1999

PGM INC. and Carla C. Zimmerman v. Westchester Investment Partners, LTD. : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

PGM INC. and CARLA C. ZIMMERMAN, Plaintiffs/Appellants, vs. WESTCHESTER INVESTMENT PARTNERS, LTD., Defendant/Appellee.	Case No. 990420-CA ARGUMENT PRIORITY CLASSIFICATION NO. 15

APPEAL FROM A FINAL JUDGMENT
OF THE FOURTH DISTRICT COURT OF UTAH COUNTY, UTAH
THE HONORABLE RAY HARDING, SR.

REPLY BRIEF FOR APPELLANTS, PGM, INC. and CARLA ZIMMERMAN

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I. THE FINDINGS IN THE PARIA PROCEEDING RELATING TO THE FRAUDULENT TRANSFER AND THE ALTER EGO ISSUES ARE NOT BINDING UPON PGM BECAUSE PGM WAS NOT NAMED, WAS NOT SERVED, AND DID NOT APPEAR IN THE PARIA PROCEEDING.

A. The Finding of Fraudulent Transfer in the Paria Proceeding Is Not Binding on PGM as a Transferee because PGM Was Not a Party to the Paria Proceeding and because the Remedies Available to a Creditor for Relief against a Fraudulent Transfer Are Subject to the Procedures Prescribed by the Utah Rules of Civil Procedure.

Westchester argues that the trial court's dismissal of PGM's Complaint was proper based upon the finding in the Paria proceeding that Paria transferred its property to PGM with "actual intent to hinder, delay, or defraud Mr. Zimmerman's and Paria Group's creditors." Record at 0017. After this finding, the Paria court imposed a constructive trust upon PGM's assets "to the extent necessary to satisfy Westchester's judgment" in the amount of $244,976.82. Record at 0016-0015. Westchester contends that the judgment entered against PGM in the Paria proceeding may be affirmed because Utah Code Annotated § 25-6-8 provides that a creditor may obtain an avoidance of a fraudulent transfer to the extent necessary to satisfy the creditor's claim.

This argument does not provide an independent basis for dismissal as urged by Westchester. Westchester ignores the fact that PGM was not named, was not served, and did not otherwise appear in the Paria proceeding. As the United States Supreme Court explained, "It is elementary that one is not bound by a judgment *in personam* from

litigation in which he is not designated as a party or to which he has not been made a party by service of process." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110, 89 S. Ct. 1562, 1569 (1969). As the Utah Supreme Court stated:

> Service of summons in conformance with the mode prescribed by statute is deemed jurisdictional, for it is service of process, not actual knowledge of the commencement of the action, which confers jurisdiction. . . . The proper issuance and service of summons is the means of invoking the jurisdiction of the court and of acquiring jurisdiction over the defendant; these cannot be supplanted by mere notice, by letter, telephone or any other such means.

Murdock v. Blake, 484 P.2d 164, 167 (Utah 1971); see also Garcia v. Garcia, 712 P.2d 288 (Utah 1986) (holding that the requirements of Utah Rule of Civil Procedure 4 relating to service of process are jurisdictional). Because PGM was not named, nor served, in the Paria proceeding, PGM is not bound by the findings and judgment entered in the Paria proceeding.

1. The remedies available to a creditor for relief against a fraudulent transfer are subject to Utah Code Annotated § 25-6-9 and the procedures prescribed by the Utah Rules of Civil Procedure.

Westchester fails to recognize that the remedies available to a creditor under Utah Code Annotated § 25-6-8 are subject to the limitations of Utah Code Annotated § 25-6-9 and the procedures prescribed by the Utah Rules of Civil Procedure. Section 25-6-8, Remedies of creditors, provides:

> (1) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in Section 25-6-9, may obtain:
>
> (a) avoidance of the transfer or obligation to the extent necessary to satisfy

the creditor's claim;
(b) **an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by the Utah Rules of Civil Procedure;**
(c) **subject to applicable principles of equity and in accordance with applicable rules of civil procedure:**
(i) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;
(ii) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or
(iii) any other relief the circumstances may require.

(Bold added.)

2. Because PGM was not a party to the Paria proceeding, the finding of fraudulent transfer and the imposition of a constructive trust should be vacated.

Because PGM was not named and was not served in the Paria proceeding pursuant to the Utah Rules of Civil Procedure, the judgment and findings entered in the Paria proceeding are not binding upon PGM. Moreover, the finding that the transfer was fraudulent and the order voiding the transfer of assets from Paria to PGM and imposing a constructive trust on PGM's assets should be vacated and set aside because PGM, as transferee of the assets, was an indispensable party. Though Utah has not addressed this issue specifically, numerous Utah cases which allow a creditor to reach the assets fraudulently transferred include the transferee as a named and served defendant. Butler v. Wilkinson, 740 P.2d 1244 (Utah 1987); Territorial Savings & Loan Association v. Baird, 781 P.2d 454 (Utah App. 1989); National Loan Investors, L.P. v. Givens, 952 P.2d 1067 (Utah 1998).

Requiring that the transferee of a fraudulent conveyance be a named party of an action to set aside the conveyance and execute on the transferred asset is consistent with decisions from other jurisdictions. In Tanaka v. Nagata, 868 P.2d 450, 454 (Hawaii 1994), the Supreme Court of Hawaii vacated and set aside the trial court's order granting the creditor's motion to execute on a fraudulently transferred asset on the grounds that the transferees should have been named as party defendants in underlying action. The court held:

> where a creditor alleges a fraudulent transfer of property from a judgment debtor to a transferee who retains title to the subject property or who claims an interest in the property or its proceeds, the transferee is a necessary party to any action seeking to set aside the transfer. [footnote omitted] Such an action for relief against a transfer alleged to be fraudulent should be brought pursuant to Hawai'i Revised Statutes (HRS) ch. 651C (1985) [citation omitted], **and should expressly name the alleged fraudulent transferees as defendants.**[1]

Tanaka, 868 P.2d at 454 (bold added). The court further explained:

> Fundamental principles of due process require that transferees who claim an interest in real property or its proceeds have a full and fair opportunity to contest claims of fraudulent transfer.

Id. at 455. In reaching this holding, the Hawaii Supreme Court relied on the decisions of the following jurisdictions: Simmons v. Clark Equipment Credit Corp., 554 So.2d 398, 399 (Ala. 1989) (grantee who retained title to property was necessary party to action by grantor's creditors to set aside conveyance as fraudulent); T W M Homes, Inc. v. Atherwood Realty & Investment Co., 214 Cal.App.2d 826, 848, 29 Cal.Rptr. 887, 899

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[1]HRS ch. 651C (1985) is substantially similar to Utah Code Annotated § 25-6-8.

(1963) (transferees were necessary party defendants in action to set aside fraudulent conveyance); Guice v. Modica, 337 So.2d 302, 303 (La. App. 1976) (children to whom debtor made donation of property were indispensable parties to suit by creditor to nullify donation); Mihajlovski v. Elfakir, 355 N.W.2d 264, 267 (Mich. App. 1984) (presence of grantee who retains title to property was essential to permit court to render complete relief in action to set aside fraudulent conveyance); Murray v. Murray, 358 So.2d 723, 725 (Miss. 1978) (grantee is necessary party in action to set aside fraudulent conveyance); Dempsey & Spring, P.C. v. Ramsay, 435 N.Y.S.2d 336, 337 (1981) (trial court acted improperly in determining that defendant's conveyance of property to his daughter was fraudulent where no notice or opportunity to appear was afforded to daughter, who was present owner of record); Fraley Ins. Agency v. Johnston, 784 P.2d 430, 431 (Okla. App. 1989) (in action to set aside fraudulent conveyance or transfer of property, grantee or transferee claiming interest in subject property was necessary and indispensable to resolution of claim); Becker v. Becker, 416 A.2d 156, 162 (Vt. 1980) (transfer of property creates an interest in grantee that made grantee necessary party to action for fraudulent conveyance, even though no fraud on grantee's part needed to be shown); see also, Kennedy, Reception of the Uniform Fraudulent Transfer Act, 43 S.C.L.Rev. 655, 673 (1992) (to avoid constitutional due process objections, any transferee or other claimant to property transferred or its proceeds should be party to any creditor's action that would affect claimant's rights in property).

