2005

National Advertising Company v. Murray City Corporation, Gene V. Crawford, Sherry T. Crawford : Reply Brief

Utah Court of Appeals

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Donald L. Dalton; Dalton and Kelley; Attorney for Appellee.

IN THE UTAH COURT OF APPEALS

NATIONAL ADVERTISING COMPANY,	:	Case No. 20050110-CA
	:	Priority No. 15
Plaintiff/Appellee,	:	
vs.	:	
MURRAY CITY CORPORATION, GENE V. CRAWFORD, SHERRY T. CRAWFORD dba "Val-Dev, L.L.C.,"	:	
Defendants/Appellants.	:	

APPELLANT'S REPLY BRIEF

On Appeal from Judgment
of the Third Judicial District Court,
Salt Lake County, State of Utah
Honorable J. Dennis Frederick, Presiding

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I. THE CRAWFORDS' COUNTERCLAIM IS NOT SAVED BY URCP 13(d).

The Crawfords have made various excuses for their failure to file a counterclaim until after the end of the case. None of them is plausible. The first is that the counterclaim did not "mature" until after this Court ruled on the validity of the parties' sign permits. However, it is easy to see that the validity of the sign permits had nothing to do with the Crawfords' breach of contract claim.

The Crawfords' counterclaim was based on breach of the Lease, specifically, ¶9. Validity of the sign permit was not an element of the claim. This can be seen from the express terms of ¶9:

> In the event that the portion of the Lessor's property occupied by the Lessee's displays is to be improved by permanent construction or remodeling, as evidenced by a building permit, requiring the removal of the Lessee's displays, the Lessor may terminate this lease upon giving the Lessee ninety (90) days written notice of termination,.... The Lessee agrees to remove its displays within the 90 day period.

The Crawfords' claim for damages is based on the fact that NAC did not remove its sign from the Crawfords' property in response to the early termination notice.[1] This is evident from statements made by the Crawfords in this case:

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[1] The sign was removed at the end of the normal Lease term.

> National had to remove its sign by October 23, 1996. The evidence presented at trial established that if National had done so, the Crawfords could have erected their own sign and collected lease payments beginning in November of 1996, which they were ready, willing and able to do.
>
> Pg. 17, Appellees' Brief

It is obvious that the Crawfords needed a sign permit to erect a sign and collect the lease payments, but this was no part of their claim against NAC. The Crawfords never claimed that NAC breached a duty to them by applying for a sign permit of its own even though this prevented them from getting their sign permit.

It was with good reason this Court said that questions concerning ¶9 of the Lease were "ultimately irrelevant to our decision." (Memorandum Decision, Case No. 20020717-CA)

Even if the validity of the sign permit were a "prerequisite" to the Crawfords' claim (pg. 12, Appellees' Brief), it is clear that the Crawfords were possessed of such a permit back on March 29, 1996. (R. 936, ¶12)

From the day the Crawfords entered the case, it has been their claim that theirs was the only valid sign permit. It was not necessary for this Court to rule on this issue before the Crawfords could assert their claim. Otherwise, parties would be required to separately litigate each and every element of their claim to a

successful conclusion before asserting a claim. Civil litigation would grind to a halt under such a precedent.

There can be no question that the Crawfords' counterclaim was "mature" on or before October 23, 1996. Therefore, the counterclaim was impermissible under URCP 13(d).

II. THE TRIAL COURT'S DISCRETION WAS STRICTLY LIMITED BY THE ENTRY OF FINAL JUDGMENT.

The gist of the Crawfords' argument is that no matter whether their counterclaim was mature, the trial court had discretion to allow its late filing. A recent decision of the Tenth Circuit Court of Appeals confirms this position, but makes it clear that in a case like this, the trial court's discretion is strictly limited by the provisions of URCP 60(b) and 59(e).

In *The Tool Box, Inc. v. Ogden City Corp.*, 419 F.3d 1084 (10th Cir. 2005), plaintiff waited until after final judgment and affirmation on appeal before moving for leave to amend its complaint. Plaintiff made the same argument as the Crawfords in this case (pp. 10-11): "[T]hat leave to amend should be freely allowed under Rule 15(a) when justice requires,...." 419 F.3d at 1087

However, the liberal amendment policy of URCP 15(a) does not apply to motions for leave brought after entry of final judgment: "[O]nce judgment is

entered, the filing of an amended complaint is not permissible until judgment is set aside or vacated pursuant to Fed.R.Civ.P. 59(e) or 60(b)." 419 F.3d at 1087 (quotations and citations omitted)

The court quoted from *Wright & Miller* as follows:

> To hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of judgments and the expeditious termination of litigation. The fact that a party desiring to amend after judgment has been entered is obliged first to obtain relief from the judgment imposes some important restrictions on the ability to employ Rule 15(a)....For example, a judgment generally will be set aside only to accommodate some new matter that could not have been asserted during the trial, which means that relief will not be available in many instances in which leave to amend would be granted in the prejudgment situation. Furthermore, unlike the liberal amendment policy of Rule 15(a), a party moving under Rule 60(b) will be successful only if he first demonstrates that the judgment should be set aside for one of the six reasons specified in the rule.
>
> 419 F.3d at 1087 (*quoting* 6 Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 1489, at 694)

The Crawfords seem to recognize the applicability of URCP 60(b) and 59(e). On pg. 9 of their brief, the Crawfords claim as excuses for their late filing "(1) mistake, inadvertence, surprise, or excusable neglect in discovering the new claims for damages; and/or (2) newly discovered evidence, which are grounds for reopening the judgment under Rules 59 and/or 60." (Pg. 9, n.1, Brief of Appellees)

However, the Crawfords never claimed "newly discovered evidence" until now, and their Motion for Leave filed in the district court was no more specific about "mistake, inadvertence, surprise, or excusable neglect" than their appellate brief in this case. (RR. 814-20) The district court never should have entertained the Crawfords' Motion without a statement of the specific grounds for relief under URCP 60(b) or 59(e).

No matter whether the Motion was filed under URCP 13(e), 59(e) or 60(b), there was no basis for relief. The Crawfords quibble about their son's "subjective belief" in the ripeness of their counterclaim, (pg. 12, Appellees' Brief) but there is no question that they knew such a claim existed back on August 7, 1996. It is impossible to imagine how the Crawfords claim "mistake, inadvertence, surprise, or excusable neglect" under the circumstances of this case.

The Crawfords contend that abuse of discretion cannot be shown without prejudice to the opposing party. *E.g.*, *Norman v. Arnold*, 2002 UT 81, ¶38; *R&R Energies v. Mother Earth Industries*, 936 P.2d 1068, 1080 (Utah 1997) The Crawfords proceed to question whether NAC can make that showing. (Pg. 11, Appellee's Brief)

The prejudice should be obvious: A money judgment for $109,632.91 has been entered against NAC. Except for the late filing of the Crawfords' counterclaim, NAC would not be the subject of this judgment.

III. THE CRAWFORDS' MOTION WAS UNTIMELY.

This says nothing about the timeliness of the Crawford's Motion under URCP 60(b) or 59(e). This was also addressed in *Tool Box*.

Like the Crawfords (pg. 10, Appellees' Brief), The Tool Box claimed that the judgment was not final until after the ruling by the appellate court. 419 F.3d at 1088 However, "Tool Box is again mistaken:...[A]n appeal does not toll or extend the one-year time limit of Rule 60(b)." *Id.* As a result: "The district court correctly denied Tool Box's Rule 60(b)(1) motion...as untimely, and, thus, correctly denied the motion to amend the complaint." *Id.* at 1089

The Crawfords' position on finality of judgments would turn appellate procedure on its head. The time for filing a motion under URCP 60(b) and 59(e) started to run from the date that Judgment was entered in the trial court (August 2, 2002). Even if the Court wishes to excuse the fact that the Crawfords never made such a motion, the time for filing such a motion ran on November 4, 2002 (in the case of URCP 60(b)) and August 16, 2002 (in the case of URCP 59(e)).

The Crawfords contend that they could have filed an independent action (pg. 14, Appellees' Brief), and this is true, but they never did, and it was too late by the time they finally moved to amend their Answer. UCA § 78-12-23(2)

The "relation back" principle of URCP 15(c) was the only way to save their counterclaim, and this is why the Crawfords had to move for leave in this case.

CONCLUSION

The clock started to run on the Crawfords' counterclaim on October 23, 1996 (at the latest). The Crawfords waited until after final judgment (six years later) before raising it. When they did, it was past the time for motions under URCP 59(e) or 60(b). If their Motion for Leave is to be interpreted as a motion under URCP 59(e) or 60(b), they have not stated any grounds. If the district court had discretion to entertain the Crawfords' Motion for Leave, that discretion was abused when the Motion was granted.

For the foregoing, additional reasons, judgment for the Crawfords (R. 934) should be REVERSED.

DATED this 7th day of October, 2005.

DALTON & KELLEY

By _____
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CERTIFICATE OF SERVICE

THIS WILL CERTIFY that true and correct copies of the within and foregoing "Appellant's Reply Brief" were mailed, postage prepaid, this 7th day of October, 2005, to:

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