

1982

Naylor-Gross Inc et al v. Thomas K. Backman et al : Brief of Defendant-Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

NAYLOR-GROSS, INC., a Utah Corp.,)
GARTH L. NAYLOR and TERRY GROSS,)
)
Plaintiffs, Counter-)
Defendants and Respondents.)

vs.)

THOMAS K. BACKMAN and MILTON V.)
BACKMAN, Trustee,)
)
Defendants, Counter-)
Claimant and Appellant.)

Case No. 18218

Brief of Defendant-Appellant

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TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| Nature of the Case | 1 |
| Disposition In The Lower Court | 1 |
| Relief Sought On Appeal | 2 |
| Statement Of Facts | 2 |
| Argument | 8 |
| POINT I. THE PLAINTIFFS WERE NOT ENTITLED TO JUDGMENT BECAUSE THEY DID NOT HAVE "CLEAN HANDS" BECAUSE THEY HAD NOT COMPLIED WITH THE PROVISIONS OF THE STIPULATION AND ORDER OF THE COURT | 8 |
| POINT II. NO NOTICE WAS GIVEN TO DEFENDANT THAT A JUDGMENT WAS GOING TO BE REQUESTED, AND COPIES OF THE AFFIDAVIT AND JUDGMENT WERE NOT SERVED UPON DEFENDANT UNTIL AFTER THE JUDGMENT HAD BEEN EXECUTED AND ENTERED BY THE COURT | 12 |
| POINT -III. THE GRANTING OF A JUDGMENT WITHOUT NOTICE AND WITHOUT AN OPPORTUNITY TO BE HEARD AND RESPOND CONSTITUTES A DENIAL OF DUE PROCESS TO THE DEFENDANT PURSUANT TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ALSO PURSUANT TO SECTION 7, OF THE CONSTITUTION OF UTAH | 13 |
| POINT IV. THERE WERE ISSUES OF FACT WHICH WERE NOT YET RESOLVED, AND THE COURT SHOULD NOT HAVE GRANTED JUDGMENT WHILE SUCH ISSUES OF FACT WERE AS YET UNDETERMINED | 15 |
| POINT V. THE ORDER ENTERED BY THE COURT ON OCTOBER 8, 1982, WHICH APPROVED THE WRITTEN STIPULATION AS STATED BY PLAINTIFFS COUNSEL, BUT NOT SIGNED BY DEFENDANT, WENT BEYOND THE AGREEMENT OF THE PARTIES AND SHOULD NOT HAVE BEEN ENTERED BY THE COURT | 15 |
| CONCLUSION | 18 |

AUTHORITIES CITED

Statutes

| | |
|--|----|
| Section 59-15-10 Utah Code Annotated (1953) | 10 |
| Rule 6(d) Utah Rules of Civil Procedure | 12 |
| Rule 56(c) Utah Rules of Civil Procedure | 15 |

Other Authorities

| | |
|---|----|
| Section 1, Fourteenth Amendment United States Constitution | 13 |
| Section 7, Article 1 Constitution of Utah | 13 |

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Plaintiffs, Counter-)
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vs.)

THOMAS K. BACKMAN and MILTON V.)
BACKMAN, Trustee,)

Case No. 18218

Defendants, Counter-)
Claimant and Appellant.)

Brief of Defendant-Appellant

NATURE OF THE CASE

This is an action brought by the Plaintiff (Respondents) to recover allegedly delinquent payments on a contract for the purchase of certain property and seeking a forclosure on that property. Defendant (Appellant) also filed a Counterclaim against the Plaintiff because of breaches in the contract by the Plaintiff.

DISPOSITION IN THE LOWER COURT

At the time the case was set for trial, the parties entered into a Stipulation on the record, wherein each of the parties was to perform certain acts. Plaintiff was represented by Counsel, and Defendant was acting Pro Se. Counsel for Plaintiff thereafter presented a written Stipulation to the Court (Record 141-145) but the Defendant did not agree that the written Stipulation accurately set forth the verbal Stipulation to which he had agreed and he sent a letter to Judge Palmer (R. 140) in which he set forth those

objections.

