IN THE UTAH COURT OF APPEALS

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Sharlene Francisconi, Plaintiff and Appellee, v. Becky Hall, and/or John Does 1-2 and Jane Does 1-2, Defendants and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20070331-CA F I L E D (May 8, 2008) 2008 UT App 166

Third District, Salt Lake Department, 040922431
The Honorable Denise P. Lindberg

Attorneys: E. Craig Smay, Salt Lake City, for Appellant
Gregory M. Constantino, West Jordan, for Appellee

Before Judges Thorne, McHugh, and Orme.

McHUGH, Judge:

Becky Hall appeals the trial court's order setting aside a prior order, denial of a motion to amend, and final judgment. We affirm and remand for a determination of the reasonable attorney fees Sharlene Francisconi incurred on appeal.[1]

We begin by emphasizing the importance of complying with rule 24 of the Utah Rules of Appellate Procedure. Of particular importance here are the requirements that briefs "contain the contentions and reasons of the appellant with respect to the issues presented, including . . . citations to the authorities, statutes, and parts of the record relied on," Utah R. App. P. 24(a)(9), and that they "be concise, presented with accuracy,

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1. Francisconi argues this court lacks jurisdiction because Hall filed her notice of appeal before the entry of the trial court's final Judgment and Order. However, pursuant to rule 4(c) of the Utah Rules of Appellate Procedure, "[a] notice of appeal filed after the announcement of a decision, judgment, or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof." Utah R. App. P. 4(c) (emphasis added).

logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters," id. R. 24(k). "Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer." Id.

In this case, Hall's briefs were noncompliant with the requirements of rule 24.[2] For example, Hall's arguments contain only sporadic citations to legal authorities or the record; Hall fails to develop or explain the legal authorities she does cite; the limited citations that are provided often do not support the facts or law as stated; Hall's contentions are not presented in a manner that is clear and concise; Hall fails to set forth the correct standard of review for each issue on appeal; and the arrangement of Hall's initial brief and its four argument headings are largely unrelated to the seven topics Hall identifies as issues. Despite these deficiencies, we exercise our discretion and address the merits of Hall's arguments on appeal so that the parties may have the benefit of a decision on the merits.

First, we address Hall's argument that the trial court erred when it set aside its January 19, 2005 Order.[3] Hall argues the Order was a final judgment that could only be vacated under the framework of rule 60(b) of the Utah Rules of Civil Procedure. We disagree.

By its own terms, rule 60(b) applies only to "a final judgment, order, or proceeding." Utah R. Civ. P. 60(b) (emphasis added); see also Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1310 n.2 (Utah Ct. App. 1994) ("[B]y its terms, Rule 60(b)(7) applies only to motions for relief from a final judgment or order." (emphasis added)). "For an order or judgment to be

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2. Francisconi's brief was also noncompliant with several of the other requirements for appellate briefs. For example, it was not double sided, see Utah R. App. P. 27(c); was not typed in 13-point font, see id. R. 27(b); and did not include parallel citations, see Utah Supreme Court Standing Order No. 4.

3. The January 19, 2005 Order is simply titled "Order." This Order was originally set aside by Judge Dever on May 25, 2005. Judge Dever's May 25 ruling was in turn stayed on June 3, 2005. Judge Himonas was then assigned to the case. On December 19, 2005, Judge Himonas conducted another evidentiary hearing and concluded, like Judge Dever before him, that the January 19, 2005 Order should be vacated. Despite the consistent rulings by two different trial judges, Hall continued to raise this same issue throughout the proceedings in the trial court.

final, it must . . . finally dispose of the subject-matter of the litigation on the merits of the case. In other words, it must end[] the controversy between the litigants, leav[ing] nothing for the court to do but execute the judgment." Powell v. Cannon, 2008 UT 19, ¶ 11, 598 Utah Adv. Rep. 31 (alterations in original) (internal quotation marks omitted).

Here, the Order did not end the litigation.[4] On the contrary, the Order merely held "[f]urther proceedings herein . . . in abeyance" because the parties had agreed to "endeavor to agree upon a total sum paid by Hall" and to attempt to "agree on an appraised value of the property." (Emphasis added.) In other words, the parties were "trying to resolve this" dispute and the trial court "continued" the case so the parties could participate in settlement negotiations. (Emphasis added.) Thus, by its terms and by its operation, the Order stayed but did not "end[] the controversy between the litigants," see id. (alteration in original) (internal quotation marks omitted).[5] Accordingly, the Order was not final, and rule 60(b) is inapplicable.

