

2011

Midland Funding LLC v. Kenneth Pipkin : Reply Brief

Utah Court of Appeals

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Johnson Mark LLC.

Kenneth Pipkin.

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Appeal No. 20110788-CA

IN THE UTAH COURT OF APPEALS

MIDLAND FUNDING LLC,

Plaintiff and Appellee

vs.

KENNETH PIPKIN,

Defendant and Appellant, Pro Se

On Appeal from the Fifth Judicial District Court, State of Utah, Washington County,

St. George Department,

Case No. 110500860

Judge Eric A. Ludlow

REPLY BRIEF OF THE APPELLANT

Defendant/Appellant requests oral arguments.

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STATEMENT OF THE ISSUES - REPLY

Issue I: Should the Court of Appeals affirm Appellant's arguments when his brief is adequate as 1) Appellant brought issues before the Trial Court with each motion, beginning with Appellant's Answer to Summons and Complaint; 2) Appellant's Brief has been accepted by the Court of Appeals; and 3) Appellant's limited resources and inability to pay for professional legal services have been acknowledged by the Court of Appeals as Appellant is acting Pro Se.

Whether a case is inadequately briefed would have been determined by a rejection by the Court of Appeals, as evidenced with Appellant's initial Brief. Whether Appellee is attacking the competency of the Appellant, the Court, or both, is an original question first brought before the Appellate Court.

Issue II: Did the Appellant succeed in marshaling the evidence, beginning when Appellant "requested information listed on 1st Request for ORIGINAL Documentation and ORIGINAL contracts from Plaintiff on Date of June 18, 2010" (cited page 5, Answer to Summons and Complaint)?

Issue III: Did the Appellant succeed in marshaling the evidence when it is impossible to prove a negative because producing evidence to prove a negative is impossible?

Whether proving that a contract does not exist with supporting evidence as a requirement is an original question first brought before the Appellate Court.

Issue IV (VI): Did the Trial Court error in granting Appellee's Motion for Summary Judgment, which was supported by Affidavit that referred to documentation that was not attached thereto or served therewith Affidavit (see Utah Rules of Civil Procedure, Rule 56(e))?

If the matter of Appellant's form is Just Cause for the Trial Court to Grant Summary Judgment, would it also be Just for the Appellate Court to Grant reversal of Summary Judgment, considering Appellee presented Issues I, II, III, and VI, without presenting Issues IV and V in Appellee's Brief?

Also stated in Appellant's Brief, Defendant/Appellant preserved the issues in Appellant's Brief before and in the Trial Court, Defendant/Appellant feels that the above issues and issues in Appellant's Brief were ignored and unpreserved by the Plaintiff/Appellee and/or the Judge. Therefore, Defendant/Appellant requests the Court of Appeals to review the above non-preserved issues, especially if non-preserved or unpreserved in the Trial Court.

ARGUMENT

I. THE COURT OF APPEALS SHOULD AFFIRM APPELLANT'S ARGUMENTS AS BRIEF IS ADEQUATE

Appellant brought issues before the Trial Court with each motion filed by Appellant. The issues regarding FDCPA violations by Appellee are violations occurring prior to, at commencement of, and during proceedings in the Trial Court.

Further, Appellant's Brief has been accepted by the Court of Appeals. The Appellee's reminder, although impressive, is merely a reminder, to the Appellant and the Court, that Appellant is acting Pro Se. While Appellee is busy focusing on the adequacy, and competency, of Appellant and Appellant's Brief, Appellee is circumventing the issues.

Furthermore, Appellant has not concealed the fact that Appellant does not have the ability to pay for professional legal services to perfect Brief to Appellee's standards as a legal professional. Appellant had no prior legal knowledge and Appellant is grateful to the Court of Appeals for forgiving Appellant's limited knowledge in the legal field.

