

2008

Joseph Naso, Rene Evans v. Younzong "Frank" Fu : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

and RENE EVANS,

Appellees,

APPELLEES BRIEF

"FRANK" FU,

Appellate No. 20080465

Appellant.

Civil No 080916174DC

APPEAL FROM

JUDICIAL DISTRICT COURT SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE DENO HIMONAS

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Oral Argument and Published Decision Requested

IN THE UTAH COURT OF APPEALS

JOSEPH NASO and RENE EVANS,

Plaintiffs/Appellees,

APPELLEES BRIEF

vs.

YOUNZONG “FRANK” FU,

Appellate No. 20080465

Civil No. 080916174DC

Defendant/Appellant.

APPEAL FROM
THE THIRD JUDICIAL DISTRICT COURT SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE DENO HIMONAS

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Jurisdiction

The Utah Court of Appeals has jurisdiction of this appeal under Utah Code Annotated §78A-4-103, and Rule 3(a) of the Utah Rules of Civil Procedure.

Issues Presented for Review

Issue 1: The Appellant fails to address the real issue that was before the trial court. The issue is whether or not the Notice of Interest filed by Appellant Fu violated Utah Code Ann. § 38-9-1(6), and in particular those provisions that specifically define a wrongful lien as one that is not “(a) expressly authorized by this chapter or another state or federal statute;” or (c) signed by or authorized pursuant to a document signed by the owner of the real property,” were met in the case at bar.

Standard of Review: De novo. Questions of statutory interpretation are... questions of law that are reviewed for correctness giving no deference to the [trial] Court’s interpretation. *Centennial Investment Company, LLC, v. Nuttal* 2007 UT App. 171 P.2d 458 (Utah Ct. App. 2007)

Issue 2: Are counter and cross claims allowed in a wrongful lien action.

Standard of Review: As set forth by Appellant.

Constitutional or Statutory Provisions

The following are the only determinative constitutional provisions, statutes, or ordinances whose interpretation is determinative of the appeal or of central importance to the appeal:

1. Utah Code Ann., § 38-9-1 Wrongful Liens and Wrongful Judgment Liens. See Addendum “A” at the end of Appellant’s brief.
2. Utah Code Ann., § 57-9-4 Filing of notice of claim of interest authorized -- Effect of possession of land by record owner of possessory interest. See Addendum “B” at the end of Appellant’s brief.

Statement of the Case.

This case came before the trial court at Plaintiffs/Appellees Naso/Evans’s request for an expedited proceeding pursuant to §38-9-7, to declare the Notice of Interest filed by Defendant Fu a wrongful lien. Prior to the expedited hearing, Defendant/Appellant Fu caused counterclaims and a third party complaint to be filed alleging breach of contract, foreclosure, fraudulent transfer, common law fraud, and negligent misrepresentation.

After hearing the evidence proffered by Counsel, as well as reviewing documents and the testimony of witnesses, the Court found that the Plaintiffs had not given their written consent or authority to Defendant Fu to file a Notice of Interest and further found that the Notice of Interest was not authorized by any State or Federal Statute. The Court determined that the Notice of Interest affecting the Tolin property was invalid and declared it a wrongful lien. The Court further concluded that the other causes of action were not appropriate in a wrongful lien proceeding under §38-9-7 and dismissed them without prejudice.

Defendant Fu filed another action re-alleging the breach of contract, foreclosure, fraudulent transfer, common law fraud, and negligent misrepresentation causes of action.

See the Reply in Support of Suggestion of Mootness filed by the Appellees Naso before the Court of Appeals, dated December 29, 2008.

Summary of Arguments

Defendant Fu's Notice of Interest was not authorized by §57-9-4, was filed without written authorization or consent of the Plaintiffs Naso/Evans in violation of §38-9-1 *et seq.*, and as such, was properly found by the trial court to be a wrongful lien as defined by §38-9-1(6).

The Trial Court properly dismissed the counter and cross claims. Even if the dismissal was improper, the issue is mooted by the Defendant Fu's filing of another action with the same causes of action as set forth in the Reply in Support of Suggestion of Mootness filed by Plaintiffs.

Arguments

I. The Notice of Interest filed by Fu Against the Tolin Property of Appellees Naso/Evans was a Wrongful Lien.

The statute at issue herein is succinct and clear. §38-9-1 defines a wrongful lien:

(6) "Wrongful lien" means any document that purports to create a lien, notice of interest, or encumbrance on an owner's interest in certain real property and at the time it is recorded or filed is not:

- (a) expressly authorized by this chapter or another state or federal statute;
- (b) authorized by or contained in an order or judgment of a court of competent jurisdiction in the state; or
- (c) signed by or authorized pursuant to a document signed by the owner of the real property.

