

1984

Guardian State Bank, a Utah corporation v. F.C. Stangl III : Reply Brief of Appellant

Utah Supreme Court

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FOR THE STATE OF UTAH

Defendant and
Respondent.[illegible]

Case No. 20158

APPELLANT'S REPLY BRIEF

Appeal from a Judgment of the
Third Judicial District Court for Salt Lake County
Honorable Scott Daniels, Judge

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1984

IN THE SUPREME COURT
FOR THE STATE OF UTAH

GUARDIAN STATE BANK, a)	
Utah corporation,)	
)	
Plaintiff and)	
Appellant,)	
)	
vs.)	Case No. 20158
)	
F.C. STANGL III,)	
)	
Defendant and)	
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IN THE SUPREME COURT
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GUARDIAN STATE BANK, a
Utah corporation,

Plaintiff and
Appellant,

VS.

F.C. STANGL III,

Defendant and
Respondent.

APPELLANT'S REPLY BRIEF

Case No. 20158

Appellant Guardian State Bank ("Guardian") will respond herein to certain of the arguments raised by Respondent F.C. Stangl III. ("Stangl") in his Reply Brief.

I. PRELIMINARY STATEMENT

Stangl would like to characterize this case as one simply involving a negotiated settlement of a dispute between sophisticated business men represented by lawyers where Guardian negotiated a bad deal and now wants to back out of the transaction. To characterize this case in that manner is a little like saying a counterfeiter is someone who makes a lot of money. It simply doesn't tell the real story.

If that were all that was involved in this case, this appeal would never have been filed. Guardian is not asking this Court to let it out of a

bad deal. Guardian is asking this Court to require Stangl to live up to the bargain he really made and pay his legal obligation.

Stangl makes a very telling statement in his Brief:

"At no time did either Stangl or his counsel establish as a condition to the transaction that bank had to indorse the Sargetis note with recourse. That is simply the way it worked out." [Stangl Brief, p. 5]

Exactly. At no time did the parties agree that Guardian would have any liability whatsoever to Stangl on the original Note. Stangl never bargained for an agreement that the original Note would be indorsed with recourse. Stangl never obtained such an agreement and knew that was not the agreement reached between the parties. Stangl can't avoid his obligation by ignoring the real bargain he made and focusing solely upon the written indorsement. The parole evidence introduced below demonstrated beyond doubt that the real bargain of the parties was that Guardian would have no liability. See, Gensplit Finance Corp. v. Link Power & Machinery, 36 U.C.C. Reporting Service 588 (S.D.N.Y. 1983).

II. OBJECTIONS TO STANGL'S STATEMENT OF FACTS

The following contentions made by Stangl in his Statement of Facts are not supported by the record:

1. Stangl claims that in his initial meeting with Mr. Webb, the President of Guardian, that Stangl never "unequivocally" agreed to pay off the August 29, 1978 Note (the "original Note") and that he told Webb he needed to consult with counsel before he decided what to do about the situation. [Stangl's Brief, p. 3]

Stangl's claim in this regard not only directly contradicts the testimony of Webb [R. 561, line 19 - 562, line 10], but is also inconsistent

with Stangl's testimony. Stangl testified he told Webb that if Guardian was going to require him to pay all of the original Note right then, that he was going to need an attorney's help in figuring out what to do. Stangl testified, however, that during the initial meeting he and Webb came to an agreement that the original loan would not all have to be paid at that time but would be repayable one-half around 60 days from then and the remainder in another year. [R. 627, line 19 - 628, line 7]

The evidence was simply undisputed that during the initial meeting between Webb and Stangl, the repayment schedule on the original Note was agreed to, the payment terms of the May 11, 1981 Note (the "new Note") to be executed by Stangl were agreed to and Stangl told the Bank he wanted the old Note and Guaranty so that he could attempt to collect from John Sargetis Ford, Inc. (the "dealership") and from John Sargetis ("Sargetis"). [R. 342; R. 561, line 19 - 562, line 10; R. 627, line 19; 628 line 7; 675 lines 17 - 22]