Thereafter, Plaintiff and Defendant both defaulted in a portion of the Stipulation, but Plaintiff's Counsel submitted an Affidavit (R. 162) representing that Defendant had defaulted and the court thereafter entered Judgment in favor of Plaintiff based upon the Affidavit. The Court subsequently denied Defendant's Motion for Relief from Judgment and Order.

RELIEF SOUGHT ON APPEAL

In this appeal the Defendant-Appellant asks this Court to determine that the District Court erred in granting Judgment against him based upon the Stipulation made by the parties, and also asks the Court to determine that Defendant has a right to appeal the Order signed by Judge Palmer on October 8, 1981 in which the written Stipulation was accepted by the Court, to determine that the Lower Court erred by entering said Order and said Judgment, and that this case be sent back to the District Court for a trial upon the merits of the case as to each of the parties.

STATEMENT OF FACTS

For purposes of reference in this Brief, references to the Record will be referred to by an "R" preceding the page number of the Record. There are transcripts of three (3) separate days hearings, and for reference purposes, any reference to the transcript for September 9, 1981 will be referred to as "T1" - any references to the transcript for January 28, 1982 will be referred to as "T2", - and any references to the transcript for February 11, 1982 will be referred to as "T3".

On or about June 27, 1979, the Defendant, Thomas K. Backman, entered into an agreement to purchase the stock in Naylor-Gross, Inc., which is a Utah Corporation, which it was represented owned the Old Rock Mill Farm,

together with substantial personal property located thereon. The Old Rock Mill Farm is real property located in Farmington, Utah, on which there is presently a restaurant known as the "Heidelberg" restaurant, and other related facilities.

At the time of purchase, the corporation was having substantial financial difficulties and liabilities which had been represented to Mr. Backman to be approximately \$110,000. Because of the financial difficulties at that time, the contract for the Defendant to purchase provided for a total price of \$440,000.00, but did not require Mr. Backman to pay any amounts of cash directly to the sellers, as stated in the contract (R(-7) as follows:

- "A. \$110,000.00, which shall be paid toward the Sellers debts which have been accrued by the Naylor Gross, Inc. Buyer and Seller will arrange for the method and time of payment to debtors.
- B. \$3,000.00 per month beginning March 20, 1979, until balance is paid in full, including interest.
- C. Sellers agree to release upper north 4 acres to Buyer, free and clear, upon receipt of \$10,000.00 from buyer at any time during contract. Sellers agree to pay expenses of Corporation liquidation of Naylor Gross, Inc.
- D. Buyer agrees to assume the present existing SBA obligation of approximately \$70,000.00.
- E. It is understood that this agreement is subordinate to the terms and provisions of a forthcoming final agreement which shall be written by the attorneys representing the buyer and seller and approved by all parties concerned."

At the time of entering into the Agreement, it is questionable whether either party was represented by Counsel, because the Agreement was entered into by Naylor Gross, Inc., and purported to sell itself. Also, the agreement was prepared on a Standard Uniform Real Estate Contract Form, even though it did not include the legal description of any property. Never-

theless, it is, counsel for Defendant believes, substantially agreed that it was intended to sell the Stock of Naylor Gross, Inc., which had been represented owned the property on which the Heidelberg restaurant and related facilities sits, together with substantial personal property necessary to operate those facilities.

Defendant took possession of the facilities, and there were then disputes that arose between the parties. As a result of those disputes, the Plaintiffs filed suit in the Second Judicial District Court on December 1, 1980. In that Complaint, the Plaintiffs alleged that Defendant was delinquent in his payments to them personally and to the Small Business Administration, and they asked for a Judgment thereon, a return of the property, and a declaration that the Trust Deed on the property should be returned to them.

