

2009

Jospeh Billings v. Paul James Toscano : Reply Brief

Utah Court of Appeals

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Joseph Billings; pro se.

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No. 20091000

IN THE UTAH COURT OF APPEALS

Joseph Billings,

appellant,

vs.

Paul James Toscano, Paul Toscano P.C., and
Does 1-50, inclusive,

respondents.

CASE NO. : 20091000

APPELLANT'S REPLY BRIEF

**Appeal from the Judgment of the
District Court of Utah, Third Judicial District, Salt Lake County
District Court Case No. 090907164
Honorable Denise P. Lindberg**

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I INTRODUCTION

Appellee's brief is shot through with contradictions, equivocations, and a disturbing lack of candor. Worse, it is plain from the brief that appellee openly *urges and expects* this court to prejudice its analysis of appellant's claims by the events that resulted in appellant's painful loss of his license to practice law in the State of California about twenty-five years ago. To be sure, appellant has been eligible for re-admission for over twenty-years now in light of a solid record of over twenty-five years of continuous sobriety and recovery from alcoholism. But these matters are quite irrelevant to the issues before this court. And appellant, in any case, does not share appellee's revealing expectation that this court might determine the issues in this case on the basis of mistakes, which appellant committed as a young man over twenty-five years ago instead of the trial court record.

II

Appellee Is Not Entitled to Summary Adjudication of Count One of the First Cause Of Action for Abuse of Process Contained in the First Amended Complaint Because Appellant Controverted, by Sworn Affidavit, Appellee's Claim That Count One is Barred by a Prior Settlement Agreement

The trial court record is clear. Count One of the First Cause of Action for Abuse of Process contained in the First Amended Complaint alleges that appellee Toscano abused court process by overzealously filing a Chapter 7 petition in 2008 in behalf of a client, which flagrantly abused Chapter 7 as a matter of law within the meanings of 11 U.S.C. Section 707 (b) (2) (A) (1); 11 U.S.C. Section 707 (b) (2) (B) (I), and 11 U.S.C. Section 707

(b) (3).¹ Appellee asserted “prior settlement” as an affirmative defense to the claim in a motion for summary judgment according to the procedures contained in Utah Rules of Civil Procedure 56 and 7 (c)(3)(A). Appellee alleged (falsely in violation of Utah Rule of Professional Conduct 3.3)² in his Statement of Undisputed Facts that he and appellant had previously settled count one of the first cause of action (effective March 30, 2009).

Appellee’s moving papers and the trial court transcript show plainly that appellee relied exclusively upon his Statement of Undisputed Facts pertaining to an attached unsigned, settlement document in his attempt to show that appellant could not present a “genuine issue as to any material fact and that appellee was therefore entitled to judgment as a matter of law” in accordance with Utah Rule of Civil Procedure 56. Now, appellee claims that he also asserted *res judicata* or *collateral estoppel* as affirmative defenses in the trial court to establish that the alleged settlement document was genuine and legitimate as a matter of law. But here is what appellee told the trial court on September 1, 2009:

Peter Guyon (for defendant Toscano): “*So, this is not a question of res judicata. It’s not a question of collateral estoppel, it’s a question that Mr. Billings bargained away, whatever claims he may have had, and that boat sailed. Those claims are no longer and for that reason he does not have a right to assert them in this case and that’s why we’re asking for summary judgment.*” [RT, 8, Lines 5-11]

¹ Hence, if properly given the opportunity, appellant will eventually be able to show that he (not appellee) is entitled to summary judgment on count of the First Cause of Action for Abuse of Process contained in the First Amended Complaint as a matter of law.

² Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; or ...
(3) offer evidence that the lawyer knows to be false.

Perhaps the foregoing might be interpreted as an unusual, self-destructive way of asserting *res judicata* or *collateral estoppel* as affirmative defenses. Still, the better interpretation is that appellee simply elected to stand exclusively upon his Statement of Undisputed Facts (and his characterization contained therein of the attached unsigned, settlement document) and nothing more to support his motion for summary judgment.

