

1994

Michael A. Mower v. James D. Craghead, F. Lunn Padan : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS

MICHAEL A. MOWER,	:	
	:	
Plaintiff/Appellee,	:	Case No. 940682-CA
	:	
vs.	:	
	:	
JAMES D. CRAGHEAD, F. LYNN	:	
PADAN aka ASPEN	:	
CONSTRUCTION, INC., MARTIN	:	
BENNETT, JOHN and JANE DOES	:	
NOS. 1 through 20,	:	Priority 15
	:	
Defendants/Appellants.	:	

BRIEF OF PLAINTIFF/APPELLEE, MICHAEL A. MOWER

APPEAL FROM JUDGMENT BY THE
THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY,
HONORABLE SHEILA K. McCLEVE, PRESIDING

UTAH COURT OF APPEALS
BRIEF

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Aspen Construction

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COURT OF APPEALS COURT OF APPEALS

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CITATIONS TO THE RECORD

Citations to the Record will be abbreviated as follows:

Record on Appeal	"R."
Judgment	"J."
Appellant Brief	"App. Br."

The Addendum includes relevant portions of the record and other pleadings and shall be cited to as "Add." with the page number following the citation.

JURISDICTION

Jurisdiction over this appeal is conferred upon the Court of Appeals pursuant to Utah Code Ann. § 78-2a-3(d) (1994), providing for appellate jurisdiction by the Court of Appeals over appeals from the circuit courts.

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

The issues before this Court are 1) whether the Circuit Court abused its discretion by entering the judgment by default pursuant to Utah R. Civ. P. 37(b)(2)(C) against defendants for failure to respond to discovery; and 2) whether the circuit court's refusal to set aside the judgment pursuant to Rule 60(b)(1) was an abuse of discretion.

Standard of Review: The Court reviews both the entry of default judgment and the refusal to set it aside as to whether the Circuit Court abused its discretion. Amica Mutual Insurance Co. v. Shettler, 768 P.2d 950, 961 (Utah App. 1989); Tucker Realty v. Nunley, 396 P.2d 410, 412.

Appellant must clearly show an abuse of discretion; it is not enough to show that some basis may exist to set aside the default. Utah Dept. of Transportation v. Osguthorpe, 259 Adv. Rep. 36, 39 (Utah 1994); Katz v. Pierce, 732 P.2d 92, 93 (Utah 1986).

DETERMINATIVE LAW

The following statutes which bear on the resolution of the issues presented are reproduced in Addendum A to this brief:

Utah R. Civ. P. 37(b)(2)(c)

Utah R. Civ. P. 55

Utah R. Civ. P. 60(b)(1), (7)

STATEMENT OF THE CASE

A. Nature of the Case

Defendants appeal a default judgment in favor of plaintiff Michael A. Mower entered August 25, 1994 (R. at 189-90), and from an order denying defendant's motion to set aside the judgment dated September 22, 1994 (R. at 234-36), of the Third Circuit Court of Salt Lake County, Salt Lake City Division, the Honorable Sheila K. McCleve presiding. A copy of the circuit court's orders are attached in Addendum B to this Brief.

B. Course of Proceedings and Disposition Below

The plaintiff Michael Mower initially filed this action on August 13, 1993 seeking to foreclose a mechanics lien on the residence of defendant James A. Craghead (defendant Craghead) for materials and labor provided to the residence for the benefit of defendant Craghead (R. at 1-6). Plaintiff filed an Amended Complaint on January 24, 1994, stating causes of action for breach of contract and quantum meruit against defendant Craghead and against defendant Lynn Padan, Inc. (defendant Padan), general contractor for the remodeling of the Craghead residence. (R. at 7-13.)

On March 28, 1994, plaintiff served defendants by mail, through counsel, with Plaintiff's First Request for Production of Documents to Defendants James D. Craghead and F. Lynn Padan, and

Plaintiff's First Set of Interrogatories to Defendants James D. Craghead and F. Lynn Padan. (R. at 48.)

On May 10, 1994, ten days after defendants' responses to discovery were due, plaintiff's counsel sent a letter to defendants' counsel reminding him defendants' responses were past due. (R. at 73.) On May 17, 1994, receiving no response, plaintiff filed his first Motion to Compel Discovery. (R. at 49-73; 80-104.) Defendants did not respond. On June 9, 1994, 40 days after defendant's responses to discovery were due, the circuit court entered an order giving defendants ten days within which to answer the discovery, and awarding to plaintiff costs and fees incurred in bringing the motion. (R. at 78-79).

On June 17, 1994, within the ten days required by the Court, defendants filed a certificate of service with the Court, and provided limited and incomplete responses to the interrogatories. No documents were provided. (R. at 105-106.) On June 21, 1994, plaintiff's counsel wrote a letter to defendants' counsel requesting that documents be delivered before the deposition of defendant Padan scheduled for June 24, 1994. The letter also informed defendants that their answers to the interrogatories were inadequate, and stated why plaintiff felt entitled to more complete responses. (R. at 139.)

On June 24, 1994, as agreed by the parties through counsel in an earlier telephone call, counsel for plaintiff filed a notice continuing the deposition of defendant Padan in order to give defendants until July 5, 1994 to produce documents. (R. at

107.) Defendants failed to produce the documents as agreed. On July 7, 1994, 68 days after defendants' responses to discovery were due, plaintiff filed his second motion to compel, along with supporting memorandum. (R. at 109-139.)

Again, defendants did not respond. Although defendant Padan produced a few documents at his deposition on July 8, 1994, he did not produce all requested documents, and had still failed to answer the interrogatories. Defendant Craghead did not produce any discovery, or respond in any way to plaintiff's motion.

On July 20, 1994, 81 days after defendants' responses to discovery were due, plaintiff mailed a copy of a Notice to Submit for Decision on his motion to compel, and mailed a copy of the notice to defendants' counsel on July 20, 1994, which was filed with the circuit court on July 22, 1994. (R. at 140-141). On July 26, 1994, in a summary disposition, the circuit court granted plaintiff's motion and awarded attorneys' fees. The circuit court, in its minute entry, also ordered defendants to respond within 20 days or their answer would be stricken and a default judgment entered against them. (R. at 142.)

On August 2, 1994, 93 days after defendants' responses to plaintiff's discovery were due, plaintiff's counsel mailed to defendants' counsel a copy of a proposed order reflecting the circuit court's decision. The order states in relevant part:

Plaintiff's Motion to Compel is granted. Defendants are to provide their response to plaintiff's discovery within 20 days or defendants' answer will be deemed stricken and judgment entered.

(R. at 148.) The language contained in the order is almost identical to the minute entry of July 26, 1994, which states:

Attnys fees awarded/defendants respond w/in 20 days or answer stricken and judgment entered.

(R. at 142.)

On August 4, 1994, the circuit court entered the order, granting plaintiff's motion to compel and awarding fees, and ordering defendants to respond within 20 days or their Answers to plaintiff's Complaint would be stricken. (R. at 143-49.) On August 9, 1994, 100 days after their responses were due, defendants filed a motion objecting to the order. Defendants, however, still did not respond to the discovery (R. at 150-165.)

On August 19, 1994, ten days after defendants' objection to the order was filed, 23 days following the circuit court's minute entry, and following defendants' continued noncompliance with the court's order, plaintiff filed a responsive motion, seeking entry of judgment. (R. at 167-186). On August 24, 1994, 28 days after the minute entry, and 20 days after the entry of the order, defendants had still not complied with the court's order. On August 25, 1994, 149 days after the discovery was served, and 116 days after responses were due, the circuit court entered Judgment against defendants, striking defendants' answer, dismissing their counterclaim, and awarding plaintiff the amount of his lien, and his costs and fees. (R. at 187-191.)

