

2005

Venna M. Swlasberg Lange, Carl A. Swalsberg Family Trust v. David Eby : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

VENNA M. SWALSBERG LANGE,)	
TRUSTEE OF THE CARL A.)	Case No. 20050040
SWALSBERG FAMILY TRUST,)	
)	
Plaintiff-Appellee,)	
)	
v.)	
)	
DAVID EBY,)	
)	
Defendant-Appellant.)	

BRIEF OF APPELLEE VENNA M. SWALSBERG LANGE

Appeal from the Third District Court of
Salt Lake County, State of Utah
Judge Deno G. Himonas

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Trust

ORAL ARGUMENT REQUESTED

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I.

JURISDICTION

This court previously dismissed as untimely Eby's appeal of the final judgment and his motion to credit settlement proceeds to the judgment in this matter. This court lacks jurisdiction over the sole argument raised in Eby's brief that the district court erred in denying his motion to be credited with the proceeds of Appellant's ("Lange") settlement with Geary Construction, Inc. ("Geary"). Eby's argument is the very argument raised by Eby in appealing from the final judgment and could only be raised as part of an appeal of the final judgment and not in an appeal from denial of Eby's Rule 60(b) motion.

II.

ISSUES

1. Does this court lack jurisdiction to decide Eby's argument that the district court erred in refusing to credit the final judgment against Eby with the proceeds of Lange's settlement with another defendant, Geary, because, as this court has already ruled, Eby failed to timely appeal the final judgment against him and the denial of his motion to credit the proceeds and Eby's argument cannot be raised as part of his appeal of the denial of his Rule 60(b) Motion?

Standard of Review: This court decides its own jurisdiction as a matter of law.

State v. Todd, 2004 UT App. 266, 98 P.3d 46.1

2. If the court decides that it has jurisdiction to decide the settlement credit issue and does not strike Eby's brief and summarily dismiss the appeal as Lange has requested in her prior motion, did the district court correctly decide that under the Liability Reform Act, Utah Code Ann. § 78-27-37, *et seq.*, Eby was not entitled to have the judgment against him credited with the proceeds received by Lange from her settlement of her claims against Geary?

Standard of Review: The district court's denial of a motion for relief from judgment under Rule 60(b) is reviewed under an abuse of discretion standard. *Birch v. Birch*, 771 P.2d 1114, 1117 (Utah App. 1989). A district court's alleged erroneous decision on a point of law cannot be raised by a Rule 60(b) motion. *Fischer v. Bybee*, 2004 UT 92, ¶¶ 10-12, 104 P.3d 1198. If this Court reaches the legal issue of whether the district court correctly determined that Eby was not entitled to have the judgment against him credited with the Geary settlement proceeds, that decision would be reviewed for correctness. *State v. Pena*, 869 P.2d 92, 93-96 (Utah 1994).

III.

DETERMINATIVE STATUTES

The determinative statutes in this case are Utah Code Ann. § 15-4-3 (1953) of the Joint Obligations Act (the "JOA") and the Liability Reform Act, Utah Code Ann. § 78-27-37, *et seq.* (the "LRA"). These statutes are set forth in Eby's Appendix.

IV.

STATEMENT OF THE CASE

1. On November 6, 2002, Lange filed a complaint against Eby and Geary for trespass, negligence, gross negligence, violation of Utah Code Ann. § 78-38-3 and for punitive damages against each defendant arising out of their activities in destroying trees, bushes, shrubs and other vegetation located on Lange's pristine land located near the Weber River in Summit County. [R. 1-8.] Eby hired Geary to perform the road widening work. [R. 3; Plaintiff's Exhibit P-3 and P-4.] Eby did not obtain a permit from Summit County for this work although he represented to Geary that he did have a permit. [Exhibits P10, P16 and P20.]

2. In June, 2004, Lange entered into a settlement agreement with Geary pursuant to which Geary paid to Lange \$140,000 in return for release of all claims against Geary and dismissal of the lawsuit against Geary. The settlement agreement expressly reserved all of Lange's claims against Eby, reciting that Lange's claims against Eby "are not compromised or affected by the agreement." [R. 01223.]

