

IN THE UTAH COURT OF APPEALS

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<u>Richard M. Jensen</u> and Juanita)	MEMORANDUM DECISION	
B. Jensen dba R.M. Jensen)	(Not For Official Publication)	
Construction Co.,)		
)	Case No. 20100554-CA	
Plaintiff and Appellant,)		
)		
v.)	F I L E D	
)	(September 16, 2010)	
)		
<u>Jami Bogenschutz dba JB &</u>)	<table border="1"><tr><td>2010 UT App 256</td></tr></table>	2010 UT App 256
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<u>Associates Realty; Carl J.</u>)		
<u>Trujillo;</u> and Affiliated)		
First Title Ins. Agency, Inc.,)		
)		
Defendants and Appellees.)		

Third District, Salt Lake Department, 050903432
The Honorable Robert K. Hilder

Attorneys: Richard M. Jensen, Brigham City, Appellant Pro Se
Darrel J. Bostwick and Steven D. Crawley, Salt Lake
City, for Appellees

Before Judges Davis, Voros, and Roth.

PER CURIAM:

This appeal is taken from an order denying a motion to set aside the order dismissing the underlying case for failure to prosecute. This case is before the court on (1) the motion of Defendants and Appellees Jami Bogenschutz doing business as JB & Associates Realty and Carl J. Trujillo for summary disposition and (2) a sua sponte motion for summary disposition.

The underlying case was filed in the district court by Juanita B. Jensen doing business as R.M. Jensen Construction Co. Shortly before the notice of appeal was filed, Richard M. Jensen filed a Notice of Substitution of Parties in the district court, stating that he had purchased "all assets and the rights to the name of R.M. Jensen Construction Co., a d.b.a. of Juanita B. Jensen." Defendants argue that Richard M. Jensen lacks standing to pursue this appeal because he did not move to be substituted as a party in the district court under rule 25(c) of the Utah Rules of Civil Procedure. Because the district court had entered

its final order before the filing of the notice of substitution, there would be no purpose for substitution in the district court. However, rule 38(c) of the Utah Rules of Appellate Procedure states that "[i]f substitution of a party is appropriate for any [reason other than death or incompetency], the court may substitute the party upon good cause shown." Utah R. App. P. 38(c). We substitute Richard M. Jensen as the appellant in this case.

Juanita B. Jensen filed the underlying case in February 2005. Defendants filed an answer and counterclaim. In May 2005, Richard M. Jensen and Juanita B. Jensen filed a Chapter 7 bankruptcy action. On October 17, 2005, both debtors were discharged in bankruptcy. On February 28, 2006, the district court issued an order to show cause requiring the parties to appear on April 17, 2006, to show cause why the case should not be dismissed for failure to prosecute. The district court later dismissed the case without prejudice for failure to prosecute because no party or counsel appeared to oppose dismissal. In March 2010, roughly four years after the case was dismissed, Jensen filed a motion for summary judgment. The district court denied the motion because the underlying case had been dismissed.

Jensen moved to set aside the 2006 dismissal order. The district court denied the motion to set aside the dismissal order, ruling

that the automatic stay was not in place; Rule 60(a) [of the Utah Rules of Civil Procedure] provides no relief, because the error complained of was (1) not clerical, and (2) not an error; Rule 60(b) [of the Utah Rules of Civil Procedure] is not available because any such motion is egregiously untimely and no excusable neglect has been demonstrated; and plaintiff's notice claims are unpersuasive.

The district court did not err in denying the motion to set aside the dismissal order after concluding that the automatic stay was not in effect when the order to show cause was initiated by the district court in April 2006. Defendants provided the district court with a copy of the docket of the chapter 7 bankruptcy proceeding, which reflected that both Jensens were discharged as debtors on October 17, 2005. Although there were additional proceedings before the case was closed, the discharge of the debtors terminated the automatic stay. See 11 U.S.C.S. § 362(c)(2)(C) (2010). Section 362(c)(2) provides that

the stay . . . continues until the earliest
of--

- (A) the time the case is closed;
- (B) the time the case is dismissed;
- or
- (C) if the case is a case under Chapter 7 of this title concerning an individual . . . , the time a discharge is granted or denied;

Id. § 362(c)(2). The earliest of the three listed events that would result in termination of the automatic stay insofar as it was applicable to the underlying case was the discharge of Juanita and Richard Jensen as debtors in October 2005.

Richard M. Jensen contends that there is no proof that the order to show cause was sent to the parties because the file was destroyed after the retention period expired. The district court docket indicates that notice was sent on February 28, 2006, to the addresses on file with the court. The district court did not err in rejecting Richard M. Jensen's claim that the court did not provide notice and an opportunity to be heard prior to dismissing the case for failure to prosecute.

The district court correctly ruled that the dismissal of the case was not the result of a clerical error, oversight, or omission. See generally Utah R. Civ. P. 60(a) (allowing correction of clerical error in orders or judgments and errors arising from oversight or omission). Finally, the district court did not err in denying a motion to set aside the dismissal based upon a claim of excusable neglect under rule 60(b)(1) of the Utah Rules of Civil Procedure as an untimely motion. See id. 60(b) (requiring a rule 60(b)(1) motion to be filed within three months after entry of the challenged order). Even if the motion is construed as being made under the residual clause contained in rule 60(b)(6), a motion made over four years after the dismissal of the underlying case was not made "within a reasonable time." Id. (requiring a motion under the residual clause to be made "within a reasonable time").

Accordingly, we affirm.

James Z. Davis,
Presiding Judge

J. Frederic Voros Jr., Judge

Stephen L. Roth, Judge