1995

Action Collection Service, Inc., an Idaho corporation v. Van Adams : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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ACTION COLLECTION SERVICE, INC., an Idaho corporation,	:	
Plaintiff/Appellee,	:	Case No. 950386-CA
-vs-	:	
VAN ADAMS,	:	
	:	Priority 15
Defendant/Appellant.	:	

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REPLY BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE THIRD CIRCUIT COURT,
HONORABLE MICHAEL K. BURTON,
ENTERED ON MAY 18, 1995

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Defendant, by and through counsel, submits the following Reply Brief in further support of its appeal from the judgment of the Honorable Michael K. Burton, Third Circuit Court, Salt Lake County, State of Utah, entered on May 18, 1995.

ARGUMENT

POINT I.

THE EVIDENCE ADDUCED AT TRIAL DOES NOT SUPPORT THE TRIAL COURT'S FINDING THAT DEFENDANT CAUSED ANY DAMAGE TO THE RENTED JET SKIS

In a baffling interpretation of its obligation to produce some substantial evidence toward meeting its burden of proof, plaintiff takes the position that it was not necessary for it to produce a single witness with personal knowledge of the condition of the jet skis at the time they were returned to Just 4 Fun, to make its case in the first instance or to refute the testimony offered by defendant's witnesses that no noticeable damage existed when they finished using the jet skis. The only witness, apart from defendant, with personal knowledge of the condition of the jet skis on their return, Jeremy Meadows, was never called by plaintiff. Plaintiff implies in its brief that, contrary to the normal requirement of some substantial evidence being introduced by the proponent of a proposition as to that proposition, the burden was on defendant to call Jeremy

Meadows.[1] Plaintiff's position is patently absurd. Plaintiff initiated the litigation. It was, therefore, plaintiff's burden to prove through the only witness they could have offered, the condition of the jet skis at the time they were returned.

To establish the ***complete absence*** of liability, defendant personally testified and presented the testimony of Cliff Miller and Connie Morgan that the jet skis were not in noticeably different condition when returned than when they were rented. Plaintiff , having failed to call the person to whom defendant returned the skis, had the burden of rebutting defendant's evidence. In the absence of any rebuttal evidence, a finding that defendant caused damage, rather than Jeremy Meadows, is pure speculation. The inference that the damage occurred ***after*** the jet-skis were in the possession of Jeremy Meadows, the son of the owner of the company, who was rushing to go out on a date, could not be rebutted without his testimony. Heather Meadows, the daughter of the owner of Just 4 Fun, did testify, but contrary to plaintiff's veiled suggestion[2], offered ***no evidence*** as to the condition upon check-in. Further, plaintiff's suggestion that the trial court made any credibility assessment against defendant is disingenuous.[3] Not only do the findings of fact fail to find any portion of defendant's testimony not

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[1] Appellee's Brief, at page 22.

[2] Appellee's Brief, at pp. 22-23.

[3] Appellee's Brief, at page 23.

credible, the trial judge's own, handwritten notes of his impressions of defendant form a finding of the ***credibility*** of defendant; in fact, the trial judge rated the defendant "++ for honesty . . .". R. 266B.

Plaintiff did not offer any evidence on the condition of the skis when they were returned by defendant and accepted by Just 4 Fun. The burden of proof was upon plaintiff, not only to show that defendant damaged the property, but also that the property was damaged beyond reasonable wear and tear while it was in defendant's possession. Plaintiff failed even in its burden to show that damage occurred in defendant's possession, by failing to call any witness who inspected the jet skis upon their return, or who could testify that any damage was not caused while the jet skis were in the ***exclusive*** possession of Jeremy Meadows.

The testimony of defendant's witnesses, as to ***condition upon check-in***, absence of comment by Jeremy Meadows upon check-in, and the finding of the trial judge as to defendant's credibility mandate judgment in favor of defendant, where no substantial evidence was offered through the testimony of Jeremy Meadows to the contrary. On the record, the trial court's finding that defendant damaged the skis or was responsible for damage cannot be supported because of the unrefuted evidence to the contrary.

POINT II.

