

1988

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

Utah Court of Appeals

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DOCKET NO. 88-0606 IN THE COURT OF APPEALS
OF THE STATE OF UTAH

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

BRIEF OF RESPONDENT FIRST NATIONAL BANK OF LAYTON

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

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DEPOSITED BY THE
STATE OF UTAH
AUG 16 1990

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FILED

JAN 5 1990

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Other Authorities Cited:

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IN THE COURT OF APPEALS
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NATIONAL BANK OF LAYTON,	:	
	:	
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JURISDICTION AND NATURE OF PROCEEDINGS BELOW

This is an appeal on the Amended Judgment on the verdict entered June 23, 1988, after jury trial. On October 19, 1988, the Supreme Court poured this case over to the above-entitled court as provided in Utah Code Annotated §78-2-2(4) and this Court has entertained jurisdiction as authorized by §78-2a-3(2)(h).

RELIEF SOUGHT

Defendant Bank seeks affirmance of the Amended Judgment on verdict and amendment of paragraph 3 of that Judgment as an obvious mistake, conceded by plaintiff's Amended brief.

ISSUES

The value of the property at the time of the conversion is the measure of plaintiff's damages less recoupment or setoff allowed to the parties. Plaintiff adamantly denied throughout the trial that Smedley was entitled to any offset for the road

and culvert work done pursuant to the terms of the agreement (Plaintiff's Exhibit 2) but the jury found against Smedley on that issue and deducted from the \$35,000.00 stipulated value the allotted road work value of \$20,139.00 and the balance due on the promissory note in the sum of \$14,275.00. Plaintiff alleged and the jury found conspiracy on the part of the Bank to convert plaintiff's interest in the well drilling rig. 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.

Against plaintiff's denials, the jury found that Smedley was entitled to credit for the road and culvert work done pursuant to the agreement. Smedley's good faith claim to a substantial interest in the drilling rig was therefore confirmed by the jury and the Bank's reliance upon Smedley's claimed interest was a substantial part of conspiracy charged against the Bank, and the conduct of the Bank as a co-conspirator was therefore also under a claim of right as indicated by the jury and the court properly refused to instruct the jury on punitive damages.

STATEMENT OF FACTS

Defendant First National Bank of Layton (hereinafter "Bank") adopts the Statement of Facts set forth in plaintiff's brief at pages 3, 4, 5, and 6 with the following additions and exceptions:

1. Smedley and the Bank did not develop a plan to obtain the equity in the drilling rig and apply it against Smedley's loan with the Bank." Dale Smedley suffered a heart attack and was behind in his payments to the Bank and his sons advised Dennis Brown, a bank officer, that General Electric Credit Corporation had given notice of foreclosure on the drilling rig because plaintiff had refused to pay the note and Smedley was fearful that their equity in the drilling rig would be lost and that they would be willing to apply their equity in the drilling rig to their indebtedness at defendant Bank. (emphases added) (Brown Dep. P. 10 L. 1)

2. Defendant Smedley represented to the Bank that the drilling rig had a value of approximately \$30,000.00 (Brown Dep. P. 21 L. 18) and that Smedley's equity in the drill rig was equal to or greater than its value. (R-137)

3. Because of the representation of defendant Smedley, the Bank doubted that plaintiff would pay the balance due on the note and therefore agreed to purchase the note and security interest of GECC, but the Bank followed the advice of counsel in foreclosing its interest in the drilling rig (Brown Dep. P. 13 L. 10; P. 14) and the notice of sale that was sent to plaintiff was also sent to defendant Smedley (Plaintiff's Exhibit 7).

4. The reason defendant Smedley could perform no more work on the property to entirely pay the \$65,000.00 for the drilling rig is that plaintiff used the real property on which the work

was to be done as collateral on a loan and the property was foreclosed by plaintiff's creditor preventing Smedley from doing further work. (R-154)

5. Smedley had money in its account with the Bank to support the check tendered to redeem the drilling rig. The reason the Bank didn't cash Smedley's check until after Doxey had bought from Smedley is that the Bank could not get title to the drilling rig from GECC and did not cash the redemption check until it could deliver title. (See Defendant's Exhibit 12)

6. It is true that Smedley refused to deliver the drill rig to plaintiff because plaintiff had already stated its intention to sell the rig and would not acknowledge any equity in the rig by reason of Smedley's work on the road and culverts. Plaintiff did not want the well drilling rig but did want the contract value of \$65,000.00.

