

2011

GDE Construction Inc v. Dianne W. Leavitt : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

<p>GDE CONSTRUCTION, INC</p> <p>Plaintiff/Appellant,</p> <p>v.</p> <p>DIANNE W. LEAVITT, et al.</p> <p>Defendants/Appellees.</p>	<p>REPLY BRIEF OF APPELLANT</p> <p>Appellate Court Docket No. 20110128</p>
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APPEAL FROM JUDGMENT OF
THE FOURTH DISTRICT COURT, UTAH COUNTY,
THE HONORABLE STEVEN HANSEN

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ARGUMENT

Both the Leavitts and Bank of American Fork ("BAF") respond to GDE's Statement of Facts, and assert their own. The facts as asserted in all the briefs are congruous with each other with the exception of the stricken paragraphs of the Amy Eldredge Declaration regarding mutual mistake. *Brief of BAF at p. 27, ¶ 43; Brief of Leavitts at p. 23.* Nevertheless, GDE contends that there are issues of interpretation of those facts which preclude the trial court's grant of summary judgment.

I. GDE RESTS ON THE MAJORITY OF ITS ARGUMENTS.

GDE stated its case in its opening brief and made arguments in support of each of its contentions of error. GDE reasserts those arguments here and incorporates them herein. In this reply, GDE only addresses those arguments raised by the Leavitts and BAF to the extent they address additional issues.

II. THE TRIAL COURT INCORRECTLY STRUCK PARAGRAPH 5 OF THE AMY ELDREDGE DECLARATION.

GDE appeals from the Trial Court's decision to strike paragraph 5 of the Amy Eldredge Declaration

which restated the contents of a letter from a third party (CityWide Mortgage) to the Leavitts regarding the financing of their property. GDE has already argued this issue, but the Leavitts raise a new argument in their brief, that "GDE knew or should have known that this alleged statement from CityWide to the Leavitts was untrue." Leavitts' Brief, p. 24.

GDE cannot find where this argument was raised by the Leavitts before, but nevertheless responds that it is in error. The statement was from a letter provided by the Leavitts in discovery which was previously shown to GDE during negotiations regarding the first lien. There was no reason for either GDE or the Leavitts to believe it to be false, and indeed, there is nothing in the record that leads to that conclusion. However, the truthfulness of the letter is irrelevant as it is only offered for the effect on the listener. It is immaterial whether or not CityWide would actually deny funding the loan unless the lien was removed, but rather, the only fact that matters is whether GDE and the Leavitts believed it. This fact is uncontroverted

in the record and the Court should not have stricken the statement as hearsay.

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE BASIS OF ACCORD AND SATISFACTION.

GDE does not dispute the underlying facts of the circumstances leading up to the release of the first lien, and neither do the Leavitts (or BAF who was not a party to those discussions). However, what is disputed is the effect of those discussions and subsequent actions taken by the Leavitts. The Trial court found that there was an accord and satisfaction when GDE presented the promissory note to the Leavitts and the Leavitts signed it. The Court found that acceptance of the promissory note constituted payment. (R. 2330). However, the Court never explained why mere acceptance of the note constituted payment when the payment contemplated by the note (\$10,000 down) was never made.

GDE maintains that both the failure to make the original payment, and the Leavitts' subsequent denial of validity of the note (in their Amended Verified Complaint) vitiates their argument that an accord and satisfaction was reached. While the Leavitts are

entitled to plead in the alternative, that does not change that they stated, under oath, that they believed the note was unenforceable and invalid. R. 24-31. This dispute creates at least an inference that the Note might be invalid and thus no accord and satisfaction was reached.

CONCLUSION

In light of the facts and arguments set forth above, GDE respectfully requests that this Court reverse the trial court's grant of summary judgment in favor of the Leavitts and BAF, reverse the trial court's order striking the defense of mutual mistake and paragraph 5 of the Eldredge Declaration, and remand this matter for trial on the merits.

DATED this 22nd day of February, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Reply Brief for Appellant, to be sent by United States Mail, postage prepaid, on this ____ day of February 2012, as follows:

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