

1986

Israel Pagan Estate v. Cannon : Petition for Rehearing

Utah Court of Appeals

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Kay M. Lewis, Kevin V. Olsen; Jensen & Lewis; attorneys for appellant.

Mark S. Miner; attorney for respondent.

Recommended Citation

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DOCKET NO 860072-CA IN THE UTAH COURT OF APPEALS

ISRAEL PAGAN ESTATE and
LEONOR PAGAN, Personal
Representative,

Plaintiff-Respondent,

vs.

JOSEPH N. CANNON, DORRUS
BLACK, ALPHA LEASING,
COMPANY, a partnership,
ROBERT D. APGOOD, JOSEPH N.
CANNON, DORRUS BLACK, and
RICHARD McKEAN, doing
business under the name and
style of ALPHA LEASING
COMPANY, BILL BROWN
REALTY, INCORPORATED,
SCOTT PEATROSS, personally,
STEWART TITLE COMPANY OF
UTAH, TOMMY W. SISK,
CAPITOL THRIFT & LOAN,
a financial corporation, and
MERLYN HANKS,

Defendants-Appellant.

PETITION FOR REHEARING

Case No. 860072-CA

PETITION FOR REHEARING

Respondent respectfully Petitions for Rehearing on Judgment entered in the above entitled Court on November 16, 1987.

KAY M. LEWIS
KEVIN V. OLSEN
JENSEN & LEWIS
320 South 300 East, Suite 1
Salt Lake City, Utah 84111
Attorneys for Appellant

MARK S. MINER
525 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Attorney for Respondent

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Court of Appeals

IN THE UTAH COURT OF APPEALS

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Exhibit 7-P	Check No. 3303 payable to Joseph N. Cannon August 19, 1980
Exhibit 23	Earnest Money Receipt and Offer to Purchase July 30, 1980
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Exhibit 27-D	Statement of Account signed by Joseph N. Cannon August 18, 1980
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CAPITOL THRIFT & LOAN, a
financial corporation, and
MERLYN HANKS,

Defendants-Appellant.

PETITION FOR REHEARING

Case No. 860072CA

**POINTS OF FACT THAT THE COURT OVERLOOKED OR
MISAPPREHENDED OR COMPLETELY DISREGARDED**

1. That Israel Pagan, the Respondent herein, had been severely injured in a blasting accident at Kennecott Copper Corporation. (TR-540) As a result thereof, his face and head was severely disfigured. In addition thereto, his brain was injured to an extent that he had little or no abstract thinking ability. (TR-538) He did not speak English nor could he read or write the English language. (TR-538) His Intelligence Quotient was in the low to normal range. (TR-540, 542) His mentality was such that he did not comprehend or understand the real estate transaction. (TR-541, 743, 744, and 745)

2. That Dorius Black was a well known, judgment proof land developer. (TR-490). Dorius Black and Joseph E. Cannon had never inspected or saw the house and lot; nor, did they make any payments thereon nor did they ever intend to own or possess the Pagan property. (TR-197, 492)

3. On the 18th day of August, 1980, the disfigured and retarded Israel B. Pagan did appear at the Salt Lake City offices of Stewart Title Company of Utah for the purpose of closing the real estate transaction. There was also present Dorius Black, Joseph N. Cannon, Tommy Sisk, Scott Peatross, Jack Rhoades, and Emilio Ortiz. Merlyn Hanks of Capitol Thrift & Loan, was present at various times during the closing. He having delivered to Stewart Title Company of Utah, the funds necessary to carry out the transaction along with the necessary Trust Deeds, Notes and other documents which had been previously prepared by Merlyn Hanks at the office of Capitol Thrift & Loan. (TR-615); Merlyn Hanks either prepared or supervised the preparation of all the documents.

