2016

Zions First Naitonal Bank, Plaintiff-Appelle, v. Shayne D. Crapo, Defendant-Appellant.

Utah Supreme Court

IN THE UTAH SUPREME COURT

ZIONS FIRST NATIONAL BANK, Plaintiff-Appellee, v. SHAYNE D. CRAPO, Defendant-Appellant.	PUBLIC Appellate Case No. 20160218-SC District Court Case No. 140907019

REPLY BRIEF OF THE APPELLANT

Appeal from the Third District Court, Salt Lake County, from an Order Granting Summary Judgment Before Honorable Barry Lawrence

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ARGUMENT

This case presents a simple question to the Court: did the trial court err in granting summary judgment in favor of a bank (ZB), allowing the bank to collect on a debt it told the borrower (Crapo) was "FORGIVEN DEBT." The answer, of course, is yes. Crapo created genuine issues of material fact as to whether ZB was estopped from collecting on the Note at issue in this case and whether ZB actually discharged the debt. Because ZB discharged the debt, took no action to collect the debt for nearly four years, and then affirmatively told Crapo that his debt was forgiven, the trial court should have allowed the case to go to the jury.

I. GENUINE DISPUTES OF MATERIAL FACT EXIST AS TO WHETHER ZB WAS ESTOPPED FROM COLLECTING THE NOTE.

As this Court is aware, estoppel is intended "to rescue from loss a party who has, without fault, been deluded into a course of action by the wrong or neglect of another." *Salt Lake City Corp. v. Big Ditch Irrigation Co.*, 2011 UT 33, ¶ 40, 258 P.3d 539 (emphasis removed). In this case, Crapo has raised genuine issues of material fact as to whether he was deluded into a course of action by the wrong or neglect of ZB. Specifically, Crapo has created an issue of fact as to whether ZB's statement that the Note was "FORGIVEN DEBT," in conjunction with ZB's other statements and actions, now estops ZB from collecting on that obligation. ZB argues in its opposition that there is no dispute of fact and that it is not estopped from collecting the Note. However, ZB is incorrect.

Under Utah law, a party is estopped from pursuing its claims if the following three elements are met:

(1) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted;
(2) reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act or failure to act; and
(3) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act.

Youngblood v. Auto-Owners Ins. Co., 2007 UT 28, ¶ 14, 158 P.3d 1088. As each element is essential to an estoppel claim, a finding of a factual dispute as to one issue precludes a court from granting summary judgment. Here, Crapo has created a genuine dispute of material fact as to each of these elements, therefore, the trial court should be reversed.

A. *A Genuine Dispute of Material Fact Exists Relating to Whether ZB Made Inconsistent Statements, Admissions, or Actions*

In its opposition, ZB contends that the 1099-C, which described the Note as "FORGIVEN," is not evidence of inconsistent conduct. According to ZB, there is nothing inconsistent about telling a debtor that his debt is "FORGIVEN DEBT" and then subsequently suing to collect that debt. To arrive at this conclusion, ZB focuses on the IRS regulations that underpin the issuance of a 1099-C. However, ZB's arguments miss the mark.

ZB argues, for example, that the IRS does not view a 1099-C as an admission that a debt has been discharged. *See* Opposition at 14. Moreover, ZB asserts that a 1099-C is merely a reporting tool and is not used to effectuate a discharge of debt. Whether these characterizations of the IRS's position are accurate is irrelevant to the issue at hand: the

message ZB sent to Crapo. The message ZB sent to Crapo is undeniably inconsistent with its position in the present action.

In Box 4 of the 1099-C, ZB affirmatively stated, "FORGIVEN DEBT AMT 3 YEARS NO PAYMENT." (Rec. 308) The IRS did not require ZB to describe the debt as "FORGIVEN," ZB chose to describe the debt that way. In fact, in the IRS instructions for Box 4, the IRS merely requires "a description of the origin of the debt, such as student loan, mortgage, or credit card expenditure." *See* page 6 of ZB's Addendum 4. Rather than comply with the IRS's instructions, ZB chose to describe the Note as forgiven. Even if ZB believed that the 1099-C was merely a reporting tool, it does not alter the fact that ZB chose to describe the Note as "FORGIVEN." The message this unambiguous language sent to Crapo is entirely unrelated to the message ZB intended to send to the IRS and is plainly inconsistent with its present attempt to collect on the Note. This alone establishes that a genuine dispute of fact exists as to whether ZB engaged in inconsistent conduct and should be estopped from collecting on the Note.

Moreover, as noted in his opening brief, Crapo also provided proof of other disputes of fact regarding ZB's inconsistent conduct. For example, not only did ZB tell Crapo that the Note was forgiven, ZB also took no actions to collect the Note for four years (Rec. 403, 420-21) and charged off the debt. (Rec. 428). Plainly, ZB has taken inconsistent positions with regards to the Note and the district court erred in finding that there was no genuine dispute of fact as to whether ZB engaged in inconsistent conduct.

