1993

Larry M. Chaffin and Greta M. Chaffin v. Mark R. Cromar and Geneve D. Cromar : Reply Brief

Utah Court of Appeals

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Paul M. Durham, Esq.; G. Richard Hill, Esq.; Attorneys for Appellants.

IN THE UTAH COURT OF APPEALS

LARRY M. CHAFFIN and GRETA M. CHAFFIN,

Plaintiffs,

vs.

MARK R. CROMAR and GENEVE D. CROMAR,

Defendants and Third-Party Plaintiffs, and Appellants

vs.

DONALD DWYER,

Third-Party Defendant and Fourth-Party Plaintiff, and Appellee

vs.

GREG L. WINGET, et al.,

Fourth-Party Defendants.

No. 930539-CA

Priority No. 15

REPLY BRIEF OF APPELLANTS

Appeal from a Summary Judgment of the Third Judicial District Court of Salt Lake County, State of Utah. Honorable Kenneth Rigtrup, Judge.

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IN THE UTAH COURT OF APPEALS

LARRY M. CHAFFIN and GRETA M. CHAFFIN, Plaintiffs, vs. MARK R. CROMAR and GENEVE D. CROMAR, Defendants and Third-Party Plaintiffs, and Appellants vs. DONALD DWYER, Third-Party Defendant and Fourth-Party Plaintiff, and Appellee vs. GREG L. WINGET, et al., Fourth-Party Defendants.	)	No. 930539-CA Priority No. 15

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REPLY BRIEF OF APPELLANTS

DETERMINATIVE PROVISIONS OF LAW

This case involves the proper interpretation and construction of a contract, namely the Agreement Surviving Real Estate Closing and related Note reproduced in the Addendum at tabs A and D respectively.

INTRODUCTION

Pursuant to Rule 24(c) of the Utah Rules of Appellate Procedure, Appellants Mark and Geneve Cromar reply herein only to those new matters raised by Appellee Donald Dwyer not otherwise covered in their principal brief.

ARGUMENT

I.

APPELLANTS ARE NOT ATTEMPTING TO RAISE ARGUMENTS FOR THE FIRST TIME ON APPEAL.

A. Promissory Note.

Cromars agree that appellate courts generally will not consider arguments relating to matters not raised in the pleadings nor put in issue at trial and which are presented for the first time on appeal. See, e.g., Smith v. Iversen, 848 P.2d 677 (Utah 1993); Zions First Nat'l. Bank v. National Am. Title Ins., 749 P.2d 651, 657 (Utah 1988); Bundy v. Century Equipment Co., 692 P.2d 754, 758 (Utah 1984); Valley Bank & Trust Co. v. Wilken, 668 P.2d 493, 494 (Utah 1983); Olson v. Park-Craig-Olson, Inc., 815 P.2d 1356, 1359 (Utah App. 1991); James v. Preston, 746 P.2d 799, 801 (Utah App. 1987). This clearly is not such a case.

Dwyer contends that the Cromars are attempting to raise a new issue on appeal, namely that "The Cromars never contended in the court below that Dwyer had a duty to pay attorney's fees directly

to them under the terms of the note." (Brief of Appellee at 5.) Dwyer's characterization of Cromars' argument misses the point which is that Dwyer assumed the Note and agreed to indemnify Cromars for "any and all" obligations arising thereunder. (Agreement at 2d.) (Add. D.)

The argument raised by the Cromars below and on appeal is that Dwyer's promise as expressly set forth in the Agreement Surviving Real Estate Closing was to hold them harmless, including reasonable attorney's fees, from any and all obligations contained in the Second Trust Deed and Note dated November 6, 1979. (Agreement, Add. D.) Thus, the underlying obligation referred to in the Agreement which forms the basis of this action was the Cromars' duty to pay Chaffins' principal, interest, and costs including reasonable attorney's fees if suit were brought on the Note, which obligation was assumed by Dwyer. (R. 29, 57.) Once judgment was entered in favor of Chaffins and against Cromars on the Note, Dwyer incurred the primary obligation to indemnify Cromars for their loss pursuant to the express terms of the Agreement, which incorporated the terms of the Note by reference. (Agreement at 2d.) (Add. D.)

