

2003

Mark Hernandez v. Kelly S. Baker, dba Performance Auto and marine Supply, Performance Auto and Marine Supply Corp, and Does II through X : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MARK HERNANDEZ,

Plaintiff/Appellee,

v.

Case No. 20030753-CA

KELLY S. BAKER dba Performance Auto
& Marine Supply; PERFORMANCE
AUTO & MARINE SUPPLY CORP.; and
DOES II through X,

Defendants/Appellants.

On appeal from an order of the Third District Court for Salt Lake County
The Honorable Stephen L. Henriod

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Paulette Stagg
Clerk of the Court

PARTIES TO THE PROCEEDING

The caption of the case includes all parties to the proceeding before the district court.

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JURISDICTION

The Utah Supreme Court transferred this appeal to the Utah Court of Appeals. Therefore, the court of appeals has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2002).

ISSUES AND STANDARDS OF REVIEW

I.

Appellant Kelly Baker proffered defenses to Appellee Mark Hernandez's claims against him that, if proven at trial, would preclude Hernandez from recovering on such claims. The first issue presented is whether the trial court correctly ruled Baker is without a meritorious defense to Hernandez's claims.

Standard of Review. Whether a defense is meritorious is a question of law that is reviewed for correctness. See Lund v. Brown, 2000 UT 75, ¶12, 11 P.3d 277.

Preservation. This issue was presented below and is preserved at R. 182-84, 260-63, 215, 336-37.

II.

Appellee Mark Hernandez obtained leave to amend his complaint to include Appellant Performance Auto as an additional defendant. However, Hernandez did not file the amended complaint, nor did he serve the same upon Performance Auto. The second issue presented is whether the trial court had jurisdiction to enter default judgment against Performance Auto.

Standard of Review. A motion to set aside a judgment for lack of jurisdiction is a question of law that is reviewed for correctness. See State Dep't Soc. Servs. v. Vijil, 784 P.2d 1130, 1132 (Utah 1989).

Preservation. This issue was presented below and is preserved at R. 183-84, 216.

DETERMINATIVE RULES

Rules that are of central importance to this appeal include the following:

Utah R. Civ. P. 3(b):

Time of jurisdiction. The court shall have jurisdiction from the time of filing of the complaint or service of the summons and a copy of the complaint.

Utah R. Civ. P. 15(a):

Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Utah R. Civ. P. 60(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. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

A. Nature of the Case

This case involves an appeal of the trial court's order denying a motion to set aside default judgment. While it is typically within a trial court's discretion to grant or deny a motion to set aside a default judgment, this case presents two issues that are beyond a trial court's discretionary reach. The first issue involves the proper legal standard for showing a meritorious defense. The second issue is jurisdictional in nature and involves the proper procedure for amending a complaint to add an additional defendant.

B. Course of Proceedings and Disposition Below

This case was filed by Mark Hernandez against Kelly Baker in the Fourth District Court for Utah County. Venue was then changed to the Third District Court for Salt Lake County and assigned to the Honorable Stephen L. Henriod. Hernandez later obtained leave to amend his complaint to join Performance Auto & Marine Supply Corp.

as a defendant. However, Hernandez never filed the amended complaint nor did he serve the same upon Performance Auto.

During the course of the litigation, Hernandez sought default judgment against Baker and Performance Auto as a sanction for their failure to respond to written discovery. The trial court granted the motion and defaulted both Baker and Performance Auto. Baker and Performance Auto moved to set the judgment aside. The trial court denied their motion.

Baker and Performance Auto appealed to the Utah Supreme Court. Thereafter, Hernandez filed a motion for summary disposition under Rule 10(a)(2) of the Utah Rules of Appellate Procedure arguing that the grounds for appeal are so insubstantial as not to merit further consideration. The Utah Supreme Court transferred this appeal to this Court, which denied Hernandez's motion and ordered full briefing of the issues. See Hernandez v. Baker et al., Case No. 20030753-CA (Utah Ct. App. Nov. 19, 2003.).

STATEMENT OF FACTS

Defendant Performance Auto & Marine Supply Corp. ("Performance Auto") is a Utah corporation. (R. 192-93.) Defendant Kelly Baker ("Baker") is Performance Auto's president. (R. 193, 234.)

Sometime in 1995, Plaintiff Mark Hernandez ("Hernandez") took his boat and a trailer to Performance Auto to have work performed on the boat's engine. (R. 193, 201A.) The initial estimate provided to Hernandez for the work was \$250. (R. 201A,

250.) The actual cost of the repair work exceeded the estimate by \$584.72. (R. 225, 282-83.)

After the work on Hernandez's boat and engine was complete, Performance Auto attempted but was unable to contact Hernandez to advise him of the same. (R. 252, 283.) After several months without being able to contact Hernandez, Performance Auto exercised its rights under Utah's repairman's lien statutes, Utah Code Ann. §§ 38-2-3, -3.2, and -4 (2001), and sold the boat and the trailer to recoup its parts, labor, and storage costs. (R. 283-85, 309.)

Hernandez later resurfaced and demanded a return of his boat and trailer. (R. 283.) A dispute ensued between the parties (R. 283-85) and Hernandez filed a verified complaint against "Kelly S. Baker, dba Performance Auto & Marine Supply". (R. 1.)¹ In the Verified Complaint, Hernandez alleged: (1) violation of the Utah Consumer Sales Practices Act; (2) replevin; (3) conversion/trespass to chattels; and (4) punitive damages. (R. 1.)

Baker answered the Verified Complaint, and asserted that Performance Auto the corporation, not Baker the individual, had business dealings with Hernandez. (R. 56.)² Thus, Baker denied any personal liability for the claims alleged by Hernandez. (R. 57.)

In response to Baker's Answer, Hernandez sought leave to amend his complaint to include Performance Auto as an additional defendant. (R. 62, 71.) On December 5,

¹ A copy of the Verified Complaint is attached as Addendum B.

² A copy of the Answer is attached as Addendum C.

2000, the trial court granted Hernandez's motion for leave to amend. (R. 78.) However, Hernandez never filed his amended complaint nor did Hernandez serve the amended complaint upon Performance Auto. (R. 183-184.)³ Rather, Performance Auto was simply added as a party to the caption of subsequent pleadings. (R. 80 *et. seq.*, 184.)

Approximately one year after obtaining leave to amend, Hernandez submitted written interrogatories and request for production of documents on both Baker and Performance Auto. (R. 92-108.) Neither Baker nor Performance Auto responded to this discovery. (R. 102, 106.)

On June 25, 2001, after an apparent lag in the proceedings, the trial court issued a notice of order to show cause as to why the case should not be dismissed for failure to prosecute. (R. 87.) At the July 31, 2001, order to show cause hearing, the trial court gave Hernandez 30 days to file a motion to compel answers to his discovery or request a trial setting or the case would be dismissed without further notice. (R. 86.)

Nearly three months later, on November 1, 2001, Hernandez filed a motion to compel pursuant to Rule 37 of the Utah Rules of Civil Procedure. (R. 89.) On March 11, 2003, the trial court ordered Baker and Performance Auto to respond to the written discovery on or before March 29, 2002. (R. 111.)

³ A review of the record, including the index and docket entry of the district court clerk therein (R. 270-72), fails to reveal the filing of an amended complaint or of any proposed amended complaint in connection with Hernandez's motion and memorandum for leave to amend. (R. 62, 71, *passim.*) Nor does the record, index, or docket reveal the filing of a return of service for Performance Auto. (R. *passim.*)

By this time in the litigation, Baker had relocated from Salt Lake City to St. George, and had not informed his previous attorney of his move. (R. 177-78.) This was a result of representations from his attorney, which caused Baker to believe the case had been dismissed as a result of the trial court's order to show cause. (R. 177-78.) Thus, Baker was unaware of the trial court's order compelling answers to the discovery and neither Baker nor Performance Auto responded to the same. (R. 115, 123-24.)

Thereafter Hernandez moved for default. (R. 115, 123-24.) On February 13, 2003, the trial court entered default judgment in the amount of \$52,677.75 against both Baker and Performance Auto, jointly and severally. (R. 165-66.)

