2001

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

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 APPELLANT

Appeal from the Judgement of the Fifth Judicial District Court, for Washington County, Utah

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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 Defendent to recover the value of an air compressor.

DISPOSITION IN LOWER COURT

The case was tried before the Honorable A. John

Ruggeri, sitting without a jury. The trial court entered a judgement against the Plaintiffs dismissing the complaint with prejudice, and a judgment of a like nature against the Defendant's counter-claim. The attorney for the Defendant submitted Findings of Fact and Conclusions of Law for the courts approval which were subsequently signed by the court. The Plaintiffs filed Objections to Findings of Fact and Conclusions asking the court for more specific findings and these objections were not ruled on by the court. The Plaintiffs also moved for a new trial which later motion was overruled and denied by the court.

RELIEF SOUGHT ON APPEAL

Appellants seek to have the Judgment againt the Plaintiffs of the trial court reversed and remanded with instructions to enter judgment against the Defendant Orval Wright, for the amount due on the promissory note and for a reasonable attorney's fees and costs.

STATEMENT OF FACTS

The defendant Orval Wright had been active in the Southern Utah area in the development and sale of subdivision properties, particularly in the Kolob area of Washington County, Utah. Mr. Wright prevailed upon the Plaintiffs and others to invest in a particular project of development and sale. It eventually developed that the United States Government was interested in aquiring part of the particular project for an addition to the National Park and for that purpose commenced an action in eminent domain in the U. S. District Court, Central Division for the State of Utah. The parties to that action were represented by Attorney Owen Nitz of Las Vegas, Nevada, and also by Utah counsel. The parties were paid the original appraised value of the property by the U. S. Government and pursuant to an agreement of the parties, the monies were paid to Mr. Nitz who was to disperse part of

the funds and retain the rest in his trust account to cover costs, etc., until the action was concluded.

On March 14, 1964, the Plaintiff and his wife and the Defendant met in the office of Owen Nitz in Las Vegas, Nevada, for the purpose of obtaining part of the money they had received in the first payment by the U. S. Government. Each party received a specific sum, but by reason of an agreement between the Plaintiffs and Defendant, the Plaintiffs loaned the Defendant the Six Thousand ($6,000) Dollars that they were to receive. This was done by having Mr. Nitz issue his trust account check no. 7293, dated March 14, 1964, to Lester Cannon and Margaret Cannon, who then in turn endorsed the check and delivered it to Orval Wright. At that same time a note was prepared, no one remembering clearly who prepared the same, it being a printed form note modified for the purpose, but signed by Mr. Wright on the face thereof and initialed on the back following an additional provision. Mr. Wright, after some urging, admitted both the signing and the initialing. The note was then delivered by Mr. Wright to Lester Cannon who had the note in his sole possession until the time this action was commenced. The check for Six Thousand ($6,000) Dollars given to Orval Wright was subsequently endorsed by Orval Wright who received the proceeds thereof.

The note provided in the hand written portion for payment as follows: "On the day payment is received by the undersigned from the United States Government 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 from any settlement paid the undersigned as a result of said civil action no. C-114-63."

The testimony was to the effect that settlement was made sometime in 1965, although the parties were somewhat vague. The note was then due and payable. It ap-

pears from the testimony that neither party was present at the time any final disbursements were made in the civil action in the U. S. District Court, but rather settlement payments were made by mail or otherwise by Owen Nitz. Plaintiff testified that he had not received payment of the note and the Defendant admitted that he personally had not paid the note, but had not received any final payment from Attorney Nitz.

ARGUMENT

POINT I

THE TRIAL COURT ERRORED AS A MATTER OF LAW AND AGAINST THE CLEAR WEIGHT OF THE EVIDENCE BY HOLDING THE PROMISE OF THE SIX THOUSAND ($6,000) DOLLAR NOTE TO BE CONDITIONAL, AND IN LIMITING THE DEFENDANT'S LIABILITY TO THE MONIES FROM THE FUND WHICH MERELY SECURED THE DEBT.

The law traditionally favors negotiability of notes, and thus, the law favors the unconditionality of promises in notes. When a note is primarily unconditional, clear and explicit language is needed to make the promise conditional. This attitude towards promises serves two purposes, to prevent unnecessary litigations, and to insure the integrity of notes which merely make reference to the underlying transaction. This preference and purpose is shown in C. H. Mountjoy Part Co. v. San Antonio Nat'l Bank, 12 S. W. 2d 609 (Tex. Civ. App., 1928); Jones v. Green, 293 S. W. 749, 173 Ark. 846 (1927); and Branch Banking & Trust Co. v. Leggett, 116 S. E. 1, 185 N. C. 65 (1923).

