

1993

Gordon E. Johnson v. National Association of
Securities Dealers, Inc.; Kenneth T. Adams; Reo
Cutler; First Equities Corporation; Robert C.
Strokes; and, Kevin O'Connell: Response to
Petition for Rehearing

Utah Court of Appeals

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Gordon E. Johnson; Appellant Pro Se.

Scott Marriott Hadley; Van Cott Bagley, Cornwall, McCarthy; Attorneys for Appellee NASD.

Recommended Citation

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GORDON E. JOHNSON,
Plaintiff and Appellant,
vs.
National Association of
Securities Dealers, Inc.;
Kenneth T. Adams; Reo Cutler;
First Equities Corporation;
Robert C. Stokes; and, Kevin
O'Connell,
Defendants and Appellees.

Priority No. 15 (Oral
argument not permitted
pursuant to Utah R. App. P.
35(a))

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Attorneys for Appellee NASD

FILED

SEP 2 1993

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

GORDON E. JOHNSON,)	
)	
Plaintiff and Appellant,)	ANSWER TO APPELLANT' S
)	PETITION FOR REHEARING
vs.)	
)	Appellate Case No.
)	930370-CA
National Association of)	
Securities Dealers, Inc.;)	Priority No. 15 (Oral
Kenneth T. Adams; Reo Cutler;)	argument not permitted
First Equities Corporation;)	pursuant to Utah R. App. P.
Robert C. Stokes; and, Kevin)	35(a))
O' Connell,)	
)	
Defendants and Appellees.)	
)	
)	

Nature of Proceedings: Appellant's petition for rehearing.
On appeal from the First District Court, Box Elder County,
Honorable Gordon J. Low.

Scott Marriott Hadley,
Van Cott Bagley, Cornwall, McCarthy
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Ogden, UT 84401
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Attorneys for Appellee NASD

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216 West 1st North
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Appellant Pro Se

INTRODUCTION

The defendant/appellee National Association of Securities Dealers, Inc. (hereinafter, "NASD" or "Appellee") answers plaintiff/appellant Gordon E. Johnson's (hereinafter, "Johnson" or "Appellant") petition for rehearing as follows:

STATEMENT OF FACTS

Johnson filed suit against NASD (and others) to compel NASD to arbitrate Johnson's claims against the co-defendants. NASD responded by filing a motion to dismiss, which the trial court granted.

Johnson then moved the trial court for a rehearing. (The Court of Appeals has construed Johnson's trial court motion for a rehearing as one to alter or amend the trial court's order of dismissal under Rule 59, Utah Rules of Civil Procedure. (See the August 3, 1993 Court of Appeals memorandum decision, Attached hereto as Exhibit "A".))

The trial court, in an April 26, 1993 memorandum decision, denied Johnson's motion for a rehearing and directed NASD's counsel to prepare a formal order. Two days later, on April 28, 1993, Johnson filed a notice of appeal from the

memorandum decision. On June 15, 1993, the trial court entered its order denying the motion for rehearing.

On August 3, 1993, the Court of Appeals dismissed Johnson's appeal because it was not taken from a final order.

On August 9, 1993, Johnson filed a motion for rehearing in the Court of Appeals. The Court of Appeals has construed such motion to be a Rule 35 petition for rehearing, Utah R. App. P., and has requested NASD to file a response thereto. (See August 19, 1993 correspondence from Mary T. Noonan, Clerk of the Court of Appeals, to Attorney Scott Hadley, counsel for NASD, a copy of which is attached hereto as Exhibit "B".) This answer is NASD's response,

ARGUMENT

POINT I: JOHNSON'S PETITION FOR REHEARING SHOULD BE DENIED.

Johnson admits, in his motion for a rehearing, that his notice of appeal was filed prematurely. Relying solely on California Rules of Appellate procedure, Johnson opines that it is nonetheless valid. Apparently, under California law, a notice of appeal filed prior to the entry of the order is deemed to have been filed immediately after the entry of the order.

Johnson admits that he does not have access to Utah law on this point.

Utah law is contrary to that cited by Johnson. The Utah Rules of Appellate Procedures specifically provide that a premature filing of a notice of appeal such as Johnson's has no affect and that a new notice of appeal must be filed. Utah R. App. P. 4. (See also Utah R. App. P. 3: "Failure of an appellant to take any step *other than the timely filing of a notice of appeal* does not affect the validity of the appeal...." [Emphasis added.].) The Utah Supreme Court, under earlier appellate rules, held that the failure to timely file a notice of appeal is jurisdictional and deprives the appellant court of jurisdiction. Bowen v. Riverton City, 656 P.2d 434 (Utah 1982).

