

2006

Kirkpatrick MacDonald v. Michael Nielsen : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KIRKPATRICK MACDONALD,

Plaintiff and Appellee,

-vs-

MICHAEL NIELSEN,

Defendant and Appellant.

Case No. 20060177-CA

[Consolidated with
Case No. 20060614]

District Court Case No. 040500403

OPENING BRIEF OF APPELLANT

APPEAL FROM THE RULING AND ORDER, DATED JANUARY 10, 2006;
THE JUDGMENT, DATED JANUARY 24, 2006; AND THE
RULING AND ORDER, DATED JUNE 2, 2006
OF THE HONORABLE BRUCE C. LUBECK

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TABLE OF CONTENTS

	<u>Page</u>
JURISDICTION	1
STATEMENT OF ISSUES PRESENTED ON APPEAL	1
APPLICABLE STATUTES AND RULES	2
STATEMENT OF THE CASE	2
A. Nature of the Case.	2
B. Course of Proceedings.	2
C. Disposition By Trial Court.	3
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	8
ARGUMENT	9
I. APPLICABLE STANDARD	9
II. THE TRIAL COURT ERRED WHEN IT HELD THERE WERE NO GENUINE ISSUES OF MATERIAL FACT IN ITS ORDER GRANTING SUMMARY JUDGMENT. .	10
CONCLUSION	18
CERTIFICATE OF SERVICE	20

ADDENDUM:

Ruling and Order, dated January 10, 2006

Judgment, dated January 24, 2006

Ruling and Order, dated June 2, 2006

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases:</u>	
<i>Alder v. Bayer Corp.</i> , 2002 UT 115, 61 P.3d 1068	10
<i>Apache Tank Lines, Inc. v. Cheney</i> , 706 P.2d 614 (Utah 1985)	10
<i>Aquagen Int'l., Inc. v. Calrae Trust</i> , 972 P.2d 411 (Utah 1998)	11
<i>Dementas v. Estate of Tallas, by and Through First Security Bank</i> , 764 P.2d 628 (Utah 1988)	17
<i>Equitable Life & Casualty Ins. Co. v. Ross</i> , 849 P.2d 1187 (Utah Ct. App. 1993)	11
<i>Harmon City, Inc. v. Nielsen & Senior</i> , 907 P.2d 1162 (Utah 1995)	1
<i>Hermansen v. Tasulis</i> , 2002 UT 52, 48 P.3d 235	1
<i>IHC Health Services, Inc. v. D & K Management, Inc.</i> , 2003 UT 5, 73 P.3d 320	9
<i>In the Matter of the Discipline of Alex</i> , 2004 UT 81, 99 P.3d 865	17
<i>Interwest Construction v. Homer</i> , 923 P.2d 1350 (Utah 1996)	10
<i>Machock v. Fink</i> , 2006 UT 30, 137 P.3d 779	9
<i>Mountain States Telephone & Telegraph Co. v. Atkin, Wright & Miles, Chartered</i> , 681 P.2d 1258 (Utah 1984)	9
<i>Royal Resources, Inc. v. Gibraltar Fin. Corp.</i> , 603 P.2d 793 (Utah 1979)	17
<i>Sears v. Riemersma</i> , 655 P.2d 1105 (Utah 1982)	10

TABLE OF AUTHORITIES

	<u>Page</u>
<i>SME Industries, Inc. v. Thompson, Ventulett, Stainback, and Assoc., Inc.</i> , 28 P.3d 669, 2001 UT 54	9
<i>Snow v. Rudd</i> , 998 P.2d 262, 2000 UT 20	9
<i>Tates, Inc. v. Salisbury</i> , 795 P.2d 1140 (Utah Ct. App. 1990)	10
<i>Webster v. Sill</i> , 675 P.2d 1170 (Utah 1983)	10
<i>Zions First Nat'l Bank v. National Am. Title Ins. Co.</i> , 749 P.2d 651 (1988)	11

Statutes:

UTAH CODE ANN. § 78-2-2(4)	1
UTAH CODE ANN. § 78-2-2(3)(j)	1

Rules:

UTAH R. CIV. P. 56:	2, 9
UTAH R. CIV. P. 56(c)	9

JURISDICTION

The Utah Supreme Court has original appellate jurisdiction over this matter pursuant to UTAH CODE ANN. § 78-2-2(3)(j). Pursuant to UTAH CODE ANN. § 78-2-2(4), this matter was assigned to the Utah Court of Appeals, by Order of the Utah Supreme Court, dated July 6, 2006, and effective July 26, 2006.

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. **Issue:** Does defendant's affidavit raise a genuine issue of material fact as to plaintiff's entitlement to relief, with respect to the claim or any defense thereto, such that the trial court erred when it granted plaintiff's motion for summary judgment?¹

Standard of Review: "Because the propriety of . . . a summary judgment . . . presents questions of law, we accord no deference to the trial court's determinations and review the issues under a correctness standard." *Harmon City, Inc. v. Nielsen & Senior*, 907 P.2d 1162, 1167 (Utah 1995). "We review the trial court's summary judgment for correctness, considering only whether the trial court correctly applied the law and correctly concluded that no disputed issues of material fact existed." *Hermansen v. Tasulis*, 2002 UT 52, at ¶10, 48 P.3d 235, 238. "Summary judgment is appropriate only 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' When we review a grant of summary judgment, 'we view the facts and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party.'" *Id.* at 239 (citations omitted).

¹This issue subsumes and includes all possible subsidiary issues.

APPLICABLE STATUTES AND RULES

UTAH R. CIV. P. 56:

Rule 56. Summary judgment.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

STATEMENT OF THE CASE

A. Nature of the Case.

The judgment appealed from was entered upon a summary judgment of liability and damages for a debt alleged to be owing from defendant to plaintiff upon a promissory note.

B. Course of Proceedings.

Plaintiff/appellee filed suit to recover sums he alleged were owing to him by appellant individually. Plaintiff moved for summary judgment, which was granted by the

trial court in a Ruling and Order, dated January 10, 2006. R. 309-318. Before judgment was entered, defendant filed a motion for leave to file a third-party complaint, which was opposed by the plaintiff. R. 325-329.

On January 24, 2006, judgment was entered in favor of plaintiff, while the motion for leave to file a third-party complaint was pending. R. 340-342. June 2, 2006, the trial court entered its order granting the motion to allow a third party complaint and entering findings under UTAH R. CIV. P. 54(b) to make its January 19, 2006 Judgment entered on summary judgment final. Before such findings were entered, appellant had filed a Notice of Appeal on February 22, 2006, which appeal was pending before the Utah Court of Appeals as Case No. 20060177CA. R. 397-400.

On June 29, 2006, defendant filed his notice of appeal with respect to the trial court's June 2, 2006 Ruling and Order, which was assigned Case No. 20060614. On July 31, 2006, this Court entered its order consolidating the appeals.

C. Disposition By Trial Court.

The trial court entered summary judgment in favor of plaintiff, but the third-party complaint of the defendant has not been dismissed. Proceedings are being held in abeyance pending the outcome of this appeal.

