

1993

Lowell E. Potter v. Century 21 Mining, and OTC Stock Transfer : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

J. Ray Barrios, P.C..

Robert M. McDonald; McDonald, West and Benson; F. Keith Biesinger.

Recommended Citation

Reply Brief, *Lowell E. Potter v. Century 21 Mining, OTC Stock Transfer*, No. 930179 (Utah Court of Appeals, 1993).
https://digitalcommons.law.byu.edu/byu_ca1/5055

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCKET NO. 930179
KF-U
55
JUL 14 1993
DOCKET NO. 930179

IN THE UTAH COURT OF APPEALS

LOWELL E. POTTER,	:	
	:	
Plaintiff/Appellee,	:	REPLY BRIEF
	:	
v.	:	
	:	
CENTURY 21 MINING, and	:	Case No. 930179-CA
OTC STOCK TRANSFER,	:	
	:	
Defendants/Appellant.	:	

APPEAL FROM A FINAL ORDER OF THE THIRD JUDICIAL DISTRICT COURT
THE HONORABLE RICHARD H. MOFFAT, PRESIDING

Robert M. McDonald
MCDONALD, WEST & BENSON
455 East 500 South, #200
Salt Lake City, Utah 84111

J. Ray Barrios, P.C.
First American Title Building
330 East 400 South, #250
Salt Lake City, Utah 84111

F. Keith Biesinger
175 South Main, Suite 550
Salt Lake City, Utah 84111
FILED
Utah Court of Appeals

JUL 14 1993

March

IN THE UTAH COURT OF APPEALS

LOWELL E. POTTER,	:	
	:	
Plaintiff/Appellee,	:	REPLY BRIEF
	:	
v.	:	
	:	
CENTURY 21 MINING, and	:	Case No. 930179-CA
OTC STOCK TRANSFER,	:	
	:	
Defendants/Appellant.	:	

APPEAL FROM A FINAL ORDER OF THE THIRD JUDICIAL DISTRICT COURT
THE HONORABLE RICHARD H. MOFFAT, PRESIDING

J. Ray Barrios, P.C.
First American Title Building
330 East 400 South, #250
Salt Lake City, Utah 84111

Robert M. McDonald
MCDONALD, WEST & BENSON
455 East 500 South, #200
Salt Lake City, Utah 84111

F. Keith Biesinger
175 South Main, Suite 550
Salt Lake City, Utah 84111

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	1
POINT I	
THE EVIDENCE DOES NOT SUPPORT THE CLAIM THAT CENTURY KNEW OF THE ENTRY OF THE DEFAULT JUDGMENT FOR A LONG PERIOD PRIOR TO FILING ITS MOTION TO SET ASIDE THE JUDGMENT	1
POINT II	
NOTICE OF ENTRY OF THE DEFAULT JUDGMENT WAS REQUIRED IN THIS CASE	4
CONCLUSION	5
ADDENDUM	7

TABLE OF AUTHORITIES

<u>Lincoln Benefit Life Insurance Company v. D.T. Southern Properties</u> , 838 P.2d 672 (Utah App. 1992)	4
---	---

STATUTES AND RULES

Rule 58A(d)	5
-------------	---

This brief is submitted by Defendant/Appellant Century 21 Mining (hereinafter "Century") in reply to the brief heretofore filed by Plaintiff/Appellee Lowell E. Potter (hereinafter "Potter").

SUMMARY OF ARGUMENT

The claim that Century knew of the default judgment for a long period before filing its Motion to Set Aside Judgment is not supported by the record and is diametrically opposed to Potter's position in related litigation.

The claim that Potter was not obligated to notify Century of the entry of the default judgment is contrary to the legal authorities on the subject. On the contrary, the legal authorities confirm that Potter had a duty to disclose the entry of the default judgment.

