

2006

Kenneth Davis v. Dennis Goldsworthy : Brief of Appellant

Utah Court of Appeals

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Gregory Hansen; Duval Haws and Moody PC.

Justin Heideman; Lorelei Naegel; Ascione, Heideman, and McKay, L.L.C.; Attorneys for Appellant.

Recommended Citation

Brief of Appellant, *Davis v. Goldsworthy*, No. 20060924 (Utah Court of Appeals, 2006).
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IN THE UTAH COURT OF APPEALS, STATE OF UTAH

KENNETH DAVIS,

Plaintiff/Appellant,
vs.

DENNIS GOLDSWORTHY,

Defendant/Appellee.

**APPELLATE BRIEF OF
APPELLANT KENNETH DAVIS**

Appellate Case No. 20060924

Appeal from Ruling on Appellee's Motion to Set Aside Default Judgment granted on February 27, 2006 and from Ruling Denying Appellant's Motion for Reconsideration on Ruling Granting Motion to Set Aside Default Judgment entered on March 31, 2006 by the Honorable James R. Taylor of the Fourth Judicial District Court, Utah County, State of Utah.

Gregory Hansen
DUVAL HAWS & MOODY PC
947 S. 500 E. STE 200
American Fork, Utah 84003
Telephone: 801- 763-0155

Justin D. Heideman (USB 8897)
Lorelei Naegle (USB 9577)
ASCIONE, HEIDEMAN & MCKAY,
L.L.C.
Attorneys for Appellant
2696 N. University Ave., Suite 180
Provo, Utah 84604
Telephone: 801-812-1000

FILED
UTAH APPELLATE COURTS
APR 11 2007

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Gregory Hansen
DUVAL HAWS & MOODY PC
947 S. 500 E. STE 200
American Fork, Utah 84003
Telephone: 801- 763-0155

Justin D. Heideman (USB 8897)
Lorelei Naegle (USB 9577)
ASCIONE, HEIDEMAN & MCKAY,
L.L.C.
Attorneys for Appellant
2696 N. University Ave., Suite 180
Provo, Utah 84604
Telephone: 801-812-1000

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STATEMENT OF JURISDICTION

Utah Code Ann. § 78-2a-3(2)(j) confers jurisdiction on this Court to decide this appeal.

ISSUES PRESENTED FOR REVIEW

Did the trial court abuse its discretion in granting Appellee’s Motion to Set Aside Default Judgment and denying Appellant’s Motion for Reconsideration where the only reasoning provided for setting aside the default was the Court’s *sua sponte* assertion that Appellee was not properly served with the Notice to Appear or Appoint, but where Appellee was served with a Notice to Appear or Appoint pursuant to Rule 5(b)(1) of the Utah Rules of Civil Procedure?

1. Standard of Review: A trial court has broad discretion in deciding whether to set aside a default judgment. Lund v. Brown, 2000 UT 75, ¶ 9, 11 P.3d 277. Though broad, the trial court’s discretion is not unlimited. Id. As a threshold matter, a court’s ruling must be “based on adequate findings of fact” and “on the law.” Id. (citing May v. Thompson, 677 P.2d 1109, 1110 (Utah 1984) (per curiam)). A decision premised on flawed legal conclusions, for instance, constitutes an abuse of discretion. Id.

Moreover, the nature of a default judgment and the equitable nature of Rule 60 of the Utah Rules of Civil Procedure provide further limits. Id. at ¶10. For example, the Utah Supreme Court has stated that a trial court’s “discretion should be exercised in furtherance of justice and should incline towards granting relief in a doubtful case to the end that the party may have a hearing.” Id. (citing Helgesen

v. Inyangumia, 636 P.2d 1079, 1081 (Utah 1981)) Likewise, the Utah Supreme Court has further stated that “if default is issued when a party genuinely is mistaken to a point where, absent such mistake, default would not have occurred, the equity side of the court ... [should] grant relief.” Id. (citing May, 677 P.2d at 1110). Based on these principles, the Utah Supreme Court has stated that ““it is quite uniformly regarded as an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to appear, and timely application is made to set it aside.”” Id. at ¶11 (citing Helgesen, 636 P.2d at 1081).

2. Issue Preserved at: [R. 374: 9 – 16 (Transcript for Hearing on February 27, 2006, attached hereto as Addendum “1”, pg. 9 -16)].¹ [R. 237:1-5 (Memorandum in Support of Amended Motion for Reconsideration, attached hereto as Addendum “2”, pg. 1-5)]. [R. 275 (Ruling dated March 31, 2006 denying Motion for Reconsideration, attached hereto as Addendum “3”)].

STATEMENT OF THE CASE

1. Nature of the Case. The underlying facts of this case involve Appellant Kenneth Davis’ (“Davis”) claims to real property located in American Fork, Utah County. Appellee Dennis Goldsworthy (“Goldsworthy”) is the present title owner of the

¹ Hereinafter, all citations to the trial transcript shall be designated [R. __:__] indicating page number and line number separated by a colon.

property, having received title to the property through Davis' ex-wife, Edna Davis, who is now deceased. In his complaint, Davis asserts a right to the property through an agreement with his ex-wife and that the transfers to Goldsworthy were in contravention to the agreement and were the result of undue influence and/or fraud. [R. 012].

2. Course of Proceedings and Disposition Below: Davis filed the present action on December 23, 2003. [R: 006]. In June 2005, Goldsworthy failed to appear at a regularly and properly scheduled deposition, and as a result Davis filed a Motion to Compel Goldsworthy's attendance. [R: 066, 089]. Just prior to the hearing scheduled on the Motion, Goldsworthy's counsel requested to withdraw from the case. [R. 108 – 124].

Pursuant to Rule 74 of the Utah Rules of Civil Procedure, Davis' counsel mailed a Notice to Appear or Appoint to Goldsworthy via first class mail on September 7, 2005. This Notice was sent to Goldsworthy's last known addresses. [R. 130]. As a result of Goldsworthy's failure to appear on October 14, 2005 at the rescheduled hearing on Davis' Motion to Compel and his failure to attend the properly noticed deposition, the trial court struck Goldsworthy's pleadings and entered default against him. [R. 134]. An order striking Goldsworthy's pleadings was entered by the trial court on November 7, 2005. [R.134].

Based on Davis' Request for a Hearing on Damages and Equitable Relief the Court set a hearing for February 3, 2006. [R. 136]. Notice of this hearing was sent out by the Court on December 22, 2005. [R. 139]. On January 27, 2006, Gregory Hansen filed an appearance of counsel on Goldsworthy's behalf and filed a Motion to Continue the Damages Hearing. [R. 148, 150]. On February 2, 2006, Goldsworthy filed a Motion and Memorandum to Set Aside Default. [R. 156].

At the hearing on February 3, 2006, the trial court granted a continuance of the hearing on damages until the Motion to Set Aside Default could be heard on February 27, 2006. [R. 186]. At the hearing on the motion to set aside on February 27, 2006, the trial court granted the Motion to Set Aside Default based on an issue not raised or briefed by Goldsworthy but raised by the Court *sua sponte*. [R. 222]. On March 3, 2006, responding to the Court's *sua sponte* reasoning for granting the Motion to Set Aside Default, Davis filed a Motion for Reconsideration of the Court's decision setting forth controlling case law setting forth that improper service of a notice to appear appoint is not grounds for setting aside default. [R. 232 – 237]. The Motion was denied on March 31, 2006. [R. 275]. Goldsworthy later filed a Motion to Dismiss, which was granted by the Court on August 7, 2006, and an order entered on September 8, 2006 [R. 364, 370]. A Notice of Appeal was filed on October 5, 2006 [R. 373].

STATEMENT OF FACTS

The relevant facts of this case concern the procedural history culminating in the trial court's decision to set aside the default judgment entered against Goldsworthy. In particular, on December 23, 2003, Davis filed a complaint and amended complaint against Goldsworthy wherein Davis claimed ownership of real property located in American Fork, Utah County. [R. 012:2]. Goldsworthy is the present owner of the property, and received title to the property through Davis' ex-wife, Edna Davis, who is now deceased. [R. 012:2-3]. In his complaint, Davis alleged claim to the property through an agreement with his ex-wife and that the transfers to Goldsworthy were in contravention to the agreement, and were the result of undue influence and/or fraud. [R. 012: 4-6].

On May 5, 2005, Davis noticed up Goldsworthy's deposition, to be held on Monday, June 13, 2005. [R. 066:1]. Goldsworthy's counsel arranged to appear at the deposition via telephone. However, at the appointed time of the deposition, Goldsworthy failed to appear. [R. 166: 2]. On the record, Goldsworthy's counsel confirmed that he had made several attempts to locate Goldsworthy but had been unable to do so. [R. 166: 3]. Accordingly, Davis filed a Motion to Compel Goldsworthy's Attendance at Deposition. [R. 095]. The Court set a hearing on Davis' Motion for September 2, 2005 [R. 105], but prior to the hearing Goldsworthy's counsel filed a Motion to Withdraw as Counsel. [R. 108].

