

1997

Montford-Apollo Sugarhouse, LP v. The Brown Bear International Corporation, Michael Brown, Guy L. Thomas : Brief of Appellant

Utah Court of Appeals

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DOCKET NO. 970388

IN THE UTAH COURT OF APPEALS

MONTFORD-APOLLO
SUGARHOUSE, LP,

Plaintiff-Appellee

Vs.

THE BROWN BEAR
INTERNATIONAL
CORPORATION, a Utah
Corporation, MICHAEL BROWN,
an individual, and GUY L.
THOMAS, an individual,

Defendant-Appellant

OPENING BRIEF OF
DEFENDANT-APPELLANT
GUY L. THOMAS

Trial Court No. 960902088 CN

970388

Priority No. 10

INTERLOCATORY APPEAL FROM ORDER
OF THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH
(Honorable Glenn K. Iwasaki)

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FILED

Utah Court of Appeals

MAR 13 1998

Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

MONTFORD-APOLLO	:	OPENING BRIEF OF
SUGARHOUSE, LP,	:	DEFENDANT-APPELLANT
	:	GUY L. THOMAS
Plaintiff-Appellee	:	
	:	Trial Court No. 960902088 CN
Vs.	:	
	:	
THE BROWN BEAR	:	
INTERNATIONAL	:	
CORPORATION, a Utah	:	
Corporation, MICHAEL BROWN,	:	
an individual, and GUY L.	:	
THOMAS, an individual,	:	
	:	
Defendant-Appellant	:	

**INTERLOCATORY APPEAL FROM ORDER
OF THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH
(Honorable Glenn K. Iwasaki)**

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COMPLETE LIST OF ALL PARTIES

Pursuant to Rule 24 (a)(1) of the Utah Rules of Appellate Procedure, the undersigned counsel for appellees represent that the named parties, Montford-Apollo Sugarhouse, L.P. and Guy L. Thomas, are the parties to this interlocutory appeal. That the parties Montford Apollo Sugarhouse, L.P., The Brown Bear International Corporation, Michael Brown and Guy L. Thomas, are and have been the only parties to the litigation.

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I. STATEMENT OF JURISDICTION

This is an interlocutory appeal from an award of Attorney's fees in favor of Plaintiff-Appellee, Montford-Apollo Sugarhouse, L.P. and against Defendant-Appellant, Guy Thomas pursuant to an Order dated December 26, 1998 by the Honorable Glenn K. Iwasaki.

II. STATEMENT OF ISSUES ON REVIEW

- 1. Did the District Court commit reversible error in awarding attorneys fees prior to the entry of final judgment by the District Court?*
- 2. Did the District court abuse its discretion in awarding unreasonable attorneys fees to Plaintiff -Appellee in the amount of \$5,488.00 for fees allegedly incurred for the preparation of a summary judgment motion.*
- 3. Did the District Court, in awarding unreasonable attorneys fees to Appellee, violate Appellant Thomas's right of equal protection of the law as guaranteed by Article I, Section 24 of the Utah Constitution and the 14th Amendment of the United States Constitution.*

III. APPLICABLE STANDARD OF APPELLATE REVIEW

The applicable standard of with respect to the issue appears to be *de novo* (as purely a question of law). “[A] ppellate review of a Court’s determination of the law is usually characterized by the term ‘correctness.’” State v. Pena, 869 P.2d 932, 936(Utah 1994); “correctness” means “the appellate court decides the matter for itself and does not defer to any degree to the trial judge’s determination of the

law.” *Id.*: State v. Deli , 861 P.2d 431, 433 (Utah 1993); Steffensen v. Smith’s Management Corp., 820 P.2d 482, 490 (Utah App. 1991); Knapstad v. Smith’s Management Corp., 774 P.2d 1,2 (Utah App. 1989).

Additionally, the applicable standard of appellate review in this case, for the issues stated appears to be abuse of discretion. State v. Wetzel, 868 P.2d 64, 67 (Utah 1993); Nay v. General Motors Corp., 850 P.2d 1260, 1262 (Utah 1993).

IV. STATEMENT OF THE CASE

The Appellant, Guy Thomas, was the owner of a business in the Sugarhouse area. Co-Defendant, Michael Brown, owned a small restaurant, which was also in the Sugarhouse area, called the Brown Bear. Mr. Brown was a Utah Jazz player and was traded. Subsequently, he no longer was interested in maintaining the restaurant, and began to look for someone to sublet the space. Mr. Thomas became aware of the opportunity, and submitted a business proposal to the landlords, Sugarhouse Development Partnership. This business plan outlined plans for a restaurant specializing in gourmet coffees and chicken wings. The business plan was approved and the parties negotiated an Assignment/Lease Extension Agreement. Following the execution of this lease, Sugarhouse Development Partnership negotiated a lease agreement on the space directly next to Mr. Thomas' new business. This business was also a gourmet coffee shop, Moxie Java. Further, the space leased to Moxie Java did not have bathroom facilities, therefore, a hole was punched through to Mr. Thomas' space, so that Moxie Java's patrons could use his facilities. Sugarhouse Development

Partnership declared bankruptcy and was purchased by the Plaintiff/Appellee, Montford-Apollo.