On May 1, 2003, Baker and Performance Auto moved to set the judgment aside pursuant to Rule 60(b) of the Utah Rules of Civil Procedure. (R. 172-73.) Baker sought to set the judgment aside on the grounds that there was mistake, inadvertence, and/or excusable neglect for his failure to answer the discovery requests, that his motion to set aside was timely filed, and that he had meritorious defenses to the action. (R. 180-84, 256-263.)

Performance Auto sought to set the judgment aside on the grounds that the trial court was without jurisdiction over it because, although Hernandez obtained leave of court to amend his complaint to include Performance Auto as a party, Hernandez never filed the amended complaint, nor did he serve the same upon Performance Auto. (R. 183-84.)

In ruling on the motion, the trial court determined that Baker and Performance Auto “must show: 1) the default judgment was entered based upon mistake, inadvertence, surprise, or excusable neglect; 2) the motion to set aside is timely; and 3) . . . a meritorious defense.” (R. 336-37.)⁴

On the issue of Baker’s meritorious defenses, trial counsel for both parties argued extensively in their written memoranda concerning (1) Baker’s individual liability under a corporate shield defense and (2) whether the sale of the boat complied with the repairman’s lien statutes. (R. 182-83, 209, 211-16, 235-37, 260-63, 280-82.)

The trial court then denied the motion on the grounds that Baker and Performance Auto “failed to provide ‘specific’ and ‘detailed’ facts necessary to support their underlying claim and therefore are unable to set forth the necessary evidence of a meritorious defense to the action against them.” (R. 337.) Though the issue was placed squarely before it, the trial court did not address Performance Auto’s jurisdictional challenge. (R. 336-37.)

Baker and Performance Auto appeal. (R. 339.)

SUMMARY OF ARGUMENTS

The trial court denied Baker’s motion to set aside solely on the grounds that he failed to present a meritorious defense. In denying the motion, the trial court applied a meritorious defense standard that necessarily required Baker to prove the merits of his

⁴ A copy of the trial court’s Findings of Fact and Conclusions of Law is attached as Addendum A.

defense. However, to show a meritorious defense, the law merely requires a simple determination of whether the defenses proffered, if proven at trial, would preclude recovery on the claims asserted by the plaintiff. See Lund v. Brown, 2000 UT 75, ¶¶28-29, 11 P.3d 277; Erickson v. Schenkers Int'l Forwarders, Inc., 882 P.2d 1147, 1148 (Utah 1994).

In the instant case, the defenses proffered by Baker, if proven at trial, would preclude recovery on all claims asserted by Hernandez. Therefore, Baker presented a meritorious defense as a matter of law. As a result, the trial court's denial of Baker's motion to set aside default judgment was incorrect and must be reversed.

The trial court also denied the motion to set aside with regard to Performance Auto on the grounds that it failed to present a meritorious defense. The issue with regard to Performance Auto, however, is jurisdictional. Performance Auto was not an original party to this action. Hernandez obtained leave to file an amended complaint to include Performance Auto as a party. However, Hernandez never filed the amended complaint nor did he serve Performance Auto with process. Performance Auto was simply added to the caption of the pleadings as the case moved forward, culminating in the trial court's entry of a default judgment against it as discovery sanction.

A trial court does not de facto obtain jurisdiction over a new defendant at the time it grants leave to amend the complaint to include the new defendant as a party to the action. Rather, the rules of civil procedure and due process require actual filing and

service of the amended complaint. Because this did not occur in the instant case, the default judgment against Performance Auto is void and the trial court must be reversed.

ARGUMENT

I. THE TRIAL COURT INCORRECTLY CONCLUDED BAKER DID NOT HAVE A MERITORIOUS DEFENSE.

A. Standard for Setting Aside Default Judgment

To obtain relief from a default judgment a defendant must show: (1) default was entered against him for any of the reasons specified in Rule 60(b); (2) his motion to set aside the default judgment is timely; and (3) he has a meritorious defense to the action.⁵

See Erickson v. Schenkers Int'l Forwarders, Inc., 882 P.2d 1147, 1148 (Utah 1994) (citing State ex. rel. Dep't of Social Servs v. Musselman, 667 P.2d 1053, 1055-56 (Utah 1983) (plurality opinion)). Further, courts should be liberal in applying these standards with an eye towards granting relief against default judgments so that cases may be tried on the merits. See id. at 1149.

In the instant case, the trial court correctly articulated this three-part standard. However, it then proceeded to deny Baker's motion to set aside because it determined that Baker failed to meet the third requirement—that of showing a meritorious defense.

⁵ It should be noted that the standard for setting aside a judgment under Rule 60(b) is the same whether the default was the result of a failure to answer a complaint, or, as here, a Rule 37 motion to compel. See Darrington v. Wade, 812 P.2d 452, 456 (Utah Ct. App. 1991); Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950, 969 (Utah Ct. App. 1989).

The existence of a meritorious defense only becomes an issue after a trial court is satisfied that the first two requirements for setting aside a default judgment have been shown. See Musselman, 667 P.2d at 1056 (stating it is “unnecessary” and “inappropriate [] to consider the issue of meritorious defenses unless the court is satisfied that a sufficient excuse has been shown.”); see also Board of Educ. of Granite Sch. Dist. v. Cox, 14 Utah 2d 385, 387, 384 P.2d 806, 808 (1963) (stating meritorious defense question arises only after sufficient excuse is shown). Thus, where, as here, a trial court considers the issue of a meritorious defense without specifically ruling on the question of whether there was a sufficient excuse under Rule 60(b), the existence of a sufficient excuse is implied. See id.⁶

Therefore, because the trial court specifically ruled on the issue of Baker’s meritorious defenses, Baker has satisfied the excuse and timeliness prongs of Rule 60(b). The only question is whether Baker presented a meritorious defense as a matter of law.

B. The Meritorious Defense Standard

In determining Baker did not have a meritorious defense, the trial court concluded “that the defendants have failed to provide ‘specific’ and ‘detailed’ facts necessary to support their underlying claim and therefore are unable to set forth the necessary evidence of a meritorious defense to the action against them.” (R. 337; see also Add. A.)

⁶ This was one of the few points of agreement between the five justices in Musselman. See Musselman, 667 P.2d at 1058 (Howe, J., concurring), at 1059 (Durham, J., dissenting, joined by Stewart, J.) (stating, “I agree with that portion of the opinion which concludes that the appellant has met his burden on the issues of timeliness and excusable neglect.”).

In determining whether a defendant has a meritorious defense to the claims against him, the central inquiry is whether the defendant can “show” a “proposed defense containing allegations, facts, or claims that, if proven at trial, would preclude total or partial recovery by [the plaintiff].” Lund v. Brown, 2000 UT 75, ¶28, 11 P.3d 277.

A party need not actually prove the its proposed defenses to meet the meritorious defense standard. See id. at ¶29. Rather, “where a party presents a clear and specific proffer of a defense that, if proven, would preclude total or partial recovery by the claimant . . . , it has shown a nonfrivolous and meritorious defense for the purposes of its motion to set aside a default judgment.” Id.

In Lund, the party seeking to set aside the default pointed to its original complaint as providing the defenses to the counterclaim which formed the basis for the default judgment. See id. at ¶29. The supreme court determined that the allegations in the complaint and counterclaim “presented genuine issues of material fact, the resolution of which, one way or the other, will necessarily affect each party’s ability to recover for its own claims.” Id. at ¶31. Thus, if the allegations in the complaint were proven at trial, the party asserting the counterclaims would be precluded from recovering on such claims. See id. Therefore, the meritorious defense standard was satisfied. See id.

In Erickson v. Schenkers International Forwarders, Inc., the court reasoned that “general denials” in an answer to a complaint would be sufficient to satisfy the meritorious defense requirement so long as those denials, if proven at trial, would preclude recovery by the plaintiff. 882 P.2d at 1149. According to Erickson, a defense is

sufficiently meritorious if it is entitled to be tried. See id. Thus, in Erickson, general denials in answer to specific allegations in the complaint were sufficient to show a meritorious defense, and the court vacated the default judgment and remanded for a trial on the merits. See id.

