

1968

Movie Films Inc., a Corporation v. First Security Bank of Utah, N.A., a Corporation : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

MOVIE FILMS INC.,
a corporation,

Plaintiff-Respondent

-vs-

Case No.
11259

FIRST SECURITY BANK
OF UTAH, N.A., a
corporation,

Defendant-Appellant

STATEMENT OF THE NATURE
OF THE CASE

Plaintiff seeks to recover money paid out by defendant Bank from plaintiff's corporate checking account, on the ground that checks so paid were signed by the president alone rather than two officers as originally contemplated.

DISPOSITION OF THE LOWER COURT

The case was tried on March 22,

1968, before the Honorable Stewart M. Hanson, Judge, without a jury. The court rendered its memorandum decision (R. 11) giving judgment for plaintiff against defendant in the amount of \$5,470.30. Upon the entry of Findings, Conclusions and Judgment (R. 14-16), defendant filed its motion to amend the Findings, Conclusions and Judgment (R. 17-18). After hearing thereon, the court denied defendant's motion (R. 19) and notice of this appeal was subsequently filed.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment on the ground that plaintiff's corporate president had ample authority as a matter of fact and law to be sole signator on the checks paid by defendant Bank. In the alternative, defendant seeks

reduction of the judgment by the amount of \$3,170.34 because at least two checks were paid for proper corporate obligations and plaintiff suffered no loss by defendant's actions, even assuming, arguendo, that defendant was negligent in paying the checks bearing only one signature.

STATEMENT OF FACTS

Plaintiff is a Utah corporation organized July 19, 1966, under Articles of Incorporation showing David Patterson, President and Director, William Cramer, Vice-President, Secretary-Treasurer and Director, and D. Ann Bullock, Director (Exh. D-17). No corporate minutes exist showing a change of officers until September 15, 1966 (Exh. D-23).

On or about August 1, 1966, plaintiff opened a checking account with the

Highland Drive Office of defendant Bank. A "Corporation-Account-Authorization" (Exh. P-1) was filed with the Bank showing the signatures of "David Patterson," President and "Rex L. Jensen," Vice-President. The name of Patterson was typed as "Shawn D. Patterson" but the signature was in the form of "David Patterson." A signature card was also filed (Exh. D-30) showing the signatures of "David Patterson," President and "Rex L. Jensen," Vice-President, with a notation that both signatures were required for payment of checks.

Thereafter, a number of checks were drawn on the account beginning on August 15, 1966, all of which checks contained only the signature of Shawn D. Patterson (Exhs. P-3 through P-9 and D-18 through D-22 are the only checks in evidence).

When one of the earliest of said checks was presented, it was brought to the Bank by Shawn D. Patterson on August 16, 1966, with the request that a cashier's check be made payable to R. L. Polk & Company. Said check (Exh. P-3, payable to "cash," in the amount of \$139.92) was signed by Shawn D. Patterson. The teller to whom the check was presented raised the question that only one signature was on the check when the signature card (Exh. D-30) required two signatures (R. 71, L. 5). Thereafter, Mr. Patterson stated to the Bank personnel that it was not their original intention to require two signatures and that he could not conduct the business in Salt Lake and have Mr. Jensen in Las Vegas if Mr. Jensen's signature were required (R. 72, L. 17).

Mr. Patterson was then instructed regarding execution of a new signature card and a new Corporation-Account-Authorization to reflect the expressed desire of requiring only one signature on the account. The new signature card was signed "Shawn D. Patterson" as President of Movie Films Inc. and left with the Bank (Exh. D-31). The Corporation-Account-Authorization form was handed to Mr. Patterson but was not returned to the Bank (R. 82, L. 5).

