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Mark Hernandez v. Kelly S. Baker dba Performance Auto and Marine Supply Corp.; and Does II through X : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MARK HERNANDEZ, Plaintiff/Appellee, v. KELLY S. BAKER dba Performance Auto & Marine Supply; PERFORMANCE AUTO & MARINE SUPPLY CORP.; and DOES II through X, Defendants/Appellants.	Case No. 20030753-CA

On appeal from an order of the Third District Court for Salt Lake County
The Honorable Stephen L. Henriod

APPELLANTS' REPLY BRIEF

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REPLY TO HERNANDEZ'S ARGUMENTS

I. HERNANDEZ ARGUES FOR A MERITORIOUS DEFENSE STANDARD THAT IGNORES CLEARLY ESTABLISHED PRECEDENT.

It should be noted as a preliminary matter, that Hernandez does not dispute that where, as here, a trial court considers the issue of a meritorious defense without specifically ruling on the question of whether there was a sufficient excuse under Rule 60(b), the existence of a sufficient excuse is implied. Thus, Hernandez has conceded that because the trial court specifically ruled on the issue of Baker's meritorious defenses, Baker has satisfied the excuse and timeliness prongs of Utah R. Civ. P. 60(b). Therefore, the only question is whether Baker presented a meritorious defense as a matter of law.

Addressing this issue in Points I and II of his brief, Hernandez asks this Court to apply a meritorious defense standard that ignores clearly established precedent. Hernandez asserts that Erickson v. Schenkers Int'l Forwarders, Inc., 882 P.2d 1147 (Utah 1994), Lund v. Brown, 2000 UT 75, 11 P.3d 277, and State ex. rel. Dep't of Social Services v. Musselman, 667 P.2d 1053 (Utah 1983) provide a standard under which "undisputed material" facts supporting a judgment render a defense unmeritorious. (Br. at 11.) In essence, he argues the standard for a meritorious defense should be the same as a motion for summary judgment. (Br. at 16.) He further asserts that courts should "look outside the pleadings" to make this determination. (Br. at 16.)[1]

[1] Curiously, Hernandez mentions at lease twice that Baker did not file a "verified answer" to his verified complaint. (Br. at 5, 17.) The undersigned is unaware of any requirement in the rules of civil procedure or elsewhere—and Hernandez fails to point to any—that requires a "verified answer" be made in response to a "verified complaint."

His assertions are erroneous. First and foremost, Hernandez fails to cite a single authority, and the undersigned is unaware of any, in which the court has held that a motion to set aside should be analyzed in the same manner as a motion for summary judgment. Second, Hernandez asks this Court to weigh the evidence and decide the merits of the case. This is not the meritorious defense standard.

Rather, the case law is clear, to show a meritorious defense, the law merely requires a simple determination of whether the defenses proffered, if proven at trial, would preclude recovery on the claims asserted by the plaintiff. See Lund, 2000 UT 75 at ¶¶28-29; Erickson, 882 P.2d at 1148. This is so regardless of whether the defenses are proffered in the form of general denials or more specific affirmative defenses. See Erickson, 882 P.2d at 1149 & n.1. Baker's opening brief goes through the allegations in the verified complaint one by one, and for each, points out a meritorious defense that, if shown, would preclude recovery at trial. (Appellants' Br. at 13-17.)

Furthermore, the Utah Supreme Court has "made it clear that a party need not actually prove its proposed defenses to meet [the meritorious defense] standard." Lund, 2000 UT 75 at ¶29. Whether or not Baker can ultimately prevail on his defenses is an issue for a trial on the merits; not for determining whether the defense is meritorious. Thus, it is improper for Hernandez to ask this Court to decide the merits of the underlying case, and Hernandez's attempt to get this Court to view the letter from Baker's previous attorney as the smoking gun evidence and, in essence, conduct its own evidentiary hearing is inappropriate and unsupported by law.

Furthermore, Hernandez's invitation to this Court to "look outside the pleadings" is contrary to the Utah Supreme Court's admonition to look only at the pleadings. See Erickson, 882 P.2d at 1148 (holding "the Court should only examine the defendant's proposed answer and determine whether as a matter of law it contains a defense which is entitled to be tried." (quoting Musselman, 667 P.2d at 1058 (Howe, J., concurring)).

Moreover, Hernandez's argument that "pleading practice [will be pushed] into ethically shady areas where good will becomes lost in the murk[]" (Br. at 19-20) by allowing general denials to stand as meritorious defenses not only ignores clearly established supreme court precedent, it also ignores Rule 11. See Utah R. Civ. P. 11(b)(2) (stating: "By presenting a pleading . . . an attorney . . . is certifying that . . . the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law"). It is Rule 11, not the meritorious defense standard, which is meant to prevent any foray into dark places.

In sum, Baker has a meritorious defense. Hernandez has not shown otherwise.

II. HERNANDEZ'S SECTION ON PUNITIVE DAMAGES SHOULD BE IGNORED.

Hernandez spends considerable time attempting to justify the trial court's imposition of punitive damages. Baker has set forth a meritorious defense to the same. (Appellants' Br. at 16-17.) On appeal of a Rule 60(b) order, the appellate court is not concerned with nor does it reach the merits of the underlying judgment. See Franklin

Covey Client Sales, Inc. v. Melvin, 2000 UT App 110, ¶19, 2 P.3d 451 (stating "appeal of a Rule 60(b) order addresses only the propriety of the denial or grant of relief[, it] does not . . . reach the merits of the underlying judgment from which relief is sought."). Thus, whether or not punitive damages were justified in the trial court's underlying judgment is immaterial to this appeal.

