well as an Affidavit of Attorney's Fees and Costs. (R. 16; R. 17-21). On September 27, 1999, a Default Judgment was entered against Mr. Kearns in favor of Wells Fargo in the sum of \$266,351.85, costs in the sum of \$107.00, attorneys' fees in the sum of \$837.00, and interest in the sum of \$5,094.18, for a total award of \$272,390.03. (R. 22-23). Subsequently, the Notice of Entry of Default Judgment was filed on October 1, 1999. (R. 26-27).

On December 27, 1999, Mr. Kearns filed a Motion to Set Aside the Default Judgment. (R. 81-94). On March 1, 2000, the trial court denied Mr. Kearns' Motion to Set Aside the Default Judgment. (Addendum No. 1 (R. 241-43)). On March 28, 2000, pursuant to Rule 3 of the Utah Rules of Appellate Procedure, Mr. Kearns appealed the final Order of the Honorable Sandra N. Peuler Denying Defendant's Motion to Set Aside Default Judgment entered on March 1, 2000. (Addendum No. 2 (R. 244-46)).

C. Disposition at Trial Court

The Honorable Sandra N. Peuler denied Mr. Kearns' Motion to Set Aside the Default Judgment ruling that although the motion was timely, Mr. Kearns failed to show excusable neglect and failed to demonstrate that he had a meritorious defense to the matters raised in Wells Fargo's Complaint. (R. 242 ¶¶ 3-4). Particularly, the Court was not persuaded by Mr. Kearns' argument that the matter should have been arbitrated in accordance with the express language in the Agreement because the Court determined that Mr. Kearns had to make a formal election of arbitration before the Court in the civil action before the arbitration provision became effective. (R. 242 ¶ 4).

SUMMARY OF THE ARGUMENT

The trial court clearly abused its discretion in refusing to vacate the judgment entered against Mr. Kearns. Mr. Kearns provided the trial court with reasonable justification for his failure to appear and answer the Complaint based upon the facts that his wife had recently given birth and his newborn son suffered from life-threatening ailments.

Similarly, the trial court erred in ruling that Mr. Kearns did not have a meritorious defense. Even though Mr. Kearns never disputed that he owed Wells Fargo the loan amount pursuant to the terms of the Agreement, Mr. Kearns' meritorious defense is rooted in the express language of the Agreement which provides that the only form of dispute resolution is binding arbitration. As a result,

Wells Fargo improperly filed the Complaint in the Third Judicial District Court and obtained a judgment against Mr. Kearns that exceeded the amount Wells Fargo was entitled to under the express language of the Agreement because Wells Fargo was awarded court costs and attorney's fees.

ARGUMENT

POINT I

The Trial Court Abused its Discretion in Ruling That Mr. Kearns Failed to Show That the Judgment Entered Against Him Was Due to Excusable Neglect Considering That His Wife Had Recently Given Birth to Their First Child, Combined with the Fact That His Newborn Son Suffered from Life Threatening Conditions Ranging from Severe Allergies to Complications with His Digestive System

The trial court clearly abused its discretion in refusing to vacate the judgment because Mr. Kearns had a reasonable justification for his failure to answer. The standard for setting aside a default judgment is set forth in Utah R. Civ. P. 60(b)(1):

On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect

Utah R. Civ. P. 60(b)(1). Mr. Kearns' motion to set aside the default judgment was predicated upon excusable neglect.

The trial court is given broad discretion in granting or denying Rule 60(b)(1) motions and the appellate court "will reverse the trial court only where an abuse of discretion is clearly established" *Airkem Intermountain, Inc. v. Parker*, 513 P.2d

429, 431 (Utah 1973); *see also Gardiner & Gardiner Builders v. Swapp*, 656 P.2d 429 (Utah 1982). “No general rule can be laid down respecting the discretion to be exercised in setting aside or refusing to set aside a judgment by default . . . but the discretion should always be so exercised as to promote the ends of justice.” *Utah Commercial & Savings Bank v. Trumbo*, 53 P. 1033, 1037 (Utah 1898).

