

1989

Utah State Retirement Board v. Badi Mahmood : Reply Brief of Appellant

Utah Court of Appeals

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Brant H. Wall; Wall & Wall; Warren Patten; Mark L. Mathie; Fabian & Clendenin; Attorneys for Respondents.

Henry S. Nygaard; Craig T. Vincent; Steven H. Lybbert; Nygaard; Coke & Vincent; Mark A. Madsen; Attorneys for Appellant.

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UTAH COURT OF APPEALS
BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

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DOCKET NO.

UTAH STATE RETIREMENT BOARD,

Plaintiff and Appellant

vs.

BADI MAHMOOD and NATIONAL
HOUSING AND FINANCE
SYNDICATE,

Defendants and
Respondents.

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Case No. 870375

Category 14.b.

APPELLANT'S REPLY BRIEF

Appeal from Judgments of the Third Judicial District
Court of Salt Lake County, State of Utah
The Honorable James S. Sawaya, Judge

Brant H. Wall
WALL & WALL
Suite 800 Boston Building
Salt Lake City, Utah 84111

Attorney for Respondent
Badi Mahmood

Warren Patten
Mark L. Mathie
FABIAN & CLENDENIN
Twelfth Floor
215 South State Street
Salt Lake City, Utah 84111

Attorneys for Respondent
National Housing and Finance Syndicate

Henry S. Nygaard
Craig T. Vincent
Steven H. Lybbert
NYGAARD, COKE & VINCENT
333 North 300 West
Salt Lake City, Utah 84103

Mark A. Madsen
540 East 200 South
Salt Lake City, Utah 84102

Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH STATE RETIREMENT BOARD,)	
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Plaintiff and Appellant,)	
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vs.)	Case No. 870375
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BADI MAHMOOD and NATIONAL)	
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Henry S. Nygaard
Craig T. Vincent
Steven H. Lybbert
NYGAARD, COKE & VINCENT
333 North 300 West
Salt Lake City, Utah 84103

Mark A. Madsen
540 East 200 South
Salt Lake City, Utah 84102

Attorneys for Appellant

Brant H. Wall
WALL & WALL
Suite 800 Boston Building
Salt Lake City, Utah 84111

Attorney for Respondent
Badi Mahmood

Warren Patten
Mark L. Mathie
FABIAN & CLENDENIN
Twelfth Floor
215 South State Street
Salt Lake City, Utah 84111

Attorneys for Respondent
National Housing and Finance Syndicate

LIST OF ALL PARTIES

The parties to this action are:

1. Utah State Retirement Board, Plaintiff and Appellant.
2. Badi Mahmood, Defendant and Respondent.
3. National Housing and Finance Syndicate, Defendant and Respondent.
4. Irene Woodside, Defendant. A Default Judgment was entered against Ms. Woodside on September 23, 1987. (R. 294-295)
5. Dale Jackman, Defendant. Mr. Jackman was dismissed by stipulation of the parties and order of the District Court on March 11, 1987. (R. 148)
6. Bara Investment Corporation, Defendant. Bara Investment Corporation was dismissed by stipulation of the parties and order of the District court on April 4, 1986. (R. 75-77)

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SUMMARY OF ARGUMENT

Although the record clearly reveals it to be the case, respondent refuse to acknowledge that the trial court never considered appellant's motion to amend its complaint on the merits of the motion and proposed amended complaint.

Neither are respondents willing to recognize that the Sixth Cause of Action of appellant's proposed Second Amended Complaint stated a cause of action for misrepresentation by omission, and its validity was not dependent on a finding that the appraisal by Dale Jackman was fraudulent. The determination whether the relationship between Badr Mahmood and appellant was sufficiently "confidential" to support a cause of action for misrepresentation by omission must be determined by reference to all of the circumstances of the case, and the allegations of the Sixth Cause of Action alleging a close and confidential relationship were not addressed in the summary judgment motion filed by National Housing and Finance Syndicate ("National Housing").

