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Howells Inc. A Corporation v. William Nelson, Aka William Lord Associate : Brief of Respondentt

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

HOWELLS, INC., a	:	
corporation,	:	
Plaintiff-Appellant,	:	
vs.	:	Case No. 14,829
WILLIAM NELSON, a/k/a	:	
WILLIAM LORD ASSOCIATES,	:	
Defendant-Respondent.	:	

BRIEF OF RESPONDENT

APPEAL FROM JUDGMENT OF THE FOURTH JUDICIAL DISTRICT
COURT FOR UTAH COUNTY, HONORABLE J. ROBERT BULLOCK

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FILED

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BRIEF OF RESPONDENT

NATURE OF THE CASE

This is an action by the plaintiff to collect the sum of \$2,852.66 owed by the defendant and to hold defendant William Nelson personally liable for the debt. Plaintiff also claims attorney's fees because the defendant gave the plaintiff an insufficient funds check on the account in the amount of \$2,164.19.

DISPOSITION IN THE LOWER COURT

On September 1, 1976, the case was tried without a jury before the Honorable J. Robert Bullock, Judge. The Court awarded judgment in favor of the plaintiff and against William Lord Corporation, doing business as William Lord Associates.

Appellant is attempting to appeal from the judgment of the trial Court.

RELIEF SOUGHT ON APPEAL

Respondent seeks a dismissal of the appeal of the appellant, or in the alternative, an affirmance of the judgment of the trial court.

STATEMENT OF FACTS

Respondent disagrees with several of the facts stated by the appellant and believes that the facts so stated are incomplete.

On February 5, 1976, a check was issued to Howells, Inc., on the account of William Lord Associates, and over the signature of William H. Nelson. The check was in the amount of \$2,164.19. (Plaintiff's Exhibit 1). Judgment of \$2,852.66 was entered on stipulation of the parties, that being the total amount due on the account of the defendant.

When defendant, William Nelson, delivered the check to the plaintiff's offices, he had a conversation with the Secretary-Treasurer and credit manager, Ettie Mosher. Mr. Nelson requested Mr. Mosher to hold the check for two weeks until he had made a bank deposit. (R. 10, 13). The check was presented to the bank on February 26, 1976, after which it was returned to the plaintiff unpaid by reason of insufficient funds in the account of "William Lord Associates". The check was again submitted on approximately March 2, 1976, and was again returned unpaid.

At trial it was shown that there was no corporation "William Lord Associates", nor had a certificate of doing business under an assumed name been filed with the Secretary

of State. It was, however, agreed by the parties and found by the Court that William Lord Corporation was doing business as William Lord Associates, William Lord Corporation being a duly incorporated corporation in the State of Utah.

Plaintiff claimed that since defendant knew at the time of the issuance of the check that there were insufficient funds, Utah Code Annotated 7-15-1 and 2, make defendant William Nelson personally liable, entitle plaintiff to attorney's fees.

The trial court found that because the check had been given to the plaintiff by the defendant with a request to hold it for two weeks before depositing it, the check was a promissory note and not a check within the meaning of Utah Code Annotated 7-15-1. Consequently, at the close of trial on September 1, 1976, the Court awarded judgment in the amount of \$2,164.19 against William Lord Corporation. (R. 24).

On September 14, 1976, counsel for plaintiff submitted to the Court a Judgment and Findings of Fact and Conclusions of Law. On September 16, 1976, the Court signed the Judgment and the Findings of Fact and Conclusions of Law, but the Judgment erroneously awarded judgment against "William Nelson, Inc.", instead of William Lord Corporation. (R. 36, 37, 38-40). Consequently, on September 21, 1976, the defendant filed a "Motion to Conform Judgment to the Proof or in Lieu thereof, Motion for New Trial". (R. 33-34). The defendant pointed out to the Court that Judgment had been erroneously entered against William Nelson Inc., a corpora-

tion instead of William Lord Corporation. Defendant asked that in the event the Judgment was not modified to conform to the proof, then a new trial should be granted, since the Judgment entered was not supported by any evidence. Counsel for plaintiff filed no response to the Motion and on October 14, 1976, the Court granted defendant's motion to Conform Judgment to the proof and ordered counsel for the defendant to prepare an appropriate amended judgment. (R. 32).

