

2004

Jimmy Zufelt v. Haste Inc. and Harry Gounaris: Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Zufelt v. Haste Inc.*, No. 20041043 (Utah Court of Appeals, 2004).
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IN THE UTAH COURT OF APPEALS

| | | |
|--------------------------------------|---|---------------------------------------|
| JIMMY ZUFELT, an individual, | : | |
| | : | |
| Plaintiff-Appellee, | : | Case No. 20041043-CA |
| | : | |
| vs. | : | |
| | : | |
| HASTE, INC., a Utah Corporation, and | : | Court and judge below: |
| HARRY GOUNARIS, an individual, | : | Fourth Judicial District, Utah County |
| | : | Judge Fred D. Howard |
| Defendants-Appellants. | : | Trial Court Case No. 000403084 |

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(Oral Argument and Published Decision Requested)

FILED
UTAH APPELLATE COURTS
AUG 12 2005

Pursuant to Utah Rule of Appellate Procedure 24(c), Defendant-Appellants Haste, Inc. ("Haste, Inc.") and Harry Gounaris ("Gounaris"), (collectively "Appellants"), by and through their counsel John Martinez, hereby submit the following Reply Brief:

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ARGUMENT

INTRODUCTION¹

Appellee Jimmy Zufelt is a landlord who seeks to recover in the district court below for harm resulting from the abandonment of rented premises by a "tenant." Appellants Harry Gounaris and Haste, Inc. contend that neither one of them was Zufelt's "tenant," and that Zufelt instead entered into his lease with Steven Kallinikos personally. As a result of the trial court's actions, Gounaris and Haste, Inc. never got their day in court to make that argument.

The trial court's actions can be viewed as a series of seven steps: (1) The trial court denied Gounaris and Haste, Inc. the opportunity to argue neither was Zufelt's "tenant." (2) That denial, in turn, was based on the trial court's conclusion that Gounaris had no standing to assert claims or defenses on behalf of Haste, Inc. or himself. (3) That conclusion, in turn, was based on the trial court's conclusion that Gounaris had no ownership interest in Haste, Inc., or otherwise, to confer standing under the circumstances. (4) And that conclusion was based on the trial court's conclusion that as a result of prior bankruptcy court proceedings, the doctrine of *issue preclusion* prevented Gounaris from litigating the issue of his ownership. (5) The trial court therefore struck all Appellants' pleadings and (6) entered summary judgment against Appellants by default. (7) The trial court has subsequently entered post-judgment orders at Zufelt's request, giving Zufelt access to the only asset in the lawsuit.

Appellants Gounaris and Haste Inc. through this appeal seek to have their day in court. This court should hold that Gounaris has standing and remand for further proceedings.

¹. Appellants substantially rely on the Statement of Facts set out in their Opening Brief. This Introduction helps establish the context of this Reply.

PROCEDURAL CONTEXT

How and why the trial court denied Gounaris and Haste, Inc. their day in court requires an understanding of the procedural background of the case. A review of that background brings the issues now before this court--standing, issue preclusion, and judicial estoppel--into focus.

On July 6, 1990, Kallinikos and Gounaris established Haste, Inc., to own and operate a hamburger joint. Each of them owned 50% of the shares of Haste, Inc.² Essentially, Kallinikos was the "operations" guy, serving as President of Haste, Inc. and Gounaris was the investor. The business did not prosper, so in November 1997, Haste, Inc. sold its assets to Richard Nuttall, who executed a \$72,000 Note payable to Haste, Inc. ("the Nuttall Note").³ The Nuttall Note thus became the only remaining asset of Haste, Inc., and the sole function of that entity became to collect the \$912.07 monthly payments on the Nuttall Note and to divide them equally between Kallinikos and Gounaris.⁴ Kallinikos, as President of Haste, Inc., duly carried out that function--for a while.

On or about March 30, 1998, the lease Zufelt is suing upon was executed.⁵ The lease was signed by Kallinikos, but there is a factual dispute about whether he signed in his

². Appellee Brief p.6, ¶5 ("...Gounaris...was a 50% shareholder, (500 shares)...of Haste.").

³. *Id.* As set forth in the Opening Brief Statement of Facts, Nuttall actually executed *two* Notes, but for purposes of simplification and clarity, this Reply Brief will refer only to the "large," \$72,000 Note. Zufelt concedes that the other, "small" Note is irrelevant to this case. Zufelt Mem. 1/17/02 at 10 (R. 300) ("The ... small (Personal) Note ... is not part of this lawsuit.").

⁴. Again, with the caveats set out in the preceding footnote.

⁵. Appellee Brief p.5, ¶ 1.

personal capacity (as Gounaris and Haste, Inc. contend) or in his capacity as President of Haste, Inc. (as Zufelt contends). What *is* clear is that the venture never got off the ground, and that Kallinikos abandoned the leased premises in April 1999.⁶

Meanwhile, sometime in 1999 Kallinikos stopped sending Gounaris his one-half of the payments on the Nuttall Note.⁷ Nevertheless, in May and June 1999, Gounaris took out an equity line-of-credit loan on his home and sent Kallinikos an additional \$20,000.⁸

In February 2000, Gounaris demanded that Kallinikos repay the \$20,000 Gounaris had sent to him in 1999, as well as to account for Gounaris' one-half of the payments on the Nuttall Note that Kallinikos had not forwarded to him.⁹ In order to resolve that dispute, on February 25, 2000, Kallinikos transferred *his one-half interest* in the Nuttall Note to Gounaris.¹⁰ (As discussed below, that transfer subsequently was voided by the bankruptcy court.) Gounaris, of course, already owned the other one-half interest in the Nuttall Note.

⁶. Kallinikos Aff. ¶ 12 (R. 354)(Opening Brief Addendum Exh. 2).

