

2015

Utah Central Credit Union, Plaintiff/Appellee vs. Steven H. Larsen, Defendant/Appellant

Utah Court of Appeals

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Case No. 20150395

IN THE
UTAH COURT OF APPEALS

UTAH CENTRAL CREDIT UNION,
Plaintiff/Appellee

vs.

STEVEN H. LARSEN,
Defendant/Appellant

Oral Argument Requested

Brief of Appellant

Defendant appeals from the final judgment, and the underlying orders and rulings giving rise to that judgment, entered in the Fourth District Court, Utah County, American Fork Department, Case No. 140100216, the Honorable Thomas Low presiding

JOSEPH A. SKINNER (10832)
**SCALLEY READING BATES HANSEN
& RASMUSSEN**
15 West South Temple, Suite 600
Salt Lake City, Utah 84147
Telephone: (801) 531-7870
Facsimile: (801) 326-4669
joseph@scalleyreading.net
Attorney for Plaintiff/Appellee

ROBERT T. SPJUTE, ESQ. (13866)
JARED S. HYDE, ESQ. (15638)
SHUMWAY VAN
8 East Broadway, Suite 550
Salt Lake City, Utah 84111
Phone: (801) 478-8080
Fax: (801) 478-8088
tee@shumwayvan.com
jared@shumwayvan.com
Attorney for Defendant/Appellant

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UTAH APPELLATE COURTS

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15 West South Temple, Suite 600
Salt Lake City, Utah 84147
Telephone: (801) 531-7870
Facsimile: (801) 326-4669
joseph@scalleyreading.net
Attorney for Plaintiff/Appellee

ROBERT T. SPJUTE, ESQ. (13866)
JARED S. HYDE, ESQ. (15638)
SHUMWAY VAN
8 East Broadway, Suite 550
Salt Lake City, Utah 84111
Phone: (801) 478-8080
Fax: (801) 478-8088
tee@shumwayvan.com
jared@shumwayvan.com
Attorney for Defendant/Appellant

LIST OF ALL PARTIES

Plaintiff/Appellee: Utah Central Credit Union, a division of Chartway Federal Credit Union.

Defendant/Appellant: Steven Larsen, in his individual capacity.

TABLE OF CONTENTS

LIST OF ALL PARTIES.....	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.....	iv
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE ISSUES & STANDARDS OF REVIEW	1
1. Did the trial court err by denying Appellant’s Motion to Set Aside Judgment where the judgment was entered at a hearing at which Appellant was not present because he was not adequately notified of the hearing at which judgment was entered against him, he received no actual notice of the hearing, and where appellant underwent surgery only three days before the hearing?.....	1
2. Did the trial court err by granting Appellee’s Motion for Summary Judgment where Appellant disputed the material facts regarding whether Appellant recorded a wrongful lien and whether Appellee’s wrongful lien claim violated the automatic stay imposed by Appellant’s bankruptcy, and such facts were improperly weighed by the trial court and evaluated in the light most favorable to Appellee as opposed to Appellant, the non-moving party?.....	1
3. Did the trial court err by entering an order declaring Appellant’s interest in real property void where Appellant was, at the time, the subject of a bankruptcy proceeding and was protected by an automatic stay?	2
DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES.....	2
STATEMENT OF THE CASE	5
STATEMENT OF THE FACTS	6
SUMMARY OF THE ARGUMENT	10
I. THE TRIAL COURT erred by denying appellant’s motion to set aside judgment because Appellant was not adequately notified of the hearing, had no actual notice of the hearing, and underwent surgery only three days before the hearing.....	10
II. THE TRIAL COURT Erred in granting appellee’s motion for summary judgment because appellant disputed the material facts that formed the basis of the motion for summary judgment.	11
III. THE TRIAL COURT ERRED BY ENTERING AN ORDER DECLARING APPELLANT’S INTEREST IN REAL PROPERTY VOID WHERE APPELLANT WAS, AT THE TIME, THE SUBJECT OF A BANKRUPTCY PROCEEDING AND WAS PROTECTED BY AN AUTOMATIC STAY.	11
ARGUMENT.....	13

I. THE TRIAL COURT erred by denying appellant’s motion to set aside judgment because Appellant was not adequately notified of the hearing, had no actual notice of the hearing, and underwent surgery only three days before the hearing.....	13
A. Appellant’s Failure to Attend the Wrongful Lien Hearing was Excusable Because Appellant was not Adequately Notified of the Hearing.	14
B. Appellant’s Failure to Attend the Wrongful Lien Hearing was Excusable Because he Lacked Actual Notice of the Hearing.	16
C. Appellant’s Failure to Attend the Wrongful Lien Hearing was Excusable Because Appellant Underwent Surgery Only Three Days before the Hearing.	17
II. THE TRIAL COURT Erred in granting appellee’s motion for summary judgment because appellant disputed the material facts that formed the basis of the motion for summary judgment.	18
A. Appellee was not the Record Interest Holder	18
B. The Court’s Ruling on the Wrongful Lien Claim was not an Issue of Fact for purposes of Summary Judgment.....	21
III. THE TRIAL COURT ERRED BY ENTERING AN ORDER DECLARING APPELLANT’S INTEREST IN REAL PROPERTY VOID WHERE APPELLANT WAS, AT THE TIME, THE SUBJECT OF A BANKRUPTCY PROCEEDING AND WAS PROTECTED BY AN AUTOMATIC STAY.	23
CONCLUSION	24
Certificate of Compliance With Rule 24(f)(1)	25
Proof of Service.....	26
ADDENDUM.....	a
RULING AND ORDER DENYING MOTION TO SET ASIDE	b
RULING AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT.....	c

