1983

Transpower Manufacturing, Inc., a Utah Corporation, And Ben v. Helsten v. Free-Wing Turbine Corporation, a Utah Corporation, And Laird B. Gogins : Appellant's Brief

IN THE SUPREME COURT OF THE

STATE OF UTAH

TRANSPOWER MANUFACTURING, INC., a Utah corporation, and BEN V. HELSTEN, an individual,	:	
Plaintiffs,	:	
vs.	:	Case No. 19214
FREE-WING TURBINE CORPORATION, a Utah corporation, and LAIRD B. GOGINS, an individual,	:	
Defendants-Appellants.	:	

APPELLANTS' BRIEF

* * * * *

Appeal from an Order and Judgment
of the Third Judicial District Court,
in and for Salt Lake City
Honorable Judith Billings, Judge

* * * * *

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STATE OF UTAH

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APPELLANTS' BRIEF

NATURE OF THE CASE

This case involves a "judgment by confession" entered against the defendants Free-Wing Turbine Corporation and Laird B. Gogins (hereinafter referred to collectively as the "Defendants") without the filing of a complaint, without issuance or service of process and without hearing. Judgment was entered against the defendants as makers of a promissory note upon ex parte application to the court by Ben V. Helsten and Transpower Manufacturing (hereinafter referred to collectively as the "Plaintiffs").

DISPOSITION IN LOWER COURT

Judgment was entered against the defendants upon ex parte application of the plaintiff on March 3, 1983. On April 7, 1983, as soon as possible after learning of the entry of the judgment, plaintiffs moved to set aside the judgment pursuant to Rule 60(b) of the Utah Rules of Civil Procedure. Defendants' motion was heard by the Honorable Judith Billings of the Third District Court on April 14, 1983. The court dictated its order and its findings into the record at that time and directed plaintiffs' counsel to prepare an order for the file. This order was signed by the court on April 22, 1983. Pursuant to Rule 2.9 of the Rules of Practice in the District Courts, the defendant objected to the form of the order prepared by plaintiffs' counsel and defendants' objections were heard and sustained by the court on May 6, 1983. As a result of the courts ruling of May 6, the parties stipulated to amend the judgment and the amended judgment was entered on May 12, 1983. Defendants filed their Notice of Appeal on May 11, 1983. Defendants appeal the judgment entered on March 3, 1983, and the amendments thereto entered on May 12, 1983, as well as the lower courts denial of their motion to set aside the judgment.

NATURE OF RELIEF SOUGHT ON APPEAL

First and foremost, defendants seek an order vacating the judgment entered against them below. They also ask for an

order that judgment cannot be entered against them on the note which is the subject of this lawsuit without the filing of a complaint, and the issuance and service of process to which defendants shall be given the customary right to respond.

STATEMENT OF FACTS

Due to the nature of a judgment by confession it is difficult to make citations to the record as is required by Rule 75(p)(2)(d). Though defendants' counsel suggested the court should allow an evidentiary hearing on any defenses defendants might have before their motion to set aside the judgment was denied (T. 16), none was given. It is therefore difficult to cite to the record regarding the facts; but, counsel believes the following is a fair statement of the background facts.

Laird Gogins is the developer of a device known as the Free-Wing Turbine. This is a device which generates electrical power from the wind. Free-Turbine Corporation, a Utah corporation in which Laird Gogins is the principal stockholder, entered into a sales license agreement and license agreement with the plaintiff, Ben Helsten, to market these devices. It is defendants' understanding that Ben Helsten is a principal in Transpower Manufacturing Inc. and Transpower Manufacturing is the entity through which Ben Helsten is marketing these devices.

Disputes subsequently arose between the parties as to who was indebted to whom and in what amounts under the terms of

the agreement. Defendants were in desperate need of funds & they "borrowed" money from the plaintiffs on several occasions. These advances of sums were several in number and were evidenced by a series of promissory notes. The last of these notes is the one on which judgment was entered in this case and it was executed in conjunction with another agreement. Prior notes provided that under some circumstances the sum evidenced by the note could simply be set off against any amount the plaintiffs owed defendants when all disputes were resolved. The agreement which was executed with the last promissory note has the same provision.

