

1992

Kendrick Brothers Construction Company, Inc. v. Clare T. Morse and Transamerica Equities, Inc. : Brief of Appellant

Utah Court of Appeals

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STATE COURT OF APPEALS
BRIEF

UTAH
DOCUMENT

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A10
DOCKET NO. 920103-CA

IN THE COURT OF APPEALS
FOR THE STATE OF UTAH

KENDRICK BROTHERS CONSTRUCTION)	
COMPANY, INC.,	)	BRIEF OF APPELLANT
)	
Plaintiffs,	)	Docket No. 920103-CA
)	
vs.)	
	)	District No. 91090009CN
CLARE T. MORSE and)	
TRANSAMERICA EQUITIES, INC.	)	Priority Classification 16
)	
Defendants.)	

* * * *

APPEAL FROM THE RULING OF THE THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE HOLMER WILKINSON PRESIDING
TO THE COURT OF APPEALS FOR THE STATE OF UTAH

* * * *

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FILED

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COURT OF APPEALS

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IN THE COURT OF APPEALS
FOR THE STATE OF UTAH

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C. Jurisdiction

This Court has jurisdiction over this action pursuant to §78-2a-3(2)(d), Utah Code Annotated, plus Rules 3 and 4, Utah Court of Appeals.

D. Nature of Proceedings

This is an Appeal from an Order of the District Court denying Defendants' Motion To Set Aside The Judgment And Sanctions pursuant to Rules 55 and 60.

E. Statement of Issues on Appeal

I. Where Defendants' attorney was activated during certain periods of the Desert Storm Crisis which in part lead to certain papers not being produced and answered, should the Court upon being appraised of the matter set aside the Judgment and Sanctions.

II. Where one of the Defendants, Clare Morse had not appeared for several of the Supplemental Orders, should this be a part of the criteria for denying the judgment to be set aside where Defendant Clare Morse had depended upon his attorney to take care of the Supplemental Order.

F. Determinative Status

The statutes and Rules which Defendants Clare T. Morse and Transamerica Equities, Inc. believe may be determinative are copied or set forth in their entirety in Appendix XIV. hereto.

STATEMENT OF CASE

A. Nature of the Case

The record now before the court establishes the following facts that are material to Plaintiff's Motion:

1. In response to service of the Summons and Complaint in the above matter upon the defendants Transamerica Equities, Inc. and Clare T. Morse, an answer was filed and served by mail on behalf of Transamerica Equities, Inc. and Clare T. Morse on or about January 11, 1992. (Affidavit of Grant Orton).

2. On July 10, 1991, Clare T. Morse and Transamerica Equities, Inc. learned for the first time that a Judgment had been obtained against Transamerica Equities, Inc. and Clare T. Morse in the instant matter when he was personally served by a constable with a Motion and Order in Supplemental Proceedings. (Affidavit of Grant Orton)

3. Transamerica Equities, Inc.'s registered agent was never served with the Supplemental Order. (Affidavit of Grant Orton)

4. Defendants' attorney, Grant Orton was out of town on a military call up during most of the time period of January - June, 1992. Grant Orton's Affidavit states that he had never received notice of plaintiff's Motion For Sanctions and Default Judgment nor Judgment which followed. (Affidavit of Grant Orton).

5. According to Grant Orton's Affidavit, mail is delivered to a mail box in front of the building where his office is located. During the months of January thorough May 1991, Grant

Orton had numerous military assignments outside of the State of Utah. During that time normally the mail would have been retained by the Postal Service if his part-time secretary did not pick it up in a timely fashion. (Affidavit of Grant Orton).

In the past when this happened, it has been retained by the post office for it to be picked up there. Upon checking with the post office Grant Orton found that this was not the case since there is no such mail retained by the Postal Service, nor had his secretary picked up the mail. In other words, he did not receive the mailings from Plaintiffs. (Affidavit of Grant Orton).

6. Had Grant Orton become aware from any source that a Motion preliminary to the granting of judgment and sanctions had been served in any manner, including by mail, he would have taken the action necessary to timely prepare, file and serve an appropriate response thereto and he would not have permitted or suffered any judgment or sanctions to have been entered against the Defendant herein, without his answering said motions. (Affidavit of Grant Orton).

7. Defendants have, hold and claim valid and meritorious defenses to each of the claims and issues that are raised in and that are the subject of the Complaint and has asserted them in his Answer. (Affidavit of Grant Orton).

8. Defendants Transamerica Equities, Inc. nor Clare T. Morse did not receive notice of the Motion for Sanctions and Judgment. (Affidavit of Grant Orton, Affidavit of Clare Morse).

9. Defendants did not receive Notice of Plaintiffs' Motions nor have they found those notices. (Affidavit of Grant Orton, Affidavit of Clare Morse).

10. That Grant Orton was attorney for Defendant Clare T. Morse and Transamerica Equities, Inc. and all defenses for Transamerica Equities included Morse. (Affidavit of Grant Orton and Affidavit of Clare Morse).

11. That Clare Morse did not receive notice of any of Plaintiff's notices. (Affidavit of Clare Morse).

12. Defendants Clare T. Morse and Transamerica Equities did not have notice of any of the lack of response and therefore were dependent upon their attorney to represent them in this matter. (Affidavit of Clare Morse).

B. Course of Proceedings

Clare Morse, upon having received the July 10, 1991 Supplemental Order and giving it to his attorney Grant Orton to have the Court set the Judgment Aside, Grant Orton was again called up on active duty, and he and the Defendants requested present counsel Wesley Sine to take over the lawsuit for Defendants. Well within the 90 days from the time of Judgment, a Motion To Set Aside The Judgment was filed by the Defendants.

C. Disposition At The Hearing

After a hearing before the Honorable Judge Wilkinson, the Court ruled that since Defendant Clare T. Morse had failed to show up for two Supplemental Orders that he would not Set the Judgment Aside. (See Transcript page 10, lines 5-21, page 11,

lines 1-4)

Defendants then in a timely fashion appealed the Court's decision to the Utah Supreme Court who through its powers transferred this case to the Utah Court of Appeals.

D. Relevant Facts

1. According to the Affidavit of Grant Orton, he did not receive notice of Plaintiff's Motion For Sanctions and Judgment. (See Affidavit of Grant Orton, paragraph 3)

2. The Motion To Set Aside Plaintiff's Judgment was filed within 90 days of the filing of the Judgment.

3. Defendants had no notice of the Judgment until being served with the Supplemental Order. (See Affidavit of Clare Morse, paragraphs 7, 8, and 9)

SUMMARY OF ARGUMENT

Rules 55(c) and 60(b), Utah R. Civ. P., provide for relief from the entry of defaults and default judgments for good cause shown and for (b)(1), "mistake, inadvertence, surprise, or excusable neglect". The applicable standard is stated as follows in Westinghouse Electric Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P. 2d 876, 879 (Utah 1975)

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

The facts established by the record now before the Court clearly satisfy the requirements of Rule 55(c) and 60(b) and compel the granting of the relief sought by Defendant's Motion. The failure of Defendants to file and serve a timely and appropriate response to the Motions for Sanctions and Judgment brought by the Plaintiff was caused by problems both with the mail (Orton nor Morse received the notices), and with Grant Orton serving military duty during the war in Kuwait during January - June 1991. The failure was not the result of poor practices, carelessness, or lack of concern on the part of Defendants, but rather a problem with the mail in part caused by Defendant Orton being called up in the military during this period. Moreover, defendants have, hold and claim, and are fully prepared to assert, good and meritorious defenses to each of the claims and issues that are raised by and that are the subject of the Plaintiff's Complaint.

ARGUMENT

Although a litigant is often charged with his attorney's misconduct, the rule may not apply with equal force to default judgments. See 21 ALR3d 1255 and cases there cited. The courts have demonstrated their willingness to relieve innocent clients from the consequences of their attorney's negligence in certain circumstances by recognizing exceptions to the general rule.

Such relief is often limited to extraordinary circumstances, such as where the attorney's neglect is extreme, or counsel has actually abandoned his responsibilities. The utter failure of

representation in effect abolishes the attorney-client relationship. 64 ALR 4th 323, § 2, footnotes 19-20 and cases there cited. Since the application of one of the exceptions to the general rule usually involves questions of fact regarding the nature of counsel's conduct, the trial judge has great discretion. See Harris v. Tilley (197) 25 U.2d 260, 480 P2d 132, 64 ALR4th 323 at § 20[b].

Even after trial, where it is determined that the lawyer utterly failed to provide adequate representation, and his client's substantive rights were adversely affected by palpable attorney malfeasance, a new trial has been allowed. Garrett v. Osborn, 164 Colo 31, 431 P2d 1012. If a client's rights have been wantonly or inadvertently jeopardized or lost by counsel, as in a complete failure to appear, the court may afford relief by granting a new trial in a civil case. Nordensson v. Nordensson (App) 146 Ariz 544, 707 P2d 948, later app 152 Ariz 438, 733 P2d 635. A litigant who employs counsel and communicates the merit of the case may reasonably rely on that counsel, and counsel's negligence will not be imputed to the litigant without ample notice either of counsel's negligence or of the need for personal action. Thelen v. Thelen, 53 NC App 684, 281 SE2d 737.

Utah allows relief for extreme misconduct by counsel. The following Utah cases have discussed incompetence of counsel as a ground for relief from a judgment:

(a) In 1979 the Utah Court commented that alleged incompetence of counsel, based on differing theories and

assumptions, is not grounds for relief. In Maltby v. Cox, (Utah 1979) 598 P.2d 336 the Utah Supreme Court refused to reverse denial of a motion for a new trial based on allegedly incompetent trial counsel, because present counsel disagreed with the theories and assumptions of the former attorney who had tried an automobile accident case. The court said the plaintiff had now shown that the jury's verdict would have been different had the alternative theories been followed, and denied relief.

In dicta in the Maltby case, the main opinion by Justice Wilkins (Justice Maughn concurring) made the general comment that while incompetence of counsel in a criminal case might be grounds for a new trial, so far as they had determined the Utah Supreme Court had never granted relief on such grounds in a civil case.

(b) Concurring opinion allows relief where process has gone awry in civil cases. Crockett's concurrence in Maltby v. Cox, (Utah 1979) 598 P. 2d 336 (joined by Hall and Stewart, J.) objected to that broad language and commented as follows:

At P. 341:

The purpose of all court proceedings is, of course, to do justice. If the processes have so clearly gone awry that an injustice has resulted, the court in charge of the trial, or this Court on review, should rectify such an unfortunate occurrence, whether the proceeding is criminal or civil. (emphasis added).

At P. 342:

[I]ncompetence or negligence of counsel which appears to have resulted in an injustice will justify the granting of a new trial (citing Garrett v. Osborn, 164 Colo. 31, 431 P.2d 1012 (1968)). It is therefore my view that in determining whether relief should be granted the matter of critical concern should not be as to the nature of the proceeding, but whether there is such a strong likelihood that an

injustice had resulted (id. at 1013) that good conscience requires it to be remedied." (emphasis added).

Judgment deprives Morse and Transamerica Equities of due process of law. Under the 5th Amendment to the U.S. Constitution and Art. I, § 7 of the Utah Constitution, he may not be deprived of property without "due process of law".

Strong public policy favors hearing the case on the merits. If URCP 60(b)(1) excusable neglect standard were applicable (it is not) still Morse has met that standard. Some rules announced in cases that have discussed circumstance which justify relief from a default judgment include the following:

(a) Liberal in granting of trial on merits. Courts should be liberal and somewhat indulgent in granting relief against judgments taken by default to end that controversies may be tried on merits. Mason v. Mason, 597 P.2d 1322 (Utah 1979); Baird v. Intermountain School Federal credit Union, 55 P.2d 877 (Utah 1976); McKean v. Mountain View Memorial Estates, Inc., 411 P.2d 129, 17 U.2d 323 (1966); Pitts v. Pine Meadow Ranch, Inc., 589 P.2d 767 (Utah 1978)

(c) A 1982 medical malpractice case reaffirmed Justice Maign's concurring opinion in Maltby. In Jennings v. Stoker, 652 P.2d 912 (Utah 1982), the Supreme Court refused to reverse a verdict based on alleged trial attorney incompetence because: (A) a motion for a new trial had not been filed, (B) mere differences in theory of trial techniques are not sufficient to grant a new trial, and (C) the plaintiff had failed to demonstrate that there was a reasonable likelihood that the verdict would have been

different. The court cited with approval 58 Am. Jur. 2d New Trial § 160 & 66 CJS New Trial § 82b, and cited with approval Justice Maign's concurring opinion in Maltby v. Cox, 598 P.2d 336 [quoted in paragraph 24(b) above]. At page 913 the Utah Supreme Court commented in part as follows:

"The general rule is that in civil cases a new trial will not be granted based upon the incompetence or negligence of one's own trial counsel. There are cases which recognize that under exigent or exceptional circumstances, xxx...xxx the court may justify in granting a new trial. Maltby v. Cox, 598 P.2d 336, see the concurring opinion by Chief Justice Crockett which is concurred in by two other justices; 58 Am. Jur. 2d New Trial § 160 & 66 CJS New Trial § 82b." (emphasis added)

(d) Supreme Court reversed denial of motion to vacate default judgment entered as sanction for tardiness of attorney. In McKean v. Mountain View Memorial Estates, 411 P.2d 129 (Utah 1966), defendant's attorney was 27 minutes late for trial. The court scheduled trial on short notice, and counsel objected because witnesses were unavailable. The morning of trial counsel sought a writ of prohibition from the Supreme Court. Unsuccessful, he called the Court and advised what he was doing and that he would be late. Because of his absence the Court entered default of his client and proceeded to hear evidence. The trial court refused to permit the attorney after he arrived late) to participate meaningfully in those proceedings, and entered a default judgment. New counsel moved to vacate that default, which was denied by the trial court. The Supreme Court reversed and in part stated as follows:

It is policy of law to favor trial on merits and to afford both sides full opportunity to present their evidence and

contentions as to disputed issues so they may be disposed of on substantial rather than upon technical grounds. (emphasis added).

Courts should exercise caution in regard to default judgments and should be somewhat indulgent if setting such judgments aside. (emphasis added).

"In order to achieve the objectives just stated it is sometimes necessary to look beyond what appear to be ill-advised, or even irritating or contemptuous conduct of counsel to the adjudication of the rights of the parties to the action. It should be kept in mind that their rights and any such misconduct of counsel are separate and distinct things which should be dealt with separately." The purpose of a default judgment is to conclude litigation when defendant fails to plead or otherwise defend an action. . . it was never intended to be used as a means of disciplining attorneys who may be derelict in the performance of their duties. If such a course were followed it may do a grave injustice to the client by punishing him rather than the attorney who has done the wrong." (emphasis added).

At p. 131 the Court stated, "We are acquainted with no foundation in law, either statutory or decisional, which would justify the entering of a default judgment and preventing the defendants from participating in a trial under circumstances shown here." (Court cited Hovey v. Elliott, et al. 167 US 490, 17 S Ct 8412, 43 LEd 215 and 14 ALR2d 580, et seq. re impropriety of striking pleading and entering default to punish contempt). (emphasis added). (See discussion in paragraph 23(a) above).

The sanction of a default judgment should not be imposed upon Morse and Transamerica Equities because of misfeasance of his attorney if such might be found. As noted by the Court in McKean v. Mountain View Memorial Estates, supra, where defendants have raised issues by their pleading, they should not be punished by suffering a default judgment as a result of misconduct of their attorney.

Reasonable excuse. It is generally an abuse of discretion to refuse to vacate judgment where there is reasonable justification or excuse and timely application is made to set it

aside. See Central Finance Co. v. Kynaston, 22 U. 2d 284, 452 P. 2d 316; Board of Education of Granite School Dist. v. Cox, 384 P.2d 806, 14 U.2d 385 (Utah 1963). The Court should be indulgent toward permitting full inquiry and knowledge of disputes so they can be resolved in conformity with law and justice. See Mayhew v. Standard Gilsonite, 376 P.2d 951, 14 U. 2d 52; Social Service v. Musselman, 667 P.2d 951, 14 U. 2d 52; Social Service v. Musselman, 667 P.2d 1053.

Policy favors trial on merits. The law tends to accord to litigants the chance for a hearing on the merits where it can be done without serious injustice to the other party. Courts are generally indulgent toward setting aside default judgments if there is reasonable justification or excuse and timely application is made. See Interstate Excavating, Inc. v. Agla Development Corp., 611 P.2d 369 (Utah 1980);

Doubt should be resolved in favor of vacating judgment. If there it is unclear whether a default should be set aside, the law favors doing so. Interstate Excavating, Inc. v. Agla Development Corp., 611 P.2d 369.

