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Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

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MORRIS MYERS and PEGGY A. MYERS,	:	
	:	
Plaintiffs-Respondents,	:	Case No. 16991
v.	:	
HOWARD R. MORGAN and DAVID T. GREEN,	:	
	:	
Defendants-Appellants.	:	

- - - - - - - - - - - - - - - - - - - -

APPELLANT'S BRIEF

Appeal from an Order of the Third Judicial District Court in and for Salt Lake County, Utah, the Honorable Jay E. Banks, Judge

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IN THE SUPREME COURT

OF THE STATE OF UTAH

- - - - - - - - - - - - - - - - - - - -

MORRIS MYERS and PEGGY A. MYERS, Plaintiffs- Respondents, v. HOWARD R. MORGAN and DAVID T. GREEN, Defendants- Appellants.	: : : : : : :	Case No. 16991

- - - - - - - - - - - - - - - - - - - -

APPELLANT'S BRIEF

STATEMENT OF THE CASE

Plaintiffs initiated this action on December 14, 1976, for the balance due and owing on a Promissory Note dated September 1, 1974. The Promissory Note obligates Defendant Howard R. Morgan to pay Peggy A. Myers Three Thousand Seven Hundred Dollars ($3,700.00) in monthly installments of One Hundred Dollars ($100.00) per month. Defendant David T. Green did not sign the Note.

DISPOSITION IN LOWER COURT

On May 31, 1979, Judge Banks heard the case and entered judgment in favor of the plaintiffs and against both defendants in the amount of Two Thousand Five Hundred Forty

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Dollars ($2,540.000). (Reporter's Transcript at 43.) The sole basis of defendant-appellant David T. Green's liability was that Howard R. Morgan signed the Promissory Note as Green's agent. (Findings of Fact and Conclusions of Law).

On July 21, 1979, appellant filed a Motion for a New Trial pursuant to Rule 59; a Motion to Amend or Alter the Judgment under Rule 59; and a Motion for Relief from the Judgment made under Rule 60.

A hearing was held on the Motions on November 14, 1979, where, as the Minute Entry indicates, the Court took the matters under advisement. On February 26, 1980, the Court denied the Motions and made a Minute Entry to that effect.

RELIEF SOUGHT ON APPEAL

Appellant seeks to reverse the judgment entered by the District Court against David T. Green.

STATEMENT OF FACTS

Plaintiffs initiated this action for the balance due on a Promissory Note dated September 1, 1974. The Note, however, was actually signed in March or April, 1975. (Tr. 21). Howard Morgan signed the Note at the residence of the plaintiffs. Defendant David Green was not present at the execution and did not sign the Note. (Tr. 13).

Under the terms of the Note, defendant Morgan agreed to pay Peggy Myers $3,700 in monthly installments. Subsequent

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to the execution of the Note, Peggy Myers assigned one-half of her interest in the Note to Morris Myers. Morris Myers later assigned that interest to P. J. Pagores.

On June 11, 1979, the Third Judicial District Court entered a judgment against the defendants for the balance due on the Note. In its Findings of Fact, the Court found:

* * *

> 5. Plaintiffs are the owners and holders of said Promissory Note.
>
> 6. Defendants failed to pay the installments on said Promissory Note . . . .
>
> 7. On May 31, 1979, the principal balance remaining due on said Promissory Note is $2,540.00

* * *

> 9. Said Promissory Note is a valid and subsisting obligation on the part of defendants, individually and as partners . . . .

ARGUMENT

I. The Evidence at Trial was Insufficient to Support a Judgment Against Appellant David Green

A. The Judgment from which relief is sought is a Judgment on a Promissory Note. The Third District Court's Findings of Fact and Conclusions of Law states that:

> 3. Defendant, Howard R. Morgan, individually and for said partnership, and as agent of defendant, David T. Green, a partner, made, executed and delivered to plaintiff, Peggy A.