Utah’s well-settled policy with regard to setting aside default judgments is “that the courts should be liberal in granting relief against judgments taken by default to the end that controversies may be tried on the merits.” *Mason v. Mason*, 597 P.2d 1322, 1323 (Utah 1979). The Utah Supreme Court, however, has acknowledged the coexistence of judicial policy with the broad deference accorded to the trial court in ruling upon motions predicated upon setting aside default judgments due to excusable neglect. *Warren v. Dixon Ranch Co.*, 260 P.2d 741 (Utah 1953); *Mayhew v. Standard Gilsonite Co.*, 376 P.2d 951 (Utah 1962). The Utah Supreme Court has addressed the implementation of this policy as follows:

It is undoubtedly correct that the trial court is endowed with considerable latitude of discretion in granting or denying such motions. However, it is also true that the court cannot act arbitrarily in that regard, but should be generally indulgent toward permitting full inquiry and knowledge of disputes so they can be settled advisedly and in conformity with law and justice. **To clamp a judgment rigidly and irrevocably on a party without a hearing is obviously a harsh and oppressive thing. It is fundamental in our system of justice that each party to a controversy should be afforded an opportunity to present his**

side of the case. For that reason it is quite uniformly regarded as a abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to appear, and timely application is made to set it aside.

Mayhew v. Standard Gilsonite Co., 376 P.2d at 952 (citations omitted; emphasis added). Clearly, it is an abuse of discretion to refuse to vacate a judgment where there is reasonable justification for the defendants' failure to appear and answer. *Id.*

In *Westinghouse*, the Utah Supreme Court further elaborated on implementation of public policy considerations:

It is indeed commendable to handle cases with dispatch and to move calendars with expedition in order to keep them up to date. But it is even more important to keep in mind that the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them. In conformity with that principle the courts generally tend to favor granting relief from default judgments where there is any reasonable excuse, unless it will result in substantial prejudice or injustice to the adverse party.

Westinghouse Electric Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P.2d 876, 879 (Utah 1975)(citing Utah R. Civ. P. 55(c) and 60(b); *Heathman v. Fabian & Clandenin*, 377 P.2d 189 (Utah 1962))(emphasis added); *Utah Commercial & Savings Bank v. Trumbo*, 53 P. 1033 (Utah 1898)).

Courts generally grant relief in questionable cases so that a party may have a hearing. In *Warren*, the court stated:

The allowance of a vacation of judgment is a creature of equity designed to relieve against harshness of enforcing a judgment, which may occur through procedural difficulties, the wrongs of the opposing party, or misfortunes which prevent the presentation of a claim or defense.

Warren v. Dixon Ranch Co., 260 P.2d 741, 742 (Utah 1953).

The trial court abused its discretion when it refused to vacate the judgment entered against Mr. Kearns because he had a reasonable justification for his failure to appear and answer. Mr. Kearns' reasonable justification stems from the dynamics associated with his wife recently giving birth to their son, combined with the fact that the newborn suffered from life-threatening conditions. It is reasonable that an individual enduring the same emotional and physical stress, resulting from the uncertainty of whether your newborn child would survive, may similarly fail to consider it a priority to respond to a Complaint.

Additionally, Mr. Kearns was engaged in efforts to terminate the Kearns Trust at Wells Fargo, and he assumed that the Complaint was Wells Fargo's attempt to retaliate for his efforts to terminate a trust worth approximately \$8 million dollars. Given that Wells Fargo managed his trust and provided the loan pursuant to the terms of the Agreement, Wells Fargo knew that Mr. Kearns would not be able to pay the demanded amount on the loan until he could successfully terminate the Kearns Trust. Taking advantage of this knowledge, Wells Fargo filed the Complaint and deliberately served it upon Mrs. Kearns, at a time when Mr. Kearns was extremely vulnerable. Wells Fargo knew that Mr. Kearns was represented by Kirton &

McConkie and easily could have contacted Eric C. Olson or Matthew K. Richards to request that they accept service on behalf of Mr. Kearns. Mr. Kearns set forth these facts in his Motion to Set Aside Default Judgment and requested an oral argument on this motion. In the Minute Entry dated January 31, 2000, Judge Peuler found that although oral argument was requested, oral argument would not substantially assist the Court in rendering its ruling.

In summary, given the trial court's abuse of discretion, this Court should reverse and remand with instructions to the trial court to vacate the judgment entered against Mr. Kearns.

POINT II

The Trial Court Erred in Ruling That Mr. Kearns Failed to Show a Meritorious Defense Given the Express Language in the Agreement That the Only Form of Dispute Resolution Is Binding Arbitration

After considering and resolving the question of whether the trial court abused its discretion in refusing to vacate the judgment entered against Mr. Kearns, this Court is faced with assessing whether the trial court was correct in ruling that Mr. Kearns failed to show a meritorious defense.

In *Musselman*, the leading case establishing the requirement that one seeking to be relieved from a default judgment must additionally show that the motion was

filed in a timely manner and that a meritorious defense to the action exists, the Utah Supreme Court stated:

“In order for [Mr. Kearns] to be relieved from the default judgment, he must not only show that the judgment was entered against him through excusable neglect (or any other reason specified in Rule 60(b)), but he must also show that his motion to set aside the judgment was timely, and that he has a meritorious defense to the action.”

