

2000

George V. Alexander and Al Johnson v. Ed De La Cruz and Beth De La Cruz : Brief of Appellant

Utah Supreme Court

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Maurice Richards; Attorney for Appellants.

Brian R Florence; Attorney for Respondent.

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IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE V. ALEXANDER and)

AL JOHNSON,)

Plaintiffs-Appellants,)

vs.)

ED DE LA CRUZ and BETH)

DE LA CRUZ,)

Defendants-Respondents.)

Case No. ¹³⁹²⁸~~57002~~

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13 JUN 1977

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

BRIEF OF APPELLANTS

Appeal from judgment against Appellants in Second Judicial District Court,
in and for the County of Weber, State of Utah, the Honorable Calvin Gould
presiding.

MAURICE RICHARDS
Attorney for Appellants
2568 Washington Blvd.
Ogden, Utah 84401

BRIAN R. FLORENCE
Attorney for Respondent
818 - 26th Street
Ogden, Utah 84401

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE

STATE OF UTAH

GEORGE V. ALEXANDER and)
AL JOHNSON,)

Plaintiffs - Appellants,)

Case No. 13928

v.)

ED DE LA CRUZ and)
BETH DE LA CRUZ,)

Defendants - Respondents)

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF CASE.

Appellant sued to recover judgment for money and of foreclosure on a promissory note to real property mortgage.

DISPOSITION IN THE LOWER COURT.

The case was tried on October 13, 1974, before the Honorable Calvin Gould, judge of the District Court of Weber County, Utah, without a jury. The trial court dismissed the cause as to Beth DeLa Cruz as it was established that the real property was hers and that the other defendant (her husband) had forged her name to the note and mortgage. The court dismissed as to the Defendant Ed DeLaCruz for the reason that the evidence failed to show a legal consideration by which he could be bound to the note.

RELIEF SOUGHT ON APPEAL.

Appellant asks that a new trial be granted as to the defendant Ed DeLa Cruz, or in the alternative judgment be entered against the defendant Ed DeLaCruz on the note.

STATEMENT OF FACTS.

At all times mentioned in this law suit, the Respondent Ed DeLa Cruz was the manager and in direct charge of a Utah corporation doing business in Ogden, Utah, named Car Corral, Inc. Al Johnson, one of the appellants, was a minority stockholder in this corporation. George V. Alexander, the other appellant, was not. The corporation was in the retail used car business. The corporation financed its cars as they were purchased through the Bank of Utah on a flooring agreement. The agreement provided that as the floored car was sold, it would be paid for and title released on that car by the bank. The two appellants signed the flooring guarantee at the Bank of Utah as guarantors stating that if a car was purchased for a certain amount and could not be sold for that same amount or more, that Appellants would guaranty the difference to the bank.

Respondent Ed DeLaCruz managed the car sales operation under a corporate arrangement where he would manage and sell and would receive fifty percent of the net profits from the company as compensation. Respondent withdrew funds from the corporation in the approximate amount of \$8,000.00 above what he would be entitled to receive as one-half of the sales profits.

Respondent DeLaCruz also disposed of cars by improperly taking them out of trust at the bank and without paying the Bank. By doing this he was wrongfully out of trust at the Bank in the amount of \$7,657.00. Appellants guarantee to the bank did not cover this and Appellants had no obligation to the Bank or to DeLaCruz to pay this amount back to the bank. When it was discovered that Respondent was \$7,600.00 out of trust at the bank, then he discussed with Appellants the fact that if the bank were not reimbursed for the amount out of trust, that Respondent would lose his license and be subject to other possible penalties which would mean that he would lose his future livelihood. He agreed, according to his testimony, that he did owe this amount to the bank and that the bank would not accept his note. Respondent agreed with Appellants that if Appellants would cover him by signing a note at said bank for the amount of Respondent was out of trust, that he and his wife would sign a note to Appellants and give a mortgage on a home which Respondent stated that he and his wife Beth DeLaCruz owned. The note and mortgage sued on here were then delivered to Appellants by that Respondent. Both note and mortgage were signed and the mortgage was notarized with both Respondent and his wife's name on them. Respondent then made certain payments on the note and Appellants recorded the mortgage. Without the signature of Respondent and his wife on the note and mortgage Appellants would

not have signed the note for Respondent at the bank. Because Respondent failed to pay his note, Appellants had to pay off their note at Bank of Utah. Respondent at no time advised Appellants up until time of law suit, that his wife's signature on the note and mortgage were forgeries and that he, in fact, had no interest in the land which he had mortgaged to them. At trial Respondent and his wife testified that her signature on the note and mortgage were forgeries. Respondent testified that he had forged his wife's signature and had misrepresented to the Appellants that it was her signature. He testified that he had without authority taken a notary seal of Rick Beyer and had attached this to the mortgage and had forged Rick Beyers signature intending to further mislead Appellants. The trial court relied on Manwell vs. Oyler, 11 Utah 2nd 433, 461 P 2d 177, to hold that a promissory note to be binding must have the consideration established as a burden of proof by the payee or holder and that there was no consideration in Appellants signing a note for Respondent at the bank.

POINTS ON APPEAL.

POINT I

The Lower Court erred in holding that it is the Payee-Holders burden to show that a promissory note was given for consideration before he can prevail.

A promissory note under the Uniform Commercial Code is presumed to have been given for consideration. It is not appellants burden to show

the consideration, the respondent must rebut it. 11 Am Jur 2nd, Sec. 216 states: "Like any other contract, a negotiable instrument requires a consideration as between the original parties, or a recognized substitute therefor, but such an instrument is presumed to have been issued for a valuable consideration."

