2002

Green v. Kuhlmann : Brief of Appellee

Utah Court of Appeals

Gary G.Kuhlmann; Respondent/Appellee.
Chad J. Utley; Eric R. Gentry; Christopherson, Farris, White & Utley; Attorneys for Petitioner/Appellant.

IN THE UTAH COURT OF APPEALS

WILLIAM JUDSON and DONNA JUDSON, husband and wife, Plaintiffs and Appellees, v. WHEELER RV LAS VEGAS, LLC, A Nevada foreign limited liability company, dba WHEELER'S LAS VEGAS RV, Defendant and Appellant	BRIEF OF APPELLEES Court of Appeals No. 20020698 -CA

APPEAL FROM AN ORDER OF THE FIFTH JUDICIAL DISTRICT COURT OF UTAH, WASHINGTON COUNTY, HONORABLE ERIC A. LUDLOW, DENYING DEFENDANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT

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JURISDICTIONAL STATEMENT

This court has jurisdiction pursuant to §§78A-3-102 and 78A-4-103, Utah Code Annotated, and the Order of the Utah Supreme Court transferring this case to this court for disposition.

STANDARDS OF REVIEW

The standards of review applicable to the issue raised under defendant's Issue #1 are as follows.

> A denial of a motion to vacate a judgment under rule 60(b) is ordinarily reversed only for an abuse of discretion. However, when a motion to vacate a judgment is based on a claim of lack of jurisdiction, the district court has no discretion: if jurisdiction is lacking, the judgment cannot stand without denying due process to the one against whom it runs. Therefore, the propriety of the jurisdictional determination, and hence the decision not to vacate, becomes a question of law upon which we do not defer to the district court.

Franklin Covey Client Sales, Inc. v. Melvin, 2000 UT App 110, ¶ 8, 2 P.3d 451, 454.

Additionally, "A trial court has discretion in determining whether a movant has shown Rule 60(b) grounds, and this Court will reverse the trial court's ruling only when there has been an abuse of discretion." *Id* at 110, ¶ 9.

Where the trial court relies only on documentary evidence to determine whether jurisdiction exists, "If there are no material disputes in the documentary evidence, the appellate court reviews the matter de novo to determine whether as a matter of law jurisdiction exists. *Kamdar & Co. v. Laray Co., Inc.,* 165 Utah Adv. Rep. 9, 815 P.2d 245, 248.

Contrary to defendant's assertion, the issue set forth under defendant's Issue #1 was not preserved in the trial court, and in fact was not even raised before the trial court.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

Rule 60. Relief from judgment or order.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.

On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken.

Rule 12. Defenses and objections.

(b) How presented.

Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

(h) Waiver of defenses.

A party waives all defenses and objections not presented either by motion or by answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the

parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

STATEMENT OF THE CASE

I. Statement of Relevant Facts.

The following are the facts applicable to this case, as supported by the Affidavit of Gary G. Kuhlmann in Opposition to Motion to Set Aside Default Judgment and documents attached thereto, Record ("Rec.") at pages 46 - 63, a copy of which is attached hereto as Addendum A, and the Findings, Conclusions and Order of the trial court, Rec. at pages 94 - 100, a copy of which is attached as Addendum 5 to the Brief of Appellant. To avoid unnecessary repetition, reference to the record shall be to Appellees' Addendum A and Appellant's Addendum 5 where applicable.

1. The complaint was filed in the trial court on August 16, 2007, and was served upon the defendant on August 20, 2007. Rec. at pp. 1 - 18.

2. During September, 2007, plaintiffs' counsel, Gary Kuhlmann, was contacted by Sharon Nelson, attorney for the defendant. Ms. Nelson requested an extension of time to answer the complaint. She informed Mr. Kuhlmann that she believed her client was not liable to the plaintiffs because her client had purchased the involved dealership after the sale of the motorhome at issue in this case to the plaintiffs. Addendum A at p. 2, ¶ 3; Addendum 5 at p. 2, ¶¶ 3 - 4.

3. In mid-September, 2007, Mr. Kuhlmann agreed to grant Ms. Nelson an extension to allow her a short time to provide Mr. Kuhlmann with evidence that her client was not the proper party in the case. Addendum A at p. 2, ¶ 4; Addendum 5 at p. 2, ¶ 5.

4. After not hearing from or receiving information from Ms. Nelson, Mr. Kuhlmann's office contacted Ms. Nelson's office by phone on October 15, 2007, and demanded that the requested information be provided or an answer filed. Addendum A at p. 2, ¶ 5; Addendum, 5 at p. 2, ¶ 6.

5. On October 30, 2007, Mr. Kuhlmann received a fax from Ms. Nelson containing a two page Bill of Sale which was apparently part of a larger contract. Addendum A at p. 2, ¶ 6; Addendum 5 at p. 7.

