1977

W.E.A. Credit Union v. Paula Pace : Brief of Respondent

Utah Supreme Court

TIMOTHY W. BLACKBURN; Attorney for RespondentPETE N. VLAHOS; Attorney for Appellant

IN THE SUPREME COURT

OF THE

STATE OF UTAH

W.E.A. CREDIT UNION,	:	
Plaintiff and Respondent,	:	
vs.	:	Case No. 14561
PAULA PACE,	:	
Defendant and Appellant.	:	

BRIEF OF RESPONDENT

Appeal from Judgment of the Second Judicial District Court of Weber County, State of Utah, the Honorable John F. Walquist presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

W.E.A. CREDIT UNION,	:	
Plaintiff and Respondent,	:	
vs.	:	Case No. 14561
PAULA PACE,	:	
Defendant and Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an action brought by the Respondent, who was the Plaintiff in the Lower Court, on an Order To Show Cause why the Court should not order the Appellant, who was the Defendant in the Lower Court, to deliver to the Respondent property upon which the Respondent had a lien upon a secured transaction entered into and signed by both the Appellant and her spouse which pledged the property as security. The Complaint and the Order To Show Cause did not have joined with it the spouse of the Appellant, but was an action against the Appellant only.

DISPOSITION IN THE LOWER COURT

The Lower Court did grant to the Respondent the right to possession of the security pledged by the Appellant, without having joined in said cause of action the spouse of the Appellant.

RELIEF SOUGHT ON APPEAL

The Respondent seeks an order affirming the Lower Court's granting to the Respondent a right to immediate possession of the property which had been pledged to secure a loan from the Respondent to the Appellant and her spouse, without the joinder of the Appellant's spouse in the action.

STATEMENT OF FACTS

Respondent disagrees with the facts as outlined by the Appellant in the following ways:

1. The Respondent brought an Order To Show Cause seeking an order requiring Appellant to deliver the security as listed on the April 1, 1974 note to Respondent. (R-19)

2. An Order was signed and issued by the Lower Court on April 1, 1976, directing the Sheriff of Weber County to take possession of the security and turn it over to the Respondent to be sold under the terms of the Uniform Commercial Code. (R-32)

3. The Court issued the Writ of Replevin, after Respondent's hearing on the Order To Show Cause, but before trial. (R-33)

4. The Writ of Replevin was issued by the Clerk of the District Court on April 1, 1976; however it was never delivered to the sheriff for service. On the 21st day

of April, 1976, the Respondent brought a motion to waive undertaking pursuant to rule 64(F) of the Utah Rules of Civil Procedure; Appellant's counsel David Knowlton appeared. The Court granted said motion and an Order Waiving the Undertaking was entered on April 23, 1976. These documents were not filed with the Lower Court as Respondent received an Order from the honorable Bruce S. Jenkins staying further proceedings. (See Appendix)

ARGUMENT

POINT I

WHEN BOTH SPOUSES HAVE PLEDGED THE SAME PERSONAL PROPERTY TO SECURE LOANS WITH TWO DIFFERENT INSTITUTIONS, THE HUSBAND'S BANKRUPTCY AND HIS SUBSEQUENT PURCHASE OF THE PLEDGED COLLATERAL FROM THE FIRST LIEN HOLDER DOES NOT EXTINGUISH THE SECOND LIEN HOLDER'S INTEREST.

It is important initially to determine where title to the security pledged lies. If title passed to the first lien holder, the subsequent purchase by the husband of the Appellant after his Bankruptcy would have vested title solely in him clear of any liens. If title did not pass, but remained in the spouses, the subsequent purchase would only have extinguished the first lien and title could not have passed solely to the husband because the first lien holder had never acquired title.

The transactions by the Paces were secured trans-

actions which fall under Article 9 of the Uniform Commercial Code. The general policy of Article 9 makes title relatively unimportant in connection with any secured transaction. Article 9 adopts neither a "title theory" nor a "lien theory" and does not determine title to collateral in either the secured party or the debtor. 70A-9-201, Utah Code Annotated, as amended in 1953, and comments thereto.

However, in some instances it may be necessary in a secured transaction subject to Article 9 to determine the location of title in order to apply some rule of law outside of the Code. In these instances, it would seem that the rules under pre-code law might apply.

> "In general, under pre-code law, title to pledged property remained in the pledgor, and only a special property vested in the pledgee. A pledge did not confer title to the collateral but only a lien thereon to the extent of the obligation." 68 Am. Jur., 2d, Secured Transactions, § 196.

