

1991

Louis L. Timm, John Neiuwland, and Floyd M. Childs, Precision Machine and Engineering Company Profit Sharing Trust, et al v. T. Lamar Dewsnap and Aletha Dewsnap : Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Michael Z. Hayes; Mazuran, Verhaaren & Hayes; attorney for appellees.

Russell A. Cline; attorney for appellants.

Recommended Citation

Reply Brief, *Timm v. Dewsnap*, No. 910157.00 (Utah Supreme Court, 1991).

https://digitalcommons.law.byu.edu/byu_sc1/3479

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

DOCUMENT

BRIEF

KFU

45.9

.S9

DOCKET NO.

910157

IN THE UTAH SUPREME COURT

LOUIS L. TIMM, JOHN
NEIUWLAND, and FLOYD M.
CHILDS, Trustees of United
Precision Machine and
Engineering Company Profit
Sharing Trust; et al.

Plaintiffs and
Appellees,

vs.

T. LAMAR DEWSNUP and
ALTHEA DEWSNUP,

Defendants and
Appellants

Docket No. 91-0157

Priority No. 16

REPLY BRIEF OF APPELLANTS T. LAMAR AND ALETHA DEWSNUP

APPEAL FROM AN ORDER OF
THE FOURTH JUDICIAL DISTRICT COURT
OF MILLARD COUNTY, UTAH
HONORABLE RAY M. HARDING
DATE OF ORDER: March 11, 1991
Case No. 7191

Russell A. Cline (4298)
123 Second Avenue, T-2
Salt Lake City, Utah 84103
Telephone: (801) 537-1931
Attorney for Defendants and
Appellants T. LaMar and
Aletha Dewsnap

Michael Z. Hayes (1432)
Mazuran, Verhaaren & Hayes P.C.
2180 South 1300 East, #260
Salt Lake City, Utah 84106
Telephone: (801) 484-6161
Attorney for Plaintiffs and
Appellees

FILED

OCT 02 1991

CLERK SUPREME COURT
UTAH

LOUIS L. TIMM, JOHN)
NEIUWLAND, and FLOYD M.)
CHILDS, Trustees of United)
Precision Machine and)
Engineering Company Profit)
Sharing Trust; et al.)
)
Plaintiffs and)
Appellees,)
)
vs.)
)
)
T. LAMAR DEWSNUP and)
ALTHEA DEWSNUP,)
)
)
Defendants and)
Appellants)

Docket No. 91-0157

Priority No. 16

APPEAL FROM AN ORDER OF
THE FOURTH JUDICIAL DISTRICT COURT
OF MILLARD COUNTY, UTAH
HONORABLE RAY M. HARDING
DATE OF ORDER: March 11, 1991
Case No. 7191

Michael Z. Hayes (1432)
Mazuran, Verhaaren & Hayes P.C.
2180 South 1300 East, #260
Salt Lake City, Utah 84106
Telephone: (801) 484-6161
Attorney for Plaintiffs and
Appellees

LOUIS L. TIMM, JOHN)
NEIUWLAND, and FLOYD M.)
CHILDS, Trustees of United)
Precision Machine and)
Engineering Company Profit)
Sharing Trust; et al.)
)
Plaintiffs and)
Appellees,)
)
vs.)
)
)
T. LAMAR DEWSNUP and)
ALTHEA DEWSNUP,)
)
)
Defendants and)
Appellants)

Docket No. 91-0157

Priority No. 16

APPEAL FROM AN ORDER OF
THE FOURTH JUDICIAL DISTRICT COURT
OF MILLARD COUNTY, UTAH
HONORABLE RAY M. HARDING
DATE OF ORDER: March 11, 1991
Case No. 7191

PARTIES BELOW:

- A. Louis L. TIMM, JOHN NEIUWLAND, and FLOYD M. CHILDS,
Trustees of United Precision Machine and
Engineering Company Profit Sharing Trust
- B. ABCO Insurance Agency, Inc., a Utah corporation.
- C. JOSEPH L. HENRIOD, Trustee for the ANNETTE JACOBS
Trust
- D. T. LAMAR DEWSNUP
- E. ALETHA DEWSNUP
- F. ARROW INVESTMENT CO., a limited partnership
- G. THE FEDERAL LAND BANK OF BERKLEY, IMPERIAL LAND
TITLE INC., as Trustee and EUGENE L. CARSON and
ELAINE CARSON as Beneficiaries
- H. STRINGHAM, MAZURAN, LARSEN & SABIN, a Professional
Corporation
- I. MINERAL FERTILIZER CO., INC.
- J. HARRY V. KAPS

The parties listed in F through J were defendants in the original complaint but are not parties to this appeal.

TABLE OF CONTENTS

| | PAGE |
|--|------|
| TABLE OF AUTHORITIES | iii |
| SUMMARY OF REPLY | 1 |
| STATEMENT OF FACTS | 2 |
| I. THE DEWSNUPS COUNTERCLAIM HAS NOT BEEN ADJUDICATED | 9 |
| A. UNDER RULE 54(b) OF THE UTAH RULES OF CIVIL PROCEDURE, THE DEWSNUPS' COUNTERCLAIM WAS NOT DISPOSED OF BY THE SUMMARY JUDGMENT | 9 |
| B. THE DEWSNUPS' COUNTERCLAIM IS NOT AN AFFIRMA- TIVE DEFENSE | 12 |
| C. UNDER THE GENERAL RULES GOVERNING THE INTERPRETATION OF JUDGMENTS, THE DEWSNUPS' COUNTERCLAIM WAS NOT DISPOSED OF BY THE SUMMARY JUDGMENT | 12 |
| D. ANY DISPOSITION OF THE DEWSNUPS' COUNTER- CLAIM WOULD HAVE BEEN WITHOUT NOTICE, AND THEREFORE IN VIOLATION OF DUE PROCESS AND IN VIOLATION OF RULE 56(c) OF THE UTAH RULES OF CIVIL PROCEDURE | 13 |
| II. THE DEWSNUPS' MOTION TO AMEND THEIR COUNTER- CLAIM SHOULD HAVE BEEN GRANTED | 13 |
| A. THE CORRECTNESS STANDARD SHOULD BE USED IN REVIEWING JUDGE HARDING'S DENIAL OF THE DEWSNUPS' MOTION TO AMEND THEIR COUNTERCLAIM | 13 |
| B. THE AMENDED COUNTERCLAIM IS NOT BARRED BY THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL | 14 |
| C. THE FILING OF THE AMENDED COUNTERCLAIM WOULD NOT BE UNDULY PREJUDICIAL TO PLAINTIFF | 20 |
| D. THE DEWSNUPS' BANKRUPTCIES DID PRECLUDE THEM FROM A TIMELY MOTION TO AMEND THEIR COUNTER- CLAIM | 22 |
| III. JUDGE HARDING ERRED IN REFUSING TO RECONSIDER AND SET ASIDE OR CERTIFY AS FINAL THE SUMMARY JUDGMENT | 23 |
| CONCLUSION | 24 |

