2001

Woods Cross City v. Douglas R. Smith : Reply Brief

Utah Court of Appeals

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Randy B. Birch; Attorney for Appellant.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

WOODS CROSS CITY, A Utah municipal corporation, Plaintiff / Appellee, vs. DOUGLAS R. SMITH, dba RALPH SMITH TRUCKING COMPANY, Defendants / Appellant.	APPELLANT'S REPLY BRIEF 20010240A Court of Appeals No. ~~990193-CA~~ District Court No. ~~960004927~~

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I. Defendant Made a Proper Motion to Amend His Answer

Plaintiff relies on *Valley Bank & Trust Co. v. Wilken*, 668 P.2d 493 (Utah 1983), for the argument that Defendant's motion to amend his answer was not proper or timely. Defendant submits that the case at bar is not only distinguishable from *Valley Bank & Trust*, but in fact is in accord with what *Valley Bank & Trust* indicates should have been done.

In *Valley Bank & Trust*, the defendant's only method of raising an affirmative defense was in an affidavit served on the plaintiff one day before the summary judgment hearing. The court noted that the proper approach for the defendant to have followed would have been to file a motion to amend their answer which would have given the other side at least five days notice of their claimed affirmative defense.

In the case at bar, Defendant, in his answer, had made clear his intent to raise affirmative defenses as found through discovery. In response to Plaintiff's motion for summary judgment, Defendant, through a Rule 56(f) motion reiterated his intent to raise affirmative defenses and his reply pleading was a joint reply brief and motion to amend answer. Because Defendant believed that his intent to rely on affirmative defenses was adequately raised (which defenses would be identified through and during the time for additional discovery under the Rule 56(f) motion) the Defendant raised his motion in the alternative. It was postured that if the Court did not believe Defendant could use the

affirmative defenses found, because they were not raised in the answer, then here is a motion to amend Defendant's answer.[1]

Plaintiff did not object to Defendant's motion, not did the Court deny the motion or require the Defendant to file an amended answer. Defendant in good faith believed that the Court had ruled by implication that it would consider Defendant's affirmative defenses.

Later in Defendants response to Plaintiff's summary judgment motion, Defendant identified and argued the affirmative defenses at issue now. Plaintiff in their summary judgment reply memorandum argued against said affirmative defenses. Unlike *Valley Bank & Trust*, in the case at bar, Plaintiff was on notice of Defendant's intent to use affirmative defenses, had time to respond, and in fact did respond to said affirmative defenses all prior to oral arguments and the Courts ruling.

II. There are Genuine Issues of Material Fact Regarding Defendant's Affirmative Defenses

Plaintiff has argued that Defendant cannot succeed on any of its affirmative defenses of spot zoning, discrimination and taking of property without just compensation. Defendant submits that the real question is whether there are genuine issues of material fact such that Summary Judgment is precluded. Defendant need not show at summary

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[1] The alternative motion to amend was stated as follows:
Should this Court conclude that Defendant may not seek discovery on or present the affirmative defenses indicated in Defendant's 56(f) motion and discovery requests, Defendant hereby moves this court for an order allowing them to amend their answer pursuant to Rule 15 of the Utah Rules of Civil Procedure

judgment that it will prevail on the merits, only that there are factual issues that cannot be decided as a matter of law. It only takes one sworn statement to dispute averments on the other side of controversy and create issue of fact, precluding summary judgment. *Holbrook Co. v. Adams*, 542 P.2d 191 (Utah 1975).

In the case at bar, there are factual issues regarding all of the affirmative defenses raised by Defendant. Defendant should be entitled to have a fact finding tribunal consider and weigh the evidence and decide the factual matters regarding the affirmative defenses.

III. Defendant Has No Opportunity to Exhaust Administrative Remedies

Plaintiff also argues that Defendant should not be able to raise taking without just compensation because he has not filed for any land use permits and thus has failed to exhaust his administrative remedies. Defendant submits that he has had no opportunity to exhaust his remedies. Defendant believed that he was waiting for Plaintiff to figure out its flood plan and would meet with them after Plaintiff knew what they were doing. After this action was filed by Plaintiff, Defendant did make an attempt to get a land use permit from Plaintiff, but Plaintiff refused to accept his application because this appeal was pending. Although Defendant could find not Utah law dealing with exceptions to exhausting administrative remedies, other jurisdictions exceptions, one of which is when a party has no opportunity to exhaust said remedies. See *South Hollywood Hills Citizens Association for Preservation of Neighborhood Safety and Environment v. King County*, 101 Wash. 2d 68, 677 P.2d 114 (Wa. 02/02/1984). Defendant submits that he has not had an

opportunity to exhaust his administrative remedies and is entitled to an exception therefrom.

IV. Plaintiff's Brief Concedes that Defendant is Surrounded by Non Conforming Uses

Plaintiff's brief concedes the fact that Defendant is surrounded by non-conforming uses. Plaintiff's brief states:

> Each of the neighboring properties listed in Smith's Brief is zoned I-1, the same classification as Smith's Property.(sic) At least nine of the eleven businesses adjacent to Smith's Property are either validly approved or legal nonconforming uses. (Appellee's brief pg. 11)

This leaves Defendant using his property in a manner very consistent with virtually all of the surrounding property owners and those located in the same subdivision, but being the only property owner forced to stop using his property.

A good analogy would be if city were to re-zone an area containing hog farms to residential. Then have an existing hog farmer expand his hog farm into adjacent property, still surrounded by hog farms, but acquired the after the zoning change. Now the City, knowing that all the other hog farms are valid non-conforming uses, will only let this existing/expanding hog farmer use his new property for residential housing, yet the City claims that the existing/expanding hog farmer is not being discriminated against, his property is being not spot zoned, nor has the City confiscated his property!

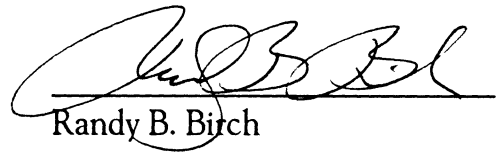
Though Plaintiff may not have created the zoning situation with Defendant in mind, the effect and disparate impact upon Defendant caused by Plaintiff's enforcement, creates the exact type of injustice which the doctrines of spot zoning, discrimination and

taking without just compensation, were developed to thwart.

CONCLUSION

The trial court was in clear error when it failed to consider the affirmative defenses of spot zoning, discrimination and taking of property without just compensation, raised by Defendant. Said defenses were adequately pled and created factual issues which would preclude summary judgment. Further, the trial court again erred in not finding a valid non-conforming use with respect to lot 14 of the Newport subdivision. Finally the trial court erred in not considering and finding a valid accessory to Defendants lawful use of adjoining property as to the remaining lots in question. Accordingly Defendant's request that the trial court's order granting Summary Judgment be reversed and the case be remanded for the above issues to be considered.

Dated this 30th day of October, 2001.



Randy B. Birch

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, I caused two true and correct copies for the foregoing Appellant's Reply Brief to be served via United States Mail, postage prepaid, addressed to:

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