

1956

The Continental Bank and Trust Co. v. David H. Bybee et al : Brief of Respondent

Utah Supreme Court

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David H. Bybee; Attorney for Appellants;

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IN THE SUPREME COURT OF
THE STATE OF UTAH

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THE CONTINENTAL BANK AND
TRUST COMPANY, a Utah Banking
Corporation,

Plaintiff

-vs-

DAVID H. BYBEE and
ERDA M. BYBEE,

Defendants
and
Appellants

CASE No. 8500

-vs-

H. ADAMS CARPET COMPANY,

3rd Party Defendants
and Respondents

FILED
JUN 1 - 1951

Clerk Supreme Court, Utah

BRIEF OF APPELLANTS

DAVID H. BYBEE

Attorney for Appellants

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STATEMENT OF FACTS

Action was brought in the lower court by the Plaintiff as holder in due course, and without recourse, of a Promissory Note and Contract signed by the Defendants and Appellants and made payable to the third party Defendants and Respondent., in the amount and according to their terms.

Appellants admitted liability upon the note and contract, but alleged that Respondent had agreed to pay the obligation or at least to hold the Defendants harmless upon the obligation. The Respondents defended upon the ground that the document wherein the third party Defendants had agreed to save Appellants harmless was obtained by fraud.

Testimony was presented by the Appellants, solely for the purpose of negating the allegations of fraud. No finding of fraud was made by Trial Court.

The Lower Court dismissed the third party complaint upon the grounds that the Respondent did not understand the meaning of the word "obligation", as used in the instrument signed by Appellant and Respondent.

It is from the Court's judgment dismissing the third party complaint that Appellants now appeal.

STATEMENT OF POINTS

1. The court erred in ruling that a person taking part in a bilateral contract is entitled to enforce his individual standard of meaning to the contract.

ARGUMENT

1. The trial court erred in ruling that a person taking part in a bilateral contract is entitled to enforce his individual standards of meaning to the contract.

When a person takes part in a bilateral act, for example, a transaction in which other persons share, he must accept a common standard. He cannot claim to enforce his individual standard of meaning. Quoted from Wigmore on Evidence, Volume 9, Page 216-217, Paragraph 2466.

12, Amer. Juris. Title: Contracts, page 751, Paragraph 229, Necessity of Interpretation: Plain Language. "Words are to receive their plain and literal meaning even though the intention of the party drawing the contract may have been different from that expressed. It is said that the agreement of the parties is to be ascertained by the plain language used by them, no matter what the intentions may have been. Presumptively, the intent of the parties to a

contract is expressed by the natural and ordinary meaning of their language referable to it, and such meaning cannot be perverted or destroyed by the Courts through construction".

This is an elementary and universal rule, and it would appear redundant to cite cases to support it. However, the following cases from our own jurisdiction are cited for this purpose.

"Intent of parties to clear an unambiguous contract must be determined from the language thereof". Middleton-vs-Evans, 45 Pac. 2d. 570-86 Utah, 396.

"Where a writing is clear and plain on its face and not ambiguous or doubtful, there is no room for construction, but resort must be had to the language employed in determining the meaning or intention of the writing". Richlands Irrigation Company, -vs- Westview Irrigation Company, 80 Pac. 2d. 458, 96 Utah 403.

CONCLUSION

For the foregoing reasons, the lower courts order dismissing the third party complaint should be reversed.

Respectfully submitted,

DAVID H. BYBEE

Attorney for Appellants

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

THE CONTINENTAL BANK
AND TRUST COMPANY, a
Utah banking corporation,

JUN 20 1956

Clerk, Supreme Court, Utah

vs.

DAVID H. BYBEE and VERDA
M BYBEE,

Defendants and Appellants,

Case No. 8500

vs.

W. H. ADAMS CARPET
COMPANY,

*Third Party Defendants
and Respondents.*

BRIEF OF RESPONDENT

ALBERT J. COLTON of
FABIAN, CLENDENIN,
MOFFAT & MABEY

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IN THE SUPREME COURT
of the
STATE OF UTAH

THE CONTINENTAL BANK
AND TRUST COMPANY, a
Utah banking corporation,
Plaintiff,

vs.

DAVID H. BYBEE and VERDA
M. BYBEE,
Defendants and Appellants,

vs.

