

2016

Penn Smith, Plaintiff/ Appellee, vs. V Alden Cram, as Executive-Trustee Under the Declaration of Trust Dated 11/26/93, Operating Under the Name of the Terrestrial Kingdom of God, Defendant/ Appellee John H. Kirkland, Et Al., Intervenors/ Appellants

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

PENN SMITH,

Plaintiff/Appellee,

vs.

VALDEN CRAM, as Executive-Trustee
under the DECLARATION OF TRUST
dated 11/26/93, operating under the name of
the TERRESTRIAL KINGDOM OF GOD,

Defendant/Appellee.

JOHN H. KIRKLAND, *et al.*,

Intervenors/Appellants.

REPLY BRIEF OF THE APPELLANT

Case No. 20150637-CA

District Civil No. 060501773

Appeal from the Fifth Judicial District, Washington County, State of Utah
The Honorable James L. Shumate

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III. BENEFICIARIES' OBJECTIONS TO DEFENDANTS' STATEMENT OF RELEVANT FACTS

Appellants (hereafter referred to as "Beneficiaries") object to Appellees' (hereafter referred to as "Defendants") Statement of Facts 2 and 3 of Appellees' Brief as follows: **Defendants' Statement No. 2:** "After years of useless motions, changes in counsel and many delays, the case was finally given to the lower court on a partial summary judgment motion, which the court granted in favor of Appellees." *See* Appellee Brief at 3:¶2.

Beneficiaries response: Denied in part. The district court denied Defendants' first motion for summary judgment ("MSJ1") in part and granted it in part. The district court found that there were genuine issues of material fact that precluded summary judgment on the issues of Plaintiff Penn Smith's compensation and whether Defendants breached their fiduciary duties as trustees. *See* July 9, 2013 MSJ1 Order at R. 5601-5603.

Furthermore, Beneficiaries object to the characterization or suggestion that Beneficiaries filed "useless motions" for years in this case. A review of the motions filed in the district court through the time that Defendants filed their second motion for summary judgment ("MSJ2"), shows that Defendants filed approximately 84 motions while Beneficiaries filed approximately 17.¹ Put another way, Defendants filed approximately 12 motions per year while Beneficiaries filed 2.4.

¹ The numbers do not include a parties' objections to motions filed by the other party, reply memorandums, or requests to submit.

Defendants' Statement No. 3: Said judgment left some of the issues unresolved.

However, Appellees moved for a second summary judgment, which the lower court also granted. It eliminated all the remaining issues of fact and law.

Beneficiaries response: Denied in part. Beneficiaries maintain that Defendants' MSJ2 did not eliminate all remaining issues. *See* Appellants' Brief at 45.

IV. ARGUMENT

1. Rule 7 requires each statement of fact to be properly supported by relevant material before it may be deemed admitted.

Defendants seem to argue that regardless of whether Defendants supported each statement of fact in their MSJ2, each statement of fact is deemed admitted because Beneficiaries did not oppose Defendants' MSJ2. *See* Appellee Brief at 5-7. For this proposition, Defendants cite Rule 7 (c)(3)(A), which states that "Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party." Utah R.Civ.P.7(c)(3)(A) (2013 version).²

However, before a fact may be deemed admitted, the moving party must have properly supported the fact. Rule 7 first requires that "[e]ach fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials." *Id.* at 7(c)(3)(A) (2013). Utah courts have reiterated that the moving party must support its motion for summary judgment "with specific material facts as to

² Defendants' Appellee Brief actually cites to the new Rule 56(a)(4), which has similar language to Rule 7 (c)(3)(A). However, since the 2013 version of the Utah Rules of Civil Procedure were in place at all relevant times, Beneficiaries have cited to the 2013 rules.

which the moving party contends no genuine issue exists, and each fact must be supported with a citation to relevant materials.” *Jensen v. Skypark Landowners Ass’n*, 2013 UT App 48, ¶2, 299 P.3d 609.