Under the circumstances in this situation before the Court, the Judgment should be set aside.

Defendants' attorney Grant Orton, had been called up on military duty for certain periods of time during the Gulf War Crisis. He established certain criteria to oversee his legal responsibilities during that period of time. His secretary was to pick up the mail or the post office was to hold his mail. He

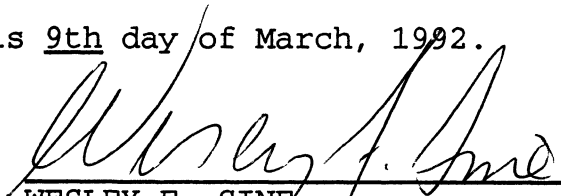
would periodically check his mail and take care of the problems shown there. Nothing came to him in the mail in reference to the motions for sanctions and motions for judgment. He thought everything was taken care of.

And so it was with considerable surprise that he found his client had been served with a Supplemental Order upon a Judgment that he had no knowledge of. He tried to take care of the client by filing a Motion To Set Aside was again activated by the military and therefore requested new counsel to file the Motion and to pursue the Setting Aside Of The Judgment. This was done in a timely fashion but was denied by the District Court.

Conclusion

Justice clearly calls for a reversal of the lower court's denial or Defendants' Motion To Set Aside Its Judgment. Based upon rule 55 and 60(b) the District Court should be instructed to set aside the Order For Sanctions And Judgment and allow the case to be set for trial.


Respectfully so requested this 9th day of March, 1992.


WESLEY F. SINE
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of March, I hand delivered a true and correct copy of the foregoing Brief of Appellant to the following:

J. Bruce Reading
Marlon L. Bates
SCALLEY & READING
Attorneys for Plaintiff
261 East 300 South, Suite f200
Salt Lake City, Utah 84111


Samantha Lane

APPENDIX

EXHIBIT I

FILED
DISTRICT COURT

JAN 10 3 55 PM '91

THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY
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261 East 300 South, Suite 200
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DATE 7 Jan 91 TIME 10:24 PM
R/B 1600 W 11400 S
UPON CLARE T. MORSE (Pres.)
SANDY PRECINCT, SALT LAKE COUNTY, UTAH
DEPUTY [Signature]

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

KENDRICK BROTHERS CONSTRUCTION : SUMMONS
COMPANY, INC., (Twenty Day)

Plaintiff,
vs. :

CLARE T. MORSE and
TRANSAMERICA EQUITIES, INC.

Civil No. 910900069CN

Defendants. :

Judge Wilkinson

THE STATE OF UTAH TO THE ABOVE-NAMED DEFENDANT, TRANSAMERICA EQUITIES, INC.:

You are hereby summoned and required to file an answer in writing to the attached complaint with the clerk of the above-entitled District Court, 240 East 400 South, Salt Lake City, Utah 84111 and to serve upon, or mail to Marlon L. Bates of Scalley & Reading, plaintiff's attorney, 261 East 300 South, Suite 200, Salt Lake City, Utah 84111, a copy of said answer, within twenty (20) days after service of this summons upon you.

If you fail to do so, judgment by default will be taken against you for relief demanded in said complaint, which has been


C:\MLB\PLEADING\MORSE2.SUM

CLARE T. MORSE Pres. & L.A.
157-6292 to 3200 #200
inventorship

17 1600 W 11400 S

filed with the Clerk of the Court and a copy of which is hereto annexed and herewith served upon you.

DATED this 4th day of January, 1991.


Marlon L. Bates
Attorney for Plaintiff

Serve Defendant:
Transamerica Equities, Inc.
c/o Clare T. Morse, President and Registered Agent
6292 South 320 West #200
Murray, Utah 84107

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

KENDRICK BROTHERS CONSTRUCTION : COMPLAINT
COMPANY, INC.,

Plaintiff,
vs.

:

CLARE T. MORSE and
TRANSAMERICA EQUITIES, INC.,

Civil No. 910700069CN

Defendants.

:

Judge Wilkinson

Plaintiff, Kendrick Brothers Construction, Inc.
(hereinafter "Kendrick"), for cause of action against defendants,
Clare T. Morse (hereinafter "Morse") and Transamerica Equities,
Inc. (hereinafter "TEI"), asserts as follows:

GENERAL ALLEGATIONS

1. Kendrick is a Utah corporation with principal offices located in Salt Lake County, state of Utah.
2. Morse is an individual who upon information and belief is a resident of Salt Lake County, state of Utah.

3. TEI, upon information and belief, is a Utah corporation with principal offices located in Salt Lake County, state of Utah.

4. The activities upon which this action is based occurred in Salt Lake County, state of Utah.

5. On or about April 18, 1990, TEI and Morse entered into a joint venture agreement (hereinafter "the Agreement") with Kendrick wherein Kendrick would pay a Fifty Thousand and No/100 Dollar (\$50,000.00) loan commitment fee to obtain financing for the purchase and improvement of certain commercial real property located in Salt Lake County, state of Utah (hereinafter "the Venture"). A copy of the Agreement is attached hereto as "Exhibit A" and incorporated herein by this reference.

6. In order to induce Kendrick to enter into the Agreement and provide the Fifty Thousand and No/100 Dollar (\$50,000.00) loan commitment fee, TEI and Morse provided Kendrick with a loan commitment letter (hereinafter the "Loan Commitment") from John L. Gordin (hereinafter "Gordin") of Commercial Property Mortgage Corporation (hereinafter "CPMC") wherein Gordin had approved financing in the amount of Two Million Five Hundred Thousand and No/100 Dollars (\$2,500,000.00), conditioned upon receipt of the loan commitment fee and other conditions enumerated within the Loan Commitment. A copy of the Loan Commitment is

attached hereto as "Exhibit B" and incorporated herein by this reference.

7. Kendrick confirmed with both Morse and Gordin that all conditions precedent to fulfilling the obligation to provide the financing had been fulfilled except the receipt of the Fifty Thousand and No/100 Dollars (\$50,000.00) loan commitment fee.

8. On April 19, 1990, Kendrick wired the sum of Fifty Thousand and No/100 Dollars (\$50,000.00) into the account of CPMC in reliance upon the representations of Morse and Gordin that funding for the Venture was approved. A copy of the wire confirmation is attached hereto as "Exhibit C" and incorporated herein by this reference.

9. Notwithstanding Gordin and CPMC's promise to provide funding in the amount of Two Million Five Hundred Thousand and No/100 Dollars (\$2,500,000.00) for the Venture, no financing has ever been provided.

10. On numerous occasions from April to the present time, Kendrick attempted to contact Morse and TEI to find out why the financing had not been provided. Morse and TEI refused to discuss the matter with Kendrick and refused to return its repeated phone calls.

11. In an effort to recover its Fifty Thousand and No/100 Dollars (\$50,000.00) loan commitment fee, Kendrick retained

counsel in California to file an action against Gordin and CPMC. A copy of the Complaint, Application for Prejudgment Writ of Attachment, and Declaration of Tom Kendrick, Sr. are attached hereto as "Exhibit D," "Exhibit E," and "Exhibit F" respectively and incorporated herein by this reference.

12. In response to the documents filed by Kendrick, the Court ruled that the Loan Commitment was an agreement between CPMC and Morse and that Kendrick was not in privity of contract with CPMC and was not, therefore, the proper party to sue CPMC.

13. When Kendrick learned that the California court would not allow Kendrick to proceed against CPMC for a return of Kendrick's loan commitment fee, Kendrick once again attempted to solicit Morse's and TEI's support to enforce the Loan Commitment or receive a return of the fee paid. Once again, Morse and TEI refused to respond in any manner to assist Kendrick despite repeated telephone calls.

14. On September 18, 1990, Kendrick's Utah counsel, Marlon L. Bates, contacted Morse's attorney, Grant L. Orton, to request that Morse and TEI send a letter to CPMC and Gordin demanding that the Venture either be funded or the commitment fee refunded. Mr. Orton was reminded of the fact that the Loan Commitment was scheduled to expire on October 18, 1990, and that if any additional documents were being requested by Gordin or CPMC,

they would have to be provided before that date or the commitment fee could become non-refundable. Mr. Orton agreed to send a letter to Gordin's and CPMC's attorney. Mr. Bates transmitted to Mr. Orton a copy of what he believed the letter should say together with a letter summarizing the contents of the telephone call. A copy of the letter to Mr. Orton and the sample letter to be sent to Gordin's and CPMC's attorney are attached hereto as "Exhibit G" and "Exhibit H" respectfully and are incorporated herein by this reference.

15. From September 24, 1990 through November 29, 1990, a series of letters were sent among Kendrick's counsel, Morse's counsel, and CPMC's counsel which collectively illustrate that Kendrick did everything possible to solicit the assistance of Morse and TEI (who were in privity of contract with CPMC) to join Kendrick in persuading CPMC to refund the Fifty Thousand and No/100 Dollars (\$50,000.00) loan commitment fee or finance the Venture as promised:

a. Letter dated September 24, 1990, from Kendrick's counsel to Morse's counsel requesting that the letter promised on September 18 be sent out immediately because the October 18, 1990 expiration date of the Loan Commitment was drawing closer. A copy of such letter is attached hereto as "Exhibit I" and incorporated herein by this reference.

b. Letter dated September 25, 1990, from Kendrick's counsel to Morse's counsel requesting once again that the letter be sent immediately. A copy of such letter is attached hereto as "Exhibit J" and incorporated herein by this reference. *lluc*

c. Letter dated October 1, 1990, from Kendrick's counsel to Gordin's and CPMC's counsel in California demanding information regarding what, if anything, was preventing the funding of the Venture or demanding a return of the loan commitment fee. A copy of such letter is attached hereto as "Exhibit K," and incorporated herein by this reference. *lluc*

d. Letter dated October 1, 1990 from Morse's counsel to CPMC's counsel in California requesting information as to why the Venture had not been financed as promised. (Kendrick's counsel did not receive a copy of this letter until one week after it was sent.) A copy of such letter is attached hereto as "Exhibit L" and incorporated herein by this reference. *lluc*

e. Letter dated October 4, 1990, from Kendrick's counsel to Morse's counsel demanding once again that the letter promised on September 18 be sent out immediately in order to meet the October 18, 1990 expiration date of the Loan Commitment. A copy of such letter is attached hereto as "Exhibit M" and incorporated herein by this reference. *lluc*

f. Letter dated October 5, 1990, from Morse's counsel to Kendrick's counsel explaining that he did send out the promised letter on October 1, 1990 and enclosing a copy of the October 1, 1990 letter for Kendrick's counsel. *huc*

g. Letter dated October 12, 1990, from Gordin's and CPMC's counsel in California to Kendrick's counsel stating that additional information was necessary to conclude the financing of the Venture and that such information had already been requested of Morse, who was CPMC's customer. The letter further refused to refund the loan commitment fee and made reference to a letter dated September 4, 1990 from CPMC's counsel to Kendrick's California counsel which stated that Kendrick had nothing to do with the financing of the Venture because CPMC's Loan Commitment was to Morse and TEI and not to Kendrick. A copy of the October 12, 1990 letter is attached as "Exhibit O" and incorporated herein by this reference. A copy of the September 4, 1990 letter is attached hereto as "Exhibit P" and incorporated herein by this reference.

h. Letter dated October 16, 1990 from Kendrick's counsel to Morse's counsel transmitting copies of the two letters sent by Gordin's and CPMC's counsel and requesting verification of the statement that CPMC had, indeed, previously requested additional information from Morse in order to finance the Venture. *huc*

A copy of such letter is attached hereto as "Exhibit Q" and incorporated herein by this reference.

1. Letter dated November 29, 1990, from Kendrick's counsel to Morse's counsel referencing a telephone conversation between the two attorneys three weeks before in which Morse's attorney confirmed that Morse had received a letter from CPMC requesting additional information in order to finance the Venture and promised to transmit the letter to Kendrick's counsel upon receipt of the letter from Morse. A copy of such letter is attached hereto as "Exhibit R" and incorporated herein by this reference.

16. In addition to the correspondence described above, Morse's attorney disclosed to Kendrick's attorney in a telephone conversation on November 1, 1990, that Morse and CPMC were working together on a second project which Gordin and CPMC had also promised to finance. According to Morse's attorney, Morse would do nothing to help Kendrick either recover its commitment fee or force CPMC to finance the Venture until the second project which Morse had with CPMC was fully funded. Morse's attorney stated that he did not know how long it would take to conclude the second transaction between Morse and CPMC.

17. As of the date of this Complaint, Morse and TEI: (1) have not provided Kendrick with information regarding what CPMC has

requested in order to finance the Venture although Morse has had that information for quite some time now, (ii) have not indicated whether such information has been provided to CPMC, and (iii) have not informed Kendrick about when Morse's second project with CPMC would be completely funded, and (iv) have not told Kendrick why the Venture was subordinated to the second project between Morse and CPMC. Additionally, Morse has declined Kendrick's request to join Kendrick in an action against CPMC to force the promised financing or to refund the commitment fee even though Kendrick has promised to pay all attorney's fees associated therewith. Indeed, with the sole exception of one letter sent by Morse's counsel to CPMC's attorney after repeated demands by Kendrick's counsel, Morse and TEI have done nothing to support Kendrick's efforts to conclude the financing for the Venture or receive a refund of its Fifty Thousand and No/100 Dollars (\$50,000.00) commitment fee even though Morse and TEI were aware of the damages their inaction would cause Kendrick.

COUNT I (Breach of Fiduciary Duty)

18. Kendrick incorporates herein by this reference all allegations contained in paragraphs 1-17 above.

19. Morse and TEI have materially breached their fiduciary duty to their joint venturer, Kendrick, by failing to exercise loyalty to the joint concern and by failing to show the

utmost good faith, fairness, and honesty in their dealing with Kendrick.

20. Morse and TEI have failed to follow through on efforts to conclude the financing, have refused to assist Kendrick in bringing an action against CPMC for wrongfully failing to finance the Venture or return the commitment fee, and have placed the interests of a second transaction with CPMC above the interests of the joint venture, to the detriment of the joint venture.

21. As a direct and proximate result of this breach of fiduciary duty, Kendrick has incurred damages in the amount of Fifty Thousand and No/100 Dollars (\$50,000.00), plus profits lost on the joint venture in an amount to be established upon the evidence at trial.

COUNT II (Breach of Implied Covenant
of Good Faith and Fair Dealing)

22. Kendrick incorporates herein by this reference all allegations contained in paragraphs 1-21 above.

23. Morse and TEI have materially breached their implied covenant to Kendrick of good faith and fair dealing by failing to assist Kendrick in completing the financing for the Venture or receiving a refund of its commitment fee, and by placing the interests of a second transaction with CPMC above the interest of the joint venture to the detriment of the joint venture.

24. As a direct and proximate result of this breach of an implied covenant of good faith and fair dealing, Kendrick has incurred damages in the amount of Fifty Thousand and No/100 Dollars (\$50,000.00), plus profits lost on the joint venture in an amount to be established upon the evidence at trial.

COUNT III (Negligence)

25. Kendrick incorporates herein by this reference all allegations contained in paragraphs 1-24 above.

26. Morse and TEI had a duty to use reasonable care to provide all information required by CPMC in a timely manner in order to facilitate the funding of the Venture.

27. Morse and TEI materially breached their duty by failing to provide in a timely manner information requested by CPMC to conclude the financing of the Venture.

28. As a direct and proximate result of the failure of Morse and TEI to fulfill their duty to provide said information, Kendrick has been damaged in the amount of Fifty Thousand and No/100 Dollars (\$50,000.00), plus profits lost in the joint venture in an amount to be established upon the information.

COUNT IV (Fraud)

29. Kendrick incorporates herein by this reference all allegations contained in paragraphs 1-28 above.

30. Morse and TEI fraudulently conspired with Gordin and CPMC to withhold their support of Kendrick's efforts to protect the interests of the joint venture in exchange for Gordin's and CPMC's efforts to finance a second transaction on behalf of Morse and TEI.

31. As a direct and proximate result of this fraudulent activity, Kendrick has been damaged in the amount of Fifty Thousand and No/100 Dollars (\$50,000.00), plus profits lost on the joint venture in an amount to be established upon the evidence at trial.

WHEREFORE, Kendrick prays for relief as follows:


1. As to COUNT I, COUNT II, and COUNT III, Kendrick prays for judgment against defendants in the amount of Fifty Thousand and No/100 Dollars (\$50,000.00), together with lost profits of the joint venture in an amount to be established upon the evidence at trial, prejudgment interest at the legal rate, court costs, and attorney's fees incurred herein.

