1997

Hans Rosenwinkel v. John Bennett : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

HANS ROSENWINKEL,	:	
	:	
Plaintiff/Appellant,	:	
	:	
vs.	:	
	:	Case No. 970521-CA
JOHN BENNETT,	:	Priority 15
	:	
Defendant/Appellee.	:	

Appeal from a Judgment of the Third Judicial District Court,
in and for Salt Lake County, State of Utah, Judge Homer F. Wilkinson

APPELLANT'S REPLY BRIEF

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Plaintiff/Appellant Hans Rosenwinkel ("Rosenwinkel") submits this Reply Brief.

ARGUMENT

I. THE JUDGMENT IS NOT SUPPORTED BY THE PROCEEDINGS IN THE DISTRICT COURT

Bennett argues that the district court's Judgment is supported by the proceedings below and that although the Order and Judgment contain clerical errors, they accurately reflect the substance of the Order and Judgment of the Commissioner and the Court. A simple comparison of the transcript of the March 10, 1997 hearing and the Judgment demonstrates the contrary.[1] Given the clear inconsistency between what the Commissioner recommended and what the Judgment recites, Bennett next obliquely argues that Rosenwinkel somehow consented to the relief requested by Bennett in his pleadings because Rosenwinkel did not contest any of the facts set forth in Bennett's or Bennett's counsel's affidavits at the March 10 hearing. Bennett's Br. at 7. However, Rosenwinkel's statement that "He's [Bennett"] admitted to having a hot temper so we better be willing to stick up to him when he blows up because nothings [sic] is going to stand in his way. He frightens both of us and we feel that we shouldn't have to deal with that way in this situation," R. at 100

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[1]Bennett argues that his position in his Memorandum in Opposition to Extension of Protective Order, in which he stated that the conduct alleged did not come within the conduct prohibited by the Utah Cohabitant Abuse Act, was adopted by the Commissioner. This is inaccurate. Bennett never argued that the Act did not apply to cotenants. R. at 41-42. The Commissioner, on the other hand, stated that the Utah Cohabitant Abuse Act was not designed to address landlord-tenant or cotenant situations. R. at 100 (p. 5).

(p. 4), contradict the version of events in Bennett's affidavit. Bennett's counsel's affidavit was never even raised at the hearing.

Moreover, Bennett's counsel repeatedly stated in the March 10 hearing that a dismissal of the protective order was all that was being sought. He stated first "there is no need for any further relief to issue from the Court." R. at 100 (p. 5). Bennett's counsel then stated that "I don't think there is any showing that any further necessity for court intervention of any sort, even if there was at the beginning." Id. Given these statements and the Commissioner's statement that he agreed that the matter should end, there was no reason for Rosenwinkel to respond to the request in Bennett's Verified Answer for lost rent or attorneys fees.

Bennett's argument that because Rosenwinkel did not respond to requests for relief which were not raised at the hearing, he should have expected them to be incorporated as part of the Commissioner's Order is mere sophistry and should be rejected. When Bennett wanted lost rent awarded at the February 24, 1997 hearing, he was correct in specifically raising the issue and requesting lost rent. R. at 99. At the March 10, 1997 hearing, if he still wished to have lost rent awarded, he knew he needed to request it again, particularly in light of his posture at the hearing that no "court intervention of any sort" was required. R. at 100 (p. 5). He cannot simply award it to himself in an Order or Judgment.

Finally, Bennett argues that any error in referring to the February 24 hearing rather than the March 10 hearing was not prejudicial and did not affect the substance of the Judgment and Order. Bennett's Br. at 6. In this case, the failure to identify the correct hearing in the Order and Judgment, is substantively misleading. In addition to stating the incorrect date, the Order and Judgment incorrectly state that Rosenwinkel failed to appear. At the hearing referred to in the Judgment the Commissioner did recommend an award of lost rent. At the continued hearing on March 10 he did not.[2]

Elsewhere in his brief Bennett argues that the attorneys fees award should be affirmed because the Court's statement that the Utah Cohabitant Abuse Act was inapplicable to cotenants is effectively a finding that the action was without merit. Bennett's Br. at 9. As set forth in Rosenwinkel's opening brief at page 14, the Utah Cohabitant Abuse Act specifically includes cotenants in its coverage, so to the extent that the Commissioner's statement is read as a finding that the petition was without merit is erroneous as a matter of law. More importantly, Bennett does not even attempt to argue that the Commissioner found that Rosenwinkel filed the petition in bad faith. In the absence of such a finding, attorney fees cannot be awarded under *Utah Code Ann. § 78-27-56.* Chipman v. Miller, *934 P.2d* 1158, 1161-62 (Utah Ct. App. 1997).

