

1993

Gregory Oar, and American Pension Services, Inc., a Utah corporation v. Dale s. Parks and Sterling Press, Inc. : Brief of Appellee

Utah Court of Appeals

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Gregory H. Oar; Plaintiff/Appellant Pro Se.

Allen Sims; Attorney for Appellees.

Recommended Citation

Brief of Appellee, *Oar v. Parks & Sterling Press, Inc.*, No. 930643 (Utah Court of Appeals, 1993).
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DOCKET NO. 930643

IN THE UTAH COURT OF APPEALS

GREGORY OAR, and AMERICAN	:	
PENSION SERVICES, INC., a Utah	:	
corporation,	:	
	:	
Plaintiffs,	:	
	:	
GREGORY OAR,	:	
	:	
Plaintiff and Appellant,	:	Priority No. 15
	:	
vs.	:	Case No. 930643-CA
	:	
DALE S. PARKS and	:	
STERLING PRESS, INC.,	:	
	:	
Defendants and Appellees.	:	

BRIEF OF APPELLEES

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County,
The Honorable Tyrone E. Medley, presiding

DEC 29 1993


Allen T. Nozomi

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IN THE UTAH COURT OF APPEALS

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PENSION SERVICES, INC., a Utah	:	
corporation,	:	
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	:	
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	:	
Plaintiff and Appellant,	:	Priority No. 15
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DALE S. PARKS and	:	
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	:	
Defendants and Appellees.	:	

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to §78-2a-3(2)(k); §78-2-2(3)(j), (4).

STATEMENT OF ISSUES

Appellant has appealed the trial court's ruling on two interlocutory motions.

1. Did the trial court err in denying Plaintiff's Motion to Disqualify?

The trial court's ruling on the motion should not be set aside unless there is no set of facts contained in the record to sustain the motion or unless the ruling to disqualify is clearly erroneous. Despain v. Despain, 855 P.2d 254 (Utah App. 1993).

2. Should the trial court's denial of Plaintiff's Motion for Release of Funds be reversed? The standard of review for an interlocutory motion is the clearly erroneous standard. Mower v. McCarthy, 245 P.2d 224 (Utah 1952).

STATEMENT OF THE CASE

Nature of the case.

This was an action for partition of real property filed by one of two co-tenants against the other. The original plaintiff also sought relief alleging unlawful detainer, unjust enrichment and breach of fiduciary duty.

Course of the Proceedings.

In July, 1990, Plaintiff, Florence Bowers, a tenant in common holding a 42.87% interest in real property (the "Partition Property") filed a Complaint against Dale S. Parks, a tenant in common owning a 57.13% interest in the partition property, Sterling Press, Inc., sole tenant of all of the Partition Property occupying the premises under written lease, West One Bank, a first lien mortgage holder of the Partition Property, Richard G. Newton, whose IRA trust held a trust deed against Bowers interest in the Partition Property, and Bruce M. Giffen, who held a trust deed against the Bowers interest in the Partition Property. See Complaint with attachments. (R 2-12; Add. No. 1).

Tenant in Common, Dale S. Parks, and tenant, Sterling Press, Inc., filed their Answer to Plaintiff's Complaint. See Answer and Counterclaim with attachments, (R 17-26; Add No. 2). Said Defendants denied Plaintiff's allegations as to unjust enrichment, unlawful detainer, and breach of fiduciary duty. Defendants counterclaimed against Plaintiff for sums expended for maintenance and upkeep of the premises to which they were entitled to reimbursement and also requested partition and/or sale of the Partition Property.

On September 13, 1991, J. Spencer Ball, attorney for Plaintiff, withdrew as counsel. (R 36) On April 17, 1992, Michael L. Chidester of Mooney & Associates, appeared as attorney for

Plaintiff, Florence Bowers. (R 39-40)

On March 24, 1992, Plaintiff, Florence Bowers, moved to substitute Gregory Oar as Plaintiff, based on assignment of her cause of action or claims in the case. (R 41-42)

On May 4, 1992, Plaintiff, Gregory Oar, filed a Motion for Release of Funds specifically asking for the release of rental payments claimed to be held in "escrow". (R 51-53; Add No. 3) Said motion alleged that an underlying trust deed note given by Florence Bowers was in default and that foreclosure of Bowers' interest had been scheduled for May 12, 1992. Plaintiff Oar filed the motion for release of rental payments alleged to be held in escrow for the purpose of curing the default on the trust deed note on the property held in Florence Bowers' name. The court held a hearing for argument on the Motion for Release of Funds on May 11, 1992. (R 54-57) Plaintiff failed to established the existence of any "escrow account." Beyond that, Plaintiff failed to establish any right to immediate payment of disputed amounts if any account, escrow or otherwise, in fact, existed. Judge Sawaya denied the motion by minute entry dated May 11, 1992. (R 58)

On May 15, 1992, American Pension Services, Inc., the trustee for the IRA account of Richard G. Newton, filed to intervene as a party plaintiff. Said motion was made by attorney Michael Chidester, the attorney for Gregory Oar, and before that Florence Bowers, whose interest in the Partition Property was

foreclosed by Mr. Newton's trust. See Motion to Intervene and Memorandum in Support of Intervention. (R 59-64)

The trial court granted the motion of American Pension Services, Inc. to intervene as a party plaintiff. See Minute Entry dated July 8, 1992. (R 109)

On June 3, 1992, Plaintiff Gregory Oar filed a Motion to Disqualify through his attorney, Michael Chidester, to disqualify the attorney for Dale S. Parks and Sterling Press, Inc. on the grounds that said attorney had previously represented Gregory Oar in a substantially factually related matter. See Motion to Disqualify and Memorandum with attachments. (R 74-94; Add No. 5) Defendants, Dale S. Parks and Sterling Press, Inc., responded to the Motion to Disqualify on June 16, 1992, filing a response and the Affidavit of Dale S. Parks. (R 97-102; Add No. 6) Mr. Parks' affidavit disputed the allegations contained in Mr. Oar's affidavit asserting Attorney Sims represented Sterling Press, Inc. in 1981.

On July 8, 1992, the trial court denied Plaintiff's Motion to Disqualify and granted the Motion to Intervene by American Pension Services, Inc. (R 109) Michael Chidester of Mooney & Associates continued to represent Gregory Oar as the assignee of any claim of Florence Bowers that remained after foreclosure of her percent interest in the Partition Property and the intervening Plaintiff, American Pension Services, Inc., as the new owner of the Florence Bowers' interest.

On December 14, 1992, Stephen Cook, an attorney with Mooney & Associates, withdrew as attorney for Gregory Oar. (R 157-158) Gregory Oar filed a pro se appearance. (R 159-160)

On February 25, 1993, Gregory Oar, pro se, filed a Motion to Disqualify Counsel, supported by an affidavit and supporting memorandum. (R 165-186)

The trial court per Judge Tyrone E. Medley, denied the renewed motion to disqualify counsel. (R 193)

On May 4, 1993, the trial court entered its Scheduling Order and Trial Notice, setting trial for July 29, 1993 for two days. Said Scheduling Order was mailed to Gregory Oar, Allen Sims, and Stephen R. Cook. Exhibit and witness lists were ordered to be exchanged by June 3, 1993, with a final pre-trial settlement conference to be held July 22, 1993. (R 210-211)

On May 7, 1993, attorney for Plaintiff, American Pension Services, Inc. and attorney for Defendants, Dale S. Parks and Sterling Press, Inc., entered into a Stipulation agreeing to jointly list the Partition Property for sale, naming individual agents for each tenant in common and setting forth other matters. (R 212-213)

On June 3, 1993, Defendants, Dale S. Parks and Sterling Press, Inc., filed their list of witnesses and exhibits to be used at trial. (R 214-223)

Plaintiff American Pension Services, Inc. filed its

Witness and Exhibit List identifying no exhibits and listing one witness, Richard G. Newton. (R 224-225)

Plaintiff Gregory Oar filed no witness or exhibit list.

On July 26, 1993, Defendants filed their Trial Brief with attachments and Proposed Findings of Fact and Conclusions of Law. (R 244-285) Neither Mr. Oar or American Pension Services filed any trial brief in this matter.

Disposition in the Trial Court.

On July 29, 1993, the parties appeared before the Honorable Tyrone E. Medley for trial of the matter. American Pension Services, Inc. appeared through counsel, Stephen R. Cook. Gregory Oar appeared pro se. Dale S. Parks and Sterling Press, Inc. appeared in person and through counsel, Allen Sims. Plaintiff American Pension Services, Inc. and Defendants entered into an oral stipulation resolving all issues between them. Plaintiff Gregory Oar was given the opportunity to identify and present any claims which he believed he had through the assignment by Florence Bowers in the case and to present any evidence or documents to support such claims but failed to do so. See Findings of Fact and Conclusions of Law, Finding paragraph 29. (R 305-313; Add No. 6)

Plaintiff Gregory Oar was given a fair and ample opportunity to engage in discovery during the pendency of this action, and was given a full and fair opportunity to present all of his claims, witnesses and exhibits on the date appointed for trial.

See Findings of Fact and Conclusions of Law, Finding 27 and 28.

Plaintiff Gregory Oar failed to present evidence or witness testimony and failed to sustain his burden of proof. The trial court entered a judgment of dismissal with prejudice on any and all of his claims. See Findings of Fact and Conclusions of Law, Conclusion No. 5.

On August 26, 1993, Gregory Oar, acting pro se, filed a Notice of Appeal. (R 324-325) The Notice of Appeal does not contest any Finding of Fact or Conclusion of Law or the Judgment, but appeals the trial court's ruling on two interlocutory motions.

On September 9, 1993, Gregory Oar certified to the appellate court that a transcript of any of the proceedings at the trial level were not required.

SUMMARY OF ARGUMENT

Appellant's Brief does not contain a Statement of Issues that complies with Rule 24(a)(5) of the Utah Rules of Appellate Procedure. The brief makes numerous factual allegations under the caption Statement of Issues with no references whatsoever to the record. Appellant's Statement of the Case and Statement of Facts also makes numerous factual allegations with not one reference to the record. Defendants/Appellees have requested that Appellant's Brief be stricken for failure to comply with Rule 24(a)(7), (e), and (k), Utah Rules of Appellate Procedure. Appellees' motion was made on the basis that the Appellant failed to cite to the record

to support any of his allegations, alleges irrelevant and immaterial matter, and makes scandalous allegations unsupported by the record.

As to Plaintiff's appeal of the trial court's denial of two interlocutory motions, Plaintiff has failed to show any legal basis for reversal and has failed to show how or why reversal would make any difference in the judgment below since none of the trial court's findings or its judgment has been challenged on appeal. Plaintiff also has not mustered any evidence and has not shown that the challenged rulings are clearly erroneous.

ARGUMENT

Appellant's appeal should be dismissed for failure to properly comply with the Rules of Appellate Procedure for his failure to contest any of the Findings of Fact and Conclusions of Law and the judgment.

The appellate court should assume the correctness of the trial court's judgment with respect to its motions due to the Appellant's lack of compliance with Utah Rules of Appellate Procedure. Christensen v. Munns, 812 P.2d 69, 73 (Utah App. 1991).