As set forth in detail below, when the allegations in support of the claims alleged in Hernandez's Verified Complaint are reviewed against the defenses and denials proffered by Baker, it is clear that Baker has presented a meritorious defense as a matter of law.

1. Utah Consumer Sales Practices Act

The Utah Consumer Sales Practices Act (the "Act"), Utah Code Ann. §§ 13-11-1 to -23 (2001), protects consumers from deceptive practices by "suppliers" who regularly engage in consumer transactions. See id. § 13-11-4. Generally, to be liable for a deceptive practice under the Act, a supplier must have acted knowingly and intentionally to deceive the consumer. See id. § 13-11-4(2).

The essence of Hernandez's claims that Baker violated the Act are that Baker, in the course of operating his retail shop, provided an estimate for repairs, then exceeded that estimate and performed additional repairs without prior authorization (Verified Complaint ¶¶6-9, 10-11) and failed to comply with the repairman's lien statutes in retaining and ultimately selling Hernandez's boat. (Verified Complaint ¶¶12-13, 15-16.) Hernandez alleges that Baker's conduct was unconscionable and constituted deceptive

acts or practices in violation of the Act and, as a result, Hernandez is entitled to damages. (Verified Complaint ¶¶21-26.)

In his Answer, Baker denied the allegations set forth above and specifically asserted that Performance Auto the corporation had dealings with Hernandez, not Baker in his individual capacity. (Answer ¶¶5-26.) Further, Baker submitted an affidavit to the trial court in which he testified to the separateness of his personal affairs and the business affairs of Performance Auto. (R. 192-97, 280-81.)⁷ The affidavit also sets forth the facts and circumstances surrounding the sale of the boat and trailer and compliance with Utah Code Ann. § 38-2-4. (R. 192-97, 280-87.)

If proven at trial, Baker's denials would preclude any recovery by Hernandez against Baker because Hernandez could not show that Baker, individually, was responsible for any of the actions alleged in the Verified Complaint. Further, and at the very least, Baker's individual liability creates issues of fact warranting a trial on the merits. See Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 47 (Utah Ct. App. 1988) (whether the corporate veil should be disregarded creates material issue of fact for trial). Additionally, Baker has created material issues of fact regarding whether or not the sale of the boat and trailer complied with Utah Code Ann. §§ 38-2-3 and -4. See Lund, 2000 UT 75 at ¶31 (allegations which create issue of fact for trial are sufficient to satisfy meritorious defense requirement).

Therefore, Baker has a meritorious defense to Hernandez's first claim.

⁷ A copy of Baker's first and second affidavits are attached as Addendum D.

2. Replevin

In support of his claim for replevin, Hernandez alleged that to the extent Baker had any continuing control over the boat, Hernandez is entitled to a court order requiring Baker to return the boat. (Verified Complaint ¶¶28-29.)

Baker denied ever having had control or continuing control over the boat (Answer ¶¶27-30) and again, specifically asserted in his affidavits that he was at all times acting for and on behalf of Performance Auto, thereby asserting the corporate shield defense. (R. 192-97, 280-81.)

Baker's denials, if proven at trial, would preclude recovery by Hernandez on his second claim because Hernandez could not show that Baker wrongfully took or detained Hernandez's property or, at the time of the complaint, was presently detaining the same. See Utah R. Civ. P. 64B(a)-(b) (to recover for replevin plaintiff must show that defendant has wrongfully taken and is currently detaining the property of the plaintiff); see also Bush v. Bush, 55 Utah 237, 242, 184 P. 823, 825 (1919) (same). Therefore, Baker has a meritorious defense to Hernandez's second claim.

3. Conversion/Trespass to Chattels

In support of his claim for conversion/trespass to chattels, Hernandez alleged that Baker took possession of Hernandez's boat, and despite Hernandez's demands for its return, Baker converted it to his own use and otherwise unlawfully disposed of it without complying with Utah law. (Verified Complaint ¶¶32-34.) Baker denied each of these

allegations and incorporated his corporate shield defense. (Answer ¶¶31-38.) Further, in his affidavits Baker asserts that he was at all times acting for and on behalf of Performance Auto and that his personal affairs were kept separate from the corporate affairs of Performance Auto. (R. 192-97, 280-81.)

Baker's denials, if proven at trial, would preclude recovery by Hernandez on his third claim because Hernandez could not show the necessary elements of his third claim, namely that Baker, in his individual capacity, willfully interfered with or otherwise intentionally exercised dominion or control over Hernandez's property without lawful justification. See Mumford v. ITT Comm. Finc. Corp., 858 P.2d 1041, 1045 (Utah Ct. App. 1993) (stating conversion requires showing of willful interference with property without lawful justification); cf. Jenkins v. Equipment Ctr., Inc., 869 P.2d 1000, 1002-03 (Utah Ct. App. 1994) (where repairman's lien is claimed, liability for conversion creates a fact-intensive question).

Therefore, Baker has a meritorious defense to Hernandez's third claim.

4. Punitive Damages

Finally, in support of his claim for punitive damages, Hernandez alleged that Baker's conduct was willful, wanton, malicious, and in reckless disregard of Hernandez's rights and that he was therefore entitled to punitive damages. (Verified Complaint ¶¶40-43.) Baker denied these allegations. (Answer ¶¶39-43.)

Punitive damages may only be awarded if compensatory or general damages are awarded and it is established by clear and convincing evidence that the tortfeasor's acts

or omissions are willful or malicious, intentionally fraudulent, or in reckless indifference towards the rights of others. See Utah Code Ann. § 78-18-1(1)(a) (2002).

Baker's denials that he acted in willful, malicious, or reckless disregard of Hernandez's rights, if proven at trial, and the fact that Baker denied all substantive allegations on the underlying claims alleged by Hernandez, would preclude recovery of any punitive damages by Hernandez. Therefore, Baker has a meritorious defense to Hernandez's final claim.

In sum, Baker asserted general denials in his Answer to the Verified Complaint and specific defenses of the corporate shield and compliance with the repairman's lien statutes, which, if proven at trial, would preclude recovery by Hernandez. Thus, there can be no doubt that Baker's denials as set forth in his Answer and the testimony he provided in his affidavit meet the requirements for showing a meritorious defense under Utah law.

As stated by the Utah Supreme Court in Lund, "there appears little more [Baker] realistically could have done, short of proving [his] claims in an evidentiary hearing, to 'show' the trial court [his] meritorious defense." Lund, 2000 UT 75 at ¶32. However, the law does not require as much. See, e.g., Musselman, 667 P.2d at 1060-61 (Durham, J., dissenting) (stating a defendant should not be "put to his proof" on his proposed defenses nor through the "onerous burden" of a "mini-trial" to show the merits of the same). As a result, it is clear that the trial court incorrectly concluded Baker did not have

a meritorious defense. Therefore, this Court must reverse the trial court and remand this case for a trial on the merits.

II. THE TRIAL COURT WAS WITHOUT JURISDICTION OVER PERFORMANCE AUTO BECAUSE HERNANDEZ NEVER FILED OR SERVED THE AMENDED COMPLAINT INCLUDING PERFORMANCE AUTO AS A PARTY.

As stated, although Performance Auto moved to set aside the default judgment for lack of jurisdiction, the trial court did not address the issue. Rather, it merely held Performance Auto was without a meritorious defense to this action.

“[W]hen a motion to vacate a judgment is based upon a 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.” Vijil, 784 P.2d at 1132 (Utah 1989); see also Garcia v. Garcia, 712 P.2d 288, 290-91 (Utah 1986) (holding when court lacks jurisdiction judgment is void and must be set aside under Utah R. Civ. P. 60(b)). Furthermore, when a judgment is being attacked as void under Rule 60(b)(4), the party attacking the judgment need not meet the standard excuse, timeliness, and meritorious defense requirements for setting aside a default judgment. See Garcia, 712 P.2d at 290-91.