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[2]Rosenwinkel was absent from the February 24 hearing due to an error in the clerk's office. Although Bennett recites that the hearing was rescheduled from 9:30 a.m. to 8:30 a.m., Bennett Br. at 3, Rosenwinkel was not notified of any rescheduling. See R. at 31, 87.

At the hearing on March 10, the Commissioner recommended dissolution of the protective order and made no recommendation awarding lost rent or attorney fees. In addition, the Commissioner informed the parties that "the Court will enter it's own order." R. at 100 (p. 5). Thus, the Order and Judgment, which were prepared by Bennett, do not accurately or fairly reflect the proceedings and to the extent the Judgment does not do so, it should be reversed.[3]

II. ROSENWINKEL PROPERLY PRESERVED THE ISSUES ON THIS APPEAL

Bennett argues that Rosenwinkel did not preserve the issues presented here for appeal. Bennett's Br. at 8. Bennett relies upon Salt Lake County v. Carlston, 776 P.2d 653, 655 (Utah Ct. App. 1989) and Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832, 837 (Utah 1984). Bennett's reliance upon Carlston and Barson is misplaced. In Carlston, plaintiff claimed that she was denied a fair trial when the county challenged three of four women for selection to the jury, thus denying her a fair cross section of the community in the jury. Id. at 654. However, Carlston objected to the jury selection only after she received an adverse verdict and thus had not preserved that issue for appeal. Id. at 655. In Barson, the defendant failed to make a hearsay objection to certain evidence at trial but raised it in post-trial

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[3]Bennett argues in his Statement of Issues and Standard of Review that the Judgment and award of attorneys fees should be reviewed for clear error or abuse of discretion. Bennett's Br. at 1. This assumes that the district court made findings of fact which are being challenged. There are no such findings in the transcript of the March 10 hearing, the April 23 Order or the Judgment.

Because no timely objection was made to the evidence as it was presented, the issue could not be raised on appeal. Barson, 682 P.2d at 839.

In this case, Rosenwinkel objects not to a ruling, testimony or occurrence during the hearing before the Commissioner but to the proposed final Judgment of the Court, which he did not receive until June 14, 1997. R. at 88. Rosenwinkel consulted counsel in a reasonable manner and then timely filed his Rule 60(b) Motion and Notice of Appeal.

Finally, Bennett argues that Rosenwinkel's July 23, 1997 affidavit should not be admitted as part of the record because it was filed in connection with Rosenwinkel's Motion for Relief from Judgment in the district court on the same day that Rosenwinkel's Notice of Appeal was filed. Bennett cites to Onyeabor v. Pro Roofing, Inc., 787 P.2d 525 (Utah Ct. App. 1990) for support. Bennett's Br. at 10 n.5. Onyeabor is inapplicable here. In Onyeabor, the plaintiff made a motion to supplement the record on appeal with affidavits. Id. at 528 n.2. The court of appeals provisionally allowed the plaintiff to supplement the record pending oral argument of the case. Id. Afterwards, the court denied the plaintiffs' motion to supplement the record on appeal. Id.

Utah R. App. P. 11 allows that "*original papers and exhibits filed in the trial court, the* transcript of proceedings, if any, the index prepared by the clerk of the trial court, and the docket sheet, shall constitute the record on appeal in all cases." In this case, Rosenwinkel filed a Motion for Relief from Judgment in the trial court as permitted under Utah R. Civ. P.

60 and at the same time filed his Notice of Appeal because his time to file was at an end. Both a Rule 60 motion and an appeal can be pending simultaneously. Lord v. Lord, 709 P.2d 338, n.1 (Utah 1985) (per curiam) (stating Rule 60(b) motion does not toll time for appeal). Bennett never responded to the Motion for Relief from Judgment and it appeared from this Court's September 18, 1997 Order for possible summary disposition, that the matter might be resolved very rapidly on appeal. Rosenwinkel therefore pursued his appeal. Thus, Rosenwinkel's affidavit is properly part of the record in the district court and before this Court on appeal.

CONCLUSION

For the reasons set forth above and in Rosenwinkel's Opening Brief, that portion of the Judgment awarding Bennett lost rent and attorneys fees should be reversed.

DATED this 15th day of June, 1998.

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the attached APPELLANT'S REPLY BRIEF were served upon the following by depositing a properly addressed envelopes containing the same in the United States Mail, postage prepaid, this 15th day of June, 1998:

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