2006

Kirkpatrick MacDonald v. Michael Nielsen : Reply Brief

Utah Court of Appeals

James S. Lowrie; R. L. Knuth; Ryan M. Harris; Jones, Waldo, Holbrook and McDonough; Attorneys for Plaintiff and Appellee.
David W. Scofield; Ronald F. Price; Peters, Scofield, Price; Attorneys for Defendant and Appellant.

IN THE UTAH COURT OF APPEALS

KIRKPATRICK MACDONALD, Plaintiff and Appellee, -vs- MICHAEL NIELSEN, Defendant and Appellant.	Case No. 20060177-CA [Consolidated with Case No. 20060614] District Court Case No. 040500403

REPLY BRIEF OF APPELLANT

APPEAL FROM THE RULING AND ORDER, DATED JANUARY 10, 2006;
THE JUDGMENT, DATED JANUARY 24, 2006; AND THE
RULING AND ORDER, DATED JUNE 2, 2006
OF THE HONORABLE BRUCE C. LUBECK

James S. Lowrie
R. L. Knuth
Ryan M. Harris
JONES WALDO HOLBROOK & MCDONOUGH, P.C.
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101

Attorneys for Plaintiff and Appellee

DAVID W. SCOFIELD - 4140
RONALD F. PRICE - 5535
PETERS SCOFIELD PRICE
A Professional Corporation
111 East Broadway, Suite 340
Salt Lake City, Utah 84111
Telephone: (801) 322-2002

Attorneys for Defendant and Appellant

IN THE UTAH COURT OF APPEALS

KIRKPATRICK MACDONALD, Plaintiff and Appellee, -vs- **MICHAEL NIELSEN,** Defendant and Appellant.	Case No. 20060177-CA [Consolidated with Case No. 20060614] District Court Case No. 040500403

REPLY BRIEF OF APPELLANT

APPEAL FROM THE RULING AND ORDER, DATED JANUARY 10, 2006; THE JUDGMENT, DATED JANUARY 24, 2006; AND THE RULING AND ORDER, DATED JUNE 2, 2006 OF THE HONORABLE BRUCE C. LUBECK

James S. Lowrie
R. L. Knuth
Ryan M. Harris
JONES WALDO HOLBROOK & MCDONOUGH, P.C.
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101

Attorneys for Plaintiff and Appellee

DAVID W. SCOFIELD - 4140
RONALD F. PRICE - 5535
PETERS SCOFIELD PRICE
A Professional Corporation
111 East Broadway, Suite 340
Salt Lake City, Utah 84111
Telephone: (801) 322-2002

Attorneys for Defendant and Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

SUMMARY OF ARGUMENT

Appellee seeks to persuade the Court that the trial court's grant of summary judgment was based on a simple promissory note, evidencing a personal loan made by Appellee to Appellant, personally, which Appellant did not repay. Appellee argues that it is undisputed the loan was not repaid. That is simply not the case. It is that factual dispute that makes the trial court's grant of summary judgment inappropriate and requires that the summary judgment be vacated and the case remanded for further proceedings.

ARGUMENT

I. THE TRIAL COURT'S RULING ACKNOWLEDGES SIGNIFICANT FACTUAL ISSUES IN DISPUTE, THEN INAPPROPRIATELY RESOLVES THOSE ISSUES IN FAVOR OF THE MOVING PARTY.

In its January 10, 2006 ruling, the trial court stated:

> On its face a portion of this letter agreement is clear, ***but as a whole it is less clear***. The task of the court is to determine if the entire note is ambiguous such that parol evidence ought to be considered. ***Clearly there were other dealings surrounding this note***, as shown by the note itself. If the note is ambiguous, a party to a contract may be heard as to the intent of the parties. The court does not find this letter ambiguous. Parts of it are completely unambiguous, (date, interest, time for repayment) but other parts render the entire letter less unambiguous. Still, the intent of the parties must be determined from the note and the court believes that can be done.

R. 315. The trial court acknowledged that, far from being a simple loan transaction: (1) "Defendant claims this loan was part of a long, complex relationship and that the loan was to an entity in which plaintiff had an interest, and that any disputes were resolved in an arbitration proceeding[;]" (R. 311) (2) "Defendant asserts that . . . the loan was not for Nielsen personally but was to pay debts of Redhawk Development[;] (*id.);* (3)

"Defendant urges also that his initialing the agreement was so the files of plaintiff would show the intent, but the real interest of the parties was that the loan would be repaid by or through Redhawk Development, and the letter's language (the loan may be "recast") demonstrates that[;] (*id.*) and (4) "Defendant also disputes the claim the loan was not repaid. The loan was satisfied through the dissolution and the accounting in the arbitration."

