

1987

LDS Church Employees Credit Union v. Jean Asay : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS

DOCKET NO.

870161-CA

LDS CHURCH EMPLOYEES CREDIT UNION,)
Plaintiff & Respondent)

v.)

JEAN ASAY,)
Defendant & Appellant)

v.)

DONNA NELSON & HARPER R. NELSON,)
Third Party Defendants.)

Case No. 87-0161CA

RESPONDENT'S BRIEF

Appeal from a Judgment from the Fifth
Circuit Court, Salt Lake County,
Murray Department, the Honorable
LeRoy H. Griffiths, Judge

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Received
Sep 25, 87
Court of Appeals

UTAH COURT OF APPEALS

LDS CHURCH EMPLOYEES CREDIT UNION,)	
Plaintiff & Respondent)	
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RESPONDENT'S BRIEF

STATEMENT OF JURISDICTION AND NATURE OF
PROCEEDINGS BELOW

Jurisdiction to hear this appeal is granted the Court by 78-4-11 and 78-2a-3(2)(c), Utah Code Annotated.

Proceedings before the Circuit Court resulted in a judgment being entered in favor of Appellant/Third Party Plaintiff Jean Asay, as to Respondent/Third Party Defendants Nelson. However, because that judgment did not include attorney's fees awarded the LDS Credit Union as part of its judgment against Jean Asay or her own attorney's fees, this appeal was instituted.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Limited to Respondents Nelsons, the issues presented by this appeal are:

1. Whether the Third Party Defendants made a valid profer of judgment.

2. Whether Appellant is entitled to attorney's fees from Respondents Nelson as part of her judgment.

3. While not discussed by Appellant in her Brief, whether this appeal is moot by reason of Jean Asay's acceptance of a check from the Nelsons in full satisfaction of the judgment from which these proceedings were taken.

STATUTES & RULES DETERMINATIVE

Contrary to Appellant's Brief, Respondents Nelson do not believe that Rule 68(b), Utah Rules of Civil Procedure, or 78-27-56, Utah Code Annotated, are determinative of the issues pertaining to this appeal of Asay's judgment against the Nelsons.

STATEMENT OF THE CASE

This appeal arises out of two separate judgments rendered in the Circuit Court. For purposes of convenience, these judgments will be referred to as the "McPhie Judgment" and the "Katz Judgment", reflecting the counsel who prepared those pleadings on behalf of their respective clients, the LDS Credit Union and Harper and Donna Nelson.

Both of the subject judgments arose out of the execution of promissory notes by Jean Asay in favor of the LDS Credit Union. The proceeds of the initial loan (\$711.50) were admittedly placed in the Nelsons' account with the Credit Union and used to cover check overdrafts.

After Ms. Asay defaulted in payments due under the second loan with the Credit Union, which loan represented a refinance of the first obligation, this suit was instituted

by Plaintiff. In response to Plaintiff's complaint, an Answer and Counterclaim was filed by Jean Asay, as well as a Third Party Complaint against the Nelsons.

The Nelsons, who did not participate in any pre-trial motions or discovery proceedings, but for their appearance at a deposition taken by Plaintiff Credit Union, made an Offer of Judgment prior to trial of the case. The judgment entered pursuant to that Offer was thereafter satisfied by the Nelsons after numerous proceedings which will be described in greater detail below.

STATEMENT OF THE FACTS

On or about June 6, 1984, Jean Asay executed a note payable to LDS Credit Union in the sum of \$5,000.00, which funds were placed into the deposit account of Donna Nelson (Paragraph 4 of Counterclaim and Third Party Complaint of Jean Asay). Over the course of several months following that loan, proceeds thereof were used to cover overdrafts on Third Party Defendants' checking account all in the total sum of \$711.50. There is no dispute that Third Party Defendants Nelson received the benefit of those funds and did not repay the same to either Asay or the Credit Union (Paragraphs 5 and 6 of Asay's Third Party Complaint). There is, however, no evidence in the record of a demand for payment.

Following an apparent default by Asay in payment of amounts owed under the note, suit was instituted by Plaintiff for collection. Defendant thereupon filed a

counterclaim alleging a mishandling of loan proceeds by the Credit Union. Further, a Third Party Complaint was brought against the Nelsons seeking a judgment of \$711.50, and "for such other and further relief as the Court deems just and equitable" (Third Party Complaint of Jean Asay). A review of the entire record incident to this case reveals that no answer was filed on the part of the Nelsons, nor did they engage in any pre-trial motions or discovery.

Filing of that Third Party Complaint was the apparent result of testimony given by the Nelsons at a deposition conducted by Plaintiff's counsel on or about May 14, 1986. At that time, the nature and existence of the debt was admitted by Third Party Defendants. Pursuant to that acknowledgement of liability, on October 23, 1986, the Nelsons offered to pay the full amount of the \$711.50 in satisfaction of the Asay claim (Appendix A to this Brief). This offer was, however, rejected by Third Party Plaintiff.