In response to appellee's Statement of Undisputed Facts, appellant duly filed an Affidavit Controverting Defendants' Statement of Undisputed Facts and an Affidavit of Disputed Facts and Genuine Issues. In these affidavits, appellant testified upon personal knowledge that (1) *appellee Toscano* had actually repudiated the parties' legitimate January 28, 2009 settlement agreement (as amended March 30, 2009); (2) that Toscano unilaterally altered the legitimate agreement to create the sham, *unsigned* settlement document, which he had submitted to the trial court in support of summary judgment, and (3) that appellant had rejected the unilateral changes and withdrew the original offer of settlement in writing in light of the unilateral changes. Appellant's affidavits were detailed, specific, and exhaustive and therefore sufficient to refute (and establish disputed facts and genuine issues pertaining to) appellee's affirmative defense of "prior settlement" to count one of the First Cause of Action for Abuse of Process. It is well established that courts do not decide factual disputes on summary judgment motion; they simply decide whether there *is* a factual dispute or genuine issue of law. Holbrook Company v. Adams 542 P.2d 191 (Utah 1975). Summary judgment is appropriate if, and only if, there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Adamson v. Multi Cmty. Diversified Services, Inc. 514 F.3d 1136, 1145 (10th Cir.

2008). And it takes only one sworn, good faith affidavit to create a genuine issue of fact in order to preclude summary judgment. Holbrook Company v. Adams 542 P.2d 191.

Appellee's only response to these well established authorities is to assert that appellant is somehow barred from testifying upon personal knowledge in his affidavits about his settlement experiences with Toscano and the ultimate breakdown of the January 28, 2009 settlement agreement (as amended March 30, 2010). Appellee embeds an indiscriminate list of evidentiary objections to appellant's affidavits into his appellee's brief, but he failed to raise even one of the objections before the district court. Accordingly, even if appellee had managed to state a valid evidentiary objection in his brief, he nevertheless would have waived it because he failed to assert evidentiary objections of any sort before the district court.

III

Appellee has Failed to Show That The Federal Bankruptcy Court Order Approving Settlement of the Debtor's Estate Entitles Appellee to Judgment as a Matter of Law on Any Cause of Action Contained in the First Amended Complaint According to the Principles of *Res Judicata* or *Collateral Estoppel*

A. Appellee Waived and Rejected the Affirmative Defenses of *Res Judicata* and *Collateral Estoppel*

The federal bankruptcy court order approving settlement of the debtor's estate does not impact in the least any cause of action contained in the First Amended Complaint for several reasons. But most fundamentally, appellee is barred from even attempting to assert that he is somehow entitled to judgment as a matter of law in light of a separate court order because he explicitly waived and rejected the affirmative defenses of *Res Judicata* and *Collateral Estoppel*. Yet it is simply axiomatic that an order issued in a separate action

cannot impact *this* action in any manner except through the due process sensitive mechanisms of *Res Judicata* and *Collateral Estoppel*.

It is impossible to tell from appellee's brief exactly what he ultimately urges this court to believe with respect to his failure to allege *res judicata* or *collateral estoppel* as affirmative defenses in the trial court. Appellee invites this court to accept several tortuous claims and lines of reasoning. For example, the trial court record demonstrates that appellee asserted categorically that he knew well enough that his "prior settlement" defense "*is not a question of res judicata*" and it is "*not a question of collateral estoppel*." [RT, 8, Lines 5-11]. Now appellee claims that when he told the court that his motion did not present questions of *res judicata* or *collateral estoppel* that he was actually asserting the defenses, not waiving them (Appellee's Brief-30). Yet in another section of his brief, appellee is apparently asking the court to overlook his *failure to assert these defenses* because he did not "knowingly" waive them or, alternatively, because he did not really "intend" to waive them (Appellee's Brief-30). In any case, at the same time that appellee contends that he actually asserted these affirmative defenses (or did not know that he was waiving them), he also asks this court to excuse his *failure* to assert them because it is only appropriate, according to appellee, to raise *res judicata* or *collateral estoppel* as affirmative defenses in an answer, and appellee failed to file an answer to the complaint (Appellee's Brief-31). This last line of reasoning appears to be that appellee's failure to assert *res judicata* or *collateral estoppel* as affirmative defenses on summary judgment motion is excused by his prior failure (or refusal) to assert them in an answer. Appellee cites no cases in support of his odd proposition, which in any case contradicts his initial proposition that

he actually asserted *res judicata* or *collateral estoppel* (he does not say which) as affirmative defenses. Appellee himself makes his credibility a serious issue.

