

2002

J. Scott Ockey v. Christena White : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Ockey v. White*, No. 20021073 (Utah Court of Appeals, 2002).
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IN THE UTAH COURT OF APPEALS

J. SCOTT OCKEY,

Plaintiff/Appellee,

vs.

CHRISTENA WHITE,

Defendant/Appellant.

Case No. 20021073
District Court No. 010909255

BRIEF OF APPELLEE

Appeal from Judgment of the Third District Court, Salt Lake County
Honorable Stephen Henriod Presiding

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FILED
Utah Court of Appeals

MAY - 5 2003

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Clerk of the Court

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STATEMENT OF ISSUES

1. Did the trial court err in denying defendant's Motion to Reconsider the trial court's entry of Summary Judgment in plaintiff's favor? This Court should apply an abuse of discretion standard of review. *See, e.g., Timm v. Dewsnup*, 921 P.2d 1381, 1386 (Utah 1996).
2. Does defendant's brief comply with Rule 24 of the Utah Rules of Appellate Procedure?
3. Did defendant properly raise before the trial court her claims now advanced on appeal?
4. Does any error established or claimed by defendant constitute reversible error?

STATEMENT OF THE CASE

The trial court granted plaintiff's Motion for Summary Judgment awarding plaintiff damages due to defendant's breach of a written lease agreement. Defendant then filed a Motion for Reconsideration, which was also denied.

FACTS

1. On October 18, 2001, plaintiff filed his Verified Complaint against defendant seeking defendant's eviction from premises she leased from plaintiff and a judgment for damages for breach of lease relating to defendant's complete nonpayment of rent. (District Court Record, pp. 10-14.)
2. Defendant was personally served with the Summons and Complaint on October 22, 2001. (Record, p. 56.)
3. Defendant, through legal counsel, filed an Answer and "Counterclaim" on October 26, 2001. Defendant also vacated the subject premises. (Record, pp. 17-22.) In filing the Answer and "Counterclaim," defendant did not appear specially or first raise by motion any

challenge to service. The one paragraph "Counterclaim" merely requests leave to file a counterclaim and states no affirmative claim against plaintiff, an unusual approach, indeed.

4. Plaintiff filed a Motion for Summary Judgment on July 11, 2002, supported by plaintiff's affidavit, seeking damages for defendant's breach of lease. (Record, pp. 23-37.)

5. On July 25, 2002, defendant, through legal counsel, filed a Motion to Enlarge the Time to Respond to Plaintiff's Motion for Summary Judgment requesting an additional 30 days in which to file a response. Defendant's motion cited three grounds for the requested extension: (1) defendant simultaneously filed a Motion to Dismiss based on alleged defects in service of process; (2) defendant was awaiting sentencing on her plea to a related criminal charge which, defendant claimed, may result in an order of restitution for the damages sought by plaintiff under his summary judgment motion; and (3) numerous, but unspecified, disputes in fact precluded summary judgment. (Record, pp. 41-42.)

6. On August 30, 2002, defendant responded to plaintiff's Motion for Summary Judgment by filing, through legal counsel, an "Objection to Plaintiff's Motion for Summary Judgment." This three page objection did not comply with Rule 4-501 of the Utah Rules of Judicial Administration and did not properly refute or dispute any of the material facts properly asserted in Plaintiff's Memorandum in Support of his Motion for Summary Judgment. The entire sum and substance of defendant's Objection was a passing and entirely unsupported reference to Rule 56(f) of the Utah Rules of Civil Procedure, along with an assertion that the Court should first resolve the Motion to Dismiss defendant had filed asserting procedural technicalities with service of process. (Record, pp. 57-59.)

7. Plaintiff filed a Reply to defendant's "Objection," a Memorandum in Opposition to Defendant's Motion to Dismiss, and submitted the pending motions to the trial court for decision. (Record, pp. 65-67.)

8. On October 16, 2002, the trial court issued its Minute Entry granting plaintiff's Motion for Summary Judgment, describing the basis for the court's ruling as follows:

No motion to dismiss has been filed as Defendant claims. Defendant has had adequate [time] to respond to the Motion for Summary Judgment, and she has failed to do so in any meaningful way, including her failure to contradict any of the Plaintiff's st. of facts.

(Record, p. 68).

9. The trial court's granting of summary judgment disposed of all claims asserted in this case. Nonetheless, defendant filed a Motion for Reconsideration, which the trial court denied.

10. In reviewing the trial court record for purposes of preparing this Brief, plaintiff's counsel discovered that defendant had, in fact, filed her Motion to Dismiss on July 25, 2002. Apparently, the trial court overlooked this filing. However, defendant failed to bring this oversight to the trial court's attention in her subsequent Motion to Reconsider.