ARGUMENT

POINT I

THOUGH DEFENDANT SMEDLEY AFFIRMATIVELY
PLED SETOFF, THE DEFENSE WAS ACTUALLY FOR
RECOUPMENT.

Courts often treat setoff and recoupment as the same but there is an important distinction between the two concepts. In most instances pure setoff requires mutuality of obligation and involves claims that are not part of the same transaction Milgrim v. DeLuca, 487 A. 2d 522 (Conn. 1985) but recoupment is a defense growing out of the transaction constituting the

plaintiff's claim for relief; and is available to reduce or satisfy the plaintiff's claim but cannot be the basis for affirmative relief. Granmo v. Superior Court in and for Pima Co., 596 P.2d 36, 38 (Ariz. App. 1979).

In the absence of a showing of prejudice, equity requires a right of recoupment. Freston v. Gulf Oil Company-U.S., 565 P.2d 787 (Utah 1977). Recoupment exists in equity as well as at common law and is equitable in nature. It is applied in reduction of the affirmative claim to the extent that reason and conscience permit and is not a separate cause of action but applies to mitigate or limit an otherwise valid recovery.

The thrust of plaintiff's Complaint against defendant Bank initially was that the Bank wrongfully disposed of plaintiff's property when the Bank did not accept plaintiff's tender and "sold" the drill rig to defendant Smedley. (R. 9-10) Plaintiff then amended its Complaint and alleged UCC violations in addition to wrongful disposition and conspiracy to convert. 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. The right to reduce plaintiff's claim by recoupment exists as long as the plaintiff's cause of action exists because it is limited by the amount of plaintiff's claim, is defensive in nature, and affords no relief in excess of plaintiff's claim. 20 Am. Jur. 2d Counterclaim, Recoupment, and Setoff §6 P. 232; §12 P. 236.

Equitable setoff is in the nature of recoupment, and does not require mutuality of obligation nor must it support an independent obligation or counterclaim. In Atchison County Farmer's Union Co-op Association v. Turnbull, 736 P.2d 917 (Kan. 1987) the Supreme Court of Kansas said at page 921:

Equitable setoffs of unmatured obligations may be allowed under special circumstances, such as insolvency of the obligor or probable difficulty in collecting the obligation at maturity, but such setoffs are largely within the court's discretion.

An equitable setoff will be allowed when the party seeking it shows some equitable ground therefor, and it is necessary to promote justice, to avoid or prevent wrong or irreparable injustice, or to give affect to a clear equity of the party seeking it.

The jury was fully informed as to the participation of the Bank and the reasons therefore 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. See International Equipment Service, Inc. v. Pocatello Indus. Park Co., 695 P.2d 1255 (Idaho 1985). Exercising its equitable discretion the trial court was therefore correct in permitting the jury to setoff credits for the road and culvert work done by Smedley and the balance due on the note which plaintiff failed to pay and any judgment of plaintiff against the Bank.

Plaintiff submitted its case to the jury under two theories: breach of contract for which plaintiff claimed the sum of \$65,000.00 due and owing allowing no credit for work done by defendant Smedley (Plaintiff's Exhibit 2); and secondly for conversion, stipulating that the value of the drill rig at the time of conversion was \$35,000.00. Conspiracy only goes to the conversion and sale of the drilling rig and the Bank became involved on the strength of Smedley's representation that the drilling rig was worth about \$40,000.00 and that Smedley had in excess of \$30,000.00 equity in the drilling rig and that is the equity that defendant Bank agreed to take in part payment of Smedley's debt to the Bank. In spite of defendant Smedley's representations to the Bank and the allegations set forth in his Answer, his testimony at the trial supported a setoff of only \$20,139.00 for work done on the road and a \$14,275.00 payment on the note. Had defendant Smedley's testimony supported road work equal to \$30,000.00 as he represented to the Bank and as set forth in his Answer, and had the jury so found, the jury verdict would have been in favor of the Bank and against the plaintiff under any theory of conversion or conspiracy because the measure of damages for conversion is different than the damages for breach of contract. It begs credulity to believe that had the jury found no breach of contract but instead rendered a verdict of conversion and conspiracy to convert against Smedley and the Bank then Smedley and the Bank could not deduct the road work

found by the jury to be worth \$20,139.00, and the note balance of \$14,275.00 from the \$35,000.00 verdict. (R-484)

POINT II

THE JURY FOUND THAT THE BANK CONSPIRED WITH
DEFENDANT SMEDLEY TO CONVERT ONLY THE
PLAINTIFF'S INTEREST IN THE DRILLING RIG.

