1997

Zions First National Bank, a national banking association and 4447 Associates, a Utah general partnership v. First Security Financial, a Utah Corporation : Reply Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ZIONS FIRST NATIONAL BANK, a national banking association, and **4447 ASSOCIATES**, a Utah general partnership, Plaintiff and Appellee, v. **FIRST SECURITY FINANCIAL**, a Utah corporation, Defendant and Appellant.	Case No. 970644-CA Priority No. 15

Reply Brief of Appellant

Appeal from Judgment Entered by
the Third Judicial District Court, Salt Lake County,
the Honorable Frank G. Noel

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I. THE DISTRICT COURT ERRED ON REMAND BY HOLDING THAT SECTION 70A-9-318(3) DOES NOT APPLY TO THIS CASE.

As demonstrated in First Security's principal brief, the district court erred on remand by holding that section 70A-9-318(3) does not apply to this case. In its responding brief, 4447 Associates does not dispute that the decision of the Utah Supreme Court in America First Credit Union v. First Sec. Bank, 930 P.2d 1198 (Utah 1997), demonstrates that section 318(3) does apply to cases like this one.[1] Rather, 4447 Associates relies on the argument that "[t]his Court has already addressed and rejected" First Security's argument concerning section 318(3). Brief of Appellee at 18. However, this argument fails to address the real issue of this appeal. The question is not what the court of appeals held in its previous opinion but whether that decision was overruled by the decision of the Utah Supreme Court in America First and whether the district court was obligated to follow the law as announced by the supreme court.

In the prior appeal in this case, this Court ruled that the dual notice requirement of section 318(3) applies only to "payments as they become due" and not to a payment in full like the settlement in this case. Id. 4447 Associates does not

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[1]Nor does 4447 Associates dispute or discuss any of the cases from other jurisdictions applying section 318(3) to cases where there has been a full payment of the obligation.

dispute that the Utah Supreme Court reached a contrary conclusion in America First. It merely makes the circular argument that "America First does not assist here because this Court's ruling in the First Appeal did not involve application of Section 70A-9-318(3)." Brief of Appellee at 20. In other words, 4447 Associates does not dispute that section 318(3) was involved and argued in the prior appeal; it merely argues that section 318(3) was not applied by this Court in the first appeal. However, America First reaches a different conclusion than this Court did, and it teaches that this case requires application of section 318(3).

In America First, the supreme court applied the two-pronged notice requirement of section 318(3) even though there had been a full payment. Thus, the law, as announced by the highest court in the state is that section 318(3) is not limited to cases involving the assignment of payments "as they become due." Therefore, this Court's prior opinion is no longer controlling. 4447 Associates seems to acknowledge this point and therefore relies upon the doctrines of res judicata and law of the case to argue that the change in the law does not apply here. This argument is wrong.

Because no judgment was entered on remand, the doctrines of res judicata and law of the case do not apply, and the district court was bound to follow the law as announced by the Utah

Supreme Court in America First.[2] In its opening brief First Security cited the Court to the case of Petty v. Clark, 192 P.2d 589 (Utah 1948). In that case, which is not refuted or discussed by 4447 Associates, the Utah Supreme Court held that where an intermediate appellate court announces a rule and remands a case, but in the meantime the highest appellate court has reached a contrary conclusion, the lower court "is bound by the decision of the highest court of appeals." Id. at 594. This is precisely what happened in this case. This Court rendered a decision and remanded the case, but before judgment was entered, the supreme court reached a contrary conclusion.

First Security acknowledges that if judgment had already been entered against it, the change of law announced by America First would not benefit First Security. A case may not be reopened simply because there has been a change in the law. See Street v. Fourth Judicial Dist. Court, 191 P.2d 153, 158 (Utah 1948). But when final judgment has not been entered on remand, the case is governed by the principle that an "order or other form of decision is subject to revision at any time before the

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[2]Likewise, the supreme court's denial of First Security's petition for a writ of certiorari has no precedential value. In Heaton v. Second Injury Fund, the Utah Supreme Court held: "[O]ur rules clearly state that the denial or granting of a petition for certiorari 'shall not constitute a decision on the merits.' Utah R. App. P. 51(a). It should be emphasized that the denial of a petition for certiorari has no precedential value whatsoever." 796 P.2d 676, 679 (Utah 1990) (emphasis added).

entry of [final] judgment," Utah R. Civ. P. 54(b) (emphasis added), and that when there is an intervening change in the law prior to judgment, a lower court is bound to follow the decision "of the highest court of appeals." Petty, 192 P.2d at 594. Because judgment had not been entered,[3] the district court erred in not following the law as announced by the Utah Supreme Court.