It is black letter law that “the plain language controls the interpretation of a statute, and only if there is ambiguity do we look beyond the plain language to legislative history or policy considerations.” *Vigos v. Mountainland Builders Inc.*, 2000 UT 2, ¶13, 993 P.2d 207.

In the case at bar, the statute specifically provides that a lien is wrongful unless it is (a) expressly authorized by this chapter or another state or federal statute; (b) authorized by or contained in an order or judgment of a court of competent jurisdiction in the state; or (c) signed by or authorized pursuant to a document signed by the owner of the real property.

Contrary to the arguments made by Appellant Fu, this is not properly a case applying the “statute of frauds” (found at §25-5-1), although similar, this statute has its own criteria. Plaintiffs Naso/Evans will address each part of this statute:

- (a) expressly authorized by this chapter or another state or federal statute.

Appellant Fu attempts to argue that the Notice of Interest he filed is authorized pursuant to §57-9-4, of the Marketable Record Title Act. In order for this section to apply, there needs to be an agreement between the parties creating that interest. In neither the case at bar, nor in *Russell v. Thomas*, 999 P.2d 1244, 2000 UT App 82, was there an agreement conveying an interest in the real property. In both cases there were “nothing more than a promise to do so at a later time.” *Russell*, ¶12. Noticeably, in the case at bar, there is nothing signed by both Plaintiffs Naso/Evans that even promises to do so at a later time, but the claims are based upon the emailed representations of the third party Rhodes.

The Utah courts have repeatedly held that when real property is held in joint tenancy, the signature of both owners is necessary to satisfy the Utah State of frauds. See Utah Code Ann. § 25-5-1, see also *Krantz v Holt*, 819 P.2d 352, 353 (Utah 1991), and *Williams v Singleton*, 723 P.2d 421, 423 (Utah 1986).

While Appellant Fu discusses the language of the statute of frauds, and then argues that the statute of frauds provides equitable principals which should provide Appellant Fu relief, the law at issue herein is NOT the statute of frauds, but is 38-9-1 which requires that there be a “state or federal statute,” not a “law” that allows the notice of interest. Twist as they may the language of this statute, there is no interest created by “state or federal statute.”

- (b) authorized by or contained in an order or judgment of a court of competent jurisdiction in the state.

Appellant Fu does not claim there is any such order and hence this provision is not applicable.

- (c) signed by or authorized pursuant to a document signed by the owner of the real property.

Appellant Fu argues that while there was no document signed by both Plaintiffs Naso/Evans, the owners of the real property, that the trial court erred in not fashioning an equitable remedy for Appellant Fu. Apparently arguing that this Court should construe the acts, primarily those of a third party (Rhodes), so as to bind Plaintiffs Naso/Evans, despite the fact that Naso/Evans did not receive the consideration they were promised and did not sign any documents conveying an interest to Appellant Fu.

Appellant Fu attempts to use an equitable claim of “sufficient partial performance” and then should that fail, he asks the Court to read this statute and use the “statute of frauds” to twist the language of §38-9-6 into saying something it clearly does not state.

There is nothing in the case at bar that is “expressly authorized by this chapter or another state or federal statute;” nor is there any document “signed by or authorized pursuant to a document signed by the owner of the real property.” While it may be similar in language, §38-9-6, the statute involved in this case, is not a statute of frauds (§25-5-1) case.

II. The Trial Court Properly Dismissed the Counter and Cross Claims.

Trial courts are generally accorded great deference in matters concerning management of trial court calendars. The trial judge has great discretion in such matters; a party seeking appellate review must typically show actual and substantial prejudice.

An action commenced under §38-9-7, is designed to provide expedited relief in a situation where time is of the essence, and usually arises where there is a dispute that is threatening to derail a pending sale of property. To allow such a proceeding to be cluttered with allegations of breach of contract, foreclosure, fraudulent transfer, common law fraud, and negligent misrepresentation would defeat the purposes of such an expedited proceeding.

In the case at bar, whereas the trial court dismissed without prejudice the counter and cross claims filed by Appellant Fu, there is no actual and substantial prejudice to the Appellant.

Even if the dismissal was improper, the issue is mooted by the Defendant Fu's filing of another action with the same causes of action as set forth in the Reply in Support of Suggestion of Mootness filed by Plaintiffs.

Conclusion

Appellees request that this Court affirm the trial court and dismiss this appeal with prejudice, assessing the Appellant the Appellees' attorneys fees and costs incurred in defending this appeal, pursuant to §38-9-7(5).

DATED this 13th day of April 2009.

BOSTWICK & PRICE, P.C.



Randy B. Birch
Attorney for Appellees

Certificate of Service

I hereby certify that on April 13, 2009, I caused two true and correct copies of the foregoing document to be

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