

1983

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

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IN THE SUPREME COURT OF THE
STATE OF UTAH

TRANSPOWER MANUFACTURING, INC.,)
a Utah corporation, and)
BEN V. HELSTEN, an individual,)

Plaintiffs/Respondents,)

vs.)

Case No. 19214

FREE-WING TURBINE CORPORATION,)
a Utah corporation, and)
LAIRD B. COGINS, an individual,)

Defendants/Appellants.)

RESPONDENTS' BRIEF

* * * * *

Appeal from an Order and Judgment
of the Third Judicial District Court,
in and for Salt Lake County
Honorable Timothy R. Hansen and Judith M. Billings, Judges

* * * * *

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FILED

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DISPOSITION IN THE LOWER COURT

Judgment by Confession was entered against Appellants upon the application of Respondents on March 3, 1983. On April 22, 1983, Appellants' Motion to Set Aside the Judgment pursuant to Rule 60(d) of the Utah Rules of Civil Procedure was denied by the Honorable Judith M. Billings. An Amended Judgment was entered by Stipulation of the parties on May 17, 1983.

NATURE OF RELIEF SOUGHT ON APPEAL

Respondents seek an Order affirming the Judgment and the District Court's denial of Appellants' Motion to Set Aside the Judgment. Respondents also seek an award of attorneys' fees incurred in connection with Appellants' post-Judgment motions below as well as fees incurred on appeal.

STATEMENT OF FACTS

A. Objections to Appellants' Statement of Facts.

Although Appellants have failed to cite the portions of the record which they believe support the statements contained in their Statement of Facts, Respondents believe that the following "facts" set forth in Appellants' Brief find absolutely no support in the record:

1. "Defendants were in desperate need of funds" when they borrowed money from Plaintiffs. [Appellants' Brief, pg. 4, line 1] There was absolutely no evidence that the Defendants were in desperate need of funds.

2. "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." [Appellants' Brief, pg. 4, lines 7-11] The only prior Promissory Note

Before the Court was a Promissory Note for \$10,000.00 dated January 20, 1983 [T.30] which provided that Respondents would have the option of applying any amounts due pursuant to the note against any present or future sums, if any, which may be owing to Appellant Free-Wing and that in the event Respondents elected not to so apply the amounts due under the note, the amounts due under the note would be paid without any right of offset or abatement. The Promissory Note which is the subject of this action [T.10] and the Settlement Agreement entered into by the parties at the same time [T.32] contained essentially the same provision.

3. "Two more lawsuits growing out of the same transactions, occurrences and events leading up to this lawsuit have been filed in Third District Court." [Appellants' Brief, pg. 5, lines 17-19] There was no evidence before the District Court that the indebtedness owed by Appellants on the subject Promissory Note arose out of the "same transactions, occurrences and events" as the two other lawsuits referred to other than the bald conclusion contained in Appellant Laird B. Gogins' Affidavit that he had "numerous counterclaims against Plaintiffs, which claims arise from the same transactions and occurrences as does the Promissory Note." [T.20]

B. Respondents' Statement of Facts.

As of February 7, 1983, certain disputes existed between the parties concerning a Sales License Agreement dated August 24, 1981, and a License Agreement dated December 1981. As of that date, Respondents had also made various loans to Appellants [T.32], including a \$10,000.00 loan evidenced by a Promissory Note dated January 20, 1983, which was due and payable on or before February 1, 1983 [T.36]. The disputes between the parties were at that time

being negotiated and the parties were each represented by counsel in connection with such negotiations [T.136]. As part of such negotiations, an Agreement dated February 8, 1983 was negotiated and entered into by the parties with advice of counsel [T.32]. Pursuant to the terms of that Agreement, Respondents agreed to and did in fact loan to Appellants an additional \$10,000.00, and Appellants agreed to and did in fact execute in favor of Responents the Promissory Note which is the subject of this action in the principal sum of \$52,324.40, payable together with interest at the rate of 21½ per annum on or before February 21, 1983 [T.10-12]. Appellants' signatures on the Promissory Note were notarized.

