1993

Charles C. Brown v. Nu Skin International Inc, a Utah Corporation : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH SUPREME CO

CHARLES C. BROWN

Plaintiff

vs.

NU SKIN INTERNATIONAL INC.,
Utah corporation,

Defendant/Appellee,

and

vs.

RONEY,

Defendant.

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BRIEF OF APPELLAN

An appeal from the decision
Rokich, Third District Court, State of

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IN THE UTAH SUPREME COURT

CHARLES C. BROWN

Plaintiff/Appellant,

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NU SKIN INTERNATIONAL INC.,
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vs.

NEDRA RONEY,

Defendant.

Appellate Case No. 92 0412
Argument Priority 16

BRIEF OF APPELLANT

An appeal from the decision rendered by Judge John A. Rokich, Third District Court, State of Utah.

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JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction in this matter pursuant to Section 78-2-2(3)(j), Utah Code Annotated, 1953 as amended and Rule 3(a), Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES

I.

Whether service of process was sufficient giving the trial court jurisdiction to enter the default judgment. The standard of review is whether the judge acted in accord with the law; the judge is not allowed any discretion, and no deference is given to the judge's ruling. State Dept. of Social Service v. Vijil, 784 P.2d 1130 (Utah 1989).

II.

Whether defendant adequately met its burden of proof and persuasion in its motion to overcome the presumption of valid jurisdiction. The standard of review is whether the judge acted in accord with the law; the judge is not allowed any discretion, and no deference is given to the judge's ruling. State Dept. of Social Service v. Vijil, 784 P.2d 1130 (Utah 1989).

III.

Whether service of process upon Nu Skin's employee was valid under the doctrine of apparent authority. The standard of review is whether the judge acted in accord with the law; the

judge is not allowed any discretion, and no deference is given to the judge's ruling. State Dept. of Social Service v. Vijil, 784 P.2d 1130 (Utah 1989).

IV.

Whether the Judge abused his discretion in denying counsel the opportunity to argue against the motion, in summarily granting the motion to quash service of process, and in denying counsel the opportunity to take discovery, including the deposition of Rob Mullins of Nu Skin. The standard of review is whether the trial court judge abused his discretion. Birch v. Birch, 771 P.2d 1114 (Utah App. 1989); Taylor v. Estate of Taylor, 770 P.2d 163 (Utah App. 1989).

V.

Whether the Judge abused his discretion in awarding attorney fees in the matter. The standard of review is whether the trial court judge abused his discretion. Birch v. Birch, 771 P.2d 1114 (Utah App. 1989); Taylor v. Estate of Taylor, 770 P.2d 163 (Utah App. 1989).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

Counsel believes there are no determinative constitutional provisions, statutes, ordinances or rules in this matter.

STATEMENT OF THE CASE

This is an appeal from the orders of Judge Rokich of the Third District Court of Utah, Salt Lake County, granting the Motion of defendant-appellee Nu Skin International, Inc. ("Nu Skin") seeking to quash service of process following entry of a default judgment against it, and further awarding Nu Skin costs of $1,000.00. The facts relevant to the appeal are that the lawsuit below was filed on January 29, 1992 wherein plaintiff sought recovery against defendant Nedra Roney (not served below) and Nu Skin for damages resulting from claims of Defamation, Intentional Infliction of Emotional Distress, Tortious Interference with Advantageous Economic Relations, Services Provided on Open Account, Collection on a Promissory Note, various Breaches of Agreements and common law Fraud. (See complaint).

In February, 1992, a copy of the summons and complaint, together with an "Acceptance of Service" form, and a letter from appellant's counsel was sent to Mr. Steven Lund, the registered agent for Nu Skin, asking that he sign the Acceptance of Service form and respond to the complaint. (Affidavit of Jeffrey B. Brown, paragraph 2 and copies attached thereto). He chose not to respond to the summons and complaint, but sent it to Nu Skin

counsel in California. Nu Skin counsel also chose not to respond to the complaint. (Affidavit of Steven J. Lund, paragraph 4).

