

2011

Mojo Syndicate Inc., and A Bar Named Sue LLC v. 3928 LLC and John Fredrickson : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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MOJO SYNDICATE, INC., a Utah	:	
corporation, and A BAR NAMED SUE	:	
LLC, a limited liability company	:	Appeals Case No. 20110995-CA
	:	
Plaintiffs / Appellants,	:	District Court Civil No. 100904277
vs.	:	
	:	
3928 LLC, a limited liability company,	:	
JASON RASMUSSEN, an individual,	:	
JOHN FREDRICKSON, an individual,	:	
and JOHN DOESI-IV,	:	
	:	
Defendants / Appellees.	:	
	:	

**APPELLANTS' MOJO SYNDICATE, INC., AND A BAR NAMED SUE, LLC'S
REPLY BRIEF ON APPEAL**

Appeal from the Order of the Third District Court,
Salt Lake County, Salt Lake Division, The Honorable Judge Sandra Peuler

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ORAL ARGUMENT REQUESTED

**FILED
UTAH APPELLATE COURTS**

SEP 25 2012

IN THE UTAH COURT OF APPEALS

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ARGUMENT

I. This Court Should Hear the Mojo Plaintiffs' Appeal because They Intended to Appeal the District Court's Summary Judgment Ruling and Have Substantially Followed the Utah Rules of Appellate Procedure.

Rule 3 of the Utah Rules of Appellate Procedure states, "[a]n appeal may be taken from a district or juvenile court to the appellate court with jurisdiction over the appeal from all final orders and judgments ... by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4." *Id.* at 3(a) (2011). Rule 4 of the Utah Rules of Appellate Procedure states, "the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from." *Id.* at 4(a).

A. The Fredrickson Defendants Failed to Raise the Issue of an Untimely Appeal and, Therefore, Any Argument is Waived.

The Fredrickson Defendants argue the Mojo Plaintiffs failed to file a timely Notice of Appeal and, therefore, this Court does not have jurisdiction to hear the appeal. However, Fredrickson Defendants failed to raise the issue of an untimely appeal on a motion for summary disposition. Rule 10 of the Utah Rules of Appellate Procedure allows a party to move to dismiss the appeal on the basis that the appellate court lacks jurisdiction. Utah R. App. P. 10(a)(1). Over one year has passed since the Mojo Plaintiffs filed their notice of appeal. Many months have passed since Mojo Plaintiffs' current counsel appeared. Both sides have incurred costs and fees in briefing the appeal. If the appeal is deemed untimely, the Fredrickson Defendants should have raised the issue

prior to any briefing on appeal and it would have saved both sides time and fees. Just as the Utah Supreme Court has recognized, "[i]t is well settled that issues raised by an appellant in the reply brief that were not preserved in the opening brief are considered waived and will not be considered by the appellate court." *Allen v. Friel*, 2008 UT 56, ¶ 8, 194 P.3d 903. The same reasoning applies here. Fredrickson Defendants should have raised the issue prior to their Opposition Brief. In any event, if this Court determines the Mojo Plaintiffs' appeal is untimely, this Court should not award either side its costs and fees on appeal.

B. The Mojo Plaintiffs's Notice of Appeal is Timely under Rule 58A and the Record is Clear the Mojo Plaintiffs Always Intended to Appeal the Trial Court's Summary Judgment Ruling.

The Fredrickson Defendants argue Mojo Plaintiffs failed to file a timely notice of appeal and, even if the notice of appeal were timely filed, the Mojo Plaintiffs did not file a sufficient motion to set aside the summary judgment ruling under Rule 59 of the Utah Rules of Civil Procedure to toll the time period to file a notice of appeal. However, the notice of appeal was timely filed and the record is clear the Mojo Plaintiffs always intended to appeal the trial court's summary judgment ruling.

Rule 4 of the Utah Rules of Appellate Procedure requires a party to file Notice of Appeal within 30 days of the final judgment or order. *See* Utah R. Civ. P. 4(a). Rule 58A(b) of the Utah Rules of Civil Procedure states, "all judgments shall be signed by the judge and filed with the clerk." Utah R. Civ. P. 58A(b) (2011). Further, Rule 58A

continues, "[a] judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when it is signed and filed as provided in paragraphs (a) or (b). The clerk shall immediately record the judgment in the register of actions and the register of judgments." Utah R. Civ. P. 58(c).

