

2005

KaLynn Ninow v. William Lowe and Augusta Rose : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

In the matter of the estate of
Gary G. Pahl, deceased.

WILLIAM LOWE'S REPLY BRIEF

[Ninow v. Lowe II]

Appeal No. 20050867-CA

KaLynn Ninow,
Petitioner and Appellee,

v.

William Lowe and Augusta Rose,
Respondents and Appellants.

Appeal from a Final Order of the Third District Court, Salt Lake County,
Hon. Leslie A. Lewis, Former District Judge, Presiding.

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LIST OF ALL PARTIES TO THE PROCEEDING BELOW

Original Parties [See Ninow v. Lowe (Estate of Pahl), 2004 UT App. 291]:

1. KaLynn Ninow,

Petitioner,

v.

2. William Lowe; 3. Augusta Rose; 4. Robert Mortensen; and

5. Grand Staircase Land Co., a Utah corporation,

Respondents.

Augusta Rose,

Third-party Petitioner,

v.

KaLynn Ninow, **6. Ryan Pahl, and 7. Richard Ninow,** and Does I-V,
Third-party Respondents.

Additional party added by the trial court's URCP 42 order [April 15, 2004] consolidating two shareholder derivative actions during the pendency of the prior appeal [See Ninow v. Lowe (Estate of Pahl), 2004 UT App. 291, n.10]:

8. Diamond Fork Land Company, a Utah corporation, as relator in a shareholder derivative action against KaLynn Ninow to assert the rights of Pahl's Salt Palace Loan Office, Inc., a Utah corporation not a party to this matter, and as relator in a second shareholder derivative action against Ryan Pahl to assert rights of Pahl's Land Partnership, not a party to this matter, [formerly know, *inter alia*, as GHF Investments or GHF Investment Partnership], by and through its general partner, Pahl's Salt Palace Loan Office, Inc., a Utah corporation not a party to this action. Said shareholder derivate actions brought under Civil Case No. 020908627 and Civil Case No. 030907064 were ordered consolidated April 15, 2004. (R. 1421-1424).]

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REPLY POINT ONE

The Court of Appeals has jurisdiction only over orders appealed.

In her¹ brief, appellee KaLynn Ninow argues the April 26, 2005, final order should be “disregarded” as “an anomaly” [Appellee Brief, p. 22] or it should be “regarded” as “effective.” [Appellee. Brief, p. 24]. Appellants are not challenging that order. Ms. Ninow did not cross-appeal. That order will stand. It is not being appealed. Since, on its face, is the final and appealable order disposing of all claims as to all parties, every action taken by the trial court after April 26, 2005, that is being appealed, should now be reversed.

REPLY POINT TWO

The arguments in appellee’s brief should be rejected on appeal.

I. THE TRIAL COURT’S REMOVAL OF LOWE AND ROSE AS LOAN OFFICE OFFICERS/DIRECTORS SHOULD BE REVERSED.

It was plain error to remove them on August 16, 2005, because they have a right to serve until their successors, if any, are lawfully qualified.²

¹ Ms. Ninow’s brief was filed only by her as appellee. Richard Ninow and Ryan Pahl are respondents to the Third-Party Petition that was reduced to a judgment as to Richard Ninow and dismissed as to KaLynn Ninow and Ryan Pahl before being erroneously resurrected in the order of August 16, 2005.

²This appeal involves only trial court activity that occurred after the filing of Notices of Appeal pertaining to Ninow v. Lowe I [Estate of Pahl], 2004 UT App. 291. Lowe and Rose own no shares. The May 1, 2003, order affirmed in that appeal dealt only with share ownership. Their interest was in getting that order affirmed on appeal as a final order before it was expanded to add language removing them. Since KaLynn Ninow controls less than 51% of the shares, the remaining share claimants possess an important legal right to preserve the *status quo* through passive boycott that thwarts a shareholder quorum and prevents Lowe and Rose from being removed and/or replaced unless a court expressly does so in a proper action with the proper parties.

A. Removal of Lowe and Rose was plain error. If it was invited, only Ms. Rose invited the court to err. Therefore, the court should consider William Lowe's appeal of that error. Since the proposed August 16, 2005, order was submitted only by Rose, no error was invited by Lowe and his appeal of that portion of that order is now before this court.³ Because the erroneous removal of Lowe and Rose was plain error, it should now be reversed even if the issue was not preserved by William Lowe. But it was preserved by him. While Mr. Lowe took no action under URCP 59 or 60 to further preserve that issue after the August 16, 2005, order, he had, prior thereto, consistently preserved it by carefully pointing out to the trial court, that he and Ms. Rose had never been removed and should not be removed. [*inter alia* R. 1988 and 1996] The August 16, 2005, order, by implication, orders that they had not previously been removed by prior shareholder action or by the May 1, 2003, finding of undisputed summary judgment fact. But Mr. Lowe is appealing only the removal itself. The implicit order that there was no previous removal stands [as *res judicata*] due to lack of any cross-appeal. And the removal was plain error, since [1] while Lowe and Rose are parties with standing to litigate in a judicial action to remove them, all share claimants must first be joined in the action, as must the corporation itself, and their competing claims must first subjected to a final order; and, [2] no personal jurisdiction has ever been exercised over that corporation so as to impose the May 1, 2003, judgment affirmed in Ninow v. Lowe I upon that corporation, and Ms. Ninow still controls only 3000 shares [less than 51%].

³Ms. Rose submitted the order as a proposed correct recordation of prior erroneous rulings. The court signed it. The error was a "chain error" that started when the court erroneously started entering orders post-April 26th.

B. The law of the case does not prohibit the consideration of Lowe and Rose's removal as officers and directors of the Loan Office. Instead, the law of the case establishes that they were officers and directors until they were removed in error on August 16, 2005.⁴ Ms. Lowe's argument that the court adjudicated the removal of Lowe and Rose as officers and directors in its Findings of Fact and Conclusions of Law Re: Summary Judgment entered May 1, 2003, was implicitly rejected by the trial court on August 16, 2005, when she executed their removal that day via judicial order. That very clear implication within that order is *res judicata*, and there was no cross-appeal.

Even if Ms. Ninow had cross-appealed, she would have faced tough sledding challenging the trial court's implicit rejection of her argument that the May 1, 2003, Findings of Fact and Conclusions of Law Re: Summary Judgment adjudicated the removal of officers and directors. Findings of fact entered with a summary judgment order merely memorialize the undisputed facts. By rule, under URCP 56, those findings are deemed undisputed only for purposes of the summary judgment order itself. Had Ms. Ninow stated as an undisputed fact that she controlled 100% of Microsoft shares and had removed Bill Gates, and had Lowe and Rose not disputed that for strategic reasons, that "undisputed fact" would have no legal force as an order that removed Bill Gates and replaced him with KaLynn Ninow, Richard Ninow and Ryan Pahl, since Microsoft Corporation was not a party. The findings similarly do not constitute the judicial removal/replacement, by order, of Lowe and Rose as officers or directors. The finding that they had been removed and replaced was not challenged in the prior appeal since it was, at

⁴ That is why the trial court placed them under injunction from time to time. [Had they not been officers, there would have been no need to enjoin them.]

best, only a Parduhn v. Bennett⁵ “subsidiary finding” that had no legal force or effect as a judicial order. It merely memorialized a fact not disputed for purposes of the summary judgment. And since the summary judgment order dealt itself only with shares [and does not remove or replace officers], Lowe and Rose, who claim no ownership of shares, simply pursued their strategic goal of getting the May 1, 2003, order affirmed on appeal as a final order in order to put a stop to vexatious litigation to which they were not the proper parties and to which Ms. Ninow failed/refused to join Pahl’s Salt Palace Loan Office, Inc., as a party. The trial court implicitly agreed with the foregoing analysis by removing Lowe and Rose on August 16, 2005. Ms. Ninow’s failure to cross-appeal means this implication is now *res judicata*.

