

1998

Karl I. Truman v. William M. Dalton, Audit and Accounting Authority, Ltd. : Brief of Appellee

Utah Court of Appeals

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Ken Chamberlain; Attorney for Plaintiff-Appellant.

Joseph Harlan Burns; Attorney for Defendant/Appellee; John G Mulliner; Attorney for Defendant-Appellee .

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DOCKET NO. 981354-CA
IN THE UTAH COURT OF APPEALS

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KARL I. TRUMAN,

Plaintiff - Appellant,

-vs-

WILLIAM M. DALTON and AUDIT AND
ACCOUNTING AUTHORITY, LTD.,

Defendants - Appellees.

BRIEF OF APPELLEE AUDIT AND
ACCOUNTING AUTHORITY, LTD.

Docket No. 981354-CA

Argument Priority: 15

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ON APPEAL FROM A FINAL JUDGMENT
OF THE SIXTH JUDICIAL DISTRICT COURT
OF SEVIER COUNTY, STATE OF UTAH
THE HONORABLE DAVID L. MOWER, DISTRICT JUDGE

Joseph Harlan Burns
Attorney for Defendant-Appellee
William M. Dalton
965 South Main, Suite 4
P.O. Box 6330
Cedar City, UT 84721-6330

John G. Mulliner 2349
Attorney for Defendant-Appellee
Audit and Accounting Authority
363 N. University Ave., Suite 103
P.O. Box 1045
Provo, UT 84603

Ken Chamberlain
Attorney for Plaintiff-Appellant
225 North 100 East
Richfield, UT 84701

FILED
JAN 12 1999

COURT OF APPEALS

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STATEMENT OF THE CASE

Plaintiff-Appellant, Karl I. Truman, (hereinafter referred to as Truman) commenced this action in the district court seeking to set aside a settlement between Truman's assignee of an account for collection, Audit and Accounting Authority, Ltd. (AAA) and William M. Dalton (Dalton), the debtor. The case was tried to the court on March 30, 1998. At the close of Plaintiff's case, both Defendants moved for a judgment of dismissal. The court granted the motion and entered its judgment of dismissal. From this judgment, Plaintiff Truman appeals.

STATEMENT OF FACTS

In 1992, Truman assigned an account for collection in the claimed amount of \$58,905.09 against Dalton to AAA pursuant to a written assignment, a copy of which is Addendum 1 to Truman's brief. (Tr. 43). That assignment gave AAA full discretion to settle the account.

AAA sent a demand for that amount to Dalton. (Exhibit D-29, Addendum 2 to Truman's brief).

During the course of correspondence and negotiation, Dalton, through counsel, asserted that the indebtedness was no more than \$5,245.86 (Exhibit D-27). He also asserted that even with improper charges, interest, and compounding of interest the balance is no more than \$25,130.92. (Exhibit D-34).

A settlement agreement was reached between AAA and Dalton (Exhibit D-35, Addendum 5 to Truman's brief) and Dalton paid the agreed sum. (Admitted at page 33 of Truman's brief)

As the payments were made, AAA took its 50% commission and forwarded 50% to Truman who cashed the first several checks. (Tr. 40).

After rejecting the last several checks and demanding reassignment of the collection account, Truman commenced this action.

SUMMARY OF ARGUMENT

Appellant's brief does not comply with rule 24 (a) (5), Utah Rules of Appellate Procedure. There are no proper citations to the record nor does it properly set forth the standard of review. The only claim for preserving the issues for appeal is that they were raised in the pleadings.

Truman has failed to marshal the evidence which supports the trial court's ruling. He makes no reference to the evidence that the debt was disputed. For that reason alone, the trial court must be affirmed on that issue.

The evidence supports the trial court's ruling. Truman failed to show that there was no dispute or that there was no separate consideration. Absent those showings, he was not entitled to relief. The law favors settlement of disputes. The elements of a proper settlement were present.

Appellee AAA should be awarded its attorneys fees for this appeal.

ARGUMENT

POINT I: APPELLANT'S BRIEF DOES NOT COMPLY WITH RULE 24 (a) (5), UTAH RULES OF APPELLATE PROCEDURE.