6. On that same date, Mr. Kuhlmann's office responded to Ms. Nelson's fax and informed her that to evaluate the matter, and determine who was responsible for the dealership liabilities, Mr. Kuhlmann would need to receive the Purchase Agreement and other documents related to the alleged sale of the dealership. Addendum A at p. 2, ¶ 7; Addendum 5 at p. 3, ¶ 8.

7. On November 1, 2007, Mr. Kuhlmann received a second fax from Ms. Nelson requiring that Mr. Kuhlmann sign a confidentiality agreement before any further documents would be provided. The demand was for a general confidentiality agreement and was not limited to financial or proprietary matters. Addendum A at p. 2, ¶ 8; Addendum 5 at p. 3, ¶ 9.

8. Mr. Kuhlmann refused to sign the confidentiality agreement since it was the defendant that was requesting that the defendant be dismissed from the case and because to do so could prejudice the plaintiff in using the information in the purchase documents in the case in the trial court. Addendum 5 at p. 3, ¶ 10.

9. After receiving no further information and having no further contact with Ms. Nelson, on November 27, 2007, Mr. Kuhlmann, by letter, advised Ms. Nelson that plaintiffs would be seeking the entry of default and default judgment. Addendum A at p. 2, ¶ 9; Addendum 5 at p. 3, ¶ 11.

10. An Application for Entry of Default and a Motion for Entry of Default Judgment were filed with the court on November 27, 2007. Rec. at pp. 19 - 22.

11. A Default Certificate was entered on December 3, 2007, and Default Judgment was entered on December 4, 2007. Rec. at pp. 23 - 25.

12. Despite having been advised that the plaintiffs would be seeking a default judgment and being provided with a copy of the Application for Entry of Default, the defendant's attorney took no action to prevent the entry of default. Addendum A at p. 3, ¶ 12; Addendum 5 at p. 3, ¶ 14.

13 On December 19, 2007, Mr. Kuhlmann received a phone call from William Frazier, the new attorney for the defendant. Mr. Frazier asked if Mr. Kuhlmann would be willing to stipulate to set aside the default judgment based upon his assertion that his client had purchased the business after the plaintiff's purchase of the motorhome at issue. While Mr. Kuhlmann refused to simply stipulate to set aside the default without some evidence of the factual assertions of defendant's counsel, Mr. Kuhlmann relayed to Mr. Frazier a continuing willingness to review any documents Mr. Frazier would like to provide, and emphasized Mr. Kuhlmann's frustration with prior defense counsel's failure to provide any type of documentation as previously promised. At the end of this conversation, Mr. Frazier informed Mr. Kuhlmann that he would obtain and provide Mr. Kuhlmann with documentation to show that

Mr. Frazier's client was not the proper defendant in this matter. Addendum A at p. 3, ¶ 13; Addendum 5 at pp. 3 - 4, ¶¶ 15 - 17.

14. Despite being told yet again that Mr. Kuhlmann would be provided certain documents by the defendant, no further documents were provided and no further contact from defendant's attorneys occurred until February 27, 2008. On that date Mr. Kuhlmann received a voice-mail message from defendant's counsel simply indicating that he would be filing a Motion to Set Aside Default Judgment. Addendum A at pp. 3 - 4, ¶ 14; Addendum 5 at p. 4, ¶¶ 18 - 19.

15. Despite being told repeatedly that Mr. Kuhlmann would be receiving certain documents for review, the same were never provided by defendant. Addendum A at p. 4, ¶ 15.

16. The defendant filed its Motion to Set Aside Default Judgment on February 29, 2008, four days shy of three months from the date of entry of the Default Judgment. Addendum 5 at p. 4, ¶ 20; Rec. at pp. 30 - 33.

17. The defendant was afforded over three months to provide the plaintiffs with the documents requested by plaintiffs or to file an answer. Addendum 5 at p. 4, ¶ 21.

18. The only evidence provided to the trial court to try to demonstrate the existence of a meritorious defense were the conclusory statements of defendant's counsel that:

a. The evidence will show that plaintiffs have sued the wrong party.

b. Defendant did not own the subject dealership when the plaintiffs purchased the recreational vehicle.

c. Defendant will be able to demonstrate that it is not the proper party, and that any assertion of personal jurisdiction over defendant is highly questionable. Addendum 5 at pp. 4 - 5, ¶ 22.

19. At no time did the defendant seek to dismiss the case or have the default judgment declared void, but rather sought only to set aside the default judgment in this matter under Rule 60(b)(1) and (6). Rec. at p. 30 - 33.