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> Myers, the Promissory Note received in evidence at the trial of this cause in consideration of loans and advances made to said partnership by plaintiffs. . . .
>
> 6. Defendants failed to pay the installments due on said Promissory Note when due so that the balance due on said Note is immediately due and payable. . . .
>
> 9. Said Promissory Note is a valid and subsisting obligation on the part of defendants, individually and as partners aforesaid, to pay to plaintiffs said principal sum and interest.

It is thus clear that the Court below held appellant liable to plaintiffs on the theory that appellant was obligated under the Promissory Note introduced into evidence.

B. A party is not liable on any instrument unless his name appears on the face of it. Section 70A-3-401(1) of the Utah Uniform Commercial Code provides:

> SIGNATURE -- (1) No person is liable on an instrument unless his signature appears thereon.

This basic principle has been adopted, without exception, by every court considering the question. Fewox v. Tallahassee Bank & Trust Co., 249 S.2d 55 (Fla. 1971); Jennaro v. Jennaro, 190 N.W.2d 164 (Wis. 1971); Ness v. Greater Arizona Realty Inc., 517 P.2d 1278 (Ariz. 1974); Bostwick Banking Co. v. Arnold, 178 S.E.2d 890 (Ga. 1970); Wiebke v. Richardson & Sons Inc.,, 265 N.W.2d 571 (Wis. 1978); Havatampa Corp. v. Walton Drug Co. Inc., 354 S.2d 1235 (Fla. 1978). See, also, 11 AM JUR 2d, Bills and Notes, § 560.

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Ness v. Greater Arizona Realty Inc., supra, is representative of this authority and is particularly significant since it arises out of a fact situation remarkably similar to the present case. In Ness, the plaintiff brought an action against Louise Ness, Ness Investment Company, Ness Finance Company and others for the balance due on a Promissory Note. The Complaint alleged that Berth Ness, acting as agent, and on behalf of the defendants, made, executed and delivered to plaintiff a Promissory Note. Berth Ness' name was the only name on the Note. Plaintiff filed the Complaint and obtained service of process on the defendants. Subsequently, default judgments were rendered by the Court. The defendants moved the court to vacate the default but the trial court denied the motions. In reversing this ruling, the appellate court held that the defendants could not be liable on the Note, since they did not sign it:

> Nowhere in Appellee's [plaintiff's] complaint does it appear that the names of appellants appeared on the Note. Nor is it alleged that the Note in any way discloses that Berth Ness signed in any capacity other than that for himself individually. A suit may not be maintained or judgment obtained on a promissory note against an undisclosed principle whose signature does not appear thereon. Richards v. Warnekros, 14 Ariz. 488, 131 P. 154 (1914); Plain State Bank v. Ellis, 174 Kansas 653, 258 P.2d 313 (1953). See also, 11 AM JUR 2d, bills and Notes, § 560.

Id. at 1279 (emphasis added).

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The appellate court in Ness, supra, emphasized that this rule applied even though the payee on the Note knew that the Note was an obligation of a nonsigning party. The court observed:

> The Official Comment found in Uniform Laws Annotated, Uniform Commercial Code, § 3-401 provides: "(1) no person is liable on an instrument unless and until he has signed it. The chief application of the rule has been in cases holding that a principal whose name does not appear on an instrument signed by his agent is not liable on the instrument even though the payee knew when it was issued that it was intended to be an obligation of one who did not sign . . . ." (emphasis added)

Id. at p. 1280

C. An agent is personally liable on an instrument if he does not name the principal he represents or show that he signed in a representative capacity. The corollary to Section 70A-3-401 of the Uniform Commercial Code is found in Section 70A-3-403(2) which provides:

> 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. (emphasis added)

This principle has also been universally adopted by the courts. Wolfe v. University National Bank, 310 A.2d 558 (Md. 1973); North Carolina National Bank v. Wallens, 230 S.E.2d 690 (N.C. 1976); Ness v. Greater Arizona Realty Inc., 517 P.2d 1278

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(Ariz. 1974). The court's decision in <u>Wolfe</u>, <u>supra</u>, has an excellent application of this principle. In that case, the defendant Wolfe was a general partner in Watkins Glen Ltd. The partnership opened an account with the bank and entered into an agreement that checks were to be signed by Wolfe, Holtze and Altman. Later the agreement was changed to require that the checks be signed by either (a) Wolfe and Holtze or (b) Wolfe and Waymoth.

