

1979

# Commercial Credit Corporation v. Star Koncar : Brief of Respondent, Commercial Credit Corporation

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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COMMERCIAL CREDIT CORPORATION, :

Plaintiff and Respondent, :

vs. : Case No. 16234

STAR KONCAR, :

Defendant and Appellant. :

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BRIEF OF RESPONDENT, COMMERCIAL CREDIT CORPORATION

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Appeal from Judgment of Third District Court of  
Salt Lake County

Honorable G. Hal Taylor, Judge

-----

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FILED

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Clerk, Supreme Court

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COMMERCIAL CREDIT CORPORATION, :

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BRIEF OF RESPONDENT, COMMERCIAL CREDIT CORPORATION

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STATEMENT OF CASE

This is an action in contract to recover money due and owing on a Promissory Note. Appellant has Counterclaimed for damages under the Uniform Commercial Code for Respondent's alleged wrongful disposition of collateral.

DEPOSITION IN LOWER COURT

Respondent, Commercial Credit Corporations, Motion for Summary Judgment was granted by the lower court on November 3, 1978 giving Respondent a Judgment against Appellant for One-Thousand One-Hundred and Twenty-Four (\$1,124.82) Dollars and eighty-two cents, attorney's fees in the sum of Three-Hundred (\$300.00) Dollars and court costs in the sum of Twenty-Five (\$25.00)

Dollars.

In February, 1979 the lower court denied Appellant's Motion to Set Aside Default Judgment and ordered a Stay on Respondent's execution of the Judgment previously granted until such time as Appellant's Counterclaim was disposed of upon the merits.

RELIEF SOUGHT ON APPEAL

Respondent, Commercial Credit Corporation, seeks affirmation of the lower court's Summary Judgment in its favor and denial of Appellant's Motion to Set Aside Default Judgment.

## STATEMENT OF FACTS

In August, 1978 Respondent filed a Complaint against Appellant in the Murray Circuit Court based upon a Promissory Note and Security Agreement. Respondent sought damages in the sum of One-Thousand Twenty-Two (\$1,022.59) Dollars and fifty-nine cents plus interest, attorney's fees and court costs. In August, 1978 Appellant filed an Answer and Counterclaim with the Murray Circuit Court. Appellant's Counterclaim exceeded the Circuit Court's jurisdictional limit. Accordingly, the entire lawsuit was transferred from the Murray Circuit Court to the Salt Lake County District Court.

On or about September 21, 1978, before it received notice of the transfer of the case, Respondent filed a Motion for Summary Judgment with the Murray Circuit Court. After being notified of the necessary transfer, the Respondent paid the additional fee and filed a new Motion for Summary Judgment with the Salt Lake County District Court. The hearing on Respondent's Motion for Summary Judgment was properly noticed in the District Court of Salt Lake County for the 27th day of October, 1978. The notice was mailed to counsel for Appellant on October 11, 1978.

Prior to the hearing, Respondent's counsel spoke with Appellant's counsel and explained not only the transfer of the case from the Circuit

Court to the District Court, but also explained that the Motion for Summary Judgment would be heard before the Salt Lake County District Court.

The hearing was scheduled for 10 o'clock on October 27, 1978. At approximately 9:15 on the day in question, Appellant's counsel, Stephen L. Johnston, telephoned Respondent's attorney, James R. Blakesley, and requested a continuance on the hearing on the Motion for Summary Judgment because he had a trial before Judge Ernest F. Baldwin of the Salt Lake County District Court scheduled for the same time. Respondent's counsel agreed to a continuance as long as the Court would approve the same. Respondent's counsel telephoned and spoke with Judge G. Hal Taylor, the Salt Lake County District Court Judge scheduled to hear the Law and Motion Calendar, who refused to continue the hearing on such late notice.

After speaking with Respondent's counsel, Judge G. Hal Taylor went and spoke personally with Appellant's attorney regarding the Motion for Summary Judgment.

When Respondent's Motion for Summary Judgment came up for hearing, Judge G. Hal Taylor indicated that he had spoken with Appellant's counsel, was aware of the contents of the Counter-Affidavit and considered Respondent's Motion to be well taken.



The Summary Judgment was granted only as to Respondent's Complaint. The question of legitimacy of the Appellant's Counterclaim was reserved.

In early December, 1978 Appellant filed a Motion to Set Aside Default Judgment. That Motion was scheduled for hearing on December 26, 1978. Judge G. Hal Taylor denied Appellant's Motion to Set Aside the Default Judgment, although he ordered that a Stay be placed upon Respondent's execution on the Judgment previously granted until such time as Appellant's Counterclaim was heard upon the merits. This appeal arises out of those two lower court decisions.

