2000

Sandra Tretheway v. Robert Furstenau : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SANDRA L TRETHEWAY, trustee of the Tretheway Family Trust Plaintiff/Appellant	:	Case No. 20000907 CA
ROBERT FURSTENAU, BLAIR NEBEKER, U.P.N.L.C.V. and ADVANCED PROPERTIES INTERNATIONAL, INC. a Nevada Corporation, Defendants/Appellees	:	Oral Argument Priority No. 15

REPLY BRIEF OF APPELLANT

ON APPEAL FROM AN AMENDED FINAL JUDGMENT AND A COURT ORDER IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, THE HONORABLE LESLIE A. LEWIS

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IN THE UTAH COURT OF APPEALS

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INTRODUCTION

Defendant Furstenau cites statutes, cases, and general legal principles that are more red herrings than applicable to this case. A critical fact that Furstenau ignores, and that changes the landscape of this case, is that the Promissory Note contains a provision stating that "[i]f there is any conflict between the terms of this note and the Trust Deed securing this note, the terms of the note are controlling." R. 94. In other words, the Promissory Note, by express agreement of the parties, became part of the terms of the Trust Deed. They must be read together when determining how and when the properties securing the debt are to be released. They are not separate transactions as Furstenau would like the Court to believe.

As such, the release provisions of the Promissory Note control the release of the property. These release provisions required payment of the DiCamillo Note before the Gas Station Property would be released. Even defendant Nebeker admitted that this was the intent of the parties. At the very least, a question of fact exists concerning this issue and summary judgment was not appropriate. Likewise, given Nebeker's admission the district court should have allowed plaintiff to amend the complaint to state a claim for reformation after the district court interpreted the agreement contrary to Nebeker's admission.

ARGUMENT[1]

I. The Provisions of the Trust Deed and Promissory Note Must be Construed Together, And the Release Provisions of the Promissory Note Control.

The Promissory Note and the Trust Deed were signed on the same day regarding the same loan and each document referred to the other. The Promissory Note, which was drafted specifically for this transaction, contained a provision stating that "[i]f there is any conflict between the terms of this note and the Trust Deed securing this note, the terms of the note are controlling." R. 94. Furstenau emphasizes the terms of the form Trust Deed and suggests they are controlling, when in fact the parties agreed that the Promissory Note would control. By so agreeing, the Promissory Note in effect became part and parcel to the Trust Deed. They were the same agreement.

Thus, the key issue is whether the district court properly concluded that the "clear and unambiguous language" of the Promissory Note and Trust Deed required

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[1] Because the Court already has ruled that it has jurisdiction over this appeal, plaintiff will not reply to the arguments Furstenau raised concerning plaintiff's notice of appeal. Plaintiff notes, however, that the district court, after being informed of this Court's ruling on the jurisdictional issue, granted plaintiff's motion to correct the record, but went beyond plaintiff's request and purported to vacate both the September 21, 2000 Court's Ruling and September 25, 2000 Court's Ruling, and substitute for them *nunc pro tunc* to September 21, 2000, a Revised Court's Ruling, that was dated and entered May 16, 2001. Copies of the Court's Ruling and Order to Vacate, dated May 16, 2001, and the Revised Court's Ruling, also dated May 16, 2001, are attached in the Addendum to this brief.

Although plaintiff questions the district court's jurisdiction to vacate a final ruling that had been appealed to this Court and as to which this Court has ruled it has jurisdiction, out of an abundance of caution plaintiff has filed a notice of appeal from the Revised Court's Ruling. Plaintiff has also filed in this Court a motion to consolidate the appeals.

Furstenau to only repay $150,000 "in order for all of the Trust Property to be released." R. 146-47. The district court did not correctly read the Promissory Note.

The Promissory Note sets forth in detail how a release of the property could be obtained. The Promissory Note references the two different parcels by different exhibits, Exhibit A being the Apartment Property[2] and Exhibit B being the Gas Station Property. R. 96-97. It contains three release provisions, two different provisions for obtaining release of the Apartment Property and one provision for obtaining release of the Gas Station Property. These are not three alternative release provisions as Furstenau argues.

