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Vitagraph, Inc. v. American Theater Co. and Theatres Operating Co. : Brief of Respondent

Utah Supreme Court

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James M. Carlson; attorney for respondent.

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4924

In the
Supreme Court of the State of Utah

VITAGRAPH, INCORPORATED,
a Corporation,

Respondent.

vs.

AMERICAN THEATRE COMPANY,
a Corporation,

Appellant,

and

THEATRES OPERATING COMPANY,
a Corporation,

Defendant.

4924-

Respondent's Brief

JAMES M. CARLSON,
Attorney for Respondent.

ARROW PRESS, SALT LAKE

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STATEMENT OF CASE.

As appears from the complaint and findings, the Appellant, American Theatre Company, originally entered into contract exhibit A, with the plaintiff, leasing the film involved in this suit. In said contract, known as number 2112, and introduced in evidence as plaintiff's exhibit A, the appellant was then the owner and operating the American Theatre in Salt Lake City. A little

later, the American Theatre and Vitagraph, as sole contractors, entered into another agreement pertaining to the film involved in this suit, which modified in some respects the original contract. This second agreement was introduced in evidence as plaintiff's exhibit B, and was attached to plaintiff's complaint and is designated in the appellant's abstract as exhibit A. A short time after said exhibit C was executed by the appellant and respondent, appellant informed respondent that appellant desired to assign said contracts to Theatres Operating Company, to which company appellant was leasing the said theatre. Under the terms of the agreement, plaintiff's exhibits A, and B, the consent of the respondent to an assignment must be obtained. At appellant's request, therefore, a contract of assignment was made and entered into. Said contract of assignment is attached to plaintiff's complaint, and introduced in evidence as plaintiff's exhibit C. It is designated in the abstract as exhibit B. (pp. 9, 10, and 11) The original contract, plaintiff's exhibit A, entered into between appellant and respondent alone, provided that appellant should pay a rental for said picture film of \$4,000.00, and 50 per cent of the amount collected at the showing over \$10,000. The second contract executed by and between the same parties as sole contractors, provides that appellant shall pay 50 per cent of the gross box office receipts for the first seven days, and 25 per cent of the gross box office receipts for the two additional days; and said contract provides also that in the event the appellant fails to comply

with any of the terms of the contract, it guarantees to pay to the distributor, \$4,000.00 as film rental. Said plaintiff's exhibit B was entered into on the 9th day of September, 1927. The assignment contract entered into at the request of appellant, assigning the contract exhibit B to Theatres Operating Company, was executed on or about the 20th day of September, 1927. Plaintiff's complaint describes each and all of the said contracts. Defendant admits the allegations of the execution of the three contracts in its answer. Appellant admits all the allegations of the complaint except, performance by plaintiff, and that appellant agreed to pay \$4,000.00 rental. In addition to said admissions, appellant sets forth but one defense. That single defense in the answer is in effect that respondent should have collected 50 per cent of the receipts daily, and having failed to do so, varied the terms of the contract. That was and is the sole defense to this suit as is disclosed by the pleadings and the proceedings in the trial court. A general demur by appellant was interposed, but never argued, and the record discloses all the evidence including three contracts, Plaintiff's exhibits A, B, and C, were proved and introduced in evidence without objection on the part of appellant.

Appellant is guilty of some errors in copying documents in his abstract. The abstract does not correctly disclose the assignment contract, introduced as plaintiff's exhibit C, and known in the abstract as exhibit B. The last paragraph of the abstract, page 13, and at the end of the contract proper, reads as follows: "Our guarantee is on

condition that contract is faithfully performed; if not so performed, then no liability." There is no such language in any of the contracts. Theatres Operating Company *was* served with summons. [Judgt. Roll pp. 8, 9]

ARGUMENT.

Counsel for appellant makes or attempts to make four contentions: 1. That the complaint does not support the judgment; 2. That the guarantee pleaded and found is conditional; 3. That the guarantor (appellant) is discharged by a change in the mode of performance; and, 4. That the appellant is discharged by a change in the contract. Respondent will deal with said contentions in the order named.