2. Stangl appears to contend that most of the substance of the transaction was negotiated between lawyers. [Stangl's Brief, p. 5]

However, the evidence was that the agreement was reached in the first meeting between Webb and Stangl and that the attorneys were simply to document that agreement. [Id.] In Stangl's words, the attorneys were to "write down the legalees for the arrangements we'd made." [R. 629, line 24]

3. Stangl states that the essence of the transaction was that Stangl would purchase the original Note and Guaranty by giving Guardian a new Note for the amount due, bring the past due interest current and forego any suit or claim with respect to the Guaranty. [Stangl's Brief, p. 5]

The true essence of the transaction was that Stangl requested and was given additional time to pay his obligation to the Bank, and Stangl was given the Note and Guaranty to attempt to collect against the dealership and Sargetis. The transaction was structured as a purchase of the Note and Guaranty because of Stangl's concern that if the transaction was structured as a payment of the old Note with a new Note that his rights against the dealership and Sargetis would be impaired. [R. 626, lines 19 - 25]

III. THIS APPEAL WAS TIMELY FILED

A. An Extension of Time Was Not Necessary.

Stangl, in a very narrow reading of U.R.C.P., Rule 73(a), argues that because the post-trial motions filed by Guardian were voluntarily withdrawn on August 15, 1984, rather than granted or denied, that this appeal was not timely filed.

Of course, under Rule 73(a), where post-trial motions are filed the time for filing an appeal commences to run anew once those motions are decided. Rule 73(a) does not specifically address one way or another what happens when a post-trial motion is withdrawn voluntarily without a decision from the Court. However, there does not appear to be any reason for differentiating between the situation where a post-trial motion is actually decided by the Court and where the post-trial motion is simply withdrawn.¹

¹ The only concern should be whether a post-trial motion is frivolous and only filed to extend the time for appeal. This concern is present whether the motion is denied or withdrawn.

Out of an abundance of caution, Guardian obtained an Order from the District Court on August 17, extending the time for filing a Notice of Appeal 30 days. Guardian filed its Notice of Appeal the same day. However, it is respectfully submitted that this Court should determine that the Order extending the time for appeal was unnecessary and that under Rule 73(a), when Guardian voluntarily withdrew its motions on August 15, the time for filing an appeal commenced to run anew.

B. Excusable Neglect.

Stangl further argues that the District Court erred in granting an extension of the time for filing an appeal because it was not excusable neglect for counsel to withdraw the post-trial motions rather than requesting those motions be denied. If a withdrawn motion does not toll the time for appeal, Rule 73(a) is at best unclear in that regard and it was reasonable for Guardian to believe that the time for appeal would commence with the withdrawal of the motions. In the event this Court holds the appeal period did not commence at that time, Guardian's mistake was certainly excusable.

IV. EVEN IF GUARDIAN'S INDORSEMENT OF THE ORIGINAL NOTE IS VALID, GUARDIAN IS NOT LIABLE TO STANGL

A. Guardian Has Not Raised Issues for the First Time on Appeal.

Stangl's argument that Guardian has raised issues for the first time on appeal is in error. Stangl's position can only be supported by an unduly restrictive interpretation of the law and the issues which were before the Trial Court. In fact, all of the issues raised by Guardian on this appeal were before the Trial Court.

Guardian has continually asserted that if Guardian is liable to Stangl on the original Note, Guardian is entitled to recover from Stangl on his Guaranty and that those liabilities offset each other. Guardian has also continually asserted that it is not liable to Stangl on its indorsement because the original Note and Guaranty were only given to Stangl to enable him to collect from the dealership and Sargetis and that Guardian's indorsement and delivery of the original Note to Stangl did not have the effect of making Guardian liable to Stangl on that Note. [See, e.g., R. 26; 117-118, 145, 205-206, 347] The undisputed evidence at trial supported Guardian's position on these issues.

Guardian has not raised additional issues on appeal but has simply cited additional authorities in support of its position on these issues to show (1) Guardian is entitled to offset the liability which Stangl has on the Guaranty by virtue of subrogation, (2) Guardian is not liable under its indorsement which was only given to allow collection against other parties as Guardian was only an accommodation indorser, and (3) Guardian's indorsement and delivery of the original Note to Stangl did not render Guardian liable to Stangl, but rather discharged any liability.