The first release provision applies only to "Exhibit 'A'"and allows for partial payments on the obligation and corresponding partial releases of the Apartment Property by individual condominium unit. R. 94. The first release provision does not reference the Gas Station Property.

The second release provision also applies only to "Exhibit 'A'," or the Apartment Property. It provides that

> Upon payment of $150,000 to Lender and there has been no default in any of the payments by Borrowers to Lender the Trust Deed **described in Exhibit "A"** shall be released.

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[2] Furstenau suggests that Exhibit A to the Promissory Note is not a legal description of the Apartment Property. That exhibit, however, contains a tax serial number for the parcel and, thus, properly identifies that parcel.

R. 94 (emphasis added). This provision clearly references Exhibit A to the Promissory Note, not Exhibit A to the Trust Deed. And, while there is no "Trust Deed described in Exhibit 'A'" to the Promissory Note, there is an Exhibit A to the Promissory Note that identifies property secured by the Trust Deed—namely, the Apartment Property. R. 96. The second release provision also does not reference the Gas Station Property.

The third release provision, however, applies only to the Gas Station Property, which is the property referenced in "Exhibit 'B'" to the Promissory Note. That provision states in relevant part:

> The first trust deed on the property **described in Exhibit "B"** attached hereto **shall be released on the payment of the sum of $53,400.00 for the purchase of the note Described as the Camillo note**, . . . plus interest in the sum of $5,696.00 which is interest due as of February 1, 1999, plus interest at the rate of $712.00 per month thereafter until paid . . .

R. 94 (emphasis added). Thus, pursuant to this third release provision, defendants were required to satisfy the DiCamillo note before receiving a release of the Exhibit B property—which is the Gas Station Property.

Furstenau's citations to and reliance upon *Hector, Inc. v. United Savings & Loan Ass'n,* 741P.2d.542 (Utah 1987), *Swaner v. Union Mortgage Co.,* 105 P.2d 342 (Utah 1940), and *Jenkins v. Equipment Center, Inc.* 869 P.2d1000 (Utah Ct. App.1994), are unavailing because their reasoning and holdings are inapplicable here. These cases each dealt with a lender who tried to use property held to secure one debt as leverage to

obtain payment of a separate obligation not contemplated by the agreement of the parties. *Hector*, 741 P.2d at 545 (property pledged to secure construction loan could not be held as leverage to pay unsecured improvement bond); *Swaner*, 105 P.2d at 344-45 (mortgaged property could not be held to compel payment of unsecured loan costs); *Jenkins*, 869 P.2d at 1003 (repaired tractor held as security for payment of other amounts due under open account).

That is not the case here. Defendants agreed by signing the Promissory Note that the Gas Station Property did not have to be released until the DiCamillo Note was paid. Thus, using the Gas Station Property as security for the payment of the DiCamillo Note was expressly agreed upon by the parties, and plaintiff is not using the Gas Station Property as leverage to obtain payment of some separate, unsecured debt. The Promissory Note is enforceable as written as it controls the release of the properties.

Defendant Nebeker confirmed that the agreement of the parties was that the Gas Station Property would be released only upon payment of the DiCamillo Note. Nebeker testified as follows:

> 5. I agreed that he [Tretheway] would not have to release the security on the gas station until all the monies due Tipton on the note are paid. I told him that upon payment of the $150,000 we would get a complete release as to the condos (to which he (Tretheway) agreed) but he would not have to release gas station property until the Tipton-DiCamillo principal, interest, and all attorney fees to Paul Halliday were paid.

> 6. Part of the consideration for the loan of $150,000 was that the Tipton-DiCamillo Note would be paid off before a release would be given to the gas station. Without the agreement to pay off the Tipton-DiCamillo note Tretheway would not lend us the money. I explained this to Forstenau and he agreed as long as the Tipton-Camillo [sic] note would be assigned to us upon Tretheway being paid off.

R. 127-28. Nebeker negotiated the agreement for all defendants. R. 86-89.

In sum, the language of the Promissory Note provided that the Gas Station Property would be released upon payment of the DiCamillo Note. Language of the Promissory Note expressly controls conflicting language from the Trust Deed. Defendant Nebeker admitted that this was the agreement of the parties. At the very least a question of fact exists on the issue given the Nebeker affidavit, which was submitted to the district court before it ruled on the motion for summary judgment. R. 127-28. The district court's decision should be reversed.

II. Plaintiff's Motion to Amend Should Have Been Granted.

As set forth above, the Promissory Note appropriately is interpreted as allowing plaintiff to hold the Gas Station Property as security for the DiCamillo Note. The district court, however, read the Promissory Note otherwise. Not until the district court interpreted the Promissory Note to require reconveyance of the Gas Station Property upon payment of $150,000 did plaintiff have a reason to seek amendment of its complaint to state a claim for reformation. Plaintiff promptly moved to amend its complaint in a

manner that was consistent with the facts that had been presented on the motion for summary judgment. R. 181-82.

The cases cited by Furstenau support plaintiff's position that the district court should have allowed amendment of the complaint. In *Swift Stop, Inc. v. Wight*, 845 P.2d 250, 253 (Utah Ct. App. 1992), this Court noted the general rule that leave to amend "'shall be freely given when justice so requires.'" *Id.* (quoting Utah R. Civ. P. 15(a)). The Court then stated that the following factors are to be considered in determining whether to allow amendment: (1) the timeliness of the motion; (2) the justification for delay; and (3) any resulting prejudice to the responding party. *Id.* at 253.

In this case, the motion to amend to add a claim for reformation was made promptly after the district court interpreted the documents differently than the parties who negotiated the deal intended. Prior to that time, plaintiff reasonably believed the documents were written to accomplish the objectives that were negotiated, as reflected in the affidavits submitted to the district court. *See* R. 86-89 and 127-28. Finally, no prejudice would result to Furstenau from allowing amendment because little or no discovery had been completed and the district court had never set a trial date.

In contrast, in the cases Furstenau cites, the claims the parties sought to add should have been known to the parties years in advance of their filing the motion to amend. *Neztsosie v. Meyer*, 883 P.2d 920, 922 (Utah 1994) (motion to amend brought three years after filing of original complaint and plaintiff should have known of new

claims when original complaint was filed); *Sneddon v. Graham*, 821 P.2d 1185, 1189 (Utah Ct. App. 1991) (motion to amend brought two years after filing of original complaint in the same month the case was set for trial and one motion to amend had already been granted); *Swift Stop*, 845 P.2d at 253-54 (causes of action should have been known to party three to five years prior to filing motion to amend). Surely, plaintiff in this case does not fit into the same category. Plaintiff moved as promptly as she could for leave to amend the complaint.

The court should have allowed amendment because reformation of an instrument, including a deed, is appropriate when it is clear that it does not reflect the intentions of the parties. *Hottinger v. Jensen*, 684 P.2d 1271, 1273 (Utah 1984) ("Reformation . . . is appropriate where the terms of the written instrument are mistaken in that they do not show the true intent of the agreement between the parties.") Plaintiff sought to prove that the agreement contained a mutual mistake because affidavits submitted to the district court showed the parties intended something entirely different than what the district court said the written documents "unambiguously" stated.

Even if the terms of a contract or deed are unambiguous, they can still be reformed if they do not reflect the intentions of the parties. *Timm v. Dewsnup*, 921 P.2d 1381, 1392 (Utah 1996) ("where the document is unambiguous on its face, the challenging party must present proof of mistake by clear and convincing evidence"). Parol evidence of the parties' intent is admissible to determine whether the parties

actually intended something different than was contained in the writing. *Warner v. Sirstins*, 838 P.2d 666, 669 (Utah Ct. App. 1992) ("Parol evidence is admissible to show the writing did not conform to the intent of the parties.")

Plaintiff presented an affidavit of defendant Nebeker stating clearly that the parties intended the Gas Station Property to secure payment of the DiCamillo Note as well as the Promissory Note in this case. R. 127-28. Nebeker was the only defendant who participated in the negotiations with plaintiff. R. 128. He was Furstenau's partner,[3] R. 127, and is bound by the negotiations Nebeker conducted. Utah Code Ann. § 48-1-6(1).

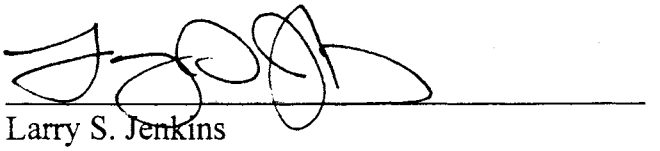
Thus, the Court should remand the case to the district court to allow plaintiff to state a claim for reformation. The evidence is clear that the parties intended the DiCamillo Note be secured by the Gas Station Property.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court and remand this case for further proceedings.

DATED this 1st day of June, 2001.

WOOD CRAPO LLC



Larry S. Jenkins
Attorneys for Plaintiff/Appellant

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[3] Furstenau does not deny that he was Nebeker's partner. R. 118-19.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2001, I caused to be hand delivered , two true and correct copies of the foregoing **Reply Brief of Appellant**, to the following:

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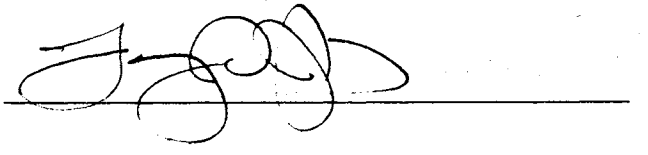

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ADDENDUM

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SANDRA L. TRETHEWAY, trustee of the Tretheway Family Trust,	COURT'S RULING AND ORDER TO VACATE
Plaintiff,	CASE NO. 990908053
vs.	
ROBERT FURSTENAU, BLAIR NEBEKER, U.P.N.L.C., and ADVANCED PROPERTIES INTERNATIONAL, INC., a Nevada corporation,	
Defendants.	

The Court has before it a Request For Decision filed by the plaintiff seeking a ruling on her Motion for Order Correcting Record and Vacating Ruling Dated September 21, 2001. Having reviewed the moving and responding memoranda, the Court rules as stated herein.

It appears from the record that on September 21, 2000, a Court's Ruling was inadvertently entered prior to the final editing changes having been made. A finalized (corrected) Court's Ruling was entered on September 25, 2000. This did not get mailed to counsel, for reasons that are unclear. In addition, it appears that the finalized Court's Ruling of September 25, 2000, also contained an error in the pivotal sentence alluded to by the plaintiff. Therefore, neither the sentence in the first Court's

Ruling, nor the subsequent Court's Ruling are accurate reflections of this Court's actual Ruling.

The sentence at issue, should have read:

> "Defendant Fursteneau has consistently maintained that he never understood nor intended to sign a Note for $150,000, **but** instead be responsible for repaying $203,400, which represents the addition of an unrelated debt which is not the subject of the Note or the Trust Deed." (Emphasis added.)

This sentence, as it now appears in the Revised Court's Ruling, is more accurate and reflective of what defendant Fursteneau attested to in his Affidavit and what the Court held. Accordingly, the Court has vacated both Court's Rulings and entered the Revised Court's Ruling *nunc pro tunc*[1].

This Court's Ruling will stand as the Order of the Court, granting the plaintiff's Motion (in her request to vacate the September 21, 2000, Court's Ruling). This Order also vacates the September 25, 2000, Court's Ruling. As stated previously, the Revised Court's Ruling with the change in the sentence indicated above is entered *nunc pro tunc* to September 21, 2000. The Court

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[1]The Court has also corrected a clerical error on p. 4 of the Revised Court's Ruling to reflect that "[n]o further Order in connection with these Motions will be necessary."

apologizes for the previous clerical errors and any confusion and inconvenience related to the same.

Dated this 16th day of May, 2001.

LESLIE A. LEWIS
DISTRICT COURT JUDGE

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Court's Ruling and Order to Vacate, to the following, this 10 day of May, 2001:

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SANDRA L. TRETHEWAY, trustee of the Tretheway Family Trust,	**REVISED COURT'S RULING**
Plaintiff,	**CASE NO. 990908053**
vs.	
ROBERT FURSTENAU, BLAIR NEBEKER, U.P.N.L.C., and ADVANCED PROPERTIES INTERNATIONAL, INC., a Nevada corporation,	
Defendants.	

Before the Court is the plaintiff's Motion for New Trial, Motion to Amend Ruling or in the Alternative to Amend Complaint. The parties appeared in Court, and counsel argued on August 31, 2000. At the conclusion of the hearing, the Court took the matter under advisement to further consider the arguments, the relevant case law and statutes and the written submissions of the parties. Since taking the Motions under advisement, the Court has had an opportunity to consider or reconsider the law, all relevant pleadings, facts and the oral argument in this case. Now being fully advised, the Court enters the following Memorandum Decision.

In its Motion, the plaintiff contends that the Court should reconsider its Ruling of March 2, 2000, wherein the Court granted defendant Robert Furstenau's Motion for Summary Judgment.

According to the plaintiff, summary judgment is inappropriate because there are two issues of material fact which the Court alluded to in its Ruling which would preclude summary judgment from being granted. Specifically, the plaintiff contends that the Court's reference to the plaintiff's having drafted the Trust Deed and its statement that "according to defendant Furstenau," the Camillo Note was not secured by the Trust Deed constitute two disputed matters of fact which the Court should not have resolved as a matter of law.

With respect to the first point, the Court agrees with defendant Furstenau that the reference to authorship was merely in passing and was not material to the Court's ruling, which was based on the plain, unambiguous language of the Note and Trust Deed. Moreover, the Court was not improperly resolving a dispute when it restated defendant Furstenau's legal position that the Camillo Note was not secured by the Trust Deed. Whether the Note was secured by the Trust Deed was the central question of law presented to the Court by the parties' cross-Motions for Summary Judgment. The Court's resolution of this legal issue in favor of defendant Furstenau did not require a factual assessment because the Court looked strictly to the plain language of the documents involved, without regard to extrinsic evidence. The Court remains convinced of the correctness of this decision and again determines that there

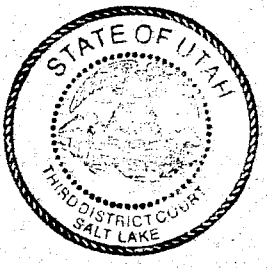
are no genuine issues of material fact concerning the fact that the Promissory Note and Trust Deed required repayment of $150,000 in order for all of the Trust Property to be released. Accordingly, the plaintiff's Motion for Reconsideration is denied.

Next, the Court considers the plaintiff's Motion to Amend. Amendment is in the Court's discretion and not a matter of right, at this juncture. The Court determines that the plaintiff's Motion is untimely, having been filed only after the Court had disposed of all of the legal issues raised in the parties' cross-Motions for Summary Judgment. Moreover, the proposed amendment does not raise any new claims which appear to be legally viable. Specifically, the plaintiff's new theory of reformation is not applicable in this case because there does not appear to be any evidence of mutual mistake. Defendant Furstenau has consistently maintained that he never understood nor intended to sign a Note for $150,000, but instead be responsible for repaying $203,400, which represents the addition of an unrelated debt which is not the subject of the Note or the Trust Deed. (See Furstenau Affidavit). Accordingly, the Court concludes that the plaintiff's proposed Amended Complaint is untimely and legally insufficient and therefore denies the Motion to Amend, in its discretion.

This Memorandum Decision will stand as the Order of the Court, denying the plaintiff's Motions. No further Order in connection with these Motions will be necessary.

Dated this 16th day of May, 2001.

LESLIE A. LEWIS
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Revised Court's Ruling, to the following, this 10 day of May, 2001:

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