

1988

Mark VII Financial Consultants Corporation v. Dale Smedley and the First National Bank of Layton : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

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

David A. Bean; Bean and Smedley; William Thomas Thurman; Scott C. Pierce; McKay, Burton and Thurman; Attorneys for Appellees.

Jackson Howard; D. David Lambert; Leslie W. Slaugh; Howard, Lewis and Petersen; Attorneys for Appellant.

Recommended Citation

Reply Brief, *Mark VII Financial Consultants Corporation v. Smedley*, No. 880606 (Utah Court of Appeals, 1988).
https://digitalcommons.law.byu.edu/byu_ca1/1385

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

BRIEF

UTAH
DOCUMENT
KFU
50
A10
DOCKET NO. 88-0606

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

MARK VII FINANCIAL
CONSULTANTS CORPORATION,

Plaintiff-Appellant,

vs.

DALE SMEDLEY and THE FIRST
NATIONAL BANK OF LAYTON,

Defendant-Appellees.

:
:
:
:
:
:
:

Case No. 880606-CA

Category 14b

REPLY BRIEF OF APPELLANT

APPEAL FROM THE JURY VERDICT AND JUDGMENT OF THE
SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY,
STATE OF UTAH, THE HON. RODNEY S. PAGE, PRESIDING.

JACKSON HOWARD,
D. DAVID LAMBERT, and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84601
ATTORNEYS FOR APPELLANT

DAVID A BEAN, for:
BEAN & SMEDLEY
190 South For Lane, Suite 2
Layton, UT 84041
ATTORNEYS FOR APPELLEE
FIRST NATIONAL BANK OF LAYTON

WILLIAM THOMAS THURMAN and
SCOTT C. PIERCE, for:
McKAY, BURTON & THURMAN
Kennecott Building Suite 1200
Salt Lake City, UT 84133
ATTORNEYS FOR APPELLEE
DALE SMEDLEY

DEPOSITED BY THE
STATE OF UTAH

AUG 16 1990

FILED

FEB 10 1989

COURT OF APPEALS

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

MARK VII FINANCIAL	:	
CONSULTANTS CORPORATION,	:	
Plaintiff-Appellant,	:	Case No. 880606-CA
vs.	:	
DALE SMEDLEY and THE FIRST	:	Category 14b
NATIONAL BANK OF LAYTON,	:	
Defendant-Appellees.	:	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE JURY VERDICT AND JUDGMENT OF THE
SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY,
STATE OF UTAH, THE HON. RODNEY S. PAGE, PRESIDING.

JACKSON HOWARD,
D. DAVID LAMBERT, and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84601
ATTORNEYS FOR APPELLANT

DAVID A BEAN, for:
BEAN & SMEDLEY
190 South For Lane, Suite 2
Layton, UT 84041
ATTORNEYS FOR APPELLEE
FIRST NATIONAL BANK OF LAYTON

WILLIAM THOMAS THURMAN and
SCOTT C. PIERCE, for:
McKAY, BURTON & THURMAN
Kennecott Building Suite 1200
Salt Lake City, UT 84133
ATTORNEYS FOR APPELLEE
DALE SMEDLEY

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
POINT I	
THE BANK DID NOT ACQUIRE ANY "RIGHTS" BY ITS CONSPIRACY WITH SMEDLEY.	2
POINT II	
THE BANK DID NOT PLEAD NOR WAS IT ENTITLED TO CLAIM ANY OFFSET OR RECOUPMENT.	6
CONCLUSION	7

TABLE OF AUTHORITIES

Cases Cited:

<u>Caradonna v. Cunningham, Sponzo and Arseneau, M.D.S., P.C.,</u> 118 A.D.2d 1031, 500 N.Y.S.2d 404 (1986).	4
<u>Elder v. Triax Co.,</u> 740 P.2d 1320 (Utah 1987).	6
<u>International Equipment Service, Inc. v. Pocatello</u> <u>Industrial Park Co.,</u> 107 Idaho 1116, 695 P.2d 1255 (1985).	4
<u>Kamer v. ITT Life Insurance Company,</u> 33 A.D.2d 682; 305 N.Y.S.2d 825 (1969).	4
<u>Security Management Company v. King,</u> 132 Ga. App. 618, 208 S.E.2d 576 (1974).	4
<u>Sturges v. Bennett,</u> 47 Ariz. 470, 56 P.2d 1038 (1936). . . .	4
<u>White v. Jackson,</u> 252 S.C. 274, 166 S.E.2d 211 (1969). . . .	3

Other Authorities Cited:

20 Am. Jur. 2d <u>Counterclaim, Recoupment, and Setoff</u> § 10 (1965).	6
20 Am. Jur. 2d <u>Counterclaim, Recoupment, and Setoff</u> § 126 (1965).	3
<u>Black's Law Dictionary</u> 1147 (5th ed. 1979).	6

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

MARK VII FINANCIAL	:	
CONSULTANTS CORPORATION,	:	
	:	
Plaintiff-Appellant,	:	Case No. 880606-CA
	:	
vs.	:	
	:	
DALE SMEDLEY and THE FIRST	:	Category 14b
NATIONAL BANK OF LAYTON,	:	
	:	
Defendant-Appellees.	:	

STATEMENT OF FACTS

Appellant has pursued this appeal without a transcript of the trial because the errors asserted by appellant are clear from the written record which exists. Defendant First National Bank of Layton has responded by citing to deposition testimony which was not admitted into evidence of trial, and by otherwise attempting to argue its version of the facts, which was rejected by the jury. These factual disputes are not at issue in this appeal. Appellant objects to the Bank's attempt to color the issues in this appeal by arguing the factual issues where the Bank has not appealed or otherwise challenged the verdict of the jury.