In the present case, Defendants did not support each statement of fact with “relevant material.” As addressed in Appellants’ Brief, neither the Affidavit of Penn Smith (Exhibit III to MSJ2. *See* R. 5643) nor the inadmissible internet page (Exhibit V to MSJ2. *See* R. 5647-5648) supported the statement of facts regarding compensation to Plaintiff Smith for services as trust manager (“Compensation Issue”). *See* Appellants’ Brief at 26-30. Therefore, it was not “relevant material.”

Defendants argue that even if Defendants did not support with admissible evidence their assertion that Plaintiff Smith’s compensation rate of \$50 per hour was reasonable, the district court may in its own discretion determine what the reasonable rate is for a trust manager’s services. *See* Appellees’ Brief at 8:¶2. However, Defendants cite no authority for this assertion and the argument should be disregarded.

In addition, the only material Defendants provided in regards to the breach of fiduciary duties issue (“Breach Issue”) was the 2007 Board of Arbitration Findings (“2007 Board Findings”). *See* 2007 Board Findings at R.5661. Yet, the 2007 Board Findings is an incomplete document and does not even address the Breach Issue with regards to the allegations put forward by Beneficiaries in their Complaint. *See* Appellants’ Brief at 22-26. Therefore, the 2007 Board Findings document was not “relevant material.” Consequently, Defendants’ statement of facts should not have been

deemed admitted, due to a lack of support by relevant material; and Defendants were not entitled to judgment as a matter of law. *See* Rule 56(c) (2013 version).

A. *Pepperwood* is directly on point with this case.

Defendants argue that the present case is unlike the *Pepperwood* case, in which the moving party failed to support its summary judgment motion with the essential document that would have demonstrated its entitlement to judgment. *See Pepperwood Homeowners Assn. v. Mitchell*, 2015 UT App. 137, 351 P.3d 844. However, *Pepperwood* is directly on point. In their MSJ2, Defendants cited to the 2007 Board of Arbitration for the proposition that the 2007 Board determined that Defendants had not breached their fiduciary duties with regards to the issues before the district court.

However, a reading of the 2007 Board's findings shows that the 2007 Board explicitly excluded any issue that was before the district court from the purview of its findings. *See* 2007 Board Findings at R. 5661-5662. In other words, the 2007 Board Findings were irrelevant to the issues before the district court. Consequently, like *Pepperwood*, Defendants did not produce an essential document to demonstrate an entitlement to summary judgment or to support Defendant's statement of fact #13 in MSJ2- that the 2007 Board did not find Defendants in breach of their duties to Beneficiaries (in regards to the issues before the district court).

2. The granting of MSJ2 was not justified on the merits.

In Defendants' Appellee Brief, Defendants do not deny that the 2007 Board of Arbitration excluded any issue before the district court from the purview of its findings

and conclusions of law. Defendants simply state in their brief: “[T]he court looked at the ruling of a board of arbitration which cleared the Trustees of any breach of fiduciary duty.” *See* Appellees’ Brief at 7:¶3. Defendants do not deny that the 2007 Board only cleared Defendants of any breach of fiduciary duty that was NOT being adjudicated by the district court. The 2007 Board stated: “The Board members all concurred that in all matters not before the Washington County, Utah 5th District Court the Trustees acted in the Trust’s best interest.” *See* R.5661:¶1; *see* also R.5662 (2007 Board states that those matters that are before the district court should be left to the district court to decide). Therefore, the 2007 Board Findings should not have been considered by the district court in ruling on Defendants’ MSJ2.

