

1981

# Burnis Finlinson And Melva J. Finlinson v. Lyle D. Oder : Appellant's Brief On Appeal

Utah Supreme Court

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## Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

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BURNIS FINLINSON and	)	
MELVA J. FINLINSON,	)	
	)	
Plaintiffs and	)	
Respondents,	)	
	)	
vs.	)	Case No.
	)	16,684
LYLE D. ODER,	)	
	)	
Defendant and	)	
Appellant.	)	

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APPELLANT'S BRIEF ON APPEAL

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NATURE OF THE CASE

Consideration of a single issue of validity of a tender to satisfy a judgment and terminate judgment interest during time consumed by an appeal of the judgment to the Supreme Court.

DISPOSITION BY THE TRIAL COURT

Following the entry of money judgment against Respondents and in behalf of Appellant, Appellant filed an appeal to the Supreme Court.

Upon entry of Remittitur, the case was returned to the Millard County Clerk. Execution on the judgment was issued. The Respondents then tendered, to the Millard County Clerk, two checks; one in the sum of \$62,557.96 representing the principal amount of the original judgment and one in the sum of \$9,724.05 representing interest earned on the principal judgment amount during the time consumed by the initial appeal. After hearing on the question of interest due, the Trial Court entered judgment in behalf of the Respondents satisfying and releasing the judgment against the Respondents for the payment of the principal amount of \$62,557.96 and returning the interest sum to the Respondents; the Court finding interest had been terminated by a tendered payment of the judgment amount prior to the filing of the first appeal.

RELIEF SOUGHT ON APPEAL

The Defendant-Appellant seeks the following relief on appeal:

1. Reversal of the Trial Court's ruling disallowing the claim of the Appellant for judgment interest.

2. Reversal of the Trial Court's ruling ordering the entry of Satisfaction of Judgment.

3. An Order directing the Trial Court to reinstate the Judgment granted to the Appellant, including interest thereon at the rate of 8% per annum from the date of the Judgment until paid in full, and giving Respondents credit thereon for the \$62,557.96 paid on June 11, 1979.

STATEMENT OF FACTS

On August 1, 1977, the Trial Court entered a money judgment against the Plaintiffs-Respondents and in behalf of the Defendant-Appellant. (R. 180-183) The total amount of the judgment was in the sum of \$62,557.96 and by its terms earned interest at the rate of 8% per annum. The judgment further provided that certain corporate stock belonging to the Plaintiffs-Respondents, consisting of 10,000 shares of the Finlinson-Oder Corporation, be sold by way of foreclosure to satisfy the judgment. On August 2, 1977, the Defendant-Appellant secured from the Court an Order of Execution (R. 184) directing the Sheriff of Millard County to collect the amount of judgment in cash and, if unable to do so, to sell said corporate stock at a time certain. The Execution was served upon the Plaintiffs-Respondents on August 5, 1977, cash was not paid, and the Sheriff gave the Plaintiffs-Respondents notice that he would sell their Finlinson-Oder Corporation stock at a Sheriff's Sale on August 11, 1977.

On the morning of August 11, 1977, according to the testimony of the parties given at the hearing before the Trial Court on June 19, 1979, the following took place:

TESTIMONY OF LYLE D. ODER, June 19, 1979 transcript:

Q. You were present on August the 11th of 1977, in the Millard County Courthouse in the morning of approximately the hour of Ten a.m.?

A. I was.

Q. And for what purpose had you come here?

A. I came there with you, to tell the Sheriff to continue the sale that had been set up, that we were going to appeal.

Q. And on that morning, did you meet with the Sheriff?

A. I did.

Q. And could you tell us approximately what time it was?

A. 9:30, 9:45. Somewhere along in there.

Q. Okay. And where did you meet the Sheriff that morning?

A. In the Sheriff's office, which is in a different place than it is now, just inside and to the right when you come in the front door.

