

2001

Valley Bank and Trust Company v. First Security Bank of Utah NA : Brief of Appellant

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

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VALLEY BANK AND TRUST COM-
PANY, a Utah corporation,

Plaintiff and Appellant,

vs.

FIRST SECURITY BANK OF UTAH,
N.A.,

Defendant and Respondent.

Clk., Supreme Court, Utah

Case No.
13852

APPELLANT'S BRIEF

Appeal from the Judgment of the Third District Court
for Salt Lake County, Hon. Stewart M. Hansen

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

VALLEY BANK AND TRUST COM-
PANY, a Utah corporation,
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FIRST SECURITY BANK OF UTAH,
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Defendant and Respondent.

} Case No.
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APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action arising under the "Bank Deposit and Collections" provisions of the Uniform Commercial Code to require the intermediary bank to reverse an entry against the account of a depositing bank.

DISPOSITION IN LOWER COURT

After trial before the Court, the District Judge entered his Findings of Fact, Conclusions of Law and Judg-

ment therein determining that the provisions of Section 70A-4-202 of the Utah Code Annotated did not require written notice of dishonor of an item, that notice was promptly given and rendered judgment in favor of the Defendant.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment and judgment in its favor as a matter of law.

STATEMENT OF FACTS

Bernard M. Tanner and Kent Lundquist executed a check drawn on the Guaranty Bank and Trust Company, Chicago, Illinois, in the amount of \$4,500.00 payable to Detacap International, Inc. (Exhibit 7).

The check was duly, regularly and timely endorsed by the payee, Detacap International, Inc., for deposit to its account in Valley Bank and Trust Company which Bank is hereinafter sometimes referred to as "depository Bank" which is the same reference as used in the Uniform Commercial Code (Exhibit 1).

Valley Bank and Trust Company (depository Bank) timely and in due course forwarded the items to First Security Bank of Utah, N.A. for collection.

Valley Bank and Trust Company maintains an account with First Security for the purpose of clearing items through its correspondent Bank, First Security Bank of Utah, N.A., and such account carried an average balance

of approximately, \$2,000,000.00 (two million dollars) (R. 31).

In addition to the transit account, Valley Bank and Trust Company maintains a nonactive account of approximately \$500,000.00 (R. 31).

First Security Bank of Utah, N.A. hereinafter sometimes referred to as "intermediary Bank" which is in accordance with the references contained in the Uniform Commercial Code, analyzed the accounts of Valley Bank and Trust Company and assessed charges for the services rendered as an intermediary (R. 31 and 32).

The month involved was a rather typical month (R. 32) and approximately One Hundred Sixty Thousand (160,000) items passed through Valley Bank and Trust Companies account in First Security Bank of Utah, N.A. (R. 31).

The check was credited to the account of the depositor, Datacap International, Inc., on 8-17-1970 (Exhibit 1, R. 27).

The account of the depositor was later closed (R. 28, line 5).

The amount of the check was not charged back to the customer's account (R. 27, Exhibit 1) and the customer, Datacap International, Inc. is now insolvent.

The item was duly presented to the drawee Bank (Guaranty Bank and Trust Company, Chicago, Illinois).

First Security Bank of Utah, N.A. in due time and

in due course was notified that the item was being returned "insufficient funds" and not paid. The advice was in writing by Western Union Telegraph (Exhibit 5). Such written advice being rendered on September 8, 1970 (Exhibit 5). First Security, (intermediary Bank) claims it gave *oral* notice to Valley Bank, (depository Bank) on September 9, 1970, and supports such claim with notations made by a collection teller (Exhibit 6 D).

Valley Bank could find no record of having received "oral notice" and those things which usually happen on receiving oral notice of a charge back did not occur (R. 32, R. 35, line 26, et seq., R. 39, 41).

Although First Security received written notice it did not furnish any written notice to Valley Bank and Trust Company until March 2, 1972, when it charged the account of Valley Bank and Trust Company with the sum of \$4,500.00 (Exhibit 3 P). Testimony of Carla Manning, supervisor of cash items department for First Security (R. 37):

QUESTION: "Did you send any written notice September 8 or 9, whichever you received this, to Valley Bank and Trust Company?"

ANSWER: "No written notice." (Finding of Fact 14)

Written notice was furnished by First Security (6) six months after the date that it received written notice (Exhibit 5 P, Exhibit 3 P).

ARGUMENT

POINT I.

A COLLECTING BANK MUST GIVE WRITTEN NOTICE OF DISHONOR AS A CONDITION PRECEDENT TO CHARGING THE ACCOUNT OF THE DEPOSITING BANK.

This is an interbank transaction, the action by a depositing Bank against the collecting Bank. Therefore, the law governing this transaction is contained in the "Bank Deposit and Collection Code" which is Chapter 70A-4 of the Utah Code Annotated, 1953, as amended.

