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Property Improvement Corporation v. CLEON D. TUCKER and MRS. CLEON D. TUCKER, also known as BETTY J. TUCKER, his wife; WILLARD M. TUCKER and MRS. WILLARD M. TUCKER, also known as PHYLLIS 0. TUCKER, his wife; CONTINENTAL ACCOUNT SERVICING HOUSE, INC., a Utah corporation; and KEY ACCOUNT COLLECTION HOUSE, INC., a Utah corporation : Brief of Respondent

Utah Supreme Court

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Kay M. Lewis; Jensen & Louis; Attorney for Plaintiff-Respondent.
Richard J Leedy; Attorneys for Defendants-Appellant.

4021

IN THE SUPREME COURT OF THE STATE OF UTAH

PROPERTY IMPROVEMENT CORPORATION, a corporation,

Plaintiff and Respondent,

vs.

CLEON D. TUCKER and MRS. CLEON D. TUCKER, also known as BETTY J. TUCKER, his wife; WILLARD M. TUCKER and MRS. WILLARD M. TUCKER, also known as PHYLLIS O. TUCKER, his wife; CONTINENTAL ACCOUNT SERVICING HOUSE, INC., a Utah corporation; and KEY ACCOUNT COLLECTION HOUSE, INC., a Utah corporation,

Defendants,

EUGENE S. SIMPSON and MRS. EUGENE S. SIMPSON, also known as JANE JOE SIMPSON, his wife,

Defendants and Appellants.

No. 14231

RESPONDENT'S BRIEF

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Defendants and Appellants.	)	

RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action on a promissory note bearing the names of the Defendants-Appellants and others.

DISPOSITION IN LOWER COURT

Plaintiff filed its complaint based upon a promissory note bearing the names of the Defendants-Appellants and others. Plaintiff's motion for summary judgment as to all defendants was granted as to the individual defendants but denied as to the corporate defendants whose cases are still before the trial court. Defendants-Appellants have appealed the lower court's order of summary judgment against them.

RELIEF SOUGHT ON APPEAL

Plaintiff-Respondent seeks affirmance of the judgment of the trial court.

STATEMENT OF FACTS

Defendants-Appellants Simpson (hereinafter referred to as "Defendants Simpson") and others executed a promissory note to Plaintiff-Respondent (hereinafter referred to as "Plaintiff"), on March 26, 1974, in the amount of $150,000.00, the proceeds therefrom being received by the Defendants Simpson for their own benefit. The promissory note was executed for the purpose of facilitating a sale of certain stock and other interests in Continental Account Servicing House, Inc., and Key Account Collection House, Inc., both party defendants in this action but not participating in this appeal. The seller in this transaction was Eugene S. Simpson and the buyers were Mr. and Mrs. Cleon D.

Tucker and Mr. and Mrs. Willard M. Tucker, all named defendants.

As partial security for the promissory note, the Defendants Tucker were required to and did place into Continental Account Servicing House, Inc., certain real properties valued in excess of $1,000,000.00. As additional security, the Defendants Simpson were required to and did place into escrow certain stock of the Defendant corporations. However, on or about June 17, 1974, the Defendants Tucker removed the real properties from the said corporation, allegedly because they believed themselves to have been defrauded by the Defendants Simpson.

As a result of the transfer of that real property out of the corporation, the terms of both the promissory note and the contract of sale were breached, and Plaintiff's security on the note was seriously jeopardized. Plaintiff brought this action for judgment on the promissory note and for a decree that the stock held in escrow might be sold at public auction. After the pleadings were filed by all parties, Plaintiff moved for summary judgment.

The trial court granted Plaintiff's motion for summary judgment as against the individual defendants, but, inasmuch as the court felt the corporate defendants had pled certain defenses which established issues of material fact, judgment was denied as against the corporate defendants. Defendants Simpson have appealed the trial court's decision.

ARGUMENT

POINT I

THE DECISION OF THE TRIAL COURT WAS PROPER FOR THE REASON THAT THERE WERE NO DISPUTED ISSUES OF MATERIAL FACT BETWEEN PLAINTIFF AND DEFENDANTS SIMPSON.