SUMMARY OF ARGUMENTS

The defendant's claim that the default judgment should have been set aside under Rule 60(b)(4), Utah Rules of Civil Procedure, was not raised in the trial court. Rather, the defendant's claim for relief was premised only on Rules 60(b)(1) and (6). This court should not review an issue raised for the first time on appeal, especially where there is no evidence in the record which supports the asserted issue.

All of the allegations of the plaintiff's complaint were deemed admitted when defendant failed to file an answer and the default judgment was entered. Further, the defendant waived any defense based upon a lack of personal jurisdiction when it failed to raise such defense in a responsive pleading or by motion before filing a responsive pleading.

After reviewing the defendant's arguments as contained in the defendant's motion and hearing the arguments of counsel, the trial court properly denied the defendant's motion since there was no excusable neglect, surprise, inadvertence or mistake shown by the defendant. Additionally, the defendant, in its motion for relief from the default judgment, failed to even address whether a meritorious defense existed to the plaintiff's claims.

ARGUMENT

I. The Defendant Raises Issues on Appeal which were not Raised in the Trial Court nor Properly Preserved for Appeal.

The defendant asserts that it has disputed personal jurisdiction "in first and all subsequent pleadings." Appellant's Brief at p. 12. However, the defendant has never filed a pleading in this case. Defendant also asserts that its motion to set aside the default judgment was "brought on the grounds that the Trial Court (sic) lacked personal jurisdiction over the Defendant, among other grounds." Appellant's Brief at p. 12. Defendant then claims that the trial court erred by not setting aside the default judgment as being void, pursuant to Rule 60(b)(4), Utah Rules of Civil Procedure. These assertions by the defendant simply are not true.

The defendant's claim that the defendant should be granted relief from the default judgment based upon the judgment being void was not raised, briefed nor argued in the trial court. Since the defendant chose not to provide this court with transcripts of the hearing before the trial court, this court is left with only the printed record. The only evidence in such record regarding the defendant's claims for relief from the judgment are in the defendant's motion and memorandum seeking relief from the default judgment, a copy of which is attached to the defendant's brief as Addendum 2, and the accompanying affidavits, copies of which are attached to defendant's brief as Addenda 3 and 4.

As evidenced by the defendant's motion, memorandum and affidavits, the motion was specifically "brought pursuant to Rule 60(b)(1) and 60 (b)(6) of the Utah Rules of Civil Procedure." Addendum 2 at p. 1. The defendant argued only that "the subject judgment was issued subsequent to mistake, inadvertence, surprise, (sic) and excusable neglect." Addendum 2

at p. 2. While defendant made certain conclusory and unsupported statements regarding whether the defendant was a proper party and claimed that the defendant "has legitimate and valid legal defenses, including misjoinder and lack of personal jurisdiction," Addendum 2 at p. 4, nowhere in the motion nor the affidavits submitted therewith is there a single fact supporting a dispute of personal jurisdiction. In fact, the motion itself indicates that the defendant was not raising such issue by the motion but wished to have the judgment set aside because "Defendant **will be** able to demonstrate that . . . any assertion of personal jurisdiction over Defendant is highly questionable. . . ." Addendum 2 at p. 4.

The "Conclusion" of the defendant's motion and memorandum is perhaps the most telling. In such conclusion, the defendant does not request that the court dismiss the case for lack of jurisdiction or find the judgment void due to lack of jurisdiction. Rather, the defendant "requests that the Default Judgment entered against it on or about December 5, 2007 be set aside, due to mistake, inadvertence, excusable neglect, (sic) and surprise." Addendum 2 at p. 4. Thus, the issue of whether the judgment was void under Rule 60(b)(4), Utah Rules of Civil Procedure, was never raised in the trial court, was never briefed by the parties, was never decided by the trial court, is raised for the first time in this court, and was not properly preserved for determination by this court.

II. Personal Jurisdiction Over the Defendant has been Admitted and any Defense of Lack of Personal Jurisdiction has been Waived.

Setting aside the default judgment based upon an asserted lack of personal jurisdiction is also unsupported since the defendant has never properly raised the issue, never presented any factual basis for such claim, personal jurisdiction has been admitted, and the defendant has

waived any defense based upon a lack of personal jurisdiction. While the defendant's brief to this court makes several assertions as to why personal jurisdiction is lacking, none are supported by any evidence in the record and none were raised in, or presented to, the trial court. The defendant did not file an answer disputing the plaintiffs' claims of personal jurisdiction over the defendant. Nor did the defendant file a motion to dismiss for lack of personal jurisdiction. At the time the defendant filed its only motion, the plaintiffs had already been granted judgment. The defendant's failure to contest the allegations of the complaint before default resulted in the allegations of the plaintiffs' complaint being admitted. *See Cody v. Lowe*, 2008 UT App 440, 2008 Utah App. LEXIS 438, citing *Stevens v. Collard*, 837 P.2d 593, 595 (Utah Ct. App. 1992) ("When allegations in a complaint are not properly contested by an opposing party, they are deemed admitted."); *Murdock v. Blake*, 26 Utah 2d 22, 484 P.2d 164, 169 (Utah 1971) (Allegations in a pleading to which a responsive pleading is required are admitted when not denied in a responsive pleading). In this case, the defendant has not filed any responsive pleadings in this matter and default was entered. Therefore, all facts of the complaint are deemed admitted.