On October 20, 1976, counsel for plaintiff filed a Notice of Appeal, appealing to this Court from the "Judgment" of the trial court entered on the 16th day of September, 1976. The Notice of Appeal was dated September 22, 1976, but was, in fact, not mailed to the defendant until October 12, and not filed with the clerk until October 20. On October 21, the Court signed the Amended Judgment and the Amended Findings of Fact and Conclusions of Law. The Amended Judgment awarded judgment to the plaintiff against William Lord Corporation in the amount of \$2,852.66, and awarded plaintiff no attorney's fees.

Plaintiff did not amend its Notice of Appeal to include the Amended Judgment nor did it file a subsequent Notice of Appeal. As the case now stands, the plaintiff has appealed from the original judgment entered by the Court but has not appealed from the amended judgment. It should be remembered that the original judgment granted judgment against William Nelson, Inc., a corporation. William Nelson, Inc., is not named as a defendant in this action, nor was that term ever

used by anyone prior to its inclusion in the judgment prepared by counsel for plaintiff.

POINT I

THIS COURT HAS NO JURISDICTION TO CONSIDER THIS APPEAL.

Plaintiff's Notice of Appeal states that it is appealing from the judgment of the trial court entered on the 16th day of September 1976. (R. 31).

Plaintiff made no attempt to amend its notice of appeal or file a new notice of appeal when judgment was entered on October 21, 1976. As a result, plaintiff appeals from a judgment which has been rendered null and void by an amendment, thereby making plaintiff's appeal moot.

Appellant has completely failed to recognize the amended judgment, never mentions the amended judgment in its brief, and is apparently unconcerned about it.

While respondent realizes that defects in appellant procedure are subject to waiver, U.R.C.P. 73, State v. Good, 9 Ariz.App. 388, 452 P.2d 715 (1960); that the object of a notice of appeal is to advise the opposite party that an appeal has been taken, Nunley v. Stan Katz Real Estate Inc., 15 Utah2d 126, 388 P.2d 798 (1964); and that rules and statutes implementing the right of appeal are liberally construed and applied in the furtherance of justice, Wood v. Turner, 18 Utah2d 229, 419 P.2d 634 (1966); in the present case there is a technical defect in the appellate instruments of the plaintiff which this Court cannot correct.

Respondent submits that the case of Nunley v. Stan Katz

Real Estate Inc., supra, while different in fact is correct in principle and binding in the present case.

In Nunley, a judgment was entered and 11 days later motions for a new trial and to amend the Findings of Fact and Conclusions of Law were filed. The trial court heard the motions and granted an amendment to the Findings of Fact and Conclusions of Law and a judgment was subsequently entered. Defendant appealed from the subsequent judgment.

In deciding the case, this court was "initially faced with a procedural question, i.e., whether this Court can act on an appeal from an admittedly void judgment." It was determined that the subsequent judgment was void because the motion for a new trial and to amend the Findings of Fact and Conclusions of Law was filed too late for the lower court to act. Appellant claimed that the notice of appeal, while designating the subsequent judgment, was a clerical error and should have designated the prior judgment which appeal would then have been timely, since it would have been within the thirty day period.

This Court in Nunley determined that there would be no problem if it were faced with only one judgment appealed from, but in fact, there were two judgments. In deciding the case, the Court stated:

Respondent is entitled to know specifically which judgment is being appealed. The second judgment being different from the first, and in addition, void takes this case from the realm of a mere clerical error as was evidentially made in the Price case. The date becomes material in this

instance and we are not inclined to correct appellant's error. Nunley, supra, at 800.

The Court in Nunley concluded that an appeal cannot be taken from a void judgment. While the fact situation was essentially backwards from that in the present case, the same principles apply. Plaintiff appeals from a void judgment, thereby depriving this Court of jurisdiction to hear the matter.

POINT II

THE TRIAL COURT WAS CORRECT IN NOT AWARDING ATTORNEY'S FEES TO PLAINTIFF.

As stated above, Judgment of the trial court awarded judgment against William Lord Corporation of \$2,852.66 and costs in the amount of \$25.00, but denied judgment against defendant William Nelson personally and awarded plaintiff no attorney's fees.

