

1984

Zions First National Bank v. Clark Clinic Corporation, a Utah corporation : Brief of Appellant

Utah Supreme Court

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James G. Clark; Ray Phillips Ivie; Ivie & Young; Attorneys for Defendant.

M. Dayle Jeffs; Jeffs and Jeffs; Attorney for Respondent.

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1984 20105

IN THE SUPREME COURT
OF THE STATE OF UTAH

ZIONS FIRST NATIONAL BANK,
a Utah corporation,

Plaintiff/Respondent,

vs.

CLARK CLINIC CORPORATION,
a Utah corporation,

Defendant/Appellant.

No. 20105

APPELLANT'S BRIEF

Appeal from the Judgment of the 4th
District Court for Utah County
Hon. David Sam, Judge

JAMES G. CLARK, Esq.
261 E. Broadway, Suite 150
Salt Lake City, UT. 84111
Attorney for Appellant

RAY PHILLIPS IVIE, Esq.
48 North University Avenue
Provo, Utah 84603
Attorney for Appellant

M. DAYLE JEFFS of JEFFS AND JEFFS
90 North 100 East
Provo, Utah 84603
Attorney for Respondent

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Clerk, Supreme Court, Utah

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261 E. Broadway, Suite 150
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Attorney for Appellant

RAY PHILLIPS IVIE, Esq.
48 North University Avenue
Provo, Utah 84603
Attorney for Appellant

M. DAYLE JEFFS of JEFFS AND JEFFS
90 North 100 East
Provo, Utah 84603
Attorney for Respondent

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IN THE SUPREME COURT
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ZIONS FIRST NATIONAL BANK,
a Utah corporation,

Plaintiff/Respondent,

vs.

CLARK CLINIC CORPORATION,
a Utah corporation,

Defendant/Appellant.

APPELLANT'S BRIEF

No. 20105

STATEMENT OF THE CASE

This action was brought by Zions Bank against Clark Clinic to collect on a promissory note executed by an employee of Appellant Clark Clinic Corporation, using the facsimile signature stamps of the officers of Clark Clinic Corporation. Clark Clinic Corporation counterclaimed against Zions Bank to recover funds it alleged were wrongfully disbursed from Clark's checking account on stamped facsimile signatures and checks cashed on unauthorized endorsements.

DISPOSITION IN LOWER COURT

The District Court on September 30, 1982, granted Summary Judgment for respondent, dismissing Clark Clinic Corporation's counterclaim. The Court entered a pre-trial Order in Limine precluding Clark Clinic from putting on relevant and necessary

evidence at trial. Finally, the Court granted Summary Judgment for respondent Zions Bank on its first cause of action. Appeal is taken from these decisions.

RELIEF SOUGHT ON APPEAL

Clark Clinic Corporation seeks reversal of the judgments appealed from as a matter of law. Clark asks for judgment in its favor as a matter of law or, that failing, that this action be remanded to the district court for trial on all issues.

FACTS AND PARTIES

Defendant and appellant Clark Clinic Corporation (hereinafter "Clark") had a business checking account at plaintiff/respondent's (hereinafter "Bank") Provo office. The signature card contract on file with the Bank required two manual signatures; that of Richard S. Clark, S.N. Clark, S.M. Clark, or R. Craig Clark, in order to validate a check on that account. (Record on appeal at 18).

Beginning about January, 1978, and unknown to Clark's principals, Clark's employee and business manager Robert N. Westover (hereinafter "Westover"), began using signature stamps to draw checks on Clark's Corporate checking account. (Record at 19). The facsimile signature stamps had been made to endorse medical insurance forms (Affidavit of Robert N. Westover, page 54 lines 14-25) and there was no authorization for the bank to honor checks drawn with facsimile stamps. (Record at 39). Clark's officers continued to draw checks on the corporate

account with manual signatures.

Westover was only authorized to stamp checks "for deposit only" and deposit them to the corporate and partnership accounts. (Record at 283 paragraph 8, Record at 287 paragraph 8, Record at 291 paragraph 8, Westover, supra, at 53 lines 1-8).