With regard to the 2007 Board Findings, Defendants also quote a section of the district court’s Memorandum Decision and Order on Beneficiaries’ 60(b) Motions³, for the proposition that the district court had already considered Beneficiaries’ assertion that the 2007 Board Findings excluded any issues before the district court. *See* Appellees’ Brief at 8. However, the quoted section is taken out of context. The district court was ruling on whether Defendants intentionally misrepresented the 2007 Board Findings to such a degree that the district court should grant Beneficiaries’ Rule 60(b) Motion to set aside the judgment: “There simply has not been, however, a demonstration of the kind of fraud or misrepresentation that results in the ‘prevention of an opposing party from fairly

³ *See* Memorandum Decision and Order on (1) Intervenors’ Rule 60(b) Motions to set Aside the Final Judgment and (2) Second Rule 62(b) Motion For Stay of Judgment at R.6438.

presenting his case,' the showing required by the rule..." See R.6438:¶2. In other words, the district court determined there was not enough evidence of fraud or misrepresentation to overturn the summary judgment; but it did not make a determination as to the scope of the 2007 Board Findings.

A. The Trust does not dictate that arbitration is mandatory for resolving disputes.

Defendants incorrectly argue that the Trust requires any disputes to be taken to a board of arbitration. See Appellees' Brief at 7:¶3. This issue was argued by Defendants twice to the district court and both times the district court interpreted the Trust and determined the district court had jurisdiction to adjudicate Beneficiaries' claims. See June 11, 2007 Order Denying Motion to Dismiss at R. 126; and August 5, 2009 Notice of Entry of Order at R. 2056:¶1.

B. Mr. Smith's affidavit does not support Defendants' claim that Mr. Smith was entitled to compensation.

Contrary to Defendants' assertions in their brief, Mr. Smith's affidavit does not state or indicate that he was entitled to or expected compensation for his services. See Appellees' Brief at 8. It also does not indicate that he had kept track of his time. *Id.* In fact, Mr. Smith states just about the opposite in his affidavit: "I have spent almost countless hours..." See Smith Affidavit at R. 5643:¶3. Looking at the four corners of the document, Mr. Smith's affidavit simply does not support the MSJ2 statement of fact #7 that "Plaintiff was later appointed manager of the Trust and the Trustees allowed him to be paid the amount of \$50 an hour for his services." See MSJ2 at R. 5614.

3. It was an abuse of discretion not to allow Beneficiaries an opportunity to oppose MSJ2.

Defendants argue that Beneficiaries had 3 months to file an opposition to MSJ2 and a motion to strike does not stay the time. Beneficiaries addressed these two arguments in Appellants' Brief. *See* Appellants' Brief at 34-36. However, Defendants do not make a counter argument against Beneficiaries' position that it was an abuse of discretion not to allow Beneficiaries a chance to oppose MSJ2 in light of (1) the latitude the district court had granted Defendants on procedural issues and (2) the ample evidence of genuine issues of material fact that had previously been presented to the district court, but the district court chose not consider. *See* Appellants' Brief at 36-40.

4. Law of the case doctrine applies to denials of summary judgment.

Contrary to Defendants' argument, law of the case doctrine is applicable to summary judgment motions that are denied, not just those that are granted. *See AMS Salt Indus. v. Magnesium Corp. of Am.*, 942 P.2d 315, 319 (Utah 1997) (court recognizes that the law of the case doctrine applies to subsequent motions for summary judgment on the same issue, subject to exceptions); *Sittner v. Big Horn Tar Sands & Oil, Inc.*, 692 P.2d 735, 736 (Utah 1984) (court finds that the law of the case doctrine applies to subsequent motions for summary judgment, subject to exceptions); and *Red Flame, Inc. v. Martinez*, 2000 UT 22, ¶4, 996 P. 2d 540, 542 (affirming the holdings in *AMS* and *Sittner*). Unless a party meets one of the three exceptional circumstances, the previous ruling should be law of the case.

The three exceptional circumstances are: "(1) when there has been an intervening change of controlling authority; (2) when new evidence has become available; or (3) when the court is convinced that its prior decision was clearly erroneous and would work a manifest injustice." *See IHC Health Services, Inc. v. D & K MANAGEMENT, INC.*, 2008 UT 73, ¶34, 196 P. 3d 588, 596, 597. As outlined in Beneficiaries' Appellant Brief, none of these exceptions apply in the present case and Defendants have not argued otherwise. *See Appellants' Brief* at 30-32.

