

2008

Delta Delta Delta an Illinois Nonprofit corporation
v. Theta Phi House Corporation of Delta Delta
Delta, a utah nonprofit corporation : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DELTA DELTA DELTA, an Illinois Nonprofit corporation, Plaintiff/Appellee)	
)	Case No. 20080366
vs.)	District Ct. No. 060912357
THETA PHI HOUSE CORPORATION OF DELTA DELTA DELTA, a Utah non-profit Corporation, Defendant/ Appellant))	

REPLY BRIEF OF DEFENDANT/APPELLANT

Appeal from the Third District Court, Salt Lake County, Judge Anthony B. Quinn

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

**FILED
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Utah Rules of Civil Procedure, Rule 56 (e)1

ARGUMENT

The Appellee's brief is largely relying upon the argument that the Appellant has not preserved issues raised in its brief upon appeal. Accordingly, the Appellant's Reply Brief is limited to respond by demonstrating that all issues raised on appeal were preserved in the trial court proceedings that terminated by summary judgment and not by evidentiary trial.

The pleadings are the initial considerations to granting summary judgment pursuant to Rule 56(e) Utah Rules of Civil Procedure which provides that "The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." All of the issues considered by the trial court were contained in the pleadings. There was no mention of affidavits, and there was a focus on the bylaws and articles of incorporation attached to the complaint. Thus, the complaint and answer, the pleadings, were issues the trial court was required to consider. The standard of review was stated by the Supreme Court in *Western Water LLC v. OLDS*, 184 P^{3d}578 (Utah 2008) at 584, as follows:

[1,2] ¶ 14 We review the district court's summary judgment ruling for correctness, *Wayment v. Clear Channel Broad., Inc.*, 2005 UT 25, ¶ 15, 116 P.3d 271, and view all facts and reasonable inferences in favor of the nonmoving part. *Badger v. Brooklyn Canal Col.*, 966 P.2d 844, 847 (Utah 1998). Because, by definition, summary judgments do not resolve factual issues, the conclusions of the

district court are conclusions of law that we review for correctness. *See Bonham v. Morgan*, 788 P.2d 497, 499 (Utah 1989).

[3] ¶ 15 Jurisdictional questions are likewise legal issues that we review for correctness, affording no deference to the district court. *Beaver County v. Qwest, inc.*, 2001 UT 81, ¶ 8, 31 P.3d 1147; *see also re Uintah Basin*, 2006 UT 19, ¶ 7, 133 P.3d 410.

The cases cited by the appellee regarding preservation of issues on appeal are not summary judgment decisions and are not pertinent to this appeal.

We summarize the cases cited by the appellee:

State v. Holgate 10 P.3d 346, 350 (Utah 2000) is a criminal homicide case where the defendant failed to raise the question of insufficient evidence to convict him of murder but raised no exceptional circumstances.

State v. Pinder 114 p.3d 551, 561 (Utah 2005) is a criminal case where the defendant in a motion for a new trial raised for the first time the argument that the state presented a witness solely for the purpose of later impeaching her testimony, and the Supreme Court held that “[g]enerally speaking, a timely and specific objection must be made in order to preserve an issue for appeal.”

Lebaron & Assoc. v. Rebel Enterprises 823 P.2d 479 (Utah App. 1991) was a contract action where an appeal was taken from a bench trial judgment where the judgment debtor claimed that the trial court erred in failing to consider an affirmative defense that the creditor did not mitigate its damages. This Court held at page 483 that “[f]urther, the mere mention of an issue in the pleadings, when no supporting evidence or relative legal authority is introduced at trial in support of

the claim, is insufficient to raise an issue at trial and thus insufficient to preserve the issue for appeal.”

By contrast, Theta Phi House, made detailed pleadings citing authority for the issues now raised on appeal and argued at the summary judgment hearing all issues which the trial court desired to consider. At the outset, the trial court stated:

“Consistent with my usual policy, I’m going to tell you what I think about the case, and give you a chance to respond, I’ve read everything that’s been filed with respect to these two motions, and I’ve developed some tentative views that I’m going to share with you at this time. My tentative view would be to grant plaintiff’s motion for summary judgment, and to deny the defendant’s motion for summary judgment.

The way that I reach that is in viewing this whole circumstance, I think that you have to consider the bylaws of the local house corporation in context. That context is the tripartite relationship that exists between the national fraternity, the local chapter, and the house corporation. I don’t think that you can view the circumstances of this case in any other way. (Tr 2-3).

The following excerpts from the transcript which is supplied in the addendum to Appellant’s brief demonstrate that all issues raised on appeal were brought to the attention of the trial court.