Further, a fraudulent transfer is not voidable against a person who took in good faith and for reasonably equivalent value. Utah Code Annotated § 25-6-9(a). There are no findings in the record of the Paria proceeding provided to the PGM proceeding which establish that PGM was not a good faith purchaser for value. This is a result of the fact that PGM never made an appearance in the Paria proceeding. To enforce the judgment entered in the Paria proceeding against PGM when PGM was never afforded an opportunity to be heard by appearing and defending would violate PGM's right to due process.

Because PGM, as transferee, was not made a party to the Paria proceeding, the finding and constructive trust entered therein are void and should be vacated. Consequently, the judgment in the Paria proceeding "is not res adjudicata of anything." In re Evans, 130 P. 217, 225 (Utah 1913); Matsushima v. Rego, 696 P.2d 843, 845 (Hawai'i 1985) (the doctrine of res judicata is predicated upon a valid judgment and a void judgment may not be used to invoke its application); Estate of Blaney, 607 P.2d 354, 357 (Wyo. 1980) (a void judgment is not res judicata).

B. The Judgment and the Findings in the Paria Proceeding Are Not Binding on PGM because PGM Was Not Subject to the Jurisdiction of the Paria Court.

Westchester's arguments for enforcing both the fraudulent transfer findings and the judgment against PGM are based on the allegation that PGM is the alter ego of Paria and Stephen Zimmerman. Essentially Westchester's argument presupposes the answer to

the issue which PGM seeks to litigate: Whether PGM is the alter ego of Stephen Zimmerman and/or Paria.

The United States Supreme Court has made clear that a stipulation that one corporation is the alter ego of another corporation is not "an adequate substitute for the normal methods of obtaining jurisdiction over a person or a corporation." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110, 89 S. Ct. 1562, 1569 (1969). Moreover, the United States Supreme Court also indicated that a determination that one corporation is the alter ego of another corporation would not be binding on the corporation which was not subject to the jurisdiction of the court so finding, even if the issue of alter ego had been actually litigated. As the Court explained:

> **Perhaps** Zenith could have proved and the trial court might have found that HRI and Hazeltine were *alter egos*; **but absent jurisdiction over Hazeltine, that determination would bind only HRI. If** the *alter ego* issue had been litigated, **and if** the trial court had decided that HRI and Hazeltine were one and the same entity and that jurisdiction over HRI gave the court jurisdiction over Hazeltine, **perhaps Hazeltine's appearance before judgment with full opportunity to contest jurisdiction would warrant entry of judgment against it.[2]** But that is not what occurred here. The trial court's judgment was based wholly on HRI's stipulation. HRI may have executed the stipulation to avoid litigating the *alter ego* issue, [footnote omitted] but this fact cannot foreclose Hazeltine, which has never had its day in court on the question of whether it and its subsidiary should be considered the same entity for purposes of this litigation.

Zenith, 395 U.S. at 111, 89 S. Ct. at 1570 (bold added).

In the present case it is undisputed that PGM was not named, was not served, and

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[2]Hazeltine, unlike PGM, filed a "special appearance" after Zenith proposed that judgment be entered against it. Zenith, 395 U.S. at 109, 89 S. Ct. at 1569.

did not appear in the Paria proceeding. It is also undisputed that PGM never made a special appearance "with full opportunity to contest jurisdiction." As a result, there was no jurisdiction over PGM in the Paria proceeding, and the judgment and findings entered therein relating to the alter ego issue and the fraudulent transfer are not binding on PGM. Essentially, because PGM was not subject to the jurisdiction of the Paria court, the findings and judgment therein as to PGM are void. Thus, the findings and judgment in the Paria proceeding are not res judicata. In re Evans, 130 P. at 225.

1. Even if the alter ego issue were fully litigated in the Paria proceeding, a determination that PGM is the alter ego of Paria and/or Stephen Zimmerman is not binding on PGM who never appeared to contest jurisdiction.

Westchester attempts to distinguish the holding in Zenith by arguing that the issue of alter ego was fully litigated in the Paria proceeding. Even if such issue had been actually litigated, it is doubtful that it was fully and fairly litigated because PGM never appeared in the Paria proceeding. Westchester contends that the court in the Paria proceeding based its finding that Stephen Zimmerman was the alter ego of Paria and PGM on numerous "other circumstances" which justified the court's judgment against PGM. Appellee's Brief, p. 29. Westchester argues that "PGM/Paria/Zimmerman had an opportunity to fully and completely litigate the issue of whether PGM, Paria, and Zimmerman were alter egos." Id.

This argument ignores the fact that PGM was never subject to the Paria court's

jurisdiction because PGM was not named, was not served, and did not appear in the Paria proceeding. Basically, Westchester's argument is that PGM had the opportunity to litigate the issue because it is the alter ego of Steven Zimmerman and Paria. Such reasoning is circular and contrary to the sound reasoning of the United States Supreme Court. Despite Westchester's attempts to distinguish it, the holding in Zenith is precisely on point. The United States Supreme Court held that the stipulation and Hazeltine's special appearance to contest jurisdiction "with full opportunity to contest jurisdiction" were not adequate substitutes for the "normal methods of obtaining jurisdiction over a person or corporation." Zenith, 395 U.S. at 109-110, 89 S. Ct. 1562, 1569. Thus, even though the alter ego issue may arguably have been fully litigated in the Paria proceeding, PGM never had a full opportunity to contest jurisdiction in the Paria case. This is because PGM was not named, was not served, and never entered an appearance--the normal methods of obtaining jurisdiction over a corporation--in the Paria proceeding. Therefore, it is clear that the findings and judgment entered against PGM in the Paria proceeding are void and not binding on PGM. Consequently, those findings and judgment are not res judicata to PGM. In re Evans, 130 P. at 225.

2. There is no privity between PGM and Stephen Zimmerman and Paria such that res judicata would apply.

Westchester argues that PGM is bound by the findings and judgment in the Paria proceeding because Stephen Zimmerman represented both Paria and PGM in the Paria

proceeding, despite the fact that there is no finding and no evidence that Stephen Zimmerman appeared in the Paria proceeding on behalf of PGM. Westchester bases its argument on the fact that Stephen Zimmerman is a director of both corporations.[3] Westchester states "Stephen Zimmerman is the president and CEO of Paria Group and of PGM." Appellee's Brief, page 16. This statement is patently false. As the addendum to Westchester's brief clearly indicates, the president of PGM is Jenifer Gordon--not Stephen Zimmerman. Appellee's Brief, page A-2.

Westchester sets forth the general rule that a corporation controlled by the same person who controlled the corporation involved in the first litigation is bound by the judgment. Appellee's Brief, page 19. Though PGM does not dispute the accuracy of this general rule, it does dispute the rule's relevancy to this action. The cases cited by Westchester to support the above-mentioned rule are factually distinguishable. In several of the cases, the plaintiff, after bringing an action personally, attempted to bring the same action as shareholder of a closely-held corporation. The courts found that the closely-held corporation and the owners should not be regarded as distinct. Thus, a judgment against the shareholder personally would be conclusive on the corporation, and vice-versa.

The cases cited by Westchester, wherein privity was found to exist between the

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[3] Westchester also bases its argument on Restatement (Second) of Judgments § 59, comment e. However, this Restatement section has not been adopted in Utah.

officers or shareholders and the corporation, are distinguishable from the present case because Stephen Zimmerman is not a shareholder, officer, or owner of PGM. Carla Zimmerman is the sole shareholder of PGM. Westchester assumes that because the Paria court found Paria and Stephen Zimmerman to be alter egos, somehow Stephen Zimmerman's appearance in the Paria proceeding on behalf of Paria is binding on PGM. Though Paria and Stephen Zimmerman may be considered one and the same for litigation purposes because Stephen Zimmerman is a shareholder of Paria, this privity does not automatically extend to PGM simply because Zimmerman is also a director of PGM. This is because Westchester's argument ignores the general rule that:

> The corporate entity is distinct although all or a majority of its stock is owned by a single individual or corporation, or although the corporation is a so-called "family" or "close" corporation . . .

18 Am. Jur. 2d Corporations § 45. Stephen Zimmerman appeared in the Paria proceeding individually and on behalf of Paria. Because Stephen Zimmerman is not an officer or shareholder of PGM and because there are no evidence and no findings that Stephen Zimmerman was appearing on behalf of PGM in the Paria proceeding, it cannot be said that PGM is bound by Stephen's appearance in the Paria proceeding. PGM was not a named party in the first litigation, and therefore PGM should not be precluded from having its day in court.

