2006

David C. Matthews v. Olympus Construction, L.C. : Reply Brief

Utah Court of Appeals

Steven T. Waterman; Steven C. Strong; Brent D. Wride; Ray, Quinney & Nebeker; Counsel for Appellee.
Dwayne A. Vance; Miller, Vance & Thompson; Counsel for Claimant/Appellant .

IN THE UTAH COURT OF APPEALS

IN RE: OLYMPUS CONSTRUCTION, L.C.	Court of Appeals No. 20060739-CA
DAVID C. MATTHEWS, Claimant and Appellant, vs. OLYMPUS CONSTRUCTION, L.C., Appellee.	District Court No. 020904299

REPLY BRIEF OF APPELLANT

Appeal from the
Third Judicial District Court, Salt Lake County
Honorable Tyrone E. Medley

Steven T. Waterman
Steven C. Strong
Brent D. Wride
Ray Quinney & Nebeker
P.O. Box 45385
36 S. State Street, Suite 1400
Salt Lake City, Utah 84145
Telephone: (801) 532-1500

Counsel for Appellee

Dwayne A. Vance (7109)
Miller Vance & Thompson
P.O. Box 682800
2200 N. Park Avenue, Suite D200
Park City, Utah 84068-2800
Telephone: (435) 649-8209

Counsel for Claimant/Appellant

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Miller Vance & Thompson
P.O. Box 682800
2200 N. Park Avenue, Suite D200
Park City, Utah 84068-2800
Telephone: (435) 649-8209

Counsel for Claimant/Appellant

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REPLY POINTS

I. ONCE OLYMPUS ELECTED TO AFFORD ITSELF OF A CLAIM BAR DATE PURSUANT TO UTAH CODE ANN. § 48-2c-1305(4) (2001), OLYMPUS WAS OBLIGATED TO REJECT TIMELY FILED CLAIMS WITHIN THE STATUTORILY PRESCRIBED PERIOD.

The determining issue in the dispute between Matthews and Olympus with respect to the application of UTAH CODE ANN. § 48-2c-1305 (2001) to the facts of this case is the purported permissive nature of the provisions of that statute. Matthews contends that while Olympus was permitted to decide whether or not it wanted to take advantage of a claim bar date pursuant to this statute, once Olympus afforded itself of the benefit of that statute, Olympus was bound to comply with the plain terms of that statute. On the other hand, Olympus contends that each and every provision of the statute is absolutely permissive in the sole discretion of Olympus, and that Olympus had the discretion to establish a claim bar date without being bound by the statutory deadline to reject claims plainly set forth in the statute.

There is no legal authority, including the plain language of the statute itself, that supports the position taken by Olympus in this matter. To the contrary, the plain language of the statute leads to the conclusion that once Olympus elected to establish a claim bar date pursuant to the statute, then Olympus was obligated to reject timely filed claims in writing within 90 days of receipt thereof or such claims would be considered approved as prescribed by the statute.

It is true that the May 6, 2003 Successor Receiver Order provides that to the extent permitted by law, all claims filed against Olympus shall be adjudicated and

determined by this Court in and as part of this proceeding. However, absent the judicial dissolution proceeding, then different creditors would be free to file claims against Olympus in any number of courts. The Successor Receive Order simply provides that to the extent permitted by law all claims would be decided in a single judicial proceeding.

In applying the plain language of UTAH CODE ANN. § 48-2c-1305 (2001) to the facts of this case and ordering Olympus to pay Mr. Matthews' timely filed claim as an approved claim, then Mr. Matthews' claim has been adjudicated and determined in and as part of the judicial dissolution proceeding. If Olympus had wanted to contest the merits of Mr. Matthews' claim in the judicial dissolution proceeding, all Olympus had to do was timely reject Mr. Matthews' claim in writing within the statutorily prescribed time, which Olympus simply failed to do.

As previously set forth in the Brief of Appellant, Olympus expressly relied upon UTAH CODE ANN. § 48-2c-1305 (2001) in seeking an order from the trial court establishing a claim bar date, and should be bound by the plain language thereof.

The two-step process pursued by Olympus in addressing claims is consistent with the fact that if Olympus rejects a timely filed claim in writing within the statutorily prescribed time, then similar to a scheduling order in a civil action some manner of order would then be necessary to establish the procedure and timing of the adjudication of the claims properly put in dispute.

