

2016

Steve Brazell, the Armer Texas Trust (Aka Texas Armer Trust), Et Al, Appellants/Plaintiff, vs. Robert v. Brazell, Et Al. Appellees/ Defendants

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STEVE BRAZELL, THE ARMER
TEXAS TRUST (AKA TEXAS ARMER
TRUST), et al.,

Appellants/Plaintiff,

vs.

ROBERT V. BRAZELL, et al.

Appellees/Defendants.

REPLY BRIEF OF APPELLANTS

Case No. 20150140-CA

REPLY BRIEF OF APPELLANTS

Appeal from the Third District Court, Salt Lake County
District Civil Case No. 130900740

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STATEMENT OF THE CASE IN REPLY TO APPELLEES' COMPLAINTS

In response to Appellees' complaints regarding the lack of citation to the record in the Procedural History section of the Appellants' Brief, the following is a revised version of that section containing citations to the record.

The Complaint was filed on February 1, 2013. (R.0001-00026). An Amended Complaint was filed on April 1, 2013. (R.00027-00044) Whitby's counsel entered an appearance on May 9, 2013. (R.00062-00064) R Brazell, the IBN Defendants, Talos and Kasten filed an Answer and Counterclaim against S Brazell, as well as a Motion for Temporary Restraining Order and Preliminary Injunction on June 14, 2013. (R.000130-000173) (R.000174-000178) (R.000179-000195) An additional appearance of counsel on Whitby's behalf was filed on June 17, 2013. (R.000236- 000238) The Appellants filed an Answer to the Counterclaim on July 5, 2013. (R. 000301-000308). Judge John Paul Kennedy recused himself, and Judge Andrew Stone was assigned this case on June 17, 2013. (R. 000213 & 000215).

The Appellants moved for expedited discovery, including the oral deposition of R Brazell, on June 21, 2014. (R.000267-000276) Rather than provide the discovery, the IBN Defendants withdrew their request for injunctive relief on June 25, 2014. (R.000293-000296).

On July 23, 2013, Craig Jacobsen, counsel for R Brazell, the IBN Defendants, Kasten and Talos, first advised counsel for the Appellants that they were claiming a conflict of interest existed between the Appellants and their counsel. (R.03091-03092). An Answer was filed by Mark Oleksik on August 12, 2013. (R.000390 - 000394).

On August 30, 2013, counsel for the Appellants called and wrote Jacobsen regarding a meeting to discuss pretrial issues on September. (R. 03097) Counsel got a rather tepid response to his entreaty. (R. 03094 - 03095) Again, the conflict of interest issue was raised by R Brazell's, the IBN Defendants', Kasten's and Talos' counsel. (R. 03099) A Second Amended Complaint was filed on September 3, 2013. (R.000476-000496) A meeting between counsel for Appellants, John Mertens and Donald H. Flanary, Jr., and counsel for R Brazell, the IBN Defendants, Kasten and Talos, Craig Jacobsen, was held at Jacobsen's office on September 6, 2013. (R. 03099). On September 9, 2013, following up on the September 6, 2013, meeting, Flanary sent Jacobsen a letter that contained a proposed scheduling order for his consideration. (R. 03101 - 03102).

On September 18, 2013, Flanary wrote Jacobsen regarding outstanding discovery and requested he be advised of the deficiencies in the Appellants' initial disclosures that the IBN Defendants were claiming existed. (R. 03108 - 03109) On September 18, 2013, Flanary wrote Jacobsen regarding the status of an agreement on pretrial matters. On September 30, 2013, Flanary again wrote Jacobsen regarding pretrial matters and discovery. (R. 03111)

Robert V. Brazell's, In Store Broadcasting Network, LLC's, In Store Broadcasting Holdings, LLC's, IBN Media, LLC's, In Touch LLC's, In Touch Media LLC's, Talos Partners, LLC's, and Robert W. Kasten Jr.'s Motion to Amend Counterclaim and Add Third Party was granted November 6, 2013. (R.000537-000538)