On August 29, 1994, defendants' filed a motion to set aside the default. On September 9, 1994, defendants' filed a supplemental memorandum in support of their motion and a Notice to

Submit for Decision. (R. at 207-213.) The circuit court denied the motion in a minute entry dated September 12, 1994, which was formalized in an order filed September 23, 1994. (R. at 231, 234-366.) On October 12, 1994, defendants filed their Notice of Appeal. (R. at 237-238.)

C. Statement of Facts

As provided by Rule 24(b) of the Utah Rules of Appellate Procedure, plaintiff does not repeat the statement of facts offered by defendants. Plaintiff disputes the alleged burglary was the reason for defendants' failure to respond to discovery and comply with the circuit court's orders. Some additional facts contained in the record, are offered for consideration in resolving this appeal:

1. Defendants' own counsel admits his clients' failure to comply with discovery was due to their failure to cooperate with their counsel. (App. Br. at 6., n.4.)

2. The alleged burglary claimed by defendants as making response impossible took place well after the time defendants were required to respond, and after one motion to compel had been granted and a second motion filed. (R. at 164.)

3. There is no evidence in the record that the burglary was a reason for defendant Padan's failure to produce documents not on a computer disc, for defendant Craghead's failure to provide any documents, or for both defendants failure to answer interrogatories.

4. Defendants called plaintiff's counsel on July 26, 1994, allegedly to notify her of the burglary. When plaintiff returned defendant Padan's call, however, defendant Padan was unavailable. Despite the fact that plaintiff's counsel left a message, defendant Padan did not try to contact plaintiff's counsel again. (R. at 163.) Neither plaintiff or his counsel was notified of the burglary until August 4, 1994, over a week after the minute entry giving defendants twenty days to respond to discovery. (R. at 158.)

5. On August 4, 1994, on first learning of the burglary, plaintiff's counsel wrote defendants' counsel, asking for a list of documents believed stolen. Defendants' counsel did not respond. Add. C.

6. No evidence or argument was introduced at the trial court level respecting the action referred to in defendants' brief, Martin Bennett v. James Craghead, Aspen Construction, Michael A. Mower, et al, Civil No. 930904047CV. Furthermore, that action was decided by a default judgment based on pro se plaintiff Bennett's failure to respond to the Motion to Dismiss filed by Lynn Padan, aka Aspen Construction. Mower was a co-defendant with Craghead and Padan in that matter, and there is no order barring Bennett from collecting from Mower the value of the materials and labor provided as subcontractor for Mower, or releasing Mower from his obligation to Bennett, or releasing defendants Craghead and Padan from their obligations to co-defendant Mower.

SUMMARY OF THE ARGUMENT

A trial court has discretion, pursuant to Utah R. Civ. P. 37(b)(2)(C), to render a judgment by default against a party who fails to comply with discovery. Rule 55 Utah R. of Civ. P. provides a party seeking to set aside a default judgment must do so pursuant to Utah R. Civ. P. 60(b). It is then within the discretion of the trial court whether or not to grant the motion. A denial of a motion to set aside a default judgment will not be disturbed, even if there were some basis on which a default judgment could have been set aside, unless defendants can clearly prove an abuse of discretion.

The record shows defendants were granted numerous opportunities to respond to discovery, including extensions of time and two motions to compel. Defendants' failure to respond to discovery in this case was due to their own negligence, their failure to cooperate with their counsel, and their disregard of the judicial process. The record contains sufficient evidence to demonstrate that the circuit court did not abuse its discretion in entering a default judgment against defendants for their failure to respond

Nor did the circuit court abuse its discretion in denying defendants' motion to set aside the default pursuant to Utah R. Civ. P. 60(b). The evidence contained in the record supports the trial court's rulings. The record shows the burglary, which defendants claim made response impossible, took place over two months after the time defendants were required to respond, and

after one motion to compel had been granted and a second motion filed. In addition, the record contains no evidence the alleged burglary kept defendant Padan from providing documents not on the computer discs allegedly stolen, or was the reason for defendant Craghead's failure to produce any documents, or kept either of the defendants from answering interrogatories. At best, the burglary only offers a limited justification. Furthermore, there is no evidence either of the defendants' attempt to notify plaintiff of the burglary and make other arrangements concerning discovery until after the second motion was submitted for decision. Instead, the record shows a constant disregard and lack of diligence by defendants to comply with plaintiff's requests and the court's orders. Defendants failed to meet their burden of showing a clear abuse of discretion by the circuit court. The entry of judgment in favor of plaintiff should be affirmed, and plaintiff should be awarded his attorneys' fees and costs on appeal.

ARGUMENT

I. THE COURT DID NOT ABUSE ITS DISCRETION IN STRIKING DEFENDANTS' ANSWER AND ENTERING DEFAULT JUDGMENT FOR FAILURE TO COMPLY WITH DISCOVERY.

Utah R. Civ. P. 37(b)(2) states in relevant part:

If a party fails to obey an order to provide or permit discovery...the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:...(C) an order striking out pleadings or...rendering a judgment by default against the disobedient party.

(Add. A.)

"The entry of default judgment as a sanction based on failure to fulfill discovery obligations is within the discretion of the trial court." Shoney v. Memorial Estates, Inc., 790 P.2d 584, 585 (Utah App. 1990); Tucker Realty v. Nunley, 396 P.2d 410, 412 (Utah 1964). The sanction of default is justified "without reference to whether the unexcused failure to make discovery was wilful." W.W.& W. B. Gardner, Inc. v. Park West Village, Inc., 568 P.2d 734, 738 (Utah 1977).

A lower court's granting of a default judgment is presumed to be correct and shall not be disturbed "unless it is shown [the court's] action is without support in the record, or is a plain abuse of discretion." Amica Mutual Insurance Co. v. Shettler, 768 P.2d at, 961 (Utah App. 1989); Tucker Realty v. Nunley, 396 at 412. "That some basis may exist to set aside the default does not require the conclusion that the court abused its discretion in refusing to do so when the facts and circumstances support the refusal." Utah Dept. of Transportation v. Osguthorpe, 259 Utah Adv. Rep. 36, 39 (Utah 1995); citing Katz v. Pierce, 732 P.2d 92, 93 (Utah 1986).

In Shoney v. Memorial Estates, 790 P.2d 584, 586, this Court affirmed the district court's granting of a default judgment to defendants as a sanction against plaintiff for failure to respond to discovery served on plaintiffs less than two months before, finding the absence of a motion to compel did not require a finding of abuse of discretion because there was ample evidence in the record supporting the court's decision. Id. at 586.

In this case, there is also ample evidence in the record to support the trial court's decision to enter a default judgment. The defendants in this case were granted even more opportunities to respond than was the plaintiff in Shoney. Unlike in Shoney, defendants in this case had already been served with two motions to compel the requested discovery, and had been given notice of a twenty-day time period in which to respond, before judgment was entered. Defendants were given an excess of three additional months to respond to discovery. Within that time period, defendants were repeatedly reminded by plaintiff's counsel and by the Court of their obligations.

Furthermore, defendants' own counsel admits that "[b]etween March 28 and May 17 the defendants' counsel was unable to obtain his clients' cooperation to adequately respond to the Interrogatories and Request for Documents." (App. Br. at 6.)

Defendants' counsel also claims he did not file a response to plaintiff's first motion to compel "due to his clients not taking time to provide responses." (App. Br. at 6, n.4.)

The record also reflects that when defendants finally did file responses, the responses were insufficient, with several interrogatories left completely unanswered, and with no documents produced. The record also shows that, although plaintiff's counsel agreed to continue the deposition of Padan to allow defendants more time to produce the documents, defendants still failed to comply, requiring plaintiff to file a second motion to compel. (R. at 113, 111.)

