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Marian S. Goeltz v. Continental Bank and Trust Company : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

Peter W. Billings; Albert J. Colton; Fabian, Clendenin, Moffat & Mabey;

IN THE SUPREME COURT
of the
STATE OF UTAH

MARION S. GOELTZ,
Plaintiff and Respondent,

vs.

THE CONTINENTAL BANK AND TRUST COMPANY, a Utah banking corporation,
Defendant and Appellant.

Case No. 8408

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

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PETITION FOR REHEARING

Comes now defendant in the above entitled matter and respectfully petitions this court for a re-hearing of the decision heretofore entered on

July 27, 1956 on the following grounds and for the following reasons:

I. The court erred in determining that the trial court did not abuse its discretion in refusing to allow appellant bank to amend its complaint to place in issue the Statute of Limitations.

II. The court erred in determining that the new evidence of plaintiff did not substantially affect the question of the Statute of Limitations.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

STATEMENT OF POINTS

POINT I. THE COURT ERRED IN DETERMINING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ALLOW APPELLANT BANK TO AMEND ITS COMPAINT TO PLACE IN ISSUE THE STATUTE OF LIMITATIONS.

POINT II. THE COURT ERRED IN DETERMINING THAT THE NEW EVIDENCE OF PLAINTIFF DID NOT SUBSTANTIALLY AFFECT THE QUESTION OF THE STATUTE OF LIMITATIONS.

ARGUMENT

POINT I. THE COURT ERRED IN DETERMINING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ALLOW APPELLANT BANK TO AMEND ITS COMPAINT TO PLACE IN ISSUE THE STATUTE OF LIMITATIONS.

The court court ruled that justice did not require this amendment to the pleadings. It further asserted that "to defeat a claim by the bar of the

Statute of Limitations is not a determination of a case on its merits." It is submitted that such a statement implies that the Statute of Limitations lacks merit as a defense — that it has a taint of legalism and formality to be frowned upon. Such an attitude is contrary to the many pronouncements of this court and of courts generally, that the defense is a meritorious one performing a salutory purpose. (See for example, *Gibson* v. *Jensen*, 48 Utah 244, 158 P. 426). It is, therefore, a statement not supported by the rulings of this very court.

It is submitted that in frowning on a technical defense on one hand, this court has on the other hand used legal reasoning of the utmost technicality to deny the Bank relief.

Defendant bank from the outset of this action entered a plea a laches. The doctrine of laches was applied, as we all know, by the courts of equity for identical purposes as the Statute of Limitations was applied by courts of law. Indeed, courts of equity in applying the doctrine of laches often looked for guidance to the Statute of Limitations. The doctrine of laches is, in fact, more demanding than the Statute.

> "The defense of laches is different from the defense of the statute of limitations in this, that in order to bar a remedy because of laches there must appear, in addition to mere lapse of time, some circumstances from

> which the defendant or some other person may be prejudiced, or there must be such lapse of time that it may be reasonably supposed that such prejudice will occur if the remedy is allowed; whereas in the case of the statute of limitations there need be nothing more than mere lapse of time in order to constitute a bar." 34 Am. Jur. p. 15, Limitations of Action Section 15.

The Bank by seeking to amend to assert a less demanding test, certainly cannot be said to have prejudiced Plaintiff. It is clear that Plaintiff from the moment this case was at issue, knew the question of lapse of time would be raised in this case. She knew full well that the Bank contended that an unreasonable and improper period of time had elapsed between the pledge of the stock certificates and the commencement of her action.

This contention was never waived. The Bank merely sought to amend its pleadings to more properly classify its basic claim—(ie. to conform to a legal rather than equitable action.)

A layman would have understandable difficulty in understanding the historical distinction between courts of law and equity. He would be even more confused to find that while these two systems now operate through the same courts and judiciary, the powers and issues of the two systems are still kept distinct in certain matters. But to explain to a lay-

man how because the attorney raised the issue of an improper lapse of time, but chose to classify this issue by the language of the court of equity rather than law, and to find that this linguistic lapse precluded a determination of the issue on its merits, is impossible. It smacks of medieval sophistry and the esotericism of the common law forms of action, rather than the liberal common sense of our modern procedure.

In what way did such an amendment prejudice Plaintiff? It would not vary in any way the evidence offered. It did not even surprise Plaintiff, who already knew that the issue of lapse of time had been raised and would be urged.

Thus, we submit that justice does indeed require a resolution at this point on its merits.

POINT II. THE COURT ERRED IN DETERMINING THAT THE NEW EVIDENCE OF PLAINTIFF DID NOT SUBSTANTIALLY AFFECT THE QUESTION OF THE STATUTE OF LIMITATIONS.

This court in its opinion, appears to concede the possible applicability of the Statute of Limitations to this case. It asserts, however, that as "No new evidence was discovered during the trial which made this defense available where it had not been available under the facts known by the bank in the first instance", the trial court did not abuse its discretion

in failing to allow an amendment so that this issue could be decided on its merits.

It is earnestly contended that the statement does not reflect the record in this case and is inconsistent with the court's own decision.

In Plaintiff's deposition taken prior to trial and the filing of an answer, as this court admitted, was one where "Plaintiff indicated that she had endorsed the transfer clause on all three of the original certificates and left them with her broker." Assuming this to have been the case (and if the Plaintiff herself so stated, certainly the bank was justified in relying on the fact that the question of the genuiness of the endorsements was not an issue) there was no reason for Defendant to raise the question of the Statute of Limitations. If there were no forgery, then as the dissenting opinion indicated, the bank could rely on the protection of the Uniform Stock Transfer Act, and in addition it did raise the issue of estoppel.

However, at the trial, Plaintiff radically changed her testimony, asserting contrary to her previous testimony at the deposition, that all but one o fthe certificates had forged endorsements.

The significance of this change in testimony was readily apparent to all parties and to the trial

court as well. The trial was broken off in media res for a period of months while this evidence could be developed.

The significance of the change in evidence was shown by the steps taken by Plaintiff to establish this newly asserted fact. Expert testimony was procured and extensive argument made.

This court asserted "Nor did the surprise testimony have any bearing on the question of whether Plaintiff's claim was based on the Statute of Limitations." This court further stated that the amendment proposed by the bank was made "not because of new evidence which brought into operation that Statute but because the new evidence materially weakened another and entirely different defense of estoppel."

It is submitted that to the contrary, there was a strong correlation between the new surprise evidence and the defense of the Statute of Limitations. According to Mrs. Goeltz's earlier testimony, the bank was faced with a case where Mr. Goeltz pledged stock properly endorsed by his wife to which he had always had access. This raised questions of apparent authority and presented a case of a transfer quite proper on its face. Effective arguments as to estoppel could be made on these facts.

Forgery removes the case from the subtleties of apparent authority. We are now faced with patent theft and conversion. A wrong upon which the Statute of Limitations commenced to run was committed immediately upon the removal and pledge of the certificates. Gone was the fuzziness of proving conversion where, with an un-forged document, the existence of apparent authority was strongly probable. In its place was a clearly defined wrong committed at a clearly defined time.

While appellants do not dispute the assertion of this court that the determination of forgery would have a bearing in weakening Appellant's arguments as to estoppel, it strongly urges that there is nothing incompatible between this and the fact that this new evidence strongly reinforces the bank's position as to unreasonable lapse of time.

CONCLUSION

It is respectfully submitted that a rehearing should be granted and that the decree of the trial court be reversed and that defendant and appellant be allowed to amend its pleadings so that the question of the Statute of Limitations might be decided on its merits.

Respectfully submitted,

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