Paragraph 3 of the Agreement [T.33] specifically provided that in the event the parties were not able to reach a resolution concerning their disputes under the Sales License Agreement and the License Agreement, and in the event Respondents did not elect to apply the amount due under the Promissory Note to amounts, if any, then due or due in the future under the Sales License Agreement and/or License Agreement, that the Promissory Note would be payable by Appellants "strictly" on or before February 21, 1983 "without any right of offset or abatement". The Promissory Note dated February 7, 1983 [T.10] also provided that, "the amounts due pursuant to the terms of this Promissory Note are not subject to any right of offset."

The subject Promissory Note executed by Appellants contained the following Confession of Judgment provision:

"In the event this note is not paid in full according to the terms herein set forth, the undersigned do hereby consent and authorize the payor to enter judgment against them for the amount of the principal, interest and other costs incurred in obtaining said judgment."

Appellants represented and warranted as part of the subject note that, "this Promissory Note is enforceable according to its terms."

Appellants did not pay any portion of the Promissory Note as agreed [T.3]. Thereafter, and on or about March 2, 1983, Respondents, pursuant to Utah Code Annotated, Section 78-22-3, and Utah Rules of Civil Procedure, Rule 58A(e), filed a Verified Statement for Judgment by Confession signed by Appellant Transpower Manufacturing, Inc. [T.2-7], which incorporated by reference as an Exhibit a copy of the subject Promissory Note. Thereafter, on March 3, 1983, a Judgment by Confession was signed by the Honorable Timothy R. Hanson, Judge, which Judgment was docketed March 4, 1983 at 8:12 A.M. [T.8].

On April 7, 1983, Appellants filed a Motion to Set Aside the Judgment by Confession [T.13]. In support of such motion, Appellants filed the Affidavit of Appellant Laird B. Gogins, in which Mr. Gogins simply stated that he had never been served with a Summons and Complaint, that at the time he executed the Promissory Note his counsel assured him that Judgment could not be taken against him without notice and an opportunity to be heard and that he believed that he had:

"good and substantial defenses on the merits to whatever claims Plaintiffs may assert in this action. Furthermore, I have and intend to assert numerous counterclaims against Plaintiffs, which claims arise from the same transactions and occurrences as does the Promissory Note." [T.19-20]. However, no evidence whatsoever was presented to the Court by Appellants in such Affidavit or otherwise that Appellants had any meritorious defense to enforcement of the Promissory Note [T.42]. Nor did Appellants even state what purported defenses they had.

A hearing was held on Appellants' Motion to Set Aside the Judgment on April 14, 1983, and the motion was denied by the Court by Order dated April 22, 1983 [T.41].

On May 11, 1983, Appellants filed a Notice of Appeal, giving notice of their appeal to this Court of the Judgment entered March 3, 1983, and of the denial of their Motion to Set Aside that Judgment. Thereafter, and on May 17, 1983, an Amended Judgment by Confession was entered deleting a five percent rate penalty which had been included in the original Judgment [T.271-272]. This Amended Judgment was entered pursuant to stipulation of the parties [T.267-268].¹

The subject Promissory Note contains an attorneys' fee provision and on May 31, 1983, Respondents filed a Motion to Modify the Judgment to include an award of attorneys' fees incurred with respect to the post-Judgment motions of Appellants [T.284]. That motion was denied by the Court solely on the basis that the case was on appeal so the Court lacked jurisdiction [T.314].

As stated in Appellants' Brief [pgs. 5-6], two other lawsuits are presently pending between the parties concerning the Sales License Agreement and License Agreement. However, the subject matter of those actions is not related to the Promissory Note which is the subject of this lawsuit [T.135-136].

ARGUMENT

Appellants attack the Judgment of the District Court on the grounds that the required statutory procedures were not followed and that the Utah statutes authorizing Judgments by Confession are unconstitutional. For the reasons set forth below, it is respectfully submitted that these arguments should be rejected and the Judgment affirmed.

¹ Although the Notice of Appeal filed by Appellants does not specifically state they appeal from the Amended Judgment and in fact the Notice of Appeal was filed prior to entry of the Amended Judgment, Respondents do not assert these omissions as grounds for dismissing the appeal.

I. THE JUDGMENT WAS PROPERLY ENTERED PURSUANT TO STATUTORY AUTHORIZATION.

Appellants argue that the Judgment by Confession was not entered in accordance with the statutory authorization therefor because the notarized Promissory Note executed by Appellants and filed by Respondents in this action did not meet the requirements of Rule 58A(e) of the Utah Rules of Civil Procedure. Appellants have cited no authorities which support their various arguments on procedural deficiencies and it is Respondents position that the Promissory Note filed with the Court was in fact sufficient to comply with the statutory requirements.