A special section is provided in the Code to govern interbank transactions as Banks are presumed to be expert and knowledgeable in commercial matters. As indicated by the evidence in this case, an immense number of items and amount of money pass between the financial institutions on a daily basis. The drafters of the Code, in order to avoid any confusion, specified that the Bank Deposit and Collection Code would control over the provisions of the Code involving "commercial paper":

70A-4-102. Applicability. "... In the event of conflict the provisions of this chapter govern those of chapter 3. . . ."

As indicated by Section 70A-4-105, Utah Code Annotated, 1973, Valley Bank and Trust Company is the depository Bank:

(a) “ ‘Depository bank’ means the first bank to which an item is transferred for collection . . . ”

and First Security is the collecting Bank:

(d) “ ‘Collecting bank’ means any bank handling an item for collection . . . ”

In all cases, the notice must be given before the midnight deadline of the bank involved which is midnight of the day following the date the Bank receives the item or the notice (Section 70A-4-211, 212, 213).

First Security, the collecting Bank, charged the account of Valley Bank and Trust Company approximately six months after First Security had received written notice of a charge back.

The authority to charge the account of the depositing Bank is contained in Section 70A-4-211 of the Utah Code Annotated which is as follows:

“(1) A collecting bank may take in settlement of an item . . . (c) *appropriate authority to charge* an account of the remitting bank or of another bank with the collecting bank . . .

(2) *If before its midnight deadline the collecting bank properly dishonors a remittance check or authorization . . . The collecting bank is not liable . . .* (Emphasis added)

In accordance with this section the collecting Bank must “properly dishonor an item”. The Code must then

be examined to determine the proper method of dishonor.

Section 70A-4-212 of the Utah Code Annotated, 1953 as amended, sets forth the conditions:

“Right of charge-back or refund. (1) If a collecting bank has made provisional settlement . . . and itself fails . . . to receive settlement for the item . . . the bank may revoke the settlement given by it, charge back the amount of any credit given for the item . . . whether or not it is able to return the items if by its midnight deadline or within a longer reasonable time after it learns the facts it returns the *item* or *sends* notification of the facts. . . .” (Emphasis added)

“(2) Within the time and *manner prescribed* in this section and section 70A-4-301, an intermediary . . . bank . . . may return an unpaid item directly to the depository bank . . .” (Emphasis added)

This section (212) incorporates Section 70A-4-301 which describes the time and manner of returning an item and the appropriate portions are as follows:

70A-4-301 Utah Code Annotated “Time of Dishonor . . . the payor bank may revoke the settlement and recover any payment if before it has made final payment . . . and *before its midnight deadline* it

(a) *returns the item*; or

- (b) *sends written notice* of dishonor for nonpayment if the item . . . is otherwise unavailable for return. . . .”
(Emphasis added)

In the instant case the item was apparently lost. Therefore, the Chicago Bank sent a telegraphic notice which complies with subsection (b) of the above statute. First Security failed to either return the item or send written notice to Valley Bank and Trust Company.

The lower Court ignores the word “written” in the above section and apparently relied on the word “send” in section 212 considering that the word “send” could include oral advice. The Code contemplated this problem and in Section 70A-1-201 (38) of the Utah Code Annotated the word “send” is defined as follows:

“ ‘Send’ in connection with any writing or notice *means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed . . .*” (Emphasis added)

Unless you can “deposit” and “properly address” a telephone call, it cannot be “sent” and does not constitute proper notice. Further the section says “*sends written notice.*”

There is testimony that banks in Salt Lake give each other telephone advance notice on “large items” over \$1,000.00. This practice is most certainly followed

by all banks in the community. It is not a substitute for the written notice. To consider it as a substitute for written notice you would create the following anomaly:

- A. On all items under \$1,000 written notice would be required as per the Code.
- B. On all items over \$1,000 oral notice would be satisfactory.

This is obviously not the intention of the practice but would be counter-productive and against the best interest of all banks involved.

The purpose of the oral notice is to give any associated bank as much advance notice as possible since the written notice would not be received until the following day or, with the noted efficiency of the U. S. Postal Service, two or three days later. The Court should note that the notice is complete upon being deposited in the mail.

The only act required of First Security in order to charge back the item was to give Valley Bank and Trust Company the same courtesy as it had received from the Chicago Bank and furnish written notice of the dishonor.

The official comments of the drafters of the Uniform Commercial Code shed considerable light on this subject and in commenting on Section 4-211 state:

- 6. "... if ... the collecting bank receiving the item acts seasonably in handling it before

the bank's midnight deadline, the bank is not liable to prior parties in the event of dishonor. . . ."

and in commenting on Section 4-212 states:

3. "... the right of charge-back or refund must be exercised *promptly* after the bank learns the facts. The right exists (if so promptly exercised) whether or not the bank is able to return the item." (Emphasis added) (Uniform Law Annotated, Uniform Commercial Code)

A recent decision in New York specifically holds that a collecting Bank which failed to exercise its right of charge-back within the time provided by the statute, lost that right (*Fromers Distributors, Inc. v. Bankers Trust Co.*, 1971, 36 A. D. 2d 840, 321 N. Y. S. 2d 428).

