

1979

Imperial-Yum Production Credit Association v. Earl Hunter and Lavon Hunter et al : Brief of Respondent

Utah Supreme Court

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Macoy A. McMurray and Robert J. Dale; Attorneys for Defendants-Appellants;

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IN THE DISTRICT COURT
OF THE STATE OF UTAH

IMPERIAL-YUMA PRODUCTION)
CREDIT ASSOCIATION, a)
corporation,)
)
Plaintiff and Respondent,)
)
vs.)
)
EARL HUNTER and LAVON HUNTER,)
his wife,)
)
Defendants and Third Party)
Plaintiffs and Appellants,)
)
vs.)
)
GLS LIVESTOCK MANAGEMENT,)
INC., a Utah corporation,)
and GEORGE L. SMITH,)
)
Third Party Defendants.)

Case No.

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Third District Court for Salt Lake County
Honorable James S. Sawaya, Judge

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FILED

MAY 6 1979

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OF THE STATE OF UTAH

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and GEORGE L. SMITH,)
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Case No. 16202

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This is an action by Imperial-Yuma Production Credit Association against Earl Hunter and LaVon Hunter, his wife, to recover an amount due and owing on a promissory note, including, principal, interest, costs and attorney's fees.

DISPOSITION IN THE LOWER COURT

Judge James S. Sawaya, sitting without a jury, tried the case and awarded judgment in favor of Plaintiff-Respondent

and against Defendants-Appellants, jointly and severally, in the sum of \$9,135.00, together with costs and attorney's fees in the sum of \$4,000.00.

The issues raised by the third-party pleadings were not tried.

RELIEF SOUGHT ON APPEAL

Imperial-Yuma Production Credit Association seeks affirmation of the judgment of the trial court against Defendants-Appellants; or, in the alternative, a remand to the trial court for the purpose of taking evidence concerning the identity of Earl Hunter and "Earl H. Hunter" and the allocation of attorney's fees awarded to plaintiff.

IDENTIFICATION OF THE PARTIES AND EXPLANATION OF ABBREVIATIONS

Imperial-Yuma Production Credit Association, the Plaintiff and Respondent, is herein referred to as the "Plaintiff" or as "Imperial-Yuma." Earl and LaVon Hunter, the Defendants and Appellants, are referred to as "Defendants" or by their names. Third Party Defendants GLS Livestock Management, Inc., and George L. Smith, are referred to as "GLS" and "Smith", respectively.

"R" refers to a page in the record of the case.

"T" refers to a page in the transcript of the case.

STATEMENT OF FACTS

Defendant, Earl Hunter, was contacted by Mr. George L. Smith of GLS Livestock Management Company concerning the possibility of Mr. Hunter's investing in a cattle feeding pool. T at 119. Through his accountant, John Q. Midgley, Mr. Hunter made arrangements for his participation in such a cattle feeding pool, including financing that was to be made by plaintiff. T at 129, 137, 138. By documents dated December 27, 1973, Defendants, Earl and LaVon Hunter, agreed to borrow funds from Plaintiff to finance a portion of their cattle feeding investment with George L. Smith and GLS. Said documents consisted of a Loan Agreement, Exhibit 3, a Level Line of Credit Agreement, Exhibit 4, a Promissory Note, Exhibit 6 and other documents, Exhibits 5, 7, 9, 11 and 15.

The cattle feeding pool in which Defendants invested was put together by Smith and GLS and was managed by Smith. The pool was given the name "Hanalei." T at 7, 41, 71.

Plaintiff took no part in formulating, selling or managing the cattle feeding pool operation. Plaintiff participated only to the extent of financing a portion of Defendants' investment and conducting periodic appraisals of the cattle and feed to assure its security for the loan made to Defendants. T at 41, 83, 94, 97.

In managing the cattle feeding pool and in dealing with Plaintiff, Smith acted as Defendants' agent. T at 56, 70, 122; Exhibits 8 and 9.

The cattle feeding pool was liquidated in May of 1975, all security for the loan was sold and the proceeds were applied to Defendants' loan. T at 37; Exhibit 19.

Plaintiff accounted for all credits and charges to the Defendants' loan account. T at 31-78; Exhibits 16, 17, 18 and 19. As of the trial date, Defendants were indebted to Plaintiff on their loan in the principal sum of \$5,439.41 and interest in the sum of \$3,696.08. T at 78; Exhibit 19.