On December 13, 2013, Flanary wrote Jacobsen, confirming a meeting in Salt Lake City to discuss discovery and pretrial issues. (R. 03113 - 03114) On December 14,

2013, Flanary sent draft Confidentiality and Scheduling Orders to Jacobsen and Mark D. Stubbs, counsel for Mark Oleksik, for their review. (R. 03117) On December 30, 2013, Flanary sent Jacobsen a later version of the proposed Confidentiality and Scheduling Orders. (R. 03119) On January 6, 2014, Flanary wrote Jacobsen regarding the proposed Confidentiality and Scheduling Orders. (R. 03130)

Robert Brazell's, In Store Broadcasting Network, LLC's, In Store Broadcasting Holdings, LLC's, IBN Media, LLC's, In Touch, LLC's and In Touch Media, LLC's, Talos Partners, LLC's, and Robert W. Kasten Jr.'s Amended Counterclaim and Third Party Complaint was filed on January 17, 2014. (R.000966- 001011)

On January 23, 2014, Mertens wrote Jacobsen regarding the proposed Confidentiality and Scheduling Orders. (R. 03133) The Stipulated Discovery and Scheduling Order was filed on January 31, 2014. (R.001124-001127) It was agreed to by everyone in the lawsuit except Whitby, who had not yet answered. (R.001124-001127) Whitby's counsel was served with a copy of the agreement. (R.001124-001127) On February 2, 2014, Mertens wrote Jacobsen, again seeking dates to take R Brazell's deposition. (R. 03135) On February 7, 2014, Jacobsen wrote Mertens regarding the aforementioned R Brazell deposition. (R. 03138 – 03139) In that communication Jacobsen wrote, "We spent months coming to an agreement on a global discovery order. We intend to follow the order...." (R. 03138 – 03139) On February 17, 2014, Mertens advises Jacobsen the Appellants would like to take R Brazell's deposition the first week in April. (R. 03142)

The Motion to Disqualify Attorney Donald H. Flanary, Jr. and The Law Firm of Pia Anderson Dorius & Moss was filed on February 26, 2014. (R.001204-001208) On February 28, 2014, Mertens and Jacobsen exchanged communications regarding the conflict of interest issues. (R. 01345 – 01348) A Third Amended Complaint was filed on March 6, 2014. (R.001316-001367) The Third Amended Complaint was filed without leave of Court because the parties agreed and stipulated that additional parties had to be added by March 6, 2014 in the Stipulated Discovery and Scheduling Order filed with the Court on January 31, 2014. (R.001124-001127) The Court adopted the Scheduling Order at its May 8, 2014 hearing. (R.001746-001749) While R Brazell, the IBN Defendants, Kasten, Talos and Whitby now complain about the filing of the Third Amended Complaint, the language agreed to in the filed order and reaffirmed by Jacobsen is as follows:

Other Parties shall be joined pursuant to Utah Rules of Civil Procedure by March 6, 2014. A motion for leave to add parties is not necessary, provided the parties are added by this date, otherwise leave of Court is required.” (R.001124-001127)

On April 18, 2014, the Appellants filed their Motion for Rule 11 Sanctions. (R.001592-001609) On April 25, 2014, R Brazell, the IBN Defendants, Kasten and Talos filed their Expedited Motion to Continue Preliminary Injunction Hearing Without Date and Stay All Procedural Matters, Except for the Kondos Motion to Dismiss and the Motion to Disqualify. (R.001671-001675)

Beginning in February 2014, the Appellants tried to discover relevant documents about the IBN Defendants' and Whitby's conduct from Stubbs, Mark Oleksik's counsel. (R. 03152 – 03155) These efforts were thwarted by the failure of Jacobsen to respond to Stubbs. (R. 03156) It was only after Mertens wrote Jacobsen on May 1, 2014, threatening to involve the Court, that Stubbs got what he needed to produce the document in May 2014. (R. 03160)