In addition, and as the Court of Appeals pointed out in its memorandum decision, the trial court's memorandum decision is simply an invitation to prepare and present a formal order. An appeal does not lie from an order directing the entry of a formal judgment. Ellingswood v. Bennion, 73 Utah 653, 276 P.2d 159 (1929). (See also, 4 Am. Jur. 2d Appeal and Error § 74.)

Finally, an appeal does not generally lie from a trial court's memorandum decision. The intention of the court is the controlling factor as to whether a memorandum decision is deemed

an appealable final order. Annotation, *Formal Requirements of Judgment or Order as regards Appealability*, 73 A. L. R. 2d 250 (1960). As the Court of Appeals has noted, the trial court's "[M]emorandum decision was not, *in the [trial] court's view*, the actual order but only the [trial] court's indication that such an order would be signed when prepare and presented." (Emphasis added.)

Johnson's premature filing of a notice of appeal is ineffectual and deprives this Court of Appeals of jurisdiction. The Court of Appeal's memorandum decision is correct in dismissing Johnson's appeal and his petition for rehearing should be denied.

POINT II: DAMAGES AND COSTS SHOULD BE AWARDED TO NASD

Johnson's frivolous appeal and petition for rehearing present to this court a classic case for an award of damages, attorney fees and costs under Rules 33 & 34, Utah R. App. P. Neither the appeal nor the petition for rehearing the appeal were warranted by existing law, or based on a good faith argument to extend, modify or reverse existing law. *Id.* Indeed, Johnson's petition acknowledges no access to Utah law and, incredibly, cites contrary California authority as controlling.

In addition or alternatively, NASD requests that costs of the appeal be taxed against Johnson, since his appeal was dismissed. Utah R. App. P. 34.

CONCLUSION

Johnson's petition for rehearing should be denied as an untimely filing of a notice of appeal, such as Johnson's, has no affect and deprives the appellate court of jurisdiction. In addition, costs for the dismissal of the appeal, and/or damages for Johnson's frivolous appeal or petition for rehearing, should be awarded to NASD.

Respectfully submitted this 31 day of August
1993.

VAN COTT, BAGLEY, CORNWALL & MCCARTHY

By Scott M. Hadley
Scott Marriott Hadley
Attorneys for Defendant/Appellee
NASD

CERTIFICATE OF MAILING

I hereby certify that I caused two true and correct copies of the within and foregoing ANSWER TO APPELLANT'S

PETITION FOR REHEARING to be mailed, postage prepaid, this 1st
day of September 1993, to the following:

Gordon E. Johnson
216 West 1st North
Brigham City, Utah 84302

Alma B. Humphreys

Exhibit A

AUG 03 1993

IN THE UTAH COURT OF APPEALS

-----ooOoo-----


Mary T. Noonan
Clerk of the Court

Gordon E. Johnson,)
)
Plaintiff and Appellant,)
)
v.)
)
National Association of)
Securities Dealers, Inc.;)
Kenneth T. Adams; Reo Cutler;)
First Equities Corporation;)
Robert C. Stokes; and Kevin)
O'Connell,)
)
Defendants and Appellees.)

MEMORANDUM DECISION
(Not For Publication)

Case No. 930370-CA

F I L E D
(August 3, 1993)

First District, Box Elder County
The Honorable Gordon J. Low

Attorneys: Gordon E. Johnson, Brigham City, Pro Se Appellant
Scott Marriott Hadley, Ogden, for Appellee
National Association of Securities Dealers

Before Judges Russon, Orme, and Jackson.

PER CURIAM:

This matter is before the court on cross-motions for summary disposition.

Appellee National Association of Securities Dealers, Inc. ("NASD") asserts that this court lacks jurisdiction because the notice of appeal was filed prior to entry of a final order.

By order dated February 26, 1993, the trial court granted appellees' motion to dismiss. Appellant then filed a motion for rehearing, which we construe to be a motion to alter or amend the judgment pursuant to Rule 59, Utah Rule of Civil Procedure. The court denied the motion in a memorandum decision which states,

THIS MATTER IS BEFORE THE Court on the
Plaintiff's Motion for Rehearing. For
reasons set forth in Defendant National

Association of Securities Dealer's Response,
the Motion is denied.

Counsel for Defendant is directed to
prepare a formal Order in conformance
herewith.

The memorandum was signed and dated on April 26, 1993.