The basis for the Motion to Withdraw was that the Goldsworthy had failed to pay for the attorney services, failed to contact his counsel, and had moved out of the area to an unknown address. [R. 108: 1-2; 111: 1-2]. Neither of the mailing certificates accompanying the Motion to Withdraw as Counsel or the Declaration of James W. Jensen included Goldsworthy's last known addresses. [R. 108: 3; 111: 3]. Indeed, only the Notice of Entry of Order Permitting Withdrawal of Counsel contained an address for Goldsworthy, which was his business address. [R. 127: 3].

Because the Motion to Withdraw as Counsel did not include the last known address of the Goldsworthy, upon entry of the Order permitting Goldsworthy's counsel to withdraw, Davis' counsel obtained Goldsworthy's last known addresses from his former counsel. [R. 375: 11 – 12]. Thereafter, pursuant to Rules 5(b)(1) and 74 of the Utah Rules of Civil Procedure, Davis' counsel served a Notice to Appear or Appoint to both Goldsworthy's home and business addresses. [R. 130:3]. At the continued hearing on October 14, 2005 on Davis' Motion to Compel, as a result of Goldsworthy's failure to appear, the Court struck Goldsworthy's pleadings and counterclaim and default judgment was granted against him. [R. 131; 134:1]. Davis' counsel prepared an order reflecting the Court's ruling, a copy of which was mailed to Goldsworthy on October 19, 2005 to both addresses. [R. 134:3].

Because Davis' complaint did not contain a request for damages in a sum certain amount, Davis requested a hearing on damages [R.136], and on December 22, 2005 the

Court set a hearing on the issue of damages for February 3, 2006 [R. 139]. The request for hearing on damages was sent to both of Goldsworthy's addresses [136: 2], and the Court sent notice of the hearing to Goldsworthy's business and home addresses. [R. 139: 2]. The Notice sent to Goldsworthy's business was returned to the Court as undeliverable. [R. 142].

On January 20, 2006, the Court received a letter dated January 16, 2006 from Goldsworthy indicating that he had received notice "from my ex-wife stating there is to be a hearing on February 3, 2006." [R. 146 (Letter to Court attached hereto as Addendum "4")]. Goldsworthy claimed to not have been aware of the proceedings in the case "due to the fact that I no longer live in Utah and now live in Colorado." [R. 146]. Goldsworthy further requested a continuance of the hearing so that he could get time off work and to acquire new counsel. [R. 146]. Immediately prior to the damages hearing, Gregory Hansen filed an appearance of counsel on Goldsworthy's behalf and simultaneously filed a Motion to Continue the Damages Hearing. [R. 148, 150]. The day before the damages hearing, Goldsworthy filed a Motion and Memorandum to Set Aside Default. [R. 156]. The next day, the Court granted a continuance until February 27, 2006 to give the parties time to brief Goldsworthy's Motion to Set Aside Default. [R. 186].

In his Motion to Set Aside Default, Goldsworthy argued that the default judgment should be set aside due to mistake, inadvertence, or excusable neglect due to the fact that:

Defendant was going through a divorce at the time the litigation began, and was required to shut down his business, and move to Colorado. His only stable address was that of his business. When he moved, he had no forwarding address. He had not been able to communicate with his former counsel, Mr. Jensen, since May of 2005, and moved the first week of June, 2005, which was when the Subpoena Duces Tecum was served on his counsel. Defendant's counsel did not inform him of the Subpoena or the deposition, and then withdrew in September of 2005 without informing him of the status of the case. [R. 156: 2 (Goldsworthy's Motion and Memorandum in Support of Motion to Set Aside Default, attached hereto as Addendum "5", pg. 2)].

Goldsworthy further argued that these events were "so distracting and consuming that he neglected to pay attention to the lawsuit." [R. 156:2]. Furthermore, Goldsworthy asserted simply that the Motion to Set Aside should be granted because "Defendant states that the claims made by the Plaintiff in the case are false." [R. 156:2].

In his Memorandum in Opposition to the Motion to Set Aside, Davis argued that pursuant to Hernandez v. Baker, 2004 UT App 462, ¶3, 104 P.3d 664, Goldsworthy had failed to show either excusable neglect or that he had a meritorious defense to the action. [R. 195:2]. Davis argued that Goldsworthy's unsupported statement that Davis' claims were "false" fell well below the requirement that Davis must "present a clear and specific proffer of a defense that, if proven, would preclude total or partial recovery by the claimant." Hernandez at ¶6. [R. 195: 2]. Davis further argued that pursuant to Black's Title Inc. v. Utah State Ins. Dept., 1999 UT App 330, ¶10, 991 P. 2d 607, Goldsworthy had failed to show that he had "used due diligence and that he was prevented from appearing by circumstances over which he had no control." Id. [R. 195: 2 - 5].

On the day prior to the hearing on the Motion to Set Aside Judgment, Goldsworthy submitted a lengthy Reply Memorandum wherein he argued at length that Davis' claims had no merit because Davis had no standing to raise his claims and that there were meritorious factual disputes to Davis' claims. [R. 217]. At the hearing the following day, Goldsworthy presented arguments raised in both his initial Memorandum as well as his Reply Memorandum, despite the Court's indication that it had not received the Reply Memorandum and over Davis' objection. [R. 374: 3 –9].

During Davis' counsel's argument, the Court interjected to inquire as to the method used to serve Goldsworthy with the Notice to Appear or Appoint. [R. 375: 11]. Davis' counsel explained Goldsworthy's addresses were obtained from his prior counsel, and that the Notice to Appear or Appoint was served via regular first class mail to both Goldsworthy's last known home and business addresses. [R. 375: 11 – 12]. Davis' counsel argued that it was Goldsworthy's responsibility to maintain a forwarding address with the Court and that the rules do not require service via return receipt or personal service. [R. 375: 12 – 15]. Because the issue was raised *sua sponte* by the Court and had not been argued by Goldsworthy, Davis' counsel indicated that he was willing to submit a legal memorandum on the issue. [R. 375:12]. The Court, however, ruled to set aside the default judgment, stating simply, "I'm going to grant their motion to set aside the default judgment" [R. 375:16] without making any further findings. Indeed, as part of its basis

for awarding attorney fees the Court informed Goldsworthy that he had “been less than diligent in maintaining contact with your attorneys and this court” [R. 375:16].

Just two days after the hearing, Davis requested that the Court review its decision to set aside default. [R. 224]. In his Memorandum in Support of Amended Motion for Reconsideration, Davis argued that pursuant to Rule 74 of the Utah Rules of Civil Procedure, Goldsworthy’s prior counsel was required to include the Goldsworthy’s address as part of the motion to withdraw, and that subsection (b) of that Rule provides simply that Davis should “serve” the notice on the unrepresented party. [R. 237: 3]. Rule 5(b)(1) of the Utah Rules of Civil Procedure provides that unless otherwise specified in the Rules, service of documents filed with the Court “shall be made by delivering a copy or by mailing a copy to the *last known address*, or if no address is known, by leaving it with the clerk of the court.” Utah R. Civ. P. 5(b)(1)(emphasis added). [R. 237: 3]. Furthermore, Davis relied on the memorandum decision of Hawley v. Union Pacific Railroad, 2005 UT App 368 (attached hereto as Addendum “6”), to argue that Goldsworthy was not entitled to relief from the default judgment because he failed to fulfill his duty to inform the trial court of changes in his address. [R. 237: 4].

Despite the factual similarities between the actions taken by Goldsworthy and those taken by the Defendant in Hawley, the trial Court denied Davis’ Motion for Reconsideration and ruled that the Motion did “not present arguments that could not have been made in connection with the motion.” [R. 275]. Davis now seeks this Court’s

review of the trial court's ruling to set aside default judgment based upon the arguments set forth below.

SUMMARY OF ARGUMENT

The trial Court abused its discretion in setting aside the default judgment against Goldsworthy because Davis adequately served Goldsworthy with a notice to appear or appoint and because Goldsworthy otherwise failed to show that excusable neglect justified setting aside the default entered against him. Accordingly, Davis seeks an order from this Court reversing the trial court's decision to set aside default judgment against Goldsworthy, and remanding the action for a determination of damages.

ARGUMENT

The trial court abused its discretion in setting aside default judgment because Goldsworthy was properly served with a notice to appear or appoint, the decision was not based on adequate findings or on the law, and Goldsworthy otherwise failed to show excusable neglect. In the preceding below, the trial court granted Goldsworthy's Motion to Set Aside Default Judgment and denied Davis' Motion for Reconsideration based upon the reasoning that Goldsworthy did not have proper notice to appear or appoint because it was known at the time of the withdrawal of Goldsworthy's prior counsel that the addresses on record for Goldsworthy were not current. The Court further denied Davis' Motion for Reconsideration on the basis that the arguments raised in the motion could have been made in connection with the motion to set aside default.

In order to obtain relief from a default judgment under Rule 60(b) of the Utah Rules of Civil Procedure on the basis of excusable neglect, a defendant must show: (i) that the judgment was entered against him through excusable neglect; (ii) that his motion to set aside the judgment was timely, and (iii) that he has a meritorious defense to the action. Hernandez v. Baker, 2004 UT App 462, ¶3, 104 P.3d 664. The basis of this appeal is that as a matter of law, that the trial court abused its discretion in granting Goldsworthy's motion to set aside default judgment.

