1983

Marathon Ranching Co. Ltd., and Hans W. Roeck v. Synergetics. A Utah Limited Partnership. By And Through Its General Partner. Lancer Industries. Inc. , A Corporation; and Addland Enterprises, Inc. : Brief of Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

SYNERGETICS, A Utah Limited Partnership, by and through its general partner, LANCER INDUSTRIES, INC., a corporation; and ADDLAND ENTERPRISES, INC.,

Plaintiffs-Respondents,

vs.

MARATHON RANCHING CO., LTD., and HANS W. ROECK,

Defendants-Appellants,

Case No. 19143

BRIEF OF RESPONDENTS

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

Honorable Phillip R. Fishler, Judge

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CORRECTIONS TO THE BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

Table of Contents - Cont.

Table of Contents - Appendix - Cont.

AUTHORITIES CITED

RULES CITED

STATUTES CITED

CONSTITUTIONS CITED

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BRIEF OF RESPONDENTS

NATURE OF THE CASE

This is an action for money damages and for rescission of an agreement providing for the exchange of certain real property purportedly owned by defendant Marathon Ranching Col, Ltd., located in the Province of Saskatchewan, Canada, for an ocean-going sailboat owned by plaintiffs alleging that the transaction was the product of defendants' fraud, misrepresentations and deceit.

DISPOSITION IN THE LOWER COURT

After the distric court denied defendants' motion to dismiss for lack of personal jurisdiction, and defendants had repeatedly refused to comply with discovery orders, default judgment was finally entered against defendants when they

failed to produce documents as ordered and when Roeck repeatedly failed to appear for the taking of his deposition pursuant to repeated orders of the court.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the judgment of the lower court.

STATEMENT OF FACTS

Facts Re Exchange Transaction:

The statement of facts submitted by counsel for defendants is imcomplete and in some instances inaccurate; accordingly the following is submitted as a statement of facts:

1. In May, 1980, plaintiffs exchanged an ocean-going sail boat with a value of approximately $352,000.00 for an agreement from Marathon Ranching Co., Ltd. ("MARATHON"), a Canadian corporation, of which Hans W. Roeck ("ROECK") was president for alleged clear title to a quarter section of land (160 acres - R16, 34) in Canada and the agreement of Marathon to assume and pay an obligation of about $200,000.00 owed to General Electric Credit Corporation ("GECC") which was secured by the boat. (R. 2-4, 16, 17-20, 30-39, 231-249 and 272-277).

2. Defendants took possession of the boat, failed to make any payments whatever thereon (which resulted in plaintiffs being required to make payments of $2,419.12 per month on the GECC loan), failed to keep the boat insured as required by the GECC loan, concealed the whereabouts of the boat, removed it to Tahiti and from there to some unknown place. (R. 2-4, 17-20, 30-39, 231-240 and 272-277).

3. The $7,500.00 check issued by defendants as part payment was dishonored by the bank and was never paid (R. 3, 246).

4. Plaintiffs claim that the Canadian land was not as represented and that their agreement to accept that land in exchange for the boat was the result of fraud and deceit practiced by the defendants upon the plaintiffs. Among the misrepresentations and omissions by defendants are the following: (a) the land was represented by defendants to be readily marketable and to have a fair market value of $320,000 (R. 35), however its maximum market value (had title been clear) did not exceed $18,000.00 (R. 275); (b) the land was located 120 miles in the bush country; (c) it was represented to be treed and to have meadows sloping to a "shallow gradual declining, safe, sandy beach" adjoining a lake (R. 131), whereas in fact it has a high, steep bank which separates the balance of the land from the beach. Much of the land is swampy and the adjoining lake water is filled with reeds. It is extremely doubtful that subdivision of the land wwould be permitted under local law, and if it were permitted a substantial portion of the land would be required to be donated for public benefit under local law (most likely the beach area). It is highly urlikely that realtors would be interested in showing the land because of the long distances involved, poor roads, and because other land in the area was available for a fraction of the proposed cost of this land. Title to the land was not marketable for various reasons including claims by two other parties to whom the defendant had sold the same land, a pending tax sale fo

unpaid property taxes, execution levied on the property by the holder of a judgment against the defendants, outstanding mortgages on the property given by the defendants, etc. (R. 239-24-, 272-277).

5. After the exchange occurred and the boat was delivered to defendants Roeck came to Utah (about March, 1981) and negotiated a substantial modification of the exchange agreement (R. 34) to entirely change the quarter section of land being received by plaintiffs for a different quarter section; to give defendants the right to "deal with these lands in preparation for a subdivision and other investors' participation," subject only to defendants' agreement to protect the $100,000.00 price which plaintiffs were to receive for that land. (R. 34). The new agreement was signed by all parties in Utah. Some of the misrepresentations relied upon by plaintiffs were made in connection with negotiations for the modification agreement in Utah, including the representations therein that the land was subdividable and that defendants were "in preparation for a subdivision." (R. 34, 272-277).

6. Plaintiffs claim that most of the misrepresentations made by defendants in connection with negotiating the original contract (R. 16) and the modification agreement (R. 34) were also made in long distance telephone calls between agents of plaintiffs and Roeck and by letters written by defendants and mailed into Utah. (R. 31-39, 231-249). Counsel for defendants incorrectly assert (P. 6 of brief) that Roeck's affidavit in

support of defendants' motion to quash was not countered by an affidavit from plaintiff. To the contrary, after Roeck's affidavit was filed, plaintiffs filed an amended verified complaint setting forth in detail the contacts with the State of Utah upon which Plaintiffs' claims of long arm jurisdiction was based. (R. 30-33).