On May 2, 2014, Mertens and Jacobsen exchanged communications regarding R Brazell's unilateral decision not to appear at his deposition that was noticed for May 6, 2014. (R. 03158 - 03160)

On May 8, 2014, the Court, after hearing the Parties, ordered: a) The motion to disqualify is denied; b) The Preliminary Injunction hearing is stricken and cannot be reset until IBN Defendants have responded to outstanding discovery requests and R Brazell appeared for deposition; c) The Plea to the Jurisdiction is continued until Kondos obtains sufficient discovery and he may request an evidentiary hearing; d) The IBN Defendants were ordered to respond to the Rule 11 motion in 10 days; e) The Appellants and the IBN Defendants are ordered to meet and confer on outstanding discovery; and, f) The Parties' Stipulated Discovery and Scheduling Order remains in effect and unmodified, without prejudice to the parties' ability to seek a continuance as the discovery process continues. (R.001746-001749)

On May 21, 2014, Jacobsen asked Mertens for more time to respond to the Plaintiffs' Rule 11 Motion. Jacobsen was given the time he requested. (R. 03163 –

03165) Whitby filed an answer to the Third Amended Complaint on May 29, 2014. (R.001867-001877)

On June 30, 2014, the oral deposition of R Brazell was commenced and ended, prior to its completion, when he unilaterally terminated the deposition. (R. 04713 – 04718)

A Fourth Amended Complaint was filed on July 3, 2014, without leave of Court because the parties agreed and stipulated that amended pleadings had to be filed by July 3, 2014, in the Stipulated Discovery and Scheduling Order filed with the Court on January 31, 2014. (R.002024-002047) The Court adopted the Scheduling Order at its May 8, 2014 hearing. (R.001746-001749)

Just as with the Third Amended Complaint, R Brazell, the IBN Defendants, Kasten, Talos and Whitby now complain about the filing of the Fourth Amended Complaint, even though it was timely filed. The language agreed in to in the filed order and reaffirmed by Jacobsen is as follows:

Amended pleadings shall be filed by July 3, 2014. This included, but was not limited to cross-claims, counterclaims, defenses, affirmative defenses, causes of action, remedies requested, and relief requested.

A motion for leave to amend is not necessary. (R.001124-001127)

The Court held a hearing on the Plaintiffs' Rule 11 Motion for Sanctions on July 16, 2014. (R. 002125)

On July 17, 2014, Mertens and Jacobsen exchanged communications regarding the IBN Defendants' document production the preceding week. (R. 3169 – 3170)

Whitby filed an answer to the Fourth Amended Complaint on July 18, 2014. (R.002126-002137)

On August 6, 2014, Mertens wrote Jacobsen regarding the IBN Defendants' document production. (R. 03172) On August 7, 2014, Appellants served supplemental disclosures per the Court's Order. (R. 03174)

On September 2, 2014, the Court signed its Order on the Appellants' Motion for Sanctions. (R.002323-002328) The Court granted the motion in part and denied it in part. The Court denied it as to the Motion to Disqualify. (R.002323-002328) The Court granted it because of its *in terrorem* effect in obtaining leverage against Plaintiffs. (R.002323-002328) The Court found that the Counterclaim, as to all the Plaintiffs except S Brazell, was filed without evidence or without the likelihood of obtaining evidentiary support and dismissed all the Counterclaims except those against S Brazell. (R.002323-002328) The Court reserved the issue of monetary sanctions. (R.002323-002328) The Court further set up a schedule for the Appellants and the IBN Defendants to follow in resolving their discovery issues. (R.002323-002328) Finally, the Court admonished R Brazell for his unilateral cancellation of his deposition and denied his motion to stay. (R.002323-002328)

On September 19, 2014, Mertens wrote Jacobsen, inquiring as to when the parties could meet and confer regarding the deficiency statement they had exchanged. (R. 03176)

On October 9, 2014, a Notice of Appearance was filed by Prince Yates & Geldzahler. (R.002403-002405)

