1978

Naon Winkel v. J. Harold Call : Brief of Appellant

Utah Supreme Court

James J. Smedley; Attorney for Defendant-Appellant;
Paul N. Cotro-Manes; Attorney for Plaintiff-Respondent;

IN THE SUPREME COURT

OF THE

STATE OF UTAH

----oo0oo----

NAON WINKEL,

Plaintiff-
Respondent.

v.

J. HAROLD CALL, Executor
of the Estate of William
J. Ercanbrack, deceased,

Defendant-
Appellant.

Case No. 15942

----oo0oo----

APPELLANT'S BRIEF

----oo0oo----

JAMES J. SMEDLEY
30 North Main
Heber City, Utah 84032
Attorney for Defendant-
Appellant

PAUL N. COTRO-MANES, ESQ.
COTRO-MANES, WARR, FRANK HOUSER & BEESLEY
430 Judge Building
Salt Lake City, Utah 84111
Attorney for Plaintiff-
Respondent

IN THE SUPREME COURT

OF THE

STATE OF UTAH

----oo0oo----

NAON WINKEL,

Plaintiff-
Respondent.

v.

J. HAROLD CALL, Executor of the Estate of William J. Ercanbrack, deceased,

Defendant-
Appellant.

Case No. 15942

----oo0oo----

APPELLANT'S BRIEF

----oo0oo----

JAMES J. SMEDLEY
30 North Main
Heber City, Utah 84032
Attorney for Defendant-
Appellant

PAUL N. COTRO-MANES, ESQ.
COTRO-MANES, WARR, FRANK HOUSER & BEESLEY
430 Judge Building
Salt Lake City, Utah 84111
Attorney for Plaintiff-
Respondent

TABLE OF CONTENTS

Page

CASES

STATUTES

SECONDARY AUTHORITIES

IN THE SUPREME COURT

OF THE

STATE OF UTAH

----oo0oo----

NAON WINKEL,

Plaintiff-
Respondent.

v.

Case No. 15942

J. HAROLD CALL, Executor
of the Estate of William
J. Ercanbrack, deceased,

Defendant-
Appellant.

----oo0oo----

APPELLANT'S BRIEF

----oo0oo----

STATEMENT OF THE NATURE OF THE CASE

Appellant seeks to overturn the lower court's decision and have judgment entered in his favor.

DISPOSITION OF THE LOWER COURT

After a trial on the merits the court granted judgment stating that plaintiff was entitled to contribution from the Estate of William J. Ercanbrack, deceased, for all monies paid by plaintiff on a contract and denied relief to appellant on its counterclaim asking for judgment on a promissory note signed by plaintiff.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the lower court's decision vacated, a decision entered in his favor, and for a money judgment on the counterclaim.

STATEMENT OF FACTS

(a) Plaintiff's Complaint - Statement of Facts. On or about September 2, 1965, plaintiff entered into an Installment Sale and Security Agreement for the purchase of a mobile home. (See Exhibit P-1). The agreement was in the name of and signed by the plaintiff. Also on the document was the signature of the deceased, William J. Ercanbrack. The deceased had signed in the lower left hand corner of the first page under a heading that stated "Buyer Acknowledges Receipt Of An Exact Copy Of This

Agreement." Plaintiff's witness testified that the deceased signed "to secure the note, to secure the agreement." (T.T. at p. 5). Plaintiff's witness went on to state "as I recall, he (William J. Ercanbrack), stated that she (the plaintiff) had no credit, and that he (William J. Ercanbrack) would sign. . ." Title to the mobile home was taken in the name of Naon Winkel, the plaintiff. (T.T. at p. 5). When the deceased signed the September 2, 1975, Installment Sale and Security Agreement, acknowledging along with plaintiff receipt of a copy of the same, it was understood and agreed that the mobile home was to be the plaintiff's property, no consideration flowed to him, and the deceased claimed no title or interest in the mobile home. Plaintiff claims full ownership to the same. Plaintiff acknowledges that Mr. Ercanbrack received "nothing under the terms of that contract to sell the trailer, that is, he obtained no right or interest" in the mobile home (See T.T. at p. 24 lines 7 to 11). The home was purchased solely for the benefit of Miss Winkel, the plaintiff. (Plaintiff's witness - T.T. at p. 59).

Plaintiff took possession of the mobile home and the mobile home dealer, Mobile Mansions, assigned the Installment Sale and Security Agreement to Walker Bank & Trust Company with "full recourse" on or about September 6, 1975.