11. Defendant's Statement of Facts in her brief is inaccurate in at least the following respect. There was no "default judgment" entered by the trial court. Rather, the trial court granted plaintiff's Motion for Summary Judgment following the trial court's rejection of defendant's "Objection" to the motion.

SUMMARY OF ARGUMENT

Defendant's challenges to service of process in this case are without merit. Defendant appeared in the case and consented to the jurisdiction of the trial court by filing an Answer and Counterclaim and a Motion for Extension of Time to respond to plaintiff's Motion for Summary Judgment before defendant ever filed a Motion to Dismiss based on alleged defects in service of process. Thus, defendant's challenge in this regard is without merit or, at most, constitutes harmless error.

Defendant's brief fails to comply with Rule 24 of the Utah Rules of Appellate Procedure by not citing to any record evidence, and not identifying any applicable standard of review. Further, the brief does not contain an accurate, logically arranged argument. Thus, the brief should be disregarded and defendant's appeal should be denied.

Finally, even if the Court wishes to consider the merits of defendant's claim that the materials filed with her procedurally improper Motion to Reconsider create a dispute in material facts, a closer examination demonstrates that the evidence is undisputed with respect to all of the material elements of plaintiff's claim, and the trial court did not err in ruling that plaintiff is entitled to judgment as a matter of law.

ARGUMENT

A. Appellant's Challenges to Service of Process are Procedurally and Substantively Without Merit.

Defendant's primary argument on appeal is that the trial court has somehow erred by failing to dismiss this matter or at least deny plaintiff's Motion for Summary Judgment based upon defendant's technical challenges to the service of a Summons and Complaint upon her. The fatal deficiency in this claim is obvious and simple: Defendant waived any defects in service and submitted to the jurisdiction of the trial court by filing an Answer and Counterclaim and a Motion for an Extension of Time before ever filing a Motion to Dismiss asserting these alleged defects.

Defendant admits that she was served with the subject pleadings, but nonetheless argues that such personal delivery did not constitute proper service under Rule 4 because the date was not endorsed upon the summons, the process server did not sign the summons, and the process server did not specifically indicate that she was serving process at that time. However, it is clear through defendant's own actions that she received proper notice and accepted service of the summons and complaint in this matter, and that she filed a timely response thereto. Specifically,

after receiving service of the summons and complaint, defendant promptly took the documents to her attorney who filed substantively responsive pleadings on defendant's behalf. Defendant also vacated the subject premises as demanded in these pleadings, and later filed a motion seeking additional time to respond to plaintiff's Motion for Summary Judgment.

Even assuming that all of defendant's technical complaints regarding service are accurate, reversal is not warranted. By appearing in the case through counsel and filing responsive pleadings, Utah law is clear that defendant has waived all deficiencies in service and consented to jurisdiction. In *Barlow v. Capps*, 821 P.2d 465, 466 (Utah Ct. App. 1991), this Court held that the filing of a motion to dismiss based on *forum non conveniens* is a concession to personal jurisdiction. "An appearance by the defendant for any purpose except to object to personal jurisdiction constitutes a general appearance In fact, by asking the court for any affirmative relief, a defendant thereby submits to that court's jurisdiction." *Id.* at 466-467. *See also, e.g., State v. Hendricksen*, 546 P.2d 901, 902 (Utah 1976); *Sorenson v. Sorenson*, 417 P.2d 118, 119 (Utah 1966).

Defendant also believes that since no proof of service was immediately filed with the Court, service is ineffective. However, Rule 4(e)(3) of the Utah Rules of Civil Procedure clearly provides that "[f]ailure to make proof of service does not affect the validity of the service." *See also, Redwood Land Co. v. Kimball*, 433 P.2d 1010 (Utah 1967) (only purpose of proof of service is to supply court and parties information that service has been effected).

Accordingly, defendant's claims in this regard are utterly without merit.

Defendant will likely argue that reversal is required because the trial court failed to rule on her Motion to Dismiss. However, any problem here is truly harmless error. It is beyond dispute, based on the record, that defendant has consented to jurisdiction and waived any defects in service by appearing in this case. Thus, this case should not be remanded to the trial court

since defendant's Motion to Dismiss, based solely on alleged deficiencies in service, lacks merit on its face.

B. Defendant's Brief Fails to Comply with Rule 24 of the Utah Rules of Appellate Procedure and Should be Disregarded or Stricken.

