

2004

Marlene A. Terpening v. RTM Restaurant Group, a Georgia Corporation; and RTM Operating Company, a Delaware corporation : Brief of Appellees

Utah Court of Appeals

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**UTAH COURT OF APPEALS**

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MARLENE A. TERPENING	:	
	:	
Plaintiff and Appellant	:	Appeal No. 20040335-CA
	:	
vs.	:	
	:	
RTM RESTAURANT GROUP, a	:	
Georgia corporation; and RTM	:	
OPERATING COMPANY, a	:	
Delaware corporation,	:	Salt Lake District Ct. No. 990900024
	:	
Defendants and Appellees.	:	

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**BRIEF OF APPELLEES RTM RESTAURANT  
GROUP AND RTM OPERATING COMPANY**

---

Appeal from a Judgment of the Third Judicial District Court, Salt Lake County  
Honorable William B. Bohling, Presiding

---

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**UTAH COURT OF APPEALS  
BRIEF**

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**DOCKET NO. 2004 0335-CA**

Attorneys for Appellees RTM Restaurant  
Group and RTM Operating Company

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UTAH APPELLATE COURTS

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## UTAH COURT OF APPEALS

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Plaintiff and Appellant	:	Appeal No. 20040335-CA
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## PARTIES

The caption contains the names of all parties before the district court.

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## **STATEMENT OF JURISDICTION**

The Utah Court of Appeals has jurisdiction as a result of transfer of this matter from the Supreme Court under Utah Code Ann. § 78-2-2(4) and § 78-2a-3(2)(j). The Supreme Court had original appellate jurisdiction under Utah Code Ann. § 78-2-2(3)(j).

## **STATEMENT OF ISSUES AND STANDARD OF REVIEW**

Appellant Marlene Terpening's statement of the issue is argumentative in that it assumes lack of adequate notice, a timely motion, and a meritorious claim, all of which are issues themselves, and fails to address the express grounds on which the trial court rejected Terpening's motion. A simple statement of the issue is: Did the trial court clearly abuse its discretion in denying Terpening's motion on October 14, 2003 under Utah Rule of Civil Procedure 60(b) to set aside the dismissal without prejudice entered August 10, 2000? If facts were to be added to the statement of the issue, the critical facts, as discussed in this brief, are that, although Terpening appears not to have been mailed a copy of the dismissal, Terpening wholly failed to prosecute her claim, including her admitted failure to check the court file for over three years after the August 2000 dismissal, Record at 25 (Addendum at 4), arising out of the trial court's order to show cause why the case should not be dismissed for failure to prosecute in June 2000, Record at 22 (Addendum at 1), and hearing on the order to show cause in July 2000, Record at 24 (Addendum at 3). Because of those facts, (1) Terpening's suggestion in her statement of the issue that reason existed for granting her motion "in the furtherance of justice" under Rule 60(b) and her assumption that her motion was timely are wrong; and (2) her doubtful claim of merit for her complaint, which properly

was not addressed in the trial court, should not be reached.

Under Gardiner and Gardiner Builders v. Swapp, 656 P.2d 429, 430 (Utah 1982) reversal of the trial court is justified “only where a clear abuse of discretion is shown.” As the Utah Supreme Court recently stated:

The outcome of rule 60(b) motions are rarely vulnerable to attack. We grant broad discretion to trial court’s rule 60(b) rulings because most are equitable in nature, saturated with facts, and call upon judges to apply fundamental principles of fairness that do not easily lend themselves to appellate review.

Fisher v. Bybee, 2004 UT 92, ¶ 7, 512 Utah Adv. Rep. 18 (citation omitted). Discretion is not abused where the motion to set aside is denied due to lack of diligence of the moving party. See, e.g., Classic Cabinets, Inc. v. All America Life Insurance Co., 1999 UT App 88, ¶¶ 14-16, 978 P.2d 465; Charlie Brown Construction Co. v. Leisure Sports Inc., 740 P.2d 1368, 1370-71 (Utah Ct. App.), cert. denied, 765 P.2d 1277 (Utah 1987); Katz v. Pierce, 732 P.2d 92, 93-94 (Utah 1986); Gardiner and Gardiner Builders, 656 P.2d at 430 (Utah 1982); Airkem Intermountain v. Parker, 30 Utah 2d 65, 513 P.2d 429, 431 (1973) (“The movant must show that he has used *due diligence* and that he was prevented from appearing by circumstances over which he had no control.” (Emphasis in original)).

## **SIGNIFICANT PROVISIONS OF LAW**

### **1. Utah Rule of Civil Procedure 60(b) states:**

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. . . .

### **STATEMENT OF THE CASE**

**Nature of the Case.** Part of Terpening’s statement of the nature of the case is not supported by the record. Terpening seeks to impose liability on RTM for her fall on a wet floor despite the fact that she had been warned and knew that the floor was wet from being mopped (“He was mopping the floor and there was a sign there that it was wet . . .,” Record at 45 (Terpening depo. at 30:11-23); see also Record at 47-48 (Terpening depo. at 37:24 to 38:24, 40:17 to 41:5)) but nevertheless proceeded to walk on it. Terpening’s statement that “an employee assured Terpening that it was safe to walk across” the floor is inaccurate. Terpening only asked the employee, “was it okay if we walked on it, and he said yeah, sure.” Record at 45, 47 (Terpening depo. at 30:20-23, 38:14-15). Terpening’s claim of injuries attributable to the fall is not supported in the record by competent medical evidence or by circumstances that would lead one to expect so many injuries from a single fall while walking carefully because of a wet floor. (“I thought I was walking carefully . . . slow and precise,” Record at 48 (Terpening depo. at 42:19-25)).

**Course of Proceedings/Disposition in the Trial Court.** Terpening’s statement of the course of proceedings in the trial court primarily notes activity, quite limited in itself, that occurred outside of court, including the last two and one-half years before the motion to set

aside during which time Terpening did absolutely nothing to advance the case. Terpening Brief at ix-xiv; see also Record at 26-29.

The picture of Terpening's stark failure to prosecute her case is painted by the Record Index showing that she filed nothing with the court—not even a single notice of discovery or request for scheduling—for four years and seven months after filing of her complaint and proof of its service. Terpening's inactivity after the filing of her complaint on January 4, 1999, Record at 1, led the court to schedule a hearing on July 7, 2000 for Terpening “to appear on said date and time and show cause why this case should not be dismissed for failure to prosecute.” Record at 22 (Addendum at 1). The court's notice further stated:

By failing to appear, the Court will enter an order of dismissal without further notice.

CASES ON THE ORDER TO SHOW CAUSE CALENDAR WILL NOT BE CONTINUED. DO NOT CALL THE COURT. TO AVOID APPEARANCE OR DISMISSAL, you may submit a request for scheduling conference or a certificate of readiness for trial in writing 10 days prior to hearing.