When a person has been afforded trial, the presumption arises that the judgment relative to issues in that case are sound, and cannot be properly disturbed unless the one attacking it meets a burden of showing error which is substantial and prejudicial in the sense that there is a reasonable likelihood that the result

would have been different in absence of such error. Revas v. Pacific Finance Co., 397 P.2d 990 (Utah 1964); Hall v. Blackham, 417 P.2d 664 (Utah 1966).

In order to challenge the trial court's determination, Appellant must marshall the evidence which supports the finding or conclusion and demonstrate that despite this evidence that it is clearly erroneous. This Appellant has not done. Anton v. Thomas, 806 P.2d 744, 747 (Utah App. 1991).

Denial Of Plaintiff's Motion To Disqualify Should Not Be Reversed.

In 1981, Sterling Press, Inc. hired Allen Sims to undertake a liquidation of the corporation, remove real estate from the corporation, and liquidate other assets to a successor corporation owned solely by Dale S. Parks. At the end of the liquidation process in 1981, Gregory Oar was no longer a shareholder of or involved with Sterling Press, Inc. Mr. Oar and Mr. Parks became owners of three properties as tenants in common, one of which was leased to Sterling Press, Inc. and subject of the partition action. See Affidavit of Dale S. Parks, paragraphs 3, 4, 5 (R 101; Add No. 6) Mr. Parks stated in his affidavit that after the liquidation Mr. Oar ceased all contact with Mr. Parks, and it fell upon Sterling Press, Inc. to undertake maintenance and improvements that were the responsibility of the tenants in common under the provisions of the lease between Sterling Press and the

tenants in common. In 1985, Sterling Press, Inc. and Dale S. Parks requested that Mr. Sims represent them to collect items owing from Mr. Oar and resolve payments between them. Mr. Sims represented Sterling Press, Inc. and Dale S. Parks. Said representation was clear to the parties at that time. See Affidavit of Dale S. Parks, paragraph 8. (R 101; Add No. 6) Mr. Oar's own affidavit states that Allen Sims was hired by Sterling Press, Inc. to prepare the liquidation documents.

In Defendants' Response to Motion to Disqualify Counsel (R 97-99; Add No. 6), Attorney Allen Sims indicated that he undertook to liquidate certain assets to the individual shareholders but he represented the corporation, that his billings went to Sterling Press, Inc., that all payments came from Sterling Press, Inc., and that there had never been an attorney-client relationship between Mr. Oar and Allen Sims. Eleven years after the liquidation in which Mr. Oar ceased to be a shareholder in Sterling Press, Inc., where he never had title to the Partition Property for any time period relevant to Plaintiff's claim (merely obtaining an assignment of the claim of Florence Bowers), and where his contact with the parties was nil, Mr. Oar moves for disqualification. Mr. Oar's presence in this case was to pursue the claims of Florence Bowers, if she had any, a short time before and after foreclosure of her interest in the Partition Property.

Appellant has not shown that denial of Plaintiff's Motion

to Disqualify was clearly erroneous. The trial court's ruling was well within the court's discretion, based upon the affidavits of the parties and the surrounding facts.

In reviewing an Interlocutory order where issues of fact are involved and there are no findings of fact, the court does not review the facts but assumes that the trier of facts found them in accord with its decision and will affirm the decision if from the evidence it would be reasonable to find facts to support it. Mower v. McCarthy, 245 P.2d 224 (Utah 1952).

Appellant's burden on appeal is to cite to the appellate court all of the evidence in the record that would support the determination reached and then demonstrate why, even when viewed in the light most favorable to the court below, it is insufficient to support the decision or finding under attack. Harker v. Condominums Forest Glen, Inc., 740 P.2d 1361, 1362 (Utah App. 1987); Reed v. Mutual of Omaha Ins. Co., 776 P.2d 896 (Utah 1989); Saunders v. Sharp, 793 P.2d 927, 931 (Utah App. 1990).

By an assignment of claims by Florence Bowers, Mr. Oar substituted as a party plaintiff and then raised the issue of conflict of interest. With contested facts, given the eleven years that passed between Mr. Oar's involvement as a shareholder of Sterling Press and his appearance as a Plaintiff and given the fact that any claims he had as Plaintiff were the claims of Florence Bowers during the period she owned the Partition Property as a co-

tenant, the trial court denied Mr. Oar's motion. It was well within the discretion of the trial court to deny the Motion to Disqualify Counsel, there are facts in the record to sustain such denial and Appellant has not shown such denial of said motion was clearly erroneous.

There Is No Basis For The Court Of Appeals To Review The Trial Court's Denial Of Plaintiff's Motion For Release Of Funds.

The other issue raised by Appellant is the denial by the trial court of his Motion for Release of Funds. Most kindly characterized, Appellant alleges attorney misconduct. Appellant repeatedly mischaracterizes said motion, claiming that it was for an accounting and that it was for the turnover of funds. In fact, said motion never requested an accounting and the release of funds was related to an alleged "escrow" account held by Defendants. The trial court denied the motion. The Appellant failed to establish the existence of any escrow account held by Defendants. Appellant has failed to relate any of his outrageous and unfounded allegations to any part of the record that would in any way sustain his position. This portion of the appeal of Gregory Oar should be dismissed as frivolous as it lacks any support in the record and the characterization by Appellant is an outrageous attack on Defendants' counsel. Further, attorney fees should be awarded for the inclusion of burdensome, irrelevant, immaterial and particularly scandalous matters in the appeal and Brief of Mr. Oar,

pursuant to Rule 24(k), Utah Rules of Appellate Procedure.

Appellant, as relief, seeks damages or a new trial. The claim for damages on appeal is clearly frivolous. The other claim for relief for a new trial is unsupported by any argument or any citation of the record or the law that a new trial is justified, or would make any difference where no findings of fact or conclusions of law on the judgment is appealed or contested. Appellant does not identify any claim Florence Bowers had after foreclosure to be adjudicated. Appellant has done little more than reargue the memorandum of counsel at the trial level and has not forwarded any argument as to why the trial court should be reversed in its ruling.

CONCLUSION

For the foregoing reasons, Appellees respectfully request the following relief on appeal;

1. Appellant's appeal should be dismissed for its substantial failure to comply with the Utah Rules of Appellate Procedure, Rule 24(a)(5)(7)(e) and (k). Appellant failed to identify or try any substantive issues at trial by his failure to present any evidence, he has not appealed any of those issues, and he has not challenged any findings of fact or conclusions of law or the trial court's judgment.

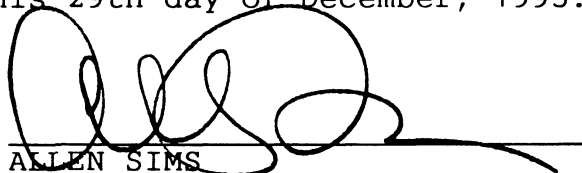
2. There is factual support for the trial court's refusal to disqualify and Appellant has not shown the court's

decision to be clearly erroneous.

3. The trial court's denial of Appellant's motion to release funds contains outrageous allegations unsupported by any reference in the record whatsoever and there is no support for any facts cited by Appellant for it to even consider this issue and it should be dismissed.

4. Appellees should be granted their attorney's fees for Appellant's disregard of the Rules of Appellate Procedure and for willful allegations of unsupported, scandalous matters.

Respectfully submitted this 29th day of December, 1993.




ALLEN SIMS
Attorney for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of December, 1993, I caused an original and eight (8) copies of the foregoing Brief of Appellees to be hand delivered to the Utah Court of Appeals and two (2) copies to be mailed via first class mail, postage prepaid thereon to:

Gregory H. Oar
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North Salt Lake City, Utah 84054
Plaintiff/Appellant Pro Se



Allen Sims

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Attorney for Plaintiff
2102 East 3300 South
Salt Lake City, Utah 84109
Telephone (801) 486-5634

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

FLORENCE BOWERS,

Plaintiff,

v.

DALE S. PARKS, STERLING
PRESS, INC., a Utah
Corporation, WESTONE BANK,
a Utah Corporation, RICHARD
G. NEWTON, and BRUCE M.
GIFFEN,

Defendants

COMPLAINT

Civil No.

Judge

Comes now the Plaintiff, and complains against Defendants
and alleges as follows:

1. Plaintiff and Defendant Dale S. Parks are residents of
Salt Lake County, Utah.

2. Defendant Sterling Press, Inc. is a Utah Corporation
doing business in Salt Lake County and with its principal place
of business in Salt Lake County

3. Defendants West One Bank and Pension Services are
corporations doing business in Salt Lake County.

4. The real property which is the subject of this cause of
action is in Salt Lake County, and the events complained of
occurred in Salt Lake County.

5. Plaintiff acquired title to a 42.87% interest in fee

simple as a tenant in common to an improved property located at 2630 South 300 West, Salt Lake City, Utah. The other 57.13% is owned by Defendant Dale S. Parks, the only other tenant in common.

6. Defendant Westone Bank has a security interest in the form of Trust Deed, which secures payment on a Note.

7. Defendants Richard G. Newton, and Bruce M. Giffen have security interests against Plaintiff's 42.87% interest in the property, and are junior to the interest of Westone Bank.

8. All or a majority of the stock of Defendant Sterling Press, Inc. is owned by Defendant Parks, and Parks is the chief executive officer of the same.

COUNT I--UNLAWFUL DETAINER

9. Plaintiff realleges every paragraph above, and incorporates the same herein.

10. Defendant Sterling Press, Inc. has been a tenant on the subject property on a month to month verbal "triple net" lease with the property owners, where the tenant is liable for all utilities, taxes, insurance, maintenance, costs of improvements, and any other expenses or improvements, with the lease payment being the amount of the mortgage payment, or \$2,372.00.

11. On June 13, 1990, Plaintiff gave notice of a demand for an increase in rent on the month to month triple net lease to Defendant Sterling Press on her share of the property. Said increase raised the rent from \$1,028.88 per month to \$1,750.00 per month, in order to reflect the current commercial rental market. See Letter, attached as Exhibit "A".

12. On June 20, 1990, Defendant Sterling Press wrote a letter in response to Plaintiff's demand for a rental increase, and gave his refusal to pay the same, and Defendant has also failed to pay the same.

13. On July 2, 1990, Defendants were served notice to cure default of the said Lease, which default amounted to \$724.49, or to vacate the premises in three days. A true and correct copy of this Notice Pay Rent in Three Days or Vacate, along with a notarized Return of Service is attached as Exhibits "B" and "C".

14. Defendants have unlawfully detained said premises from July 6, 1990, after being properly served the appropriate Notice to Pay Rent or Vacate. See Exhibit "B".

COUNT II--PARTITION

15. Plaintiff realleges every paragraph above, and incorporates the same herein.

16. Defendant Parks' lease arrangement with Defendant Sterling Press, wholly owned by Parks, where the rental amount is far below the fair market value of the property, has encroached upon Plaintiff's rights as a tenant in common to receive his share of the rental income from the property.