TABLE OF AUTHORITIES

Cases

<i>Bear River Mut. Ins. Co. v. Williams</i> , 2006 UT App 500, P 15, 153 P.3d 798	22, 23
<i>Bish's Sheet Metal Co. v. Luras</i> , 11 Utah 2d 357, 359 (Utah 1961)	15
<i>Estate of Clements v. Summers</i> , 1998 Utah App. LEXIS 196 (Ut. Ct. Appeals, 1998)	17
<i>Lundahl v. Quinn</i> , 67 P.3d 1000, 1001–02 (Utah 2003)	11, 14, 21
<i>May v. Thompson</i> , 677 P.2d 1109 (Utah 1984)	15
<i>Nelson v. Jacobsen</i> , 669 P.2d 1207, 1213 (Utah 1913)	11, 14, 21
<i>Reeves v. Geigy Pharm., Div. of Ciba-Geigy Corp.</i> , 746 P.2d 636, 640 (Ut. Ct. App. 1988)	21
<i>Timm v. Dewsnup</i> , 851 P.2d 1178, 1181 (Utah 1993)	21
<i>Warren v. Dixon Ranch, Co.</i> , 123 Utah 416, 260 P.2d 741 (1953)	18
<i>Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, Inc.</i> , 544 P.2d 876 (Utah, 1975)	11, 14

Statutes

11 U.S.C § 362	12, 24
Utah Code Ann. § 38-9-102(3)	21
Utah Code Ann. § 38-9-203	12, 19

Rules

Rule 56(c)(1)(A) of the Utah Rules of Civil Procedure	21, 22
Rule 60(b)(1) and (6) of the Utah Rules of Civil Procedure	11, 14

JURISDICTIONAL STATEMENT

The Utah Supreme Court has original jurisdiction of this appeal pursuant to Utah Code Ann. § 78A-3-102(3)(j). On May 18, 2015, the Utah Supreme Court entered an order pursuant to Rule 42(a) of the Utah Rules of Appellate Procedure, transferring this matter to the Utah Court of Appeals for decision. The Utah Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j).

STATEMENT OF THE ISSUES & STANDARDS OF REVIEW

1. Did the trial court err by denying Appellant's Motion to Set Aside Judgment where the judgment was entered at a hearing at which Appellant was not present because he was not adequately notified of the hearing at which judgment was entered against him, he received no actual notice of the hearing, and where appellant underwent surgery only three days before the hearing?

Standard of Review: A trial court's denial of a Rule 60(b) motion to set aside judgment is reviewed for abuse of discretion. *Metro Water Dist. Of Salt Lake v. Sorf*, 2013 UT 27, ¶12 (Utah 2013).

See (R. 121–50) (preserving issue on appeal).

2. Did the trial court err by granting Appellee's Motion for Summary Judgment where Appellant disputed the material facts regarding whether Appellant recorded a wrongful lien and whether Appellee's wrongful lien claim violated the automatic stay imposed by Appellant's bankruptcy, and such facts were improperly weighed by the trial court and evaluated in the light most favorable to Appellee as opposed to Appellant, the

non-moving party?

Standard of Review: A trial court's entry of summary judgment is reviewed for correctness granting no deference to the trial court. *Menzies v. State*, 2014 UT 40, ¶30 (Utah 2014).

See (R. 291–339) (preserving issue on appeal).

3. Did the trial court err by entering an order declaring Appellant's interest in real property void where Appellant was, at the time, the subject of a bankruptcy proceeding and was protected by an automatic stay?

Standard of Review: A trial court's refusal to set aside a judgment based on a violation of the automatic stay is reviewed for abuse of discretion. *Surety Life Ins. Co. v. Rupp*, 833 P.2d 366, 369 (UT Ct. App. 1992).

See (R. 228–42, 301–04) (preserving issue on appeal).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES

Rule 60(b)(1) and (6), Utah Rules of Civil Procedure:

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; . . . (6) any other reason justifying relief from the operation of the judgment.

Rule 56(a), (c)(1), (c)(3), and (e)

Utah Rules of Civil Procedure:

(a) Motion for summary judgment or partial summary judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. The court should state on the record

the reasons for granting or denying the motion. The motion and memoranda must follow Rule 7 as supplemented below.

...

(c)(1) Supporting factual positions. A party asserting that a fact cannot be genuinely disputed or is genuinely disputed must support the assertion by:

(c)(1)(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(c)(1)(B) showing that the materials cited do not establish the absence or presence of a genuine dispute.

...

(c)(3) Materials not cited. The court need consider only the cited materials, but it may consider other materials in the record.

...

(e) Failing to properly support or address a fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by paragraph (c), the court may:

(e)(1) give an opportunity to properly support or address the fact;

(e)(2) consider the fact undisputed for purposes of the motion;

(e)(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the moving party is entitled to it; or

(e)(4) issue any other appropriate order.

Utah Code Ann. § 38-9-203(1) and (2):

(1) A lien claimant who records or causes a wrongful lien to be recorded in the office of the county recorder against real property is liable to a record interest holder for any actual damages proximately caused by the wrongful lien.