Record at 22 (Addendum at 1) (emphasis in original).

Following the hearing, the court stated in its minute entry: “This case is granted a thirty day continuance. If no pleadings are filed within the allotted time, the Court will automatically dismiss this case.” Record at 24 (Addendum at 3). Terpening admits to having “understood this directive to mean that the parties must take some action in furthering the case along,” Record at 30 and Terpening Brief at 4, and makes no claim that the trial court misled her in any way. She also does not dispute that nothing was filed with the court, not only for the next 30 days after the hearing, but for the next three years until her

motion to set aside the dismissal on October 14, 2003. See Record at 24-26; see also Record Index. All that Terpening did in the weeks after the hearing was to send two short letters dated July 21 and July 25, 2000 providing a telephone number and address for Terpening's former daughter-in-law. Record at 97, 99; see Record at 42 (Terpening depo. at 20:10-17). No pleading having been filed, dismissal without prejudice was entered on August 10, 2000. Record at 25 (Addendum at 4). Although Terpening appears to claim not to have checked with the court clerk for the dismissal for the next three years, see, e.g., Terpening Brief at 10, Terpening filed nothing of record to establish that her attorney Todd Emerson<sup>1</sup> was not aware of or on notice of the dismissal.

Terpening's activity outside of court during the more than three years after the dismissal following the order-to-show-cause hearing was limited to transmittal of some medical records (not in the court record) on September 22, 2000 and her settlement letter dated April 19, 2001, Record at 103-06, a brief interchange initiated by RTM, Record at 101. Terpening's settlement offer of April 21, 2001—in which her offer ballooned to an amount nearly 5 times greater than her offer of March 17, 1999, Record at 161—expired on

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<sup>1</sup>Although Terpening describes Emerson as having the case “transferred to” him in March 2002, see Terpening Brief at 21, an affidavit of attorney Thomas Schaeffer states that Schaeffer “turned the case over to . . . Emerson . . . and performed no work on the case after March 5, 2001.” In addition, Emerson's involvement went back to the beginning of the case when he appeared as the particular attorney for Terpening to be served with the answer to the complaint, see Record at 1, 6. Emerson later received and responded to the communication from RTM in July 2000 shortly before the dismissal, Record at 95-99, and signed the April 19, 2001 settlement letter, which was prepared on Schaeffer's letterhead and with his typed name included in the signature block 45 days after Schaeffer states that he stopped working on the case, Record at 103-04.

May 1, 2001. Record at 104. Despite expiration of her settlement offer, Terpening continued in her failure to pursue her case for almost two and one-half more years. See, e.g., Terpening's Brief at xiii-xiv.

The disposition in the trial court included the court's succinct statement of reasons for denying Terpening's motion to set aside the dismissal:

Before the Court is plaintiff's Motion to Set Aside Default Judgment.

Having considered the parties' Memoranda, and good cause appearing, the Motion is denied. The basis for the Court's decision is well articulated in defendants' Memorandum in Opposition to the Motion.

The case is now more than five years old. Plaintiff's activity has been minimal, almost nonexistent in the last several years. Plaintiff's failure to discover the dismissal for several years alone is evidence of plaintiff's lack of prosecutorial diligence. In short, the docket reveals plaintiff's failure to meet its burden to move the case forward. Accordingly, the dismissal was appropriate.

Record at 167-68 (Addendum at 5-6).

### **STATEMENT OF FACTS**

The above statement of the course of proceedings contains the critical facts for purpose of this appeal. As with Terpening's statement of the nature of the case, Terpening's statement of facts begins with argument about the merits of Terpening's underlying negligence claim, which is far more questionable than her statement of facts suggests. Her own testimony reflects that the employee did not assure her that it was "safe," but only that it was "okay" or "all right" if she crossed the floor where he was mopping and had posted a "wet floor" sign. Record at 45, 47-48 (Terpening depo. at 30:11-23, 37:24 to 38:24, 40:17 to 41:10). Terpening recognized the circumstances well enough that she testified that she

twice warned her daughter to be careful and herself was taking extra precaution by walking “slow and precise.” Record at 47-49 (Terpening depo. at 38:17-18, 42:19 to 43:6, 46:13-17). Add to this that before her fall Terpening had two personal injury lawsuits relating to two automobile accidents and over ten years of ongoing back problems and medication needs (back to before she stopped working in 1987) that prevented her from driving or even going walking, Record at 41, 73-75, 77-78 (Terpening depo. at 13-15, 143-49, 159-64) and that no medical evidence in the record establishes causation of the many problems she claims from the fall, and it is easy to see that there were reasons for Terpening not to have been motivated enough to invest substantial effort in prosecuting her case.

### **SUMMARY OF ARGUMENT**

The trial court aptly stated its reasons for denying Terpening’s Rule 60(b) motion. In a nutshell, over the course of nearly five years, Terpening did almost nothing to pursue her claim. Even after being on notice in June 2000 that the trial court considered the case subject to dismissal for failure to prosecute, Terpening failed to take sufficient action to avoid dismissal. One consequence of Terpening’s lack of diligence was that she did not perform her “duty to check with the clerk periodically to determine whether orders have been entered,” see West v. Grand County, 942 P.2d 337, 341 (Utah 1997), and thus failed to keep herself apprised of the final disposition of the order-to-show-cause proceedings. Without excuse and despite having been called before the court, Terpening continued not to pursue her case for three more years such that the trial court had abundant support in the record for its conclusion that “the docket reveals plaintiff’s failure to meet its burden to

move the case forward.” Record at 168 (Addendum at 6). Her mere lack of receipt of a copy of the dismissal does not justify Rule 60(b) relief, see, e.g., 12 J. Moore, Moore’s Federal Practice § 60.48[6][b] at 60-186 (3d ed. 2004), particularly in view of her long-term lack of diligence.

Terpening was afforded due process. She merely failed to check with the clerk for the court’s resolution of the order-to-show-cause proceedings and did not take advantage of any of the many avenues available to her to advance her case. Her technical point that she was not sent a copy of the dismissal, a claimed right for which she has failed to provide a valid legal basis, does not avoid the consequences of her years of inaction. Although the trial court did not deny Terpening’s motion because she was years past the three-month limitation applicable to Rule 60(b)(1), the three-month limitation provides additional support for the trial court’s decision, and Terpening’s claim does not involve the “exceptional circumstances” required for relief under Rule 60(b)(6). The one-year limitation in the savings statute of Utah Code Ann. § 78-12-40 and related time-sensitive legal requirements provide more support for the trial court’s denial of relief first sought over three years after the dismissal. In view of Terpening’s failures providing an inadequate basis for relief from the dismissal, the questionable merits of her underlying claim properly were not addressed by the trial court.



