

1989

West One Trust Company, Trustee, and Lewis W. Butcher v. Crossland Savings, FSR, fka Western Savings & Loan Company : Reply Brief of Appellants

Utah Court of Appeals

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BRIEF

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DOCKET NO.

890640-CA

IN THE UTAH COURT OF APPEALS

WEST ONE TRUST COMPANY,
Trustee, and LEWIS W. BUTCHER,

Plaintiff/Appellants,

vs.

CROSSLAND SAVINGS, FSB, fka WESTERN
SAVINGS & LOAN COMPANY,

Defendant/Respondent.

Case No. 890640-CA

Consolidated No. 890641-CA

REPLY BRIEF OF APPELLANTS

APPEAL FROM TWO SUMMARY JUDGMENT RULINGS IN THE THIRD
JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF
UTAH, THE HONORABLE RAYMOND S. UNO PRESIDING

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ARGUMENT PRIORITY: 14(b)

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SALT LAKE COUNTY, UTAH

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SUMMARY OF ARGUMENTS

I.

The Authorization leaves unanswered the question of whether Butcher waived his right to advance notice of disbursements from his construction loan account. Parol evidence is necessary to ascertain the parties' intent and whether the four questioned disbursements violated that intent.

II.

Butcher does not seek to interpret the Authorization selectively nor to contradict its limited terms.

III.

This suit was timely as to each of the four wrongful disbursements because the limitation period did not begin to run until after Butcher both discovered the disbursements and made demand for reimbursement under Utah's Commercial Code statute (U.C.A. §70A-4-406). Butcher's timely demand commenced the running of the statute of limitations.

ARGUMENT

I.

THE AUTHORIZATION LEAVES UNANSWERED THE QUESTION OF WHETHER BUTCHER WAIVED HIS RIGHT TO ADVANCE NOTICE OF DISBURSEMENTS FROM HIS CONSTRUCTION LOAN ACCOUNT. PAROL EVIDENCE IS NECESSARY TO ASCERTAIN THE PARTIES' INTENT AND WHETHER THE FOUR DISBURSEMENTS IN QUESTION VIOLATED THAT INTENT.

The terse Authorization which the District Court found precluded Butcher from contesting any disbursements from his construction loan account was drafted by Crossland. Its conciseness does not recommend it as a model of lucidity.

The Authorization by its exact terms does nothing more than remove the requirement that disbursement checks include Butcher's name as a co-payee. A grant of permission to make payoff checks "direct to the parties concerned" does not necessarily include the grant of permission to disburse funds without prior notice to the owner of the account (the borrower of the funds). If Crossland wanted blanket authority to deplete the construction loan account without any advance notice to its borrower and without the borrower having any right to object to disbursements, it should have drafted an Authorization explicitly giving it that authority. The Authorization it did draft falls far short of giving Crossland such blanket authority.

The Authorization does not reasonably put Butcher on notice that his signing it would rob him of all control over disbursement of the loan proceeds while preserving all his liability on the loan. Nothing in the tersely opaque Authorization reflects a waiver of Butcher's right to know of and approve releases of funds from the account.

If Crossland intended the Authorization to destroy Butcher's right to receive advance notice of disbursements or to object to disbursement requests he believed to be fraudulent or unwarranted, its intent is not reflected within the four corners of the document it prepared. Parol evidence is necessary to ascertain Crossland's intent. The ascertainment of Butcher's intent is even more critical, since he is the party who was injured by the questioned disbursements. Since the Authorization addresses only whether Butcher would need to be named as a co-payee on disbursement checks, evidence must be taken to determine whether Butcher intended that in signing the Authorization he was surrendering his right to know of and approve the amount and frequency of disbursements for labor and materials supposedly being supplied to the project.

Butcher is entitled to his day in court.

II.

BUTCHER DOES NOT SEEK TO INTERPRET THE AUTHORIZATION "SELECTIVELY" NOR TO CONTRADICT ITS LIMITED TERMS.

Crossland claims that because Butcher does not object to all of the disbursements which were made, he is seeking to interpret the Authorization selectively. This is simply not true. Butcher objects to each disbursement which he did not approve. Crossland asserts in paragraph 3 of its Statement of Facts that "all the disbursements made by Defendant were approved by either Butcher or his designated agent and contractor, Jerry Wilmore". This assertion, while true, is misleading. Butcher did not approve the disbursements at issue, and the agreement he signed did not authorize approval by Wilmore or any other third party. Butcher endorsed each payment authorization except the four he contests in this suit. (See R. 79-94). Only those four disbursements were made without advance notice to Butcher.

Contrary to Crossland's contention, Butcher is not undertaking to contradict or vary the language of the Authorization. Butcher merely points out that the Authorization does not, on its face, immunize Crossland from liability for making the four questioned disbursements. Parol evidence is necessary to determine whether the parties intended the Authorization to so immunize the Bank. The Authorization is facially ambiguous in that it does not state (or even imply) that the Borrower waives advance notice and approval of disbursements.

III.

BUTCHER'S CLAIMS ON THE TWO EARLIER DISBURSEMENTS
WERE NOT BARRED BY THE STATUTE OF LIMITATIONS
AND SHOULD NOT HAVE BEEN DISMISSED SUMMARILY.

