

2005

William Lowe and Augusta Rose v. Kalynn Ninow : Brief of Appellee

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, and AUGUSTA
ROSE,

Appellants,

v.

KALYNN NINOW, et al.,

Appellees.

BRIEF OF APPELLEE

Appeal No. 20050867-CA

Appeal from the Third District Court, Salt Lake County, Hon. Leslie Lewis

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UTAH APPELLATE COURTS
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List of Parties to Proceedings Below:

1. Kalynn Ninow
2. William Lowe
3. Augusta Rose
4. Robert H. Copier
5. Robert K. Mortensen
6. Diamond Fork Land Company, Inc.
7. Pahl's Salt Palace Loan Office, Inc.
8. Grand Staircase Land Company, Inc.
9. Pahl's Land Partnership
10. Ryan Pahl

Table of Contents

TABLE OF AUTHORITIES	vi
STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES AND STANDARDS OF REVIEW	1
DETERMINATIVE RULES	3
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENTS	17
ARGUMENT	19
I. THE TRIAL COURT’S REMOVAL OF LOWE AND ROSE AS OFFICERS AND DIRECTORIES OF PAHL’S SALT PALACE LOAN OFFICE, INC. SHOULD NOT BE REVERSED	19
A. The removal of Lowe and Rose as officers and directors of the Loan Office is invited error and cannot be considered on appeal	19
B. The issue of the removal of Lowe and Rose as officers and directors of the Loan Office was not preserved for appeal .	21
C. The law of the case prohibits consideration of Lowe and Rose’s removal as officers and directors of the Loan Office	21
II. THE APRIL 26, 2005, RULING AND ORDER SHOULD BE DISREGARDED, OR, IN THE ALTERNATIVE, IF THE COURT REGARDS SUCH ORDER AS EFFECTIVE, THIS APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION ...	22
A. The April 2005 Ruling and Order should be disregarded ...	22

B.	If the Court gives effect to the April 2005 Ruling and Order, this appeal should be dismissed for lack of jurisdiction	24
III.	IT WAS NOT ERROR FOR THE TRIAL COURT TO RULE THAT THE MAY 1, 2003 SUMMARY JUDGMENT IS A PARTIAL SUMMARY JUDGMENT	24
A.	In substance, the Order of Summary Judgment was a partial summary judgment	25
B.	The ability to appeal from the partial summary judgment in a probate proceeding does not convert a partial summary judgment into a full summary judgment	26
IV.	THE MAY 2003 SUMMARY JUDGMENT IS DISPOSITIVE AND FINAL AS TO OWNERSHIP OF THE LOAN OFFICE SHARES	27
V.	IT WAS NOT ERROR FOR THE TRIAL COURT TO DENY LOWE’S MOTION FOR LIABILITY ON THE UNDERTAKING	29
VI.	THIS COURT LACKS JURISDICTION TO REVIEW THE JUNE 12, 2003, ORDER SETTING ASIDE THE NOVEMBER 26, 2002, DEFAULT JUDGMENT.	31
A.	Lowe and Rose lack standing to challenge the issue of the setting aside of the default judgment	32
B.	This court lacks jurisdiction over the setting aside of the default judgment for failure to timely appeal	33
C.	The issue of the setting aside of the default judgment was waived and/or not preserved for appeal	33
VII.	THE TRIAL COURT’S SETTING ASIDE OF THE DEFAULT JUDGMENT SHOULD BE AFFIRMED	34

A.	This court may affirm the setting aside of the default judgment on any ground apparent on the record	34
B.	The Default Judgment exceeds the scope of the relief prayed for in the Complaint and is therefore void	35
C.	Ninow’s interest and title in and to the Loan Office shares was never reached or attached by Lowe and Rose	36
D.	The trial court’s setting aside of the default judgment should be affirmed because the clerk entered judgment without first entering a default certificate	37
E.	The trial court’s setting aside of the default judgment should be affirmed because it was proper under Utah R. Civ. P. 60	38
VIII.	NINOW SHOULD BE AWARDED HER COSTS AND ATTORNEYS FEES FOR THIS FRIVOLOUS APPEAL	41
A.	Lowe and Rose submitted an Order on a Petition in which they had no interest and then appealed from that Order claiming error	41
B.	Lowe and Rose clearly have no interest in the Diamond Fork default judgment yet continue to advocate setting it aside ..	44
C.	Lowe and Rose failed to provide a factual or legal basis for recovering on the TRO undertaking or finding the May 2003 Summary Judgment was a “full” summary judgment	45
D.	Ninow should also be awarded her fees for Lowe and Rose’s failure to observe appellate briefing requirements	46
CONCLUSION		47
CERTIFICATE OF SERVICE		48

ADDENDUM 49

List of Exhibits in Addendum

- A. Order Granting Preliminary Injunction - August 26, 2002 (R. 886)
- B. Findings of Fact and Conclusions of Law Re: Summary Judgment - May 1, 2003 (R. 1117)
- C. Order Granting Summary Judgment - May 1, 2003 (R. 1114)
- D. Complaint (Diamond Fork case # 020908627) - September 3, 2002 (R. 4026)
- E. Default Judgment (Diamond Fork case # 020908627) - November 26, 2002 (R. 23-Case No. 030907064)
- F. Ruling and Order Setting Aside Default Judgment (Diamond Fork case # 020908627) - June 12, 2003 (R. 4053)
- G. (1) Motion to Dismiss and (2) Memorandum in Support (Diamond Fork case # 020908627) - March 12, 2004 (R. 4079, 4081)
- H. Minute Entry and Order (Dismissing Diamond Fork case # 020908627) - April 11, 2004 (R. 4083)
- I. Memorandum Decision, Ninow v. Lowe I, 2004 UT App 291 (unpublished) - September 2, 2004
- J. April 2005 Ruling and Order - April 26, 2005 (R. 2609)
- K. May 2005 Memorandum Decision - May 26, 2005 (R. 2787)
- L. Final Order on the May 29, 2002, Petition - August 19, 2005 (R. 3200)
- M. Minutes of April 6, 2005, Hearing - April 6, 2005 (R. 2555)
- N. (1) Motion to Drop Parties and (2) Memorandum in Support - March 24, 2004 (R. 1411, 1413)

- O. Memorandum in Opposition to Motion for Stay - July 8, 2005 (R. 3080)
- P. May 29, 2002, Petition, Petition for Determination of Ownership for Shares of Stock and Interests in Real Estate - May 29, 2002 (R. 471)

Table of Authorities

Cases

<u>Bailey v. Bayles</u> , 2002 UT 58, 52 P.3d 1158	35
<u>Cashner v. Freedom Stores, Inc.</u> , 98 F.3d 572 (10 th Cir. 1996)	39
<u>DeBry v. Noble</u> , 889 P.2d 428 (Utah 1995)	35
<u>Franklin Covey Client Sales, Inc. v. Melvin</u> , 2000 UT App 110, 2 P.3d 451	2
<u>Harris v. IES Assocs., Inc.</u> , 2003 UT App 112	3
<u>Jones v. Barlow</u> , 2007 UT 20	32
<u>In re Estate of Christensen</u> , 655 P.2d 646 (Utah 1982)	24, 27, 33
<u>In re Estate of Voorhees</u> , 12 Utah 2d 361, 366 P.2d 977	24, 27, 33
<u>Ninow v. Lowe I</u> , 2004 UT App 291 (unpublished)	26, 28, 29, 30, 45
<u>Oseguera v. Farmers Insurance Exchange</u> , 2003 UT App 46, 68 P.3d 1008 .	40, 41
<u>Paulos v. Covenant Transport, Inc.</u> , 2004 UT App 35, 86 P.3d 752	20
<u>P & B Land v. Klungervik</u> , 751 P.2d 274 (Ut. App. 1998)	38
<u>S.K. and J.K. v. State</u> , 2007 UT App 67	21, 34
<u>Smith v. Four Corners Mental Health Ctr., Inc.</u> , 2003 UT 23, 70 P.3d 904	28
<u>Softsolutions, Inc. v. Brigham Young Univ.</u> , 2000 UT 46, 1 P.3d 1095	1
<u>State v. Thomas</u> , 961 P. 2d 299 (Utah 1998)	36
<u>State v. Green</u> , 2004 UT 76, 99 P.3d 820	46
<u>Thurston v. Box Elder County</u> , 892 P. 2d 1034 (Utah 1995)	21

Rules

Utah Rule of Appellate Procedure 4	24
Utah Rule of Appellate Procedure 24	41, 46
Utah Civil Rule of Procedure 54(c)(2)	35
Utah Rule of Civil Procedure 55(a)	37, 38
Utah Rule of Civil Procedure 55(b)(2)	38
Utah Rule of Civil Procedure 60(b)(1)	39, 40
Utah Rule of Civil Procedure 60(b)(6)	40
Utah Rule of Civil Procedure 64C(e)(5)	36
Utah Rule of Civil Procedure 65A(c)(1)	29
Utah Rule of Civil Procedure 69(a)	36

Statutes

Utah Code Ann. § 70A-8-111 (2001)	36, 37
---	--------

Other

5 C.J.S. <u>Appeal & Error</u> § 714 (1993)	35
---	----

STATEMENT OF JURISDICTION

Jurisdiction is proper under Utah Code Ann. § 78-2a-3(2)(j), as this appeal was transferred to this Court by the Utah Supreme Court.

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

Issue No. 1 - Whether the May 1, 2003, Summary Judgment ratified Ninow's Action by Shareholder Consent, which removed Lowe and Rose as officers and directors of the Loan Office. (Lowe and Rose frame the issue as a question of whether the May 1, 2003, Summary Judgment "vested title" of the shares in Ninow, which Ninow does not claim.)

Standard of Review - The matter of the Action by Shareholder Consent, which removed Lowe and Rose as officers and directors of the Loan Office was a finding of fact by the trial court. Findings of fact are reviewed under a clearly erroneous standard. Softsolutions, Inc. v. Brigham Young Univ., 2000 UT 46, ¶ 12.

Preservation of Issue - Lowe and Rose challenge the May 1, 2003, Summary Judgment but failed to preserve this issue for appeal.

Issue No. 2 - Whether the June 12, 2003, order setting aside the November 2002 default judgment should be reversed.

Standard of Review - The trial court set aside the November 2002 default judgment under Utah R. Civ. P. 60(b). "A trial court has discretion in

determining whether a movant has shown Rule 60(b) grounds, and this Court will reverse the trial court's ruling only when there has been an abuse of discretion."

Franklin Covey Client Sales, Inc. V. Melvin, 2000 UT App 110, ¶ 9.

Preservation of Issue - This issue was not preserved below by any party with standing. Lowe and Rose may have advocated setting the default judgment aside, but they have no protectible interest in the default judgment and no standing to challenge the trial court's action.

Issue No. 3 - Whether the portion of the Final Order on the May 29, 2002, that purports to remove William Lowe and Augusta Rose as officers and directors of the Loan Office should be reversed.

Standard of Review - This is a question of law that should be reviewed for correctness.

Preservation of Issue - Lowe and Rose failed to preserve this issue for appeal. (Lowe and Rose contend they preserved this issue by filing their notice of appeal).

Issue No. 4 - Whether it was error for the trial court to deny Lowe and Rose's motion to recover against the surety's undertaking on the preliminary injunction.

Standard of Review - To the extent this issue requires interpretation of rules of civil procedure, it presents a question of law which is reviewed for correctness. Harris v. IES Assocs., Inc., 2003 UT App 112, ¶ 25.

DETERMINATIVE RULES

Utah Civil Rule of Procedure 54(c)(2) states, in relevant part:

A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

Utah Civil Rule of Procedure 60(b) states, in relevant part:

Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Utah Civil Rule of Procedure 65A(c)(3) states, in relevant part:

Jurisdiction over surety. A surety upon a bond or undertaking under this rule submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

STATEMENT OF THE CASE

This is an appeal from a probate case in which several other lawsuits were consolidated. The probate matter centered around ownership of two assets: a loan office corporation, and two parcels of real estate. The issue of the loan office ownership was resolved in a prior appeal of this same case. Although ownership of the real estate has been resolved, no order regarding such was entered. A purported final order in the probate matter was entered which lead to this appeal. In a separate shareholder derivative action, a default judgment was entered against Appellant and was later set aside.

STATEMENT OF FACTS

1. Gary G. Pahl passed away on June 25, 2000. On September 6, 2000, the trial court appointed KaLynn Ninow ("Ninow") Personal Representative of Gary G. Pahl's estate and decreed that Gary G. Pahl died intestate. Pursuant to the laws of intestacy under the Uniform Probate Code, all property in Gary G. Pahl's

estate passed to his son Ryan B. Pahl, as his sole heir. (R. 693, 1121.) At the time of his death, Gary Pahl owned all 6,000 shares of Pahl's Salt Palace Loan Office, Inc. (the "Loan Office"). (R. 892)

2. On May 15, 2002, Ninow, holding legal title to the 6,000 shares of common stock of the Loan Office executed a shareholder action by consent in accordance with Utah Code Annotated §16-10a-704 which removed William T. Lowe ("Lowe") and Augusta Rose ("Rose") as officers and directors of the Loan Office. (R. 1122, ¶ 21; Addendum Exh. B ¶ 21)

2.1 A copy of the action by consent was sent certified mail along with other documents to Lowe and Rose and their counsel, Mr. Copier. (R. 1122 ¶ 20; Addendum Exh. B ¶ 20)

3. On May 20, 2002, the trial court issued a Temporary Restraining Order ("TRO") in favor of Ninow against Lowe, Rose (and their agents) wherein such parties were ordered to "immediately desist from conducting any further activities purportedly on behalf of the Loan Office or as manager(s) of the [real estate properties associated with Gary Pahl's estate]." (R. 1122, ¶ 22; Addendum Exh. A ¶ 22)

3.1 On or about May 29, 2002, Ninow, by and through counsel, filed a

Petition to determine two issues: 1) ownership of the Loan Office; and 2) ownership of real estate located at 1588 and 1594 South State Street, Salt Lake City, Utah (the “State Street Property”). (R. 471; Addendum Exh. P)

4. During TRO/preliminary injunction proceedings, Lowe and Rose, presented seven documents to the trial court attached to a brief entitled “Argument in Opposition to Injunction.” (R. 1123, ¶ 26, 27) One of the documents, entitled “Amendment of By-Laws of Pahl’s Salt Palace Loan Office, Inc.” and purportedly signed by Gary Pahl and William Lowe, was found by the Court to be a forgery. (R. 1123, ¶ 27)

5. A second document that was attached to Lowe and Rose’s brief, entitled “Bill of Sale Agreement” bearing the date of December 28, 1998, was presented to the court in an effort to prove that 3000 shares of the Loan Office were sold by Gary Pahl to the Loan Office before Gary’s death. (R. 1123, ¶ 28)

6. The Court later found, however, that none of the requirements or conditions precedent of the December 28, 1998, Bill of Sale Agreement (the “December Agreement”) had ever been met and thus, no transfer of shares from Gary Pahl to the Loan Office was ever completed. (R. 1124-29, ¶ ¶ 30, 49, 54)

7. Minutes of alleged Board of Directors Meetings were also submitted to the Court by Lowe and Rose which purportedly documented the transfer of the

3000 shares in question to Lowe who, one week later, transferred the shares equally between Rose and Robert K. Mortensen. (R. 1124, ¶ 31)

7.1 On May 31, 2002, the TRO was converted to a Preliminary Injunction. (R. 501). The formal Order Granting Preliminary Injunction was later entered August 26, 2002. (R. 886)

7.2 The Preliminary Injunction specifically orders, adjudges, and decrees that Respondents Lowe, Rose and

any of their agents . . . [and] attorneys, and all those acting in concert with them . . . shall immediately desist from conducting any further activities purportedly on behalf of the Loan Office or as manager(s) of the aforementioned real estate.

The phrase “aforementioned real estate” refers therein to “the real property located at 1588 & 1594 South State Street in Salt Lake City, Utah,” which property was the subject of the May 29, 2002, Petition. (R . 886; Addendum Exh. A; R. 471)

7.3 The Preliminary Injunction also provides that it shall

continue until further order of the Court or until an ultimate determination on the merits of KaLynn Ninow’s underlying Petition for Determination of Ownership for Shares of Stock and Interests in Real Estate filed with this Court [the May 29, 2002, Petition].

(R . 886; Addendum Exh. A)

8. On June 4, 2002, following the issuance of the Preliminary Injunction, Robert Copier, attorney for Lowe, filed with the Court a “Stock

Transfer Notice and Request for Notice” purporting to transfer 3000 shares of stock in Pahl’s Salt Palace Loan Office, Inc. (1500 transferred outright and 1500 held in escrow by Lowe) to a Utah corporation known as Grand Staircase Land Company, Inc. (R. 1124, ¶ 32)

9. On July 5, 2002, Copier filed a second stock transfer notice purporting to transfer 1500 shares of stock in the Loan Office from Grand Staircase Land Company to Diamond Fork Land Company (“Diamond Fork”). (R. 1124, ¶ 33)

9.1 A “Certified Copy of the Entire File” from the Utah Department of Commerce, demonstrated that Robert Copier (counsel for Lowe and Rose) is the only officer and the only director of both Diamond Fork, and Grand Staircase Land Company. (R. 1124, ¶ 34)

10. On or about July 26, 2002, Ninow moved the Court for summary judgment as to her claim in the May 29, 2002, Petition that Gary Pahl owned all shares of stock of the Loan Office at the time of his death. (R. 683)

11. On August 26, 2002, Judge Medley, ruling from the bench after oral argument, granted Ninow’s motion for summary judgment, ruling that all 6,000 shares of the Loan Office are property that belong to the Estate of Gary Pahl and to Ryan Pahl as the only devisee of the Estate. (R. 892)

12. On May 1, 2003, the Court entered Findings of Fact and Conclusions of Law re: Summary Judgment and an Order Granting Summary Judgment. (R. 1117; Addendum Exh. B) In the findings of fact, the Court found that all property of Gary Pahl’s estate passed to his son Ryan B. Pahl as his sole heir. (R. 1121, ¶19)

13. Ultimately, the trial court found as a matter of law that “Neither Gary Pahl nor his Estate was ever compensated as required under the December 28, 1998 Bill of Sale Agreement According to the express terms of the agreement, the stock never became treasury stock of the corporation, and the subsequent ‘transfers’ have all been void ab initio.” (R. 1129, ¶ 2)

14. Lowe and Rose appealed the May 1, 2003, Order Granting Summary Judgment, and on September 2, 2004, in Ninow v. Lowe, 2004 UT App 291 (“Ninow I”), the Utah Court of Appeals affirmed that Gary Pahl owned all 6,000 shares of the Loan Office stock at the time of his death. (R. 1887)

The Diamond Fork Case formerly before Judge Hilder¹

¹ The record for the Diamond Fork case (Civil No. 020908627) has been destroyed. (R. 3819) The parties have supplemented the record with copies of various documents in their possession, but not all documents that were filed in the Diamond Fork case are contained in the record. Appellee will cite to the docket in some instances to show simply that the referenced document was in fact filed, and in other instances to the document itself.

