

2011

Insight Assets, Inc. v. Homero Farias : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

INSIGHT ASSETS, INC., a Utah
corporation,

Appellant/Cross-Appellee and
Plaintiff/Counterclaim-Defendant,

v.

HOMERO FARIAS, an individual,

Appellee/Cross-Appellant/ and
Defendant/Counterclaim-Plaintiff.

**REPLY BRIEF OF
CROSS-APPELLANT
HOMERO FARIAS**

Appellate Case No. 20110020-SC

**APPEAL FROM A SUMMARY JUDGMENT OF THE
SECOND JUDICIAL DISTRICT COURT FOR WEBER COUNTY
HONORABLE W. BRENT WEST, DISTRICT COURT JUDGE**

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Oral Argument Requested

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INTRODUCTION

Insight Assets, Inc. (“Insight Assets”) initiated this lawsuit by filing a complaint against Farias seeking declaratory relief and an *in rem* judicial foreclosure. Insight Assets asserted its interest in the Property under a prior trust deed that was executed by a former owner of the property. As part of its request for relief, Insight Assets sought “costs, and expenses of collection, including reasonable attorney fees” as allowed pursuant to the Trust Deed Note and Trust Deed. Farias asserted that he was a bona fide purchaser for value and that he took title to the property free and clear of any purported interest that Insight Assets had to the property. Because the litigation was based upon a writing that provided for an award of attorney fees to one of the parties, Farias asserted that he was entitled to his reasonable attorney fees under Utah’s reciprocal fee statute, UTAH CODE ANN. § 78B-5-826 (2011).

Although the trial court granted summary judgment in favor of Farias, finding that he was a bona fide purchaser, the trial court refused to award attorney fees to Farias under UTAH CODE ANN. § 78B-5-826. The trial court erred in failing to award attorney fees to Farias because it misinterpreted and misapplied the reciprocal fee statute. Although this Court and the Utah Court of Appeals has explicitly held that the reciprocal attorney fees statute merely requires a party to the litigation assert the writing’s enforceability, the trial court required that the parties also be parties to the contract containing the attorney fees provision. Because the trial court misinterpreted and misapplied the statute, the trial court’s refusal to award attorney fees should be reversed.

ARGUMENT

I. INSIGHT ASSETS DOES NOT DISPUTE THAT THE TRIAL COURT’S INTERPRETATION AND APPLICATION OF UTAH CODE ANN. § 78B-5-826 IS CONTRARY TO UTAH LAW.

As set forth in the Brief of Appellee/Cross-Appellant Homero Farias, the trial court misread and misapplied Utah case law and UTAH CODE ANN. § 78B-5-826 in denying Farias’ request for attorney fees in this matter. The trial court ruled that in order to be entitled to attorney fees under Section 78B-5-826, one must be a party to the original contract. [R. 578.] Specifically, the trial court held an award of attorney fees was not warranted because it would not help in “‘creating a level playing field’ between *contractual* parties.” See Ruling [R. 578] (emphasis added). The trial court’s inclusion of an additional requirement, that the parties must also be parties to the contract, is not supported by Utah law. Indeed, in *Bilanzich v. Lonetti*, 2007 UT 26, 160 P.3d 1041, this Court emphasized that the reciprocal fee statute “requires only that a party to the litigation assert the writing’s enforceability as basis for recovery.” 2007 UT 26, ¶ 15 (emphasis added). This Court also held that a court may award attorney fees to the prevailing party where “the litigation was based on a writing that granted attorney fees to at least one of the parties in the litigation.” *Id.* at ¶ 16 (emphasis added). The Utah Court of Appeals has explicitly held that a non-party to the contract could recover attorney fees under UTAH CODE ANN. § 78B-5-826 because “the statute ‘requires only that a party to the *litigation* assert the [contract’s] enforceability as a basis for recovery.’” *Hooban v. Unicity Int’l, Inc.*, 2009 UT App 287, ¶ 9, 220 P.3d 485 (alteration and emphasis in original).

