2011

Deron Brunson v. Bank of New York Mellon : Brief of Appellee

Utah Court of Appeals

Darren K. Nelson, Michael D. Black; John P. Snow; Parr Brown Gee & Loveless; Thomas T. Billings, Mary Jane Galvin-Wagg; Kelley M. Marsden; Van Cott, Bagley, Cornwall & McCarthy, P.C.; Attorney for Defendants/Appellees.
Deron Brunson; Plaintiff/ Appellant pro se.

IN THE UTAH COURT OF APPEALS

DERON BRUNSON, Plaintiff and Appellant, v. THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATE HOLDERS CWALT, INC., ALTERNATIVE LOAN TRUST 2005-58 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-58, AND RECONTRUST COMPANY, N.A., GREEN TREE SERVICING, LLC, and JOHN DOES OF UNKNOWN NUMBER, Defendants-Appellees.	Appellate Case No. 20110854 Trial Court Case No. 100913085

BRIEF OF APPELLEE GREEN TREE SERVICING, LLC

Deron Brunson
138 E. 12300 S. #C-1
Draper, Utah 84020

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LIST OF ALL PARTIES

Deron Brunson ..... Plaintiff-Appellant

The Bank of New York Mellon
f/k/a The Bank of New York, as Trustee
for the Certificate Holders CWALT, Inc.,
Alternative Loan Trust 2005-58 Mortgage
Pass-Through Certificates, Series
2005-58 ..... Defendant-Appellee

Recontrust Company, N.A. ..... Defendant-Appellee

Green Tree Servicing, LLC ..... Defendant-Appellee

John Does of Unknown Number ..... Defendants-Appellees

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STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issue 1. Did the trial court err in dismissing Mr. Brunson's claims against the Recontrust Defendants' by order dated August 13, 2010?

Standard of review: "A trial court's decision to grant or deny a motion to dismiss presents a question of law, which we review for correctness." *State v. Bernert,* 2004 UT App.321, P 6, 100 P.3d 221 (Ut. Ct. App. 2004) (*quoting State v. Horrocks,* 2001 UT App 4, P 10, 17 P.3d 1145 (2001)).

Answer: The trial court did not err in dismissing Mr. Brunson's claims against the Recontrust Defendants or its subsequent orders dismissing Mr. Brunson's claims against Green Tree.

STATEMENT OF CASE

Green Tree is the servicer of a loan that has been the subject of no fewer than three different wrongful foreclosure lawsuits initiated by plaintiff Deron Brunson. The case underlying this appeal was Mr. Brunson's second attempt to avoid the consequences of failing to repay a loan in excess of $1,000,000.00. His complaint asserted claims for wrongful foreclosure (First Cause of Action) and declaratory judgment (Second Cause of Action) against co-defendants and appellees The Bank of New York Mellon f/k/a The Bank of New York, as Trustee for the Certificate Holders CWALT, Inc; Alternative Loan Trust 2005-58 Mortgage and Recontrust Company, N.A. (the

"Recontrust Defendants") as well as quantum meruit (Third Cause of Action) against all defendants-appellees. (R. 1-13)

By order dated August 13, 2010, the district court dismissed with prejudice Mr. Brunson's claims against the Recontrust Defendants. The court found that the underlying action was barred by both claim preclusion and issue preclusion, was frivolous and without merit, and was not brought in good faith in violation of Utah Code Ann. § 78B-5-825. Subsequently, Green Tree's own motion to dismiss Mr. Brunson's complaint was also granted. (R. 670). Although Mr. Brunson appealed the August 13, 2010 order, he has not appealed dismissal of the claims against Green Tree.

STATEMENT OF FACTS

1. On or about August 8, 2005 Mr. Brunson took a loan secured by real property at 14772 S. Golden Leaf Court (the "Property" and the "Loan"). (R. 1-13 at ¶¶ 1, 13).