A. The Trial Court Abused its Discretion in Setting Aside Default Judgment Based on the Decision that Service of the Notice to Appear or Appoint was not Adequate.

As a threshold matter, the trial court erred in ruling that default judgment should be set aside because Goldsworthy was not served a Notice to Appear or Appoint via registered mail or personal service. Rule 74 of the Utah Rules of Civil Procedure provides for the withdrawal of counsel and the sending of a Notice to Appear or Appoint. In particular Rule 74(a) states in relevant part that the notice of withdrawal shall include "the address of the attorney's client" and subsection (b) of the same rule provides that "the opposing party shall serve a Notice to Appear or Appoint Counsel on the unrepresented party." Utah R. Civ. P. 7. Of note, Rule 5(b)(1) specifically provides that service upon a party of documents filed with the Court, unless otherwise specified by the Rules, "shall be made by delivering a copy or by mailing a copy to the *last known*

address, or if no address is known, by leaving it with the clerk of the court.” Utah R. Civ. P. 5(b)(1)(emphasis added).

A plain reading of Rule 74 in conjunction with Rule 5(b)(1) does not require either personal service or service via registered mail of a Notice to Appear or Appoint.

Furthermore, the case of Hawley v. Union Pacific Railroad, 2005 UT App 368, directly addresses the issue of whether the method of service of the notice to appear or appoint a sufficient is basis for setting aside default judgment. In Hawley, the Plaintiff sought relief from Summary Judgment under Utah Rule of Civil Procedure 60(b)(6) based on the alternative arguments that he had failed to receive a notice to appear or appoint counsel, and that he was never served with notice of the judgment. In affirming the trial court’s decision to deny Mr. Hawley’s motion for relief from the judgment, the Court held that:

Hawley is not entitled to relief under Rule 60(b) because he did not fulfill his duty to inform the trial court and opposing counsel of any changes in his address nor did he exercise due diligence in keeping himself informed of ongoing court proceedings. See Volostnykh v. Duncan, 2001 UT App 26 (per curiam)(recognizing the parties’ duties to inform the court of any address changes and to “keep themselves apprised of ongoing court proceedings”). Here, Hawley did not inform the trial court or opposing counsel of his new address. Union Pacific received Mueller’s notice of withdrawal but the new address was not listed in the notice, rather it was found in the mailing certificate. As a result, Union Pacific attempted to mail Hawley a notice to appear or appoint counsel to the address provided in the Complaint twice, but both attempts were unsuccessful. Id.

The facts of this case are directly analogous to those in Hawley. In both instances, neither Hawley nor Goldsworthy made *any* attempt to inform the Court or opposing

counsel of a new address. [R. 165:2]. In the present case, Goldsworthy did not even make an attempt to keep his counsel informed as to his address. [R. 108: 1-2; 111: 1-2].

Furthermore, Goldsworthy's own letter requesting a continuance of the damages hearing reveals that he had received notice of the hearing through his ex-wife. [R. 146]. Presumably the second address listed in mailing certificate for the Notice of Hearing is the address of Goldsworthy's ex-wife and because this notice was not returned to the Court as undeliverable. [R. 142]. Of note, a copy of the Notice to Appear or Appoint, Default Judgment, and the Request for a Hearing on Damages were also sent to this address. [R. 130:3; 134:3; 136:2].

As in Hawley, Plaintiff's counsel received a defective notice of withdrawal which did not correctly identify the last known address of the Defendant. Nevertheless, as Union Pacific did in Hawley, Davis' counsel attempted to mail Goldsworthy a notice to appear or appoint counsel to the address where Goldsworthy was served as well as his business address. Nothing in Hawley, or in Rule 74, suggests that Plaintiff's counsel had a duty above and beyond serving Goldsworthy with a notice to appear or appoint by regular first class mail to his last known address. Indeed, Hawley specifically states that it was Goldsworthy's duty to keep himself current with ongoing proceedings and to update his address with the Court. Furthermore, Rule 5(b)(1) specifically provides that in the event that there is no last known address for a party, that service is complete upon delivery of the document with the clerk of the court. Thus, even in the event that service

of the Notice to Appear or Appoint had been returned as undeliverable to both of Goldworthy's addresses, service would be complete under Rule 5 by delivery of the Notice to the clerk of the court.

While these arguments were raised in Davis' Motion for Reconsideration, the trial court denied the motion on the basis that Davis "did not present arguments that could not have been made in connection with the motion." However, as noted above, the issue of proper service of the Notice to Appear or Appoint was first raised *by the Court* at the hearing on the Motion to Set Aside Default Judgment. When asked regarding the service requirement of a Notice to Appear or Appoint, Davis' counsel noted that the issue had not been raised by Goldworthy in his memoranda in support of his motion and suggested that he would, and could, provide a legal brief outlining the authorities that supported Davis' position that the method of service of the Notice to Appear or Appoint chosen by Davis was sufficient. While not citing any case law, Plaintiff's counsel further argued that the requirement that Plaintiff was required to personally serve the Notice to Appear or Appoint was onerous and not required under the Utah Rules of Civil Procedure. Thus, while Davis' counsel did raise the essential arguments set forth in Hawley during oral argument on the motion to set aside, because the issue was raised *sua sponte*, Davis' counsel could not reasonably have been expected to cite the Hawley opinion during the course of argument. Thus, it was appropriate for Davis to bring this controlling authority

to the Court's attention through a motion for reconsideration, and given the ruling in Hawley the trial court should have granted Davis' Motion for Reconsideration.

B. Default Judgment should not have been Set Aside because it was not Supported by Any Findings of Fact or on the Law because Goldsworthy Failed to Show Excusable Neglect to Set Aside the Default Judgment.

Next, this Court should reverse the trial court's ruling because the evidence presented by Goldsworthy does not provide a reasonable basis for the Court's decision to set aside the default judgment against Goldsworthy. In order to have the default set aside on the grounds of excusable neglect, Goldsworthy "must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control. Black's Title Inc. v. Utah State Ins. Dept., 1999 UT App 330, ¶10 991 P.2d 607. The Utah Supreme Court has found that simply alleging illness alone is not sufficient to show excusable neglect, but the Defendant must also allege that the illness incapacitated the Defendant so that he was unable to act. Id. (citing Warren v. Dixon Ranch Co., 260 P.2d 74, 743 (Utah 1953)).

Furthermore, in the matter of Sierra Wholesale Supply, L.L.C. v. Radiant Technologies, Inc. 2005 UT App 540 (Attached hereto as Addendum "7"), this Court stated:

Although Defendant avers that its president was out of the office recovering from back surgery, no affidavit was submitted to the trial court detailing how this so incapacitated Defendant, a corporation doing business on a national scale, that it was unable to take steps to protect its rights. See Warren v. Dixon Ranch Co., 123 Utah 416, 260 P.2d 741, 743 (1953)] (finding that excusable

neglect was not demonstrated by an affidavit that did not “identify the nature of the illness” or demonstrate how the director and trustee of the defendant corporation “was so incapacitated that he could not have called an attorney to have his right and the rights of the corporation protected”). We agree with the trial court’s observation that it seems unlikely that the president of such a corporation would be “out of the office for back surgery and no one is looking at this mail.” Even if this were the case, however, it does not demonstrate that Defendant acted with the “due diligence” necessary to show excusable neglect. See Black’s Title, 1999 Ut App 330 at ¶ 10 (quotations and citation omitted). The trial court acted within its discretion in refusing to set aside the default judgment on these grounds. Id.

In this case, the reasons provided by Goldsworthy to evidence that he used due diligence were that:

(1) Defendant was going through a divorce at the time the litigation began, and was required to shut down his business, and move to Colorado. (2) His only stable address was that of his business. (3) When he moved, he had no forwarding address. (4) He had not been able to communicate with his former counsel, Mr. Jensen, since May of 2005, and moved the first week of June, 2005, which was when the Subpoena Duces Tecum was served on his counsel. (5) Defendant’s counsel did not inform him of the Subpoena or the deposition, and then withdrew in September of 2005 without informing him of the status of the case. [R. 156: 2 (Goldsworthy’s Motion and Memorandum in Support of Motion to Set Aside Default, attached hereto as Addendum “5”, pg. 2)]. See *also* [R. 219: 2-3](internal numbers added for clarification purposes).

Furthermore, Goldsworthy’s affidavit indicates that (6) “the divorce, move, and closing of my business consumed my attention, and I neglected the lawsuit because of it” and that (7) because of these events he was “unable to properly attend to this lawsuit.” [R. 210: 2].

