2009

CST Financial v. McCabe : Brief of Appellant

Utah Court of Appeals

Dusten Heugly; attorney for appellee.
Gary Buhler; attorney for appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

CST FINANCIAL SERVICES, LLC Plaintiff and Appellee, Vs. MIKE MCCABE, individually, MIKE MCCABE TRUCKING, BILL STRICKLAND, individually and STRICKLY TRUCKIN INC. Defendants and Appellant	Appellate Court No20090392-CA Trial Court No. 050909240

BRIEF OF APPELLANT

This is an appeal from the final order granting the plaintiff's motion for summary judgment issued by the Honorable L. A. Dever, Third Judicial District Court, in and for Salt Lake County, Utah, entered in this matter on April 15, 2099.

The parties involved in the appeal are Strickly Truckin Inc., Appellant and one of three original defendants and CST Financial Services, LLC the plaintiff and Appellee.

Mike McCabe, individually, Mike McCabe Trucking, and Bill Strickland, individually as the remaining defendants at trial are not involved with this appeal.

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LIST OF ALL PARTIES

CST FINANCIAL SERVICES, LLC;	Plaintiff and Appellee
MIKE MCCABE, individually;	Defendant
MIKE MCCABE TRUCKING;	Defendant
BILL STRICKLAND, individually;	Defendant - - Dismissed
STRICKLY TRUCKIN INC.;	Defendant and Appellant

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JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann §78A-3-102 and §78A-4-103 which placed the matter before the Supreme Court of the State of Utah, and the Order dated May 13, 2009 which transferred the matter from the Utah Supreme Court to the Utah Court of Appeals for disposition pursuant to Rule 42(a) of the Utah Rules of Appellate Procedure as of June 3, 2009.

STATEMENT OF THE ISSUES and STANDARD OF REVIEW

ISSUE ONE: Did the trial court deny the defendant Strickly Truckin Inc., its constitutional right to a have remedy without unnecessary delay by (1) failing to rule upon Strickly's Rule 12(b)(6) Motion to Dismiss for more than 1,270 days after it was filed with the Court;

(2) by allowing the plaintiff CST more than 90 days after the court entered the default judgement against CST for CST to file its Memorandum in Support of Motion to Set Aside Default Certificate, although it never filed any Motion to Set Aside Default Certificate; (3) by allowing the plaintiff CST more than 100 days after the November 2006 hearing to serve Strickly with the proposed findings and order to set aside the default judgement although the plaintiff never filed the proposed findings and order with the court; (4) by allowing the plaintiff CST 830 days, after the court set aside the default judgement against CST, to file its Memorandum of Points and Authorities Concerning Strickly's 12(b)(6) Motion to Dismiss with the court.

Standard of review: We review a district court's decision to dismiss a cause of action under Utah Rule of Civil Procedure 12(b)(6) for correctness. *E.g., Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 9, 104 P.3d 1226.

Determinative law: Utah Constitution Art. I; Section 11, [Courts open - Redress of injuries] All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay.

ISSUE TWO: Did the court make a correct decision by denying Strickly's 12(b)(6) motion without making any findings that supported the ruling that CST had sufficiently stated its claims of Breach of Contract and Fraud, where Strickly claimed

there was no valid allegation of the formation of a contract supported by consideration between CST and Strickly made in CST's complaint. Without a contract between CST and Strickly, there could be no Fraud by Strickly.

Standard of review: We review a district court's decision to dismiss a cause of action under Utah Rule of Civil Procedure 12(b)(6) for correctness. *E.g., Oakwood Vill. LLC v. Albertsons, Inc.,* 2004 UT 101, ¶ 9, 104 P.3d 1226. "[W]e accept the factual allegations in the complaint as true and interpret those facts and all inferences drawn from them in the light most favorable the non-moving party." Id.

Determinative law: Rule 12(b)(6) of the Utah Rules of Civil Procedure.

Hermansen v. Tasulis, 2002 UT 52, P 24, 48 P.3d 235

> In order to establish fraudulent concealment, "a plaintiff must prove the following three elements: (1) the nondisclosed information is material, (2) the nondisclosed information is known to the party failing to disclose, and (3) there is a legal duty to communicate."

Copper State Leasing, 770 P.2d 88 at 91 (citing *General Ins. Co. of Am. v. Carnicero Dynasty Corp.,* 545 P.2d 502, 504 (Utah 1976)).

"If there is no consideration, there is no contract." "Consideration is an act or promise, bargained for and given in exchange for a promise. . . . For the mutual promises of the parties to a bilateral contract to constitute the consideration for each other, the promises must be binding on both parties."

ISSUE THREE: Did the court correctly conclude that CST was entitled to a Summary Judgment against Strickly when it interpreted the CST/McCabe Factoring

Agreement to be a contract binding upon Strickly that required Strickly to pay CST amounts in excess of what it owed to McCabe under the preexisting lease agreement between Strickly and McCabe and when it entered summary judgment in favor of CST based upon a contractual obligation of Strickly to CST, without making any specific findings for the basis of the contractual obligation or the terms of the contract and where other than *"implied consideration*" no consideration between the parties was ever alleged by CST.

Standard of review: Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Crestwood Cove Apartments Bus. Trust v. Turner*, 2007 UT 48, 1110, 164 P.3d 1247 (internal quotation marks omitted). When reviewing a grant of summary judgment, we review the district court's conclusions of law for correctness and give them no deference. *Grappendorf v. Pleasant Grove City,* 2007 UT 84, ¶ 5, 173 P.3d 166; *Blackner v. State,* 2002 UT 44, ¶ 8, 48 P.3d 949. We review the facts in the light most favorable to the nonmoving party, and make any reasonable inferences in their favor. *Johnson v. Hermes Assocs.,* 2005 UT 82, ¶ 2, 128 P.3d 1151. The appellate Court reviews the trial Court's interpretation of a contact for correctness, giving no deference to the trial Court. *Sackler v. Savin,* 897 P.2d 1217, 1220 (Utah 1995).

Determinative law: "If there is no consideration, there is no contract." *Copper State Leasing,* 770 P.2d 88 at 91 (citing *General Ins. Co. of Am. v. Carnicero Dynasty Corp.,* 545 P.2d 502, 504 (Utah 1976)). "Consideration is an act or promise, bargained

for and given in exchange for a promise. . . . For the mutual promises of the parties to a bilateral contract to constitute the consideration for each other, the promises must be binding on both parties."

CONSTITUTIONAL PROVISIONS AND CIVIL PROCEDURE RULES

Utah Constitution Art. I; Section 11, [Courts open -Redress of injuries]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself, or counsel, any civil cause to which he is a party. 1896.

URCP Rule 6. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day that is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed, without reference to any additional time provided under subsection (e), is less

than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

Rule 7. Pleadings allowed;

(c)(1) Memoranda required, exceptions, filing times. Within ten days after service of the motion and supporting memorandum, a party opposing the motion shall file a memorandum in opposition.