A party is not barred from presenting additional authorities on appeal in support of its position on an issue. Nor is a new issue created upon appeal merely by the use of different terminology. Similarly, simply because an issue was not presented to the trial court in as satisfactory manner as it is presented on appeal does not give rise to a new issue.

Young v. Saroukos, 189 A.2d 437 (Del. 1963); People v. Vallejos, 59 Cal.Rptr. 450 (Cal. 1967); Meuse-Rhine-Ijssel Cattle Breeders of Canada, Ltd. v. Y-Tex Corporation, 590 P.2d 1306 (Wyo. 1979).

For example, in the Y-Text Corp. case, which is directly on point, the applicable provisions of the Uniform Commercial Code on an issue between the parties had not been brought to the attention of or considered by the Trial Court. The appellate court rejected the contention that the applicability of the Uniform Commercial Code on the issue between the parties could, therefore, not be raised or considered on appeal, stating:

"It is not considered a new issue to consider additional relevant authority in the disposition of a case. This does not interfere with the course of the litigation selected by the parties. There is no reason to keep secret the proper law applicable to a case just because overlooked. The Trial Judge and the parties had available the U.C.C. to the extent applicable. The U.C.C. became a part of the contract as though written into its terms." [590 P.2d at 1309]

Both trial courts and appellate courts have the duty to apply the correct principles of law to the issues involved in a case, whether or not either party has argued such principles. A court is not limited to simply choosing between the legal principles relied upon by the parties, whether or not correct. In this regard, many times appeals are decided based upon legal principles that have not been advanced by either party.²

² Even if this Court were to determine that new issues have been raised on appeal, this Court may nevertheless decide any such issues. First, it is not improper to raise new issues on appeal where the underlying facts are not in dispute. See, e.g., State v. Lee, 633 P.2d 48 (Ut. 1981) (Maughan, J., dissenting); People v. Vallejos, supra; Burdette v. Rollefson Const. Co., 344 P.2d 307 (Cal. 1959). The underlying facts upon which all of Guardian's arguments which Stangl attacks are premised upon undisputed facts. Second, this Court has the discretion to hear new issues where justice requires it. Earl M. Jorgensen Co. v. Mark Construction Inc., 540 P.2d 978 (Ha. 1975).

B. Guardian is Entitled to Setoff Stangl's Liability Under His Guaranty.

1. Subrogation.

Stangl argues that Guardian is not entitled to enforce Stangl's liability on his Guaranty as a setoff to any liability of Guardian on the original Note because Stangl owns the Guaranty and the Guaranty is a "separate and distinct" instrument from the original Note.

Stangl would understandably like to chop up the transaction into the smallest pieces possible in the hope that the transaction can no longer be recognized. However, the transaction cannot be artificially truncated. The fact of the matter is that as part of a single transaction pursuant to which Stangl agreed to pay his debt to Guardian by executing a new Note, he received the original Note and Guaranty from Guardian to attempt collection from the dealership and Sargetis. If Guardian is liable on the original Note, Guardian has all of the rights of a holder of that Note, including the right to recover from Stangl on his Guaranty of the Note.

Significantly, Stangl has not cited one case which would deny Guardian the right to recover against Stangl on his Guaranty. Rather, Stangl has simply attempted to distinguish on irrelevant grounds some of the authorities cited by Guardian. However, the principle of law set forth by Guardian that an indorser who has to pay a Promissory note is subrogated to all of the rights for recovery not only on the Note but on the underlying indebtedness is well established and stands un rebutted by Stangl.

2. Merger.

Stangl argues that the original Note has been merged into the Judgment entered in this action and no longer exists as an instrument upon which a subrogation claim may be based. Stangl's argument misstates the law.

The merger doctrine only applies to merge the liability of the party against whom a Judgment is obtained on a Note into the Judgment itself. The merger doctrine does not extinguish the liabilities of any other parties. Thus, when a Judgment is entered against an indorser, the Note does not cease to exist and the indorser is entitled to subrogation and to collect the Note. See, e.g., Whitten v. Kroeger, 82 P.2d 668 (Okla. 1938).

