2006

Ann Schwartz and Stephen H. Schwartz v. Brad Adair Ray Spencer, and Southern Utah Title Co., Inc : Reply Brief

Utah Court of Appeals

Michael D. Hughes; Hughes & Bursell; Attorneys for Defendants/Appellees.
Stephen H. Schwartz; Pro Se.

IN THE UTAH COURT OF APPEALS

ANN SCHWARTZ and
STEPHEN H. SCHWARTZ,

Plaintiffs/Appellants

v.

BRAD ADAIR
RAY SPENCER, and
SOUTHERN UTAH TITLE CO., INC

Case No. 20060275CA

Defendants/Appellees

APPELLANTS' REPLY BRIEF

On Appeal from a summary judgment entered on March 13, 2006 In the Sixth District Court Kane County, Utah, case number 020600042, the Honorable David L Mower, presiding.

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TABLE OF CITATIONS

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The Appellee's brief and argument throughout this proceeding has focused on the acts and proposed acts of one William Pringle. Appellee has successfully argued that what did not occur, would have; has been able to substitute conjecture for actuality; supposition for fact; and has shifted the focus of the case from the consequences of the Appellee's undeniable failure to act in accordance with its fiduciary obligations. The undisputed facts are that the Appellees appeared as fiduciaries for the Appellants at a tax sale where they were instructed to bid $35,000.00 on property; that the Appellees bid only $11,000.00; that the property sold for $11,250.00. The fact is that the Appellant lost any chance to be the successful bidder because of the Appellee's breach of it's contract with Appellant, not because of anything Mr. Pringle did.

Appellee convinced the trial court that William Pringle's statements of contingent future behavior were facts, but are they? Clearly Mr. Pringle's bids are facts - they occurred. The balance of what Mr. Pringle said could never have been subjected to the rigorous scrutiny and proof requirements that would elevate the statements to facts. First, what Appellees produced as affidavits from Mr. Pringle refer to what Mr. Pringle avers he would have done had the bidding proceeded, not to what actually happened. Second the statements were belied by actual facts.

Appellants present two basic arguments in their appeal: first, that the failure to bid, causing the termination of the auction, caused the Appellants' loss ; and second, even if the potential bid of Mr. Pringle is to be determinative on the question causation, there are material facts in issue relating to his bidding which render the matter unsuitable for summary determination

The core of Appellants' first argument is that due to the nature of the effect of the breach (the end of the bidding and award of the property to the successful bidder) the Appellees' breach itself was the immediate and effective cause of the Appellants' loss and that in proving the breach the burden of persuasion as to proof of causation was met as well. In Appellant's view, the question of what Mr. Pringle might have bid is relevant only to the defense of the claim, a burden that the defendant would bear. Otherwise, in an auction with anonymous bidders, a fiduciary agent defendant who failed to bid as instructed would not be subject to liability to its principal, which would render any such contract illusory.

Contrary to the repeated assertions of the Appellees, Appellants did Provide admissible evidence to prove that Appellants would have been the successful bidders at the auction, but for Appellees' tortious breach of contract. Thus even were the Court to reject Appellants first contention and find it relevant to divine what Mr. Pringle would have bid, summary judgment would be inappropriate.

Contrary to the Appellees' statement heading "Issue No. II" of their brief (Appellee's Brief, p. 23) Appellants produced the following admissible evidence which established that Appellees would have outbid Mr. Pringle had they bid as instructed: a non-hearsay statement of Mr. Pringle, together with Mr. Pringle's prior bid records. Mr. Pringle admitted to bringing only $30,000.00 to the cash auction and admitted that he was bidding other property as well. This statement is admissible and is not hearsay as it is not used for proving the truth of the matter asserted (ie that he had only $30,000.00 and was bidding on other property), rather for proof that he would not have outbid the $35,000.00 the Appellees were instructed to bid. *State v. Haltom*, 121 P.3d 42, 2005 UT 348 (Utah App., 2005), cert granted, 125 P.3d 102 (2005); *State v. Olsen*, 860 P2d 332 (Utah, 1993). Accordingly, Appellees' claim (Appellees' Brief, Issue III) that Mr. Pringle's unavailability as a witness prevents the Appellants from proving their case just is not so, unless these statements are found to be inadmissible. Additionally, the Appellant submitted Kane County's own records of Mr. Pringle's prior bids which showed him to be a 'bargain basement' shopper [to the same effect see Bryan Pringle's testimony, R285, lines 8-17] who had never, in 17 prior bids, bid more than $5250.00 [R132] or more than the market value of any property (the market value of this property was $8349.00[R26, 28], so it can be argued that Mr. Pringle

