2001

Aspenwood v. C.A.T : Petition for Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

Aspenwood, L.L.C., et al.

Plaintiffs/Appellants,

vs.

C.A.T., L.L.C., et al.

Defendants/ Appellees.

APPELLANTS' PETITION FOR REHEARING

Civil No. 20010735-SC CA

Nature of Proceeding:
Appeal from the Third District Court,
Salt Lake County, State of Utah
Honorable William B. Bohling, Presiding
Argument Priority Classification: 15

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PLAINTIFFS/APPELLANTS' PETITION FOR REHEARING

The Plaintiffs/Appellants respectfully believe that the Appellate Court's opinion in this matter either misapprehended the facts or law in the following particulars:

1. **Opportunity to Conduct Full and Fair Discovery**. The April 2000 scheduling order would not in and of itself have necessarily been a problem for JMS, if CAT had not used that order as a tool to refuse to allow JMS to take any depositions other than those identified in that Order – until all of those depositions were completed. It was Judge Bohling's subsequent refusal to allow JMS sufficient time to take the extra depositions needed to develop this case which deprived JMS of a full and fair opportunity to conduct discovery. The Appellate Court's opinion seems to gloss over this problem. Yes, it was true that initially Plaintiffs acquiesced in the April 2000 order. But, when the discovery period ran and there had been no opportunity to take the extra needed depositions, JMS did start to object. And, the Appellate Court's opinion does not accurately recite the facts when it states that "the trial court and CAT granted JMS several extensions in response to JMS' claims that it needed more time to take depositions." Yes, "extensions" were granted; but JMS still had its hands tied during each such extension. During the approximately 90 days total of "extra time," JMS was only allowed to complete the depositions of Taggart and Coats (delayed because CAT had wrongfully held back and not produced critical daytimer documents during the original discovery period) and take a very few other depositions. In its 56(f) and other motions, JMS and Aspenwood complained vehemently that they needed to take several dozen depositions. AT NO TIME DURING THE DISCOVERY PERIOD OF APPROXIMATELY TWELVE

MONTHS TOTAL, WAS JMS OR ASPENWOOD EVER FREE TO TAKE ALL OF THE DEPOSITIONS THAT THEY WANTED OR NEEDED. Given a case as complex as this case, twelve months of unfettered discovery time would likely not have been sufficient to fully prepare plaintiffs' case. But, when JMS was never free at any time during that twelve months to take all of the depositions that it wanted, JMS was deprived of a full and fair opportunity to conduct discovery. Perhaps Judge Bohling's April 2000 order was not in and of itself objectionable, and perhaps CAT should not have been sanctioned for withholding documents, etc., BUT JMS SHOULD HAVE HAD A FAIR OPPORTUNITY TO DO ITS DISCOVERY WITHOUT HAVING ITS HANDS TIED BEHIND ITS BACK. JMS' due process rights were denied by the application of the April 2000 order, and Judge Bohling's subsequent refusal to lift the restrictions which had been placed on JMS' ability to fully and fairly conduct discovery.

2. **Rule 56(f) Motion Should Have Been Granted.** The Appellate Court correctly states that the law and rules require that a 56(f) motion be supported by an affidavit stating the reasons the party opposing the summary judgment motion "is presently unable to present evidentiary affidavits essential to support his opposition to summary judgment." But the Court then mischaracterizes the facts by stating that Aspenwood did not meet this burden, and that while the motion was pending Aspenwood's "priorities have not been to try to establish criteria to dispute the motion for summary judgment, but rather to pursue other matters ...." The Rule 56(f) Declarations of David C. Condie and Dan Mehr fully satisfy the requirements of the case law quoted in the opinion and then above. Furthermore, the reason that Aspenwood did not take the depositions that it needed and wanted to take

during the pendancy of the motion was that CAT refused to allow them due to the April 2000 order, and Judge Bohling would not open up discovery so that they could be taken. It is a pretty cheap shot for CAT to claim that we did not take depositions, when we were precluded from taking those depositions. Finally, the evidence produced and submitted by Aspenwood and JMS in opposition to CAT's claim that the corporate veil should not be pierced was sufficient for a jury to find in Aspenwood and JMS' favor. IT IS ABSOLUTELY UNTRUE THAT JMS LACKED DILIGENCE IN PURSUING DISCOVERY.

