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Valley Bank and Trust Company v. Rite Way
Concrete Forming, Inc., Peter Lowe, Jr., J. Randall
Outsen, Tracy M. Jones, Richard H. Lowe, and Don
Bailey Construction, Inc. Peter Lowe, Jr., and
Richard H. Lowe v. Don Bailey Construction, Inc.,
Don Bailey, Draper Bank, and Jacobsen-Robbins
Construction Company : Brief in Opposition to
Certiorari

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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VALLEY BANK AND TRUST COMPANY, a Utah corporation,

Plaintiff and Petitioner,

PET NO. 870348

vs.

RITE WAY CONCRETE FORMING, INC., a Utah corporation, PETER LOWE, JR., J. RANDALL
OUTSEN, TRACY M. JONES, RICHARD H. LOWE, and DON BAILEY CONSTRUCTION, INC.,
a Utah corporation,

Defendants and Respondents.

and

PETER LOWE, JR., and RICHARD H. LOWE,

Cross-Complainants, Third-Party
Plaintiffs,

vs.

DON BAILEY CONSTRUCTION, INC., a Utah corporation,

Cross-Defendants,

and

DON BAILEY, DRAPER BANK, a Utah corporation, and JACOBSEN-ROBBINS CONSTRUCTION
COMPANY, a Utah corporation,

Third-Party Defendants.

Certiorari Docket No. 870348 #13

FILED

DEC 4 1987

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Clerk, Supreme Court, Utah

Petition for Writ of Certiorari From a Decision of the Utah Court of Appeals

The Honorable Richard C. Davidson
The Honorable R. W. Garff
The Honorable Gregory K. Orme

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IN THE SUPREME COURT OF THE STATE OF UTAH

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I N T R O D U C T I O N

In the interest of brevity, as mandated by the rules of this Court, Respondents Peter Lowe, Jr., and Richard H. Lowe accept the treatment in Petitioner's brief as it related to the following:

QUESTIONS PRESENTED FOR REVIEW

OPINION OF THE COURT OF APPEALS

JURISDICTION OF THE UTAH SUPREME COURT

STATUTES, ORDINANCES, RULES, REGULATIONS, ETC.

STATEMENT OF THE CASE

STATEMENT OF FACTS

A review of the foregoing, together with a review of the opinion of the Court of Appeals [Valley Bank and Trust Company v. Riteway Concrete Forming Inc., 64 Utah Advance Reports 66 (CA Utah 1987)] will provide the Court with an adequate background to rule on the petition for issuance of a writ of certiorari.

ARGUMENT IN OPPOSITION TO ISSUANCE OF WRIT

Petitioner invites review based on an unsupported allegation that the decision of the Court of Appeals is in conflict with prior decisions of this Court. No such conflict exists, and, accordingly, Petitioner never really develops this argument. There is an effort to find an inconsistency with a Colorado case relied upon by the Court, but such effort fails in the face of the facts of the case and the equitable maxim that

the law does not require a useless act.

Petitioner also complains that the Court of Appeals buttressed its decision by reference to a provision of the Uniform Commercial Code (U.C.C.), which Petitioner claims to be inapplicable. There are two compelling reasons to decline granting certiorari to treat this issue. First, the Court of Appeals' principal reliance is premised on a well-established general rule of case law rather than the U.C.C. While the U.C.C. is cited in support, it is not necessary to the decision. Second, this Court, in Continental Bank, etc. v. Utah Sec. Mortg., 701 P.2d 1095 (1985), has applied the precise same sections of the U.C.C. in a similar case involving personal guaranties.

POINT I: PAYMENT ON A CONTRACT OF PERSONAL GUARANTY NEED NOT BE MADE BEFORE THE GUARANTOR CAN RAISE A DEFENSE THAT SUBROGATION RIGHTS HAVE BEEN WRONGFULLY IMPAIRED BY THE BENEFICIARY OF THE GUARANTY.

In the case at bar, the Bank affirmatively released the collateral securing the loan covered by the personal guaranties of the Lowes. Such release came after the said personal guarantors had located the collateral for the benefit of the Bank. The release was accomplished without the knowledge or awareness of the personal guarantors and effectively emasculated their subrogation rights.

Relying upon solid authority from the courts of Colorado and Arizona, and on the general rule as set forth by

text writers¹, the Court of Appeals adopted the equitable concept that wrongful impairment of subrogation rights of a personal guarantor will discharge such guarantor from his obligation to the extent of the impairment. [Valley Bank v. Rite Way, supra at 64.]

Petitioner argues to this Court that the Court of Appeals erred in recognizing a right of subrogation without first requiring payment on the personal guaranties. In essence, Petitioner argues that the personal guarantors should have been required to make full payment to the bank on the personal guaranties and then turn around and sue the bank for a refund.

Petitioner offers no reason for following this circuitous route to justice. As stated by the Supreme Court of our sister state, "It is an ancient and well-established maxim that equity does not require the doing of a vain and useless thing as a prerequisite to obtaining equitable relief." [Saccomano v. Palermo, 411 P.2d 22, 25 (Colo. 1966).]

