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Zions First National Bank v. M-S Commodities, Inc.; M-S Commodities of Utah, Inc.; Priscilla Secrest; Maurie Schneider; J. Moroni Stoof; Edward Dallin Bagley; Dal-Ron Enterprises : Brief of Appellant

Utah Supreme Court

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17011

IN THE SUPREME COURT OF THE STATE OF UTAH

ZIONS FIRST NATIONAL BANK, a National Association,)

Plaintiff and Appellant,)

vs.)

M-S COMMODITIES, INC.; M-S COMMODITIES OF UTAH,)
INC.; PRISCILLA SECREST; MAURIE SCHNEIDER; J.)
MORONI STOOF; EDWARD DALLIN BAGLEY; DAL-RON)
ENTERPRISES, a corporation,)

Defendants and Respondents,)

ZIONS FIRST NATIONAL BANK, a National Association,)

Third Party Plaintiff and Appellant,)

vs.)

CLARK TANK LINES COMPANY, a corporation,)

Third Party Defendant and Respondent.)

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04 FEB 1976

BRIGHAM YOUNG UNIVERSITY
I. Reuben Clark Law School

Case No. 14017

APPELLANT'S BRIEF

Appeal from Order dated February 5, 1975, denying Motions to
Set Off Judgment, Extinguish Attorney's Lien, Vacate and Set
Aside Execution and to Quash Order to Show Cause by the
District Court of Salt Lake County, Utah
Honorable Stewart M. Hanson, Jr., Judge

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FILED
JUL 16 1975

IN THE SUPREME COURT OF THE STATE OF UTAH

ZIONS FIRST NATIONAL BANK, a National Association,)

Plaintiff and Appellant,)

vs.)

M-S COMMODITIES, INC.; M-S COMMODITIES OF UTAH,)

INC.; PRISCILLA SECREST; MAURIE SCHNEIDER; J.)

MORONI STOOF; EDWARD DALLIN BAGLEY; DAL-RON)

ENTERPRISES, a corporation,)

Defendants and Respondents,)

Case No. 14017

ZIONS FIRST NATIONAL BANK, a National Association,)

Third Party Plaintiff and Appellant,)

vs.)

CLARK TANK LINES COMPANY, a corporation,)

Third Party Defendant and Respondent.)

APPELLANT'S BRIEF

PRELIMINARY STATEMENT OF RELATIONSHIP OF THIS
APPEAL TO ANOTHER PENDING APPEAL BEFORE THIS
COURT ARISING OUT OF THE SAME CASE

This appeal, being Case No. 14017, has to do with post judgment proceedings in connection with Judgments entered by the trial court, presently on appeal in Case No. 13669, which is a pending appeal arising out of the same case and cause as this appeal. A Motion to Consolidate the two appeals was filed on behalf of Zions First National Bank and argued before this Court on April 7, 1975, but the Motion was denied on the representation of counsel for M-S Commodities,

Inc. that it would be burdensome and unfair to require that party to become involved in both appeals. (As will be argued later, and in connection with the other appeal, it is submitted that M-S Commodities, Inc. in fact is involved in both appeals.) It is respectfully urged that the two appeals should definitely be set for argument on the same day, and decided with reference to each other, because each appeal has to do with the legal effect of the same judgments entered by the court below.

STATEMENT OF THE NATURE OF THE CASE

This appeal arises from an attempted execution by Respondent M-S Commodities, Inc. upon a Judgment which was awarded by way of offset against a larger Judgment contemporaneously awarded to Appellant Zions First National Bank. On January 17, 1974, Judgment for \$38,505.00 was entered in favor of Zions First National Bank and against M-S Commodities, Inc. (and others) by Judge Bryant Croft. Other Judgments were also entered, including a Judgment for \$25,000.00 by way of offset in favor of M-S Commodities, Inc. (only) and against Zions First National Bank, so that the net effect of the Judgments as between Zions First National Bank and M-S Commodities, Inc. was a net Judgment in favor of Zions First National Bank against M-S Commodities, Inc. in the amount of \$13,505.00. On January 22, 1975, a Writ of Execution was served upon Zions First National Bank relative to the said \$25,000.00 Judgment. The execution was not honored because the larger \$38,505.00 had not been satisfied in whole or in part. An Order to Show Cause issued against Zions First National Bank for failure to respond to the execution, whereupon motions to Vacate and Set Aside the Execution, to Quash the Order to Show Cause, and to Set Off the Judgments were filed on behalf

of Appellant herein, Zions First National Bank. Motions for Reconsideration and to Stay Execution were thereafter filed, but never acted upon since this appeal was taken.