The common law view is also expressed in the statutes dealing with commercial paper, 70-A-3-105 (1) (f), UCA (1953). The statute provides that a promise is not made conditional by the fact that it refers to any fund or source from which reimbursement is expected. The statute continues, at 70A-3-105 (2) (b), by stating that a pro-

mise is conditional only if the note states that it is to be paid only out of a particular fund.

Upon examining the $6,000 note in light of the statute, the error of the trial court becomes evident. The note begins with an unconditional promise to pay, and then says, ".....and the undersigned does hereby assign to the payees as security for this note the sum of $6,000 from any settlement paid to the undersigned as a result of said civil action no. C-114-63." Two things are demonstrated: First, that there is no language that in any way limits payment from only a particular fund; and second, that the monies from the expected settlement was only additional security for the personal obligation of the Defendant, and as such was only a mere expected source of reimbursement for the debtor/Defendant. This clear and unambiguous language leaves no room for speculation as to its meaning, and there is certainly no way to interpret the language in a way that would make the Defendant's promise to pay conditional. However, the trial court held that the promise was conditional, in direct contradiction to the applicable law, as shown in language and purpose of the commercial paper statutes.

A variety of cases restate the common law and statutory rules (further demonstrating the error of the trial court), in cases where a source of expected reimbursement is mentioned in a promissory note. In Jones v. Green, 293 S. W. 749, 173 Ark. 846 (1927), the court found a promise to be unconditional when the note recited, "The tolls collected under lease dated February 17, 1922 will be credited on the face of the note until paid." It should be noted that the language in that case was more restrictive than on the $6,000 note in question now. In the case of Branch Banking & Trust v. Leggett, 116 S. E. 1, 185 N. C. 65 (1923), the court found the promise of a note to be unconditional when the note made reference to a fund from which payment was expected. The Louisiana court similarly found a promise to be unconditional in Muhoberac v.

Saloon, Inc., 210 So. 2d 572 (LA. 1968). In that case, the court said that the language of a note must say that it is payable only out of a particular fund, or it will be held to be merely security additional to the personal obligation of the makers. Also see Road Improvement Dist. No. 1 of Howard County v. Bank of Commerce & Trust Co. of Memphis, Tenn., 272 S. W. 834, 169 Ark. 43 (1925), and Continental Bank & Trust Co. v. Miller, 172 So. 557 (LA 1937).

Clearly the promise is unconditional, and the liability of the Defendant is not limited by the monies of the expected fund which only secured the debt.

POINT II

THE TRIAL COURT ERRORED AS A MATTER OF LAW AND AGAINST THE CLEAR WEIGHT OF EVIDENCE, BY FINDING AN ACCORD AND SETTLEMENT OF THE DEBT MERELY FROM THE FACT THAT THE DEFENDANT NEVER RECEIVED MONIES FROM THE FUND FROM WHICH THE DEFENDANT HAD EXPECTED REIMBURSEMENT.

In the argument of Point I, it was shown that the Trial Court errored in determining that the Defendant was not personally liable on his unconditional promise to pay his debt. This error in the interpretation of the commercial paper statute, 70A-3-105, UCA (1958), resulted in a second error. The second error was in determining that merely because the debtor/Defendant did not receive money from the fund as he expected for reimbursement, the Defendant's unconditional promise to pay and his underlying debt were completely extinguished. The argument of Point I clearly shows that the debtor/Defendant's promise to pay was to exist even though the expected source of reimbursement, which acted only as addition security, was never received by the Defendant as he had hoped.

Since the Trial Court's first error led to the second

error, it is obvious that the entire matter can be remedied by a finding that the promise to pay in the $6,000 note is unconditional, which in turn would lead to the correct result of the Defendant being personally liable on the debt, and that his duty to pay would in no way be limited merely because the source of reimbursement never arose for the Defendant. This result is especially proper, because in the arguments that follow, it is shown that no other theories of law, or facts of evidence, exist which would allow the Defendant to avoid payment of the debt evidenced by the $6,000 note.

POINT III

THE PLAINTIFF AS HOLDER OF THE NOTE, ESTABLISHED HIS RIGHT TO ENFORCE PAYMENT OF THE NOTE, AND ESTABLISHED THE LIABILITY OF THE DEFENDANT ON THE NOTE.

The Plaintiff is a holder of the note. UCA 70A-1-201 (20), (1953) (Nevada Revised Statutes 104.1201 subsection 20, (1973) defines a holder as one in possession of an instrument drawn, issued, or endorsed to him or his order. Since the note is payable to the order of the Plaintiff, and since the Plaintiff had possession of the note at all times, the Plaintiff is a "holder" of the note.