First, the Mojo Plaintiffs timely filed a Notice of Appeal pursuant to Rule 58A. After the trial court entered its order on summary judgment ruling, the Mojo Plaintiffs filed a motion to set aside the summary judgment ruling. On or about August 29, 2011, the trial court signed a minute entry, which constituted a final order, denying the Mojo Plaintiffs' motion to set aside the summary judgment ruling. The order was entered on the trial court's docket on August 30, 2011, and mailed by the trial court's clerk on August 30, 2011. As of August 30, 2011, the Minute Entry was a final, appealable order because it was signed and entered as required under Rule 58A. Thirty days thereafter, on September 29, 2011, counsel for Mojo Plaintiffs filed their Notice of Appeal. Therefore, the Notice of Appeal was timely filed.

Second, the Mojo Plaintiffs' motion to set aside the summary judgment ruling was sufficient for the trial court to rule upon. The Fredrickson Defendants argue the Mojo Plaintiffs' notice of appeal was not timely because the Mojo Plaintiffs did not file an adequate Rule 59(a) motion. Fredrickson Defendants cite to *B.A.M. Development, L.L.C. v. Salt Lake County*, 2012 UT 26, — P.3d — to support their argument. However, Fredrickson Defendants' argument is flawed for two reasons. First, the Mojo Plaintiffs

should not be held to a standard when the case law was not in existence at the time the motion to set aside the summary judgment ruling was filed. The Mojo Plaintiffs filed their motion to set aside the summary judgment ruling on July 26, 2011. The *B.A.M. Development* case was not decided until May 4, 2012, nearly one year *after* the Mojo Plaintiffs filed their motion. Therefore, the *B.A.M. Development* is inapplicable. Second, the Mojo Plaintiffs' motion to set aside the summary judgment ruling was adequate for the trial court to issue a decision. The motion to set aside the summary judgment ruling cited to Utah R. Civ. P. 59 and 60 and case law, such as *Moon Lake Elec. Ass'n v. Ultrasystems W. Constructors, Inc.*, 767 P.2d 125 (Utah Ct. App. 1988), and requested relief from the summary judgment ruling. (R. 1923-29.) In its Minute Entry, the trial court ruled on the motion and identified that Mojo Plaintiffs cited to Utah R. Civ. P. 59 and 60. (R. 2104-07.) Though the trial court found there was insufficient analysis on which to set aside the summary judgment ruling, it did not dismiss the motion for failure to comply with Utah R. Civ. P. 59 and 60. Therefore, Fredrickson Defendants' argument is baseless.

Last, even if this Court determines the notice of appeal was not filed with 30 days of entry of the Minute Entry, the Mojo Plaintiffs always intended to appeal the trial court's summary judgment ruling. After the trial court entered its summary judgment ruling, on February 7, 2011, the Mojo Plaintiffs filed a Notice of Appeal. However, the trial court had not issued a final order, as the trial court reserved the issue of attorney fees

and counsel for Mojo Plaintiffs filed a motion to set aside the summary judgment ruling. A per curium decision by this Court, issued on May 11, 2011, states that the appeal is dismissed without prejudice to timely file an appeal from a final order. Thereafter, jurisdiction was transferred to the trial court to issue a decision on the attorney fees and to rule on the Mojo Plaintiffs' motion to set aside the summary judgment ruling. Thereafter, On August 30, the trial court issued its ruling on the attorney fees and the Mojo Plaintiffs' motion to set aside the summary judgment ruling. On September 29, 2011, the Mojo Plaintiffs timely filed a second Notice of Appeal. The Mojo Plaintiffs filed two notices of appeal and always intended to appeal the trial court's summary judgment ruling. Therefore, the Mojo Plaintiffs' appeal should not be dismissed.

II. This Court Should Reverse the Trial Court's Summary Judgment Dismissal because Mr. Brown's Conduct Rose to the Level of Ineffective Assistance of Counsel.

Fredrickson Defendants argue the ineffective assistance of counsel does not apply in the civil context and, even if it did, Mojo Plaintiffs cannot show that Mr. Brown's counsel was ineffective. They cite to *Chilton v. Young*, 2009 UT App 265 for the proposition that ineffective assistance of counsel does not apply in the civil context. However, what *Chilton* and its predecessors acknowledge is the "general rule" that there is no constitutional right to effective representation in civil matters. *See Chilton, supra*; *see also Rukavina v. Triatlantic Ventures, Inc.*, 931 P.2d 122, 126 (Utah 1997); *Jennings v. Stoker*, 652 P.2d 912 (Utah 1982). However, the Utah Supreme Court has noted that

"[t]here are cases which recognize that under exigent or exceptional circumstances which appear to have resulted in an injustice, the court may be justified in granting a new trial." *Jennings*, 652 P.2d at 913.