The fact that a receiver had been appointed to wind up the affairs of Olympus has no bearing on whether or not Olympus is excused from the statutory

deadline set forth in § 48-2c-1305 once the receiver elected to afford Olympus the benefit of a claim bar date pursuant to that statute.

The analogy that Olympus attempts to make to bankruptcy proceedings and the creation of a rebuttable presumption is simply inapplicable in that the bankruptcy laws do not establish a firm deadline by which claims are "considered approved" if not rejected in writing by the debtor, and § 48-2c-1305 is plainly written in terms of an absolute limitation on the pursuit of claims and defenses if not presented in a timely manner that clearly cuts both ways.

It must be remembered that the subject clause in § 48-2c-1305 that requires a dissolved company to reject timely filed claims within a specified period of time or such claims are to be "considered approved" is a unique provision crafted by the Utah State Legislature, who must have intended that this clause have some meaning and effect. The position taken by Olympus would essentially render this clause meaningless.

Finally, even assuming, arguendo, that it was appropriate for the trial court to extend the statutorily prescribed time period within which Olympus was required to reject timely filed claims, then similar to the manner in which extensions of other deadlines prescribed by statute or rule are typically made, such an extension should have been addressed prior to the expiration of the subject deadline rather than essentially granting Olympus an open-ended extension until such time as Olympus, in the sole and absolute discretion of Olympus, decided it was time to address third-

party claims rather than trying to obtain approval for payments to members in advance of payments to third-party creditors.

This Court should reverse the trial court's decision and order Olympus to summarily pay the full amount of Mr. Matthews' timely filed claim as an approved claim due to the failure of Olympus to timely reject such claim in writing as mandated by statute.

II. THE GRANT OF SUMMARY JUDGMENT ON THE STATUTE OF FRAUDS ISSUE WAS ERROR IN LIGHT OF DISPUTED ISSUES OF MATERIAL FACT THAT CAN ONLY BE RESOLVED AT TRIAL.

As plainly set forth by the Utah Supreme Court in *L.P. Bentley v. Potter*, 694 P.2d 617, 621 (Utah 1984), an admission at trial with respect to an oral promise is a well-established exception to the statute of frauds.

Olympus places great emphasis on the fact that no such admission at trial exists in this case. Of course, no trial has taken place. Matthews has been precluded from the opportunity to put Richard Jaffa on the stand at trial and question him under oath with respect to his oral promise on behalf of Olympus. Notably, Olympus has not submitted any affidavit of Richard Jaffa in which he states under oath that no such promise was made, but rather Olympus is going to great lengths to prevent Richard Jaffa from testifying under oath at trial.

Summary judgment on this issue is simply inappropriate in light of the disputed issues of material fact that can only be resolved at trial. At the very least, this Court should reverse the trial court's decision and remand this case to the trial

court with instructions to conduct a trial to address the factual disputes with respect to the statute of frauds issue.

III. THE COLLECTION BY AN ASSIGNEE OF A COMMISSION EARNED BY A PROPERLY LICENSED BROKER IS CONSISTENT WITH THE INTENT AND PURPOSE OF THE BROKER LICENSING STATUTES.

None of the cases cited and relied upon by Olympus with respect to this issue directly address a factual situation in which a commission is initially earned by a properly licensed broker and then assigned after-the-fact solely for purposes of collection.

In *Young v. Buchanan*, 259 P.2d 876, 877 (Utah 1953), the licensed principal broker "did not intend to conduct a brokerage or to be active in the real estate business" and "expressly agreed that [the agent] was to act independently of [the broker]; was to pay all expenses; retain all commissions; and [the broker] was to take no responsibility and was to be implicated in none of [the agent's] transactions." The purposes of the licensing statute were clearly not satisfied in that the agent was working independent of the licensed principal broker, the agent was not properly supervised by the licensed principal broker, and the licensed principal broker took no responsibility for any of the agent's transactions. Contrary to the situation in *Young*, in the Olympus transaction Fred B. Law, a licensed principal broker, was involved at all times leading up to the closing, properly supervised Mr. Matthews as his agent, and the commission was initially payable to Mr. Law as the licensed principal broker. Only after the commission was earned and payable did

Mr. Law assign the right to collect the commission. Unlike the situation in *Young*, the purposes of the licensing statutes were fully satisfied in the Olympus transaction.