STATEMENT OF FACTS

1. Defendant and Appellant Nielsen resides in Summit County, Utah and is the managing member of an entity known as The Ridge at Red Hawk, LLC, a Utah limited liability company ("The Ridge"), which is the successor in interest to an entity known as Nielsen Redhawk, LLC ("NR"). Affidavit of Michael Nielsen ("Nielsen Aff.") at ¶ 1, R. 54-55. Although plaintiff's motion for summary judgment was directed strictly to the terms of a specific note, whether liability currently exists on such note involves

not simply the loan in question, but an entire partnership relationship between entities owned by the parties relating to a large real estate development in Summit County, the dissolution of which has already been the subject of an arbitration award. *Id.*

2. The plaintiff in this action, Kirkpatrick MacDonald (“MacDonald”), is a partner in MacDonald Redhawk Investors (“MRI”), a New York general partnership and a member in Redhawk Development Company, LLC (“RDC”), a Utah limited liability company, both of which are MacDonalds in another action in the Third District Court, Summit County, State of Utah, against The Ridge, Nielsen, Redhawk Management, LLC (“RM”) and NR, as defendants, assigned Case No. 050500229. In that action, MRI and RDC seek to “quiet title” to real property that has been divided by virtue of an arbitration award dissolving RDC (the “Award”), which award was entered by a panel of three American Arbitration Association arbitrators (the “Panel”), after an arbitration in which the Panel first calculated Nielsen’s and MacDonald’s equity interests in RDC. MacDonald, himself characterized his personal involvement in RDC, in “Claimant’s Arbitration Brief,” a genuine copy of which is attached to the affidavit of the defendant as Exhibit “A”: “Kirk MacDonald through MacDonald Redhawk Investors, LLC (MacDonald RH) has invested \$4,894,000 in the Project since May 1997” Nielsen Aff. at ¶ 2, R. 55 and Nielsen Aff. Exhibit A, R. 63 and R. 92-94.

3. MacDonald, himself, characterized one of the “realities” of the arbitration proceeding to be: “Mr. MacDonald’s dire need and right to protect his investment.” R. 63.

4. MacDonald, himself, noted for the arbitrators as a material point in the proceeding before them: “Mike Nielsen, alone has derived \$2,557,426.69 in direct economic benefits from the Redhawk project (\$250K in cash payments; \$1,830,763.50

in property retained; and over \$476K in proceeds from a financing with the Beehive Credit Union).” R. 63, n. 1.

5. The entire arbitration proceeding went forward, by mutual agreement between defendant and MacDonald, to analyze their individual positions in RDC with respect to the assets and liabilities of RDC and how to divide the Project between them, using their respective entities as investment vehicles. Nielsen Aff. at ¶ 5, R. 56.

6. After the Panel decided that RDC should be dissolved and the property partitioned between The Ridge and MacDonald, the Panel asked each party to make a “baseball” arbitration proposal, for the purpose of fairly dividing all assets and liabilities of RDC between them. Defendant’s “baseball” proposal was adopted by the arbitrators as the fairest split between the parties, based on all the financial considerations of RDC and the parties’ equity interests in RDC. Nielsen Aff. at ¶ 7, R. 56.

7. When defendant prepared the “baseball” proposal he submitted and the Panel adopted, defendant did so with the understanding and intent, as expressed by MacDonald in Claimant’s Arbitration Brief, that the final award would resolve all financial considerations of RDC and divide between MacDonald and defendant all of the assets and liabilities. One of the liabilities that defendant specifically took into account in defendant’s mind when making the baseball proposal adopted by the Panel was the very loan at issue in this case. While the complaint herein and motion for summary judgment attempt to make it appear as though defendant received the money, personally, that is not true. Nielsen Aff. at ¶ 8, R. 56-57. Every penny of the loan was intended to be spent for, and was spent for, the purpose of paying debts for the Project, to the benefit of RDC. The document reflecting the loan specifically references the intended purpose of the loan to pay Project vendors: “At your request, in order to see

that local or long overdue invoices are paid, I have today wired your Red Hawk Ranch account at Zions the sum of \$60,000.00. I understand that Messrs. Gaskill and Gillette have also advanced \$60,000.00 toward local vendor payables.” *Id.* and Exhibit 1 to MacDonald Affidavit filed in support of motion for summary judgment, R. 30.

8. At the time that loan was made, there was a bitter dispute ongoing between MacDonald and another partner, Mr. Gaskill. MacDonald told defendant that MacDonald did not want to make the loan to RDC so long as Mr. Gaskill was a partner, so MacDonald asked defendant to sign personally, but with the understanding that defendant, then, would advance the funds to the benefit of RDC, thereby creating a creditor relationship with RDC. Nielsen Aff. at ¶ 9, R. 57. The loan specifically contemplated that it would be reworked when Mr. Gaskill was gone, by its language: “We may eventually recast it in some other manner depending on how things develop.” Mr. Gaskill in fact left, but then differences developed between MacDonald and defendant. *Id.* and Exhibit 1 to MacDonald Affidavit, R. 32.

9. The loan was never an issue until the arbitration proceeding. Defendant in fact does not recall ever receiving the unsigned letter, dated July 13, 1999, attached as Exhibit 2 to MacDonald’s affidavit, and believes that he did not receive it. Nielsen Aff. at ¶ 10, R. 57-58. Defendant did, however, learn through e-mails received in the arbitration, that MacDonald during that time period was scheming with his lawyers and others about ways to eliminate defendant’s interest in RDC. R. 142-244. Defendant therefore infers that the letter now attached to MacDonald’s affidavit may have been one of the proposed schemes, but that instead of going forward on that route, in light of Mr. Gaskill being gone and the prior understanding defendant had with MacDonald about redoing the loan when Mr. Gaskill was gone, that MacDonald and his attorney

elected instead to go forward with an arbitration to dissolve RDC. Nielsen Aff. at ¶ 10, R. 58.

10. That inference is reinforced by the fact that MacDonald caused a Complaint to be filed in Third District Court, the following month, on August 30, 1999, seeking an order to compel an arbitration over dissolution of RDC to be completed no later than November 1, 1999, for the pleaded purpose of allowing “disputes within [RDC to] be resolved sufficiently before January, 2000 to allow each Member adequate time to negotiate settlements with the creditors with claims against the portions of the Property that each Member receives through binding arbitration.” R. 245-250. From that point forward, the statements of MacDonald made clear that all issues surrounding RDC were to be resolved through the arbitral dissolution. This would include the loan at issue in this case, which would be paid from the RDC dissolution, since it was a debt incurred by RDC to me, to be repaid to MacDonald. Nielsen Aff. at ¶ 11, R. 58-59.

11. The monies advanced to RDC pursuant to that loan should have been, and defendant believes were, booked as liabilities of RDC and thus, even pursuant to the Arthur Andersen report prepared for MacDonald, would have been taken into account by the Panel in its equity determination, as it was taken into account by defendant in determining the reasonableness of the “baseball” proposal defendant made that was adopted by the Panel as the Award. Nielsen Aff. at ¶ 12, R. 59.

12. The Panel's Award contains no written explanation of its reasoning. The Panel did agree to meet with the parties about the Award, and such a meeting took place in the office of James R. Holbrook, shortly after the Award was issued. Defendant recalls that, present at that meeting on defendant's behalf were defendant, Steve Ross, who was defendant's project manager, and Robert Stoelbarger, who was

defendant's lawyer, on behalf of MacDonald were MacDonald, a brother of MacDonald, Steve Wood, who was MacDonald's California lawyer, Thomas Billings, who was MacDonald's Utah lawyer and the three arbitrators, James R. Holbrook, Alan Funk and Philip Cook. During Mr. Holbrook's explanation of the Panel's reasoning and intent, Mr. Wood said: "What about my client's \$60,000 personal loan to Nielsen?" Mr. Holbrook responded by clarifying the Panel's intent in handling the loan: "That was included in the 40/60 split [of equity]." Nielsen Aff. at ¶ 14, R. 59-60.

13. Defendant understood MacDonald to have agreed that the loan subject of this action was part and parcel of the arbitration, MacDonald's conduct in the arbitration and his lawyer's question to the Panel evidenced MacDonald's own knowledge that such loan had been accounted for in the dissolution of RDC and defendant relied on the impression that defendant received from MacDonald during the entirety of the arbitration proceeding that such loan was being resolved as part of the dissolution when defendant formulated and proposed the "baseball" arbitration proposal that was adopted by the Panel as their Award. *Id.*

SUMMARY OF ARGUMENT

MacDonald persuaded the trial court that the controversy presented for resolution involved one simple transaction. The trial court ignored the long and complex relationship between the parties, of which the transaction at issue was only one component, while acknowledging that the documents upon which the plaintiff relied referred to those other transactions and relationships. Ruling and Order, R. 365.

