

1998

Cache County v. Leo R. Beus, Annette Beus,
Malcolm C. Young, Alice H. Young, Charles M.
Young, John H. Young, William Horsely, and Susan
Horsely ("The Beus Group" : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CACHE COUNTY, a public politic,)	
)	
Plaintiff/Appellee,)	
)	
vs.)	
)	
LEO R. BEUS, ANNETTE BEUS, MALCOLM C. YOUNG, ALICE H. YOUNG, CHARLES M. YOUNG, JOHN H. YOUNG, WILLIAM HORSLEY, and SUSAN HORSLEY ("THE BEUS GROUP"),)	Case No. 980067-CA Trial Court No. 95 081 CV Judge Gordon J. Low
Defendants/Appellants.)	Priority No. 15

REPLY BRIEF OF APPELLANT

Appeal from a Judgment and Order of the
First Judicial District Court
Cache County, Utah
The Honorable Judge Gordon J. Low Presiding

UTAH COURT OF APPEALS
BRIEF

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COURT OF APPEALS

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Plaintiff/Appellee,)
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LEO R. BEUS, ANNETTE BEUS,)
MALCOLM C. YOUNG, ALICE H.) **Case No. 980067-CA**
YOUNG, CHARLES M. YOUNG,)
JOHN H. YOUNG, WILLIAM)
HORSLEY, and SUSAN HORSLEY) **Trial Court No. 95 081 CV**
("THE BEUS GROUP"),) **Judge Gordon J. Low**
)
Defendants/Appellants.) **Priority No. 15**

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ARGUMENT

I

RULE 56(C) OF THE UTAH RULES OF CIVIL PROCEDURE PREVENTS A TRIAL COURT FROM RENDERING JUDGMENT BASED ON ALLEGED FACTS THAT ARE NOT A PART OF THE TRIAL COURT RECORD.

In its Memorandum Decision of May 29, 1997, the trial court held that "general principles of equity demand that the consequences imposed on a defaulting party resulting from a breach not be disproportionate to the damages suffered by the non-defaulting party. See *Bellon v. Malnar*, 808 P.2d 1089, 1096 (Utah 1991) (forfeiture is inappropriate if "the forfeiture would be so 'grossly excessive' in relation to any realistic view of loss . . . that would so shock the conscience that a court of equity would refuse such forfeiture.")." *TR at 334 (Memorandum Decision, p.4)*.

The Beus Group argues in its Brief of Appellant that genuine issues of material fact remain unresolved as to the adverse consequences that Cache County will suffer if the Lease is terminated in proportion to the damages suffered by the Beus Group due to Cache County's default. (*Brief of Appellant, p.21*). Cache County argues in its Brief of Appellee, however, that the Beus Group "Now, for the first time, Defendant raises this ground

as a reason that summary judgment should not have issued. It is too late to raise this contention." (*Brief of Appellee, p.24*).

Pursuant to Rule 56(c) of the Utah Rules of Civil Procedure, "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Rule 56(c) of the Utah Rules of Civil Procedure.*

Cache County, however, asserts various alleged facts regarding the inequitable consequences of forfeiture in its Brief of Appellee that are not supported by any deposition, affidavit, or otherwise, contained in the trial court record as required by Rule 56(c), and upon which the trial court could have properly relied in rendering summary judgment in Cache County's favor.

Cache County contends that "According to Attorney Beus, the 1995 market rate was \$7,000.00 a month, \$78,000.00 a year more than the lease rate. (Motions for Summary Judgment Hearing Transcript, p.11)." (*Brief of Appellee, p.6*). Cache County relies on an oral statement made by Andrew Morse, attorney for Cache County, at the motion

hearing, that "Mr. Beus has invited us to negotiate this. He has told me that \$7,000 a month might be appropriate instead of the \$500." *TR at 369 (Transcript of Hearing, p.11, ln. 16-18).*

Cache County further contends that "Cellular One has threatened the County that it will sue for several hundred thousand dollars if the County is evicted and breaches Cellular One's sublease. (R. at 369; Transcript of Hearing on Summary Judgment Motions, pp. 11-12)." (*Brief of Appellee, p. 6*). In support of this contention, Cache County again relies on Attorney Morse's mere oral statements made at the hearing. *TR at 369 (Transcript of Hearing, pp.11-12, ln. 6-8).*

Cache County did not argue these points in its pleadings filed in support of its motion for summary judgment. *TR at 263 (Memorandum in Support of Motion for Summary Judgment; Statement of Undisputed Facts, pp. 2-4).* Further, there was no evidentiary or discovery documentation submitted by Cache County which supports either of the forgoing contentions. Such assertions should not have been relied on by the trial court, and should not now be relied on by this Court in finding that summary judgment was

appropriate pursuant to Rule 56(c) of the Utah Rules of Civil Procedure.