Q. Okay. And who was present at that time?

A. Myself and you, my counsel, and the Sheriff, .  
Probably a deputy or two around.



Q. Okay. And did you have a conversation with the Sheriff at that time?

A. I think you did all the talking. I may have commented to the Sheriff, I don't remember.

Q. Okay. And were you present to that conversation?

A. I was.

Q. Now, prior to that time or at that time, had you seen the defendant or his counsel, Eldon Eliason?

A. On that date I had not.

Q. Okay. Could you tell us what you told the Sheriff and what you heard in the conversation with the Sheriff at that time?

A. I told the Sheriff that the sale would be continued that we are going to appeal the case.

Q. Now, following that conversation, what happened?

A. We stood around there for awhile, and directly Mr. Finlinson and his attorney appeared.

Q. Okay. And was there a conversation between Mr. Finlinson, yourself, and his legal counsel?

A. There was a general conversation, you, me, Mr. Finlinson, his counsel. I'm sure the Sheriff was there and participated in it.

Q. Okay. And do you recall approximately what time it was that that conversation took place?

A. Almost exactly ten minutes before 10:00 o'clock, the scheduled time of the sale.

Q. Okay, and where did that conversation take place?

A. In the little entry way right out there by the main --- by the front entrance to the Courthouse.

Q. Okay. And do you recall what was said by the parties?

A. Yes, I do. The first comment was Mr. Eliason, he said, "We have got the money; where's the stock?"

Q. Okay. And then what was said after that?

A. You told him that the sale was going to be continued, that we decided to appeal the case. That is all you told him, that I can recall.

Q. And did he or Mr. Finlinson make any comment at that point?

A. No.

Q. Okay. And did the Sheriff make any comment at that point?

A. Not that I recall.

Q. Okay. And then what was done?

A. Mr. Eliason or Mr. Finlinson, between the two of them, they had two cashier's checks, and they were passed from their hand to yours and you looked at them and handed them to me. I looked at them and handed them back to you. You gave them back to Mr. Eliason.

Q. Was there any comment made during that time?

A. There was.

Q. Tell us what you heard.

A. After you handed the checks back to him, you told Mr. Eliason that if he wanted interest not to run on that judgment, that he should deposit the checks with the County Clerk; and if he took the money back and didn't leave it on deposit there, that interest would continue to run.

Q. Was there any reply to that?

A. Not that I heard. Mr. Eliason and Mr. Finlinson went off and conferred about that a little bit, but I don't recall hearing any comment back from them in response to that.

Q. Was there any other conversations that morning at the place, that you recall?

A. No.

Q. Okay. And what was done after that?

A. We all went our separate ways.

TESTIMONY OF BURNIS FINLINSON, June 19, 1979 transcript:

Q. And did you attend the execution sale of August the 11th, 1977?

A. Yes.

Q. And who was present with you, if anyone, when you attended that execution sale?

A. Oh, my counsel, my wife, and sons.

Q. And did you, at that day, talk to the Sheriff relative to any costs on execution?

A. Yes.

Q. And did you on that date see Mr. Lyle Oder or/and Mr. Milton Harmon, his attorney?

A. Yes.

Q. And when and where was --- what time of day was it that you saw those people?

A. Oh, shortly before 10:00 o'clock in the morning down in the foyer.

Q. (By Mr. Eliason) All right, about what time was it that you observed Mr. Oder and Mr. Harmon on that particular day?

A. Oh, probably quarter to ten.

Q. All right. Now, you stated the time of day, and you've stated who was present. Did you have any discussion at that time with the defendant and his legal counsel?

A. No special conversation, only tendered them the money, gave them the check, the cashier's checks.

Q. And what money did you give and to whom did you give it?

A. We gave the two cashier's checks to Mr. Harmon and Mr. Oder in the amount of \$62,557.96.

Q. (By Mr. Eliason) Did they make any comments after delivering to them the \$62,557.96?

THE COURT: You answer that "yes" or "no". Did they make any comment?

