

1980

Sam L. Kiniry v. Larry Sorenson and American Heritage Builders, Inc : Appellant's Brief on Appeal

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

SAM L. KINIRY,

Plaintiff and Respondent,

-vs-

LARRY COPELSON and AMERICAN
HERITAGE BUILDERS, INC.,

Defendant and Appellant.

APPEAL TAKEN FROM THE THIRD JUDICIAL DISTRICT
THE COUNTY OF SALT LAKE, JUDGE DAVID R. HARRIS

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IN THE SUPREME COURT
OF THE STATE OF UTAH

SAM L. KINIRY,)	
)	
Plaintiff and Respondent,)	
)	
-vs-)	APPELLANT'S BRIEF ON APPEAL
)	
LARRY SORENSON and AMERICAN)	Case No. 16665
HERITAGE BUILDERS, INC.,)	
)	
Defendant and Appellant.)	

APPEAL TAKEN FROM THE THIRD JUDICIAL DISTRICT IN AND FOR
THE COUNTY OF SALT LAKE, JUDGE DEAN E. CONDOR.

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TABLE OF CONTENTS

STATEMENT OF CASE	1
ARGUMENT	3
POINT I. APPELLANT SIGNED NOTE AS OFFICER OF CORPORATION AND NOT IN INDIVIDUAL CAPACITY, NOR AS GUARANTOR	3
POINT II. THE RECOVERY, BY RESPONDENT OF THE MOBILE HOME, WHICH WAS THE UNDERLYING OBLIGATION OF THE NOTE, TERMINATED ALL LIABILITY UNDER THE TERMS OF THE NOTE	3
CONCLUSION	11

CASES CITED

Dulio v Senechal, 7 UCC Reporting Service 222, Utah Code Annotated §70-A-3-403, §70-A-3-603, §70-A-3-802, Restatement of the Law in the Courts, Restitution	
First Bank & Trust Company v Post, 12 UCC Reporting Service 512	
J.P. Sivertson & Company v Lolmaugh, 24 UCC Reporting Service 1212	
Speer v Friedland, 12 UCC Reporting Service 509	

STATEMENT OF CASE

This is an action by Plaintiff Respondent to recover on a note after having recovered the underlying obligation on the note and also to hold corporate officer personally liable for the corporate note.

DISPOSITION IN LOWER COURT

This case was tried before the Third Judicial District Court in and for the County of Salt Lake, Judge Dean E. Connor, and judgment was granted to Plaintiff Respondent.

EXACT RELIEF SOUGHT

Defendant Appellant respectfully requests the Supreme Court of the State of Utah to reverse the judgment of the lower court.

STATEMENT OF MATERIAL FACTS

Plaintiff Respondent traded a mobile home to American Heritage Builders, Inc. for a home (page 11,12). Plaintiff Respondent also gave note to American Heritage Builders, Inc. for Five Thousand Dollars (\$5,000.00) representing the down payment on said home (page 16). Plaintiff Respondent did not have title to the mobile home, he held no equity in the property and owed an obligation to his credit union for Thirteen Thousand Dollars \$13,000.00 on the mobile home (page 14). Larry J. Sorenson was the president of American Heritage Builders, Inc. (page 5). At closing, as part of the closing documents, a note was given by American Heritage Builders, Inc. to indicate an

obligation of Thirteen Thousand Dollars (\$13,000.00), equal to Plaintiff/Respondent's obligation to indicate their obligation to pay to Plaintiff/Respondent the amount he was paying to his credit union on the mobile home (page 19). Several documents were exchanged by the parties in this transaction. They were:

Chattel Mortgage	Page 27
Bill of Sale	Page 26, 27
Real Estate Contract	Page 25
Note to American Heritage	Page 25
Note from American Heritage	Page 19

