

2017

**American Express Bank , Fsb, Plaintiff / Appellee, v. James Tanne,  
Defendant/Appellant.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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AMERICAN EXPRESS BANK, FSB, )  
Plaintiff/Appellee, )  
v. )  
JAMES TANNE, )  
Defendant/Appellant. )

APPELLANT'S BRIEF

Case No. 2016-0363  
Civil No. 159102739  
4<sup>th</sup> District Court of Utah

APPEAL FROM A JUDGMENT OF THE FOURTH DISTRICT COURT OF UTAH COUNTY, UTAH, HON. CHRISTINE JOHNSON

BRIEF OF APPELLANT

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UTAH APPELLATE COURTS

JUN 05 2017

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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AMERICAN EXPRESS BANK, FSB,	)	<b>APPELLANT'S BRIEF</b>
Plaintiff/Appellee,	)	
	)	
v.	)	
	)	Case No. 2016-0363
JAMES TANNE,	)	Civil No. 159102739
Defendant/Appellant.	)	4 <sup>th</sup> District Court of Utah

APPELLANT'S OPENING BRIEF

I JURISDICTION OF THE COURT OF APPEALS

On the 22nd of April, 2016, Defendant filed a Notice of Appeal against final judgment entered by the trial court on the 28th of March, 2016. The Court of Appeals took jurisdiction on the 4th of May, 2016 by notice. The Utah Court of Appeals has jurisdiction to hear this appeal pursuant to Utah Code Ann. §78A-4-103(2)(j), which by way of Utah Code Ann. §78A-3-102(4) the Supreme Court of Utah "poured" this appeal into the Court of Appeals.

II OPENING STATEMENT

Appellant, **James Tanne**, upon information and belief, seeks the reversal of the entire ruling of the 3rd<sup>1</sup> of March, 2016 by

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1. Court's Ruling was issued on 3 March, 2016, but final judgment was not entered until 25 March, 2016.

Judge Christine S. Johnson which granted Summary Judgment in favor of Plaintiff, **American Express Bank, FSB.**

In rendering said judgment, the trial court erred in finding of facts, in conclusions of law, and in prejudicial procedural practices, amounting to harmful abuse of discretion. Plaintiff did not adequately demonstrate that there were no genuine issues of material fact and failed to plead any legal authority by which he was entitled to relief as a matter of law. In spite of gross inconsistencies between Plaintiff's allegations and evidence produced in support thereof, the trial court ruled in his favor, providing legal inferences where none were actually pleaded by Plaintiff and accepting as evidence that which did not logically support the conclusions drawn by the trial court.

Specifically, Plaintiff could not produce the "credit agreement" nor the "application for credit" as alleged in both his Complaint<sup>1</sup> and Motion for Summary Judgment<sup>2</sup>, and the evidence which Plaintiff did produce contained gross chronological inconsistencies. Plaintiff's Affidavit<sup>3</sup> which was presented in

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1. Plaintiff's "Complaint" filed 06/18/2015, Page 1, Count I, Paragraphs 2 and 3.
  2. Plaintiff's "Memorandum in Support of Motion for Summary Judgment" filed 08/26/2015, Page 1, Statement of Facts, Paragraph 1.
  3. Plaintiff's "Affidavit" filed 08/26/2015.

support thereof was fatally flawed and those flaws were sufficiently argued before the trial court by Appellant.

Additionally, Plaintiff in pointing to Appellant as the obligor of the alleged debt, failed to provide a unique account number<sup>1</sup> other than "xxxx-1009" to positively identify and match Appellant to the account, neither in pleadings nor in the evidence produced. By way of affidavit<sup>2</sup>, Appellant showed an American Express account with the same identifying account number under terms of settlement as evinced by exhibits. The account has since been settled in full and because settlement occurred after the jurisdiction of the Action was removed from the trial court, proof of settlement is attached herein as an exhibit.

Furthermore, procedural irregularities<sup>3</sup> allowed by the trial court harmed Appellant in preventing due consideration of his well pleaded arguments and evidence which revealed the contradictions between Plaintiff's productions and his supporting affidavit. In spite of the trial court's written assurance to Appellant of due process of discovery<sup>4</sup>, the court

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1. Plaintiff's "Complaint" filed 06/18/2015, Page 1, Count I, Paragraph 2.
  2. Defendant's "Affidavit in Support of Objection to Motion for Summary Judgment" filed 09/08/2015, Page 2, Paragraph 9 to Page 3, Paragraph 15, with Exhibits attached "A", "B", and "C".
  3. Defendant's "Notice of Procedural Irregularities & Request for Relief" filed 02/25/2016.

allowed circumvention of full discovery of Plaintiff through an inconsistent application of procedural sequence and by overlooking notice<sup>1</sup> given by Appellant of Plaintiff's failure of undertakings.

When Plaintiff failed to produce the alleged agreement and application through proper Rule 26 discovery requests<sup>2</sup>, Appellant formally filed a notice<sup>3</sup> of default of undertakings and sought remedy from the court, but in spite of that, the court preempted any relief by scheduling a hearing on Plaintiff's Motion for Summary Judgment while aware<sup>4</sup> of Appellant's grievances. Appellant filed notice of Plaintiff's default and raised the same issue of lack of discovery again during oral arguments.

Complicating matters, the clerk of the court transposed Appellant's address such that the envelope<sup>5</sup> containing the notice

4. Court's "Ruling and Order on Defendant's Motion to Dismiss" entered 07/28/2015, Page 3, final paragraph.
1. Defendant's "Memorandum in Support of Notice of Default & Motion to Strike" filed 02/22/2016.
2. Defendant's "Revised Request for Production of Documents Propounded upon Plaintiff" filed 11/10/2015, Page 3, Paragraph 1 and Page 4, Paragraph 2.
3. Defendant's "Memorandum in Support of Notice of Default & Motion to Strike" filed 02/22/2016, Pages 4 & 5, Paragraphs 17 to 22.
4. Court's Case History, "DEF agreed to the date with the condition that he will be filing an Objection to the Request to Submit." annotated on 02/12/2016.
5. Court's "Mail Returned - Notice of Oral Arguments - James Tanne" entered on 02/24/2016.

was returned and the court did not properly mail Notice of Oral Arguments until the 28th of February, 2016, leaving Appellant a single court day to prepare for the hearing.

### **III STATEMENT OF ISSUES & STANDARD FOR REVIEW**

#### **A GENUINE ISSUES OF MATERIAL FACT**

The most relevant question presented by this appeal is whether summary judgment as granted in favor of Appellee was adequately supported by fact and law, and to the point, if genuine issues of material fact were absent such that Plaintiff was actually entitled to judgment as a matter of law.

Specifically, Appellee, while admitting<sup>1</sup> to the destruction of alleged contract, produced a boiler plate contract which in his written pleadings was purported to be of the 24th of April, 2015<sup>2</sup> with the pretense of binding Appellant to obligations predating the 24th of April, 2015<sup>3</sup>. Even after disavowing that date, Appellee provided no alternative date that was either factual or would by law bind Appellant to the alleged obligation(s).

