

1978

Henry Maas v. Kenneth J. Allred And Arvel Allred v. Utah Bank & Trust Company : Petition For Rehearing

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

HENRY MAAS,
Plaintiff and Respondent,

vs.

UTAH BANK & TRUST,
Defendant & Appellant.

CASE NO.
14808

PETITION FOR REHEARING

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FILED

APR 11 1978

TABLE OF CONTENTS

| | <i>Page</i> |
|--|-------------|
| PETITION FOR REHEARING | 1 |
| ARGUMENT OF POINTS RELIED UPON | 3 |
| POINT I: THE APPELLATE COURT ERRED IN BASING IT'S DECISION UPON, AND THE LOW- ER COURT ERRED IN GIVING AND SUBMIT- TING TO THE JURY, INSTRUCTION NO. 12, AND SPECIAL VERDICT NO. 6 FOR THE REAS- ON THAT: | |
| A. THERE WAS NO EVIDENCE OR FACTS ADMITTED AT TRIAL SUFFICIENT TO SUPPORT OR REQUIRE SUCH INSTRU- TION OR VERDICT, AND | |
| B. UNDER THE FACTS AND EVIDENCE THE APPELLANT WAS NOT REQUIRED TO DISPOSE OF THE COLLATERAL IN A COMERCIALLY REASONABLE MANNER, AND | |
| C. INSTRUCTION NO. 12, IS NOT A COR- RECT STATEMENT OF THE LAW. | |
| CONCLUSION | 7 |

STATUTES CITED

| | |
|---|------|
| Utah Code Ann. Sec. 70A-9-506 | 5 |
| Utah Code Ann. Sec. 70A-9-504 | 5, 6 |
| Utah Code Ann. Sec. 70A-9-505 (2) | 5 |
| Utah Code Ann. Sec. 70A-9-507 | 6 |

IN THE
SUPREME COURT
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HENRY MAAS,
Plaintiff and Respondent,

vs.

UTAH BANK & TRUST,
Defendant & Appellant.

CASE NO.
14808

PETITION FOR REHEARING

Comes now the Appellant and Petitions the Court for a rehearing and reargument of the above entitled cause upon the following grounds:

POINT I

THE APPELLATE COURT ERRED IN BASING ITS DECISION UPON, AND THE LOWER COURT ERRED IN GIVING AND SUBMITTING TO THE JURY, INSTRUCTION NO. 12. AND SPECIAL VERDICT NO. 6, FOR THE REASON THAT:

- A. THERE WAS NO EVIDENCE OR FACTS ADMITTED AT TRIAL SUFFICIENT TO SUPPORT OR REQUIRE SUCH INSTRUCTION OR VERDICT, AND
- B. UNDER THE FACTS AND EVIDENCE THE APPELLANT WAS NOT REQUIRED TO DISPOSE OF THE COLLATERAL IN A COMMERCIALY REASONABLE MANNER, AND
- C. INSTRUCTION NO. 12, IS NOT A CORRECT STATEMENT OF THE LAW.

Dated: April , 1978.

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Layne B. Forbes
*Attorney for Appellant and
 Petitioner*

DELIVERY RECEIPT

Served 2 copies of the foregoing Petition for Rehearing and included Brief upon James L. Wilde and Paul S. Felt, Attorneys for Respondent, at 400 Deseret Bldg., Salt Lake City, Utah, this day of April, 1978.

ARGUMENT

POINT I

THE APPELLATE COURT ERRED IN BASING ITS DECISION UPON, AND THE LOWER COURT ERRED IN GIVING AND SUBMITTING TO THE JURY, INSTRUCTION NO. 12, AND SPECIAL VERDICT NO. 6, FOR THE REASON THAT:

- A. THERE WAS NO EVIDENCE OR FACTS ADMITTED AT TRIAL SUFFICIENT TO SUPPORT OR REQUIRE SUCH INSTRUCTION OR VERDICT, AND
- B. UNDER THE FACTS AND EVIDENCE THE APPELLANT WAS NOT REQUIRED TO DISPOSE OF THE COLLATERAL IN A COMMERCIALY REASONABLE MANNER.
- C. INSTRUCTION NO. 12 IS NOT A CORRECT STATEMENT OF THE LAW.