2. As to COUNT IV, Kendrick prays for judgment against defendants in the amount of Fifty Thousand and No/100 Dollars (\$50,000.00), together with lost profits of the joint venture in an amount to be established upon evidence at trial, punitive damages, prejudgment interest at the legal rate, court costs, and attorney's fees incurred herein.

3. For such other and further relief as this Court
deems just and equitable in the premises.

DATED this 4th day of January, 1991.

SCALLEY & READING


Marlon L. Bates
Attorney for Plaintiff

Plaintiff's Address:
4015 South 300 West
Murray, Utah 84107

EXHIBIT II

FILED ✓
DISTRICT COURT

JAN 13 9 11 AM '91

Grant G Orton #2482
Attorney for Defendants
2670 South 2000 East
Salt Lake City, Utah 84109
Telephone: (801) 485-7937

THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY
BY mf
DEPUTY CLERK

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

KENDRICK BROTHERS CONSTRUCTION)	
COMPANY, INC.,)	
)	
Plaintiff,	)	A N S W E R
)	
vs	)	Civil No. 910900069CN
)	
CLARE T. MORSE and)	
TRANSAMERICA EQUITIES, INC.	)	Judge Homer Wilkinson
)	
Defendants.)	

COME NOW defendants, by and through their attorney, Grant G Orton, and in response to the allegations of plaintiff's complaint answer, aver and allege as follows:

1. Plaintiff's complaint fails to state a claim against these defendants, individually and collectively, upon which relief can be granted.

2. Defendants admit the allegations of paragraphs 1, 2, 3, 4, 5, 9, 11, 12, 15 and 26 of plaintiff's complaint.

2. Defendants admit that defendant Transamerica Equities, Inc. provided Kendrick with a copy of a loan commitment letter from Commercial Property Mortgage Corporation wherein CPMC approved financing in the amount of Two Million Five Hundred Thousand and No/100 Dollars (\$2,500,000.00), conditioned upon receipt of the loan commitment fee and other conditions enumerated within the Loan Commitment; allege that said copy was given to plaintiff at its

request and not in an attempt to induce plaintiff to provide any funds to defendants or either of them, and deny each and every other allegation of paragraph 6 of plaintiff's complaint.

3. Defendants deny that plaintiff confirmed with Morse that all conditions precedent to fulfilling the obligation to provide the financing had been fulfilled except the receipt of the Fifty Thousand and No/100 Dollars (\$50,000.00) loan commitment fee; and are without sufficient information or knowledge to form a belief as to the truth or falsity of the balance of the allegations of paragraph 7 of plaintiff's complaint and therefore deny the same.

4. Defendants allege that plaintiff represented to each of them that plaintiff had wired the sum of Fifty Thousand and No/100 Dollars into the account of CPMC; have no independent knowledge that this did in fact occur; submit that Exhibit "C" of plaintiff's complaint does not show the owner of the account into which plaintiff's funds are alleged to have been transferred; but assume that said sum was transferred to CPMC by its subsequent actions, and therefore admit the allegations of paragraph 8 of plaintiff's complaint.

5. Defendants admit that on numerous occasions from April to the present time, Kendrick attempted to contact Morse and TEI to find out why the financing had not been provided, but allege that Morse, on behalf of TEI as its President, returned calls on numerous occasions when he was told of calls being made by plaintiff, and therefore deny the balance of the allegations of paragraph 10 of plaintiff's complaint inconsistent herewith.

6. Derendants allege that after Kendrick notified them that the California court had dismissed plaintiff's case against CPMC, plaintiff attempted to solicit Morse's and TEI's support to enforce the Loan Commitment or receive a return of the fee paid, that, Morse, as President of TEI, spoke to CPMC about the matter on several occasions and authorized corporate counsel to communicate the corporation's concerns to CPMC, that to this date CPMC has advised TEI that it is proceeding with the financing package for the project, that items may still be required which are unknown at the present time due to the unavailability of certain documents because of the takeover of the owner of the project by the RTC, and the lack of cooperation of the RTC's predecessor in interest; and deny all allegations of paragraph 13 of plaintiff's complaint inconsistent herewith.

7. Defendants admit that on September 18, 1990, Kendrick's Utah Counsel, Marlon L. Bates, contacted Morse's attorney, Grant G Orton, to request that Morse and TEI send a letter to CPMC and Gordin demanding that the Venture either be funded or the commitment fee refunded; and that Mr. Orton was told that the loan Commitment was scheduled to expire on October 18, 1990, and that if any additional documents were being requested by Gordin or CPMC, they would have to be provided before that date or the commitment fee could become non-refundable; allege that Mr. Orton could not send any such letter to Gordin and CPMC's attorney without an authorization to do so; allege that the sample letter which plaintiff proposed to send is immaterial and has no bearing on this matter at all, because such a letter in any event would have to

approved by TEI, but do admit that copies of Exhibit "G" and Exhibit "H" were sent to defendants' counsel; and deny all other allegations of paragraph 14 inconsistent herewith.

8. Defendants admit that defendants' attorney disclosed to Kendrick's attorney in a telephone conversation on November 1, 1990, that Morse and CPMC were working together on a another project which CPMC had also promised to finance. Defendants deny that defendants' attorney said that Morse would do nothing to help Kendrick either recover its commitment fee or force CPMC to finance the Venture until the second project which Morse had with CPMC was fully funded; but allege that Morse's attorney rather indicated to plaintiff's attorney that it was his understanding that CPMC would not finance the subject project until the first project was done, and that Morse's attorney did not know how long it would take to conclude the first transaction which was brokered by Morse to CPMC; and deny all other allegations of paragraph 16 inconsistent herewith.

9. Defendants admit that Morse has declined Kendrick's request to join Kendrick in an action against CPMC to force the promised financing or to refund the commitment fee; allege that Morse, as President of TEI, is convinced that it is CPMC's intent to fund the project, and that to file such a suit at this time could jeopardize the funding of the project because TEI has been informed by CPMC that estoppel letters from tenants are required, which TEI has been unable to obtain from the present fee owner, and has been forced to file a suit in federal court to force the sale of the project and to provide necessary documents to complete the

funding; and furthermore allege that plaintiff has been told of this problem; allege that the financing on the other project which was brokered by Morse, has nothing to do with this matter, other than the fact that as a matter of funding priority it is TEI's understanding that said project will be funded before the subject project, and therefore that no information on said project has been provided to plaintiff, and deny all other allegations of plaintiff's paragraph 17 inconsistent herewith.

10. Defendants deny the allegations of paragraphs 19, 21, 23, 24, 27, 28 and 30 of plaintiff's complaint.

11. In response to paragraphs 18, 22, 25 and 29 of plaintiff's complaint, defendants hereby incorporate by reference their responses to all other allegations of plaintiff contained herein.

AFFIRMATIVE DEFENSES

12. At all times pursuant hereto, defendant, Clare T. Morse ("Morse"), was an officer in defendant corporation, Transamerica Equities, Inc., was acting solely for said corporation, and is not personally liable for the acts of the said corporation.

13. There is no contractual relationship between plaintiff and defendant, Clare T. Morse.

14. The copy of the subject joint venture agreement, attached to plaintiff's complaint as Exhibit "A", is not a true and correct copy in that the original document bears interlineations on page 1 eliminating all references to Clare T. Morse.

15. Plaintiff's complaint fails to name an indispensable party, i.e. Commercial Property Mortgage Corporation.

WHEREFORE, these defendants pray for dismissal of this action together with costs and attorneys' fees necessarily incurred in their defense, and for such other and further relief as the court may deem just and proper.

DATED this 11th day of January, 1991.


GRANT G ORTON
Attorney for Defendants

MAILING CERTIFICATE

I certify that I did send a true and correct copy of the foregoing ANSWER, postage prepaid, to plaintiff's attorneys, J. Bruce Reading and Marlon L. Bates at SCALLEY & READING, 261 East 300 South, Suite 200; Salt Lake City, Utah 84111 this 11th day of January, 1991.




EXHIBIT III

FILED
DISTRICT COURT

APR 23 4 32 PM '91

THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY

BY mf
DEPUTY CLERK

J. BRUCE READING, #2700
MARLON L. BATES, #4794
SCALLEY & READING
Attorneys for Plaintiff
261 East 300 South, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 531-7870

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

KENDRICK BROTHERS CONSTRUCTION : MOTION TO STRIKE ANSWER AND
COMPANY, INC., AWARD DEFAULT JUDGMENT AND
ATTORNEY'S FEES

Plaintiff,
vs. :

CLARE T. MORSE and
TRANSAMERICA EQUITIES, INC.,

Civil No.910900069CN

Defendants. : Judge Homer F. Wilkinson

COMES now the plaintiff, by and through counsel, and moves this Court for an order striking defendants' answer and awarding default judgment as prayed for in plaintiff's complaint, together with attorney's fees incurred in bringing the Motion to Compel and this Motion to Strike. This motion is brought in accordance with Rule 37(b) of the Utah Rules of Civil Procedure and based upon the defendants' failure to produce discovery within 15 days of the Court's minute entry dated April 5, 1991. This motion is supported by the accompanying Memorandum of Points and

Authorities and the Affidavit of Marlon L. Bates, counsel for the plaintiff.

DATED this 23 day of April, 1991.

SCALLEY & READING


Marlon L. Bates

MAILING CERTIFICATE

I hereby certify that on the 23 day of April, 1991, I mailed, postage prepaid, a true and correct copy of the foregoing Motion to Strike Answer and Award Default Judgment and Attorney's Fees to the following:

Grant G. Orton, Esq.
2670 South 2000 East
Salt Lake City, Utah 84109



EXHIBIT IV

WESLEY F. SINE (2967)
Attorney for Defendants
349 South 200 East, Suite 170
Salt Lake City, Utah 84111
Telephone: (801) 364-5125

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

KENDRICK BROTHERS CONSTRUCTION	)	DEFENDANTS TRANSAMERICA
COMPANY, INC.,	)	EQUITIES AND CLARE T. MORSE'S
	)	MOTION TO SET ASIDE SANCTIONS
Plaintiff,	)	AND JUDGMENT
)	
vs.	)	Civil No.: 91090069CN
)	
CLARE T. MORSE and	)	JUDGE: WILKINSON
TRANSAMERICA EQUITIES, INC.,)	
)	
Defendants.)	

DEFENDANTS Transamerica Equities, Inc. and Clare T. Morse hereby move the Court pursuant to rules 55(c) and 60(b) Utah R. Civ. P., to set aside the Judgment Certificate and Sanctions in favor of Plaintiff against Transamerica Equities, Inc. and filed the 3rd day of June, 1991.

The grounds for this Motion and the facts support the same are more particularly set forth in the Affidavits and Memorandum in support hereof that are filed herewith.

DATED this 23rd day of August, 1991.

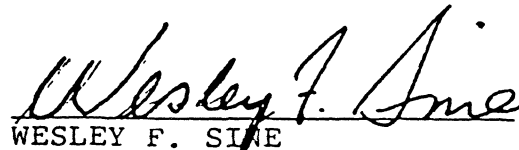

WESLEY F. SINE
Attorney for Defendants

EXHIBIT V

WESLEY F. SINE (2967)
Attorney for Defendants
349 South 200 East, Suite 170
Salt Lake City, Utah 84111
Telephone: (801) 364-5125

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

KENDRICK BROTHERS CONSTRUCTION	)	MEMORANDUM OF POINTS AND
COMPANY, INC.,	)	AUTHORITIES IN SUPPORT OF
	)	PLAINTIFF'S MOTION TO SET
Plaintiff,	)	ASIDE DEFAULT AND DEFAULT
vs.	)	JUDGMENT
CLARE T. MORSE and)	
TRANSAMERICA EQUITIES, INC.,	)	Civil No.: 910900069CN -
)	
Defendants.	)	JUDGE: WILKINSON

I. INTRODUCTION

This Memorandum is submitted to the provision of Rule 4-501, Utah Rules of Judicial Administration, in support of Defendants Grant G. Orton and Clare T. Morse's Motion To Set Aside Judgment and Sanctions filed by Plaintiff and served herewith.

II. STATEMENT OF MATERIAL FACTS

The record now before the court establishes the following facts that are material to Plaintiff's Motion:

1. In response to service of the Summons and Complaint in the above matter upon the defendants Transamerica Equities Inc. and Clare T. Morse, an answer was filed and served by mail on behalf of Transamerica Equities, Inc. and Clare T.

Morse on or about January 11, 1991.

2. On July 10, 1991 Clare T. Morse and Transamerica Equities, Inc. learned for the first time that a Judgment had been obtained against Transamerica Equities, Inc. and Clare T. Morse in the instant matter when they were personally served by constable with a Motion and Order in Supplemental Proceedings.

3. Their attorney, Grant Orton was out of town on a military call up. Upon reviewing the files and inquiring into this matter with Grant Orton, it was found that he had never received notice of plaintiff's judgment nor of the Motion apparently filed preliminary to the granting of judgment.

4. The mail to Grant Orton's office is delivered to a mail box in front of the building where his office is located. During the months of January through May 1991, Grant Orton had numerous military assignments outside of the State of Utah, and during that time the mail has been retained on occasion by the Postal Service when his part-time secretary has not picked it up in a timely fashion.

5. In the past when this happened, it has been retained by the post office for it to be picked up there. Upon checking with the post office Grant Orton found that this was not the case since there is no such mail retained by the Postal Service.

6. Had Grant Orton become aware from any source that

a Motion preliminary to the granting of judgment and sanctions had been served in any manner, including by mail, he would have taken the action necessary to timely prepare, file and serve an appropriate response thereto and he would not have permitted or suffered any judgment or sanctions to have been entered against the Defendant herein, without his answering said motions.

7. Defendants have, hold and claim valid and meritorious defenses to each of the claims and issues that are raised in and that are the subject of the Complaint and has asserted them in his Answer.

8. Defendants Transamerica Equities, Inc. nor Clare T. Morse did not receive notice of the Motion for Sanctions and Judgment.

9. Defendants did not receive Notice of Plaintiffs' Motions nor could they find those notices.

10. That Grant Orton was attorney for Defendant Clare T. Morse and Transamerica Equities, Inc. and all defenses for Transamerica Equities included Morse.

11. That Clare Morse did not receive notice of any of Plaintiff's notices.

12. Defendants Clare T. Morse and Transamerica Equities did not have notice of any of the lack of response and therefore were dependent upon their attorney to represent them in this matter.

13. That at the very most, this was caused by excusable neglect.

III. ARGUMENT

Rules 55(c) and 60(b), Utah R. Civ. P., provide for relief from the entry of defaults and default judgments "for good cause shown" and for "mistake, inadvertence, surprise, or excusable neglect". The applicable standard is stated as follows in Westinghouse Electric Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P. 2d 876, 879 (Utah 1975)

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


The facts established by the record now before the Court clearly satisfy the requirements of Rule 55(c) and 60(b) and compel the granting of the relief sought by Defendant's Motion. The failure of Defendants to file and serve a timely and appropriate response to the Motions for Sanctions and Judgment brought by the Plaintiff was caused by problems both with the mail (Orton nor Morse received the notices), and with Grant Orton serving military duty during the war in Kuwait during January - May 1991. The failure was not the result of poor practices, carelessness, or lack of concern on the part of Defendants, but rather a problem with the mail in

part caused by Defendant Orton being called up in the military during this period. Moreover, defendants have, hold and claim, and are fully prepared to assert, good and meritorious defenses to each of the claims and issues that are raised by and that are the subject of the Plaintiff's Complaint.

IV. CONCLUSION

For the reasons stated above Defendant's Motion should be granted.

DATED this 21st day of August, 1991.


WESLEY F. SINE
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT was served upon the following named individuals by mailing a copy thereof to said individuals, postage pre-paid, at the address shown below:

J. Bruce Reading,
Marlon L. Bates,
SCALLEY & READING
Attorneys for Plaintiff
261 East 300 South, Suite 200
Salt Lake City, Utah 84111

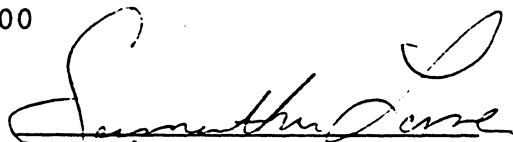

Samantha Lane

EXHIBIT VI

J. BRUCE READING, #2700
MARLON L. BATES, #4794
SCALLEY & READING
Attorneys for Plaintiff
261 East 300 South, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 531-7870

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

KENDRICK BROTHERS CONSTRUCTION : OPPOSITION TO MOTION TO SET
COMPANY, INC., ASIDE SANCTIONS AND JUDGMENT

Plaintiff,
vs. :

CLARE T. MORSE and
TRANSAMERICA EQUITIES, INC.,

Civil No.910900069CN

Defendants. : Judge Homer F. Wilkinson

I. INTRODUCTION

This Court properly responded to the defendants' long history of complete disregard for this case by striking defendants' answer and entering judgment against defendants. Now, over seven months after defendants abandoned this matter, they believe they have the right to start over again by setting aside the judgment which was properly entered.