Appellants first argue that the Promissory Note is insufficient because it is not "verified". However, it was uncontradicted that the Promissory Note was notarized. The purpose of requiring verification is twofold: First, to assure that the signature on the confession of judgment is in fact that of the debtor. Second, to attempt to protect creditors of the Debtor against fraudulent judgments being entered to protect the debtor's assets from his creditors. The first purpose of the requirement was clearly satisfied in the present case by notarization of the Promissory Note. The second requirement is for the protection of creditors and not the debtor. Recognizing this fact, the Courts have held that as between the parties the failure to have a verified statement does not affect the validity of a Judgment by Confession. Thus, in Barnes v. Hilton, 239 P.2d 966, 970 (Kan. 1952), the Court stated:

"Appellant does not contend that the California attorney who filed the confession of judgment in the California court included therein anything he was not authorized by the cognovits in the respective notes to include in such a

statement. His real contention appears to be that the respective cognovits are ineffective because his signature thereto was not verified by his oath. We think the point not well taken . . . The cognovits are parts of the contracts that defendant was privileged to make, and as between the parties there is no reason why he is not bound thereby." [Emphasis added]

In the present case, Appellants do not contend that they did not execute the Promissory Note or that the Promissory Note did not truthfully set forth the indebtedness owing by Appellants. Consequently, they cannot complain that the note was not verified.

Appellants next argue that the Promissory Note is insufficient because it does not expressly state that any sum is "justly" due or to become due. However, the authorities do not require that the statement specifically state that the sum is "justly due". It is sufficient if, as in the present case, the Promissory Note shows from the facts stated therein that the debt is due or to become due. Thus, in 49 C.J.S. Judgments, Section 159 at 291, the authors state:

"Under some statutes, the statement, in addition to setting forth the facts on which the indebtedness arose, must also show that the sum confessed is justly due or to become due. It has been held, however, that this does not require the confession to state in terms that the sum for which the judgment is confessed is justly due or to become due, if such fact appears from the other facts set forth; and, where the statement sets forth facts showing a just debt and the amount thereof, it need not in terms negative that it has been paid or otherwise discharged."

Appellants also argue that the Promissory Note does not authorize the entry of Judgment for a specified sum because the note only authorizes entry of Judgment for "the amount of principal, interest and other costs incurred in obtaining said judgment". However, the amount of the principal owed and the interest rate are set forth explicitly in the Promissory Note itself so that all that is required to determine the amount of the Judgment

confessed is a mathematical calculation based upon the precise figures set forth in the Promissory Note. This is sufficient specificity to support the Judgment. 47 Am.Jur.2d, Judgments Section 1132. In addition, the provision in the Promissory Note that the Judgment include "other costs incurred in obtaining said judgment" simply follows the statutory language of Rule 58A(e) which authorizes the Clerk to include costs of entry of judgment in the Judgment confessed and such provision is valid. 47 Am.Jur.2d, Judgments Section 1137. Furthermore, even if the \$300.00 costs included in the Judgment in this action were not authorized, the proper course for the Court to follow would be to simply delete the costs from the Judgment entered, not to set aside the entire Judgment. See, e.g., Pitts v. Pine Meadow Ranch, Inc., 589 P.2d 767 (Ut. 1978).

Finally, Appellants argue that even if the Promissory Note did meet the requirements of Rule 58A(e), the Judgment was still not properly entered because the Promissory Note was not filed for one hour and 25 minutes after the Judgment was filed and did not have the Judgment endorsed upon it. However, the Promissory Note was filed on March 3, 1983 prior to the docketing of the Judgment on March 4, 1983, which is all that Rule 58A(e) requires. Further, a copy of the the Promissory Note was filed as an Exhibit to the Affidavit presented to the court prior to the time the Court signed the Judgment by Confession. And the original note was clearly filed prior to the entry of the Amended Judgment on May 17. The fact that the Clerk or Judge did not endorse upon the note "a judgment of the Court for the amount confessed", if required at all, is simply a clerical mistake which can be corrected at any time. Bagnall v. Suburbia Land Company, 579 P.2d 917 (Ut. 1978).

