IN THE UTAH COURT OF APPEALS

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William R. Stratton, Plaintiff and Appellant, v. JB Oxford Holdings, Inc., Defendant and Appellee.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20070855-CA F I L E D (August 7, 2008) 2008 UT App 298

Third District, Salt Lake Department, 970908225
The Honorable Tyrone E. Medley

Attorneys: Chad M. Steur, Salt Lake City, for Appellant
Lincoln W. Hobbs, Lisa M. McGarry, and Julie Ladle, Salt Lake City, for Appellee

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Before Judges Billings, Davis, and Orme.

PER CURIAM:

On December 2, 2004, the district court granted summary judgment in favor of JB Oxford Holdings, Inc. (JBOH). JBOH's counsel prepared proposed orders on two summary judgment motions and two related motions, which were filed and served in May 2005. Plaintiff William R. Stratton filed objections to each of the proposed orders. On August 11, 2005, the district court entered the Order on Defendant's Second Motion in Limine; Order on Defendant's Motion for Partial Summary Judgment Re: Mitigation; Order on Defendant's Motion for Summary Judgment Re: Defendant's Liability; and Order on Defendant's Motion to Strike the Affidavits of J. Garry McAllister and John M. Whitesides. The district court judge placed an identical hand-written statement on each order: "Plaintiff's objections have been considered and are denied." In November 2006, the district court mistakenly issued an order to show cause why the case should not be dismissed for failure to prosecute. At a subsequent hearing, the district court stated:

> [F]rom my review of the file, there is no question that I signed any of the orders. Not only did I sign and enter them, but in my own handwriting, by way of interlineation on

> each of the orders, I have written that plaintiff's objections to the proposed orders are denied. The orders were signed and entered on August the 11th of 2005.

In February 2007, Stratton filed a Motion to Strike Orders, based upon rule 60(b)(6) of the Utah Rules of Civil Procedure. Stratton conceded the summary judgment announced in December 2004 "effectively ended the case." However, he contended that entry of the August 11, 2005 orders was irregular because there was no hearing on his objections; counsel for JBOH failed to serve a notice of entry of judgment pursuant to rule 58A of the Utah Rules of Civil Procedure; and counsel for JBOH had a set of orders without the hand-written notation denying Stratton's objections. Stratton speculated that there had been improper contact between the trial judge and counsel for JBOH that resulted in the denial of his objections after the orders were executed. The court denied the rule 60(b)(6) motion, finding that "the Motion to Strike Orders, filed in excess of one (1) year after the entry of the Orders, was untimely pursuant to Rule 60(b)(6)." The Court stated, "in addition to the untimeliness of the Motion, . . . Plaintiff has failed to present any cognizable reason pursuant to Rule 60(b)(6) or otherwise, as to why the Orders should be set aside or stricken." The court denied a motion to reopen discovery as moot.

Stratton contends the district court erred in finding that his rule 60(b)(6) motion was untimely because counsel for JBOH failed to serve notice of entry of the judgment as required by rule 58A(d) of the Utah Rules of Civil Procedure. In Workman v. Nagle Construction, 802 P.2d 749 (Utah Ct. App. 1990), we stated that although failure to timely serve notice of entry of a judgment does not invalidate the judgment, "failure to give the required notice is an important factor in determining the timeliness of post-judgment proceedings where an exact time limit is not prescribed." Id. at 751. Under the circumstances of this case, we conclude that the district court did not abuse its discretion in concluding that the motion to set aside the judgment was not filed within a reasonable time after entry of the judgment.

In Henshaw v. Estate of King, 2007 UT App 378, 173 P.3d 876, "we reaffirm[ed] the generally accepted rule that the moving parties in a 60(b)(6) motion asserting that they had no notice of the trial court's judgment must show either 'diligence in trying to determine whether judgment had been entered,' or that they were 'actually misled . . . as to whether there had been entry of judgment.'" Id. ¶ 30 (omission in original). Stratton was served with the proposed orders, obtained an extension to file objections, and filed objections, but did not request a hearing.

Accordingly, he "cannot claim that he was unaware that the trial court might soon enter a judgment." Id. ¶ 29. Although Stratton's trial counsel claimed that his staff inquired of the court clerk whether the dispositive orders had been entered, he did not provide specific evidence to establish diligence in trying to determine whether the judgment had been entered. If Stratton intended to appeal the final judgment, it is not credible that neither he nor his counsel determined that the judgment had been entered until the court issued an apparently mistaken order to show cause over a year later.

Stratton's arguments based on Code v. Utah Department of Health, 2007 UT 43, 162 P.3d 1097, are raised for the first time on appeal and do not support the claim that failure to serve a proposed order within fifteen days renders the subsequent judgment invalid. Code held that where rule 7(f)(2) of the Utah Rules of Civil Procedure requires that an order be filed, "no finality will be ascribed to a memorandum decision or minute entry for purposes of triggering the running of the time for appeal." Id. "If the prevailing party fails to submit an order within the fifteen-day period required by rule 7(f)(2), any party interested in finality . . . may submit an order." Id. ¶ 7. It is undisputed that Stratton's counsel received proposed orders. Stratton asserts that his objections should have been construed by the district court sua sponte as post-judgment motions to alter or amend the findings and judgment under either rule 52 or rule 59 of the Utah Rules of Civil Procedure. This argument was not preserved in the trial court and is also without merit.

JBOH requests an award of attorney fees and costs based upon a frivolous appeal under rule 33 of the Utah Rules of Appellate Procedure. Stratton's claim of improper ex parte contact based upon speculation about the existence of two sets of orders is without merit. The trial court record contains orders signed by the district court, including a handwritten denial of Stratton's objections. JBOH's counsel also presented credible evidence in the trial court to support his representation that the orders JBOH's counsel received were conformed copies. To persist in the claim of irregularity in the entry of the final orders and the speculative claim of improper ex parte contact constitutes assertion of a claim that is without a basis in law or fact. See generally Utah R. App. P. 33(b) ("[A] frivolous appeal . . . is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law."). We award JBOH its attorney fees and costs incurred in this appeal.

We affirm the denial of Stratton's rule 60(b) motion to set aside the final judgment and denial of the related motion to reopen discovery. We remand this case to the district court for

determination of the costs and attorney fees reasonably incurred by Appellee JBOH on appeal.

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Judith M. Billings, Judge

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James Z. Davis, Judge

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Gregory K. Orme, Judge