

1979

Commercial Security Bank v. Corporation Nine : Reply Brief

Utah Supreme Court

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Recommended Citation

Reply Brief, *Commercial Security Bank v. Corporation Nine*, No. 15773 (Utah Supreme Court, 1979).

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

COMMERCIAL SECURITY BANK,)
a Utah Corporation,)
)
Plaintiff,)
)
-vs-)
)
CORPORATION NINE,)
a Utah Corporation, ET AL,)
)
Defendants.)

Case No. 15773

REPLY

APPEAL from judgment of the Second Judicial
District Court of Weber County, State of Utah, the
Honorable Ronald O. Hyde presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

COMMERCIAL SECURITY BANK,)
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Plaintiff,)
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-vs-)
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CORPORATION NINE,)
a Utah Corporation, ET AL,)
)
Appellant-Defendants.)

Case No. 15773

REPLY BRIEF

THE NATURE OF THE CASE

Plaintiff-Respondent is hereinafter referred to as "bank". Defendant-Appellant is hereinafter referred to as "corporation". All abbreviations and designations in this Reply Brief shall be the same as those set out in the Brief of Appellant.

POINT I.

WHETHER THE BANK INTERFERED IN THE CONTRACTS OF THE CORPORATION IS A DISPUTED ISSUE OF FACT.

There is no question that the "bank" failed to disburse the final Twenty-One Thousand Dollars (\$21,000.00) of the loan. The only question is whether the \$21,000.00

would have allowed the "corporation" to attract sufficient renters to create a cash flow adequate to completion of the park. Testimony was presented on behalf of the "corporation" that such funds would have been sufficient. (T-104; also see pages 10 and 11 of Appellant's Brief)

If the testimony presented by the "corporation" is believed by the jury, the "corporation" would prevail on this issue. There is a clear fact dispute requiring a jury determination as to the retention of the \$21,000.00.

The other element of interference is Mr. Nye's pirating of the "corporation's" file and using it in a manner likely to severely hurt the "corporation". Nye adamantly denies using the "corporation's" file in any manner.

Gordon M. Belnap, who was the "bank's" chief real estate officer at the time, just as adamantly maintains that Nye used the file to use a rival park-- and used it after the loan was approved. (T-61,62 and 80; also see Appellant's Brief pages 8 and 9)

Mr. Nye's use of the file was not only unusual, it was unique. Gordon Belnap testified that it was the only incident of such use in his seventeen years at the bank. (T-62)

Whether or not there was a violation of the file clearly depends on whether the testimony of Mr. Belnap or Mr. Nye is believed.

Gordon Belnap testified that all of the leg work necessary to build a mobile home park was completed and presented to the "bank's" board of directors. Belnap testified that Alan Nye never did contact him about building a mobile home park until after the "corporation's" loan was approved. (T-58)

It is clear that as to the issue of interference there is testimony on both sides of the case. If the Defendant's evidence is believed, the case for interference is clearly established. This matter should have gone to the jury.

POINT II.

THE BANK RAISES THREE NEW ISSUES IN ITS BRIEF

The three issues raised by the Respondent's Brief are:

1. The Defendant conveyed the property after commencement of the foreclosure.
2. The evidence is insufficient to show any damages.
3. The "corporation's" counterclaim has been previously litigated.

These items can be dealt with, with the same brevity applied to them by the Respondent.

a. Transfer of Title: Respondent asserts that

the Defendant is a stranger to the title and lacks standing in the present case. Defendant's counterclaim concerns

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the property of Plaintiff's foreclosure but is a separate cause of action that would stand alone in a separate suit. Additionally, even if Plaintiff were correct, the testimony at trial was that the "corporation" owned property at the time of the commencement of the present action and still owned the property on the day of trial.

b. Evidence of Damages: Respondent in its Brief lists a number of the elements of damage specifically testified to by witnesses on behalf of the "corporation". Many of these items, as is pointed out by Respondent are project cost items with fixed dollar and cent liability. This is also pointed out in documents introduced as exhibits.

It is informative to analyze Respondent's statement, "These are project cost items, and we question them as being proper elements of damage." (Page 16 of Respondent's Brief) The question of whether or not these items of damage are attributable to the acts of the "bank" is a fact question. Clearly, as outlined previously, if the witnesses of the "corporation" are believed, the proximate cause of these items of damage would be the "bank" and its employees, officers and agents.

c. Defendant's Counterclaim Previously Liti-
gated: The litigation arising out of the problems of the mobile home park at the center of this case was massive.

In the original action there were over thirty (30) parties. That case was divided into a number of smaller actions for the purpose of trial. Two of those actions are still awaiting trial at the time of this writing.

One portion of that trial concerned the "bank's" foreclosure action on phase one of the mobile home park. The "corporation" has asserted as a defense and counterclaim the interference of contract in every action filed by the "bank" against "corporation". A stipulation was entered allowing the bank to foreclose on phase one of the mobile home park and sell the property at a Sheriff's Sale with a stipulated redemption price.

As is pointed out by Respondent in its Brief on page 11, "However, the counterclaim as such of the Defendant was not dismissed." (Respondent's Brief at Page 11)

Respondents filed the action to foreclose the Huggins property after the above-described stipulation was entered, and the "corporation" asserted as a defense to this action the counterclaim that it has asserted in every action. The trial in the present case has been the one and only time that the issues asserted by the "corporation" have been heard by the Court. The "corporation" has never stipulated to a dismissal of its counterclaim, nor has any Court at any time ordered a dismissal of its

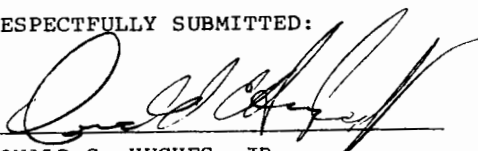
counterclaim other than a directed verdict in the instant case.

CONCLUSION

It is abundantly clear that Alan Nye was a director, officer, and shareholder of the "bank". It is also clear that if the witnesses of the "corporation" are believed, Mr. Nye acting within the scope and authority of his position as officer and director of the "bank" violated the file of the "corporation" and used documents and items contained therein to construct a rival mobile home park with the sure knowledge that such action would prevent the construction and success of "corporation's" mobile home park. The damages are clear. Many of the elements of damage have specific dollars and cents values in the form of special damages.

The trial Court erred in taking this case away from the jury. "Corporation" has not had its day in Court and deserves to have the issues adjudicated by the jury.

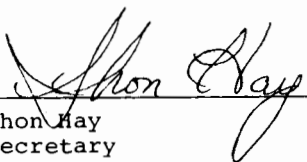
RESPECTFULLY SUBMITTED:



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CERTIFICATE OF DELIVERY

I hereby certify that I delivered two true and correct copies of the enclosed Reply Brief to Richard L. Stine, Attorney for Respondent, at 2650 Washington Boulevard, Ogden, Utah 84401, on this 5th day of February, 1979.



Shon May
Secretary

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