Appellant contends that Utah Code Annotated §7-15-1 and 2 entitle it to attorney's fees in this action. In order to make U.C.A. §7-15-1 applicable, the following elements must be established:

1. The person must willfully, with intent to defraud draw any check, draft or order, and
2. The document must in fact be a check, draft, or order.

These two elements have not been established by the appellant.

First, the instrument signed by Mr. Nelson and given to the plaintiff was essentially a post dated check and there-

fore, a promissory note. It is undisputed that at the time of the transfer of the document, plaintiff's agent was informed that the check should not be deposited for a period of two weeks since there would be insufficient funds to cover the check during that time. (R. 10, 13). In State v. Bruce, 1 Utah2d 136, 262 P.2d 960 (1953), this Court, in a criminal case, held that a post dated check could not be used in a conviction for criminal fraud. The Court stated at 962:

The portions of our statute relating to bogus checks, material to the present inquiry, are:

"Any person who * * * wilfully, with intent to defraud, makes * * * or delivers any check, * * * knowing at the time * * * that the maker * * * has not sufficient funds in, or credit with said bank * * * for the payment of such check * * * is punishable * * *.

"The making, * * * or delivering of such check, * * * shall be prima facie evidence of intent to defraud." (Emphasis added).

The emphasized words indicate that the statute denounces the passing of a bad check only where there is misrepresentation that the maker has money or credit at the time the bad check is passed. It logically follows that it does not apply when both maker and payee know that the check is postdated. Under such circumstances the clear inference is that the maker has not money to pay the check at the time, but intends to cover it by the postdate. Where the payee accepts it with that understanding, he is not relying on a representation that the maker has money in the bank at the time, but rather that it will be covered when it is presented on its date. This amounts to a promise to be performed in the future. Obviously such a promise may be made in good faith, but plans go awry, unexpected

or uncontrollable events intervene, or a bona fide change of mind occurs, any one of which would negative the existence of an intent to defraud at the time the check was passed, thus eliminating an element essential to constitute the crime. Such reasoning is the basis of the general rule that a promise of performance in the future will usually not support a charge of fraud. We so held with respect to a postdated check in the case of *State v. Trogstad*. (Emphasis added).

For additional cases holding that acceptance of a postdated check or one wherein the drawer indicates that the check should be held for a period of time because of insufficient funds, is equivalent to an extension of credit; see *Seaboard Oil Company v. Cunningham*, 51 F.2d 321, cert. den. 284 U.S. 657, 76 L.Ed. 557, 52 S.Ct. 35 (1931); *People v. Poyett*, 99 Cal.Rptr. 750, 492 P.2d 1150 (1972); *People v. Meller*, 185 Colo. 389, 524 P.2d 1366 (1974); *State v. Eikleberger*, 72 Idaho 245, 239 P.2d 1069 (1951); *People v. Mazeloff*, 229 App.Div. 451, 242 N.Y.S. 623 (1930).

The above authorities clearly indicate that a check given with a representation that there are presently insufficient funds to cover the check and that it should be held for a number of days proscribe the application of U.C.A. §7-15-1 since the transaction becomes an extension of credit.

In addition, the document signed by William Nelson does not constitute a "check" within the meaning of U.C.A. §70A-3-104. That section defines a check as a "draft drawn on a bank and payable on demand". This same section states that to be a negotiable instrument, an instrument is either

"payable on demand or at a definite time". Since the instrument in the present case was not payable on demand but was payable at a definite time, it was not a check as defined in this section and the only other applicable definition is that of a "note".

Utah Code Annotated §70A-3-109, defines "definite time" as "payable or before a stated date or at a fixed period after a stated date".

In the present case, the instrument negotiated by defendant William Nelson was not a "check" as defined by the Uniform Commercial Code, and therefore, appellant failed to establish an essential element required by U.C.A. §7-15-1.

The second element essential for a claim under U.C.A. §7-15-1 is also lacking, that of willful intent to defraud at the time of the making of the instrument.

As previously stated, it is undisputed that the Secretary-Treasurer for the plaintiff accepted the check on the representation by the defendant that it was to be held for two weeks until such time that he could deposit funds in the account.