If the trial court did abuse its discretion by not ruling on the merits of the motion to amend before granting summary judgment, then the summary judgment as to both respondents must be reversed because appellant has alleged the existence of a conspiracy between Mahmood and National Housing and National Housing's summary judgment motion contained no evidence by which the trial court could conclude that there was no conspiracy.

ARGUMENT

In their briefs, both respondents argue that the trial court denied plaintiff's motion to amend its complaint because the proposed amendment was futile. In so arguing, respondents ignore the plain fact that the trial court did not consider plaintiff's motion based on the merits of the Proposed Second Amended Complaint but denied the motion "as moot" [R. 269] despite the fact that plaintiff filed its motion to amend before respondent National Housing and Finance Syndicate ("National Housing") filed its summary judgment motion. The trial court did not abuse its discretion merely by denying the motion but did abuse its discretion by not considering the motion to amend on the merits.

Both respondents fail to recognize--or choose to ignore --that proof of the allegations of the Sixth Cause of Action of plaintiff's Proposed Second Amended Complaint [R. 157-170] is not dependent on a finding that the appraisal by Dale Jackman was in and of itself fraudulent. The Sixth Cause of Action of the Proposed Second Amended Complaint states a cause of action for misrepresentation by omission and is based on the allegations that respondent Badi Mahmood failed to disclose material facts which he had a duty to disclose.

In their briefs, respondents appropriately point out that generally a confidential relationship is necessary to a finding of constructive fraud, but fail to acknowledge that the existence of a confidential relationship is determined by reference to all the circumstances of the case, and is a factual

rather than legal question. Elder v. Clawson, 14 Utah 2d 379, 384 P.2d 802, 804-805 (1963); Von Hake v. Thomas, 705 P.2d 766, 769 (Utah 1985). In this case, plaintiff alleged facts in the Sixth Cause of Action of its Proposed Second Amended Complaint which would be sufficient if proven to establish a confidential relationship between it and Badi Mahmood. National Housing's summary judgment motion addressed the allegations of the Amended Complaint and not the Proposed Second Amended Complaint. The summary judgment motion did not present evidence disproving the allegations set forth in the Sixth Cause of Action of the Proposed Second Amended Complaint; thus, it was an abuse of discretion for the trial court to deny plaintiff's motion to amend without considering the merits of the Sixth Cause of Action of the Proposed Second Amended Complaint.

Finally, although plaintiff does not contend that a confidential relationship existed between it and National Housing (but instead only between it and Badi Mahmood), plaintiff has alleged that Mahmood and National Housing conspired to defraud plaintiff. National Housing's summary judgment motion did not present evidence sufficient to preclude a finding by the trier of fact of a conspiracy between the two respondents. If the trial court abused its discretion when it granted summary judgment without first ruling on the merits of plaintiff's motion to amend, it is not necessary to find that both respondent's failed to disclose facts to plaintiff which they had a duty to disclose in order to state a cause of action against each.

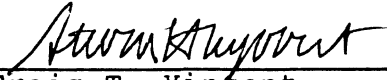
CONCLUSION

Based on all of the above, on Appellant's Opening Brief, and on the record below, appellant Utah State Retirement Board respectfully submits that the judgments in favor of respondents National Housing and Badi Mahmood should be reversed and the case should be remanded to the trial court for trial.

Appellant should also be awarded its costs on appeal.

Dated this 2nd day of May, 1988.

NYGAARD, COKE & VINCENT

By 
Craig T. Vincent
Henry S. Nygaard
Steven H. Lybbert
Attorneys for Plaintiff-
Appellant Utah State
Retirement Board

CERTIFICATE OF HAND DELIVERY

I hereby certify that on the 4th day of May, 1988, I personally hand delivered copies of Appellant's Reply Brief in the case of Utah State Retirement Board v. Badi Mahmood and National Housing and Finance Sydicate, Case No. 870375, to the following:

Brant H. Wall
Wall & Wall
Suite 800 Boston Building
Salt Lake City, Utah (4 copies)

Warren Patten
Mark L. Mathie
Fabian & Clendenin
Twelfth Floor
215 South State Street
Salt Lake City, Utah (4 copies)



Steven H. Lybbert