3. Lange's claims against Eby were tried to a jury commencing July 6, 2004. On July 8, 2004, the jury returned its verdict in favor of Lange. The jury determined that Lange had suffered damages in the amount of \$56,000 and that Eby was 85% at fault. The jury determined that Summit County was 10% at fault and Geary was 5% at fault. The jury also awarded punitive damages against Eby. [R. 01167-01169.] Judgment was

entered against Eby on July 13, 2004, for his proportion of the compensatory damages in an amount of \$47,750 and for punitive damages. [R. 01163-01164.]

4. Thereafter, Eby filed a motion to be credited with the \$140,000 received by Lange from the Geary settlement. Eby argued that because the settlement was far larger than the jury verdict, the judgment against Eby had already been fully paid and satisfied and that the court should enter a judgment that Eby owes nothing to Lange. [R. 01179-01192.]

5. Eby also filed a second motion under Rule 60(b) of the Utah Rules of Civil Procedure on the basis that the judgment should not have been entered until after Eby's objections to the form of the judgment and his motion to credited with the settlement proceeds were determined. [R. 01193-01217.]

6. By orders dated January 6, 2005, the court denied both motions. [R. 01314-01319.]

7. On December 27, 2004, prior to the entry of the orders denying his post-judgment motions, Eby filed his Notice of Appeal purporting to appeal from the final judgment against him and from the denial of the post-judgment motions.

8. On April 5, 2005, this Court entered its Order Partially Dismissing Appeal and Denying Stay, ruling that Eby had not timely appealed the judgment against him and the denial of his motion to credit the settlement proceeds and dismissing the appeal except that Eby was entitled to proceed with his appeal of the denial of his motion for relief

under Rule 60(b) that the judgment had been irregularly entered prior to the expiration of the time for making objections. [See Appendix “A”.]

9. The sole argument raised by Eby in his brief is that the district court erred in not crediting the proceeds of the Geary settlement to the judgment against Eby.

IV.

SUMMARY OF ARGUMENT

This Court has already dismissed Eby’s appeal from the final judgment and his post-judgment motion to alter or amend the judgment to credit him with the proceeds received by Lange from the Geary settlement because the appeal was not timely filed. The sole argument raised by Eby in his brief is that the district court erred in not crediting the settlement proceeds to the judgment. Eby has no right to raise this argument on appeal from the denial of his Rule 60(b) motion. That motion was based upon the alleged fact that the judgment was entered irregularly before Eby’s objections to the judgment were decided. Indeed, this court and the Supreme Court have squarely held that Rule 60(b) cannot be utilized to complain that a district court wrongly decided points of law.

Even if Eby could raise this issue on his appeal from the denial of his Rule 60(b) motion, the district court correctly decided that Eby was not entitled to be credited with the proceeds of the settlement. Section 15-4-3 of the JOA has been superceded by the comparative negligence provisions of the LRA. Section 15-4-3 only applies where two or

more defendants have *shared* liability. Eby shared no liability with Geary. Rather, under the LRA, they were each only liable for their proportionate share of the fault. Eby has already had his liability reduced to his proportion of the total fault. He is not entitled to a further reduction for the settlement proceeds that Lange received when she settled Geary's proportion of the fault. Eby's argument that he is entitled to a further reduction of the judgment against him to eliminate any liability based upon Geary's payment would result in an enormous windfall to Eby and is totally contradictory to the purpose of the LRA which eliminated both joint and several liability and contribution among joint tortfeasors. Cases in other jurisdictions have squarely rejected Eby's position. Lange is entitled to the benefit of her bargain that she negotiated with Geary.

V.

ARGUMENT

A. EBY HAS NO RIGHT TO RAISE HIS SETTLEMENT CREDIT ARGUMENT ON HIS APPEAL OF THE DENIAL OF HIS RULE 60(b) MOTION.

This court previously dismissed Eby's appeal of the final judgment against him and the denial of his settlement credit motion on the basis that the appeal was not timely. This court ruled that Eby only had the right to appeal from the denial from his motion for "relief from the judgment under Rule 60(b) of the Utah Rules of Civil Procedure based upon alleged irregularities in entering the judgment prior to expiration to the time for

making objections.” (Order at p. 2.) Lange previously filed a motion to strike Eby’s brief and to summarily dismiss the appeal because rather than arguing about the supposed irregularities in entering the judgment prior to time for making objections, Eby has attempted to raise in his brief his argument about the failure of the district court to credit the judgment against him with the amount of the Geary settlement, which argument this court has already foreclosed by dismissing Eby’s appeal of the final judgment and the denial of his settlement credit motion. The court has not yet ruled on Lange’s motion. Lange will therefore briefly discuss this issue.