Defendants Simpson have claimed in their appeal brief that certain issues of material fact remain unresolved and that the matter should, therefore, be remanded to the trial court. Further, Defendants Simpson have listed in their brief those question which they allege to be disputed issues of material fact, to-wit:

1. Defendants Simpson now allege that the signature of Pauline Simpson was a forgery.

> "Defendant Pauline Simpson. . .filed an affidavit. . .that she did not execute the promissory note in question and that her purported signature was a forgery." Appellants' Brief, 2.

2. Defendants Simpson have sought refuge in the defense of the corporate defendants that the contract was unconscionable as to them. "Other defendants averred. . . that the terms of the agreement. . .were unconscionable. . . ." Appellants' Brief, 2.

3. Defendants Simpson have alleged that they are not liable on the promissory note because they are mere accommodation makers. Appellants' Brief, 3.

4. Defendant Eugene S. Simpson has alleged that after he executed the promissory note "the terms and conditions of the promissory note had been changed." Appellants' Brief, 3.

Each of these four issues raised by Defendants Simpson in their brief will be dealt with separately, in the order in which they were presented.

1. There is no disputed issue of material fact as to the signature of the Defendant Mrs. Eugene S. Simpson.

Under the statutory law of the State of Utah, there can be no disputed issue of material fact as to the signature of Mrs. Eugene S. Simpson. The Defendants Simpson failed to deny specifically in their amended answer that the signature was genuine, and the signature of Mrs. Eugene S. Simpson was, therefore, admitted for all purposes. The law is stated at §70A-3-307, U.C.A., 1953, "1. Unless specifically denied in the pleadings, each signature on an instrument is admitted." Official Comment 1 to that section of the Code explains its significance.

> "The purpose of the requirement of a specific denial in the pleadings is to give the plaintiff notice that he must meet a claim of forgery or lack of authority as to a particular signature, and to afford him an opportunity to investigate and obtain evidence. . . . In the absence of such specific denial, the signature stands admitted, and is not in issue." (Emphasis added.)

This section of the Uniform Commercial Code deals specifically with commercial paper, and the promissory note in question is by definition "commercial paper". In the present case, the answer of Defendants Simpson to Plaintiff's amended complaint, filed by them on June 5, 1975, contains absolutely nothing by way of a specific denial of Mrs. Simpson's signature. On the contrary, ¶1 of their amended answer is just a general denial to the allegations of Plaintiff's amended complaint. Under the rule of law applicable in Utah, the signature of Mrs. Simpson stands admitted and is not in issue. Therefore, when the court granted summary judgment to the Plaintiff, there was no disputed issue of fact concerning the signature since the signature stood admitted.

This rule has been applied not only in Utah but in all other jurisdictions adopting the Uniform Commercial Code, and there is uniform case authority from those jurisdictions supporting Plaintiff's position.

In Conran v. Yager, 211 S.E.2d 288, 16 U.C.C. 320 (S.C., 1975), the defendant appealed from a summary judgment granted to the plaintiff. The court based its decision affirming the summary judgment on §3-307 of the Commercial Code.

> "The appellant's first defense, a general denial, while effective in an action on a simple contract is unavailing in an action on a note where the note is attached to the complaint." Id. 321.

See also Merrimack Farmers Exchange v. Elliott, 276 A.2d 258, 9 U.C.C. 287 (N.H., 1971).

In the present case, Defendants Simpson's sole defense in their amended answer was a general denial and this was an action on a promissory note where the note was attached to the complaint. In Bentz v. Mullins, 24 O.App.2d 137, 265 N.E.2d 317, 8 U.C.C. 726 (1970), the court stated,

> "It will be observed that in pleading, the answer of the defendant does not specifically deny his signature is on the note in question. . . . In the absence of such specific denial, the signature stands admitted and is not in issue." Id. 728.

Also, in Ferris v. Nichols, 245 S.2d 660, 8 U.C.C. 1284 (Fla., 1971), the court held,

> "In our opinion, the answer of the defendant was simply a general denial of the assertions of the complaint. As such it had the legal effect of admitting that the defendant did sign the note and eliminating from the action any issue as to signature. Had the defendant desired to deny that he signed the note, he should have done so by a specific denial addressed to the appropriate allegations in the complaint." Id. 1284-5. (Emphasis added.)

