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Attorneys' Title Guarantee Fund, Inc., Edward Rollins, Shanen Rollins v. Paul Alva, Elaine Alva, David Knudson, Guaranty National Insurance Company : Reply Brief

Utah Court of Appeals

Thor B. Roundy; Counsel for Appellants.
Mark O. Morris; Snell & Wilmer; Counsel for Appellees.

IN THE UTAH COURT OF APPEALS

ATTORNEYS' TITLE GUARANTEE FUND, INC., a Colorado Corporation, and EDWARD ROLLINS and SHANEN ROLLINS, Plaintiffs and Appellants, v. RAUL ALVA, ELAINE ALVA, DAVID KNUDSON, and GUARANTY NATIONAL INSURANCE COMPANY, a Utah Corporation, Defendants and Appellees.	:	REPLY BRIEF OF THE APPELLANTS Appellate Court No. 981423-CA Appeal from the Third Judicial District Court, Judge Noel

Mark O. Morris
Snell & Wilmer, LLP
Attorneys for Appellees
111 E. Broadway, Suite 900
Salt Lake City, Utah 84111

Thor B. Roundy
Attorney for Appellants
275 East South Temple, Suite 150
Salt Lake City, Utah 84111

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Mark O. Morris
Snell & Wilmer, LLP
Attorneys for Appellees
111 E. Broadway, Suite 900
Salt Lake City, Utah 84111

Thor B. Roundy
Attorney for Appellants
275 East South Temple, Suite 150
Salt Lake City, Utah 84111

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ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO GRANT PLAINTIFFS' RULE 60(b) MOTION TO SET ASIDE THE JUDGMENT IN QUESTION.

Appellee Knudson raises a single argument in opposition to the argument pursuant to Rule 60(b) presented in the Brief of Appellant ATGF.[1] Knudson's sole argument is that ATGF failed to make a facial showing of mistake, inadvertence, surprise or excusable neglect. Below, ATGF will describe the basis for finding, first, surprise on the part of ATGF; second, mistake on the part of the Trial Court; and third, excusable neglect on the part of ATGF. Each requires that the judgment in question be set aside.

Justice requires that the decision of the Trial Court be set aside. There is a strong preference in the law that cases be decided upon their merits. The Utah Supreme Court stated in Interstate Excavating, Inc. v. Agla Dev. Corp., 611 P.2d 369 (Utah 1980), "where there is doubt about whether a default should be set aside, the doubt should be resolved in favor of doing so, to the end that each party may have an opportunity to present his side of the controversy and that there be a resolution in accordance with law and justice." Id. at 371.

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[1] For purposes of clarity and brevity, Appellants Attorneys' Title Guaranty Fund, Inc., Edward Rollins and Shanen Rollins are herein referred to collectively at "ATGF."

Attorneys rely upon the foregoing statement of the law. If the Courts adhere to this statement of the law only in published opinions, but not in day-to-day practice, then the judicial process suffers immeasurably.

A. A Showing of Surprise Has Been Made.

The Trial Court made several statements that were relied upon by ATGF and which resulted in surprise. The Trial Court stated that "The Court will not rule on deft. Knudson's cross-motion for summary judgment until the completion of discovery has been done for both motions."[2] [R. 273] ATGF had the right to rely upon those statements, and did so. ATGF was unjustly surprised when a decision was rendered.

The interests of justice require that the judgment be set aside on the basis of surprise.

B. A Showing of Mistake Has Been Made.

The simple fact of the matter is that the Trial Court had forgotten about the posture of the case at the time that it rendered a decision. As explained in the Trial Court's own memorandum, dated September 25, 1997, when the Trial Court received the notice to submit for decision it erroneously

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[2] The statement appears with respect to the docket entry for February 25, 1997. The statement came after similar earlier statements by the Trial Court. See the Brief of Appellant, statement of facts, fact nos. 12 through 14.

concluded that the motion was unopposed. The Trial Court stated that plaintiffs had missed a deadline under Rule 4-501, C.J.A. and that missing such a deadline was an insufficient basis to set aside the summary judgment.[3] [R. 265-267]

The interests of justice require that the judgment be set aside on the basis of mistake by the Trial Court.