In *Morris v. John Price Assocs., Inc.*, 590 P.2d 315 (Utah 1979), the lawsuit to collect the commission was brought in the names of both the broker and the broker's agent; while the judgment in favor of the agent was vacated, the judgment in favor of the broker was affirmed. Noticeably absent in this case was any purported assignment from the broker to the agent of the right to collect the subject commission, but rather the broker sought collection in the broker's own name. The facts on which *Morris* was decided are simply different and inapplicable to the Olympus transaction in that no assignment ever occurred. Unlike the situation in *Morris*, Mr. Law is not seeking collection of the commission from Olympus, but rather he has properly assigned such right of collection, and now Mr. Matthews stands in the shoes of Mr. Law for purposes of collecting the commission.

In *Diversified Gen. Corp. v. White Barn Golf Course, Inc.*, 584 P.2d 848 (Utah 1978), there was simply no licensed principal broker involved in the transaction, and the plaintiff seeking collection of the commission could not avoid the application of the broker licensing statutes by claiming it was owed a fee under a "finders agreement" rather than characterizing the payment as a real estate commission. Similarly, in *Andalex Res., Inc. v. Myers*, 871 P.2d 1041 (Utah Ct. App. 1994), again there was simply no licensed principal broker involved in the transaction, and the plaintiff seeking collection of the commission could not avoid

the application of the broker licensing statutes. Unlike the situations in *Diversified General* and *Andalex*, a properly licensed real estate broker, Mr. Law, was involved in the Olympus transaction, and the commission was initially payable to Mr. Law in his capacity as a licensed broker.

It is a true statement that there is no Utah case law specifically addressing an assignment of a principal broker's right to collect a commission properly earned and payable to the broker under UTAH CODE ANN. § 61-2-18 (1985). This is a case of first impression for the Utah appellate courts. However, in light of the well-established Utah law on assignments in general, as well as the fact that the Utah courts have recognized exceptions to a similar licensing statute applicable to contractors when the purposes of the licensing statute have been satisfied, this Court should declare that an assignee of a licensed principal broker is allowed to collect a real estate commission properly earned by and initially payable to the principal broker, but subsequently assigned solely for purposes of collection.

CONCLUSION

This Court should reverse the trial court's denial of Mr. Matthews' claim and judgment in favor of Olympus, and remand with directions to the trial court to enter an order requiring Olympus to summarily pay the full amount of Mr. Matthews' timely filed claim as an approved claim as a result of the failure of Olympus to timely reject the claim in writing as mandated by statute. If this Court grants that relief, all of the other aspects of the trial court's judgment that Mr. Matthews challenges must also be reversed.

Alternatively, this Court should:

(1) reverse the trial court's grant of summary judgment in favor of Olympus as to Mr. Matthews' claim, and remand this case to the trial court for a trial on the merits of Mr. Matthews' claim, including a resolution of the disputed issues of fact surrounding the statute of frauds defense asserted on behalf of Olympus;

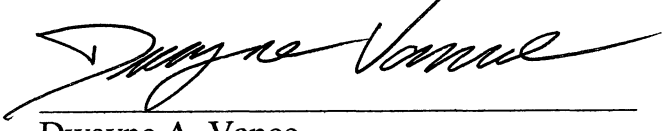
(2) reverse the trial court's award of attorney fees to Olympus on the grounds that Mr. Matthews' claim has merit and/or was asserted in good faith; and/or

(3) reverse the trial court's determination of the amount of attorney fees awarded to Olympus and remand to the trial court for a calculation of Olympus' reasonable attorney fees, if any, strictly limited to the purported delay caused by the subject affidavits and expressly excluding any fees attributable to Annette Jarvis, any fees attributable to the administrative complaint pursued by Olympus, and any fees attributable to excess and unnecessary time spent on this matter by Olympus' attorneys.

Dated this 14th day of May, 2007.

Respectfully submitted,

MILLER VANCE & THOMPSON



Dwayne A. Vance

Counsel for David C. Matthews
Claimant and Appellant

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2007, I caused two (2) copies of the foregoing Reply Brief of Appellant to be hand delivered to Steven T. Waterman, Steven C. Strong and Brent D. Wride, of Ray Quinney & Nebeker, counsel for Olympus Construction, L.C., Appellee herein, at the following address:

Steven T. Waterman
Steven C. Strong
Brent D. Wride
Ray Quinney & Nebeker
P.O. Box 45385
36 S. State Street, Suite 1400
Salt Lake City, UT 84145