Because the trial court was not limited to the framework of rule 60(b), it had much broader discretion to set aside the order. See Utah R. Civ. P. 54(b) ("[A]ny order . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order . . . is subject to revision at any time . . . ." (emphasis added)); Brookside Mobile Home Park, Ltd. v. Peebles, 2002 UT 48, ¶ 18, 48 P.3d 968 ("Trial courts have clear discretion to reconsider and change their position with respect to any orders or decisions as long as no final judgment has been rendered." (citing Utah R. Civ. P. 54(b))).[6] The trial court set aside the order based on

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4. Hall argues that the trial judge subsequently "made findings that a final order had been entered." In fact, the one paragraph of the trial court's ruling that Hall cites reads: "The ORDER was submitted to the Court, with a certificate of mailing attached, and was entered by the Court." Nowhere does that paragraph support Hall's argument that the trial court deemed it a final order.

5. This conclusion is further supported by the trial court's factual finding that the Order did not embody a binding settlement agreement--a finding which Hall does not challenge.

6. Hall argues rule 54(b) is inapplicable because there were not multiple claims or parties. Rule 54(b), however, provides a (continued...)

evidence from which the court found settlement efforts had stalled and that there was no "legally enforceable agreement[] with regard to settlement of the above-entitled action." Hall does not challenge the trial court's factual findings or argue that the trial court exceeded its discretion.[7] Instead, Hall limits her arguments to rule 60(b). Because rule 60(b) was inapplicable to the trial court's nonfinal Order, we affirm on this issue.

Second, Hall argues the trial court erred when it denied her motion for leave to amend her answer and file a counterclaim. We again disagree.

Leave to amend "shall be freely given when justice so requires." Utah R. Civ. P. 15(a). However, contrary to Hall's assertion, "[t]he standard of review of a denial to amend pleadings is abuse of discretion."[8] Fishbaugh v. Utah Power & Light, 969 P.2d 403, 405 (Utah 1998) (alteration in original) (internal quotation marks omitted). Generally "[i]n analyzing the grant or denial of a motion to amend, Utah courts have focused on three factors: the timeliness of the motion; the justification given by the movant for the delay; and the resulting prejudice to the responding party." Kelly v. Hard Money Funding, Inc., 2004 UT App 44, ¶ 26, 87 P.3d 734 (alteration in original) (internal quotation marks omitted).

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6. (...continued)
trial judge with authority to amend any nonfinal judgment. See Utah R. Civ. P. 54(b); see also U.P.C. Inc. v. R.O.A. Gen., Inc., 1999 UT App 303, ¶ 55, 990 P.2d 945 ("We have interpreted Rule 54(b) to allow a [trial] court to change its position with respect to any order or decision before a final judgment has been rendered in the case." (alteration in original) (internal quotation marks omitted)).

7. Indeed, Hall failed to provide a transcript of the evidentiary hearing as part of the record, and we therefore "presume the regularity of the proceedings below." State v. Pritchett, 2003 UT 24, ¶ 13, 69 P.3d 1278.

8. After listing the seven issues Hall identifies on appeal, Hall states, "All of the foregoing are issues of law, reviewed de novo, without deference for the District Court's conclusions." Hall's sole citation in support of this assertion is Colonial Leasing Co. of New England, Inc. v. Larsen Brothers Construction Co., 731 P.2d 483 (Utah 1986). However, Colonial Leasing never addressed the standard of review for the denial of a motion to amend or several of Hall's other alleged errors. See id. at 484-85.

Hall's argument focuses entirely on the first prong--the timeliness of the motion. This court has previously recognized that "regardless of the procedural posture of the case, motions to amend have typically been deemed untimely when they were filed several years into the litigation." Id. ¶ 30 (emphasis added). Thus, the trial court emphasized that Hall did not seek leave to amend her answer until one year and nine months after the case began. Hall argues that her delay was caused by the Order, which stayed litigation for a period of eleven months, and therefore her request for leave was timely. Even if we were to accept Hall's argument, the trial court still did not exceed its discretion under the circumstances of this case. In addition to noting the twenty-one month delay, the trial court also found that Hall lacked sufficient justification for obtaining leave to amend and that Francisconi would be prejudiced by such amendment. Hall does not challenge these findings, and we therefore accept them as true.

Moreover, the trial court relied on several other factors. See generally Aurora Credit Servs., Inc. v. Liberty W. Dev., Inc., 970 P.2d 1273, 1282 (Utah 1998) ("[M]any other factors, such as delay, bad faith, or futility of the amendment, may weigh against the trial court's allowing amendment. . . . [T]he trial court must ultimately assess all the factors . . . to determine if leave to amend is appropriate."). For example, Hall had been living on the property for over two years "without making a single payment towards the financial obligations associated with the premises"; Hall filed her amended answer and counterclaims without first seeking leave of the court; Hall did not seek leave for approximately four months; Hall moved for default judgment on her counterclaims even though they were not properly before the court; Hall failed to pay the required filing fee; Hall's purported amended pleadings referenced certain exhibits which she did not file with the court; and Hall's memorandum in support of her motion for leave was "devoid of any legal analysis in support of [her] motion."