The business of plaintiff was selling movie cameras and affiliated accessories in package "units" (R. 28, L. 5). Prior to commencing business in Utah, a written agreement was signed in Las Vegas between Rex L. Jensen and Shawn D. Patterson reflecting some of the economics of the

business. Mr. Patterson was to receive \$75.00 as commission for each unit sold, (Exh. P-34) in addition to any commissions earned by other salesmen (R. 31, L. 7). Mr. Jensen supplied ten units upon commencing business, and subsequently Mr. Jensen furnished an additional eight units (R. 32, L. 20). The equipment units were manufactured by Technicolor Corp. and were obtained through a distributor named Cottrell Distributing Co., of Denver, Colorado (R. 43, L. 5). (Please note that Exh. D-27, L. 2, shows the correct spelling of Cottrell; the reporter throughout the transcript has used the spelling Cotret or Codret, but all such references are to the same distributing company.) Additional units were subsequently received in Salt Lake City, one

by shipment through REA Express received August 23, 1966, (Exh. D-27 and R. 62, L. 25) the other units having been shipped to the post office and picked up later by another party apparently after Patterson's departure from the business (R. 39, L. 16). The shipment at REA Express was paid for by means of a check on the corporate account made payable to cash in the sum of \$1,820.34 (Exh. P-4) which was converted to a cashier's check payable to REA Express in the same amount and deposited by REA Express on August 23, 1966, (Exh. P-11).

The business of plaintiff included assigning the customer's installment purchase contracts to a financial institution, principally Nationwide Acceptance Company, Salt Lake City, which Mr. Jensen

knew at the outset (R. 31, L. 24). Mr. Patterson, as president of plaintiff, executed a "Master Dealer Agreement #1, non-recourse" (Exh. D-28) under which contracts were subsequently assigned to Nationwide. Each contract was endorsed on behalf of Movie Films Inc. by David Patterson (Exh. D-29). Mr. Jensen was informed that at least three cash sales and fifteen contract sales had been effected (R. 48, L. 1). However, the summary provided by the finance company to plaintiff (Exh. P-25 and R. 57, L. 23) evidenced eighteen contract sales through August 25th, thus creating a total of twenty-one units sold including the cash sales.

On or about September 1, 1966, Mr. Jensen learned that Mr. Patterson had departed Salt Lake City, (R. 40, L. 7),

and shortly thereafter he discovered that no units were left in the place of business (R. 39, L. 13). The bank account was intact and as of August 31st had \$272.96 remaining (Exh. D-33). Between August 9, 1966 and August 31, 1966, deposits were made to the banking account in the aggregate amount of \$8,034.48 (Exh. D-33). Of the various checks which had been paid out from the corporate account, Mr. Patterson apparently received a considerable amount of cash, paid some corporate obligations, and left the following checks in dispute:

Schedule of Checks in Issue

<u>Exhibit No.</u>	<u>Payee</u>	<u>Amount</u>
P-4	Cash	\$1820.34

(Exchanged for cashier's
check, Exh. P-111, payable
to REA Express)

(Schedule of Checks in Issue continued)

P-5	Laury Miller Pontiac	\$ 42.02
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P-6	Cash	\$ 463.20
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(Exchanged for cashier's
check, Exh. P-12, payable
to J. Reed Tuft, endorsed,
and cashed by Shawn D.
Patterson)

P-7	Cash	\$1470.00
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(Exchanged for cashier's
check, Exh. P-14, payable
to J. Reed Tuft, endorsed,
and cashed by Shawn D.
Patterson)

P-8	Cash	\$1525.00
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(Exchanged for cashier's
check, Exh. P-13, payable
to J. Reed Tuft, endorsed,
and cashed by Shawn D.
Patterson)

P-9	First National Bank of Nevada	\$ 110.00
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D-19	Joan Nelsen	\$ 20.37
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\$5450.93

ARGUMENT

POINT I. DEFENDANT BANK WAS ENTITLED TO RELY ON THE AUTHORITY OF THE CORPORATE PRESIDENT IN ACCEPTING A SIGNATURE CARD AND PAYING CHECKS SIGNED BY HIM ALONE.

The facts as evidenced in the record reflect three basic conclusions relevant to this point of argument:

(1) By reason of powers inherent by law in a corporate president, as manifested by the actual authority exercised by Patterson, the record evidences his authority to execute a new signature card with the Bank even without the formality of a board resolution; indeed such a resolution would have been futile as a matter of fact because of no valid and functioning board of directors;

(2) Rex L. Jensen was the moving force behind plaintiff but clothed Patterson with full ostensible and actual

authority to handle the entire business;

(3) Because of Patterson's actual authority exercised as president of the corporation, and Jensen's lack of attempt to limit the authority so being exercised by Patterson, this corporation cannot now be heard to say that Patterson did not possess legal authority to conduct the banking business:

This discussion can focus at once on the important operative facts. The original signature card containing both the signatures of Patterson and Jensen (Exh. D-30) was replaced on or about August 16, 1966, with the signature card bearing only the signature of Patterson (Exh. D-31). The Corporation-Account-Authorization (Exh. P-1) filed with the first card did not have its counterpart with the second card, which, of course,

is the only factual point which suggests the Bank may have been negligent. Admittedly, it was the practice of the Bank to require such a resolution (R. 77, L. 6). Viewing the matter realistically, however, the corporate resolution is a formality, and though consistent with accepted corporate practice, it is a formality which in any event could not have been lawfully carried out in this instance.

The signature card itself constitutes the contract between the Bank and the depositor, and recites on the face thereof:

The Bank is hereby authorized to recognize the signatures executed below in the payment of funds or the transaction of any other business of said corporation. The conditions as set forth on the reverse side are hereby accepted as a part of this contract. (Exh. D-31)

Immediately below said recitation, Shawn D. Patterson, President of Movie Films, Inc., executed the signature card contract

on August 16th. Defendant submits that said action could not have been ratified by the board of directors because there was no functioning board at the time. The Articles of Incorporation (Exh. D-17) appointed Patterson, Cramer and Bullock as directors and officers. Notwithstanding the testimony that Jensen, Patterson and Phillips were appointed officers and directors in a meeting held about August 15 (R. 43, L. 28), such an action could not possibly have been taken validly because Bullock and Cramer were still officers and directors, without resignation. The minutes of the September 15, 1966 meeting (Exh. D-23) reflect that Cramer did not resign until that date, and Bullock and Patterson were removed as stockholders for non-payment of their subscription, but their resignation or removal as officers

never does appear. An irreconcilable conflict appears with respect to handling the corporate organization, and the only clear fact emerging is that Patterson was the only consistent and functioning director and officer from July 19, 1966, the date of incorporation, until at least the end of August when he departed. Admittedly, we are better informed now than the Bank was on August 16th, but why insist on the formality of a board resolution to back up the actions of the president, when there was no legally constituted board even acting at the time? The actual exercise of the authority of Patterson, including the dealings with the Bank, is very consistent with the manner in which plaintiff had established him in charge of its affairs

It is interesting to note that both the trial Court in its memorandum decision

(R. 11) and Jensen and his counsel (R. 56, L. 26 and R. 77, L. 19) described Patterson as a "conniver," a "con man" or a "crook," and yet both attempted to assert that the Bank was negligent in being taken in by such a disreputable character. Defendant submits that Jensen and plaintiff corporation should be estopped from making such a claim against the Bank, not merely as an equitable principle of law, but as part of the factual background supporting defendant's notion that Jensen clothed Patterson with full authority to act on behalf of the business in every aspect, and took no steps to limit or investigate the actual use of such authority. In addition to the corporate irregularities noted above which leave Patterson the only functioning officer and director, we note

that it was Patterson, and not Jensen, who had communication with the corporate counsel, J. Reed Tuft, in establishing the corporation and commencing its business (R. 45, L. 8). Jensen was not even an incorporator (Exh. D-17), but admittedly supplied the initial money. Patterson was the sales manager and office manager (R. 29, L. 23), and as such he ordered additional equipment units to sell, paid for them at REA Express (Exhs. D-27, P-4 and P-11) and supervised the sale of at least eighteen units on contract (Exh. P-25) and perhaps three additional units for cash (R. 48, L. 1). Patterson signed the dealer agreement with Nationwide Acceptance Co. (Exh. D-28), and by his sole signature endorsed the customers' purchase contracts to the finance company (Exh. D-29). Patterson hired and fired the office help

and the salesmen (R. 49, L. 1). All of the foregoing except the REA Express transaction were fully known and consented to by Jensen, who, though perhaps not a legally constituted officer, provided the financial backing for plaintiff and has caused this action to be commenced.

Patterson wrote many checks in payment of corporate obligations, many of them before Jensen's visit to Salt Lake City on August 15, 1966, (R. 49, L. 25 and Exhs. D-18, D-19, D-20, D-21, D-22). Jensen didn't ask for the records or the check-book to see how Patterson was conducting the business or if he had paid any normal operating expenses of the business (R. 50, L. 2).

