2011

John Johnson v. Payson City Corporation : Brief of Appellee

Utah Court of Appeals

Aaron P. Dodd; Fillmore Spencer; Attorneys for Appellant.
Jody K. Burnett; George A. Hunt; Williams & Hunt; Attorneys for Appellee.

IN THE UTAH COURT OF APPEALS

JOHN JOHNSON, Plaintiff/Appellant, v. PAYSON CITY CORPORATION, Defendant/Appellee.	Case No. 20110284-CA

BRIEF OF APPELLEE

APPEAL FROM A SUMMARY JUDGMENT IN FAVOR OF DEFENDANT PAYSON CITY CORPORATION IN THE FOURTH JUDICIAL DISTRICT COURT, UTAH COURT, STATE OF UTAH THE HONORABLE DAVID N. MORTENSEN, PRESIDING

Aaron P. Dodd (10239)
FILLMORE SPENCER, LLC
3301 N. University Avenue
Provo, Utah 84604
Telephone: (801) 426.8200
Facsimile: (801) 426.8208
Email: adodd@fslaw.com

ATTORNEYS FOR APPELLANT JOHN JOHNSON

JODY K BURNETT (0499)
GEORGE A. HUNT (1586)
WILLIAMS & HUNT
257 East 200 South, Suite 500
Salt Lake City, Utah 84111
Telephone: (801) 521.5678
Facsimile: (801) 364.4500
Email: jburnett@wilhunt.com
ghunt@wilhunt.com

ATTORNEYS FOR APPELLEE PAYSON CITY CORPORATION

IN THE UTAH COURT OF APPEALS

JOHN JOHNSON, Plaintiff/Appellant, v. PAYSON CITY CORPORATION, Defendant/Appellee.	:	Case No. 20110284-CA

BRIEF OF APPELLEE

APPEAL FROM A SUMMARY JUDGMENT IN FAVOR OF DEFENDANT PAYSON CITY CORPORATION IN THE FOURTH JUDICIAL DISTRICT COURT, UTAH COURT, STATE OF UTAH THE HONORABLE DAVID N. MORTENSEN, PRESIDING

Aaron P. Dodd (10239)
FILLMORE SPENCER, LLC
3301 N. University Avenue
Provo, Utah 84604
Telephone: (801) 426.8200
Facsimile: (801) 426.8208
Email: adodd@fslaw.com

ATTORNEYS FOR APPELLANT JOHN JOHNSON

JODY K BURNETT (0499)
GEORGE A. HUNT (1586)
WILLIAMS & HUNT
257 East 200 South, Suite 500
Salt Lake City, Utah 84111
Telephone: (801) 521.5678
Facsimile: (801) 364.4500
Email: jburnett@wilhunt.com
ghunt@wilhunt.com

ATTORNEYS FOR APPELLEE PAYSON CITY CORPORATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF JURISDICTION

Jurisdiction is present in this Court pursuant to Utah Code Ann. § 78A-4-103(2)(j).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Appellee Payson City Corporation (herein "City") agrees with the Statement of Issues and Standard of Review in the Brief of Appellant.

PROVISIONS OF STATUTES AND RULES

The City agrees that Rule 56 of the Utah Rules of Civil Procedure and Payson City Ordinance 07-05-95 as stated by Appellant are central to the importance of this appeal.

STATEMENT OF THE CASE

This is a breach of contract action brought by Plaintiff and Appellant John Johnson (herein "Johnson") against the City, and arising out of a Reimbursement Agreement between the parties dated August 13, 1997. (The purpose of the Reimbursement Agreement was to reimburse for offsite infrastructure that was to be installed and would serve the development property as well as other city residents. The land that was the subject of the Reimbursement Agreement is referred to herein as the "Property".) After the close of discovery, the City moved for summary

judgment. [R. 117-167.][1] The motion was briefed and argued and on February 4, 2011, the lower court entered a Ruling granting the motion. [R. 211- 216.] A final Order dismissing the case was entered below on February, 22, 2011. [R. 217-220.] This appeal followed.