Additionally, the trial court found that there was a substantial likelihood that at least two of Hall's three counterclaims would "not survive a motion to dismiss under Utah R. Civ. P. 12(b)(6)." For example, fraud must be pleaded with particularity. See Utah R. Civ. P. 9(b); see also Coroles v. Sabey, 2003 UT App 339, ¶ 30, 79 P.3d 974 (dismissing claim of fraud that was not pleaded with particularity). Such particularity means a party must allege, at least, the nine elements of fraud. See Armed Forces Ins. Exch. v. Harrison, 2003 UT 14, ¶ 16, 70 P.3d 35 (listing the nine "elements that a party must allege to bring a claim sounding in fraud" (internal quotation marks omitted)). Hall's amended complaint did not

allege all nine of the required elements. Indeed, even on appeal, Hall focuses on fewer than the nine required elements.

Hall's abuse of process claim is also deficient. "[T]o establish a claim for abuse of process, a claimant must demonstrate [f]irst, an ulterior purpose; [and] second, an act in the use of the process not proper in the regular prosecution of the proceedings." Anderson Dev. Co. v. Tobias, 2005 UT 36, ¶ 65, 116 P.3d 323 (alterations in original) (internal quotation marks omitted). Hall's allegations in support of this claim are the following: "The present action was filed maliciously and for an improper purpose. In pursuit of such purpose, Francisconi has served process upon Hall to force vacation of the premises."

Even assuming Hall's allegations establish an "ulterior purpose," her claim is still insufficient. "[T]here is no action for abuse of process when the process is used for the purpose for which it is intended, [even though] there is an incidental motive of spite or an ulterior purpose of benefit to the defendant." Restatement (Second) of Torts § 682 cmt. b (1977). "For abuse of process to occur there must be use of the process for an immediate purpose other than that for which it was designed and intended." Id. (emphasis added); accord Hatch v. Davis, 2004 UT App 378, ¶¶ 34-36, 102 P.3d 774, aff'd in part and remanded in part by 2006 UT 44, 147 P.3d 383. Here, unlawful detainer proceedings are, by design, intended to "force vacation of the premises." See Utah Code Ann. § 78-36-10 (2002) ("A judgment entered in favor of the plaintiff shall include an order for the restitution of the premises . . . ."). Accordingly, it was not an abuse of process for Francisconi to initiate unlawful detainer proceedings for that purpose. Thus, the trial court did not err in concluding that Hall's abuse of process claim would not survive a motion to dismiss.

The third and final claim Hall sought to add was for anticipatory breach. The trial court acknowledged that "it is a closer call whether or not the 'anticipatory breach of contract' claim would [have] survive[d a motion to dismiss]." Nevertheless, the court found that this one potentially viable claim was not "enough to tip the balance towards allowing amendment of the pleadings when considering the totality of the circumstances and the foregoing analysis." We agree.

In short, we reject Hall's assertion that the trial court relied on "pseudo-analysis" and "make-weight" reasoning. On the contrary, the trial court thoughtfully considered the matter and provided detailed written findings. Consequently, we conclude that the trial court did not exceed its discretion in denying Hall's motion for leave to amend.

Third, we address Hall's defense to Francisconi's unlawful detainer action based on anticipatory breach.[9] Hall argues that Francisconi anticipatorily breached the contract and, therefore, Hall was excused from all future performance. Again, we are not persuaded.

Assuming Francisconi committed an anticipatory breach, Hall had three options: (1) "[t]reat the entire contract as broken and sue for damages"; (2) "[t]reat the contract as still binding and wait until the time arrived for its performance and at such time bring an action on the contract"; or (3) "[r]escind the contract and sue for money paid or for value of the services or property furnished." Breuer-Harrison, Inc. v. Combe, 799 P.2d 716, 724 n.4 (Utah Ct. App. 1990). Hall failed to exercise any of these options. Instead, she continued to reside in the house for over two years without paying any rent to Francisconi, leaving Francisconi obligated on the monthly mortgage payments. Hall could have immediately sued for breach of contract, continued to treat the contract as binding and later sued for breach of contract if Francisconi failed to deliver clean title, or Hall could have immediately rescinded the agreement. However, Hall could not continue to receive the benefits of the bargain and simultaneously claim to be released from further performance of her own obligations. See Callahan v. Simons, 64 Utah 250, 228 P. 892, 893-94 (1924) ("The acceptance or retention of benefits after the nonperformance or imperfect performance of a contract is a waiver of any right to consider such breach a discharge or release from the contract." (internal quotation marks omitted)); see also Southern Energy Homes, Inc. v. Gregor, 777 So. 2d 79, 82