B. *A Genuine Dispute of Material Fact Exists as to Whether Crapo Reasonably Relied upon ZB's Inconsistent Conduct*

From 2010 until the commencement of this suit, ZB corresponded with Crapo three times regarding the Note: (1) a demand letter in October 2010, (2) a demand letter in November 2010, and lastly, (3) the 1099-C describing the Note as forgiven in January 2014. (Rec. 403; 414; 421-22) Following receipt of the 1099-C, Crapo reported the full value of the debt as income on his taxes, and otherwise arranged his finances believing the debt was extinguished. Whether it was reasonable for Crapo to rely on these statements by ZB and act as if the debt was "FORGIVEN" is a question of fact for the jury. *See, e.g., Gold Standard, Inc. v. Getty Oil Co.*, 915 P.2d 1060, 1067 (Utah 1996) (holding that "the question of reasonable reliance is usually a matter within the province of the jury"); *Ferris v. Jennings*, 595 P.2d 857, 860 (Utah 1979) ("What is reasonable is a question of fact."). Put another way, it is a genuine issue of fact whether it is reasonable for a debtor to include the full value of a debt as income in his tax returns (and take other actions) when the lender, after three years of silence, tells the debtor that the debt has been forgiven.

Attempting to avoid the trial court's reversal, ZB contends that it was unreasonable for Crapo to interpret the phrase "FORGIVEN DEBT AMT 3 YRS NO PAYMENT" in the 1099-C as meaning the debt was forgiven. According to ZB, the only reasonable interpretation of this phrase is that it correlates with the designated "identifiable event." However, it is just as reasonable to read the phrase as "FORGIVEN DEBT AMT [because of] 3 YRS NO PAYMENT." *See Smith v. Four Corners Mental*

Health Ctr., 2003 UT 23, ¶ 2, 70 P.3d 904 (the Court must view the facts and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party, in this case, Crapo). At the very least, Crapo's different interpretation of the language of the 1099-C creates an issue of fact as to whether his reliance was reasonable.

Moreover, ZB argues that "a party cannot reasonable rely upon oral statements by the opposing party in light of contrary written information." Opposition at 20 (quoting *Gold Standard, Inc.*, 915 P.2d at 1068 (Utah 1996)). ZB argues therefrom that the non-waiver provision of the Note made it unreasonable for Crapo to rely upon ZB's more than three years of inactivity. According to ZB, its three years of silence was like an "oral statement" that contradicted the writing in the Note. However, as previously noted by Crapo, this case does not involve only the passage of time, it also involves the affirmative statement by ZB that the Note was forgiven. (Rec. 308) For ZB to conclude that the non-waiver provision is applicable, ZB ignores its own *written* statement that the Note was "FORGIVEN DEBT."

Faced with these facts, the district court erred in finding that there were no disputes of fact under the second element of estoppel. It was for the jury to decide whether Crapo reasonably relied upon ZB's statement that the debt was forgiven, coupled with more than three years of inactivity.

C. *A Genuine Dispute of Material Fact Exists in Relation to the Whether Crapo was Injured*

Crapo created a genuine dispute of material fact in relation to the third element of estoppel by showing that he will be injured if ZB is allowed to contradict and repudiate

its prior affirmations. Crapo has already paid taxes on the full value of the Note. (Re. 403) Furthermore, Crapo has relied upon ZB's affirmations and has taken no steps to pay the Note or to create the financial ability to pay the Note. Therefore, should ZB be allowed to retract its prior acts and statements, Crapo would be harmed by paying the value of a Note he reported to the IRS as income and that he understood to have been forgiven.

ZB argues that this is insufficient to show that Crapo was harmed by his reliance on ZB's inconsistent conduct. According to ZB, Crapo has not created an issue of fact because he has not shown the *amount* of his damage. *See* Opposition at 22-23. However, the amount of injury is not at issue presently, merely the existence of an injury. *See Youngblood v. Auto-Owners Ins. Co.*, 2007 UT 28, ¶ 14. Moreover, the cases relied upon by ZB on this point are inapposite. In the first, *I.X.L. Stores Co. v. Success Markets*, the case was on appeal following a jury trial, not following a summary judgment ruling that cut off the need for a determination of the amount of harm. 97 P.2d 577 (Utah 1939). In the second, *Whitaker v. Utah State Ret. Bd.*, the party "failed to show any actual reliance upon or injury resulting from" the other party's inconsistent conduct. 2008 UT App 282, ¶ 28, 191 P.3d 814. Having failed to establish the elements of estoppel in that case, the question of the amount of damages was not before the court. *See id.* In contrast, all Crapo need show here is that he was injured. The facts presented to the court below (and restated to this Court) created a genuine issue of fact as to whether he was harmed. Relying upon ZB's statement that the Note was forgiven, Crapo reported the value of the

Note as income and arranged his finances accordingly. It is for the jury to decide whether this shows that Crapo was harmed.

