

2011

Mojo Syndicate Inc., and A Bar Named Sue LLC v. 3928 LLC and John Fredrickson : Brief of Appellant

Utah Court of Appeals

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Denver C. Snuffer, Jr.; Daniel B. Garriott; Tahnee L. Hamilton; Attorneys for Appellants.

J. Ryan Mitchell; Andrew V. Collins; Attorneys for Appellees.

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IN THE UTAH COURT OF APPEALS

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MOJO SYNDICATE, INC., a Utah	:	
corporation, and A BAR NAMED SUE	:	Court of Appeals Case No. 20110995-
LLC, a limited liability company	:	CA
	:	
Plaintiffs / Appellee,	:	District Court Civil No. 100904277
vs.	:	
	:	
3928 LLC, a limited liability company,	:	
JASON RASMUSSEN, an individual,	:	
JOHN FREDRICKSON, an individual,	:	
and JOHN DOESI-IV,	:	
	:	
Defendants / Appellant.	:	
	:	

**APPELLANTS MOJO SYNDICATE, INC., AND A BAR NAMED SUE, LLC'S
OPENING BRIEF ON APPEAL**

Appeal from the Order of the Third District Court,
Salt Lake County, Salt Lake Division, The Honorable Judge Sandra Peuler

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3928 LLC, Jason Rasmussen, and John
Fredrickson.

FILED
UTAH APPELLATE COURTS

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APPELLANT'S BRIEF

Appellants, Mojo Syndicate, Inc., and A Bar Named Sue, LLC, submit this brief in the appeal before this Court.

LIST OF ALL PARTIES TO THE PROCEEDING BELOW

The Plaintiffs-Appellants:

Mojo Syndicate, Inc., a Utah corporation, and A Bar Named Sue, LLC, a limited liability company (collectively "Mojo Plaintiffs").

The Defendants-Appellees:

3928 LLC, a limited liability company, and John Fredrickson, an individual (collectively "Fredrickson Defendants").

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Other Sources

None.

JURISDICTION OF APPELLATE COURT

The jurisdiction of all appellate courts "shall be provided by statute."¹ Section 78A-3-102(3)(j) (2009) of the Utah Code provides that: "The Supreme Court has appellate jurisdiction..., over orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction[.]" This is an appeal from the final judgment of the Third District Court in a civil matter and, although it has original appellate jurisdiction, the Utah Supreme Court has transferred this matter to the Court of Appeals pursuant to §78A-3-102(4), which provide that the Supreme Court may transfer any matter over which it has original appellate jurisdiction.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

(1) Whether the Utah Court of Appeals should reverse the dismissal of Mojo Plaintiffs' case on summary judgment when Mojo Plaintiffs' counsel did not provide adequate representation and was likely affected by his improper conduct and disability?

Standard of Review: A constitutional claim for ineffective assistance of counsel is a mixed question of law and fact. *State v. Lenkart*, 2011 UT 27, ¶ 20, 262 P.3d 1. The appellate court reviews the trial court's application of the law to the facts under a correctness standard. *Id.* "If there are factual findings to review, [the appellate court] will not set them aside unless they are clearly erroneous." *Id.*

¹ Utah Const., Article VIII, § 5.
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Preservation of the Record: This issue was not preserved in the Trial Court. Mojo Plaintiffs' prior counsel, Charles C. Brown, represented Mojo Plaintiffs through the litigation phase, filed the Notice of Appeal and Docketing Statement, and was later placed on "Disability" status by the Office of Professional Conduct. Therefore, Mojo Plaintiffs were unable to preserve the issue in the record below.

(2) Whether the Trial Court erred in granting summary judgment and dismissing Mojo Plaintiffs' claims when the Mojo Plaintiffs substantively followed Rules 7 and 56 of the Utah Rules of Civil Procedure in connection with Fredrickson Defendants' motion for summary judgment.

Standard of Review: "Because entitlement to summary judgment is a question of law, no deference is due the trial court's determination of the issue." *Sanderson v. First Sec. Leasing Co.*, 844 P.2d 303, 304 (Utah 1992) (citing *Ward v. Richfield City*, 798 P.2d 757, 79 (Utah 1990)). "An appellate court reviews a trial court's 'legal conclusions and ultimate grant of denial of summary judgment' for correctness, and views 'the facts and all reasonable inferences drawn there-from in the light most favorable to the nonmoving party.'" *Orvis v. Johnson*, 2008 UT 2, 177 P.3d 600, 601 (citing *Higgins v. Salt Lake County*, 855 P.2d 231, 233 (Utah 1993)).

Preservation of Issue: Mojo Plaintiffs preserved this issue in the record in Plaintiffs Response to Defendant's Motion for Summary Judgment, (R. 1421-1562);

Objection to Proposed Order Granting Summary Judgment, (R. 1731-35); Motion to Set Aside Summary Judgment and Request for Hearing, (R. 1919-1959).

(3) Whether the Trial Court erred in granting summary judgment in favor of the Fredrickson Defendants and dismissing the Mojo Plaintiffs' claims when there were genuine issues of material fact that prevented summary judgment on each of the five claims?

Standard of Review: "Because entitlement to summary judgment is a question of law, no deference is due the trial court's determination of the issue." *Sanderson v. First Sec. Leasing Co.*, 844 P.2d 303, 304 (Utah 1992) (citing *Ward v. Richfield City*, 798 P.2d 757, 79 (Utah 1990)). "An appellate court reviews a trial court's 'legal conclusions and ultimate grant of denial of summary judgment' for correctness, and views 'the facts and all reasonable inferences drawn there-from in the light most favorable to the nonmoving party.'" *Orvis v. Johnson*, 2008 UT 2, 177 P.3d 600, 601 (citing *Higgins v. Salt Lake County*, 855 P.2d 231, 233 (Utah 1993)).

Preservation of Issue: Mojo Plaintiffs preserved this issue in the record in Plaintiffs Response to Defendant's Motion for Summary Judgment, (R. 1421-1562); Objection to Proposed Order Granting Summary Judgment, (R. 1731-35); Motion to Set Aside Summary Judgment and Request for Hearing, (R. 1919-1959).

(4) Whether the Trial Court erred in awarding the Fredrickson Defendants their attorney fees when the claims did not require the enforcement or interpretation of the Asset Purchase Agreement and the awarded fees were unreasonable.

Standard of Review: The question of "[w]hether a party is entitled to an award of attorney fees is a legal conclusion . . . which we review for correctness." *IHC Health Servs. v. D & K Mgmt., Inc.*, 2008 UT 73, ¶ 38, 196 P.3d 588; *see also Meadowbrook, LLC v. Flower*, 959 P.2d 115, 116 (Utah 1998) ("We review a trial court's conclusions of law [regarding attorney fees] for correctness, granting no deference to the trial judge's legal determinations").

Preservation of Issue: Mojo Plaintiffs preserved this issue in the record in their Memo in Opposition to Defendants 2938 LLC's Motion and Memo for Attorneys' Fees and Costs, (R. 1802-1809) and Memo in Opposition to Defendants 2938 LLC's Motion and Memo for Attorney's Fees and Costs, (R. 1862-1894).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS APPLICABLE TO APPEAL

Utah Rule of Civil Procedure 7(c)(3)(B) (2011).

(c)(3)(B). A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered

and supported by citation to supposing materials, such as affidavits or discovery materials.

Utah Rule of Civil Procedure 56(c) (2011).

(c) Motions and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

Nature of the Case

This case was originally brought by Mojo Plaintiffs against 3928 LLC, John Fredrickson, and Jason Rasmussen². Mojo Plaintiffs brought suit against the Fredrickson Defendants, alleging five causes of action: (1) Rescission based upon Breach of Contract and Fraud, (2) Intentional Interference with Prospective Economic Advantage, (3) Civil Conspiracy, (4) Breach of Fiduciary Duty, and (5) in the alternative, Breach of Contract. Little discovery was performed and Fredrickson Defendants moved for summary judgment on all causes of action. The Trial Court granted summary judgment, in part for Mojo Plaintiffs' alleged failure to comply with Utah Rules of Civil Procedure 7 and 56,

² Rasmussen was a named defendant, but was not served and has not otherwise appeared in the case.

and found this was a negotiated transaction to sell the assets of Mojo Plaintiffs to Fredrickson Defendants.

Course of Proceedings and Disposition Below

Mojo Plaintiffs filed the Complaint with five causes of action: (1) Rescission based upon Breach of Contract and Fraud, (2) Intentional Interference with Prospective Economic Advantage, (3) Civil Conspiracy, (4) Breach of Fiduciary Duty, and (5) in the alternative, Breach of Contract. (R. 1-12.) Mojo Plaintiffs' Complaint alleged the Asset Purchase Agreement was void and procured by deception by the Fredrickson Defendants. Fredrickson Defendants denied the allegations. (R. 15-25.) Fredrickson Defendants filed a motion to conduct expedited discovery and Mojo Plaintiffs moved for a preliminary injunction. (R. 44-44A; 48-65.) These issues were settled by stipulation of the parties.

Very little discovery was conducted and, within five months of the filing of the Complaint, Fredrickson Defendants moved for summary judgment. (R. 699-702.) Fredrickson Defendants were able to take the depositions of Mark Peterson and Judith Peterson, but Mojo Plaintiffs were unable to schedule the deposition of Fredrickson Defendants due to Mr. Fredrickson's travel schedule. Mojo Plaintiffs filed a response. Due to complications with the filing of certain other motions, Mojo Plaintiffs' first response was stricken and the Trial Court granted Mojo Plaintiffs a second opportunity to respond to Fredrickson Defendants' motion for summary judgment.

After the Trial Court held a hearing on the motion for summary judgment, it granted Fredrickson Defendants' motion for summary judgment and dismissed all causes of action. The Court grant the motion for two reasons: (1) Mojo Plaintiffs' failure to

comply with Utah Rules of Civil Procedure 7 and 56 and (2) a finding that the Asset Purchase Agreement was a negotiated contract and Mojo Plaintiffs were not damaged. (R. 1738-43.) Mojo Plaintiffs immediately filed a Notice of Appeal, which was denied as untimely. (R. 1900-03.) The Trial Court also awarded Fredrickson Defendants attorney fees under the Asset Purchase Agreement. (R. 1904-08.)

Mojo Plaintiffs moved to set aside the summary judgment ruling, in part, based on the failure to fully conduct discovery, which the Trial Court denied. (R. 1919-22; 2104-07.) Mojo Plaintiffs filed this appeal.

Facts established in the District Court Record

1. Mark Peterson is the son of Judith Peterson. (R. 1559.)
2. Mark and Judith Peterson hired Attorney John Bates to form Mojo Syndicate and Bar Named Sue. (R. 1473.)
3. On July 10, 2008, Mr. Bates formed Mojo Syndicate, Inc, and Bar Named Sue, LLC. (R. 1473.)
4. Mojo Syndicate, Inc., is the parent company of Bar Named Sue, LLC. (R. 1453.)
5. Bar Named Sue, LLC, is a wholly-owned subsidiary of Mojo Syndicate, Inc. (R. 1453.)
6. Mark Peterson was a president of Mojo Syndicate, Inc., (R. 1559), and a manager of Bar Named Sue, LLC, (R. 1452).
7. Judith Peterson wanted to invest in the construction of a bar, named a "Bar Named Sue." (R. 1559.)

8. Judith Peterson personally purchased all of the assets of Mojo Syndicate and Bar Named Sue. (R. 1476, 1479.)

9. In the summer of 2009, Mark Peterson was having difficulty with another principal, Jason Rasmussen. (R. 1559.)

10. Mark Peterson believed Rasmussen was mismanaging the Bar and stealing money from the Bar. (R. 1476.)

11. At the end of August, 2009, Mark Peterson enlisted the help of Fredrickson to remove Rasmussen from the Bar. (R. 1476.)

12. Fredrickson was a former neighbor of Mark and Judith Peterson. (R. 1559.)

13. Mark Peterson knew that Fredrickson has prior experience with running two bars and the two discussed forming a partnership to run the Bar successfully. (R. 1502.)