DISPOSITION IN THE LOWER COURT

After argument before Judge Stewart M. Hanson, Jr., on a regular law and motion day, the Court below denied in all particulars Appellant Zions First National Bank's Motions to Vacate or Set Aside the Execution, to Quash the Order to Show Cause, and to Set Off the Judgments, by entry of Order dated February 5, 1975.

RELIEF SOUGHT ON APPEAL

Appellant Zions First National Bank seeks reversal of the Order of the lower court denying its Motions to Vacate or Set Aside the Writ of Execution, to Quash the Order to Show Cause and to Set Off the Judgments, and judicial declaration that Zions First National Bank is entitled to a judgment against M-S Commodities, Inc. ab initio for the residue in its favor in the net amount of \$13,505.08.

In the alternative, if for any reason this Court should decline to rule as a matter of law as to the ab initio effect of the judgments as having been offset against each other, or should refuse to reverse the law and motion judge's order declining to offset, this matter should be remanded for further proceedings to the trial judge who entered the original judgments.

STATEMENT OF FACTS

A five day trial of this case was commenced on October 15, 1973, before the Third Judicial District Court, Judge Bryant Croft. At the conclusion, Judgments were entered as follows:

ORDERED, ADJUDGED AND DECREED that plaintiff Zions First National Bank is awarded judgment against M-S Commodities, Inc. in the amount of \$38,505.08, plus interest and costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant M-S Commodities, Inc. is awarded judgment on its counterclaim against plaintiff Zions First National Bank in the amount of \$25,000.00, plus interest and costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that third party plaintiff Zions First National Bank is awarded judgment against third party defendant Clark Tank lines in the amount of \$25,000.00, plus interest and costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Zions First National Bank is awarded judgment against defendant Maurie Schneider, personally, in the amount of \$38,505.08, plus interest and costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff, Zions First National Bank, is awarded judgment against J. Moroni Stoof, personally, in the amount of \$38,505.08, plus interest and costs and that no recovery is allowed for attorney's fees.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff, Zions First National Bank is awarded judgment against Dal-Ron Enterprises, Inc. in the amount of \$34,725.50, plus interest and costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff, Zions First National Bank's claims against Priscilla Secrest, personally, and Edward Dallin Bagley are dismissed with prejudice and that plaintiff's claim against M-S Commodities of Utah, Inc. is dismissed.

Third Party Defendant Clark Tank Lines filed its Notice of Appeal both as to the entry of the \$25,000.00 Judgment in favor of M-S Commodities, Inc. and against Zions First National Bank, and as to the entry of the \$25,000.00 Judgment in favor of Zions First National Bank and against Clark Tank Lines. That appeal is now pending before this Court, being Case No. 13669. Although neither Zions First National Bank nor M-S Commodities, Inc. filed Notices of Appeal as to any

of the said judgments, both are named as Respondents in the aforesaid appeal in Case No. 13669. It is with respect to the \$25,000.00 Judgment in favor of M-S Commodities, Inc. now pending on that appeal, which the trial court ruled in its Conclusions of Law is an offset against the \$38,505.08 Judgment in favor of Zions First National Bank, that the Writ of Execution involved in this appeal was issued.

The Writ of Execution in question was issued on January 21, 1975, and served upon a representative of Zions First National Bank on January 22, 1975. (R. 1371-1371) It was refused by the bank on the same date. A Notice of Attorney's Lien thereafter was filed, and an Order to Show Cause was issued on January 23, 1975. (R. 1383, 1384) The scheduled Hearing thereupon never occurred since the Motions which are the subject matter of this appeal intervened, said Motions having been filed on January 27, 1975, and heard by Judge Stewart M. Hanson, Jr. on February 4, 1975. Thereafter, a Motion for Reconsideration and a Motion to Stay Execution were filed. In order to be sure not to have acquiesced in the prior Order denying the Motions to Vacate, to Quash and to Set Off, however, a timely Notice of Appeal was filed as to that Order before any hearing was had on the aforesaid motions. Accordingly, there has never actually been a hearing or argument either as to the pending Order to Show Cause or the pending Motions for Reconsideration or to Stay Execution.