15. On September 3, 2002, just 8 days after Judge Medley ruled from the bench regarding Ryan Pahl's ownership of the Loan Office shares (R. 1114.), Lowe and Rose's attorney, Mr. Copier, filed a complaint purportedly on behalf of Diamond Fork and the Loan Office and against Kalynn Ninow. (R. 4026) The case was assigned case number 020908627. (R. 4026)

16. The Complaint purported to be a shareholder derivative action seeking to "vindicate the rights" of the Loan Office corporation. (R. 4028)

17. The Complaint sought to divest title to Ninow's 3,000 shares of stock relying on the December Agreement, and to ensure Rose and Lowe's ability to act on behalf of the Loan Office. (R. 4026)

18. On November 25, 2002, in response to the Diamond Fork Complaint, Ninow served and filed a Motion to Dismiss and Motion to Consolidate and/or Transfer Case to Judge Medley. (R. 4053, 3815)

19. On November 26, 2002, the trial court, not knowing a responsive pleading had been filed the day before, entered Default Judgment in favor of the Loan Office and against Kalynn Ninow. (R. 3815, 23-Case No. 030907064²)

² A copy of the Default Judgment is attached to a letter that was filed in a separate case numbered 030907064, and which was later consolidated into the probate case, case number 003901101. The record, therefore, actually contains two records: 1) the first is the record for 003901101, which is indexed with numbers 1 to 4092; this record contains the record from the probate case and
(continued...)

20. The docket for the Diamond Fork case shows that defendant's default or a default certificate was never entered prior to entering default judgment and that Diamond Fork simply filed a proposed Default Judgment. (R. 3815)

21. The Default Judgment purports to vest title to 3000 shares of the Loan Office in the name of two parties: 1) Bangkok Birth Mothers Basic Education Trust (With Bangkok Birth Mothers Trust for Equity and Justice as the beneficial owner) and 2) Bangkok Birth Mothers Advocacy Trust (With Diamond Fork Land Company, a Utah Corporation, as the beneficial owner) (these parties are referred to herein as the "Bangkok Parties"). (R. 23-Case No. 030907064)

22. On June 12, 2003, the trial court set aside the Default Judgment. (R. 4053)

23. On or about July 2, 2003, Diamond Fork moved the court to vacate the order setting aside the default judgment. (R. 4057) On or about July 15, 2003, Ninow filed a Memorandum in Opposition to the motion. (R. 3818)

24. Diamond Fork's Motion to Vacate the order setting aside the default judgment was never submitted to the Court for decision. On March 12, 2004,

²(...continued)
various documents from case number 020908627 (see note 1); and 2) the second is the record for case number 030907064, which is indexed with numbers 1 to 399.

Diamond Fork admitted that it lacked standing in the matter and moved the court to dismiss Civil No. 020908027. (R. 4079; Addendum Exh. G)

25. On April 15, 2004, Civil No. 020908027 was consolidated into this probate proceeding. (R. 1421.) On May 11, 2004, the trial court dismissed the case formerly known as Civil No. 020908027 pursuant to Diamond Fork's unopposed Motion to Dismiss. (R. 4083; Addendum Exh. H)

26. The caption of the court's dismissal of the Diamond Fork case clearly indicates the case being dismissed is the Diamond Fork case formerly before Judge Hilder. (R. 4083; Addendum Exh. H)

Lowe's Motion for Liability on the Undertaking

27. On or about November 20, 2004, Lowe filed a Motion to Enforce Surety's Liability, which moved the trial court to set a hearing to determine the surety's liability on the undertaking with respect to the TRO. (R. 2031) In this Motion, Lowe alleged damages and claimed that he had been wrongfully restrained by the TRO. (R. 2031)

28. On or about April 6, 2005, the trial court denied Lowe's Motion to Enforce Surety's Liability. (R. 2555)

Ninow's Contempt Proceedings Against Lowe, Rose and Mr. Copier

29. On or about March 7, 2005, pursuant to Ninow's motion, the trial court issued the first of several Orders to Show Cause naming as Respondents

Lowe, Rose, and Robert H. Copier, counsel for Lowe and Rose. (R. 2363)

Diamond Fork was later added as a party to the Order to Show Cause. (R. 3221-22)

30. The Orders to Show Cause require the Respondents named above to show cause why they should not be held in contempt of court for violating the Preliminary Injunction and acting in contravention of the May 1, 2003, Order of Summary Judgment. (R. 3221-22)

31. In her affidavit in support of the Order to Show Cause, Ninow alleges that certain actions of Lowe, Rose, Mr. Copier and Diamond Fork Land Company constituted contempt of the trial court's prior preliminary injunction (see ¶¶ 7.1 - 7.3) and order of summary judgment regarding the shares. Those actions include, but are not limited to: 1) acting on behalf of the Loan Office by filing the Diamond Fork case (R. 4026) and; 2) acting on behalf of the Loan Office by filing the lawsuit seeking to evict Ryan Pahl from the Loan Office premises (R. 1- Case No. 030907064), and 3) other actions by Lowe, Rose, Mr. Copier, and/or Diamond Fork Land Company. (R. 2363)

32. On April 6, 2005, the trial court heard arguments on the contempt proceedings and stated, in the hearing minutes, "The Court takes the order to show cause issue under advisement and will render a written ruling." (R. 2555)

33. On May 26, 2005, Judge Lewis rendered a Memorandum Decision

regarding the April 6, 2005, hearing, in which she held, among other things, that the May 2003 Summary Judgment was a partial summary judgment and that Lowe was subject to the Preliminary Injunction. (R. 2787; Addendum Exh. K) The court also set an evidentiary hearing on the contempt matter. (R. 2787; Addendum Exh. K)

The April 26, 2005, Ruling and Order

34. Between the April 6, 2005, hearing on the Order to Show Cause and the May 26, 2005, Memorandum Decision being issued, counsel for Lowe and Rose filed a proposed Ruling and Order, which was signed and entered by Judge Lewis on April 26, 2005. (R. 2609; Addendum Exh. J)

35. A copy of the April 26, 2005 proposed Order was purportedly served on counsel for Ninow on April 21, 2005. (R. 2609; Addendum Exh. J) Counsel for Ninow hereby certifies that they never received a copy of the proposed Order in 2005 and that the first time Ninow saw such order was in preparation for this appeal.

36. The April 2005 Ruling and Order and the May 2005 Memorandum Decision drafted by Judge Lewis differ in the following significant respects, suggesting that the April 26, 2005 order was inadvertently signed by Judge Lewis:

[table on next page]

April 2005 Order	May 2005 Memorandum Decision
States that “this shall constitute the final order as to all claims and all parties to any and all probate proceedings pending under this probate number.” (R. 2609; Addendum Exh. J)	Makes no claim regarding whether the decision is a final order as to all claims and all parties under this probate number. (R. 2787.) Rather, the Court concludes that the May 1, 2003 Order of Summary Judgment by Judge Medley was only a partial summary judgment and that certain issues in the Probate Petition remain pending. (R. 2789; Addendum Exh. K)
States that contempt proceedings against Lowe, Rose and Copier are now properly dismissed without the need for an evidentiary hearing. (R. 2610; Addendum Exh. J)	Schedules an evidentiary hearing in order to (1) determine which parties should be subject to the rulings of this decision and of the contempt hearing, and (2) whether those parties subject to the contempt hearing violated the preliminary injunction. (R. 2790; Addendum Exh. K)

37. On October 12, 2005, the trial court scheduled another contempt hearing on the Order to Show Cause for November 17, 2005. (R. 3354) The Minutes of that hearing were entered by Judge Lewis, who again took the contempt issue under advisement. (R. 3506)

Final Order on the May 29, 2002 Petition

38. On or about August 12, 2005, Lowe and Rose, by and through their attorney, Mr. Copier, submitted a proposed final order on the May 29, 2002, Petition. (R. 3200; Addendum Exh. L)

39. On or about August 17, 2005, Ninow timely objected to the proposed final order. (R. 3196)

40. On or about August 16, 2005, without considering Ninow's timely objection and before the five day deadline for filing an objection had passed, Judge Lewis signed the purported Final Order on the May 29, 2002, Petition. (R. 3200; Addendum Exh. L)

41. On or about August 25, 2005, Lowe and Rose submitted a second proposed Final Order on the May 29, 2002, Petition, which edits out certain parts of the previous proposed order, apparently in light of Ninow's objection. (R. 3206)

42. The August 25, 2005, Final Order contains the blatant misrepresentation that Ninow had "admitted by written filing dated July 8, 2005, that she will not pursue the merits of her May 29, 2002, petition beyond the May 1, 2003, order granting summary judgment" (R. 3200; Addendum Exh. L)

43. The only filing by Ninow dated July 8, 2005, is a Memorandum in Opposition to Motion for Stay. (R. 3080; Addendum Exh. O) That memorandum does not contain the admission or statement of Ninow as claimed in the August 16, 2005, Final Order. (R. 3080; Addendum Exh. O)

44. It is obvious from the record that Ninow and even Lowe and Rose

continued to litigate the May 29, 2002, Petition beyond May 1, 2003. Ninow filed a motion for summary judgment regarding ownership of the real estate on May 21, 2004. (R. 1458) Lowe and Rose themselves litigated the issue by filing a Memorandum Opposing the Summary Judgment Motion (R. 1666) and even filed a Cross-Motion for Summary Judgment. (R. 1688)

45. Lowe and Rose continued to litigate in the probate case after final resolution of the Loan Office shares even though they expressly disclaimed any ownership in the real estate. (R. 1411, 1413; Addendum Exh. N) The real estate issues were the only pending issues under the May 29, 2002, Petition.

46. In the August 2005 Final Order, Lowe and Rose also purport to “remove” themselves as officers and directors of the Loan Office. (R. 3200; Addendum Exh. L) They could not have been removed, however, because they had already been removed by shareholder consent in May of 2002. See ¶ 2, 2.1 supra.

SUMMARY OF ARGUMENTS

The August 2005 Final Order which purports to remove Lowe and Rose as officers and directors of the Loan Office should not be reversed because Lowe and Rose themselves submitted the Order. They cannot complain on appeal of alleged error they themselves committed.

The April 2005 Ruling and Order should be disregarded as it manifestly contradicts the parties' and trial court's subsequent actions and the trial court's subsequent Memorandum Decision. If the April 2005 Ruling and Order is to be given effect, it should be considered a final appealable order and this appeal should be dismissed for lack of jurisdiction.

The May 1, 2003, Summary Judgment, which was affirmed in Ninow I, was in substance a partial summary judgment that did not preclude continued litigation of the real estate issues. The trial court properly denied Lowe's motion for liability on the TRO undertaking because Lowe failed to show he was wrongfully restrained.

This Court lacks jurisdiction to consider the setting aside of a default judgment because the parties to the case in which such judgment was entered are not before the Court, and Lowe and Rose lack standing to challenge the setting aside. Even if they did have standing, the trial court acted properly in setting aside the default judgment because it was void and improper, and the trial court acted within its discretion in setting it aside.

Finally, Ninow is entitled to her costs and attorneys fees on appeal for this frivolous appeal. Lowe and Rose have plainly abused the legal system in their improper attempts to gain control of the Loan Office. This appeal is a continued abuse of the legal system and the Court should award Ninow her costs and

attorneys fees for having to defend this frivolous appeal and for failing to adhere to appellate briefing requirements and standards.

ARGUMENT

I. THE TRIAL COURT’S REMOVAL OF LOWE AND ROSE AS OFFICERS AND DIRECTORS OF PAHL’S SALT PALACE LOAN OFFICE, INC. SHOULD NOT BE REVERSED.

Lowe and Rose (may be collectively referred to herein as “Lowe”) contend that only the portion of the August 2005 order that removes them as officers and directors should be reversed. Lowe’s fails to assign any point of error as to the removal and failed to preserve this issue for appeal. If there was error, it was invited error that cannot be considered on appeal.

A. The removal of Lowe and Rose as officers and directors of the Loan Office is invited error and cannot be considered on appeal.

As evidenced by Mr. Copier’s name and address in the upper left hand corner of the August 16, 2005, Order (see Addendum Exh. L), it was not Ninow but Rose and Lowe who actually submitted the order that expressly removed them as officers and directors. Ninow timely objected to the order for other reasons not related to Lowe and Rose’s removal. See ¶ 38. The Order contained a blatant misrepresentation as to Ninow’s litigation of remaining real estate issues under the May 29, 2002, Petition. See ¶¶ 42 -45.

The Order was signed by Judge Lewis over the objection of Ninow. It appears that the only reason for the submission of the August 2005 Order was to create an Order from which Rose and Lowe could appeal as being a final order on the May 29, 2002, Petition, and more importantly, to retroactively end the effects of the May 2002 Preliminary Injunction. There is no other proper reason since Lowe and Rose expressly disclaimed any interest in the real property of the Estate (see Addendum Exh. N) and therefore should not have even participated in the probate litigation subsequent to the May 2003, summary judgment.

As the parties who prepared the August 16, 2005, Order, Lowe and Rose chose to memorialize their removal as officers and directors, creating, at best, invited error that Rose and Lowe cannot challenge on appeal. "The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal." Paulos v. Covenant Transport, Inc., 2004 UT App 35, ¶ 30. Calling this issue "invited error," however, is a bit of a misnomer. After all, it was not technically "error" that Lowe and Rose were removed, but merely an unnecessary redundancy since they had previously been removed. See ¶ 2. Nevertheless, Lowe and Rose cannot be allowed to propose language to the Court in a proposed order then later claim that such Order was in error.

- B. The issue of the removal of Lowe and Rose as officers and directors of the Loan Office was not preserved for appeal.

Closely related to the issue of invited error here is the rule that issues must be preserved in order to be considered on appeal. S.K. and J.K. v. State, 2007 UT App 67, ¶ 7. Lowe and Rose contend that they preserved the issue of their removal as officers and directors of the Loan Office “by filing a notice of appeal.” See Appellants’ Amended Opening Brief, page 8. If issues could be preserved by filing a notice of appeal, however, the statement that an issue was preserved below would become a tautology rather than a contention subject to proof. Lowe’s failure to preserve this issue precludes the Court’s consideration of such on appeal.

- C. The Law of the Case prohibits consideration of Lowe and Rose’s removal as officers and directors of the Loan Office.

The Court adjudicated the removal of Lowe and Rose as officers and directors of the Loan Office in the Findings of Fact and Conclusions of Law Re: Summary Judgment entered on May 1, 2003. See ¶ 2; Addendum Exh. B. Any challenge of those findings should have been raised in Ninow I, the first appeal of this probate matter, but Lowe failed to do so even then.

Since the findings were not challenged at that time, those findings stand as the law of the case and cannot be challenged now. See Thurston v. Box Elder County, 892 P.2d 1034, 1042, n. 2 (Utah 1995)(“a lower court ruling becomes

binding on a higher court through failure of the parties to preserve an issue for review.”)(citation omitted). In other words, since the first appeal involved the issues surrounding ownership and control of the Loan Office, **none** of those issues or related findings (including the removal of Lowe and Rose as officers) can be considered in this appeal, regardless of whether such issues were raised in the first appeal. This Court, therefore, does not have jurisdiction to consider this issue.

II. THE APRIL 26, 2005, RULING AND ORDER SHOULD BE DISREGARDED, OR, IN THE ALTERNATIVE, IF THE COURT REGARDS SUCH ORDER AS EFFECTIVE, THIS APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

Counsel for Ninow first learned of the April 26, 2005, Ruling and Order in preparation for this appeal as they never received a copy of the proposed Ruling and Order in 2005. This is supported by the record, which shows that the parties as well as the trial court acted as if the Order had never been entered. Given the circumstances, this Court should disregard the April 2005 Ruling and Order as an anomaly and without effect. In the alternative, if the Court chooses to give effect to the April 2005 Ruling and Order, such Order should be considered a final order and this appeal should be dismissed for lack of jurisdiction.

A. The April 2005 Ruling and Order should be disregarded.

Utah R. Civ. P. 7(f)(2) states as follows:

(f)(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the

prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

While it is not apparent from the record why Judge Lewis signed the proposed Ruling and Order, it is clear from the minutes of the April 2005 hearing that Lowe and Rose were not “prevailing parties” and that Judge Lewis indicated she would prepare a written ruling herself. See ¶ 32; Addendum Exh. M. Also, it is clear from the certificate of service that Mr. Copier did not wait the prescribed time for an objection to the proposed order. He simply filed the proposed order at the same time he served the opposing party. Otherwise, Judge Lewis would not have been able to sign the Order only five days after service.

In addition to the procedural irregularities surrounding the April 2005 Order, the evidence from the record and the course of action of the parties following such Ruling and Order show that the parties and the trial court judge were not even aware such an Order had been signed. After all, just a short time later in May 2005, Judge Lewis issued her own Memorandum Decision, which totally contradicts the supposed prior Ruling and Order. See ¶¶ 33, 36; Addendum Exhs. J, K. Lowe and Rose made no objection to the May 2005 memorandum

decision and did not move to set it aside. For these reasons, the Court should disregard the extraneous April 2005 Ruling and Order.

- B. If the Court gives effect to the April 2005 Ruling and Order, this appeal should be dismissed for lack of jurisdiction.

In the alternative, the Court may choose to regard the April 2005 Ruling and Order as fully effective. By its own terms, the Order states that it “concludes all litigation now pending or that had been pending under Probate No. 003901101.” See R. 2612; Addendum Exh. J. As such, the Order would be a final appealable order since it: 1) resolved an issue of vital importance, and 2) concluded a major phase in the probate (it actually concluded the probate as a whole). See In re Estate of Christensen, 655 P.2d 646, 648 (Utah 1982); In re Estate of Voorhees. 12 Utah 2d 361, 366 P.2d 977, 980.

To properly appeal this matter, Lowe and Rose were required to file a notice of appeal within 30 days from April 26, 2005. See Utah R. App. P. 4. Since Lowe and Rose filed their Notice of Appeal in September 2005 (see R. 3303), more than 30 days following the final order, the Court should dismiss this appeal for lack of jurisdiction.

- III. IT WAS NOT ERROR FOR THE TRIAL COURT TO RULE THAT THE MAY 1, 2003, SUMMARY JUDGMENT IS A PARTIAL SUMMARY JUDGMENT.

The trial court held that the May 1, 2003, Summary Judgment was a partial summary judgment. Such ruling was not error.

A. In substance, the Order of Summary Judgment was a partial summary judgment.

The Petition of May 29, 2002, requested resolution of two issues: 1) ownership of a business (the Loan Office), and 2) ownership of real property (the “State Street property”). The Order of Summary Judgment entered May 1, 2003, disposed of only one of those issues, namely, ownership of the Loan Office. Ownership of the real property was still to be determined and was actually litigated in the trial court over the next several years. A final order on the May 29, 2002 Petition was not entered until August 2006 (that order is the final Order that forms the basis of the present appeal). The probate matter is still not concluded as contempt proceedings are still pending. The Summary Judgment, therefore, although not styled as such, was in effect and substance a partial summary judgment.