THE WITNESS: Yes.

THE COURT: All right.

Q. (By Mr. Eliason) What was said, if you recall?

A. They said it was a lot of money. And there was no objection to the amount, just that it was a lot of money.

Q. What happened after that, if anything?

A. They took the checks and then they, in private, discussed what to do. And when they came back, they handed

the checks back, and said they wouldn't accept them.

Q. Did they give you any reason for not accepting them?

THE COURT: Who spoke and what was said?

MR. ELIASON: Yeah.

THE COURT: When you say, "they said", it connotes that they did it in unison ---

THE WITNESS: They about did.

THE COURT: --- like singing a song.

Q. (By Mr. Eliason) Would you try and delineate who was speaking there, Mr. Finlinson?

A. I think that Mr. Harmon did the speaking, said that they would continue the sale at a later date; that they would appeal it to the Supreme Court, the decision that had been made, and they returned the money to us.

Q. Then what did you do with the money thereafter, I mean, on that day?

A. Well, it was given back to the Sheriff and then the Sheriff gave it to me and then I returned it to the people I had got it from.

Q. And what did you tell the Sheriff, if anything? Did you deliver any paper to him?

A. Not that I remember.

Q. Was there anything said about any further discuss.  
with him?

A. Well, only that it was discussed whether the sale  
should go forward or not. And he was advised by Mr. Harmer  
that they would not hold the sale at this date and it would  
be continued later.

Q. I'll ask you whether or not at the delivering of  
the tendering of the \$62,557.00 there was conversation relat  
to the return of your stock?

Q. (By Mr. Eliason) All right, what was said with  
regard to that, Mr. Finlinson?

A. That he had the stock and would keep it.

In addition to this event, the facts are that the  
\$62,557.96 was returned to Mr. Finlinson who diverted it  
as tendered payment of the judgment to use in his business  
(T. 15-16) and he then filed a cross-appeal. (R. 7-9)

ARGUMENT

POINT I: THE OFFER TO PAY \$62,557.96 ON AUGUST 11, 1977 WAS CONDITIONAL, DID NOT CONSTITUTE LEGAL TENDER, AND DID NOT TERMINATE THE INTEREST PROVISION OF THE JUDGMENT.

Following this transaction on August 11, 1977 an Appeal was perfected by Oder and a Cross-Appeal by Finlinson and there were questions presented to this Court by way of motion to dismiss the Oder Appeal which are pertinent to the present consideration:

(A) Did Oder have the right to appeal when he had secured an Execution and Sheriff's Sale? Finlinson moved to dismiss the Appeal alleging that the answer to that question was "no"; but this Court did not agree and the motion was denied. Oder had the right to appeal because the Supreme Court said, in a prior case - Sierra Nevada Mill Co. vs. Keith-O'Brien Co., Utah (1916) 48 U. 12, 156 P. 943, that the right to appeal exists:

" . . . when the amount found in favor of a litigant by a judgment or decree is due him in any event - when there is no controversy over his right to receive and retain it - so that the only question to be determined by the appellate tribunal is whether he is or is not entitled to a greater or an additional sum."



The point of the above is this: On August 11, 1977 Oder had the right to be paid, by Finlinson, the \$62,557.96, to appeal the interest question (The only question to be determined by the appellate tribunal being whether he is or is not entitled to a greater or an additional sum.), and to retain the Finlinson-Oder Corporation stock pledged as security for any additional amounts which may be awarded as a result of the Appeal. Under such circumstances, if the tendered \$62,557.96 is not continuing but is diverted to Finlinson's business uses, then the judgment interest continues and is not terminated.

(B) Was the \$62,557.96 offered with these rights in mind? No. Finlinson required an exchange of stock for the money. Thus the offer was conditional. It required, if accepted under the terms of "We have got the money, where's the stock?" (T. 23 L. 19), that Oder part with his right to hold security. A conditional offer is not a tender and does not act to terminate interest. See Zions Properties, Inc. vs. Forrest C. Holt, Utah (1975) 538 P2d. 1319.

