

1997

Stephen D. Oliverson and Ruth H. Oliverson v. Lester Romero : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STEPHEN D. OLIVERSON and
RUTH H. OLIVERSON

Plaintiffs-Appellees,

v.

LESTER ROMERO,

Defendant-Appellant.

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Case No. 970572-CA

Priority No. 15

REPLY BRIEF OF APPELLANT

APPEAL FROM A DECISION OF THE
FOURTH DISTRICT COURT, UTAH COUNTY, STATE OF UTAH
HONORABLE ANTHONY W. SCHOFIELD

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**DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, ORDINANCES, RULES, AND REGULATIONS**

Utah Rules of Civil Procedure 56(e). Form of affidavits;

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Utah Rules of Evidence Section 102. Purpose and construction.

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

INTRODUCTION

Defendant Lester Romero ("Defendant") submits the following response to the allegations and arguments contained in Plaintiffs' Brief:

POINT I

Plaintiffs have Waived the Right to Object to the Admissibility and Sufficiency of Defendant's Affidavit in Opposition to the Motion for Summary Judgment

In Point I of their brief, Plaintiffs argue that the Affidavit submitted by Defendant in Opposition to Plaintiffs' Motion for Summary Judgment ("Defendant's Affidavit") was comprised of inadmissible and immaterial evidence, was insufficient to raise genuine issues of material fact, and therefore insufficient evidence was presented by Defendant to preclude summary judgment in favor of Plaintiffs.¹

Specifically, the Plaintiffs argue that the facts alleged by Defendant and set forth in his sworn affidavit regarding the applicable promissory note secured by the Trust Deed was "inadmissible parol evidence".² Plaintiffs further argue that the facts alleged and set forth in Defendant's Affidavit regarding the absence of Mr. Huish from the state of Utah was inadmissible hearsay.³

However, even if the evidentiary deficiencies alleged by Plaintiffs are well founded, which they are not, Plaintiffs

¹ Brief of Plaintiff-Appellee, page 13.

² Brief of Plaintiff-Appellee, pages 15-20.

³ Brief of Plaintiff-Appellee, pages 23-25.

nonetheless waived the right to object to the admitted evidence on appeal, when they failed to properly motion the Trial Court to strike the Defendant's Affidavit.

a. Plaintiffs Were Required to File a Motion to Strike the Allegedly Objectionable Affidavit

Although Plaintiffs raised their evidentiary objections to Trial Court for the first time at oral argument, in order to preserve for appeal the issue of the sufficiency of Defendant's Affidavit and whether such affidavit created a genuine issue of material fact which precluded summary judgment in favor of Plaintiffs, Plaintiffs were required to file an actual motion to strike with the Trial Court.

It is well established that a party who raises objections to alleged deficiencies in an affidavit submitted in opposition to a motion for summary judgment, must formally move to strike the affidavit. See, e.g., D&L Supply v. Saurini, 775 P.2d 420, 421 (Utah 1989) (alleged errors contained in affidavit were waived by party's failure to properly object at the trial court); Hobelman Motors, Inc. v. Allred, 685 P.2d 544, 546 (Utah 1984) (although affidavit in opposition to motion for summary judgment was not properly notarized, the objection was waived when not timely made); Franklin Fin. v. New Empire Dev. Co., 659 P.2d 1040, 1043-44 (Utah 1983) (even if affidavits in support of summary judgment were defective, party opposing summary judgment motion failed to move to strike and was deemed to have waived his opposition to evidentiary defects); Howick v. Bank of Salt Lake, 498 P.2d 352 (Utah 1972); Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 46

(Utah App. 1988). If the objecting party fails to file the appropriate motion to compel, then that party waives the right to show that such affidavit does not comply with Rule 56(e) of the Utah Rules of Civil Procedure. Id.

