

1990

Lorenzo J. Taylor v. Douglas E. Bagley : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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900454-CA

IN THE COURT OF APPEALS IN AND FOR
THE STATE OF UTAH

LORENZO J. TAYLOR,

Plaintiff and Appellant,

vs.

DOUGLAS E. BAGLEY,

Defendant and Respondent.

Case No. 900454 - CA

Priority 16

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH,
CIVIL NUMBER 89-0905272 CN, THE HONORABLE J. DENNIS
FREDERICK, PRESIDING.

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Man...
Clerk of the Court

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IN THE COURT OF APPEALS IN AND FOR
THE STATE OF UTAH

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|---------------------------|---|----------------------|
| LORENZO J. TAYLOR, |) | |
| |) | |
| Plaintiff and Appellant, |) | |
| |) | |
| vs. |) | |
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| DOUGLAS E. BAGLEY, |) | Case No. 900454 - CA |
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DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH,
CIVIL NUMBER 89-0905272 CN, THE HONORABLE J. DENNIS
FREDERICK, PRESIDING.

I.

STATEMENT SHOWING JURISDICTION OF THE COURT

Jurisdiction is proper in this Court by virtue of plaintiff having appealed from the District Court of Utah to the Supreme Court of Utah pursuant to U.C.A. 78-2-2(j) (1953, as amended 1989). The Supreme Court referred this case to the Court of Appeals pursuant to U.C.A. 78-2a-3(2)(j) (1953, as amended 1990).

II.

STATEMENT OF ISSUES

1. Did the trial court err in interpreting the language of the parties' contract such that defendant was not personally obligated to pay plaintiff the sums due and owing thereunder?

2. Did the trial court commit reversible error in not determining a genuine issue of material fact was raised by the Affidavits filed by defendant, plaintiff and Rene Taylor?

3. Did the trial court commit reversible error in denying plaintiff's Motion to Amend his Complaint on the basis that the Court had granted defendant's Motion for Summary Judgment by Minute Entry, despite the fact that the unopposed Motion to Amend was filed prior to the trial court's Minute Entry?

III.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

The following Constitutional provisions, statutes, ordinances and/or rules are applicable to the case on appeal and each of the following are set forth verbatim in the Addendum submitted herewith:

1. Rule 15(a) of the Utah Rules of Civil Procedure.

2. Rule 56(a) & (b) of the Utah Rules of Civil Procedure.

IV.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an action to collect unpaid sums alleged to be due and owing by defendant pursuant to a written promissory note.

B. COURSE OF PROCEEDINGS AND
DISPOSITION IN TRIAL COURT

Plaintiff filed his Complaint on August 28, 1989.
(R.0001) Defendant's counsel served a Motion a Dismiss on September 15, 1989, but did not file the same with the court. The trial court denied defendant's Motion and awarded plaintiff reasonable attorney's fees of \$250.00 on October 26, 1989. (R.0020) On November 9, 1989, the trial court entered an order denying defendant's Motion, ordering defendant to answer plaintiff's Complaint within ten (10) days of entry of the order and awarding plaintiff fees as set forth above.
(R.0021-23)

Defendant failed to answer the Complaint and a Default Certificate was entered on November 29, 1989. (R.0024-25) Defendant filed his Answer on November 31, 1989. (R.0026) On

December 1, 1989, plaintiff filed his Notice of Intent to File Default Judgment. (R.0028) On December 13, 1989, defendant filed a Motion and Memorandum to Set Aside Default Certificate. (R.0036) Plaintiff filed a response to defendant's Motion with an Affidavit of counsel on December 18, 1989. (R.0040-53) The Court granted defendant's Motion by order dated January 19, 1990. (R.0059)

Plaintiff served discovery requests upon defendant on January 26, 1990. (R.0061) On March 7, 1990, plaintiff filed a Motion for Summary Judgment, with accompanying Memorandum of Points and Authorities, based upon defendant's responses to the foregoing discovery requests. (R.0069-0145) On March 19, 1990, defendant filed a cross Motion for Summary Judgment with accompanying Memorandum of Points and Authorities. (R. 0146-0153) Defendant also filed an Affidavit in Opposition to plaintiff's Motion for Summary Judgment. (R.0154-0156) On March 22, 1990, plaintiff filed a Motion to Strike defendant's Affidavit with an accompanying Memorandum of Points and Authorities. (R. 0157-0164) On March 29, 1990, plaintiff filed a Memorandum of Points and Authorities in Opposition to defendant's Motion for Summary Judgment, together with Affidavits of Plaintiff and Rene Taylor, concerning the preparation and intent of plaintiff regarding the promissory

note. (R.0175-0185) Plaintiff also served a Motion to Amend (R.0195) concurrent with the responsive pleadings to defendant's Motion for Summary Judgment, but the same was not filed (due to lack of filing fee) until April 3, 1990. (R.0188) Plaintiff's proposed Amended Complaint, that was filed with the Motion, asserted a Second Cause of Action against defendant based upon piercing the corporate veil. Defendant did not oppose plaintiff's Motion to Amend.