POINT I

THE EVIDENCE DOES NOT SUPPORT THE CLAIM THAT CENTURY KNEW OF THE ENTRY OF THE DEFAULT JUDGMENT FOR A LONG PERIOD PRIOR TO FILING ITS MOTION TO SET ASIDE THE JUDGMENT

In his Brief, Potter repeatedly asserts that Century negotiated with Potter with respect to the default judgment for a long period of time before Century filed its Motion to Set Aside Judgment. The apparent purpose of the claim is to create the appearance that Century knew of the judgment for a

considerable period of time before filing its Motion to Set Aside Judgment.

Potter's claim that Century knew of the judgment by reason of a long period of negotiation is based upon two vague statements in Potter's Affidavit. Each of these statements will be separately addressed to demonstrate the lack of merit to Potter's claims.

The first statement claiming Century's prior knowledge of the judgment is in paragraph 2(e) of Potter's Affidavit wherein he states that the judgment was "disclosed in corporate statements and pro-formas long before this Motion was filed." (R. 73). Copies of the alleged "corporate statements and pro-formas" containing the "disclosures" are noticeably absent from the Affidavit.

In order to demonstrate Potter's bad faith in claiming that Century disclosed the judgment in its corporate financial statements prior to filing the Motion to Set Aside the judgment, Century calls attention of the Court to a complaint which was filed by Potter in related litigation on or about October 6, 1992. In the complaint, Potter asserts the exact opposite position that he takes in his Brief in this action. In paragraphs 7, 8 and 12 of the complaint in the related action, Potter alleged that the existence of the judgment had

not been disclosed in corporate financial statements. A copy of the complaint in the related litigation is attached as Addendum Exhibit "A". Moreover, financial statements produced in the related litigation establish that the judgment was not mentioned in financial statements until 1991, after Century filed its Motion to Set Aside Default Judgment.

The other reference in Potter's Affidavit that Century knew of the judgment at an earlier point in time is contained in paragraph 4 of the Affidavit (R. 73), wherein Potter claims that "Defendants entered into negotiations for settlement of the judgment with me." However, there is no suggestion that such negotiations occurred prior to December, 1989, when Century acknowledged it first learned of the judgment.

The evidence establishes that the first notice that Century received concerning the existence of the default judgment occurred in December, 1989 (Drage Affidavit, ¶ 11, R. 52). It was only after learning of the judgment in December, 1989, that Century attempted negotiations with Potter for a period of approximately two and one-half months. When the negotiations failed, Century filed its Motion to Set Aside on February 26, 1990 (R. 23). Thus, there was no unreasonable delay in filing the Motion to Set Aside.

In reviewing Potter's Affidavit, one further false statement should be noted by the Court. In paragraph 2(a) of his Affidavit (R. 72), Potter claims that the Promissory Note involved in this action was executed in settlement of 1987 action. Such statement could not possibly be true. The 1987 action was filed on March 18, 1987 (R. 43). By Potter's own admission, the Promissory Note involved in this action was executed on February 28, 1986 (Complaint, ¶ 15, R. 4), more than one year prior to the filing of the 1987 action.

POINT II
NOTICE OF ENTRY OF THE DEFAULT
JUDGMENT WAS REQUIRED IN THIS CASE

On page 7 of his brief, Potter argues that in the circumstances of this case, he was not obligated to give Century notice of the default judgment. In support of this argument, Potter cites Lincoln Benefit Life Insurance Company v. D.T. Southern Properties, 838 P.2d 672 (Utah App. 1992). The Lincoln Benefit case provides no support whatsoever for Potter's argument. On the contrary, the Lincoln Benefit case confirms the obligation of a party to provide notice of a default judgment. The decision states that failure to give notice does not invalidate the judgment, but confirms that such failure "is an important factor in determining the

timeliness of post-judgment proceedings, where an exact time is not prescribed."

Century has never asserted that non-compliance with the notice requirements of Rule 58A(d) invalidates the default judgment. However, Century contends that Potter's failure to give notice should be an important factor in determining the timeliness of Century's Motion to Set Aside the default judgment. Thus, the Lincoln Benefit case supports Century's position.

