2018

JAMES PRIEUR, Petitioner and Appellant, vs. THE ENSIGN GROUP, INC., Defendant and Appellee. : Reply Brief

Utah Court of Appeals

313

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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JAMES PRIEUR,	:	
	:	
Petitioner and Appellant,	:	
	:	Appeal No. 20180704-CA
vs.	:	
	:	
THE ENSIGN GROUP, INC.,	:	
	:	
Defendant and Appellee.	:	

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APPEAL FROM A JUDGMENT OF THE FOURTH DISTRICT COURT OF UTAH COUNTY, UTAH, HON. JAMES BRADY

APPELLANT'S REPLY BRIEF

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TABLE OF AUTHORITIES CITED
CASE AUTHORITY

RULES CITED

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ARGUMENT

POINT I

THE COURT'S DECISION TO REFUSE TO RATIFY THE PARTIES STIPULATED-TO AGREEMENT WAS NOT HARMLESS

Appellee argues that the Court's decision to ratify the stipulated agreement was harmless. In support of their argument, Appellee attempts to note that the Court's findings in *Birch* and *Zundel* are inapposite to the case at bar. Appellant disagrees as the nature of a stipulated agreement is contractual in nature and does not vary if the stipulation is on a waiver of lien rights, a property settlement, or, as in the case at bar, an agreement between attorneys.

It is settled that stipulations are conclusive and binding on the parties, unless good cause is shown for relief. *See Higley v. McDonald,* 685 P.2d 496, 499 (Utah 1984). This court "cannot overlook or disregard stipulations which are absolute and unequivocal. Stipulations of attorneys may not be disregarded or set aside at will." *L.P.S. by Lutz v. Lamm,* 708 F.2d 537, 539 (10th Cir.1983). We find that having stipulated to the trial court's actions, the Estate may not now complain about them on appeal. *See Leaver v. Grose,* 610 P.2d 1262, 1264 (Utah 1980). *DLB Collection Tr. by Helgesen & Waterfall v. Harris*, 893 P.2d 593, 595 (Utah Ct. App. 1995).

In fact, this Court has previously analyzed the nature of stipulated agreements between counsel as it relates to the extension of discovery periods in *Townhomes at Pointe Meadows Owners Ass'n.*

In *Townhomes*, as in the case at bar, Plaintiff argues that the district court abused its discretion in denying the Association's motion to extend the discovery deadlines and ordering summary judgment because the Association had a reasonable basis for failing to comply with the deadlines to name expert witnesses—that the defendant's counsel had agreed to an extension of the deadlines. *Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC*, 2014 UT App 52, ¶ 10, 329 P.3d 815, 818. (Superseded by Rule on other grounds).

The Court ultimately concluded that the District Court did not abuse its discretion, because Plaintiff in that matter had only reached a timely stipulation with one of the named parties, not all of them. "We agree with the district court that it was not reasonable for the Association to rely on the stipulation of only some of the defendants in this complex, multi-party litigation in choosing to let its obligations under the amended case management order lapse." *Id.*

In the instant case, as noted in Appellant's initial Motion, Appellant repeatedly relied on proposals brought by Appellee's Counsel to postpone discovery in an effort to forego expending costs in discovery. Appellee approached Appelllant and expressed an interest in attempting to mediate this case prior to incurring expert discovery costs. (R. 410-425). The parties scheduled a mediation to take place on July 11, 2016, which was postponed at the request of defense counsel for personal reasons. *See Id.*

The parties were able to reschedule the mediation to take place on August 25, 2016, with Lew Quigley as the mediator. However, the parties were unable to reach an agreement on the date of the mediation, and Mr. Quigley continued communicating with both parties in an attempt to resolve the matter without further litigation.

Toward the end of 2016, Mr. Quigley informed Appellant's previous counsel, Brandon Kidman, that settlement on this case would be unlikely. *See Id.* Mr. Kidman

then reached out to Defendants' counsel in order to come up with a new discovery plan now that a resolution to the case without proceeding with litigation was unlikely. See Id.

The parties were able to finalize a new Stipulation and submitted a proposed case management order to the Court that would assist in allowing the case to move forward. (R. 120-122). Both parties anticipated that expert discovery would not begin until early 2017. Id. The parties anticipated that Plaintiffs would disclose their experts on February 28, 2017. *Id.*

Time and time again Appellant relied on the proposals of Appellee to delay litigation in this matter. Then, prior to the agreed upon deadline, Appellee brought its Motion for Summary Judgment.

The Court's findings in this matter were not harmless. If the agreed upon deadlines had been ratified by the Court, expert disclosures would have been tiely made prior to February 28, 2017. There would have been no basis for the Court's summary judgment order as expert testimony would have been a genuine issue of material fact.

Appellee has profited based upon Appellant's, perhaps naïve, reliance on their insistence that discovery be postponed. Appellant possibly should have named their expert witnesses in accordance with the Court's scheduling order—but based upon their reliance on the verbal, and later signed, agreements with Counsel, Appellant

understandably relied, to their detriment upon their agreement with Appellee.

The case at bar is distinguishable from this Court's finding in *Townhomes* as there was no failure by Appellant to reach stipulations with all opposing parties. Appellant had multiple agreements in place with the Defendant in the underlying case. As such, the Court abused its discretion in overlooking the reasonable basis for Appellant's failure to timely name expert witnesses.

