1999

Southwest Communications, Inc. v. Paria Group and Stephen Zimmerman : Reply Brief

Utah Court of Appeals

Mark S. Swan; Richer, Swan and Overholt; Attorneys for Plaintiff/Appellee.
John G. Mulliner; Attorney for Defendants/Appellants.

IN THE UTAH COURT OF APPEALS

---oooOooo---

.A10
DOCKET NO. 990093-CA

SOUTHWEST COMMUNICATIONS, INC.,

Plaintiff-Appellee,

-vs-

PARIA GROUP and STEPHEN ZIMMERMAN,

Defendants-Appellants.

APPELLANTS' REPLY BRIEF

Case No. 990093-CA

Civil No. 970400848

Argument Priority: 15

---oooOooo---

APPEAL FROM A FINAL JUDGMENT
OF THE FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH
THE HONORABLE GARY STOTT, DISTRICT JUDGE

John G. Mulliner 2349
Attorney for Defendants/Appellants
363 North University Ave., Suite 103
P. O. Box 1045
Provo, UT 84603
Telephone: (801) 375-3120

Mark S. Swan
RICHER, SWAN & OVERHOLT
Attorneys for Plaintiff/Appellee
6925 South Union Park Center
Suite 450
Midvale, UT 84047
Telephone: (801) 561-4750

IN THE UTAH COURT OF APPEALS

---oooOooo---

SOUTHWEST COMMUNICATIONS, INC.,	:	APPELLANTS' REPLY BRIEF
Plaintiff-Appellee,	:	Case No. 990093-CA
-vs-	:	Civil No. 970400848
PARIA GROUP and STEPHEN ZIMMERMAN,	:	Argument Priority: 15
Defendants-Appellants.	:	

---oooOooo---

APPEAL FROM A FINAL JUDGMENT
OF THE FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH
THE HONORABLE GARY STOTT, DISTRICT JUDGE

John G. Mulliner 2349
Attorney for Defendants/Appellants
363 North University Ave., Suite 103
P. O. Box 1045
Provo, UT 84603
Telephone: (801) 375-3120

Mark S. Swan
RICHER, SWAN & OVERHOLT
Attorneys for Plaintiff/Appellee
6925 South Union Park Center
Suite 450
Midvale, UT 84047
Telephone: (801) 561-4750

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATEMENT OF FACTS

Southwest's statement of facts "relevant to Defendant's affirmative defense" includes items which are interpretation rather than statement of fact:

In paragraph 3 the test of the letter is set forth including the statement that a balloon payment would be made. In paragraph 4 it is set forth as fact that the balloon payment would be "the entire balance." Nowhere in the letter does it mention "entire balance."

Paragraph 7 calls what is referred to in the contract as a $100.00 per day late payment penalty (emphasis added) a late fee, construes the argument that it is unenforceable as an affirmative defense, and states that it had not been raised by answer or motion. Plaintiff's answer clearly admits that the $100.00 per day penalty was agreed to in the contract and just as clearly denies that it is owing.

ARGUMENT

POINT I: Plaintiff's prima facie case for judgment is not undisputed.

Defendants admitted that the contract contained a provision for late payment penalties. Defendants denied the amount owing. (R. 23). In response to the Motion for Summary Judgment, Defendants argued that the penalties were unenforceable. (R. 144). Southwest argues that its prima facie case was admitted. The amount owing is very definitely a part of the prima facie case and it was not admitted. The statement

in Southwest's brief (Point I) that the prima facie case is established as a matter of law is dependent on the assertion that the amount owing was admitted. This is clearly not true.

POINT II: There are material facts in dispute regarding the affirmative defense of settlement.

Southwest states that this defense fails for four reasons: Lack of written modification, no contract, no acquiescence by silence, and breach of the settlement agreement by Defendants. There is no sufficient basis for any of those reasons.

The requirement of a writing is overcome by Southwest's oral agreement and performance by Paria. It is well settled that part performance will substitute for a writing. On the relevant point, this case directly parallels Jenkins v. Percival, 962 P.2d 796 (Utah 1998) in which the Supreme Court held that part performance satisfies the requirement of a writing. at 801.

Southwest argues that there is no evidence to indicate a meeting of the minds. Schetter's affidavit, set forth in Appellee's brief, states that he negotiated with John Kirby and sent a letter confirming his understanding of the agreement. That affidavit is sufficient to at least raise the question of fact that there was an agreement, a meeting of the minds. Southwest also denies consideration for the agreement, saying that where the amount owed is undisputed, an agreement to pay the undisputed amount is not

sufficient. It should be noted that the Schetter letter refers to the unaudited amount claimed to be due. This clearly implies a dispute as to the amount and Paria's agreement to accept the unaudited figure.

Southwest suggests that because it is pointed out that there was no objection to the letter that Paria was relying on acquiescence by silence. That is not the case. The Schetter affidavit clearly states that an agreement was arrived at. This raises at least a triable issue of fact as to whether there was an agreement.

Finally, Southwest argues that Paria violated any agreement by not making the balloon payment. This argument obviously fails. First there has been no determination of when or how much the balloon payment would be. Second, Southwest immediately sued, thereby breaching the agreement, and was applying all payments to penalties. Clearly, no balloon payment could have been expected under those circumstances.

POINT III: That the penalty provision is unenforceable is adequately raised in the Answer to the Complaint.

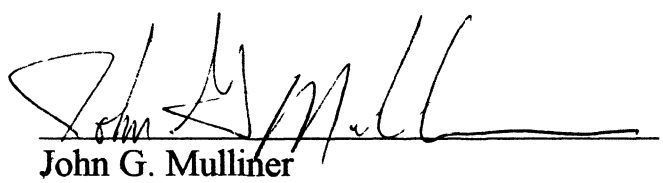
Southwest repeatedly asserts that its prima facie case is admitted and that the enforceability of the penalties is outside their prima facie case. Defendants have consistently denied the amount claimed to be owing. The amount due is part of the prima facie case. Since it is not admitted, it is in dispute.

Rule 8(c), Utah Rules of Civil Procedure sets forth certain things which must be raised as affirmative defenses. Penalty provisions being unenforceable is not among them. Southwest has failed to cite a single case which rules that this is an affirmative defense which must be specifically raised as such. Since it is not listed in the rule and there are no cases ruling that it is included in the catch-all provision of the rule, it is clear that the denial of the amount due is sufficient to put Southwest on notice. Fishbaugh v. Utah Power & Light, 969 P.2d 403, 406 (Utah 1998).

CONCLUSION

The grant of summary judgment by the trial court was error. Southwest is not entitled to recover the penalty. There is a triable issue of fact as to the existence of a settlement agreement.

RESPECTFULLY SUBMITTED this 16 day of June, 1999.



John G. Mulliner
Attorney for Defendants/Appellants

Mailing Certificate

Served the foregoing Appellants' Reply Brief this 16 day of June, 1999 by Mailing two true and correct copies thereof, postage prepaid, addressed as follows:

Mr. Mark S. Swan
RICHER, SWAN & OVERHOLT
6925 South Union Park Center
Suite 450
Midvale, UT 84047