Defendant's Brief contains not one citation to the record, nor does it identify the applicable standard of review. Further, defendant's entire argument that the trial court's granting of summary judgment was improper due to disputes in fact consists of three sentences. (Defendant's Brief, page 12.) Basically, defendant's argument is that the pleadings filed with her Motion for Reconsideration exposed the existence of material disputes of fact which the trial court should have considered or which should have convinced the trial court to reverse the summary judgment previously entered against her. Rather than detailing for this Court and plaintiff's counsel exactly which facts are disputed and referring specifically to record evidence establishing such dispute, defendant merely leaves the Court to ferret out this information without further guidance. This presentation clearly does not comply with the requirements of Rule 24 of the Utah Rules of Appellate Procedure, which requires briefing to include citations to the record within an accurate, logically arranged argument. Given defendant's complete failure to follow Rule 24, defendant's Brief should be stricken and not considered. *See, e.g., State v. Wareham*, 772 P.2d 960, 996 (Utah 1989); *Phillips v. Hatfield*, 904 P.2d 1108, 1109-1110 (Utah Ct.App. 1995); *Christensen v. Munns*, 812 P.2d 69, 72 (Utah Ct.App. 1991), and *State v. Yates*, 834 P.2d 599, 602 (Utah Ct.App. 1992).

This Court recently rejected an appeal from a summary judgment under substantially similar facts. In *Brown v. Wanlass*, 18 P.3d 1137 (Utah Ct.App. 2001), the trial court granted summary judgment against Brown based largely upon his failure to file any of the materials required by Rule 56(e) of the Utah Rules of Civil Procedure to establish the existence of a genuine dispute of fact in response to a motion for summary judgment. Rule 56(e) provides:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

On appeal, Brown contended, but only quite generally, that there was a dispute of fact somewhere in the record. However, Brown's brief, similar to defendant's brief, failed to provide any detailed reasoning or citation to record evidence to support the contention that material facts were in dispute. As a result, the Court simply elected not to address Brown's arguments because they were not properly supported by record evidence and logical argument. *Id.* at 1138-1139. *See also, e.g., State v. Thomas*, 961 P.2d 299, 305 (Utah 1998) (failure to cite pertinent authority and provide a reasoned analysis renders a brief inadequate when it essentially shifts the burden of research and argument to the reviewing court); and *State v. Smith*, 995 P.2d 14, 16, *cert. denied*, 4 P.3d 1289 (Utah 2000) (brief that fails to cite legal authority impermissibly shifts the burden of analysis to the reviewing court and violates Rule 24 of the Utah Rules of Appellate Procedure).

Because defendant's Brief does not comply with Rule 24, the Court should refuse to address the arguments she attempts to raise on appeal.

C. The Record Evidence, Even That Presented Along With Defendant's Motion for Reconsideration, Does Not Create a Genuine Dispute of Material Fact.

The only "evidence" defendant ever attempted to submit in opposition to plaintiff's Motion for Summary Judgment was filed after the court had ruled and along with defendant's Motion for Reconsideration, citing only *Salt Lake City Corp. v. James Constructors, Inc.*, 761 P.2d 42 (Utah Ct.App. 1988), as the legal basis for such relief. Defendant was not entitled to file a "Motion for Reconsideration" because the summary judgment completely resolved this case.

Thus, there was no Rule 54(b) grounds for the trial court to "readjust" its ruling, contrary to the facts in *James Constructors*.¹

Should the Court elect to forgive the inadequacy of defendant's brief and the numerous other deficiencies plaguing her claims, her challenge also lacks substantive merit. The record evidence, even that filed with defendant's improper Motion for Reconsideration, does not create a material dispute in fact.

This simple matter involves plaintiff's efforts to collect damages on a lease agreement which defendant breached by a complete nonpayment of rent despite her admitted occupancy of the premises. Plaintiff moved for summary judgment on July 11, 2002, properly supported with plaintiff's affidavit. Defendant's first response was not substantive, but merely sought an extension of time to respond.

Defendant's second response, by way of "Objection," also does not properly dispute any facts as required by Rule 56(e) and Rule 4-501 of the Utah Code of Judicial Administration.

On October 16, 2002, the trial court granted plaintiff's motion, finding that defendant had had adequate time to respond to the motion yet failed to do so in any meaningful way. This ruling completely disposed of all claims in the case.

