

1979

FMA Financial Corporation v. Hansen Dairy, Inc. et al : Appellant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

FMA FINANCIAL CORPORATION, :
:
Plaintiff- :
Appellant, :
:
vs. :
:
HANSEN DAIRY, INC., et al., : Case No. 16528
:
Defendants- :
Respondents, :
:
vs. :
:
JAMES M. LEVIE and :
LAVOY CHRISTIANSEN, :
:
Third-Party :
Defendants- :
Respondents. :

APPELLANT'S REPLY BRIEF

Appeal from the Judgment for Defendants-Respondents
in the District Court of Sanpete County, State of
Utah

Honorable Don V. Tibbs, Judge

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APPELLANT'S REPLY BRIEF

The Plaintiff-Appellant, FMA Financial Corporation, respectfully submits the following Reply Brief in response to the Brief of Respondents, Hansen Dairy, Inc., et al., filed on February 25, 1980.

ARGUMENT

RESPONDENTS MISREAD THE CASE OF AMERICAN NATIONAL BANK V. A. G. SOMMERVILLE, INC., 191 Cal. 364, 216 P. 376 (1923), AND THE APPLICABILITY OF THE DOCTRINE OF ESTOPPEL IN PAIS TO THE CASE AT BAR.

The above-referenced case (cited on page 11 of Respondents' Brief) involves a seller-S who enters into two executory contracts with buyer-B to sell two automobiles to B. The contracts are in writing and signed by the parties. Both contracts contain provisions acknowledging receipt of the property and waiving defenses against any assignee of S.

S then assigned his interest in the contracts to A-1 who assigned the contracts to A-2. B failed to make payments. A-2 brought this action against S and B. A-2 put on its prima facie case. B then attempted to introduce evidence that there was a total failure of consideration. The court sustained A-2's objections based upon the waiver of defenses found in the original contracts.

On appeal, the California Supreme Court did state that "no estoppel by contract arose by reason of the acknowledgment of receipt of the automobiles which would suffice to preclude the defendant [B] from proving that, through the nondelivery to him of the personal property covered by the contracts, consideration therefor had wholly failed." (Emphasis added) American National Bank, supra. p. 378.

However, the court in that case goes on to say that if there is an estoppel in the case, it must "be one arising in pais." (Emphasis added) It then defines estoppel in pais and then states, "There is no doubt that, upon a proper showing being made, a party to a contract will be estopped from setting up . . . either that there was no consideration or that there was a total or partial failure of consideration."

The court then reversed the lower court's refusal to allow B to introduce testimony on the allegation of failure of consideration. It stated that if B should be successful in establishing a failure of consideration, he should prevail, unless the facts showed that he is estopped to deny the effect of waiver of defense clauses.

The court clearly did not rule on the estoppel in pais issue. It merely acknowledged it as a valid principle fully applicable to the case and to be established by the party asserting the same.

The elements of estoppel in pais are fully set forth in Appellant's Brief, page 8. That each of these elements were fully and clearly established by Plaintiff-Appellant at trial is also set forth therein on pages 8-11 of its Brief.

Although I have been unable to locate the case San Francisco Security Corporation v. Phoenix Motor because of an error in the citation, it appears to deal with the waiver of defenses with respect to a seller's assignee. Such is clearly immaterial to the matters before this Court today.


CONCLUSION

Estoppel in pais is fully applicable to the case before the Court today. The elements thereof were clearly established at the trial court. Respondents must be estopped to deny the truthfulness of their written representations to Appellant.

Respectfully submitted this 6th day of June, 1980.

MARSDEN, ORTON & LILJENQUIST

By


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DELIVERY CERTIFICATE

Delivered a copy of the foregoing APPELLANT'S REPLY
BRIEF to Gayle Dean Hunt, 2121 South State, Salt Lake City,
Utah, this 6th day of June, 1980.