Following the entrance of the competitive shop, Mr. Thomas' business declined rapidly. He approached the new landlord, Montford-Apollo seeking release from his lease. He searched for and presented several candidates that were willing and capable to assume the lease, but all were rejected by Plaintiff/Appellee Montford Apollo. Mr. Thomas could no longer afford the lease amount on his failed business. Montford Apollo filed suit against Mr. Thomas for the lease amount.

On April 9, 1996, Defendant/Appellant, Guy Thomas, by and through his attorney of record, filed an answer to Plaintiff's complaint. On June 18, 1996, after doing initial research, Defendant submitted their First set of Admissions, Interrogatories and Request for Production of Documents to Plaintiff-Appellee Montford Apollo, in which Defendant/Appellant addressed the issue of lack of good faith and fair dealing. In their answers to said Admissions and Interrogatories, Plaintiff/Appellee avoided all issues involving good faith, presumably because Defendant/Appellant had stated "you" in their questions, rather than "you and/or your predecessors".

On July 9, 1996, Plaintiff -Appellee submitted a set of Request for Admissions, Interrogatories and Request for Production of Documents to Defendant/Appellant Guy Thomas. Mr. Thomas was out of the Country for a period during this time and counsel for Defendant/Appellant was unavailable to answer all of the questions, without conferring with Mr. Thomas. Counsel for

Defendant/appellant spoke with Plaintiff/Appellee's counsel on several occasions confirming that we would supply the answers as soon as possible

In August 1996, Plaintiff/Appellee supplemented their answers responding to the original questions brought by the Defendant in relationship to good faith and fair dealings issues.

Although it had been three months since the requests were served upon Defendant-Appellant, Plaintiff-Appellee had not indicated that there was a problem waiting for the overdue answers, nor did Plaintiff file a Motion to Compel these answers. It is assumed that the Plaintiff-Appellee wanted the Requests for Admissions to be deemed admitted, therefore, they filed a Motion for Summary Judgment against Defendant Guy L. Thomas on September 26, 1996, without the answers to their discovery. Defendant was finally able to complete the Answers to Plaintiff Interrogatories on November 26, 1996 and on December 9, 1996, Plaintiff and Defendant argued on Plaintiff's Motion for Summary Judgment. It was determined at that time, that Plaintiff would be granted Summary Judgment only on the unanswered Admissions, and that Defendant would be allowed to amend their answer to the original complaint to include the defense of good faith and fair dealings. Further, the Court awarded fees to Plaintiff in an amount of \$350.00 as well as appropriate fees for filing the Motion for Summary Judgment. However, after Defendant-Defendant-Appellant and his Counsel were able to speak, most of the Admission would have been admitted, since they dealt with non-payment of the lease.

SUMMARY OF ARGUMENTS

It is the Defendant-Appellant's contention that the District Court abused its discretion by awarding Appellee attorneys' fees of \$5,488.00 and \$350.00 prior to the conclusion of the case. The Court allowed Appellant to amend his answer to include the defense that Appellee had breached its covenant of good faith and fair dealing. This breach was based on the fact that Sugarhouse Development Partnership, Appellee's predecessor in interest, had placed a gourmet coffee shop, Moxie Java, directly adjacent to Appellants place of business, WOW Wings. It was established in the Lease Agreement that one of the primary products of WOW Wings was to be gourmet coffee. This placement of Moxie Java contributed to the failing of Appellant's business. As a result of this failure, Appellant Thomas was unable to make his lease payments.

The only way that attorneys' fees can be awarded in the present case is by the agreement of the parties. This agreement allows for the reimbursement of attorneys' fees upon a party being "successful". To be successful, it must be successful in the final outcome. The case is not over and there has been no final outcome. The award of attorneys fees for Appellee for bringing their motion for summary judgment is premature, and a serious abuse of discretion of the court.

Without even addressing the appropriateness of the award of attorneys' fees, the amount given for bringing a "boiler plate" motion for summary judgment is absurd. \$5,488.00 to bring a simple motion for summary judgment for non-payment under a commercial lease, is unimaginable, especially in view of the abilities of the attorneys involved, including efficiency. Further, the amount

normally charged for this type of legal work in this community under similar circumstances, does not give any basis for this large award of attorneys fees.