Westchester also contends that PGM is in privity with Paria because PGM is Paria's successor in interest. Appellee's Brief, page 21. While PGM did purchase assets

from Paria, these assets were not the subject matter of the litigation and PGM did not obtain the same interests as Paria in these assets. A "successor in interest" is defined as:

> One who follows another in ownership or control of property. In order to be a "successor in interest", a party must continue to retain the same rights as original owner without change in ownership and there must be change in form only and not in substance, **and transferee is not a "successor in interest."**

BLACK'S LAW DICTIONARY, abridged 6th edition, (1991), page 998 (bold added). Because PGM is the transferee of Paria's assets and because Paria did not transfer any of its liabilities to PGM, PGM is not Paria's successor in interest.

In arguing the PGM is Paria's successor in interest, Westchester relies on the following rule on successor liability:

> The rule for a claim based on successor liability is that where one company sells or otherwise transfers all its assets to another company the latter is not liable for the debts and liabilities of the transferor, except where: . . . *(3)the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction is entered into fraudulently in order to escape liability for such debts.*

Macris & Associates, Inc. v. Neways, Inc., 374 Utah Adv. Rep. 6 (Utah App. July 21, 1999). Contrary to Westchester's contention, the Paria court did not find that PGM was "merely a continuation" of Paria. And although the Paria court specifically found that the transaction between Paria and PGM was fraudulent and was entered into in order for Paria to escape liability for its debts, PGM is not bound by this finding because, as explained above, PGM was not a party to the Paria proceeding and PGM never had the opportunity to litigate this issue in court.

3. Because of the circularity involved in determining the issue of privity when that is the procedural and substantive issue presented, the application of res judicata is inappropriate.

It is clear that whether PGM is in privity with Paria and/or Stephen Zimmerman as their alter ego determines whether res judicata applies. It is also clear that the issue of privity and alter ego is the substantive issue PGM seeks to litigate. Because of the circularity involved in such a situation, the Eighth Circuit has held that res judicata is not appropriate when the procedural issue and substantive issue are the same issues of privity and alter ego. Crest Tankers v. National Maritime Union of America, 769 F.2d 234 (8th Cir. 1986).

Westchester argues that Crest Tankers does not apply because it centered on a labor dispute involving large co-subsidiaries and their parent corporation; therefore, whether the corporations are alter egos would be much more difficult to determine. However, Westchester gives no reason why it would be a more difficult determination and offers no conclusion as to why this alleged greater degree of difficulty has any relevance to the present action. The alter-ego issue in this case would appear to be just as difficult an issue, and any relative difference in degree of difficulty is not a valid basis for Westchester's attempt to distinguish Crest Tankers.

In Crest Tankers, the procedural issue of privity between two co-subsidiary corporations and their parent corporation was too circular to apply res judicata when the identity of the corporations was the substantive issue sought to be litigated. In the present

case, PGM contends that it is not in privity and is not the alter ego of Paria, a separate corporation. Westchester's argument is that PGM may not dispute that it is the alter ego of Paria and Stephen Zimmerman because PGM is the alter ego. The circularity of this argument makes res judicata inappropriate. The reasoning in Crest Tankers is sound and should be persuasive.

Moreover, res judicata is inapplicable for an additional reason: The judgment entered against PGM in the Paria proceeding is void because the Paria court did not have jurisdiction over PGM. The doctrine of res judicata is intended to "preserve the integrity of judgments." Appellee's Brief, p. 13. Because there is no integrity in an invalid or void judgment, res judicata is inapplicable. PGM is not taking a "second bite at the apple." PGM is contesting the entry of a $244,976.82 judgment entered against it when it had not been named, had not been served, and had not appeared with full opportunity to contest jurisdiction.

II. ALLOWING PGM ITS DAY IN COURT TO COLLATERALLY ATTACK THE DETERMINATION THAT IT IS THE ALTER EGO OF PARIA WILL NOT RESULT IN A NEVER-ENDING SERIES OF LAWSUITS.

Westchester contends that PGM should be bound by the judgment entered in the Paria proceeding, despite the fact that PGM was not named, was not served, and did not appear in the Paria proceeding, because failure to bind PGM will result in a never-ending series of lawsuits.

Such argument is meritless. Further litigation may be prevented simply by issuing

injunctions prohibiting transfers by all corporations from which Westchester seeks relief. This remedy is available to Westchester pursuant to Utah Code Annotated § 25-6-8(c)(ii). Of course, such corporations must be named and served pursuant to the prescribed procedures in the Utah Rules of Civil Procedure and long-recognized due process rights.

CONCLUSION

The judgment entered against PGM in the Paria proceeding, including the finding relating to the Utah Fraudulent Transfer Act, is void and not binding upon PGM because PGM was not named, was not served, and did not appear in the Paria proceeding. This is the case despite the allegation that PGM is the alter ego of Paria and Stephen Zimmerman. Because the judgment entered against PGM in the Paria proceeding is void as to PGM, it is not res judicata to PGM. PGM respectfully requests that this Court reverse the trial court's dismissal of PGM's complaint and remand this case for further proceedings on the merits.

Dated this 8 day of November, 1999.

Respectfully, submitted

Brent D. Young

BRENT D. YOUNG

MAILING CERTIFICATE

I hereby certify that on this 8 day of November, 1999, I caused to be mailed, first-class mail, postage prepaid, the foregoing Appellant's Reply Brief, addressed as follows:

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ADDENDUM

A. Utah Code Annotated § 25-6-8

B. Utah Code Annotated § 25-6-9

C. Tanaka v. Nagata, 868 P.2d 450 (Hawaii 1994)

D. Murdock v. Blake, 484 P.2d 164 (Utah 1971)

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A. Utah Code Annotated § 25-6-8

Utah Code § **25-6-8**

UTAH CODE, 1953
WEST'S UTAH CODE
TITLE 25. FRAUD
CHAPTER 6. UNIFORM
FRAUDULENT TRANSFER ACT

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)

Current through End of 1999 General Sess.

§ **25-6-8**. Remedies of creditors

(1) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in Section 25-6-9, may obtain:

(a) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(b) an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by the Utah Rules of Civil Procedure;

(c) subject to applicable principles of equity and in accordance with applicable rules of civil procedure:

(i) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(ii) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(iii) any other relief the circumstances may require.

(2) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court orders, may levy execution on the asset transferred or its proceeds.

As enacted by Chapter 59, Laws of Utah 1988.

WEST'S UTAH CODE

TITLE 25. FRAUD

CHAPTER 6. UNIFORM FRAUDULENT TRANSFER ACT

Search this disc for cases citing this section.

B. Utah Code Annotated § 25-6-9

Utah Code § 25-6-9

UTAH CODE, 1953
WEST'S UTAH CODE
TITLE 25. FRAUD
CHAPTER 6. UNIFORM
FRAUDULENT TRANSFER ACT

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)

Current through End of 1999 General Sess.

§ 25-6-9. Good faith transfer

(1) A transfer or obligation is not voidable under Subsection 25-6-5 (1)(a) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(2) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under Subsection **25-6-8** (1)(a), the creditor may recover judgment for the value of the asset transferred, as adjusted under Subsection (3), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(a) the first transferee of the asset or the person for whose benefit the transfer was made; or

(b) any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

(3) If the judgment under Subsection (2) is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to an adjustment as equities may require.

(4) Notwithstanding voidability of a transfer or an obligation under this chapter, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

(a) a lien on or a right to retain any interest in the asset transferred;

(b) enforcement of any obligation incurred; or

(c) a reduction in the amount of the liability on the judgment.

(5) A transfer is not voidable under Subsection 25-6-5 (1)(b) or Section 25-6-6 if the transfer results from:

(a) termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(b) enforcement of a security interest in compliance with Title 70A, Chapter 9, the Uniform Commercial Code.

(6) A transfer is not voidable under Subsection 25-6-6 (2):

(a) to the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;

***7825** (b) if made in the ordinary course of business or financial affairs of the debtor and the insider; or

(c) if made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

As enacted by Chapter 59, Laws of Utah 1988.

WEST'S UTAH CODE

TITLE 25. FRAUD

CHAPTER 6. UNIFORM FRAUDULENT TRANSFER ACT

Search this disc for cases citing this section.