The matter proceeded to trial on January 27, 1987, before the Honorable LeRoy Griffiths. Consistent with their earlier admission of liability for the \$711.50 debt, the Nelsons submitted both orally and in writing an Offer of Judgment to the Court. No objections were received to that Offer. Instead, it was accepted by Jose Luis Trujillo, counsel for Third Party Plaintiff (Statements of David McPhie at page 6, lines 5-13 and statements by the Court, transcript of hearing held on March 19, 1987). By reason of Appellant's acceptance of the Offer of Judgment, the Nelsons

did not participate any further in the trial proceedings, and, in fact, Third Party Defendant's counsel left the Court (statements of David McPhie at page 6, transcript of the March 6, 1987 hearing). Important to the present appeal, that offer was expressly limited to principal, interest and court costs owed Third Party Plaintiff and did not include any attorney's fees of either Jean Asay or as might be awarded by way of pass through to LDS Credit Union.

Two different orders were then submitted by counsel for Plaintiff and Third Party Plaintiff. This was necessitated by Mr. McPhie's refusal to include a pass through of attorney's fees to the Nelsons which was awarded by the Court at the conclusion of trial (transcript of March 19, 1987 hearing, pages 4 and 5, lines 22-25 and 1-9, respectively). Objections were made to the award of attorney's fees by pleadings and at a hearing held before the Court on the various issues on March 19, 1987.

Following extensive argument and testimony by counsel for all parties, the Court reduced attorney's fees awarded LDS Credit Union and further rescinded its prior determination that those fees should be passed through by way of judgment against the Nelsons (statements by the Court at pages 33-36, transcript of March 19, 1987 hearing). The grounds underlying the Court's ruling on these various points will be discussed in greater detail below.

Immediately after the Court's execution of a Judgment submitted by counsel for the Nelsons, a check in the full

amount thereof was submitted to Ms. Asay's counsel, together with a Satisfaction of Judgment (Motion for Entry of Satisfaction of Judgment). Because the Satisfaction was not executed by Ms. Asay or her counsel, the Nelsons were required to bring a motion before the Court for entry. This motion was granted and a Satisfaction signed by Judge Griffiths on June 8, 1987. (See Appendix "B").

SUMMARY OF ARGUMENTS

1. Appellant is bound by her acceptance of Nelsons' Offer of Judgment and her recovery is therefore limited to amounts paid pursuant thereto. Any technical defect was waived.

2. Appellant is not entitled to her attorney's fees from Third Party Defendants by reason of her failure to plead therefore, offer any evidence at trial thereof, and the fact that no frivolous defenses were posed by the Nelsons to her Third Party Complaint. Nor is Appellant entitled to pass through attorney's fees awarded the LDS Credit Union to Respondent Nelsons.

3. By her acceptance of sums representing the judgment awarded against the Nelsons, Asay's appeal is moot and should be dismissed.

ARGUMENTS

POINT I. THIRD PARTY DEFENDANTS CANNOT BE LIABLE FOR ADDITIONAL SUMS OVER AND ABOVE THOSE AWARDED IN THE JUDGMENT ENTERED BY THE COURT PER APPELLANT'S ACCEPTANCE OF AN OFFER OF JUDGMENT.

Appellant's primary argument as to Respondent Nelsons is her entitlement to a pass through of attorney's fees awarded Plaintiff LDS Credit Union. Judge Griffiths refused to allow a pass through on two principal grounds, to wit: that the acceptance of an offer of judgment by Third Party Plaintiff barred any additional award and; that a pass through would be inequitable because the Credit Union's fees were incurred solely as a result of Appellant's vigorous defense in the underlying collection action. As the first of these reasons is premised upon Third Party Defendants' Offer of Judgment under Rule 65(b), Utah Rules of Civil Procedure, construction and interpretation thereof is required to resolve this appeal.

Similar to their earlier proposals to settle the case, Third Party Defendants made their Offer of Judgment in order to avoid an award of attorney's fees to Third Party Defendants, though Ms. Asay's entitlement thereto was disputed and believed to be without any foundation. Respondent's intent in making the Offer was thus consistent with Rule 65 whereby an acceptance of the offer precludes any award of further costs and attorney's fees.

Appellant in reliance on alleged technical defects, principally the timeliness of the Offer, argues that she is not bound by the acceptance and, hence, may seek her attorney's fees and those passed through from Plaintiff. Assuming for purposes of argument that such awards would be warranted, she has, however, waived those defects and is

bound and limited to the sums set forth in the Offer and reduced to judgment by the Court.

