

1995

Accounting v. Murdock : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 950409-CV

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AUDIT & ACCOUNTING AUTHORITY,
LTD.,

Plaintiff, Appellee,

-vs-

BILLIE MURDOCK,

Defendant, Appellant.

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BRIEF OF THE APPELLEE

Docket No. 950409-CV

Argument Priority: 15

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ON APPEAL FROM A FINAL JUDGMENT
OF THE THIRD CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, SANDY DEPARTMENT
THE HONORABLE ROGER A. LIVINGSTON, JUDGE

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STATEMENT OF THE CASE

Plaintiff, as assignee of an account receivable for dental services, commenced this action against Defendant to attempt to collect a debt. Defendant counterclaimed for violations of the Fair Debt Collections Practices Act, 15 U.S.C. §1692 *et seq.* and the Utah Consumer Sales Practices Act, §13-11-19 *et seq.*, Utah Code Annotated. The case was tried to the Court on December 16, 1994. Judgment for the Plaintiff in the sum of \$1,923.74 was signed May 5, 1995. From this Judgment Defendant appeals.

SUMMARY OF ARGUMENT

Appellant's statement of the issues does not comply with Rule 24(a)(5)(A), Utah Rules of Appellate Procedure. The statement of the issues is totally lacking in citations to the record as required by the rule. Appellants statement of facts is also totally lacking any citations to the record as required by Rule 24(a)(7), Utah Rules of Appellate Procedure.

By failing to object on the record or to make any record at all on the question of time allowed for trial, Defendant failed to preserve any issue for this Court to review.

Defendant offered no evidence or argument to the trial court relating to the question of waiver, laches, or estoppel. By failing to raise the issue at trial, even though the defenses are raised in the answer, Defendant has failed to preserve any issue for this Court to review.

The trial court properly refused to consider any claim of offset for interest allegedly due on a contract that was apparently not offered into evidence and was not raised in the answer or a counterclaim.

Appellant has failed to marshal the evidence on question of the amount of judgment. For that reason alone, the trial court must be affirmed on this question.

Defendant failed to offer any testimony on her counterclaim. Defendant declined to explain the basis of her counterclaim to the trial court. Defendant did not request additional time to present evidence or argument on her counterclaim and therefore can not now claim that she was precluded from doing so by time restraints imposed for trial.

ARGUMENT

POINT I: APPELLANT'S BRIEF DOES NOT COMPLY WITH RULE 24, UTAH RULES OF APPELLATE PROCEDURE.

Appellant's Statement of Facts does not contain a single citation to the record as required by Rule 24(a)(7), Utah Rules of Appellate Procedure ("All statements of fact . . . shall be supported by citations to the record . . ."). This court, in Phillips v. Hatfield, 904 P.2d 1108, 1109 (Utah App. 1995), stated "This court will assume the correctness of the judgment below if the appellant fails to make a 'concise statement of the facts and citation of the pages in the record where those facts are supported.'" (Citations omitted.) Rule 24(a)(5)(A) also requires that the statement of the issues presented for review include for each issue a citation to the record showing that the issue was preserved in the trial court. Appellant's statement of the issues does not contain such a citation for any of the issues. That alone is sufficient reason to affirm the judgment of the trial court.

POINT II: DEFENDANT DID NOT PRESERVE FOR APPEAL ANY ISSUE RELATING TO TIME TO BE ALLOWED FOR TRIAL.

Appellant cites the record wherein the court stated that it would allow one half day for trial. Appellant makes the assertion that Defendant was notified on the day of trial that only one hour would be allowed for trial. (Brief of Appellant, page 10.) If this were true, Defendant had a duty to request adequate time on the record and obtain a ruling on the record. A search of the record fails

to turn up any indication that Defendant objected to any restrictions on time. Having never given the trial court the opportunity to rule on the question, on the record, Appellant can not now raise the issue for the first time. That doctrine is well settled in Utah Law. See US Xpress, Inc. v. Utah State Tax Commission, 886 P.2d 1115, 1119 (Utah 1994), Stewart v. Utah Public Service Commission, 885 P.2d 759, 781 (Utah 1994).

POINT III: APPELLANT FAILED TO PRESERVE FOR APPEAL ANY ISSUE RELATING TO WAIVER, LACHES, AND ESTOPPEL BY FAILING TO OFFER EVIDENCE OR ARGUMENT AT TRIAL.

There is no citation to the record of any place where the words waiver, laches, or estoppel appear except to mention the amended answer. A search of the transcript does not bring to light any instance of the Defendant arguing this issue. It is fundamental that “. . . to preserve a substantive issue for appeal, a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue’s merits.” LeBaron & Assoc. v. Rebel Enterprises, 823 P.2d 479, 482 (Utah App. 1991) (citations omitted) Mere mention of the issue in the pleadings is insufficient. *Id.* at 483. In this case no request was made of the trial court to rule on that question. The trial court should be summarily affirmed on this issue.

POINT IV: APPELLANT HAS NOT ESTABLISHED A RIGHT TO OFFSET THE JUDGMENT WITH INTEREST ALLEGEDLY DUE TO DEFENDANT.