⁷. Kallinikos Aff. ¶ 9 (R. 354)(Opening Brief Addendum Exh. 2); Gounaris Aff. ¶ 8 (R. 346)(Opening Brief Addendum Exh. 3); Bankr. Ct. Findings of Fact and Conclusions of Law ¶ 9 at 3 (R. 468)(Opening Brief Addendum Exh. 4).

⁸. Kallinikos Aff. ¶ 13 (R. 353)(Opening Brief Addendum Exh. 2); Gounaris Aff. ¶ 11 (R. 346)(Opening Brief Addendum Exh. 3); Zufelt Mem. 1/17/02 at Exh. C (cancelled checks on Gounaris' home equity line of credit) (R. 255-56).

⁹. Kallinikos Aff. ¶ 16 (R. 352-53)(Opening Brief Addendum Exh. 2); Gounaris Aff. ¶ 13 (R. 345)(Opening Brief Addendum Exh. 3).

¹⁰. Bankr. Ct. Findings of Fact and Conclusions of Law ¶¶ 17, 18 at 4 (R. 467)(Opening Brief Addendum Exh. 4).

However, on September 27, 2000, Landlord Zufelt filed suit on the lease in the district court below, initially naming only Haste, Inc. as the defendant.¹¹ Understandably, Zufelt sought to get at Haste, Inc.'s only asset: the payment stream on the \$72,000 Note from Richard Nuttall to Haste, Inc.. After Zufelt found out about the transfer of Kallinikos' one half-interest in the Nuttall Note to Gounaris, Zufelt named Gounaris as a defendant as well.¹²

Zufelt asserts that the transfer of Kallinikos' one-half interest in the Nuttall Note to Gounaris "is the gist of the dispute between Zufelt and Haste."¹³ In doing so, Zufelt fundamentally misconstrues the interests of Haste, Inc., Gounaris and Kallinikos. The first question, yet to addressed below, is whether Kallinikos signed the lease personally, or on behalf of Haste, Inc. If he signed personally, then Zufelt sued the wrong defendants. Second, if Kallinikos signed on behalf of Haste, Inc., then the question becomes whether Gounaris has standing to speak for Haste, Inc. (and as a 50% shareholder, that seems obvious) as well as to speak on his own behalf (and since he was sued personally, that also seems obvious).

The complicating factor--which apparently confused both Zufelt and the trial court below--is that on February 13, 2001, Kallinikos filed for bankruptcy.¹⁴ Kallinikos' bankruptcy trustee brought an adversary proceeding in the bankruptcy court against Gounaris to void the transfer of Kallinikos' one-half interest in the Nuttall Note to Gounaris as a preferential

¹¹. Appellee Brief p.4 ("Because Gounaris was not originally named as a party to the Complaint, the Complaint was amended to name Gounaris as a party.")

¹². Appellee Brief p.4 ("This action was precipitated by the filing of a complaint by Plaintiff to recover the proceeds to a conveyance from Defendant Haste to Defendant Gounaris.").

¹³. Appellee Brief p.4.

¹⁴. (R. 468).

transfer under 11 U.S.C. § 547(b).¹⁵

Gounaris contended in the bankruptcy court that the transfer of Kallinikos' one-half interest in the Nuttall Note to Gounaris was a sale, and that the two had agreed that the \$20,000 Gounaris previously had sent to Kallinikos would be treated as payment of the purchase price, rather than repayment of an "antecedent debt."¹⁶ Such an argument is common in similar commercial transactions, and courts employ a multi-factor approach to determine the nature of the transaction, focusing particularly on whether the transferee has assumed the risk of non-collection.¹⁷ The bankruptcy court, however, voided the transfer, and recaptured *Kallinikos' one-half interest* in the Nuttall Note back into Kallinikos' bankruptcy estate.¹⁸

¹⁵. See Bankr. Ct. Findings of Fact and Conclusions of Law (R. 469)(Opening Brief Addendum Exh. 4).

¹⁶. Bankr. Ct. Findings of Fact and Conclusions of Law ¶ 13 at 3-4 (R. 468-67)(Opening Brief Addendum Exh. 4).

¹⁷. Endico Potatoes, Inc. v. CIT Group/Factoring, Inc., 67 F.3d 1063, 1069 (2d Cir. 1995)("The root of all these factors is the transfer of risk. Where the lender has *purchased* the accounts receivable, the borrower's debt is extinguished and the lender's risk with regard to the performance of the accounts is direct, that is, the lender and not the borrower bears the risk of non-performance by the account debtor. If the lender holds only a security interest, however, the lender's risk is derivative or secondary, that is, the borrower remains liable for the debt and bears the risk of non-payment by the account debtor, while the lender only bears the risk that the account debtor's non-payment will leave the borrower unable to satisfy the loan."); Major's Furniture Mart, Inc. v. Castle Credit Corp., Inc., 602 F.2d 538, 539 (3rd Cir. 1979)("When is a sale not a sale, but rather a secured loan?"); In re Carolina Utilities Supply Company, Inc., 118 B.R. 412, 415 (D. S.C. 1990)(court looks to "practices, objectives, relationship, and intention of the parties..."); In re Evergreen Valley Resort, Inc., 23 B.R. 659, 661-62 (D. Maine 1982)(factors discussed)

¹⁸. See Bankr. Ct. Findings of Fact and Conclusions of Law (R. 469)(Opening Brief Addendum Exh. 4).