4. Prior to the closing date of August 18, 1980, Merlyn Hanks for and on behalf of Capitol Thrift & Loan, at the instance and request of Dorius Black, appraised the Israel Pagan home for the approximate amount of \$43,100.00 for bank loan purposes. (TR-612) (See Exhibit 43P) On the closing date as aforesaid, Merlyn Hanks, as loan officer for Capitol Thrift & Loan delivered to Stewart Title Company of Utah a check for \$32,325.00. For some reason known only to Merlyn Hanks, the \$32,325.00 check had been made out to one Joseph Cannon, who was previously in his office. Neither Joseph Cannon nor Merlyn Hanks was able to explain why the check was made out to Joseph Cannon, when in truth and in fact, the buyer of the house and lot was Dorius Black. Joseph Cannon denied ever endorsing the check and he further denied that he received any of the money whatsoever. Joseph Cannon further denied that he was the buyer or that he purchased the Pagan house and affirmatively testified that his only purpose in being at the closing was to be a guarantor of loans and purchases of Dorius Black. (TR-567)

5. At the closing, Merlyn Hanks requested Stewart Title to withhold and deliver back to Merlyn Hanks and Capitol Thrift & Loan a check or draft in the amount of \$4,848.75. (TR-616) This check in the amount of \$4,848.75 was to be credited to Dorius Black. (TR-497, 499). Dorius Black denied having any interest in or taking any title to the Pagan property, and further denied being liable for the making of any loans or the borrowing of any money on the Pagan property. (TR-499) Capitol Thrift & Loan and Merlyn Hanks admittedly drew the Trust Deed, which encumbered the Pagan house and lot in the amount of \$32,325.00. The Trustor of the Deed was Joseph N. Cannon a "straw man," which was brought into the transaction by Dorius Black, under mysterious circumstances, which even Joseph Cannon did not understand. (TR-618) Joseph N. Cannon also denied being the purchaser of the Pagan home, and alleges that he went to Stewart Title Company of Utah at the sole request of Dorius Black for the purpose of being a Guarantor of a loan. (TR-562) Joseph N. Cannon admitted receiving a check from Stewart Title Company of Utah, which he deposited in the account of Alpha Leasing for the sole purpose of "laundering" said funds. (TR-566) Joseph N. Cannon denies receiving any of the money personally. (TR-566) Joseph N. Cannon admits that the partnership of Alpha Leasing did not know that he deposited the money in their account. (TR-566) Joseph N. Cannon further testified that all of the money went to Dorius Black from the Alpha Leasing account. (TR-567) Joseph N. Cannon further testified that he had no knowledge of the fact that the house was to be deeded to him from Israel Pagan. (TR-568-569) Joseph N. Cannon further admitted that he never put one cent of his money in the real estate transaction, and in addition thereto, he further testified that he made no payments whatsoever on the trust deed and note and, that he, had no equity in the Pagan property. In fact, he admitted that he had

never seen the property; and that he did not even know that the property had been deeded to him. The Jury so found!

6. The Court misapprehended and completely disregarded the testimony of Dr. William W. Barrett, a psychiatrist of considerable experience, who had practiced in the Salt Lake County area for more than twenty-five (25) years, and who was licensed to practice in the State of Utah, with excellent references and excellent credentials, examined Israel Pagan. (TR-525-541).

THE COURT SUMMARILY DISREGARDED THE JURY VERDICT!

7. The jury unanimously found by **clear and convincing evidence** that Capitol Thrift & Loan, through its agent, Merlyn Hanks and its real estate promoter and finder, Dorius Black; and a judgment proof "straw man", who did business under the name and style of Joseph Cannon, and all of them, did engage in a civil conspiracy to defraud the mentally deficient Israel Pagan out of his house and lot, by engaging in a confidence game, incident to the real estate in question. The jury assessed damages in the amount of \$12,000.00 compensatory and \$4,000.00 punitive.

8. The foregoing facts were specifically found by the Jury by clear and convincing evidence to be true and correct. The Court, contra to the established law in this state, completely disregarded the jury findings and replaced them with findings of its own. The Jury was present and weighed the conflicting evidence as the law provides; this court misapprehended all of the Plaintiff's evidence; all of the Juries findings; and, substituted its judgment for the juries verdict and thereby reversed the established law in this State. See Von Hake v. Thomas, 705 P.2d 766, (1985); Berkeley Bank v. Meibos, 607 P.2d 798, (1980); Schwartz v. Tanner, 576 P.2d 873, (Utah, 1978). The Court's decision, in effect, deprived the plaintiff of his right to a jury trial.

