

1949

Seaboard Finance Company v. L. V. Shire and Bank of Vernal : Reply Brief of Appellant

Utah Supreme Court

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Recommended Citation

Reply Brief, *Seaboard Finance Co. v. Shire*, No. 7299 (Utah Supreme Court, 1949).
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IN THE SUPREME COURT OF THE STATE OF UTAH

SEABOARD FINANCE COMPANY,
a corporation,

*Plaintiff, Appellant and
Cross Respondent,*

— vs. —

L. V. SHIRE, doing business as
Shire Motor Company,

Defendant,

BANK OF VERNAL,

*Garnishee, Respondent and
Cross Appellant.*

Case No.
7299

FILE

CLERK, SUPREME COURT

Appellant's Reply Brief

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APPELLANT'S REPLY BRIEF

COMMENT ON RESPONDENT'S STATEMENT OF FACTS

Respondent has filed a Cross Appeal and has made a lengthy statement of facts in its Brief. Appellant contends that the facts essential to a determination of the controversy before this Court are set forth in Appellant's original Brief and that much of the detail set out by Respondent is irrelevant, immaterial and super-

fluous. Appellant specifically controverts certain portions of Respondent's Statement of Facts as follows:

(a) Appellant controverts the statement on Page 6 of Respondent's Brief "on the same day accounted for the minimum sale price of one of the Frazer cars", and the statement in the same paragraph as follows: "On January 6, 1948, he accounted for the minimum sale price of a second Frazer car", and the statement on Page 7: "Shire accounted for the third Frazer car listed in the Trust Receipt". Anything more than that payments were made on Shire's indebtedness to the Bank in the amounts set forth is a mere conclusion of Respondent.

(b) Appellant controverts the last paragraph on Page 8 ending on the first two lines on Page 9. More will be said concerning this in discussing Respondent's Specification of Errors Nos. 2 and 3.

ARGUMENT

SPECIFICATION OF ERROR NO. 1

Respondent contends the Court erred in not granting its Motion for a Non-suit upon the ground that Appellant failed to show that Shire had not authorized or consented to the Bank's making charges upon his account. Appellant proved that Shire had on deposit with the Bank \$2783.17 on February 13, 1948, and \$2605.00 on February 21, 1948, and that his account was charged *by the Bank* with said amounts on said dates (Tr. 12 and 13). Appellant also proved that the entire amount of the \$2783.17 was applied to the \$11,270.00

note which was secured and that \$805.00 of the \$2605.00 was credited by the Bank on the \$1500.00 note which was secured. If the Bank had obtained authority or consent from Shire to the making of such charges, such was a matter of defense and not a part of Appellant's case. The pleadings in a Garnishment action are limited by Statute (Section 104-19-11). Although there is no pleading as such the Bank in fact relies on the doctrine of set-off, which is an affirmative defense. Appellant's situation is not unlike that of a suit by a depositor against a bank for the balance of his deposit. In such a case the depositor makes a prima facie case upon proof of a debt owing by the bank and is entitled to recover the whole amount, but for the proof by the bank of a valid set-off. (See Zollman on Banks and Banking, Vol. 7, Page 188).

The question of whether or not Shire authorized or consented to the charges made by the Bank was entirely within the knowledge of the Bank. For Appellant to prove there was no such authority or consent would be requiring it to prove a negative, the facts of which are peculiarly within the knowledge of the Bank. This the law does not require the Appellant to do. The general rule is stated in 31 C. J. S., Pages 721-2:

“It is very generally held that, where the party who has not the general burden of proof possesses positive and complete knowledge concerning the existence of facts which the party having that burden is called on to negative, or has peculiar knowledge or control of evidence as to such matters, the burden rests on him to produce the evidence, the negative averment being

taken as true unless disproved by the party having such knowledge or control.”

The text is supported by the cases therein cited, and particularly by the following: Hooper v. Talbot, 175 N. E. 783, 343 Ill. 590. Speas v. Merchants' Bank & Trust Co. of Winston-Salem, 125 S. E. 398, 188 N. C. 524. Guaranty Life Insurance Company vs. Nelson, 101 Pac. 2d 627, 187 Okl. 56.

Appellant having shown that on the date of the Garnishment, Shire had funds on deposit, except for the Bank's claim thereto, it was encumbent upon the Bank to show it had a right to the use of those funds. Therefore the Court did not err in denying Respondent's motion for a non-suit.