Significantly, there was never any serious question in the bankruptcy proceedings that Gounaris at all times has owned 50% of the outstanding shares of Haste, Inc., and that such ownership entitles him to *the other one-half interest in the Nuttall Note*. Kallinikos' bankruptcy trustee stipulated that "The defendant Gounaris alleges and admits to be a 50% stockholder, officer and director of Haste, Inc."¹⁹ After the bankruptcy court voided the transfer of *Kallinikos' one-half interest* in the Nuttall Note to Gounaris, Kallinikos' bankruptcy trustee in a subsequent motion for money judgment against Gounaris acknowledged that only "one-half of the total payments under the [Nuttall Note]...were avoidably transferred from [Kallinikos to Gounaris]."²⁰ And on October 18, 2002, the bankruptcy court entered judgment accordingly, recapturing only one-half of the payments on the Nuttall Note that Gounaris had received from February 25, 2000 until July 2002.²¹

The status of Gounaris as a party in this litigation, therefore, has absolutely nothing to do with Kallinikos' transfer of Kallinikos' one-half interest in the Nuttall Note to Gounaris. That issue has been decided in the bankruptcy court, retrieving the money Gounaris received as a result of that transfer, back into Kallinikos' bankruptcy estate.²² Only Gounaris' one-half of the Nuttall Note payment stream remains, to which he is undoubtedly entitled as a result

¹⁹. Reply Addendum Exh. 1, p.2, ¶ 5. This court may consider the bankruptcy court filings as public records. See Green River Canal Company v. Thayn, 2003 UT 50, ¶ 31 n.8, 84 P.3d 1134 (court on appeal can take judicial notice of public records).

²⁰. Reply Addendum Exh. 2, p.4, ¶16.

²¹. Reply Addendum Exh. 2, p.1; Reply Addendum Exh. 3, p.4, ¶16.

²². Presumably, Kallinikos' one-half of the Nuttall Note payments subsequent to the voided transfer *also* are part of Kallinikos' bankruptcy estate.

of his 50% ownership of Haste, Inc.

As set out in Appellants' Opening Brief, the bankruptcy court did not decide the issue of who owned Haste, Inc., and to the extent that court said anything, it acknowledged that Gounaris owned 50% of Haste, Inc. Thus, the trial court misapplied the doctrine of issue preclusion. Moreover, as set forth below, there is no doubt that Gounaris has standing in this litigation, both in his capacity as 50% shareholder of Haste, Inc., as well as in his individual capacity. Since the issue of standing is an issue of law which this court can decide outright, this court should address it now.²³

And the doctrine of judicial estoppel argued by Zufelt in his brief is not applicable.

I. GOUNARIS HAS STANDING TO OPPOSE ZUFELT'S COMPLAINT BELOW

A. Gounaris has standing in his capacity as shareholder of Haste, Inc.

The trial court held that the bankruptcy court determined that Gounaris had no ownership interest in Haste, Inc. Purporting to apply the doctrine of issue preclusion, the trial court therefore prevented Gounaris from litigating the question whether he had such ownership interest. Since the trial court thereby conclusively presumed that Gounaris had no ownership in Haste, Inc., the court went on to conclude that Gounaris had no standing to assert claims or defenses on behalf of Haste, Inc. The trial court then proceeded to strike all Gounaris' pleadings and to enter summary judgment by default for Zufelt.²⁴

²³. See Parkside Salt Lake Corp. v. Insure-Rite, Inc., 2001 UT App 347, ¶¶26, 37 P.3d 1202 (court has duty to pass on issues that may become material on remand).

²⁴. Contrary to Zufelt's assertion, Appellants herein appeal *all* the trial court's rulings. See Notice of Appeal ("This appeal is taken from each of such rulings.").

As set out in Appellants' Opening Brief, the issue of Gounaris' ownership of Haste, Inc. was not an issue before the bankruptcy court, and to the extent it considered the matter, the bankruptcy court acknowledged Gounaris owned 50% of Haste, Inc., and as such was the owner of one-half of the Nuttall Note. As the subsequent supplemental motion by the bankruptcy trustee and the bankruptcy court's judgment thereon demonstrate, the bankruptcy court confirmed that Gounaris owns one-half of the Nuttall Note.²⁵ Since the Nuttall Note was payable to Haste, Inc., the only way in which Gounaris could own one-half of that note was because he remains a 50% owner of the shares of Haste, Inc. Accordingly, Gounaris has standing to assert claims and defenses on behalf of Haste, Inc., and the trial court erred by ruling otherwise.

Zufelt erroneously refers several times in his Brief to the "identity of facts or evidence test" as being a component of the issue preclusion doctrine.²⁶ That is a component of the claim preclusion doctrine, not issue preclusion.²⁷ And the claim preclusion doctrine is inapplicable here as well. The bankruptcy proceedings involved a claim by the bankruptcy

²⁵. See Reply Addendum Exhibits 2 and 3.

²⁶. Appellee Brief, pp. 8-9, 10.

²⁷. See Macris & Associates, Inc. v. Neways, Inc., 2000 UT 93, ¶ 28, 16 P.3d 1214 (discussing claim preclusion); Schaer v. State, 657 P.2d 1337, 1340 (Utah 1983) ("There are certain distinctions to be made in the application of the doctrines of res judicata and collateral estoppel. In order to determine which doctrine is to be properly applied, one must focus on whether the second claim, demand, or cause of action is different from that of the first: *In order for res judicata to apply, both suits must involve the same parties or their privies and also the same cause of action*; and this precludes the relitigation of all issues that could have been litigated as well as those that were, in fact, litigated in the prior action *Collateral estoppel, on the other hand, arises from a different cause of action* and prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit.") (citations omitted).

trustee against Gounaris to void a preferential transfer. Zufelt's lawsuit involves a claim against Haste, Inc. and Gounaris to recover for harm resulting from a breach of a lease. Clearly, the two actions "rest on different state of facts and evidence of a different kind or character is necessary to sustain the two causes of action."²⁸

Only the issue preclusion doctrine is relevant here. And as discussed in Appellants' Opening Brief, the issue of whether Gounaris owns Haste, Inc. was not involved, and certainly was not "actually litigated" in the bankruptcy proceedings. Moreover, to the extent that the bankruptcy court mentioned it, that court acknowledged that Gounaris owns 50% of Haste, Inc. And subsequently, the bankruptcy court confirmed that understanding when it required Gounaris to return only one-half of the Nuttall Note proceeds he had received.²⁹

B. Gounaris has standing in his individual capacity

The Nuttall Note was payable to Haste, Inc.. Gounaris and Kallinikos each owned 50% of Haste, Inc. The Nuttall Note payments therefore were made to Haste, Inc., and then re-transmitted 50% to Gounaris and 50% to Kallinikos.