As set forth above, the facts are clear and undisputed with regard to Performance Auto. Performance Auto was not an original party to this action. Hernandez obtained leave to file an amended complaint to include Performance Auto as a defendant. However, Hernandez never filed the amended complaint nor did he serve Performance

Auto with process. Rather, Performance Auto was simply added to the caption of the pleadings as the case moved forward, culminating in the trial court's entry of a default judgment against it.

The plain language of Rule 3 of the Utah Rules of Civil Procedure, which governs the commencement of civil actions, specifically requires the filing of a complaint as a jurisdictional prerequisite. See Utah R. Civ. P. 3(b) (providing, "The court shall have jurisdiction from the time of filing of the complaint or service of the summons and a copy of the complaint."); see also *Dipoma v. McPhie*, 2001 UT 61, ¶10, 29 P.3d 1225 (discussing Utah R. Civ. P. 3.).⁸

Rule 3 makes no distinction between the filing of an original complaint or an amended complaint including an additional defendant. Indeed, authorities considering Rule 3 in a context similar to the facts in the instant case do not recognize a distinction. For example, in *Donner v. Sulcus Computer Corp.*, 103 F.R.D. 548 (N.D. Pa. 1984), the court held that amendment of a complaint is not effective until that complaint is actually filed with the court. See id. at 549 (considering Fed. R. Civ. P. 3, 15).

Similarly, Professors Wright and Miller, in their oft cited treatise, state: "An action is commenced as against an additional defendant named in an amended complaint as of the date of filing the amended complaint, rather than the date of the court's order

⁸ Though Rule 3(b) provides for jurisdiction upon filing "or" service, service without filing would be a meaningless act insofar as an action must be dismissed if a complaint is not filed within 10 days of service. See Utah R. Civ. P. 3(a); see also *Dipoma*, 2001 UT 61 at ¶20 n.7 (explaining same). Thus, even though Hernandez failed to serve Performance Auto, the failure to file the amended complaint renders any claim of actual notice in lieu of service moot.

granting leave to amend the complaint.” Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 1052 n.1 (3d ed. 2002) (discussing Fed. R. Civ. P. 3).

Indeed, it seems elementary that, upon obtaining leave to amend a complaint, the plaintiff is required to thereafter file and serve that amended complaint. Until the plaintiff completes these necessary requirements, his amended complaint is nothing more than a proposal, having no force or effect of law. Rule 15, which governs the requirements for amended and supplemental pleadings, also supports this conclusion.

Rule 15 does not specifically provide for or reference a filing requirement as a condition precedent to the effectiveness of an amended pleading. See Utah R. Civ. P. 15(a). However, in Nelson v. Adams, USA, Inc., 529 U.S. 460 (2000), the United States Supreme Court held that Rule 15 assumes an amended pleading will be filed as a prerequisite to its effectiveness. See id. at 465.

In Nelson, the Supreme Court considered federal rule 15 with regard to an issue and facts similar to the instant case. In Nelson, the defendant was awarded attorney fees against the plaintiff corporation. See id. at 462. The defendant feared that the corporation would be unable to pay its attorney fees award and obtained leave under Rule 15 to amend its pleading to include the Donald Nelson, the corporation’s sole shareholder and president, as a party. See id. at 463-64.

Although the defendant obtained leave to amend, it never served Nelson with the amended pleading, nor did it file the same with the trial court. See id. at 466. However, the trial court, upon granting leave to amend, simultaneously amended the judgment and

subjected Nelson to individual liability for the attorney fees. See id. at 464-65. The United States Court of Appeals for the Federal Circuit affirmed, reasoning that Nelson **had** suffered no prejudice because the original judgment was against his own corporation. See id. at 464-65.

On appeal, the Supreme Court reversed. See id. at 467. The Court reasoned, “Rule 15 assumes an amended pleading will be filed and anticipates service of that pleading on the adverse party.” Id. at 465. Because the amended pleading was never filed with the trial court or served on Nelson, the Court held that the entry of judgment against Nelson violated his right to due process under Rule 15. See id. at 467.

While the above cited authorities consider Rules 3 of 15 of the Federal Rules of Civil Procedure, “[i]nterpretations of the Federal Rules of Civil Procedure are persuasive where the Utah Rules of Civil Procedure are ‘substantially similar’ to the federal rules.” Tucker v. State Farm Mut. Auto. Ins. Co., 2002 UT 54, ¶7 n.2, 53 P.2d 947 (quoting Lund, 2000 UT 75 at ¶26). The Compiler’s Notes to Utah rules 3 and 15 indicate that those rules are similar to federal rules 3 and 15. See Utah R. Civ. P. 3 Compiler’s Notes; Utah R. Civ. P. 15 Compiler’s Notes.

Such authorities are even more persuasive when considered in connection with Utah case law governing the effect of filing an amended pleading. In Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union 222 v. Motor Cargo, 530 P.2d 807 (Utah 1974), the Utah Supreme Court stated, “The law is overwhelming to the effect that when an amended complaint . . . is filed, the former complaint is functus officio and

cannot be used for any purpose.” Id. at 808; see also Kuhre v. Goodfellow, 2003 UT App 85, ¶13, 69 P.3d 286 (stating “amended pleading supercedes original pleading, and original pleading performs no function” (citation omitted)).

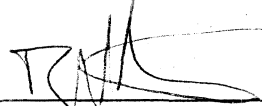
Insofar as the filing of an amended complaint supercedes the original, it necessarily follows that an amended complaint serves no function or purpose until it is actually filed with the clerk of court. See Utah R. Civ. P. 5(e) (defining “filing” as “with the clerk of the court”). Thus, the only effective complaint in the instant case is the original Verified Complaint, which names only Baker individually.

In sum, the weight of authority on the issue is clear—because Hernandez failed to file and serve an amended complaint including Performance Auto as a party to this action, the trial court was without jurisdiction over Performance Auto as a matter of law. As a result, the entry of default judgment against Performance Auto is void and should have been set aside under Rule 60(b)(4). Therefore, the trial court must be reversed.

CONCLUSION

For the foregoing reasons, Appellants respectfully request this Court reverse the trial court’s entry of default judgment and remand the case for a trial on the merits.

Respectfully submitted this 30 day of January 2004.



Bryan J. Pattison

DURHAM JONES & PINEGAR
192 East 200 North, Third Floor
St. George, Utah 84770

Heath H. Snow

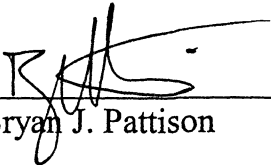
BARNEY & MCKENNA, P.C.
63 South 300 East, Suite 202
St. George, Utah 84771-2710

Attorneys for Appellants

CERTIFICATE OF SERVICE

In accordance with Utah R. App. P. 26(b), I, Bryan J. Pattison, certify that on January 30, 2004, I served two (2) copies of Appellants' **BRIEF OF APPELLANTS** upon counsel for Appellee in this matter, via first class mail with sufficient postage prepaid, to the following address:

Thomas P. Isom
1199 West 700 South
Pleasant Grove, UT 84062
Attorney for Plaintiff/Appellee



Bryan J. Pattison

Tab A

AUG 13 2003

SALT LAKE COUNTY

Pursuant to Utah Rules of Civil Procedure 60(b), in order for the Court to set aside a default judgment the defendants must show: 1) the default judgment was entered based upon mistake, inadvertence, surprise or excusable neglect; 2) the motion to set aside is timely; and 3)

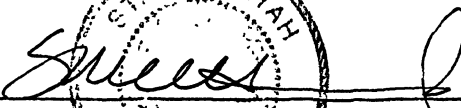
that defendants have a meritorious defense to the underlying action. State by & through D. of SS. v. Musselman, 667 P.2d 1053 (Utah 1983).