Subsequently, 37 checks were drawn on the account, each check bearing only one signature. Relying on Section 3-401-(1) of the Uniform Commercial Code, the court held that the partnership was not liable for the checks, even though it was a partnership obligation.

> Watkins Glen's signature was comprised of two individual signatures as provided for in its contract with the bank. Consequently, since Watkins Glen's signature did not appear on any of the 37 checks in question, the partnership cannot be held liable on them, . . .

<u>Id</u>. at p. 560.

D. <u>Parol evidence is not admissible to show that a party signed in a representative capacity</u>. Under Section 70A-3-401 of the Uniform Commercial Code a party is not liable for an instrument that he did not sign. To be liable on the instrument, his agent must identify the principal or otherwise show that he signed in a respresentative capacity. However, as

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Section 70A-3-403 indicates, if the agent does not do so, the agent is personally liable and there is not liability on the part of the principal. Further, parol evidence is inadmissible to establish the principal's liability or to otherwise alter the clear terms of the instrument. Trenton Trust Co. v. Klausman, 296 A.2d 275 (Pa. 1972); Bostwick Banking Co. v. Arnold, 178 S.E.2d 890 (Ga. 1970); J. P. Sivertson and Co. v. Lolmaugh, 380 N.E.2d 520 (Ill. 1978). The court in Bostwick explains the principle this way:

> One who executes a note in his own name with nothing on the face of the note showing his agency cannot introduce parol evidence to show that he executed it for a principal, or that the payee knew that he intended to execute it as agent. . . . A court may take judicial notice that the signature of an inidividual on the face of a note, at the bottom on the right, without limiting or descriptive words before or after it, is the universal method of signing a contract to assume a personal obligation.
>
> . . .
>
> It is well established . . . that parol evidence is not admissible to add to, take from or vary the terms of an unambiguous written contract. [citations omitted] Under the Uniform Commercial Code enacted in Georgia in 1962, 'An authorized representative who signs his own name to an instrument . . . is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity.' [citations omitted] Even though the instrument may name the person represented, the one who signs in a representative capacity may still be personally liable on the instrument if by his

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> manner of signing he does not clearly indicate that he is signing in a representative capacity or if the instrument does not name the person represented but does show that the signer thereof signed in a representative capacity.

Id. at 893-894 (emphasis added).

When there is an ambiguity appearing on the face of the document, parol evidence is admissible to determine the intent. However, the Code makes it clear that there is no ambiguity when a party signs an instrument without adding any description or indication that he is acting in the capacity of an agent. Therefore, parol evidence is inadmissible. Trenton Trust Co. v. Klausman, 296 A.2d 275 (Pa. 1972); J. P. Sivertson & Co. v. Lolmaugh, 380 N.E.2d 520 (Ill. 1978). The court in Lolmaugh explains:

> If there is a question as to whether or not a person signed as an individual or as an agent for a principal, parol evidence is admissible if, and only if, two criteria are met. First the action must be between the immediate parties to the Note.[1] Secondly, there must be some indication of the existence of a principal or that the signator signed in a representative capacity.

---

[1]It is interesting to Note that this proceeding is not between the immediate parties to the Promissory Note. Morris Myers was not a party to the September 4, 1974, Note. His interest arises by way of assignment. In Wood Press, Inc. v. Eisen, 384 A.2d 538 (N.J. 1978), the court held that a holder in due course of the Note, was not an immediate party and therefore not entitled to rely on parol evidence.

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Id. at 522.