TABLE OF AUTHORITIES

| <u>CASES</u> | <u>PAGE</u> |
|---|-------------|
| A.J. MacKay Company v. Okland Construction Company, Inc., 167 Utah Adv. Rep. 3 (August 16, 1991) | 11 |
| Bennett v. Trio Industries, Inc., 306 F.2d 546 (1st Cir. 1962) | 10 |
| Cheney v. Rucker, 381 P.2d 86 (Utah 1963) | 22 |
| Citizens Casualty Company of New York v. Hackett, 410 P.2d 767 (Utah 1966) | 19 |
| Copper State Thrift and Loan v. Bruno, 735 P.2d 387 (Utah App. 1987) | 15 |
| Drury v. Lunceford, 415 P.2d 662 (Utah 1966) | 23 |
| First Security Bank of Utah v. Conlin, 164 Utah Adv. Rep. 27 (July 9, 1991) | 11 |
| Ford Motor Co. v. Transport Indemnity Company, 795 F.2d 538 (6th Cir. 1986) | 10 |
| Glen Allen Mining Co. v. Park Galena Mining Co., 296 P.231 (Utah 1931) | 19 |
| Haner v. Haner, 373 P.2d 577 (Utah 1962) | 23 |
| Harman v. Yeager, 134 P.2d 695 (Utah 1943) | 12 |
| Heiser v. Woodruff 327 U.S. 726 (1946) | 15, 17 |
| Hirshhorn v. Mine Safety Appliances Co., 101 F. Supp. 549 (W.D. Penn. 1951) | 21 |
| Howey v. United States, 481 F.2d 1187 (9th Cir. 1973) | 20 |
| Issen V. GSC Enterprises, Inc., 522 F. Supp. 390 (N.D. Ill. 1981) | 20 |
| Peay v. Peay, 607 P.2d 841 (Utah 1980) | 23 |
| Salt Lake City Corp. v. James Constructors, 761 P.2d 42 (Utah App. 1988) | 24 |

Table of Authorities
Cont'd

| | |
|--|----|
| Todaro v. Gardner, 285 P.2d 839 (Utah 1955) | 19 |
| Utah State Employees Credit Union v. Riding, 469 P.2d 1 (Utah 1970) | 23 |

OTHER REFERENCES

| | |
|--|--------|
| 10 C. Wright, A. Miller and M. Kane, Federal Practice and Procedure, pp. 20-29 (1983) | 9 |
| 11 U.S.C. Section 362(a)(1) (Supp. 1991) | 8, 16 |
| 28 U.S.C.A. Rule 54 (1982) | 9 |
| 2 Collier on Bankruptcy, Section 362.11 (15th Ed.) | 16 |
| Rule 54(b) Federal Rules of Civil Procedure | 9 |
| Rule 54(b) Utah Rules of Civil Procedure | 23, 24 |
| Restatement Second, Judgments, Section 27 (1982) | 18 |

SUMMARY OF REPLY

The facts material to this appeal are relatively simple. Plaintiffs filed a claim against the Dewsnums, and the Dewsnums filed a counterclaim against plaintiffs. Plaintiffs filed a motion for summary judgment on their claim, which was granted. Neither plaintiffs' motion for summary judgment, the affidavit in support of the motion for summary judgment, nor the judgment itself either mentioned the Dewsnums' counterclaim or any of the issues raised in the Dewsnums' counterclaim.

The Dewsnums later filed a motion to amend their counterclaim and a motion to either reconsider and set aside the summary judgment or to certify it as final so that it could be appealed. Judge Harding denied both motions, holding that the summary judgment on the plaintiffs' claim had "implicitly" disposed of the Dewsnums' counterclaim. From that ruling the Dewsnums brought this appeal.

Plaintiffs argue that the summary judgment on plaintiffs' claim "implicitly" disposed of the Dewsnums' counterclaim since there was a substantial factual overlap between plaintiffs' claim and the Dewsnums' counterclaim. As previously discussed in the Appellants Brief and as discussed hereafter, the "factual overlap" test was rejected by the 1946 amendment to Rule 54(b) of the Federal Rules of Civil Procedure, which requires an "express" adjudication of claims. Furthermore, under the general principles governing the interpretation of judgments, the summary judgment, by its terms, did not dispose of the Dewsnums' counterclaim. Moreover, even if the summary judgment did

"implicitly" dispose of the Dewsnums' counterclaim, that disposition would have been invalid since it would have been made without notice to the Dewsnums and therefore would have been in violation of due process and in violation of Rule 56 of the Utah Rules of Civil Procedure.

Since the Dewsnums' counterclaim was not disposed of it is still subject to adjudication and the Dewsnums' motion to amend their counterclaim should have been granted. Furthermore, since the Dewsnums' counterclaim was not disposed of, the summary judgment did not dispose of all the claims in this case and under Rule 54 of the Utah Rules of Civil Procedure, the summary judgment is still subject to revision and should have either been reconsidered and set aside or certified as final so that it could be appealed.

STATEMENT OF FACTS

The Dewsnums' statement of facts in their Appellants Brief is accurate and is properly cited to the record. Plaintiffs' feigned offense at two statement made about Joseph Henroid is particularly disingenuous since those same statements were made in record below (R. 90-91, 93) and in two reply briefs plaintiffs never denied the truth of those statements. (R. 217-226, 237-252)

This is the first time the Dewsnums will have this story heard. It is true that the Dewsnums' bankruptcy case has been heard by "two Utah District Court Judges, a United States

Bankruptcy Judge, a Federal District Court Judge, the United States Tenth Circuit Court of Appeals and ... [presently] the United States Supreme Court." (Appellees Brief, p. 2) However, as discussed in paragraph 5 below, the Dewsnums' bankruptcy case is very different from this case.

