

2012

Kendall v. Discover Bank : Brief of Appellee

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.

Brent G. Messel; Attorney for Appellee.

L. Miles LeBaron; Attorneys for Appellant.

Recommended Citation

Brief of Appellee, *Kendall v. Discover Bank*, No. 20120498 (Utah Court of Appeals, 2012).

https://digitalcommons.law.byu.edu/byu_ca3/3060

This Brief of Appellee 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.

Brent G. Messel (11082)
GUGLIELMO & ASSOCIATES
PO Box 9420
Salt Lake City UT 84109
Tel: (801)466-4912
FAX: (801)466-4913

Attorney for Plaintiff

IN THE UTAH COURT OF APPEALS

Kevin E Kendall
Defendant/Appellant

vs.

Discover Bank,

Plaintiff/Appellee

BRIEF OF APPELLEE

Appellate Case No.: 20120498

Parties:

L. Miles LeBaron
LeBaron & Jensen, P.C.
476 West Heritage Park Blvd., Ste 230
Layton, Utah 84041
Tel: (801)773-9488
FAX: (801)773-9489

Attorney for Kevin E. Kendall
Defendant/Appellant

Brent G. Messel (11082)
GUGLIELMO & ASSOCIATES
PO Box 9420
Salt Lake City UT 84109
Tel: (801)466-4912
FAX: (801)466-4913

Attorney for Discover Bank
Plaintiff/Appellee

FILED
UTAH APPELLATE COURTS

DEC 06 2012

Brent G. Messel (11082)
GUGLIELMO & ASSOCIATES
PO Box 9420
Salt Lake City UT 84109
Tel: (801)466-4912
FAX: (801)466-4913

Attorney for Plaintiff

IN THE UTAH COURT OF APPEALS

Kevin E Kendall
Defendant/Appellant

vs.

Discover Bank,

Plaintiff/Appellee

BRIEF OF APPELLEE

Appellate Case No.: 20120498

Parties:

L. Miles LeBaron
LeBaron & Jensen, P.C.
476 West Heritage Park Blvd., Ste 230
Layton, Utah 84041
Tel: (801)773-9488
FAX: (801)773-9489

Attorney for Kevin E. Kendall
Defendant/Appellant

Brent G. Messel (11082)
GUGLIELMO & ASSOCIATES
PO Box 9420
Salt Lake City UT 84109
Tel: (801)466-4912
FAX: (801)466-4913

Attorney for Discover Bank
Plaintiff/Appellee

TABLE OF CONTENTS

Table of Contents	1
Table of Authorities	2
Constitutional or Statutory Provisions	2
Statement of Facts	3
Summary of Argument	4
Argument	4
Conclusion	10
Signature of Counsel	10
Proof of Service	11

TABLE OF AUTHORITIES

Cases:

<i>Langeland v. Monarch Motors, Inc.</i> , 952 P.2d 1058, 1060-1061 (Utah 1998)	4, 5, 6
<i>Jensen v. Pioneer Dodge Center, Inc.</i> , 702 P. 2d 98, (Utah 1985)	7
<i>Brunetti v. Mascaro</i> , 854 P.2d 555, 558 (Utah Ct. App. 1993).	7, 8

Rules:

Utah R. Civ. Pro. 36	4, 6, 7
----------------------	---------

Constitutional or Statutory Provisions:

Utah R. Civ. Pro. 36	
----------------------	--

STATEMENT OF FACTS

1. Appellee, Discover Bank, filed a lawsuit on November 28, 2011, seeking to recover amounts owed under a credit card agreement.
2. Appellant filed an answer to Appellee's complaint in December of 2011.
3. Appellant served Appellee with Requests for Admissions on or about December 6, 2011.
4. Appellant's Request for Admissions No. 4 stated: "admit that Kevin E. Kendal has paid off the account that you allege he owes money on, and that he has fulfilled all of his contractual obligations to you."
5. On March 13, 2012, Appellee filed a response to Appellant's discovery requests, denying the admissions, including Admission No. 4.
6. Appellant filed a Motion for Summary Judgment on February 22, 2012, based on deemed admissions.
7. Appellee filed a Memorandum in Opposition to Appellant's Motion for Summary Judgment, and a Cross Motion for Summary Judgment on March 13, 2012.
8. The Appellant did not present any evidence in any of his pleadings refuting the facts as set for by the Appellee in Appellee's Motion for Summary Judgment.
9. The Second District Court granted Appellee's Motion for Summary judgment for the amount of \$20,601.76 on May 9, 2012.