These documents were reviewed by the parties at the closing (page 16,18) and all documents showed American Heritage Builders, Inc. as one party and Plaintiff/Respondent as the other (page 29). There was no request by Plaintiff/Respondent nor discussion between the parties that Defendant/Appellant act as guarantor of the note or that he should sign personally (page 29,30,34). Plaintiff/Respondent said he couldn't recall if he knew he was dealing with a corporation. He left all those details to his wife (page 36). Wife of Plaintiff/Respondent said she knew they were dealing with American Heritage Builders, Inc. (page 59). Subsequently, American Heritage Builders, Inc. fell into hard times and failed to make some of the payments as agreed (page 7). Suit was brought against American Heritage Builders, Inc. and Larry Sorenson and judgment was rendered against American Heritage Builders, Inc. (page 46). Plaintiff/Respondent recovered mobile home at sheriff's sale (page 47) and resold the mobile home, paid off the note that he owed to the credit union and recovered Three Thousand Dollars (\$3,000.00) for himself (page 50). The mobile home was out of Plaintiff/Respondent's possession from

December 1973 to January 1977, or a total of approximately three years, and during that time, American Heritage Builders, Inc. missed only five payments until the suit was filed, for a total of Nine Hundred and Forty Five Dollars (\$945.00) (page 38, 39). Action was continued on the note and judgment was rendered in favor of Plaintiff/Respondent and against Defendant/Appellant for the amount of the note.

ARGUMENT

POINT I: DEFENDANT/APPELLANT SIGNED NOTE AS OFFICER OF CORPORATION AND NOT IN INDIVIDUAL CAPACITY, NOR AS GUARANTOR.

Five documents were exchanged between the parties at the time of the transaction, which gave rise to the note complained of below, the note being one of the documents. All of the documents showed American Heritage Builders, Inc. as one party with Defendant/Appellant Sorenson signing as an officer of said corporation and with Plaintiff/Respondent Kiniry as one of the other parties. Only one document, the note given from American Heritage Builders, Inc. to Plaintiff/Respondent is in any way ambiguous. In First Bank & Trust Company v Post, 12 UCC Reporting Service 512, the Illinois Appellate Court handled a similar fact situation. In this matter, the defendants signed two documents, a chattel mortgage security agreement and a chattel mortgage note. The chattel mortgage security agreement granted to the Plaintiff, a security

interest in a lathe as collateral for the loan. On the security agreement, the words "Palatine Welding Sales and Manufacturing, Inc." were hand written, once at the top left of the document and again on the first line provided for signatures with the defendant's signatures beneath. The chattel mortgage note did not bear the name of the corporation. In the area provided for the signatures the names of the three defendants appeared with no designation of either the person represented or their representative capacity. The plaintiff in this matter argued that the court should affirm the judgment of the trial court by giving him judgment against the officers of the corporation. The court answered in part as follows: "Second, the note and security agreement were executed contemporaneously and as part of the same transaction and concerned the same subject matter and therefore, should be construed together... The security agreement clearly shows that the corporation, Palatine Welding Sales & Manufacturing Company, Inc. was a party to this loan transaction. The note appears to be signed by the defendants, personally, but the reverse side bears a guarantee wherein the same persons personally guarantee their own signatures, a seemingly senseless redundancy. When construed together the form of these instruments fairly indicates to the eye of common sense that the makers intended to sign the face of the note as officers of the corporation."

If the documents exchanged as part of the transaction in this matter, in addition to the note complained of, are all construed together with the note, there can be no doubt that

the intent of the parties was that the transaction was between American Heritage Builders, Inc. and Plaintiff/Respondent as the parties with Defendant/Appellant signing for the corporation as an agent and in his corporate capacity and not as guarantor nor in any personal capacity.

Testimony before the Court below by Defendant/Appellant was that he never intended to sign in an individual capacity, but only in his representative capacity as an agent of the corporation. The testimony of Plaintiff/Respondent was that he didn't recall any conversation about the existence of the corporation. There was not testimony to indicate the intent, desire or understanding by either party that Defendant/Appellant Sorenson signed in an individual capacity nor as guarantor.

In Speer v Friedland, 12 UCC Reporting Service 509, the Florida District Court of Appeal, Second District, had to decide a matter in which the question of the capacity in which an individual signed a check was raised. In this matter, the Court quoted the Uniform Commercial Code §3-403, which is contained in Utah Code Annotated in §70-A-3-403, which provides in part that "(2) an authorized representative who signs his own name to an instrument:

(a) Is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity;

(b) Except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented, but does not show that the representative

signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in the representative capacity." In this matter, the Court held as follows: "In the case sub judice, the check signed by Appellant was ambiguous on its face as to whether she had signed as a co-maker or in a representative capacity. Parol evidence was therefore admissable to show the intention of the parties.