(f)(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

STATEMENT OF THE CASE
TO INCLUDE RELEVANT FACTS

This is an action brought by a factoring company to recover moneys that were advanced to a semi truck owner/operator under a factoring agreement, but that were not paid in full by the person to whom the advances were made nor by the trucking company for whom the owner/operator had been performing services under a Lease agreement. When the owner/operator quit working for the trucking company, they reconciled the accounts due to, and from the owner/operator and found he had been overpaid by about $17,000.00. At that time, the trucking company stopped paying any further invoices from the factoring company and asked for a refund of the money they had paid to the factoring company but that was not owing to the owner/operator.

On May 20, 2005 the factoring company filed this breach of contract action alleging breach of contract and fraud against the owner/operator and the trucking company. On June 8, 2005, the trucking company served the factoring company with its 12(b)(6) motion to dismiss the action against it along with a supporting memorandum. On January 9, 2009, CST filed its Motion for Summary Judgment and Request for Oral Argument along with a supporting memorandum and the Affidavit of Karla Harris. On April 15, 2009, the court entered its minute entry wherein it denied the trucking company's 12(b)(6) motion and granted CST's Motion for Summary Judgment and stated that "*This entry stands as the Order of the Court. No further order is*

required." It is from this order that the trucking company appeals to the Court of Appeals.

FACTS

Strickly Truckin, Inc., is a small family owned trucking company located in and operating from Grantsville Utah with Tracy Strickland serving as the company's president and bookkeeper while her husband William Strickland drives and performs as the general operations manager. While the company owns a few vehicles and has a few employees, many of its operating trucks are owned by owner-operators who lease their personally owned trucks to Strickly Truckin along with their personal services as the operators for those leased trucks.

Strickly/McCabe Lease of 2003

The Defendant Mike McCabe was one such owner/operator who entered into a Temporary Lease agreement with Strickly on September 12, 2003. As with all other leases made by Strickly, the Strickly/McCabe Lease required Strickly to pay McCabe for his labor and use of his equipment in exchange for McCabe using his equipment to haul loads for Strickly. Under the terms of the Lease, McCabe was solely responsible for all expenses related to the operation and repair of his personally owned truck. (Addendum 1; Temporary Lease; ¶6, 7)

By mutual agreement, Strickly allowed McCabe to use its credit resources to purchase the fuel, repairs, supplies, and services required by McCabe's trucking operations. All such costs due reimbursement to Strickly from McCabe were authorized by the Lease to be, and were, routinely deducted from the compensation paid to McCabe before the checks for the balance were issued to McCabe. (Addendum 1, ¶5)

Until January 2004, McCabe would submit an invoice to Strickly for the work completed at the end of each project and Strickly would deduct the expenses it had previously paid to the benefit of McCabe from the amounts due under the current invoice. As required by the Lease, Strickly would then issue a check to McCabe for the remaining balance due for the given project. Under this Lease, Strickly was obligated to pay no more than the agreed price for the work completed by McCabe, less all deductions for the credit extended by Strickly to McCabe for expenses previously incurred by McCabe.

McCabe/CST Factoring Agreement

In January 2004, Strickly received an unsolicited Letter by Fax from the plaintiff CST Financial Services, concerning the assignment of McCabe's accounts receivables to CST. (Addendum 2; CST Letter)

Although the document contained incomplete and nonsensical sentences, such as a reference in the third paragraph to some unknown document that was supposedly signed by CST's Agent and notarized but was not attached, Tracy Strickland understood the "Letter" to be a notice of McCabe's assignment to CST of his accounts receivable and a request that Strickly mail the money Strickly owed to McCabe for work completed, less the normal deductions for McCabe's expenses, made payable to CST rather than to McCabe.

The "Letter" said nothing about any compensation from CST for the extra services requested of Strickly. The "Letter" said nothing whatsoever about Strickly somehow becoming contractually obligated to pay any amount more than that which

was actually due to McCabe after all applicable deductions for credit provided to McCabe by Strickly had been made.

Before Tracy signed the letter acknowledging that Strickly would mail the money actually due from Strickly to McCabe to CST, as requested in the fourth paragraph, she confirmed with McCabe that he had made a factoring agreement with CST.

Because McCabe, had asked Strickly to forward the balance of the payments due to him after all allowable deductions had been subtracted to CST at the address requested in the letter, Strickly began making the payments due to McCabe to CST.

At that time, McCabe began to submit his invoices to CST rather than to Strickly and CST would place their sticker on the McCabe invoice and rubber stamp it with mailing instructions for the payment. Over time, CST submitted several invoices to Strickly as demand for payment and Strickly paid said invoices from CST for McCabe's work upon receipt based upon the invoices received from CST. During the period from January 2004 until August 2004, Strickly received invoices from CST claiming it was due the total gross amount of $68,661.39 less deductions for fuel and the broker's 10% fee in the total net amount due of $51,793.25. [Rec Index Pg 161] During that period, Strickly paid CST $38,379.84 based upon the invoices it had received from CST less the expense deductions. [Rec Index Pg 161]

Expense reimbursement due to Strickly from McCabe

In May, 2004, McCabe needed a major repair to the engine of his truck in order to keep operating. With McCabe's acknowledgement that Strickly was entitled to regain all of the advanced money as provided in the Lease, to be taken as deductions from the compensation due to McCabe for his future services, Strickly agreed to advance

McCabe the $13,178.01 necessary to pay for the repair of his truck's engine and thereafter made arrangements with the repair company to pay the repair bill over time. (Addendum 10; Seagull Repair Bill showing Strickly payment schedule) Over the following five month period, Strickly paid the full amount of the repair bill to the repair shop as agreed.

Because the $13,000 could not be deducted from McCabe all at one time, both Strickly and McCabe agreed that Strickly would deduct the repair expenses from McCabe's invoices at the monthly rate of $3,000.00 as soon as McCabe could better afford the monthly deductions.

In July 2004, Strickly received an invoice from CST (Addendum 3; Invoice from CST to Strickly #3215 dated 7/12/2004) that showed the first $3,000.00 monthly deduction for the $13,000 engine repair as allowed by the Lease and as required by the subsequent monthly payment agreement between Strickly and McCabe.

In August 2004, Strickly received an invoice from CST (Addendum 4; Invoice from CST to Strickly #3381 dated 8/13/2004) that showed the second $3,000.00 deduction for the $13,178.01 engine repair.

Although it was CST that sent the two invoices showing deductions for engine repair to Strickly, in paragraph 28 on page 33 of the Harris Affidavit made in support of CST's MSJ Memorandum [Rec Index Pg 201], CST claimed as its first notice of the debt due to Strickly from McCabe that **only after McCabe quit work** did CST receive a $13,718.01 invoice for repairs to McCabe's truck engine.