The bankruptcy court and the court below focused on whether Gounaris, through a voidable preferential transfer, had acquired *Kallinikos' one-half* of that payment stream. The bankruptcy court held that such transfer was indeed a voidable preference and recaptured it into Kallinikos' bankruptcy estate.

²⁸. Schaer v. State, supra, 657 P.2d at 1340.

²⁹. See Reply Addendum Exhibit 3 (Bankruptcy court judgment upon supplement proceeding).

There was no question, however, that Gounaris was--and remains--entitled *to his own 50% of the payment stream* on the Nuttall Note. This is confirmed by the post-judgment motion and order in the bankruptcy court, whereby Gounaris was ordered to pay back only one-half of the Nuttall Note payments he received as preferential transfers.³⁰

Zufelt in his Opposition Brief concedes that "the Complaint was amended to name Gounaris as a party."³¹ Zufelt thereby concedes that Gounaris has a sufficient "personal stake" in the dispute to confer standing in his individual capacity in this case.³²

II. THE DOCTRINE OF JUDICIAL ESTOPPEL DOES NOT APPLY

The doctrine of judicial estoppel provides that:

"a person may not, to the prejudice of another person, deny any position taken in a prior judicial proceeding between the same persons or their privies involving the same subject matter, if such prior position was successfully maintained."³³

Zufelt argues that Appellants should be "judicially estopped from seeking judicial relief by offering statements inconsistent with their sworn statements in a prior judicial proceeding."³⁴ First, the "position" Zufelt refers to is that Gounaris contended in the bankruptcy court that the transfer of Kallinikos' one-half interest in the Nuttall Note to

³⁰. Reply Addendum Exhibits 2 and 3.

³¹. Appellee Brief p.4.

³². Berg v. State, 2004 UT App 337, ¶ 9, 100 P.3d 261("personal stake" confers standing).

³³. Nebeker v. State Tax Comm'n, 2001 UT 74, ¶ 26, 34 P.3d 180 (quoting Tracy Loan & Trust Co. v. Openshaw Inv. Co., 102 Utah 509, 132 P.2d 388, 390 (1942)).

³⁴. Appellee Brief pp. 9, 12-13.

Gounaris was a sale, rather than repayment for an antecedent debt.³⁵ The issue upon which the trial court below based its judgment, however, and upon which Gounaris took a "position" in this litigation, was about whether Gounaris was an "owner" of Haste, Inc. The two "positions" are not even about the same question, and so cannot possibly be inconsistent. (There was never any real doubt in the bankruptcy proceedings about *Gounaris'* one-half of the Nuttall Note, so his position on that point in the court below was eminently consistent.)

Second, even if the sale-versus-antecedent debt "position" were the relevant one, judicial estoppel does not apply because Zufelt nowhere alleges that he "relied" on the fact that Gounaris had taken the "it was a sale" position in the bankruptcy court.³⁶ Not having relied, he cannot possibly have been prejudiced by such nonexistent reliance either.

Third, even if the sale-versus-antecedent debt "position" were the relevant one, Gounaris was *unsuccessful* in the bankruptcy court. The judicial estoppel doctrine only applies if the prior position was "successfully maintained."³⁷

Fourth, (and conversely), Gounaris is asserting here that he is an owner of Haste, Inc., and that is consistent with his position in the bankruptcy court on that point. Far from "denying" that position, Gounaris is emphasizing it--consistently. For all these reasons, the principle of judicial estoppel does not apply.

³⁵. Ibid.

³⁶. *Schaer v. State*, 657 P.2d 1337, 1340 n.3 (Utah 1983)("The position advanced by the State in the Hansen litigation in 1979, clearly demonstrates that the State did not in any way "rely" on the position advanced by the plaintiff in the 1967 litigation. Thus, the absence of any reliance renders the doctrine of judicial estoppel or estoppel by oath inapplicable to the present case.").

³⁷. *Stevensen v. Goodson*, 924 P.2d 339, 253 (Utah 1996)(for judicial estoppel to apply, "the party seeking judicial relief must have prevailed upon its statement in the earlier proceeding...").

III. ALL RULINGS, JUDGMENT AND ORDERS OF THE TRIAL COURT BELOW SHOULD BE REVERSED

A. The trial court's judgment and all prior rulings should be reversed

As set out in Appellants' Notice of Appeal, "This appeal is taken from each of [the trial court's] rulings." Accordingly, the issue preclusion ruling--leading to the standing ruling--leading to the motion to strike ruling--leading to the summary judgment ruling--and subsequent entry of judgment--all should be reversed.

B. All the trial court's post-judgment orders also should be reversed

"A reversal of a judgment or decision of a lower court ... places the case in the position it was before the lower court rendered that judgment or decision, and vacates all proceedings and orders dependent upon the decision which was reversed."³⁸

After ruling that Appellants lacked standing, the trial court struck all Appellants' pleadings, and since that left no opposition to Zufelt, the trial court entered judgment by default. The trial court subsequently issued several post-judgment orders, *inter alia*, paying Zufelt the accumulated proceeds of the Nuttall Note.