5. Beneficiaries provided material evidence of Defendants' breaches of fiduciary duty and that Mr. Smith was not entitled to compensation.

Defendants erroneously state: "All that was required of the Appellants at the lower court level was to show some evidence of the Appellees' alleged breach of fiduciary duty and some evidence of the alleged unreasonableness of Mr. Smith's wage...For the entirety of the eight plus years this case spent at the lower court, they gave the court neither." *See Appellees' Brief* at 11. As outlined in Appellants' Brief, Beneficiaries provided evidence on the Compensation and Breach Issues. *See Appellants' Brief* at 38-40, 43-45. For instance, in 2008, the district court granted Beneficiaries summary judgment against Defendants on the Breach Issue and Compensation Issue. *See* 2008 MSJ Order at R. 387-395. The district court made findings and concluded that: (1) Defendants committed serious breaches of their fiduciary duties according to Utah Code Ann. §75-7-706(2)(a), §75-7-809, and §75-7-802; and (2) Defendants' actions in attempting to obtain compensation for themselves from the Trust were void. *Id.* at R.388:¶3 through R.395.

Additionally, in opposing Defendants' MSJ1, Beneficiaries provided evidence of Defendants' breaches and evidence that Mr. Smith's claimed compensation should not be awarded. *See* Opp. To MSJ1 at R. 5465-5481, and 5482-5539. The district court then denied Defendants' MSJ1 on these two issues, finding genuine issues of material fact. *See* MSJ1 Order at R. 5602-5603. Consequently, an argument cannot be maintained that Beneficiaries never provided evidence in support of their positions on the Breach and Compensation Issues.

6. Attorney fees should not have been granted.

Defendants argue that since Utah Code Ann. §78B-5-825(1) ("Bad Faith Statute") does not explicitly require a court to make findings regarding the issues of bad faith and meritless claims before awarding attorney fees, a district court does not have to. *See* Appellee Brief at 12. However, the case law shows otherwise. While written findings are not strictly necessary, a court is still required to make findings regarding bad faith and meritless claims. *UBDH v. Davis County Com'n*, 2005 UT App 347, ¶7, 121 P. 3d 39 ("We do, however, insist that a district court's decision concerning a motion for the award of attorney fees be supported by adequate findings."); *see also Still Standing Stable, L.L.C. v. Allen*, 2005 UT 46, ¶10, 122 P.3d 556 (holding that when a court awards attorney fees pursuant to §78B-5-825, the court must indicate "a clear basis" for its findings).

In addition, simply because Defendants alleged in their MSJ2 that Beneficiaries' claims were frivolous, does not mean the district court adopted Defendants' position.

Indeed, the district court did issue an order on MSJ2 captioned Final Summary Judgment on January 23, 2014 (“FSJ Order”) with some findings and conclusions. *See* R at 6026-6027. However, it made no such findings in the FSJ Order regarding bad faith or meritless claims. In fact, all the FSJ Order essentially states on the issue is that attorney fees have been paid out of the Trust corpus and those funds should be paid back. *Id.* Additionally, the district court did not make findings from the bench at oral arguments regarding bad faith and without merit. Therefore, the logical conclusion is that the district court did not find bad faith or that the claims were without merit because it did not address the issues in its findings or from the bench.

Furthermore, if this Court is inclined to accept Defendants’ argument that the district court simply adopted Defendants’ reasoning in their MSJ2, Defendants still would not be entitled to attorney fees. Defendants’ MSJ2 addresses the without merit issue, calling the lawsuits a “hurricane of frivolous litigation that has been perpetuated” by Beneficiaries, but MSJ2 does not address the bad faith element. Black’s Law Dictionary defines “frivolous” as “Lacking a legal basis or legal merit; not serious; not reasonably purposeful.” *See Black’s Law Dictionary* (7th Ed. 1999). “Bad faith” is defined as “dishonesty of belief or purpose.” *Id.* No argument or statement of fact in Defendants’ MSJ2 suggests that Beneficiaries were dishonest in their purpose or belief. Furthermore, the Utah Supreme Court explained:

To find that a party acted in "bad faith," the trial court must find that one or more of the following factors existed: (i) The party lacked an honest belief in the propriety of the activities in question; (ii) the party intended to take unconscionable advantage of others; or (iii) the party intended to or acted

with the knowledge that the activities in question would hinder, delay, or defraud others.