The defendant's claims regarding personal jurisdiction were also waived by the defendant. Rule 12(b), Utah Rules of Civil Procedure provides

> Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

Additionally, Rule 12(h), Utah Rules of Civil Procedure provides

> A party waives all defenses and objections not presented either by motion or by answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Based upon the foregoing, the defendant's failure to raise the defense of lack of personal jurisdiction by motion prior to pleading, or in a responsive pleading, constitutes a waiver of such defense. The same applies to the defendant's claim that it is not the proper party to this case. In *Lewis v. Porter*, 556 P.2d 496 (Utah 1976), after judgment was entered for the plaintiff, the defendant claimed that he should not have been found liable in his individual capacity but in a corporate capacity. The court found "Any objection to a defect of the parties is waived, if not asserted by a party as provided in Rule 12(h)." Thus, defendant's claim that it is not the right party to this action has been waived.

III. The Trial Court Properly Exercised its Discretion in Denying the Defendant's Motion for Relief from the Default Judgment.

Contrary to the defendant's argument, the trial court, after weighing the evidence and arguments before it, properly ruled that there was not a sufficient basis for granting the defendant relief from the default judgment. In the context of reviewing a trial court's denial of a motion for relief from a judgment, the Utah Supreme Court has noted:

> The trial court is endowed with considerable latitude of discretion in granting or denying a motion to relieve a party from a final judgment under Rule 60(b)(1), U.R.C.P., and this court will reverse the trial court only where an abuse of this discretion is clearly established . . . . The rule that the courts will incline towards granting relief to a party, who has not had the opportunity to present his case, is

> ordinarily applied at the trial court level, and this court will not reverse the determination of the trial court merely because the motion could have been granted. For this court to overturn the discretion of the lower court in refusing to vacate a valid judgment, the requirements of public policy demand more than a mere statement that a person did not have his day in court when full opportunity for a fair hearing was afforded him or his legal representative.
>
> In order for defendant to be relieved from the default judgment, he must not only show that the judgment was entered against him through excusable neglect (or any other reason specified in Rule 60(b)), but he must also show that his motion to set aside the judgment was timely, and that he has a meritorious defense to the action.
>
> * * * *
>
> The latter question [of a meritorious defense] arises only after consideration of the first question [of excusable neglect] and a sufficient excuse therefrom being shown . . . . Furthermore . . . . it is unnecessary, and moreover inappropriate to even consider the issue of meritorious defenses unless the court is satisfied that a sufficient excuse has been shown.

State vs. Musselman, 667 P.2d 1053, 1055-1056 (Utah 1983). Based upon the evidence before the trial court, and as reflected in the record, it is evident that the trial court did not abuse its "considerable latitude of discretion" in denying the defendant's motion.

A **<u>The defendant failed to show mistake, inadvertence, surprise or excusable neglect</u>.**

It has been noted in relation to a Rule 60(b) motion that "A prime requisite precedent to the granting of such relief is that the movant demonstrate that he comes to the court with clean hands and in good faith." *Chrysler vs. Chrysler*, 303 P.2d 995, 997 (Utah 1956). This, the defendant did not do. Defendant asserts that there was continuing dialog between counsel, that various documents requested by the plaintiffs were provided by the defendants, and that each time documents were provided, plaintiffs' counsel requested additional documents. Appellant's Brief at pp. 8 - 9. Defendant also asserts that after plaintiffs' counsel refused to sign a

confidentiality agreement, "Plaintiffs' counsel and general counsel for Defendant continued to attempt to work through their concerns via correspondence, mainly via facsimile." Appellant's Brief at p. 9. Nothing in the record supports these factual assertions.