Defendant answered and filed a Counterclaim in which he alleged that he was not delinquent in the payments and by way of Counterclaim alleged as follows:

1. The Plaintiff had removed substantial amounts of personal property from the premises which belonged to the Corporation, although he did not know the number of items or the value of those items at the time.

2. He had determined that the real property was not in the name of the Corporation as had been represented, so that his present contract really gave him nothing except a hollow shell, and the Plaintiffs were refusing to transfer the property into the name of the Corporation.

3. The Corporation liabilities were substantially larger than had been disclosed at the time of purchase by him, and since he had purchased the corporate stock those liabilities caused a substantial difference in the value of the corporate stock which had not been disclosed to him.

4. Although Defendant was to assume the obligation to the Small Business Administration, the Plaintiffs had sold or removed some of the real and personal property which had been pledged as collateral to the Small Business Administration, and therefore he could not assume an obligation where collateral had been pledged where that collateral no longer belonged to the Corporation.

5. The Plaintiffs had failed to clear the existing bills and obligations of the Corporation as they had promised to do.

6. The Plaintiffs had failed to pay the property taxes through the time period when they were committed to pay said property taxes.

7. That Plaintiffs had failed to give Defendants credit for numerous payments which he had made to the Creditors of the Plaintiff.

Substantial discovery went on and there were other matters that proceeded, but the case was set for trial on September 9, 1981 before the Honorable J. Duffy Palmer. At the appointed time, Plaintiff's and their counsel met with Defendant and Judge Palmer in Judge Palmer's chambers. Certain discussions were carried on regarding the possibilities of settlement both in the presence of Judge Palmer and some additional discussions out of the presence of Judge Palmer. The portion which were carried on in the presence of Judge Palmer were not recorded, but at the conclusion of those discussions, the parties had come to an agreement and they met in Judge Palmers chambers and entered a Stipulation into the record. That Stipulation is contained in Tl-1 to 19. One of the first and most important provisions of that Stipulation was stated at Tl-2, wherein it was stated:

"1. The Defendant will pay, or fully assume so as to relieve plaintiff from all liabilities, outstanding — let's see, accounts payable that were outstanding against the plaintiff as of March 1, 1979, in the sum of \$110,000, plus any interest that has accrued on said amount. The plaintiff will, within the same time, pay or fully assume so as to relieve

defendant of all liability, all other accounts payable that existed as of March 1, 1979. The parties will work out, well, the parties will further stipulate and work out between themselves which bills, which accounts payable will be so satisfied or fully assumed by which the parties -- does that make sense?"

There is no part of that transcript wherein the Defendant agrees, or even discusses, what penalties would be imposed if either the Defendant or the Plaintiff failed to abide by the provisions contained in that stipulation.

There had been previous discussions relating to which liabilities would be assumed by the Plaintiff, but those matters were in fact stated in writing by counsel for Plaintiffs in a letter directed to the Defendant on November 2, 1981 (R169-172), and the relevant portions of that letter are contained at R.171 wherein it is stated as follows:

"You are hereby notified that Plaintiffs shall pay or fully assume that amount of obligations within the time provided in the Stipulation as follows:

1. Since almost from the first week after the settlement there was verbal agreement between Plaintiffs and yourself that the tax amount attributable to Line 26 and verified to be \$8,325.60 would be a logical item for Plaintiffs to take responsibility for, Plaintiffs will pay or fully assume so as to release you from any liability that amount together with all accrued interest and penalties attributable to that amount since March 1, 1979."

Following entry of the Stipulation in Court, Counsel for Plaintiff submitted a proposed Order to the Court for its signature (R.141-142) and it had attached thereto Exhibit A, which was his interpretation of the Stipulation (R.143-145). Another copy of the same document is contained at (R. 146-150). That document was submitted to Mr. Backman for his approval as to form, and he immediately ordered a copy of the transcript because it did not seem correct to him, and he notified Judge Palmer that he did not agree with the written stipulation, and his objection was sent by way of a letter

dated September 22, 1981 which may be found at (R.140).