The Plaintiff, as a holder of the note, has the right to enforce payment on the note; UCA, 70A-3-301 (1953), (Nev rev stat 104.3301, (1973).

Because the Plaintiff established the signature of the Defendant, and produced the instrument, he is entitled to recover on the note, unless the Defendant could establish a valid defense; UCA, 70A-3-307 (2), (1953), (Nev rev stat 104.3307 subsection 2, 1973). The Defendant did not specifically deny his signature on the note in the pleadings, and therefore his signature is admitted, according to the provisions of UCA, 70A-3-307 (1), (1953), (Nev rev stat 104.3307 sub 1, 1953). Additionally, the Defendant admitted his signature in the course of his testimony at

trial.

Therefore, because signatures are admitted or established, production of the instrument entitles the holder, the Plaintiff, to recover on the note, unless the Defendant could establish a valid defense. Posession of the note by the holder is evidence of non-payment and a presumption of non-payment. See McCary v. Crumpton, 103 So. 2d 714, 267 Ala. 484 (1958); Guerin v. Cassidy, 119 A. 2d 780, 38 N. J. Super. 454 (1951); Lurie v. Newhall, 76 N. E. 2d 813, 333 Ill. App. 173 (1947).

POINT IV

THE TRIAL COURT ERRORED IN DISMISSING THE COMPLAINT BECAUSE THE PLAINTIFF'S RIGHT TO RECOVER ON THE NOTE WAS ESTABLISHED, WHILE THE DEFENDANT FAILED TO PRODUCE ANY EVIDENCE THAT MIGHT SATISFY HIS BURDEN OF PROVING A VALID DEFENSE.

A. The Defendant claimed payment or satisfaction as a defense, he therefore had the burden to prove that payment was made. UCA, 70A-3-307 (2) (1953), (Nev rev stat 104.3307 sub 2, 1973) states that when a note is produced and the signatures are established, the Defendant is liable unless he can establish a defense. The common law similarly is that payment is an affirmative defense, and that the party alleging the defense has the burden of proving payment. See Rees v. Archibald, 6 Utah 262, 311 P2d 788 (1957); State Bank of Beaver County v. Hollingshead, 82 Utah 416, 25 P2d 612 (1933); Bell v. Jones, 100 Utah 87, 110 P2d 327 (1941); and 70 C.J.S. Payment 65 (1951).

The Defendant's only evidence to support his alleged defense of payment was that the funds from the settlement of the civil suit, which were merely collateral securing the debt, had been distributed. The distribution of funds in itself is certainly not sufficient to constitute a defense, especially when the obligation of the note is ex-

amined. See Preston County Coke v. Preston County Light & Power, 119 S. E. 2d 420, 146 W. Va. 231 (1961).

The clear language of the note states that the expected funds from the settlement were merely to secure the debt. There is no indication that the settlement fund was to be the sole source of payment, as the Defendant alleges. The applicable statutes clearly provide that a promise is not made conditional by the fact that the note refers to any fund or source from which reimbursement is expected; UCA, 70A-3-105 (1) (f) (1953), (Nev rev stat 104.3105 sub 1 para f, 1973). The same statute continues by stating that the promise is conditional only if the note states that it is to be paid only out of a particular fund or source; UC A, 70A-3-105 (2) (b) (1953), (Nev rev stat 104.3105 sub 2 para b, 1973). There is no language in the note that would make it payable only from the settlement fund, or in any other way conditional upon the distribution of the settlement fund. Therefore, even though the funds are not available to pay the note as expected, the Defendant is still on his unconditional promise to pay the debt. There is no basis in the Defendant's allegations that his liability is discharged merely because the fund was distributed which secured the debt.

The Plaintiff had no obligation to exhaust the security, or attempt to collect payment from the settlement fund which secured the debt, before suing on the underlying obligation. UCA, 70A-9-501, (1953), (Nev rev stat 104.9501, 1973), states that when a debtor is in default, a secured party may reduce his claim to a judgement, foreclose, or otherwise enforce the security interest by any available judicial procedure. The purpose of the statute was to provide secured parties with a variety of remedies upon default. The Plaintiff was not limited to seek recovery only by foreclosing on the settlement fund which served merely as collateral. Therefore, even though the Plaintiff did not seek recovery from the settlement fund, he is free to reduce his claim to a judgement

by suing on the underlying obligation. See AM JUR 69 2d Secured Transactions S548 (1973).

