

2008

Key Bank National Association v. Wayne R. Weston : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KEY BANK NATIONAL
ASSOCIATION,

Plaintiff/Appellee,

Vs.

WAYNE R. WESTON,

Defendant/Appellant.

:
Case No. 20080511-CA
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APPELLANT'S REPLY BRIEF

From Order and Judgment Entered May 6, 2008
by the Fourth Judicial District Court, Utah County
Honorable Gary D. Stott, Presiding

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ARGUMENTS

It is obvious (though Key Bank has failed to admit it) that Weston controverted most of the material facts on which Key Bank's Motion for Summary Judgment was based. Starting with, the most basic: "Mr. Weston contacted Key Bank by telephone and applied for a Preferred Credit Line." (Brief of Appellee, pg. 2) This implies that Weston applied for the credit line in his name, but this is contrary to the record evidence cited by Key Bank.

Key Bank's record evidence is pp. 174 and 187 of Weston's deposition. However, as the Court can see, the cited deposition testimony actually contradicts Key Bank's assertion:

- Q. Did you ever contact Key Bank to find out why they sent you this book of checks?
- A. No. Because we had negotiated for a loan which was a result of conversation [sic], and the money went into the corporation, which is Wayne Weston.
- Q. Let's unpack that a little bit. When you say "we negotiated a loan," who's we?
- A. We as the bank.
- Q. And you, Wayne Weston?
- A. Wayne Weston as secretary/treasurer of May Corporation.

....

Q. What is it you said?

A. I said I solicited it on behalf of the company.

R. 217, pp. 174-75, R. 215, pg. 187 (emphasis added)

This problem can be seen throughout Key Bank's papers. Not only does the record evidence fail to support Key Bank's factual averments, it actually contradicts them, which is something that Key Bank blithely ignores, pretending the averments are established facts, rather than issues of material fact that have been genuinely disputed. Utah R. Civ. Proc. 56(c)

Take the business about the Preferred Credit Line Agreement (the actual, written document). (Brief of Appellee, pg. 2) Key Bank claims that a copy was sent to Weston when the account was opened. (R. 180, ¶11)¹ However, Weston was never shown a copy of the agreement during his deposition. What Key Bank chose to show him was an "internal Key Bank document," (R. 182, ¶6) which Key Bank admitted Weston never would have seen. (R. 216, pg. 182, lines 11-14)

¹ Never mind that this statement was made many years after the fact by a person without any personal, firsthand knowledge about the transaction.

Deposition Exhibit 3 (R. 182, Exhibit B) looks just like the Preferred Credit Line Agreement. (R. 259, Exhibit C).² Therefore, Weston may be excused whatever confusion he had regarding the nature of the document. However, and this is the important part, he made plain that he had “never seen” such document before. (R. 216, pg. 181, lines 6-14) Therefore, it is entirely too much to say, as Key Bank has implied, that Weston admitted receiving the Preferred Credit Line Agreement.³

On pg. 3 of its brief, Key Bank states: “After opening the Preferred Credit Line, Key Bank mailed Mr. Weston a book of checks and a copy of the Preferred Credit Line Agreement to the home address Mr. Weston had provided.” (emphasis added) The record reference for this statement is Weston’s deposition, pg. 173, lines 12-13. (*Id.*) However, as with most of Key Bank’s factual averments in this case, the statement is not supported by the record evidence. This is the actual exchange:

² We assume this is what Key Bank meant when it said: “To the contrary, the record clearly shows that Exhibit ‘B’ to Key Bank’s Memorandum of Points and Authorities in Support of Summary Judgment was the actual **Preferred Credit Line Agreement**,...” (emphasis in original) Exhibit B is clearly something else (Defendant’s Answer to Plaintiff’s First Set of Interrogatories, *etc.*).

³ Without citing any authority, Key Bank also states: “Mr. Weston never disputed that he received the Preferred Credit Line Agreement and he cannot do so now.” (Brief of Appellee, pg. 14 n.4) Actually, this is important because the trial court picked up on this line in its April 22, 2008 Ruling: “The defendant never disputed receipt of the Preferred Line of Credit Agreement....” (R. 401, pg. 3 of 3) Hopefully, the trial court’s error in this regard has been fully demonstrated.

Q. And your address, okay.

A. The home address.

At the time of Weston's deposition, Key Bank was questioning Weston about checks that had been issued in 2001, which was before Weston moved to the location appearing on the checks. (R. 217, pg. 172, lines 10-25, pg. 173, lines 1-13) However, there was no mention of the Preferred Credit Line Agreement in any part of the line of questioning. So, who now is being "underhanded"? (Brief of Appellee, pg. 13)⁴

Actually, this business about the Preferred Credit Line Agreement points to another, bigger problem with Key Bank's case. Helen M. Rozich stated in her affidavit that she reviewed "Key Bank's files and records as pertain to Defendant's Preferred Credit Line" and that this review "occurred in the ordinary course of business." (R. 181, ¶2) Admittedly, Ms. Rozich had nothing to do with the creation of the account. (R. 182, ¶1)

⁴ We thought we settled this business about Weston's "home address." Either Key Bank does not understand, or persists in deliberately misrepresenting the record evidence. Once more: Weston had moved to 303 West 100 North, Provo UT 84601 when his deposition was taken. (R. 237, pg. 5, lines 12-13) However, he moved there a little over three years before his deposition was taken (September 10, 2007). (*Id.* at lines 16-18) He resided at another place in Orem at the time the account was created. (*Id.* at lines 19-22) The above address was May Corporation's registered address. (R. 313, ¶¶9-11) Therefore, Weston never gave Key Bank his "home address" when the account was created. He gave the address of May Corporation, the intended beneficiary of the account. Key Bank finally seems to concede the factual issue, however, claiming that it is not material. (Brief of Appellee, pp. 15-16)