Cromars basic argument was raised in the pleadings stage of this action against Dwyer as follows:

> Pursuant to the terms of the Agreement, Dwyer assumed the Note and held the Cromars harmless from any and all obligations under the Note, including reasonable attorneys fees.

Third Party Complaint at para. 10. (R. 29)

Dwyer admitted this allegation in the Second Defense of his Answer (R. 57) and despite subsequent denials (R. 235), the court so found. (R. 261.)

The argument was specifically presented to the court in Cromars' Motion for Summary Judgment which was granted except for an award of attorney's fees. (R. 155; 158-62; 253-55).

Dwyer's contention that Cromars are raising a new argument in this regard misconstrues their position and lacks merit.

B. Attorney's Fees.

In the court below, the trial judge initially awarded the Cromars "such attorney's fees and costs against Dwyer as are supported by affidavit and as are awarded by the court." (R. 260-62; Add. F.) The Cromars then submitted an Affidavit of Attorneys' Fees and Costs which contained a description of time spent both in the defense of the action by Chaffins and the prosecution of the summary judgment motion against Dwyer. (R. 303-07; Add. F.) The precise wording is as follows:

(b) Attorneys' fees:

> (Factual investigation; preparation of documents, affidavits, pleadings, research and correspondence with respect to the defense of the action for summary judgment by Chaffins and the prosecution of the motion for summary judgment against Dwyer, including preparation of judgment and conferences with client and opposing counsel regarding the same).
>
> 73.5 Total Hours
>
> TOTAL ATTORNEYS' FEES: $7,259.75

Affidavit of Attorneys' Fees and Costs. (Add. F.) (Emphasis added.)

It is obvious from the text of the Affidavit quoted above that Cromars claimed attorney's fees incurred in the defense of the action against Chaffins in the court below. This is, therefore, hardly a new issue. Dwyer, however, only objected to those fees incurred in enforcing the Agreement. (R. 267-70; 294-99.) Cromars' arguments below were consequently designed to overcome this specific objection. (R. 286-91.)

At no time did the Cromars waive their right to recover attorney's fees incurred in defending the action which were claimed from the outset. On the contrary, they have always maintained that they are entitled to recover attorney's fees incurred both for defense and enforcement purposes. Dwyer's contention to the contrary lacks merit on this point as well.

II.

THE RULE THAT A CONTRACT WILL BE CONSTRUED AGAINST THE DRAFTER ONLY APPLIES IN CASES WHERE OTHER FACTORS ARE NOT DECISIVE.

Dwyer argues that since the Agreement was drafted by the Cromars' agent, i.e., Paramount Title Corporation, any ambiguity therein must be construed in his favor. (Brief of Appellee at 7.)

In this case, there is no evidence in the record that the Agreement was prepared by the Cromars or their agent. The Cromars did not select the terms of the contract or had any reason to know of uncertainties in its meaning. Consequently, this rule of construction does not apply. See, Restatement (Second) of Contracts § 206 (1981). (Add. L.)

In this case, Cromars have demonstrated that the more reasonable interpretation of the Agreement favors the creation of an obligation to pay attorney's fees in addition to those covered by the Note, including enforcement of the Agreement itself. They have cited other factors such as the decisions of other courts interpreting similarly broad language to permit such recovery. Finally, they have advanced public policy reasons favoring the award. In short, this is not a case in which resort must be made to a rule of construction in order to break a tie between two reasonable meanings as contemplated by the rule. Id.

CONCLUSION

The issues raised on this appeal were presented below and ruled upon by the trial court. Dwyer has failed to demonstrate why the Cromars should not be entitled to an award of attorney's fees in this case. The Summary Judgment of the lower court should be reversed insofar as it denies the Cromars' attorney's fees and the case remanded for a determination and award of such fees as are just.