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1. Plaintiff's "Response to Defendant's Revised Request for Production of Documents Propounded upon Plaintiff" served 12/11/2015, Page 3, Item 1 referenced in Defendant's "Supplemental Memorandum in Object to Motion for Summary Judgment" filed 02/22/2016, Page 7, Paragraph 12 and attached as Exhibit "C".
  2. Plaintiff's "Memorandum in Support of Motion for Summary Judgment" filed 08/26/2015, Page 1, Statement of Facts, Paragraph 1.
  3. Plaintiff's "Complaint" filed 06/18/2015, Page 1, Count I, Paragraph 4.



This argument was timely raised by Appellant both in his Supplemental Memorandum<sup>1</sup>, and in oral arguments<sup>2</sup> thus preserving the issue on appeal.

If the trial court were to accept Appellee's originally alleged date it would be a clear manifest error because the cause of action according to Appellee predated such date, which would obviously undermine any obligation or breach of contract in totality.

But after Appellee admitted in oral arguments that the 2015 date was a typo without specifying an alternative date, it would be a abuse of discretion for the trial court to grant summary judgment with such an issue of material fact to remain outstanding.

For the court to use the Appellee's arbitrary date of "March of 2000 or 2002, that was from the affidavit", a genuine issue remains of a two year gap of uncertainty. However, the proof of contract which Appellee did produce<sup>3</sup>, as far as can be discerned, was newly generated in the present for the purpose of litigation and not in 2000 or 2002. For the court to accept the alleged date

1. Defendant's "Supplemental Memorandum in Support of Objection to Motion for Summary Judgment" filed 02/22/2016, Page 8, Paragraphs 16 and 17.
2. "Partial Transcript" of 03/03/2016, Page 42, Line 13 to Page 44, Line 6.
3. Plaintiff's "Affidavit" filed 08/28/2015, Exhibit "A".

of "2000 or 2002" is a clear manifest error because the agreement that was produced for summary judgment bore no such date.

To accept an agreement bearing one date, with a potential 15 year spread between the alleged and actual date is clearly a gross abuse of discretion and appears to be a search for an outcome at the expense of the factuality of the evidence.

Intrinsic to the above question, if the boiler plate agreement produced by Appellee were to be accepted, how would the alleged obligation be examined? What are the terms of the agreement from which an alleged obligation might be determined? Other than a generalized claim of breach, Appellee did not cite any applicable term(s) in the agreement (what page, which paragraph?) nor identify the nature of breach in the context thereof (What date? How much?), and the trial court did not infer or make a finding of fact pertaining to anything in the alleged contract as produced as is clear by the absence of any citation of terms in the ruling<sup>1</sup>.

**B APPELLEE ALLOWED LAST MINUTE ARGUMENTS**

If the court accepts Appellee's last minute disavowal, over half a year after Appellee had averred the date of 24th of April, 2015 for the agreement in production, how does this play out with

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1. Court's "Order on 03/03/2016 Hearing on Plaintiff's Motion for Summary Judgment" entered 03/28/2015.

the 10th Circuit Court of Appeals admonition that "arguments not properly made in pleadings cannot be first made during oral arguments"? Is it not an abuse of discretion to lend such latitude to one of the parties?

How can Appellant hope to respond to a last minute oral argument from Appellee that disavows a central fact asserted in Plaintiff's Motion for Summary Judgment<sup>1</sup>? The existence of an agreement was a central element which preserved the action from dismissal on Appellant's Motion to Dismiss and the date of the agreement of 24 April, 2015 was on the record for over seven months from the filing of the Motion for Summary Judgment. Why would the trial court tolerate such a last minute change in pleadings? Is this not the very essence of a genuine issue of material fact to be resolved before moving for judgment?

It was an abuse of discretion for the trial court to consider the last minute disavowal of the stated date, particularly when no clear alternative date was offered, and to allow it during Appellee's closing arguments was an abuse of discretion when, as movant, Appellee had the final word without Appellant being able to properly prepare a response. It was incumbent upon Appellee to correct the record with an amended

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1. Plaintiff's "Memorandum in Support of Motion for Summary Judgment" filed 08/26/2015, Page 1, Statement of Facts, Paragraph 1.

memorandum or at least state the correct date in initial arguments at the hearing.

Because the trial court allowed this a last minute argument just before ruling on Plaintiff's Motion for Summary Judgment, Appellant was deprived of any opportunity to address the procedural harm and thus the standard for review of this issue should be based upon abuse of discretion. Inasmuch as Appellant's oral arguments pertaining to Appellee's ad hoc change to the contract date are not persuasive is itself evidence of the harm wrought through procedural irregularities like this.

**C CHALLENGE TO THE CONTRACT & ACCOUNT STATEMENT**

During the course of pleadings, the veracity of Plaintiff's production of an agreement and account statement was challenged by Appellant. The chronological and existential problems with Appellee's production of an agreement have already been discussed, but Appellant also challenged the nature of the production of those documents which Appellee submitted as evidence, which would comprise a genuine issue of material fact.

In Appellant's Affidavit<sup>1</sup> attached to his Objection to Motion for Summary Judgment, Appellant disavowed any relationship with American Express Bank, FSB and the elements of Appellee's

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1. Defendant's "Affidavit in Support of Objection to Motion for Summary Judgment" filed 09/08/2015, Page 1, Paragraphs 1 to 5.

claim of "breach of contract". In the same Affidavit<sup>1</sup>, Appellant refuted the authenticity of Appellee's productions attached to his Motion for Summary Judgment.

It is well held that to establish that an issue of material fact is genuine requires more than argumentative disputation in pleadings, thus by filing of an affidavit that challenged Appellee's productions and in the absence of a trial or examination to impeach Appellant's challenge, there remained genuine issues of material fact specific to Appellee's productions of the agreement and account statements.

In addition to his Amended Memorandum in Opposition to Summary Judgment<sup>2</sup> and his Supplemental Memorandum<sup>3</sup>, Appellant also raised the issue in oral arguments<sup>4</sup>, thus preserving the issue on appeal. The standard for review should be a de novo review of the documents against Appellant's affidavit.

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1. Defendant's "Affidavit in Support of Objection to Motion for Summary Judgment" filed 09/08/2015, Page 2, Paragraph 8.
  2. Defendant's "Amended Memorandum Objection to Motion for Summary Judgment" filed 09/18/2015, Page 14 to 15, Paragraph 48.
  3. Defendant's "Supplemental Memorandum Objection to Motion for Summary Judgment" filed 02/22/2016, Page 2 to 3, Paragraph 3 and Page 11, Paragraph 26.
  4. "Partial Transcript" of 03/03/2016, Page 19, Lines 9 to 16 and Page 36, Lines 6 to 7.



**D MISINTERPRETATION OF UNIFORM COMMERCIAL CODE**

Returning to Appellee's admission<sup>1</sup> to destroying the original contract upon which the alleged obligation is based, Appellant argued that without the contract the claim was unenforceable<sup>2</sup>, and that pursuant<sup>3</sup> to Utah Uniform Commercial Code UCC §3-604 specifies that Appellee "with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such as surrendering of the instrument to the party, destruction, mutilation, or cancellation of the instrument."