Having created a genuine dispute of material fact in relation to the elements of estoppel, the trial court should have denied ZB's motion for summary judgment and conducted a trial on the merits. This Court should therefore reverse the trial court's decision and remand this case for trial.

II. CRAPO CREATED GENUINE DISPUTES OF FACT AS TO WHETHER ZB ACTUALLY DISCHARGED CRAPO'S OBLIGATIONS UNDER THE NOTE.

ZB argues that it did not actually discharge the Note because there was no signed writing as required by the statute of frauds.[1] Once again, ZB's argument misses the mark. While it is true that "every credit agreement" is void unless memorialized in writing, *see* UTAH CODE § 25-5-4(1)(f), that does not preclude the possibility that the Note was discharged by ZB.[2] The statute of frauds does not require a detailed memorandum just a "cryptic, abbreviated, and incomplete" writing. *Coulter & Smith Ltd. v. Russell*, 1999 UT App 055, ¶ 15 n.2, 976 P.2d 1218. What matters is that the note is "adequate, when considered with the admitted facts, the surrounding circumstances and all ... evidence, to convince the court that there is no serious possibility of consummating a fraud by

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[1] Below, the trial court asked ZB "Under banking law, what does it take to quote, unquote, discharge a debt?" ZB's response: "I don't know." (R. 807). Nevertheless, ZB now contends that a signed agreement is necessary to effectuate a discharge of a debt. In contrast, Crapo cited a statute to the trial court that allows "A person entitled to enforce an instrument, with or without consideration" to unilaterally extinguish the obligation evidenced by the instrument. (R. 821-22). Thus, a signed agreement may not be needed for ZB to discharge the Note.

[2] UTAH CODE § 25-5-4(2)(a) does not include "extinguish," "discharge," or "forgive" within the definition of a credit agreement.

enforcement." *English v. Standard Optical Co.*, 841 P.2d 613, 616 (Utah Ct. App. 1991) (internal citation omitted). In this case, the 1099-C, coupled with the surrounding circumstances, provides the Court with ample proof that enforcement of ZB's pronouncement that the Note was "FORGIVEN" will not consummate a fraud. Therefore, the statute of frauds is no bar to Crapo's claim.

Only one case has addressed whether a 1099-C satisfies the statute of frauds. *See Franklin Credit Mgmt. Corp. v. Nicholas*, 812 A.2d 51 (Conn. Ct. App. 2002). In that case, similar to here, Franklin Credit sought to foreclose on a note, but the defendant argued that the debt "was discharged and released" as shown by a Form 1099-C issued by Franklin Credit. *Id.* at 838. At issue there was a statute that provided that a debt may be cancelled by the lender, "with or without consideration," by either an intentional voluntary act (similar to UTAH CODE § 70a-3-604, which allows a beneficiary of an obligation to unilaterally discharge the obligation "with or without consideration"), or by agreeing to renounce its rights by a "signed writing" (similar to Utah's statute of frauds). *Id.* at 839. In that case, the court not only found that the 1099-C was prima facie evidence of a discharge, it also found that the 1099-C "constitute[d] a signed writing" and satisfied the statutory requirement for a signed writing. *Id.* at 842-43. The same result should be found here. Even if the statute of frauds applies to ZB's unilateral discharge of the Note, the 1099-C constitutes a sufficient "note or memorandum" of that agreement to satisfy the statute of frauds. *See* UTAH CODE § 25-5-4(1).

Having overcome this technical barrier, the issue remains whether the "contextual clues" presented to the trial court were sufficient to create a genuine issue of fact as to

whether ZB discharged the Note. They were. As previously noted, the facts and all inference drawn therefrom must be viewed in the light most favorable to Crapo. In this light, the plain language of the 1099-C ("FORGIVEN DEBT") coupled with ZB's nearly four years of inaction, discharge of the debt, and other statements and actions, provides sufficient proof to create an issue of fact for the jury as to whether ZB discharged the Note. Therefore, the trial court should be reversed.

CONCLUSION

The Court should reverse the trial court's order granting summary judgment in favor of ZB and remand this case back to the trial court for a trial on the merits.

DATED this 26th day of October, 2016.

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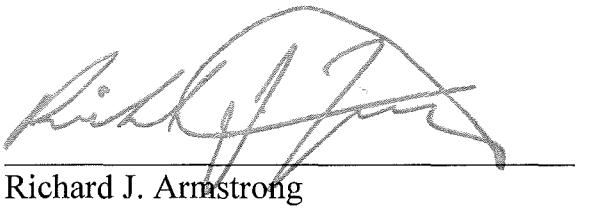
WORD COUNT CERTIFICATION

I hereby certify that this brief complies with the word limitations in Utah R. App. P. 24(f) and contains 3,007 words according to the word count function in Microsoft Word 2010.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of October, 2016, two true and correct copies of the foregoing ***REPLY BRIEF OF THE APPELLANT***, along with an electronic version of the brief on CD, was mailed in the U.S. mail, postage prepaid, to the following:

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