On summary judgment, the facts pleaded in defendant's affidavit, and the attachments thereto, must be considered as true and, if true, those facts effectively demonstrate material issues as to whether the obligation was intended by the parties to

be an individual obligation of defendant, whether the form of the transaction was to have been “recast” upon the exit of one of the partners and, indeed, whether the obligation was intended to have been included in the final arbitration award entered which was to have resolved the disputes between the parties.

ARGUMENT

I. APPLICABLE STANDARD:

A lower court’s ruling on a summary judgment motion is reviewed for correctness. “‘Because a summary judgment presents questions of law, we accord no particular deference to the court of appeals’ ruling and review it for correctness.” *Machock v. Fink*, 2006 UT 30, ¶ 8, 137 P.3d 779, 782. “A trial court’s grant or denial of summary judgment is reviewed for correctness.” *Snow v. Rudd*, 2000 UT 20, ¶ 9, 998 P.2d 262, 265. “Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *SME Industries, Inc. v. Thompson, Ventulett, Stainback, and Assoc., Inc.*, 2001 UT 54, ¶ 9, 28 P.3d 669, 673 (citing UTAH R. CIV. P. 56(c)). “Doubts, uncertainties or inferences concerning issues of fact must be construed in the light most favorable to the party opposing summary judgment. Litigants must be able to present their cases fully to the court before judgment can be rendered against them unless it is obvious from the evidence before the court that the party opposing judgment can establish no right to recovery. The trial court must not weigh evidence or assess credibility.” *Mountain States Telephone & Telegraph Co. v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258, 1261 (Utah 1984) (footnotes omitted). See also UTAH R. CIV. P. 56.

“[A]ll undisputed material facts [must be considered] in the light most favorable to the nonmoving party” (*IHC Health Services, Inc. v. D & K Management, Inc.*, 2003

UT 5, ¶ 6, 73 P.3d 320, 323), and “all reasonable inferences drawn therefrom [must be viewed] in the light most favorable to the nonmoving party[.]” (*Alder v. Bayer Corp.*, 2002 UT 115, ¶ 25, 61 P.3d 1068, 1076). A single sworn statement of fact on a material question of fact is sufficient to defeat a summary judgment motion. See *Apache Tank Lines, Inc. v. Cheney*, 706 P.2d 614, 616 (Utah 1985) (per curiam) (“ ‘A single sworn statement is sufficient to create an issue of fact.’ ”) (quoting *Webster v. Sill*, 675 P.2d 1170, 1172 (Utah 1983)).

II. THE TRIAL COURT ERRED WHEN IT HELD THERE WERE NO GENUINE ISSUES OF MATERIAL FACT IN ITS ORDER GRANTING SUMMARY JUDGMENT.

The “Note” on which this action is based consists in fact of a letter from MacDonald, (who is now the putative assignee of MRI), to Nielsen. R.6. In its summary judgment ruling, the trial court stated: “On its face a portion of this letter agreement is clear, but as a whole it is less clear.” R.315. “As a whole” is, of course, how contracts must be construed. See *Sears v. Riemersma*, 655 P.2d 1105, 1108 (Utah 1982)(courts “look[] at the entire contract and all of its parts in relation to each other, giving an objective and reasonable construction to the contract as a whole.”). Nevertheless, the trial court found the Note unambiguous.² *Id.* This finding was in error. The trial court’s determination that the Note was unambiguous is a question of law. *Interwest*

²The trial court made no finding as to integration. Yet there is no question, under Utah law, that the determination of whether a document was intended to be an integration is a question of fact, not law. See *Tates, Inc. v. Salisbury*, 795 P.2d 1140, 1142 (Utah Ct. App. 1990) (“Whether a particular expression is an integration of the contract is a question of fact, and evidence both within and without the claimed integration is admissible to determine whether it is indeed an integration.”) As the language of the Note, itself, and the Affidavit of C. Michael Nielsen shows, there was an understanding about when and under what circumstances the Note would be “recast” from a personal obligation of Nielsen to an RDC obligation. Thus, the Note could not qualify as an integration, or at least a fact issue is raised on that issue.

Construction v. Homer, 923 P.2d 1350, 1358 (Utah 1996) (“[d]etermining whether a contract is ambiguous presents a threshold question of law”); *Equitable Life & Casualty Ins. Co. v. Ross*, 849 P.2d 1187, 1192 (Utah Ct. App. 1993) (“whether a contract is ambiguous is itself a question of law”) (quoting *Zions First Nat’l Bank v. National Am. Title Ins. Co.*, 749 P.2d 651, 653 (1988)). Thus, this Court “accord[s] a trial court’s interpretation of a contract no deference and review[s] it for correctness.” *Aquagen Int’l., Inc. v. Calrae Trust*, 972 P.2d 411, 413 (Utah 1998). The Note stated: “in order to see that local vendors’ long overdue invoices are paid, I have today wired to your Red Hawk Ranch account at Zions the sum of \$60,000.” R.6 The Note further states: “We may eventually recast it in some other manner, depending on how things develop.” *Id.* The Note, itself, does not say when or under what conditions the obligation would be recast, and so is plainly ambiguous.

The Affidavit of C. Michael Nielsen sets forth facts explaining that Mr. Gaskill’s presence as an RDC partner was the reason that MacDonald wanted the loan to be originally “personal” to Nielsen. R.57. The fact that the Note talks about “recasting” the obligation “depending on how things develop,” plainly raised an issue about whether the “things developing” would be the departure of Mr. Gaskill, which in fact occurred. See R.57. Mr. Nielsen’s understanding was that the recasting was to take place upon Mr. Gaskill’s departure. R. 58. That Nielsen in fact had that understanding and treated the obligation as “recast” is further shown by the fact that he included the obligation in the Baseball Arbitration Proposal he drafted. R. 56-57. MacDonald’s credibility in denying such intent to recast is brought into question by his hidden motivation to remove Nielsen from RDC R. 57-58.

Further, the affidavit sets forth a full factual context from which many inferences

favorable to Mr. Nielsen may be derived. Mr. Nielsen is the managing member of The Ridge, which is the successor in interest to an entity known as Nielsen Redhawk, LLC. R. 54-55. Although plaintiff's motion for summary judgment was directed strictly to the terms of a specific note, whether liability currently exists on such note involves not simply the loan in question, but an entire partnership relationship between entities owned by the parties relating to a large real estate development in Summit County, the dissolution of which has already been the subject of an arbitration award. *Id.*

MacDonald is a partner in MacDonald Redhawk Investors ("MRI"), a New York general partnership which is member in RDC, a Utah limited liability company, both of which are MacDonald's entities and parties in another action in the Third District Court, Summit County, State of Utah, against The Ridge, Nielsen, Redhawk Management, LLC ("RM") and NR, as defendants, assigned Case No. 050500229. In that action, MRI and RDC seek to "quiet title" to real property that has been divided by virtue of an arbitration award dissolving RDC (the "Award"), which award was entered by a panel of three American Arbitration Association arbitrators (the "Panel"), after an arbitration in which the Panel first calculated Nielsen's and MacDonald's equity interests in RDC. MacDonald, himself characterized his personal involvement in RDC, in "Claimant's Arbitration Brief," a genuine copy of which is attached to the affidavit of the defendant as Exhibit "A": "Kirk MacDonald through MacDonald Redhawk Investors, LLC (MacDonald RH) has invested \$4,894,000 in the Project since May 1997" Nielsen Aff. at ¶ 2, R. 55 and Nielsen Aff. Exhibit A, R. 63 and R. 92-94.

