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Lester E. Cannon, Margaret Cannon v. Orval Wright : Brief of Respondent

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

LESTER E. CANNON and
MARGARET CANNON,
Plaintiffs and Appellant,

vs.

ORVAL WRIGHT,
Defendant and Respondent.

Case No.
13746

BRIEF OF RESPONDENT

Appeal from the Judgment of the Fifth Judicial
District Court, for Washington County, Utah
Honorable A. John Ruggeri

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NATURE OF THE CASE

This was an action to recover the amount due on a promissory note, together with costs and attorney's fees on the part of the plaintiffs and a counter-claim on the part of the Defendant to recover the value of an air compressor.

DISPOSITION IN THE LOWER COURT

This case was tried before the Honorable A. John Ruggeri, sitting without a jury. The trial court entered

a judgment against the plaintiffs dismissing the complaint with prejudice, and a judgment of a like nature against the defendant's Counter-claim. The plaintiffs moved for new tiral and that motion was overruled and denied.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the judgment of the trial court affirmed.

STATEMENT OF FACTS

On April 16, 1963, Lester and Margaret Cannon became involved in a corporation known as Kolob Acres. They subsequently acquired sixty-six and two-thirds percent of the shares of Kolob Corporation and Orval Wright acquired thirty-three and one-third percent of the shares of that corporation. (TR. 11). Mr. Cannon was represented by an attorney from Las Vegas, Nevada, who was later the attorney for Kolob Acres. This attorney, Mr. Nitz, defended a condemnation suit where approximately $45,000.00 was placed in a trust account for Kolob Acres. (TR. 15). The condemnation suit was brought by the federal government on certain real property owned by Kolob Acres for the purpose of taking said real property. (TR. 17).

The federal government contended there was not enough water on the condemned property for subdivision purposes and the corporation thereafter loaned Orval Wright $6,000.00 pursuant to the promissory note con-

cerned with here to develop said water rights so that the property would be more valuable when condemned. (TR. 17 & 18).

Pursuant to that loan Orval Wright was asked by the attorney, Nitz, to sign a promissory note. Nitz was attorney for Cannon and his wife who owned two-thirds of the corporation at that time. (TR. 11,14). The promissory note was undated, (TR. 53), to be paid from the settlement of the lawsuit, Civil No. 114063 and prepared by Cannon's attorney.

Orval Wright testified on page 23 of the transcript of trial, line 3:

Q. Mr. Wright, do you know whether you paid the note off when the monies were dispersed from the final fund due and owing Kolob Acres Corporation?

A. When I left that money, everything was supposed to be paid. There was nothing outstanding I knew about.

Lester Cannon testified on page 32 of the transcript:

Q. So you don't know whether you got the $6,000.00 from Orval Wright at that time, do you?

A. Well, I know that Orval Wright paid me my $6,000.00. I didn't issue--attach his part of that trust account. I didn't attach that. I don't know what was done with his trust account.

Lester Cannon also testified on page 30 of the

transcript that Orval Wright did not pay him back, but that he didn't know how much money he got from the settlement or what it was for.

Thereafter Lester E. Cannon and Margaret Cannon divorced. The ex-wife of Lester Cannon, Margaret Cannon, gave a release of said promissory note to the defendant, Orval Wright.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DETERMINING THE PROMISSORY NOTE WAS CONDITIONAL.

The Uniform Commercial Code, Section 70A-3-105 sets forth the law applicable in the instant case:

* * *

(2) A promissory or order is not unconditional if the instrument

(a) states that it is subject to or governed by any other agreement; or

(b) states that it is to be paid only out of a particular fund or source except as provided in this section.

The promissory note in this case provides that the $6,000.00 is to be paid:

". . . on the day payment is received by the undersigned from the United States govern-

> ment in settlement of Civil Action No. C-114-63 in the United States District Court of the State of Utah, Central Division, and undersigned does hereby assign to payees as security for this (over) note the sum of $6,000.00 from any settlement paid the undersigned as a result of said Civil Action No. C-114-63."

Mr. Cannon and his attorney received an initial payment of $45,000.00 and later received final settlement in Civil Action No. C-114-63. That same attorney represented the majority stockholders (Lester E. Cannon and Margaret Cannon) and subsequently distributed monies available from the condemnation action.

Orval Wright testified at trial that all obligations owed by him were paid out of the settlement of Civil Action No. C-114-63. (TR. 23). Lester Cannon testified he didn't know if he received $6,000.00 from the settlement of said Civil Action No. C-114-63. (TR. 32).

Plaintiff contends the promissory note was signed in March of 1964 and the testimony at trial was clear on the point that final settlement was made sometime in 1965 and that Mr. Cannon did not make demand for payment on this promissory note until this lawsuit was commenced on December 20, 1969.

Since Mr. Nitz was handling the matters in and for Kolob Acres the plaintiff was well aware that the distribution monies was to be handled by Mr. Nitz. Nitz was aware of the note and aware of payment due Mr. Cannon in the settlement of Civil Action No. C-114-63. Therefore, plaintiff's contention that money from

the expected settlement was only "security not personal obligation of the defendant" is without reason. The intention of both parties is clearly shown by the language of the note. The language of the note in this case clearly makes the promise or order conditional as set forth in Section 70A-3-105 above, as there are no exceptions under this Section which are applicable to the instant case.