In the concurring opinion in *Maltby v. Cox Const. Co., Inc.*, 598 P.2d 336 (Utah 1979), Chief Justice Crockett acknowledged, "[t]he purpose of all court proceedings is, of course, to do justice. If the processes have so clearly gone awry that an injustice has resulted, the court in charge of the trial, or this Court on review, should rectify such an unfortunate occurrence, whether the proceeding is criminal or civil." *Id.* at 341 (concurring opinion of Crockett, J.J., and concurred by Hall and Stewart). Chief Justice Crockett continued that, in his view, "determining whether relief should be granted the matter of critical concern should not be as to the nature of the proceeding, but whether there is such a strong likelihood that an injustice has resulted that good conscience requires it to be remedied." *Id.* at 342.

Here, the Mojo Plaintiffs' case is one of the "exigent circumstances" warranting a reversal of the trial court's summary judgment dismissal because Mr. Brown's counsel was ineffective. As detailed in Mojo Plaintiffs' Opening Brief on Appeal, Mr. Brown's counsel was ineffective by his failures to comply with Rules 7 and 56 in responding to Fredrickson Defendants' Motion for Summary Judgment, (R. 1393-97; 1738-43); failing to serve documents upon opposing counsel, (R. 1328-29; 1393-94); and, failing to comply with the Rules of Civil Procedure in motion practice, (R. 1326-27; 1394-95). Ultimately,

the trial court ruled that because Mr. Brown failed to follow the Rules of Civil Procedure in responding to the motion for summary judgment, Plaintiff's case should be dismissed. Had Mr. Brown followed the Utah Rules of Civil Procedure, the trial court likely would not have granted summary judgment and would have allowed the case to proceed to trial. *See Kell v. State*, 2008 UT 62, ¶ 48, 194 P.3d 913 (noting that summary judgment is a "drastic remedy").

Additionally, at the time he was representing Mojo Plaintiffs, Mr. Brown was involved in suspicious activities with home mortgage modifications and investigated by the FBI. Further, the Office of Professional Conduct filed an administrative action against Mr. Brown and his license was placed on "disability" status. *See In Re Discipline of Trujillo*, 2011 UT 38, ¶ 25, 24 P.3d 972 ("An attorney's disability status derives from a 'physical or mental condition which adversely affects the lawyer's ability to practice law[.]'" (citing RLDD 23(c) (superseded by Supreme Court Rules of Professional Practice, ch. 14, art. 5, Rule 14-523))).

Mr. Brown's conduct was not "irregular" as Fredrickson Defendants argue. The trial court acknowledged Mr. Brown's numerous and faulty filings and penalized the Mojo Plaintiffs for his conduct by awarding the Fredrickson Defendants with attorney fees. (R. 1906.) Further, the trial court acknowledged Mr. Brown did not comply with the Utah Rules of Civil Procedure, granted summary judgment in favor of Fredrickson Defendants, and dismissed the case. (R. 1738-1743; 2125, Tr., 43:1-5.) Even

Fredrickson Defendants acknowledge the trial court granted summary judgment based on Mr. Brown's failure to comply with Rules 7 and 56 of the Utah Rules of Civil Procedure. *See Appellees' Brief*, p. 22. Mr. Brown's conduct fell woefully below the standard of reasonable care and prejudiced the Mojo Plaintiffs. Therefore, this case presents an exigent circumstance where reversal is proper based on Mr. Brown's ineffective assistance of counsel.

III. Alternatively, this Court Should Reverse the Trial Court's Dismissal on Summary Judgment because the Mojo Plaintiffs Substantially Complied with Rules 7 and 56 to Show Genuine Issues of Material Fact.

Fredrickson Defendants argue the standard of review to apply in this case is abuse of discretion. Mojo Plaintiffs disagree and argue this court should apply a "correctness" standard of review. Under either standard of review, the trial court's dismissal on summary judgment must be reversed because the Mojo Plaintiffs substantially complied with Utah R. Civ. P. 7 and 56.