It is important to have the courts accessible to all of its citizens. If Mr. Thomas is forced to pay this award of attorneys' fees, it will prevent him from pursuing this case to its final conclusion. This barrier will result in the denial of equal protection of the law as specified in Article I, Section 24 of the Utah Constitution and the 14th Amendment of the United States Constitution.

V. ARGUMENT

Point 1.

Did the District Court commit reversible error in awarding attorneys fees prior to the entry of final judgment by the District Court?

Utah allows the recovery of attorneys' fees either by statute or by agreement of the parties. Estate of Quinn, 830 P.2d 282, (Utah App. 1992) which states :

In Utah, attorney fees may only be awarded if authorized by statute or contract. See, also.g., Canyon Country Store v. Bracey, 781 P.2d 414, 419-20(Utah 1989) (quoting Turtle Management, Inc. v.Haggis Management, Inc., 645 P.2d 667, 671 (Utah 1982)); Occidental/Nebraska Fed. Sav. v. Mehr, 791 P.2d 217, 221 (Utah App.1990).

In the present case any attorneys fee award must be premised on the terms of the Lease Agreement. Paragraph 19.02 of the Lease Agreement states,

19.02 Attorney's Fees. In the event that either the Landlord or the Tenant shall institute any action or proceeding against the other relating to the provisions of this Lease, or any default hereunder, then, and in that event, the unsuccessful party in such action or proceeding agrees to reimburse the successful party for the reasonable expense

of such action including reasonable attorneys' fees and disbursements incurred therein by the successful party.

It would appear that Appellee might be entitled to attorney's fees under the lease agreement, which is the subject matter of this lawsuit, but only if Appellee is successful in this action. To be successful, Appellee must prevail by way of a final judgment. This was pointed out in the case of, General Motors Acceptance Corp.v. Martinez, 712 P.2d 243, (Utah 1985), where the Court stated:

. . . no judgment has yet been entered on the third-party claims in compliance with our mandate. No determination has been made as to the amount of the judgment to be entered, including attorney fees, if appropriate. Until these and any other pending matters are resolved by the court below, there has not been a final disposition of all the respective liabilities and rights of the parties. We see no reason to address in piecemeal fashion the issues ruled on below. Burton v. Barker, Utah, 696 P.2d 1217 (1985).

Since, Appellee is the successor to the author of this lease agreement and must assume responsibility, any ambiguity will be construed against the Appellee as maker of the document. 19.02 does not say "partially" successful. It says successful. The only way to interpret a successful outcome is to allow the case to come to a conclusion and the Appellee must be successful at that time. To determine the success, all claims and defenses including breach of the covenant of good faith and fair dealing, must be determined.

Appellee is entitled to reimbursement of attorneys' fees only if successful in the final outcome. This has yet to be determined. Appellant Thomas alleges that Appellee, by and through their predecessor in interest, breached the covenant of good faith and fair dealing by placing an espresso coffee house, Moxie Java, next to Defendant Guy Thomas's establishment, especially when, Appellant, in his

business plan submitted to Plaintiff's predecessors in interest, showed espresso coffee as one of the two primary products of his business. This business plan was submitted prior to Mr. Thomas's execution of the assumption of the lease.

Appellant would not have executed the lease assumption knowing that the Landlord was going to place another business selling one of the two primary products directly next door.

It is one thing to have another espresso coffee purveyor in the same shopping center, but another to have that purveyor of espresso coffee placed in the adjacent space. Landlord's audacity was further compounded, when, it then asked Mr. Thomas to allow a door to be cut in the wall between Moxie Java and his business, WOW Wings, to give access to the customers and employees of the Moxie Java to use Mr. Thomas's establishment's restrooms.

Until this matter is brought to a final disposition in the lower court, any determination of attorneys fees, even the \$350.00 awarded to Plaintiff for the addition of the new defense in the Amended Answer of Appellant, would be premature and contrary to the terms of the Lease Agreement authorizing attorneys fees. See TS 1 Partnership v. Allred, 877 P.2d 156, (Utah App. 1994)

Point 2.

Did the District court abuse its discretion in awarding unreasonable attorneys fees to Plaintiff -Appellee in the amount of \$5,488.00 for fees allegedly incurred for the preparation of a summary judgment motion.

Assuming arguendo, that the District Court, had not committed reversible error in the premature award of attorney's fees . Did Plaintiff present enough evidence to determine that the award of attorneys' fees for bringing a summary judgment in the amount of \$5,488.00 was reasonable. There are several factors, which should be used in the determination of whether attorneys are reasonable. In the case of Agency, Inc. v. Reichert, 784 P.2d 1210, (Utah 1989) these were outlined.

Several Factors to consider in determining a reasonable attorneys fee are the difficulty of the litigation, the efficiency of the attorneys presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result attained, and the experience of the attorneys involved.