STATEMENT OF FACTS

Although it is incomplete, the City agrees with the Statement of Facts of Johnson, with one clarification: Johnson never owned any part or portion of the Property. His ex-wife Lana Johnson owned a 50% interest in the Property from June 15, 1995, until she sold it to Carrie Woods on August 4, 1997. [R. 156, 143.] Johnson claimed a beneficial interest in the Property by virtue of his marriage to Lana Johnson, apparently unaware that the ancient doctrines of dower and curtsey were abolished in 1975 by the Utah Legislature when the Uniform Probate Code was adopted in Utah. See Utah Code Ann. § 75-2-112 (1975, as amended 1998.)

Subsequent to the Property being purchased on August 4, 1997 by Ray Hiatt and Carrie Woods, 100% of the infrastructure was constructed and placed by Ray and Noell Hiatt. [R. 134-135.][2] Whatever interest Johnson had in the Property

---

[1] The Record in this case is paginated backwards, so on any given document, a lower page number actually means the citation is further toward the end of the document. This unfortunate fact makes the Record citations very confusing.

[2] An unnumbered page exists in the Record between pages 134 and 135.

ceased to exist when the Property was sold to Woods and Hiatt on August 4, 1997. [R. 135; 198-199.] Thereafter, the Hiatts built the infrastructure, sold the lots and then donated any reimbursement due for the infrastructure back to the City. [R. 194.] In doing so, they relied on City Ordinance 07-5-95 rather than the Reimbursement Agreement that Johnson had obtained. [R.121-128.] The work was all bonded by the Hiatts and they posted a Letter of Credit with the City to secure completion of the infrastructure. [R. 123.]

SUMMARY OF ARGUMENT

Both the Reimbursement Agreement and the City Ordinance required as a condition of payment that the applicant prove to the City Engineer that the infrastructure had been built and paid for by the applicant and then the costs of construction had to be justified. Johnson simply could not do this because he neither built nor paid for the infrastructure. His argument was that he was paying the Hiatts by reducing the price of the land, but then he never owned the land, so that was impossible. On those facts, there is simply no dispute. Johnson tries to controvert his own deposition testimony with a conclusory Affidavit [R. 180.] but his deposition testimony was clear. The Hiatts denied any deal with Johnson after they acquired the Property and he was unable to present sufficient proof to the Court after the City had made a *prima facie* case that Johnson was not entitled to

reimbursement. As a result, Johnson's claim must fail and the decision of the lower court should be affirmed.

ARGUMENT

IT IS UNDISPUTED THAT JOHNSON FAILED TO CREATE A MATERIAL DISPUTE OF FACT RESPECTING A KEY ELEMENT OF HIS CLAIM AND THUS SUMMARY JUDGMENT WAS PROPER.

When a summary judgment motion has been filed and the movant has established a *prima facie* defense against a claim, the other party who bears the burden of proof at trial must come forth and present contrary evidence sufficient to create a material issue of fact, or lose the motion. Orvis v. Johnson, 2008 UT 2 ¶ 7, 177 P.3d 600, 602. And, the non-moving party cannot do this with a conclusory affidavit that conflicts with his own deposition. Webster v. Sill, 675 P.2d 1170, 1173 (Utah 1983); Gaw v. State, 798 P.2d 1130 (UT App. 1990); *See also* Murdock v. Springville Municipal Corporation, 1999 UT 39, 982 P.2d 65.

Here, the City filed its motion and set out in some detail with deposition testimony, documents and affidavits, that the infrastructure that Johnson sought reimbursement for had in fact been constructed and paid for by Noell & Ray Hiatt. These gentlemen had proven this fact to the City Engineer, provided back-up invoices to establish value and then donated the infrastructure to the City. [R. 121-