I.

Under the first contention, appellant takes the position that there are not sufficient allegations in the complaint to support the judgment. Counsel contends that the allegations of the complaint which incorporated the contracts and made them a part of the complaint by copies, does not sufficiently plead the contracts, and he seems to contend also that the complaint showed no acceptance of the contract.

Counsel, in making his argument for insufficiency of allegation of the contract, cites a California case, to wit: *Los Angeles Humane Society v. Adler*. That case is not in point for the reason that there, the plaintiff had failed to allege that the contract of surety was made or execut-

ed by the party sought to be charged. In the case at bar, the allegation of execution is specific in the complaint. Paragraph 5 says, "that the American Theatre Company and the Theatres Operating Company made and entered into a contract in writing, known and described as an assignment contract, on or about the 20th day of September, 1927. A copy of said assignment contract is marked, exhibit B, attached hereto, and made a part hereof." "That the plaintiff furnished said film or moving picture to the defendants and fully performed all its part of said contracts specified to be performed." And at the end of said paragraph there is the following allegation: "Defendants exhibited said picture *under the terms of said contract* for a period of nine days."

The law of this state has been settled for a long time, that a contract may be alleged by attaching a copy thereof, and making it a part of the complaint, with the allegation of its execution by the defendants, and that such an allegation and attaching of a contract constitutes sufficient allegation of the contract itself, see:

Stevens vs. American Fire Insurance Company, 14 Utah 265, 47 Pac. 83. The court says: "Under our system, in a suit upon a written contract, it makes no difference whether a contract is set out in *haec verba*, or whether it is annexed, and by proper reference made a part of the pleading."

Orpheus Company vs. Clayton, 41 Utah 605. This case holds that attaching of the contract to the complaint and making it a part of the complaint with an allegation

of its execution, is a sufficient allegation of the contract.

Counsel also seems to contend that there is no allegation of acceptance of the contract sued upon. There was no delivery or acceptance. Respondent calls the court's attention to the complaint which alleges that the picture "was exhibited under the terms of said contract," and "that plaintiff furnished said film or moving picture, and fully performed all its part of said contract specified to be performed," and "defendants used and exhibited said film or moving picture in the American Theatre, under the terms of said contract for a period of nine days." Those allegations certainly are sufficient to import delivery and acceptance of the agreement sued upon. See:

Bailey vs. Leishman, 32 Utah 123, at 128—"The contention that there is no express allegation in the complaint, that the memorandum was delivered, and for that reason the complaint is vulnerable to a general demurrer, is not tenable. The allegation that the agreement was "entered into," it has repeatedly been held, is sufficient to admit proof of delivery if denied. From such an averment, delivery may be implied." Said case also holds that the words in the pleading entered into are allegations of ultimate fact and "import acceptance, and the meeting of minds." see also:

Wall vs. Eccles, 61 Utah 247. Eddington vs. U. P. Railroad Company, 42 Utah 274. Coray vs. Perry Irrigation Company, 50 Utah 70.

If there were any technical defect in the allegation of execution of the assignment contract, the same was reme-

died by appellant's answer which affirmatively alleges its existence and the obligations of respondent thereunder. It is also remedied by the findings of the court, and more especially finding number 10 of the findings of fact. (page 21 of the abstract). The technical objections if any, were waived by failure to object to the proof of its execution, and failure to object to its introduction in evidence.

II.