2. Green Tree acquired Mr. Brunson's Loan from National City Bank on July 1, 2009 and became the servicer of the Loan. *See* Exhibit J to Verified Complaint (R. 54-59).

3. When Mr. Brunson failed to fulfill his payment obligations under the terms of the Loan, defendant-appellee Recontrust Company, N.A. ("Recontrust") as trustee of the trust deed securing the Loan began non-judicial foreclosure efforts in early 2009.

4. On or about June 3, 2009, plaintiff sued Recontrust and Countrywide Home Loans, Inc. ("Countrywide") seeking, among other things, damages against Recontrust due to alleged wrongful foreclosure. *Deron Brunson v. ReconTrust Company, N.A. et al*, In the Third Judicial District for Salt Lake County, Utah, Case No. 90909512. (R. 156-162, ¶¶ 3-16).

5. In that case, Judge Kennedy granted the defendants' motion to dismiss, and flatly told Brunson that the allegations contained in the Lawsuit were "frivolous." Judge Kennedy entered an order dismissing Brunson's Amended Complaint with prejudice. (R. 158, ¶ 9).

6. Plaintiff appealed that ruling, which the Utah Court of Appeals upheld. *Brunson v. Recontrust Co., N.A.*, 2009 UT App 381 (Utah Ct. App. 2009). Plaintiff's petition for certiorari to the Utah Supreme Court was denied on April 22, 2010. (R. 158, ¶¶ 10-12).

7. On July 20, 2010, plaintiff filed this lawsuit, seeking among other things a declaration that the defendants had no interest in the Property and therefore could not foreclose. He also sought damages in amounts similar to those sought in the previous action. (R. 159-60, ¶¶ 17-24).

8. On the same day, Mr. Brunson also filed an emergency motion for a temporary restraining order to halt Recontrust's foreclosure efforts. (R. 78-95).

9. The Recontrust Defendants moved to dismiss on July 26, 2010, arguing that Mr. Brunson's claims were barred by both issue preclusion and claim preclusion due to the fact that they were raised or should have been raised in the previous case before Judge Kennedy. (R. 96-108).

10. Green Tree had not yet been served with Mr. Brunson's pleadings when the Recontrust Defendants filed their motion to dismiss, (*see* R. 520), and therefore, did not join in the motion.

11. At oral argument on July 27, 2010—less than a week after Green Tree had been served and before Green Tree had an opportunity to respond—the district court denied plaintiff's motion for a temporary restraining order and granted the Recontrust Defendants' motion to dismiss. In a minute entry, the court told Mr. Brunson, "This case is going to be dismissed as well and you're advised not to file again." (R. 672, p. 15). The court also granted the Recontrust Defendants' request for attorneys' fees in light of Mr. Brunson's "frivolous lawsuit." (R. 672, p. 16).

12. In an order dated August 13, 2010 (the "Appealed Order"), the Court dismissed Mr. Brunson's claims against the Recontrust Defendants with prejudice. The Court also awarded the Recontrust Defendants their attorneys fees because Mr. Brunson's claims were "frivolous, without merit and not brought in good faith pursuant to Utah Code Ann. § 78B-5-825."

Finally, the Court ordered, "Plaintiff is not to refile this case anew." (R. 156-61).

13. Plaintiff unsuccessfully attempted to appeal the August 13, 2010 order. (R. 168-69). By order dated December 16, 2010, the Utah Court of Appeals dismissed Mr. Brunson's appeal for lack of jurisdiction. (R. 186-88).

14. In the interim, in June of 2011, Mr. Brunson commenced yet another lawsuit, seeking again to prevent anyone from foreclosing on either of the properties at issue. *See Brunson v. American Home Mortgage Servicing, Inc. et al.*, Case No. 110915040. By Order dated November 17, 2011, the district court, Hon. Sandra N. Peuler, dismissed plaintiff's claims, stating that "[r]es judicata bars all claims asserted by Mr. Brunson against the Moving Defendants and dismisses all claims against the Moving Defendants, with prejudice."

