

1980

Morris Myers and Peggy A. Myers v. Howard R. Morgan and David T. Green : Appellant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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MORRIS MYERS and
PEGGY A. MYERS,

Plaintiffs-
Respondents,

v.

HOWARD R. MORGAN and
DAVID T. GREEN,

Defendants-
Appellant.

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No. 16991

APPELLANT'S REPLY BRIEF

Appeal from a Judgment of the Third
Judicial District Court in and for
Salt Lake County, State of Utah, the
Honorable Jay E. Banks, Judge

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OF THE STATE OF UTAH

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PEGGY A. MYERS,	:	
	:	
Plaintiffs-	:	
Respondents,	:	
	:	
v.	:	No. 16991
	:	
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	:	
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Appeal from a Judgment of the Third
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PRELIMINARY STATEMENT

On July 21, 1980, Plaintiffs-Respondents filed with this Court a brief responding to Appellant's arguments on appeal and also purporting to set forth a cross-appeal. This filing by respondents occurred ninety-four days after the record on appeal was designated on April 18, 1980; ninety-one days after Plaintiffs-Respondents' Motion to Dismiss Appeal was denied on

April 21, 1980; and seventy-five days after Plaintiffs-Respondents' Motion for Summary Affirmance was denied on May 7, 1980. Defendant-Appellant now respectfully submits this short Reply Brief pursuant to Rule 75(p)(1) of the Utah Rules of Civil Procedure.

ARGUMENT AND AUTHORITY

I. PLAINTIFFS-RESPONDENTS' CROSS-APPEAL SHOULD BE DISMISSED.

A. Respondents' Cross-Appeal is Untimely.

In their brief filed with this Court on July 21, 1980, Plaintiffs-Respondents purport to set forth a "cross-appeal". Black's Law Dictionary (1968) defines a "cross-appeal":

Where both parties to a judgment appeal¹
therefrom, the appeal of each is called a
'cross-appeal' as regards that of the other
(emphasis added).

Id. at 124. Rule 74(b) of the Utah Rules of Civil Procedure recognizes cross-appeals and provides:

¹Rule 75(p)(1) of the Utah Rules of Civil Procedure provides in pertinent part:

Within one month after the record on appeal is
filed in supreme court, unless a motion to dismiss
the appeal has been interposed, in which event
within twenty days from the denial of such motion,
the Appellant shall file with the clerk of the
Supreme Court not less than ten copies of his
brief on appeal, and shall serve upon the imposing
party not less than two copies of such brief
. . . (emphasis added).

Where any . . . part[y] ha[s] filed a notice of appeal as required by Rule 73, other parties may separately . . . cross-appeal from the order or judgment of the lower court without filing a notice of appeal; provided, however, such party . . . shall file a statement of the points on which he intends to rely on such cross-appeal within the time and as required by subdivision (d) of Rule 75. (emphasis added)

The requirements referred to in Rule 75(d) are as follows;

If the Respondent desires to cross-appeal, . . . the Respondent shall, within ten days after the service and filing of Appellant's designation, OR if the parties stipulate as to the record on appeal, within ten days from the filing of such stipulation, serve and file a statement of Respondent's points, either by way of such cross-appeal or for the purpose of having considered other additional matters than those raised by appellant. (emphasis added)

Whether Plaintiffs-Respondents had ten days from the filing of Appellant's Designation of Record appeal under Rule 74(b) or whether they had 20 days from the final denial of their last Motion on appeal as provided in Rule 75(b)(1), Preliminary Statement to this Brief. The "cross-appeal" filed by Plaintiffs-Respondents was severely out of time and thus cannot be recognized by this Court under the applicable Rules of Civil Procedure. [See Preliminary Statement, supra]. The Utah Legislature has provided for orderly appeal as recommended by this Court. Compliance with these statutory Rules of Civil Procedure is mandatory. In re Martins Estate, 415 P.2d 319 (Hawaii 1966). For this reason if none other, Defendant-Appellant respectfully requests this Court to dismiss the untimely cross-appeal.

B. The District Court Was Correct in Receiving Evidence of Partial Payment on the Promissory Note.

Plaintiffs-Respondents erroneously urge on cross-appeal that the District Court improperly admitted, heard and considered evidence as to partial payment of the promissory note. Cited in support of this contention are Rules 8(c) and 12(h) of the Utah Rules of Civil Procedure and two Utah Supreme Court cases: Bezner v. Continental Dry Cleaners, Inc., 548 P.2d 898 (Utah 1976) and Tygesen v. Magna Water Co., 375 P.2d 456 (Utah 1962). A close examination of these rules and cases clearly indicates the vacuity of the cross-appeal.²

Rule 8(c) requires the pleading of "affirmative defenses". Each of the common law affirmative defenses set forth in Rule 8(c) would, if successful, completely relieve a defendant of liability on the claim.³ Thus, the "payment" contemplated by Rule 8(c) (and the waiver provisions of Rule 12(h)) is complete payment in the sense of satisfaction. In the case at bar, defendant-Appellant Green does not claim satisfaction

²The decisions cited by Plaintiffs-Respondents, the Bezner case and the Tygeson case, are wholly inapposite in that neither deal with the 8(c) defense of payment let alone with the factual question of partial payment implicit in Defendant-Appellant's specific denials portions of the Plaintiffs' Complaint.