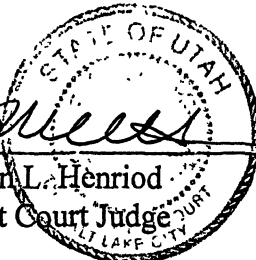
Under Musselman, in order for a defense to be meritorious it must "set forth specific and sufficiently detailed facts which, if proven, would have resulted in a judgment different from the one entered." Id. Based upon that standard the Court concludes that the defendants have failed to provide "specific" and "detailed" facts necessary to support their underlying claim and therefore are unable to set forth the necessary evidence of a meritorious defense to the action against them.

Accordingly, the defendants' Motion to Set Aside Default Judgment and Motion to Enforce July 31, 2001 Order should be denied.


ENTERED this 12 day of August, 2003.

BY THE COURT:


Stephen L. Henriod
District Court Judge



Approved as to form:




Heath H. Snow
Attorney for the defendants

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 4-504, Code of Judicial Administration, the forgoing *Findings of Fact and Conclusions of Law* were sent by mail to opposing counsel at the address appearing below on the 11th day of July 2003:

Attorneys for the Defendants

Heath H. Snow
Daren Barney
BARNEY & McKENNA, P C.
63 South 300 East, Suite 202
P.O. Box 2710
St. George, Utah 84771-2710



Thomas P. Isom

Tab 6

Copy

FILED
FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY STATE OF UTAH

JAN 15 1997

CARMA B. SMITH, CLERK
DEPUTY

FILED DISTRICT COURT
Third Judicial District

JAN - 9 1998

By _____
SALT LAKE COUNTY

GUY L. BLACK, No. 6182
GREENWOOD & BLACK
Attorneys for Plaintiff
1840 North State Street, Suite 200
Provo, Utah 84604
Telephone: (801) 377-4652
Facsimile: (801) 377-4673

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

MARK HERNANDEZ,

Plaintiff,

vs.

KELLY S. BAKER, dba
Performance Auto & Marine
Supply, and JOHN DOES
I THROUGH X,

Defendants.

VERIFIED COMPLAINT

Case No. 970400043

Judge Nactani

COMES NOW, Plaintiff, MARK HERNANDEZ, by and through his
attorney, Guy L. Black, and complains of Defendant, KELLY S.
BAKER, dba Performance Auto & Marine Supply, as follows:

GENERAL AVERMENTS

1. Plaintiff is a bona fide and actual resident of Utah County, State of Utah.
2. Defendant is a resident of Salt Lake County, State of Utah, and is doing business as Performance Auto & Marine Supply in Salt Lake County, State of Utah.
3. Jurisdiction and venue in this matter is proper in the Third District Court of Salt Lake County, State of Utah.

FIRST CLAIM

(Violations of the Utah Consumer Sales Practices Act)

4. Plaintiff incorporates herein by this reference the averments in paragraphs 1 through 3 of this Complaint.

5. Defendant operates a retail shop which repairs boats called Performance Auto & Marine Supply.

6. Said retail repair shop is located at 6321 South Highland Drive, Salt Lake City, Utah.

7. On or about August 1, 1996, Plaintiff contacted Defendant regarding certain repairs to a 1981 Sunset Runabout 21' board #BT209465 and hull number TKB00119M81D, and his trailer, a 1981 Maynard, model 100k, plate #0B671J, serial #TW109.

8. Defendant orally estimated that the total cost of repair to be \$250.00.

9. Based upon the oral repair estimate, Plaintiff left the boat with Defendant for repair.

10. Without obtaining any additional verbal authorization from Plaintiff for additional repairs, Defendant subsequently presented Plaintiff with an invoice for \$834.72 in alleged repairs.

11. Defendant did not obtain any written authorization from Plaintiff to perform the additional repairs.

12. Plaintiff offered to pay and actually tendered the original estimate amount of \$250.00, but Defendant refused to accept the payment, but instead demanded the entire \$834.72 invoice amount.

13. Defendant also refused to release Plaintiff's boat, but instead retained possession of the boat and asserted a claim for a repairman's lien on the boat.

14. At the time of this incident, Defendant did not have a sign posted at his repair shop indicating Plaintiff's right, upon request, to obtain a written estimate of repair costs.

15. If Defendant had posted such a sign at his shop, Plaintiff would have requested a written estimate before having the work performed.

16. Sometime prior to November 9, 1995, Defendant sold Plaintiff's boat without any prior notice to Plaintiff and without complying with one or more of the requirements of 38-2-4.

17. On or about November 9, 1995, Plaintiff's attorney at that time, Dennis V. Dahle of Snow, Christensen & Martineau, contacted Defendant regarding the wrongful sale of the boat.

18. In said letter, Plaintiff's attorney made an additional written demand for the return of Plaintiff's boat.

19. On or about November 10, 1995, Defendant, through his attorney, Daniel Bay Gibbons, stated that the boat had been sold and attempted to tender a check to Plaintiff in the hope of reaching an accord and satisfaction.

20. Plaintiff refused to accept the offered accord and satisfaction.

21. Defendant's conduct, as described in this Complaint and as may be further presented at trial, was unconscionable, in violation of the Utah Consumer Sales Practices Act.

22. Defendant's actions in this case, as described in this Complaint, and as may be further presented at trial, constituted deceptive acts or practices, in violation of the Utah Consumer Sales Practices Act.

23. Plaintiff has been damaged and has suffered a loss as a result of Defendant's unconscionable conduct and deceptive acts and practices, which loss includes, without limitation, the fair rental value of the boat during the time Defendant deprived him thereof, or the entire value of the boat, in excess of \$8,500.00 in the event Plaintiff is unable to recover the boat from Defendant, and such other damages as may be proven at trial or adduced during discovery.

24. Pursuant to the Utah Consumer Sales Practices Act, Plaintiff is entitled to judgment against Defendant for his

actual damages or \$2,000.00, whichever is greater, plus court costs.

25. Pursuant to the Utah Consumer Sales Practices Act, Plaintiff is entitled to judgment against Defendant for his reasonable attorney fee incurred in this matter.

26. Plaintiff is entitled to such other and further relief as is just and equitable in the premises.

SECOND CLAIM

(Replevin)

27. Plaintiff incorporates herein by this reference the averments in paragraphs 1 through 26 of this Complaint.

28. To the extent Defendant has any continuing control over Plaintiff's boat, or to the extent that other Defendants are discovered who have possession of Plaintiff's boat but are not good faith purchasers of the boat, Plaintiff is entitled to replevin of the boat from such persons.

29. In such event, Plaintiff is entitled to an order from the court requiring Defendant or other persons in control of the boat to immediately return the boat to Plaintiff.

30. Plaintiff is entitled to such other and further relief as is just and equitable in the premises.

THIRD CLAIM

(Conversion/Trespass to Chattels)

31. Plaintiff incorporates herein by this reference the averments in paragraphs 1 through 30 of this Complaint.

32. On or before November 9, 1995, Defendant took possession of a boat and trailer belonging to Plaintiff.

33. Despite demand by Plaintiff, Defendant refused to return the boat and trailer belonging to Plaintiff.

34. Defendant has converted said boat and trailer to his own use, or has unlawfully disposed of such property without compliance with Utah law.

35. As a result of Defendant's conversion and use of the boat and trailer, Plaintiff has been harmed and has suffered damages as previously stated in this complaint.

36. Plaintiff is entitled to judgment against Defendant for all damages suffered as a result of Defendant's conversion of the boat and trailer.

37. Alternatively, Plaintiff is entitled to judgment against Defendant for all damages suffered as a result of Defendant's trespass to his chattels.

38. Plaintiff is entitled to such other and further relief as is just and equitable in the premises.

FOURTH CLAIM

(Punitive Damages)

39. Plaintiff incorporates herein by this reference the averments in paragraphs 1 through 38 of this Complaint.

40. The aforementioned conduct of the Defendant was willful, wanton, malicious, and were doing with reckless disregard for the rights of Plaintiff.