As demonstrated in more detail in Lange’s motion to strike Eby’s brief and summarily dismiss the appeal, Eby’s Rule 60(b) motion “pertained to procedural and clerical mistakes and the need to rule on Mr. Eby’s first motion (to be credited with the settlement proceeds) before the correct judgment could be known.” (Eby Memo. in Opp. to Mot. for Sum. Disposition at p. 3.) Eby acknowledged that “[t]he first motion requested that the judgment be amended to reflect that Mr. Eby owes nothing to Plaintiff for the reasons stated therein (i.e., that Eby was entitled to credited with the amount of the Geary Settlement).” *Id.* Nevertheless, the sole argument made in Eby’s brief is that the district court committed a mistake within the meaning of Rule 60(b) by refusing to credit the proceeds of the Geary settlement in the amount of \$140,000 to erase any liability that Eby has to Lange under the final judgment. However, this court has already ruled that Eby did not timely appeal the district court’s refusal to credit the judgment with the Geary

settlement proceeds. Eby is not entitled to another bite of the apple on the pretext of including his dismissed argument as part of his appeal of the denial of his Rule 60(b) motion.

Eby's only purported justification for arguing about the settlement credit in his brief is that:

The law requires Eby to be credited with Geary's settlement payment to Lange [the law in fact has no such requirement]. . . . The judgment can be ruled by this Court to be a judicial mistake, and that it has been satisfied, discharged, or is void as a matter of law. . . [and] [t]his Court can also grant relief from the judgment for the reason that it is no longer equitable that it should have prospective application and for the miscellaneous reasons of subsection (6) of Rule 60(b). (Eby Brief at p. 9.)

Not only is Eby's attempt to argue as part of his appeal of the denial of his Rule 60(b) motion that the court committed judicial mistake in refusing to credit the proceeds of the Geary settlement foreclosed by this court's Order, but it is also foreclosed by the Supreme Court's decision in *Fischer v. Bybee*, 2004 UT 92, 104 P.3d 1198. In *Fischer*, the Supreme Court approved this court's ruling in *Franklin Covey Client Sales, Inc. v. Melvin*, 2000 Ut. App. 110, ¶ 22, 2 P.3d 451 which "categorically removed legal error from the realm of mistake recognized under Rule 60(b)(1) and "pared back its definition of judicial 'mistake' to include only the correction of 'a minor oversight, such as the omission of damages, which in most cases would be obvious.'" 2004 UT 92 at ¶ 11. The Supreme Court agreed with the conclusion of the *Franklin Covey* court that "[i]n sum, 'if

a court merely wrongly decides a point of law, that is not [mistake], inadvertence, surprise, or excusable negligent.”” *Id.* at ¶ 12. [brackets by the court]

Consequently, even if it were wrongly assumed for purposes of argument that the district court erroneously concluded that Eby was not entitled to a credit for the Geary settlement, Eby could not raise that alleged error on a Rule 60(b) motion.

B. SECTION 15-4-3 OF THE JOINT OBLIGATIONS ACT DOES NOT APPLY IN THE CASE AT BAR.

Eby argues at length in his brief that the LRA, Utah Code Ann. § 78-27-37, *et seq.*, does not supercede Utah Code Ann. § 15-4-3 of the JOA and that Lange would receive a windfall if Eby is not credited with the proceeds she received from the Geary settlement. These arguments ignore the fundamental change in Utah law effected by the LRA which (except for very narrow situations such as vicarious liability) abolished joint and several liability and made each defendant liable only in proportion to that defendant’s percentage of fault. To further reduce a defendant’s liability by amounts paid by other defendants to settle their percentage share of the fault would be totally inconsistent with the purpose of the LRA.¹ In fact, it is Eby who seeks to obtain an enormous windfall in this case.

