

Date: April 22, 2022

To: Division of Occupational & Professional Licensing Construction Services
Commission

From: Austin C. Nate, Esq., Ray Quinney & Nebeker

Re: Trevor Gough – April 27, 2022 Construction Services Commission Hearing

List of Supplemental Exhibits

10. Satisfaction of Judgment – Case No. 219900380 (Latham)
11. Settlement Agreement – Case No. 200401222 (Mitchell)
12. Check Regarding First Payment – Case No. 210902208 (Champion)
13. Email Regarding Satisfaction of Ogden Project
14. \$50,000 Bond Documentation
15. Motion to Set Aside Judgment – Case No. 198100128 (Lambert) (*See Exhibit 7*)



EXHIBIT 10

STEPHEN B. ELGGREN, PC.
Stephen B. Elggren (0970)
Attorney for Plaintiff
PO Box 1726
Draper, UT 84020
Phone (801) 304-3600
E-mail Steve@evlaw.net
No: 20000361

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY
SALT LAKE DEPARTMENT, STATE OF UTAH

LATHAM POOL PRODUCTS INC.

Plaintiff,

vs.

ASPIRE CIVIL CONSTRUCTION, INC.

Defendant.

SATISFACTION OF JUDGMENT

Civil No. 219900380

Judge LINDA JONES

Plaintiff, through Plaintiff's undersigned attorney of record, hereby acknowledges satisfaction of the judgment entered herein against Defendant and authorizes and directs the clerk of the above-entitled court to enter a full Satisfaction of Judgment accordingly.

Pursuant to UCA 78B-5-705, I declare under civil penalty of the State of Utah that the foregoing is true and correct.

Executed on April 21, 2022

By:

/s/Stephen B. Elggren P.C.
Stephen B. Elggren
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2022, I caused a true and correct copy of the above SATISFACTION OF JUDGMENT to be delivered to the following, in the manner noted below, directed to:

Shawn H. Robinson
Attorney for Defendant
srobinson@skeenandrobinson.com

(x)by ecf filing with the Court

(x) by email

/s/ Julie Mason
Legal Assistant

EXHIBIT 11

MUTUAL RELEASE OF ALL CLAIMS


Effective upon the receipt of the Payment (as defined below), the undersigned parties, in consideration of the mutual releases, Payment, and waiver described below, do hereby release, acquit, and forever discharge each other, and waive all claims against each other, based upon or in any manner related to the facts and transactions in any way arising from or related to the attached Contract for Concrete Pool Install between the parties (the "**Contract**").

The undersigned declare and represent that no promise, inducement or agreement not herein expressed has been made to the undersigned and that this release (the "**Release**") contains the entire agreement between the parties hereto and the terms of this Release are contractual and not a mere recital. Aspire Civil Construction, Inc. dba Aspire Pools and Design, and Trevor Gough (collectively, "**Aspire**") agree to pay to Michael and Julie Mitchell (the "**Mitchells**") \$23,500.00, payable to "BTJD" in certified funds (the "**Payment**") and delivered to BTJD, c/o David Kono, 3165 E. Millrock Dr., Suite 500, Salt Lake City, UT 84121 on or before April 29, 2022 (the "**Deadline**"). The Mitchells agree to accept the Payment and this Release in full and final satisfaction of any and all amounts owed to it by Aspire under the terms of the Contract. The Mitchells further agree that within three (3) business days after receipt of the Payment, they will file a stipulated motion to dismiss with prejudice the lawsuit filed against Aspire (Fourth Judicial District Case No. Case No. 200401222 – the "**Lawsuit**"). Aspire agrees that if it fails to make the Payment by the Deadline, the Release is not effective and the Mitchells may pursue all claims in the Lawsuit and/or under this Release.


The parties hereto are entering into this Release strictly for the purpose of compromising claims that are disputed and avoiding the expense of litigation. The parties released specifically deny liability to the other parties and this Release shall in no way be construed or characterized in any way to be an admission of wrongdoing or liability by the parties released or anyone else.

The laws of the State of Utah shall govern this Release. This Release supersedes and replaces all prior negotiations, agreements, or representations, whether oral or written. This Release shall only be modified in writing. In the event suit is commenced to enforce the terms of this Release, the prevailing party shall be entitled to an award of reasonable attorneys' fees and costs.