The trial court recognized this fact and in its Memorandum Decision explained as follows:

After carefully reviewing the record, the Court concludes that while styled as an Order of Summary Judgment, Judge Medley actually granted only a partial summary judgment as to the portion of claims dealing with the ownership of the 6,000 shares of Pahl’s Salt Palace Loan Office, Inc. (“Loan Office”). In fact, as the petitioner correctly points out, the Probate Petition is still pending because the second

portion of the claims, dealing with the ownership of certain State Street property, has yet to be adjudicated. Therefore, the Court rules that the Preliminary Injunction did not expire with the entry of the Order of Summary Judgment. Rather, the Preliminary Injunction remains in place and defendant Lowe remains subject to it.

See Addendum Exh. K. The trial court's reasoning is sound and does not merit further consideration on appeal. The ruling of the trial court should be summarily affirmed.³

- B. The ability to appeal from the partial summary judgment in a probate proceeding does not convert a partial summary judgment into a full summary judgment.

In Ninow I, 2004 UT App 291, this Court found that the May 1, 2003, Order of Summary Judgment was a final, appealable order. Lowe and Rose argue that this fact alone necessarily implies that the Order was also a non-partial summary judgment. In doing so, they urge this Court to elevate form over substance.

³ One must question why it matters to Lowe and Rose whether the Order of Summary Judgment was a partial or "full" summary judgment? Lowe and Rose appear to be motivated to reverse this ruling in an effort to create a defense for themselves after-the-fact in the pending contempt proceedings. The Preliminary Injunction entered by the trial court (which has not been challenged on appeal), by its terms, expires upon a final determination of the May 29, 2002 Petition.

Presumably, the earlier Lowe and Rose could show that the Petition was resolved, the better. They avoid being held in contempt for violating that Injunction by arguing that the Preliminary Injunction expired. That argument, however, lacks any merit and does not reflect what actually transpired in the trial court. The Order of Summary Judgment was clearly a partial summary judgment as the trial court held. The Court should not condone the use of its tribunal to create a contempt defense after the fact.

While Ninow concedes that the Order was “final” for purposes of appeal, it did not ultimately determine or dispose of the probate matter as a whole. Indeed, the probate action continued in the trial court for several years after the entry of the summary judgment order so that the parties could litigate the issue of the ownership of the real property. To say that the Order was a “final, appealable order” is equivalent only to recognizing that the Order both: 1) resolved an issue of vital importance (the ownership of the business), and 2) concluded a major phase in the probate (a major remaining phase being ownership of the real estate). See In re Estate of Christensen, 655 P.2d 646, 648 (Utah 1982); In re Estate of Voorhees, 12 Utah 2d 361, 366 P.2d 977, 980. That, however, does not preclude a finding that the Order of Summary Judgment was, in substance, a partial summary judgment, notwithstanding its lack of being styled as such. In conclusion, Lowe and Rose’s argument fails, and the trial court’s determination that the May 1, 2003 Order of Summary Judgment was a partial summary judgment should be affirmed.

IV. THE MAY 2003 SUMMARY JUDGMENT IS DISPOSITIVE AND FINAL AS TO OWNERSHIP OF THE LOAN OFFICE SHARES

Lowe and Rose still attempt to cast doubt on the ownership of the Loan Office shares. Ninow held legal title as Personal Representative of Gary’s estate and as a matter of law. See ¶¶ 1 -2. The May 2003 Summary Judgment held that Gary Pahl owned all shares of the Loan Office at the time of his death. See

Addendum Exhs. B, I. The Summary Judgment simply confirmed this; it did not affirmatively vest title because title had already been vested by operation of law and as a matter of fact.

Lowe contends that notice requirements were not met in order to remove Lowe and Rose as officers and directors. Lowe offers no legal support or argument for this contention but only cites generally to Titles 75 and 78 of the Utah Code. The issue should therefore not be considered by the Court for Lowe's failure to adequately brief the subject. See Smith v. Four Corners Mental Health Ctr., Inc., 2003 UT 23, ¶ 46 (“[The Court] may decline to review an argument imposing on [it] ‘the burden of argument and research.’”).

Notwithstanding, Ninow was not subject to any alleged notice requirements because removal was not done pursuant to any judicial action but pursuant to shareholder consent and action without meeting, which is allowed by statute. See Utah Code Ann. § 16-10a-704.

The Court's finding in Ninow I that Gary Pahl owned all 6,000 shares of stock at the time of his death inherently ratifies the Action by Shareholder Consent (see ¶ 2) that removed Rose and Lowe as officers and directors of the Loan Office. This was properly accomplished pursuant to the Utah Code. Thus, a court order removing them was not necessary. Ultimately, any challenge of these matters is barred by the law of the case, failure to preserve the issue (in either Ninow I or in

this appeal), and by lack of standing since Lowe and Rose are not shareholders of the corporation.

V. IT WAS NOT ERROR FOR THE TRIAL COURT TO DENY LOWE'S MOTION FOR LIABILITY ON THE UNDERTAKING.

The Utah Rules of Civil Procedure provide that when seeking a temporary restraining order, a party must give security so that an adverse party will not “suffer costs, attorney fees or damage as the result of any wrongful order or injunction.” Utah R. Civ. P. 65A(c)(1). Such security was provided when Ninow obtained a temporary restraining order, which was later converted to a preliminary injunction, against Lowe.

In Ninow I, this Court considered whether the trial court had properly found Lowe in contempt. The Court found that “Lowe's actions during the noon recess of the preliminary injunction hearing were not in violation of the TRO.” Ninow v. Lowe, 2004 UT App 291. Subsequently in the trial court, Lowe attempted to recover against the surety, contending that this Court's finding that Lowe was not in violation of the TRO was tantamount to a finding that Lowe was wrongfully restrained. The trial court denied Lowe's motion.

Lowe contends on appeal that the trial court erred in denying his motion to impose liability on the surety pursuant to the surety's undertaking for damages in relation to the temporary restraining order. Lowe also contends that he

successfully eliminated any wrongful enjoinder through successful appellate reversal in Ninow I. These arguments misconstrue the prior rulings of both the trial court and this Court and are completely without merit.

Contrary to Lowe's contention, in Ninow I the Court did **not** find that the TRO wrongfully enjoined Lowe; rather, the Court determined that Lowe was wrongfully found in contempt, and accordingly ordered Ninow to return the attorney's fees it had been awarded in the contempt action. This Court did not even consider the question of the propriety of the temporary restraining order or the preliminary injunction as those issues were not raised.

As it has never been found that Lowe was wrongfully enjoined, it was proper for the Court to deny Lowe's Motion to impose liability on the surety pursuant to the surety's undertaking for damages in relation to the temporary restraining order. Lowe cannot take the trial court's wrongful finding of contempt and transform that into an alleged wrongful enjoinder. Neither the TRO nor the Preliminary Injunction have ever been found to be wrongful and this Court must therefore accept them as properly enjoining the named parties.

Lowe also contends that it was error for the trial court to deny a hearing on the motion, but offers no legal support for this position. Contrary to Lowe's contention, there is nothing in Rule 65A that mandates the court hold a hearing in such a situation.

VI. THIS COURT LACKS JURISDICTION TO REVIEW THE JUNE 12, 2003, ORDER SETTING ASIDE THE NOVEMBER 26, 2002, DEFAULT JUDGMENT.

Lowe and Rose were not parties to the default judgment and were not parties to the Diamond Fork case, the underlying case in which default was entered. See Diamond Fork Complaint, Addendum Exh. D. That case was a purported shareholder derivative action brought by Diamond Fork Land Company, which purported to act as relator for the Loan Office. The only shareholder of the Loan Office at this time, however, was Ryan Pahl. This fact was affirmed in Ninow I.

Diamond Fork was actually owned and controlled by Mr. Copier. See ¶ 9.1; Addendum Exh. B ¶ 34. Mr. Copier is and was also legal counsel and counsel of record in the probate case for Lowe and possibly Rose. The Diamond Fork case was obviously an “end-around” attempt to gain control of the Loan Office shares. After all, Lowe and Rose’s first attempt to gain control of the Loan Office shares failed when Judge Medley granted Ninow’s motion for summary judgment as to the Loan Office shares on August 26, 2002. See ¶ 11.

Just eight days later, on September 3, 2002, Mr. Copier’s company, Diamond Fork, filed the purported shareholder derivative action. In the Diamond Fork complaint, Diamond Fork claimed ownership of the Loan Office shares in precisely the same way Lowe and Rose had alleged— by relying on the “December

Agreement.” See ¶¶ 13, 17; Addendum Exhs. D, I. That attempt, along with other actions of Lowe, Rose and Mr. Copier, form the basis for Ninow’s contempt proceedings before the trial court. See ¶ 31. The Court lacks jurisdiction over the issue of the setting aside of the default judgment for the following reasons.

- A. Lowe and Rose⁴ lack standing to challenge the issue of the setting aside of the default judgment.

Lowe and Rose do not have standing to challenge the setting aside of the default. Under the traditional test for standing, "the interests of the parties must be adverse" and "the parties seeking relief must have a legally protectible interest in the controversy." Jones v. Barlow, 2007 UT 20, ¶ 12 (citation omitted). Lowe and Rose cannot show any legally protectible interest in the default judgment.

The only parties who benefit from the default judgment are the Bangkok Parties. See Addendum Exh. E. The parties to the Diamond Fork case are Diamond Fork Land Company (who moved to dismiss the case, based on lack of standing) and the Loan Office, which is owned by Ryan Pahl. Lowe and Rose have no absolutely no stake in the setting aside of the default judgment. Since Lowe and Rose lacks standing to claim error as to the setting aside of the June 12, 2003, default judgment, this Court lacks jurisdiction over that issue.

⁴ In the Docketing Statement, only appellant Rose asserts this issue on appeal. In any event, this same argument holds true for Lowe as well.

- B. This court lacks jurisdiction over the setting aside of the default judgment for failure to timely appeal.

After the default judgment was entered in the Diamond Fork case, Diamond Fork, the alleged relator, moved the trial court to dismiss the case based on lack of standing. See ¶ 24; Addendum Exh. G. The case was then consolidated into the probate case in April 2004. See ¶ 25. Judge Medley then granted Diamond Fork Land Company's Motion to Dismiss. See ¶ 25; Addendum Exh. H. Any appeal of the setting aside of the default judgment should have been noticed within 30 days after the case was dismissed (which occurred on May 11, 2004). See Utah R. App. P. 4(a).

This is because the order dismissing the Diamond Fork case was a final, appealable order as to the probate case in that it: 1) resolved an issue of vital importance (ownership of Loan Office shares), and 2) concluded a major phase in the probate (the purported shareholder derivative action). See In re Estate of Christensen, 655 P.2d 646, 648 (Utah 1982); In re Estate of Voorhees. 12 Utah 2d 361, 366 P.2d 977, 980 (1961).

- C. The issue of the setting aside of the default judgment was waived and/or not preserved for appeal.

Even assuming, *arguendo*, Lowe has standing, Diamond Fork waived its objection to the setting aside of the default judgment when it moved to dismiss the case without the court hearing its motion to set aside the default judgment. "[1]n

order to preserve an issue for appeal[,] the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue."

S.K. and J.K. v. State, 2007 UT App 67, ¶ 7. By moving to dismiss the case (and the case later being dismissed pursuant thereto) Diamond Fork failed to preserve the issue for appeal because it never gave the trial court an opportunity to rule on its motion to vacate the setting aside of the default judgment. If Diamond Fork waived this issue, Lowe and Rose cannot simply revive it on appeal (or in the trial court) by suddenly advocating the setting aside, especially when they completely lack standing.

VII. THE TRIAL COURT'S SETTING ASIDE OF THE DEFAULT JUDGMENT SHOULD BE AFFIRMED.

Even if this Court has jurisdiction to consider the setting aside of the default judgment in the Diamond Fork case, the record shows this action should be affirmed on appeal.

- A. This Court may affirm the setting aside of the default judgment on any ground apparent on the record.

It is well settled that an appellate court may affirm the judgment appealed from:

if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory is not urged or argued on appeal

by appellee, was not raised in the lower court, and was not considered or passed on by the lower court.

Bailey v. Bayles, 2002 UT 58, ¶ 10 (citations omitted); see also 5 C.J.S. Appeal & Error § 714 (1993) ("Generally, the appellate court may affirm the judgment where it is correct on any legal ground or theory disclosed by the record, regardless of the ground, reason, or theory adopted by the trial court."); DeBry v. Noble, 889 P.2d 428, 444 (Utah 1995) ("[a] party to an appeal does not have a constitutional right to have a cause of action decided on a particular ground.")

B. The Default Judgment exceeds the scope of the relief prayed for in the Complaint and is therefore void.

Utah Civil Rule of Procedure 54(c)(2) states that "A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment." The default judgment in the Diamond Fork case purports to vest title to 3000 shares of the Loan Office in the Bangkok Parties. Nowhere in the Diamond Fork complaint is this relief requested. See R. 4026, Addendum Exh. D. Diamond Fork requests specific performance of the "December Agreement" and an order requiring Ninow to transfer title to 3000 shares of the Loan Office to Diamond Fork (other relief is claimed that is not at issue here). See Id. It was therefore improper and beyond the jurisdiction of the trial court to enter the default judgment, since it vested title to the Loan Office

shares in third parties not before the Court, rather than ordering Ninow to transfer the shares as requested in the Complaint.

- C. Ninow's interest and title in and to the Loan Office shares was never reached or attached by Lowe and Rose.

The record shows that Lowe failed to execute upon the default judgment and attach Ninow's interests in the shares. Implicit in Lowe and Rose's attempts to advocate the effects of the default judgment is that the judgment itself vested title to the Loan Office share in the Bangkok Parties. It is axiomatic, however, that in order to effectuate a judgment, it must be enforced and executed upon. See Utah R. Civ. P. 69(a) ("A writ of execution is available to a judgment creditor to satisfy a judgment or other order requiring the delivery of property or the payment of money by a judgment debtor."); State v. Thomas, 961 P.2d 299 n. 5 (Utah 1998) ("core judicial functions include . . . the authority to enforce any valid judgment, decree or order").

The only way Lowe and Rose could have reached Ninow's interest in the shares of stock, which are certificated securities, was to physically seize the certificates. Under Utah law, the interest of a debtor in a certificated security may be reached by a creditor only "by actual seizure of the security certificate by the officer making the attachment or levy . . ." Utah Code Ann. § 70A-8-111(1) (2001); see also Utah R. Civ. P. 64C(e)(5). If the security is uncertificated, the

debtor's interest may only be attached "by legal process upon the issuer at its chief executive office in the United States" Utah Code Ann. § 70A-8-111(2) (2001). There is nothing in the record of Civil No. 020908627 to indicate that Lowe and Rose accomplished anything that would have attached the interests of the Loan Office shares so that they could then be transferred.

- D. The trial court's setting aside of the default judgment should be affirmed because the clerk entered judgment without first entering a default certificate.

Under Utah R. Civ. P. 55(a), a party's default must be entered before default judgment is entered. If an application for default and proposed default certificate had been submitted and entered, those documents would have been entered in the docket. The docket for the Diamond Fork case indicates that an entry of default or default certificate was never entered by the clerk of the court. See R. 3813, 3815.

Although the default judgment states that Ninow's default was entered, this is because counsel for Diamond Fork submitted the proposed default judgment and included this as a matter of form. Mr. Copier simply submitted a proposed default judgment without a request to enter a default certificate or a motion for default judgment. The court then mistakenly entered the default judgment for reasons unknown. This is supported by the docket, which states for November 25, 2002: "Filed Order: Default Judgment," and then indicates that it was signed by

Judge Hilder. See R. 3813, 3815. This indicates the Order was submitted by itself, with no other documents. This also violates Rule 55 because the party seeking default must “apply to the court therefor.” See Utah R. Civ. P. 55(b)(2). There is no evidence Diamond Fork applied for default judgment. Because no entry of default was entered and no application for default judgment was made, the court lacked jurisdiction to enter default judgment and the default judgment is void.

- E. The trial court’s setting aside of the default judgment should be affirmed because it was proper under Utah R. Civ. P. 60.

The trial court’s order setting aside of the default judgment in the Diamond Fork case was proper and should be affirmed. The trial court properly recognized that the default judgment was “improper or illegal, and voidable” because Ninow had not in fact “failed to plead or otherwise defend” at the time that the default judgment was entered. See Utah R. Civ. P. 55(a). The language of Rule 55(a) clearly does not allow an entry of default by the clerk of the court when a defendant has filed a responsive pleading.

The trial court correctly relied upon P. & B Land v. Klungervik to support the setting aside of the default judgment against Ninow since the entry of default was improper. See P & B Land v. Klungervik, 751 P.2d 274, 277 (Ut. App. 1988)

(holding that where a court improperly enters a certificate of default, a subsequent default judgment based on that improper entry is voidable). As Judge Hilder pointed out: “It makes no sense to consider such a judgment illegal and voidable if the court is nevertheless precluded from voiding the illegal judgment because the defendant did not comply strictly with a three month deadline.” See Addendum Exh. F.

Furthermore, the setting aside of the Default Judgment should stand because the three month deadline for moving the court on that matter does not apply in this case. Rule 60(b)(6) states that such a motion for relief “shall be made within a reasonable time and for reasons (1), (2) or (3), not more than 3 months after the judgment, order or proceeding was entered or taken.” There is no finding in the record that the Rule 60 motion was not made within a reasonable time.

Lowe suggests that Ninow’s basis to set aside the default judgment was Rule 60(b)(1), mistake, inadvertence, surprise, or excusable neglect. The “mistake” provision in Rule 60(b)(1), however, provides for the reconsideration of judgments only where: (1) *a party* has made an excusable litigation mistake or *an attorney* in the litigation has acted without authority from a party, or (2) ... the judge has made a *substantive mistake of law or fact* in the final judgment or order. Cashner v. Freedom Stores, Inc., 98 F.3d 572, 576 (10th Cir. 1996)(emphasis

added)(citation omitted). Here, the mistake in question is neither one made by a party or attorney, nor is it a substantive mistake of law or fact and therefore does not properly fall within the confines of Rule 60(b)(1).

Thus, The trial court's reliance on Rule 60(b)(6) to set aside the Default Judgment was proper because the court's obvious mistake clearly falls within the language of "any other reason justifying relief from the operation of the judgment." Utah R. Civ. P. 60(b)(6).

Additionally, The trial court's setting aside of the Default Judgment is supported by Rule 60(a), which allows the setting aside based on "[c]lerical mistakes in judgments, orders and other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative . . .").

The setting aside is also proper under Oseguera v. Farmers Insurance Exchange, 2003 UT App 46. In that case, this Court concluded that

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 do whatever needs to be done to fix the mistake as soon as it is called to the court's attention.

Lowe mistakenly distinguishes Oseguera from the instant case on the basis that in order for the court to set aside a judgment under 60(b)(6), the moving party must

have been “actually misled” by the court. However, as Oseguera plainly states, this is only true when the relief from judgment is sought specifically “for a lack of notice.” Id. at ¶ 9. Here, “lack of notice” was not the reason relief was requested under Rule 60(b)(6), rather it is being sought as a result of an improper entry of default made by the court. Thus, the general holding of Oseguera as stated above readily applies here. Id. at ¶ 12.

