

2007

Village North Apartments v. Kopelev : Brief of Appellee

Utah Court of Appeals

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Artem Kopelev; Appellant.

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IN THE UTAH COURT OF APPEALS

VILLAGE NORTH APARTMENTS

Plaintiff/Appellee

ARTEM KOPELEV

Defendant/Appellant

BRIEF OF THE APPELLEE

Case No.: 20070602

Judge: Medley

APPEAL FROM THE THIRD DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH, JUDGE TYRONE E. MEDLEY

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**APPELLANT FAILED TO MARSHAL THE EVIDENCE AS REQUIRED BY
RULE 24 OF THE UTAH RULES OF APPELLATE PROCEDURE AND
APPLICABLE APPELLATE CASE LAW TO DEMONSTRATE THAT THE
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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. §78-2a-3(2)(j).

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

ISSUE No. 1

Should this Court affirm the trial court's Findings of Fact and Conclusions of Law because Artem Kopelev failed to marshal the evidence as required by Rule 24 of the Utah Rules of Appellate Procedure and applicable appellate case law?

STANDARD OF REVIEW FOR ISSUE No. 1

The trial court's Findings of Fact are subject to a clearly erroneous standard of review. Rule 52(a) of the Utah Rules of Civil Procedure states, "Findings of Fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." (Utah R. Civ. P. 52(a)). An appellate court "will not reverse the findings of fact of a trial court setting without a jury unless they are ... clearly erroneous." (Orton v. Carter, 970 P.2d 1254, 1256 (Utah 1998); citations omitted). The

clearly erroneous” standard applies whether the case is one in equity or one at law.
(Baker vs. Francis, 741 P.2d 548 (Utah Ct. app. 1987))

DETERMINATIVE RULES AND STATUTES

Rule 24 of the Utah Rules of Appellate Procedure requires the Appellant to marshal all the evidence in his argument section. Failure to marshal the evidence requires a dismissal of the appeal.

Rule 52(a) of the Utah Rules of civil Procedure sets forth that the Findings of Fact shall not be set aside unless they are clearly erroneous.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Plaintiff discovered that defendant did not qualify for subsidized rent payments because under HUD regulations he was a student of an institute of higher education, was under 24 years of age, was not a veteran, was unmarried, does not have a dependent child and has parents who jointly are not eligible to receive assistance. Following trial the lower court concluded that defendant was not eligible for subsidies, failed to pay the higher rent required and should be evicted (See Findings of Fact 4 through 8).

B. COURSE OF PROCEEDINGS

On April 23, 2007, plaintiff filed its complaint for unlawful detainer (pages 1-8). On May 11, 2007 defendant filed his answer and counterclaim (pages 18 - 39). On July 11, 2007 a bench trial was held (page 66). The parties presented their witnesses and evidence. Defendant filed a Notice of Appeal on July 17, 2007 (pages 72 - 73). Findings of Fact and Conclusions of Law were entered on July 23, 2007 (pages 84 - 87) ruling in plaintiff's favor.

C. DISPOSITION OF TRIAL COURT

On July 23, 2007 the trial court issued its Findings of Fact and Conclusions of Law specifically finding that defendant was not qualified to receive a subsidy, failed to pay the increased rent and should be evicted. Plaintiff presented as an exhibit the HUD Regulation which set forth the standard for terminating a subsidy (page 67).

RELEVANT FACTS

The Findings of Fact set forth as follows:

1. The parties signed a rental agreement for the premises at 815 West 700 North - #D, Salt Lake City, Utah.
2. That said rental agreement is governed by Section 8 of the United States Housing Act of 1937.
3. Defendant received a subsidy for his rent payment.

4. That plaintiff, pursuant to HUD regulations, discovered that defendant does not qualify for subsidy payments because he is a student at an institute of higher education, is under 24 years of age, is not a veteran, is unmarried, does not have a dependent child, and has parents who jointly are not eligible to receive assistance.

5. Plaintiff notified defendant in writing on January 24, 2007, that he was not eligible for a subsidy and that his rent would be \$534.00 as of April 1, 2007.

6. Defendant failed to pay the rent due on April 1, 2007.

7. Plaintiff served defendant a 3-Day Pay Rent or Vacate on April 9, 2007.

8. Defendant failed to pay rent or vacate and is in unlawful detainer.

9. Plaintiff's counsel testified to reasonable attorney's fees of \$1,200.00.

SUMMARY OF THE ARGUMENT

First, this Court should affirm the trial court's Findings of Fact and Conclusions of Law because the Appellant failed to marshal the evidence as required by Rule 24 of the Utah Rules of Appellate Procedure and applicable appellate case law. Artem Kopelev has not marshaled the evidence to demonstrate why the trial court's specific findings were in error.

ARGUMENT

ARTEM KOPELEV FAILED TO MARSHAL THE EVIDENCE AS REQUIRED BY RULE 24 OF THE UTAH RULES OF APPELLATE PROCEDURE AND APPLICABLE APPELLATE CASE LAW TO DEMONSTRATE THAT THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW SHOULD BE REVERSED. THUS, APPELLANTS' APPEAL MUST FAIL, ANT THE FINDINGS AFFIRMED.

If the appellant has not met the marshalling requirement, the appellate court is required to affirm that the Findings of Fact are correct, and the appeal must fail. (Valcarce vs. Fitzgerald, 961 P.2d 305, 312 (Utah 1998); see also Johnson vs. Higley, 989 P.2d 61, 72 (Utah Ct. App., 1999)). The trial court’s Findings of Fact must be affirmed and this appeal must fail because Artem Kopelev did not marshal the evidence to demonstrate why the Findings of fact and Conclusions of Law are clearly erroneous. There are clear procedural requirements outlined in the Utah Rules of Civil Procedure, the Utah Rules of Appellate Procedure, and applicable case law for marshalling the evidence.