THE UNDERSIGNED HAVE READ THE RELEASE, HAVE AUTHORITY TO EXECUTE IT, FULLY UNDERSTAND IT, AND INTEND TO BE LEGALLY BOUND BY ITS TERMS.



Aspire Civil Construction, Inc., by Trevor Gough, Manager
DATED this 19 day of April, 2022



Trevor Gough, Individually
DATED this 19 day of April, 2022

Michael Mitchell, Individually
DATED this day of April, 2022

Julie Mitchell, Individually
DATED this day of April, 2022

EXHIBIT 12

Acct [REDACTED] GOUGH, TREVOR P Effect: 04/19/22 Post: 04/19/22 Tlr: [REDACTED] Time: 9:29am
Purpose of check: SHARE WITHDRAWAL 10,000.00 Check Number: [REDACTED]

Payee: CHAMPION FABRICATION AND STEEL

(See receipt for reference)

THIS DOCUMENT HAS A TRUE WATERMARK. THE FRONT OF THE DOCUMENT HAS A MICRO-PRINT SIGNATURE LINE. ABSENCE OF THESE FEATURES WILL INDICATE A COPY.

CASHIER'S CHECK

P.O. Box 2331, Sandy, Utah 84051 • 1-800-748-4302 • www.macu.com

DATE 04/19/22
\$10,000.00

PAY** Ten Thousand and 00/100 DOLLARS **

TO THE
ORDER
OF

CHAMPION FABRICATION AND STEEL
FROM: TREVOR P GOUGH
MEMO: ASPIRE CIVIL CONSTRUCTION PAYMENT
TOWARDS DEBT

PAYABLE THROUGH BOKF, NA, EUFAULA, OK



MOUNTAIN AMERICA
CREDIT UNION

[Handwritten Signature]

AUTHORIZED SIGNATURE

MP

EXHIBIT 13

Austin Nate

From: Wright Jason <jason.wright@terumomedical.com>
Sent: Friday, April 22, 2022 11:54 AM
To: Austin Nate
Subject: Re: Pool pay off

CAUTION: EXTERNAL EMAIL

Yes. I received the \$5000 wire yesterday. This fulfills the amount we agreed upon to settle the debt.

Thank you.

Jason Wright
801-391-9783

On Apr 22, 2022, at 11:25 AM, Austin Nate <ANate@rqn.com> wrote:

This email originated from outside the organization. Do not click links or open attachments unless you have v

Hi Jason,

Could you please confirm that Trevor has paid you in full, and there remain no outstanding debts/claims with regard to you and Trevor and/or his company?

Thank you,

Austin Nate | Ray Quinney & Nebeker P.C. | 36 South State Street, Suite 1400 | Salt Lake City, Utah 84111
Direct: +1 (801) 323-3327 | Facsimile: +1 (801) 532-7543 | www.rqn.com

This email is from a law firm and may contain privileged or confidential information. Any unauthorized disclosure, distribution, or other use of this email and its contents is prohibited. If you are not the intended recipient, please contact the sender and delete this email. Thank you.

From: Wright Jason <jason.wright@terumomedical.com>
Sent: Thursday, April 21, 2022 6:07 AM
To: Trevor Gough <trevor@newhorizonpools.com>
Cc: Austin Nate <ANate@rqn.com>; Kristin Jacobs <kristin@kjacobslaw.com>
Subject: Re: Pool pay off

CAUTION: EXTERNAL EMAIL

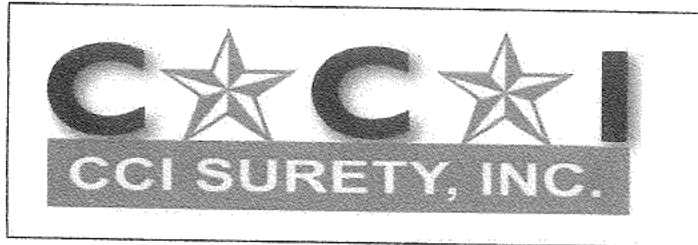
The funds posted to my account this morning.

Thank you Trevor.