SPECIFICATIONS OF ERROR NOS. 2 and 3

Respondent contends the Court erred in finding that the two charges in question made by the Bank were without any authority from Shire. The testimony of Mr. Meagher clearly shows that instead of Shire authorizing the charging of his account as contended for by Respondent, he refused to give such authority. Mr. Meagher testified as follows (Tr. 51):

“I asked him two or three times for a check on this one car, and he said, ‘No, I don't know exactly how I stand, and I need a little money to go to Salt Lake on; but it will be all right Monday.’

“Then I said: ‘All right. I will expect payment for these cars Monday.’

“He said: ‘I will be back here Monday—if not Monday, at the latest, Tuesday.’

"I said: 'All right, you will clear up the whole line?'"

"He said: 'Yes.'"

In the afternoon of the same day the conversation between Mr. Meagher and Shire of Friday, February 6, 1948, came up again, and Mr. Meagher again testified to substantially the same thing. Upon being asked for a check to clear up the account Mr. Meagher testified that Shire said:

"I have the money in the bank, but I would rather not give you a check because I have a few little checks outstanding; but I will pay you for that on Monday, when I discount all these contracts in Salt Lake." (Tr. 54)

It was only after a recess over night and upon the third time that Mr. Meagher was called to the stand that in response to a leading question from counsel he testified that Shire said it was O. K. for the Bank to charge his account with the amount of the Frazer and the parts on Monday, February 9, 1948. (Tr. 109.)

When this matter again came up in connection with the cross examination of Mr. Meagher the statement of the Court and the understanding of Mr. Critchlow are helpful (Tr. 125):

"The Court: Maybe this would be helpful: My understanding of his testimony was that he asked him if he could charge his account and he said he had some checks outstanding that he would go to Salt Lake and bring the money back Monday or Tuesday.

"Mr. Critchlow: That is my understanding of it.

"The Court: I did not understand that he

authorized the defendant, or anybody else, in any way to withdraw from his checking account, but he wanted him not to withdraw, because he had some outstanding checks.”

Mr. Meagher’s “after-thought” concerning the authority from Shire to make a charge on Monday fades into comparative insignificance in view of his prior testimony referred to above and in face of the fact that no charge was made until Friday, the 13th.

This being a law case this Court is bound by the findings of the trial Court if there is any competent evidence to support them. Harper vs. Tri-State Motors, Inc. 90 Utah 212, 58 Pac. 2d 18; Vadner, vs. Rozelle, 88 Utah 162, 45 Pac. 2d 561; Van Leeuwen, vs. Huffaker, 78 Utah 521, 5 Pac. 2d 714; In re Knight’s estate, 105 Utah 130, 141 Pac. 2d 879. The findings of the Court are not only supported by competent evidence, but by the weight of the evidence.

Respondent claims that it had the right without Shire’s authority, to charge his account for the Frazer car which was sold, because, so Respondent contends, the proceeds from the sale of the car were to have been held in trust for the Bank and at the time of the charge were not secured. This argument begs the whole question of the law suit. Appellant maintains that so long as any of the cars included in the trust receipt and chattel mortgage securing the \$11,270.00 note were unsold that the note and trust receipt were secured. The Bank had one of the Frazer cars included in the trust receipt and chattel mortgage on hand and unsold at the time of Garnishment (Record Page 9).

Respondent claims that the deposit made on February 14, 1948, (the deposit slip is dated February 13, 1948, Exhibit "H") was intended by Shire to be applied on his indebtedness to the Bank. The evidence does not support this contention. The evidence on the contrary shows that a deposit slip was made out for the items involved, (Exhibit "H") which bears the initial "W", a Teller by the name of Winkel at the Bank (Tr. 75) and the figures \$2564.00 in two places, are those of Mr. Winkel. Exhibit "AA" shows that the sum of \$2564.00 was credited *by the Bank* to Shire's account on February 14, 1948. These being the facts there can be no inference that Shire intended this sum to be used to pay his debts to the Bank. It is more logical to assume he sent the funds for deposit to cover his outstanding checks. He was more greatly concerned about his outstanding checks than his indebtedness to the Bank, as is borne out by references made by both Appellant and Respondent to the testimony of Mr. Meagher concerning what Shire said about his checks. In any event here again not only competent evidence on this point, but the weight of the evidence supports the finding of the trial Court.

Appellant concedes that the bank had the right to apply \$1800.00 of the \$2605.00 charged against Shire's account to the payment of the \$2065.00 unsecured note.

