

2011

Metropolitan Water District of Salt Lake and Sandy v. Zdenek Sorf : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

METROPOLITAN WATER DISTRICT
OF SALT LAKE & SANDY,

Plaintiff/Appellee,

v.

ZDENEK SORF,

Defendant/Appellant.

Case No. 20110443

District Ct. No.: 100921025

APPELLANT'S BRIEF

ON APPEAL FROM DECISION OF THE
THIRD DISTRICT COURT OF SALT LAKE COUNTY

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Appellant requests oral argument and a published decision.

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UTAH APPELLATE COURTS

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LIST OF PARTIES

ZDENEK SORF

Defendant/Appellant

METROPOLITAN WATER DISTRICT OF SALT LAKE & SANDY

Plaintiff/Appellee

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JURISDICTIONAL STATEMENT

Defendant/Appellant filed his notice of appeal on May 16, 2011. An Amended Notice of Appeal was filed on May 17, 2011. The Utah Supreme Court has jurisdiction pursuant to Utah Code Ann. § 78A-3-102.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court err in denying Appellant's Rule 60(b) Motion to Set Aside the Default Judgment? (R. 353-355.)
2. Did the district court err in denying Appellant's Rule 13(d) Motion for Leave to File a Counterclaim? (R. 548-550.)

STANDARD OF REVIEW

Issue #1: A trial court's ruling on a motion to set aside a default judgment involves the trial court's discretionary power and will be overturned only if it has abused its discretion. *See Davis v. Goldsworthy*, 2008 UT App. 145, ¶ 10, 184 P.3d 626.

Issue #2: A trial court's ruling on a motion for leave to file a counterclaim is a question of law. Questions of law are reviewed for correctness with no deference given to the trial court. *State v. Harmon*, 910 P.2d 1196, 1199 (Utah 1995).

DETERMINATIVE RULES

Utah Rule of Civil Procedure 60(b) is determinative of the first issue. Utah Rule of Civil Procedure 13 is determinative of the second issue. These rules are set out in the addendum.

STATEMENT OF THE CASE

This matter concerns an easement over the property of Appellant, Zdenek Sorf, and the ordered removal of landscaping, rock retaining walls, a gazebo, hot tub, buildings, trees and a water feature following a default judgment. The easement relates to the Salt Lake Aqueduct owned and operated by the Appellee, Metropolitan Water District of Salt Lake & Sandy ("District"). The claimed easement was granted to the District in 1946 for the purpose of operating and maintaining the Salt Lake Aqueduct pipeline. In 1952, the easement was transferred to the United States Department of Interior. In 2006, the easement was conveyed back to the District. Since receiving the easement back, the District has dramatically expanded the scope of the easement through rules and regulations imposed by it that limit and restrict property owners. The rules and regulations were not mentioned in, nor were they part of the original easement. The claimed easement is 120 feet wide and runs through a large majority of Mr. Sorf's backyard and even included a corner of his house. Shortly after this appeal was initiated, the District suddenly abandoned the portion of the easement that includes Mr. Sorf's home. (Ex. B of Supplemental Record, accepted by the Court on 10/28/11.) The remaining easement area now begins immediately outside Mr. Sorf's backdoor and covers most of his backyard.

In October 2010, a complaint was filed seeking a determination of the District's rights and authority to Mr. Sorf's property. Specifically, but not exclusively, the District sought a determination as to the enforcement of multiple rules and regulations that were adopted by the District more than 58 years after the initial granting of the easement. (R.

5.) A Summons and Complaint was left at Mr. Sorf's home, but not personally served on him. At the same time frame, Mr. Sorf received a letter from the District soliciting contact and resolution to the dispute. Mr. Sorf contacted the District to try and facilitate a resolution. He did not understand he had been sued or that he was required to answer. Due to his mistaken understanding, a default judgment was entered against Mr. Sorf on December 16, 2010. (R. 97.) The default judgment requires Mr. Sorf to remove all structures, trees, a water feature, a hot tub, a gazebo, rock retaining walls and other landscaping (which Mr. Sorf paid more than \$150,000 to install). (R. 97-99.) In January 2011, Mr. Sorf retained counsel and initiated efforts to set aside the default judgment. On February 3, 2011, Mr. Sorf filed a proposed Answer to the District's Complaint and asserted multiple meritorious defenses. (R. 125-134.) On March 17, 2011, Mr. Sorf's Rule 60(b) Motion to Set Aside the Default Judgment was denied. (R. 353-354.) The District argues Mr. Sorf should have recognized that a complaint had been filed. However, he was mistaken and it would be fundamentally unfair to allow Mr. Sorf's mistaken understanding to lead to the dramatic and costly implications imposed by the default judgment. Mr. Sorf should not be deprived of all useful purpose of his backyard, forced to remove hundreds of thousands of dollars of landscaping, and suffer a significant loss in value of his home without the District's claims being determined on the merits.

Entry of the default judgment resulted in a final determination of the District's rights and authorities over Mr. Sorf's property. The terms of the default judgment constitute a taking. In light of the taking that occurred, Mr. Sorf filed a Rule 13(d) Motion for Leave to file a counterclaim against the District for inverse condemnation.

(R. 374.) Mr. Sorf's claim for inverse condemnation was not acquired until after the default judgment was finalized. The District's rights to Mr. Sorf's property had to be defined before one could determine if a taking had occurred. On May 9, 2011 Mr. Sorf's Rule 13(d) Motion for Leave to file a counterclaim was denied. (R. 527.) Mr. Sorf's claims for inverse condemnation did not mature until after the default was finalized with denial of the Motion to Set Aside. Mr. Sorf should not be stripped of his recognized and bona-fide claims for inverse condemnation just because default was entered on earlier issues. To preclude Mr. Sorf from pursuing his claims for inverse condemnation would be an additional penalty arising from the default. Fundamental justice does not allow such punishment. Mr. Sorf should be given the opportunity to assert claims for inverse condemnation against the District.

STATEMENT OF MATERIAL FACTS

Salt Lake Aqueduct

1. On February 4, 1946, Elizabeth Colemere conveyed and warranted to the District "a perpetual easement to construct, reconstruct, operate and maintain a pipeline or pipelines on, over and across [specifically] described property in Salt Lake County, State of Utah" (which is now the appellant's property). The original warranty deed was a simple two page document that did not include any regulations, restrictions or limitations as to use of property. (R. 39-40.)

2. On August 22, 1952, a Warranty Deed of Easement was entered between the District and the United States of America. The District conveyed to the United States Department of Interior a "perpetual easement to construct and reconstruct, operate and

maintain an underground pipeline and appurtenant structures, which latter may be situated above ground surface, on, over or across [specifically] described property situated in Salt Lake County, State of Utah.” When the easement was conveyed to the United States, it did not include any restrictions or limitations as to use of property. (R. 48-49.)

3. During the time the easement was held by the United States Department of Interior, individuals were not restricted from building significant and costly improvements on the easement area including, but not limited to, homes, swimming pools, tennis courts, etc. (Hearing Transcript at pp. 5-8, starting at R. 556.)

4. On October 2, 2006, the United States Department of Interior, through a quitclaim deed, conveyed all interests in the SLA to the District. When the easement was deeded back to the District, it did not include any restrictions or limitations as to use of property. (R. 43-47.)

5. Since receiving the easement back, the District has adopted rules and regulations expanding the easement and significantly limiting how property owners can and cannot use property within the easement area. The scope of the restrictions is left to the unilateral discretion of the District. The restrictions were not included in the original easement, the conveyance to the United States, or the return of the easement to the District. The restrictions were created unilaterally by the District more than 58 years after the easement was originally granted. (R. 417-428.)

Mr. Sorf's Residence

6. Mr. Sorf lives at 9625 South Mount Jordan Road (2250 East) in Sandy, Utah. (R. 10 at ¶ 27.) He has resided in his residence for nearly 24 years. The SLA easement covers the majority of Mr. Sorf's backyard and even extended into the southeast corner of his house. (R. 430-432.) After this appeal was initiated, the District abandoned the portion of the easement that included Mr. Sorf's house. The easement still in effect begins immediately outside of Mr. Sorf's backdoor. (Ex. B of Supplemental Record, accepted by the Court on 10/28/11.)

7. Several large trees, rocks and brush were located on the SLA easement in Mr. Sorf's backyard before Mr. Sorf bought his property in 1988. (R. 434 at ¶ 4.) Two of the trees were at least 60 feet tall. (R. 435 at ¶ 5.) (*See also* Ex. 9 & 10 of Ex. A of Supplemental Record, accepted by the Court on 10/28/11, showing the large size of the tree, stump and roots associated with one of the removed trees.)

8. A small shed was also located on the easement prior to the time Mr. Sorf purchased his home. (R. 435 at ¶ 6.)

9. For at least twenty years after Mr. Sorf purchased his home, no one ever expressed any concern with the trees, rocks, patio, brush and shed being located on the SLA easement. (R. 435 at ¶ 8.)