EXHIBIT 14

Please return completed form to:

Michelle Anderson:
manderson@ccisurety.com



Accounting Contact:
1710 N. Douglas Dr. Ste 110
Golden Valley, MN 55422
Phone 763-543-6993 Fax
763-512-0430
Toll Free 1-866-317-3294

Bond Payment Authorization Form

Principal Name: New Horizon Pools, LLC Phone: _____

Bond Number: TBD

TOTAL AMOUNT MUST BE FILLED IN AND FORM MUST BE SIGNED FOR PAYMENT TO BE PROCESSED

Credit Card Payment

Credit Card Type (Check One):

VISA Mastercard Discover Amex

Credit Card #: _____ Exp. Date: _____ CVV: _____

Cardholder Name (as it appears on the card): New Horizon Pools LLC, Amanda Wiseman (3 digits on back or 4 on front for AMEX)

Billing Address: PO Box 167

City: Draper State: UT Zip: 84020

Cost of Bond: 2,000 + 4% fee 80.00 = Total Amount charged to CC: \$ 2,080.00

Print Name: Amanda Wiseman

Signature: Amanda Wiseman Date: 3/29/22

Checking/Savings Payment

Account Type (Check Checking Savings)

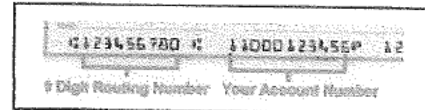
One): Name on Account: _____

Bank Name: _____

Account #: _____

Bank Routing #: _____

Bank City/State: _____



ACH Total Amount being charged (NO FEE)\$ _____

Print Name: _____

Signature: _____ Date: _____

I agree to pay the total amount listed above. I certify that the above statements and information made in the agreement are true and correct to the best of my knowledge. I also certify that I am authorized to effect charges to the above credit card and/or account number. I agree to notify CCI Surety, Inc. in writing of any changes in my credit card and/or account information immediately.

This authority is to remain in full force and effect until the payment has been made in full according to the amount listed above by CCI Surety, Inc.

*First year premiums and fees are fully earned and once paid shall be non-refundable.



Mailing Instructions

Information as it should appear on the bond (if this is not completed we will go off of the application)

Applicant/Company Name: New Horizon Pools LLC

Address: 12075 S. Draper Ridge Dr.

City: Draper State: UT Zip Code: 84020

Effective Date (if you do not list one we will use the date the bond is issued): _____

Choose One of the Following Options:

1. US Mail (free)
No tracking #'s provided, no guaranteed arrival date

2. UPS or FedEx Account Number
Account # _____ Account Zip Code: _____

3. \$35.00+ Standard Overnight without Shipping Account Number
(priority overnights may exceed \$35.00)

We will add \$35.00 to ACH/CC Authorization Form used to pay for the bond

Please Complete The Following For Where The Bond Should Be Mailed

(Cannot send bond to the obligee - party requiring the bond):

Company Name: New Horizon Pools

Attn: Trevor Gough

Street Address: 12075 S. Draper Ridge Dr.

*No PO Box for Overnights

City: Draper ST: UT ZIP: 84020
Phone: 801-381-4844

ccisurety.com ★ Home Office: 866-317-3294 ★ 1710 N Douglas Dr, Ste 110, Golden Valley, MN 55422

GENERAL INDEMNITY AGREEMENT

READ CAREFULLY. YOUR SIGNATURE CREATES LEGAL CONSEQUENCES TO YOU.

In consideration of Surety System Insurance Services, LLC and any of its surety carriers (hereinafter collectively called "Company") executing a Bond on behalf of the undersigned, the Indemnitors do hereby undertake, represent, warrant, and agree, jointly and severally, as follows:

1. That this Agreement shall apply to any bond or undertaking applied for or executed, and any and all extensions, increases, modifications, or renewals thereof, or additions or subtractions therefore, any and all such instruments separately and collectively being herein called "Bond".
2. That the foregoing statements made and answers given are the truth without reservation, and are made for the purpose of inducing the Company to execute or procure the execution of a Bond.
3. That the Company or its representatives shall have the right to examine the credit history, employment history, bank accounts, books and records, and other pertinent underwriting information for the Indemnitor(s).
4. That the Company or its representatives shall be under no obligation to execute, renew, or continue any Bond and shall have the absolute right to cancel the Bonds in accordance with any cancellation provision contained therein or to otherwise lawfully procure its release from any Bond. The Company is hereby released from any damage that may be sustained by the undersigned by reason of such cancellation or release.
5. That the Indemnitor(s) shall at all times indemnify, save the Company harmless from, and place the Company in funds to meet any claim, demand, loss, liability, cost, charge, attorneys' fees, expense, suit, order, judgment, or adjudication arising from the existence of a Bond.
6. That if the Company shall set up a reserve to cover any claim, demand, loss, liability, cost, charge, attorneys' fees, expense, suit, order, judgment, or adjudication arising from the existence of a Bond, the Indemnitor(s) shall, immediately upon demand, deposit with the Company a sum of money equal to such reserve, such sum to be held by the Company as collateral security for the Bond obligation.
7. That the Company shall have the exclusive right to determine for itself and the Indemnitor(s) whether any claim or suit brought against the Company or the Indemnitor, as a result of the existence of a Bond, shall be settled or defended and its decision shall be binding and conclusive upon the Indemnitor(s).
8. That nothing herein contained shall be in derogation of any right or remedy which the Company might have independently hereof.
9. That separate suits may be brought hereunder as causes of action accrue, and the bringing of suit or the recovery of judgment upon any cause of action shall not prejudice or bar the bringing of other suits upon other causes of action, whether theretofore or thereafter arising.
10. That the Indemnitor(s) shall pay the Company in advance the initial premium for the Bond and any renewal or additional premium charges or Company fees as may become due until the Company shall be discharged and released from any and all liability and responsibility under a Bond and until the Indemnitor(s) shall deliver to the Company competent written evidence satisfactory to the Company of such discharge and release.
11. That if the Company shall procure any other company to execute or join with it in executing, or to reinsure said Bond, this instrument shall inure to the benefit of such other company, its successors and assigns, so as to give it a direct right of action against the Indemnitor(s) to enforce the provisions of this instrument and in that event the word "Company" wherever used herein, shall be deemed to include such other company as its respective interests may appear.
12. That this Agreement shall bind the heirs, executors, administrators, successors, and assigns of the Indemnitor(s) as well as all ventures or businesses in which any of the undersigned or subsidiary, division, or affiliate has an interest, whether now existing or which hereafter be created or acquired.
13. That this Agreement bearing the signature(s) of the Indemnitor(s) shall be valid, effective, and enforceable whether received by the Company as an original, facsimile transmission, or by other electronic means.
14. That the obligations under this Agreement may only be terminated by sending written notice to the Company and shall only affect the obligations of new Bonds executed after 20 days following the Company's receipt of such notice. Obligations existing at the time of termination under those Bonds previously executed shall in no way be modified or discharged by such notice of termination.

Any person who knowingly and with intent to defraud any insurance company or other person, files an application for insurance or statement of claim containing any materially false information or conceals for the purpose of misleading information concerning any fact material thereto commits a fraudulent insurance act, which is a crime, and subjects such person to criminal and civil penalties.

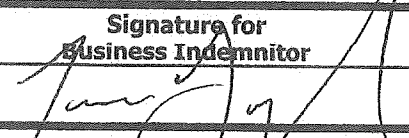
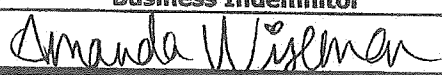
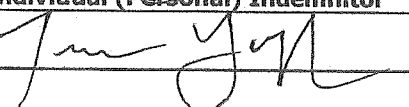
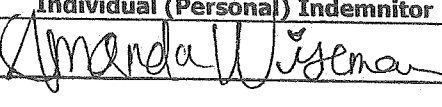
Regardless of the date of signature, this indemnity is effective as of the date of execution and renewal of any Bond and is continuous until the Company is satisfactorily discharged from liability pursuant to the terms and conditions contained herein and in any Bond.

Signed, sealed, and dated this date:

03/25/2022

Name of Business = New Horizon Pools LLC

** all witnesses below must be non-relatives

Signature for Business Indemnitor	Business Indemnitor's Name	Witness' signature for Business Indemnitor
	Trevor Gough	
Signatures for each Individual (Personal) Indemnitor	Individual (Personal) Indemnitor Name(s)	Witness' signature for each Individual (Personal) Indemnitor
	1. Trevor Gough	
	2.	
	3.	
	4.	



Jen Coles <jen@newhorizonpools.com>

Fwd: N.H.P. UT \$50,000 BOND - General Indemnity Agreement/Payment Form/Issuance Form

1 message

Amanda Wiseman <amanda@newhorizonpools.com>
To: Jen Coles <jen@newhorizonpools.com>

Tue, Mar 29, 2022 at 11:19 AM

----- Forwarded message -----

From: **Amanda Wiseman** <amanda@newhorizonpools.com>
Date: Tue, Mar 29, 2022, 10:19 AM
Subject: Re: N.H.P. UT \$50,000 BOND - General Indemnity Agreement/Payment Form/Issuance Form
To: Telden Wiseman <twiseman@inszoneins.com>
Cc: trevor@newhorizonpools.com <trevor@newhorizonpools.com>

Thank you Telden! Here are the signed documents.

