

2001

Westinghouse Credit Corp v. HydrosSwift Corporation : Brief of Appellant

Utah Supreme Court

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Paul M Halliday; Halliday and Halliday; Attorney for Respondent.

Paul N. Cotro-Manes; Cotro-Manes, Warr, Fankhauser and Beasley; Attorney for Appellant.

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BRIEF

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OF THE STATE OF UTAH
BY BRIGHAM YOUNG UNIVERSITY.
Reuben Clark Law School

WESTINGHOUSE CREDIT
CORPORATION,

Plaintiff and Respondent,

vs.

HYDROSWIFT CORPORATION,

Defendant and Appellant.

Case No.
13533

BRIEF OF APPELLANT

Appeal from the Judgment of the Third Judicial
District Court of Salt Lake County, State of Utah,
Honorable Stewart M. Hanson, Judge.

Paul M. Halliday of
HALLIDAY & HALLIDAY
Attorney for Respondent
400 Executive Building
Salt Lake City, Utah 84111
Telephone: 355-2886

Paul N. Cotro-Manes of
COTRO-MANES, WARR,
FANKHAUSER & BEASLEY
Attorney for Appellant
430 Judge Building
Salt Lake City, Utah 84111
Telephone: 355-7551

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IN THE SUPREME COURT OF THE STATE OF UTAH

WESTINGHOUSE CREDIT
CORPORATION,

Plaintiff and Respondent,

vs.

HYDROSWIFT CORPORATION,

Defendant and Appellant.

Case No.

13533

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an action brought by the Plaintiff to enforce a guaranty purportedly executed by the Defendant guaranteeing the floor planning account of a boat dealer buying boats from the Plaintiff manufactured by the Defendant.

DISPOSITION IN LOWER COURT

The case was tried to the Court. From a judgment for the Plaintiff, Defendant appeals.

RELIEF SOUGHT ON APPEAL

The Defendant seeks a reversal of the judgment and the entry of a judgment in favor of the Defendants of no cause of action, or that failing, a new trial.

STATEMENT OF THE FACTS

The Plaintiff is a corporation engaged in the business of financing the purchase by trust receipts and floor planning of various commodities by retailers.

The Defendant is engaged in the manufacture and sale of boats, the sales being to retail dealers and outlets.

In 1972, a retail dealer by the name of L & S Boats, located in Great Falls, Montana, wished to buy boats for retail sale. As a means of purchasing the boats, L & S Boats entered into a financing contract with the Plaintiff whereby Plaintiff would purchase the boats from Defendant and cause their delivery to be made to L & S Boats (Exhibits 5-P, 7-P, 8-P, 16-P). The boats were to be held in trust by L & S Boats for the benefit of the Plaintiff, and when each boat was sold, the original purchase price of the boat was to be transmitted to the Plaintiff. This agreement between L & S Boats was entered into in March of 1972 (R 53) (Exhibit 4-P). Plaintiff required the Defendant to sign a guaranty of L & S Boat's account as a condition for Plaintiff buying and paying for the boats (Exhibit 1-P), although L & S Boats did not know of the guaranty (R 84). It was

agreed by the parties that monthly floor checks of the inventory would be conducted by Plaintiff's agent (R 55) and floor checks by Defendant every 90 days. The guaranty is silent as to the amount of credit that was purportedly guaranteed by the Defendant; however, Plaintiff admitted that the credit amount was \$25,000 (R 56, 78).

Shortly after the agreements were signed, L & S Boats violated its trust agreement and sold boats without remitting the cost price to the Plaintiff. This situation persisted for several months and was known to Plaintiff. On December 20, 1972, the Defendant was advised by the Plaintiff that L & S Boats was out of trust on numerous boats, and shortly thereafter, Defendant demanded that Plaintiff pick up the balance of the boats then still in the possession of L & S Boats (R 67). Plaintiff refused to do this (R 48, 51) and demanded that the Defendant pay to Plaintiff the remaining balance due from L & S Boats. During this interval, L & S Boats disposed of the remaining boats without remitting to the Plaintiff any money realized from the sale of the boats. Defendant refused to pay Plaintiff the balance due to Plaintiff from L & S Boats and Plaintiff thereupon brought suit against Defendant on the guaranty for the claimed balance.