II. THE DISTRICT COURT ERRED IN HOLDING THAT FIRST SECURITY AND CAPITOL WERE NOT ENTITLED TO MODIFY THEIR CONTRACT PURSUANT TO SECTION 70A-3-318(2).

The district court also erred in its legal conclusion that First Security and Capitol were not entitled to settle their disputes pursuant to section 70A-9-318(2). 4447 Associates does not respond to any of the legal authorities cited by First Security and does not dispute that under section 318(2), First Security and Capitol were free to modify or substitute the terms of their original contract. 4447 Associates' sole response is that First Security waived this argument by not raising it below and by not appealing the district court's factual findings. As explained below, these arguments are incorrect and must fail.

First Security has argued from the outset that it was free to settle its disputes with its original creditor, Capitol. This argument is supported by section 70A-9-318, upon which First Security has relied throughout the entire course of the

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[3]The only judgment that was ever entered in this case is the judgment in favor of First Security that was entered after a two-day bench trial.

litigation. 4447 Associates seems to argue that First Security waived certain provisions of section 318 by not including a specific subsection number in its arguments. This Court should reject this hypertechnical argument. More importantly, it is clear that the lower court considered and specifically ruled upon First Security's arguments concerning subsection 318(2). First Security now seeks review of those legal rulings.

4447 Associates also suggests that First Security has committed the fatal error of not appealing the district court's factual findings in this regard. However, the issue on appeal is *not whether the district court's findings of fact were correct* but whether the court erred in its <u>legal</u> conclusion that subsection 318(2) does not apply because First Security <u>terminated</u> rather than <u>modified</u> its contract with Capitol.

As demonstrated in First Security's opening brief, the right to "modify" an assigned contract necessarily includes the right to terminate it altogether. Brief of Appellant at 13-14, 18. 4447 Associates does not respond to the cases and commentaries setting forth this principle. Thus, this Court should hold that the district court erred in its legal conclusion and that there was no need for First Security to appeal the district court's factual findings.

In sum, the contract was properly modified and, notwithstanding the fact that this Court held that notice had

been received,[4] the district court erred in entering judgment against First Security.

III. THE DISTRICT COURT ERRED IN AWARDING ATTORNEY'S FEES TO 4447 ASSOCIATES.

4447 Associates' argument concerning the award of attorney's fees ignores the plain language of the contract:

> In the event of a dispute among the parties arising under this Agreement, the party or parties prevailing in such dispute shall be entitled to collect their costs from the other parties, including without limitation court costs and reasonable attorney's fees.

(Emphasis added.)

The dispute between First Security and 4447 Associates did not "arise under" the Asset Purchase Agreement but revolved around whether First Security had received notice of a subsequent assignment of the Asset Purchase Agreement. This is a matter that is extraneous to the contract. If 4447 Associates had wanted to obtain attorney's fees in the event there was a dispute concerning the assignment, it should have so contracted with the party from whom it obtained the assignment. First Security had no part in the assignment and should not be required to pay attorney's fees incurred in litigating whether First Security

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[4]On remand, First Security did not challenge, and does not challenge on this appeal, this Court's determination that First Security had received notice of the assignment (but only through a footnote in a financial statement that First Security received). However, both this Court and the district court have conclusively determined that First Security did not receive notice that it was to make its payments to the assignee.

received adequate notice of the assignment. The issue in this lawsuit was whether First Security must pay its debt twice. This is not something that arose under the contract, and the district court erred in awarding attorney's fees to 4447 Associates.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment entered in favor of 4447 Associates and remand the case for judgment in favor of First Security.

DATED this 15th day of October, 1998.

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT were mailed, postage prepaid, on this 15th day of October, 1998, to:

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