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Mark Greer v. Big 5 Corp, dba Big 5 Sporting Goods, a Corporation : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS

MARK GREER, Plaintiff/Appellant, vs, BIG 5 CORP, dba BIG 5 SPORTING GOODS, a Corporation, Defendant/Appellee	Case No. 20080364 CA District Court No. 050921371

APPELLANT REPLY BRIEF

On Appeal from the Final Judgment
of the Third District Court
The Honorable L.A. Dever

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POINT 1: THE TRIAL COURT INCORRECTLY GRANTED DEFENDANT SUMMARY JUDGMENT WHEN A QUESTION OF FACT EXISTED.

To grant a summary judgment in this matter, the trial Court must determine that there are absolutely no genuine issue of material facts and the moving party is entitled to judgment as a matter of law. "Summary judgment is proper only when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Johnson v. Hermes Assocs.*, 2005 UT 82, ¶ 12 (quoting Utah R. Civ. P. 56(c)). "The facts and all reasonable inferences drawn therefrom [are viewed] in the light most favorable to the non-moving party." *Id.* (quoting *Arnold Indus., Inc.*v. *Love*, 2002 UT 133, P11, 63 P.3d 721); *see also*, *Krantz v. Holt*, 819 P.2d 352, 353 (Utah 1991); *and Larson v. Overland Thrift & Loan,* 818 P.2d 1316,1319 (Utah App.1991).

The question of fact is whether Appellant"s (Greer's) Counsel filed the complaint in the rear drop box at the Third District Court, Matheson Courthouse on November 28,2005. That question was raised in the pleadings of Appellant in Reply Memorandum in Opposition to Defendant's Motion for Summary Judgment. "Plaintiff's counsel's copy of the complaint bears a date stamp of November 28,2005. That is when the original Complaint was placed in the pleading receptacle....November 28, 2005 is the date that it was placed in the receptacle and should be the date it should be considered filed.."(R.91) This statement by Greer's counsel is a statement under Rule 11 Utah Rules of Civil Procedure by an officer of the court and as such has the same standing as a declaration or affidavit.

To defeat Defendant's Motion for Summary Judgment, there must be a genuine issue of material fact. *See Shaw Res. Ltd, LLC v. Pruitt, Gushee & Bachtell, P.C.*, 2006 Ut App. 313, P. 22 (2006). Defendant was not entitled to summary judgment because a question of fact was raised by Greer's pleading. Plaintiff's counsel stated in his pleadings that he placed the Complaint in the pleadings drop box for the Third District Court at the Matheson court house on November 28, 2005. This is a personal fact known only by Plaintiff's counsel. The Utah Rules of Civil Procedure Rule 11(b), as amended in 1997, states

> **(b) Representation to Court.** By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or later advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,
>
> > (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery;

In Plaintiff's counsel Reply Memorandum in Opposition to Defendant's Motion for Summary Judgment (R.117-119), stated the fact that the complaint was placed in the receptacle at the rear of the Matheson Court House on the November 28, 2005. That is why Plaintiff's counsel's copy of the Complaint bears a date stamp of November 28, 2005 By stating this in the pleadings under Rule 11, it has the same effect as if it was an affidavit. The Utah Supreme Court in the case of 15 P.3d 1021 *Morse v. Packer* 2000 UT 86 stated,

> "Rule 11 places an affirmative duty on attorneys and litigants to make a reasonable investigation (under the circumstances) of the facts and the law

before sighing and submitting any pleading, motion, or other paper." 2 James Wm. Moore, *Moore's Federal Practice* § 11.11[2][a] (Matthew Bender, 3d ed.2000).

Plaintiff's Counsel knew that the complaint had been placed in the receptacle on November 28, 2005 and stated so in his Reply Memorandum in Opposition to Defendant's Motion for Summary Judgment (R.117-119). Plaintiff's counsel is an officer of the court. In the case of *James Jess on behalf of Dino A Morelli on Habeas Corpus*, 1970.CA.40288, 11 Cal.App.3d 819;91 Cal.Rptr. 72, the California Appellate court stated that,

> "a statement of the facts: by such a judicial officer as an alternative to an affidavit of the fact made by someone not such a judicial officer. Thus, the portion of the supporting papers indicating that Morelli had been served with the subpoena duces tecum, demanded and received witness fees, and failed to appear at the required time and place was supplied by the certificate of the reporter. Any elements of the contempt which were derived from the declaration of plaintiffs' attorney met the requirements of section 1211, Code of Civil Procedure, because his declaration was given under penalty of perjury, which by Code of Civil Procedure, section 2015.5 is satisfactory substitute for an affidavit.