With respect to the necessity of filing a motion to strike an allegedly deficient affidavit, the Utah Supreme Court has established the following rule:

if, on a motion for summary judgment, an opposing party fails to move to strike defective affidavits, he is deemed to have waived his opposition to *whatever evidentiary defects* may exist.

Franklin Fin., 659 P.2d at 1044 (*emphasis added*).

In the present case, a motion to strike Defendant's Affidavit was not filed by Plaintiffs.⁴ Therefore, whatever objections Plaintiffs may have had to Defendant's Affidavit, were waived, when they chose not to file a motion to strike.⁵

b. Whether to file a Motion to Compel and Provide the Opportunity to Cure a Deficient Affidavit is the Strategic Choice of the Objecting Party

The Utah Court of Appeals has previously recognized that the decision of whether or not to formally strike an affidavit submitted in opposition to a motion for summary judgment, may be the result of a "calculated risk", or simply an "oversight". Salt Lake City Corp. v. James Construction, 761 P.2d 42, 46 (Utah App. 1988). This is so, because the result of a motion to strike is not simply the striking of the objectionable affidavit, or portion

⁴ Record. (The Record does not contain a motion to strike).

⁵ Id.

thereof, but also the granting of the opportunity to the party opposing summary judgment to resubmit a follow up affidavit which is free of the alleged deficiencies and objections. Id.

In Salt Lake City Corp. v. James Construction, the Utah Court of Appeals followed the established tradition of the Utah Supreme Court and ruled that the opportunity to object to an allegedly deficient affidavit is waived by the failure to timely move to strike the objectionable affidavit. Id. at 46. In so ruling, the Utah Court of Appeals recognized that the decision not to move to strike an objectionable affidavit is often made out of "concern that if the court struck the affidavit, it would probably also continue the hearing and give the other party the chance to submit a proper affidavit". Id. at 46, N.8.⁶

The requirement of formally striking an objectionable affidavit when the matter is before the Trial Court and thus easily cured, is consistent with, and required by the express purpose and construction of the Utah Rules of Evidence, which provides as follows:

the end that the truth may be ascertained
and proceedings justly determined.

UTAH RULES OF EVIDENCE SECTION 102.

In the present case, and as previously recognized by this Court, Plaintiffs simply took the chance that "that no appeal would

⁶ In Salt Lake City Corp. v. James Construction, the failure to object to the "reply affidavit" was not an oversight, but a calculated risk. As explained by counsel at oral argument, it was decided not to object to the affidavit out of concern that if the court struck the affidavit, it would probably also continue the hearing and give the party a chance to submit a proper affidavit.

be taken or, if one was, that the lack of a motion to strike would go unnoticed or be glossed over by the appellate court." Lister v. Utah Valley Community College, 881 P.2d 933, 942, N.1 (Utah App. 1994).

Point II

Extrinsic Evidence May be Submitted and Considered in Determining the Parties' Rights and Obligations Under the Agreement Originally Entered into Which Gave Rise to the Parties' Dispute

Even if the reviewing court determines that Plaintiffs have not waived the right to object to the sufficiency and admissibility of Defendant's Affidavit, the Defendant's Affidavit and the facts contained therein are nonetheless admissible evidence and should be considered in determining the Parties' respective rights and duties which have resulted from the Obligation created by the agreement originally entered into between the Defendant and Mr. Huish.

In their Brief, Plaintiffs argue that simply because the Trust Deed dated July 2, 1986 refers to a promissory note of even date herewith, that any evidence submitted by Defendant that the underlying Obligation secured by the Trust Deed may actually be reflected by, referred to, or set forth in documents other than the July 2, 1986 Promissory Note is inadmissible parol evidence offered in an impermissible attempt to alter the language of the Trust Deed.⁷

However, and as set forth more fully in Defendant's initial brief, while the Parties do not dispute the existence of the

⁷ Brief of Plaintiff-Appellee, pages 15-20.

underlying Obligation created in favor of Defendant and secured by the Trust Deed, they are in serious disagreement as to the controlling documents which evidence such underlying Obligation.⁸

Because both Defendant and Mr. Huish are parties to the Trust Deed as well as both promissory notes, there is legitimate, confusion, disagreement, as well as ambiguity as to which documents are controlling.