The IBN Defendants' Rule 12(b)(6) Motion to Dismiss with Prejudice was filed on October 29, 2014. (R.002419-002421) The IBN Defendants' Rule 12(b)(6) Memorandum in Support of Motion to Dismiss with Prejudice was filed on October 29, 2014. (R.002422-002436) The Declaration of Robert V. Brazell in Support of The IBN Defendants' Rule 12(b)(6) Motion to Dismiss with Prejudice was filed on October 29, 2014. (R.002437-002441) Von Whitby's Joinder in The IBN Defendants' Rule 12(b)(6) Motion to Dismiss with Prejudice was filed on October 29, 2014. (R.002475-002477)

The IBN Defendants' Motion to Dismiss Plaintiffs' First Cause of Action with Prejudice was filed on November 21, 2014. (R.002425-002417) The IBN Defendants' Memorandum in Support of Motion to Dismiss Plaintiffs' First Cause of Action with Prejudice was filed on November 21, 2014. (R.002518-002525)

Von Whitby's Joinder in the IBN Defendants' Motion to Dismiss Plaintiffs' First Cause of Action with Prejudice was filed on December 1, 2014. (R.002547-002548) Robert Riley's Joinder in the IBN Defendants' Motion to Dismiss Plaintiffs' First Cause of Action with Prejudice was filed on December 2, 2014. (R. 002554-00255)

The Appellants filed their Motion for Leave to File Amended Complaint and their Fifth Amended Complaint on December 3, 2014. (R.002556-002560) The Appellants filed their Memorandum in Support of Motion for Leave to File Amended Complaint December 3, 2014. (R.002585-002592)

The Appellants filed their Memorandum in Opposition to the IBN Defendants' Rule 12(b)(6) Motion to Dismiss with Prejudice on December 3, 2014. (R.002646-002660) The Appellants filed their Memorandum in Opposition to the IBN Defendants' Motion to Dismiss Plaintiffs' First Cause of Action with Prejudice on December 3, 2014. (R.00266-002674) The Appellants filed Objection and Motion to Exclude the Declaration of Robert V. Brazell in Support of IBN Defendants' Rule 12(b)(6) Motion to Dismiss with Prejudice on December 3, 2014. (R.002675-002675) R Brazell, the IBN Defendants, Kasten and Talos filed their Reply to the Plaintiffs' Memorandum in Opposition to the IBN Defendants' Rule 12(b)(6) Motion to Dismiss with Prejudice on December 10, 2014. (R.002698-002704) R Brazell, the IBN Defendants, Kasten and Talos filed their Reply to the Plaintiffs' Memorandum in Opposition to the IBN Defendants' Motion to Dismiss Plaintiffs' First Cause of Action with Prejudice on December 10, 2014. (R.002705-002716) The Plaintiffs' Notice of Errata Regarding Plaintiffs' Memorandum in Opposition to IBN Defendants' Motion to Dismiss Plaintiffs' First Cause of Action with Prejudice was filed on December 17, 2014. (R.002944-002948) The Appellants filed Objection and Motion to Exclude the Tolling Agreement Made a Part of the IBN Defendants' Rule 12(b)(6) Motion to Dismiss with Prejudice on December 17, 2014. (R.002954- 002958)

Whitby filed an Opposition to the Plaintiffs' Motion to Amend Complaint on December 17, 2014. (R. 002743-002798)

After a number of refusals to appear at deposition and mid-deposition walk-outs, the Deposition of the main defendant, R Brazell, occurred on January 21, 2015, the day

before the Trial Court's memorandum decision was entered and long after it was briefed and argued. (R. 04520 – 4536)

Any statements as to the Procedural History of this matter, complained about by the Appellants for lack of citation to the record, have been cured and meet the requirements of Rule 24(a).