Rule 56 of the Utah Rules of Civil Procedure governs summary judgment and requires "[t]he motion, memoranda, and affidavits shall be in accordance with Rule 7 [of the Utah Rules of Civil Procedure]." *Id.* at 56(c) (2011). Rule 7 of the Utah Rules of Civil Procedure requires an opposing memorandum to contain "a verbatim restatement of each of the moving party's facts that is controverted," as well as an explanation of the grounds for the dispute and citations to relevant materials. *Id.* at 7(c)(3)(B). While "the

trial court has discretion in requiring compliance with [rule 7 of the Utah Rules of Civil Procedure]," *Bluffdale City v. Smith*, 2007 UT App 25, ¶ 5, 156 P.3d 175 (second alteration in original) (internal quotation marks omitted), strict compliance under Rule 7 is not necessary if the failure to comply with Rule 7 was harmless error, *Salt Lake County v. Metro West Ready Mix, Inc.*, 2004 UT 23, n. 4, 89 P.3d 155.

Fredrickson Defendants argue the Mojo Plaintiffs' Second Opposition Memorandum was noncompliant with Rule 7 because: (1) the factual assertions are not "quoted verbatim," (2) the explanation of disputes was a series of "unanswered rhetorical questions," (3) the citations to supporting materials refer to documents provided by the Fredrickson Defendants and demonstrate no dispute, and (4) the citations do not contain sufficient pinpoint citations. *See Appellees' Brief*, pp. 23-24. However, Fredrickson Defendants' argument is unavailing.

First, the Mojo Plaintiffs quoted verbatim the Fredrickson Defendants' facts that were in dispute. Rule 7 only requires a verbatim restatement of the facts that are **in dispute**. *See Utah R. Civ. P. 7(c)(3)(B)* (emphasis added). The Mojo Plaintiffs did just that. They cited to the facts that were controverted in the "Statement of Facts" section and within the body of the memorandum. (R. 1425-1441.) Therefore, the first requirement of Rule 7 is met.

Second, the Mojo Plaintiffs provided an explanation of the disputed issues, as well as citations to supporting materials. While the Second Opposition Memorandum does

entertain certain questions, these questions raise genuine issues of material fact. The Second Opposition Memorandum raises the issue of (1) whether Fredrickson Defendants provided a full accounting of the \$40,000 to Judith and Mark Peterson, (R. 1432, ¶ 10); (2) whether the Fredrickson Defendants were responsible to pay the taxes for a Bar Named Sue, (R. 1432-33, ¶ 12); (3) whether Mark Peterson under-reported the second quarter sales for Bar Named Sue or was involved in wrongful conduct relating to Bar Named Sue, (R. 1433-34, ¶ 14); (4) whether Mojo Plaintiffs wanted to sell the Bar to Fredrickson Defendants, (R. 1437, ¶ 20-22); (5) whether Mojo Plaintiffs were represented by counsel in the Asset Purchase Agreement, (R. 1437, ¶ 20-22); and (6) whether Fredrickson Defendants made promises of partnership after the signing of the Asset Purchase Agreement and subsequent documents, (R. 1479, ¶¶ 31-32, 1561, ¶¶ 22-23, 1505, ¶ 27). Further, Mojo Plaintiffs provided the trial court with documentary evidence, including the Certificates of Agency Authority and of Resolution, (R. 1452-53), the acknowledgment of Fredrickson's 50 percent ownership in Bar Named Sue, (R. 1468), the Affidavit of John Bates, (R. 1469-71), the Second Affidavit of Judith Peterson, (R. 1475-80), a blank promissory note, (R. 1481), the Second Affidavit of Mark Peterson, (R. 1501-07), and the Affidavit of Mark Peterson, (R. 1558-62).

The Mojo Plaintiffs' Second Opposition Memorandum complied with Utah R. Civ. P. 7 and 56. The Mojo Plaintiffs provided a restatement of the facts in dispute, as well as citations to other documentary proof, including affidavits and documents. The Mojo

Plaintiffs substantially complied with Rule 7 and, therefore, the trial court's grant of summary judgment based on noncompliance with Rules 7 and 56 was in error and should be reversed.

IV. This Court Should Reverse the Trial Court's Grant of Summary Judgment because Fredrickson Defendants' Promises to Mark Peterson Regarding Ownership in the Bar Create Genuine Issues of Material Fact.

Fredrickson Defendants argue summary judgment was appropriate because there are no disputed issues of fact relating to any of the five claims in Mojo Plaintiffs' complaint. However, a review of the record shows that there are genuine issues of fact that preclude summary judgment on *any* of the claims. To overcome summary judgment, Mojo Plaintiffs only need to "offer at least some evidence that could be interpreted to satisfy the elements of the claim...." *Waddoups v., Amalgamated Sugar Co.*, 2002 UT 69, ¶ 35, 54 P.3d 1054. Each of these claims should be presented at trial.