Mr. Mansfield, for the appellant was invited by the judge to explain anything that the trial court was “missing,” to which Mansfield responded: (Tr 5)

MR. MANSFIELD: Certainly, Judge. With your Honor’s preliminary comments in mind, first, your Honor, I think you need to look at the claims asserted by the plaintiff in this case. They’ve asserted four causes of action; two of which are for specific performance to enforce the bylaws of the corporation; third is for judicial dissolution; and the fourth is for a declaratory judgment encompassing the three prior causes of action.

Your Honor, I don’t think the plaintiff here has standing to assert enforcement of the bylaws. Under the provisions of the Utah Not For Profit Corporation Act, Act 16-6(a)-101 et sec, the only parties who may bring an

action to enforce the bylaws or articles of incorporation would be the members or the director of that corporation. There's no dispute here that the plaintiff is neither a member, nor a director of the Theta Phi House Corporation. That simply isn't the case here; and I don't think they have standing in order to enforce those claims, because of that.

With respect to judicial dissolution, another claim they've alleged, only three parties can force a judicial dissolution of a not-for-profit corporation. That's found in 16-6(a)-1414. The three parties who can enforce that are the Attorney General for the Division, the Head - - the Director of the Division of Corporations, a member or director of the not-for-profit corporation, or a creditor of the not-for-profit corporation who has reduced his claim to a judgment and has established that the not-for-profit corporation is insolvent. None of that showing is made here.

The proper claim that plaintiff should have raised is a breach of contract claims.

Mr. Lund for the Appellee commenced his argument: (Tr 10)

MR. LUND: Your Honor, I think I'll keep it brief, because your thinking is obviously in accord with our position. This procedural issue Mr. Mansfield raises about the breach of contract argument is first, not found in his briefs, and not something that has been argued, except right now this very minute.

I would inform the Court that we did request of Mr. Mansfield back in February that he agree to an amendment to the complaint to assert a breach of contract action; and he never responded to that. I did not file an amended complaint. He's briefed this as a contract case, and raised consideration; and under 54, Rule 54, I believe you're entitled to grant relief on the facts in front of you, if indeed the basis is there to do so. So whether the grounds here - - this is - - this is a - -

THE COURT: Help me to understand what claim you think you haven't asserted. I mean, you brought a claim for specific performance.

MR. LUND: We did; and so I guess the idea would be is if having sought that specific performance, we didn't somehow or another couch it in a breach of contract language, that would be the issue, is that the complaint

- -

THE COURT: Except the performance is just a remedy. It's not a claim. The claim is breach of contract, and the remedy is specific performance, if it's appropriate.

MR. LUND: But the basis for specific performance would be, you know, again, I guess I couch it as terms of the bylaws. If it's Mr. Mansfield that decided to argue those or actually set a contractual relationship. That's how it's been briefed. So if the remedy we're seeking is specific performance, to which we have prayed for, is on the basis of enforcing that contractual obligation in the bylaws, I believe that's within the pleadings.

THE COURT: What about the issue of whether or not you have standing to dissolve a corporation?

MR. LUND: I suppose - - this is an interesting problem. In some respects, if your Honor orders the specific performance we're seeking, I suppose it's still of some interest to the national corporation that a house corporation formed pursuant to the structure that we're talking about is indeed dissolved according to the bylaws, So isn't that a part of the specific remedy that we're seeking, to have that other provision of the bylaws complied with?

The trial court mentioned the issue of "reversion" on page 4 of the transcript beginning at line 18:

So based upon my analysis of that tripartite relationship, there's really no question at all that there's consideration to support the obligation and the bylaws; and in the affidavit of incorporation, to require reversion of this real property to the national.

EXTRACT FROM PLEADINGS

The complaint with its exhibits, and the detailed answer with affirmative defenses fully apprised the trial court of all of the issues raised on appeal. This Court has the complaint and answer in the addendum to Appellee's brief to verify the matters raised in this brief.

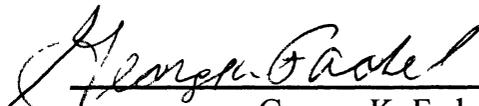
CONCLUSION

The assertions of the Appellee relative to a failure of appellant to preserve issues for appeal are unfounded.

The court should reverse the trial court's orders and remand the cause to the district court to order reconveyance of the real property to the defendant with proper restitutions.

Dated this 16th day of December, 2008.

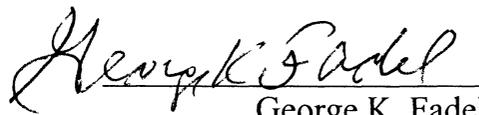
Respectfully submitted,



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Attorney for Defendant – Appellant

Certificate of Mailing

I certify that I mailed two copies of this Reply Brief to Mr. John R. Lund, Attorney for the Appellee, P.O. Box 45000, Salt Lake City, Utah 84145, this 16th day of December, 2008.



George K. Fadel