A charge-back which was made six months after First Security knew of the dishonor of the item could hardly be considered a prompt or reasonable charge-back.

Bankers should be sophisticated in relation to the special portion of the statute that is adopted to regulate interbank transactions. The wording of the statutes is clear and concise. Written notice of dishonor is required between financial institutions. The return of the item is written notice of dishonor or, in case the item is lost or becomes difficult to return, the intermediate Bank is given the authority to give any kind of notice it desires as long as the notice is in writing. When one con-

siders the number of items that pass through a bank together with the almost impossible burden of proving that it did not receive an oral notice, the reasons for requiring written notice are apparent.

In this case the testimony is clear that certain activities would have occurred immediately within the structure of Valley Bank if it had received oral notice. Those activities did not occur and no charge was made against the customer's account nor was any effort made to collect the item from the customer. First Security claims it gave "oral notice" to Valley Bank and has some business records to support the same. Obviously, in this case, the notice although possibly sent, failed to arrive at Valley Bank or, if it was received, was given to some person not in the proper department or, the notation thereon was lost, or the person receiving the notice failed to make the proper notation and give the internal notices, or the notice was never received, or the wrong bank was called, or the notice was received by an improper party during a coffee break or luncheon, or the party making the "business notation" at First Security made an error in noting that this call was made when she should have noted another call being made, or, or, or. The possibilities are infinite! The fact is that First Security believes it gave oral notice and Valley Bank has nothing in its files to indicate it received oral notice and the customer's account was not charged and Valley Bank was not able to seasonably protect itself from the liability. The reason for requiring

written notice between financial institutions is obvious. All that had to happen to completely switch liability from First Security Bank (Collecting Bank) to Valley Bank, (Depositing Bank) was to write a notice and deposit the same in the mail. If this had been done, Valley Bank would have received actual, written notice within two or three days, could have charged the customer's account and made collection efforts as against the customer. By the time notice was received, six months later, there was no possibility of collecting the item from the customer.

CONCLUSION

Under Chapter 3 of the Uniform Commercial Code, oral notice is permitted and is sufficient. The reason for this is obvious in that the general public is involved and the drafters of the Code did not wish to saddle the general public with the duty of furnishing a specific type of notice. When regulating the conduct between and/or among banks, the drafters of the Code required a much more particular duty (written notice) and just in the case some court might get confused between Chapter 3, which governs the general public, and Chapter 4, which governs the conduct of financial institutions, it was provided in Section 102 of Chapter 4 that the provisions of Chapter 4 take precedence over those of Chapter 3.

Thousands of items will be contained in one day's deposit between two banks. If the written deposit slips and the written notices of dishonor can be amended by

oral notice or claimed oral notice, an absolutely chaotic condition would exist among and between banks. No bank would ever know the extent of its liability or how its liability was modified by claimed or purported oral notice or modification. Account could never be settled and would hang in limbo for more than 6 months and possibly years.

In this case, in order to obtain the right to charge back the amount of the dishonored check (\$4,500.00) First Security had to give written notice before midnight of the day following the date of receipt of the item. This it failed to do. Therefore, it has no right to charge the item back to Valley Bank and Trust Company.

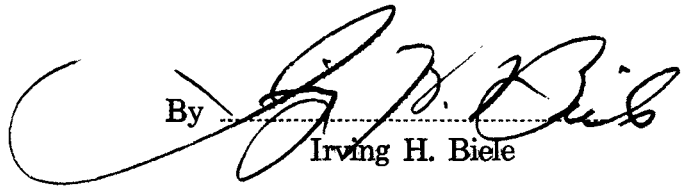
Assuming that First Security did give timely notice then, nevertheless, charge-back must be made promptly or the right to make the same is waived. If within four or five days, or even two weeks, Valley Bank's account had been charged with \$4,500.00, First Security might equitably claim that Valley Bank had notice of the dishonored item on the date that its account was charged. Valley Bank had neither written notice nor a charge-back of the item until six months after the date that First Security, by written instrument, had been advised of the dishonor of the item.

Obviously, one of the banks must bear the loss and equitably that loss can only be placed on the bank who failed to perform under the provisions of the law and failed to give adequate notice to its correspondent bank so that that Bank could defend itself. The judgment of the

District Court should be reversed and it should be directed to enter judgment in favor of Valley Bank and Trust Company against First Security Bank of Utah, N.A. in accordance with the prayer of the Complaint.

Respectfully submitted,

BIELE, HASLAM & HATCH

By 
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