See also Steelman v. Associates Discount Corporation, 7 U.C.C. 697 (Ga.App., 1970).

Any issue as to the alleged forgery of Mrs. Simpson's signature was effectively waived and the signature was admitted

when the Defendants Simpson filed their amended answer which failed to deny the signature specifically.

2. There is no disputed issue of material fact as to the alleged unconscionability of the agreement as to the Defendants Simpson.

The Defendants Simpson do not allege that the contract entered into is unconscionable as against themselves, but rather, wish to bring themselves under the umbrella of a defense that can only be alleged by other defendants to the action. The Defendants Simpson are alleging, simply stated, that since the contract is unconscionable as against the other defendants, then they too should be relieved of any contractual obligations. The Defendants Simpson refer to p. 90 of the record which is the affidavit of Eugene S. Simpson. That affidavit states the alleged factual issue in question: Since the execution of the note, the Plaintiff had allegedly unconscionably altered the contract by "the retention of a substantial proceeds of the loan to the remaining defendants by agents of the Plaintiff." R.91 (Emphasis added.)

There are two aspects of this purported defense which bear close examination. First, the "remaining defendants" spoken by Mr. Simpson are the only parties to this action allegedly affected by any unconscionable contract terms, and the Defendants Simpson cannot avail themselves of a defense

possibly available only to other parties, but not to themselves. Secondly, the "remaining defendants" referred to in the affidavit include Continental Account Servicing House, Inc., and Key Account Collection House, Inc. These corporations are not even parties to this appeal. The trial court expressly recognized that factual issues might still exist in relation to these two corporations and expressly denied summary judgment as to them. R.96-7. These corporate defendants are not parties to this appeal and Defendants Simpson cannot avail themselves of defenses available only to the corporate defendants.

In addition to assailing principles of logic, the appeal claim of Defendants Simpson assails principles of law. How can the Defendants Simpson hope to avail themselves of equitable defenses that can be available only to third parties (the other defendants) when the corporate defendants are not even parties to the appeal and their cases are presently continuing in the trial court. Indeed they cannot according to law. This principle of law is stated concisely at 17A C.J.S., Contracts, §528 (1963).

> "As a general rule, a defense, in order to be available, must be one which may be asserted by the party urging it in his own right. . . . Equities existing in favor of third persons against plaintiff cannot be availed of by defendant where he has received all the benefits to which he is entitled under the contract."

In the present case, the Defendants Simpson admit that any "unconscionability" affected only the "remaining defendants" and that the rights and interests of the Simpsons were not affected thereby. Such being the case, the defense of unconscionability is not available to the Defendants Simpson. Since the defense was not available to them, it certainly was not a disputed issue of material fact and certainly could not have prevented the court's order of summary judgment as against the Defendants Simpson.

3. There is no disputed issue of material fact as to the obligation of the Defendants Simpson on the promissory note as accommodation makers.

The Defendants Simpson have alleged as a disputed issue of material fact that they were mere accommodation makers on the promissory note and are, therefore, not liable as a matter of law on that note. Utah statutory law concerning promissory notes and accommodation makers is clear in stating that an accommodation maker is every bit as liable on a promissory note as is a party who signs the note for consideration. The general principle is that an accommodation maker has received some sort of consideration, albeit indirect or intangible, or else he would not have signed the note. In this case Simpson received the money. To hold otherwise would severely disrupt the American banking system and would ignore volumes of legal precedence both in Utah and elsewhere. Utah

law on the matter has been codified by the adoption of §3-415 of the Uniform Commercial Code found at §70A-3-415, U.C.A.

> "(1) An accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it. (2) When the instrument has been taken for value before it is due the accommodation party is liable in the capacity in which he has signed even though the taker knows of the accommodation."

Official Comment 1 to this section states, "An accommodation maker or acceptor is bound on the instrument without any resort to his principal. . . ."