## ARGUMENT

### THE DECISION NOT TO DISTURB THE DISMISSAL ENTERED OVER THREE YEARS BEFORE TERPENING'S MOTION TO SET IT ASIDE WAS WELL WITHIN THE DISCRETION OF THE TRIAL COURT

#### A. The record supports the decision of the trial court.

The starting point for evaluating the decision of trial court should be the trial court's decision itself. In contrast, Terpening completely fails to acknowledge or address the reasons given by the trial court for refusing to set aside the dismissal in this case, which dismissal was over three years old when Terpening filed her motion to set it aside. Trial courts, charged in connection with managing their case loads<sup>2</sup> with the responsibility and broad discretion to regularly evaluate whether cases are being reasonably prosecuted, are in an advantaged position for recognizing when a particular party has failed its responsibility to go forward with its case. See, e.g., Utah Rule of Judicial Administration 4-103; Fisher v. Bybee, 2004 UT 92, ¶ 7, 512 Utah Adv. Rep. 18 (noting trial court's advantaged position for making equitable judgments needed for Rule 60(b) motions); Country Meadows Convalescent Center v. Utah Department of Health, 851 P.2d 1212, 1214 (Utah Ct. App. 1993) (broad discretion in determining failure to prosecute).

Notwithstanding Terpening's generous description of activity in the case, such as

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<sup>2</sup>Docket management is an important responsibility of a trial court judge. See In re Anderson, 2004 UT 7, ¶ 91, 82 P.3d 1134 (removal of judge in connection with failure to hold adjudication hearings and decide cases in a timely manner). Even a stipulation between the parties does not wrest control from the court of its own calendar. See Charlie Brown Construction Co. v. Leisure Sports Inc., 740 P.2d 1368, 1371 (Utah Ct. App.), cert. denied, 765 P.2d 1277 (Utah 1987).

referring to RTM's issuance of routine records subpoenas as reflecting that "the parties conducted discovery," the trial court easily could see that this is in substance a case in which Terpening merely filed her complaint and did almost nothing to pursue it. See Record at 167-68 (Addendum at 5-6). In light of her activity related to the case comprising only a few short letters that she sent to RTM over the course of the first two years, three and one-half months of the case with her doing absolutely nothing after that for the next two and one-half years, the court's observation that "[p]laintiff's activity has been minimal, almost nonexistent in the last several years" described the case perfectly. Record at 167 (Addendum at 5).

The trial court also noted that "[p]laintiff's failure to discover the dismissal for several years alone is evidence of plaintiff's lack of prosecutorial diligence." Record at 167 (Addendum at 5). The factual context of this statement underscores its accuracy because Terpening had direct notice in June 2000, see Record at 22 (Addendum at 1), that the court expected her to prosecute her case. See also Utah Rule of Judicial Administration 4-103 (expressly recognizing the value of "allow[ing] the trial courts to manage civil case processing[ t]o reduce the time between case filing and disposition"). In addition, a party has a general "duty to check with the clerk periodically to determine whether orders have been entered," see West v. Grand County, 942 P.2d 337, 341 (Utah 1997). Terpening makes no claim that she was misled by the trial court, which had ordered her to appear in July 2000 because of inactivity in the case and placed on her the burden to "show cause why this case should not be dismissed for failure to prosecute." Record at 22 (Addendum at 1). She also

was advised in the notice for the order-to-show-cause hearing that she could request a scheduling conference or certify the case, which was one and one-half years old at the time of the hearing, as ready for trial. Record at 22 (Addendum at 1). Neither then nor later did she take either of those simple steps. After the hearing and the minute entry specifying that “[i]f no pleadings are filed within the allotted time [30 days], the Court will automatically dismiss this case,” she does not dispute that nothing at all was filed during that time. Record at 24-25 (Addendum at 3-4). The thirty days after the hearing rather elapsed with only RTM’s cancellation of a scheduled date for a deposition of Terpening’s companion at the restaurant on the day of the fall. Record at 91. Terpening filed nothing with the court for the next three years and three months after the hearing and also did not check with the trial court clerk to see whether a dismissal had been entered pursuant to the minute entry regarding the order-to-show-cause hearing. Even after the minimal activity of RTM, essentially limited to collection of medical records, see Record at 29, 91-147, had ceased completely over two years before Terpening’s motion,<sup>3</sup> Terpening did nothing.

As soon as Terpening attempted to turn back to the case, an event that occurred by pure chance due to the departure of her individual attorney from his law firm, Record at 29, she quickly discovered that it had long ago been dismissed, and Terpening offered no

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<sup>3</sup>Assuming that Terpening’s attorney during that period was not aware of the dismissal, another reason Terpening would have discovered the dismissal much earlier had she prosecuted her case is that RTM’s former attorney (later appointed to the bench) was aware of the dismissal over one and one-half years before Terpening’s motion to set aside, see Record at 155 n.4. Thus, Terpening stood to learn of the dismissal, not only from the trial court, but also from opposing counsel had she done anything at all to pursue her claim.

evidence of anything that would have prevented her from discovering the dismissal long before in the same way had she only prosecuted her case. Just as in West, 942 P.2d at 340, it can be said that Terpening is responsible for not discovering the dismissal long before she did because "[c]learly, [her] failure to check with the clerk was neglect." Under the circumstances, far from abusing its broad discretion, the trial court rightly viewed Terpening's failure to discover the dismissal as more evidence of Terpening's failure to prosecute her case.

Another reason that the decision of the trial court was appropriate is that "[t]he courts have unanimously agreed, a mere lack of Rule 77(d) [requiring the clerk of court to give notice of the entry of judgment in federal practice] notice does not justify Rule 60(b) relief." See 12 J. Moore, Moore's Federal Practice § 60.48[6][b] at 60-186 (3d ed. 2004) (citation omitted); see also West, 942 P.2d at 338-40 & n.1(discussing former Utah Rule 77(d)). Terpening failed to appeal the dismissal in August 2000 and should be barred, especially at this late date, from using Rule 60(b) as a "back door to a direct appeal" of the trial court's decision as of August 2000, Record at 22-25 (Addendum at 1-4), that the case merited dismissal in accordance with Utah Rule of Judicial Administration 4-103 for failure to prosecute. See Fisher v. Bybee, 2004 UT 92, ¶¶ 9-10, 512 Utah Adv. Rep. 18 (Rule 60(b)(1) not a substitute for timely appeal of claimed "mistake" of the trial court); Franklin Covey Client Sales, Inc. v. Melvin, 2000 UT App 110, ¶ 23, 2 P.3d 451 (Rule 60(b) may not be used as "back door to a direct appeal"). Applying the standard of West, regardless of the dismissal not being sent to her, if Terpening wished to appeal the dismissal, she was required