C. A Showing of Excusable Neglect Has Been Made.

Knudson did not file a new motion for summary judgment, which would have afforded ATGF the opportunity to respond and to present its evidence in the form of the Affidavit from Karen James. An order to show cause was not issued. Notice was not given that the Trial Court had changed its mind concerning its statement that a decision would not be rendered until discovery was completed. Knudson did nothing more that file another notice to submit for decision.

Contrary to Knudson's assertions, ATGF was not guilty of "general procedural neglect." General procedural neglect would arise if an actual deadline was missed as a result of neglect in general. Heath v. Heath, 541 P.2d 1040, 1041 (Utah 1975) (cited by Knudson).

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[3] See Brief of the Appellant, statement of facts, fact no. 19.

In the present case, ATGF was engage it is discovery and it did ultimately obtain the affidavit of Karen James demonstrating the actual knowledge and fraudulent intent of Knudson, just as ATGF had informed the Trial Court. ATGF did so by obtaining the evidence from a named defendant through an informal discovery process that was ultimately prudent and less costly that if ATGF had served the defendant and obtained the same information through formal discovery. ATGF timely filed its Rule 56(f) Affidavits in each instance and was otherwise attentive to the matter. Under the circumstances, as described above and in the Brief of Appellant, the failure of ATGF to obtain the affidavit earlier must be characterized as "excusable" neglect. The surprise and the mistake described above may, therefore, also fall within the scope of "excusable neglect."

The interests of justice require that the judgment be set aside on the basis of excusable neglect.

II. THE APPELLATE COURT MUST DEFER TO THE TRIAL COURT'S INITIAL FINDING THAT ADDITIONAL TIME FOR DISCOVERY WAS WARRANTED UNDER RULE 56(f).

As quoted by Knudson in the Brief of Appellee, the appellate court reviews three factors when considering whether a moving party's affidavit was sufficient to merit a Rule 56(f) continuance:

> "(1) Where the reasons articulated in the Rule 56(f) affidavit 'adequate' or is the party against whom summary judgment is sough merely on a fishing expedition' for purely speculative facts after substantial discovery has been conducted without producing any significant evidence? (2) Was sufficient time since the inception of the lawsuit for the party against whom the summary judgment is sought to use discovery procedures, and thereby cross-examine the moving party? (3) If discovery procedures were timely initiated, was the non-moving party afforded an appropriate response?"

Callioux v. Progressive Ins. Co., 745 P.2d 838, 841 (Utah App. 1987) (cited by defendant).

The first of two reasons that the Trial Court determined that a continuance was appropriate was that ATGF expressly informed the Trial Court that there was a witness, Karen James, that would provide evidence of the knowledge and fraudulent intent of Knudson at the time of his actions slandering the title of the property in question.

The second reason that the Trial Court determined that a continuance was appropriate was because the case was newly filed and virtually no formal discovery had been conducted. ATGF moved for summary judgment quickly after the case was filed on the basis that there was no need for the discoverable evidence of knowledge and intent. Knudson did not contest his knowledge and intent. Instead, he only made a legal argument that evidence of knowledge and intent was not in the form of evidence. On other legal grounds not requiring a showing of knowledge and intent, summary

judgment was appropriate in favor of ATGF. Therefore, when Knudson filed a cross motion for summary judgment referring to all causes of action, including those with respect to which knowledge and intent were material potentially disputed facts, it was appropriate to file a Rule 56(f) affidavit.

The Appellate Court must defer to the Trial Court's finding that additional time for discovery was warranted in the case.

Without any action by Knudson to submit further evidence on the subject of knowledge and intent, there was a vacuum of actual submitted evidence before the Trial Court. Informal discovery with the necessary third party was being conducted. Knudson's deposition was not yet needed and had not yet been scheduled. Therefore, the Rule 56(f) affidavit should have been honored, particularly in light of the Trial Court's statements that the Rule 56(f) affidavit had been accepted, and the reliance of ATGF thereon.

Even if the Appellate Court were to assume that the Trial Court entered a judgment based on an unexpressed finding that a further continuance under Rule 56(f) was unwarranted--as opposed to the actual mistake by the Trial Court which is clearly expressed in the record--the Appellate Court should find that the Trial Court committed an abuse of discretion in doing so. The Appellate Court should not assume that the Trial Court altered its

decision concerning the Rule 56(f) issue. The record is to the contrary. However, even if the Appellate Court makes such an assumption for purposes of finding some justification for the Trial Court's action, then the Appellate Court must acknowledge that such a decision by the Trial Court under the circumstances constituted a surprise or otherwise gives rise to a finding of excusable neglect on the part of ATGF, or that ATGF is otherwise entitled to have the judgment in question set aside in order to prevent an injustice in this case.