14. Mark Peterson and Fredrickson discussed the possibility of Fredrickson becoming involved in the operations of A Bar Named Sue. (R. 1476.)

15. Mark Peterson and Fredrickson discussed forming a partnership where both would operate and jointly own A Bar Named Sue. (R. 1476-77; 1559-60.)

16. On September 30, 2009, Mr. Bates drafted a "Certificate of Resolution" and "Certificate of Agency Appointment" to remove Rasmussen from the business and give Fredrickson broad authority over the business. (R. 1473.)

17. On September 30, 2009, the parties executed a number of documents, including Agency Appointment documents, executed by Mark Peterson, on behalf of A Bar Named Sue, Judith Peterson, on behalf of Mojo Syndicate. (R. 1477; 1542-1556.)

18. The purpose of these documents was to have Fredrickson assist in removing Rasmussen from the business and to make Fredrickson and Mark partners in the business. (R. 1502; 1560-61.)

19. Mark Peterson, as manager of Bar Named Sue, LLC, signed a Certificate of Agency Appointment, which appointed Fredrickson as an "authorized agent for the purposes of removing Jason Rasmussen from all factes of the existence and operation of the Company ... and taking such actions as might be deemed by Mr. Fredrickson to be prudent and necessary to secure the Bar Named Sue promises and to establish clear, proper, and appropriate business practices" (R. 1452.)

20. Judith Peterson, as secretary of Mojo Syndicate, Inc., signed an Agency Appointment Agreement, which appointed Fredrickson as an "authorized agent for the purposes of removing Jason Rasmussen from all factes of the existence and operation of the Company ... and taking such actions as might be deemed by Mr. Fredrickson to be prudent and necessary to secure the Bar Named Sue promises and to establish clear, proper, and appropriate business practices" (R. 1453.)

21. The parties also signed a document giving Fredrickson 50 percent ownership interest and control of Mojo Syndicate and A Bar Named Sue. (R. 1502.)

22. The document states that effective October 2, 2009, Fredrickson would "assume 50 per cent [sic] control, ownership, and assigned shares of MOJO SYNDICATE INC., and a BAR NAMED SUE LLC." (R. 1468.)

23. Throughout October 2009, Mark and Judith Peterson and Fredrickson had a few meetings, wherein Fredrickson continued to represent that he and Mark Peterson would be partnership in ownership of Bar Named Sue. (R. 1478.)

24. Fredrickson stated he paid approximately \$40,000.00 to the Bar's vendors, including the landlord, beer and liquor vendors, payments for the fire suppression system, and payments for insurance coverage. (R. 1486.)

25. On October 13, 2009, Judith Peterson and Fredrickson retained Sean Egan to represent Mojo Syndicate in pursuing claims against Rasmussen. (R. 1478.)

26. On October 15, 2009, Fredrickson formed 3928, LLC, naming himself as the only manager. (R. 1462.)

27. On October 22, 2009, Mr. Bates received an email from Mr. Hollingworth with a draft of an asset purchase agreement for Fredrickson's "purchase of A Bar Named Sue assets." (R. 1473.)

28. Mr. Hollingworth sought Mr. Bates' comments on the documents. (R. 1473.)

29. On October 24, 2009, Mr. Bates reviewed the proposed agreement and note, but did not have any knowledge of the transaction and "had not been retained by the Petersons to assist in any transaction." (R. 1474.)

30. On October 26, 2009, Mr. Bates sent an email to Mr. Hollingworth with a few minor comments. (R. 1474.)

31. However, neither Mark Peterson nor Judith Peterson retained Mr. Bates to represent them or Mojo Plaintiffs. (R. 1474.)

32. On October 27, 2009, Fredrickson came to Judith Peterson's home with the Asset Purchase Agreement. (R. 1478.)

33. Mark Peterson, Judith Peterson, and Fredrickson executed the Asset Purchase Agreement. (R.. 1474.)

34. The Asset Purchase Agreement spells out a purchase price of \$80,000, of which \$40,000 is to be paid at closing. (R. 1542-56.)

35. Judith Peterson received a promissory note for \$40,000. (R. 1543.)

36. However, there is no copy of the executed promissory note. (R. 1556.)

37. The Promissory Note requires Fredrickson Defendants to pay \$40,000.00 to Bar Named Sue in monthly installments of \$2,000.00 until paid in full. (R. 1479.)

38. Additionally, Fredrickson was to receive a dollar-for-dollar credit against the purchase price for all amounts that it advanced to the business to cover operations prior to closing. (R. 1542-56.)

39. It is unknown whether Fredrickson promised he and Mark Peterson would be partners in Bar Named Sue before and after the signing of the Asset Purchase Agreement. (R. 1505.)

40. Mark Peterson stated Fredrickson promised he and Mark Peterson would be partners of Bar Named Sue. (R. 1505.)

41. Judith Peterson stated her understanding was Mark Peterson would be partners in the Bar with Fredrickson. (R. 1478-79.)

42. On November 10, 2009, the parties signed a Closing Memorandum and assignment and bill of sale. (R. 1557.)

43. The Closing Memorandum acknowledges the name of Bar Named Sue, LLC, was changed to It Could Have Been Fun, LLC. (R. 1557.)

44. The Closing Memorandum states the parties agree to a dollar-for-dollar credit of \$40,000, so no money was required of Fredrickson at closing (R. 1557.)

45. On October 14, 2009, Mojo Plaintiffs filed suit against Rasmussen and Fredrickson Defendants. (R. 1-12.)

46. Mojo Plaintiffs alleged five causes of action, (1) Mojo Plaintiffs filed the Complaint with five causes of action: (1) Rescission based upon Breach of Contract and Fraud, (2) Intentional Interference with Prospective Economic Advantage, (3) Civil Conspiracy, (4) Breach of Fiduciary Duty, and (5) in the alternative, Breach of Contract. (R. 1-12.)

47. Mojo Plaintiffs' Complaint alleged the Asset Purchase Agreement was void and procured by deception by the Fredrickson Defendants. (*Id.*)

48. Fredrickson Defendants denied the allegations. (R. 15-25.)

49. Fredrickson Defendants filed a motion to conduct expedited discovery and Mojo Plaintiffs moved for a preliminary injunction. (R. 44-44A; 48-65.)

50. These issues were settled by stipulation of the parties. (R. 1833-38.)

51. Mojo Plaintiffs then filed a motion to amend the complaint, but Trial Counsel for Mojo Plaintiffs failed to send the motion and accompanying memorandum to opposing counsel. (R. 345-46.)

52. Very little discovery was conducted and, within five months of the filing of the Complaint, Fredrickson Defendants moved for summary judgment. (R. 699-702.)

53. Fredrickson Defendants were able to take the depositions of Mark Peterson and Judith Peterson, but Mojo Plaintiffs were unable to schedule the deposition of Fredrickson Defendants due to Mr. Fredrickson's travel and his girlfriend visiting. (R. 1923-59.)

54. Mojo Plaintiffs filed a Notice to Submit Amended Complaint and Order to File Amended Complaint. (R. 1011-1014.)

55. Trial Counsel for Mojo Plaintiffs filed the Supplemental Amended Complaint. (R. 1015-70.)

56. Mojo Plaintiffs then filed a response to the motion for summary judgment. (R. 1075-1137.)

57. The Court signed the Order allowing Mojo Plaintiffs to file an amended complaint. (R. 1013-14.)

58. After numerous motions were filed by both sides, the Trial Court set aside the order allowing Mojo Plaintiffs leave to file an amended complaint, as well as resolving other motions before the Trial Court. (R. 1393-97.)

59. The Trial Court granted Mojo Plaintiffs a second opportunity to respond to Fredrickson Defendants' motion for summary judgment. (R. 1393-97.)

60. Mojo Plaintiffs filed a second Response to motion for summary judgment. (R. 1421-1562.)

61. Mojo Plaintiffs also filed a motion for further discovery under Rule 56(f), which the Trial Court declined to hear because it was filed untimely. (R. 1723-34; 1738-43.)

62. After a hearing, the Court granted Fredrickson Defendants' motion for summary judgment and dismissed all causes of action. (R. 1738-43.)

63. The Trial Court granted the motion for two reasons: (1) Mojo Plaintiffs' failure to comply with Utah Rules of Civil Procedure 7 and 56 and (2) a finding that the Asset Purchase Agreement was a negotiated contract and Mojo Plaintiffs were not damaged. (R. 1738-43.)

64. Mojo Plaintiffs immediately filed a Notice of Appeal, which was denied as untimely. (R. 1900-03.)

65. The Trial Court also awarded Fredrickson Defendants attorney fees under the Asset Purchase Agreement. (R. 1904-08.)

66. Mojo Plaintiffs moved to set aside the summary judgment ruling, in part, based on the failure to fully conduct discovery, which the Trial Court denied. (R. 1919-22; 2104-07.)

67. Mojo Plaintiffs filed this appeal. (R. 2113-14.)

SUMMARY OF ARGUMENT

The Trial Court erred in granting summary judgment in favor of Fredrickson Defendants and dismissing all Mojo Plaintiffs' claims. First, Mojo Plaintiffs' trial counsel, Charles C. Brown, displayed inappropriate conduct and was likely affected by a disability, which likely affected his representation of Mojo Plaintiffs and caused the Trial Court to incorrectly grant summary judgment. Second, even if this Court determines Mr. Brown's representation was adequate, the Trial Court erred in granting summary judgment because Mojo Plaintiffs' response to the summary judgment motion

substantially complied with the Utah Rules of Civil Procedure. Third, the Trial Court erred in granting summary judgment because genuine issues of material fact precluded summary judgment. Lastly, the Trial Court erred in awarding Fredrickson Defendants their attorney fees because there was no basis to award attorney fees and the Asset Purchase Agreement was not put "enforced or interpreted" in the case. Therefore, this Court should reverse and remand for a trial on the merits.

ARGUMENT

I. This Court should Reverse the Trial Court's Dismissal on Summary Judgment Because Mojo Plaintiffs' Trial Counsel, Charles C. Brown, Displayed Inappropriate Conduct and His Disability Likely Affected His Representation of Mojo Plaintiffs.

Rule 14-501 of the Rules Governing Utah Bar states, "The purpose of lawyer disciplinary and disability proceedings is to ensure and maintain the high standard of professional conduct required of those who undertake the discharge of professional responsibilities as lawyers and to protect the public and the administration of justice from those who have demonstrated by their conduct that they are unable or unlikely to properly discharge their professional responsibilities." Supreme Court Rules of Professional Practice, Chapter 14, Rules Governing the Utah State Bar, Article 5, Lawyer Discipline and Disability, Rule 14-501(a) (2011). "It is basic that the responsibility is upon the Bar and the courts to supervise those licensed to practice and to disbar, suspend or discipline those guilty of infractions of proper standards because the practice of law is not a right accorded all citizens ... In the prudent exercise of the power to discipline in order to maintain such standards lies the protection of the public and of the Bar itself." *In Re MacFarlane*, 10 Utah 3d 217, 350 P.2d 631, 633 (Utah 1960).

This Court should reverse the summary judgment ruling dismissing Mojo Plaintiffs' claims because Mojo Plaintiffs' Trial Counsel, Charles C. Brown ("Brown"), displayed inappropriate conduct during his representation of Mojo Plaintiffs. Brown represented Mojo Plaintiffs throughout the trial court proceedings, from filing the Complaint (R. 1-10) to arguing the motion for summary judgment (R. 2125) to filing the Notice of Appeal (R. 2113-2114) and Docketing Statement (on file herein) in this case. However, the Office of Professional Conduct ("OPC") of the Utah State Bar filed an administrative action against Brown on March 19, 2012. (*See* Appendix Exhibit 5.) Brown's law license was placed on "Disability" status as of March 21, 2012. (*See* Appendix Exhibit 6.)