ARGUMENT

POINT I

THE FINDINGS AND JUDGMENT OF THE TRIAL COURT ARE SUPPORTED BY CREDIBLE EVIDENCE AND SHOULD BE AFFIRMED.

A. Standard of Review. Defendants' appeal raises three factual issues to be reviewed by the Supreme Court: 1) whether Defendants are indebted to Plaintiff as found by the trial court; 2) whether Plaintiff wrongfully debited charges designated "Earl H. Hunter" to Defendants' loan account; and 3) whether Plaintiffs are entitled to attorney's fees as awarded by the trial court. Brief of Appellant at 12, 18, 21.

The Supreme Court has recently summarized the standard to be followed in examining factual issues on appeal, stating that: "Generally, evidence produced at trial is to be reviewed in the light most favorable to sustain the findings and judgment of the trier of fact." Rodgers v. Hansen, 580 P.2d 233, 234 (Utah 1978).

B. Defendants' Indebtedness to Plaintiff. Defendants claim that they are not indebted to Plaintiff because certain items designated "Earl H. Hunter" were improperly charged to their loan account and no evidence was produced at trial to establish that Earl Hunter, one of the Defendants, and "Earl H. Hunter" were the same person. Brief of Appellants at 12, 14. The items complained of by Defendant are (1) voucher copies of checks issued by Plaintiff to pay drafts attached thereto and (2) loan advices. T at 31-33; see Exhibit 16. The documents found in Exhibit 16 contain all of the charges made against Defendants' loan account. T at 33.

In arguing that all charges referenced "Earl H. Hunter" should be deleted from the accounting for Defendants' loan, Defendants overlook substantial evidence to the effect that all the charges and credits accounted for by Plaintiff at the time pertained to Defendants' loan account. Roy F. Richter, Branch Manager and Secretary-Treasurer of Plaintiff testified concerning the Exhibit 16 documents as follows:

Q. Would you tell us what the documents consist of?

A. The first document which is our check with our check number showing who the amount will be charged to -- in this particular case it's Mr. Hunter, of course, Mr. Earl Hunter -- the amount of the check to pay and then we have in the "Comments," to pay whatever it's issued for and then also the draft attached to the back of it to coincide with our check that was issued to take care of that particular item, as in all cases, whether it be cattle or feed. The draft -- the drafts are attached to our check on all of these.

Q. These are not your actual checks, apparently. They appear to be a voucher.

A. These are our copies of the checks that were issued to take care of this draft.

. . . .

Q. (By Mr. Dunn) Are all of the drafts which pertain to the Earl and LaVon Hunter loan included in Exhibit 16?

A. Yes.

Q. And with respect to the check vouchers, are all of those that relate to the specific draft and which relate to the Hunters' loan, are they included in Exhibit 16?

A. Yes.

Q. There are documents included in Exhibit 16 which are entitled Loan Advice. Would you describe what a Loan Advice is?

A. A Loan Advice is something -- that is a charge that's been made outside of maybe a purchase of cattle or feed or medicine. In this particular one that I'm referring to, it's for a charge of issuing insurance and insurance premium of a certain amount that is to be charged against Mr. and Mrs. Hunter for the insurance that they said that they wanted when they took the loan out and this is what this Loan Advice is in here for, because this amount is being charged against their loan to cover their insurance premium.

Q. So, is it correct that the drafts relate to purchases of cattle or feed or medicine? Is that correct?

A. Yes.

Q. But the Loan Advices would relate to other charges with respect to the loan?

A. Yes. Inner office -- well, in relation to -- in relation to insurance or different things like that, yes, they will.

Q. Are all of the Loan Advices which would reflect charges against the account of Mr. and Mrs. Hunter included in Exhibit 16?

A. Yes

Q. Does Exhibit 16 in fact contain all of the charges by way of draft or Loan Advice which were made against the Hunters' account?

A. Yes. T at 31-33 (emphasis added)

Concerning Exhibit 17 Mr. Richter testified:

Q. And for what purpose were these cancelled checks issued?

A. To pick up the draft at the bank that was for a various charge that was made against Mr. Hunter's account.

Q. These checks were issued to pay the draft?

A. Right.

Q. And to pay the Loan Advice charges as well?

A. Right.

Q. Or the charges reflected by the Loan Advice?

A. Right.

Q. Now, there is attached to proposed Exhibit 17 a computer tape and also an eight and a half by eleven sheet of paper. Can you identify what those items are for us?