W. H. ADAMS CARPET
COMPANY,
*Third Party Defendants
and Respondents.*

Case No. 8500

BRIEF OF RESPONDENT

STATEMENT OF FACTS

It is submitted that the inadequacy of appellant's statement of facts makes a restatement necessary.

Respondent operates a carpet business. In February of 1955, it entered into an agreement with appellants to sell and install in their home carpeting of a certain designated type. The agreed

purchase price was \$607.00. Appellant paid \$177.00 in cash and for the balance of \$430.00 signed a promissory note with respondent as payee, which note included interest. Respondent discounted this note to The Continental Bank and Trust Company and the parties stipulated that the Bank took the note as a holder in due course. Appellants knew of this transfer and made one payment to the bank of \$74.86 (R.p. 55), leaving a balance unpaid on the note of \$374.30.

Subsequently, appellant became dissatisfied with the carpeting which was installed. They claimed that it had an unsightly seam along one wall and that they had ordered wall to wall carpeting without seams. Several visits were made to appellant's home by agents of the respondent, in an attempt to adjust the matter. These negotiations included, according to the testimony of respondent's manager, the sending to appellant's home of a crew of men who reburled the carpet (R. p. 38) and later an offer to take back the carpet and refund appellant's money. (R. p. 43) Finally, the parties thought they had reached a settlement. On May 18, 1955, respondent's agent, Thompson, took over to appellant David H. Bybee the check for \$100.00. It was Thompson's testimony that he understood the agreement of settlement to be that respondent was to pay appellant \$100.00 which would be a full

adjustment of the defect in the carpet and that appellant would keep the carpet and pay off the outstanding promissory note to the Bank. (R.p. 44; p. 54)

Appellant David H. Bybee is a practicing Attorney. When Thompson came to his office with the check Bybee told him he had drawn up a paper which set forth their understanding and asked Thompson to sign. Thompson testified that he glanced over it, signed and handed Bybee the check. (R. p. 45) The agreement reads as follows:

“Agreement”

“THIS AGREEMENT made and entered into by and between W. H. ADAMS & SONS of Salt Lake County, Utah, and DAVID H. BYBEE of Davis County, Utah.

“WITNESSETH:

“THAT WHEREAS, DAVID H. BYBEE has heretofore purchased a carpet from W. H. ADAMS & SONS which carpet has heretofore been installed and placed in the living room of the home of Mr. and Mrs. David H. Bybee at 6885 Orchard Drive, Bountiful, Utah, and a contract for the payment of the unpaid purchase price has been entered into; “AND WHEREAS, he is dissatisfied with said carpet.

“AND WHEREAS, W. H. ADAMS & SONS are desirous of making an amicable settlement: IT IS MUTUALLY AGREED:

1. That W. H. ADAMS & SONS will pay to DAVID H. BYBEE the sum of One Hundred (\$100.00) Dollars.
2. Will give DAVID H. BYBEE a Bill of Sale for the carpet showing complete payment and vesting the title of the property in DAVID H. BYBEE.
3. Will cancel any and all evidences of any indebtedness by DAVID H. BYBEE to the W. H. ADAMS & SONS, their assignees, or transferees, or agents.
4. DAVID H. BYBEE will give and does by these presents give to W. H. ADAMS & SONS a complete release from any and all liability, damages, actions or any claim that he may have against W. H. ADAMS & SONS by reason of having purchased the aforesaid carpet.

DATED May 18, 1955.

W. H. ADAMS & SONS
By /s/ C. M. Thompson
/s/ David H. Bybee
DAVID H. BYBEE"

Thompson had written on the back of the check he handed Bybee the following:

"In full settlement on adjustment on carpet installed in the Bybee residence."

Bybee subsequently endorsed the check below this writing.

Later, Bybee refused to make payment to the Bank and the Bank commenced action on the promissory note. Appellant filed a general denial in that action and filed a third party complaint against respondent alleging the execution of an agreement "that third party defendant would assume and pay the obligation to The Continental Bank and Trust Company herein sued upon and would hold the defendant harmless from any action by any person based upon the said promissory note." (R. p. 3) The Bybees alleged that respondent maliciously refused to make payment as agreed and claimed relief from the bank's claim, for attorney's fees and for punitive damages.

Judgment was given the Bank against the Bybees which judgment has been satisfied. After testimony, the trial court found that there was no provision in the written agreement, (Ex. 3) or was there any agreement which provided that the carpet company would assume the promissory note then held by the bank or that the carpet company would hold the Bybees harmless from any damages based on this note.

