

IN THE UTAH COURT OF APPEALS

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Tiffani Barbee-Dean, an individual,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,	)	Case No. 20080529-CA
	)	
v.	)	F I L E D
	)	(April 23, 2009)
Advantage Title Company, a Utah corporation; and Shawn Turner, an individual,	)	2009 UT App 111
	)	
Defendants and Appellants.	)	

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Third District, Salt Lake Department, 080900499  
The Honorable Kate A. Toomey

Attorneys: Shawn D. Turner, South Jordan, for Appellants  
David P. Hirschi, Jeffrey J. Steele, and Brennan H. Moss, Salt Lake City, for Appellee

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Before Judges Greenwood, Thorne, and McHugh.

GREENWOOD, Presiding Judge:

Defendants Advantage Title Company and Shawn Turner (collectively Defendants) appeal (1) the trial court's order striking Defendants' Memorandum in Opposition to Plaintiff Tiffani Barbee-Dean's Motion for Summary Judgment and (2) the trial court's grant of summary judgment in favor of Plaintiff. The trial court stated that even if it had considered Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, "Plaintiff would still be entitled to summary judgment on her claim for breach of contract." We agree and conclude that notwithstanding any possible error or abuse of discretion in striking Defendants' Memorandum in Opposition to Summary Judgment, the trial court was correct in granting Plaintiff summary judgment.

Plaintiff's claim is for breach of contract. Defendants, however, assert that the written contract executed in 2007 was not supported by consideration and therefore is not enforceable. Plaintiff argues first, that the 2007 contract is merely a memorialization of a 2004 agreement for which there was

consideration, and second, that the 2007 contract itself is supported by consideration consisting of forbearance. The latter argument fails because the breach occurred after the 2007 contract was executed, not while only the 2004 agreement was effective; thus, that claim was necessarily not forborne by the 2007 contract.

We turn then to Plaintiff's argument that the 2007 contract is merely a memorialization of the 2004 agreement and thus enforceable. Defendants argue this is not accurate because the 2007 contract included an additional party--Shawn Turner, President of Advantage Title Company (Advantage). The trial court agreed with Plaintiff, citing Plaintiff's transfer of property to Advantage as the appropriate consideration, in exchange for Defendants' commitment to make the mortgage payments. The court noted that, even under Defendants' theory, Defendants are still responsible for the mortgage payments, and that Defendants may not argue that a contract memorializing a previously-made and partially-performed agreement is not supported by consideration. Furthermore, the trial court cited Restatement (Second) of Contracts: "Even though a binding contract is made before a contemplated written memorial is prepared and adopted, the subsequent written document may make a binding modification of the terms previously agreed to." Restatement (Second) of Contracts § 27 cmt. d (1981).

Defendants argue that summary judgment was inappropriate because, at the very least, there are disputed issues of material fact that should not be addressed at summary judgment. Defendants further argue that the trial court viewed the facts and inferences in the light most favorable to Plaintiff by accepting Plaintiff's assertion that the 2007 contract is merely a memorialization of the 2004 agreement. This misstates the trial court's position; the trial court simply agreed with Plaintiff, concluding that Defendants presented no evidence to the contrary, and that there was thus "no genuine dispute of material fact regarding whether the 2007 [contract] was a belated memorialization of the 2004 [agreement]." We agree with the trial court that Defendants have presented no evidence to show a material issue of fact and that the 2007 contract was simply a memorialization of the 2004 agreement and is thus supported by consideration.

Plaintiff is also entitled to attorney fees on appeal. See Utah Dep't of Soc. Servs. v. Adams, 806 P.2d 1193, 1197 (Utah App. 1991) ("The general rule is that when a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal").

Accordingly, the trial court's ruling on Plaintiff's summary judgment motion is affirmed.

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Pamela T. Greenwood,  
Presiding Judge

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WE CONCUR:

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William A. Thorne Jr.,  
Associate Presiding Judge

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Carolyn B. McHugh, Judge