Essentially the same fact situation occurred in State v. Trogstad, 98 Utah 565, 100 P.2d 564 (1940), except that it involved a criminal prosecution. In that case, this Court ruled at 566:

The statute provides that there must be proved (a) an intent to defraud, and (b) a knowledge that the maker or drawer did not have (1) sufficient funds

or (2) credit with the bank for payment. The essence of the charge is that the injured party must have relied upon some false and deceitful pretense. The check must have been drawn, uttered or delivered willfully and with the intent to defraud and knowing there was neither sufficient funds nor credit with the firm or person upon whom it was drawn.

The specific intent to defraud must be found from the evidence. Such intent must be shown to exist in the mind of the maker or drawer. Intent may be found from the circumstances. Reliance by the receiver of the check, draft or order upon the representations made at the time of the transaction and damage resulting therefrom are elements of the fraud. If the receiver accepted the check, draft or order as evidence of a loan, an essential element of fraud would be wanting. In the instant case, there is evidence that the transaction was one between a borrower and a lender.

Mrs. Frakes knew that there were no funds available for payment of the check immediately, when she received the \$300 check, but that it was to be held for a few days until it was good. This is in accord with Mrs. Frake's own testimony. She held it for some time and tried to collect upon it. In other words, Mrs. Frakes treated the check as a promise to pay in the future, rather than as a check. This rebuts any idea that the check was delivered as a check with intent to defraud. (Emphasis added).

While U.C.A. §7-15-2 includes a presumption of fraud, if there are insufficient funds when the check is drawn or presented, that presumption is rebutted if the payee accepts the check as a promise to pay and not as a negotiable instrument. That was exactly the situation in State v. Trogstad and in the present case. See also Meller, supra; In Re Griffin, 83 Cal.Appl. 779, 257 P.2d 458 (1927); and People v. Burnett,

39 Cal.2d 556, 247 P.2d 828, 1952.

In the present case the appellant failed to prove that the document accepted was a check, was accepted as a check by the plaintiff's agent, or that at the time of the acceptance the defendant had the intent to defraud the plaintiff.

POINT III

DEFENDANT WILLIAM NELSON IS NOT PERSONALLY LIABLE ON THE JUDGMENT IN THE PRESENT CASE.

Appellant contends that Defendant William Nelson, since he signed the check in question, is personally liable for the amount of the check. The trial court found that William Lord Associates was an assumed name for William Lord Corporation, and since the defendant was an officer for that corporation, he had no personal liability when he signed the document.

Appellant contends that since the defendant failed to comply with the assumed name statute, U.C.A. §42-2-5, defendant William Nelson is personally liable for the check. What appellant fails to realize is that the assumed name statute merely precludes the filing of a lawsuit by one who has failed to properly register.

Penalties. Any person or persons who shall carry one, conduct or transact any such subbusiness under an assumed name without having complied with the provisions of this act, shall not sue, prosecute or maintain any action, suit, counterclaim, cross-complaint or preceeding in any of the courts of this state until the provisions of this chapter have been complied with, and any such person or persons so failing to comply shall be guilty of a misdemeanor. U.C.A. §42-2-10.

There is nothing in the assumed name statute nor in the provisions relating to corporations which makes an individual officer of the corporation liable for failure of the corporation to register for doing business under an assumed name.

Appellant's attempt to place liability on Mr. Nelson through case law is equally misplaced. All of the cases cited by appellant involve an officer or director who knew that there were insufficient funds at the time the check was written but failed to inform the other party thereby willfully defrauding the payee. In the present case, there was no fraud, and therefore, there can be no imposition of liability upon defendant William Nelson.

CONCLUSION

Plaintiff's appeal is defective, and consequently, this Court has no jurisdiction to hear the matter.

If the Court does consider the matter, the appellant has nevertheless failed to establish that at the time the document was issued by William Lord Associates, that there was an intent to defraud the plaintiff, and consequently, the document does not constitute a check and further, defendant William Nelson cannot be personally liable for its issuance.

Respondent respectfully requests the Court to dismiss the appeal, or in the alternative, to affirm the judgment of the trial court.

DATED this 12th day of February, 1977.

Rht C. Filling for
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MAILED a copy of the foregoing Brief to Dale R. Kent,
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Marianne Peterson
Secretary