It should further be noted that Defendant in the Lincoln Benefit case received notice of the entry of the judgment in the form of service of an Order and Supplemental Proceedings. In the instant case, Potter took no enforcement action prior to the Motion to Set Aside for the apparent purpose of concealing the existence of the default and thereby inducing Century to delay filing its Motion to Set Aside.

Potter should not be permitted to benefit by any delay in filing Motion to Set Aside inasmuch as his non-compliance with the notice requirements of Rules of Procedure was the cause of such delay.

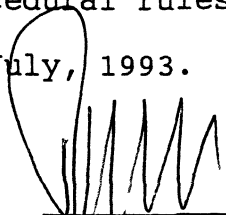
CONCLUSION

The claim that Century knew of the judgment prior to December, 1989, is not supported by the record before the

Court and is diametrically opposed to Potter's position in related litigation. Century first learned of the judgment in December, 1989, and thereafter took appropriate action to assert its rights.

Potter violated his duty to give notice of the entry of the default judgment and should not be permitted to benefit by the delay which was caused by his non-compliance with the express mandates of the procedural rules.

DATED this 14ⁿ day of July, 1993.

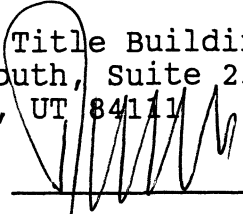


Robert M. McDonald

CERTIFICATE OF SERVICE

I hereby certify that I mailed, postage prepaid, a true and accurate copy of the foregoing Reply Brief this 14ⁿ day of July, 1993, to the following:

J. Ray Barrios
First American Title Building
330 East 400 South, Suite 250
Salt Lake City, UT 84111



ADDENDUM

- EXHIBIT A: Complaint in Related Litigation
- EXHIBIT B: Rule 58A(d), Utah Rules of Civil Procedure

J. RAY BARRIOS, P.C.
FIRST AMERICAN TITLE BUILDING
330 East 400 South, Suite 250
Salt Lake City, Utah 84111
Telephone: (801) 322-3762

Attorney for Lowell E. Potter

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

LOWELL E. POTTER,)	
)	
Plaintiff,)	
)	COMPLAINT
vs.)	
)	
TV COMMUNICATIONS NETWORK,)	
INC. a Colorado corporation,)	
and CENTURY 21 MINING, INC.,)	
a Utah corporation a)	
subsidiary of TVCN, Inc.,)	Civil No. 920905554cv
OMAR A. DUWAIK, individual,)	
and JOHN DOES I-X,)	Judge John A. Rouch
individuals,)	
)	
Defendants,)	

Plaintiff, Lowell E. Potter, above named, for causes of
action as against the above named Defendants, states and alleges
as follows:

PARTIES

1. Defendant TV Communications Network, Inc. is a Colorado
corporation authorized to do business in the State of Colorado
with it's principal place of business in Denver, Colorado, is
registered with the Securities & Exchange Commission, SEC File #
1.

EXHIBIT

A

33-16113-D, and is a publicly traded company.

2. Defendant Century 21 Mining, Inc. is a Utah corporation authorized to do business in Utah and Colorado with its current principal place of business in Denver, Colorado, is registered with the Securities & Exchange Commission as being owned by TV Communications Network, Inc.

3. Defendant Omar A. Duwaik is the President of TV Communications, Inc. and is an individual with his principal place of residence in Colorado.

4. Defendants John Does I-X are officers, directors, and/or persons providing information for the disclosures to the Securities & Exchange Commission, whose names are unknown at the present time.

5. Plaintiff is a resident of the State of Utah, is a stockholder in Century 21 Mining, Inc., and is the creditor beneficiary of a judgment against Century 21 Mining, Inc.

GENERAL ALLEGATIONS

6. Defendants, TV Communications Network, Inc., Century 21 Mining, Inc., and Omar A. Duwaik in his capacity of President of TV Communications Network, Inc. and as an individual have disclosed to the public and the Securities & Exchange Commission that TV Communications Network, Inc. has purchased a controlling interest of Century 21 Mining, Inc., and that such purchase has resulted in the following:

(a) That the assets of Century 21 Mining, Inc. are part of the assets of TV Communications Network, Inc.;

(b) That Century 21 Mining, Inc. owns 1060 Acres of a mining property located in Sierra County, California, known as the Mountain House Mine;

(c) That total outstanding liabilities of Century 21 Mining, Inc. were all negotiated and settled, or to be settled for transfer of stock in TV Communications Network, Inc.;

(d) That the assets of the two corporations as combined included all notes and/or judgment payable as disclosed.