DATED this 8TH day of December, 1993.

Respectfully submitted,

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CERTIFICATE OF MAILING

I certify that I caused two true and correct copies of the foregoing Reply Brief of Appellant to be mailed, first class postage prepaid, to the following this 8TH day of December, 1993:

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ADDENDUM L

§ 206. Interpretation Against the Draftsman

In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.

Comment:

a. Rationale. Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert. In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party. The rule is often invoked in cases of standardized contracts and in cases where the drafting party has the stronger bargaining position, but it is not limited to such cases. It is in strictness a rule of legal effect, sometimes called construction, as well as interpretation: its operation depends on the positions of the parties as they appear in litigation, and sometimes the result is hard to distinguish from a denial of effect to an unconscionable clause.

b. Compulsory contract or term. The rule that language is interpreted against the party who chose it has no direct application to cases where the language is prescribed by law, as is sometimes true with respect to insurance policies, bills of lading and other standardized documents. In some cases, however, the statute or regulation adopts language which was previously used without compulsion and was interpreted against the drafting party, and there is normally no intention to change the established meaning. Moreover, insurers are more likely than insureds to participate in drafting prescribed forms and to review them carefully before putting them into use.

REPORTER'S NOTE

This Section carries forward the substance of former § 236(d). See 3 Corbin, Contracts § 559 (1960 & Supp. 1980); 4 Williston, Contracts § 621 (3d ed. 1961).

Comment a. On the general rule, see, e.g., Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1206–07 (2d Cir. 1970), quoting from this Comment in Tentative Draft; Goddard v. South Bay Union High School Dist., 79 Cal. App.3d 98, 144 Cal. Rptr. 701 (1978); Pappas v. Bever, 219 N.W.2d 720 (Iowa 1974). That it has less force when the other party has taken an active role in the draft-

ing process, or is particularly knowledgeable, see Centennial Ent., Inc. v. Mansfield Dev. Co., 568 P.2d 50 (Colo. 1977); Crestview Bowl, Inc. v. Womer Constr. Co., 225 Kan. 335, 592 P.2d 74 (1979); Graziano v. Tortora Agency, Inc., 78 Misc.2d 1094, 359 N.Y.S.2d 489 (Civ. Ct. 1974). As the text of the Section makes clear, the rule does not apply if the non-drafting party's interpretation is unreasonable. See Intertherm, Inc. v. Coronet Imp. Corp., 558 S.W.2d 344 (Mo. Ct. App. 1977), quoting from this Comment in Tentative Draft; Perry and Wallis, Inc. v. United States, 192 Ct. Cl. 310, 427 F.2d 722 (1970). Nonetheless, one may doubt that the rule is "the last one to be resorted to, and never to be applied except when other rules of interpretation fail," Quad Constr., Inc. v. Wm. A. Smith Contr. Co., 534 F.2d 1391 (10th Cir. 1976), quoting (in a diversity case) from Patterson v. Gage, 11 Colo. 50, 16 P. 560 (1888).

Comment b. The substance of this Comment was contained in former § 236(d) as a qualification of the general rule concerning terms prescribed by law.

§ 207. Interpretation Favoring the Public

In choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred.

Comment:

a. Scope. The rule preferring an interpretation which favors an interest of the public applies only to agreements which affect a public interest. It is a rule of legal effect as well as interpretation, and rests more on considerations of public policy than on the probable intention of the parties. It has often been relied on to justify narrow construction of a grant of a public franchise or an agreement for a tax exemption. In general, it does not prefer the interest of a governmental agency as a party to a contract; government contracts are likely to be construed against the government as the drafting party.

Illustration:

1. A is employed by B as an inventor. In an agreement settling their disputes on termination of the employment, A promises to assign to B all A's rights in a pending patent application and all improvements on the invention covered. Thereafter A makes an invention and applies for a patent, and B claims it as an improvement. The public interest in encouraging invention supports an interpretation of the agreement excluding future improvements unless future improvements were specifically included.