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9. Hall also claims the trial court erred when it entered an order of restitution before trial. We see no merit to this argument. Under Utah Code section 78-36-8.5, the plaintiff in an unlawful detainer case "may execute and file a possession bond. . . . in an amount that is the probable amount of costs of suit and damages which may result to the defendant if the suit has been improperly instituted." Utah Code Ann. § 78-36-8.5(1) (2002). Francisconi posted such a bond here. The statute then provided Hall with alternate remedies that would allow her to remain on the property: (1) "pay[] accrued rent, utility charges, . . . and other costs"; or (2) "execute[] and file[] a counter bond." Id. § 78-36-8.5(2)(a)-(b). Hall never took advantage of either of these opportunities, and therefore the trial court properly entered Francisconi's ex parte order of restitution. See id. § 78-36-8.5(3). However, this order did not end the controversy; Hall was free to, and did, assert her defenses during trial. Had she succeeded, Hall would have been entitled to recover any injury out of the bond Francisconi posted with the trial court.

(Ala. 2000) ("A plaintiff cannot simultaneously claim the benefits of a contract and repudiate its burdens and conditions."). Accordingly, we affirm the trial court's ruling.[10]

Finally, we address Hall's contention that "[t]he contract enforced by the District Court is unconscionable, and unenforceable on its face."[11] "A party claiming unconscionability bears a heavy burden." Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 402 (Utah 1998). "Unconscionability, while defying precise definition, has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." Id. (emphasis omitted) (internal quotation marks omitted). "Generally, the critical juncture for determining whether a contract is unconscionable is the moment when it is entered into by both parties." Resource Mgmt. Co. v. Weston Ranch & Livestock Co., 706 P.2d 1028, 1043 (Utah 1985).

In this case, we agree with the trial court that "[t]his is hardly an unconscionable agreement." Indeed, the terms of the contract essentially mirrored the terms of the promissory note Francisconi executed in favor of the bank. Francisconi did not charge Hall more than the amount she was obligated to pay under the note, nor did Hall forfeit the funds she provided as a down

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10. Because we affirm on this basis, we need not address the trial court's ruling that Hall was provided an exclusive remedy under the contract. See Dipoma v. McPhie, 2001 UT 61, ¶ 18, 29 P.3d 1225 ("[I]t is well settled that an appellate court may affirm the judgment appealed from if it is sustainable on any legal ground or theory apparent on the record . . . ." (internal quotation marks omitted)).

11. As part of this argument, Hall alleges that "any consideration [was] wholly illusory." We disagree. "Consideration is commonly defined as '[s]omething of value (such as an act, a forbearance, or a return promise) received by a promisor from a promisee.'" Surety Underwriters v. E & C Trucking, Inc., 2000 UT 71, ¶ 22 n.6, 10 P.3d 338 (quoting Black's Law Dictionary 300 (7th ed. 1999)). In this case the consideration is obvious--Francisconi purchased the property and became obligated on the mortgage to assist Hall, whose credit history would not allow her to buy it herself. Francisconi then sold the property to Hall in exchange for Hall's monthly installment payments.

payment on the property.[12] There is nothing suggesting the contract was "unreasonably favorable" to Francisconi or that Hall lacked "meaningful choice" when she agreed to be bound by its terms. Rather, Francisconi used her credit worthiness to assist Hall, who could not herself qualify for a mortgage loan, in purchasing a home.

In sum, we reject Hall's arguments on appeal and affirm the trial court's rulings. Because Francisconi was awarded attorney fees below and was successful on appeal, she is also entitled to the reasonable attorney fees and costs incurred on appeal. See, e.g., Aris Vision Inst., Inc. v. Wasatch Prop. Mgmt., Inc., 2006 UT 45, ¶ 22, 143 P.3d 278. We remand to the trial court for a determination of those fees and costs.

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Carolyn B. McHugh, Judge

I CONCUR:

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William A. Thorne Jr.,
Associate Presiding Judge

I CONCUR IN THE RESULT:

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Gregory K. Orme, Judge

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12. Hall's purchase price under the contract was the value of the property when Francisconi purchased it, minus Hall's $30,000 down payment. In addition, the trial court offset that $30,000 against the amount Hall owed Francisconi in unpaid rent and other damages.