A. As to the First Cause of Action for Rescission Based upon Breach and Fraud, Genuine Issues of Fact Exist as to Whether Fredrickson Defendants Verbally Modified the Asset Purchase Agreement and Whether Mojo Plaintiffs had Counsel in Connection with the Alleged Sale.

Fredrickson Defendants argue the "undisputed evidence" shows the Fredrickson Defendants did not verbally modify the Asset Purchase agreement, the "undisputed evidence" shows Mojo Plaintiffs received legal counsel, and the "undisputed evidence" shows that Mojo Plaintiffs receive the payments required under the Asset Purchase

Agreement. *See* Appellees' Brief, pp. 29-34. However, the evidence on the record is disputed and shows disputed issues of fact.

First, the evidence is disputed as to whether the Fredrickson Defendants verbally modified the Asset Purchase Agreement by making verbal promises to Mojo Plaintiffs and Mark and Judith Peterson. Specifically, in her second affidavit, Judith Peterson stated, "[o]n October 27, 2009, [Fredrickson] came to my home with an Asset Purchase Agreement that he had already drafted," (R. 1478, ¶ 21), and "John had myself and Mark sign the agreement at my dining room table," (R. 1479, ¶ 28). Judith Peterson's testimony continues, "John Fredrickson never mentioned that I was selling the bar. I was only selling my half of the bar. Mark was keeping his half of the bar and was to be partners with John Fredrickson." (R. 1479, ¶¶ 31-32.) Judith Peterson's second affidavit lists the events in chronological order. According to her testimony, the Asset Purchase Agreement was signed and then Fredrickson made the verbal promises. The Affidavit of Mark Peterson and Second Affidavit of Mark Peterson are substantially similar. (R. 1504-05, ¶¶ 24-27; 1561, ¶¶ 22-23, 1505, ¶ 27.) This creates a genuine issue of material fact. The record is not "undisputed" as Fredrickson Defendants allege. In fact, this is a dispute over a genuine issue of material fact relating to the rescission claim. Therefore, summary judgment was inappropriate.

Second, the evidence is disputed whether Mojo Plaintiffs were represented by legal counsel in connection with the Asset Purchase Agreement. The Affidavit of John Bates

raises the issue that the Mojo Plaintiffs were not represented by counsel in connection with the Asset Purchase Agreement and subsequent documents. (R. 1470, ¶ 6.) Mr. Bates disclaims any representation of Mojo Plaintiffs during that time period, though acknowledges that he reviewed a few documents and gave his comments. (R. 1470, ¶ 6.) Notwithstanding his review, he stated the review was limited and the comments were forwarded to Fredrickson Defendants' attorney. (R. 1471, ¶ 8.) Never did Mr. Bates represent the Mojo Plaintiffs, communicate with the Mojo Plaintiffs, or provide legal advice to Mojo Plaintiffs relating to the Asset Purchase Agreement. Mark Peterson confirms that they were not represented by legal counsel. (R. 1504, ¶ 24.) This creates a genuine issue of fact as to whether the Mojo Plaintiffs were represented by counsel for the Asset Purchase Agreement and subsequent documents. Certainly, if neither the attorney nor the alleged client believe there was representation, then no representation occurred. *See Kilpatrick v. Wiley, Rein & Fielding*, 2001 UT 107, ¶ 40, 37 P.3d 1130 ("[T]he proper determination of whether an implied attorney-client relationship exists hinges on whether the party had a *reasonable belief* that it was represented." (alteration in original).)

Third, it is disputed whether Mojo Plaintiffs received and accepted the monthly payments under the promissory note and Asset Purchase Agreement. While Fredrickson Defendants argue the evidence is "undisputed" and the parties signed the Closing Memorandum, evidence on the record again demonstrates genuine issues of fact. For

example, Mark Peterson stated there was no accounting of the \$40,000, (R. 1504, ¶ 22) and testified in his deposition that Fredrickson never gave an accounting and represented, "he was taking care of it," (R. 1499, 145:4-146:23). In fact, Mark Peterson testified Fredrickson said he was "taking care of it" at the time the Closing Memorandum was signed. (*Id* at 146:20-23.) It is disputed whether Fredrickson promised to provide an accounting. This creates a genuine issue of material fact, which prevented summary judgment. Therefore, the trial court's decision should be reversed.

B. As to the Second Cause of Action for Intentional Interference with Prospective Economic Relations, Genuine Issues of Material Fact Exist as to Whether Fredrickson Defendants Made Promises to Mojo Plaintiffs Regarding Mark Peterson's Ownership in the Bar.

