

2005

Mishel Minnock v. Misty L. Fisher : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MISHEL MINNOCK,

Defendant/Appellant,

vs.

MISTY L. FISHER,

Plaintiff/Appellee.

Case No. 20051128-CA

BRIEF OF APPELLANT

APPEAL FROM JUDGMENT DENYING DEFENDANT'S *MOTION TO SET ASIDE DEFAULT JUDGMENT*, CASE NO. 040927544, IN THE THIRD JUDICIAL DISTRICT OF UTAH, SALT LAKE COUNTY, THE HONORABLE STEPHEN ROTH PRESIDING

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APPELLEE

IN THE UTAH COURT OF APPEALS

MISHEL MINNOCK,

Defendant/Appellant,

vs.

MISTY L. FISHER,

Plaintiff/Appellee.

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APPELLEE

LIST OF PARTIES

The parties are accurately identified in the caption.

“Defendant-Appellant” is: Mishel Minnock.

“Plaintiff-Appellee” is: Misty L. Fisher.

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I. JURISDICTIONAL STATEMENT

Defendant-Appellant (hereinafter “Defendant”) seeks review of the Third District Court’s denial of her *Motion to Set Aside Default Judgment*. The Utah Court of Appeals has jurisdiction over this matter pursuant to § 78-2a-3(2)(j), *Utah Code Annotated*, as amended.

II. STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Did the District Court err in denying Defendant’s *Motion to Set Aside Default Judgment* pursuant to Utah R. Civ. P. 60(b) when Defendant did not receive notice of the hearing until after the hearing was held, promptly responded upon receipt of the notice by filing its *Motion to Set Aside Default Judgment*? The District Court denied Defendant’s *Motion* under *Utah Rules of Civil Procedure* 60(b), stating that the court did not believe Defendant’s excuse for missing the evidentiary hearing and the Defendant failed to present a meritorious defense. *See R. 127-128*. Appellant preserved this issue for appeal in her *Memorandum in Support of Motion to Set Aside Default Judgment* and her *Reply Memorandum in Support of Default Judgment*. *See R. 74-77 and R. 95-101*. In reviewing a Rule 60(b) refusal to vacate a default judgment, an appellate court employs the abuse of discretion standard. *See Lund v. Brown*, 2000 UT 75, 11 P.3d 277, 280 (Utah 2000).

III. DETERMINATIVE RULE

Utah Rules of Civil Procedure Rule 60 - Relief from judgment or order.

(a) *Clerical mistakes*. Clerical mistakes in judgments, orders or 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 or on the motion of any party and after such notice, if any, as the court orders. During the pendency

of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) *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.

IV. STATEMENT OF THE CASE

Defendant entered into a contract to sell a 2004 Chevrolet Tahoe (“vehicle”) to Plaintiff for the amount of \$35,000. Both parties were in agreement with the terms of the contract. Plaintiff performed on the contract by initially providing \$15,000.00 towards the contract price for the vehicle. The payment plan called for Plaintiff to make payments after the initial lump sum. Plaintiff was delinquent in these payments and the vehicle was repossessed at Defendant’s request.

On December 29, 2004, Plaintiff filed her Complaint in the Third District Court, from which this appeal is taken. Defendant failed to answer the Complaint. Defendant received notice of the matter on or about March 28, 2005. Plaintiff moved for default judgment on April 18, 2005. Default Judgment was not entered by the court for reasons stated in the April 28, 2005, Minute Entry. The Court stated that it “will not make findings without testimony, exhibit A was not attached to complaint and punitive damages needs an evidentiary hearing.” In response to this entry, an evidentiary hearing was scheduled for June 24, 2005. Defendant received no notice of this hearing.

At this hearing, the Court heard proffer from counsel for the Plaintiff and found fraud and misrepresentation on the part of the Defendant. In addition, the Court heard testimony from Mr. Pilon. Damages were awarded to Plaintiff in an amount of \$35,000 plus costs, \$17,500 of which were punitive. This order was filed July 5, 2005. Defendant was not present at this hearing. Defendant did not receive notice of the evidentiary hearing until the first week of July. She filed an affidavit to that effect. There was no contradictory testimony.

