2016

Michael J. Van Leeuwen, Appellant, vs. Bank of America., Et Al. Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

MICHAEL J. VAN LEEUWEN, **Appellant,** **vs.** **BANK OF AMERICA, N. A., et al.** **Appellee.**	**APPELLANT'S REPLY BRIEF** **Appellate Case No. 20150610-CA**

APPEAL FROM THE THIRD DISTRICT COURT,
SALT LAKE COUNTY, CIVIL NO. 150902048; JUDGE LAURA S. SCOTT

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ARGUMENT

APPELLENT'S FIRST CAUSE OF ACTION FOR DECLARATORY JUDGMENT UNDER UCA § 78B-6-401 SHOULD BE ALLOWED

Appellant brought this action for a simple declaratory judgment pursuant to Utah's declaratory judgment statute, Utah Code § 78B-6-401, seeking an order declaring Appellee's "Creditor/Ownership" versus "Servicer" status pertaining to an alleged debt and loan. Appellee claimed it was the "Creditor/Owner" of Appellant's alleged Debt.

> *(1) Each district court has the power to issue declaratory judgments determining rights, status, and other legal relations within its respective jurisdiction...*

Appellant received a Fair Debt Collection Practices Act compliance letter (the "Letter"), from Appellee, acknowledging that *it was not* in fact the "Creditor/Owner" of the purported Debt. Appellant, through information and belief, knew that Appellee *was not* the "Creditor/Owner" of the purported Debt at the time that Plaintiff received the Letter.

Contrary to what Appellee believes in that Appellant's claims could have and should have been brought in the "2010 Complaint," Appellant believes that the claims could not have been brought let alone been fully and fairly litigated in the previous lawsuit as they had not even occurred until 2011 even if they *may* have, as Appellee believes and which Appellant does not believe, derived from the same

core issues. *Macris & Assoc. v. Neways,* 2000 UT 93, P 19, 16 P.3d 1214 (Utah 2000).

Appellant also believes that the Appellee created a fictitious scenario, as it is now doing again in its answering brief, setting the environment for the Court to be persuaded regarding claims that this action is about foreclosure and not what Appellant is claiming it is about, that of a simple declaration of Appellee's status as a "Servicer" as opposed to a "Creditor," as the letter clearly and unmistakably states, therefore, making it easier to dismiss his complaint.

Furthermore, as explained in both Appellant's motion to reconsider and his brief, the only reason that "The present 2015 Complaint" has a second cause of action for injunctive relief concerning foreclosure is that when Plaintiff filed the complaint he was facing what he believes was a wrongful and unauthorized Trustee's Sale approximately forty five days from the filing of the complaint, otherwise, there would have been no mention whatsoever of foreclosure in the complaint and or try to seek an injunction.

Appellant, as stated in his motion to reconsider in the lower court, *is willing to remove* the second cause of action for injunctive relief in order for the first cause of action for declaratory judgment as to status and rights of Appellee pertaining to the February 2011 letter to survive and receive a declaration as sought for in the relief requested.

As previously stated in Appellant's Brief; when determining whether a complaint states a claim upon which relief can be granted, the Court *must* accept, as true, the factual allegations in the complaint. *Tal v. Hogan*, 453 F.3d 1244, 1252 (10th Cir. 2006), and a motion to dismiss fails if Plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 570 (2007). The standard for dismissal under Rule 12(b)(6) should be a stringent one. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 811 (1993) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Here in the instant matter, one cannot have better facts to support his claims than that of *prima facie evidence* such as is the Letter.

Although Appellee characterizes their challenge to Appellant's claims as a motion to dismiss, Appellant firmly believes that it should have been considered as a motion for summary judgment under Rule 56 of the Utah Rules of Civil Procedure based on the evidence outside the pleadings that Appellee relied on to support its position for its *res judicata* arguments. As Appellee believes that this claim was not brought in the lower Court, Appellant would ask the Appeals Court in reviewing matters of issue preservation for correctness of legal authority (*Donjuan v. McDermott,* 2011 UT 72, para. 20, 266 P. 3d 839), that it might

consider the applicable exceptions to the general rule, which includes instances involving exceptional circumstances or plain error.

Under URCP 56, the party against whom the judgment has been granted is entitled to have all the facts presented, and all the inferences fairly arising therefrom, considered in the light most favorable to him. *Briggs v. Holcomb*, 740 P.2d 281 (Utah Ct. App. 1987), *Winegar v. Froerer,* 813 P.2d 104 (Utah 1991). The standard under which the Court should consider Appellee's motion to dismiss should be on the issue of the viability of Appellant's claims ruled in a light most favorable to him.

Moreover, pursuant to Utah's declaratory judgment statute § 78B-6-401:

> *...An action or proceeding may not be open to objection on the ground that a declaratory judgment or decree is prayed for.*

In the instant matter of seeking a simple declaratory judgment, Appellee's objection to Appellant's claims should not have been allowed.

CONCLUSION

The Third District Court's granting of Appellee's motion to dismiss should be reversed as Appellee went far beyond the scope of Appellant's Complaint in its attempt to piece together a res judicata argument, which according to the foregoing statute should not have been open to objection.

Regardless of whether or not Appellee's motion is looked at in the light of dismissal or summary judgment, Appellant as the party against whom the

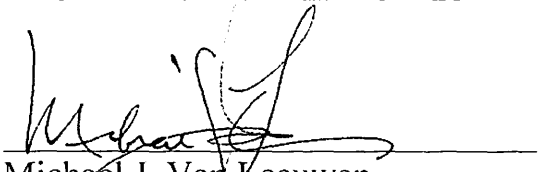
judgment was granted was and is entitled to have all the facts presented, and all the inferences fairly arising therefrom, considered in the light most favorable to him. *Briggs v. Holcomb*, 740 P.2d 281 (Utah Ct. App. 1987).

Again, as previously stated, Appellant is willing to remove the second cause of action for injunctive relief in order for the first cause of action for declaratory judgment as to Appellee's status and rights as a "Servicer" versus a "Creditor," as Appellee so stated, in its February 2011 letter, to survive and receive a declaration as sought for in the relief requested.

Appellant only seeks that the valid merits of his prima facie evidenced backed complaint be fully and fairly litigated and not be deprived of his rights of due process of law because of technical and legal stratagem that will not serve his, the public or the Court's best interests.

RESPECTUFLLY SUBMITTED this 26th day of February, 2016

MICHAEL J. VAN LEEUWEN



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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of February, 2016, I caused to be served by U.S. Mail a correct copy of the foregoing to the following:

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