The Clark Clinic Corporation does business out of a building owned by Clark Clinic, a partnership. Clark paid rent of \$1,200.00 per month for the use of the medical suite. During the time this suit arose, the officers of Clark would draw and manually sign corporate checks payable to the order of Clark Clinic, a partnership which had its account at another bank. Westover would endorse these checks and Zions Bank would cash them. Westover was not authorized to endorse and cash partnership nor corporate checks. (Westover, supra, at 21 line 13 to page 26 line 13; Record at 283 paragraph 4, Record at 287 paragraph 4, Record at 291 paragraph 4).

Over the next several months, and unknown to Clark's principals, Clark's account was run into a cronic overdraft state of approximately \$20,000.00. (Record at 12 line 24 to page 13 line 24; Record at 383, Deposition of Arnold W. Brown page 11 line 2 to page 12 line 8). This had never happened during the relationship between Clark and Bank (Record at 383 p. 32 lines 5-9), and Clark had never authorized the Bank to overdraft its account.

An officer of Bank, Mr. Brown, recommended to Westover that

Clark should take out a loan in order to clear up the overdraft. Clark had never taken out a loan before. (Record at 383, page 11 line 12 to page 12 line 18). Westover then used the facsimile stamps to execute a corporate resolution authorizing a corporate loan, stamped personal financial statements and personal guarantees of the officers of Clark; Westover then used the facsimile stamps to execute a promissory note for \$25,000.00, in favor of Bank and on behalf of Clark and the Bank deposited the money to Clark's account. (Record at 383 page 12 line 12 to page 14 line 20). The proceeds of the note were then disbursed from Clark's account on checks drawn with unauthorized signatures. (Record at 288 paragraph 12, Record at 284 paragraph 12, Record at 292 paragraph 12).

Clark, through its officers and directors, did not become aware of the loan until October, 1978. (Westover, supra, at 27 lines 12-20). At that time Westover's employment had been terminated and Clark's account was again in overdraft. Clark had no operating capital and had to use accounts receivable to cover its overdraft and close out its account with Bank. (Record at 284 paragraph 10, Record at 288 paragraph 10, Record at 292 paragraph 10). At that time Bank demanded payment on the promissory note from Clark and Clark expressly repudiated the note on the grounds that it was executed without authority, Clark did not know of the borrowing and Clark did not have the proceeds from the note to return. (Id.)

The Bank filed suit for recovery on the note seeking principle, contract interest (prime plus 5% for default), and attorney's fees. (Record at 13 et seq.). The District Court granted Summary Judgment on that issue, holding in part: "...the extent of the agent's authority is not controlling nor material." (Record at 346).

Just after Clark became aware of the promissory note, it also discovered the checks drawn with stamped signatures of its Officers and the checks cashed with unauthorized endorsements. Clark counterclaimed on that theory. (Record at 18-23). The question of what became of the missing funds has never been reached in this action. The Court granted Summary Judgment dismissing the Counterclaim, holding:

1. In this matter the Court finds that the stamped signatures on the checks paid by the plaintiff Bank are within the purview of the requirements of the signature card contract between the plaintiff and the defendant.

2. There is now no dispute that the stamped signatures were placed on the checks by the defendant's fiduciary.

3. The bank is not obligated to inquire into whether the fiduciary is honest or whether he is acting within the scope of his employment.

4. The Court finds the Sugarhouse Finance Company case cited in plaintiff's Memorandum applicable to the facts now before the Court and the bank is not guilty of lack of due care in paying the checks in question when considered in light of the facts before the Court, the Sugarhouse Finance Company case, and applicable sections of the Utah Commercial Code.

Accordingly the Court now makes and enters the following:

O R D E R

Plaintiff's Motion for Summary Judgment is granted and defendant's Counterclaim is hereby dismissed.

ARGUMENT

POINT 1:

THE COURT ERRED AS A MATTER OF LAW IN GRANTING SUMMARY JUDGMENT DISMISSING APPELLANT'S COUNTERCLAIM

A. STAMPED FACSIMILE SIGNATURES USED WITHOUT AUTHORITY ARE NOT VALID SIGNATURES UNDER THE SIGNATURE CARD CONTRACT BETWEEN THE BANK AND CLARK CLINIC CORPORATION.

The basic question raised by this case is, simply, what is the nature of a stamped signature used without authority. In the context of a checking account, a stamped signature does not validate a check. The Utah Supreme Court has held that a bank deals with its depositors' funds as a fiduciary. See Continental Bank & Trust Co. v. Taylor, 14 U.2d 370, 384 P.2d 796 (1963). The signature card creating a bank deposit is a contract between the Bank and its depositor and is entitled to the same binding effect as any other contract. McCullough v. Wasserback, 30 U.2d 398, 518 P2d 691, (1974).