Moreover, with regards to the adverse consequences of forfeiture, the only evidence submitted was contained in Cache County's Rule 56(f) Affidavit, which was filed after the motion hearing and was later retracted. *TR at 317 (Rule 56(f) Affidavit); TR at 325 (Withdrawal of Memorandum and Affidavit)*. Cache County admitted in its Rule 56(f) Affidavit that "This evidence was not previously developed because the parties agreed to submit stipulated facts. The evidence only became relevant when the Court was concerned with evidence of the adverse consequences, penalties, and damages that a forfeiture would cause." *TR at 317 (Rule 56(f) Affidavit, p.2, para.4)*. Cache County further admits in its Brief of Appellee, that "the Beus Group presented no proof of any damage it suffered by getting the rent late." (*Brief of Appellee, p.8*).

It is clear, that there are genuine and material fact issues which remain unresolved in this matter concerning the adverse consequences of forfeiture suffered by Cache County in relation to the damages suffered by the Beus Group, which were not presented by either party in their respective motions and supportive pleadings and which were not made a part of the trial

court record or stipulated facts agreed to by the parties. Such evidence was not properly before the trial court.

Accordingly, the trial court committed error in granting Cache County's motion for summary judgment where genuine issues of material fact remain unresolved and where the trial court record was absent the necessary evidence upon which summary judgment could be granted in Cache County's favor as required by Rule 56(c) of the Utah Rules of Civil Procedure.

II

THE BEUS GROUP IS NOT REQUIRED TO MARSHAL ALL EVIDENCE AND SHOW AN ABUSE OF DISCRETION AS A CHALLENGE TO SUMMARY JUDGMENT PRESENTS CONCLUSIONS OF LAW ONLY AND DOES NOT RESOLVE FACTUAL ISSUES.

Cache County contends that the Beus Group has failed to marshal all the evidence supporting the trial court's decision to grant its motion for summary judgment and failed to show that the trial court abused its discretion. (*Brief of Appellee, p.27*). The appropriate standard of review for this appeal, however, is that "a challenge to summary judgment presents for review conclusions of law only, because, by definition, summary judgments do not resolve factual issues, this court reviews those conclusions for correctness, without according deference to the trial court's legal conclusions." Bonham v. Morgan, 788 P.2d 497, 499 (Utah 1989) (*citing Madsen v. Borthick*, 769 P.2d 245 (Utah 1988)).

With an award of summary judgment to Cache County, the trial court, rather than resolving issues of fact, made conclusions of law based on the parties' stipulated facts, which are reviewed by this Court for correctness. *Id.* Further, as argued above, there is no evidence contained in the trial court record, beyond Attorney Morse's oral assertions made at the motion hearing, to marshal regarding the adverse consequences that may be suffered by Cache County in the event of forfeiture of the Lease, beyond that which has been cited herein. Thus, the Beus Group is not required to marshal all evidence supporting the trial court's decision and show an abuse of discretion. The Beus Group is, however, required to show that Cache County was not entitled to an award of summary judgment as a matter of law pursuant to Rule 56(c) of the Utah Rules of Civil Procedure, as is argued herein and in the Brief of Appellant. *Rule 56(c) of the Utah Rules of Civil Procedure.*

In reviewing the trial court's grant of summary judgment, this Court must view the facts in the light most favorable to the Beus Group, the non-moving party. *Schnuphase v. Storehouse Markets*, 918 P.2d 476, 477 (Utah 1996).

CONCLUSION

For the reasons outlined above, and as argued in the Brief of Appellant, the trial court's decision granting Cache County

summary judgment should be reversed and the matter remanded for further consideration.

Dated this 15 day of October, 1998.

HILLYARD, ANDERSON & OLSEN, P.C.



BRIAN G. CANNELL
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(original signature)

CERTIFICATE OF MAILING

I hereby certify that two (2) true and correct copies of the foregoing REPLY BRIEF OF APPELLANT were mailed, postpaid, to the following this 15 day of October, 1998:

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