The same date that judgment was entered, July 6, 2005, Defendant filed her Motion to Set Aside Default Judgment. Both parties agree that the motion was timely filed. Counsel for Defendant made its appearance at this time. In its Motion, Defendant argued that Rule 60(b) allows for default judgments to be set aside where either (1) excusable neglect is found or (2) additional factors that justify relief from judgment. Defendant was not provided notice

of the evidentiary hearing where the default judgment was ordered. Defendant has not been provided adequate opportunity to respond to the allegations against her. This Motion was fully briefed and oral arguments were held September 26, 2005.

The judge denied the Defendant's Motion. The judge premised his denial of the Motion to Set Aside Default Judgment upon Defendant's failure to raise a meritorious defense in its motion and Defendant's failure to respond to the Complaint. The Defendant comes before this Court to appeal the denial of its Motion to Set Aside Default Judgment.

V. STATEMENT OF RELEVANT FACTS

1. On or about September 23, 2004 the parties entered into a written agreement whereby Defendant sold Plaintiff a 2003 Chevrolet Tahoe for the price of \$35,000.00. *See R. 1 ¶3; and R. 66 ¶3.*

2. Under the terms of the written agreement, Plaintiff was to make a down payment of \$15,000.00 concurrent with delivery of the Chevrolet Tahoe on or about September 23, 2004. Thereafter, Plaintiff was to pay one (1) monthly installment of \$2,000.00 followed by four (4) monthly installments of \$3,000.00, followed by three (3) monthly installments of \$2,000.00 until the balance of \$35,000.00 was paid to Defendant by May of 2005. *See R. 1-2 ¶4; and R. 66 ¶4.*

3. Plaintiff took possession of the Chevrolet Tahoe on or about September 23, 2004 and paid Defendant \$15,000.00 via money order concurrently therewith. Defendant did not deliver a written title to the vehicle at that time. *See R. 2 ¶5; and R. 66 ¶5.*

4. Plaintiff paid an additional \$2,500.00 to Defendant in or about October, 2004. *See R. 2 ¶7; and R. 66 ¶7.*

5. On or about December 21, 2004, Plaintiff filed its *Complaint* alleging breach of contract, fraud, fraudulent concealment, unjust enrichment and conversion on the part of the Defendant. *See R. 2-5.*

6. Defendant was personally served with the *Complaint*. *See R. 9 ¶2-3.*

7. Plaintiff requested a default judgment be entered due to Defendant's failure to answer the *Complaint*. *See R. 20-21.*

8. The Court would not enter a default judgment absent a hearing regarding damages. *See R. 28.*

9. An evidentiary hearing was held on or about June 24, 2005. *See R. 123.*

10. Defendant did not receive notice of this hearing. *See R. 93-94.*

11. At this hearing the district court judge heard testimony from the Plaintiff, Plaintiff's counsel and Terry Pilon.

12. The district court found that Defendant breached the contract, defrauded the Plaintiff and was unjustly enriched. *See R. 68 ¶27.*

13. Plaintiff was granted a judgment in the amount of \$35,352.50. *See R. 69 ¶32.*

14. Default judgment was entered July 5, 2005. *See R. 71-72.*

15. On July 6, 2005 Defendant filed its *Motion to Set Aside Default Judgment*. *See R. 74-77.*

16. The *Motion to Set Aside Default Judgment* was fully briefed and oral argument was heard on September 26, 2005 before the Honorable Judge Stephen Roth. *See R. 113-115.*

17. At this hearing, Judge Roth denied Defendant's *Motion to Set Aside Default Judgment*. *See R. 123; R. 127-128; and R. 130.*

18. Defendant filed its *Notice of Appeal* on November 3, 2005. *See R. 134-135.*

VI. SUMMARY OF THE ARGUMENT

The District Court improperly denied Defendant's *Motion to Set Aside Default Judgment*. Utah courts favor setting aside default judgments so that cases may be decided on the merits. A party should be given the opportunity to fully participate in an adjudication of all matters raised in a Complaint. Defendant was deprived of that opportunity. Defendant does not dispute her failure to respond to the Complaint. Defendant's appeal focuses on the damage hearing held on June 24, 2005. Defendant was not provided notice of the hearing. At this hearing, the district court judge heard proffer from counsel and found fraud on the part of the Defendant. As stated, Defendant was without an opportunity to defend the allegations. From this hearing, the Court entered its default judgment.