Mr. Gogins' previous counsel advised him that judgment could not be taken against him on the note which is the subject of this lawsuit without notice and hearing. Relying upon this advice, the defendants executed the note in question.

Judgment was subsequently entered against the defendants without the issuance of process and without notice and hearing. The first time the defendants learned of the judgment was when Laird Gogins attempted to sell his home and the judgment lien appeared on the title report. Thereafter, defendants made their motion to set aside the judgment by confession on the grounds that: (1) judgment was not entered in accordance with the statutory provisions governing confession of judgment; (2) even if judgment had been entered

in accordance with the appropriate statutory provisions, such judgment was void because it denied defendants their right to due process of law as guaranteed by the United States Constitution, and (3) even if judgment had been properly entered in accordance with the appropriate statutory provisions and was not violative of the United States Constitution, the judgment was void because it denied the defendants due process of law as guaranteed by the Constitution of the State of Utah, and (4) even if the judgment was properly entered in accordance with the governing statute and was not violative of the United States Constitution or the Utah Constitution, it would further the interest of justice if relief from the judgment was granted in accordance with Rule 60(b)(7) of the Utah Rules of Civil Procedure. Defendants' motion to set aside the judgment by confession was denied by the Honorable Judith Billings of the Third District Court.

Two more lawsuits growing out of the same transactions, occurrences and events leading up to this lawsuit have been filed in Third District Court. These lawsuits are: Wm V. Helsten, and Transpower Manufacturing, Inc., vs. Free-Wing Turbine Corporation, Laird B. Gogins, and John Does 1 through 10, Civil No. C83-2040 and Free-Wing Turbine Corporation and Laird B. Gogins, vs. Transpower Manufacturing,

Inc. and Ben V. Helsten, Civil No. C83-3001. Plaintiffs' counsel indicated that one of these lawsuits had been filed at the time of the hearing on defendants' motion to set aside the judgment (T. 26). It is anticipated that these lawsuits will be consolidated for trial. In these lawsuits, the parties ask for judgment against one another for sums in excess of $1,000,000.

Under the judgment in this case, plaintiffs have attempted to execute on the interest Laird B. Gogins has in Free-Wing Turbine Corporation and, thereby, gain control of Free-Wing Turbine Corporation. Had this been accomplished, plaintiffs could have summarily short-circuited a large part of the other two lawsuits. Execution has been prevented only by posting the stock of Laird B. Gogins in Free-Wing Turbine Corporation as part of the supersedeas bond. If defendants lose on appeal, the stock may be forfeited and the other lawsuits may still be disposed of quickly by plaintiffs.

ARGUMENT

I. THE JUDGMENT BY CONFESSION WAS NOT ENTERED PURSUANT TO STATUTORY AUTHORIZATION.

Judgment by confession finds statutory authorization in Utah in Utah Code Annotated § 78-22-3 which reads as follows:

> A judgment by confession may be entered without action, either for money due or to

become due or secure any person against contingent liability on behalf of the defendant or both, in the manner prescribed by law. Such judgment may be entered in any court having jurisdiction for like amounts.

The "manner prescribed by law" is found in Rule 58 A(e) of the Utah Rules of Civil Procedure which reads as follows:

> (E) Judgment by confession. Whenever judgment by confession is authorized by statute, the party seeking the same must file with the clerk of the court in which the judgment is to be entered a statement, verified by the defendant to the following effect;
>
> (1) if the judgment to be confessed is for money due or to become due, it shall concisely state the claim and that the sum confessed therefore is justly due or to become due;
>
> (2) if the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the claim and that the sum confessed therefore does not exceed the same;
>
> (3) it must authorize the entry of judgment for a specified sum.
>
> The Clerk shall thereupon endorse upon the statement and enter in the judgment docket, a judgment of the court for the amount confessed, with cost of entry, if any.