Both the affidavits of defendant's general counsel, Sharon Nelson, and the affidavit of plaintiffs' counsel, Gary Kuhlmann, show that prior to the entry of default, there was a total of five contacts between counsel's offices. In mid September there was a telephone conversation between counsel wherein Mr. Kuhlmann told Ms. Nelson that she could have a short extension to answer so she could provide Mr. Kuhlmann with documents supporting her claim that the defendant was not a proper party to this action. After no contact was received from Ms. Nelson for approximately a month, Mr. Kuhlmann advised Ms. Nelson, that she should file an answer or provide the requested documents. No response was received from Ms. Nelson for two weeks, at which time she sent a fax to Mr. Kuhlmann with a two-page Bill of Sale. That same day, Mr. Kuhlmann responded and indicated that the Bill of Sale was not sufficient and that the requested documents had to be to Mr. Kuhlmann by the end of business on November 1, 2007. On November 1, 2007, Ms. Nelson sent a fax requiring that Mr. Kuhlmann execute a confidentiality agreement before any further documents would be provided. Mr. Kuhlmann refused to sign the confidentiality agreement and gave the defendant an additional twenty-six days to file an answer before seeking a default. No answer nor motion to dismiss was filed during an almost three month period. During this time, Ms. Nelson called Mr. Kuhlmann's office once and sent two fax transmissions. Communication between counsel was far from "continuing." Additionally, after having been given a demand that an answer be filed if the documents were not provided, no documents were provided and no answer was filed.

In *Pacer Sport and Cycle, Inc. vs. Myers*, 534 P.2d 616 (Utah 1975), a father had co-signed a promissory note with his son. When the son failed to make payment, the attorney for the plaintiff wrote the father and requested payment. The father refused to pay, claiming that he had only signed for the purpose of obtaining credit for his son. The father was later served with a summons and complaint. The father called the plaintiff's attorney, stating that he was not liable for the debt and that his son was in California. After the plaintiff was unable to find the son, the plaintiff took a default judgment against the father. The father then moved to set aside the default judgment on the basis that

> he told plaintiff's counsel that the son was the one who should have been sued and that the default judgment was not taken until one year after the action was commenced. He also claimed that he assumed the action had been taken care of and therefore took no steps to file an answer to the complaint.

Id. at 617. In determining whether such claims justified setting aside the default, the court found "none of these claims even approaches 'excusable neglect' as required under Rule 60(b), U.R.C.P., in order to be relieved from a default judgment." *Id*. The same is true in this case. Simply claiming that the defendant is the wrong party and then taking no further action does not support setting aside the default judgment.

After reviewing the evidence and hearing the arguments of counsel in the instant case, the trial court found:

> 5. Defendant has asserted no basis for finding the existence of mistake or inadvertence in this case but rather relies on the claims of excusable neglect and surprise.
>
> 6. Defendant did not exercise due diligence in this matter since an answer could have been filed by the defendant at anytime during the more than three months between that date the Complaint was served and the date the default was entered. Nothing prevented the defendant from filing such Answer and there

were no circumstances outside the control of the defendant which rendered the defendant unable to file an Answer. An Answer was not filed simply because the defendant chose not to do so. Based thereon, the defendant has failed to show the existence of excusable neglect in this case.

7. The defendant has further failed to establish the existence of surprise. Defendant's counsel was told that only a short time would be given to provide the documents requested by plaintiffs' counsel and defendant failed to provide such documents. Further, the defendant was informed that the plaintiff was seeking a default and a copy of the Application for Entry of Default was provided to defendant's counsel. Nevertheless, no action was taken by defendant to prevent or overcome a default being entered until almost three months after the default judgment was entered.

Addendum 5 at p. 6. After reviewing the evidence from the record, it cannot be said that the trial court abused its discretion.

B. <u>The defendant failed to establish a meritorious defense</u>.

Even if it were arguable that the defendant has established the existence of excusable neglect or surprise, the defendant has failed, both in the trial court and before this court, to establish the existence of a meritorious defense. Indeed, the issue of a meritorious defense as a requirement of relief under Rule 60(b) is not even addressed in the defendant's brief. As stated in *State vs. Musselman*, 667 P.2d 1053 (Utah 1983)

> A meritorious defense is one which sets forth specific and sufficiently detailed facts which, if proven, would have resulted in a judgment different from the one entered. Defendant must therefore do more than merely dispute or deny the truth of plaintiffs' allegations; he must set forth specific facts showing meritorious defenses to those allegations in order to have the default judgment set aside.

Id. at 1057-1058.

Reviewing the record clearly establishes that the defendant's motion and supporting affidavits contain no more than cursory statements that the plaintiffs have sued the wrong party, that the defendant did not own the subject dealership when the plaintiffs purchased their

motorhome, and that the plaintiffs have failed to show a proper basis for personal jurisdiction. The motion and affidavits contain no facts whatsoever, much less a statement of specific and sufficiently detailed facts, showing a meritorious defense. As the trial court found

> The defendant has failed to provide the Court with any "specific and sufficiently detailed facts which, if proven, would have resulted in a judgment different from the one entered." Thus, even if the Court were to find the existence of a mistake, inadvertence, excusable neglect or surprise, the defendant's motion is deficient and should be denied.