* * * *

A. THERE WAS NO EVIDENCE OR FACTS ADMITTED AT TRIAL SUFFICIENT TO SUPPORT OR REQUIRE SUCH INSTRUCTION OR VERDICT.

The Court gave and submitted to the jury the following instruction and Special Verdict:

Instruction No. 12

Even if you find that defendant, Utah Bank & Trust Com-

pany, had the right to repossess the 1972 Mack Truck in the manner that the repossession was accomplished in this case, you are instructed that the Bank had the lawful duty to sell the truck in a commercially reasonable sale. To be commercially reasonable, the sale must meet the following requirements:

(1) The Bank must have given notice of intention to hold the sale, including the date, time and place thereof, to all persons having any rights or interest in the truck.

(2) The Bank must have exercised due diligence in attempting to get the best price obtainable for the truck. The requirement of due diligence is satisfied by acts such as advertising the sale to prospective buyers of trucks and soliciting bidders for sale.

Proposition No. 6

The disposition of the 1972 Mack Tractor on February 27 or 28 by the Utah Bank & Trust Company was a commercially unreasonable disposition of the tractor.

The Appellant took exception to Instruction No. 12, and Special Verdict No. 6. (R-350, 320)

There was no evidence whatever to support this Instruction and Special Verdict. The undisputed evidence as it relates to this issue is as follows:

1. The title to the truck, and thus the ownership thereof, was at all times in the name of Kenneth Allred. (Tr. 132, Ex. 12D)

2. On February 25, 1975, the Appellant repossessed the truck. (Tr. 95, 96)

3. At the time of the repossession the balance of the promissory note was \$4346.38. (Tr. 99, Ex. 6P)

4. On February 26, 1975, Arvel Allred, father of Kenneth Allred, (owner of the truck) came to the bank and paid the balance of the note. (Tr. 99) He did this so the bank would not sell the truck; he didn't want Kenneth Allred to lose the truck. (Tr. 99)

5. On March 1, 1975, the bank released the keys to the truck and the Certificate of Title thereof to the owner, Kenneth Allred. (Tr. 119)

From the foregoing evidence, which is unequivocal and undisputed, the only possible conclusion that can result therefrom is that the debtor (Kenneth Allred) redeemed the collateral; that the collateral was not sold. The title was not endorsed or negotiated by the bank, nor was any Bill of Sale executed, all of which would have been necessary in event of a sale. How could the bank sell the truck to the owner (Kenneth Allred) who had a right to and did redeem?

B. UNDER THE FACTS AND EVIDENCE THE APPELLANT WAS NOT REQUIRED TO DISPOSE OF THE COLLATERAL IN A COMMERCIALLY REASONABLE MANNER.

Before disposition of the collateral the debtor (Kenneth Allred) had a right to redeem the collateral. Section 70A-9-506 U.C.A., 1953, as amended, provides as follows:

70A-9-506. Debtor's right to redeem collateral.—At any time before the secured party has disposed of collateral or entered into a contract for its disposition under section 70A-9-504 or before the obligation has been discharged under section 70A-9-505 (2) the debtor or any other secured party may unless

otherwise agreed in writing after default redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition, in arranging for the sale, and to the extent provided in the agreement and not prohibited by law, his reasonable attorney's fees and legal expenses.

Section 70A-9-504, relating to the secured party's right to dispose of the collateral, only has application in the event the debtor did not redeem the collateral beforehand.

C. INSTRUCTION NO. 12 IS NOT A CORRECT STATEMENT OF THE LAW.

The instruction as given, would require:

- (1) that notice be given to all persons having any rights or interest in the truck, and
- (2) that the bank must have advertised the sale to prospective buyers of trucks and solicited bidders for the sale.

Whereas Sections 70A-9-504 and 507, dealing with secured party's right to dispose of the collateral and liability for failure to comply with the requirements set forth only require:

- (1) that "reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the *debtor*." (Sec. 504) (Emphasis added)
- (2) that "the fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not itself sufficient to establish that the sale was not made in a commercially reasonable manner." (Sec. 507)

CONCLUSION

The Court in its majority opinion based its holding upon the finding by the jury that the truck was not disposed in a commercially reasonable manner. However the evidence is crystal clear that the debtor (Kenneth Allred) redeemed the collateral, as he had a right to by law, and thus negating the necessity to dispose of the collateral in any other manner.

Respectfully submitted,

Layne B. Forbes
Attorney for Appellant