The pertinent part of the Order provided as follows:

"If the Defendant, Thomas K. Backman, does not fulfill all of the terms and conditions relating to Defendant set forth in Exhibit "A" within the time provided therein, and if Plaintiffs have fulfilled all the terms and conditions relating to Plaintiffs, Judgment shall be entered in favor of Plaintiffs, Naylor-Gross, Inc., Garth L. Naylor and Terry Gross and against Defendant, Thomas K. Backman"

The Order was apparently resubmitted as contained at (R.146-147), and was apparently signed by Judge Palmer on October 8, 1981.

Defendant believed that this was an appealable Order and called the District Court clerks office on November 4, 1981 to determine the date on which the Judge signed the Stipulation and Order so as to determine his deadline for filing a Notice of Appeal. After searching the file, the employee of the Clerk's office informed Defendant that the Order was not signed and had been filed with a note "Ordered to be filed unsigned 10-23-81 by J. Duffy Palmer, Judge." (see R. 155). The employee in the clerks office had a second employee confirm that, so that Defendant was given that statement by two (2) separate employees in the Clerks office, and was also told that his Notice of Appeal would not be accepted because there was no existing Order to be appealed.

Even though Defendant believed that the Order and Stipulation had not been signed or approved, he made the \$6,000.00 payment required by said Stipulation on September 9, 1981, and paid the other \$3,000.00 on November 9, 1981 to show his good faith in complying with the agreement he had entered into in Court.

Thereafter, on December 23, 1981, counsel for Plaintiffs filed an Affidavit in Court (R. 162-166) in which he indicated that the Defendant had not complied with the terms of the Stipulation and Order, and based upon

that Affidavit a Judgment was entered by the court (R.182-185) without further consultation or notice to Defendant. This was done notwithstanding the fact that Plaintiffs had not paid or "fully assumed so as to relieve Defendant of all liability" of the obligation to the Utah State Tax Commission in an amount of \$8,325.60 as they had agreed to do, thereby placing them in breach of the Stipulation.

It is from that Judgment, and from the entry of the Order approving the Stipulation that this appeal is taken.

ARGUMENT

POINT I

THE PLAINTIFFS WERE NOT ENTITLED TO JUDGMENT BECAUSE THEY DID NOT HAVE "CLEAN HANDS" BECAUSE THEY HAD NOT COMPLIED WITH THE PROVISIONS OF THE STIPULATION AND ORDER OF THE COURT.

When the parties were before Judge Palmer and entered into a verbal Stipulation on the record, it was agreed that the Defendant would assume existing liabilities in the sum of \$110,000.00 and that Plaintiff would "pay or fully assume, so as to relieve Defendant of all liability, all other accounts payable that existed as of March 1, 1979." (T1-3) (emphasis added). The parties later agreed that one of the liabilities which Plaintiff would pay or assume so as to relieve Defendant from all liability from was an existing obligation to the Utah State Tax Commission for state sales tax in an amount of \$8,325.60.

Defendant does challenge herein the correctness of signing the Order and Stipulation submitted to the court by Plaintiffs counsel, but assuming arguendo for purposes of this point, that the Order was correct, that Order provided as follows:

"If the Defendant, Thomas K. Backman, does not fulfill all of the terms and conditions relating to Defendant set forth in Exhibit 'A' within the time provided therein, and if Plaintiffs have fulfilled all of the

tions relating to Plaintiffs, Judgment shall be entered in favor of Plaintiffs, Naylor Gross, Inc., Garth L. Naylor and Terry Gross, and against Defendant, Thomas K. Backman." (emphasis added)

When counsel for Plaintiff submitted his Affidavit and proposed Judgment to the Court and represented that Defendant had not complied with the Stipulation, he did so without any notice to Defendant and he attempted to show that he had complied with the Stipulation by submitting to the Court certain documents, including a statement from the State Tax Commission and an Assistant Attorney General to show that the amount of taxes due was \$8,325.60 and to further indicate that Mr. Backman had not formally assumed any of the sales and withholding tax liabilities of Naylor Gross, Inc. However, that did not carry Plaintiffs burden of proof to show that Plaintiff had fulfilled all of the terms and conditions of the Stipulation, and in fact, Plaintiff had not complied with the provisions of the Stipulation as it related to paying or assuming the tax obligation so as to relieve Defendant from liability thereon.