From the foregoing, then, it can be concluded that Green is liable on the September 1, 1974, Note only if (a) he personally signed it; or (b) Howard Morgan signed it and indicated on the face of the instrument that Green was his principal and that Morgan was signing in a representative capacity. If Morgan only signed his name, Morgan is personally liable. Parol evidence is inadmissible to establish that Morgan was signing for some one else.

E. Appellant David Green is not liable as a party to the September 4, 1974, instrument because he did not sign it. The signator, Howard Morgan, alone is personally liable on the Note. The plaintiffs in this case have brought an action on a Promissory Note dated September 1, 1974. The sole claim for relief is the purported liability on the instrument. The Findings of Fact and Conclusions of Law in this case clearly indicate that Green's liability is limited to his liability as a party to the instrument. As previously discussed, this Note is, as a matter of law, not sufficient to impose any liability on David Green. Reference is made again to Ness v. Greater Arizona Realty, Inc., supra.

In Ness v. Greater Arizona Realty, Inc., the plaintiff filed a Complaint on a promissory note against a nonsigner to the note. An examination of the Complaint in that case and the

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Complaint filed in this case demonstrate they are virtually identical:

Ness

That at all times complained of herein, Berth C. Ness was acting as agent of and with the full authority to bind the defendants and each of them in connection with all complained of herein. . . .

That prior to the commencement of this action, Berth C. Ness acting for and on behalf of the defendants and each of them, made and delivered a promissory note dated the 15th day of May, 1969, in the sum of $25,000 to the order of the plaintiff.

Myers v. Green

2. That at the time of the loans and advances hereinabove mentioned defendants engaged in business as a partnership doing business under the firm name and style of MGM Personnel Associates.

3. Defendant, Howard R. Morgan, individually and for said partnership, and as agent of defendant, David T. Green, a partner, made, executed and delivered to Peggy A. Myers, a Promissory Note.

The court in Ness held that the nonsigning parties were not liable because they did not sign the instrument. The court did indicate however, that plaintiffs "could have sued defendants on the underlying obligation for which the note was given, but this was not done." Id. at 1279.

In the present case, defendant-appellant David T. Green may have had similar liability, but plaintiffs did not sue on the obligation underlying the Note. Like Ness, plaintiffs-respondents' suit was brought and judgment was entered on the Note. Therefore, Green cannot, as the Uniform Commercial Code indicates, be liable.

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Plaintiffs-respondents have not challenged the validity of the rules provided in the Uniform Commercial Code. They do not argue that the Code does not mean what it says or even suggest that the case law interpreting the Code is incorrect. Rather respondents allege that Green is liable because Morgan signed the instrument in a representative capacity, was Green's partner, and is therefore liable on the instrument under common agency principals. However, as previously discussed, (1) Howard Morgan did not sign the Note in a representative capacity; (2) since there is no ambiguity in his signature, parol evidence is inadmissible to establish that he was signing in a representative capacity, and (3) therefore, David T. Green is not liable on the instrument.

F. The Judgment entered below ignores the essential distinction between a negotiable Note and an underlying obligation. It is important to emphasize that the Code does not prevent the payee of an instrument from collecting from a nonsigner in a proceeding based upon the obligation underlying the Note. Wiebke v. Richardson, 265 N.W.2d 571 (Wis. 1978); Ness v. Greater Arizona Realty, Inc., supra; McClung v. Saito, 4 Cal. App. 3d 143, 84 Cal. Rptr. 44 (1970); Potts v. First City Bank, 86 Cal. Rptr. 552 (1970). The court in Saito Notes the distinction this way:

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> The fact that they [the defendants] had not signed the Note did not relieve them of their obligation to repay the consideration given for it. The law distinguishes between an action on a promissory note and an action to recover the consideration for which it was given (emphasis added).