SUMMARY OF ARGUMENT

The Bank's primary claim is that, by virtue of its conspiracy with Smedley, it acquired or became subrogated to Smedley's rights with respect to plaintiff. This argument is

without merit. There are no benefits awarded by the law to a conspirator.

The distinction between recoupment and offset is of no significance in this case. Both recoupment and offset are available only to one who has a claim against the plaintiff. The Bank had no claim against the plaintiff, and was not entitled to offset or recoupment.

ARGUMENT

POINT I

THE BANK DID NOT ACQUIRE ANY "RIGHTS" BY ITS CONSPIRACY WITH SMEDLEY.

The primary thrust of the Brief of Respondent First National Bank of Layton ("Bank Brief") appears to be that the Bank was entitled to the benefit of Smedley's offsets as a right flowing to the Bank by virtue of its conspiracy with Smedley:

By finding conspiracy, the jury supplied the mutuality of obligation which plaintiff alleges is lacking as to the Bank and by becoming a co-conspirator, the Bank was entitled to all of the offsets that Smedley was entitled to.

Bank Brief at 2.

The Bank knew it did not have an independent cause of action that would support setoff or counterclaim and the Bank therefore had to rely upon Smedley's claim because that's what the Bank relied upon in getting involved in an attempt to salvage Smedley's equity.

Bank Brief at 5.

The jury was fully informed as to the participation of the Bank and the reasons therefore [sic] and by instructing the jury on conspiracy, upon a finding of conspiracy

the Bank became subrogated to all of the rights and obligations of Smedley. By asserting conspiracy, plaintiff puts the Bank in the same position as an equitable subrogee, putting the Bank in Smedley's shoes as to the conversion cause of action.

Bank Brief at 6.

But neither plaintiff nor the jury has a right to pick or choose only the liabilities of conspiracy and not the benefits that go with it. . . . [P]laintiff in alleging the conspiracy, and the jury in finding conspiracy to exist under the instructions given by the court, must also accord to the Bank as a co-conspirator all of the benefits to which Smedley was entitled.

Bank Brief at 9.

This argument, that a court in equity was required to give the Bank some benefit as a result of the Bank's conspiracy, is astounding. It is not surprising that the Bank has failed to cite any case law in support of this novel proposition.

Plaintiff has similarly been unable to find any case law directly supporting or contradicting the Bank's theory. One would not expect to find a reported case where a conspirator had attempted to claim that he had some legal rights as a result of his conspiracy. The most closely analogous situation is that of a partnership. Even among lawful partners, however, the right of offset claimed by the Bank does not exist. When an individual partner is sued by a person who also owes a debt to the partnership, the individual partner generally cannot claim any offset on his personal debt by reason of the plaintiff's debt to the partnership. 20 Am. Jur. 2d Counterclaim, Recoupment, and Setoff § 126 (1965); White v. Jackson, 252 S.C. 274, 166 S.E.2d

211 (1969). See also Caradonna v. Cunningham, Sponzo and Arseneau, M.D.S., P.C., 118 A.D.2d 1031, 500 N.Y.S.2d 404 (1986); Security Management Company v. King, 132 Ga. App. 618, 208 S.E.2d 576 (1974); Kamer v. ITT Life Insurance Company, 33 A.D.2d 682; 305 N.Y.S.2d 825 (1969).

This principle is also illustrated by the case of Sturges v. Bennett, 47 Ariz. 470, 56 P.2d 1038 (1936). The defendant in that case had executed a promissory note in favor of the plaintiff, who was an attorney. The promissory note had been executed in connection with litigation between the defendant and the plaintiff's client. The defendant and the plaintiff's client had been partners in a partnership. In defense to the action on the note, the defendant asserted that the prior litigation had been a "frame-up" between the attorney and his client which had the effect of depriving the defendant of most of his interest in the partnership. The court rejected the defendant's claims on several grounds, including that "[t]he counterclaim set up by the defendant against Allen [the client], even if proved, could not be an offset against a debt owed by defendant to Bennett, the plaintiff." 56 P.2d at 1040-41.

The Bank also claims that it is entitled to some rights as a "equitable subrogee" of Smedley. (Bank Brief at 6.) The Bank cites as support for this proposition the case of International Equipment Service, Inc. v. Pocatello Industrial Park Co., 107 Idaho 1116, 695 P.2d 1255 (1985). That case quotes other authorities as follows:

Equitable subrogation is a legal device which permits a party who has been required to satisfy a loss created by a third-party's wrong to step into the shoes of the loser and recover from the wrongdoer.