The liability to the Utah State Tax Commission was in the name of Naylor Gross, Inc. The property which Defendant had purportedly purchased was the stock in Naylor Gross, Inc. Therefore, the only way that Plaintiffs could have complied with the Stipulation so far as it related to the State Tax Commission, was to either pay the obligation or to obtain a release from the State Tax Commission in which it agreed not to look to either the Defendant or Naylor Gross, Inc. for those taxes. The record is clear that the Plaintiffs did not do either of those, and they therefore have not fulfilled the terms of the Stipulation.

However, Plaintiffs have argued in the District Court that this should not prevent them from taking Judgment because the Defendant has taken

for the obligation. Nevertheless, it is submitted that Defendant is entitled to take that position with the State Tax Commission, and that is not dispositive of the issues in this case. The issues in each case are different. In fact, this is not inconsistent with the position taken in this case, because he may take the position before the Tax Commission that he is not personally liable for those obligations, but maintain that it is a corporate obligation of the corporation for which he purchased the stock. Therefore, even if he were not held responsible for those taxes before the Tax Commission on the basis that it is a corporate obligation, the Plaintiffs still would not have fulfilled their responsibility because the corporation which the Defendant would then own would in fact be responsible for those taxes, and it would ultimately reduce his value or net worth in the corporation, and would therefore be coming directly out of his pocket as far as any accounting with the Plaintiffs is concerned.

However, notwithstanding any position taken by the Defendant with the Tax Commission, there is a statute which makes him liable for those taxes based upon certain premises, which is Section 59-15-10, Utah Code Annotated, 1953, as amended, which provides as follows:

"The tax imposed by this act shall be a lien upon the property of any wholesaler or retailer or proprietor who shall sell out his business or stock of goods or shall quit business and such person shall be required to make out the return provided for under Section 59-15-5, within thirty (30) days after the date he sold out his business or stock of goods or quit business and his successor in business shall be required to withhold sufficient of the purchase money to cover the amount of said taxes due and unpaid until such time as the former owner shall produce a receipt from the Tax Commission showing that the taxes have been paid, or a certificate that no taxes are due. If the purchaser of a business or stock of goods shall fail to withhold the purchase money as above provided and the taxes shall be due and unpaid after the thirty (30) day period allowed, he shall be personally liable for the payment of the taxes collected and unpaid by the former owner."

(Emphasis added)

It is clear from the record, that the Defendant, Thomas K. Backman, purchased the business from the Plaintiffs on or about March 1, 1979, and that there were delinquent sales and use taxes which constituted Judgments against the property in an amount, including all penalties and interest, of nearly \$9,000, and it is equally clear that the Defendant failed to withhold from the purchase money sufficient amounts to pay the taxes due and unpaid, and that those amounts were not paid within thirty (30) days thereafter, and in fact have still not been paid. Based upon that situation, it is clear that the statute makes the Defendant personally liable for the payment of those taxes.

Therefore, it is clear that the only way that Plaintiffs could comply with the Stipulation which they entered into in Court is to either pay to the Tax Commission the amount of taxes that were due at the time the business was purchased, or in the alternative, to obtain a release from the Utah State Tax Commission.

It is submitted that the Plaintiffs did not perform either one of those steps, and certainly have not provided the Court with any evidence that such steps have in fact been taken, and until such steps are taken, the Plaintiffs are in breach of the Stipulation entered into before Judge Palmer even assuming arguendo that the Defendant did in fact breach that agreement.

Therefore, where the Plaintiffs have breached the Stipulation, they do not have "clean hands" and cannot ask the Court to enforce the Stipulation against the Defendant while they are personally in default and in breach of the Stipulation they entered into and therefore do not have clean hands.