Fredrickson Defendants argue the trial court correctly concluded that there is no evidence in the record that Fredrickson Defendants had an improper purpose or exercised improper means to take the bar and its assets from Mojo Plaintiffs. Fredrickson Defendants allege the undisputed evidence demonstrates that "Mojo Plaintiffs agreed to sell the bar's assets to the Fredrickson Defendants for \$80,000.00 and that the Fredrickson Defendants tendered an agreed payment." *See* Appellees' Brief, p. 38. However, as discussed above, there are genuine issues of fact regarding Fredrickson Defendants' promises to Mojo Plaintiffs regarding Mark Peterson's ownership of the bar.

First, as discussed in Section IV.A. above, there are genuine issues of fact as to whether the Fredrickson Defendants made promises to Mark Peterson about ownership of

the bar. (R. 782-83; 1505.) According to Judith Peterson's second affidavit, listing events in chronological order, Fredrickson made these promises *after* signing the Asset Purchase Agreement. (R. 1479, ¶¶ 31-32.) This is a genuine issue of fact. Second, it is a disputed fact whether the Mojo Plaintiffs intended to sell the bar at all. According to Judith Peterson's second affidavit, she believed she was only selling her share of the bar to Fredrickson Defendants and that Mark Peterson would be a partner with Fredrickson. (R. 1479, ¶¶ 31-32.) This is another genuine issue of material fact. Third, if Judith Peterson, not Mojo Plaintiffs, owned the assets of the bar, then Fredrickson Defendants could not have purchased the assets. Though Fredrickson Defendants argue Mojo Plaintiffs should be estopped from this argument, this would be an issue ripe for trial. Fredrickson Defendants also argue Judith Peterson signed the Asset Purchase Agreement; however, the signature was as "secretary" on behalf of Mojo Syndicate, Inc. (R. 1549.) Therefore, if she owned the assets personally, the Fredrickson Defendants could not have purchased the assets. These facts are material and go to the heart of the issue whether Fredrickson Defendants used an improper purpose to induce a mentally unsound woman to allegedly sell the assets of the bar to them. (R. 1482.) Therefore, the trial court erred in granting summary judgment and dismissing this claim.

C. As to the Third Cause of Action for Civil Conspiracy, Genuine Issues of Fact as to Whether Fredrickson Defendants Made Verbal Promises to Mojo Plaintiff Regarding Mark Peterson's Ownership of the Bar.

Fredrickson Defendants argue the claim for civil conspiracy fails because there is nothing unlawful or wrongful with signing the Asset Purchase Agreement, or with selling the bar for the \$80,000 agreed-upon purchase price. *See Appellees' Brief*, pp. 38-39. However, as discussed in IV.A. and IV.B. above, there are genuine issues of fact relating to Fredrickson Defendants' conduct and the trial court should not have granted summary judgment. Mojo Plaintiffs provided evidence that Fredrickson Defendants obtained the assets through the Asset Purchase Agreement, while making verbal promises to Mark Peterson and Judith Peterson that they would keep Mark Peterson as a partner in the bar. (R. 1479, ¶¶ 31-32.) Fredrickson Defendants purchased the bar for \$80,000, when the evidence shows the sales for the second quarter of the bar were at least \$232,837.90. (R. 758-59, Vol. I, 91:19-92:17.) These create genuine issues of fact as to whether Fredrickson Defendants conspired to obtain the assets of the bar using unlawful means or wrongful purpose. Certainly, making false promises to purchase something for far less than its value is an unlawful means or wrongful purpose. These genuine issues of fact preclude summary judgment. The trial court erred in granting summary judgment and the decision should be reversed.

D. As to the Fourth Cause of Action for Breach of Fiduciary Duty, Genuine Issues of Material Fact Exist as to Whether Fredrickson Owed a Fiduciary Duty to Mojo Plaintiffs and Whether Such a Duty was Breached.

Fredrickson Defendants argue the trial court correctly found that there was no fiduciary duty owed to Mojo Plaintiffs after the execution of the Asset Purchase Agreement and, even if a fiduciary duty continued during negotiation and execution of the Asset Purchase Agreement, "the only thing that the Mojo Plaintiffs claim Fredrickson did to breach his alleged duty was to fail to inform them of his conduct." *See Appellees' Brief*, p. 41. However, genuine issues of material fact exist to whether Fredrickson owed fiduciary duties to Mojo Plaintiffs and whether he breached those duties.

