

1987

Leonard D. Udell v. Tracy-Collins Bank and Trust Company : Brief of Appellant

Utah Court of Appeals

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BRIEF

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IN THE UTAH COURT OF APPEALS, THE STATE OF UTAH

LEONARD D. UDELL,
Plaintiff and Respondent,

Case No. 87 0478 CA

v

TRACY-COLLINS BANK AND TRUST
COMPANY,
Defendant and Appellant,

BRIEF OF APPELLANT

Appeal from a Judgment of the Fifth Circuit Court
Salt Lake County, Salt Lake City Department
State of Utah
Judge George M. Haley

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COURT OF APPEALS

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JURISDICTION

Jurisdiction is properly with the Utah Appeals Court pursuant to the provisions of Utah Code Annotated 78-6-10 (2), as amended 1986. The present case is an appeal from the ruling of a Circuit Court Small Claims Court.

STATEMENT OF
NATURE OF PROCEEDINGS

This is an appeal from the judgment of the Fifth Circuit Small Claims Court, Salt Lake City Department. Judgment was granted to the plaintiff Leonard D. Udell on the theory that the defendant, Tracy-Collins Bank and Trust Company was unjustly enriched by retaining possession of payments made by Mr. Udell to Tracy-Collins Bank and Trust Company. Tracy-Collins Bank and Trust Company contends payments were just compensation for the use and possession of the vehicle by Mr. Udell.

STATEMENT OF ISSUES

I. Was Tracy-Collins Bank and Trust Company unjustly enriched by retaining the vehicle payments made by Mr. Udell during the time he possessed the vehicle and prior to any communication with the bank?

II. Should the motion of the appellant to consolidate this action with the action pending in the Fifth Circuit Court, State of Utah, Salt Lake County, Salt Lake City, Department Civil No. 87 3012876 CV?

III. Should the proceedings of the Small Claims Court be upheld when the testimony was not under oath?

STATEMENT OF :

This case comes before the Court on appeal from a judgment entered in the Small Claims Court.

Plaintiff/respondent filed an action seeking return of payments he made to defendant/appellant on a vehicle. The Small Claims Court ruled the defendant, Tracy-Collins Bank and Trust Company had been unjustly enriched in retaining those payments.

At the time of hearing (October 28, 1987), motions were made by the defendant Tracy-Collins Bank and Trust Company to dismiss the action or to consolidate the small claims action with the defendant's action in the matter. The Small Claims Court refused to consider either motion.

The testimony in the claims action was taken without having sworn the witnesses.

The record is a copy of the taped proceeding rather than a transcript so by necessity the citations are general.

The facts of the case are as follows:

Tracy-Collins Bank and Trust Company sold a motor vehicle to Delmar and Velma Gray on or about July 8, 1985. Mr. and Mrs. Gray died and their son Gerald C. Gray took possession of the vehicle. Tracy-Collins Bank and Trust Company's loan was a dealer recourse loan. The death of the original parties caused the bank to seek to repossess the

vehicle and return it to the dealer. On July 20, 1987, Mr. Gerald Gray contacted the bank and indicated he would be returning the car to the bank as he did not want to assume the indebtedness. Mr. Gerald Gray failed to perform and Tracy-Collins Bank and Trust Company assigned the car for repossession on August 4, 1987.

In July 1987, Mr. Gray "sold" the vehicle to the respondent Mr. Leonard D. Udell. Mr. Gray did not notify the bank of this transaction and the bank, who retained title to the vehicle, continued to try to recover the vehicle. During July, 1987 and September, 1987 the bank received two payments on the loan from Mr. Udell. It is these payments out of which the dispute arises. Mr. Gray revealed to the bank he had "sold" the vehicle to a Mr. Udell and the bank contacted Mr. Udell. Mr. Udell refused to return the vehicle to Tracy-Collins Bank and Trust Company. There were some discussions with Mr. Udell regarding his assuming the loan. Mr. Udell, however, could not qualify for a loan.

Tracy-Collins Bank and Trust Company was forced to file a complaint in the Fifth Circuit Court, State of Utah, Salt Lake City Department, to recover the vehicle and to seek the issuance of a Writ of Replevin and for money damages. (Tracy-Collins Bank and Trust Company vs. Gray and Udell, Case #87-3012876 CV, filed October 8, 1987).

Mr. Gray filed the action from which this appeal arises on October 6, 1987, seeking return of the payments made. Tracy-Collins Bank and Trust Company did not counter-claim in the small claims action as it had filed another action against Messrs. Gray and Udell and said action included a request for a Writ of Replevin, an order beyond the ambit of the jurisdiction of the Small Claims Court.

Mr. Udell claimed entitlement to a refund for the payments he made while he possessed the car from July to October, 1987.

Tracy-Collins Bank and Trust Company claims that Udell had use of the vehicle from July through October, 1987 and that the payments made were just compensation for that period of use and noted its extensive costs in seeking to repossess the vehicle.

SUMMARY OF ARGUMENT

- I. The bank was not unjustly enriched in retaining payments.
- II. The cases should have been consolidated since the issue and facts of the two cases are inseparably interwoven.
- III. The Small Claims Court proceedings are fatally flawed in that they were not conducted pursuant to sworn testimony.

ARGUMENT

I. Unjust enrichment of a person occurs when he has or retains money or benefits which in justice or equity belong to another. Granted Tracy-Collins Bank Company has retained money paid by Mr. Udell. The money (payments) retained by Tracy-Collins do not in either justice or equity, however, belong to Mr. Udell. Mr. Udell unilaterally chose to make the two loan payments without any demand, agreement, or coercion from Tracy-Collins Bank and Trust Company. In view of the fact that Mr. Udell had possession of the vehicle, it is only right that the bank be recompensed for his use of the vehicle. And thus the conclusion that in justice and equity these payments did not belong to another.