Therefore, it is respectfully submitted that the District Court erred in granting Judgment to Plaintiffs, and the Court should reverse that Judgment and send the case back for a trial upon its merits.

POINT II

NO NOTICE WAS GIVEN TO DEFENDANT THAT A JUDGMENT WAS GOING TO BE REQUESTED, AND COPIES OF THE AFFIDAVIT AND JUDGMENT WERE NOT SERVED UPON DEFENDANT UNTIL AFTER THE JUDGMENT HAD BEEN EXECUTED AND ENTERED BY THE COURT.

Assuming arguendo, for purposes of this Brief, that the Judge had correctly entered the Order and Stipulation dated October 8, 1981, the Judgment was still entered improperly and incorrectly against the Defendant.

The Judgment was entered by presenting to Judge Palmer an Affidavit and proposed Judgment from the Plaintiff. No copy of that Affidavit or proposed Judgment was ever served upon the Plaintiff prior to the time it was executed and entered by the Court, and it was therefore handled as an ex parte proceeding.

It is submitted that it should have been handled as a Motion for a Judgment with the Affidavit, with the Defendant to have an opportunity to respond to the Motion and any facts alleged in the Affidavit. Rule 6d, Utah Rules of Civil Procedure, provides as follows:

"A written motion, other than one which may be heard ex parte, and Notice of the hearing thereof, shall be served not later than five (5) days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the Court. Such an Order may for cause shown be made on ex parte application. When a Motion is supported by Affidavit, the Affidavit shall be served with the Motion; and, except as otherwise provided in Rule 59(c), opposing Affidavits may be served not later than one (1) day before the hearing, unless the Court permits them to be served at some other time period." (Emphasis added)

There is no reason at all why the Judgment should not have been applied for by way of Motion instead of ex parte, and there is no reason at all why Defendant should not have been served a copy of the Motion and Affidavit, nor is there any reason why he should not have had an opportunity to respond with an opposing Affidavit. Instead of following Rule 6(d) of the Utah Rules of Civil Procedure, counsel for Plaintiff proceeded on an ex parte basis.

Therefore, it is respectfully submitted that counsel for Plaintiff and the Court failed to properly adhere to the Utah Rules of Civil Procedure, and the Judgment which was improperly entered should be reversed and the case should be sent back for a trial upon its merits.

POINT III

THE GRANTING OF A JUDGMENT WITHOUT NOTICE AND WITHOUT AN OPPORTUNITY TO BE HEARD AND RESPOND CONSTITUTES A DENIAL OF DUE PROCESS TO THE DEFENDANT PURSUANT TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ALSO PURSUANT TO SECTION 7, ARTICLE 1 OF THE CONSTITUTION OF UTAH.

The relevant portions of Section 1 of the Fourteenth Amendment to the Constitution of the United States provides as follows:

"Nor shall any state deprive any person of life, liberty or property, without due process of law;"

In addition, Section 7 of Article 1 of the Constitution of Utah provides:

"No person shall be deprived of life, liberty or property, without due process of law."

It clearly cannot be denied that the Judgment entered by the Court in this case deprives the Defendant of property. The Defendant had entered into an agreement to purchase the business for a sum of \$440,000, and the record reflects that the Defendant, Thomas K. Backman, as of the time of the Judgment, had made substantial payments thereon, including the payment of \$90,000.00 of the required \$110,000.00 liabilities to be assumed, payment of \$31,000.00 on the Small Business Administration loan, payment of \$54,000.00 in monthly payments, and had made improvements of \$25,000.00, for a total amount as of the time of the Judgment which he had paid in excess of \$200,000. It is represented that additional payments have been made since that time. Therefore, the Defendant has clearly been deprived of substantial property

The only question then is whether Defendant was granted due process of law by the manner in which the Judgment was entered.

