1982

American Manufacturers Mutual v. Resort Campers, Ltd. Et al : Brief of Defendants

Utah Supreme Court

David K. Smith; Attorney for Defendant and Appellants;
R. Scott Williams; Strong & Hanni; Attorneys for Plaintiff and Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

AMERICAN MANUFACTURERS MUTUAL, Plaintiff, Respondent and Cross-Appellant, vs. RESORT CAMPERS LTD., DES TOWNSEND and GLEN HATCH, Defendants and Cross-Respondents, and ROGER T. RUSSELL, TOM VOGEL, LEWIS TED COWLEY, DALE CHRISTIANSEN, JOHN W. WHITELY, GWYN D. DAVIDSON, and UNITED BANK, a Utah corporation, Defendants and Appellants.	)	Case Nos. 18262 and 18263

BRIEF OF DEFENDANTS RESORT CAMPERS LTD., DES TOWNSEND AND GLEN HATCH

Appeal from Declaratory Judgment of the Third Judicial District Court of Salt lake County, Honorable Dean E. Conder, Presiding

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STATEMENT OF THE NATURE OF THE CASE

This proceeding was brought by plaintiff, American Manufacturers Mutual, the issuer of a once-renewed motor vehicle dealer's bond, against defendants, whom had made separate claims in separate actions against plaintiff, to obtain a declaratory judgment that plaintiff's total limit of liability to all claimants for all losses was limited to $20,000 and that plaintiff could extinguish its liability by depositing said sum with the Clerk of the Court.

DISPOSITION IN LOWER COURT

Plaintiff American Manufacturers Mutual, hereinafter the

"bond company", by motion, successfully moved the trial in the instant declaratory judgment action into the trial setting which had been scheduled for the action filed earlier by defendants Des Townsend and Glen Hatch, the first of the defendants to obtain a trial setting, and obtained deferral of the Townsend-Hatch setting.

In this action, tried by the Honorable Dean E. Conder on December 16 and 17, 1981, the lower court entered a declaratory judgment that the liability of the bond company was $20,000 as to all claims and losses arising between October 31, 1978 and October 31, 1979, the period covered by the first bond premium, and $20,000 as to all claims and losses arising between October 31, 1979 and April 13, 1980, the period covered by the payment of a second bond premium to the effective date the bond was withdrawn.

The court further ordered all cases filed by defendants consolidated so defendants' various claims could be determined and equitable proration of the bond amount could be made by the court. (R-237)

RELIEF SOUGHT ON APPEAL

Defendants-Appellants Dale Christiansen and John W. Whiteley (represented by David K. Smith) and Roger T. Russell and Lewis Ted Cowley (represented by David M. Swope) joined on appeal by defendant United Bank (represented by Carl Kingston) and defendant-cross appellant Gwyn D. Davidson (represented by Bruce Findlay) all seek a judgment in this court that the bond company is liable to each separate claimant up to a maximum of $20,000 per claim.

Plaintiff-cross-appellant bond company seeks a judgment in this court that its liability is limited to a maximum of $20,000 regardless of the number of claimants, amount of claims or times the losses occurred or number of premiums paid.

Defendants-cross-respondents Resort Campers Ltd., Des Townsend and Glen Hatch agree with defendants that this court should determine that the liability of the bond company is $20,000 per claimant and, in addition, that if this court does not so rule that the declaratory judgment of the lower court that the liability of the bond company is $20,000 per paid premium period should be affirmed.

This brief, filed by defendants Resort Campers Ltd., Des Townsend and Glen Hatch, responds to the bond company's brief and its cross appeal on the issue of whether the liability of the bond company is at least $20,000 per paid premium period.

STATEMENT OF FACTS

Defendants Resort Campers Ltd., Des Townsend and Glen Hatch agree that some of the essential facts are set forth in the bond company's brief. However, that statement of facts is so interlaced with misleading, selfserving bond company contentions not found as facts by the trial court it is necessary to summarize other relevant evidence.