In late August 2004, without prior notice, McCabe abandoned the Lease. Prior to the time McCabe abandoned the Lease, Strickly was only able to collect a total of

$6,000.00 of the $13,178.01 owed by McCabe to Strickly for the engine repair via deductions from the CST invoices leaving a balance of $7,178.01 due from McCabe to Strickly for the engine repair. [Rec Index Pg 202]

Once it was discovered that McCabe had abandoned the Lease, Strickly stopped any further payments to CST pending a reconciliation of McCabe's accounts. Strickly then conducted a complete review of all prior fuel, repair, and service invoices it had received from McCabe, to include the actual job documents going back to September 2003 as well as the invoices received from CST after January 2004.

That reconciliation of McCabe's accounts revealed that, in addition to the unpaid balance of $7,178.01 for the engine repair, McCabe owed Strickly a total of $9,543.46 for various other repairs and expenses due under the terms of the Lease agreement. (Addendum 5; Summary of McCabe's unpaid expenses) The review also showed CST had not deducted $357.75 for the Broker's fee in one of its invoices as required by the Lease. (Addendum 6, CST Invoice #3283)

Upon completion, the review of the McCabe/CST accounts determined that at the time he abandoned the Lease, altogether McCabe owed Strickly $17,261.47 for expenses Strickly had incurred by McCabe's use of Strickly's credit. Because Strickly had already paid CST $38,379.84 towards the invoices received from CST, while CST was claiming McCabe and/or Strickly still owed it $13,055.66 for payments it had advanced to McCabe, the overall result was that Strickly had overpaid CST/McCabe $4,205.81.

Strickly informed CST of this overpayment and demanded a refund in that amount from CST.

The Complaint

On May 20, 2005, instead of reimbursing Strickly for the overpayment it had received from Strickly based upon the invoices it had sent to Strickly, CST filed the complaint in this matter alleging in paragraph #33 [Rec Index Pg 5] that Strickly (Broker) had breached a contract with CST by not paying it the $8,655.96 CST had demanded from McCabe and from Strickly and also alleging in paragraph #14 that Strickly (Broker) had failed to notify CST of the engine repair and that the repair was not reflected on the bills submitted by CST to Strickly thus causing CST to overpay McCabe. In paragraph #14 of its Complaint [Rec Index Pg 3], CST also stated that *". . . CST advanced Trucker more money on the bill submitted by Trucker than Broker actually owed CST and Trucker*."

CST claims, in paragraph #39 and 41 of its complaint [Rec Index Pg 6], that Strickly committed a fraud upon CST because Strickly (Broker) failed to notify CST that the bills submitted by CST [to Strickly] did not reflect the repairs done to McCabe's truck. CST's claim that before he quit, it did not know of the engine repair and therefore overpaid McCabe, was a material misrepresentation made by CST to the Court. The July 12, 2004 invoice to Strickly from CST (Addendum 3) clearly showed the first $3,000.00 deduction for the $13,000 engine repair due to Strickly as did the August 13, 2004 invoice to Strickly from CST (Addendum 4).

The falsity of the claim that CST had no knowledge of the engine repair thereby overpaying McCabe can also be seen in exhibits 22 [Rec Index Pg 460] and 24 [Rec Index Pg 503] to CST's Motion for Summary Judgment wherein CST provided the Court with McCabe's July and August invoices to CST which both clearly show the first two

$3,000.00 deductions for the engine repair. (Addendum 7 & 8; July and August invoices with deductions for engine repair)

Although CST correctly stated in paragraph 9 of its complaint [Rec Index Pg 2] that Strickly was to send "*all payments* ***otherwise due*** *Trucker directly to CST*," and in paragraph #27 of its complaint [Rec Index Pg 4] that Strickly's obligations to pay anyone were limited to payment for the work done by McCabe for Strickly, CST never stated any allegation that Strickly owed any money to McCabe other than what had been previously paid by Strickly to McCabe's benefit.

The Proceedings

On May 27, 2005 Strickly was served the CST summons and complaint.

On June 8, 2005 Strickly served CST with its 12(b)(6) motion to dismiss the action against Strickly Truckin Inc., along with a supporting memorandum.

On June 14, 2005 Strickly filed its motion and supporting memorandum with the court. In the supporting memorandum, Strickly stated its position to be that CST's Second cause of action for breach of contract, as stated against Strickly, was legally deficient and therefore should be dismissed because, in its complaint, CST had failed to make any allegation whatsoever that there had ever been any consideration that could be deemed to be sufficient to support the formation of a contract between CST and Strickly, citing *Copper State Leasing,* 770 P.2d 88 at 91 "*If there is no consideration, there is no contract.*"). Strickly also cited to *General Ins. Co. of Am. v. Carnicero Dynasty Corp.,* 545 P.2d 502, 504 (Utah 1976). "*Consideration is an act or promise, bargained for and given in exchange for a promise. . . . For the mutual*

promises of the parties to a bilateral contract to constitute the consideration for each other, the promises must be binding on both parties."

Strickly's stated position was also that CST's Third cause of action for fraud, as stated against Strickly, was legally deficient and therefore should be dismissed because in its complaint, CST (1) had failed to allege any fact that could conceivably establish Strickly had a contractual or any other legal duty to report to CST that CST's bills to Strickly did not reflect a previous repair to McCabe's truck and (2) that CST had failed to allege any fact that could establish Strickly knew of, but did not disclose, the material fact that CST's bills to Strickly did not reflect a repair to McCabe's truck; citing *Hermansen v. Tasulis,* 2002 UT 52, P 24, 48 P.3d 235; "*In order to establish fraudulent concealment, "a plaintiff must prove the following three elements: (1) the nondisclosed information is material, (2) the nondisclosed information is known to the party failing to disclose, and (3) there is a legal duty to communicate."*

On June 24, 2005, 16 days after it served CST with its 12(b)(6) motion, Strickly filed a notice to submit its motion for decision with the court.

On June 27, 2005, 19 days after Strickly served CST with its 12(b)(6) motion dismiss, the court granted the motion.

On June 30, 2005, 22 days after Strickly served CST with the 12(b)(6) motion, although the URCP require a response within 10 days, CST filed its response to the 12(b)(6) motion with the court along with an unsigned "Affidavit of Karla Harris" dated June 27, 2005. In the first paragraph on page 2 of that response [Rec Index Pg 28], CST cites the Harris affidavit to establish *"In that there are numerous agreements*

between the parties, consideration was given and that Plaintiff is not required to specifically allege consideration." In paragraph #4 on page 3 of that response [Rec Index Pg 29], CST claims it had alleged consideration between itself and Strickly in its complaint "*by implication*." In the second paragraph of the argument on page 5 of CST's response [Rec Index Pg 31], CST cites URCP Rule 12 to support its argument that Strickly's motion to dismiss should have been treated by the court as a motion for summary judgment.

On July 11, 2005 Strickly filed a "Clarification of Entry of Order to Dismiss" with the court giving the court notice that its "notice to submit" had erroneously stated June 27th rather than the correct date of June 28th as the day its motion would be ready for decision. However, by that time, the Court had already entered the order.