Under Stangl's argument, the original maker of a Note would always be relieved of all responsibility for payment of a Note once a Judgment was entered determining that an indorser was liable. Or, if a payee was only able to obtain service of process on one co-maker and obtained a Judgment against that co-maker, the payee could not thereafter obtain Judgment on the Note against a second co-maker. Such results are absurd. An indorser or other party to a Note simply doesn't have to give up his right to have a judicial determination of his liability or risk losing his right of subrogation.

C. Guardian has Been Discharged By Stangl's Reacquisition of the Note and Guaranty.

Stangl doesn't really deal with Guardian's argument that his reacquisition of the original Note and Guaranty had the effect of discharging Guardian pursuant to U.C.A. Sec. 70A-3-208 (1953). Stangl is content to distinguish the cases cited by Guardian on the inconsequential ground that because those cases (holding that one who signs a separate Guaranty of a Note is a "party" to that Note) involved another section of Article 3 of the Commercial Code that Guardian's authorities are inapplicable to this case. Stangl concludes simply that it is not necessary

for him to "address cases dealing with other statutes that say black is white". [Stangl Brief, pp. 13-14]

Stangl's analysis is superficial at best. The fact that the cases cited by Guardian involved another section under Article 3 of the Commercial Code appears inconsequential. The determination of who is a "party" to an "instrument" for the purposes of Article 3 is presumptively uniform and should not differ based upon what specific section of Article 3 is involved unless there is some compelling reason for such a distinction. Stangl has offered no reason whatsoever for such a distinction.

The cases cited by Guardian are fully applicable to the present situation. There is no good reason that the rights and obligations flowing between Stangl and Guardian should hinge on the question of which piece of paper Stangl signed his Guaranty. As between the original parties to the transaction, Stangl should be treated no differently than if his Guaranty were signed on the original Note itself.

D. Guardian is an "Accommodation Indorser".

Stangl argues that, as a matter of law, Guardian is not an accommodation indorser of the original Note because Guardian sold that Note to Stangl in exchange for the new Note and that, as Guardian was in the chain of title, there was a presumption that Guardian was not an accommodation indorser.

Stangl ignores the undisputed evidence in the Court below that Stangl and his attorney told Guardian that the reason he wanted Guardian to give him the original Note and Guaranty was so that he could attempt to collect from the assets of the dealership and Sargetis and that Guardian only gave him the original Note and Guaranty to collect from those parties. This evidence clearly carried Guardian's burden of showing Guardian was an

accommodation indorser under the authorities cited in Guardian's opening Brief [p. 16].

V. GUARDIAN'S INDORSEMENT IS INVALID AND UNENFORCEABLE

A. Guardian is Entitled to Relief For Fraud.

Stangl professes to be confused as to just what Guardian claims constituted the fraud in this case. It is respectfully submitted that Stangl's confusion is self-generated. The fraud claim is clear. Both Stangl and his attorney represented to Guardian that Stangl was going to pay his debt but needed more time and that Stangl simply wanted all of Guardian's rights in the original Note and Guaranty to attempt collection from the dealership and Sargetis, when Stangl's real intent was exactly the opposite.³

1. Duty to Speak.

Stangl claims that an omission is only fraudulent where there exists a duty to speak and that where the parties deal at arms length and the facts are reasonably within the knowledge of both parties, there is no duty to speak.

The answer to this contention is twofold. First, Stangl did in fact speak, but didn't tell the whole truth and misled Guardian. Second, the fact that Stangl did not intend to pay his debt and did not want the

³ Stangl's collateral estoppel argument [Stangl Brief, p. 20] is without merit. The Searle Bros. case cited by Stangl specifically recognized that collateral estoppel only applies where the issue decided in a prior case was identical with the issue presented in a later case. The issue of Stangl's liability for fraud was never submitted to or determined by the jury in the present case. Obviously, there can be more than one proximate cause of damage. Jacques v. Farrimond, 380 P.2d 133 (Ut. 1963). The fact that the Judgment against Guardian's attorney has been paid and not appealed does not effect Guardian's separate and distinct causes of action against Stangl. Jensen v. Eddy, 514 P.2d 1142 (Ut. 1973).

original Note and Guaranty simply to go after the dealership and Sargetis, but in fact secretly intended to evade his obligation by seeking to hold Guardian liable on its indorsement was not reasonably within Guardian's knowledge.