Walker Bank & Trust Company brought action against

the plaintiff on the Installment Sale and Security Agreement because of plaintiff's failure to make the payments due thereunder and plaintiff is in this action attempting to obtain contribution.

(b) Defendant's Counterclaim - Statement of Facts. On or about November 20, 1975, plaintiff, Naon Winkel, signed a promissory note in the amount of $6,273.00 made payable to the order of William J. Ercanbrack, which note fell due September 20, 1976. (See Exhibit D-18). Two days thereafter on November 22, 1975, the deceased, William J. Ercanbrack, wrote a letter to his attorney, J. Harold Call, dated November 22, 1975, requesting in the event of his death, that the note be treated as "uncollectible and to be wrote off of my 1976 income as a loss." (See Exhibit D-20). William J. Ercanbrack died on the 26th day of October, 1976, without the note having been paid.

I

WILLIAM J. ERCANBRACK, DECEASED, WAS MERELY AN ACCOMMODATION MAKER AND THUS THE PLAINTIFF IS NOT ENTITLED TO CONTRIBUTION.

Although William J. Ercanbrack might be held responsible to the holder of the Installment Sale and Security Agreement in event the buyer and owner of the mobile home, Naon Winkel, failed to pay, because of his signature appearing on the contract indicating that he had "acknowledged receipt of an exact copy of

the agreement," the facts clearly show that if he signed as a promissor, it was for the accommodation and as a surety for the plaintiff (T.T. at p. 5 p. 24 and p. 59). Under the facts of the case he would only be secondarily liable, the plaintiff being primarily liable.

It must be borne in mind that Mr. Ercanbrack received no consideration for the contract (T.T. at p. 24 lines 7-11). The motive which prompts one to enter into a contract and the consideration for the contract are distinct and different. Williston, Contracts 3rd Edition Section 111. Parties are led into agreements by many inducements, such as the hope of profit, the expectation of acquiring what they could not otherwise obtain, the desire of avoiding a loss, etc. These inducements are not, however, either legal or equitable consideration, and actually compose no part of the contract. Hunter vs Golf Proof Production Company, 220 SW 163. See Restatement, Contracts Section 84.

Prior to and under the NIL an accommodation party is one who has signed the instrument as maker, drawer, acceptor, or endorser, without receiving value therefore, and for the purpose of lending his name to some person. "Without receiving value," means without receiving value for the instrument, and not without receiving any consideration for lending one's name. See Carr vs Wainwright, 43 Federal 2d 507, 508; Morris County

Brick Company vs Austin, 75 A 550.

Under the Commercial Code the essential characteristic of an accommodation party is that the accommodation party is a surety and even the absence of consideration is not a requisite. Thus, under the Commercial Code defendant would not even need to show that William J. Ercanbrack signed gratuitously. He may have been a paid surety or received other compensation from Miss Winkel, the party accommodated. The Commercial Code provides that an accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party. See Section 70A-3-415 U.C.A.

An "accommodated party" is the one for whose convenience the paper is made, the one for whose benefit the accommodation party signs, or the one to whom the name or credit of another person - the accommodating party - is loaned.

Under law the accommodation party is liable on the instrument, this liability attaches in regard to parties other than the accommodated party, but not in regard to the accommodated party for whom the accommodation party is a surety.

It is well recognized that an accommodation party has a right to subrogation. When an accommodation party has paid an instrument some courts maintain he may sue thereon on the basis that he is subrogated to the rights of the creditor and others

hold that he has the right to sue on the implied promise of indemnity. Under either theory a principal would be barred from asking for contribution from the accommodating party.

Thus, the only issue is whether or not William J. Ercanbrack was an accommodation maker. The evidence is clear that he was, he received nothing "for the instrument," and he is not liable to the plaintiff, the party he accommodated.

Utah's Uniform Commercial Code prevents the plaintiff from recovering against the estate of the deceased.

Section 70A-3-415 U.C.A.

> "Contract of accommodation party. - (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. . . (5) An accommodation party is not liable to the party accommodated, and if he pays the instrument has a right of recourse on the instrument against such party."

II

THE COURT ERRED IN CONSIDERING EVIDENCE THAT WAS INADMISSIBLE BECAUSE OF THE DEAD MAN STATUTE.