When no response was forthcoming, on March 23, 1992, a Utah County Deputy Sheriff traveled to the Nu Skin's headquarters in Provo, Utah, with instructions to serve Steve Lund, the registered agent for Nu Skin, and if he could not be found, to otherwise comply with the provisions of Rule 4(e)(5), Utah Rules of Civil Procedure. (Affidavit of Sheriff, paragraph 4). Upon arriving at the Nu Skin headquarters, the Deputy was ultimately directed to a Nu Skin employee, Rob Mullins, who expressly represented to the Deputy that he could accept the summons and complaint as part of his official duties. After inquiring into his name and position, and based upon his express representations, the Deputy served Mr. Mullins with the summons and complaint as an agent of the corporation. (Affidavit of Sheriff, paragraphs 6 through 9).

On May 22, 1992, the trial court entered a default judgment against the defendant Nu Skin International, Inc. after it failed to appear in the action, despite being served with legal process and despite having been sent a Notice of Intent to Enter Default by appellant's former counsel. Thereafter, Nu Skin filed a motion to quash service of process--claiming the person served at Nu Skin was not authorized to accept service of process

on behalf of Nu Skin--seeking to set aside the default judgment and seeking an award of attorney fees. Conspicuously absent from discussion in this motion was any discussion or evidence concerning what the Nu Skin employee did with the summons and complaint after he received it. A hearing was held on said motion, during which counsel was denied the opportunity to argue against the motion, and during which the Judge denied counsel the opportunity to take the deposition of Rob Mullins, the Nu Skin employee served. The motion quashing service of process was granted by Judge Rokich, and subsequently the Judge entered an order awarding defendant $1,000.00 in attorney fees, ostensibly for the bad faith of counsel for appellant under Rule 11, Utah Rules of Civil Procedure, in obtaining the default judgment. The court finally ruled on all issues on August 3, 1992, and this appeal was thereafter taken and the Notice of Appeal was filed on September 1, 1992.

SUMMARY OF ARGUMENTS

The service of process in this case was sufficient giving the trial court jurisdiction to enter the default judgment and service of process upon Nu Skin's employee was valid under the doctrine of apparent authority. Further, the defendant Nu Skin failed to adequately meet its burden of proof and persuasion in its motion to overcome the presumption of valid jurisdiction

in having the default judgment set aside. Further, Judge Rokich abused his discretion in denying counsel the opportunity to argue against the motion to set aside the default judgment, in summarily granting the motion to quash service of process and in denying counsel the opportunity to take discovery, including the deposition of Rob Mullins of Nu Skin, the person upon whom service of process was made. Finally, Judge Rokich abused his discretion in awarding attorney fees in the matter against plaintiff's counsel for having the default judgment entered.

ARGUMENT

I., II. AND III.

THE DEFENDANT NU SKIN FAILED TO ADEQUATELY MEET ITS BURDEN OF PROOF AND PERSUASION IN ITS MOTION TO OVERCOME THE PRESUMPTION OF VALID JURISDICTION IN HAVING THE DEFAULT JUDGMENT SET ASIDE.

SERVICE OF PROCESS UPON NU SKIN'S EMPLOYEE WAS VALID UNDER THE DOCTRINE OF APPARENT AUTHORITY.

THE SERVICE OF PROCESS IN THIS CASE WAS SUFFICIENT GIVING THE TRIAL COURT JURISDICTION TO ENTER THE DEFAULT JUDGMENT.