That is exactly what is present here. Plaintiff's Counsel, as an officer of the court made a statement of fact, under the penalty of Rule 11. That qualifies as an affidavit and under the new rules allowing a declaration to be used in place of an affidavit, it definitely is the same as a declaration.. In BIG 5 's Memorandum in Support of Summary Judgment in its Statement of Facts states "The copy of the complaint that was served on Big 5 bears a Third District date stamp dated November 28, 2005."(R. 78). This statement of fact by Defendant is sufficient to raise a question of fact in and of itself. As such there is a question of fact before the court and summary judgment cannot be granted.

POINT 2: THE STATUTE OF LIMITATIONS SHOULD BE TOLLED DUE TO A STATUTORY PROHIBITION FOR A PERIOD FROM JUNE 12, 2003 TO NOVEMBER 3, 2003 AS TO BIG 5 BECAUSE BIG 5 WAS NOT IN EXISTENCE AND AS SUCH COULD NOT HAVE BEEN IN THE STATE.

There is no question that §78B-2-307 (formerly §78-12-25) is applicable to this case. It requires the complaint to be brought within 4 years. However, the legislature provided §78B-2-112 (formerly §78-12-41) and §78B-2-104 (formerly §78-12-35) as tolling statutes to, in effect, extend the statute of limitations. §78B-2-104 states:

78B-2-104. Effect of absence from state.

> If a cause of action accrues against a person while the person is out of the state, the action may be commenced within the term as limited by this chapter after his return to the state. If after a cause of action accrues the person departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

Renumbered and Amended by Chapter 3, 2008 General Session

In the present case, the facts are that Big 5 Certificate of Incorporation was forfeited, in its home state of Delaware pursuant to Delaware Statute § 136. BIG 5 did not have a Certificate of Incorporation. It was out of existence for the period of June 12, 2003 to November 3, 2003, a period of 144 days. If Big 5 was not in existence as a legal entity during this period, it cannot be present in this state.(R.94-95) Therefore, it was absent from the state of Utah from June 12, 2003 to November 3, 2003, a period of 144 days. §78B-2-104 states clearly that if a person (corporation) is absent from the state. that period of absence

is not part of the time limited for commencement of the action. That is even if he could have been served out of state under the long arm statute. See *Arnold v Grigsby*, 2008 UTCA 20060481-022808. Greer had an additional 144 days after December 1, 2005 to file his complaint. Hence, the statute of limitations had not run, even if the date of the filing is considered to be December 2, 2005.

Further, §78B-2-112 states:

> **78B-2-112. Effect of injunction or prohibition.**
>
> The duration of an injunction or statutory prohibition which delays the filing of an action may not be counted as part of the statute of limitations.
>
> Renumbered and Amended by Chapter 3, 2008 General Session

A forfeiture of a Certificate of Incorporation is a statutory prohibition because it terminates the existence of the corporation for the period it was forfeited.. Big 5 as a corporation did not exist under Delaware law and the 144 days should not be counted as part of the limitation period.. Again, the statute of limitations had not run, even if the date of the filing is considered to be December 2, 2005, instead of the correct one of November 28, 2005.

CONCLUSION

The trial court incorrectly granted Defendant summary judgment when a question of fact existed. Plaintiff's counsel, as an officer of the court and subject to Rule 11, stated from his own personal knowledge that the Complaint was filed on November 28, 2005 by placing in the drop box at the rear of the Matheson Courthouse. That is why his

copy bore the date stamp of November 28, 2005. That fact is confirmed by a statement of fact by Defendant in its Memorandum in Support of Summary Judgment. Under Rule 11, Plaintiff's counsel' statement is a declaration or akin to an affidavit. As such it is sufficient to raise the question of fact to defeat Defendant's summary judgment.

Additionally, BIG 5 did not exist for a period of 144 days during the limitation's period. As such it was not in existence, hence it could not have been in the state of Utah. Therefore, the statute should be tolled for this period. This is even though the defunct corporation could be served. This is similar to the statute tolling when an individual is out of the state, even though he could be served under the long arm statute. Even though the corporation articles of incorporation were forfeited, taking it out of existence for 144 days, a registered agent could have still been served. However, Big 5 failed to exist, that is it can no longer exist in the state of Utah or anywhere else during that period of time. Hence, it was absent from the state and the statute of limitations should be tolled.

Respectively submitted this 18th of February 2009.

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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT MARK GREER were caused to be served upon the following, depositing by Hand Delivery thereon on 18th day of February 2009 to the following:

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