Mojo Plaintiffs and Fredrickson signed an agreement on October 2, 2009, wherein Fredrickson would assume "50 per cent [sic] control, ownership, and assigned shares of MOJO SYNDICATE INC., and A BAR NAMED SUE LLC." (R. 815.) Though not specifically titled a "partnership agreement," Fredrickson owed fiduciary duties to Mojo Plaintiffs (and Mark and Judith Peterson) as he owned 50 percent of the bar. He was required to provide accounting records of any money he put into the bar for repairs (which he claims is \$40,000), (R. 489, ¶13), and inform them of his plans not to make Mark Peterson a partner in the new venture, (R. 490, ¶ 17). These are material facts which are in dispute. If Fredrickson had a fiduciary duty to Mojo Plaintiffs, then he was required to disclose information to Mojo Plaintiffs. He failed to do so. Instead, according

to Judith and Mark Peterson, he represented that Mark Peterson would be his partner in the bar. (R. 1479, ¶¶ 31-32; 1561, ¶¶ 22-23, 1505, ¶ 27.) According to Judith Peterson, after signing the Asset Purchase Agreement, Fredrickson represented he wanted Mark Peterson to be his partner. That is enough to form a partnership. The trial court erred in granting summary judgment because a fiduciary duty has attendant obligations, which were breached if Fredrickson had a fiduciary duty to Mojo Plaintiffs. This issue should have proceeded to trial.

E. As to the Fifth Cause of Action for Breach of Contracts, Genuine Issues of Fact Exist as to Whether Fredrickson Verbally Modified the Asset Purchase Agreement and Breached the Contract.

Fredrickson Defendants argue there is no evidence of breach of contract because the terms of the fully executed Asset Purchase Agreement are clear and there is no provision that requires an accounting from Fredrickson in the Asset Purchase Agreement or Closing Memorandum. *See* Appellees' Brief, pp. 42-44. However, the trial court's dismissal of the breach of contract claim was error because genuine issues of fact exist as to whether the Asset Purchase Agreement was verbally modified by Fredrickson Defendants after it was signed and, if so, whether Fredrickson Defendants breached that contract.

As discussed in Section IV.A. above, Mojo Plaintiffs raised the issue of whether Fredrickson verbally modified the Asset Purchase Agreement. Both Judith Peterson's and

Mark Peterson's second affidavits raise the issue that Fredrickson was planning to keep Mark Peterson as a partner with him. (R. 1479, ¶¶ 31-32; 1561, ¶¶ 22-23, 1505, ¶ 27.) Mojo Plaintiffs also raised the issue of whether Fredrickson contracted to pay Judith Peterson "\$2,000.00 a month and \$3,000.00 a month to Mark Peterson under the table and \$40,000.00 up front for partnership in the bar, which he did not do." (R. 1272, ¶ 27.) It is unclear when Fredrickson made this promise, but if the promise was made and Fredrickson failed to make the payments to Mark Peterson and full payments to Judith Peterson, then that is a breach of contract. Further, Mojo Plaintiffs raised the issue that Fredrickson Defendants did not provide any evidence of payment in full and never provided an accounting of the \$40,000 "credit" Fredrickson Defendants received in the Asset Purchase Agreement. (R. 1498-99.) Again, it is unclear when this promise was made. However, if Fredrickson Defendants promised to provide an accounting after the Asset Purchase Agreement was signed or after the Closing Memorandum was signed and never did, then that is a breach of the contract. The fact that these promises were made at all prevent summary judgment. The trial court erred in granting summary judgment when Mojo Plaintiffs raised these issues and they were never investigated. These are genuine issues of fact preventing summary judgment. Therefore, this Court should reverse the summary judgment ruling and allow this case to proceed to trial.

V. This Court Should Reverse the Trial Court's Award of Attorney Fees because Summary Judgment was Inappropriate and the Amount of Fees was Unreasonable.

Fredrickson Defendants argue the standard of review on appeal is correctness and abuse of discretion. *See* Appellees' Brief, pp. 44-45. Fredrickson Defendants also argue Mojo Plaintiffs never preserved their argument that Fredrickson Defendants are not entitled to an award of attorney fees and, in any event, the amount of fees was reasonable. *Id.* at pp. 45-47. However, Fredrickson Defendants misunderstand Mojo Plaintiffs' argument.

First, the trial court erred in awarding Fredrickson Defendants attorney fees at all in connection with this case because summary judgment was inappropriate. As discussed in Section IV above, the grant of summary judgment was error because there are genuine issues of material fact that prevent summary judgment on each of the five causes of action. Logically, it follows that if the grant of summary judgment was error, then the award of attorney fees was also error. Therefore, this Court should reverse the attorney fee award.