That a claimant may waive defects in an Offer of Judgment is established by Hirsh v. Ogden Furniture and Carpet Company, 48 Utah 434, 160 p. 283 (1916), under a predecessor to Rule 68. There the defendant failed to make a proper tender into court of the amount necessary to discharge the claim. However, by reasons of Plaintiff's failure to note that the money was not produced, the court held that he had waived his rights to object. And while there is not a determinative case under Rule 68 emanating from Utah, there are numerous federal cases under the similarly-worded Rule 68 Federal Rules of Civil Procedure which offer insight.

Importantly, when making an offer of judgment, defendant is not required to itemize amounts being tendered. Marek v. Chesny, 473 U.S. 1 (1985). Similarly, in Lyon's v. Cunningham, 583 F. Supp. 1147 (N.Y. 1983) where a defendant's offer did not include an amount for attorney's fees, it did not make that offer defective for purposes of Rule 68.

Appellant, having accepted the Nelsons' Offer of Judgment is precluded from seeking additional amounts, including attorney's fees.

POINT II. APPELLANT HAS FAILED TO SHOW ANY ENTITLEMENT TO AN AWARD OF HER ATTORNEY'S FEES OR A PASS THROUGH OF THOSE FEES GRANTED THE CREDIT UNION.

Utah is among those majority of states which allow a successful litigant his attorney's fees only if they are provided for by statute or a contract between the parties. Because there is not contract between Appellant and Respondents Nelson and as admitted by counsel in Appellant's Brief, the only possible grounds for an award is 78-27-56, Utah Code Annotated. Without quoting that provision extensively, it allows a grant of attorney's fees if the court determines that the defense was without merit and not brought or asserted in good faith. Ms. Asay's appeal must fail on this issue for two very simple reasons. (1) There was no defense raised in this case by the Nelsons; and (2) assuming there was a defense, Third Party Plaintiff failed to put on any evidence as to bad faith in connection therewith.

As stated above and as apparent from even a cursory review of the record, the Nelsons did not file an Answer in this case nor raise any defense to the Third Party Complaint. Thus, on this very simple level, Appellant is unable to make out any claim of frivolous defense. It is inconceivable that a failure to file an answer nor pursue any pretrial discovery could rise to this threshold level. But even apart from this deficiency, Ms. Asay has not put on any evidence of the Nelsons' "bad faith", which issue is clearly a question of fact requiring competent evidence or testimony. Counsel's bare unsupported statements in Point V of his Brief are not only blatant, objectionable heresay

statements but are further contradicted by the Nelsons' offer to settle this case immediately after filing of the Third Party Complaint and long before any trial on the merits.

As a third and final reason for denying Third Party Plaintiff her attorney's fees, Respondents Nelson note counsel's failure to put on any evidence thereof at the trial of this case. Under numerous rulings of the Utah Supreme Court, fees can only be awarded if supported by the testimony or affidavit of that party's attorney. See generally Turtle Management v. Haggis Management, 645 P. 2d 667 (1982), and Utah Farm Production Credit Association v. Cox, 627 P. 2d 62 (1981).

Although not specifically addressed in Appellant's Brief, it is perhaps appropriate to here briefly argue the merits of any pass through of the Credit Union's fees to the Nelsons. It was previously believed that this would be the crux of Third Party Plaintiff's appeal.

In what can best be described as a plea for equity, the Nelsons have consistently argued that attorney's fees awarded the Credit Union could not and should not be passed through as originally occurred at trial. It was, at least in part, these equitable considerations which prompted the Court to rescind its prior award at the March 19, 1987 hearing. And the Court's ruling on this issue is amply supported by a record which indicates that no action on the part of the Nelsons resulted in attorney's fees being

incurred by either Plaintiff or Defendant Asay. Instead, at all pertinent times commencing with the Nelsons' deposition, they have admitted liability and pursued full settlement of the claim. In fact, the vast majority of pretrial proceedings which resulted in Plaintiff incurring attorney's fees took place prior to the filing of any Third Party Complaint against the Nelsons. As the Court cogently observed,

. . . but I hadn't considered this problem of the Nelsons being in a position of not being able to help themselves. They had offered to settle for what the principal amount, but Asay didn't want that, because that was against her position in the case.

And so, because Asay made that decision, she required the attorney for the Credit Union to continue to put time and effort into it and run up the bill, and she prevented the Nelsons from doing anything of minimizing their costs, because their position was opposite of her position. (Transcript of the March 19, 1987 hearing at page 35).

So, even to the extent that Appellant may succeed in showing the Offer of Judgment to be defective, she is still not entitled to a pass through of the Credit Union's attorney's fees by way of her judgment against the Nelsons.

POINT III. MS. ASAY'S APPEAL IS MOOT BY HER ACCEPTANCE OF PROCEEDS FROM THE "KATZ JUDGMENT".

While this point was argued as part of Respondents Nelson's Motion to Dismiss this appeal, a ruling on which was deferred, a brief review is helpful.