C. Tanaka v. Nagata, 868 P.2d 450 (Hawaii 1994)

[10] In the present case, the family court did not specify whether Husband had made a gift of his separate assets that were not credited to him, thereby giving rise to an appearance of a *Gussin* violation. However, as discussed above, the family court is accorded broad discretion in deciding what is just and equitable under the circumstances. Judge Luke, in response to the subsequent motion for reconsideration, clearly articulated the reasoning underlying the exclusion of those particular assets in her order of distribution. And because the family courts are not bound by any "fixed rule for determining the amount of property being awarded each spouse," the court may, subject to the parameters of HRS § 580–47, exercise its own independent judgment in arriving at a just and equitable result. *Gussin*, 73 Haw. at 479, 836 P.2d at 489. Inasmuch as Judge Luke has not abused the broad discretion afforded by HRS § 580–47, we uphold her division of the Tougases' marital property.

3. *Deviation From Equal Division of Joint Business*

[11] Finally, Wife argues that because the court determined that both she and Husband contributed as equal partners to the formation and operation of PDI, she should be allotted fifty percent, and not twenty-five percent, of the business.

[12] The analysis of this contention is very much the same as that utilized above. Again, the court's actions in distributing the estate are discretionary, based on what the court deems to be just and equitable under the circumstances. Moreover, because the applicable statute, HRS § 580–47, allows the court to consider the condition of the parties after the divorce, separate property holdings may properly factor into the court's consideration. This does not mean, however, that Wife's partnership interests should offset Husband's interest in the marital estate. The validation of the spousal consent agreement, which operates as a waiver by Husband of all rights to the partnerships, conclusively establishes the contrary. The court may, nevertheless, alter alimony, child support and, as in this case, the ultimate distribution of the marital estate based on the respective separate conditions of the spouses.

We therefore hold that Judge Luke's deviation from the equal division of the Tougases' joint property is justified in light of Wife's significant separate property holdings.

III. *CONCLUSION*

Accordingly, we affirm the family court's division and distribution of the Tougases' marital property.

James K. TANAKA, Fusako Tanaka, Petitioners,

and

Ben T. Tanaka, Defendant,

v.

Russell S. NAGATA, Judge, First Circuit Court, State of Hawai'i, and All Lease, Inc., Respondent/Plaintiff.

No. 17615.

Supreme Court of Hawaii.

Feb. 11, 1994.

Property transferees petitioned for writ of mandamus directing the Circuit Court, First Circuit, Russell Nagata, J., to vacate and set aside order in creditor's underlying action against transferor debtor granting motion for execution on fraudulently transferred asset, on ground that transferees should have been named as party defendants in underlying action. The Supreme Court held that: (1) when a creditor alleges fraudulent transfer of property from a judgment debtor to a transferee who retains title to subject property or who claims interest in property or its proceeds, transferee is necessary party to any action seeking to set aside transfer, and

(2) transferees were entitled to writ of mandamus.

Writ granted.

1. Mandamus ⇐1

Mandamus is extraordinary remedy that is not issued unless petitioner demonstrates clear and indisputable right to relief and lack of other means adequately to redress alleged wrong or obtain requested action.

2. Mandamus ⇐4(1), 28

Writs of mandamus are neither meant to supersede legal discretionary authority of lower courts nor to serve as legal remedies in lieu of normal appellate procedure.

3. Mandamus ⇐4(1), 26

Mandamus is appropriate remedy where petitioner has indisputable right to defend his or her interest in property, has not been named as party in proceeding in lower court, and has no remedy by way of appeal.

4. Fraudulent Conveyances ⇐255(4)

When creditor alleges fraudulent transfer of property from judgment debtor to transferee who retains title to subject property or who claims interest in property or its proceeds, transferee is necessary party to any action seeking to set aside transfer. HRS §§ 651C–4(a)(2), 651C–7.

5. Fraudulent Conveyances ⇐237(1), 255(4)

When creditor seeks to set aside debtor's transfer of property as fraudulent, creditor's action for relief should be brought pursuant to Uniform Fraudulent Transfer Act, and should expressly name alleged fraudulent transferees as defendants. HRS § 651C–1 et seq.

6. Constitutional Law ⇐278(1.1)
Fraudulent Conveyances ⇐306

Fundamental principles of due process require that transferee who claims interest in real property or its proceeds have full and fair opportunity to contest claims of fraudulent transfer. HRS §§ 651C–4(a)(2), 651C–7; U.S.C.A. Const.Amend. 14.

7. Mandamus ⇐4(4), 53

Property transferees were entitled to writ of mandamus directing circuit court to vacate and set aside order in creditor's underlying action against transferor debtor granting motion for execution on fraudulently transferred asset; creditor should have filed separate action against transferees to set aside alleged fraudulent transfer, and transferees had no alternative remedy to writ, as transferees had no right to appeal order in underlying action. HRS §§ 651C–4(a)(2), 651C–7.

Syllabus by the Court

1. Mandamus is an extraordinary remedy that is not issued unless the petitioner demonstrates a clear and indisputable right to relief and a lack of other means adequately to redress the alleged wrong or obtain the requested action.

2. Mandamus is an appropriate remedy where the petitioner: (1) has an indisputable right to defend his or her interest in property; (2) has not been named as a party in the proceeding in the lower court; and (3) has no remedy by way of appeal.

3. Where a creditor alleges a fraudulent transfer of property from a judgment debtor to a transferee who retains title to the subject property or who claims an interest in the property or its proceeds, the transferee is a necessary party to any action seeking to set aside the transfer.

4. Fundamental principles of due process require that a transferee who claims an interest in real property or its proceeds have a full and fair opportunity to contest claims of fraudulent transfer.

George K. Noguchi, Honolulu, on the writ and reply, for petitioners.

Jeffrey Daniel Lau, Keith Y. Yamada and Carina Y. Miyazawa, Honolulu, on the answer, for respondent.

Before MOON, C.J., and KLEIN, LEVINSON, NAKAYAMA and RAMIL, JJ.

PER CURIAM.

In this original proceeding, the petitioners James K. Tanaka and Fusako Tanaka (the petitioners) petition this court for an extraordinary writ directing the Honorable Judge Russell Nagata, Judge of the District Court of the First Circuit assigned to serve temporarily as a Judge of the Circuit Court of the First Circuit,[1] to vacate and set aside his order granting a motion for execution on fraudulently transferred asset, entered on October 6, 1993, in *All Lease, Inc. v. Tanaka*, Civil No. 92-2858-08 (*All Lease*), and any subsequent orders related to it. The petitioners contend that they should have been named as party defendants in the *All Lease* action because the subject property was transferred to them and they have an interest in the property.

Upon review of the record before us, we conclude that the petitioners have an interest in the subject property and were indispensable parties in any action to set aside the conveyance to them. Accordingly, we grant the requested relief and vacate the order granting motion for execution on fraudulently transferred asset and any subsequent orders related to it.

I. *BACKGROUND*

The petitioners are the parents of the defendant Ben Tanaka (Ben). When Ben and his wife, Mari Tanaka (Mari), divorced in 1991, the couple owned a condominium (the property). Mari conveyed her half interest in the property to the petitioners on April 30, 1991. As a consequence, the petitioners owned a one-half interest and Ben owned a one-half interest in the property as tenants in common. On July 15, 1991, the petitioners and Ben entered into an agreement to sell the property to Hakim Properties, Inc. (Hakim Properties) for $432,000.00. Ben quitclaimed his remaining one-half interest in the property to the petitioners on September 18, 1991, purportedly to satisfy debts owed to the petitioners. Because Hakim Properties was unable to obtain financing, the contract for the sale of the property was amended to an agreement of sale, which was executed on October 9, 1992. According to the agreement of sale, Hakim Properties agreed to assume three existing mortgages on the property for which Ben was liable and agreed to pay the petitioners $3,736.67 per month for thirty-six months, beginning on November 5, 1992.

On August 6, 1992, All Lease, Inc. (the respondent) filed the *All Lease* complaint in the circuit court against Ben for default of a vehicle lease agreement. The complaint sought back payments on the lease and repossession of the vehicles. On February 17, 1993, a judgment was entered against Ben in the amount of $67,770.00.