As has been stated above, the Judgment was entered without any Notice of any type being given to Defendant, and without any opportunity to submit an opposing Affidavit to indicate to the Court that the Plaintiffs had not complied with the relevant portions of the Stipulation. In addition, the Judgment was granted without said matter being presented to the Court by way of a Motion as would normally be required by Rule 6(d), Utah Rules of Civil Procedure.

The Defendant, in the Stipulation entered into before the Court, did not agree that any Judgment could be granted if there was non-compliance with the Stipulation, and especially did not provide that the Judgment could be granted without any Notice or hearing permitted to him. In addition, the Order which was entered by the Judge approving the Stipulation and stating that Judgment would be granted, did not state that Judgment would be entered without Notice to the Defendant.

Therefore, it is respectfully submitted that when a Judgment was taken against the Defendant without any notice being given to him and without any opportunity to respond and present an opposing Affidavit to the Court, that Defendant has been deprived of property without due process of law, and that this violates the Fourteenth Amendment to the United States Constitution and Section 7 of Article 1 of the Constitution of the State of Utah, and this case should be sent back to the Court for a trial upon its merits.

POINT IV

THERE WERE ISSUES OF FACT WHICH WERE NOT YET RESOLVED, AND THE COURT SHOULD NOT HAVE GRANTED JUDGMENT WHILE SUCH ISSUES OF FACT WERE AS YET UNDETERMINED.

The Judgment entered by the court was presented in a manner which is not specifically provided for by the Utah Rules of Civil Procedure. Nevertheless, it was procedurally very similar to a Motion for Summary Judgment which is provided for by Rule 56 of the Utah Rules of Civil Procedure. A portion of Rule 56(c), Utah Rules of Civil Procedure, provides as follows:

"The Judgment sought shall be rendered forthwith if the Pleadings, Depositions, Answers to Interrogatories, and Admissions of file, together with the Affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a Judgment as a matter of law."(emphasis added)

It is submitted that there were still issues of fact to be determined in this case. Specifically, if the Court had given Defendant an opportunity to present an opposing Affidavit, Defendant would have presented an Affidavit showing that Plaintiffs had not complied with all of the requirements of the Stipulation, and therefore would not have been entitled to the Judgment. Instead, Defendant was denied that right.

Nevertheless, there were issues of fact which should have been resolved by the District Court before entering a Judgment in favor of Plaintiffs, and it is respectfully submitted that the case should be sent back to the District Court for a trial upon the merits of the case.

POINT V

THE ORDER ENTERED BY THE COURT ON OCTOBER 8, 1981, WHICH APPROVED THE WRITTEN STIPULATION AS STATED BY PLAINTIFFS COUNSEL, BUT NOT SIGNED BY DEFENDANT, WENT BEYOND THE AGREEMENT OF THE PARTIES AND SHOULD NOT HAVE BEEN ENTERED BY THE COURT.

On September 9, 1981, the parties met at the time the case was set for trial, and numerous discussions were held in the presence of the Court to begin with, following which there were numerous and lengthy discussions held out of the presence of the Court, and following that the parties re-entered the Court's presence and placed a verbal stipulation upon the record before the Judge and the Court Reporter.

Prior to that Stipulation being entered upon the record, it is obvious from the file that each of the parties believed they had good and valid points to present to the Court at the time of trial.

Nevertheless, in an effort to attempt to settle the case, it is obvious that each of the parties had made certain concessions to reach the Stipulation which was entered upon the Court record before Judge Palmer and it must also be remembered that Plaintiff was represented by an attorney, whereas Defendant was acting pro se and was not represented by an attorney.

At the conclusion of the discussions, the verbal stipulation was entered on the Court record and is fully disclosed in the document herein referred to as T1, which is the Reporters transcript of the proceedings for Wednesday, September 9, 1981. A full reading of that transcript will not disclose any agreement by the Defendant to have Judgment entered in the event that either he or Plaintiff was not able to fully comply with the provisions of that Stipulation.

At the time the Defendants Motion for Relief from Judgment and Order was argued before the Court, there were comments made by Judge Palmer that would indicate he felt earlier discussions, which were not on the record, had discussed the possibility of Judgment being entered against Defendant, and there were also statements which would indicate that any Stipulation would have to have some provision for Judgment if it was not complied with.

