

1972

FMA Financial Corporation v. Richard Mckean And Timothy F. Buehner : Brief of Appellant Timothy F. Buehner

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IN THE SUPREME COURT
OF THE STATE OF UTAH

FMA FINANCIAL CORPORATION

Plaintiff and Respondent

vs.

RICHARD McKEAN and
TIMOTHY F. BUEHNER

Defendants and Appellants

Brief of Appellants

Appeal from Judgment of the
District Court of the
Honorable Stewart

Brief of Appellants
Dated
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IN THE SUPREME COURT OF THE STATE OF UTAH

FMA FINANCIAL CORPORATION,
Plaintiff and Respondent,

vs.

RICHARD McKEAN and
TIMOTHY F. BUEHNER,

Defendants and Appellants.

} Case No.
12726

Brief of Appellant Timothy F. Buehner

STATEMENT OF THE CASE

Plaintiff sued to enforce the rental payment provisions of a lease rental contract and thereafter moved for Summary Judgment.

DISPOSITION OF CASE IN LOWER COURT

The District Court granted Plaintiff's Motion for Summary Judgment.

NATURE OF RELIEF SOUGHT ON APPEAL

Appellant Timothy F. Buehner seeks reversal of the Lower Court's Order and requests the case be returned to the District Court for determination on the merits.

STATEMENT OF FACTS

Defendants and Plaintiff entered into a contract for the lease of an automatic car wash on or about November 14, 1968. Subsequently on June 15, 1970, Plaintiff filed suit against Defendants alleging that only those payments as shown in Exhibit B of Plaintiff's Complaint had been made and demanded judgment for the deficiency. The Defendants, Buehner and McKean, each filed separate Answers — Defendant McKean counterclaiming and raising the affirmative defenses of release and estoppel. Thereafter, Plaintiff moved for Summary Judgment supporting the Motion by the Affidavit of John H. Firmage, Jr., which can be read to controvert McKean's affirmative defense of release. In his Answer, however, Buehner denied Plaintiff's claim and accounting of payments made as found in paragraph 2 of Plaintiff's Complaint. Neither this denial, nor the testimony of Buehner relative thereto (Buehner's Deposition, at 4), was met, opposed, or controverted by Plaintiff's Affidavit or any of Plaintiff's other submissions.

ARGUMENT

POINT I.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WAS UNSUPPORTED WITH RESPECT TO DEFENDANT BUEHNER'S DENIAL AS REQUIRED BY RULE 56 OF THE UTAH RULES OF CIVIL PROCEDURE.

Rule 56(c) of the Utah Rules of Civil Procedure provides:

"When a motion for summary judgment is made and *supported* as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings. . . ." (Emphasis added).

The clear and unmistakable inference from this language is that when a Motion for Summary Judgment is not supported as provided in this rule the adverse party may indeed rest upon the denials contained in his pleadings. The Affidavit of Mr. Firmage (Tr. 13-14) does not deal with Defendant Buehner's Answer wherein Buehner denied Plaintiff's claim and accounting as set forth in paragraph 2 of Plaintiff's Complaint (Tr. 36). Inasmuch as Plaintiff's Affidavit does not oppose this denial, Defendant Buehner was entitled to rely solely upon his Answer, in light of Rule 56(c), in opposing Plaintiff's Motion for Summary Judgment.

POINT II.

A GENUINE DISPUTE OF MATERIAL FACTS EXISTS AS SHOWN BY THE SUBMISSIONS OF THE PARTIES. THE LOWER COURT'S ORDER GRANTING SUMMARY JUDGMENT WAS, THEREFORE, IMPROPER.

This Court has consistently held that when a bona fide dispute exists as to any material facts, as shown by the submissions of the parties, Summary Judgment is inappropriate. *Transamerica Title Ins. Co. v. United States Resources, Inc.*, 24 U. 2d 346, 348, 471 P.2d 165 (1970) and *Gillmor v. Carter*, 15 U.2d 280, 283, 391 P.2d 426 (1964). The pleadings, depositions of the Defendants, and Affidavit of John H. Firmage, Jr., clearly show that there exists a bona fide dispute between the parties as to the amount due and owing, if any, under the contract (Buehner's Answer, Tr. 36, and Buehner's Deposition at 4).

Moreover, Defendants were "entitled to the benefit of having the Court consider all of the facts presented, and every inference arising therefrom in the light most favorable to [them]." *Morris v. Farnsworth Motel*, 123 Utah 289, 259 P.2d 297, 298 (1953). Although Buehner was entitled to rely solely upon his Answer (See Point I supra), his deposition nevertheless indicates that he is able to testify and present evidence to refute Plaintiff's claim. (Buehner's Deposition at 4.)

CONCLUSION

Plaintiff's Affidavit is insufficient to support his Motion or Summary Judgment against Defendant Buehner and material issues such as Plaintiff's claim and accounting amount are in issue. Defendant Buehner is, therefore, entitled to a trial on the merits.

Respectfully submitted,

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