17. Defendants have occupied the premises in such a manner that Plaintiff has been excluded from the premises.

18. Defendants have hindered Plaintiff from Plaintiff's efforts to market the property or to sell the property to prospective purchasers which have shown an interest in Plaintiff's property interest.

19. A partition of the property cannot be made without

great prejudice to the owners by reason of the manner in which it is situated.

COUNT III--UNJUST ENRICHMENT

20. Plaintiff realleges every paragraph above, and incorporates the same herein.

21. Defendants have been unjustly enriched in that they have received the benefit of possession of a building without paying a fair market compensation.

COUNT IV--BREACH OF FIDUCIARY DUTY

22. Plaintiff realleges every paragraph above, and incorporates the same herein.

23. Defendant Parks has breached his fiduciary duty to all tenants in common in leasing the property at a rate far below market value, in that he has set the amount of rent such that his Corporation would benefit and therefore he would benefit from the below market rent, and the other tenant in common would suffer the corresponding detriment of not receiving the fair market value of rent to the same extent.

WHEREFORE, Plaintiff prays for relief against Defendants as follows:

UNLAWFUL DETAINER

1. That an order of the court should issue restoring possession of the above-described premises to Plaintiff, requiring the Defendants to immediately vacate the same.

2. That judgment be entered in favor of Plaintiff against Defendants for back rent which has accrued and which will accrue until this matter is resolved.

5

3. That Plaintiff be awarded its reasonable attorney's fees, costs and interest.

4. That Plaintiff be awarded treble damages pursuant to Utah Code Annotated, section 78-36-10 up to the time that Defendants vacate the premises.

5. That Plaintiff be awarded all damages to the premises to be proven at trial.

PARTITION

6. That the undivided interest of the parties be partitioned by requiring the property to be sold, and Plaintiff to be awarded his share of all proceeds of sale.

7. That in the alternative, that Defendant be ordered to allow an appraiser to appraise the property, each party paying one half of the appraisal, and that Plaintiff be awarded judgment against Defendant for the entire amount of Plaintiff's equity in the property.

8. For all court costs, abstracting costs, costs of referees and all other costs as is necessary in order for the Court to effect the partition of the property.

9. For a reasonable attorney's fee for having to prosecute this action, together with all costs and interest.

UNJUST ENRICHMENT

10. For the fair market amount of rent less the amount of rent received for the entire period in which the property was leased to Sterling Printing.

11. For a reasonable attorney's fee for having to prosecute this action, together with all costs and interest.

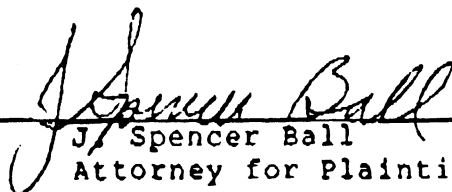
BREACH OF FIDUCIARY DUTY

12. For the fair market amount of rent less the amount of rent received for the entire period in which the property was leased to Sterling Printing.

13. For a reasonable attorney's fee for having to prosecute this action, together with all costs and interest.

14. For such other relief as this Court deems just.

Dated this 20th day of July, 1990.


J. Spencer Ball
Attorney for Plaintiff

J. SPENCER BALL
ATTORNEY AT LAW

102 East 300 South
Salt Lake City, Utah 84109

Telephone: (801) 486-5634

June 13, 1990

Dale S. Parks
Sterling Press, Inc.
c/o Allen Sims
8 East Broadway, Suite 510
Salt Lake City, Utah 84111

Re: Lease and partition of property owned by Dale S. Parks
and Florence Bowers

Dear Mr. Sims:

I represent Florence Bowers regarding her interest and rights in the property located at 2630 South 300 West, Salt Lake City, Utah. I am writing in order to demand that the rent on the property be increased, for an accounting of the amounts of Florence's share of rents and mortgage expenses.

Florence acquired her interest from Mr. Birkinshaw, who acquired his interest by a quitclaim deed from Gregory Oar. A search of the County records regarding title will conclusively show that Florence has clear title to her 42.87 percent interest.

Florence has sought advice from commercial real estate agents and printing companies, where she has obtained reliable advice regarding the market value of rent for the property. Several commercial real estate agents have told her that the market value of warehouse space is \$0.26 per square foot per month. An additional four to six cents should be added to that figure for the elaborate electrical installations which are required by a printing operation. Florence has also compared the rent with Davis Printing and Business Forms, Inc., and to Westwind Printing, where the rent averages \$0.30 to \$0.32 per square foot per month.

Based on the above information, Florence is demanding that the rent on her undivided share of the property be immediately raised to reflect \$0.28 per square foot for her 42.87% share of the 14,607 square feet of space, or \$1,753.37. Her demand for rent is based upon Mr. Parks' exclusion of Florence from her rightful share of the market value of rent from the third party, Sterling Printing, which is in fact owned exclusively by Mr. Parks. Such a relationship between Mr. Parks and Sterling Printing involves a fiduciary relationship from Mr. Parks to Florence, requiring Florence receive the fair market value of rent for her share.

EXHIBIT A

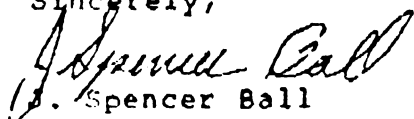
Florence's accountant has also indicated to her the importance of her maintaining an accounting of rents received and mortgage expenses on the property. This accounting is needed, among other things, to document her claims on her tax returns. In order for Florence to properly account for her share of rents and mortgage expense, she needs a monthly statement to be sent to her each month with her rental payment showing the amounts of rent owed and the principal, interest, taxes and insurance portions of the mortgage expense for her share.

Florence therefore is demanding that she receive the accounting for present and past rent to the satisfaction of her accountant.

If Sterling Printing refuses to accept the increase of the rent by the next payment, or if we fail to agree as to the market value, and if Mr. Parks continues to refuse to send her the required accounting, then I will immediately commence a lawsuit in her behalf to recover the fair market value of the rents, for both the past as well as the future, according to what the Court will determine as the fair market value. In addition, I will sue for a partition of the property, so that the property be actually physically partitioned in order that Florence may rent the space granted to her to a new tenant.

I hope that we can resolve these problems between the cotenants to their mutual benefit without the expense of litigation.

Sincerely,


J. Spencer Ball

J. SPENCER BALL
ATTORNEY AT LAW

2102 East 3300 South
Salt Lake City, Utah 84109

Telephone (801) 486-5634

Served Mark I. Strickland
Title Process Server
Date 7-2-90, Time 4:30 P.M.

NOTICE TO PAY RENT IN THREE DAYS OR VACATE

TO STERLING PRESS, INC., TENANTS AT 2630 SOUTH 300 WEST, SALT LAKE CITY, UTAH:

YOU ARE HEREBY NOTIFIED and required to pay the entire balance owing for rent, amounting to \$1,753.37, less the mortgage payment of \$1,028.88, which amounts to \$724.49, or to vacate the premises in THREE (3) DAYS from the date of service of this notice.

In the event of your failure to pay the said amount owing or to vacate the premises within such period of THREE (3) DAYS, you will be unlawfully detaining possession of said premises, and in accordance with the provisions of Section 78-36-10 of Utah Code Annotated, you will be liable for TREBLE DAMAGES for such unlawful detainer, and action will be commenced against you to evict you from said premises and to take judgment against you for three times the damages assessed by the court for unlawful detainer, together with the costs of legal action.

Dated this 27 day of June, 1990.

SERVE:
Sterling Press, Inc.
2630 South 300 West
Salt Lake City, Utah

J. Spencer Ball
J. Spencer Ball
ATTORNEY AT LAW

EXHIBIT B

Allen Sims, Esq. (2966)
of Allen Sims, P.C.
#8 East Broadway, Suite 510
Salt Lake City, Utah 84111
Telephone: (801) 364-9168

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

FLORENCE BOWERS,
Plaintiff,

vs.

DALE S. PARKS, STERLING PRESS,
INC., a Utah Corporation,
WEST ONE BANK, A Utah
Corporation, RICHARD G. NEWTON,
and BRUCE M. GIFFEN,
Defendants.

:
: ANSWER AND COUNTERCLAIM
:
:
:
: Civil No. _____
: Judge _____
:
:
:

COMES NOW Defendants, Dale S. Parks and Sterling Press,
Inc., by and through their attorney, Allen Sims of Allen Sims,
P.C. and for an Answer to Plaintiff's Complaint, admits, denies
and alleges as follows:

1. Except as specifically admitted hereafter,
Defendants deny each and every allegation of Plaintiff's
Complaint.

2. Plaintiff's Complaint fails to state a cause of
action upon which relief can be granted against Defendants.

3. Defendants admit Paragraphs 1, 2, 4, 6, 8, 12, and
13 of Plaintiff's Complaint.

4. As to Paragraph 5 of Plaintiff's Complaint,
Defendant Dale S. Parks, admits that he is the owner of a 57.13%

And.

interest in the premises located at 2630 South 300 West, Salt Lake City, Utah, 84115, but on information and belief, alleges that Florence Bowers is not the true owner of a 42.87 interest, but rather is a nominee holder for one, Gregory Oar, the true owner of said interest.

5. Defendants lack sufficient information upon which to form a belief as to Paragraphs 3 and 7 of Plaintiff's Complaint, and therefore, deny the same.

6. As to Paragraph 11 of Plaintiff's Complaint, Defendants admit the Plaintiff mailed a notice to Defendants, but deny that said notice had any legal effect.

7. Defendants deny the allegations of Paragraphs 10 and 14 of Plaintiff's Complaint.

8. As to Count II for Partition of Plaintiff's Complaint, Defendants reallege their answers to Paragraph 1 through 14 of Count I and incorporate the same herein as their response to Paragraph 15 of Count II of Plaintiff's Complaint.

9. Defendants lack sufficient information upon which to form a belief as to Paragraph 19 of Plaintiff's Complaint, and therefore, deny the same.

10. Defendants deny Paragraphs 16, 17 and 18 of Plaintiff's Count II.

11. As to Count III for Unjust Enrichment of Plaintiff's Complaint, Defendants reallege their answers to Paragraphs 1 through 19 and incorporate the same as their response to Paragraph 20 of Count III of Plaintiff's Complaint.

12. Defendants deny Paragraph 21 of Count III of Plaintiff's Complaint.

13. As to Count IV for Breach of Fiduciary Duty of Plaintiff's Complaint, Defendants reallege their answers to Paragraphs 1 through 21 and incorporate the same as their response to Paragraph 22 of Count IV of Plaintiff's Complaint.

14. Defendants deny Paragraph 23 of Count IV of Plaintiff's Complaint.

WHEREFORE, Defendants claim that:

1. Plaintiff's Complaint, Counts I, II, III, and IV, and the whole of it should be dismissed and the Plaintiff take nothing thereunder;

2. Defendants be awarded their attorneys' fees and costs in the defense of Plaintiff's Complaint; and

3. Such other and further relief as law and equity may provide.

COUNTERCLAIM

COMES NOW Defendant, Dale S. Parks, and complains against Plaintiff, Florence Bowers, as follows:

1. Plaintiff and Defendant are residents of Salt Lake County, State of Utah.

2. Defendant, Dale S. Parks, is a tenant-in-common of real property located at 2630 South 300 West, Salt Lake City, Utah, 84115, owning a 57.13% interest.

