

1992

# GRO Enterprises, Inc., dba Chicago Barter Corp. v. National Insurance Marketing Services, Inc., a Utah corporation : Reply Brief

Utah Court of Appeals

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Brief

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DOCKET NO.

92-0114-CA

IN THE UTAH COURT OF APPEALS

GRO ENTERPRISES, INC., dba CHICAGO  
BARTER CORP.,

Plaintiff and Appellee,

vs.

NATIONAL INSURANCE MARKETING SERVICES,  
INC., a Utah corporation,

Defendant and Appellant.

Case Nos. 920114-CA  
and 920227-CA

REPLY BRIEF OF APPELLANT

APPEAL

FROM THE THIRD DISTRICT COURT

IN AND FOR THE COUNTY OF SALT LAKE

HONORABLE J. DENNIS FREDERICK, JUDGE

ARGUMENT PRIORITY CLASSIFICATION 16

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JUL 14 1992

TABLE OF CONTENTS

TABLE OF AUTHORITIES	. . . . .	iii
STATEMENT OF THE CASE	. . . . .	1
SUMMARY OF ARGUMENTS	. . . . .	2
ARGUMENT	. . . . .	3
1. The facts do not justify the harsh sanction of default judgment.		
. . . . .		3
2. Relief was available to NIMS under Rule 60(b).		
. . . . .		6
3. Relief should have been granted to NIMS under Rule 60(b).		
. . . . .		10
CONCLUSION	. . . . .	12

TABLE OF AUTHORITIES

CASES

<u>Amica Mut. Ins. Co. v. Schettler</u> , 768 P.2d 950	
(Utah Ap. 1989) . . . . .	7-8
<u>Darrington v. Wade</u> , 812 P.2d 452 (Utah App. 1991) . . .	7
<u>Katz v. Pierce</u> , 732 P.2d 92 (Utah 1986) . . . . .	7, 11
<u>Larsen v. Collina</u> , 684 P.2d 52 (Utah 1984) . . . . .	10
<u>Moon Lake Electric Ass'n, Inc. v. Ultrasystems</u>	
<u>Western Constructors, Inc.</u> , 767 P.2d 125	
(Utah App. 1988) . . . . .	9-10
<u>Peay v. Peay</u> , 607 P.2d 841 (Utah 1980) . . . . .	6
<u>Schoney v. Memorial Estates, Inc.</u> , 790 P.2d 584	
(Utah App. 1990) . . . . .	5
<u>Utah State Employees Credit Union v. Riding</u> ,	
24 Utah 2d 211, 469 P.2d 1 (1970) . . . . .	6

RULES

Rule 60(b) of the Utah Rules of Civil Procedure	2-3, 6-10
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STATEMENT OF THE CASE

In paragraph 21 of its Statement of the Case, plaintiff and appellee Gro Enterprises, Inc. (Gro) asserts that no response was made to the Request for Production of Documents. However, Delwin T. Pond, who was serving as attorney for the defendant and appellant National Insurance Marketing Services, Inc. (NIMS), affirmed in connection with that Request for Production of Documents that a copy of a letter dated May 26, 1987 showing the items returned by NIMS to Gro for a total credit of \$11,050 had been sent to NIMS' attorney, Ms. Van Frank. Record on Appeal (ROA) at 82, 84.

In addition, Mr. Pond had indicated that on May 29, 1991 he had sent to Gro's counsel a copy of the Memorandum generated by Gro relating to NIMS' claim that goods for credit were returned to Gro. ROA at 41.

The record on appeal does not include any Request for Production of Documents.

The trial court had before it the Affidavit of Leslie Van Frank dated June 27, 1992 containing the general assertion that "no answers to the outstanding discovery have been filed." ROA at 36. This Affidavit omitted any mention of the documents Mr. Pond had already produced for her or that additional documents were due.

Thus the record does not substantiate the statement, "No response was made to the Request for Production of Documents."

As a matter of fact and for the Court's information, as

shown in Plaintiff's First Request for Production of Documents to Defendant, a copy of which is attached hereto, the only documents NIMS was requested to produce were those identified in its answers to the Interrogatories.