MacDonald, himself, characterized one of the "realities" of the arbitration proceeding to be: "Mr. MacDonald's dire need and right to protect his investment." R. 63. MacDonald, himself, noted for the arbitrators as a material point in the proceeding

before them: “Mike Nielsen, alone has derived \$2,557,426.69 in direct economic benefits from the Redhawk project (\$250K in cash payments; \$1,830,763.50 in property retained; and over \$476K in proceeds from a financing with the Beehive Credit Union).”

R. 63, n. 1. The entire arbitration proceeding went forward, by mutual agreement between Mr. Nielsen and MacDonald, to analyze their individual positions in RDC with respect to the assets and liabilities of RDC and how to divide the Project between them, using their respective entities as investment vehicles. Nielsen Aff. at ¶ 5, R. 56. After the Panel decided that RDC should be dissolved and the property partitioned between The Ridge and MacDonald, the Panel asked each party to make a “baseball” arbitration proposal, for the purpose of fairly dividing all assets and liabilities of RDC between them. Mr. Nielsen’s “baseball” proposal was adopted by the arbitrators as the fairest split between the parties, based on all the financial considerations of RDC and the parties’ equity interests in RDC. Nielsen Aff. at ¶ 7, R. 56. When Mr. Nielsen prepared the “baseball” proposal he submitted and the Panel adopted, Mr. Nielsen did so with the understanding and intent, as expressed by MacDonald in Claimant’s Arbitration Brief, that the final award would resolve all financial considerations of RDC and divide between MacDonald and Mr. Nielsen all of the assets and liabilities.

One of the liabilities that Mr. Nielsen specifically took into account in Mr. Nielsen’s mind when making the baseball proposal adopted by the Panel was the very loan at issue in this case. While the complaint herein and motion for summary judgment attempt to make it appear as though Mr. Nielsen received the money, personally, that is not true. Nielsen Aff. at ¶ 8, R. 56-57. Every penny of the loan was intended to be spent for, and was spent for, the purpose of paying debts for the Project, to the benefit of RDC. The document reflecting the loan specifically references the

intended purpose of the loan to pay Project vendors: "At your request, in order to see that local or long overdue invoices are paid, I have today wired your Red Hawk Ranch account at Zions the sum of \$60,000.00. I understand that Messrs. Gaskill and Gillette have also advanced \$60,000.00 toward local vendor payables." *Id.* and Exhibit 1 to MacDonald Affidavit filed in support of motion for summary judgment, R. 30.

At the time that loan was made, there was a bitter dispute ongoing between MacDonald and another partner, Mr. Gaskill. MacDonald told Mr. Nielsen that MacDonald did not want to make the loan to RDC so long as Mr. Gaskill was a partner, so MacDonald asked Mr. Nielsen to sign personally, but with the understanding that Mr. Nielsen, then, would advance the funds to the benefit of RDC, thereby creating a creditor relationship with RDC. Nielsen Aff. at ¶ 9, R. 57. The loan specifically contemplated that it would be reworked when Mr. Gaskill was gone, by its language: "We may eventually recast it in some other manner depending on how things develop." Mr. Gaskill in fact left, but then differences developed between MacDonald and Mr. Nielsen. *Id.* and Exhibit 1 to MacDonald Affidavit, R. 32.

The loan was never an issue until the arbitration proceeding. Mr. Nielsen in fact does not recall ever receiving the unsigned letter, dated July 13, 1999, attached as Exhibit 2 to MacDonald's affidavit, and believes that he did not receive it. Nielsen Aff. at ¶ 10, R. 57-58. Mr. Nielsen did, however, learn through e-mails received in the arbitration, that MacDonald during that time period was scheming with his lawyers and others about ways to eliminate Mr. Nielsen's interest in RDC. R. 142-244. Mr. Nielsen therefore infers that the letter now attached to MacDonald's affidavit may have been one of the proposed schemes, but that instead of going forward on that route, in light of Mr. Gaskill being gone and the prior understanding Mr. Nielsen had with MacDonald

about redoing the loan when Mr. Gaskill was gone, that MacDonald and his attorney elected instead to go forward with an arbitration to dissolve RDC. Nielsen Aff. at ¶ 10, R. 58.

That inference is reinforced by the fact that MacDonald caused a Complaint to be filed in Third District Court, the following month, on August 30, 1999, seeking an order to compel an arbitration over dissolution of RDC to be completed no later than November 1, 1999, for the pleaded purpose of allowing “disputes within [RDC to] be resolved sufficiently before January, 2000 to allow each Member adequate time to negotiate settlements with the creditors with claims against the portions of the Property that each Member receives through binding arbitration.” R. 245-250. From that point forward, the statements of MacDonald made clear that all issues surrounding RDC were to be resolved through the arbitral dissolution. This would include the loan at issue in this case, which would be paid from the RDC dissolution, since it was a debt incurred by RDC to me, to be repaid to MacDonald. Nielsen Aff. at ¶ 11, R. 58-59.

The monies advanced to RDC pursuant to that loan should have been, and Mr. Nielsen believes were, booked as liabilities of RDC and thus, even pursuant to the Arthur Andersen report prepared for MacDonald, would have been taken into account by the Panel in its equity determination, as it was taken into account by Mr. Nielsen in determining the reasonableness of the “baseball” proposal Mr. Nielsen made that was adopted by the Panel as the Award. Nielsen Aff. at ¶ 12, R. 59.

The Panel’s Award contains no written explanation of its reasoning. The Panel did agree to meet with the parties about the Award, and such a meeting took place in the office of James R. Holbrook, shortly after the Award was issued. Mr. Nielsen recalls that, present at that meeting on Mr. Nielsen’s behalf were Mr. Nielsen, Steve Ross, who

was Mr. Nielsen's project manager, and Robert Stoelbarger, who was Mr. Nielsen's lawyer, on behalf of MacDonald were MacDonald, a brother of MacDonald, Steve Wood, who was MacDonald's California lawyer, Thomas Billings, who was MacDonald's Utah lawyer and the three arbitrators, James R. Holbrook, Alan Funk and Philip Cook. During Mr. Holbrook's explanation of the Panel's reasoning and intent, Mr. Wood said: "What about my client's \$60,000 personal loan to Nielsen?" Mr. Holbrook responded by clarifying the Panel's intent in handling the loan: "That was included in the 40/60 split [of equity]." Nielsen Aff. at ¶ 14, R. 59-60.

Mr. Nielsen understood MacDonald to have agreed that the loan subject of this action was part and parcel of the arbitration, MacDonald's conduct in the arbitration and his lawyer's question to the Panel evidenced MacDonald's own knowledge that such loan had been accounted for in the dissolution of RDC and Mr. Nielsen relied on the impression that Mr. Nielsen received from MacDonald during the entirety of the arbitration proceeding that such loan was being resolved as part of the dissolution when Mr. Nielsen formulated and proposed the "baseball" arbitration proposal that was adopted by the Panel as their Award. *Id.* While the trial court is correct that entities owned by Mr. Nielsen and MacDonald were the parties to the arbitration, and not them personally, that observation does not alter the understanding Mr. Nielsen had of the agreement to "recast" the "personal" obligation at the time of Mr. Gaskill's departure from RDC to an RDC obligation. The fact that Mr. Nielsen's affidavit says he drafted the Baseball Arbitration Proposal with that in mind supports that and raises the question for resolution by the trier of fact.

Taking into consideration the relationship of the parties, the purpose of the loan, the reason that MacDonald expressed his desire that it be considered "personal" while

Mr. Gaskill was present in RDC, the departure of Mr. Gaskill that Mr. Nielsen understood would result in the “recasting,” the fact that RDC received the benefit of all the proceeds of the loan and MacDonald’s motives to oust Nielsen’s company from RDC after Mr. Gaskill’s departure, sufficient facts exist to allow a trier of fact to conclude that the understanding was that the “recasting” referenced would be the acknowledgment that the loan was a debt of RDC upon Mr. Gaskill’s departure, that, consistent with that understanding it was incorporated into the Baseball Arbitration Proposal by Mr. Nielsen and that it was fully satisfied by the arbitration panel’s award adopting Mr. Nielsen’s Baseball Arbitration Proposal to divide the RDC assets.