Nevertheless, despite the significant factual issues raised by Defendant, the trial court granted summary judgment, ignoring the disputed material facts and construing the disputed facts and drawing all inferences against Nielson, instead of in his favor, as required by binding precedent in Utah. "[A]ll undisputed material facts [must be considered] in the light most favorable to the nonmoving party . . . ." (*IHC Health Services, Inc. v. D & K Management, Inc.*, 2003 UT 5, ¶ 6, 73 P.3d 320, 323), and"all reasonable inferences drawn therefrom [must be viewed] in the light most favorable to the nonmoving party[,]" (*Alder v. Bayer Corp.*, 2002 UT 115, ¶ 25, 61 P.3d 1068, 1076). A single sworn statement of fact on a material question of fact is sufficient to defeat a summary judgment motion. *See Apache Tank Lines, Inc. v. Cheney,* 706 P.2d 614, 616 (Utah 1985) (per curiam) (" 'A single sworn statement is sufficient to create an issue of fact.' ") (*quoting Webster v. Sill,* 675 P.2d 1170, 1172 (Utah 1983)).

Whether the reference to "recasting" of the Note was intended to be, as understood by Nielsen, something that would occur upon the departure of Gaskill, whether such recasting was intended to occur with no further action of the parties, and whether MacDonald Redhawk Investors' ("MRI") conduct in the participation in the arbitration proceeding and its statements therein evidence an intent to waive, elect

remedies or otherwise to resolve the indebtedness to MRI, now at issue in this case, but which was in fact owed by Redhawk Development, another party to the arbitration, or whether it supports a finding that MRI believed that the "recasting" had occurred by virtue of Gaskill's departure, as Nielsen believed would occur, are questions of fact that exist under a construction of the Note and the affidavit of Nielsen, in his favor, as is required under the summary judgment standard. Nielsen is entitled to have a trial on those issues. Whether Nielsen was relieved by an automatic recasting or whether the recasting was intended to be effected through the dissolution of Redhawk Development are material facts as to which a dispute exists and which Nielsen, the non-moving party, is entitled to have construed in his favor for purposes of summary judgment.[1]

MRI's asserted position in the arbitration, that the dissolution, accounting, satisfaction of RDC liabilities and winding up of RDC and distribution of its assets and liabilities, would end internal disagreements at RDC raises an issue of fact about whether the parties to the arbitration intended the Award to have preclusive effect in later proceedings. Nielsen clearly so intended. By not asserting otherwise when asking about how the Panel incorporated the loan into its Award, a genuine issue of material fact is raised about whether MacDonald also so intended.

By reviewing the contract piecemeal, finding some parts clear and some ambiguous, the trial court ignored long established rules of contract construction, which require that the entire contract be viewed and interpreted as a whole, each part to be

---

[1]Were it otherwise, Redhawk Development would be subject to potentially multiple or inconsistent obligations as between claims of Nielsen or MacDonald that its debt had not ben resolved by the Award.

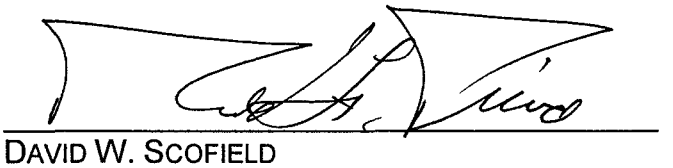
given effect and considered in relation to the intent of the entire agreement. *See Sears v. Riemersma,* 655 P.2d 1105, 1108 (Utah 1982)(courts "look[ ] at the entire contract and all of its parts in relation to each other, giving an objective and reasonable construction to the contract as a whole.").

CONCLUSION

For the reasons stated above, the judgment of the trial court should be reversed and the case remanded for further proceedings.

DATED this 15th day of November, 2006.

PETERS SCOFIELD PRICE
A Professional Corporation

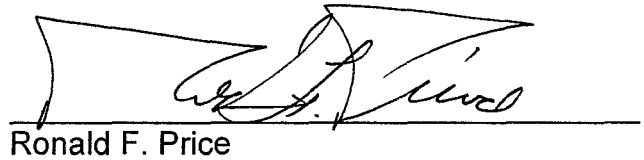


DAVID W. SCOFIELD
RONALD F. PRICE
Attorneys for the Defendant/Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the above and foregoing Appellant's Reply Brief were deposited in the United States Mail, first class postage prepaid, this 15th day of November, 2006, addressed to the following:

James S. Lowrie
R. L. Knuth
Ryan M. Harris
JONES WALDO HOLBROOK & MCDONOUGH, P.C.
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101



Ronald F. Price