10. During the nearly twenty-three years Mr. Sorf has lived in his neighborhood, he has observed and continues to observe concrete pads, driveways, large trees, cinder block walls, rock walls, sheds, and other structures and objects over the SLA easement in his neighbors' property. (R. 435 at ¶ 9, Ex. F; *see also* picture of large tree,

driveway and other large objects over the SLA easement across the street from Mr. Sorf's property, R. 444; picture of a stake, placed by District, in front of the cinderblock wall identifying the western edge of the easement and demonstrating that Mr. Sorf's neighbor has large trees over the easement, R. 446; picture of a stake, placed by District, identifying the western edge of the easement and demonstrating that approximately 5 to 6 feet of Mr. Sorf's neighbor's house and foundation are on the SLA easement, R. 448; and Ex. 7 & 8 of Ex. A of Supplemental Record, accepted by the Court on 10/28/11.)

11. In approximately March 2009, Mr. Sorf began improving his backyard. (R. 436 at ¶ 12.)

12. Mr. Sorf removed the large trees, rocks and brush from the easement and graded the dirt but did not bring new dirt onto the property. (R. 436 at ¶ 13, Ex. F; *see also* picture of the tree stump from one of the trees Mr. Sorf removed, and where the gazebo and hot tub are now located, R. 450.)

13. Based upon instruction that was given by the District's representatives, Mr. Sorf purposely did not place any structures directly over the pipeline. (R. 436 at ¶ 14.)

14. The small storage shed that is on the SLA easement existed prior to the time Mr. Sorf purchased the property and is approximately twenty-six (26) feet from the pipeline. (R. 436 at ¶ 16.)

15. Mr. Sorf placed a hot tub in the spot where he tore out one of the large trees. (R. 436 at ¶ 17; Ex. 9 of Ex. A of Supplemental Record, accepted by the Court on 10/28/11.)

16. Mr. Sorf's hot tub and gazebo are located approximately forty-eight (48) feet from the pipeline. (R. 436 at ¶ 18.)

17. The garden boxes for vegetables are located approximately thirty-one (31) feet from the pipeline and the water feature is approximately twenty-three (23) feet from the pipeline. (R. 436 at ¶ 20; Ex. 1 & Ex. 6 of Ex. A of Supplement Record, accepted by the Court on 10/28/11.)

18. The second shed on Mr. Sorf's property is located approximately forty-four (44) feet from the pipeline. (R. 436 at ¶ 21; Ex. 1 of Ex. A of Supplemental Record, accepted by the Court on 10/28/11.)

19. In November 2009, one of the District's employees visited Mr. Sorf at his property. Mr. Sorf believes the employee's name was Lynn Coon. (R. 437 at ¶ 22.) By that time, a majority of Mr. Sorf's landscaping was finished, except for a few items such as the rock sidewalk, grass, roof on the gazebo, fencing and a concrete pad in front of the second shed. (R. 437 at ¶ 23.)

20. Mr. Coon did not instruct Mr. Sorf to cease landscaping nor did he explain that Mr. Sorf needed permission from the District to continue. (R. 437 at ¶ 24.) Instead, Mr. Coon told Mr. Sorf that the landscaping should not interfere with the pipeline and suggested that Mr. Sorf submit an application to the District indicating that he had improved the property for the purpose of updating their records. (R. 437 at ¶ 25.)

21. Mr. Coon showed Mr. Sorf where he thought the easement boundaries on the property were and instructed Mr. Sorf that he should not build or place any structures directly over where the pipeline was located. (R. 437 at ¶ 26.)

22. Mr. Sorf would have immediately stopped landscaping had Mr. Coon instructed him to cease activities or if he had told Mr. Sorf he was interfering with the SLA pipeline. (R. 437 at ¶ 30.)

23. The District placed a stop work order sign on Mr. Sorf's property after improvements to the backyard were nearly complete. (Hearing Transcript at pp. 14 & 15, starting at R. 556.)

24. A tall cinder block wall with three foot foundations existed on the north side of Mr. Sorf's property prior to the time he purchased his home approximately 23 years ago. (R. 438 at ¶ 37.)

25. The cinder block wall did not contain a gate or otherwise permit access to that portion of the SLA easement on Mr. Sorf's property. (R. 438 at ¶ 38.)

26. Mr. Sorf tore down the tall cinder block wall and its three foot foundations and installed a wood fence in its place. (R. 438 at ¶ 39.) After removing the cinder block wall, the district requested Mr. Sorf to install a gate in the wood fence. This was the first time in over 24 years that the District showed any interest in the activities being conducted on or having access to Mr. Sorf's property. (Hearing Transcript at p. 6, starting at R. 556.)

27. In compliance with the District's request, Mr. Sorf installed an access gate on the north side to allow the District access to the portion of the SLA easement on his property. (R. 438 at ¶ 40.)

28. Since the time Mr. Sorf has lived in his home, he has never observed anyone performing any routine inspections of the portion of easement which crosses his property until he tore down the cinder block wall. (R. 439 at ¶ 43.)

Complaint

29. The District filed a Complaint in this matter on October 28, 2010. (R. 5.)

30. The District asked the Court to approve its rights and authorities in relation to the SLA corridor and Mr. Sorf's property, including the imposition of pages and pages of rules and regulations that were not part of the original easement. The District requested an order from the Court declaring its property rights and regulatory authority, declaring its rights and powers to remove Mr. Sorf's improvements, and quieting the District's title. (R. 16 at ¶ 61.)

31. The District sought the following relief:

Wherefore, [the District] requests an order and judgment as follows:

- A. Enjoining Defendant from interfering with [the District's] restoration of the SLA corridor; and
- B. Enjoining Defendant from any future trespass upon [the District's] property interests or violations of [District] regulations; and
- C. Declaring [the District's] property rights; and
- D. Declaring [the District's] regulatory authority; and
- E. Declaring [the District's] right and power to remove Defendant's improvements which infringe [District] property rights, or which violate [District] regulations; and
- F. Quieting [District's] title; and

- G. For damages suffered by [District] due to Defendant's actions, including costs to be incurred in restoring the SLA corridor, together with interest; and
- H. For costs incurred by [District] in this action; and
- I. For such other relief this Court deems appropriate and just.

(R. 17-18.)

32. On October 28, 2010, a Summons and Complaint were delivered to Mr. Sorf's residence. However, he was not home. A female at the residence was unwilling to accept the papers. (R. 79.)

33. Mr. Sorf received a letter from the District's counsel asserting that a complaint and summons were enclosed, but he did not have the actual enclosures. (R. 114 at ¶ 3; R. 115 at ¶ 4.)

34. The letter indicated that the District was willing to discuss an amicable resolution of the matter. (R. 114 at ¶ 5 & R. 118.) Based on the letter, Mr. Sorf believed that the District would refrain from filing a lawsuit if the parties were able to reach an amicable resolution of the dispute. (R. 115 at ¶ 6.)

35. Later in November, Mr. Sorf called the District's counsel to discuss resolution. (R. 115 at ¶ 7.) During the telephone conversation, the District's counsel did not inform Mr. Sorf that he needed to file an Answer. (R. 115 at ¶ 9.)

36. After discussions with the District's counsel, Mr. Sorf was under the impression that the District would only pursue court action if Mr. Sorf could not reach a settlement with the District. (R. 115 at ¶ 8.)

37. The District's counsel instructed Mr. Sorf to call and speak with the District directly to discuss resolution. (R. 115 at ¶ 10.) Specifically, Mr. Sorf was instructed to call Wayne Vinzer and Mike Wilson. (R. 115 at ¶ 11.)

38. Mr. Sorf telephoned both Mr. Vinzer and Mr. Wilson but was unable to reach them. (R. 115 at ¶ 11.)

Default Judgment

39. Without a hearing on the merits, a default judgment was entered against Mr. Sorf on December 13, 2010. The default judgment ordered in part as follows:

- a. Defendant shall remove all encroachments not authorized by [the District] including, but not limited to, rock retaining walls, added fill material, gazebo, hot tub, two (2) outbuildings, trees, and water features.
- b. Defendant shall return adequate soils and fill (2' to 3' in depth) on the south portion of Defendant's Property traversed by the SLA.

* * * *

- f. Defendant will immediately remove all impediments to access to [sic] the SLA corridor by [the District] and its contractor(s). This will be accomplished by installing (at a minimum) access gates with openings not less than 12 feet in width on the north and south property lines. If Defendant desires to have a lock on the gate, he shall make arrangements acceptable to [the District] for locks in series and allow [the District] to place their own lock, such that [the District] has access to the SLA corridor at all times.

(R. 97-99.)

40. If Mr. Sorf does not fully abide by the terms of the default judgment, the District may remove the described encroachments and seek costs from Mr. Sorf.

If Defendant fails to fully comply with Paragraph 1 immediately above, [the District] or [the District's] contractor, may move and remove all

described encroaching improvements, and Defendant is hereby enjoined from interfering with such work. [The District] may seek additional judgment or judgments for any costs incurred as a result of Defendant's failure to fully comply with paragraph 1 above.

(R. 99.)

41. While not mentioned in the District's complaint, the default judgment orders Mr. Sorf to enter a Cooperation Agreement. (R. 97-99.) The Cooperation Agreement is the District's unilateral decision as to what they will and will not allow on the land within the easement area. By demanding Mr. Sorf to enter a Cooperation Agreement, the trial court in essence approved the extensive rules and regulations imposed by the District nearly 60 years after the granting of the easement. (R. 460-470.)

