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Macris and Associates, Inc. v. Neways, Inc., Thomas E. Mower and Leslie D. Mower : : Reply Brief

Utah Court of Appeals

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IN THE UTAH
COURT OF APPEALS

MACRIS & ASSOCIATES, INC.

Plaintiff/Appellant,

v.

NEWAYS, INC., THOMAS E.
MOWER, and LESLIE D. MOWER,

Defendants/Appellees.

Civil No. 20041007-CA

APPELLANT'S REPLY BRIEF

Appeal from a Final Judgment of the Fourth Judicial District Court,
Utah County, State of Utah, Judge Gary D. Stott

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STATEMENT OF AUTHORITIES

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ARGUMENT

POINT I THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF DISCOVERY.

The complaint in this action alleged that Images had fraudulently transferred all its assets to Neways, rendering Images incapable of satisfying its debt to Macris and requiring Macris to sue Neways to set aside that fraudulent conveyance. When Macris sent out discovery requests designed to demonstrate the fraudulent transfer and the fact that Images had no assets from which to satisfy its debt to Macris, the defendants objected, arguing that they shouldn't have to provide this information "unless and until Plaintiff can show this action was necessary in order to collect the judgment against Images" This frames the Catch 22 which is the defendants' position: when you prove it was necessary for you to bring this action we will give you the information that establishes that fact. The defendants have never cited any legal authority to support their position. Instead, they recite the fact that the case is old as being somehow an indication that the Court should simply make it go away. While they cite authority regarding the discretion of the trial court in matters relating to discovery, they offer no authority for the proposition that it is within a trial court's discretion to deny plaintiff discovery from the defendants "unless and until" plaintiff has demonstrated an element of its claim from a source other than the defendants themselves. Plaintiff's interrogatory number 13 asked defendants what assets Images had after its transfer of assets to Neways. A truthful answer to this question (as defendants well know) is:

essentially none. This fact alone would establish why it was necessary for Macris to bring the present action against Neways, the company to which Images transferred all its assets.

Defendants' approach to this case is also disingenuous. While it chides Macris for failing to provide a record citation for its argument that the Court required Macris to make an evidentiary showing before it would permit discovery from the defendants, defendants know that the Court's ruling recited that "if Macris is successful in demonstrating that it incurred attorney's fees as a natural consequence of Images' breach and that the second claim was in fact necessary, the Court will then consider whether Neways should be required to respond to the discovery request[s]." Ruling of January 12, 2004, at p. 2. (A copy of which is in the Addendum hereto.)

The most disingenuous of defendants' suggestions is the implication that the Images' judgment would have been paid if only Macris would have asked that it be satisfied. This suggestion flies in the face of the fact that Images appealed the original judgment and Neways denied any liability for that judgment in the trial court, this Court and the Supreme Court. Only after the Supreme Court ruled in Macris' favor was the judgment satisfied.

In a truly odd bit of sophistry, the defendants suggest that Macris suffered no prejudice from the trial court's error in denying discovery by asserting that there may have been record "evidence potentially relating to the alleged fraudulent transfer that

could have been used in an attempt to defeat Neways' motion for summary judgment." Defendants' brief at p. 15. This suggestion is obviously contrary to the representation defendants made in the court below, that there was no evidence of record to create a genuine issue of material fact, and is not supported by any indication of what this mystery evidence is supposed to have been or how it supposedly related to the issue of the necessity of Macris bringing this action to recover on its claim against Images.

In reality, this argument is simply made in a vain effort to avoid this court's acknowledgment in Askew v. Hardman, 884 P.2d 1258 (Ut. App. 1994), rev'd on other grounds, 918 P.2d 1258 (Utah 1996), that the erroneous denial of discovery is presumptively prejudicial. 884 P.2d at 1262-63. The "facts" articulated by defendants in no way speak to the question of how the result of this case would have been altered had the requested discovery been provided. To meet their burden under Askew, the defendants would have to have demonstrated that truthful responses to the discovery requests wouldn't have affected the result reached below. This they have not done and could not do.

It is also troubling that defendants suggest that Macris was somehow culpable for not being more vigilant in pursuing collection from Images, implying that Images was a viable entity in 1995 and thereafter. At least in the trial court when counsel prepared an exhibit for the court showing the time line of this action he had it

accurately reflect that on September 1, 1992 Images "ceases doing business." (See exhibit 2 in Addendum.) To imply otherwise in this Court is to be less than candid.

Plaintiff submits that the reason the defendants encumbered their brief with reference to evidence from a different case and unspecified facts that they claim may be in the record in this case is an effort to avoid what they know to be true, that accurate responses to plaintiff's discovery would have proven plaintiff's case and should have been required.

POINT II THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT.