Let me know if you need anything else.

Thanks again!
Amanda



Virus-free. www.avg.com

On Tue, Mar 29, 2022 at 8:49 AM Telden Wiseman <twiseman@inszoneins.com> wrote:

Good morning.

Please see below from our bond underwriter.

We will need the following to get this bond issued:

IMPORTANT INFO:

1. This General Indemnity Agreement (GIA attachment) CANNOT be electronically signed. Trevor must physically sign the Indemnity agreement and it must be signed by a witness (Ideally Jen, Mike, or Amanda). You can complete the payment form and the issuance form on your computer.
2. The bond CANNOT be sent directly to DOPL.
3. Annual Cost of bond = \$2,000.00 (for the ACH/CC Payment form attached)

Indemnity Agreement:

Attached is the agreement we will need signed by all parties listed on it and their signatures witnessed and the signed copy returned to us along with payment and the issuance form. We cannot accept e-signatures for this surety. **Please make sure all names are spelled correctly and the business name reads how it needs to appear on the bond or it will be rejected.** *If there are any errors on the agreement, please let me know so I can make the changes accordingly. Information on the agreement cannot be crossed out, erased, or whited out on your end.

Payment:

The payment options are an agency check that can be mailed to our company or payment via ACH/EFT or credit card. If you're mailing an agency check, original payment is due in our office before the bond can be issued. The check should be **made payable to CCI Surety, Inc** and sent to the address listed in my signature. If the client chooses the ACH/EFT or credit card option, attached is the authorization form I'll need completed, signed, and sent back to process payment. ACH/EFT or credit card payments can be done by the client direct or the agency and there is no additional fee for ACH/EF and a 4% processing fee for credit card payments. Payment via ACH/EFT or credit card allows everything to be emailed back to me for quicker bond issuance.

Issuance Form:

Please also complete the attached issuance form so we know where to send the bond. ****Please note we cannot send the bond direct to the obligee (the party requiring the bond).****

If you have any additional questions, please let me know.

Telden Wiseman, CIC
COMMERCIAL INSURANCE SPECIALIST

Phone: 801-655-0506

SMS: 385-425-5635

Office: 801-377-3060

Fax: 916-400-2625

Email: twiseman@inszoneins.com



289 East Center

Provo, UT 84606

INSZONEINSURANCE.COM

LIC #0F82764

Certificate Request

Fax: 916-636-0134

Email: certs@inszoneins.com

Did I provide you with excellent service? [Click here to submit a review!](#)

Scan.pdf
1280K

EXHIBIT 15

Samuel C. Straight (7638)
Austin C. Nate (17789)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500
Facsimile: (801) 532-7543
sstraight@rqn.com
anate@rqn.com

Attorneys for Defendants

**DRAPER JUSTICE COURT
SALT LAKE COUNTY, STATE OF UTAH**

JOSEPH LAMBERT,

Plaintiff,

v.

**TREVOR PETER GOUGH and ASPIRE
CIVIL CONSTRUCTION, LLC,**

Defendants.

**MOTION TO SET ASIDE SMALL
CLAIMS JUDGMENT AND CONFIRM
ARBITRATION AWARD**

Case No.: 198100128

Judge Daniel F. Bertch

Pursuant to Rule 10 of the Utah Rules of Small Claims Procedure and Rule 60(b) of the Utah Rules of Civil Procedure, Defendants Trevor Peter Gough and Aspire Civil Construction, LLC (“Aspire”) (collectively, “Defendants”), by and through their counsel of record, Ray Quinney & Nebeker P.C., hereby move this Court to set aside the small claims judgment (the “Judgment”) entered against them in this case and confirm the arbitration award issued in this case.

RELIEF REQUESTED AND GROUNDS THEREFOR

Defendants request that the Court set aside the Judgment entered against them on December 16, 2021. On or around February 23, 2018, Aspire and Plaintiff Joseph Lambert (“Lambert”) entered into a Contract for Fiberglass Pool Install (the “Contract”). As a result of alleged issues with the pool’s heater and circuit board and an alleged leak, Lambert initiated the instant case on December 16, 2019. On January 26, 2021 and pursuant to the terms of the Contract, the Court submitted this case to arbitration. The parties participated in arbitration on March 18, 2021, and the arbitrator issued his decision on March 20, 2021. The arbitrator concluded that both parties had legitimate positions regarding the Contract, but ultimately awarded Lambert \$1,112.00, with the parties to bear their own fees and costs (the “Award”). A copy of the Award is attached hereto as Exhibit A. Neither Lambert nor Defendants’ former counsel moved to confirm the Award. On or around July 29, 2021, Defendants’ former counsel accepted a job with Clearfield City and abruptly withdrew as counsel in this case.