SUMMARY OF REPLY ARGUMENTS

I. THE TRIAL COURT ERRED IN DENYING LEAVE TO AMEND.

The Appellees' argument is that the Appellants' reliance on *Williams* and *Blackham* is misplaced. The Appellees argue that the proper standard is that set out in *Klienert v. Kimball Elevator Co.*, 854 P.2d 1025, 1028 (Utah Ct. App. 1993). However, the standard applied in *Klienert* was the same standard as was applied in both *Williams* and *Blackham*

Rule 15 should be interpreted liberally so as to allow parties' claims to be fully adjudicated and even more so when the motion to amend is made well in advance of trial. Utah liberalized its pleading standard to allow parties to present the legitimate contentions they have, subject only to the requirement of fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.

Refusing leave to amend is only justified upon a showing of undue delay, bad faith, or undue prejudice to the opposing party

An opposing party is prejudiced where that party is forced to try an issue for which that party had no time to prepare. Prejudice will only justify denial if it is undue or

substantial prejudice, because almost every amendment of a pleading will result in some practical prejudice to the opposing party.

II. THE TRIAL COURT ERRED IN FINDING THE PROPOSED AMENDED COMPLAINT LACKED PARTICULARITY UNDER UTAH RULE OF CIVIL PROCEDURE 9(B)

Appellees' argument, that Appellants failed to plead their claims of fraud with the required particularity, ignores the Appellants' Fifth Amended Complaint. Mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude a summary disposition. A sufficiently clear and specific description of the facts underlying the plaintiff's claims of fraud will satisfy the requirements of Rule 9(b). Utah's liberalized pleading rules are designed to allow parties the opportunity of presenting whatever legitimate contentions they have, subject only to the requirement that their opposition have fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved. Appellants' proposed pleading meets this requirement.

III. THE TRIAL COURT ERRED IN APPLYING UTAH RULE OF CIVIL PROCEDURE 9(B) TO CLAIMS OF CONSTRUCTIVE FRAUD (INSOLVENCY) UNDER THE UTAH FRAUDULENT TRANSFER ACT

The Appellees' argument that the Appellants have not plead insolvency or properly preserved this issue for appeal is without support in this record. Rule 9(b) did not apply to "constructive" fraud claims under the UFTA. Rule 9(b)'s requirements apply to intentional fraudulent transfer claims, which turn on the transferor's "actual intent to hinder, delay, or defraud," but not to constructive fraudulent transfer claims, which turn

solely on the sufficiency of the consideration and the transferor's financial condition. The underlying rationale of these cases is that "there is no reason to require a plaintiff to plead a defendant's fraud or misconduct with specificity if such fraud or misconduct is not an element of the plaintiff's fraudulent transfer claim.

ARGUMENTS

IV. THE TRIAL COURT ERRED IN DENYING LEAVE TO AMEND

Parties should be afforded leave to amend freely. Utah R. Civ. P. 15(a) "It is fundamental that parties are entitled to have their claims fully adjudicated," and "[t]his is especially true when the motion to amend is made well in advance of trial." *Nunez v. Albo*, 53 P.3d 2, 10 (Utah Ct. App. 2002) (quotation and citation omitted). As the Court can see, there is no trial date in this matter (indeed the remaining counterclaims have not yet been set for trial today).

Without again detailing specificity for the proposed amended complaint, the Appellants set out with a high degree of particularity each element of a fraud claim. As to each of the allegations, Appellants identified the individual Appellant or groups of Appellants, as well as individual Appellee or groups of Appellees involved in each such allegation.

Additionally, Appellants set out a claim against R. Brazell, the IBN Defendants, Kasten and Whitby under the Uniform Fraudulent Transfer Act, to which Rule 9(b) is not applicable. This claim specifically involves remedies for conduct declared unlawful as to transactions undertaken when the defendants were insolvent.

Again, this state's liberal pleading rules' intent is to afford parties the opportunity to present whatever legitimate contentions they have pertaining to their dispute, subject **only** to the requirement that their adversary have "fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved." *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 971 (Utah 1982) (quoting *Cheney v. Rucker*, 381 P.2d 86, 91 (Utah 1963)); *Blackham v. Snelgrove*, 280 P.2d 453, 455 (Utah 1955).

