1981

United American Life Insurance Company, A Corporation v. Zions First National Bank, A National Association, Franklin D. Johnson And Kathleen Johnson, His Wife; Glendon E. Johnson And Bobette Johnson, His Wife; Clifton I. Johnson; Johnson Land Company, A Partnership; And Bar 70 Ranches, Inc., A Nevada Corporation : Reply Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

UNITED AMERICAN LIFE INSURANCE COMPANY, a corporation, Plaintiff & Appellant, vs. ZIONS FIRST NATIONAL BANK, a national association, Defendant & Third-Party Respondent, FRANKLIN D. JOHNSON and KATHLEEN JOHNSON, his wife; GLENDON E. JOHNSON and BOBETTE JOHNSON, his wife; CLIFTON I. JOHNSON; JOHNSON LAND COMPANY, a partnership; and BAR 70 RANCHES, INC., a Nevada corporation, Third-Party & Additional Party Defendants.	No. 17187

REPLY BRIEF

Appeal from the Judgment of the
Seventh District Court of Grand County

Honorable Boyd Bunnell, Judge

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UNITED AMERICAN LIFE INSURANCE COMPANY, a corporation, Plaintiff & Appellant, vs. ZIONS FIRST NATIONAL BANK, a national association, Defendant & Third-Party Respondent, FRANKLIN D. JOHNSON and KATHLEEN JOHNSON, his wife; GLENDON E. JOHNSON and BOBETTE JOHNSON, his wife; CLIFTON I. JOHNSON; JOHNSON LAND COMPANY, a partnership; and BAR 70 RANCHES, INC., a Nevada corporation, Third-Party & Additional Party Defendants.	:	No. 17187

REPLY BRIEF

Respondent'a Brief raises two points of argument that were not discussed in Appellant's initial brief. These two points are material to the decision of this case but not dispositive. The argument set forth by the bank is not meritorious but does create an erroneous impression and may cause confusion if not adequately dealt with at this time.

POINT I

APPELLANT (PLAINTIFF) WAS NOT REQUIRED TO PLEAD THE WORD "ESTOPPEL" IN ITS COMPLAINT.

The position taken by Respondent bank at the time the case was argued at the conclusion of the evidence and alluded to by the lower Court in its comments after the case was argued was that Plaintiff was precluded from raising the doctrine of estoppel because it was not pled. The bank announced this defense only after all of the evidence was in and both sides had rested.

Plaintiff asserted in the lower Court, as on appeal, that the bank accepted the conditional check, cashed the same, and retained the proceeds and could not thereafter deny its duty to release the Trust Deed.

An elementary question of pleading is raised by the argument of the bank. That question is whether a Plaintiff must, in so many words, raise the doctrine of estoppel in the Complaint and even further, must a Plaintiff use the word "estoppel" in a Complaint or be precluded from asserting that doctrine at the time of trial? The argument of the bank seems to assume that when a Plaintiff sets forth grounds for relief in a Complaint that he must also anticipate denials by a Defendant and set forth affirmative defenses to those denials in the Complaint. This is the concept contended for by the bank and is fallacious and not in accord with the Utah Rules of Civil Procedure. Rule 8(a) provides:

"Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim or third-party claim shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or several different types may be demanded."

This rule does not require that a pleader anticipate a defense or denial and assert in the Complaint an affirmative defense to the unstated denial.

It is well that the Court have before it the claim stated by Plaintiff in its Complaint and Amended Complaint. (Record 80-81)(Record 2) The paragraphs are identical in both the Complaint and Amended Complaint.

"7. On and before January 2, 1974, defendant agreed with plaintiff's predecessors to release or reconvey its trust deed on the lands described above conditioned on the payment to it of the sum of $50,000 in partial payment of said trust deed note.

8. On January 2, 1974, plaintiff deposited with Title Insurance Agency of Utah the sum of $152,816.98 with written instructions concerning the disbursement of said sum. One term of the instruction provided that Title Insurance Agency of Utah should pay to the defendant the sum of $50,000 and to obtain therefore a reconveyance of the property described herein and in said trust deed.