The second heading in appellant's brief reads, "The guaranty pleaded and found is conditional." It is difficult to ascertain from appellant's brief what his contention is, or what or how the quotations in his brief have any bearing on this appeal, or upon his assignment of errors. It is agreed that the whole contract and all the related contracts must be read together to properly construe the meaning of the suretyship obligation, and that if any antagonism exists between the different provisions, they must be reconciled. The last paragraph of said heading gives one the only inkling of appellant's contention. The quotation from *Burton vs. Dewey*, 4 Kan. App. 589 indicates that appellant may be contending that the assignment contract introduced in evidence as exhibit C, and designated as exhibit B in the abstract is an indemnity contract in which appellant agrees to indemnify plaintiff against loss if the debtor does not pay the debt. He evidently contends that if said contract is an indemnity contract, plaintiff was required to pursue the principal debtor

first, before suing appellant. The contract has no provision from which one can import that appellant agrees to indemnify anybody. On the contrary, the liability of appellant and the liability of the Theatres Operating Company arise at the same time under the very terms of said agreement. The very terms of the agreement provide that appellant and said Theatres Operating Company shall be joint and several. The contract reads, Abstract (pp. 10 & 11) "It is mutually agreed that if the Purchaser shall fail or neglect to perform or shall breach any of the terms and provisions of any of said contracts hereby agreed to be performed by said Purchaser, the said Exhibitor as well as the said Purchaser shall be liable jointly and severally to Vitagraph Inc., or its assigns for any loss occasioned thereby."

Certainly the contract is not one of indemnity, for that would be a promise running to the debtor. See: Stearns on Suretyship (2nd. Ed.) sec. 32 "The latter undertaking [a guarantee of indemnity] is an engagement to make good or save another from a loss upon some obligation which he has or is about to incur to a third party and is not a promise made to one *to whom* another is answerable. In other words, the promise is to the debtor and not to the creditor."

In the case at bar, involving an absolute guaranty of the contract, the appellant had no obligation to proceed by suit or otherwise against the principal.

Spencer on Suretyship and Guaranty, sec. 184 "A technical surety, i.e.: One who is bound with the prin-

principal on the same contract for the same debt, is not released by the creditor's failure to make demand upon the principal or to give notice of the latter's default, unless he (the surety) has specifically stipulated for such a demand or notice, or both."

Brandt on Suretyship and Guaranty, vol. 1, sec. 110. "Whether a surety or a guarantor becomes liable to a suit immediately upon default of, and before any steps are taken against the principal depends in every case upon the terms of the contract. When by terms of the contract the obligation of surety or guarantor is same as the principal; then as soon as principal is in default, surety or guarantor is in default and may be sued immediately, and and before any proceedings are had against the principal. In such a case no demand on the principal is necessary, nor is the demand on surety or guarantor necessary, nor need unliquidated damages be liquidated by a previous suit against the principal."

Stearns on Suretyship, sec. 61 at page 74. "A contract of guaranty for the payment of the rent and the performance of the lessee's covenants for the full term of the lease, made in consideration of the letting of the premises, is an absolute guaranty and renders the guarantor liable immediately upon the default of the lessee."

Spencer on Suretyship and Guaranty, sec. 172. "The reasons commonly given for this rule are that mere passive indulgence to the principal affords the surety no grounds for complaint, for the surety may at any time pay the debt himself and proceed immediately against the prin-

cipay for reimbursement, and that to permit the surety to thus control the actions of the creditor, at least without resort to a court of equity, would be in many cases both mischievous and oppressive, and without support in authority or justice, nor is it, we may add, within the terms of the contract of a surety or absolute guarantor of payment or performance that the creditor shall, even upon notice, proceed against the principal debtor."

See also: Peck vs. Trenk, 10 Iowa, 193: 74 Am. D. 384 (28 C. J. 895).

The law of this state is well settled that the surety and guarantor and his principal, may be sued at the same time and in the same suit. It is so specifically provided, by our statutes, sec. 6511, Compiled Laws of Utah, 1917, reads: "Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties *on the same or separate instruments*, may all, or any of them, be included in the same action, at the option of the plaintiff."

Sec. 6855 provides: "Upon the rendition of any judgment, if it shall be shown that one or more of the defendants against whom the judgment is to be rendered are principal debtors, and others of the said defendants are sureties of such principal debtors, the court may order the judgment so to state, and upon the issuance of an execution upon such judgment, it shall direct the sheriff to make the amount due thereon out of the goods and chattels, lands and tenements of the principal debtor

or debtors, or if sufficient thereof cannot be found within his county to satisfy the same, then that he levy and make the same out of the property, personal or real, of the judgment debtor who was surety."

