

2004

R. Michael Anderson and Robert H. Anderson v. Wilshire Investments. L.L.C. : Appellant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

R. MICHAEL ANDERSON and ROBERT
H. ANDERSON,

Petitioners, Appellants,

vs.

WILSHIRE INVESTMENTS, L.L.C.,

Respondent, Appellee.

UTAH SUPREME COURT
BRIEF

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DOCKET NO. 20040278-SC

Case No. 20040278-SC

APPELLANTS' REPLY BRIEF

APPEAL FROM THE JUDGMENT OF THE FOURTH
DISTRICT COURT, WASATCH COUNTY, THE HONORABLE
DONALD J. EYRE PRESIDING, ENTERED AUGUST 9, 2002

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UTAH APPELLATE COURTS
JAN 25 2005

I

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<p>Prior to the entry of the trial court’s August 9, 2002 order, Appellants chose not to amend their pleading to include additional non-wrongful lien claims and thus removed from issue any additional claims that might have been considered by the trial court under Utah Code Ann. §38-9-7(4).</p>	
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<p>At the conclusion of the July 17, 2002 hearing before the trial court, Appellee’s motion for attorney’s fees was refused by the court. After being confronted with Appellants’ July 29, 2002 objection that Appellee’s proposed order was a final order, Appellee was on notice that the finality of the terms proposed in its form of order was in issue. Nevertheless, Appellee failed to renew its motion for attorney’s fees prior to the August 9, 2002 entry of that order and so forfeited any claim to attorney’s fees, thus rendering the attorney’s fee provision of that order moot.</p>	
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TABLE OF AUTHORITIES

A. Federal Cases

Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987)..4

B. State Cases

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I. ARGUMENT

A. Preliminary Statement of Disputed Facts

At page v in it's brief in its Statement of the Case, Appellee asserts that Appellants' claim that Mr. Jenson never represented to them that the trust deed would not be foreclosed upon, is false. Appellants dispute this claim and refer the Court to R. 444, ¶12 for factual averments laying out the basis for this claim by Appellants. Furthermore, case authority is clear that the language in the trust deed does not control this issue.

B. The Order Signed by the Trial Court Finally Ruled in Appellee's Favor

The Appellee asserts that the trial court never had an opportunity to rule on the issue of attorney's fees, thus rendering its judgment non-final (but see R. 470 @ 53, 54). But after the July 17, 2002 hearing Appellee submitted a proposed form of order to the trial court which converted into a final order the non-final verbal order pronounced by the trial court in open court. In particular, the trial court in its written order concluded that the Appellee's trust deed was not a wrongful lien, thereby disposing of with prejudice all of Appellants' claims before the trial court. And in fact, Appellants made formal objection to the proposed written order submitted by Appellee to the trial court, arguing that although the trial court had verbally pronounced a non-final order, its proposed written order erroneously recited terms that made it a final order.

C. **Appellee had Prior Notice the August 9, 2002 Order When Entered Would be Final.**

In doing so, Appellants effectively put both the trial court and Appellee on notice that the issue of attorney's fees must be addressed prior to entry into judgment of Appellee's proposed written order. It may be useful to summarize the procedure followed in this case:

- i. At the July 17, 2002 hearing the trial court verbally pronounced an order that denied Appellants summary disposition on their wrongful lien claims. At the close of that hearing, the trial court denied both Appellee's and Appellants' verbal motions for attorney's fees. R.470 @ 53, 54;
- ii. On July 26, 2002 the Appellee submitted to the trial court a form of order that by its terms found as a matter of law that Appellee's trust deed was not a wrongful lien, thus going beyond the issue of summary disposition addressed at the July 17, 2002 hearing, to dispose of all of Appellants' claims.
- iii. On July 29, 2002 the Appellants objected that the proposed order was a final order and inconsistent with the trial court's verbal order at the July 17, 2002 hearing. R. 273-277; 278-282.
- iv. Despite the Appellants objection that the proposed order was by its terms a final order, prior to the entry of that order Appellee made no effort to renew its motion for attorney's fees.
- v. On August 9, 2002 the trial court executed Appellee's proposed order. R.

303-306.