Facts Re Court Proceedings:

7. Defendants' moved to quash service of summons with supporting affidavit and memorandum of authorities, which claimed that the entire transaction, the subject matter of the lawsuit, was negotiated and executed outside of the State of Utah and that there were insufficient minimal contacts with Utah for long arm jurisdiction. Plaintiffs responded by an amended complaint with supporting exhibits and affidavit (R. 30-39) spelling out specific contacts and transactions by defendants in the State of Utah, including:

(a) Telephone calls from Roeck, who was out of state, to agents of plaintiffs, who were in Utah, during which telephone calls, defendants repeated most or all of the misrepresentations alleged in the original complaint. (R. 31, ¶ 5(a) R. 235-249). Some of these calls included negotiations for the exchange agreement. (R. 31, 16).

(b) Roeck came to Utah and while there negotiated, drafted and signed the new agreement which substituted different land for the land originally agreed to be

conveyed to plaintiffs in exchange for the boat. The Utah agreement also included an additional written misrepresentation to the effect that the land said to be conveyed to plaintiffs could be and was in process of being subdivided, which was false. That fraudulent misrepresentation is one of the fraud claims asserted in the lawsuit. (R. 31, ¶ 5(b)).

(c) Roeck made numerous telephone calls into Utah both before and after execution of both agreements (R. 31, ¶ 5(c)).

(d) Defendants caused purported title to the Canadian land to be mailed into Utah by his Canadian attorney (R. 31, ¶ 5(e), R. 37-38).

(e) Roeck sent a telegram into Utah on June 10, 1981, (R. 32, ¶ 5(e), R. 39) in furtherance of the scheme to defraud.

8. About June 5, 1982, plaintiffs filed a request for production of documents, which required plaintiff to respond by July 12, 1982, and served notice of the taking of Roeck's deposition on July 16, 1982. (R. 44-47).

9. About June 8, 1982, defendants petitioned the Supreme Court for an interlocutory appeal re denial of their motion to quash (R. 87). [See Supreme Court case No. 18504 - notice of denial of that petition was received by counsel about July 22, 1982 (R. 73, ¶ 6))].

10. July 15, 1982, defendants obtained a protective order excusing Roeck from appearing for his deposition which was scheduled for July 16, 1982, but ordered that Roeck appear at the office of counsel for plaintiff and submit to the taking of his deposition within five (5) business days after notice of denial of defendants' petition for interlocutory appeal (R. 63, 90-92). A copy of that order is attached as appendix "A".

11. July 22, 1982, notice received denying petition for interlocutory appeal (R. 73); accordingly under the order Roeck had through July 29, 1982, to appear for his deposition.

12. July 28, 1982, defendants moved for a protective order seeking to be excused from the July 29, 1982, deposition, alleging that Roeck was ill with Pancreatitis and back pain, was still in Hawaii and unable to travel, asking that the orders mentioned in (appendix "A") be vacated.

The medical statement furnished stated disability through August 6, 1982. (R. 71-79, 99-101).

13. July 29, 1982, plaintiffs moved (with supporting memo of authorities) for sanctions by reason of defendants' failure to produce documents and failure of Roeck to appear for his deposition as ordered by the Court (R. 96-98, 102-107 and 108-109).

14. August 9, 1982, Court orders that documents requested in notice of June 5, 1982, (¶ 8 above) be produced by August 16, 1982, and that Roeck appear for taking of his deposition by August 27, 1982. (R. 110, 137-138). Copies of said orders are attached hereto as appendix "B".

15. August 18, 1982, defendants "respond" to June 5, 1982, request for production of documents by attaching additional copies of documents which nad been attached to defendants' April 15, 1982, memorandum of authorities (R. 16-17) and copies of documents which plaintiffs had attached to their amended complaint (R. 34-39), and by stating that the other documents which had been requested were not produced because they were not in the possession of defendants' counsel. (R. 118, ¶ 2). Absolutely no documents that were not already in the file were produced by defendants at that time or at any time thereafter. (R. 250-251).

16. August 18, 1982, defendants move to change deposition date of Sept. 13, 1982, claiming that Roeck was still in Hawaii, was still ill, and that counsel had been unable to contact Roeck until August 15, 1982. No affidavit or statement from a physician was filed in support of the alleged illness.

17. August 18, 1982, Roeck deposition noticed for August 27, 1982, pursuant to court order (see ¶ 14 above). (R. 136).

18. August 26, 1982, Court orders that Roeck appear for his deposition no later than September 3, 1982, and that if he fails to do so upon ex-party application of counsel for plaintiffs the answer of defendants will be struck and judgment entered for relief requested in complaint. (R. 144, 157-168). Copies of said orders are attached hereto as appendix "C".

19. September 3, 1982, Roeck appeared for his deposition with attorney John T. Anderson, Esq. of the firm of Roe and

Fowler. After 15 minutes of deposition (15 pages) Roeck became angry about the questions being asked and, against the advice of his counsel who advised him that if he left his pleadings might be struck (Roeck Deposition P. 14-15), terminated the deposition by leaving. The questions being asked pertained to plaintiffs' claim that Roeck went through a collusive divorce as a part of a scheme to convey his assets in fraud of creditors (Roeck deposition, P. 3-15, R. 212, ¶ 2). No questions had yet been asked concerning the exchange of the boat for the Canadian land or the other transactions between the parties. Roeck has never appeared to complete his deposition. (R. 250-251).

Before leaving the deposition Mr. Roeck stated, while still under oath, "The boat doesn't exist anymore. It sunk." (Roeck Deposition P. 15, L. 9), which statement was untrue. (R. 276, ¶ 10; R. 213, ¶ 4). Mr. Roeck also stated "I'll see you maybe some time the next three years." (Roeck deposition P. 15, L. 10-11). Copies of pages 14 and 15 of the Roeck deposition are attached as appendix "D".

Thereafter Roeck stated by affidavit that he would attend a rescheduled deposition if given an opportunity to do so (R. 206) The Court gave Roeck that opportunity but Roeck again failed to appear and the defendants failed to produce the required documents. (see ¶ 22 below).