(2) If the person in violation of Subsection (1) refuses to release or correct the wrongful lien within 10 days from the date of written request from a record interest holder of the real property delivered personally or mailed to the last-known address of the lien claimant, the person is liable to that record interest holder for \$3,000 or for treble actual damages, whichever is greater, and for reasonable attorney fees and costs.

11 U.S.C. § 362 (a)(3)

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

...

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

STATEMENT OF THE CASE

Nature of the case, Course of Proceedings, and disposition below

This is a wrongful lien case in which the lien claimant was never given the opportunity to defend himself by presenting his case and having his evidence considered by the trial court. Appellant recorded a notice of interest in property after placing a bid on it in connection with a trustee's sale. Due to the trustee's failure to properly cry the sale, there was some confusion about who the highest bidder actually was. Appellee, who contends that it was the highest bidder at the sale, brought suit against Appellant based on a wrongful lien claim. The trial court held an expedited hearing, which Appellant was not properly notified of. Instead Appellant was told by the process server and the summons served on him that he had 30 days to respond to the papers being served on him. Therefore, Appellant, a pro se litigant, did not know about the hearing and did not attend the hearing. As a result an order was entered against him by default declaring his interest in the property void. Appellant moved to set aside the order, which the trial court denied. The trial court then entered summary judgment against Appellant based on its previous adjudication of the wrongful lien issue. However, because Appellant was never given the opportunity to present his evidence and have it properly considered below, Appellant now appeals the trial court's judgment and the underlying orders and rulings giving rise to that judgment.

STATEMENT OF THE FACTS

Background Facts

Appellant, who was the defendant in the underlying case, attempted to buy real property at a foreclosure sale. (R. 125). Despite having his agents go to the place designated for the sale, at the time designated for the sale, Appellant was unable to purchase the property at the foreclosure sale because the sale was not properly cried. (R. 125). Appellant then bid on the property by the only means available to him, which was placing a bid online on the day of the sale and then delivering payment to the office of the trustee through a process server on the next business day. (R. 125). Appellant then recorded his notice of interest in the property. (R. 10).

Service of Documents on Appellant

On August 6, 2014, the following documents were served on Appellant at his home in Idaho: (1) Summons, (2) Complaint, (3) Order Setting Matter for Hearing, (4) Order Declaring [Notice of Interest] Void Ab Initio, (5) Request for Hearing for Petition for Expedited Summary Relief, (6) Declaration of Real Interest Holder, (7) Memorandum in Support of Petition for Expedited Summary Relief, and (8) Petition for Expedited Summary Relief. (R. 96). Upon serving Appellant, the process server told Appellant that he had "30 days from today to answer." (R. 123). The Summons, which was on the top of the large pile of documents handed to Appellant, stated that Appellant had 30 days to respond. (R. 123). The documents regarding the expedited hearing had lines for the date

of the hearing but the lines were blank and the date of the hearing was not listed. (R. 123). Based on the foregoing, Appellant believed he had 30 days to respond. (R.123).

Appellant's Surgery

On August 11, 2014, only five days after being served, Appellant underwent stomach surgery, which was scheduled prior to Appellant's being served. (R. 123–24, 128–32). After surgery, Appellant was instructed to refrain from driving or putting pressure on his stomach area to avoid stressing his sutures. (R. 124, 132). Appellant was also given pain medication after his surgery which impaired his ability to drive. (R. 124).

Surprise Hearing

Unbeknownst to Appellant, on August 14, 2014, only three days after Appellant's surgery, the trial court held a wrongful lien hearing to determine whether Appellant's notice of interest was wrongful. (R. 99). Appellant received no actual notice of the hearing, (R. 123), and did not appear at the hearing. (R. 99). At the hearing, the trial court granted Appellee's proposed order declaring Appellant's notice of interest void ab initio. (R. 99). The trial court signed the aforementioned order on August 22, 2014.

Appellant's Motion to Set Aside Order

On August 25, 2014, 19 days after being served, Appellant called the court to see if a hearing would be held after he answered the complaint, and Appellant was informed that a hearing had already been held and an order entered against him by default. (R. 124). On August 28, 2014, only three days after learning that an order was entered against him, Appellant filed a Motion to Set Aside Judgment and Request for Hearing

(*“Motion to Set Aside”*) and an affidavit in support thereof (*“Affidavit in Support”*). (R. 121–50). Appellant’s Motion to Set Aside thoroughly set forth evidence in support of a finding of excusable neglect including, evidence regarding his being misled by the process server and lacking actual notice of the hearing and evidence regarding his surgery and the reasons his surgery prevented him from attending the hearing or otherwise entering an appearance. (R. 121–50). Despite his proffer of evidence, the court denied his motion and his request for a hearing, ignoring much of Appellant’s evidence and finding instead that Appellant’s “only basis for relief relies on his error in not reading the papers he was given.” (R. 223). The trial court’s order on this issue did not address Appellant’s evidence regarding his being misled by the process server, nor did it address Appellant’s evidence regarding his surgery. (R. 222–24).