As can be seen from NIMS' Answers to Interrogatories, no documents were identified therein. ROA at 75-78. Nevertheless, NIMS produced documents supporting those answers.

#### SUMMARY OF ARGUMENTS

1. The facts do not justify the harsh sanction of default judgment.

Gro justifies its entitlement to a default judgment because (1) NIMS missed four deadlines to answer the discovery, (2) NIMS promised these answers for months, and (3) NIMS' attorney did not explain the final delay in timely manner.

However, there are valid and justifiable reasons for these events, not the least of which involved NIMS having to employ new counsel during that time period. And these facts do not approach those normally justifying such a harsh sanction, such as where an action has been pending for years and a trial has been set to begin shortly after the missed deadline.

2. Relief was available to NIMS under Rule 60(b).

NIMS' Motion to Set Aside Default Judgment was properly made under Rule 60(b) of the Utah Rules of Civil Procedure. It was not a second postjudgment motion or otherwise without basis in the rules.

3. Relief should have been granted to NIMS under Rule 60(b)

There was no need for the trial court to reach the merits of this action in order to grant NIMS' Motion to Set Aside Default Judgment.

Even though the trial court has broad discretion, the facts of this case, including the extreme hardship to NIMS, show that it was error not to set aside the default judgment of over \$18,000 in the interest of justice.

#### ARGUMENT

1. THE FACTS DO NOT JUSTIFY THE HARSH SANCTION OF DEFAULT JUDGMENT.

Under Point I of its Brief, Gro argued that the trial court was justified in imposing the harsh sanction of a default judgment because (1) NIMS missed four deadlines to answer the discovery, (2) NIMS promised these answers for months, and (3) NIMS' attorney did not explain the final delay in timely manner.

With respect to (1) the four deadlines, Gro asserts that the fact that NIMS changed its attorneys is a red herring, and that the Order Granting Plaintiff's Motion to Compel, dated May 1, 1991, is not on appeal.

Addressing the latter point first, that May 1st Order was clearly interlocutory, and could not be appealed immediately as of right. Rather, it was merged into the final Default Judgment and was appealed unless specifically excluded in the Notice of Appeal, which it was not.

The Affidavits of Delwin T. Pond, NIMS' new attorney, clearly show that the change of attorneys was a very important factor.

Whereas NIMS' prior attorney may have known that negotiations would prove futile, Mr. Pond was unaware of that. And he did not learn of this futility by speaking with Ms. Van Frank on May 10, 1991. ROA at 82. She likewise had been preceded by other counsel, and not until June 3, 1991, after a review of the file, did she send a letter to Mr. Pond notifying him that her client had previously and consistently refused to acknowledge any credit for returned goods. ROA at 38. During that interim, Mr. Pond reasonably delayed incurring the cost of responding to the discovery and reasonably assured NIMS that the case would be fairly simple and should settle. ROA at 82.

In addition, the change of attorneys could well have had an effect on (2) another promise to answer the discovery. If Mr. Pond had been familiar with Mr. Weeks' schedule and the fact that he was the only principal of NIMS in a position to supply the necessary information, his actions and promises would probably have been different.

As to (3) NIMS' attorney did not explain the final delay in timely manner, that lack of a continual volunteered update does not seem to justify entry of a Default Judgment. The explanation was set forth in Mr. Pond's Affidavit in Opposition to Plaintiff's Motion for Entry of Judgment, executed about three weeks after Mr. Pond first realized it would be difficult to get the information and just when he had succeeded in getting the information and putting into the proper form. ROA at 40-41. Gro's attorney had not contacted Mr. Pond asking about a reason



for the delay, nor had she indicated that he should be keeping her posted if there were reasons for a delay.

When the reasons for the delay were supplied, there was no allowance made by Gro in view of those difficulties. Rather, a Supplemental Affidavit of Leslie Van Frank was filed along with a Request to Submit for Decision. ROA at 45-47. If it was important for NIMS to make Gro aware of difficulties it was experiencing in responding to discovery, then there should have been some noticeable effect when NIMS did make Gro aware of those difficulties.

Even if Gro was unwilling to vary from its course of pursuing a default judgment, the trial court should not have facilitated that course of action. This becomes apparent when comparing the facts of this case with those where the sanction in the form of a default judgment for failure to timely respond to discovery has been upheld.