Proposed Cooperation Agreement

42. With regard to Mr. Sorf's use of the SLA Corridor, the Cooperation Agreement provides:¹

The southeast corner of [Mr. Sorf's] home encroaches approximately 4.3 feet onto the SLA corridor, as shown in Exhibit A. In addition and as depicted in Exhibit A, other improvements exist including, but not limited to, earthwork (added fill material), turf areas, rock retaining walls (for landscaping), fencing and access gates, flat work (concrete and rock pathways), garden boxes, an electrical utility line, a motorcycle barn, an equipment shed, a gazebo and hot tub, deck, water feature, and trees within the SLA corridor without prior approval from the District. All improvements not expressly approved by this agreement shall be removed at owner's expense no later than August 30, 2011. Additional improvements shall not be constructed within the easement without first receiving written permission from the District.

¹ On June 28, 2011, after this appeal had been initiated, the District entered a "Notice of Partial Abandonment of Easement" whereby it abandoned the portion of the easement which is encumbered by Mr. Sorf's existing home. This abandonment does not significantly change the matters on appeal. Even with the abandonment, the easement still being claimed by the District exists immediately outside of Mr. Sorf's backdoor and covers the majority of his backyard. (See Ex. B of Supplemental Record, accepted by the Court on 10/28/11.)

[Mr. Sorf's] use of the SLA corridor shall be limited to the following as shown on Exhibit A: earthwork (added fill material), turf areas, a rock retaining wall (for landscaping), the existing fences with three access gates, flat work (concrete and rock pathways), garden boxes, and an electrical utility crossing. The existing fences shall be modified to include access gates within the easement to provide District access.

(R. 461.)

43. The Cooperation Agreement is only good for five (5) years and has a maximum duration of fifteen (15) years. Renewal of the agreement is not guaranteed.

(R. 461.)

44. Not only does the Cooperation Agreement limit what a property owner can do with their property within the easement area, it also tells property owners what cannot be done on property "close" to the easement area. However, no definition of the word "close" is provided.

[Mr. Sorf] warrants and agrees that no earthwork, construction work or other work performed by or for [Mr. Sorf] on the SLA corridor or *close* enough to the SLA corridor to present risk to District improvements or operations will take place except as expressly described in plans and specifications approved in writing by District. Any modifications to such plans and specifications must be approved in writing by District.

(R. 463)(emphasis added.)

45. The Cooperation Agreement provides the District with the authority "to stop work and require correction of any work, or replacement of any materials, which in its reasonable judgment does not comply with any term or condition" of the Cooperation Agreement. (R. 463-464.)

46. If the District modifies or destroys any of the improvements installed on Mr. Sorf's property that are within or in "close" proximity to the SLA Corridor, Mr. Sorf

must personally bear the financial implications of such actions. "Applicant accepts all risks that any or all of Applicant's improvements installed on the SLA corridor may be modified, destroyed or reconstructed at Applicant's sole cost and expense to accommodate District's exercise of District rights to use the SLA corridor." (R. 465.)

47. The Cooperation Agreement can be terminated, for any reason, at the discretion of either party. "Either party may, at their sole option, terminate this Agreement upon ninety (90) days written notice to the other party." (R. 466.)

48. If a new agreement is not entered before the Cooperation Agreement's expiration, Mr. Sorf's right to use his property would be forever terminated. "Applicant's right to use the SLA corridor shall expire completely upon the expiration of the term described in Article I above, absent a new agreement or written extension signed by both parties." (R. 466.)

49. If the Cooperation Agreement is terminated, Mr. Sorf will still be expected to remove any improvements made to the SLA corridor, restore the SLA corridor according to District's specifications, and reimburse the District for any costs owed.

The following, as described in this Agreement, shall survive any termination of this Agreement: (i) All of Applicant's obligations to reimburse any costs incurred by the District; (ii) All of Applicant's obligations to remove Applicant's improvements and make restoration

District will reasonably determine what portion of Applicant's improvements on the SLA corridor will be removed upon termination of this Agreement and set a deadline and specifications for removal and restoration. Such removal and restoration will be at the sole expense of the Applicant.

(R. 466-467.)

50. In any dispute relating to the Cooperation Agreement, the District will not be liable for consequential damages to Mr. Sorf even if the District is found to be at fault. "Under no circumstances shall District or its officers, trustees or employees be liable for any consequential damages resulting from interruption of Applicant's use of the SLA corridor." (R. 467.)

51. Any rights given to Mr. Sorf in relation to use of the SLA corridor cannot be assigned or transferred without prior written consent of the District. The District is under no obligation to approve an assignment or transfer of Mr. Sorf's rights.

Applicant's rights and obligations under this Agreement shall run with the property Applicant's rights and obligations may not otherwise be assigned or transferred by Applicant without the prior written consent of District, which District is under no obligation to give. Any such attempt to assign without the prior written consent of District shall be considered null and void and shall be grounds for termination of this Agreement.

(R. 468.)

Motion to Set Aside Default

52. On or about January 24, 2011, Mr. Sorf retained the law firm of Strong & Hanni to help him determine whether a default judgment has been entered against him and what action, if any, was necessary. (R. 115 at ¶ 14.)

53. On January 24, 2011, Mr. Sorf's counsel received a copy of the Summons and Complaint from the District's counsel. (R. 115 at ¶ 14.) On January 24, 2011, Mr. Sorf saw the District's Summons and Complaint for the first time. (R. 115 at ¶ 14.)

54. On January 28, 2011, Mr. Sorf filed a Motion to Set Aside the Default Judgment and supporting memorandum. (R. 104-118.)

55. On February 3, 2011, Mr. Sorf filed a supplement to his Motion to Set Aside and submitted a proposed Answer to the District's Complaint. (R. 122-134.)

56. On March 8, 2011, a hearing was held in conjunction with Mr. Sorf's Motion to Set Aside. (See Hearing Transcript, starting at R. 558.) During the hearing, Judge Fratto made findings of fact concerning issues of excusable neglect. However, despite requests from counsel, Judge Fratto did not issue findings of fact concerning whether Mr. Sorf's failure to timely answer the District's complaint was due to mistake, surprise or inadvertence.

THE COURT: Yes. Now, I appreciate everyone's presentation. I'm prepared to make a decision. The matter is in front of me as a motion to set aside the default judgment. It is a Rule 60(b) motion, pled as a 60(b) motion. It has two prongs to the analysis. The first is that there must be, in this case, it appears to me, invoked the excusable neglect. I should set aside the judgment as a result of excusable neglect Now, I have some discretion here, but I think I have a lot of guidance in terms of what is excusable neglect that would guide me as to what would be the appropriate exercise of discretion. It appears to me that the law is fairly clear that, 'You've actually served it on someone else who didn't advise me they had been served' is not excusable neglect

MR. BELNAP: Your Honor, could you also address the mistake –

THE COURT: Yes. Let me finish, and then if there's some questions, I'll entertain a few of those, but I'm just trying to give you the reasons I'm going to rule as I'm ruling And so it seems to me that there's a failure to show that excusable – that first prong, excusable neglect. And I suppose I could bring the analysis to a close with that, because without a showing of excusable neglect, then the matter cannot be set aside. The complaint cannot be set aside.

* * *

MR. BELNAP: -- may I ask a question?

THE COURT: Yes.

MR. BELNAP: And I understand your ruling, but the rule also speaks of mistake and inadvertence, which I understand your analysis of the letter, but the letter can certainly –

THE COURT: Well, Mr. Belnap, I'm going to stop you there. I appreciate the other – and there's other factors in the rule, also, but it appears to me the only one that would be applicable in this instance and with what excuses have been given is excusable neglect, and, for the reasons I've already stated, I do not see that there has been a showing here of excusable neglect.

MR. BELNAP: Your Honor, could we talk about the next step here, and that is –

THE COURT: I'm going to stop you there, because we're going to have to do that in another context. We've actually – the next matter, I think, was scheduled, if I'm correct, at 3:30, and so we've gone well beyond that. I can only deal with what we've got here in front of me today.

MR. BELNAP: Thank you.

(Hearing transcript at p. 56-63, starting at R. 556.)

57. Near the conclusion of the hearing, counsel for Mr. Sorf offered to pay the costs incurred by the District in conjunction with obtaining the default judgment.

(Hearing Transcript at p. 55, starting at R. 556.)

58. On March 17, 2011, the Court entered an order denying Mr. Sorf's Motion to Set Aside. Judge Fratto's ruling, in part, was based on the assumption that the "defenses proffered by [Mr. Sorf] to [the District's] Complaint are not meritorious as a matter of law" (R. 353.)

Motion for Stay & Motion for Leave to File Counterclaim

59. On April 13, 2011, Mr. Sorf filed a Motion for Stay of Action to Enforce Judgment pending appeal. (R. 364-366.)

60. On April 14, 2011, Mr. Sorf filed a Motion for Leave to File a Counterclaim and supporting memorandum. (R. 374-485.)

61. On May 9, 2011, oral argument was held on Mr. Sorf's Motion for Leave. While the judge denied Mr. Sorf's Motion, he explained that the decision was related only to whether a claim could be raised after a case had gone to judgment. The decision did not consider whether Mr. Sorf's claim was a compulsory or permissive counterclaim.

