2016

Deutsche Bank National Trust Company, Trustee for Ameriquest Mortgage Securities, Inc. Asset-Backed Pass-Through Certificiates Series 2004-R8 Appellee, v. William York, Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

DEUTSCHE BANK NATIONAL TRUST COMPANY, TRUSTEE FOR AMERIQUEST MORTGAGE SECURITIES, INC. ASSET-BACKED PASS-THROUGH CERTIFICIATES SERIES 2004-R8 Appellee, v. WILLIAM YORK, Appellant.	Case. No. 20141083-CA

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT, MILLARD COUNTY, STATE OF UTAH, THE HON. JAMES BRADY, CASE NO. 120700011

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ARGUMENT

I. Mr. York's counterclaims were never addressed on the merits and they do not preclude him from raising an affirmative defense during an eviction hearing.

Deutsche Bank as trustee for Ameriquest Mortgage Securities, Inc. Asset-Backed Pass-Through Certificates Series 2004-R8 (Deutsche Bank) has argued that the trial court had already addressed Mr. York's affirmative defense when it dismissed his counterclaims. *See* Appellee's Brief, 20. The trial court, however, never considered the merits of Mr. York's counterclaim. And even if the trial court had, the dismissal of a counterclaim does not preclude a defendant from raising an affirmative defense at trial.

The Utah Supreme Court has held that "nothing in the unlawful detainer statute prohibits the assertion of any defense *or* counterclaim by the defaulting tenant–defendant." *Bichler v. DEI Systems, Inc.*, 2009 UT 63, ¶ 25, 220 P.3d 1203 (emphasis added) (citations and internal quotation marks omitted). Utah law recognizes a difference between an affirmative defense and a counterclaim. In *Harman v. Yeager*, 134 P.2d 695 (Utah 1943), the Utah Supreme Court addressed whether an affirmative defense raised in an answer rose to the level of a counterclaim. The Court held that a counterclaim is "viewed as an original action . . . and is tested by the same tests and rules as a complaint." *Id.* at 696. Because

the defendant's affirmative defense in *Harman* lacked "many facts essential to statement of a cause of action," it was not considered an adequate counterclaim. *Id.* at 697. In other words, a higher standard applies to counterclaims than applies to affirmative defenses. A counterclaim seeks damages or other relief from the plaintiff whereas an affirmative defense merely prevents the plaintiff from recovering damages or other relief from the defendant. In an eviction setting, a defendant may raise an affirmative defense and a counterclaim. If the counterclaim fails, the defendant can still argue an affirmative defense at trial.

In this case, Mr. York filed similar pro se counterclaims in state and federal court. The federal court dismissed Mr. York's pro se claim because he failed to meet the pleading standard. R. 325–29. After taking judicial notice of the federal court's decision, the state trial court issued a memorandum decision dismissing Mr. York's counterclaims for the same reasons. R. 334. At no point in time did any court rule on the merits of Mr. York's counterclaims. Specifically, Mr. York's fraud claims were dismissed because they failed to meet the pleading standards of rule 9(b) of the Utah Rules of Civil Procedure. *Id.* Considering this, it is entirely inaccurate to conclude, as Deutsche Bank did, that "[b]ased on the persuasive Federal Court decision and its own examination of the issues, the Trial Court properly excluded ownership from consideration at trial." *See* Appellee's Brief, 20–21.

In what turned into a pre-trial hearing on November 21, 2012, Mr. York, acting pro se, tried to raise his affirmative defense that Ameriquest Mortgage

Securities, Inc. Asset-Backed Pass-Through Certificates Series 2004-R8 did not own the property in question. T. 1075: 18. In response to this line of argument, the trial court explicitly instructed Mr. York to wait until the trial and argue it as an affirmative defense. The trial court said, "Right. And those would be arguments you could raise at trial because they haven't been raised before." *Id.* Even though Mr. York's counterclaims failed because they did not meet the pleading standard, it did not mean that he could not raise arguments about ownership as an affirmative defense at the trial. The trial court even explicitly instructed Mr. York to do so. Considering this, Deutsche Bank's contention that the trial court properly excluded the issue during trial is untenable.