Having recognized the harsh and overbearing nature of the remedy of judgment by confession, the Utah Court has held

that strict compliance with the law and the rules must be adhered to or any attempted confession of judgment is void. Bacon v. Raybould, 4 Utah 357, 10 P. 481, aff'd on rehearing, 4 Utah 357, 11 P. 510 (1886); Utah National Bank v. Sears, 13 Utah 172, 44 P. 832 (1896); and Utah Association of Credit Men v. Jones, 49 Utah 519, 164 P. 1029 (1917). If the judgment is not entered in strict accordance with the statutory provisions, it is void:

> it has been uniformly held that a judgment by confession must conform strictly to the statute and can exist only by statutory authority. This court long ago maintained the doctrine that a judgment by confession, obtained in any other manner than that directed by our statutes is null and void . . ..

Utah National Bank v. Sears, 44 P. at 832-33.

A. The "Verified Statement For Judgment by Confession" Proferred by the Plaintiffs Did Not Meet The Requirements of Rule 58A(e).

An examination of the record will reveal a document entitled "Verified Statement For Judgment by Confession" dated March 2, 1983, and filed with the Clerk of Court on March 2, 1983, at 4:49 P.M. One has to presume that this document was intended by the plaintiffs to meet the requirements of 58A(e). The title of the document alone should force one to conclude this. However, an examination of this document will reveal it

is not a verified statement "by the defendant" at all; it is a verified statement of the plaintiffs and therefore it does not meet the requirements of Rule 58A(e).

No one but the defendants could execute the verified statement required for a judgment by confession. Consider Utah National Bank v. Sears, 13 Utah 172, 44 P. 832 (1886). That case involved a promissory note which contained a warrant authorizing any attorney who was duly admitted to the bar of the United States or of any state to appear in any court and confess judgment against the maker of the note. A judgment was entered upon the verified statement of an attorney pursuant to the provisions of the Note but was set aside upon motion of the defendant. On appeal, the Supreme Court of Utah stated:

> The sole contention in this case, as we view it, is, can such a warrant of attorney as is involved in this case authorize the creditor himself to enter judgment against his debtor?
>
> * * *
>
> We think the parties cannot, either by signature of one or by the signature of all to any kind of contract, vary the rules of procedure of courts expressly established by the Code. The only method of obtaining a judgment by confession in this state is the one pointed out by our statute. Comp. Laws §§ 3767-3770. The very object of enacting the Code was to confine parties, so far as legal procedure is concerned, to the method prescribed in the Code. Any defect in the proceeding, or material departure from the statutory provisions, would render a judgment absolutely void.

Id. at 832-33. The Court required strict statutory compliance and held that there must be a verified statement by the debtor

himself and affirmed the lower court's vacation of the judgment.[1]

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[1] Judgment by confession was then governed by §§ 3767, 3768, 3769 and 3770 of the Compiled Laws of Utah 1888. As counsel pointed out below, these previous statutes do not differ from the current statues in any material way. They read as follows:

> Sec. 3767. A judgment by confession may be entered without action, either for money due or to become due or secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter. Such judgment may be entered in any court having jurisdiction for like amounts.
>
> Sec. 3768. A statement in writing must be made, signed by the defendant and verified by his oath to the following effect:
>
> (1) It must authorize the entry of judgment for a specified sum.
>
> (2) If it be for money due, or to become due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due or to become due;
>
> (3) If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and show the sum confessed therefor does not exceed the same.
>
> Sec. 3769. The statement must be filed with the clerk of the court in which the judgment is to be entered, who must endorse upon it, and enter in the judgment book, a judgment of such court for the amount confessed, with five dollars cost. The statement and affidavit with the judgment endorsed, thereupon, becomes the judgment roll.
>
> Sec. 3770. In a justice's court, where the court has the authority to enter the judgment, the statement may be filed with the justice, who must thereupon enter his docket a judgment of his court for the amount confessed, with three dollars cost. If a transcript of such judgment filed with the district clerk, a copy of the statement must be filed with it.