Defendants contend that under the holding of Celotex Corp. v. Catrett, 477 U.S. 317 (1986), Macris had an affirmative duty to come forward with evidence to defeat their motion for summary judgment. The Utah Supreme Court has previously noted that the rule announced in Celotex has never been adopted by our Supreme Court and, in fact, the Court has expressly declined to adopt Celotex. See Harline v. Barker, 912 P.2d 433, 445n.13 (Utah 1996). Furthermore, to the extent federal law can be said to put an affirmative duty on the plaintiff to produce evidence on an issue upon which plaintiff has the burden of proof, that duty only arises after the plaintiff has had a full opportunity to conduct discovery from the defendants. As stated by the Court in Anderson v. Liberty Lobby, Inc., 477 U.S. 202 (1986), a case decided on the same day as Celotex,

the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery.

477 U.S. at 257 (emphasis added).

In the present case, the Court ruled that defendants didn't have to respond to discovery designed to demonstrate that Macris had to sue Neways to collect on the debt owed to it by Images because Images had transferred all its assets to Neways in exchange for essentially nothing. The discovery requests, if they had been answered truthfully, would have established facts which would not only have been sufficient to defeat summary judgment but would have demonstrated the existence of a fraudulent transfer as a matter of law. It defies logic to say that a plaintiff must produce evidence of facts solely within the possession of the defendants and then deny it the opportunity to conduct discovery of the defendants. Defendants have never cited any authority supporting their argument in this regard and there is none. It was error for the court below to grant summary judgment because the plaintiff didn't proffer the evidence which the Court had previously ruled the defendants did not have to provide to plaintiff.

It is ironic that defendants now suggest there may have been record evidence creating a material issue of fact which could have precluded summary judgment. Even under Celotex, it is the obligation of the moving party to establish the nonexistence of

evidence on an issue on which the nonmoving party bears the burden. It cannot simply assert that plaintiff has no evidence and put plaintiff to its proof, it must affirmatively demonstrate the absence of evidence. As explained by Justice Brennan in Celotex, in an opinion where he dissented from the Court's application of the rule announced but not from the rule itself, if the moving party seeks to establish that the nonmoving party has no evidence on an issue upon which he bears the burden of proof,

the mechanics of discharging Rule 56's burden of production are somewhat trickier. Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. Such a "burden" of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories, and other exchanges between the parties that are in the record. Either way, however, the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party.

If the moving party has not fully discharged this initial burden of production, its motion for summary judgment must be denied, and the court need not consider whether the moving party has met its ultimate burden of persuasion.

477 U.S. at 332 (citations omitted).

By suggesting to this Court that there was evidence in the record which might have created a material issue of fact, which defendants did not bring to the attention of the court below, defendants are acknowledging (albeit unwittingly) that their motion was not "properly supported" within the meaning the United States Supreme Court gave to Rule 56. For that reason alone the motion should have been denied even if the rule announced in Celotex was applicable.

Under Utah law, however, unless the party moving for summary judgment has supported that motion with evidence establishing the absence of a material issue of fact, the nonmoving party is entitled to rely on the allegations of his complaint to defeat the motion. In Wilkinson v. Union Pacific Railroad Co., (Utah 1998), the Court noted that the defendant

has not supported its motion for summary judgment - it has offered no affidavits showing that the facts are undisputed facts. Because [the defendant] has offered no affidavits disputing [the plaintiff's] allegations, it has not met its burden of showing that there are no material issues of fact. Consequently [plaintiff] may rely on the allegations in her pleadings.

975 P.2d at 465. See also, Lamb v. B & B Amusements Corp., 869 P.2d 926 (Utah 1993).

In this case, defendants offered no evidence on the issue of Images' ability to satisfy its debt to Macris and Macris was entitled to rely on the allegations of its complaint that Images lacked that ability to defeat the motion for summary judgment.

It is worth noting that Wilkinson was decided two years after Celotex and did not adopt its holding that a plaintiff may be required to present affirmative evidence on an issue on which it bears the burden if the defendant can properly demonstrate that the record contains no evidence on that issue. As noted above, however, defendants did not properly make that demonstration in this case and summary judgment was erroneous even under the Celotex rule which Utah has never adopted.

CONCLUSION

The court below abused its discretion in denying plaintiff the opportunity to conduct discovery of the defendants and erred in granting summary judgment on defendants' motion which was not properly supported within the meaning of Rule 56 of the Utah Rules of Civil Procedure. Defendants have never presented any evidence to rebut plaintiff's allegations that this action was made necessary because Images fraudulently transferred its assets to Neways, nor could they. The judgment below should be vacated and the matter remanded with instructions to compel that defendants' respond to plaintiff's discovery requests.

DATED this 24~~th~~ day of June, 2005.

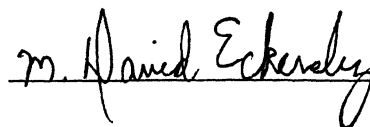
PRINCE, YEATES & GELDZAHLER

By M. David Eckersley
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Attorneys for Appellant
Macris & Associates, Inc.