As certified in Plaintiff's Response to Defendant's Revised Request for Production of Documents Propounded upon Plaintiff<sup>4</sup>, "The original signed contract/agreement is not available. It is the record retention policy to dispose of applications after seven (7) years."

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1. Defendant's "Supplemental Memorandum in Object to Motion for Summary Judgment" filed 02/22/2016, Page 7, Paragraph 12 and attached as Exhibit "C".
  2. Defendant's "Supplemental Memorandum in Object to Motion for Summary Judgment" filed 02/22/2016, Page 7, Paragraphs 12 to 14.
  3. "Partial Transcript" of 03/03/2016, Page 15, Line 11 to Page 17, Line 7.
  4. Defendant's "Supplemental Memorandum in Object to Motion for Summary Judgment" filed 02/22/2016, Page 7, Paragraph 12 and attached as Exhibit "C".

The trial court<sup>1</sup> did err in both statutory interpretation and abuse of discretion in disregarding the discharge of the alleged debt. By misapplying the word "may" to operate on the discharge of the debt instead of where it was intended to operate on the means by which a discharge may occur, Appellee renders the statute a legal nullity, and the court in deferring to Appellee's interpretation was a clear abuse of discretion.

While the word "may" as it appears in statute offers a choice of action, it cannot not also offer a choice in consequence without robbing the statute any legal effect. The voluntary portion of UCC §3-604 is in the destruction of the instrument (the action), not the discharge of the debt (the legal consequence) once the instrument is voluntarily destroyed - any more than carelessly shredding a dollar bill is destruction of the token value with no recourse but loss to the holder of the inherent value.

We note that "destruction" of the instrument is only one of several means by which an obligation may be discharged in UCC §3-604. To test the logical parsing and legislative intent of the statute, if words indicating "cancelled" were written over the instrument, would one argue that the instrument was still

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1. Court's "Order on 03/03/2016 Hearing on Plaintiff's Motion for Summary Judgment" entered 03/28/2015, Page 3, Paragraph 2.

enforceable? How can the word "may" apply to the destruction of the instrument as a revocable option but not to the other means by which an obligation is discharged? It is obvious that whether by altering the instrument with words or outright destroying the instrument, it has the same irrevocable effect of discharging the obligation and Appellee admitted to disposing of both the credit agreement and the application for credit.

The standard of review for this issue should be a review of correctness of statutory interpretation without deference to the conclusion of the trial court and whether the trial court abused its discretion in accepting an agreement that does not exist to enforce an alleged obligation. The issue is preserved on appeal by Appellant timely raising it in both written pleadings<sup>1</sup> and oral arguments<sup>2</sup>, Appellee's admission to the destruction thereof being produced as an Exhibit on the 22nd of February, 2016<sup>3</sup>.

**E MISINTERPRETATION OF UTAH STATUTE OF FRAUDS**

After Appellee's claim was suo sponte converted by the trial court<sup>4</sup> from a credit card agreement in default to a generalized

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1. Defendant's "Supplemental Memorandum Objection to Motion for Summary Judgment" filed 02/22/2016, Page 7, Paragraph 14.
  2. "Partial Transcript" of 03/03/2016, Page 16, Line 10 to Page 17, Line 7.
  3. Defendant's "Supplemental Memorandum in Object to Motion for Summary Judgment" filed 02/22/2016, Page 7, Paragraph 12 and attached as Exhibit "C".

"breach of contract", can the cause of action survive the lack of an original signed contract, or even without a bona fide contract that names both the obligor and obligee, has a unique account number, and bears a chronologically relevant date?

Two issues exist in questioning the trial court's interpretation of the Utah Statute of Frauds, namely:

1. The first is, while inferring the cause of action as a general "breach of contract", whether the law still provides an exception for credit card debt in light of said recharacterization.
2. The second, is if the exception for credit card debt still applies, if the exception allows for the complete absence of an original agreement or facsimile thereof, signed or unsigned.

As to the first issue, the inference of Appellee's claim as general "breach of contract" was necessary for the trial court<sup>1</sup> to preserve the action against Appellant's original Motion to Dismiss. This was not ruled by the court as an alternative, but

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4. Court's "Ruling and Order on Defendant's Motion to Dismiss" entered 07/28/2015, Page 2 and 3, final and first paragraph.

1. Court's "Ruling and Order on Defendant's Motion to Dismiss" entered 07/28/2015, Page 2 and 3, final and first paragraph.

the very grounds by which the Action would survive the Motion to Dismiss:

*"In order to prevail upon its contract claim, American Express must allege prima facie case for breach of contract. 'The elements of a prima facie case for breach of contract are (1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages.' Bair v Axiom Design, L.L.C., 2001 UT 20, ¶14, 30 P.3d 388.*

In recasting the claim as a "breach of contract", can the trial court still apply the credit card exception of the Statute of Frauds and ignore the stricter requirement of Utah Code, 25-5-4(1), that "agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement"? Appellant asserts that the court misinterpreted the statute and requests a review for correctness in interpretation without deference to the conclusions of the trial court.

The second question that arises relates to element (1) above in the trial court's inference of a "breach of contract" - can a plaintiff enforce the obligation without even producing an original contract or facsimile thereof, with or without signature of the obligor? Obligees still need to retain the original agreement that defines the terms. Appellee having destroyed the original agreement, the exception does not cover his claim.



Appellant asserts that the court misinterpreted the statute, that even if no signature is required, the exception still requires the original agreement, assuming it meets the other requirements:

*(e) A credit agreement is binding and enforceable without any signature by the party to be charged if:*

Appellant requests a review for correctness in interpretation without deference to the conclusions of the trial court, noting that Appellee failed to produce the original agreement having admitted to destroying it.

The issue of the Statute of Frauds is preserved on appeal Appellant having argued such in his Objection to Motion for Summary Judgment<sup>1</sup> as well as during oral arguments<sup>2</sup>.

**F UNSOLICITED LEGAL INFERENCES BY THE TRIAL COURT**

Is the trial court sufficiently bestowed with discretion to infer legal arguments where none were stated by a party, or to suo sponte reconstruct the claim as a general "breach of contract" where Appellee failed to state such? And then, in reverse, apply statutes as if it were still a "credit card agreement in default"? Does this heavy handed insertion of the

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1. Defendant's "Amended Memorandum in Objection to Motion for Summary Judgment" filed 09/18/2016, Page 10, Paragraph 33 to 35.
  2. "Partial Transcript" of 03/03/2016, Page 13, Line 14 to Page 14, Line 11.

court's own arguments on behalf of one of the parties not present as prejudice contrary to the adversarial nature of the judicial forum to credibly resolve disputes between parties? The standard of review would be an abuse of discretion, where the court cannot construct a legal argument central to a claim where it was not made by plaintiff.

By raising this issue in Appellant's Memorandum in Opposition to Summary Judgment<sup>1</sup> and in his Supplemental Memorandum<sup>2</sup>, and again in oral arguments<sup>3</sup> this issue is preserved on appeal.

