1979

Federal Employees Credit Union, A Corporation v. Agapito Espinoza and Mary Espinoza : Notice of Newly Uncoverd Case

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

FEDERAL EMPLOYEES CREDIT UNION, a corporation,	NOTICE OF NEWLY
Plaintiff/Respondent,	UNCOVERED CASE
v.	
AGAPITO ESPINOZA and MARY ESPINOZA,	Case No. 16224
Defendants/Appellant.	

Appellant Mary Espinoza, by and through her attorney of record, Bruce Plenk of Utah Legal Services, Inc., and pursuant to Rule 75(p)(3), Utah Rules of Civil Procedure, hereby moves this Court to consider the following newly uncovered case as an addition to her previously filed Brief in Support of Appellant's Petition for Rehearing.

COSTS ON APPEAL ARE
NOT PROPERLY AWARDED
AGAINST AN IMPECUNIOUS
APPELLANT

In Cody v. Cody, 47 U. 456, 154 P. 952, 956 (1916), this Court held that no costs on appeal should be charged against an appellant filing the appeal with an affidavit of impecuniosity. This case has never been reversed or modified in sixty-three years and the policy underlying the decision is still sound. The present case was also filed with an

impecunious affidavit. Thus, no costs should be awarded on the appeal in the event that respondent prevails.

DATED this 26th day of November, 1979.

UTAH LEGAL SERVICES, INC.

By Bruce Plenk
BRUCE PLENK
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Salt Lake City, Utah 84111

Attorneys for Appellant
Mary Espinoza

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a copy of the foregoing Notice of Newly Uncovered Case to Timothy W. Blackburn, Attorney for Respondent, 2605 Washington Boulevard, Ogden, Utah 84401, this 26 day of November, 1979.

Jackie McCann

IN THE SUPREME COURT

OF THE

STATE OF UTAH

FEDERAL EMPLOYEES CREDIT UNION, A Corporation,	*	
Plaintiff and Respondent,	*	
vs.	*	Case No. 16224
AGAPITO ESPINOZA and MARY ESPINOZA,	*	
Defendant and Appellant.	*	

BRIEF OF RESPONDENT

Appeal from the Judgment of the Second Judicial District Court of Weber County, State of Utah
The Honorable Ronald O. Hyde

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FEDERAL EMPLOYEES CREDIT UNION, A Corporation, Plaintiff and Respondent,	*	
vs.	*	Case No. 16224
AGAPITO ESPINOZA and MARY ESPINOZA, Defendant and Appellant.	*	

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is an action brought by Respondent, who was the plaintiff in the lower court, to enforce their secured interest in property pledged by Appellants, who were the defendants in the lower court, because of Appellants' default. Among property pledged were items which would have been exempt had they not been pledged.

DISPOSITION IN THE LOWER COURT

The lower court, Second Judicial District Court of Weber County, State of Utah, Honorable Ronald O. Hyde presiding, ruled that defendants had waived their statutory exemption rights by pledging exempt property as security, plaintiff did not have to inform defendant of the effect of pledging exempt property and that such action is not unconscionable.

RELIEF SOUGHT ON APPEAL

The Respondent seeks an order affirming the lo court's decision as to the waiver of exemption rights voluntarily pledging exempt property.

STATEMENT OF FACTS

Respondent agrees with the facts as set forth Appellant.

ARGUMENT

A DEBTOR IS NOT ENTITLED TO THE PROTECTION UTAH'S EXEMPTION STATUTE IF HE VOLUNTARILY PLEDGES OTHE WISE EXEMPT PROPERTY AS SECURITY FOR A LOAN.

Courts in this country have consistently and f quently recognized the fact that when a person is grante statutory right he may, by his actions, relinquish th right. It is not argued by the Respondent that much of personal property pledged as security by the Appellan the Promissory Note and Security Agreement which is subject of this law suit would be exempt from execut under Section 78-23-1 Utah Code Annotated (1953) had s security not been pledged. There is no question that t above cited statute was designed by the Utah legislature protect persons from involuntarily being deprived of c tain property considered to be essential to ones gene happiness and well being. There is, however, no trace involuntariness associated with the Appellant's pledge therefore, she is properly removed from the catch

protection offered by the above cited statute. The exemption laws were not intended to protect a person who voluntarily pledges exempt property as stated in 31 Am. Jur. 2d Section 125 (Exemptions):

> Exemption laws exempt property only from seizure and sale on mesne or final process. They are not designed to prevent persons from giving liens upon whatever property they may see fit; and where such a lien is given, it creates security for the debt in the property to which it attaches, from which the debtor cannot relieve himself. The lien is not discharged until the debt is paid: and unless there is some provision in the statute to the contrary, it may be enforced against the property to which it attaches even though that property is exempt under law.

In the leading Utah Supreme Court decision relating to Utah's Exemption Statute, the high court not only sets forth the general rule governing a voluntary pledge of exempt security, but also sets forth some very enlightening and logical reasoning for its decision when it said:

> "It matters not that the property may be subject of such an exemption. The owner thereof may nevertheless sell or alienate his property of that nature, or any interest that he may have therein, to rule otherwise would have the effect of depriving him of part of his property rights therein. Moreover, it would be repugnant to elementary principles of justice to permit him to pledge this property to obtain $2,500.00 from the bank and then try to defeat the bank's claim by asserting that he had no right to make the pledge. Clearfield State Bank v. Contos. 562 P. 2d 622,625, (1977).