In plaintiffs' "Statement of Facts" in their Appellees Brief, plaintiffs "skip over" a number of facts that are material to this case:

1. The Purchase Contract had terminated before Joseph Henroid made the \$49,966.21 payment on the Purchase Contract. In paragraphs 4 and 5 on page 5 of their Appellees Brief, plaintiffs correctly state that the Dewsnums' \$119,000 loan was secured by the Purchase Contract, and that Joseph Henroid made the January 2, 1980 payment on the Purchase Contract on June 7, 1980 (\$49,966.21), but plaintiffs neglect to state that the Purchase Contract had already terminated when Joseph Henroid made that payment. The Purchase Contract gave the Dewsnums the right to terminate the Purchase Contract by failing to make any of the annual payments due under the Purchase Contract on January 2 of each year by the following June 2:

If Buyers default on the payment falling due on January 2, 1977, or any payment thereafter falling due, and if such sum or any part thereof remains in default for a period of five months, then Buyers shall forfeit any and all right, title and interest that they otherwise would have in and to the property covered by this agreement, title to which has not passed to the Buyers at that time, and this agreement shall terminate.

(R. 153-54).

Furthermore, if any January 2 payment due under the Purchase Contract was not paid by the next succeeding June 2, the escrow agent holding title to the land being purchased under the Purchase Contract was instructed to return title to the land to the seller:

Your instructions are to...release to the Seller the warranty deed...if...the Buyers shall default in the payment of any sum or any part thereof remains in default for a period of five months.

(R. 183-184).

On June 2, 1980, when the Dewsnums failed to make the January 2, 1980 payment by June 2, 1980, the Purchase Contract terminated according to its terms, the escrow agent delivered title to the land back to the seller as provided for in the escrow instructions, and all of the Dewsnums' right, title and interest in the land being purchase under the Purchase Contract was forfeited. (R. 92, 125, 200-01). Five days later, on June 7, 1980, when Joseph Henroid made the January 2, 1980 payment (\$49,966.21), the Purchase Contract had already terminated. (R. 92, 125-126, 201). The Assignment of Contract only required the Dewsnums reimburse plaintiffs for payment made by plaintiffs "under and pursuant to the Purchase Contract":

[The Dewsnums] agree that in the event they are in default that [plaintiffs] may make the payments due under and pursuant to [the Purchase Contract] and will be reimbursed for the same by [the Dewsnums].

(R. 145).

Therefore, because the Purchase Contract had terminated before Joseph Henroid made the \$49,966.21 payment, that payment was not made "under and pursuant to the Purchase Contract" and the Dewsnums had no obligation to reimburse Joseph Henroid for that payment.

2. The Dewsnums paid in full the \$119,000 loan. In paragraph 8 on page 5 of their Appellees Brief, plaintiffs state that "[i]n December 1980, the Dewsnums paid some, but not all, of the amounts due plaintiffs." In fact, the Dewsnums paid in full the \$119,000 loan, but did not pay the \$49,966.21 plaintiffs claimed the Dewsnums were required to reimburse them. In at least three places in the record, plaintiffs have acknowledged that the Dewsnums paid the \$119,000 loan in full. (R. 66-67, 70, 254).

3. The \$49,966.21 payment was not secured by the Trust Deed. In paragraph 8 on page 5 of their Appellees Brief, plaintiffs state they brought a motion for summary judgment on the \$49,966.21. Plaintiffs fail to state that the motion for summary judgment was to foreclose on the Trust Deed on the Dewsnums' farm for the \$49,966.21 payment, even though the claim for the \$49,966.21 payment, even if valid, was not secured by the Trust Deed. (R. 66-70). The Trust Deed only secured the \$119,000 loan, and did not secure payments made under the Assignment of Contract:

[The] trustor conveys and warrants to trustee in trust with power of sale, following described property...for

the purpose of securing payment of the indebtedness evidence by a promissory note of even date herewith, in the principal sums of \$33,000; 56,000 and 30,000, made by Trustor, payable to the order of Beneficiary at the times, in the manner and with interest as thereon set forth and any extensions and/or renewals or modifications thereof.

(R. 133, 138).

4. The motion for summary judgment only requested summary judgment on plaintiffs' claim, and not on the Dewsnums' counterclaim; the Summary Judgment and Decree of Foreclosure only granted summary judgment on plaintiffs' claim, and not the Dewsnums' counterclaim. In paragraphs 8-11 on pages 5 and 6 of their Appellees Brief, plaintiffs correctly state that they filed a motion for summary judgment and a supporting affidavit of Louis Timm, and that summary judgment was granted. However, plaintiffs fail to state that plaintiffs' motion for summary judgment was only for summary judgment on plaintiffs' claim, not on the Dewsnums' counterclaim. (R. 66-67). Neither plaintiffs' motion for summary judgment nor the affidavit of Louis Timm either mention the Dewsnums' counterclaim or any of the issues raised in the Dewsnums' counterclaim. (R. 66-70). Similarly, the Summary Judgment and Decree of Foreclosure only granted summary judgment on the plaintiffs' claim, and did not mention either the Dewsnums' counterclaim or any of the issues raised in the Dewsnums' counterclaim. (R. 75-79).

5. The issues in the bankruptcy case are different from the issues in this case. In paragraphs 15-22 on pages 6 and 7 of

their Appellees Brief, plaintiffs imply that the issues being considered in this case have somehow been considered by the bankruptcy court or are currently on appeal from the bankruptcy court. In fact, the issues in this case are very different from the issues in the Dewsnums' bankruptcy case. The main issue in the Dewsnums' bankruptcy case is whether under Section 506(d) of the Bankruptcy Code the Dewsnums can "redeem" their farm by paying the fair market value of their farm to plaintiffs, or whether they must pay the total amount owing to plaintiffs even though it far exceeds the value of their farm. In Judge Clark's 20-page opinion, he decided that under Section 506(d) of the Bankruptcy Code the Dewsnums could only "redeem" their farm by paying the total amount due to plaintiffs. (R. 322-341.) The Dewsnums then appealed that decision to the Federal District Court, the Tenth Circuit and certiorari has now been granted before the United States Supreme Court. (R. 220). That issue, however, involves the construction of federal bankruptcy law and is very different from the issues raised in this case.