The record also shows that defendants did not file any responsive pleading to either motion to compel. There is ample evidence of defendants' continual failure to comply. This Court should affirm the circuit court's decision granting judgment in favor of plaintiff.

II. THE COURT'S REFUSAL TO SET ASIDE THE DEFAULT JUDGMENT WAS NOT AN ABUSE OF DISCRETION; DEFENDANT FAILED TO MEET THE REQUIREMENTS OF UTAH R. CIV. P. 60(b).

Defendants also appeal the trial court's refusal to set aside the default judgment. Utah R. Civ. P. 60(b) states in relevant part:

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...or (7) any other reason justifying relief from the operation of the judgment.

(Add. A.)

In ruling on a motion to set aside a default judgment pursuant to Utah R. Civ. P. 60(b), the trial court is afforded broad discretion "and its determination will not be disturbed absent an abuse of discretion." Birch v. Birch, 771 P.2d 1114, 1117 (Utah App. 1989). The trial court's ruling in such cases will not be reversed by the appellate court "merely because the motion could have been granted." State by and Through Div. of Social Services v. Musselman, 667 P.2d 1053, 1055 (Utah 1983) (citations omitted).

On August 4, 1994, over three months after defendants' responses were due, the circuit court signed an order reflecting

it's minute entry of July 26, 1994, granting plaintiff's Motion to Compel and for fees. (R at 147-148; Add. B.)

Even though the circuit court had not yet entered a default judgment, but had only entered an Order granting fees and giving defendants 20 days to comply, on August 9, 1994, defendants filed an objection to the Order entered on August 4th pursuant to Utah R. Civ. P. 60(b)(1) and (7), stating that a burglary of defendant Padan's office on July 13, 1994, made compliance with the order impossible. (R. at 150-165.)

The record does not support defendants' assertion that all compliance was impossible. Even accepting the burglary prevented production of documents on computer disks, there is no mention on the police report that the documents not on a computer disk, such as architectural plans, defendant Padan's 1992 and 1993 day planners, and bills, bids and invoices submitted by subcontractors, were stolen. (R. at 164-165.) Nor does the alleged burglary of Padan's office offer an explanation why both Padan and Craghead failed to complete their answers to the interrogatories, or why Craghead failed to produce any documents. Defendants had had the discovery for over three months, and had already been in default for failure to respond for over two months, before the alleged burglary even took place. The record is also void of any adequate explanation for defendants' tardiness in notifying plaintiff of the alleged burglary, for failing

to produce to plaintiff's counsel a list of the documents allegedly stolen, or for failing to produce discovery during the various opportunities allowed by the circuit court.

Apart from burglary, the only other excuse offered by defendants for their continual failure to respond is the alleged illness of their counsel. As with the burglary, however, the alleged illness of counsel was not until July 20, 1995, almost three months after the responses were due. (R. at 155-156.)¹

Moreover, defendants' excuses were considered by the circuit court, and the circuit court determined these factors to be insignificant. Whether the defenses or excuses raised by defendants justified giving defendants even more time than the three-month extension already given was a decision within the discretion of the circuit court. It is well settled that it is the trial judge who is in the best position to make such a determination as whether to set aside a default judgment. Board of Education v. Cox, 384 P.2d 806, 808 (Utah 1963).

In the absence of an abuse of discretion, the Appellate Court "should not undertake to substitute [its] idea of what is proper for that of the trial court." G.M. Leasing Corp. v. Murray First Thrift and Loan Co, 534 P.2d 1244, 1245 (Utah 1975). The circuit court could choose not to find the burglary as a

¹ The defendants' delay can best be ascertained by reviewing the various deadlines and extensions given plaintiff. Discovery was served March 28, 1994, making responses due on Monday, May 1, 1994 (34 days). The Court's first order compelling discovery extended the deadline to June 19, 1994. The second order extended the deadline to August 24, 1994, 149 days after the discovery was mailed.

justification for setting aside the default, especially in the light of defendants' failure to provide sufficient evidence to excuse their near-total failure to respond. Defendants have failed to meet their burden of showing a clear abuse of discretion; the circuit court's entry of judgment in favor of plaintiff should be affirmed.

III. DEFENDANTS WERE GIVEN NOTICE OF THE TWENTY-DAY TIME LIMIT TO RESPOND TO DISCOVERY.

On August 24, 1994, the circuit court entered a default judgment in favor of plaintiff. Defendants filed a second motion pursuant to Rule 60(b)(1) and (7) seeking to set aside the default judgment. (R. at 192-202.) Again, the record supports the trial court's refusal to set aside the judgment.

In their motion, defendants claim there was no order prepared concerning the deadline for discovery, in contravention of Rule 4-504(1) of the Code of Judicial Administration. This contention, however, is contradicted by the record. Both the circuit court's minute entry and the order clearly and explicitly refer to the 20-day time limitation:

Plaintiff's Motion to Compel granted. Attnys
fees awarded. Defendants respond w/in 20
days or answer stricken and judgment entered

(Add. B; R. at 142;)

Plaintiff's Motion to Compel is granted. Defendants
are to respond within 20 days or defendants' answer
will be deemed stricken and judgment entered.

(Add. B; R. at 147-148.)

IV. DEFENDANTS' ARGUMENT ON CLAIM PRECLUSION WAS NOT ARGUED BELOW, IS NOT CONTAINED IN THE RECORD, AND IS NOT BEFORE THE COURT.

Defendants' first motion pursuant to Rule 60(b) seeks to set aside the default judgment, claiming impossibility due to burglary and excusable neglect due to illness of counsel. Their second motion seeks to set aside the judgment on the grounds that the procedural requirements of Rule 4-501 of the Code of Judicial Administration were not met.²

Defendants now seek to raise on appeal, a new argument--for the first time--that a default judgment granted defendant Padan in a different case in which Mower and defendant Craghead were co-defendants, bars plaintiff from recovery from defendants in this case.

Defendants did not raise this issue below and are precluded from raising it on appeal. Dansie v. Anderson Lumber Co., 878 P.2d 1155 (Utah App. 1994); Ringwood v. Foreign Autoworks, Inc., 786 P.2d 1350 (Utah App. 1990); Broberg v. Hess, 782 P.2d 198 (Utah App. 1989). Nor does the default judgment entered against the plaintiff of the other case in favor of defendants Craghead and Padan preclude plaintiff's claims against defendants in this

² Defendants also argued the Judgment should be set aside because they fully complied. (R. at 159.) Plaintiff disputed this. (R. at 216-17.) Furthermore, "a party has a certain specified time to answer; if he does not, he has failed to answer, and the opposing party may appropriately invoke the sanctions." Shoney v. Memorial Estates, Inc., 790 P.2d at 586 (citations omitted). See also W.W. & W.B. Gardener v. Park W. Village, 568 P.2d at 737: "once the motions for sanctions has been filed, the opposing party may not preclude their imposition by making a belated response...."

action before the court.³ Nor are defendants freed from their legal obligations and liabilities to produce discovery and comply with the Court's orders in this case. In addition to being barred from being considered for not being raised below, defendant's reliance on the other case is without merit, for it simply has no bearing on plaintiff's rights or defendants' obligations in this case; the circuit court's granting of judgment in favor of plaintiff should be affirmed.