3. Plaintiff, Florence Bowers, claims to own the balance of 42.87% interest in said property as a tenant-in-common.

4. Defendant, Dale S. Parks, has been, since the creation of the co-tenancy, between himself and Gregory Oar, the tenant-in-possession of said premises.

5. Since 1985, neither Gregory Oar nor Florence Bowers has neither taken nor offered to take any active role in the management or upkeep of the premises.

6. Since 1985, Defendant, Dale S. Parks, has been required to expend sums for maintenance and upkeep of the premises for which he is entitled to reimbursement from the co-tenant.

7. Defendant, Dale S. Parks, has expended in the care and preservation of the aforesaid property the following amounts that require reimbursement by the co-tenant:

a.	Insurance premiums :	\$ 6,500.00
	(\$1,300 per year for five years)	
b.	Taxes paid:	\$ 4,306.53
c.	Asphalt Work	\$ 2,200.00
d.	Roof Repair	\$ 825.00
e.	Floor Repair -	\$ 5,568.00
TOTAL:		\$ 19,399.53

8. Plaintiff's portion of the above amount is \$9,699.76.

9. Defendant, Dale S. Parks, made written demand upon Plaintiff (as showed by Exhibit A attached hereto) for reimbursement for such amounts, but Plaintiff has failed to respond or otherwise make payment.

WHEREFORE, Defendant, Dale S. Parks, prays for relief against Plaintiff as follows, that:

1. Defendant, Dale S. Parks, be awarded \$9,699.76 for expenditures and disbursements;

2. The respective interests of the parties in this action be determined;

3. A partition of all of the real property be undertaken according to the respective interests of the parties, or if a partition thereof cannot be made without material injury to their rights, then for a sale of the real property and a division of the proceeds of such sale among the parties according to their respective rights and interests, and that due credit on such partition sale for the sums found to be due to Defendant for expenses be allowed;

4. Defendant, Dale S. Parks, be granted a reasonable attorney's fee for services performed and to be performed for the common benefit of all parties;

5. Defendant, Dale S. Parks, be granted his costs in this action; and

6. Defendant, Dale S. Parks, be granted such other and further relief as the Court may deem just in the premises.

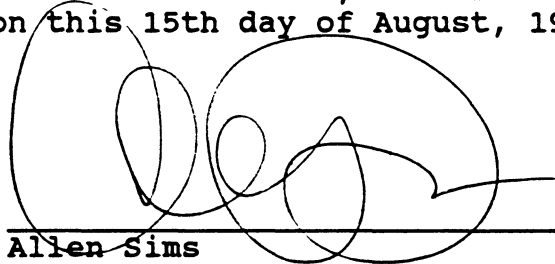
DATED this 15th day of August, 1990.

A handwritten signature in black ink, consisting of a large, stylized 'A' followed by a cursive 'S' and a horizontal line extending to the right.

Allen Sims
Attorney for Defendants
Dale S. Parks and
Sterling Press, Inc.

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing ANSWER AND COUNTERCLAIM to J. Spencer Ball, Attorney for Plaintiff, at 2102 East 3300 South, Salt Lake City, Utah, 84109, postage prepaid on this 15th day of August, 1990.

A handwritten signature in black ink, identical to the one above, consisting of a large, stylized 'A' followed by a cursive 'S' and a horizontal line extending to the right.

Allen Sims

ALLEN SIMS, P.C.

LAW OFFICES

8 EAST BROADWAY, SUITE 510

SALT LAKE CITY, UTAH 84111

ALLEN SIMS

(801) 364-9166

June 20, 1990

J. Spencer Ball, Esq.
2102 East 3300 South
Salt Lake City, Utah 84109

Re: 2630 South 300 West
Salt Lake City, Utah

Florence Bowers / Gregory Oar, and
Dale S. Parks, Owners

Dear Mr. Ball:

Thank you for your letter dated June 13, 1990, with respect to the above real estate.

Based on a July, 1988, appraisal obtained by Mr. Parks, the building in question on the property was constructed in 1951 and contains 8,332 square feet. There is a separate building in the rear of the property containing 2,275 square feet that has no heat and no electricity and is basically junk storage. I enclose a schematic of the real estate.

Rental comparables of property of similar age in July, 1988, showed the property to have a rental value between \$.17 and \$.19 per square foot for the 8,332 square feet. The appraisal showed \$.17 per square foot for the 8,332 plus \$.02 per square foot for the storage, or a total of \$.19 per square foot or a rental amount of \$1,583.08 per month.

Sterling Press has paid rent of \$2,400 per month over the years, even though the rental value was much less. Even at today's values, the amount of rent Sterling Press is paying is more than the market value based on the appraisal. If, as you assert, only fair market value of rent is to be paid, Sterling Press would be entitled to a refund of rents paid over the years.

As I indicated to you over the telephone, Mr. Parks and Mr. Oar and Sterling Press reached a settlement and an accounting in 1985 whereby Mr. Oar reimbursed Mr. Parks for advances made in

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Page 2
J. Spencer Ball, Esq.
June 20, 1990

prior years. Since that date Mr. Oar has taken no role in the upkeep of the premises and, for much of that time, has not been either in contact or available for contact.

The mortgage payments over the years have been \$2,372 per month, slightly under the rental amount paid. The following is a partial list of items that Mr. Parks has advanced and that require reimbursement by the co-tenant:

1. Insurance Premiums (\$1,300 per year for 5 years)	\$ 6,500.00
2. Taxes Paid (1989 taxes are still due)	4,306.53
3. Asphalt work (May, 1989)	2,200.00
4. Roof repair (March, 1989)	825.00
5. Floor repair (April, 1990)	5,568.00
<hr/>	
TOTAL:	\$ 19,399.53

The co-tenant's portion of this amount is \$9,699.76. Dale is reviewing his records to determine what other expenses have been incurred since 1985 and I will forward such expenses to you. I assume Mrs. Bowers or Greg is prepared to make an immediate payment of these items to Mr. Parks.

You should also be aware that there is water damage in the rear of the building that requires repair. A preliminary appraisal of this damage indicates about \$2,800 will be required to repair it.

Mr. Parks has previously advised Mrs. Bowers that he will provide to the co-tenant a periodic accounting showing the rents received of \$2,400 and the payments made of \$2,372. Additional items of expense such as insurance, taxes and repairs will also be included. Mr. Parks will either make this accounting quarterly or annually, but prior to tax filing time. With respect to needed repairs and periodic payments of insurance premiums and taxes, Mr. Parks will request the co-tenant to make a contemporaneous payment of the insurance premiums, taxes and repair invoices as they come due rather than advance the sums and have a charge against the co-tenant interest in the premises.

Page 3

J. Spencer Ball, Esq.

June 20, 1990

For some time Sterling Press has not had enough room in this aging facility to efficiently operate its business. It likely would have moved earlier, however, Mr. Parks did not wish to vacate the premises and assume all of the responsibilities of the payments on an empty building alone. (Mr. Oar not being available to handle that responsibility with Dale.) However, if Florence and/or Greg are now financially capable of handling such responsibility, Dale can formulate his own plans about getting into a more modern facility. You are probably aware that the real estate market is still a buyer's market. Sterling Press is interested in modernizing while the market is still favorable.

With respect to your desire to commence a partition action, I assume you will follow a course of action that is in the best interest of your clients. An inspection of the premises will reveal that a partition of the property to two separate deeded units with access is probably not feasible and that a court in a partition action might order a sale of the property. Let us make it clear, however, that we do not believe that a partition action is appropriate given the above-market rents paid and the expenses incurred which show the co-tenant owes a reimbursement to Mr. Parks.

Please feel free to contact me with any questions.

Sincerely,

Allen Sims

AS:lls

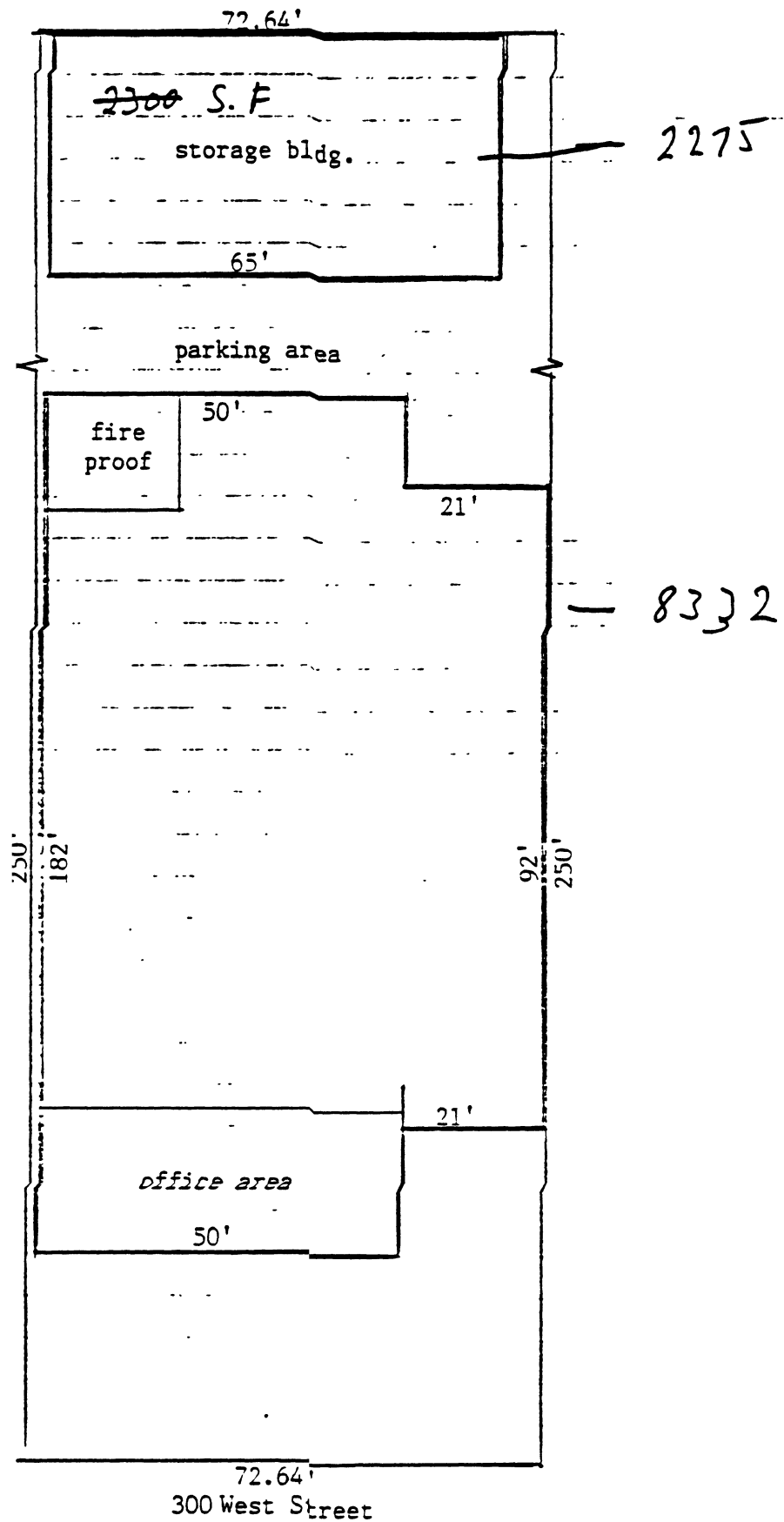
Enclosure

cc: Dales S. Parks

WILLIAMS APPRAISAL CO.