VIII. NINOW SHOULD BE AWARDED HER COSTS AND ATTORNEYS FEES INCURRED FOR THIS FRIVOLOUS APPEAL.

Ninow should be awarded her costs and attorneys fees herein as this is clearly a frivolous appeal and is brought for the improper purpose of harassment and unnecessarily increasing the cost of litigation. Lowe and Rose’s arguments, with the exception of those under Osegura, and possibly very few other exceptions, are not ground in fact, not warranted by existing law, and not based on a good faith argument to extend, modify or reverse existing law. Also, Ninow should be awarded attorneys fees for Lowe and Rose’s failure to meet briefing requirements under Utah R. App. P. 24.

- A. Lowe and Rose submitted an Order on a Petition in which they had no interest and then appealed from that Order claiming error.

Lowe and Rose, by and through their counsel, have orchestrated this appeal by first submitting a final order on the May 29, 2002, Petition in August 2005, *in*

the midst of the contempt proceedings. Lowe and Rose had absolutely no interest remaining in the Petition. The Loan Office issues had been resolved long ago and they expressly disclaimed any interest in the State Street Property. See Addendum Exh. N. Submitting the Final Order was done ostensibly for the purpose of relieving them from the effects of the preliminary injunction, which expired only upon resolution of such Petition. See ¶¶ 3, 7.2, 7.3, 37; Addendum Exhs. A, L.

Further evidence of Lowe and Rose's bad faith is that after submitting the final order on a Petition in which they had no interest, they now contend provisions of such order were entered in error! They now wish to be "reinstated" as officers and directors of the Loan Office, even though they were **not** officers and directors just prior to entry of the purported August 2005 Final Order.

The August 25, 2005, Final Order contains the blatant misrepresentation that Ninow had "admitted by written filing dated July 8, 2005, that she will not pursue the merits of her May 29, 2002, petition beyond the May 1, 2003, order granting summary judgment" See Addendum Exh. L.

The filing by Ninow dated July 8, 2005, is a Memorandum in Opposition to Motion for Stay. See Addendum Exh. O. That memorandum does not contain the

admission or statement by Ninow as claimed in the August 16, 2005, Final Order.

See Id.

It is obvious from the record that Ninow and even Lowe and Rose continued to litigate the May 29, 2002, Petition beyond May 1, 2003. Ninow filed a motion for summary judgment regarding ownership of the real estate on May 21, 2004.

See ¶ 44. Lowe and Rose themselves actually litigated the issue by filing a Memorandum Opposing the Summary Judgment Motion and even filed a Cross-Motion for Summary Judgment regarding the State Street Property issue. See ¶ 44.

Lowe and Rose continued to litigate in the probate case after final resolution of the Loan Office shares even though they expressly disclaimed any ownership in the real estate. See Addendum Exh. N. The real estate issues were the only pending issues under the May 29, 2002, Petition.

In the August 2005 Final Order, Lowe and Rose also purport to “remove” themselves as officers and directors of the Loan Office. See Addendum Exh. L. They could not have been removed, however, because they had already been removed by shareholder consent in May of 2002. See ¶ 2, 2.1. This is an egregious misuse of the legal system, a frivolous action, and obviously done for improper purposes.

There is no ground in fact or law that can support Lowe and Rose's attempt to remove themselves as officers and directors of the Loan Office after they had already been removed several years earlier, and then complaining of it on appeal seeking to be reinstated as such. Ninow should therefore be awarded her costs and attorneys fees on appeal.

- B. Lowe and Rose clearly have no interest in the Diamond Fork default judgment yet continue to advocate setting it aside.

The Diamond Fork case was clearly a sham from its inception. The trial court ruled summarily in August 2002 that the Loan Office shares were not subject to the December Agreement and that they were the decedent's property at the time of his death. Conveniently, just eight days later, shares of the Loan Office happened to have been transferred to Diamond Fork, which also conveniently is owned and controlled by Mr. Copier. Diamond Fork also claims ownership of the shares under the December Agreement, which had just been rejected by the trial court as having not been fulfilled.

The default judgment then vests title to shares in the Bangkok Parties, who are not parties to this appeal and never appeared in the probate or Diamond Fork case. Sometime later, Diamond Fork admits that it lacks standing, and Lowe and Rose soon begin to advocate the setting aside of the default judgment. Lowe and

Rose, by and through their attorney, come before this Court and ask to set aside a default judgment, when they have specific knowledge that: 1) the Loan Office shares have been undisputably held to be owned by Ryan Pahl; 2) the December Agreement, upon which the Diamond Fork case was based, has been specifically rejected by the trial court and this Court in Ninow I; 3) the default judgment improperly provided that they would be returned to the board of directors when Ninow had them removed as directors in May of 2002.

Lowe and Rose's attempts to set aside the default judgment is clearly an improper attempt to somehow gain control of the Loan Office. This, along with the actions described above are an improper use of this Court's resources and should not be tolerated.

- C. Lowe and Rose failed to provide a factual or legal basis for recovering on the TRO undertaking or finding the May 2003 Summary Judgment was a "full" summary judgment.

Lowe and Rose also have no factual or legal basis for recovering on the TRO undertaking. Lowe has failed to point out any place in the record where Lowe is found to have been wrongfully restrained. He has provided no legal support for the proposition that a party should recover against a TRO undertaking when they merely were wrongfully found to be in contempt of such TRO.

Lowe and Rose also contend the May 2003 summary judgment was a “full” summary judgment that disposed of all issues under the May 29, 2002, Petition and therefore ended the probate litigation and absolved them of any further liability under the Preliminary Injunction. They offer no legal support for this and accordingly ask this Court to disregard the plain facts of the case, which they themselves litigated the May 2002 Petition beyond the entry of summary judgment. Ninow should therefore be awarded her fees in this appeal.

- D. Ninow should also be awarded her fees for Lowe and Rose’s failure to observe appellate briefing requirements.

Rule 24 of the Utah Rules of Appellate Procedure contains unambiguous requirements for a brief’s organization and contents. Failure to adhere to these requirements “increases the costs of litigation for both parties and unduly burdens the judiciary’s time and energy.” State v. Green, 2004 UT 76, ¶ 11 (citation omitted). Failure to adhere to the requirements may invite the Court to impose serious consequences, such as disregarding or striking the briefs, or assessing attorney fees against the offending lawyer. Id. (citing Utah R. App. P. 24(j)).

The fact that Lowe and Rose failed to include a summary of arguments is the least of concerns. The statement of issues, along with the remainder of the brief, is convoluted, verbose, rambling, and an incredibly tedious read. The

statement of facts contains only five paragraphs with scattered references to the record. The only section that resembles traditional legal argument and analysis with support by citations to proper legal authority is that dealing with the Oseguera issue.

This lack of organization and clarity has placed a tremendous burden of factual and legal research on Ninow. Ninow presumes this Court will face a similar burden. Ninow has spent many hours simply trying to figure out what exactly Lowe and Rose's assignment of error is here on appeal and any logical or legal reasoning behind such assignments of error. Their lack of citation to the record for factual assertions is perhaps most frustrating and time consuming to rectify. Because Lowe and Rose's brief does not meet appellate briefing standards as set forth in Green, Ninow respectfully requests that she be awarded her attorneys fees incurred for this appeal.

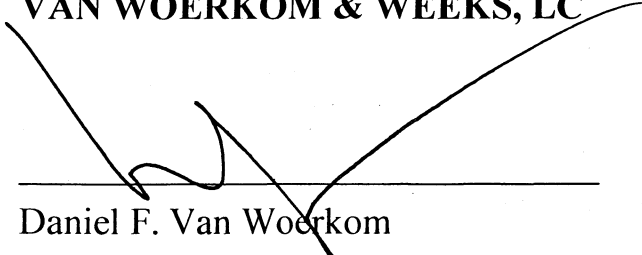
CONCLUSION

Based on the foregoing argument, Ninow respectfully requests that the actions of the trial court be affirmed, that she be awarded her attorneys fees and double costs on appeal, and that this matter be remanded to the trial court to resolve the contempt proceedings and so that Ninow may seek sanctions if she so desires and resolve current sanctions issues against Lowe, Rose and their attorney.

In the alternative, Ninow requests that this appeal be dismissed for lack of jurisdiction.

DATED this 9th day of March, 2007.

VAN WOERKOM & WEEKS, LC

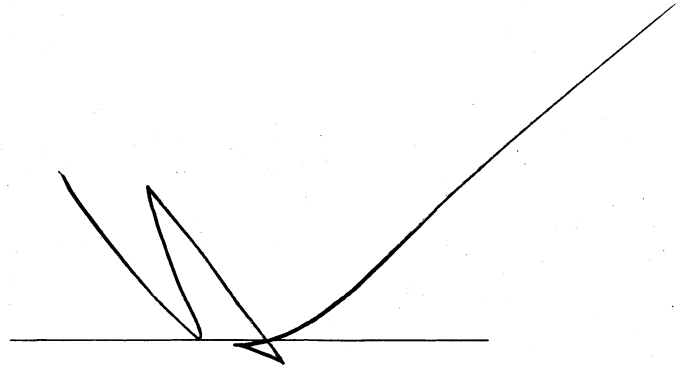


Daniel F. Van Woerkom
Sandra K. Weeks
Hala E. Afu
Attorneys for Ninow

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of March, 2007, I caused a copy of the foregoing BRIEF OF APPELLEE to be sent via first class mail, postage prepaid, to the following:

Robert H. Copier, Esq.
17 East 400 South
Salt Lake City, Utah 84111



ADDENDUM

Exhibits:

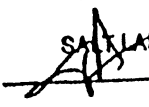
- A. Order Granting Preliminary Injunction - August 26, 2002 (R. 886)
- B. Findings of Fact and Conclusions of Law Re: Summary Judgment - May 1, 2003 (R. 1117)
- C. Order Granting Summary Judgment - May 1, 2003 (R. 1114)
- D. Complaint (Diamond Fork case # 020908627) - September 3, 2002 (R. 4026)
- E. Default Judgment (Diamond Fork case # 020908627) - November 26, 2002 (R. 23-Case No. 030907064)
- F. Ruling and Order Setting Aside Default Judgment (Diamond Fork case # 020908627) - June 12, 2003 (R. 4053)
- G. (1) Motion to Dismiss and (2) Memorandum in Support (Diamond Fork case # 020908627) - March 12, 2004 (R. 4079, 4081)
- H. Minute Entry and Order (Dismissing Diamond Fork case # 020908627) - April 11, 2004 (R. 4083)
- I. Memorandum Decision, Ninow v. Lowe I, 2004 UT App 291 (unpublished) - September 2, 2004
- J. April 2005 Ruling and Order - April 26, 2005 (R. 2609)
- K. May 2005 Memorandum Decision - May 26, 2005 (R. 2787)

- L. Final Order on the May 29, 2002, Petition - August 19, 2005 (R. 3200)
- M. Minutes of April 6, 2005, Hearing - April 6, 2005 (R. 2555)
- N. (1) Motion to Drop Parties and (2) Memorandum in Support - March 24, 2004 (R. 1411, 1413)
- O. Memorandum in Opposition to Motion for Stay - July 8, 2005 (R. 3080)
- P. May 29, 2002, Petition, Petition for Determination of Ownership for Shares of Stock and Interests in Real Estate - May 29, 2002 (R. 471)

Tab A

FILED DISTRICT COURT
Third Judicial District

AUG 26 2002

By  SALT LAKE COUNTY
Deputy Clerk

Daniel F. Van Woerkom USB #8500
David Condie USB #8053
VAN WOERKOM & CONDIE, LC
32 Exchange Place, Suite 101
Salt Lake City, UT 84111
Telephone: (801) 531-6195
Facsimile: (801) 363-4850

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

IN THE MATTER OF THE ESTATE OF
GARY G. PAHL

ORDER GRANTING PRELIMINARY
INJUNCTION

Deceased.

Civil No. 003901101
Judge Medley

Based upon the Findings of Fact and Conclusions of Law which are incorporated herein by reference as set forth in its entirety

IT IS HEREBY ORDERED, ADJUDGED, and DECREED:

1. That William T Lowe, Augusta Rose and Robert K Mortensen are restrained and prohibited from entering the business premises occupied and owned by Pahl's Salt Palace Loan Office, Inc ("Loan Office"), located at 1588 & 1594 South State Street in Salt Lake City, Utah
2. William T. Lowe, Augusta Rose, Robert K. Mortensen and any of their agents, servants, employees, officers, directors, attorneys, and all those acting in concert with them, are ordered to immediately turn over to Ms Ninow or her attorneys all documents, records, memoranda inventory keys to the premises computer files equipment banking records.

A

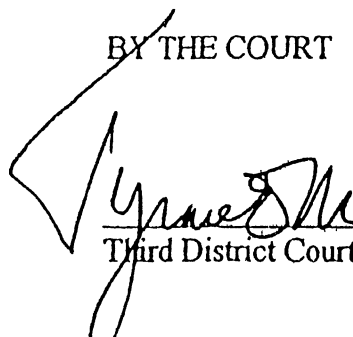
checkbooks, passbooks, and all other like items pertaining to the Loan Office or to the management of the real property located at 1588 & 1594 South State Street in Salt Lake City, Utah, and shall immediately desist from conducting any further activities purportedly on behalf of the Loan Office or as manager(s) of the aforementioned real estate.

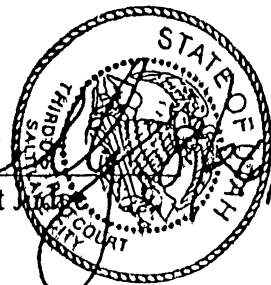
3. William T. Lowe, Augusta Rose and Robert K. Mortensen are expressly prohibited from disbursing, dissipating, transferring, encumbering, or paying any monies to themselves or any person or entity from any account held publicly or privately by the Loan Office or any entity purporting to manage the real estate located at 1588 & 1594 South State Street, Salt Lake City, Utah
4. Any peace officer of this into whose hands this Order may come, is directed to take any action reasonably necessary to enforce the above provisions of this Court's Order.

This order shall be deemed to take effect, *nunc pro tunc*, as of May 30, 11:00 a m and shall continue until further order of the Court or until an ultimate determination on the merits of KaLynn Ninow's underlying Petition For Determination of Ownership for Shares of Stock and Interests in Real Estate filed with this Court

ENTERED this _____ day of June, 2002.

BY THE COURT


Third District Court Judge



CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of June 2002, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing **ORDER GRANTING PRELIMINARY INJUNCTION** to the following:

Robert Copier *Hand-Delivered 25 Jun '02*
Attorney for William T. Lowe and Grand Staircase Land Company
200 Metro Place
243 East 400 South, Suite 200
Salt Lake City, UT 84111-2803

Jay W. Taylor
P.O. Box 901340
Sandy, Utah 84090
FAX: 943-0994

James McConkie, III
Attorney for Robert K. Mortensen
175 East 400 South, Suite 900
Salt Lake City, Utah 84111


Augusta Rose
1363 East 4170 South
Salt Lake City, Utah 84106

A handwritten signature in black ink, appearing to be "Augusta Rose", written over a horizontal line.

Tab B

FILED DISTRICT COURT
Third Judicial District

MAY - 1 2003

By 
SALT LAKE COUNTY
Deputy Clerk

Daniel F. Van Woerkom USB #8500
David Condie USB #8053
VAN WOERKOM & CONDIE, LC
32 Exchange Place, Suite 101
Salt Lake City, UT 84111
Telephone: (801) 531-6195
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IN THE THIRD JUDICIAL COURT FOR SALT LAKE COUNTY
STATE OF UTAH

IN THE MATTER OF THE ESTATE OF
GARY G. PAHL

Deceased.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
RE: Summary Judgment

Civil No. 003901101
Judge Medley

This matter came before the Court at a hearing on August 26, 2002 based on the Motion for Summary Judgment filed by KaLynn Ninow, in her capacity as the personal representative of the Estate of Gary G. Pahl, and in her capacity as the court appointed Guardian and Conservator for Ryan B. Pahl, the only heir (devisee) of Gary G. Pahl. Also, the court considered the motions for competing motions for summary judgment filed by Mr. Copier on behalf of his clients. Appearing at the hearing was KaLynn Ninow, represented by and through counsel, Van Woerkom & Condie, LC, William T. Lowe, represented by and through counsel, Robert Copier. The Court, having heard the arguments of counsel and being otherwise fully and sufficiently

R

advised hereby enters the following:

FINDINGS OF FACT

1. The Articles of Incorporation of the Loan Office (attached to Ninow Affidavit as Exhibit "1") provide for sixty thousand dollars of capital stock to be authorized and divide the sixty thousand dollars into six thousand shares of common voting stock with a par value of ten dollars per share.
2. Article II, Section 1 of the Bylaws of Salt Palace Loan Office, Inc. ("Loan Office") attests to the same number and value of shares, stating, "The aggregate number of shares of Capital Stock is 6,000 shares with the par value of \$10.00 per share." Moreover, the shares cannot be divided into classes "and all stock of the corporation shall be of the same class and have the same rights."
3. Shareholders also have no pre-emptive right to acquire additional shares of stock in the corporation. Thus, only one class containing a maximum number of six thousand shares of common voting stock in the Loan Office can be issued and outstanding.
4. The Articles of Incorporation of the Loan Office have never at any time been amended to allow more than six thousand (6,000) shares of capital stock to be authorized.
5. On March 3, 1984, a stock was issued to A. Gunther Pahl ("Gunther") as holder of three thousand shares of the capital stock of Pahl's Salt Palace Loan Office, Inc.
6. After Gunther's death on February 24, 1996, his three thousand shares passed to his

surviving wife, Beverly Jean Pahl, via their joint will. The will was executed on May 7, 1981, and stated in part, "We [A. Gunther and Beverly Pahl] give, devise and bequeath to each other, respectively, all of such right, title and interest as we respectively hold, possess and enjoy in and to our personal and real property which we own or may own, hereby giving and devising all of the personal and real property of the one who may die first to the survivor."

7. On June 22, 1996, Beverly Pahl assigned Gunther's three thousand shares to her son, Gary G. Pahl. In the letter of assignment, Beverly Pahl stated that it was the intent of the late A. Gunther Pahl to leave his full interest in the shares to Gary G. Pahl. Beverly Pahl further stated that she received Gunther's three thousand shares instead of Gary G. Pahl via the joint will because Gunther Pahl never took the necessary measures to insure his intent would be legally carried out. In addition, Beverly Pahl stated that because "[i]t is also my desire for our son, Gary Gunther Pahl, to fully own the fifty percent (50%) interest in PAHL'S SALT PALACE LOAN OFFICE, INC., I hereby assign and transfer unto Gary Gunther Pahl, three thousand (3,000) shares represented by the attached certificate."

8. Five of Gary G. Pahl's sisters and Lowe signed as witnesses to the assignment. As drafter of the assignment and a witness, Lowe must have recognized Gunther Pahl as the owner of three thousand shares in the Loan Office at the time of his death, and that the shares had passed to Beverly Pahl via the joint will and then to Gary G. Pahl by assignment.