The plaintiff, Mr. Udell, had approximately four (4) months (July, August, September and October) use of the vehicle which was effectively converted to his own use prior to contacting Tracy-Collins Bank and Trust Company.

It surely must have occurred to Mr. Udell prior to September 17, 1987 that he ought to contact Tracy-Collins Bank and Trust Company and attempt to obtain title to the vehicle he had "purchased" in July, 1987. Mr. Udell is a bright individual with considerable business experience and his testimony indicates he knew he could not qualify for a loan secured by this vehicle. The bank attributes Mr. Udell's

failure to contact the bank to this supposition.

Judge Haley in his ruling alluded to the "fact" that Mr. Udell had made his payments in reliance upon an assumption agreement being entered into with the bank. The testimony of Mr. Udell was, however, that he made the two payments prior to having any contract with the defendant, Tracy-Collins Bank and Trust Company. The payments then could not reasonably have been made in reliance upon any anticipated contractual arrangement with the bank.

The loan on the vehicle was technically in default upon the death of the debtors. The bank attempted to negotiate an assumption arrangement with Mr. Delmar Gray, the son of the deceased debtors. Said agreement did not come to pass, and the bank began to pursue its responsibility under the terms of its dealer contract to recover the vehicle. Said efforts to locate and recover the vehicle began August 8, 1987.

Mr. Udell's testimony is that he "purchased" the vehicle from Mr. Gray in July, 1987 and that he did not have any communication with the bank until middle to late September 1987 regarding possible purchase of the vehicle. Mr. Udell then had possession and use of the vehicle for at least one and one half (1 1/2) months before contacting the bank and continued in possession of the vehicle for an additional month. During this entire period the registration on the vehicle had lapsed, the vehicle was uninsured and the

physical possession of the motor vehicle title remained in the possession of the defendant.

The Utah Court looked at the unjust enrichment issue in the case of Jensen v. Whitesides, 370 P2d765, 13 Utah 2d 193, (1962). This was an action brought by Ms. Jensen to compel delivery of a deed to her from the defendants. It seems Ms. Jensen had paid the Whitesides to build a home for her. The Whitesides failed to deliver a deed to the property and Ms. Jensen sued them on a claim of unjust enrichment arising out of a claimed contract to deliver a deed. The lower Court found for Jensen and the Utah Supreme Court affirmed. In Jensen we at least find an implied contract between the parties. In the present case, Mr. Udell made payments to Tracy Collins Bank and Trust Company of his own volition and by his own testimony prior to any discussions with Tracy Collins Bank and Trust Company regarding an assumption. One certainly can not infer from those facts that a bilateral contract existed. The bank was incidentally not aware who had made the payments on the loan in question only that payments had been made. In September, 1987 when the bank seriously began to pursue the matter, it then became aware that both payments made had been from Mr. Udell.

II. The motion of the defendant, Tracy-Collins Bank and Trust Company to dismiss and/or consolidate the case should have been addressed and granted. The facts out of which this

case arises and the Fifth Circuit action of Tracy-Collins Bank and Trust Company vs. Gray and Udell arises are the same facts. The issues of the two actions are clearly interwoven and overlapping.

The appellant draws the Court's attention to the Matter of Appeal in Maricopa County Juvenile Action, 680 P2d 143, 140 Ariz 7 (1984). In that matter dependency proceedings and adoption proceedings concerning the same child were being entertained by separate courts. The Court in commenting on the circumstances noted:

"In light of overlapping interests and issues, principals of judicial economy mandate that the dependency proceedings and the adoption proceedings be consolidated".
at Page 145

The Court went on to note that jurisdiction should go to the first Court which would have entertained jurisdiction. If this rule were to be applied to the matter before the Court, the following would result: The small claims action would have been consolidated into the Fifth Circuit action 87-3012876 CV rather than consolidating the matters into the small claims action. The reason the Small Claims Court would not have had jurisdiction stem from the facts the sums involved exceed the small claims jurisdiction limit and the remedy sought (i.e. issuance of a Writ of Replevin) is without the purview of the jurisdiction of the small claims Court.

III. Testimony in the action was not taken from sworn witnesses. The nature of a small claims proceeding is such that the rules of evidence are not observed. While this is perfectly in keeping with the spirit of a "people's court", the failure to have testimony offered under oath exceeds the ambit of the proposed informality of the small claims forum. Without the protection of sworn testimony, the Small Claims Court runs the risk of becoming a mockery.

That although the rules of evidence do not apply in small claims actions, Rule 603 of the Utah Rules of Evidence requiring that testimony be taken under oath certainly is relevant.

CONCLUSION

The Small Claims Court erred in failing to consolidate this case with the other pending matter and erred in ruling that the payments made by Mr. Udell had been made in reliance upon the negotiation of an assumption agreement and the bank had been unjustly enriched by retention of the proffered payments.

The case should be consolidated with Fifth Circuit Court action #87-3012876-CV for further proceedings.

The foregoing Brief of Appellant is respectfully
submitted this 6th day of January, 1988.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief of Appellant was served upon the plaintiff/respondent Leonard D. Udell, 810 North 1220 West, Provo, Utah 84604, by placing said brief in the United States mails this 6th day of January, 1988.


Cynthia F. Daniels

ADDENDUM

Utah Rules of Evidence, Rule 603

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation in a form calculated to awaken his conscience and impress his mind with his duty to do so.