**G FALLIBILITY OF PLAINTIFF'S AFFIDAVIT**

Having produced no genuine agreement or contract, having admitted to disposing of the original instrument, Plaintiff's Motion for Summary Judgment relied solely on the hearsay exception to the Rules of Evidence for business records, which in turn relied solely upon an affidavit of the custodian of said records. However, as argued by Appellant in both his Supplemental

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1. Defendant's "Amended Memorandum in Objection to Motion for Summary Judgment" filed 09/18/2016, Page 7, Paragraph 20 to Page 8, Paragraph 35.
  2. Defendant's "Supplemental Memorandum in Objection to Motion for Summary Judgment" filed 02/22/2016, Page 5, Paragraph 9 Page 6, Paragraph 11.
  3. "Partial Transcript" of 03/03/2016, Page 19, Line 22 to Page 24, Line 22.

Memorandum<sup>1</sup> and in oral arguments<sup>2</sup>, there are several fatal flaws in Plaintiff's Affidavit of Mario D. Morales-Arias:

1. In his Supplemental Objection to Plaintiff's Motion for Summary Judgment<sup>3</sup> and in oral arguments<sup>4</sup>, Appellant produced for the trial court five different publications<sup>5</sup> which described at least five separate security breaches in the same systems used for account storage which Mr. Morales-Arias certified as "reliable and kept in good state of repair." However, Mr. Morales-Arias did not disclose these data and security breaches as evinced in the publicly available reports. Nor did Appellee at any time dispute or challenge the authenticity of said publications in his pleadings or response.
2. This raises two issues:

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1. Defendant's "Supplemental Memorandum in Objection to Motion for Summary Judgment" filed 02/22/2016, Page 9, Paragraph 21 through Page 11, Paragraph 26.
  2. "Partial Transcript" of 03/03/2016, Page 17, Line 8 to Page 19, Line 11.
  3. Defendant's "Supplemental Memorandum in Objection to Motion for Summary Judgment" filed 02/22/2016, Page 9, Paragraph 21 to Page 11, Paragraph 26.
  4. "Partial Transcript" of 03/03/2016, Page 18, Lines 5 to Page 19, Line 7.
  5. Defendant's "Supplemental Memorandum in Objection to Motion for Summary Judgment" filed 02/22/2016, Exhibits "E" through "H" as referenced on Page 9, Paragraph 20.

- a. First, if American Express Bank, FSB relies upon the compromised systems in lieu of preserving transaction records and original agreements, but they are publicly known to have been repeatedly breached, how can the production of computer generated statements and boiler plate agreements prevail as an exception to the prohibition of hearsay in the Rules of Evidence?
- b. Secondly, if Plaintiff's affidavit made a broad claim of systems "kept in good state of repair", but neglected to disclose that during the time of the cause of action they were known to suffer security breaches at least five different times, how can the testimony of Mr. Morales-Arias be taken seriously?

Through contradicting evidence, Appellee's affidavit was duly impeached without any contest from Appellee.

3. The affidavit was not an expression of personal knowledge but a generalized boilerplate declaration as evidenced by the affiant's name being stamped onto the title caption like a very similar affidavit used in a San Francisco court<sup>1</sup>. The affidavit has the appearance of one produced by "robo-signers" and without an opportunity to pursue

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1. Defendant's "Supplemental Memorandum in Objection to Motion for Summary Judgment" filed 02/22/2016, Exhibits "K".

discovery of Plaintiff, Appellant was denied the opportunity to challenge affiant's personal knowledge of his subject matter and he was never called upon to testify.

The standard of review for this issue should be whether or not the trial court abused discretion in assigning sufficient credibility to Appellee's sole affidavit, particularly when a grant of Summary Judgment should be made in the light most favorable to the non-movant, who in this case, Appellant, had challenged the credibility of the affidavit by both his own affidavit and by way of presenting before the court multiple publications that directly contradict statements made by affiant.

#### **H PROCEDURAL IRREGULARITIES**

Appellant admits that as pro se litigant that he indeed met procedural challenges, but his filings were timely and throughout the action there was a consistent referral to the Rules of the Court to guide his filings. However, rather than find any flexibility or leniency in the court's conduct toward a pro se litigant, he was harshly sanctioned with artificial constraints that turned out to be harmful when Appellee did not cooperate with Rule 26 discoveries.

The irregularity occurred when Appellee failed to timely respond to Appellant's Motion to Dismiss<sup>1</sup>, and indeed, filed no direct response to the Motion as indicated in Appellant's Request



to Submit for Decision<sup>1</sup> filed on the 21st of July, 2015. Citing<sup>2</sup> Supreme Court decisions of *Bell Atlantic Co. v. Twombly* (550 U.S. 544-2007) and *Ashcroft v Iqbal* (556 U.S. 662-2009) as precedent, Appellant requested the case be dismissed inasmuch as a complaint must "plead sufficient facts "to raise a right to relief above the speculative level" which standard "requires more than labels and conclusions," such that "a formulaic recitation of the elements of a cause of action will not do"."

In light of Appellee's failure to even respond to the Motion to Dismiss, any defense was waived and the trial court ruling should be reviewed for an abuse of discretion.

Another specific procedural irregularity was sequence related to Rule 7 in that on the 25th of November, 2015, Appellant requested<sup>3</sup> to submit on his Amended Memorandum in Objection to Summary Judgment<sup>4</sup> as filed on the 18th of September, 2015, which only presented a minor typographic change to a

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1. Defendant's "Answer and Motion to Dismiss" filed 06/23/2015.
  1. Defendant's "Request to Submit on Motion to Dismiss" filed 07/21/2015, Page 2, Paragraph 7.
  2. Defendant's "Request to Submit on Motion to Dismiss" filed 07/21/2015, Page 4, Paragraph 13.
  3. Defendant's "Request to Submit for Decision on Defendant's Motions" filed 11/25/2015.
  4. Defendant's "Amended Memorandum in Objection to Motion for Summary Judgment" filed 09/18/2015.

mistake in his original Memorandum<sup>1</sup> filed on the 8th of September, 2015. For no reason which Appellant can discern, the Request to Submit along with proposed Order was returned<sup>2</sup>. When Appellant resubmitted virtually the same styled request and proposed order<sup>3</sup>, it was finally granted on the 18th of December.

This delay is about equivalent to the gap of time in which Appellee filed his request to submit<sup>4</sup> on Plaintiff's Motion for Summary Judgment on the 11th of February, 2016 while Appellant was still waiting for Appellee's to request to submit on his Motion to Strike<sup>5</sup> from the 14th of January, 2016.

Even after giving notice to the trial court of the irregularities, rather than relief, the trial court allowed a sequence in the proceedings which curtailed discoveries and suppressed Appellant's ability to respond to and prepare against Plaintiff's Motion for Summary Judgment, even incorporating errors in the Record of the Court.

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1. Defendant's "Memorandum in Objection to Motion for Summary Judgment" filed 09/08/2015.
  2. Court's "Minute Entry for Returned Item" entered 12/03/2016.
  3. Defendant's "Request to Submit for Decision on Defendant's Motions" filed 12/07/2015.
  4. Plaintiff's "Request to Submit for Motion on Summary Judgment" filed 02/12/2016.
  5. Plaintiff's "Motion to Strike Defendant's Request for Discoveries" filed 01/14/2016.