It has been held in the State of Utah that even if the creditor knows that one of the other parties is an accommodation maker, the accommodation maker is still liable on the promissory note. In Assets Realization Company v. Cardon, 70 Ut. 597, 272 P. 204 (1928), the court stated:

> "There is much merit in plaintiff's claim that it is entitled to a judgment against the defendant Cardon Company upon the record before us. Concededly, plaintiff is the owner and holder of the two notes, and they have not been paid. Defendant Cardon Company is admittedly one of the makers of both the notes. Two defenses were interposed by the defendant Cardon Company to defeat plaintiff's action: First, that it was an accommodation maker. . . . The mere fact that McCormick and Company, Bankers, knew that defendant Cardon Company was an accommodation maker does not defeat plaintiff's right to recover." Id. 206.

The case of Miller v. Stuart, 69 Ut. 250, 253 P. 900 (1927) states clearly that an accommodation maker is liable on the instrument.

> "The evidence plainly shows that defendant executed and delivered the note for the purpose of lending his credit to the coal company or Quigley and Welch, relying upon their promise to pay the note. Defendant, in his answer, averred that it was represented to him, among other things, that the note 'was merely an accommodation and convenience to said Pahvant Coal Company.' That is the essence of the matter, and the defendant testified, in effect, that he so understood it. In such case, the relation of defendant to the note was that of accommodation party, who is defined and whose liability is fixed by the negotiable instruments law as follows: 'An accommodation party is one who has signed the instrument as maker. . .without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value. . . .'" Id. 902 [Citations following.] (Emphasis added.)

The negotiable instruments law which was adopted in Utah has been superseded by the Uniform Commercial Code, and the effect of the Commercial Code is even more conclusive than was the negotiable instruments law. The difference is explained at 11 Am.Jur.2d, Bills and Notes, §530 (1963).

> ". . .The [Uniform Commercial] Code eliminates troublesome questions as to consideration and directs itself to the fact that an accommodation party is always a surety whether or not he is compensated or receives consideration."

There can be no doubt that the signatures of the Defendants Simpson as accommodation parties on the promissory note render them liable to the Plaintiff.

4. There is no disputed issue of material fact as to the terms of the promissory note.

Appellants' fourth and final point for review is that after they executed the note they claim that ". . .the terms and conditions of the promissory note had been changed." Appellants' Brief, 3. This is not a disputed issue of material fact for the simple reason that after the promissory note was executed, it was legally impossible to change the terms of that note without executing the new note. The law is very clear on this point.

In the first place, a promissory note cannot be oral. It must be written and it must be signed. 70A-3-104 U.C.A.; 10 C.J.S., Bills and Notes, §71 (1938). Where an instrument is required by law to be written and signed, then any alteration or modification of that instrument must also be written and signed. 10 C.J.S., Bills and Notes, §264 (1938).

Defendants Simpson have presented the court with a phantom issue for it is obvious from the pleadings that neither the Plaintiff nor the Defendants Simpson have relied on any changed terms or conditions in the promissory note, particularly in light of their amended answer to Plaintiff's amended complaint:

> "2. Defendants. . .allege affirmatively that the terms of the note which is attached as Exhibit "A" to Plaintiff's amended complaint speaks for itself. . . .
>
> "5. Defendants. . .allege affirmatively that the terms of the contract in the escrow agreement speak for themselves." (R.76)

Even if one of the parties to this appeal had hoped to rely on changed or altered terms in the promissory note or the contract for sale, such reliance could not be allowed. The Utah Statute of Frauds specifically provides that a contract for the sale of securities must be in writing, and this would include any modifications of such contract. §70A-8-319 U.C.A. The Utah statutes further provide that any contract for the sale of contract rights or an interest in a corporation must also be in writing and this, too, would include any modifications of such contract. §§70A-1-206, 70A-2-201, U.C.A.

The Utah Legislature has also adopted a parol evidence rule, found at §70A-2-202, U.C.A., which would conclusively prohibit the court from considering any purported oral modifications or changes in the promissory note or the contract for sale.

> "Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement, but may be explained or supplemented. . .(b) by evidence

> of consistent additional terms unless the court finds the writing to have been intended as a complete and exclusive statement of the terms of the agreement."