The trial court did not cite any findings of facts in making its determination to set aside default judgment. While the Court has broad discretion in granting a motion to set

aside default judgment, as a threshold matter, a court's ruling must be "based on adequate findings of fact" and "on the law." May v. Thompson, 677 P.2d 1109, 1110 (Utah 1984). Indeed, the only statement that may be construed as a finding by the Court does not support the setting aside of the default judgment. In granting an award of attorney's fees the Court informed Goldsworthy that he "had been less than diligent in maintaining contact with your attorneys and this court." [R. 375:16]. The facts presented by Goldsworthy in his own defense fail on their face to show excusable neglect because he failed to allege how his divorce, move, or closing of his business so incapacitated him so that he was unable to act

In particular, Goldsworthy has made no allegations that the divorce, move, and close of his business were events so "outside his control" that he could not have maintained contact with his attorney or retained new counsel in order to protect his rights. In some ways, the present case is more egregious than the neglect evidenced in Sierra and Black's Title. Specifically, in the present case Goldsworthy actually retained an attorney to prosecute the matter, who filed a counterclaim on his behalf, [R. 44], and was involved in setting the time and date for the deposition scheduled for June 13, 2005. [R. 172:2]. All that was required was that Goldsworthy keep in contact with his attorney and respond to requests through his attorney. But by Goldsworthy own admission, he "neglected" the lawsuit. [R. 210:2]. In other words, Goldsworthy had ample opportunity to respond, obtain counsel, appear at properly noticed depositions and other hearings, and simply

chose not to respond, become involved, protect his rights, or even communicate with his attorney.

Contrary to Goldsworthy's affidavit testimony that he had no contact with his attorney since May 2005, at the time of the deposition, Goldsworthy's attorney indicated that he had "initiated a telephone call and talked to [Goldsworthy's] employment who said that he was obligated to go to Colorado and didn't give me the details as to why." [R. 166:3]. Furthermore, Goldsworthy's affidavit states simply that "he has not been able to communicate with his former counsel since May 2005," but provides no further information regarding whether this failure to communicate was a result of his own neglect or that of his attorney. [R. 44]. Goldsworthy's prior attorney's affidavit evidences that Goldsworthy failed to contact his attorney and not the other way around. [R. 108: 1-2; 111; 1-2]. Any inability to obtain information regarding the status of the case and the eventual withdrawal of prior counsel was not a result of Goldsworthy's prior counsel's actions, but as a direct result of Goldsworthy's neglect.

As indicated in Hawley, it was Goldsworthy's responsibility to keep himself apprised of the status of the litigation and to update the Court of his address change. All that was required was that Goldsworthy update either his counsel or the Court as to his forwarding address. He failed to do either. This failure is particularly acute given that a defense was tendered, including a counterclaim, on Goldsworthy's behalf and with his

assistance. To suddenly ignore the litigation evidences lack of due diligence higher than a simple “loss of interest.”

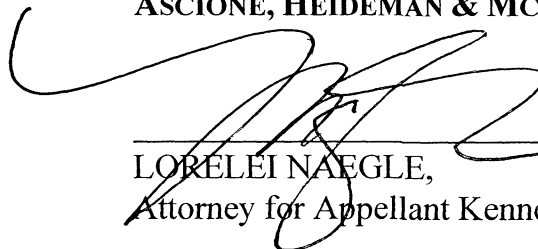
Goldsworthy failed to use due diligence and was not otherwise prevented from appearing by circumstances over which he had no control. Nothing asserted was beyond Goldsworthy’s control and hence the facts and circumstances of this case do not justify setting aside default as a result of Goldsworthy’s “excusable neglect”. Accordingly, the Court must reverse the trial court’s arbitrary and capricious decision setting aside default judgment.

CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, this Court should reverse the trial court’s ruling setting aside default judgment, enter default against Goldsworthy, and remand the matter to the trial court for a hearing on damages.

Respectfully submitted this 10th day of April, 2007.

ASCIONE, HEIDEMAN & MCKAY, L.L.C.



LORELEI NAEGLE,
Attorney for Appellant Kenneth Davis

ADDENDA

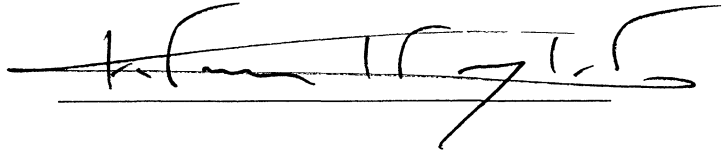
1. Transcript for Hearing on Motion to Set Aside dated February 27, 2006.
2. Davis' Memorandum in Support of Amended Motion for Reconsideration.
3. Ruling dated March 31, 2006 denying Davis' Motion for Reconsideration.
4. Letter to Court from Dennis Goldsworthy date January 16, 2006.
5. Goldsworthy's Motion and Memorandum in Support of Motion to Set Aside Default.
6. Hawley v. Union Pacific Railroad, 2005 UT App 368.
7. Sierra Wholesale Supply, L.L.C. v. Radiant Technologies, Inc. 2005 UT App 540.

CERTIFICATE OF SERVICE

On the 10th day of April, 2007 I caused to be delivered via the following method two copies of the foregoing to the following:

Gregory Hansen
DUVAL HAWS & MOODY PC
947 S. 500 E. STE 200
American Fork, Utah 84003

<input checked="" type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Facsimile
<input type="checkbox"/>	Hand-Delivered
<input type="checkbox"/>	Federal Express

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

ADDENDUM 1

IN THE FOURTH JUDICIAL DISTRICT - PROVO COURT
UTAH COUNTY, STATE OF UTAH

4 KENNETH DAVIS,) SCHEDULING CONFERENCE/OA
)
 5 PLAINTIFF,)
)
 6 vs.)
)
 7 DENNIS GOLDSWORTHY,) CASE 030405431
) APPEAL 20060924-CA
 8)
 DEFENDANT.) JUDGE JAMES R. TAYLOR
 9)

10

11 BE IT REMEMBERED that this matter came on for hearing

12 before the above-named court on February 27, 2006.

13 WHEREUPON, the parties appearing and represented by

14 counsel, the following proceedings were held:

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OFFICIAL CERTIFIED TRANSCRIPT
(From CD Recording)

COURT PROCEEDINGS

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A-P-P-E-A-R-A-N-C-E-S
FOR PLAINTIFF:
JUSTIN D. HEIDEMAN, ESQ.
LORELEI NAEGLE, ESQ.
ASCIONE HEIDEMAN & MCKAY
2696 N UNIVERSITY AVE #180
PROVO UT 84604
FOR DEFENSE:
GREGORY G. HANSEN, ESQ.
DUVAL HAWS & MOODY
47 S 500 E, #200
AMERICAN FORK UT 84003

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RULING.	9	

1 P-R-O-C-E-E-D-I-N-G-S
2 (February 27, 2006)
3 THE JUDGE: Be seated.
4 Mr. Hansen, you've put us at a substantial
5 inconvenience.
6 MR. HANSEN: I know. I apologize for that,
7 Judge. I'm sorry about that.
8 THE JUDGE: Am I correct that your client has come
9 from Colorado for this hearing?
10 MR. HANSEN: That's true. It was in my notes, it
11 wasn't on my calendar. No excuse.
12 THE JUDGE: We set it at 11:00 and we now have 15
13 minutes. I don't know if that's realistically time to give
14 a fair exposition of what's before me. And I, I just don't
15 know quite what to do about that.
16 Mr. Heideman, it's your motion. No, it's Mr., it's
17 your motion. Mr. Hansen, it's your motion to set aside the
18 default judgment.
19 MR. HANSEN: My motion to set aside.
20 THE JUDGE: What, literally I have to, I have to
21 recess in 15 minutes.
22 MR. HANSEN: Do you have a copy of the reply that
23 I filed on Friday?
24 THE JUDGE: No.
25 MR. HANSEN: That contains a lot of what the court
COURT PROCEEDINGS

1 needs to look at. I can give a brief summary if the court
2 would like. Basically it's the same as what we raised
3 before. The a,--
4 THE JUDGE: Well let me, let me be accurate.
5 What I have is there's a fax in the file. We're not able to
6 receive faxes so I haven't, haven't looked at it.
7 MR. HANSEN: I filed this on Friday at about 3:00
8 o'clock.
9 THE JUDGE: There would be no way.
10 MR. HANSEN: Okay.
11 THE JUDGE: I haven't had time to look at them
12 ARGUMENT BY MR. HANSEN
13 MR. HANSEN: Basically it is under Rule 60(b)
14 because of mistake (short inaudible, no mic) or surprise or
15 neglect excusable neglect.
16 What happened in this case there is a case that is
17 very much like it. If you'd like to take it under
18 advisement and look at this later I would appreciate it.
19 There is a case Interstate Excavating versus (inaudible word,
20 no mic), it's a Utah case where a, the situation is very
21 similar under Rule 60(b). In that case the attorney for the
22 defendant had not notified him of the pending situation in
23 the case, nor did the defendant understand what was going on,
24 then he actively sought to set aside the judgment.
25 That is basically what has happened in this case.

COURT PROCEEDINGS

1 The defendant, Goldsworthy's attorney withdrew. He moved, he
2 did not have a forwarding address, there was a breach, a
3 lack of communication there and--

4 THE JUDGE: Well, I recall the motion to
5 withdraw. The motion to withdraw was because the attorney
6 alleged that Mr. Goldsworthy was not communicating with him
7 so he--

8 MR. HANSEN: That may be--

9 THE JUDGE: -- he alleged that he lost, lost
10 touch with his attorney at that, or with his client at that
11 point--

12 MR. HANSEN: And that's--

13 THE JUDGE: -- that's why the motion was
14 granted.

15 MR. HANSEN: That's correct. And what happened
16 is that basically he was forced to shut down his business
17 here, move to Colorado. And he was in the midst of a
18 divorce. Mr. Goldsworthy's affidavit states that he was
19 consumed by the divorce. Unlike I think what the plaintiff's
20 have alleged that a divorce would make you more aware of your
21 surroundings or more aware of your litigation, anyone who has
22 been in a divorce or has witnessed the effects it has on a
23 divorce, a divorce has a person would know that that is
24 pretty consuming to lose your family, to lose your wife, to
25 lose your kids.

