

1994

Bonneville Manufacturing, Inc., Hughes Western Sales, Inc. v. Viola L. Irwin and Beverly V. Thornblad : Petition for Rehearing

Utah Court of Appeals

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Richard S. Nemelka; Attorney for Appellees.

John W. Buckley; Attorney for Appellants.

Recommended Citation

Legal Brief, *Bonneville Manufacturing, Inc., Hughes Western Sales, Inc. v. Viola L. Irwin and Beverly V. Thornblad*, No. 940447 (Utah Court of Appeals, 1994).

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UTAH COURT OF APPEALS

BONNEVILLE MANUFACTURING,
INC., and HUGHES WESTERN
SALES, INC.,

Plaintiffs and Appellees,

No. 940447-CA

v.

VIOLA L. IRWIN and BEVERLY
V. THORNBLAD,

Defendant and Appellants.

PETITION FOR REHEARING

Appeal from a final order of the
Third Judicial District Court, State of Utah,
Salt Lake County, Honorable Timothy R.
Hanson, Presiding

Richard S. Nemelka #2396
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Category (15)

FILED

AUG 31 1995

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COURT OF APPEALS

UTAH COURT OF APPEALS

BONNEVILLE MANUFACTURING,
INC., and HUGHES WESTERN
SALES, INC.,

Plaintiffs and Appellees,

No. 940447-CA

V.

VIOLA L. IRWIN and BEVERLY
V. THORNBLAD,

Defendant and Appellants.

PETITION FOR REHEARING

Defendants herewith make and file their petition for rehearing from the Memorandum Decision (Not for Publication) of the Court dated August 17, 1995, and with particularity state the points of law or fact overlooked or misapprehended by the Court, as follows, to-wit:

ARGUMENT AND AUTHORITY:

Introduction: Reference is made in the decision to a contempt proceeding and to contemptuous conduct on the part of defendant Thornblad. The Court is reminded that nowhere in the record is it shown that Thornblad was guilty of such conduct; only that the trial court by judicial coercion compelled her to sign an earnest money purchase agreement in which she purportedly agreed to sell her real estate and which she would not have signed but for the coercion by the trial court, viz., the

threat of being jailed if the agreement was not signed by Thornblad. This never became an issue, but did this set of circumstances ever product a valid, binding agreement of sale? Of course not; the element of consensuality is missing. The purchaser in the agreement was aware of this; he never sought to enforce the agreement after the reversal by the Utah Supreme Court.

It has always been the understanding of the undersigned that the contempt procedure will not be, or will improperly be employed by a court where the consequences of the act to be enforced will not produce a constructive result or will be an exercise in futility as was the case here.

A. The Court's finding that because the judgment for attorney's fees sought to be vacated was "imposed because of Thornblad's refusal to abide by an order of the court" and therefore was not a "judgment 'based upon' the original judgment" is totally incorrect and hopefully was the result of a misunderstanding by the Court of the record in this appeal.

A copy of the Judgment for attorney's fees sought by appellant Thornblad to be vacated is appended hereto as Exhibit "A", and a copy of the Affidavit for Attorney's Fees to which is attached an itemization of the services for which claim is made by plaintiffs' counsel is appended hereto as Exhibit "B"; this long preceded the purported contempt proceedings and is unrelated thereto. It cannot be successfully contended that the Judgment for attorney's fees [dated May 3, 1993] sought to

be vacated would have been entered if the Judgment and Order of Sale of December 2, 1991, reversed on September 24, 1993, had not been in place. It is therefore shown that the prior judgment of December 2, 1992, is a necessary element of the judgment sought to be vacated, the Judgment of May 3, 1993. 7 Moore's Federal Practice (1983), para. 60.26[3]; Vol. 11, Wright & Miller, Sec. 2863; Kelly v. Scott, 5 Utah 2d 159, 298 P.2d 821 (1956).

B. Appellant Irwin's right to jury trial. The Court based its decision to deny Irwin her right to jury trial on her actions in not objecting to a bench trial, in not objecting to the trial court's scheduling of a bench trial, in her silence when the court proceeded without a jury, whereby appellants "waived their right to jury trial" citing an Oregon case in support, viz., Kesterson v. Lewis, 868 P.2d 1350, 1351-52 (Ore. App. 1994). Under the facts of this case appellant's due process and equal protection rights under the Fourteenth Amendment, U.S. Const., are violated.