Mr. Lowe has standing to seek reversal of the challenged portion of the August 16, 2005, order as to both himself and Ms. Rose, since he has a

⁵“Because a finding of fact need only be supported by sufficient subsidiary facts to justify it, one erroneous subsidiary finding does not necessarily render the ultimate factual finding erroneous as well.” Parduhn v. Bennett, 2005 UT 22, ¶24; 112 P.3d 495. While the finding that Lowe and Rose had been removed and replaced is erroneous, it is “subsidiary” [if not gratuitous], and it had nothing to do with the May 1, 2003, order’s declaration of share ownership or the reasoning employed by the Court of Appeals in affirming that order in Ninow v. Lowe [Estate of Pahl], 2004 UT App. 291. It did not need to be challenged in that prior appeal because it creates no judicial order *res judicata*, by rule. The trial court, by order of August 16, 2005, implicitly rejected both the contention that Lowe and Rose had been removed by the May 1, 2003, “finding” and the contention that the said finding should have been challenged it in the prior appeal. That August 16, 2005, law of the case now stands due to the lack of any cross-appeal. As is the case with all of the controlling authorities cited by the appellants in their opening brief and their legal analysis presented in their opening brief based upon those controlling authorities, appellee has neither countered the controlling authorities nor met that legal analysis. Instead, she attacks the character of appellants’ lawyer, but then fails to analyze the difference between an order and factual finding.

legitimate interest in having a functioning quorum of a board of directors on which serves as a director. The portion of the August 16, 2005, order that removed Mr. Lowe and Ms. Rose as officers and directors should be fully reversed as error, since they have a right to continue to serve as directors because Pahl's Salt Palace Loan Office, Inc., lawfully rejected shareholder attempts to remove them through its officer [Lowe], it was not a party, and no court with personal jurisdiction over the corporation has removed them.⁶

The status of Mr. Lowe and Ms. Rose as the only quorum of directors with authority over Salt Palace Loan Office, Inc., and Ms. Ninow's lack of authority, was put to rest on November 26, 2002. Full reinstatement of the November 26, 2002 judgment is sought through reversal of an April 6, 2005, ruling on a June 12, 2003, order, so that the matter will be finally put to rest.

But, in any event, KaLynn Ninow, Richard Ninow, and Ryan Pahl were never directors or officers by virtue of attempts by Ms. Ninow to take unanimous shareholder action, the May 1, 2003, order did not remove and

⁶ Mr. Lowe repeatedly gave notice to the trial court and to Ms. Ninow that, as an officer of the corporation, he had utilized the time between expiration of the TRO at 11:00 a.m. on May 30, 2002, and the entry of the preliminary injunction, to duly reject, on behalf of the corporation, Ms. Ninow's attempts to vote shares. That claim by him will stand until a court that has personal jurisdiction over the corporation itself litigates his assertion. Any contest between a shareholder who claims she has removed and replaced a corporate officer, and that officer who claims that as an officer he rejected that attempt to remove him and did so on behalf of the corporation, cannot be resolved in favor of the shareholder until the corporation is joined as a party. Until then, the officer remains an officer and the shareholder's vote[s] remain[s] a legal nullity recognized neither by the corporation nor by the Utah courts. Like most of the issues the remain adjudicated, all of this will be settled by now reinstating the November 26, 2002, default judgment on appeal. But if that is not done, then the adjudicated matters are in need of further lawsuit[s].

replace officers and directors because it contains no order language doing so, that order gave her no title to any to any shares free of adverse claims, and it gave her no voting rights [since Pahl's Salt Palace Loan Office, Inc., is not a party to that order], all of which is implicit within the trial court's decision to remove on August 16, 2005, instead of declining to sign the proposed order.

Under that *res judicata*, the said corporation now has no officers, and that should be remedied by the Court of Appeals by reversing that portion of the August 16, 2005, order that removed Mr. Lowe and Ms. Rose as officers and as a quorum of directors so they can now serve until removed either by a quorum of shareholders or by a proper judicial action with the proper parties.

II. THIS COURT HAS APPELLATE JURISDICTION OVER THE APPEALED ORDERS. Appellee argues that since the April 26, 2005, order was the final, appealable order that disposed of all claims as to all parties, appellants should have appealed from that order, not the later August 16, 2005, order. Appellee's argument has no merit under "law of the case."

By erroneously entering the additional orders after April 26, 2005, the trial court erroneously turned the April 26, 2005, order into an interlocutory order by virtue of post-April 26, 2005, law of the case.⁷ After the trial court then [as a "chain-error"] signed another final order on August 16, 2005, filed on August 19, 2005, appellants, timely, appealed a part of that order as well as the orders entered prior to August 16, 2005, being challenged on appeal.

⁷Something very similar happened with the November 26, 2002, default judgment. It was a final, appealable order. The URCP 60 motion did not render it interlocutory and the denial of the URCP 60 motion was itself final and appealable on the narrow issue of whether the denial was correct. But, with two final orders in place, the trial court then erroneously entered a June 12, 2003, order that treated the orders as interlocutory under law of the case.

The time for appealing is computed based on the law of the case as it exists at the time appellants file their notice of appeal, not on the law of the case as it will exist after the appellants win that appeal. Appellants are not required to have the prescience [or arrogance] to appeal based on anything other than law of the case as it exists at the time they file a notice of appeal.

III. IT WAS ERROR FOR THE TRIAL COURT TO RULE THAT THE MAY 1, 2003, SUMMARY JUDGMENT WAS JUST A PARTIAL SUMMARY JUDGMENT. Because that ruling did not occur until after April 26, 2005, it was plain error to enter any ruling. Because a final order dismissing everything before the court had been entered on April 26, 2005, the trial court lacked the jurisdiction to enter the *sua sponte* order turning the April 26, 2005, final order into an interlocutory order by ruling that the May 1, 2003, summary judgment was a partial summary judgment and that the May 29, 2002, petition had survived the prior appeal and was still pending.

Also, the May 1, 2003, summary judgment is not a partial summary judgment under the law of the case. No order on the merits of the May 29, 2002, petition has been entered other than that May 1, 2003, order [already affirmed in Ninow v. Lowe I]. The real property issues that Ms. Ninow attempted to plead in her May 29, 2002, petition have, since then, never been reached in any subsequent order on the merits. Everything was dismissed on April 26, 2005, and again on August 16, 2005, after Ms Ninow abandoned the issues on April 6, 2005. The erroneous ruling concluding it was only a partial judgment should be reversed as an improper ruling on a moot issue.

IV. THE MAY 2003 SUMMARY JUDGMENT IS DISPOSITIVE AND FINAL AS TO OWNERSHIP OF THE LOAN OFFICE SHARES ONLY AS BETWEEN THE PARTIES TO THAT JUDGMENT. It does not bind

any persons or entities who were not made parties, it does not vest title in the shares free of adverse claims and liens, and it does not give Ms. Ninow any voting rights over shares [because Pahl's Salt Palace Loan Office, Inc., is not a party to that judgment]. Under relevant law of the case, that judgment is not dispositive as to the rights of the successor[s] to the parties to the May 1, 2003, judgment. That very important question was duly decided by the trial court, against Ms. Ninow, when the trial court decided to dismiss Diamond Fork Land Company without prejudice instead of dismissing with prejudice.