20. September 8, 1982, counsel for plaintiffs mailed to counsel for defendants a motion for sanctions for failure of defendants to produce documents and for failure of Roeck to appear for his deposition, (which appears to have been omitted

from the record - copy attached as appendix "E") and on October 6, 1982, filed a supplemental motion for sanctions (R. 171-175), then by stipulation that motion was continued without date (R. 177-179) pending possible settlement (R. 220) then both motions were re-noticed for hearing November 18, 1982, when no settlement offer was received (R. 218).

21. October 22, 1982, defendants filed memorandum of authorities in opposition to plaintiffs' motion for sanctions (R. 183-203) with affidavit of Roeck offering to return to Utah to complete his deposition. (R. 204-206).

22. November 18, 1982, Court ordered (R. 222-225) that defendants produce all documents required by the request for production of June 5, 1982, (¶ 8 above - R. 44-47) and that Roeck appear for his deposition on or before November 29, 1982, and that if they failed to do so their answer would be struck and judgment entered. Roeck failed to appear for his deposition and the documents were not produced. (R. 250-251). Copies of those orders are attached as appendix "F".

23. December 1, 1982, notice of withdrawal by Roe & Fowler as counsel for defendants, stating that there had been no oral communication with Roeck since September 10, 1982, and no written communication since October 7, 1982; that defendants had failed to pay attorney fees; but offering to remain in the case for purposes of a Rule 55(b)(2), URCP, hearing re damages, on short notice. (R. 226).

24. December 23, 1982, plaintiffs move to strike answer and enter default judgment. (R. 250-251).

25. December 29, 1982, Court grants motion to strike answer and enter default judgment. Mr. Goss of Roe & Fowler attended that hearing on behalf of defendants. (R. 252). A copy of that order is attached as appendix "G".

26. January 5, 1983, Mr. Jones, California counsel for defendants, filed an unverified objection to the proposed judgment submitted by plaintiffs' counsel (R. 266-271) asserting that there had been no hearing re damages and that Roeck had received no notice of recent proceedings or orders.

27. February 14, 1983, Court on its own motion ordered a hearing on defendants'objections. (R. 258, 264). Copies of the minute entries are attached as appendix "H".

28. February 25, 1983, Court holds hearing re objection to proposed order; orders that judgment enter upon filing of an affidavit re actual and punitive damages; quieted title to boat in plaintiffs; denied request for lien on Canadian property. Attorneys Joel Dangerfield and Ronald Goss of Roe & Fowler appeared at that hearing on behalf of defendants. (R. 265). Copy of minute entry attached as appendix "I".

29. March 2, 1983, affidavit in support of damages mailed (R. 272-277).

30. March 14, 1983, judgment signed by Court, a copy of which is furnished herewith as appendix "J" for the convenience of the Court.

31. Although 3 1/2 months passed between the time when Roeck last failed to appear for his deposition and to produce documents (see ¶ 22 above) and the date of entry of the judgment (see ¶ 30 above) the defendants did not offer to produce Roeck for the taking of his deposition and did not produce the required documents. Roeck had an opportunity to but did not appear for the hearing re entry of judgment held February 25, 1983, (R. 26, Appendix "I" hereto), to explain to the Court reasons for his prior nonappearance, which hearing was held almost 3 months after the last date by which he should have appeared for the taking of his deposition (see ¶ 22 above).

ARGUMENT

POINT I

TRIAL COURT PROPERLY CONCLUDED THAT SUFFICIENT MINIMAL CONTACT EXISTED BETWEEN DEFENDANTS AND THE STATE OF UTAH FOR LONG ARM JURISDICTION.

32. Defendants' 16 pages of citations and argument re due process requirements for long arm jurisdiction (P. 9 thru 25) cite only four Utah cases (P. 12, 16, and 18). Decisions from other jurisdictions may be helpful but are not controlling upon the Utah Courts. Although many of the decisions cited by defendants recite correct general legal concepts, since the Utah long-arm differes from the long arm statutes of the various states those decisions are of limited assistance in applying the Utah Long Arm Statute to the facts in our case.

The Utah Long Arm Court decisions and statute are discussed in ¶ 33 below and corrections to and discussion of "facts" asserted in defendants' brief are discussed in ¶ 34 through 38 below.

33. Utah long arm statute and decisions. The Utah Long-Arm Statute 78-27-24, UCA, 1953, reads in part as follows:

> "Any person, . . . who . . . does any of the following acts, submits himself, . . . to the jurisdiction of the courts of this state as to any claim arising from:
> (1) The transaction of any business within this state;
> (2) . . .
> (3) The causing of any injury within this state; whether tortious or by breach of warranty;" (Emphasis added)

That statute must be read together with 78-27-23(2), UCA, 1953, which reads in part as follows:

> "(2) The words 'transaction of business within this state' mean activities of a nonresident person, his agents, or representatives in this state which affect persons or businesses within the State of Utah." (Emphasis added)

In construing those statutes the Utah Supreme Court has set forth the following basic rules and requirements for exercise of long-arm jurisdiction:

> (a) An activity which would bring a non-resident tortfeasor within the Utah long-arm statute must be something done by the party himself or by his agent. Hanks v. Adm. of Est. of Jensen, 531 P.2d 363. [In our case Roeck himself placed long distance calls into Utah and therein engaged in preliminary negotiations for the

original and supplemental contracts, purposefully came to Utah and there renegotiated the consideration to be received by plaintiffs from the exchange. Roech made misrepresentations of fact both in the telephone calls and while in Utah renegotiating for the supplemental contract].

(b) Minor negotiations are insufficient without more. Union Ski Co. v. Union Plastics Corp., 548 P.2d 1257. [In our case the acts of Roeck in Utah were not "minor," and in fact the supplemental agreement which was made in Utah substantially altered palintiffs' rights].

(c) Making of a small single retail purchase in Utah by out of state visitor is insufficient, it being required under "fair play and substantial justice" notions that there must be some activity of a more substantial and purposeful nature. Dahnken, Inc. v. Marshinsky, 580 P.2d 596. [The Utah activity to Roeck was of a "substantial and purposeful nature].