COURT PROCEEDINGS

1 THE JUDGE: Uh-huh (affirmative).
2 MR. HANSEN: And a, it was just an excusable
3 neglect. That's, that's basically he just did not take care
4 of his matters and let the matter go and didn't communicate
5 with his counsel. His counsel did not forward the
6 information along to him about the withdrawal, about the
7 notice to a, to appoint or a, appear. And he only got
8 notice of the judgment, I'm not exactly sure how he got
9 notice of the default. But now is actively pursuing to set
10 aside the default on the merits.
11 Now the merits are very important here--
12 THE JUDGE: Uh-huh (affirmative).
13 MR. HANSEN: -- is because he has a meritorious
14 defense for his claims. There was a second thing that has
15 been raised a, by the plaintiff is that we don't have a
16 meritorious defense. Well, if that's true plaintiff has no
17 standing to bring a majority of his claims in this case.
18 Number one--
19 THE JUDGE: Huh-uh (negative).
20 MR. HEIDEMAN: Your Honor, I'm going to object.
21 This is not party of the motion.
22 MR. HANSEN: This is part of my reply. And I'm
23 sorry you didn't have a chance to take a look at it.
24 MR. HEIDEMAN: Well, I'm sorry. But it should
25 have been raised at the time of the motion. The only, the
COURT PROCEEDINGS

1 only matters that are appropriate subject matter to be raised
2 in the reply are matters that are raised in the motion. If
3 he failed to raise his proffer at the time of the motion
4 that's not our problem.

5 MR. HANSEN: The reason I did not, Your Honor, is
6 because I was contacted pretty late in the game. And there
7 was some, there was a hearing coming up and I had to get
8 something on file. Did not have time to adequately research
9 this until later until I got their reply. So then I
10 replied. And now it's before the court. I would appreciate
11 it if the court would take a look at it because it is a
12 meritorious defense. One of the things that a, the court
13 must consider are whether there are defenses, whether the
14 judgment should be set aside or not.

15 THE JUDGE: Uh-huh (affirmative).

16 MR. HANSEN: Your Honor has stated before that a,
17 that there, it is more likely or it is the tendency to go on
18 merits rather than just have a, have a default.

19 The standing issue briefly. The chain of title
20 shows that the plaintiff had the land with his wife Edna.
21 Upon their divorce they did not want to have it involved in
22 the divorce so they transferred it to his parents. His
23 parents later transferred it back to Edna. Edna was the
24 sole owner of the property, nothing was ever raised about
25 that. Then she transferred the property to the defendant.

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1 The plaintiff has no standing to bring a cause of
2 action because he's not an heir of Edna, he hasn't shown that
3 he is an heir, he's not, he doesn't stand to get it under an
4 intestate statute nor under a Will. It would be like me
5 selling my property to you and having the plaintiff come and
6 say you can't do that. He just doesn't have any standing in
7 the property, in the real property.

8 Second of all, the divorce decree specifically
9 states between he and Edna that the only property, everything
10 that is in their possession at the time of the divorce is
11 theirs except for a GMC van which I believe is the truck
12 they're talking about, and his tools. Those are the only
13 things he's raised in this, in this, in this lawsuit that are
14 claims for his property. The GMC van is still there at the
15 property, it's just been moved around behind. Okay. The
16 tools, we don't know where those are, are about. So that's
17 really the only issue are there any tools there, who took
18 them and who is responsible. If they're still there he can
19 have them, he can go and get his car. In fact, the plaintiff
20 has stated or the defendant has stated that Edna has asked
21 him several times to remove his property from the place.
22 So all of the furnishings, the household stuff and everything
23 in the divorce decree is awarded to Edna, she can do whatever
24 she wants with it after that. He doesn't have any standing
25 to bring claims against that stuff. The only issue really

COURT PROCEEDINGS

1 is the van and the tools. So that's the meritorious
2 defense.

3 THE JUDGE: What's the connection of your client
4 to a, Second Chance, 450 South Main Street in Cedar City or
5 95 North Drive Light in Cedar City, Utah?

6 MR. GOLDSWORTHY?: That, that was my previous
7 business address and 94 North my ex-wife's home.

8 THE JUDGE: Okay. The business address until
9 when?

10 MR. GOLDSWORTHY?: Until May of 2005.

11 THE JUDGE: Okay. All right.

12 MR. HANSEN: And then on the issue of attorney's
13 fees otherwise defendant has meritorious factual disputes.
14 He claims he (short inaudible, no mic) exercise undue
15 influence, there was no problem there and that a, you know,
16 he has factual disputes.

17 As far as the attorney's fees like Your Honor has
18 stated, the majority of the stuff that they've already done
19 work can be used in the litigation, a, and so we shouldn't be
20 required to pay attorney's fees for something they can just
21 reuse. Thank you.

22 ARGUMENT BY MR. HEIDEMAN

23 MR. HEIDEMAN: May it please the court.
24 Your Honor, this is just another attempt by the
25 defendant in this case to try and benefit from delay. To

COURT PROCEEDINGS

1 file an inappropriate reply on the basis that he was
2 contacted late in the game, that's just inappropriate. It
3 should be stricken and those comments should be stricken from
4 the record because we've had no notice of those, we've not
5 even received a copy OF the reply, and it's not appropriate
6 to raise those at that point.

7 But in dealing with the merits of the case there is
8 simply no way that the defendant concede to have this
9 removed. The Hernandez, Black's Title and Sierra case as
10 well as Warren versus Dixon Ranch make it very clear that
11 counsel, or that the defendant must be able to show why his
12 excuse would prevent him for communicating. He has to be
13 able to relate to this court why it is that a divorce would
14 prevent him from picking up the telephone, from leaving a
15 forwarding address with the court, or from corresponding with
16 his counsel.

17 And we know very well, Your Honor, that Mr. Jensen
18 attempted to contact the defendant on multiple occasions.
19 And in fact on June 13th of 2005 we have a record of that
20 contact before the court. A deposition was noticed, it was
21 conducted. At that time Mr. Jensen tried to call his
22 client's work. His client's work informed him that he was
23 employed by them still and that he had departed for Colorado
24 on business. So a representation to the court that he was
25 no longer employed there as of May seems to be suspect.

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1 It's... I simply cannot see where the motion as pled meets
2 the standard that is required. The specific language from
3 the Black opinion I believe is what is relevant here. In
4 the Black opinion--
5 THE JUDGE: Counsel, I want you to back up and
6 address another problem that I'm concerned about first.
7 MR. HEIDEMAN: Certainly, Your Honor.
8 THE JUDGE: How did you obtain service of your
9 notice to appear or appoint?
10 MR. HEIDEMAN: Service of the notice to appear or
11 appoint counsel?
12 THE JUDGE: Uh-huh (affirmative).
13 MR. HEIDEMAN: I believe that the court issued
14 that at the hearing that the defendant failed to appear at
15 because the defendant had not given a forwarding address to
16 the court.
17 THE JUDGE: Well, how did you serve? Under
18 Rule 74 how did you obtain service of the (inaudible word,
19 voice trailed off).
20 MR. HEIDEMAN: May I allow Ms. Naegle to speak to
21 that. She was in charge of that.
22 MS. NAEGLE: If I may I was actually involved in
23 that. The, the initial a, withdrawal of counsel did not
24 contain an address. And I contacted Mr. Jensen's office and
25 asked for the addresses and notified them of the problem.

COURT PROCEEDINGS

1 THE JUDGE: Uh-huh (affirmative).
2 MS. NAEGLE: They gave me the two addresses in
3 regard to--
4 THE JUDGE: And you simply mailed it?
5 MS. NAEGLE: Simply mailed it.
6 THE JUDGE: And a, is it your position that that's
7 adequate under the rules?
8 MR. HEIDEMAN: I believe it is, Your Honor. It's
9 his responsibility to maintain a forwarding address with the
10 court. It's also his--
11 THE JUDGE: Can you cite me to a rule that states
12 that that's all the service that's required?
13 MR. HEIDEMAN: I believe that at the point in time
14 that he has a, an attorney who is given notice of the
15 hearings and the attorney gives us the forwarding addresses,
16 I think that, that is his responsibility. I don't have a
17 rule off on the top of my head but I'm happy to research
18 and provide a written memorandum to the court on that
19 position.
20 THE JUDGE: Well, I'm troubled by that. It would
21 seem that in a circumstance like this where there hasn't been
22 communication between the attorney and his client, we know
23 that that's the context, the rule requires that before the
24 court move forward notice to appoint or appear in person be
25 given. The obvious intent of that rule is to warn the

COURT PROCEEDINGS

1 client your attorney is not functioning for you, he's been
2 allowed out of the case, you're now on your own, you need to
3 appear by an attorney or by yourself. And simply mailing
4 that to an address without return receipt requested, without
5 other proof of service which would be required for a summons
6 or complaint, or effecting personal service of the notice
7 which was required under the old rule, a, I'm puzzled as to
8 how that, that gives the court jurisdiction to go forward.