When neither party moved to confirm the Award nor made any filings with the Court post-arbitration, the Court dismissed this case on or around August 1, 2021. Lambert subsequently moved to set aside the dismissal, and the Court reopened the case. Lambert, however, made no mention of the result of the arbitration and failed to apprise the Court of the Award. Instead, Lambert pursued the case as if the arbitration had not occurred. Without knowledge of the Award, the Court entered the Judgment against Defendants on December 16, 2021, in an amount far above that in the Award. Importantly, as a result of Defendants’ prior counsel withdrawing, the case notifications were sent to an old address that Defendants have not used or occupied since approximately March of 2021. Therefore, Defendants were neither

represented nor notified and did not appear at the small claims trial or any corresponding hearings. Accordingly, Defendants respectfully request that the Court set aside the Judgment and confirm the Award.

ARGUMENT

Rule 10 of the Utah Rules of Small Claims Procedure allows a court to set aside a default judgment. Utah R. Sm. Cl. P. 10(a). Similarly, Rule 60(b) of the Utah Rules of Civil Procedure permits a court to “relieve a party . . . from a judgment, order, or proceeding for . . . any other reason that justifies relief.” Utah R. Civ. P. 60(b)(6). Trial courts enjoy broad discretion in deciding whether to set aside a default judgment. *Lund v. Brown*, 2000 UT 75, ¶ 9, 11 P.3d 277, 279. The Utah Supreme Court has explained that “a movant is entitled to have a default judgment set aside under 60(b) if (1) the motion is timely; (2) there is a basis for granting relief under one of the subsections of 60(b); and (3) the movant has alleged a meritorious defense.” *Sewell v. Xpress Lube*, 2013 UT 61, ¶ 27, 321 P.3d 1080, 1086 (quoting *Menzies v. Galetka*, 2006 UT 81, ¶ 64, 150 P.3d 480).

Here, although the Judgment is styled as a “small claims judgment,” it is necessarily a default judgment because it was entered as a result of Defendants’ failure to appear at the small claims trial. Thus, because Defendants can satisfy each of the foregoing prongs to set aside a default judgment, the Court should set aside the Judgment and confirm the Award.

I. Defendants’ Motion Is Timely.

Although the period for setting aside a default judgment is generally 15 days in small claims cases, a court may extend the time “for good cause if the motion is made in a reasonable time.” Utah R. Sm. Cl. P. 10(b). Rule 60(b) motions likewise must be brought “within a

reasonable time.” Utah R. Civ. P. 60(c). “Under rule 60(b), a reasonable time depends upon the facts of each case, considering such factors as the interest in finality, the reason for the delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties.” *Menzies*, 2006 UT 81, ¶ 65. In general, a party will meet this standard by showing that he “acted diligently once the basis for relief became available, and that the delay in seeking relief did not cause undue hardship to the opposing party.” *Workman v. Nagle Const., Inc.*, 802 P.2d 749, 752 (Utah Ct. App. 1990) (quoting J. Friedenthal, M. Kane & A. Miller, *Civil Procedure* § 12.6 at 574 (1985)).

Here, Defendants have brought this motion within a reasonable time under the circumstances of this case. As noted above, Defendants’ prior attorney abruptly discontinued his practice when he accepted a job with Clearfield City and withdrew from this case. Such withdrawal was nearly simultaneous with the Court dismissing this case. Consequently, when the Court reinstated the case, all case notifications were sent to an address that Defendants no longer used or occupied, causing Defendants to be unaware as to the status of the case. After being apprised of the Judgment, however, Defendants have acted diligently in engaging new counsel and bringing the present motion. Furthermore, setting aside the Judgment and confirming the Award does not cause undue hardship to Lambert, nor does it cause him prejudice. The Judgment was only entered in December, and it does not appear that Lambert has taken any steps regarding collection. Accordingly, Defendants have brought this motion within a reasonable time such that they have met the first prong above.