A. Origin of the Subject Bond Form.

Bond company agent Robert L. Blackham testified it was customary to use the dealer bond form which is the subject of this case, because the same had evidently been approved by the Attorney General. (R-320) The director of the Motor Vehicle Business

Administration, John A. Burt, testified that the Motor Vehicle Business Administration would accept whatever bond form was approved by the Attorney General (R-359), and that any language changes of any sort, both those decreasing and those increasing the scope of the bond, would be rejected unless and until the same had been approved by the Attorney General. (R-372, 381) Former Attorney General Robert Hansen testified that he served as Attorney General from January 1977 to January 1981 (R-438), and that he served in the office of the attorney general eight years before that time. (R-445). He had no specific recollection as to whether the bond form in question had been presented for evaluation or approval during his tenure in office (R-443) and could only say that, in general, the Attorney General's office would review forms to see if they complied with the particular statute in question, but that in less than one-half of one percent of the cases would the Attorney General's office do any drafting. (R-440) He indicated that it would be the general policy of the Attorney General's office to approve forms that would increase public protection beyond that required by a specific statute. (R-441)

No conversations at all took place, much less any discussion of "intent of the parties" as to what the bond meant when Dick Noren and/or his wife Lavonne Noren applied for the bond. (R-295) Both the bond company and the Motor Vehicle Business Administration were permitted to partly testify and partly agree, over objection, with bond counsel's interpretation that the premiums only buy $20,000 in protection and that the statute limits bond coverage to only

$20,000, regardless of the number of claims or claimants or when claims arise. (R-344,371)

B. Bond Company Practice

About 1200 motor vehicle dealer bonds of the kind in question are issued or renewed for Utah motor vehicle dealers annually. (R-427) The premiums charged for these bonds are apparently determined on the basis of rates fixed by the Surety Association of America, a "rate fixing organization." (R-332, 344) The premium is $20.00 per $1,000 in bond coverage per annum. (R-343) The same premium is charged regardless of dealer volume. (R-388) [This results in annual premium revenue from Utah bonded dealers of approximately $480,000.00.]

No bond claims losses are anticipated by the bonding companies who issue motor vehicle dealer bonds. (R-332, 344, 396)

It is bond company practice to investigate dealer bond applicants and to require financial statements and information concerning the applicant's business reputation. (R-394, 411-12) This "underwriting file" is updated annually when renewal premiums are billed. (R-387, 404-05, 408, 415-16)

The bond company could have refused Noren's bond application had it determined him to be an unacceptable risk. (R-394) If financial information shows insufficient liquid assets or insufficient net worth or an unfavorable Dun & Bradstreet report, the bond does not issue or is not renewed or is cancelled because the bond company does not accept any probability of loss. (R-338, 411-12)

N.E.2d 617, 673 (Mass. 1973), a case cited by defendants in support of the Dobbs rule, in which the court actually declined to apply Dobbs. The court reasoned in part as follows:

> It might be appropriate for us to reconsider our present rule in the light of the New Jersey rule as laid down in the case of Ellsworth Dobbs, Inc. v. Johnson, supra, if we had before us a case involving a "substantial inequity of bargaining power, position or advantage between the broker and the other party involved." Perhaps such a case might be one involving a broker and a person selling his residence once in his lifetime and where the contracting buyer accepted by the seller is in fact not ready, able and willing to complete the purchase on the agreed date for conveyance.

291 N.E.2d at 624. The Dobbs ruling conflicts with F.M.A. Financial Corp. v. Build, Inc., 17 Utah 2d 80, 404 P.2d 670 (1965) discussed above, and plaintiff respectfully contends that Dobbs is not the law in Utah.

It is clear from the decisions of the New Jersey courts that the Dobbs decision would not be applied by them in this case as proposed by defendants. In Kennedy v. Roach, 122 N.J. Super. 361, 300 A.2d 570 (1973), sellers obtained a buyer for their motel through the broker, Kennedy, who agreed to take $3,000 of his commission down and the balance at a later time. Like the case at bar, the buyer paid a down payment and went into possession, and then defaulted, and the buyer retook possession and retained the amount paid. The estate of the broker sued for the balance of the brokerage fees, and the defendants contended the commission was contingent upon the buyer's payment of further

commissions. The court said, in ordering judgment to enter as a matter of law for the broker and in reversing the trial court, that--

> We are, of course, well aware of the landmark holding of Ellsworth Dobbs Inc. v. Johnson . . .
>
> However, Dobbs did not deal with a situation such as is here involved . . .
>
> Under the circumstances of this case we find no "inequality of bargaining power, position or advantage" between the broker and the seller, nor any inequity or unconscionability which militates against the entitlement of plaintiff to his $9,000 commission as of the time when the buyer went into possession and took over the operation of the motel, albeit payment of $6,000 thereof was to be deferred to September 15, 1970.