In the present case, we are dealing with a promissory note and contract for sale which were intended as a "complete and exclusive statement of the terms of the agreement." Therefore, parol evidence of contemporaneous or subsequent oral modifications cannot be entertained by the court. Official Comment 3 to §2-202 of the Uniform Commercial Code clarifies the point that the court could not accept evidence of subsequent oral modifications and justifies the trial court's order of summary judgment on the matter.

> "Uunder paragraph (b) consistent additional terms, not reduced to writing, may be proved, unless the court finds that the writing was intended by both parties as a complete and exclusive statement of all of the terms. <u>If the additional terms are such that, if agreed upon, they would certainly have been included in the document in view of the court, then evidence of their alleged making must be kept from the trier of fact</u>." (Emphasis added.)

If the subsequent modifications to the promissory note are insignificant, then they would not constitute a material fact and would not be subject to review by this court. If, on the other hand, the alleged subsequent oral modifications were truly substantial, then "evidence of their alleged making must be kept from the trier of fact." Either way, any changed terms or conditions in the promissory note were not proper

matters to be considered by a jury or by the trier of fact and the court's order of summary judgment was proper and correct.

POINT II

THE SCOPE OF APPELLATE REVIEW HEREIN APPLICABLE BETWEEN PLAINTIFF AND THE DEFENDANTS SIMPSON IS SIGNIFICANTLY RESTRICTED DUE TO THE CIRCUMSTANCES OF THE CASE.

It is the rule in appellate proceedings that the proceedings before the trial court are presumed to have been proper and any rulings are presumed to have been properly made and for sound reasons.

> "The scope of appellate review is largely influenced by a number of rebuttable presumptions, pre-eminent among which is that which, at least where the decision has been rendered by a court of record or a court of general jurisdiction, assumes the correctness of the decision or ruling appealed from and the regularity of the proceedings below. Thus, every reasonable intendment favorable to a ruling of the court below will be indulged, and in the absence of an affirmative showing to the contrary, a ruling of the court below will be presumed to have been properly made and for sound reasons." 5 Am.Jur.2d, Appeal and Error, §704 (1962).

It is Plaintiff's contention that Defendants Simpson have failed to make any affirmative showing that any of the rulings of the trial court directed against them were improper or unsound. Defendants Simpson have presented to the court on appeal four purported factual issues. In each case, it

has been shown by Plaintiff that a disputed issue of material fact does not exist. In some of their arguments, Defendants Simpson have even sought the benefit of defenses that may be available to other parties but are most certainly not available to the Simpsons. 17A C.J.S., Contracts, §528, supra.

The scope of appellate review is restricted by the Defendants Simpson's own brief. Plaintiff has fully answered the issues presented by the Appellants and the Plaintiff is not on notice as to any other issues before the court. Such being the case, it is not permissible to allow new issues to be presented in this appeal -- issues to which Plaintiff will not have the opportunity to respond. This rule is commonly accepted and is stated clearly in Mead v. Mead, 301 P.2d 691 (Okla. 1956).

> "It is neither the duty nor the prerogative of the Supreme Court to explore a theory which is not raised in Appellant's brief, to find a valid ground on which to reverse the trial court's judgment."

CONCLUSION

The Defendants Simpson have stated in their brief the four grounds upon which they base their contention that the court's order of summary judgment should be reversed. Each of those grounds has been dealt with, one-by-one: The matter of Mrs. Simpson's signature has been waived by Defendants'

failure to plead it specifically in their amended answer; any alleged unconscionability of the agreement as to other defendants cannot be a defense for the Defendants Simpson; an accommodation maker is clearly liable under law to the same extent as any other maker on a promissory note; and the written, integrated terms of the promissory note and contract for sale must stand alone, both under law and as admitted in the amended answer of the Defendants Simpson.

Respectfully submitted,

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I hereby certify that I mailed two copies of the foregoing Respondent's Brief to Richard J. Leedy, Attorney for Appellant, 744 East Broadway, Salt Lake City, Utah 84102, this 26 day of November, 1975, postage prepaid.