Ms. Ninow did not cross-appeal and that order is *res judicata* as to the out-of-state share claimants who may well be awaiting the outcome of this appeal before reinstating the derivative lawsuit dismissed without prejudice.

IV. IT WAS PREMATURE FOR THE TRIAL COURT TO DENY LOWE'S MOTION FOR LIABILITY ON THE UNDERTAKING. Mr. Lowe's motion asked only that the matter be set for hearing and that notice be given to the surety. That was the proper motion under URCP 65A(c)(3).

The court should have set a hearing, not denied the motion out-of-hand. The court lacked discretion to deny a proper motion for a hearing and, to the extent it had discretion, that discretion was abused. Two separate grounds for giving notice to the surety, so that he can litigate, are apparent.

First, the reasoning under which the Court of Appeals reversed and remanded the portion of the contempt order that held Mr. Lowe in contempt for violating the TRO in Ninow v. Lowe I [Estate of Pahl], 2004 UT App. 291, involved scaling-back a TRO that the trial court retroactively extended.

Mr. Lowe was wrongfully restrained as a matter of law under the law of the case between the time that the trial court retroactively extended the TRO expiration time to cover conduct he had engaged in reliance on that

expiration time and the time that the Court of Appeals reversed the order that had retroactively extended the TRO's expiration time past the stated time. A second unadjudicated ground for holding a hearing now exists under the law of the case because the TRO was initially obtained based on allegations that Mr. Lowe, Ms. Rose, and Robert Mortensen were engaged in all manner of embezzlement, forgery, and malfeasance and that "irreparable harm" would be imminent if the TRO was not entered restraining them from acting in their offices as Pahl's Salt Palace Loan Office, Inc., officers and directors. No subsequent order on the merits has ever established any such misconduct on their part and the tribunal that hears the TRO undertaking matter might find from this that Mr. Lowe was wrongfully restrained, since a dispute over share ownership and real estate did not require any TRO. In fact, it would have been far better to leave the officers and directors of the corporation free from restraint/injunction and join the corporation as a party, so that the merits, rather than injunctions and contempt, could be litigated.

It was premature to deny the request for a TRO undertaking hearing, and the matter should now be remanded with an order to hold the hearing.

VI. THIS COURT HAS APPELLATE JURISDICTION TO REVIEW THE JUNE 12, 2003, ORDER SETTING ASIDE THE NOVEMBER 26, 2002, DEFAULT JUDGMENT AND SHOULD REVERSE THE ORDER.

A. Lowe and Rose have standing to appeal the April 6, 2005, denial of their motion to vacate the June 12, 2003, order. As non-shareholders, Lowe and Rose had no standing to initially participate in the shareholder derivative action. But once a final and appealable judgment in favor of Diamond Fork Land Company as relator for Pahl's Salt Palace Loan was entered against KaLynn Ninow, and they relied upon it after the 3-month 60(b) deadline

elapsed, they gained such standing. They are expressly named in the judgment and personally⁸ relied upon it. When they were made parties to this proceeding, over their objection, through consolidation, they properly answered the complaint and also joined in the motion⁹ to vacate. [R. 1634]

This court has jurisdiction on appeal over the November 26, 2002, default judgment because denial of the motion to vacate the June 12, 2003, order that set it aside was made in an interlocutory minute entry on April 6, 2005, that is part of the current appeal. The trial court had jurisdiction to grant or deny the motion on April 6, 2005, reverse the June 12, 2003, order, and reinstate the November 26, 2002, default judgment. The June 12, 2003, *sua sponte* order that set aside the November 26, 2002, default judgment did so without addressing the question of whether Ms. Ninow had shown any defense of at least ostensible merit. The trial court, at a minimum, should have vacated the June 12, 2003, order on April 6, 2005, and granted leave to Ms. Ninow to make such a showing. Since we now have the benefit of a subsequent trial court order, we now know that the sole defense raised by Ms. Ninow, that of preclusion, lacks merit under *res judicata*. The trial court dismissed Diamond Fork Land Company without prejudice instead of with prejudice. Ms. Ninow has not cross-appealed. This ground, preserved at [R. 1634], is a sufficient basis for now reversing the April 6, 2005, denial.

⁸ While their personal reliance on the November 26, 2002, judgment gives them personal standing, they also relied upon it as the corporate officers.

⁹Because Diamond Fork Land Company was dismissed without prejudice on its own motion only after consolidation, that was not a final order as to all claims and parties and Lowe and Rose could join in the motion to vacate. The trial court never ruled that they could not do so. Instead, on April 6, 2005, it denied the motion vacate in which they had joined and advocated.

B. Diamond Fork Land Company and/or its successors can still litigate ownership of Loan Office shares but do not need to do so yet and can wait to see if this court reverses the June 12, 2003, order and can wait to see if the November 26, 2002, judgment is reinstated and can then decide whether it is necessary to litigate the original shareholder derivative action. Dismissal without prejudice, therefore, did not conclude a major phase in the probate.

And it did not conclude the shareholder derivative action because the court had not ruled on the motion to set aside the June 12, 2003, order and the court did not rule on that until April 6, 2005. That April 6, 2005, minute entry ruling was not reduced to an order that could have been appealed prior to the time that the court signed its final order on the May 29, 2002, petition on August 16, 2005, under law of the case. That final order was appealed.

Law of the case created by a court governs all parties. There was no basis in Utah law for appealing a dismissal of Diamond Fork Land Company “without prejudice” on its own motion within 30 days of its entry. Instead, the issue of setting aside the default judgment was duly preserved by Lowe and Rose when they joined the motion to vacate the June 12, 2003, order setting aside the default judgment. The court denied Lowe and Rose’s motion on April 6, 2005. Both Lowe and Rose have standing and both Lowe and Rose appealed this issue in their opening brief. And appellee’s footnote 4 on page 32 of her brief discussing that this issue was raised in the docketing statement by Ms. Rose and is raised on appeal by both appellants does not advance the analysis, as both gained standing once the November 26, 2002, judgment was entered and they reasonably relied upon it after the 3 month 60(b) deadline passed. The trial court denied their motion to vacate the June 12, 2003, order on April 6, 2005, implying that they had standing.

It is to be noted that Diamond Fork Land Company is not a party to this appeal. It, and/or its successor[s], can still sue over share ownership.¹⁰

Lowe and Rose would have been laughed out of the appellate court if they had tried to appeal a dismissal without prejudice and would have been told to go back and get a final order on the motion to vacate a June 12, 2003, order that was referred in Ninow v. Lowe I, that had still not been ruled on, and was not ruled on until April 6, 2005. Yet, appellee argues in her brief, apparently with a straight face, that a 30-day appeal deadline applied to that.

VII. THE SETTING ASIDE OF THE DEFAULT JUDGMENT SHOULD BE REVERSED AS PLAIN ERROR MADE WITHOUT JURISDICTION.

a. This court cannot affirm the setting aside of the default judgment on June 12, 2003, on a ground not raised by motion below or on a ground that could have been raised below by a timely motion filed under URCP 60(b)(1), (2), or (3). The general appellate proposition that an appellate court can sustain any order on any ground[s] does not apply when the appellate court lacks jurisdiction to do so and when the error by the trial court, as in this case, was jurisdictional. The June 12, 2003, order rules that motions that could be brought under 60(b)(1), (2), or (3) are all time-barred.

