

2001

BMC West Corporation v. Desert Crest Development, Jessica Barker : Reply Brief

Utah Court of Appeals

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CERTIFICATE OF MAILING

I hereby certify that on April 17, 2001, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

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By 
Deputy Clerk

Case No. 20010269-CA

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IN THE UTAH COURT OF APPEALS

BMC WEST CORPORATION,	:	
	:	
Plaintiff/Appellee,	:	
	:	Case No. 20010269-CA
vs.	:	
	:	
DESERT CREST DEVELOPMENT,	:	Priority No. 15
JESSICA BARKER, and DOES 1-20,	:	
	:	
Defendants/Appellants.	:	
	:	

ARGUMENT

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN STRIKING EVIDENCE UNDER RULE 37 OF THE UTAH RULES OF CIVIL PROCEDURE

A. This issue was properly preserved below.

Appellee asserts that appellants failed to properly preserve this issue in the trial court and are, therefore, barred from raising the issue on appeal. However, what is required for preservation of an issue is that it be presented to the trial court “in a manner sufficient to obtain a ruling thereon.” *Holmstrom v. C.R. England, Inc.*, 2000 UT App 239 at ¶26, 8 P.3d 281. Clearly the issue of Rule 37 sanctions was presented to the trial court. Appellee requested said sanctions. The trial court considered the request and ultimately granted such sanctions. The minute entry of January 23, 2001, indicates that “Pursuant to Rule 37, deft’s are not allowed to introduce matters into evidence in opposition to 11-30-99 affidavit of Charles Rhodes” (R. 309). In addition, the signed Order of February 7, 2001, includes the same language (R. 315). Appellants were not required to file an objection or a post-judgment motion objecting to the order as a

prerequisite to filing an appeal. *Sittner v. Schriever*, 2000 UT 45 at ¶16, 2 P.3d 442. Accordingly, appellants assert that this issue was properly preserved as it was raised and considered by the trial court.

B. The evidence was struck pursuant to Rule 37 and not Rule 56(c).

Appellee's contend that the affidavits of Desert Crest and Jessica Barker were stricken on "the independent grounds it was not based on the affiant's personal knowledge, and [was] therefore offered in violation of Rule 56(c)" (Br. of Appellee at 22). However, while appellee may have requested that the affidavits be stricken pursuant to Rule 56(e) (R. 231, 232), there is no language in either the trial court's minute entry granting appellee's motion to strike and motio for summary judgment (R. 309) or the actual written order which indicates that the affidavits were stricken pursuant to Rule 56 (R. 315-16). Instead what the trial court relied on in striking the affidavits was Rule 37 (R. 309, 315-16). Any vague incorporation by reference of language from appellee's supporting memorandum is insufficient to establish that the trial court relied on Rule 56 in striking the affidavits. Accordingly, appellee cannot rely on Rule 56 as an idependent ground for affirming the trial court's striking of the affidavits pursuant to Rule 37.

C. The trial court abused its discretion in excluding evidence (including the affidavits of Desert Crest and Jessica Barker) as a sanction under Rule 37.

This Court reviews a trial court's decisions in regards to Rule 37 of the Utah Rules of Civil Procedure for an abuse of discretion. This Court will find an abuse of discretion when "there is either 'an erroneous conclusion of law or... no evidentiary basis for the trial court's ruling.'" *Hales v. Oldroyd*, 2000 UT App 75 at ¶16, 999 P.2d 588, *cert. denied*, 4 P.3d 1289 (Utah 2000) (citation omitted). However, before imposing sanctions under Rule 37, the "trial court must find on the part of the noncomplying party willfulness, bad faith, or fault, or persistent dilatory tactics frustrating the judicial

process.” *Hales*, 2000 UT App 75 at ¶16; *Morton v. Continental Banking Co.*, 938 P.2d 271, 274 (Utah 1997). Because the trial court failed to find that appellants acted willfully, in bad faith or engaged in persistent dilatory tactics which frustrated the judicial process this Court should find that the trial court abused its discretion in imposing the sanction of excluding/striking “evidence in opposition to the November 30, 1999, Affidavit of Charles Rhodes” without first satisfying the preliminary requirements under Rule 37 (R. 315, 309).

POINT II

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFF

A. This issue was preserved below and is adequately briefed.

Appellee asserts that appellants failed to properly preserve this issue in the trial court and are, therefore, barred from raising the issue on appeal. However, what is required for preservation of an issue is that it be presented to the trial court “in a manner sufficient to obtain a ruling thereon.” *Holmstrom v. C.R. England, Inc.*, 2000 UT App 239 at ¶26, 8 P.3d 281. Clearly the issue of summary judgment was presented to the trial court. Appellee twice moved the trial court to grant summary judgment (R. 143, 227-80). The trial court denied the first motion (R. 183) and granted the second motion which formed the basis of this appeal (R. 309, 315). Appellants were not required to file an objection or a post-judgment motion objecting to the order as a prerequisite to filing an appeal. *Sittner v. Schriever*, 2000 UT 45 at ¶16, 2 P.3d 442. Accordingly, appellants assert that this issue was properly preserved as it was raised and considered by the trial court.

In addition, appellee claims that appellants have failed to adequately brief this issue. However, appellants have adequately briefed this issue providing both analysis and pertinent legal authority as required by the Rules of Appellate Procedure. *Cf. Phillips v. Hadfield*, 904 P.2d 1108 (Utah App. 1995).

B. The trial court erred in granting summary judgment.

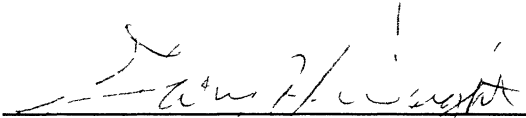
Summary judgment is only appropriate when the pleadings, depositions, admissions, affidavits, and other evidence, when viewed in a light most favorable to the nonmoving party, establish that there is no genuine issue of material fact. *Krantz v. Holt*, 819 P.2d 352 (Utah 1991); *Billings v. Union Bankers Ins. Co.*, 819 P.2d 803 (Utah 1991). The trial court previously, on February 4, 2000, denied appellee's motion for summary judgment and found that "there are disputed issues of material fact" (R. 183).

Appellants assert that at the time the Court granted appellee's motion for summary judgment in January-February of 2001 there are still disputed issues of material fact which have been set forth in appellants' brief, and accordingly, the trial court erred in granting summary judgment. *See, Hatch v. Sugarhouse Fin. Co.*, 434 P.2d 758 (Utah 1967) (Where pleadings and counteraffidavit of defendant raise issue of fact summary judgment is improper). Particularly where the trial court, as established *supra*, erred in imposing the sanction under Rule 37 of striking evidence without first finding that appellants' noncompliance was done willfully, in bad faith, or by use of persistent dilatory tactics which have frustrated the judicial process. *Cf. Boice v. Marble*, 982 P.2d 565 (Utah 1999) (Where trial court erred in striking expert testimony which would have raised a material issue of fact, the grant of summary judgment was erroneous).

CONCLUSION AND PRECISE RELIEF SOUGHT

For the foregoing reasons, Appellants ask that this Court reverse the orders of the trial court and remand the matter to Third District Court for further proceedings.

RESPECTFULLY SUBMITTED this 7th day of October, 2001.



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Counsel for Appellants

CERTIFICATE OF MAILING

I hereby certify that I delivered two (2) true and correct copies of the foregoing Reply Brief Of Appellants to F. Mark Hansen, 431 North 1300 West, Salt Lake City, UT 84116, this 7th day of October, 2001.