to check periodically with the clerk as to the date of entry and file her appeal within 30 days, or in the case of excusable neglect, within 60 days. See Utah Rule of Appellate Procedure 4(a) & (e). Terpening is even long past the liberal provision of federal procedure that allows the trial court to reopen the time for appeal upon motion made a maximum of 180 days after the entry of judgment when a party has not had notice of the judgment and meets the other requirements of Federal Rule of Appellate Procedure 4(a)(6). The trial court reasonably could refuse to permit a party like Terpening, who had been the opposite of diligent and did not claim to have been misled about the entry of the dismissal, to use Rule 60(b) in effect to do an "end run" around the appellate rules applicable to the trial court's first decision that she had not adequately pursued her claim. In light of the time limits for appeal imposed by state and federal law, as well as limitations discussed below inherent in the respective state and federal Rules 60(b) and the Utah savings statute of Utah Code Ann. § 78-12-40, far from being outside the bounds of reasonable discretion, the trial court's denial of relief to Terpening fits perfectly with consensus legal standards that required Terpening to take action to discover the dismissal long before the over 1,100 days that Terpening admits that she allowed to pass before doing anything to "research the status of the case" in September 2003. See Terpening Brief at xiv.

**B. Terpening is not entitled to relief under Rule 60(b) of the Utah Rules of Civil Procedure.**

*1. Terpening was not deprived of due process, but rather failed to take advantage of rights afforded her in the litigation.*

Terpening's claim that the dismissal "deprives Terpening of her case without due process of law" is based on Bish's Sheet Metal Co. v. Luras, 11 Utah 2d 357, 359 P.2d 21 (1961), which involved a district court appeal from a city court judgment. However, Terpening cannot claim the complete lack of "knowledge of . . . the proceedings in the district court" that the court in Bish's Sheet Metal stated in dicta "would establish a lack of due process of law." 359 P.2d at 22 (The issue was not before the court because no Rule 60(b) motion had been made and "[t]he record indicate[d] that he [defendant] had notice of such appeal and presented his defense and was accorded due process of law in that respect." Id.) Nothing in Bish's Sheet Metal suggests that a party like Terpening who actually commenced the district court case and participated in the proceedings that led to the judgment can obtain relief under Rule 60(b)(6)<sup>4</sup> for denial of "due process" merely because she was not sent a copy of the resulting judgment. More important, West, 942 P.2d at 340-41, squarely holds that, far from being a denial of "due process," it is the ultimate responsibility of the party who may wish to object to the judgment "to check with the clerk periodically to determine whether orders have been entered."

***2. Terpening's lack of diligence is fatal to her motion to set aside the dismissal.***

Rule 60(b) only provides that the trial court "may" grant relief from a judgment when to do so is "in the furtherance of justice." Applying that standard, the trial court was well within the bounds of its discretion when it decided not to grant relief for the reasons given in its minute entry. In addition, Rule 60(b) contains an overriding requirement that "the

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<sup>4</sup>Formerly Rule 60(b)(7) Bish's Sheet Metal when was decided.

motion shall be made within a reasonable time . . . after the judgment, order, or proceeding was entered or taken." To satisfy the requirement that her motion be made within a reasonable time, Terpening must establish at a minimum that she acted diligently because against the interest in presentation of claims and defenses are countervailing interests in discouraging delay and in the need for finality of judgments. See, e.g., Katz v. Pierce, 732 P.2d 92, 93 n.2 (Utah 1986). Thus, a motion to set aside a judgment is properly denied due to lack of diligence of the moving party. See, e.g., Classic Cabinets, Inc. v. All America Life Insurance Co., 1999 UT App 88, ¶¶ 14-16, 978 P.2d 465; Charlie Brown Construction Co. v. Leisure Sports Inc., 740 P.2d 1368, 1370-71 (Utah Ct. App.), cert. denied, 765 P.2d 1277 (Utah 1987); Katz, 732 P.2d at 93-94; Gardiner and Gardiner Builders v. Swapp, 656 P.2d 429, 429-30 (Utah 1982); Airkem Intermountain v. Parker, 30 Utah 2d 65, 513 P.2d 429, 431 (1973) ("The movant must show that he has used *due diligence* and that he was prevented from appearing by circumstances over which he had no control." (Emphasis in original)). This is not a case of a short and understandable lapse in responding to a claim, see Lund v. Brown, 2000 UT 75, ¶¶ 5-6, 19, 11 P.3d 277 (claim "arguably barred . . . under the [federal bankruptcy] stay" so relief appropriate in light of "good faith, legitimate belief that no action would be taken" and motion "shortly" after receipt of default judgment only three weeks after entry of default),<sup>5</sup> but rather a disappearance by the plaintiff after filing her

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<sup>5</sup>The cases cited by Terpening do not come close to providing authority that the trial court was required to grant the extreme sort of relief Terpening sought over three years after entry of the judgment. In most of the cases, the trial court was affirmed including (in alphabetical order): Airkem Intermountain v. Parker, 30 Utah 2d 65, 513 P.2d 429, 431 (1973) (denial of motion made 25 days after judgment); Bish's Sheet

claim even after an order-to-show-cause “wake-up call” from the trial court.

Terpening offers no justification whatsoever for her utter failure to prosecute her claim, which resulted in her failure to seek relief from the judgment of dismissal within a reasonable time. On the contrary, she seeks to take advantage of the way in which her failure to pursue her claim led to her claimed delay in acquiring actual knowledge of the dismissal. She completely ignores her earlier constructive notice, at least, of the dismissal that existed because of her actual knowledge of the express and implied warnings to her in connection with the trial court’s order-to-show-cause proceedings and because she would have learned of the dismissal long before in the same manner that she eventually did had she

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Metal Co. v. Luras, 11 Utah 2d 357, 359 P.2d 21 (Utah 1961) (direct appeal); Classic Cabinets, Inc. v. All America Life Insurance Co., 1999 UT App 88, ¶¶ 14-16, 978 P.2d 465 (denial of motion made about 18 months after judgment); Katz v. Pierce, 732 P.2d 92, 93 n.2 (Utah 1986) (denial of motion made two weeks after judgment); Lincoln Benefit Life Insurance Co. v. D.T. Southern Properties, 838 P.2d 672, 673-75 (Utah Ct. App. 1992) (denial of motion made 6 months after judgment); State ex rel. Department of Social Services v. Musselman, 667 P.2d 1053, 1056 (Utah 1983) (denial of motion made 30 days after judgment due to lack of meritorious defense) (plurality opinion); Warren v. Dixon Ranch Co., 123 Utah 416, 260 P.2d 741, 744 (1953) (denial of motion made 64 days after default despite affidavits reflecting circumstances, including serious illness of defendant’s representative and plaintiff’s attorney’s oral promise of extension of time to answer, such that “the trial court could have, in its discretion, set aside the judgment”). In Helgesen v. Inyangumia, 636 P.2d 1079, 1080-82 (Utah 1981), the motion came only 16 days after entry of judgment and the defendant had reasonably understood from negotiations between the parties that no default judgment would be taken while it awaited receipt of medical records promised by the plaintiff. Similarly, in Olsen v. Cummings, 565 P.2d 1123, 1124-25 (Utah 1977), the motion was made only 25 days after entry of the judgment and the court held that in the circumstances of the case, including negotiations, “the unilateral termination of the extension [of time to answer the complaint] buried in the letter dealing with the accounting, did not give defendants adequate notice of the status of the action” such that “their failure to respond constituted excusable neglect.”