As the above procedural history makes clear, instead of filing a formal written motion for attorney's fees prior to entry into judgment of its form of order, Appellee elected to rely upon the language in the order it drafted, which in part states:

“Respondent’s request for an award of attorney’s fees is denied at this time. The request is reserved for consideration should this case continue.”

Appellee did this after also having drafted into the order the term:

“That portion of Petitioners’ Petition that asserts a wrongful lien under Utah Code Ann. §38-9-1 et seq is hereby dismissed.”;

and having also drafted into the order the conclusion of law that:

“The Trust Deed does not constitute a wrongful lien as that term is defined in Utah Code Ann. §38-9-1(6).”

with full knowledge that the only claims plead by Appellants were wrongful lien claims.

Perhaps Appellee was seeking a particular procedural advantage by drafting an order that by operation of its terms could only be final, but also purported to reserve the issue of attorney's fees. Perhaps Appellee wished to force judicial modification of the requirements of ProMax v. Raile, 2000 UT 4, ¶12 and Meadowbrook v. Flower, 959 P.2d 115, 117 (Utah 1998), that one must move for attorney's fees prior to the entry of final judgment or forfeit any claim to attorney's fees.

Although Appellees reasons for proceeding in this manner (like it's drafting of the order) are somewhat murky, it is clear that the conditional reservation of attorney's fees creates a procedural renvoi that has no case within which to operate. Note that the trial court had already explicitly and repeatedly denied Appellee's verbal motion for

attorney's fees. In that light, what Appellee really advocates is a rule that allows a trial court to dispose of **on the merits** all substantive issues before it in a case, refuse a motion for attorney's fees and then reserve jurisdiction to revisit attorney's fees in that case on the condition that the case continue before it **on the merits**. This woulda, coulda, shoulda rule advocated by Appellees serves no proper judicial policy and only invites confusion over this court's clear holdings on the issue of attorney's fees in Meadowbrook and Promax.

D. **There Were No Additional Claims Left for Determination Under Utah Code Ann. §38-9-7(4)**

Appellee's remaining arguments are also disposed of when one applies this same analysis to them. In light of the express terms of the trial court's conclusion of law in its written order that the trust deed was not a wrongful lien, Appellee's claim that the trial court refused to declare the partys' property rights is irrelevant. And that same conclusion of law disposes of Appellee's claims that all the trial court did in its written order was to refuse to grant Appellants summary nullification of the trust deed.

Furthermore, as the record clearly discloses, the July 17, 2002 hearing was not a hearing on Appellants' objections but a hearing on Appellants' motion for new trial.


Finally, the other legal remedies that were potentially available to Appellants under Utah Code Ann. §38-9-7(4) are not at issue in this case. The trial court only had wrongful lien issues before it and prior to the court's entry of its final judgment the Appellants elected not to amend their pleading to pursue additional, non-wrongful lien, remedies. As masters of their pleading, this was well within Appellants' discretion. *Cf.*

Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987).

II. **CONCLUSION**

Appellants are masters of their petition and prior to the August 9, 2002 entry of final judgment, they elected not to amend their petition to include non-wrongful lien claims. As masters of their pleading Appellants did not bring into issue in this action any other potential remedies under Utah Code Ann. §38-9-7(4). Because Appellee's written form of order converted a non-final verbal order to a final written order, Appellants in their objection to that form argued that the trial court had on July 17, 2002 only verbally declared a non-final order and on that basis objected to Appellee's written form of order. By signing that written form of order the trial court entered final judgment against Appellants. By failing to renew its application for attorney's fees prior to that order's entry, Appellee waived its claim for attorney's fees.

DATED this 24th day of January, 2005.



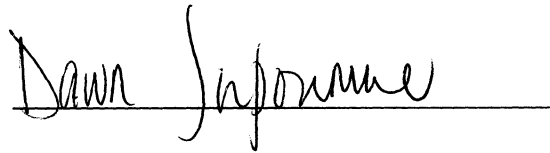
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MAILING CERTIFICATE

I hereby certify that I caused to be mailed, U.S. Mail, postage prepaid, a true and correct copy of the above Appellants' Reply Brief to the following:

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on this 25th day of January, 2005.

A handwritten signature in cursive script, reading "Dawn Johnson", is written over a horizontal line.