Because the plaintiff submitted its case on two different theories of recovery, the jury had a right to apply all setoffs or recoupment to each theory upon which they rendered a verdict. Defendant Smedley redeemed the collateral and then sold without any notice to or control in the defendant Bank and the only way plaintiff could tie the Bank to Smedley was the conspiracy theory but conspiracy in and of itself does not constitute a cause of action. Tapscott v. Fowler, 437 So. 2d 116 (Ala. 1983). In Lindbeck v. Bendziunas, 498 P.2d 1364 (N.M. App. 1972) the court said at page 1370:

In a civil action, however, the basis for relief is not the conspiracy but the damages caused by acts permitted pursuant to the conspiracy.

Where two or more persons enter into a conspiracy any act done by either in furtherance of a common design and in accordance with the general plan becomes the act of all and each conspirator is responsible for each act. Vaughan v. Hornaman, 403 P.2d 943 (Kan. 1965); Wyatt v. Union Mortgage, 598 P.2d 45 (Cal. 1979). As hereinafter set forth defendant Bank does not believe that it was guilty of any unlawful conspiracy with defendant Smedley but the jury so found and the Bank did not

cross appeal. 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. Defendant Bank did not allege recoupment or setoff as to the road work done by Smedley and indeed could not without admitting to being a conspirator. In like manner, plaintiff could make no cause of action against the Bank unless plaintiff alleged conspiracy but plaintiff 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. In its sound discretion the trial court so instructed the jury and the jury made an equitable decision as to what was fair and reasonable based on the Bank's participation and the overall "conspiracy."

POINT III

THE JURY VERDICT WAS CONSISTENT WITH THE
INSTRUCTIONS GIVEN.

As shown by the record, it was apparent to the jury that in becoming involved in the transaction, defendant Bank had relied on defendant Smedley's representations of equity in the drilling rig. Regardless of plaintiff's representations in the pleadings and at trial, the jury accepted defendant Smedley's position that he in fact did have an equity in the drilling rig equal to \$34,414.00 and the parties stipulated that the value of the drilling rig was \$35,000.00 when sold by defendant Smedley. Therefore, the only equity plaintiff had in the drilling rig as

to the cause of action for conversion was the amount of the judgment against the Bank.

The jury followed Instruction Number 31 to the letter and that is very apparent in the verdict form the jury submitted to the court. The jury scratched out the \$65,000.00 verdict in favor of plaintiff and against Smedley and deducted from that figure the \$34,414.00 in credits due Smedley and granted judgment for \$30,586.00. (Appendix B, R-440) Under plaintiff's theory of the case, the Bank doesn't even get credit for the balance due from plaintiff on the promissory note and the costs of sale. Instruction Number 31 is specifically directed to the conversion cause of action, and the conspiracy as pled by plaintiff, tried to the jury, and found by the jury relates only to conversion, not the breach of contract action. It is further evident that the jury did not misinterpret plaintiff's theories of recovery because the court specifically instructed the jury as to plaintiff's breach of contract theory in Instruction Number 16 (Appendix A herein) and plaintiff's conversion theory in Instruction Number 17 (Appendix A) and the burden of proof on Smedley set forth in Instruction Number 21 (Appendix A). Once the jury determined that there was in fact a conspiracy the Bank was totally dependent on Smedley's proof as to the amount of recoupment or equitable setoff.

Plaintiff took exception to the court's instructions on damages, alleging that the Bank should be equally liable with

Smedley on the breach of contract theory, but the court specifically rejected that argument and ruled that there was no evidence in the trial that would even remotely connect the Bank with defendant Smedley's breach of contract if any. (T-1 and 2).

POINT IV

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT
THE JURY ON PUNITIVE DAMAGES.

Even though the jury did find conversion on the part of Smedley and conspiracy on the part of the Bank, the jury also vindicated Smedley's rightful claim to all of the value of the drilling rig except \$586.00 amended to \$836.00 by the court's additur. Smedley's claim of an interest in the drilling rig was therefore bona fide and in good faith and the Bank relied on and is entitled to Smedley's bona fides. To make sure that the jury understood the damage issues, the court added Instruction Number 36a at the specific request of counsel for plaintiff after the initial Instructions were given by the court. (R-421, see Appendix A)