II. There Is A Legitimate Basis For Granting Defendants Relief.

Rule 60(b)(1) allows for relief from a default judgment entered for “any other reason that justifies relief.” Utah R. Civ. P. 60(b)(6). That the parties participated in arbitration, and the arbitrator issued an award justifies setting aside the Judgment in this case. “It is the policy of the law in Utah to interpret contracts in favor of arbitration, in keeping with [Utah’s] policy of encouraging extrajudicial resolution of disputes when the parties have agreed not to litigate.” *Mariposa Exp., Inc. v. United Shipping Sols., LLC*, 2013 UT App 28, ¶ 17, 295 P.3d 1173 (citation omitted). Utah’s public policy encouraging arbitration is embodied in Utah’s Uniform Arbitration Act, Utah Code § 78B-11-101 to 131, which “supports arbitration of both present and future disputes and reflects long-standing public policy favoring speedy and inexpensive methods of adjudicating disputes.” *Denison Mines (USA) Corp. v. KGL Assocs. Inc.*, 2016 UT App 171, ¶ 12, 381 P.3d 1167 (quoting *Allred v. Educators Mutual Ins. Ass’n of Utah*, 909 P.2d 1263, 1265 (Utah 1996)).

In this case, both parties participated in the arbitration, and the arbitrator issued the Award. In light of the policies underlying arbitration, the Award should be respected and should constitute the judgment of this case. Moreover, the Award represents a fair adjudication of the parties’ rights regarding the claims in this case because the arbitrator determined the Award after hearing arguments from *both parties* when *both parties* were represented by counsel. Therefore, Defendants have legitimate grounds for relief under Rule 60(b)(6), and they have satisfied the second prong above.

III. Defendants Have A Meritorious Defense.

“The assertion of a meritorious defense under rule 60(b) requires only a clear and specific proffer of a defense that, if proven, would preclude total *or partial recovery* by the claimant or counterclaimant.” *Sewell*, 2013 UT 61, ¶ 33, 321 P.3d 1080 (emphasis added) (quoting *Judson*, 2012 UT 6, ¶ 23, 270 P.3d 456). Importantly, the “purpose of the meritorious defense rule is to prevent the necessity of judicial review of questions which, on the face of the pleadings, are frivolous.” *Lund*, 2000 UT 75, ¶ 28, 11 P.3d 277 (internal quotation marks omitted).

Here, Defendants have a meritorious defense. First, although Lambert incurred charges and costs in allegedly fixing the circuit board, the heater, and the pool leak, such charges and costs were unreasonable. Defendants were actively trying to resolve the issue by contacting the necessary individuals, but that process took time. The circuit board and the heater were also covered by the warranty such that Defendants would have repaired or replaced them at a much lower cost, and potentially no cost to Lambert. In addition, Lambert replaced the heater with a more expensive heater than the one agreed to under the Contract. And as the arbitrator explained, most of these issues arose in the middle of the winter at a time when Defendants had a scaled back crew and outdoor swimming is uncommon. All of these considerations collectively establish a clear and specific defense that would, at least, partially preclude recovery by Lambert. In fact, when the arbitrator considered the foregoing circumstances, he determined that Lambert was entitled to only \$1,112.00—well below the amount sought by Lambert—for the reasonable cost to rebuild the heater, circuit board, and leak detection.

Defendants have established that they have a meritorious defense—a defense that was considered and accepted by the arbitrator. Defendants have satisfied the third prong above, and the Court should therefore set aside the Judgment.

IV. The Court Should Confirm the Award.

The Utah Uniform Arbitration Act provides:

After a party to an arbitration proceeding receives notice of an award in a matter not pending before a court, the party may petition the court for an order confirming the award. If the notice of award is in a matter pending before the court, the party may file a motion for an order confirming the award. The court *shall* issue a confirming order unless the award is modified or corrected pursuant to Section 78B-11-121 or 78B-11-125 or is vacated pursuant to Section 78B-11-124.

Utah Code Ann. § 78B-11-123 (emphasis added). When a party to arbitration has not sought to vacate, modify, or correct an arbitration award, “the district court [is] *required* to grant the motion to confirm the arbitration award.” *Am. Home Sys., LLC v. Cambria Homeowners Ass’n, Inc.*, 2012 UT App 306, ¶ 7, 289 P.3d 619, 621 (emphasis added).

