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IN THE SUPREME COURT OF THE

STATE OF UTAH

* * * * * * *

AIRD INSURANCE AGENCY, a Utah corporation, Plaintiff-Appellant,	)	
v.	)	Case No. 16539
ZIONS FIRST NATIONAL BANK, Defendant-Respondent.	)	

* * * * * * *

BRIEF OF RESPONDENT

* * * * * * *

APPEAL FROM THE JUDGMENT OF THE

THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,

THE HONORABLE CHRISTINE DURHAM, DISTRICT JUDGE

FILED

DEC 24 1979

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE

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AIRD INSURANCE AGENCY, a Utah corporation, Plaintiff-Appellant, v. ZIONS FIRST NATIONAL BANK, Defendant-Respondent.	)	Case No. 16539

* * * * * * *

BRIEF OF RESPONDENT

* * * * * * *

STATEMENT OF THE CASE

This case was originally brought by Aird Insurance Agency (hereinafter referred to as "Aird") against Zions First National Bank (hereinafter referred to as "Zions") to recover from the bank an amount of money previously deposited at Zions in a savings account by a third party, Mr. David Fitzen, which money Mr. Fitzen had in fact borrowed from Zions. Aird asserted an interest in the savings account by virtue of a quit claim type of assignment of rights received by Aird from Transamerica Insurance Company (hereinafter referred to as "Transamerica"). Mr. Fitzen had used the savings account (funded solely by proceeds of Mr. Fitzen's loan from Zions) as collateral for the

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issuance of a Performance Bond from Transamerica. Aird's appeal is from the decision of the lower court which found, based upon uncontested evidence, that Transamerica's contingent interest in the savings account as collateral for its bond had been extinguished, and therefore that Aird, as assignee, had no further interest in said account. The lower court consequently granted Zions's Motion for Summary Judgment and dismissed Aird's Complaint with prejudice.

DISPOSITION IN LOWER COURT

Following extensive oral arguments on Zions's Motion for Summary Judgment, on April 24, 1979, and its review of the depositions of the Transamerica personnel, the lower court, acting pursuant to its Memorandum Opinion of May 2, 1979, granted Summary Judgment in favor of Zions First National Bank, and dismissed Aird Insurance Agency's Complaint with prejudice.

RELIEF SOUGHT ON APPEAL

Defendant-Respondent Zions seeks to have the judgment of the lower court affirmed.

STATEMENT OF FACTS

Defendant-Respondent does not believe that all of the material facts pertinent to this particular matter have been set forth in the Statement of Facts in Plaintiff-Appellant's

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Brief. Rather than attempt to just set forth omitted facts which the Defendant-Respondent believes are material, the following Statement of Facts is provided by the Defendant-Respondent:

LOAN FROM ZIONS BANK TO FITZEN
FOR BOND COLLATERAL AND ISSUANCE OF BOND
TO FITZEN BY TRANSAMERICA

Mr. David L. Fitzen was in the demolition business and in early 1974 had a contract with the State of Idaho to perform certain work for which a performance bond in the amount of Seventeen Thousand Nine Hundred Thirty-Two Dollars ($17,932.00) was required (R.17). The Plaintiff-Appellant Aird acted as an agent relative to the issuance of bond, but Aird was and is a separate and independent business apart from the issuing company, Transamerica (R.17-18; 30; 181-182; 190-191).

In December, 1973, prior to the issuance of the said $17,932.00 Performance Bond, Transamerica was aware that Mr. Fitzen had no savings account at Zions, and Transamerica was further aware that Mr. Fitzen was in contact with Zions in an effort to get financial resources for bond collateral purposes (R.150). Then, in early 1974, Mr. Fitzen arranged with Zions for a loan from the bank in the principal amount of Seventeen Thousand Nine Hundred Thirty-Two Dollars ($17,932.00), which amount was deposited in savings account No. 08 008148 2 at the Zions ~~Main~~ 7th East Office (R.63-64). This was the savings account which then became the collateral to secure the Performance Bond (R.63-64).

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On or about February 1, 1974, Transamerica (not Plaintiff-Appellant Aird) issued a bond to Mr. Fitzen in the face amount of said $17,932.00, for which the savings account No. 08 008148 2 at Zions was assigned as security (R.17-18; 63-64). Thus, the loan to Mr. Fitzen from Zions became the basis of the collateral for the bond.