Appellee's Brief fails to argue against Appellant's argument that the Court's actions were arbitrary and capricious as there was no motion by Appellee to rescind their stipulation:

> [A] court has the discretion to set aside a stipulation under certain conditions. **First, the party seeking relief from the stipulation must request it by motion from the trial court**. Second, the motion to repudiate the stipulation must be timely filed. Third, it must show that the stipulation was **"entered into *inadvertently* or *for justifiable cause.*"** Inadvertence cannot be the basis for repudiation when the mistake was "due to failure to exercise due diligence, [or if it could] have been avoided by the exercise of ordinary care." We have also noted that "[i]t is unlikely that a stipulation signed by counsel and filed with the court was entered into inadvertently." Fourth, the lower court must state its basis for relieving the parties of the

stipulation. ("In the absence of any *articulated* 'justifiable cause,' we must reverse the withdrawal of the stipulation." *Yeargin, Inc. v. Auditing Div. of Utah State Tax Comm'n*, 2001 UT 11, ¶ 21, 20 P.3d 287, 293 (Internal Citations Omitted) (Emphasis Added).

The Court's decision to terminate discovery in the matter was unwarranted as the parties were of one accord as to the need for further discovery. Based upon this unanimity of purpose of the parties and the lack of any need for judicial determination by the Court, the Court should have allowed the parties' stipulated-to agreement to stand and their failure to ratify the agreement between the parties was an abuse of discretion.

POINT II

APPELLANT PROPERLY PRESERVED ARGUMENTS AS TO SUMMARY JUDGMENT AND NEW TRIAL

Approximately half of Appellee's Brief is devoted to arguing that Appellant's failed to timely preserve for appeal arguments against the Trial Court's Order of Summary Judgment and Order for New Trial. This argument is defeated by reference to the record.

As a preliminary note, Appellant apologizes for not addressing this issue in its initial brief. As will be noted below, it was clear that these arguments were preserved. However, Appellant asks the Court to entertain Appellant's argument on

this matter as it was only raised in Appellee's brief. As the Court has noted:

> [F]airness to the respondent is not a concern if it is the respondent who first raises an issue in the opposing brief. In fact, our appellate rules expressly direct an appellant to "answer[ ] any new matter set forth in the opposing brief." Utah R.App.P. 24(c). Therefore, if an appellant responds in the reply brief to a new issue raised by the appellee in its opposing brief, the issue is not waived. This is also generally the rule with other courts that have considered this issue.

Brown v. Glover, 2000 UT 89, ¶ 24, 16 P.3d 540, 545.

Appellee made a similar argument before the trial Court, arguing that Appellant had not brought its Motion for a New Trial in a timely manner after the Court's order of Summary Judgment. In its July 26, 2018 Order, the Court noted that Appellant's Motion for New Trial was submitted in a timely manner:

> Defendants argue Plaintiffs' motion is untimely because it was not filed within 28 days following the Court's ruling which granted summary judgement against Plaintiffs. Case law does not support Defendants' position on this issue.
>
> A Rule 59 motion is timely if it is filed within 28 days of the entry of judgment. Rule 58A identifies when a judgement is filed. Rule 54 defines what a judgment is. The Court granted Defendants

motion for summary judgement on April 12, 2017. That ruling dismissed all of Plaintiffs' claims against all served defendants. However, the ruling did not resolve all claims against all defendants as required by Rule 54. There remained one unserved defendant potentially subject to Plaintiffs' claims.

In *York v. Performance Auto, Inc.,* 2011 UT App 257, ,12, 264 P.3d 212, the Appellate Court ruled:

> Under *Hunter,* the order of May 28, 2009, dismissing [a named and served party] as a defendant in this case is not a final order. By dismissing the only served co-defendant, the trial court did not dispose of the case but converted it into an action against the remaining unserved defendants. It may well be that service on the unserved defendants is now impracticable or legally foreclosed. Nevertheless, until the trial court enters an order concluding the litigation as to all litigants, including unserved defendants, York has no final order from which to appeal.

As in *York,* in the present case, Defendants' motion for summary judgment did not result in a judgment or final order, only the dismissal of the served parties. When Plaintiffs' claims against

the remaining party were dismissed on March 30, 2018, all issues against all parties were resolved, and the time for filing post judgment motions and/or appeals began to run. Plaintiffs filed their motion for a new trial on April 27, 2018, the 28th day following the order. Plaintiffs' motion is timely.

The Trial Court correctly noted that Plaintiffs' Motion for New Trial based upon the Summary Judgment deficiencies presently before the Appellate Court was not required until all parties had been disposed of in the trial court. Based upon binding case law in *York*, Plaintiff appropriately preserved its rights to appeal the Court's Summary Judgment Order and Refusal to Grant a New Trial, as those issues were not ripe for Appeal until March 30, 2018.

Therefore, Appellant notes that it appropriately and timely preserved its right to appeal this matter by virtue of their Motion for New Trial on April 27, 2018. As such, the Court is warranted in making a finding on the merits.

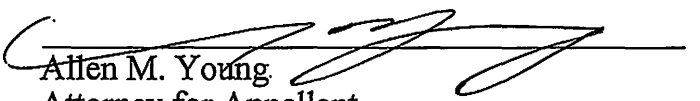
CONCLUSION

This case is before this Court on review of the order of Summary Judgment granted against Appellant by the Court under Rule 56(a). Petitioner and Appellee had a fully executed stipulation which the Court chose not to ratify. There is no compelling reason to refuse ratification of the parties' stipulation. As such, the Court's order of summary judgment should be reversed, and the matter should be

remanded to the District Court for an evidentiary hearing.

DATED this 20th day of March, 2019.

BIGHORN LAW.



Allen M. Young
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2019, Appellant served a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** upon the parties listed below via email.

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CERTIFICATE OF COMPLIANCE

I, Allen M. Young, certify that this Brief complies with URAP 24(a)(11)(A) paragraph (g), governing the number of pages or words in the instant reply brief.

I also certify that this Brief complies with Rule 21, governing public and private records.

Allen M. Young
Attorney for Appellant