15. Subsequently, Mr. Brunson obtained a default judgment against Green Tree. (R. 197-216). Green Tree moved to vacate the default as procedurally improper, (R. 217-382), and by order dated November 3, 2011 the district court requested supplemental briefing on Green Tree's motion. (R. 424-25).

16. Following supplemental briefing on Green Tree's motion to vacate, (*see* R.428- 549), the district court granted Green Tree's motion to vacate the procedurally improper default. (R. 550).

17. By motion dated January 25, 2012, Green Tree moved to dismiss the claims asserted against it in Mr. Brunson's verified complaint. Mr. Brunson opposed the motion. (*See* R. 554-662).

18. By minute entry dated February 24, 2012, the district court (Hon. Paul G. Maughan) granted Green Tree's motion to dismiss. (R. 670).

19. Mr. Brunson has not appealed the dismissal of his claims against Green Tree.

SUMMARY OF ARGUMENT

As set forth in Point I.A below, Mr. Brunson has not appealed the order dismissing his claims against defendant-appellee Green Tree. Accordingly, the resolution of this appeal should have no effect on the status of those claims, which the district court properly dismissed.

As set forth in Point I.B below, the district court acted within its discretion and did not err in dismissing Mr. Brunson's claims against the Recontrust Defendants.

ARGUMENT

POINT I THE DISTRICT COURT PROPERLY DISMISSED MR. BRUNSON'S COMPLAINT

A. Reversal of the Appealed Order Would Not Disturb Mr. Brunson's Claims Against Green Tree, Which Were Properly Dismissed

Mr. Brunson has not challenged dismissal of his Third Cause of Action against Green Tree. Thus, even if the Court determines—which it should not—that the district court improperly dismissed Mr. Brunson's claims against the ReconTrust Defendants, it would not revive his claims against Green Tree.

The only grounds Mr. Brunson identifies for reversing the Appealed Order is that the ReconTrust Defendants' motion to dismiss was granted before it was fully briefed and submitted for decision. Brunson Brief at 6-9. That is not the case with Green Tree's motion to dismiss, however, which was granted after it was fully briefed and submitted for decision. (R. 554-662). Accordingly, there is no basis for disturbing the district court's dismissal of Mr. Brunson's causes of action against Green Tree.

B. The District Court Had Discretion to Dismiss Claims Barred by Claim Preclusion and Issue Preclusion Regardless of Whether a Request to Submit was Filed Pursuant to UTAH R. CIV. P. 7(d)

Mr. Brunson argues on appeal that the trial court erred in dismissing his complaint against the Recontrust Defendants because the motion had not

been submitted for decision pursuant to Rule 7(d) of the Utah Rules of Civil Procedure. *See Opening Brief of Appellant and Demand for Transparency* dated April 9, 2012 ("Brunson Brief") at 7-8. Mr. Brunson claims he was thus deprived of due process, *id.* at 7-9, but offers no substantive reasons why dismissal should not have been granted. His argument has no support under Utah law.

In *Bolinder Co. v. Walker*, 2010 UT App 363 (Ut. Ct. App., Dec. 16, 2010),[1] this Court examined whether the absence of a Rule 7(d) request to submit for decision barred a court from deciding a pending motion. Determining that it did not, the court stated:

> Rule 7(d) of the Utah Rules of Civil Procedure does state that if no party files a request to submit a motion for decision, "the motion will not be submitted for decision." Utah R. Civ. P. 7(d). This rule, in substance, was formerly located in the Utah Code of Judicial Administration, *see* Utah Code of Jud. Admin. 4-501(1)(D) (repealed 2003) (stating, in pertinent part, "If neither party files a notice [to submit for decision], the motion will not be submitted for decision"). In interpreting that materially identical rule, this court squarely held in *Scott v. Majors*, 1999 UT App 139, 980 P.2d 214, that "**nothing in this rule or any other rule bars a court from deciding [a matter that is not submitted for decision] sua sponte.**" *Id.* ¶ 11.

