

IN THE UTAH COURT OF APPEALS

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Deron Brunson,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellant,)	
)	Case No. 20090896-CA
v.)	
)	
<u>Etitle Insurance Agency,</u>)	F I L E D
<u>Trustee</u> ; and Jane and John)	(June 17, 2010)
Does 1-10,)	
)	2010 UT App 166
Defendant and Appellee.)	

Fourth District, Provo Department, 090401330
The Honorable Fred D. Howard

Attorneys: Deron Brunson, Draper, Appellant Pro Se
Deanna Lasker-Warden, Salt Lake City, for Appellee

Before Judges Orme, Thorne, and Voros.

PER CURIAM:

Deron Brunson appeals the trial court's dismissal of his complaint. We affirm.

Brunson first asserts that the trial court erred in ruling on the motion because Etitle Insurance Agency (Etitle) withdrew its motion to dismiss at the August 2009 hearing. Brunson did not preserve this issue below. "[I]n order to preserve an issue for appeal[,] the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue. . . . Issues that are not raised at trial are usually deemed waived." 438 Main St. v. Easy Heat, Inc., 2004 UT 72, ¶ 51, 99 P.3d 801 (alterations in original) (quotation marks omitted). Brunson did not alert the trial court that he thought Etitle's counsel withdrew the motion. Accordingly, the issue is waived.

Brunson next argues that the trial court erred in determining the case on the merits rather than in the posture of a motion to dismiss under rule 12(b)(6) of the Utah Rules of Civil Procedure. Relatedly, he also asserts that it was unclear whether the trial court treated the motion to dismiss as a motion for summary judgment after considering a document outside the pleading. However, the transcript of the hearing establishes that the trial court considered matters beyond the pleadings and, as permitted by rule 12(b), converted the motion to dismiss for failure to state a claim to one of summary judgment based on undisputed facts. Accordingly, dismissal remained the appropriate outcome regardless of the initial ground for the motion.

A rule 12(b)(6) motion will be considered a summary judgment motion when "matters outside the pleading are presented to and not excluded by the court." Utah R. Civ. P. 12(b); see also Doit, Inc. v. Touche, Ross & Co., 926 P.2d 835, 838 n.3 (Utah 1996) (stating that "when affidavits or other evidence is presented to the court in conjunction with a motion to dismiss" and such evidence is not excluded by the court, the motion is properly treated as one for summary judgment); Thayne v. Beneficial Utah, Inc., 874 P.2d 120, 124 (Utah 1994) (noting that 12(b)(6) motion was properly treated as a summary judgment motion when evidence outside the pleading was considered). In support of its motion to dismiss, Etitle included a copy of the adjustable rate note that was part of the closing documentation. The note was clearly a document beyond the pleading. The trial court did not exclude the document and considered it in making its ruling. Because the note was not excluded by the court and was considered by it, the motion became one of summary judgment rather than a motion to dismiss for failure to state a claim. The trial court explained as much to Brunson at the hearing and noted the different standards.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Utah R. Civ. P. 56(c). At the hearing, it was established as an undisputed fact that Brunson had signed an adjustable rate note setting forth the loan amount and repayment terms and including a promise to pay the amounts due. Brunson admitted that he signed the note at the closing. With that fact established, the trial court did not err in finding that the adjustable rate note constituted a promissory note as a matter of law, and was the promissory note referred to in the trust deed. Based on the undisputed facts, as a matter of

law Etitle was entitled to judgment in its favor, which is properly effected by the dismissal of the complaint.

Affirmed.¹

Gregory K. Orme, Judge

William A. Thorne Jr., Judge

J. Frederic Voros Jr., Judge

¹Brunson argues that his version of the facts alleged in the complaint should control and be accepted as fact. However, many of the "facts" alleged are legal conclusions rather than facts. The sufficiency of a complaint "must be determined by the facts pleaded rather than the conclusions stated." Franco v. Church of Jesus Christ of Latter-day Saints, 2001 UT 25, ¶ 26, 21 P.3d 198 (quotation marks omitted). Appellate courts "have stressed, and continue to hold, that mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude" dismissal or summary judgment. Id. ¶ 36 (citation omitted). Brunson's complaint consists in large part of conclusions asserting he is entitled to relief, but the complaint lacks a meaningful recitation of the salient facts.