Addendum 5 at pp. 6 -7. Clearly such a finding by the trial court was not an abuse of discretion.

CONCLUSION

Based upon the above, the plaintiffs respectfully request that the court affirm the trial court's findings, conclusions and order entered June 25, 2008, denying the defendant's motion for relief from the default judgment, and that the court award the plaintiffs their costs and attorney fees incurred herein.

RESPECTFULLY SUBMITTED this 31st day of December, 2008.

/s/ Gary Kuhlmann
Gary G. Kuhlmann
Attorney for Plaintiffs/Appellees

Certificate of Service

I hereby certify that on this 31st day of December, 2008, I mailed a true and correct copy of the foregoing to: William E. Frazier, LAW OFFICES OF STEVEN R BANGERTER, 720 S. River Rd., Suite A-200, St. George, UT 84790.

/s/ Gary Kuhlmann
Gary G. Kuhlmann

ADDENDUM A

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FIFTH DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH

WILLIAM JUDSON and DONNA JUDSON, husband and wife, Plaintiffs, v. WHEELER RV LAS VEGAS, LLC, a Nevada foreign limited liability company, dba WHELLER'S LAS VEGAS RV, Defendant.	AFFIDAVIT OF GARY G. KUHLMANN IN OPPOSITION TO MOTION TO SET ASIDE DEFAULT JUDGMENT Civil No. 070501867 Judge Eric A. Ludlow

STATE OF UTAH)
: ss
COUNTY OF WASHINGTON)

Gary G. Kuhlmann, being first duly sworn, deposes and says:

1. I am a member in good standing of the Utah State Bar and am attorney for the plaintiffs in the above-captioned action. I am competent to testify to all matters contained herein.

2. A Complaint in the above-captioned matter was filed on August 16, 2007, and was served upon the defendant on August 30, 2007.

3. During September, 2007, I was contacted by Sharon Nelson, attorney for the defendant. Ms. Nelson requested an extension of time to answer the Complaint. She informed me that her client had purchased the dealership at issue after the sale of a motorhome to the plaintiffs and was not responsible for the plaintiffs' claims in this case.

4. In mid-September, 2007, I agreed to grant Ms. Nelson an extension to allow her a short time to provide me with evidence that her client was not the proper party in this case.

5. After not hearing from or receiving information from Ms. Nelson, my office contacted her office by phone on October 15, 2007, and demanded that the requested information be provided or an answer filed.

6. October 30, 2007, I received a fax from Ms. Nelson containing a Bill of Sale, a copy of which is attached hereto as Exhibit A.

7. On that same date, my office responded to Ms. Nelson's fax and informed her that to evaluate the matter, we would need to receive the Purchase Agreement and other documents related to the alleged sale of the dealership. A true and correct copy of our response is attached as Exhibit B.

8. On November 1, 2007, I received a second fax from Ms. Nelson requiring that I sign a confidentiality agreement before any further documents would be provided, a copy of which is attached hereto as Exhibit C.

9. After receiving no further information and having no further contact with Ms. Nelson, on November 27, 2007, I advised Ms. Nelson that we would be seeking the entry of default and default judgment. A copy of the letter is attached hereto as Exhibit D.

10. An Application for Entry of Default, and Motion for Entry of Default Judgment were filed with the court on November 27, 2007.

11. A Default Certificate was entered on December 3, 2007, and Default Judgment was entered on December 4, 2007.

12. Despite having been advised that the plaintiffs would be seeking a default judgment and being provided with a copy of the Application for Entry of Default, the defendant's attorney took no action to prevent the entry of default.

13. On December 19, 2007, I received a phone call from William Frazier, the new attorney for the defendant. Mr. Frazier asked if I would be willing to stipulate to set aside the default judgment based upon his assertion that his client had purchased the business after the plaintiff's purchase of the motorhome at issue. While I refused to simply stipulate to set aside the default without some evidence of the same, I relayed to Mr. Frazier my continuing willingness to review any documents he would like to provide but emphasized my frustration with prior counsel's failure to provide any type of documentation as previously promised. At the end of our conversation, Mr. Frazier informed me that he would be obtaining and would provide me with documentation to show that his client was not the proper defendant in this matter. A copy of an email evidencing this conversation is attached hereto as Exhibit E.

14. Despite being told yet again that I would be provided certain documents by the defendant, I received no further documents and had no further contact with the defendant's attorneys until February 27, 2008. On that date I received a voice-mail message from

defendant's counsel simply indicating that he would be filing a Motion to Set Aside Default Judgment.

15. Despite being told repeatedly that I would be receiving certain documents for review, the same have never been provided.

Dated this 24th day of March, 2008.