Bolinder Co. v. Walker at *2-3. (emphasis added). The purpose of Rule 7(d) "is to bring order to the manner in which the courts operate. They are not intended to, nor do they, create or modify substantive rights of litigants, nor

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[1] A true and correct copy of this unpublished opinion is attached in the Appendix hereto.

do they decrease the inherent power of the court to control matters pending before it." *Scott v. Majors*, 1999 UT App. 139, *P12 (Ut. Ct. App. 1999) (citing *Hartford Leasing Corp.*, 888 P.2d at 702 ("[a] trial judge is accorded broad discretion in determining how a [case] shall proceed in his or her courtroom."))

As set forth both in the Recontrust Defendants' and Green Tree's motions to dismiss,[2] Mr. Brunson's complaint is barred by issue preclusion and claim preclusion. (R. 6-8; 562-64). He makes no attempt to show otherwise on appeal. He had ample opportunity to pursue all of his claims in his first lawsuit before Judge Kennedy (Third Dist. Case No. 90909512). Instead, he advanced the same frivolous claims—which arose out of the same transaction—against the same parties after they had been fully litigated. (*e.g.*, R. 555-566). Because all of the elements of claim preclusion and issue preclusion were satisfied, *id.*, and because his claims in any event are not cognizable under Utah law (R. 564-68), the district court did not err when it granted dismissal.

CONCLUSION

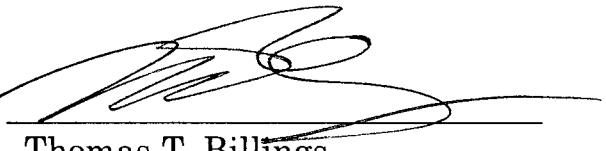
For the foregoing reasons and as set forth in the brief of co-defendants and appellees the Recontrust Defendants, the district court did not err in

[2] To the extent it is consistent with Green Tree's position, Green Tree joins in and incorporates the Recontrust Defendants' brief as if set forth fully herein.

dismissing Mr. Brunson's claims. Accordingly, defendant and appellee Green Tree Servicing, LLC respectfully requests that this Court affirm the Appealed Order in its entirety.

DATED: May 14, 2012

VAN COTT, BAGLEY, CORNWALL
& MCCARTHY, P.C.

By: 

Thomas T. Billings
Mary Jane E. Galvin-Wagg
Kelley M. Marsden

CERTIFICATE OF SERVICE

The undersigned certifies that on May 14, 2012 the foregoing **BRIEF OF APPELLEE GREEN TREE SERVICING LLC** was served upon the following via U.S. Mail, postage prepaid:

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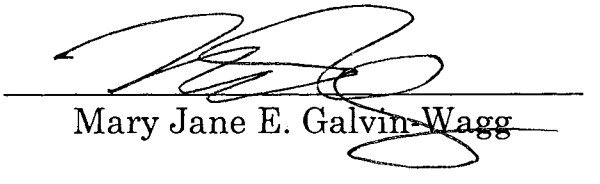

Mary Jane E. Galvin-Wagg

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 1,855 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 13 point Century Schoolbook.

DATED: May 14, 2012

Mary Jane E. Galvin-Wagg

4823-4905-9599, v. 1

Bolinder Company, Inc., a Utah corporation, Plaintiff, v. Steven K. Walker, Defendant, Third-party Plaintiff, and Appellant, v. Russell Christensen dba Fineline Development, Third-party Defendant and Appellee.

Case No. 20091076-CA

COURT OF APPEALS OF UTAH

2010 UT App 363; *2010 Utah App. LEXIS 369*

December 16, 2010, Filed

NOTICE: NOT FOR OFFICIAL PUBLICATION

PRIOR HISTORY: [*1]
Third District, Tooele Department, 070301570. The Honorable Stephen L. Henriod.