See Valcarce v. Fitzgerald, 961 P.2d 305, 316 (Utah 1998). Here, Defendants' MSJ2 did not address any of the three factors needed to find "bad faith."

7. Beneficiaries' first, ninth, and eleventh claims were not resolved by the district court's FSJ order.

Some of Beneficiaries' claims were not resolved by the district courts' FSJ Order. Beneficiaries' first cause of action for declaratory relief states: "Questions of construction of the Declaration exist, including, without limitation, the ability of Trustees to appoint their own successors as opposed to ratifying an individual selected and listed by the Trustor when executing the Declaration as stated by its terms." *See* Amended Complaint at R. 2132:¶59. Nothing in the FSJ Order addresses this claim for declaratory relief or relates to a breach of fiduciary duty, such that a finding that Defendants did not breach their fiduciary duties would dispose of this cause of action.

Beneficiaries' ninth cause of action is for Conversion. *See* R. 2138. "A conversion is an act of wilful interference with a chattel, done without lawful justification by which the person entitled thereto is deprived of its use and possession." *See Bonnie & Hyde, Inc. v. Lynch*, 2013 UT App 153, ¶30, 305 P.3d 196 (citing *Fibro Trust, Inc. v. Brahman Fin., Inc.*, 1999 UT 13, ¶ 20, 974 P.2d 288). In the present case, Mr. Smith has consistently maintained throughout litigation that he did not breach his fiduciary duties as a trustee when he sued the Trust because he was doing it in his individual capacity. Thus, the issue of whether Mr. Smith converted Beneficiaries' property without lawful justification in his

individual capacity was not adjudicated by the district court's finding that Defendants/trustees did not breach their fiduciary duties.

Similarly, Beneficiaries' eleventh cause of action is for Waste of the Trust Property. *See* R. 2139-2140. As Trust Manager, Mr. Smith claims he was not acting in the capacity of a trustee but in his individual capacity. Therefore, the issue of whether Mr. Smith committed waste in his individual capacity was not adjudicated by the district court's finding that Defendants/trustees did not breach their fiduciary duties.

8. The failure of the Trustor in preparing and delivering the lease and stewardship agreements invalidated the Trust.

Defendants do not provide a counter argument to Beneficiaries' argument that there is no hint of a mistake of law or fact in the language of the Trust that would give rise to a court's authority to reform the Trust through Utah Code Ann. §75-7-415. The Trustor was clear in his intention that only he would be allowed to prepare and deliver the original Lease and Stewardship Agreements ("LSAs"). But since the Trustor died before preparing and delivering the LSAs, the Trust is invalid. *See* Appellants' Brief at 45-47.

Instead, Defendants argue that under the terms of the Trust document itself, the Trustees have broad authority to change the Trust to whatever they determine would be the will of the Trustor. *See* Appellees' Brief at 14-15. While the Trust may provide the trustees broad powers to necessary to carry out and perform their duties as trustees, the Trust does not provide them power to perform duties that the Trustor was required to perform under the terms of the Trust. In fact, the Trust states that the trustees may not

take actions that are “inconsistent with other provisions” of the trust. *See* Trust at R. 5496:¶3. Therefore, Defendants’ argument must fail.

V. CONCLUSION

There are genuine issues of material fact that should have precluded the District Court from granting Defendants summary judgment. Based on the foregoing reasons, Appellant/Beneficiaries respectfully request that the Court reverse the District Court’s grant of summary judgment to Appellees/Defendants.

DATED this 18th day of February, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of February, 2016, I served a copy of the foregoing Reply Brief upon the parties by U.S. 1st Class Mail, postage prepaid to:

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