Kennedy v. Roach, supra, at 571-72. Similarly, in the case at bar the parties dealt with one another voluntarily and in a commercial setting; the defendants had purchased the propety earlier in a transaction in which they dealt with the plaintiff. Plaintiff respectfully suggests, therefore, that the Dobbs rule would not be applied to this case even if it were subject to New Jersey law.

Ferrara v. Firsching, 533 P.2d 1351 (Nev. 1975) does not aid defendants; like Real Estate Exchange v. Kingston, 18 Utah 2d 254, 420 P.2d 117 (1966), it involved an explicit agreement that broker's commission was to be paid from purchase money as it was received.

Point IV

The trial court properly found no material issue of fact in defendants claim that they did not sign as individuals

Defendants advance the proposition that the note is not integrated, and that therefore they are entitled to present extrinsic evidence to show that they did not sign it as individuals. As noted above, §70A-3-403 provides presumptively for liability of a representative on a note like the one in suit, and therefore it would seem that such evidence would not raise a material issue of fact. Defendants argue as also noted above that other documents involved in the sale of the Sandy Ranch seem in their view to support their claim that they did not sign as individuals. This argument cannot stand, however, since the note is plain. The rule is provided in 11 Am. Jur. 2d, Bills and Notes §726 that--

> If an obligor understands, or should understand, the language and effect of a note when he signs it, and executes it willingly, without being seduced by the fraud of the obligee, he ought not to be, and he is never, permitted to dispute or deny its obligation, according to its legal and rational construction.

Ignorance of the contents of the agreement is similarly not a basis for attacking its clear meaning. In Garff Realty Co. v. Better Building, Inc., 120 Utah 344, 234 P.2d 842 (1951), the defendant's attorney had proposed a question to an officer of defendant whether the officer knew certain terms of the agreement

involved in suit when it was signed. Objection to this question was sustained, and the defense of the defendant that the officer was not aware of all the terms of the contract and "it was not the intention of the defendant to become bound for the payment of any commission," was held to be insufficient to state a defense. The court adopted the following reasoning:

> To permit a party, when sued on a written contract, to admit that he signed it but to deny that it expresses the agreement he made or to allow him to admit that he signed it but did not read it or know its stipulations would absolutely destroy the value of all contracts.

234 P.2d at 844. The court observed further that there were no issues of fraud or mutual mistake raised, as none have been in the case at bar, (Minute Entry, Record at 100), and therefore the court sustained a directed verdict.

The Federal District Court for the District of Utah has granted summary judgment over similar objections in E.F. Hutton and Co., Inc. v. Schank, 456 F. Supp. 507 (D. Utah 1976), where the plaintiff securities broker sought to enforce an arbitration clause in a contract between the securities broker and its customer, the customer claiming that its attention had been distracted from this clause by an inadequate presentation f the contract's meaning and that therefore the contract was invalid. The court observed that the mistake, if any had occurred, had been solely that of defendant and was not mutual, and that because the plaintiff's agent had informed defendant that the contract was for the good of plaintiff there had been no unilateral mistake either, and that the signature was genuine,

and therefore summary judgment should enter enforcing the arbitration clause.

The defense that the defendants had not signed the note in their individual capacities was not raised in the case at bar until after plaintiff's motion for summary judgment was on file and until after the plaintiff had taken the deposition of defendant Robert S. Nielson, relying in taking that deposition on the state of the pleadings as a guide to the scope of the issues in the suit. This claim was not alleged in the answer, nor was it based on any facts not in possession of the defendants at the time of filing the answer. In these circumstances the discretion of the court to deny defendants the right to raise this issue by amendment was properly exercised. See, Dupler vs. Yates, 20 Utah 2d 251, 351 P.2d 624 (1960)(liberality of rule permitting amendment to pleadings "not without limit"); Bradford v. Alvey & Sons, 621 P.2d 1240 (Utah, 1980)("Such an amendment [to conform pleadings to evidence] should be allowed by the court only when it will serve the purpose of the rule, which is to further the interests of justice . . .More importantly, there is nothing in the record, nor in the facts as viewed by the trial court, which would provide a basis upon which the defendants should be estopped . . .")