STATEMENT OF POINTS

POINT I. THE AGREEMENT OF MAY 18, 1955 IS NOT CLEAR, PLAIN AND UNAMBIGUOUS.

POINT II. THE TRIAL COURT'S INTERPRETA-

TION OF THE AGREEMENT OF THE PARTIES WAS REASONABLE.

- (a) It is not the only writing.
- (b) The respondent's interpretation leads to an unreasonable result.
- (c) Appellant did not request return of the promissory note.
- (d) Paragraphs 3 and 4 of the agreement of May 18 are merely mutual releases.
- (e) Findings of fact of the trial court shall be set aside only if clearly against the weight of the evidence.
- (f) The absence of an express finding as to fraud does not prejudice appellant.

ARGUMENT

POINT I. THE AGREEMENT OF MAY 18, 1955 IS NOT CLEAR, PLAIN AND UNAMBIGUOUS.

The Bybees contend that in signing the agreement of May 18, 1955, Adams Carpet Company agreed not only to let them keep the carpet, but to pay the Bybees \$100.00 and to relieve them of their obligation on the promissory note. In other words, the Bybees contend that Adams Carpet company agreed that because of a seam along the wall, that they would reduce a \$607.00 sale to \$77.00.

Appellants, in their laconic brief, rely upon the rule that a court must resort to the language of the

instrument alone in determining the meaning of the parties. Of course, as this court has held, this rule applies only "where a writing is clear and plain on its face and not ambiguous or doubtful." *Richards Irr. Co. vs. Westview Co.* (1938) 96 Utah, 403, 80 P. 2d, 458. The instant case does not contain facts which bring it within this rule.

To begin with, the agreement drafted by Bybee was not the only writing executed on that date by the parties. Bybee endorsed the \$100.00 check, which contained an unconditional release above his signature. There was no reference there to the assumption of a debt to a third party. This writing is completely consistent with the carpet company's interpretation of their agreement. Even if another writing conflicted with this one, would there be any reason why the agreement set forth on the check is not just as effective? In that event, we would have conflicting documents and the court would have to look to the underlying facts to determine the true agreements of the parties.

But it is submitted that the recitation on the check and the more elaborate agreement drafted by Bybee are not inconsistent. Neither contains an agreement to assume a promissory note. The Bybees contend that the carpet company agreed with them in writing that the carpet company would "assume and pay the obligation to The Continental Bank and

Trust Company herein sued upon and would hold the defendant harmless from any action from any person, based upon the said promissory note.” (3rd Party complaint, R. p. 3.)

The only part of the agreement drafted by Bybee, which might conceivably refer to the agreement alleged in the Bybees’ complaint is paragraph 3, which provides:

“It is mutually agreed: * * *

3. Will cancel any and all evidences of any indebtedness by David H. Bybee to the W. H. Adams and Sons, their assigns, or transferees or agents.”

The ambiguity of paragraph 3 is most clearly shown by the fact that the Bybees, in attempting to re-state what they claim the paragraph to mean, had to use completely different and more concise language (we refer to Mr. Bybee’s letter of June 8, 1955, ex. 7, and paragraph II of the Third party complaint (R. p. 3)). These show that Bybee could clearly say what he meant when he wanted to do so.

The trial court found that this sentence did not refer to the promissory note held by The Continental Bank (R. p. 59-60). A word-by-word analysis shows the propriety of this decision.

The Bybee-drafted instrument provides that the parties will “cancel any and all evidence of any in-

debtedness.” The word “cancel” means to physically annul or destroy. The word has been so interpreted by several courts, including this one. Thus, in *Clegg v. Schvaneveldt*, (1932), 79 Utah 195 8 P. 2d 620, 621 this court said:

“The word ‘cancel’ means to make void or invalid. It is synonymous with annul, abolish, reject, abrogate, repeal, make void, do away with, etc.”

A New York court has held that there can be no such thing as a “cancellation” of an instrument either as a physical fact or as a legal inference unless the instrument itself is in some form defaced or obliterated. In *Re Akers Will* (1902), 77 N.Y. Supp. 643, 646. The Supreme Court of Michigan has held that to determine whether a note is cancelled within the meaning of the Uniform Negotiable Instruments law, the court shall look to the act of destruction of the instrument, and not the intent of the parties to make a gift or release. *McDonald v. Loomis*, (1925), 233 Mich. 174, 206 N. W. 348. To “cancel” implies therefor, a thing within the control of the person cancelling.