The Motions for Summary Judgment and Motion to Strike the Affidavit of Defendant Bagley were submitted for decision pursuant to Rule 4-501 of the Utah Code of Judicial Administration. On April 10, 1990, the Court, in an unsigned Minute Entry, granted plaintiff's Motion to Strike defendant's Affidavit to the extent the same related to defendant's understanding or intent; denied plaintiff's Motion for Summary Judgment; and granted defendant's Motion for Summary Judgment. (R.0206)

On April 16, 1990, plaintiff filed a Notice to Submit for Decision regarding plaintiff's Motion to Amend. (R.0207) On April 18, 1990, the trial court denied plaintiff's Motion to Amend in an unsigned Minute Entry for the reason that the Court had previously granted defendant's Motion for Summary Judgment on April 10, 1990. (R.0209) The Order granting

defendant's Motion for Summary Judgment was entered on April 23, 1990. (R.0210-211) The Order denying plaintiff's Motion to Amend was entered on May 9, 1990 (R.0212-213) Plaintiff filed his Notice of Appeal on May 23, 1990. (R.0214-215)

C. STATEMENT OF FACTS

This case involved interpretation of the following promissory note that is set out, in toto, as follows:

"Forty-five (45) days after date, for value received, I/we jointly and severally, promise to pay to Rene Taylor, agent for Lorenzo Jones Taylor or order Fifty-eight Thousand Dollars with interest payable Dec. 20, 1984 at the rate of 14% per annum from No.v(sic) 6, 1984 until paid. The holder shall have the right to declare this note due for default in payment of interest.

Oncor Sound, Inc.

/s/Douglas E. Bagley
President"

A factual dispute exists between the parties as to their intent with respect to personal liability as well as the issue of who drafted the note. The Affidavits submitted by plaintiff (R.0175-180) assert defendant drafted the note while defendant's Affidavit (R.0154-155) asserts plaintiff's son, Rene Taylor, either drafted the note or had the same drafted by an attorney.

V.

SUMMARY OF ARGUMENT

Defendant drafted a promissory note in favor of plaintiff containing the following phrase: "I/we jointly and severally promise to pay to... Lorenzo Taylor Jones...." Plaintiff maintains that the foregoing contractual language can only be interpreted to impose personal liability on defendant inasmuch as only one signature is affixed to the note. Plaintiff maintains that the trial court ignored the foregoing contractual language by failing to impose personal liability upon defendant. As such, plaintiff maintains the lower court erred in that it effectively rewrote the parties' agreement so as to eliminate the joint and several language in the note.

The trial court erred in granting defendant's Motion for Summary Judgment where the Affidavits submitted by plaintiff evidenced a clear intent to hold defendant personally liable and defendant admits a discussion concerning his personal liability on the note was had between himself and plaintiff's agent. As such, defendant's Motion for Summary Judgment was improperly granted inasmuch the contract in question was not an integrated contract and genuine issues of material fact existed, precluding summary judgment.

Finally, the trial court erred in holding that

plaintiff's unopposed Motion to Amend was barred by the court's granting of defendant's Motion for Summary Judgment where no order had been entered as of the date the Motion to Amend was ruled upon. As such, the case was not dismissed and the court committed reversible error in so holding.

VI.

ARGUMENT

I.

THE TRIAL COURT ERRED IN GRANTING
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
BECAUSE THE CONTRACTUAL PHRASE "I/WE
JOINTLY AND SEVERALLY, PROMISE TO PAY..."
RENDERS DEFENDANT PERSONALLY LIABLE TO
PLAINTIFF. PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT SHOULD HAVE BEEN GRANTED.

An appellate court reviews summary judgments for correctness "without according deference to the trial court's legal conclusions", Bonham v. Morgan, 788 P.2d 497, 499 (Utah 1989) (citing Madsen v. Borthick, 769 P.2d 245 (Utah 1988)). Moreover, the interpretation of the parties' agreement is a question of law and the trial court's construction of the contract will be given no deference. Jones v. Hinkle, 611 P.2d 733, 735 (Utah 1980). Finally, an agreement should be construed as a whole with all of the terms to "be given effect if it is reasonably practicable to do so". Id., (citations omitted).