Not once in Insight Assets' reply brief, does Insight Assets assert that the trial court correctly ruled that one must be a party to the original contract to be entitled to attorney fees. Insight Assets also fails to point the Court to any case law supporting the analysis of the trial court. Indeed, Insight Assets could not take such a position when it argued below, and argues before this Court, that it is entitled to attorney fees it has incurred pursuant to the Trust Deed Note and Trust Deed, even though it was not an original party to the contracts.

Instead, Insight Assets argues that Farias is not entitled to his attorney fees because (1) Insight Assets, not Farias, was the prevailing party and (2) there is no uneven playing field because Insight Assets could only recover attorney fees against Farias' Property, not against Farias personally. As set forth below, both of these alternative arguments to uphold the trial court's ruling fail on the merits.

II. FARIAS, NOT INSIGHT ASSETS, IS THE PREVAILING PARTY IN THIS LITIGATION.

Insight Assets argues, for the first time on appeal, that regardless of whether Farias prevails on his quiet title claim and defeats Insight Assets' judicial foreclosure claim, the trial court should have determined that Insight Assets was the prevailing party because it is entitled to a deficiency judgment against the Boecks under the Trust Deed Note. Insight Assets, purportedly relying on *Ellsworth Paulsen Contr. Co. v. 51-SPR, LLC*, 2006 UT App 353, 144 P.3d 261, argues that if Insight Assets prevails on some of its claims "brought under a common core of facts," that it is entitled to all of its attorney fees reasonably incurred in the litigation. Because Insight Assets failed to make this argument

below, it cannot raise it for the first time on appeal. *See Monson v. Carver*, 928 P.2d 1017, 1022 (Utah 1996). Even if the issue was properly before the Court, which it is not, Insight Assets' argument is contrary to the both the findings of the trial court and applicable law. As set forth below, Insight Assets' argument fails because Insight Assets has not prevailed on any of its claims under the contract because the Boecks were not parties to this lawsuit and, even if Insight Assets had prevailed against the Boecks, Farias would still be entitled to his attorney fees because he prevailed on all claims between him and Insight Assets.

Insight Assets cannot be considered the prevailing party where it has not prevailed on any of the claims brought in the lawsuit. Insight Assets argues that it is the prevailing party because it is entitled to prevail against the Boecks, the borrowers under the Phalen Trust Deed, under a claim for deficiency judgment. The Boecks, however, were not named in the lawsuit below, Insight Assets did not assert any causes of action against them, and the trial court and this Court have no jurisdiction over the Boecks to enter a deficiency judgment against them. *See Pelt v. Utah*, 539 F.3d 1271, 1281 (10th Cir. 2008) ("It is a fundamental rule of civil procedure that one who was not a party to an action is not bound by the judgment"). Insight Assets refers the Court to *Russell v. Hank*, 34 P. 245 (Utah 1893), to support its claim that this Court can enter a deficiency judgment against the Boecks even though Insight Assets did not plead a claim for a deficiency judgment and did not name the Boecks in the lawsuit. In *Russell*, however, the defendant was named and served in the lawsuit; therefore, the court had jurisdiction over him to enter the deficiency judgment. 34 P. 245, 245.

In this case, Insight Assets has not sought to enforce its claims against the Boecks, instead electing to pursue claims solely against Farias and the Property. Insight Assets cannot prevail on a claim that was not asserted against the Boecks, who are not before the trial court. Insight Assets lost on all claims brought in this lawsuit and cannot be considered the prevailing party.