For example, in the case of Schoney v. Memorial Estates, Inc., 790 P.2d 584 (Utah App. 1990), such a sanction was upheld against the plaintiff. The plaintiff had amended its complaint five times. The case had been pending for over six years before the entry of the judgment. There had been an order cutting off discovery, which the Court stated was comparable to an order compelling discovery. Finally, the trial was set to begin only a few weeks after the deadline that had been missed.

Clearly the facts in the instant matter are much different, and they merit a response much different from the harsh remedy of a default judgment.

2. RELIEF WAS AVAILABLE TO NIMS UNDER RULE 60(B).

In Point II of its Brief, Gro argues that relief under Rule 60(b) of the Utah Rules of Civil Procedure is never available when default judgment is rendered as a sanction for failure to comply with discovery.

However, the cases cited in that Brief do not support such a conclusion.

Gro cited the case of Peay v. Peay, 607 P.2d 841 (Utah 1980). In that case, defendant made an alternative motion pursuant to Rule 60(b) to set aside a decree of divorce. Id. at 842 n. 2. Upon plaintiff's motion, defendant's said motion to vacate and set aside was struck. Defendant then filed a "Motion for Reconsideration of Order Striking Petition and Motion for Relief from Final Judgment." It was this latter motion that did not exist under the rules according to the case law cited in the decision.

That is, once the postjudgment ruling has been made, there is no provision for a motion to set aside that ruling. Nothing in the cases prohibits the initial postjudgment motion.

This same conclusion results from an analysis of the case of Utah State Employees Credit Union v. Riding, 24 Utah 2d 211, 469 P.2d 1 (1970) cited by Gro.

In that case plaintiff was granted summary judgment. The trial court then denied defendants' motion to vacate. So defendants filed a "Motion to Reconsider the judgment denying the motion to vacate, and to vacate it." Id. at 214. That latter motion was the one for which the Court found no basis in the rules.

On the other hand, Utah case law, including some of the same cases cited in Gro's Brief, show that this Court may indeed consider a Rule 60(b) motion under the circumstances of this case.

As indicated in NIMS' Brief, in the case of Darrington v. Wade, 812 P.2d 452 (Utah App. 1991), the issue was whether the trial court abused its discretion when it set aside the default judgment it previously entered as a discovery sanction. This issue and its resolution was summarized as follows:

Because trial courts must deal first hand with the parties and the discovery process, they are given broad discretion regarding the imposition of discovery sanctions. See Utah R. Civ. P. 37(d). They are also vested with considerable discretion under Rule 60(b) to grant or deny motions to set aside default judgments. See Utah R. Civ. P. 60(b). Consequently, we will interfere with the trial court's decision in this case only if an abuse of discretion is clearly shown. See Katz v. Pierce, 732 P.2d 92, 93 (Utah 1986). We see no abuse of discretion in this instance and affirm the trial court's decisions to vacate the default judgment and, having done so, not to reinstate it. Id. at 457.

Thus the appellant in that case was attacking on appeal the trial court's vacating of the default judgment it had obtained as a discovery sanction. This action by the trial court in vacating the judgment was upheld on appeal. There was no mention of any inability on the part of the trial court to consider a 60(b) motion because such a motion in essence asked the trial court to reconsider its prior order.

The case of Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950 (Utah App. 1989), cited in Gro's Brief, had a procedural history which is very informative with respect to this issue

raised by Gro.

In that case also a default judgment was entered following the striking of pleadings as a sanction for failure to comply with discovery. The defendant in that case filed two successive sets of motions, each set including both a Rule 59 motion for a new trial and a 60(b) motion to set aside.

Both Rule 59 motions were found to be untimely since more than 10 days had elapsed.

In addressing the first 60(b) motion, the appellate court did not say that such a motion was essentially a motion for reconsideration and as such could not be entertained. Rather, no appeal had been perfected and for that reason, the appellate court did not need to reach the merits.

Finally, we hold that the trial court's order of June 24, 1987, denying Schettler's 60(b) motion was a final appealable order, and since Schettler has not timely appealed that order, we need not address whether the trial court abused its discretion in denying his motion for relief from final judgment.