In summary, it is respectfully submitted that Respondents complied with all essential requirements in causing Judgment to be entered in this action. Even if it is assumed for purposes of argument that certain minor mistakes were made in connection with the Judgment entered, those mistakes are not in any way prejudicial or affect the rights of Appellants and Appellants should not be allowed to avoid the consequences of their agreement on the basis of technicalities which in no way prejudiced their rights.

II. THE JUDGMENT DID NOT DEPRIVE APPELLANTS OF ANY CONSTITUTIONAL RIGHTS.

Appellants contend that the Judgment entered in this action is void on the basis that because the Judgment was entered without notice to Appellants and an opportunity for Appellants to be heard, Appellants were denied their right to due process of law under both the Constitutions of the United States and the State of Utah. Appellants concede that such due process rights may be waived but argue that there was not sufficient evidence of a waiver in the present case and that due process requires a hearing on the question of waiver prior to entry of the Judgment by Confession. It is respectfully submitted that these contentions are without merit.

The United States Supreme Court and numerous other courts throughout the country have specifically upheld the constitutionality of statutes authorizing Judgment by Confession without prior notice or hearing. See, e.g., D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 31 L.Ed.2d 124, 133, 92 S.Ct. 775 (1972); Swarb v. Lennox, 405 U.S. 191, 31 L.Ed.2d 138, 92 S.Ct. 967 (1972); Reh. den. 405 U.S. 1049, 31 L.Ed.2d 592, 92 S.Ct. 1303 (1972); Colonial Bank & Trust Co. v. Cahill, 424 F.Supp. 1200 (D. Ill. 1976); Tunheim v. Bowman, 366

8 Supp. 1392 (D.Nev. 1973). See, also, Barnes v. Hilton, 239 P.2d 966 (Kan. 1952); Coon v. District Court, 420 P.2d 827 (Colo. 1966); Hecker v. Bail, 431 P.2d 11 (Colo. 1967); Westring v. Cheyenne National Bank, 393 P.2d 119 (Wyo. 1964).

In D. H. Overmyer Co. v. Frick Co., supra., a case almost identical to the case at bar, the United States Supreme Court specifically rejected Appellants' constitutional argument. In Overmyer, the Defendant had executed a Promissory Note containing a cognovit provision as part of a settlement of various disputes between the parties. The parties were both represented by counsel in connection with the settlement negotiations and the execution of the Promissory Note. Defendant subsequently defaulted in repayment of the Promissory Note and a Judgment by Confession was entered against Defendant without any prior notice or hearing. Defendant subsequently moved to set aside the Judgment, which motion was denied. Defendant argued on appeal that the Ohio statute pursuant to which the Judgment had been entered was unconstitutional because it did not require any prior notice or hearing before Judgment was rendered. The Supreme Court rejected this contention and upheld the constitutionality of the statute. In so ruling, the court noted that there was no contract of adhesion involved, nor was it a case of unequal bargaining power or overreaching and concluded:

Our holding necessarily means that a cognovit clause is not, per se, violative of Fourteenth Amendment due process. Overmyer could prevail here only if the clause were constitutionally invalid. The facts of this case, as we observed above, are important, and those facts amply demonstrate that a cognovit provision may well serve a proper and useful purpose in the commercial world and at the same time not be vulnerable to constitutional attack.

. . .

Overmyer merely because of its execution of the cognovit note, is not rendered defenseless. It concedes that in Ohio the judgment court may vacate its judgment upon a showing of a valid defense and, indeed, Overmyer had a post-judgment hearing in the Ohio court. If there were defenses such as prior payment or mistaken identity, those defenses could be asserted. And there is nothing we see that prevented Overmyer from pursuing its breach of contract claim against Frick in a proper forum." (92 S.Ct. at 783)

Appellants cite a number of lower Federal Court cases for the proposition that the standard for showing a waiver of constitutional rights is the same in a civil suit as in a criminal context and that a hearing on the question of waiver must be conducted prior to entry of Judgment. Appellants contend that because no prior hearing is required under the Utah statute and Judgment could allegedly be entered by the Clerk without ever consulting a Judge, the Utah statute is unconstitutional on its face.²

