

1955

Continental Bank and Trust Co. v. R. W. Stewart : Appellant's Reply Brief

Utah Supreme Court

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In the Supreme Court
of the State of Utah

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CONTINENTAL BANK AND TRUST
COMPANY, a corporation,

Plaintiff and Respondent,

— vs. —

R. W. STEWART,

Defendant and Appellant.

Case No. 8378

APPELLANT'S REPLY BRIEF

J. GRANT IVERSON,

Attorney for Appellant

In the Supreme Court of the State of Utah

CONTINENTAL BANK AND TRUST
COMPANY, a corporation,

Plaintiff and Respondent,

— vs. —

R. W. STEWART,

Defendant and Appellant.

Case No. 8378

APPELLANT'S REPLY BRIEF

The respondent in its brief at page 8 states :

“First, let it be pointed out that perhaps the most trustworthy witness and most favorable witness for the respondent bank at the trial was not a person called to the stand, but the figure which Stewart concedes was the figure he agreed to pay ‘to banks’; that is, the figure, \$17,647.80.”

Since, as is pointed out in Appellant's Brief, the testimony of Cheney is of little or no weight, the witness the respondent must rely on is the one mentioned by it, the figure of \$17,647.80. Appellant desires to analyze the evidence as to the amounts which are involved in the figure of \$17,647.80.

Appellant accepts the amounts of principal and interest as calculated by respondent on the notes to Barnes Banking Company and Valley State Bank as set out at page 8 of Appellant's Brief as follows :

1. Barnes Banking Company		
first mortgage	\$4,970.50	
Interest	309.67	
Total		\$ 5,280.17
2. Barnes Banking Company		
second mortgage	\$6,000.00	
Interest	106.77	
Total		\$ 6,106.77
3. Barnes Banking Company		
mortgage on cows and		
land — sold to Valley		
State Bank, principal and		
interest		\$ 4,120.00
		<hr/>
TOTAL		\$15,506.94

In addition to the above notes, there was a note to Barnes Banking Company secured by a chattel mortgage on cows only, which note and chattel mortgage had been sold to Valley State Bank. Mr. Myrick testified that there was on November 30, 1953, a balance owing on that note of \$2860.00. (R. 103) Mr. Cheney testified that the amount owing on that note on the same date was between twenty-two hundred and twenty-three hundred dollars. (R. 19)

Respondent states in its brief at page 9 :

“It should be emphasized that Stewart insisted the obligation to Valley State Bank in the

amount of \$2860.00 (R. 103), and secured by a mortgage on cows only, was not part of the deal (R. 69). But if it was Stewart's intention to assume all indebtedness of the seller, Cheney, to the Barnes Bank and Valley State Bank, then the total amount which he would have assumed to pay would be \$18,366.94. No combination of figures introduced through the various witnesses, including officers of both Valley State Bank and Barnes Bank, totals anywhere near \$17,647.80, except the total of the two notes to Barnes Bank and the Promissory notes to Continental."

It is true that Stewart testified that he did not agree to pay the note secured by cows only, which had been assigned to Valley State Bank. However, as Mr. Bell, the real estate agent, testified, Cheney had slips of paper showing his obligations, which they totaled, and that he took the Valley State Bank and the Barnes Bank figures. (R. 31)

The figures which respondent uses to prove that the Barnes Bank notes and the Continental notes were used in arriving at the figure of \$17,647.80 are as follows:

Barnes Bank first mortgage	\$ 5,280.17
Barnes Bank second mortgage.....	6,106.77
Continental unsecured notes	6,280.00
Total	\$17,666.94

However, the amount owed by Cheney to Continental on November 30, 1953, was slightly less than \$5990.96. (R. 116) With the figure \$5990.96 as the amount owed to Continental, instead of \$6280.00, and adding to it the

amounts owing Barnes Banking Company, the total obligations owing to said two banks were as follows:

Barnes Bank first mortgage	\$ 5,280.17
Barnes Bank second mortgage.....	6,106.77
Continental Bank unsecured notes.....	5,990.96
Total	<u>\$17,377.90</u>

Thus it appears that the obligations owing to Barnes Bank and Continental Bank totaled \$17,377.90, instead of \$17,647.80.