On October 3, 2005, 98 days after the court entered the order to dismiss after default, CST filed its Memorandum in Support of Motion to Set Aside Default Certificate, although it never filed any Motion to Set Aside Default Certificate. In the first paragraph on page 4 of the Memorandum [Rec Index Pg 58], CST admits it was required to respond to the 12(b)(6) motion no later than June 27, 2005. Along with the Memorandum, CST's counsel filed his Affidavit of Plaintiff's Attorney Dusten L. Heugly, where, in paragraph #8 [Rec Index Pg 66], he claimed under oath that he had filed his Response to the Motion to Dismiss in a timely manner because "*the Court had allowed me to fax the pleading . . .*"

On October 5, 2005 Strickly served CST with its Memorandum in Opposition to Motion to Set Aside Default Certificate and filed the same with the court on October 7,

2005. In that filing, Strickly reminded the court that CST had failed to comply with URCP Rule 7(c)(1) when it filed a supporting memorandum but failed to file the supported motion and that CST had violated URCP Rule 60(b) in that the relied upon portion of the Rule required CST to file its motion "*not more than three months after*" the entry of the objectionable order, but that more than three months had actually past between June 27, 2005 and October 3, 2005, when CST did finally file its Memorandum with the court.

On October 17, 2005, CST filed its Response to Memorandum in Opposition to Motion to Set Aside Default Certificate. In the second full paragraph on page 3 of the response [Rec Index Pg 74], CST claimed that "T*he Court should set aside the Default based upon subsection 6 [of URCP Rule 60(b)] because of Strickly's failure to abide standards of conduct and Rules of Civility and Professionalism."*

On November 14, 2006, the court heard the parties' oral arguments concerning CST's Motion to Set Aside the Default Certificate. At the hearing, CST's counsel admitted that he knew the due date for his response was June 27, 2005 [Rec Index Pg 603 Tr. 3 Line 1 –2]. CST also admitted that even if the court had signed the order to dismiss on June 28, 2005 as he claimed was proper, rather than on the day earlier, his response was still not timely as it had not been filed until June 30, 2005. [Rec Index Pg 603 Tr. 6 Line 9 – 19]

When CST's counsel tried to convince the court that he had actually filed the response and the Harris affidavit by fax on June 27, 2005, the court noted that the Harris affidavit had not been signed until June 30, 2005. [Rec Index Pg 603 Tr. 23 Line

9 – 19] CST's counsel then explained that he had always filed his pleadings supported by unsigned affidavits. [Rec Index Pg 603 Tr. 23 Line 14 – 22]

At the conclusion of argument, the court stated that it would be appropriate to allow the plaintiff his day in court and set aside the order to dismiss. However, the court also awarded Strickly $750.00 as reasonable attorney's fees "for having to appear and having to go through this." [Rec Index Pg 603 Tr. 24 Line 5 – 17]

On March 3, 2006, more than 260 days after it served CST with its 12(b)(6) motion, and over 105 days after the November hearing, Strickly was served with CST's proposed findings and order to set aside the default judgement, although CST never filed its proposed findings and order with the court. (Addendum 9; Proposed Order)

On March 8, 2006, Strickly filed its memorandum in opposition to plaintiff's proposed findings of fact and order wherein Strickly complained that CST had failed to comply with URCP Rule 7(f)(2) which required the prevailing party to serve the proposed order upon the other parties within 15 days after the court's decision unless otherwise directed by the Court. Strickly also complained that the findings stated in CST's proposed findings were never stated by the Court as its findings, thus the proposed order did not accurately reflect the findings of the court and that the order made no mention whatsoever of the defendant's' arguments on such issues as URCP Rule 61: Harmless Error.

On April 24, 2006 in response to Strickly's Notice to Submit filed on April 14, 2006, the court entered a minute entry and its own "Order Setting Aside Dismissal."

On July 20, 2006 Strickly received CST's Request for Decision which was filed with the Court on July 25, 2006, requesting the court to issue a decision following payment of the required $750.00 to Strickly.

On July 31, 2006, the Court entered a second minute entry granting CST's Motion to Set Aside Default.

On October 13, 2006 Strickly served CST with, and filed its answer, cross claim, and counter claim with the court, wherein Strickly alleged that (1) CST submitted several invoices for McCabe's work to Strickly which paid said invoices from CST upon receipt; (2) an accounting of said invoices subsequent to McCabe abandoning the Lease revealed that CST had failed to properly make the deductions required by the Lease between Strickly and McCabe in a total amount of no less than $4,205.81; and (3) such overpayment to CST was directly and proximately caused by CST's negligent miscalculation of the amounts due to it and the submission of overcharged invoices to Strickly.

In the Counterclaim, Strickly demanded that CST return to it the $4, 205.81 Strickly had overpaid to CST and also demanded that McCabe repay Strickly the $7,718.00 he still owed for his truck engine repair.

On October 30, 2006 CST answered Strickly's complaint. Other than to admit Strickly and McCabe entered into a lease agreement in 2003 and that subsequent to that lease, CST and McCabe entered into a factoring agreement, CST denied all of Strickly's allegations and listed 23 affirmative defenses.

Other than the filing of Strickly's counterclaim, cross claim and the subsequent answers, as of this date no further court proceedings have occurred to resolve the

issues raised by these pleadings.

On March 26, 2007 the plaintiff made discovery requests to the appellant which were answered on April 24 and May 18, 2007.

On November 11, 2008, the court issued an Order to Show Cause requiring the parties to appear on January 2, 2009 and show cause why this case should not be dismissed for lack of activity.

On January 9, 2009, CST filed its Motion for Summary Judgment and Request for Oral Argument along with a three inch thick supporting memorandum with several hundred pages of exhibits and the Affidavit of Karla Harris dated December 9, 2008.

On page two of the 44 page memorandum. [Rec Index Pg 126], CST states that because Strickly had signed a form letter acknowledging that Strickly would send all payments owed to McCabe directly to CST and because McCabe had not reimbursed CST for the money McCabe had been overpaid, CST was entitled to judgment against Strickly and McCabe. However, nowhere in the 44 pages does CST acknowledge that Strickly had actually overpaid McCabe for work preformed for Strickly after the deductions allowed by the Lease were subtracted from his invoices.

The memorandum also fails to acknowledge the counter claim Strickly has filed against CST for those amounts still due and owed to Strickly by McCabe but that were previously paid to CST, all of which have priority for payment over any amounts due to CST from any party.

In that memorandum and the supporting affidavit [Rec Index Pg 162], CST also claims to have incurred $14,000.00 in legal fees in its effort to collect $5,695.31 from Strickly and McCabe.

On January 16, 2009, Strickly served CST with its Memorandum in opposition to CST's Motion for Summary Judgment accompanied by the affidavit of Tracy Strickland and its Notice to submit for decision defendant's motion to dismiss for failure to state a claim or in the alternative for change of venue.

