1977

Joseph S. Gasser, Jr. v. Lyman Dayton : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

JOSEPH S. GASSER, JR.,	)	
Plaintiff-Appellant,	)	
vs.	)	Case No. 15394
LYMAN DAYTON,	)	
Defendant-Respondent.	)	

APPELLANT'S BRIEF

Appeal from a Judgment of the Third Judicial District Court for Salt Lake County, State of Utah.

Honorable Dean E. Conder, Judge

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APPELLANT'S BRIEF

NATURE OF THE CASE

This action is based on an oral agreement whereby the plaintiff loaned $5,000.00 to the defendant on August 26, 1969, which was to be repaid within one year of that date. Defendant failed to repay the $5,000.00, claiming that it was not a loan, but a business investment, the return of which was contingent upon the profitability of a current film venture.

DISPOSITION IN LOWER COURT

After a trial held before the district court sitting without a jury, the court granted judgment in favor of the defendant of no cause of action.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the Findings of Fact and Conclusions of Law, and for reversal of the judgment against plaintiff of no cause of action; for judgment in favor of the plaintiff for the amount of $5,000.00 plus interest to date.

STATEMENT OF FACTS

The plaintiff was a resident of Salt Lake County, State of Utah, and the defendant was a resident of the State of California and engaged in motion picture production during all times material to this action. The plaintiff and defendant became acquainted during the fall of 1969 through the defendant father-in-law. (Tr. p. 3) In August of 1969 plaintiff transferred $5,000.00 to the defendant (Tr.p.3) which the defendant admits receiving. (Tr.pp.17-18)

Plaintiff maintains that he loaned the $5,000.00 to defendant to help the defendant pay off his business debts and his personal obligations, such as rent. (Tr. pp.3,4,5 and 11) According to the plaintiff the money was to be repaid within one(1) year (Tr.p.4) along with a normal interest on the money (Tr.p.5) On August 4, 1971, plaintiff sent a letter to defendant (R.p.23), introduced as Exhibit P-2 at trial, requesting repayment of the $5,000.00 loan. Defendant responded by letter dated August 16, 1971, and marked as Exhibit P-3 at trial, stating that he hoped "foreign sales will make it possible to give a remittance of the $5,000.00 dollars sooner." (R.p.22) Again January 13, 1972, plaintiff wrote defendant a letter, marked Exhibit P-4 at trial, demanding repayment of "the $5,000.00 I made to you..." (R.p.24) To date, the defendant has made no repayment.

any of the $5,000.00 dollars (Tr.pp.5,9).

Defendant claims that the $5,000.00 he received from the plaintiff was for an investment in a film, repayable only if the film made a profit (Tr. pp.19,20). Also, if the film was profitable, the plaintiff was to receive an additional 2% return on his money. (Tr. p.20) Plaintiff denies having any interest in the film (Tr.p.5) and the defendant admits that the plaintiff was given nothing to evidence any ownership in the film (Tr.pp.32,33).

ARGUMENT
POINT I

THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE COURT'S FINDING THAT THE $5,000 RECEIVED BY DEFENDANT WAS AN INVESTMENT, WHILE THE EVIDENCE CLEARLY PREPONDERATES TO THE CONTRARY THAT THE $5,000 WAS A LOAN FROM PLAINTIFF TO DEFENDANT.

This Court adheres to the substantial evidence rule in reviewing the trial court's findings and rulings Cannon v. Wright, 531 P.2d 1290, Utah 2d (1975).

In the case before this Court now, the record clearly indicates no substantial evidence upon which the lower court's ruling can be approved and upheld.

The material evidence adduced at trial weighs heavily in plaintiff's favor. Only four exhibits were introduced at trial and all were by the plaintiff. The first exhibit, marked P-1 at trial, was the check for $5,000.00. This check was sent to the defendant in California where it was endorsed by his wife and deposited in the bank where the defendant had a personal account.

The second piece of documentary evidence received at trial as Exhibit P-2 was a letter dated August 4, 1971 from the

plaintiff to the defendant. In this letter the plaintiff asks the defendant to repay the loan made to him because the plaintiff was in need of money at that time.

