

1975

# Globe Leasing Corporation, Al Weigelt, and Gloria Morrison v. Bank of Salt Lake and Norton Parker: Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF

GLOBE LEASING CORPORATION, a  
Utah corporation; AL WEIGELT and  
GLORIA MORRISON, individuals,

Plaintiffs/Appellants,

-vs-

Case No. 15155

BANK OF SALT LAKE, a Utah corporation,  
and NORTON PARKER, an  
individual,

Defendants/Respondents.

BRIEF OF RESPONDENTS

Appeal from an Order against Appellants in the  
District Court in and for the  
County of Salt Lake, State of Utah, the Honorable  
Gordon R. Hall presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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GLOBE LEASING CORPORATION, a :  
Utah corporation; AL WEIGELT and :  
GLORIA MORRISON, individuals, :

Plaintiffs/Appellants, :

-vs- :

Case No. 14155

BANK OF SALT LAKE, a Utah corp- :  
oration, and NORTON PARKER, an :  
individual, :

Defendants/Respondents. :

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BRIEF OF RESPONDENTS

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STATEMENT OF THE NATURE OF THE CASE

This is an action by the Plaintiff/Appellant Globe Leasing Corporation for damages which it claims to have sustained as the result of the alleged breach of a contract with the Defendant/Respondent Bank of Salt Lake for the financing of certain motor vehicle leases.

The parties will be referred to herein as they appear in the lower court.

DISPOSITION IN THE LOWER COURT

The Complaint of the Plaintiff Globe Leasing Corporation was dismissed on May 23, 1975 because of its failure to comply with a previous Order entered September 12, 1974 requiring it to deposit with the Court

certain funds representing "Security Deposits" which it had received from the lessees.

#### RELIEF SOUGHT ON APPEAL

The Defendants seek to have the Judgment of the District Court affirmed.

#### STATEMENT OF FACTS

This action arises out of an arrangement which was entered into between the Plaintiff Globe Leasing Corporation and the Defendant Bank of Salt Lake in approximately July of 1973. By the terms of the arrangement the Bank agreed to finance certain leases covering motor vehicles which were thereafter entered into by Globe. The practice followed thereafter was that Globe would obtain a credit application from a prospective lessee and submit the tentative lease to the Bank who would then accept or decline to finance the same. If the lessee's credit application was approved by the Bank, the lease agreement would be entered into between Globe and the lessee and the same would be assigned to the Bank in exchange for funds sufficient to pay for the purchase of the automobile. (R. 134-144)

During the period of approximately one year subsequent to the time the arrangement was entered into between Globe and the Bank, approximately sixty (60) leases were financed by the Bank. The Bank financed the entire amount of the transaction for Globe and the amount paid by it for the assignment of the leases constituted the purchase price of the automobile, plus a markup of approximately seven (7) percent. (R. 145)

At the time the leases were entered into, Globe Leasing Corporation obtained from the lessees a "Security Deposit" to insure that the lessee would not damage the vehicle or otherwise default in the terms of the same during the time the lease was in default and that if this did not occur, the "Security Deposit" was to be returned to him at the termination of the lease. (R. 201)

During the month of July, 1974 the Bank advised Globe Leasing Corporation that it would not finance further leases for it and this lawsuit ensued. (R. 1-13)

After the lawsuit was in progress, the Defendant Bank of Salt Lake made a Motion to Compel Deposit of Funds whereby it requested the Court to compel the Plaintiff Globe Leasing Corporation to deposit the funds which it had received from the lessees as "Security Deposits" in the amount of \$11,323.47 with the Court pending the outcome of the litigation. (R. 86-92) This Motion was heard before Judge Gordon R. Hall and an Order was entered on September 12, 1974 requiring Globe to deposit the funds with the Court or a federally insured bank or savings and loan institution to be agreed to by the parties, pending the outcome of the litigation. (R. 225-227)