However, only one of the cases relied upon by Appellants, Osmond v. Spence, 359 F.Supp. 124 (D. Del. 1972), involved a Judgment by Confession. The facts of the other cases cited were far different from the case at bar and the decisions in those cases are not on point. For example, Appellants cite Gonzales v. County of Hidalgo, 489 F.2d 1043 (5th Cir. 1973). In that case, a migrant worker brought suit challenging the County Housing Authority's seizure, without notice or hearing, of all his personal belongings in his apartment for non-payment of rent based upon a provision in a lease signed by

²It is not clear whether Rule 58A(e) authorizes the Clerk, rather than a Judge, to actually sign the Judgment. That Rule simply provides that the Clerk is authorized to "enter in the Judgment docket a Judgment of the Court for the amount confessed." In the event this Court believes that a Judgment by Confession can only be constitutionally signed by a Judge, it could so interpret Rule 58A(e). In the present case there was clearly a judicial determination that a waiver had occurred prior to the entry of the original Judgment by Judge Hansen. Judge Billings also made such a determination prior to entry of the Amended Judgment.

plaintiff without benefit of counsel authorizing such procedure. Osmond is not distinguishable from the case at bar as the Plaintiffs in that case had executed consumer notes and there was no showing they acted with benefit of counsel. More importantly, as the court recognized in Tunheim v. Bowman, supra, in upholding the constitutionality of Nevada's Confession of Judgment statutes, the Osmond decision relied upon by Appellants is directly contrary to the Supreme Court's decision in Overmyer:

"With due respect for the Delaware Court, we cannot so interpret the opinions and rulings of the Supreme Court. The Overmyer case did not leave the question open. It specifically held that a statutory scheme which did not provide for notice and hearing prior to entry of a confessed judgment did not run afoul of due process requirements." (366 F.Supp. at 1394)

The rationale of the decisions cited above that no prior hearing on waiver is constitutionally required is that the consent signed by a Defendant is prima facie evidence of waiver and if a Defendant challenges the validity of the waiver, he is free, as was done in the present case, to file a Motion to Set Aside the Judgment. This statutory scheme was expressly approved by the Supreme Court in Overmyer, supra, as affording sufficient protection to a Defendant.

Utah's statutory scheme for entering Judgments by confession without a prior hearing on waiver is not by any means unique. There are a number of other instances in which Judgments are entered without any such hearing.

For example, statutes and Court rules in Utah and throughout the country authorize the entry of a Default Judgment against a Defendant upon the filing of a proof of service of the Summons and Complaint. The filing of a proof of service simply constitutes prima facie evidence that the Defendant

was properly served with process and has failed without legal justification to respond. No prior hearing is required to determine whether the Defendant was in fact properly served with the Complaint, whether the Defendant knew and understood that he was required to file a response to the Complaint, whether the Defendant could even read the Summons and Complaint, whether the Defendant had any legal justification for not responding, or any of the numerous other issues which are clearly relevant when a Default Judgment is entered. The Defendant's right to move to set aside the Default Judgment after the fact is universally deemed to be a sufficient protection of the Defendant's constitutional rights. Furthermore, it is not uncommon at all for statutes or Court rules to authorize the Clerk, rather than a Judge, to enter a Default Judgment upon the filing of a proper proof of service of the Summons and Complaint (see the Rules of the Fifth Circuit Court for Salt Lake County, State of Utah.).

Similarly, during the course of a lawsuit Judgments are entered routinely upon the non-appearance of a party or his counsel at a hearing or trial based solely on proof of service of notice of the hearing. No prior determination is required that the failure to appear at the hearing was intentional or without legal justification. Again, the party against whom a Judgment is entered is left with his remedy of moving to set aside the Judgment if good cause exists.

Such a procedure is also deemed by the courts to adequately protect the rights of a Defendant with respect to the entry of Judgment by Confession. See, e.g., D. H. Overmyer Co. v. Frick, supra.; Barnes v. Hiltorf, supra.; Henritze v. The Borden Company, 432 P.2d. 2 (Colo. 1967); Westring v. Cheyenne National Bank, supra.