On January 20, 2009, because it had never received any ruling on its 12(b)(6) motion which was originally filed with the Court some 1,235 days earlier, Strickly filed its Notice to submit for decision on its 12(b)(6) motion.

On January 20, 2009, Strickly also filed its memorandum in opposition to CST's Motion for Summary Judgment accompanied by the affidavit of Tracy Strickland.

The statement made by Tracy Strickland in paragraph #12 of this affidavit [Rec Index Pg 565], "*at the time Mike McCabe stopped working with Strickly Truckin he had been overpaid by several thousand dollars. Therefore, McCabe owes Strickly Truckin $4,205.81, not the other way around*" has never been disputed by CST. The statement made by Tracy in paragraph #14 [Rec Index Pg 565], that "*In the complaint, CST admits in paragraph #14 that McCabe actually received more money than he was owed by Strickly Truckin."* has never been disputed and was admitted by CST in paragraph #9 of its response to Strickly's Memorandum in opposition to CST's MSJ. [Rec Index Pg 574]

On February 17, 2009, although the rules allow 5 days, 32 days after CST was served with the memorandum in opposition to its MSJ, CST filed with the court its response to Strickly's Memorandum in opposition to CST's MSJ along with a Notice to submit the MSJ for decision. In the last two sentences of paragraph #4 of that

response[Rec Index Pg 571], CST stated that it was uncontroverted and thus deemed admitted that under the terms of the form letter signed by Tracy Strickland (Addendum 2) Strickly was required "*to send payments for the debt they owed McCabe."* However, in paragraph #14 of its complaint, CST admits that McCabe actually received more money than he was owed by Strickly.

In paragraph #11 of its Response [Rec Index Pg 574-575], CST cites UCA **70A-9a-406** to state that "*once an account debtor (Strickly in this case) receives proper notification that the account has been assigned, the only way to pay off that obligation is to pay the assignee (CST Financial). No consideration is needed to make a valid assignment*." [Rec Index Pg 573]

On February 20, 2009, Strickly filed its Second Notice to submit for decision its 12(b)(6) motion to dismiss.

On February 23, 2009, 1,273 days after Strickly first filed its Motion to Dismiss for failure to state a claim and 830 days after the court set aside CST's default dismissal, CST filed its Memorandum of Points and Authorities Concerning Strickly's Motion to Dismiss with the court.

On March 31, 2009 Strickly filed its Third Notice to submit for decision its motion to dismiss for failure to state a claim.

On April 15, 2009, the court entered its six page minute entry wherein it dismissed Bill Strickland as a defendant, denied Strickly's 12(b)(6) motion and granted CST's Motion for Summary Judgment and stated that "*This entry stands as the Order of the Court. No further order is required.*"

The court provided no findings with the Order. Although Strickly had filed the affidavit of Tracy Strickland and referenced that affidavit in its Memorandum in opposition to MSJ, the Court stated that " Defendants solely present their Undisputed Facts, without citation to supporting materials.

In the Order, on page 3, the court cites to *Anderson v. Taylor* 2006 UT 79 to support the statement "Our rules require "*not just bald citation to authority*. . ." and cited *Salt Lake County v. Metro W. Redy Mix, Inc.*, 2004 UT 23, ¶23, in support of the finding that it was not harmless error for Strickly to fail to make a verbatim restatement of each controverted fact.

On May 3, 2009, Strickly filed its notice of appeal. On June 18, 2009 Strickly filed its docketing statement with the Court of Appeals.

SUMMARY OF ARGUMENT

The defendant Strickly Truckin Inc., had an obligation under a written Lease to pay McCabe for his efforts that amount that was due to him after deducting the expenses McCabe incurred and charged to Strickly in the performance of his efforts.

After entering the Lease, McCabe entered into a factoring agreement with CST by assigning his future income earned from Strickly in exchange for instant money and a percentage held back by CST when Strickly paid that amount due to McCabe after deducting the expenses McCabe had incurred.

CST and Strickly were never parties to any common agreement but when McCabe quit working and Strickly deducted a portion of the still outstanding expenses due from McCabe, Strickly had already been short changed by McCabe because he

owed Strickly more than he had earned and in addition he owed CST more for the advances he had taken than- was due to him.

Rather than go to McCabe alone, for its losses, CST also sued Strickly falsely claiming it had failed to honor the assignment of McCabe's income less expenses along with suing McCabe. While there is no argument that CST has a valid action against McCabe, CST can have no action against Strickly unless it shows an agreement separate from the subordinate factoring agreement to which Strickly was not a party and separate from the Lease which limited Strickly's obligations to no more than what it owed McCabe. To support that separate agreement, consideration must have been given to Strickly by CST and it is undisputed that no such consideration exists.

Given this situation, the court should have denied CST's MSJ and should have granted Strickly's 12(b)(6) motion. The trial court delayed the decision on the 12(b)(6) motion for over 1,270 days thereby denying Strickly its constitutional right to receive a remedy without unnecessary delay and it denied the motion to dismiss when faced with ample facts to render the correct decision to dismiss Strickly.

When the trial court granted CST its MSJ, it did so based upon an incorrect interpretation of the Factoring Agreement to be a contract binding upon Strickly that required Strickly to pay CST amounts in excess of what it owed to McCabe under the preexisting Lease. Based upon that flawed interpretation, the court incorrectly granted the MSJ without making any specific findings for the basis of the contractual obligation, what the consideration had been, or even the terms of the contract which allegedly obligated Strictly to pay CST .

Because the motion to dismiss and the MSJ were both incorrect decisions, they each should be reversed by this Court.

ARGUMENT

The first issue on appeal is whether the trial court denied Strickly its constitutional right under Art. I; Section 11 of the Utah Constitution to receive a remedy without unnecessary delay.

In this action, Strickly was forced to wait for more than 1,270 days for a response after it first requested relief from the court by filling a Motion to Dismiss pursuant to Rule 12(b)(6).

Although Strickly cannot cite to any code, or state the maximum specified number of days allowed before any given type of decision is rendered by the court without jeopardizing the parties' right to receive justice without unnecessary delay, clearly there must be some upper limit of time past which the delay denies the party its constitutional rights. If this were not true, then the language in Section 11 is rendered meaningless.

Rule 12(b)(6) of the Utah Rules of Civil Procedure concerns the sufficiency of the pleadings, not the underlying merits of a particular case. Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §1356 (2d ed. 1990). When a 12(b)(6) motion is filed, the issue before the court is whether the petitioner has alleged enough in the complaint to state a cause of action, and this preliminary question is asked and answered before the court conducts any hearings on the case. Regardless of the cause for such delay, when this preliminary question remains unanswered for several

years, as it did in this action, the defendant depending upon receiving that ruling before proceeding with very expensive litigation on the merits is severely prejudiced by the delay. Not only was the 12(b)(6) Motion left unanswered by the court for more than 1,270 days, but the plaintiff CST was allowed 830 days to file its objection to the Motion after the court set aside CST's default, when the URCP Rule 7(c)(1) allowed 10 days after service for CST to file such Memoranda.