Further facts delineating the nature of the judgments entered and the background of this case are set forth in a brief contemporaneously filed in this Court by Zions First National Bank in companion appeal, in Case No. 13669, which is referred to and by this reference incorporated herein.

ARGUMENT

POINT I. THE LEGAL EFFECT OF THE JUDGMENTS IN FAVOR OF ZIONS FIRST NATIONAL BANK AND M-S COMMODITIES, INC. WAS A NET JUDGMENT IN FAVOR OF ZIONS FIRST NATIONAL BANK AND HENCE NO WRIT OF EXECUTION COULD PROPERLY ISSUE AS TO THE LESSER JUDGMENT IN FAVOR OF M-S COMMODITIES, INC.

M-S Commodities, Inc. pleaded by way of Counterclaim that it was entitled to a judgment of \$25,000.00 against the claim of \$38,505.08 which Zions First National Bank asserted against it. The trial court in its Conclusions of Law expressly related the two judgments one to the other, and declared the \$25,000.00 Judgment in favor of M-S Commodities, Inc. to be an offset to the larger Judgment of \$38,505.08 in favor of Zions First National Bank:

Plaintiff Zions First National Bank was negligent in releasing the \$25,000 wire transfer of March 15, 1971, which had been sent for the credit of Dal-Ron Enterprises to representatives of Clark Tank Lines, by check made payable to the Clearfield State Bank, and M-S Commodities is entitled to a judgment of \$25,000 as an offset to its liability to Zions First National Bank. R. 659-60; A. 243-44 [Emphasis added.]

The legal effect of these two judgments was recognized by the trial court to be a net judgment in favor of Zions First National Bank, since it was stressed that the Judgment of \$25,000.00 was strictly "an offset to its liability to Zions First National Bank." Certainly as between Zions First National Bank and M-S Commodities, Inc. there was in substance and effect no net Judgment in favor of M-S Commodities, Inc. which could stand as the basis for a Writ of Execution. As between these parties, the setoff had already occurred and the trial court's discretion had been exercised in the matter. Although as a matter of form separate judgments in fact were entered, in substance as between the two parties there was only the remaining net liability of M-S Commodities, Inc. to Zions First

National Bank in the amount of \$13,505.08. The said \$13,505.08 represented the remaining liability of M-S Commodities, Inc. to Zions First National Bank after setting off the \$25,000.00 Judgment in its favor against the \$38,505.08 Judgment against M-S Commodities, Inc. and in favor of Zions.

This analysis is entirely consistent with the law:

Where a set-off or counterclaim is pleaded it becomes part of a single controversy between the parties and only one judgment is required . . . Where defendant established a counterclaim to an amount equal to, or greater than, plaintiff's demand, the judgment must be in favor of defendant, and if defendant establishes a counterclaim for an amount of less than plaintiff's demand, although there may be a finding for each party, only one judgment is proper, a judgment for plaintiff for the difference between the amounts of the findings. 80 C.J.S. Set-off and Counterclaim, § 58, p. 116 [Emphasis added.]

* * *

Where a setoff or counterclaim is pleaded, it becomes a part of a single controversy between the parties, requiring only one verdict and one judgment according to the facts. The general rule is that where an established setoff or counterclaim is less than plaintiff's demand, plaintiff had judgment for the residue only; . . . 20 Am Jur 2d Counterclaim, Recoupment, etc., § 157, p. 364 [Emphasis added.]

It is submitted that the judgments as between and affecting Zions First National Bank and M-S Commodities, Inc. should be revised ab initio so as to reflect the correct and proper net effect of the two judgments, namely a Judgment in favor of Zions First National Bank and against M-S Commodities, Inc. in the amount of \$13,505.08. Since in contemplation of law the two judgments were merged and a net remaining Judgment in favor of Zions First National Bank for the residue of \$13,505.08 should have been entered, this Court should either:

- (1) Enter its order declaring and establishing the net

effect of the two judgments to be one judgment for the residue
in favor of Zions First National Bank in the net amount of \$13,505.08;
or

(2) Remand this case to the trial judge who entered the original
judgments, with directions to enter a judgment ab initio for the residue
in favor of Zions First National Bank in the net amount of \$13,505.08.

POINT II. THE LOWER COURT ERRED IN REFUSING TO TREAT THE JUDGMENTS
AS BEING OFFSET OR TO OFFSET THE JUDGMENTS AND IN REFUSING TO VACATE
THE WRIT OF EXECUTION.