9. On May 6, 1998, Frank H. Pahl and Gary G. Pahl both signed a Bill of Sale drafted by Lowe, which stated in part, "It is my [Frank H. Pahl's] desire to sell my full interest in Pahl's Salt

Palace Loan Office, Inc. to Gary G. Pahl. My full interest consists of 3,000 shares Upon successful completion of this Bill of Sale, my [Frank H Pahl's] 3,000 shares of Pahl's Salt Palace Loan Office, Inc. will belong to Gary G. Pahl. The three thousand shares amount to fifty percent (50%) of the business. William T. Lowe is holding the three thousand-share certificates until this Bill of Sale is fulfilled in whole." In addition to the signatures of Frank H. Pahl and Gary G. Pahl, Lowe signed the Bill of Sale as a witness.

10. The purchase price for Frank Pahl's 3000 shares was \$96,000.00.

11. The Bill of Sale called for a down payment of \$46,000 00 and Frank Pahl agreed to carry a note on the remaining \$50,000 00 which was to be repaid monthly at the rate of \$1,000.00.

12. The Bill of Sale also indicates that "Upon successful completion of this Bill of Sale, my 3,000 shares of Pahl's Salt Palace Loan Office, Inc. will belong to Gary G. Pahl."

13. Gary Pahl did pay the \$46,000.00 down payment, and made monthly payments as required. The payment schedule was accelerated and completely paid in full as of April 17, 2000.

14. Attesting to the fact that he had been paid in full for the 3,000 shares of stock, on March 13, 2002, Frank H Pahl signed a Ratification of Payment for Bill of Sale Dated May 6, 1998, acknowledging and ratifying that said Bill of Sale was paid in full by Gary G. Pahl before his date of death.

15. The acceleration of the payment schedule took place because Frank H. Pahl entered into a subsequent Bill of Sale dated September 25, 2000 to transfer Frank's interest in the buildings located at 1588 and 1594 South State Street, Salt Lake City Utah to the Loan Office. Before

Frank would allow the sale of his interest in the buildings to go through, he insisted that Gary pay him in full for his stock in the Loan Office. To meet Frank's demands, Gary refinanced his home and obtained a \$10,000.00 loan from his mother, Beverly Pahl. The money from the refinancing and the loan was used to pay Frank in full for his stock. Therefore, pursuant to the terms of the May 6, 1998 Bill of Sale and its "successful completion", said three thousand shares belonged to Gary G. Pahl at the date of his death.

16. Frank H. Pahl has never at any time sold, transferred, devised, bequeathed or assigned any of his shares to any person other than to sell the said three thousand (3,000) shares to Gary G. Pahl via the said Bill of Sale referenced above.

17. Additionally, Frank H. Pahl has never at any time appointed or designated an agent or ratified any agent's actions to purportedly sell the said three thousand (3,000) shares to any other person. He is also unaware of any person ever attempting to claim that they have sold Frank's shares on his behalf or of any person attempting to claim that they have acquired Frank's shares either directly or through an agent or other transaction.

18. As previously established, Gary G. Pahl passed away on June 25, 2000. On September 6, 2000, the Third Judicial Court appointed KaLynn Ninow Personal Representative of Gary G. Pahl's estate and decreed that Gary G. Pahl died intestate.

19. Pursuant to the laws of intestacy under the Uniform Probate Code, all property in Gary G. Pahl's estate passed to his son Ryan B. Pahl, as sole heir (devisee). See U.C.A. § 75-2-106(2).

20. On May 15, 2002, KaLynn Ninow, holding legal title to the 6,000 shares of common

stock of the Loan Office executed a shareholder action by consent in accordance with Utah Code Annotated §16-10a-704, which was sent certified mail along with other documents to William T. Lowe, Augusta Rose and Robert Mortensen and Robert Copier on or about May 23, 2002. (Certificate of Service, filed May 23, 2002).

21. The action by shareholder consent removes Lowe, Rose and Mortensen as officers and directors and names Ryan Pahl, KaLynn Ninow and Richard Ninow as directors of the corporation. Ryan B. Pahl was subsequently elected/appointed as President and Treasurer, Richard Dean Ninow as Vice President, and KaLynn Ninow as Secretary.

22. On May 20, 2002, a Temporary Restraining Order was issued which required that “William T. Lowe, Augusta Rose, Robert K. Mortensen and any of their agents, servants, employees, officers, directors, attorneys, and all those acting in concert with them, are ordered to immediately turn over to Ms. Ninow or her attorneys all documents, records, memoranda, inventory, keys to the premises, computer files, equipment, banking records, checkbooks, passbooks, and all other like items pertaining to the Loan Office or to the management of the real property located at 1588 & 1594 South State Street in Salt Lake City, Utah, and shall immediately desist from conducting any further activities purportedly on behalf of the Loan Office or as manager(s) of the aforementioned real estate.”

23. On May 23, 2002, William T. Lowe caused 35 pages of material to be turned over to Damian E. Davenport. A representative of Mr. Lowe indicated to Mr. Davenport that those 35 documents constituted “all that they had.”

24. At the beginning of the hearing on KaLynn Ninow's motion for Preliminary Injunction, Mr. Lowe again represented to the Court through his attorney, Robert Copier, that he had turned over all of the corporate documents which were in his possession.

25. Mr. Copier also stated that he did not represent Pahl's Salt Palace Loan Office, Inc., and that he only represented Mr. Lowe.

26. On May 27, 2002, William T. Lowe, Robert Mortensen and Augusta Rose each signed a "Response to Order to Show Cause" which also contained a brief "Argument in Opposition to Injunction."

27. Seven documents were attached to the aforementioned Response to Order to Show Cause. The first document, entitled "Amendment of By-Laws of Pahl's Salt Palace Loan Office, Inc." and purportedly signed by Gary Pahl and William T. Lowe, was found by the Court to be a forgery and a fraud based upon the testimony of George Throckmorton.

28. The second document attached to the Response to Order to Show Cause was entitled "Bill of Sale Agreement" and bore the date of December 28, 1998. Lowe, Mortensen and Rose indicate in their signed response that under the terms of this document "Gary G. Pahl sold, and Pahl's Salt Palace Loan Office, Inc., purchased, the 3000 shares of common stock originally owned by Frank Pahl, leaving Gary G. Pahl with only 3000 shares at death."

29. According to the terms of the agreement, Gary had paid \$53,000.00 to Frank Pahl for the purchase. This amount was to be repaid to Gary by the corporation at the rate of \$700.00 per month beginning January 10, 1999 until paid in full.

30. The corporation did not and has not reimbursed either Gary or his estate for the purchase of the shares acquired from Frank Pahl back into the treasury of the corporation. Additionally, when the payment schedule to Frank was accelerated in the spring of 2000, the money to pay Frank in full came from Gary's personal funds, and not the funds of the corporation. None of the requirements or conditions precedent of the December 28, 1998 Bill of Sale Agreement which would have transferred Gary's shares into the treasury of the corporation have ever been met.

31. Minutes of alleged Board of Directors Meetings were also submitted, which purported to transfer the 3000 shares referred to in the preceding paragraph to William T. Lowe, who one week later purported to transfer said shares equally between Rose and Mortensen.

32. On June 4, 2002, following the issuance of the Preliminary Injunction referred to above, Robert Copier, attorney for William T. Lowe, filed with the Court a "Stock Transfer Notice and Request for Notice" purporting to transfer 3000 shares of stock in Pahl's Salt Palace Loan Office, Inc., (1500 transferred outright and 1500 held in escrow by William T. Lowe) to a Utah corporation known as "Grand Staircase Land Company, Inc."

33. On July 5, 2002, Robert Copier filed another "Notice Regarding A Transfer of Corporate Shares of Stock" purporting to give notice that 1500 shares of stock in Pahl's Salt Palace Loan Office Inc., had been transferred from Grand Staircase Land Company to "Diamond Fork Land Company."

34. A "Certified Copy of the Entire File" from the Utah Department of Commerce, demonstrates that Robert Copier is the only officer and the only director of both Diamond Fork

Land Company, and Grand Staircase Land Company.

35. Section 5 of the By-Laws of Pahl's Salt Palace Loan Office, Inc., reads as follows:

"Section 5. TRANSFER OF STOCK. The shares of the corporation shall be transferable only on the books of the corporation upon surrender of the certificate or certificates representing the same, properly endorsed by the registered holder or by his duly authorized attorney, such endorsement or endorsements to be witnessed by one witness. The requirement for such witnessing may be waived in writing upon the form or endorsement by the President of the corporation."

36. No corporate stock transfer ledger or certificates or any kind of document purporting to give a history of transfers of the corporation's stock have been provided by Lowe, Rose or Mortensen. Despite diligent searches of the offices and records located at Pahl's Salt Palace Loan Office, no such document or ledger has been located. Additionally, no other corporate documents, certificates or records of any kind have been turned over by Lowe, Rose or Mortensen.

37. Gary G. Pahl owned 6,000 shares of stock in Pahl's Salt Palace Loan Office, Inc., when he passed away on June 25, 2000, having acquired 3000 shares from his late father, A. Gunther Pahl, and the remaining 3,000 shares from his uncle, Frank H. Pahl.

38. The Court finds that Gary Pahl entered into a "Bill of Sale" agreement dated May 6, 1998 for the purchase of 3,000 shares from his uncle Frank H. Pahl.

39. The Court finds that the terms of the May 6, 1998 agreement are not ambiguous, and can

therefore be interpreted as a matter of law.

40. Gary Pahl had completely paid for Frank's 3,000 shares as of April 17, 2000, and had thereby successfully completed the terms of the Bill of Sale. The provisions of the Bill of Sale explicitly state that "[U]pon successful completion of this Bill of Sale, my 3,000 shares of Pahl's Salt Palace Loan Office, Inc. will belong to Gary Pahl." Therefore, as of April 17, 2000, Gary Pahl was the owner of Frank Pahl's 3,000 shares of stock.

41. Several of the Respondents in this case, William T. Lowe, Grand Staircase Land Company, Diamond Fork Land Company, and Augusta Rose, have attempted to cast doubt or question the legal, if not beneficial, ownership of the shares of stock Gary acquired from his uncle Frank. In making this attempt, these individuals and entities make several inconsistent claims.

42. The Bill of Sale provides that "The three thousand shares amount to fifty percent (50%) of the business. William T. Lowe is holding the three thousand-share certificates until this Bill of Sale is fulfilled in whole." The individuals and entities cited in the preceding paragraph have attempted to rely on the language quoted above to assert that William T. Lowe held legal title to the shares of stock at the time of Gary Pahl's death, since Mr. Lowe has indicated via his attorney in pleadings filed with the Court that he never "conveyed" the shares of stock back to Gary Pahl before his death.

43. This Court finds that the issue of whether or in what capacity Mr. Lowe is purported to have "held" the shares is moot. As soon as the payments had been made under the Bill of Sale,

the ownership of the shares vested in Gary Pahl.

44. William Lowe had no power or authority to retain the shares in any way once the Bill of Sale had been completed.

45. The only documentation in existence evidencing the sale of stock from Frank Pahl to Gary Pahl is the Bill of Sale dated May 6, 1998 and the cancelled checks and accounting records evidencing payment. The stock was never transferred on the books of the corporation, and no Certificate of Shares was ever executed either by Frank or Gary Pahl or William Lowe or anyone else.

46. The allegations of non-conveyance by Mr. Lowe back to Gary Pahl are moot. This Court has, and does find that according to the Bill of Sale, the shares were the property of Gary Pahl as of April 17, 2000, several months prior to his death.

47. With respect to the December 28, 1998 "Bill of Sale Agreement," this Court finds that the terms of said agreement are unambiguous and may be interpreted as a matter of law.

48. The Court finds that the terms were never completed, and that the 3,000 shares of stock which Gary Pahl acquired from Frank Pahl never became "treasury" shares of the corporation.

49. There are two material requirements under the December 28, 1998 Bill of Sale Agreement (the "Treasury Stock Agreement") which had to be met before any of Gary Pahl's stock would become property of the corporate treasury. First, "the fifty-three thousand dollars (\$53,000.) paid to Frank Pahl by Gary Pahl will be reimbursed to Gary Pahl at the rate of seven hundred dollars (\$700.) per month, without interest, until the Corporation pays the total amount

back to Gary Pahl. Payments to Gary Pahl to begin on January 10, 1999 and the same date each month until paid in full.” The second requirement was “[A]lso, the Corporation will assume the balance due to Frank Pahl, per the Bill of Sale dated May 6, 1998, at the terms and conditions as outlined therein.”

50. The express terms of the Treasury Stock Agreement provide that “upon successful completion of this agreement, Frank Pahl’s 3,000 shares will belong to the treasury of the Corporation, leaving a balance of 3,000 common stock shares outstanding.”

51. The payment provisions were conditions precedent to the “successful completion” of the agreement, and therefore, full and final payment was a condition precedent to the shares becoming treasury stock.

52. Payments to Gary under the agreement were to begin on January 10, 1999 and continue thereafter until the \$53,000.00 had been repaid. At the rate of \$700.00 per month, it would have taken approximately 75.7 months to repay the \$53,000.00. If payments had begun in January, 1999, it would have taken until approximately May, 2005 to repay the obligation. However, when the payments would have been completed is moot, since it is undisputed that neither Gary nor his Estate have ever received any payments under the Treasury Stock Agreement.

53. As to the second condition precedent, the money paid to Frank Pahl under the accelerated payment schedule came from the personal funds of Gary Pahl, not the corporation.

54. Payment was not made according to the terms of the Treasury Stock Agreement. The Treasury Stock Agreement was never successfully completed and the shares of stock acquired

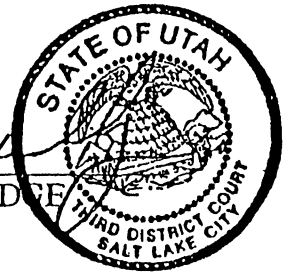
from Frank Pahl could not have become treasury stock, either prior to, or following Gary Pahl's death. Therefore, there was no treasury stock in existence for Augusta Rose and Robert Mortensen to convey to William Lowe on August 25, 2000, and the subsequent "transfers" have all been void *ab initio*. It was impossible for them to transfer what did not, and does not exist.

CONCLUSIONS OF LAW

1. Based upon the foregoing FINDINGS OF FACT, the Court concludes that as a matter of law, that Gary Pahl had acquired A. Gunther Pahl's 3,000 shares of Pahl's Salt Palace Loan Office, Inc., by assignment from Beverly Pahl as of June 22, 1996, and further finds that Gary Pahl had acquired Frank Pahl's 3,000 shares of stock in Pahl's Salt Palace Loan Office, Inc., as of April 17, 2000, and that Gary Pahl owned all 6,000 shares of the corporation at the time of his death.
2. Neither Gary Pahl nor his Estate was ever compensated as required under the December 28, 1998 Bill of Sale Agreement (the "Treasury Stock Agreement"). According to the express terms of the agreement, the stock never became treasury stock of the corporation, and the subsequent "transfers" have all been void *ab initio*.
3. The Personal Representative of the Estate of Gary Pahl is entitled to summary judgment as a matter of law, declaring that Gary Pahl was the owner of all 6,000 shares of stock of Pahl's Salt Palace Loan Office, Inc., at the time of his death, and further that all of those 6,000 shares are part of the property belonging to the Estate of Gary Pahl, and to Ryan Pahl as the only devisee of the Estate.

DATED, this the 1 day of May, 2003.

By: *[Signature]*
DISTRICT COURT JUDGE



CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of April 2003, I caused to be mailed, postage ~~prepaid~~, a true and correct copy of the foregoing to the following: **HAND-DELIVERED**

Robert Copier
Attorney for William T. Lowe, Grand Staircase Land Company, Diamond Fork Land Company
and Augusta Rose
200 Metro Place
243 East 400 South, Suite 200
Salt Lake City, UT 84111-2803



Tab C

FILED DISTRICT COURT
Third-Judicial District

MAY - 1 2003

SALT LAKE COUNTY

By 

Deputy Clerk

Daniel F. Van Woerkom USB #8500
David Condie USB #8053
VAN WOERKOM & CONDIE, LC
32 Exchange Place, Suite 101
Salt Lake City, UT 84111
Telephone: (801) 531-6195
Facsimile: (801) 363-4850

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

IN THE MATTER OF THE ESTATE OF
GARY G. PAHL

Deceased.

ORDER GRANTING SUMMARY
JUDGMENT

Civil No. 003901101
Judge Medley

This matter came before the Court at a hearing on August 26, 2002 based on the Motion for Summary Judgment filed by KaLynn Ninow, in her capacity as the personal representative of the Estate of Gary G. Pahl, and in her capacity as the court appointed Guardian and Conservator for Ryan B. Pahl, the only heir (devisee) of Gary G. Pahl. Also, the court considered the motions for competing motions for summary judgment filed by Mr. Copier on behalf of his clients. Appearing at the hearing was KaLynn Ninow, represented by and through counsel, Van Woerkom & Condie, LC, William T. Lowe, represented by and through counsel, Robert Copier, who appeared on behalf of his clients. The Court, having heard the arguments of counsel and

being otherwise fully and sufficiently advised, and having entered its FINDINGS OF FACT AND CONCLUSIONS OF LAW hereby ORDERS, ADJUDGES AND DECREES:

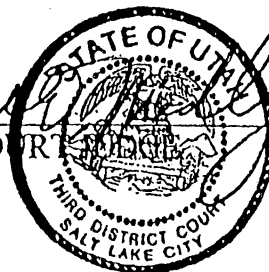
1. The Motion for Summary Judgment filed by the Personal Representative of the Estate of Gary Pahl is GRANTED.

2. Gary Pahl was the owner of all 6,000 shares of stock of Pahl's Salt Palace Loan Office, Inc., at the time of his death, and all of said 6,000 shares are part of the property belonging to the Estate of Gary Pahl, and to Ryan Pahl as the only devisee of the Estate.

DATED, this the 1 day of May, 2003.

By: 

DISTRICT COURT



CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of April 2003, I caused to be mailed, postage
~~prepared~~, a true and correct copy of the foregoing to the following: **HAND-DELIVERED**

Robert Copier
Attorney for William T. Lowe, Grand Staircase Land Company, Diamond Fork Land Company
and Augusta Rose
200 Metro Place
243 East 400 South, Suite 200
Salt Lake City, UT 84111-2803

A handwritten signature in black ink, appearing to read "Robert Copier", is written over a horizontal line.

Tab D

FILED DISTRICT COURT
Third Judicial District

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

SEP 03 2002

By ACS SALT LAKE COUNTY
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,

COMPLAINT

Plaintiff,

vs.

KALYNN NINOW, personal
representative of the estate of
Gary G. Pahl, deceased, and
individually, and DOES I-V,

Civil No. 020908627
Judge Lubeck

Defendants.

Plaintiff alleges:

1. At least one defendant resides in Salt Lake County.
2. In December of 1998, while Gary G. Pahl was still alive, he entered into a bill of sale agreement with the plaintiff, Pahl's Salt Palace Loan Office, Inc., to sell to plaintiff his interest in 3000 shares of plaintiff's own stock, and by May of 2002, all the conditions and covenants of the agreement had been successfully completed and Gary G. Pahl had transferred all of his interest in the shares to plaintiff's treasury. After his interest had been transferred to plaintiff's treasury, plaintiff, for good and valuable consideration, by action of plaintiff's board of directors, conveyed and agreed to convey the 3000 shares to William Lowe (who already held the shares) and transferred all rights in the shares to William Lowe.