While Brown represented Mojo Plaintiffs, he was involved in suspicious (and likely illegal) activities. In 2010, the Utah Real Estate Division of the Department of Commerce issued a cease and desist order against Brown's law offices, CC Brown Law Offices, for negotiating loan modifications. (*See* Appendix Exhibit 7.) In 2011, the Maryland Commissioner of Financial Regulation issued a cease and desist Order to Brown's law offices. (*See* Appendix Exhibit 8, p. 3.) In 2012, the Connecticut Department of Banking issued a Temporary Order to Cease and Desist and the intent to impose a civil fine against Brown's law offices. (*Id.*) Additionally, on June 12, 2012, the Federal Bureau of Investigations ("FBI") raided Brown's law offices in Midvale and West Valley City, Utah. (*See* Appendix Exhibit 9.) The Better Business Bureau gave Brown's law offices an "F" rating. (*See* Appendix Exhibit 8.) This conduct was distracting to and likely affected Brown's representation of Mojo Plaintiffs.

Brown is also disabled. His disability likely affected Brown's representation of Mojo Plaintiffs. While disability is not necessarily akin to intentional misconduct, "[a]n attorney's disability status derives from a 'physical or mental condition which adversely affects the lawyer's ability to practice law'" *In Re Discipline of Trujillo*, 2011 UT 38, ¶ 25, 24 P.3d 972 (citing RLDD 23(c) (superseded by Supreme Court Rules of Professional Practice, ch. 14, art. 5, Rule 14-523)). However, as the Utah Supreme Court has noted, "[i]ndeed, since one of the primary purposes of lawyer discipline and disability proceedings is to 'protect the public ... from those who have demonstrated by their conduct that they are unable ... to properly discharge their professional responsibilities,' RLDD 1(a), courts must be concerned with disabled lawyers who endanger the public, even if no misconduct has been committed." *Id.* at ¶ 25.

Here, Brown's law license was placed on "Disability" status as of March 21, 2012, within weeks of Brown's representation of Mojo Plaintiffs. (See Appendix Exhibits 5, 6.) However, Brown represented Mojo Plaintiffs throughout the trial phase of this litigation. Brown failed to follow Utah Rules of Civil Procedure 7 and 56 in responding to Fredrickson Defendants' motion for summary judgment. (R. 1738-43.) The Trial Court gave Brown two opportunities to respond to Fredrickson Defendants' motion for summary judgment. (R. 1075-1137; 1421-1562.) Both times, the Court ruled Brown failed to comply with the Utah Rules of Civil Procedure. (R. 1393-97; 1738-43.)

Additionally, Brown's other questionable conduct includes:

- Filing a Request to Submit and enter a default against Fredrickson Defendants, when no leave of Court was given to file the "Supplemental Amended Complaint"

and there was no evidence the document was served upon opposing counsel, (R. 1328-29; 1393-94);

- Failing to obtain leave of court before filing an amended complaint, (R. 1394-95);
- Filing a Notice to Submit an ex parte objection to defendants' late filing of memorandum contesting plaintiffs [sic] motion to amend complaint without enlargement of time and request for enlargement of time for plaintiffs [sic] to respond, but there was no motion or memoranda, no evidence that the document was served upon opposing counsel, and no basis for an ex parte application, (R. 1326-2; 1394);
- Filing a Notice to Submit Mojo Plaintiffs' motion to file supplemental amended complaint because it was not based upon a motion or memoranda, it mis-stated the Court's ruling, and there is no evidence that it was served upon opposing counsel, (R. 1394-95);
- Failing to correctly state the Court's ruling from the May 25, 2010, hearing, in the September 13, 2010, order prepared by Brown, as well as failing to serve it upon opposing counsel, (R. 1394);
- Failing to adhere to the Utah Rules of Civil Procedure in responding to a motion for summary judgment, (R. 1075-1137; 1395; 1421-1562).

Brown failed to follow the requirements of the Utah Rules of Civil Procedure. Mr. Brown was admitted to practice in Utah in 1974, and has been practicing law for over 35 years. (See Appendix Exhibit 5.) Mojo Plaintiff retained Brown to represent their interests as qualified and knowledgeable counsel. The fact that Brown was placed on

disability status within weeks of his representation of Mojo Plaintiffs casts doubt on his ability to function as a competent attorney.³ However, Brown failed to perform and the relationship between his disability and failure to perform cannot be dismissed.

Therefore, Mojo Plaintiffs should be granted relief on equitable grounds, as they had no control over Brown's performance and trusted in his competence as a qualified attorney. This Court should reverse the summary judgment dismissal and remand to the Trial Court, with instruction to allow Mojo Plaintiffs an opportunity to adequately defend against Fredrickson Defendants' motion for summary judgment.

II. Even if this Court Chooses Not to Reverse Due to Mojo Plaintiffs' Trial Counsel's Disability, this Court Should Reverse Summary Judgment Ruling on Procedural Grounds because Mojo Plaintiffs Substantially Complied with Rules 7 and 56.

The Trial Court granted summary judgment, in part, based upon Mojo Plaintiffs' failure to comply with Rules 7 and 56 of the Utah Rules of Civil Procedure. (R. 1738-1743.) Specifically, the Trial Court granted the Fredrickson Defendants' motion for summary judgment on all causes of action because "the opposing memorandum does not, in fact, comply with the Rules of Civil Procedure and so procedurally it is defective and does not, is not a proper memorandum to counter the summary judgment motion that was made by [Fredrickson D]efendants." (R. 2125, Tr., 43:1-5.) The Trial Court's ruling was in error because, despite any failing by Mr. Brown, the Mojo Plaintiffs specifically disputed facts and cited to the record where applicable.

³ The exact reasons for the administrative action by the OPC against Brown are unknown. The case, *OPC v. Brown*, Third Judicial District Court, Case no. 120901875, is classified as "private" and Mojo Plaintiffs are unable to investigate or learn of the reasons for Brown's disability status.

"The 'major purpose of summary judgment is to avoid unnecessary trial by allowing the parties to pierce the pleadings to determine whether there is a genuine issue to present to the fact finder.'" *Brown v. Jorgensen*, 2006 UT App 168, ¶ 20, 136 P.3d 1252 (citing *Reagan Outdoor Adver., Inc. v. Lundgren*, 692 P.2d 776, 779 (Utah 1984)). Rule 56 of the Utah Rules of Civil Procedure governs summary judgment and requires "[t]he motion, memoranda, and affidavits shall be in accordance with Rule 7 [of the Utah Rules of Civil Procedure]." *Id.* at 56(c) (2011). Rule 7 of the Utah Rules of Civil Procedure states:

A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted ... [and f]or each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials.

Id. at 7(c)(3)(B).

"[T]he trial court has discretion in requiring compliance with [rule 7 of the Utah Rules of Civil Procedure.]" *Bluffdale City v. Smith*, 2007 UT App 25, ... 5, 156 P.3d 175 (second alteration in original) (internal quotation marks omitted). However, strict compliance under Rule 7 is not necessary if the failure to comply with Rule 7 was harmless error. *Salt Lake County v. Metro West Ready Mix, Inc.*, 2004 UT 23, n. 4, 89 P.3d 155.

In *Metro West, supra*, Salt Lake County filed an action to quiet title to certain real property on the border of Salt Lake and Utah Counties. *Id.* at ¶ 9. Metro West filed a motion for summary judgment, arguing it had legal ownership under Utah's Recording Statute and it had adversely possessed the property under Utah's Adverse Possession

Statute. *Id.* The Trial Court granted summary judgment in favor Metro West, finding Metro West was the real property owner under Utah's Recording Statute and the "undisputed facts that [Metro West] purchased [the Property] for valuable consideration and in good faith, and recorded its deed in Utah County prior to any recording there by [Salt Lake County]."⁴ *Id.* at ¶ 9. On review, the Utah Supreme Court reversed, finding there were "at least two key areas of dispute sufficient to render summary judgment inappropriate." *Id.* at ¶ 23.

The Utah Supreme Court also addressed Metro West's argument that the County failed to set forth in its opposing memorandum a statement of facts that it claims are in dispute as required under Rule 4-501(2)(B) of the Utah Code of Judicial Administration (the predecessor to Rule 7 of the Utah Rules of Civil Procedure). The Utah Supreme Court ruled the failure to comply with the technical requirements was harmless because "the disputed facts were clearly provided in the body of the memorandum with applicable record references." *Id.* at n. 4. This reasoning would apply equally here.

The Trial Court erred in ruling there were procedural deficiencies in violation of Rule 7 because the Mojo Plaintiffs set forth each *controverted* fact. Specifically, Rule 7 requires "[f]or each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute" Utah R. Civ. P. 7(c)(3)(B).

⁴ It should be noted that the Honorable Sandra Peuler was the assigned judge over the *Metro West*, *supra*, case. Judge Peuler is the judge in the present case also.

First, a review of the Mojo Plaintiffs' second Response to Plaintiff's Motion for Summary Judgment ("Response") lists each *controverted* fact, with the corresponding paragraph from the Fredrickson Defendants' Memorandum in Support of Defendants 3928 LLC and John Fredrickson's Motion for Summary Judgment ("Memo. Summ. J."). (R. 1425-1441.) Mojo Plaintiffs' Response has 38 numbered paragraphs under the heading, "Statement of Undisputed Material Facts." (R. 1425-1441.) These statements of fact correspond directly to Fredrickson Defendants' 38 numbered paragraphs under the heading, "Statement of Undisputed Material Facts." (R. 707-724.)

Second, the controverted facts include citations to the record, whether the citations are within the "Statement of Undisputed Facts" section or within the "Argument" section of Mojo Plaintiffs' Response. For example:

- Paragraph 7 of Mojo Plaintiffs' Response quotes exactly to the Statement of Fact No. 7 in Fredrickson Defendants' Mem. Summ. J. (R. 1428, ¶ 7, and *compare* R. 707, ¶ 7.) Mojo Plaintiffs' Response also cites to John Bates' Affidavit for support and raises the issue of the scope of Mr. Bates' alleged representation of Plaintiffs and Mark and Judith Peterson. (R. 1428; 1445; 1473-1475.)
- Paragraph 13 of Mojo Plaintiffs' Response quotes exactly to the Statement of Fact No. 13 in Fredrickson Defendants' Mem. Summ. J. (R. 1434, ¶ 13, and *compare* R. 708-709, ¶ 13.) Mojo Plaintiffs cite to Mark Peterson's Second Affidavit in support of the disputed fact regarding the accounting of A Bar Named Sue. (R. 1502-1508.)

- Evidence that Fredrickson Defendants are using Mark Peterson's EIN number for Bar Named Sue, LLC to file taxes, with a citation to the Garnishment of John Fredrickson. (R. 1444; 1509-1512.)

Therefore, Mojo Plaintiffs complied with Rules 7 and 56 of the Utah Rules of Civil Procedure in their Response. They set forth each *controverted* fact as required by Rule 7. Further, they provided record citations to those controverted facts, including citations to the John Bates Affidavit, the Second Affidavit of Mark Peterson, the Agency Appointment, and the Second Affidavit of Judith Peterson. Therefore, as in *Metro West, supra*, "the disputed facts were clearly provided in the body of the memorandum with applicable record references" and Mojo Plaintiffs' substantially complied with Rule 7. See *Metro West Ready Mix, Inc.*, 2004 UT at n. 4.

III. This Court Should Reverse the Trial Court's Dismissal on Summary Judgment because Mojo Plaintiffs Presented Evidence of Genuine Issues of Material Fact that Prevented Entry Judgment as a Matter of Law.

"On a motion for summary judgment, a trial court should not weigh disputed evidence, and its sole inquiry should be whether material issues of fact exist." *Bear River Mut. Ins. Co. v. Williams*, 2006 UT App 500, ¶ 15, 153 P.3d 798 (internal citations omitted). "In reviewing a grant of summary judgment, [the appellate courts] view the facts and all reasonable inferences drawn therefrom in a light most favorable to the nonmoving party." *Sanderson v. First Sec. Leasing Co.*, 844 P.2d 303, 304 (Utah 1992).