Only in addressing the second motion under Rule 60(b) did the court find a need to impose a rule of finality as argued by Gro in its said Memorandum.

Furthermore, Schettler's second motion is clearly barred by "law of the case." "The purpose of the doctrine of 'the law of the case' is that in the interest of economy of time and efficiency of procedure, it is desirable to avoid the delays and the difficulties involved in repetitious contentions and ruling upon the same proposition in the same case." [Citation.] The doctrine is clearly applicable to this case. Both motions were made pursuant to Rule 60(b) and asserted newly discovered evidence as grounds for relief.

It is conceded that the foregoing cases assume and act as if a Rule 60(b) motion is appropriate rather than specifically addressing and deciding that issue. However, a Utah appellate court has decided that a comparable Rule 59 motion is appropriate.

In the case of Moon Lake Electric Ass'n, Inc. v. Ultrasystems Western Constructors, Inc., 767 P.2d 125 (Utah App. 1988) the court addressed the issue of whether a motion for a new trial could be made under Rule 59 of the Utah Rules of Civil Procedure to challenge a summary judgment. The court found it could.

While acknowledging that the Utah Rules of Civil Procedure did not specifically allow such a motion following summary judgment, the court analyzed the rationale behind the rules and concluded that such a motion was procedurally correct.

As part of analyzing the rationale, the court drew on case law from Arizona which showed the advantage and logic of allowing the trial court, in the first instance, to correct any error.

[T]he Arizona Supreme Court has held that a summary judgment may be challenged by means of a motion for new trial and that the timely filing of such a motion extends the time in which to appeal. The court has reasoned that it is unrealistic to hold that the only remedy left to an unsuccessful litigant after a summary judgment is to file an appeal. [Citation.] The language of their procedural rule is "broad enough to accommodate the policy that a litigant should be given the opportunity to persuade the trial court of its error before proceeding by appeal." Id. at 127.

This same logic and rationale applies to NIMS' Motion to Set Aside under Rule 60(b). It is no more a non-existent "motion to reconsider" than a motion under Rule 59. Rather, Rule

60(b) also is "broad enough to accommodate the policy that a litigant should be given the opportunity to persuade the trial court of its error before proceeding by appeal." Id.

Therefore, NIMS' Motion to Set Aside Default Judgment could not properly be denied on the basis of a procedural defect.

3. RELIEF SHOULD HAVE BEEN GRANTED TO NIMS UNDER RULE 60(B).

In Point III of its Brief, Gro first argues that the Rule 60(b) Motion could not have been granted because it dealt with the merits of the action. Apparently Gro contends that since the neglect sought to be found excusable occurred during the course of discovery, rather than after the filing of its Motion for Entry of Default, such neglect relates to the merits of the action.

However, the case Gro cites as support, Larsen v. Collina, 684 P.2d 52 (Utah 1984), does not provide a foundation for that logic.

It is true that Larsen states that usually "it is not appropriate on Rule 60(b) motions to examine the merits of the claim decided by the default judgment." Id. at 55. But the procedural history of that case should be reviewed for clarification.

In that case, as in the instant matter, a default judgment was entered because of defendant's failure to answer interrogatories. Defendant then filed a motion under Rule 60(b), as in the instant matter.

After citing the general rule about not examining the merits, the Larsen Court reviewed the evidence in that paternity action establishing the defendant as the father. Thus when the Court found an exception to the rule against reviewing the merits,

it did not review the neglect in answering the interrogatories. Rather, it reviewed the merits of the underlying cause of action.

Likewise in the instant matter, a review of the merits of the underlying cause of action would involve a review of the evidence of the alleged debt and the evidence of returns made offsetting that debt. Reviewing the merits would not be reviewing the neglect in answering interrogatories.

Gro then argues in its Brief that NIMS did not show sufficient grounds for the setting aside of the Default Judgment imposed as a sanction. It urges this court to view the case of Katz v. Pierce, 732 P.2d 92 (Utah 1986) as controlling on this issue.