¹⁰ Unlike Lowe and Rose, who did not oppose the undisputed facts that gave rise to the May 1, 2003, judgment because they do not claim ownership of shares and because they strategically wanted to get a final order as soon as possible that did as little damage to their interests as possible, relators in a future shareholder derivative action would likely oppose those facts with Mr. Lowe's affidavit, filed below, that both the May and December agreements were accelerated and Gary Pahl transferred 3000 shares to the corporation in exchange for its unsecured obligation. At a minimum, a jury trial would be required. Ms. Ninow has produced nothing to counter Mr. Lowe's affidavit and, in a future shareholder derivative action, the court could not weigh Mr. Lowe's credibility and the matter would proceed to a jury trial of the issue.

That part of the order is not being appealed. Once the trial court had ordered Ms. Ninow's URCP 60 motion to set aside the November 26, 2002, denied on May 2, 2003, it thereafter lacked jurisdiction to grant *sua sponte* relief under 60(b)(6), since Ms. Ninow did not then file a motion under URCP 60(b)(6) after her motion was ordered denied under URCP 60(b). A trial court lacks any jurisdiction to grant URCP 60(b) relief *sua sponte* without having any motion to do so before it. The appellate court also lacks appeal jurisdiction to grant any relief *sua sponte* and only has jurisdiction to now reverse the June 12, 2003, order. *Moore's Federal Practice 3d, Sec. 60.62.*

b. To the extent the default judgment exceeds the scope of the relief prayed for in the complaint, it is not void, but is "voidable." A "voidable" judgment is effective until voided by grant of a timely motion under URCP 60(b)(1), (2), or (3). The trial court properly ruled on June 12, 2003, that relief that could have been obtained under URCP 60(b)(1), (2) or (3) is not available to Ms. Ninow. Ninow did not cross-appeal so as to challenge that ruling. The appellate court cannot grant such relief to her *sua sponte*. *Id.*

c. Ninow's interest to and title in the Loan Office shares was never reached or attached by Lowe and Rose because they claim no interest in any of the Loan Office shares. Their personal interest is in setting aside a default judgment that impacts their rights and on which they had reasonably relied.

There has been no order, finding, or showing that Ms. Ninow even possesses the share certificate issued by the corporation for the said 3000 shares. Nor has there been any order, finding, or showing that a bearer certificate for the 3000 shares is not held out-of-state by a third part[ies].

Ms. Ninow's focus on the physical share certificate also misses the

legal significance of the default judgment as a shareholder “derivative” judgment. It is the corporation itself that has the right to designate its shareholders [subject to being overruled by a court with jurisdiction over the corporation], and whereabouts of the physical share certificate is of no consequence in a shareholder derivative judgment in which the rights of the corporation itself are adjudicated. Ms. Ninow had to defend the lawsuit, not default and then try to argue erroneously on appeal about a stock certificate.

d. In this case, the court clerk signed the default certificate but did not enter it on the computer docket. There has been no showing of whether or not this is standard practice as to all default certificates or whether this was an omission by the clerk. The court ruled on June 12, 2003, [R. 2012] that the clerk signed the default certificate on November 25, 2002, the day before the default judgment was entered on November 26, 2002. Ms. Ninow argues that there was no default certificate at all. That is contrary to the law of the case in the ruling. That law of the case is not being appealed and Ms. Ninow did not cross-appeal. Once the default judgment itself was entered, that superceded any and all irregularities regarding the default certificate.

Any issue about the absence of a computer docket entry recording the signing of the default certificate on November 25, 2002, should have been raised under URCP 60(b)(1), (2), or (3), within the 3 month time limit.

e. The trial court’s setting aside of the default judgment should be reversed because it was plain error in law under URCP 60. The case of Oseguera v. Farmers Insurance Exchange, 2003 UT App 46, 63 P.3rd 1008. was relied upon by appellee. It is distinguishable. That case turns upon its own unique procedural facts [See Swart v. State, 2004 UT App 209] and the majority and the dissent are in both in accord with well-settled Utah law and

well-settled precedent from FRCP 60(b) cases, which holds that 60(b)(6) relief cannot be granted when any unexcused lack of due diligence can be detected. That case turned on whether or not Ms. Oseguera had lacked due diligence and whether she was “affirmatively misled” so as to excuse such lack of due diligence. The “unique procedural facts” of Oseguera are light years away from the facts of the case at bar. Here, Ms. Ninow would have known she had filed her responsive motion well past the time stated in the summons had she been duly diligent. Due diligence would therefore have included checking for a default judgment. And there is no finding that she did not receive the Notice of Judgment in time to meet the 3-month deadline.

The June 12, 2003, order is erroneous because, while it does attempt to excuse some of the lack of diligence [she missed the 3-month deadline by a “relatively short time”], the trial court failed identify and dispose of some obvious unexcused lack of due diligence that bars relief under 60(b)(6) and thus the court abused its discretion by granting relief under URCP 60(b)(6).

But before one even reaches those issues, one reaches a jurisdictional bar. Once the court denied the URCP 60(b) motion, there was no basis in law on which to then grant *sua sponte* relief under URCP 60(b), since Ms. Ninow was first required to file another motion to obtain any such relief.¹¹

While the court could grant relief under URCP 55 or URCP 60(a) *sua sponte*, it did not do so. This court lacks grounds and jurisdiction to do so.¹²

¹¹ “Rule 60(b) contemplates relief only ‘on motion.’” “[A] court may not grant relief under Rule 60(b) *sua sponte*.” *Moore’s Federal Practice 3d, Sec. 60.62*. Identical “on motion” language is found in URAP 22(b)(2). The judges of this appellate court don’t grant enlargements of time *sua sponte*.

¹²URCP 55 no longer applies since the default judgment itself was entered. No URCP 60(a) “clerical” errors are present. Entering a default when no

The November 26, 2002, default judgment was the final, appealable order that was not appealed within 30 days. When the court denied the Rule 60 motion on May 2, 2003, that was a final appealable order on which Ms. Ninow could have appealed within 30 days on the narrow issue of denial of her motion. Instructing the parties to brief URCP 55 and 60(a) did not turn the November 26, 2002, judgment, or, May 2, 2003, order, into interlocutory orders. A URCP 60 motion does not extend the appeal time or change the finality of a final order. URAP 4(b). Therefore, on June 12, 2003, the trial court could not revisit its May 2, 2003, order that had denied the motion under URCP 60(b). That was a final order. Thus, Thurston v. Box Elder County, 892 P.2d 1034 (Utah 1995) and Trembley v. Mrs. Fields Cookies, 884 P.3d 1306 (Utah App. 1994), provide no basis revisiting it. Instead, as was pointed out in the motion to vacate the June 12, 2003, order in which Lowe and Rose joined, preserving that issue, the trial court lacked any jurisdiction to enter the June 12, 2003 order. Those two cases involve the ability of a trial court to change its mind under URCP 54(b) prior to the entry of a final order. Reliance on P & B. Land v. Klungervik, 751 P.2d 274, 277 (Utah App. 1988), was also error. There was no default in law or fact in that case and there was no entry of default prior to the entry of default judgment. In the case now at bar there was a default in both law and fact when Ms. Ninow failed to plead or otherwise defend within the time set forth in the summons and then, several days later, upon application for a default and judgment, the clerk signed the default certificate on November

responsive motion has made it into the file is not 60(a) “clerical” error even if a motion is filed the same day and it is not in the file through no fault of a movant. Signing a default judgment you would not have signed if you had known all the foregoing is not 60(a) “clerical” error. Both are 60(b) issues.