Defendant's sales invoices sold and delivered title of the boats to the Plaintiff and the Defendant did not retain any title or security interest in the boats (R 76). The evidence did not establish that Plaintiff ever perfected its security interest in the boats with proper filing

of a UCC Form 1 with the Secretary of State of Montana (R 98, 99).

Plaintiff, at the time of trial, maintained that the Defendant had an unequivocal duty to perform under the guaranty. Defendant defended the action on the grounds that the Plaintiff had breached its duty to the Defendant by its failure to repossess the unsold boats when it found that L & S Boats had been selling out of trust; and further, that the guaranty was null and void in that the same had not been approved by the Board of Directors of the Defendant when the guaranty agreement expressly required such an approval (Exhibit 1-P), and that Plaintiff had obtained other guarantors, but had not named them in the action, and that Plaintiff failed to perfect its security agreement with L & S Boats to protect title. The matter was tried to the Court, and upon judgment for the Plaintiff and against the Defendant this appeal was taken.

ARGUMENT

POINT I

DEFENDANT'S GUARANTY WAS VOIDED BY PLAINTIFF'S CONDUCT.

It is the position of the Defendant that the Plaintiff had a duty to repossess the boats in the possession of L & S Boats when the Plaintiff ascertained that L & S Boats was selling boats out of trust and dissipating the

proceeds of the inventory without paying Plaintiff, if Plaintiff intended to look to Defendant on the guaranty.

The evidence was undisputed that the Plaintiff refused to repossess the boats or to take any steps whatsoever to protect the position of the guarantor, Defendant Hydroswift Corporation, even though requested by it to do so.

In the authoritative work 50 Am Jur 1011, *Suretyship*, Section 163, it is stated:

“The contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction. Moreover, a surety is a favored debtor and his rights are zealously guarded, both at law and in equity. Hence, the slightest fraud on the part of the creditor, touching the contract, annuls it.”

In the instant case, the Plaintiff had title to the boats. It knew that the L & S Boat Company was selling the boats out of trust and in violation of its agreement with the Plaintiff, but Plaintiff took no steps to protect itself or to protect the guarantor Defendant. Defendant could not repossess the boats as title was in Plaintiff, and L & S Boats held the boats under a trust agreement with the Plaintiff. The Plaintiff was in a position to satisfy its debt, but chose not to do so.

Again, 50 Am Jur 970, *Suretyship*, Section 99, sets forth the general law that:

“Failure to assert, setoff or counterdemand against principal . . . ordinarily, a surety is discharged from the liability when a creditor, hav-

ing in his possession or under his control the means of satisfying the debt, chooses not to make the appropriation and voluntarily parts therewith."

It has long been the law that "In all suretyship relations, the creditor owes to the surety a duty of continuous good faith and fair dealing." *Sumitomo Bank of California vs. Iwasaki*, (Calif. 1968) 73 Cal. Reporter 564, 447 P. 2d 956.

Since Utah has adopted the Uniform Commercial Code (referred to as "UCC" herein) 70 A Section 3-606, UCA, there can be little doubt that the release of security by the holder serves as a release of the accommodation maker or guarantor (11 Am Jur 2d 981, *Bills & Notes*, Sec. 939). The adoption of the UCC has overruled the Court's previous ruling in *Felkner vs. Smith*, (1933), 77 U. 410, 296 P. 776. The effect of the Uniform Negotiable Instrument Law (sometimes referred to as "NIL") repealed by the adoption of the UCC on this question, has likewise become moot. In the Illinois case of *Key Credit Corporation vs. Young*, (1970) 124 Ill. App. 2d 309, 260 N.E. 2d 488, the Appellate Court discussed the Utah law with respect to the releasing of chatteled property back to the maker of the note without the consent or knowledge of an accommodation maker. The case arose in the State of Utah and the case was decided on Utah law. The Illinois Court, after discussing the law prior to the adoption of the Uniform Negotiable Instrument Law, and subsequent thereto under the UCC, and the effect of *Wolstenholme vs. Smith*, 34 U. 300, 97 P. 329, concluded by ruling:

“We, too, are of the opinion that by releasing the chattel mortgage property after default without the consent or knowledge of Defendant, as accommodation maker, the Plaintiff discharged the obligations of Defendant under the note. We realize that some cases have interpreted the NIL differently. However, our holding is in conformity with both the common law existing prior to the adoption of the NIL, and today’s Uniform Commercial Code which Utah adopted in 1966. (See Utah Code Annotated 1953, *Replacement*, Vol. 7B, Title 70A, Section 3-606).”

This case then goes on to hold that the discharge is not necessarily complete, but it is effective only to the extent that the accommodation maker has been injured. This holding is in conformity with a similar ruling under the UCC in the Oregon case of *Christensen vs. McAtee*, (Oregon 1970) 473 P. 2d 659. Wyoming has followed this rationale in the case of *Shaffer vs. Davidson*, (Wyo. 1968) 445 P. 2d 13. See annotation 2 ALR 2d 260, 269.

In the authoritative work on the UCC, 3 Anderson Uniform Commercial Code, 2 Ed. 129, Section 3-606:7, it states:

“The holder of a negotiable instrument discharges any party to the instrument to the extent that, without such party’s consent, the holder unjustifiably impairs any collateral for the instrument given by or on behalf of that party or any person against whom he has a right of recourse.”

In the instant case, we have even a stronger case than those cases where the guarantor or accommodation maker was looking to chattelled or pledged security. In

the instant case, title to the merchandise was vested in the Plaintiff although possession was in L & S Boats under the trust agreement and floor plan. There was no way that Defendant could assume the position of the primary debtor as pointed out in the *Felkner vs. Smith* case. That the Defendant was damaged is obvious, and that the amount of that damage is susceptible to computation by reviewing Exhibit 3-P which shows the inventory then on hand with L & S Boats when demand was made by Hydroswift to repossess the boats. Plaintiff's Exhibit 2-P, the letter of December 27, 1972, showed that the inventory on hand was valued at \$13,721.07 at wholesale prices. The evidence further showed that in January of 1973, when Defendant again requested the Plaintiff to pick up the remaining boats, there was approximately \$9,000 in merchandise left at L & S Boats (R 48).

Plaintiff attempted to show that in addition to title to the boats, that it had perfected a security lien under the UCC of Montana. However, Plaintiff failed to introduce into evidence recorded copies of the UCC Form 1 and the Defendant moved that all references to the UCC Form 1 be stricken (R 98, 99). The Court erred in not striking the testimony with respect to it (Rule 4, Rules of Evidence, Utah).

3 Anderson, Uniform Commercial Code, 2d Ed. 129, Sec. 3-606:8 states:

“The failure to perfect a security interest under Article 9 is an ‘impairing’ of collateral within the discharge provision of Article 3 . . .

“Consequently, where a creditor is given chattel mortgage on an automobile to secure payment of a note, the chattel mortgage constitutes ‘collateral’ and if the creditor fails to file the mortgage with the result that it has no effect as against a subsequent purchaser of the automobile, there is a failure to preserve collateral within the meaning of Code Sec. 9-207, and an accommodation maker on the note is discharged under Code Sec. 3-606.” (See *Shaffer vs. Davidson*, op cite)

POINT II

PLAINTIFF FAILED TO PROVE THAT THE GUARANTY WAS AN OFFICIAL ACT OF DEFENDANT AND THEREFORE, THE COURT ERRED IN GRANTING JUDGMENT BASED ON GUARANTY.