The URCP Rule 7(c)(1) allowed CST 10 days to respond, but it took CST 98 days after the court entered the default against CST to file its Memorandum in Support of Motion to Set Aside Default Certificate and even then, CST never filed the supported Motion to Set Aside. When, during the November 2006 hearing, the Court questioned CST about the lack of a Motion and the lateness of its response to the12(b)(6) Motion, at first, CST's counsel tried to convince the court that he had actually filed the response and the Harris affidavit by fax on June 27, 2005, but when the court noted that the Harris affidavit had not been signed until June 30, 2005 [Rec Index Pg 603 Tr. 23 Line 9 – 19], CST's counsel changed his story and then explained that he had always filed pleadings supported by unsigned affidavits. [Rec Index Pg 603 Tr. 23 Line 14]

The URCP Rule 7(f)(2) allowed CST 15 days after the court made its ruling concerning the Motion to Set Aside Default for CST to serve Strickly with the proposed findings and Order to set aside the default judgement. CST served the proposed Order more than 100 days after the November 2006 hearing.

Strickly believes that regardless of the many causes for such delays, when the chain of events led to such an inordinate delay in receiving its ruling on a preliminary matter, Strickly was severely prejudiced by the delay and was therefore denied its

constitutional right under Art. I; Section 11 of the Utah Constitution to receive a remedy without unnecessary delay. Because of this prejudice it has received, Strickly asks the Court of Appeals to restore his constitutional right to justice without undue delay by reversing the MSJ and dismissing Strickly from that part of this action.

The second issue on appeal is whether the trial court was correct in denying Strickly's 12(b)(6) motion without making any factual findings that supported the ruling.

When making the decision to dismiss an action under the provisions of URCP 12(b)(6), the court must accept the factual allegations in the complaint as true and interpret those facts and all inferences drawn from them in the light most favorable to the non-moving party." *E.g., Oakwood Vill. LLC v. Albertsons, Inc.,* 2004 UT 101, ¶ 9, 104 P.3d 1226.

However, here, because it had the complaint, the counter-claim and Tracy Strickland's Affidavit, the two contracts, the assignment letter, the Motion for Summary Judgment to include a MSJ memoranda with hundreds of pages of exhibits all before it when undertaking the decision whether to dismiss the action under Rule 12(b)(6), the court should have been able to determine the fatal flaws existing in CST's complaint from Strickly's arguments and the documents the court had before it at the time of the decision.

Had this truly been an action by CST against Strickly for its failure or refusal to honor the assignment of the right to collect the accounts receivable due to McCabe from Strickly to CST, then the Court would have been spot on in its denial of Strickly's 12(b)(6) Motion and CST would have been completely correct in its denials of the need

for it to provide additional consideration to Strickly before Strickly had any obligation to CST.

However, from start to finish, this case had nothing whatsoever to do with Strickly's failure to honor the assignment from McCabe to CST, but rather it had everything to do with Strickly being forced to pay CST a debt not due from Strickly to McCabe, who does owe CST money, all because CST chose to ignore Strickly's preexisting Lease agreement that clearly precluded such debt passing from McCabe to Strickly.

It is undisputed that in September 2003, Strickly and McCabe entered into a Lease whereby Strickly agreed to allow McCabe to use its credit to purchase the fuel, repairs, supplies, and services required- by McCabe's trucking operations and to pay McCabe for this labor and use of his equipment. In exchange, McCabe agreed to use his equipment to haul loads for Strickly and be solely responsible for all expenses related to the operation and repair of his personally owned truck. (Addendum 1; Temporary Lease; ¶6, 7)

McCabe would submit an invoice to Strickly for the work completed and once McCabe's expenses were known to Strickly and deducted from the compensation due to McCabe, a check for the balance was issued by Strickly to McCabe.

It is undisputed by any party to this action that under this Lease, Strickly was obligated to pay no more than the agreed price for the work completed by McCabe, less all deductions for the credit extended by Strickly to McCabe for expenses previously incurred by McCabe. CST correctly stated in paragraph 9 of its complaint [Rec Index Pg 2], that Strickly was to send "*all payments* ***otherwise due*** *Trucker directly to CST*,"

and, in paragraph #27 of its complaint [Rec Index Pg 4], CST stated that Strickly's obligations to pay anyone were limited to payment for the work done by McCabe for Strickly.

It is also undisputed that in January 2004, and subsequent to the formation of the Strickly/McCabe Lease, McCabe entered a factoring agreement with CST to which Strickly was not a party, whereby CST would advance money to McCabe in anticipation of McCabe receiving income from his trucking operations in exchange for CST keeping a percentage of the money McCabe did receive from his trucking operations.

Strickly learned of the factoring agreement when, in January 2004, it received a Letter from CST concerning the assignment of McCabe's accounts receivable to CST. The letter contained incomplete and nonsensical sentences, but was accepted by Strickly as a notice of McCabe's assignment of his accounts receivable to CST and complied with that demand. It is undisputed that when CST began sending invoices to Strickly, after Strickly applied the expense deductions for McCabe's known expenses, Strickly began making the checks payable to CST rather than to McCabe.

It is undisputed that the "Letter," although ambiguous, said nothing whatsoever about Strickly somehow becoming contractually obligated to pay any amount more than that which was actually due under the Lease agreement to McCabe after all applicable deductions for credit provided to McCabe by Strickly had been made. Yet, the trial court cited to Tracy Strickland's signature on that 2004 letter as the only justification given by CST or the trial court for CST to sue for and apparently win on Summary Judgment just such an obligation from Strickly. The trial court however chose not to cite to, or even mention Tracy Strickland's affidavit to the contrary in its ruling thereby

ignoring the very material genuine issue of material fact of whether there was any obligation for Strickly to pay to anyone any more than what it truly owed to McCabe.

When McCabe asked Strickly to forward his money to CST, Strickly honored McCabe's assignment of his accounts to CST. Only when McCabe stopped working did Strickly stop sending the money to CST. During the period from January 2004 until August 2004, CST submitted invoices to Strickly for a gross of $68,661.39 less deductions for fuel and the broker's fee in the total net amount of $51,793.25. Strickly paid CST $38,379.84 of the $51,793.25 based upon the invoices it had received from CST. Therefore, it can not be said that Strickly refused to honor the assignment and yet that is the exact claim made by CST in this action and accepted in error by the trial court when granting CST summary judgement.

In May, 2004, when McCabe needed a $13,000 repair to the engine of his truck in order to keep operating, Strickly paid for the repair to McCabe's benefit with McCabe's acknowledgement that Strickly was entitled to regain all of the advanced money as provided in the Lease, to be taken as deductions from the compensation due to McCabe for his future services to Strickly. Because the $13,000 could not be deducted from McCabe all at one time, both Strickly and McCabe agreed that Strickly would deduct the repair expenses from McCabe's invoices at the monthly rate of $3,000.00. It is undisputed that in July 2004, Strickly received an invoice from CST (Addendum 3; Invoice from CST to Strickly #3215 dated 7/12/2004) that showed the first $3,000.00 monthly deduction and in August, Strickly received an invoice from CST that showed the second $3,000.00 deduction for the engine repair. (Addendum 4)

It is undisputed that CST sent its invoices showing $3,000.00 deductions for engine repair to Strickly for two months before McCabe quit working, and yet in paragraph #28 of its memorandum in support of its MSJ [Rec Index Pg 161], CST claimed that it knew nothing about the engine repair until after McCabe quit working and apparently the trial court accepted this false statement as fact.