(d) Sufficient "minimum contacts" were found to exist where a non-resident purposefully contracted with a Utah corporation knowing that goods would be likely to be used in Utah and derived substantial economic benefit from the plaintiff. Burt Drilling, Inc. v. Portadrill, 608 P.2d 244. [In our case defendants purposefully contracted with plaintiffs in Utah knowing that Synergetics was a Utah partnership, and derived

substantial economic benefit from plaintiffs].

(e) The "doing business" concept differs from the "minimal contacts" concept in that under the former once it is shown that defendant has conducted substantial and continuous business activity within the forum state, defendant is subject to litigation related or unrelated to that business, whereas under the "minimal contacts" concept, plaintiff's claim must arise out of some contact defendant has with the forum state. Roskelley & Co. v. Lerco, Inc. (1980) 610 P.2d 1307. See also language quoted on page 13 of defendants' brief. [In our case it is not claimed that defendants were "doing business" in Utah; Long-arm jurisdiction is based upon the "minimal contacts" concept since a substantial part of plaintiffs claims arose out of Roeck's telephone calls into Utah wherein negotiations and misrepresentations occurred with respect to both the original and supplemental contracts, and from his visit to Utah where misrepresentations were made which resulted in the supplemental contract being executed in Utah. The supplemental agreement substantially changed the consideration being received by plaintiffs in the exchange].

(f) Utah Court had long-arm jurisdiction over non-resident manufacturer whose goods were sold through Utah sales representatives, although the non-resident did not have any employees in Utah. Brown v. Carnes, 611 P.2d

378. The Court stated in part as follows (at 380):

> "Due process . . . mandates consideration of:
> (1) whether the cause of action arises out of or has a substantial connection with the activity;
> (2) the balancing of the convenience of the parties and the interest of the State in assuming jurisdiction; and
> (3) the character of the defendant's activity within the State." (emphasis added)

The Court then went on to state that:

> "the defendant's activities . . . represent a purposeful intrusion into the State which is sufficient to supply the requisite factual nexus between the defendant and the State. Secondly, the State's interest in protecting the rights of its residents who are adversely affected by the interstate activities of non-resident manufacturers outweighs any inconvenience the defendant may experience in defending his activities in the State." (emphasis added)

[As indicated above, a substantial part of plaintiffs' claims arose out of Roeck's trip to Utah and the resulting supplemental agreement there executed. Roeck claims to be a resident of Canada but when questions were asked at his deposition concerning his place of residence he gave evasive answers, first asserting that is place of residence was with his brother's family in Canada, although he admitted that there is a dispute as to Roeck's claim of a share of ownership of the home. (Roeck deposition P. 3-4); that he does not reside with his family in California although a current telephone call to that address is met with a recorded message in the voice of Roeck (Roeck deposition P. 4-13); and that he has another

telephone listed in his name at the home of a lady in Calgary, Alterta, Canada (Roeck deposition P. 13-15). He also travels abroad extensively. In balancing the convenience of the parties it is apparent that it would be less inconvenient for Roeck (who is hard to find) to come to Utah, particularly since he travels extensively and could probably work his trips into other travel plans, than to require plaintiffs herein to try to locate Roeck as he travels about. As indicated above, Roeck made several "Purposeful intrusions" into the state of Utah by making negotiation telephone calls into Utah, by sending letters and legal documents into Utah, and by his purposeful trip to Utah to negotiate a sutstantial change in the contract. The character of Roeck's activity in Utah is such that he could reasonably anticipate being required to litigate disputes arising out of that contract in the State of Utah. Here Roeck found the time and money to meet with plaintiffs in the State of Utah, and as observed in Roskelley v. Lerco, 610 P.2d 1307 at P. 1313 "it does not appear that it would be a hardship to" defendant if he is required to defend this lawsuit in this state.)

34. Corrections to "facts" stated in defendants' Point I

Many of the purported "facts" in defendants' brief upon which defendants' arguments are based (alleged "insufficient minimum contacts . . . between defendants and the State of Utah") are

incorrectly stated. Application of the actual "facts" to the rules of law recited by defendants shows that the cases cited by defendant support the Courts conclusion that long arm jurisdiction existed and show that the Court correctly denied defendants' motion to dismiss. See statement of facts on pages 2 through 12 above (¶ 1 through 31). As observed above, some of the errors by defendants in reciting the "facts" in Point I of defendants' brief are as follows:

(a) Defendants incorrectly assert that plaintiffs "did not controvert the statement in Roeck's affidavit that the May 23, 1980 agreement ("original agreement") was negotiated in Canada and California, not Utah." (P. 11). To the contrary, Roeck's affidavit does not state that negotiations were not conducted by telephone or in Utah (R. 25, ¶ 3). After filing of the Roeck affidavit plaintiffs filed Kent's counter affidavit and their amended verified complaint (R. 30-33 - copy attached hereto as appendix "K") wherein plaintiffs set forth specifically defendants' acts in and contacts with the State of Utah, which include the following claims:

(1) That, prior to execution of the original agreement, Roeck made telephone calls from out of state to officers of plaintiff who were in Utah; that in those calls Roeck made "most or all of the misrepresentations as alleged in the original complaint," and that said calls were made as a part of the plan and scheme to defraud. (R. 31, ¶ 6(a)).

(2) After execution of the original agreement Roeck came to Utah, engaged in negotiations, drafted and signed an agreement ("Supplemental Agreement") (Ex. "I" to amended complaint - R. 34) which substantially modified the terms of the original contract. The supplemental agreement wholly changed the land being conveyed by defendants to plaintiffs and changed other consideration to be received by plaintiffs in exchange for the boat. The amended complaint and Kent affidavit also show that the supplemental agreement contained additional affirmative written misrepresentation re (A) the purported intent of defendants to repurchase the land for $100,000.00, (B) that defendants were preparing for a subdivision of that land and (C) that other investors would be participating therein.