B. Appellee Also Failed to Show That the Bankruptcy Court Order Otherwise Satisfied the Requirements of Either *Res Judicata* or *Collateral Estoppel*.

Under Utah law, *res judicata* (claim preclusion) does not apply unless three requirements are met: (1) [t]he subsequent action must involve the same parties, their privies, or their assigns as the first action, (2) the claim to be barred must have been brought or have been available in the first action, and (3) the first action must have produced a final judgment on the merits of the claim.” See Brigham Young Univ. v. Tremco Consultants, Inc., 110 P.3d 678 (Utah 2005); Salt Lake City v. Silver Fork Pipeline Corp., 913 P.2d 731, 733 (Utah 1995), and Macris & Assocs., Inc. v. Neways, Inc., 16 P.3d 1214 (Utah 2000). *Collateral Estoppel* (issue preclusion) does not apply, unless four elements are satisfied: (1) [t]he party against whom issue preclusion is asserted must have been a party to or in privity with a party to the prior adjudication; (2) the issue decided in the prior adjudication must be identical to the one presented in the instant action; (3) the issue in the first action must have been completely, fully, and fairly litigated; and (4) the first suit must have resulted in a final judgment on the merits. See Brigham Young Univ. v. Tremco Consultants, Inc., *supra*; Salt Lake City v. Silver Fork Pipeline Corp., *supra*, and Macris & Assocs., Inc. v. Neways, Inc. *supra*. Appellee’s brief is entirely silent with respect to these cases, and he makes no attempt to show that he satisfied their requirements in the district court ---instead of insisting that the

requirements were simply not at issue [RT, 8, Lines 5-11] because he could not satisfy them.

Appellee relies exclusively upon Olsen v. Board of Education 571 P.2d 1336 (1976) (although he fails to draw an analogy between the facts in Olsen and this action), apparently as some sort of refutation or qualification of Brigham Young Univ. v. Tremco Consultants, Inc., 110 P.3d 678 (Utah 2005), Salt Lake City v. Silver Fork Pipeline Corp., 913 P.2d 731, 733 (Utah 1995), and Macris & Assocs., Inc. v. Neways, Inc., 16 P.3d 1214 (Utah 2000) concerning the requirements of *res judicata*. But Olsen is entirely in line with the foregoing authorities. No cause of action (or issue necessary to the determination of the cause of action) filed in one court is impacted by *res judicata* unless the cause of action was actually brought and tried on the merits or could have been brought and tried on the merits in the prior, separate court proceeding Olsen 571 P.2d at 1338. But appellee makes no attempt at all to demonstrate that any cause of action alleged in the First Amended Complaint in the state court was actually brought or could have been brought in the federal bankruptcy court –much less tried on the merits there. None of the causes of action filed in this state court proceeding were also filed in the federal bankruptcy proceedings.³ And as the district court itself noted, none of the claims *could have been filed in federal bankruptcy court because the federal bankruptcy court lacked jurisdiction to consider them* [RT-4]. Meanwhile, appellee is utterly and necessarily silent with respect to his failure to satisfy the requirements of *collateral estoppel* (issue preclusion) because the federal bankruptcy court simply refused to

³ Indeed, the hearing held to settle the debtor's estate was not even an adversary proceeding.

conduct an evidentiary hearing of any kind on any issue pertaining to any cause of action alleged in the state court proceedings.