Specifically, the trial court, while admonishing<sup>1</sup> Appellant to follow Rule 7 in submitting for decision as a remedy, ignored that Rule 7 also dictates response times for other party to respond, leaving Appellant in an impossible spot as was the case when Appellant sought relief<sup>2</sup> from the trial court to enforce Rule 26 discoveries<sup>3</sup> prior to the oral hearing of the 3rd of March, 2016.

Combined a the clerical error wherein the court mailed notice of the hearing to the wrong address<sup>4</sup>, it became chronologically impossible for Appellant to satisfy Rule 7 and submit because the opposing party would not have had sufficient time to respond. The court abused discretion in denying a continuance when these issues were raised at the hearing<sup>5</sup> and even fought the notion that the aforementioned error mailing notice had been made<sup>6</sup> before finally admitting the mistake<sup>7</sup>.

- 
1. "Partial Transcript" of 03/03/2016, Page 28, Line 1 to 17.
  2. Defendant's "Notice of Procedural Irregularities & Request for Relief" filed 02/25/2016.
  3. Defendant's "Memorandum in Support of Notice of Default & Motion to Strike" filed 02/22/2016.
  4. Court's "Mail Returned - Notice of Oral Arguments - James Tanne" entered on 02/24/2016.
  5. "Partial Transcript" of 03/03/2016, Page 7, Lines 20 to 25, Page 9, Line 23 to Page 10, Line 7.
  6. "Partial Transcript" of 03/03/2016, Page 10, Lines 8 to 25 and Page 12 Lines 4 to 24.

Were the procedural irregularities harmful? Appellant was not afforded equal time to prepare for the hearing for one, and, for two, Appellant was interrupted mid stream during arguments to go over the irregularities. While Appellant defers to the court to conduct the proceedings as the sitting judge sees fit, Appellant does assert that a procedural disadvantage harmful with prejudice occurred and he is left wondering if his arguments, which are now presented on appeal, were adequately considered by the trial court.

The harm was obvious, in that Appellee was cleverly able to take advantage of the sanction<sup>1</sup> against Appellant limiting filings, while circumventing undertakings for discovery with impunity. The captions of filings on the docket are sufficient to show that the Discovery process was not proceeding in spite of the court's written assurance<sup>2</sup> to the contrary, and Appellant's request for procedural relief went unanswered, even when Appellant made a proper request under URCP Rule 12(c) having formally noted<sup>3</sup> failure<sup>4</sup> of Appellee to produce undertakings.

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7. "Partial Transcript" of 03/03/2016, Page 13, Lines 7 to 10.

1. Court's "Order on 11/2/15 Motion to Strike Hearing" entered 11/18/2016, Page 2, Paragraph 2.

2. Court's "Ruling and Order on Defendant's Motion to Dismiss" entered 07/28/2015, Page 3, final paragraph.

3. Defendant's "Objection to Request to Submit" filed 02/22/2016, Page 2, Paragraph 4.

Confronted with Appellant's request under Rule 56(d), the trial court denied it on the grounds that Appellant hadn't properly "declared" a need for continuance<sup>1</sup>:

*"If you want to request a continuance on a Rule 56 motion, there has to be an affidavit supporting it."*

Though the rule states "affidavit or **declaration**", to which the court responded<sup>2</sup>,

*"I don't see a Rule 56 **declaration**"*

even though Appellant's Objection to Submit<sup>3</sup> clearly stated,

*"As **declared** by Defendant above, in the Statements of Fact & Brief History of the Proceedings herein, Plaintiff has not provided any of the documents specifically requested..."*

The standard of review should be for an abuse of discretion in considering the court's 18 November, 2015 sanction and the 3rd of March, 2016 denial of Appellant's request for continuance in light of Appellant's adequate conformity to the rules and procedures.

- 
4. Defendant's "Memorandum in Objection to Request to Submit" filed 02/22/2016, Page 6, Paragraph 22.
  1. "Partial Transcript" of 03/03/2016, Page 32, Lines 14 to 15.
  2. "Partial Transcript" of 03/03/2016, Page 33, Line 9.
  3. Defendant's "Memorandum in Objection to Request to Submit" filed 02/22/2016, Page 6, Paragraph 23.

**IV STATEMENT OF CASE**

This is a civil action lawsuit for debt collection in which Plaintiff (Appellee), **American Express Bank, FSB** alleged a credit card debt owed by Defendant, **James Tanne** (Appellant). The trial court, by its own inference<sup>1</sup>, treated the claim as a "breach of contract" and granted Summary Judgment in favor of Plaintiff.

**V STATEMENT OF FACTS**

References herein are to the Record of this case, No. CA-CV 07-0527 and to the current docket of the appeal, No. 2016-0363. A more detailed Procedural History is found in the Addendum.

1. The civil action was brought by Plaintiff (Appellee), American Express Bank, FSB against Defendant (Appellant), James Tanne on the 18th of June, 2015.
2. On the 23rd of June, 2015, Appellant timely filed a combined Answer and Motion to Dismiss because of lack of specificity found in the Complaint.
3. Appellee did not file a timely response to the Motion to Dismiss.

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1. Court's "Ruling and Order on Defendant's Motion to Dismiss" entered 03/28/2015, Page 2 and 3, final and first paragraph.



4. However, on the 28th of July, 2015, instantaneous with Appellee's Request to Submit, Appellant's Motion to Dismiss was denied.
5. On the 26th of August, 2015 Appellee filed a Motion for Summary Judgment.
6. On the 8th of September, 2015, Appellant responded to the Motion for Summary Judgment and amended the title on the 11th of September, 2015 seeking leave to do so on the 18th of September, 2015.
7. On the 10th of November, 2015, Appellant propounded a Request for Documents on Appellee, but by the 10th of December, 2015 he was in default.
8. On the 25th of November, 2015, Appellant submitted for a decision on leave to amend and resubmitted on the 7th of December, 2015, leave being granted on the 18th.
9. By the 10th of December, 2015 Appellee was in default on his undertakings and on the 11th of December, without seeking a protective order, produced none of the requested documents although he admitted to destroying the original agreement and credit application.
10. On the 3rd of March, 2016, oral arguments were heard and Summary Judgment was granted in favor of Appellee.

11. The original agreement referred in Appellee's original Complaint and in his Motion for Summary Judgment was never produced and substituted was a computer generated agreement template from some later time period.
12. The original application for credit referred in Appellee's original Complaint was never produced.
13. On the 8th of September, 2015, Appellant produced a statement and correspondence with the same unique "xxxx-1009" account number showing a different balance.
14. As of the 28th of March, said account was settled in full.

#### **VI SUMMARY OF ARGUMENTS**

In rendering said judgment, the trial court erred in finding of facts, in conclusions and interpretations of law, and by prejudicial procedural practices or by granting Appellee liberal leeway, such as overlooking a failure to respond and delayed service while applying harsh sanctions to Appellant. Appellant was genuinely harmed inasmuch as he was deprived of time to prepare responses, to prepare for a hearing, and to obtain reasonable relief in the form of a continuance. The procedural irregularities should be examined for abuse of discretion.