(3) The supplemental agreement also materially changed the relationship between the parties in that it gave defendants almost unlimited power to deal with the land exchanged by defendants as they found to be "necessary and fit" so long as the right of plaintiffs to the $100,000.00 (repurchase price) was not affected. (R. 34). Said misrepresentations form a substantial part of the fraud claims asserted in plaintiffs' original and amended complaints. (R. 2-4, R. 30-39).

35. Defendants' incorrectly assert that the supplemental agreement involved only "incidental negotiations of a modification to the May 23, 1983, agreement" (P. 12) and that the "purported modification agreement of March 17, 1981, concerning which Roeck made his only physical contact within the State of Utah, is not an issue in this litigation." (P. 14). As indicated above, the modification agreement which was negotiated, drafted and executed in Utah (a) completely changed the consideration to be received by plaintiff for the boat in that an entirely different tract of land was substituted for that agreed to in the original exchange agreement, and (b) defendants were given full power to deal with the land as they saw fit, purportedly to assist defendants with their (misrepresented) alleged subdivision of that land in anticipation of defendants' exercise of their option to repurchase the land for $100,000.00. The maximum benefit which plaintiff could have received from the land was receipt of that sum from the exercise by defendants of said option to repurchase while in Utah and as a part of the supplemental agreement. Defendants reaffirmed their prior misrepresentations (both orally and as a part of the modification contract) re their purported intent to exercise the option, the purported value of the land, its suitability for subdividing, their purported "preparations" toward subdividing the land, the purported participation by "other investors," etc. The fraud practiced in Utah in connection with execution of the supplemental agreement is a substantial part of

plaintiff's claims. A copy of that supplemental agreement is attached as an exhibit to the amended complaint (R. 34 and as Appendix "K" hereto). (c) Letters were sent into Utah by Roeck directing defendants' Canadian attorney to forward the "Caveat" concerning the Canadian property described in the original contract to plaintiffs. (R. 37-38 - copy of attached as Appendix "K" hereto).

36. Point I of defendants brief seems to be almost entirely based upon their erroneous conclusion that the supplemental agreement (March 17, 1981) "is not at issue in this litigation," (P. 14 & 15). To the contrary, the allegations of the amended complaint rely upon the supplemental agreement (R. 31, ¶ 6(b)) and a copy of said supplemental agreement is attached hereto as Appendix "K". With that corrected fact in mind, the cases cited in defendants' memorandum support the lower Court's decision, finding sufficient "minimal contact" to justify exercise of long-arm jurisdiction, particularly where, as here, the cause of action arose out of that very contact in Utah (making of the supplemental agreement).

37. Counsel for defendants also incorrectly states (P. 14) that the telephone calls made by defendants into Utah "did not involve negotiations for the sale and purchase of the subject sailboat, citing Roeck's affidavit, R. 25, however that affidavit makes no statements as to the content of said telephone calls. On the other hand Kent's affidavit shows that in fact "most or all of the misrepresentations alleged in the original complaint

were made by Roeck . . . during said telephone conversations," R. 31, ¶ 6(a). Defendants' argument that mail and telephone calls are "insufficient activity within the forum state to allow jurisdiction: (P. 17) relies upon situations where the letters and telephone calls were only "secondary or ancillary factors," and are factually different from the true facts in this case. Where, as here, the fraud occurred in part in connection as a part of the telephone calls made by defendants into Utah and mail sent by defendants into Utah, it is not "secondary or ancillary" and is sufficient, standing alone, to justify long-arm jurisdiction.

38. Defendants conclude their Point I by stating that it would be "repugnant to the fundamental fairness principal of International Shoe" v. Washington, 326 US 310, 66 S Ct 154, 90 LEd 95 (1945) to "require defendants to answer in Utah for their participation in a transaction executed in the province of Saskatchewan, the object of which was the exchange of Canadian property for an ocean-going sailboat docked in California." If the facts were as stated by defendants we would agree with that argument. Defendants, however, omit to include in their fact summary that (a) the original transaction was negotiated in part by telephone calls made by defendants into Utah in which substantial misrepresentations of fact were made which led to the original contract, (b) that a supplemental contract was made in Utah which substituted a different parcel of land to be received by plaintiffs in the exchange, gave defendants an

option to repurchase that land for $100,000.00, gave defendants a power of attorney to deal with that land as they "saw fit," and (c) that while in Utah defendants made both oral and written misrepresentations of fact as to the value of the land, as to its subdividability, investments by others in the project, status of the subdivision project, etc. With the full facts and circumstances in mind the arguments advanced by defendants support exercise of long-arm jurisdiction by the Court.

39. Threshold jurisdiction established. At the stage to which the case had progressed, it was enough for plaintiffs to show "threshold jurisdiction: sufficient to "demonstrate the fairness of allowing them to continue suit here." Roskelley v. Lecero, 610 P.2d 1307 at P. 1310, quoting with approval from U.S. v. Montreal Co., 358 F.2d 239 at pages 242-243. The Court then held that the procedures from Rule 56(e), URCP, re affidavits in motions for summary judgment was an appropriate procedure in determing jurisdiction prior to trial. The verified pleadings and Kent's Affidavit clearly meet this "threshold jurisdiction: requirement and justified the Court in finding that it had long-arm jurisdiction over defendants.