COUNSEL: Sean N. Egan, Salt Lake City, for Appellant.

Jaime D. Topham, Grantsville, for Appellee.

JUDGES: J. Frederic Voros Jr., Judge. WE CONCUR: Carolyn B. McHugh, Associate Presiding Judge, William A. Thorne Jr., Judge.

OPINION BY: J. Frederic Voros Jr.

OPINION

MEMORANDUM DECISION

VOROS, Judge:

The trial court granted plaintiff Bolinder Company, Inc. summary judgment against defendant Steven K. Walker. It also granted third-party defendant Russell Christensen summary judgment against third-party plaintiff Walker. Walker sought relief from the latter judgment under *rule 60(b) of the Utah Rules of Civil Procedure. See Utah R. Civ. P. 60(b)*. The trial court denied Walker's *rule 60(b)* motion, and Walker appeals. We affirm. [1]

1 We have determined that "[t]he facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument." *Utah R. App. P. 29(a)(3)*.

The portion of *rule 60(b)* relied upon by Walker authorizes the trial court, "in the furtherance of justice," to relieve a party from a final judgment on the grounds of "mistake, inadvertence, surprise, or excusable neglect." [*2] *Utah R. Civ. P. 60(b)(1)*. We note at the outset that dispositions of "*rule 60(b)* motions are rarely vulnerable to attack. We grant broad discretion to trial courts' *rule 60(b)* rulings because most are equitable in nature, saturated with facts, and call upon judges to apply fundamental principles of fairness that do not easily lend themselves to appellate review." *Fisher v. Bybee, 2004 UT 92, ¶ 7, 104 P.3d 1198*.

Walker advances four separate arguments on appeal. First, he contends that the trial court erred in denying *rule 60(b)* relief because the trial court granted Christensen's motion for summary judgment notwithstanding the fact that Christensen had never formally submitted the motion for decision. *Rule 7(d) of the Utah Rules of Civil Procedure* does state that if no party files a request to submit a motion for decision, "the motion will not be submitted for decision." *Utah R. Civ. P. 7(d)*. This rule, in substance, was formerly located in the Utah Code of Judicial Administration, *see* Utah Code of Jud. Admin. 4-501(1)(D) (repealed 2003) (stating, in pertinent part, "If neither party files a notice [to submit for decision], the motion will not be submitted for decision"). In interpreting [*3] that materially identical rule, this court squarely held in *Scott v. Majors, 1999 UT App 139, 980*

P.2d 214, that "nothing in this rule or any other rule bars a court from deciding [a matter that is not submitted for decision] sua sponte." *Id.* ¶ 11. The object of *rule 7(d)* is thus not to prevent the court from disposing of a fully briefed motion, but to alert the parties that they "may not assume that a matter will be presented to the judge for decision by the clerks' office unless a party notifies the clerk of the court that the matter is fully briefed . . . and ready for decision." *Id.* The trial court's actions here complied with applicable law as expressed in *Scott* and did not require *rule 60(b)* relief.

Next, Walker argues that the trial court erred in denying *rule 60(b)* relief because Christensen's summary judgment motion was never noticed for hearing by the court. However, Walker's *rule 60(b)* motion filed in the trial court did not cite this as a ground for relief. This claim of error is thus not preserved for appellate review. *See Pratt v. Nelson, 2007 UT 41, ¶ 15, 164 P.3d 366* ("In order to preserve an issue for appeal the issue must be presented to the trial court in such a way **[*4]** that the trial court has an opportunity to rule on that issue" (internal quotation marks omitted)). Nor does Walker offer any "grounds for seeking review of an issue not preserved in the trial court." *Utah R. App. P. 24(a)(5)(B).* Accordingly, we do not consider it further.