Rule 24 (a) (5), Utah Rules of Appellate Procedure requires: "A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and (A) citation to the record showing the issue was preserved in the trial court; or (B) a statement of grounds for seeking review of an issue not preserved in the trial court." Truman's Statement of the Issues Presented for Review contains not a single citation to the record nor a single assertion of the standard of review with supporting authority within the list of issues. Following the Statement of Issues under subheadings are sections entitled Standard of Review and Issues for Appeal Reserved in the Trial Court.

Truman's claim of having preserved the issues in the trial court rests on his assertion that they were "... reserved for appeal by allegations in his complaint ...". Utah law is clear that allegations in a complaint are not sufficient to preserve an issue for appeal when the party has been heard at trial and that the Court of Appeals will not address such issues without a showing that they were adequately preserved at trial. Mills v. Brody, 929 P.2d 360, 364 (Utah App. 1997). Mere mention of the issue in the pleadings is insufficient. LeBaron & Assoc. v. Rebel Enterprises, 823 P.2d 479, 482 (Utah App. 1991) Since there is no citation to the record showing that the issues were preserved, the judgment below should be affirmed.

POINT II: TRUMAN HAS FAILED TO MARSHAL THE EVIDENCE WHICH SUPPORTS THE TRIAL COURT'S RULING.

The trial court specifically found that the amount of the debt was in dispute. The trial judge, in pronouncing his ruling from the bench when granting the motion to dismiss at the end of Plaintiff's evidence said "I think they acted in his behalf and settled the disputed claim." (Tr. 63) and "I think it was a disputed claim." (Tr. 64). The conclusions of law state: "2. The claim assigned by Plaintiff to Defendant AAA against Defendant Dalton was a disputed claim." (R. 49). In the section of Truman's brief headed "Marshalling the defendant's evidence" there is no mention of any of the evidence that the amount of the debt was in dispute.

Truman failed to mention his own testimony that he had received a letter notifying him of Dalton's claim as to the amount owed. (Tr. 50). The exhibit about which he testified indicated that the true amount owing was no more than \$5,245.86. (Exhibit D-27). The discrepancy in amounts makes it clear that the dispute is over more than interest or mathematical calculations, since Truman's evidence was that the face amount of the unpaid invoices was \$30,482.11. (Exhibit P-37, addendum 7 to Truman's brief). He also fails to mention Exhibit D-34 in which Dalton, through counsel notifies AAA that even with improper charges, interest, and compounding of interest the balance is no more than \$25,130.92. There was evidence offered and admitted regarding the dispute as to the amount of the debt and none of it is mentioned in Truman's so called "Marshalling the defendant's evidence." For that reason alone, his attack on the court's finding must fail and the trial

court judgment should be affirmed. Robb v. Anderton, 868 P.2d 1322, 1328 (Utah App. 1993)

POINT III: THE LACK OF EVIDENCE MANDATED THE TRIAL COURT'S RULING.

Truman filed suit against AAA and Dalton asking the court to determine that the settlement agreement entered between them was invalid and not binding on him. In order to prevail he had to show that the amount of the indebtedness was not in dispute and that there was no consideration for the compromise. Sugarhouse Finance Co. v. Anderson, 610 P.2d 1369 (Utah 1980) relied on by Truman and cited in his docketing statement as controlling states that where the underlying claim is disputed, payment of a compromise amount is sufficient consideration to support an accord and satisfaction. at 1372. Where the underlying claim is liquidated and certain as to amount, separate consideration is necessary to support the accord. *id* at 1372.

At trial, Truman failed to offer evidence that the amount of the debt was not in dispute and failed to offer evidence that there was no separate consideration. Truman testified that the invoices were unpaid. His accountant testified as to the amount owing based on the invoices and interest, assuming that they were all unpaid and owing. There was not one word of evidence to indicate whether Dalton admitted to receiving all the goods represented by the invoices or whether Dalton claimed payments that had not been credited. Neither was there evidence as to whether there had been consideration for the settlement. In fact the court found, even without the defendants having had an opportunity to present evidence, that

there was a dispute and indicated its belief that there was likely also separate consideration in the form of an agreement to avoid litigation. (Tr. 62). At the end of the Plaintiff's case he had failed to offer evidence that there a *bona fide* dispute was lacking to support the settlement agreement and he had failed to offer evidence that consideration was lacking. The trial court's dismissal was mandated by the lack of evidence and should be affirmed.