B. The Promissory Note Itself Does Not Meet The Requirements of Rule 58 A(e).

Once these obvious deficiencies were pointed out to the court below, the court, on its own motion, inquired whether or not the note itself was verified and signed by the defendants. Plaintiffs' counsel volunteered a statement that the note was verified while defendants' counsel offered that it was only notarized and even if it was verified it did not contain the statements required by Rule 58A(e). (T. 17). Thereafter, the court made the following finding:

> Court finds that the note itself which was executed by the defendant and was verified and thus complies with the provisions of Rule 58 A(e), sworn to by him, and it has the sum certain which will be due under certain conditions as set out in the note. (T. 31).

(T. 31). See also Paragraph 2 of that order of the court denying defendants' motion to set aside the judgment.

An examination of the note itself will reveal it was not sworn and not verified by the defendants. The makers of the note simply acknowledged before a notary public that they, in fact, executed the note.[2]

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[2] The promissory note is dated February 27, 1983, and was filed with the clerks office on March 3, 1983, at 4:45 P.M.

Furthermore, even if the note were verified, it would not meet the requirements of Rule 58A(e). The note does not indicate that any sum is "justly" due or to become due nor does it concisely state the claim giving rise to any "contingent liability". Nor, does it "authorize the entry of judgment for a specified sum" unless "the amount of principle, interest and other cost incurred in obtaining said judgment" is a specified sum.

Even if the note did meet the requirements of Rule 58A(e), judgment would still not have been entered in accordance with the provisions of Rule 58A(e). The judgment itself was filed March 3, 1983, at 3:20 P.M. The note was filed March 3, 1983, at 4:45 P.M. - after the judgment by confession. Rule 58A(e) specifies that the judgment will be filed upon presentation of the verified statement. This clearly did not take place. The note was filed well after the judgment was filed. It also does not appear that the clerk (or the judge) "endorsed upon the statement . . . a judgment of the court for the amount confessed" as is required by Rule 58A(e).

II. THE JUDGMENT IS VOID BECAUSE IT DENIED DEFENDANTS THEIR RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE UNITED STATES CONSTITUTION

It is well settled that people have due process rights to notice and hearing prior to civil adjudications. However,

it is equally clear that such due process rights are subject to waiver. The Supreme Court of the United States has stated "due process rights of notice and hearing prior to a civil judgment are subject to waiver". D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 31 L. Ed. 2d 124, 133, 92 S. Ct. 775 (1972). See also, Swarb v. Lennox, 405 U.S. 191, 31 L. Ed. 2d 138, 92 S. Ct. 767, reh'g denied, 405 U.S. 1049, 31 L. Ed. 2d 592, 92 S. Ct. 1303 (1972).

As defendants counsel pointed out to the lower court, the United States Supreme Court has not clearly ruled on the standard by which waiver of these due process rights is to be determined. (T. 15-16). Nevertheless, in Overmyer, supra, two justices - Douglas and Marshall - out of a seven justice court[3] indicated that the standard for waiver of due process rights in the civil context was the same as in criminal cases: "it must be voluntarily, knowingly and intelligently made"; "an intentional relinquishment of a known right or privilege". The other 5 participating justices gave no clear ruling on what the standard was but stated:

> Even if for present purposes, we assume that the standard for waiver in a corporate property right case of its kind is the same standard applicable to waiver in a criminal

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3 Justices Powell and Rehnquist did not participate.

> proceeding, that is, that it be voluntary, knowingly and intelligently made, (citations omitted), 'an intentional relinquishment or abandonment of a known right or privilege', (citations omitted), and even if as the court has said in the civl area, 'we do not presume acquiescence', (citations omitted), the standard was fully satisfied here.

31 L. Ed. 2d at 134.

Despite the absence of a clear ruling by the Supreme Court, it appears the lower federal courts all express the view that the standard for waiver of due process rights in the civil context is the same as in criminal cases:

> While the United States Supreme Court has not yet authoritatively decided whether the same waiver or standard applies in civil cases as in criminal cases, the lower federal courts have universally applied the same standard. See, e.g., Gonzalez v. County of Hidalgo, Texas, 489 F.2d 1043, 1046, (5th Cir. 1973); American Consumer, Inc. v. United States Postal Service, 427 F. Supp. 591 (E.D. Pa. 1977). Thus, in order to waive a right, there must be an intentional relinquishment of a known right or privilege. Brewer v. Williams, 430 U.S. 387, 404, 97 S. Ct. 1232, 1242, 51 L. Ed 2d 424 (1977); Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1049, 1023, 82 L. Ed. 1461 (1938).