Once Strickly discovered that McCabe had abandoned the Lease, Strickly stopped any further payments to CST pending a reconciliation of McCabe's accounts which showed that McCabe still owed Strickly $7,178.01 for the engine repair, $9,543.46 for fuel, repair, and service invoices that had been charged to Strickly but not paid and that CST had over charged $357.75 for the Broker's fee. (Addendum 5; Summary of unpaid expenses). As stated in Tracy's affidavit [Rec Index Pg 565], Strickly informed CST of this overpayment situation and demanded a $4,205.81 refund from CST and demanded the balance from McCabe.

Instead of reimbursing Strickly for the overpayment it had received from Strickly based upon the invoices CST had sent to Strickly, CST filed the complaint in this matter alleging that Strickly had breached a contract with CST by not paying it the $8,655.96 CST had demanded from McCabe.

BREACH OF CONTRACT

"If there is no consideration, there is no contract." *Copper State Leasing,* 770 P.2d 88 at 91 (citing *General Ins. Co. of Am. v. Carnicero Dynasty Corp.,* 545 P.2d 502, 504 (Utah 1976) "Consideration is an act or promise, bargained for and given in exchange for a promise. . . . For the mutual promises of the parties to a bilateral contract to constitute the consideration for each other, the promises must be binding on

both parties.") If there is no contract, there can be no viable cause of action for a breach of contract.

It is undisputed that the Strickly/McCabe Lease Agreement, which preexisted the CST/McCabe factoring agreement, limited Strickly's obligation to pay anyone for McCabe's services to the money that was left after the deductions for the costs of operations charged to Strickly's credit. In light of the money McCabe undisputedly owed to Strickly when he abandoned the Lease, CST can not establish any contractual obligation for Strickly to pay any money to CST unless it can establish a contractual obligation due from Strickly to CST separate from the Strickly/McCabe Lease and separate from the McCabe/CST Factoring Agreement, to which Strickly was not a party.

In paragraph #14 of its Complaint [Rec Index Pg 3], CST correctly stated that *". . . CST advanced Trucker more money on the bill submitted by Trucker than Broker actually owed CST and Trucker*." Therefore CST knew at the time of making its complaint that under the lease agreement that was limited to only that money McCabe was owed by Strickly, CST could not collect anything from Strickly without some separate agreement with Strickly to pay CST whatever McCabe owed to CST.

Apparently, in order to establish the necessary separate agreement to support its breach action against Strickly, in its complaint, CST alleged *"by implication*" that CST had given consideration to Strickly for a bargained for agreement or promise from Strickly to pay CST **regardless** of the amount Strickly owed to McCabe.

On its face, even without the ambiguous language, whether Tracy Strickland signed it or not, the CST letter sent to Strickly in January clearly fails the consideration

test, but it was specifically mentioned and used against Strickly in the court's decision to deny Strickly's 12(b)(6) Motion and grant CST's MSJ.

This lack of consideration for a separate agreement between Strickly and CST is fatal to CST's Breach of Contract action. The law is clear: if the consideration given to Strickly was a promise, then the promises made by the two parties must be binding on both parties (545 P.2d 502, 504 Id.) and yet, on its face, the 2004 letter required nothing from CST.

Apparently, because CST could not show such consideration, it chose to lie to the trial court when, in paragraph #11 of its Response to the objection to the MSJ [Rec Index Pg 574-575], CST chose to materially misrepresent the law to the court by claiming **70A-9a-406** states that "*once an account debtor (Strickly in this case) receives proper notification that the account has been assigned, the only way to pay off that obligation is to pay the assignee (CST Financial). No consideration is needed to make a valid assignment*."

What the cited law really says is "*After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor"* which is completely different from what CST told the Court and the cited law says nothing whatsoever about *"No consideration is needed to make a valid assignment*."

"A plaintiff cannot amend the complaint by raising novel claims or theories for recovery in a memorandum in opposition to a motion to dismiss or for summary judgment" *Thomason v. Nachtrieb,* 888 F.2d 1202, 1205 (7th Cir.1989); *McCabeDowell*

v. Sullivan, 132 F.R.D. 501, 502 (N.D.Ill.1990), therefore the trial court should not have considered any of CST's subsequent filings in deciding the Motion to Dismiss or it should have considered all of the evidence before it in granting CST's MSJ.

However, it can not be determined what the trial court relied on when making its decision, as no findings on those issues were announced in the decision of the court.

Accordingly, because CST did not allege and can not establish any such consideration given to create the necessary separate obligation from Strickly, the Court should reverse the trial court's denial, or remand with instructions to dismiss CST's Breach of Contract action against Strickly for CST's failure to state a claim for which relief can be granted under the provisions of URCP, Rule 12(b)(6).

FRAUD

In order to establish fraudulent concealment, "a plaintiff must prove the following three elements: (1) the nondisclosed information is material, (2) the nondisclosed information is known to the party failing to disclose, and (3) there is a legal duty to communicate." *Hermansen v. Tasulis,* 2002 UT 52, P 24, 48 P.3d 235.

When CST filed its complaint in May, 2005, CST alleged that Strickly had committed fraud upon CST because Strickly had failed to notify CST of McCabe's engine repair and that the repair was not reflected on the bills submitted by CST to Strickly thus causing CST to overpay McCabe. However, it is undisputed that it was CST that sent the two invoices showing deductions for engine repair to Strickly in July and August, 2004. As stated above, in paragraph #28 of its response [Rec Index Pg 160], CST falsely claimed that only after McCabe quit work did CST receive a $13,718.01 invoice for repairs to McCabe's truck engine. CST's claim in paragraph #39

and 41 of its complaint [Rec Index Pg 6] and CST's claim in subsequent filings that CST did not timely know of the engine repair and therefore overpaid McCabe were each material misrepresentations intentionally made by CST to the trial Court.

Just as with CST's breach claim, the only way CST could sustain a claim for fraud was to show Strickly had a contractual duty to inform CST of the engine repair, knew of this obligation, and chose not to so inform CST which was impossible because CST was sending the invoices showing the engine repair to Strickly, not the other way around. Just as with the breach claim, the only way CST could show Strickly had any duty to so inform CST was to falsely claim it had some separate agreement with Strickly supported by separate consideration. The fraud claim is fatally defective for the same reasons as the breach of contract claim and should likewise be dismissed.