Defendant raised her Motion to Set Aside Default Judgment timely and stated her reason supporting the setting aside of the judgment. The District Court found that Defendant failed to raise a meritorious defense in her Motion. The court found this flaw to be fatal to the motion. Defendant acknowledges that a meritorious defense must be asserted in order to obtain relief under Rule 60(b)(1) excusable neglect. However, a meritorious defense was asserted to the best of Defendant's ability under the constrained time frame of the case. Defendant filed her Motion the same day the order was filed with the court. Defendant met the requirements of Rule 60(b)(1) in order to set aside the default judgment to the extent available at the time.

The District Court focused solely on Defendant's request for relief based upon excusable neglect. Defendant also raised its Motion under Rule 60(b)(6). This allows relief for any other reason justifying relief from an order. Defendant did not receive notice of the evidentiary hearing held on June 24, 2005. At this hearing, the Court heard testimony based on impermissible hearsay. Following this hearing, the Court entered the Default Judgment. Defendant was not provided an opportunity to respond. The denial of an opportunity to present evidence and defenses at the evidentiary hearing is sufficient to justify relief from the order of the court. Where Defendant's Motion was timely and set forth reasons justifying relief, the Motion should have been granted, either under Rule 60(b)(1) excusable neglect or Rule 60(b)(6) additional factors, in order for the Court to make a full adjudication of the dispute on the merits.

VII. ARGUMENT

A. UTAH COURTS FAVOR GRANTING RELIEF FROM DEFAULT JUDGMENT UNLESS IT WOULD RESULT IN SUBSTANTIAL INJUSTICE TO THE ADVERSE PARTY

Utah Courts are generally in favor of setting aside default judgments where there is a reasonable excuse for defendant's failure and when application is timely. *Katz v. Pierce*, 732 P.2d 92, 93 (Utah 1986). Both parties agree that the application was timely filed. Discretion is placed in the district court judge to determine whether a reasonable excuse exists. *Id.* Abuse of discretion on the part of the judge must be clearly shown. *Id.* Finally, "when there is doubt about whether a default should be set aside, that doubt should be

resolved in favor of doing so.” *Id.* “The courts will generally grant relief in doubtful cases so that a party may have a hearing.” *Board of Education of Granite School Dist. v. Cox*, 14 Utah 2d 385, 384 P.2d 806, 807 (1963). In this case the judge abused his discretion in denying Defendant’s *Motion to Set Aside Default Judgment*.

B. DEFENDANT PRESENTED SUFFICIENT EVIDENCE OF MERITORIOUS DEFENSE IN ITS MOTION TO SET ASIDE DEFAULT JUDGMENT TO SATISFY THE REQUIREMENTS OF RULE 60(b)(1)

Defendant provided evidence of possible defenses in its *Motion to Set Aside Default Judgment* to the extent available following the entering of the judgment. Rule 60(b)(1) of the *Utah Rules of Civil Procedure* allows a court to “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.” In *State ex rel. Utah State Department of Social Services v. Musselman*, 667 P.2d 1053, 1057 (Utah 1983) the Utah Supreme Court stated the requirements for

In order to obtain relief from a default judgment, defendant must show that “the judgment was entered against him through excusable neglect (or any other reason specified in Rule 60(b)), but he must also show that his motion to set aside the judgment was timely, and that he has a meritorious defense to the action.” *Id.* at 1055-6 (citations omitted). See *Downey State Bank v. Major-Blakeney Corp.*, 545 P.2d 507 (Utah 1976) *overruled in part on other grounds*. Utah has accepted the rule regarding proposed defenses as set forth in

Musselman, 667 P.2d at 1057 (citing *Lopez v. Reserve Insurance Co.*, 525 P.2d 1204, 1206 (Colo.App.1974):

A meritorious defense is one which sets forth specific and sufficiently detailed facts which, if proven, would have resulted in a judgment different from the one entered.