Name _____

Building Dimensions _____



PLOT AND BUILDING PLAN



MICHAEL L. CHIDESTER #5263
MOONEY & ASSOCIATES
Attorney for Plaintiff
236 South 300 East
Salt Lake City, Utah 84111
Telephone: (801) 364-5635

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

---ooo0ooo---

GREG OAR,

Plaintiff,

VS.

DALE S. PARKS, STERLING PRESS.
INC., a Utah corporation, WEST
ONE BANK, a Utah corporation,
RICHARD G. NEWTON, and BRUCE
M. GIFFEN,

Defendants.

**MOTION FOR RELEASE
OF FUNDS**

Civil No. 900904365 PR

Judge James S. Sawaya

---ooo0ooo---

Plaintiff, Greg Oar, by and through his attorney of record, Michael L. Chidester; hereby moves this Court for an Order requiring the defendants, Dale Parks and Sterling Press Inc., to release rental funds which they are currently holding in escrow. The basis for this Motion is as follows:

1. The plaintiff initially filed this action for unlawful detainer and unjust enrichment, alleging that defendant's were paying an inadequate amount of rent for the subject property.

2. Defendants Dale Parks and Sterling Press, Inc. counterclaimed against plaintiff alleging that plaintiff owed defendant a certain amount of money for maintenance of the subject property.

3. Since the inception of this lawsuit, the underlying mortgage of the subject property has been paid off, and Dale Parks and Sterling Press, Inc. are currently placing the rental payments for the subject property in escrow pending the resolution of this lawsuit.

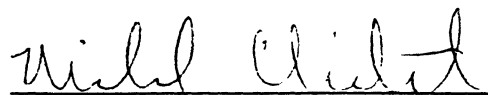
4. Plaintiff's right to the rental fees is established by contract; defendant's right to the rental fees as maintenance have not yet been established by this Court.

5. Plaintiff's interest in the subject property is subject to a trust deed note and trust deed in favor of Richard G. Newton. The trust deed note is currently in default, and the foreclosure sale for defendant's interest in the subject property has been scheduled for May 12, 1992.

6. The rental payments which the defendants are currently withholding would be sufficient to cure the default on the trust deed note and to preserve the plaintiff's interest in the property.

WHEREFORE, plaintiff requests this Court for an Order requiring defendants to release the rental payments which he is holding in escrow for the purpose of allowing plaintiff to cure the default on the trust deed note.

DATED this 4 day of May, 1992.



MICHAEL L. CHIDESTER
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MOTION FOR RELEASE OF FUNDS was mailed on the 4 day of May, 1992 to the following:

Allen Sims
Attorney for Defendants
124 South 600 East
Salt lake City, Utah 84102

Geri Allison
Attorney for WestOne Bank
107 South Main, #200
Salt Lake City, Utah 84111

A handwritten signature in cursive script, reading "Shelli Maynard", is written over a horizontal line.

MICHAEL L. CHIDESTER #5263
MOONEY & ASSOCIATES
Attorney for Plaintiff
236 South 300 East
Salt Lake City, Utah 84111
Telephone: (801) 364-5635

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

---ooo0ooo---

GREG OAR,

Plaintiff,

vs.

DALE S. PARKS, STERLING PRESS,
INC., a Utah corporation, WEST
ONE BANK, a Utah corporation,
RICHARD G. NEWTON, and BRUCE
M. GIFFEN,

Defendants.

MOTION TO DISQUALIFY
COUNSEL

Civil No. 900904365 PR

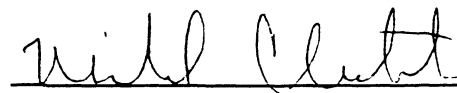
Judge James S. Sawaya

---ooo0ooo---

Plaintiff, Greg Oar, by and through his attorney of record, Michael L. Chidester, hereby moves this Court for an Order disqualifying Allen Sims from representing defendants Dale S. Parks and Sterling Press, Inc. in this matter on the grounds that Allen Sims previously represented Greg Oar in a substantially factually related matter.

This Motion is supported by the Memorandum of Points and Authorities filed herewith,
as well as the other pleadings filed in this matter.

DATED this 3 day of June, 1992.



MICHAEL L. CHIDESTER
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MOTION TO DISQUALIFY COUNSEL
was mailed on the 8 day of June, 1992 to the following:

Allen Sims
Attorney for Defendants
124 South 600 East
Salt lake City, Utah 84102

Geri Allison
Attorney for WestOne Bank
107 South Main, #200
Salt Lake City, Utah 84111



MICHAEL L. CHIDESTER #5263
MOONEY & ASSOCIATES
Attorney for Plaintiff
236 South 300 East
Salt Lake City, Utah 84111
Telephone: (801) 364-5635

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

---oo0ooo---

GREG OAR,

Plaintiff,

VS.

DALE S. PARKS, STERLING PRESS, INC., a Utah corporation, WEST ONE BANK, a Utah corporation, RICHARD G. NEWTON, and BRUCE M. GIFFEN,

Defendants.

**MEMORANDUM IN SUPPORT
OF MOTION TO
DISQUALIFY COUNSEL**

Civil No. 900904365 PR

Judge James S. Sawaya

---000000---

Plaintiff, Greg Oar, by and through his attorney of record, Michael L. Chidester, hereby submits this Memorandum in Support of his Motion to Disqualify Counsel.

INTRODUCTORY STATEMENT

In March of 1981, Sterling Press, Inc., a defendant in this matter, was liquidated with certain assets being distributed to the shareholders. The two shareholders were Greg Oar ("Oar") the plaintiff in this action, and Dale S. Parks, ("Parks"), a defendant in this matter.

Allen Sims ("Sims"), who represents Sterling Press and Parks in this matter, assisted the parties in negotiating the terms of the liquidation, and drafted the documents necessary to effectuate the liquidation (the "liquidation agreement").

As part of the liquidation, the property which is the subject of this lawsuit (the "property") was distributed to Oar and Parks as tenants in common. After the liquidation of Sterling Press, a successor corporation was formed, also known as Sterling Press. Sterling Press leased the property from Oar and Parks. Sims drafted the lease by which Sterling Press became a tenant in the property.

In November 1985, Sterling Press, Oar and Parks entered into an agreement ("the 1985 agreement") clarifying the terms of the liquidation, and establishing a method for managing the property. Once again, Sims was instrumental in negotiating the terms of the 1985 agreement, and Sims drafted the 1985 agreement which was signed by the parties. A copy of the 1985 agreement is attached hereto as Exhibit "A".

Oar ultimately sold his interest in the property, and after several transfers, his mother, Florence Bowers ("Bowers") purchased the property. In July 1990, Bowers filed this action asserting claims for unlawful detainer, partition, unjust enrichment, and breach of fiduciary duty. The basis for Bowers' Complaint was that Parks was using his position as the majority owner of the property to charge Sterling Press, the corporation which he owns, an inadequate amount of rent. Sims filed an Answer and Counterclaim on behalf of Parks and Sterling Press.

In April 1992, this Court granted Bowers' Motion to Substitute Oar as plaintiff in this action. On May 11, 1992, a hearing was held on Oar's Motion for Release of Funds. At that

hearing, Sims argued on behalf of Parks and Sterling Press that Oar was not entitled to receive his share of the rental proceeds because he was in arrears on his share of the maintenance costs for the property. Sims supported that argument by referring to the liquidation agreement, the lease, and the 1985 agreement.

ARGUMENT

Rule 1.9 of the *Utah Rules of Professional Conduct* sets forth the circumstances under which a lawyer may not represent a party whose claims are adverse to those of a former client.

That provision provides as follows:

A lawyer who has formerly represented a client in a matter shall not thereafter: a) represent another person in the same or a substantially factually related matter in which that person's interests are materially adverse to the interest of the former client unless the former client consents after consultation; or b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

Thus, in order to establish that a lawyer has a conflict of interest against a former client, the former client must establish that an attorney/client relationship existed, and that his former attorney is representing another party in a substantially factually related matter in which the present client of the lawyer has interests adverse to those of the former client. In the matter at hand, an attorney/client relationship previously existed between Oar and Sims, and Sims is now representing Parks and Sterling Press in a matter which is substantially factually related to Sims' former representation of Oar.

A. AN ATTORNEY/CLIENT RELATIONSHIP
EXISTED BETWEEN OAR AND SIMS.

Rule 1.9 of the *Utah Rules of Professional Conduct* presupposes the existence of a prior attorney/client relationship between the challenged attorney and the party who is disputing the attorney's representation of the adversarial party in the current litigation. Thus, the first question to be answered in a motion to disqualify is whether there was a prior attorney/client relationship. *Otaka v. Klein*, 791 P.2d 713, 717 (Hawaii 1990).

Sims initially performed services for Oar in 1981 when Sterling Press was liquidated. At that time, Sims negotiated the terms of the liquidation agreement, and drafted the documents necessary to effectuate the liquidation. Where a small, closely held corporation is involved, and in the absence of a clear understanding with the corporate owners that the attorney represents solely the corporation and not their individual interests, it is improper for the attorney thereafter to represent a third party whose interests are adverse to those of the stockholders and which arise out of a transaction which the attorney handled for the corporation. *In Re Brownstin*, 602 P.2d 655, 657 (Or. App. 1979). In actuality, the attorney in such a situation represents the corporate owners in their individual capacities as well as the corporation unless other arrangements are clearly made. *Id.* In the matter at hand, Sterling Press had only two shareholders. When Sims negotiated and drafted the liquidation agreement, he was representing not only the corporation, but also Oar and Parks in their individual capacities.

Sims was also representing Oar when he negotiated and drafted the lease for the property, and when he negotiated and drafted the 1985 agreement. In *Carlson v. Langdon*, 751 P.2d 344

(Wyo. 1988), the Supreme Court of Wyoming interpreted Rule 1.9 of the *Wyoming Rules of Professional Conduct*. That Rule is identical to Rule 1.9 of the *Utah Rules of Professional Conduct*. In that case, the court held that when an attorney does nothing to indicate or dispel a party's belief that the attorney is representing his interests, then an attorney/client relationship exists between the attorney and that party. *Id.* at 347. When Sims drafted the lease and the 1985 agreement, Oar was under the impression that Sims was representing his interests. See Affidavit of Greg Oar, attached hereto as Exhibit "B". Sims did nothing to dispel Oar's belief that he was representing him in the negotiation and drafting of these documents. As such, an attorney/client relationship existed between Sims and Oar with regard to those agreements as well.