CONCLUSION

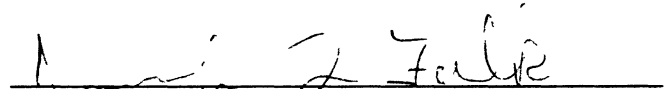
The circuit court's granting of a judgment by default in favor of plaintiff pursuant to Utah R. Civ. P. 37(b)(2) against defendants for their continued failure to comply with discovery orders is supported by the record and was not an abuse of discretion. Defendants' failure to respond arose despite the entry of two orders compelling discovery and the lapse of 149 days between the serving of the discovery and the order. The circuit court's denial of defendants' motions to set aside the judgment pursuant to Rule 60(b)(1) and (7) is also supported by the record and does not constitute an abuse of discretion.

³ Claim preclusion only applies if the same issue was litigated on the merits in a previous case that resulted in a final judgment. State Office of Recovery Services v. V.G.P., 845 P.2d 944 (Utah App. 1992). In the Bennett case, relied on by defendants, the issues on appeal in this case were never litigated; the court awarded defendants Craghead and Padan default for plaintiff's failure to file any pleadings after his complaint, and for failing to respond to defendant Craghead and Padan's Motion to Dismiss. See also State in Interest of J.J.T., 887 P.2d 161 (Utah App. 1994); Madsen v. Borthick, 789 P.2d 245 (Utah 1988) (issue preclusion is only available if the issue was fully, fairly and competently litigated in the first action).

Defendants have failed to meet their burden of demonstrating an abuse of discretion by the circuit court in either instance. Defendants' filing of the appeal has required plaintiff to incur further fees in supporting its position. The Court should affirm the decision of the circuit court entering judgment in favor of defendant, and the decision denying defendants' motions to set aside the judgment, and should award costs and fees to plaintiff.

Respectfully submitted this 18th day of April, 1995.

WINDER & HASLAM, P.C.



JENNIFER L. FALK
Attorneys for Plaintiff/Appellee



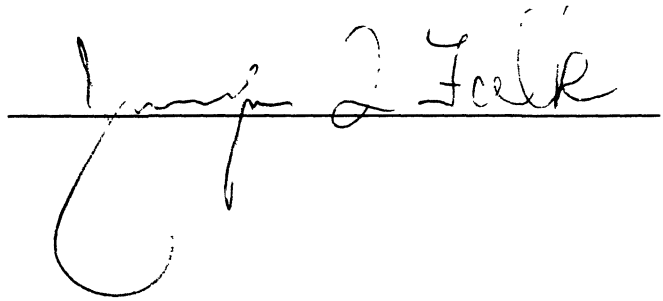
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing BRIEF OF PLAINTIFF/APPELLEE, MICHAEL A. MOWER was mailed, postage prepaid, via U.S. Mail, this 18th day of April, 1995, to:

Attorneys for Defendants/Appellants:

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A handwritten signature, likely of Joseph M. Chambers, is written over a horizontal line. The signature is in cursive and appears to read "Joseph M. Chambers".

FILED

APR 20 1995

UTAH COURT OF APPEALS

COURT OF APPEALS

MICHAEL A. MOWER,	:	
	:	
Plaintiff/Appellee,	:	Case No. 940682-CA
	:	
vs.	:	
	:	
JAMES D. CRAGHEAD, F. LYNN	:	
PADAN aka ASPEN	:	
CONSTRUCTION, INC., MARTIN	:	
BENNETT, JOHN and JANE DOES	:	
NOS. 1 through 20,	:	Priority 15
	:	
Defendants/Appellants.	:	

CERTIFICATE OF SERVICE OF CORRECTED BRIEF
OF PLAINTIFF/APPELLEE, MICHAEL A. MOWER

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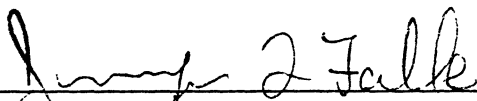
FILED

APR 10 1968

I hereby certify that I caused an original Corrected Brief with original signature and a copy of the same to be hand-delivered to the Utah Court of Appeals at 230 South 500 East, Suite 400, Salt Lake City, Utah 84102 on this 20th day of April, 1995, pursuant to a letter dated April 19, 1995, from the Utah Court of Appeals.

Respectfully submitted this 20th day of April, 1995.

WINDER & HASLAM, P.C.


JENNIFER L. FALK
Attorneys for Plaintiff/Appellee

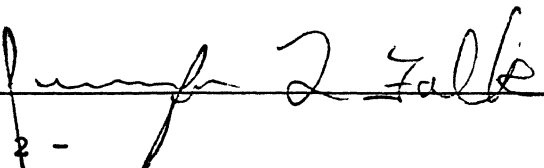
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing CERTIFICATE OF SERVICE OF CORRECTED BRIEF OF PLAINTIFF/APPELLEE, MICHAEL A. MOWER was mailed, postage prepaid, via U.S. Mail, this 20th day of April, 1995, to:

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- 2 -

ADDENDUM

COLLATERAL REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d Depositions and Discovery §§ 314 to 325.

C.J.S. — 27 C.J.S. Discovery §§ 88 to 110.

A.L.R. — Continuance sought to secure testimony of absent witness in civil case, admissions to prevent, 15 A.L.R.3d 1272.

Party's duty, under Federal Rule of Civil Procedure 36(a) and similar state statutes and rules, to respond to request for admission of

facts not within his personal knowledge, 20 A.L.R.3d 756.

Formal sufficiency of response to request for admissions under state discovery rules, 8 A.L.R.4th 728.

Permissible scope, respecting nature of inquiry, of demand for admissions under modern state civil rules of procedure, 42 A.L.R.4th 489.

Key Numbers. — Discovery = 121 to 129.

Rule 37. Failure to make or cooperate in discovery; sanctions.

(a) **Motion for order compelling discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) **Appropriate court.** An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) **Motion.** If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) **Evasive or incomplete answer.** For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) **Award of expenses of motion.** If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) **Failure to comply with order.**

(1) **Sanctions by court in district where deposition is taken.** If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) **Sanctions by court in which action is pending.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) an order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in Paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) **Expenses on failure to admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) **Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under Paragraphs (A), (B), and (C) of Subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless

1106 (Utah Ct. App. 1990); *City Consumer Serv., Inc. v. Peters*, 815 P.2d 234 (Utah 1991); *Cornish Town v. Koller*, 817 P.2d 305 (Utah 1991); *Town of Manila v. Broadbent Land Co.*, 818 P.2d 2 (Utah 1991); *Peterson v. Peterson*, 818 P.2d 1305 (Utah Ct. App. 1991); *Quinn v. Quinn*, 830 P.2d 282 (Utah Ct. App. 1992); *King v. Searle Pharmaceuticals, Inc.*, 832 P.2d 858 (Utah 1992); *Watson v. Watson*, 837 P.2d 1

(Utah Ct. App. 1992); *J.H. ex rel. D.H. v. West Valley City*, 840 P.2d 115 (Utah 1992); *Ledfors v. Emery County Sch. Dist.*, 849 P.2d 1162 (Utah 1993); *Ong Int'l (U.S.A.), Inc. v. 11th Ave. Corp.*, 850 P.2d 447 (Utah 1993); *Shaw v. Layton Constr. Co.*, 854 P.2d 1033 (Utah Ct. App. 1993); *Brumley v. Utah State Tax Comm'n*, 230 Utah Adv. Rep. 13 (Utah 1994).

COLLATERAL REFERENCES

Brigham Young Law Review. — Multiple Claims Under Rule 54(b): A Time for Reexamination?, 1985 B.Y.U. L. Rev. 327.

Am. Jur. 2d. — 5 Am. Jur. 2d Appeal and Error § 1009 et seq.; 20 Am. Jur. 2d Costs §§ 14, 26 to 36, 87 et seq.; 46 Am. Jur. 2d Judgments § 1.