41. Defendant's conduct otherwise justifies an award of punitive damages.

42. Plaintiff is entitled to an award of punitive damages against Defendant in the sum of not less than \$25,000.00.

43. Plaintiff is entitled to such other relief and judgment as is just and equitable in the premises.

WHEREFORE, Plaintiff, MARK HERNANDEZ, prays for judgment against Defendant, KELLY S. BAKER, dba Performance Auto & Marine Supply, as follows:

1. For a judgment pursuant to the Utah Consumer Sales Practices Act in a sum equal to Plaintiff's actual damages suffered herein or \$2,000.00, whichever is greater.

2. For a judgment pursuant to the Utah Consumer Sales Practices Act for Plaintiff's attorney fees and costs incurred herein.

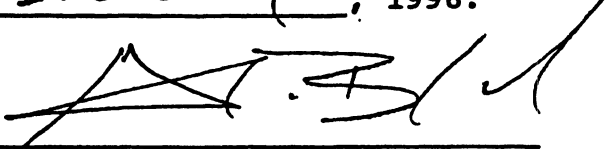
3. For a writ of replevin requiring Defendant and any other person who is not a bona fide purchaser to immediately return Plaintiff's boat and trailer to Plaintiff.

4. For a judgment against Defendant for damages as a result of Defendant's conversion of Plaintiff's property or for Defendant's trespass to Plaintiff's chattels.

5. For a judgment against Defendant for punitive damages in the sum of not less than \$25,000.00, or such other greater sum as may be proven at trial.

6. For such other relief and judgment as is just and equitable in the premises.

DATED this 31 day of December, 1996.



GUY L. BLACK
Attorney for Plaintiff

Plaintiff's Address:
281 East 600 North
Provo, Utah 84606

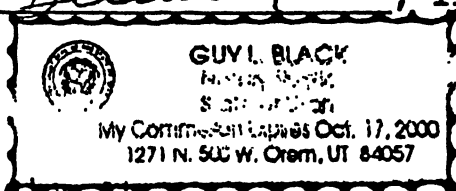
STATE OF UTAH)
 §
COUNTY OF UTAH)

COMES NOW, Plaintiff, MARK HERNANDEZ, and having been first duly sworn, deposes and says that he is the plaintiff in the above-entitled action, that he has read the foregoing Verified Complaint and voluntarily executed the same, and that he knows the contents thereof to be true, except as to those items stated on information, and believes those items to be true.



MARK HERNANDEZ
Plaintiff

SUBSCRIBED AND SWORN to before me this 31 day of
December, 1996.



NOTARY PUBLIC

Residing At: _____
My Commission Expires: _____

Tab C

Daniel Bay Gibbons (#4837)
Attorney for Defendant Kelly Baker
6375 Highland Drive, Suite B
Salt Lake City, Utah 84121
Telephone: (801) 272-8101
Fax: (801) 272-0467

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

MARK HERNANDEZ,	:	
	:	
Plaintiff,	:	ANSWER TO VERIFIED
	:	COMPLAINT
	:	
vs.	:	Civil No. 980900225
	:	
KELLY S. BAKER, dba Performance Auto	:	Judge Stephen L. Henriod
& Marine Supply, and JOHN DOES I	:	
THROUGH X,,	:	
	:	
Defendants.	:	

Defendant Kelly Baker ("Baker"), by and through his attorney, Daniel Bay Gibbons, answers the separately numbered paragraphs of the Verified Complaint of Plaintiff Mark Hernandez ("Hernandez") as follows:

1. Deny for lack of information or belief.
2. Admit that Baker is a resident of Salt Lake County, and otherwise deny.
3. Admit.

4. Baker incorporates his answers to paragraphs 1 through 3 of the Verified Complaint.

5. Deny.

6. Admit that Performance Auto & Marine Supply Corp., a Utah corporation, may have had business dealings with Hernandez, and otherwise deny, and specifically deny that Baker in his individual capacity had any dealings whatsoever with Hernandez.

7. Deny. See answer to paragraph 6.

8. Deny. See answer to paragraph 6.

9. Deny. See answer to paragraph 6.

10. Deny. See answer to paragraph 6.

11. Deny. See answer to paragraph 6.

12. Deny. See answer to paragraph 6.

13. Deny. See answer to paragraph 6.

14. Deny. See answer to paragraph 6.

15. Deny for lack of information or belief.

16. Deny. See answer to paragraph 6.

17. Admit that Hernandez's various attorneys have made contact with Baker or Baker's attorneys over the years complaining of alleged acts or omissions of Performance Auto

& Marine Corp., a Utah corporation, deny for lack of information or belief any particular contact made on November 9, 1995, and otherwise deny.

18. Admit that any such letter will speak for itself, and otherwise deny.

19. Admit that on or about November 10, 1995 Mr. Gibbons, acting as attorney for Performance Auto & Marine Corp., a Utah corporation, tendered a check to Hernandez, that the check and letter of tender speak for themselves, and otherwise deny, and specifically deny that Mr. Gibbons made such tender on behalf of Baker.

20. Admit that Hernandez refused to accept the tender of Performance Auto & Marine Corp., a Utah corporation, and otherwise deny.

21. Deny.

22. Deny.

23. Deny.

24. Deny.

25. Deny.

26. Deny.

27. Baker incorporates his answers to paragraphs 1 through 26 of the Verified Complaint.

28. Deny that Baker ever had control or has continuing control over the subject boat, and otherwise deny.

29. Deny.

30. Deny.

31. Baker incorporates his answers to paragraphs 1 through 30 of the Verified

Complaint.

32. Deny. See answer to paragraph 6.

33. Deny. See answer to paragraph 6.

34. Deny. See answer to paragraph 6.

35. Deny. See answer to paragraph 6.

36. Deny.

37. Deny.

38. Deny.

39. Baker incorporates his answers to paragraphs 1 through 38.0 of the Verified

Complaint.

40. Deny.

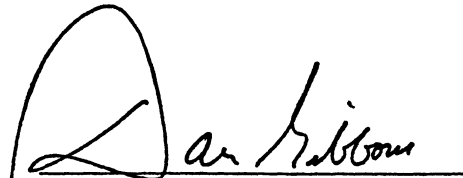
41. Deny.

42. Deny.

43. Deny.

WHEREFORE, Baker asks that the Court dismiss this action as against Baker, that Plaintiff take nothing by way of his Complaint, and that Baker be awarded his costs and attorneys fees in defending this action.

DATED this 9th day of February, 2000.



Daniel Bay Gibbons,
Attorney for Defendant

Defendant's Address:

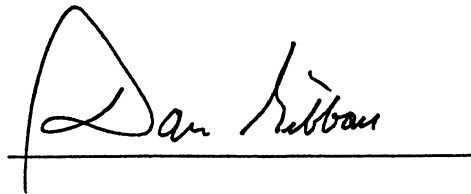
Kelly Baker
2209 Fardown Ave.
Holladay, UT 84121

CERTIFICATE OF MAILING

I certify that on this 9th day of February, 2000 I caused a true and correct copy of the foregoing **Answer to Verified Complaint**, to be mailed, postage prepaid, to the following:

Thomas P. Isom, Esq.
7321 South State Street, Suite A
Midvale, Utah 84047

An additional copy of said document was also faxed to Mr. Isom at 562-1350.

A handwritten signature in black ink, reading "Dan Hibbs", is written over a horizontal line.

Tab D

June

<p>MARK HERNANDEZ,</p> <p>Plaintiff,</p> <p>vs.</p> <p>KELLY S. BAKER, dba Performance Auto & Marine Supply, PERFORMANCE AUTO & MARINE SUPPLY CORP. and DOES II THROUGH X,</p> <p>Defendants.</p>	<p>AFFIDAVIT OF KELLY BAKER</p> <p>Civil No.: 980900225 Judge: Stephen L. Henroid</p>
---	--

KELLY BAKER, being first duly sworn on his oath, deposes and says:

1. I am over the age of majority and competent to testify.
2. I am a Defendant in, and have knowledge of the above-captioned case.
3. On or about November 20, 1990, Defendant, Performance Auto & Marine Supply, Corporation (hereinafter "Performance") filed articles of incorporation and

registered as a legal corporation with the Utah Division of Corporations and Commercial Code pursuant to Utah Code Ann. § 16-10a-101 *et seq* (Utah Revised Business Corporations Act).