25, 2002. After judgment was entered on November 26, 2002, Ms. Ninow could have appealed within 30 days or filed her motion under URCP 60(b)(1), (2) or (3) within 3 months. And even in cases where there is no default in law or fact, under P & B Land the judgment is “illegal and “voidable” and is not “illegal and void.” It was error for the trial court to conclude that it “makes no sense” not to void such a judgment if the defendant “did not comply strictly with the three month deadline.” It “makes sense” to the courts that have made the settled and controlling precedent that the 3-month deadline is jurisdictional. It was also error to excuse Ms. Ninow because she missed the 3-month motion deadline by a “relatively short time.” No jurisdictional bar known to law has that wiggle room, especially when third parties [Lowe and Rose] rely on the deadline.¹³

VIII. THIS APPEAL IS NOT FRIVOLOUS. Starting on May 20, 2002, with the entry of an *ex parte* TRO, Ms. Ninow engaged Ms. Lowe and Ms. Rose in years of litigation in which she never obtained any order on the merits to which Mr. Lowe and Ms. Rose were proper parties until August 16, 2005. Instead, Ms. Ninow has engaged in attempts to retroactively impose injunctions [the last one was lifted August 16, 2005] and endless serial contempt motions, which were finally disposed of on April 26, 2005.

The final order, on the merits, signed on August 16, 2005, is the first order on the merits in which Lowe and Rose actually have a recognizable interest [since it removes them as officers and directors of Pahl’s Salt Palace

¹³ There is no finding that Ms. Ninow’s counsel did not receive the notice of judgment in time to meet the 3-month deadline. The negligently tardy filing is a jurisdictional bar. No exceptional circumstances completely beyond Ms. Ninow’s control taking this from 60(b)(1)-(3) to 60(b)(6) are in the record. A basis for 60(b)(6) relief is not present. *Moore’s Federal Practice* 3RD 60.48.

Loan Office, Inc.], and it was, at long last, signed on August 16, 2005, and entered on August 19, 2005. But it was error to remove them. That order was timely appealed. That appeal is before this court and it is not frivolous. The August 16, 2005, judicial removal of Lowe and Rose as officers and directors constitutes both an implicit order, by the trial court, that they had not theretofore been removed [either by judicial finding or shareholder action] and an order that judicially removes them by order. Mr. Lowe is not appealing the implicit order that he and Ms. Rose had never been removed prior thereto. He appeals only the portion of the order that removes them.

The basis for assigning error to that removal order is: [1] Under both Utah law and the articles and bylaws of Pahl's Salt Palace Loan Office, Inc., Rose and Lowe have a right to serve as the directors until their successors are qualified and no successors have ever been qualified by a shareholder action or the judicial finding, which is implicit in the judicial removal of Lowe and Rose by order on August 16, 2005. [2] After April 6, 2005, the only issues that remained before the trial court were the contempt motions. The trial court had jurisdiction only to find, or decline to find, parties in contempt, and if found to be in contempt, to limit remedies to those available for contempt. [3] After April 26, 2005, the court had no jurisdiction to enter any orders at all other than to dismiss any further contempt motions under *res judicata*. [4] It was error to remove directors without joining Pahl's Salt Palace Loan Office, Inc., as a party. [5] Since the shareholder derivative action was dismissed without prejudice, it was very premature to remove directors without awaiting a final order in a shareholder derivative action or an action brought by Ms. Ninow against the corporation in which Lowe and Rose were freed from injunction and could direct its defense as corporate

officers; [6] Since the November 26, 2002, default judgment had divested title to 3000 shares from Ms. Ninow and had judicially vested it in out-of-state owners, the June 12, 2003, order setting aside the November 26, 2002, judgment did not place the 3000 shares back under Ms. Ninow's control.¹⁴

... She currently controls owns the legal voting title to only 3000 shares [50%], she cannot, unilaterally, convene a shareholder quorum and act, and her sole remedy, if any, is to file a shareholder derivative action of her own or to sue the corporation. But she should wait to do so until this appeal is decided. If the Court of Appeals reverses the trial court's April 6, 2005, denial of the motion to vacate the June 12, 2003, *sua sponte* order, then the November 26, 2002, judgment will be *res judicata* that fully precludes her.

A. Mr. Lowe and Ms. Rose did not submit an order on a petition in which they had no interest and then appeal from the order claiming error. Mr. Lowe did not submit the order. Ms. Rose submitted it as a proposed correct recordation of prior erroneous trial court rulings, and the trial court signed it. Ms. Rose clearly had an interest in obtaining that order once the trial court, in error, started entering erroneous post-April 26, 2005, rulings and orders.

B. Lowe and Rose clearly have an interest in the Diamond Fork default judgment and therefore continue to advocate reversing the April 6, 2005,

¹⁴ The trial court had jurisdiction to move title to the shares out-of-state on November 26, 2002, [because a probate court in which Ms. Ninow was the fiduciary had ruled they were in the estate] but it then lost *in rem* jurisdiction as soon as it did so. As a result, setting aside the default judgment on June 12, 2003, did not vest the title to the shares back in Ms. Ninow. Title remains vested to this day in non-party out-of-state share owners or their out-of-state successors. There is no basis under Utah probate law for removing officers/directors since Ms. Ninow lost title to 3000 shares. The dismissal without prejudice of the shareholder derivitaive action is now *res judicata* as to standing of out-of-state owners and absence of preclusion.

order that denied their motion to vacate the June 12, 2003, *sua sponte* order that set it aside. They had no interest in the shareholder derivative action because they are not shareholders and have no kind of connection with or control over Diamond Fork Land Company. They serve at the pleasure of the shareholders, but have a right to continue to serve until their successors are qualified. Once the lawsuit was reduced to judgment on November 26, 2002, and the 3-month deadline for moving to set it aside under URCP 60(b) (1), (2) or (3), elapsed, they reasonably relied upon it, it names them, and it impacts their right to act as officers and a quorum of directors of Pahl's Salt Palace Loan Office, Inc., the corporation whose rights were vindicated in the shareholder derivative judgment, and so they gained an interest and standing once the action was reduced to a judgment and they reasonably relied on it.

C. Rose is not attempting to recover on the TRO undertaking. Lowe moved the trial court to set a hearing and give notice to the surety so the surety could litigate the matter. The court lacked discretion to refuse that.