II. THE APPELLANT SUCCEEDED IN MARSHALING THE EVIDENCE

Appellant has requested proof of alleged debt, repeatedly, from Appellee which has not been received by Appellant as of the date of this Reply. As evidenced in Appellant's Answer to Summons and Complaint, "...requested information listed on 1st Request for ORIGINAL Documentation and ORIGINAL contracts from Plaintiff on Date of June 18, 2010" (See page 5, Answer to Summons and Complaint), Appellee's Complaint and Summons had been filed unlawfully. (See Exhibit "E" of Appellant's Brief) "If, however, you request proof of the debt or the name and address of the original creditor within the thirty-day period that begins with your receipt of this letter, the law requires our firm [Appellee and Appellee's legal council] to suspend our efforts to collect the debt (through a lawsuit, arbitration or otherwise) until we mail the requested information to you [Appellant]".

Although Appellant had, in fact, requested the information and proof within the thirty-day period (see Exhibits "A" and "C" of Appellant's Brief), Appellee failed to furnish requested information to Appellant and/or the Trial Court. Therefore, Appellee's failure to furnish information to Appellant before filing original lawsuit was unlawful and in violation of FDCPA.

III. THE APPELLANT HAS SUCCEEDED IN MARSHALING THE EVIDENCE BECAUSE IT IS IMPOSSIBLE TO PROVE A NEGATIVE

The burden of presenting a prima facie case is always on the Plaintiff. Although Appellee has failed to present any contract to support accusations of a Breach of Contract claim, it is impossible for Appellant, or anyone else, to present any evidence to support the non-existence of a contract. Proving that something does not exist is impossible. Creating evidence to show a contract does not exist would be fraudulent activity and in contempt (see Utah Rules of Civil Procedure, Rule 56(g)).

Whether Appellee's general provisions of a general contract (Cardmember Agreement, see cited pages 16-35) is admissible as overwhelming evidence was brought before the Trial Court (cited pages 47-48) and is an original question first brought before the Appellate Court.

IV. THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT BECAUSE APPELLEE'S EVIDENCE WAS CONTROVERTED.

Appellant's Memorandum in support of Motion in Opposition to Motion for Summary Judgment (cited in page 37) states "Defendant does not dispute validity of age, competency or employment of Affiant. Affiant's affidavit does not provide

documented evidence of alleged debt therefore is irrelevant. Pursuant to the Fair Debt Collections Practices Act (FDCPA), there has been no documented evidence of alleged debt provided to Defendant by Plaintiff or any affiliated parties, alleged debt is null and void. Defendant has no access to information regarding alleged debt.” (see Utah Rules of Civil Procedure, Rule 56(e)) “Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.” Account information, contract, and any other “records” referred to in Affiant’s Affidavit were neither attached thereto nor served therewith.

Further, Appellant had raised issue to material fact and proceedings were not set for trial. Furthermore, Appellant is not required to submit affidavits when opposing Motion for Summary Judgment or controverting evidence (see Utah Rules of Civil Procedure, Rule 56(c)) “....together with the affidavits, if any, show that there is no genuine issue as to any material fact...” (emphasis on “if any”).

Assuming, arguendo, that Appellant’s FDCPA issues were not preserved in the Trial Court, Appellant has requested the Appellate Court to review the non-preserved issues in Appellant’s Brief. Further, assuming, arguendo, the issues are disregarded or stricken, the issue regarding the Breach of Contract claim is unsupported by material facts as Affiant’s Affidavit did not include any records, attached thereto or served therewith in the Trial Court (see Utah Rules of Civil Procedure, Rule 56(e)), which Affiant’s Affidavit referred to in support of Appellee’s Breach of Contract claim.

Furthermore, any evidence submitted to the Trial court, by Appellee, Affiant, or any other affiliated parties, did not include any specific documented correlation (i.e. "contract", "account information", etc.) between Appellant and alleged Breach of Contract claim.

Appellant does not have means to research Utah Court cases as Utah requires a paid-membership account to access any Utah Court cases. As Appellant lives near the Southern border of Utah, any research facilities would require that Appellant drive a minimum of four hours in order to conduct any research. As Utah does not publish Court records and cases publicly, on the internet, or otherwise, as many other states do, Appellant has no means of conducting research and including Utah Court cases in Appellant's Brief or Reply.

Further, many cases cited in Appellee's Brief that were publicly available to Appellant, via internet for Appellant to research, a signed contract (deed, quit-claim deed, lien, etc.) was brought before the Courts, either Utah state or Federal, to support cited cases.