4. At all times since its organization as a corporation, I have been a shareholder and President of Performance.

5. Since its organization as a corporation, I have kept all corporate formalities and have bifurcated my personal affairs from the affairs of Performance.

6. Sometime in 1996 or 1997, Plaintiff, Mark Hernandez (hereinafter "Plaintiff") brought to Performance's store, a boat and trailer and asked that Performance complete certain repairs on the boat and its engine.

7. Thereafter, Performance carried out said request by supplying labor and parts to repair Plaintiff's boat.

8. Upon completing said repairs, Performance requested that Plaintiff pay for said labor and parts which Plaintiff wholly failed or refused to do so.

9. After several months and repeated requests for payment with no response from Plaintiff, Performance exercised its repairman's lien rights pursuant to Utah Code Ann. § 38-2-3 and sold the boat and trailer pursuant to Utah Code Ann. § 38-2-4 to recoup its parts, labor and storage costs.

10. As an act of good faith and commercial reasonableness, Performance cut a check, and caused it to be mailed to Plaintiff, for the difference between sale proceeds and the costs of parts, labor and storage.

11. Sometime prior to January 9, 1998, Plaintiff filed a complaint against me in the 4th District Court in and for Utah County, seeking return of the boat and trailer under the theory of conversion or in the alternative money damages.

12. On or about January 9, 1998, after I had legal counsel enter a limited appearance and file a motion for change of venue, the case was transferred to this court.

13. I was served with a copy of the complaint and summons on or about, January 20, 2000.

14. On or about February 11, 2000, I caused my counsel to file an answer to Plaintiff's complaint with the court wherein I asserted as an affirmative defense the fact that I was not the proper party in interest in this case, but rather the corporation, Performance, of which I was a principal.

15. On or about September 21, 2000, after more than 7 months of no action, Plaintiffs filed a Motion for Leave of Court To Amend its Complaint and add Performance.

16. I am informed that, although Plaintiff's Motion for Leave of Court was granted on December 5, 2000, Plaintiff never filed an amended complaint.

17. To the best of my knowledge Performance was never served with an amended complaint and summons, nor did I authorize my counsel at the time, Daniel Gibbons (hereinafter "Mr. Gibbons") to accept service on behalf of Performance.

18. It is my understanding that on or about June 25, 2001, after another 7 months of inaction by Plaintiff, the court, *sua sponte*, issued an Order to Show Cause as to why the case should not be dismissed for failure to prosecute.

19. Shortly before the July 25, 2001, Order to Show Cause was issued, Plaintiff's served Mr. Gibbons with discovery requests.

20. It is my understanding that on or about July 31, 2001, this court held a hearing on its Order to Show Cause at which counsel for Plaintiff, Tom Isom, was present.

21. It is my understanding that at the July 31, 2001, Order to Show Cause Hearing, Plaintiff was ordered to file a motion to compel discovery or a certificate of readiness for trial within 30 days of the hearing "*or the case would be dismissed without further notice.*"

22. After confirming that Plaintiff had taken no action for over 30 days, Mr. Gibbons notified me in a letter that the matter would be dismissed by the court in its due course.

23. After receiving Mr. Gibbons letter, I contacted Mr. Gibbons, by phone and discussed the fact that the case would be dismissed by the court in its due course, without Mr. Gibbons having to take any affirmative action.

24. Based on the court's order, Plaintiff's inaction, and the advise of Mr. Gibbons, I thought that the case was essentially over. Accordingly, I did not have any further communications with Mr. Gibbons and I did not inform Mr. Gibbons that I had moved to St. George, Utah.

25. It is my understanding that on or about November 8, 2001, Plaintiff filed, and the court accepted, a Motion to Compel discovery responses.

26. It is my understanding that copies of the Motion to Compel, and its accompanying documents, were served upon Mr. Gibbons, who had been appointed and sworn in as a Justice Court Judge in the City of Holladay, thus causing him to close his law office and maintain a very small law practice from his home.

27. It is my understanding that on or about January 25, 2002, Mr. Gibbons sent a letter to Performances' old business address of 6321 Highland Drive, Salt Lake City, Utah, wherein he attempted to inform me of the pending Motion to Compel.

28. I never received the January 25, 2002, letter.

29. It is my understanding that on or about July 22, 2002, Plaintiff filed and served upon Mr. Gibbons a Motion for Entry of Default and Default Judgment.

30. It is my understanding that on or about July 25, 2002, Mr. Gibbons sent a letter to Performances' old business address informing me of Plaintiff's pending Motion for Entry of Default and Default Judgment.

31. Again, I never received the July 25, 2002, letter.

32. It is my understanding that on or about August 23, 2002, the court granted Plaintiff's Motion for Entry of Default and Default Judgment and ordered an evidentiary hearing on damages.

33. It is my understanding that on or about September 27, 2002, the court held and evidentiary hearing where Plaintiff requested and obtained an award of punitive damages in the amount of \$25,000.00.

34. It is my understanding that on or about February 14, 2003, after Plaintiffs submitted its affidavit of attorneys fees and costs, the court entered Judgment against me personally and Performance in the amount of \$52,677.75.

35. On or about March 27, 2003, I was served with a Writ of Execution against my personal residence and documents evidencing the fact that the February 14, 2003, judgment had been abstracted into Washington County, State of Utah.

36. Between the time I last communicated with Mr. Gibbons around August or September of 2001 and the time I was served with the Writ of Execution on March 27, 2003, I had no idea that the case had not been dismissed and that in fact a \$52,677.75 judgment had been entered against me and Performance.

37. Had I known that the above-captioned case was not dismissed by the court after the July 31, 2001, hearing or that the court was not going to dismiss the case on its own initiative, I would have stayed in contact with Mr. Gibbons and retained he or another attorneys services to defend myself, just as I had done for the first 2 ½ years after Plaintiff's complaint was filed.

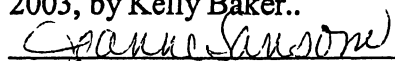
FURTHER AFFIANT SAITH NOT.

DATED this 23 day of April, 2003.

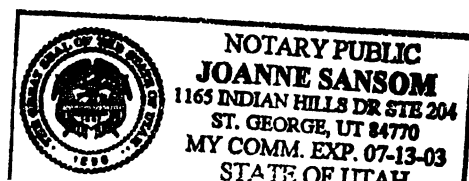


KELLY BAKER, Affiant

SUBSCRIBED AND SWORN TO (or affirmed) before me this 23rd day of April, 2003, by Kelly Baker..



NOTARY PUBLIC
Address: St. George, UT
My Commission Expires: 7-13-03



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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MARK HERNANDEZ,

Plaintiff,

VS.

**KELLY S. BAKER, dba Performance Auto
& Marine Supply, PERFORMANCE AUTO
& MARINE SUPPLY CORP. and DOES II
THROUGH X,**

Defendants.

SECOND AFFIDAVIT OF KELLY BAKER

Civil No.: 980900225
Judge: Stephen L. Henroid

STATE OF UTAH)
)ss:
COUNTY OF WASHINGTON)

KELLY BAKER, being first duly sworn on his oath, deposes and says:

1. I am over the age of majority and competent to testify.
2. I am a Defendant in, and have knowledge of the above-captioned case.

3. Since its organization as a corporation, I have kept all corporate formalities and have bifurcated my personal affairs from the affairs of Performance Auto & Marine Supply, Corp. (hereinafter "Performance").

4. Contrary to Plaintiff's affidavit, Performance included the abbreviation "Corp." in all signage, advertisements (including the phone directories), business invoices and letterhead/envelopes in an effort to place customers and third-persons on notice of the fact that Performance was a corporation, created and existing under the laws of the State of Utah.

5. After further research, I believe that sometime in 1995 (instead of 1996 or 1997 stated in my previous affidavit) I was first contacted by Plaintiff Mark Hernandez (hereinafter "Plaintiff") who wanted me to give him a quote for the cost of installing a motor in a boat for him.