SUMMARY OF ARGUMENT

The trial court acted within its discretion when it granted Appellee's Motion for Summary Judgment because withdrawal or amendment of the admission promoted the merits of the action and did not result in prejudice to the Appellant. Appellee's Motion for Summary Judgment provided specific evidence to the court that the deemed admissions were in fact untrue and the trial court did not unilaterally disregard the deemed admission in granting judgment based on the merits of Appellee's action.

ARGUMENT

I. AMENDMENT OR WITHDRAWAL OF THE APPELLEE'S ADMISSIONS SERVES THE PRESENTATION OF THE MERITS AND DOES NOT RESULT IN PREJUDICE TO THE APPELLANT.

Under Rule 36 of the Utah Rules of Civil Procedure, matters deemed admitted are conclusively established unless the trial court, on motion permits withdrawal or amendment of the admission. "The court may permit withdrawal or amendment if the presentation of the merits of the action will be promoted and withdrawal or amendment will not prejudice the requesting party." Utah R. Civ. P. 36(c).

The Utah Supreme Court has established a two step process for reviewing the trial court's decision to allow withdrawal or amendment of admissions in *Langeland v. Monarch Motors, Inc.*, 952 P.2d 1058, 1060-1061 (Utah 1998). First, the court reviews

the trial court's determination as to whether amendment or withdrawal would serve the presentation of the merits and whether amendment or withdrawal would result in prejudice to the nonmoving party. *Langeland*, 952 P.2d at 1061. Second, the court reviews the trial court's discretion to grant or deny the motion. *Id.*

The Court stated in *Langeland* that, "To show that a presentation of the merits of an action would be served by amendment or withdrawal of an admission, the party seeking amendment or withdrawal must (1) show that the matters deemed admitted against it are relevant to the merits of the underlying cause of action, and (2) introduce some evidence by affidavit or otherwise of specific facts indicating that the matters deemed admitted against it are in fact untrue." 952 P.2d at 1062.

In Appellant's Request for Admission No. 4, Appellant asked Appellee to "Admit that Kevin E. Kendall has paid off the account that you allege he owes money on, and that he has fulfilled all of his contractual obligations to you." (See Appellant's *Copy of Discovery Requests* in Appellant's Exhibit B to Motion for Summary Disposition.) In Appellee's Motion for Summary Judgment, Appellee demonstrated that Appellant's failure to pay the amounts owed under the contract resulted in damages to Appellee and constitute the basis for Appellee's cause of action. The basis for Appellee's Complaint and subsequent Motion for Summary Judgment, is that Appellant has not paid off the account, and that he does indeed still owe money to Appellee. Were Admission No. 4 true, the entire basis for Appellee's case would be removed. Therefore, Admission No. 4 is relevant to the merits of the case.

Appellee did not rely on mere assertions to dispute the veracity of Admission No. 4, but presented specific and detailed documentary evidence of Appellant's ongoing failure to pay the amounts owed to Appellee. Specifically, Appellee provided monthly billing statements showing all transactions conducted on Appellant's credit card account and introduced the billing statements via affidavit of Appellee's Personal Representative. These documents show a deficiency of \$17,503.17 as of the date of the final itemized billing statement. (See Exhibit A and Exhibit B to Appellee's Motion for Summary Judgment). Appellee, submitted a denial to Admission No. 4, and by means of the Motion for Summary Judgment, provided documentary evidence that the Admission is untrue.

Appellee has therefore demonstrated that the amendment or withdrawal of Admission No. 4 is permissible under Rule 36 by (1) showing that the matters deemed admitted are relevant to the merits of the underlying action and by (2) introducing evidence of specific facts indicating that the matters deemed admitted are in fact untrue.

In *Langeland*, the Court held that the "test of whether a party will be prejudiced by the withdrawal of an admission is whether the party is not any less able to obtain the evidence required to prove the matter which was admitted than he would have been at the time the admission was made." *Id.* Furthermore, the "mere necessity of proving matters formerly admitted does not constitute prejudice." *Id.*