On May 24, 1993, the respondent moved to examine the petitioners about Ben's financial affairs and was granted leave to question them regarding the transfer of the property. Unable to collect the judgment from Ben, the respondent filed a motion for execution on fraudulently transferred asset on September 3, 1993. In the motion, the respondent alleged that the petitioners were not the actual owners of the property because there was no consideration for the transfer and the transfer was made to the petitioners in contemplation of avoiding Ben's debt.[2] The petitioners

1. By order of the Chief Justice dated August 27, 1993. *See* Article VI, § 2 of the Hawai'i Constitution (1978).

2. The Uniform Fraudulent Transfer Act is codified under Hawai'i Revised Statutes (HRS) ch. 651C (1985). HRS § 651C-4(a)(2) provides in relevant part:

> *§ 651C-4 Transfers fraudulent as to present and future creditors.* (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made and the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> ....
>
> (2) Without receiving a reasonably equivalent value in exchange for the transfer of obligation, and the debtor:
>
> (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small to the business or transaction; or
>
> (B) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

HRS § 651C-7 provides in relevant part:

> *Remedies of creditors.* (a) In any action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations provided in section 651C-8, may obtain:

were not named as parties, but the respondent did serve them with notice of the hearing. Although Ben filed no opposition, his attorney appeared at the hearing on September 24, 1993 to request a continuance. The circuit court denied the continuance and granted the respondent's motion. On October 6, 1993, the circuit court entered the order granting the respondent's motion for execution of fraudulently transferred asset that decreed as follows:

> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Execution on Fraudulently Transferred Asset be and is hereby granted;
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff is allowed to execute on the receivables of James K. Tanaka and Fusako Tanaka arising out of their Agreement of Sale to Hakim Properties, Inc. dated October 9, 1992 relating to the sale of Apt. 601, Punahou Palms condominium and to credit any monies received thereunder to the outstanding Judgment in favor of Plaintiff and against Defendant Ben T. Tanaka.

The circuit court subsequently issued a garnishee summons and order and directed Hakim Properties to hold all debts owed to the petitioners and to make the monthly payments to the respondent. Although the petitioners were not parties to the action, they nevertheless filed a motion for reconsideration. The motion was denied, and the petitioners filed the instant petition.

II. *STANDARD FOR DISPOSITION*

[1–3] This court has consistently held that a writ of mandamus is an extraordinary remedy that is usually not issued unless the petitioner demonstrates: (1) a clear and indisputable right to relief; and (2) a lack of other means adequately to redress the alleged wrong or obtain the requested action. *Breiner v. Takao,* 73 Haw. 499, 502, 835 P.2d 637, 640 (1992) (citations omitted). Such writs are neither meant to supersede the legal discretionary authority of the lower courts nor to serve as legal remedies in lieu of normal appellate procedure. *State ex rel. Marsland v. Town,* 66 Haw. 516, 668 P.2d 25 (1983). Mandamus is an appropriate remedy where the petitioners, as in the instant proceeding, have an indisputable right to defend their interest in property, have not been named as parties to the lower court action, and have no remedy by way of appeal. *See Stewart Properties, Inc. v. Brennan,* 8 Haw. App. 431, 807 P.2d 606 (1991) (only parties to a lawsuit may appeal from any adverse judgment).[3]

III. *DISCUSSION*

The petitioners argue that: (1) they were denied due process when their property was taken without notice and an opportunity to be heard; (2) the circuit court had no authority to issue the disputed order because the petitioners were not named as parties to the *All Lease* action; and (3) there is no alternative to a writ because the petitioners were not parties to the proceedings below and have no remedy by way of appeal. The respondent acknowledges that the petitioners were not parties to the action, but contends that it was unnecessary to name the petitioners as parties because: (1) the evidence established conclusively that the property was fraudulently transferred;[4] and (2) any pro-

> (1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;
>
> ....
>
> (b) If a creditor has obtained a judgment on a claim against the debtor, the creditor may, if the court so orders, levy execution on the asset transferred or its proceeds.

HRS § 651C–8 delineates the defenses, liability, and protection accorded to transferees. The petitioners are transferees in the instant case.

3. In *Stewart Properties,* the ICA suggested that a non-party whose interest is affected by a trial court's judgment should seek intervention for the purposes of appeal and that a denial of such a motion to intervene would be appealable. *Stewart Properties,* 8 Haw.App. at 433 n. 1., 807 P.2d at 607 n. 1. (citing *Marino v. Ortiz,* 484 U.S. 301, 303, 108 S.Ct. 586, 587, 98 L.Ed.2d 629 (1988)). In the present case, the petitioners, who were not represented by counsel until after the respondent's motion was granted, did not move to intervene. We decline, under these circumstances, to require them to have intervened.

4. Although the circuit court did not specifically find that the conveyance from Ben to the petitioners was fraudulent, that finding is implicit in

ceeds from the sale of the property belonged to Ben and not to the petitioners. The respondent also contends that the petitioners have a remedy against Ben and that relief by way of mandamus is therefore not warranted.

A. *The Respondent Should Have Filed A Separate Action Against The Petitioners In Their Attempt To Set Aside The Alleged Fraudulent Transfer.*

Although there is no recent Hawai'i authority expressly denominating the necessary parties to an action to set aside an alleged fraudulent transfer, our territorial court noted that, in this jurisdiction, a transfer to defraud a creditor is void as to the creditor and the question whether the transfer was bona fide may be adjudicated in an action at law; in order to do so, however, it is clearly necessary to have the alleged fraudulent transferee before the court in order to bind him. *Hoffschlaeger Co. v. Jones*, 24 Haw. 74 (1917) (citations omitted). Although the statement regarding a transferee in *Hoffschlaeger* is dictum, it is consistent with decisions from courts in other jurisdictions that have ruled that a grantee or transferee of property, who claims an interest therein, is a necessary and indispensable party to the resolution of a claim of fraudulent transfer. *See, e.g., Simmons v. Clark Equipment Credit Corp.*, 554 So.2d 398, 399 (Ala.1989) (grantee who retained title to property was necessary party to action by grantor's creditors to set aside conveyance as fraudulent); *T W M Homes, Inc. v. Atherwood Realty & Investment Co.*, 214 Cal.App.2d 826, 847, 29 Cal. Rptr. 887, 899 (1963) (transferees were necessary party defendants in action to set aside fraudulent conveyance); *Guice v. Modica*, 337 So.2d 302, 303 (La.App.1976) (children to whom debtor made donation of property were indispensable parties to suit by creditor to nullify donation); *Mihajlovski v. Elfakir*, 135 Mich.App. 528, 535, 355 N.W.2d 264, 267 (1984) (presence of grantee who retains title to property was essential to permit court to render complete relief in action to set aside fraudulent conveyance); *Murray v. Murray*, 358 So.2d 723, 725 (Miss.1978) (grantee is necessary party in action to set aside fraudulent conveyance); *Dempsey & Spring, P.C. v. Ramsay*, 79 A.D.2d 1017, 1018, 435 N.Y.S.2d 336, 337 (1981) (trial court acted improperly in determining that defendant's conveyance of property to his daughter was fraudulent where no notice or opportunity to appeal was afforded to daughter, who was present owner of record); *Fraley Ins. Agency v. Johnston*, 784 P.2d 430 (Okl.App.1989) (in action to set aside fraudulent conveyance or transfer of property, grantee or transferee claiming interest in subject property was necessary and indispensable to resolution of claim); *Becker v. Becker*, 138 Vt. 372, 380, 416 A.2d 156, 162 (1980) (transfer of property creates interest in grantee that made grantee necessary party to action for fraudulent conveyance, even though no fraud on grantee's part needed to be shown); *see also* Kennedy, *Reception of the Uniform Fraudulent Transfer Act*, 43 S.C.L.Rev. 655, 673 (1992) (to avoid constitutional due process objections, any transferee or other claimant to property transferred or its proceeds should be party to any creditor's action that would affect claimant's rights in property).

[4–6] We agree with the authority cited above, reaffirm the dictum in *Hoffschlaeger*, and hold that where a creditor alleges a fraudulent transfer of property from a judgment debtor to a transferee who retains title to the subject property or who claims an interest in the property or its proceeds, the transferee is a necessary party to any action seeking to set aside the transfer.[5] Such an action for relief against a transfer alleged to be fraudulent should be brought pursuant to Hawai'i Revised Statutes (HRS) ch. 651C (1985), *see supra* n. 2, and should expressly name the alleged fraudulent transferees as defendants. Our holding is consistent with established Hawai'i law regarding the naming of parties in property disputes. *Cf. Ros-*

the court's order that allowed the respondent to execute on the proceeds that the petitioners had received.