Nu Skin's sole argument for its Motion to Quash service of process was that Rob Mullins, the person served with the Summons and Complaint by Deputy Sheriff JoAnn Murphy of the Utah County Sheriff's Office was not an officer, a managing or general agent, or was not otherwise authorized to receive service of process for Nu Skin. However, in making this argument, Nu Skin

did not submit an Affidavit of Rob Mullins and the trial court refused to allow counsel for appellant to conduct any discovery or take the deposition of Rob Mullins. According to the Affidavit of Deputy Murphy, she traveled to Nu Skin's corporate office in Provo, and was directed to Rob Mullins who stated that he could accept service, that his official title was order processor, but that he had other duties as well. After service of the Summons and Complaint on Mr. Mullins, Nu Skin still failed to make any response or appear in the case and default judgment was sought. An Affidavit of Deputy Murphy, dated May 12, 1992, was filed with the court and a Notice of Intent to default was sent to Nu Skin. After reviewing the Affidavit of Deputy Murphy and Notice of Intent, the trial court entered a default judgment against Nu Skin for failure to appear in the action. This was more than two months after service was completed. Nu Skin attempted to make it appear as though Appellant was using games of deceit or tricks or pulling a fast one on the court in having the default judgment entered. This was not the case as appellant complied with all rules of procedure and practice in having the default certificate and default judgment entered, and further complied with additional requests of the trial court that a Notice of Intent to take Default be sent and further that an

Affidavit of the Deputy Sheriff be obtained explaining why she served the person that she did serve.

Rule 4(e)(5) of the Utah Rules of Civil Procedure (U.R.C.P.) provides that a summons and complaint may be served upon any corporation by delivering a copy thereof to an officer, a managing or general agent, or other agent authorized to receive service or if no such officer can be found then upon the person in charge of such office or place of business.

Nu Skin claimed that the responsibilities and duties of Rob Mullins did not include acceptance of service of process. Nu Skin further claimed that these facts were uncontroverted in the lower court, but without basis in fact. At the trial court level, Nu Skin artfully skirted the issue of what ultimately happened to the summons and complaint served on Rob Mullins. Mr. Lund, the registered agent, merely stated that he had "never been personally served with the Summons and Complaint in the present action." (Affidavit of Steven Lund, paragraphs 3 and 5.) He never stated that he did not receive the copy of the Summons and Complaint that was served upon Rob Mullins. Nowhere is this possibility factually denied. No Affidavit from Mr. Mullins was ever filed with the court in support of Nu Skin's motion. In fact, appellant's counsel requested an opportunity to depose and question Mr. Mullins, but was refused the opportunity to do so by

the court. Nu Skin failed to submit any affidavit or sworn statement by Mr. Mullins concerning his duties and responsibilities, in spite of a sworn affidavit by a Utah County Sheriff Officer, that Mr. Mullins expressly represented to the officer that he had authority to accept service.

Rule 4(e)(5) of the Utah Rules of Civil Procedure (U.R.C.P.) provides that a summons and complaint may be served upon any corporation by delivering a copy thereof to an officer, a managing or general agent, or other agent authorized to receive service or if no such officer can be found then upon the person in charge of such office or place of business. The affidavit of Steven J. Lund does not even deny that Mr. Mullins might have been someone "in charge of such office or place of business." It merely states that he "does not supervise personnel, operations, or any other aspect of Nu Skin's business." (Paragraph 7).

In considering motions to set aside a default judgment, such as Nu Skin's, the issue is essentially one of jurisdiction. Garcia v. Garcia, 712 P.2d 288, 290 (Utah 1986). Unlike motions to vacate default judgments for other reasons, a resolution of a motion to vacate a default judgment based upon lack of jurisdiction is a matter of law, not discretion. State Dept. of Social Services v. Vijil, 784 P.2d 1130, 1132 (Utah 1989).

Further, the opposing party must overcome the presumption of valid jurisdiction. As the Utah Supreme Court noted in Vijil:

> When a judgment, including a default judgment, has been entered by a court of general jurisdiction, the law presumes that jurisdiction exists, and the burden is on the party attacking jurisdiction to prove its absence. [Citations omitted].

Vijil, 784 P.2d at 1133.

While there appear to be no Utah cases directly on point--i.e., concerning service of process based on the apparent authority of a domestic corporation's employee--other jurisdictions have ruled directly on the issue. In those cases, the courts have held that employees with apparent authority to accept service of process will be deemed to have actual authority, and the service of process will be valid.