D. There is no basis for awarding fees for failure to observe appellate briefing requirements. Counsel for appellants has successfully briefed cases in which he has gained appellate reversals for clients in the Utah Supreme Court, in the Utah Court of Appeals, and in the United States Court of Appeals for the Tenth Circuit. It is counsel's practice to rely upon the clerks of the appellate courts to "checklist" his briefs for compliance with appellate briefing requirements and he often has appellate clerks do that before he even takes the brief to Kinkos for copying. As to the substantive matters in the brief, the limit of the May 1, 2003, order affirmed in the prior appeal is a fairly straightforward matter of parties and preclusion. As to Ms. Ninow's literary criticism of writing style as "convoluted, verbose, rambling, and an

incredibly tedious read,” counsel has reread his brief and he personally finds it to be clear, orderly, and cogent. As one who has written professionally as a *Deseret Morning News* staff writer, was the Commerce Editor for *Utah Holiday Magazine*, and still writes under pen names in Utah publications, counsel welcomes literary criticism, but adversarial litigation is probably not the best place to find it. In an interesting twist, at the same time counsel was reading the literary criticism proffered by the appellee, the *Deseret Morning News* reprised an article he wrote 25 years ago on the 25th anniversary of its publication, deeming it noteworthy enough to be a “week in . . . history.”¹⁵

REPLY POINT THREE

Appellee’s brief is frivolous, warranting attorney fees and costs.

Litigation conducted prior to the notices of appeal¹⁶ in Ninow v. Lowe I [Estate of Pahl], 2004 UT App. 291 is not before the court. There is no need to re-plow that ground and appellee’s brief is frivolous in doing so.

Since Judge Medley’s dismissal without prejudice of Diamond Fork Land Company is now *res judicata*, binding on Ms. Ninow, establishing that Ninow v. Lowe I [Estate of Pahl], 2004 UT App. 291, neither precludes nor binds Diamond Fork Land Company or its successors and that they have the standing to sue derivatively if they care to, appellee’s brief frivolous in that

¹⁵Difficulty in comprehension sometimes has more to do with the reader than the writer. It is perhaps revealing that a litigant who never joined Pahl’s Salt Palace Loan Office, Inc., as a necessary and indispensable party and thought she could get judicial relief on the merits by filing contempt motions now also discloses she had difficulty grasping the legal concepts of this appeal.

¹⁶Ninow v. Lowe I consolidated two appeals, Nos. 20030169 and 20030458.

it argues unadjudicated matters yet to be litigated between proper parties.¹⁷

Appellee's brief is frivolous because the entire brief fails to draw any distinctions between appellants Lowe and Rose as between themselves, their counsel, and entities that are not parties to this appeal. There is no factual basis upon which to lump them together and her attempts to do so on appeal are a frivolous continuation of her all attempts to do so in the trial court that were rejected in the April 26, 2005, order. Ms. Ninow did not cross-appeal.

Ms. Ninow's attempt to "certify" in her brief that she never saw the April 26, 2005, order is frivolous. This appellate court is not equipped to adjudicate such a factual representation. To "certify" a fact to an appellate court that is not in the record is frivolous. A direct appeal from a trial court is not a matter in which an appellate court decides facts not in the record.

Appellee's brief is frivolous because it tries to attack the character of appellants' counsel, attempts to attribute to appellants' counsel positions never taken by appellants' counsel, and does so without reference to the trial court record. The Utah State Bar's emphasis on civility and professionalism is encouraging to the dwindling few of us who remember the days when the Utah State Bar was a small but lively group of smart men and women who got together for law and motion calendars, and who disliked having to start dealing with lawyers who we did not even know because they were being pumped out of the two law schools in Utah in ever-increasing numbers.

¹⁷ Ms. Ninow's brief argues matters to be litigated in derivative actions in the event this court does not reverse the June 12, 2003, *sua sponte* order. This is not the proper forum. The issue since the preliminary injunction was entered on May 31, 2002, has been appellants' "purported right...to continue to operate this business." [Medley, J; T.64, Par. 24-25, 5/31/02]. That issue was not concluded until August 16, 2005, by judicial removal that was error.

Standards of professionalism prevent the undue annoyance of having an adversary attributes positions to you that you have never taken. Diamond Fork Land Company duly acquired its interest in 1500 shares through Grand Staircase Land Company, which had acquired shares from Augusta Rose and Robert Mortensen in arms-length transactions at the time they were both the recognized record shareholders because no court had exercised personal jurisdiction over the corporation as a party so as to change its shareholder records. And the transaction occurred prior to the time that Augusta Rose retained Robert Henry Copier as her legal counsel. Appellee's inappropriate personal attacks in her brief such as "(t)he "Diamond Fork case was clearly a sham from its inception" [Appellee Brief, p. 44] is not supported by any finding by Judge Lubeck or Judge Hilder, who had the case before it was consolidated, or Judge Medley or Judge Lewis, who adjudicated it after it was consolidated into the probate proceeding now on appeal. The fact that Judge Medley dismissed the case without [not with] prejudice means that Diamond Fork Land Company and/or its successors can still pursue that litigation if they care to and the May 1, 2003, summary judgment that was affirmed on appeal in Ninow v. Lowe I [Estate of Pahl], 2004 UT App. 291, will not have any preclusive effect barring that, since Judge Medley ruled against Ms. Ninow on that point when he declined to dismiss with prejudice.

Accusing one's opposing counsel of a "sham" is an attack on that counsel's character. Equally offensive as [well as clearly incorrect] is Ms. Ninow's unsupported assertion that "Lowe and Rose continued to litigate the probate case . . . even though they expressly disclaimed any ownership in the real estate." [Appellee Brief, p. 44]. First of all, they claim no personal fee ownership, but Mr. Lowe does claim that interests in real estate were

pledged by Pahl's Salt Palace Loan Office, Inc., as sole partner in Pahl's Land Partnership [fka, inter alia, GHF Investment Partnership] to secure all of his attorney fees in dealing with Ms. Ninow. That claim has never been adjudicated. Second, their participation in the attempts by Ms. Ninow to litigate real estate claims after May 1, 2003, was to demonstrate that no order on the merits as to any such claims could be entered because [1] the May 29, 2002, petition had not survived the May 1, 2003, final order; [2] Pahl's Salt Palace Loan Office, Inc., which was the sole surviving partner of GHF Investment Partnership, *aka, inter alia*, Pahl's Land Partnership, had not been joined as a necessary/indispensable party; and, [3] because neither the earlier summary judgment "finding" nor any attempted "unanimous shareholder action" had removed Mr. Lowe and Ms. Rose as the officers and directors, sundry Pahl family members lacked any authority, no one with any standing was litigating, and title should be quieted against them. No court order was ever entered adjudicating any of those issues, which were mooted when Ms. Ninow announced to the trial court on April 6, 2005, that she was no longer attempting to obtain a court order on any of the real estate claims.

CONCLUSION

The April 6, 2005, ruling denying the motion to vacate the June 12, 2003, order should be reversed.¹⁸ Everything done between April 26, 2005, and August 16, 2005, should be reversed. Removal of Lowe and Rose by

¹⁸ In this case, third-parties who relied on the 3-month 60(b) deadline were made parties over their objection and then joined in the motion to vacate a *sua sponte* order entered after that deadline. If reversal of that order is not granted in this appeal, then URCP 60(b)(1)-(5) might as well be repealed, leaving 60(b)(6) as the rule under which trial judges can vacate any final judgment at any time, *sua sponte*, based on what "makes no sense" to them,

judicial order on August 16, 2005, should be reversed.¹⁹ The April 6, 2005, ruling denying a TRO undertaking hearing should be reversed. Appellants should be awarded attorney fees/costs. Appellee's brief should be stricken.

The court should expressly state that the April 26, 2005, order stands.

SIGNATURE OF COUNSEL

By this signature, counsel certifies that this is the reply brief of client William Lowe in his individual and personal capacity only and not in any representative capacity or in concert with any other person or entity. He further certifies that it is filed only by and on behalf of said client. It is not made on behalf of, or binding upon, any other persons or entities, except that William Lowe adopts by this reference all of Augusta Rose's Reply Brief, in its entirety, into this Reply Brief, pursuant to URAP 24(g), and notes that Augusta Rose has similarly adopted everything herein into her Reply Brief.