II. STATEMENT OF MATERIAL FACTS

A chronology of material facts in this case establishes an inexcusable pattern of total neglect:

1. On January 18, 1991, plaintiff's attorney sent a Request for Production of Documents to Grant G. Orton, the attorney for defendants. The mailing certificate indicates that the document was properly mailed to the address which Mr. Orton uses for his practice of law. The document was not returned by the post office.

2. On February 22, 1991, plaintiff's attorney sent Mr. Orton a letter reminding him that the time to answer the Request for Production of Documents had now passed and granting Mr. Orton an extension of time until March 1, 1991 to respond to the Request. Mr. Orton was duly advised that if he failed to respond on or before March 1, 1991, a motion to compel would be brought and sanctions would be requested. The letter was correctly mailed to Mr. Orton's business address and was not returned by the post office. A copy of the letter is attached as "Exhibit A" and incorporated herein by this reference.

3. On March 5, 1991, plaintiff's attorney filed a Motion to Compel Production of Documents and asked the Court to award attorney's fees associated with bringing the motion because of defendants complete lack of response. This motion was also duly mailed to defendants' counsel and was not returned by the post office.

4. On April 1, 1991, plaintiff's attorney filed with the Court and duly mailed to defendants' attorney a Notice to Submit for Decision. This document was also not returned by the post office.

5. On April 5, 1991, the Court granted plaintiff's motion and ordered defendants to respond to the Request for Production of Documents within fifteen (15) days of April 5, 1991. The Court held in reserve the issue of awarding attorney's fees. The Court's Minute Entry was duly mailed to defendants' attorney at the same address to which plaintiff's attorney had been sending correspondence.

6. On April 18, 1991, Mr. Orton telephoned plaintiff's counsel to apologize for neglecting the matter. Mr. Orton acknowledged that he received ~~the~~ Court's Minute Entry ~~and the~~ previous documents but had been too busy to get with Mr. Morse. Mr. Orton said that he told Mr. Morse about the Request for Production of Documents but he did not think Mr. Morse had done anything yet to assemble documents. Mr. Orton then requested additional time and plaintiff's attorney denied the request, reminding Mr. Orton that he already been given three months to respond. Finally, Mr. Orton said that he could not locate the Request for Production of Documents and asked if plaintiff's attorney would send him a new set. Plaintiff's attorney offered to

fax the document to Mr. Orton so that he could have it immediately. As soon as the telephone conversation ended, plaintiff's counsel faxed the Request for Production of Documents to Mr. Orton. A copy of the fax transmittal sheet is attached hereto as "Exhibit B" and incorporated herein by this reference. A copy of the April client billing which further proves that Mr. Morse spoke directly with plaintiff's attorney and was denied any extension of time is attached hereto as "Exhibit C" and incorporated herein by this reference.

7. On April 23, 1991, plaintiff's attorney filed a Motion to Strike Answer, Enter Default Judgment and Award Attorney's Fees because of defendants' failure to respond in any manner within the time period ordered by the Court. A copy of this motion was duly mailed to Mr. Orton and was not returned by the post office.

8. On May 7, 1991, plaintiff's attorney filed a Notice to Submit and duly mailed a copy to Mr. Orton. The mailing was not returned by the post office.

9. On May 21, 1991, the Court prepared a Minute Entry granting plaintiff's Motion to Strike Answer, Enter Default and Award Attorney's Fees. Once again, the Court properly sent a copy of the Minute Entry to Mr. Orton.

10. On May 30, 1991, plaintiff's attorney sent to Mr. Orton a copy of the proposed Order Striking Answer and Awarding Default Judgment and Attorney's Fees.

11. On June 3, 1991, the Court signed the proposed order.

12. On June 13, 1991, Clare Morse was personally served by a constable with two Motions and Orders in Supplemental Proceedings. One was served upon him in his capacity as the registered agent of Transamerica Equities, Inc., and the second was served upon him in his individual capacity. These motions fully explained on their face that judgment had been entered against both defendants in the amount of Fifty Thousand Two Hundred Thirty and No/100 Dollars (\$50,230.00). Copies of these motions together with the constable's return of service affidavits are attached hereto as "Exhibit D" and "Exhibit E" and are incorporated herein by this reference.

13. Clare Morse did not show up at the hearing which was scheduled for June 30, 1991.

14. On July 10, 1991, Clare Morse was personally served by a constable for a second time with two Motions and Orders in Supplemental Proceedings. Copies of these two documents together with the constable's return of service affidavits are attached

hereto as "Exhibit F" and "Exhibit G" and are incorporated herein by this reference.

15. Clare Morse did not show up at the hearing which was scheduled for July 23, 1991.

16. On August 6, 1991, Clare Morse was personally served by a constable for a third time with two Orders to Show Cause. Copies of these two documents together with the constable's return of service affidavits are attached hereto as "Exhibit H" and "Exhibit I" and are incorporated herein by this reference.

17. On August 12, 1991, one day before the Order to Show Cause hearing was scheduled, Clare Morse's new attorney, Wesley Sine, telephoned plaintiff's attorney and notified plaintiff's attorney that defendants had retained him to represent both defendants and that he would be filing a motion to Set Aside the Default Judgment.

18. On August 23, 1991, defendants' new attorney filed a Motion to Set Aside Sanctions and Judgment.

II. ARGUMENT

Defendants' Memorandum in Support of Motion to Set Aside Default Judgment correctly indicates that courts generally tend to favor granting relief from default judgments. But as the preceding statement of material facts makes clear, this case is anything but

typical and the defendants' total and complete neglect of this matter was anything but excusable.

First, defendants' Memorandum states that Clare Morse and Transamerica Equities first learned that a judgment had been obtained against them on July 10, 1991 when Morse was served by a Motion and Order in Supplemental Proceedings. (See paragraph 2 of Memorandum). In Morse's Affidavit, Morse testifies that if he had been aware that a motion preliminary to the granting of judgment had been mailed, he would have taken any action to obtain new counsel and respond timely. Both of these statements are contradicted by the facts. As Exhibits D and E make clear, Morse knew a judgment had been entered against him and his company on June 13, 1991, almost one month before he admits this knowledge and two full months before he took any action to hire new counsel or do anything about the judgment. In fact, if it were not for the order to show cause hearing and the imminent issuance of a bench warrant for Morse's arrest, it is doubtful that any response would have taken place even to this date.

Second, defendants' memorandum states that defendants' attorney, Grant Orton, never received notice of plaintiff's judgment nor of the motion filed preliminary thereto (par. 3); that had Orton been aware of such a preliminary motion, he would have immediately responded (par. 6); that Orton was called up to serve

with the military from January through May, 1991 (par. 4 and third and fourth lines from the bottom of page 4); and that Orton was having problems with his mail from January through May of 1991 (par. 4 and 5, and last 8 lines on page 4). These statements in the memorandum are further alleged in the Morse Affidavit which states that Orton was on military call from January to late May of 1991 (Morse Aff., par. 5) and the Orton Affidavit which states as follows: Orton never had notice of the judgment or motions filed preliminary thereto (Orton Aff., par. 3); Orton had mail problems from January through May of 1991 (Orton Aff., par 4-5); and Orton would have timely responded if he had been aware of motions preliminary to the judgment (Orton Aff., par. 6).

Once again, a review of the facts contradicts each representation made above. In the first place, even if Orton's incredible story about having mail problems for a five month period of time is somehow accepted as truthful, it does not explain the telephone conversation which plaintiff's attorney had with Orton on April 18, 1991. In that telephone conversation, Orton apologized for neglecting to respond to the discovery, acknowledged receipt of the Court's April 5, 1991 Minute Entry granting plaintiff's Motion for Sanctions and requested that plaintiff's counsel grant him more time and send again the Request for Production of Documents (Affidavit of Marlon L. Bates, par. 3-4). If the Court questions

the Affidavit of Marlon L. Bates with respect to the telephone conversation, Exhibit B evidences a fax transmission on that date to Orton. It should be noted that Orton has never claimed that his fax machine was not working. Furthermore, Exhibit C evidences that in the ordinary course of billing for this case, plaintiff's attorney described a telephone conversation with Orton on April 18, 1991 in which plaintiff's attorney denies Orton's request for more time. Exhibits B and C were prepared in April of 1991, well before the issues raised by defendants' motion came to light. Consequently, the validity of Exhibit B and C is much more certain than the validity of affidavits which were prepared in anticipation of this motion. Exhibits B and C establish that Orton was not completely removed from his practice of law from January through May of 1991 as defendants' memorandum and affidavits suggest; rather, in the middle of that period, Orton is documented as having a telephone conversation with plaintiff's attorney regarding the issues of the case and knew enough about the time frame imposed by the Court to request an extension of time. If Orton were placed under oath to testify regarding his practice from February through May of 1991, it is likely that Orton spent a substantial amount of time practicing law.

If the facts of Orton's military service were to show that after his April 18, 1991 conversation with plaintiff's

attorney, Orton became too busy to practice law, Orton has a duty to inform his client of this fact and withdraw as counsel. Orton did not do this. This flagrant neglect of a legal matter entrusted to Orton is certainly not excusable within the meaning of the Rules of Civil Procedure. If defendants honestly believe this neglect injured their case, their remedy is to sue their attorney for malpractice. The defendants picked their attorney and the defendants -- not the plaintiff -- should bear the burden of their choice. It is interesting to note, however, that notwithstanding Orton's total neglect of the case, defendants have not fired him. Instead, they have hired new counsel to work with Orton.

In addition to Orton's responsibility for the legal matters entrusted to him, Orton also bears the burden of solving any problems his legal practice has with the delivery of his mail. From January through May of 1991, Orton was sent at least nine different packages of documents from plaintiff and the court. Orton claims none of these were received by him. Certainly a mail problem of this magnitude (if the Court believes this story) should become apparent to any reasonable person and should be solved in short order. Orton's failure to do this is not excusable neglect and plaintiff should not be forced to bear the burden of Orton's failure to solve his alleged mail problem.

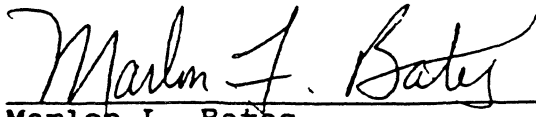
IV. CONCLUSION

Although Courts should generally grant motions to set aside default judgments, this is one case where it should not be granted. The volume of work, time, and considerable expense involved in bringing this particular case to judgment and attempting to collect on that judgment takes it out of the ordinary scope of default judgments. While the plaintiff spent thousands of dollars jumping through a wide assortment of legal hoops and while the Court patiently granted defendants every opportunity to respond, defendants' attorney knowingly neglected the case. And while the plaintiff spent additional sums attempting to collect on the judgment, the defendants totally refused for two months to respond to the Court's orders to attend hearings in Supplemental Proceedings or take any action to set aside the judgment. It is incredible that at this point, defendants are asking the Court to pretend the last seven months never happened. To grant this motion is to render totally ineffective the discovery process and to penalize plaintiff for diligently pursuing its remedies in good faith.

For these reasons, plaintiff respectfully requests that defendants' motion be denied.

DATED this 4th day of September, 1991.

SCALLEY & READING


Marlon L. Bates

MAILING CERTIFICATE

I hereby certify that on the 4th day of September, 1991, I mailed, postage prepaid, a true and correct copy of the foregoing Opposition to Motion to Set Aside Sanctions and Judgment together with the Affidavit of Marlon L. Bates to the following:

Wesley F. Sine, Esq.
647 W. North Temple
Salt Lake City, Utah 84116

Grant G. Orton, Esq.
2670 South 2000 East
Salt Lake City, Utah 84109



LAW OFFICES

SCALLEY & READING

A PROFESSIONAL CORPORATION

SUITE 200

261 EAST 300 SOUTH

SALT LAKE CITY, UTAH 84111

FORD G. SCALLEY
J. BRUCE READING
STEVEN K. WALKENHORST
MICHAEL W. SPENCE
MARLON L. BATES
DAVID M. CARLSON
SCOTT N. RASMUSSEN
LORI NIELSEN JERMAN

TELEPHONE
AREA CODE 801
531-7870

FACSIMILE
AREA CODE 801
531-7868

February 22, 1991

Grant Orton, Esquire
2670 South 2000 East
Salt Lake City, Utah 84109

Re: Kendrick Brothers Construction v. Morse and Transamerica
Equities

Dear Mr. Orton:

My records indicate that our Request for Production of Documents was mailed to you on January 18, 1991. Consequently, I believe the 30 days allowed by the Rules of Civil Procedure have expired. I will grant a one week extension of time to produce these documents but if I do not receive the documents on or before Friday, March 1, 1991, I will bring a motion to compel their production and will request sanctions.

Sincerely,

SCALLEY & READING



Marlon L. Bates

btr
cc: Tom Kendrick, Sr.

LAW OFFICES

SCALLEY & READING

A PROFESSIONAL CORPORATION

SUITE 200

261 EAST 300 SOUTH

SALT LAKE CITY, UTAH 84111

FORD G. SCALLEY
J. BRUCE READING
STEVEN K. WALKENHORST
MICHAEL W. SPENCE
MARLON L. BATES
JOHN E. HANSEN
SCOTT N. RASMUSSEN
JOHN E. SWALLOW
STEVEN B. SMITH

TELEPHONE
AREA CODE 801
531-7870

FACSIMILE
AREA CODE 801
531-7968

FACSIMILE COVER LETTER

PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME: Grant H. Orton, Esq.
LOCATION: 3098 Highland Drive #300
Salt Lake City, Utah 84106

FACS. NO: (801) 487-3502

DOCUMENT(S) SENT FROM:

NAME: Marlon L. Bates, Esquire
LOCATION: SCALLEY & READING
261 East 300 South, Suite 200
Salt Lake City, Utah 84111
TEL. NO: (801) 531-7870
FACS. NO: (801) 531-7968

TOTAL NUMBER OF PAGES INCLUDING THIS COVER LETTER: 5

DATE: April 18, 1991-
TIME: 4:50 p.m.

IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL BACK AS SOON AS POSSIBLE. IF YOU HAVE PROBLEMS, PLEASE CONTACT: Bonnie

COMMENTS:

261 East 300 South, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 531-7870

Kendrick Brothers Construction Co.
Attn: Tom Kendrick
4015 South 300 West
Murray, Utah 84107

April 30, 1991
Page 1
Client: 53014
Matter: 08
Invoice # 4816

Matter: Commercial Property Mortgage Corporation

Date	Professional Services Rendered	Hours	Amount
04/18/91	Conference with opposing counsel; send <u>second</u> set of document request to him and deny additional time to respond.	0.30	34.50
04/23/91	Conference with Tom; draft motion to strike, memorandum of law, and affidavit; file with court.	1.00	115.00

Total Hours	1.30	Total Services	149.50
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Totals for this matter:

Prior balance	3,367.89
---------------	----------

Balance due	3,517.39
-------------	----------

ACCOUNT AGING

Current	Over 30	Over 60	Over 90	Total
				3,517.39

Interest charges at 10% on accounts over 31 days.

J. BRUCE READING, #2700
MARLON L. BATES, #4794
SCALLEY & READING
Attorneys for Plaintiff
261 East 300 South, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 531-7870

DATE 13 June 91 TIME 5:18 PM
BY 1680 TW 11400 S
UPON Plerson
SANDY PRECINCT. SALT LAKE COUNTY, UTAH
DEPUTY [Signature]

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

KENDRICK BROTHERS CONSTRUCTION : MOTION AND ORDER OF
COMPANY, INC., SUPPLEMENTAL PROCEEDINGS

Plaintiff,
vs. :

CLARE T. MORSE and
TRANSAMERICA EQUITIES, INC.,

Civil No. 910900069CN

Defendants. : Judge Homer F. Wilkinson

In the above-entitled action, plaintiff moves the Court for an order requiring defendant, Clare T. Morse, to appear before this Court to answer questions under oath concerning its property, and to restrain defendant from disposing of its non-exempt property pending the hearing. Judgment was entered against defendant on the date of June 3, 1991, in the amount of Fifty Thousand Two Hundred Thirty Thousand and No/100 Dollars (\$50,230.00) of which Fifty Thousand Two Hundred Thirty and No/100 Dollars (\$50,230.00) is still unpaid.

