2004

Dorothy Derian dba Black Rose v. West Point City, a municipal corporation : Reply Brief of Appellant

Utah Court of Appeals

Fleshaw King; Attorney for Appellee.
W. Andrew Mccullough; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

DOROTHY DERIAN d.b.a. BLACK ROSE, Appellant, vs. WEST POINT CITY, Corp., a municipal corporation, Appellee.	:	Appeal No. 20040869

APPEAL FROM A JUDGMENT OF THE SECOND DISTRICT COURT OF DAVIS COUNTY, UTAH. HON. THOMAS L. KAY

Oral Argument & Published Opinion Requested

REPLY BRIEF OF APPELLANT DOROTHY DERIAN, d.b.a. BLACK ROSE

W. ANDREW MCCULLOUGH, L.L.C. (2170)
Attorney for Appellant
6885 South State St.. Suite 200
Midvale, Utah 84047
Telephone: (801) 565-0894

FELSHAW KING
Attorney for Appellee
330 North Main Street
Kaysville, Utah 84037
Telephone: (801) 543-2288

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TABLE OF AUTHORITIES CITED

CASE AUTHORITY

STATUTES CITED

RULES CITED

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Appellant.	:	

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SUMMARY OF ARGUMENT

Plaintiff's business was previously licensed by the City as a Home Occupation, pursuant to local ordinance. The ordinance requires a person running such a business to reside in the home. The City Council found, after a hearing, that Plaintiff did not live in the home, as she spends a significant minority of her time at a second home

Arizona. Plaintiff maintains that she does reside in the home, and that the question of residence is a question of law to be determined by State law, or by a standard deemed appropriate by this Court. Under such a standard, her residency, and her right to retain her business license should be upheld.

ARGUMENT

POINT I

THE DECISION OF THE TRIAL COURT WAS ON A MOTION FOR SUMMARY JUDGMENT. THERE IS NO LEGAL REQUIREMENT TO"MARSHAL THE EVIDENCE."

Appellee argues that "appellant has failed to marshall {sic} the evidence and as a result her Appealo {sic} should be dismissed."(Aplee. Br.1). Appellee has misstated the standard, as Defendant was granted Summary Judgment in the court below. According to rule 56 U.R.C.P., summary judgment is appropriate when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." On appeal of a summary judgment case, the Supreme Court, in Winegar v. Froerer Corp.,813 P.2d 104, 107 (Utah 1991), said: "In reviewing the trial court's ruling, we accept the facts and inferences in the light most favorable to the losing party. Because summary judgment is granted as a matter of

law, we may reconsider the trial court's legal conclusions". Thus, in cases of summary judgment there is no duty of the appellant to "marshal the evidence". Such a duty would arise only when a factual determination has been made by the trial court, based on contested evidence. The Supreme Court set out the requirement of marshaling the evidence in Matter of Estate of Beesley, 883 P.2d 1343, 1349 (Utah 1994):

> The District Court's factual findings, however, are fatal to La Jauna's argument. The court specifically found that La Jauna knew and understood the contents of the agreement and that she agreed to be bound by its terms. According to the Court, she signed the agreement "voluntarily"and "of her own free will." Again, to successfully challenge factual findings such as these, an appellant must first marshal all of the evidence that supports the findings and then demonstrate that even viewing it in the light most favorable to the district court, the evidence is insufficient to support the finding.

This case is not similar. Appellant, in her original brief, set out the findings of fact made by the West Point City Council, concerning whether Appellant "resided" in the home, and whether she was an "inhabitant thereof". Much of the testimony leading to those conclusions was obtained from Plaintiff herself. The contested portion of the material presented to the City Council was relatively minor. According to Ms. Price, the Business License Administrator, "I had a young couple come in and talk to me