III. KNUDSON WAS NOT ENTITLED TO SUMMARY JUDGMENT; AND ATGF WAS ENTITLED TO RELY ON ITS PLEADINGS WITH REGARD TO THE ISSUE OF KNOWLEDGE AND INTENT BECAUSE KNUDSON PRESENTED NO EVIDENCE TO REMOVE THE ISSUE BEYOND THE PLEADINGS.

The merits underlying summary judgment are properly before this Court. Knudson's argument that the decision of the Trial Court was based solely on Rule 56(f) makes no sense. Even if the Trial Court concluded that it would change its position on the timing of its decision to disallow further discovery, the burden still rested upon Knudson to establish that summary judgment was appropriate.

Further, because Knudson did not submit any affidavit or other evidence denying his knowledge and intent in committing insurance fraud, ATGF was entitled to rely on its pleadings and

the absence of dispute without submitting evidence on the issue.[4] Subject to Utah Rules of Civil Procedure, Rule 56(f), Rule 56(e) provides:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Therefore, ATGF did establish the elements of knowledge and intent as disputed material facts even before the Affidavit of Karen James was submitted to the Trial Court.

A. David Knudson Is Liable For Unjust Enrichment And ATGF Is Entitled To Restitution.

Knudson argues that Restatement of Restitution, section 23, at 101, including comment b., cited in the Brief of Appellant, is not Utah law. However, Restatement of Restitution, section 23, at

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[4] Had Knudson filed and affidavit denying his knowledge and intent, then ATGF would now have the right to move the Trial Court to set aside the judgment on the basis of fraud upon the court pursuant to Utah Rules of Civil Procedure, Rule 60(b). The Affidavit of Karen James proves that such statement, had Knudson submitted such evidence, would have been fraudulent.

The fact that Knudson did not make an affidavit or submit other evidence to establish that he did not have the knowledge and intent to commit the insurance fraud in question is the very reason that the law provides, as it does that the opposing party need not respond with counter evidence. See Utah Rules of Civil Procedure, Rule 56(e). Until evidence is presented, the pleadings of the parties are the appropriate statement as to the existence of a material disputed fact.

101 is cited by the Utah Supreme Court in Utah State Dept. of Social Servs. v. Toscano, 624 P.2d 1156 (Utah 1981). Knudson attempts to distinguish that case on the basis that there was not a contract between the parties in that case. However, Knudson ignores the fact that the Restatement being quoted by the Utah Supreme Court does not make such a distinction.

In order to make the leap describe above, Knudson further alleges on appeal that there was no misleading act upon which a claim of unjust enrichment may be made. Knudson argues that there was a valid, binding contract between ATGF and Knudson that removes the matter from the scope of equitable remedies. Knudson's argument blatantly ignores the facts. Knudson admitted from the very outset that the insurance money was wrongfully paid. [R. 98-101] Implicit in that acknowledgement of Knudson is the acknowledgement that the written instruments obtained at the time of payment were the result of the same mistake.

Restatement of Restitution, section 23, at 101 requires only a showing of mistake in payment in order to require restitution. It was undisputed that the payment was made by mistake. It is not enough for Knudson to allege on appeal that ATGF might have had the opportunity to discover the mistake.

Moreover, construed in the light most favorable to ATGF, payment was made and the documents in question were executed

simultaneously as a result of Knudson's insurance fraud. Even without the Affidavit of Karen James, ATGF's pleadings and evidence presented were entitled to be construed in the light most favorable to ATGF. At the very least, there was a dispute as to the material facts.

B. The Documents Recorded By David Knudson In Connection With The Sheriffs' Sale Constituted A Wrongful Lien.

The Trial Court concluded that a showing of knowledge and intent on the part of Knudson at the time of his actions was material to the wrongful lien statute. If evidence was presented of knowledge and intent, the Trial Court would have granted the motion for summary judgment filed by ATGF. This was the reason that the Trial Court deferred its decision until completion of discovery for "both motions." [R. 273] Contrary to Knudson's argument, as the Trial Court determined, all of the other elements of Wrongful Lien were properly met.

