

2006

Kendell Insurance, Inc., and Shirley Ann Morgan,
and Charles Morgan v. R & R Group, Inc., and Rick
B. Stanzione : Reply Brief

Utah Court of Appeals

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**IN THE COURT OF APPEALS
STATE OF UTAH**

KENDALL INSURANCE, INC., and
SHIRLEY ANN MORGAN, and
CHARLES MORGAN

Plaintiffs and Appellees,

v.

R & R GROUP, INC., and
RICK B. STANZIONE,

Defendants and Appellants

**APPELLANTS' AMENDED REPLY
BRIEF**

Case #: 20060570

Appeal from Findings of Fact, Order of Judgment, & Post-judgment Orders

Second Judicial District Court

Weber County, State of Utah

Trial Case #: 040901442 PD

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TABLE OF AUTHORITIES

n/a

RULES & STATUTES

n/a

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SUMMARY OF ARGUMENT

Appellants did not fail to properly marshal evidence favoring the Appellee. The few items enumerated by the Appellee were addressed in the Appellants' previous brief and/or were not substantive factors in the lower court's analysis of the facts. Appellees' contention that the lower court's failure to address order to show cause issues was not prejudicial because those facts were subsidiary fails to accurately and reasonably consider the massive damages that Appellants incurred as a result of the Appellees' contemptuous behaviors.

ARGUMENT

Did Appellants fail to properly marshal the evidence in favor of the Appellee?

Appellees (“Morgans”) have argued that Appellants (“Stanzione”) failed to marshal evidence in favor of the Morgans and enumerate these factors on page 15-16 of their brief.

Morgans first point out that there was no independent verification by Mr. Kano of the sources of the funds that were reflected on the statements he reviewed. This fact is not on point. The lower court’s findings concluded that the parties had no meeting of the minds as to the value of the business. Stanzione’s brief outlined the method that the Morgans argued was the appropriate method for determining the value of the business and then showed that their method could only be used against their argument that Mr. Stanzione represented a different value for the business. Even if Stanzione’s argument would have failed because he did not provide more evidence to support his position, there remains nothing in the record to support the position taken by the lower court that the Morgans prevailed in their position. Thus, whether or not Mr. Kano’s testimony was independently verified is not relevant *unless* it was Stanzione’s burden of proof to prove the value of the business. In contrast, it was the Morgan’s burden of proof to show that the book of business was not equal in value to what it was represented to be by Mr. Stanzione

because they brought the allegation of fraudulent misrepresentation. The Morgans provided zero accounting evidence to show that the book of business was not equal to the value represented by Mr. Stanzione. Thus, this new fact is only a diversion because it merely points to the insufficiency of Stanzione's defense and does not address the Morgans' failure to meet their burden of proof. Stanzione's position is that the lower court was in clear error by making findings in favor of the Morgans as to the value of the book of business without adequate evidence to support those findings – the Morgans did not meet their burden of proof and there is nothing substantive in the lower court's record to justify a finding that they met their burden of proof. Accordingly, any fact that would suggest that Stanzione's defense was imperfect is not on point because it does not go to whether or not the Morgans met their burden of proof (or more specifically, whether or not the lower court had sufficient evidence to find that they met their burden of proof) that the value of the book of business was not the same as was represented by Stanzione.

Additionally, although less important, Mr. Kano used documents in evidence to make the determinations he did and so testified in conjunction with the testimony cited by the Morgans in their brief. There was no evidence introduced to suggest that better documents were available or that the documents entered into evidence were inaccurate as they pertained to his testimony and report.

Second, Morgans argue that Stanzione failed to include references to “significant premium payments that were generated by Morgans entirely independent of the Kendall Insurance book of business” and failed to include references to the “inclusion of funds advanced by Morgans.” Appellee’s Brief, 15. However, Stanzione made extensive reference to these facts in his brief (see pages 7-8, 13 [see footnotes 6-7]). More significantly, Stanzione argued that even if the Morgans’ position were true as regards these additional funds, the facts can only conclude that there was still more money coming into the business from commissions than the Morgans should have expected according to the testimony that they and their witnesses gave and therefore, the value of the book of business was greater than they expected.

Third, Morgans argue that Stanzione failed to include references to contributions “of Paul Nelson’s independent book of business into the agency.” Appellee’s Brief, 15. Again, this fact is not significant to the issue at hand. First, there was no testimony or documentary proof by the Morgans as to any specific figures that Mr. Nelson allegedly could have contributed to the business below. Second, there were no findings of fact and conclusions of law concerning Mr. Nelson’s book of business and therefore it seems clear that the lower court did not consider this testimony in favor of the Morgans, which makes Morgans’ reference to

it in their brief irrelevant to the issue at hand because it was not an issue that the lower court found in their favor. Third, Stanzione's brief outlined accounting issues showing monies that were put into the relevant account and thereby address this issue on pages 7-8 and 13 as cited above.