Notwithstanding those comments by Judge Palmer, it is clear that Judge Palmer was not present during the entire discussions which led up to that Stipulation. Judge Palmer did not know what concessions had been made by each of the parties, nor did he know the significance of each of those concessions made by each of the parties. Further, it is just as obvious that if there needed to be a provision to allow for Judgment if Defendant did not comply with the Stipulation, it is just as obvious that there should have been a similar type of provision for Judgment if Defendant fully complied with the Stipulation but Plaintiff did not comply with his portion of the Stipulation. Where is any such a statement contained in the Exhibit "A" attached to the Order which was drafted by Plaintiffs counsel? If it is, in fact, obvious that Judgment would need to be granted, why did Plaintiffs attorney not put in a recipricol provision in case Plaintiff failed to comply, but Defendant fully complied?

It is submitted that the Order and Stipulation were drafted by Plaintiff, the party which was represented by counsel at the proceeding, and that Plaintiffs counsel attempted to take advantage of Defendant because he was not represented by counsel and to come through the Stipulation with the clear advantage and benefit.

It is respectfully submitted that when the parties were negotiating that there was "give and take" by each of the parties and that there were certain concessions made by each of the parties. Judge Palmer, in signing the Order dated October 8, 1981, presumed that all of the give and take was by Defendant, and that Plaintiffs were entitled to have every questionable item construed in their favor. However, such is not the case, and Defendant is entitled to have the Stipulation which he made and entered into interpreted within the walls of that Stipulation as it was placed on the record. Any

on the record, were not part of the Stipulation actually entered into, and were merely preliminary discussions in attempting to see if a basis for agreement could be reached.

In addition, since Plaintiff was represented by counsel, and since it was Plaintiff's counsel who stated the initial Stipulation on the record, it is submitted that any shortcoming in that Stipulation should be construed against the parties so represented by counsel and in favor of the party not represented by counsel. If a Judgment was desired if there was no compliance with the Stipulation, then such procedural problems should have been covered by the party represented by counsel, and cannot be construed against the party not represented by counsel.

In summary, it is respectfully submitted that the Order dated October 8, 1981, was improperly entered by the Court and it exceeded the Stipulation which had been entered into by the Defendant, and the Defendant may well not have entered into the Stipulation if a provision for Judgment had been requested in his presence while the Stipulation was actually being placed on the record.

CONCLUSION

In this case, the Plaintiff does not have clean hands because they did not comply with the provisions of the Stipulation relating to them, and they are therefore not entitled to hold the Defendant strictly to the provisions of the Stipulation while they are also in non-compliance. Further, if the Plaintiff's intended to ask the Court for a Judgment for any alleged non-compliance by the Defendant, they should have given the Defendant Notice of their intention to make such a request, they should have made a formal Motion in compliance with the Utah Rules of Civil Procedure, and they should have given the Defendant an opportunity to present ~~an opposing Affidavit~~

to present the Defendant's side of the story. The failure by Plaintiff to give such notice and opportunities to the Defendant is a clear violation of the Utah Rules of Civil Procedure and is a clear denial of the constitutional rights of the Defendant as provided by the Constitutions of the United States and the State of Utah. Further, the Order and written Stipulation upon which the Judgment was based was clearly improperly entered.

Therefore, it is respectfully submitted that this Court should reverse the decision of the District Court and should return it to the District Court for a trial upon its merits.

DATED this 9th day of July, 1982.

MORGAN, SCALLEY & DAVIS


G. Blaine Davis

CERTIFICATE OF DELIVERY

I do hereby certify that I did deliver two true and correct copies of the foregoing Brief of Defendant-Appellant to Mr. John T. Kesler, Attorney for Plaintiff-Respondent, 115 East South Temple, Salt Lake City, Utah, 84111, this 9th day of July, 1982.


G. Blaine Davis