SAVINGS ACCOUNT ASSIGNED
FOR SECURITY PURPOSES

On or about January 31, 1974, an assignment of Mr. Fitzen's savings account at Zions was executed by Mr. Fitzen in favor of Transamerica, (not to Plaintiff-Appellant Aird) as security for the Performance Bond (R.153-156). Further, on or about February 1, 1974, a letter was delivered by Mr. Ben Watnes, Bond Underwriting Manager for Transamerica, to Zions stating that an assignment of the passbook was made to Transamerica by Mr. Fitzen, but also stating in said letter that "said passbook is being held by us as collateral towards the execution of our bonds" (R.192). There is no evidence of any kind in the record that Aird was a party to the collateral assignment.

TRANSAMERICA RELINQUISHES INTEREST
IN SAVINGS ACCOUNT

Transamerica felt confident enough about Mr. Fitzen's demolition job in Idaho, that it permitted the State of Idaho, in July of 1974, to release to Mr. Fitzen a five percent (5%) retainage being held by the State on the project (R.164-167). In October 1974, Mr. Fitzen had not paid his note indebtedness

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and was in default to Zions on his loan, which loan was the basis of the savings account used as security. Pursuant to Mr. Fitzen's default on the provisions of his loan from Zions, the bank debited the savings account (No. 08 008148 2) thereby offsetting against its delinquent loan the amounts on deposit in said savings account (R.63-64).

Nothing further took place in the matter until nearly three (3) years later. In late September, 1977, Mr. Watnes, Bond Underwriting Manager of Transamerica and the person involved in the issuing of the bond by Transamerica, made inquiry at Zions relative to the status of the Fitzen savings account (R.157-159). He was informed at that time of the offset made by the bank and it is undisputed that prior to October 5, 1977, Transamerica through Ben Watnes knew that the savings account had been debited (R.157-162).

Mr. Watnes of Transamerica testified in his deposition that at the time he reviewed the situation of the Fitzen bond in September, 1977, "the only person according to my records who would have had an interest in the savings passbook would be Mr. Fitzen" and that Aird had no such interest (R.181-182). Watnes also acknowledged that no claims had been made against the bond by late September, 1977 (R.158). Mr. Watnes further testified that as of the end of September, 1977, Transamerica

> ". . . did not have an interest. I had made a decision that the obligation had been fulfilled. I felt the Statute of

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> Limitations had held for claims to come in. I had conducted an inventory as of September 30, 1978 [corrected in subsequent testimony to be September 30, 1977] which records will bear" (R.182). (Emphasis added).

Thus, it is very clear and undisputed that as of the end of September, 1977, Transamerica considered that it no longer had any interest in the savings account or the passbook because the conditions of the bond had been fulfilled and there was no liability existing relative to the bond at that time, and thus no need for the security.

Thereafter, on October 5, 1977, Aird obtained a judgment against Mr. Fitzen in the Third Judicial District Court for the State of Utah, Civil No. 239679. There is no evidence in this record however, that the judgment obtained by Aird related to the present matter in any way, and there is no evidence that the bond premiums for the bond in this matter were not paid. On or about October 7, 1977, after Transamerica and Aird were fully aware of Zions' debiting Mr. Fitzen's account to cover Zions' note from which the account funds were derived, and after Transamerica had relinquished its interest in the bond (and thus had no interest), Aird served a Writ of Garnishment on Zions pursuant to its judgment in the other action (Civil No. 239679) (R.15,58).

Aird received an answer to its garnishment from Zions and filed a response in Civil No. 239679 (R.27-28), but proceeded no further in that action. Rather, months later it commenced this action against Zions on January 25, 1978. Nearly six weeks

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after this action was commenced, Aird asked Transamerica to give an assignment of whatever interest Transamerica had in the savings account to Aird, which assignment was dated March 13, 1978 (R.204). Transamerica required an indemnification from Aird and the assignment was only quit claim in nature (R.138,204). No money consideration was given for the quit claim assignment (R.34). This quit claim assignment was made nearly six months after Transamerica indicated it had no interest in the savings account collateral and also nearly six weeks after the Complaint in the present action was filed.