Crossland argues that the law in State ex rel Baker v. Intermountain Farmers Association, 668 P.2d 503 (Utah 1983), is inapplicable because its facts are distinguishable from the facts in this case. It is true that in Baker our Supreme Court dealt with a claim brought under Utah's Uniform Disposition of Unclaimed Property Act. It is also true that the Court applied the general rule (that the statute begins to run when a debt is due and payable) rather than the exception applicable here. Our Supreme Court, however, took the occasion to set forth the entire black-letter law, as follows:

The statute of limitations begins to run on a debt when it is due and payable unless "a contract existing between the parties provides that an additional thing be done before action may be brought...." (citation omitted.) Thus, when it is contemplated that an amount will not be paid immediately, such as where a bank holds a deposit subject to check or payment of interest, the statute of limitations does not run until payment is demanded and refused. Esponda v. Ogden State Bank, 75 Utah 117, 124, 283 P. 729, 731 (1929). (Emphasis added.) 668 P.2d at 506.

See also, Commercial Bank of Spanish Fork v. Spanish Fork South Irr. Co., 153 P.2d 547 (Utah 1944).

Both the Baker and the Commercial Bank of Spanish Fork cases cite with approval Esponda v. Ogden State Bank, 75 Utah 117, 283 P.2d 729 (1929), for the holding that the limitations period cannot commence until the act complained of was discovered or, by reasonable diligence, could have been discovered.

Like this case, Esponda concerned a claim against a banking institution. In Esponda the owner of a certificate of deposit made claim against the bank some fifteen years after the bank disbursed the certificate proceeds to another person. Our Supreme Court affirmed the trial court's finding that the claim was not untimely. After noting that the statute of limitations does not begin to run until a bank's wrongful act is discovered by the injured party, our Court held:

The defendant's plea of the statute of limitations must also fail. The plaintiff had no cause of action against the defendant until he demanded payment of the certificate, and hence the statute of limitations did not begin to run until that date.
Esponda v. Ogden State Bank, 75 Utah 117, 283 P. 729, 731 (1929).

The law set forth in Esponda applies to this case. If a fifteen year old claim against a bank for wrongful disbursement was not barred by the statute of limitations there, Butcher's claim against Crossland should not be barred here.

Crossland erroneously claims that §70A-4-406 has no application to this suit. That statute defines the scope of a depositor's remedy and covers all claims by a depositor against a banking institution, regardless of the theory upon

which suit is brought. §70A-4-406 requires that a depositor discover and report any unauthorized signature or endorsement or any alteration on an item prior to bringing a suit for, among other things, breach of contract. Tally v. American Security Bank, 35 UCC Rep. Serv. 215 (D.C. Cir. 1982); Brighton, Inc. v. Colonial First National Bank, 422 A.2d 433 (N.J. Super. A.D. 1980), aff'd 430 A.2d 902 (1981).

The term "item" in the statute is defined as "any instrument for the payment of money even though it is not negotiable...." §70A-4-104(g). Each withdrawal from Crossland occurred pursuant to an "item". That "item" was the "Contractors Authorization for Payment". (R. 79-94.) Three of the four questioned disbursements were based on such authorizations ("items") endorsed by J. N. Wilmore, while the fourth was signed by J. K. Bills apparently on behalf of Wilmore. (R. 85-91.) Crossland made those four disbursements without Butcher's knowledge or approval.

Section 70A-4-406 applies even when the Bank retains the "items" on file. See, e.g., Tally v. American Security Bank, supra.

The disbursement of funds from a depositor's account on the endorsement of persons other than the depositor and without the depositor's knowledge is precisely the situation meant to be addressed by §70A-4-406. The statute therefore applies.

CONCLUSION

It is hornbook law that a contract which is ambiguous or incomplete will be construed against the party which prepared it. See, e.g., 17 Am.Jur. Contracts §276 at 689-91. Here, Crossland prepared the Authorization behind which it seeks immunity from liability for the four disbursements it made without Butcher's knowledge or approval.

The tersely opaque terms of the Authorization do nothing more than remove the requirement that disbursement checks include Butcher's name as a co-payee. If Crossland intended the Authorization to destroy Butcher's right to receive advance notice of disbursements or to object to pay requests he believed to be unwarranted, its intent is not reflected within the four corners of the document. Since the document does not reflect a clear waiver of Butcher's right to know of and approve releases of funds from the account, parol evidence is necessary to ascertain the parties' intent.

Butcher does not seek to contradict the limited, terse terms of the Authorization. He merely contends that the Authorization does not, on its face, allow the disbursement of funds on the approval of persons other than himself. The four disbursements he contests were issued on the signature of other persons and without his knowledge. They were the only disbursements made without Butcher's signature on the "Contractors Authorization for Payment". (R. 79-94).

Butcher does not ask that the Authorization be interpreted selectively, merely that it be interpreted consistently with his understanding that he had retained the right to know of and object to disbursements.

The limitation period did not begin to run until after Butcher both discovered the unauthorized disbursements and made demand for reimbursement. Butcher's timely demand commenced the running of the statute. His suit is timely as to each of the four wrongful disbursements.

The case should be remanded for a trial on all the claims asserted in the Complaint, including the two which the District Court incorrectly ruled were barred by the statute of limitations.

Respectfully submitted this 20th day of March, 1990.

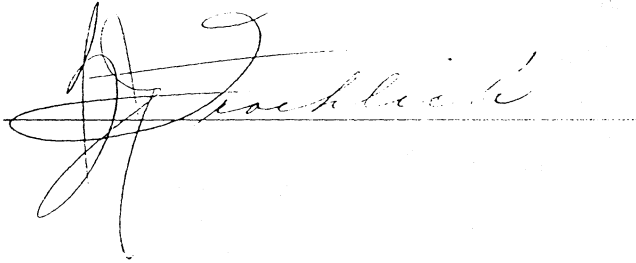


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CERTIFICATE OF MAILING

On the 20 day of March, 1990, I mailed four true and accurate copies of the foregoing REPLY BRIEF OF APPELLANTS, postage prepaid, to:

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A handwritten signature in cursive script, appearing to read "J. Randall Call", written over a horizontal line.

DGM/105/bjf