Appellee’s Motion for Summary Judgment

On December 2, 2014, Appellee filed a Motion for Summary Judgment seeking \$3,000.00 in damages against Appellant for filing a wrongful lien. (R. 262–81). Appellant filed an opposition to the Motion for Summary Judgment re-stating the arguments he made earlier in his Motion to Set Aside, which arguments were not properly considered. (R. 289–339). Appellant specifically contended that UCCU “ignore[d] . . . the requirement for ‘crying the trustee sale’ or being there at the proper place and time, or make a legal opening bid.” (R. 294). In addition, Appellant previously supported these factual contentions in Appellant’s Affidavit in Support of the Motion to Set Aside. (R. 121–50). Specifically, Appellant made a sworn statement that the Trustee’s

sale was defective because the trustee did not cry the sale and “made no bid for the bank.” (R. 125). Appellant supported this sworn statement with a signed statement from two witness who were at the place designated for the Trustee’s sale and stated that “no one showed up to conduct or participate in the Trustee Sale.” (R. 135). Appellant also informed the court that he had requested the security camera footage from the Utah County Courthouse from the time of the sale. (R. 125, 147). Appellant contended that the security camera footage would show that the sale was never cried.

Notwithstanding, on February 5, 2015, Appellee’s Motion for Summary Judgment was granted over Appellant’s factual disputes. (R. 346–47). The Ruling states that “Defendant opposes the motion because he considers his lien to have not been wrongful. The lien has already been adjudicated, and it has been found to be unlawful.” (R. 347). The trial court’s Ruling does not make any other findings of facts regarding the merits of the wrongful lien issue. (R. 346–47).

Appellant’s Bankruptcy

Much of the foregoing happened while Appellant was the subject of an open bankruptcy proceeding and while Appellant was protected by a bankruptcy stay. Appellant filed a bankruptcy petition on March 4, 2010 giving rise to an automatic stay. (R. 249–58). While Appellant received a bankruptcy discharge on June 24, 2010, the case was reopened on November 19, 2012 reinstating the automatic stay. (R. 249–58). The case remained open until it was closed on October 6, 2014. (R. 249–58).

SUMMARY OF THE ARGUMENT

I. THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SET ASIDE JUDGMENT BECAUSE APPELLANT WAS NOT ADEQUATELY NOTIFIED OF THE HEARING, HAD NO ACTUAL NOTICE OF THE HEARING, AND UNDERWENT SURGERY ONLY THREE DAYS BEFORE THE HEARING.

Rule 60(b)(1) and (6) of the Utah Rules of Civil Procedure authorizes a court to grant a party relief from a final order for “mistake, inadvertence, surprise, or excusable neglect. . . [and] any other reason justifying relief from the operation of judgment.” “[C]ourts generally tend to favor granting relief from default judgments where there is any reasonable excuse,” because “the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them.” *Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, Inc.*, 544 P.2d 876 (Utah, 1975). Furthermore, “because of his lack of technical knowledge of law and procedure [a layman acting as his own attorney] should be accorded every consideration that may reasonably be indulged.” *Lundahl v. Quinn*, 67 P.3d 1000, 1001–02 (Utah 2003) (bracketed language in original) (quoting *Nelson v. Jacobsen*, 669 P.2d 1207, 1213 (Utah 1913)).

Here, Appellant did not know about the hearing at which the final order was entered but, instead, was informed by the process server that he had 30 days to respond. (R. 123) Also, Appellant underwent surgery only three days before the hearing and was physically unable to travel to the hearing even if he had known about it. (R. 123–24, 128–32). Therefore, acknowledging that Appellant was a pro se litigant, his absence was

excusable and the order entered against him due to his absence should have been set aside.

II. THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT BECAUSE APPELLANT DISPUTED THE MATERIAL FACTS THAT FORMED THE BASIS OF THE MOTION FOR SUMMARY JUDGMENT.

Summary Judgment was granted based on Utah Code Ann. § 38-9-203, which states that if (1) a lien claimant records a wrongful lien; (2) the record interest holder of the property that is the subject of the wrongful lien provides a written request that the lien claimant release or correct the lien within 10 days; and (3) the lien claimant refuses to release or correct the wrongful lien within 10 days from receiving a request to do so, then the lien claimant is liable to the record interest holder for \$3,000.00. Thus, for the trial court to enter summary judgment, the undisputed facts needed to establish all three of the foregoing elements as well as establish that Appellee was the record interest holder. Because factual disputes existed, the required elements were not established. Therefore, as is discussed below, the trial court erred in entering summary judgment.

III. THE TRIAL COURT ERRED BY ENTERING AN ORDER DECLARING APPELLANT'S INTEREST IN REAL PROPERTY VOID WHERE APPELLANT WAS, AT THE TIME, THE SUBJECT OF A BANKRUPTCY PROCEEDING AND WAS PROTECTED BY AN AUTOMATIC STAY.

Under 11 U.S.C § 362, a bankruptcy petition “operates as a stay, applicable to all entities, of . . . any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” Here, Appellant filed a bankruptcy petition on March 4, 2010 giving rise to an automatic stay. (R. 249–58).

While Appellant received a bankruptcy discharge on June 24, 2010, the case was reopened on November 19, 2012 reinstating the automatic stay. (R. 249–58). The case remained open until it was closed on October 6, 2014. (R. 249–58). Thus, at the time the trial court entered the Order Declaring Appellant’s Notice of Interest Void Ab Initio, the automatic stay was in place to protect Appellant. Because the Order of the trial court improperly extinguished his interest in real property or his claim to an interest in real property, the courts action constituted an “act to obtain possession of property of the estate . . . or to exercise control over property of the estate.” And, such action by the trial court and Appellee was a violation of the automatic stay. As such, the Order was invalid, should have been set aside, and should not have formed the basis of the trial court’s granting summary judgment.