JUDGMENT GRANTED IN FAVOR OF ZIONS BANK

After a number of interrogatories had been propounded to Aird by Zions, and the depositions of two representatives of Transamerica who were involved in the matter were taken, Zions filed a Motion for Summary Judgment. No Cross-Motion for summary judgment was filed on behalf of Aird. Following extensive oral argument on Zions' summary judgment motion, and the trial court's review of the depositions of the Transamerica representatives (as is specifically indicated in the lower court's Memorandum Opinion of May 2, 1979 (R.103-104)), Summary Judgment was granted in favor of Zions on May 23, 1979 (R.105).

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ARGUMENT

POINT I

APPELLANT ERRS IN SEEKING SUMMARY JUDGMENT FROM THIS COURT

Plaintiff-Appellant Aird specifies in its Brief on Appeal that it seeks to have this court "reverse the judgment of the lower court in this case and grant Summary Judgment for and in behalf of the Plaintiff-Appellant". (Page 1 of Appellant's Brief, "Relief Sought").

Aird has, however, apparently overlooked the fact that no motion for summary judgment was ever filed by Aird in the lower court proceedings. The only Motion for Summary Judgment filed before the lower court was that of the Defendant Zions (R.89-90), which was granted by the lower court pursuant to its Memorandum Opinion of May 2, 1979 (R.103-105).

It is improper for Aird to seek a summary judgment ruling from this Court inasmuch as such a motion was not pled by Aird in the lower court and is therefore not before this Court on appeal. No affidavit in support of such a summary judgment motion has been filed by Aird, nor has Zions been given the opportunity to defend against such motion by filing a counter-affidavit or memorandum in opposition. To permit a party to in essence file such a motion on appeal would be highly prejudicial and contrary to the rules of procedure.

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Respondent Zions respectfully urges that the summary judgment relief sought by Aird is improper in the context of the present case.

POINT II

TRANSAMERICA INSURANCE COMPANY'S INTEREST IN THE SUBJECT SAVINGS ACCOUNT AS COLLATERAL WAS CONTINGENT AND WAS EXTINGUISHED PRIOR TO THE ASSIGNMENT TO PLAINTIFF

Notwithstanding the form of the January 31, 1974 assignment (R.6) from the Contractor, Mr. Fitzen, to Transamerica, it is undisputed that the savings account at issue in the present case was intended only to serve as cash collateral for the issuance of a Performance Bond by Transamerica. A letter of February 1, 1974 from Transamerica to Zions (R.192) states: "Said passbook [evidencing the Savings Account No. 08 008148 2 opened at Zions by Mr. Fitzen with funds borrowed from Zions for that purpose] is being held by us as collateral towards the execution of our bonds" (R.192). There is no evidence in the record to indicate that Transamerica was not paid a separate bond fee for issuance of the subject Performance Bond and it is clear that the only purpose of the collateral was to cover any legitimate claims which may have subsequently been made on the bond (R.192). The right of Transamerica to withdraw any funds from said savings account was thus restricted to circumstances wherein a legitimate claim was made and paid under the terms of the Performance Bond. There is no question that, following the successful completion of the Fitzen contract with the State of Idaho, the payment of all bills by Mr. Fitzen and the

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passage of the statutory time period allowed for the submission of claims on the bond, Transamerica had no right to the possession or use of the funds on deposit by Mr. Fitzen as collateral for the Transamerica bond. 1/

The uncontroverted evidence presented to the trial court shows that at the time Transamerica transferred whatever interest it had in the savings account to the Plaintiff Aird, and indeed for nearly six months prior to that, all those events which would operate to terminate Transamerica's interest in the collateral for its bond had already taken place.

It is clear from the record of the present case that Transamerica had terminated whatever interest it had in the collateral prior to any garnishments by Plaintiff or any quit claim assignment by Transamerica to Plaintiff Aird. In July of 1974, Mr. Watnes, the Bond Underwriting Manager for Transamerica, sent a letter dated July 19, 1974 (R.203) to the State of Idaho, indicating that the five percent (5%) retainage amount being held by the State pursuant to Mr. Fitzen's contract could be released. Mr. Watnes testified in his deposition that the guidelines for authorizing such a release were that no claims had been filed against the Performance Bond and all bills and costs would have been paid by the contractor as of a certain

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1 As indicated in the Statement of Facts, supra, Aird did not issue the bond and had no liability with respect thereto. This was strictly a transaction between Transamerica, Fitzen and Zions.