Since it is clear that distribution of the settlement fund itself does not discharge the Defendant's liability on the note, the only remaining allegation of payment by the Defendant is that the settlement fund was distributed, in part, as payment for the note. The Defendant presented no evidence to prove the specific payment of the note, but only testified that he assumed that the note had been paid from the settlement fund distribution. Actually, a variety of transactions had taken place involving the Plaintiff and the Defendant, to which funds from the settlement were applied. When several obligations between parties exist and one party claims that a payment was to be applied to a particular obligation, the burden of proof is on that party to prove the specific application of the payment. This placement of the burden of proof is clearly established by Light v. Stevens, 159 Cal 288, 113 P. 659 (1911); State Finance Co. v. Hershel California Fruit Products Co., 8 Cal App 2d 524, 47 P2d 821 (1935); Redwine v. Rohlff Lumber & Supply Co., 54 Wyo 253, 91 P2d 49 (1939); and C.J.S. Payment S97 (1951). Therefore, even though the Plaintiff received part of the funds from the settlement, the Defendant still had the burden to prove that the funds were to be specifically applied as payment for the note. Because the Defendant has failed to present any evidence of the specific application of the settlement fund distribution and because he admits no other payment, his defense of payment has no basis.

Additional evidence of non-payment is the fact that the Plaintiff retained posession of the note. The obligee's possession of the written obligation evidencing the indebtedness is evidence of non-payment and raises a presumption of non-payment. See Southward v. Foy, 65 Nev 694, 201 P2d 302 (1948); Light v. Stevens, 159 Cal 288, 113 P. 659 (1911); and 70 C.J.S. Payment S99 (1951). Because the Plaintiff has possessed the note at all times with no

evidence of cancellation or renunciation on the face of the instrument, the above presumption of non-payment applies. Retention of the note by the Plaintiff is fully inconsistent with the allegations of payment as claimed by the Defendant, and is also inconsistent with the ordinary course of business which would require delivery or cancellation of a note upon payment.

It is obvious that the Defendant has failed to overcome the presumptions of non-payment and has failed to present any evidence to prove or establish his alleged payment.

B. The release signed by Margaret Cannon Sullen was invalid as a means to discharge the Defendant's liability on the note, and in any event her interest had terminated before the release was signed.

The note was payable to Lester Cannon and Margaret Cannon jointly, not in the alternative. UCA, 70A-3-116 (b) (1953) (Nev rev stat 104.3116 1973), states that if an instrument is payable to two or more persons and not in the alternative, it is payable to all of them and may be discharged only by all of them. Therefore, the release by Margaret C. Sullen alone could not discharge the Defendant's liability on the note.

Additionally, the statutes on discharge only allow cancellation or renunciation by the holder of an instrument; UCA, 70A-3-605 (1973), (Nev rev stat 104.3605 1973). Since Lester Cannon had possession of the note at all times, Margaret C. Sullen could not have been a "holder" to effectively discharge the Defendant's liability.

In any event, Margaret Cannon Sullen's interest was terminated by a divorce property settlement prior to the signing of the release.

Therefore, the release not only did not discharge the Defendant's liability on the note, but also was completely ineffective because Margaret Cannon Sullen's interest

had been previously terminated.

C. The Defendant had the burden to prove his allegation of failure of consideration. As shown above, UCA, 70A-3-307 (2) (1953), (Nev rev stat 104.3307 sub 2 1973), states that when the note is produced and signatures established, the Defendant is liable unless he can establish a defense. In effect, there is a presumption of adequate consideration. Evidence was presented by the Plaintiff that the Defendant received Six Thousand ($6,000) Dollars by check from the Plaintiff, at or near the time he signed the note for $6,000. The Defendant failed to present any evidence that there was not full consideration. Because the burden of proof was on the Defendant, and because he failed to offer any proof , his claimed defense of failure of consideration is without basis.

In any event, the Defendant admitted at trial that there was consideration and withdrew the claim in favor of a defense of payment.

CONCLUSION

The Plaintiff, as holder of the note, fully established his claim in lower court by producing the note and establishing the signatures. The Defendant had the burden to prove that he had a valid defense. However, the Defendant presented no evidence at all that would overcome presumptions of full consideration and non-payment, or the evidence presented by the Plaintiff.

Therefore, the trial court errored in holding that the note was to be paid from a specific fund and by improperly placing the burden of proof on the Plaintiff to show that there were no defenses, and by improperly finding that the Defendant had met his burden of proof, in the absence of any facts or evidence to support such a finding, and contrary to the clear weight of evidence in support of the Plaintiff.

Therefore, the trial court should be reversed and judgement for the Plaintiff granted in the amount of Six Thousand ($6,000) Dollars on the note, plus costs and attorney fees as required in the note. In the alternative to reversal for the Plaintiff, the case should be remanded to the lower court for new trial.

Respectfully submitted,

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