DATED this 11 day of June, 1991.

1600w. 11400s
So Jordan, Ut.

SCALLEY & READING

Marlon L. Bates
Marlon L. Bates
Attorney for Plaintiff

or
WK/ 6292 S 320 W #200
Murray, Ut. RISA
C:\MLB\PLEADING\MORSE.SUP

Correct add

~~5296 S 320 W #200~~
Vacant

ORDER

THE STATE OF UTAH TO DEFENDANT, CLARE T. MORSE:

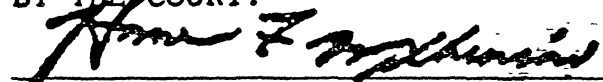
IT IS ORDERED that, pursuant to the foregoing motion and good cause appearing, you appear in person before this Court at the time and place shown below to answer questions under oath concerning your property.


DATE : Thursday, June 20, 1991
TIME : 8:30 a.m.
PLACE: Third District Court
240 East 400 South
Room #303
Salt Lake City, Utah 84111

YOU ARE FURTHER ORDERED not to sell, loan, give away, or otherwise dispose of your non-exempt property pending this hearing. If you have been personally served with this order and you fail to appear, the Court may order a warrant for your arrest.

DATED this 11th day of June, 1991.

BY THE COURT:


Circuit Court Judge
Attest Clerk of the Circuit Court

By: 

Serve Defendant:
Clare T. Morse, President and Registered Agent
Transamerica Equities, Inc.
6292 South 320 West #200
Murray, Utah 84107

or

Clare T. Morse
1600 West 11400 South
South Jordan, Utah 84065

I am a duly appointed Deputy Constable of Sandy Precinct, -
State of Utah, a citizen of the United States over the age of 21 years at the
time of service herein, and not a part of or interested in the within action.

I received the within and hereto annexed,

SUPPLEMENTAL ORDER

on the 12 of JUNE , 1991 , and served the same upon MORSE, CLARE T.

within named defendant in said,

(
(
(

SUPPLEMENTAL ORDER

by serving a true copy of said,

SUPPLEMENTAL ORDER

for the defendant with CLARE T. MORSE (PERSONALLY)

a person of suitable age and discretion there residing at,

1600 WEST 11400 SOUTH

, SOUTH JORDAN

his/her usual place of ABODE

, on this 13 day of JUNE , 1991

I further certify that at the time of service of the said,

SUPPLEMENTAL ORDER

I endorsed the date and place of service and added my name and official
title thereto.

On the 13 day of JUNE , 1991

Deputy

D. McClellan

Deputy Constable

Sandy Precinct, Salt Lake County

Subscribed and sworn to before me this On the 13 day of JUNE , 1991

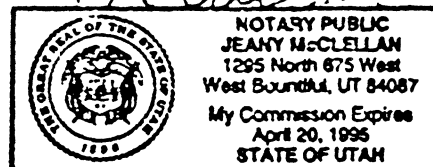
My Commission Expires: April 20 1995

Notary Public

State of Utah

Fee's Service Fee
 Mileage
 2nd address
 3rd address
 Copies
 P&H/Extra's

Jeany
6.00



Total

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6.00

J. BRUCE READING, #2700
MARLON L. BATES, #4794
SCALLEY & READING
Attorneys for Plaintiff
261 East 300 South, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 531-7870

DATE 13 June 91 TIME 5:18 PM
B/S 1600 W 11400 S
UPON Clare T. Morse (pres.)
SANDY PRECINCT. SALT LAKE COUNTY, UTAH
DEPUTY [Signature]

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

KENDRICK BROTHERS CONSTRUCTION : MOTION AND ORDER OF
COMPANY, INC., SUPPLEMENTAL PROCEEDINGS

Plaintiff,
vs. :

CLARE T. MORSE and
TRANSAMERICA EQUITIES, INC.,

Civil No. 910900069CN

Defendants. : Judge Homer F. Wilkinson

In the above-entitled action, plaintiff moves the Court for an order requiring defendant, Transamerica Equities, Inc., to appear before this Court to answer questions under oath concerning its property, and to restrain defendant from disposing of its non-exempt property pending the hearing. Judgment was entered against defendant on the date of June 3, 1991, in the amount of Fifty Thousand Two Hundred Thirty and No/100 Dollars (\$50,230.00) of which Fifty Thousand Two Hundred Thirty and No/100 Dollars (\$50,230.00) is still unpaid.

DATED this 11 day of June, 1991.

Clare T. Morse - Pres & Agent

~~6292 So 320 W #200 WSA~~

Correct add

~~5296 E 3200 #202 Vacant~~

SCALLEY & READING

Marlon L. Bates

Marlon L. Bates
Attorney for Plaintiff

C:\MLB\PLEADING\TRANSAME.SUP

Res 1600 W 11400 S

ORDER

THE STATE OF UTAH TO DEFENDANT, TRANSAMERICA EQUITIES, INC.:

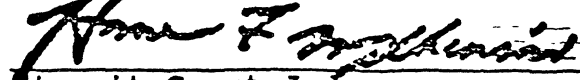
IT IS ORDERED that, pursuant to the foregoing motion and good cause appearing, you appear in person before this Court at the time and place shown below to answer questions under oath concerning your property.

DATE : Thursday, June 20, 1991
TIME : 8:30 a.m.
PLACE: Third District Court
240 East 400 South
Room #303
Salt Lake City, Utah 84111

YOU ARE FURTHER ORDERED not to sell, loan, give away, or otherwise dispose of your non-exempt property pending this hearing. If you have been personally served with this order and you fail to appear, the Court may order a warrant for your arrest.

DATED this 11th day of June, 1991.

BY THE COURT:


Circuit Court Judge
Attest Clerk of the Circuit Court

By: 

Serve Defendant:
Transamerica Equities, Inc.
6292 South 320 West #200
Murray, Utah 84107

I am a duly appointed Deputy Constable of Sandy Precinct, Salt Lake County, State of Utah, a citizen of the United States over the age of 21 years at the time of service herein, and not a part of or interested in the within action.

I received the within and hereto annexed,

SUPPLEMENTAL ORDER

on the 12 of JUNE, 1991, and served the same upon TRANSAMERICA EQUITIES INC. ((((within named defendant in said,

SUPPLEMENTAL ORDER

by serving a true copy of said,

SUPPLEMENTAL ORDER

for the defendant with CLARE T. MORSE (PRESIDENT)

a person of suitable age and discretion there residing at,

1600 WEST 11400 SOUTH

, SALT LAKE CITY

his/her usual place of ABODE

, on this 13 day of JUNE, 1991

I further certify that at the time of service of the said,

SUPPLEMENTAL ORDER

I endorsed the date and place of service and added my name and official title thereto.

On the 13 day of JUNE, 1991

Deputy *D. McClellan*

Deputy Constable
Sandy Precinct, Salt Lake County

Subscribed and sworn to before me this On the 13 day of JUNE, 1991

My Commission Expires: April 20 1995

Notary Public

Fee's

Service Fee
Mileage
2nd address
3rd address
Copies
P&H/Extra's

6.00
14.00



NOTARY PUBLIC
JEANY McCLELLAN
1295 North 575 West
West Bountiful, UT 84087
My Commission Expires
April 20, 1995
STATE OF UTAH

State of Utah

Total

=====

20.00

JUL 5 1991

J. BRUCE READING, #2700
MARLON L. BATES, #4794
SCALLEY & READING
Attorneys for Plaintiff
261 East 300 South, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 531-7870

DATE 10 JUL 11 TIME 7:45 PM
BY 11600 W 11400 S
UPC Clare T. Morse
SALT LAKE COUNTY UTAH
DEPUTY [Signature]

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

KENDRICK BROTHERS CONSTRUCTION : MOTION AND ORDER OF
COMPANY, INC., SUPPLEMENTAL PROCEEDINGS

Plaintiff,
vs. :

CLARE T. MORSE and Civil No. 910900069CN
TRANSAMERICA EQUITIES, INC.,

Defendants. : Judge Homer F. Wilkinson

In the above-entitled action, plaintiff moves the Court for an order requiring defendant, Clare T. Morse, to appear before this Court to answer questions under oath concerning its property, and to restrain defendant from disposing of its non-exempt property pending the hearing. Judgment was entered against defendant on the date of June 3, 1991, in the amount of Fifty Thousand Two Hundred Thirty Thousand and No/100 Dollars (\$50,230.00) of which Fifty Thousand Two Hundred Thirty and No/100 Dollars (\$50,230.00) is still unpaid.

DATED this 20 day of June, 1991.

6292 So. 320 W. #200
Murray
or
1600 W. 11400 So.
So. Jordan

SCALLEY & READING

[Signature]
Marlon L. Bates
Attorney for Plaintiff

ORDER

THE STATE OF UTAH TO DEFENDANT, CLARE T. MORSE:

IT IS ORDERED that, pursuant to the foregoing motion and good cause appearing, you appear in person before this Court at the time and place shown below to answer questions under oath concerning your property.

July 23
DATE : Tuesday, ~~June 20~~ 1991
TIME : 8:30 a.m.
PLACE: Third District Court
240 East 400 South
Room #303
Salt Lake City, Utah 84111

YOU ARE FURTHER ORDERED not to sell, loan, give away, or otherwise dispose of your non-exempt property pending this hearing. If you have been personally served with this order and you fail to appear, the Court may order a warrant for your arrest.

DATED this 20th day of June, 1991.

BY THE COURT:

[Signature]
District Circuit Court Judge *District*
Attest Clerk of the Circuit Court

By: *[Signature]*

Serve Defendant:
Clare T. Morse, President and Registered Agent
Transamerica Equities, Inc.
6292 South 320 West #200
Murray, Utah 84107

or

Clare T. Morse
1600 West 11400 South
South Jordan, Utah 84065

I, S. MANN

I am a duly appointed Deputy Constable, Salt Lake County, State of Utah,
a citizen of the United States over the age of 21 years at the time of service
herin, and not a part of or interested in the within action.

I received the within and hereto annexed,

SUPPLEMENTAL ORDER

on the 5 of JULY , 1991 , and served the same upon MORSE, CLARE T.

a within named defendant in said,

(
(
(

SUPPLEMENTAL ORDER

by serving a true copy of said,

SUPPLEMENTAL ORDER

for the defendant with CLARE T. MORSE (PERSONALLY) -

a person of suitable age and descretion there residing at,

1600 WEST 11400 SOUTH

, SOUTH JORDAN

his/her usual place of ABODE

, on this 10 day of JULY , 1991

I further certify that at the time of service of the said,

SUPPLEMENTAL ORDER

I endorsed the date and place of service and added my name and offical
title therto.

On the 10 day of JULY , 1991

Deputy

Deputy Constable

Salt Lake County, State of Utah

Robert J. Reitz Constable

On the 10 day of JULY , 1991

Subscribed and sworn to before me this

My Commission Expires: April 20 1995

Notary Public

State of Utah

Fee's

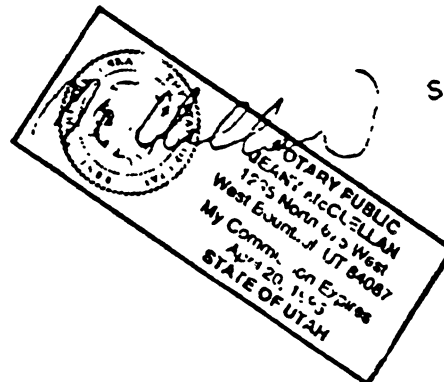
Service Fee
Mileage
2nd address
3rd address
Copies
P&H/Extra's

Jenny
6.00
19.00

Total

=====

25.00



JL 5 14

EXHIBIT

DATE July 9/1991 TIME 7:15 p

FILE 1600 W 11400 SO

UP Clare T. Morse - Pres & Reg Agent

SAL. PRECINCT 1600 W 11400 SO COUNTY UTAH

DEPUTY [Signature]

J. BRUCE READING, #2700
MARLON L. BATES, #4794
SCALLEY & READING
Attorneys for Plaintiff
261 East 300 South, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 531-7870

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

KENDRICK BROTHERS CONSTRUCTION : MOTION AND ORDER OF
COMPANY, INC., SUPPLEMENTAL PROCEEDINGS

Plaintiff,
vs. :

CLARE T. MORSE and Civil No. 910900069CN
TRANSAMERICA EQUITIES, INC.,

Defendants. : Judge Homer F. Wilkinson

In the above-entitled action, plaintiff moves the Court for an order requiring defendant, Transamerica Equities, Inc., to appear before this Court to answer questions under oath concerning its property, and to restrain defendant from disposing of its non-exempt property pending the hearing. Judgment was entered against defendant on the date of June 3, 1991, in the amount of Fifty Thousand Two Hundred Thirty and No/100 Dollars (\$50,230.00) of which Fifty Thousand Two Hundred Thirty and No/100 Dollars (\$50,230.00) is still unpaid.

CLARE T. MORSE (Pres & Reg. Agent) DATED this 20 day of June, 1991.

6292 So. 320 W. #200
Murray

or

1600 W. 11400 So.

So. Jordan

SCALLEY & READING

[Signature]
Marlon L. Bates

Attorney for Plaintiff

ORDER

THE STATE OF UTAH TO DEFENDANT, TRANSAMERICA EQUITIES, INC.:

IT IS ORDERED that, pursuant to the foregoing motion and good cause appearing, you appear in person before this Court at the time and place shown below to answer questions under oath concerning your property.

DATE : Tuesday, ~~July 1~~ ^{July 23}, 1991
TIME : 8:30 a.m.
PLACE: Third District Court
240 East 400 South
Room #303
Salt Lake City, Utah 84111

YOU ARE FURTHER ORDERED not to sell, loan, give away, or otherwise dispose of your non-exempt property pending this hearing. If you have been personally served with this order and you fail to appear, the Court may order a warrant for your arrest.

DATED this 20th day of June, 1991.

BY THE COURT:

District *Thomas F. [Signature]*
Circuit Court Judge *District*
Attest Clerk of the Circuit Court

By: *[Signature]*

Serve Defendant:
Transamerica Equities, Inc.
6292 South 320 West #200
Murray, Utah 84107

or

Transamerica Equities, Inc.
c/o Clare T. Morse, President
1600 West 11400 South
South Jordan, Utah 84065

EXHIBIT VII

FILED
DISTRICT COURT

APR 23 4 32 PM '91

TH. DISTRICT
SALT LAKE COUNTY
BY mf
CLERK

J. BRUCE READING, #2700
MARLON L. BATES, #4794
SCALLEY & READING
Attorneys for Plaintiff
261 East 300 South, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 531-7870

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

KENDRICK BROTHERS CONSTRUCTION :	MEMORANDUM OF POINTS AND
COMPANY, INC.,	AUTHORITIES IN SUPPORT OF MOTION
	TO STRIKE ANSWER AND AWARD
Plaintiff,	DEFAULT JUDGMENT AND ATTORNEY'S
vs.	FEES
:	
CLARE T. MORSE and	Civil No.910900069CN
TRANSAMERICA EQUITIES, INC.,	
Defendants.	Judge Homer F. Wilkinson

In response to plaintiff's Motion to Compel Production of Documents, this Court ordered defendants to produce the long awaited documents within 15 days of the Court's minute entry or the defendants' answer would be struck and default judgment would be entered against defendants as prayed for in plaintiff's complaint. The defendants have wholly failed to produce said documents or any of them within said period of time (See Affidavit of Marlon L. Bates, par. 3). Accordingly, pursuant to Rule 37(b), plaintiff is entitled to receive an order striking defendants' answer and granting default judgment in the amount of Fifty Thousand and No/100 Dollars (\$50,000.00) together with lost profits of the joint

venture, prejudgment interest at the legal rate, punitive damages, court costs, and attorney's fees incurred herein, all in amounts to be proved upon an evidentiary hearing, and attorney's fees in the amount of One Hundred Fifteen and No/100 Dollars (\$115.00) for bringing the Motion to Compel, and attorney's fees in the amount of One Hundred Fifteen and No/100 Dollars (\$115.00) for bringing this Motion to Strike, together with its accompanying Memorandum of Points and Authorities and the Affidavit of Marlon L. Bates, attorney for plaintiff.

DATED this 23 day of April, 1991.