The linchpin here, though, seems to be whether this is a compulsory counterclaim. If it is a compulsory counterclaim to the complaint, then under our rules, the claim itself may be lost. Of course, that's what makes it – if it's a compulsory counterclaim, then it necessarily must be raised. But I'm not deciding here whether this is a compulsory counterclaim or not to be raised in yet another lawsuit, I suppose, or however it may be appropriately raised. The only thing I'm deciding here is whether you can raise a claim of any kind with the case in the posture it is in, and that is, it has gone to a judgment. There's been a request to set that judgment aside. That has been denied. And I think we can go further with the matter, if you will, in terms of raising new claims with the case in that posture. Consequently, and for that reason, your motion is respectfully denied.

(Hearing transcript at p. 32 & 33, starting at R. 557.)

62. On May 12, 2011, oral argument was held on Mr. Sorf's Motion to Stay Enforcement of Judgment. In granting Mr. Sorf's Motion to Stay, Judge Fratto pointed out that he had never ruled on the merits of Mr. Sorf's defenses and that he had never stated Mr. Sorf's defenses were frivolous. Since the underlying case resulted in default, neither the merits of the claim nor the merits of the defenses were considered.

In this case I take into account the fact that this is a default judgment. I did, as part of Mr. Belnap's motion to reconsider this, opine in terms of the – whether there was a meritorious defense presented, and there's a distinction here between a meritorious defense presented at the time of the motion. That's the only time I can judge it, in relation to the motion, and whether there is ultimately a meritorious defense. But, in any event, I did not opine

that what was offered were frivolous defenses, so we have a default judgment in which the merits of the matter have not been determined, and I cannot find that what has been raised as defenses are frivolous, and it seems to me that, as I say, that the execution on the judgment results in permanent – a permanent situation.

(Hearing Transcript at p. 30 & 31, starting at R 558.)

63. On May 16, 2011, Mr. Sorf filed a Notice of Appeal and on May 17, 2011, Mr. Sorf filed an Amended Notice of Appeal. (R. 542-547.)

64. On May 17, 2011, the Court entered an Order denying Mr. Sorf's Motion for Leave to File a Counterclaim. (R. 548.)

SUMMARY OF ARGUMENT

Mr. Sorf's failure to timely file an Answer was due to mistake, surprise, inadvertence and excusable neglect. A Summons and Complaint was delivered to Mr. Sorf's home, but not personally served on him. At the same time frame, Mr. Sorf received a letter from the District soliciting contact and resolution to the dispute. Mr. Sorf contacted the District to try and facilitate a resolution. He did not understand he had been sued or that he was required to answer. Based on written and verbal communications with the District, Mr. Sorf was under the impression that the District would not file a lawsuit against him if an agreeable settlement could be reached. Mr. Sorf's mistaken understanding led directly to the default judgment being entered. It was an abuse of discretion for the trial court to deny Mr. Sorf's Motion to Set Aside.

Mr. Sorf asserted multiple meritorious defenses in response to the District's Complaint and thus, his Motion to Set Aside should have been granted. Whether it be the scope of expressive language in the grant of the easement (with after-adopted rules and

regulations), abandonment, or equitable estoppel, Mr. Sorf clearly proffered defenses that, if proven, would have precluded the injunction and declaratory relief sought by the District. The Court's denial of Mr. Sorf's Motion to Set Aside was based on the improper assumption that Mr. Sorf's defenses were not meritorious as a matter of law. (R. 353.) Such an assumption was made despite Judge Fratto admitting that Mr. Sorf's defenses were never actually considered and no determination as to the merits of the defenses made. (*See* Hearing Transcript at p. 30 & 31, starting at R. 558.)

The implications of the default judgment are significant to Mr. Sorf. The default judgment authorizes the District to compel the removal of nearly all improvements from the easement area and prohibits future installation of improvements. Such extreme use restrictions are contrary to the expressive language of the easement and are inconsistent with the District's past use of the easement area. For more than 20 years, the District has not objected to use of the easement area and has allowed houses, sheds, pools, water features, tennis courts, patios, gazebos, etc. to be built within the prescribed easement. Now suddenly, the District is claiming authority over the easement area and demanding improvements be removed and/or destroyed at the property owner's expense.

The useful purpose and financial value of Mr. Sorf's home is at stake in this litigation. Accordingly, the potential consequences to Mr. Sorf are too great to allow the District's authority to be determined through a default judgment entered on a technicality concerning service of process. Mr. Sorf's failure to timely file an answer was due to mistake and excusable neglect. Mr. Sorf has asserted meritorious defenses in this case and thus, his Motion to Set Aside should have been granted. It was an abuse of discretion

to deny Mr. Sorf the opportunity to have the District's allegations and his defenses considered on the merits.

The trial court also erred in denying Mr. Sorf's Motion to Leave to File a Counterclaim. Mr. Sorf's counterclaim for inverse condemnation was not acquired until after the default judgment was entered and finalized with denial of the Motion to Set Aside. The default judgment defined the District's rights and authorities in relation to Mr. Sorf's property. (R. 456 at ¶ 1.) The default gave the District the power to demand Mr. Sorf permanently remove various structures and items from his property. (R. 456 at ¶ 1.) The Default Judgment also demands Mr. Sorf enter a Cooperation Agreement with the District. (R. 458 at ¶ 1.) The Cooperation Agreement imposes yet further restrictions and requirements on Mr. Sorf's property. (R. 460-470.) In light of the magnitude of the rights and authorities provided to the District in the default judgment, Mr. Sorf is deprived of all useful purpose of his backyard. The terms of the default judgment constitute a taking sufficient to satisfy the requirements of an inverse condemnation action.

The default judgment constitutes a final decision as to the authority the District has over Mr. Sorf's property. Prior to entry of default, the District's rights had not been defined and there was no way to determine if the alleged regulations and claimed authority went too far as to constitute a taking. Mr. Sorf's inverse condemnation claim did not ripen until default was finalized with denial of the Motion to Set Aside.

Mr. Sorf's inverse condemnation counterclaim is not compulsory in nature. In order to be compulsory, the counterclaim must have existed at the time Mr. Sorf's

pleading was served. The taking in this case did not occur until default was finalized on March 17, 2011 with denial of the Motion to Set Aside. By then, Mr. Sorf's proposed Answer had already been filed. Mr. Sorf did not have a claim for inverse condemnation when he filed his pleading and thus, the counterclaim cannot be compulsory.

Just because default was entered as to the claims filed by the District, that should not mean that Mr. Sorf is out of luck with regard to claims that arose subsequent to the default judgment. Mr. Sorf should not be stripped of his fundamental rights to seek redress of later injuries simply because he made a mistake in not timely answering the District's Complaint. Mr. Sorf's claims for inverse condemnation are separate and subsequent to the issues addressed in the default judgment. The default judgment should not act as a bar to Mr. Sorf's inverse condemnation claims.

ARGUMENT

A. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MR. SORF'S MOTION TO SET ASIDE THE DEFAULT JUDGMENT.

When considering a motion to set aside a default judgment, the trial court should "incline towards granting relief in a doubtful case to the end that the party may have a hearing." *Lund v. Brown*, 11 P.3d 277, ¶ 10 (Utah 2000.) Moreover, "it is quite uniformly regarded an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to appear, and timely application is made to set aside." *Id.* at ¶ 11 (citation omitted.)

1. **Mr. Sorf's Failure to Timely Respond to the Complaint was Due to Mistake, Surprise, Inadvertence or Excusable Neglect. The Trial Court Failed to Make Adequate Findings of Fact as to All of the Rule 60(b) Reasons Proffered by Mr. Sorf.**

Utah Rule of Civil Procedure 60(b)(1) provides that in the furtherance of justice a court may set aside a judgment for “mistake, inadvertence, surprise, or excusable neglect.” “[I]f default is issued when a party genuinely is mistaken to a point where, absence such mistake, default would not have occurred, the equity side of the court should grant relief.” *May v. Thompson*, 677 P.2d 1109, 1110 (Utah 1984). The trial court abused its discretion when it denied Mr. Sorf’s Motion to Set Aside because Mr. Sorf clearly showed that his failure to timely respond to the District’s Complaint was due to mistake, inadvertence, surprise and excusable neglect. Mr. Sorf did not receive the papers that were delivered to his house in October 2010 because they were served on a woman at the home who did not accept them.

Mr. Sorf received a letter from the District’s counsel. While the letter indicated that a Summons and Complaint were enclosed, no such documents were actually there. (R. 114 at ¶¶ 3 & 4; R. 118.) The letter indicated that the District was willing to discuss an “amicable resolution” to the matter. (R. 118.) The letter led Mr. Sorf to believe that the District wanted to discuss an amicable resolution prior to serving him with a complaint. (R. 115 at ¶ 6.)

In response to the District’s letter, Mr. Sorf made a diligent effort to contact the District to discuss resolution. Mr. Sorf telephoned the District’s attorney. (R. 115 at ¶ 7.) During that conversation, the District’s counsel did not inform Mr. Sorf that he needed to

answer. (R. 115 at ¶ 9.) Instead, the District's counsel told Mr. Sorf to call the District directly to discuss a resolution. (R. 115 at ¶ 10.) Mr. Sorf was given the names and telephone numbers to two individuals employed by the District. (R. 115 at ¶ 11.) After the telephone conversation with counsel, Mr. Sorf was under the impression that the District would not serve a complaint against him if a settlement could be reached. (R. 115 at ¶ 8.) After the telephone call with the District's attorney, Mr. Sorf called the two District employees pursuant to the District's counsel's direction. Unfortunately, Mr. Sorf was unable to reach the employees. (R. 115 at ¶ 11.)