695 P.2d at 1258 (citations omitted).

Under this rule cited by the Bank, the only way the Bank would be subrogated to Smedley's rights would be if the Bank had, pursuant to a contractual or other duty owed to Smedley, paid to Smedley the amount of any obligations owed by plaintiff to Smedley. The payment would need to have been compulsory; a voluntary payment does not entitle one to subrogation. The doctrine obviously has no application in this case. First, the Bank did not pay to Smedley any of plaintiff's obligations. Second, even if the Bank's payment of the GECC note were considered to meet the requirements, the payment was wholly voluntary. The Bank clearly was not an equitable subrogee of Smedley's rights against plaintiff.

These authorities establish that even if the relationship between Smedley and the Bank was a legitimate, voluntary partnership, the Bank would not have been entitled to claim any offset based on an obligation owed by a plaintiff to Smedley. The authorities further establish that the Bank has not met the requirements of an equitable Subrogee. It is even more certain that the Bank, coming into court with the unclean hands of a conspirator, may not in good faith claim that the court in the exercise of its equitable powers is required to accord the Bank the "benefits" of the Bank's conspiracy with Smedley. The trial

court erred in granting the Bank any offset based on Smedley's claims against plaintiff.

POINT II

THE BANK DID NOT PLEAD NOR WAS IT ENTITLED TO CLAIM ANY OFFSET OR RECOUPMENT.

The Bank acknowledges that it did not claim any right to an offset in its pleadings. Bank Brief at 6. The Bank attempts to avoid this pleading defect by now claiming for the first time that its unplead defense was actually for recoupment, not offset. Bank Brief at 4. First, the Bank's claim is not properly labeled as recoupment. Second, even if the proper label is recoupment instead of offset, the distinction is without legal significance.

"Recoupment" is a label used at common law to refer to a counterclaim arising out of the same transaction. It could not be the basis for affirmative relief, but only to reduce the amount of the plaintiff's recovery. Setoffs, in contrast, were based on unrelated claims and served as sources of affirmative relief. Elder v. Triax Co., 740 P.2d 1320, 1322 (Utah 1987). The distinctions are of little modern significance. 20 Am. Jur. 2d Counterclaim, Recoupment, and Setoff § 10 (1965).

The distinction between the two terms is concisely set forth in Black's Law Dictionary 1147 (5th ed. 1979) as follows:

Set-off distinguished. A "set-off" is a demand which the defendant has against the plaintiff, arising out of a transaction extrinsic to the plaintiff's cause of action, whereas a "recoupment" is a reduction or rebate by the defendant of part of the plaintiff's claim because of a right in

the defendant arising out of the same transaction.

(Citation omitted.)

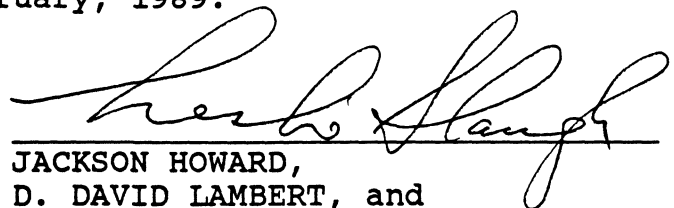
The distinction between setoff and recoupment, in other words, is based solely on whether or not the claim arises out of the same transaction. Setoff and recoupment are the same, however, in that both require that the claim be one owed to the defendant by the plaintiff. Neither setoff or recoupment permits a defendant to claim a benefit by reason of a debt the plaintiff may owe to another person.

The foregoing and plaintiff's initial brief establish that the Bank was not entitled to a setoff based on amounts the plaintiff owed to Smedley. The trial court's award of such a setoff must be reversed.

CONCLUSION

The offsets given to the Bank should be disallowed, and judgment entered for plaintiff for the value of the drill rig converted by the Bank. The case should also be remanded for a new trial on the issue of punitive damages for the reasons set forth in plaintiff's initial brief.

DATED this 7th day of February, 1989.

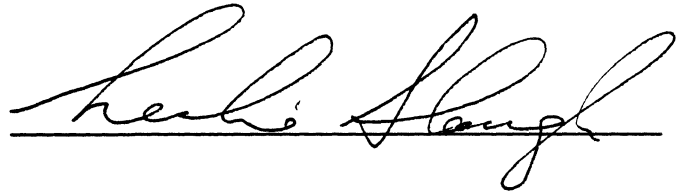

JACKSON HOWARD,
D. DAVID LAMBERT, and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Appellant

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing were mailed to each of the following, postage prepaid, this 7th day of February, 1989.

David E. Bean
Bean & Smedley
190 South Fort Lane Suite 2
Layton, Utah 84041

William Thomas Thurman
Scott C. Pierce
Mckay, Burton & Thurman
Kennecott Building Suite 1200
Salt Lake City, Utah 84133

A handwritten signature in cursive script, appearing to read "Keith Stange", is written over a horizontal line.