MAILING CERTIFICATE

I hereby certify that on the ~~24th~~ day of June, 2005, I caused two true and correct copies of the foregoing **Appellant's Reply Brief** to be mailed, first-class postage prepaid thereon, to the following:

Mark R. Gaylord
Ballard Spahr
201 South Main #600
Salt Lake City, Utah 84111

_____

ADDENDUM

RECEIVED

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of Utah County State of Utah
1/12/04 KS Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

MACRIS & ASSOCIATES, INC., Plaintiff, vs. NEWAYS, INC., THOMAS E MOWER, and LESLIE D MOWER, Defendants.	RULING CASE NO. 950400093 JUDGE: GARY D STOTT CLERK: KS
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RULING

On November 20, 2003, counsel for the respective parties appeared before the Court concerning Plaintiff's Motion to Compel Responses to Discovery and for Attorneys' Fees, and Defendant's Motion for Protective Order and/or to Bifurcate. Prior to hearing argument from counsel, the memoranda and materials previously submitted which addressed the issues in question had been read by the Court. After hearing argument, the Court took the matter under advisement, desiring to review the material again and to be more fully informed. After doing so, and having reviewed the record with respect to oral arguments, the Court enters this ruling.

As has been stated by counsel for the parties, this action is far too old, and should be resolved. The present litigation was filed just prior to the first lawsuit going to trial against Images and Attitudes, Inc. In that case, Macris sought judgment against Images based on the parties' prior business relationships. In the Macris I case, as indicated above, Macris obtained a stipulated judgment against Images in the amount of \$360,681.20 just prior to the time of trial. However, the judgment was not then paid. Macris then sought to hold Neways liable for the Images judgment based on fraudulent transfer, successor liability and alter ego claims. Macris claims that it was entitled to recover damages because it was forced to file this present action in order to collect the Images judgment. The Images judgment was paid in February 2001 by Neways International.

At present, the issue before this Court is whether Macris is entitled to recover attorneys' fees based on the third party litigation exception. In the recent decision of the Utah Court of Appeals it is stated, "Furthermore, in order to recover attorneys' fees under the third party litigation exception, Macris must also show that Macris II was a natural consequence of Images' breach and that it was necessary to bring this action." *Macris and Associates, Inc., vs. Neways, Inc.*, 60 P.3rd 1176 (Utah App. 2002).

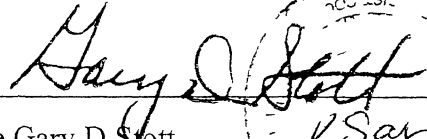
A discovery dispute has occurred by reason of Plaintiff's Motion to Compel Defendants to respond to discovery submitted by Macris. Macris believes that it is entitled to recover damages, including punitive, against Neways based upon its fraudulent transfer, successor liability and alter ego claims. However, Neways believes that the Utah Court of Appeals opinion limits Macris to what it may be entitled to recover as to attorneys' fees that were incurred by Macris as a "natural consequence" of Images' breach and which necessitated the filing of this action.

Since the matter now before the Court is one of first impression with this particular Court, I believe the Court of Appeals has limited Plaintiff's recovery, if any, solely to attorneys' fees which it may have incurred in this action, that are the "natural consequences" of Images' breach. Therefore this Court finds that Plaintiff's discovery requests are premature and may be unnecessary. This Court therefore agrees that the discovery requests served upon Neways are at the present, unduly burdensome, oppressive, and not likely to lead to the discovery of admissible evidence relevant to remaining issue, that of attorneys' fees. The Court of Appeals remanded this case for the determination of whether Macris is entitled to recover attorneys' fees based on the third party litigation exception. Consequently, this Court believes that it is appropriate to issue a protective order limiting discovery to determine the amount of attorneys' fees, if any, incurred by Macris in seeking to collect the Images judgment and whether this present action was a natural consequences of Images' breach of contract making it necessary to bring this present claim.


On the other hand, if Macris is successful in demonstrating that it incurred attorneys' fees as a natural consequence of Images' breach, and that the second claim was in fact necessary, the Court will then consider whether Neways should be required to respond to the discovery request. The Court therefore believes that it is appropriate to bifurcate the issue of whether Macris II was a natural consequence of Images' breach and necessary to obtain the satisfaction of judgment. Therefore the motion by Macris to compel is denied, and the Motion for Protective Order and/or

to Bifurcate is granted. Also, the request for attorneys' fees is denied. Counsel for Defendant shall prepare the appropriate order and submit it within 20 days of the date of this ruling.

DATED this 12 day of Jan, 2004.



Judge Gary D Stott



Macris & Assoc., Inc.
v.
Neway's Int'l, Inc.