It is clear that genuine issues of material fact exist with respect to whether Nielsen in fact received any consideration for which he agreed to pay or whether MacDonald always intended the consideration to go to RDC and to use the written memorandum as some sort of diversion to use with respect to Mr. Gaskill. See *Dementas v. Estate of Tallas, by and Through First Security Bank*, 764 P.2d 628, 634 (Utah 1988) (“Therefore, the underlying claims on which an account stated is based must contain the basic elements of a contract, including consideration.”) Also, there is a fact question as to whether that part of the consideration that called for a “recasting” failed? See *id.* at 632 n. 4.

It is clear that genuine issues of material fact exist as to whether MRI, by its participation in the arbitration proceeding, intended to waive,³ elect remedies⁴ or

³See *In the Matter of the Discipline of Alex*, 2004 UT 81 ¶ 21, 99 P.3d 865, 869 (“To constitute waiver, there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it.”)

⁴See *Royal Resources, Inc. v. Gibraltar Fin. Corp.*, 603 P.2d 793, 796 (Utah 1979) (“The doctrine of election of remedies is a technical rule of procedure and its purpose is not to
(continued...)”)

otherwise to resolve the indebtedness to MRI, now at issue in this case, but which was in fact owed by RDC, another party to the arbitration. It is likewise clear that if the loan at issue in this case was resolved through MRI's participation in the arbitration, and it would seem difficult to conclude it was not, since all liabilities of RDC were taken into account in the arbitration and Mr. Holbrook expressed that the debt was specifically taken into account to determine the equity percentages between MRI and NR, that genuine issues of material fact exist with respect to the defenses of claim preclusion, issue preclusion and arbitration and award, and that RDC, as a mutual party to the arbitration, would be a necessary party to such determination, since Nielsen has testified that the debt was agreed by MacDonald to really be RDC's and not Nielsen's. Otherwise, RDC would be subject to potentially multiple or inconsistent obligations as between claims of Nielsen or MacDonald that its debt had not been resolved by the Award.

MRI's asserted position in the arbitration, that the dissolution, accounting, satisfaction of RDC liabilities and winding up of RDC and distribution of its assets and liabilities, would end internal disagreements at RDC raises an issue of fact about whether the parties to the arbitration intended the Award to have preclusive effect in later proceedings. Nielsen clearly so intended. By not asserting otherwise when asking about how the Panel incorporated the loan into its Award, a genuine issue of material fact is raised about whether MacDonald also so intended.

⁴(...continued)

prevent recourse to any remedy, but to prevent double redress for a single wrong. Said doctrine presupposes a choice between inconsistent remedies, a knowledgeable selection of one thereof, free of fraud or imposition, and a resort to the chosen remedy evincing a purpose to forego all others.

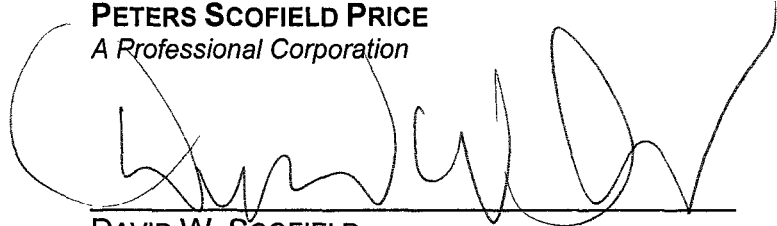
CONCLUSION

The record clearly contains facts which raise issues of material fact which preclude summary judgment. For the reasons stated above, the judgment of the trial court should be reversed and the matter remanded for further proceedings.

DATED this 15th day of September, 2006.

PETERS SCOFIELD PRICE

A Professional Corporation

A large, stylized handwritten signature in black ink, appearing to read 'David W. Scofield', is written over a horizontal line.

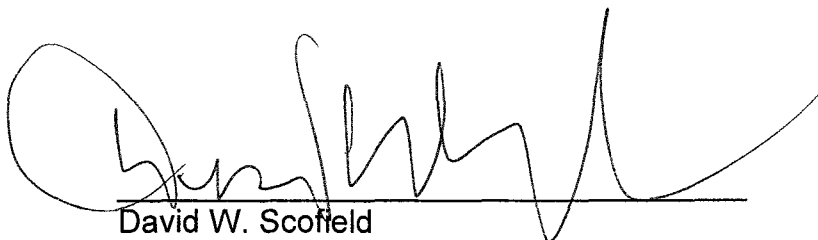
DAVID W. SCOFIELD

Attorneys for the Defendant/Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the above and foregoing Appellant's Opening Brief were deposited in the United States Mail, first class postage prepaid, this 15th day of September, 2006, addressed to the following:

James S. Lowrie
R. L. Knuth
Ryan M. Harris
JONES WALDO HOLBROOK & McDONOUGH, P.C.
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101



David W. Scofield

Addendum:
Ruling and Order,
dated January 10, 2006

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

KIRKPATRICK MACDONALD, Plaintiff, vs. MICHAEL NIELSEN, Defendant.	RULING and ORDER Case No. 040500403 Honorable BRUCE C. LUBECK DATE: January 10, 2006
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The above matter came before the court on January 9, 2006, for oral argument on Plaintiff's motion for summary judgment. Plaintiff was present with James S. Lowrie and Ryan M. Harris and defendant was not present in person or with counsel. At the appointed hour for argument the court had its clerk call counsel for defendant, and the court clerk received a voice message that Mr. Scofield was not in the office. Plaintiff was present and had traveled from New York for the argument. The court heard argument from plaintiff.

Plaintiff filed this motion on June 2, 2005. Defendant filed an opposition response on July 14, 2005. Plaintiff filed a reply on August 8, 2005. A notice to submit was filed by Plaintiff on August 8, 2005. For some reason, presumably that a new clerk at that time received and docketed the notice, that notice was not ever brought to the attention of the court. That error is regretted and the court apologizes for the delay that error has caused. Plaintiff filed a renewed request to submit on December 14, 2005. The same clerk, presumably now better

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trained, provided that renewed notice to the court on that date. Plaintiff requested oral argument. Oral argument was scheduled and held January 9, 2006, as noted without defendant's presence. The court took the matter under advisement.

The court has reviewed the pleadings of the parties and the entire file, heard oral argument from plaintiff, and concludes as follows.

BACKGROUND

Plaintiff filed a complaint June 4, 2005. It alleged that on April 23, 1998, plaintiff loaned \$60,000 to defendant, interest free for one year then if not repaid, accumulating at 10%. Notice was given to defendant and no payment has been made. Causes of action are alleged for (1) breach of loan agreement; and (2) unjust enrichment.

On March 16, 2005, defendant filed an answer and denied the essential allegations and raised various affirmative defenses.

This motion followed.

ARGUMENTS

Plaintiff claims as undisputed facts that plaintiff, through a partnership he controls, Macdonald Redhawk Investors, made a personal loan to defendant on April 23, 1998. That was evidenced

by a letter initialed by defendant. The terms were that it was a personal loan to defendant, for one year interest free if repaid, and 10% simple interest if not paid within one year. On July 13, 1999, after the one year term, plaintiff asked defendant to repay the loan and defendant refused.

In opposition to this rather simple appearing motion, defendant has filed voluminous attachments. Defendant claims this loan was part of a long, complex relationship and that the loan was to an entity in which plaintiff had an interest, and that any disputes were resolved in an arbitration proceeding.