9 MR. HEIDEMAN: Your Honor, I believe that this is
10 a substantially different matter than a service of summons or
11 a complaint. This is an individual--

12 THE JUDGE: Sure, sure it is. But I'm--

13 MR. HEIDEMAN: Well, I think that that's why it
14 addresses the court's concern. It's, it's repugnant to me
15 to believe that this individual by simply disappearing can
16 evade litigation and cost my client money, and that's what
17 he's attempted to do. If this court dismisses the default
18 judgment they will effectively have awarded, or rewarded
19 that.

20 THE JUDGE: Well it may be, counsel. But it may
21 be. But the address that you've used is the address who was
22 provided to you by the attorney who says I haven't got
23 contact with my client. How am I to have confidence that
24 that notice got to Mr. Goldsworthy?

25 MR. HEIDEMAN:: I think that that's, there's a,
COURT PROCEEDINGS

1 that that, there's a difference of opinion there. He says I
2 haven't had communication with my client as of the date of
3 his motion to withdraw. But as of June 13th, Your Honor, he
4 was making telephone calls to his client's work in my
5 presence, in front of the presence of a stenographer, and
6 that stenographer was being informed that he was in fact
7 working for that company. You've just heard the defendant
8 say he was not there after May but that's not true. We've
9 got the, the stenographic record that he was on at least
10 June 13th because they knew where he was at.

11 And it's, it's... I mean, it seems to be a, a high
12 burden to place on the plaintiff in this matter to say not
13 only are you in charge of prosecuting your case but you're
14 also in charge of making sure that the defendant doesn't run
15 away from his responsibilities.

16 THE JUDGE: Counsel, as of the 24th of August of
17 2005 James Jensen in his affidavit said,

18 Numerous correspondence and
19 documentation was sent to the defendant
20 and counter-plaintiff and returned moved,
21 left no address, unable to forward,
22 return to sender. I have attempted to
23 send plaintiff has closed his business
24 with no further contact information. Then he
25 moves to withdraw. That's all 24th of 2005.

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1 September 20th of 2005, a document dated I think
2 September 20th, it might be the 25th, must be the 20th, is
3 when your notice to appear or appoint is filed and
4 presumably mailed. Certificate of mailing says it was
5 mailed that same day by U.S. Mail to the address, which by
6 Mr. Jensen's address is no longer good.
7 MR. HEIDEMAN: I understand, Your Honor. But at
8 the same time there is a responsibility on the part of the
9 defendant. He has a duty--
10 THE JUDGE: Well why go through the motion of
11 requiring the notice if we don't care if it was served?
12 MR. HEIDEMAN: Well, Your Honor, we do care if it
13 was served. We also care whether or not he's being
14 attentive to his legal duties.
15 THE JUDGE: Okay. I understand.
16 Anything further further, counsel?
17 FURTHER ARGUMENT BY MR. HANSEN
18 MR. HANSEN: Well they could have... As far as
19 the service of that notice to appear, I think it all ties
20 back into whether he ought to be held responsible for a
21 lapse, for neglect. And, a, they could have reached it,
22 reached him by service of publication, they could have asked
23 for certified mailing or some other alternate service. They
24 mailed it knowing that, that he wasn't there or at least
25 questioning--

COURT PROCEEDINGS

1 THE JUDGE: Well it only gets you so far,
2 counsel. I'm going to grant their motion to set aside the
3 default judgment. I'm going to grant his, his request for
4 attorney's fees. I presume I have an affidavit,
5 Mr. Heideman. Is that correct?
6 MR. HEIDEMAN: I haven't--
7 THE JUDGE: Please submit one, I'll consider the
8 attorney's fees.
9 Mr. Goldsworthy, you have been less than diligent
10 in maintaining contact with your attorneys and this court,
11 it's going to cost you.
12 I'll see, I'll receive the affidavit of attorney's
13 fees and I'll determine the appropriate amount of attorney's
14 fees to be awarded.
15 Mr. Hansen, if you'll prepare an appropriate
16 order. Thank you.
17 MR. HEIDEMAN: Do you have time to set a
18 scheduling conference, Your Honor?
19 THE JUDGE: Excuse me?
20 MR. HEIDEMAN: We probably don't have time for a
21 scheduling--
22 THE JUDGE: We don't have time. We'll initiate a
23 telephone scheduling conference after I get the order. I
24 encourage you to do a Rule 26 conference
25 WHEREUPON, the recording was ended.

COURT PROCEEDINGS

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REPORTER'S CERTIFICATION

STATE OF UTAH)
) SS.
COUNTY OF UTAH)

I, Penny C. Abbott, a Certified Shorthand Reporter and
Notary Public in and for the State of Utah, do hereby certify
that I received the electronically recorded CD 06-15-402 in
the matter of Davis vs. Goldsworthy, hearing date February
27, 2006, and that I transcribed it into typewriting and that
a full, true and correct transcription of said hearing so
recorded and transcribed is set forth in the foregoing pages
numbered 1 through 17, inclusive except where it is indicated
that the tape recording was inaudible.
WITNESS my hand and official seal this 27th day of
December, 2006.

PENNY C. ABBOTT, COURT REPORTER/NOTARY
License 22-102811-7801
Notary Public, Comm Exp 9-24-08

COURT PROCEEDINGS

ADDENDUM 2

ga

2008.11.11 - 2 1 5:12

JUSTIN D. HEIDEMAN (USB #8897)
LORELEI NAEGLE (USB #9577)
ASCIONE, HEIDEMAN & MCKAY, L.L.C.
2696 North University Avenue, Suite 180
P.O. Box 600
Provo, UT 84604
Telephone: (801) 812-1000
Fax: (801) 374-1724
Attorneys for Plaintiff

**IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY
PROVO DEPARTMENT, STATE OF UTAH**

<p>KENNETH DAVIS,</p> <p>Plaintiff,</p> <p>vs.</p> <p>DENNIS GOLDSWORTHY,</p> <p>Defendant</p>	<p>MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION</p> <p>Case No. 030405431</p> <p>Judge: James R. Taylor</p>
--	---

COMES NOW the Plaintiff by and through his attorneys of record and submits the following Memorandum in Support of his Motion for Reconsideration.

STATEMENT OF FACTS

1. On August 29, 2005, Defendant's prior counsel James Jensen filed a Motion for Permission to Withdraw as Counsel with an accompanying Affidavit setting forth the fact that Mr. Jensen had been unable to contact Mr. Goldsworthy for some time and that several items of mail had been returned to him as undeliverable.

2. On September 1, 2005, the Court granted Mr. Jensen's Motion for Permission to Withdraw as Counsel.

3. Neither the Motion to Withdraw nor Order Granting Leave to Withdraw included the last known address of the Defendant.

4. Plaintiff's counsel contacted Mr. Jensen's office to obtain the Defendant's last known addresses.

5. On September 20, 2005, Plaintiff filed a Notice to Appear or Appoint which was served on Defendant to his last known address via regular first class mail.

6. On February 27, 2006, at a hearing on Defendant's Motion to Set Aside, the Court granted Defendant's Motion and held that the Court was setting aside the default because the Court did not believe that the Notice to Appear or Appoint was adequate since it was served via regular first class mail to Defendant's last known address and not by personal service or registered and/or certified mail.

ARGUMENT

A motion for reconsideration may be properly heard when it can be properly raised under Rule 60 of the Utah Rules of Civil Procedure. *See J.V. Hatch Construction, Inc. v. Kampros*, 971 P.2d 8, 11 (Ut App. Ct 1998). Rule 60(b)(1) provides for relief from an order for "mistake, inadvertence, surprise, or excusable neglect." In this case, the Court reasoned that Defendant did not have proper notice to appear or appoint because it was known at the time of the withdrawal of Defendant's counsel that the addresses on record for Defendant were not current. The issue of proper notice was first raised by the Court at the hearing, and when asked regarding the service

requirement of a Notice to Appear or Appoint, Plaintiff's counsel suggested that he would and could provide a legal brief outlining the authorities that supported Plaintiff's counsel's position that the service made of the Notice to Appear or Appoint was sufficient. Plaintiff's counsel further argued that the requirement that Plaintiff was required to personally serve the Notice to Appear or Appoint was onerous and not required under the Utah Rules of Civil Procedure.

Rule 74 of the Utah Rules of Civil Procedure provide for the withdrawal of counsel and the sending of a Notice to Appear or Appoint. In particular Rule 74(a) states in relevant part that the notice of withdrawal shall include "the address of the attorney's client" and subsection (b) of the same rule provides that "the opposing party shall serve a Notice to Appear or Appoint Counsel on the unrepresented party." Of note, Rule 5(b)(1) specifically provides that service upon a party of documents filed with the Court, unless otherwise specified by the Rules, "shall be made by delivering a copy *or by mailing a copy* to the *last known address*, or if no address is known, by leaving it with the clerk of the court."