This is a standard case of non-payment of commercial rent. The firm of Prince, Yeats & Geldzahler handles multitudes of this type of case annually. The attorneys for the Plaintiff are experienced and as such very efficient. The research for this case has been done previously with all of the other non-payment of rent cases. This "boiler plate" memorandum was most is likely already stored in their computers. Even if Calculated at \$150.00 per hour, a high hourly billing amount for this community, the preparation for this particular summary judgment motion and memorandum should not take 38.96 hours of time, especially in light of the caliber of attorneys representing the plaintiff/Appellee. This motion and memorandum should not have taken more than 10 hours. Therefore the maximum attorneys fee would be \$1500.00.

It is interesting to note that the result attained is a factor. No result has been obtained since the case is not over and whether a breach of covenant of good faith and fair dealing has occurred, has yet to be determined..

Hence, it would appear that there is not sufficient record in the file to show the basis for the award of attorneys' fees was sufficient to even allow an appellate review of their reasonableness , let alone whether they were premature.

Point 3.

Did the District Court, in awarding unreasonable attorneys fees to Appellee, violate Appellant Thomas's right of equal protection of the law as guaranteed by Article I, Section 24 of the Utah Constitution and the 14th Amendment of the United States Constitution.

To allow for the award of attorneys of such magnitude part way through the case , is a barrier to prevent anyone who is not as economically well off to be victimized by their opponent and prevented from seeing the case to a final conclusion. This is a denial of equal protection of the law as guaranteed by Article I, Section 24 of the Utah Constitution and the 14th Amendment to the United States Constitution. By stopping a person from completing the case because they are ordered to pay the opposing party's attorneys fees prior to the conclusion of the case, especially when their claim or defense is meritorious, the Court is violating that person's rights to said equal protection of the law.

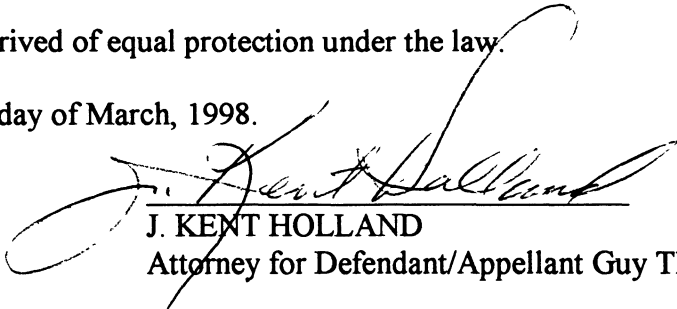
VI. CONCLUSION

As stated, the award of attorney's fees in the as contained in 19.02 of the Lease Agreement, requires that the party seeking reimbursement for attorneys fees to be successful. To determine whether Appellee is successful, the case must come to a final conclusion. It has not. Therefore the award of attorneys fees by the District Court is a serious abuse of discretion.

Further, even if the attorneys' fees could be awarded, the amount of the attorneys fees awarded is without sufficient foundation in the record. Further, the amount awarded appears to be extreme in light of the simplicity of the summary judgment motion for non- payment of monies due under a commercial lease, the expertise of the Appellee's attorneys, especially in efficiency, and the customary fees for this type of legal action in the community. The amount of \$5,488.00 for this work is extreme.

The award of attorneys fees part way through the case has a very "chilling" effect upon the Appellant completing the case. This "chilling" effect deprives Mr. Thomas of equal protection under the law. Both the Utah Constitution and the 14th Amendment to the United States Constitution provide for equal protection under the law. Therefore the award of attorneys fees prematurely results in Guy Thomas being deprived of equal protection under the law.

Dated this 13th day of March, 1998.

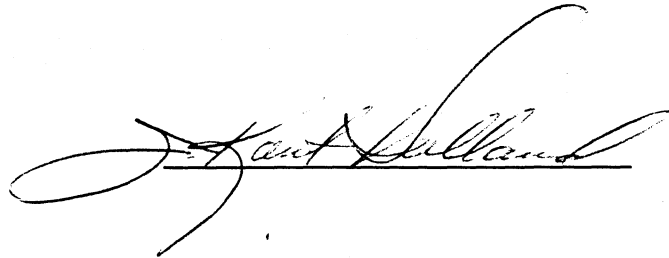

J. KENT HOLLAND
Attorney for Defendant/Appellant Guy Thomas

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day March, 1998, I caused to be served two true and correct copies of the OPENING BRIEF OF DEFENDANT- APPELLANT GUY THOMAS by hand delivery to the addressees below:

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A handwritten signature in cursive script, appearing to read "J. Kent Lulland", is written over a horizontal line.

NO ADDENDUM NECESSARY
in this Brief