One cannot physically deal with something he does not have in his possession or control. The promissory note was held by the Continental Bank. The carpet company could not have cancelled it if it had wished.

Even more clearly, the word “cancel” does not imply the taking of *affirmative* action to hold the Bybees harmless from subsequent litigation.

“Evidence of indebtedness” is a legal term of art meant to cover all sorts of obligations. There was no need of such “legalese” in this case. There was only one obligation outstanding—the promissory note held by The Continental Bank. If the drafter meant to refer to this, he should have said so. In the light of the circumstances, it is not unreasonable to assume a desire on the part of the drafter to obfuscate or to make less obvious.

Particularly in light of the general rule interpreting a contract against the person who drew it, there can be little question but that the writings of the parties were not clear and unambiguous.

POINT II. THE TRIAL COURT’S INTERPRETATION OF THE AGREEMENT OF THE PARTIES WAS REASONABLE.

Where the wording of a contract is not clear and unambiguous, the trial court may look at all the facts and circumstances to determine the intent of the parties.

(a) *It is not the only writing.*

As pointed out above, the agreement drafted by Bybee, is of course, not the only writing involved in

this case. Bybee endorsed the \$100.00 check which contained a clause a clear release with no provision for any assumption of any indebtedness to a third party. The recitation above Bybee's endorsement is consistent with the trial court's interpretation of the parties of May 18, 1955. To accept the Bybee interpretation would mean to ignore this recitation.

(b) *The respondent's interpretation leads to an unreasonable result.*

To assume that the carpet company, because of a minor flaw in installation would all but give the carpet away, is to assume the ridiculous. The Bybees claim breach of warranty. Their possible remedies under the law are to seek either (1) diminution in price, (2) damages, if consequential, or (3) rescission, by returning the article. (Sec. 60-5-7 UCA '53)

There is no evidence of consequential damage. Appellant did not seek to rescind. To assume that a carpet company would concede that a \$607.00 carpet job has been reduced in value to \$77.00 because of a seam which showed, is to put little faith in the perennial optimism of the American salesman.

(c) *Appellant did not request return of the promissory note.*

Mr. Bybee is a lawyer who knows that the most effective way to provide for payment of a promis-

sory note by Adams, would have been simply to require Adams to deliver the original note to him. Not only was no such provision made, but the agreement makes no reference at all to the disposition of the promissory note.

(d) *Paragraphs 3 and 4 of the agreement of May 18, are merely mutual releases.*

Respondent's manager Thompson was a layman. He hurriedly read through the proposed agreement. A cursory examination of paragraphs 3 and 4 would lead one untrained in verbal subtlety to assume that it was merely a mutual release of rights by both parties against each other. That Thompson understood it to be so is shown by his testimony and the writing on his check. Also, it is the most obvious interpretation to be given.

(e) *Findings of fact of the Trial Court shall be set aside only if clearly against the weight of the evidence.*

The trial court heard all of the testimony and observed the witnesses and parties. On the basis of all of the evidence, the court ruled as to the intent of the parties and the meaning of their agreements. Even if another court may have decided otherwise on the same evidence, there is sufficient evidence in the record to support the trial court's finding. As the record clearly can support such a finding, it

cannot be set aside on appeal. *Perry v. McConkie*, (1953) 1 Utah 2d 189, 264 P. 2d 852; *Morley v. Willden*, et al., (1951, 120 Utah 423, 235 P. 2d 500.

(f) *The absence of an express finding as to fraud does not prejudice appellant.*

Appellant mentions that the trial court made no finding as to fraud. The carpet company, in addition to denying that there was an agreement between the parties as alleged by appellant, also alleged affirmatively that if there were such a writing, it was procured and signed as a result of fraud and mistake. The absence of such a finding by the trial court is an assumed denial of such a fact, and as it clearly does not prejudice appellant, has no bearing on this appeal.

CONCLUSION

It is submitted that the several writings of the parties made on May 18, 1955, are by no means clear and unambiguous on their face. In the light of all the facts, the finding of the trial court as to the intent of the parties is reasonable.

Respectfully submitted,

FABIAN, CLENDENIN, MOFFAT & MABEY
ALBERT J. COLTON
Attorneys for Respondent
W. H. Adams Carpet Company