5. Although the petitioners sold the property by way of agreement of sale to Hakim Properties, they remain the titleholders of the property until the payments under the agreement of sale are completed in 1995. The petitioners also have a claim to the monthly proceeds from the sale of the property.

siter v. Rossiter, 4 Haw.App. 333, 337, 666 P.2d 617, 620 (1983) (record owner of property was necessary and indispensable party to action affecting her interest in property, and family court had no jurisdiction to adjudicate questions affecting title to property where record owner not named as party). Fundamental principles of due process require that transferees who claim an interest in real property or its proceeds have a full and fair opportunity to contest claims of fraudulent transfer. Because the respondent resorted to an improper vehicle for establishing a fraudulent transfer, the order granting the respondent's motion to execute on fraudulently transferred asset must be vacated.[6]

B. *The Petitioners Have No Alternative Remedy To A Writ.*

[7] Contrary to the respondent's contention, the petitioners have no alternative remedy to a writ. As the circuit court ruling now stands, the petitioners have no right to appeal because they were not parties to the *All Lease* action. *See Stewart Properties, Inc.*, 8 Haw.App. at 433, 807 P.2d at 607 (only parties to a lawsuit may appeal from an adverse judgment). The circuit court allowed the petitioners to file a motion for reconsideration, but this action alone did not make them parties to the proceedings. Furthermore, it is questionable whether a nonparty could even file such a motion in a pending action. However, as we have noted, after the disputed order is vacated, the respondent can file an action under HRS ch. 651C naming the petitioners as defendants. It is possible that the circuit court may conclude that the respondent is entitled to garnish the payments that Hakim Properties makes to the petitioners. Should it do so, the petitioners, as named defendants, would then have a remedy by way of appeal.

IV. *CONCLUSION*

For the foregoing reasons, we direct Judge Nagata, the administrative judge of the First Circuit Court, or the latter's designee, to vacate the October 6, 1993 order granting the respondent's motion for execution on fraudulently transferred asset and any subsequent orders related to it.

6. By issuing this opinion, this court renders no decision on the respondent's allegation that Ben transferred the subject property to the petitioners to avoid payment of the respondent's judgment against Ben.

KEY NUMBER SYSTEM

KO'OLAU AGRICULTURAL CO., LTD., a Hawai'i corporation, Appellant,

v.

COMMISSION ON WATER RESOURCE MANAGEMENT, William W. Paty in his capacity as Chairperson of the Commission on Water Resource Management, John C. Lewin, M.D., Michael J. Chun, Ph.D., Robert S. Nakata, Richard H. Cox and Guy K. Fujimura, in their capacity as members of the Commission on Water Resource Management, Appellees.

No. 16473.

Supreme Court of Hawaii.

Feb. 25, 1994.

Agricultural firm appealed decision of commission on water resource management to designate certain aquifer systems as ground water management areas. The Supreme Court held that notice of appeal was not timely filed.

Appeal dismissed.

1. Administrative Law and Procedure ⇐723

Waters and Water Courses ⇐100

Supreme Court lacked jurisdiction to hear agricultural firm's appeal of decision of commission on water resource management to designate certain aquifer systems as ground water management areas where notice of appeal was filed more than 30 days

D. Murdock v. Blake, 484 P.2d 164 (Utah 1971)

These actions seem to be maintained upon the theory that directors are trustees for creditors, but generally these cases have some element of fraud and deceit involved therein. * * *

See also cases cited in the annotation at 50 A.L.R. 462.

We think the trial court correctly held that the second amended complaint did not state a cause of action against the individual defendants, the judgment is affirmed with costs to the respondents.

CALLISTER, C. J., and TUCKETT, HENRIOD and CROCKETT, JJ., concur.

26 Utah 2d 22

Peter B. MURDOCK and Anthony J. Butkovich, dba P & B Oil Company, Plaintiffs and Appellants,

v.

Richard L. BLAKE, dba Wendover Richfield; and Atlantic Richfield Company, a corporation, Defendants and Respondents.

No. 12195.

Supreme Court of Utah.

April 8, 1971.

Lessor, which had obtained quashal of service of summons on it in action based on "insufficient funds" checks given by operator of leased gasoline service station and declaration that judgment against it was void moved for judgment on counterclaim for value of property sold on execution. The Third District Court, Tooele County, Gordon R. Hall, J., granted motion and plaintiffs appealed. The Supreme Court, Callister, C. J., held that where return of officer making service upon station operator as agent of lessor, a foreign corporation, which had qualified to do business in Utah and had a designated process agent, did not indicate that service could not have been made upon designated process agent nor show that station operator came within statutory class of persons authorized to receive service of process for lessor, default judgment against lessor was void.

Affirmed, except for award of attorneys' fees.

1. Process ⇐4

Service of summons in conformance with mode prescribed by statute is jurisdictional, for it is the service of process, not actual knowledge of commencement of action, which confers jurisdiction.

2. Process ⇐4

Proper issuance and service of summons is means of invoking jurisdiction of court and of acquiring jurisdiction over defendant and such cannot be supplanted by mere notice by letter, telephone or any other such means.

3. Corporations ⇐668(4)
Judgment ⇐141

Where service was not made on foreign corporation's designated process agent as provided by law, even if corporation had actual knowledge of the action, court did not have jurisdiction over corporation which was entitled to have default judgment entered against it vacated. Rules of Civil Procedure, rules 4(e) (4), 41(b).

4. Process ⇐74, 135

Under rule providing system of classification whereby service is to be upon one group primarily with right to serve others as secondary mode, to justify service upon member of inferior class, it must be shown that service upon member of superior class cannot be had and if person served was member of secondary class, return must sufficiently show facts which warrant service upon him. Rules of Civil Procedure, rule 4(e) (4).

5. Judgment ⇐17(9)

Where return of officer making service upon alleged agent of foreign corporation, which had qualified to do business in Utah and had a designated process agent,

did not indicate that service could not have been made upon designated process agent nor show that person served came within statutory class of persons authorized to receive service of process, default judgment against foreign corporation was void for lack of proper service, even though plaintiffs' counsel may have received misinformation from office of Secretary of State to effect that corporation was not qualified to do business in the state. Rules of Civil Procedure, rule 4(e) (4).

6. Judgment ⇐401

After judgment for plaintiff is vacated, plaintiff stands in position of trustee of defendant of the property obtained under the judgment and restitution may be sought in the same or an independent action.

7. Secured Transactions ⇐161

In all security interests, debtor's interest in collateral remains subject to claims of creditors who take appropriate action. U.C.A.1953, 70A–1–101 et seq., 70A–9–311, 70A–9–503; Rules of Civil Procedure, rule 8(d).

8. Secured Transactions ⇐138, 168

Security agreement creates in favor of secured party a lien entitled to priority over rights of unsecured creditors, but collateral may still be sold by execution creditor subject to interest of the secured party. U.C.A.1953, 70A–1–101 et seq., 70A–9–311, 70A–9–503; Rules of Civil Procedure, rule 8(d).

9. Secured Transactions ⇐228

Most important remedy available to secured party is right to take possession of collateral following a debtor's default. U.C.A.1953, 70A–1–101 et seq., 70A–9–311, 70A–9–503; Rules of Civil Procedure, rule 8(d).

10. Secured Transactions ⇐222, 237

After default, debtor has lost his right of possession in property subject to security interest and retains only contingent right in the surplus, if any, after sale. U.C.A.1953, 70A–1–101 et seq., 70A–9–311, 70A–9–503; Rules of Civil Procedure, rule 8(d).

11. Secured Transactions ⇐228

On default, secured party is entitled to possession as against a subsequent levying creditor, for levy cannot void secured party's right to repossession. U.C.A.1953, 70A–1–101 et seq., 70A–9–311, 70A–9–503; Rules of Civil Procedure, rule 8(d).

12. Pleading ⇐182

Allegations in counterclaim not responded to are deemed admitted. Rules of Civil Procedure, rule 8(d).