## ARGUMENT AND AUTHORITY

POINT I: AT ALL TIMES MATERIAL HEREIN, THE LOWER COURT WAS AWARE OF THE ALLEGED FACTUAL AND LEGAL ISSUES SET FORTH IN APPELLANT'S COUNTER-AFFIDAVIT OFFERED IN OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

The Statement of Facts in Appellant's Brief is somewhat misleading. Prior to the October 27, 1978 hearing on Respondent's Motion for Summary Judgment, Judge G. Hal Taylor of the Salt Lake County District Court spoke with Appellant's counsel. If anything, that conversation would be prejudicial to the Respondent. At that time, Judge G. Hal Taylor asked Appellant's attorney what basis he had to oppose the Motion for Summary Judgment. He was advised. Judge G. Hal Taylor still, and rightfully so, considered the Motion well taken.

Afterwards, in December, 1978, Appellant filed her Motion to Set Aside the Default Judgment which must have been a Motion in the nature of a rehearing of Respondent's Motion for Summary Judgment.

At that time, the District Court was aware of all of the Affidavits filed by Appellant in opposition to Respondent's Motion. Still, the lower court considered Respondent's Motion to be well taken and refused to reverse itself. Essentially, Appellant had two shots at the same apple. The Court was cognizant of all of the relevant data.

The Court made an informed decision. The Court did not abuse its discretion.

POINT II: THIS APPEAL INVOLVES A SUMMARY JUDGMENT, NOT A DEFAULT JUDGMENT.

Since Respondent's Motion for Summary Judgment was granted, Appellant's counsel has continually and inappropriately treated it as a Default Judgment. It was a Summary Judgment granted on the basis that as far as Respondent's Complaint was concerned there were no material issues of fact and Respondent was entitled to Judgment as a matter of law. It is difficult to argue apples and oranges rationally. The rules for Summary Judgment and Default Judgment are different.

If Appellant had not actually been given "her day in Court" and if the District Court had not spoken with her counsel on the day of the hearing on the first Motion for Summary Judgment or if the District Court had not reconsidered all of the arguments and Affidavits at what amounted to Appellant's Motion for Rehearing, then Appellant's argument that she was not entitled to an adversary hearing would be more persuasive.

The cases cited in Appellant's Brief, Griffith -v- Hammon, 560 P2d 1375 (Utah, 1977), Warren -v- Dixon Ranch Company, et al, 123 Utah 416, 260 P2d 741 (1953) and Mayhew -v- Standard Gilsonite Company, 14 Utah 2d 52, 376 P2d 951 (1962), are inapposite to the

case sub judice. All of those cases dealt with Motions to Set Aside Default Judgments. In this case, the test should be whether, taking the facts in the light most favorable to the Appellant, the Motion for Summary Judgment should have been granted. That is, were there any relevant questions of fact remaining to be decided or was the Respondent entitled to Judgment, looking at the facts in the light most favorable to the Appellant, as a matter of law. See Pioneer Sav. & Loan Ass'n. -v- Pioneer Finance & Thrift Co., 417 P2d 121 (Utah, 1966) and Allen's Products Co. -v- Glover, 414 P2d 93 (Utah, 1966). If the Respondent was not entitled to a Judgment pursuant to Rule 56, Utah Rules of Civil Procedure, then the lower court decision should be reversed and the case should be remanded for trial.

POINT III: THE GRANTING OF RESPONDENT'S MOTION FOR SUMMARY JUDGMENT WAS PROPER.

In Respondent's Complaint, it sought to recover One-Thousand Twenty-Two (\$1,022.59) Dollars and fifty-nine cents due and owing on a Promissory Note and Security Agreement together with accrued interest, attorney's fee and court costs. The contractual agreement provided for the latter two items and the Affidavit of Leonard Cenatiempo, Respondent's Assistant Claims Manager, fixed the balance due and owing on the account at One-Thousand Twenty-Two (\$1,022.59) Dollars and fifty-nine cents, plus accrued

interest at eighteen (18%) percent per annum from and after February 28, 1977. The letter dated July 26, 1977 attached to that Affidavit shows that the Appellant was given reasonable notification of the time after which any private sale or other intended disposition was to be made of the 1976 Lincoln Continental, which served as collateral on the Promissory Note. The return receipt, registered, insured and certified mail attached to that Affidavit shows that the notice of sale was not only mailed but received. It states in Utah Code Annotated Section 70A-9-504 (1953) as amended that:

"Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made should be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale."

In Appellant's Answer to Respondent's Complaint, Appellant did not request any set off or reduction for the alleged UCC violation. She elected to proceed by way of Counterclaim for those damages, if any. It is well recognized that generally a failure to plead an affirmative defense results in its waiver and excludes it as an

issue in the case. See Thomas -v- Braffet's Heirs, 305 P2d 507 (Utah, 1956).

In short, the Motion for Summary Judgment was properly granted by the District Court. Especially, since the purpose of Rule 56, Utah Rules of Civil Procedure is to allow the Court to pierce the pleadings in order to eliminate paper issues in cases that would end in directed verdicts or other rulings of law. See Dupler -v- Yates, 351 P2d 624 (Utah, 1960).

#### CONCLUSION

Based upon the foregoing, Respondent, Commercial Credit Corporation, respectfully requests that the Summary Judgment in its favor be affirmed.

Respectfully submitted,

KIPP AND CHRISTIAN



James R. Blakesley