Illustrative of that sound jurisprudential principle is the case of Leo v. General Electric Co., 111 F.R.D. 407 (E.D.N.Y. 1986), where the court held that service upon a clerical employee who held herself out to be authorized to accept service, was sufficient service of process. In Leo, the process server went to one of G.E.'s many office and was directed by an employee in the main lobby to call Mr. Bob Malool from the lobby phone. Using the phone, the process server spoke with Mr. Malool's secretary who, after meeting him in the lobby, told him she could accept the papers. To his question she answered affirmatively

that she was authorized to accept the papers, and so he served her. G.E. maintained that this service was not valid; however, the court found valid and sufficient service under the doctrine of apparent authority.

The court held that while the secretary was not a "managing agent" under the Rule 4(e)(3), Fed. R. Civ. P. (which is virtually identical to the Rule 4(e)(5) U.R.C.P.), the employee's apparent authority validated the delivery. Where the Utah Rules of Civil Procedure are substantially identical to the Federal Rules, the court will "freely refer to authorities which have interpreted the federal rule." Miller v. Brocksmith, 825 P.2d 690, 693 (Utah App. 1992).

In regard to the employee's apparent authority, the court in Leo noted:

> Although the secretary was not an agent for process under [the Rules], the service was made in a manner which, objectively viewed, was calculated to give the corporation fair notice of the lawsuit...When a process server acts reasonably in serving a corporate employee who displays apparent authority to accept such service, the fault lies with the defendant corporation and service will be upheld. [Emphasis added].

Leo, 111 F.R.D. at 411-412 (quoting Fashion Page Ltd. v. Zurich Insurance Co., 50 N.Y.2d 265, 273-274, 428 N.Y.S.2d 890, 406 N.E.2d 747 (1980). In addition, the Leo court found that the process server acted diligently to effect service of process and stated:

> ...if a corporation is subject to jurisdiction, and if the summons is effectively delivered to a servable official, the better approach is to seek to sustain jurisdiction rather than become bogged down in highly cerebral distinctions between types of agents.

Leo, 111 F.R.D. at 413 (quoting N.Y. Civ. Prac. § 311, McLaughlin Practical Commentary (McKinney 1972). The solid rule set forth in Fashion Page and Leo on apparent authority continue to be followed in New York. The court in M. Prusman, Ltd. v. Ariel Maritime Group, Inc., 719 F.Supp. 214 (S.D.N.Y. 1989), stated:

> Recognizing that a 'process server cannot be expected to know the corporation's internal practices,'...valid service [is found] where 'the process server has gone to [the corporation's] offices, made proper inquiry of the defendant's own employees, and delivered the summons according to their directions.'

Prusman, at 220, quoting Fashion Page, 50 N.Y.2d 265, 406 N.E.2d 747, 751, 428 N.Y.S.2d 890, 894).

In the present case, Deputy Sheriff Murphy went to the corporate offices of the defendant, and there was directed to the floor of Nu Skin's corporate headquarters to effect service. At that location, Mr. Mullins represented to the Deputy that he had authority to accept the summons and complaint on behalf of Nu Skin. As in Leo, the employee expressly represented that he had apparent authority to a process server who was acting properly and diligently. If Rob Mullins did not in fact have actual authority, as Nu Skin only partially contended at the trial court level, the fault leading to the default judgment lies with Nu

Skin and its employees, and service should have been upheld by the trial court judge as a matter of law.