Generally, a party moving for summary judgment must make an initial showing of entitlement to judgment as a matter of law and that there are no genuine issues of material fact to preclude summary judgment in his favor. *Orvis v. Johnson*, 2008 UT 2, ¶ 29, 177

P.3d 600. "Once the movant has [met its burden,] 'the burden then shifts to the *non-moving* party, who may not rest upon the mere allegations or denials of the pleadings, but must set forth specific facts showing that there is a genuine issue for trial.'" *Stevens v. LaVerkin City*, 2008 UT App 129, ¶ 18, 183 P.3d 1059 (citing *Orvis v. Johnson*, 2008 UT 2, ¶ 18, 177 P.3d 600) (emphasis in original). "To overcome summary judgment, plaintiffs must offer at least some evidence that could be interpreted to satisfy the elements of the claim...." *Waddoups v., Amalgamated Sugar Co.*, 2002 UT 69, 54 P.3d 1054, 1135.

A. Genuine Issues of Material Fact Remain Relating to First Cause of Action for Rescission of the Contracts for Breach and Fraud.

"The elements of a prima facie case for breach of contract are (1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages." *Bair v. Axiom Design*, 2001 UT 20, ¶ 14, 20 P.3d 388. "As a general proposition, a party to a contract has a right of rescission and an action for restitution as an alternative to an action for damages where there has been a *material* breach of the contract by the other party." *Polyglycoat Corp. v. Holcomb*, 591 P.2d 449, 451 (Utah 1979) (alteration in original). "What constitutes so serious a breach as to justify rescission is not easily reduced to precise statement, but certainly a failure of performance which 'defeats the very object of the contract' or '[is] of such prime importance that the contract would not have been made if default in that particular had been contemplated' is a material failure." *Id.*

Here, the Trial Court erred in granting summary judgment in favor of Fredrickson Defendants because genuine issues of material fact exist as to whether the Contracts

should be rescinded due to breach and fraud. Mojo Plaintiffs' First Cause of Action was for Rescission based upon breach and fraud. On summary judgment, Fredrickson Defendants' alleged there were no genuine issues of material fact to preclude summary judgment on rescission due to fraud because the contents of the Asset Purchase Agreement contradict the oral statements, Mojo Plaintiffs were represented by counsel, and accepted monthly payments required under the Promissory Note and Asset Purchase Agreement. (R. 726-28.) However, genuine issues of material fact prevented entry of summary judgment.

i. Genuine Issues of Fact Exist as to Whether Fredrickson Defendants Modified the Asset Purchase Agreement After Signing and Prevent Summary Judgment.

The Trial Court found "plaintiffs cannot have reasonably relied on any statements allegedly made to them that contradicted the express written terms of the parties' agreement, which Plaintiffs admit they signed." (R. 1739-40.) However, Mark Peterson and Judith Peterson both provided affidavits with disputed facts that prevented summary judgment relating to oral representations by Fredrickson Defendants. For instance, Mark Peterson's Second Affidavit states, "I always believed John Fredrickson's statements to me when [he] said that we were going to be owners of A Bar Named Sue because of the three party agreement ... and his repeated statements of his intent that we will be partners" (R. 1278.)

If these representations were made after the signing of the Asset Purchase Agreement, then these statements are not precluded by the writings. See *Nielson Co. v. Cook*, 2002 UT 11, n. 4, 40 P.3d 1119 ("In Utah, parties to a written agreement may not

only enter into separate, subsequent agreements, but they may also modify a written agreement through verbal negotiations subsequent to entering into the initial written agreement, even if the agreement being modified unambiguously indicates that any modifications must be in writing.") Further, Mojo Plaintiffs response argued "Fredrickson's affidavit is self-serving and Judith Peterson and Mark Peterson never intended to sell A Bar Named Sue." (R. 1436, ¶ 18.)

Judith Peterson's Second Affidavit also states, "I believe that John added pages to the Asset Purchase Agreement after I signed it on October 27, 2009, as I do not recall seeing the documents when it was signed." (R. 1271.) She continues, "John Fredrickson still has not brought Mark Peterson back in as a partner of A Bar Named Sue." (*Id.*) She testifies, "I own the assets of A Bar Named Sue," (*Id.* at ¶ 25-26), and that Fredrickson Defendants did not pay her \$2,000 per month or \$40,000.00 up front for his partnership in the bar," (*Id.* at 27).

Further, in Mark Peterson's deposition, he testifies that he, Judith Peterson, and John Fredrickson spoke on October 27, 2009, when the Asset Purchase Agreement was signed. (R. 782, 232:6-21.) Mark Peterson continues that he and Judith Peterson had contact with John Fredrickson after the signing of the Asset Purchase Agreement to sign other documents. (R. 782-83.) If Fredrickson Defendants represented that they would make Mark Peterson a partner with Fredrickson Defendants *after* the signing of the Asset Purchase Agreement, then that prevents summary judgment. (R. 1505.) This issue was never addressed. If Judith Peterson owned the assets of A Bar Named Sue, then they could not have been sold to Fredrickson Defendants by Mojo Plaintiffs without approval

from Judith Peterson personally. (R. 751, 64:3-15; 767, 155:20-768, 156:25.) If Fredrickson Defendants did not pay Judith Peterson \$2,000 per month, then that is a breach of contract. Each of these facts is material and prevents summary judgment.

The Trial Court should not have weighed the evidence in deciding summary judgment. Instead, the Trial Court was required to take all facts and inferences in the light most favorable to Mojo Plaintiffs. Had the Trial Court followed the requirements of Rule 56, genuine issues of material fact would have prevented summary judgment. These facts prevent summary judgment.

ii. Genuine Issues of Fact Exist as to Whether Mojo Plaintiffs Were Represented by Counsel and Prevent Summary Judgment.

The Trial Court found, "Plaintiffs' own attorney drafted certain of the documents executed in connection with the parties' agreement" and the Mojo Plaintiffs were not subject to duress. (R. 1740.) Fredrickson Defendants repeatedly argued Mojo Plaintiffs were represented by counsel. (R. 727.) However, Mojo Plaintiffs' representatives, Mark Peterson, testified in his Second Affidavit that they were not represented by counsel (R. 1277.) John Bates also testified he was not hired "on approximately October 13, 2009, or on any other date, to represent [Mojo Plaintiffs or the Petersons] in the sale of A Bar Named Sue." (R. 1265-66.) In their Response to the motion for summary judgment, Mojo Plaintiffs stated, "Mr. Bates was not hired by the Plaintiffs in connection with the asset sale as they had no intention of selling A Bar Named Sue and were unaware that there was going to be a sale of A Bar Named Sue." (R. 1437.) This creates a genuine issue of material fact. Mojo Plaintiffs were not represented by counsel and did not confer

with any counsel. Therefore, this creates a genuine issue of fact to prevent summary judgment.

iii. Genuine Issues of Fact Exist as to Whether Mojo Plaintiffs Received and Accepted Monthly Payments Under the Promissory Note and Asset Purchase Agreement.

The Trial Court found, "[r]egarding breach of contract allegations, the undisputed evidence – including the deposition testimony given by Plaintiffs' principals – shows that Defendants fully complied with the terms of the parties' agreement, including by timely making all required payments." (R. 1739.) However, Mojo Plaintiffs provided evidence that they never received the payments. Judith Peterson's Second Affidavit states, "John Fredrickson stated that he was going to pay me \$2,000.00 a month and \$3,000.00 a month to Mark Peterson under the table and \$40,000.00 up front for partnership in the bar, which he did not do." (R. 1272, ¶ 27.) Defendants did not provide any evidence of payment in full and never provided an accounting of the \$40,000 "credit" Fredrickson Defendants received in the Asset Purchase Agreement, (R. 1498). Therefore, this creates a genuine issue of material fact, which prevented summary judgment

B. Genuine Issues of Material Fact Remain Relating to the Second Cause of Action for Intentional Interference with Prospective Economic Relations

Utah recognizes a common law cause of action for intentional interference with prospective economic relations. *Leigh Furniture and Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982). In order to recover damages under the tort of intentional interference with prospective economic relations, the plaintiff must prove "(1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) for

an improper purpose or by improper means, (3) causing injury to the plaintiff." *Id.* "The second element of the tort can be proved in one of two ways. To prove the defendant acted with an improper purpose, the plaintiff must prove more than a motivation for ill will, but must show that "the defendant's predominant purpose was to injure the plaintiff." *Anderson Dev. Co. v. Tobias*, 2005 UT 36, ¶ 20, 116 P.3d 323 (internal citations omitted). To prove the improper means, the plaintiff must show the "defendant's means of interference were contrary to statutory, regulatory, or common law or violated an established standard of a trade or profession." *Id.*

The Trial Court found:

There is no evidence that Defendants interfered with Plaintiffs' economic relations or that they acted for an improper purpose or by improper means. ... the undisputed evidence shows that the parties entered into a valid written agreement and that Defendants fully performed that agreement by timely paying all of the agreed-upon amounts to Plaintiffs.

(R. 1740.) The Trial Court found this was a contract between the parties. However, again, Mojo Plaintiffs provided material facts that Fredrickson Defendants interfered with Mojo Plaintiffs economic relations by (1) representing that Mark Peterson would be a partner with the Fredrickson Defendants, (R. 782-83; 1505), (2) never agreeing to sell the bar and its assets for \$80,000, (R. 1504, ¶ 20), (3) there is no executed promissory note, (R. 1504, ¶ 22), (4) the Judith Peterson never received an accounting from Fredrickson Defendants regarding the \$40,000 he paid and the alleged credit he received in the Closing Memorandum, (R. 1498-1499). Each of these facts prevents summary judgment because they go toward the allegations that Fredrickson Defendants used an improper purpose to take the bar and its assets from Mojo Plaintiffs.

Further, the fact that the assets in the Asset Purchase Agreement were owned by Judith Peterson, not Mojo Plaintiffs, casts doubt on Fredrickson Defendants' ability to purchase the assets. Fredrickson Defendants could not have purchased the assets if they were not owned by Mojo Plaintiffs. (R. 751, 64:3-15; 767, 155:20-768, 156:25.) Again, this creates a genuine issue of material fact as to whether Fredrickson Defendants used an improper purpose, and prevents summary judgment.

The Trial Court also found "there [is no] evidence of injury to Plaintiffs. Plaintiffs' principals acknowledge receiving every monthly payment required by the parties' agreement." (R. 1741.) However, Mojo Plaintiffs provided evidence that they never received the payments. Judith Peterson's Second Affidavit states, "John Fredrickson stated that he was going to pay me \$2,000.00 a month and \$3,000.00 a month to Mark Peterson under the table and \$40,000.00 up front for partnership in the bar, which he did not do." (R. 1272, ¶ 27.) If Fredrickson Defendants did not pay Judith Peterson \$2,000 per month, then Mojo Plaintiffs were injured. (R. 1271.) This disputed fact goes to the heart of the third element of intentional interference with prospective economic relations and prevents summary judgment. Therefore, the Trial Court erred in granting summary judgment on Mojo Plaintiffs' Second Claim for Intentional Interference with Prospective Economic Advantage.

C. Genuine Issues of Material Fact Remain Relating to Third Cause of Action for Civil Conspiracy.

To establish a claim for civil conspiracy, a plaintiff must show "(1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a

proximate result thereof." *Peterson v. Delta Air Lines, Inc.*, 2002 UT App 56, ¶ 12, 42 P.3d 1253 (internal citations omitted). The claim of civil conspiracy requires an underlying tort. *Puttuck v. Gendron*, 2008 UT App 361, ¶ 21.