However, the Katz case reviews the appropriateness of setting aside a default judgment entered when there was a failure to answer, not when such a judgment imposed as a discovery sanction. In this case, an effort had already been made in a timely manner to address the issues in the form of an Answer, and allowance must be made for that.

Furthermore, the Katz case upheld a Default Judgment in the sum of \$2,686.50, while acknowledging that the trial court had a duty "to balance the equities," including "the respective hardships in denying or granting relief." Id. at 93 n. 2.

Even if a court should view a Motion to Set Aside a Default Judgment the same, whether the Default Judgment was entered due to a failure to file an answer or as a discovery sanction, the balancing of the equities would have to be different where, as in the instant matter, the Default Judgment entered was in the much

greater sum of \$18,103.95. And as near as can be determined from the record, that greater judgment amount has resulted in at least as much greater hardship on NIMS.

Therefore NIMS' Motion to Set Aside Default Judgment should have been granted because the requisite willfulness and bad faith for a discovery sanction were not shown, and the interest of justice could only have been served by setting aside the default judgment of over \$18,000 where the merits of the case may well show that Gro's Complaint should be dismissed, no cause of action.

#### CONCLUSION

Thus this Court should vacate the Order and Default Judgment entered below and remand for a continuation of the litigation.


DATED this 14<sup>th</sup> day of July, 1992.

LYNN P. HEWARD & DELWIN T. POND  
Attorneys for Defendant and Appellant

By   
LYNN P. HEWARD

#### MAILING CERTIFICATE

I hereby certify that four copies of this Brief were mailed to Leslie Van Frank, P.O. Box 11008, Salt Lake City, UT 84147 on this 14<sup>th</sup> day of July, 1992, with postage attached thereon.





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

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GRO ENTERPRISES, INC., dba	)	
CHICAGO BARTER CORP.,	)	
	)	
Plaintiff,	)	PLAINTIFF'S FIRST REQUEST FOR
	)	PRODUCTION OF DOCUMENTS TO
vs.	)	DEFENDANT
	)	
	)	Civil No. 90-0906404-CN
NATIONAL INSURANCE MARKETING	)	
SERVICES, INC., a Utah	)	
corporation,	)	Judge J. Dennis Frederick
	)	
Defendant.	)	

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Plaintiff requests the Defendant, pursuant to Rule 34, Utah Rules of Civil Procedure, to produce at the office of their counsel, within thirty days after service of this request, the documents hereinafter designated that are in the possession, custody or control of said defendant including its employees, agents and attorneys and, upon such production, to permit the inspection and copying of such documents.

DEFINITIONS

1. As used herein, "document" includes any written, printed, typed, recorded or graphic matter, however produced or reproduced, now in the possession, custody or control of the plaintiff, its

present and former employees, and all other persons acting or purporting to act on behalf of defendant.

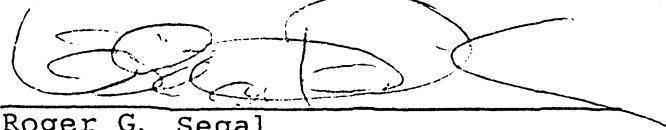
2. As used herein, "you" or "your" means the defendant producing the documents requested herein, and all other persons acting or purporting to act on behalf of the defendant.

REQUESTS

REQUEST NO. 1. Produce all documents identified in your answers to the Interrogatories served herewith.

DATED this 3rd day of January, 1991.

COHNE, RAPPAPORT & SEGAL, P.C.

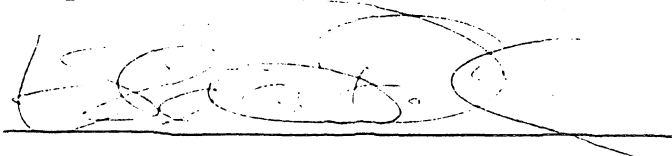


Roger G. Segal  
Leslie Van Frank  
Attorneys for defendant

CERTIFICATE OF MAILING

I HEREBY CERTIFY a true and correct copy of the foregoing document was mailed this 2d day of January, 1991, in the United States mail, postage prepaid, addressed to the following:

Terry C. Turner  
Attorney for defendant  
5505 South 900 East  
Suite 220  
Salt Lake City, Utah 84117



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