Thereafter, Mr. Sorf received default judgment papers. Mr. Sorf had not been served with a complaint and so he did not understand what the default judgment papers meant. (R. 115 at ¶ 12.) Mr. Sorf contacted counsel in order to determine what action, if any, was necessary. On January 24, 2011, Mr. Sorf learned for the first time that a default judgment had been entered against him. He also saw the Summons and Complaint for the first time on that date. (R. 115 at ¶ 14.) Four days later, on January 28, 2011, Mr. Sorf filed a Motion to Set Aside the default judgment. (R. 104.)

The facts of this case clearly demonstrate that the default against Mr. Sorf was entered due to mistake, inadvertence, surprise and excusable neglect. Mr. Sorf did not see the District's Summons or Complaint prior to default being entered. Since he had not been personally served, Mr. Sorf had no reason to believe a default judgment could be entered against him. Based on written and verbal communications from the District, Mr. Sorf was led to believe that the District wanted to discuss an amicable resolution prior to serving him with the complaint. Mr. Sorf mistakenly believed that he had an opportunity

to engage in settlement discussions with the District prior to a legal action being filed. As soon as Mr. Sorf became aware of the default judgment, he retained legal counsel and promptly initiated efforts to set aside the default aside.

The events of this case are analogous to *Lund v. Brown*, 11 P.3d 277 (Utah 2000). In *Lund*, Kurtis Lund and B&B Drywall failed to respond to Brown's counterclaim and thus, default was entered. Lund and B&B argued that the default "should be vacated under the 'mistake, inadvertence, surprise, or excusable neglect' prong of rule 60 because they believed the[ir] bankruptcy case stayed any further actions regarding their complaint or the counterclaim." *Id.* at 279. Brown countered that the bankruptcy stay did not apply to the counterclaim and did not prohibit a declaratory judgment. The trial court explained that while Lund and B&B were mistaken in their understanding of the bankruptcy stay, they had shown "reasonable justification or excuse" for their failure to reply to the counterclaim. Accordingly, the trial court's decision denying Lunds' motion to vacate the default judgment was reversed.

For rule 60(b) purposes, it is enough to state that there is substantial support for Lund's and B&B's interpretation of bankruptcy law. In other words, under rule 60(b), Lund and B&B need not show that their interpretation of bankruptcy law is legally correct, but merely that they possessed a reasonable, good faith belief that the bankruptcy stay was effective against the Browns' counterclaim.

Id. at 280 (emphasis added.)

Just like in *Lund*, Mr. Sorf had a reasonable, good faith belief that a judgment would not be entered against him. Mr. Sorf did not believe that a lawsuit had been filed and thus, did not understand how a default judgment could be entered. Written and

verbal communications with the District's counsel provided substantial support for Mr. Sorf's belief that the District was negotiating an amicable resolution of the dispute before filing suit. The fact that Mr. Sorf's belief was ultimately incorrect is of no significance. Mr. Sorf's mistaken belief was reasonable and made in good faith. In hindsight, one can say that Mr. Sorf should have done things differently. However, that is exactly why Rule 60(b) exists (i.e. to provide protection from the harsh effects of a default judgment that was entered due to a mistaken belief). Like in *Lund*, the circumstances in this matter warrant that Mr. Sorf be given his day in court. The trial court abused its discretion when it denied Mr. Sorf's Motion to Set Aside.

The trial court further abused its discretion when it denied Mr. Sorf's Motion to Set Aside because it failed to support the denial with adequate findings of fact. A court's ruling on a motion to set aside "must be 'based on adequate findings of fact' and 'on the law.'" *Lund*, 11 P.3d at 279 (citing *May*, 677 P.2d at 1110). In *Hernandez v. Baker*, 104 P.3d 664 (Utah App. 2004), the trial court entered default judgments against Baker and Performance Auto after they failed to file an answer to Hernandez' complaint. Baker and Performance Auto argued that the default should be set aside because it was entered against them through excusable neglect, that their motion to set aside was timely and that they had meritorious defenses to the action. *Id.* at 666. The trial court made a ruling as to whether meritorious defenses were present, but failed to address whether the motion to set aside was timely or whether sufficient explanation under Rule 60(b) had been given.

A court may 'relieve a party . . . from a final judgment' because of 'mistake, inadvertence, surprise, or excusable neglect.' *Utah R. Civ. P. 60(b)*. To obtain relief from a default judgment, a defendant must show: (i)

‘that the judgment was entered against him through excusable neglect (or any other reason specified in rule 60(b)).’ (ii) ‘that his motion to set aside the judgment was timely,’ and (iii) ‘that he has a meritorious defense to the action.’

Id. (citing *Erickson v. Schenkers Int’l Forwarders Inc.*, 882 P.2d 1147, 1148 (Utah 1994)(emphasis added.) On appeal, Baker argued that because the trial court did not make a ruling as to timeliness and grounds under Rule 60(b), the appellate court should simply assume the factors had been met. *Id.* The appellate court rejected Baker’s argument and remanded the case “to determine whether Baker satisfied the *rule 60(b)* reason [proffered] and the timeliness requirement.” *Id.* at 668. While Baker only asserted excusable neglect to explain his inactions, the appellate court pointed out that adequate findings of fact must be made as to “any . . . reason specified in rule 60(b).” *Id.* at 666.

Just like in *Hernandez*, the trial court’s denial of Mr. Sorf’s Motion to Set Aside was based on inadequate findings of fact. In his Motion to Set Aside, Mr. Sorf argued that default was entered against him due to “mistake, surprise, inadvertence **and** excusable neglect.” (R. 106-118 & R. 274-339)(emphasis added.) However, Judge Fratto only made a factual finding as to whether excusable neglect was present. Judge Fratto did not issue findings of fact with regard to mistake, surprise or inadvertence. (Hearing transcript at pp. 56-63, starting at R. 556.) As such, Judge Fratto did not fully address the reasons why default was entered against Mr. Sorf. At the relevant hearing, counsel for Mr. Sorf specifically asked Judge Fratto to make a determination as to whether mistake and/or inadvertence reasonably explained why default had been entered

against Mr. Sorf. Judge Fratto declined counsel's request. (Hearing transcript at pp. 59 & 62, starting at R. 556.) As such, no findings of fact were made as to mistake, surprise or inadvertence. Judge Fratto's actions were improper and an abuse of discretion. Judge Fratto had a duty to make findings and rulings as to all of the Rule 60(b) reasons proffered by Mr. Sorf. Since he did not, this matter must be remanded to the trial court to make findings and rulings as to whether the default judgment was entered against Mr. Sorf because of mistake, surprise or inadvertence. The trial court's denial of Mr. Sorf's Motion to Set Aside was an abuse of discretion.

2. Mr. Sorf Has Demonstrated Meritorious Defenses to the Underlying Action.

Rule 60(b) provides that "a court may in the furtherance of justice relieve a party . . . from a final judgment, order, or proceeding for . . . any . . . reason justifying relief from the operation of the judgment." Utah R. Civ. P. 60(b)(1)(6). Such relief is warranted when the moving party has demonstrated a "meritorious defense" to the underlying action.

We have held that relief from judgment requires a showing of a meritorious defense to a claim. The purpose of the meritorious defense rule is 'to prevent the necessity of judicial review of questions which, on the fact of the pleadings, are frivolous. The rule requires the party seeking to set aside a judgment to 'show' that he or she 'has a meritorious defense to the action.'

Lund, 11 P.3d 277, 283 (Utah 2000) (citing *Erickson v. Schenkers Int'l Forwarders Inc.*, 882 P.2d 1147, 1149 (Utah 1994).) In making an adequate showing of a meritorious defense, the "party need not actually prove its proposed defenses to meet this standard." *Id.* The party need only "present[] a clear and specific proffer of a defense that, if

proven, would preclude total or partial recovery by the claimant or counterclaimant”

Id.

The trial court’s denial of Mr. Sorf’s Motion to Set Aside was based, in part, on the assumption that the “defenses proffered by [Mr. Sorf] to [the District’s] Complaint **are not meritorious as a matter of law**” (R. 353)(emphasis added.) The trial court’s assumption was an abuse of discretion because Mr. Sorf did actually assert several meritorious defenses. In fact, the existence of meritorious defenses was contemplated by Judge Fratto during a hearing on May 12, 2011. The May 12 hearing took place after Mr. Sorf’s Motion to Set Aside had been denied. At the May 12 hearing, contrary to what is stated in the Order, Judge Fratto stated that no consideration of defenses had been done and that no determination as to the merits of Mr. Sorf’s defenses made. (See Hearing Transcript at p. 30 & 31, starting at R 558.) If the trial court had properly considered Mr. Sorf’s defenses, it would have quickly recognized their merits. Mr. Sorf has asserted multiple meritorious defenses. Therefore, it was an abuse of discretion to deny his Motion to Set Aside the Default Judgment.