Ms. Rozich's testimony was based entirely on documents she did not identify. For example, what was the basis for the following statement: "In order to obtain a Preferred Credit Line, the Defendant provided his personal financial information such as social security number, personal address, and employment history"? (R. 180, ¶9) Presumably, Ms. Rozich was referring to an archived and unrelated document bearing Weston's social security number, but she never identified the document, and it was not until we challenged Key Bank on the matter that it rooted through Weston's prior dealings with Key Bank to produce a document bearing Weston's social security number.⁵

Weston's objections to Ms. Rozich's Affidavit were spelled out in his Motion to Strike (R. 320), Memorandum in Reply to Memorandum in Opposition to Defendant's Motion to Strike the Affidavit of Helen M. Rozich (R. 358) and Objections to [Proposed] Order and Judgment on Key Bank's Motion for Summary Judgment and Wayne R. Weston's Motion to Strike the Affidavit of Helen M. Rozich. (R. 371)

If Key Bank was mistaken about the bases for the motion and objections, it did not say. (R. 352) In fact, Key Bank properly characterized the nature and

⁵ This was the Business Service Center Worksheet (RR. 344-43), which we showed was generated before and did not reference the account in question. (Brief of Appellant, pg. 14)

bases of Weston's objections on pg. 3 of its Memorandum in Opposition to Defendant's Motion to Strike the Affidavit of Helen M. Rozich: "Ms. Rozich's testimony lacks foundation and is based upon inadmissible hearsay."

Without identifying the documents on which Ms. Rozich's very specific testimony was based, it was impossible to determine whether she had "personal knowledge of the matter." Utah R. Evid. 602 Key Bank's failure to abide by the proscriptions of Utah R. Evid. 803(6) was not Weston's responsibility. (Brief of Appellee, pg. 24) Key Bank's failings in these regards were adequately communicated to the trial court who simply made an erroneous decision in both regards.

Finally, we take up Key Bank's claim on the Commercial Guaranty⁶ at the same time we address its exceptional claim that Weston "mischaracterize[d]" the trial court's rulings. (Brief of Appellee, pg. 9) Key Bank takes exception with the statement in Appellant's Brief that "the Commercial Guaranty formed no part of the trial court's ruling." (Brief of Appellant, pp. 15, 18) However, Key Bank conceded as much in its brief: "Key Bank submitted to Mr. Weston a proposed

⁶ It is obvious that Key Bank has dropped and/or made no effort to resuscitate its spurious claim of *quantum meruit*. It is mentioned as being one of the bases for Key Bank's Motion for Summary Judgment. (Brief of Appellee, pg. 10) However, nothing further is said about it in the Brief of Appellee. This only stands to reason given the unambiguous authority cited by Weston in his brief: *Davies v. Olsen*, 746 P.2d 264, 268 (Utah App. 1987). (Brief of Appellant, pp. 23-24)

Order and Judgment in conformity with what Key Bank understood from the district court's bench ruling." (Brief of Appellee, pg. 13)

Key Bank's proposed Order, including the one signed by Judge Stott (R. 406), made no mention of the Commercial Guaranty. According to Key Bank, the sole basis for the trial court's ruling was the Preferred Credit Line Agreement. Therefore, Key Bank understood the same thing as Weston: that the Commercial Guaranty formed no part of the trial court's ruling on summary judgment, just as stated in Weston's brief. This is why Key Bank had to resort to that old saw about trial court rulings being affirmed "on any ground available to the trial court, even if it is one not relied on below." (Brief of Appellee, pg. 21) (*citing Higgins v. Salt Lake County*, 855 P.2d 231, 235 (Utah 1993))

The problem starts with the trial court's subsequent ruling on the Commercial Guaranty (R. 401), which raised more questions than it answered. The trial court made clear "there were three Commercial Guaranties involved in this action, two of which were abrogated. The final one remains in force." (R. 401, pg. 3 of 3) (emphasis added) Key Bank claims (Brief of Appellee, pp. 14-15) that the trial court meant the original Commercial Guaranty signed by Weston for May Corporation. (R. 182, Exhibit A) However, this makes no sense whatsoever.

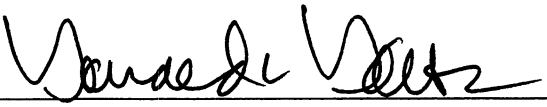
The record plainly shows a substitution of one transaction for another. In other words, by the time of the second transaction, the \$323,191.00 loan to May Corporation had been paid down to \$278,059.00, and Weston was substituted for May Corporation as the "Borrower," with May Corporation and Weston's wife substituting as guarantors. This was a new loan, with a new loan number. Therefore, if any of the loan guaranties was "abrogated," as the trial court seemed to accept, it had to be the earlier, older one. The loan to which it attached was no longer in existence. There is evident confusion on this score, which should have prevented summary judgment from entering.

CONCLUSION

For the foregoing additional reasons, the trial court's Order and Judgment on Key Bank's Motion for Summary Judgment and Wayne R. Weston's Motion to Strike the Affidavit of Helen M. Rozich (R. 406) should be REVERSED and the case REMANDED for further proceedings consistent therewith.

DATED this 9th day of March, 2009.

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CERTIFICATE OF SERVICE

THIS WILL CERTIFY that true and correct copies of the within and foregoing "Appellant's Reply Brief" were mailed, First Class, postage prepaid, this 9th day of March, 2009, to:

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