Therefore, Point III of Hernandez's brief should simply be ignored.

III. HERNANDEZ'S ATTEMPT TO EVADE HIS FAILURE TO SIMPLY FILE HIS AMENDED COMPLAINT IS UNAVAILING.

Hernandez makes several arguments in support of this Court upholding the judgment against Performance Auto. However, for the reasons set forth below, his arguments are inapposite and unavailing.

First, several issues regarding the "facts" Hernandez relies on must be dealt with. Hernandez asserts that,

> little would have been accomplished by attempting to go through the motions of serving a summons on the Corporation since Baker, the registered agent, could not be found at the registered office of the corporation. By the time Baker was served with a summons for a second time in this litigation, months before the Corporation was joined as party, Performance was no longer doing business as the address listed for the corporation's registered agent and Baker could not be found there.

(Br. at 25.)

Aside from the absurd notion that the rules of civil procedure should be disregarded, Hernandez fails to cite anywhere in the record which supports such factual contentions. As a result, it should be stricken or otherwise ignored by this Court in

considering the instant appeal. See Wilderness Bldg. Sys., Inc. v. Chapman, 699 P.2d 766, 768 (Utah 1985) (stating appellate review "is of course limited to the evidence contained in the record on appeal").

In addition, Hernandez argues that his amended complaint was "mysteriously not filed" (Br. at 28) and that Hernandez's counsel "submitted a '[Proposed] Amended Complaint' with motion to amend and mailed the same to Baker's counsel." (Br. at 5.) As noted in Appellants' Brief and undisputed by Hernandez, the proposed amended complaint appears nowhere in the record. Hernandez's attempt to infer that it was ever placed before the trial court or mailed to Baker or Performance Auto's attorney should be disregarded by this Court.

Second, Hernandez's attempt to get this Court to adopt some type of notice test in relation to whether a judgment can stand against a defendant would make bad law and policy. This type of test would require courts in this state to spend valuable time weighing evidence concerning notice and whether, under the circumstances of each case, it would make sense to require a plaintiff to try to serve a particular defendant; all of this, simply because the plaintiff failed to file his amended complaint.

The better rule is simply to require a plaintiff who obtains leave to amend his complaint to actually file the same. This bright line rule avoids any evidentiary requirements and places the burden squarely where it should be—on the plaintiff.

Third, as noted in Appellants' Brief (Appellants' Br. at 19 n.8), any claim of actual notice in lieu of proper service is moot if a complaint is never actually filed. Rule 3(a) of the Utah Rules of Procedure provides that an action must be dismissed if a

complaint is not filed within ten days of service. See Utah R. Civ. P. 3(a) (stating, "If, in a case commenced [by service of a summons and copy of complaint], the complaint, summons and proof of service are not filed within ten days of service, the action commenced ***shall be deemed dismissed*** and the court shall have no further jurisdiction thereof." (emphasis added)). Here, it is undisputed that the amended complaint was not filed, thereby necessarily rendering service of process moot.

Fourth, Hernandez fails to cite a single authority that stands for the proposition that actual notice of litigation is a substitute for ***filing*** the complaint on which that litigation is based.

Fifth, Hernandez's assertion that this case falls within the category of a "non-prejudicial misnomer" is without merit. In Wilcox v. Geneva Rock Corp., 911 P.2d 367 (Utah 1996), the Utah Supreme Court addressed a "mistake" wherein the plaintiff erroneously named "Geneva Rock Corp." as the defendant rather than "Geneva Rock Products, Inc." Id. at 368. The supreme court held that in such a circumstance leave should have been given to the plaintiffs to amend the complaint. See id. at 370.

In the instant case, there was never an error or mistake as to the name of the defendant. Rather, this case clearly involved two different defendants: Baker, individually, and Performance Auto, the corporation. Liability was sought against both, and judgment obtained against both. There was simply no "misnomer" here. Wilcox does not apply.

Furthermore, the cases cited by Hernandez regarding the relation back of amendments involve Utah R. Civ. P. 4(b) and issues concerning limitations of actions

and the point in time when an additional defendant must be served. See Valley Asphalt, Inc. v. Stubbs, 714 P.2d 1142, 1143 (Utah 1986) (addressing timing of service on additional defendant and Rule 4(b)). Performance Auto has never asserted that Hernandez's motion to amend was too late in time or that it could not have been served at all. The issue is the absolute failure to serve and ***file*** the amended complaint as a jurisdictional prerequisite. Moreover, Rule 4(b) addresses service "at any time prior to trial"; it does not provide and has never been construed to mean that judgment may be obtained against an additional defendant on mere actual notice where the complaint on which the judgment is based does not even appear of record.

Finally, Hernandez's conclusory attempts to distinguish the cases relied upon by Performance Auto are unavailing. As set forth in Appellants' Brief, those cases are determinative and instructive to a resolution of this issue. Hernandez fails to show otherwise.

In sum, had Hernandez merely served and filed the amended complaint, there would not be a jurisdictional issue. This Court should not relieve him from his failure to consummate such fundamental procedures at the expense of Performance Auto.

CONCLUSION

For the foregoing reasons and the reasons set forth in Appellants' Brief, Appellants request the trial court be reversed.

Respectfully submitted this 14th day of April 2004.

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CERTIFICATE OF SERVICE

In accordance with Utah R. App. P. 26(b), I, Bryan J. Pattison, certify that on April 14th, 2004, I served two (2) copies of **APPELLANTS' REPLY BRIEF** upon counsel for Appellee in this matter, via first class mail with sufficient postage prepaid, to the following address:

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