Here, the Trial Court found "there is no evidence that Defendants committed any unlawful or wrongful act. ... The undisputed evidence shows that Defendants did not act unlawfully. Furthermore, there is no evidence that Plaintiffs have suffered any damages." (R. 1741.) However, Mojo Plaintiffs provided evidence Fredrickson Defendants tried (and succeeded) in obtaining the assets through the Asset Purchase Agreement without paying full value, (R. 1272, ¶ 27), failed to uphold promises to keep Mark Peterson as a partner, (R. 782-83; 1505), and took assets Judith Peterson personally owned, (R. 751, 64:3-15; 767, 155:20-768, 156:25). If Judith Peterson owned the assets personally (as Plaintiffs alleged), then Mojo Plaintiffs could not sell the personal assets of Judith Peterson. It was unlawful for Mojo Plaintiffs to sell the personal assets of Judith Peterson. This is a genuine issue of material fact preventing summary judgment. Additionally, if Fredrickson Defendants obtained the assets without paying full value, then that is likewise unlawful. This, again, prevents summary judgment.

D. Genuine Issues of Material Fact Remain Relating to Fourth Cause of Action for Breach of Fiduciary Duty.

The Trial Court granted summary judgment on Mojo Plaintiffs' claim for breach of fiduciary duties, finding "[t]he undisputed evidence in this case shows that the parties dealt at arm's length with each other throughout the negotiation and execution of their agreement. ... Under these circumstances of arm's-length negotiation, there were no fiduciary duties owed by Defendants to Plaintiffs in connection with the asset purchase."

(R. 1741-42.) However, the Trial Court failed to acknowledge the parties were partners with one another *before* they entered into the Asset Purchase Agreement. There is at least a question of fact as to whether John Fredrickson owed Mojo Plaintiffs and Mark and Judith Peterson a fiduciary duty, and summary judgment is inappropriate.

The elements of a breach of fiduciary duty for failure to disclose material information are "(1) a fiduciary duty to disclose material information, (2) knowledge of the information, and (3) failure to disclose the information." *Gilbert Dev. Corp. v. Wardley Corp.*, 2010 UT App 361, ¶ 20, 246 P.3d 131. Whether a duty exists is a legal question, which courts analyze by "examining 'the structure and dynamics of the relationship between the parties' including their 'legal relationships' and 'the duties created by [those] relationships.'" *Id.* (citing *Yazd v. Woodside Homes Corp.*, 2006 UT 47, ¶ 14, 143 P.3d 283). "Age, knowledge, influence, bargaining power, sophistication, and cognitive ability are but the more prominent among a multitude of life circumstances that a court may consider in analyzing whether a legal duty is owed by one party to another." *Id.* at ¶ 16. However, "normally partners 'occupy a fiduciary relationship and must deal with each other in the utmost good faith.'" *Ong, Int'l (U.S.A.), Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 453-54 (Utah 1993).

Here, John Fredrickson owed a fiduciary duty to Judith Peterson and Mark Peterson because they signed the partnership agreement on October 2, 2009. (R. 815.) The partnership agreement provides that John Fredrickson would assume "50 per cent [sic] control, ownership, and assigned shares of MOJO SYNDICATE INC., and A BAR NAMED SUE LLC." (R. 815.) Thus, from October 2, 2009, forward, Fredrickson owed

fiduciary duties as a partner to Mojo Plaintiffs and Mark and Judy Peterson. From that time, Fredrickson owed a duty to Mojo Plaintiffs and Mark and Judy Peterson to inform them of his conduct involving the partnership, including obtaining a liquor license, (R. 1460), not planning to make Mark Peterson a partner in the new venture, (R. 1443; 1503-05), and providing Mojo Plaintiffs with financial and accounting records, (R. 1504). Each of these is material facts that Fredrickson Defendants should have disclosed to Mojo Plaintiffs and Mark and Judith Peterson. This information went to the heart of John Fredrickson's partnership with Mark and Judith Peterson and involved the structure of the bar. Therefore, summary judgment was inappropriate.

E. Genuine Issues of Material Fact Remain Relating to Fifth Cause of Action for Breach of Contracts.

The Trial Court found, "the undisputed evidence in this case – including the deposition testimony of Plaintiffs' principals – shows that Defendants fully complied with the parties' agreement, including by timely making all required payments to Plaintiff. (R. 1742.) However, as discussed in Section II.A. above, there are genuine issues of material fact that prevent summary judgment. "The elements of a prima facie case for breach of contract are (1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages." *Bair v. Axiom Design*, 2001 UT 20, ¶ 14, 20 P.3d 388.

Here, genuine issues of fact exist as to whether Fredrickson Defendants performed their end of the bargain or whether they breached the Asset Purchase Agreement with Mojo Plaintiffs. In the Complaint, Mojo Plaintiff pled, in the alternative, that Fredrickson Defendants failed to pay the \$80,000, failed to provide the \$10,000 to Mojo Plaintiffs,

and failed to return Mark Peterson's personal property. (R. 9-10.) Mojo Plaintiffs raised issues of fact, such as "John Fredrickson stated that he was going to pay [Judith Peterson] \$2,000.00 a month and \$3,000.00 a month to Mark Peterson under the table and \$40,000.00 up front for partnership in the bar, which he did not do." (R. 1272, ¶ 27.) Defendants did not provide any evidence of payment in full and never provided an accounting of the \$40,000 "credit" Fredrickson Defendants received in the Asset Purchase Agreement. (R. 1498-99.) If Fredrickson Defendants promised to provide an accounting after the Closing Memorandum was signed and never did, then that is a breach of the contract and a genuine issue of fact preventing summary judgment.

The Trial Court erred in granting summary judgment in favor of Fredrickson Defendants and in dismissing Mojo Plaintiffs' Complaint. There are genuine issues of fact that exist and prevent judgment as a matter of law. Therefore, this Court should reverse the ruling and allow the parties to finish discovery and proceed to trial.

IV. This Court Should Reverse the Award of Attorney Fees to Fredrickson Defendants because Summary Judgment was Inappropriate and Mojo Plaintiffs Did Not Sue to Enforce or Interpret the Contracts.

"As a general rule, Utah courts award attorney fees only to a prevailing party, and only when such action is permitted by either statute or contract." *Gilbert Dev. Corp. v. Wardley Corp.*, 2010 UT App 361, ¶ 44, 246 P.3d 131 (citing *Doctors' Co. v. Drezga*, 2009 UT 60, ¶ 32, 218 P.3d 598); see also *Occidental/Nebraska Fed. Sav. v. Mehr*, 791 P.2d 217, 221 (Utah Ct. App. 1990). "Where there was a right to attorney fees, Utah courts have allowed the party who successfully prosecuted or defended against a claim to

recover the fees attributable to those claims on which the party was successful." *Occidental/Nebraska Fed. Sav.*, 791 P.2d at 221.

The Trial Court found, "The Asset Purchase Agreement (the Agreement) permits attorney fees where 'either party brings an action at law or inequity to enforce or interpret this Agreement, the prevailing party shall be entitled to recover reasonable attorneys fees, court costs and expert witness fees.'" (R. 1833.) "The Agreement's attorney fee provision is broad and only requires either party to bring an action to 'enforce or interpret' the Agreement to award fees to the prevailing party." (R. 1834.) The Trial Court awarded Fredrickson Defendants reasonable attorney fees "associated with all filings leading to the Court's Order on summary judgment," reasoning that Plaintiff's complaint set forth five claims for relief, all of which required the Court to interpret and enforce the Agreement to grant summary judgment. (R. 1834.) However, Mojo Plaintiffs' causes of action included (1) Rescission based on breach and fraud, (2) intentional interference with prospective economic relations, (3) civil conspiracy, (4) breach of fiduciary duty, and (5) in the alternative, breach of contract. (R. 1-10.) The second, third, and fourth causes of action have no bearing on the Asset Purchase Agreement and did not require the Trial Court to "interpret or enforce" the Agreement. These allegations involved conduct separate and apart from the Agreement.

The Trial Court awarded Fredrickson Defendants "reasonable" fees in the amount of \$73,052.85. (R. 1906.) However, the Trial Court awarded Fredrickson Defendants all requested fees, from the initial filing of the Complaint and Answer to filing to Amended Declaration of Attorney's Fees and Costs. (R. 1842-59.) These fees were unreasonable.

Fredrickson Defendants requested \$19,617.00 in fees for "Defendants' Motions for Preliminary Injunction, to Amend Complaint, and for Appointment of a Receiver," (R. 1846-48; 1859), which the Trial Court acknowledged was "settled after all pleadings had been filed," (R. 1906). The Trial Court should not have awarded Fredrickson Defendants \$19,000 in attorney fees on an issue that was settled.

Moreover, the Trial Court awarded Fredrickson Defendants \$16,347.75 in attorney fees for "Depositions and Discovery." (R. 1848-1851; 1859.) Defendants only took two depositions, of Judith Peterson and Mark Peterson, and propounded discovery requests on Mojo Plaintiffs. Mojo Plaintiffs never took the depositions of John Fredrickson and 3928 LLC, (R. 1704-05), and Fredrickson Defendants did not produce documents requested by Mojo Plaintiffs, (R. 1704). In fact, the record shows very little discovery was conducted. There were two Notices of Subpoena Duces Tecum to Judith Peterson and Mark Peterson, (R. 28-43), and two Notices of Depositions, one for Judith Peterson and one for Mark Peterson, (R. 327-344). Then Fredrickson Defendants filed a motion for summary judgment. (R. 699-1010.) A fee award of over \$16,000 for depositions and discovery is not reasonable.

Lastly, the Trial Court erred in awarding Fredrickson Defendants \$17,962.25 in attorney fees in connection with the motion for summary judgment. Counsel for Fredrickson Defendants spent 32.75 hours, or \$6,526.25, in drafting the motion for summary judgment, (R. 1853-54), and 22.25 hours, or \$4,566.25, in drafting the reply memorandum, (R. 1854-55). Counsel for Fredrickson Defendants also spent 18.4 hours,

or \$3,808.50, in preparing for and attending the summary judgment hearing, which was only one hour. This award is unreasonable.

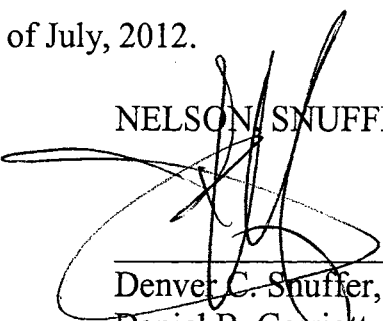
The Trial Court erred in awarding Fredrickson Defendants their attorney fees. The fee was unreasonable and inappropriate, in light of the fact that there were genuine issues of material fact that prevented the entry of summary judgment.

CONCLUSION

Pursuant to the foregoing arguments and law, Appellants Mojo Syndicate, Inc., and Bar Named Sue, LLC, respectfully request this Court reverse the Third District Court and remand to the Trial Court for a trial on the merits.

DATED this 25th day of July, 2012.

NELSON, SNUFFER, DAHLE & POULSEN



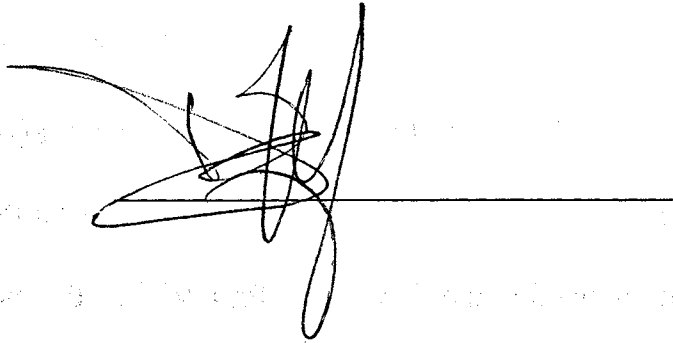
Denver C. Snuffer, Jr.
Daniel B. Garriott
Tahnee L. Hamilton
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I served two true and correct copies of the foregoing, via first class mail, postage prepaid, including an electronic copy, on the following:

J. Ryan Mitchell
Andrew V. Collins
MITCHELL & BARLOW, P.C.
6465 South 3000 East, Suite 203
Salt Lake City, UT 84121

on this 25th day of July, 2012.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, is written over a horizontal line.