SCALLEY & READING


Marlon L. Bates

MAILING CERTIFICATE

I hereby certify that on the 23 day of April, 1991, I mailed, postage prepaid, a true and correct copy of the foregoing Memorandum of Points and Authorities in Support of Motion to Strike Answer and Award Default Judgment and Attorney's Fees together with Affidavit of Marlon L. Bates to the following:

Grant G. Orton, Esq.
2670 South 2000 East
Salt Lake City, Utah 84109



EXHIBIT VIII

WESLEY F. SINE (2967)
Attorney for Defendants
349 South 200 East, Suite 170
Salt Lake City, Utah 84111
Telephone: (801) 364-5125

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

KENDRICK BROTHERS CONSTRUCTION)	
COMPANY, INC.,	)	REPLY TO PLAINTIFF'S
	)	OPPOSITION TO MOTION TO
Plaintiff,	)	SET ASIDE SANCTIONS AND
	)	JUDGMENT
VS.)	
	)	Judge Homer F. Wilkinson
CLARE T. MORSE and)	
TRANSAMERICA EQUITIES, INC.,	)	Civil No.: 910900069CN
)	
Defendants.)	

I. INTRODUCTION

From January of 1991 to the end of May of 1991, Grant Orton (attorney for Defendants Transamerica Equities, Inc., and Clare T. Morse), served as an Army Reserve Battalion Commander of the 141'st M.I. Battalion. During that period of time, part of his unit was called up, necessitating Grant Orton's efforts to follow through on their call up. During part of that period Grant Orton was out of the state on military call up and during part of that time was at the local headquarters for the 141'st military intelligence battalion. On his part it was not a full time call up but it did take him away from his practice of law for a considerable amount of the time.

This Judgment was taken during that period of time. Defendants claim that but for this national emergency and a subsequent problem with their attorney's mail collection, this Judgment would not have happened.

Section 60 (b)(1) of U.C.A. allows for a setting aside of a judgment if within three months of the Judgment on a basis of excusable neglect. The Judgment was taken on June 3, 1991 and a Motion to Set Aside was filed on August 23, 1991. This falls within those parameters, since the Motion was taken well within the three month allowance.

II. STATEMENT OF MATERIAL FACTS

1. Grant Orton in his Affidavit of August 23, 1991 stated in paragraph number 4 that "During the months of January through May 1991, I have had numerous military assignments outside of the state of Utah".

2. Grant Orton further states that while he was away, "the mail has been retained on occasion by the postal service when his part time secretary did not pick it up in a timely fashion".

3. Grant Orton further states that there was not mail retained for him at the post office.

4. Grant Orton also states in his Affidavit that "he had never received notice of Plaintiff's Judgment nor of the motions filed preliminary to the granting of the Judgment".

5. Answers to interrogatories were filed with the Plaintiffs.

6. On April 18, 1991, under Plaintiff's Statement of Facts (par. 6), Plaintiff's attorney claims he spoke with Grant Orton but further on down states that Plaintiff's attorney spoke with Mr. Morse; but this must be a mistake as there is no evidence that he spoke with Mr. Morse, only Grant Orton.

7. Clare T. Morse was not the registered agent of Transamerica Equities or its President at the time of service of the Supplemental Hearing Motion and Order (see exhibit A).

III. ARGUMENT

The period of time, within which Plaintiff complains of "an inexcusable pattern of total neglect", falls during the crisis in the Gulf War. Grant Orton is a citizen soldier serving as the Commander of the 141'st Military Battalion for the Army Reserve. While his whole unit was not called up during the War, approximately half of it was called to active duty necessitating his call up for periods of time to effect their call up and later their reactivation after the peace was won. This all happened during the period of time complained of and caused the problems complained of by the Plaintiff. Most of the items complained of can be explained not upon willfull denial of the law, but because of the particular situation that attorney Orton found himself in, plus a lack of communication caused by a problem with the mail which was not timely discovered due to the military obligations of attorney

Orton. So far as Clare T. Morse not answering the Supplemental Hearings timely, these items were also turned over to Grant Orton who was to apply for a setting aside of the judgment, but again because of military obligations it was not handled.

Defendant's attorney tried to cover all bases, i.e., serving his country and protecting his clients. Unfortunately, this particular Plaintiff was not concerned with its country's problems but only in expediting an unconscionable lawsuit and took advantage of Mr. Orton's military obligations. Mr. Orton had arranged for his mail to be held for him but during the period of April, May, and June something happened that prevented the mail from reaching Mr. Orton. Therefore this Judgment was taken without the Defendants knowing of it until being served for a Supplemental Hearing.

Once again the Defendants turned to their trusted legal counsel to straighten out the Default Judgment problem but the military was still calling and Lieutenant Colonel Orton was now striving to deactivate his people once again pulling him away from his legal responsibilities. This is why the present counsel was hired to represent the plaintiffs until Grant Orton could committ enough time to represent them properly.

Mr. Orton could not solve his mail problem until he was aware of the problem, by the time he was aware of the problem, the damage had been done. Problems with mail is not an unheard

of event. Coupled with his partial military call up created the problem we have here.

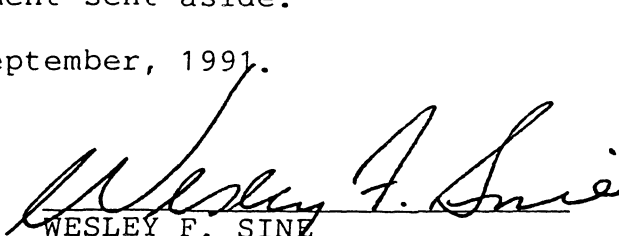
IV. CONCLUSION

This case cries out for justice. Rule 60(b)(1) is written for this type of problem. A war, a lawyer who is a citizen soldier, a mix up with the mail all added together have caused damage to Defendants by a default judgment having been given to the Plaintiffs upon a complaint which was defendable by Defendants. Plaintiffs will not be hurt if this is set aside so that Defendants may have their day in court; but justice will be served.

All of us should feel a debt of gratitude for citizen soldiers like Grant Orton and we should not penalize the Defendants because the lawyer they chose was dedicated to serving his country and failed to adequately represent them because of a mix up in the mail and the military pressures of the moment. Certainly a once in a life time problem should not be left uncorrected.

For these reasons Defendants respectfully request their Motion be allowed and the Judgment sent aside.

DATED this 23rd day of September, 1991.


WESLEY F. SINE
Attorney for Defendants

MAILING CERTIFICATE

I hereby certify that on the ____ day of September, 1991,
I mailed a true and correct copy, postage pre-paid of the
foregoing REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO SET
ASIDE SANCTIONS AND JUDGMENT to:

J. Bruce Reading
Marlon L. Bates
SCALLEY & READING
Attorneys for Plaintiffs
261 East 300 South
Suite 200
Salt Lake City, Utah 84111



Samantha Lane

EXHIBIT IX

Wesley F. Sine (2967)
Attorney for Defendant
349 South 200 East, Suite 170
Salt Lake City, Utah 84111
Telephone: (801) 364-5125

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

KENDRICK BROTHERS CONSTRUCTION)	
COMPANY, INC.,	)	AFFIDAVIT OF GRANT G. ORTON
)	
Plaintiff,	)	Civil No.: 91090069CN
)	
CLARE T. MORSE and	)	JUDGE: WILKINSON
TRANSAMERICA EQUITIES, INC.,)	
)	
Defendants.)	

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

GRANT G. ORTON, being first duly sworn on oath, deposes
and says:

1. That I am an adult citizen over the age of 18
and resident of the United States of America and of the State
of Utah, and I make this Affidavit on the basis of facts that
are within my personal knowledge in support of Defendant's
Motion to Set Aside Judgment filed and served herewith.

2. I am now and at all times since 1977 have been a
member in good standing of the Utah State Bar engaged in the
active full-time practice of law in the State of Utah.

3. Upon reviewing the files and inquiring into this
matter I found that I had never received notice of plaintiff's

Judgment nor of the Motions apparently filed preliminary to the granting of Judgment.


4. The mail to my office is delivered to a mail box in front of the building where my office is located. During the months of January through May 1991, I have had numerous military assignments outside of the State of Utah, and during that time the mail has been retained on occasion by the Postal Service when my part-time secretary has not picked it up in a timely fashion.

5. In the past when this happened, it has been retained by the post office for it to be picked up there. Upon checking with the post office I have not found that this was the case since there is no such mail retained by the Postal Service.

6. Had I become aware from any source that a Motions preliminary to the granting of judgment had been served in any manner, including by mail, I would have taken action necessary to timely prepare, file and serve an appropriate response thereto.

7. ~~I~~^{the} Transamerica Equities, and Clare T. Morse, hold and claim valid and meritorious defenses and offsets to each of the issues raised by plaintiff's complaint, and have asserted them in ~~my~~^{their} answer.

DATED this 23rd day of August, 1991.


GRANT G. ORTON

SUBSCRIBED AND SWORN to before me this 23rd day of August, 1191.

1, 3. 1991.

I am a duly appointed Deputy Constable, Salt Lake County, State of Utah,
citizen of the United States over the age of 21 years at the time of service
verin, and not a part of or interested in the within action.

I received the within and hereto annexed,

SUPPLEMENTAL ORDER

on the 5 of JULY , 1991 , and served the same upon TRANSAMERICA EQUITIES,
(INC.
(
(
a within named defendant in said,

SUPPLEMENTAL ORDER

by serving a true copy of said,

SUPPLEMENTAL ORDER

for the defendant with CLARE T. MORSE (PRESIDENT & REG. AGENT)

a person of suitable age and descretion there residing at,

1600 WEST 11400 SOUTH

, SOUTH JORDAN

his/her usual place of ABODE

, on this 10 day of JULY, 1991

I further certify that at the time of service of the said,

SUPPLEMENTAL ORDER

I endorsed the date and place of service and added my name and official
title therto.

On the 10 day of JULY, 1991

Deputy *[Signature]*

Deputy Constable
Salt Lake County, State of Utah
Robert J. Reitz Constable

Subscribed and sworn to before me this On the 10 day of JUL , 1991

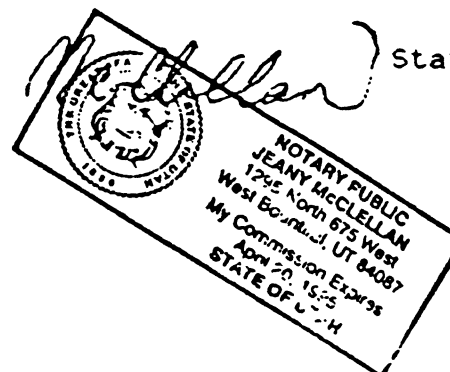
My Commission Expires April 20 1995

Notary Public

State of Utah

Fee's Service Fee
 Mileage
 2nd address
 3rd address
 Copies
 P&H/Extra's

Jeany
6.00



=====
Total 6.00

JUL 25 1991

CANIDITION

J. BRUCE READING, #2700
MARLON L. BATES, #4794
SCALLEY & READING
Attorneys for Plaintiff
261 East 300 South, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 531-7870

6/24/91 TIME 9:00 AM
1600 W. 11400 SO
UPON Reason
Constable Reitz Deputy
5801741

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

KENDRICK BROTHERS CONSTRUCTION : ORDER TO SHOW CAUSE
COMPANY, INC.,

Plaintiff,
vs. :

CLARE T. MORSE and
TRANSAMERICA EQUITIES, INC.,

Civil No.910900069CN

Defendants. : Judge Homer F. Wilkinson
1600 W. 11400 SO.

So. Jordan
THE STATE OF UTAH TO DEFENDANT, CLARE T. MORSE:

So. 320 W. #200
urray
It appears from the records of this court that you were
ordered to appear in person before the District Court at the time
and place shown below to answer questions under oath concerning
your property.

Date: July 23, 1991
Time: 8:30 a.m.
Place: Third District Court
210 East 400 South
Room #303
Salt Lake City, Utah 84111

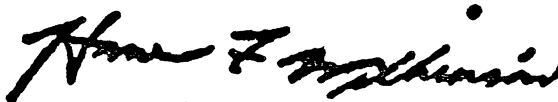
The records of this court further show that the order was
served upon you, and that you failed to appear as required.

IT IS THEREFORE ORDERED that you appear in person before
a judge of the District Court at:


Date: August 13, 1991
Time: 8:30 a.m.
Place: Third District Court
240 East 400 South
Room #303
Salt Lake City, Utah 84111

to show cause why you should not be punished for contempt of court
for failure to obey a lawful order of this court.

DATED this 23rd day of July, 1991.



District Court Judge
Attest Clerk of the District Court

By: 
Deputy Clerk

Serve Defendant:
Clare T. Morse, President and Registered Agent
Transamerica Equities, Inc.
6292 South 320 West #200
Murray, Utah 84107

or

Clare T. Morse
1600 West 11400 South
South Jordan, Utah 84065

I, O. MADSEN

, being first duly sworn

I am a duly appointed Deputy Constable, Salt Lake County, State of Utah, citizen of the United States over the age of 21 years at the time of service herein, and not a part of or interested in the within action.

I received the within and hereto annexed,

ORDER TO SHOW CAUSE

on the 25 of JULY, 1991, and served the same upon MORSE, CLARE T.

(
(
(

within named defendant in said,

ORDER TO SHOW CAUSE

by serving a true copy of said,

ORDER TO SHOW CAUSE

for the defendant with CLARE T. MORSE (PERSONALLY)

person of suitable age and discretion there residing at,

, SOUTH JORDAN

1600 WEST 11400 SOUTH

, on this 6 day of AUG, 1991

his/her usual place of ABODE

I further certify that at the time of service of the said,

ORDER TO SHOW CAUSE

I endorsed the date and place of service and added my name and official

title thereto.

On the 6 day of AUG, 1991

Deputy *O. Madsen*

SL 802

Robert Reitz Constable, Salt Lake County
396 Cypress St., Midvale UT. 84047 580-1741

Subscribed and sworn to before me this On the 6 day of AUG, 1991

My Commission Expires: April 20 1995

Notary Public

State of Utah

Fee's

Service Fee

age

address

address

es

Extra's

6.00

19.00

10.00



NOTARY PUBLIC
JEANY McCLELLAN
1295 North 675 West
West Bountiful, UT 84037
My Commission Expires
April 20, 1995
STATE OF UTAH

=====

35.00

EXHIBIT 1

J. BRUCE READING, #2700
MARLON L. BATES, #4794
SCALLEY & READING
Attorneys for Plaintiff
261 East 300 South, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 531-7870

DATE 6 Aug 91 TIME 9:10 PM
BY 16000 11400 30
UFON: Clare T. Morse (Reg. Agent)
S. [Signature] - S. [Signature]
Constable Ritz 580171

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

KENDRICK BROTHERS CONSTRUCTION : ORDER TO SHOW CAUSE
COMPANY, INC.,

Plaintiff,
vs. :

CLARE T. MORSE and
TRANSAMERICA EQUITIES, INC.,

Civil No. 910900069CN

Clare T. Morse (Reg. Agent + Pres.)
6292 So. 320 W. #200
Murray
Defendants.

: Judge Homer F. Wilkinson

or THE STATE OF UTAH TO DEFENDANT, TRANSAMERICA EQUITIES, INC.:

00 W. 11400 So. It appears from the records of this court that you were
D. Jordan ordered to appear in person before the District Court at the time
and place shown below to answer questions under oath concerning
your property.

Date: July 23, 1991
Time: 8:30 a.m.
Place: Third District Court
240 East 400 South
Room #303
Salt Lake City, Utah 84111

The records of this court further show that the order was
served upon you, and that you failed to appear as required.

extended 1 week =

I, O. MADSEN

, being first duly sworn

I am a duly appointed Deputy Constable, Salt Lake County, State of Utah, citizen of the United States over the age of 21 years at the time of service herein, and not a part of or interested in the within action.

I received the within and hereto annexed,

ORDER TO SHOW CAUSE

on the 25 of JULY , 1991 , and served the same upon TRANSAMERICA EQUITIES,
(INC.
(
(

within named defendant in said,

ORDER TO SHOW CAUSE

by serving a true copy of said,

ORDER TO SHOW CAUSE

for the defendant with CLARE T. MORSE (REG AGENT)

a person of suitable age and descretion there residing at,

1600 WEST 11400 SOUTH

, SOUTH JORDAN

his/her usual place of ABODE

, on this 6 day of AUG , 1991

I further certify that at the time of service of the said,

ORDER TO SHOW CAUSE

I endorsed the date and place of service and added my name and official title thereto.