9. In accordance with the instructions given by plaintiff, Title Insurance Agency of Utah prepared and delivered to defendant its certain check with voucher attached in the amount of $50,000. A copy of said check and voucher is attached hereto as Exhibit "C" and made a part hereof as though fully set forth.

10. Defendant received and negotiated the $50,000 check accepted the funds represented thereby; and still has in its possession the voucher portion of the check.

11. Although demand has been made, defendant refused and continues to refuse to execute and deliver its instrument of reconveyance or other release of the aforesaid trust deed in accordance with its agreement.

12. To assert its lien, although unlawful and contrary to its agreement with plaintiff's predecessors, defendant executed a document entitled "Notice of Default" dated March 20, 1978. A copy of said Notice of Default is attached hereto as Exhibit "D" and made a part hereof as though fully set forth. Said Notice of Default was recorded in the office of the Grand County Recorder, March 31, 1978, in Book 277, Page 435.

13. Although contrary to its agreement with Plaintiff's predecessors, Defendant has threatened to and will, unless enjoined and restrained, exervise the power of sale in said Trust Deed and after notice for publication offer the real property described herein for public sale to the highest bidder, all to the damage and detriment of plaintiff.

The foregoing paragraphs adequately and completely state a claim. Further, those paragraphs clearly give rise to estoppel. In substance, it is said that the bank made an agreement; accepted and retained the consideration therefore; has reneged on that agreement to the detriment of Plaintiff who changed its position in reliance thereon.

It is without diepute that all of the evidence introduced by the Plaintiff in this action materially related to the issues raised by the allegations of the Complaint and the legal theories associated therewith including estoppel. At trial, no objection was made by Respondent that the evidence went to a legal theory not pleaded.

In an analogous situation, our Court has dealt with affirmative defenses raised at trial but not pled by Defendnat. In the

case of Cheney v. Rucker, 381 P.2d 86 (Utah) the Court stated:

> "[12-15] Plaintiff also raises the procedural point that since defendants did not plead the subsequent agreement as an affirmative defense, they should not have been permitted to rely thereon. It is true, as plaintiff insists, that Rule 8(c) U.R.C.P., requires that affirmative defenses be pleaded. It is a good rule whose purpose is to have the issues to be tried clearly framed. But it is not the only rule in the book of Rules of Civil Procedure. They must all be look to in the light of their even more fundamental purpose of liberalizing both pleading ad procedure to the end that the parties are afforded the privilege of presenting whatever legitimate contentions they have pertaining to their dispute. What they are entitled to is notice of the issues raised and an opportunity to meet them. When this is accomplished, that is all that is required.[12] Our rules provide for liberality to allow examination into and settlement of all issues bearing upon the controversy, but safeguard the rights of the other party to have a reasonable time meet a new issue if he so requests. Rule 15(b) U.R.C.P., so states. It further allows for an amendment to conform to the proof after trial or even after judgment, and indicates that if the ends of justice so require: "Failure so to amend does not affect the result of the trial of these issues." This idea is conformed by Rule 54(c)(1), U.R.C.P.: "[E]very final judgment shall grant the relief to which the party in whose favor is rendered is entitled, even if the party has not demanded such relief in his pleadings."
>
> Although the plaintiff did object to evidence on the issue of subsequent agreement, when it was overruled, he made no request for a continuance nor did he make any representation to the court that he was taken by surprise or otherwise at a disadvantage in meeting that issue. The trial court not only did not abuse his discretion in allowing the issue to be raised and receiving the contract in evidence, but he would have failed the plain mandate of justice had he refused to do so.

12. See Taylor v. E.M. Royle Corporation, 1 Utah 2d 175, 264 P.2d 279.

See also the following cases:

Cellucci v. Sunn Oil Company, 320 NE2d 919 (Mass.) and Greer v. Chelewski, 76 NW 2nd 438 (Neb.), Palmer v. Crews Lumber, 519 P2d 269, (Okla.), Farley v. United Pacific Insurance Company, 525 P2d. 1003 (Ore.)

POINT II

THE STATUTE OF FRAUDS HAS NO APPLICATION TO THIS CASE.

Respondent argues in its brief that the action of Plaintiff is barred by the statute of frauds (25-5-1 U.C.A. 1953). Implied in that argument is the concept that a lien against real property can only be released by an instrument in writing because a mortgage or trust deed is a conveyance".