Under Appellant's facts, the Requests for Admissions were sent to Appellee on December 6, 2011, and Appellee's response to those Requests for Admission were received by Appellant on or about March 13, 2012—a passage of just over three month's

time. There is no indication that the passage of three months has created any prejudice to the Appellant. Appellant does not indicate that he is any less able to obtain any evidence or witnesses that may be required to prove the merits of Appellant's case, than he would have been had there been no delay in denying the requested Admission. In fact, Appellant has not produced any evidence whatsoever that would support the Appellant's claim to have "paid off the account that you allege he owes money on, and that he has fulfilled all of his contractual obligations to you," but relies exclusively on the deemed Admission No. 4, which is manifestly untrue. Appellee, therefore can only presume that Appellant is the sole witness to his claim, and Appellant is clearly able to obtain his own testimony to the same degree he would have, had Appellee's denial of the requested admissions been made timely. The Appellant has not demonstrated that withdrawal or amendment of Admission No. 4 would unfairly prejudice Appellant, and appears to be attempting to avoid the "necessity of proving matters formerly admitted."

The trial court's decision to permit amendment or withdrawal of admissions fell within the court's discretion under Rule 36 because it promotes the presentation of the merits of the action and does not prejudice the Appellant.

II. WHERE THE PLAINTIFF FILED A MOTION PRESENTING SPECIFIC EVIDENCE TO DEMONSTRATE THAT THE DEEMED ADMISSION WAS INDEED FALSE, THE TRIAL COURT ACTED IN RESPONSE TO PLEADINGS AND DID NOT UNILATERALLY DISREGARD THE ADMISSIONS

Rule 36(c) provides the trial court with, “discretion to permit withdrawal or amendment of admissions when the presentation of the merits of the action would be served and the party obtaining the admissions fails to satisfy the court that he will be prejudiced in maintaining his action.” *Jensen v. Pioneer Dodge Center, Inc.*, 702 P. 2d 98, (Utah 1985). However, “the trial court does not have discretion to unilaterally disregard the admissions.” *Id.*

The Utah Court of Appeals recognized that a fully briefed motion for summary judgment was, in substance, a motion to withdraw the admission in issue because the motion “clearly outlined the parties’ respective positions.” *Brunetti v. Mascaro*, 854 P.2d 555, 558 (Utah Ct. App. 1993). The court stated that, “It is well settled that in determining whether the trial court properly characterized a document before it, we look to the substance of that document, and not merely to its caption.” *Id.* In *Brunetti*, the court denied the plaintiff’s motion for summary judgment, based solely on his requested admissions, despite the defendant’s failure to respond timely reasoning that, “although the trial court did not have a per se motion to withdraw before it, its denial of Brunetti’s motion constituted authorization for such withdrawal. Because the . . . documents clearly outlined the parties’ respective positions on the question of withdrawal of the admissions, and the trial court was fully briefed thereon, it properly treated the various documents as a motion to withdraw the admissions.” *Id.*

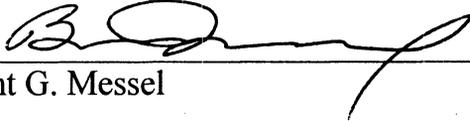
In the case at hand, both parties submitted motions for summary judgment to the trial court in which their positions were “clearly outlined.” Thus, as in *Brunetti*, the trial

court could properly construe the Appellee's motion for summary judgment as a request to withdraw the admission in question. The trial court did not act unilaterally, but responded appropriately to the parties' respective motions, finding that the deemed admission was not supported by any evidence and that Appellee's motion for summary judgment could appropriately be construed as a motion to withdraw the admission.

CONCLUSION

Therefore, because Appellee has demonstrated that the trial court's decision to permit amendment or withdrawal of Admission No. 4 promotes the presentation of the merits because (1) the matters deemed admitted are relevant to the merits of the underlying case, and (2) the Appellee presented evidence that the matters deemed admitted are in fact untrue; and that the Appellant will not be prejudiced in maintaining his action on the merits, the trial court's grant of summary judgment was not in error. Furthermore, the trial court acted appropriately in construing the Appellee's motion for summary judgment as a motion to withdraw admissions, and granted the motion based on the merits. Accordingly, the trial court's grant of summary judgment in favor of the Appellee should be upheld.

Dated December 5, 2012.



Brent G. Messel

CERTIFICATE OF MAILING/DELIVERY

I, the undersigned, hereby certify that a true and correct copy of the foregoing
RESPONSE TO MOTION FOR SUMMARY DISPOSTION was, this 6th day
of December, 2012, mailed first class, postage-prepaid to:

Kevin E Kendall
C/O L. Miles LeBaron
LeBaron & Jensen, P.C.
476 West Heritage Park Blvd., Ste 230
Layton, Utah 84041