ARGUMENT

Introduction

I. THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SET ASIDE JUDGMENT BECAUSE APPELLANT WAS NOT ADEQUATELY NOTIFIED OF THE HEARING, HAD NO ACTUAL NOTICE OF THE HEARING, AND UNDERWENT SURGERY ONLY THREE DAYS BEFORE THE HEARING.

Rule 60(b)(1) and (6) of the Utah Rules of Civil Procedure authorizes a court to grant a party relief from a final order for “mistake, inadvertence, surprise, or excusable neglect. . . [and] any other reason justifying relief from the operation of judgment.” “[C]ourts generally tend to favor granting relief from default judgments where there is any reasonable excuse,” because “the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them.” *Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, Inc.*, 544 P.2d 876 (Utah, 1975). Furthermore, “because of his lack of technical knowledge of law and procedure [a layman acting as his own attorney] should be accorded every consideration that may reasonably be indulged.” *Lundahl v. Quinn*, 67 P.3d 1000, 1001–02 (Utah 2003) (bracketed language in original) (quoting *Nelson v. Jacobsen*, 669 P.2d 1207, 1213 (Utah 1913)).

Here, Appellant did not know about the hearing at which the final order was entered but, instead, was informed by the process server that he had 30 days to respond. (R. 123). Also, Appellant underwent surgery only three days before the hearing and was physically unable to travel to the hearing even if he had known about it. (R. 123–24, 128–

32). Therefore, acknowledging that Appellant was a pro se litigant, his absence was excusable and the order entered against him due to his absence should have been set aside.

A. Appellant's Failure to Attend the Wrongful Lien Hearing was Excusable Because Appellant was not Adequately Notified of the Hearing.

While Appellant was served an Order Setting Motion for Hearing, service of process did not put him on notice of the hearing, but instead misled him to believe he had more time to respond. The Utah Supreme Court held that a “[d]efault judgment should not have been entered . . . where contradictions surrounding the adequacy of service of process and other factors result in a genuine mistake on part of defendant, in the absence of which the default would not have occurred.” *May v. Thompson*, 677 P.2d 1109 (Utah 1984). Furthermore, a party claiming and establishing a lack of due process of law “would be entitled to relief from a judgment.” *Bish’s Sheet Metal Co. v. Luras*, 11 Utah 2d 357, 359 (Utah 1961).

Here, Appellant was served an Order Setting Motion for Hearing at the same time he was served a Summons and Complaint. (R. 96). The Summons and Complaint were situated on top and the Order Setting Motion for Hearing was buried in the pile of documents. (R. 123). The Summons stated that Appellant had 30 days to respond to the Complaint. (R. 123). In addition, the process server told Appellant that he had 30 days to respond. (R. 123) Because, the process server’s statement was consistent with the statement on the first document received by Appellant, Appellant was justified in relying

on the process server's statement and believing that no response or appearance was required of him until 30 days after being served.

Furthermore, because the Summons referred to the Complaint which was below it in the pile of documents, Appellant had no reason to believe that any other documents in the pile would have a different deadline to respond. Appellant was justified in believing that the Summons, giving him 30 days, applied to all documents in the pile he was given. The very purpose of the summons is to put the Defendant on notice of his deadline to respond without requiring that he read the entire Complaint and corresponding documents to determine the applicable deadline to respond. Appellant was well within reason, believing he had 30 days to respond, to wait until after his surgery, scheduled for August 11, 2014 (5 days after being served), to review the documents more thoroughly and assess what needed to be done in response. Appellant, in fact, did this, and on August 25, 2014 he called the court to check on the status of the case and was surprised to learn that a hearing had already been held and an order entered against him. (R. 124).

Furthermore, Appellant was a pro se litigant and should have been given every consideration that could reasonably have been indulged. However, the trial court gave Appellant almost no consideration. First, Appellant requested a hearing on his Motion to Set Aside, but the trial court determined a hearing was not necessary. (R. 222). Second, the trial court's order denying Appellant's Motion to Set Aside, ignores much of Appellant's evidence. For example, the trial court ignored the fact that Appellant was misled by the process server and the summons informing him that he had 30 days to

respond as these facts were not mentioned in the court's order. (R. 222–24). The court also ignores the fact that Appellant had surgery only days before the hearing as this fact was also omitted in the court's order. (R. 222–24). Instead, the trial court inaccurately stated that “[Appellant's] only basis for relief relies on his error in not reading the papers he was given.” (R. 223). Thus, the trial court did not consider all of Appellant's evidence, nor did the trial court give him a fair opportunity to present his case and have his day in court.

Appellant was genuinely mistaken about the time in which he had to respond, and had the process server and the summons not stated that he was given 30 days, or had he been put on notice that an expedited hearing would be held, Appellant would have attended the hearing, presented his arguments and avoided an order being entered by default. Therefore, the trial court should have set aside the order.

B. Appellant's Failure to Attend the Wrongful Lien Hearing was Excusable Because he Lacked Actual Notice of the Hearing.

Whether a party receives actual notice of an action is a factor courts consider in determining whether excusable neglect exists. *See Estate of Clements v. Summers*, 1998 Utah App. LEXIS 196 (Ut. Ct. Appeals, 1998) (“[L]ack of notice of entry of judgment can be considered in determining whether there is good cause or excusable neglect.”) Here, although Appellant was served an Order Setting Motion for Hearing, Appellant contended below that the Order Setting Motion For Hearing served upon him did not contain dates. (R. 123). Furthermore, Appellant repeatedly contended in the trial court

that he did not know that a hearing was set. Therefore, Appellant's lack of actual notice as to the hearing weighs in favor of a finding of excusable neglect.