C. Appellee Has Also Failed to Show That the Alleged Settlement Document Impacted Counts Two and Three of the First Cause of Action for Abuse of Process, the Second Cause of Action for Fraud, or the Third Cause of Action for Negligence

Even the alleged settlement agreement (the sham document, which Toscano presented to the court) is relevant to only *count one* of the First Cause of Action for Abuse of Process contained in the First Amended Complaint.⁴ The alleged effective date of the sham settlement document is March 30, 2009, and it pertains to conduct, which Toscano committed in 2008. But *all* of the facts and events alleged in support of counts two and three of the First Cause of Action for Abuse of Process, the Second Cause of Action for Fraud, and the Third Cause of Action for Negligence occurred *after the alleged effective date* of the sham settlement agreement. Hence, even the sham settlement document fails to include counts two and three of the First Cause of Action for Abuse of Process, the Second Cause of Action for Fraud, and the Third Cause of Action for Negligence, which arise from acts that Toscano committed after he allegedly entered into a settlement agreement effective March 30, 2009 for claims that arose from his 2008 conduct.

Notwithstanding, appellee and the trial court (after, in essence, giving *collateral estoppel* effect to the bankruptcy court order in error) interpret the sham settlement document to mean that appellant agreed to waive all claims against Toscano, including

⁴ The claim for abuse of process referred to in the sham document is the claim that arose from Toscano's filing of a frivolous Chapter 7 proceeding in flagrant abuse of the federal bankruptcy laws in 2008 ---count one (and only count one) of the First Cause of Action.

claims for liability for *any act* that Toscano might commit after March 30, 2009 or in other words *anytime in the future, including tomorrow*. Here is the language that the court and appellee rely upon:

[T]he parties hereby mutually release each other from any and all claims, debts, obligations, actions, demands, liabilities, costs, expenses, attorneys fees, damages, real property (sic) or controversies of any kind (sic) or nature whatsoever (sic), including any actions for abuse of process or malicious prosecution, whether grounded in law or equity, whether known or unknown, in any way relating to or arising out of the claims and defenses raised in the lawsuit, the adversary proceeding, or any motions or actions in any court, tribunal, administrative proceeding, of any kind or any nature whatsoever

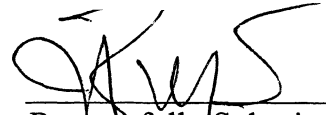
To be sure, Toscano has written the sham release to include acts known or unknown at the time of the alleged agreement. This is a common addition important in California and perhaps Utah. But releasing a party from liability for acts (including any actions for abuse of process) “known and unknown” at the time of settlement is a far cry from releasing the party from liability for all *future* acts (including *future, distinct abuses of process* and *fraud* and *negligence*). Nothing in even Toscano’s sham release can be fairly or even reasonably interpreted to mean that the parties allegedly intended that Toscano would be released from liability for any act, which he might commit *after* the effective date of the alleged settlement agreement. Toscano and the trial court have simply read the term “any and all *future* acts” into the sham document. What is more, Toscano failed to introduce any sort of evidence or legal authority in the trial court (much less evidence or authorities that would entitle to him to judgment as a matter of law) that leads to a *necessary legal conclusion* that the foregoing language means that appellant

released Toscano from liability for any act that Toscano might (*still*) commit in the future.

Nothing in law, fact, or equity warrants such a radical interpretation and conclusion.

IV CONCLUSION

In light of the foregoing, appellant respectfully requests that the court reverse the trial court's order entering summary judgment of the First Amended Complaint on February 24, 2010. Appellant also respectfully requests that the court award costs of appeal.


Respectfully Submitted,
Joseph Billings
Appellant, In Pro Per

Certificate of Service

I am not a party to this action. On August 14, 2010, I served the following described document:

Appellant's Reply Brief

upon the interested parties by placing a true and correct copy addressed and delivered as follows:

Defendants Paul Toscano and Paul Toscano, P.C.

Law offices of Paul Toscano and Paul Guyon
Newhouse Building, Suite 614
10 Exchange Place
Salt Lake City, UT 84111
(Two Copies)

Original Filed with the court at
Clerk of the Court of Appeals
450 South State Street, 5th Floor
Salt Lake, City, Utah 84114
(Federal Express Mail – Original and Eight Copies)

X (By Mail) I deposited the sealed envelope with the China Postal Service with postage fully prepaid.

I certify under penalty of perjury under the laws of the State of Utah that the foregoing is true and correct.

Executed on August 14, 2010 in Shanghai, China.

A handwritten signature in black ink, appearing to read 'Jili Jiang', with a long horizontal flourish extending to the right.

Jili Jiang