40. US Supreme Ct. holds that sanction of finding facts to be established supporting long-arm jurisdiction does not violate due process. In a fact situation much like ours, the U.S. Supreme Court recently affirmed an order of a lower Federal Court which imposed as a sanction under Rule 37(b)(2), FRCP [which is practically identical to Rule 37(b)(2), URCP] a

determination that facts necessary to support a finding of personal jurisdiction existed. In that case the non-resident defendants had (as in our case) repeatedly failed to comply with discovery and court orders compelling discovery. Insurance Corp. of Ireland, Ltd. et al., v. Compagnie des Bauxites de Guinee, 102 S. Ct. 2099 (June, 1982). The U. S. Supreme Court stated in part at P. 2106 as follows:

> "By submitting to the jurisdiction of the court for the limited purpose of challenging jurisdiction, the defendant agrees to abide by that court's determination on the issue of jurisdiction; That decision will be res judicata on that issue in any further proceedings." (emphasis added)

At P. 2108 the Court stated in part as follows:

> "Petitioners failure to supply the requested information as to its contacts with Pennsylvania supports 'the presumption that the refusal to produce evidence . . . was but an admission of the want of merit in the asserted defense.' (citations omitted) The sanction took as established the facts - contacts with Pennsylvania - that CBG was seeking to establish through discovery. That a particular legal consequence - personal jurisdiction of the court over the defendants - follows from this, does not in any way affect the appropriateness of the sanction." (emphasis added)

In a like manner defendants in our case should be precluded from contesting the finding of the Court that sufficient minimal contacts existed to establish jurisdiction by reason of their failure to comply with discovery orders.

41. Conclusion. The trial Court properly concluded that defendants had made sufficient purposeful "minimal contacts" with the State of Utah to permit the Utah Courts under traditional notions of justice and fair play to require the

defendants to defend this lawsuit in Utah, which lawsuit resulted in substantial part from those purposeful activities by defendants in Utah. Accordingly, the decision of the lower Court re existence long-arm jurisdiction should be affirmed.

POINT II

TRIAL COURT PROPERLY ASSESSED DAMAGES AFTER HEARING.

42. Counsel for defendants incorrectly argue that no hearing was held before assessment of damages. The Court held such a hearing and gave defendants full opportunity to appear, present evidence, and to make appropriate objections.

43. The facts surrounding the entry of judgment are set forth in ¶ 23 through 30 above, which shows that:

(a) Counsel for defendants attended the hearing which resulted in imposing sanction of striking of answer and entry of defendants' default for failure to comply with discovery orders (¶ 25 above - copy of order attached as Appendix "G").

(b) Counsel for defendants objected to entry of judgment without a hearing to assess damages (¶ 26 above - R. 266-271).

(c) The Court on its own motion scheduled a hearing re those objections. (¶ 27 above - R. 258, 264 - Appendix "H" hereto).

(d) Court hearing was held (¶ 28 above - Appendix "I" hereto) at which defendants were represented by counsel. At that hearing some of the relief sought by plaintiffs

(lein on Canadian land) was denied and the Court ordered plaintiffs to file an affidavit in support of their claims for damages. Counsel for defendants had full opportunity to object to Court's procedure, but failed to do and cannot now raise that issue for the first time on appeal.

(e) The required affidavit re damages was filed (See ¶ 29 above). Thereafter, the Court entered its judgment, a copy of which is furnished herewith as Appendix "J". It is important to note that the judgment expressly provides that upon prompt return of the boat in good condition the $352,000.00 of damages for conversion would be deemed satisfied, and that the Court would determine the amount of credit to be allowed if the boat was returned under different circumstances (see ¶ 2 of judgment). The judgment for $100,000.00 rental value during the period while the boat was detained is based upon plaintiffs' affidavit and punitive damages are assessed based upon fraud and misrepresentation as detailed in that affidavit. The boat has not been and probably never will be returned. The judgment was and is justified under the circumstances.

(f) No counter-affidavit was filed by defendants; no objections were made by defendants to the affidavit or its sufficiency; and no objections were made by defendants to the terms of the judgment itself. Issues re the sufficiency of the Court's procedures are raised for the first time on appeal.

44. Hearing was held. From the foregoing it is apparent that defendants were well represented at all stages of the proceedings; that a hearing was in fact held at which counsel for defendants were given an opportunity to present evidence, to object, etc.; that a detailed affidavit was filed by plaintiffs in support of their claim for damages, rental value and punitive damages, which affidavit included a detailed recital of the various acts of fraud and deceit practiced by defendants upon plaintiff, (R. 272-277). The Court was fully justified in entering said judgment based upon the record in this matter and that affidavit. That affidavit was requested by the Court pursuant to Rule 55(b)(2), which reads in part as follows:

> "If, in order to enable the court to enter judgment . . . it is necessary to . . . determine the amount of damages or to establish the truth of any averment by evidence or to make any investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper." (emphasis added).

Whether or not such a hearing is held is discretionary with the Court since the rule uses the word "may". The Court, however, ordered such a hearing and requested plaintiffs' file a supporting affidavit. Defendants failed to object to the sufficiency of the affidavit and thereby waived any objection that they might have raised with respect to the content of the affidavit. See Fox v. Allstate Ins. Co., 22 U. (2d) 383, 453 P.2d 701; Strange v. Ostlund (1979) 594 P.2d 877. Having failed to object to the affidavit, which objections would have

given the District Judge the opportunity to correct any possible error, defendants cannot now raise that question for the first time on appeal.

45. Cannot raise issue for first time on appeal. Rule 46, URCP, eliminates the need for formal exceptions to the Court's rulings, but does not eliminate the requirement that some objection be made to the trial Court if the question is to be preserved for appeal. That rule reads in part as follows:

> "Formal exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party, at the time the ruling or order of the Court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; . . ." (emphasis added)

Counsel for defendants wholly failed to "make known to the court the action which he desired the court to take" with respect to plaintiffs' affidavit or the content of the judgment itself, or their objections (if any) thereto, as required by that rule. Having failed to do so they cannot now raise those objections for the first time on appeal. Nelson v. Blomquist, 378 P. 2d 891, 14 U.2d 133; Corner v. Clingers, Inc., 387 P. 2d 85; Stagmeyer v. Leatham Bros., Inc., 439 P.2d 279, 20 U.2d 421. Failure to move for a new trial precludes defendants from raising on appeal the sufficiency of the evidence to sustain the judgment. Brigham v. Moon Lake Elec. Ass'n., 470 P.2d 393, 24 U.2d 292

46. Appeals limited to law questions. The foregoing rules are not mere technicalities, but are founded upon constitutional

limitations on the power of the Supreme Court. Art VIII, § 9 of the Utah Constitution reads in part as follows:

> "From all final judgments of the district courts, there shall be a right of appeal to the Supreme Court. The appeal shall be upon the record made in the court below . . . In equity cases the appeal may be on questions of both law and fact, in cases at law the appeal shall be on questions of law alone."