Respondents have failed to Note this obvious distinction. However, the cases cited in respondents' prior briefs clearly observe it, and by no stretch of the imagination do they stand for the proposition that David T. Green is liable on the September 1, 1975 instrument. In Salt Lake City Brewing Co. v. Hawke, 66 P. 1058 (Utah 1901), the plaintiff brought an action to recover money loaned and for goods sold and delivered. It is important to emphasize the basis of the claim. The plaintiff applied, by a letter to the plaintiff, for a One Thousand Dollar ($1,000.00) loan. In a second letter, he applied for an additional Five Hundred Dollars ($500.00) and made an order for goods. While the subsequent passage of the Utah Uniform Commercial Code would invalidate any contrary holding or dicta in Hawke, the action brought in Hawke was not on a negotiable instrument, but rather for the obligation to pay for goods received and for money lent. The Utah Supreme Court held that the defendant could obligate the partnership for partnership obligations:

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> When, therefore, . . . money is borrowed by one member of a firm on the credit of the firm, according to the usual course of its business, and within the general scope of its authority, the partnership is liable therefore.

_Id_. at 1060.

Clearly, as in _Hawke_, a signing partner to a sales contract can create a partnerhip obligation, or he can create an obligation to a nonsigning partner. However, that liability is based on the _obligation_, for the _benefit received_. Neither _Hawke_, nor any other case has held that a nonsigning partner can be obligated _on an instrument_ he does not sign, when his agency does not appear on the face of the instrument.

The case of _McCollum v. Steitz_, 67 Cal. Rptr. 703 (1968) is a perfect example of this. There the court held that a nonsigning partner could be held liable on a Note signed by his partner. However, his partner signed the Note and inserted the firm name and address after the signature. This is obviously a different situation from the present case, where Howard Morgan signed his name without any indication of agency. It should also be Noted that _Steitz_ also recognized the principle that parol evidence is admissible to determine agency only if there is a patent ambiguity on the face of the document.

Respondents have also relied on _North Carolina National Bank v. Wallens_, 230 S.E.2d 690 (N.C. 1976). In

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Wallens, the bank had brought an action against partners under an agreement wherein the defendants agreed in July of 1970 to guarantee and assume all future liabilities for debts of the partnership. Later in March, 1973, one of the partners borrowed money from the plaintiff and signed a Promissory Note. The Note was merely signed by G. C. Wallens. Neither the partnership name nor the name of the other partner was on the Note. On a Motion for Summary Judgment, the trial court, relying on Section 3-401(1) of the Uniform Commercial Code found that the partnership was not liable on the Note. The appellate court reversed this determination and held that although the Note was not enforceable, the guarantee agreement (the underlying obligation) was enforceable against the partnership. The court emphasized that the partnership was not on the Note:

> *Defendant's potential liability had to be based on something other than that of a party to the note.* That a nonsigner is ordinarily not liable on an instrument which he had not signed, 'does not mean that a nonsigner may not be liable under some other principle of law. *It only means that the liability of the nonsigner is not as a party to the instrument.*

Id. at 692 (emphasis added).

It is clear then, that under the Code, Green is not liable on the September 1, 1974 Note unless he signed it or unless Morgan signed it in a representative capacity. That

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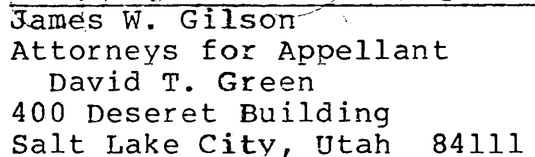
capacity, moreover, must appear on the face of the Note. Parol evidence is inadmissible to establish such capacity. The cases cited by both Green and the plaintiffs support these basic principles. Defendant Green has been unable to find a single case which holds otherwise.

DATED this ___ day of June, 1980.

RAY, QUINNEY & NEBEKER



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CERTIFICATE OF SERVICE

I hereby certify that on the ___ day of June, 1980, a true and correct copy of the foregoing Appellant's Brief was mailed, postage prepaid, to the following:

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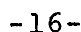

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