See also *Fisher v. Bunker Hill Co.*, 96 Idaho 341, 528 P.2d 903 (1974); *Beckett v. Cosby*, 73 Wash.2d 825, 440 P.2d 831 (1968).

Defendant did not receive notice of the hearing until after the hearing was conducted. This is clearly an example of excusable neglect which would justify the Court in setting aside the default judgment. The district court found otherwise, citing the lack of an explanation as to why notice was not received. If Defendant was aware of the reason why notice was not received, such mistake could be referenced and corrected. However, where Defendant has no knowledge as to why notice of the hearing was not received until after the entry of the judgment, excusable neglect may be imparted to the Defendant.

It is important to note that Footnote 2 of the Utah Supreme Court opinion in *Katz*, 732 P.2d 92 (1986) provides direction to the district court judge in determining whether a reasonable justification or excuse exists. Footnote 2 states:

The trial court has broad discretion to balance the equities on a case-by-case basis, including such considerations as the preference to allow the presentation of all claims and defenses, any delay or unfairness of a party's conduct, the need for finality of judgments, and the respective hardships in denying or granting relief.

Id. See *Warren v. Dixon Ranch Co.*, 123 Utah 416, 260 P.2d 741 (1953); *Boyce v. Boyce*, 609 P.2d 928, 931 (Utah 1980); *Airkem Intermountain v. Parker*, 30 Utah 2d 65, 513 P.2d 429 (1973). In making the decision whether to set aside a default judgment, the court must consider each of the factors listed in *Katz*. This list is not conclusive. Additional factors exist which would show reasonable justification for setting aside default judgment. In this matter, Defendant was not allowed to present her claims, it was Plaintiff's responsibility to notify Defendant of the June 24, 2005 hearing, and judgment was entered against Defendant. This is a clear illustration of the hardships placed upon Defendant in the matter.

The district court judge also found that Defendant failed to set forth in sufficient detail any meritorious defense to the action. In hastening to respond to the hearing, Defendant did not describe such defenses in her *Motion*. However, the judge was able to hear a description of those meritorious defenses at oral argument held September 26, 2005. Counsel for Defendant pointed out several discrepancies at the evidentiary hearing, including impermissible hearsay on the part of Terry Pilon, that are able to be rectified by setting aside the default judgment. Provision of meritorious defenses is not solely limited to the pleadings regarding setting aside default judgment, but may also be provided through oral argument on the motion.

The provision of meritorious defenses at oral argument should have been found sufficient to support Defendant's claim of excusable neglect. The district court judge abused his discretion in finding otherwise. For the reasons stated above, Defendant requests this

Court to set aside the default judgment and order that a new evidentiary hearing be conducted in this matter.

C. DENIAL OF AN OPPORTUNITY TO BE HEARD AND TO PRESENT EVIDENCE AT THE EVIDENTIARY HEARING IS SUFFICIENT TO JUSTIFY RELIEF FROM JUDGMENT UNDER RULE 60(b)(6)

The denial of an opportunity for Defendant to present her defenses to the allegations raised in the Complaint is sufficient to justify relief under *Utah Rules of Civil Procedure* 60(b)(6) additional factors justifying relief. Rule 60(b)(6) allows relief from a judgment for “(6) any other reason justifying relief from the operation of the judgment.” Relief under Rule 60(b)(6) requires “[f]irst that the reason be one *other* than those listed in subdivision (1) through [(6)]¹; second, that the reason justify relief; and third, that the motion be made within a reasonable time.” *Richins v. Delbert Chipman & Sons, Co., Inc.*, 817 P.2d 382, 387 (Utah 1991) (emphasis in original) (citing *Laub v. South Cent. Utah Tel. Ass’n*, 657 P.2d 1304, 1306-07 (Utah 1982)). Defendant acknowledges that this subsection should be “cautiously and sparingly invoked by the Court only in unusual and exceptional instances.” *Id.* (quoting *Hughes v. Sanders*, 287 F.Supp. 332, 334 (E.D. Okla.1968)). Failure to provide notice of a dispositive hearing is sufficient to justify the court granting relief based upon Rule 60(b)(6).

