

1988

LCI Enterprises v. Norman R. Chesler and Shawn David Nelson : Reply Brief

Utah Court of Appeals

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BRIEF

880146 CA IN THE UTAH COURT OF APPEALS

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LCI ENTERPRISES,	:	
	:	
Plaintiff/Appellant,	:	Docket No. 880146-CA
	:	
v.	:	
	:	
NORMAN R. CHESLER and	:	Priority No. 14(b)
SHAWN DAVID NELSON,	:	
	:	
Defendant/Respondent.	:	

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APPELLANT'S REPLY BRIEF

Appeal from the Order of Dismissal of the Third District Court
in and for Salt Lake County, The Honorable James S. Sawaya presiding

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FILED
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IN THE UTAH COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

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APPELLANT'S REPLY BRIEF

Appellant LCI Enterprises submits the following Reply Brief (i) to demonstrate the lack of merit in Respondent's argument that summary judgment was in fact appropriate; (ii) to address the appropriate test to determine whether Respondents are third-party beneficiaries of the lease at issue; and (iii) to address Respondent's allegations that Plaintiff has raised new issues on appeal that were not raised in the lower court.

STATEMENT OF FACTS

The facts of this case are summarized in the Statement of Facts presented in Appellant's original Brief. In lieu of a repetitious recitation of those facts, Appellant refers this Court to that original Statement of Facts.

ARGUMENT

POINT I: THE PLAIN LANGUAGE OF THE LEASE MANDATES A REVERSAL OF THE LOWER COURT'S SUMMARY JUDGMENT.

Respondents appear to argue that because they concede the facts alleged by Plaintiff, Plaintiff cannot argue that the case is not ripe for summary judgment. The plain language of the clause at issue does not justify a summary judgment for Respondents. As set forth in Point I of Appellant's Brief, the plain language of the subrogation waiver clause clearly states that those protected, *i.e.*, "representatives, successors, heirs, administrators, and assigns," are protected not only from their own negligence, but from vicarious liability arising out of the negligence of their agents and employees. To construe the clause otherwise, in a manner contrary to its plain language, as Respondents urge and as the lower court did, requires consideration of facts not before the lower court.

There is no ambiguity in the language itself with regard to the applicability of the clause in the context before the Court. Ambiguity, if it is found, as Respondents urge, is with regard to the breadth of the scope of the nature of the acts to which the clause applies. For example, does it apply to intentional or reckless acts of parties or their successors, or is it limited to negligent acts? Here, there is admitted ambiguity, and the Court must look to the intent of the parties. However, neither party has introduced any evidence with regard to the parties' intent.

Respondents further seem to argue in Point I of their Brief that this Court should look only to the lease agreement and not to all the relevant facts before the Court. In evaluating the correctness of the lower court's ruling, this Court must review all the facts available to the lower court to enable it to determine whether a factual dispute precludes summary judgment and to evaluate whether the law was correctly applied to the undisputed facts. Respondents' argument misses the focus of a summary judgment proceeding.

Respondents urge, quite convincingly, in Point III of their Brief that the purpose of a subrogation waiver clause is "to help *the parties* avoid continuing dispute and litigation." (Resp. Br. at 8, emphasis added.) Here, Appellant can agree with Respondents. Appellant and the Theatre Candy Distributing corporation wanted no part of involvement in claims against one another. However, they did not waive claims against third persons not parties to the agreement. The plain language of the lease mandates reversal of the lower court's award of summary judgment. Before a contract can be construed beyond its plain language, an ambiguity must be found. Ambiguity can be found only by analyzing the intent of the parties; yet there is no evidence before the Court on the issue of the Lessor and Lessees' intent. Therefore, summary judgment in favor of Respondents was not appropriate.

POINT II: SUMMARY JUDGMENT, IF BASED UPON RESPONDENTS' CLAIMS THAT THEY ARE THIRD-PARTY BENEFICIARIES TO THE LEASE AT ISSUE, IS UNFOUNDED AND PREMATURE.

Respondents state in a conclusory manner in Point V of their Brief that they are third-party beneficiaries of the lease between Appellant and the Theatre Candy Distributing corporation. There is no evidence that the parties to the lease intended Respondents to hold a third-party beneficiary status.

This Court very recently discussed the law pertaining to third-party beneficiary contracts in *Hansen v. Green River Group*, 748 P.2d 1102, 74 Utah Adv. Rep. 44 (Ct. App. Utah 1988). There, the vendors of real property sought to enforce their contract with the purchasers not only against the purchasers but against all successors in interest. The plaintiff vendors argued that the successors in interest were third-party beneficiaries under the contract and therefore liable. This Court stated:

As a general rule, the rights of third-party beneficiaries are determined by the intentions of the parties to the subject contract.

.

For a third-party beneficiary to have a right to enforce a right, the intention of the contracting parties to confer a separate and distinct benefit upon the third party must be clear.

748 P.2d at 1104-05 (citations omitted.) This Court recognized that those individuals

only incidentally benefitting from the contract are not entitled to enforce it. Quoting from 2 S. Williston, *A Treatise On the Law of Contracts*, §356 (1981), this Court noted:

[W]here any benefits to a third person are incidental to the performance of the promise and such person is neither a donee nor a creditor beneficiary, he is a stranger to the promise and may assert no rights thereunder.

748 P.2d at 1105. In the present case, there was no evidence before the lower court that the parties intended Respondents to be third-party beneficiaries of the lease agreement and Respondents' claims that they are third-party beneficiaries have no merit. The lower court's summary judgment cannot, therefore, be sustained on the basis of a third-party beneficiary theory and must be reversed.

POINT III: APPELLANT HAS RAISED NO NEW ISSUES BEFORE THIS COURT ON APPEAL.

Respondents argue in Point VII of Respondents' Brief that new issues are raised by Appellant on appeal. (Resp. Br. at 19.) This argument is without merit. Both in their Memorandum in Opposition to Defendants/Respondents' Motion for Summary Judgment and at the hearing on that Motion, Plaintiff/Appellant vigorously argued the plain language of the lease agreement as well as the nature of Respondents' behavior. That is the focus of this appeal and it was the focus of the argument in opposition to the Motion for Summary Judgment. Respondents' argument is not well taken.

CONCLUSION

The trial court erred in construing the subrogation waiver provision of the lease beyond the plain language of the clause. There is no indication that the parties to the agreement intended to confer a benefit on Respondents and summary judgment was inappropriate. The factual and legal issues raised by this appeal were available to the trial court for its review. The lower court erred in its finding that Respondents fell within the protection of the subrogation waiver clause and, accordingly, the summary judgment granted by the lower court must be reversed.

RESPECTFULLY SUBMITTED this 17th day of November, 1988.

PARKEN & KECK

By Marcella L. Keck
Marcella L. Keck
Counsel for Appellant

Original Signature

MAILING CERTIFICATE

I hereby certify that on the 7th day of November, 1988, I caused four (4) true and correct copies of the foregoing Reply Brief of Appellant to be mailed, postage prepaid, to the following:

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Original Signature