

1998

Todd Meeks, Plaintiff-Appellant, v. Gunlock Water Users Association, Inc., a Utah Non-Profit Corporation, et. al., Defendants-Appellees : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS DOCKET NO. 980086-CA

TODD MEEKS,)

Plaintiff/Appellant,)

v.)

Appellate No. 980086-CA

GUNLOCK WATER USERS)
ASSOCIATION, INC., a Utah)

Non-Profit Corporation, et. al.)
Defendants/Appellees.)

Argument Priority No. 15

APPELLANT'S REPLY BRIEF

Appeal from the Judgment and Orders of the District Court of the Fifth Judicial District,

the Honorable G. Rand Beacham, Presiding.

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Julia D'Alesandro
Clerk of the Court

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ARGUMENT

In determining whether the trial court correctly concluded that there was no genuine issue of material fact, the facts and inferences to be drawn therefrom should be viewed in the light most favorable to the losing party. Hamblin v. City of Clearfield, 795 P.2d 1133, 1135 (Utah 1990). The trial court refused to consider certain evidence presented in the form of an Affidavit and corporate minutes which controverted the material facts as submitted by the Defendant/Appellee, particularly with regard to their claims of where the service boundary was, the reasons for the Plaintiff/Appellant being denied his extra water request. The trial court also failed to consider the Defendants' admission in their Answer to the Amended Complaint that the Corporation was unincorporated for a period of time from September, 1992 to April, 1995. (R. 143,236).

Appellant conceded in oral argument before the trial court that Utah R. Civ. P. 23.1 partially applied to this case, during the period of time Appellant was a shareholder of the corporation, but that it did not apply during the period of time between September, 1992 and April 13, 1995, when the corporation was dissolved. (See R.426, Page 23, Lines 15-25.) The trial court erred in refusing to consider this even though it had been admitted by the Defendants/Appellees in their Answer to the Amended Complaint (See R. 236) and was a part of the record the Court should have considered prior to ruling on the Motion for Summary Judgment.

The argument is made that if the corporation was not in existence, no bylaws

breach. This would leave those who continued to pay their water fees and other corporate dues in limbo by not having those taking and managing the money not be responsible for their actions. This is clearly not the intent of U.C.A. 16-6-106, which makes individuals acting as a non-profit corporation personally liable for their actions.

This also is where the trial court erred by claiming in its Memorandum Opinion that Appellant had not provided any case law or citations about constructive trusts in the State of Utah. (See R.405.) As Appellees admit in their brief, “constructive trusts concerns an equitable remedy available to the courts to prevent unjust enrichment” and then cite a Utah case about it, In re Estate of Hock, 655 P.2d 1111 (Utah 1982). This is clearly an area which Appellant anticipated would be handled at trial. (See R.426, Page 23, Lines 5-14).

The trial court further ruled that Plaintiff/Appellant had presented evidence without proper foundational affidavits and refused to consider the corporate minutes. R.403. A close review of the Plaintiff's Affidavit (R. 372-276) shows that the Affidavit itself referred to the corporate minutes.

A more important element was that the Defendants/Appellees did not raise any objection to the evidence. Under Utah case law, this waives any objections, Howick v. Bank of Salt Lake, 498 P.2d 352, 353-354 (Utah 1972). The Trial Court erred in refusing to consider the Corporate Minutes as presenting issues of genuine material fact. The corporate minutes were referred to in the Plaintiff's Affidavit and no Motion to Strike the minutes was ever filed by Defendants.

Affidavits [and, by inference, other forms of evidence] which are defective (including their failure to be notarized) must be objected to on a Motion To Strike or the objections to them are deemed waived. D & L Supply v. Saurini, 775 P.2d 420, 421 (Utah 1989), *citing*, Norton v. Blackham, 669 P.2d 857, 859 (Utah 1983), Hobelman Motors, Inc. v. Allred, 685 P.2d 544, 546 (Utah 1984) (affidavit in opposition to motion for summary judgment not properly notarized, but objection waived where not timely made); and Franklin Fin. V. New Empire Dev. Co., 659 P.2d 1040, 1044 (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).

The disputed minutes affirm Plaintiff's claim that the Defendants were unclear as to why they twice denied his requests for additional water taps, that the Corporation had been dissolved during this time, that the Defendants did not know where the boundaries of their service area were (which was one of their alleged grounds for denial), that the Defendants knew they were not authorized to spend Corporate monies on fire protection, street lights and the donation of the trailer park. All of these claims are issues of fact which would be material to the Plaintiff proving his causes of action for Breach of Contract and Violation of Fiduciary Duty, as outlined in the Amended Complaint.

The issues described in the preceding paragraph raise issues of material fact regarding causes of action for Breach of Contract and Violation of Fiduciary Duty sufficient to

withstand Summary Judgment. The Defendants' Statement of Material Facts supporting their Motion for Summary Judgment merely shows specific instances of where the Defendants claimed to have acted the same way they did against Plaintiff; but it is unsupported by the reports of the Minutes submitted by the Plaintiff with regard to the reasons of rejection and the issue of the boundaries of the service area, as claimed by the Defendants in their supporting Affidavits to the Motion For Summary Judgment and which are directly contradicted by the Minutes submitted by Plaintiff and not objected to by Defendants.

It has been alleged that evidence was presented by oral argument for the Summary Judgment Motion. In fact, during that oral argument, Plaintiff's counsel demonstrated how the evidence set forth in the Exhibits and Affidavit showed that material facts existed which should be heard at trial (R. 422, 424-427).

CONCLUSION

In this matter, the trial court clearly failed to weigh the facts, inferences and the evidence upon which they were based in the light most favorable to the Appellant. Appellee's failure to object or file a Motion To Strike waived any such objections or inadmissibility. The Trial Court in this case clearly erred by failing to consider evidence which was not objected to by Defendants, by failing to properly consider that the evidence specifically created genuine issues of material fact with regard to the Causes of Action claimed by Plaintiff had been held. The issues of fact dealt specifically with claims made

by Defendants about the service area, the reason the Plaintiff's water requests were denied and the misuse of corporate funds and assets during the period of time the corporation was dissolved. The trial court specifically failed to hold the participants individually liable as required under Utah statute during the period of almost three years the corporation was dissolved.

The Trial Court also failed to appropriately rule on the record before it with regard to the issue of the dissolved status of the corporation, failure to properly state and evaluate the arguments of Plaintiff's counsel with regard to the applicability of shareholder derivative status and also failed to give any weight to Utah case law regarding constructive trusts or to give any weight to arguments from Plaintiff regarding the applicability of constructive trusts in this matter.

Based upon these clear errors, the Summary Judgment against Plaintiff should be overturned and the case remanded to the Trial Court for further proceedings.

DATED this 24 day of August, 1998.



TERRY L. HUTCHINSON,
SLEMBOSKI & HUTCHINSON, L.L.C.

CERTIFICATE OF MAILING

I hereby certify that I mailed a full, true and correct copy of the foregoing
APPELLANT'S REPLY BRIEF, first class postage prepaid on the 24 day of August,
1998, to the following:

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Secretary

CERTIFICATE OF MAILING

I hereby certify that I mailed two full, true and correct copies of the foregoing APPELLANT'S REPLY BRIEF, first class postage prepaid on the 24 day of August, 1998, to the following:

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