Plaintiffs correctly point out that 4 years ago during the course of the bankruptcy proceedings the Dewsnums did try to raise the issue that the Summary Judgment and Decree of Foreclosure should be set aside because the \$119,000 loan had been paid. The Dewsnums argued that because the Summary Judgment and Decree of Foreclosure was signed before but not entered until after the Dewsnums had filed bankruptcy, the automatic stay

provision of 11 U.S.C. Section 362(a)(1) (the "Section 362 automatic stay") voided entry of the Summary Judgment and Decree of Foreclosure and therefore the bankruptcy court could go behind the Summary Judgment and Decree of Foreclosure and reconsider the underlying merits of that judgment. . However, the bankruptcy court rejected that argument and refused to void the Summary Judgment and Decree of Foreclosure, accepting it as a valid state court judgment and therefore refusing to consider its underlying merits. In his affidavit, the Dewsnums' bankruptcy attorney at the time, Scott Pierce, stated:

6. Paragraphs 20, 21, 22 and 23 of [the complaint filed by the Dewsnums in bankruptcy court (the "Complaint")] alleged that the plaintiffs' Summary Judgment and Foreclosure Decree had been entered in violation of the Section 362 automatic stay since it had been signed, but not entered, until after the Dewsnums had filed bankruptcy.

7. Judge Clark ruled from the bench that the Summary Judgment and Foreclosure Decree was not entered in violation of the Section 362 automatic stay.

8. Having ruled that the Summary Judgment and Foreclosure Decree was not entered in violation of the Section 362 automatic stay, Judge Clark gave full faith and credit to the Summary Judgment and Foreclosure Decree, and refused to consider the allegations set forth in paragraphs 8, 9, 10 and 11 of the Complaint, which went to the underlying claims in the Summary Judgment and Foreclosure Decree.

9. No evidence was introduced at trial on paragraphs 8, 9, 10 and 11 of the Complaint.

10. Judge Clark did not consider the allegations set forth in paragraphs 8, 9, 10 and 11 of the Complaint.

11. The allegations set forth in paragraphs 8, 9, 10 and 11 of the Complaint were not litigated or

considered by the bankruptcy court in any form or fashion.

(A copy of Scott Pierce's Affidavit is attached hereto as Exhibit A and is found in the record at R. 318-321.)

ARGUMENT

I

THE DEWSNUPS' COUNTERCLAIM HAS NOT BEEN ADJUDICATED.

- A. UNDER RULE 54(b) OF THE UTAH RULES OF CIVIL PROCEDURE, THE DEWSNUPS' COUNTERCLAIM WAS NOT DISPOSED OF BY THE SUMMARY JUDGMENT.

Prior to the 1946¹ amendment to Rule 54(b) of the Federal Rules of Civil Procedure, a "factual overlap" test was used to determine whether a judgment on one claim also "implicitly" disposed of other claims. 10 C. Wright, A. Miller and M. Kane, Federal Practice and Procedure, pp. 20-29 (1983). Where one claim was disposed of, if other claims that had a sufficient "factual overlap" with the claim disposed of, that claim was also held to have been implicitly disposed of. Id. As discussed in the Dewsnums' Appellants Brief at pages 16-20, this approach did not work because the parties did not know which claims had and which claims had not been disposed of. Thus, parties with other claims were placed in the untenable position of having to immediately appeal their claim or risk a court later holding that

¹ The text in 10 C. Wright, A. Miller and M. Kane, Federal Practice and Procedure, pp. 20-29 (1983) states that this amendment was made in 1948. However, 28 U.S.C.A. Rule 54 (1982) states that this amendment was made in 1946. The 1946 date has been used both in the Appellants Brief and in this Appellants Reply Brief.

there was sufficient "factual overlap" between the claims expressly disposed of and their claim and therefore their claim had been implicitly disposed of. Therefore, in 1946 Rule 54(b) was amended to provide that claims could only be expressly disposed of so that the parties would know which claims had and which claims had not been disposed of.

In their Appellees Brief, plaintiffs argue pre-1946 law. (See Appellees Brief, pp. 9, 11-12) Plaintiffs argue that there was sufficient "factual overlap" between their claim and the Dewsnums' counterclaim to justify a holding that the disposition of their claim implicitly disposed of the Dewsnums' counterclaim. That was the test prior to 1946, but that is not the test today. Rule 54(b) now requires an express disposition of claims.

The two cases cited by the plaintiffs both involve cases where a claim was considered and intended to be disposed of, but was inadvertently not mentioned in the subsequent judgment. In Bennett v. Trio Industries, Inc., 306 F.2d 546 (1st Cir. 1962), both the claim and counterclaim were tried:

The factual issues posed by this action and the counterclaim were fully developed and explored at the trial. And the court below made full findings of fact on every one of them.

Id. at 548.

Similarly, in Ford Motor Co. v. Transport Indemnity Company, 795 F.2d 538 (6th Cir. 1986), the counterclaimants' counterclaims were "addressed" and "argued." Id. at 543. In both Bennett and in Ford Motor Co., the court held that the claims in question

had been tried and considered and were intended to have been disposed of but were inadvertently omitted from the final judgment. Those cases do not apply here. The Dewsnums' counterclaim was not before the court on plaintiffs' motion for summary judgment. The Dewsnums' counterclaim was never actually tried or considered.