128.] This was specifically noted by Judge Mortensen in his Ruling. [R. 214.] The solitary evidence posited by Johnson to support this aspect of his claim came from an Affidavit he filed that, without foundation, stated that, "I hired Ray Hiatt to provide his labor and materials and install the infrastructure on the property. Ray Hiatt agreed that he would be paid for his labor and materials as the individual lots sold." [R. 179 ¶¶ 9, 10.] In his Appellate Brief, Johnson cites to deposition excerpts from the Noell Hiatt deposition, claiming that Hiatt's deposition established that an agreement existed between Noell Hiatt, his father Ray Hiatt and Johnson, to the effect that the Hiatts would install the infrastructure to the Property and Johnson would pay them. What is not explained, however, is that Johnson never performed on that oral agreement, the deal changed and thereafter Ray Hiatt and Carrie Woods bought the Property and Johnson was out of the picture. [R. 131.] At the end of the day, Johnson paid nothing for the infrastructure that was installed. *Id.* The Affidavit statements were, of course, inconsistent with statements by Hiatt and were unsupported by any other evidence or statement. [R. 131.] To the contrary, all of the documentary evidence indicated that the infrastructure had been paid for by the Hiatts themselves, and that Johnson was in no position to pay by reducing property sales prices because his spouse had sold the Property and he had never owned it. [R. 121-128, 131, 149-157.] Johnson's assertion that he discounted the Property when

it was sold and that is how he paid the Hiatts for the infrastructure is further discredited by the fact that Lana Johnson sold her interest in the Property to Carrie Woods – not Ray Hiatt. [R. 143.] In his deposition, Johnson admitted that by August 4, 1997, the Property had been sold, that he no longer had any property interest in it and that he had no agreement with the new owners. [R. 197-198.] Specifically, he stated that:

Q.: . . . And so on August 4th of 1997, none of the five owners that you represented as the developer were property owners in Payson Meadow Subdivision; is that correct?

A.: As of what point?

Q.: As of August 4th when your wife was the last one to transfer her interest in the Payson Meadows to Ms. Woods?

A.: That is correct.

***

Q.: . . . Did you have any agreement with Mr. Ray Hiatt – I can include Mr. Noel Hiatt too. They were in the construction business – or Ms. Carrie Woods, to continue to represent the owners of the property in developing the Payson Meadows Subdivision?

A.: No, sir.

Id.

This testimony was inconsistent with the Affidavit he filed.

From all of this, the trial court concluded that Johnson had failed to present any evidence that he had performed and paid for infrastructure, and further concluded that it was impossible for Johnson to have the agreement he contended in his Affidavit because he had no interest in the Property and the interest of his ex-wife had been sold. [R. 212-213.] In other words, if the alleged agreement is to discount the price of property to pay for infrastructure, one must first own the property in order to be able to discount it. There was no evidence presented that Johnson ever owned the Property or any portion thereof, or that the sales price to Ray Hiatt and/or Carrie Woods had been discounted.

Thus, in the Court below, Johnson failed to present sufficient evidence to create a material fact dispute on key elements of his claim – for which he bore the evidentiary burden at trial. As a result, under the rule of Orvis, the City is entitled to summary judgment as the lower court ruled.

CONCLUSION

The City respectfully requests that the ruling of the lower court granting its Motion for Summary Judgment be affirmed. Johnson failed to present evidence that he paid for or installed the infrastructure for which he sought reimbursement.

Such proof was a key element of his claim for which he had the burden of proof at trial. The failure is fatal to Johnson's case and the trial court correctly granted the Motion for Summary Judgment. Its decision should be affirmed.

DATED this 10th day of August, 2011.

WILLIAMS & HUNT

By _____
JODY K BURNETT
GEORGE A. HUNT
Attorneys for Appellee
Payson City Corporation

CERTIFICATE OF SERVICE

I certify that on the 10TH day of August, 2011, I served eight (8) copies of the foregoing Brief of Appellee Payson City Corporation (one with original signature) as follows:

1. Two copies of the brief by U.S. Mail, First Class postage prepaid thereon, to:

Aaron P. Dodd
FILLMORE SPENCER, LLC
3301 N. University Avenue
Provo, Utah 84604

2. One (1) CD disk in searchable pdf format, by hand delivery to:

Utah Court of Appeals
450 South State Street
Salt Lake City, Utah 84114-0230