SPECIFICATION OF ERROR NO. 4

The Court did not err in failing to find that the minimum sale price of each of the Frazer cars in the Trust Receipt was \$2504.84. Whether such was the agreement is not a material issue raised by the pleadings, and

is not an ultimate fact essential to a determination of the controversy. This Court has held that findings should be limited to the ultimate facts to be ascertained. *Fuller vs. Burnett*, 66 Utah 507, 243 Pac. 790; *Jankele vs. Texas Company*, 88 Utah 325, 54 Pac. 2d 425.

SPECIFICATION OF ERROR NO. 5

Respondent contends the Court erred in not quashing the Writ of Garnishment on the ground that the claims of Appellant sued upon were secured. The Appellant's suit against Shire consists of three Causes of Action, each based upon an unpaid check. The First Cause of Action was for a check in the amount of \$3230.69 (Record 1) the Second Cause of Action was for a check in the amount of \$509.08 (Record 2) and the Third Cause of Action was for a check in the amount of \$100.00 (Record 3). There can be no question but what the Appellant was entitled to a Garnishment on the Third Cause of Action for the reason that the check for \$100.00 was never secured. Appellant merely cashed the check for Shire as an accommodation (Tr. 91). The Appellant entered into a "Floor plan" arrangement with Shire wherein it financed the purchase of four automobiles: A 1942 DeSoto and a 1941 Ford were the subject of one transaction evidenced by a Trust Receipt (Exhibit "3") and another trust receipt was executed for two 1948 Frazer automobiles (Exhibit "4"). Shire paid for the Ford automobile by a check in the amount of \$850.00 on February 2, 1948, at which time Appellant gave him a receipt, (Exhibit "I") and delivered to him the Title Certificate for the automobile. (Tr. 128). On February

9, 1948, Shire delivered to Appellant his check for \$509.08 (which check is the subject of Appellant's Second Cause of Action) and which was credited one-half to each car in Exhibit "4", and Shire was given a receipt for said amount (Exhibit "J", Tr. 129-130). Universal C. I. T. paid one-half of the balance on Exhibit "4" to pay for one of the Frazer automobiles (Tr. 130). On February 12, 1948, Shire gave Appellant his check for \$3230.69 (which is the subject of Appellant's First Cause of Action) and which was given to pay for the other Frazer automobile in Exhibit "4" and for the DeSoto in Exhibit "3". At that time Appellant gave Shire a receipt for the amount of the check and delivered to him the Title Certificate for the DeSoto automobile (Tr. 130-131). At said time Shire reported to Appellant that he had sold the remaining Frazer automobile listed in Exhibit "4". The Frazer automobile was a new car; and had not been registered and no title certificate had been issued therefor. Appellant held no title document which Shire needed to effect the registration of the automobile. The evidence therefore is to the effect that the two trust receipts were paid in the manner above set forth.

Th Trust Receipt, Exhibit "4", contains the following provision:

"So long as Trustee is not in default hereunder, Trustee may in the regular course of his business sell said vehicles for cash, or on terms approved in advance by Entruster, for not less than the minimum sale price hereinabove set opposite said respective vehicles, plus a pro-rata part of all accrued interest and charges hereunder. Trustee agrees in case of each sale to hold

in trust for Entruster the proceeds of such sale, together with any vehicle taken in trade, separate from his funds and property, and immediately to pay over and deliver said proceeds and trade vehicle to Entruster.”

The amount owing on the trust receipt was not due until February 29, 1948, therefore Shire was not in default and had a right to sell the automobiles described therein. Upon a sale of said automobiles according to the terms of the trust receipt they were no longer secured by the trust receipt, but in lieu of the security the Trustee was obligated to hold the funds in trust for the Appellant. In other words, Shire was a trustee with the power to sell, and upon sale was obligated to account to Appellant, but Appellant did not have the right to follow the automobiles which were sold in the regular course of business into the hands of a purchaser from Shire, but was limited to his right to require Shire to account for and pay to Appellant the minimum sale price of the automobiles listed. As authority for this contention the following cases are cited: Peoples Finance and Thrift Company of Visalia, vs. Bowman, 137 Pac. 2d 729 Cal., which holds as follows:

“A buyer of an automobile from a dealer was a buyer in the ordinary course of trade and obtained good title to the automobile free from the lien of the trust receipt.”

See also Colonial Finance Co. vs. DeBenigno, 7 Atl. 2d 841, 125 Conn. 626; General Finance Corporation, vs. Krause Motor Sales, 23 N. E. 2d 781, 302 Ill. App. 210.