³This statement purposely ignores the later statutory modification of certain common law affirmative defenses as contributory negligence.

of the debt. Neither did the District Court analyze such a claimed defense. Defendant-Appellant did specifically deny in his Answer, however, that (a) he was liable for the amount of a certain promissory note; and (b) that no payments had been made save \$100.00 on the note. These specific denials did not raise the affirmative defense of payment (meaning extinguishing a once valid debt) but rather disputed specific factual allegations made in Plaintiff's Complaint, (i.e.: that no payments save \$100.00 were ever made on the note.)

The District Court correctly took to be at issue the question of whether any payments (and if so any in excess of \$100.00) had been made on the alleged promissory note. The Court's receipt of evidence concerning partial payment and its finding that some payments had been received was not to test an 8(c) defense but to rightly ascertain the factual sum allegedly due from defendants. This was a proper exercise of fact-finding judicial authority by the District Court. Such a finding has not been alleged to be erroneous by Plaintiffs-Respondents.

II. THE JUDGMENT ENTERED BELOW AGAINST APPELLANT DAVID GREEN MUST BE REVERSED.

A. The Judgment on Appeal Here Is for Liability on a Promissory Note.

The judgment, Findings of Fact, and Conclusions of Law which are on appeal before this Court set forth that David Green

is liable to Plaintiffs-Respondents on a promissory note. A review of the transcript of trial clearly shows that the District Court accepted no evidence nor found any facts as to an underlying obligation of defendant-Appellant David Green. On the contrary, the entire trial proceeded on the issue of whether a promissory note had been executed by David Green and Howard Morgan and whether that note had been partially paid. Thus, this Court does not face the "right result for the wrong reason."

If such were the case, the logic of some decisions cited by Plaintiffs-Respondents would be applicable. (See, e.g., Alphin Realty, Inc. v. Sine, 595 P.2d 860 (Ut. 1979); Edward v. Iron County, 531 P.2d 476 (Ut. 1975); Green Ditch Water Co. v. Salt Lake City, 190 P.2d 586 (Ut. 1964).) There are no statutes with one or more alternative interpretations nor are there rules of law with alternative justifications. None of the situations posed in the cases cited by Plaintiffs-Respondents are at all helpful or on point with the issue facing this Court. Rather, this appeal confronts a District Court judgment which is clearly wrong and cannot, absent remand, be transformed from a judgment on a promissory note to a judgment on an alleged underlying debt obligation.

B. The District Court Based Its Judgment Upon the Evidence it Received.

The District Court found that the note had been partially paid and that the promissory note was a liability of both

defendants, even though defendant David Green had never signed the note. (See Appellant's Brief at 3.) Appellant's Petition before this Court is thus on the very judgment of the District Court itself.

The District Court record and Findings of Fact are not sufficient to impose liability on Appellant David Green on any underlying obligation. Any such finding must be the result of specific evidentiary submissions, legal argument and specific findings of fact and conclusions of law as to that point. This Court can affirm the lower court's decision only if it finds that Defendant-Appellant David Green is liable on a promissory note. This is legally impossible.

C. Respondents Have Failed to Controvert the Rule of Law that David Green is not Liable on the September 4, 1974 Note Because He Did Not Sign It.

The impossibility of affirming the District Court's judgment arises because a party is not liable on any instrument unless his name appears on the face of it. Havatampa Corp. v. Walton Drug Co., Inc., 354 S.2d 1235 (Fla. 1978); Wiebke v. Richardson & Sons, Inc., 265 N.W.2d 571 (Wis. 1978); Ness v. Greater Arizona Realty, Inc., 517 P.2d 1278 (Ariz. 1974); Fewox v. Tallahassee Bank & Trust Co., 249 S.2d 55 (Fla. 1971); Jennaro v. Jennaro, 190 N.W.2d 164 (Wis. 1971); Bostwick Banking Co. v. Arnold, 178 S.E.2d 890 (Ga. 1970). See, also, 11 AM JUR 2d, Bills

and Notes § 560; § 70A-3-401(1) Utah Code Ann. It is Howard Morgan's signature, not that of David Green which appears prominatly on the face of the promissory note.

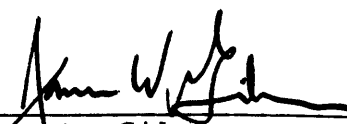
Howard Morgan alone was properly found liable on that note even in the face of the allegation that he was acting as defendant David Green's agent. An agent is solely and personally liable on an instrument if he does not name the principal he represents or show that he signed in a representative capacity. North Carolina National Bank v. Wallens, 230 S.E.2d 690 (N.C. 1976); Ness v. Greater Arizona Realty, Inc., 517 P.2d 1278 (Ariz. 1974); Wolfe v. University National Bank, 310 A.2d 558 (Md. 1973); § 70A-3-403(2) Utah Code Ann.


CONCLUSION

On the strength of the detailed legal and factual analysis set forth in Appellant's Brief (uncontroverted by Respondents), the course open to this Court is clear. David Green is not and cannot be liable as a party to the September 4, 1974 note because he did not sign it. To the extent that the District Court's judgment differs it must be reversed.

Respectfully submitted this 1st day of August, 1980.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of August, 1980, a true and correct copy of the foregoing Appellant's Reply Brief was mailed, postage prepaid, to the following:

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