

IN THE UTAH COURT OF APPEALS

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In the matter of the Estate of Frieda Kuhn, Deceased.)	MEMORANDUM DECISION
_____)	(Not For Official Publication)
)	Case No. 20080716-CA
Stephen J. Hatch,)	
Appellant,)	F I L E D
)	(October 30, 2008)
v.)	2008 UT App 400
Fred Kuhn Jr., Paul Kuhn, and Joan O'Bray,)	
Appellees.)	

Third District, Salt Lake Department, 063900669
The Honorable Judith S. Atherton

Attorneys: Charles M. Bennett, Salt Lake City, for Appellant
Stephen J. Trayner, Salt Lake City, for Appellees

Before Judges Greenwood, Davis, and McHugh.

PER CURIAM:

Stephen J. Hatch appeals from the orders of the trial court granting summary judgment in favor of Appellees and denying his postjudgment motion pursuant to rule 59 of the Utah Rules of Civil Procedure. This is before the court on Appellees Fred Kuhn Jr., Paul Kuhn, and Joan O'Bray's (collectively, the Children) motion for summary disposition. We affirm.

Under rule 7 of the Utah Rules of Civil Procedure, a party opposing a motion must file an opposing memorandum within ten days after service of the motion. See Utah R. Civ. P. 7(c)(1). However, rule 6(b) of the Utah Rules of Civil Procedure grants the trial court discretion to permit a filing after the time period to file has expired, upon a showing of excusable neglect. See Utah R. Civ. P. 6(b)(2). We will not disturb a trial court's denial of a motion under rule 6(b) absent an abuse of discretion. See Stoddard v. Smith, 2001 UT 47, ¶ 22, 27 P.3d 546.

Hatch failed to file a response to the Children's summary judgment motion or request an extension until about four months after first being served with the motion in November 2007. When

he finally filed his single-sentence opposition, incorporating by reference a withdrawn document, he also filed a motion for an extension of time. The motion did not provide any reason why he failed to respond for the previous four months. Although he asserted that he was unaware of settlements being pursued by other parties, he did not explain why he failed to protect his own interests. In short, he made no showing of excusable neglect to warrant an extension. Accordingly, the trial court properly struck the motion and the opposing memorandum as untimely.

With no opposition to the motion for summary judgment, the trial court appropriately granted the motion. The memorandum in support of the motion contained a statement of facts set forth with supporting documentation as required by rule. See Utah R. Civ. P. 7(c)(3)(A), 56(e). Absent opposition controverting the stated facts, "each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment." Utah R. Civ. P. 7(c)(3)(A). "Summary judgment, if appropriate, shall be entered against a party failing to file" a response. Utah R. Civ. P. 56(e). Here, because Hatch did not timely respond to the summary judgment motion and controvert the stated facts, the facts as asserted in the Children's memorandum were deemed admitted. The undisputed facts established that the decedent was incompetent in 2003. Accordingly, the trial court appropriately determined that the 2003 will was void and the Children were entitled to judgment as a matter of law.

Hatch also argues that the trial court erred in denying his rule 59 motion. The trial court has broad discretion to grant or deny motions under rule 59 of the Utah Rules of Civil Procedure. See Crookston v. Fire Ins. Exch., 817 P.2d 789, 804 (Utah 1991). Accordingly, appellate courts review decisions regarding rule 59 motions for abuse of discretion. See id.

Hatch argues that the trial court had an independent duty to review the record and determine whether a factual dispute existed based on his initial petition and the withdrawn opposition memorandum. He asserts that such an affirmative duty was created in Jackson v. State, 2008 UT App 151U (mem.) (per curiam). However, he overstates what this court concluded in Jackson.

Jackson does not expand a trial court's duty but, rather, emphasizes that a party seeking summary judgment must establish entitlement to it based on undisputed facts. Even in the absence of a response, summary judgment would be unwarranted unless a movant establishes he is entitled to summary judgment by supporting the motion with facts and law. The inquiry is "whether there is any genuine issue as to any material fact, and if there is not, whether the [movant is] entitled to judgment as a matter of law." Thornock v. Cook, 604 P.2d 934, 936 (Utah 1979). Jackson's own papers failed to show he was entitled to summary judgment because the undisputed facts did not support his

legal claims. Accordingly, even without a response, summary judgment was not appropriate because Jackson was not entitled to judgment as a matter of law. Therefore, the court properly denied summary judgment. The court in Jackson did not, however, have the duty to review the entire record to seek out a factual dispute.

Furthermore, Hatch's assertion that a trial court has an independent duty to ferret out opposing facts in prior pleadings in the record when a party fails to respond to a summary judgment motion is contrary to the rules. When a summary judgment motion is properly supported under the rules, "an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response . . . must set forth specific facts showing that there is a genuine issue for trial." Utah R. Civ. P. 56(e). And, "[e]ach fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party." Utah R. Civ. P. 7(c)(3)(A). Accordingly, summary judgment "shall be entered against a party" failing to respond to the motion, if appropriate. Utah R. Civ. P. 56(e).

The party to the litigation clearly bears the burden of establishing a factual dispute to overcome summary judgment. The trial court is limited to reviewing the undisputed facts and determining whether the movant is entitled to judgment on those facts. See Utah R. Civ. P. 56. It is important to note that because Hatch did not timely respond, the asserted facts were deemed admitted and are the operative facts of the case. See Utah R. Civ. P. 7(c)(3)(A). The trial court had no obligation to seek contradictory facts in prior documents because the facts were admitted and, thus, conclusively established the factual basis for the decision.

Accordingly, the trial court did not abuse its discretion in denying Hatch's rule 59 motion.

Affirmed.

Pamela T. Greenwood,
Presiding Judge

James Z. Davis, Judge

Carolyn B. McHugh, Judge