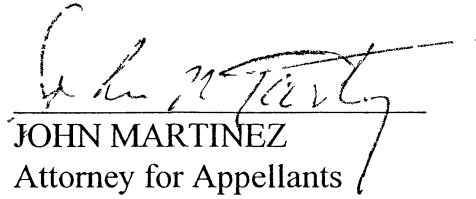
Since the trial court had already denied Appellants standing, Appellants were helpless to contest such post-judgment orders. And since those post-judgment orders were dependent upon the trial court's judgment, they also should be reversed.

CONCLUSION

This Court should reverse the final judgment by the trial court, as well as all pre-judgment and post-judgment rulings and orders, and remand the case for further proceedings.

³⁸. Phebus v. Dunford, 114 Utah 292, 294, 198 P.2d 973, 974 (1948). See also Ault v. Holden, 2002 UT 33, ¶ 48, 44 P.3d 781 (reversal of summary judgment also requires reversal of award of attorney fees, because appellees are no longer "prevailing parties").

DATED this 12th day of August, 2005.



JOHN MARTINEZ
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Reply Addendum

- Exhibit 1:** *Amended Stipulated Facts* (Filed July 16, 2002)(In Re Kallinikos, Bankruptcy No. 01-21857, Adversary Proceeding No. 01P-2192JAB).
- Exhibit 2:** *Motion for Money Judgment, Memorandum and Notice of Hearing* (Filed September 18, 2002)(In Re Kallinikos, Bankruptcy No. 01-21857, Adversary Proceeding No. 01P-2192JAB).
- Exhibit 3:** *Judgment* (Filed October 18, 2002)(In Re Kallinikos, Bankruptcy No. 01-21857, Adversary Proceeding No. 01P-2192JAB).

REPLY ADDENDUM EXHIBIT 1

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FILED IN THE
UNITED STATES
BANKRUPTCY COURT
DISTRICT OF UTAH

JUL 16 4 08 PM '02

WILLIAM C. SAUER
CLERK OF COURT

BY _____
DEPUTY CLERK

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
DISTRICT OF UTAH, CENTRAL DIVISION**

| | | |
|----------------------|---|-----------------------------|
| In re: | : | Bankruptcy No. 01-21857 JAB |
| | : | (Chapter 7) |
| STEVE KALLINIKOS and | : | |
| DEBBY D. KALLINIKOS | : | |
| Debtors. | : | |

| | | |
|---------------------------|---|--------------------------------------|
| STEPHEN W. RUPP, TRUSTEE, | : | Adversary Proceeding No. 01P-2192JAB |
| Plaintiff, | : | |
| -vs- | : | |
| HARRY GOUNARIS, | : | |
| Defendant. | : | |

AMENDED STIPULATED FACTS

1. The debtor Steve Kallinikos filed a voluntary Chapter 7 petition on February 13, 2001.
2. The debtor Kallinikos was a principal, stockholder and officer of Haste, Inc.
3. Haste Inc. sold to Richard and Connie Nuttall a restaurant known as Burger Supreme in November 1997.
4. In consideration for the sale the Nuttalls executed a note in the amount of \$72,000.00 to be paid by 118 monthly payments with interest at the rate of 9%. Nuttalls also executed a note to the debtor Kallinikos and the defendant Gounaris in the amount of



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\$15,000.00, to be paid by 123 monthly payments with interest at the rate of 9%. The notes are secured by the restaurant property. (hereafter "the notes")

5. The defendant Gounaris alleges and admits to be a 50% stockholder, officer and director of Haste, Inc.
6. The defendant Gounaris alleges that he transferred to the debtor Kallinikos \$10,000.00 in May and \$10,000.00 in June of 1999.
7. The debtor Kallinikos transferred by assignment his interest in the notes to the defendant Gounaris sometime after February 24, 2000.
8. The defendant Gounaris has admitted the following
 - a. The actual date of the assignments of the notes was February 25, 2000.
 - b. That the amount of the consideration for the assignments was determined by negotiation based upon monies delivered to the debtor Kallinikos in May and June 1999.
 - c. The reason for assignment was that the debtor Kallinikos needed cash since early 1999.
 - d. From November 1, 1997 through early 1999 the distribution of payments on the notes was 50-50 between defendant Gounaris and debtor Kallinikos. From the latter part of 1999 through February 2000 more of the payments were distributed to the debtor Kallinikos than the defendant Gounaris.
9. The defendant Gounaris alleges he paid no less than \$15,000.00 to the debtor Kallinikos for the assignment of the notes.
10. Exhibit "A" is the only written notice of any assignment given to Richard Nuttal.
11. The debtor Kallinikos has declared under penalty of perjury and again under oath

that he received \$15,000.00 from the defendant Gounaris and that he needed the money for creditors.

12. The defendant Gounaris has declared under oath "I, Harry Gounaris, made a deal with Steve Kallinikos in 1999 to buy his half-share of the promissory notes."
13. As of February 12, 2001, the principle balance due on the Haste, Inc. note was \$54,749.52 and on the \$15,000.00 note was \$11,724.54. Half of the balances of the 2 notes as of February 12, 2001, was \$33,207.03.
14. In response to the plaintiffs request for the production of prepared and filed state and federal income tax returns for the years 1998, 1999, 2000 the debtor Kallinikos has stated:

"The significant business losses, medical problems, extremely low personal income by both debtors [Mr. and Mrs. Kallinikos] during the years 1998, 1999, and 2000 and the absence of any asset other than the assigned promissory note cast doubt as to the trustee's need for these tax returns to administer the bankruptcy estate."