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time (R.166). Thus, as early as July, 1974, Transamerica felt confident enough about its bond that the retainage could be released.

Whatever effect may be attributed to the retainage release in July, 1974, however, any and all interest of Transamerica in the collateral savings passbook was released as of the end of September, 1977. In his deposition taken on January 10, 1979, Mr. Watnes stated as follows:

> Q. Well, at that time on September 30, do I understand your statement there were no claims on the bond for which that passbook was collateral?
>
> A. Please rephrase that so I don't answer incorrectly.
>
> Q. I assume from what you've said that as of September 30, 1977, when you made those particular notes there were no claims in existence at that time.
>
> A. That's correct.
>
> Q. Against the bond?
>
> A. That's correct. (R.158) (Emphasis added).

Then Mr. Watnes went ahead to make it very clear that as of September 30, 1977, Transamerica no longer had any interest or claim with respect to the savings account:

> Q. Now when you spoke with a representative of Aird Insurance Company in late 1977 to see if it was okay to release collateral, was the reason you did because you felt that Aird Insurance Company had some interest themselves in the collateral?

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A. No, not really.

Q. Was it your position or belief at that time that if anyone had a complaint about the collateral, it would be Fitzen? In other words, if the collateral hadn't been released is the reason you talked to Aird because you felt it would be Mr. Fitzen who would be interested in having the collateral released?

A. I'm not sure I understand the question fully. The only person according to my records who would have an interest in the savings passbook would be Mr. Fitzen.

Q. When you called, talked with the representative of Aird Insurance, was it your belief or intention at that time that if the collateral was not released that somehow the bank would have a claim?

A. No, sir.

Q. Your concern was primarily with the insured himself?

A. That's correct.

Q. At that time was it your opinion that Transamerica still had an interest in that savings account?

A. We did not have an interest. I had made a decision that the obligation had been fulfilled. I felt the Statute of Limitations had held for claims to come in. I had conducted an inventory as of September 30, 1978 which records will bear.

MR. PRICE: '77?

THE WITNESS: Yes, '77 - wait a minute '77.

MR. PRICE: Your assignment wasn't until '78, September of '77 is your bank note.

THE WITNESS: May I look at the file?

MR. PRICE: Sure.

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THE WITNESS: I want to make sure I get this right. Yeah, '77 is right.

(R.181-182) (Emphasis added).

Under the facts of the present case, and as found by the trial court in its Memorandum Opinion of May 2, 1979, (R.103-104), Transamerica's interest in the savings account was not absolute, but was contingent upon the occurrence of a claim against their bond; the principal (Fitzen) retained an equitable interest in the account, enforceable in the event Transamerica should ever attempt to collect the funds absent a legitimate claim on their bond. Inasmuch as such a claim never arose, the most Transamerica could transfer or assign to Plaintiff was its contingent interest in collecting against the account if any claims had arisen.

Fundamental to the law of assignments is the concept that an assignee takes nothing more and could thus have no greater interest in the assigned property than had his assignor. He is also bound by any defenses which could be asserted against his assignor. This Court has previously stated in Cheney v. Rucker, 14 Utah 2d 205, 381 P.2d 86, 91 (1963):

> It is elementary that [assignee] could have nothing more than his assignor and is bound by any waiver, relinquishment or change of its rights which has occurred by virtue of its execution of a new agreement.

Similarly, in Tanner v. Lawler, 6 Utah 2d 84, 305 P.2d 882, 885 (1957) this Court said:

> An assignment merely sets over or transfers the interest of one party in certain property to another.

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See also: Estate of Haney, 344 P.2d 16 (Colo. App., 1959) and Home Indemnity Co. v. McClellan Motors, Inc., 459 P.2d 389 (Wash., 1969).

Applying the fundamental law of assignments to the present situation, Transamerica's assignee, Aird, could have no greater interest in the assigned property (the savings account funds) than had Transamerica, and Aird's assigned interest was subject to the same conditions precedent in being able to collect on the account. The uncontradicted evidence brought forth in Court, including the deposition testimony of Mr. Ben Watnes of Transamerica quoted, supra, indicates that those conditions precedent have not been met and will never be met (the statute of limitations having run for the period in which claims on the bond should have been filed). Thus, Aird cannot recover the monies from the savings account inasmuch as the contingent interest of Transamerica, Aird's assignor, had, as of September 30, 1977, been extinguished. Transamerica having determined that it no longer had any legal or other interest in said savings account, Aird is certainly in no position to assert a contrary position.