The fact that Oar may not have paid Sims for all of the work which he performed should not control the question of whether an attorney/client relationship existed between them. An attorney/client relationship does not require the payment of a fee or formal retainer but may be implied from the conduct of the parties. *Matter of McGlothlen*, 663 P.2d 1330, 1334 (Wash. 1983). Payment may be an important consideration, but it is not essential to the existence of an attorney/client relationship, especially for purposes of applying Rule 1.9. *Carlson v. Langdon*, *supra*.

Because Oar was one of only two stockholders in Sterling Press, and because Sims represented Sterling Press, Sims also represented Oar with regard to the liquidation agreement. In addition, an attorney/client relationship also existed between Sims and Oar with regard to the lease and the 1985 agreement because Sims did nothing to dispel Oar's notion that he was

representing his interests in those matters. An attorney/client relationship is thus presumed to have existed between Sims and Oar.

B. THE MATTERS INVOLVED IN THIS ACTION
ARE SUBSTANTIALLY FACTUALLY
RELATED TO THE MATTERS IN WHICH SIMS
REPRESENTED OAR.

Once it has been established that an attorney/client relationship existed between the challenged lawyer and the party who is disputing the attorney's representation of an adversarial party in the current litigation, the court must determine whether the matters are substantially factually related. The court must determine whether in the factual context the matters involving the two clients are related in some substantial way. *Carlson v. Langdon, supra*. If the two matters have common facts, the attorney is in a position to receive confidential information which possibly could be used to the detriment of the former client in a later proceeding. *Id.*

In the matter at hand, Sims' prior representation of Oar is substantially factually related to the matters being litigated in this action. In proving the allegations made in his Complaint, Oar must refer to the circumstances surrounding the negotiation and signing of the liquidation agreement, the lease, and the 1985 agreement. Sims represented Oar with regard to the drafting and signing of all of those documents. In his representation, Sims became privy to confidential information which he could use to Oar's detriment in this matter. In fact, Sims has already used provisions of the 1985 agreement to support his argument opposing Oar's Motion for Release of Funds.

Oar's recovery in this matter is predicated upon proving the facts related to the liquidation agreement, the lease, and the 1985 agreement. Sims represented Oar with regard to the drafting and signing of all of those documents. The matters are substantially factually related, and Rule 1.9 prohibits Sims from representing parties with adverse interests to Oar in this matter.

CONCLUSION

Based upon the foregoing, Oar's Motion to Disqualify Counsel should be granted.

DATED this ____ day of June, 1992.

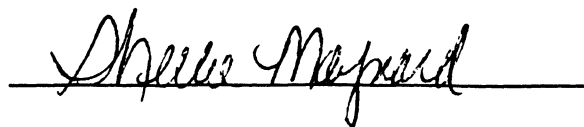
MICHAEL L. CHIDESTER
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION TO DISQUALIFY COUNSEL was mailed on the 8 day of June, 1992 to the following:

Allen Sims
Attorney for Defendants
124 South 600 East
Salt lake City, Utah 84102

Geri Allison
Attorney for WestOne Bank
107 South Main, #200
Salt Lake City, Utah 84111



A handwritten signature in cursive script, appearing to read "Sherie Mepard", is written over a horizontal line.

AGREEMENT

This Agreement made November 21, 1985, among Sterling Press, Inc., a Utah corporation, Dale Parks, and Gregory Oar. For valuable consideration the parties agree as follows:

1. REPRESENTATIONS:

(a) In March, 1981, Sterling Press, Inc. was liquidated with certain assets being distributed to the shareholders consisting of Gregory Oar (hereinafter "Oar") and Dale Parks (hereinafter "Parks") and the business assets of Sterling Press being sold on an installment note basis to S.P. Inc. After the liquidation of Sterling Press, S.P. Inc. changed its name to Sterling Press ("New Sterling Press") and now operates as the successor to Sterling Press ("Old Sterling Press")

(b) The sale of the business assets by Old Sterling Press to New Sterling Press was represented by two notes in the amount of \$94,250 distributed to Oar and \$114,250 distributed to Parks.

(c) Upon liquidation of Old Sterling Press, the notes were distributed to Parks and Oar together with three parcels of real estate, to wit: 2630 South 300 West, Salt Lake City, Utah; Elko, Nevada, Tract 106A, Block 3, Lot 8; and Elko, Nevada, Tract 107, Block 4, Lot 3. Additionally, \$20,000 in cash was distributed to Oar. The Sports Haven memberships were distributed to Oar and Parks. Two automobiles were distributed to Oar and Parks.

(d) A reserve was maintained and not distributed in the approximate sum of \$6,600 held in a checking account.

(e) Subsequent to the reorganization, it was determined that income taxes arising out of recapture required an additional payment of \$10,000 which New Sterling Press loaned to Oar and Parks. On March 12, 1982, Parks repaid his portion or \$5,000. Oar has an outstanding obligation arising out of the taxes of \$5,000, stemming from the loan in 1982.

(f) On March 2, 1981, Oar borrowed from new Sterling Press the sum of \$32,495, plus interest at 13.75%. The demand note was to be paid out of proceeds from the sale of a Summit Park housing property. The property was sold and the principal amount remaining since the date of the note is \$4,977.40, plus interest computed to November 21, 1985 in the sum of \$3,229.90.

(g) Of the three properties distributed to Oar and Parks, the Nevada Tract 107, Block 4, Lot 3 has been sold and the net proceeds are available for distribution between the parties. The other two properties are held as tenants in common by Oar and Parks, but taxes have remained unpaid on both properties since 1981. Taxes are due and owing through the date of closing in the sum of \$8,948.92 on 2630 South 300 West, and \$247.82 on Nevada Tract 106A, Block 3, Lot 8.

(h) Parks and Oar have not operated under any formal agreement with respect to the management of the commercial property at 2630 South 300 West and by necessity Sterling Press has paid on account of Oar and Parks for repairs to the building and other expenses the following items:

Roof repair (July, 1984):	\$ 2,936
Barton fire protection (October, 1984):	138
Lynn Ferran sprinkler system:	658

Accounting services (McKenzie):	\$ 1,000
Insurance (1982 through 1985):	<u>1,816</u>
SUBTOTAL:	\$ 6,548
Less amount of rent reserves applied:	<u>350</u>
TOTAL:	\$ 6,198

(i) It is agreed and understood by and among the parties that Oar owes to Sterling Press the following sums: \$8,207.30 arising out of amounts due plus interest on the March 2, 1981, note, the sum of \$5,000 (without interest), and the sum of \$2,657.08 (42.87% of amounts paid by Sterling on account of Oar and Parks for maintenance of the commercial property at 2630 South 300 West, Salt Lake City, Utah).

(j) It is agreed and understood by and among the parties that Parks owes to Sterling Press the sum of \$3,540.92 arising out of his portion (57.13%) of amounts paid on account of Parks and Oar for the maintenance of the property at 2630 South 300 West, Salt Lake City, Utah.

(k) Oar now holds the note of Sterling Press upon which the principal balance of which is \$63,138.50.

(l) Sterling Press is willing to pay to Oar and Oar is willing to agree to accept the payment of \$48,000 to pre-pay and purchase the note from Oar.

(m) It is agreed that upon closing of the sale of the note that amounts due from Oar to Sterling Press may be paid from proceeds of the sale of the note to Sterling Press from Oar and that amounts due for real estate taxes allocable to Oar may be paid from sale proceeds.

2. SALE OF THE NOTE:

(a) Sterling Press agrees to purchase and Oar agrees to sell that certain note dated March 2, 1981 in the face amount of \$94,250, against which there is a current principal balance of \$63,138.50, for the cash price of \$48,000 to be paid as follows: \$29,000 on the date of closing and the balance of \$19,000 cash without interest to be paid on or before the expiration of ninety (90) days from the date hereof.

3. AMOUNTS OWED BY OAR:

It is agreed upon between the parties that Oar owes the following amounts to Sterling Press:

(a) Note dated March 2, 1981 in the face amount of \$32,495 - principal due: \$ 4,977.40 interest: <u>\$ 3.220.80</u>	
Total:	\$ 8,207.30
(b) Borrowing for taxes - principal due without interest:	\$ 5,000.00
(c) Obligations paid by Sterling Press on account of Oar and Parks on maintenance of 2630 South 300 West:	<u>\$ 2,657.08</u>
TOTAL:	\$15,864.38

4. AMOUNTS OWED ON REAL PROPERTY TAXES:

It is agreed by Parks and Oar that the following taxes are due with respect to the real estate owned by the parties as tenants in common:

(a) Taxes due on parcels at 2630 South 300 West, total taxes 1981 through 1985: \$ 8,948.92	
(1) Amount owing from Oar X 42.87%:	\$ 3,836.40
(2) Amount owing from Parks X 57.13%:	\$ 5,112.52
(b) Taxes due on Elko, Nevada, Tract 106A, Block 3, Lot 8 through 1985: \$	247.82

(1) Amount owing from Oar X 42.87%:	\$ 106.24
(2) Amount owing from Parks X 57.13%:	<u>\$ 141.56</u>
TOTAL AMOUNT OWING FOR TAXES FROM OAR:	\$ 3,942.64
TOTAL AMOUNT OWING FOR TAXES FROM PARKS:	\$ 5,254.08

5. PROCEEDS WITHHELD FOR PROPERTY TAXES:

It is understood and agreed between the parties that from the proceeds of the purchase of the Note by Sterling Press from Oar that the sum of \$3,942.64 shall be withheld at the closing representing Oar's portion of real property taxes due and owing on the aforesaid parcels.

6. PAYMENT OF REAL PROPERTY TAXES:

It is understood and agreed by the parties that Parks shall pay the real property taxes. The sum withheld under paragraph 5 hereinabove shall be used to reimburse Parks upon proof of payment of the taxes in an amount no less than the amounts held in escrow at the closing, to wit: \$3,942.64. Oar and Parks agree that Parks shall pay all of the taxes due and owing with respect to said parcels on or before the expiration of ninety (90) days from the date hereof.

7. RESERVE FOR PAYMENT OF INCOME TAXES ARISING OUT OF REORGANIZATION:

Parks has accounted to Oar the expenditure of all funds held in reserve for the payment of taxes and other amounts due and owing arising out of the reorganization of Sterling Press and the parties agree to release each other from any and all claims arising out of the disposition of funds from any amounts held in reserve. Oar and Parks also agree to release any claim against the other with respect to cash, notes, automo-

biles, and Sports Haven memberships, distributed on the basis that the distribution was equal as possible under the circumstances and the parties received adequate and full consideration for the division.

8. MAINTENANCE OF REAL PROPERTY:

Oar and Parks will continue to hold as tenants in common Nevada Tract 106A, Block 3, Lot 8, and the real estate located at 2630 South 300 West, Salt Lake City, Utah. The parties further agree to create procedures for the payment of taxes on an annual basis and any and all repairs that may become necessary from time to time as to the premises at 2630 South 300 West in order to avoid Sterling Press having to make expenditures for the premises it occupies.

