1996

Larry R. Vonwald v. Kevin Plumb : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS DOCKET NO. 960851-CA

LARRY R. VONWALD,

Plaintiff and Appellant

V. No. 960851-CA

KEVIN PLUMB,

Defendant and Appellee.

APPELLANT'S REPLY BRIEF

Appeal from final orders of the Third Judicial District Court, Salt Lake County, State of Utah
Hon. Glenn K. Iwasaki, Presiding

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Argument: 1) Defendant Plumb cannot establish his entitlement to have the Stipulation for Release of Cash Bond (r. 348-49) amended on the basis of unilateral mistake under any set of facts.

At page 9 of his answering brief attorney Poole states "Plumb did state the circumstances constituting the mistake in the Affidavit of Dennis K. Poole dated January 26, 1996 which was filed contemporaneously with Plumb's Motion to Amend Order (R. 408-13)." At pages 15 and 16 of said answering brief, about the January 26, 1996, affidavit, attorney Poole again asserted that it, the affidavit, "presented evidence to support Plumb's claim of mistake of fact. (R. 408-13)."

Poole's allegations as set forth in paragraphs 12. and 13. of the affidavit are not credible when compared to the provisions of the stipulation (r. 349-50). Paragraph 3. of the stipulation refers to the cash supersedeas bond filed to stay the enforcement of the June 8, 1994 judgment. It requires disbursement as directed in subparagraphs (a) and (b) of said paragraph 3.; and "[u]pon receipt of such funds, Defendant shall cause a Satisfaction of Judgment to be filed with the Court." Defendant did receive the funds. First of all, under the rule of construction announced in Continental Bank and Trust Company v. Bybee, 306 P.2d 773, 775 (Utah 1957), "[s]ince [Poole] was both the attorney draftsman of and a party to the instrument, the proper construction of the [stipulation] should be strictly against him.", requiring that the supersedeas bond referred to in said paragraph 3. is reference to the judgment of June 8, 1994, as the judgment superseded. This was the only judgment in the picture at the time of the stipulation; it also must be construed to be the judgment mentioned as the judgment to be satisfied in paragraph 5. of the stipulation.

At page 7. of his memorandum in support of the

motion to amend order (r. 403), attorney Poole states "[i]f, because of clerical error, there is an ambiguity that Defendant was to issue a satisfaction as to the January 2, 1996 Order only . . ." There is no requirement that the January 2, 1996, ORDER FOR RELEASE OF CASH BOND be satisfied because it is not a judgment for money against Plumb, or Poole, for that matter. (r. 350-51)

Attorney Poole's statements in his brief as to the record at pp. 408-426 setting out the basis of the claim of mistake are the first indications plaintiff has had as to the basis of such claim; but the claim of mistake is still not sufficiently stated.

In Equitable Life & Cas. Ins. Co. v. Ross, 849 P.2d 1187 (Utah App. 1993), the Court held that

> "1. The mistake must be of so grave a consequence that to enforce the contract as actually made would be unconscionable."

At paragraph 6, pages 10-12, of appellant's opening brief it is shown without dispute that attorney Poole would not have been entitled to any additional fees over and above those covered by the $5500 cash supersedeas bond. It therefore would not have been unconscionable to enforce the stipulation against him.

It should be emphasized there is no mistake, and attorney Poole cannot in good faith claim a mistake exists. In addition, the doctrine of judicial estoppel is properly applicable in this case, "-[defendant and attorney Poole] received a benefit [from the Order for Release of Cash Bond] and therefore are precluded from changing their position to obtain another benefit now." Mecham v. City of Glendale, 15 Ariz.App. 402, 489 P.2d 65, 67 (1972), cited with approval in Condas v. Condas, 618 P.2d 491 (Utah 1980).

2) As to the matter of ambiguity, for the first time attorney Poole asserts in his answering brief at page 14 the basis of his claim of ambiguity which is that it, the ambiguity, "arises when [paragraphs 1. and 4. of the Stipulation for Release of Cash Bond (r. 348-49)] are read together." There follows then, in attorney Poole's words, his convoluted thought process which I will not repeat except to state that central to such convoluted thought process is Poole's assertion that "[t]he effect of the January 2, 1996 Order (r. 550-51) was to award Plumb a judgment of $5,315.44 for Plumb's attorney's fees on appeal (apart from his attorney's fees below)." This goes against the clear meaning and mention of $5,315.44

as used in the stipulation which was to allocate to Poole that much of the $5500 cash supersedeas bond filed to supersede the June 8, 1994 judgment for $4064.90. It further violates the applicable rules of construction, including that referred to above, to-wit, since Poole was both the attorney draftsman and party to the instrument, the proper construction should be strictly against him.

3) It should be apparent to the Court that defendant's purported opposition to plaintiff's appeal as evidenced by his answering brief, is frivolous, i.e., such opposition is not grounded in fact, not warranted by existing law, and not grounded on good faith argument to extend, modify, or reverse existing law. Plaintiff, therefore, requests the Court, on its own motion, and pursuant to Rule 33, Utah Rules of Appellate Procedure, to award plaintiff damages in such amount as the Court deems fair and reasonable under these extreme circumstances of abuse on the part of attorney Poole.

Conclusion: Plaintiff further requests reversal of the orders appealed and remand to the trial court with instructions to order the clerk to note the judgment of June 8, 1994, satisfied and discharged of record; and for the trial court to set and determine the amount of

plaintiff's reasonable attorney's fees and to grant plaintiff judgment therefore against the defendant.

DATED March 31, 1997.

LARRY L. WHYTE

On ~~March 31~~ April 4, 1997, two true copies mailed as follows:

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LARRY L. WHYTE