

2008

Lonnie Paulos et al. v. All My Sons Moving and Storage; S and B Storage, John Siddoway, John Does 1-10 : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LONNIE PAULOS et al,

Plaintiff/Appellant,
vs.

ALL MY SONS MOVING AND
STORAGE; S&B STORAGE; JOHN
SIDDOWNAY; JOHN DOES 1-10

Defendants/Appellees

**REPLY BRIEF OF
PLAINTIFF/APPELLANT
LONNIE PAULOS**

Appeal No. 20080196
Lower Court No. 060903698

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ARGUMENT

I. THIS COURT HAS PROPER JURISDICTION TO HEAR THE APPEALS OF THE LOWER COURT ORDER DISMISSING THE ACTION, THE DENIAL MOTION FOR A NEW TRIAL OF PLAINTIFF, AND THE AWARD OF ATTORNEYS FEES.

In order to preserve judicial economy, Appellant hereby incorporates by reference his Response to Defendants Motion for Summary Disposition and Memorandum in Opposition in Support Thereof previously filed with this Court. More importantly, Appellant reemphasizes the fact that this Court has already denied the Appellees Motion for Summary Disposition, which contained the same argument as Argument I. of the Brief of Appellees.

In short, the Appellees inaccurately contend that this Court lacks the proper jurisdiction to adjudicate the appeals before the Court because the time frame to appeal has lapsed. However, Rules 3 and 4 of the Utah R. App. P. specifically allow an appeal from a *final* order within 30 days of the date of the order. On November 07, 2007, the Trial Court entered an Order contemplated by the Appellees as being the bases for their appeal timeframe analysis. Contained within that Order is an award of attorneys' fees and costs, which is based upon the submission of an affidavit and a corresponding future order. Appellees argue that this was a final order, which begins the timeframe to appeal under the Utah R. App. P. However, this is contrary to Utah case law. The Utah

Supreme Court in Promax Development Corp. v. Raile, 2004 UT 4, ¶15, 998 P.2d 254, specifically ruled that “a trial court must determine the amount of attorney fees awardable to a party before the judgment becomes final for the purposes of an appeal under Utah Rule Appellate Procedure 3.” Here, the Trial Court contemplated and adhered to Promax in that the Order entered November 07, 2007 mandates an affidavit of attorneys’ fees to decipher the sum certain amount of the judgment. More importantly, after the affidavits were submitted the Trial Court entered a *final* order on January 08, 2008. Thus, the timeframe to appeal the *final* order began on January 08, 2008; all “post-judgment” motions subsequently filed after this date toll of time for appeal, unlike what the Appellees contend. This Court has jurisdiction to hear the appeal before based upon the workings of the Utah Rules of Appellate Procedure and Utah case law.

II. THIS COURT SHOULD NOT AFFIRM THE DECISIONS OF THE LOWER COURT BECAUSE THE APPELLANT HAS MARSHALED THE EVIDENCE.

The Appellant has satisfied his burden to marshal all the evidence. The Appellant has the burden of marshalling all evidence in the record that would support the determination reached by the trial court. Interiors Contracting, Inc. v. Smith, Halander & Smith Associates, 881 P.2d 929, 933 (Utah Ct. App. 1994). Appellee wrongfully contends that Appellee has not satisfied this burden. However, the record, documents filed, and circumstances surrounding this appeal clearly illustrate that the Appellant has exhaustively supplied this court with the necessary evidence for appeal as required by Interior and Rule 24 of the Utah R. App. P.

First, in the Brief of the Appellees, the Appellees alleged that Appellant has not included

the orders from the lower court or listed the facts underlying the orders from the lower court as prescribed by Rule 24(a)(11)(C) of the Utah R. App. P. Rule 24(a)(11)(C) states that the Addendum to the Brief of the Appellant shall contain “those parts of the record on appeal that are of central importance to the determination of the appeal.” According to the mandates of this Rule, Appellee has satisfied his requirement, i.e., everything that is of central importance to the appeal is contained in the Addendum of the Brief of the Appellant. Appellee attempts to argue to this court that the mandates in Rule 24(a)(11)(C) is considered marshalling the evidence as required in Rule 24(a)(9). The Legislature of the State of Utah would have incorporated both of these Rules into each other or referenced marshalling the evidence in the other if that was the legislative intent of the Legislature. See Progressive Cas. Ins. Co. v. Ewart, 2007 UT 52, ¶ 16, 167 P.3d 1011; Bluffdale Mountain Homes, LC v. Bluffdale City, 2007 UT 57, ¶ 30, 167 P.3d 1016. This is obviously not the case; otherwise, both Rules would have been incorporated or referenced within the other.

Similarly, Rule 24(a)(9) mandates that a “party challenging a fact finding must first marshal all *record* evidence that supports the challenged finding.” (emphasis added). The Appellant has satisfied this rule by: (1) filing with this Court, all the record evidence from the lower District Court as directed by Rule 11 of the Utah R. App. P.; (2) filing the transcript of the challenged finding from the Bench Trial on November 05, 2007, pursuant to Rule 11(e)(2) of the Utah R. App. P.; and (3) referring to the record evidence as contained in the Argument of the Brief of the Appellant in order to “demonstrate why, even when viewed in the light most favorable to the court below, it is insufficient to support the finding under attack.” Interior at

933. More importantly, this Court specifically held that there is “no need for an appellant to marshal the evidence when the findings [of the trial court] are so inadequate that they cannot be meaningfully challenged as factual determinations.” Anderson v. Domes, 1999 UT App 207, ¶10, 984 P.2d 392 (quoting Woodward v. Fazzio, 823 P.2d 474, 477 (Utah Ct.App.1991)).