C. Appellant's Failure to Attend the Wrongful Lien Hearing was Excusable Because Appellant Underwent Surgery Only Three Days before the Hearing.

While, illness alone is not a sufficient excuse in failing to defend an action, it is sufficient if it prevents the party from taking steps to avoid a default judgment. See *Warren v. Dixon Ranch, Co.*, 123 Utah 416, 260 P.2d 741 (1953). While the Court in *Warren* did not set aside judgment based on illness, it is because the petitioner "neither described his illness nor explained how it wholly prevented him from taking the steps required to avoid a default judgment." *Id.* Here, to the contrary, Appellant did describe his illness and explained how it prevented him from avoiding default. (R. 121–50). First, Appellant was not merely ill, he underwent a serious surgery which required him to refrain from driving from Idaho, where he lives, to avoid straining his sutures and to allow his body to fully recover from surgery. (R. 124, 132). Appellant explained these physical constraints to the court in his Motion to Set Aside Judgment and further explained how driving post-surgery was not reasonably practicable. (R. 121–50). But, the trial court ignored these facts. Appellant's surgery, coupled with the fact that Appellant, a pro se litigant, had no actual notice of the hearing but was misled as to the time he had to respond, was sufficient for a finding of excusable neglect and the trial court abused its discretion in refusing to set aside the Order.

II. THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT BECAUSE APPELLANT DISPUTED THE MATERIAL FACTS THAT FORMED THE BASIS OF THE MOTION FOR SUMMARY JUDGMENT.

Summary Judgment was granted based on Utah Code Ann. § 38-9-203, which states that if (1) a lien claimant records a wrongful lien; (2) the record interest holder of the property that is the subject of the wrongful lien provides a written request that the lien claimant release or correct the lien within 10 days; and (3) the lien claimant refuses to release or correct the wrongful lien within 10 days from receiving a request to do so, then the lien claimant is liable to the record interest holder for \$3,000.00. Thus, for the trial court to enter summary judgment, the undisputed facts needed to establish all three of the foregoing elements as well as establish that Appellee was the record interest holder. Because factual disputes existed, the required elements were not established. Therefore, as is discussed below, the trial court erred in entering summary judgment.

A. Appellee was not the Record Interest Holder

The Trustee's Deed, upon which Appellee relies to show that it was the record interest holder is invalid because it states that UCCU became the owner of the subject property because UCCU was the high bidder at the Trustee's Sale. (R. 41–42). However, the validity of the Trustee's Deed was disputed by Appellant, and UCCU's ownership of the subject property was also otherwise disputed. Appellant's Opposition to Motion for Summary Judgment repeatedly asserts that Appellee was not the owner of the property. (R. 289–339). Appellant specifically contended that UCCU "ignore[d] . . . the requirement for 'crying the trustee sale' or being there at the proper place and time, or

make a legal opening bid.” (R. 294). Appellant thereby asserted that UCCU failed to make a legal opening bid. These assertions were supported by evidence that was before the trial court.

In Defendant’s Affidavit In Support of Motion to Set Aside Judgment, Defendant made a sworn statement that the Trustee’s sale was defective because the trustee did not cry the sale and “made no bid for the bank,” (R. 125), and supported this sworn statement with a signed statement from two witness who were at the place designated for the Trustee’s sale and stated that “no one showed up to conduct or participate in the Trustee Sale.” (R. 135). As further support for these factual assertions, Appellant informed the court that he had requested the security camera footage from the Utah County Courthouse from the time of the sale. (R. 125, 147). Appellant contended that the security camera footage would show that the sale was never cried. Therefore, even if the trial court determined that Appellant’s lien was wrongful because he did not properly bid at the trustee’s sale, Appellant was not liable to UCCU for any such wrongful lien because UCCU did not properly bid at the trustee’s sale and, therefore, could not have been the record interest holder at the time Appellant recorded his notice of interest. As such the notice of interest, even if wrongful, does not make Appellant liable to UCCU because UCCU was not, and still is not, the record interest holder. “Interest holder”, as defined in the statute, “means a person who holds or possesses a present, lawful property interest in certain real property, including an owner, title holder, mortgagee, trustee, or beneficial owner.” Utah Code Ann. § 38-9-102(3). Because UCCU did not properly bid at the

trustee's sale, the basis for UCCU's interest, or the trustee's deed to UCCU, was not valid. Therefore, UCCU was not the record interest holder.

While Appellant did not cite to the particular parts of materials in the record to support these factual positions as is required by Rule 56(c)(1)(A) of the Utah Rules of Civil Procedure, pursuant to Rules 56(c)(3) and 56(e) of the Utah Rules of Civil Procedure, the trial court could have considered other materials in the record not specifically cited. Rule 56 of the Utah Rules of Civil Procedure allows trial courts to use their discretion to consider other facts in the record that are not specifically cited to. Because summary judgment is "a drastic remedy", see *Timm v. Dewsnup*, 851 P.2d 1178, 1181 (Utah 1993), and because "disposition of a case on summary judgment denies the benefit of a trial on the merits," see *Reeves v. Geigy Pharm., Div. of Ciba-Geigy Corp.*, 746 P.2d 636, 640 (Ut. Ct. App. 1988), courts should avoid disposing of a case on summary judgment where it would preclude a party from having the opportunity to have his case heard. Furthermore, "because of his lack of technical knowledge of law and procedure [a layman acting as his own attorney] should be accorded every consideration that may reasonably be indulged." *Lundahl v. Quinn*, 67 P.3d 1000, 1001–02 (Utah 2003) (bracketed language in original) (quoting *Nelson v. Jacobsen*, 669 P.2d 1207, 1213 (Utah 1913)).