timely pursued her case. Terpening's argument that "[b]oth parties continued to act as if the case remained open and actively litigated it by conducting discovery, by supplying and requesting information to the respective counsels, and by offering settlement proposals," Terpening Brief at 11, is not supported by the record. Although there was limited activity after the dismissal (almost all of it within the one-year period after entry of the dismissal during which Terpening might have sought to rely on the savings statute of Utah Code Ann. § 78-12-40), the complete cessation of all activity soon after that was more consistent with how parties would be expected to act if the case were closed. Indeed, an RTM motion to dismiss due to Terpening's failure to prosecute would have been appropriate if the case had been in fact open. Assuming for argument that Terpening continued to believe that the case was open, both before and after the complete cessation of all activity, she never "actively litigated it." The record reflects no discovery initiated by Terpening, no information that she requested, no settlement offer made to her, and no formal or informal attempt to schedule proceedings in the case with the trial court or counsel.

Thus, Terpening's argument that her motion was timely based on a "history" of the case that only goes as far back as September 2003 when her new counsel realized the case had been dismissed years before, see, e.g., Terpening's Brief at xvi, 10-11, ignores that she should have learned of the dismissal long before that. By her logic, instead of picking up the case again in September 2003, she could have let the case sit for another three years, or ten, and would still have been entitled to have the dismissal set aside on the technical ground she claims. The trial court correctly denied Terpening's motion based on her years of

essential abandonment of her case.

***3. The claimed reasons for Terpening's motion do not satisfy the requirements of Utah Rule of Civil Procedure 60(b) due to the three-month limitation applicable to motions for relief for reasons recognized in Rule 60(b)(1)-(3) or the "extraordinary circumstances" requirement applicable to Rule 6(b)(6).***

Terpening argues that because "the reasons for setting aside dismissal of Terpening's case were properly governed under Rule 60(b)(6), and her motion was not limited by a three-month time limitation[,]. . . the Trial Court abused its discretion in holding that Terpening's motion should fail due to untimeliness." Terpening Brief at 11-12. On the contrary, the trial court did not determine whether Terpening's motion failed due to the three-month requirement applicable to a motion for relief "for reasons (1), (2), and (3)" of Rule 60(b)<sup>6</sup> because Terpening's motion failed to satisfy the overriding requirement discussed above that she exercise appropriate diligence to ascertain the entry of judgment and make any motion regarding it within a reasonable time.

The three-month limitation, however, does provide further support for the ruling of the trial court because Terpening's motion effectively seeks relief under Rule 60(b)(1) for her claimed "mistake, inadvertence, surprise, or excusable neglect" in failing to ascertain until September 2003 the entry of judgment in August 2000. Notwithstanding Terpening's acknowledgment of the trial court's minute entry that "[i]f no pleadings are filed within the

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<sup>6</sup>One indication of the relatively great importance placed on finality of judgments in Utah procedure is that the three-month limitation is four times shorter than the corresponding limitation in federal procedure. Compare Utah R. Civ. P. 60(b) (three months) with Fed. R. Civ. P. 60(b) (one year).

allotted time [thirty days], the Court will automatically dismiss this case,” Record at 24 (Addendum at 3), Terpening neglected to take the minimal step of seeing that a filing occurred within the thirty-day period. Terpening attempts to excuse her neglect by arguing that she “understood this directive to mean that the parties must take some action in furthering the case along” and that she “believed that the [Amended] Notice[, which merely canceled a scheduled deposition date, Record at 91,] had been filed with the court and the Court’s order regarding a filing had been fulfilled.” Terpening Brief at 4. Terpening’s conjecture that mere cancellation of a scheduled deposition date fulfilled the trial court’s directive reflected in the order-to-show-cause hearing minute entry was unreasonable, and Terpening in any event failed to check the Court file, which could have been accomplished by a simple telephone call, to see if the amended notice actually was filed with the trial court and if the trial court in any event may have considered such an inconsequential filing insufficient to avoid dismissal.<sup>7</sup> Terpening made a mistake and claims to be surprised by the

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<sup>7</sup>Even if Terpening’s motion were construed to include a claim of “misconduct” of RTM in not assuring that the amended notice made it to the trial court’s file, that ground would come within Rule 60(b)(3) and her motion still would be barred by the three-month requirement of Rule 60(b).

Federal district court local rules bar the court record from being burdened with filing of various discovery documents, including notices of deposition. See DUCivR 26-1(b)(1)(B). Utah court rules bar filing of some discovery documents, see Utah R. Civ. P. 26(i), but do not appear to include an express bar of filing notices of deposition. Although the record does not establish why the original amended notice was not placed in the trial court’s file, a different understanding of the rules or a simple error by the person responsible at the time for filing documents with the trial court seems a likely explanation.

dismissal because of her neglect, including “failure to check with the clerk,”<sup>8</sup> see West v. Grand County, 942 P.2d 337, 341-42 (Utah 1997) (interpreting former Rule 77(d)), and her long-term neglect of the case as a whole even after the trial court’s warning through the order to show cause that the case needed to be moved along.

Rule 60(b)(6) cannot be used to circumvent the three-month requirement applicable to such a motion fairly within the scope of Rule 60(b)(1). See Lincoln Benefit Life Insurance Co. v. D.T. Southern Properties, 838 P.2d 672, 675 (Utah Ct. App. 1992) (notwithstanding failure of counsel to mail a copy of the default judgment as required by Utah Rules of Civil Procedure 58A(d) and 5(a) and seven-week delay in notice of judgment through supplemental proceedings, grounds asserted for relief from judgment held to fall within subsection (1)); Kessimakis v. Kessimakis, 546 P.2d 888, 888-89 (Utah 1976) (notwithstanding that motion was based in part on claimed failure to receive a copy of judgment, motion five and two-thirds months after entry of judgment held too late due to three-month limitation); see also, e.g., Classic Cabinets, Inc. v. All American Life Insurance Co., 1999 UT App 88, ¶¶ 14-15, 978 P.2d 465 (defendant’s argument that summons and complaint were not properly forwarded fell within Rule 60(b)(1) so motion properly denied for failure to file within three months); Richins v. Delbert Chipman & Sons, 817 P.2d 382, 386-87 (Utah Ct. App. 1991) (due to the three-month limit of Rule 60(b)(1), no jurisdiction

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<sup>8</sup>Had Terpening brought her motion within three months, no circumstances are claimed by Terpening that would have made the violation of her "duty to check with the clerk periodically to determine whether orders have been entered" excusable. See West, 942 P.2d at 340-41.

to consider motion filed more than fifteen months after entry of judgment).