This court is well aware that under the usual rule of review the evidence will be surveyed in the light most favorable to the trial court's findings and judgment. *Buehner Block v. Glezos*, 6 U.2d 226, 310 P.2d 517 (1957). The facts here unequivocably point to a writing or promissory note based upon a condition which must have been performed before the note was valid. The facts further show that the plaintiffs were in position at all times to direct the attorney, Nitz, when making the settlement as the plaintiffs were the majority stockholders in Kolob Acres. Therefore, since the note was conditioned and the plaintiff held the key to the performing of the conditions, then the plaintiffs should have been paid in accordance with the actions initiated by themselves.

The Supreme Court ruled on a similar issue in the case of *Skousen v. Smith,* 27 U.2d 169, 493 P.2d 1003 (1972). In that case the note stated as follows:

> "It is agreed that the drawer of this note shall not be liable hereunder until and unless payment is received from . . . Walker on notes

executed by him in the total sum of $13,-977.70."

The Court then stated:

"We think the nub of this case is whether the note, subject to this action, became due and payable when Mr. Smith received a $2,-500.00 payment from Walker. The trial court held that it did and we are constrained too, and do agree."

The defendant in this case contended that the promissory note was conditioned on a payment of $13,-977.70 from Walker.

Walker did pay $2,500.00 but had not paid the remainder and the defendant insisted that the note did not become due because Smith received a $2,500.00 payment from Walker and paid none of this to the defendant Skousen.

The Court stated that the document meant what it said and was conditioned upon certain payments being made and that the parties were bound by the language they deliberately used in their contract, irrespective of the fact that it might result in improvidence.

In the instant case the parties contracted for payment of a certain promissory note by defendant to plaintiff when certain conditions arose. The trial court found that the parties were bound by the terms of this promissory note and the Skousen case agrees with this interpretation.

POINT II

THE TRIAL COURT DID NOT ERR IN DETERMINING THAT BOTH PARTIES TO THE PROMISSORY NOTE WERE BOUND BY THE DISTRIBUTION AND SETTLEMENT IN CIVIL CASE NO. C-114-63.

Under the Uniform Commercial Code cited in Point I and the *Skousen* case, the law in the State of Utah is that a promissory note can be conditional and the promissory note in the instant case is conditional because both parties agreed to the writing set forth on the promissory note and there was no testimony at the trial otherwise.

The trial court found that the plaintiffs were parties to the distribution and settlement and were bound by said distribution and settlement.

Apparently the Court realized that the plaintiffs were the majority stockholders in Kolob Acres and that plaintiffs hired the attorney who represented Kolob Acres in the condemnation action and said plaintiffs also had their attorney hold the initial money in trust and also the final payment and thereafter distributed said money.

The defendant testified that he simply took the money that was given to him by the plaintiff's attorney. Since the note was conditional and plaintiff's made distribution through their attorney, the trial court sim-

ply found that the plaintiffs should have exercised whatever conditions applied to said promissory note at the time of settlement and as far as the transcript or trial goes, it may be that plaintiff was paid at that time, as the plaintiff, Lester Cannon, did not specifically testify that he did not receive his $6,000.00 from the setlement.

POINT III

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE PLAINTIFF, MARGARET CANNON, NOW KNOWN AS MARGARET SULLINS, GAVE A FULL RELEASE TO THE DEFENDANT, ORVAL WRIGHT, FOR ALL DEBTS, PAST AND PRESENT.

The promissory note in this case was made payable to Lester E. Cannon and Margaret Cannon, and/or order.

Such a note is governed by Section 70A-3-110, Utah Code Ann. (1953):

> 70A-3-110. Payable to order. - - (1) An instrument is payable to order when by its terms it is payable to the order or assigns of any person therein specified with reasonable certainty, or to him or his order, or when it is conspicuously designated on its face as "exchange" or the like and names a payee. It is payable to the order of

(a) the maker or drawer; or

(b) the drawee; or

(c) a payee who is not maker, drawer or drawee; or

(d) two or more payees together or in the alternative; or

(e) an estate, trust or fund, in which case it is payable to the order of the representative of such estate, trust or fund or his successors; or

(f) an office, or an officer by his title as such in which case it is payable principal but the incumbent of the office or his successors may act as if he or they were the holder; or

(g) a partnership or unincorporated association, in which case it is payable to the partnership or association and may be indorsed or transferred by any person thereto authorized.

In this case the promissory note was made payable to Lester E. Cannon and Margaret Cannon and/or order, and under Section 70A-3-110 the note is made payable to order because it is payable to plaintiffs or their order. Because the note is made payable to order, then under 70A-3-110(d) it is payable to the order of two or more payees together or in the alternative.

Under this Section the note is payable, in the alternative, to Margaret Cannon, also known as Margaret Cannon Sullins.

It would appear that the plaintiff, Lester Cannon, got all that he deserved out of the settlement which was a condition of promissory note for the reason that Margaret Cannon felt that she gained her just due under the promissory note and gave a release of said note.

CONCLUSION

Plaintiff, Lester Cannon, testified that he did not receive the $6,000.00 and he also testified that he did receive it.

Plaintiff, Margaret Cannon gave a complete release indicating that the note was paid. The note was conditional and Lester Cannon, through his attorney was in charge of initiating the conditions.

Therefore, it appears that the trial court found the evidence did not preponderate in favor of plaintiffs and the Complaint and Counterclaim were dismissed.

Respectfully submitted,

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