It has been held that "use of the pronoun 'we' usually creates a joint obligation,... " 17 Am. Jur. 2d 718, Contracts, Section 298, and "a promise in the plural is prima-facie joint." Fidelity Deposit Ins. Corp. v. Bismarck Invest. Corp., 547 P.2d 212, 214 (Utah 1976) (citations omitted). Moreover, the obligee is not required to pursue all joint obligors because

"...if judgment were taken against all who were jointly obligated, the judgment creditor could get satisfaction from any one of the debtors. The one who was compelled to pay the joint obligation would have his rights to have contribution against his joint obligors, and this would be true whether the judgment was against them or not." Id. at 214. (Emphasis added).

Finally, the effect of a joint and several obligation is that:

"Parties having a 'joint and several' obligation are bound jointly as one party, and also severally as separate parties at the same time and a joint and several contract is a contract with each promisor and a joint contract with all." Morgan & Oswood Const. Co, Inc. v. U. S. Fidelity and Guaranty Co., 535 P.2d 170, 172 (Montana 1975).

In the case at bar, the defendant has admitted he freely and voluntarily signed an unambiguous contract that "I/we jointly and severally promise to pay to... Lorenzo Jones Taylor..." The foregoing language "must be followed by the

Court," Federal Deposit Ins. Corp. at 214, and leads to only one conclusion -- the defendant is personally liable for payment of the Note as a joint and several obligor with Oncor Sound, Inc.

The trial court apparently adopted defendant's argument, however, that the promissory note was executed solely in a corporate capacity. In so doing, the lower court had to simply ignore the joint and several language of the agreement because the trial court struck defendant's Affidavit to the extent defendant asserted his intent. By striking defendant's Affidavit, the trial court must have determined the note to be unambiguous and that the contract must be interpreted solely on the language contained therein. The lower court, however, interpreted the agreement without construing all of the terms of the agreement. See, Jones, supra. The trial court therefore committed reversible error by denying plaintiff's Motion for Summary Judgment. Plaintiff respectfully requests this Court to reverse and remand this matter to the District Court for entry of judgment in favor of plaintiff pursuant to his Motion for Summary Judgment.

II.

PLAINTIFF, ALTERNATIVELY, ASSERTS THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE TERMS OF THE AGREEMENT CANNOT BE

RECONCILED ON ITS FACE THEREBY RENDERING
THE SAME AMBIGUOUS AND GENUINE ISSUES OF
MATERIAL FACT EXIST PRECLUDING SUMMARY
JUDGMENT.

A trial court must not assess credibility or weigh evidence in ruling on a motion for summary judgment and "[a] single sworn statement is sufficient to create an issue of fact." Webster vs. Sill, 675 P.2d 1170, 1172 (Utah 1983).

The Plaintiff submitted his own affidavit as well as that of his son, Rene Taylor, stating that the Defendant drafted the agreement and the intent of the agreement was to hold Defendant personally liable. Defendant acknowledged, at paragraph 6 of his affidavit (R.0155), that a discussion was had concerning his personal liability on the note but controverted the affidavits filed in behalf of Plaintiff by stating he did not agree to be personally bound. Rene Taylor's affidavit, at paragraph 3 (R.0176), denies the statements of Defendant and asserts Defendant was to be personally liable.

Thus, a dispute existed as to the issue of personal liability and the affidavits of the parties must be construed to mean that the parties' agreement was not a fully integrated and complete agreement. As such, the trial court should have considered the parol evidence submitted by the parties. See, Union Bank vs. Swenson, 707 P.2d 663, 665 (Utah 1985).

Moreover, parol evidence is admissible to clarify a facial ambiguity in an agreement, id., and it is plainly evident that the trial judge failed to consider the affidavits submitted by Plaintiff. Plaintiff therefore submits that a genuine issue of material fact existed that should have precluded granting of Defendant's Motion for Summary Judgment.

III.

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S UNOPPOSED MOTION TO AMEND.

The lower court denied Plaintiff's Motion to Amend because the court had promulgated a minute entry granting Defendant's Motion for Summary Judgment prior to ruling on Plaintiff's Motion to Amend. The trial court apparently relied on the cases of Steiner vs. State, 495 P.2d 809 (Utah 1972) and Nichols vs. State, 554 P.2d 231 (Utah 1976). The trial court's reliance on these decisions is misplaced and warrants reversal.

Both Steiner and Nichols involved similar fact situations in which the plaintiff's case was dismissed, an order was formally entered thereon and the plaintiff then filed a motion to amend several months after entry of the order of dismissal. The facts at bar are significantly different, to-wit: the Motion to Amend was filed before any ruling on the merits had occurred and the ruling on the Motion to Amend was decided

before entry of any order dismissing Plaintiff's Complaint. Neither Steiner nor Nichols is analgous to the case at bar and do not constitute good precedent to support the trial judge's ruling.