In two recent cases this Court has refused to take jurisdiction where less than all of the claims in the case had been adjudicated and the judgment had not been certified as final pursuant to Rule 54(b) of the Utah Rules of Civil Procedure. First Security Bank of Utah v. Conlin, 164 Utah Adv. Rep. 27 (July 9, 1991); A.J. Mackay Company V. Okland Construction Company, Inc. 167 Utah Adv. Rep. 3 (August 16, 1991). Had the Dewsnums appealed the Summary Judgment and Decree of Foreclosure when it was entered, this is exactly what would have happened to them since the Summary Judgment and Decree of Foreclosure had not been certified as final and did not dispose of all the claims in this case (having not disposed of the Dewsnums' counterclaim). To now hold that the Summary Judgment and Decree of Foreclosure was final (having implicitly disposed of the Dewsnums' counterclaim) would put every party in the untenable position of not knowing when a judgment was final, and having to appeal every judgment that expressly adjudicates less than all the claims in a case in order to protect themselves against a later finding that the judgment had implicitly disposed of all the claims in the

case and could no longer be appealed. Parties have to be able to rely on the express language of a judgment. If a judgment doesn't say it disposes of a claim, parties shouldn't have to guess as to whether implicitly it actually does.

B. THE DEWSNUPS' COUNTERCLAIM IS NOT AN AFFIRMATIVE DEFENSE.

Plaintiff allege that the Dewsnums' counterclaim "was comprised of several affirmative defenses...that were characterized by the Dewsnums' attorney as a Counterclaim." (Appellees Brief, p. 12). The Dewsnums' counterclaim was not an affirmative defense. The Dewsnums' counterclaim states a cause of action for reformation of the Trust Deed and the Purchase Contract. A claim for reformation of instruments is a counterclaim, and not an affirmative defense. That very issue was decided by the Utah Supreme Court in Harman v. Yeager, 134 P.2d 695 (Utah 1943).

C. UNDER THE GENERAL RULES GOVERNING THE INTERPRETATION OF JUDGMENTS, THE DEWSNUPS' COUNTERCLAIM WAS NOT DISPOSED OF BY THE SUMMARY JUDGMENT.

Even if Rule 54(b) does not prevent the implicit adjudication of the Dewsnums' counterclaim, under the general rules governing the interpretation of judgments, the Summary Judgment and Decree of Foreclosure did not dispose of the Dewsnums' counterclaim. Plaintiffs' have not objected to this discussion in the Dewsnums' Appellants Brief (See Appellants Brief, pp. 20-23).

- D. ANY DISPOSITION OF THE DEWSNUPS' COUNTERCLAIM WOULD HAVE BEEN WITHOUT NOTICE, AND THEREFORE IN VIOLATION OF DUE PROCESS AND IN VIOLATION OF RULE 56(c) OF THE UTAH RULES OF CIVIL PROCEDURE.

In their Appellees Brief, plaintiffs' missed the point of the Dewsnums' discussion of the above-captioned issues. Clearly the Dewsnums received notice of plaintiffs' motion for summary judgment on plaintiffs' claim, however neither plaintiffs' motion for summary judgment nor the affidavit filed in support thereof either mentioned the Dewsnums' counterclaim nor any of the issues raised in the Dewsnums' counterclaim. Therefore, although the Dewsnums had notice of plaintiffs' motion for summary judgment on plaintiffs' claim, the Dewsnums had no notice of any motion for summary judgment on their counterclaim or that their counterclaim was in any way subject to adjudication. (See Appellants Brief, pp. 23-28)

II

THE DEWSNUPS' MOTION TO AMEND THEIR COUNTERCLAIM SHOULD HAVE BEEN GRANTED.

- A. THE CORRECTNESS STANDARD SHOULD BE USED IN REVIEWING JUDGE HARDING'S DENIAL OF THE DEWSNUPS' MOTION TO AMEND THEIR COUNTERCLAIM.

Judge Harding based his denial of the Dewsnums' motion to amend their counterclaim on the conclusion of law that the Dewsnums' counterclaim had been "implicitly" disposed of by the summary judgment. (See the Memorandum Decision, attached as Exhibit G to the Dewsnums' Appellants Brief and at R. 348-49) As

discussed in Appellants Brief, where the lower court's decision is based on a legal conclusion, the appellate court will not give deference to the lower court's decision but will use the correctness standard, even though the deference standard would otherwise be applicable. (See Appellants Brief, pp. 2-4)

B. THE AMENDED COUNTERCLAIM IS NOT BARRED BY THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL.

There is only one allegation made in the Dewsnums' amended counterclaim that the Dewsnums tried to raise in the bankruptcy proceeding--that the Trust Deed was paid in full and therefore should have been released (which is alleged as part of Claim Two of the amended counterclaim, See R. 204). Although the Dewsnums tried to raise that issue in the bankruptcy proceeding, because the bankruptcy court concluded that the entry of the Summary Judgment and Decree of Foreclosure did not violate the Section 362 automatic stay, the court gave full faith and credit to the Summary Judgment and Decree of Foreclosure and did not and could not rule on that issue.

Plaintiffs belabor the point that this issue was raised in the Dewsnums' complaint filed in bankruptcy court. Plaintiffs also belabor the point that the Dewsnums' complaint filed in bankruptcy court was dismissed with prejudice. However, plaintiffs miss the point that even where an issue is raised in a pleading and even where a judgment is rendered on that pleading "with prejudice," the doctrines of res judicata and collateral estoppel do not bar relitigation of that issue unless that issue

was "actually litigated" in a previous suit, was "essential to the resolution of [the previous] suit" and was "competently, fully and fairly litigated" in the previous suit. Copper State Thrift and Loan v. Bruno, 735 P.2d 387, 389-91 (Utah App. 1987). None of those requirements are met in this case.

As a general rule, a state court judgment is res judicata on a bankruptcy court, and a bankruptcy court will not go behind the state court judgment to determine whether it was properly decided. Heiser v. Woodruff, 327 U.S. 726 (1946). Thus, unless an exception could be found, the bankruptcy court would accept the Summary Judgment and Decree of Foreclosure as conclusive, and would not consider whether the Summary Judgment and Decree of Foreclosure had been properly granted (i.e., would not consider the Dewsnums' allegations that the Trust Deed had been satisfied). In Paragraphs 20, 21, 22 and 23 of the Dewsnums' complaint filed in bankruptcy court, the Dewsnums alleged that such an exception existed. (R. 230-231). In those paragraphs the Dewsnums alleged that the Summary Judgment and Decree of Foreclosure had been entered in violation of the Section 362 automatic stay and was therefore void. The Summary Judgment and Decree of Foreclosure had been signed April 22, 1980, but not entered until April 24, 1980. The Dewsnums filed for bankruptcy on April 22, 1980. Section 362 of the Bankruptcy Code automatically stays the "continuation...of [a] judicial...action or proceeding against the debtor" then in progress upon the

filing of bankruptcy. 11 U.S.C. Section 362(a)(1) (Supp. 1991). Any action taken in violation of the stay is void. 2 Collier on Bankruptcy, Section 362.11 (15th Ed.). Therefore the Dewsnums argued that even though the Summary Judgment and Decree of Foreclosure had been signed before the Dewsnums had filed bankruptcy, because it had not been entered until after they had filed for bankruptcy the Summary Judgment and Decree of Foreclosure was entered in violation of Section 362 automatic stay and was therefore void.

