1998

Alan B. Thomas v. 3D Communications Von Gordan and Ron Davies : Reply Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

ALAN B. THOMAS,

Plaintiff/Appellant,

vs.

3D COMMUNICATIONS, VON GORDON and RON DAVIES,

Defendants/Appellees.

Case No. 980012

REPLY BRIEF OF APPELLANT

Appeal From the Orders of the Third District Court,
Salt Lake County, State of Utah
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TABLE OF AUTHORITIES

None cited.

SUMMARY OF APPELLANT'S ARGUMENTS ON REPLY

Thomas' appeal should be granted for all of the reasons set forth in his first Appellant's Brief. Apparently fearing a reversal on the merits, the Appellees' main argument in opposition to this appeal is that Judge Young properly dismissed Thomas' second amended complaint due to an alleged failure by Thomas to prosecute. Thomas does not believe that this was the basis of Judge Young's ruling, but even if it were, it would be reversible error based upon the following facts:

a. On April 12, 1991, Thomas filed a request for trial **R. 258**;

b. On August 28, 1991, Thomas filed a request for ruling on the defendants/appellees' motion for summary judgment **R. 306** ;

c. On September 27, 1991, Judge Fuchs signed a Decision and Order in which he declined to rule on the motion for summary judgment, and sent the matter back to Judge Young for a ruling on the motion or for a trial setting **R. 308**; but

d. Judge Young did not rule on the motion for years; and

e. When Thomas attempted to get the actual court file in order to complete his docketing statement, the file was lost and could not be found for weeks.

Judge Young -- and now the Appellees -- would like to shift the blame for Judge Young's failure to act on this motion, and for the fact that the Third District Court misplaced the file, on Thomas. But procedurally Thomas had done everything that he was required to do to move the case along. He not only asked for a trial setting in April of 1991, but also asked for a ruling on the motion for summary judgment in August of 1991. The ball was no longer in Thomas' court. When Judge Fuchs passed the ball to Judge Young and the Third District Court,

somehow the ball was dropped. Thomas should not be blamed for the fact that the Third District Court lost the file and that Judge Young failed to timely rule on the motion for summary judgment. At all times Thomas was ready, willing and able to proceed to trial, and had asked for the same to be scheduled. There was no dereliction on Thomas' part. A manifest injustice will occur if Judge Young's dismissal of Thomas' claims is affirmed on this basis.

I. Appellees' Creative "Failure to Prosecute" Argument Should Be Rejected

A. Judge Young's November 1997 Order Was Clearly In Error When It Stated that the 1990 Order Had Precluded Thomas From Bringing a Second Action for Interest and Attorney's Fees, and Other Matters.

The Appellant's Brief in this matter quotes extensively from the transcript of the 1990 Hearing and Judge Young's 1990 Order to demonstrate that said hearing and order clearly contemplated the filing of a second amended complaint for additional contractual interest and attorney's fees. Therefore, Judge Young's November 1997 Order stating that the Appellees' motion for summary judgment should be granted because the 1990 Order had resolved those issues was clearly in error. (See Appellant's Brief, pp. 26-27) Obviously the Appellees seek desperately for some other basis upon which to urge this Court to affirm Judge Young's ruling -- and they believe that they have found it in their creative assertion that the underlying action was in actuality dismissed for failure to prosecute.

B. Judge Young's November 1997 Order Does Refer to Inaction, But Does Not Make Failure to Prosecute a Basis for the Granting of the Defendants'/Appellees' Motion

With respect to inaction in the case, Judge Young's November 1997 Order does state the following:

"2. No activity has occurred in this matter since September 27, 1991, suggesting that the

parties consider this matter either to be resolved, or not to warrant further action." **R. 338**

This language does not state that the Appellees' motion for summary judgment is granted due to a failure by Thomas to prosecute. In fact, it does not even state that Thomas failed to prosecute. Rather, this language clearly is mere commentary. Thomas respectfully suggests that this language is not sufficient to find that Judge Young granted the motion for summary judgment on the grounds that Thomas had culpably failed to prosecute the matter.

C. It is Undisputed That Judge Young Failed to Rule on the Motion for Years -- But That Is Not Thomas' Fault.

Judge Young's November 1997 was partially correct when it stated that no action had occurred from September of 1991 until Thomas insisted again that Judge Young rule on the matter. Despite the fact that Thomas had filed a request for trial setting and had asked for a ruling on the motion for summary judgment, and that Judge Fuchs had entered an order directing the matter to Judge Young for resolution -- Judge Young failed to rule on the long pending motion or to schedule this matter for trial for years. At the May 1997 hearing, when Thomas' counsel tried to gently suggest that the file might have been lost by the Court -- which would be the only excuse for Judge Young's dereliction in failing to timely address this matter -- Judge Young exploded at Thomas' counsel. Appellees' brief fails to quote the entire exchange between Thomas' counsel and Judge Young in this regard, which was as follows:

[Interrupting Thomas' counsel's argument]

The Court: How can anybody think that this case was not over, when there's been no action in this case since 1991?

I certainly thought the case was over. I thought it was resolved, and that the interest was paid. And my docket, unless I'm looking at the wrong docket, there were activities on this case before Judge Fuchs, and then activities before me.

And so that was in the Circuit Court at the time, which is now Division Two. But has there been any activity on this case recently, since 1991?