was already stretching). Given that summary dispositon under Rule 56(c) is appropriate only when it clearly appears that there are no issues of material fact which, if resolved in favor of the non-movant would entitle him to prevail, *Russell v. Park City Corp.,* 29 Utah 2d 184, 506 P. 2d 1274(1973); *University Club v. Invesco Holding Corp*., 29 Utah 2d 1, 504 P. 2d 29 (1972); *Wingets, Inc v. Bitters*, 28 Utah 2d 231, 500 P. 2d 1007 (1972), it is submitted that the lower court erred in granting appellants summary judgment motion below.

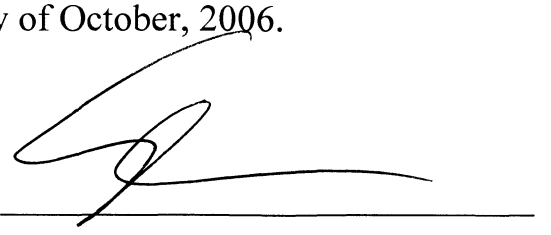
Interestingly, Appellees seek to have the matter of Mr. Pringle's statements and characterization as a witness both ways in their brief arguing on the one hand that his statements prove what he would have bid, yet arguing on the other that he is not a witness. (Appellee's Brief: pages 10,11,12; Addendum A34). Appellees even adopt a portion of the taped recording of the Appellant's conversation with Mr. Pringle in their brief (Appellee's Brief, p. 24). Further, the Appellees attempted to bolster the unverifiable statements of Mr. Pringle with testimony of his son Bryan Pringle. Bryan Pringle was not at the auction (R280, lines 10-16); did not make the decisions as to how much to bid (R279, line 7 to R278, line 7); and despite his assertion, four years after the fact that he was somehow a partner in the purchase, was excluded from the original title (R386) and only added as an afterthought after William Pringle "let the family know" about the property

(Appellee's Brief, p. 24). In any event, Bryan Pringle's evidence could only be considered cumulative evidence, not determinative, such that if the evidence produced by the Appellants is sufficient to raise a material issue of fact, Bryan Pringle's testimony could not be dispositive. *Kilpatrick v. Wiley, Rein & Fielding,* 909 P.2d 1283, 1292 (Utah App.,1996); *Holbrook Co. v. Adams,* 542 P.2d 191, 193 (Utah, 1975)[a single affidavit is sufficient to raise an issue of material fact].

Finally, with regard to the final issue raised by the Appellees, that Appellants have lost the right to appeal from a summary adjudication of a District Court, because they failed to object to it's entry, Appellants can only admire the ability of Appellee to analogize the present case, in which the lower court summarily dismissed the matter to a case in which judgment was granted after a trial on the merits. Appellants are unaware of any other Appellants who on appeal of a summary disposition have been barred from appeal as Appellee seeks to have this court bar the Appellants here.

For the foregoing reasons, the Appellants respectfully request this Honorable Court reverse the judgment of the District Court and remand the matter for a trial on the merits.

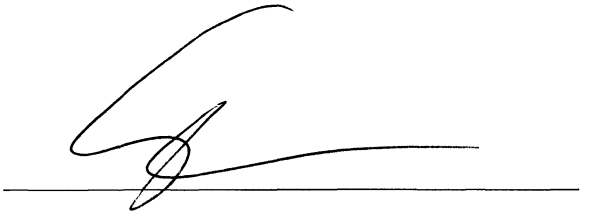
Respectfully Submitted this 30th day of October, 2006.



Stephen H Schwartz, Pro Se

APPELLANTS' CERTIFICATE OF SERVICE RE: FILING APPELLATE REPLY BRIEF

I, STEPHEN H SCHWARTZ, hereby certify that on this 30th day of October, 2006, I served a copy of the Appellants' Reply Brief by mailing two copies of it, first class, postage pre-paid to Michael D. Hughes, Hughes & Bursell, 187 North 100 West, St George, Utah 84770, attorney for the Defendants and Appellees.



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