C.J.S. — 20 C.J.S. Costs § 1 et seq.; 49 C.J.S. Judgments § 1.

A.L.R. — Attorney's personal liability for expenses incurred in relation to services for client, 15 A.L.R.3d 531; 66 A.L.R.4th 256.

Effect on compensation of architect or building contractor of express provision in private building contract limiting the cost of the building, 20 A.L.R.3d 778.

Recoverability under property insurance or insurance against liability for property damage of insured's expenses to prevent or mitigate damages, 33 A.L.R.3d 1262.

Dismissal of plaintiff's action as entitling defendant to recover attorney's fees or costs as "prevailing party" or "successful party," 66 A.L.R.3d 1087.

Who is the "successful party" or "prevailing party" for purposes of awarding costs where both parties prevail on affirmative claims, 66 A.L.R.3d 1115.

Continuance of civil case as conditioned upon applicant's payment of costs or expenses incurred by other party, 9 A.L.R.4th 1144.

Running of interest on judgment where both parties appeal, 11 A.L.R.4th 1099.

Allocation of defense costs between primary and excess insurance carriers, 19 A.L.R.4th 107.

Authority of trial judge to impose costs or other sanctions against attorney who fails to appear at, or proceed with, scheduled trial, 29 A.L.R.4th 160.

Allowance of attorneys' fees in mandamus proceedings, 34 A.L.R.4th 457.

Retrospective application and effect of state statute or rule allowing interest or changing rate of interest on judgments or verdicts, 41 A.L.R.4th 694.

Obduracy as basis for state-court award of attorneys' fees, 49 A.L.R.4th 825.

Modern status of state court rules governing entry of judgment on multiple claims, 80 A.L.R.4th 707.

Recoverability of cost of computerized legal research under 28 USC § 1920 or Rule 54(d), Federal Rules of Civil Procedure, 80 A.L.R. Fed. 168.

Modern status of Federal Civil Procedure Rule 54(b) governing entry of judgment on multiple claims, 89 A.L.R. Fed. 514.

Key Numbers. — Appeal and Error ⇐ 24 to 135; Costs ⇐ 78 et seq., 195 et seq., 221 et seq.; Judgment ⇐ 1.

Rule 55. Default.

(a) Default.

(1) **Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter his default.

(2) **Notice to party in default.** After the entry of the default of any party, as provided in Subdivision (a)(1) of this rule, it shall not be necessary to give such party in default any notice of action taken or to be taken or to serve any notice or paper otherwise required by these rules to be served on a party to the action or proceeding, except as provided in Rule 5(a), in Rule 58A(d) or in the event that it is necessary for the court to conduct a hearing with regard to the amount of damages of the nondefaulting party.

(b) Judgment. Judgment by default may be entered as follows:

(1) **By the clerk.** When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, and the defendant has been personally served otherwise than by publication or by personal service outside of this state, the clerk upon request of the plaintiff shall enter judgment for the amount due and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) **By the court.** In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

(c) **Setting aside default.** For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) **Plaintiffs, counterclaimants, cross-claimants.** The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) **Judgment against the state or officer or agency thereof.** No judgment by default shall be entered against the state of Utah or against an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.
(Amended effective Sept. 4, 1985.)

Compiler's Notes. — This rule is similar to Rule 55, F.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Damages.
Divorce action.
Failure to plead.
Judgment.
—Conduct of counsel.
—Default entry necessary.
—Failure to follow rule.
—Hearing on merits.
—Punitive damages.
Notice.
Setting aside default.
—Collateral attack.
—Direct attack.
—Discretion of court.
—Grounds.
—Excusable neglect.
—Judicial attitude.
—Movant's duty.
—Setting aside proper.
Time for appeal.
Cited.

Damages.

A default judgment establishes, as a matter of law, that defendants are liable to plaintiff as to each cause of action alleged in the complaint. Nevertheless, it is still incumbent upon the nondefaulting party to establish by competent evidence the amount of recoverable damages and costs he claims. *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950 (Utah Ct. App. 1989).

There is no right to a jury trial on the issue of damages once default has been entered. *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950 (Utah Ct. App. 1989).

Divorce action.

Defendant who failed to file answer in divorce action was not entitled to hearing or notice before entry of default divorce decree even

though 90-day statutory period had not elapsed. *Heath v. Heath*, 541 P.2d 1040 (Utah 1975).

Failure to plead.

In an action for modification of the custody provision in a divorce decree, it was appropriate for the trial court to rule on appellee's petition, absent any responsive pleading, and to accept the allegations in the petition as true in resolving the threshold requirement of whether appellant's circumstances had materially changed; however, it does not follow that appellee's petition entitled her to relief. A trial court asked to render a judgment by default must first conclude that the uncontroverted allegations of an applicant's petition are, on their face, legally sufficient to establish a valid claim against the defaulting party. *Stevens v. Collard*, 837 P.2d 593 (Utah Ct. App. 1992).

Judgment.

Judgments by default are not favored by the courts nor are they in the interest of justice and fair play. *Heathman v. Fabian & Clendenin*, 14 Utah 2d 60, 377 P.2d 189 (1962).

—Conduct of counsel.

When defendant's counsel was 27 minutes late on morning trial was commenced because he was unable to obtain from the Supreme Court a writ of prohibition to prevent the holding of the trial on that day due to absence of defense witnesses, the trial court erred in granting a default judgment to plaintiff and refusing to allow defense counsel to participate in the proceedings or challenge plaintiff's evidence, notwithstanding any ill-advised, irritating or contemptuous conduct from defense counsel during the action, since the law prefers that a case be tried on its merits and the parties litigant should not be made to suffer for the misconduct of their counsel. *McKean v.*

Absence of judge from courtroom during trial of civil case, 25 A.L.R.3d 637.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial, 64 A.L.R.3d 126.

Amendment, after expiration of time for filing motion for new trial, in civil case, of motion made in due time, 69 A.L.R.3d 845.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties, 9 A.L.R.4th 1041.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 38 A.L.R.4th 1170.

Jury trial waiver as binding on later state civil trial, 48 A.L.R.4th 747.

Court reporter's death or disability prior to

transcribing notes as grounds for reversal or new trial, 57 A.L.R.4th 1049.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages — modern cases, 5 A.L.R.5th 875.

Excessiveness or adequacy of compensatory damages for personal injury to or death of seaman in actions under Jones Act (46 USCS Appx. § 688) or doctrine of unseaworthiness — modern cases, 96 A.L.R. Fed. 541.

Excessiveness or adequacy of awards of damages for personal injury or death in actions under Federal Employers' Liability Act (45 USCS §§ 51 et seq.) — modern cases, 97 A.L.R. Fed. 189.

Key Numbers. — New Trial ⇐ 13 et seq., 110, 116.

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) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) 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 (7) 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), (3), or (4), 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.

Compiler's Notes. — This rule is similar to Rule 60, F.R.C.P.

Cross-References. — Fee for filing motion to set aside judgment, § 21-1-5.

NOTES TO DECISIONS

ANALYSIS

"Any other reason justifying relief."
—Default judgment.
—Impossibility of compliance with order.
—Incompetent counsel.
—Lack of due process.
—Merits of case.

—Mistake or inadvertence.
—Mutual mistake.
—Real party in interest.
Appeals.
Clerical mistakes.
—Computation of damages.
—Correction after appeal.
—Date of judgment.

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FILED

JUN 13 1994

Third Circuit Court
Salt Lake Department

IN THE THIRD CIRCUIT COURT, STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

MICHAEL A. MOWER,
Plaintiff,

vs.

JAMES D. CRAGHEAD, F. LYNN
PADAN aka ASPEN
CONSTRUCTION, INC., MARTIN
BENNETT, JOHN and JANE DOES
NOS. 1 through 20,
Defendants.