A. Yes. This is a list of the different charges that were to go against the different people that Mr. Smith was handling in the various pools that was paid by one check or that was paid by one draft and then when we picked the draft up at the bank we paid it with one check and then brought it back in and separated the various charges to the different accounts that it should go and this is the breakdown that's showing here.

Q. And the one check which was used to pay that particular draft, is it in the exhibit as well?

A. Yes.

Q. And the breakdown or summary at the end, does it indicate the portion of that check that was charged against the Hunters' account?

A. Yes. T at 35-36 (emphasis added)

Exhibit 18 is composed of receipts credited to Defendants' account. T at 37, 38.

Claude Elmer Nichols, Assistant Vice-President of Plaintiff and the person charged with the responsibility for maintaining Plaintiff's records, testified as follows:

Q. Have you had an opportunity specifically to review the account of Earl and LaVon Hunter?

A. Yes.

Q. Have you made a summary of your review of their account which would take -- take into consideration all of the drafts as indicated by Plaintiff's Exhibit 16, all of the credits as indicated by Plaintiff's 18 and all of the cancelled checks as indicated by Plaintiff's Exhibit 17?

A. Yes. I have.

Q. I show you now what has been marked as Plaintiff's Exhibit 19. Can you identify that for us?

A. Yes.

Q. Tell us what that is.

A. That is a summary of all of the loan transactions that transpired on the Earl Hunter account.

Q. And did you prepare that yourself?

A. Yes, I did.

Q. And in preparing that particular summary, did you in fact go through and analyze the primary documents relating to drafts, credits, cancelled checks?

A. Yes. They were prepared directly from those documents.

Q. Was there any other documentation or information source that went into your preparation of Exhibit 19?

A. Not so far as the loan balance figures are determined. The only other thing in there is the interest accrual which was -- it's not -- it's a general association figure rather than each individual loan figure. In other words, the interest accrual is made from the effective interest rate in effect at various periods of time since the loan began until the present time.

Q. The interest accrual which appears as the third page of the exhibit, was that prepared by you?

A. Yes.

Q. There appears on the bottom of page three handwriting in pencil. Who prepared that?

A. I did.

Q. And from the summary that you prepared as Exhibit 19, did you conclude -- did you make some conclusion regarding the status of the account of Mr. and Mrs. Hunter with PCA.

A. Yes, I did.

Q. And what were the conclusions that you have arrived at?

A. That the -- that the -- the principal -- the principal balance outstanding is six thousand and forty-four dollars and forty-one cents less a credit of six hundred and five dollars for B stock and the interest.

THE COURT: Credit for what?

THE WITNESS: For Association B Stock that he owned in Production Credit.

Mr. MCMURRAY: Is that six hundred five even?

THE WITNESS: Plus interest accrual to date is three thousand six hundred ninety-six dollars and two cents.

THE COURT: That figure again?

THE WITNESS: Three thousand six hundred ninety-six dollars and two cents.

Q. (By Mr. Dunn) Let me see if I understand, Mr. Nichols. The net amount of principal owing as of today's date is five thousand four hundred thirty-nine dollars and forty-one cents?

A. That's correct.

Q. And the total amount of interest outstanding as of today is three thousand six hundred ninety-six dollars and two cents?

A. That's correct. T at 76-78 (emphasis added).

The sworn testimony is clear and un rebutted that the evidence offered by Plaintiff and received by the trial court related to the loan account of the Defendants, Earl and LaVon Hunter.

While denying the validity of charges made against their account referenced "Earl H. Hunter," Defendants are eager to accept credits variously referenced "Earl Hunter, " "E. Hunter," "E. H. Hunter," "EHH" and "Hunter." T at 66-68;

Exhibit 18. Such a position is both inconsistent with Defendants' stance as to charges and contrary to the evidence. If all credits were eliminated bearing any reference other than "Earl Hunter" Defendants would lose some \$8,036.28 in credits. This may account for the failure of Defendants to raise the issue of name confusion until counsel for Defendants made his closing argument, this in spite of repeated attempts by the trial court to have Defendants identify their defenses at trial. See T at 13, 48-50.

There is consistency, nevertheless, between Plaintiff's position and the evidence produced at trial. All credits and all charges made to Defendants' account bear the reference "Hanalei," Exhibits 16 and 18. Hanalei being the name of the cattle feeding pool in which Defendants invested. T at 7. Only one Hunter appears on the Hanalei credit distribution slips. Exhibit 18.

Plaintiff through its officers, has testified without contradiction concerning the nature and amount of the Defendants' obligation. T at 86. Defendants are attempting to avoid the obligation by advancing an argument that is not supported by the evidence.