13. Secured Transactions ⇐170, 228

Where, at time suppliers of gasoline service station obtained default judgment against operator of station on basis of operator's giving supplier's checks returned marked "insufficient funds", operator had been in default to lessor oil company which had security interest in tools, equipment, inventory and proceeds therefrom, oil company was entitled to possession of collateral and to recover from suppliers its value at time of sheriff's sale rather than proceeds of the sale. U.C.A. 1953, 70A–9–306, 70A–9–503.

14. Secured Transactions ⇐171

One who has possession or immediate right to possession, such as chattel mortgagee or conditional seller after default, may maintain action for conversion against one who has exercised unauthorized acts of dominion over property.

15. Trover and Conversion ⇐46

Ordinarily, where there has been a conversion, and property is not returned, measure of damages is value of property at time of the conversion.

Parker M. Nielson, LaMar Duncan, Salt Lake City, for plaintiffs and appellants.

Allen H. Tibbals, of Boyden, Tibbals & Staten, Salt Lake City, for defendants and respondents.

CALLISTER, Chief Justice:

Plaintiffs commenced the initial phase of this case in March of 1969, when they filed an action against Richard Blake and Atlantic Richfield Company, alleging that Blake was the agent and operator of a service station in Wendover, Utah, which was owned and leased by Atlantic. Plaintiffs then alleged that on three separate occasions, Blake, in the course of his employment, purchased merchandise for which he gave checks to plaintiffs, which were returned to plaintiffs and marked "Insufficient Funds." Plaintiffs prayed for judgment against the defendants for $2,551.98 in their first cause of action, and for $2,652.89 in the second and third causes of action.

Service of summons was made upon Blake by serving him personally, and service upon Atlantic was made by delivering the summons and complaint to "Richard L. Blake, agent." On April 28, 1969, plaintiffs had a default judgment entered against both defendants. Plaintiffs subsequently brought a supplemental proceeding against Blake, and in May 1969, they entered into a stipulation with Blake which provided a schedule of payments. Evidently, Blake did not make the payments, and, thereafter, plaintiffs caused an undated execution to be issued on the judgment. A sheriff's sale upon the personal property located in the service station was set for the 24th of September, 1969. Atlantic learned of this proposed sale and through its credit manager notified plaintiffs' attorney that Atlantic claimed a security interest in the property. Included with the letter were copies of all the documents which indicated that Atlantic had a perfected security interest in all the tools and service station equipment and inventory, and proceeds therefrom. The security agreement had been executed November 14, 1968, to secure payment of a promissory note executed by Blake on September 16, 1968, for the sum of $8,781.19. A financing statement was filed in accordance with the Uniform Commercial Code in the office of the Secretary of State. Plaintiffs' attorney was admonished that legal action would be taken if the seizure and sale of the assets of the service station were consummated. Nevertheless, the sale was held, at which time three parties paid cash in the sum of $1,290.03; and plaintiff, Butkovich, purchased the remainder for $1,531.60, which was applied against the judgment.

Subsequently, Atlantic filed a motion to vacate the judgment and to quash the service of summons. Atlantic alleged that service of summons upon it, a foreign corporation, had not been in accordance with Rule 4(e), U.R.C.P. Atlantic pleaded that it was a Pennsylvania corporation, qualified to do business in Utah, and that at all times pertinent to this action it had on file with the Secretary of State a designated resident agent qualified to receive service of process, namely, the C. T. Corporation System at 175 South Main Street, Salt Lake City, Utah. The pleading stated that no process at any time was served upon this designated agent. Atlantic concluded that the service was defective and no jurisdiction was acquired; and, therefore, the judgment should be set aside and the parties restored to their prior status. Plaintiffs' response thereto asserted that Atlantic was aware of the action, and that plaintiffs' counsel had inquired at the office of the Secretary of State and been informed that Atlantic was not qualified to do business in the state of Utah, and, therefore, at the time of service of process, Blake was the only agent having control of the assets of the corporation within the state.

A hearing was held, and the trial court entered an order quashing the service of summons on the ground Blake was not an agent of Atlantic within the meaning of Rule 4(e) (4), U.R.C.P.; and therefore, service upon him was insufficient to bring Atlantic within the jurisdiction of the court. The judgment against Atlantic was declared void and vacated.

Thereafter, defendant Atlantic filed a motion for restitution, wherein Atlantic alleged that its property, having a market

value of $4,942.88, was sold at the sheriff's sale. Accompanying the motion was an affidavit of Atlantic's regional credit manager, itemizing the property and its value. Plaintiffs have never controverted this affidavit. Subsequently, plaintiffs properly served Atlantic and then responded to the motion for restitution by claiming that the issues raised in the complaint would determine the true ownership of the property claimed by Atlantic. The trial court entered an order requiring plaintiffs to pay into court the sum of $4,942.88, the value of the property sold, to be held by the clerk, subject to the order of the court as to the ultimate disposition thereof, based upon a determination of the right thereto as between plaintiffs and Atlantic. Defendant Atlantic filed an answer, counterclaim, and a cross-claim against Blake. Plaintiffs filed a reply to the counterclaim, and an appeal to this court, which was dismissed as premature; the case was remanded to the trial court.

Plaintiffs took no further action to comply with the order of the court; so Atlantic filed a motion to dismiss under Rule 41(b), U.R.C.P., and for judgment on its counterclaim for the value of the property sold on execution under the void judgment. The trial court granted judgment in accordance with the motion; plaintiffs appeal therefrom.

Plaintiffs contend that the trial court erred in vacating the default judgment entered against defendant Atlantic, because Atlantic had actual knowledge of the action. Plaintiffs argue that although service was not made on Atlantic's designated process agent, as provided by law, Atlantic was aware of the impending sheriff's sale and contacted plaintiffs' attorney prior to the date upon which it was held.

Atlantic urges that strict compliance with Rule 4(e) (4), U.R.C.P., is necessary to acquire jurisdiction over the corporation and that service upon Blake was not in conformity therewith, and was, therefore, insufficient; the trial court properly quashed the service of summons and declared the judgment against Atlantic void.

[1–3] Service of summons in conformance with the mode prescribed by statute is deemed jurisdictional, for it is service of process, not actual knowledge of the commencement of the action, which confers jurisdiction. Otherwise, a defendant could never object to the sufficiency of service of process, since he must have knowledge of the suit to make such objection.[1] The proper issuance and service of summons is the means of invoking the jurisdiction of the court and of acquiring jurisdiction over the defendant; these cannot be supplanted by mere notice by letter, telephone or any other such means.[2]

Plaintiffs further assert that service upon Blake was sufficient under Rule 4(e) (4), U.R.C.P., to acquire jurisdiction over Atlantic because Blake was an agent who had the management and control over property to which Atlantic claims a right of possession.

Rule 4(e), U.R.C.P., provides:

> Personal service within the state shall be as follows:
>
> * * * * * *
>
> (4) Upon any corporation, not herein otherwise provided for, * * * by delivering a copy thereof to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. If no such officer or agent can be found in the county in which the action is brought, then upon any such officer or agent, or any clerk, cashier, managing agent, chief clerk, or other

1. Sternbeck v. Buck, 148 Cal.App.2d 829, 307 P.2d 970, 972 (1957); Tropic Builders, Ltd. v. Naval Ammunition Depot, 48 Haw. 306, 402 P.2d 440, 448 (1965).

2. Utah Sand & Gravel Products Corp. v. Tolbert, 16 Utah 2d 407, 409, 410, 402 P.2d 703 (1965).

agent having the management, direction or control of any property of such corporation, partnership or other unincorporated association within the state. If no such officer or agent can be found in the state, and the defendant has, or advertises or holds itself out as having, an officer or place of business in this state, or does business in this state, then upon the person doing such business or in charge of such office or place of business.

The evidence established that Atlantic had been qualified to do business in the state of Utah, that it was in good standing, and that it had a designated process agent.