Gary G. Kuhlmann

SUBSCRIBED AND SWORN to before me this 24 day of March, 2008.

Notary Public

LISA T. BUNTING
Notary Public
State of Utah
My Commission Expires
08/04/2010
1585 E Sweetgum Cir., St George, UT 84790

EXHIBIT A

LAW FIRM
401 North Buffalo Drive, Suite 210
Las Vegas, Nevada 89145

Telephone (702) 247-4LAW
Facsimile (702) 737-4LAW

FACSIMILE TRANSMITTAL SHEET

TO: Gary G. Kuhlmann	FROM: Celeste Mariscal Paralegal for Sharon Nelson
COMPANY	DATE: October 30, 2007
FAX NUMBER: 435-634-1398	TOTAL NO. OF PAGES INCLUDING COVER: 3
PHONE NUMBER	SENDER'S REFERENCE NUMBER
RE: Judson v. Wheeler's RV	YOUR REFERENCE NUMBER

☐ URGENT ☒ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:
Attached is the Bill of Sale and Assignment

BILL OF SALE AND ASSIGNMENT

By this Bill of Sale and Assignment given on the date set forth below by **L.V.R.V.,INC**, a Nevada corporation ("Seller") and **JACK TOO, LLC**, A Nevada limited liability company (together with Seller, the "Sellers") for and in consideration of the purchase price provided in the Asset Purchase Agreement between Sellers and Buyer dated as of November 29, 2004 (the "Purchase Agreement") in hand paid by **WHEELER RV LAS VEGAS, LLC**, a Minnesota limited liability company ("Buyer"), the receipt and sufficiency of which is hereby acknowledged, Sellers hereby sell, bargain, assign, transfer and convey to Buyer all of the Assets as defined in the Purchase Agreement, including but not limited to the following:

(a) Recreation Vehicle Inventory. The RV Vehicle as defined in the Purchase Agreement.

(b) Parts and Accessories. The Parts and Accessories Inventory as defined in the Purchase Agreement.

(c) Working Capital. The Working Capital as defined in the Purchase Agreement.

(d) Furniture, Fixtures, Equipment and Leasehold Improvements. The Fixed Assets as defined in the Purchase Agreement.

(e) Supplies. The Other Inventories as defined in the Purchase Agreement.

(f) Work in Process. The Work in Process as defined in the Purchase Agreement.

(g) Intangible Assets and Seller's Records, Customer Lists and Files, Relinquishment of Franchise. The Intangible Assets as defined in the Purchase Agreement.

(h) Contract Rights. The Contract Rights as defined in the Purchase Agreement.

(i) Orders and Customer Advances. The Sales Orders as defined in the Purchase Agreement.

(j) Miscellaneous Assets. All other assets, rights and properties relating to the Business, including but not limited to choses in action.

To have and to hold the same unto Buyer and its legal representatives, successors and assigns, forever and free and clear of any and all liens, security interests, claims, encumbrances and demands of any kind or nature whatsoever or by or of any other person or entity.

Each Seller, for itself and legal representatives, successors or assigns, covenants to and with Buyer, and its legal representatives, successors or assigns, that each Seller is the lawful owner of the described property; that each Seller has good right to sell the same; and that each Seller will warrant and defend the same of said property, assets, rights, goods, chattels and instruments hereby made unto Buyer and its legal representatives, successors or assigns, against the claims and demands of every kind or type of any and all persons whatsoever, except as may be limited or otherwise provided in the Purchase Agreement.

IN WITNESS WHEREOF, Seller has caused this instrument to be executed by its duly authorized representative as of the 11th day of March, 2005.

SELLERS:

L.V.R.V., INC.

By: Marlene S. Wheeler
Marlene S. Wheeler, President

JACK TOO, LLC

By: Marlene S. Wheeler
Marlene S. Wheeler, Member

EXHIBIT B

Gary G. Kuhlmann & ASSOCIATES PC

ATTORNEYS AT LAW

SENT VIA FACSIMILE

October 30, 2007

Sharon Nelson
401 North Buffalo Drive, Suite 210
Las Vegas, Nevada 89145
Fax: (702) 737-4529

Re: Judson vs. Wheeler's RV

Dear Ms. Nelson:

We are in receipt of the Bill of Sale and Assignment that you faxed to our office regarding the above-referenced matter. However, this does not satisfy Mr. Kuhlmann's request for all documents related to the sale. Please note that the Purchase Agreement, and all other documents related to the sale, must be received in our office by close of business (5:00 PM Utah time) on Thursday, November 1, 2007.

If you have any questions, please contact our office.

