

2009

Express Recovery Services v. Monjazez : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

EXPRESS RECOVERY SERVICES	:	
INC., a Debt Collection Agency,	:	
	:	
Plaintiff/Appellee,	:	Case No. 20090014
	:	
vs.	:	District Court No. 080403156 DC
	:	
KARMAN MONJAZEB	:	
	:	
Defendant/Appellant.	:	
	:	
	:	
	:	
	:	

BRIEF OF APPELLEE EXPRESS RECOVERY SERVICES, INC.

**APPEAL FROM THE THIRD DISTRICT COURT, IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH,
JUDGE ROBERT ADKINS
(All parties contained in caption)**

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Statutes and Rules Cited

Utah Code Ann. § 78-2a-3 1

Rule 60(b)(3) of the Utah Rules of Civil Procedure 1

JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to *Utah Code Ann.* § 78-2a-3(2)(4) as this is an appeal of a final order of the Third District Court.

CONSTITUTIONAL PROVISIONS AND STATUTES

DETERMINATIVE OF APPEAL

Rule 60(b)(3) of the Utah Rules of Civil Procedure provides:

On motion and upon such terms as are just, the court may in furtherance of justice relieve a party. . . from a final judgment, order, or proceeding for the following reasons: (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party.

STATEMENT OF CASE

Express Recovery Services, Inc., (“Express”) brought this contract action against Kamran Monjazez (“Monjazez”) personally, doing business as A-A Better Roofing, for failure to pay for advertising services to Phone Directories Company, Inc. (“Directories”). Monjazez signed two contracts with Directories, one dated February 20, 2007, and the other dated February 7, 2006. Monjazez failed to pay for the services rendered by Directories and therefore legal proceedings were initiated. Monjazez filed a timely answer and subsequently Express filed an Amended Complaint because Monjazez made a partial payment after he was served the 10-day summons and complaint.

Monjazez did not answer the amended complaint. Express then filed a Motion for Summary Judgment. Monjazez filed a timely response stating “I Kamron Monjazez strongly disagree with the accusations [and] I have sufficient Documents to prove beyond doubt that

I DO NOT OWE ANY money to the Plaintiff.” (Emphasis in response). Monjazez failed to provide any affidavits or exhibits to his response. The Third District Court Judge Robert Adkins granted Summary Judgment to Express.

Monjazez filed a Motion to Set Aside the Judgment and for the first time alleged fraud, misrepresentation or misconduct pursuant to Utah Rule of Civil Procedure 60(b)(3). Monjazez stated for the first time that he inserted new terms to the 2006 contract. He alleges that the terms of the contract were changed and that Directories failed to comply with those terms. Monjazez has not alleged any defenses to the 2007 contract. His Motion to Set Aside was denied.

STATEMENT OF FACTS

1. Monjazez signed two contracts with Phone Directories (Addendum: Exhibit 1 and 2).
2. Monjazez failed to pay for the services rendered by Directories.
3. Monjazez has presented no defense for his failure to pay the 2007 contract with Directories.
4. Monjazez inserted new terms to the 2006 contract.
5. There is notation of any sort to indicate that Directories assented to the new terms or modification proposed by Monjazez.
6. Monjazez did not express any concerns with the 2006 contract and signed a new contract in 2007.

SUMMARY OF ARGUMENT

Monjazez signed two contracts with Directories and failed to pay for the services provided. Monjazez does not present any defense to the 2007 contract. As to the 2006 contract. Monjazez inserted new terms to the contract: “our Full page Ad must be the 1st or 2nd (only after Kimbal[1] roofing) per Kim Blomseth or void the whole thing, with full refund.” Directories published the 2006 ad and the Monjazez’s ad was placed in the 3rd position behind Kimball Roofing.

ARGUMENT

I. MONJAZEB HAS PRESENTED NO DEFENSE TO THE 2007 CONTRACT WITH DIRECTORIES

Monjazez signed a contract in 2007 for services with Directories. Monjazez has not paid Directories for that service. Monjazez has not presented any objection, defense, or any reason whatsoever for his refusal to pay for the 2007 service. Therefore the trial courts summary judgment should be affirmed as to the amounts owed on the 2007 contract.

II. MONJAZEB’S ATTEMPT TO CHANGE THE TERMS OF THE 2006 CONTRACT WAS NOT ASSENTED TO BY DIRECTORIES

Monjazez altered the Advertising Contract by inserting new terms to the contract. Monjazez inserted, “our Full page Ad must be the 1st or 2nd (only after Kimbal roofing) per Kim Blomseth or void the whole thing with full refund.”