The foregoing statutes clearly give to the court the authority to proceed with a suit against principal and surety, and that the liability of the parties in their order shall be designated by the judgment. If a demand for payment should be made first upon the principal, the sheriff is directed and must be directed under execution to so demand payment or to collect from said principal first if possible. But in the case at bar the judgment roll discloses that the respondent demanded payment from the Theatres Operating Company during the performance or showing of said picture, and demanded payment immediately at the conclusion of the performance, and also demanded payment thereafter from appellant, before bringing this suit. That fact has been settled for the court found in its findings of fact (abstract p. 21) paragraph 10. "That said picture described herein was exhibited under the contracts introduced in evidence therein. That the plaintiff was not required to collect its portion of the receipts daily, that plaintiff and its agents demanded payment from the Theatres Operating Company, and its officers and managers, on several occasions, during the exhibition of said picture in the said American Theatre Company, and demanded payment immediately after the termination of the showing of said picture, and shortly thereafter demanded payment from the defendant,

American Theatre Company, and that the defendant, American Theatre Company, is not, was not, and at no time has been discharged from obligations to pay the \$1,655.64 due and owing plaintiff as its percentage of the box office receipts during the showing of the said picture.”

This case is an appeal upon the judgment roll. The findings of the court are conclusive. The court not only finds that demand was made during the performance upon the principal and at the end of the performance, and that notice and demand were served upon appellant, but the court also finds specifically that the American Theatre Company (appellant) “is not, was not, and at no time has been discharged from obligations to pay the \$1,655.64 due and owing plaintiff.”

III.

Appellant contends that there was a change in the mode of performance of agreement of plaintiff's exhibit C. This is the only defense to the action at bar that was pleaded by appellant's answer, and it is the only defense advanced at the trial of this cause. Appellant's defense is set forth in paragraph No. 5 of the answer. (abstract pp. 15 & 16). Briefly stated, counsel's contention is that respondent was bound to collect its percentage of the receipts each and every day of the nine days, and that not being successful in doing so, the mode of performance was changed. There is a provision on the back

of the original contracts executed by appellant and respondent as the sole contractors, when appellant was operating its own theatre, that the exhibitor (appellant) should pay the percentage daily. There is no such provision in the assignment contract. That promise or obligation is the obligation of the appellant, and of course the assignee, Theatres Operating Company, but it is not a promise on the part of the respondent. In effect counsel's contention is that respondent, when he failed to collect the receipts each day, should have brought a suit. That would mean that respondent would be compelled to bring nine law suits to enforce the promise of appellant. Certainly no creditor is bound to go that far before he can look to the surety, especially when the surety is the original obligor. The findings which are binding in this case upon appeal, specifically find as a fact (as heretofore indicated) "That the plaintiff and his agents demanded payment from the Theatres Operating Company and its officers and managers, on several occasions during the exhibition of said picture in the American Theatre, and demanded payment immediately after the termination of the showing of said picture, and shortly thereafter, demanded payment from the defendant, American Theatre Company. * * *

The law is well settled that a creditor need not do more than demand payment of the principal obligor before bringing suit, unless the contract of guaranty provides something to the contrary. It has been shown herein that the contract of guaranty [pls. ex. C.] is absolute, and

that the appellant and the principal are jointly and severally bound. It is also settled that failure to collect immediately or proceed against the principal immediately and even giving an extension of time in which to pay, does not discharge the principal.

Stearns on Suretyship, (2nd Ed.) sec. 95. "Mere delay on the part of the creditor to proceed against the principal does not release the surety or guarantor. The creditor owes no duty of active diligence to his promisor in suretyship, except where such duty is made the subject of a condition, either express or by necessary implication."