Hence the Appellant and her spouse had title to the property and never transferred it to either lending institution. The Bankruptcy Court could have obtained title to the property; but by giving a disclaimer to the first lien holder the Bankruptcy Court never acquired title. Rather, there was a revesting of title in the spouses as of the date of the filing of the petition in Bankruptcy and the Paces continued to hold title as if Bankruptcy had never occurred. As a consequence of the disclaimer, the Bankruptcy Court could not adjudicate

persons' rights in the property. This must be done in state court since the property is not part of the Bankruptcy estate and hence not subject to its jurisdiction. (Clark v. Huckably, 28 F.2d 154 (C.C.A., 8th Cir., 1928))

The law is clear that a person can transfer only whatever interest he may have in property. Therefore, when the Appellant's spouse purchased the property from the first lien holder, he was only clearing that lien; there was no transfer of title. Mr. Pace knew of the second security agreement with the Respondent and could not claim bona fide purchaser status with respect to the property. The legal effect of the purchase was to extinguish the first security interest and make the second security interest held by the Respondent primary; the purchase in no way affected this security interest.

The Appellant's spouse was discharged in Bankruptcy of his debt owed to the Respondent. Likewise, Appellant, subsequent to the Lower Court's decision, was similarly discharged in Bankruptcy. But neither discharge had an effect on the Respondent's lien. The term "discharge in Bankruptcy" is defined in the Bankruptcy Act as the release of a bankrupt from all his debts which are provable, except those excepted under the Act. (11 U.S.C. § 1(15)) What it means to be "released" is found in court decisions.

In the case of Brown v. Cleverly, 93 Utah 54, 70 P.2d 881 (1937), at page 887, the Utah Supreme Court stated:

> "As a general rule, and except in cases where § 67f applies, the discharge in Bankruptcy does not effect an existing lien and only releases the debtor's personal liability."

In National Finance Co. v. Valdez, 11 Utah 2d 339, 359 P.2d 9 (1961) the Court further explained:

> "A discharge in Bankruptcy is neither a payment nor an extinguishment of the debt. It is merely a bar to the enforcement of a discharged debt by legal proceedings."

In the case of Kamas Securities Co. v. Taylor, 119 Utah 2d 241, 226 P.2d 111 (1950) the Court commented on a section of the Restatement of the Law of Securities which stated that a pledge is not terminated by the running of the statute of limitations against the claim secured by the pledge, nor by a discharge of the claim in Bankruptcy. The Court used this language at page 117 in stating that extinguishing the debt does not extinguish the security interest:

> "Certain statutes which in terms seem to extinguish the debt, have been interpreted as statutes of limitations. Even when interpreted as extinguishing the debts, the effect is not to terminate a security interest unless it is especaslly provided that security interests are to end with the extinguishment of the debts."

The Respondent has a security interest in the property. Its debt was discharged in Bankruptcy, but not its security interest. If properly pleaded, the discharge in Bankruptcy is a complete defense to enforcement of the debt,

but it neither destroys the debt nor the moral obligation to pay. A debt is divested of its character as a personal obligation which is legally enforceable, but it remains in existence so that security given for the debt may be resorted to in satisfaction of the security agreement.

POINT II

A SECURED PARTY MAY OBTAIN POSSESSION OF PROPERTY PLEDGED AS SECURITY BY BOTH SPOUSES BY MEANS OF LEGAL ACTION AGAINST ONE OF THE SPOUSES.

There is no argument that the common law estate by the entirety might be recognized in Utah. There is an open question, however, if recognition is extended beyond estates in real property to personal property. The Appellant refers to two Utah statutes in her brief; but neither statute plainly extends its coverage to personal property. While most American jurisdictions recognize the estate in real property, there is a split among those jurisdictions which have ruled on its existence as to personalty. A majority of these jurisdictions have held that the estate may exist in personalty; while at least seven jurisdictions have held that it may not. 64 A.L.R. 2d 8, §§ 6,7. There is no prior case law in Utah, but if Utah does follow the majority, there are additional questions, such as, by what instruments or transactions the estate may

arise? is there a presumption for household goods and furnishings in joint possession of the husband and wife? Additionally, the Florida court in First National Bank of Leesburg v. Hector Supply Co., 254 So.2d 777 (Fla. 1971), made an important distinction regarding the existence in personal property. At page 780, the Florida Court noted that not only must there be the form of ownership consistent with entirety (as required for real property); but that as a second standard the intention of the parties to hold the personal property by the entirety must be proven by the spouses. If tenancy by the entirety is recognized in personal property in Utah, the better view is to require a showing by the spouses of their intention and the manner of their obtaining the property, which is not present in the current action.