Stangl ignores the authorities cited by Guardian in its Brief [pp. 19-20] which demonstrate beyond dispute that even if Stangl initially had no duty to speak, once Stangl and his attorney opened their mouths and told Guardian why they wanted the original Note and Guaranty, they were obligated to tell Guardian the whole truth and not to mislead and deceive Guardian by omitting the crucial fact that Stangl intended to attempt to evade his obligation by holding Guardian liable on its indorsement. Stangl's obligation did not depend upon the existence of a confidential relationship and the fact that the parties dealt at arms' length is irrelevant. See, e.g., A.C. Heise v. Pilot Rock Lumber Co., 352 P.2d 1072 (Ore. 1960).

2. Duty to Disclose Information Later Acquired.

Stangl attempts to avoid the consequences of his fraud by arguing that when he told Webb during their initial meeting that Stangl would pay the debt but needed more time and that he only wanted the original Note and Guaranty to attempt collection from the dealership and Sargetis, Stangl did not know he had the legal right to hold Guardian liable on its indorsement. Stangl claims he was not advised of that fact by his counsel until shortly before the transaction was consummated.

Stangl therefore concludes that he could not have committed any fraud because at the time he told Guardian why he wanted the Note and Guaranty, he did not intend to hold Guardian liable. Stangl asserts he had

no duty to correct his previous representation when he learned the new facts. The law is to the contrary. St. Joseph Hospital v. Corbetta Construction Co., Inc., 316 N.E.2d 51 (Ill. 1974); Mammas v. Oro Valley Townhouses, Inc., 638 P.2d 1367, 1369 (Ariz. 1981); Stevens v. Marco, 305 P.2d 669, 683 (Cal. 1957); Restatement of Torts 2d, Sec. 551(2)(c); Prosser's Handbook on the Law of Torts, Sec. 106 (4th Ed. 1971).

Thus, in the St. Joseph Hospital case, supra, the Court observed:

"It is also well established that where one has made a statement which at that time is true but subsequently acquires new information which makes it untrue or misleading, he must disclose such information to anyone whom he knows to be acting on the basis of the original statement -- or be guilty of fraud or deceit." [316 N.E.2d at 71]

3. Intent to Pay New Note.

Stangl contends that he didn't defraud Guardian by executing the new Note whereby he unconditionally promised and agreed to pay Guardian the amount of that Note in two equal installments in July of 1981 and 1982 because he admitted he was liable on the new Note subject to Guardian's liability to him on the original Note. This argument is sophistry.

In executing the new Note, Stangl unconditionally represented and agreed to pay his debt to the Bank strictly in accordance with the terms of the Note. Stangl's true intent in the transaction was not to pay his debt but to slide out of it. The only way he intended to pay Guardian one cent is if he collected from the dealership or Sargetis. That simply is not what Stangl promised when he signed the new Note. Stangl's promise to pay his debt in accordance with the terms of the new Note when he had absolutely no intent of performing that promise constituted fraud.

B. The Doctrine of Election of Remedies Does Not Bar Guardian From Equitable Relief Based Upon Mistake.

Stangl seeks to characterize this case as one where Guardian attempted below to retain the favorable parts of a transaction and be relieved of the unfavorable aspects of that transaction. Stangl argues that this action was brought by Guardian solely as a case at law for damages and that no "affirmative" equitable relief was ever sought.⁴ Consequently, Stangl concludes that Guardian elected purely a legal remedy and cannot "change its entire theory of the case" and ask for equitable relief. Stangl's claims are not supported by the record or the controlling authorities.