**CONTRA TO THE COURT'S DECISION, THE JURY'S VERDICT WAS
SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.**

The jury heard the witnesses, weighed the evidence, and made extensive findings of fact by answering special interrogatories AND DELIBERATED OVER A PERIOD OF TWO DAYS!. This being the case, this Court has consistently held that it is both the prerogative and the duty of the Supreme Court to review the evidence and every inference that may be fairly and reasonably drawn therefrom in the light most favorable to the Plaintiff; Devas v. Noble, 13 Utah 2d 133. Also Fleming v. Fleming Felt Co., 7 Utah 2d 293, 323 P.2d 712. This Court very recently held in the case of E.A. Strout Western Realty v. W. C. Foy & Sons, 665 P.2d 1320, that it is a prerogative of the jury to resolve issues of fact, and the accepted rules of appellant review preclude the Supreme Court from substitution its judgment for that of the jury on issues of fact. Citing Watters v. Query, Utah, 626 P.2d 445 (1981). The Court stated as follows: "On appeal, we view the evidence in the light most supportive of the verdict." Citing Cintron v. Milkovich, Utah 611 P.2d 730. This Court assumes that the jury believed those aspects of the evidence which sustained its findings and the court went on to say, we will upset a jury verdict only on a showing that the evidence so clearly preponderates in favor of the Appellant that reasonable people would not differ on the outcome of the case. Citing Ute-Cal Land Development v. Sather, Utah, 605 P.2d 1240 (1980). THIS COURT HAS NOW REVERSED ALL OF THE FOREGOING CASES AND HAS IN EFFECT HELD THAT THE JURIES FINDINGS OF FACT ARE NO LONGER BINDING UPON THE COURT AND THAT THEY MAY BE SUBSTITUTED BY THE APPELLATE COURT.

CONCLUSION

This Court has ruled that the evidence presented was such that the jury's findings must NOW be overturned and reversed as a matter of law. This ruling was made irrespective of the fact that the jury listened carefully to the witnesses for nearly three days. The jury from their advantaged position and being in close proximity to the witnesses were given the opportunity not only to observe, hear, and exclusively judge the credibility of the witnesses but were also under proper instructions, permitted to weigh the evidence and to make special findings of fact therefrom. It was the jurors prerogative to make an appraisal of the witnesses, to know, understand and to test their capacity to tell the truth and to remember.

The Court's attention is called to the jurors answers to Special Interrogatories No. 1 and 11 which are as follows:

No. 1. Did Capitol Thrift & Loan Company, through its agent, Merlyn Hanks, by clear and convincing evidence engage in a civil conspiracy to defraud plaintiff incident to the transaction in question?

Answer: YES

No. 11: If you found by clear and convincing evidence that Capital Thrift and Loan, through its agent, Merlyn Hanks, engaged in a civil conspiracy incident to the transaction in question, what damage, if any, do you find was caused to the plaintiff:

Compensatory	\$12,000.00 (not to exceed \$24,000.00)
Punitive	\$ 4,000.00

THE JURY AFTER A TWO DAY DELIBERATION FOUND AS A FACT THAT
CAPITAL THRIFT WAS A PARTY TO THE CONSPIRACY. THIS WAS NOT A
DEAL THAT TURNED SOUR; THIS WAS A SCAM AND A FRAUD!

A LEARNED JUDGE AND AN EIGHT PARTY JURY SO FOUND!