3. **Failure to Fund Claim Should Not Have Been Dismissed**. The Appellate Court's determination is based in significant part on an incomplete description of Aspenwood's position: "[Aspenwood] contends that Mehr, Taggart and Coats entered into an oral agreement prior to signing the Operating Agreement." It is true that Mehr and Aspenwood claimed that Taggart and Coats had agreed to fund projects prior to the Operating Agreement being signed. But – Mehr and Aspenwood also alleged under oath that AFTER THE OPERATING AGREEMENT was signed, Mehr, Taggart and Coats met to go through all of Taggart's due diligence, and that they selected the projects that they would have Aspenwood pursue, and that Taggart and Coats reaffirmed their agreement to provide all the funding necessary to develop those specifically selected projects. This oral agreement was based upon specific information (the extensive due diligence that Taggart had performed), and it was to provide funding for amounts which Taggart had specifically and in detail had set forth in Taggart's detailed projections for each of the selected projects. There was no guess work. The projects were reviewed,

analyzed, voted and agreed upon. Taggart and Coats knew what the projected costs were going to be, and knowingly agreed to provide the funding for those costs. This was a fully enforceable oral agreement. The Appellate Court's analysis completely ignores this critical testimony, and does not apply to this fact situation.

4. **The Court's Waiver of Jury Trial Analysis Ignores Judge Bohling's Representations Which JMS Reasonably Relied Upon**. This Court's "waiver" analysis ignores JMS' testimony from two attorneys as to Judge Bohling's promise that -although the box for "nonjury trial" would be checked on the scheduling order – JMS would get a jury trial if JMS had in fact asked for and paid for a jury. JMS did not "object" to the checking of the "nonjury trial" box because it relied upon Judge Bohling's promise and representation. JMS was induced to not object to Judge Bohling's checking of this "nonjury trial" box in reliance upon Judge Bohling's promise and representation that JMS would get a jury trial. JMS legitimately feels like Judge Bohling has negligently defrauded JMS of its fundamental right to trial by jury. None of the cases cited by the Appellate Court involve a situation where the trial Court had "faked out" a party into initially allowing a "nonjury trial" box to be checked, with a promise that a jury trial will be granted if one was asked for – and are all therefore absolutely inapposite. JMS' version of these facts must be deemed to be true, and a waiver not found.

5. **JMS is Not Aware of Any Rule Which Precludes the Marshalling of Evidence in an Addendum**. JMS is absolutely stunned by the Appellate Court's analysis on the marshaling of evidence. JMS is not aware of, nor does the Appellate Court cite to, any rules which require that the marshaled evidence be placed in the body of the Appellant's

Brief. It cannot be fatal that the marshaled evidence be set forth in an addendum. The Appellate Court does cite a case which states that it is improper to cite to a trial court memorandum in lieu of an argument. But this case does not state that you cannot marshal the evidence in an addendum. Rule 24(a)(11) does not state that ONLY those items identified therein may be placed in an addendum. It states that those items so identified MUST BE incorporated in an addendum. Trial involving extensive testimony may often require marshaling of evidence that is so extensive – such as in this case – that the BEST PLACE for that marshaled evidence to be put is in an addendum. How can you place a page limit on a marshaling requirement? You cannot limit the number of pages for your marshaled evidence. Marshaling is a function of the extent of the relevant evidence. Further, JMS cannot see any possible justification for the Court's conclusion that "JMS has not attempted to meet its burden of demonstrating taht despite the marshaled evidence supporting the findings, 'the trial court's findings are so lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous.'" JMS' Addendum 6 exhaustively marshaled the evidence and demonstrated conclusively that the critical facts were ADMITTED by CAT and Taggart.