3. William Lowe and Pahl's Salt Palace Loan Office, Inc., (by formal action of its board of directors), subsequently transferred the 3000 shares of stock from William Lowe to Augusta Rose (1500) and Robert K. Mortensen (1500).

4. After these transfers of 3000 shares from William Lowe to Augusta Rose and Robert K. Mortensen, the official shareholder list of the plaintiff prepared under the direction of the plaintiff's board of directors showed that Augusta Rose owned 1500 shares of its stock as of September 5, 2000, and that Robert K. Mortensen owned 1500 shares of its stock as of September 5, 2000.

5. On June 1, 2002, for good and valuable consideration, Augusta Rose conveyed her 1500 shares to Grand Staircase Land Company, a Utah corporation, and on June 1, 2002, for good and valuable consideration, Robert K. Mortensen conveyed his 1500 shares to Grand Staircase Land Company, a Utah corporation, with the latter 1500 shares being held in escrow by William Lowe and with the relator Diamond Fork Land Company holding the beneficial interest in the shares.

6. On June 1, 2002, Diamond Fork Land Company and Grand Staircase Land Company gave the hereto-annexed notice to Pahl's Salt Palace Loan Office, Inc., to take action to vindicate the rights of the corporation in connection with a probate proceeding filed by the defendant in which she claimed ownership of the 3000 shares and in connection with the actions of the defendant and others in trespassing upon corporation property, in converting corporation property to their own use, and in dealing in matters involving real-estate owning partnerships in which Pahl's Salt Palace Loan Office, Inc., is the sole surviving general partner without any authority to deal in or to take actions as to the said real property:

***1588 and 1594 S State S - VTDI 16-18-157-101-0000 and 17-18-157-011-0000
Lots 12 & 13 BLK 2, BIGGS FIRST ADD 5675-1298 8317-213, 225.
Lots 14 & 15 BLK 2, BIGGS FIRST ADD 4884-0692. SL County Recorder.***

7. On August 26, 2002, in a probate proceeding in which Pahl's Salt Palace Loan Office, Inc., was not a named party, a ruling was made that the conditions and covenants in the December 1998 agreement had not yet been fully met and that the stock had not yet been transferred by Gary G. Pahl to plaintiff.

8. Ninety days have elapsed since the notice was given on June 1, 2002, and Pahl's Salt Palace Loan Office, Inc., which was not a party to the proceeding in which the ruling was entered on August 26, 2002, has taken no steps to, in any way, vindicate any of the rights of the corporation in connection with the bill of sale agreement of December, 1998. The filing of this shareholder derivative action on behalf of Pahl's Salt Palace Loan Office, Inc., is appropriate. The rights of the corporation that are being vindicated by this shareholder derivative action are not specific to the shareholder bringing the action as the relator and they are general to the corporation, because the corporation, in reliance upon the transfer to it by May of 2000 of all of Gary G. Pahl's interest in the 3000 shares after the plaintiff's full and successful completion by May of 2000 of the December, 1998, bill of sale agreement, took board actions agreeing to and approving subsequent stock transfers. It has an interest in honoring its formal actions and in avoiding claims from those who relied upon its board actions and its shareholder lists.

FIRST CLAIM FOR RELIEF

(Specific Performance of December, 1998, Bill of Sale Agreement)

9. Plaintiff is entitled to a writ and order of specific performance requiring KaLynn Ninow to transfer all right, title, and interest (if any) in the 3000 shares to plaintiff's successors, Diamond Fork Land Company (1500 shares) and Grand Staircase Land Company, (1500 shares). Such a writ and order to transfer all defendant's right, title, and interest (if any) to the 3000 shares should be entered without further payment from the plaintiff to KaLynn Ninow because sufficient amounts were transferred from the plaintiff to Gary G. Pahl between

December of 1998 and May of 2000 to fully satisfy all of the conditions and covenants of the December, 1998, agreement between them, and, plaintiff hereby demands that defendant apply all sums transferred from plaintiff to Gary G. Pahl between December of 1998 and May of 2000 plus all sums transferred from plaintiff to Gary Pahl after May of 2000 and all sums transferred from plaintiff to KaLynn Ninow after Gary G. Pahl's death to first satisfy their 1998 agreement.

10. Specific performance is a reasonable remedy because the shares represent a 50% voting block of shares for cumulative voting purposes. Even though Diamond Fork Land Company and Grand Staircase Land Company are still the legal and beneficial owners and holders of these 3000 shares for stock¹ voting purposes, conveyance of any residual and remaining interest in the stock held by defendant by way of a writ and order of specific performance is required.

SECOND CLAIM FOR RELIEF

(Equitable Relief Rescinding Unauthorized Corporate Acts)

11. William Lowe and Augusta Rose have continued to hold office as plaintiff's directors since before Gary Pahl's death and continuously thereafter because no quorum of shareholders has ever been convened to elect and qualify their successors. No other persons currently hold office as directors. William Lowe and Augusta Rose are also currently plaintiff's only officers. Defendants have engaged in filings and other acts in which they have falsely held themselves out as officers and directors of Pahl's Salt Palace Loan Office, Inc., even though

¹ Diamond Fork Land Company and Pahl's Salt Palace Loan Office, Inc., were not parties to the probate proceeding in which the August 26, 2002, ruling was made, and so it has no force or effect over either of these corporations, either as to the shareholder list prepared by Pahl's Salt Palace Loan Office, Inc., or as to Diamond Fork Land Company's ownership of 1500 shares. As to the 1500 shares owned by Grand Staircase Land Company, the ruling has not yet ripened into an order and, for the time being, Grand Staircase Land Company still holds 1500 voting shares.

none of them have been appointed or elected as officers or directors. Any acts engaged in by them on behalf of the plaintiff, including, but not limited to, acts that involve the above-described real property, are void and should be rescinded.

THIRD CLAIM FOR RELIEF

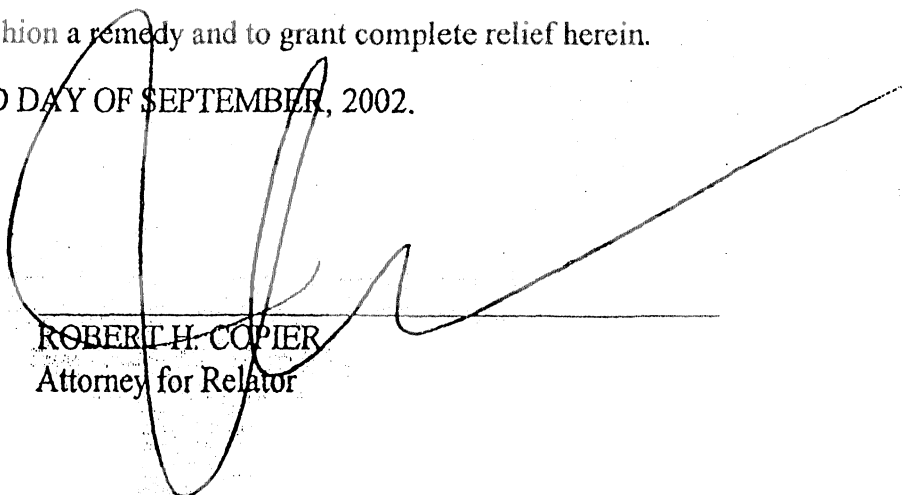
(Trespass and Conversion)

12. Defendants have trespassed upon plaintiff's property or converted plaintiff's property to their own use without permission of William Lowe and Augusta Rose, the officers and directors of the corporation. Plaintiff should be awarded damages against defendants in amounts to be determined at trial. The identity of the doe defendants shall be substituted for the doe designations once their involvement in these activities is established through discovery or otherwise.

PRAYER

Wherefore, plaintiff prays for a writ and order of specific performance against KaLynn Ninow as the personal representative of the estate of Gary G. Pahl compelling her to convey to Grand Staircase Land Company and Diamond Fork Land Company all right, title, and interest to 3000 shares of Pahl's Salt Palace Loan Office, Inc., stock, for other equitable relief consistent with the body of the complaint, for damages consistent with the body of the complaint, together with costs, attorney fees to the extent authorized by law, and such other and further orders as are needed to fashion a remedy and to grant complete relief herein.

DATED THIS 3RD DAY OF SEPTEMBER, 2002.


ROBERT H. COPIER
Attorney for Relator

Plaintiff's address:
1588 South State Street
Salt Lake City UT 84115

Tab E

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*.

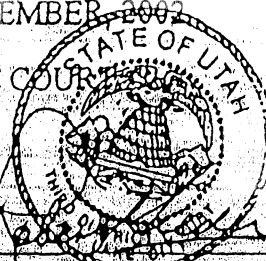
5. It is further decreed that no action, filing, or transaction purportedly made or entered into by or on behalf of Pahl's Salt Palace Loan Office, Inc., from and after the date of this judgment shall have any force or effect unless approved or ratified by a board of directors upon which William Lowe 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. LOBECK



Tab F

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. Milder

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 *Tremblay 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 avoidable." 751 P.2d at 277. It makes no sense to consider such a judgment illegal and avoidable 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

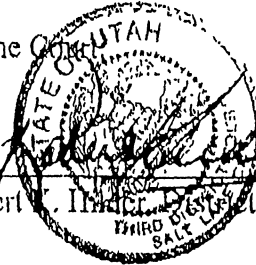
¹ Plaintiff may argue that the pleading was deficient in some way, but that is properly a subject of another motion.

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 W. Medley District Court Judge



Tab G

MAR 12 PM 5:03

JUDICIAL DISTRICT
SALT LAKE COUNTY

BY  DEPUTY CLERK

ROBERT HENRY COPIER, 727
Attorney for the Relator
17 East 400 South
Salt Lake City, Utah 84111
Telephone (801) 272-2222

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,

MOTION TO DISMISS

Plaintiff,

vs.

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

Civil No. 020908627
Judge Robert Hilder

Defendant.

Relator, Diamond Fork Land Company, respectfully moves the court to dismiss this action without prejudice. This motion is made on the ground that as a result of recent transfers of shares in Pahl's Salt Palace Loan Office, Inc., relator is no longer a beneficial shareholder of that corporation and now lacks any standing.

This motion is supported by a memorandum.

DATED this 12th day of March, 2004.


ROBERT HENRY COPIER
Attorney for the Relator

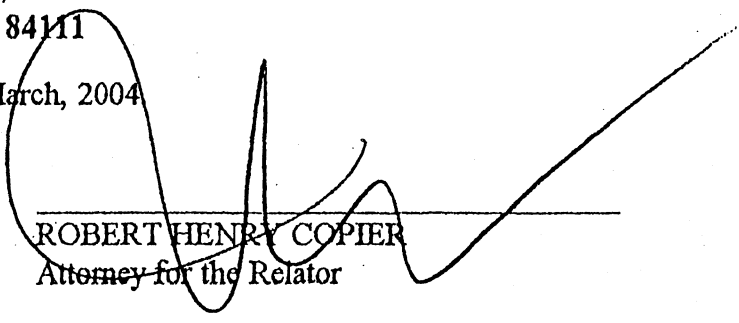
G

MAILING CERTIFICATE

A true copy hereof was this-day mailed to:

David C. Condie
Attorney at Law
32 Exchange Place, Suite 100
Salt Lake City UT 84111

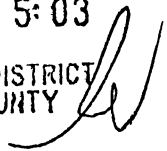
DATED this 12th day of March, 2004



ROBERT HENRY COPIER
Attorney for the Relator

ROBERT HENRY COPIER, 727
Attorney for the Relator
17 East 400 South
Salt Lake City, Utah 84111
Telephone (801) 272-2222

SALT LAKE COUNTY
MAR 12 PM 5:03

JUDICIAL DISTRICT
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,

Plaintiff,

vs.

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

Defendant.

MEMORANDUM
IN SUPPORT OF THE
MOTION TO DISMISS

Civil No. 020908627
Judge Robert Hilder

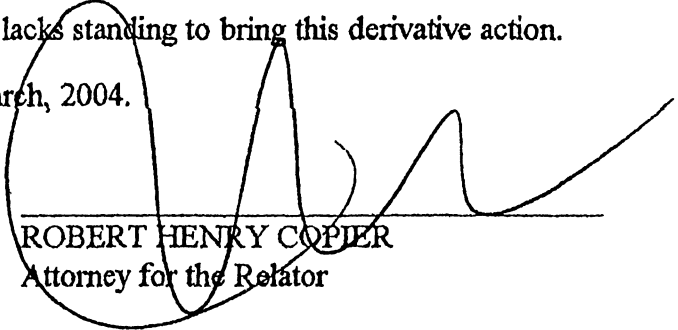
The relator, Diamond Fork Land Company, has moved the court to dismiss this action without prejudice. The motion has been made on the ground that as a result of recent transfers of shares in Pahl's Salt Palace Loan Office, Inc., relator is no longer a beneficial shareholder of that corporation and now lacks any standing.

This memorandum supports the motion.

This is a derivative shareholder action brought by Diamond Fork Land Company [asserting that it is a beneficial shareholder of Pahl's Salt Palace Loan Office, Inc. ("the corporation")] asserting the corporation's rights. As a result of recent transfers of shares, Diamond Fork Land Company no longer asserts that it is a beneficial shareholder of Pahl's Salt Palace Loan Office, Inc., and therefore claims no standing to continue to pursue this action on behalf of the corporation.

Therefore, this action should now be dismissed without prejudice, since it is also defendant's position that relator lacks standing to bring this derivative action.

DATED this 12th day of March, 2004.



ROBERT HENRY COPIER
Attorney for the Relator

MAILING CERTIFICATE

A true copy hereof was this-day mailed to:

David C. Condie
Attorney at Law
32 Exchange Place, Suite 100
Salt Lake City UT 84111

DATED this 12th day of March, 2004.



ROBERT HENRY COPIER
Attorney for the Relator

Tab H

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

PAHL'S SALT PALACE LOAN OFFICE, :	MINUTE ENTRY AND ORDER
INC., a Utah corporation, ex	
rel., DIAMOND FORK LAND COMPANY, :	CASE NO. 020908627
a Utah corporation,	
	:
Plaintiff,	:
	:
vs.	:
	:
KALYNN NINOW, personal	
representative of the estate of :	
Gary Pahl, deceased,	
	:
Defendant.	:

Plaintiff Diamond Fork Land Company's Motion to Dismiss is submitted to the Court for decision pursuant to Rule 7, Utah Rules of Civil Procedure. Having reviewed plaintiff's unopposed Memorandum in support, the Court rules as follows:

1. Plaintiff Diamond Fork Land Company's Motion to Dismiss without prejudice is granted in full as prayed for.

2. This signed Minute Entry shall constitute the Order of the Court resolving the matter referenced herein, no further Order is required.

Dated this 11 day of May, 2004.


TYRONE E. MEDLEY
DISTRICT COURT JUDGE

H

DIAMOND FORK LAND
CO. V. NINOW

PAGE 2

MINUTE ENTRY

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 17th day of May, 2004:

Robert Henry Copier
Attorney for Diamond Fork Land
17 East 400 South
Salt Lake City, Utah 84111

David C. Condie
Attorney for KaLynn Ninow
32 Exchange Place, Suite 100
Salt Lake City, Utah 84111

Karen Smith

Tab I

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

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

KaLynn Ninow,
Petitioner and Appellee,

v.

William Lowe; Augusta Rose; Robert Mortensen; and Grand Staircase
Land Co., a Utah corporation,
Respondents and Appellants.

Augusta Rose,
Third-party Petitioner,

v.

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

MEMORANDUM DECISION
(Not For Official Publication)

Case No. 20030169-CA

F I L E D
(September 2, 2004)

2004 UT App 291

Third District, Salt Lake Department

The Honorable Tyrone E. Medley

Attorneys: Robert H. Copier, Salt Lake City, for Appellants

Daniel F. Van Woerkom and Sandra K. Weeks, Lehi, for Appellee

I

Before Judges Billings, Davis, and Thorne.

DAVIS, Judge:

William Lowe and Augusta Rose (collectively, Respondents) appeal the trial court's October 1, 2002 order determining that Lowe was in contempt of court and the trial court's May 1, 2003 order granting summary judgment in favor of KaLynn Ninow. We affirm in part, and reverse and remand in part.

As an initial matter, we have determined that Respondents' appeal is taken from a final, appealable order. See In re Estate of Voorhees, 12 Utah 2d 361, 366 P.2d 977, 980 (1961).

Respondents argue that the trial court erred in its October 1, 2002 order by determining that Lowe was in contempt of court. Pursuant to rule 65A of the Utah Rules of Civil Procedure, once a temporary restraining order (TRO) is granted, it

shall expire by its terms within such time after entry, not to exceed ten days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.

Utah R. Civ. P. 65A(b) (2).

The terms of the TRO in this case provided for the preliminary injunction hearing to be held at 10:00 a.m. on May 30, 2002, and for the TRO to expire at 11:00 a.m. on the same day. The parties did not stipulate to an extension of the TRO; Ninow did not request that the trial court extend the TRO for "good cause"; and, contrary to Ninow's argument, commencement of the preliminary injunction hearing one hour prior to the expiration of the TRO did not operate as a "good cause" extension of the TRO. Id. As such, under the plain language of rule 65A(b) (2), the TRO expired at 11:00 a.m. on May 30, 2002. Therefore, Lowe's actions during the noon recess of the preliminary injunction hearing were not in violation of the TRO.⁽¹⁾

Accordingly, we reverse the trial court's determination that Lowe was in contempt of court for violating the TRO. With respect to the relief granted by the trial court in its October 1, 2002 order, we reverse only Ninow's attorney fee award.⁽²⁾ We remand and instruct the trial court to order the return to Lowe of all amounts paid for Ninow's attorney fees awarded in connection with the trial court's contempt determination.⁽³⁾

Respondents also argue that the trial court erred in its May 1, 2003 summary judgment order by determining that Gary G. Pahl (Gary)

owned all 6000 shares of Pahl's Salt Palace Loan Office, Inc. (the Corporation) at the time of his death. More specifically, Respondents assert that the trial court erred by determining that, at the time of his death, Gary owned 3000 shares of the Corporation (the 3000 shares) that were previously owned by Frank H. Pahl (Frank).⁽⁴⁾ Based upon this alleged error, Respondents argue that it was error for the trial court to grant summary judgment in favor of Ninow.

Pursuant to rule 56 of the Utah Rules of Civil Procedure, summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). Rule 56 also provides that

[w]hen a motion for summary judgment is made and supported as provided in [rule 56], an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Utah R. Civ. P. 56(e).