Second, even if Insight Assets could prevail against the Boecks on a deficiency claim, Farias would still be the prevailing party as between it and Insight Assets because Farias prevailed on his quiet title claim and defeated Insight Assets' claim for judicial foreclosure on his property. Courts have recognized the general rule that "attorney fees and costs in multi-party cases as well as in certain consolidated cases are awarded to different parties on the basis of the separate judgments obtained, not the overall trial result." See, e.g., *Tulsa Litho Co. v. Tile and Decorative Surfaces Magazine Publ'g, Inc.*, 69 F.3d 1041, 1043 (10th Cir. 1995); *Scott v. Art of Optiks Cherry Creek, Inc.*, 60 P.3d 770, 771 (Colo. Ct. App. 2002) ("To hold otherwise would produce an unfair and absurd result, preventing recovery of attorney fees by a party who successfully defends against all claims against it simply because the opposing party prevailed on claims against other parties."); *Christie-Lambert Van & Storage Co., Inc. v. McLeod*, 693 P.2d 161, 166 (Wash. Ct. App. 1984). In *Tulsa Litho*, the plaintiff brought claims against three companies for breach of contract and against the president of the companies under an alter ego theory. 69 F.3d 1041, 1042. The court granted summary judgment to the president on the alter ego claims and after trial, a judgment was entered against the three companies for breach of contract. *Id.* The Tenth Circuit held, under this scenario, the

plaintiff was entitled to its attorney fees against the companies, but that the president was entitled to his attorney fees against the plaintiff because the president had prevailed on the claims made against him, even though the plaintiff ultimately prevailed against the companies. *Id.* at 1043.

A similar result is mandated in this case. Even if Insight Assets had prevailed against the Boecks, had it named them in the lawsuit, Farias prevailed on all claims made between him and Insight Assets. Therefore, Farias is the prevailing party as between him and Insight Assets and is entitled to his reasonable attorney fees incurred in this matter.

III. THE CONDITIONS FOR ATTORNEY FEES UNDER UTAH CODE ANN § 78B-5-826 ARE MET IN THIS CASE.

In its opposition brief, Insight Assets argues that the conditions for attorney fees under UTAH CODE ANN. § 78B-5-826 are not met in this case because Insight Assets was not in default under the terms of the Trust Deed Note or Phalen Trust Deed. Insight Assets argument is based upon a misreading of *Giusti v. Sterling Wentworth Corp.*, 2009 UT 2, 201 P.3d 966. In *Giusti*, the court found that the reciprocal attorney fee statute was inapplicable because the contract did not create an unequal exposure to attorney fees to either party. 2009 UT 2, ¶¶ 76-77. The attorney fees provision in *Giusti* stated that “[i]n the event *either party defaults*” the non-defaulting party shall be entitled to recover its fees. *Id.* at ¶ 72.

In this case, however, the attorney fees provisions contained in the Trust Deed Note and Trust Deed are unilateral and create an unequal litigation risk because they allow only the holder of the trust deed and note to recover attorney fees. The necessary

conditions of UTAH CODE ANN. § 78B-5-826 have been met in this case because the underlying litigation is based upon contracts, the Trust Deed Note and the Phalen Trust Deed, and the contracts allow at least one party to recover attorney fees. *See Hooban*, 2009 UT App 287, ¶ 9; *Bilanzich*, 2007 UT 26, ¶ 14.

IV. THE UNDERLYING POLICIES OF UTAH CODE ANN. § 78B-5-826 SUPPORT AN AWARD OF ATTORNEY FEES IN THIS CASE.

Although the reciprocal attorney fees statute allows the trial court to exercise its discretion in awarding attorney fees, this court has held that “district courts should award fees liberally under Utah Code section [78B-5-826] where pursuing or defending an action results in an unequal exposure to the risk of contractual liability for attorney fees.” *Bilanzich*, 2007 UT 26, ¶ 19. This Court has identified two underlying policies behind the reciprocal attorney fees statute. First, the statute remedies “the unequal allocation of litigation risks.” *Bilanzich*, 2007 UT 26, ¶ 18 (emphasis added). “[E]xposure to the risk of a contractual obligation to pay attorney fees must give rise to a corresponding risk of a statutory obligation to pay fees.” *Id.* at ¶ 19. Second, the statute “rectifies the inequitable common law result where a party that seeks to enforce a contract containing an attorney fees clause has a significant bargaining advantage over a party that seeks to invalidate the contract.” *Id.* at ¶ 18.

