

1983

Claron D. Bailey v. Deseret Federal Savings And Loan Association : Reply Brief

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IN THE SUPREME COURT
OF THE STATE OF UTAH

CLARON D. BAILEY,)	
)	
Plaintiff-Respondent,)	
)	
v.)	Case No. 18961
)	
DESERET FEDERAL SAVINGS AND)	
LOAN ASSOCIATION,)	
)	
Defendant-Appellant.)	

REPLY BRIEF

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT
COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE HOMER F. WILKINSON, PRESIDING

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FILED

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REPLY BRIEF

Respondent's Brief failed to argue the points of his cross-appeal. Further, his Brief discussed in detail an Affidavit of James R. Ivins. Appellant would like to take the opportunity of this Reply Brief to discuss these two points.

POINT I: RESPONDENT'S FAILURE TO BRIEF HIS CROSS-APPEAL SHOULD RESULT IN A DISMISSAL OF CROSS-APPEAL.

On February 4, 1983, and pursuant to Rule 74(b) and 75(d), Utah Rules of Civil Procedure, Respondent filed his Statement of Respondent's Points on Cross-Appeal. The Respondent also filed that day a Respondent's Designation of Record on Appeal. Said Designation requests that the transcript of the testimony of all witnesses at trial be

filed. However, subsequent to those filings, Respondent has failed to take any of the necessary steps to perfect his cross-appeal.

Apparently, Respondent's assignment of error on cross-appeal is that the lower court improperly found that Appellant's reasonable attorney's fees and costs were \$3,200.00. But, Respondent does not brief this point on appeal. Respondent cites no law or facts to support his view that the finding of \$3,200.00 was improper.

The failure of Respondent to brief his cross-appeal makes it virtually impossible for Appellant to reply. Thus, Respondent's cross-appeal should be dismissed with prejudice.

POINT II: THE AFFIDAVIT OF RESPONDENT'S COUNSEL IS IRRELEVANT.

Both Respondent's Motion for Summary Affirmation and his Brief rely heavily upon a document entitled "Affidavit in Opposition to Motion for Summary Judgment" (R. 62-65). This document is an affidavit of Respondent's own attorney. The affidavit contains mostly hearsay, legal conclusions and self-serving comments. Thus, the Affidavit should not have been relied upon by the District Court in its decision to deny Appellant's Motion for Summary Judgment, and it should not be relied upon by this Court to either reverse or affirm the District Court's Judgment.

An examination of the Affidavit, paragraph by paragraph, reveals the worthlessness of that Affidavit. The

evidence presented in in Paragraph 1 violates DR5-101(B), the Code of Professional Responsibility. Paragraph 2 contains evidence that is irrelevant to any issue in District Court or on appeal. Paragraph 3 states a legal conclusion. Paragraphs 4 and 5 of the Affidavit are irrelevant to any issues before the District Court or on appeal. Most of the information contained in Paragraphs 6, 7 and 8 of the Affidavit is information over which a Court can take judicial notice by reviewing the Court documents referred to in the Affidavit.

The final two paragraphs of the Affidavit have been quoted by Respondent in his Brief. Paragraph 9 is essentially a hearsay statement of what the U.S. Bankruptcy Judge Ralph R. Mabey intended by the dismissal of Respondent's Complaint. Not only is the statement hearsay, but it is incompetent evidence. The U.S. Seventh Circuit Court of Appeals ruled that a "court will not take evidence from the judge in a earlier suit to find our what his findings really meant . . .; the parties ought to be able to rely on what the judgment says in guiding their behavior." Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F. 2d 466, 470 (7th Cir., 1982). Judge Mabey dismissed Respondent's Complaint pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure. This is a dismissal with prejudice under Rule 41(b), Federal Rules of Civil Procedure. Appellant should be allowed to rely upon such a dismissal as final and dispositive of the issues raised by Respondent.