Although Appellant's opposing memorandum had, in fact, not "contained a verbatim restatement of each of the moving party's facts that is controverted", Appellant had, in fact, raised genuine issue as to material facts. If the matter of form is more important than the issues raised, Appellant had no knowledge that a verbatim restatement was required at the time Appellant filed opposing memorandum. Whether

a verbatim restatement is sufficient grounds for Granting Summary Judgment, even with genuine issues being raised by Appellant, is a question first brought before the Appellate Court. Appellee had not mentioned, nor included in any motions, the overlooked lack of verbatim restatement in the Trial Court.

Appellee's statement "movant must establish each element of his claim in order to show that he is entitled to judgment as a matter of law." is lacking foundation as Appellee has failed, and continues to fail, to produce evidence to support Appellee's claim of a contract to be in "breach" of. Additionally, Appellee's statement in *Orvis v. Johnson*, 2008 UT 2, ¶10, "Once established, '[t]he burden on summary judgment then shifts to the nonmoving party....'" (emphasis on "once established"), while a restatement that a *prima facie* case must first be established by Plaintiff (Appellee), once again fails without a contract or, at a minimum, actual documentation referred to by Appellee's Affiant in Affidavit, being "attached thereto or served therewith" (see Utah Rules of Civil Procedure, Rule 56(e).

Further, if Appellee had cited *Orvis v. Johnson*, 2008 UT 2, ¶10 in its entirety, it would show a different view of the meaning of *Orvis v. Johnson*, 2008 UT 2, ¶10 "A summary judgment movant must show both that there is no material issue of fact and that the movant is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). Where the moving party would bear the burden of proof at trial, the movant must establish each element of his claim in order to show that he is entitled to judgment as

a matter of law. In order to meet his initial burden on summary judgment, therefore, Orvis must present evidence sufficient to establish that judicial estoppel is appropriate under the facts of the case, and that no material issues of fact remain. The burden on summary judgment then shifts to the nonmoving party to identify contested material facts, or legal flaws in the application of judicial estoppel.”

Furthermore, Appellee fails to mention the purpose of Appeal into Supreme Court of Utah, *Orvis v. Johnson*, 2008 UT 2, ¶1, “We granted certiorari on two questions: (1) whether the court of appeals correctly construed and applied the respective procedural burdens borne by opposing parties on summary judgment, and (2) whether the court of appeals correctly applied the summary judgment standard in this case. We conclude that the court of appeals misconstrued the initial procedural burden required on summary judgment. Because Jayson Orvis did not meet this initial burden, we also conclude that the court of appeals erred in affirming the trial court's grant of summary judgment.”. Appellee had failed to attach thereto or serve therewith contract, documentation, account information, and other pertinent information referred to in Affiant's Affidavit (see Utah Rules of Civil Procedure, Rule 56(e).

Even assuming, arguendo, that the Appellee had succeeded in forming a prima facie case, with supporting evidence such as a signed contract, account information, or documents referred to in Affiant's Affidavit that were not attached thereto or

served therewith (see Utah Rules of Civil Procedure, Rule 56(e) , Appellant producing contrary evidence to prove a negative is impossible, at best. Considering Appellee has not produced proof and information requested by Appellant, Appellant was not prepared to affirm or deny alleged debt. Therefore, Summary Judgment should be reversed.

Additionally, Appellee fails to mention that Appellee had unlawfully filed the Action in the Trial Court after Appellant had, in fact, requested the information, in writing, within the legal thirty day period. Appellee's first letter received by Appellant (see Exhibit "E" in Appellant's Brief) states, on Appellee's letterhead (Appellee's legal counsel's letterhead), "If, however, you request proof of the debt or the name and address of the original creditor within the thirty-day period that begins with your receipt of this letter, the law requires our firm [Appellee] to suspend our efforts to collect the debt (through a lawsuit, arbitration or otherwise) until we mail the requested information to you [Appellant]." (emphasis on "suspend our efforts to collect the debt" and "through a lawsuit"). As of the date of this Reply, none of the requested information, including "proof of the debt" and name and address of original creditor, has been received by Appellant although Appellant repeatedly requested the information from Appellee.