Defendant responded to the plaintiff's letter of August 4, 1971 by a letter dated August 16, 1971, which was introduced at trial as plaintiff's Exhibit 3. In this letter the defendant replies to plaintiff's request for repayment of the loaned money by stating that "I'm hoping that foreign sales will make it possible to give a remittance of the $5,000.00 dollars sooner". The defendant thereafter concluded the letter by saying, "The monies you sent came at a very crucial time and I appreciate that fact. I am doing all I can to justify your confidence". This letter does not make payment conditional. In fact, it offers remittance as soon as funds are available. Also, and more importantly, the defendant does not deny or contradict plaintiff's statement that the money was a loan to the defendant. Surely he would have denied the money was a loan if it had been received for another purpose.

The last document introduced at trial was another letter from the plaintiff to the defendant, dated January 13, 1972. In the plaintiff asks for repayment of "the $5,000.00 loan I made to you." (Exhibit P-4)

The testimony received at trial can be fairly summarized by stating that the plaintiff testified that the money given to the defendant was a loan to be repaid within a year, with the defendant countering that it was an investment to be repaid out of film profits, if any. Yet the defendant admits he gave the plaintiff no written document to evidence this business investment.

(Tr. p.32 lines 14-30 and p. 33 lines 1-5)

The above listed sequence of facts and documentary evidence cannot be interpreted in any manner other than in support of plaintiff's claim that the money was loaned to defendant.

The only aspect of the documentary evidence which would tend in any manner to support the defendant's contention that the money was given to him for investment purposes is a notation on the check which appears to be the letters inv. However, as can be seen from "exhibit A" attached to the Answer to Defendant's Interrogatories this notation does not appear on the check as of August 26, 1967, which is the date the check bears. (R.p.21) It must have been added to the check sometime after it was drawn. Further, the notation is written in pencil, and the plaintiff has testified that it did not look like the letters inv to him, and that even if it was, he could not recall writing it on the check, and it was not his custom to make such a notation on a check. (Tr.p.12 lines 25-30 and p.13 lines 1-3)

The plaintiff claims that the defendant told him that the money was to be used for satisfying defendant's personal and business debts. (Tr. P.4 lines 17-21; Tr. P.11 lines 23-25)

The defendant claims the money was used in the business and applied to him personally as a salary. (Tr.P21 lines 3-8) This shows that the money was used partly for his personal expenses by way of the salary distribution to him. This directly supports the plaintiff's testimony that the money was to be used for business and personal obligations.

At the trial's conclusion the court commented on the evidence and set forth the following summary of key evidentiary

points (Tr. p. 34 lines 5-22):

> (1) "The check has the word, inv. on it, which leads me to be concerned about whether or not that's an investment;"
> (2) "but in Exhibit P-2 Mr. Gasser's letter to Mr. Dayton, he does refer to it as a loan."
> (3) "But in Mr. Dayton's response he does not contradict that."
> (4) "Something else that bothers me very much is, that the check shows it was deposited by Mrs. Dayton and would certainly give me the appearance that goes into a personal account rather than a business account, because I am assuming--I think Mr. Dayton did testify that he and his wife did have an account, a joint account, and that leaves some questions in my mind."

Taking these comments together with the undisputed fa that the defendant received the money, there are four material elements out of five that support and favor the plaintiff's contentions. These elements are that the defendant received $5,000.00 from plaintiff, plaintiff by letter asked for repaym of this $5,000.00 because it was a loan, defendant did not cont dict or deny that it was a loan in his letter response to plai tiff's demand for payment and, finally, the money was deposited a bank where the defendant and his wife had a personal account, with Mrs. Dayton, the defendant's wife, endorsing the check.

The only possible negative element of supporting evid appearing at trial is that the check has inv written on it. Ho ever, even this was written in pencil sometime after the check had been sent to the defendant.

From the above elements, it must be clear that the evidence greatly preponderates in plaintiff's favor.

The oral evidence is contradictory, yet, four out of

two key pieces of documentary evidence favor plaintiff's oral testimony, and the one piece of evidence unfavorable to plaintiff's contentions is the inv notation on the check, which, at best, is an undramatic and unconvincing piece of evidence. Surely not enough to outweigh the greater quantum of evidence favorable to the plaintiff.