Lastly, none of these facts are crucial for the determination of this Court because even if all of the facts outlined or implied by the lower court were true (for example, that the Morgans deposited monies totaling \$10,300.00), Stanzione's argument still stands: by the Morgans' own testimony and by the testimony of the Morgans' witness, they expected to make less monies than they actually made.

Was the lower court's failure to address order to show cause issues nonprejudicial because these findings could only be considered subsidiary?

On page 17 of Appellees' brief, Morgans argue that the order to show cause issues were merely subsidiary and therefore not of a nature that they needed to be addressed by the lower court in its final findings of fact and conclusions of law. Perhaps there is some merit to Morgans' suggestion if the only issue before this Court was whether or not the Morgans should have been held in contempt. However, this was not the only issue affecting Stanzione. The major issue affecting Stanzione was whether or not the Morgans' actions reduced the value of his business to less than half of what it was before they purchased the business. This

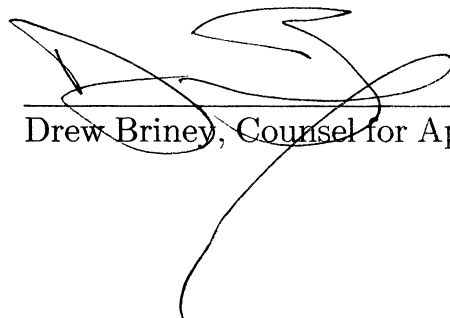
fact is crucial in the instant case because the lower court attempted to effectuate an equitable remedy intending to put the parties in the position that they were in prior to the execution of the contract (as Morgans argued on page 13-14 of their brief). If that was the intent of the lower court in rescinding the contract, that intent was not effectuated in the actual consequences. In an equitable rescission of contract, Stanzione would have been awarded the viable business that existed prior to the execution of the contract in question and the Morgans would have had their monies returned to them. That equity could not be effectuated via a rescission of the contract in the instant case because, in the process of litigation, the Morgans engaged in conduct that drastically reduced the value of the business and accordingly, granting Stanzione ownership of the business did not put him in the position that he was in prior to the execution of the contract. This failure of this equitable remedy was the thrust of Stanzione's Rule 60 motion as well.

CONCLUSION

New information provided in Morgans' brief does not support the conclusion that Stanzione failed to appropriately marshal the evidence in the record against Stanzione's position; either the facts were already addressed in Stanzione's brief or the facts were not on point; in either event, Stanzione brought every fact before this

Court that could be reasonably construed as substantive and necessary to prevail on appeal. Further, Morgans' brief arguing that the order to show cause issues were subsidiary is not convincing because those issues drastically affect the equitable remedy implemented by the lower court and run contrary to the intent behind the equitable remedy implemented by the lower court.

Therefore, for all of the above and foregoing reasons and for all of the reasons stated in Stanzione's opening brief, this Court should reverse and remand the lower court's final order, grant Stanzione his prayer for relief by enforcing the contractual terms as they stood previous to the filing of the complaint, and remand the case for further proceedings so that the lower court can determine whether or not Stanzione is entitled to further relief under his order to show cause issues presented and to determine the amount of Stanzione's attorney's fees. In addition or in the alternative, this Court should reverse the lower court's Memorandum Decision and remand this case for the lower court's consideration of Stanzione's Rule 60(b) motion.



Drew Briney, Counsel for Appellants

DATE: January 25, 2007

SIGNATURE PAGE & CERTIFICATE OF SERVICE

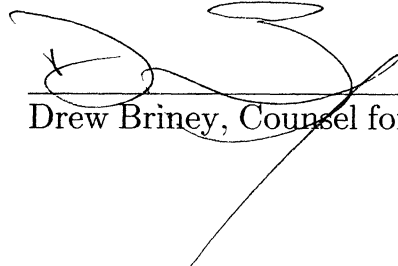
I hereby state that on January 25, 2007, I caused a true and correct copy of Appellant's Amended Reply Brief to be served as follows:

Two copies via first class mail to:

NOEL S. HYDE
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The original and seven copies of the brief were sent overnight and certified mail to this Court.

Dated: January 25, 2007.


Drew Briney, Counsel for Appellants