IN THE UTAH COURT OF APPEALS

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Roger Bryner, Plaintiff and Appellant, v. Cohne, Rappaport, and Segal; Howard Lundgren; and Emily Smoak, Defendants and Appellees.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20070163-CA F I L E D (July 3, 2008) 2008 UT App 255

Third District, West Jordan Department, 060417519
The Honorable Robert Adkins

Attorneys: Roger Bryner, Midvale, Appellant Pro Se
Jeffrey L. Silvestrini and Edward T. Vasquez, Salt Lake City, for Appellees

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Before Judges Greenwood, Thorne, and Orme.

PER CURIAM:

Roger Bryner appeals from the district court's order dismissing his complaint with prejudice and entering a judgment against him for attorney fees.

Bryner first asserts that the district court erred in converting the motion to dismiss filed by Cohne, Rappaport and Segal, Howard Lundgren, and Emily Smoak (collectively referred to as the Cohne Parties) into a rule 56 motion for summary judgment. It is axiomatic that a court may convert a motion to dismiss into a motion for summary judgment when matters outside the pleadings are presented to the court as long as each side is given a reasonable opportunity to present all pertinent information. See Utah R. Civ. P. 12(b). Bryner's argument appears to be premised on his belief that the district court improperly considered another district court's docket entry without giving Bryner a reasonable opportunity to respond to the information. However, contrary to Bryner's assertions the record of the summary judgment hearing states, "the court is not going to receive the docket from the last hearing." Thus, the district court did not consider the evidence Bryner deemed objectionable. To the extent

Bryner is arguing that the district court made any other errors in converting the motion to dismiss into a summary judgment proceeding, they were waived by Bryner when he failed to object to the conversion and, in fact, sought summary judgment in his own favor.[1] See Brewer v. Denver & Rio Grande W. R.R., 2001 UT 77, ¶ 20, 31 P.3d 557 (concluding that a party waives its right to appeal an issue when it makes admissions before the district court that are inconsistent with the argument).

Second, Bryner argues that the district court erred in dismissing his complaint with prejudice because the Cohne Parties never filed an answer to his complaint or otherwise set forth affirmative defenses. However, rule 12(b) of the Utah Rules of Civil Procedure allows a party to raise the defense of failure to state a claim for which relief can be granted in a motion prior to filing an answer to a complaint. See Utah R. Civ. P. 12(b). The Cohne Parties' motion to dismiss was properly filed and resolved prior to the Cohne Parties' obligation to file an answer in the matter. See id. R. 12(a) (setting forth obligation to file a responsive pleading within ten days after a district court has denied a motion to dismiss made under the rule).

Third, Bryner asserts that the district court erred in dismissing his complaint with prejudice instead of without prejudice because the district court failed to adequately provide Bryner with notice that the rule 12 motion to dismiss had been converted into a rule 56 motion for summary judgment. However, as explained above, Bryner knew the motion to dismiss was being converted to a motion for summary judgment and even asked the court to grant him relief under rule 56. Further, the court did not refer to the material from the other district court case. Thus, Bryner's argument that he was not given sufficient notice was waived. See Brewer, 2001 UT 77, ¶ 20.

Bryner next argues that the district erred in awarding the Cohne Parties attorney fees based upon the district court's determination that Bryner's complaint was without merit and was asserted in bad faith. Bryner claims that the district court erred because the court should have made all factual inferences in favor of him instead of the Cohne Parties because the matter was before the court on a motion to dismiss. However, the determination of whether a case should be dismissed under either rule 12 or rule 56 of the Utah Rules of Civil Procedure is separate and distinct from the decision as to whether a case is

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[1]Bryner affirmatively sought relief under rule 56 of the Utah Rules of Civil Procedure when he filed his "Memorandum in Opposition to Dismissal and in Support of Summary Disposition Against Defendants under Rule 56."

brought in bad faith. Thus, the procedural posture of the case leading to the dismissal of the case is immaterial to the determination of whether a case is brought in bad faith.

As to the merits of the decision to award fees, the record supports the district court's determination that the case was brought in bad faith. "The trial court's determination that [a] claim was filed in bad faith is a question of fact that we review under a 'clearly erroneous' standard." Hopkins v. Hales, 2008 UT App 95, ¶ 7, 185 P.3d 402. Here, the district court determined that there was no legitimate purpose in filing the instant action because Bryner could have sought relief in the other action involving the collection efforts in question. Further, in an email sent by Bryner to the Cohne Parties, immediately prior to the filing of the complaint in this matter, Bryner stated that he was trying to move the case away from Judge Hansen because Bryner had been dissatisfied with Judge Hansen's rulings.[2] Under the circumstances, this court cannot conclude that the district court clearly erred in determining that the case was filed in bad faith. Thus, because the district court determined that Bryner's claims were both without merit and were filed in bad faith, the court properly granted the Cohne Parties attorney fees under Utah Code section 78-27-56. See Utah Code Ann. § 78-27-56 (2002) ("In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith.").

Finally, Bryner's issues dealing with the merits of the garnishment in question are not properly before this court because they were not addressed by the district court in this case due to the district court's determination that it was not a proper forum to seek redress for Bryner's perceived wrongs.

The Cohne Parties request their attorney fees on appeal. The Cohne Parties were awarded attorney fees below pursuant to Utah Code section 78-27-56, which allows a district court to award a prevailing party attorney fees when a complaint was without merit and not filed in good faith. "When a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal." Pack v. Case, 2001 UT App 232, ¶ 39, 30 P.3d 436 (internal quotation marks omitted). However, Bryner filed for bankruptcy protection on August 16, 2007. Accordingly, because the Cohne Parties are entitled to attorney fees incurred in this appeal, we will defer so ordering until the bankruptcy case is closed, the automatic stay is lifted to permit our doing so, or they persuade us that

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[2]The email was also derogatory toward Judge Hansen.

we may now so order, notwithstanding the bankruptcy case and resulting automatic stay. Cf. Williams v. Williams, 23 S.W.3d 721, 723-24 (Mo. Ct. App. 2000) (concluding appellate court retained jurisdiction over matter to hear wife's request for attorney fees incurred on appeal after automatic stay in bankruptcy was lifted).

Affirmed.

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Pamela T. Greenwood,
Presiding Judge

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William A. Thorne Jr.,
Associate Presiding Judge

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Gregory K. Orme, Judge