¹ Eby devotes a good deal of space to reciting general rules of statutory construction to attempt to support his argument that the LRA did not affect Section 15-4-3. (Eby Brief at pp. 17-19.) Eby relies principally upon the Supreme Court’s decision in *Murray City v. Hall*, 663 P.2d 1314, 1318 (Utah 1983). That case does not assist Eby because the Supreme Court determined that an existing statute providing that a person who was driving under the influence if he or she had a blood alcohol content of .08% or greater was inconsistent with the legislature purpose in enacting a new statute making it illegal to drive with a blood alcohol content of .10% or greater and therefore the prior

Section 15-4-3 of the JOA provides:

The amount or value of any consideration received by the obligee from one or more of several obligors, or for one or more of joint or joint and several obligors, in whole or in partial satisfaction *of their obligations* shall be credited to the extent of the amount received *on the obligations of all co-obligors* to whom the obligor or obligors giving the consideration did not stand in relation of a surety [emphasis added].

This court's interpretation of section 15-4-3 in *Jorgensen v. Aetna Casualty & Surety Co.*, 769 P.2d 809, 812 (Utah 1988) disposes of Eby's attempt to utilize that statute to escape his liability in the case at bar. In *Jorgensen*, this court opined:

[T]he language of Section 15-4-3 expressly limits the section's applicability to payments made in "satisfaction of *their* obligations." We find this usage of the word "their" indicative of the fact that the drafters had mind only such obligations as are shared by the obligors. . . . (Emphasis in original.)

In the case at bar, Geary and Eby did not have any shared obligation. They were each only liable to Lange in proportion to their percentage of the fault. The jury determined that Eby was 85% at fault, Geary was 5% at fault, and Summit County was 10% at fault. Lange only settled her claim against Geary for *Geary's* percentage of the

statute was impliedly repealed to the extent that it conflicted with the purpose of the new statute. That same situation applies here. Section 15-4-3 is inconsistent with the purpose of the comparative negligence statutes which make each person only liable for his or her own fault.

fault. She did not settle Eby's percentage of the fault and expressly reserved her rights against Eby.

Prior to the enactment of the LRA and its abolishment of joint and several liability, it made perfect sense to reduce the amount that a plaintiff could recover from non-settling defendants by amounts paid by settling defendants toward the shared liability of all of the defendants. If a plaintiff settled with one of the defendants for less than the full amount of the plaintiff's damages, the plaintiff was still entitled to recover the remaining amount of the damages from the non-settling defendants. As among each other, the defendants had the right of contribution to equalize their payments toward satisfaction of the shared liability. In this context, it was only logical that amounts paid by one settling defendant would be credited towards the full amount of the shared liability.

The LRA changed all that. A plaintiff now settles with a defendant at the plaintiff's own risk. If the plaintiff settles with the defendant for less than what a jury later determines was the defendant's percentage of fault, the plaintiff is the loser and cannot recover the difference from the other defendants. By the same token, if a plaintiff settles with a defendant for more than what the jury later determines was the settling defendant's share of the fault, the non-settling defendants have no right to credit any amount of the settlement towards their separate liability. Further, defendants no longer have the right of contribution among each other because they are not jointly and severally liable but are only liable for their proportionate share of the fault. Thus, to apply Section

15-4-3 of the JOA to further reduce – and in fact eliminate – Eby’s liability to Lange after Eby’s liability has already been reduced to his proportion of the fault would constitute a double reduction totally inconsistent with the purpose of the LRA.

Not surprisingly, Eby has been unable to cite one case which supports his misinterpretation of the law. Numerous cases decided in other jurisdictions having comparative negligence statutes have rejected his position.

For example, in *Glenn v. Flemming*, 732 P.2d 750, 755 (Kan. 1987), the court held that a non-settling defendant was not entitled to have the amount of the judgment entered against him reduced by the amount paid by another defendant to settle with plaintiff. The court held that the rule allowing a *pro tanto* reduction based on a settlement agreement does not apply where “tortfeasors are liable only for proportionate shares of harm”, citing Restatement (2d) of Torts Section 885(3) comment (a) (1977). The court stated:

An injured party whose claim for damages is exclusively subject to the Kansas comparative negligence statute may now settle with any person or entity whose fault may have contributed to injuries ***without that settlement in any way affecting his or her right to recover from any other party liable under the act.*** The injured party is entitled to keep the advantage of his or her bargaining, just as he or she must live with an inadequate settlement should the jury determine larger damages or a larger proportion of fault than the injured party anticipated when the settlement was reached. [Emphasis added.]

The *Glenn* court rejected the cases cited by the defendant on the basis those cases were “not persuasive because those cases are from jurisdictions which have not abrogated the concept of joint and several liability.” *Id.* at 731.

