

1980

Burnis Finlinson And Melva J. Finlinson v. Lyle D. Oder : Respondents Brief On Appeal

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

BURNIS FINLINSON and)
MELVA J. FINLINSON,)
)
Plaintiffs and)
Respondents,)
)
vs.)
)
L YLE D. ODER,)
)
Defendant and)
Appellant.)

Case No. 16,684

RESPONDENTS BRIEF ON APPEAL

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Clark, Supreme Court, Utah

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NATURE OF THE CASE

The case involves the tender by the respondents (plaintiffs, counter-defendants) of the Judgment of \$62,557.96, awarded to the appellant, defendant, counter-claimant August 1, 1977, which tender was made to defendant and his counsel at an execution foreclosure sale noticed by the defendant to sell 10,000 shares of stock owned by respondents in the Finlinson-Oder Corporation, which stock represented respondents' one-half interest in 600 acres of land being purchased by Finlinson-Oder Corporation.

The appellant was intent upon the foreclosure because respondents property was valued at at least \$30,000 in excess of the amount of the Judgment, and the sale on execution would have resulted, had the respondents not tendered the money, in an enrichment to the appellant of an additional \$30,000 above the Judgment.

The respondents, in order to avoid the sale of the stock and the foreclosure of their interest in the real property, paid the judgment to the appellant and when appellant delivered it back stating he intended to appeal, respondents kept the tender open and good during the appellate period, wherein the appellant attempted to increase the amount of his judgment on claims of increased inventory, increased damages, increased interest, which the Supreme Court

denied in upholding the trial courts decision. And the trial court, after the Remittitur was filed, held that there had been valid, unconditional tender continuing during the appellate period.

DISPOSITION BY THE TRIAL COURT

The District Court upon entry of Remittitur from the Supreme Court upholding a Judgment of \$62,557.96 from respondents, entered an Order and Judgment denying interest since tender of the Judgment payment, August 11, 1977 and staying execution and sale of respondents' one-half interest in farming property which stock was valued at \$90,000, and which stock appellant had held as pledge and security for payment of the Judgment.

The respondents had tendered to the Clerk of the District Court, following the entry of the Remittitur June 5, 1979, cashier's check for the payment of the Judgment in the sum of \$62,557.96. The said Judgment appealed from herein, dated August 22, 1979, held the tender of payment of the Judgment of August 1, 1977 was full, complete, unconditional and remained good, thus being a bar to additional interest after tender.

The Judgment of August 22, 1979 further provided for a stay of execution of sale of respondents' corporate stock for payment of \$9,724.05 interest since the tender by respondents on August 11, 1977

at which time respondents delivered two cashier's checks to the appellant in the total amount of the Judgment and costs which the Court held was a full and unconditional tender. And that it was a continuing tender with the funds available for payment, and the respondents were absolved from the payment of interest after said tender, and that the \$9,724.05 requested by the appellant as additional interest after tender was disallowed.

RELIEF SOUGHT ON APPEAL

The plaintiffs and respondents seek affirmation of the Judgment of the District Court.

STATEMENT OF FACTS

The plaintiffs and the defendants since 1973, were each owners of one-half of the stock of the Finlinson-Oder Corporation. The only assets of the corporation was a contract to purchase the Callister land and water for approximately \$90,000, now valued at \$300,000.

Burnis Finlinson and Lyle Oder had previously engaged in a dairy heifer feeding program where Finlinson furnished the labor and Oder the capital. Finlinson became indebted to Oder for

advances and expenses, and Burnis Finlinson and Melva Finlinson pledged their stock in Finlinson-Oder Corporation as security for said advances. Defendant Oder was renting the corporation's property (Callister), and using it in the feeding venture.

When the parties fell out of favor in both the corporation and feeding venture, litigation ensued in which the Court entered the Judgment on August 1, 1977 of \$62,557.96, for respondents. The Judgment was secured by the pledge of plaintiffs' corporate stock. Because of accretion and more especially because some of the neighbors had produced fantastic potato crops at great profit, the value of the pledged property increased to three times its purchase value. Defendant immediately filed execution on his Judgment and Notice of Sale on the pledged stock and set August 11, 1977 as the date of sheriff's sale to sell plaintiffs stock. Plaintiffs and their attorney showed up at the sale with two cashier's checks and delivered them to the defendant in satisfaction of the Judgment. The defendant and his counsel received the checks, acknowledged the sufficiency of the amount with no condition, except of course, the Judgment would be satisfied. The defendant with the sale of the property thwarted, returned the money to plaintiffs and stated they elected to appeal in an attempt to increase the amount of the Judgment (and keep the plaintiffs from redeeming their pledged property.)

