

1999

Joy Pinckney v. John David Snideman : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS

JOY PINCKNEY

Case No. 990944-CA

Plaintiff/Appellant

JOHN DAVID SNIDEMAN

Oral Argument Priority No. 15

Defendant/Appellee

REPLY OF APPELLANT

On Appeal from a Judgement Entered
in the Fourth district Court , In and For Utah County,
Honorable Merrill Hermansen

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TITLE 78 of the Utah Codes annotated as amended.8

PRELIMINARY STATEMENT

Contrary to Snideman's assertions Plaintiff was suing Snideman for unlawful detainer based upon the statutory provisions of the Utah Code and not on the Trust Deed. The Trust deed only gave the right by assignment to Appellant Pinckney to sue for rents. This right was assigned by Prodigy Enterprises Inc the owner of the property to Robin Lott the seller of the property and the beneficiary of the deed of trust who assigned her right to the Appellant. It was not based on the Deed of Trust. The basis of the law suit was for unlawful detainer and the collection of rents.

Although Appellee has titled their response as Appellee's Opening Brief to Plaintiffs opening brief Appellant will treat it as a reply by the Appellee to Appellant's opening brief.

Appellee although having failed to filed any notice of appeal yet through out it's brief restates the issues on which the Appellant is making her appeal. If the Appellee wanted to have his own issues on appeal he should have filed an appeal and set forth his own issues. Appellant stands on the issues of appeal as she has stated them, but Appellant is not sure if the issues as stated by the Appellee is raising new issues or not. Therefore Appellant will answer more fully than is generally required of a reply by Appellant to Appellee's reply..

Although technically Appellant may not have made the appropriate citation showing the preservation of the issue in the trial court at the proper time and the proper

place within it's opening brief, the record is clear from the citations set forth in the opening brief and the addendum that all the issues Appellant is appealing were made an issue in the trial court and the record was preserved thereon. See findings of fact filed by Appellant. R. 0049 and R0073 . As a result of the manner in which the Court handled the case the only way the Appellant could preserve the issues on appeal was to object to findings of fact and conclusions of law. See R.0049, 0050, 0073 through 0067.

ARGUMENT

Appellee Snideman makes nine arguments in support of the district court's decision. Appellant Pinckney will reply to each in the order presented by Appellee Snideman.

APPELLEE'S ARGUMENT NO. 1. PINCKNEYS FIRST ISSUE ON APPEAL WAS NOT DECIDED NOR REACHED BY THE LOWER COURT.

The Appellant argues that it was mandatory for the lower court to reach the decision of "was there a tenancy or not". Both the lower court and the Appellee are confused between the right to foreclose which is based on owner ship against the owner of the property and a suit for unlawful detainer which is based on possession and non payment of rent. R. 0004 par. 2 and paragraph 5. In the instant case Appellee was sued as an individual in possession of the property and who lived on the property T. page 7 line 18 and who admitted he owed rent. T page 40 1 through 10 and Exhibit 5.

Prodigy Enterprises Inc. The owner of the property would still have the right to

possession of the property and be the owner of the property whether or not the action against Snideman ,an individual, was successful or not successful. Appellee Snidemen would be out if the unlawful detainer action was successful and remain in if it was unsuccessful.

The fact that the lower court failed to find on the issue of the unlawful detainer is the basis of the appeal. The court did not find one way or the other as to whether Snidemen was a tenant but apparently found that the owner of the property was the proper party as the defendant or Plaintiff. The lower courts finding of fact that the real party interest is the corporation (R. 0109 par. 1) is not clear as to whether the lower court means by the term 'party'. Does it mean the plaintiff or the defendant.. Clearly one cannot sue the owner of the property for rent and unlawful detainer. The lower court ignored the issue of tenancy. There should have been a finding that Snideman was or was not a tenant. Thus Appellees argument and the lowers courts decision is based on a misunderstanding of the difference between an action in unlawful detainer and a statutory foreclosure of a trust deed.

For the foregoing reasons the issue of tenancy should have been reached by the lower court.

APPELLEE'S ARGUMENT NO. 2. PLAINTIFF'S FAILURE TO FOLLOW PROCEDURE AND ATTEMPT TO FRAME THE ISSUE DOES NOT COMPORT WITH THE FACTS.