Defendant now requests this Court to reverse the trial court's refusal to reconsider its ruling based upon her later submission of October 31, 2002. Defendant claims that she did not present an adequate response to plaintiff's motion in a timely manner due to the neglect of her legal counsel, an entirely undeveloped basis for appeal. Of course, the substantive merits of the

¹ It is acknowledged that "Motions for Reconsideration" can be construed, under compelling circumstances, as proper motions under other Rules of Civil Procedure, such as Rules 59 and 60. However, even if defendant were now to raise such a claim here, her Motion does not meet the requirements for substantive relief under any rule. Further, even assuming her Motion was construed to be procedurally proper as a recognized post-judgment proceeding, defendant failed in her Motion to point out to the trial court that she had, in fact, filed her Motion to Dismiss, which would have allowed the trial court an opportunity to address that motion on its merits prior to this appeal. If this Court chooses to substantively recognize defendant's Motion for Reconsideration under some uncited Rule, the Court should also consider defendant's failure to raise the trial court's mistaken belief as to the filing of the Motion to Dismiss as precluding her challenges on that issue.

appeal necessarily depends on a showing that defendant has a legitimate, properly presented defense which the trial court has not considered. Distilling the pleadings submitted in support of defendant's Motion for Reconsideration, the "facts" she now urges upon the Court in support of her appeal can be summarized as follows:

1. There is a dispute as to the form of the written lease agreement which governed defendant's admitted occupancy of the subject premises, but which, even if true, would not affect the amount of rent defendant agreed to pay; and

2. Plaintiff allegedly and unsuccessfully suggested a relationship with defendant and her friends in lieu of payment of rent, but no such relationship occurred.

Significantly, defendant's belated submissions to the trial court still do not provide any legitimate evidence to contest the following material facts, which are all that is necessary to sustain summary judgment in plaintiff's favor:

1. Defendant occupied the subject premises during the time period alleged in plaintiff's motion for summary judgment;

2. Defendant's occupancy was subject to a lease agreement, and there is no dispute as to the material terms of that agreement, specifically the amount of rent due, and the other damages awarded to plaintiff; and

3. Defendant has paid nothing to plaintiff even though she occupied the premises for more than three months.

Defendant simply failed to timely submit any affidavit properly establishing any "facts" which would justify denial of summary judgment or reconsideration of the Court's ruling. The actual affidavit defendant submitted in support of her Motion for Reconsideration contains only three short paragraphs. The moving papers defendant filed in opposition to the motion for summary judgment, containing entirely unsupported assertions, are clearly insufficient to create

legitimate disputes of fact. As it now stands, there is no sworn, record evidence that defendant failed to sign the lease agreement attached as Exhibit A to plaintiff's complaint, or that any "facts" alleged in her moving papers are properly supported.

There is no legitimate basis upon which to challenge the entry of summary judgment or the trial court's refusal to reconsider its ruling based upon alleged disputes of fact. Simply put, this appeal lacks any merit whatsoever, and should be summarily rejected.

D. Defendant's Constitutional Arguments are Frivolous.

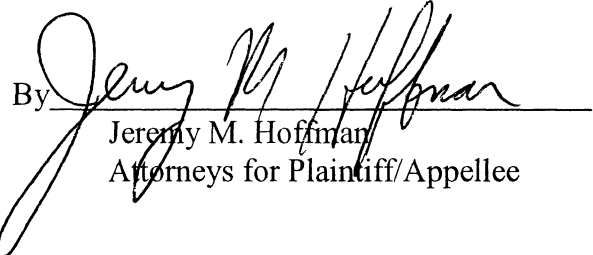
Defendant's final arguments based on alleged violations of her Constitutional rights are entirely frivolous, were not raised below, and should not now be considered.

CONCLUSION

For the above reasons, plaintiff urges this court to affirm the trial court's grant of summary judgment, summarily reject defendant's appeal, and remand the matter to the trial court for the determination of an award of attorneys' fees and costs on appeal to plaintiff pursuant to the written lease at issue and the trial court's prior determination that plaintiff is entitled to an award of fees.

DATED this 5th day of May, 2003.

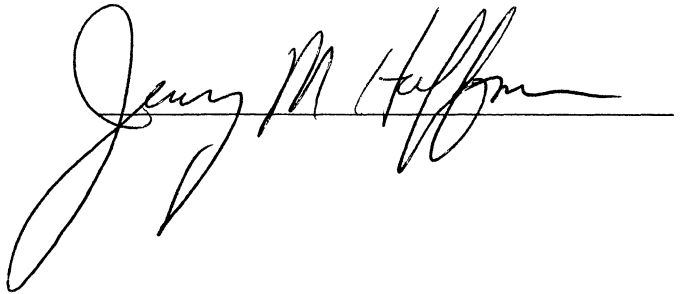
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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of May, 2003, I mailed a true and correct of the foregoing Brief of Appellee to the following:

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A handwritten signature in black ink, reading "Jerry M. Hoffman", is written over a horizontal line. The signature is cursive and fluid.