The proposed amended pleading gave fair and particularized notice, as required under Utah law, of the claims of every Plaintiff against each Defendant. The appellees were entitled to and got notice of the issues raised and an opportunity to meet them, and that is all that is required. *Cheney*, 381 P.2d at 91.

Since the matter has never been set for trial, the Appellees had ample time to prepare this matter for trial. The Appellees completed the written discovery to which they were entitled under the Utah Rules and the rulings of this Court. The only deposition requested by the Appellees was S Brazell, and he was tendered for deposition on January 20, 2015, as set out in the stipulation filed with the Court. R Brazell, the IBN Defendants, Kasten and Whitby are hardly in the position to argue any delay, bad faith or undue prejudice as a result of the filing of the proposed amended complaint. "Refusing leave to amend is only justified upon a showing of undue delay, bad faith, or undue prejudice to the opposing party." *Childers v. Indep. Sch. Dist. No. 1*, 676 F.2d 1338, 1343 (10th Cir. 1982) *Foman v. Davis*, 371 U.S. 178, 182 (1962)), *Nebraska v. Wyoming*, 515 U.S. 1, 8. (1995).

The proposed amended complaint met the Utah R. Civ. P. 9 affirmative defense of the failure to state a claim requirement with a cogent pleading that stated the Appellants' fraud claims with particularity. It is improper for a trial court to require the plaintiff to provide such detail as would be necessary to carry its burden of proof. A plaintiff does not necessarily need the exact dollar amounts, billing numbers, or dates to prove by a preponderance of evidence that fraudulent bills were actually submitted. To require these details at pleading is one small step shy of requiring production of actual documentation with the complaint, a level of proof not demanded to win at trial and significantly more than any federal pleading rule contemplates. *Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009)

Appellees did not claim they would be forced to litigate this matter without time to prepare because such an argument is preposterous. An opposing party is prejudiced where he or she is forced to adjudicate an issue "for which he or she had no time to prepare." *Swan Creek Vill. Homeowners Ass'n v. Warner*, 134 P.3d 1122, 1127 (Utah 2006). Prejudice will only justify denial if it is "undue or substantial prejudice, because almost every amendment of a pleading will result in some practical prejudice to the opposing party." *Id.* Appellees were not hindered in their preparation of this matter.

Appellants met the requirements for leave to amend their pleadings by clearly and succinctly meeting the standard under which the Trial Court should have decided their motion.

V. **PLAINTIFFS DID NOT FILE THEIR THIRD AND FOURTH COMPLAINTS IN VIOLATION OF UTAH R. CIV. P. 15(A)**

Appellees continue to mislead the Court as to the truth about the filing of the Appellants' Third and Fourth Amended Complaints. Rule 15 allows the amendment of pleadings **by written consent of the adverse party.**

The Stipulated Discovery and Scheduling Order was filed on January 31, 2014. That Stipulation, which was signed by the counsel for R Brazell, IBN Defendants, Kasten, Talos and was served on counsel for Whitby, provides in it its relevant parts:

“2. Amended pleadings shall be filed by July 3, 2014. This includes, but is not limited to cross-claims, counter-claims, defenses, affirmative defenses, causes of action, remedies requested, and relief requested. A motion for leave to amend is not necessary.

3. All motions to dismiss, motions for summary judgment, or other dispositive motions, shall be filed by November 3, 2014. Unless leave of court is first obtained, a party may not file more than one motion for summary judgment.”

On May 21, 2014, this Court signed an Order that stated in it its relevant parts:

“6. The Parties Stipulated Discovery and Scheduling Order remains in effect and unmodified, without prejudice to the parties' ability to seek a continuance of dates as the discovery process continues.”

While the Court did not sign the Stipulated Discovery and Scheduling Order filed on January 31, 2014, it adopted it in its May 21, 2014, Order. These are facts that Counsel for Appellees were aware of, yet they proceeded with their misleading representations to the Trial Court.