It is submitted as a matter of law that the true net effect of the judgments
in question was, at least as between the parties, that there was an offset ab initio,
creating a net judgment of \$13,505.08 in favor of Zions First National Bank, with
there then being no valid basis for issuance of the Writ of Execution in question
in favor of M-S. Assuming, for sake of argument only, that further action
by the Court was necessary for some reason to effect the offset, it is submitted
that the lower court should have declared the existence of an offset and vacated
the Writ of Execution.

A. Setoff of one Judgment against another Judgment is appropriate where
mutual claims of parties each have been reduced to Judgment, and in the absence
of compelling circumstances to the contrary, the Court should allow set off of
Judgments.

It is clear that the Court has power to offset an unpaid judgment in
favor of a judgment debtor against a judgment sought to be enforced by a judgment
creditor. In this regard, the rule is well established that judgments resulting
from mutual claims of parties may be set off against each other:

The satisfaction of a judgment may be wholly or partly produced by compelling the judgment creditor to accept in payment a judgment to which he is subject, since it is a general rule that when mutual claims of parties have passed into judgments, one judgment may be set off against the other. 47 Am Jur Judgments § 999 [Emphasis added.]

* * *

As a general rule, one judgment may be set off against another, since a party should not be permitted to collect the judgment in his favor leaving unpaid a judgment against him. 49 C.J.S. Judgments § 566a [Emphasis added.]

The courts have stated as reasons for granting setoff such things as "equity and good conscience require setoff," "substantial justice would be promoted thereby," "the judgments must be between the same parties," and "both judgments must require payment of money." (See 49 C.J.S., Judgments, 1043, 47 Am Jur, Judgments, 98, Anno. 121 ALR 501, and cases cited therein.)

It is submitted that all of the aforesaid reasons would require application of setoff of the judgments in question. Accordingly, the lower court erred in failing to offset, and that error should be corrected in the interest of justice.

B. The filing of a Notice of Attorney's Lien does not constitute grounds to justify refusal to offset Judgments.

This Court has not been called upon to rule as to the relative priority of attorney's liens and offsetting judgments. However, in referring to the Utah attorney's lien statute, this Court has stated:

The lien which this statute gives the attorney is upon his client's cause of action and/or the judgment; and with respect thereto he stands in no better position than his client. Lundberg v. Dastrup, 28 Utah 2d 28, 497 P.2d 648, 650-51.

A case cited by counsel for Respondent below, Alexander v. Clarkson, et al., 164 Pac. 194 (Kansas 1917) is not on point because there were not mutual judgments

involved, and there was a bona fide assignment of judgment for value which intervened. In the case at bar, the attorney for M-S Commodities and Maurie Schneider clearly had notice of the other judgment, and any assignment or alleged assignment after the judgment to any of the parties to the suit would be subject to the same infirmity. Such party to the lawsuit (including Maurie Schneider) could not be a bona fide purchaser without notice.

This Court should hold that an attorney's lien is inferior to a setoff acquired in the same cause of action. Zions First National Bank's judgment should be set off against M-S Commodities, Inc.'s judgment, thus extinguishing any alleged lien by the attorney for M-S Commodities. To hold otherwise, would put the attorney in a better position than his client.

POINT III. IN THE ALTERNATIVE, THIS CASE SHOULD BE REMANDED TO THE TRIAL JUDGE WHO ENTERED THE ORIGINAL JUDGMENTS.

By reason of Judge Hanson's refusal to recognize the setoff which had been judicially declared by Judge Croft, it would appear that the action by the law and motion judge in this case in substance and effect amounted to a reversal or substantial variance of the action by the trial judge. This Court has clearly stated that orders of one District Judge may not be set aside by another district judge, nor can one district judge overrule another such judge having identical authority and stature. Harward v. Harward, 526 P.2d 1183 (Utah 1974), State of Utah v. Morgan, 527 P.2d 225 (Utah 1974).

It is submitted that if for any reason this Court is not inclined to rule as a matter of law that the judgments were offset ab initio, or that the Order of the Law and Motion judge refusing to offset should be reversed, then the case should

be remanded to the District Judge who tried the case for further proceedings.

Respectfully submitted,

J. THOMAS GREENE
GIFFORD W. PRICE

Attorneys for Appellant Zions
First National Bank

DATED: July 16, 1975

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