Hernandez v. Casillas, 520 F. Supp. 393 (S.D. Tex. 1981). See also, Mosley v. St. Louis Southwestern Railway, 634 F.2d 94 (5th Cir. 1981); Ricker v. United States, 417 F. Supp. 133 (D. Minn. 1976); Garner v. Tri-State Development Co., 382 F. Supp.

381 (E.D. Mich. 1974) and other authorities cited in these cases. The same views have been expressed by state supreme courts. Telephonic Inc. v. Rosenbloom, 88 N.M. 532, 543 P.2d 825 (1976).

In determining whether or not a waiver has taken place, courts consider all the surrounding facts and circumstances including the relative bargaining position of the parties, the sophistication of the parties and whether or not the waiver was specifically bargained for.

Furthermore:

> The Supreme Court in Fuentes v. Sheven, (citation omitted), and in numerous other cases, (footnote omitted) has clearly indicated that a heavy burden must be born by the party claiming that a 'voluntary, intelligent, and knowing' contractual waiver has occurred . . ..

Gonzalez v. County of Hidalgo, Texas, 489 F.2d 1043, 1046 (5th Cir. 1973). As the Fifth Circuit Court of Appeals noted in Mosley v. St. Louis Southwestern Railway, 634 F.2d 942, 946 (5th Cir. 1981):

> Courts, . . ., 'indulge every reasonable presumption against waiver'. Aetna Ins. Co. v. Kennecy, 301 U.S. 389, 393, 57 S. Ct. 89, 812, 81 L. Ed. 1177 (1937) to be effective, a waiver 'not only must be voluntary but must be knowing, intelligent, (and) done

> with sufficient awareness of the relevant circumstances and likely consequences.'

Brady v. Maryland, 397 U.S. 742, 748, 20 L. Ed. 2d 747, 90 S. Ct. 1463, 1469 (1970). See also, Garner v. Tri-State Development Co., 382 F. Supp. 377, 380-81 (E.D. Mich. 1974) and cases cited therein. The burden of proof for establishing that a waiver took place falls on the party asserting the waiver.

Even if a party effectively waives this right:

> Constitutional due process requires that a judicial determination of waiver must preceed entry of judgment. Osmond v. Spence, 359 F. Supp. 124, 127 (D. Del. 1972).
>
> The most current line of cases involving cognovit notes holds that, even in the context of a clear waiver of notice and opportunity to be heard, there must be a judicial determination as to whether the waiver was voluntary before judgment can be entered. See Virgin Island National Bank v. Tropical Ventures Inc., 358 F. Supp. 1203, 1205 (D.R.I. 1973); Osmond v. Spence, 359 F. Supp. 124, 127 (D. Del. 1972); Scott v. Danaher, 343, F. Supp. 1272, 1278 (N.D. Ill. 1972); but see Tunheim v. Bowman, 366 F. Supp. 1392, 1394 (D. Nev. 1972).

Hernandez v. Casillas, 520 F. Supp. 389, 393 (S.D. Tex 1981). As the court stated in Osmond v. Spence, 359 F. Supp. 124, 127 (D. Del. 1972):

> Since a signed cognovit note does not constitute proof of an effective waiver, a hearing and judicial determination are necessary, and an understanding and voluntary waiver must be shown prior to entry of judgment. Unless a hearing is conducted on the waiver question before the judgment is entered, an alleged debtor will be deprived of his due process rights on every occasion when an effective waiver had not occurred upon the initial execution of the note. (Emphasis added).

Given this information, one may well conclude not only that the entry of judgment in this case was unconstitutional, but that the Utah provisions governing confession of judgment are unconstitutional on their face. The Utah provisions allow judgment to be entered by the clerk without ever consulting a judge.[4] This certainly does not allow for a judicial determination of waiver prior to the entry of judgment. Unless Rule 58A(e) is read to require a verified statement signed by the actual debtor, these provisions most certainly are unconstitutional; judgment could be entered with no evidence that a waiver has taken place.