The apparent authority doctrine has also been favorably applied in other jurisdictions to support service, rather than to defeat it on hyper-technical and strained grounds. In Henderson v. Cherry, Beakaert & Holland, 932 F.2d 1410 (11th Cir. 199), the Eleventh Circuit held that service upon a non-partner employee of an accounting firm constituted valid service of process, because the person's "position is such as to afford reasonable assurance that he will inform his principal that such process has been served upon him." Henderson, 932 F.2d at 1412 (quoting Scott v. Atlanta Dairies Coop., 239 Ga. 721, 724, 238 S.E.2d 340, 343 (1977). Similarly, in Merrill Chadwick Co. v. October Oil Co., 725 P.2d 17 (Colo. 1986), the court held that the representation by the secretary of the registered agent, that she had authority to accept service and the fact that she did accept service, was sufficient to uphold service. On that basis, the court denied the motion to set aside the default judgment.

In these cases dealing with apparent authority, courts uphold service where, as in the instant case, it is likely that the notice will reach and does reach the intended party. Indeed, in the present case, the record is factually devoid of any evidence that the summons and complaint served on Mr. Rob Mullins

did not in fact reach the intended party and Nu Skin has failed to meet its burden of proof and persuasion on that critical issue.

It is undisputed, however that the notice was designed to reach Nu Skin through service by a deputy sheriff, after Nu Skin refused to accept service of process through mail sent to Steven Lund, the registered agent of Nu Skin. Nu Skin knew informally of the existence of the complaint, but chose to do nothing in regard to it. After service of process upon Rob Mullins, again Nu Skin failed to take any action to protect it from entry of a default judgment. Only after entry of said judgment, and prior to any action by appellant to enforce said judgment, Nu Skin moved to set aside the default judgment.

Further support for appellant's position is found in Jordan v. United States, 694 F.2d 833 (D.C. Circ. 1982), where, as in our case, service was first attempted by mail. Later, the plaintiff's attorney invoked the process of the U.S. Marshall's office to effect service. The United States moved to quash service as being deficient and not in accord with the rules. The court held:

> Where the necessary parties in the government have actual notice of a suit, suffer no prejudice from a technical defect in service, and there is justifiable excuse for the failure to serve properly, courts should not...constru[e] [the federal rules] so rigidly or...so narrowly.

Jordan, 694 F.2d at 836.

In the present case, Nu Skin received actual notice by mail, which is admitted in the Affidavit of Steven Lund. He further stated that he turned the same over to Nu Skin's attorney, who did nothing with the same. Personal service was subsequently made upon an employee at the corporate headquarters of Nu Skin who expressly represented that he had authority to accept service. Later, a Notice of Intent to take default was mailed to Nu Skin, and then finally, an Affidavit of the Deputy Sheriff was obtained in order to get the court to enter the default judgment. Appellant complied with all of the rules of procedure in obtaining the default.

Nu Skin's technical argument that the employee served was "clerical" and thus could not, under Rule 4(e)(5) U.R.C.P., accept process, is incorrect. While service on a "managing agent" would undoubtedly be effective service under the rules, the fact that an employee is not a "managing agent" does not mean that he may not also accept service. An employee, even a "clerical" employee, may be authorized to accept service and, as the cases quoted abundantly demonstrated, may have apparent authority to accept service even when he has no actual authority. This is particularly so where the employee at corporate

headquarters expressly represents to a diligent process server that he is authorized to accept service.

Whether actual notice, standing alone, is sufficient to assert jurisdiction is not the issue in this case. This case involves actual knowledge of the case through notification sent through the mail, and further service of process on an employee of defendant at the corporate headquarters after that employee has represented to the process server that he was authorized to accept service of process. Further, this case includes the added issue of what happened to the summons and complaint served upon Rob Mullins. The evidence presented by Nu Skin fails to negate the possibility or even the likelihood that Mr. Mullins gave said summons and complaint served upon him to Steven Lund or other authorized agents of Nu Skin, and the trial court action in refusing to allow appellant to take any discovery of Mr. Mullins or Nu Skin denied appellant the opportunity to resolve that issue. Nu Skin is attempting to evade the logical result of its own deliberate inaction. Courts strongly disfavor this kind of conduct. As the Utah Court of Appeals noted in a case where the defendant had artfully avoided service, "personal service should not become a 'degrading game of wiles and tricks."' Wood v. Weening, 736 P.2d 1053, 1055 (Utah App. 1987) (quoting Business &

Prof. Adj. Co. v. Baker, 62 Or.App. 237, 659 P.2d 1025, 1027 (1983).