During the entire period when Patterson was dealing with the Bank, no facts and circumstances appeared to put the Bank on notice that the funds from the account might be diverted to Patterson's own use,

for the various checks were payable to parties who might be normal business accounts, including the corporate counsel. The Bank had no duty of inquiry when there was nothing suspicious about the checks or the officer's conduct, Havana Cent. R. Co. v. Central Trust Co. of N.Y. (2nd Cir. 1913) 204 Fed. 546.

The actual powers of the corporate president as manifested by Patterson have been noted above. The governing law in Utah is:

While it is true that, ordinarily, the president of a corporation, as such, has no inherent power to execute contracts in general without express authority of its board of directors yet when, as here, the president is also the general manager of the company authorized to act under its by-laws, and has been long accustomed to transact all the corporate business, his power and the legality of his acts may not be questioned, especially when exercised and performed in good faith and in the absence of fraud. (Passow & Sons v. Wetherbee, (1917) 50 Ut. 243, 167 P. 350, 352.

In the present case, the Bank certainly had no knowledge of any bad faith or fraud of Patterson.

In the case of Shircliff v. Dixie Drive-In Theatre (1955) 7 Ill. App. 2d 346, the Court sustained the right of a corporate president to execute a note even without approval of the directors, and the trial court's conclusions, affirmed on appeal, are very relevant here:

The trial court found that O'Keefe, as President, transacted the entire business of the corporation, and, in fact, the directors were apparently a little less than nominal, if possible. Under these circumstances the corporation held him out as the agent to transact business. There is nothing in this transaction but what would ordinarily be included in the ordinary business of the corporation. (129 N.E. 2d, 348).

More specifically in the area of a corporate employee who makes checks payable to "cash" and obtains the funds for

his own benefit, it has been held that the Bank is not liable therefor where the employee was acting within the scope of his apparent authority in the business. This employee, one of three authorized to sign checks, had exclusive charge of the bank business of the company. Harlan E. Moore & Co. v. The Champaign National Bank (1957) 13 Ill. App. 2d 232, 141 N.E. 2d 97. Defendant submits that in the case at bar, Patterson was acting within the scope of his actual and apparent authority in exclusively conducting the banking business with defendant.

In another case very much in point, it has been held that where the president of a corporation opened a bank account and gave a signature card with his name attached as president, without a formal board resolution, and thereafter drew

checks in accordance with the signature card, the ordinary rule requiring a board resolution authorizing corporate action should be relaxed with reference to commercial transactions of an ordinary business nature wherein the president has implied authority to carry on such business:

I find as a fact, and rule as a matter of law, that the bank was justified and fully protected in paying out the money upon the order of the Brenner & Brody Shoe Company, signed by the person depositing the same. Sawyer v. Rochester Trust Co. (D.C. N.N. 1931) 45 Fed. 2d 867, 871)

Also relevant is Dexter Savings Bank v. Friend (D.C. Ohio 1898) 90 Fed. 703, wherein it is held:

In the absence of legislative enactment, or provision made in the by-laws, corporations usually act through their president. He being the legal head of the body, when an act is performed by him the presumption will be indulged that the act is legally done, and is binding upon the body. (90 Fed. 706)

Defendant submits that all of the foregoing discussion of facts and applicable law result in the inescapable conclusion that Patterson, as president and the only functioning officer of Movie Films, Inc., had the actual authority to create a new contract with the Bank wherein his sole signature was required for payment of corporate checks, and that the Bank was justified in relying on his authority. Accordingly, the judgment should be reversed, and judgment for the defendant against the plaintiff directed.

POINT II. CHECKS PAID BY DEFENDANT BANK IN DISCHARGE OF PROPER CORPORATE OBLIGATIONS CANNOT CONSTITUTE LOSS TO PLAINTIFF, EVEN ASSUMING NEGLIGENCE OF THE BANK.

As an alternative to complete reversal of the judgment, defendant seeks reduction of the judgment by \$3,170.34,

representing amounts paid for proper corporate obligations of plaintiff. The sum of \$1,820.34 was paid for equipment and at least \$1,350.00 of the money taken by Patterson was due as commission. The law is so elementary as to obviate any necessity of citations that even assuming negligence of the Bank in paying checks if no loss to plaintiff resulted therefrom, no recovery can be obtained.