Respondent submits that it is the responsibility, and indeed the duty of the legislature to protect what it considers to be general priorities regarding property pos-

session in this state. This it has done by passing Utah's Exemption Statute. It would be, however, a severe encroachment upon the rights of the citizens of this state for its courts to interpret Section 78-23-1 Utah Code Annotated (1953) so strictly as to prevent the voluntary alienation of the property described therein. To allow a person to voluntarily pledge otherwise exempt property as loan security removes none of his statutory rights, but rather allows him the freedom to prioritize his own possessory rights and provides him the opportunity to, in effect say, "I desire to use the loaned money for purposes which are more important to me than the use of the pledged property."

In addressing a problem very similar to the one brought in issue by the Appellant, the Ohio Supreme Court placed the burden where it properly belongs when it said "... if this Statute is to include executed waivers... the change in the law should be accomplished through unambiguous legislature enactment." City Loan and Savings Co. v. Keenan 136 Ohio 125, 24 N.E. 2d, 452, 454 (1939). In the past, the Utah Legislature has been very careful to prescribe what it feels must be fully disclosed to borrowers. This is evidenced by the rather complex disclosure requirements found in the Uniform Consumer Credit Code, Section 70B 2-301 et seq. U.C.A. (1953). The exemption statutes

this state place no disclosure responsibility upon creditors when granting loans and taking otherwise exempt property as security.

Appellant's argument that waivers regarding rights under the Exemption Statute must be "knowingly and intelligently made" is, in this case, simply not supported by legal logic. The general rule is as follows "...an express waiver is not necessary for a mortgage or pledge implies a waiver." 35 C.J.S., Exemptions Section 106, See Kay v. Furlow, 178 L.A. 637, 152 So. 315, 316 (1933); U.S. Building and Loan Association v. Stevens, 93 Mont. 11, 17 P 2d 62 (1932); City Loan and Savings Co., v. Kennen 136 Ohio St. 125, 24 N.E. 2d 452 (1939). Since the law allows for implied waivers to be made with regard to exemption statutes, it would be illogical to simultaneously require a creditor to obtain a "knowing and intelligent waiver". Such a requirement would place the waiver in the category of express. It would further place an undue burden upon creditors, and place at issue in all security agreement cases the problems and judgments associated with a loan officer's assurance that a debtor knowing and intelligently waived his rights. Until such time as the legislature establishes a reasonable and systematic method whereby a creditor may obtain an express waiver of a debtor's exemption rights, the courts are wise in allowing for an implied

waiver as evidenced by a signed security agreement.

THE FACT THAT A CREDITOR DOES NOT INFORM A DEBTOR OF THE EXEMPTION LAW WILL NOT MAKE A SECURITY AGREEMENT UNCONSCIONABLE.

Defendant's claim of unconscionability of the agreement pursuant to Utah Code Annotated Section 70B-5-1[illegible] is without merit. In the comment of commissioners on Uniform State Laws, which follows Utah Code Annotated Section 70B-5-108, it sets forth the basic test.

> ...the basic test is whether, in light of the background and setting of the market, the commercial needs of the particular trade or case, and the condition of the particular parties to the contract, the contract or clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract..."

Further, the court in Williams v. Walker-Thomas Furn. Co. 350 F. 2d 445 (D.C. Cir. 1965) states that "[u]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party (see also Campbell Soup Co. v. Wentz 172 F 2d 80 [3rd Cir. 1948]).

Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In the case at bar there are no facts indicating that defendants were uneducated, illiterate individuals who were incapable of

appreciating the documents which they signed. The trial judge who had the opportunity to listen to the testimony made the determination that defendants were capable of understanding the consequences of their actions and had not been taken advantage of in this case.

The collateral given to secure the loan was disclosed to defendants and they were definitely aware of what would happen in the event of default.

As to reasonableness or fairness, Corbin suggests the test as being whether the terms are "so extreme as to appear unconscionable according to the mores and business practices of the time and place." 1 Corbin, Contracts Section 128 (1963).

It can hardly be said that from the circumstances surrounding the transaction involved here, this transaction would be elevated to the level of unconscionability as argued by defendant. While defendant argues that taking of nonpurchase money security interests in exempt household goods has been "widely" condemned as unconscionable yet indicates that "at least four states" have legislatively followed this approach. This could hardly be viewed as "widely" condemning this practice.

CONCLUSION

Section 78-23-1 Utah Code Annotated (1953) can be waived by implication. Express waivers are not required by any section of Utah law dealing with exemption rights. The

exemption statute is designed to protect judgment debtors against involuntarily losing their possessory rights, and was not intended to prevent property alienation or the voluntary pledging of property as loan security. To interpret the Exemption Statute as suggested by the Appellant would defer legislative responsibility to the courts and to grantors of loans. Appellants implied waiver being valid, this court should find that Respondent possesses a valid security interest in Appellant's pledged property and should therefore allow the Respondent all remedies prescribed by the Utah Consumer Credit Code, Section 70B-3-104 et. seq. U.C.A. (1953).

Furthermore, this court should find that under the circumstances of this action, the taking of the security was not unconscionable and allow plaintiff to enforce it's contractual remedies under the agreement.

Respectfully submitted,

Timothy W. Blackburn

TIMOTHY W. BLACKBURN
Attorney for Respondent

CERTIFICATE OF MAILING

A copy of the foregoing Brief of Respondent was posted in the U.S. mail, postage prepaid, and addressed to

the Attorney for Appellant, Bruce Plenk, Utah Legal Services Inc. 352 South Denver, Salt Lake City, Utah 84111 on this the 4 day of April, 1979.

Debbie Hudman
Secretary