On the 6 day of AUG , 1991

Deputy

O. Madsen

SL 802

Robert Reitz Constable, Salt Lake County
396 Cypress St., Midvale UT. 84047 580-174

Subscribed and sworn to before me this On the 6 day of AUG , 1991

My Commission Expires: April 20 1995

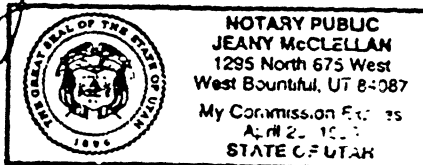
Notary Public

Jeany McClellan

State of Utah

Fee's Service Fee
 Mileage
 2nd address
 3rd address
 Copies
 P&H/Extra's

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Total

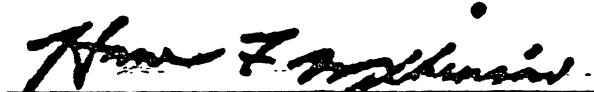
6.00

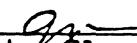
IT IS THEREFORE ORDERED that you appear in person before
a judge of the District Court at:

Date: August 13, 1991
Time: 8:30 a.m.
Place: Third District Court
240 East 400 South
Room #303
Salt Lake City, Utah 84111

to show cause why you should not be punished for contempt of court
for failure to obey a lawful order of this court.

DATED this 23rd day of July, 1991.


District Court Judge
Attest Clerk of the District Court

By: 
Deputy Clerk

Serve Defendant:
Clare T. Morse, President and Registered Agent
Transamerica Equities, Inc.
6292 South 320 West #200
Murray, Utah 84107

or

Clare T. Morse
1600 West 11400 South
South Jordan, Utah 84065

Wesley Sine

NOTARY PUBLIC

Residing at:

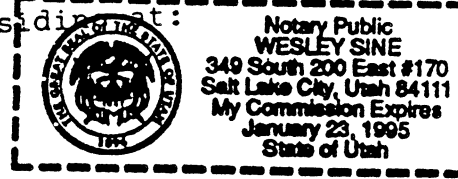


EXHIBIT X

WESLEY F. SINE (2967)
Attorney for Defendants
349 South 200 East, Suite 110
Salt Lake City, Utah 84111
Telephone: (801) 364-5125

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

KENDRICK BROTHERS CONSTRUCTION)	
COMPANY, INC.,	)	AFFIDAVIT OF CLARE T. MORSE
)	
Plaintiff,	)	Civil No.: 910900069CN
)	
CLARE T. MORSE and	)	JUDGE: WILKINSON
TRANSAMERICA EQUITIES, INC.,)	
)	
Defendants.)	

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

CLARE T. MORSE, being first duly sworn on oath, deposes
and says:

1. That I am an adult citizen over the age of 18 and
resident of the United States of America and of the State of
Utah, and I make this Affidavit on the basis of facts that are
within my personal knowledge in support of Defendant's Motion
To Set Aside Judgment filed and served herewith.

2. I am now and at all times since 1987 have been an
officer for Transamerica Equities, Inc.

3. That on behalf of myself and Transamerica Equities,
Inc., I contacted and hired Grant Orton, an attorney in good

standing as a member of the Utah State Bar to represent myself and Transamerica Equities Inc. in a lawsuit brought by Kendrick Brothers Construction Company, Inc. on or about the 7th day of January 1991.

4. That at all times I believed that our attorney Grant Orton was properly representing myself and Transamerica Equities and was not in default with the Court or the plaintiff.

5. That during the fall of 1990 and from January to late May of 1991, Grant Orton was on military call up caused by the Desert Storm invasion.

6. That it was my understanding that during the time he was away on military call up, that arrangements had been made by Mr. Orton to protect defendants' rights in this lawsuit.

7. That I, nor Transamerica Equities knew that certain documents had not been delivered to the plaintiffs per court order.

8. That I, nor Transamerica Equities knew of the Default Judgment entered against us by the Court on or about the 3rd day of June, 1991.

9. That if I or Transamerica Equities had become aware from any source that a Motion preliminary to the granting of Judgment had been served in any manner including mail, I would have taken any action necessary to timely obtain new

counsel to timely prepare, file, and serve an appropriate response thereto.

10. I and Transamerica Equities have, hold, and claim valid and meritorious defenses and offsets to each of the issues raised by plaintiffs complaint, and have asserted them in our Answer.

11. I and Transamerica Equities have hired new counsel to work with Grant Orton on representing us in the future.

DATED this 23rd day of August, 1991.



CLARE T. MORSE, personally

TRANSAMERICA EQUITIES



BY: _____ Sr. V.P.

Subscribed and sworn to before me this 23rd day of August, 1991.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Affidavit of Clare T. Morse, was served upon plaintiff by mailing the same, postage prepaid, to Plaintiff's Attorneys, J. Bruce Reading and Marlon L. Bates, at 261 East 300 South, Suite 200, Salt Lake City, Utah 84111, postage prepaid, on the 23rd day of August, 1991.



Samantha Lane

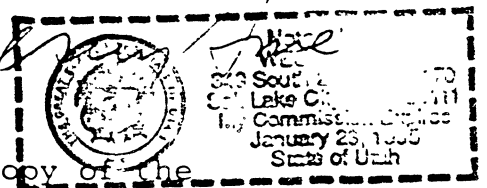


EXHIBIT XI

OCT 31 1991

SALT LAKE COUNTY

Clerk *DK*

J. BRUCE READING, #2700
MARLON L. BATES, #4794
SCALLEY & READING
Attorneys for Plaintiff
261 East 300 South, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 531-7870

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

KENDRICK BROTHERS CONSTRUCTION : COMPANY, INC.,	ORDER DENYING DEFENDANTS' MOTION TO SET ASIDE SANCTIONS AND JUDGMENT
Plaintiff,	
vs.	:
CLARE T. MORSE and TRANSAMERICA EQUITIES, INC.,	Civil No.910900069CN
Defendants.	: Judge Homer F. Wilkinson

This matter was heard by the Court on October 18, 1991 with Wesley F. Sine appearing as counsel for defendants and with Marlon L. Bates appearing as counsel for plaintiff. Based upon the motion of the defendants, the opposition of the plaintiff, the memoranda and affidavits in support thereof, and the arguments made by counsel at the hearing,

IT IS HEREBY ORDERED that defendants' Motion to Set Aside Sanctions and Judgment is denied.

DATED this 31 day of October, 1991.

BY THE COURT:


Judge Wilkinson

Approved as to form:

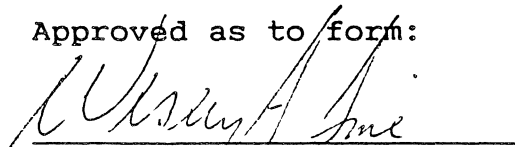

Wesley F. Sine
Attorney for Defendants

EXHIBIT XII

9/27/91
9/28/91
9/29/91

WESLEY F. SINE (2967)
Attorney for Defendants
349 South 200 East, Suite 170
Salt Lake City, Utah 84111
Telephone: (801) 364-5125

FILED
DISTRICT COURT

Nov 4 1 05 PM '91

THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY
BY W. Sine
DEPUTY CLERK

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

KENDRICK BROTHERS CONSTRUCTION
COMPANY, INC.,

Plaintiff and appellees,

vs.

CLARE T. MORSE and
TRANSAMERICA EQUITIES, INC.,

Defendants and Appellees.

NOTICE OF APPEAL

Civil No. 910900069CN

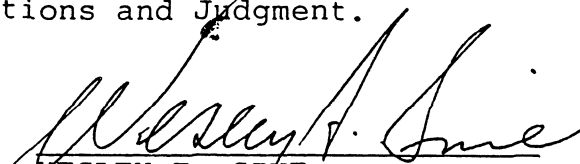
910511

GM

Appellants

NOTICE is hereby given that defendants and appellants,
Clare T. Morse and Transamerica Equities, Inc. through counsel,
Wesley F. Sine, appeals to the Utah Supreme Court, the final
order of the Honorable Wilkinson, entered in this matter on
October 31, 1991.

The Appeal is taken from the Order of the Court denying
defendants' Motion to Set Aside Sanctions and Judgment.


WESLEY F. SINE
Attorney for Defendants

00193

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing NOTICE OF APPEAL, postage prepaid to the following:

J. Bruce Reading
Marlon L. Bates
Scalley & Reading
261 East 300 South, Suite 200
Salt Lake City, Utah 84111



Samantha Lane

EXHIBIT XIII

WESTINGHOUSE ELECTRIC SUPPLY
COMPANY, Plaintiff and Appellant,

v.

PAUL W. LARSEN CONTRACTOR, INC., a
Utah Corporation, et al., Defendants and Respondents.

No. 14040.

Supreme Court of Utah.

Dec. 18, 1975.

Suit was instituted against a general contractor and its bondsman to recover for materials supplied by plaintiff to a subcontractor. The Third District Court, Salt Lake County, Stewart M. Hanson, J., entered order dismissing action with prejudice and, from denial of motion to vacate order, plaintiff appealed. The Supreme Court, Crockett, J., held that order dismissing suit with prejudice on ground that plaintiff had failed to diligently prosecute action was an abuse of discretion, notwithstanding unusual delay in getting case to trial, where delay was due in large part to unusual circumstances of case, such as enormity of discovery materials, and defendants not only failed to manifest any particular haste in getting pretrial discovery procedures completed, but failed to act responsively when plaintiff assembled records and sent messages as to their availability.

Order vacated, and case remanded.

Henriod, C. J., dissented and filed opinion.

1. Dismissal and Nonsuit \Rightarrow 60(1)

In order to handle business of court with efficiency and expedition, trial court should have a reasonable latitude of discretion in dismissing an action for failure to prosecute if a party fails to move forward according to rules and directions of court, without justifiable excuse, but such prerogative falls short of unreasonable and arbitrary action which will result in injustice.

Rules of Civil Procedure, rules 37, 55(c), 60(b).

2. Dismissal and Nonsuit \Rightarrow 60(3)

Whether there is a justifiable excuse for a failure to prosecute is to be determined by considering more factors than merely length of time from filing suit; some consideration should be given to the conduct of both parties, and to the opportunity each has had to move the case forward and what they have done about it, together with the difficulty or prejudice that might have been caused to the other side, and the injustice that might result from a dismissal. Rules of Civil Procedure, rules 37, 55(c), 60(b).

3. Dismissal and Nonsuit \Rightarrow 60(6)

Order dismissing suit with prejudice on ground that plaintiff had failed to diligently prosecute action was an abuse of discretion, notwithstanding unusual delay in getting case to trial, where delay was due in large part to unusual circumstances of case, such as enormity of discovery materials, and defendants not only failed to manifest any particular haste in getting pretrial discovery procedures completed, but failed to act responsively when plaintiff assembled records and sent messages as to their availability. Rules of Civil Procedure, rules 37, 55(c), 60(b).

C. R. Henrikson, of Henrikson, Fairbourn & Tate, Salt Lake City, for plaintiff and appellant.

Joseph J. Palmer, of Moyle & Draper, Salt Lake City, for Skyline and General.

Harry D. Pugsley, Salt Lake City, for Larsen.

CROCKETT, Justice:

Westinghouse Electric Supply Company sued Skyline Construction, general contractor, for balance due for electrical equipment it had supplied to a subcontractor, Paul W. Larsen Contractor, Inc., for construction of the Behavioral Science Build-

tion to the time involved in reciprocal pleadings, considerable time was consumed in connection with discovery procedures. As a result of the delays, the trial court granted defendants' motion to dismiss on the ground that plaintiff had failed to diligently prosecute the action²; and included in its order that the action is "dismissed with prejudice" and that, ". . . this judgment be and is hereby determined to be a final judgment."

Plaintiff filed motions to vacate the order; and also to delete therefrom the just quoted provisions and grant a trial on the merits. From a denial of these motions plaintiff appeals, contending that the court abused its discretion.

In performing its subcontract to install the electrical system and equipment, Larsen purchased its supplies from Westinghouse. Defendant General Insurance Company of America furnished the required bond to insure payments to material men.³ During the course of construction, in 1970, Larsen fell into financial difficulties and was unable to keep current its payments to Westinghouse. In order to assure Westinghouse would be paid, in May of that year, the three parties agreed that thereafter Skyline would make Larsen's checks payable jointly to Larsen and Westinghouse and that future purchases were to be approved by Skyline, ordered on its forms and invoiced to Skyline.

Despite this arrangement, difficulties still persisted in getting the account paid. Westinghouse gave formal notice on February 25, 1971, requiring payment by Skyline and/or its bondsman General Insurance. Payment not being forthcoming, on July 14, 1971, Westinghouse's counsel wrote to Skyline claiming \$41,357.22 for

materials furnished to Larsen, of which \$22,541.14 was invoiced to Skyline. On February 10, 1972, Westinghouse commenced this action against Skyline, Larsen, and General Insurance for the \$41,357.22. (Larsen is not a party to this appeal. For that reason, its dealings with Westinghouse and its conduct in the lawsuit are not discussed. Skyline and General are hereafter referred to collectively as "defendants.")

On February 17, 1972, defendants filed a motion to dismiss Westinghouse's complaint for failure to state the date of last delivery of materials.⁴ And, on the same day, defendants' counsel wrote Westinghouse's counsel and requested that Westinghouse collect the invoices on those goods sold directly to Larsen and provide a record of all payments by either Skyline or Larsen.

It is indicated that some efforts were made to settle the matter. But after it appeared that they would not be successful, Westinghouse noticed up for hearing defendants' motion to dismiss on July 20, 1973. The following month, on August 15, 1973, defendants filed a motion to dismiss on the additional ground of failure to prosecute the action and in a supporting affidavit stated:

That Westinghouse had not produced the invoices and records requested; that in September, 1972, Skyline had assigned its assets for benefit of its creditors; that in October, 1972, Larsen had discontinued operations and gone into receivership; and that, due to the insolvency and the release of employees who had knowledge of the materials used and Westinghouse's failure to provide requested information, the defendants' ability to defend the action was substantially impaired.

1. The essential facts recited herein are substantially without dispute as shown by the record and the affidavit of Westinghouse's counsel.

2. Rule 41(b), U.R.C.P. provides that: For failure of the plaintiff to prosecute a defendant may move for dismissal of an action.

3. Pursuant to § 14-1-5, U.C.A.1953.

4. Sec. 14-1-6, U.C.A.1953, requires written notice to the general contractor within 90 days and that suit be commenced within one year after the day on which the last labor or materials were supplied.

The District Court denied both of the motions to dismiss on August 20, 1973, and allowed Westinghouse to amend the complaint to allege the last date of delivery of materials, which it did the next day, August 21, 1973. Shortly thereafter, on September 10, 1973, Westinghouse's counsel sent to the defendants copies of 102 unpaid invoices, 45 pertaining to the Larsen account and 57 pertaining to the Skyline account, with a letter requesting the defendants to review the invoices as soon as possible, because they would be followed by interrogatories and other discovery procedures.

The defendants answered on September 12, 1973, and filed a request that Westinghouse produce within one month, at the office of defendants' counsel, all documents pertaining to Westinghouse's claims: (1) purchase orders; (2) delivery receipts and invoices; (3) records as to payments; (4) any notices given by Westinghouse of claims on the performance bond; (5) all documents, notes, letters or memoranda pertaining to conversations; and (6) all correspondence, between the parties.

With respect to that demand, these facts are noteworthy: that it was a very extensive request; and that much of the material requested, or copies thereof, should have already been in possession of the defendants. Plaintiff Westinghouse is a large concern, having national and in fact world-wide operations, of which the Salt Lake City office is only a regional distribution center. The electrical supplies involved here had been shipped from various places and most of them directly from factories or distribution centers to this job; and each plant issued its own invoices and maintained its own records.

It is further shown that after this demand, from October, 1973, to May, 1974, Westinghouse's personnel spent considerable time and effort searching the company's division depositories and its national

archive to obtain the documentation required and to transmit it to its Salt Lake City office. Counsel for Westinghouse telephoned the office of defendants' counsel in May, 1974, and left a message that the records were at Westinghouse's office, but that due to their volume, defendants' counsel should come there to examine them. Again on July 15, 1974, counsel for Westinghouse telephoned the office of defendants' counsel and, unable to speak with counsel, left a similar message. This was a substantial compliance with the request.⁵

During October, 1974, Westinghouse's counsel prepared requests for admissions, interrogatories, and motions to produce which were to be served upon the defendants after they had reviewed the documents and records gathered by Westinghouse in its office. But defendants' counsel did not come to make such examination. Instead of doing so, on January 9, 1975, the defendants served their second motion to dismiss for failure of prosecution on the ground that Westinghouse had not delivered the documents in accordance with defendants' request. The following day, January 10, 1975, Westinghouse filed the interrogatories, requests for admissions, and its own motion to produce documents. To this the defendants filed objections. It was upon that state of the record, and upon the basis of the above recited occurrences, that on February 27, 1975, the trial court granted the defendants' motion to dismiss.