Even if the Paces do hold the property subject to the Respondent's lien by the entirety, the cases cited by the Appellant do not preclude the Respondent from obtaining possession of the property by action only against the Appellant. The case of Phillips v. Krakower, 46 F.2d 764 (C.C.A., 4th Cir., 1931) is irrelevant to the issue before the Court and is distinguishable on its facts. The facts of Krakower are similar only to the facts of this case in that the husband was adjudicated a Bankrupt, but his wife was not at the time of the action. The case deals with

staying the husband's Bankruptcy proceeding, while Krakower sues in the state court against both husband and wife to obtain a judgment. In upholding the lower court's staying of the Bankruptcy proceeding, the court stated:

> "The discharge in Bankruptcy not only prevents judgment being obtained against him on the note, but will also prevent, during his lifetime, the property held by the entireties being subjected to the satisfaction of any judgment which may be obtained against his wife." (Emphasis added)

The case of Ades v. Catlin, et ux, 132 Md. 66, 103 A. 94 (1918) is similarly irrelevant on its facts.

Both of these cases, and others cited by Appellant, dealt with a creditor trying to obtain a judgment lien after Bankruptcy has occurred. In the present action, the Respondent is not now seeking to obtain a lien by judgment. Before either Bankruptcy, the Paces had voluntarily given a lien pledging the property as security. This lien survives the discharge in Bankruptcy of the debt and the collateral can be obtained pursuant to the default provisions of Article 9 of the Uniform Commercial Code.

To allow an assertion that the non-severance feature of tenancy by the entireties precludes a secured party from obtaining jointly pledged property would clearly be inequitable. If so permitted, a spouse could pledge property as security which the secured party could not get upon default as long as the other spouse is Bankrupt, which

would have the effect of eliminating this type of property from collateral status. In not permitting such an assertion, this field of credit which would otherwise be closed to the spouses remains open for the benefit of the spouses and the secured lendors.

The Appellant contends that the Respondent should have filed for a disclaimer in Bankruptcy Court during the Bankruptcy proceeding of the Appellant's spouse and allowed said court to determine what interest Respondent may have had in the property; that failure to do so prevents the Respondent from asserting its right against the property in the action against the Appellant. However, the Bankruptcy Court gave a disclaimer to the first lien holder, in effect saying that it did not want to be bothered with the property. It does not make sense to file for a second disclaimer when the Bankruptcy Court has released the security. What additional good would two disclaimers have done? By disclaiming any interest in the security the Bankruptcy Court places the dispute in state court (Clark, supra, page 5) and puts the parties in the same position regarding rights in the collateral as if no Bankruptcy petition had been filed. Hence, the Bankruptcy Court could not have in fact determined the Respondent's interest as the Appellant argues.

When a husband and wife execute a note together,

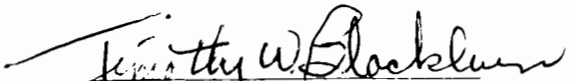
the obligation to pay is a joint and several liability. Mr. Pace's prior Bankruptcy would be a complete defense to suit against him on the debt, but not a defense to the liability of his wife. Her signature guaranteed the availability of the property and, because of the joint and several liability, she is personally liable for the debt and she may be sued and the property taken as against her. As in Point I, her subsequent Bankruptcy did not extinguish the lien. On the premises of estate by the entirety, the Appellant argues that the husband should have been a party to this action. This probably would have been more correct procedurely, so that the Appellant cannot play the "shell game" of ownership; and the simple process of joining could be done. However, in substance, the court can reach the same result with only the Appellant as party since the security interest is not affected by the discharge in Bankruptcy of either spouse and can be foreclosed by process against either spouse, as both signed the note.

CONCLUSION

The Respondent has a security interest in the property pledged, because title in the property always remained with the Paces and never passed to either the Bankruptcy Court or the lien holders. The Bankruptcy

proceeding does not discharge the security interest, but only the debt. Since a disclaimer was given with respect to the property, the state court is the appropriate court to adjudicate the parties interests in the property. It is submitted that the Appellant is severally liable for the debt and that suit against her alone is proper. Also, her intervening Bankruptcy likewise did not affect the lien held by the Respondent. The Respondent is entitled to satisfy the lien as outlined per statute. The provisions of the Uniform Commercial Code do not conflict or supersede the provisions of the Bankruptcy Act since this issue involves only disclaimed property and the foreclosure of a lien which was in existence prior to any Bankruptcy proceedings. A tenuous assertion of an estate by the entireties should not be effective to defeat the rights of the secured party as to the property and thus Replevin by the secured party is appropriate.