Plaintiffs' Third Amended Complaint and Fourth Amended Complaint were filed in reliance on the agreement between the parties and the Court's Order. The Appellees' contentions, that the Appellant's third and fourth amended complaints were improperly filed, have no factual basis.

The Appellees contended the Appellants added parties to the lawsuit in the proposed amended complaint. This is incorrect. The third and fourth amended complaints contain all the parties listed in the proposed amended complaint and did not add anyone new.

The only Rule 12(b)(6) motion to dismiss or joinder of such motion filed in the Trial Court, which complied with the agreed scheduling order and the Trial Court's Order adopting that agreement, is the IBN Defendants' Rule 12(b)(6) Motion to Dismiss with Prejudice.

PLAINTIFFS HAVE NOT DELAYED THIS MATTER

The Appellees have been the source of delay in this matter. For months, the Appellants tried to get a scheduling and discovery order agreed to and in place. When the order was finally in place, the Appellants ignored it and misled the Court as to its

application. The Appellees objected to pleadings that were properly filed in order to obstruct the matter and create delay.

Appellees used a bogus claim of conflict of interest to obstruct this matter for months. They filed a Motion to Disqualify Plaintiffs' Counsel that delayed matters and required responses from the Plaintiffs. They filed a motion to stay all proceedings pending a ruling on their motion and refused to respond to discovery, while never getting a ruling on their motion. The Appellees lost the motion to disqualify and the motion to stay.

The Appellants began trying to take the deposition of R Brazell in July 2013 and were unsuccessful. They tried again in April and May 2014 to take depositions, and R Brazell unilaterally cancelled that deposition, for which he was admonished by the Court. When he finally appeared for his deposition on June 30, 2014, he unilaterally discontinued that deposition before it was completed. He was finally deposed on January 21, 2015, pursuant to an agreement and order of this Court.

Hearings have been cancelled or rescheduled because of the Appellees' conduct; i.e.: not appearing for depositions and responding to discovery in a timely manner. R Brazell and the IBN Defendants have been sanctioned under Rule 11 for misconduct in pleading their case.

VI. THE TRIAL COURT ERRED IN FINDING THE PROPOSED AMENDED COMPLAINT LACKED PARTICULARITY UNDER UTAH RULE OF CIVIL PROCEDURE 9(B)

The Appellants set forth the “who, what, when, where and how” of the Appellees’ alleged fraud and misconduct. The “who, what, when, where and how” test was met in connection with: 1) the offering to the Appellants of In-Store Broadcasting Holding, LLC’s membership interests through an In-Store Broadcasting Holding, LLC subscription agreement or Robann Ltd. or Robann Media, LLC; 2) merger and financing transactions inside IBN and Talos by Brazell, Whitby and Kasten; and 3) efforts to induce the Plaintiffs not to act on any concerns they may have had as to the conduct or course of business by Brazell, the IBN Defendants, Whitby, Kasten and Talos. The Plaintiffs do not add any new cause of action nor any new party with the proposed amended complaint that was not in the third or fourth amended complaints.

The Appellants proposed amended complaint stated, with particularity, each of the Appellants’ fraud-based claims with the specificity required by Rule 9(b). In the proposed amended complaint, particularly in paragraphs 20 through 146, Appellants described in clear and concise language each representation of fact the Appellants relied on for this action. Further, as to each and every fraud-based cause of action set out in the “Claims and Causes of Action” section of the proposed amended complaint, the Appellants identified each paragraph referenced in the “Specific Fact Allegations of Fraud” section that apply to that particular cause of action. In other words, for each

element of each of the fraud-based causes of action, the Appellants identified the specific allegations of fraud that relate to that element.