Mr. (David) Steffensen: To answer you question, your honor, I'm not aware of any recently brought in the case. I think that the case basically got lost in limbo somewhere between the Circuit Court and this Court. I think that we had a pending resolution of the motion for summary judgment,

[Again, Judge Young interrupts counsel]

The Court: Cases don't get lost here. What happens is that if a case is thought to be active by the Court and there is no activity on the case in a six month period of time, there is an order to show cause issued as to why the case is not moving forward, and dates are set and the case is moved forward. There is no activity on this case because I believed, and everybody else believed, as far as I knew -- except apparently you -- that the cause was concluded with the Court order previously. .... **R. 351 at 7-8.**

The foregoing exchange is notable in several respects. Judge Young refused to accept the possibility that the case file did in fact get lost in limbo between the Circuit and District Courts. But the record is clear and unrefutable: Thomas did in fact request a trial setting, and did in fact request a ruling on the motion for summary judgment clear back in April and August of 1991. And Judge Fuchs did enter an order directing that the decision on these issues be made by Judge Young and remanded the matter to him. At that point in time, no one thought that the case was over. Everyone, including Judge Fuchs, knew that the case was clearly not over. Critical matters needed to be ruled upon. Rulings on those matters had been requested. But, Judge Young did not rule on the matter for years. Who should be penalized for that inaction?

If the case had been properly transferred to Judge Young, one would think that he almost certainly would have docketed a hearing on the motion immediately. Or, in the alternative, if the case had gotten back on the Third District Court's calendering system, he would have done what he described above -- within approximately six months of no action, he would have issued an

order to show cause why the cause should not be dismissed for failure to prosecute and a hearing on that order to show cause would have occurred. Judge Young did neither. Why? Because he was derelict? Because the Third District Court's calendaring system failed? Or was it because the case never got back on his calendar. It seems most likely that the case in fact became "lost in limbo" between the two courts.

Again, who should be penalized for that? Probably no one -- and **certainly not Thomas**. Procedurally, Thomas did everything that he could do: he filed a request for trial setting, and he filed a request for ruling. The rules do not require a party to file multiple such documents. This matter should be resolved on the merits, and not because somehow the Circuit and District Courts did not communicate well with one another in this particular situation.

The factual background of this case is, therefore, completely different and distinguishable from that found in the cases cited by the Appellees in their brief. There are no cases where a litigant has been held responsible, after he has requested a ruling on a matter, for a delay caused thereafter by the Court itself losing the file.

II. The Appellees' Other Arguments Are Similarly Without Merit

The Appellees assert that because Thomas admits that there might have been some minimal instances of hearsay in his affidavits, that he has somehow admitted that said affidavits were so deficient as to be stricken in their entirety. This argument is facially senseless. Thomas stands on his prior arguments in favor of his request that the order striking said affidavits be set aside.

There was only "no admissible evidence" opposing the appellees' first motion to dismiss because Judge Young had improperly stricken Thomas' voluminous affidavits. Those affidavits

should not have been stricken in their entirety, and if they had not been stricken, Judge Young's granting of the motion to dismiss was in error.

With respect to the disqualification of Brian Steffensen, the cases cited by Thomas in his brief in opposition clearly demonstrate that under the circumstances of this case, given the hardship imposed upon Thomas, etc., the proper course of action would have been to allow Brian Steffensen to act as counsel up until the point of trial. However, Judge Young did not allow this because, in Thomas' opinion given everything that has happened in this case, Judge Young felt that by disqualifying Brian Steffensen it would further his scheme to disembowel Thomas' action to such an extent as to motivate Thomas to accept only the $22,000 plus bank interest which Judge Young had gotten 3D Communications to agree to pay immediately, and go away. Thomas should have been allowed to keep Brian Steffensen as his counsel up until the point of trial.

Finally, Thomas wants to make it completely clear that he never stipulated to the relief that Judge Young granted in 1990. Judge Young signed orders which state that the $22,000 payment was pursuant to the parties stipulation, but that was incorrect and objected to by Thomas.

Otherwise, Thomas believes that his Appellant's Brief is persuasive on all issues.

Conclusion and Summary of Relief Sought

For the foregoing reasons, the Appellant Allan B. Thomas, respectfully requests that his appeal be granted as follows:

1. That Judge Young's 1990 order striking Thomas' Affidavits opposing the Appellees' motion to dismiss be set aside;

2. That with said affidavits "unstricken," Judge Young's 1990 order dismissing Thomas' complaint be set aside and Thomas be allowed to proceed on the claims set forth therein against all the named defendants;

3. In the alternative, that Judge Young's 1997 order dismissing the Second Amended Complaint be set aside and this matter be allowed to proceed to trial at the very least on those limited issues; and

4. That Judge Young's order disqualifying Brian Steffensen as counsel be set aside to the extent that it disallows Brian Steffensen from acting as Thomas' counsel up until the point in trial.

DATED the 2nd day of November, 1998.

David W. Steffensen, P.C.
Steffensen ❖ McDonald ❖ Steffensen
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of November, _____, I caused two true and correct copies of the foregoing instrument to be ✓ mailed, postage prepaid; and/or hand-delivered by _____fax and/or by _____ courier; addressed to:

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CERTIFICATE OF MAILING OF APPELLANT'S REPLY BRIEF

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I hereby certify that on the 2nd day of November, 1998, I caused two true and correct copies of the **REPLY BRIEF OF APPELLANT** to be _X_ mailed, postage prepaid; and/or hand-delivered by _____fax and/or by _____ courier; addressed to:

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