Mr. Sorf’s proposed Answer, satisfied the meritorious defense requirement because, if proven, would have precluded recovery by the District. Below is a detailed analysis of the valid meritorious defenses asserted by Mr. Sorf.

a. *The District’s Regulations Exceed the Express Language of the Easement.*

Mr. Sorf’s first affirmative defense in his proposed Answer was that the District’s restrictions and regulations for use of the SLA easement far exceed the express language

and the intended use of the easement. (R. 125.) Utah law provides that the rights founded on an easement created by a deed are limited to the uses and extent fixed by the instrument. *See Gillmore v. Macey*, 2005 UT App. 351. Utah law further provides that “an easement holder has the right to make incidental uses beyond the express easement . . . if those uses are made in a reasonable manner and they do not cause unnecessary injury to the servient owners.” *Conatser v. Johnson*, 2008 UT 48, ¶ 21.

In this case, the deed conveying the SLA easement explicitly limits the easement to: “. . . a perpetual easement to construct, reconstruct, operate and maintain a pipeline or pipelines on, over and across” (Ex. 3 attached to complaint.) The default judgment entered against Mr. Sorf permits the District to exercise rights not granted, or even contemplated, by the easement. Specifically, the default judgment ordered Mr. Sorf to remove multiple improvements, modify soil levels, and install large gates that serve to provide the District with access to Mr. Sorf’s property. (R. 97-99.) After default was entered, the District created a “Proposed Plan of Action” which provided, among other things, that the District would, on Mr. Sorf’s property, relocate trees, disconnect utilities from a barn, move the barn, add fill material on south side, grade the land, remove a retaining wall, shed, water feature, rock wall, fill material, concrete pad, utility crossing, gazebo, hot tub, deck and garden boxes and then send invoices for costs to Mr. Sorf. (R. 399.) The SLA easement does not prohibit Mr. Sorf, or any other landowner, from installing improvements nor does it authorize the District to compel the removal of improvements. As such, it is Mr. Sorf’s position that the authority granted through the default judgment dramatically exceeds the express language of the easement.

If the regulations being imposed by the District as a result of the default judgment exceed the express language of the easement, the District's right to recovery would be limited and/or destroyed. As such, the first affirmative defense in Mr. Sorf's proposed Answer is meritorious.

b. *The Easement Has Been at Least Partially Abandoned by the District.*

Mr. Sorf has asserted meritorious defenses concerning the District's abandonment of the SLA easement. (See R. 125-134 at Affirmative Defenses 3 & 4.) According to *Lunt v. Lance*, 2008 UT App. 192, it is the role of court to decide if an easement has been abandoned. In *Lunt*, the court held that a "history of non-use, coupled with an act or omission showing a clear intent to abandon" is sufficient to show abandonment. *Id.* at ¶25. In *Lunt*, the Court of Appeals affirmed a trial court's decision that there was a partial abandonment of an easement because of a portion of the easement had not been used within the past twenty years, a gate had been constructed blocking that portion of the easement from being used, and Lunt had acquiesced in the closure by never taking any action to object. *Id.* at ¶¶ 27-29.

Just like in *Lunt*, the District's lack of activity for the past several decades in conjunction with the easement constitutes an abandonment. The easement at issue has been in place since 1942. Between 1942 and 2010, homes, patios, sheds, trees, swimming pools, tennis courts, etc. were allowed to be erected on the easement. Now suddenly, without there being any change in the easement language, the District is claiming that homeowners cannot have any physical structures on the easement and that

the District can restrict all improvements to the easement area. The District's right to restrict surface improvements was abandoned by the inaction of the last 64 years in permitting permanent physical structures to be built on the easement. As such, there is a strong likelihood that principals of abandonment would meritoriously defend against the District's allegations.

c. Equitable Estoppel

Mr. Sorf has also asserted meritorious defenses concerning equitable estoppel. (See R. 125-134 at Affirmative Defense 5 & 6.) Utah courts have stated the equitable estoppel is applicable to governmental entities "in unusual circumstances where it is plain that the interests of justice so require." *Eldredge v. Utah State Retirement Bd.*, 795 P.2d 671, 675 (Utah App. 1990)(citations omitted.) The *Eldredge* court further commented that "the critical inquiry is whether it appears that the facts may be found with such certainty, and the injustice to be suffered is of sufficient gravity, to invoke the exception." *Id.* (citations omitted.)

Equitable estoppel is applicable to this case because the facts establish with certainty that Mr. Sorf relied upon statements from the District's employees that his landscaping was appropriate. Mr. Sorf will suffer significant financial and physical loss if the District is permitted to tear apart his backyard. "Where a public official, acting, within his authority and with knowledge of the pertinent facts, has made a commitment and the party to whom it was made has acted to his detriment in reliance on that commitment, the official should not be permitted to revoke that commitment." *Id.* at 676 (citation omitted.)

In *Eldredge*, the Utah State Retirement Board had authority to set up the plaintiff's retirement and grant him prior service credit. Because the plaintiff relied thereon to his substantial detriment, the *Eldredge* court held that the Board could not disavow its representations. *Id.* at 676. Similarly, Mr. Sorf relied upon the representations of District employees concerning the placement of his landscaping. Further, for more than sixty years, the District and/or its predecessors-in-interest allowed Mr. Sorf and other adjoining landowners to install houses, patios, concrete pads, sheds, pools, trees and other improvements on the easement. Since use restrictions had not been imposed in the past, it was reasonable for Mr. Sorf to believe that his recent landscaping improvements were appropriate. To this date, large tree, buildings, houses and other structures dot the SLA easement throughout the Salt Lake Valley. Moreover, the District did not instruct Mr. Sorf to stop landscaping until approximately two days prior to completion. District's employees led Mr. Sorf to believe that his landscaping was not a threat to the SLA pipeline. Mr. Sorf relied upon the District's verbal assurances in completing his landscaping. As such, there is a strong likelihood that principals of equitable estoppel would meritoriously defend against the District's allegations.

This case has critical financial and personal implication on Mr. Sorf. This is not a matter that should be decided pursuant to a default judgment entered on a technicality concerning service of process. The District's allegations need to be considered, analyzed and resolved on the merits. The trial court failed to consider the multiple meritorious defenses that Mr. Sorf set forth in this matter. The trial court abused its discretion when it denied Mr. Sorf's Motion to Set Aside.

B. THE TRIAL COURT ERRED IN DENYING MR. SORF'S MOTION FOR LEAVE TO FILE A COUNTERCLAIM.

The trial court erred in denying Mr. Sorf's Motion for Leave to file a counterclaim. A trial court's ruling on a motion for leave is a question of law that is reviewed for correctness with no clear deference given to the trial court. *See Harmon*, 910 P.2d at 1199. When a counterclaim matures or is acquired after initial pleadings, the counterclaim can be presented through supplemental pleading with permission of the court. "A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading." Utah R. Civ. P. 13(d). Mr. Sorf's counterclaim for inverse condemnation was not acquired until after the default judgment was entered and finalized with denial of the Motion to Set Aside. Mr. Sorf's claim for inverse condemnation is dependent on the existence of a taking. A taking did not occur in this case until the District's rights and authorities over Mr. Sorf's property were determined and finalized as set forth in the Order dated March 17, 2011. The trial court's denial of Mr. Sorf's Motion for Leave was incorrect and thus, should be overturned.

1. For Purposes of Inverse Condemnation, There Was No Taking of Mr. Sorf's Property Until the Default Judgment Was Finalized.

Article I, Section 22 of the Utah Constitution provides, "Private property shall not be taken or damaged for public use without just compensation." If private property is "taken or damaged for public use without a formal exercise of the eminent domain power, the property owner may bring an inverse condemnation action . . . to recover the

value of the property.” *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241, 1243 (Utah, 1990). An inverse condemnation action requires the showing of three elements: (1) property, (2) a taking or damages, and (3) a public use. *Id.*

The first element of an inverse condemnation action is clearly satisfied in this case. Considering the nature of eligible property in relation to an inverse condemnation claim, the Utah Supreme Court has stated, “The kinds of property subject to the [eminent domain] right . . . is practically unlimited.” *Id.* Property “includes, but is not limited to, land and improvements subject to the substantive law of real property.” *Id.* The property at issue in this case is the land and residence owned by Mr. Sorf at 9625 South Mt. Jordan Road in Sandy, Utah. (R. 457 at ¶ 1.) Mr. Sorf’s land and residence are referred to as “Defendant’s Property” in the default judgment. (*See generally* R. 456-458.) The District, by and through counsel, drafted the terms of the default judgment. As such, the parties have recognized, and there is no dispute, that private property is at issue.

It is also clearly obvious that the District’s actions are for a “public use” and thus, the third element of an inverse condemnation claim is satisfied. In *Farmers* the Utah Supreme Court stated that, “It is universally conceded that the government has the power to take private property in the interest of the public health and safety.” 803 P.2d at 1245. The easement rights being claimed by the District in this case relate directly to the existence and operation of the SLA. In filing a complaint, the District sought to have its rights under the SLA easement defined for the benefit of the public.