Chief Justice Crockett speaking for a unanimous Utah Supreme Court stated:

Where a depositor has placed money in a checking account to be disbursed on his order the bank requires that he fill out a card bearing the authorized signature, or signatures, upon which checks will be paid; and the only protection the depositor has is his reliance on the universally accepted practice and rule of law based thereon that the drawee is obliged to know the signature of its depositor and pay out his money only on his order and when the signature is authorized and genuine.

W.P. Harlin const. Co. v. Continental Bank & Trust Co., 23 U. 2d 422, 464 P. 2d 585 (1970), at 588

Oklahoma has a similar rule, that "A Bank upon which a depositor therein draws a check is charged with knowledge of the depositor's signature." First National Bank of McAlester v. Mann, 410 P.2d 74 (Okla. 1966). They have stated the general common law rule as follows:

A bank upon which a depositor therein draws a check is charged with knowledge of the depositor's signature.

Where a signature to a bank check is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to enforce payment thereof can be acquired through or under such signature,¹

The written agreement of the parties provides for two manual signatures of Richard S. Clark, R. Craig Clark, S.N. Clark, or S.M. Clark. There was never any authorization for the Bank to pay out Clark's money on stamped signatures. Even the Bank's own officer testified:

Q Wouldn't you have a copy of the facsimile stamp that was supposed to be used on an authorization card?

A I would think so. We would have to have that.²

Therefore, since the Bank had no authorization to honor stamped facsimile signatures on Clark's checks, the Court erred as a matter of law in determining that the stamped signatures were "within the purview of the signature card contract between the plaintiff and defendant."

¹Id., Quoting from Maurmair v. National Bank of Commerce of Tulsa, 165 P. 413, and Negim v. First State Bank of Picher, 149 P.2d 763.

²Record at 384, Deposition of J. Ross Nielsen page 12 lines 21-24.

B. STAMPED SIGNATURES ARE INVALID UNLESS AUTHORIZED

The Bank has stated that legal support for its position can be found in the Uniform Commercial Code, Utah Code Annotated, Section 70A-1-201(39), which provides that "signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing." Section 70A-3-401 provides: "A signature is made by use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature."

This argument fails since the principals of Clark never intended facsimile stamps to be authentic signatures on their checks and the Bank was on actual notice of the authorized signatures pursuant to the signature card contract with Clark.

Furthermore, the question of the validity of stamped signatures used without authority has been addressed before by the courts. The courts have consistently held that unauthorized stamped signatures or indorsements are not valid signatures.³

C. THE SUGARHOUSE FINANCE COMPANY CASE AND THE UNIFORM FIDUCIARIES ACT ARE NOT APPLICABLE TO THE FACTS BEFORE THE COURT

The District Court granted summary judgment dismissing

³Aetna Cas. & Sur. Co. v. Helper State Bank, Kan. App., 630 P.2d 721 (1981), Robb v. Pennsylvania Co., 40 A. 969, Seattle-First Nat. Bank v. Pacific Nat. Bank, Wash. App., 587 P.2d 617 (1978), 10 Am Jur 2d §607 at 570.

The case cited to the District Court was Menke v. Board of Education, Independent School District of West Burlington, 211 N.W. 2d 601 (Iowa 1973). The court in Menke held that "Rubber stamps may be easily copied and secured with facility, and fraudulent certification accomplished by the use thereof would be detrimental to the interests of a bank (Clark in the case now before the Court).

Clark's counterclaim. The Court justified this dismissal under the Uniform Fiduciaries Act as interpreted by the Utah Supreme Court in the case of Sugarhouse Finance Company v. Zions First National Bank, 21 U.2d 68, 440 P.2d 869 (1968). The Uniform Fiduciaries Act is not applicable to these facts for the simple reason that Westover (Clark's business manager) was not authorized to sign checks on Clark's account, nor was he authorized to indorse and cash checks made payable to Clark Clinic, a partnership.⁴

In extensive research by this office, we have found no cases applying the Uniform Fiduciaries Act wherein the fiduciary was not a signatory to the account or authorized to endorse

⁴THE UNIFORM FIDUCIARIES ACT, Utah Code Ann. (1953 as amended) §22-1-1 et seq. is not applicable to the facts before the Court. The various sections of the act provide immunity to the Bank when dealing with fiduciaries and trust funds.