It seems clear that the court has misapplied the proven facts and made findings against the weight of the evidence, and these are sufficient grounds for reversal. First Security Bank of Utah, N.A. v. Hall, 504 P. 2d 995, 29 Utah 2d 24 (1972); Gunnison-Fayette Canal Co. v. Roberts, 364 P.2d 103, 12 Utah 2d 153 (1961).

A proper finding by the court would have been that the $5,000.00 was a loan from plaintiff to defendant, and the refusal to make this finding is also a ground for reversal. Movie Films, Inc. v. First Security Bank of Utah, N.A., 447 P.2d 38, 22 Utah 2d 1 (1968). Further, where the appellate Court believes that no trier of fact, acting fairly and reasonably could refuse to make such a finding, such a failure will necessitate a reversal. Ray v. Consolidated Freightways, 289 P.2d 196, 4 Utah 2d 137 (1955).

The Supreme Court is not bound by a finding of the trial court, even if such a finding is based upon the type of evidence which would normally sustain the court's finding. The Court may reject such a finding if it is unreasonable or unsustainable by the evidence when viewed in light of all attendant circumstances. This was the case in Continental Bank & Trust Co. v. Stewart, 291 P. 2d 890, 892, 4 Utah 2d 153 (1955), where the Court reversed

a finding based on positive testimony where such testimony was given by a witness who had a vital personal interest in the controversy.

See also, In Re Behm's Estate, 213 P.2d 657, 117 Utah 151 (1950), in which the Court reversed a trial court decision where it had made a finding based upon an issue which had not been pled and where the evidence introduced at trial was not sufficient to support such a finding. The Court indicated that if an issue is neither pled nor supported by evidence a finding cannot be made or sustained in that trial. Even if an issue is properly pled, it must be supported by sufficient evidence, or a finding based thereon must be reversed.

POINT II

WHERE THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE COURT'S RULING, AND THE COURT'S FINDINGS ARE CLEARLY AGAINST THE WEIGHT OF THE EVIDENCE, THE JUDGMENT MUST BE REVERSED.

The Supreme Court reviews the findings and rulings of the lower court under the substantial evidence test, Cannon v. Wright, supra, and where such findings are not supported by substantial evidence they should be reversed by the Court. See Lowe v. Rosenlof, 364 P.2d 418, 12 Utah 2d 190 (1961).

In the case of O'Gara v. Findlay, 306 P.2d 1073, 6 Utah 2d 102 (1957), the Court stated that it would not overturn the trial court's findings unless the trial court had misapplied proven facts or made findings clearly against the weight of evidence. The findings were supported by documentary evidence and the uncontroverted testimony of witnesses. The present case

evidence coin. Here, the findings are directly opposed to the majority of the evidence, the documentary evidence refutes the findings and the testimony of the witnesses is in conflict. This case dictates a reversal because the circumstances necessary to such a reversal are present and clearly persuasive. It follows necessarily that a finding which lacks any evidence to support it must be reversed. Dunlap v. Jeffrey, 260 P.2d 1072 (1953); Lumbermans Mut. Cas. Co. v. Iowa Home Mut. Cas Co., 405 P.2d 160 (1965).

CONCLUSION

In conclusion it is respectfully submitted that this appeal sets forth the corollary to the long standing rule followed by this Court, that it will not reverse the findings and rulings of the trial court unless there is no substantial evidence to support them or they are clearly against the weight of the evidence.

From the facts adduced at trial, and in the court's own comments, the evidence is weighed heavily in the plaintiff's favor. To thereafter rule in the defendant's favor would require the court to ignore the evidence or misapply the recognized facts, and clearly there is no substantial evidence to support its final ruling.

The lower court erred in finding no cause of action and this Court is respectfully requested to reverse that ruling and enter judgment in favor of the plaintiff.

Respectfully submitted,

Richard B. Cuatto
Attorney for Plaintiff-Appellant

I hereby certify that I delivered eleven (11) copies of the foregoing Brief to the Utah Supreme Court, State of Utah, this _____ day of _____, 1977. I also certify that I delivered two (2) copies of the foregoing Brief to Lawrence E. Stevens, PARSONS, BEHLE & LATIMER, 79 South State Street, P.O. Box 11898, Salt Lake City, Utah, 84147, the attorney for defendant-respondent, this _____ day of _____, 1977, postage prepaid.

_____
Katy Kipp