Although Appellant's attorney failed to technically follow Rule 24(a) Appellant did clearly protect the record and show each was preserved for the record per his findings of fact which were submitted although not accepted And Appellee is not prejudiced by this oversight of Appellant's attorney and Appellant should not be denied her day in court because of the technical error of Appellant's attorney.

Appellee refers to the findings of fact signed by the lower court on September 13, 1999. R 53. In this case the Appellant does not admit that there was not a tenant, but was merely submitting findings consistent with the courts ruling. These were signed by the court.

In the record cited by Appellee R 72. Appellant Plaintiff's attorney made an error and the statement pertaining to written lease should have read "might have been a written lease between Defendant and Prodigy Enterprises Inc. In any event there wasn't any written lease between Prodigy Enterprises Inc the owner of the property and Snideman the party in possession. As noted in the pleadings R. 0004 par 2 the cause of action was based on an oral lease.

Although Appellant sought attorney fees pursuant to the unlawful detainer statute , she would have only been entitled to same if she could prove there was a written document between plaintiff and defendant, providing for the payment of same. In this case there was none.

APPELLEES ARGUMENT NO. 3. DEFERENCE TO THE TRIAL COURT'S

FACTUAL DETERMINATION SHOULD BE MADE UNLESS CLEARLY
ERRONEOUS.

The rule of law "Deference to the Trial courts Factual determination should be made unless clearly erroneous" is correct the trial courts statement " the court finds from the documentary evidence received, that the real party in interest is the corporation" is clearly erroneous. Appellants opening brief clearly covers this argument at page 7 and 8. Appellant ignores the argument contained there in and does not answer same.

APPELLEES ARGUMENT NO. 4. EXHIBIT "5," SHOULD BE
DISREGARDED.

This document goes to the issue of whether or not Appellee was a tenant or not a tenant. The lower court failed and refused to find whether Appellee was a tenant or not a tenant. This does not support the finding or conclusion that the corporation was the proper party. Thus it must be considered one way or another. If Appellee was not a tenant then the corporation could not be a proper party either . The issue is one of tenancy.

Exhibit 5 was not a settlement discussion it was an agreement as to what was owed and what was not owed. This was not a compromise and release. Appellee at page 13 is trying to keep the document out of evidence although it was stipulated as an Exhibit. His reasoning as stated at pages 13 and 14 are fallacious. Appellee / Snidman was told by Tretheway that he(Tretheway) was in the drivers seat on this deal. T 120 page 82 lines 21

through 23. Further Appellee at page 13 par. F states “ Snideman also received legal advice from Tretheway and cites R. 120 page 85. If one reads that page it is clear the legal advice given Snideman was for Appellee to get an attorney for his injury claim and asking Appellee if he wanted an attorney for this matter and he stated he didn’t want to pay counsel for this meeting. The foregoing statements clearly meets the professional standards for a lawyer and advising one to see another lawyer does not constitute legal advice.

APPELLEES ARGUMENT NO. 5. THE AUTHORITY CITED BY
PINCKNEY SUPPORTS, RATHER THAN DETRACTS FROM THE LOWER
COURTS FINDINGS.

That the Case of Pearce vs. Schurtz 70 P 2d. 442, 443 supports the lower courts finding. The dissenting opinion may have supported the lower courts decision, but the majority of the court ruled the unlawful detainer action did apply as stated in Appellants opening brief at page 7 and further clearly set forth the proper parties to an action for unlawful detainer. The majority court had no problem in finding the action for unlawful detainer and did not need to strain or have difficulty as stated by Appellee without any citations to back it up.. Appellee is trying to adapt the dissenting opinion as the law of Utah. This just doesn’t happen until the dissenting opinion is accepted by the appellate courts. As stated in the Pearce case i.d. an unlawful detainer action is not an action on a promissory note or to quiet title where all parties need to be named. Pinckney is not

trying to convert the trust deed or the note into any kind of tenancy. The trust deed by assignment gives the Appellant the right to sue only for rents in the event the Trustor or owner is in default in his payments.. The instant case of Appellant is based on statute and possession and Appellants belief that Appellee was a tenant and paid rents.