§22-1-2 does not apply to the improper endorsements since it provides: Payments made to fiduciaries.--A person, who in good faith pays or transfers to a fiduciary any money or other property which the fiduciary as such is authorized to receive, ..." Clark has consistently alleged that Westover was not authorized to receive funds or endorse and cash its checks.

§22-1-4 requires: "...a fiduciary empowered to endorse such instrument on behalf of his principal ..."

§22-1-5 provides: Checks--Drawn by fiduciaries, payable to third persons.--If a check or other bill of exchange is drawn by a fiducairy as such, or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, the payee is not bound to inquire whether the fiduciary is committing a breach of his obligation ..."

§22-1-6 requires: "...a fiduciary empowered to draw such instrument in the name of his principal, ..."

§22-1-8 requires: "...a fiduciary empowered to draw checks upon his principal's account, ..."

checks, or entrusted with certain property.⁵ In this case, Westover was not a signatory on Clark's account. Utah Code Annotated 70A-3-403, provides that one who signs without authority is personally liable on the instrument.

Respondent Zions Bank was the actual and statutory fiduciary with regard to Clark's bank account, along with the officers and directors of Clark, who were signatories authorized to withdraw funds from the account. Westover was never authorized by the Officers of Defendant to withdraw funds from the account, nor to sign checks. (See Record at 282, 286, and 290; affidavits of Richard S. Clark, R. Craig Clark and Stanly N. Clark), therefore, The Uniform Fiduciaries Act does not apply to the facts before the Court, or at least it becomes a disputed question of fact which must be resolved in Clark's favor for the purpose of Summary Judgment.

The court has held that plaintiff Bank was not guilty of lack of due care in paying checks on defendant's bank account.

Whether or not a bank acted in a commercially reasonable manner is a question of fact. Aetna, note 3, supra at 728. See also, Utah Code Annotated 70A-3-419(1)(c). Since Clark contends

⁵One who is authorized by his employer to sign checks on his employer's account or is expressly entrusted with property is a fiduciary within the terms of the act. See: Johnson v. Citizens National Bank of Decatur, 334 N.E.2d 295, Smith v. Halverson, 273 N.W.2d 146 (S.D. 1978), Roswell State Bank v. Lawrence Walker Cotton Co., 240 P.2d 1143, Valley National Bank v. American Employers Ins. Co., 138 P.2d 294 (Ariz. 1943), Board of County Com'rs v. First National Bank, 368 P.2d 132 (Wyo. 1962), Guild v. First Nat'l. Bank of Nevada, 553 P.2d 955 (Nev. 1976), Transport Trucking Co. v. First Nat'l. Bank, 300 P.2d 476 (N.M. 1976), Movie Films Inc. v. First Security Bank of Utah, N.A., 447 P.2d 38, Sugarhouse Finance Company v. Zions First National Bank, 440 P.2d 869 (UT. 1968), 5A Michie on Banks and Banking, p. 172, (1973).

that the Bank was negligent, this question of fact must be resolved in favor of Clark for the purpose of summary judgment. If the Bank was negligent, then it is guilty of conversion and Clark is entitled to a return of the money. (Utah code Annotated 70A-3-404).

POINT 2:

THE COURT ERRED AS A MATTER OF LAW IN GRANTING
THE BANK'S MOTION IN LIMINE

On or about the 1st day of August, 1983, in this matter, in the Fourth District Court of Utah County, the Court made and entered an Order in Limine as follows:

1. Defendant is prohibited from putting on evidence at trial on the issue of whether defendant's fiduciary had authority to issue checks or whether plaintiff was negligent in accepting checks with stamped signatures, those issues have been previously determined by this Court in favor of plaintiff.

2. Defendant is prohibited from putting on evidence at trial on the issue of whether its fiduciary had authority to bind it on the promissory note herein or whether plaintiff failed to ascertain the limits of defendant's fiduciary's authority for the reason that defendant has ratified the acts of its agent, Robert N. Westover, in executing the promissory note herein. Or alternatively, that Robert N. Westover acted within his apparent or implied authority in his actions in dealing with the said promissory note herein.

3. Defendant is prohibited from presenting any evidence at trial on the issues of the disbursement of funds from its checking account and whether a benefit was or was not conferred on defendant by the promissory note herein.