In *Gemstar Ltd. v. Ernst & Young*, 917 P.2d 222, 237 (Ariz. 1996) the Arizona Supreme Court held that when a defendant is liable for only his proportionate share, a reduction of judgment by the amount of the settlement is unwarranted, observing:

[R]educing plaintiff’s award by the amount of the settlement would undermine the policy justifications several only liability. Under several only liability, the defendant is liable only for the amount of plaintiff’s damages that is proportional to the defendant’s percentage of fault. Thus, offsetting a plaintiff’s damages by the amount of a non-party’s settlement is unnecessary because the defendant pays only his share of the damages. A contrary rule would (1) give the benefit of an advantageous settlement to the non-settling tortfeasor, rather than to the plaintiff who negotiated the settlement, (2) discourage some defendants from settling in anticipation of acquiring the benefits of the settlement of their co-tortfeasors, and (3) neglect to recognize the fact that settlement dollars are not synonymous with damages but merely a contractual estimate of the settling tortfeasor’s liability. [Citations and internal quotations omitted.]

To the same effect, see Kriser v. Hobbs, 166 F.3d 736, 742 (5th Cir. 1999) (the court refused to credit another defendant’s settlement and rejected defendant’s argument that he was entitled to reduce “its liability for damages twice: first, by the settling defendant’s share of fault; and second by the amount of that settlement, if greater”); *Nilsson v. Bierman*, 839 A.2d 25, 30-31 (N.H. 2003) (*pro tanto* credit does not apply when statute limited defendant’s liability to his proportionate share of damages).

Eby repeatedly cites this court's decision in *Nelson v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 935 P.2d 512 (Utah 1997) to attempt to support his position. *Nelson* is inapposite because it involved vicarious liability, in which situation the LRA does not apply. However, the Supreme Court recognized that the LRA would supercede or act as a *pro tanto* repeal of Section 15-4-4 of the JOA with respect "regular co-defendants" who are liable because of fault. *Id.* at 541, n. 3.

Eby's cry of "windfall" is misdirected. Lange did not receive a windfall. Lange settled her claim for compensatory *and punitive* damages against Geary for \$140,000. Although it turns out that the settlement may have been more than Geary would have had to pay had it tried the case,² that fact does not equal a "windfall". She bore the risk of that settlement, good or bad. Lange simply received the benefit of her bargain with Geary. It is Eby who is seeking to obtain an enormous windfall. Eby was found 85% at fault and the jury awarded \$1,000 in punitive damages against him for intentional and malicious conduct. Yet, according to Eby, he does not have to pay one cent because Geary has already paid all the damages. Even better for Eby, he faces no claim from Geary because the right of contribution was abolished by the LRA. Eby's position is not only in irreconcilable conflict with the purpose and effect of the LRA, but it would be poor public

² This is not a given because the jury may have awarded very substantial punitive damages against a large construction company. Moreover, Lange's experts opined that she suffered far greater damages than awarded by the jury, which Geary undoubtedly considered in agreeing to the settlement amount. The evidence was that the value of the trees destroyed by Eby was alone was more than \$100,000. (Exhibit P22.)

policy to accept Eby's argument because it would encourage defendants not to pay their fair share to settle a case in the hopes that other defendants would pay the liability.³

Eby incorrectly attaches significance to the fact that Section 75-27-43 of the LRA states that nothing in the LRA "affects or impairs . . . statutory immunity from liability." However, contrary to Eby's suggestion, Section 15-4-3 has nothing to do with statutory immunity but only with crediting a settlement payment made by one or more obligors toward an obligation shared by other obligors.

Eby contends that he and Geary shared an obligation to Lange because Eby and Geary were both "at fault for the same loss and destruction of vegetation on Lange's property." (Eby Brief at p. 19.) To the contrary, Eby and Lange did not share any liability; they were each only liable for their proportion of the fault, unlike the case of joint and several liability. Eby was not liable for Geary's conduct and Geary was not