Sincerely,

GARY G. KUHLMANN & ASSOCIATES, PC

Lisa T. Bunting
Paralegal

Office 435-656-6156 • Fax 435-634-1398

107 South 1470 East • Suite 105 • St. George, UT 84790
P.O. Box 910387 • St. George, UT 84791

EXHIBIT C

NELSON
LAW FIRM
402 North Buffalo Drive, Suite 210
Las Vegas, Nevada 89145

Telephone (702) 247-4LAW
Facsimile (702) 737-4LAW

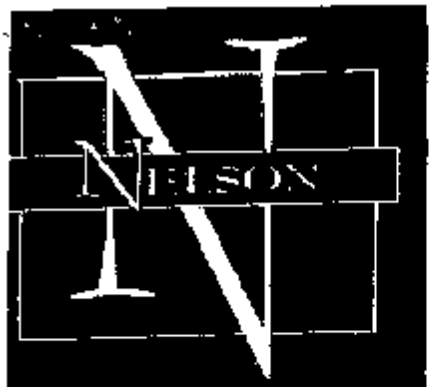
FACSIMILE TRANSMITTAL SHEET

TO:	FROM:
Gary G. Kuhlmann	Lara Feldstein Paralegal for Sharon L. Nelson
COMPANY:	DATE:
	November 1, 2007
FAX NUMBER:	TOTAL NO. OF PAGES INCLUDING COVER:
435-634-1328	02
PHONE NUMBER:	SENDER'S REFERENCE NUMBER:
RE:	YOUR REFERENCE NUMBER:
Judson v. Wheeler's RV	

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

Please see attached correspondence.



November 1, 2007

Writer's email address
nelsonl@nelsonlawlv.com

VIA FACSIMILE ONLY
435-634-1398

Gary G. Kuhlmann
Gary G. Kuhlmann & Associates PC
Attorneys at Law
107 South 1470 East, Suite 105
St. George, UT 84790

RE: Judson v. Wheeler's RV

Dear Mr. Kuhlmann:

This correspondence is in response to your paralegal, Lisa T. Bunting's facsimile dated October 30, 2007 in which you requested further documentation with regards to the "Purchase Agreement and all other documents related to the sale."

Our client has requested that you sign a confidentiality agreement before releasing the Asset Acquisition Agreement documents to you, as they contain sensitive and confidential materials. Please contact our office if you are agreeable to this condition.

In the meantime, should you have any questions, comments, or concerns, do not hesitate to contact our office.

Very truly yours,

NELSON LAW

Sharon L. Nelson

SLN/lmf
cc: client.

702.247.4LAW
702.737.4LAW Fax
401 North Buffalo Suite 210
Las Vegas, Nevada 89145
www.nelsonlawlv.com

EXHIBIT D

Gary G. Kuhlmann & ASSOCIATES PC

ATTORNEYS AT LAW

November 27, 2007

Sharon Nelson
401 North Buffalo Drive, Suite 210
Las Vegas, Nevada 89145
Fax: (702) 737-4529

Re: Judson vs. Wheeler's RV

Dear Ms. Nelson:

Over two months ago, you requested that I consider dismissing the complaint against your client in the above-referenced matter. I agreed to review any information regarding the purported sale of the business by your client. I have been trying for over two months to get that information. We have no obligation, and do not intend, to sign any non-disclosure or other document, since it is your client who is trying to convince us to dismiss this case. Because, to date, I have not received the information requested, we have filed for the entry of default judgment. A copy of our Application for Entry of Default is enclosed.

Sincerely,

GARY G. KUHLMANN & ASSOCIATES, PC

Gary G. Kuhlmann

Enclosure

Office 435-656-6156 • Fax 435-634-1398

107 South 1470 East • Suite 105 • St. George, UT 84790

PO Box 910387 • St. George, UT 84791

EXHIBIT E

InfoWest Web Mail

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inbox | compose | folders | addresses | settings |

delete | reply | forward | previous | next

To: <kuhllaw@infowest.com>
Subject: Contact Info - Jusson v. Wheeler RV
CC: "'Steven Bangerter'" <bangerterlaw@infowest.com>
Date: Wed, 19 Dec 2007 13:05:32 -0700
Status: Normal
From: "W. Frazier" <wfrazier@infowest.com>
Reply-to: "W. Frazier" <wfrazier@infowest.com>

Add To Pick List | Add To Address Book | Reject Sender

Attachments: default.htm
Display
Alternative Part

Mr. Kuhlman:

Thank you for taking the time to speak with me today. I am just becoming acquainted with the case, and will endeavor to have more meaningful and substantive discussions upon my receipt of documents related to the underlying dispute. My contact info is as follows:

William Frazier

Law Offices of Steven R. Bangerter

720 S. River Rd., Suite A-200

St. George, UT 84790

(435) 628-7004 phone

(435) 673-1964 fax

I look forward to working with you.

Bill Frazier