[4] Rule 4(e) (4), U.R.C.P., provides a system of classification whereby service is to be upon one group primarily with a right to serve others as a secondary mode. In order to justify service upon a member of an inferior class under Rule 4(e) (4), U.R.C.P., it must be shown that service upon a member of the superior classes cannot be had. If the person served was a member of the secondary class, the return must sufficiently show the facts which warrant service on him.[3]

[5] In the instant action, Atlantic's designated agent, C. T. Corporation, was a member of the primary class, and Blake, even under plaintiffs' theory, was a member of an inferior class. Furthermore, the return of the officer making the service neither indicated that service could not be made upon some member in the superior class, nor did it show by proper description that the person served came within an inferior class. The affidavit of plaintiffs' counsel during the proceeding to quash the service does not cure the defect; the fact that counsel may have received misinformation from the office of the Secretary of State does not dispense with compliance with Rule 4(e) (4), U.R.C.P., which is formulated in mandatory terms. The judgment against Atlantic was void for lack of proper service.

Plaintiffs further contend that the trial court improperly granted an order for restitution, and, furthermore, plaintiffs should be compelled to restore only $2,821.63, the sum for which the property was sold at the sheriff's sale. Plaintiffs also challenge the court's award of attorneys' fees.

[6] In Levy v. Drew,[4] the court held that where a judgment has been vacated by a trial court, the defendant is entitled to restitution of all things taken from him under the judgment. After the judgment is vacated, the plaintiff stands in the position of a trustee of defendant of the property obtained under the judgment. Restitution may be sought in the same or an independent action.[5]

Atlantic was a secured party and Blake was a debtor under a security agreement, and the issues of the instant action must be determined in accordance with the Commercial Code, Title 70A, U.C.A.1953, as amended 1965.

70A–9–311, U.C.A.1953, as amended 1965, provides:

> The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default.

[7, 8] The official comments to the code indicate that the purpose of Section 9–311 is to provide without equivocation that in all security interests the debtor's interest in the collateral remains subject to claims of creditors who take appropriate

3. Reader v. District Court, 98 Utah 1, 94 P.2d 858 (1939); Boston Acme Mines Development Co. v. Clawson, 66 Utah 103, 123, 124, 127, 240 P. 165 (1925); Gibbons & Reed Co. v. Standard Accident Insurance Co., 191 F.Supp. 174, 176 (USDC D Utah, 1960).

4. 4 Cal.2d 456, 50 P.2d 435, 101 A.L.R. 1144 (1935).

5. Also see Todaro v. Gardner, 3 Utah 2d 404, 409, 285 P.2d 839 (1955); 46 Am. Jur.2d, Judgments, § 788, p. 949.

action.[6] The security agreement creates in favor of the secured party a lien on the chattels involved which is entitled to priority over the rights of unsecured creditors, but it does not exempt the collateral from forced judicial sale. The collateral may still be sold by an execution creditor subject to the interest of the secured party.[7]

Section 70A–9–311 must be construed in light of Section 70A–9–503,[8] which provides:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action * * *.

[9–11] The most important remedy available to a secured party is the right to take possession of the collateral following a debtor's default.[9] After default the debtor has lost his right of possession and sale and retains only a contingent right in the surplus, if any, after sale. On default, a secured party is entitled to possession as against a subsequent levying creditor, for a levy cannot void the secured party's right to repossession.[10]

[12] In the instant action, Atlantic alleged in its pleadings that the debtor, Blake, had been in default in payment of his promissory note; that no payment of any kind had been made on the obligation since April of 1969, and that by reason of his default, Atlantic was entitled to possession of the collateral described in the security agreement. These allegations were incorporated in Atlantic's counterclaim against plaintiffs, and, since plaintiffs did not respond thereto, they are deemed admitted under Rule 8(d), U.R.C.P.

[13] Since Blake was in default at the time plaintiffs received the default judgment, Atlantic was entitled to possession of the collateral at that time, both by virtue of the express provisions of the security agreement and by 70A–9–503. In other words, the right to possession and sale of the collateral passed from the debtor, Blake, to the secured party, Atlantic, at the time of default, and these are the rights to which Atlantic was entitled to be restored.

[14] One who has possession or an immediate right to possession, such as a chattel mortgagee or conditional seller after default, may maintain an action for conversion against one who has exercised unauthorized acts of dominion over the property of another in exclusion or denial of his rights or inconsistent therewith.[11] The Restatement of the Law, Restitution, § 128, p. 156, provides:

> A person who has tortiously obtained, retained, used, or disposed of the chattels of another, is under a duty of restitution to the other.[12]

[15] Ordinarily, where there has been a conversion, and the property is not returned, the measure of damages is the value of the property at the time of the conversion.[13] The affidavit, submitted by Atlantic as to the value of the property at the time of the sheriff's sale has not been

6. First National Bank of Glendale v. Sheriff of Milwaukee County, 34 Wis.2d 535, 149 N.W.2d 548 (1967).

7. Altec Lansing v. Friedman Sound, Inc., (Fla.App.1967) 204 So.2d 740.

8. Harrison Music Co. v. Drake, 43 Pa. Dist. & Co.2d 637 (1967).

9. Karp Bros., Inc. v. West Ward Savings & Loan Assn. of Shamokin, Penn., (Penn. Sup.Ct.1970) 271 A.2d 493.

10. Platte Valley Bank of North Bend v. Kracl, 185 Neb. 168, 174 N.W.2d 724 (1970); William Iselin & Co. v. Burgess & Leigh, Ltd., 52 Misc.2d 821, 276 N.Y.S. 2d 659 (1967).

11. First National Bank of Bay Shore v. Stamper, 93 N.J.Super. 150, 225 A.2d 162 (1966).

12. Also see § 131, Illustration 3, p. 544.

13. Whittler v. Sharp, 43 Utah 419, 426, 135 P. 112 (1913); Clarke Floor Machine Div. of Studebaker Corp. v. Gordon (Maryland 1970), 7 U.C.C.Reptr.Serv. 363; Doenges-Glass, Inc. v. General Motors Acceptance Corp., (Colo.1970) 472 P.2d 761.

controverted by plaintiffs; so Atlantic is entitled to that amount rather than the proceeds of the sale as urged by plaintiffs.[14]

The judgment of the trial court is affirmed, except for the award of attorneys' fees, which was predicated on a provision in the security agreement to which plaintiffs were not parties. Costs are awarded to defendant, Atlantic Richfield Company.

TUCKETT, HENRIOD, ELLETT, and CROCKETT, JJ., concur.

26 Utah 2d 30

JOHN DEERE COMPANY OF MOLINE, a corporation, Plaintiff and Respondent,

v.

Harold BEHLING and Jean Behling, co-partners, etc., Defendants and Appellants.

No. 12205.

Supreme Court of Utah.

April 19, 1971.

Plaintiff brought suit to recover as assignee of note and security agreement by which defendants had purchased farm machinery from assignor. The 7th District Court, Emery County, Henry Ruggeri, J., entered judgment in favor of plaintiff, and defendants appealed. The Supreme Court, Crockett, J., held that evidence that there was no claim in writing that some of purchased farm equipment had failed to work until 23 months after transaction, a few days before first major installment payment was due, supported finding that assignee of note and security agreement was holder in due course and entitled to recover against defendants.

Affirmed except as to award of attorney's fees.

14. It should be emphasized that Atlantic was entitled to possession based on Blake's default; if Blake had not been in default, Atlantic would merely be entitled to assert its priority and right to the proceeds. § 70A-9-306.

1. Bills and Notes ⇐497(1), 525

Where execution of note and security agreement by which defendants had purchased farm machinery and assignment of them to plaintiff was admitted, it was prima facie established that plaintiff was holder in due course and entitled to recover and defendants had burden of proving that plaintiff was not holder in due course and other affirmative defenses. U.C.A.1953, 70A-3-307.

2. Sales ⇐288(1)

Absent persuasive reason for avoiding waiver of defense clause, warnings in documents by which defendants had purchased farm machinery that defendants agreed that defenses or breaches of warranty could not be asserted against third persons would be given effect. U.C.A.1953, 70A-9-206.

3. Bills and Notes ⇐525

Evidence that there was no claim in writing that some of purchased farm equipment had failed to work until 23 months after transaction, a few days before first major installment payment was due, supported finding that assignee of note and security agreement was holder in due course and entitled to recover against defendants. U.C.A.1953, 70A-3-307.

4. Secured Transactions ⇐226

In suit to recover as assignee of note and security agreement, where there was no evidence in record upon which to base award of attorney's fees, plaintiff was not entitled to such award.

Stanley V. Litizzette, Helper, E. J. Skeen, R. C. Skeen, of Skeen & Skeen, Salt Lake City, for defendants and appellants.

S. J. Sweetring, Price, for plaintiff and respondent.