Merlyn Hanks, as loan officer, had made an appraisal on the Pagan home.
(TR-611, 624) (Exhibit 43P) Merlyn Hanks wrote a letter which is marked
Plaintiff's Exhibit 1, (TR-609), which accompanied a check in the amount of
\$32,325.00 (Exhibit 38) (TR-185), both of which were given to Tommy Sisk and
Stewart Title Company of Utah by Merlyn Hanks personally on the morning of
the closing. The \$32,325.00 check showed Joseph Cannon as the payee and was
allegedly endorsed by Joseph Cannon. (Although Joseph Cannon has denied the
endorsement) See (Exhibit 38) Merlyn Hanks admitted writing the letter,
preparing the check to Joseph Cannon, preparing the Trust Deeds and Notes, and
instructing Stewart Title Company to disperse a check back to Capitol Thrift &
Loan in the amount of \$4,848.75. (TR-615, 616, 618) Merlyn Hanks further
directed Stewart Title Company of Utah to give the remainder of the funds to
Joseph N. Cannon. Merlyn Hanks prepared the Trust Deed, (Exhibit P-33) and the
Promissory Note (Exhibit P-32) between Joseph N. Cannon and Capitol Thrift &
Loan, which provided that the \$32,325.00 was to be paid back in five
installments, plus interest, with a balloon payment requiring the note to be paid
in full at the end of six months. Even though Merlyn Hanks appraised the home,
drew all documents, prepared all letters of instructions, he denied in open court
that he knew that this transaction involved Israel Pagan's home. (TR-620) He
(Hanks) further denied that he knew that Joseph Cannon had proclaimed and had

testified under oath that he never purchased the Pagan home, and further was unable to explain why Joseph Cannon never received any of the money from the sale; or, why Cannon claimed to be nothing more than a Guarantor of the loan. (TR-620) Merlyn Hanks testified and admitted that Capitol Thrift & Loan foreclosed on the Trust Deed and Note under his direction (TR-628) for the sum of \$39,300.00. In addition thereto, he received approximately \$5,000.00 in the form of a payment on Dorius Black's loan. (TR-641). By the conspiracy and fraud herein Capitol Thrift and Loan obtained the Pagan home, which was worth \$44,000.00 for the sum of \$32,325.00. Merlyn Hanks admitted preparing the business loan in the name of Joseph Cannon for household or agricultural purposes. (See Exhibit 32.) The Trust Deed (Exhibit 19) was allegedly signed by Joseph Cannon and notarized by Merlyn Hanks. (Joseph Cannon denies signing the foregoing described documents as a purchaser of the property and alleges that he only signed them as a Guarantor.) Merlyn Hanks admits that neither Dorius Black nor Joseph Cannon ever made any payments whatsoever on the loan. (TR-646).

The Jury heard the evidence; the Jury examined all the documents; the Jury was properly instructed; the Jury answered 18 questions and made 18 findings in Respondent's favor and against the appellants; the jury deliberated over a two day period; Their findings and award of damages are correct.

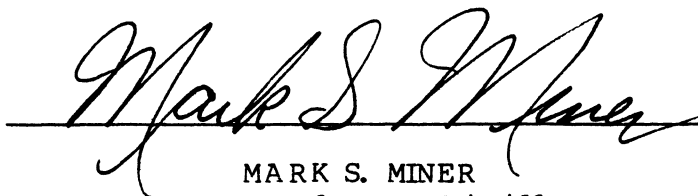
THIS CASE DESERVES A SECOND LOOK!

CERTIFICATION OF GOOD FAITH

COMES NOW, Mark S. Miner, attorney for the Plaintiff and respondent and hereby certifies that the foregoing petition for rehearing is made in good faith

and not for delay and that he respectfully requests that the above entitled court consider this petition and grant a rehearing of this case.

RESPECTFULLY SUBMITTED this 27th day of November, 1987.

A handwritten signature in cursive script, reading "Mark S. Miner", is written over a horizontal line.

MARK S. MINER
Attorney for the Plaintiff
525 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Phone 363-1449

CERTIFICATE OF SERVICE AND MAILING

I hereby certify that I mailed, postage prepaid, four (4) true and correct copies of the foregoing PETITION FOR REHEARING to: Kay M. Lewis and Kevin V. Olsen, 320 South 300 East, Suite One, Salt Lake City, Utah 84111 this 27th day of November, 1987.