A case more closely on point is Lone Star Motor Import, Inc., vs. Citroen Cars Corp., 288 F.2d 69 (5th Circ. 1961). In Lone Star, plaintiff brought suit for breach of contract. The defendant moved to dismiss for lack of jurisdiction and the lower court ruled from the bench by granting defendant's motion. Plaintiff filed a motion to amend after the ruling but before entry of the order granting defendant's motion to dismiss. The trial judge denied the motion to amend. The Fifth Circuit Court of Appeals reversed and held that denying the motion to amend would unduly prejudice the plaintiff without any comparable showing of prejudice to the defendant. Thus, the Fifth Circuit remanded with instructions to grant plaintiff leave to amend.

In the case at bar, Defendant cannot show any prejudice because Defendant did not claim any prejudice. In fact, Defendant did not even respond to Plaintiff's Motion! Clearly, Plaintiff is being prejudiced by not being able to pursue legal theories available to him whereas Defendant suffers no prejudice. Moreover, the Lone Star decision is

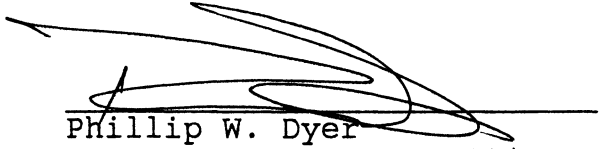
factually analgous because an unsigned minute entry is not a final order under Utah law. See, Wisden vs. City of Salina, 696 P.2d 1205 (Utah 1985)(unsigned minute entry granting summary judgment is not a final judgment). Plaintiff therefore urges this Court to adopt the Lone Star decision and apply it to the case at bar by reversing and remanding with instructions to grant Plaintiff leave to file his Amended Complaint.

CONCLUSION

Plaintiff asserts the trial court erred in denying Plaintiff's Motion for Summary Judgment as well as denying Plaintiff's Motion to Amend. Accordingly, Plaintiff requests this matter be remanded for entry of judgment in favor of Plaintiff as prayed in his Motion for Summary Judgment or, alternatively, an order remanding this matter to the trial court with instructions to grant Plaintiff leave to amend his complaint as prayed in his Motion to Amend.

Dated this 12 day of Sept, 1990.

Respectfully submitted,


Phillip W. Dyer
Attorney for Plaintiff/Appellant

k/mi/Taylor.bri/APPl

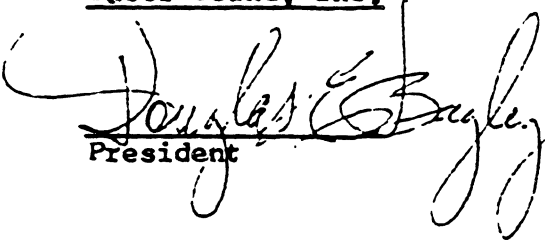
ADDENDUM

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November 6, 1984

Forty-five (45) days after date, for value received, I/we jointly and severally, promise to pay to Rene Taylor, agent for Lorenzo Jones Taylor or order Fifty-eight Thousand Dollars with interest payable Dec. 20, 1984 at the rate of 14% per annum from Nov 6, 1984 until paid. The holder shall have the right to declare this note due for default in payment of interest.

Oncor Sound, Inc.


President

00006

APPLICABLE RULES OF PROCEDURE

Rule 15. Amended and Supplemental pleadings.

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Rule 56. Summary Judgment

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

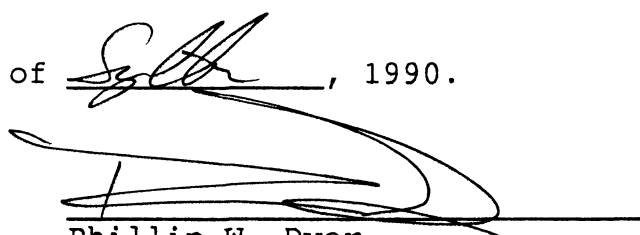
(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

CERTIFICATE OF SERVICE

I hereby certify that I caused four (4) copies of Brief of Appellant were served by mailing delivery, first-class, postage pre-paid, by depositing the same with the United States Postal Service, on the 17 day of Sept, 1990, to:

LES F. ENGLAND, ESQ.
SUTHERLAND & ENGLAND
3760 South Highland Drive
Suite 200
Salt Lake City, Utah 84106

DATED this 17 day of Sept, 1990.


Phillip W. Dyer
Attorney for Plaintiff/Appellant

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