PLAINTIFF ALSO FAILED TO INTRODUCE ANY SUBSTANTIAL EVIDENCE THAT ANY DIFFERENCE IN CONDITION WAS OTHER THAN "REASONABLE WEAR AND TEAR"

In its brief, plaintiff takes a position which is internally inconsistent. At page 27 of Appellee's Brief, plaintiff asserts the astounding position that this litigation is not a contractual dispute, apparently recognizing its failure to adduce evidence to meet its burden to show that the jet skis were returned in a non-conforming condition under the contract. The disingenuous nature of this contention is exposed by reading an earlier portion of Appellee's Brief, plaintiff's Statement of the Nature of the Case, where plaintiff concedes:

> The rental was covered by a written and signed contract in which Defendant agreed to return the jet skis in good condition and undamaged, ***subject only to reasonable wear and tear.***

Appellee's Brief at page 5 (emphasis supplied). To prove a breach of the rental contract, therefore, plaintiff had the burden to prove that the jet skis had been returned subject to something ***other than*** "reasonable wear and tear."

Plaintiff appears shocked that "[d]efendant would have the court resolve the

meaning of the phrase 'reasonable wear and tear.'"[4] What is shocking is that plaintiff would argue "[i]t was not necessary that the trial court resolve what 'reasonable wear and tear' meant as it was not a material issue."[5] Perhaps plaintiff's appreciation now that it failed to offer ***any*** evidence on this element of its case provides a context in which to appreciate fully the desperation required to make that argument.

Plaintiff simply ignored this essential contract term in its evidentiary presentation. It appears that plaintiff believes it may narrow the issues by merely characterizing its status as the "owner of a claim to collect moneys due its assignor."[6] The trial court's apparent willingness to allow plaintiff to do so, however, without proving a ***breach*** of the rental agreement is erroneous.

Plaintiff takes the position that, because no case law interprets and precisely defines the term "ordinary wear and tear" as used in the jet ski rental industry, the term is incapable of definition and the trial court cannot be expected to make a finding upon it[7]. This argument, once again, illustrates plaintiff's fundamental misunderstanding of the case.

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[4] Appellee's Brief, at page 26.

[5] Appellee's Brief, at page 27.

[6] Appellee's Brief, at page 5.

[7] Appellee's Brief, at page 26.

Throughout these proceedings, plaintiff has characterized this case as a simple collection proceeding. This is not surprising. Plaintiff is a collection agency and is a party to the action only by reason of its position as the assignee of Just 4 Fun Rental. It is reasonable to presume that plaintiff's business ordinarily involves situations where such things as notes or accounts exist, and liability need be proven only as to unpaid amounts on the note or account, so that liability is not strenuously contested as an issue of fact, as it was in these proceedings.

Unlike a simple collection case, defendant disputes that ***any*** sums are owing. It is defendant's position that the skis were rented, the rental was paid, and the skis were returned. Defendant contends that the skis were not damaged when he returned them and that the only change in the skis' condition was attributable to "reasonable wear and tear". ***Because*** the term "reasonable wear and tear" is not defined in case law, as applied to the jet ski rental industry, and ***because*** of the need to assist the court in resolving the issue factually, defendant presented the testimony of an expert witness, Ron Sprouse. Mr. Sprouse testified, based upon his experience in the industry and upon his examination of photographs depicting the jet skis at the time Just 4 Fun presented them to a repair shop for a repair estimate, that the condition of the skis did not exceed the standard of "reasonable wear and tear" within the jet ski rental industry. R. 478-480. That testimony is unrefuted.

The trial court apparently accepted the testimony of James Meadows, president of Jus 4 Fun Rental, that the rented jet skis were to be returned in "like new" condition. The contract sued upon, and entered into evidence by the plaintiff (P. 1), defines the liability of the lessee for return of the equipment as follows:

> Lessee acknowledges receipt of the equipment in good condition, appearance and repair, and agrees to return it in as good of condition subject only to REASONABLE wear and tear.

Nowhere in the contract is a duty of "like new" condition imposed on defendant. Thus, the trial court's failure to address the exclusive evidence offered on "reasonable wear and tear" mandates reversal.

POINT III.

PLAINTIFF WAS NOT ENTITLED TO RELIEF FROM THE DISMISSAL UNDER Utah R.Civ.P. 60(b)

Defendant's opening brief contained a discussion of the reasons for relief under Utah R.Civ.P. 60(b). That discussion need not be repeated here. It is important to clarify this procedural argument, however, in light of plaintiff's responsive brief.

In its brief, plaintiff abandons its claim for relief under Utah R.Civ.P. 60(b)(5)[8],

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[8] "Plaintiff's motion was based upon Utah R.Civ.P. 60(b)(1) and in the alternative, upon 60(b)(7). In its motion, a clerical error exists in which Plaintiff refers to

resting on two alternative grounds for its alleged entitlement to relief from the judgment of dismissal; specifically, Utah R.Civ.P. 60(b)(1) (mistake, inadvertence, surprise, or excusable neglect) and 60(b)(7) (any other reason justifying relief from the operation of the judgment).