VII. THE TRIAL COURT ERRED IN APPLYING UTAH RULE OF CIVIL PROCEDURE 9(B) TO CLAIMS OF CONSTRUCTIVE FRAUD (INSOLVENCY) UNDER THE UTAH FRAUDULENT TRANSFER ACT

The Appellees argument that the Appellants have not pled insolvency or properly preserved this issue for appeal is without support in this record. In fraudulent transfer claims involving allegations of fraud or mistake, Rule 9(b) of the Utah Rules of Civil Procedure requires that “the circumstances constituting fraud or mistake shall be stated with particularity.”

However, Rule 9(b) does not apply to constructive fraudulent transfer claims which require reasonable equivalent value (sufficient consideration) and the transferor’s financial condition (insolvency). With respect to the issue of insolvency of the debtor, a general allegation of insolvency provides a defendant fair notice of the plaintiff’s contention and renders sufficient information from which a defendant may create discovery requests in order to defend, as in any civil action.

The Appellants’ proposed amended complaint reads in relevant part as follows:

EIGHTH CAUSE OF ACTION

(Fraudulent Transfer)

202. Plaintiffs rely on ¶’s 20-1546 for the particular facts supporting this cause of action.

203. Defendants Brazell, Whitby, Kasten, Whitby, Talos and IBN have engaged in fraudulent transfers under Utah Code Ann. § 25-6-1 et seq., the Uniform Fraudulent Transfer Act, for which the Plaintiffs seek to have the transfers undone as plead in ¶’s 93, 103, 105, 107, and 127-145.”

"SPECIFIC FACT ALLEGATIONS OF FRAUD"

93. In 2007 IBN's net income was negative (\$9,000,000.00) on revenues of \$10,200,000.00. In 2008 IBN's net income was negative (\$11,100,000.00) on revenues of only \$8,400,000.00. During the first eight years of Brazell's tenure as CEO, the net income went from negative (\$3,300,000.00) in 2003 to a negative (\$25,400,000.00) in 2009. Despite company revenues of over \$54,000,000.00 and investments of over \$47,300,000.00 (for a total of \$101,300,000.00), Brazell had managed to bring the company to insolvency and the edge of bankruptcy by the end of 2009.

105. On November 21, 2008, Nebel, the chief financial officer of IBN, sent a letter to IBN interest holders but not to the Plaintiffs. That letter stated, "The company is insolvent...." She goes on to say, "If the reorganization in can not [sic] be completed in two weeks the Company will file for bankruptcy,...."

107. On November 25, 2008, Brazell sent an email to all Robann Media, IBN Interest Owners headlined, "URGENT AND CONFIDENTIAL." He states that, "The Company is insolvent as outlined in the Private Placement Memorandum that you will receive in the next few days. It's liabilities far exceed its assets...." and that the company was proposing reorganization."

It cannot be questioned that the Appellants plead insolvency and tied that pleading to the relevant section of the fraudulent transfer action. The controlling authority in Utah holds that Rule 9(b) does not apply to this specie of fraudulent transfer.

The issue of whether the Appellants had plead its their claims sufficiently to withstand a Rule 9(b) challenge was argued *ad nauseam* in the trial court. The fact is that, as to fraudulent transfer claim, the Appellants did plead facts that stated a claim under the statute.

CONCLUSION

Based on the foregoing, the Trial Court erred in not granting Appellants leave to amend their complaint, dismissing the Appellants for failing to plead fraud with particularity under Rule 9(b) and in ignoring Appellants' UFTA claim in analyzing the Appellees' motion to dismiss.

CERTIFICATION

Pursuant to Utah Rule of Appellate Procedure 24(f)(1)(C), the undersigned hereby certifies that, according to the word processing software used to create this brief, it contains approximately 5,054 words (excluding tables of contents and authorities and addendum), out of a maximum of 7,000.

Dated: May 13, 2016

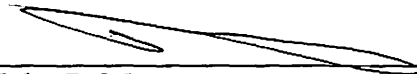
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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of May, 2016, I served a copy of the forgoing **APPELLANT'S REPLY BRIEF** on the following parties by mailing a copy, postage prepaid, to the following addresses:

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