The purchaser of the Frazer automobile from Shire took the same free from any lien of the Appellant. The

Uniform Trust Receipt Act, 1945 Session Laws, Pages 255-6, reads as follows:

“Where the trustee, under the trust receipt transaction, has liberty of sale and sells to a buyer in the ordinary course of trade, whether before or after the expiration of the thirty day period specified in subsection 1 of Section 8 of this act, and whether or not filing has taken place, such buyer takes free of the entruster's security interest in the goods so sold, and no filing shall constitute notice of the entruster's security interest to such a buyer.”

Respondent contends that Appellant's theory defeats its right to a Garnishment. This is not so. There is a difference between the relationship between the Bank and Shire and that of Appellant and Shire. The \$1500.00 note held by the Bank was secured by a chattel mortgage which was not foreclosed until after the Garnishment. The \$11,270.00 note was secured by a chattel mortgage on five Frazer automobiles. The Bank also held a trust receipt on the same automobiles. The chattel mortgage was never foreclosed and the Bank had in its possession one of the automobiles so secured at the time of the Garnishment, which had not been sold. There can be no question but what the \$1500.00 note was secured at the time of the Garnishment. We are aware of no way the bank can avoid the effect of the chattel mortgage on the five Frazer automobiles, but if in some unknown way it can be said that the Bank elected to forget the chattel mortgage and rely on the trust receipt, yet at the time of the Garnishment the Bank still had one of the automobiles included in the trust receipt in its possession which remained unsold. So long as the mortgage was not fore-

closed and any of the automobiles remained undisposed of, the note and trust receipt were secured. On the other hand, all of the automobiles described in the trust receipts held by Appellant had been sold prior to the commencement of the action. The trust receipts had been paid in the manner set forth in the testimony of Mr. Brothers (Tr. 130). The security was no longer available to Appellant, as heretofore discussed. Appellant's suit is based upon three checks, payment for which was refused by the Bank, and which were not secured.

A sufficient answer to the discussion with respect to the Milan Rogers contract on Pages 32 and 33 of Respondent's brief is that if Respondent considers that it has an interest in the automobile, then such should be asserted against the automobile itself and not against the Appellant who is a purchaser of a contract for the sale of the same at Execution Sale.

SPECIFICATION OF ERROR NO. 6

The sheriff attached the interest of Shire in the Frazer automobile at a time when it was in possession of the Bank (Record 24-25). The attachment was made pursuant to Section 104-18-11. The liability of the Bank is governed by Section 104-18-12. Under this section, if the Bank chose to retain possession of the automobile there is no reason why Appellant should be charged with storage. The Sheriff did not take possession of the car. The attachment did not prevent the Bank from disposing of the automobile, but if the Bank chose to retain possession it should bear the cost of storage. There is no basis for the charging of storage against Appellant at all. In

any event, the Court determined \$35.00 was a reasonable storage. If there was error it was in allowing the Bank any storage at all.

SPECIFICATION OF ERROR NO. 7

The Court did not err in awarding costs to Appellant. In its Answer of Garnishment the Bank denied that it was indebted to Shire in any amount (Record 9). The trial Court held that the charges made by the Bank on Shire's account were unauthorized. Therefore, the Bank's Answer was successfully "controverted" and costs were rightfully awarded to the Appellant pursuant to the sections of the statute quoted by Respondent.

SPECIFICATION OF ERROR NO. 8

There was no error in refusing to admit Respondent's proposed Exhibit "10." The date of the Exhibit, which is a letter, in April 2, 1948. The rights of the parties are to be determined as of February 24, 1948, the date of the service of the Writ of Garnishment. Whatever action the Bank took thereafter in attempting to dispose of its security under the trust receipt has no bearing upon the issues before this Court.

REPLY TO APPELLANT'S BRIEF

The only point raised by Respondent which was not discussed by Appellant in its original Brief is concerning Section 104-19-18. It would seem that this section has no application here, as Appellant seeks by this action to Garnishee the funds of Shire in the Bank and has not attempted to take possession of the mortgaged property

from the Bank. We see no way that Respondent can gain comfort in seeking help from Section 104-19-18 in an interpretation of Section 104-19-13, as Section 104-19-18 covers an entirely different situation.

CONCLUSION

We therefore respectfully submit that the Court did not err in the manner contended for by the Respondent, but respectfully urge this Court to set aside the Conclusions of Law and Judgment of the Trial Court and to make Conclusions of Law and Judgment in favor of the Appellant and against Respondent for the amounts charged by the Bank against the Defendant Shire's, account and which were applied on its secured indebtedness.

Respectfully submitted,

ROMNEY AND BOYER,

Attorneys for Appellant