The record in this case clearly reveals that no hearing was held prior to the entry of judgment to determine

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[4] Counsel does not wish to mislead the Court; judgment in this case was entered by the Honorable Timothy R. Hanson of the Third District Court. Nevertheless if entered pursuant to a statute which is unconstitutional on its face, the judgment in this case should be void.

whether or not the defendants in this case had waived their right to due process. The only thing in the record that would remotely suggest that defendants had waived this right is the promissory note executed by the defendants. This promissory note was not even filed until after the judgment had been entered! Clearly then, there was no judicial determination that a knowing and voluntary waiver had taken place prior to the entry of judgment as is required by the United States Constitution. There was certainly no evidence on which a court could have based such a conclusion.

The uncontroverted affidavit of Laird Gogins indicates that his prior counsel informed him judgment could not be taken against him or Free-Wing Turbine without the issuance of process and notice and hearing. There was virtually no evidence before the court to suggest that defendants' right to procedural due process was a known right which was deliberately, knowingly and intelligently waived.

It is well established that a conviction of a criminal defendant entered upon his or her guilty plea is unconstitutional if the guilty plea is entered upon misleading advice of counsel. This is because a guilty plea which is entered on advice of counsel is not a voluntary and intelligent waiver of the defendants due process rights to trial by his

peers, proof beyond a reasonable doubt, etc., if the defendant was misled by his attorney. McMann v. Richardson, 397 U.S. 759, 25 L. Ed 2d 763, 90 S. Ct. 1441 (1970); Pedicord v. Swenson, 304 F. Supp 393 (W.D. Mo. 1969), aff'd, 431 F.2d 92 (8th Cir. 1970). There is nothing in the record which controverts the affidavit of Laird Gogins which indicates that his previous counsel advised that no judgment could be taken against defendants without notice and hearing. The case law makes it clear that there could have been no valid waiver of defendants due process rights in such circumstances.

Nevertheless, the lower court found the defendants understanding that the judgment could not be taken against them without notice and hearing was nothing more than a "unilateral mistake of law" which did not justify lifting the judgment.[5]

III. THE JUDGMENT BY CONFESSION DENIED DEFENDANTS THEIR RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE CONSTITUTION OF THE STATE OF UTAH

The right to due process of law is guaranteed in the Constitution of the State of Utah in Article 1, Sections 7 and 11. Section 7 states:

> No person shall be deprived of life, liberty or property, without due process of law.

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[5] (T. 32); Paragraph 5 of the courts order denying defendants to set aside the judgment.

Section 11 states:

> All courts shall be open and every person, for an injury done to him in his person, property, or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause to which he is a party. (Emphasis Added).

Both of these provisions underscore the basic notion that people are entitled to their day in court before a judgment allowing others to deprive them of their property may be entered against them. The entry of judgment without notice and hearing is violative of the most basic and fundamental rights recognized by Anglo-American jurisprudence.

Defendants can find no decision of this court indicating whether or not this state constitutional right can be waived. However, it seems reasonable to believe that almost any right can be waived in the proper circumstances. The appropriate question is by what standard do we determine whether or not such a waiver has taken place. Defendants suggested to the lower court and suggest to this Court as well that waiving these state due process rights is at least as difficult as is the waiving of federal due process rights.

Defendants urge this court to rule that a judicial determination that a waiver has taken place must be made before

a judgment by confession can be entered and that a presumption exists that no such waiver has taken place and that the burden of proof regarding a waiver lies with the party asserting the waiver. If the court adopts this standard, the judgment against the defendants must fall. There was no judicial determination that a waiver had taken place prior to the entry of judgment in this case. Furthermore, the uncontroverted Affidavit of Laird Gogins indicates that he and Free-Wing Turbin Corp. clearly did not know and comprehend that they were waiving their rights to notice and hearing.