¹*Utah Rules of Civil Procedure* 60 was amended effective April 1, 1998. Prior subsection (b)(7) was renumbered as (b)(6). The text of the subsection did not change.

Defendant provided sufficient information in her pleadings and at oral argument to justify relief based on Rule 60(b)(6). The Defendant should have been provided an opportunity to present all claims and defenses. Setting aside the default judgment would provide a hearing for arguments to be heard in order to reach a conclusion to this matter. At oral arguments on September 26, 2005, the judge found that setting aside the default judgment would be prejudicial to the Plaintiff, whereas Plaintiff had presented her case at the June 24, 2005 damage hearing. The district court judge did not properly balance the prejudice to the Plaintiff with the prejudice towards the Defendant in denying the *Motion to Set Aside Default Judgment*.

VIII. CONCLUSION


The district court abused its discretion in denying Defendant's *Motion to Set Aside Default Judgment*. Utah courts favor the resolution of matters through a discussion of the merits. Defendant was not provided an opportunity to present her claims and defenses at the evidentiary hearing on June 24, 2005, due to lack of notice. Immediately upon obtaining knowledge of the proceeding, Defendant filed her *Motion*. Defendant adequately presented her claims in support of its claim for excusable neglect in its pleadings and at oral argument. The claims presented in Defendant's pleadings and at oral argument are sufficient to justify relief from the default judgment.

Based on the above, Defendant respectfully requests this Court to dismiss the District Court's decision denying Defendant's *Motion to Set Aside Default Judgment*, and order an

evidentiary hearing be held where Defendant may present her case and this matter may be decided on the merits.

DATED this 18 day of April, 2006.

SUITTER AXLAND

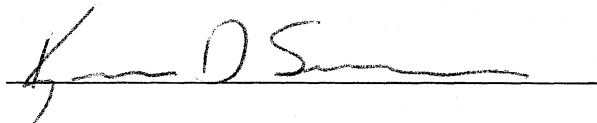
By: 

Kevin D. Swenson
*Attorney for Defendant-Appellant Mishel
Minnock*

CERTIFICATE OF SERVICE

I hereby certify that on this 19 day of April, 2006, I caused two (2) true and correct copies of the foregoing BRIEF OF APPELLANT to be deposited in the United States mail, first-class, postage prepaid to:

Stephen D. Spencer, Esq.
DAY SHELL & LILJENQUIST, L.C.
45 East Vine Street
Murray, UT 84107
Attorney for Plaintiff-Appellee

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

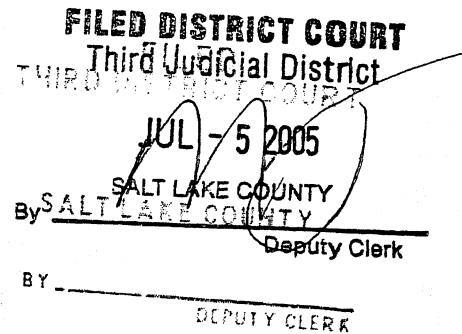
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ADDENDUM

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ATTACHMENT #1	FINDINGS OF FACT AND CONCLUSIONS OF LAW
ATTACHMENT #2	MINUTE ENTRY DENYING MOTION TO SET ASIDE

ATTACHMENT #1



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

MISTY L. FISHER,
Plaintiff,

v.

MISCHEL MINNOCK,
Defendant.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Case No. 040927544
Judge Stephen Roth

THIS MATTER came for an evidentiary hearing on June 24, 2005, the Honorable Stephen Roth presiding. The issue at bar was that of Plaintiff's damages pursuant to Utah Rule of Civil Procedure 55. Those present included: Stephen D. Spencer, counsel for Plaintiff; and Plaintiff. Defendant did not appear personally or through counsel. Terry Pilon of Fun Unlimited II Inc. was also present as a witness. The Court reviewed the file in this matter and heard the proffers and arguments of counsel. Wherefore, being fully advised in the premises and for good cause appearing, the Court now makes and enters its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Defendant Mischell Minnock is a resident of Salt Lake County, State of Utah.
2. The relevant events alleged have occurred in Salt Lake County, State of Utah.