Appellants argue that, whether or not a prior hearing on waiver is required, the waiver of their right to notice and hearing in this case was not voluntarily and knowingly given because at the time they executed the subject Promissory Note, their counsel advised them that the provisions of the note by which they authorized Respondents to have Judgment entered against them were not enforceable. Appellants urge this Court to adopt a blanket rule that the standard for showing a waiver of one's constitutional right to notice and opportunity to be heard is the same in civil matters as in a criminal context. From that premise, Appellants argue that although they realized they were signing a note which contained a Confession of Judgment provision, they did not knowingly waive their constitutional right. This contention was made and specifically rejected by the District Court with good reason.

Respondents do not believe that a blanket standard as to what constitutes a waiver of constitutional rights in a Confession of Judgment context can or should be adopted. As the Supreme Court noted in Overmyer, supra., the facts of each individual case are important. Thus, a more strict standard should certainly be applied in cases of adhesion contracts, unequal bargaining situations, or consumer contracts where attorneys are not involved. However, it is respectfully urged that the facts of the present case dictate the conclusion that a valid waiver occurred.

Appellants, by their own testimony, clearly knew and understood that the terms of the subject Promissory Note authorized Judgment by Confession to

³ Appellants also argue once again that the waiver contained in the note cannot be relied upon because the original note was not filed for one hour and 25 minutes after the Judgment was entered. This argument is unavailing for the reasons set forth above (see p.9).

be taken against them if they did not pay the note as agreed two weeks hence and that by signing such Promissory Note they were indicating their consent to such procedure. In fact, in executing the note, Appellants expressly represented and warranted the note was enforceable according to its terms. The fact that Appellants may have relied upon erroneous advice from their attorney that the agreement they were purporting to make would not be enforceable is of no consequence. As the District Court correctly ruled, any mistaken legal advice which may have been given by Appellants' attorney is no defense to enforcement of the note.

A far stronger argument against waiver of constitutional rights than made by Appellants herein was rejected by the Court in the case of Copeland Planned Futures, Inc. v. Oberchin, 510 P.2d 654 (Wash. 1973). In that case, the Defendant, a resident of the State of Washington, had executed a Promissory Note providing that any dispute arising out of the note would be litigated in New York and governed by the New York Simplified Procedure for Determination of Disputes which did away with many of the usual procedures such as summons and pleadings. A Default Judgment had been entered against Defendant in New York and suit was brought to have Judgment entered in the State of Washington. The Defendant contended that he had not consented to jurisdiction in New York as he had either neglected to read the Promissory Note or to read it carefully and he did not realize that the note contained such a provision. The Court rejected this contention, stating:

"Giving defendant the full benefit of his claims, lack of consent is not made out. A person who signs a contractual writing such as a note is charged with knowledge of its contents and cannot claim that he did not read it or was inattentive to its provisions." (Id. at 658)

In the present case, what Appellants are really saying is that although they understood what they were agreeing to, they had a secret intention not to honor their agreement because they didn't think Respondents could require them to do so. Although Appellants' secret intention at the time of signing the Promissory Note not to perform the agreement may have constituted fraud on their part, that secret intent certainly should not relieve them of their contractual commitments.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO SET ASIDE THE JUDGMENT.

Appellants argue that the District Court improperly denied Appellants' Motion to Set Aside the Judgment which was filed pursuant to Utah Rules of Civil Procedure, Rule 60(b)(7).

It is well settled that a lower court has considerable discretion in granting or denying a Motion to set aside a Judgment and that the lower court's decision will only be disturbed on appeal where an abuse of that discretion is clearly established. See, e.g., Airkem Intermountain, Inc. v. Parker, 513 P.2d 429 (Ut. 1973). It is respectfully submitted that the District Court acted well within its discretion in denying Appellants' Motion to Set Aside the Judgment as there was no showing made by Appellants that they had a meritorious defense to enforcement of the Promissory Note.

Appellants contend in their Brief that other disputes exist which are the subject of other litigation between the parties which allegedly give rise to some unspecified defense to this action. No showing whatsoever was made by Appellants below as to any defense other than the bare allegation that

a defense existed [T.19-20]. Further, the evidence before the District Court was uncontradicted that the Promissory Note which is the subject of this action arose out of settlement discussions between the parties. Both the Promissory Note and a separate agreement were executed contemporaneously. The Settlement Agreement [T.139] specifically recognized that other disputes existed between the parties which they were attempting to resolve at the time the note was executed. Significantly, paragraph 3 of that agreement specifically provided that the amounts due under the Promissory Note, "shall be paid strictly within the time set forth therein without any right of offset or abatement." [T.140] Consequently, it is clear that the parties expressly agreed that the other disputes which existed between the parties would not constitute a defense to payment of the Promissory Note and that Appellants were absolutely obligated to pay that Promissory Note regardless of the outcome of the other disputes existing between the parties.