Appellant, as a pro se litigant should have been granted more leniency, and despite his failure to support his factual disputes by citing to the record, Appellant had in fact disputed the facts that formed the basis of Appellee's Motion for Summary Judgment in

previous documents filed with the trial court. Furthermore, the trial court being repeatedly made aware of Appellant's disputation of the facts, should have considered other materials in the record to determine that the material facts were disputed. The trial court's failure to consider other materials in the record and its ignoring Appellant's disputation of the facts resulted in judgment being entered against Appellant without his ever having an opportunity to have his evidence considered by the trial court. Thus, Appellant was not afforded an adjudication on the merits, but instead suffered judgment being entered against him as a result of technical non-compliance with procedural rules. Had the trial court considered other materials on the record, specifically Appellant's affidavit in support of the Motion to Set Aside Judgment, this Court would have determined that the UCCU's ownership of the subject property was disputed and summary judgment was inappropriate.

B. The Court's Ruling on the Wrongful Lien Claim was not an Issue of Fact for purposes of Summary Judgment.

Rule 56 of the Utah Rules of Civil Procedure allows a court to grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact. "On a motion for summary judgment, a trial court should not weigh disputed evidence, and its sole inquiry should be whether material issues of fact exist." *Bear River Mut. Ins. Co. v. Williams*, 2006 UT App 500, P 15, 153 P.3d 798 (internal quotation marks omitted). "In reviewing the trial court's granting of a motion for summary judgment, we view the facts, and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Id.* (internal quotation marks omitted).

Here, the trial court based its granting of summary judgment, in large part, on a previous legal conclusion stating “[t]he lien has already been adjudicated, and it has been found to be unlawful.” (R. 347). The trial court’s previous conclusion of law on the wrongful lien issue is just that, a conclusion of law, and it should not have formed the basis of a motion for summary judgment. Such a conclusory statement that the lien was wrongful is insufficient to establish that no dispute of any material fact exists. Thus, in entering summary judgment against Appellant, the trial court either ignored Appellant’s disputations of facts or considered them to be without any weight. Such weighing of evidence is inappropriate on summary judgment, and the trial court erred in entering summary judgment based solely on Appellee’s statement of facts while ignoring Appellant’s disputation of those facts.

In the event, this Court construes the court’s previous ruling on the wrongful lien claim as a fact, Appellant still disputed the fact that the lien was wrongful, and the court erred because it ignored Appellant’s factual assertions relying instead solely on the fact that the issue had already been decided. However, as is explained above, the order was entered by default, and Appellant had not been given the opportunity to dispute the facts and have his dispute heard. Subsequently the trial court barred appellant from disputing the facts again at the summary judgment stage because the issue had “already been adjudicated.” Thus, the trial court’s failure to set aside the order, as is stated above, precluded Appellant from presenting his case. And, the trial court’s failure to consider Appellant’s factual assertions at summary judgment precluded Appellant, for a second

time, from presenting his case. Because of the trial court's errors, Appellant was never given the opportunity to present his case and have his case heard, and the trial court's entry of summary judgment was erroneous.

III. THE TRIAL COURT ERRED BY ENTERING AN ORDER DECLARING APPELLANT'S INTEREST IN REAL PROPERTY VOID WHERE APPELLANT WAS, AT THE TIME, THE SUBJECT OF A BANKRUPTCY PROCEEDING AND WAS PROTECTED BY AN AUTOMATIC STAY.

Under 11 U.S.C § 362, a bankruptcy petition "operates as a stay, applicable to all entities, of . . . any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." Here, Appellant filed a bankruptcy petition on March 4, 2010 giving rise to an automatic stay. (R. 249–58). While Appellant received a bankruptcy discharge on June 24, 2010, the case was reopened on November 19, 2012 reinstating the automatic stay. (R. 249–58). The case remained open until it was closed on October 6, 2014. (R. 249–58). Thus, at the time the trial court entered the Order Declaring Appellant's Notice of Interest Void Ab Initio, the automatic stay was in place to protect Appellant. Because the Order of the trial court improperly extinguished his interest in real property or his claim to an interest in real property, the trial courts action constituted an "act to obtain possession of property of the estate . . . or to exercise control over property of the estate." And, such action by the trial court and Appellee was a violation of the automatic stay. As such, the Order was invalid, should have been set aside, and should not have formed the basis of the trial court's granting summary judgment.


CONCLUSION

For all the foregoing reasons, this Court should reverse the trial court's denial of Appellant's Motion to Set Aside and reverse the trial court's entry of summary judgment. This Court should then order that this case be remanded to the trial court so that Appellant may have the opportunity to present his case and have his evidence properly considered.

Certificate of Compliance With Rule 24(f)(1)

**Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and
Type Style Requirements**

1. This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because this brief contains 5,574 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B), or
2. This brief complies with the typeface requirements of Utah R. App. P.27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 13-point font, Times New Roman style.