15. No place on Schedule "L" of the tax returns for Haste, Inc. for the years 1998, 1999 or 2000 is there any scheduling of the Haste, Inc. note.
16. The debtor Kallinikos has stated and scheduled under oath that his only income in years 1999 and 2000 were payments received on the notes. He declared receiving \$7,000.00 per year.
17. The debtor Kallinikos incurred the following debt on the designated dates:
 - a. Standard Restaurant, \$7,165.62 on June 15, 1999
 - b. Canyon View Medical and Utah Valley Radiology, \$1,004.53

in 1997, 1999 and May 2000

- c. RSI Restaurant Specialist, \$3,018.48 on February 26, 1999
- d. ARC, \$847.35 during January 20, 1999, through December 11, 1999
- e. IHC, \$1,621.85 on May 13, 1999.
- f. Jimmy Zufelt, \$28,800.00 on October 19, 1999

DATED this 16 day of July, 2002.

McKAY, BURTON & THURMAN

By

Stephen W. Rupp
Attorneys for Trustee/Plaintiff

NICK J. COLESSIDES

By

Nick J. Colessides
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amend Stipulated Facts was mailed, postage prepaid, on the 16th day of July, 2002, to the following:

Nick J. Colessides
466 South 400 East, #100
Salt Lake City, UT 84111-3325

ka\pl\kallinikosg.stipfacts

Honni Pavee

REPLY ADDENDUM EXHIBIT 2

FILED IN THE
UNITED STATES
BANKRUPTCY COURT
DISTRICT OF UTAH

SEP 18 3 38 PM '02

WILLIAM H. GUNTER
CLERK OF COURT
BY _____
DEPUTY CLERK

Stephen W. Rupp, Trustee (2824)
McKAY, BURTON & THURMAN
Attorneys for Trustee
Suite 600, Gateway Tower East
10 East South Temple Street
Salt Lake City, UT 84133
Telephone: (801) 521-4135

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
DISTRICT OF UTAH, CENTRAL DIVISION**

| | | |
|----------------------|---|-----------------------------|
| In re: | : | Bankruptcy No. 01-21857 JAB |
| | : | (Chapter 7) |
| STEVE KALLINIKOS and | : | |
| DEBBY D. KALLINIKOS | : | |
| Debtors. | : | |

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|---------------------------|---|--------------------------------------|
| STEPHEN W. RUPP, TRUSTEE, | : | Adversary Proceeding No. 01P-2192JAB |
| Plaintiff, | : | |
| -vs- | : | |
| HARRY GOUNARIS, | : | |
| Defendant. | : | |

**MOTION FOR MONEY JUDGMENT, MEMORANDUM
AND NOTICE OF HEARING**

The Plaintiff in the above-captioned adversary proceeding, Stephen W. Rupp, hereby requests entry of a money judgment for the Plaintiff against the Defendant in the amount of \$9,139.78. This amount is the amount admittedly avoidably transferred from the debtor, Steve Kallinikos to the Defendant, Harry Gounaris, from February 25, 2000 until July, 2002. The transfers have already been considered and determined by this Court to have been avoidable transfers. This Motion is brought as a supplemental proceeding to this Court's Judgment dated July 25, 2002.



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As Memorandum and in further support and explanation of this Motion, the Plaintiff provides as follows:

1. The debtor, Harry Gounaris, and the debtor, Steve Kallinikos, sold a business. The sale resulted in two notes. Both had an equal interest in the notes. The purchaser made monthly payments on both notes.

2. Mr. Kallinikos filed a Chapter 7 bankruptcy on February 13, 2001. The Plaintiff is the Trustee duly appointed in his Chapter 7 bankruptcy case.

3. The purchasers of the business makes a \$912.07 monthly payment on the large note, also referred to as the "Haste, Inc. note". The purchaser makes a monthly payment of \$190.02 on the small note, also referred to as the "personal note".

4. The debtor, Steve Kallinikos, allegedly transferred his interests in the notes to the Defendant, Harry Gounaris.

5. The Plaintiff has brought this adversary proceeding against the Defendant, Harry Gounaris, to set aside any transfer from Mr. Kallinikos to the Defendant as an avoidable preferential or fraudulent transfer.

6. In pursuit of the avoidance of the transfers, the Trustee's complaint also sought appropriate money judgments against the Defendant for avoided transfers.

7. The payments under the notes had commenced in approximately November of 1997. As of February, 2000, approximately one year prior to the bankruptcy filing by Mr. Kallinikos, the monthly payment on the large note was \$912.07 due the first of each month. The payment on the small note was \$190.02 due the 15th of each month.

8. All payments due under the notes have been paid by the purchaser.

9. Beginning April 10, 2001 to the present, all payments under the large note have been paid into the Fourth District Court, Utah County, State of Utah, pursuant to Court order. Otherwise, all payments under the notes have been made to the Defendant and the debtor as transferees.

10. The avoided transfers by the debtor to the Defendant occurred on or about February 25, 2000.

11. Concerning the avoided transfers and payments under the notes, the debtor, Steve Kallinikos, has testified by affidavit the following:

“19. After the February 25, 2000 assignment to Gounaris of the personal note and the Haste, Inc. note, I forwarded all payments I received pursuant to those notes directly to Gounaris. I did not retain control over those funds after the transfer was effectuated.” (See pertinent portion of Affidavit of Steve Kallinikos attached as Exhibit “A”).

12. Concerning the avoided transfers and the payments under the notes, the Defendant, Harry Gounaris, has testified by affidavit the following:

“16. After the February 25, 2000 assignment to me of the personal note and the Haste, Inc., Kallinikos forwarded all payments he received pursuant to those notes directly to me. Kallinikos and Haste, Inc. did not retain control over those funds after the transfer was effectuated.” (See pertinent portion of Affidavit of Harry Gounaris attached as Exhibit “B”).