Furthermore, when a judgment has been entered, including a default judgment, this court has stated that the burden is on the party attacking jurisdiction to prove its absence. State Dept. of Social Services v. Vijil, 784 P.2d 1130, 1132 (Utah 1989). Nu Skin failed to contradict the Affidavit of Officer Murphy. When a law enforcement officer serves papers to a corporate employee at corporate headquarters who has affirmatively represented that he has authority to accept service of process, jurisdiction is presumed, as the trial court properly found in entering the default judgment based on Deputy Murphy's Affidavit. Nu Skin should have been required to come forward and prove the absence of jurisdiction, which it failed to do. As stated above, the Affidavit of Steven Lund, while attempting to refute the Affidavit of Deputy Murphy, fails to do so, and Nu Skin failed entirely to provide proof of what actually happened to the summons and complaint that was served on Rob Mullins.

IV.

JUDGE ROKICH ABUSED HIS DISCRETION IN DENYING COUNSEL THE OPPORTUNITY TO ARGUE AGAINST THE MOTION TO SET ASIDE THE DEFAULT JUDGMENT, IN SUMMARILY GRANTING THE MOTION TO QUASH SERVICE OF PROCESS AND IN DENYING COUNSEL THE OPPORTUNITY TO TAKE DISCOVERY, INCLUDING THE DEPOSITION OF ROB MULLINS OF NU SKIN, THE PERSON UPON WHOM SERVICE OF PROCESS WAS MADE.

At the hearing on Nu Skin's Motion to Quash Service, the trial court refused to allow appellant's former counsel to argue against said motion, stating words to the effect that "You can make your argument, but I have already made my decision." The court further summarily granted the Motion to Quash, and finally denied former counsel for appellant any opportunity to take discovery or a deposition of Rob Mullins in order to ascertain what ultimately happened to the summons and complaint that was served upon him. At this point we still do not know what happened to those, and the evidence provided by Nu Skin artfully skirted that issue entirely. If, as appellant suspects, Rob Mullins turned said summons and complaint over to Steven Lund or another authorized agent of Nu Skin, then appellant's argument that the default judgment should have remained would be drastically bolstered. However, the trial court refused to allow this discovery to occur and in doing so abused its discretion. In general, under Rule 26(b)(1), U.R.C.P.:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party...

Clearly, the issues relating to the service of process on Rob Mullins, whether he has accepted service of process before or after the service in this case, and if so, whether he was ever

reprimanded by his employer for doing so, and what he did with the summons and complaint served upon him in this case are "relevant to the subject matter involved" upon which appellant should have been allowed to take discovery.

If the deposition of Mr. Mullins revealed that he was in charge of Nu Skin's property, operations, business activities, office, place of business, or in some other manner responsible for or with control over the affairs of Nu Skin, then service would be proper under Rule 4 U.R.C.P. Beard v. White, Green and Addison Associates, Inc., 336 P.2d 125 (Utah 1959). This determination should have been made by the lower court, following discovery relating to the same.

Furthermore, the Affidavit of Deputy Murphy states that Rob Mullins approached her and stated that he was authorized to accept service of process. If the deposition of Rob Mullins revealed that he was designated by Nu Skin to accept service of this or other lawsuits, or that he had done so in the past with Nu Skin's knowledge, then also service would have been proper.

Rule 26(c), U.R.C.P., regarding protective orders, states:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending...may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense...including...(1) that the

> discovery not be had...[Emphasis added; portions omitted].

In this case, there was no motion for a protective order made by Nu Skin concerning discovery; there was no good cause shown why the discovery should not be allowed; nor was the discovery anticipated such that would annoy, embarrass, oppress or subject Nu Skin to undue burden or expense. Indeed, there existed no reason to deny appellant the opportunity to take discovery concerning the service of process on Mr. Mullins. In so denying appellant the opportunity to take this discovery, the trial court abused its discretion.