C. The Insertion of an Erroneous Middle Initial is Legally Immaterial. At common law a person's middle name or initial is not part of his legal name. E.g., Clark v. National Adjusters, Inc., 140 Colo 593, 348 P.2d 370, 372 (1959). Therefore it is of no legal consequence that a person's middle

initial is omitted, id., that his middle initial is wrong, Nelson v. District Court, 136 Colo. 467, 320 P.2d 959, 966-67 (1957) or that a middle initial is inserted where none belongs, id. at 967 (dictum). This rule is true "unless it is shown that there are two persons of the same first name and surname. . . ." Tate v. State, 104 Ga. App. 699, 1222 S.E.2d 528, 529 (1961) citation omitted). It is not enough merely to assert that a difference of middle initials indicates two different people may be intended; some evidence must be produced to substantiate that claim. Bowlin v. Freeland, 289 S.W. 721, 722 (Tex. Ct. App. 1926).

Defendants place great weight on the fact that the disputed charges are referenced "Earl H. Hunter" instead of "Earl Hunter," yet during trial they presented no evidence that a person named "Earl H. Hunter" existed apart from defendant Earl Hunter. They have only hypothesized his existence. See, e.g., Brief of Appellant at 12. Thus without showing that there is an actual, as opposed to hypothetical, dispute of identity, the Tate and Bowlin cases teach that a mistaken middle initial is legally irrelevant.

Moreover, even if the mistaken middle initial were relevant, the resulting question of identity presented a factual issue that was resolved against Defendants by the trial court in its well-supported finding that charges referenced "Earl H. Hunter" applied to "Earl Hunter," the Defendant. See Point I, Part B, supra.

POINT II

SMITH WAS THE AGENT OF DEFENDANTS AND DEFENDANTS ARE RESPONSIBLE FOR HIS CONDUCT AND DEALING WITH PLAINTIFF.

Among the loan documents executed by Defendants was a letter authorizing Plaintiff to pay drafts drawn on Earl Hunter and signed by George L. Smith. According to the terms of the letter, the authority was to remain in effect until cancelled by Defendants in writing. Exhibit 8. Said authority was never cancelled by Defendants. T at 79-81, 95, 96.

In the closing statement prepared by Plaintiff and executed by Earl Hunter, Exhibit 9, Plaintiff specifically denied any agency relationship with Smith, the clear implication being that Smith represented Defendants in the entire transaction.

Smith received funds as proceeds from the cattle feeding pool operation and submitted them to Plaintiff to be applied as credits to Defendants loan account. Exhibit 18. Defendants have acknowledged and accepted all of such credits. Smith was indubitably Defendants' agent. T at 56, 70, 122; Exhibits 8 and 9.

Whatever errors were made with respect to name identification or charges to Defendants' loan account were made by Smith, Defendants' agent. Exhibits 16 and 18).

In agency law, the general rules are well established that a principal is charged with the knowledge of his agent, 3

Am. Jur. 2d Agency §273 (1962); payment to the agent is payment to the principal, even if improperly handled by the agent, Id. at §275; as between a third party and the principal, it is the principal who must withstand a loss occasioned by the act of his agent, (Id. at §261; and the retention by the principal of benefits resulting from the act of the agent constitutes ratification by the principal of the agent's act. Id. at §283. These general rules govern the issues raised by Defendants and provide more than adequate legal bases for the decision of the trial court.

As a matter of agency law, Defendants are charged with and bound by the knowledge that certain charges and credits were being made to their loan account by designations other than "Earl Hunter and LaVon Hunter." If Defendants have suffered any loss as the result of Smith's conduct, they are solely responsible.

POINT III

THE ATTORNEY'S FEES AWARDED BY THE TRIAL COURT SHOULD BE AFFIRMED.

The trial court made the following finding of fact:

13. Plaintiff has been required to employ counsel to prosecute its claim against defendants and to defend counterclaims filed by defendants. The sum of \$4,000.00 is a reasonable attorney's fee to be awarded to plaintiff in connection with these proceedings, exclusive of the defense of defendants' counterclaims. R at 290 (emphasis added).

Counsel for Plaintiff testified that all legal work performed for Plaintiff in this case had a reasonable value of \$7,164.00. T at 103-06. He did not make a specific allocation of time spent between Plaintiff's action on the promissory note and the defense of Defendants' counterclaims for the reason that the counterclaims and affirmative defenses raised precisely the same legal issues. T at 110.