6. It is my recollection and belief that I quoted the Plaintiff a cost of \$250 for installing a fully assembled, working motor with all parts, into his boat.

7. Sometime thereafter, Plaintiff delivered the boat and trailer to Performance's shop, without the motor.

8. Plaintiff informed me that the motor was being put together by someone else and that he would have it delivered when assembly was completed.

9. Approximately one week later, Plaintiff contacted me and asked that I give him a quote to assemble the motor.

10. After learning that the motor was a Chevrolet 350 V-8 engine with one head in place, I gave Plaintiff a price and made it clear that the price was contingent that the motor was as he described, when it was delivered.

11. When the motor was delivered it not as described. Engine parts were just thrown into boxes. During assembly it was discovered by myself or Performance employees that numerous parts, gaskets and the carburetor were missing and the oil pump had the pickup tube lose in the bottom of the oil pan.

12. Because of the missing parts and additional problems, the assembly and installation of the motor took longer than expected.

13. Each time missing parts or new problems were discovered, myself or employees of Performance attempted to reach Plaintiff by phone at the contact number he left with Performance.

14. Depending on whether Plaintiff returned our calls or whether he just showed up at the store, work would stop until Plaintiff was informed of the problem and he consented to the additional costs.

15. On a couple of occasions Plaintiff stated that he would obtain some of the specific missing parts himself, which he did, with additional delay.

16. The fact that the motor and the boat was not as Plaintiff had represented was the reason for additional repair costs and delays.

17. I never made any comment to the effect that I would get to his boat when I got to it because I had given him such a good deal.

18. When the assembly and installation of the motor was completed I attempted to reach Plaintiff several times at the contact number he left with Performance, to no avail.

19. The contact number Plaintiff gave Performance was neither his home telephone nor his business telephone. The number Plaintiff gave Performance was to another business where Plaintiff could be found at times.

20. For several months I tried to contact Plaintiff but was told each time by the person answering that they did not know whereabouts of Plaintiff. I left several messages to the effect that the boat was ready to be picked up.

21. It was Performance's normal business practice (as evidenced by a sign posted on the wall within its store) that any vehicle or boat that was left at Performance after 30 days of the repairs being completed would be considered abandoned and sold.

22. After several of months of no contact with Plaintiff, Performance ran an add in the newspaper for a couple of weeks advertising the sale of the boat and trailer.

23. Performance could not give Plaintiff any notice of said intended sale as he had not given a physical address to mail notice nor had Plaintiff returned my calls.

24. Performance would eventually sell the boat and trailer to an individual for \$3,000.00.

25. Only after Performance had sold the boat and trailer did Plaintiff make contact with me and demanded return of the boat and trailer.

26. After discussing the matter with Plaintiff, I felt bad about the misunderstanding and the turn of events so I attempted to contact the buyer of the boat

and trailer to see if I could give him his purchase money back in exchange for a return of the boat and trailer.

27. Based on the fact that boat and trailer had previously been sold at a Sheriff's sale, thus causing registration problems, the buyer agreed to "unravel" the sale and return the boat to Performance in exchange for a return of his purchase money.

28. After learning of this possibility, I spoke with Plaintiff and informed him that I could probably secure the return of his boat and trailer but that he would need to pay the outstanding repair bill and storage fees owed to Performance, which was in excess of \$800.00.

29. Plaintiff immediately denied the offer and said that he was retaining an attorney to sue me.

30. Based on Plaintiff's response, I had Performance's attorney, Mr. Daniel Gibbons, send a letter and a check to the Plaintiff dated November 10, 1995, offering to pay him the difference between his repair bill and the proceeds from the sale of the boat and trailer. A true and correct copy of this letter is attached hereto, marked "Exhibit A" and incorporated herein by this reference.

31. Shortly after having Mr. Gibbons send this letter and check on behalf of Performance (not myself) I received a demand letter from an attorney retained by Plaintiff dated November 9, 1995, a true and correct copy of the November 9, 1995, demand letter is attached hereto, marked "Exhibit B," and incorporated herein by this reference.

32. After receiving the November 9, 1995, demand letter and based on counsel I received from Mr. Gibbons, I caused the sale to be “unraveled” and obtained a return of the boat and trailer.

33. After not obtaining payment for the repair and storage bill owed to Performance for over a year and seeing that attempts to resolve the matter with Plaintiff were fruitless, Performance decided to dispose of the boat and trailer pursuant to repairman lien statutes (Utah Code Ann. §§ 38-2-3 and 38-2-4).

34. Accordingly, Performance had Mr. Gibbons attempt to give proper notice of the intended sale to Plaintiff on November 18, 1996, pursuant to Utah Code Ann. § 38-2-4. A true and correct copy of the November 18, 1996 notice of sale is attached hereto, marked “Exhibit C” and incorporated herein by this reference.

35. To the best of my knowledge, the November 18, 1996, notice of sale included all of the information required by Utah Code Ann. § 38-2-4 including the date, time and location of the sale as well as the amount for which Plaintiff could redeem the boat and trailer prior to sale (\$3,185.57).

36. I must surmise that Plaintiff received a copy of the November 18, 1996, notice of sale by the fact that he included it as an exhibit to his recently filed memorandum in opposition.

37. Plaintiff failed to redeem the boat and trailer prior to the sale date. Accordingly, the boat was sold to the highest bidder for an amount less than \$3,185.57 at the date, time and location specified in the November 18, 1996, notice of sale.

38. In December of 1996 I was served with a copy of the Summons and Verified Complaint which asserted causes of action against me personally, not against Performance.

39. After being served with process in December of 1996, I retained the services of Mr. Gibbons to represent me personally. Mr. Gibbons timely filed a Rule 12(b)(3) motion for change of venue.

40. Mr. Gibbons did not file an answer wherein it would be proper to raise the failure to join an indispensable party defense and the fact that Performance was a corporation.

41. After Mr. Gibbons filed the Rule 12(b)(3) Plaintiff allowed the case to languish for almost **TWO YEARS** without doing anything until he filed his own motion for change of venue which my attorney, Mr. Gibbons, did not contest.

42. It is my understanding that after the case was removed to this Court that Plaintiff was ordered to reserve me. I was served with a copy of the complaint and summons on or about, January 20, 2000.

43. On or about February 11, 2000, I caused my counsel to file an answer to Plaintiff's complaint with this Court wherein I asserted as an affirmative defense citing the fact that I was not the proper party in interest in this case, but rather the corporation, Performance, of which I was a principal.

44. On or about September 21, 2000, after more than **7 MONTHS** of no action, Plaintiffs filed a Motion for Leave of Court To Amend its Complaint and add Performance.

45. I am informed that Plaintiff's Motion for Leave of Court was granted on December 5, 2000, however it is my understanding that Plaintiff never filed an amended complaint.

46. It is my understanding that on or about June 25, 2001, after another **16 MONTHS** of inaction by Plaintiff, the court, *sua sponte*, issued an Order to Show Cause as to why the case should not be dismissed for failure to prosecute.

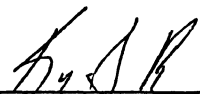
47. Shortly before the July 25, 2001, Order to Show Cause was issued, Plaintiff's served Mr. Gibbons with discovery requests.

48. It is my understanding that on or about July 31, 2001, this court held a hearing on its Order to Show Cause at which counsel for Plaintiff, Tom Isom, was present.

49. It is my understanding that at the July 31, 2001, Order to Show Cause Hearing, Plaintiff was ordered to file a motion to compel discovery or a certificate of readiness for trial within 30 days of the hearing "*or the case would be dismissed without further notice.*" A true and correct copy of the Court's docket and minute entry is attached hereto, marked "Exhibit D," and incorporated herein by this reference.


FURTHER AFFIANT SAITH NOT.

DATED this 4th day of June, 2003.



KELLY BAKER, Affiant

SUBSCRIBED AND SWORN TO (or affirmed) before me this 5th day of June, 2003,
by Kelly Baker..



NOTARY PUBLIC