Appellant states that “the court, nevertheless, refused to admit defendant’s contract into evidence . . .” (Appellant’s brief, page 24) Appellant also states that the issue was discussed at an inaudible sidebar. However, neither the original brief nor the correction contain any citation to the transcript as required by Rule 24(e) Utah Rules of Appellate Procedure indicating that the contract

was offered into evidence and that a ruling was obtained as to its admissibility. A review of Defendant's Amended Answer and Counterclaim shows that it does not contain any claim of offset for interest.

By failing to offer the evidence on the record and obtain a ruling on the record, Appellant has lost the right to have this court review the ruling. In Lamb v. V & B Amusements Corp., 869 P.2d 926, 931 (Utah 1993), the Supreme Court refers to an evidentiary ruling at a side bar conference and states that a failure to obtain a ruling on the record waives the issue. That case is controlling here.

Not having claimed the offset in the pleadings and having failed to offer the contract into evidence on the record or to obtain a ruling on the record, Defendant can not claim the evidence was improperly excluded. Without that evidence, there is no basis for the trial court to assess interest on the contract. On that basis, no offset could be allowed. The trial court should certainly be affirmed on that issue.

POINT V: APPELLANT HAS NOT MET HER BURDEN TO HAVE THE QUESTION OF SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE JUDGMENT REVIEWED.

Appellant is apparently claiming that the evidence was insufficient to support the trial court's findings with regard to the amount of the judgment. Appellant has not marshaled the evidence to show the basis of the trial court's decision. Instead, Appellant selectively argues the evidence. In Robb v. Anderton, 868 P.2d 1322, 1328 (Utah App. 1993), this Court stated that the Appellant must marshal all evidence in support of the findings as a prerequisite to an attack on findings of fact.

Appellant argues that it was error to start with the sum of \$5,328.00 rather than the \$3,976.64 that Plaintiff sued for as the number from which offsets should be deducted. This argument is apparently based on the theory that if the Plaintiff gave credit for payments made and

sued for a lesser amount, Defendant is entitled to a second credit for the same payments at the time of trial. That argument is disingenuous at best. The clear lack of merit to that argument, coupled with the failure to marshal evidence, establishes that Appellant clearly has not met her burden for reversal on this issue.

POINT VI: DEFENDANT’S FAILURE TO PROVE HER COUNTERCLAIM IS ADEQUATELY SUPPORTED BY THE RECORD.

Appellant claims that she was precluded from prosecuting her claims as the result of time restraints imposed for trial. This issue has previously been raised and answered. As previously discussed, there is no record that the time for trial was restricted nor that Defendant objected. Those facts alone are sufficient to affirm the trial court on this issue. In addition, however, the record contains several incidences of the trial court inviting the Defendant to offer more evidence or argument on her counterclaim:

“The court: Tell me -- and again why don’t we forgo the argument and just tell me what it is you claim they did.” Transcript, page 87, lines 11-13.

“The court: What are they doing -- what’s wrong with that?” Transcript, page 88, line 3-4.

“The court: Well, okay. Help me a little bit. I’m going to tell you right now that I don’t see the violation . . .” Transcript, page 92, lines 9-11.

“Tell me, why is that a violation?” Transcript, page 92, line 20.

After each of these several invitations to explain how the exhibits to the Request for Admissions violated the law, Defendant merely responded with words to the effect that everything was before the court. Finally the Defendant refused to offer anything further:

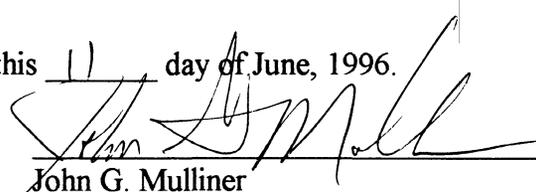
“Mr. Stanton: All right. We’ve made our allegations in the counterclaim, they’re specific in there for you. We’ve provided the admissions and then the Fair Debt Collection Practices Act. And based upon those, make your ruling and then we’ll go from there.” Transcript, pages 93, 94. Lines 22-25 and 1. It is difficult to comprehend how Appellant can now argue that she was precluded from offering evidence or argument.

Having failed to make any record regarding time restraints and having refused to offer evidence or argument when it was invited, Appellant should not now be heard to argue that the findings of the trial court were incorrect.

CONCLUSION

Defendant’s brief fails to comply with the rule regarding a statement of the facts cited to the record and a statement of the issues presented with citations to the record showing the issues were preserved. Defendants claim that she was denied due process by not being allowed sufficient time was not preserved for appeal and is not supported by the record. Defendant presented no evidence or argument regarding waiver, laches, or estoppel and should not be heard to raise them for the first time on appeal. There is no record cited that the contract by which she claims has offset for interest was ever offered into evidence at trial. Defendant failed to marshal the evidence supporting the court’s findings as to the amount of the judgment. Defendant failed to offer any argument or evidence to the trial court as to how the documents attached to the request for admissions violated her rights. The judgment of the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 11 day of June, 1996.



John G. Mulliner
Attorney for Plaintiff

Mailing Certificate

Served Appellee's brief this 11 day of June, 1996 by mailing two true and correct copies thereof, postage prepaid, addressed as follows:

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A handwritten signature in black ink, appearing to read "Daniel A. Stanton", is written over a horizontal line.