State v. Musselman, 667 P.2d 1053, 1055-56 (Utah 1983)(citing *Downey State Bank v. Major-Blakeney Corp.*, 545 P.2d 507 (Utah 1976); *Mason v. Mason*, 597 P.2d 1322 (Utah 1979); *DeHoney v. Hernandez*, 595 P.2d 159 (Utah 1979); *White v. Holm*, 438 P.2d 581 (Utah 1968)).

Similarly, in the *Cox* decision, the Utah Supreme Court set forth:

[T]he policy in this jurisdiction requiring that the lower court consider and resolve the question of excusable neglect (when the motion to vacate the default judgment is based on excusable neglect) prior to its consideration of the issue of whether a meritorious defense exists. Furthermore in accordance with this policy, it is unnecessary, and moreover inappropriate, to even consider the issue of meritorious defenses unless the court is satisfied that a sufficient excuse has been shown.

State v. Nelson, 667 P.2d at 1056 (citing *Board of Education of Granite School District v. Cox*, 384 P.2d 806 (Utah 1963)).

A. Mr. Kearns' Motion to Set Aside Default Judgment Was Timely under Rule 58a of the Utah Rules of Civil Procedure

Mr. Kearns filed his Motion to Set Aside Default Judgment in a timely manner.

Utah R. Civ. P. 58A(c) 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) Utah R. Civ. 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 Utah R. Civ. P. 58A 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 Utah R. Civ. P. 60(b).

B. Mr. Kearns Has a Meritorious Defense to this Action, Rooted in the Express Language of the Agreement, That Binding Arbitration Is the Only Form of Dispute Resolution To Which These Parties Agreed, and Wells Fargo's Filing of the Complaint in the Third District Court Was Improper

Wells Fargo's filing of the Complaint in the Third Judicial District Court was improper given the express terms of the Agreement. The Agreement, drafted by the Wells Fargo, provides in pertinent part:

(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.**

Given this language in the Agreement, Mr. Kearns has a meritorious defense to this action because he was entitled to compel arbitration of this Dispute, coupled with the fact that binding arbitration is the only form of dispute resolution to which the parties agreed.

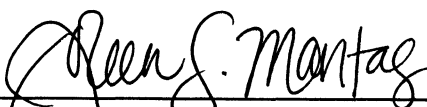
Although Mr. Kearns has never refuted that he owed Wells Fargo \$250,000.00, plus interest, he does dispute the Wells Fargo's choice of venue as well as the attorney's fees and court costs. Further, the amount of money Mr. Kearns owed to Wells Fargo may be offset in whole or in part, or may even be exceeded by Mr. Kearns's lender liability claims against Wells Fargo. In short, not only was Wells Fargo's decision to file this Complaint improper, but Wells Fargo was inappropriately awarded attorneys' fees and costs incurred in bringing this action.

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: June 16, 2000.

LARSEN & MOONEY LAW




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

CERTIFICATE OF SERVICE

I certify that on June 16, 2000, two true and correct copies of the foregoing **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

MAR - 2009

SEAL

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:

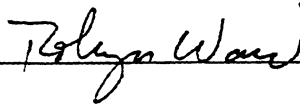


HONORABLE SANDRA N. PEULER
Third Judicial District Court Judge

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

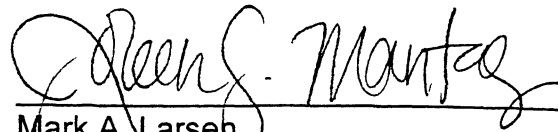
Tab 2

Pursuant to Rule 3 of the Utah Rules of Appellate Procedure, notice is hereby given that Defendant Michael J. Kearns, through Mark A. Larsen and Joleen S. Mantas, appeals to the Utah Supreme Court the final Order of the Honorable Sandra N. Peuler Denying Defendant's Motion to Set Aside Default Judgment entered on March 1, 2000.

The appeal is taken from the entire judgment.

Dated: March 24, 2000.

LARSEN & MOONEY LAW

A handwritten signature in cursive script, reading "Joleen S. Mantas", written over a horizontal line.

Mark A. Larsen

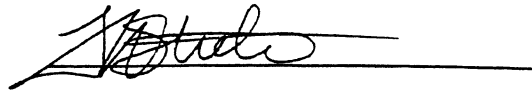
Joleen S. Mantas

Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify that on March ²⁸~~24~~, 2000, a true and correct copy of the foregoing **NOTICE OF APPEAL** 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.