The Plaintiff Globe Leasing Corporation failed to comply with the Order requiring it to deposit the funds for a period of approximately seven (7) months and, consequently, a Motion to Dismiss its Complaint was made by the Defendant Bank of Salt Lake, which was supported by an

appropriate Affidavit. (R. 293-296) This Motion was duly heard by the Court and on April 9, 1975 Judge Stewart M. Hanson, Jr. entered an Order allowing Globe ten (10) days within which to comply with the Order requiring it to deposit the funds or its Complaint would be dismissed. Globe failed to comply with the Order and on April 23, 1975 an Order Dismissing the Complaint of Plaintiff Globe Leasing Corporation was entered by the Court. (R. 307, 308) This Order was subsequently set aside and re-entered by the Court effective May 22, 1975. (R. 324, 325)

Subsequent to the Order Dismissing the Complaint of Plaintiff Globe Leasing Corporation, its Motion to Vacate the Order of September 12, 1974 was heard by Judge Hall who had entered the original Order, and was denied. (R. 338)

### ARGUMENT

#### POINT I

THE PROCEEDINGS OF THE TRIAL COURT ARE DEEMED TO BE CORRECT

There are numerous cases from the Supreme Court of the State of Utah, as well as other jurisdictions, supporting the general proposition of law that the proceedings of the trial court are deemed to be correct and no cases have been found stating a contrary position.

There is not only a presumption of validity on appeal of the proceedings in the lower court, but the burden is on the party prosecuting the appeal to affirmatively demonstrate error, and in the absence of such, the Judgment must be affirmed by the reviewing court. In this regard see



Burton v. Z.C.M.I., 122 Utah 360, 249 P.2d 541; Charlton v. Hackett, 11 Utah 2d 389, 360 P.2d 176; Leithead v. Adair, 10 Utah 2d 382, 351 P.2d 956; and Coombs v. Perry, 2 Utah 2d 381, 275 P.2d 680.

## POINT II

THE COURT CORRECTLY REQUIRED THE PLAINTIFF GLOBE LEASING CORPORATION TO DEPOSIT THE FUNDS WITH THE COURT.

It is the position of the Defendant Bank of Salt Lake that the Court properly entered an Order requiring the Plaintiff Globe Leasing Corporation to deposit the funds representing the "Security Deposits" which it had obtained from the lessees with the Court pending the outcome of the litigation.

The Motion and Order requiring the deposit of the funds with the Court was based upon the provisions of Rule 67 of the Utah Rules of Civil Procedure which provides as follows:

"When it is admitted by the pleadings, or shown upon the examination of a party, that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court or delivered to such party upon such conditions as may be just, subject to the further direction of the court; provided that if money is paid into court under this rule it shall be deposited and withdrawn in accordance with section 78-27-4, Utah Code Annotated 1953, or any like statute."

It is apparently the position of the Plaintiff Globe Leasing Corporation that because it asserts some possessory right to the "Security Deposits," the Court is without jurisdiction to compel it to deposit the same pending an outcome of the litigation. The untenable nature of the position is clearly shown by the sworn testimony of its president, Al Weigelt, as set forth in his deposition and the terms of the lease agreements under which the "Security Deposits" were obtained. In his deposition Mr. Weigelt concedes that the "Security Deposits" were obtained on the leases by Globe Leasing Corporation. (R. 145) Likewise, the Affidavit of the Defendant Norton Parker sets forth the amount of the "Security Deposits" which were not transmitted to the Bank of Salt Lake (R. 211-214) and the same is not controverted. Additionally, the terms of the lease agreement under which the "Security Deposits" were obtained from the lessees by Globe, provides in part as follows:

"3. SECURITY DEPOSIT: Lessee shall deposit with Lessor the sum set forth at 2e above, as security for the performance by Lessee of the terms and conditions of this lease. If Lessee shall have fully complied with all the terms, covenants, and conditions hereof required of Lessee, the deposit shall be refunded upon termination of the lease. Should Lessee fail to comply with any of such terms, covenants and conditions, such deposit may be applied by Lessor toward payment of any party or all of the costs and expenses, including attorney's fees, incurred by Lessor because of such default. The making of such deposit shall not be considered as payment of rent nor in any manner release Lessee from the

obligations to pay rent or from performing any of the other obligations herein assumed by Lessee." (R. 203)

It is unquestionably clear from the foregoing that the "Security Deposits" obtained by Plaintiff Globe Leasing Corporation from the lessees were not its property but were to be held by it in a trustee or fiduciary capacity during the term of the lease and thereafter would be returned to the lessee if no damage or other breach of the lease had occurred.