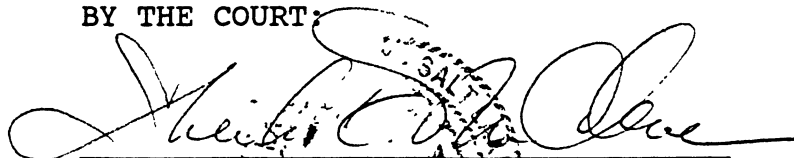
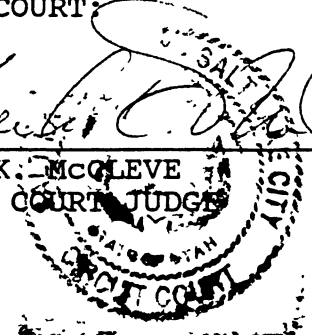
ORDER TO COMPEL DISCOVERY

Civil No. 930009062 CV
Judge Sheila K. McCleve

Based upon the Motion of plaintiff Michael A. Mower, pursuant to Utah R.Civ.P. 37(a) and Utah Code Jud. Admin. 4-502, for an Order compelling defendants to respond to the Plaintiff's First Set of Interrogatories to Defendants James D. Craghead and F. Lynn Padan and Plaintiff's First Request for Production of Documents to Defendants James D. Craghead and F. Lynn Padan, and good cause appearing therefor, IT IS HEREBY ORDERED that defendants James D. Craghead and F. Lynn Padan have ten days within which to answer the said discovery requests. The Court further ORDERS that plaintiff may be awarded his costs and attorney's fees incurred in connection with this Motion to Compel.

DATED this 27th day of June, 1994.

BY THE COURT:

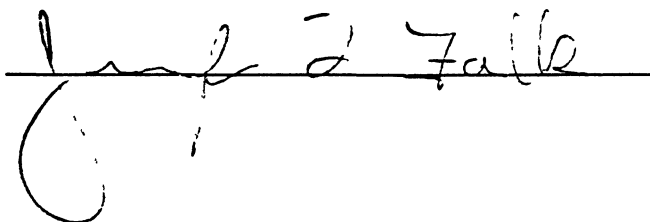

SHEILA K. MCGLEVE
CIRCUIT COURT JUDGE


CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing ORDER TO COMPEL DISCOVERY was mailed, postage prepaid, via U.S. Mail, this 17 day of May, 1994, to:

Attorneys for Defendants Craghead and Padan:

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WINDER & HASLAM, P.C.
Attorneys for Plaintiff
175 West 200 South #4000
P. O. Box 2668
Salt Lake City, Utah 84110-2668
Telephone: (801) 322-2222

FILED
CIVIL DIVISION
CLERK 3RD CIRCUIT COURT
SALT LAKE COUNTY
APR 18 PM 3 16

IN THE THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

MICHAEL A. MOWER,	:	
	:	
Plaintiff,	:	MEMORANDUM IN SUPPORT OF
	:	PLAINTIFF'S MOTION TO
	:	COMPEL DISCOVERY
vs.	:	
	:	
JAMES D. CRAGHEAD, F. LYNN	:	Civil No. 930009062 CV
PADAN aka ASPEN	:	Judge Sheila K. McCleve
CONSTRUCTION, INC., MARTIN	:	
BENNETT, JOHN and JANE DOES	:	
NOS. 1 through 20,	:	
	:	
Defendants.	:	

Plaintiff, by and through his counsel of record, hereby respectfully submits this Memorandum in Support of his Motion to Compel Discovery.

FACTS

On March 28, 1994, plaintiff submitted to defendants the Plaintiff's First Set of Interrogatories and Request for Production of Documents. A true and correct copy of plaintiff's discovery requests and the corresponding service are attached hereto as Exhibit "A".

The defendant's responses were due on April 28, 1994, however, defendants failed to respond by that date. On May 10, 1994,

counsel for plaintiff sent the letter to defendants' counsel requesting the discovery responses. A true and correct copy of this letter is attached hereto as Exhibit "B". No responses to the letter or the discovery have been received.

Plaintiff has received no response to his discovery requests despite the aforementioned letter.

ARGUMENT

Rule 37 of the Utah R. Civ. P. provides that a party may apply for an order compelling discovery if a party fails to answer interrogatories submitted under Rule 33 or allow inspection pursuant to a request made under Rule 34.


Furthermore, Rule 37(d) provides that if a party fails to serve answers or objections to interrogatories submitted under Rule 33, the court may make such orders as are just. Under Rule 37(d) the court may order the party failing to respond to interrogatories or the attorney advising the party, or both, to pay reasonable expenses, including attorney's fees, caused by the failure.

CONCLUSION

Based on the foregoing, plaintiff respectfully requests the Court to enter an order requiring defendants to respond to plaintiff's discovery requests. Plaintiff also requests the Court to award reasonable costs and attorney's fees incurred by plaintiff in bringing this Motion to Compel.

DATED this 17 day of May, 1994.

WINDER & HASLAM, P.C.





LINCOLN W. HOBBS
JENNIFER L. FALK
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL DISCOVERY was mailed, postage prepaid, via U.S. Mail, this 17 day of May, 1994, to:

Attorneys for Defendants Craghead and Padan:
Joseph M. Chambers
PRESTON & CHAMBERS
31 Federal Avenue
Logan, Utah 84321





2578\001\compel.mem

THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

DISPOSITION SUMMARY

CASE # 930009062 cv

THE _____ Plaintiff's _____ Defendant's

MOTION _____ to Quash _____

_____ for Judgment on the Pleadings

_____ for Summary Judgment

☒ to Compel _____

_____ to Set Aside _____

_____ to Dismiss _____

IS

☒ granted _____ denied

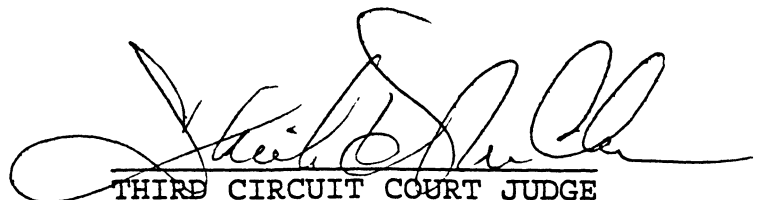
COMMENTS

Attys fees awarded
to respond within 10 days or answer
to trial & judgment entered

☒ Plaintiff _____ Defendant _____ to prepare order

_____ Set for hearing

Date 7-26-94


THIRD CIRCUIT COURT JUDGE

LINCOLN W. HOBBS, Esq. #4846
JENNIFER L. FALK, Esq. #4568
WINDER & HASLAM, P.C.
Attorneys for Plaintiff
175 West 200 South #4000
P. O. Box 2668
Salt Lake City, Utah 84110-2668
Telephone: (801) 322-2222

IN THE THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

MICHAEL A. MOWER,	:	
	:	
Plaintiff,	:	ORDER GRANTING ATTORNEY'S
	:	FEEs
	:	
vs.	:	
	:	
JAMES D. CRAGHEAD, F. LYNN	:	Civil No. 930009062 CV
PADAN aka ASPEN	:	Judge Sheila K. McCleve
CONSTRUCTION, INC., MARTIN	:	
BENNETT, JOHN and JANE DOES	:	
NOS. 1 through 20,	:	
	:	
Defendants.	:	

On July 7, 1994, plaintiff Michael Mower filed a Motion to Compel and For Sanctions, along with supporting memorandum, seeking to compel responses to certain interrogatories and for documents pursuant to discovery served by mail on defendants on March 28, 1994, and a Motion to Compel filed on May 18, 1994.