It should be pointed out that Oregon's ORCP 50 assures the right to jury trial as provided in Oregon's Constitution. Utah's rules are different. Rules 38 and 39 of the Utah Rules of Civil Procedure are taken verbatim from the federal rules. Oregon has no provision regarding waiver of the right to jury trial whereas Utah does. Waiver can only occur by consent of the parties, and in the manner prescribed by Rule 39. Rule 38(d) provides "[a] demand for trial by jury made as

herein provided may not be withdrawn without the consent of the parties." In addition, pursuant to URCP 39(a), when demand for jury trial has been made as provided in Rule 38, the trial shall be by jury, unless "the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury."

Moreover, Irwin's participation in the bench trial, without more, is insufficient to waive her right to raise the issue on appeal. Gargiulo v. Delsole, 769 F.2d 77, 79 (2nd Cir. 1985); Del'orfano v. Ramono, 962 F.2d 199 (2nd Cir. 1992).

WHEREFORE, appellants move the Court to grant rehearing and to vacate the memorandum decision of August 17, 1995, and in due course to reverse the judgments and orders of the trial court. The undersigned certifies that this petition is presented in good faith and not for delay.

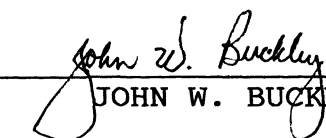
DATED August 30, 1995.



JOHN W. BUCKLEY

On August 30, 1995, two copies mailed as follows:

Richard S. Nemelka
2046 East 4800 South, Suite 103
Salt Lake City, Utah 84117



JOHN W. BUCKLEY

FILED DISTRICT COURT
Third Judicial District

MAY 3 1993

RICHARD S. NEMELKA NO. 2398
ATTORNEY AT LAW
2046 EAST 4800 SOUTH
SUITE 102
SALT LAKE CITY, UTAH 84117
(801) 272-4244

Evelyn L. Simpson
SALT LAKE COUNTY
DEPUTY CLERK

Attorney for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

BONNEVILLE MANUFACTURING, INC.,
A Utah Corporation,
Plaintiff,

v.

VI IRWIN, et al., *Beverly Thornblad*
Defendants.

) 2183020
) 5-6-93 8:20 AM
) J U D G M E N T
)
)
)

Civil No. 900905623 PR
Judge Timothy R. Hanson

Based upon the previous Order of the Court awarding to plaintiff a judgment against Beverly Thornblad for attorney's fees and the Affidavit of the plaintiff's attorney having been filed with the above-entitled Court on the 15th of April, 1993, and having been mailed to defendant's counsel on the 15th of April, 1993 and defendant having failed to file any Objections under the statutory time period and the Court having reviewed the file and good cause appearing therefore, IT IS HEREBY ORDERED

EXHIBIT "A"

ADJUDGED AND DECREED that the plaintiff, Bonneville Manufacturing, Inc., a Utah Corporation, be and the same is hereby granted judgment against the defendant, Beverly Thornblad, in the sum of \$3,375.00 with interest accruing thereon at the rate of twelve percent (12%) per annum.

DATED this 3 day of ¹⁹⁹³ ~~April~~, 1993.

BY THE COURT:

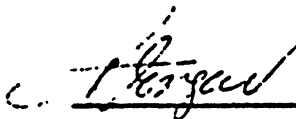

JUDGE TIMOTHY R. HANSON
District Court Judge

~~ATTEST~~

CERTIFICATE OF MAILING

By 
Deputy Clerk

I hereby certify that I mailed a copy of the foregoing Judgment to John W. Buckley, Attorney for Defendants, 1647 North Willowbrook Drive, Provo, Utah 84604, this 29th day of April, 1993, postage prepaid.



RICHARD S. NEMELKA NO. 2396
ATTORNEY AT LAW
2046 EAST 4800 SOUTH
SUITE 103
SALT LAKE CITY, UTAH 84117
(801) 272-4244



Attorney for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

BONNEVILLE MANUFACTURING,
INC., A Utah Corporation,

Plaintiff,

AFFIDAVIT OF ATTORNEY'S FEE

v.