DATED THIS 18 DAY OF JUNE, 2007.

ROBERT HENRY COPIER
Attorney for William Lowe

with no opportunity for any appellate review. What "makes no sense" to appellants is the conclusion in the June 12, 2003, order, that when the clerk signed the default certificate on November 25, 2002, a responsive motion was not in the court file through no fault of Ms. Ninow. She was in charge of responding to the summons. No application for default would have been made had she timely responded. Whether tardiness was Ms. Ninow's or her counsel's is completely irrelevant. *Moore's Federal Practice* 3rd 60.48(4)(b).

¹⁹ The remainder of the August 16, 2005, order remains for lack of a cross-appeal. The entire order appears to be erroneous, but it is erroneous due to two "chain errors" that began when the court set aside the default judgment on June 12, 2003, and then entered orders after the April 26, 2005, dismissal.

MAILING CERTIFICATE

Copies of this brief were this-day mailed to:

**DANIEL F. VAN WOERKOM
SANDRA K. WEEKS
HALA L. AFU
VAN WOERKOM & WEEKS, LC
2975 WEST EXECUTIVE PARKWAY #414
LEHI UT 84043-0255**

DATED THIS 16 DAY OF JUNE, 2007.



ADDENDUM

June 1, 2002, shareholder derivative notice and demand. [R. 4031]

November 26, 2002, shareholder derivative default judgment. [R. 2010]

November 29, 2002, docket. [R. 2008]

June 12, 2003, ruling and order. [R. 2012]

Probate Minutes, April 6, 2005 [R. 2555]

LAW OFFICES
ROBERT COPIER

ATTORNEY & CPA
ADVOCAT COPIER P.C.
SALT LAKE CITY OFFICE

SALT LAKE CITY OFFICE ADDRESS:
200 METRO PLACE
243 EAST 400 SOUTH, SUITE 200
SALT LAKE CITY, UTAH 84111-2803

SALT LAKE CITY PHONE NUMBERS:
OFFICE TELEPHONE (801) 531-7923
FAX LINE NUMBER (801) 531-7928
24-HOUR VOICE MAIL (801) 272-2222

June 1, 2002

Pahl's Salt Palace Loan Office, Inc.
1588 South State Street
Salt Lake City UT 84115

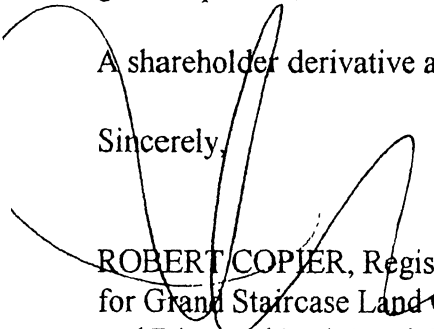
Re: *Shareholder Notice and Demand*

To whom it may concern:

You are hereby notified to update the shareholder records of the corporation to reflect transfer on June 1, 2002, of 1500 shares from Augusta Rose to Grand Staircase Land Company, 243 East 400 South, Suite 200, SLC UT 84111, and of 1500 shares from Robert K. Mortensen to Grand Staircase Land Company, 243 East 400 South, Suite 200 SLC UT 84111, with the latter 1500 shares being held in escrow by William Lowe, 3939 Alberly Way SLC UT 84124, for Grand Staircase Land Company. The beneficial owner of the 1500 shares held in escrow by William Lowe for Grand Staircase Land Company is Diamond Fork Land Company, 243 East 400 South, Suite 200, SLC UT 84111. Both new shareholders demand that you act to vindicate your rights as to claims by KaLynn Ninow, the personal representative of the estate of Gary G. Pahl, that she owns 3000 shares that were held by William Lowe and as to which Gary G. Pahl transferred all his right, title, and interest to the corporation's treasury before he died, trespass by KaLynn Ninow, Ryan Pahl, Richard Ninow, and others upon the corporation's property, the conversion of its property to their own use, their acting without authority as to the real property and real estate owning partnerships in which the corporation is sole surviving general partner, and unauthorized transfer of corporate funds to their probate counsel.

A shareholder derivative action may follow after 90 days if sufficient action is not taken.

Sincerely,


ROBERT COPIER, Registered Agent
for Grand Staircase Land Company
and Diamond Fork Land Company

ROBERT H. COPIER, 727
Attorney for Relator
200 Metro Place
243 East 400 South
Salt Lake City, Utah 84111-2803
Telephone 531-7923

FILED DISTRICT COURT
Third Judicial District

NOV 26 2002

SALT LAKE COUNTY

By  Deputy Clerk

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

PAHL'S SALT PALACE LOAN
OFFICE, INC., a Utah corporation,
ex rel. DIAMOND FORK LAND
COMPANY, a Utah corporation,

DEFAULT JUDGMENT

Plaintiff,

vs.

KALYNN NINOW, personal
representative of the estate of
Gary G. Pahl, deceased,

Civil No. 020908627
Judge Bruce C. Lubeck

Defendant.

Defendant's default having been entered, the court now grants default judgment, and hereby, ORDERS, ADJUDGES, and DECREES, as follows:

1. All of defendant's claims to 3000 shares (50%) of the stock of Pahl's Salt Palace Loan Office, Inc., a Utah corporation, are hereby extinguished and the legal and beneficial title to the said 3000 shares is hereby quieted in favor of the plaintiff's successors to those shares as set forth in the case record, as follows.

*Bangkok Birth Mothers Basic Education Trust 1500 shares (25%)
(With Bangkok Birth Mothers Trust for
Equity and Justice as the beneficial owner)*

*Bangkok Birth Mothers Advocacy Trust 1500 shares (25%)
(With Diamond Fork Land Company, a
Utah corporation, as the beneficial owner)*

2. No other or further writ or order shall be required and this default judgment fully adjudicates any claims between the parties as to the 3000 shares and fully and finally quiets the ownership of the 3000 shares as set forth above.

3. In the event that plaintiff or any of plaintiff's successors to the 3000 shares shall deem it necessary to have defendant reasonably execute papers or documents to vindicate and protect the rights of plaintiff's successors to the 3000 shares, defendant is hereby ORDERED to sign all such papers and documents.

4. As to the second claim for relief in the First Amended Complaint, it is hereby decreed that any and all acts, filings, and transactions purportedly made or entered into by or on behalf of Pahl's Salt Palace Loan Office, Inc., after the death of Gary G. Pahl through the date of this judgment, as well as any actions that were purportedly made or entered into by unanimous action of shareholders or by a quorum of shareholders after the death of Gary G. Pahl through the date of this judgment, which have not been expressly approved or ratified by a board of directors upon which Augusta Rose and William Lowe served as directors, are declared and decreed to be unauthorized, of no force or effect, and *void ab initio*.

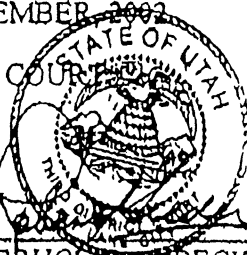
5. It is further decreed that no action, filing, or transaction purportedly made or entered into by or on behalf of Pahl's Salt Palace Loan Office, Inc., from and after the date of this judgment shall have any force or effect unless approved or ratified by a board of directors upon which William Lowe and Augusta Rose serve as directors, until such time as their successors, if any, are duly qualified.