Plaintiff in this matter is placed in a somewhat uncomfortable position. It is undisputed that the Satisfaction of Judgment which resulted in dismissal of the case was signed by the attorney then representing the plaintiff. It is clear that the attorney merely executed the document, perhaps one of many such documents, without having prepared it, or supervised its preparation[9]. Plaintiff must now argue that the case was dismissed "without a hearing on the merits", upon a "faulty Satisfaction of Judgment which clearly was insufficient to dismiss the claim."[10] Plaintiff then asserts that, within three months of receiving notice that the case had been dismissed, it moved for relief from the dismissal.

Plaintiff acknowledges a mistake was made and that the mistake, filing a

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60(b)(5)." Brief of Appellee, page 13.

[9] In support of the motion for relief from the dismissal, plaintiff filed an affidavit from the manager of the plaintiff. R. 106. The affidavit stated a new employee of the plaintiff , not the attorney and not an employee of the attorney, prepared the satisfaction of judgment in error.

[10] Appellee's Brief, at page 15.

satisfaction of judgment, was plaintiff's responsibility[11]. It is thus acknowledged by plaintiff that it, in effect, caused the dismissal by filing a satisfaction -- a satisfaction which was prepared, signed, and filed by plaintiff and its legal counsel, a copy of which was presumably maintained in the files of plaintiff and its counsel. Plaintiff certainly had notice of its own actions resulting in the dismissal.

Plaintiff caused this case to be dismissed on December 2, 1993, by filing a satisfaction of judgment form. Plaintiff moved for relief under Utah R.Civ.P. 60(b). The motion was not filed within three months of the dismissal. The motion for relief from the judgment was untimely under Utah R.Civ.P. 60(b).

It is clear, then, that there was no legal basis upon which to grant the plaintiff's motion for relief from the dismissal.

CONCLUSION

The trial court disregarded the essential nature of the case -- that is, the court failed to recognize that liability was disputed, not just the amount of damages. The trial court ignored the fact that the plaintiff (1) failed to produce Jeremy Meadows, the only witness who could testify based upon personal knowledge concerning the condition of

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[11] In fact, plaintiff only concedes that the mistake was "initially" its responsibility, asserting that the court was somehow at fault when it dismissed the case upon receipt of plaintiff's satisfaction of judgment. Appellee's Brief, page 13.

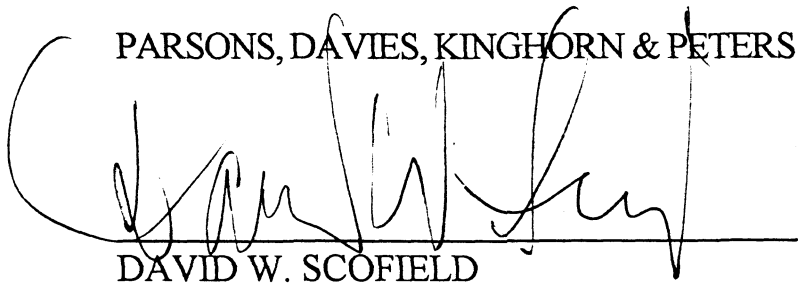
the jet skis at the time they were returned to Just 4 Fun by defendant and (2) failed to refute Defendant's expert witness or present any credible evidence of its own on the issue of "reasonable wear and tear" under the express provisions of the contract. Because the plaintiff failed to meet its burden of proof, the judgment must be reversed, with orders to enter judgment in favor of defendant, and remanded to determine reasonable attorneys' fees, costs and expenses available to defendant under the rental contract.

The trial court also erred in granting plaintiff's motion to vacate the dismissal in this matter. Because the plaintiff has abandoned its claim for relief under Utah R.Civ.P. 60(b)(5), and because the facts and circumstances of this case unequivocally fall within the ambit of Utah R.Civ.P. 60(b)(1), relief is unavailable under 60(b)(7), with its liberal "reasonable time" standard. Plaintiff was required to move for relief within three months. To find otherwise would render the differentiation between the subsections of Rule 60(b) meaningless. Because the motion for relief from the dismissal was untimely, there was no factual or legal basis for granting the motion for relief from the judgment of dismissal.

For these reasons, the defendant requests that this court vacate the judgment of the trial court and reinstate the order of dismissal or, in the alternative, remand the case to the trial court for further proceedings.

Respectfully submitted this lst day of April, 1996.

PARSONS, DAVIES, KINGHORN & PETERS



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the above and foregoing Reply Brief of Appellant were mailed, postage prepaid, this lst day of April, 1996, to the following:

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