This modification requires assent on the part of Directories. “Parties to a contract may, by mutual consent, modify any or all of the contract.” *Pasker, Gould, Ames & Weaver,*

Inc., v. Morse, 887 P.2d 872, 877 (Utah Ct. App. 1994). “A valid modification of a contract . . . requires ‘a meeting of the minds of the parties, . . .’ ” *Richard Barton Enters., Inc. v. Tsern*, 928 P.2d 368, 373 (Utah 1996) (quoting *Valcarce v. Bitters*, 12 Utah 61, 362 P.2d 427, 428 (1961)). The parties had a valid contract for a full page ad in the 2006 phone directory. Directories performed and Monjazez failed to pay.

A valid modification requires the same meeting of minds as is necessary to make the contract in the first place. *Scott v. Majors*, 1999 UT App 139, ¶ 16, 980 P.2d 214. Here there was no meeting of the minds, no mutual consent, and therefore no valid modification. It is clear Directories did not assent to the modification in that its performance (the publishing Monjazez’s ad) did not place the ad in the 1st or 2nd position behind Kimball Roofing. See *Novell, Inc., v. Canopy Group, Inc.*, 2004 Utah App 162; 92 P.3d 768. Further, there is no indication or notation signed or initialed by Directories that they assented to the new terms presented by Monjazez.

Paragraph 1, Terms and Conditions of the Advertising Contract between Monjazez and Directories states in relevant part: “Neither party shall be bound by any special arrangements contrary to or in addition to the terms and conditions as stated herein or written hereon, and no agent or employee of the Publisher has the authority to vary any terms of this application.” Therefore, the Terms and Conditions specifically prohibit Monjazez’s modification of the contract. Clearly, parties to a written contract may modify any or all of the contract, even if the contract has a provision that prohibits said modification, provided

there is “mutual consent.” *Softsolutions, Inc., v. Brigham Young University*, 2000 UT 46 ¶ 34; 1 P.3d 1095. Directories denies any mutual consent in our present case.

Monjazez accepted the benefits of the 2006 ad and failed to express any displeasure or reservation until his Motion to Set Aside Judgment. This is the first time Monjazez notes that his ad was not in the position he alleged was promised. Not only did Monjazez fail to object to the placement of his 2006 advertisement, he signed a new contract for the 2007 directory.

Clearly, if Monjazez believed he had a defense to paying the 2006 contract, he would have mentioned this prior to entering into a new contract. His inaction constitutes a waiver of any defense he may have asserted. *Continental Ins. Co. v. Kingston*, 2005 UT App 233, ¶¶ 10-14; 114 P.3d 1158. It is worth noting that the placement of the Kimball Roofing advertisement appeared on page 807 of the directory and the A-A Better Roofing advertisement appeared on page 810; one page behind the requested placement.

This court may affirm the summary judgment awarded to Plaintiff on any legal ground or theory, even though not raised in the lower court. *Ivie v. Hickman*, 2004 UT App 469, ¶ 8; 105 P.3d 946. The 2006 contract with the insertions and attempted modification by Monjazez may be affirmed through unjust enrichment or quantum meruit. Monjazez requested Directories publish his full page ad in the 2006 directory; Directories expected to be paid by Monjazez; and Monjazez knew that Directories expected payment for the publication. *Uhrhahn Const. & Design v. Hopkins*, 2008 UT App 41; 179 P.3d 808. With

all of the elements of a quantum meruit claim present, this Court may affirm the trial court's summary judgment on that ground.

CONCLUSION

The summary judgment awarded Express should be affirmed. There is no question that Monjazez owes Directories for the 2007 contract. As to the 2006 contract, this court may affirm the summary judgment awarded to Plaintiff on any legal ground or theory, even though not raised in the lower court. Therefore, even though summary judgment was based partially on the 2006 contract that did not have the language inserted by Monjazez, this Court may still affirm on an unjust enrichment or quantum meruit theory.

DATED this ____ day of October, 2009.

Samuel S. McHenry
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of October, 2009, I caused to be mailed via U.S. Mail, postage prepaid, a true and correct copy of the foregoing **BRIEF OF APPELLEE EXPRESS RECOVERY SERVICES** to the following:

Jay L. Kessler
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Magna, Utah 84044

Attorney for Appellant

ADDENDUM

Exhibit A- 2006 Contract between Monjazebe and Phone Directories

Exhibit B- 2007 Contract between Monjazebe and Phone Directories

Exhibit C- Invoice for 2006 Contract.

Exhibit D- Invoice for 2007 Contract.

EXHIBIT A

EXHIBIT B

EXHIBIT C

EXHIBIT D