Under a long line of legal precedent dating back to Ottenheimer v. Mountain States Supply Company, 56 Utah 190,

188 P. 1117 (1920), the Utah Supreme Court has held that one who accepts a benefit under a judgment is estopped from later attacking that judgment on appeal. Hence, whereas here, a prevailing party accepts sums under his judgment and, accordingly, a satisfaction is entered, that party is precluded from challenging the judgment on appeal.

A recent case construing the "acceptance of benefit doctrine" is Trees v. Lewis, 56 Utah Advance Reports 8 (1987). There, the appellant cashed checks from a respondent pursuant to the assailed judgment. Regardless of appellant's statements that "he did not intend to waive his right to appeal", the court found that a dismissal of the appeal was appropriate. Id. at 8. Application of the rule formulated in Trees v. Lewis and prior cases cited therein should result in dismissal of this pending appeal.

CONCLUSION

Respondents Nelson urged that this appeal be dismissed and the judgment entered by the lower court upheld. A dismissal is justified due to Appellant's acceptance of the benefits flowing from the assailed judgment. And on the merits of the case, Circuit Judge Griffiths was correct in ruling that Third Party Plaintiff was not entitled to her own attorney's fees nor a pass through of fees awarded the Credit Union against her. This ruling was correct by reason of both an acceptance of the Nelsons' Offer of Judgment and equity as well.

Lastly, Respondents Nelson's request in award of attorney's fees incurred in defending against this frivolous

appeal which is clearly moot in view of the above cited legal authority.

DATED this _____ day of September, 1987.

GARRETT AND STURDY

By _____
Michael A. Katz

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of September, 1987, four true and correct copies of the foregoing Respondent's Brief were mailed, postage prepaid, to:

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October 23, 1986

Mr. Jose Luis Trujillo
Attorney at Law
967 East 4800 South, Suite 3A
Salt Lake City, Utah 84117

Re: L.D.S. Church Employees Credit Union v. Jean Asay v.
Harper and Dona Nelson; Our File No. 5383

Dear Mr. Trujillo:

In response to your correspondence dated September 26, 1986, I have been authorized to offer \$711.50 on behalf of my clients, Harper and Dona Nelson, for settlement in the above case. The Nelsons will, however, require 30 days to raise the sums sufficient to pay that amount. I must state unequivocally that your client would not be entitled to additional sums, including specifically attorney's fees and, hence, we will make no accommodations in that regard.

Please contact me within seven days of this letter with your response. Once again, in the meantime I will not be filing an Answer to the Third Party Complaint you have filed in Ms. Asay's behalf.

Very truly yours,

GARRETT AND STURDY


Michael A. Katz

MAK/lam

cc: Harper and Dona Nelson

APPENDIX "A"

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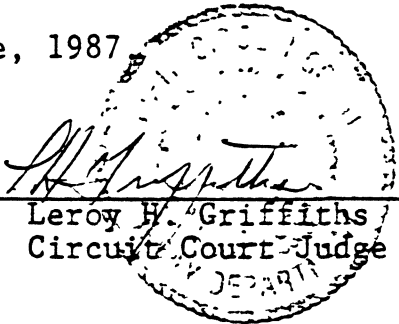
IN THE FIFTH CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, MURRAY DEPARTMENT

L.D.S. CHURCH EMPLOYEES)	
CREDIT UNION, a Utah)	
corporation,)	
)	
Plaintiff,)	SATISFACTION OF JUDGMENT
)	
vs.)	
)	
JEAN ASAY,)	
)	
Defendant and)	
Third Party Plaintiff,)	
)	
vs.)	
)	
DONA NELSON and)	Civil No. 85CVM-06470
HARPER R. NELSON,)	
)	
Third Party Defendants.)	

Third Party Defendants Dona Nelson and Harper R. Nelson's Motion for Satisfaction of Judgment having come before the Court for hearing on May 28, 1987, Michael A. Katz appearing on behalf of Third Party Defendants and the Court having heard the arguments of counsel and having read and considered the Motion, and finding good cause therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Judgment previously entered by the Court in favor of Third Party Plaintiff Jean Asay and against Third Party Defendants Dona Nelson and Harper R. Nelson in the sum of \$1,202.50 is fully satisfied and discharged and the Clerk is directed to enter this Satisfaction of Judgment pursuant thereto.

DATED this 8th day of June, 1987


Leroy H. Griffiths
Circuit Court Judge
DEPARTMENT

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Satisfaction of Judgment was mailed, postage prepaid, this 28th day of May, 1987, to Mr. Glen J. Ellis, Attorney at Law, 60 East 100 South, #102, P. O. Box 1097, Provo, Utah 84603; and Mr. David McPhie, Attorney at Law, 3450 So. Highland Drive, Suite 301, Salt Lake City, Utah 84106.