A handwritten signature in cursive script, reading "Mark S. Miner", is written over a horizontal line.
MARK S. MINER

333 SOUTH 2ND EAST 333-4783
SALT LAKE CITY, UTAH 84111

- STEWART -
TITLE OF UTAH I347I

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CITY CENTER OFFICE
VALLEY BANK & TRUST CO.
1325 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84118
97-154/1240

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DER
JOSEPH N. CANNON
4682 Highland Drive
Salt Lake City, Utah 84117

AMOUNT
August 19, 1980 \$ 13,471.57

PAY
James R. Nelson

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105 ⑈000134715⑈

17 Mountain Bank Note

JOSEPH N. CANNON
Heritage Plaza Suite 201
4685 Highland Drive
Salt Lake City, Utah 84117

ALPHA LEASING CO.
Heritage Plaza Suite 201
4685 Highland Drive
Salt Lake City, Utah 84117

EXHIBIT 7-P

Received into evidence (TR-505)

also (TR-203)

(TR-510)

This is a legally binding form, if not understood seek other advice

Name of Broker Company

Buyer's agreement to use your efforts to present this offer to the Seller, two

pay the sum of (\$

DOLLARS

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PLAINTIFF'S
EXHIBIT
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RECEIPT

Date

Purchaser

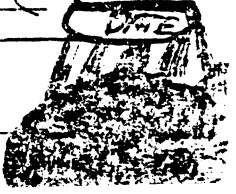
By of the foregoing agreement and signatures to be mailed to the ☐ Seller, ☐ Purchaser, or

by registered mail and return receipt is attached hereto

By

STEWART
ESCROW
Wanda B. B...
Contract
to Seller's Trustee
Seller Rec. Proceeds
Cont. to Rec. 2nd.
Sept. 81 - Sept. 83
Balloon Pmt. March 83

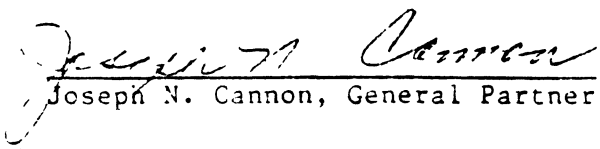
1000 EXE.
19000 - add 19,000 at closing
Contract on Balance (\$24,000)
3042.00 am.
3 YR. Payment Def.
ST. REC. 181 - INT. ONLY -
Pymt. Monthly Pay for ann Sept. 81 - Sept. 83
Balloon Pmt. March 83



BORROWER'S STATEMENT

I, Joseph N. Cannon, hereby state that the loan dated August 18, 1980, was strictly a business related loan for the benefit of Alpha Leasing Company for which I am a general partner. Said funds were not used for personal, family, household, or agricultural purposes. Alpha Leasing Company assumes now and always did assume responsibility for repayment of this loan.

ALPHA LEASING COMPANY



Joseph N. Cannon, General Partner

EXHIBIT 37-D

Received into evidence (TR-600)



CAPITOL THRIFT AND LOAN

1200 CONTINENTAL BANK BUILDING • PHONE 532-6545

~~P.O. BOX 1477~~ • SALT LAKE CITY, UTAH 84147

August 18, 1980

Stewart Title Guaranty Company
333 South 200 East
Salt Lake City, Utah 84111

Gentlemen:

Enclosed is our check in the amount of \$32,325.00, your acceptance of which guarantees Capitol Thrift and Loan title insurance in that amount covering the following:

1. That fee simple title to the property described as:
The north 50 feet of the south 100 feet of the west 98
Block 4 Amundson Subdivision
is in the name of Joseph N. Cannon.
2. That the attached Deed of Trust be recorded as a first
Trust Deed subject to no liens or incumbrances except for
current taxes and assessments.
3. Disburse the enclosed funds as follows
 - a. \$4,848.75 to Capitol Thrift and Loan
 - b. Your fees for recording and the title insurance policy.
 - c. The remainder of the funds to Joseph N. Cannon
or as he directs.

In the above disbursement, we recommend that Joseph N. Cannon's name be on all checks so as to prove "consideration" in this matter.

Yours truly,

Merlyn Hanks
Real Estate Loans

EXHIBIT P-1

Received into evidence (TR-505)

MH:ib

Attachments

CAPITOL THRIFT AND LOAN, SALT LAKE CITY, UTAH

No 137

DATE	GL NUMBER	DESCRIPTION	DEBIT	CREDI
2-27-81 JZ	113	A/R - Cannon, Joseph N. #053685 Extend Loan #053532 with 2978.91 interest owing to 1-2-81 added to balance	34303.91	

P A Y F E . DETACH THIS STATEMENT BEFORE DEPOSITING CHECK