While Respondent found no cases arising in the precise factual context that exists in the case at bar, there are numerous cases where parties have sought to insist on meaningless tenders of payment. Confronted with such an argument, the Supreme Court of Kansas stated, "[T]ender by Riley would be a mere formality. Equity does not insist on purposeless conduct

¹ The Court cited: Behlen Mfg. Co. v. First National Bank, 28 Colo. Ct. App. 300, 472 P.2d 703 (1970); D.W. Jaquays and Co. v. First Security Bank, 101 Ariz. 301, 419 P.2d 85 (1966); Mack Fin. Corp. v. Scott, 606 P.2d 993 (Ariz. 1980), 38 Am. Jur. 2d Guaranty § 84 (1968).

and disregards mere formality." [Carpenter v. Riley, 675 P.2d 900, 904 (1984); further, see Parker v. McCauley, 393 P.2d 527 (Okla. 1964); 30 C.J.S. Equity § 89; 27 Am. Jur. 2d Equity § 119; 27 Pac. Dig. Equity § 54.]

Petitioner's effort to create a conflict with the Colorado case of Behlen Mfg. Co. v. First National Bank, supra, is ill-advised. It is correct that the personal guarantor (Behlen) in that case had made payment on the personal guaranty before filing suit against the bank, but such was not considered a prerequisite. It rather resulted from the natural flow of events. Behlen paid the bank on its personal guaranty and took possession of the collateral. Subsequently, the trustee of the principal debtor's estate successfully challenged Behlen's interest in the collateral. The collateral was ultimately lost because the bank had failed to properly protect the same while it was under its charge. Behlen then successfully sued the bank to recover the payment it had made on the personal guaranty.

There is a stark contrast between the Behlen case and the case at bar. In Behlen, the personal guarantor made payment and took possession of the collateral without awareness that its subrogation interest would subsequently be defeated. In the case at bar, the subrogation rights of the personal guarantors were prematurely defeated by the affirmative release of collateral by the bank.

The general rule of law as stated by the authors of American Jurisprudence implies that interference with subrogation

rights gives rise to a defense in an action brought on the personal guaranty rather than forming the basis for an affirmative claim to obtain a refund. The text states:

[T]he guarantor, if the security had not been lost, would have been subrogated to the creditor's right to resort thereto; and hence, having been deprived of this right by the creditor's act, the guarantor is not liable on the contract of guaranty. [38 Am. Jur. 2d Guaranty § 84, at 1091.] [Emphasis added.]

It should further be noted that in the other cases relied on by the Court of Appeals--D.W. Jaguays and Co. v. First Security Bank, supra, and Mack Fin. Corp. v. Scott, supra--the personal guarantors had not made payment on their personal guaranties, but were being sued for such payment by the beneficiaries of the guaranties. In each case, the personal guarantors successfully raised defenses based on the interference with their subrogation rights. Supportive of the same general concept in the context of commercially unreasonable sales after repossession of collateral, see Pioneer Dodge Inc. v. Glaubenskle, 649 P.2d 28 (Utah 1982) and FMA Financial Corp. v. Pro Printers, 590 P.2d 803 (Utah 1979).

POINT II: PROVISIONS OF THE UTAH UNIFORM COMMERCIAL CODE SUPPORT THE RESULT REACHED BY THE COURT OF APPEALS.

The Court of Appeals applied the general rule of case law that a personal guarantor's right of subrogation is a "creature of equity," and that it cannot be abrogated with impunity unless there has been an express waiver or consent by the personal guarantor. The court stated that this general rule

has been codified in the Utah Uniform Commercial Code § 70A-3-606(1) (1980).

This Court employed essentially the same analysis in Continental Bank etc. v. Utah Security Mortgage, supra, concluding that the personal guarantors in that action could not rely upon interference with their subrogation rights because the guaranty signed by them contained an "explicit consent to impairment." [Id., at 1097.]²

Neither the Court of Appeals, nor this Court in Continental Bank focused precisely on the "label" which should be applied to a guaranty agreement under the U.C.C. Accordingly, Petitioner encourages this Court to engage in an analysis of "guaranty agreements" vis-a-vis "negotiable instruments," with the end design of determining when reference should be had to the U.C.C.

Whether such an inquiry ought ever to be undertaken is a matter which may be debated, but it seems obvious that it ought not be taken in the context of the current case, where it would have no impact on the ultimate outcome.

The fundamental underlying concepts codified in the subject provisions of the U.C.C. are identical to those established by the solid case law principally relied upon by the Court of Appeals. At the very least, the U.C.C. supports and is fully

² The agreement of guaranty executed by each of the personal guarantors in Continental provided, "[T]he liability of the guarantor[s] shall not be affected, released, or exonerated by release or surrender of any security held for the payment of any of the debts hereinbefore mentioned. . . ."

consistent with the decision reached.


If Petitioner wants to challenge the manner in which this Court in Continental Bank or the Court of Appeals herein has employed or made reference to the U.C.C., it should select a case where the analysis would be thorough and the application (or lack thereof) consequential. In this case it would be merely an exercise in academics.

C O N C L U S I O N

Petitioner seeks review of what are essentially "non-issues." Its first point is not supported by any case law or by any compelling reason. It would ask this Court to decree the performance of a useless act as a foundation for an equitable defense well established in the law. Its second point encourages the Court to engage in an academic analysis which would not change the outcome of the litigation.

The petition for a writ of certiorari should be denied.

Respectfully submitted this 3rd day of December, 1987.


KAY L. McIFF, FOR
OLSEN, McIFF & CHAMBERLAIN

AFFIDAVIT OF MAILING

I hereby certify that full, true and correct copies of the above and foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI were placed in the United States mail at Richfield, Utah, with first-class postage thereon fully prepaid on the 3rd day of December, 1987, addressed as follows:

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A handwritten signature in black ink, appearing to be "Arthur F. Sandack", written over a horizontal line.