In the light of the foregoing, we turn to the sole issue presented to this appeal: whether the granting of that motion with prejudice was an abuse of discretion.

[1,2] In doing so it is appropriate to have in mind some established principles applicable to such situations. It is not to be doubted that in order to handle the business of the court with efficiency and expedition the trial court should have a reasonable latitude of discretion in dismissing for

5. That the making available of voluminous records satisfies such a demand see *Sprague*

v. Boyles Bros. Drilling Co., 4 Utah 2d 344, 294 P.2d 689 (1956).

failure to prosecute⁶ if a party fails to move forward according to the rules and the directions of the court, without justifiable excuse.⁷ But that prerogative falls short of unreasonable and arbitrary action which will result in injustice. Whether there is such justifiable excuse is to be determined by considering more factors than merely the length of time since the suit was filed. Some consideration should be given to the conduct of both parties, and to the opportunity each has had to move the case forward and what they have done about it⁸; and also what difficulty or prejudice may have been caused to the other side; and most important, whether injustice may result from the dismissal.

[3] Applying those principles here, these observations are pertinent: although there was unusual delay in getting this case to trial, this was due in large part to the unusual circumstances delineated above. Further, we are not impressed that the defendants themselves were overly diligent or manifest any particular haste in getting the pretrial discovery procedures completed and on with the trial. They did not do so in responsive action to Westinghouse's having assembled records, nor to the latter's messages concerning their availability, nor did they seek any assistance from the court.⁹

It is indeed commendable to handle cases with dispatch and to move calendars with expedition in order to keep them up to date. But it is even more important to keep in mind that the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them. In conformity with that principle the courts generally tend to

favor granting relief from default judgments where there is any reasonable excuse, unless it will result in substantial prejudice or injustice to the adverse party.¹⁰

It is our conclusion that the trial court failed to give proper weight to the higher priority; and that under the circumstances described herein, the order of dismissal was an abuse of discretion. It is therefore necessary that the order be vacated and the case remanded for further proceedings. Costs to plaintiff (appellant).

ELLETT, TUCKETT and MAUGHAN, JJ., concur.

HENRIOD, Chief Justice (dissenting):

I dissent,—noting at the outset that the main opinion's footnote to its first sentence, disarmingly emphasizes that "The essential facts recited herein are *substantially without dispute* . . ."—which is not the test for reversal,—that being whether there are substantial believable facts to support the lower court.

Plaintiff furnished equipment to Skyline, general contractor, and to Larsen, its subcontractor, starting in 1970 and continuing in 1971. Defendant, General Insurance, was the statutory¹ surety to pay for such equipment if Skyline defaulted, which it apparently did, for an undetermined amount. Westinghouse claimed it was about \$64,000, which defendants generally denied.

Westinghouse sued on February 10, 1972, after unsuccessful negotiations for an accounting and payment had been indulged by the parties for a considerable length of time prior to the institution of this litigation. The suit was prompted, apparently,

6. See *Thompson Ditch Co. v. Jackson*, 29 Utah 2d 259, 508 P.2d 528 (1973); *Brasher Motor and Finance Co. v. Brown*, 23 Utah 2d 247, 461 P.2d 464 (1969).

7. See Rule 37 U.R.C.P.; *Marfield v. Fishler*, 538 P.2d 1323 (Utah 1975).

8. See *Crystal Line & Cement Co. v. Robbins*, 8 Utah 2d 389, 335 P.2d 624 (1959); *Wright v. Howe*, 46 Utah 588, 150 P. 956 (1915).

9. As permitted by Rule 37, U.R.C.P.

10. See Rule 55(c) and 60(b), U.R.C.P.; *Heathman v. Fabian & Clendenin*, 14 Utah 2d 60, 377 P.2d 189 (1962); *Utah Commercial & Savings Bank v. Trumbo*, 17 Utah 198, 53 P. 1033 (1898).

1. Title 14-1-5, U.C.A.1953.

to comply with the statutory requirement to file suit within one year after the last materials are furnished.² There was no counterclaim,—only an answer.

About 90% of the record consisted of communications, motions, memoranda, requests for production of documents, interrogatories, etc.

The salient, believable, admissible facts that support the trial judge's decision, arrived at by the exercise of his discretion,—which the rules say is his,—together with the principle that on appellate review, the trial judge is affirmed unless arbitrary and capricious to the point reflecting a clear abuse of discretion,³ fairly may be condensed thus:

In 1970–71, plaintiff furnished materials to Skyline and Larsen, the general and subcontractor defendants. The last were delivered on October 27, 1971. The complaint followed on February 2, 1972.⁴ A week later, on February 9, 1972, defendants moved to dismiss for *failure to state a claim*, which has little significance here. A couple of weeks later, on February 24, 1972, defendant Larsen requested records of plaintiff, having to do with sales, delivery, payments, and the like.⁵ Plaintiff did not answer interrogatories presented until five months later, on July 17, 1972, and then simply responded to the effect that it had some receipts.

A year and one month later, on August 15, 1973, defendants, through their counsel's affidavit, complained that plaintiff had not furnished the requested records and filed a motion to dismiss under Rule 41(b), "for failure . . . to prosecute" Two days later, plaintiff's counsel advised defendant's counsel that the records were ready. Five days later, on August 22, 1973, the motion was denied

and plaintiff was given ten days to amend (obviously to allow plaintiff to allege when the last materials had been furnished, a fact plaintiff had neglected to allege in its complaint). About five months later, on January 9, 1975, which was about 15 months after plaintiff's first motion to dismiss for lack of prosecution (August 15, 1973, *supra*) and about *three years after the complaint was filed*, defendants again filed a motion to dismiss for *failure to prosecute the action*, as had been the case on August 15, 1973. There followed a number of motions, notices, memoranda, affidavits, etc. when the motion was granted dismissing the action with prejudice.

During the three years this action was pending, the two defendants that primarily were obligated to pay for the materials went broke.

There is substantial evidence to the effect that the delay presented a practical, difficult problem for the remaining defendant,—the only one with means,—to accumulate evidence because of scattering of the personnel of the other two, coupled with the circumstances of dimming memories, all of which gave the remaining defendant a rather slim chance of assuming a burden of going forward,—which basically was that of the plaintiff.

Under the circumstances of this case, hardly can it be said that the trial judge's mandate arose out of an arbitrary or capricious abuse of his discretion.

On more than one occasion, this court has defended and affirmed such discretionary orders against a charge of abuse, in cases appearing factually to justify affirmance of the order here, as much as justified affirmance on the facts prevailing in those cases. About the most recent is *Thompson Ditch v. Jackson*, 29 Utah 2d

2. Title 14–1–6, U.C.A.1953.

3. *Thompson v. Jackson*, 29 Utah 2d 259, 508 P.2d 528 (1973).

4. During which period the parties appeared to have been trying to reconcile their accounting.

5. Which had to be gathered from out of state sources, making it difficult to examine in plaintiff's local office.

mously we said:

The ruling of the court below will not be disturbed on appeal unless the record plainly shows that the court below abused its discretion. The action of the court was taken in accordance with the provisions of Rule 41(b) . . . as follows: . . . For failure . . . to prosecute . . .

It is to be noted that we sustained the order there on the merits, the order not having been made *with* or *without* prejudice. The rest of the same Rule 41(b) takes care of any such unspecific order when it states that:

Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for . . . operates as *an adjudication on the merits*.

The plaintiff in its brief asked only "that this court reverse the trial court, reinstate appellant's action . . . and order the case to be set for trial upon the merits." It did not ask for a dismissal without prejudice, so that it would be inappropos for this court to send the case back for entry of an unsolicited order of dismissal without prejudice,—which might initiate a new round of protraction perhaps as great or greater than that prevailing to date.

Besides *Thompson Ditch v. Jackson*, *supra*, in *Pacer v. Myers*, 534 P.2d 616 (Utah 1975), similar language was expressed, wherein, although not a case under Rule 41(b), the court refused to set aside a default judgment, we said, "We, on appeal, should not reverse its ruling except for abuse of discretion, to wit, that it is arbitrary, capricious, or not based on adequate findings of fact or on the law."

Such was the case also in *Brasher v. Brown*, 23 Utah 2d 247, 461 P.2d 464

mentioned but not the basis of the opinion, we said that the court has an inherent discretion, irrespective of the Rule, to dismiss for lack of prosecution and that in doing so we affirm unless there is manifest abuse of discretion reflected, adopting the rule reflected in *Reed v. First National Bank*, 194 Or. 45, 241 P.2d 109 (1952), which said:

In dismissing an action for want of prosecution, the court may proceed under the statute, or it may, of its own motion, take action to that end. In acting on its own motion, the court must proceed with judicial discretion. Its ruling will not be disturbed on appeal unless it is manifest from the record that the court's discretion has been abused.⁶

In my opinion the main opinion has substituted its own unwarranted choice of the evidence as a substitute for what many times we have held to be the prerogative of the fact-finder,—which we have said elsewhere is in an advantaged position to observe, discern, weigh, canvass, review and determine,—but not in the instant instance.

One of the hallmarkian principles espoused by such opinion is that:

Some consideration should be given to the conduct of both parties, and to the opportunity each has had to move the case forward and what they have done about it; and also what difficulty or prejudice may have been caused to the other side; and most important, what injustice may result from the dismissal.

Applying such technique here, the evidence eminently adjusts itself to such words of wisdom or platitudes, as one chooses,—which prompts me to suggest that the trial court here should be affirmed, since apparently such principles were considered.

6. See also *Marfield v. Fishler*, Utah, 538 P.2d 1323, this Court, and 24 Am.Jur. 49, Dismissal Sec. 59.

EXHIBIT XIV

Williams v. State, 716 P.2d 806 (Utah 1986); Owen v. Owen, 734 P.2d 414 (Utah 1986); Tebbs, Smith & Assocs. v. Brooks, 735 P.2d 1305 (Utah 1986); Katz v. Pierce, 732 P.2d 92 (Utah 1986); Freegard v. First W. Nat'l Bank, 738 P.2d 614 (Utah 1987); Crosland v. Peck, 738 P.2d 631 (Utah 1987); Elder v. Triax Co., 61 Utah Adv. Rep. 3 (1987); Mascaro v. Davis, 741 P.2d 938 (Utah 1987); Payne ex rel. Payne v. Myers, 743 P.2d 186 (Utah 1987); McKee v. Williams, 741 P.2d 978 (Utah Ct. App. 1987);

Galloway v. Mangum, 744 P.2d 1365 (Utah 1987); Davies v. Olson, 746 P.2d 264 (Utah Ct. App. 1987); Kathy's Food Stores, Inc. v. Equitable Life & Cas. Ins. Co., 753 P.2d 501 (Utah 1988); Williams v. Public Serv. Comm'n, 754 P.2d 41 (Utah 1988); OK Motors, Inc. v. Hill, 762 P.2d 1102 (Utah Ct. App. 1988); Redevelopment Agency v. Daskalas, 785 P.2d 1112 (Utah Ct. App. 1989); Wade v. Burke, 131 Utah Adv. Rep. 94 (Ct. App. 1990).

COLLATERAL REFERENCES

Brigham Young Law Review. — Multiple Claims Under Rule 54(b): A Time for Reexamination?, 1985 B.Y.U. L. Rev. 327.

Am. Jur. 2d. — 5 Am. Jur. 2d Appeal and Error § 1009 et seq.; 20 Am. Jur. 2d Costs §§ 14, 26 to 36, 87 et seq.; 46 Am. Jur. 2d Judgments § 1.

C.J.S. — 4 C.J.S. Appeal and Error §§ 46 to 166; 20 C.J.S. Costs § 1 et seq.; 49 C.J.S. Judgments § 1.

A.L.R. — Attorney's personal liability for expenses incurred in relation to services for client, 15 A.L.R.3d 531; 66 A.L.R.4th 256.

Effect on compensation of architect or building contractor of express provision in private building contract limiting the cost of the building, 20 A.L.R.3d 778.

Recoverability under property insurance or insurance against liability for property damage of insured's expenses to prevent or mitigate damages, 33 A.L.R.3d 1262.

Dismissal of plaintiff's action as entitling defendant to recover attorney's fees or costs as "prevailing party" or "successful party," 66 A.L.R.3d 1087.

Who is the "successful party" or "prevailing party" for purposes of awarding costs where both parties prevail on affirmative claims, 66 A.L.R.3d 1115.

Continuance of civil case as conditioned upon applicant's payment of costs or expenses incurred by other party, 9 A.L.R.4th 1144.

Running of interest on judgment where both parties appeal, 11 A.L.R.4th 1099.

Allocation of defense costs between primary and excess insurance carriers, 19 A.L.R.4th 107.

Authority of trial judge to impose costs or other sanctions against attorney who fails to appear at, or proceed with, scheduled trial, 29 A.L.R.4th 160.

Allowance of attorneys' fees in mandamus proceedings, 34 A.L.R.4th 457.

Retrospective application and effect of state statute or rule allowing interest or changing rate of interest on judgments or verdicts, 41 A.L.R.4th 694.

Obduracy as basis for state-court award of attorneys' fees, 49 A.L.R.4th 825.

Modern status of state court rules governing entry of judgment on multiple claims, 80 A.L.R.4th 707.

Recoverability of cost of computerized legal research under 28 USC § 1920 or Rule 54(d), Federal Rules of Civil Procedure, 80 A.L.R. Fed. 168.

Modern status of Federal Civil Procedure Rule 54(b) governing entry of judgment on multiple claims, 89 A.L.R. Fed. 514.

Key Numbers. — Appeal and Error ⇐ 24 to 135; Costs ⇐ 78 et seq., 195 et seq., 221 et seq.; Judgment ⇐ 1.

Rule 55. Default.

(a) Default.

(1) **Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter his default.

(2) **Notice to party in default.** After the entry of the default of any party, as provided in Subdivision (a)(1) of this rule, it shall not be necessary to give such party in default any notice of action taken or to be taken or to serve any notice or paper otherwise required by these rules to be served on a party to the action or proceeding, except as provided in Rule

5(a), in Rule 58A(d) or in the event that it is necessary for the court to conduct a hearing with regard to the amount of damages of the nondefaulting party.

(b) **Judgment.** Judgment by default may be entered as follows:

(1) **By the clerk.** When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, and the defendant has been personally served otherwise than by publication or by personal service outside of this state, the clerk upon request of the plaintiff shall enter judgment for the amount due and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) **By the court.** In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

(c) **Setting aside default.** For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) **Plaintiffs, counterclaimants, cross-claimants.** The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) **Judgment against the state or officer or agency thereof.** No judgment by default shall be entered against the state of Utah or against an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

(Amended effective Sept. 4, 1985.)

Compiler's Notes. — This rule is similar to Rule 55, F.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Damages.

Default.

—Divorce action.

—Notice.

—Time for appeal.

Judgment.

—Conduct of counsel.

—Default entry necessary.

—Failure to follow rule.

—Hearing on merits.

—Punitive damages.

Setting aside default.

—Collateral attack.

—Direct attack.

—Discretion of court.

—Grounds.

—Excusable neglect.

—Judicial attitude.

—Meritorious defense.

—Movant's duty.

—Setting aside proper.

Cited.

Damages.

A default judgment establishes, as a matter of law, that defendants are liable to plaintiff as to each cause of action alleged in the complaint. Nevertheless, it is still incumbent upon the nondefaulting party to establish by competent evidence the amount of recoverable damages and costs he claims. *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950 (Utah Ct. App. 1989).

There is no right to a jury trial on the issue

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial, 64 A.L.R.3d 126.

Amendment, after expiration of time for filing motion for new trial, in civil case, of motion made in due time, 69 A.L.R.3d 845.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties, 9 A.L.R.4th 1041.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 38 A.L.R.4th 1170.

Jury trial waiver as binding on later state civil trial, 48 A.L.R.4th 747.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial, 57 A.L.R.4th 1049.

Excessiveness or adequacy of compensatory damages for personal injury to or death of seaman in actions under Jones Act (46 USCS Appx. § 688) or doctrine of unseaworthiness—modern cases, 96 A.L.R. Fed. 541.

Excessiveness or adequacy of awards of damages for personal injury or death in actions under Federal Employers' Liability Act (45 USCS §§ 51 et seq.)—modern cases, 97 A.L.R. Fed. 189.

Key Numbers. — New Trial ⇌ 13 et seq., 110, 116.

Rule 60. Relief from judgment or order.

(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Compiler's Notes. — This rule is similar to Rule 60, F.R.C.P.

Cross-References. — Fee for filing motion

to set aside judgment, §§ 78-3-16.5, 78-4-24, 78-6-14; Appx. G, Code of Judicial Administration.