Thus the trial judge ruled correctly when he said--

> In this matter the court finds that there are no facts alleged by defendants from which the court could conclude that the note upon which plaintiff brings suit is unclear, ambiguous, or was procured by fraud, duress or undue influence. It is the further finding of this court that there are no facts in dispute relating to the genuineness of the document

> and the signatures being that of the parties who they represent. Accordingly the court finds that the note speaks for itself and that there is no basis to allow parole evidence to alter the face of the instrument . . .

(Record at 100)

Point V

There was no condition in the obligation of defendants to pay the note or of N-Bar to pay broker's fees

The most troubling thing about the claim of defendants that there is a condition in their obligation to pay under the note is that it is inconsistent with the documents produced by them as extrinsic evidence of the claimed condition. The brokerage contract provides for no extension of time or condition, the note is unconditional, the escrow agreement expresses no condition, and the other documents are relevant only to establish that plaintiff did in fact earn its commission by obtaining a binding contract of sale for N-Bar Corporation. Thus the claim that there was a condition appears to be more a belated and unilateral proposal from defendants designed to meet the exigencies of litigation that to describe fairly the state of the contract.

The cases proposed by defendants to support the proposition that they should be permitted to prove a condition are not persuasive on this issue. Ventures, Inc., v. Jones, 101 Idaho 837, 623 P.2d 145 (1981), for example, involved six promissory notes which were given as interim security and which were

replaced by a mortgage intended as permanent security. The court said--

> Based upon its findings showing the circumstances of the note transaction and the close involvement of all the parties concerned, the district court concluded that the notes had been given and received for the special purpose of interim security and were to serve only a additional security until substitute security could be provided in the form of a mortgage from appellant.

Id. at 150. The analogy of Ventures to the case at bar would be sound if for example the corporation seller, N-Bar Corporation, had paid plaintiff all its broker's fees and then plaintiff had brought suit upon the note. In such a situation the liability on the note would of course be extinguished. Here, however, N-Bar Corporation has not performed; it might be said on plaintiff's behalf that the contingency against which the note was obtained has indeed been realized and now plaintiff is seeking to obtain the broker's fees under the note, exactly what was intended when it obtained the individual signatures of the defendants. Furthermore, defendants have presented the extrinsic evidence they propose in opposition to summary judgment, as required by Rule 56, and a perusal of it shows that defendants seek not to prove that the mutually agreed purpose of the note was subject to a condition, but that they will now testify that their implicit and unrevealed intention at the time was in conflict with the plain legal meaning of the note, and that therefore they should be exonerated.

Another case cited by defendants, Aird Insurance Agency v. Zion's First National Bank, 612 P.2d 341 (Utah 1980) does not

support the relief they seek herein. The plaintiff Aird knew that Fitzen had a deposit at Zion's which had been pledged to Transamerica to secure a contractor's bond. This assignment was absolute in form, but was intended for security, and at the time of the events pertinent to the case, the bond had been satisfied by the completion of the contractor's project and Transamerica had concluded for its own internal purposes that it had no further claim upon the bank deposit. Nevertheless, Aird, which had a judgment against Fitzen, garnished Transamerica and obtained an assignment of the bank deposit, represented by a passbook. In the meantime, the defendant Zion's Bank had depleted the account to set off against against a debt owed to it by Fitzen, and Aird sued to compel the bank to reverse the setoff and give Aird the money which had originally been in the account

The court looked behind the exact wording of the assignment to the understanding of the parties, which was that the assignment would have no more force once the contract protected by the bond was satisfactorily completed. Under these facts the assignment was deemed to have expired and lost its force. The court permitted proof of these facts and made the following observation:

> Satisfaction of an obligation secured by a pledge terminates, as a matter of law, the pledgee's rights in the collateral. Such termination is inherent in the definition of a security interest. Transamerica's interest having terminated before Fitzen ever defaulted on his loan, defendant moved against funds in the account now solely owned by Fitzen, Transamerica merely holding the account passbook without right, which might be likened to a constructive trust.