On matters of law, Appellant asserts a standard of review to evaluate correctness in interpretation without deference to the conclusions of the trial court. On matters of fact, in light of

prima facie mistakes and abuse of discretion, Appellant requests a de novo review of the evidence found within the record of the trial court. On matters of procedural irregularity, Appellant seeks a standard of review for abuse of discretion.

## **VII ARGUMENTS**

Appellant incorporated his individual arguments in the Statement of Issues and Standard of Review so that the arguments might be seen in the light of the issue presented. For each issue, the circumstances are described, the Record of the Court is referenced for preservation of the issue on appeal, and a logical argument of how the trial court erred is presented.

Appellant, as pro se, has no subscription service whereby he might search case law other than the published opinions of the Court of Appeals and without any access to search through briefs, has found no case law that either supports or refutes his arguments as presented. Any arguments that were contradicted by prior case law have been purposefully omitted from this Brief.

Based on Appellee's failure to produce evidence sufficient to resolve genuine issues of material fact, Appellant requests that the Court of Appeals reverse the trial court ruling. If the Court of Appeals deems it necessary to remand the action for reconsideration in the district court, Appellant moves that the trial court be instructed to rule on the pleadings as they stand

pursuant to Rule 12(c) because of the duration of the litigation and fair opportunity already provided.

Because Appellee, as Plaintiff in the trial court, stated no claim for attorney's fees, Appellant asserts that in the event that the Court of Appeals affirms the trial court's ruling(s), that no award for such fees can be granted either in the trial court or in the Court of Appeals. In light thereof, per Utah Code §78B-5-825.5, Appellant waives reciprocal rights.

#### VIII CONCLUSION

This case is before the Court of Appeals for review of the Summary Judgment ruled in Appellee's favor, which Appellant has argued is not merited based on a reasonable standard of evidence and based on factual errors and incorrect statutory interpretations. The Court of Appeals should review the facts as presented de novo and review the statutory law for correct interpretation without deference to the conclusions of the trial court. The judgment should be reversed and the action dismissed with prejudice without any award of costs to Appellee.

**DATE:** 5TH JUNE, 2017

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James Tanne,  
(Appellant/Defendant pro se)

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

---oooOooo---

COPY

AMERICAN EXPRESS BANK, FSB, )  
Plaintiff/Appellee, )

v. )

JAMES TANNE, )  
Defendant/Appellant. )

APPELLANT'S BRIEF

Case No. 2016-0363  
Civil No. 159102739  
4<sup>th</sup> District Court of Utah

APPENDIX TO APPELLANT'S BRIEF

JAMES TANNE  
Appellant/Defendant Pro Se  
190 N 980 E  
LINDON, UT 84042  
(801) 592-2527

**I CONSTITUTIONAL PROVISIONS & STATUTES**

**Utah Code Ann. §25-5-4(1). CERTAIN AGREEMENTS VOID UNLESS WRITTEN AND SIGNED.**

The applicable portion of the statute reads:

*(1) The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:*

*(a) every agreement that by its terms is not to be performed within one year from the making of the agreement;*

*(b) every promise to answer for the debt, default, or miscarriage of another;*

*(c) every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry;*

*(d) every special promise made by an executor or administrator to answer in damages for the liabilities, or to pay the debts, of the testator or intestate out of his own estate;*

*(e) every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation; and*

*(f) every credit agreement.*

**Utah Code Ann. §25-5-4(2)(e). CERTAIN AGREEMENTS VOID  
UNLESS WRITTEN AND SIGNED.**

The applicable portion of the statute for a signature exception to revolving credit agreements reads:

*(e) A credit agreement is binding and enforceable without any signature by the party to be charged if:*

*(i) the debtor is provided with a written copy of the terms of the agreement;*

*(ii) the agreement provides that any use of the credit offered shall constitute acceptance of those terms; and*

*(iii) after the debtor receives the agreement, the debtor, or a person authorized by the debtor, requests funds pursuant to the credit agreement or otherwise uses the credit offered.*

**Utah Code Ann. §70A-3-604. DISCHARGE BY CANCELLATION OR  
RENUNCIATION**

The applicable portion of the statute reads:

*(1) A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party's signature, or the addition of words to the instrument indicating discharge, or by agreeing not to sue or otherwise renouncing rights against the party by a signed writing.*



**Utah Code Ann. §78B-5-826. RECIPROCAL RIGHTS TO RECOVER ATTORNEY FEES**

The applicable portion(s) of the statute reads:

*A court may award costs and attorney fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney fees.*

**RULES OF CIVIL PROCEDURE**

The Rules of Civil Procedure are assumed to be available to the Court and all interested parties.

**II RELEVANT PROCEDURAL HISTORY**

1. On the 11th of June, 2015, Plaintiff served Defendant with *Summons and Complaint*.
2. On the 18th of June, 2015, Plaintiff filed the *Complaint* in the American Fork Department of the Fourth Judicial District of Utah.
3. On the 23rd of June, 2015, in response thereto, Defendant filed an *Answer & Motion to Dismiss* that, pursuant to Rule 12(b), simultaneously moved to dismiss the claim inasmuch as Defendant asserted the claim to lack specificity.
4. On the 8th of July, 2015, Counsel for Plaintiff, Keisuke Ushijima made an *Entry of Appearance*.

5. On the 8th of July, 2015, Plaintiff moved for an extension of time to respond to the Motion to Dismiss.
6. On the 10th of July, 2015, Plaintiff moved to extend time to file a response to the motion to dismiss, based on a delay in mailing.
7. On the 13th of July, 2015, Defendant responded stipulating to an extension equivalent to the postal delay, agreeing to the 20th of July, 2015.
8. On the 16th of July, 2015, twenty three (23) days after Defendant's Answer, Plaintiff served initial disclosures.
9. On the 20th of July, 2015, without any disclosures yet physically exchanged, (Defendant was not the bringer of suit and noting lack of specificity in Plaintiff's complaint had no disclosures to make), Defendant requested a production of documents from Plaintiff which included the original credit agreement and credit application.
10. On the 21st of July, 2015, having received no reply from Plaintiff on the pending *Motion to Dismiss*, Defendant made a *Request to Submit on the Motion to Dismiss*, supported by *Affidavit*.
11. Also on the 21st of July, 2015, Plaintiff served upon Defendant *Initial Disclosures*.

12. On the 23rd of July, 2015, Plaintiff filed a *Response* to the Defendant's *Reply to Plaintiff's Request to Extend*.
13. On the 27th of July, 2015, Defendant filed an *Objection* to Plaintiff affirming his default and requesting the Action be dismissed.
14. Also on the 27th of July, 2015, Defendant filed an *Request to Submit* on Defendant's *Motion to Dismiss*.
15. On the 28th of July, 2015, Plaintiff filed a *Request to Submit* on his *Motion for Extension*, and the trial court ruled instantly, and in the midst denied Defendant's *Motion to Dismiss*.
16. On the 26th of August, 2015, Plaintiff filed a *Motion for Summary Judgment* with supporting *Memorandum* and *Affidavit*. In spite of his own default on Initial Disclosures (9 days late), Plaintiff argued in error that Defendant's disclosures were in default, though they were not due until forty two (42) days from the 28th of July, 2015 denial of his *Motion to Dismiss* according to the Rule 26 Advisory Committee Notes.
17. On the 27th of August, 2015, with still no cure to the lack of specificity in the *Complaint*, Defendant sought leave of

the court and filed a *Motion for More Definite Statement* pursuant to Rule 12(e).