3. On September 23, 2004 the parties entered into a written agreement whereby Defendant sold Plaintiff a 2003 Chevrolet Tahoe for the price of \$35,000.00.

4. Under the terms of the written agreement, Plaintiff was to make a down payment of \$15,000.00 concurrent with delivery of the Chevrolet Tahoe on September 23, 2004. Thereafter, Plaintiff was to pay one (1) monthly installment of \$2,000.00 followed by four (4) monthly installments of \$3,000.00, followed by three (3) monthly installments of \$2,000.00 until the balance of \$35,000.00 was paid to Defendant by May of 2005.

5. Plaintiff took possession of the Chevrolet Tahoe on September 23, 2004 and paid Defendant \$15,000.00 via money order concurrently therewith. Defendant did not deliver a written title to the vehicle at that time.

6. Defendant did not inform Plaintiff that a purchase money lien for the vehicle had already been given to General Motors Acceptance Corporation (GMAC) or that the payments for the vehicle were already in default at relevant times. Further, Defendant did not inform Plaintiff that Defendant had no intention of making payments to GMAC from the money Defendant had received and was to receive from Plaintiff.

7. Plaintiff paid an additional \$2,500.00 to Defendant in October, 2004.

8. In November 2004, Plaintiff learned that Defendant had given a purchase money lien in favor of GMAC and further, that Defendant was in default on the promissory note and contract for Defendant's purchase of the vehicle.

9. In December 2004, Plaintiff allowed GMAC or its agents to repossess the vehicle upon learning of its purchase money lien and that the remaining purchase money owed by Defendant for the vehicle was approximately \$17,000.00.

10. Through the parties' actions described herein, each made a promise to perform for which consideration was given.

11. Plaintiff adequately performed under the parties' agreement by paying \$17,500.00 to Defendant at relevant times.

12. Defendant breached the parties' agreement, *inter alia*, by failing to deliver title to the vehicle.

13. As a direct result of Defendant's breach of the parties' agreement, Plaintiff has been harmed in the amount of \$17,500.00.

14. Through her actions described herein, Defendant made a representation concerning a presently existing material fact; which was false; which Defendant either knew to be false, or made recklessly, knowing that she had insufficient knowledge upon which to base such representation; for the purpose of inducing Plaintiff to act upon it, to wit: that Defendant would deliver title to the Chevrolet Tahoe to the Plaintiff.

15. Plaintiff, acting reasonably and in ignorance of its falsity; did in fact rely upon it and was thereby induced to act to her injury and damage in the amount of \$17,500.00.

16. Through her acts and omissions described herein, Defendant failed to disclose information that was material to Plaintiff's decision to enter the parties' agreement, to wit: that GMAC had a purchase money lien on the Chevrolet Tahoe; that the payments under Defendant's purchase money contract with GMAC were in default; that Defendant had no intention of using monies paid by the Plaintiff to satisfy Defendant's obligation to GMAC.

17. The nondisclosed information was material to the formation of the agreement.

18. The nondisclosed information was known to the Defendant at relevant times.

19. Defendant had a legal duty to communicate with Plaintiff regarding the lien in favor of GMAC and Defendant's obligation to GMAC that was in default at relevant times.

20. Plaintiff has conferred a benefit on Defendant.

21. Defendant has knowledge of the benefit conferred by Plaintiff.

22. There has been an acceptance or retention by the Defendant under such circumstances as to make it inequitable for the Defendant to retain the benefit without payment of its value.

23. Through Defendant's acts as described herein, Defendant has intentionally and without lawful justification deprived Plaintiff use and possession of \$17,500.00.