The total of the secured obligations owing to Barnes Bank and Valley State Bank, using the figure that Cheney gave as to the amount which he stated was owing to Valley State Bank on the obligation secured by cows only, is as follows:

Barnes Bank first mortgage.....	\$ 5,280.17
Barnes Bank second mortgage.....	6,106.77
Barnes Bank mortgage on cows and land — sold to Valley State Bank.....	4,120.00
Barnes Bank mortgage on cows alone— sold to Valley State Bank (using lesser of two figures “between \$2200.00 and \$2300.00” given by Cheney)	2,200.00
Total	<u>\$17,706.94</u>

Thus it appears that the total secured obligations owed to Barnes Bank and Valley State Bank of \$17,706.94 is nearer to the figure of \$17,647.80, than is the figure \$17,377.90, the total of the amounts owed to Barnes Bank and Continental Bank as set forth above.

The amount which was certain and upon which there was no dispute was the total purchase price to be paid by Stewart, that is, the sum of \$23,647.80. To obtain clear title to the property purchased Stewart has paid secured obligations of \$15,506.94 and \$6000.00 to Cheney. If he is obliged to pay the amount respondent claims was due by Cheney on November 30, 1953, to Continental, that is, \$6280.00, the total cost of the farm to Stewart will be \$27,786.94, instead of \$23,647.80.

Another matter which appellant desires to comment upon is the discussion of the testimony of Cheney as found at pages 14 and 15 of Respondent's Brief. The respondent there contends that the evidence supports the proposition that Cheney and Stewart could have entered into an agreement that Continental as an unsecured creditor should be the beneficiary of the agreement, and quotes verbatim from the record to the effect that Cheney owed Continental because Continental had loaned him money for remodeling his home, and that "he would like to have them paid because they had been very white with him." He further testified that Mr. Steffensen of Continental had been to his home the day before and requested him to sign another mortgage, but that he told Steffensen that it would interfere with the sale of the property if he signed another mortgage, and that he was then making the sale, and that Mr. Stewart had told him that he would take care of the Bank. However, Cheney's actions do not accord with this testimony. As pointed out in appellant's first brief at page 28, the contract was signed on November 30, 1953, which would be within a

day or two of the alleged conversations with representatives of Continental. Yet on December 16, 1954, Continental sued Cheney on two notes and took judgments thereon on January 19, 1954. Again on January 4, 1954, Continental sued Cheney on two notes and took judgment thereon on January 29, 1954. It was not until some time later than January 29, 1954, while in court on a supplemental proceeding, that Cheney thought to tell Continental that Stewart had agreed to pay his notes to Continental.

At page 16 of Respondent's Brief, respondent states :

"It is conceded that the Continental Bank stood in no better shoes than did Cheney. But Cheney could have sued on the obligation of November 30, 1953, which admittedly was never modified, and, by showing what was shown in the trial court, including evidence that the banks referred to were Barnes Banking Company and Continental, he could have recovered \$23,670.80, less any amount Stewart had paid said banks and \$6000.00 represented by the Texas property which had since been conveyed to him. He could never have recovered the amount Stewart voluntarily paid to Valley State Bank, nor could Valley State Bank have enforced the contract in its behalf on the evidence presented."

Analyzing the concessions so made by Continental we get the following result :

Amount agreed to be paid by Stewart to	
Cheney	\$23,670.80
Less amounts paid by Stewart to Barnes	
Banking Company	11,387.94
Balance	<u>\$12,282.86</u>

Less amount represented by Texas property	6,000.00
Balance	\$ 6,282.86
Less amount paid by Stewart to Valley State Bank	4,120.00
Balance	\$ 2,162.86

Thus, it appears that Continental concedes that if Cheney were suing the maximum he could recover would be \$2162.86, instead of the judgment which was rendered in the lower court of \$7095.81, and as stated Continental concedes that it is in no better shoes than Cheney.

There is another matter upon which appellant desires to comment. Respondent in its brief at page 10 states:

“It is significant that the witness Bell, who closed the sale of the property, was not positive that the figures which he used in computing the \$17,647.80 did not include the Continental Bank obligation. On cross examination Bell admitted that the Continental Bank indebtedness could have been included in the tabulation of figures that he made. (R. 35)”

A careful reading of the testimony of Bell will make it clear that Bell's testimony was that Continental was mentioned in the conversation but because the obligation to Continental was not secured the obligation to Continental was not included in the calculation of \$17,647.80, and that he was interested only in the secured obligations. (R. 31) It is true on cross examination Bell was asked if it was *possible* that Continental's obligation might

have been included in the tabulation even though it was understood it was not a secured obligation, to which he answered, "it could have been." On re-direct examination Mr. Bell was asked whether, according to his best recollection the Continental obligation was included. He answered that it was not. (R. 35)

CONCLUSION

Appellant submits that the judgment as rendered in the lower court cannot be sustained.

Respectfully submitted,

J. GRANT IVERSON,
*Attorney for Defendant and
Appellant.*