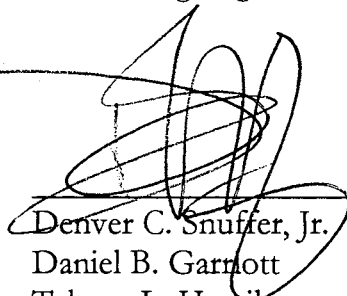
CERTIFICATE OF COMPLIANCE

As required by Utah Rules of Appellate Procedure Rule 24(f)(1)(C), I certify that **APPELLANTS MOJO SYNDICATE, INC., AND A BAR NAMED SUE, LLC'S OPENING BRIEF ON APPEAL** contains 9,525 words, excluding the parts of the Opening Brief that are exempted by Utah Rules of Appellate Procedure Rule 24(f)(1)(B).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 25, 2012.

By:



Denver C. Snuffer, Jr.
Daniel B. Garnott
Tahnee L. Hamilton
Attorneys for Appellant

ADDENDUM TABLE OF CONTENTS

1. Order Granting Defendants' Motion for Summary Judgment, dated January 6, 2011.
2. Ruling and Partial Order, dated April 12, 2011.
3. Order, dated June 24, 2011.
4. Minute Entry, dated August 29, 2011.
5. Docket from *Office of Professional Conduct v. Charles C. Brown*, Third District Court Case No. 120901875.
6. Public Directory Page for Charles C. Brown, from www.myutahbar.org.
7. Stipulation and Order, *In the Matter of CC Brow Law Offices*, Utah Residential Mortgage Regulatory Commission, Case No. 46896.
8. Better Business Bureau Business Review for CC Brown Law LLC.
9. Salt Lake Tribune Article, Published June 12, 2012 by Tom Harvey; KUTV news Article, FBI Raided Firm in Large Scale Mortgage Fraud Investigation.

ADDENDUM 1

OPENING BRIEF

FILED DISTRICT COURT
Third Judicial District

JAN - 6 2011

SALT LAKE COUNTY

By

R. J. [Signature]
Deputy Clerk

Order Prepared By:

J. Ryan Mitchell (9362)
Andrew V. Collins (11544)
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*Attorneys for Defendants John Fredrickson and
3928 LLC*

**IN THE THIRD DISTRICT COURT FOR THE STATE OF UTAH
IN AND FOR SALT LAKE COUNTY**

MOJO SYNDICATE, INC., a corporation,
and A BAR NAMED SUE LLC, a limited
liability company,

Plaintiffs,

v.

3928 LLC, a limited liability company,
JASON RASMUSSEN, an individual, JOHN
FREDRICKSON, an individual, and JOHN
DOES I-IV,

Defendants.

**ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

Case No. 100904277

Judge: Sandra Peuler

Defendants 3928 LLC and John Fredrickson's ("Defendants") Motion for Summary Judgment (the "Motion") came before the Court on November 30, 2010. Plaintiffs were represented by their counsel, Charles C. Brown of CC Brown Law, LLC. Defendants were

represented by their counsel, Andrew V. Collins and J. Ryan Mitchell of Mitchell & Barlow, P.C. Having heard oral argument and reviewed the relevant briefing and documents in support of, and opposition to, the Motion, and otherwise being fully advised in the premise, the Court hereby ORDERS, ADJUDGES, and DECREES that Defendants' Motion is GRANTED in its entirety. The grounds for this decision are as follows:

1. Plaintiffs' memorandum in opposition to the Motion does not comply with the requirements of Rules 7 or 56 of the Utah Rules of Civil Procedure governing memoranda submitted in opposition to summary judgment motions. In light of Plaintiffs' non-conforming opposition memorandum, and the materials submitted by Defendants in support of the Motion, summary judgment in Defendants' favor is proper.

2. Additionally, as a separate and independent ground for granting summary judgment, Defendants' briefing, and the evidence submitted therewith, shows that there are no genuine issues of material fact for trial and that Defendants are entitled to judgment as a matter of law on all claims asserted by Plaintiffs. Specifically, the grounds for granting summary judgment to Defendants on each of Plaintiffs' claims are as follows:

a. Plaintiffs' first claim for relief seeks rescission based on breach of contract, fraud, and duress. Regarding the breach of contract allegations, the undisputed evidence—including the deposition testimony given by Plaintiffs' principals—shows that Defendants fully complied with the terms of the parties' agreement, including by timely making all required payments. Regarding the fraud allegations, as a matter of law under *Gold Standard v. Getty Oil Co.*, 915 P.2d 1060 (Utah 1996), Plaintiffs cannot have reasonably relied on any

statements allegedly made to them that contradicted the express written terms of the parties' agreement, which Plaintiffs admit they signed. Because reasonable reliance is a necessary element to show fraud, Plaintiffs cannot prevail on their fraud allegations. Regarding the duress allegations, the undisputed evidence shows that the Plaintiffs were not subject to duress at any time in the course of the subject transaction. Indeed, the parties' agreement was negotiated and executed over a period of weeks, during which Plaintiffs could have backed out at any time. Plaintiffs' own attorney drafted certain of the documents executed in connection with the parties' agreement. As a matter of law under these circumstances, Plaintiffs were not subject to duress. Accordingly, summary judgment in Defendants' favor is proper on Plaintiffs' first claim for relief.

b. Plaintiffs' second claim for relief alleges intentional or negligent interference with prospective economic advantage. This claim requires Plaintiffs to show that Defendants interfered with Plaintiffs' economic relations for an improper purpose or by improper means in such a way that caused injury to Plaintiffs. *See Leigh Furniture and Carpet Co. v. Isom*, 657 P.2d 293 (Utah 1982). The undisputed evidence shows that Plaintiffs cannot satisfy any of these requirements. There is no evidence that Defendants interfered with Plaintiffs' economic relations or that they acted for an improper purpose or by improper means. To the contrary, the undisputed evidence shows that the parties entered into a valid written agreement and that Defendants fully performed that agreement by timely paying all of the agreed-upon amounts to Plaintiffs. Nor is there any evidence of injury to Plaintiffs. Plaintiffs' principals

acknowledge receiving every monthly payment required by the parties' agreement. Accordingly, summary judgment in Defendants' favor is proper on Plaintiffs' second claim for relief.

c. Plaintiffs' third claim for relief alleges civil conspiracy. A claim of civil conspiracy requires, among other essential elements, evidence of one or more unlawful, overt acts in furtherance of the alleged conspiracy and damages as a result of the alleged conspiracy. *See Peterson v. Delta Airlines, Inc.*, 2002 UT App 56, 42 P.3d 1253. In this case, there is no evidence that Defendants committed any unlawful or wrongful act. To the contrary, the undisputed evidence shows that Defendants acted lawfully and properly at every turn throughout the course of the subject transaction. Defendants' lawful intent to purchase the assets of A Bar Named Sue, as well as the terms of that purchase, were fully disclosed and well-documented in the parties' written agreement and the related documents. The undisputed evidence shows that Defendants did not act unlawfully. Furthermore, there is no evidence that Plaintiffs have suffered any damages. Accordingly, summary judgment in Defendants' favor is proper on Plaintiffs' third claim for relief.

d. Plaintiffs' fourth claim for relief alleges breach of fiduciary duties. As a matter of well-established law, however, parties that deal at arm's length do not owe each other fiduciary duties. *See Gold Standard*, 915 P.2d 1060. The undisputed evidence in this case shows that the parties dealt at arm's length with each other throughout the negotiation and execution of their agreement. Independent counsel represented each side of the transaction, and the final terms of the parties' agreement were the result of the negotiations between counsel. The written documents, which all parties admit having signed, clearly set forth the terms of the

parties' agreement and their mutual intent for 3928 LLC to purchase the specified assets from Plaintiffs. Under these circumstances of arm's-length negotiation, there were no fiduciary duties owed by Defendants to Plaintiffs in connection with the asset purchase. Accordingly, summary judgment in Defendants' favor is proper on Plaintiffs' fourth claim for relief.

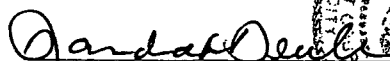
e. Plaintiffs' fifth claim for relief alleges breach of contracts. However, as noted above, the undisputed evidence in this case—including the deposition testimony of Plaintiffs' principals—shows that Defendants fully complied with the parties' agreement, including by timely making all required payments to Plaintiffs. Given this undisputed evidence, summary judgment in Defendants' favor is proper on Plaintiffs' fifth claim for relief.

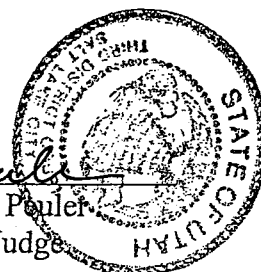
3. Because summary judgment is proper on each of Plaintiffs' claims, the Court ORDERS that all claims asserted against Defendants shall be, and hereby are, dismissed with prejudice and on the merits.

4. At the November 30, 2010, hearing on the Motion, the Court directed Defendants' counsel to file a motion on the issue of an award of attorneys' fees and costs, which the Court will consider in due course in subsequent proceedings. This Order may be amended following the Court's ruling on such motion to reflect any award of attorneys' fees and costs.

ENTERED this 6 day of Jan, 2011.

BY THE COURT


Honorable Sandra N. Pouler
Third District Court Judge



CERTIFICATE OF SERVICE

I hereby certify that on this 15 day of December, 2010, I caused a true and correct copy of the foregoing **ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** to be delivered via first class mail, postage prepaid to:

Charles Craig Brown
CC BROWN LAW LLC
1338 South Foothill Drive, #300
Salt Lake City, Utah 84103

Andrew Lee

ADDENDUM 2

OPENING BRIEF

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

MOJO SYNDICATE, INC., et al., Plaintiffs, v. 3928 L.L.C., et al., Defendants.	RULING AND PARTIAL ORDER CASE 100904277 Judge Sandra N. Peuler
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This matter came before the Court on defendants request for attorney fees. The Court has determined that oral argument will not help its resolution of the issues as they are straightforward and the applicable law is clear. The Court having fully reviewed all relevant pleadings and law, now being fully informed, rules as follows.

Defendants Prevailed in their Defense of the Case

In Utah, a party is entitled to attorney fees only where they are authorized by statute or contract. Fericks v. Lucy Ann Soffe Trust, 2004 UT 85, ¶ 23. The Asset Purchase Agreement (the Agreement) permits attorney fees where "either party brings an action at law or inequity to enforce or interpret this Agreement, the prevailing party shall be entitled to recover reasonable attorneys fees, court costs and expert witness fees." Agreement, ¶12. Defendants clearly prevailed in this action when the Court granted summary judgment in their favor on all of plaintiff's claims. See Dec. 3, 2010 Order; and see Olsen v. Lund, 2010 UT App 353, ¶ 12 (noting that a determination of which party prevailed focuses "on 'which party had attained a 'comparative victory,'

considering what a total victory would have meant for each party and what a true draw would look like.” (citations omitted)). This was a total victory for defendants.

Under Utah law, however “[i]f attorney fees are recoverable by contract, ‘[a] party is entitled only to those fees attributable to the successful vindication of contractual rights.’” Cache County v. Beus, 2005 UT App 503, ¶ 16; and see Gilbert Dev. Corp. v. Wardley Corp., 2010 UT App 361, ¶ 52. From those particular fees, the Court will only award reasonable attorney fees, and the Court has “broad discretion in determining what constitutes a reasonable fee.” EDSA/Cloward, L.L.C. v. Klibanoff, 2008 UT App 284, ¶ 8 (citations omitted); and see Cache County, at ¶ 7.

Defendants Are Entitled to an Award of Fees Associated with Prevailing on their Defense of Plaintiff's Claims to Enforce or Interpret the Agreement.