24. Defendant's use of Plaintiff's property is inconsistent with the Plaintiff's rights.

25. Plaintiff has paid sales tax for the purchase of the amount of \$1,185.50 to the State of Utah of which she has been refunded \$980.00, the difference being \$197.50.

26. Plaintiff has incurred a cost of the filing fee in this action in the amount of \$155.00.

CONCLUSIONS OF LAW

27. Defendant has breached a contract with Plaintiff; has defrauded Plaintiff; and has been unjustly enriched at Plaintiff's expense. Defendant's conduct has been willful and malicious.

28. Plaintiff should be granted a judgment against Defendant in the amount of \$17,500.00 as consequential damages.

29. Plaintiff should be granted a judgment against Defendant for \$17,500.00 as punitive damages to deter future conduct and because Defendant's conduct has been knowing and in reckless disregard for the rights of others.

30. Plaintiff should be granted a judgment against Defendant for Motor Vehicle Fees and Sales Tax that have not been recovered in the amount of \$197.50.

31. Plaintiff should be granted a judgment against Defendant for costs in the amount of \$155.00.

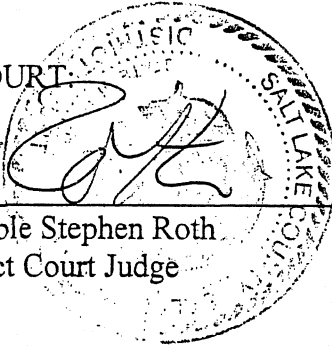
32. The grand total of Plaintiff's Judgment against Defendant should be \$35,352.50.

DATED this 5th day of July, 2005.

BY THE COURT

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

The Honorable Stephen Roth
Third District Court Judge



CERTIFICATE OF MAILING

I hereby certify that I am an employee or partner of Day Shell & Liljenquist L.C. and that I caused a true and correct copy of the foregoing Findings of Fact and Conclusions of Law to be placed in the United States Mail, first class, postage prepaid, to the following:

Mischel Minnock
7845 South Abercrombie Lane
West Jordan, UT 84088

Court; client

ON this 24 day of June, 2005.



Vanessa Stewart
Paralegal for Stephen D. Spencer

ATTACHMENT #2

COPY

Stephen D. Spencer (8913)
DAY SHELL & LILJENQUIST, L.C.
Attorney for Plaintiff
45 East Vine Street
Murray, UT 84107
Telephone: (801) 262-6800
Fax : (801) 262-6758

RECEIVED BY
SUITTER FIRM AND

SEP 27 2005

Docket Date: _____
Attorneys: _____
Client Copy: _____

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

MISTY L. FISHER,

Plaintiff,

v.

MISCHEL MINNOCK,

Defendant.

ORDER
09/26/2005

Case No. 040927544
Judge Stephen Roth

THIS MATTER came for a hearing on September 26, 2005, the Honorable Stephen Roth presiding. Those present included: Plaintiff; Michael E. Day of Day Shell & Liljenquist L.C., substituting for Stephen D. Spencer, attorney for Plaintiff; and Kevin D. Swenson, attorney for Defendant. The Defendant was not personally present. The motion at bar was Defendant's Motion to Set Aside Default Judgment, which was filed July 6, 2005. Plaintiff had filed a memorandum in opposition on July 12, 2005. Defendant had filed a reply memorandum on July 18, 2005. The Court reviewed the motion and the file in this matter and heard the proffers and arguments of counsel. Wherefore, being fully advised in the premises and for good cause appearing, the Court hereby ORDERS the following:

1. Defendant's motion is denied.

DONE this ____ day of _____, 2005.

BY THE COURT:

The Honorable Stephen Roth
Third District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I am an employee or partner of Day Shell & Liljenquist L.C. and that I caused a true and correct copy of the foregoing Order to be placed in the United States Mail, first class, postage prepaid, to the following:

Kevin D. Swenson
SUITTER AXLAND, PLLC
8 East Broadway, Suite 200
Salt Lake City, UT 84111

Court; client

ON this 26 day of September, 2005.

Vanessa Stewart
Vanessa Stewart
Paralegal for Stephen D. Spencer