The 3000 shares were the subject matter of two transfer agreements contained in the record before us.⁽⁵⁾ In the first agreement, dated May 6, 1998 (the May agreement),⁽⁶⁾ Frank agreed to transfer the 3000 shares to Gary.⁽⁷⁾ In the second agreement, dated December 28, 1998 (the December agreement),⁽⁸⁾ the Corporation agreed to purchase the 3000 shares from Gary, so that the Corporation could hold them as treasury stock. In the statement of undisputed facts contained in Ninow's memorandum in support of her motion for summary judgment, she asserted that (1) the May agreement was completed and "paid in full," and (2) the Corporation did not make the required payments to Gary under the December agreement. Ninow supported these facts with citations to affidavits and exhibits contained in the trial record. Respondents did not specifically dispute these facts either in their memorandum in opposition to Ninow's motion for summary judgment, or by way of the affidavits and exhibits cited therein. Because Respondents failed to "set forth specific facts showing that there is a genuine issue for trial," the trial court was required to accept these facts as undisputed.⁽⁹⁾ Utah R. Civ. P. 56(e); see Utah R. Civ. P. 56(c). Because these undisputed facts, together with the plain language of both the May agreement and the December agreement, are determinative of Gary's ownership of the 3000 shares at the time of his death, summary judgment in favor of Ninow was appropriate. See Utah R. Civ. P. 56(c), (e). Therefore, we conclude that the trial court did not err by determining that Gary owned all 6000 shares of the

Corporation at the time of his death, and we affirm the trial court's May 1, 2003 order granting summary judgment in favor of Ninow.⁽¹⁰⁾

James Z. Davis, Judge

WE CONCUR:

Judith M. Billings,

Presiding Judge

William A. Thorne Jr., Judge

1. We disagree with Ninow's assertion that our holding on this issue will "invite judicial chaos." If a party wishes to have a TRO extended beyond its original terms, that party can simply seek the opposing party's consent to an extension, or request an extension from the trial court. See Utah R. Civ. P. 65A(b)(2). Ninow could have pursued either of these alternatives prior to or at the outset of the preliminary injunction hearing, but chose not to. Even if Ninow had been unable to secure consent to an extension from Respondents, it is unlikely the trial court would have denied a request to extend the TRO until completion of the preliminary injunction hearing.

2. Based upon our resolution of Respondents' next argument, we affirm the trial court's determinations that Lowe was not entitled to the \$7500 he obtained during the noon recess of the preliminary injunction hearing and that he was required to return those funds to Ninow.

3. Respondents argue that Lowe is also entitled to his reasonable attorney fees in opposing the contempt motion both in the trial court and on appeal. However, none of the legal authorities that Respondents have cited in support of this argument authorize an award of attorney fees to a party opposing a contempt motion. Therefore, we conclude that this argument is inadequately briefed and we do not address it further. See Utah R. App. P. 24(a)(9); State v. Thomas, 961 P.2d 299, 304-05 (Utah 1998).

4. Respondents do not dispute that, at the time of his death, Gary owned the other 3000 shares of the Corporation.

5. Neither party asserts that these were not legal, binding agreements.

6. The trial court determined, and we agree, that the May agreement is "not ambiguous, and can therefore be interpreted as a matter of law."

7. Respondents assert that the May agreement somehow "conveyed" the 3000 shares to Lowe. However, this assertion is contrary to the plain language of the May agreement. The May agreement provided that Lowe was merely "holding" the 3000 shares until the May agreement was "fulfilled in whole." The May agreement also provided that it was "[Frank's] desire to sell [the 3000 shares] to Gary," and that upon "successful completion" of the May agreement, the 3000 shares would "belong to Gary." Accordingly, under the plain language of the May agreement, the trial court correctly determined that "Lowe had no power or authority to retain the [3000 shares] in any way once the [May agreement] had been completed."

8. The trial court determined, and we agree, that the December agreement is "unambiguous and may be interpreted as a matter of law."

9. Based upon these undisputed facts, the trial court correctly determined that (1) "[a]s soon as the payments had been made under the [May agreement], the ownership of the [3000 shares] vested in Gary"; and (2) because "[p]ayment was not made according to the terms of the [December agreement]," it "was never successfully completed and the [3000 shares] could not have become treasury stock, either prior to, or following [Gary's] death."

10. In their reply brief, Respondents ask this court to reverse a June 12, 2003 order entered in a separate civil case against Ninow. We do not address this argument for several obvious reasons. First, although the separate civil case against Ninow may have been combined with this case, that did not occur until nearly one year after Respondents filed their notice of appeal in this case; therefore, any proceedings in the separate civil case against Ninow are not part of Respondents' appeal in this case. Also, the June 12, 2003 order was not entered until after Respondents' notice of appeal was filed in this case. See Utah R. App. P. 4(a) (stating that "the notice of appeal . . . shall be filed . . . within [thirty] days after the date of entry of the judgment or order appealed from" (emphasis added)). Finally, Respondents raised this argument for the first time in their reply brief. See Utah R. App. P. 24(c); Hart v. Salt Lake County Comm'n, 945 P.2d 125, 139 n.9 (Utah Ct. App. 1997) ("[B]ecause this argument was raised for the first time in [the] reply brief, we decline to address it.").

Tab J

APR 28 2005

By Cal SALT LAKE COUNTY
Deputy Clerk

ROBERT HENRY COPIER, 727
Attorney for Respondent William Lowe
17 East 400 South
Salt Lake City UT 84111
Telephone (801) 272-2222

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
SCOTT M. MATHESON COURTHOUSE - PROBATE DIVISION

In the matter of the estate of

RULING AND ORDER

GARY G. PAHL,

Probate No. 003901101

Deceased.

Judge Leslie A. Lewis

KALYNN NINOW, personal representative
of the Estate of Gary Gunther Pahl and guardian
and conservator of the Estate of Ryan B. Pahl,

Petitioner,

vs.

WILLIAM LOWE, AUGUSTA ROSE,
and ROBERT H. COPIER,

Respondents.

Having taken certain matters under advisement at a hearing on April 6, 2005, the court now rules thereon and enters this order. As all other matters that have been brought by any party under this probate number have now been ruled upon or withdrawn, this shall constitute the final order as to all claims and all parties to any and all probate proceedings pending under this probate number.

The court has now read the written response to the order to show cause that was filed by William Lowe prior to the April 6, 2005, hearing that the court had not yet seen at the time of the hearing. The court has also read Lowe's answer and jury

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demand dated April 19, 2005, and Lowe's motion and memorandum dated April 19, 2005, seeking an evidentiary trial separate from the other named respondents.

The court has also read the decision of the Utah Court of Appeals in Ninow v. Lowe, 2004 UT App 291, wherein the Utah Court of Appeals stated "we reverse the trial court's determination that Lowe was in contempt of court for violating the TRO." [See Ninow v. Lowe, 2004 UT App 291; Page 3 of 6; Paragraph 1.]

The court is persuaded that Lowe would be entitled to an evidentiary trial before another such determination that Lowe is contempt of court could be entered against him. The court is further persuaded that even if everything that KaLynn Ninow, the petitioner, has presented to the court, or could present to the court, and all reasonable inferences to be drawn therefrom, are viewed in the light that is most favorable to Ninow, this court is unable to conclude that Lowe has disobeyed any "judgment, order or process of the court" [UCA Sec. 78-32-1(5)] or that Lowe engaged in any of the other acts or omissions constituting contempt enumerated in Section 1 of Chapter 32 of Title 78 of the Utah Code [2005]. Therefore, the court is persuaded that it is proper to dismiss this proceeding as to Lowe without the need to conduct an evidentiary trial. Petitioner has also named Augusta Rose as one of the respondents in this proceeding. While she has not yet been served with an order to show cause and is not yet before the court, the court concludes that her involvement in any alleged contempt, if any, did not include some of the acts that were alleged against William Lowe, and that this proceeding should be dismissed as to Rose for the same reason that it is being dismissed as to Lowe. Petitioner has also named Robert Henry Copier, counsel for Lowe in this proceeding and counsel for Lowe and Rose in other matters, as a respondent. Copier has not been served with an order to show cause and is not yet before the court as a party. Having now concluded that this proceeding should be dismissed as to Lowe and Rose, the court is persuaded that this proceeding should be dismissed as to Copier as well. It is

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further noted by the court that Copier represented other clients in proceedings under this probate and in other civil cases who were not parties to any preliminary injunction, that Copier was not a party to any preliminary injunction, and that there has been no showing that Lowe and Rose had the right to exercise control over Copier's other clients or to direct Copier in his representation of those clients. It is also noted that Copier's activities as an attorney of record in litigation are subject to privileges and immunities for activities undertaken in the course of litigation. For all of these reasons, it is hereby ORDERED that the above-entitled proceeding styled as *KaLynn Ninow vs. William Lowe, Augusta Rose, and Robert H. Copier*, is hereby DISMISSED. It appears that all other proceedings that were previously pending under this probate number have also been concluded, and that Lowe and Rose withdrew all other matters in which they sought affirmative relief, giving as their reason the following three factors: [1] the court, as of April 6, 2005, has now ruled upon Respondents' Motion to Vacate Order Setting Aside Default Judgment; [2] Ryan Pahl has reached the age of majority and has had a reasonable amount of time to dismiss Ninow as his guardian and take control of his property; and [3] the Utah corporation Pahl's Salt Palace Loan Office, Inc., has now ceased business operations and the land and buildings under its control have been sold, stripping the corporation of any value. It is noted that Ninow is still the guardian of Ryan Pahl even though Ryan Pahl has reached the age of majority and that William Lowe and Augusta Rose have claimed herein that they had hoped to prevent Ninow from closing down the business operations and selling the land and buildings until Ryan Pahl reached the age of majority and had had a reasonable amount of time to dismiss Ninow as his guardian and take control of his property. It is noted that Ninow has been engaged in litigation over property with extended Pahl family members other than Lowe and Rose and that said protracted litigation was only recently resolved without any adjudication on the merits from any trial court. Any

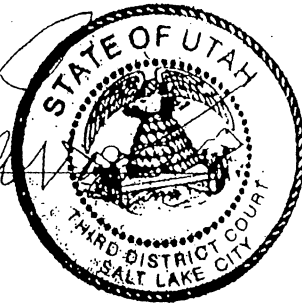
delay experienced by Ninow in selling the land and buildings was not solely a result of litigation in which only Lowe, Rose, and/or Copier were involved with her as parties or counsel. She has been able to close down the business operations of Pahl's Salt Palace Loan Office, Inc., and sell the land and buildings in which those business operations were conducted without any court order on the merits in any of the litigation in which she was involved with Lowe, Rose, and their counsel Copier, and litigation with Pahl family members independent of Lowe, Rose, and Copier.

Accordingly, this final order dismissing the proceeding styled as *KaLynn Ninow vs. William Lowe, Augusta Rose, and Robert H. Copier* concludes all litigation now pending or that had been pending under Probate No. 003901101.

DATED THIS 26 DAY OF APRIL, 2005.

BY THE COURT:


JUDGE LESLIE A LEWIS

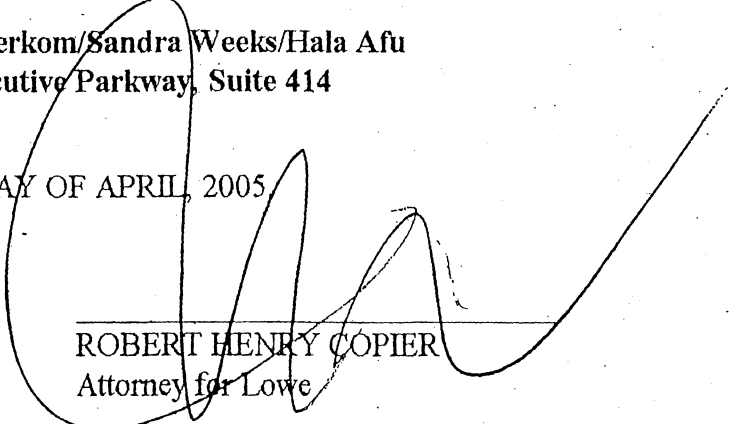


CERTIFICATE OF SERVICE

A copy of the foregoing [proposed] ruling and order was this-day mailed to:

Daniel Van Woerkom/Sandra Weeks/Hala Afu
2975 West Executive Parkway, Suite 414
Lehi UT 84043

DATED THIS 21ST DAY OF APRIL, 2005


ROBERT HENRY COPIER
Attorney for Lowe

Tab K

FILED DISTRICT COURT
Third Judicial District

MAY 26 2005

By SALT LAKE COUNTY
Deputy Clerk

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

IN THE MATTER OF THE ESTATE OF	:	MEMORANDUM DECISION
GARY G. PAHL,	:	CASE NO. 003901101
Deceased.	:	
<hr/>		
KALYNN NINOW, as Personal	:	
Representative of the Estate of	:	
Gary Gunther Pahl and as	:	
Guardian and Conservator of the	:	
Estate of Ryan B. Pahl,	:	
Petitioner,	:	
vs.	:	
WILLIAM LOWE, AUGUSTA ROSE,	:	
ROBERT H. COPIER, DIAMOND FORK	:	
LAND COMPANY, INC.,	:	
Respondents.	:	

This matter came before the Court for a hearing on April 6, 2005. At the beginning of the hearing, counsel informed the Court that argument would primarily deal with the petitioner's Motion for Order to Show Cause in Re: Contempt. However, after argument on the Order to Show Cause had concluded, counsel for respondent Lowe, Mr. Copier, proceeded to raise other pending Motions which required resolution. After hearing argument and ruling on these various Motions, the Court took the Order to Show Cause under advisement. Since doing so, the Court has had an opportunity to review the

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voluminous amount of pleadings submitted in this matter. In fact, to date, the Court has reviewed 10 volumes of pleadings filed in the consolidated probate matter alone.

In addition, after taking this matter under advisement, the Court began receiving a flurry of additional pleadings from the parties. For instance, on May 5, 2005, the petitioner filed what initially appeared to be a renewed Motion for Order to Show Cause in Re Contempt. The Court's law clerk has since clarified with the petitioner's counsel that this Motion was indeed substantively identical to the Motion already under advisement and that it was filed primarily to correct any procedural irregularities that may have arisen while serving the prior Motion and to add a new respondent, Diamond Fork Land Company, Inc. Therefore, the hearing scheduled for this second Motion for Order to Cause was subsequently struck.

That brings the Court to the matter at hand. The issue before the Court is whether respondent Lowe (the one respondent who acknowledges having been properly served with the original Motion for Order to Show Cause and who filed a formal Objection to the Order to Show Cause) should be held in contempt for violating the Preliminary Injunction (entered on August 26, 2002) and the Order of Summary Judgment (entered on May 1, 2003).

Respondent Lowe argues that he should not be held in contempt with respect to the Preliminary Injunction because it expired when the Order of Summary Judgment was entered. He contends that since the Preliminary Injunction was no longer in effect, he could not have violated it.

After carefully reviewing the record, the Court concludes that while styled as an Order of Summary Judgment, Judge Medley actually granted only a partial summary judgment as to the portion of claims dealing with the ownership of the 6,000 shares of Pahl's Salt Palace Loan Office, Inc. ("Loan Office"). In fact, as the petitioner correctly points out, the Probate Petition is still pending because the second portion of the claims, dealing with the ownership of certain State Street property, has yet to be adjudicated. Therefore, the Court rules that the Preliminary Injunction did not expire with the entry of the Order of Summary Judgment. Rather, the Preliminary Injunction remains in place and defendant Lowe remains subject to it.

Next, respondent Lowe's arguments with respect to the Order of Summary Judgment are far more convoluted and apparently rest on the presumption that this Order was somehow limited in scope and that it did not preclude him or other individuals and entities from continuing to pursue an ownership interest in the Loan Office.

Since the Order of Summary Judgment clearly adjudicated the ownership of **all 6,000** shares in the Loan Office, this argument is simply not credible. Therefore, the Court rules that the Order of Summary Judgment clearly applied to respondent Lowe.

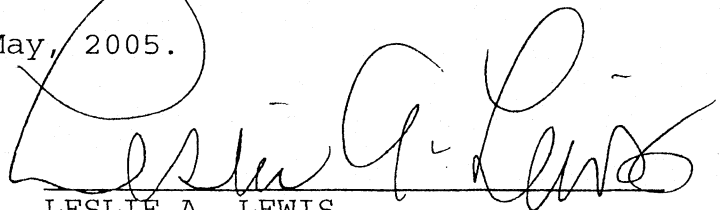
Having made the foregoing rulings, the next step is for the Court to assess whether respondent Lowe has violated the Preliminary Injunction and/or Order of Summary Judgment by the various actions detailed in the petitioner's moving papers and whether he should be held in contempt. There has been some debate over whether the Court can make this assessment based on the parties' written submissions or whether it should instead schedule an evidentiary hearing. The typical approach for contempt proceedings is for the Court to conduct a hearing where counsel is given the opportunity to either proffer evidence or present testimony concerning the alleged contempt. Therefore, the Court schedules a hearing for June 29, 2005, at 9:30 a.m.

The Court notes that the contempt hearing will serve a dual purpose. First, the Court will address whether the additional parties specified in the petitioner's second Motion for Order to Show Cause should be subject to the rulings of this Memorandum Decision and to the outcome of the contempt hearing. After ruling on the issue of additional parties, the Court will proceed with the issue of contempt, in the manner discussed above.

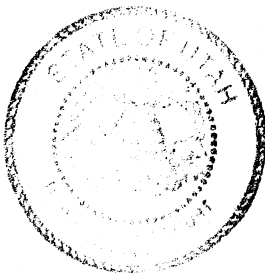
In closing, the Court notes that Mr. Copier has been sending a plethora of letters addressed to the undersigned. The Court now instructs that neither side is to write directly to the Court. While the letters have been problematic, the Court is impressed with counsels' effort to at least confer on certain issues, rather than immediately bringing them to the Court's attention. Given that this case already has 10 volumes of pleadings, the Court is optimistic that counsel will continue in this cooperative spirit. Finally, it appears that there have been continued issues of serving the respondents and Mr. Copier. If these issues pose a significant problem to the petitioner's counsel, they may be raised to the Court during the contempt hearing.

This Memorandum Decision will stand as the Order of the Court, ruling that the Preliminary Injunction and Order of Summary Judgment apply to respondent Lowe and deferring a final resolution of whether his (and potentially others') actions potentially violated these orders and resulted in a contempt of Court.

Dated this 26 day of May, 2005.



LESLIE A. LEWIS
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 26 day of May, 2005:


Daniel F. Van Woerkom
Sandra K. Weeks
Hala L. Afu
Attorneys for KaLynn Ninow
2975 W. Executive Parkway, Suite 414
Lehi, Utah 84043

Robert Henry Copier
Attorney for Respondent William Lowe
17 East 400 South
Salt Lake City, Utah 84111

M Snapp

Tab L

AUG 19 2005

By  SALT LAKE COUNTY
Deputy Clerk

ROBERT HENRY COPIER, 727
Attorney for Respondents
William Lowe and Augusta Rose
[As Attorney for Augusta Rose]
17 East 400 South
Salt Lake City UT 84111
Telephone (801) 272-2222

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
SCOTT M. MATHESON COURTHOUSE - PROBATE DIVISION

In the matter of the estate of	FINAL ORDER ON THE
GARY G. PAHL,	MAY 29, 2002, PETITION
Deceased.	Probate No. 003901101
	Judge Leslie A. Lewis

In the matter of the Estate of Gary G. Pahl, deceased
[Ninow v. Lowe I (Estate of Pahl)]

KaLynn Ninow
Petitioner
vs.