18. On the 31st of August, 2015, Defendant served upon Plaintiff his *Initial Disclosures*, which contained no disclosures as the *Complaint* still lacked specificity sufficient to determine what if any disclosures would be relevant.
19. Also on the 31st of August, 2015, Defendant moved to adjourn Plaintiff's *Motion for Summary Judgment* and to suppress in limine his exhibits noting that Plaintiff had not made timely service of his own *Initial Disclosures*.
20. On the 3rd of September, 2015, Defendant filed a consolidation of motions in order to streamline and clarify the pending motions before the court.
21. On the 8th of September, 2015, Defendant filed a timely *Objection to Plaintiff's Motion for Summary Judgment* with supporting *Memorandum* and *Affidavit*.
22. Also on the 8th of September, 2015, Appellant moved to suppress Plaintiff's exhibits based on equal application of arguments Plaintiff had made in his *Motion for Summary Judgment* to suppress Appellant's exhibits and productions. A hearing was requested.

23. As part of streamlining the procedural motions, on the 8th of September, 2015, Defendant withdrew the *Motion for More Definite Statement*, having received service of Plaintiff's *Motion for Summary Judgment*.
24. On the 11th of September, 2015, Plaintiff moved to strike Defendant's filings and requested a hearing.
25. On the 15th of September, 2015, Defendant responded to Plaintiff's *Motion to Strike*.
26. On the 18th of September, 2015, Defendant sought leave of the Court and filed an *Amended Memorandum in Support of Objection to Motion for Summary Judgment*, correcting just the title of the document which had a simple typographic error.
27. On the 18th of September, 2015, Defendant properly made a *Request to Submit* on the pending motions.
28. On the 21st of September, 2015, the court declined Defendant's request to submit on grounds that his motions were subject to Plaintiff's *Motion to Strike*, even though Plaintiff had not made a request to submit.
29. On the 21st of September, 2015, the court set a date for a hearing on the matters before it for the 2nd of November, 2015.

30. On the 22nd of September, 2015, before being served the court's 21st of September, 2015 minute entries (postmarked the 22nd of September, 2015), in response to Plaintiff's *Motion to Strike*, pursuant to Rule 10(h), Defendant moved to strike Plaintiff's filing as inappropriate.
31. Also on the 22nd of September, 2015, before notification of the court setting for oral arguments, Defendant requested a hearing on the current matters and pending motions in light of the pending *Motion for Summary Judgment*, which request for a hearing was withdrawn on the 25th of November, 2016, after the issues had been resolved.
32. On the 1st of October, 2015, the court served notice of the hearing on the parties.
33. On the 2nd of November, 2015, oral arguments were heard and on the 19th of November, 2015, a order reflecting the court's decision on matters, including allowance for both parties' disclosures and without any restriction on either parties' exhibits, was entered.
34. On the 10th of November, 2015, Defendant revised and resubmitted a *Request for Documents Propounded upon Plaintiff* and served Plaintiff with *Supplemental Disclosures*.

35. On the 25th of November, 2015, Defendant withdrew his Request for a Hearing on Plaintiff's *Motion for Summary Judgment* and consolidated his pending motions, and filed a *Request to Submit for Decision on the Amended Objection to Motion for Summary Judgment* that was filed on 18th of September, 2015.
36. On the 3rd of December, 2015, the court returned Appellant's 25th of November, 2015 documents on the grounds that there was no Request to Submit attached, but there in fact was, so Appellant refiled the documents.
37. On the 7th of December, 2015, Defendant refiled the *Request to Submit* attaching a letter to the Clerk of the Court.
38. On the 18th of December, 2015, the Court issued an order allowing Appellant's 18th September, 2017 *Amended Objection to Motion for Summary Judgment*.
39. The *Amended Memorandum* from Defendant was originally served upon Plaintiff on the 18th of September, 2015.
40. On the 28th of December, 2015, not having received the documents previously requested, Defendant served upon Plaintiff a *Request for Admissions*, serving both "American Express Bank, FSB" and "ARSI", an entity who's name



occupied the footer of the original *Complaint* where a Plaintiff's name would normally be inscribed.

41. Additionally, due to counsel for Plaintiff answering in place of Plaintiff on previous discovery requests, Defendant propounded upon Plaintiff a similar set of *Admissions* on the 28th of December, 2015.
42. On the 14th of January, 2016, without producing or responding to the content of the requested *Admissions*, Plaintiff filed a Motion to Strike Defendant's Request, requesting a hearing.
43. On the 26th of January, 2016, Defendant voluntarily withdrew the Request for *Admissions* propounded upon Counsel for Plaintiff with a supporting Memorandum.
44. On the 11th of February, 2016, Plaintiff filed a Request to Submit on Plaintiff's Motion for Summary Judgment, failing to timely serve the same upon Defendant.
45. Also, on the 12th of February, 2016, before Defendant received service of Plaintiff's Request to Submit, and while undertakings for discovery were in dispute between the parties, the Court scheduled oral arguments for hearing the matter of Plaintiff's Motion for Summary Judgment for the 3rd of March, 2016.

46. When scheduling the hearing, the Court proposed a date in February, but Defendant clearly stated that he could not appear in the month of February and requested a March date.
47. Because the date under consideration in March was initiated by Defendant on that very call, there is no way that it could be considered other than a proposed date, and Defendant never at any time did the clerk call back to confirm the date.
48. In spite of the mailing of said Notice of Hearing on the 16th of February, 2016, the Court improperly addressed Defendant's copy such that it was returned to the Court on the 24th of February, 2016 as undeliverable.
49. A new *Notice of Hearing* was mailed on the 26th of February, 2016 and was delivered to Defendant on or about the 1st of March, 2016.
50. In the interim, on the 22nd of February, 2016, Defendant filed several filings, including:
  - a. *Supplemental Memorandum in Support of Objection to Motion for Summary Judgment* with attachments;
  - b. *Objection to Plaintiff's Request to Submit* with supporting *Memorandum*;

- c. *Motion to Strike and Notice of Default* (of undertakings), moving to strike certain of Plaintiff's pleadings based upon limited discovery;
51. On the 25th of February, 2016, Defendant filed a *Notice of Procedural Irregularities* based on delay or outright lack of service.
52. On the 29th of February, 2016, Defendant served additional *Disclosures* upon Plaintiff, and again prior to the Hearing for Oral Arguments on the 3rd of March, 2016.
53. On the 3rd of March, 2016 the Hearing on the matter of Plaintiff's *Motion for Summary Judgment* took place, judgment found in favor of Plaintiff.
54. On the 25th of March, 2016, Plaintiff submitted a *Proposed Order* which was entered on the same day by the Court, with a modification as to the amount made on the 28th of March, 2016.
55. With motions in the lower court pertaining to impecuniosity of Appellant still pending, the trial court prematurely transmitted the *Roll and Index of Records* to the Court of Appeals on the 22nd of November, 2016. The issue of impecuniosity was remanded to the lower court for determination and a supplemental roll and index, including

a partial transcript of the oral arguments was transmitted on the 1st of May, 2017. The lower court failed to issue a final ruling on certain interlocutory matters before it, namely it did not make entry of a ruling of a *Motion to Reconsider Impecuniosity* or to *Enter a Statement of Evidence* prepared by Appellant.