During the trial, the trial court appeared to be confused and inexplicably refused to allow Mr. York to argue the issue of ownership in any way. This was even after Mr. York directed the trial court's attention to the minute entry where the trial court told Mr. York to raise the issues at trial. *See* 1076: 15. Instead the trial court decided that the affirmative defense that Ameriquest Mortgage Securities, Inc. Asset-Backed Pass-Through Certificates Series 2004-R8 did not own the property was an "interesting question . . . for another day." *Id.* at 25–26. At no point in time was Mr. York ever allowed to raise his affirmative defense. In light of this, Deutsche Bank's repeated assertion that Mr. York failed to present evidence to rebut their position must fail. *See* Appellee's Brief, 16–20. How could Mr. York present evidence of his affirmative defense when the trial court never allowed him to do so?

The trial court erred when it instructed Mr. York to argue his affirmative defense at trial and then later prohibited him from doing so. Therefore, the case should be remanded and Mr. York should be allowed to raise his defense.

II. Deutsche Bank is incorrect in its unsupported assertion that proof of ownership is not an element of an unlawful detainer action.

Without citing any supporting authority, Deutsche Bank summarily concludes that "[p]roof of ownership is generally not an element of an unlawful detainer action." *See* Appellee's Brief, 17. Utah's unlawful detainer law, however, is premised on actual ownership, and it will always be an element of an unlawful detainer action when a defendant raises the issue as an affirmative defense.

Utah's unlawful detainer law is premised on the centuries of property law that came before it. The ancient maxim *nemo dat quod non habet*, no one gives what he does not have, is apposite. If one does not own a property, then one has no right to sell that property at a forced sale or evict another person from that property. Much more recently, the framers of the Utah Constitution were concerned about the rights of Utah citizens who faced losing their homes due to defaulting on loans. Utah Const. art. XXII, § 1 requires the Utah Legislature to pass statutes to protect homes from forced sales except under certain circumstances.[1] One of those circumstances is that the entity attempting to force

[1] Deutsche Bank complains that the use of the Utah Constitution is a "red herring." *See* Appellee's Brief, 31. This, however, seems to be based on a misunderstanding of Mr. York's purpose in referencing it. Mr. York refers to the Utah Constitution

the sale of a property must have "security interests in the property . . . for debts created for the purchase price of the property." *See* Utah Code Ann. § 75B-5-503(3)(b). Utah's unlawful detainer statute is based on the common law and comports with the Utah Constitution. It provides that "a previous owner . . . is guilty of unlawful detainer if the person . . . continues to occupy the property after the [forced sale] after being served with a notice to quit by the purchaser." *See* Utah Code. Ann. § 78B-6-802.5. The statute is premised on the validity of the forced sale, which would make the purchaser the new owner. If there is a flaw or a breach in that process, then there is no one to serve the notice to quit to the previous owner. Ownership, therefore, is absolutely essential in an unlawful detainer action, particularly when it has been raised as an affirmative defense.

In this case, Mr. York raised ownership as an affirmative defense to the unlawful detainer action. If Ameriquest Mortgage Securities, Inc. Asset-Backed Pass-Through Certificates Series 2004-R8 does not own his property, then it cannot rationally take advantage of Utah's unlawful detainer law to evict him. As a result, it should have been necessary for Deutsche Bank to prove that Ameriquest Mortgage Securities, Inc. Asset-Backed Pass-Through Certificates Series 2004-R8 actually owned the property in question.

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to show two things: First, that historically the framers of the Utah Constitution placed an emphasis on protecting homeowners from eviction. *See* Appellant's Brief, 17–18. And, second, that Mr. York was harmed by the trial court's error because if he could show that Deutsche Bank does not own his home, then Deutsche Bank could not evict him. *Id.* at 18–19.