1. Guardian's Pleadings.

From the very beginning of this case, Guardian has sought alternative legal or equitable remedies. Guardian specifically requested declaratory relief in its Complaint determining the rights and liabilities of the parties with respect to the transaction. The prayer of Guardian's Complaint, in addition to the specific prayers for relief, also requested "such other, further or different relief as the law may require or as the Court may deem just and proper." [R. 2-6] In Guardian's Answer to the Counterclaim, Guardian also raised a number of equitable defenses, including mistake, laches, estoppel, fraud, bad faith and unclean hands, and requested

⁴ Stangl's argument is inconsistent because he later admits Guardian raised the equitable defense of mistake as a defense to the Counterclaim and sought equitable relief in the form of a declaratory judgment in its Complaint.

in its prayer, among other things, such "further relief as the Court deems just and equitable in the premises."

2. The Declaratory Relief Claim.

Stangl further argues that Guardian's claim for declaratory relief did not enable the Court to grant equitable remedies because a declaratory relief action will not lie where the purpose is to determine the sufficiency of legal defenses to a pending action and it was thus proper for the trial court to dismiss the declaratory count. This argument begs the point. The cases previously cited by Guardian [Guardian's Brief, p. 24] hold that even if a party is not entitled to the specific equitable relief requested, the Court can nevertheless grant any other equitable relief.⁵

3. Rule 54(c).

Finally, Stangl does not respond to the authorities cited in Guardian's opening Brief, [p. 25], that under Rule 54(c) U.R.C.P., a Court can grant any relief to which a party is entitled, whether legal or equitable, and whether or not specifically requested.

In addition to the authorities previously cited, the case of Reynolds v. Slaughter, 451 F.2d 254 (10th Cir. 1976) is closely on point. There, the Tenth Circuit held that Plaintiff could not recover damages for breach of contract because of the bar of the statute of frauds. However,

⁵ Moreover, contrary to Stangl's implication, the declaratory relief cause of action was never dismissed as being redundant or improper. In fact, whether Guardian was entitled to declaratory relief was one of the specific contested issues of law to be litigated at trial. [R. 346], the trial court never specifically ruled on that issue and simply as part of the final Judgment entered Judgment in favor of Stangl on the declaratory relief cause of action.

the Court held that under Rule 54(c) Plaintiff could obtain restitution, even though he had not specifically requested it in his Complaint, and that the doctrine of election of remedies was not a bar to obtaining that relief. To the same effect, see Kansas City St. L. and C.R. Co. v. Alton R. Co., 124 F.2d 780 (7th Cir. 1941); Perkins v. Remillard, 84 F.Supp. 224 (D.Mass. 1949); 6 Moore's Federal Practice, Sec. 54.62.

Consequently, Guardian is entitled to reformation of its indorsement or rescission based upon its mistake of fact which was induced and known by Stangl.

C. The Original Note and Guaranty Were Only Delivered To Stangl For the Special Purpose of Collecting From Other Parties.

Stangl claims that Guardian's argument under Sec. 70A-3-306, U.C.A., that Guardian is not liable to Stangl on the indorsement of the original Note because that Note was only given to Stangl for the special purpose of enabling Stangl to attempt to collect from the dealership and Sargetis must fail because there is no evidence of such an agreement between the parties.

To the contrary, the undisputed evidence was that Stangl and his attorney represented to Guardian they wanted the original Note and Guaranty for that purpose and that was the only reason Stangl received those documents. Stangl cannot prevail on the specious distinction that there wasn't an agreement because he represented he only wanted documents for a specific purpose, he didn't expressly say he agreed he would only use the documents for that purpose.

D. Stangl Gave No Consideration for the Original Note and Guaranty.

Stangl asserts that he did indeed give consideration for the original Note and Guaranty in that he executed the new Note, paid interest on the original Note current and gave up any defenses "his lawyer thought he had" to the Guaranty.

However, Stangl doesn't even attempt to argue that his "defenses" to the Guaranty had any colorable merit or even bother to specify what those supposed "defenses" were. Stangl simply did not have even an arguable defense to the Guaranty and was already absolutely obligated to pay the debt to Guardian immediately. Therefore, his payment of \$8,000 past due interest and his execution of the new Note at a lower interest rate whereby he promised to pay the debt in the future did not constitute consideration.