Counsel's overall statement of time and effort was accepted by the Defendants, who raised as the only objection the question of allocation of charges between the primary case and the defense of the counterclaims. T at 106. Counsel for the Defendants stated that his purpose in cross-examining counsel for Plaintiff was to disclose ". . . some factors which we would urge should not entitle Imperial-Yuma to recover the full legal expense." T at 105 (emphasis added).

The trial court had before it the detailed testimony of counsel for Plaintiff, T at 103-11, counsel for Defendants. T at 144-48, and counsel for third party defendants Smith and GLS, T at 112-18), all relating to the allocation of counsel's time between the primary case and the defenses of the counterclaims. Having heard their testimony, as well as the arguments of Defendants that no attorney's fees be awarded for the defense of the counterclaims, the trial court found as a matter of fact that \$4,000.00 was a proper award of attorney's fees to Plaintiff for the prosecution of the primary case on the promissory note.

Defendants now urge the Court to deny any award of attorney's fees, and in support of their position, refer to the cases of Nelson v. Newman, 583 P.2d 601 (Utah 1978) and Stubbs v. Kemert, 567 P.2d 168 (Utah 1977). Neither of these cases disposes of the issues raised by Defendants.

In the Nelson case the Supreme Court ruled that the trial court's granting of attorney's fees under Rule 68(b) of the Utah Rules of Civil Procedure was improper. In dicta the court noted that the Plaintiff was contractually entitled to reasonable attorney's fees but had failed to prove how much time his attorney had spent on the collection of the plaintiff's notes as opposed to defense of the counterclaims. Nelson's general principal does not apply to the instant case, however. After hearing testimony regarding Plaintiff's attorney's fees, the trial judge made a specific finding of fact as to the attorney's fees to which Plaintiff was entitled for services performed with regard to collection of the note, "exclusive of the defense of defendants' counterclaim." R at 290.

Likewise, in the Stubbs case, the party seeking to recover attorney's fees for defense of the counterclaim had settled the primary case prior to trial and then lost on the counterclaim at trial. The trial court awarded attorney's fees for the settled primary case pursuant to the provision in the promissory note there at issue, partly based upon the specific allocation of time given to that portion of the case. The

Supreme Court affirmed that action. The instant case comports with that decision for the trial judge awarded attorney's fees only for prosecution of the primary case, not the counterclaims.

POINT IV

THE SUPREME COURT MAY REMAND FOR A DETERMINATION OF THE IDENTITY OF EARL H. HUNTER AND TO RECONSIDER THE ALLOCATION OF TIME IN AWARDING ATTORNEY'S FEES.

Notwithstanding the position of Plaintiff that the evidence supports the findings and judgment of the trial court; should the court determine that the issues of identity of "Earl Hunter" and "Earl H. Hunter" and the allocation of attorney's fees were not sufficiently examined by the trial court, this action may be remanded to the trial court for further proceedings, pursuant to the authority set forth in Rule 76(a), Utah Rules of Civil Procedure.

It should be pointed out that counsel for Defendants first raised the issue of name confusion in his closing argument. T at 153-58. Counsel for Plaintiff made a motion to re-open for the purpose of presenting evidence on the issue, but the motion was denied. T at 158.

CONCLUSION

The evidence before the trial court was sufficient to allow the trial judge to find that the name "Earl H. Hunter" was

used to describe the account transactions of these Defendants, that Imperial-Yuma was not Defendants' agent in any way, and that \$4,000.00 is a proper allocation of attorney's fees to the trial of the primary cause in this matter by Imperial-Yuma.

The Appellants have presented no factual or legal issue which would warrant a reversal of the judgment of the trial court in any part. The trial judge heard and evaluated all of the necessary and relevant evidence. He entered specific findings of fact regarding the issues raised here by Appellants. The law will easily support both the factual and legal conclusions of the trial court in this matter.

Respondents respectfully urge that the judgment of the trial court be affirmed, or in the alternative, that the case be remanded to the court for further proceedings, with costs of this appeal to Respondent.

Respectfully submitted,

JARDINE, LINEBAUGH, BROWN & DUNN

By: 

James M. Dunn

Attorneys for Imperial-Yuma
Plaintiff-Respondent

DELIVERY CERTIFICATE

I hereby certify that I personally hand-delivered the foregoing Brief of Respondent to Attorneys for Defendants-Appellants, Macoy A. McMurray and Robert J. Dale of McMurray & Anderson, by living a true copy with Secretary at 800 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah, this 6th day of July, 1979.