This is also important from a policy standpoint. Since the recent mortgage crisis in the United States, there have been countless examples of banks evicting people from the wrong homes, evicting people from homes that the banks do not own, and evicting people based on fraudulent paperwork. *See, e.g.*, Elizabeth M. Lynch, *The Second-Mortgage Shell Game*, NYTimes.com (Feb. 17, 2013) http://www.nytimes.com/2013/02/18/opinion/the-second-mortgage-shell-game.html?_r=0; Matt Taibbi, *Invasion of the Home Snatchers*, RollingStone.com (November 10, 2010) http://www.rollingstone.com/politics/news/matt-taibbi-courts-helping-banks-screw-over-homeowners-20101110.[2] The rash of abuses that have occurred across the country in unlawful detainer actions underline the wisdom in viewing ownership as a necessary element of an unlawful detainer action. At the very least, a plaintiff in an unlawful detainer action must show that it has ownership of a property when the defendant challenges that ownership as an affirmative defense.

Because Deutsche Bank is incorrect in its unsupported assertion that ownership is not a necessary element of an unlawful detainer action, the trial court erred in not allowing Mr. York to present his affirmative defense. This particularly true considering that the trial court had instructed Mr. York to save his affirmative defense for trial.

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[2] While the Rolling Stones article contains some of the most important and thorough reporting on the subject, it also contains some explicit language.

III. Preventing a Mr. York from presenting an affirmative defense is a structural error and the harm is presumed.

Deutsche Bank has argued that even if there was fraud involved with the forced sale and subsequent unlawful detainer action against Mr. York, it was harmless. *See* Appellee's Brief, 31. It further argues that the trial court's decision to prohibit Mr. York from raising his affirmative defense was harmless as well. *See id.* at 23–27. The trial court's error, however, was a structural error and the harm is presumed.

A structural error is a flaw in the "framework within which the trial proceeds, rather than simply an error in the trial process itself." *State v. Cruz*, 205 UT 45, ¶ 17, 122 P.3d 534 (citations and internal quotation marks omitted). When a structural error occurs the prejudice is presumed. *Id.* This is because if the framework of the proceeding is flawed, it is then impossible to imagine how the entire proceeding would have been different absent the error. With a "garden-variety" error, *see id.*, it is possible, and necessary, to imagine whether a particular result would have been different absent the error, *see State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993).

In this case, denying Mr. York the opportunity to argue and support his affirmative defense was a structural error in the very framework of the proceeding. As a result, there is no record to show how strong or weak the evidence may have been. Mr. York very well could have supported his contention that the

circumstances were exceptional enough to warrant setting aside the forced sale. *See Reynolds v. Woodall*, 2012 UT App 206, ¶ 15, 285 P.3d 7.

It should be noted that Deutsche Bank, by way of what appears to be an inadvertent typo, has misquoted the *Reynolds* case in an important way. Deutsche Bank quotes the *Reynolds* case as follows:

> The Utah Court of Appeals articulated the standard and the timing to challenge an underlying foreclosure sale, "The proper remedy is to seek an injunction prior to sale . . . ."

Appellee's Brief, 17. The actual quote from the *Reynolds* case, however, begins with a discussion about the kinds of circumstances that would justify setting aside a forced sale. It then states: "*Absent such exceptional circumstances*, the proper remedy is to seek an injunction prior to a sale . . . ." *Reynolds*, 2012 UT App 206, ¶ 15. The distinction is important because if what Mr. York alleges is true, it would certainly qualify as an unjust extreme that would justify setting aside the forced sale. The way Deutsche Bank mistakenly quoted the case, however, gives the impression that setting aside a forced sale is not an available remedy.

If what Mr. York alleges is true, then Deutsche Bank would be unable to make use of Utah's unlawful detainer law to evict Mr. York. The record in this case, however, does not indicate how strong Mr. York's case was because he was not allowed to make his case. This is a structural error in the framework of the proceeding. Therefore, the prejudice must be presumed.

Because the trial court refused to allow Mr. York to present and support his affirmative defense, the judgment should be vacated and the case should be remanded.

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests this Court to reverse and remand with instructions to the trial court to allow the Appellant to raise his affirmative defenses.

RESPECTFULLY SUBMITTED ON Feb. 9, 2016

Marshall Thompson
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I, Marshall Thompson, certify that the Appellant's Brief complies fully with the requirements of rule 24(f) of the Utah Rules of Appellate Procedure. It contains 2,651 words and 306 lines of text.

Marshall Thompson
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Marshall Thompson, certify that on Feb. 9, 2016 I served two copies of the Appellant's Reply Brief to the counsel for the Appellee by first class mail to the following address:

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