Robert T. Spjute, Esq.

Dated: November 17, 2015

Proof of Service


I hereby certify that I caused two true and correct copies of the foregoing BRIEF OF APPELLANT to be served in the method indicated below to the below named this 18th day of November, 2015.

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JOSEPH A. SKINNER (10832)
**SCALLEY READING BATES HANSEN
& RASMUSSEN**
15 West South Temple, Suite 600
Salt Lake City, Utah 84147
Telephone: (801) 531-7870
Facsimile: (801) 326-4669
joseph@scalleyreading.net
Attorney for Plaintiff/Appellee

Signature: _____

Print Name: _____


Robert T. Spjute

ADDENDUM

RULING AND ORDER DENYING MOTION TO SET ASIDE

**FOURTH JUDICIAL DISTRICT COURT, STATE OF UTAH
UTAH COUNTY, AMERICAN FORK DEPARTMENT**

UTAH CENTRAL CREDIT UNION, A DIVISION OF CHARTWAY FEDERAL CREDIT UNION, Plaintiff, vs. STEVEN H. LARSEN, Defendant.	RULING AND ORDER: DEFENDANT'S MOTION TO SET ASIDE Case No. 140100216 Judge Low
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THE ABOVE-ENTITLED MATTER comes before the court on Defendant's motion to set aside. Plaintiff opposes the motion, and Defendant has not replied. Plaintiff has submitted the matter for decision. Defendant requests a hearing on the motion, but the court concludes that further hearing would be unhelpful and denies the request.

RULING

On August 6, 2014, Defendant was served a notice of the order setting Plaintiff's Petition for hearing. Defendant failed to appear at the hearing held on August 14, 2014. Nor did Defendant seek a continuance of the hearing. He now moves for relief from the order that entered from the hearing because he claims that he did not know about the hearing.

Rule 60(b)(1) authorizes a court to grant a party relief from a final order for a “mistake, inadvertence, surprise, or excusable neglect.” Defendant’s motion for relief is based on his error in failing to read through the papers he was served, and his failure to notice that the case was set for hearing. He does not deny being served. In fact, he claims that the notice was served improperly because the process server trespassed on his private property in order to deliver it. Therefore, his only basis for relief relies on his error in not reading the papers he was given. But relief is not proper when a defendant’s own statements demonstrate indifference and a lack of diligence in pursuing his opportunity to defend. *Russell v. Martell*, 681 P.2d 1193 (Utah 1984). Defendant’s own statements do just that here. He offers no excuse for failing to read through the documents he was served other than the fact that there were several documents served at the same time and that the process server trespassed on his private property. While this certainly demonstrates neglect, it does not demonstrate “excusable” neglect. Consequently, Defendant’s motion should be denied on this basis alone. This is especially true where granting relief would work an injustice on the opposing party, *Chrysler v. Chrysler*, 303 P.2d 995 (1956), such as would occur here by any further delay in adjudicating Plaintiff’s property rights to property at issue.

CONCLUSION

For the foregoing reasons, it is appropriate for the court to exercise its discretion to deny Defendant’s motion to set aside the order entered on August 22, 2014.

ORDER

Based on the foregoing, the court enters the following order:

1. Defendant's motion to set aside the order entered August 22, 2014, is DENIED.
2. This is the order of the court. No additional order is necessary.

DATED this 16 day of Oct., 2014.

BY THE COURT

Thomas

JUDGE LOW



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RULING AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

FILED

el FEB 05 2015

4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

**FOURTH JUDICIAL DISTRICT COURT, STATE OF UTAH
UTAH COUNTY, AMERICAN FORK DEPARTMENT**

**UTAH CENTRAL CREDIT
UNION, a Division of Chartway
Federal Credit Union,**

Plaintiff,

vs.

STEVEN H. LARSEN,

Defendant.

RULING AND ORDER:

**PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT and**

**DEFENDANT'S MOTION
FOR STAY**

Case No. 140100216

Judge Low

THE ABOVE-ENTITLED MATTER comes before the court on Plaintiff's motion for summary judgment and Defendant's motion for a stay.

RULING

Defendant moves for a stay because of a bankruptcy case that he previously filed in Idaho. Plaintiff points out that the bankruptcy case was both filed and closed in 2010. Defendant's actions giving rise to Plaintiff's claim occurred almost four years later, in 2014. Defendant concedes these facts but replies that he may be on the verge of applying to reopen the bankruptcy case.

In light of the fact that no bankruptcy case is currently pending and that, even if it were, the activities at issue here would not be subject to it, the motion for a stay should be denied.

Plaintiff moves for summary judgment as to the statutory penalty for a

wrongful lien. Defendant opposes the motion because he considers his lien to have not been wrongful. The lien has already been adjudicated, and it has been found to be unlawful. Defendant providing no other defense to the imposition of the statutory penalties, Plaintiff's motion for summary judgment should be granted.

ORDER

Based on the foregoing, the court issues the following orders:

1. Defendant's motion for a stay is DENIED.
2. Plaintiff's motion for summary judgment is GRANTED.
3. Plaintiff shall submit its affidavit of attorney fees and costs in sufficient detail for the court to consider their reasonableness.

DATED this 5 day of FEB., 20 15.

BY THE COURT:

Thomas

JUDGE LOW



[A MAILING CERTIFICATE IS ON THE FOLLOWING PAGE]