Unless a party calls the question from which an appeal is taken to the attention of the Court and obtains a ruling thereon from the Court from which ruling an appeal can be taken, there is no question of law involved. It is only from an incorrect ruling of law by the trial court that an appeal to the Utah Supreme Court will lie. Without such a ruling all that exists is a question of fact which is not reviewable by the Supreme Court. That rule is also founded upon the sound principal that a party should not be permitted to lead the Court into error by failing to call a matter to the attention of the trial court so that appropriate correction could be made without the necessity of an appeal.

47. The Security Adjustment Bureau, Inc. v. West, 20 U.2d 292, 437 P. 2nd 214 (1968) mentioned on page 25 of defendants' brief was a situation involving reversal of an order of the District Court refusing to vacate a default judgment where the trial court had no evidence in support of its award of punitive damages in its default judgment. Our situation is clearly distinguishable in that (as indicated on P. 27 above) a hearing was held, a detailed affidavit was filed re the fraud and deceit

practiced by defendants and the damages sustained by plaintiffs and was available to the Court in determining the amounts to be awarded as a part of the judgment. Defendants in our case had a full opportunity to object to the affidavit, to present additional evidence, etc. to the Court prior to or following entry of judgment.

48. Conclusion. The judgment as framed by the Court was fair and just under the circumstances, particularly where, as here, it was awarded as a sanction for repeated failure to comply with discovery and repeated disobedience of court orders.

POINT III

THE COURT WAS JUSTIFIED IN STRIKING DEFENDANTS' ANSWER AND ENTERING DEFAULT JUDGMENT IN VIEW OF DEFENDANTS' REPEATED DISOBEDIENCE OF DISCOVERY ORDERS.

49. Summary of disobeyed court orders. For the convenience of the Court, and to assist in more fully understanding the frustration experienced by plaintiffs and the Court from defendants willful and repeated disregard of discovery and orders compelling discovery, we have set forth in ¶ 7 through 31 a summary of the court proceedings which led to the Court finally striking defendants' answer and entering of the default judgment, and have attached hereto as an appendix, copies of various minute entries and Court orders which defendants disobeyed, as follows:

Appendix "A" - 7-15-82 - orders production of documents and appearance by Roeck for deposition within 5 days after denial by Supreme Court of defendants' petition for interlocutory appeal.

Appendix "B" - 8-19-82 - order requiring production of documents by 8-16-82 and that Roeck appear for deposition no later than 8-27-82.

Appendix "C" - 8-26-82 - orders that Roeck appear for deposition no later than 9-3-82 and that, upon failure to do so upon ex-party application, defendants' answer will be struck and default judgment entered for relief requested.

Appendix "D" - 9-3-82 - partial copy of Roeck deposition where Roeck refused to answer questions and walked out of deposition after 15 minutes of questions.

Appendix "F" - 11-18-82 - orders that Roeck appear for his deposition and produce documents within 10 days and that Roeck not leave deposition until excused by counsel for plaintiffs; that upon failure to comply the court will feel compelled to strike answer and enter default.

Appendix "G" - 12-29-82 - orders answer struck and default judgment be granted.

50. Failure of defendants to communicate with their lawyer is inexcusable. From the foregoing it is clear that the Court was most tolerant of defendants' excuses and that the Court repeatedly gave defendants additional chances to comply but that defendants wilfully failed to do so. The only point raised on appeal by defendants is that Roeck allegedly had no notice of the orders and accordingly no opportunity to comply, (defendants' brief, pages 27-29). In support of that claim, defendants' brief cites the following unsworn declaration by Jones, co-counsel for defendants (R. 256-257):

> "The undersigned further declares that the defendant Hans W. Roeck has been unavailable for approximately

> 45 days, outside the continental United States, and has received absolutely no notice or knowledge of any of the proceedings or orders leading up to and including the apparent order of the above entitled Court striking defendants' answer in the above entitled matter and for entry of judgment against defendants and in favor of plaintiffs." (emphasis added).

That motion is dated Januray 5, 1983, (R. 256-257), which means that Roeck had not been in contact with his counsel since about November 21, 1982, (a Sunday), however counsel for defendants motion for permission to withdraw states that Roeck has not been in oral communication with his attorneys since September 10, 1982, and has not been in written communication since October 7, 1982, (R. 227, ¶ 3). That motion for permission to withdraw is based upon Roeck's "failure to maintain contact and communication with his lawyers throughout this litigation," (R. 226, ¶ 1). Apparently that failure on the part of Roeck to communicate with his lawyers continued through March 14, 1983, when the judgment was signed by the Court, since there were no further offers by Roeck to appear for the taking of his deposition and no documents were produced within that time. Apparently the October 7, 1982, communication was Roeck's September 21, 1982, affidavit (R. 204-206) wherein he offered to return to Salt Lake City to complete the deposition (R. 206, ¶ 5). Notwithstanding that offer by Roeck to return and submit to deposition, he wholly failed during the following six months to contact his counsel to determine whether or not his offer to return had been accepted. It is difficult to believe that said offer was made in good faith when he thereafter completely ignores his

attorneys and the pending legal proceedings. Willful failure of a client to keep in contact with his attorney is inexcusable. It is difficult to understand defendants' "due process" arguments based upon lack of actual notice to the client (Defendants' brief page 27) when lack of notice resulted solely from Roeck's willful failure to communicate with his attorneys.