The final element of Mr. Sorf’s inverse condemnation claim (i.e. the taking or damages) was acquired when the default judgment was finalized with denial of the

Motion to Set Aside. The default judgment defined the District's rights and authorities in relation to Mr. Sorf's property, including the right and power to remove improvements. (R. 456 at ¶ 1.) The default judgment gives the District the power to demand Mr. Sorf permanently remove various structures and items from his property including, but not limited to, a rock retaining wall, added fill material, a gazebo, a hot tub, two outbuildings, trees and water features. (R. 456 at ¶ 1.) The default judgment demands that once the improvements are removed, Mr. Sorf must also "return adequate soils and fills (2' to 3' in depth) on the south portion of [his] property traversed by the SLA." (R. 457 at ¶ 1(b).) Further, the default judgment requires Mr. Sorf to install "access gates with openings not less than 12 feet in width on the north and south property lines" so that the District "has access to the SLA corridor at all times." (R. 457 at ¶ 1(f).) If Mr. Sorf desires to lock the access gate, he has to make "arrangements acceptable to [the District]" and "allow [the District] to place their own lock." (R. 457 at ¶ 1(f).) If Mr. Sorf does not fully abide by the terms of the default judgment, the District may remove the described encroachments and seek costs from Mr. Sorf. (R. 458 at ¶ 2.) Mr. Sorf is not allowed to make any subsequent improvements to his property without the prior approval of the District.

The District's rights as established by the default judgment dramatically extend beyond anything ever contemplated by the original easement. The terms of the default judgment mirror the extensive rules and regulations that were unilaterally created by the District after the easement was granted. When the easement was initially granted, the District had unimproved and barren land. Now, 60 years later, the District is in essence strangling homeowners with rules prohibiting all use of the easement area. Even though

the District abandoned the portion of the easement concerning Mr. Sorf's house, the District is still restricting all use of Mr. Sorf's property and all subsequent owner's use of the property.

Neither the original easement nor the District's complaint contemplated any sort of "Cooperation Agreement." Nonetheless, the District included in the default judgment the requirement that Mr. Sorf enter into such an agreement. The Cooperation Agreement proposed by the District imposes yet further restrictions and requirements on Mr. Sorf's use of his property. (R. 460-470.) The Cooperation Agreement gives the District the discretion to set construction standards on the development of improvements and to define how improvements are maintained. (R. 463-464.) The Cooperation Agreement can be terminated by either party for any reason at any time. (R. 466.) The Cooperation Agreement must be renewed every five years, but renewal is left to the discretion of the District. (R. 461.) There is no guarantee that the agreement will be renewed. At a maximum, the Cooperation Agreement is good for 15 years. (R. 461.) There is no clear explanation in the agreement as to what happens at the end of the 15 years. However, the agreement does explicitly state that upon expiration of its terms, Mr. Sorf's right of use "shall expire completely." (R. 461.) Accordingly, the agreement implies that Mr. Sorf's right to use will abruptly end 15 years after signing the Cooperation Agreement, if not sooner. Such restrictions are imposed on Mr. Sorf without any just compensation.

The SLA easement encompasses the majority of Mr. Sorf's property behind his home. (R. 432.) In light of the magnitude of rights and authorities provided to the District in the default judgment, Mr. Sorf is deprived of all useful purpose of his

backyard. Mr. Sorf has to permanently remove all of the landscaping and structures that he paid for and that were created for his enjoyment. Any future use of Mr. Sorf's backyard is left to the discretion and restriction of the District.

Any rights given to Mr. Sorf for non-district use of the SLA corridor are non-assignable and non-transferable. (R. 468.) Further, the District is under no obligation and there is no guarantee that the District will grant non-district use rights to a subsequent owner of Mr. Sorf's home. (R. 468.) Therefore, Mr. Sorf's ability to sell his home has been dramatically diminished, if not completely destroyed, as a result of the default judgment. No reasonable buyer will purchase a home that is subject to the extreme use regulations imposed by the default judgment and Cooperation Agreement.

In summary, the default judgment and Cooperation Agreement demand Mr. Sorf to remove, at his expense, extensive landscaping and multiple physical structures that Mr. Sorf personally paid for and that have been in place for years. Additionally, Mr. Sorf must enter a Cooperation Agreement giving the District further authority to regulate and restrict the usage of his property. The injuries imposed by the default judgment are physical in nature, permanent and continuous. The terms of the default judgment as applied to Mr. Sorf constitutes a taking sufficient to satisfy the second element of an inverse condemnation action.

2. Mr. Sorf's Inverse Condemnation Claim Did Not Ripen Until the Default Judgment Was Finalized With Denial of the Motion to Set Aside.

Asserting a claim for inverse condemnation prior to finalization of the default judgment would have been premature. The Utah Supreme Court has stated that inverse

condemnation actions are proper **after** a taking has occurred. “In Utah, the appropriate **post-taking remedy** is an inverse condemnation action” *Patterson v. American Fork City*, 67 P.3d 466, 477 (Utah 2003) (emphasis added). Multiple courts outside of Utah have directly addressed the issue of when an inverse condemnation claim becomes ripe. Such courts have consistently held that there must be a final determination as to governmental rights before a taking has occurred and before an inverse condemnation claim can be asserted.

In *Droste v. Board of County Commissioners of the County of Pitkin*, 85 P.3d 585 (Colo. App. 2003), plaintiffs owned 926 acres of land in Pitkin County. In 1974, Pitkin County adopted a zoning resolution that allowed development of single family residences on plaintiff’s property. In 1975, Pitkin County established a permit system for new development in natural resource areas. In 1996, plaintiffs sold a conservation easement on the property to Pitkin County. In 1999, plaintiffs sold another conservation easement to Snowmass Village and Pitkin County. In 2000, plaintiffs filed an application to build a 15,000 square foot family residence on their property. Following hearings, the county denied the application. The Pitkin County Board of Commissioners determined that the denial did not constitute a taking. Plaintiffs filed suit and argued that the provision vesting the County Board of Commissioners with the authority to make takings determinations was unconstitutional and thus, the determination was void. In analyzing this issue, the court held:

Under the ripeness doctrine, courts usually do not consider disputes involving uncertain or contingent future matters. A taking claim is ripe if the government entity charged with implementing the regulations has

reached a **final** decision regarding the application of the regulations to the property at issue and **determination whether a taking has occurred cannot be made until a court knows the extent of permitted development on the land in question An inverse condemnation claim based on assertions that government regulations constitute a taking is not ripe until a final determination has been made concerning the uses to which the property may be put.**

Id. at 591 (citations omitted)(emphasis added.)

Further, in *Williams v. City of Central*, 907 P.2d 701 (Colo. App. 1995), the plaintiff asserted claims for regulatory taking and inverse condemnation arising from a moratorium on development imposed by Central City on its gaming district. Plaintiff alleged that the moratorium preventing him from repairing or rebuilding his property (i.e. the Belvidere Theatre) and thus, resulting in a compensable taking. The trial court concluded that the inverse condemnation claim was not ripe. The appellate court affirmed the trial court decision and explained:

A claim for inverse condemnation alleging that the government has executed a permanent regulatory taking is not ripe until a final decision has been made as to the uses to which the property may be put. *Wilkinson v. Board of County Commissioners*, 872 P.2d 1269 (Colo. App. 1993); *Reale Investments, Inc. v. City of Colorado Springs*, 856 P.2d 91, 94 (Colo. App. 1993) (a "court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes"). Williams does not dispute that the moratorium has been repealed. Neither does he assert that he has been denied a permit to conduct any economically viable activity at the Belvidere Theater. Therefore, his claim for inverse condemnation, to the extent that it is based on a permanent regulatory taking, is not ripe for review.

Id. at 708 (emphasis added).

Finalization of the default judgment resulted in the ripening of Mr. Sorf's inverse condemnation claim. The default judgment constitutes a "final decision" as to the

authority the District has over Mr. Sorf's property. Prior to finalization of the default judgment, the District's rights had not been defined and thus, there was no way to determine if the District's authority went too far as to constitute a taking. If the district court had set aside the default judgment, then the determination of the District's rights to Mr. Sorf's property would still be at issue and there would be no taking. Mr. Sorf's inverse condemnation claim was not ripe until the default judgment defined the uses to which his property can, and more importantly cannot, be put. Raising an inverse condemnation claim prior to entry of and finalization of the default judgment would have been premature.

3. Mr. Sorf's Claims Against the District Are After-Acquired Counterclaims, Not Compulsory Counterclaims.

Mr. Sorf should not be stripped of his fundamental rights to seek redress of an injury simply because default was entered on earlier issues. Mr. Sorf's claims for inverse condemnation are separate and subsequent to the issues addressed in the default and did not mature until default was finalized with denial of the Motion to Set Aside. Mr. Sorf's claims for inverse condemnation do not question the matters decided in the default but rather look at the implications of the regulations imposed on his property as a result thereof. The trial court's denial of the Motion for Leave stripped Mr. Sorf of the right to assert a claim that was not even acquired until the default was finalized. Such implications are fundamentally unfair.

The impact of the default judgment simply cannot be that Mr. Sorf has lost his claims for inverse condemnation. The inverse condemnation claims did not mature until

the default was finalized with denial of the Motion to Set Aside. Accordingly, after the court denied the Motion to Set Aside, it was entirely proper for Mr. Sorf to move for leave to file a counterclaim that arises out of the same facts, that concerns the same parties, and that was acquired as a result of the default judgment. The procedural steps taken by Mr. Sorf following the default judgment are essentially the same steps that would have been taken had an answer been filed, the District's complaint considered on the merits, and a decision entered ruling that the District's regulations were enforceable. In such a situation, the Court's decision enforcing the rules and regulations would have constituted a taking for purposes of an inverse condemnation claim. At that point, Mr. Sorf would have requested leave to file an inverse condemnation counterclaim. The fact that default was entered on the District's complaint rather than a decision on the merits should have no impact on what happens next (i.e. that Mr. Sorf requests leave to file an inverse condemnation counterclaim).

