2010

Keybank National Association v. Systems West Computer Resources, Inc., and Nancy H. Halverson : Reply Brief

Utah Court of Appeals

UTAH COURT OF APPEALS

KEYBANK NATIONAL ASSOCIATION, Plaintiff/Appellee, SYSTEMS WEST COMPUTER RESOURCES, INC., and NANCY H. HALVERSON, Defendants/Appellants.	:	**REPLY BRIEF OF APPELLANT** Published Opinion Requested Appellate Case No: 20100101

Appeal from the Third District Court of Utah, Central Division
Honorable Paul G. Maughan
District Judge
No. 080921404

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ARGUMENT

Rule 24(c) of the Utah Rules of Civil Procedure directs that the reply brief "shall be limited to any new matter set forth in the opposing brief." There is little new in the bank's opposing brief, and this reply addresses only the new matters.

I. THE DISTRICT COURT ERRED BY DISMISSING COUNTERCLAIMS AND DEFENSES THAT WERE NOT INCLUDED IN THE BANK'S MOTION FOR SUMMARY JUDGMENT

The bank acknowledges that the district court granted summary judgment as to the entire case even though the bank chose not to move with respect to all claims and defenses. That is, the district court granted summary judgment as to claims and defenses that, for reasons known only to the bank, the bank had decided not to include in its summary judgment motion.

Summary judgment is improper with respect to claims and defenses not expressly or implicitly within the scope of the movant's motion. *Kell v. State of Utah,* 194 P.3d 913(Utah 2008); *Timm v. Dewsnup,* 851 P.2d 1178 (Utah 1993). The bank's brief is a telling illustration of how the defendants were prejudiced by the district court's overreaching summary judgment.

For example, the bank in its appellee brief now argues the substance of the defendants' negligent misrepresentation claim, which the bank failed to argue, and failed to present to the district court. The appellee brief only now on appeal argues that the defendants' pleading of negligent misrepresentation was "vague" and did not identify the

"KeyBank officials" who made the misrepresentations. The bank also now argues that the misrepresentations at the base of the negligent misrepresentation claim related to a state of mind and not to objective, verifiable facts. The bank now chides that defendants failed in the district court, and fail in this Court, to "point to any such evidence that would allow a different outcome on summary judgment...." Appellee Brief pp. 23 - 24.

The reason the defendants did not marshal evidence and argument in the district court to support their misrepresentation claim was that the bank did not move for summary judgment on the misrepresentation claim. Defendants responded squarely to the only argument that the bank made about negligent misrepresentation -- namely, the bank's argument that the parol evidence rule doomed the misrepresentation claim. But this argument was a legal argument, and did not invite or require the defendants to present the substantive evidence of negligent misrepresentation.

Defendants are not able in this Court to adduce that evidence exactly because the evidence is not in the record in the district court. Had the bank included the misrepresentation claim in its summary judgment motion, defendants would have and could have presented overwhelming evidence of negligent misrepresentation. Defendants would, obviously, be severely prejudiced if the bank were able to prevail in dismissing the negligent misrepresentation claim by failing to move for summary judgment on that claim in the trial court, and then to argue to this Court that the claim was justifiably dismissed because the defendants failed to respond to a motion that was never made.

The defendants and their counsel were surprised by a summary judgment that went beyond the claims and defenses included in the bank's motion. They responded to the entire scope of the summary judgment motion that the bank chose to make, and did not respond to the issues, claims and defenses not included within the scope of the bank's summary judgment motion. The movant is the master of the scope of the summary judgment motion that it makes. This Court should reverse a summary judgment that resolved claims and defenses that were not even within the scope of the summary judgment motion. *Timm v. Dewsnup,* 851 P.2d 1178 (Utah 1993).