51. Counsel for defendants finally argues (P. 29) that "defendants' failure to comply with the court's discovery order is excusable," without offering any reasonable excuse other than that Roeck simply chose to ignore the Court's orders, failed to keep in contact with his attorneys for approximately 6 months (or more), and ignored his obligations in this lawsuit. It is doubtful, in view of the conduct of Roeck, that the documents would have been produced or the deposition would have been taken had the Court given defendants another 6 months. Either the discovery rules mean something or they don't. If every lawsuit were met with this type of misconduct the Courts would be clogged and justice would be denied. Repeated refusal to obey court orders cannot be tolerated. To tolerate such misconduct would wholly destroy our system of law and order which is based upon compliance with Court orders.

52. Prior decisions affirming sanctions for failure to permit discovery. The Utah Supreme Court has affirmed similar sanctions by the lower Court in various cases where the conduct of the defendant was less flagrant than in our situation, as follows:

(a) In Tucker Realty, Inc. v. Nunley, 16 U.2d 97, 396 P.2d 410, the Utah Supreme Court affirmed a judgment awarded because defendant did not comply with pretrial discovery order to produce documents supporting claim of discharge of promissory note.

(b) In W. W. & W. B. Gardner, Inc. v. Park West Village, Inc., (1977) 568 P.2d 734 the Utah Supreme Court affirmed a default judgment where there had been a frustration of the judicial process, as where (as here) the failure to respond to discovery impedes trial on the merits and makes it impossible to ascertain whether the allegations of the answer have any factual merit. [In our situation, the disregard by Roeck of discovery orders was far more outrageous than the fact situation in the above-quoted case. In that case belated answers to interrogatories were served after the motion and prior to the hearing and the Court imposed the sanctions without first making an order compelling discovery].

53. Possible remittitur. Should the Court determine that the punitive damages award are excessive (we believe that they were fully justified under the circumstances) this would be an appropriate case for the Court to order a remittitur as to a part of the punitive damages and to affirm the balance of the judgment. See Utah State Road Comm. v. Johnson, 550 P.2d 216.

CONCLUSION

54. A substantial part of plaintiffs' claim arose out of fraud and deceit, practiced by Roeck in Utah, in connection with negotiation and signing of a supplemental contract which substantially changed the rights of plaintiff under the exchange agreement, which the Court properly found to constitute sufficient "minimal contacts" for the Court to exercise long-arm jurisdiction over the defendants. Defendants repeated failure to comply with discovery orders justified the Court in finally striking the answer and entering judgment by default. Defendants' counsel participated in the hearings, which resulted in the judgment, which judgment was supported by a detailed affidavit re fraud and deceit by defendants and resulting damages to plaintiffs. Defendants waived any objection that they might have raised to the sufficiency of that affidavit by failing to object to the affidavit or to the judgment itself. Defendants cannot contest the sufficiency of said affidavit for the first time on appeal. Defendants have had their opportunity to litigate the matter on its merits and have refused to do so. It is unlikely that defendants would behave any differently if a new trial were granted, based upon their prior misconduct as discussed above.

55. The Court's judgment should be affirmed.

Dated the 1st day of September, 1983.

Ronald C. Barker, attorney for plaintiffs Synergetics and Lancer Industries, Inc.

Robert L. Lord, attorney for Addland Enterprises, Inc.

(a) In Tucker Realty, Inc. v. Nunley, 16 U 2d 97, 396 P.2d 410, the Utah Supreme Court affirmed a judgment awarded because defendant did not comply with pretrial discovery order to produce documents supporting claim of discharge of promissory note.

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(c) In Empire Corp. v. Empire Credit, Inc., et al. #16237 an unreported Utah Supreme Court decision filed January 3, 1980, (copy furnished as Appendix "L" hereto) the Utah Supreme Court affirmed a similar order in striking the answer and entering default judgment for $84,800.00 as a result of a similar repeated failure of the defendants to comply with discovery orders. In that decision the Court stated at page 3 in part as follows:

> "Though it is true that the courts should be indulgent in setting aside default judgments to the end that controversied be resolved on their merits, it is also true that there must be an end to such patience and indulgence."

53. Possible remittitur. Should the Court determine that the punitive damages award are excessive (we believe that they were fully justified under the circumstances) this would be an appropriate case for the Court to order a rimittitur as to a part of the punitive damages and to affirm the balance of the judgment. See Utah State Road Comm. v. Johnson, 550 P.2d 216.

CONCLUSION

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See corrected insert

CERTIFICATE OF MAILING

I hereby certify that I caused 3 copies of the foregoing brief together with 3 copies of the Appendix, to be mailed, postage prepaid, the 1st day of September, 1983, to each of the following persons at the addresses indicated:

W. Montgomery Jones, JONES AND JONES, 1340 Munras Avenue, Monterey, California 93940

William G. Fowler, Bryce E. Roe, Joel R. Dangerfield and Ronald W. Goss, ROE AND FOWLER, 340 East Fourth South, Salt Lake City, Utah 84111

Ronald C. Barker

dicussed above.

55. The Court's judgment shoud be affirmed.

Dated the 9th day of November, 1983.

Ronald C. Barker, attorney for plaintiffs Synergetics and Lancer Industries, Inc.

Robert L. Lord, attorney for Addland Enterprises, Inc.

CERTIFICATE OF MAILING

I hereby certify that I caused 3 copies of Corrections to page 34 of the foregoing brief, page iv of Table of Contents and 3 copies of Appendix "L" as a supplement to the Appendix, to be mailed, postage prepaid, the 9th day of November, 1983, to each of the following persons at the addresses indicated:

W. Montgomery Jones, JONES AND JONES, 1340 Munras Avenue, Monterey, California 93940

William G. Fowler, Bryce E. Roe, Joel R. Dangerfield and Ronald W. Goss, ROE AND FOWLER, 340 East Fourth South, Salt Lake City, Utah 84111

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