The business of plaintiff was selling movie units, and when the supply of units available was dwindling by reason of sales, it is natural in the ordinary course of business that the president and sales manager should purchase some more. Accordingly, Patterson executed a check to "cash" for \$1,820.34, (Exh. P-4) exchanged it for a cashier's check in the same amount (Exh. P-11), and delivered the same to REA Express on August 23, 1966

(R. 63, L. 10 and R. 62, L. 25). The records of REA Express (Exh. D-27) clearly show the shipment from Cottrell Distributing Co., Denver, admittedly the source of the movie units for plaintiff (R. 43, L. 5). This probably constituted eight units @ \$225.00 per unit, totaling \$1,800.00. Equipment cost was estimated at \$230.00 per unit by Jensen (Exh. P-34). Since at least fifteen contract sales had been made by August 23rd (Exh. P-25) and three cash sales (R. 48, L. 3), the original supply of eighteen units was exhausted and the new shipment arrived just in time. On August 23rd and 24th, another three contract sales were made (Exh. P-25).

Defendant submits that no question whatever can exist regarding the payment of a proper corporate obligation by the \$1,820.34 of Exh. P-4, so plaintiff in-

curred no loss by the Bank's payment of that check with only one signature.

The other item of corporate debt relates to the commission due Patterson. He was to receive \$75.00 commission for every unit sold (R. 31, L. 10). Even disregarding the three cash sales concerning which there is testimony but no documentary evidence, it is absolutely clear that at least eighteen units were sold on contract (Exh. P-25). The trial Court correctly computed the total commission due ($18 \times \$75.00$) as \$1,350.00 (R. 48, L. 23 and R. 57, L. 12). Although Jensen testified that Patterson was to deduct his commission (R. 33, L. 25), yet it appears obvious that the proceeds of sale came after assignment to the finance company. Upon deposit of those proceeds, therefore, Patterson was entitled to take out his commission.

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Jensen testified that sales at various prices should have resulted in proceeds of approximately \$8,220.00 or \$8,230.00 (R. 57, L. 28). The finance company showed total sales of \$8,280.00 (Exh. P-25). The bank statement showed deposits after August 9th (not including the original \$1,000.00 deposited by Jensen) totaling \$8,034.48 (Exh. D-33). The money thus deposited was pretty close to the total sale proceeds, especially considering the finance company retention.

Defendant submits, therefore, that Patterson deposited all the money and was entitled to take his commission from the checking account. On August 26th, Patterson drew a check for \$1,470.00 (Exh. P-7), exchanged it for a cashier's check (Exh. P-14), obtained the endorsement of the payee, J. Reed Tuft, endorsed

it himself and cashed it at a bank (reverse of Exh. P-14). Of the money thus obtained, \$1,350.00 was unquestionably due Patterson for commissions earned.

The foregoing result is the only common-sense conclusion from the record. It also conforms with the law in point which declares that a check paid negligently by a bank which discharges a corporate debt of the depositor cannot be the basis for any recovery against the Bank, for the depositor has suffered no loss. Industrial Savings Board v. People's Funeral Service Corp. (C.C.A. D.C. 1924) 296 Fed. 1006 and Sawyer v. Rochester Trust Co., supra, p. 23.

The total of the two debts thus paid is \$3,170.34, which deducted from the judgment of \$5,450.93, leaves the balance of \$2,280.59. If the Bank is found to be

negligent under Point I, of the argument, the judgment should certainly be reduced to the latter figure.

CONCLUSION

Based on the foregoing discussion of the facts and applicable law, defendant requests the Court on this appeal to reverse the judgment and direct entry of judgment in favor of defendant and against plaintiff. The president and managing officer of plaintiff was clothed with substantial authority and exercised the same with knowledge of other parties interested in plaintiff. Accordingly, he was authorized to effect a new contract with defendant in which a signature card was presented and signed, thus authorizing the Bank to pay checks on his sole signature.

In the alternative, and if the foregoing request is not granted by the Court, the judgment should be reduced by the amount of \$3,170.34 representing checks paid by defendant in discharge of proper corporate obligations of plaintiff, as a result of which plaintiff suffered no loss.

Respectfully submitted,

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By 

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