APPELLEES ARGUMENT NO. 6. RESPONSE TO PINCKNEYS SECOND ISSUE. Appellees argument ignores the fact that the Appellants suit was brought pursuant to Title 78 of the Utah Codes annotated 1953 as amended. R 0004 par. 4. This action was not brought against the Appellee on the trust deed as Appellee keeps claiming. The trust deed was not between Appellant and Appellee. Although it did provide for attorney fees as between the Trustor and the Beneficiary thereto. In the case before the Court there is not one shred of evidence showing that the attorney fees provisions were for the benefit of any third party.

The case of 447 Associates v. First Security Financial 973 P 2. 992 App CT. (1999) is clearly distinguishable for the following reasons.

1. The written agreement was between the Plaintiff and the Defendant. In Appellant's case the agreement is not between the Plaintiff and the Defendant.
2. The suit was brought on the agreement between the Plaintiff and the Defendant and that agreement provided in writing for the award of attorney fees to the parties to the agreement. In the instant case there was no such agreement.

Appellant's suit is not brought on any agreement between the parties nor does

Appellants claim for attorney fees arise out of the Trust deed as claimed by Appellee.

Appellee fails to cite any part of the record to establish such claim as there is none.

It appears that Appellee is also claiming that where one party wrongfully makes a claim for attorney fees such a claim gives the other party if they prevail the right to be awarded attorney fees in spite of the fact there is no written agreement between the parties providing for attorney fees, nor any third party beneficiary contract providing same to a third party.

APPELLEE'S ARGUMENT NO. 7. Appellant response to this argument is that the affidavit R 56,57, 58, 59 is totally defective in that it does not go into specific detail as to whether or not the items listed had to do with the defense of the case. Much of the items were after the case was tried. After all this case started at 9:05 R. 0023 and ended before noon. It was just a three hour case involving only 46 pages of testimony and six stipulated Exhibits. Attorney fees in the sum of \$3418.00 for a case of such a short trial for unlawful detainer is exorbitant.

APPELLEE'S ARGUMENT NO. 8. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER PROVIDE FOR ATTORNEY FEES.

Appellee can contend all Appellee wants to concerning the finding of facts regarding attorney fees , but the lower courts findings of fact do not comply with the cases as set forth at page 13 of Appellant's brief as to findings of fact regarding attorney fees.

**APPELLEES ARGUMENT NO. 9. PINCKNEYS APPEAL IS FRIVOLOUS
AND DAMAGES INCLUDING ATTORNEY FEES SHOULD BE AWARDED.**

Considering how this case was handled by the lower court and the lack of written agreement between the parties as to attorney fees as well as the total failure of findings of fact which sustain the courts decision as to the main issue of tenancy and the sub issue of attorney fees , Appellee's claim for sanctions not appropriate.

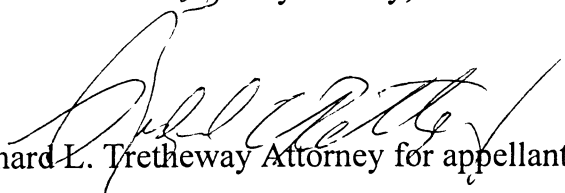
Further the issue of attorney fees in the instant case is a complex one that has not been decided on by the appellate courts of Utah.

CONCLUSION

For the foregoing reasons, Appellant Pinckney's claim should not have been dismissed and the Appellee awarded attorney fees.

The Court should reverse the district court and remand this case for further proceedings.

Dated this 23rd Day of May, 2000


Richard L. Tretheway Attorney for appellant

CERTIFICATE OF SERVICE

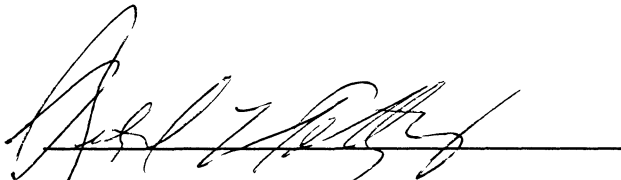
I hereby certify that on the 24 day of May, 2000, I caused two true and correct copies of the foregoing Reply to Brief of Appellee to be mailed first class mail;; postage prepaid to:

Thomas KLC

Attorney for the Defendant

4725 South Holladay Blvd. Suite 110

Salt Lake City , Utah 84117

A handwritten signature in black ink, appearing to read 'Richard L. Tretheway', is written over a horizontal line.

Richard L. Tretheway