In 11 Am Jur 2nd, Sec 188, page 222 the law is that: "There is a presumption of consideration for a negotiable instrument even though there is no recital of consideration, and the presumption may be rebutted even though consideration is recited."

The Respondent acknowledged to the court that when the note was signed, he felt that he was receiving consideration from the appellants. Respondent at trial gave no testimony to rebut the presumption of consideration. The Utah Uniform Commercial Code, Title 70A-3-307-(2) Utah Code Annotated, states "(2) When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense." In this case the defendant Ed DeLaCruz's signature on the note and mortgage were admitted by him. 11 Am Jur 2nd, Sec. 215, page 244, further states "like any other contract a negotiable instrument requires a consideration as between the original parties or a recognized substitute therefor, but such an instrument is presumed to have been issued for a valuable consideration."

In this case the appellants had guaranteed to the bank that each car

floored or placed in trust would be sold for as much as the flooring on that car. They did not guarantee that Respondent would not embezzle the cars from out of trust. His dealers license and bond were the bank's insurance on this. When Respondent removed \$7,000 to \$8,000 worth of cars out of trust and sold them illegally and then overdrew this same amount from the Company he was in effect stealing from the bank.

Appellants and Respondent knew that the only way to keep Respondent from losing his bond and his license and perhaps more was for Appellants to help him by covering his "shorts" at the bank of Utah with their own promissory note. This was ample consideration for Respondent giving Appellants his own note and mortgage in the same amount to cover any loss Appellants might suffer. Appellants did in fact have to pay off their note at the bank except for the \$1,275.00 payment which Respondent made to them. The Lower Court should have granted Appellants a judgment where Respondent did not meet his burden to show lack of consideration.

POINT II

The Lower Court erred in not recognizing what constitutes legal consideration.

ARGUMENT

Part A. The Lower Court relied on the case of Manwill v. Oyler, 11 Utah 2nd 433, 461 P2 177 in making its decision. Appellants do not feel this case is in point under the fact situation in the present case.

Part B. What appears to be the general law on consideration is stated in 11 Am Jur 2nd in Section 216 at page 244: "The general principles

as to what constitutes consideration for a contract, full discussion of which appears in another article, apply in determining what constitutes consideration for a bill or note. Any consideration that is, any valuable consideration as distinguished from 'good' consideration, sufficient to support a simple contract, supports a negotiable instrument.

Thus, while nothing is a consideration unless it is known and agreed to as such by both parties, and these definitions are not completely comprehensive, consideration may be said to consist in any benefit to the promisor, or in a loss or detriment to the promisee, or to exist when at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, the consideration being the act, abstinence, or promise. It has been said generally that to give a consideration value for the supporting of a promise, it must be such as deprives the person to whom the promise is made of a right which he possessed before, or else confers upon the other party a benefit which he could not otherwise have had.

Consideration may be given to the promisor or to some other person. It matters not from whom the consideration moves or to whom it goes. If it is bargained for as the exchange for the promise, the promise is not gratuitous. Consideration need not move from the promisee, and it need not be pecuniary or beneficial to the promisor. Consideration moving to the promisor may be a benefit to a third person or a detriment incurred on his behalf."

And 11 Am Jur 2nd Sec 236 states: "Consideration for a bill or note may consist of money or property received by the maker, a contract of sale, an assignment of a claim, a sale of such title, if any, as the seller has (a quit claim deed), or the grant of a privilege, an inconvenience, or some risk or trouble incurred by the promisee at the instance of the promisor.

Consideration may also consist of money or property received, lent, advanced, or returned by the payee to a third person or an extension of credit to a third person, at the instance of the maker and with his knowledge and consent. . . . "

And Section 218 states: "The consideration which renders a promise binding need not exist at the time an instrument is executed. If what is anticipated or requested by the promisor is performed by the promisee, it is not necessary that the promisee have promised or been under an obligation to perform the act. Thus, a bill or note given for services to be performed in the future is binding, for the full amount when services are subsequently rendered, even where there was no agreement to render the services."

In this case the Respondent DeLaCruz caused his corporation to become "out of trust" to the Bank of Utah in the sum of approximately \$8,500.00. He admitted that without Appellants giving their personal note to said bank and paying this note personally to cover this "out of trust" that he could have lost his dealer's license and bond. Respondent persuaded Appellants to help him and gave his own note and forged mortgage

to induce them to do so. This was an act which was not required of Appellants under their guarantee at the Bank. It was clearly at some "risk and trouble" to Appellants. It was also a return of money by Appellants to the Bank with Respondents knowledge and consent.

CONCLUSION:

The respondents desire to draw \$7,000 to \$8,000 more out of the Company he managed than it legitimately earned caused him to dispose of this same amount of cars out of trust. His desire not to be caught by the bank or his bonding company or the car dealer licensing department of the State of Utah caused him to persuade Appellants to cover his out of trust amount at the Bank with Appellants personal note. He was so anxious to have them do this that he was willing to represent that he and his wife owned a home which they would mortgage and secure Appellants. It was so important to him that he forged his wife's name to the note and mortgage. He was so eager to have Appellants bail him out of trouble that he was willing to misappropriate Rick Beyer's notary seal and place it on the mortgage and forge Beyer's name to it. He felt that Appellants had given him sufficient help and consideration that he repaid them some \$1,300 on his note. Now after Appellants have paid off their note at the Bank and Respondent is no longer in trouble at the bank or his bonding company or the State of Utah, he refuses to pay.

Therefore, Appellants ask that a new trial be awarded or in the alternative, that Appellants be granted judgment for the amount due on the note.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Maurice Richards". The signature is written in dark ink and is positioned above the printed name.

MAURICE RICHARDS

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