The bankruptcy court, however, rejected that argument and held that the Summary Judgment and Decree of Foreclosure was not entered in violation of the Section 362 automatic stay, and therefore was not void. Therefore, the bankruptcy court accepted the Summary Judgment and Decree of Foreclosure as a valid state court judgment and refused to consider its underlying merits (i.e., refused to consider paragraphs 8, 9, 10 and 11 of the Dewsnums' complaint filed in bankruptcy court that alleged that the Trust Deed had been satisfied).

Once the bankruptcy court ruled that the Summary Judgment and Decree of Foreclosure was not entered in violation of the Section 362 automatic stay, the bankruptcy court did not and could not consider the factual issues underlying the Summary Judgment and Decree of Foreclosure, but had to grant it full faith and credit as a state court judgment. Had the bankruptcy court failed to grant full faith and credit to the Summary

Judgment and Decree of Foreclosure, the bankruptcy court would have been reversed. This is exactly what happened in Heiser v. Woodruff, 327 U.S. 726 (1946). In that case, the bankruptcy court set aside a state court judgment and the United States Supreme Court reversed, stating that a valid state court judgment is res judicata on a bankruptcy court, and the bankruptcy court cannot further litigate the issues underlying a valid state court judgment:

[W]e are aware of no principle of law or equity which sanctions the rejection by a [bankruptcy] court of the salutary principle of res judicata...[where a state court judgment has been validly rendered] that [judgment] is now res judicata and may not further be litigated in the bankruptcy proceeding...[T]he principles of res judicata preclude the revival of the litigation in the bankruptcy court.

Id. at 733-34, 736.

Because the bankruptcy court never reached the issue of whether the Trust Deed had been satisfied, the Dewsnums are not precluded from raising that issue in Claim Two of their amended counterclaim.

The courts have distinguished between two branches of the doctrine of res judicata -- "claim preclusion" (or traditional res judicata) and "issue preclusion" (or collateral estoppel). "Claim preclusion" involves the relitigation of a claim or cause of action that was litigated in a previous case. "Issue preclusion" involves relitigation of an issue that was litigated in a previous case. See generally Copper State Thrift and Loan v. Bruno, 735 P.2d 387, 389 (Utah App. 1987).

This case involves the "issue preclusion" branch of res judicata (or collateral estoppel). Claim Two of the Dewsnums' amended counterclaim alleges a cause of action based on Section 57-1-33, Utah Code Annotated 1953, as amended. (R. 204). The Dewsnums' allegation in paragraphs 8, 9, 10 and 11 of their complaint filed in bankruptcy court did not allege that same cause of action, but did allege one of its elements, i.e., that the indebtedness secured by the Trust Deed was paid in full.

The elements of "issue preclusion" (or collateral estoppel) are set forth in Copper State Thrift and Loan v. Bruno, 735 P.2d 387 (Utah App. 1987). Collateral estoppel only bars the relitigation of an issue that has been "actually litigated" in a previous suit, was "essential to the resolution of [the previous] suit," and was "competently, fully and fairly litigated" in the previous suit. Id. at 389-91. (See also Restatement Second, Judgments, Section 27 (1982)). None of those conditions were met in this case. Because the bankruptcy case was disposed of on other grounds, the allegations in paragraphs 8, 9, 10 and 11 of the Dewsnums' complaint filed in bankruptcy court were never "actually litigated." Furthermore, because that case was disposed of on other grounds, those allegations were not "essential to the resolution of [that] suit." Finally, since the bankruptcy court never reached the issue of whether the Trust Deed had been satisfied, that issue was never "competently, fairly and fully litigated."

The Utah Supreme Court has consistently held that, where an issue has been raised but not decided in a prior action, res judicata does not bar litigation of that issue in a later action. For example, in Todaro v. Gardner, 285 P.2d 839 (Utah 1955), a party filed an action in Arizona based on two causes of action. The Arizona court ruled on one cause of action, but did not reach the other cause of action. When a separate action was filed in Utah based on the cause action that had not been ruled on, the Utah Supreme Court held that res judicata did not bar litigation of that cause of action since it had not been reached by the Arizona court. Id. at 841. Similarly, in Glen Allen Mining Co. v. Park Galena Mining Co., 296 P. 231 (Utah 1931), a party filed an action to set aside a foreclosure sale and to hold the property in trust. The court upheld the foreclosure sale but did not rule on the trust issue. When a separate case of action was filed on the trust issue, the Utah Supreme Court held that res judicata did not bar litigation of that issue, since the court had never reached that issue. Id. at 233.

The party asserting the doctrine of collateral estoppel has the burden of proving its elements. Citizens Casualty Company of New York v. Hackett, 410 P.2d 767 (Utah 1966). Plaintiffs have not and cannot meet their burden of proof in this case. The issue of whether the debt secured by the Trust Deed had been paid was not "actually litigated" in bankruptcy court, was not "essential to the resolution of [that case]" and has not been

"competently, fairly and fully litigated." The Dewsnums are therefore not barred from raising that issue as part of Claim Two of their amended counterclaim.

C. THE FILING OF THE AMENDED COUNTERCLAIM
WOULD NOT BE UNDULY PREJUDICIAL TO
PLAINTIFFS.

The Dewsnums have not been able to prosecute their counterclaim until now because their counterclaim was transferred by operation of law to the bankruptcy trustee upon the filing of Chapter 7 bankruptcy by the Dewsnums, and was not abandoned until January, 1991. Although over 10 years have past since the counterclaim was filed, delay alone is not sufficient grounds to deny a Rule 15 motion to amend. In Howey v. United States, 481 F.2d 1187, 1190-91 (9th Cir. 1973), the court stated:

[W]e know of no case where delay alone was deemed sufficient grounds to deny a Rule 15(a) motion to amend...The purpose of the litigation process is to vindicate meritorious claims. Refusing, solely because of delay, to permit an amendment to a pleading in order to state a potentially valid claim would hinder this purpose while not promoting any other sound judicial policy.