POINT III

AT THE TIME OF GARNISHMENT BY PLAINTIFF, NEITHER TRANSAMERICA NOR FITZEN HAD ANY CLAIM TO THE SUBJECT SAVINGS ACCOUNT FUNDS

Based upon the deposition testimony of Mr. Ben Watnes, (R.157-162), it is apparent that prior to October 5, 1977, Transamerica had knowledge of the fact that the savings account

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of Mr. Fitzen, which Transamerica looked to as collateral for its bond, had been debited by Defendant Zions. Yet, there is no indication in the deposition or elsewhere in the record that a demand was made on Zions by Transamerica with respect to such savings account. The reason for this, as discussed in Point II, supra, is that the interest of Transamerica in said savings account had terminated as of September 30, 1977 (R.182). No claims had been filed against the Transamerica bond, and the statute of limitations for the filing of such claims had run (R.158;181-182). Transamerica's contingent interest in said account having, therefore, terminated, no demand was or could be made by Transamerica for said funds.

The very fact that Plaintiff garnished the account of Mr. Fitzen at Zions on October 7, 1977, reveals an inconsistency in the position asserted by Plaintiff before the lower court. In order for Plaintiff to have gained any benefit from its garnishment, the savings account would had to have been the property of Fitzen himself; thus, said account would not have even been subject to the assignment executed between Transamerica and the Plaintiff, Aird. Even assuming, arguendo, that Zions was indebted to Mr. Fitzen per the savings account, Aird would, however, still have no claim to the funds in said account, inasmuch as there were no funds in said account at the time of the garnishment. Whether or not Aird suggests that the offsetting of said account by Zions in 1974 was proper, Zions

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had the right, under Utah law, to do so even at the time the garnishment was received. Rule 64D(n) of the Utah Rules of Civil Procedure makes this very clear:

> (n) Claims of Garnishee against Plaintiff or Defendant. Every garnishee shall be allowed to retain or deduct out of the property, effects or credits of the defendant in his hands all demands against the plaintiff and against the defendant of which he could have availed himself if he had not been served as garnishee, whether the same are at the time due or not. Such garnishee shall be liable for the balance only after all mutual demands between himself and the plaintiff and defendant are adjusted, not including unliquidated damages for wrongs and injuries. The verdict or finding, if any, and the judgment shall show against which party any such claim is allowed, and the amount thereof. (Emphasis added).

As discussed in the Statement of Facts, supra, Mr. Fitzen had taken out a loan with Zions in the amount of Seventeen Thousand Nine Hundred Thirty-Two Dollars ($17,932.00), the proceeds of which loan comprised the only deposit (other than interest) made to the subject savings account opened at Zions by Mr. Fitzen. In October, 1974, with the loan to Mr. Fitzen in default, Zions debited the subject savings account with the total amount necessary to cover the default indebtedness of Mr. Fitzen on the underlying loan which had funded the account.

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Whatever interest Mr. Fitzen had in said savings account was therefore, as of October, 1974, extinguished as a result of Mr. Fitzen's default on his loan with Zions.

A bank has the right to offset deposits to cover an indebtedness as in the situation of the defaulted loan of Mr. Fitzen in the present case. Mr. Fitzen has not asserted any wrongdoing by Zions. Even assuming, arguendo, that Zions offset the account balance prior to the determination by Transamerica that it (Transamerica) had no interest in the account, there was never any demand made upon Zions by Transamerica and the offset, therefore, became confirmed, in essence, when the contingent interest of Transamerica in said account was terminated.

CONCLUSION

Neither Transamerica nor Mr. Fitzen are able or entitled to claim any interest whatsoever in the subject savings account at Zions. Plaintiff, having received by quit claim assignment from Transamerica a contingent interest in said savings account and that contingency having never arisen, Plaintiff is barred from recovering the monies from said account. Plaintiff, as an assignee, can stand in no better position relative to the acquisition of the funds from said account than could its

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assignor, Transamerica. Defendant Zions First National Bank respectfully urges that the decision of the lower trial court, granting Summary Judgment in favor of Defendant Zions, be affirmed.

RESPECTFULLY SUBMITTED this 21st day of December, 1979.

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