The record of the case amply demonstrates that the "Security Deposits" were in controversy, thus, the same were "the subject matter of the litigation." Additionally, they were found to be "held by him [Globe] as trustee for another party," within the meaning of Rule 67 of the Utah Rules of Civil Procedure. In this regard, the Court, in denying the Motion of Globe to vacate the Order requiring it to deposit the funds stated in part as follows:

"The Court has reviewed again the lease agreement, which it relied upon in making its order initially, which provides for a security deposit. The Court deems the plaintiff in this matter to be a fiduciary or trustee of those funds and that was the theory upon which the Court granted the prior order allowing those funds to be held and deposited until the matter was completed. ... " (R. 358)

The cases cited by the Plaintiff Globe Leasing Corporation in its Brief in support of its contention that the District Court was without jurisdiction to enter the Order requiring it to deposit the funds involve

factual situations substantially different from those presented in the instant action. In the case of In re Elias, 25 Cal. Rptr. 739 (1962), the claim arose out of a civil action for monies claimed due under a contract between a subcontractor and a contractor, and his surety company. The contractor was ordered to pay certain monies which he had allegedly received on the contract in question into Court and was incarcerated because of his refusal and a habeas corpus proceeding thereafter ensued. The Court held that there was "...no proof that Elias owes anything to plaintiff or to any other person..." and consequently the order of deposit was improper. (25 Cal. Rptr. at p. 744)

In the case of Burke v. Superior Court, 93 P. 1058 (1907) cited by the Plaintiff Globe Leasing Corporation in its Brief, the Plaintiff was an officer in a corporation which was involved in a dissolution proceeding. He had received certain funds on behalf of the corporation in which he claimed an interest for services performed for it and for this reason the Court held that he could not be compelled to deposit the funds. However, it is significant to note that no discovery had been completed in that case and the claims of the parties to the funds were merely the bare allegations as set forth in the pleadings.

The foregoing cases contrast markedly to the instant case where the record, which includes the lease drawn by the Plaintiff Globe Leasing Corporation, the deposition of its principal officer, Al Weigelt, and the un rebutted Affidavit of Norton H. Parker of the Defendant Bank of

Salt Lake, clearly shows that it has received the "Security Deposits" from the Leases which constitute trust funds within the meaning of Rule 67 of the Utah Rules of Civil Procedure. It is true that Globe Leasing Corporation alleges in its pleadings and asserts in its Brief that it has a right to the "Security Deposits." However, this is a mere allegation and will not stand in the face of the uncontroverted facts which are shown in the record. In this regard see Dupler v. Yates, 10 Utah 2d 251, 351 P.2d 624; and Walker v. Rocky Mountain Recreation Corp., 29 Utah 2d 274, 508 P.2d 538, wherein the Supreme Court of the State of Utah has held that a party may not rest upon mere allegations or unsubstantiated conclusions in opposition to established facts in resisting a Motion for Summary Judgment.

The Plaintiff Globe Leasing Corporation also contends in its Brief that the provisions of Rule 67 of the Utah Rules of Civil Procedure do not apply because the fund has been spent and is, therefore, no longer "in his possession or under his control." The inconsistency and incorrect nature of this position is vividly shown by the fact that Globe first claimed the fund had been spent and, therefore, it was unable to comply with the Order of the Court on April 16, 1975, some seven (7) months after the entry of the Order. (R. 303, 304) Obviously, a party may not openly defy an Order of the Court and thereafter use the result of its defiance to its advantage in establishing an "excuse" for its actions.

### POINT III

THE COMPLAINT OF THE PLAINTIFF GLOBE LEASING CORPORATION WAS PROPERLY DISMISSED AS A RESULT OF ITS FAILURE TO COMPLY WITH AN ORDER OF THE COURT.