See LOIGMAN v. KINGS LANDING CONDOMINIUM ASSOCIATION INC., , III, C. "Nevertheless, defendants thereafter breached the FDCPA by failing to

halt its collection efforts after plaintiffs questioned and sought verification of the amount of the debt. It is unchallenged that plaintiffs wrote to dispute and question the debt on November 25, 1998. From that moment, until they provided verification of the debt on December 29, 1998, defendants were obligated to cease all collection efforts. 15 U.S.C. § 1692g(b). Accordingly, any further attempt by defendants to collect on the debt between November 25, 1998 and December 29, 1998—including their recording of the lien with the county clerk on December 16, 1998—was in breach of the FDCPA....

...Interestingly, the FDCPA expressly creates only a cause of action for monetary relief, and is silent with regard to a court's ability to provide equitable relief as sought here. The FDCPA does not, however, prohibit the granting of equitable relief, including the discharging of a lien filed at a time when the creditor is prohibited by the FDCPA from taking further collection efforts. Where a 'legal right has been infringed, a remedy will be given,' is how Pomeroy expressed the equitable maxim more commonly phrased 'equity will not suffer a wrong without a remedy.' 2 Pomeroy, Equity Jurisprudence (1941) § 423. In the absence of legislative prohibition, the power of a court of equity to remedy a wrong exists. It then becomes the province of the court to determine whether, under the particular circumstances of the case, the remedy should be provided. Other than the absence of a provision in the FDCPA which would expressly support such a conclusion—which only creates a

vacuum, not a prohibition-the court can fathom no reason why it may not, in good conscience and in the discretionary exercise of its equitable powers, remedy the actions taken by the Association in breach of 15 U.S.C. § 1692g(b) by ordering a discharge of the lien.”. Therefore, as Appellee failed to cease collection activity after Appellant requested proof, name and address of original creditor, and alleged balance information, Summary Judgment should be reversed.

Further, Appellee’s accusation of “The Appellant did ‘not dispute the validity of age, competency or employment of Affiant’ or any other fact as set forth. (R. 37)” (emphasis on “or any other fact as set forth”) is unsubstantiated as the only items undisputed by Appellant were Affiant’s age, competency and employment. Appellant had disputed all other items filed regarding Affiant, Affidavit and general provisions of general cardmember agreement (cited in page 37).

CONCLUSION/RELIEF SOUGHT

Appellant prays that the Court will forgive Appellant’s lack of form, nature, and understanding as Appellant is acting Pro Se out of necessity. Appellee has violated and continues to violate Appellant’s Rights Pursuant to Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692p. § 809. Validation of debts (a)(4), (a)(5), and (b). Appellant requests the Court to consider and approach these violations with

regard to Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692p. §

813. Civil liability.

Further, Plaintiff/Appellee has failed to satisfy the burden of production Pursuant to Utah Rules of Civil Procedure, Rule 56, to make a prima facie showing that it was entitled to summary judgment. Appellant requests the Court to reverse summary judgment and dismiss this case.

In the event the Court is unable to reverse summary judgment and dismiss case, Appellant requests the Court to order, or have District Court order Appellee to present, to Appellant and the Court, original signed contract as evidence and proof, provide verification of alleged debt and name and address of original creditor, and remand case to District Court for trial.

Respectfully submitted this 15th day of March, 2012.

By: Kenneth Pipkin

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CERTIFICATE OF SERVICE

I, Kenneth Pipkin, hereby certify that on March 1st, 2012, I mailed two copies of

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RULE 56. SUMMARY JUDGMENT, UT RCP Rule 56

West's Utah Code Annotated

State Court Rules

Utah Rules of Civil Procedure (Refs & Annos)

Part VII. Judgment

Utah Rules of Civil Procedure, Rule 56

RULE 56. SUMMARY JUDGMENT

Currentness

(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 for summary judgment 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 for summary judgment as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the

RULE 56. SUMMARY JUDGMENT, UT RCP Rule 56

reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Credits

[Amended effective November 1, 1997; November 1, 2004.]

Notes of Decisions (879)

Current with amendments received through 10/1/2011

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