The Courts in a number of states have held that before a Judgment by Confession will be set aside, the Defendant must come forward with facts demonstrating that he has a meritorious defense to the Plaintiff's claim. See, e.g., Barnes v. Hilton, supra.; Henritze v. The Bordon Company, supra.; Coon v. District Court, supra.; Hecker v. Bail, supra.; Westring v. Cheyenne National Bank, supra. For example, in Henritze v. The Bordon Company, the Court, in refusing to set aside such a Judgment, observed:

"When a motion to vacate a judgment is made . . . it must allege a defense which is prima facie meritorious; and also, it must be stated with such particularity that the court can see that it is a substantial and meritorious defense, and not merely a technical or a frivolous one." (432 P.2d at 2)

Having failed to make any showing that they had a meritorious defense in this action, Appellants were not entitled to have the Judgment set aside and the District Court clearly acted well within its discretion in denying Appellants' motion.

IV. RESPONDENTS ARE ENTITLED TO AN AWARD OF REASONABLE ATTORNEYS' FEES INCURRED IN CONNECTION WITH APPELLANTS' POST-JUDGMENT MOTIONS AND ON THIS APPEAL

The Promissory Note which is the subject of this action contains a provision for attorneys' fees [T.10]. The Judgment by Confession which was entered in this action did not contain an award of attorneys' fees because little time was spent by Respondents' attorneys in connection with the entering of the original Judgment. However, after the Judgment was entered, substantial time was spent by Respondents' attorneys in litigating Appellants' Motion to Set Aside the Judgment, Motion to Stay Execution Without the Filing of a Supersedeas Bond, and Objection to the Order Denying Appellants' Motion to Set Aside the Judgment.

Respondents subsequently filed a Motion in the District Court to Modify the Judgment to add the amount of fees which they had incurred in connection with the post-Judgment motions. Respondents sought an award of attorneys' fees in the amount of \$11,300.00 based upon a detailed Affidavit of Respondents' counsel setting forth the time which had been expended in connection with such matters [T.286]. That motion was denied by the District Court solely on the basis that this appeal had already been filed and the Court lacked jurisdiction.

A Court has the inherent power to modify a Judgment within a reasonable time to include attorneys' fees where a party is entitled to an award of attorneys' fees. Braat v. Andrews, 514 P.2d 540 (Ore. 1973) It is respectfully submitted that this Court should modify the Judgment entered below by adding thereto the attorneys' fees incurred by Respondents in connection with the post-Judgment motions, or, in the alternative, remand the case to the District Court for a determination of the amount of attorneys' fees to be awarded in connection with such motions.

In addition, it is respectfully submitted that Respondents are entitled to an award of attorneys' fees incurred in connection with this appeal. Management Services Corp. v. Development Associates, 617 P.2d 406 (Ut. 1980) Respondents have filed with this Court an Affidavit setting forth the amount of attorneys' fees incurred in connection with this appeal and would request an award in the sum of \$2,565.00.

CONCLUSION

As part of a negotiated settlement and with the advice of counsel, Appellants voluntarily executed the Promissory Note and contemporaneous Agreement which are the subject of this lawsuit, requiring them to pay, two weeks hence, the amount of the Promissory Note without offset or abatement for the other disputes existing between the parties. Respondents complied in all essential respects with the necessary procedures to have Judgment by Confession entered. No good reason exists to grant relief to Appellants from the Judgment, especially considering the fact that Appellants wholly failed to present any evidence of even a colorable defense to enforcement of the Promissory Note and it is clear from the specific provisions of the note that no defense exists.

What Appellants really seek to accomplish by this appeal is to delay entry of Judgment on the note until the disputes on other agreements between the parties are litigated. Such a result was specifically bargained away by Appellants when they executed the subject note and agreement in order to induce Respondents to make the subject loan. This Court should not allow Appellants to avoid the consequences of their bargain.

DATED this 19th day of August, 1983.

BURBIDGE & MITCHELL

By



STEPHEN B. MITCHELL

Attorneys for Respondents