1993

TSI Partnership v. Penny Allred dba It's About Time : Reply Brief

Utah Court of Appeals

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930056 CA

IN THE UTAH COURT OF APPEALS

TSI Partnership, an Indiana Limited Partnership Plaintiff/Appellee vs. Penny Allred d/b/a About Time, Defendant/Appellant.	Case No. 930056-CA Priority: 15

APPELLANT'S REPLY BRIEF

On Appeal from Summary Judgment
in the Third Judicial District Court
Honorable James S. Sawaya, District Judge

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ARGUMENTS

I. IT WAS TS1'S DUTY TO SUPPLY HEATED AND CHILLED AIR TO ALLRED'S STORE, AND ALLRED HAS SHOWN BY AFFIDAVIT THAT IT DID NOT.

TS1 has attempted to confuse what is really a straight-forward issue. TS1's duty under the lease agreement was to supply heated and chilled air "to the premises." (R. 250) The "premises" are defined in the lease agreement as the 850 square feet of Allred's store. (R. 13, ¶ (c)) TS1 concedes that Allred installed the local delivery system to hook into TS1's central delivery system. (P. 23, Appellee's Brief)[1] The issue raised by Allred's Affidavit was whether TS1 had connected the "bay" where Allred's store was located with the central delivery system in the mall. (R. 237, ¶ 7) If it did not, Allred would not have gotten heated and chilled air, even if she had correctly hooked into the central delivery system.

Certainly, it was Allred's duty to "adapt" to the mall's central delivery system. (P. 25, Appellee's Brief) But that is not the question before the Court. This Court must determine if paragraph 7 of Allred's Affidavit has successfully

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[1]TS1 tries to argue that Allred failed to make this allegation in the court below. (P. 22, Appellee's Brief) Allred made the allegation in paragraph 3 of her counterclaim. (R. 71) However, it was unnecessary for Allred to do so, since TS1 later conceded the point in its reply memorandum. (R. 243, "[I]t is the Plaintiff's contention that the Defendant did connect her store to the HVAC system.")

controverted a necessary element of TS1's recovery, that is, whether TS1 supplied heated and chilled air to Allred's store. Allred said that it did not, and TS1 is correct in urging the Court not to weigh the evidence. (P. 23, Appellee's Brief) While it may seem "improbable" to TS1, Allred has raised a genuine issue as to a material fact precluding summary judgment in TS1's favor.

TS1 is left with the same lame argument it made in the trial court: Since it was Allred's duty to install a local delivery system, TS1 has no obligation for supplying heated or chilled air to her premises. Contrary to what TS1 seems to suggest (PP. 24-25), it was not Allred's duty to see that all the central delivery connections were made. All she was required to do was hook on to the central delivery system. It is for the trial court to decide if Allred properly did that.

II. ALLRED DID NOT NEED TO FILE AN AFFIDAVIT IN SUPPORT OF HER COUNTERCLAIM BECAUSE TS1'S SUMMARY JUDGMENT MOTION WAS BASED ENTIRELY ON ARGUMENTS OF LAW.

TS1's third point reveals a fundamental misapprehension of the common law of Utah and her Rules of Civil Procedure. There are two parts to a summary judgment: first, no genuine issue as to any material fact; second, moving party entitled to judgment as a matter of law. Rule 56(c), Utah Rules of Civil Procedure. The only factual allegations made by TS1 in

its second summary judgment motion were that Allred signed the lease agreement and the lease agreement was an integration. (RR. 360, ¶ 1; 361, ¶ 4) Neither of these facts were disputed. All the rest of the "facts" stated by TS1 were characterizations of provisions in the lease agreement (RR. 361-64) and were therefore arguments of law.[2]

TS1 has confused its motion for summary judgment with what has become known as a "Celotex" motion for summary judgment, after Celotex Corporation v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986). In such a motion, the moving party challenges the factual assertions made by the non-moving party in its pleadings. Then, if the non-moving party carries the burden of proving those factual assertions at trial, it must respond with evidence of its own.

But TS1 did not challenge the factual assertions in Allred's counterclaim. (RR. 360-64). In fact, its argument was premised on the truth of those allegations. It merely questioned whether as a legal matter Allred had plead facts sufficient to support a cause of action. Thus, it was not incumbent on Allred to put forward evidence of her own, but rather to argue the legal issues raised by TS1's motion.

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[2]It goes without saying that contract interpretation raises questions of law. Saunders v. Sharp, 806 P.2d 198, 200 (Utah 1991).

TS1 questions the sufficiency of Allred's allegations of "fraud in the inducement." Unfortunately for TS1, it did not raise this question in the court below (RR. 365-71), so this issue is not properly before the Court.[3]

TS1 cites only one Utah case in support of its proposition that "parol evidence is not...admissible to prove fraud." F.M.A. Financial Corporation v. Hansen Dairy, Inc., 617 P. 2d 327 (Utah 1980) does not stand for this proposition. In fact, it does not even mention "fraud." It does say that the parol evidence rule

> should not be applied with any such unreasoning rigidity as to defeat what may be shown to be the actual purpose and intent of the parties, but should be applied in the light of reason to serve the ends of justice.