56. On the 3rd of May, 2017, a date was already set for *Appellant's Opening Brief* for the 5th of June, 2017 by the Court of Appeals.

**III ORAL ARGUMENTS**

1. As stated, Oral Arguments were heard on the 2nd of November, 2015. Any portion of appeal taken from that hearing is clearly defined in the written minutes and ruling which is part of the written record of the Court, thus no transcript or recollection is necessary.
2. The Oral Arguments heard on the 3rd of March, 2016, which resulted in the grant of Summary Judgment in favor of Plaintiff, form a large part of the appeal which was transcribed in part.

**DATE:** 5TH JUNE, 2017

**COPY**

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James Tanne,  
(Appellant/Defendant pro se)

**CERTIFICATION OF SERVICE** (Civil No. 2016-0363)

**IN THE UTAH COURT OF APPEALS**

AMERICAN EXPRESS BANK, FSB,	)	<b>BRIEF OF APPELLANT</b>
Plaintiff/Appellee,	)	
	)	
v.	)	
	)	Case No. 2016-0363
JAMES TANNE,	)	Civil No. 159102739
Defendant/Appellant.	)	4 <sup>th</sup> District Court of Utah

**CERTIFICATION OF SERVICE**

**FOR**

**BRIEF OF APPELLANT**

THIS IS TO CERTIFY that an signed copy of the foregoing, was filed with the Court by posting it U.S. First Class Mail on or about the 5th of June, 2017, with a seven (7) copies mailed separately; and two (2) copies of the same were posted First Class Mail to Appellee/Plaintiff on or about the same day to:

American Express Bank, FSB  
c/o Gurstel Chargo PA  
Mikel M. Boley or Keisuke Ushijima  
6681 Country Club Dr.  
Golden Valley, MN 55427

**COPY**

**DATE:** 5TH JUNE, 2017

\_\_\_\_\_  
James Tanne,  
(Appellant/Defendant pro se)

APPELLANT'S EXHIBITS (Civil No. 2016-0363)

**EXHIBIT "A"**



03-29-17

JAMES TANNE  
190 N 980 E  
LINDON UT 84042-1580

Re: Account No.: [REDACTED] 1009

Dear James Tanne:

We received your payment of \$2655 on 03-27-17. With this payment, you have now completed the terms of the settlement as agreed to on August 15, 2015. No further attempts will be made to collect the remaining balance on your account.

Thank you again for settling your balance with us.

Sincerely,

American Express Global Collections

813CZFRST02\_ICAXSIFPD\_389304248



P.O. BOX 6985  
BUFFALO, NY 14240-6985

03-29-17 28261452



JAMES TANNE  
190 N 980 E  
LINDON UT 84042-1580





09-01-15

JAMES TANNE  
190 N 980 E  
LINDON UT 84042-1580

Re: Account No.: [REDACTED] 1009

Dear James Tanne:

Thank you for the \$255.00 payment toward your Balance Owed on your American Express account referenced above.

You've agreed to pay the Full Settlement Amount listed below as settlement of your Balance Owed. This payment is reflected in the Balance Owed and the Settlement Balance Due that are listed below.

This settlement offer is contingent upon timely payment. We will honor this offer if:

1. We receive the entire Settlement Balance Due by: 05-28-2017.
2. Settlement payment(s) are made as follows:

\$255.00 by 08/31/15	\$100.00 by 02/28/16	\$100.00 by 08/28/16	\$100.00 by 02/28/17
\$400.00 by 09/28/15	\$100.00 by 03/28/16	\$100.00 by 09/28/16	\$100.00 by 03/28/17
\$100.00 by 10/28/15	\$100.00 by 04/28/16	\$100.00 by 10/28/16	\$100.00 by 04/28/17
\$100.00 by 11/28/15	\$100.00 by 05/28/16	\$100.00 by 11/28/16	\$100.00 by 05/28/17
\$100.00 by 12/28/15	\$100.00 by 06/28/16	\$100.00 by 12/28/16	
\$100.00 by 01/28/16	\$100.00 by 07/28/16	\$100.00 by 01/28/17	

<u>Balance Owed</u>	<u>Full Settlement Amount</u>	<u>Settlement Balance Due</u>
\$6,219.03	\$2,655.00	\$2400.00

Failure to remit timely payment for the Full Settlement Amount may result in further collection efforts to recover the Balance Owed.

Other than communication regarding your payment plan, no further attempts will be made to collect the remaining balance while you are making payments in accordance with the terms listed above. Upon timely payment of the Full Settlement Amount, no further attempts will be made to collect the remaining balance.

If you have any questions, please contact us at 1-877-443-0144 Monday – Friday: 8am – 10pm EST, Saturday: 8am – 1pm EST.

Sincerely,

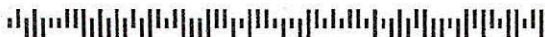
American Express Global Collections

813CZFRST02\_ICAXSIF1\_674187231



P.O. BOX 6985  
BUFFALO, NY 14240-6985

09-01-15      28261452



JAMES TANNE  
190 N 980 E  
LINDON UT 84042-1580

**CERTIFICATE OF COMPLIANCE**

This computer-generated brief was prepared using Adobe FrameMaker version 7.0 and exported to the Adobe Portable Document Format using Adobe Acrobat Professional version 6.0. It is double spaced and printed in 13 point Courier (plain, bold, and italic), a monospaced typeface. The total number of words in the brief, as calculated by FrameMaker, inclusive of point headings and footnotes and exclusive of page headings and footers, pages containing the table of contents, table of authorities, proof of service, this certificate of compliance, or any authorized addendum is 6,365 words.

James Tanne,

**COPY**

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Defendant/Appellant

CERTIFICATION OF SERVICE (Civil No. 2016-0363)

IN THE UTAH COURT OF APPEALS

AMERICAN EXPRESS BANK, FSB, )           **BRIEF OF APPELLANT**  
                                          Plaintiff/Appellee, )  
                                          )           )  
                                          v.           )           )  
                                          )           Case No. 2016-0363  
JAMES TANNE,                         )           Civil No. 159102739  
                                          Defendant/Appellant. )           4<sup>th</sup> District Court of Utah

CERTIFICATION OF SERVICE

FOR

BRIEF OF APPELLANT

THIS IS TO CERTIFY that an signed copy of the foregoing, was filed with the Court by posting it U.S. First Class Mail on or about the 5th of June, 2017, with a seven (7) copies mailed separately; and two (2) copies of the same were posted First Class Mail to Appellee/Plaintiff on or about the same day to:

American Express Bank, FSB  
c/o Gurstel Chargo PA  
Mikel M. Boley or Keisuke Ushijima  
6681 Country Club Dr.  
Golden Valley, MN 55427

**COPY**

**DATE:** 5TH JUNE, 2017

\_\_\_\_\_  
James Tanne,  
(Appellant/Defendant pro se)