Appellant testified that she never intended to sign the check in question in an individual capacity, but that she signed it in her representative capacity, which she had authority to do. Appellee produced no evidence to controvert this testimony. The presumption that she signed in a personal capacity was overcome by the manifest weight of the evidence. The burden then shifted to Appellee to prove the issue by preponderance of the evidence, unaided by the presumption, which he failed to do."

In the present case, we have a similar set of facts in that the testimony of Defendant/Appellant is very clear that there is no intention on his part to sign in any individual capacity. He also testifies that there was no request or discussion of his signing in any such personal capacity. Plaintiff/Respondent in his testimony, does not claim that Defendant/Appellant signed in his personal capacity or as a guarantor, nor that he requested that he do so, nor that he understood that he did so. His testimony is only that he did not recall a discussion concerning the fact that one of the parties to the transaction was a corporation. It seems obvious that in this matter the Plaintiff/

Respondent has failed to prove the issue by a preponderance of the evidence unaided by any presumption in law.

The parol evidence submitted to the Court below, was properly admitted because the note in question was ambiguous under the terms of §70-A-3-403 Utah Code Annotated.

In J.P. Sivertson & Company v. Lolmaugh, 24 UCC Reporting Service 1212, the Court had to decide whether or not to allow such parol evidence. In this matter, the Court summarized the facts as follows: "On October 26, 1973, the defendant executed a promissory note to the plaintiff. The note was a demand note for \$2,761.72 at 7% percent interest. The defendant signed the note in the following manner. On the first line he wrote the letters, "L.T.G. De.", and then on the next line immediately below the letters, the defendant affixed his signature." The Court recited §3-403 of the Uniform Commercial Code, which we have already cited in pertinent part and then held that "First the action must be between the immediate parties to the note. Secondly, there must be some indication of the existence of a principal or that the signator signed in a representative capacity." In the fact situation here, the Court held "The fact that the defendant wrote the letters above his signature is a clear indication that they were intended to authenticate the note by naming 'the person represented.'" The Court further held that the two elements required to allow parol evidence was present and that therefore the parol evidence was properly admitted below. In the present matter, the typewritten name of the corporation, American Heritage Builders, Inc. was placed

above the signature of Defendant/Appellant Sorenson, being a clear indication that the name American Heritage Builders, Inc. was intended to authenticate the note by naming the person representative and giving clear notice to Plaintiff/Respondent that the document was a corporate document.

POINT II: THE RECOVERY, BY PLAINTIFF/RESPONDENT,
OF THE MOBILE HOME, WHICH WAS THE UNDERLYING OBLIGATION
OF THE NOTE, TERMINATED ALL LIABILITY UNDER THE TERMS
OF THE NOTE.

In this matter, the note was given to show that American Heritage Builders, Inc. took possession of the mobile home and assumed the obligation to pay to Plaintiff/Respondent, the amount deducted from his paycheck and paid over to Cyprus Credit Union as payment for the mobile home. Plaintiff/Respondent did not have legal title, only an equitable title. Cyprus Credit Union retained title all through this course of affairs until such time as Plaintiff/Respondent recovered the mobile home at the sheriff's sale, resold it, satisfied the obligation to the credit union and realized the sum of Three Thousand Dollars (\$3,000.00) for himself in the transaction.