Second, the trial court's award of attorney fees under the Asset Purchase Agreement was error. Fredrickson Defendants do not even respond to this argument and, instead, argue the issue was never preserved in the record below. Mojo Plaintiffs preserved the issue in the Mojo Plaintiffs' Memorandum in Opposition to Defendants

3928 LLC's Motion and Memorandum for Attorneys' Fees and Costs, wherein Mojo

Plaintiffs "pray that the Court not grant attorneys fees or at least substantially reduce them." (R. 1808.) In the reply memorandum, Fredrickson Defendants dedicated an entire page to the argument that they are entitled to attorney fees under the purchase agreement. (R. 1819.) The issue was preserved for review by this Court. Given that the issue was preserved and the Fredrickson Defendants failed to address the issue, leaving it unopposed, this Court should reverse on this basis.

In any event, the trial court erred in awarding Fredrickson Defendants all of the attorney fees, as there were five causes of action and only two causes of action dealt with the Asset Purchase Agreement. (R. 1-10.) The second, third, and fourth causes of action have no bearing on the Asset Purchase Agreement and did not require the trial court to "interpret or enforce" the Agreement. These allegations involved conduct separate and apart from the Agreement. Therefore, the award of attorney fees was error and should be reversed.

Third, the trial court's award of attorney fees was not reasonable. Fredrickson Defendants argue the lawsuit was to enforce the provisions of the Asset Purchase Agreement, that 3928 LLC was the prevailing party, and the fees were reasonable. However, the fees were unreasonable because the fees incurred in responding to simple motions was absurd. Fredrickson Defendants do not even respond to the amounts of fees expended in the case. For instance, Fredrickson Defendants requested \$19,617.00 in fees for "Defendants' Motions for Preliminary Injunction, to Amend Complaint, and for

Appointment of a Receiver." (R. 1846-48; 1859.) Nearly 1/3 of all fees incurred was due to these responses. The trial court acknowledged the issues were "settled after all pleadings had been filed." (R. 1906.) The trial court erred in awarding these fees when the issue was settled and the Court acknowledged the settlement.

Additionally, the time for discovery was \$16,347.75, but only two depositions were taken and Fredrickson Defendants did not produce any documents requested by Mojo Plaintiffs. (R. 1704-05; 1848-1851; 1859.) This amounts to 1/4 of the fees incurred in the case. A fee of over \$16,000 for two depositions and slight discovery is not reasonable. Lastly, the award of \$17,962.25 in attorney fees in connection with the motion for summary judgment is not reasonable. As examined in Mojo Plaintiffs' Opening Brief on Appeal, Counsel for Fredrickson Defendants spent 32.75 hours, or \$6,526.25, in drafting the motion for summary judgment, (R. 1853-54), and 22.25 hours, or \$4,566.25, in drafting the reply memorandum, (R. 1854-55). Counsel for Fredrickson Defendants also spent 18.4 hours, or \$3,808.50, in preparing for and attending the summary judgment hearing, which was only one hour. This award is unreasonable. The fee was unreasonable and inappropriate, in light of the fact that there were genuine issues of material fact that prevented the entry of summary judgment.

Lastly, this Court should not award Fredrickson Defendants their attorney fees on appeal. The trial court erred in granting summary judgment and in awarding attorney fees

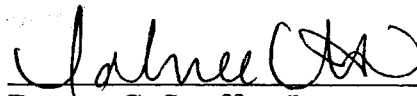
below because there are genuine issues of material fact that require this case to proceed to trial. Therefore, an award of attorney fees on appeal is not proper.

CONCLUSION

Pursuant to the foregoing arguments and law, Appellants Mojo Syndicate, Inc., and Bar Named Sue, LLC, respectfully request this Court reverse the Third District Court summary judgment ruling and award of attorney fees, and remand to the trial court for a trial on the merits.

DATED this 25 day of September, 2012.

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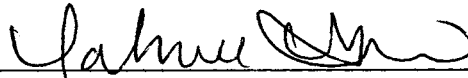
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because it contains 5,667 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B). The brief also complies with the typeface requirements of Utah R. App. P. 27(b) because it has been prepared in a proportionally-spaced type face using WordPerfect Version 12 in size 13 Times New Roman font.

DATED this 25 day of September, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that I served two true and correct copies of the foregoing, via first class mail, postage prepaid, including an electronic copy, on the following:

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on this 25 day of September, 2012.