On July 22, 1994, plaintiff filed a Notice to Submit for Decision. There being no responsive pleading filed by defendants and the time for filing such responses having now run,

The Court, having reviewed the file, and for good cause appearing, enters the following ORDER:

Plaintiff's Motion to Compel is granted. Defendants are to provide their response to plaintiff's discovery within 20 days or defendants' answer will be deemed stricken and judgment entered. Plaintiff is awarded \$ 2000 attorneys fees, against defendants for failure to provide requested discovery.

IT IS SO ORDERED

DATED this 24 day of August, 1994

BY THE COURT:

JUDGE SHEILA R. McCLEVE
CIRCUIT COURT JUDGE
CIRCUIT COURT
SALT LAKE

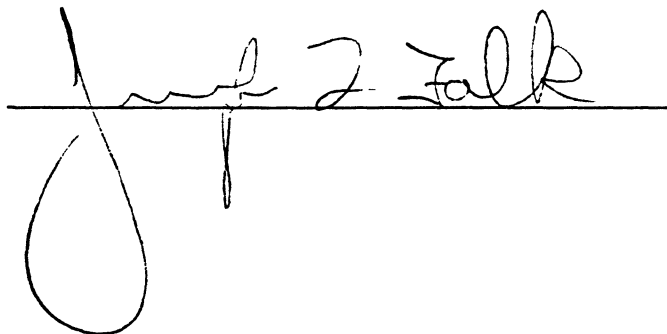
2578\001\ATTYFEE.ORD

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing ORDER GRANTING ATTORNEY'S FEES was mailed, postage prepaid, via U.S. Mail, this 2 day of August, 1994, to:

Attorneys for Defendants Craghead and Padan:

Joseph M. Chambers
PRESTON & CHAMBERS
31 Federal Avenue
Logan, Utah 84321

A handwritten signature in cursive script, appearing to read "Joseph M. Chambers", is written over a horizontal line. Below the line, there is a large, stylized loop that extends downwards.

LINCOLN W. HOBBS, Esq. #4846
JENNIFER L. FALK, Esq. #4568
WINDER & HASLAM, P.C.
Attorneys for Plaintiff
175 West 200 South #4000
P. O. Box 2668
Salt Lake City, Utah 84110-2668
Telephone: (801) 322-2222

IN THE THIRD CIRCUIT COURT, STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

MICHAEL A. MOWER,	:	
	:	DEFAULT CERTIFICATE
Plaintiff,	:	
	:	
vs.	:	
	:	
JAMES D. CRAGHEAD, F. LYNN	:	Civil No. 930009062 CV
PADAN aka ASPEN	:	Judge Sheila K. McCleve
CONSTRUCTION, INC., MARTIN	:	
BENNETT, JOHN and JANE DOES	:	
NOS. 1 through 20,	:	
	:	
Defendants.	:	

In this action, the defendants, James D. Craghead and F. Lynn Padan aka Aspen Construction, Inc., having been regularly served with process, and having failed to appear and answer plaintiff's discovery requests on file herein, and the time allowed by law for answering having expired, the default of said defendants, James D. Craghead and F. Lynn Padan aka Aspen Construction, Inc., in the premises is hereby duly entered according to law.

ATTEST my hand, and the seal of said Court, this 24 day
of August, 1994.

BY THE COURT

Clerk

CERTIFICATE OF SERVICE

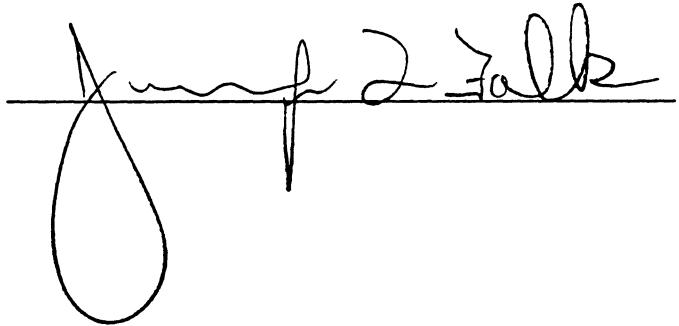
I hereby certify that a true and correct copy of the above and foregoing DEFAULT CERTIFICATE was mailed, postage prepaid, via U.S. Mail, this 19 day of August, 1994, to:

Attorneys for Defendants Craghead and Padan:

Joseph M. Chambers
PRESTON & CHAMBERS
31 Federal Avenue
Logan, Utah 84321

Courtesy copy hand delivered to:

Honorable Sheila K. McCleve
Circuit Court Judge
451 South 200 East
Salt Lake City, Utah 84111

A handwritten signature in cursive script, appearing to read "Joseph M. Chambers", is written over a horizontal line. The signature is fluid and stylized, with a large loop at the end.

FILED

AUG 25 1994

Third Circuit Court
Salt Lake Department

LINCOLN W. HOBBS, Esq. #4846
JENNIFER L. FALK, Esq. #4568
WINDER & HASLAM, P.C.
Attorneys for Plaintiff
175 West 200 South #4000
P. O. Box 2668
Salt Lake City, Utah 84110-2668
Telephone: (801) 322-2222

IN THE THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

MICHAEL A. MOWER,
Plaintiff,

vs.

JAMES D. CRAGHEAD, F. LYNN
PADAN aka ASPEN
CONSTRUCTION, INC., MARTIN
BENNETT, JOHN and JANE DOES
NOS. 1 through 20,
Defendants.

JUDGMENT

Civil No. 930009062 CV
Judge Sheila K. McCleve

On July 27, 1994, the Court ruled in plaintiff's favor, granting plaintiff's Motion to Compel and for Sanctions, granting plaintiff's request for attorney's fees. In so ruling, the Court ordered defendants to produce the requested discovery by no later than 20 days from the date of the Court's ruling, or judgment would be entered in favor of plaintiff.

The defendants having failed to comply with the previous order of the Court, and based on the pleadings on file, and for good cause appearing, the Court enters Judgment against defendants and in favor of plaintiff as follows:

1. The principal amount of \$13,515.58, plus prejudgment interest from August 16, 1992.

2. Dismissing defendants' Counterclaim herein.

3. Attorney's fees in the amount of \$4,041.00 determined by the Court based on submission of Affidavit by plaintiff's counsel.

4. Plaintiff's costs incurred herein in the amount of \$594.35.


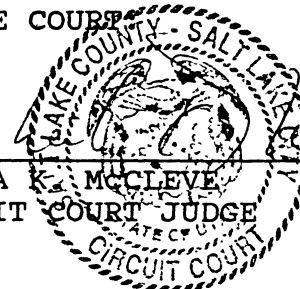

5. Entry of Judgment on plaintiff's cause of action for foreclosure will be stayed.

6. It is further ordered, pursuant to Rule 4-505 Code of Judicial Administration that this Judgment shall be augmented in the amount of reasonable costs and attorney's fees expended in collecting said Judgment by execution or otherwise as shall be established by affidavit.

IT IS SO ORDERED.

DATED this 24 day of AUGUST, 1994.