617 P. 2d at 329.

As for the other two claims in Allred's counterclaim, TS1 has said nothing about the implied covenant of good faith

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[3]Even it had, it is clear that only one of the required elements is not plead: knowledge of the falsity of the representations. TS1 is wrong when it says there is no allegation of reliance. (R. 71, ¶ 3) There is no requirement that Allred say her reliance was "reasonable;" she alleged that she changed her position to her financial detriment and that is more than sufficient. See Mountain Fir Lumber Co., Inc. v. Employee Benefits Ins. Co., 679 P. 2d 296, 300 (Or. 1984). TS1 better do its homework when it says the claim is deficient for not stating "presently existing facts." (P. 31, Appellee's Brief) The Utah Supreme Court in Von Hake v. Thomas, 705 P. 2d 766 (Utah 1985) laid this one to rest and questioned the good faith of counsel who made the argument. 705 P. 2d at 770 & n. 2.

and fair dealing (Allred's Second Claim for Relief) and has not attempted to challenge the express provisions in the lease agreement upon which Allred relies for support (Allred's Third Claim for Relief).

III. ALLRED'S JURY TRIAL DEMAND IS NOT MOOT, AND THERE WAS NO BASIS FOR THE TRIAL COURT'S RULING THAT SHE MADE A KNOWING AND VOLUNTARY WAIVER.

The issue is not moot because if the trial court erred, this case will be remanded and there may be need for a trial.

The best that can be said about the fourth point in TS1's argument is that there is a question as to who carries the burden of proof in this matter. There is no Utah authority on the subject, and the authorities cited by the parties are conflicting. Compare Leasing Service Corporation v. Crane, 804 F. 2d 828, 833 (4th Cir. 1986) with K.M.C. Company, Inc. v. Irving Trust Company, 757 F. 2d 752, 758 (6th Cir. 1985).

However, the Court need not resolve this issue. TS1 concedes that no matter who has the burden, the trial court's ruling must be overturned if it has no "reasonable basis in the evidence." (P. 37, Appellee's Brief) We must consider whether the evidence in this regard was, as represented by TS1 to be, "ample."

On this issue, the tables are turned. TS1 did not attempt to controvert any of the factual allegations in Allred's Affidavit with an affidavit of its own. Rather, it rested on the erroneous legal proposition that knowledge of a jury trial waiver may be "presumed" by the signing of the contract. TS1 has now recognized that this was error and attempts to fashion an evidentiary basis out of Allred's own Affidavit. (PP. 37-38)

Allred may have been in business for four and a half years; may have been to college; and may have assumed a prior lease (though TS1 does not tell us if it also had a jury trial waiver). But there is nothing to controvert the singularly decisive allegation that she did not know the lease agreement had a jury trial waiver. (R. 146, ¶ 6) If this were truly an issue for the "trier of fact," as TS1 concedes (PP. 36-37), then the issue should have been "tried" on the merits and not by affidavit.

In reality, there was no evidentiary basis for the trial court's ruling. The trial court made no findings that would have supported the ruling. It is clear the trial court adopted TS1's legal proposition and therefore erred as a matter of law.

IV. THERE IS NO REQUIREMENT THAT OBJECTIONS TO ATTORNEYS' FEES REQUESTS BE IN THE FORM OF AFFIDAVIT, AND TS1 DOES NOT DENY THAT THE CERTIFICATION AND APPEAL WERE AT ITS INSTANCE.

Rule 4-505, Utah Code of Judicial Administration, requires that requests for attorneys' fees be by affidavit. However, there is nothing in Utah law requiring that objections to those requests likewise be by affidavit. Quite to the contrary, this Court in LMV Leasing, Inc. v. Conlin, 805 P. 2d 189 (Utah App. 1991) considered the objections of a party even when those objections were not in affidavit form. 805 P. 2d at 198 (motion to strike).

TS1 does not deny that the certification of its judgment and the appeal therefrom were instigated by TS1. TS1 wanted to execute on its judgment, but could not do so unless it was "final." Rule 69(a), Utah Rules of Civil Procedure. TS1 is the one who sought Rule 54(b) certification of the judgment. (R. 296) Allred did not believe that Rule 54(b) certification was appropriate, but was more concerned at the time with execution on the judgment that TS1 had already started. (R. 276) When certification was made,[4] Allred had no choice but to appeal. She fought the efforts of this Court to remit the case for lack

[4]Allred did not "consent" to certification. She merely signed the certifications as "approved to form," which is not the same as saying that she agreed or consented to their entry.

of appellate jurisdiction because of the investment of time and money she had made in the appeal.

But none of this answers the question asked by Allred. Why should she pay all of TS1's attorneys' fees for a certification and appeal that TS1 clearly wanted as much as she? TS1 blithely ignores the fact that it also resisted this Court's efforts to remit for lack of appellate jurisdiction. Each party should pay its own attorneys' fees for this fruitless appeal.

As for the attempted execution on Allred's supersedeas bond, TS1 would have the Court ignore that it agreed to execute by motion--with notice to Allred. (R. 322) TS1 tried to do it without motion and notice (R. 326), and Allred should not have to pay for TS1's unlawful efforts in this regard.

CONCLUSION

For the foregoing additional reasons, Allred asks this Court to reverse the trial court on its grant of summary judgment on TS1's complaint and Allred's counterclaim, with a direction that there be a trial by jury, if trial is needed. In the alternative, Allred asks the Court to reduce the second award of attorneys' fees to $3,110.00.

Respectfully submitted this 25th day of March, 1993.

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CERTIFICATE OF SERVICE

I hereby certify that I caused four true and correct copies of the within and foregoing APPELLANT'S REPLY BRIEF to be mailed, postage prepaid, this 25th day of March, 1993, to the following:

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