Stangl further contends that if there was no consideration for Guardian's delivery to him of the original Note and Guaranty, then necessarily there was no consideration for his execution of the new Note. This argument is a non sequitur.

The fact that consideration is not given by one party to a transaction says nothing about whether consideration is given by the other party. Guardian clearly gave consideration for the execution of the new Note in that Guardian gave Stangl additional time for repayment of his indebtedness, decreased the interest rate and gave him the original Note and Guaranty to attempt to collect from Sargetis and the dealership.

E. Good Faith is a Defense to Stangl's Claim.

Stangl has continually argued in this action, without ever citing one authority, that the absence of good faith is not a defense to his attempt to enforce liability against Guardian on its indorsement, as if by

ignoring the relevant law it will go away. Stangl has good reason to wish good faith were irrelevant under the Commercial Code. However, the drafters of the Commercial Code were not fearful of Stangl's doomsday argument that to require businessmen to act honestly would bring commerce to a halt. The authorities previously cited by Guardian [Guardian's Brief, p. 27] bar Stangl's claim.

VI. STANGL IS NOT ENTITLED TO RECOVER HIS ATTORNEYS' FEES

Even if this Court should affirm the Judgment in favor of Stangl, the trial court acted correctly in refusing to award Stangl his attorneys' fees.

In the first place, there was no basis for the trial court to award Stangl his attorneys' fees because there was no written agreement between Guardian and Stangl for the payment of attorneys' fees incurred in collecting the original Note. The original Note which Guardian indorsed only provided that the maker would pay attorneys' fees in the event of legal action to collect the Note. [See Ex. 1] The original Note contained no provision obligating indorsers to pay attorneys' fees. The original Note specifically provided that, "the undersigned agrees to pay all expenses of collection of this note, including reasonable attorneys' fees and Court costs." "The undersigned" was John Sargetis Fine Cars, Inc.

When the original Note sought to affect the rights of indorsers, it specifically named indorsers. Thus, the provision immediately following the attorneys fee provision provided, "every maker, indorser, or guarantor of this note waives presentment, demand, notice" This provision did not include an agreement that indorsers would pay attorneys' fees. See, e.g.,

City Sav. Bank v. Kensington Land Co., 37 S.W. 1037 (Tenn. 1896); Robinson v. Aird, 29 So. 633 (Fla. 1901).

Second, the trial court determined under the unique circumstances of this case, that as a matter of equity Stangl should not be entitled to recover attorneys' fees. The trial court did not abuse its discretion in making that determination. See, e.g., Fullmer v. Blood, 546 P.2d 606 (Ut. 1976); Firemans Insurance Co. v. Brown, 529 P.2d 419 (Ut. 1974); Combs v. Walters, 518 P.2d 1254 (Wyo. 1973).

Finally, Guardian prevailed on its claim on the new Note against Stangl, Judgment was only entered in favor of Guardian on the new Note at the conclusion of the case and the net result of the trial court's decision was to essentially offset the parties' liabilities. Under such circumstances, the refusal to award Stangl his attorneys' fees was proper. American Gypsum Trust v. Georgia Pacific Corp., 542 P.2d 658 (Ut. 1973); Amoss v. Bennion, 420 P.2d 47 (Ut. 1966).

CONCLUSION


Stangl is attempting in this lawsuit to enforce a supposed agreement which Stangl well knows was never entered into by the parties, which he never bargained for and which is directly contrary to what he led Guardian to believe he intended the transaction to accomplish.

It is respectfully submitted that this Court should hold Stangl to his real bargain and reverse the Judgment on Stangl's Counterclaim with directions to enter Judgment in favor of Guardian.

DATED this 27th day of December, 1984.

BURBIDGE & MITCHELL

By


STEPHEN B. MITCHELL

Attorneys for Appellant

MAILING CERTIFICATE

I HEREBY CERTIFY that a copy of the foregoing was mailed to the
following on the 27th day of December, 1984:

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