BY THE COURT

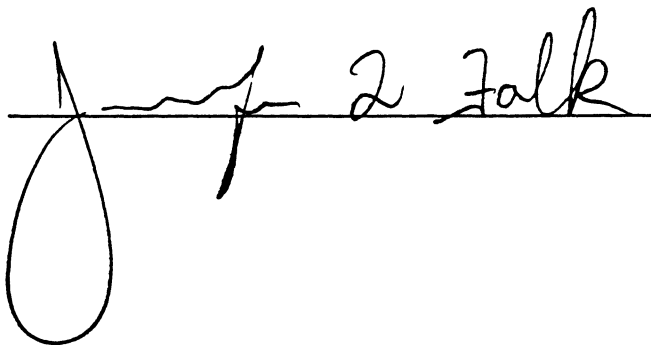
  
SHEILA K. MCCLEVE
CIRCUIT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing JUDGMENT as mailed, postage prepaid, via U.S. Mail, this 19 day of August, 1994, to:

Attorneys for Defendants Craghead and Padan:

Joseph M. Chambers
PRESTON & CHAMBERS
31 Federal Avenue
Logan, Utah 84321

A handwritten signature in cursive script, appearing to read "Joseph M. Chambers", is written over a horizontal line. The signature is fluid and stylized, with a large loop at the beginning and a long, sweeping tail.

2578\001\judgment

THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

DISPOSITION SUMMARY

CASE # 930009062

THE _____ Plaintiff's _____ Defendant's
MOTION _____ to Quash _____
_____ for Judgment on the Pleadings
_____ for Summary Judgment
_____ to Compel _____
_____ to Set Aside (Titled Objection to Order's
Motion for Relief)
_____ to Dismiss _____

IS _____ granted _____ denied

COMMENTS _____

_____ Plaintiff _____ Defendant to prepare order
_____ Set for hearing
Date 9-12-94

[Signature]
THIRD CIRCUIT COURT JUDGE

0020

LINCOLN W. HOBBS, Esq. #4846
JENNIFER L. FALK, Esq. #4568
WINDER & HASLAM, P.C.
Attorneys for Plaintiff
175 West 200 South #4000
P. O. Box 2668
Salt Lake City, Utah 84110-2668
Telephone: (801) 322-2222

IN THE THIRD CIRCUIT COURT, STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

MICHAEL A. MOWER,	:	
	:	ORDER
Plaintiff,	:	
	:	
vs.	:	
	:	
JAMES D. CRAGHEAD, F. LYNN	:	Civil No. 930009062 CV
PADAN aka ASPEN	:	Judge Sheila K. McCleve
CONSTRUCTION, INC., MARTIN	:	
BENNETT, JOHN and JANE DOES	:	
NOS. 1 through 20,	:	
	:	
Defendants.	:	

On July 17, 1994, the Court granted plaintiff's Motion to Compel and for Attorney's Fees and on August 4, 1994, entered an Order reflecting its earlier ruling.

On August 24, 1994, the Court entered default judgment in favor of plaintiff against defendants awarding plaintiff the principal amount due, plus costs and fees for a total judgment of \$18,150.93. Defendants filed an "Objection to Proposed Order (Default Judgment), Motion to Stay Entry of Default Judgment and in the Alternative Motion for Relief from Order and/or for a New Trial," along with supporting memorandum and affidavits on August

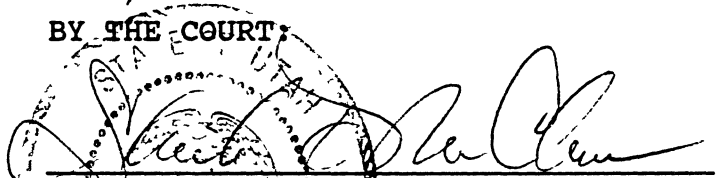
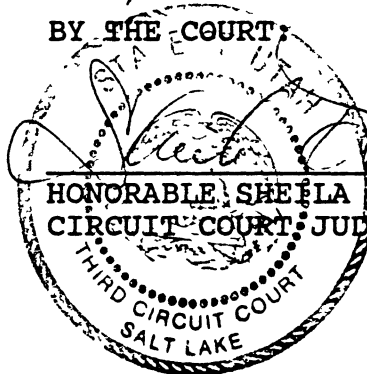
31, 1994, to which plaintiff filed a Response, defendants filed a Reply, and plaintiff filed a Supplemental Response.

The Court, having reviewed the record and the pleadings filed herein, and for good cause appearing, affirms its ruling of September 14, 1994 and DENIES defendants' Objection to Proposed Order (Default Judgment), Motion to Stay Entry of Judgment, and in the Alternative Motion for Relief from Order and/or for a New Trial.

IT IS SO ORDERED.

DATED this 22nd day of September, 1994.

BY THE COURT:

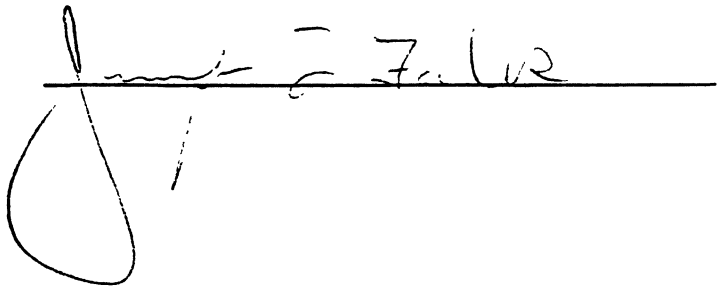

HONORABLE SHEILA K. MCCLEVE
CIRCUIT COURT JUDGE


CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing ORDER was mailed, postage prepaid, via U.S. Mail, this 19th day of September, 1994, to:

Attorneys for Defendants Craghead and Padan:

Joseph M. Chambers
PRESTON & CHAMBERS
31 Federal Avenue
Logan, Utah 84321

A handwritten signature, likely of Joseph M. Chambers, is written over a horizontal line. The signature is cursive and includes the name 'Chambers' and possibly 'J.M.' or similar initials.

2578\001\order

ATTORNEYS
AT
LAW

WINDER & HASLAM
A PROFESSIONAL CORPORATION

SUITE 4000
175 WEST 200 SOUTH
P.O. BOX 2668
SALT LAKE CITY, UTAH 84110-2668
FAX (801) 532-3706
(801) 322-2222

JENNIFER L. FALK

August 4, 1994

Joseph M. Chambers
PRESTON & CHAMBERS
31 Federal Avenue
Logan, Utah 84321

VIA FACSIMILE #752-3556

Re: Michael Mower v. James D. Craghead, et al

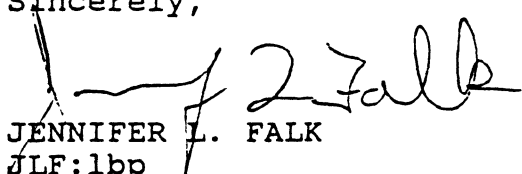
Dear Joe:

I have a phone message dated August 4, 1994, at 9:33 a.m. regarding "Lynn Padan's business burglarized-July 13th" and was further informed that you wanted me to know as to the reason we had not received responses to our discovery requests. However, our discovery was originally sent on March 28, 1994. Responses were due 30 days later and, even giving grace time for mailing, should have been filed the first of May.

When we did receive responses, they were incomplete and we filed a Motion to Compel on July 6, 1994, after a letter dated June 21 and phone calls to you requesting that the responses be supplemented. No documents have been produced. A copy of my June 21 letter is enclosed. You have not explained how the alleged burglary of Mr. Padan's business on July 13 affects your ability to respond; unless you are alleging a burglar stole all of the documents we requested. Even so, you still have not responded to certain of our interrogatory requests. Nor do I see how the burglary would affect Craghead's ability to respond.

As you know, our Motion for Sanctions was granted July 27, 1994 and you have twenty days from that date in which to fully respond to the discovery requests or judgment will be granted. We expect the answers to our interrogatories, along with all documents you do have in your possession by no later than August 17, 1994, the date designed by the Court. In addition, please send a list of those documents you allege you cannot deliver us due to the burglary.

Sincerely,


JENNIFER L. FALK
JLF:lbp

■0324