In addition, Rule 60(b)(6) ""should be very cautiously and sparingly invoked by the Court only in unusual and exceptional circumstances.""<sup>9</sup> Lincoln Benefit Life Insurance Co. v. D.T. Southern Properties, 838 P.2d 672, 674 (Utah Ct. App. 1992) (citations omitted); accord Ackermann v. United States, 340 U.S. 193, 202 (1950) ("extraordinary circumstances" requirement). Applying that principle under federal law, courts have held that such "extraordinary circumstances" do not exist where there is mere lack of notice of the judgment, see, e.g., 12 J. Moore, Moore's Federal Practice § 60.48[6][b] at 60-186 (3d ed. 2004), or fault on the part of the moving party, 12 J. Moore, Moore's Federal Practice § 60.48[3][c] (3d ed. 2004) at 60-173, including a party's failure to avail itself of pre-judgment opportunities to litigate, id. at 60-174.1 n.25 citing In re Zimmerman, 869 F.2d 1126, 1128 (8<sup>th</sup> Cir. 1989). Extraordinary relief under Rule 60(b)(6) was not merited given Terpening's utter failure to prosecute her claim, including failure for years to check with the clerk for any judgment of dismissal and to pursue any discovery or the trial court's invitation to schedule pre-trial proceedings or certify the case ready for trial.

***4. Rule 5(a)(2)(D) and Rule 58A(d) of the Utah Rules of Civil Procedure have no application to this case, and it was proper to charge Terpening with notice that she would have had but for her failure to prosecute her claim.***

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<sup>9</sup>The provision that Lincoln refers to as "Subsection (7)" is now Rule 60(b)(6) due to the 1998 amendment that eliminated the former Rule 60(b)(4). Advisory Committee Note to Utah R. Civ. P. 60. In connection with that amendment, the advisory committee considered that the former Rule 60(b)(4) basis for a motion was not found in the federal rule. Id. However, despite this recent consideration of the federal rule, Utah's shorter three-month limitation was retained. See note 6 above.

Terpening notes that “Rule 5(a)(2)(D) states that a party in default<sup>[10]</sup> for any reason shall be served with notice of entry of a judgment under Rule 58A(d) [of the Utah Rules of Civil Procedure,]” Terpening’s Brief at 7 (brackets added); see also Record at 33. However, Rule 58A(d) does not apply to a judgment drafted and entered by the court itself because notice of entry of a judgment under the express language of Rule 58A(d) is only required to be given “by the party preparing [the judgment].”<sup>11</sup> In the trial court, Terpening completely failed to address this point but now appears to more broadly assert for the first time on appeal, with no other reference to the language of Rule 5(a), that “[e]ven though RTM was not the ‘party’ preparing the judgment due to the Trial Court’s action on its own motion, Terpening still should have received proper notice of the dismissal from the Trial Court under the Utah Rules of Civil Procedure 5(a).” Terpening failed to present that

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<sup>10</sup>Terpening does not appear to have been a party “in default,” which is defined as one “against whom a judgment for affirmative relief is sought.” See Utah R. Civ. P. 55. RTM merely answered the complaint but filed no counterclaim to seek affirmative relief, see Record at 13 (Answer (3/23/99)), and indeed the August 10, 2000 dismissal granted no affirmative relief, Record at 25 (Addendum at 4).

<sup>11</sup>For similar reasons, New York Life Insurance Co. v. Brown, 84 F.3d 137, (5<sup>th</sup> Cir. 1996) is inapposite because in that case the party was deprived of all notice of the summary judgment proceedings, not just the resulting judgment. New York Life also addressed a claim under Rule 60(b)(4) that the judgment was void, a ground for relief that Terpening did not present to the trial court and has not argued on appeal. See Record at 30-35 and Terpening Brief at xv, 1. Callon Petroleum Co. v. Frontier Insurance Co., 351 F.3d 204, 210 (5<sup>th</sup> Cir. 2003) distinguished New York Life and denied relief in circumstances in which the defendants “were fully aware of the summary judgment proceedings and had a fully adequate opportunity to be heard . . .” and defendants’ representative had “ample time to present in a more timely manner his arguments for Rule 60(b) relief.” Here, Terpening does not deny receiving the trial court’s order to show cause and admits appearing before the trial court at the order-to-show-cause hearing. Thus, Terpening knew of the proceedings themselves and only questions, belatedly, their result.

argument to the trial court and should not be permitted to present it now. See, e.g., State v. All Real Property, 2004 UT App 222, ¶ 13 & n.7, 95 P.3d 1211 (affirming denial of Rule 60(b) motion). Also, Rule 5(a), in contrast to the former Rule 77(d), expressly does not refer to the court clerk and only applies except as “otherwise directed by the court.”<sup>12</sup>

Even assuming the trial court should have mailed a copy of the dismissal to Terpening, her conclusion that “Utah Rule of Civil Procedure 5(a) required a reversal of the dismissal for lack of proper notification,” Terpening Brief at 8, is unfounded. Rule 5(a) contains no such requirement of “reversal” as relief in the trial court from a judgment is governed by Rule 60(b). See Lincoln Benefit Life Insurance Co. v. D.T. Southern Properties, 838 P.2d 672, 675 (Utah Ct. App. 1992) (affirming denial of Rule 60(b) motion for relief after an admitted failure of counsel to comply with Rules 5(a) and 58A(d) by mailing a copy of the judgment). As discussed above, there were ample reasons for charging Terpening with constructive notice of the dismissal long before her motion to set it aside, and relief under Rule 60(b) was properly denied for the reasons stated by the trial court.