The Agreement's attorney fee provision is broad and only requires either party to bring an action to “enforce or interpret” the Agreement to award fees to the prevailing party. Plaintiff's complaint set forth five claims for relief, all of which required the Court to interpret and enforce the Agreement to grant summary judgment. See Dec. 3, 2010 Order. The Court determines that, as the prevailing party, defendants are entitled to reasonable fees associated with all filings leading to the Court's Order on summary judgment. Further, because the Agreement provided for an award of attorney fees, defendants are entitled to reasonable attorney fees for the pleadings associated with this motion. See Olsen, 2010 UT App at ¶ 15 (noting that a “provision for payment of

attorney[] fees in a contract includes attorney fees incurred by the prevailing party on appeal as well as at trial, if the action is brought to enforce the contract.” (citations omitted)). Defendants are entitled to an award of reasonable fees associated with prevailing on all of plaintiff’s claims to enforce and interpret the Agreement.

Defendants Are Only Entitled to Reasonable Attorney Fees.

Defendants’ entitlement to attorney fees is a wholly different matter from the reasonableness of those fees. While the Court may not ignore a prevailing party’s right to attorney fees, it “enjoys considerable discretion in fixing the amount of a reasonable fee . . . and may award considerably less than requested so long as the reduction is supported by adequate findings.” Brookside Mobile Home Park v. Sporl, 2000 UT App 195 (Mem. Decision) (citing Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988), Rappleye v. Rappleye, 855 P.2d 260, 266 (UT App 1993) and Martindale v. Adams, 777 P.2d 514, 517-18 (UT App 1989)). A court does not measure reasonableness by what prevailing counsel actually bills in a case, nor by the hours spent. Cabrera v. Cottrell, 694 P.2d 622, 624 (Utah 1985). Rather, the Court considers:

1. What legal work was actually performed?
2. How much of the work performed was reasonably necessary to adequately prosecute the matter?
3. Is the attorney’s billing rate consistent with the rates customarily charged in the locality for similar services?
4. Are there circumstances which require consideration of additional factors, including those listed in the Code of Professional Responsibility?

Dixie, 764 P.2d at 990 (citations omitted); and see Rappleye, 855 P.2d at 266

(reversing trial court's attorney fee award for abuse of discretion, where the trial court made no findings to show it considered the relevant factors in determining the reasonableness of an attorney fee award).

Defendant filed an affidavit and fee request for over \$70,000 in fees and costs for prevailing in this action. However, the affidavit makes no mention of the reasonableness of the fee request; nor does it set forth the attorneys' billing rates; nor does it justify the amount of work performed, despite the short duration of this case. There is some reference to reasonableness in the memorandum and in the earlier request for sanctions that the Court reserved, but those references are not evidence on which the Court can make findings of reasonableness. The Court has reviewed the declarations of defendants' counsel and plaintiff's objections thereto and determines that defendants' have not set forth evidence from which the Court can determine that their fee request is reasonable.

Defendants are Only Entitled to Reasonable Costs, Authorized by the Agreement.

The Agreement allows the prevailing party to recover "court costs and expert witness fees." Defendants have requested \$2,639.85 in costs. Defendants are entitled to \$18.50 for the witness fee for Sean Egan, pursuant to the Agreement.

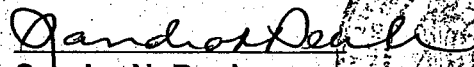
The remainder of the costs request comprises \$2621.35 for copies. The Court does not as a general matter find support in Utah case law for an award of the cost of copies, particularly where there is no attempt to show information could not be obtained

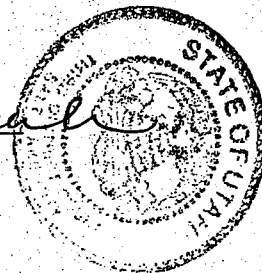
through less expensive means nor that the copies were reasonable and necessary to the litigation. See e.g. Kraatz v. Heritage Imps., 2003 UT App 201, ¶ 30 (instructing that a court should review a contract provision for costs "with an implied term of reasonableness."). No evidence supports awarding these costs to defendants.

Based on the foregoing, the Court orders that defendants are entitled to an award of reasonable attorney fees and \$18.50 in costs. The amount of the fee award is to be determined from an amended affidavit defendants may submit, which sets forth the reasonableness of the fee request based on the factors the Court must consider. Defendant may respond to that affidavit, and the Court will rule once a request to submit has been filed.

Dated this 12 day of April 2011.

By the Court:


Sandra N. Peuler
District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 100904277 by the method and on the date specified.

MAIL: CHARLES C BROWN 193 E FORT UNION BLVD STE 300 MIDVALE, UT 84047

MAIL: ANDREW V COLLINS 6465 S 3000 E STE 203 SALT LAKE CITY UT 84121

Date: 4/13/11

R. Grotelas
Deputy Court Clerk

ADDENDUM 3

OPENING BRIEF

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

MOJO SYNDICATE, INC., et al.,
Plaintiffs,
v.
3928 L.L.C., et al.,
Defendants.

ORDER

CASE 100904277

Judge Sandra N. Peuler

This matter came before the Court on: defendants' request for attorney fees, the amended declaration and defendants' motion for sanctions. The Court has considered all pleadings and relevant law and determines oral argument will not assist it in resolving the issues as they are straightforward and the applicable law is clear. Having now been fully informed, the Court rules and orders as follows.

SANCTIONS

Defendants' motion for sanctions asks the Court to sanction plaintiffs' attorney for several allegedly misleading and improper filings, and asks the Court to require plaintiff to pay defendants' attorney fees. While certain filings by plaintiffs have led to confusion and inaccuracies in the record, defendants have not requested sanctions pursuant to any rule or other legal basis. Nor do defendants cite to any support for an award of sanctions in addition to a prevailing party's award of attorney fees. There is no basis for the request and defendants' request for sanctions is denied.

ATTORNEY FEES

The Court's prior ruling and partial order cited the relevant case law on attorney

fees and specifically articulated the factors the Court must consider in making any award of reasonable attorney fees. A prevailing party must demonstrate the reasonableness of the fees and must at least "substantially answer[] the questions contemplated by Dixie State Bank." EDSA/Cloward, L.L.C. v. Klibanoff, 2008 UT App 284, ¶ 17 (citing Dixie State Bank v. Bracken, 764 P.2d 985, 990 (Utah 1988)). In response, defendants supplemented their request for fees.

The Court determines that the attorneys' billing rates, and the average rate of \$208.34, are reasonable and consistent with the rates that attorneys of similar experience charge in Salt Lake City for cases of this nature. The Court has additionally considered the legal work that was actually performed and how much of that work was reasonably necessary to adequately prosecute this matter.

Plaintiff objects to the fees for several reasons, claiming the request is unreasonable because the total contract price was only for slightly more than the fees generated. The Utah Supreme Court has noted however:

The total amount of the attorneys fees awarded . . . cannot be said to be unreasonable just because it is greater than the amount recovered on the contract. The amount of the damages awarded in a case does not place a necessary limit on the amount of attorneys fees that can be awarded.

Cabrera v. Cottrell, 694 P.2d 622, 625 (Utah 1985). Plaintiffs also claim the fees are unreasonable because two attorneys were billing, and that only 3928 requests the fee award. However, both defendants prevailed on summary judgment and the fees do not reflect an unnecessarily duplication of work. In fact, having an attorney with a lower

hourly rate draft pleadings, while both attorneys appear at hearings, is a common strategy and often saves money.

The Court notes that plaintiffs' filings generated a substantial amount of defendants' attorney fees as they required defendants to perform additional work to adequately defend this matter. The Court considers the following examples: the preliminary injunction, which settled after all pleadings had been filed; several improper *ex parte* filings; the premature notice to submit on the motion to amend, which caused the Court to erroneously grant the motion and then set it aside; the untimely appeal; and objections to the summary judgment order, which were denied.

The Court having considered plaintiffs' objections, the declarations, the Dixie factors and having previously determined that defendants are entitled to reasonable fees associated with all filings leading to the Court's Order on summary judgment. determines that defendants are entitled to a fee award of \$73,052.85. This amount does not include the \$1,627.50 for the fees generated in relation to the amended declaration, as Utah's case law is clear and defendants should have provided the necessary information on reasonableness in their initial request for fees.

COSTS

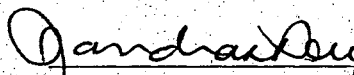
Defendants also amended their request for costs to \$2,635.85 in costs. As the Court previously noted, the underlying agreement allows a prevailing party to recover "court costs and expert witness fees." The Court has awarded defendants \$18.50 for

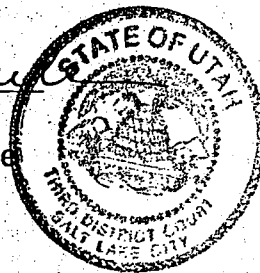
the witness fee for Sean Egan. The Court will award an additional \$1,449.40 in costs for the Peterson depositions, but not for both amounts as there is no information as to why a double award for Mr. Peterson's deposition would be reasonable. According, defendant are entitled to a total award of costs of \$1,467.90.

It is so Ordered. Defendants are to prepare a judgment consistent with this Order.

Dated this 24 day of June 2011.

By the Court:


Sandra N. Peuler
District Court Judge



CERTIFICATE OF NOTIFICATION

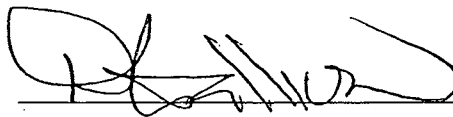
I certify that a copy of the attached document was sent to the following people for case 100904277 by the method and on the date specified.

MAIL: CHARLES C BROWN 193 E FORT UNION BLVD STE 300 MIDVALE, UT 84047

MAIL: ANDREW V COLLINS 6465 SOUTH 3000 EAST STE 203 SALT LAKE CITY UT 84121

Date:

6-27-11



Deputy Court Clerk

ADDENDUM 4

OPENING BRIEF

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

MOJO SYNDICATE, INC, Plaintiff, vs JOHN FREDRICKSON, et al, Defendant.	MINUTE ENTRY Case No. 100904277 August 29, 2011 Judge Sandra Peuler

Pending before the Court is a Request to Submit for Decision on plaintiffs' motion to set aside summary judgment. Also pending is defendants' motion to strike the affidavit of Angela Brown. Based upon a review of the relevant pleadings, the Court rules as follows.

1. The request for oral argument is denied. The issues are straight-forward and clear, and oral argument would not be of benefit to the Court in entering a ruling.
2. The defendants' motion to strike the affidavit of Angela Brown is unopposed, and based upon defendants' memorandum in support of their motion, it is granted.
3. The plaintiffs' motion to set aside summary judgment is denied. This ruling is based upon the following.

First, although defendants argue that the plaintiffs' motion was untimely, this decision is not based upon that issue, but rather on the substance of the motion. Although defendants argue that it should have been filed after the January 6, 2011, ruling, the final judgment was not entered until July 19, 2011. Therefore, the July 26, 2011, motion to set aside the summary judgment is timely.

As to the substance of the motion, plaintiffs first argue pursuant to Rule 56(f), that discovery is not complete. Although plaintiffs identify several areas of discovery they wish to pursue, that motion is untimely. The time to raise that motion was prior to the summary judgment being considered by the Court. The Court notes that the defendants' motion for summary judgment was submitted for decision on September 24, 2010, and argued November 30, 2010. Both sides had filed substantive memoranda in connection with the motion, and no Rule 56(f) motion was filed before the summary judgment was submitted for decision.

The plaintiffs did previously file a Rule 56(f) affidavit. On November 24, 2010, plaintiffs first Rule 56(f) affidavit was filed, with a motion and memorandum filed on November 29, at 5:19 p.m., the evening before the scheduled hearing. Because of the untimeliness of the 56(f) motion and affidavit, the Court refused to entertain argument on it. Thereafter, the defendants' motion for summary judgment was granted. Both the November 56(f) motion as well as this one were filed untimely, relative to discovery.

Plaintiffs next argue that Rule 59 (a) (1-7) provides a basis for the Court to set aside the summary judgment. Plaintiffs, however, set forth no analysis of the rule relative to the facts of this case, but simply argue that "belatedly discovered evidence" entitles them to a new trial. Plaintiffs' conclusory statements are insufficient to provide a basis for setting aside the summary judgment.