The issue of disbursement of funds from Clark's checking account has been dealt with in part one (1) of this brief. It becomes a question of fact in this instance because the Bank included in its first amended complaint two additional causes of

action. The plaintiff/Bank's second cause of action was for overdraft repayment and its third cause of action was for "unjust enrichment." (Record on Appeal at 13, 14, and 15).

For the Bank to prevail on either of its alternative causes of action, it had to put on evidence of the checking account relationship, or in the alternative, evidence that Clark had benefitted from the proceeds of the note.

The Bank's third cause of action was for "unjust enrichment," and is based on the theory that Bank deposited into Clark's account the sum sued on, being \$25,000.00. In order to prevail on this theory the Bank had to ordinarily prove that the money was given to Clark not pursuant to a written agreement. Mann v. American Western Life Ins. Co., 586 P.2d 461 (Utah 1978).

In restitution the measure of damages is not the amount the Bank deposited to Clark's account, but rather the benefit conferred upon Clark by Bank's act. Baugh v. Darley, 184 P.2d 335 (Utah 1974).

Therefore, the court erred as a matter of Law in entering the Order in Limine, since it allowed the Bank to put on evidence that Clark received a "benefit" and precluded Clark from putting on any evidence that no benefit was retained or conferred upon Clark.

POINT 3

THE COURT ERRED AS A MATTER OF LAW AND FACT
IN ENTERING SUMMARY JUDGMENT ON PLAINTIFF/BANK'S
FIRST CAUSE OF ACTION

A. CLARK'S EMPLOYEE, WESTOVER, DID NOT HAVE ANY AUTHORITY TO BORROW MONEY OR EXECUTE A PROMISSORY NOTE ON BEHALF OF CLARK CLINIC CORPORATION.

In order for the Bank to prevail on its first cause of action, it had to establish that Westover was an agent of Clark with the authority to borrow money on behalf of Clark. Clark is a corporation and as such can act only through its officers and employees, who are its agents. The acts and omissions of an agent, done within the scope of his authority, are, in contemplation of the law, the acts and omissions of the corporation whose agent he is. Jury Instruction forms, Utah 10.4; Carlquist v. Quayle, 62 Utah 266, 218 P. 729.

Authorization for an agency may be express or it may be implied, or the unauthorized act of an agent may be ratified by the principal.

The authority is express when it is given explicitly, either in writing or orally. Blacks Law Dictionary, 4th ed. 169. There is absolutely no fact or allegation that express authority existed in this case. There was no express authority for Westover to borrow money. The Bank contends that it relies on either implied (or apparent) authority, or ratification by Clark.

B. THE BANK MAY NOT RELY ON THE THEORY THAT WESTOVER HAD THE IMPLIED AUTHORITY TO BORROW MONEY ON BEHALF OF CLARK.

It is established beyond any conceivable question that one who deals with an agent has the responsibility to ascertain the

agents authority, and that the burden of proving agency rests upon the party who asserts it. See Bradshaw v. McBride, 649 P. 2d 74, (Utah 1982); Nalia v. Giles, 100 U. 562, 114 P.2d 208 (1941); Dohrmann Hotel Supply Company v. Beau Brummel, Inc., 99 Utah 188, 103 P.2d 650 (1940); True v. Hi-Plains Elevator Machinery, Inc., 577 P.2d 991 (Wyo. 1978); Seattle-First Nat. Bank v. Pacific Nat. Bank of Washington, 587 P.2d 617 (Wash. 1978).

It is hornbook law that a party who seeks to bind a principal with acts of an agent in borrowing money, as distinguished from other acts, has the burden of proving the express authority of the agent to borrow money and may not rely on implied authority. 3 Am. Jur 2d §88.

§74. WHEN AUTHORITY IS INFERRED

Unless otherwise agreed, an agent is not authorized to borrow unless such borrowing is usually incident to the performance of acts which he is authorized to perform for the principal.

Restatement, Agency (2d ed) §74

The depositions taken in this case establish that Clark Clinic Corporation had never taken out a loan before this instance. (Record at 384, Deposition of J. Ross Nielsen page 4 line 18 to page 5 line 11. Record at 383, Deposition of Arnold W. Brown page 4 line 5 to line 9. Deposition of Robert N. Westover, page 8 line 11 to line 15).