³ Remarkably, Eby attempts to escape any liability for his intentional and malicious acts by imploring the court that it should not "turn courts into casinos where a fully compensated plaintiff can take a risk free throw of the dice for a windfall verdict" (Eby Brief at p. 14.) and that "[d]isallowing a credit promotes frivolous or greed driven litigation by plaintiffs who no longer have suffered any loss." (*Id.* at 24.) This hyperbolic plea egregiously mischaracterizes the issue. Plaintiffs and defendants usually have vastly different views on the amount of damages and the proportion of fault of any particular defendant. Plaintiffs usually proceed to trial after settling with one defendant because they believe they have suffered further damages for which other defendants are responsible. The plaintiffs may or may not be right but they will only have the answer after the jury returns its verdict. Although Eby is certainly right that the courts are not a casino, it is fatuous for Eby to pretend that litigation is not always a gamble. More relevant to the case at bar, courts are not the Salvation Army where Eby can hold out his hand and reap the benefits of money paid by others.

liable for Eby's conduct. That is whole purpose of the comparative negligence statutes and the abolishment of joint and several liability. It would make no sense to allow Eby a credit for amounts paid by Geary to settle when Eby and Geary were each separately liable for their own fault.

Lastly, it is important to note that Eby does not even attempt to apply the credit provided by Section 15-4-3 to the judgment against him in the case at bar. Under Section 15-4-3 (if it were applicable) the entire payment made by Geary towards its supposedly "shared" obligation with Eby would be credited to the judgment against Eby. However, obviously recognizing that it would make no sense to apply the statute literally in a comparative negligence situation, Eby argues that the amount paid in settlement by a settling defendant should be first applied to the settling defendant's proportion of liability as ultimately determined by the jury and then any excess settlement amount applied to the amounts owing by the non-settling defendants. (Eby Brief at pp. 16-17.) Of course, Section 15-4-3 contains no such provision and Eby cites no authority for such a rule. Indeed, Eby does not even hazard to come up with a rule as to how the supposed excess settlement proceeds are to be allocated to reduce the liability of the non-settling defendants and, once again, Section 15-4-3 does not provide any answers.

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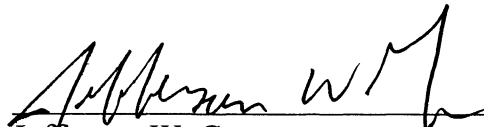
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CONCLUSION

For the foregoing reasons, it is respectfully submitted that the district court's order should be affirmed.

DATED this the 7th day of September, 2005.

BURBIDGE & MITCHELL



Jefferson W. Gross
Attorneys for Appellee

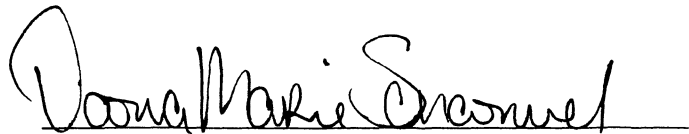
CERTIFICATE OF SERVICE

On the date below written, the undersigned hereby certifies that a true and correct copy of the foregoing **BRIEF OF APPELLEE VENNA M. SWALSBERG LANGE** was mailed with all first-class postage pre-paid to:

E. Scott Savage (2865)
Casey K. McGarvey (4882)
BERMAN & SAVAGE, P.C.
50 South Main, Suite 1250
Salt Lake City, Utah 84114

Attorneys for David Eby

DATED this the 7th day of September, 2005.



APPENDIX A

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Venna M. Swalberg Lange,)	
Trustee of the Carl A.)	
Swalberg Family Trust,)	ORDER PARTIALLY DISMISSING
)	APPEAL AND DENYING STAY
Plaintiff and Appellee,)	
)	Case No. 20050040-CA
v.)	
)	
David Eby, Geary Construction,)	
Inc., and Does 1-10,)	
)	
Defendants and Appellant.)	

Before Judges Davis, Jackson and Thorne.

This case is before the court on Appellee Venna M. Swalberg Lange's (Lange) motion for summary disposition and on Appellant David Eby's (Eby) motion for a stay pending appeal.

Lange moves to dismiss the appeal on grounds that the extension of the time for appeal exceeded the time allowed by rule 4(e) of the Utah Rules of Appellate Procedure. See Utah R. App. P. 4(e) (limiting extension to 30 days past the original appeal period or 10 days after the order granting extension, whichever is later). Eby does not dispute that the extension was ineffective, but contends that his "Motion to Be Credited with Geary Construction, Inc.'s \$140,000 Settlement with Plaintiff" was equivalent to one or more of the timely post-judgment motions that extend the time for appeal under rule 4(b) of the Utah Rules of Appellate Procedure. Eby then contends that his notice of appeal filed after announcement of the ruling denying the motion, but before entry of the signed order, is timely under rule 4(c) of the Utah Rules of Appellate Procedure. However, Lange correctly notes that rule 4(c) does not apply to orders ruling on any of the post-judgment motions enumerated in rule 4(b). See Swenson Assoc. Architects v. State, 889 P.2d 415, 416 (Utah 1994) (rejecting application of rule 4(c) to motions enumerated in rule 4(b), noting "the crucial language of rule 4(c), which provides, 'Except as provided in paragraph (b) of this rule.'").