In this case, Lambert has never moved to vacate, modify, or correct the Award. Instead, he merely pursued his claims as if the arbitrator never issued the Award. Considering Utah’s policies in favor of resolving cases through arbitration when governed by binding arbitration provisions, the Award should have been submitted to this Court and confirmed. Because Defendants have demonstrated that the Judgment should be set aside, the Court must now confirm the Award.

CONCLUSION

Based on the foregoing arguments, Defendants respectfully request that the Court set aside the Judgment and confirm the Award.

DATED this 22nd day of April, 2022.

RAY QUINNEY & NEBEKER P.C.

/s/ Austin C. Nate

Samuel C. Straight

Austin C. Nate

Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of April, 2022, I caused a true and correct copy of the foregoing **MOTION TO SET ASIDE SMALL CLAIMS JUDGMENT AND CONFIRM ARBITRATION AWARD** to be electronically filed via the Court's electronic filing system on the parties below:

James L. Harris, Jr.
Attorney at Law
214 East 400 South, Suite 20
Salt Lake City, UT 84111
Jlharris65@q.com
Counsel for Plaintiff

/s/TerriAnne Gillis

1601376

EXHIBIT A

Driggs, Bills & Day

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March 19, 2021

James L. Harris
ATTORNEY AT LAW
556 East 2100 South
SLC, UT 84106

Shawn Robinson
SKEEN & ROBINSON
5806 South 900 East
SLC, UT 84121

Re: Arbitration of Lamber v. Aspire Construction

Dear Jim and Shawn,

Here is the arbitration decision in this case.

My total fee is \$900. I presume you will each pay half. Therefore, each of you owes \$450. Please send a check to my attention. The Tax ID # is 87-0551087. Please return a copy of this bill with your payment.

Please let me know if you have any further concerns or questions.

Sincerely,

WARREN W. DRIGGS

ARBITRATION DECISION

Joseph Lambert v. Aspire Construction and Trevor Gough

This matter was submitted to binding arbitration, pursuant to contractual agreement between the parties. A video conference hearing was held March 18, 2021. After reading the materials submitted, memoranda in support of the respective positions, testimony at the hearing, and argument of counsel, I make the following findings and decision.

Background

The plaintiff contracted with the defendant to build a pool at his home in March 2018. Construction of the pool was largely uneventful and completed within a reasonably expected timeframe in the summer of 2018. The pool appeared to be operating correctly for a few months; however, by December 2018 the pool heater and circuit board acted up and needed to be repaired or replaced. The plaintiff advised the defendant of the problem in a timely manner and the defendant agreed to repair or otherwise replace the circuit board. Unfortunately, the defendant was slow to fix it and after several attempts to get the defendant back on the site to fix the problem, the plaintiff replaced the circuit board on his own. This fix appeared to do the trick, but then appeared to malfunction again within a few months. After several more attempts to get the defendant to fix the problem, the plaintiff hired another pool service company who ultimately replaced the circuit board a second time. This service company also claimed the original heater had been improperly installed and recommended new venting and ultimately a new heater, which it installed a few months later.

In addition to the foregoing, there was also a leak in the pool which was diagnosed and repaired by separate companies. This leak problem appeared to have been a relatively minor issue, at least in comparison the cost of repair.

The plaintiff sued the defendant for the cost of the circuit boards, venting, leak, and new heater, the total cost of which was \$9,439.

The defendant contends these charges and costs were unreasonable. When it was first contacted about the dysfunctional circuit board, it began calling the company rep which took time. It also argues the circuit board, heater, and all the rest was covered by warranty and would have been repaired or replaced at a fraction of the cost and at no cost to the plaintiff. It insists the heater was installed correctly and that it was unreasonable to replace the entire heater agreed upon, and especially with a more expensive, nicer one. In sum, it argues the plaintiff failed to mitigate his damages and overreached. The plaintiff insists he gave the defendant ample opportunity to fix it and finally gave up and called someone else, refusing to allow the defendant on to his property.

Decision

I sympathize with the plaintiff's frustration. He was simply trying to get his pool operational. I also sympathize with the defendant who was trying to communicate with the rep to ensure the problem was handled in a way that did not void the warranty. I also note the problems arose in the middle of

the winter at a time when the defendant presumably had a scaled back crew and outdoor swimming is uncommon.

I find the plaintiff is entitled to \$1,112 for the reasonable cost to rebuild the heater, circuit board, and leak detection. The parties bear their own fees and costs.

March 20, 2021


WARREN W. DRIGGS