V.

JUDGE ROKICH ABUSED HIS DISCRETION IN AWARDING ATTORNEY FEES IN THE MATTER AGAINST PLAINTIFF'S COUNSEL FOR HAVING THE DEFAULT JUDGMENT ENTERED.

Utah Courts have consistently held that attorney's fees may only be awarded if there is a statutory or contractual basis for the award. Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988); Amica Mut. Ins. Co. V. Schettler, 768 P.2d 950, 965 (Utah App. 1989). In this case, the only provision under which attorney's fees could be awarded is set forth in U.C.A. §78-27-56 (1988), which provides in relevant part:

> In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith.

This statute is a codification of the interpretive rule set forth in Cady v. Johnson, 671 P.2d 149 (Utah 1983), which requires three elements to be met before an award may be granted: (1) that the party requesting the award of fees by the prevailing party; (2) that the action or defense be without merit; and (3) that good faith is lacking. If all three elements are not met, then no award may be granted. Hermes v. Park's Sportsman, 813 P.2d 1221, 1225 (Utah App. 1991). These three elements were not met in the present case.

While it may be presumed, for sake of argument, that Nu Skin was the prevailing party, there is no evidence to support the elements that plaintiff's actions were without merit and that the plaintiff acted in bad faith.

In Cady, the Utah Supreme Court stated that "without merit" and "frivolous" were synonymous and then defined "frivolous" as being "of little weight or importance having no basis in law or fact..." Cady, 671 P.2d at 151. The court also addressed the burden of proof for merit-less actions when it stated that "there [must] be substantial evidence that the [action] was lacking [a] basis in either law or fact and therefore frivolous." Id. at 152.

It is evident that plaintiff's actions were not without merit. The default judgment was entered against Nu Skin in

compliance with all rules of procedure and rules of practice. The plaintiff had an absolute right to obtain a default against a non-responsive party. Thus, not only has there been no showing of "substantial evidence," there has been no evidence of a meritless action. The second element under Cady was not and cannot be met.

Additionally, the third element of bad faith is also lacking. The trial court made a finding of bad faith on the part of plaintiff's counsel premised on the fact that plaintiff did not inform the trial court of the status of Mr. Shuff's [later] claimed representation of Nu Skin and on the fact that plaintiff failed to notify Mr. Shuff of the notice of intent to take default. However, this is not a basis for a finding of bad faith.

Rule 55, U.R.C.P. does not require that any such notice be given. It states:

> ...[I]t shall not be necessary to give such party in default any notice of action taken or to be taken or to serve any notice or paper otherwise required by these rules to be served on a party to the action or proceeding...

This language is clear and unambiguous. A plaintiff is not required to give any notice to a party in default nor to their attorney.

Most importantly, the Utah Supreme Court has squarely ruled that opposing counsel need not be notified prior to taking a default judgment, despite the fact that counsel for both sides had been discussing the very matter in litigation prior to obtaining the default. In Central Bank & Trust Co. v. Jensen, 656 P.2d 1009 (Utah 1982), the plaintiffs filed a complaint on October 23, seeking a judgment for the unpaid balance of the defendants' Master Charge account. A summons and complaint was mailed to the defendants (pursuant to an order granting alternative service) on October 24, but defendants did not respond. On November 5, the defendants' attorney Mr. Schwobe spoke with plaintiff's attorney over the phone. The next day Mr. Schwobe requested copies of the pleadings in a letter to Mr. Young. Mr. Young refused to supply the documents in a letter dated November 14 unless Mr. Schwobe agreed to appear generally in the matter. Mr. Schwobe did not respond nor did he enter a general appearance, apparently in the belief that service of process was deficient.