Assuming that this court has reviewed the Transcript from the Bench Trial on November 05, 2007 it is very apparent therein that there are no factual determinations from the trial court.

Rather, the Trial Court dismissed the case with prejudice without any factual determinations as to why. Accordingly, the Appellee has met his burden of marshalling the evidence in congruence with both the Utah Rules of Appellate Procedure and Utah case law.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING THE ACTION, DENYING THE MOTION FOR NEW TRIAL, DENYING THE MOTION TO SET ASIDE, AND IN AWARDING ATTORNEYS FEES.

a. The Trial Court Abused Its Discretion In Dismissing The Action And Denying The Motion For A New Trial.

In Rohan v. Boseman, 2002 UT App 109, ¶28, this Court considered the following factors in determining whether the trial court exceeded it’s discretion in dismissing an action with prejudice when the plaintiff was not ready to proceed with the trial on the first day of trial:

(1) The conduct of both parties; (2) the opportunity each party has had to move the case forward; (3) what each of the parties has done to move the case forward; (4) what difficulty or prejudice may have been caused to the other side; and (5) most important, whether injustice may result from the dismissal.

In response the Brief of the Appellee, the Appellant hereby incorporates by references his Argument contained in the Brief of the Appellant regarding the Rohan factors one through three. However, in specific response to the Appellees' application of the fourth factor in Rohan, Appellant vigorously contests that the Appellee suffered either minimal prejudice or no prejudice at all. The Appellees list a fashionable array of items that seem, at first glance, to equate to prejudice but in reality are nothing more than conjecture and speculation. The Appellees lists no concrete prejudicial effect that was "caused" by the dismissal as required by the fourth factor in Rohan. Furthermore and more importantly, the "trial court's discretion "must be balanced against" the **priority** of " 'affording disputants an opportunity to be heard and to do justice between them.' " Rohan at ¶28 (emphasis added). Therefore, it is obvious that the Appellant's "caused" prejudice of not having an opportunity to be heard, far out weighs the speculative prejudice of the Appellees of what may occur in the future. Finally, the fifth factor in Rohan specifically addresses whether or not injustice would result by the dismissal. Here, it is paramount that this Court recognizes that the Appellant's opportunity to be heard was stripped by the Trial Court's abuse of discretion by obviously not incorporating the "priority" of that opportunity in its balancing as dictated in Rohan.

Again for the remainder of the arguments contained in the Brief of the Appellee, Appellant hereby incorporates by reference Argument III. contained within the Brief of the Appellant. In short, the Appellant and the counsel for the Appellant reasonably relied on court documents, pleadings, correspondence, and the surrounding circumstances, which reflected the dates of the bench trial to begin on November 6, 2007. Furthermore, Appellees again attempt to use pure conjecture, speculation, and opinion to convince this Court that the Appellant did not act in reasonable reliance on the specific documentation.

b. The Trial Court Abused Its Discretion In Denying The Motion To Set Aside.

Again, in order to preserve judicial economy, Appellant hereby incorporates by reference Argument II. contained within the Brief of the Appellant. More specifically, the Appellant would like to reemphasize the reasoning of the Utah Supreme Court in *Menzies v. Galetka*, 2006 UT 81, ¶63, regarding Rule 60(b) motions, in that it is an abuse of discretion to refuse to vacate an judgment when there is reasonable justification or excuse. Additionally, the Supreme Court has recognized that the entering of a default judgment was never intended to be used to punish the attorneys when there is a chance to do “grave injustice to the client.” McKean v. Mountain View Memorial Estates, 411 P.2d 129, 130-131 (Utah 1960). Thus, the appropriate punishment should have been directed

at the Appellant's counsel and not the dismissal of the Appellant's action which would prejudice him by stripping his opportunity to be heard.


c. The Trial Court Abused Its Discretion In Awarding Attorney's Fees.

Again, in order to preserve judicial economy, Appellant hereby incorporates by reference Argument II. contained within the Brief of the Appellant. In short, Appellees incorrectly contend that Appellant provides no case law constituting an error of law in awarding attorneys fees. Appellee Br. P. 33. Contrary to the Appellees' assertion, Appellant cites Wardley Better Homes and Garden v. Cannon, 2002 UT 99, ¶30, which explains that the court can award attorneys' fees under statute when a claim is without merit. In light of this, the Brief of the Appellant continues to show that the Trial Court specifically ruled that the Appellant's claim has merit and was not brought in bad faith; thus, suggesting that the Trial Court abused its discretion in awarding attorneys fees in light of Wardley. Additionally, both counsel for the Appellees requested **only** the fees for their preparation for trial. (T.4). The courts inherent power to sanction attorneys by awarding attorneys' fees should not escape the confines of deterrence and enter the unjust world of punishment. See Featherstone v. Schaerrer, 2001 UT 86, ¶41, 34 P.3d 194 (Utah 2001)

CONCLUSION

The Trial Court's decisions, Order of Dismissal, and Judgments for attorneys' fees should be reversed and this matter remanded to the Trial Court for trial.

DATED this 29 day of August, 2008.


Richard S. Nemelka
Attorney for Respondent/Appellant

CERTIFICATE OF MAILING

This is to certify that I mailed a true and correct copy of the foregoing **REPLY BRIEF OF PLAINTIFF/APPELLANT** this 29 day of August, 2008, postage prepaid and addressed as follows:

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