The respondents advised the defendant and the sheriff and the Clerk of the Court that the offer was continuing (Tr. Oct. 3, 1979, page 4, line 26; page 5, line 15 - 17) The defendant retained the pledged stock, which was readily saleable for at least \$20,000 in excess of the appeal demands of defendant. The stock or its value in money could have been left with the Clerk of the Court which would have fully secured the Judgment, both as to its sum as tendered or to any increase on appeal. But defendant retained it in his personal possession and plaintiffs were denied its use.

On June 5, 1979 the Supreme Court upheld the Judgment of the District Court in all its respects with costs to the Plaintiffs. And when the Remittitur came down to the District Court the respondents, plaintiffs again tendered to the defendant, the amount of the Judgment.

The defendant again ordered an execution and Notice of Sale of plaintiffs' pledged stock which would have meant the loss of the plaintiffs' one-half of the farm property. Defendant now requested \$9,775.00 as additional interest since August 11, 1977.

Plaintiffs filed action to stay execution and delivered \$62,557.96 to the Clerk of the Court and asked for a Satisfaction of Judgment. The defendant received his \$62,557.96, and this time retained it

on June 11, 1979, and still retains the plaintiffs' 10,000 shares of Finlinson-Oder Corporation stock with its value for sale or security of more than \$90,000.

ARGUMENT

POINT I: THE ACTUAL TENDER INTO THE HANDS OF THE APPELLANT OF \$62,557.96 ON AUGUST 11, 1977 WAS AND IS AN UNCONDITIONAL OFFER AND DID CONSTITUTE DELIVERY OF LEGAL TENDER TERMINATING THE INTEREST PROVISION OF THE JUDGMENT.

Of specific concern in this case is the fact that the defendant, appellant herein, Lyle Oder, was attempting and did attempt from the inception of the action to render it difficult or impossible for the plaintiff to make performance on the contract so that he could take advantage of the nonperformance and obtain the plaintiffs' pledged stock in the Finlinson-Oder Corporation, which would have delivered to the defendant should he be able to refuse the tender, the plaintiffs' equity in the farm land reasonably valued at \$100,000. So when on August 11, 1977, in response to Notice of Sale under foreclosure of the plaintiffs' shares of stock which would have given the buyer all the ownership in the land, the plaintiffs came prepared to the sale and actually delivered into the possession of the defendant, two cashier's checks for the total amount of the Judgment of \$62,557.96, together with costs.

The defendant does not deny the actual tender and receiving of possession, nor does he deny delivering the payment back to the

plaintiffs, refusing to accept it, stating he was going to appeal the Judgment which he had thus executed upon, to the Supreme Court.

The sole and obvious reason was to make it more difficult or impossible for the plaintiffs to pay or perform under the Judgment. And the defendant was attempting to take advantage of the nonperformance which he, the defendant had caused.

The Supreme Court has spoken definitely on this matter, wherein the case of Zions Property, Inc. vs. Forrest C. Holt, 538 Pac. 2d 1319, the following quotation is given.

"There is implied in any contract, a covenant of good faith and cooperation which should prevent either party from impeding the other's performance of his obligations under the contract, and one party may not render it difficult or impossible for the other party to continue performance and then take advantage of the nonperformance he has caused."

Under the provisions of the Requisites and Sufficiency of Tender, 74 Am Jur 2d, Section 7, it is stated:

"Tender implies the physical act of offering the money or thing to be tendered, but this cannot rest in implication alone. The law requires an actual present, physical offer; it is not satisfied by a mere spoken offer to pay. It is the general rule that the money must be actually shown to the person to whom it is tendered."

Plaintiffs met these requirements and the sufficiency of the amount is not questioned. When the actual cashier's checks

for the full amount of the Judgment was delivered back to the Plaintiffs by the defendant after it was tendered at the sheriff's sale and execution of the sale stopped by the defendant, the plaintiffs stated that there was a continuing offer and tender of the payment, and from that moment on the defendant had in his personal possession \$90,000 worth of Finlinson-Oder Corporation stock owned by the plaintiffs, and the assurance that the money represented by the cashier's checks was at all times available.

There was no condition placed upon the tender, except that the Judgment became automatically satisfied and the pledged stock would normally and automatically be surrendered to the pledgor.

The tender from August 11, 1977 was kept good and was at all times ready for the creditors acceptance, and there was never any time when the defendant could not have and did not always have the ready payment of the Judgment claimed as well as the security for the full payment.