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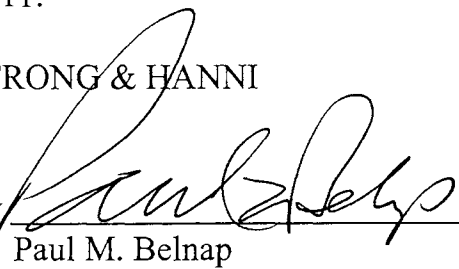
CONCLUSION

For the reasons set forth above, Mr. Sorf respectfully requests that the decisions of the trial court denying his Motion to Set Aside and Motion for Leave to File an After-Acquired Counterclaim be reversed.

DATED this 18 day of November, 2011.

STRONG & HANNI

By


Paul M. Belnap

Bradley Wm. Bowen

Jennifer R. Carrizal

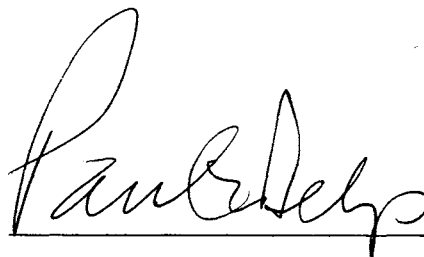
Attorneys for Appellant Zdenek Sorf

CERTIFICATE OF SERVICE

I hereby certify that on this 18 day of November, 2011, two true and correct copies of the foregoing APPELLANT'S BRIEF and a copy of this Certificate of Service were served by the method indicated below to the following:

Shawn E. Draney
Scott H. Martin
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P. O. Box 45000
Salt Lake City, UT 84145
Attorneys for Plaintiff/Appellee

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile



ADDENDUM

Addendum No. 1: Utah Rule of Civil Procedure 60

Addendum No. 2: Utah Rule of Civil Procedure 13

Addendum No. 3: Order Denying Mr. Sorf's Motion to Set Aside the Default Judgment

Addendum No. 4: Order Denying Mr. Sorf's Motion for Leave to File Counterclaim

ADDENDUM “1”



18 of 47 DOCUMENTS

UTAH COURT RULES ANNOTATED
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*** Current through rules effective as of November 1, 2011. ***
*** Annotations current through September 1, 2011. ***

STATE RULES
UTAH RULES OF CIVIL PROCEDURE
PART VII. JUDGMENT

URCP Rule 60 (2011)

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) the judgment is void; (5) 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 (6) 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), or (3), 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.

HISTORY: Amended effective April 1, 1998

NOTES: Advisory Committee Note. -- The 1998 amendment eliminates as grounds for a motion the following: "(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." This basis for a motion is not found in the federal rule. The committee concluded the clause was ambiguous and possibly in conflict with rules permitting service by means other than personal service.

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

ADDENDUM “2”



9 of 96 DOCUMENTS

UTAH COURT RULES ANNOTATED
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*** Current through rules effective as of November 1, 2011. ***
*** Annotations current through September 1, 2011.***

STATE RULES
UTAH RULES OF CIVIL PROCEDURE
PART III. PLEADINGS, MOTIONS, AND ORDERS

URCP Rule 13 (2011)

Rule 13. Counterclaim and cross-claim

(a) *Compulsory counterclaims.* -- A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject-matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(b) *Permissive counterclaim.* -- A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject-matter of the opposing party's claim.

(c) *Counterclaim exceeding opposing claim.* -- A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) *Counterclaim maturing or acquired after pleading.* -- A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(e) *Omitted counterclaim.* -- When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(f) *Cross-claim against co-party.* -- A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject-matter either of the original action or of a counterclaim therein or relating to any property that is the subject-matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(g) *Additional parties may be brought in.* -- When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained.

(h) *Separate judgments.* -- Judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b), even if the claims of the opposing party have been dismissed or otherwise disposed of.

(i) *Cross demands not affected by assignment or death.* -- When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other, except as provided in Subdivision (j) of this rule.

(j) *Claims against assignee.* -- Except as otherwise provided by law as to negotiable instruments and assignments of accounts receivable, any claim, counterclaim, or cross-claim which could have been asserted against an assignor at the time of or before notice of such assignment, may be asserted against his assignee, to the extent that such claim, counterclaim, or cross-claim does not exceed recovery upon the claim of the assignee.

HISTORY: Amended effective November 1, 2001

NOTES: Compiler's Notes. -- Subdivisions (a) to (h) of this rule are substantially similar to *Rule 13, F.R.C.P.*

ADDENDUM “3”

MAR 17 2011

By Donut Clerk

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

Judge Joseph C. Fratto, Jr.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Based on the written submissions of the parties and oral argument presented, the Court orders as follows:

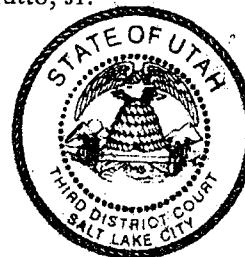
1. Based on the Court's finding that Defendant was properly served with the Complaint and Summons, that Defendant has not made an adequate showing of excusable neglect, mistake, or inadvertence in his failure to respond to the Complaint, and that those defenses proffered by Defendant to Plaintiff's Complaint are not meritorious as a matter of law under the circumstances given Plaintiff's defined easement, its prior federal ownership, and Plaintiff's status as a political subdivision of the state, the Court hereby denies Defendant's Motion.

2. The Default Judgment entered December 13, 2010 by this Court remains in full force and effect.

SO ORDERED this 17 day of March, 2011.

BY THE COURT:

Honorable Joseph C. Fratto, Jr.
District Court Judge



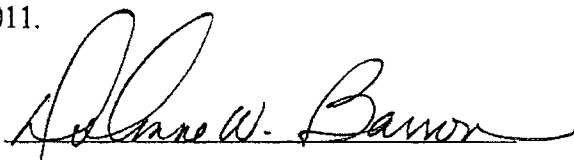
CERTIFICATE OF SERVICE

I state that I served the attached [PROPOSED] ORDER DENYING DEFENDANT'S
MOTION TO SET ASIDE DEFAULT JUDGMENT upon the party listed below by placing a
true and correct copy thereof in an envelope and causing the same to be mailed via first class

U.S. Mail to:

Paul Belnap
Bradley Wm. Bowen
Casey W. Jones
Strong & Hanni
3 Triad Center, Suite 500
Salt Lake City, Utah 84111
Attorneys for Zdenek Sorf

DATED this 16th day of March, 2011.



16002-62 1687687v1

ADDENDUM “4”

FILED DISTRICT COURT
Third Judicial District

MAY 17 2011

By _____
SALT LAKE COUNTY
Deputy Clerk

SHAWN E. DRANEY (4026)
SCOTT H. MARTIN (7750)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000
Facsimile: (801) 363-0400
Attorneys for Plaintiff

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

METROPOLITAN WATER DISTRICT
OF SALT LAKE & SANDY,

Plaintiff,

v.

ZDENEK SORF,

Defendant.

[PROPOSED] ORDER DENYING
DEFENDANT'S MOTION FOR LEAVE
TO FILE COUNTERCLAIM

Civil No. 100921025

Judge Joseph C. Fratto, Jr.

Defendant's Motion for Leave to File Counterclaim ("Motion") came before the Court on
May 9, 2011 at 2:00 p.m.

Defendant Zdenek Sorf appeared through counsel, Paul M. Belnap and Bradley Bowen.

Plaintiff Metropolitan Water District of Salt Lake & Sandy appeared through counsel,
Shawn E. Draney and Scott H. Martin.

Based on the written submissions of the parties and oral argument presented, the Court orders as follows:

Based on the Court's finding that URCP, Rule 13(d) does not allow for leave to file a post-judgment counterclaim absent an order of the Court reopening of the judgment, the Court hereby denies Defendant's Motion.

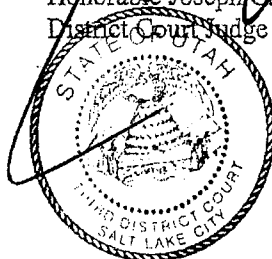
SO ORDERED this 17 day of May, 2011.

BY THE COURT

Honorable Joseph C. Fratto, Jr.
District Court Judge

Approved as to Form

Paul M. Belnap
Counsel for Defendant

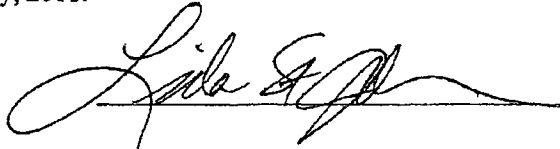


CERTIFICATE OF SERVICE

I state that I served the attached **[PROPOSED] ORDER DENYING DEFENDANT'S
MOTION FOR LEAVE TO FILE COUNTERCLAIM** upon the party listed below by placing
a true and correct copy thereof in an envelope and causing the same to be mailed via first class
U.S. Mail, and by courtesy e-mail to:

Paul Belnap
Bradley Wm. Bowen
Casey W. Jones
Strong & Hanni
3 Triad Center, Suite 500
Salt Lake City, Utah 84111
Attorneys for Zdenek Sorf

DATED this 10th day of May, 2011.

A handwritten signature in cursive script, appearing to read "Lila G. P.", written over a horizontal line.

16002-62 1745881v1