A judgment is final when it ends the controversy between the parties litigant. Salt Lake City Corp. v. Layton, 680 P.2d 538 (Utah 1979). However, the memorandum decision in this case only memorialized appellee NASD's victory on the Rule 59 motion and its entitlement to an order resolving the motion. "[C]ounsel for defendant" was directed to file an implementing order because the memorandum decision was not, in the court's view, the actual order but only the court's indication that such an order would be signed when prepared and presented.

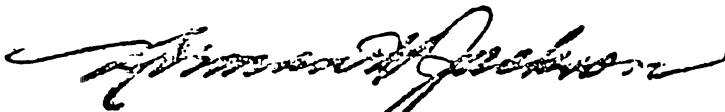
Because the memorandum decision is an invitation for an order rather than an order, the appeal is not taken from a final order. Utah R. App. P. 3. Accordingly, we dismiss the appeal.



Leonard H. Russon, Judge



Gregory K. Orme, Judge



Norman H. Jackson, Judge

COVER SHEET

CASE TITLE:

Gordon E. Johnson,
Plaintiff and Appellant,
v. Case No. 930370-CA
National Association of Securities
Dealers, Inc.; Kenneth T. Adams;
Reo Cutler; First Equities Corporation;
Robert C. Stokes; and Kevin O'Connell,
Defendants and Appellees.

August 3, 1993. MEMORANDUM DECISION (Not For Publication).

Opinion of the Court by PER CURIAM.

CERTIFICATE OF MAILING

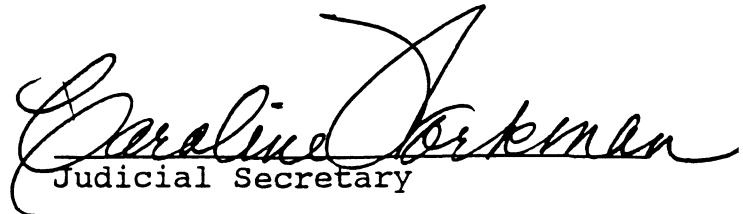
I hereby certify that on the 3rd day of August, 1993, a true and correct copy of the foregoing MEMORANDUM DECISION was deposited in the United States mail to the parties listed below:

Gordon E. Johnson
216 West 1st North
Brigham City, UT 84302

Scott Marriott Hadley
Van Cott, Bagley, Cornwall & McCarthy
Attorneys at Law
2404 Washington Boulevard, Suite 900
Ogden, UT 84401

and a true and correct copy of the foregoing MEMORANDUM DECISION was deposited in the United States mail to the district court judge listed below:

The Honorable Gordon J. Low
District Court Judge
Cache County Hall of Justice
140 North 100 West
Logan, UT 84321


Judicial Secretary

TRIAL COURT:

First District, Box Elder County #920000015 CN

Exhibit B

Judith M. Billings
Presiding Judge

Leonard H. Russon
Associate Presiding Judge

Russell W. Bench
Judge

Reginal W. Garff
Judge

Pamela T. Greenwood
Judge

Norman H. Jackson
Judge

Gregory K. Orme
Judge

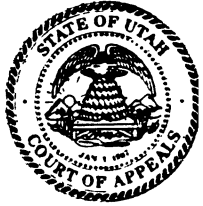
Utah Court of Appeals

230 South 500 East, Suite 400
Salt Lake City, Utah 84102

Clerks' Office 801-578-3950
Administration 801-578-3900

Fax 801-578-3999

August 19, 1993



Mary T. Noonan
Clerk of the Court

Scott Marriott Hadley
Van Cott, Bagley, Cornwall & McCarthy
Attorneys at Law
2404 Washington Boulevard, Suite 900
Ogden, UT 84401

In Re:

Gordon E. Johnson,
Plaintiff and Appellant,
v. Case No. 930370-CA
National Association of Securities
Dealers, Inc.; Kenneth T. Adams;
Reo Cutler; First Equities Corporation;
Robert C. Stokes; and Kevin O'Connell,
Defendants and Appellees.

Dear Mr. Hadley:

Pursuant to Rule 35, Rules of the Utah Court of Appeals, and at the specific request of the Court, you are requested to file a response to the Petition for Rehearing filed by the appellant herein. Your response brief and 7 copies should comply with the requirements of Rule 35, and be filed on or before September 3, 1993.

Sincerely,

A handwritten signature in dark ink, appearing to read "Mary T. Noonan", with a long, sweeping horizontal stroke extending to the right.

Mary T. Noonan
Clerk of the Court

cc: Gordon E. Johnson