7. The Defendants, and each of them, knew the above stated facts to be false, yet did not include any information regarding a judgment obtained by Plaintiff against Century 21 Mining, Inc. on December 15, 1988 in the amount of \$90,000.00 with interest accruing at the rate of 18% per annum.

8. Defendants, and each of them, knew of the Plaintiff's judgment, and the fact that Plaintiff and Defendants had not reached any settlement regarding such judgment, yet failed to disclose the amount judgment or the fact that such judgment had not been settled or satisfied.

11. The California mining claims were not owned by Century 21 Mining, Inc. at the time of disclosure, and whatever asset value such mining claims have or may have, which have been disclosed on the TV Communications Network, Inc. 10-Q filings to the Securities & Exchange Commission, could not properly be used as an asset on the books and financial disclosures of either Century 21 Mining, Inc. or TV Communications Network, Inc.

10. Such failure to disclose material, or to disclose false,
3.

information to potential buyers, and to the Securities & Exchange Commission was done so by Defendants knowingly.

FIRST CAUSE OF ACTION

11. Plaintiff incorporates by this reference paragraphs 1 through 10 above as if each were set forth at length herein.

12. Defendants knowingly and fraudulently failed to disclose that Plaintiff had a money judgment against Century 21 Mining, Inc. that had not been settled or satisfied at the time of the disclosure of assets and liabilities of Century 21 Mining, Inc. to the public and to the Securities & Exchange Commission.

13. Such information was and is material information as to knowledge regarding the financial condition of the companies, Century 21 Mining, Inc. and TV Communications Network, Inc.

14. Such failure to disclose such material information violates the Securities Exchange Act of 1934, as amended, as it read at the time of the false disclosures, and/or omissions.

15. Plaintiff, as a stockholder of Century 21 Mining, Inc. has been damaged in that the claimed recorded interest of TV Communications, Inc. in Century 21 Mining, Inc. of 65.3% of the book value of Century 21 Mining, Inc. of \$5,000,000.00 does not exist, and Plaintiff's stock is essentially worthless.

16. Defendant, TV Communications Network, Inc. offered to all stockholders of Century 21 Mining, Inc. an exchange of TV Communications, Inc. stock for Century 21 Mining, Inc. stock based upon using the claimed Century 21 Mining, Inc. asset, the

"Mountain House Mine", as a major asset in TV Communications, Inc. finalcial statement to induce the exchange.

17. The offer was not made to Plaintiff, as a holder of two-million shares of Century 21 Mining, Inc. stock pursuant to the 1988 Judgment.

18. Plaintiff has been damaged to the extent of the false disclosures and/or omission concerning the claimed "Mountain House Mine" asset, and for the failure to exchange Plaintiff's stock pursuant to TV Communications, Inc. offer, in the amount of \$500,000.00 or such other greater amount as to be proven at trial of this cause.

SECOND CAUSE OF ACTION

19. Plaintiff incorporates by this reference paragraphs 1 through 18 above as if each were set forth at length herein.

20. TV Communications Network, Inc. and/or Century 21 Mining, Inc. as owned by TV Communications Network, Inc. has failed and refused to satisfy the Judgment of Plaintiff and has rendered the assets and stock of Century 21 Mining, Inc. worthless so Plaintiff cannot satisfy his judgment through the assets of Century 21 Mining, Inc.

21. Plaintiff seeks a permanent injunction against the further dissipation of the assets of Century 21 Mining, Inc. by TV Communications Network, Inc. to protect the judgment of Plaintiff against Century 21 Mining, Inc.