The affidavits of the officers and employees of Clark are consistent with this. (Record at 287, 288 paragraphs 5, 6, 7, and 15. Record at 291, 292 paragraphs 5, 6, 7, and 15. Record

at 295 paragraph 2). Clark had never taken out a loan before, and the Corporation had never authorized any corporate borrowing.

Borrowing was not usual and incident to the performance of any duties expected or authorized for the business manager of Clark to perform. (Record on appeal at 295, Affidavit of Ray H. Ivie past business manager of Clark Clinic).

The Utah Supreme Court has recently set forth the standards for apparent or implied authority in the case of City Electric v. Dean Evans Chrysler-Plymouth, No. 18248, Decided October 12, 1983, ____ U. 2d ____, ____ P. 2d _____. This Court held:

Where corporate liability is sought for acts of its agent under apparent authority, liability is premised upon the corporation's knowledge of and acquiescence in the conduct of its agent which led third parties to rely upon the agent's actions. [citations omitted] Nor is the authority of the agent "apparent" merely because it looks so to the person with whom he deals.

Plaintiff's claim that it relied upon the implied or apparent authority of Robert N. Westover is premised solely upon the actions of Westover and Mr. Brown's own perception of the situation. Mr. Brown testified in his deposition that when he proposed a loan to "Bob," Westover said he would have to check with the "Doctors." (Record at 383). Further Mr. Brown testified that he personally tried to contact the principals of Clark prior to the loan without success. (Id). (Contested fact, See Affidavits of Officers and Suzy Odle, Record at 285, 289, 293 and 298).

Since questions of fact exist as to the apparent agency of Westover, the Court erred as a matter of fact in granting

Summary Judgment on this issue. If the facts are decided in favor of Clark, as they must be in a Summary Judgment case, [Controlled Receivables, Inc. v. Harman, 17 U. 2d 420, 413 P. 2d 807 (1966)] then the Court erred as a matter of law in granting Summary Judgment for the Bank. There is no apparent or implied authority in this case.

C. THE COURT ERRED IN ITS DETERMINATION THAT CLARK RATIFIED THE ACTIONS OF WESTOVER IN BORROWING MONEY FROM THE BANK.

The legal doctrine of ratification arises from the unauthorized act of an agent. City Electric v. Dean Evans Chrysler-Plymouth, supra.

Ratification:

In the law of principal and agent, the adoption and confirmation by one person with knowledge of all material facts, of an act or contract performed or entered into in his behalf by another who at the time assumed without authority to act as his agent.

Black's, supra at 1428.

At the time Clark became aware of the promissory note executed by its employee, the officers of Clark met with officers of Bank and expressly repudiated the note being sued on herein. (Record at 284 paragraph 11, Record at 288 paragraph 11, Record at 292 paragraph 11).

The putting of proceeds into Clark's checking account, in the absence of other elements is not enough to establish a ratification on the part of Clark. There are certain other formalities necessary in order to ratify a contract entered into by an agent without authority to do so.

It has been held that a principal was not liable on a promissory note executed by his agent without authority for the reason that receipt of the money did not constitute a ratification of the loan because the principal did not know of the borrowing. Calhoun v. McCrory Piano & Realty Co., 129 Tenn. 651, 168 SW 149. It was established in a subsequent case, Duffy v. Scott, 129 ALR 487, 235 Wis. 142, 292 NW 273, that an action would lie on such facts for unjust enrichment.

Ratification further requires certain formalities. Since it is the equivalent of prior authority, the ratification of an unauthorized act must be of the particular mode or form necessary to confer authority to perform it in the first place. 114 ALR 996. Rest. Agency 2d §93. Ratification must, to bind the principal, be in writing if the original authorization was required to be in writing. ALR supra. Therefore the Bank must prove that Clark has ratified the unauthorized act of borrowing money by formal corporate resolution. No such proof has been made.

A ratification of an agent's acts requires a principal to have knowledge of all material facts and an intent to ratify. In order to enforce an agreement, the same kind of authorization that is required to clothe an agent initially with authority to contract must be given by the principal to constitute a ratification of the unauthorized act. Where the law requires the authority to be given in writing, the ratification must also generally be in writing. Bradshaw v. McBride, supra.

Nor does the mere acceptance of benefits establish a ratification of the unauthorized borrowing. In order to have a ratification effected by the receipt of benefits, the benefit must be ascertainable and direct. Bankers Protective Life Ins. Co. v. Addison, (Tex. Civ. App.) 237 SW 2d 694. In this case any benefit is questionable at best.