Rule 24(a) of the Utah Rules of Appellate procedure states:

[t]he brief of the appellant shall contain under appropriate heading and in the order indicated:

(a)(9) An Argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented ... A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.
(Utah R. App. P. 24(a))

This Court has held that the appellant must clearly marshal the evidence in the “argument section” of appellant’s brief. (Fitzgerald vs. Critchfield, 744 P.2d 301, 304 (Utah Ct. App. 1987)) “To comply with the marshalling requirement, appellants must marshal all the favorable evidence at the point at which they challenge the factual finding.” (Roderick vs. Ricks, 54 P.3d 1119 (Utah 2002)) The marshalling requirement, which is to be found in the argument section of

the brief, is “neither elective nor optional.” (Fitzgerald vs. Critchfield, 744 P.2d 301, 304 (Utah Ct. App. 1987))

The marshalling requirement entails a “listing [of] all the the evidence supporting the finding that is challenged. Once the evidence is listed ... with appropriate citations to the record, the appellant must then show that the marshaled evidence is legally insufficient to support the findings ...” (Judge Norman H. Jackson. “Utah Standards of Appellate Reivew: Revised,” 12 Utah Bar J. 8, 13 (1999))

Rule 24 of the Utah Rules of Appellate is to be read in conjunction with Rule 52(a) of the Utah Rules of Civil Procedure. Rule 52(a) states, “Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” (Utah R. Civ. P. 52(a)).

In interpreting Rule 52, the Utah Supremen Court has held an appellate court “will not reverse the findings of fact of a trial court sitting without a jury unless they are ... clearly erroneous.” (Orton v. Carter, 970 P.2d 1254, 1256 (Utah 1998); citations omitted) The Court of Appeals will review the trial court’s conclusions of law “for correctness, according the trial court no particular deference.” (Orton, 970 P.2d at 1256). The “clearly erroneous” standard applies whether the case is one in equity or one in law. (Baker vs. Francis, 741 P.2d 548 (Utah Ct. App. 1987)) If the appellant has not met the marshalling requirement, the appellate court is required to affirm that the Findings of Fact are correct, and the appeal must fail. (Valcarce vs. Fitzgerald,

961 P.2d 305, 312 (Utah 1998); see also Johnson vs. Higley, 989 P.2d 61, 72 (Utah Ct. App. 1999)).

ISSUE No. 1

THE LOWER COURT GAVE DEFENDANT OPPORTUNITY TO PRESENT HIS COUNTERCLAIM.

Defendant/Appellant, pursuant to paragraph 4 of the Findings of Fact, did not qualify for subsidy payments because he was not a student at an institute of higher education, is under 24 years of ages, is not a veteran, does not have a dependent child, and has parents who jointly are not eligible to receive assistance. Plaintiff/Appellee presented as evidence, including the HUD rule describing the above-restrictions, that defendant was not qualified to receive a subsidy.

The Court gave defendant full opportunity to present his case by calling witnesses and presenting evidence. The fact that defendant put on scant evidence is not the fault of the plaintiff.

ISSUE No. 2

THE LOWER COURT GAVE DEFENDANT HIS OPPORTUNITY TO PRESENT HIS CASE.

Defendant misses the point that the Court repeatedly emphasized. Defendant's father is not an attorney and thus could not represent defendant in court. To have allowed defendant's father to try this case would have been a violation of law.

Defendant's first point of argument does not address how the court erred in making its ruling which was based on defendant's failure to meet conditions of eligibility cited above. Items such as the Utah Renter's Handbook.

ISSUE No. 3

DISTRICT COURT'S RULING SHOULD BE AFFIRMED.

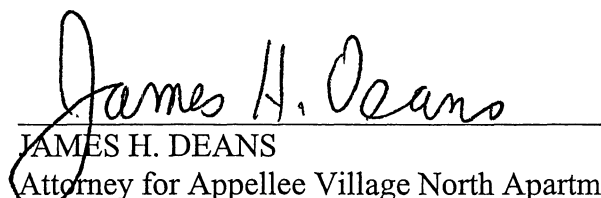
Defendant and his father, on cross-examination, were taken though a recitation of income which showed defendant was not eligible for a subsidy. Again defendant has not pointed to a portion of the record that the lower Court abused its discretion. Defendant cites to documents (HUD documents) that were never received as evidence at trial. Defendant cites nothing to this Court that would compel this Court to reverse this decision.

CONCLUSION

This Court should affirm the trial court's Findings of Fact and Conclusions of Law. Artem Kopelev failed to marshal the evidence as required by Rule 24 of the Utah Rules of Appellate Procedure. Thus, Appellant's appeal must fail, and the Findings fo Fact affirmed.

February 20, 2008

Respectfully Submitted,

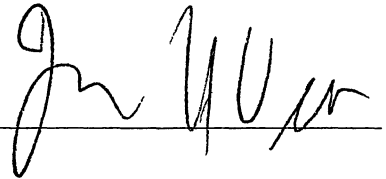


JAMES H. DEANS
Attorney for Appellee Village North Apartments

CERTIFICATE OF SERVICE

I hereby certify that I mailed ² a true and correct copy of the above BRIEF OF THE APPELLEE to the appellant, postage prepaid this 20th day of February, 2008 at the address given below:

ARTEM KOPELEV
APPELLANT
670 North 900 West #A
Salt Lake City, UT 84116



A handwritten signature in cursive script, appearing to read 'Artem Kopelev', is written over a horizontal line.