In Hawley v. Union Pacific Railroad Co., 2005 WL 2099788 (Utah App. 2005), the Plaintiff sought relief from a Summary Judgment under Utah Rule of Civil Procedure 60(b)(6) based on the alternative arguments that he had failed to receive a notice to appear or appoint counsel and that he was never served with notice of the judgment. In affirming the trial court's decision to deny Mr. Hawley's motion for relief from the judgment, the Court held that:

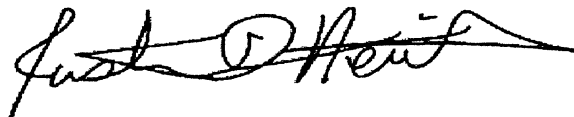
Hawley is not entitled to relief under Rule 60(b) ***because he did not fulfill his duty*** to inform the trial court and opposing counsel of any changes in his address nor did he exercise due diligence in keeping himself informed of ongoing court proceedings. *See Volostnykh v. Duncan*, 2001 UT App 26 (per curiam)(recognizing the parties' duties to inform the court of any address changes and to "keep themselves apprised of ongoing court proceedings")(emphasis added). Id.

The facts of this case are directly analogous to those in Hawley. In both cases, neither Hawley nor the Defendant made any attempt to inform the Court or opposing counsel of his new address. As in Hawley, Plaintiff's counsel received a defective notice of withdrawal which did not correctly identify the last known address of the Defendant. Nevertheless, as Union Pacific did in Hawley, Plaintiff's counsel attempted to **mail** Defendant a notice to appear or appoint counsel to the address where Defendant was served as well as his business address, but all attempts were unsuccessful. Nothing in Hawley or in Rule 74 suggests that Plaintiff's counsel had a duty above and beyond serving Defendant with a notice to appear or appoint by regular first class mail to his last known address. Indeed, Hawley specifically states that it is the Defendant's duty to keep himself current with ongoing proceedings and to update his address with the Court. Accordingly, Plaintiff respectfully requests that this Court reconsider its Order granting Defendant's Motion to Set Aside and to deny Defendant's motion on the basis that Defendant "did not make reasonably diligent efforts to learn of the entry of the judgment, and is therefore not entitled to relief." Id.

In the event that this Court denies Plaintiff's Motion for Reconsideration, Plaintiff respectfully requests that the Court certify this matter under Rule 54 for interlocutory appeal.

DATED AND SIGNED this 18 day of March, 2006.

ASCIONE, HEIDEMAN & MCKAY, L.L.C.



JUSTIN D. HEIDEMAN
Attorney for Plaintiff

ADDENDUM 3


FILED
Fourth Judicial District Court
of Utah County, State of Utah
3-31-06 Deputy

**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

Kenneth Davis, :
Plaintiff : Ruling
vs. : Date: March 30, 2006
Dennis Goldworthy, : Case Number: 030405431
Defendant : Division VII: Judge James R. Taylor

This matter comes before the Court on the Plaintiff's motion for reconsideration. The motion questions the Court's reasoning and analysis but does not present arguments that could not have been made in connection with the motion. The motion is denied. Because the questioned ruling set aside a default judgment to allow complete litigation of the case, this Court is not able to certify that there is no just reason for delay in bringing the question before the Court of Appeals. The Defendant may well have asserted a meritorious defense which should be considered. The Court therefore declines to certify the case for interim appeal under Rule 54, Utah Rules of Civil Procedure.

Dated this 30th day of March, 2006


Judge James R. Taylor
Fourth Judicial District Court



A certificate of mailing is on the following page.

Davis v. Goldworthy 030405431 Ruling 3/30/06

Copies of this Order mailed to:

Counsel for the Plaintiff:

Justin D. Heideman
Lorelei Naegle
2696 North University Avenue, Suite 180
P.O. Box 600
Provo, Utah 84604

Counsel for the Defendant:

Gregory G. Hansen
947 South 500 East, Suite 200
American Fork, Utah 84003

Mailed this 31 day of April, 2006, postage pre-paid as noted above.


Court Clerk

ADDENDUM 4

DENNIS GOLDSWORTHY

1/20/06 *gjc* Deputy

828 Myrtle Ave.
Cañon City, CO 81212
719-371-0091

January 16, 2006

Dear Judge Taylor,

I am writing this letter in regard to a notice I received from my ex-wife stating there is to be a hearing on February 3, 2006. I was not aware of the ongoing situation with case number 030405431 due to the fact that I no longer live in Utah and now live in Colorado.

I am asking for a thirty day continuance so that I might acquire counsel and schedule time off from work so that I can attend the hearing. I would like to express my appreciation in advance for your consideration in this matter.

Please notify me of any further matters in this case using the above listed address and telephone number.

Sincerely,



Dennis Goldsworthy

ADDENDUM 5

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY
ga
FEB 2 9 30 AM '05

GREGORY G. HANSEN, Bar No. 10057
DUVAL HAWS & MOODY, P.C.
947 South 500 East, Suite 200
American Fork, Utah 84003
Telephone: (801) 763-0155
Facsimile: (801) 763-8379
Attorney for Defendant

IN THE FOURTH DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH

Kenneth Davis,

Plaintiff,

v.

Dennis Goldsworthy,

Defendant.

**MOTION AND
MEMORANDUM IN SUPPORT
OF MOTION TO SET
ASIDE DEFAULT**

Case No.030405431

COMES NOW, Defendant Dennis Goldsworthy, by and through counsel, Gregory G. Hansen, and respectfully moves this court, pursuant to Rule 60(b) of the Utah Rules of Civil Procedure, to set aside the default entered against him on November 7, 2005. Pursuant to Rule 60(b), a default may be set aside for (1) mistake, inadvertence, surprise, or excusable neglect, and . . . (6) any other reason justifying relief from the operation of the judgment. Further, where any reasonable excuse is offered by a defaulting party, courts generally tend to favor granting relief from a default judgment, unless it appears that to do so would result in substantial injustice to the adverse party. *Westinghouse Elec. Supply Co. V. Paul W. Larsen Contractor*, 544 P.2d 876 (Utah 1975).

In this case, as contained in the Affidavit of Dennis Goldsworthy, filed herewith, there

are grounds for setting aside the default for mistake, inadvertence, and excusable neglect.

Defendant was going through a divorce at the time this litigation began, and was required to shut down his business, and move the Colorado. His only stable address was that of his business.

When he moved, he had no forwarding address. He had not been able to communicate with his former counsel, Mr. Jensen, since May of 2005, and moved the first week of June, 2005, which was when the Subpoena Duces Tecum was served on his counsel. Defendant's counsel did not inform him of the Subpoena or the deposition, and then withdrew in September of 2005 without informing him of the status of the case.

Mr. Goldsworthy also states that the difficulties in his life at the time were so distracting and consuming that he neglected to pay attention to the lawsuit. Further, he did not receive the Notice to Appear or Appoint Counsel because it was not mailed to him. However, Defendant is in a position now where he is able to pursue and properly handle this litigation. Further, in his affidavit, Defendant states that the claims made by the Plaintiff in this case are false. Moreover, setting aside the default in this case would not result in substantial injustice to the Plaintiff. He would only be required to pursue this case on the merits, and will lose nothing if his claims are meritorious.

Therefore, the court should set aside the default for reasons of mistake, inadvertence, and excusable neglect, and allow this case to be heard on the merits.

DATED: February 2, 2006.

DUVAL HAWS & MOODY, P.C.


GREGORY G. HANSEN
Attorney for Defendant

CERTIFICATE OF SERVICE

I certify than on February 2, 2006, I caused a true and correct copy of the foregoing MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR CONTINUANCE to be served upon the following by mailing it by first class mail to:

Justin Heideman
Lorelei Naegle
ASCIONE HEIDEMAN & MCKAY LLC
2696 N UNIVERSITY AVE STE 180
PROVO, UT 84604


Secretary

ADDENDUM 6

IN THE UTAH COURT OF APPEALS

----ooOoo----

L. Earl Hawley,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellant,)	
	)	Case No. 20040461-CA
v.)	
)	
Union Pacific Railroad Co., a	)	F I L E D
Delaware corporation,	)	(September 1, 2005)
)	
Defendant and Appellee.	)	2005 UT App 368
)	

Fifth District, Cedar City Department, 000500737
The Honorable J. Philip Eves

Attorneys: Richard Ranney, St. George, for Appellant
Kent W. Hansen, Salt Lake City, for Appellee

Before Judges Billings, Davis, and McHugh.

BILLINGS, Presiding Judge:

L. Earl Hawley appeals the district court's denial of his Motion for Relief from Judgment under Utah Rule of Civil Procedure 60(b)(6). We affirm.

Hawley first argues that pursuant to Utah Rule of Judicial Administration 4-506, an attorney does not need the approval of the trial court to withdraw as counsel once a motion for summary judgment has been briefed, argued, and orally decided from the bench, but before the judge has issued a written final order, therefore the district court erred when it did not grant Hawley relief from judgment under rule 60(b)(6).

Utah Rule of Judicial Administration 4-506 states in part that "an attorney may withdraw as counsel of record only upon approval of the court when a motion has been filed and the court has not issued an order on the motion or after a certificate of readiness for trial has been filed." Utah R. Jud. Admin.