***5. The savings statute, Utah Code Ann. § 78-12-40, does not support Terpening.***

Far from supporting Terpening, the relief available to Terpening under the savings

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<sup>12</sup>Terpening’s cursory and unsupported analysis of reasons that she arguably was entitled to additional notice of the dismissal invites this Court to undertake “the burden of argument and research” with respect to that issue. Particularly in this case, which arises primarily due to Terpening’s lack of diligence, the Court should not consider the issue further. See, e.g., State v. Thomas, 1999 UT 2, ¶ 11, 974 P.2d 269 (“[A] reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research.” (brackets in original) (citations omitted)).

statute of Utah Code Ann. § 78-12-40<sup>13</sup> expired over two years prior to her motion for relief from the judgment. The legislature easily could have provided that the one-year period allowed by the statute not run until notice of entry of the judgment, but instead the statute is expressly drafted to begin to run from the “reversal or failure” with no requirement of notice. This makes sense, particularly in light of the party’s “duty to check with the clerk periodically to determine whether orders have been entered,” see West v. Grand County, 942 P.2d 337, 340-41 (Utah 1997). Neither Utah Code Ann. § 78-12-40 nor Rule 60(b) requires the technical relief so late in time that Terpening seeks regardless of her lack of diligence.

Moreover, the savings statute provides additional support for the trial court’s order. In the one year after entry of the dismissal, Terpening’s only claimed activity is transmittal of some medical records on September 22, 2000 and, more than three and one-half months prior to the one-year anniversary of the dismissal, the April 19, 2001 settlement proposal that expired at 5:00 p.m. on May 1, 2001,” Record at 104, 154. Having failed for months to heed the trial court’s insistence that she move the case forward and by continuing to do nothing even after her offer expired unaccepted, not only for the next three months, but over the next two years and five months, Terpening’s failure to take action within one year was just

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<sup>13</sup>Utah Code Ann. § 78-12-40 states:

If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.



another consequence of her own lack of diligence. The underlying policy of the savings statute as well as other statutes of limitation and other rules requiring reasonable prosecution of claims,<sup>14</sup> including the trial courts' management of their docket through orders to show cause, see Utah Rule of Judicial Administration 4-103, and time limitations imposed by Rule 60(b), are contrary to Terpening's assumption that no harm is likely to occur from forcing defense of claims based on evidence that has grown old and stale and, to an extent that is impossible to know with precision, has been lost due to Terpening's failure to go forward.<sup>15</sup> In balancing the conflicting interests of the parties before it, the trial court in a reasonable exercise of its discretion simply refused to spare Terpening from consequences of her own conduct from which she could have protected herself had she acted with minimal diligence in prosecuting her case.

*6. Terpening's failure to meet the requirements of Rule 60(b) to the satisfaction of the trial court is not excused by the nature of the claim, which in any event is of questionable merit.*

As the trial court properly found that Terpening was not otherwise entitled to relief under Rule 60(b), the trial court properly did not consider the merits of the case. Record at 167-68 (Addendum at 5-6); see, e.g., Classic Cabinets, 1999 UT App at ¶ 16 n.5; Board of

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<sup>14</sup>See, e.g., Country Meadows Convalescent Center v. Utah Department of Health, 851 P.2d 1212, 1214 (Utah Ct. App. 1993) (affirming dismissal with prejudice under Utah R. Civ. P. 41(b) for failure to prosecute).

<sup>15</sup>In addition, with plaintiff's delay, RTM's attorney, Royal I. Hansen, who handled the case to conclusion, is no longer available due to having been appointed to the bench.

Education v. Cox, 14 Utah 2d 385, 384 P.2d 806, 808 (1963). State ex rel. Department of Social Services v. Musselman, 667 P.2d 1053, 1056 (Utah 1983) (plurality opinion), cited by Terpening, emphasizes the same point.<sup>16</sup>

Plaintiff's claim in any event is of questionable merit. Plaintiff admits being warned that the floor was wet, both by a sign and by seeing a young man mopping. See Response to "Nature of the Case" and "Statement of Facts" above at pp. 3, 6-7. The presence of a wet floor sign has been held to discharge the legal duty of a premises owner. See Bijou v. Circle K General, Inc., 539 So. 2d 730, 731 (La. App. 1989) (trial court ruling). Neither the case cited by Terpening, Merino v. Albertson's, Inc., 1999 UT 14, 975 P.2d 467, which determined as a matter of law that the slip-and-fall claim in that case should have been dismissed, nor any other Utah case holds to the contrary that an owner who has warned of such a temporary condition arising from routine maintenance that reasonably need not pose a danger to one exercising due care appropriate to the warning nonetheless is required to restrict all access or act as an insurer of those who choose to assume the risk. Rather, Massey v. Utah Power & Light, 609 P.2d 937, 937-39 (Utah 1980), affirmed summary judgment dismissal of an injury claim arising out of contact of a telescopic boom on a truck with a power line that the plaintiff claimed was hanging too low. As the risk was known to

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<sup>16</sup>Musselman notes that for a defendant to be relieved from a default judgment (see Utah R. Civ. P. 55 and note 10 above), he must show not only a proper reason under Rule 60(b) and timeliness, but also "a meritorious defense to the action." Musselman, 667 P.2d at 1055-56 (emphasis added). In quoting from Musselman, Terpening changes the word "defense" to the word "claim." Compare Terpening Brief at 2. In fact, Musselman does not address what standard should be applied to evaluation of a claim dismissed after a plaintiff has failed to pursue it.

the plaintiff, the court stated: "If one negligently creates a condition and a subsequent actor observes that condition and negligently fails to avoid it, such subsequent negligence is viewed as an intervening cause which may well become the sole proximate cause of any injury." Id. at 939; see also Lawson v. Salt Lake Trappers, Inc., 901 P.2d 1013, 1014-16 (Utah 1995) (summary judgment dismissing claim of 6-year-old struck by baseball in unscreened area; no breach of duty and assumption of risk as "being struck by a foul ball is "one of the natural risks assumed by spectators attending professional games"" ) (citations omitted). Although Terpening refuses to acknowledge the substantial difficulties with her claim, her failure to prosecute her case over such a long period of time speaks volumes.

### CONCLUSION

The trial court refused to set aside the dismissal of this case more than three years before Terpening's motion for relief from it because of Terpening's own "failure to meet [her] burden to move the case forward." Record at 168 (Addendum at 6). That decision was well within the discretion of the trial court and should be affirmed.

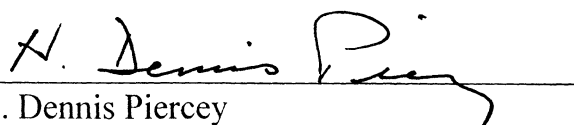
Dated: December 22, 2004.