6. **Rule 69 Does Not Grant Authority to Examine Non-Parties**. This Court makes an error when it cavalierly states that Hal Rosen could be asked questions about the assets and affairs of the non-parties - JMS Meadow and JMS Brook. Even Judge Bohling initially recognized that Rule 69 only requires "the judgment creditor" to appear and answer questions. Rosen, as a representative of JMS Meadow and JMS Brook, should not have been called to answer questions about the assets of these non-parties under Rule

69 This is a critical issue for trial practitioners We serve or defend against Orders in Supplemental Proceedings under Rule 69 all of the time There has to be precision in this Court's directions and rulings as to who can be required to attend, and the scope of the inquiry This Court's opinion in this regard significantly expands the scope of who can be brought in under Rule 69 It should only be the judgment debtor itself No one else And only the judgment debtor's assets should be the scope of the inquiry – not the assets of some other entity in which the judgment debtor may own some stock

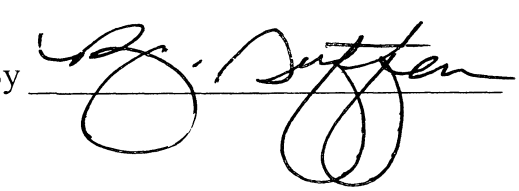
7 **Rosen Fully And Properly Answered All Relevant Questions Posed to Him** When Judge Bohling ruled that Rosen should appear and answer questions, Judge Bohling properly limited the inquiry However, after the deposition was taken, CAT complained that Rosen would not answer questions which Judge Bohling's prior ruling had clearly indicated would be "out of bounds " This Court mischaracterizes Judge Bohling's earlier ruling by stating that "the trial court had ordered Rosen to appear and provide CAT with full discovery of JMS Financial, JMS Hidden, *and other related entities' assets available for execution or that otherwise might become the basis for recovery* " That is not what Judge Bohling originally ruled Further, Rosen did in fact comply with Judge Bohling's first ruling When the second hearing was held - where Rosen was sanctioned – Rosen's deposition transcript was not even before the Court Bohling ruled based solely upon CAT's counsel's representations as to what happened – which were outrageously false This Court, just like Judge Bohling, obviously has not reviewed Rosen's deposition transcript Because – it it had – it would quickly become apparent that Rosen answered fully and in good faith all questions which were in the scope of what Judge Bohling had

previously ordered. Rosen should not have been sanctioned. THE RECORD does not support it.

8. **The Preliminary Injunction Was Wildly Extra-jurisdictional and Violative of Aspenwood's Due Process Rights**. The record does not reflect that Ms. Mona Burton acquiesced in the injunction. Ms. Burton objected to it and stated that she did not feel like it was proper. This Court entirely ignores the law of limited liability companies and the fact that creditors of members do not have the right to interfere with the internal affairs of a limited liability company. Further this Court's construction of Rule 69(q) to allow a trial court to effectively place a non-party into receivership is an breathtakingly broad expansion of a trial court's jurisdiction and power. Aspenwood did not hold any property of JMS', nor did it dispute that it owed any money to JMS. Further, Rule 69(q) only allows an injunction until " a judgment creditor" could "bring an action to determine such interest or claim and prosecute the same to judgment." Judge Bohling purported to take control over and direct what Aspenwood could do with its property and its affairs. This runs afoul of the plain language of Rule 69(q). The injunction as imposed was improper and in violation of Rule 69(q) and should be reversed.

DATED the 21st day of February, 2003.

Steffensen ❖ Law ❖ Office

By 

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of Feb, 2007, I caused two true and correct copies of the foregoing Brief to be X mailed, postage prepaid; and/or hand-delivered by ___fax and/or by ___courier; addressed to:

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