Pingree on Suretyship and Guaranty, (2nd Ed.) sec. 134. "Mere forbearance or indulgence by a creditor to sue a principal will not release the surety. Because the surety is not put to any hazard by forbearance of the creditor, as he has it in his power to protect himself. Because the surety is not put to any hazard by forbearance of the creditor, as he has it in his power to protect himself. He may either pay the debt, and thus become subrogated to the rights of the securities of the creditor or he may compel the creditor to sue."

Pingree on Suretyship and Guaranty, (2nd Ed.) sec. 2. "A surety is usually bound with his principal by the same instrument executed at the same time and with the same consideration. He is an original promisor and debtor from the beginning and must know every default of his principal."

Stearns on Suretyship (2nd Ed.) sec. 82, at page 115. "Extension of time must be for consideration and binding obligation to discharge the guarantor."

Brandt on Suretyship and Guaranty, vol. 1, sec. 378. "In order that an agreement between the creditor and principal extending time of payment shall have the effect of discharging the surety or guarantor, the extension must be for a definite time."

As is seen by the authorities, the obligation or duty to see that the principal perform, is just as much the obligation of the surety as it is of the creditor and the guarantor must acquaint himself with the facts. In the case at bar, the duty of compelling performance by the principal, and the means of compelling performance lay with appellant. The original obligation of paying the percentage was the obligation of appellant and the principal was the tenant of appellant and under appellant's control. Appellant had better opportunity to compel the payment than did respondent.

IV.

The fourth and last contention of appellant is that appellant was discharged by a change in the contract. In his brief appellant's attorney contends that the contract was violated by showing the picture nine days instead of seven, or by showing it two additional days. Contract exhibit C which makes appellant a guarantor, is silent upon the question of time that the picture should be

run. The provision which counsel for appellant refers to is contained in contract plaintiff's exhibit B, or exhibit A in the abstract. This contract is as heretofore stated, executed by the appellant as exhibitor, and the respondent as distributor. The provision reads: "If the gross receipts total \$7,000.00 for the first five days, the exhibitor agrees to increase the run to nine days." And at the top or beginning of the contract, under the words "Consecutive days run," are the words "Seven to nine." It is clear that respondent makes no promise not to permit the showing of the picture for more than seven days, and in fact, by the very nature of the transaction, the control of the picture after delivery, is with the exhibitor. The cases cited by counsel are cases where the creditor has done something to change the contract, but there are no cases that hold that the conduct on the part of the principal and the guarantor, without an agreement with the creditor, will discharge the guarantor. Clearly under the terms of the agreement, the running of the picture by the Theatres Operating Company nine days, was permissive, and doing a thing that is permissive under the terms of a contract, does not discharge the surety. see:

Pingree on Suretyship and Guaranty, (2nd Ed.) page 119 "A surety also will not be released by a change in the contract or mode of performance which is permissible under the terms of the obligation as in such case the surety will be regarded as having consented thereto."

This contention of change in contract now made by the appellant in its brief, is raised for the first time. It is

an affirmative defense, and should have been raised by the answer. That was not done. In fact, plaintiff's answer admits (abstract pp. 15, 16) "full performance by respondent except as to collection daily; and (abstract 15) alleges "that *under the agreement*, exhibitor was to pay to the plaintiff 50 per cent of the gross box office receipts for the first week, and 25 per cent of the gross box office receipts for the time the picture might be run over one week." Appellant's fourth contention is not covered by the assignment of errors and of course it is elementary that it cannot be raised in argument for the first time in the Supreme Court, without having been specifically covered by the assignment of errors, and without having been plead as an affirmative defense, or in any way raised in the trial court. see:

Mills v. Gray, 50 Utah 224; 167 Pac. 358.

Smith v. Knauss, 52 Utah 614; 176 Pac. 621.

Egelund v. Fayter, 51 Utah 579; 172 Pac. 313.

Beatty v. Shelly, 42 Utah 592; 132 Pac. 1160.

Taylor v. Los Angeles Ry. 61 Utah 524; 216 Pac. 239.

It is respectfully submitted, that the judgment of the trial court should be affirmed.

JAMES M. CARLSON,
Attorney for Respondent.