9. STERLING PRESS RETIREMENT ACCOUNT:

Oar, Parks, and Sterling Press acknowledge that upon the liquidation in March, 1981, there was a retirement account maintained for Parks and Oar. The parties acknowledge that this Agreement is not intended to resolve the disposition of the trust fund and that the parties intend within the next ninety (90) days to terminate the trust and divide the proceeds according to the appropriate account balances between Oar and Parks.

10. DISPOSITION OF PROCEEDS FROM SALE OF ELKO, NEVADA, TRACT 107, BLOCK 4, LOT 3:

Tract 107, Block 4, Lot 3 was sold for \$7,500. Expenses of closing and association payments are as follows:

2/16/82 - recording fees:	\$ 25.60
2/23/82 - Spring Creek Recreation Corp.:	167.00
2/23/82 - MCO Properties:	51.19
12/15/83 - Vaughn, Hall, Copenhaver & Hansen:	1,097.37
2/24/84 - Spring Creek Association:	45.00

4/3/84 - Spring Creek Association:	15.00
6/1/84 - Spring Creek Association:	30.00
7/23/84 - Spring Creek Association:	15.00
8/24/84 - Spring Creek Association:	15.00
2/14/85 - Spring Creek Association:	45.50
4/23/85 - Spring Creek Association:	<u>15.50</u>

SUBTOTAL: \$ 1,522.16

Subtracted from sales price of \$7,500: \$ 5,977.84

Multiplied by 42.87% for Oar: \$ 2,562.70

Multiplied by 57.13% for Parks: \$ 3,415.14

At the closing Parks agrees to pay Oar the sum of \$2,562.70 for his portion of the sales proceeds.

11. DATE OF CLOSING:

The date of closing shall be November 21, 1985 at the offices of Biele, Haslam & Hatch, 50 West Broadway, #400, Salt Lake City, Utah 84101.

12. ACCOUNTING FOR PAYMENTS AND OBLIGATIONS:

(a) Amounts due from Sterling Press to Oar: \$29,000.00

Less amount due and owing from Oar to Sterling Press: \$15,864.38

Less amount to be held by Biele, Haslam and Hatch for payment of taxes: \$ 3,942.64

NET AMOUNT PAYABLE TO OAR and account of first installment on sale of note: \$ 9,192.98

(b) Amount due from Parks to Oar on proceeds of sale of Nevada Tract 107: \$ 2,562.70

(c) Total amount payable to Oar from net proceeds of first installment on sale of note and amount due from Parks on sale of Nevada Tract 107: \$11,755.68

13. MISCELLANEOUS PROVISIONS:

(a) Applicable Law. This Agreement shall be construed, administered, and enforced according to the laws of the State of Utah.

(b) Captions. The titles to the paragraphs in this Agreement are included for convenience of reference only and are not to be used in interpreting this Agreement.

(c) Gender and Number. Neither the gender nor the number (singular or plural) of any word shall be construed to exclude another gender or number when a different gender or number would be appropriate.

(d) Duplicate Originals. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all of which shall together constitute only one Agreement.

(e) Waiver of Notice. Any person entitled to notice under this Agreement may waive the notice.

(f) Successors. This Agreement shall be binding upon all parties, their respective heirs and legal representatives, and their successors and assigns.

(g) Entire Agreement. This Agreement contains the entire understanding of the parties hereto with respect to the transactions contemplated hereby.

(h) Assignment. This Agreement shall not be assignable by any party, except with the written consent of the others.

(i) Notices. Notices and requests required or permitted hereunder shall be deemed to be delivered hereunder if mailed postage pre-paid or delivered in writing to the parties as follows:

STERLING PRESS, INC.
2630 South 300 West
Salt Lake City, UT 84115

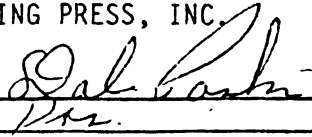
MR. GREGORY OAR
P.O. Box 1646
Park City, UT 84060

MR. DALE PARKS
c/o Sterling Press
2630 South 300 West
Salt Lake City, UT 84115

IN WITNESS WHEREOF, the parties hereto have executed the foregoing
Agreement as of the day and year first above written.

STERLING PRESS, INC.

By
Its





DALE PARKS



GREGORY OAR

MICHAEL L. CHIDESTER #5263
MOONEY & ASSOCIATES
Attorney for Plaintiff
236 South 300 East
Salt Lake City, Utah 84111
Telephone: (801) 364-5635

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

---ooo0ooo---

GREG OAR,

Plaintiff,

VS.

DALE S. PARKS, STERLING PRESS. INC., a Utah corporation, WEST ONE BANK, a Utah corporation, RICHARD G. NEWTON, and BRUCE M. GIFFEN,

Defendants.

AFFIDAVIT OF GREG OAR

Civil No. 900904365 PR

Judge James S. Sawaya

---ooo0ooo---

STATE OF UTAH

)

: SS.

COUNTY OF SALT LAKE

)

Plaintiff, Greg Oar, being first duly sworn, deposes and states as follows:

1. I am the plaintiff in the above-entitled action and I have personal knowledge of the matters set forth herein.

2. In 1981, I was the President and one of two shareholders of Sterling Press, Inc.

3. In 1981, Sterling Press, Inc. was liquidated, and as a part of that liquidation, the real property which is the subject of this lawsuit was distributed to myself and Dale Parks.

4. Sterling Press, Inc. retained Allen Sims to participate in negotiations regarding the liquidation agreement, and Mr. Sims drafted the documents necessary to effectuate that liquidation.

5. At all times during the negotiation and effectuation of the liquidation agreement, I was under the impression that Mr. Sims was representing my interests as well as those of Dale S. Parks and the corporation.

6. Shortly after the liquidation, Sterling Press, Inc. signed a lease agreeing to rent the premises located on the subject property. Mr. Sims drafted the lease agreement. At all times during the negotiations surrounding the lease agreement, I was under the impression that Mr. Sims was representing my interests as well as those of Dale S. Parks and Sterling Press, Inc.

7. In 1985, I signed an agreement which clarified the terms of the liquidation agreement and established a method for maintaining the property. Mr. Sims assisted in negotiating that agreement, and he drafted the documents necessary to effectuate that agreement.

8. At all times during the negotiations and drafting of the 1985 agreement, I was under the impression that Mr. Sims was representing my interests as well as those of Dale S. Parks and Sterling Press, Inc.

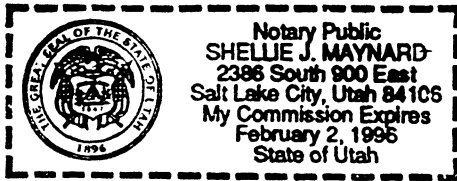
DATED this 5 day of June, 1992.



GREG OAR

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

On this 5 day of June, 1992, personally appeared before me, GREG OAR, the signer of the above instrument who duly acknowledged to me that he executed the same.



Shellie J. Maynard
NOTARY PUBLIC
Residing in Salt Lake County

My Commission Expires:
2.2.96

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing AFFIDAVIT OF GREG OAR was mailed on the 8 day of June, 1992 to the following:

Allen Sims
Attorney for Defendants
124 South 600 East
Salt lake City, Utah 84102

Geri Allison
Attorney for WestOne Bank
(need correct address)
Salt Lake City, Utah 84111

Shellie J. Maynard

liquidated. All my efforts were on behalf of Sterling Press, Inc., although the individual shareholders may have benefited by the results of that representation. All billings went to Sterling Press, Inc. and all payments came from Sterling Press, Inc.

As a result of the liquidation, certain real estate was liquidated to the shareholders as tenants in common. Sterling Press, Inc. leased certain property from the majority shareholders and I drafted a lease on behalf of Sterling Press, Inc.

In November, 1985, it had become apparent that Dale S. Parks and Sterling Press, Inc. were advancing costs on behalf of Gregory Oar. On behalf of Sterling Press, Inc. and Dale S. Parks, I obtained an agreement by which certain payments were made by the tenants in common to reimburse Sterling Press, Inc. for its advances.

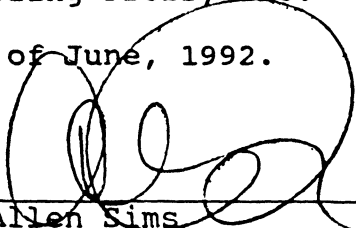
At no time has there been an attorney-client relationship between Gregory Oar and myself.

From 1981 to 1985 I represented Sterling Press, Inc. and from time to time, Dale S. Parks, on various matters. During that time I had no contact with Gregory Oar. In 1985 it was clear that I represented Dale S. Parks and Sterling Press, Inc. to collect certain funds from Gregory Oar because Mr. Oar had

disappeared from the scene and was taking no responsibility in assisting Dale S. Parks or Sterling Press, Inc. in the upkeep or running of the properties in which Sterling Press, Inc. was a tenant.

While Mr. Oar would like to recharacterize what was well-known among the parties, it is clear that I represented only Sterling Press, Inc. in 1981 in the liquidation of the company. It was also clear that in 1985 I was representing one tenant in common, Dale S. Parks, and Sterling Press, Inc.

DATED this 16 day of June, 1992.



Allen Sims
Attorney for Defendants Dale S.
Parks and Sterling Press, Inc.

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing RESPONSE TO MOTION TO DISQUALIFY COUNSEL to Michael L. Chidester, Esq., Mooney & Associates, 236 South 300 East, Salt Lake City, Utah, 84111, on this 16 day of June, 1992.



Allen Sims

3. In 1981, Sterling Press, Inc. hired Allen Sims to undertake a liquidation of the corporation to remove the real estate from the corporation and liquidate the other assets of the corporation to a new corporation which would be owned solely by me.

4. It was clear at that time that Mr. Sims was representing Sterling Press, Inc. and not the individual shareholders. This was understood by both me and Gregory Oar.

5. One of the three properties liquidated to Mr. Oar and myself as tenants in common was leased to Sterling Press, Inc. Mr. Sims, on behalf of Sterling Press, drafted a lease agreement.

6. In the years following the liquidation, Mr. Oar ceased all contact with me and it fell upon Sterling Press, Inc. to undertake maintenance and improvements that were the responsibility of tenants in common.

7. In 1985, I contacted Allen Sims to represent Sterling Press, Inc. and myself to collect items from Mr. Oar and to resolve payments that were due between us.

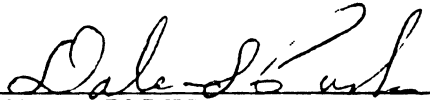
8. It was clear in 1985 that Mr. Sims represented Sterling Press, Inc. and myself in that undertaking.

9. In 1988, Mr. Oar, allegedly for value, transferred the Salt Lake property to his mother, Florence Bowers. Mr. Oar

filed a Chapter 7 bankruptcy in 1989.

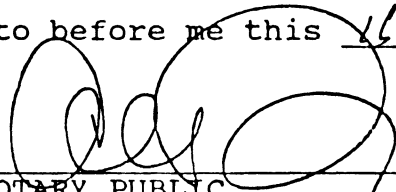
10. In April or May, 1992, Florence Bowers allegedly transferred her interest in the premises back to Gregory Oar who then substituted himself as plaintiff for his mother. This was his first appearance in this case. At no time has Mr. Oar ever indicated to me that he believed Mr. Sims was his attorney or that Mr. Sims ever acted on his behalf.