The District Court in its findings and Judgment after being fully aware of all of the circumstances in this matter, held that there had been unconditional and complete tender of the Judgment and that the tender had been kept good and that the same did stop

interest on the tendered amount.

The Court's position is upheld by the substantive law which is stated in 74 Am. Jur. 2d, 31:

"The rule is one of natural justice. A debtor is released from the payment of interest on the supposition that he has been deprived of the use of the money by holding himself in readiness all the time to pay his creditor on the demand of the latter."

Replying to the statements of the appellant in his brief, wherein he states, "That on August 11, 1977, defendant Oder had the right to be paid by Finlinson the \$62,557.96 or he had the right to appeal to the Supreme Court." He elected to execute on his Judgment and filed Notice of Sheriff's sale. When the payment was fully and unconditionally tendered him, then he elected to appeal to make it difficult for the plaintiffs to satisfy his Judgment, and receive back the security of his pledged stock, the loss of which amounted to the plaintiffs being required to keep good and be without the benefit of \$100,000 worth of collateral which was needed for his own purpose, during the appeal period.

The certificates of stock could have been placed with the Clerk of the Court or in escrow, and the defendant would have at all times had the security of his Judgment, but he kept the stock in his own possession which afforded him the same security

and at all times after August 11, 1977, the defendant had not only \$90,000 worth of stock certificates belonging to the plaintiffs, but also had the complete tender of performance as delivered to defendant in cashier's checks for the amount of the Judgment, which the Court found was kept good and continuing.

The case of Cole vs. Cole, 101 Utah 355, 122 P2, 201 as cited for authority by the appellant, is distinguished from the instant case as it was also distinguishable in the case of Sieverts vs. White 2 Utah 2d 351, 273 P2 974, wherein it was stated that Cole vs. Cole was possibly of questionable authority upon the points of acceptance by the payee of a check as payment of the obligation so that the accrual of interest upon the account thus sought to be paid, is stopped, but stated:

"The case is persuasive to the conclusion that a check is not a tender for the purpose of satisfying an obligation unless there are sufficient funds in the account of the drawor in the depository upon which it is drawn for payment in full upon its purchase in due course."

In that case the check had been paid to the Clerk of the Court and by him, transmitted to counsel for the claimant but were not presented for payment. Sometime later the maker notified counsel for the claimant that he had applied the money originally on deposit to cover the checks to other uses.

In the instant case the respondents kept the amount available for payment of the Judgment and the appellant kept \$90,000 of the respondents' as security for such payment.

It was with the thought of such sufficiency of tender that the Supreme Court in the case of Thomas vs. Johnson, 55 Utah 424, 186 P 437, stated:

"The law never compels a person to do that which is vain or useless."

For the respondents to have done more would have been vain or useless.

POINT II. A VALID SATISFACTION OF JUDGMENT TENDER WAS MADE AUGUST 11, 1977 AND REMAINED GOOD AND CONTINUING.

In a similar case the Supreme Court of Utah in Hansen vs. Christensen (1976), 545 P2 1152, found that on October 31, 1962 plaintiff went to the home of defendant and offered to make full payment. Defendant refused payment, informed the plaintiff he was in default and she was repossessing the land. The next day plaintiff left a cashier's check with First Security Bank in Brigham City. The Court in that case, found a 'present physical offer to pay was refused by the seller and the buyer did the next

thing, viz, to place on deposit to the seller's order, a cashier's check in the total amount due under the contract. The Court ruling stated:

"Where the unreasonable conduct of the obligee would make an actual tender a fruitless gesture, an offer to comply with the terms of the contract by the obligor is sufficient."

In the instant case the Court found respondents Finlinsons delivered two cashier's checks for the full amount of the Judgment into the hands of the appellant at a place and a time (appellant's execution sale on August 11, 1977 at 10 a.m.), and defendant acknowledged the sufficiency of the tendered amount. But the defendant refused it and put the checks back in the hands of the respondents, who then told both defendant and the sheriff that the tender was continuing and good (Tr. Q 4-330) and at all times thereafter the tender was good. And the appellant retained in his own possession, \$90,000 in stock certificates of respondents which he had hoped to sell on execution in satisfaction of his Judgment of \$62,557.96.

As in the case of Zion's Properties, Inc. vs. Holt, supra one party may not render it difficult or impossible for the other party to perform and then take advantage of the claimed nonperformance.