Defendant asserts that the letter-agreement notes that the purpose of the loan was to pay vendors, for debts of Redhawk Development, and that MacDonald Redhawk Investors was a member of Redhawk Development. The loan was not for Nielsen personally but was to pay debts of Redhawk Development.

Defendant urges also that his initialing the agreement was so the files of plaintiff would show the intent, but the real interest of the parties was that the loan would be repaid by or through Redhawk Development, and the letter's language (the loan may be "recast") demonstrates that.

Defendant also disputes that he received the demand letter.

Defendant also disputes the claim the loan was not repaid. The loan was satisfied through the dissolution and the accounting in the arbitration.

Defendant also claims there are other facts in dispute and those include as noted that this transaction was part of a larger agreement concerning a development in Summit County. Plaintiff is a partner in MacDonald Redhawk Investors, which is a member of Redhawk Development, a Utah LLC, and each is a plaintiff in another action in this court, docket no. 050500229. In that case it is asserted an arbitration panel divided property and dissolved Redhawk Development. That arbitration is said to have divided the project between them. The property was split based on financial considerations and the equity interests of the parties.

At the time of this loan plaintiff and Gaskill, an investor in Redhawk Investors, in turn an investor in Redhawk Management, in turn an investor in Redhawk Development, were in a dispute and so the understanding between plaintiff and defendant in this loan was that defendant would advance the funds to the benefit of Redhawk Development, thus creating a creditor relationship with Redhawk Development, and when Gaskill was not involved further, the loan would be reworked ("recast") depending on how things developed. After Gaskill left disagreements developed between plaintiff and defendant.

The understanding of the arbitration was that this loan would be included, and paid from the Redhawk Development dissolution since it was a debt of Redhawk Development to defendant, to be repaid to plaintiff. The money should have been

booked as a liability of Redhawk Development and should have, and defendant believes was, considered by the arbitration panel in its equity determination. Defendant believes the loan was discussed after arbitration and was said by one of the panel to have been included in the equity split of the arbitration panel.

Arbitration resolved all issues concerning Redhawk Development, including this loan as part of the winding up of that entity.

Defendant argues there are issues of material fact based on the above disputes, supported by his affidavit and the attachments concerning the arbitration, and voluminous email messages relating to various topics. The issues of fact are said to be whether defendant received any consideration, whether the "recasting" failed, and whether MacDonald Redhawk Investors waived or has elected other remedies concerning this claim because it participated in arbitration.

In reply plaintiff again asserts this is a simple, clear personal loan. Specifically, as to the arbitration proposal adopted by the arbitration panel, it did not resolve all assets and liability disagreements of Redhawk Development, but only the real property and related debt. Plaintiff claims that defendant's assertion that he, defendant, considered this loan in proposing the "baseball" plan is incorrect as plaintiff and defendant personally were not a part of the arbitration panel's decision.

Plaintiff also disputes that defendant did not receive the proceeds of the loan, as defendant received the proceeds and gave the funds to Red Hawk Management, an entity in which plaintiff had no interest, in order to match a contribution by other members of Red Hawk Management. Plaintiff disputes defendant's impressions and inferences and understandings.

Plaintiff asserts additional facts he claims are necessary to the motion. Those include that in April, 1998, the time of the loan, Redhawk Development was owned 87.5% by Redhawk Management and 12.5% by MacDonald Redhawk Investors. Redhawk Management was owned 50% by defendant and 50% by Gillette and Gaskill.

Plaintiff claims the loan is on its face a clear and unambiguous personal loan, and no parol evidence is needed nor allowed as there is no ambiguity in the document. The loan was never "recast" and so any "recasting" was no more than an agreement to agree, it was not a part of the agreement. The loan was not part of the arbitration.

DISCUSSION

The standard for summary judgment is well known. A genuine issue of material fact that is in dispute defeats summary judgment and all inferences are drawn against the movant, plaintiff herein.

On its face a portion of this letter agreement is clear, but as a whole it is less clear. The task of the court is to determine if the entire note is ambiguous such that parol evidence ought to be considered. Clearly there were other dealings surrounding this note, as shown by the note itself. If the note is ambiguous, a party to a contract may be heard as to the intent of the parties. The court does not find this letter ambiguous. Parts of it are completely unambiguous, (date, interest, time for repayment) but other parts render the entire letter less unambiguous. Still, the intent of the parties must be determined from the note and the court believes that can be done.

There are no genuine disputes about whether this loan was part of the arbitration. Defendant has attempted to cast the arbitration as a forum where this dispute was resolved. Defendant cites to plaintiff's question, which question most assuredly is not hearsay, to the effect he asked about the loan. The answer by a member of the panel (the loan was considered) is argued to be hearsay and should not be considered by the court. The answer is not received for the truth of the statement, but for its effect on the listener, plaintiff. Defendant was not a party to the arbitration but entities were, and the court finds no genuine dispute about whether all debts and liabilities were considered in arbitration.

They were not. Thus, there is no dispute about whether the arbitration considered the loan. Even if the court accepts the statement of the arbitrator, for its effect on the listener, the parties were entities, and so "considering" the loan does not make a genuine issue of fact out of the equitable division of real property. The court is not now about to resolve the other case concerning arbitration and is not resolving whether the loan was "considered" in that arbitration. The court is merely indicating that is one area of dispute that is not genuine.

Another example of what defendant claims is a dispute is whether defendant received the proceeds personally or whether he put them to use for the benefit of himself, his entities (Redhawk Management) or for the benefit of plaintiff or one of his entities. Again, the court does not view that as material given the structure of this note. Whether a demand letter was received or not is in dispute, but it is not material as this lawsuit serves as a demand.

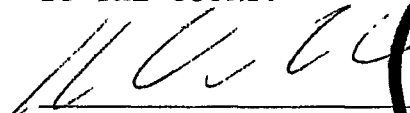
The court is not resolving the disputes between the parties, concerning this loan and its interplay with other aspects of their dealings. The court is merely ruling that concerning this note, the court believes there are no disputed issues of material fact that defeat summary judgment.

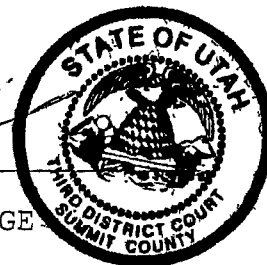
The motion for summary judgment is GRANTED.

This Ruling and Order is the Order of the court and no other order is required.

DATED this 10 day of July, 2006.

BY THE COURT:


BRUCE C. LUBECK
DISTRICT COURT JUDGE



Case No: 040500403
Date: Jan 10, 2006

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 040500403 by the method and on the date specified.

METHOD	NAME
Mail	RYAN M HARRIS ATTORNEY PLA POB 45444 SALT LAKE CITY, UT 84145-0444
Mail	JAMES S LOWRIE ATTORNEY PLA POB 45444 SALT LAKE CITY UT 84145-0444
Mail	DAVID W SCOFIELD ATTORNEY DEF 111 EAST BROADWAY SUITE 340 SALT LAKE CITY UT 84111-2605

Dated this 10th day of January, 2006.


Deputy Court Clerk

Addendum:
Judgment,
dated January 24, 2006

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FILED BY _____

James S. Lowrie (USB #2007)
R. L. Knuth (USB #3625)
Ryan M. Harris (USB #8192)
JONES, WALDO, HOLBROOK & McDONOUGH
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101
Telephone: (801) 521-3200
Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY
STATE OF UTAH

KIRKPATRICK MACDONALD, an	:	
individual,	:	
	:	JUDGMENT
Plaintiff,	:	
	:	Civil No. 040500403
vs.	:	
	:	Judge Bruce C. Lubeck
MICHAEL NIELSEN, an individual,	:	
	:	
Defendant.	:	

Pursuant to this Court's Ruling and Order dated January 10, 2006, in which this Court granted summary judgment to the Plaintiff, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED and DECREED as follows:

1. Judgment is hereby entered in favor of the Plaintiff Kirkpatrick MacDonald and against the Defendant Michael Nielsen in the amount of \$100,304.66 (including \$60,000.00 of principal and \$40,304.66 of interest since April 23, 1999). Post-judgment interest shall accrue at the statutory rate, pursuant to Utah Code Ann. § 15-1-4.