Plaintiffs also argue that Rule 60 (b) entitle them to set aside the judgment. Again, however, plaintiffs set forth little for the Court to review relative to the facts of this case. While plaintiffs do not identify the sub-section of the rule under which their motion relies, they

mention sub-section one (1), excusable neglect, and three (3), fraud. However, apart from setting forth applicable law, plaintiffs do nothing to analyze how those sections apply to this case. Without an analysis, the Court is left to guess at plaintiffs' argument. Based upon that, the plaintiffs' arguments fail to provide a basis for setting aside the judgment pursuant to Rule 60 (b).

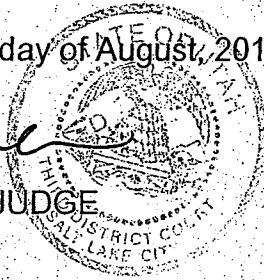
4. Defendants seek a supplemental award of attorneys fees. I decline to award supplemental fees for the present motions.

This minute entry is the final Order of the Court in the matter, and no further order is required to be prepared by counsel.

DATED this 29 day of August, 2011,

David A. Deul

DISTRICT COURT JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 100904277 by the method and on the date specified.

MAIL: CHARLES C BROWN 193 EAST FORT UNION BLVD STE 300 MIDVALE, UT 84047

MAIL: ANDREW V COLLINS 6465 SOUTH 3000 EAST STE 203 SALT LAKE CITY UT 84121

Date:

8-30-11



Deputy Court Clerk

ADDENDUM 5

OPENING BRIEF

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

OFFICE OF PROFESSIONAL CONDUCT vs. CHARLES C BROWN

CASE NUMBER 120901875 Administrative Ag

**** PRIVATE ****

CURRENT ASSIGNED JUDGE
TODD M SHAUGHNESSY

PARTIES

Plaintiff - OFFICE OF PROFESSIONAL CONDUCT
Represented by: DIANE K AKIYAMA

Respondent - CHARLES C BROWN

ACCOUNT SUMMARY

CASE NOTE

PROCEEDINGS

03-19-12 **** PRIVATE **** Filed: Stipulation For Transferring Char
03-19-12 **** PRIVATE **** Filed: Stipulation In Support Of Motion
03-19-12 **** PRIVATE **** Filed: Motion To Classify As Private And
03-19-12 Complaint filed
03-19-12 Judge TODD M SHAUGHNESSY assigned.
03-19-12 **** PRIVATE **** Filed: Petition for Immediate Transfer of
03-21-12 **** PRIVATE **** Filed: Order Transferring Charles C. Bro
03-21-12 **** PRIVATE **** Filed: Order Granting Motion To Classify
03-21-12 Case Classification changed from PUBLIC to PRIVATE
03-21-12 Case Disposition is Granted
03-26-12 Filed: Certificate of Service

ADDENDUM 6

OPENING BRIEF

Search: charles brown

Submit Search

☐ Show All

Membership Information

Name: BROWN, CHARLES C
Member ID: 00447
Member Type: Attorney
License Status: Disability
Firm: CCBROWLAW LLC
C. Craig Brown
Address: 193 E. Fort Union Blvd Suite 300
Midvale, Utah 84047
United States of America
Phone: 801-265-8500
Fax: 801-272-1071
E-mail: (Private)
Law School: University of Utah
Graduated: 1974
Bar Admission: 09/05/1974

ADDENDUM 7

OPENING BRIEF

Traci Gundersen (#9172)
Assistant Attorney General
MARK L. SHURTLEFF (#4666)
Utah Attorney General
Commercial Enforcement Division
160 East 300 South, 5th Floor
P.O. Box 140872
Salt Lake City, UT 84114-6711
Phone: (801) 366-0145

RECEIVED

MAY 14 2010

Utah Div. Of Corp. & Comm. Code

BEFORE THE UTAH RESIDENTIAL MORTGAGE REGULATORY
COMMISSION

In the Matter of
CC Brown Law Offices

STIPULATION & ORDER

CASE NO. 46896

The Real Estate Division of the Department of Commerce of the State of Utah (the Division), by and through its counsel, Traci Gundersen, and CC Brown Law Offices (Respondent), a Utah licensed Law Office, by and through its counsel Philip Danielson, hereby stipulates and agrees as follows:

STIPULATION

1. Respondent is not currently a licensee of the Division.
2. Respondent, for purposes for settlement only, admits the jurisdiction of the Utah Residential Mortgage Regulatory Commission (the Commission) over Respondent and over the subject matter of this action.
3. A cease and desist order in this matter has been brought and filed pursuant to the provisions of Utah Code Ann. § 61-2c-402(2)(e) (2009). Respondent specifically waives the right to confront adverse witnesses, to present evidence or call witnesses on its own behalf, and to the right to a hearing pursuant to U.C.A. Section 61-2-1, et seq., (2005 as amended) and the rules promulgated there under. Respondent and the Division hereby express their

intent that this matter be resolved expeditiously through stipulation as contemplated in Utah Code Ann. § 63G-4-102(4) (2008).

4. The Division and the Respondent recognize and agree that this Stipulation alone shall not be binding upon the Commission or the Director of the Division of Real Estate (Director). If the Commission or the Director do not concur in the disciplinary action proposed herein, this Stipulation shall be null and void and a hearing shall be scheduled for this matter; and the Respondent waives any claim of bias or prejudgment which the Respondent might otherwise have with regard to the Commission and Director by virtue of the Commission and the Director having reviewed this Stipulation, and this waiver shall survive any such nullification.

5. Respondent acknowledges that when this Stipulation is presented to the Commission and Director, the Commission and the Director may ask the Division investigative staff questions about the facts underlying this Stipulation or about the terms of this Stipulation. Respondent agrees that the investigative staff may answer such questions. Respondent will have the right to be present when the Stipulation is presented and to address the Commission and the Director about this Stipulation or the facts underlying it. If the Respondent desires to be present to address the Commission and Director, the Respondent may contact Renda Christensen at the Division by calling (801) 530-6750 for information about the date, time and place of the meeting at which this Stipulation will be presented to the Commission and the Director.

6. Respondent acknowledges that upon approval by the Commission and the Director, this Stipulation shall be made a part of the attached final Order, and shall be the final compromise and settlement of this matter.
7. Respondent affirms that the Respondent enters into this Stipulation voluntarily, and the only promises or understandings the Respondent has obtained from the Division, or any member, officer, agent or representative of the Division, regarding this Stipulation are contained herein.
8. Division Investigators received a complaint concerning an internet website that was advertising and soliciting for loan modifications by a law office. The website was operated by the law office of CC Brown Law Offices. Upon review of the website, the law firm indicated that they offered to negotiate loan modifications.
9. Charles C. Brown met with the Division Investigator Marv Everett to discuss the law firm's website and Mr. Brown stated that their office was negotiating loan modifications. The Division directed Mr. Brown to remove any reference to soliciting loan modifications on their website. It is the Division's position that CC Brown Law Offices was being "principally engaged in the business of negotiating residential loans" by the firm's potential clients, that it was not exempted from licensure under the law, and that CC Brown Law Offices needed to have a Utah mortgage license to conduct such business.
10. It was later discovered that the CC Brown Law Offices' website had been revised but still advertised loan modifications. A call was placed to CC Brown Law Offices. An employee named Reid answered the phone and confirmed that the law office was still negotiating loan modifications.
11. An Order was mailed from the Division to CC Brown Law Offices instructing them to cease and desist from negotiating loan modifications.

12. A representative of CC Brown Law Offices met with Division staff and indicated a willingness to comply with the Division's position by refraining from soliciting and performing loan modifications without a Utah mortgage license, unless the Respondent is not being principally engaged by the potential client in the business of negotiating residential loans.

13. While Respondent does not admit to a violation of any state statutes, it does admit that it was soliciting for and providing loan modifications.

14. U.C.A. Section 61-2c-201 (Effective 01/01/10). Licensure required of person engaged in the business of residential mortgage loans -- Mortgage officer -- Principal lending manager. Specifically, Respondent will comply with the following:

61-2c-201(1) Unless exempt from this chapter under Section 61-2c-105, a person may not transact the business of residential mortgage loans without obtaining a license under this chapter.

61-2c-201(2) For purposes of this chapter, a person transacts business in this state if:

- (a) (i) the person engages in an act that constitutes the business of residential mortgage loans; and
- (ii) (A) the act described in Subsection (2)(a)(i) is directed to or received in this state; and
- (B) the real property that is the subject of the act described in Subsection (2)(a)(i) is located in this state; or
- (b) a representation is made by the person that the person transacts the business of residential mortgage loans in this state.

15. CC Brown Law Offices agrees that it shall not become principally engaged to negotiate a loan modification at any time unless licensed with the Division.

16. Respondent acknowledges that it has been informed of the right to be represented by legal counsel and that if the Respondent has waived this right, the Respondent has either sought the advice of an attorney or has voluntarily chosen not to do so.

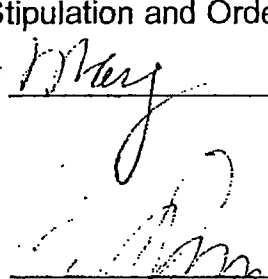
17. As full settlement of all the issues raised in this Stipulation, Respondent agrees as follows:

- a. Respondent will pay a \$5,000.00 civil penalty to the Division of Real Estate.
- b. Respondent will pay the above \$5,000.00 to the Division within 60 days after the date the Commission and the Director of the Division sign the final Order in this matter;

18. This document and all other documents incorporated herein by reference constitute the entire agreement between the parties herein and supersedes and cancels any and all prior negotiations, representations, understandings, or agreements between the parties. There are no verbal agreements which modify, interpret, construe, or affect this agreement.

19. Respondent acknowledges that this Stipulation and Order, once adopted, will be classified as a public document and may be issued to the public upon request. Respondent acknowledges that the Division may inform other persons, entities, and state and federal agencies of the action taken on the Respondent's license and the contents of this Stipulation and Order.

DATED this 14th day of May, 2010.



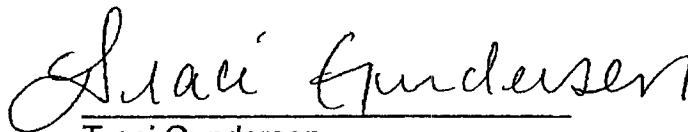
Charles Craig Brown, Owner
RESPONDENT

DATED this 4th day of May, 2010.



Philip Danielson, Counsel for Respondent

DATED this 4th day of MAY, 2010.



Traci Gundersen,
ASSISTANT ATTORNEY GENERAL

ORDER

The Commission and the Director approve and adopt the foregoing Stipulation of the parties. Based upon the foregoing Stipulation and for good cause appearing, the Commission and the Director order as follows, effective on the date of this Order:

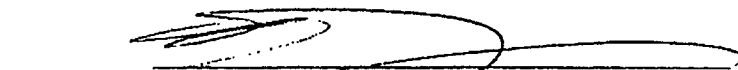
In lieu of holding a hearing on the matter, the Respondent agrees:

1. Respondent will pay a \$5,000.00 civil penalty to the Division of Real Estate.
2. Respondent will pay the above \$5,000.00 to the Division within 60 days after the date the Commission and the Director of the Division sign the final Order in this matter;


SO ORDERED THIS 5 day of May, 2010.

UTAH RESIDENTIAL MORTGAGE REGULATORY COMMISSION:


LANCE MILLER, CHAIR


MARALEE JENSEN, VICE CHAIR

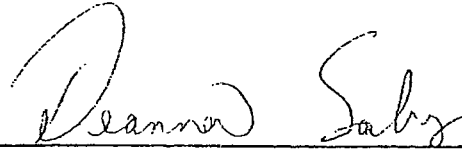
Absent
RODNEY "BUTCH" DAILEY


BRIGG LEWIS


HOLLY CHRISTENSEN

The undersigned concurs with the foregoing Order this 14 day of

May, 2010.



DEANNA D. SABEY, DIRECTOR
DIVISION OF REAL ESTATE