The third issue on appeal is whether the trial court was correct in granting CST a Summary Judgment and was the court incorrect when it interpreted the CST/McCabe Factoring Agreement to be a contract binding upon Strickly that required Strickly to pay CST amounts in excess of what it owed to McCabe under the preexisting Lease agreement between Strickly and McCabe without making any findings that such a separate agreement had been formed after negotiation and the exchange of consideration between Strickly and McCabe.

When it entered summary judgment in favor of CST based upon a contractual obligation of Strickly to CST, without making any specific findings for the basis of the contractual obligation, what the consideration had been, or even the terms of the contract, the trial court was not correct in issuing the order granting summary judgement.

Summary judgment is appropriate under URCP Rule 56 only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The Court must view all facts and inferences in the light most favorable to the non-moving party, *Speros v. Fricke,* 98 P.3d 28, 33-34 (Utah 2004).

Rule 56(c) of the Utah Rules of Civil Procedure provides that summary judgment "shall be rendered 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 judgment as a matter of law." Utah R. Civ. P. 56(c) (emphasis added); *Gerhich v. Numed, Inc.,* 977 P.2d 1205 (Utah 1999).

A review of the pleadings together with the affidavits filed in this case shows that the trial court had in its hands Tracy Strickland's affidavit stating that between the unpaid loan balance and several other offsets due from McCabe at the time he stopped working with Strickly, he had been overpaid by several thousand dollars. This fact was never disputed by CST. CST admitted in paragraph #14 of its complaint [Rec Index Pg 3], that McCabe actually received more money from Strickly than he was owed by Strickly and yet none of these facts were mentioned anywhere in the decision granting Summary Judgment. The affidavit statement by Strickly's President Tracy clearly demonstrated controversy over the very material fact of: did Strickly owe any money to CST when its obligations were limited to paying only that what it owed McCabe? Yet the trial court ruled Strickly owed more money to CST than was required under its contract with McCabe without any findings of how much more, why, or under which contract Strickly took on the obligation to pay more than it owed to McCabe.

Both of CST's stated causes of action against Strickly, for "Breach of Contract" and "Fraud", as found in the complaint paragraphs numbers 26 through 35 and 36 through 43 [Rec Index Pg 4-7], by definition require that a valid and enforceable contract exist between CST and Strickly before any cause of action could be validly stated. No proof of any such contract has ever been offered by CST because no such contract exists.

In rendering its decision, the trial court cited *Salt Lake County v. Metro W. Redy Mix, Inc.*, 2004 UT 23, ¶23 [Rec Index Pg 590], in support of the finding that it was not harmless error for Strickly to fail to make a verbatim restatement of each fact that is controverted. In the Order, on page 3 [Rec Index Pg 591], the court cites to *Anderson v. Taylor* 2006 UT 79 to support the statement "Our rules require "*not just bald citation to authority*. . ." However, the Rule referred to therein is rule 24(a)(9) of the Utah Rules of Appellate Procedure and this was not an appellate brief, but rather a trial court brief that only needed to establish that one genuine issue of fact in dispute existed, while giving deference to all implications in favor of Strickly as the non-moving party.

Strickly did not make a verbatim restatement of each controverted fact simply because the facts alleged by CST, as alleged, are generally correct. However, as stated in Strickly's Memorandum in Opposition to MSJ, CST did not report anywhere in any of its pleadings that it based its complaint allegations solely on a factoring agreement between CST and McCabe to which Strickly was not a party, not upon the Lease contract between Strickly and McCabe that preexisted the factoring agreement

and which limited all payments from Strickly to the benefit of McCabe to only that which Strickly owed to McCabe after the allowed deductions for expense were made.

CST has admitted that said Lease agreement required Strickly to pay only what money it actually owed to McCabe. There is no allegation made anywhere that Strickly failed to pay everything it owed to McCabe under the terms of the Lease agreement.

The only claim made by CST that any contract ever existed between CST and Strickly is found in the allegation made in the complaint paragraph #27 [Rec Index Pg 4], wherein it was stated "*Broker agreed to pay CST for work done by Trucker for Broker*." The claim by CST in its Memorandum in Support of Summary Judgment that "*Strickly entered into an agreement with CST wherein it agreed to make payments due to McCabe directly to CST"* is not factually correct in that it left out the very material limitation of Strickly paying to the benefit of McCabe only that which was owed under the terms of the Lease agreement.

Because the trial court failed to correctly interpret the contractual obligation created by the "Letter" and because it did not give the proper deference to the evidence before it in favor of Strickly as the non-moving party, the grant of summary judgment should be reversed, or remanded with instructions to make adequate findings to support such a ruling to include the terms of the contract, the consideration given for the contract or give the trial court instructions to dismiss the action against Strickly.

CONCLUSION

The defendant Strickly Truckin Inc., believes it was deprived of its constitutional right under Art. I; Section 11 of the Utah Constitution to receive a remedy without unnecessary delay because the trial court failed for more than 1,270 days after it was

filed with the court to rule upon Strickly's Rule 12(b)(6) Motion to Dismiss, which is a preliminary motion that should have been addressed as soon as the default judgment against CST was set aside. Because the motion was addressed in such an untimely manner, Strickly was seriously prejudiced.

Strickly believes that once the 12(b)(6) motion was finally addressed in April 2009, the court made an incorrect decision to deny the motion, based in part on its incorrect interpretation of a document presented by CST to the court under which CST claimed the right to collect from Strickly whatever McCabe owed to CST. However, because Strickly was never a party to the factoring agreement, the court should have granted the motion to dismiss so long as there was no demonstration of separate consideration to support a separate agreement between Strickly and CST. Because the trial court was not correct as a matter of law in denying the motion, this Court should reverse that decision and the CST case against Strickly should be dismissed.

Finally, because the trial court was incorrect when it interpreted the CST/McCabe Factoring Agreement to be a contract binding upon Strickly that required Strickly to pay CST amounts in excess of what it owed to McCabe under the preexisting Lease agreement without making any specific findings for the basis of the contractual obligation, what the consideration had been, or even the terms of the contract when it entered summary judgment in favor of CST, the Court should reverse that decision and the case against Strickly should be dismissed.

Because Strickly was awarded attorney's fees at the conclusion of the only hearing held, and because CST seriously delayed the course of the litigation and made

several intentional material misrepresentations to the trial court, Strickly should also be awarded its fees on Appeal.

RESPECTFULLY RE SUBMITTED ON THIS 21st th Day of September, 2009, due to missing pages in the copies.

_____
Gary Buhler
Attorney for Strickly Truckin Inc.
Appellant

CERTIFICATE OF DELIVERY

I hereby certify that on this September 14, 2009 , I served a copy of the forgoing document, by depositing a true and correct copy thereof in the United States Mails, addressed to:

Dusten Heugly
1375 South 100 East
Price UT 84501

Mike McCabe, pro-se

Salt Lake City UT

_____
Gary Buhler

With the missing pages 26 and 31 mailed separately on September 21, 2009 to Mr. Heugly.