On December 4, a default judgment was entered against the defendants without any notice regarding the default or any other matter being mailed to or discussed with defendants or their counsel with whom Mr. Young had been actively discussing the case. On December 8, Mr. Schwobe again requested copies of

the pleadings, and on December 31, a copy of the summons and complaint was served upon the defendants at their new address. On January 22 Mr. Schwobe served an answer and counterclaim on Mr. Young, but the answer was returned for failure to attach the counterclaim filing fee. On March 5 defendants answer and counterclaim was filed, and on March 11, plaintiff filed a motion to strike the same on the basis of the default judgment. On March 17, defendants filed a motion to set aside the default judgment alleging defective process and inadequate notice of the default judgment.

To the defendants' contentions in Central Bank that ongoing communications between the attorneys created an obligation to notify opposing counsel of the default, the Utah Supreme Court held that under the clear language of Rule 5, 55 and 77, U.R.C.P., "plaintiff was under no duty to notify defendants of the default." Id. at 1011. The Supreme Court in a unanimous decision further stated:

> We are satisfied that defendants had actual notice of the suit filed against them. Indeed, that fact has never been denied or controverted. The defendants knowingly shirked their duty to respond, and they have no valid basis for setting the default aside.

Id. at 1012.

In the present case, there is no dispute that Nu Skin had actual notice of the suit. As the trial court was advised on

July 21, 1992, plaintiff wanted to further develop the facts surrounding Nu Skin's receipt of the notice of intent to take default, and of the service of the summons and complaint on Rob Mullins. For this purpose, plaintiff requested that he be permitted to depose certain Nu Skin employees. This request was denied in a telephone conference between the parties and the trial court on July 21, 1992.

The court in Central Bank further found that plaintiff's actions "did nothing to lull the defendants into a false sense of security that would justify them in not taking any further action."

The Central Bank case and the present case have a lot of similarities. However, in the present case, the discussions between counsel did not even involve the case in which the default judgment was taken, but rather involved a case pending in California and likewise did nothing to lull the defendants into a false sense of security. (Affidavit of Jeffrey Brown, paragraphs 3 through 5). Further, the Notice of Intent to take Default was sent to Nu Skin International, Inc., c/o Rob Mullins, because counsel believed that was the proper thing to do. It was not sent to Mr. Shuff because it was believed that he would not be involved in the Utah case until and unless plaintiff dismissed his appeal of the California lawsuit. (Affidavit of Jeffrey B.

Brown, paragraph 5). Indeed, counsel complied with Rule 5(b) in mailing the Notice of Intent to take Default directly to Nu Skin, particularly where no counsel had entered an appearance. Apparently the trial court, in its Memorandum Decision dated August 3, 1992, based the award of the attorney fees upon the condition imposed by the court "as a condition to entry of Judgment that notice of intent to take a default judgment be given to a proper party." Apparently, while not specifically stated, the court believed that notice given directly to Nu Skin, c/o Rob Mullins, the person who had been served on behalf of Nu Skin, was not adequate in the court's mind. However, counsel for plaintiff was left at the time with no specific directions as to what was a proper notice, and was penalized later when the trial court unilaterally decided that the notice was improper.

CONCLUSION

The default judgment was properly entered against Nu Skin International, Inc. for its failure to timely respond to the summons and complaint properly served upon its employee at its corporate headquarter who affirmatively represented to the process server that he was authorized to accept service of process. It was an abuse of discretion for the trial court judgment to summarily quash service of process, to deny counsel the opportunity to argue against the motion, to deny appellant

the opportunity to take discovery on the issues surrounding the service of process and notice of intent to take default, and it was an abuse of discretion for the trial court to award attorney fees against plaintiff under the circumstances. The matter should be remanded with directions to the trial court to reinstate the default judgment, and to award no attorney fees to Nu Skin.

DATED this _____ day of February, 1993.

BROWN & BROWN

_____

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Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of February, 1993, I caused to be mailed, first class postage prepaid, four true and correct copies of the foregoing to each party separately represented in care of the following:

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