In Howey, the appellate court overruled the trial court's denial of defendant's motion to amend its third party complaint after 5 years, stating that "[t]he record fails to show any basis for finding that the proffered amendment would have unduly prejudiced [the opposing party.]" Id. at 1191. See also Issen v. GSC Enterprises, Inc., 522 F.Supp. 390 (N.D. Ill. 1981) (allowing plaintiff to amend his complaint 7 years after the action was filed, stating that "though it is chronologically late in the

litigation," the defendants "have failed to establish that they would be unduly burdened prejudice by this amendment." Id. at 394.); Hirshhorn v. Mine Safety Appliances Co., 101 F. Supp. 549 (W.D. Penn. 1951) (granting a motion to amend a complaint after 8 years, stating that "[n]o time is prescribed by Rule 15(a) for amendment by leave of the court." Id. at 552.).

This case has been ongoing for over 10 years now and plaintiffs have had notice of the Dewsnums' counterclaim since the beginning. Without citing a single case to support their position, plaintiffs allege that the Dewsnums' motion to amend their counterclaim should be denied because it would be "prejudicial" to plaintiffs. The only reasons for this given by the plaintiffs are that LeMar Dewsnum had died, Judge Burns has retired and the passage of time has made discovery "virtually impossible." (Appellees Brief, pp. 19-20) However, the allegations in the amended counterclaim are largely based on existing documents that are a matter of record in this case (e.g. the Trust Deed, the Promissory Notes, etc.) (R. 201-05). Except for LaMar Dewsnum, all of the individuals mentioned in the amended counterclaim (Aletha Dewsnum, Joseph Henroid and Earl Peck) are alive and available for discovery and trial. Furthermore, any disadvantage because of the death of LaMar Dewsnum will be to Aletha Dewsnum, and not to plaintiffs. Finally, a new judge has been assigned to this case who should be very capable of replacing Judge Burns, whose only involvement in

this case was to enter the Summary Judgment and Decree of Foreclosure. Consequently, there is no good reason not to allow the Dewsnums to amend their counterclaim.

As discussed in Appellants Brief (at pp. 37-41), in reviewing a denial of a motion to amend, this Court has always been liberal in granting leave to amend and has held that where the other party will have an adequate opportunity to respond to the amended pleadings, leave to amend should be granted. The policy of this Court has always been that parties should be allowed to adjudicate their legitimate claims:

[The Rules of Civil Procedure] must all be looked to in the light of their even more fundamental purpose of liberalizing both pleading and procedure to the end that the parties are afforded the privilege of presenting whatever legitimate contentions they have pertaining to their dispute.

Cheney v. Rucker, 381 P.2d 86, 91 (Utah 1963).

As in Howey, the record in this case "fails to show any basis for finding that the proffered amendment would ... unduly prejudice" plaintiffs. See 481 F.2d at 1191. The Dewsnums' motion to amend their counterclaim should have been granted.

D. THE DEWSNUMS' BANKRUPTCIES DID PRECLUDE THEM FROM A TIMELY MOTION TO AMEND THEIR COUNTERCLAIM.

Plaintiffs correctly state that the Dewsnums did make two aborted attempts to reorganize under Chapter 11 before filing for bankruptcy under Chapter 7. In the best of all worlds, the Dewsnums probably should have filed their motion to amend their counterclaim before filing Chapter 7 bankruptcy. But the fact

that that did not happen does not effect the validity of the Dewsnums' counterclaim and should not deprive them of the opportunity to have their counterclaim adjudicated. The Dewsnums' counterclaim is valid and the Dewsnums, having regained control of their counterclaim from the bankruptcy trustee, have promptly filed a motion to amend their counterclaim and should be allowed to pursue their counterclaim to its conclusion.

III

JUDGE HARDING ERRED IN REFUSING TO RECONSIDER AND SET ASIDE OR CERTIFY AS FINAL THE SUMMARY JUDGMENT.

All of the cases cited by plaintiffs for the proposition that the Utah courts "have never recognized a motion to reconsider" involve the reconsideration of a final judgment. See Peay v. Peay, 607 P.2d 841 (Utah 1980) (final order); Utah State Employees Credit Union v. Riding, 469 P.2d 1 (Utah 1970) (final judgment), Drury v. Lunceford, 415 P.2d 662 (Utah 1966) (final order); Haner v. Haner, 373 P.2d 577 (Utah 1962) (final divorce decree). (See Appellees Brief, pp. 22-23)

This case does not involve a final judgement. Because the Summary Judgment and Decree of Foreclosure did not dispose of all the claims on this case (having failed to dispose of the Dewsnums' counterclaim) it is not a final judgment, and therefore under Rule 54(b) it can still be revised:

[A]n order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of

decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Rule 54(b) Utah Rules of Civil Procedure. (Emphasis added).

In Salt Lake City Corp. v. James Constructors, 761 P.2d 42 (Utah App. 1988), the court expressly distinguished between reconsidering "final judgments" and reconsidering, under Rule 54(b), judgments which do not dispose of all the claims in a case, such as the Summary Judgment and Decree of Foreclosure:

A motion to reconsider is not expressly available under the Utah Rules of Civil Procedure. [citation omitted.] See Peay v. Peay, 607 P.2d 841, 843 (Utah 1980). However, by implication Rule 54(b) of the Utah Rules of Civil Procedure does allow for the possibility of a judge changing his or her mind in cases involving multiple parties or multiple claims.

...

Rule 54(b) allows courts to readjust prior rulings in complex cases as subsequent developments in the cases might suggest, unless those rulings disposed of the entire claims or parties and those rulings were specifically certified as final.

Id. at 44, ftnt 5.

Because the Summary Judgment and Decree of Foreclosure did not dispose of all the claims in this case and was not certified as final, it is subject to revision under Rule 54(b).