6. The third claim for relief is dismissed WITHOUT PREJUDICE.

DATED THIS 26th DAY OF NOVEMBER, 2002

BY THE COURT

JUDGE BRUCE C. LUBECK



3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

DIAMOND FORK LAND COMPANY vs. DOES I-V

SE NUMBER 020908627 Contracts

CURRENT ASSIGNED JUDGE
ROBERT K. HILDER

RELATIVES

Plaintiff - PAHL'S SALT PALACE LOAN
Represented by: ROBERT H COPIER

Plaintiff - DIAMOND FORK LAND COMPANY

Defendant - KAYLYN NINOW

Defendant - DOES I-V

COUNT SUMMARY

TOTAL REVENUE	Amount Due:	140.00
	Amount Paid:	140.00
	Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: COMPLAINT - NO AMT S	
Amount Due:	140.00
Amount Paid:	140.00
Amount Credit:	0.00
Balance:	0.00

SEE NOTE

PROCEEDINGS

-03-02 Case filed by karries	karries
-03-02 Judge LUBECK assigned.	karries
-03-02 Filed: Complaint No Amount	karries
-03-02 Fee Account created Total Due: 140.00	karries
-03-02 COMPLAINT - NO AMT S Payment Received: 140.00	karries
Note: Code Description: COMPLAINT - NO AMT S	
-04-02 Filed: First Amended Complaint	bryanp
-07-02 Judge HILDER assigned.	dpx
-18-02 Filed: Share Transfer Notice	bryanp
-24-02 Filed return: Summons	bryanp

Party Served: NINOW, KAYLYN

Service Type: Personal

Service Date: October 19, 2002

26-02 Filed order: Default Judgment

bryanp

Judge rhilder

Signed November 26, 2002

— nna

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

**PAHL'S SALT PLACE LOAN
OFFICE, INC., a Utah corporation,
ex rel. DIAMOND LAND FORK
COMPANY, a Utah corporation,**

RULING AND ORDER

Plaintiff,

vs.

**KAYLYNN NINOW, personal
representative of the estate of
Gary G. Pahl, deceased, and
individually,**

Case No. 020908627

Judge Robert K. Hilder

Defendant.

Defendant's Motion to Set Aside Default Judgment is before the court for decision. The parties briefed the original Motion, and the court heard argument, at which time the court indicated that it believed a Rule 60(b), Utah Rules of Civil Procedure, Motion was time barred, but that there might be grounds to set aside the judgment under Rule 60(a), or even under Rule 55, the underlying basis for a default judgment, pursuant to *P & B Land v. Klungervik*, 751 P.2d 274 (Ut. App. 1988). The parties were requested to submit supplemental briefs addressing the issue raised by the court. Now, having reviewed the briefs and the applicable law, the court rules as follows;

First, the court must exercise its option under *Thurston v. Box Elder County* and *Trembly v. Mrs. Fields Cookies*, to reconsider its previous decision regarding Rule 60(b), because the court is persuaded that it was in error as to the law, and no final judgment has entered based on the court's bench ruling of May 2, 2003.

That is, the court is still persuaded that as to any Motion based on subsections (1), (2) or (3) of Rule 60(b), including motions under 60(b)(6) that could have been brought pursuant to any one of the first three subsections, the time limit is three months, and the court has no discretion to

extend that time.

But, the court is now persuaded, based on the facts of this case and the very recent Utah Court of Appeals decision, *Oseguera v. Farmers Insurance Exchange*, 2003 UT App 46 (February 21, 2003), that Rule 60(b)(6), URCP, provides a clear basis for relief from the default judgment separate from grounds that may be asserted under the first three subsections. As the court explained at the hearing, there is no doubt in this court's mind that the entry of default results solely from court error, probably even more manifestly than was the case in *Oseguera*. Notwithstanding plaintiff's assertion that the default was proper because the responsive pleading was late, at the date the clerk signed the default certificate (November 25, 2002) and at the date the court signed the default judgment (November 26, 2002), a responsive pleading had been filed. The responsive pleading may not have been physically in the court's file, but that was the court's fault.¹ The critical point is defendant had not "failed to plead or otherwise defend" (Rule 55(a), URCP) at the time the default was sought.

In such a case, the clerk is not empowered to enter default, and there is ultimately no basis for a judgment, and *P & B Land* makes it clear that the default is "improper or illegal, and voidable." 751 P.2d at 277. It makes no sense to consider such a judgment illegal and voidable if the court is nevertheless precluded from voiding the illegal judgment because defendant did not comply strictly with a three month deadline. That is particularly true when, as here, the deadline was missed by a relatively short time, and to some extent that was because plaintiff did not give prompt notice of the judgment.

The court still believes there may be a basis to set aside pursuant to Rule 60(a), URCP, under facts such as these and/or under the court's inherent powers to correct its own errors, particularly in light of the direction given by the *Oseguera* court:

When the trial court's mistakes—not counsel's—are the reason a judgment is improvidently entered and the entry goes undetected, even if it remains undetected for some time, the court should be anxious to whatever needs to be done to fix the mistake as soon as it is called to the court's attention.

Id. at Para. 12.

Despite this belief, based on its reconsideration of the availability of Rule 60(b)(6), URCP, and based on the court's determination that defendant clearly acted within a reasonable time after becoming aware of the default judgment, the court need not reach alternative bases. For the foregoing reasons, defendant's Motion to set Aside default Judgment be and hereby is

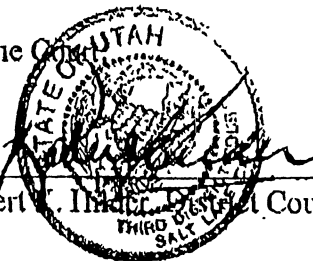
¹ Plaintiff may argue that the pleading was deficient in some way, but that is properly a subject of another motion.

GRANTED and the Motion filed November 25, 2002, is the responsive pleading to which plaintiff may direct any future motions. To the extent the defendant's Motion seeks consolidation of this case with the earlier filed case before Judge Medley, that Motion must be directed to Judge Medley. This signed Ruling shall be the **ORDER** of the court and no further Order is required.

DATED this 12th day of June, 2003..

By the Court

Robert C. Lindell, District Court Judge



3RD DISTRICT COURT - SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

IN THE MATTER OF THE ESTATE : MINUTES
: PROBATE MINUTES
OF GARY G. PAHL :
:
: Case No: 003901101 EF
:
: Judge: LESLIE A. LEWIS
: Date: April 6, 2005

Clerk: chells

PRESENT

Petitioner's Attorney: HALA L AFU JR
RAY G MARTINEAU

Other Parties: SANDRA K WEEKS
ROBERT HENRY COPIER

Video

Tape Number: 2:07 pm

Counsel stipulate that the summary judgment is withdrawn. Counsel argues the order to show cause. The Court takes the order to show cause issue under advisement and will render a written ruling. Mr Copier argues the issue of the undertaking. Ms Weeks gives opposing arguments. The Court orders the motion for the undertaking is denied. Mr Copier makes a motion in regards to rule 11. A rule 11 motion has not been filed, and therefore denied. Mr Copier makes a motion in regards to the ruling on 6/12/03 be vacated. The Court orders the motion to vacate is denied. Ms Weeks makes a motion to stay any remaining pending motions until a ruling on the order to show cause. Mr Copier stipulates to the motion.