In Amos v. Broadbent, 514 P.2d 1284, (Utah 1973), defendant purchased cattle from a prior owner of a ranch who had already sold the ranch and cattle to the plaintiff. When plaintiff's ranch foreman discovered that the cattle were missing he called at the defendant's ranch to take possession of the cattle but the defendant threatened to charge him with trespassing if he didn't leave immediately claiming that he had purchased the cattle from the owner. Plaintiff charged the defendant with conversion of

plaintiff's cattle and the court allowed the issue of punitive damages to go to the jury. In reversing the trial court on the issue of punitive damages the Supreme Court said at page 1286-1287:

...The evidence shows some high-handed conduct on the part of the defendant in dealing with plaintiff's foreman Dan Brown and in the defendant's conduct in retaining the cattle and disposing of them. However, a fair appraisal of the record would show that defendant had purchased the cattle from Bennion and that Bennion had claimed ownership of the cattle and the right to sell the same, and also that Bennion offered to defend the defendant's title and ownership when the sale was completed. It would thus appear that the defendant's refusal to surrender the cattle to the plaintiff was under a claim of right and would not support a finding that defendant acted in a reckless, wanton, or malicious way in disregard of the rights of the plaintiff. A wrongful act is not in and of itself a sufficient basis to award punitive damages.

In Johnson v. Rogers, 763 P.2d 771 (Utah 1988) the court said at page 774:

The standard for punitive damages in non-false imprisonment cases is thus clear: they may be imposed for conduct that is willful and malicious or that manifests a knowing and reckless indifference and disregard toward the rights of others.

In the case at bar, the defendants believed the evidence would show the amount due defendant Smedley from plaintiff for work on the roads and culverts to be somewhat greater than the \$20,139.00 awarded by the jury. There was therefore no evidence of "a knowing and reckless indifference and disregard toward the rights of others" and certainly no "conduct that is willful and malicious" on the part of the defendant Bank.

Secondly, defendant Bank at all times was relying upon the advice of its attorney, Thomas W. Seiler, in connection with this transaction (Brown Dep. P. 13-18). Punitive damages are generally not recoverable against the defendant who acts in good faith upon the advice of counsel. U.S. Through Farmer's Home Administration v. Redland, 695 P.2d 1031 (Wyo. 1985)

CONCLUSION

The jury was diligent in following the instructions of the court and in applying the law to the facts found by the jury to exist. Instruction Number 31, taken together with Instruction Numbers 14, 16, 17, and 36a are correct statements of the law and clearly set forth plaintiff's theories of recovery. With regard to the conversion claim of the plaintiff, the jury did assess the damages exactly the same for defendant Smedley and defendant Bank, but the court correctly ruled that defendant Bank was not involved in any possible breach of contract by defendant Smedley. Plaintiff's Memorandum filed with the court April 5, 1988, clearly shows plaintiff's recognition that defendant Smedley's affirmative defense was one in recoupment and equitable setoff rather than setoff in the nature of a counterclaim. (R. 291) Defendant Bank believed it had done nothing illegal or improper nor that it had engaged in any illegal or improper procedure and the Bank therefore did not admit to a joint venture of conspiracy with defendant Smedley in its pleadings and could not set forth affirmative defenses without doing so. In like manner, plaintiff

had no cause of action against the Bank without alleging and proving conspiracy. The Bank is therefore entitled to the benefits as well as the liabilities of that relationship. In its argument on page 8 of its brief, plaintiff admits that Instruction 31 requires a judgment against the Bank in the same amount as the judgment against Smedley and the Instruction by its terms applies only to the conversion theory. The verdict forms returned by the jury clearly show that the jury did grant judgment against Smedley on the conversion theory in exactly the same amount as the jury found against the Bank. Under the provisions of Instruction 36a, the jury granted judgment against defendant Smedley in a substantially greater amount under the breach of contract theory and the jury was therefore properly instructed as to the damages that could be assessed against the defendant Bank and the manner in which the damages were to be calculated based on the jury's other findings.

The trial court properly refused plaintiff's request for an instruction on punitive damages because there was no evidence presented to the jury that would support such an instruction. Indeed, the jury verdict shows that defendant Smedley did have a valid interest in the well drilling rig and an instruction for punitive damages would have clearly been erroneous.

For these reasons the judgment on verdict should be affirmed as corrected.

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DATED this 5th day of January, 1989.

BEAN & SMEDLEY



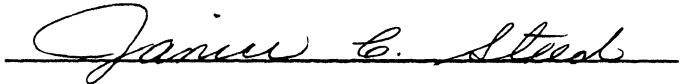
DAVID E. BEAN
Attorney for Defendant First
National Bank of Layton,
Respondent

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing were mailed to the following, postage prepaid this 5th day of January, 1989.