Although we agree that Eby's motion seeking credit for the settlement with Geary Construction is the functional equivalent

of a motion to alter or amend the judgment under rule 52(b) or rule 59(e) of the Utah Rules of Appellate Procedure, a notice of appeal filed before entry of the signed order disposing of the motion was ineffective to confer jurisdiction over the appeal from the final judgment against Eby. See Utah R. App. P. 4(b) (stating that a notice of appeal filed before disposition of a motion to alter or amend the judgment "shall have no effect" and "[a] new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion"). Accordingly, the notice of appeal was not timely from the final judgment against Eby, and we lack jurisdiction over the appeal insofar as it challenges the judgment.

Eby's second motion sought relief from the judgment under rule 60(b) of the Utah Rules of Civil Procedure based upon irregularities in the entry of the judgment prior to expiration of the time for making objections. A rule 60(b) motion is not one of the enumerated motions under rule 4(b) and "does not extend or toll the thirty-day period in which appeals in the original action must be filed." Sittner v. Schriever, 2000 UT 45, ¶21, 2 P.3d 442; see also Utah R. Civ. P. 60(b) ("A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.") Nevertheless, an order denying a rule 60(b) motion constitutes a final appealable order. See Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950, 970 (Utah Ct. App. 1989) ("It is well-settled under Utah law [that] an order denying relief under rule 60(b) constitutes a final appealable order."). In addition, the order on a rule 60(b) motion is not excluded from the operation of rule 4(c) of the Utah Rules of Appellate Procedure. Accordingly, the notice of appeal was timely filed after the announcement of the ruling denying the rule 60(b) motion and is deemed to have been filed on the date of entry of the signed order. The appeal is limited to challenging the grounds for denial of the rule 60(b) motion.

Eby also seeks a stay of the judgment pending his appeal, requesting that the stay be granted without the requirement of a supersedeas bond. See Utah R. Civ. P. 62(d) ("Upon motion and good cause shown, the court may permit a deposit of money in court or other security to be given in lieu of giving a supersedeas bond."). Lange contends that Eby provided insufficient evidence that a judgment lien on his Oakley property would constitute adequate security. Under the circumstances, the district court did not err in denying the motion to stay, and we

also deny the motion to stay the judgment without the requirement of a bond. Our denial is without prejudice to renewal of the motion to stay in the district court within thirty days of the date of this order, provided that, any renewed motion must be accompanied by a professional appraisal or analysis of comparative sales establishing a market value for the Oakley property, along with competent evidence of any and all liens and encumbrances on the land. Any evidence submitted in support of a motion for stay without a bond is subject to objection by Lange as provided in rule 62(g) of the Utah Rules of Civil Procedure. On the basis of the foregoing,

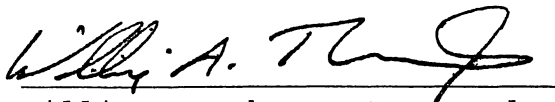
IT IS HEREBY ORDERED that the motion to dismiss the appeal is granted, in part, and the appeal is dismissed insofar as it seeks to appeal the final judgment and any post-judgment motions seeking to alter or amend the judgment.

IT IS FURTHER ORDERED that the motion to dismiss the appeal is denied, in part, and the appeal may go forward only insofar as it seeks to appeal the denial of the motion for relief from judgment under rule 60(b) of the Utah Rules of Civil Procedure and is limited to the grounds asserted in that motion.

IT IS FURTHER ORDERED that the motion for stay pending appeal is denied, without prejudice to renewal of the motion to stay in the district court within thirty days of the date of this order, provided that, the renewed motion shall fully comply with the requirement stated in this order.

DATED this 5th day of April, 2005.

FOR THE COURT:


William A. Thorne Jr., Judge

CERTIFICATE OF MAILING

I hereby certify that on April 5, 2005, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

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Dated this April 5, 2005.

By 
Deputy Clerk

Case No. 20050040
District Court No. 020500656