Insight Assets argues for the first time on appeal that the underlying policies behind UTAH CODE ANN. § 78B-5-826 do not support an award of attorney fees because Farias could not be personally liable for attorney fees where Insight Assets’ judicial foreclosure action was *in rem*. Because Insight Assets failed to make this argument

below, it cannot raise it for the first time on appeal. *See Monson v. Carver*, 928 P.2d at 1022. Even if the issue was properly before the Court, which it is not, Insight Assets' argument is contrary to applicable law.

Insight Assets argues that there is no uneven playing field because Insight Assets could only recover attorney fees against Farias' Property and not against Farias personally. In doing so, Insight Assets attempts to place emphasis that its claim was *in rem* and that it could not obtain an attorney fees award from Farias directly. In *Saucedo v. Mercury Sav. & Loan Ass'n*, 168 Cal. Rptr. 552 (Cal Ct. App. 1980), the court dealt with facts very similar to this case in which the holder of a trust deed sought to enforce the trust deed against a subsequent purchaser of the property. 168 Cal. Rptr. at 553-54. After the current owner of the property prevailed, the holder of the trust deed, like Insight Assets in this case, argued that the current homeowner was not entitled to attorney fees under the reciprocal fee statute because the current homeowner could not be personally liable for the attorney fees because they did not personally sign the note or trust deed. *Id.* at 554. The court recognized that California's reciprocal attorney fees statute¹ would apply because the holder of the trust deed would be able to recover its fees as a condition to redemption if the subsequent purchaser wished to protect his equity in the property.

¹ California's reciprocal fee statute provides in the germane portion:

(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

CAL. CIV. CODE § 1717 (West 2012).

Id. at 555. In short, the court held that it was irrelevant whether the attorney fees would be paid out of the party's property or their pocket. The court stated

While we adhere to our conclusion that [the reciprocal fee statute] was not intended to extend the right to recover attorney fees to persons who themselves could not have been required to pay attorney fees in the event their adversary prevailed in the action, we are persuaded that in every case in which the non-assuming grantee has a sufficient interest in the property to warrant his resisting foreclosure, he would as a real and practical matter be required to pay reasonable attorney fees incurred by trustee and/or beneficiary should they prevail in the action to prevent foreclosure.

Id.

Similarly in this case, if Insight Assets had prevailed, Farias would have been forced to pay Insight Assets' attorney fees to redeem the Property or he would have lost his interest and equity in the Property. The practical liability for attorney fees under the unilateral attorney fees provisions creates an unequal litigation risk that UTAH CODE ANN. § 78B-5-826 was designed to prevent. Because defending the action subjected Farias to an unequal exposure to the risk of attorney fees, Farias should be awarded his reasonable attorney fees under Section 78B-5-826. *See Bilanzich*, 2007 UT 26, ¶ 19 (noting that "district courts should award fees liberally under Utah Code section [78B-5-826] where pursuing or defending an action results in an unequal exposure to the risk of contractual liability for attorney fees.").

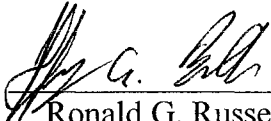
CONCLUSION

For all of the foregoing reasons, Farias respectfully requests the Court to overturn the District Court's denial of Farias' request for attorney fees pursuant to UTAH CODE

ANN. § 78B-5-826, and remand this case to the District Court with instructions to determine and award the reasonable amount of attorney fees incurred by Farias.

DATED this 20th day of March, 2012.

PARR BROWN GEE & LOVELESS, P.C.

By: 

Ronald G. Russell
Rodger M. Burge
Jeffery A. Balls

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of March, 2012, I caused two true and correct copies of the foregoing **REPLY BRIEF OF CROSS-APPELLANT HOMERO FARIAS** to be served via U.S. Mail, first-class postage prepaid, on the following:

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A handwritten signature in cursive script, reading "Adriana M. Kratzmann", written over a horizontal line.