In Dulio v Senechal, 7 UCC Reporting Service 222, the Massachusetts Appellate Division held that "The plaintiff has obtained restitution by being restored to the position he formerly occupied by the return of the 1959 Ford Sedan, which he formerly had." This was a case in which a credit union had issued a check to a car dealer to pay for a car purchased by Senechal, a credit union member, who had given the credit union his note

for the amount of the check. Senechal took possession of the car and gave the check to the dealer. The credit union then discovered that Senechal had lost his job so they stopped payment on the check. Senechal returned the car to the dealer, but the dealer sued for payment of the check. The court further held that "The conclusion is warranted that the check in plaintiff's possession had been satisfied and therefore that the Plaintiff may not recover the amount thereof. It is provided by G.L.c 106 §3-603 [70-A-3-603, Utah Code Annotated, 1953, as amended] that (1) the liability of any party is discharged to the extend of his payment or satisfaction to the holder...and (2) payment or satisfaction may be made with the consent of the holder by any person...." Chapter 8, §145 of the Restatment of the Law in the Courts, Restitution, provides as follows: A CAUSE OF ACTION FOR RESTITUTION AGAINST ANOTHER IS TERMINATED BY ITS MERGER IN A VALID JUDGMENT AGAINST THE OTHER, BASED UPON THE FACTS ESTABLISHING THE CAUSE OF ACTION FOR RESTITUTION.

Comment:

a. Where a person obtains a judgment in his favor, the cause of action which he previously had is terminated by being merged in the judgment, that is, the duty to return a benefit, its value or proceeds, based upon the operative facts which led to the judgment, is ended and a new duty is created based solely upon the rendering of a judgment which is the crystalization and specific definition of the preceding duty. This rule results from the desirability of not having two distinct claims against one person, based upon the same operative facts, existing

simultaneously. Where a person has alternate remedies to sue, either in tort or in an action for restitution and has pursued one of these remedies to judgment, since the judgment terminates the right, it terminates also the unused remedy.

b. In an action for the conversion of a chattel, a judgment for its value, until satisfied, does not transfer the title of a chattel to the judgment debtor, and, hence, the judgment creditor is entitled to regain a chattel thereafter at the expense, however, of losing his right to enforce the judgment. Illustration:

a. A converts B's horse. B obtains a judgment against A in an action for conversion. B regains the horse without the use of force or a trespass on A's land. B is entitled to retain the horse, but not to enforce the judgment.

Section 147 of Chapter 8, Restatement, Restitution, in Subsection (3) provides as follows: OBTAINING FULL SATISFACTION OF A JUDGMENT EITHER FOR DAMAGES OR FOR RESTITUTION AGAINST ONE OF TWO PERSONS SEVERALLY UNDER A DUTY OF RESTITUTION WITH REFERENCE TO THE SAME SUBJECT MATTER, TERMINATES THE RIGHT TO MAINTAIN AN ACTION AGAINST, OR TO OBTAIN SATISFACTION FROM, THE OTHER.

Comment on Subsection (3):

d. Where a claim against two persons is founded upon a single deprivation as it is where a tort resulting in a single harm has been committed by two persons concurrently or acting in cooperation, the injured person, while having a cause of action against each of the parties for the entire amount of

injury, is entitled to only one satisfaction. If he obtains judgment against one and it is satisfied, he thereby loses his claim against the other. In the instant case, judgment has been obtained against one of the parties to the lawsuit, American Heritage Builders, Inc. and restitution has been had by the recovery and resale, at a profit, to Plaintiff/Respondent of the mobile home. Under the cases cited and the Restatement of the Law and of the Sections of Utah Code Annotated cited, it is clear that Plaintiff/Respondent has been fully satisfied and restored to his former condition and that he has no further right under law or equity to pursue Defendant/Appellant for any further judgment in this matter. To so allow, would be untenable and would unjustly enrich Plaintiff/Respondent.

CONCLUSION

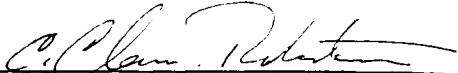
Defendant/Appellant submits that he was not a party to the note, and is not obligated under it, but that American Heritage Builders, Inc. was the party to the note and that his signature is only as an agent therefore. Defendant/Appellant further submits that the note has been satisfied by the recovery of Plaintiff/Respondent of the mobile home and its resale and Plaintiff/Respondent may not recover further.

Justice will best be served by reversing the decision of the Lower Court.

Such action would be inconsistent with Utah Law, with the decisions of the several courts in the cases cited, and with the Restatement of the Law, Restitution.

Such action would also prevent the unjust enrichment of Plaintiff/Respondent and the unjust penalization of Defendant/Appellant.

Respectfully Submitted,


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