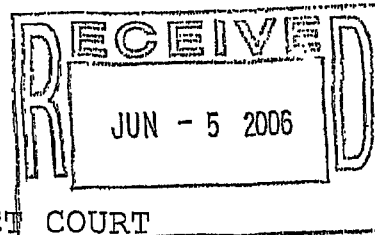
DATED this 24 day of January, 2006.

BY THE COURT:

/s/

Bruce C. Lubeck
Third District Court Judge

Addendum:
Ruling and Order,
dated June 2, 2006



IN THE THIRD JUDICIAL DISTRICT COURT
SUMMIT COUNTY, STATE OF UTAH

KIRKPATRICK MACDONALD, an
individual

Plaintiff,

vs.

MICHAEL NIELSEN, an
individual

Defendant.

RULING and ORDER

Case No. 040500403

Date: June 2, 2006

Judge BRUCE C. LUBECK

The above matter came before the Court for oral argument on May 31, 2006 on Defendant Michael Nielsen's (Nielsen) Motion to Allow Third Party Complaint. Plaintiff Kirkpatrick MacDonald (MacDonald) was present through James S. Lowrie and Ryan M. Harris. Defendant was present through David W. Scofield.

BACKGROUND

Plaintiff filed a complaint June 4, 2005. It alleged that on April 23, 1998, Plaintiff loaned \$60,000 to Defendant, interest free for one year then if not repaid, accumulating at 10%. Notice was given to Defendant and no payment was made. Causes of action were alleged for (1) breach of loan agreement; and (2) unjust enrichment.

On March 16, 2005, Defendant filed an answer and denied

the essential allegations and raised various affirmative defenses.

Counsel for the parties discussed and agreed upon a discovery plan and scheduling order which Plaintiff's counsel prepared and sent to Defendant's counsel. Defendant's counsel never signed the agreement, nor did he follow its deadlines. According to the plan, initial disclosures were to be sent May 27, 2005 and the last day for joining additional parties or amending pleadings was July 8, 2005. Defendant never sent initial disclosures to Plaintiff.

A motion for summary judgment was filed by Plaintiff June 2, 2005. Defendant filed an opposition response on July 14, 2005. Plaintiff filed a reply August 8, 2005, as well as a notice to submit. A clerical error was made and the Court did not receive notice of the request to submit. Plaintiff filed a renewed request to submit on December 14, 2005. Oral argument was scheduled and heard on January 9, 2006. Plaintiff was present, but neither Defendant nor his attorney were present. Oral arguments proceeded on that day. On January 10, 2006, the Court granted Plaintiff's motion for summary judgment. The Court found the letter

initialed by Defendant evidencing a personal loan from MacDonald Redhawk Investors, a partnership MacDonald controls, was unambiguous on its face prohibiting the Court from considering parol evidence. The Court found there were no genuine disputes of fact that were material and proceeded to say it was "not resolving the disputes between the parties, concerning this loan and its interplay with other aspects of their dealings" which are the subject of another proceeding in this Court, docket number 050500229.

After summary judgment was granted, Defendant on January 19, 2006, filed a motion to allow third-party complaint. Plaintiff filed a memorandum opposing Defendant's motion on January 30, 2006. On February 7, 2006, Defendant filed a reply memorandum. A request to submit for decision was filed February 10, 2006. Oral arguments were set for March 27, 2006, then continued at the request of the parties until May 31, 2006.

A notice of appeal was filed by defendant February 22, 2006, and on April 28, 2006, the Utah Court of Appeals temporarily remanded the case for consideration of this motion.

ARGUMENTS

Defendant requests that the Court grant leave to file a third-party complaint after summary judgment has been granted for Plaintiff in this case. Defendant claims Utah Rule of Civil Procedure 14(a) authorizes a defendant to serve a summons and complaint against a third-party at any time after commencement of the original action. If the defendant seeks to file a third-party complaint after 10 days of filing his answer, he must receive leave from the court. It is at the discretion of the trial court to grant or deny leave to file third-party complaint. The Defendant claims that, in light of the Court's ruling on summary judgment, he has third-party claims against Redhawk Development Company (Redhawk Development) because Redhawk Development received the full benefit of the loan to Nielsen but Redhawk Development has not repaid Nielsen. Redhawk Development has been dissolved, but MacDonald Redhawk Investors is liable for 60% of the unsecured liabilities of Redhawk Development under a previous arbitration agreement. (The entities controlled by or owned by the parties involved in this case participated in arbitration proceedings and are subject to the resulting arbitration agreement). The

Defendant claims that liability against the non-party who received the actual benefit of the loan should be established in the same proceeding as the liability on the loan itself because it would protect the Defendant from inconsistent positions that might be asserted if the third-party complaint was a separate action. The Defendant also claims allowing the third-party complaint to proceed would not be unjustly prejudicial to the Plaintiff, because the new parties would not raise defenses to Plaintiff's note claim that could jeopardize the summary judgment plaintiff received. The single issue in the third-party complaint is whether Redhawk Development, and, hence, MacDonald Redhawk Investors, are liable to Nielsen for his debt to Plaintiff. Defendant also argued judicial economy as even if this motion is denied, defendant may file an independent action seeking the same relief.

The Plaintiff opposes Defendant's motion. The Plaintiff claims the case is over, the motion is untimely, and the motion is without merit.

The Plaintiff claims the motion is untimely for several reasons. First, the Defendant knew of his claims against

the third parties as evidenced by the statements he affirmatively alleged in his Answer and in his affidavit in opposition to the summary judgment motion of plaintiff. Specifically, the Defendant claimed that "MacDonald's claims are barred by MacDonald's failure to join indispensable parties;" the claims are barred "in whole or in part, due to the payment of any alleged sums to his own partnership, limited liability company, or other co-venture," and "the issues raised in MacDonald's Complaint were submitted to binding arbitration and that the arbitration panel has exclusive jurisdiction over the dispute, and that such panel of arbitrators fully resolved the issues in this dispute when making and entering the arbitration award." These statements show the Defendant always knew of his claims against third-parties and should have asserted them within the ten days after he filed his Answer or, at least, before July 8, 2005 according to the terms of the discovery schedule and plan. Second, this motion was filed late in the litigation, nine months after the Complaint was filed and after summary judgment disposed of the case, and without adequate justification. In fact, Plaintiff points out the Defendant has given no reason for filing the motion at such

a late date.

The Plaintiff claims the third-party complaint is without merit and futile because Nielsen used the proceeds of the personal loan as a capital contribution in Redhawk Management LLC, and, therefore, it is immaterial that Redhawk Management used the money to pay off debts of Redhawk Development. Nielsen owned 50% of Redhawk Management and to maintain his 50% ownership position after a capital call he had to contribute an amount equal to what the other owners contributed, which in this case was \$60,000. The loan was used to invest in Redhawk Management. If a person makes an investment in a corporation in exchange for stock, and the value of that stock drops, the person (absent securities fraud) cannot recoup any of his losses. The third-party entities are not liable to Nielsen because he lost his investment. The Plaintiff also claims the Defendant has not identified a precise cause of action in his proposed third-party complaint because there is none. Plaintiff claims prejudice in protracted litigation and asserts that if untimely and futile and without justification, the motion should be denied without respect to any prejudice to plaintiff.