13. Since February, 2000, which date is coincidentally also approximately one year prior to the filing of the debtor’s bankruptcy petition, all payments under the two notes, including the interest of the debtor in the notes, have been paid to the Defendant, Harry Gounaris.

14. Payments under the large note continued until April 10, 2001 after which the payments have been directed to the State Fourth District Court. Payments under the small note have continued until after the entry of the judgment entered in this adversary proceeding avoiding the transfers of February, 2000 from the debtor to the Defendant.

15. As confirmed and admitted by both the Defendant and the debtor, as of the date of the entry of the Court's judgment, the Defendant, Mr. Gounaris, received at least fourteen payments under the large note of \$912.07 per month, due the first of each month, one-half of which were due Mr. Kallinikos but for the avoided transfer. One-half of the total payments under the large note which were avoidably transferred from the debtor to the Defendant is \$6,884.49.

16. As of the date of the entry of judgment in this adversary proceeding, there have been approximately twenty-nine monthly payments of \$190.02 under the small note, each payment due the 15th of each month. One-half of those monthly payments for the twenty-nine month period is \$2,755.29.

17. Both the debtor and the Defendant have admitted that the Defendant, Harry Gounaris, has received at least \$9,139.78 from the avoided assignments and transfers of Mr. Kallinikos' interest in the notes to the Defendant, Mr. Gounaris.

18. The Plaintiff is entitled to a money judgment against the Defendant, Harry Gounaris, in the total amount of \$9,139.78 or one-half of the payments which Mr. Gounaris has received under the notes since February, 2000 until entry of the judgment in this adversary proceeding. This Motion is brought as a motion for judgment under the complaint and as execution upon and proceeding supplemental to this Court's judgment signed July 25, 2002.

NOTICE OF HEARING

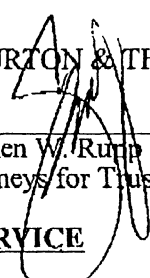
NOTICE IS HEREBY GIVEN that a hearing will be held on the foregoing Motion For Money Judgment before the Honorable Judith A. Boulden, U.S. Bankruptcy Court Judge, on the 18th day of October, 2002, at the hour of 11:00 o'clock a.m., Frank E. Moss United States Courthouse Building, 350 South Main Street, Salt Lake City, Utah. Any objections

or responses thereto shall be made in writing, filed with the above-entitled Court and served upon the undersigned Trustee no later than two (2) days prior to the time set for hearing.

DATED this 18 day of September, 2002.

McKAY, BURTON & THURMAN

By


Stephen W. Rupp
Attorneys for Trustee/Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion For Money Judgment was mailed, postage prepaid, on the 18th day of September, 2002, to the following:

Nick J. Colessides
466 South 400 East, #100
Salt Lake City, UT 84111-3325

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Karri Preece

repay the \$20,000 he had loaned to me and account for money I received from the Personal Note and the Haste, Inc. Note.

17. I was unable to repay Gounaris except through an assignment of his interest in the Personal Note and the Haste, Inc. Note. Thus, on February 25, 2000, I assigned my right in the Personal Note and Haste, Inc.'s rights in the Haste, Inc. Note to Gounaris.

18. By the transfer to Gounaris, I did not intend to defraud any of my creditors. Rather the transfer to Gounaris was intended to satisfy an obligation to Gounaris stemming from the 1997 sale of Haste, Inc.'s business to Nuttall and to repay loans he made to me.

19. After the February 25, 2000 assignment to Gounaris of the Personal Note and the Haste, Inc. Note, I forwarded all payments I received pursuant to those notes directly to Gounaris. I did not retain control over those funds after the transfer was effectuated.

20. I received reasonably equivalent value in return for the assignment of my interest in the Personal Note and the Haste, Inc. Note to Gounaris. Gounaris already owned a 50% interest in both the Haste, Inc. Note and the Personal Note stemming from the

sale of Burger Supreme to Nuttall. Thus, I assigned only my 50% interest in the notes to Gounaris. At the time of the assignment, Gounaris had recently loaned me \$20,000 drawn from Gounaris' home equity line of credit. I had also borrowed portions of the note proceeds belonging to Gounaris. Gounaris canceled those borrowed amounts in exchange for the assignment. Thus, Gounaris paid approximately \$25,000 for the assignment from me of the Personal Note and the Haste, Inc. Note.

21. At the time of the assignment of the Haste, Inc. Note, Gounaris had no reason to believe that I was insolvent and in fact at the time of the assignment to Gounaris I was not insolvent.

Dated this 24 day of January, 2002.


STEVE KALLINIKOS

13. On or about February, 2000, I demanded that Kallinikos repay the \$20,000 I had loaned to him and account for money received on the Personal Note and the Haste, Inc. Note that should have come to me but was instead kept by Kallinikos.

14. Kallinikos was unable to repay me except through an assignment of his interest in the Personal Note and the Haste, Inc. Note. Thus, on February 25, 2000, Kallinikos assigned his rights in both the Personal Note and the Haste, Inc. Note to me.

15. The assignment of the Notes to me was intended to satisfy Haste, Inc.'s obligation to me stemming from the 1997 sale of Haste, Inc.'s business to Nuttall and to repay loans made by me to Kallinikos.

16. After the February 25, 2000 assignment to me of the Personal Note and the Haste, Inc. Note, Kallinikos forwarded all payments he received pursuant to those notes directly to me. Kallinikos and Haste, Inc. did not retain control over those funds after the transfer was effectuated.

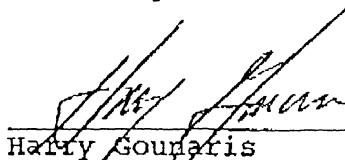
17. Kallinikos received reasonably equivalent value in return for the assignment of his interest in the Personal Note and the Haste, Inc. Note. I already owned a 50% interest in both the Haste, Inc. Note and the Personal Note stemming from the sale

of Burger Supreme to Nuttall. Thus, Kallinikos assigned only his 50% interest in the notes to me.