Finally, there can be no ratification by retention of benefits where, at the time the principal acquires the necessary knowledge, and without its fault, conditions are such that it cannot be placed in status quo or repudiate the entire transaction without loss. Newco Land Co. v. Martin, 358 Mo. 99, 213 SW2d 694. In other words, the requirement as to the return of the benefits received in order to avoid ratification will not apply where it is not possible for the principal to return the benefits. Farmers State Bank v. Haun, 30 Wyo. 322, 222 P. 45. Rest. Agency 2d §99. In this case it was not possible to return to proceeds of the promissory note. (Record at 283 paragraph 10).

When facts pertaining to the existence or nonexistence of an agency are conflicting, or conflicting inferences may be drawn from the evidence, the question presented is one of fact for the jury. 19 ALR 2d 1248, 289 P. 2d 621, §359 Am. Jur. n. 16, United States Bond & Finance Corp. v. National Bldg. & L. Asso., 80 Utah 62, 12 P.2d 758, 17 P.2d 238. (In a case where the evidence is conflicting, or a different reasonable inference may be drawn from the evidence, the question of the nature and

extent of the authority of an agent is one of fact to be determined by the trier of facts). Therefore, it was improper in this case to grant summary judgment with facts in issue. Clark has been, in essence, denied its day in court and the opportunity to defend itself and recover the losses it incurred due to the Bank's breach of its fiduciary duties.

Thus, at least five factual issues still exist: 1. Was a benefit retained by Clark? [Question of fact for the jury, Ercanbrack v. Crandall-Walker Motor Company, 550 P. 2d 723 at 775 (Utah 1976)] 2. Could the benefit have been returned to the Bank without loss to Clark? [3 Am. Jur. 2d, Agency §177; Restatement, Agency §99, Official Comment c.] 3. Was Clark effective in repudiating the promissory note? 4. Did Westover's use of the facsimile stamps constitute "Forgery," if so the act was unlawful and not capable of ratification. [See Lowe v. April Industries, 531 P. 2d 1297 at 1298 (Utah 1974)]. 5. Was the borrowing of money "usual and incident" to the performance of the duties Westover was expressly authorized to perform? (A disputed question of fact).

CONCLUSION

Summary Judgment was improperly granted in this case, both as to Clark Clinic Corporation's Counterclaim, and as to Zions Bank's first cause of action. In granting Summary Judgment dismissing Clark's Counterclaim, the Court failed even to address the checks totaling over \$12,500.00 which had been endorsed and cashed by Westover.

Robert N. Westover admitted in his deposition that he was not authorized to endorse or draw checks, nor to borrow money on the credit of Clark Clinic Corporation. Arnold Brown, the Bank's officer, admitted that Westover was not an authorized signature on the account of Clark and the authorized signatures were all manual signatures. All parties agree that Clark had never borrowed money before, that the funds were "spent" before Clark's officers were aware of the loan, and that Clark's officers expressly repudiated the loan transaction on the grounds the loan was unauthorized and that they did not have the money to return.

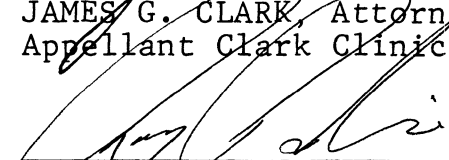
Therefore, the Court erred as a matter of law and fact in granting summary judgment herein and Clark Clinic corporation is entitled to judgment in its favor as a matter of law on all issues. In the alternative, numerous factual issues remain in dispute and should be left to the sound discretion of a jury as the trier of fact.

DATED and signed this 19th day of October, 1984.

RESPECTFULLY SUBMITTED



JAMES G. CLARK, Attorney for
Appellant Clark Clinic Corporation



RAY PHILLIPS IVIE, Attorney for
Appellant Clark Clinic Corporation

CERTIFICATE OF DELIVERY

I hereby certify that I personally delivered a true and correct copy of the above and foregoing APPELLANT'S BRIEF to the Law Office of M. Dale Jeffs, JEFFS AND JEFFS, Attorneys for Respondent, Zions First National Bank 90 No. 100 East, Provo, Utah 84603.

DATED and signed this 24th day of October, 1984.

David Bluth