Therefore, the extrinsic evidence necessary to determine the Parties' respective rights and obligations should not be excluded from consideration by the trier of fact.

a. The Trust Deed as Well as the Promissory Notes Must be Considered and Construed Together Since They Represent Parts of a Single Agreement

It is well established that where, as in the present case, there are multiple writings reflecting an agreement, such "writings must be considered together". HCA Health Serv. v. St. Mark's Charities, 846 P.2d 476 (Utah App. 1993). Because, the agreement between Defendant and Mr. Huish is arguably reflected in the Trust Deed dated July 2, 1986 as well as in the April and July Promissory Notes, "those instruments must be construed together as though they comprised a single document." Id.

In the present case, it is undisputed that in 1986, the Defendant and Mr. Huish entered into an agreement whereby Defendant agreed to loan Mr. Huish \$6,000.' However, there is a dispute as

⁸ See Brief of Defendant-Appellant, pages 10-11.

⁹ Record, page 194, paragraphs 2-5; See also, Brief of Defendant-Appellant herein, page 3, paragraph 2.

to not only whether the underlying Obligation created under the Agreement and secured by the Trust Deed was ever satisfied, but also which of the related documents are controlling and legitimate.¹⁰

Therefore, the evidence contained in Defendant's Affidavit must be considered in order to properly evaluate the effect, relevancy, genuineness and authenticity of the competing and conflicting documents.

The presence of such evidence precludes summary judgment and requires remand to the trial Court to permit the trier of fact to "survey all the evidence and all reasonable inferences to be fairly drawn therein in the light most favorable" to the Defendant. Salt Lake City Corp. v. James Constructors, 761 P.2d 42 (Utah App. 1988).

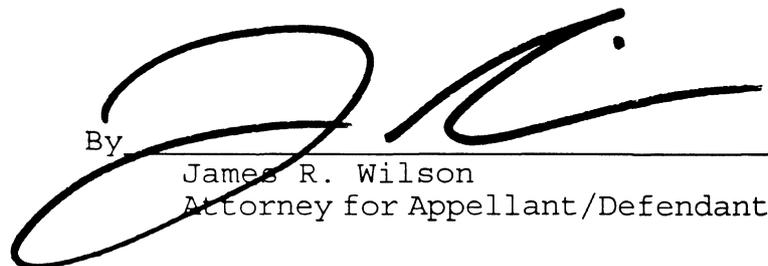
CONCLUSION

Based on the foregoing substantial and persuasive reasons, Defendant respectfully requests that the judgment of the lower court be reversed and the matter remanded for trial.

DATED this 20th day of March, 1998.

APPEL & WARLAUMONT, L.C.

By



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¹⁰ See Brief of Defendant-Appellant pages 9-15.

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of March, 1998, I caused a copy of the foregoing Reply Brief of Defendant-Appellant to be hand-delivered to:

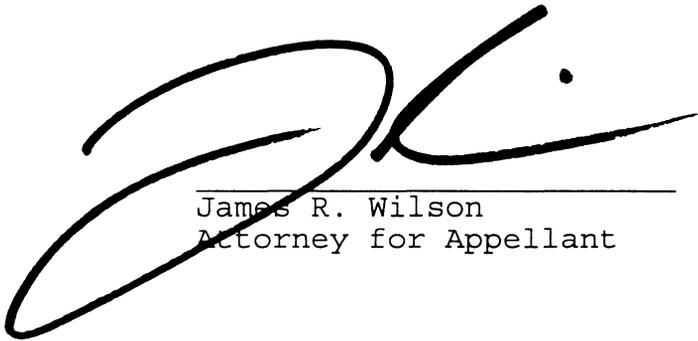
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