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APPENDIX "A"

Selected Jury Instructions

INSTRUCTION NO. 14

In the matter before you the plaintiff claims that defendant Smedley failed to repay \$65,000 which he owed the plaintiff; that defendant Smedley converted an interest in property belonging to the plaintiff to his own use; and that Smedley sold an interest in property belonging to the plaintiff to one Doxey in violation of Utah Law and this damaged plaintiff.

Plaintiff further claims that the defendant bank conspired with defendant Smedley in said conversion and wrongful sale to Doxey and as a result is jointly liable to plaintiff with Smedley.

Defendant Smedley denies the claims of plaintiff and claims that plaintiff breached their agreement to pay GECC \$12,500 and to give defendant Smedley credit for work he performed on the project and access thereto and thereby damaged defendant Smedley and that said damage more than offsets any damage which may have been caused to plaintiff.

Further defendant Smedley claims that plaintiff waived any claim for conversion or wrongful sale to Doxey by failure to reasonably protect their property interest.

Defendant bank claims that defendant Smedley redeemed the rig as provided by law and that the bank had no further duty to the parties and did not conspire with Smedley in any claimed conversion or wrongful sale.

INSTRUCTION NO. 15

You are instructed that the Court has found the written agreements entered into between the parties to be inconsistent and ambiguous, and, therefore, has allowed oral testimony to explain the intent of the parties and the meaning of the agreements. You must find, as best you can, the intent or agreement of the parties from the entire body of evidence, that is, the agreements, the testimony and the exhibits.

INSTRUCTION NO. 16

In order for plaintiff to recover under breach of contract against defendant Smedley, plaintiff must prove all of the following propositions by a preponderance of the evidence:

1. That defendant Smedley agreed to pay to the plaintiff the sum of \$65,000.
2. That defendant Smedley has not paid the same.

INSTRUCTION NO. 17

In order to prove conversion, the plaintiff has the burden to prove the following propositions by a preponderance of the evidence:

1. That the plaintiff was entitled to possession of the drilling rig;
2. That the plaintiff demanded possession of the drilling rig from the defendant;
3. That the defendant refused to return the rig to the plaintiff; and,
4. That the defendant took the rig or proceeds from the sale of the rig to it's own use and benefit; and,
5. That the plaintiff was damaged.

INSTRUCTION NO. 21

In order for defendant Smedley to prove that plaintiff breached the agreement between the parties, Smedley has to prove all of the following propositions by a preponderance of the evidence:

1. That the parties entered into an agreement whereby plaintiff agreed to pay \$12,500 to EGCC; and/or,
2. That the parties agreed that defendant would be allowed to do work on the project or access for which plaintiff would give him credit; and/or,
3. That plaintiff refused to pay the sum owing to GECC; and/or,
4. That defendant did work on said project or access and the reasonable value thereof;
5. That plaintiff failed to give credit to defendant for the work done;
6. That the defendant has been damaged thereby.

INSTRUCTION NO. 31

In the event you find the bank has conspired with Smedley as heretofore instructed, you should also enter judgment against the bank for the amount of any judgment against Smedley for conversion or wrongful sale.

INSTRUCTION NO. 36a

You are instructed that you may find in favor of the plaintiff and against the defendant Smedley and reach a verdict consistent with these instructions. You may also find in favor of the plaintiff and against both defendants consistent with these instructions so as to return two consistent verdicts in favor of the plaintiff, however, if you find against Smedley in both instances the amount of the joint verdict against both Smedley and the Bank will be deducted by the Court from the amount you award in the verdict form against Smedley alone so as to prevent a double recovery.

Nothing contained herein requires that you do either or both and you are instructed that you are free to return a verdict as you see fit based upon the evidence and facts as you find them under the law.

APPENDIX "B"

Jury Verdict

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR DAVIS COUNTY
STATE OF UTAH

MARK VII FINANCIAL,)	
)	Civil Action No. 40864
Plaintiff,)	
)	
vs.)	<u>VERDICT</u>
)	
DALE SMEDLEY, and)	
FIRST NATIONAL BANK OF LAYTON,)	
)	
Defendants.)	
)	

WE THE JURY empaneled in the above entitled matter,
Find the issues in favor of the plaintiff and against the
defendant Smedley and award damages in the following sum:

MSC
\$ ~~65,000.00~~ [#] 30,586.00

Signed this 4 day of April, 1988.

Michael S. Cole
Foreperson