Id. at 344. The point here is that in the case at bar defendant has not raised a material issue of fact supporting a defense of the type discussed in either Ventures or Aird; there is no evidence proffered of a mutual agreement that the note would be conditional or that defendants would not be individually liable, nor is there a showing of discharge of the underlying obligation, and thus there is nothing to overcome plaintiff's prima facie case on the note.

This mutuality of understanding is crucial to defendants' case and the lack of it is fatal. Therefore defendants obtain no assistance from FMA Financial Corp. v. Hansen Dairy, Inc., 617 P.2d 327 (Utah 1980), a case cited by them to support the claim that the note was conditional. FMA agreed to lease some equipment, including a silo for corn, to Hansen Dairy, which took the lease which the reservation that the silo had to be in place for the current year's harvest. The court said--

> Significantly, the court found that there was no contact directly between the plaintiff and the defendants, "but all of the dealings were done by or through the Levies." Thus, a key proposition to be borne in mind as bearing on all of the issues in this case is that Mr. Mayme, acting for the plaintiff, entrusted the handling of its interests in this transaction to Mr. Levie. Consequently, his knowledge in that regard should be imputed to it.

Id. at 329-330. Levie testified that he had understood the contract to require the silo to be in place for the current year, corroborating the testimony of Hansen Dairy, and the court then concluded that there had been an agreement that the lease would not go into effect if the silo was not installed in time, and

when it was not, the court released Hansen Dairy from the lease. The role of Levie as representative of FMA supplied the element of mutuality to the claim of Hansen Dairy that there was an agreement precedent to the lease, because through Levie the plaintiff FMA knew of and assented to the condition that the silo be furnished before the harvest began and also through Levie the plaintiff knew that the silo was not finished at the time the original lease was signed.

In the case at bar, however, the defendants make no showing of mutuality in their claim that the note was subject to a condition and they point to no facts which would establish that there was any agreement establishing a condition; their defense rests upon their unsupported assertion that there was such an intent in their mind. Plaintiff respectfully urges that this claim fails to overcome the prima facie case established on the note and that therefore the judgment should be affirmed.

CONCLUSION

This is not a case in which there is disagreement about what happened. After listening to his attorney take the deposition of Kathleen Bagley, the defendant Robert S. Nielson gave the following answer:

> Q: (Mr. Findlay) You were here at the deposition, during Mrs. Bagley's deposition?
>
> A: (Mr. Nielson) I did.

Q: Are there any points in her deposition that come to mind that you differ with her?

A: No.

(Nielson deposition at 3) What is at issue in the within matter is the application of law to the facts presented.

Plaintiff submits that the law is as follows: 1) the Uniform Commercial Code requires that a signer of a negotiable instrument is liable individually upon an instrument which does not bear the name of a person whom the signer allegedly represents as an agent; 2) Under the contract for brokerage in this case, the broker's fee was earned upon the sale, and the acceptance of the buyer by the seller waived any question as to his ability, and 3) the law does not imply a condition that a buyer will finish all payment of installments on a purchase contract before the seller is required to pay broker's fees; this requirement would force brokers to insist upon payment in full at closing in every case, and would be to the disadvantage of sellers in general.

In view of the record and the foregoing propositions of law plaintiff urges the court to conclude that the court below properly entered summary judgment and to affirm.

Respectfully submitted,

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SERVED two copies of the foregoing brief by mail this 8 day of September, 1982, upon:

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Bruce Findlay

$ 36,000.00 Torrey, Utah, December 27 19 78

For value received, I promise to pay to the order of Bushnell Real Estate, Inc.

at 183 East Center Street, P. O. Box 16, Provo, Utah 84601, the sum of

THIRTY SIX THOUSAND AND NO/100 - DOLLARS,

payable in installments as follows, to-wit:

$26,000.00 January 20, 1979;

$10,000.00 December 15, 1979

with interest thereon at the rate of eight & ½ per cent per annum from date until due, and ~~10%~~ 18% per annum after due, until paid in full, interest payable at maturity.

If this note or any part thereof be collected by an attorney, either with or without suit, I agree to pay reasonable attorney's fees.

If any installment hereof or the interest be not paid as agreed, the holder hereof may, in his option, declare the whole amount hereof due and payable.

The makers, guarantors and endorsers hereof, for value received, hereby waive presentation for payment, demand, notice of non-payment, protest and extension.

ADDENDUM