In the instant case, as soon as the District Court Judgment had been affirmed by the Supreme Court and the Remittitur filed June 11, 1979, the respondents again placed the full \$62,557.96 in the hands of the defendant who has now retained it, but asks interest after the refused tender while he retained \$90,000 of respondents' certificates for which respondents lost the security value of and at the same time the respondents kept an active account to pay appellant at any minute he requested which he did on June 11, 1979.

It was only the unreasonable conduct of the appellant in refusing the actual tender which has prevented the payment and the Court has found the obligor's tender sufficient in the following cases: Thomas vs. Johnson, 55 Utah 242, 186 F. 437 (1919); Evans vs. Houtz, 57 Utah 216, 193 P 858 (1950); Hansen vs. Christensen, 545 P2 1152 (1976).

POINT III. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND THE JUDGMENT OF THE DISTRICT COURT ARE ENTITLED TO THE TRADITIONAL RULE OF THE APPELLATE COURT VIEWING THE EVIDENCE, AND ALL INFERENCES THAT CAN REASONABLY BE DRAWN THEREFROM IN THE LIGHT MOST FAVORABLE TO THE FINDINGS MADE AND THE CONCLUSIONS DRAWN BY THE TRIAL COURT. Cutler vs. Bowen, Utah 1975, 543, P2 1349; and Hardy vs. Hendrickson, 27 Utah 251, 495 P2 28, and Oberhansley vs. Don B. Earl, et al, 1977, Utah 572 P2 1384.

In the above cases the Court found on appeal the decision of the trial court is entitled to a presumption of validity, and all evidence and inferences drawn therefrom in the light most favorable to sustaining the Court in its Findings of Fact and Conclusions of Law, dated August 22, 1979, (Tr. Q 4-330, paragraph 5, line 11), that the plaintiffs tendered to the defendant and his legal counsel, cashier's checks drawn on the First Security Bank of Utah in the sum of said Judgment of \$62,557.96, plus any costs or expenses or interest involved in the sale, and that the defendant and his counsel after conferring with each other, delivered the tendered payment, which the parties stipulated was the full

amount of principal, interest and costs, back to the plaintiffs. (Tr. Court proceedings, October 3, 1979, page 4, line 26 - 30; page 5, line 1 - 30.)

The Court further found in paragraph 6, line 20, that there were no conditions or restrictions imposed upon the payment received and had by the defendant which defendant returned to plaintiffs, except the return of the pledged stock of the Finlinson-Oder Corporation, (which was automatic with the satisfaction of the Judgment.)

The Court further found in Finding Number 8, line 27, that from the date of the Judgment through the proceedings in the Supreme Court and the Remittitur upholding the decisions of the trial court, that the defendant retained possession of the 10,000 shares of the Finlinson-Oder stock, which stock based upon the testimony of the defendant, had a reasonable value of \$90,000 to \$100,000.

The Court further found in Finding 14, that the delivery by the plaintiffs to the defendant of \$62,557.96 on August 11, 1977, which was returned by the defendant to the plaintiffs, was equivalent to the actual payment to bar interest and was bona fide tender, relieving and absolving the plaintiffs of further interest.

The Court held in Finding 15, line 26, that the law never

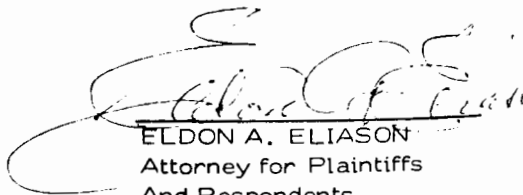
compels the individual to do that which was vain and useless, and that it would be vain and useless to have frozen the said payment after defendant refused and returned it on August 11, 1977.

The Court had, from September 18, 1974 through August of 1979, engaged in eleven days of trials and hearings, where the circumstances and the details relating to the said amount of the claim, the tender, the sufficiency thereof, and the two actual deliveries of payment were refused by him first hand, and the appellate court is required to view the evidence and any inference drawn therefor, in the light most favorable to sustain the decision. Cutler vs. Bown, 543, P2 1394.

CONCLUSIONS

The judgment of the District Court is fully sustained by the evidence, by the circumstances and is in accordance with the law relating to tender of performance. The tender was kept unconditional, good and remained good, and only the unreasonable conduct of the obligatee in attempting to avoid and delay the acceptance of payment with the hope that he could eventually foreclose the plaintiffs' equity in the real property kept the defendant from having the full amount of the tendered Judgment and it was available to him any day that he would accept it through the appellate procedure and to the date that he did finally accept it following the Remittitur on June 11, 1979. And the tender for the Judgment was found by the Court to continue from tender to date of acceptance.

DATED this 20 day of January, A. D., 1980.



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