It is the position of the Defendant Bank of Salt Lake that the Complaint of the Plaintiff Globe Leasing Corporation was properly dismissed as a result of its failure to comply with the Order of the Court entered on September 12, 1974 requiring it to deposit the "Security Deposits" which it had received with the Court pending the outcome of the litigation.

As was noted in the Statement of Facts, the Order requiring Plaintiff Globe Leasing Corporation to deposit the funds in question with the Court remained uncomplied with for several months and as a result of this, the Defendant Bank of Salt Lake moved the Court for an Order dismissing its Complaint. This Motion was made pursuant to the provisions of Rule 41 of the Utah Rules of Civil Procedure which provides in part as follows:

"(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him...."

Although no Utah cases have been found dismissing an action because of a parties' failure to comply with an Order requiring it to deposit funds into Court, the Supreme Court of the State of Utah has affirmed the

power of the trial court to dismiss the Complaint under the provisions of Rule 41 for the failure of a party to prosecute an action. In this regard, see Brasher Motor & Finance Co. v. Brown, 23 Utah 2d 247, 461 P.2d 464 (1969) and Thompson Ditch Co. v. Jackson, 29 Utah 2d 259, 508 P.2d 528 (1973). Additionally, the Court has granted Judgment against a party for failure to comply with Orders relating to discovery, in accordance with the provisions of Rule 37 of the Utah Rules of Civil Procedure. See Tucker Realty, Inc. v. Nunley, 16 Utah 2d 97, 396 P.2d 410 (1964).

In the case of First Iowa Hydroelectric Co-op v. Iowa-Illinois Gas and Electric Co., 245 F.2d 613, cert. den. 355 U.S. 871, 2 L.Ed.2d 76, 78 S.Ct. 122, rehearing den. 355 U.S. 921, 2 L.Ed.2d 281, 78 S.Ct. 339 (C.A. 8 Iowa), the Court of Appeals affirmed a district court Order dismissing the Plaintiff's Complaint because of its failure to comply with an Order requiring it to deposit the sum of \$2,500.00 with the Court to defray the costs of a special master who had been appointed. The Court held that notwithstanding the Plaintiff's right to prosecute the action against the Defendants, it must comply with the Orders of the Court concerning the procedure to be followed and if it failed to comply, its Complaint would be dismissed.

The Defendant Bank of Salt Lake recognizes that the dismissal of a Complaint any time prior to the trial is a sanction which should not be employed lightly. However, as has been set forth above, the Order requiring the deposit of funds was uncomplied with for several months and

consequently the Court properly enforced its Order by dismissing the Plaintiffs' Complaint after giving it ample opportunity to comply with the Order. In this regard, the Court in the Tucker Realty case, supra, reiterates the rule that the trial court is in the better position to determine what sanctions are appropriate in a case such as this and stated in part as follows:

"We recognize that the granting of a judgment against a party solely for disobeying an order to cooperate in discovery procedure is a stringent measure which should be employed with caution and restraint and only where the failure has been wilful and the interests of justice so demand. Except in very aggravated cases, less serious sanctions undoubtedly could be applied to accomplish the desired result, particularly where there is any likelihood of injustice by depriving a party of a meritorious cause of action or defense. Whether the failure to comply with the court's order has been wilful and whether the circumstances are so aggravated as to justify the action taken is primarily for the trial court to determine. Unless it is shown that his action is without support in the record, or is a plain abuse of discretion, it should not be disturbed...." [Emphasis added]

#### CONCLUSION

The Order requiring the Plaintiff Globe Leasing Corporation to deposit the "Security Deposits," which are deemed trust funds, with the Court was correctly and properly entered.



As a result of the entry of the Order and the failure of the Plaintiff Globe Leasing Corporation to comply with the same, its Complaint was correctly dismissed.

Respectfully submitted,

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Mailed a copy of the foregoing Brief of Respondents to  
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James M. Felt, Jr.  
Secretary