That is not the law in Utah. A mortgage or trust deed on real property can be released by parol agreement.

In the case of Bybee, et al. v. Stuart, 112 Utah 462, 189 P2d. 118, the Court stated:

> "Utah, along with most of the other western states, has long been recognized as a 'lien theory' state. Section 60,67,78. This court has repeatedly said that a mortgage in this state does not vest title in the mortgagee but merely created a lien in his favor. Thompson v. Cheeseman, 15 Utah 43, 48 P. 477; Donaldson v. Grant, 15 Utah 231, 49P. 779; Azzalia v. St. Claire, 23 Utah 401, 64 P. 1106; Carlquist v. Coltharp, 67 Utah 514, 248 P. 481 47 A.L.R. 765; In re Reynolds' Estate, 90 Utah 415, 62 P.2d 270. These cases are largely based on a statutory provision which appears in our 1943 Code at Sec. 104-57-7 and is as follows:
>
> A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale."

Utah has not passed directly on the issue of whether a release of a mortgage comes under the statute of fraud, but given the fact that Utah is a lien theory state, then the text and cases overwelmingly support the view that such lien can be released by parol.

> "A difference of opinion, based largely upon the theory of the nature of a mortgage, exists as to the application of the statute of frauds to an oral agreement to release or discharge a mortgage. In those jurisdictions where a mortgage is considered as amounting to a lien or security merely, it is generally held that a parol release or discharge of, or an agreement to release or discharge a mortgage and the discharge of the mortgagor from personal liability are not within the statute of frauds . . ."

72 A. Jur. 2nd, Statute of Frauds, Section 91.

See also: 32 ALR 874, Nye v. University Development Company, 179 SE2nd, 795 (N.C.); Rebold Lumber Company v. Scripture Company, 279 SW, 586 (Tex.) Kistler v. Latham, 244 SW, 985 (TEx.)

Additionally, there is ample support for the proposition that the check and voucher thereon represented a sufficient writing to satisfy the statute of frauds. Formality is not the standard in a case such as this. It is sufficient that the check identify the transaction, the parties, and the property. ABC Auto Parts v. Moran, Mass., 268 N.W. 2d 844 (1971). The requirement of a signature is fulfilled by the endorsement of the check by the party to be charged. Favor v. Joseph, 16 Ariz. App. 420, 494 P.2d 370 (1974). A description is adequate "if it identifies the property with such particularity that it cannot be confused with or claims to apply to any other property" and is no objection that it appears on another document, because a deficiency in one may

be cured by reference to the other. Thompson v. Giddings, 276 P.2d 299 at 233 (Okla., 1954).

The bank contends that it should not be bound by a machine stamped endorsement. Suffice it to say that in this day and age that is the way banks communicate, i.e., by machine.

CONCLUSION

The contention of the bank that "estoppel" must be stated in a pleading before it can be raised as an issue is not the law. The Complaint adequately informed the Defendant of the nature of the claim and the legal issues arising therefrom. Further, the bank raised no objection to any of the evidence going to the issue of estoppel. Quite clearly, the lower court was confused on this subject. It is obvious from his announced decision that confusion on that point as well as others pervaded his entire decision as announced from the bench.

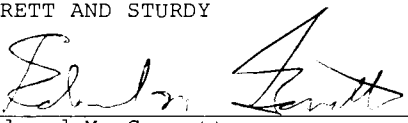
The statute of frauds has no application to this case because a mortgage or trust deed in this state can be released, or an agreement to release, may be entered into by parol. Additionally, the bank accepted the check and voucher which identified the transaction and this writing is sufficient to satisfy the statute.

One significant point in this case, entirely overlooked by Respondent, is the fact that Mr. Hintze admitted that he made a mistake by accepting the check. The lower court excused his conduct and, in effect, held that the bank was not bound by the

action of it's Senior Vice President. When ordinary people make a mistake, no such judicial beneficence is forthcoming.

It is respectfully submitted that the judgment of this lower court be reversed with direction to the lower court to decree the release of the Trust Deed.

GARRETT AND STURDY

By 
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