IV. THE LOWER COURT IMPROPERLY DENIED DEFENDANT'S RULE 60(b)(7) MOTION TO SET ASIDE THE JUDGMENT

The record below clearly reveals that defendant sought to have the judgment set aside under Rule 60(b)(7) even if the court had determined that it had been legally and constitutionally entered. (T. 3, 4, 19, 20, 32). Rule 60(b)(7) reads as follows:

> 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: . . . (7) Any other reason justifying relief from the operation of the judgment.

Defendants submit that the nature of the judgment in this case together with the facts and circumstances surrounding the case clearly indicate that it is in the interest of justice to lift the judgment. The judgment grows out of a factual situation which has led to two more lawsuits involving these parties wherein both sides pray for judgment against the other for sums in excess of $1,000,000. The note on which the judgment was entered and the agreement that went along with the note are connected and wound up inextricably in the other proceedings. The doctrine of compulsory joinder of claims dictates that any claims plaintiffs have on the note should be joined with the other claims plaintiffs have asserted in the other litigation. Defendants have asserted claims against plaintiffs in the other litigation which by all right should have been compulsory counterclaims in this action and would have been brought in this action had defendants been given the opportunity to do so. Furthermore, if plaintiffs are allowed to acquire the stock of Laird B. Gogins in defendant Free-Wing Turbine Corp. by virtue of the judgment in this case, they would have a controlling interest in Free-Wing Turbine Corp. and could cause numerous actions against plaintiffs in the other two lawsuits to be summarily dismissed.

Before the lower court, the defendants suggested that a confession of judgment should be set aside at least as easily as a default judgment.[6] The Affidavit of Laird Gogins indicates that he has defenses to the action on the note and claims against plaintiffs which are in the nature of compulsory counterclaims. This certainly would be grounds for setting aside a default judgment. If it is grounds for setting aside a default judgment, it ought to be grounds for setting aside a judgment by confession because defendants in this case did not even have the opportunity to answer a complaint after process had issued and they had been duly served.

Forseeing the possibility that the court might not adopt the same standard for setting aside judgments by confession as for judgments by default, defendant's counsel discussed other possible standards. At least one court held that judgments by confession should be set aside if the judgment debtor can present evidence sufficient to withstand a motion for a directed verdict. Livingston v. Rebman, 169 Ohio St. 104, 158 N.E.2d 366 (1959). Defendant's counsel urged that this standard was too high. Of course, defendants urge that such a judgment should be set aside in the same circumstances

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6 See defendant's memorandum of points and authorities in support of their motion to lift the judgment.

as a default judgment; such judgment should be set aside even more easily. Below, plaintiff's counsel volunteered that this was the case in Colorado. (T. 24). In the event the Court fails to adopt that standard, defendants urge that the presentation of evidence on which a motion for summary judgment could not be granted should cause a court to set such a judgment aside.

Below, defendant's counsel and defendant's affidavit indicated that defendants believe that they have defenses and that defendants at least ought to be entitled to an evidentiary hearing regarding those defenses before their motion could can be denied. (T. 19). No evidentiary hearing was had and defendant's motion was denied.

CONCLUSION

Defendants submit that it is clear judgment was not entered in this case in accordance with the applicable statutes and that for a judgment by confession to stand the statutes must be strictly adhered to. It is equally clear that the entry of judgment in this case denied defendants their right to due process of law as guaranteed by both the United States Constitution and the Utah Constitution. The surrounding facts and circumstances also justify the lifting of the judgment in this case and having the merits adjudicated in related proceedings. For these reasons, defendants pray that the Court

vacate the judgment entered against them in this case and further direct that defendants be given their day in court before any judgment may be entered against them.

RESPECTFULLY SUBMITTED, this ___ day of July, 1983.

JONES, WALDO, HOLBROOK & McDONOUGH

By _____
Duke F. Wahlquist

CERTIFICATE OF SERVICE

I hereby certify that on this the 1 day of July, 1983, I caused to be mailed, postage prepaid, two true and correct copies of the foregoing to:

Paul Franklin Farr, Esq.
CARMAN & FARR, P.C.
1811 West 2300 South
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_____

0099w
DFW