VIOLA L. IRWIN, et al.,

Civil No. 90-905623 DA
) Judge Timothy R. Hanson
)

Defendants.

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Richard S. Nemelka, being first duly sworn upon his oath
hereby deposes and states as follows:

1. That he has personal knowledge of the allegations as set forth herein and is competent to testify to the same.
2. That he is the attorney for the plaintiff in the above-entitled matter.
3. That attached hereto are the services which he rendered in the above-entitled matter in regards to plaintiff's

EXHIBIT "B"

Motion to sign the listing agreement and the Motion to sign the Earnest Money Sales Agreement together with all related issues.

4. That affiant charges \$120.00 per hour and that said amount and the services rendered were all reasonable and necessary in regards to the representation of the plaintiff in the above-entitled matter.


5. That the total amount of attorney's fees incurred in regards to the above was \$3,375.00.

DATED this 15th day of April, 1993.



RICHARD S. NEMELKA

SUBSCRIBED AND SWORN to before me this 15th day of April, 1993.



NOTARY PUBLIC
Residing in Salt Lake County, Utah

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing Affidavit to John Buckley, Attorney for Defendants, 1647 North Willowbrook Drive, Provo, Utah 84604, this 15th day of April, 1993, postage prepaid.




EXHIBIT "A"

Date	Services	Charge
11/21/92	Review and letters	\$ 40.00
11/27/92	Conferences and review	30.00
11/30/92	Conferences, review and letter	30.00
12/01/92	Conferences and review	25.00
12/05/92	Conferences and review	30.00
12/07/92	Draft Affidavit and Motion	75.00
12/08/92	Review and letter	25.00
12/09/92	Meeting with Judge and draft Order	60.00
	Review documents	60.00
12/15/92	Draft response, research and review	100.00
	Review documents	30.00
12/16/92	Conferences and review	30.00
12/19/92	Draft Memo	90.00
12/24/92	Conferences and review	30.00
12/29/92	Conference client and review	30.00
12/31/92	Conference and review	30.00
	Research	100.00
1/04/93	Draft Motion and review	50.00
1/06/93	Conferences and review	20.00
1/07/93	Conferences and review	30.00
1/08/93	Conferences and review	30.00
1/12/93	Conferences and review	25.00
1/21/93	Conference client, review Motion and draft response	120.00
1/23/93	Draft Motion, Affidavit, Notice and Order	200.00
1/25/93	Conferences and review	30.00
	Conference Court and client	30.00
1/26/93	Conferences court, attorney, review, letter	60.00
	Research and review, conferences	60.00
1/27/93	Review and conference attorney	20.00
	Hearing on Motions	90.00
	Conferences and review	60.00
	Conferences Court, client and attorney	30.00
	Conferences and review	30.00
1/28/93	Hearing on Motion; draft Order	150.00
	Conferences client and review	30.00
1/29/93	Conferences and review	30.00
	Draft response Memo and request	150.00
2/01/93	Conference and review	20.00
2/17/93	Conferences and review	30.00
2/22/93	Conference, review, draft Motions	90.00
2/23/93	Rec's pleadings	60.00
2/25/93	Conferences and review	30.00

2/26/93	Conferences and review	30.00
3/01/93	Conferences and review	30.00
	Conference client and review	20.00
3/02/93	Conferences attorney and review	20.00
3/03/93	Conference and review	30.00
	Meeting with Judge	100.00
3/04/93	Conference and review	30.00
3/12/93	Conference and review, Court	60.00
3/15/93	Conference and review	15.00
3/18/93	Review documents	20.00
	Conference Court	30.00
3/26/93	Prepare for hearing and hearing on Motions	240.00
3/27/93	Draft Order, OSC and Affidavit and research on fees	200.00
3/29/93	Review documents	30.00
	Meeting with Judge on OSC	60.00
3/30/93	OSC and review	30.00
3/31/93	Conference attorney and review	20.00
4/15/93	Review file and draft Affidavit	120.00

TOTAL

\$3,375.00