and they were upset with Ms. Derian." In discussing her conversation with them, she stated she was told "they had moved in and were living there in trade for running her business." (Tr.2). The City Council, in its findings of fact (No.11), reviewed the testimony of Ms. Derian: "she acknowledged that Cassandra Adams lived in the home for a time, but denied that Cassandra ran the business."If, of course, Mr. & Mrs. Adams were living there and running the business, they would have complied with the ordinance which required the business to be ran by the "inhabitants". While this evidences a conflict in testimony, It is unlikely that the decision of either the City Council or the Court below hinged on it. It was more important to the City Council that Ms. Derian was absent from the home for four or five months a year (Finding of Fact No.14). Therefore, in its Finding of Fact No.15, the City Council stated: "Ms. Derian does not meet the Ordinance requirement that in order to carry on a Home Occupation the use shall be carried on by the 'inhabitants thereof' and that the owner of the Home Occupation business must reside in the dwelling". (R.29-31). That last statement of course, is not a statement of fact at all, but is a conclusion of law. It is this conclusion that is being contested by Ms. Derian; and she does need to "marshal the evidence" in order to do so. The statement of facts presented by Defendant is less than a full page of its brief and fails to point out the factual areas were

marshaling is necessary. On page 5 of its brief Defendant states "what Appellants cannot do is merely re-argue the factual case they presented in the trial court." Actually, Appellant can do just that in a summary judgment case. This being a legal conclusion," an appellate court applies the same standard as that applied by the trial court." Briggs v. Holcomb, 740 P.2d 281, 283 (Utah App. 1987).

POINT II

THE DECISION OF THE WEST POINT CITY COUNCIL AND THE TRIAL COURT WERE LEGAL DECISIONS INTERPRETING AN ORDINANCE. THE INTERPRETATION OF THAT ORDNANCE IS NOT ENTITLED TO DEFERENCE.

In Point II of its Brief, the City cites § 10-9-1001 of the Utah Code which requires courts , in appeals of municipal land decisions, to " presume that land use decisions and regulations are valid". Apparently, the City suggests that Appellant disagrees with that general policy. Appellant does not claim that the general land use policies of the City of West Point are invalid. Instead, Appellant claims that a particular municipal licensing decision relies on an arbitrary and

capricious interpretation of the municipal ordnance. Where important terms are undefined in a municipal ordnance, it is the duty of the court to determine what definition "makes sense". As that is a legal determination , the interpretation of the City and the lower court are reviewed for correctness. See Petersen v. South Salt Lake, 1999 UT 93, 987 P.2d 57 (Utah 1999)

In fulfilling its legal duty, the Court does not in any way infringe on the municipality's land use decisions. While the City cites a number of appellate cases granting deference to municipal land decisions, it still misses the point. This case terms on whether the Appellant resides in the home, and whether she thus qualifies as an "inhabitant" in the context of running her business from that location. While the City is fervent in defending what it refers to as its land use decisions, it has not yet made any attempt to explain its refusal to renew Plaintiff's business licence in terms of that land use policy. It is less than obvious what harm will be done to the land use policies of the City if Plaintiff retains her business licence. Plaintiff suggests that reading into the ordinance a definition of residency which "makes sense" is in the best interest of all parties, including the City.

The City goes on, in Point III of its brief to claim that there is "substantial evidence in the record to support the decision of West Point City". While that may

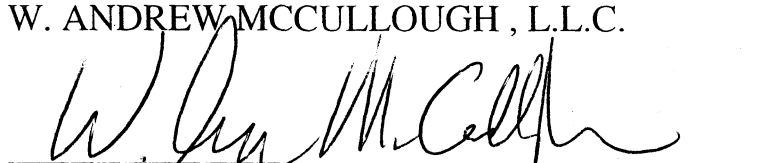
be the case, the decision of this Court is still a legal one in interpreting the ordinance. There is "substantial evidence" that Plaintiff does not reside in the home, nor does she"inhabit" it, full time; but the evidence is uncontested that she is there a majority of the time. With that in mind she cannot reside elsewhere. Consequently, the home in West Point is the only place she can reside. That being the case, it "makes sense" to rule that she is a resident of that home, and is entitled to keep her business license.

CONCLUSION

The decision of the Court granting Summary Judgment to West Point City should be reversed, and Plaintiff should be granted Summary Judgment to the effect that her business license should be renewed.

DATED this 21st day of April, 2005.

W. ANDREW MCCULLOUGH , L.L.C.



W. Andrew McCullough
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of April, 2005, I did mail two true and correct copies of the foregoing Reply Brief of Appellant, postage prepaid to Felshaw King, Attorney for Appellee, 330 North Main Street, Kaysville, Utah 84037.