4-506(1).¹ In the instant case, a final judgment was not entered until the trial court judge signed the order granting Union Pacific Railroad Company's (Union Pacific) Motion for Summary Judgment on August 20, 2003. Therefore, Hawley's trial attorney, Mr. Mueller, improperly withdrew as counsel because he was not entitled to withdraw before August 20, 2003 without seeking the trial court's approval. See Utah R. Civ. P. 58A(c) ("A judgment is complete and shall be deemed entered for all purposes . . . when the same is signed and filed as herein above provided."); see, e.g., Ron Shepherd Ins. v. Shields, 882 P.2d 650, 653, 655 n.8 (Utah 1994) ("It is well settled that an unsigned minute entry does not constitute an entry of judgment, nor is it a final judgment for purposes of [appeal]," and noting that the "plaintiffs' motion was premature because [the trial court judge's] ruling had not been reduced to a written judgment." (quotations and citations omitted)).²

Hawley also argues that he is entitled to relief from judgment under rule 60(b)(6) because Union Pacific did not serve Hawley with Notice of Judgment as required by rule 58A(d). Rule 58A(d) states that "[a] copy of the signed judgment shall be promptly served by the party preparing it in the manner provided in Rule 5. The time for filing a notice of appeal is not affected by the requirement of this provision." Utah R. Civ. P. 58A(d). We disagree with Hawley and hold that the trial court properly denied relief under rule 60(b)(6).

Hawley is not entitled to relief under rule 60(b) because he did not fulfill his duty to inform the trial court and opposing counsel of any changes in his address nor did he exercise due diligence in keeping himself informed of ongoing court proceedings. See Volostnykh v. Duncan, 2001 UT App 26 (per curiam) (recognizing the parties' duties to inform the court of any address changes and to "keep themselves apprized of ongoing court proceedings"). Here, Hawley did not inform the trial court or opposing counsel of his new address. Union Pacific received

¹Rule 4-506 of the Utah Rules of Judicial Administration was in effect at all relevant times in this case; however, the rule was repealed effective November 1, 2003 and has been recodified as Utah Rule of Civil Procedure 74. See Utah R. Civ. P. 74.

²Hawley argues that he should have received a Notice to Appear or Appoint Counsel from Union Pacific pursuant to rule 4-506 of the Utah Rules of Judicial Administration because his attorney withdrew. However, rule 4-506(4) does not apply because Mueller did not properly withdraw as counsel. Therefore, Union Pacific was not obligated to serve a Notice to Appear or Appoint Counsel on Hawley.

Mueller's notice of withdrawal but the new address was not listed in the notice, rather it was found in the mailing certificate. As a result, Union Pacific attempted to mail Hawley a notice to appear or appoint counsel to the address provided in the Complaint twice, but both attempts were unsuccessful. In addition, Hawley failed to keep himself current with ongoing proceedings. Hawley called the court clerk in June, July, and August to determine if a final order regarding Union Pacific's Motion for Summary Judgment had been issued. He was advised that the judgment could be entered at any time, but Hawley did not call the trial court again for four months--until December. Hawley did not make reasonably diligent efforts to learn of the entry of the judgment, and is therefore not entitled to relief.

Therefore, the trial court properly denied Hawley's rule 60(b)(6) motion and, accordingly, we affirm.

Judith M. Billings,
Presiding Judge

WE CONCUR:

James Z. Davis, Judge

Carolyn B. McHugh, Judge

ADDENDUM 7

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

Sierra Wholesale Supply,	)	MEMORANDUM DECISION
L.L.C., a Utah limited	)	(Not For Official Publication)
liability company,)	
	)	Case No. 20041021-CA
Plaintiff and Appellee,)	
)	
v.	)	F I L E D
	)	(December 15, 2005)
)	
Radiant Technologies, Inc., a	)	2005 UT App 540
Florida corporation doing)	
business in Utah,)	
)	
Defendant and Appellant.)	

Third District, Salt Lake Department, 030928544
The Honorable Anthony B. Quinn

Attorneys: Barnard N. Madsen and Trent M. Sutton, Provo, for
Appellant
John A. Snow and Cassie J. Medura, Salt Lake City,
for Appellee

Before Judges Davis, Greenwood, and Thorne.

GREENWOOD, Judge:

Defendant Radiant Technologies, Inc. appeals the trial court's denial of its motion, made pursuant to rule 60(b)(1) of the Utah Rules of Civil Procedure, see Utah R. Civ. P. 60(b)(1), to set aside a default judgment in favor of Plaintiff Sierra Wholesale Supply, L.L.C. We affirm.

"We grant broad discretion to [a] trial court's rule 60(b) rulings because most are equitable in nature, saturated with facts, and call upon judges to apply fundamental principles of fairness that do not easily lend themselves to appellate review." Fisher v. Bybee, 2004 UT 92, ¶7, 104 P.3d 1198. "It is true that the law disfavors default judgments Nonetheless, the [trial court] has 'considerable discretion under [r]ule 60(b) in granting or denying a motion to set aside a [default] judgment' and for this court to interfere, 'abuse of that discretion

must be clearly shown.'" Black's Title, Inc. v. Utah State Ins. Dep't, 1999 UT App 330, ¶5, 991 P.2d 607 (fourth alteration in original) (quoting Katz v. Pierce, 732 P.2d 92, 93 (Utah 1986)).

Defendant argues that the trial court abused its discretion by concluding that Defendant failed to demonstrate excusable neglect in its motion to set aside the default judgment. "To be relieved from the default, [Defendant] must show that [its] motion to set aside was timely, that [it] has a meritorious defense, and that the default occurred for a reason specified in [r]ule 60(b)."¹ Id. at ¶6. Rule 60(b) provides, in relevant part:

On motion and upon such terms as are just,
the court may in 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"

Utah R. Civ. P. 60(b). "To demonstrate that the default was due to excusable neglect, '[t]he movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control.'" Black's Title, 1999 UT App 330 at ¶10 (alteration in original) (quoting Airkem Intermountain, Inc. v. Parker, 30 Utah 2d 65, 513 P.2d 429, 431 (1973) (emphasis omitted)).

The thrust of Defendant's argument is that its neglect in contesting Plaintiff's complaint was excusable because its president, John Winning, was out of his office convalescing from back surgery at the time Plaintiff's requests to enter default judgment were received and Mr. Winning did not return to the office until after default judgment had been entered. However, "[i]llness alone is not sufficient to make neglect in defending one's action excusable.'" Id. (alteration in original) (quoting

¹There is also a dispute regarding the timeliness of Defendant's rule 60(b)(1) motion. However, because we conclude that Defendant failed to demonstrate excusable neglect, we need not consider this issue. See Black's Title, Inc. v. Utah State Ins. Dep't, 1999 UT App 330, ¶6, 991 P.2d 607 (requiring the movant to show that the "motion to set aside was timely, that [it] has a meritorious defense, and that the default occurred for a reason specified in rule 60(b)."¹ (emphasis added)).

Warren v. Dixon Ranch Co., 123 Utah 416, 260 P.2d 741, 743 (1953)). "A movant seeking relief may not simply rest on the assertion that he was ill to excuse his inaction; he must show that the nature of the illness incapacitated him such that he was unable to act." Id.

Defendant has made no such showing in this case. Although Defendant avers that its president was out of the office recovering from back surgery, no affidavit was submitted to the trial court detailing how this so incapacitated Defendant, a corporation doing business on a national scale, that it was unable to take steps to protect its rights. See Warren, 260 P.2d 741, 743 (finding that excusable neglect was not demonstrated by an affidavit that did not "identify the nature of the illness" or demonstrate how the director and trustee of the defendant corporation "was so incapacitated that he could not have called an attorney to have his rights and the rights of the corporation protected."). We agree with the trial court's observation that it seems unlikely that the president of such a corporation would be "out of the office for back surgery and no one is looking at his mail." Even if this were the case, however, it does not demonstrate that Defendant acted with the "due diligence" necessary to show excusable neglect. See Black's Title, 1999 UT App 330 at ¶10 (quotations and citation omitted). The trial court acted within its discretion in refusing to set aside the default judgment on these grounds.

Moreover, although Defendant's registered agent, after being served, mistakenly forwarded Plaintiff's complaint and summons to the wrong law firm, Plaintiff sent copies of its requests for default directly to Mr. Winning. Thus, Defendant was on notice that Plaintiff sought default judgment against it, and that it needed to act to protect its rights.²

In sum, the trial court properly exercised its discretion in denying Defendant's motion to set aside the default judgment.

²Likewise, Defendant's neglect was not made excusable because the original default judgment mistakenly indicated that judgment was to be entered in favor of Defendant rather than Plaintiff. Plaintiff's requests for default judgment, sent to Mr. Winning prior to the entry of the original default judgment, correctly indicated that Plaintiff sought default judgment against Defendant.

The facts and circumstances show that default resulted from Defendant's lack of due diligence rather than excusable neglect.

Accordingly, we affirm.

Pamela T. Greenwood, Judge

WE CONCUR:

James Z. Davis, Judge

William A. Thorne Jr., Judge