Respectively submitted,



TIMOTHY W. BLACKBURN
Attorney for Respondent

CERTIFICATE OF MAILING

A copy of the forgoing Brief of Respondent was posted in the U.S. mail, postage prepaid, and addressed to the Attorney of Appellant, Pete N. Vlahos, Esq., Legal Forum Building, 2447 Kiesel Avenue, Ogden, Utah 84401, on this the 24th day of March, 1977.

Secretary

APPENDIX

EXHIBIT A: Order to Waive Undertaking

EXHIBIT B: Writ of Replevin

EXHIBIT C: Precipe

EXHIBIT D: Order Staying Proceedings

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF WEBER, STATE OF UTAH

W.E.A. CREDIT UNION,

Plaintiff,

vs.

PAULA PACE,

Defendant.

ORDER TO WAIVE UNDERTAKING

Civil No. 63776

This matter came on regularly for hearing on plaintiff's motion to waive undertaking on the 21st day of April, 1976 before the honorable Calvin Gould, one of the Judges of said Court, Timothy W. Blackburn appearing on behalf of the plaintiff and David Knowlton appearing on behalf of the defendant and the Court having heard the arguments of the respective counsel and being fully apprised in the premises makes the following order:

IT IS HEREBY ORDERED that the bond requirement of Rule 64B be waived in the above matter.

Dated this 23 day of April, 1976.

CALVIN GOULD, District Judge

EXHIBIT A

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF WEBER, STATE OF UTAH

W.E.A. CREDIT UNION,)
(
Plaintiff,

vs. WRIT OF REPLEVIN

PAULA PACE,) File No. 65776
(
Defendant.
)

THE STATE OF UTAH:

To the Sheriff of ~~Davis~~ weber County, Utah, Greetings:

WHEREAS, an Order pursuant to Order to Show Cause was entered in the above case, in the District Court of Weber County, Utah, holding that the plaintiff was entitled to take possession of certain personal property hereinafter described, and that the Sheriff was to take possession of said property and turn it over to the plaintiff for disposition under the terms of the Uniform Commercial Code.

NOW, THEREFORE, we command you, the said Sheriff, to pick up said property, to-wit: sofa, 2 chairs, 1 end table, 2 lamps, RCA 19" Color TV, Sears 17' Deep Freeze, Coldspot Refrigerator, Maytag Washer, 9' Sofa, 2 chairs, 2 lamps, Jennair counter top trill, bedroom set, 2 ten speed bikes, and turn said property over the the plaintiff for disposition under the terms of the Uniform Commercial Code as set forth in said Order.

WITNESS, the Hon JOHN F. WAHLQUIST, Judge of the District Court of Weber County, Utah, this 1 day of April, 1976.

Given under my hand and the seal of said Court this 5 day of April, 1976.

CLERK WENDELL HANSEN

By _____
Deputy Clerk

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF WEBER, STATE OF UTAH

W.E.A CREDIT UNION,

Plaintiff,

vs.

PAULA PACE,

Defendant.

PRECIPE

File No. 63776

TO THE SHERIFF OF WEBER COUNTY, UTAH:

You will serve the attached ~~Execution~~ Writ of Replevin on the Defendant and attach the personal property listed thereon and turn the same over to the Plaintiff for sale under the provisions of the Uniform Commercial Code.

Said property is located at 5780 Village Way in Ogden, Utah.

If you need assistance for identification or transportation of said property, please contact the plaintiff's agent Mr. Bremser at 399-5941, ext. 373, to make said arrangements.

Dated this 1 day of April, 1976.

WENDELL HANSEN, CLERK

CLERK

By Jeanne M Cyler
Deputy Clerk

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF UTAH, NORTHERN DIVISION

IN RE	/	
PAULA PACE,	/	Bankruptcy No. B-76-____
Bankrupt.	/	

ORDER STAYING PROCEEDINGS

Upon the Motion of Paula Pace, the Bankrupt above named, praying that in accordance with Rule 601(a) of the Rules of Bankruptcy Procedure, an Order be issued staying any act for the commencement or continuation of any Court proceeding to enforce a lien against property in the custody of the Bankruptcy Court, and it appearing that the Petitioner in Bankruptcy, Paula Pace, has filed a Petition in Bankruptcy and that the property in possession of the Bankrupt is now in the custody of this Court, it is

ORDERED, that all proceedings be stayed as against the Bankrupt-Petitioner and that notice be served upon W.E.A. Credit Union and upon the Sheriff of Weber County, that the enforcement of any lien as against the Petitioner herein is stayed until final adjudication by this Court.

DATED at Salt Lake City, Utah, this 4th day of May, 1976.

S/

BANKRUPTCY COURT JUDGE

Vaden & Knowlton
Attorneys at Law
Legal Forum Building
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Ogden, Utah 84401

EXHIBIT D