In reply to Plaintiff's opposition, Defendant points out Plaintiff failed to address the procedural grounds for the motion. Plaintiff never claimed that he will be prejudiced by allowing the third-party complaint to go forward only that Defendant didn't abide by the terms of an unsigned schedule. Defendant claims there was good reason for not signing the schedule or abiding by its terms. Namely, numerous documents had to be filed in the arbitration case in response to Plaintiff's tactics starting May 12, 2005, which occupied the Defendant and were finally resolved May 31, 2005. Two days later, on June 2, 2005, Plaintiff filed his early motion for summary judgment in this case completely changing the landscape of the case insofar as scheduling was concerned. The Defendant claims now that this Court determined the existence of a debt between Plaintiff and Defendant, which was not part of the arbitration award entered between the entities controlled or owned by the parties herein as Defendant had claimed, it now makes sense to assert a third-party action against the entity that received the benefit of the money, Redhawk Development and the party responsible for 60% of its debts, MacDonald Redhawk Investors. Had the Court determined the

debt had been resolved in the arbitration award, there would be no debt to claim against the third-parties. Defendant further claims the cases Plaintiff cites to support a denial of Defendant's motion for untimeliness are unique and factually different from the case at hand because allowing an amendment in those cases would have been prejudicial to the non-movant. Here Plaintiff has not claimed prejudice. Defendant claims granting his motion will support judicial economy as well.

The Defendant also addressed Plaintiff's claim that a third-party complaint is futile. Defendant claims its proposed pleadings are adequate and put the third-parties on notice of the claims against them. In the proposed pleadings, Defendant asserted that Redhawk Development received the benefit of the loan proceeds from Nielsen with the reasonable expectation by Nielsen that Redhawk Development would repay Nielsen but Redhawk Development has instead retained the benefit and not repaid Nielsen under inequitable circumstances. The Defendant claims he is a creditor of Redhawk Development and has the rights accompanying the class of all creditors holding unsecured liabilities and as a third-party beneficiary of the

arbitration award Defendant has a claim against MacDonald Redhawk Investors.

DISCUSSION

Utah Rule of Civil Procedure 14(a) states, "At any time after commencement of the action a defendant . . . may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." A defendant must receive leave from the court to file a third-party complaint after ten days have passed from when the filing of an answer. A motion under Rule 14(a) is similar, but not identical, to a motion to amend the pleadings made under Rule 15. "The granting or denying of leave to amend a pleading is within the broad discretion of the trial court. . . . According to Utah Rule of Civil Procedure 15(a), which permits the amendment of pleadings by leave of court, leave is to be 'freely given when justice so requires.' In reviewing a trial court's ruling on a motion to amend, three factors are relevant: (1) the timeliness of the motion; (2) the moving party's reason for the delay; and (3) the resulting prejudice to the responding party." *Mountain*

America Credit Union v. McClellan, 854 P.2d 590, 592 (Utah 1993) (citations omitted) (affirming trial court's decision to deny leave to file a third-party complaint, where the motion seeking leave was filed nearly two years after the filing of the answer and a year and a half after the Court had granted plaintiff's motion for judgment on the pleadings). The Court will address each factor in turn.

First, the Court must consider whether the motion was timely filed. Defendant's motion was filed nine months after he filed his answer with the Court, but it was filed only 13 days after the Court granted Plaintiff's motion for summary judgment. The Court was delayed in considering the motion for summary judgment due to clerical error. A request to submit the motion for summary judgment was originally filed August 8, 2005, and was renewed December 14, 2005. The motion for summary judgment was filed very early in the case, June 2, 2005. All things considered, the Court finds the motion to allow third-party complaint was timely filed.

The Court must next consider whether Defendant's reasons for the delay justify granting his motion. The Defendant claims there were pressing matters in the related

arbitration action that required immediate attention which took precedent over this action, but more importantly, Plaintiff's early filing of a motion for summary judgment changed the nature of the proceedings. The Court agrees that the Defendant could have filed his motion at an earlier date, and the rules normally are better served when a third party complaint is filed more timely. It does appear, as plaintiff argued, that defendant made a strategic decision to attempt to prevail on the summary judgment motion but failed, and now defendant desires to have a third party defendant in the case. However, the court does conclude that the early filing of the motion for summary judgment did change the proceedings and the delay is not fatal to defendant's motion now.

Finally, the Court must consider whether the Plaintiff will be prejudiced by granting Defendant's motion, which is the most important of all the factors. The Plaintiff did not argue that he would be prejudiced other than by the increased cost of litigation, but the Court concludes that legally that is not prejudice sufficient to defeat this proposed filing. The third-parties are unlikely to challenge the validity of the loan and its existence.

Instead, the third-parties will only challenge whether or not they are liable for all or part of its repayment. Either way, the Plaintiff will be repaid.

Further, defendant is certainly entitled to bring this as an independent action, and it seems on balance that in the context of this case that all parties and the court will be better served economically if this motion is granted rather than denied and defendant brings a new action.

For the above reasons, the Court finds Defendant's motion was timely filed and should be allowed.

Plaintiff's contends the motion should be denied because the claim is without merit and the pleadings are insufficient. In *Smith v. Grand Canyon Expeditions Co.*, the Utah Supreme Court considered whether Smith should have been allowed to amend his complaint. The Court said:

"We have previously noted that rule 8©), U.R.C.P., requires that affirmative defenses be pleaded. It is a good rule whose purpose is to have the issues to be tried clearly framed. But it is not the only rule in the book of Rules of Civil Procedure. They must all be looked to in the light of their even more fundamental purpose of liberalizing both pleading and procedure to the end that the parties are afforded the privilege of presenting whatever legitimate contentions they have pertaining to their dispute. What they are entitled to is notice of the issues raised and an opportunity to meet them. When this is accomplished, that is all that is required. Our rules provide for liberality to allow examination into and settlement of all issues bearing

upon the controversy, but safeguard the rights of the other party to have a reasonable time to meet a new issue if he so requests." *Smith v. Grand Canyon Expeditions Co.*, 2003 UT 57, ¶12.

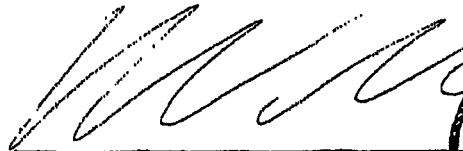
Also a party may not amend a complaint to add a cause of action that is legally insufficient, *Smith*, 2003 UT at ¶33, The Court finds the language quoted above persuasive. The Court finds Defendant's third-party complaint is legally sufficient and meets the pleading requirements of Rule 8. The pleading rules in Utah are liberal and, although Defendant's complaint does not specifically allege a cause of action, it does put the third-party defendants on notice of the claims against them. The third-party complaint is not futile at this point. The Defendant may not be able to prove that the loan to him was then a loan to Redhawk Development instead of an investment or that the money should be repaid to him on some other ground, but the third-party complaint is at most only at the pleading stage and Defendant should be given the opportunity to prove his case. The issues can be more fully developed through further proceedings.

As the matter was temporarily remanded to this court from the Utah Court of Appeals, the court believes it is

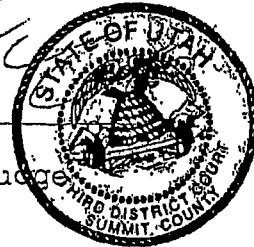
prudent to note that in the view of this court the previous ruling granting plaintiff's motion for summary judgment is a final judgment under URCP, Rule 54(b) and there is no just reason for delay and judgment should be issued.

This Ruling and Order is the Order of the Court and no other order is required.

Dated this 2 day of April, 2006.



BRUCE C. LUBECK
Third District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 040500403 by the method and on the date specified.

METHOD NAME

Mail	JAMES S LOWRIE ATTORNEY PLA POB 45444 SALT LAKE CITY, UT 84145-0444
Mail	DAVID W SCOFIELD ATTORNEY DEF 111 E BROADWAY STE 340 SALT LAKE CITY UT 84111-3508

Dated this 2nd day of June, 2006.


Deputy Court Clerk