DATED this 16 day of June, 1992.



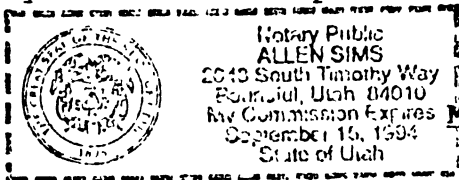
DALE S. PARKS

SUBSCRIBED AND SWORN to before me this 16 day of June, 1992.



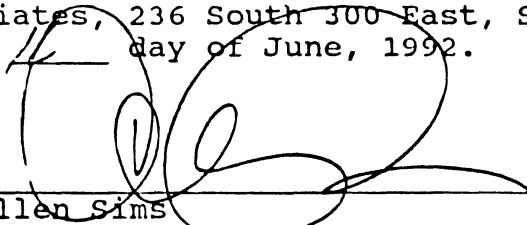
NOTARY PUBLIC
Residing at Davis County, Utah

My Commission Expires:



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing AFFIDAVIT OF DALE S. PARKS, to Michael L. Chidester, Esq., Mooney & Associates, 236 South 300 East, Salt Lake City, Utah, 84111, on this 16 day of June, 1992.



Allen Sims

ALLEN SIMS, Esq. (2966)
51 Allen Sims, P. C.
Attorney for Defendants
124 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 533-8505

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

GREGORY OAR, and AMERICAN	:	
PENSION SERVICES, INC., a Utah	:	FINDINGS OF FACT AND
corporation,	:	CONCLUSIONS OF LAW
	:	
Plaintiffs,	:	
vs.	:	
	:	Civil No. 900904365 PR
Dale S. PARKS, and STERLING	:	Judge: Tyrone E. Medley
PRESS, INC., a Utah corporation,	:	
	:	
Defendants.	:	

The above-captioned matter, having come on before the Court for trial on the 29th day of July, 1993, before the Honorable Tyrone E. Medley, Judge presiding; Plaintiff American Pension Services, Inc. appearing in person and through counsel, Stephen R. Cook; Plaintiff Gregory Oar appearing pro se; and Defendants Dale S. Parks and Sterling Press, Inc. appearing in person and through counsel, Allen Sims; Plaintiff American Pension Services, Inc. and Defendants having entered their oral stipulation resolving all issues between them; the stipulation of said parties being incorporated into the following Findings of Fact and Conclusions of Law; the Court having given Plaintiff

Gregory Oar an opportunity to present evidence and documents; and the Court being fully advised in the premises, now, therefore, hereby makes and enters the following:

FINDINGS OF FACT

1. Dale S. Parks and American Pension Services, Inc. hold title to the premises at 2630 South 300 West, Salt Lake City, Salt Lake County, Utah as tenants in common, bounded and described as follows:

Beginning on the West line of 300 West Street at a point which is North 0°04'30" West along the monument line 609.58 feet and South 89°55'30" West 47.00 feet from the monument at the intersection of 300 West Street and 2700 South Street, said point of beginning also being (according to previous descriptions) North 1065.27 feet and East 281.61 feet from the South Quarter Corner of Section 24, Township 1 South, Range 1 West, Salt Lake Base and Meridian; thence South 89°55'30" West 250.00 feet; thence North 0°04'30" West 73.02 feet; thence South 89°58'47" East along the extension of and the center of the North wall of a brick building 250.00 feet to said West line of 300 West Street; thence South 0°04'30" East along said street line 72.61 feet to the point of beginning.

2. The premises are not suitable for partition between the two parties.

3. Each tenant in common has engaged a real estate broker and the premises are now under an earnest money agreement and sale is pending.

4. In the event voluntary sale does not take place as planned, an order of sale should enter, ordering the premises be sold at sheriff's sale for the best price possible.

5. The balance of all other claims of American Pension Services, Inc. in this action (other than for partition/sale of the premises) may be dismissed with prejudice.

6. The Counterclaim of Defendants against American Pension Services, Inc. may be dismissed with prejudice.

7. Each party should bear their own costs and attorney's fees in this proceeding.

8. Plaintiff Gregory Oar was given the opportunity and invited by the Court to present any witnesses, exhibits or evidence at the time appointed for trial.

9. Plaintiff Gregory Oar substituted as a plaintiff for the original plaintiff Florence Bowers, based on an assignment of claims and was represented by counsel until December 14, 1992 when counsel withdrew.

10. After December 14, 1992, Gregory Oar filed and maintained a pro se appearance in this matter.

11. Between December 14, 1992 and the date of trial, Gregory Oar has filed his own motions and made his own appearances in this matter.

12. On July 10, 1992, the attorney for Gregory Oar filed a Certificate of Readiness for Trial, asserting that all discovery had been completed and that the matter should be set for trial.

13. On August 19, 1992, an order for scheduling conference was entered for a scheduling conference to be held on September 28, 1992 at 11:00 a.m. before the Honorable James S. Sawaya.

14. At the scheduling conference on September 28, 1992, the Court ordered a discovery cutoff of December 1, 1992 and dispositive motion cutoff by December 31, 1992.

15. On March 23, 1993, the Court entered an order for scheduling conference for May 3, 1993 at 11:15 a.m., mailing notice of said order to Gregory Oar, pro se, Stephen R. Cook, attorney for American Pension Services, Inc., and Allen Sims, attorney for Defendants.

16. At the scheduling conference held on May 3, 1993, Gregory Oar failed to appear although Gregory Oar acknowledged, in open court on the day of trial, receipt of said Order.

17. The scheduling order and trial notice issued by the Court on May 3, 1993, set a two-day trial commencing on July 29, 1993 at 9:00 a.m., witness and exhibit lists were ordered to

be exchanged by June 3, 1993 and a final pre-trial settlement conference was ordered held on July 22, 1993 at 8:30 a.m.

18. The scheduling order and trial notice was mailed by the clerk of the Court on May 4, 1993 to Plaintiff Gregory Oar, pro se, Allen Sims, attorney for Defendants, and Stephen R. Cook, attorney for Plaintiff American Pension Services, Inc.

19. On June 3, 1993, Allen Sims, on behalf of Defendants, filed his Defendants' List of Witnesses and Exhibits to be Used at Trial, naming seven witnesses and exhibits consisting of an accounting of expenses, invoices, cancelled checks, depositions, agreements, correspondence and expert opinion letters.

20. On June 8, 1993, Stephen R. Cook, for Plaintiff American Pension Services, Inc., filed his Witness and Exhibit List, listing one witness, Richard G. Newton, and stated that, "No exhibits were contemplated by this plaintiff."

21. Gregory Oar filed no witness or exhibit list.

22. On June 22, 1993, the Court held a final pre-trial settlement conference. Gregory Oar appeared pro se. Stephen R. Cook failed to appear. Richard G. Newton, the beneficiary of the IRA trust of Plaintiff American Pension Services, Inc., appeared. Defendants appeared, along with counsel, Allen Sims.

23. At the June 22, 1993 final pre-trial settlement conference, Gregory Oar moved the Court orally for a continuance of the trial and subsequently filed a written motion for continuance, which motion was objected to in writing by Defendants. Plaintiff Gregory Oar's last minute Motion for Continuance was denied, and the Court adopted the arguments set forth in Defendants' written Objection to Motion for Continuance.

24. On July 26, 1993, attorney for Defendants filed his Trial Brief and Proposed Findings of Fact and Conclusions of Law.

25. Plaintiff Gregory Oar filed no proposed Findings of Fact and Conclusions of Law or Trial Brief.

26. Counsel for Plaintiff American Pension Services, Inc. filed no proposed Findings of Fact and Conclusions of Law or Trial Brief.

27. All parties have been given a fair and ample opportunity to engage in discovery during the pendency of this action.

28. All parties hereto have been given full opportunity to present their claims, witnesses, and exhibits on the day appointed for trial.

29. Plaintiff Gregory Oar declined and failed to produce any witnesses or introduce any exhibits in support of his

claims in this matter.

30. Plaintiff American Pension Services, Inc. stipulated that their claims, other than for partition/sale of the property, may be dismissed with prejudice.

31. Defendants agreed that their Counterclaim may be dismissed with prejudice.

Based upon the foregoing Findings of Fact, the Court hereby enters its:

CONCLUSIONS OF LAW

1. The real property subject of this partition action located at 2630 South 300 West, Salt Lake City, Utah, should be sold at sheriff's auction for the best possible bid price. Said Order should be conditional and be entered upon written motion of either American Pension Services, Inc. or Dale S. Parks.

2. Plaintiff American Pension Services, Inc. and Defendant Dale S. Parks are co-tenants in the premises located at 2630 South 300 West, Salt Lake City, Utah.

3. In the event the property is sold at sheriff's sale, the net proceeds should be divided between Dale S. Parks and American Pension Services, Inc. in accordance with their recorded interests, to-wit: 57.13% for Dale S. Parks and 42.87% for American Pension Services, Inc.

4. The balance of all claims of Plaintiff American Pension Services, Inc. and the claims of Defendants on their Counterclaim should be dismissed with prejudice.

5. Plaintiff Gregory Oar by failing to present evidence by witness testimony or exhibits, has not sustained his burden of proof and the Court shall enter a judgment of dismissal with prejudice of all of his claims.

6. All parties should pay their own costs and attorney's fees in this proceeding.

DATED this _____ day of August, 1993.

BY THE COURT:

HONORABLE TYRONE E. MEDLEY
District Court Judge

NOTICE PURSUANT TO RULE 4-504, RULES OF JUDICIAL ADMINISTRATION

TO PLAINTIFFS AND COUNSEL, STEPHEN R. COOK:

Notice is hereby given pursuant to Rule 4-504 of the Rules of Judicial Administration of the District and Circuit Courts of the State of Utah, that these Findings of Fact and Conclusions of Law prepared by Defendants shall be the order of the Court unless you file an objection in writing within five (5) days of the date of service of this notice.

2nd day of August, 1993.



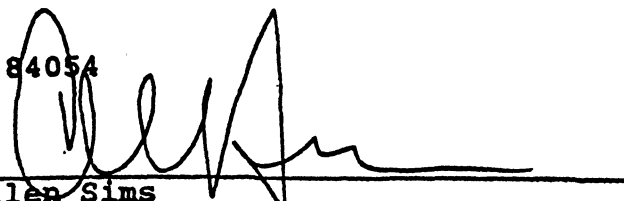
ALLEN SIMS
Attorney for Defendants

MAILING CERTIFICATE

I hereby certify that I caused to be mailed true and correct copies of the foregoing Findings of Fact and Conclusions of Law, to the following, postage prepaid, on this 2nd day of August, 1993.

Stephen R. Cook, Esq.
Mooney & Associates
236 South 300 East
Salt Lake City, Utah 84111
Attorney for Plaintiff,
American Pension Services, Inc.

Gregory Oar
217 Lancelot Circle
North Salt Lake, Utah 84054
Plaintiff



Allen Sims