The last paragraph of the Affidavit is also a series of hearsay statements. Additionally, the bankruptcy trustee's interpretation of the Order allowing Appellant to proceed with its foreclosure sale is irrelevant. Just as the Bankruptcy Judge's dismissal, the Order speaks for itself.

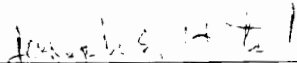
CONCLUSION

The United States has a dual system of courts. We have a federal court system with limited, and sometimes exclusive, jurisdiction. We have a state court system with general jurisdiction. In this case, the Respondent properly invoked the jurisdiction of the U.S. Bankruptcy Court. However, the Respondent lost his case when the Bankruptcy Judge dismissed his Complaint with prejudice. The Respondent then filed a Complaint in state District Court. Such a filing ignored the res judicata effect of the dismissal of the Complaint in Bankruptcy Court and the exclusive jurisdiction of the Bankruptcy Court. For these reasons, Appellant respectfully requests that this Court reverse the Judgment of the District Court.

DATED this 26th day of September, 1983.

GARRETT AND STURDY

By


Joseph E. Hatch

CERTIFICATE OF MAILING

I hereby certify that two correct copies of the foregoing REPLY BRIEF were mailed, postage prepaid, this 26th day of September, 1983, to:

J. Steven Newton, Esq.
NEWTON & IVINS
1325 South Main Street
Suite 201
Salt Lake City, Utah 84115



Maureen Kelly and
William Maiben
2774 Wardway Drive
Salt Lake City, Utah 84117
(801) 278-1440

IN THE SUPREME COURT OF THE STATE OF UTAH

Maureen Kelly and William Maiben, :
 :
 Plaintiffs-Appellants, : PETITION FOR A REHEARING
 :
 v. :
 :
 The State of Utah et al, : No. 18962
 :
 Defendants-Respondents. :

Pursuant to Rule 76(e), the Plaintiffs and Appellants petition the Supreme Court for a rehearing, on the grounds that the Appellants were not given an opportunity to respond to Respondents' Motion for Summary Disposition within ten days (as required by Rule 73B(c)), and that the record in Burgers v. Maiben shows that Appellant William Maiben was imprisoned on February 10, 1983, solely in order to prevent him from filing a timely response to Respondents' Motion for Summary Disposition.

The record in Burgers v. Maiben, Civil No. C81-735, shows that Judge Timothy R. Hanson sentenced Appellant William Maiben to thirty days in jail on February 10, 1983, but offered to suspend the jail sentence if Appellant William Maiben would agree not to file any more legal pleadings in either the District Court or the Supreme Court. The Appellant, knowing that his response to the Motion for Summary Disposition was due in ten days, refused to make that agreement, and considered the Court's offer an attempt to obstruct justice. The Appellant was then imprisoned. While in the County Jail, Appellant was denied access to his own legal pleadings and was denied access to a copy of the Rules of Civil Procedure, in violation of the posted jail rules.

Appellant William Maiben considers his imprisonment to be a deliberate obstruction of justice on the part of Judge Timothy R. Hanson, and an attempt on the part of Judge Hanson to conceal previous wrongdoing on the parts of several Justices of the Utah Supreme Court, who have been named Defendants and Respondents in the present appeal.

The Appellants have also moved that the record in Burgers v. Maiben, Civil No. CB1-735, be admitted. This record will clearly show not only that Judge Hanson intended to obstruct justice when he imprisoned William Maiben on February 10, but that he admitted at the time, and for the record, that this was his reason for doing so.

The Brief in support of this Petition for a Rehearing has been incorporated into the Appellants' Brief, and is filed herewith.

Dated this 8th day of April, 1983.

William Maiben

William Maiben for
the Appellants

CERTIFICATE

A copy of the Petition for a Rehearing and of Appellants' Motion to Admit the Record in Burgers v. Maiben was served on each of the Attorneys for the Respondents this 8th day of April, 1983.

William Maiben