Section 78-24-2 clearly states that Miss Winkel, the plaintiff, cannot testify as to any conversation or transaction which she had with William J. Ercanbrack, the deceased.

This section of the code commonly referred to as the dead man statute reads as follows:

> "Who may not be witnesses. - the following persons cannot be witnesses:
> (3) A party to any civil action. . . and any person directly interested in the event thereof. . . when the adverse party in such action. . . defends, . . . as the executor. . . of any deceased person. . . as to any statement, or transaction with, such deceased. . . or a matter of fact whatever, which must have been equally within the knowledge of both the witness and such. . . deceased person. . . ."

The trial court erred in allowing the plaintiff to testify concerning transactions with the deceased which were calculated to take him out of the status of an accommodation maker.

The transcript shows that the plaintiff tried to defraud the estate by alleging that the June 1, 1976, promissory note signed by the deceased was due and payable and that no payments had been made against the same.

This attempt was evidenced by her "under oath" creditor's claim for $1600.00. See defendant's Exhibit D-19. It wasn't until her deposition was taken and she was confronted with certain cancelled checks that she admitted that nearly half of the claim had previously been paid. (T.T. at p. 90 and p. 91)

Defendant claims there is good cause and a need for strictly enforcing the dead man statute in this particular case because of Miss Winkel's previous attempts to obtain at the expense of the minors and other children money that she was not entitled to.

III

THE PURPORTED CODICIL DID NOT CONTAIN LANGUAGE THAT CONCELLED THE INDEBTEDNESS PLAINTIFF OWED THE DECEASED.

The letter of November 22, 1975, provides that the November 20, 1975, promissory note signed by Naon Winkel in the amount of $6,273.00 was to be treated "as an uncollectible item and to be wrote off of my 1976 income as a loss."

The deceased did not cancel the indebtedness. His language does not indicate he intended to make her a gift, but he merely wanted the obligation treated as a bad debt. A bad debt or uncollectible obligation can be written off as a loss on an income tax return. However, a gift or gratuitous cancellation of a debt could not be treated as tax deductible item on an income tax return. If we treat the language as making a gift, we would defeat the clear intent spelled out in the letter or codicil - he would not be able to treat it as a loss on his income tax return.

Under the circumstances, because of the financial condition of the plaintiff, Naon Winkel, the deceased was aware of the fact that the expense and effort of legal action to collect the obligation would be unfeasible - thus his instructions to treat it as an uncollectible item and write if off as a bad debt. However, these practical instructions to J. Harold Call, deceased's attorney, do not require him to ignore the obligation or prevent him from using the same as an offset against any claim that the plaintiff might file against the estate.

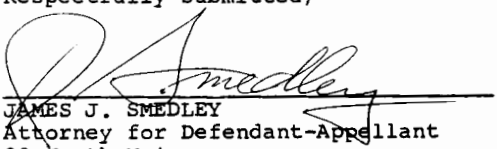
It appears to appellant that the court erred in denying defendant's counterclaim, in refusing to allow the executor to use the indebtedness owed by the plaintiff to the deceased as an offset against the claims Miss Winkle filed against the estate, and in rendering a decision that prevents J. Harold Call from treating the item as a bad debt for income tax purposes. The decision defeats and puts at naught the language used by the deceased who said to treat the note "as an uncollectible item and to be wrote off of my 1976 income as a loss," for if the court legally declares it a gift it would not qualify as a "deductible bad debt."

CONCLUSIONS

Pursuant to Section 70A-3-415 the defendant "is not liable to the party accommodated," Naon Winkel, on any payments she has or shall hereafter make on the Installment Sale and Security Agreement; plaintiff is not entitled to contribution because the deceased, William J. Ercanbrack, was an accommodation

party under Section 70A-3-415 U.C.A. The defendant should be entitled to judgment against the plaintiff in the amount of $6,273.00 on the November 20, 1975, promissory note or at least have the right to claim the indebtedness as an offset against the amount that the court found owed plaintiff on the June 1, 1976, promissory note.

Respectfully submitted,



JAMES J. SMEDLEY
Attorney for Defendant-Appellant
30 North Main
Heber City, Utah 84032

CERTIFICATE OF MAILING

This is to certify that I mailed two (2) copies of the foregoing brief to Paul N. Cotro-Manes, Attorney for Plaintiff-Respondent, 430 Judge Building, Salt Lake City, Utah 84111, on this 4 day of October, 1978.

JAMES J. SMEDLEY