22. Plaintiff will be irreparably harmed if TV

Communications Network, Inc. is allowed to continue to disclose to the public that the assets of Century 21 Mining, Inc. are part of it's assets when the largest part of such assets are claimed to be in the California mining claims which are not owned by either TV Communications Network, Inc. or Century 21 Mining, Inc. (See Exhibit "A", TVCN 1991 Annual Report, attached hereto).

THIRD CAUSE OF ACTION

23. Plaintiff incorporates by this reference paragraphs 1 through 22 above as if each were set forth at length herein.

24. Plaintiff seeks a declaratory judgment that TV Communications Network, Inc. is the sole owner or controlling owner of Century 21 Mining, Inc. and that all the assets of Century 21 Mining, Inc. have been transferred to TV Communications Network, Inc. thus enabling Plaintiff to satisfy his judgment against Century 21 Mining, Inc. directly against the assets of TV Communications Network, Inc.

WHEREFORE, Plaintiff prays judgment against Defendant's, and each of them, as follows:

1. For \$500,000.00 general damages against Defendants, and each of them, for their knowing, deliberate, willful and fraudulent disclosures and omissions in securities documents which have rendered Plaintiff's stock in Century 21 Mining, Inc. worthless;

2. For a permanent injunction against the further dissipation of Century 21 Mining, Inc. assets;

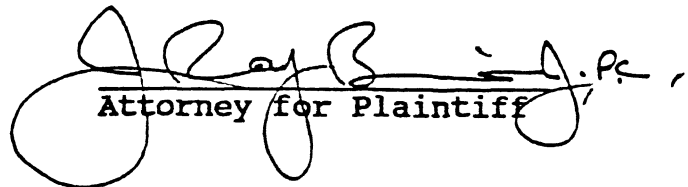
3. For a declaratory judgment that Plaintiff can satisfy his

judgment against Century 21 Mining, Inc. directly from the assets of TV Communications Network, Inc.;

4. For all Plaintiff's attorney fees and costs of this action on each of Plaintiff's causes of action;

5. For any further relief the Court deems just and proper in the premises.

Dated this 6th day of October, 1992.


Attorney for Plaintiff

PLAINTIFF'S ADDRESS:

428 Pepperridge Drive
Midvale, Utah 84047

The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Compiler's Notes. — This rule is similar to Rule 57, F.R.C.P.

NOTES TO DECISIONS

Cited in *Oil Shale Corp. v. Larson*, 20 Utah 2d 369, 438 P.2d 540 (1968).

COLLATERAL REFERENCES

Am. Jur. 2d. — 22A Am. Jur. 2d Declaratory Judgments §§ 183, 186, 203 et seq.	declaratory relief in state court, 33 A.L.R.4th 146.
C.J.S. — 26 C.J.S. Declaratory Judgments §§ 17, 18, 104, 155.	Key Numbers. — Declaratory Judgment 41, 42, 251, 367.
A.L.R. — Right to jury trial in action for	

Rule 58A. Entry.

(a) **Judgment upon the verdict of a jury.** Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be forthwith signed by the clerk and filed. If there is a special verdict or a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49, the court shall direct the appropriate judgment which shall be forthwith signed by the clerk and filed.

(b) **Judgment in other cases.** Except as provided in Subdivision (a) hereof and Subdivision (b)(1) of Rule 55, all judgments shall be signed by the judge and filed with the clerk.

(c) **When judgment entered; notation in register of actions and judgment docket.** A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.

(d) **Notice of signing or entry of judgment.** The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court. However, the time for filing a notice of appeal is not affected by the notice requirement of this provision.

(e) **Judgment after death of a party.** If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be rendered thereon.

(f) **Judgment by confession.** Whenever a judgment by confession is authorized by statute, the party seeking the same must file with the clerk of the court in which the judgment is to be entered a statement, verified by the defendant, to the following effect:

(1) If the judgment to be confessed is for money due or to become due, it shall concisely state the claim and that the sum confessed therefor is justly due or to become due;

(2) If the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the claim and that the sum confessed therefor does not exceed the same;