POINT IV: THE LAW FAVORS SETTLEMENT OF DISPUTES.

"It is a basic rule that the law favors settlement of disputes." John Deere, Co. v. A&H Equipment, Inc., 876 P.2d 880, 883 (Utah App. 1994) citing Goodmansen v. Liberty Vending Sys., Inc., 866 P.2d 581, 584 (Utah App. 1993). "For a valid accord and satisfaction, a 'disagreement need not be well-founded, so long as it is in good faith.'" S&G, Inc. v. Intermountain Agency, 913 P.2d 735, 739 (Utah 1996) quoting Estate Landscape v. Mountain States, 844 P.2d 322, 326 (Utah 1992). Truman argues that based upon mathematical calculations, the dispute was not well founded. The dispute between Truman and Dalton was clearly over more than different mathematical calculations, but even if it weren't, there was not a scintilla of evidence that the dispute was not in good faith. "The final requirement for an accord and satisfaction is the creditor's acceptance of the payment." S&G, Inc., at 740. There is no dispute that the settlement amount was paid and accepted by AAA and that the first several payments were accepted by Truman. (Truman's brief, p. 13)

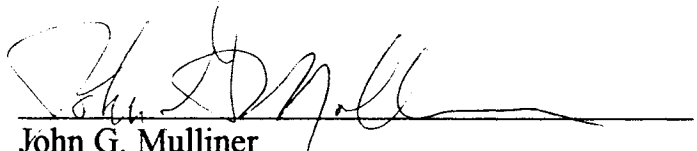
**POINT V: APPELLEE AAA SHOULD BE AWARDED ITS ATTORNEYS
FEES FOR THIS APPEAL.**

Because it was clear at the time of the dismissal by the trial court that evidence was entirely lacking on two necessary parts of the plaintiff's case, there is no good faith basis for this appeal. Because the appeal is frivolous, the judgment below should be affirmed with instructions to the trial court to enter judgment against plaintiff-appellant Truman in favor of AAA for attorneys fees incurred herein.

CONCLUSION

Truman's brief does not comply with Rule 24 (a) (5) Utah Rules of Appellate Procedure. Truman failed to marshal the evidence which supported the trial court's ruling. Those failures to comply with the rules are grounds for summary affirmance of the trial court's judgment. There was no showing that a good faith dispute was lacking to support the settlement agreement and no showing that consideration was lacking. The lack of evidence mandated the trial court's ruling granting the motions to dismiss. This appeal is without substantial basis and Appellee AAA is entitled to an award of attorneys fees.

RESPECTFULLY SUBMITTED this 12 day of January, 1999.



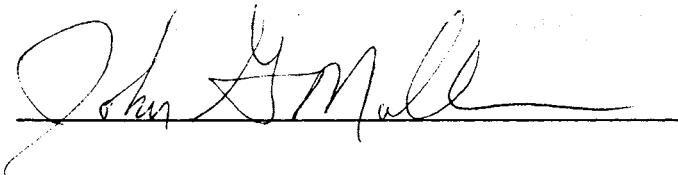
John G. Mulliner
Attorney for Defendant-Appellee AAA

Mailing Certificate

Served the Brief of Appellee Audit and Accounting Authority this 12 day of January, 1999 by Mailing a true and correct copy thereof, postage prepaid, addressed as follows:

Ken Chamberlain
Attorney for Plaintiff-Appellant
225 North 100 East
Richfield, UT 84701

Joseph Harlan Burns
Attorney for William M. Dalton
965 South Main, Suite 4
P.O. Box 6330
Cedar City, UT 84721-6330

A handwritten signature in cursive script, appearing to read "John G. Mull", is written over a horizontal line.