18. At the time of the assignment, I had recently loaned Kallinikos \$20,000 drawn from my home equity line of credit. Kallinikos had also borrowed portions of the note proceeds belonging to me. I forgave those debts in exchange for the assignment. Thus, I paid approximately \$25,000 for the assignment of the Personal Note and the Haste, Inc. Note.

19. At the time of the assignment of the Haste, Inc. Note, I had no reason to believe that Kallinikos was insolvent.

Dated this 24th day of January, 2002.

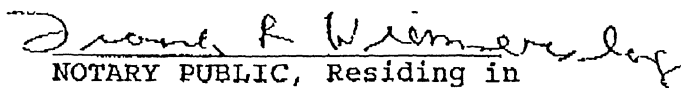


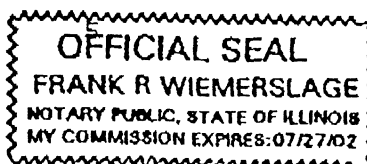
Harry Gounaris

STATE OF ILLINOIS)
: ss
COUNTY OF COOK)

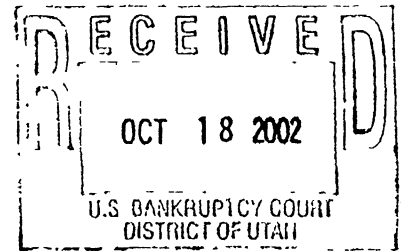
On the 24th day of January, 2002, personally appeared before me Harry Gounaris, who being by me duly sworn, did say, that he is the signer of the foregoing instrument, who duly acknowledged to me that he executed the same.

My Commission Expires:


NOTARY PUBLIC, Residing in
COOK COUNTY,
State of ILLINOIS



REPLY ADDENDUM EXHIBIT 3



Stephen W. Rupp, Trustee (2824)
McKAY, BURTON & THURMAN
Attorneys for Trustee
Suite 600, Gateway Tower East
10 East South Temple Street
Salt Lake City, UT 84133
Telephone: (801) 521-4135

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
DISTRICT OF UTAH, CENTRAL DIVISION**

| | | |
|----------------------|---|--------------------------------------------|
| In re: | : | Bankruptcy No. 01-21857 JAB (Chapter 7) |
| STEVE KALLINIKOS and | : | |
| DEBBY D. KALLINIKOS | : | |
| Debtors. | : | |

| | | |
|---------------------------|---|--------------------------------------|
| STEPHEN W. RUPP, TRUSTEE, | : | Adversary Proceeding No. 01P-2192JAB |
| Plaintiff, | : | |
| -vs- | : | |
| HARRY GOUNARIS, | : | |
| Defendant. | : | |

JUDGMENT

The Motion For Money Judgment by the Plaintiff, Stephen W. Rupp, Trustee, came on for hearing on the 18th day of October, 2002. Stephen W. Rupp appeared for the Plaintiff. Other appearances were noted on the record. The Court considered the Plaintiff's Motion For Money Judgment and Memorandum dated September 18, 2002. There were no responses or objections to the motion. Having considered all presented, and the arguments of counsel, notice appearing proper and for good cause otherwise appearing,



012192D31

IT IS HEREBY ORDERED that Stephen W. Rupp, Trustee of the bankruptcy estate of Steven and Debbie Kallinikos, is hereby granted a money judgment against the Defendant, Harry Gounaris, in the amount of \$9,139.78, which amount shall accrue interest at the legal rate of interest from the time of the entry of this judgment.

DATED this 18 day of October, 2002.

BY THE COURT:



JUDITH A. BOULDEN
U.S. BANKRUPTCY COURT JUDGE

CERTIFICATE OF SERVICE
CLERK OF THE COURT

I hereby certify that a true and correct copy of the foregoing Judgment was mailed, postage prepaid, on the 21 day of October, 2002, to the following:

Nick J. Colessides
466 South 400 East, #100
Salt Lake City, UT 84111-3325

Stephen W. Rupp, Trustee
Suite 600, 10 East South Temple Street
Salt Lake City, UT 84133



Deputy Clerk

ka\pl\kallinikosg.jud

CERTIFICATE OF SERVICE

Filed **eight** copies of the foregoing, **one containing an original signature** with the Clerk of the Utah Court of Appeals:

OFFICE OF THE CLERK OF THE COURT
UTAH COURT OF APPEALS
450 SOUTH STATE STREET, FIFTH FLOOR
SALT LAKE CITY, UTAH
84114-0230

and served **two** copies of the foregoing upon each of the following:

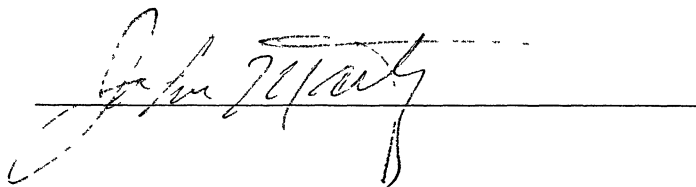
Attorney for Plaintiff-Appellee Jimmy Zufelt:

STEVEN F. ALLRED
Law Office of Steven F. Allred, P.C.
Troon Park, 585 S. State Street
Orem, Utah 85058

Trustee for the Bankruptcy Estate of Steve Kallinikos:

STEVEN W. RUPP
Trustee for the Bankruptcy Estate of Steve Kallinikos
McKay Burton & Thurman
170 South Main Street, Suite 800
Salt Lake City, Utah 84101

via first class mail, postage pre-paid, this 12th of August, 2005, addressed as set forth above.

A handwritten signature in dark ink, appearing to read "John Murphy", is written over a horizontal line.