MOYLE & DRAPER, P.C.

and

H. Dennis Piercey

Attorneys for RTM Restaurant Group  
and RTM Operating Company

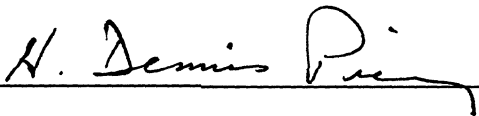
  
H. Dennis Piercey

**CERTIFICATE OF SERVICE**

I certify that on December 22, 2004, I mailed two copies of this **BRIEF OF APPELLEES RTM RESTAURANT GROUP AND RTM OPERATING COMPANY** to:

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Attorneys for Marlene Terpening

  
\_\_\_\_\_

THIRD DISTRICT COURT-SALT LAKE COURT  
SALT LAKE COUNTY, STATE OF UTAH

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MARLENE A TERPENING,	:	NOTICE OF
Plaintiff,	:	ORDER TO SHOW CAUSE
	:	
vs.	:	Case No: 990900024 PI
	:	
RTM RESTAURANT GROUP et al.,	:	Judge: WILLIAM B. BOHLING
Defendant.	:	Date: June 16, 2000

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ORDER TO SHOW CAUSE is scheduled.

Date: 07/07/2000

Time: 09:00 a.m.

Location: Fourth Floor - W42  
THIRD DISTRICT COURT  
450 SOUTH STATE  
SLC, UT 84111-1860

Before Judge: WILLIAM B. BOHLING

On its own motion, the Court orders the parties to appear on said date and time and show cause why this case should not be dismissed for failure to prosecute. By failing to appear, the Court will enter an order of dismissal without further notice.

CASES ON THE ORDER TO SHOW CAUSE CALENDAR WILL NOT BE CONTINUED. DO NOT CALL THE COURT. TO AVOID APPEARANCE OR DISMISSAL, you may submit a request for scheduling conference or a certificate of readiness for trial in writing 10 days prior to hearing.

Dated this 17 day of June, 2000.

  
\_\_\_\_\_

District Court Deputy Clerk

Record at 22  
Addendum at 1

Case No: 990900024  
Date: Jun 16, 2000

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CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 990900024 by the method and on the date specified.

METHOD	NAME
Mail	THOMAS SCHAFER ATTORNEY PLA 2180 SOUTH 1300 EAST SUITE 520 SALT LAKE CITY, UT 841060000
Mail	ROYAL I. HANSEN ATTD City Centre I Suite 900 175 East Fourth So. Salt Lake City UT 84111

Dated this 17 day of June, 2000.

Uwate  
Deputy Court Clerk

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) during this proceeding should call Third District Court-Salt Lake at 238-7300 at least three working days prior to the proceeding.

Record at 23  
Addendum at 2

THIRD DISTRICT COURT-SALT LAKE COURT  
SALT LAKE COUNTY, STATE OF UTAH

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MARLENE A TERPENING,	:	MINUTES
Plaintiff,	:	ORDER TO SHOW CAUSE
	:	
	:	
vs.	:	Case No: 990900024 PI
	:	
RTM RESTAURANT GROUP Et al,	:	Judge: WILLIAM B. BOHLING
Defendant.	:	Date: July 7, 2000

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Clerk: melbar

PRESENT

Plaintiff's Attorney(s): THOMAS SCHAFFER

Defendant's Attorney(s): ROYAL HANSEN

Video

Tape Number: 9:32 A.M.

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HEARING

TAPE: 9:32 A.M. On record This case is granted a thirty day continuance. If no pleadings are filed within the allotted time, the Court will automatically dismiss this case.

Record at 24  
Addendum at 3

THIRD DISTRICT COURT-SALT LAKE COURT  
SALT LAKE COUNTY, STATE OF UTAH

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MARLENE A TERPENING,	:	MINUTES
Plaintiff,	:	INCOURT NOTE
	:	
	:	
vs.	:	Case No: 990900024 PI
	:	
RTM RESTAURANT GROUP Et al,	:	Judge: WILLIAM B. BOHLING
Defendant.	:	Date: August 10, 2000

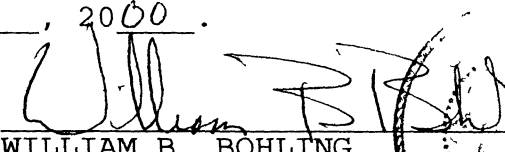
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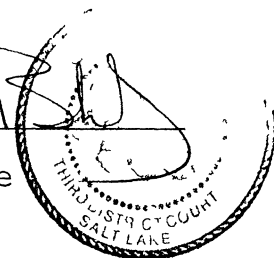
Clerk: melbar  
Video

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On the Court's own motion, this case is ordered to be dismissed without prejudice, based on the Court's OSC for dismissal.

Dated this 10 day of August, 2000.

  
WILLIAM B. BOHLING  
District Court Judge



Record at 25  
Addendum at 4



**FILED DISTRICT COURT**  
Third Judicial District

MAR 24 2004

SALT LAKE COUNTY

By                      Deputy Clerk

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

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MARLENE A. TERPENING,	:	MINUTE ENTRY DECISION
	:	AND ORDER
Plaintiff,	:	
	:	CASE NO. 990900024
vs.	:	
RTM RESTAURANT GROUP, a Georgia :	:	
corporation, RTM OPERATING	:	
COMPANY, a Delaware corporation,:	:	
Defendants.	:	

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Before the Court is plaintiff's Motion to Set Aside Default Judgment.

Having considered the parties' Memoranda, and good cause appearing, the Motion is denied. The basis for the Court's decision is well articulated in defendants' Memorandum in Opposition to the Motion.

The case is now more than five years old. Plaintiff's activity has been minimal, almost nonexistent in the last several years. Plaintiff's failure to discover the dismissal for several years alone is evidence of plaintiff's lack of prosecutorial diligence.

Record at 167  
Addendum at 5


TERPENING V.  
RTM RESTAURANT GROUP

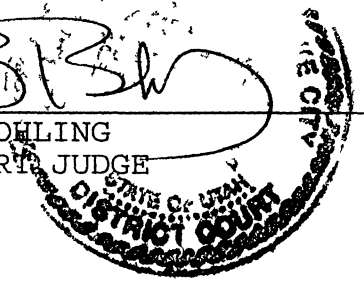
PAGE 2

MINUTE ENTRY

In short, the docket reveals plaintiff's failure to meet its burden to move the case forward. Accordingly, the dismissal was appropriate

Dated this 23 day of March, 2004.

  
WILLIAM B. BOWLING  
DISTRICT COURT JUDGE



**MAILING CERTIFICATE**

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 24 day of March, 2004:

J. David Pearce  
David N. Kelley  
Attorneys for Plaintiff  
215 S. State Street, 12<sup>th</sup> Floor  
P.O. Box 510210  
Salt Lake City, Utah 84151

Wayne G. Petty  
Attorney for Defendants  
175 East 400 South, Suite 900  
Salt Lake City, Utah 84111

H. Dennis Piercey  
Attorney for Defendants  
938 Greenwood Terrace  
Salt Lake City, Utah 84105



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