Next, Walker contends that the trial court erred in denying *rule 60(b)* relief because neither counsel for Walker nor counsel for Christensen attended the hearing on Christensen's motion for summary judgment. [2] As noted above, "We grant broad discretion to trial courts' *rule 60(b)* rulings." *Fisher, 2004 UT 92, ¶ 7, 104 P.3d 1198.* We acknowledge that when counsel for Walker and Christensen failed to appear, the trial court might have taken a more measured approach, continuing the summary judgment hearing and perhaps assessing attorney fees against counsel. *See Paulos v. All My Sons Moving & Storage, 2008 UT App 462U*, para. 7 (mem.) ("When a party fails to appear, the trial court may award attorney fees under its authority to control proceedings before it."); *see also Jones v. Layton/Okland, 2009 UT 39, ¶ 22 n.15, 214 P.3d 859.* Instead, the trial court followed a more rigorous course. Having done so, Walker contends, the court erred **[*5]** in later denying relief from the judgment ordered at that hearing.

> 2 Because we decline to reach the merits of Walker's claim that the summary judgment motion was not properly noticed, we assume for purposes of this appeal that it was.

Essentially, Walker is claiming excusable neglect. The trial court has wide latitude in determining whether a party's neglect was excusable:

> [I]n deciding whether a party is entitled to relief under *rule 60(b)* on the ground of excusable neglect, a district court must determine whether the moving party has exercised sufficient diligence that it would be equitable to grant him relief from the judgment entered as a result of his neglect. In making this determination, the district court is free to consider all relevant factors and give each factor the weight that it determines it deserves.

Jones, 2009 UT 39, ¶ 25, 214 P.3d 859. In denying the *rule 60(b)* motion, the trial court here explained in detail the basis for its finding that Walker's counsel had not exercised "due diligence" in attempting to continue or attend the hearing. Those facts are set out in the court's lengthy minute entry and we do not repeat them here. [3] We conclude on this record that the court acted within **[*6]** its broad discretion in denying Walker's *rule 60(b)* motion despite counsel's nonappearance at the summary judgment motion hearing.

> 3 We recognize that the trial court addressed this issue in the context of the motion for summary judgment filed by Bolinder, heard at the same hearing as the summary judgment motion filed by Christensen. In so doing, the court followed Walker's lead. Walker's *rule 60(b)* motion did not argue that his failure to appear and argue the Christensen motion was more excusable than his failure to appear and argue the Bolinder motion in the same hearing. He did argue that the absence of Christensen's counsel was a reason to grant Walker relief from the summary judgment in Christensen's favor. We find this argument unpersuasive.

Finally, Walker argues that the trial court erred in denying *rule 60(b)* relief because genuine issues of material fact precluded summary judgment. However, Walker is appealing the court's denial of his *rule 60(b)* motion. Accordingly, we are reviewing the order denying the *rule 60(b)* motion, not the underlying order granting summary judgment:

> "An appeal of a *Rule 60(b)* order addresses only the propriety of the denial or grant of relief. The appeal **[*7]** does not, at least in most cases, reach the merits of the underlying judgment from which relief was sought. Appellate review of *Rule 60(b)* orders must be narrowed in this manner lest *Rule 60(b)* become a substitute for timely appeals. An inquiry into

> the merits of the underlying judgment or order must be the subject of a direct appeal from that judgment or order."

Franklin Covey Client Sales, Inc. v. Melvin, 2000 UT App 110, ¶ 19, 2 P.3d 451 (emphasis omitted) (quoting 12 James Wm. Moore et al., *Moore's Federal Practice § 60.68[3]* (3d ed. 1999)). Accordingly, Walker's challenge to "the underlying judgment from which relief was sought," *id.*, is not well taken.

Affirmed.

J. Frederic Voros Jr., Judge

WE CONCUR:

Carolyn B. McHugh, Associate Presiding Judge

William A. Thorne Jr., Judge