On the other hand, Utah Code Ann., section 38-9-1 (1994) does not require such a showing. Instead, the statute focuses on the response of the defendant after the error has been brought to the attention of the defendant. Damages are applied "if he willfully refuses to release or correct such document of record within 20 days from the date of written request from the owner or beneficial title holder of the real property."

ATGF, in its position through subrogation as the owner or beneficial title holder, made written demand. Knudson willfully refused to correct the effects of his wrongfully filed execution against the property. At the time of the demand, ATGF plainly showed that the execution was wrongful. Without regard to the knowledge of Knudson (which has since been established by the affidavit of Karen James as an undisputed fact), Knudson admitted his knowledge at the time of the written demand to correct. The mere fact that Knudson was not at that time the party holding the judgment or engaged in execution against the property does not destroy his ability to correct the effects of his filing which was wrongful at the time it was filed.

C. David Knudson Is Liable For Slander Of Title.

Knudson does not deny that he slandered the title of the owner of the property when he filed his execution against it. Knudson claims that ATGF cannot bring an action for slander of title if it did not own the property in question. Knudson's argument ignores the fact that ATGF is bringing this action in its own name under the principle of subrogation. ATGF is in the shoes of the owner of the property.

Knudson does not deny that ATGF suffered a loss when it paid Knudson to prevent the execution. Knudson attempts to characterize the payment as an arm's length business transaction,

as though ATGF wanted to purchase the judgment rather than stop the execution. The fact remains, that ATGF did suffer a pecuniary loss as a result of Knudson's slander of title.

Knudson does not dispute that he knew and should have known that the documents he filed pursuant to his execution against the Subject Property constituted false claims against the Subject Property. Defendant Knudson's own motion for summary judgment challenged only the malice element of plaintiffs' cause of action for Slander of Title. Defendant Knudson asserted that plaintiffs had not presented evidence sufficient to establish the malice element. As discussed above, without an affidavit from Knudson, ATGF was entitled to refer to its pleadings, and did not at that stage require the affidavit of Karen James which was later produced.[5]

Moreover, as discussed in the Brief of Appellant, the other facts presented to the Trial Court, construed in the light most favorable to ATGF, established the element of malice. Knudson's argument on appeal that his false notice was "inadvertent rather than calculated" is simply legal argument without basis in fact or

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5 See footnote 4 and accompanying text.

logic.[6] Knudson actively sought to execute the judgment against the property in question. He knew he was going to hurt the owner of the property. His calculated actions in researching the existence of the judgment on a parcel of property insured by title insurance, purchasing the judgment from the judgment holder, and then executing without regard to the release of the property from the judgment, was a calculated act and not an "inadvertent" error.

CONCLUSION

Amid a host of very thin arguments, Knudson still has not asserted as a "fact" or in the form of evidence that the insurance money was paid to him when it should not have been. It would be unjust not to permit the claims of ATGF to be heard on the merits, where all parties and the Courts acknowledge that a wrong has been done which can still be corrected.

Wherefore, ATGF requests that the Appellate Court reverse the judgment entered by the Trial Court, reverse the Trial Court's order denying that the judgment be set aside under Utah Rules of Civil Procedure, Rule 60(b), and remand this matter to the Trial

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[6] It should be noted that Knudson's arguments are legal argument concerning the construction of facts based on the absence of evidence submitted, and that they are not based on evidence of facts actually presented by Knudson in the form of affidavits or otherwise. Therefore, the relevant facts are subject to dispute by reason of the pleadings and by construction in the light most favorable to ATGF. See footnote 4 and accompanying text.

Court for adjudication on the merits on the basis of further motion and/or trial.

DATED this 26th day of February, 1999.

Thor B. Roundy
Attorney for Appellant

CERTIFICATE OF SERVICE BY MAIL

Thor B. Roundy
275 East South Temple, Suite 150
Salt Lake City, Utah 84111
Telephone (801) 364-3229
Bar No. 6435

I, THOR B. ROUNDY, certify that on this 26th day of February, 1999, I served two copies of the attached REPLY BRIEF OF THE APPELLANT, Appellate Court No. 981423-CA, upon counsel for the appellee in this matter by mailing it to him by first class mail with sufficient postage prepaid to the following address:

Mark O. Morris
Snell & Wilmer, LLP
111 E. Broadway, Suite 900
Salt Lake City, Utah 84111

Thor B. Roundy
Attorney for Appellant