"A tender required that there be a bond fide, unconditional offer of payment of the amount of money due, coupled with an actual production of the money or its equivalent." (Emphasis added.)

POINT II: A VALID SATISFACTION OF JUDGMENT TENDER MUST BE A CONTINUING OFFER, CONTINUOUSLY FINANCIALLY SUPPORTED, IF IT IS TO TERMINATE THE RUNNING OF JUDGMENT INTEREST.

This point is emphasized by the case law cited in Hansen vs. Christensen, Utah (1976) 545 P2d. 1152, where the Court found a valid tender to a real estate purchase contract was made by the deposit with a local bank of a cashier's check to the sellers' order. That case by contrast applies to the present facts. In the case before the Court there was a showing of cashier's checks and the instructions, "If he wanted interest not to run on that judgment, that he should deposit the checks with the County Clerk and if he took the money back and didn't leave it on deposit there, that interest would continue to run." (T. 24 L. 10) With those instructions the money was taken back. No deposit was made. Therefore, no valid tender. Utah law allows such deposits and provides as follows:

78-27-4. MONEY DEPOSITED IN COURT - If money is deposited in Court, it must be paid to the Clerk, who must deposit it with the County Treasurer, by him to be held subject to the Order of the Court. For the safekeeping of the money so deposited with him, the Treasurer is liable on his official bond.

Note the statute provides for "money" and the safe-keeping thereof. Here no money parted from Finlinson's hands for continuing tender.

Further, there was no continuing financial support for the purported tender. No doubt Finlinson had \$67,557.28 in hand on August 11, 1977 but after that day he diverted the money for his own use - first to terminate interest on a loan upon which interest was at a higher rate than the 8% judgment earnings (T. 6 L. 3 and L. 20) and second, he used the money in his own business. (T. 15 L. 25)

These facts fall within the law announced by the Supreme Court in the case of Cole vs. Cole, Utah (1942) 122 P2d. 201, where a check was deposited with the Millard County Clerk but was not held to be a valid tender to terminate interest; the Court stating:

"As has heretofore been stated, the tender made is not good unless the tender is a continuing good tender. Winslow C. Cole did not show that he has suffered a loss because the check was not presented for payment within a reasonable time after its issue because he himself testified that he had used the money supporting the check to his own benefit."

Finlinson did as Cole. He used the money of his purported tender to his own benefit and further filed a

Cross-Appeal to this Court.

The principal of law is one of equity and justice and goes to the question of actual loss or harm which may have been suffered. Under these facts, with Finlinson's diversion of the funds to his own use to terminate a higher interest rate and to finance his own business, he has had the full use and benefit of his money to his financial gain with no loss. See 74 Am Jur 2d 566.

"The loss 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."

As specified above, Finlinson was not deprived but rather was enhanced by his personal use of his money which was not held in readiness at all times to pay the judgment but which was diverted to his own use. It was rather Oder who suffered the loss of not having the tender deposited with the County Clerk or other acceptable officers, earning interest from the bank, until the Appeal and Cross-Appeal concluded.

CONCLUSION

The judgment granted the Appellant Lyle D. Oder, by its terms, earned interest at the rate of 8% per annum until paid. Tender of payment can terminate the interest earning provision of the judgment if such tender is an unconditional offer of payment of the amount of money due, coupled with an actual production of the money or its equivalent, and if such offer is continuing and financially supported. If an offer is made and there the money produced in support thereof is withdrawn and diverted to other uses inconsistent with the satisfaction of the judgment; there has been no termination of the interest earning provision of the judgment and the judgment, including the interest provision, continues in full force and effect until paid in full. The offer of payment made by Finlinson was withdrawn, the money was diverted to his own private use, and thus there was no valid interest termination tender. The Trial Court erred in finding the interest terminated. Its judgment at that point should be reversed.