Plaintiff’s entire case is based upon the guaranty which was purportedly executed by the corporation. Plaintiff introduced into evidence Exhibit 1-P which shows that a Mr. Ludlow executed the guaranty, but nothing is shown as to his corporate office or capacity.

The guaranty form used by the Plaintiff has printed on it in bold type:

“The signature of each corporate guarantor must be supported by a certified copy of a board resolution or by-law naming the officer or officers authorized to sign.”

It is evident that the Plaintiff recognized the general law which requires that corporate authority be shown for the execution of a guaranty.

The general law is stated by 19 Am Jur 2d 607, *Corporations*, Section 1183:

“A corporation is not liable upon a contract of suretyship or guaranty made by an officer, in the absence of evidence that the contract was within the authority of the officer as expressly or impliedly conferred upon him by statute, by-law or the act or acquiescence of its managing body, or was properly incidental to business entrusted to him by that body, or was within his ostensible authority as established by the practice of the company, or was ratified by the proper authority.”

In an annotation in 34 ALR 2d 290, *Authority of Officer or Agent to Bind Corporation as Guarantor*, at page 291, it is stated, after reasserting the principle laid down by the 19 Am Jur 2d statement:

“Although this general rule applies to all contracts of a corporation, it has specific application to those of suretyship or guaranty because these are not usually contemplated as within the regular course of commercial business.”

No corporate authorization was asked for at the time of the signing of the guaranty and no corporate authorization was ever delivered.

The Plaintiff had the burden of showing the corporate authority of the officer executing the guaranty (9 Fletcher Cyclopedia Corporations 506). The officer being an agent, the law of agency applies. As stated in *Fuller vs. Stout*, (Okla. 1917) 166 P. 898 at page 900:

“That agency is a fact, the burden of proving which rests upon the party affirming its existence, is an unquestioned canon of the law.”

As stated in 19 Am Jur 649, *Corporations*, Section 1239:

“It is for him who asserts that such authority exists to prove it.”

Plaintiff, in its Complaint, did not specifically allege corporate authority; however, Defendant denied the entire guaranty. This put the matter of the guaranty in issue. Plaintiff did not attempt to introduce any evidence or testimony with respect to the existence of corporate authority of Mr. Ludlow, or to show any other facts which would allow the finding of apparent or ostensible authority on the part of Mr. Ludlow to execute the guaranty on behalf of the corporation (*Grover vs. Garn*, 23 U. 2d 441, 464 P.2d 598; *Amoss vs. Bennion*, 18 U. 2d 251, 420 P. 2d 47). The facts of each case must be looked at to determine whether or not there is such authority (*Peterson vs. Holmgren Land and Livestock Company*, 12 U. 2d 125, 363 P. 2d 786).

The form used by the Plaintiff showed on its face that the corporate authority was required to be evidenced at the time that the document was to be executed. Plaintiff cannot now be heard to assert estoppel, apparent or ostensible authority. It well knew that such a guaranty was outside the scope of general corporate authority and that it could not rely upon the signature of an officer alone.

The failure of the Plaintiff to prove corporate authority is fatal; and therefore, the Court erred in finding that there was a viable and legally binding guaranty which bound the Defendant corporation.

CONCLUSION

It is respectfully submitted that the Trial Court erred in not granting Defendant's motion to dismiss Plaintiff's Complaint.

The Court further erred in ruling that the guaranty executed by the Defendant was a corporate act and that the corporation was bound thereby.

The Court further erred in not holding that the Defendant's guaranty was voided by Plaintiff's conduct in refusing to repossess the boats and to sell the same to satisfy the indebtedness.

Respectfully submitted,

PAUL N. COTRO-MANES of
Cotro-Manes, Warr,
Fankhauser & Beasley

Attorney for Appellant

430 Judge Building
Salt Lake City, Utah 84111

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