II. THE WRITTEN AGREEMENTS EITHER SUPPORTED SYSTEMS WEST'S POSITION OR WERE AMBIGUOUS

The bank admits that the contract between the bank and the defendants included the Business Loan Agreement (ROA 122 - 129). The Business Loan Agreement expressly provides that all loans made by the bank to the defendants were subject to the "representations, warranties, and agreements as set forth in this [Business Loan Agreement]," and that all loans made under the agreement that were reflected in the series of promissory notes "shall be and remain subject to the terms and conditions of this [Business Loan] Agreement." ROA 122. The Business Loan Agreement provides as follows:

> TERM. This [Business Loan] Agreement shall be effective as of January 10, 2001, and shall continue in full force and effect until such time as all of Borrower's Loans in favor of Lender have been paid in full ... or until such

time as the parties may agree in writing to terminate this [Business Loan Agreement].

ROA 122.

These provisions make the following clear, and the bank does not challenge these obvious propositions: the Business Loan Agreement was clearly the primary and pivotal document among the contract documents, with the other documents subject to and subordinate to the Business Loan Agreement. The Business Loan Agreement was never superseded and never ended.

The foregoing unambiguous provisions of the Business Loan Agreement make it clear that the agreement could be terminated only if the loan had been paid in full or if the parties mutually agreed in writing to terminate the agreement. The bank admits that neither of these conditions of terminating the loan ever occurred.

The bank has no coherent answer for how the district court could be justified in finding a termination of the agreement in the face of this language and the fact that the express conditions of termination were never satisfied. The bank simply argues that the foregoing term language applied only to "*this [Business Loan] Agreement*", apparently suggesting that the parties intent was that the promissory notes could be called or non-renewed even though the conditions of terminating the line of credit under the Business Loan Agreement had not been satisfied.

The defendants believe that, by expressly providing that the promissory notes "shall be and remain subject to the terms and conditions of this [Business Loan Agreement]," the bank was prevented from calling the loan because the conditions of terminating the Business Loan Agreement had not been satisfied. Even if this Court concludes that the termination provision of the Business Loan Agreement is ambiguous, summary judgment was improper because parol evidence should have been considered.

The bank's integration arguments do not change this. Integration clauses do not make parol evidence inadmissible where the written contract is ambiguous. *E.g., City of Grantsville v. Redevelopment Agency of Tooele City,* 2010 UT 38, 233 P.3d 461 (Utah 2010). Even if the Business Loan Agreement was integrated, as both parties concede, parol evidence may be considered to determine the intent of the parties and resolve the ambiguity. *Id.*

The only parol evidence on this question was the declaration of Systems West's CEO that the parties had agreed that the loan could not be terminated and called so long as Systems West remained current on the monthly payments. Halverson Decl. ROA 1271. If the Business Loan Agreement is ambiguous regarding the conditions of termination, the district court should either have credited the only parol evidence presented, and dismissed the bank's claims, or found that a genuine issue of material fact existed, and ordered that the claims proceed to trial.

A finding of ambiguity would also destroy the bank's principal argument about the defendants' claims and defenses of breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, breach of fiduciary duty and promissory and equitable estoppel. The bank argues that all of these claims and defenses were based upon oral agreements and representations that were made inadmissible by the parol evidence rule. Even if this argument were correct - and defendants have shown that it is not - the argument fails because its premise fails. The written agreements either supported the defendants' claims and defenses or were ambiguous, and the bank's argument that the contract prevented all claims and defenses fails.

CONCLUSION

Defendants/appellants Systems West Computer Resources and Nancy Halverson respectfully request that this Court vacate the summary judgment and order the district court to reinstate defendants' defenses and counterclaims (except the seventh counterclaim, defamation, which defendants voluntarily dismissed). Defendants further request that this Court reverse the district court's ruling on plaintiffs' motion for summary judgment, and either dismiss the claims if this Court determines that the written agreements unambiguously prevent the termination of the loan in the absence of a mutual written agreement of termination, or order that the agreements are ambiguous and that parol evidence may and shall be considered to determine the intent of the parties.

Dated this ___ of September, 2010.

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– and –

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CERTIFICATE OF SERVICE

I hereby certify that on the September 24, 2010, I caused a two true and correct copies and a CD containing a searchable, electronic version of the foregoing **REPLY BRIEF OF APPELLANT** to the following identified person by mailing a copy thereof, via first-class United States mail, postage prepaid, addressed as follows:

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