William Lowe, Augusta Rose, Robert Mortensen,
and Grand Staircase Land Company, Inc.
Respondents

Augusta Rose
Third-party Petitioner
vs.

Ryan Pahl, KaLynn Ninow, Richard Ninow, and Does I-V
Third-party Respondents

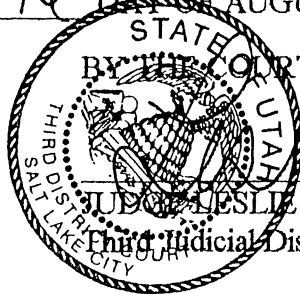
Kalynn Ninow having admitted by written filing dated July 8, 2005, that she will not pursue the merits of her May 29, 2002, petition beyond the May 1, 2003, order granting summary judgment, the court, being sufficiently advised, ORDERS:

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1. All remaining claims under the May 29, 2002, petition are dismissed.
2. William Lowe and Augusta Rose are hereby ordered removed as officers and directors of Pahl's Salt Palace Loan Office, Inc., and, as they have no authority over Pahl's Salt Palace Loan Office, Inc., by virtue of this removal, the preliminary injunction that was entered in connection with the May 29, 2002, petition is lifted.
3. Augusta Rose's defamation claims against KaLynn Ninow and Ryan Pahl remain pending. The judgment and permanent injunction against Richard Ninow in favor of Augusta Rose entered by Judge Tyrone E. Medley remain in full effect.
4. All unadjudicated URCP 11 motions remains pending.

DATED THIS 16 DAY OF AUGUST, 2005.



CERTIFICATE OF SERVICE

A copy of this [proposed] order was mailed on August 12, 2005, to

Daniel Van Woerkom, Sandra Weeks and Hala Afu
2975 West Executive Parkway, Suite 414
Lehi UT 84043
Attorneys for KaLynn Ninow

ROBERT HENRY COPIER
Attorney for William Lowe and Augusta Rose
[As Attorney for Augusta Rose]

Tab M

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.

Tab N

MAR 24 2004

SALT LAKE COUNTY

By  Deputy Clerk

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Attorney for William Lowe, Augusta Rose,
and Grand Staircase Land Company
17 East 400 South
Salt Lake City UT 84111
Telephone (801) 272-2222

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
SCOTT M. MATHESON COURTHOUSE - PROBATE DIVISION

In the matter of the estate of

MOTION TO DROP PARTIES

GARY G. PAHL,

Deceased.

Probate No. 003901101

Judge Tyrone E. Medley

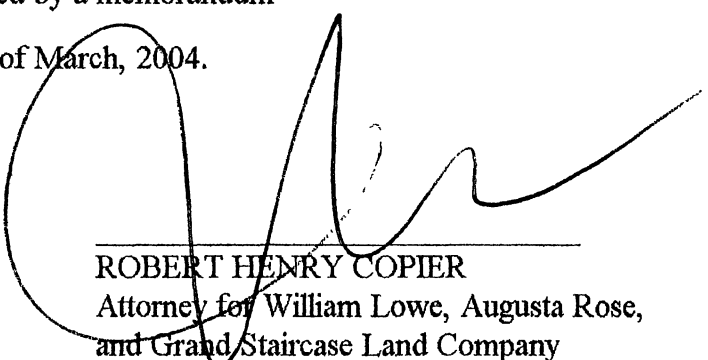
Grand Staircase Land Company, William Lowe, and Augusta Rose, move the court, pursuant to URCP 21, to drop them as parties. The proceeding in which they were interested involved the common shares of Pahl's Salt Palace Loan Office, Inc., and it is currently before the Utah Court of Appeals, with briefing underway.

KaLynn Ninow has indicated she still intends to litigate issues in the probate court involving the ownership of real property at 1588 and 1594 South State Street.

These three movants do not claim any ownership interest in that property.

This motion is supported by a memorandum

DATED this 24th day of March, 2004.



ROBERT HENRY COPIER
Attorney for William Lowe, Augusta Rose,
and Grand Staircase Land Company

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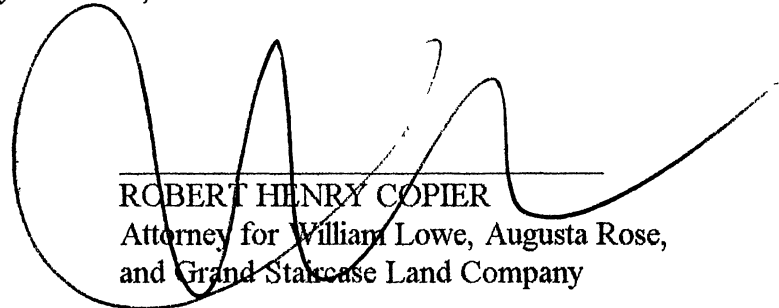
CERTIFICATE OF SERVICE

True copies of the foregoing were this-day mailed to:

**Daniel F. Van Woerkom
Sandra K. Weeks
VAN WOERKOM & WEEKS, L.C.
2975 West Executive Parkway, Suite 414
Lehi UT 84043**

**David C. Condie
32 Exchange Place, Suite 101
Salt Lake City UT 84111**

DATED this 24th day of March, 2004.



ROBERT HENRY COPIER
Attorney for William Lowe, Augusta Rose,
and Grand Staircase Land Company

By  SALT LAKE COUNTY
Deputy Clerk

ROBERT HENRY COPIER
Attorney for William Lowe, Augusta Rose,
and Grand Staircase Land Company

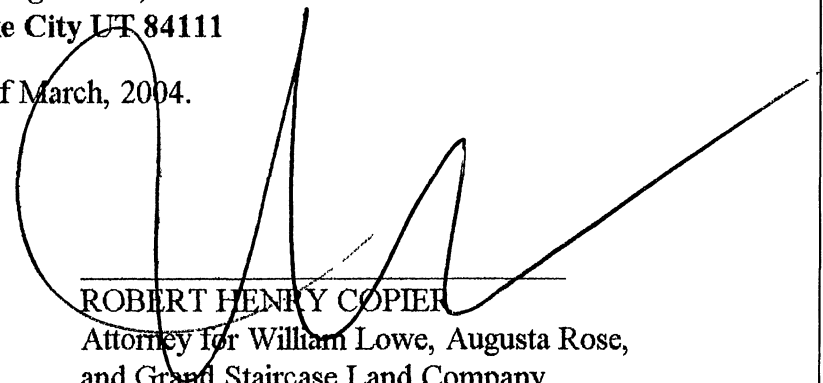
CERTIFICATE OF SERVICE

True copies of the foregoing were this-day mailed to:

**Daniel F. Van Woerkom
Sandra K. Weeks
VAN WOERKOM & WEEKS, L.C.
2975 West Executive Parkway, Suite 414
Lehi UT 84043**

**David C. Condie
32 Exchange Place, Suite 101
Salt Lake City UT 84111**

DATED this 24th day of March, 2004.



ROBERT HENRY COPIER
Attorney for William Lowe, Augusta Rose,
and Grand Staircase Land Company

Tab O

FILED DISTRICT COURT
Third Judicial District

JUL 14 2005

SALT LAKE COUNTY

By G
Deputy Clerk

Daniel F. Van Woerkom (USB #8500)
Sandra K. Weeks (USB #8491)
Hala L. Afu (USB #8967)
VAN WOERKOM & WEEKS, LC
2975 West Executive Parkway, Suite 414
Lehi, Utah 84043
Telephone: (801) 407-8330
Facsimile: (801) 407-8331

Attorneys for KaLynn Ninow, as Personal Representative of the Estate of Gary Gunther Pahl and
as Guardian and Conservator of the Estate of Ryan B. Pahl

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

**IN THE MATTER OF THE ESTATE OF
GARY G. PAHL,**

Deceased.

**KALYNN NINOW, as Personal
Representative of the Estate of Gary
Gunther Pahl and as Guardian and
Conservator of the Estate of Ryan B. Pahl,**

Petitioner,

v.

**WILLIAM LOWE, AUGUSTA ROSE,
ROBERT H. COPIER,**

Respondents,

**MEMORANDUM IN OPPOSITION
TO MOTION FOR A STAY**

Probate No. 003901101

Judge Lewis

Kalynn Ninow, by and through her above named counsel, hereby responds to the
Respondents' motion (dated June 24, 2005) for a stay of contempt proceedings as follows.

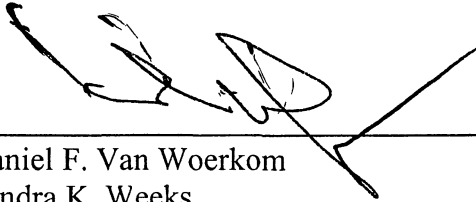
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1. The Motion to Stay should be denied as the contempt proceeding is the only remaining matter in which Respondents' have an interest in this case. Once the issue of contempt is decided, this probate case will be able to move speedily toward conclusion.
2. The Motion to Stay should be denied as Respondents have already requested and were granted one continuance of the contempt hearing from June 29, 2005, to July 21, 2005. The July 21, 2005 date was selected by Respondents' counsel. Any further delays will substantially prejudice Petitioner in her efforts to conclude this matter.
3. There is no need to have the preliminary injunction lifted as the record in this case clearly shows that Respondents have been removed as officers and directors of the Loan Office and that they have no authority to act on behalf of the Loan Office.
4. The preliminary injunction entered in this case should be converted to a permanent injunction as prayed in the contempt pleadings filed and on record in this matter. Any stay of the contempt proceedings will prejudice Petitioner in her attempts to protect the estate from Respondents' repeated and continual attempts to improperly exercise control over the assets of the estate.

Wherefore, Petitioner respectfully requests that Respondents' motion for a stay be denied in full and that the contempt proceeding on July 21, 2005 be heard as scheduled.

DATED this 9th day of July, 2005.

VAN WOERKOM & WEEKS, LC

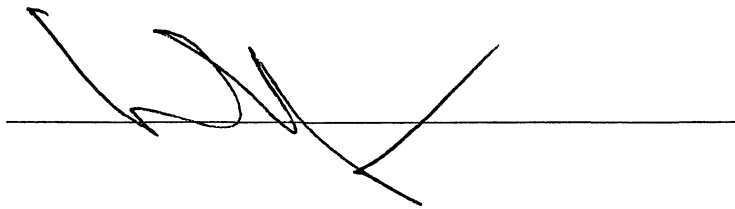


Daniel F. Van Woerkom
Sandra K. Weeks
Hala L. Afu
Attorneys for KaLynn Ninow

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 2005, I placed in the mail, postage prepaid, a true and correct copy of the foregoing addressed as follows:

Robert Copier
17 East 400 South
Salt Lake City, UT 84111



Tab P

FILED
THIRD DISTRICT COURT
02 MAY 29 AM 10:27
SALT LAKE DEPARTMENT
BY *[Signature]*
DEPUTY CLERK

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

**IN THE MATTER OF THE ESTATE OF
GARY G. PAHL**

Deceased.

**PETITION FOR DETERMINATION OF
OWNERSHIP FOR SHARES OF STOCK
AND INTERESTS IN REAL ESTATE**

**Civil No. 003901101
Judge Medley**

Kalynn Ninow, in her capacity as the personal representative of the Estate of Gary G. Pahl, and in her capacity as the court appointed Guardian and Conservator for Ryan B. Pahl, the only heir (devisee) of Gary G. Pahl, in order to protect and preserve the property of the Estate hereby petitions this Court for a hearing to determine and establish the ownership of shares of stock in Pahl's Salt Palace Loan Office as well as the ownership interests in the real property and improvements associated with the Loan Office which are located at 1588 and 1594 South State Street, Salt Lake City, Utah.

The circumstances giving rise to the need for this determination and the grounds for the relief requested are more particularly outlined below.

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Pahl's Salt Palace Loan Office Inc. ("Loan Office") is a Utah corporation which was formed in 1969. In lay terms, the Loan Office is engaged in the pawn business. There are six thousand shares of common stock authorized and issued by the Loan Office. Prior to his death, Gary G. Pahl ("Gary") had acquired all six thousand shares. Gary acquired 3000 shares which had belonged to his father, Appoloneur Gunther Pahl, ("Gunther") following Gunther's death in 1996. In 1998, an agreement was entered into whereby Gary would purchase the remaining 3000 shares from his uncle, Frank H. Pahl ("Frank").

Gary personally owned a one-third interest in the buildings located at 1588 & 1594 South State Street in Salt Lake City, Utah. One building houses the Loan Office, the other is rented to another business entity. The Loan Office also held a one-third interest in the buildings described above. Therefore, in his personal capacity and via his 100% ownership of the stock in the Loan Office, Gary owned an undivided two-thirds interest in the buildings.

Gary died intestate on June 25, 2000. He had one son, Ryan B. Pahl ("Ryan"), who was 17 years old at the time of his father's death. On September 6, 2000, the Third Judicial Court appointed KaLynn Ninow ("KaLynn"), Gary's ex-wife and Ryan's mother, as Personal Representative of Gary's estate and decreed that Gary died intestate. KaLynn had previously been appointed as Guardian and Conservator for her son Ryan on August 30, 2000.

The present petition to determine the ownership of shares and of the interests in real estate

are directed at protecting Ryan's interests in the Loan Office and the real estate mentioned above. As the only heir/devisee of the estate of his late father, all of Gary's property, including the six thousand shares of stock in the Loan Office, and the ownership interest in the buildings belongs to Ryan as the beneficial owner. However, by virtue of her appointment as Guardian and Conservator for Ryan, KaLynn holds legal title to the property on Ryan's behalf.

Ryan began to work with his father in the Loan Office at a very young age. Ryan watched closely and observed the workings of the business. Gary told his son that someday the business would belong to him and that he needed to pay attention and learn how to run it. Ryan applied himself and proved very adept despite his youth. However, there are those who are now attempting to take control and alienate Ryan from the business for which he has worked and which he owns.

The seeds of the attempted coup began to appear in public documents in 1999, when Gary filed an annual report with the Department of Commerce, State of Utah, amending the list of officers and directors of the corporation. Gary named William T. Lowe ("Lowe") and Augusta Rose ("Rose") as directors of the Loan Office. Gary and Lowe were also the only two officers of the corporation, with Lowe serving as vice president and treasurer, and Gary occupying the positions of president and secretary.

On September 16, 2000, ten days following the appointment of KaLynn as personal representative for Gary Pahl's estate, Lowe filed a Registration Information Change Form with the Department of Commerce, State of Utah, designating Robert K. Mortensen ("Mortensen") as

President of the Loan Office, Rose as Vice-President and Secretary, and Lowe as Treasurer. Lowe took this action without notice to KaLynn, and never called a shareholders' meeting to elect directors to fill the vacancy left by Gary's death.

In January, 2001, the corporation was renewed by sending in an automatic renewal coupon with appropriate payment. No new changes in corporate structure were filed. No shareholder's meeting was ever called or held.

Ryan continued to work in the Loan Office following his father's death. It appeared both to him and to KaLynn that Lowe, Mortensen and Rose recognized Ryan as the "owner" of the business. As late as December, 2001, Lowe prepared documents to America Online which acknowledged Ryan as the "owner" of Pahl's Salt Palace Loan Office. From the time of Gary's death until very recently, neither Ryan nor KaLynn suspected that Lowe, Rose or Mortensen would ever take any action to undermine Ryan's rights with respect to the Loan Office.

However, recent events have made it clear that Lowe has abused the position of trust and confidence placed in him by the late Gary Pahl and the Loan Office. As will be more fully described in the following paragraphs, Lowe has wrongfully attempted to entrench himself and take over the business.

A little more than a month ago, after Lowe had repeatedly refused to turn over information and documents requested by KaLynn, Ryan informed Lowe during a conference call with his attorney and Lowe, that he no longer wished to have Lowe serve as treasurer or to work for the Loan

Office in any capacity. In response, Lowe, Rose and Mortensen purported to "release" or fire him and told him he was no longer allowed to be involved with the Loan Office. Lowe has also recently provided a list of shareholders which alleges that Rose and Mortensen are each the owners of 1500 shares of stock. In addition to refusing to provide a copy of the corporation's stock transfer ledgers, Lowe has also refused to provide financial and other corporate information which has been requested repeatedly, and has wrongfully asserted control of the Loan Office and the management of the real estate located at the addresses indicated above. Lowe has failed again in 2002 to hold the annual shareholder's meeting and has allowed the corporation to become delinquent by failing to file annual renewal fees.

Documents were made available on May 24, 2002, to counsel for the Personal Representative in this case which demonstrate that through a series of alleged directors' meetings which reportedly took place in late August and early September, 2000, William Lowe, Augusta Rose and Robert Mortensen attempted to take ownership of the shares of stock which Gary had acquired from his uncle Frank Pahl. There is substantial credible evidence that Lowe and others have engaged in acts of wrongdoing, including conversion and misappropriation of corporate funds, and destruction of corporate records.

The Affidavits of Ryan B. Pahl, KaLynn Ninow, Frank H. Pahl, Harold D. ("Dan") Pahl, Rachel Peirce and Jay W. Taylor were submitted in connection with a memorandum in support of a motion for ex parte restraining order and order to show cause for the issuance of a preliminary

injunction. The memorandum in support of that motion as well as the supporting affidavits are also incorporated herein by reference in support of this Petition

It is the position of the personal representative, KaLynn Ninow, that these affidavits, along with the other documentation provided, clearly establish that there is no possible way that any of the shares of stock in the Loan Office have ever been transferred to Rose or Mortensen. However, these individuals have now asserted that the shares were transferred and belong to them.


With respect to the property located at 1588 and 1594 South State Street in Salt Lake City, said property is owned by the members of DDTS LLC, whether in their individual capacity or via the LLC, KaLynn Ninow (in her representative capacity as Guardian and Conservator for her son Ryan), and Pahl's Salt Palace Loan Office, Inc., each owning an undivided one third interest as tenants in common. Actions taken by Lowe pertaining to these buildings are also discussed which reveal that he has abused his position as the de facto or self-appointed operating agent and trustee of said property. While the ownership of the interest in this real property does not appear to be disputed as between the individuals and entities named above, the control over rents received and the disposition of funds associated with the real estate has become a source of contention in that William T. Lowe has taken it upon himself to maintain control of the funds. The owners of the interests in the real property do not wish to have William T. Lowe involved in the control or management of their real property and require the assistance of the court in disentangling Mr. Lowe from their affairs.

WHEREFORE, Ms. Ninow respectfully requests that the Court set a time for hearing to

determine the ownership interests of the individuals asserting ownership in the stock of the corporation as well as the real property and improvements thereon, entering such provisional orders regarding time for discovery pertaining to the issues raised in this Petition, and for such further orders as are just and reasonable under the circumstances, as well as such further relief to which the Estate may be entitled under the circumstances, such as costs, attorneys fees, etc.

DATED, this the 29th day of May, 2002.

VAN WOERKOM & CONDIE, LC

By: 
David C. Condie