CONCLUSION


Over 10 years ago a judgment was erroneously entered against the Dewsnums. Everyone in this case knows that that judgment was incorrect. Plaintiffs have never tried to justify the judgment. Neither in the lower court nor in their Appellees Brief have plaintiffs ever argued that the judgment was correct. Instead,

they argue procedural issues to try to prevent a court from correcting that mistake.

The Dewsnums have suffered enormously as a result of a summary judgment that was erroneously granted 10 years ago, and they continue to suffer. Because that summary judgment did not dispose of the Dewsnums' counterclaim it did not dispose of all the claims in this case and can be set aside under Rule 54(b) of the Utah Rules of Civil Procedure. The Dewsnums should also be allowed to amend their counterclaim toward a final adjudication thereof.

Aletha Dewsnum is a 65-year-old farmer's widow that lives near Delta, Utah who has persevered for over 10 years in her knowledge that the mortgage on the farm was paid and plaintiffs had no right to foreclose on the farm. Aletha Dewsnum looks to this court for relief from the burden of injustice. Substantively and procedurally Aletha Dewsnum's case is right. This court should grant her the relief she seeks.

Dated this 2nd day of October, 1991.



Russell A. Cline
Attorney for T. LaMar
and Aletha Dewsnum

MAILING CERTIFICATE

This is to certify that on this 2nd day of October 1991,
four (4) true and correct copies of the foregoing Appellants
Reply Brief were mailed by first class mail postage prepaid to:

Michael Z. Hayes
Mazuran, Verhaaren & Hayes
2180 South 1300 South, Suite 260
Salt Lake City, UT 84106

Russell Olson

INDEX TO EXHIBITS

Exhibit A - Affidavit of Scott Pierce.

EXHIBIT A

Russell A. Cline (4298)
123 2nd Avenue, T-2
Salt Lake City, Utah 84103
Telephone: (801) 537-1931

Attorney for Defendants and Counterclaimants
T. LaMar Dewsnap and Aletha Dewsnap

IN THE DISTRICT COURT OF MILLARD COUNTY,
STATE OF UTAH

LOUIS L. TIMM, JOHN NEIUWLAND,
and FLOYD M. CHILDS, Trustees
of United Precision Machine
and Engineering Company Profit
Sharing Trust; ABCO Insurance
Agency, Inc., a Utah Corpor-
ation; and, JOSEPH L. HENROID,
Trustee for the ANNETTE JACOB
TRUST,

Plaintiffs,

vs.

T. LAMAR DEWSNUP and ALETHA
DEWSNUP, ARROW INVESTMENT CO.
a Limited Partnership, THE
FEDERAL LAND BANK OF BERKLEY,
IMPERIAL LAND TITLE INC., as
Trustee and EUGENE L. CARSON
and ELAINE CARSON as Bene-
ficiaries, STRINGHAM, MAZURAN,
LARSEN & SABIN, a Professional
Corporation, MINERAL FERTILIZER
CO., INC, and HARRY V. KAPS,

Defendants.

SCOTT PIERCE AFFIDAVIT

Civil No. 7191

T. LAMAR DEWSNUP and
ALETHA DEWSNUP,

Counterclaimants,

vs.

LOUIS L. TIMM, JOHN NEIUWLAND,
and FLOYD M. CHILDS, Trustees
of United Precision Machine
and Engineering Company Profit
Sharing Trust; ABCO Insurance
Agency, Inc., a Utah Corpor-
ation; and JOSEPH L. HENROID,
Trustee for the ANNETTE JACOB
TRUST,

Counterclaim Defendants.

STATE OF UTAH)
 : ss
SALT LAKE COUNTY)

Scott Pierce having been duly sworn deposes and says:

1. I am an attorney duly authorized and licensed to practice
law in the State of Utah.

2. I was one of the attorneys representing the Dewsnums in
Adversary Proceeding No. 87PC-0116 in the United States Bankruptcy
Court for the State of Utah.

3. The Amended Complaint to Determine Validity of Lien (the
"Complaint") attached as Exhibit A to the plaintiffs' memorandum in
this case, dated January 31, 1991, was signed by me.

4. I was one of the attorneys representing the Dewsnums in the trial on the Complaint, held before the Honorable Glen E. Clark of the United States Bankruptcy Court, on June 25 and 26, 1987.

5. I was present at the trial during the entire proceeding.

6. Paragraphs 20, 21, 22 and 23 of the Complaint alleged that the plaintiffs' Summary Judgment and Foreclosure Decree had been entered in violation of the Section 362 automatic stay since it had been signed, but not entered, until after the Dewsnums had filed bankruptcy.

7. Judge Clark ruled from the bench that the Summary Judgment and Foreclosure Decree was not entered in violation of the Section 362 automatic stay.

8. Having ruled that the Summary Judgment and Foreclosure Decree was not entered in violation of the Section 362 automatic stay, Judge Clark gave full faith and credit to the Summary Judgment and Foreclosure Decree, and refused to consider the allegations set forth in paragraphs 8, 9, 10 and 11 of the Complaint, which went to the underlying claims in the Summary Judgment and Foreclosure Decree.

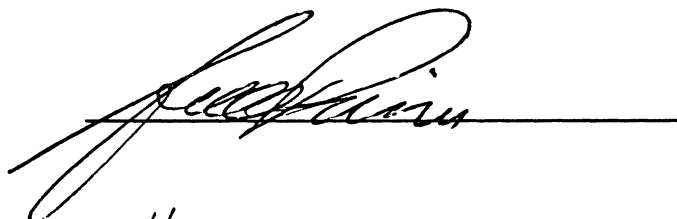
9. No evidence was introduced at trial on paragraphs 8, 9, 10 and 11 of the Complaint.

10. Judge Clark did not consider the allegations set forth in paragraphs 8, 9, 10 and 11 of the Complaint.


11. The allegations set forth in paragraphs 8, 9, 10 and 11 of the Complaint were not litigated or considered by the bankruptcy court in any form or fashion.

12. I have reviewed the Amended Counterclaim attached as Exhibit A to the Dewsnums' Motion to Amend Counterclaim, dated January 22, 1991.

13. None of the allegations or claims set forth in the Amended Counterclaim were litigated or considered by the bankruptcy court in any form or fashion.



Subscribed and sworn to me this 11 day of February, 1991.



My commission expires:

Residing at:

