Brigham Young University Law School
BYU Law Digital Commons

Utah Court of Appeals Briefs

2011

Lamoreaux v. Black Diamond Holdings : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3

Part of the Law Commons

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

David L. Elmont; Barney, Mckenna, and Olmstead, PC; Attorneys for Defendants/Appellee.
Michael W. Park; The Park Firm PC; Attorney for Plaintiffs/Appellants.

Recommended Citation
Reply Brief, *Lamoreaux v. Black Diamond Holdings*, No. 20110786 (Utah Court of Appeals, 2011).
https://digitalcommons.law.byu.edu/byu_ca3/2951

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

DAVID LEE LAMOREAUX,	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	
	)	Appellate No. 20110786-CA
BLACK DIAMOND HOLDINGS, LLC,	)	
A Utah Limited Liability Company,	)	District Court No. 080500885
	)	Judge Eric A. Ludlow
Defendant/Appellee.	)	

APPELLANT'S REPLY BRIEF

An Appeal from a Final Judgment Entered in the Fifth Judicial District Court issued by the Honorable Judge Eric A. Ludlow

David L. Elmont (9640)
BARNEY, McKENNA, & OLMSTEAD, PC
43 South 100 East, Suite 300
St. George, Utah 84771-2710
Telephone: (435) 628-1711
Facsimile: (435) 628-3318
delmont@barney-mckenna.com
Attorneys for Defendants/Appellee

Michael W. Park (2516)
THE PARK FIRM PC
315 West Hilton Drive, Suite 4
St. George, Utah 84770
Telephone: (435) 673-8689
Facsimile: (435) 673-8767
michael@theparkfirm.com
Attorney for Plaintiffs/Appellants

FILED
UTAH APPELLATE COURTS
MAR 26 2012

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

IN THE UTAH COURT OF APPEALS

DAVID LEE LAMOREAUX,	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	
	)	Appellate No. 20110786-CA
BLACK DIAMOND HOLDINGS, LLC,	)	
A Utah Limited Liability Company,	)	District Court No. 080500885
	)	Judge Eric A. Ludlow
Defendant/Appellee.	)	

APPELLANT'S REPLY BRIEF

An Appeal from a Final Judgment Entered in the Fifth Judicial District Court issued by the Honorable Judge Eric A. Ludlow

David L. Elmont (9640)
BARNEY, McKENNA, & OLMSTEAD, PC
43 South 100 East, Suite 300
St. George, Utah 84771-2710
Telephone: (435) 628-1711
Facsimile: (435) 628-3318
delmont@barney-mckenna.com
Attorneys for Defendants/Appellee

Michael W. Park (2516)
THE PARK FIRM PC
315 West Hilton Drive, Suite 4
St. George, Utah 84770
Telephone: (435) 673-8689
Facsimile: (435) 673-8767
michael@theparkfirm.com
Attorney for Plaintiffs/Appellants

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

TABLE OF CONTENTS

Table of Authorities 4

Arguments 5

I. Appellant Properly Marshalled. 5

II. The Trial Court Erred In Determining that Following the Repeal of Rule 69, URCP, A Party May Still Execute Upon a Chose in Action 5

III. The Trial Court Abused Its Discretion in Failing to Hold An Evidentiary Hearing On Whether Lamoreaux Transferred His Interest in This Action Thereby Precluding Black Diamond From Purchasing The Chose in Action at the Execution Sale. 7

IV. The Trial Court Abused Its Discretion in Granting the Motion to Substitute. 8

V. The Trial Court Erred When It Ruled Lamoreaux Was Collaterally Attacking A Sister Court Judgment. 9

VI. The Trial Court Abused Its Discretion by Failing to Render a Decision on the Merits 10

VII. The Trial Court Erred as a Matter of Law by Dismissing the Action and Thereby Defeating the Park Firm's Contractual Right to Compensation. 11

VIII. Appellee Is Not Entitled to An Award of Attorney Fees. 12

Conclusion 13

Certification 14

Mailing Certificate 14

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

TABLE OF AUTHORITIES

Statutory Provisions

UCA §25-6-1 8
UCA §25-6-5 8

Utah Rules

Rule 25(c), URCP 9
Rule 64, URCP 7
Rule 64E, URCP 9
Rule 69, URCP 6, 7
Rule 69A, URCP 7
Rule 33, URAppP. 14
Canon 3, Code of Judicial Administration 11

Utah Cases

Applied Medical Technologies, Inc. v. Eames, 2002 UT 18 6
Bangerter v. Petty, 2010 UT App 49 . . . . . 8, 10
Barbir v. Orem City, 2005 UT App 114 8
Cornish Town v. Koller, 758 P.2d 919, 922 (Utah 1988). 6
Hinckley v. Hinckley, 815 P.2d 1352, 1355-56 (Utah App. 1991). 14
Jeffs v. Stubbs, 970 P.2d 1234 (Utah 1998) 8
Merriam v. Board of Review, 812 P.2d 447 (Utah App 1991) 11
P.A.D.D. v. Graystone Pines Homeowners, 789 P.2d 52 (Ut. App. 1990) 12
Posner v. Equity Title Ins. Agency, 2009 UT App. 347 11
Potter v. Ajax Mining Co., 22 Utah 273, 61 P. 999 (1900) 12
Sampson v. Richins, 770 P.2d 998, 1002 (Utah Ct.App. 1989). 6
United States Fuel Co. v. Huntington-Cleveland Irrigation Co., 2003 UT 49, 79 P.3d 945 10
Valcarce v. Fitzgerald, 961 P.2d 305, 319 (Utah 1998). 13

Cases from Other Jurisdictions

Costanzo v. Harris, 427 P.2d 963 (WA 1967) 10
In re Smith, 687 A.2d 1229 (Pa. Ct. Jud. Disc. 1996) 11
Jackson v. Commonwealth, 255 Va. 625 (1988) 11
Pierson v. Ray, 386 U.S. 547, 554, 87 S.Ct. 1213 (1967). 11
Saucier v. Hayes Dairy Prod. Inc., 373 So.2d 102 (La. App. 2d Cir. 1983) 12
State v. Erlewin, 755 N.E.2d 700 (Ind. Ct. App. 2001) 11

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

ARGUMENTS

I. LAMOREAUX PROPERLY MARSHALLED

Appellee argues Lamoreaux had a duty to and failed to properly marshal. Lamoreaux respectfully disagrees. Marshalling requires the appellant to marshall all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence. *Cornish Town v. Koller*, 758 P.2d 919, 922 (Utah 1988); *See also Sampson v. Richins*, 770 P.2d 998, 1002 (Utah Ct.App. 1989). Lamoreaux did exactly that and therefore properly marshaled.

II. THE TRIAL COURT ERRED IN DETERMINING THAT FOLLOWING THE REPEAL OF RULE 69, URCP, A PARTY MAY STILL EXECUTE UPON A CHOSE IN ACTION.

In *Applied Medical Technologies, Inc. v. Eames,* 2002 UT 18, 44 P.3d 699, the Court held execution of a chose in action is permissible. However, because *Applied Medical Technologies* relied on now repealed Rule 69, Utah R. Civ. Pro., it is no longer binding precedent. Upon repeal of Rule 69, no companion rule was adopted which expressly provides for the execution upon and sale of a chose in action. Therefore, it is clear that the drafters of the rule no longer sanctioned such sharp practices.

As acknowledged by Appellee, there are no Utah cases interpreting the effect of the repeal of former Rule 69. As such, whether the right to execute upon a chose in action remains after the repeal of Rule 69 presents a question of first impression.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

While the Appellee diagrams the various provisions of former Rule 69 which provided a basis for executing upon a chose in action, it glosses over the language of the rules which remain in effect at the time of the execution and sale of the chose in action in this case. Rule 64(a)(9), Utah R. Civ. Pro. defines "Property" as meaning the defendant's property of any type not exempt from seizure. Property includes but is not limited to real and personal property, tangible and intangible property, the right to property whether due or to become due, and an obligation of a third person to perform for the defendant." There is no Utah cases which specifically states that a chose in action is intangible personal property.

Rule 69A, Utah R. Civ. Pro. allows for the execution on property. However, the Rule gives a right to the *Defendant* to provide a preference regarding what personal property may be attached and sold to satisfy the debt. *See* Rule 69A(a). However, in the instant case, Lamoreaux was not given the opportunity to express that preference. The result was clearly inequitable. The AppeIn accordance with the Utah Rules of Civil Procedure, this order is sent to you for your review. If you do not object to the order within five (5) days, the original will be sent to the judge for signature. A copy of this order is being sent to: llee acquired property potentially valued at $500,000.00 sold to satisfy a judgment valued under $20,000.00. Thus, Appellee's received a windfall in excess of $480,000.00. It is this type of inequity which results in Lamoreaux characterizing the execution and sale of a chose in action as a "sharp practice."

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

With the repeal of former Rule 69(f), the express basis for execution on a chose in action no longer exists. Lamoreaux believes that based on that repeal, execution on a chose in action is no longer permitted by Utah law. Therefore, the trial court erred as a matter of law by permitting the Appellee to execute upon and sell the chose in action, resulting in an equitable result and a windfall in excess of $480,000.00.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO HOLD AN EVIDENTIARY HEARING ON WHETHER LAMOREAUX TRANSFERRED HIS INTEREST IN THIS ACTION THEREBY PRECLUDING BLACK DIAMOND FROM PURCHASING THE CHOSE IN ACTION AT THE EXECUTION SALE.

The trial court abused its discretion in failing to hold an evidentiary hearing. Whether to grant an evidentiary hearing is reviewed for abuse of discretion. *Barbir v. Orem City,* 2005 UT App 114. During oral argument on the Motion, Lamoreaux's counsel argued it was improper for the trial court to grant a summary disposition on the issue of whether Black Diamond purchased an interest in the chose of action, based on Lamoreaux's assignment of his interest to his son. (Hearing Transcript., P. 23, L. 20 to P. 24, L. 10).

Whether a conveyance is fraudulent is a mixed question of law and fact. *See e.g. Jeffs v. Stubbs,* 970 P.2d 1234, 1244 (Utah 1998). However, in determining whether there was a transfer of Lamoreaux's interest, Black Diamond should have brought an action under the Utah Fraudulent Transfer Act, UCA §25-6-1, *et seq.* Further, assuming the Court was willing to render any determination regarding the transfer, the burden was on the Court to consider those elements set forth in Utah Code Annotated §25-6-5. All of these elements of intent required an evidentiary hearing to determine whether Lamoreaux

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

held any interest at the time of execution or sale and whether the assignment of his interest was valid or otherwise a fraudulent transfer.

Nonetheless, the Court did not hold an evidentiary hearing. It was an abuse of discretion for the Court to fail to hold an evidentiary hearing, summarily granting the Motion to Substitute despite the conflicting evidence before the Court that Lamoreaux held no interest in the chose in action. This Court should reverse the trial court and remand with instruction to hold an evidentiary hearing to determine whether Lamoreaux owned any interest in the chose in action at the time of the execution and sale.

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE MOTION TO SUBSTITUTE

The trial court abused its discretion in granting the motion to substitute Black Diamond in as the party plaintiff. (R000570). Whether to substitute a party pursuant to the Utah Rules of Civil Procedure is within the discretion of the trial court which will only be reversed on appeal if said discretion was abused. *See* Rule 25(c), Utah R. Civ. Pro. Substitution is based on Rules 25, 64E, and 69A, Utah Rules of Civil Procedure. It was inequitable to permit substitution in this case based on the completed trial and pending judicial determination. The equities weighed against substitution of any party for the Plaintiff. This action had been completed up through a trial on the merits. The parties awaited the trial court's decision based on the evidence of record. Because Rule 25(c) specifically contemplates the continuation of the action in the name of the original party, the appropriate action would have been for the Court to deny the motion to

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

substitute but rather to rule on the merits of the action. Thereafter, if the Court determined Black Diamond was the successful purchaser at a properly conducted sale which is authorized by Utah law, the resulting judgment (if any) could have been addressed in numerous ways, including the filing of a satisfaction thereof. It was improper to substitute Black Diamond as the party plaintiff under the procedural posture of the action.

V. THE TRIAL COURT ERRED WHEN IT RULED LAMOREAUX WAS COLLATERALLY ATTACKING A SISTER COURT JUDGMENT.

The trial court erred in concluding Lamoreaux objection to the Motion to Substitute based on the alleged purchase of the chose in action constituted an impermissible collateral attack on a sister court's judgment. (R. 000573). A trial court's determination of the law is reviewed under a correctness standard which is afforded no degree of deference. *United States Fuel Co. v. Huntington-Cleveland Irrigation Co.*, 2003 UT 49, ¶ 9, 79 P.3d 945. Lamoreaux did not collaterally attack the Fisher case judgment. Lamoreaux challenged the procedure of executing upon a chose in action and its sale as void, as forming the basis for a Motion to Substitute as a party plaintiff. Such a challenge does not constitute an impermissible collateral attack. *See e.g. Costanzo v. Harris,* 71 Wn.2d 254, 427 P.2d 963 (1967). Even assuming the challenge to the Motion to Substitute based on the alleged purchase of the chose in action at the execution sale is a collateral attack, where Utah law no longer authorizes the execution upon a chose in action, such execution and sale are void. Void proceedings are subject to collateral

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

attack. *See e.g. Bangerter v. Petty,* 2010 UT App 49, ¶¶8-9, 228 P.3d 1250. The Court erred as a matter of law in ruling it was an impermissible collateral attack on a sister court judgment.

VI. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO RENDER A DECISION ON THE MERITS.

The trial court abused its discretion by failing to render a decision on the merits of the action after more than six months when the trial court took the matter under advisement on February 17, 2011. (R. 000572). District judges "have broad discretion in managing the cases assigned to their courts, which is subject to an abuse of discretion standard on appeal. *Posner v. Equity Title Ins. Agency*, 2009 UT App 347, ¶ 23, 222 P.3d 775, *cert. denied*, 230 P.3d 127 (Utah 2010).In *Pierson v. Ray,* 386 U.S. 547, 554, 87 S.Ct. 1213 (1967), the United States Supreme Court stated, "It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants." Judge Ludlow failed in that admonition. This failure resulted in a violation of the spirit of Canon 3of the Code of Judicial Conduct. In the instant case, Judge Ludlow did not decide the matter promptly as required by Canon 3. This was an abuse of discretion. *See e.g. Merriam v. Board of Review,* 812 P.2d 447 (Utah App. 1991); *In re Smith,* 687 A.2d 1229 (Pa.Ct.Jud.Disc. 1996); *State v. Maggard,* 126 Idaho 477, 886 P.2d 782 (App. 1994); *Jackson v. Commonwealth,* 255 Va. 625, 499 S.E.2d 538 (1998); *State v. Erlewin*, 755 N.E.2d 700, 707 (Ind.Ct.App. 2001). In the instant action, Judge Ludlow failed to promptly decide

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

the case. It was error as a matter of law to both grant the substitution of Black Diamond as a party plaintiff and dismiss the action without deciding the case on the merits. These actions should be reversed and this case remanded to the trial court to enter a decision on the merits.

VII. THE TRIAL COURT ERRED AS A MATTER OF LAW BY DISMISSING THE ACTION AND THEREBY DEFEATING THE PARK FIRM'S CONTRACTUAL RIGHT TO COMPENSATION.

The trial court erred in dismissing the case following substitution of the Defendant as party Plaintiff without ruling on the merits of the case after trial, thereby effectively precluding counsel for the Plaintiff who had prepared and tried the case from receiving any compensation for the services rendered. Lamoreaux entered into an employment agreement with the Park Firm on a one third contingency basis. While a client may discharge his attorney at any time as a matter of right, the attorney is nonetheless entitled to recover the reasonable value of the services rendered to the date of discharge. *Saucier v. Hayes Dairy Products, Inc.*, 373 So.2d 102 (La. 1979).

In the instant case, Lamoreaux never terminated his agreement with the Park Firm. Instead, Lamoreaux's interest in the outcome of the litigation was allegedly purchased at the Execution Sale by Black Diamond, resulting in dismissal of the action. By so dismissing the action, Black Diamond effectively constructively discharged the Park Firm, without cause and without paying any compensation. In *P.A.D.D. v. Graystone Pines Homeowners*, 789 P.2d 52 (Utah App. 1990), the Court found in that following discharge, the attorney was entitled to recovery under a theory of *quantum meruit. Id.* at

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

58; *see also Potter v. Ajax Mining Co.*, 22 Utah 273, 61 P. 999, 1003 (1900). Following dismissal in the instant case, the Park Firm was provided no remedy or right to receive any compensation. This Court should reverse the trial court and remand for further proceedings, specifically ordering the Court to consider the *quantum meruit* value of the services rendered by the Park Firm.

VIII. APPELLEE IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES

Appellee argues an entitlement to attorney fees. No award of attorney fees should be granted to Appellee. Further, Appellee, even if entitled to an award of attorney fees, is not entitled to such an award against the Park Firm.

Appellee's argument to substantiate the claim for attorney fees focuses on the "problem" with arguing a right to such fees on appeal, based primarily on Appellee's motion for summary disposition in this action which was denied. Appellee's characterization of "problems" with the argument does not provide any basis for an award of attorney fees on appeal, neither against Lamoreaux nor the Park Firm.

Appellee did not file a counter appeal. Nonetheless, it seeks affirmative relief on appeal in the form of an award of attorney fees. Further, no award of attorney fees was granted by the trial court. Generally,"when a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal." *Valcarce v. Fitzgerald*, 961 P.2d 305, 319 (Utah 1998). In the instant case, Appellee's were not awarded attorney fees below.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Appellee argues there are "problems" with arguments made on appeal. However, when attorney fees are not awarded by the trial court, the standard on appeal is whether the appeal is frivilous. Attorney fees may be awarded on appeal if the appeal is frivolous. Utah R.App.P. 33. A frivolous appeal is "one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law." Utah R.App.P. 33(b). However, an unsuccessful appeal which has some merit is not frivolous. *See Hinckley v. Hinckley*, 815 P.2d 1352, 1355-56 (Utah App. 1991).

In the instant case, the appeal is not frivolous. The appeal is grounded in fact, is warranted either by existing law or is made on a good faith argument to extend, modify, reverse, or clarify existing law. Therefore, no basis exists for this Court to award attorney fees to Appellee.

CONCLUSION

This Court should reverse the trial court and remand for further proceedings. First, the trial court erred in ruling that a chose of action may be executed upon after the repeal of Rule 69, Utah R. Civ. Pro. Second, the Court erred by not holding an evidentiary hearing on whether Lamoreaux owned any interest in the chose in action at the time of the execution and sale. Third, the trial court's grant of the motion to substitute should be reversed. Fourth, the trial court's motion to dismiss should be reversed. Fifth, the trial court should be ordered to decide the action on the merits. Sixth, the Court should order the trial court to hold an evidentiary hearing on the *quantum*

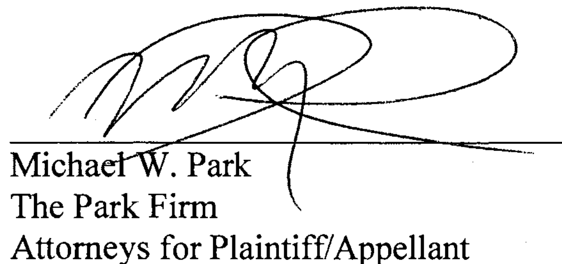
Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

meruit value of the services rendered by the Park Firm in prosecuting this action which fees should be charged to and be ordered to be paid by Black Diamond. Finally, Black Diamond is not entitled to an award of attorney fees.

CERTIFICATION

Counsel for the Appellant certifies that this reply brief complies with the page limitations, word or line counts set forth in the Utah Rules of Civil Procedure.

Dated and Signed this 2P day of March, 2012.



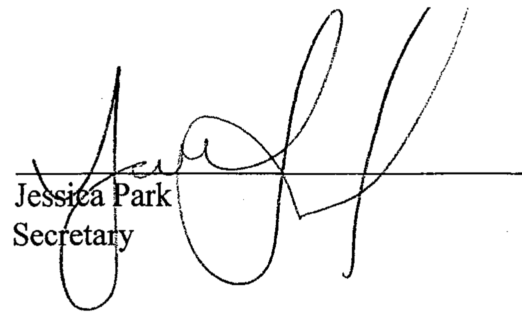
Michael W. Park
The Park Firm
Attorneys for Plaintiff/Appellant

MAILING CERTIFICATE

This is to certify that on this the 23rd day of March, 2012, I mailed a true and correct copy of the foregoing Appellant's Opening Brief, to the person named below, first class postage prepaid:

David L. Elmont (9640)
BARNEY, McKENNA, & OLMSTEAD, PC
43 South 100 East, Suite 300
St. George, Utah 84771-2710
Telephone: (435) 628-1711
Facsimile: (435) 628-3318
delmont@barney-mckenna.com
Attorneys for Defendants/Appellee

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.



Jessica Park
Secretary

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.