1982

Zions First National Bank v. M-K Investment Co. et al : Brief of Appellants

Utah Supreme Court

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John H. Allen; Carl E. Kingston; John G. Marshall; Attorneys for Respondents;

IN THE SUPREME COURT

OF THE STATE OF UTAH

ZIONS FIRST NATIONAL BANK, A National Association, Plaintiff and Respondent, vs. M-K INVESTMENT COMPANY, J. O. KINGSTON, FRANK A. NELSON, JR., PAUL W. NELSON, and WILLIAM D. MAXWELL, Defendants and Appellants.	)	Supreme Court No. 18308

APPELLANTS PAUL W. NIELSEN'S AND WILLIAM D. MAXWELL'S BRIEF

Appeal from the Third Judicial District Court
of Salt Lake County, Honorable David B. Dee, Judge

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NATURE OF THE CASE

This is an action on a promissory note and against the guarantors of said note.

DISPOSITION IN LOWER COURT

The lower court entered a partial summary judgment against the four guarantors of the promissory note, holding them pecuniarily liable on their guaranty's.

RELIEF SOUGHT ON APPEAL

The appellants, Paul W. Nielsen and William D. Maxwell, seek a reversal of the partial summary judgment of liability and for a trial of the case on its merits.

STATEMENT OF FACTS

On March 26, 1979, the defendant M-K Investment Company, executed a promissory note in favor of the plaintiff for the

sum of $150,000. (R-4) At the time of the execution of the promissory note, the four guarantors, J. O. Kingston, Frank A. Nelson, Jr., Paul W. Nielsen, mistakenly referred to in the caption of the pleadings as Paul W. Nelson, and William D. Maxwell, each executed a guaranty of said promissory note. (R-5, 6, 7, and 8)

The defendant, M-K Investment Company, failed to pay the promissory note and the plaintiff brought its action against the maker and the four guarantors.

Subsequently, M-K Investment Company was placed in involuntary bankruptcy by the United States Bankruptcy Court for the District of Utah and all matters with respect to M-K were stayed by the Court.

The defendants, Maxwell and Nielsen, filed answers alleging, in pertinent part, that the plaintiff had agreed in its negotiations with respect to the promissory note that it would take collateral security for the note from M-K Investment Company in the form of a real property mortgage, which M-K would assign over to the plaintiff as collateral security, as well as other security. The mortgage covered certain real property located in Salt Lake County, State of Utah, and was a mortgage given to M-K by one of its debtors, Western Ready Mix Concrete Corp. (R-175) Additionally, M-K Investment Company made an assignment to the bank of other collateral security as shown in a document denominated "Assignment of Monies" (R-154), which document provided:

> "For value received, the undersigned, M-K Investment Company hereinafter called assignor, hereby transfers and sets over to Zions First National Bank, a national association, hereinafter called Bank, all monies now due or which may hereafter become due from those certain accounts receivable, security agreements, mortgages, and personal guaranties between borrowers listed below and M-K Investment Company."

The document then lists among two others:

> "Borrower; Western Ready Mix Concrete Corporation, 8925 West 3500 South, Magna, Utah, dated May 6, 1975." (R-154)

The plaintiff failed to obtain an assignment of the mortgage of Western Ready Mix (R-175) and further the bank failed to collect any of the monies due from any one of the three creditors shown on the Assignment of Monies (R-154) and the full amount of the promissory note remained due and payable together with accumulating interest thereon at an annual percentage rate of prime plus two and one-half percent. (R-200-201)

All of the parties filed their answers and crossclaims against each other for contribution and the plaintiff filed a motion for summary judgment on December 7, 1981. (R-145)

Affidavits in opposition to the motion for summary judgment were filed by all of the party defendants claiming that a condition precedent to any action against the defendants was a foreclosure of the security which was to have been taken by the plaintiff before any action would be brought against the guarantors, and it was also pointed out in memorandum filed and arguments to the court that the plaintiff had

failed to perfect its security by an assignment of the mortgage from Western Ready Mix Concrete Corp. to M-K Investment Company.

The matter was heard on January 5, 1982, and the court entered its partial summary judgment holding the guarantor defendants liable, which judgment was entered on February 8, 1982. From this partial summary judgment, the defendants, Nielsen and Maxwell, timely filed their notice of appeal on March 5, 1982.

Subsequently, the court entered a money judgment against the defendants for the principal amount of the promissory note and the accrued interest and attorney's fees.

ARGUMENT

POINT ONE

PARTIAL SUMMARY JUDGMENT WAS IMPROPER IN THE INSTANT CASE DUE TO DISPUTED MATERIAL ISSUES OF FACT.

At the time of the hearing on the motion for summary judgment, there still remained an issue between the parties, as to whether or not the plaintiff, at the time that the loan was made to M-K Investment Company, made representations that it would look either solely to or partially to the collateralization of the loan before recourse would be had to the guarantors. This matter remained unresolved. Further, a question as to whether or not the real property mortgage from Western Ready Mix Concrete Corp. to M-K Investment Company was to have been assigned over to Zions was a material

question of fact which again remained unresolved as well as the issues of the loss or impairment of the collateral by the bank which factually would diminish the liability, if any, of the guarantors.

The case law in Utah with respect to the granting of summary judgments are numerous and repetitive as to the proposition that summary judgment will not be sustained where there are disputed material issues of fact unresolved and that it is error for the trial court to enter summary judgment until these matters are resolved either by affidavits, depositions, or other evidence. Hatch v. Sugarhouse Finance, 20 U.2d 156, 434 P.2d 758, Holbrook Company v. Adams, (Utah, 1975) 542 P.2d 191, W. M. Barnes Company v. Sohio Nat. Res. Co., (Utah, 1981) 627 P.2d 56; Larsen v. Wycoff Company, (Utah, 1981) 624 P.2d 1151.

It is respectfully submitted that the court erred in granting summary judgment with the issues of what was the intent of the parties still remaining unresolved as well as the issues of loss or impairment of collateral and the value thereof.

POINT TWO

PLAINTIFF'S FAILURE TO PERFECT ITS COLLATERAL SECURITY ACTS AS A RELEASE TO THE GUARANTORS.

In the instant case, Zions First National Bank took as collateral security for the loan:

"All monies now due or which may hereafter become due from those certain accounts receivable, security agreements, mortgages, and personal guaranties between borrowers listed below and M-K Investment Company.

1. Borrower: Eldon Pugh dba Eldon Pugh's Machine Shop, 570 West 4th South, Salt Lake City, Utah, dated March 12, 1976.

2. Borrower: Beehive State Agricultural Co-op, 1007 South 500 West, Salt Lake City, Utah, dated January 26, 1976.

3. Borrower: Western Ready Mix Concrete Corporation, 8925 West 3500 South, Magna, Utah, dated May 6, 1975."

(R-154) The record is absolutely devoid of any evidence showing that the plaintiff attempted in any way to collect any of the sums due and owing from these three parties, but to the contrary, the record does show, through the affidavits of the party defendants, that the real property mortgage of Western Ready Mix Concrete Corp., was not assigned over to the plaintiff as collateral security for this loan, although it was supposed to have been.

The general rule with respect to the issue of failure to perfect security and its affect upon guarantors is set forth in 38 Am Jur 2d 1091, Guaranty, § 84, wherein it is stated:

"Where the creditor, having had other security for payment of the debtor's obligation, releases or diverts that security, the guarantor is generally discharged to the extent of the value of the collateral released or diverted. The creditor, having thus had security for payment of the debt, is deemed to have toward the guarantor in the position of trustee and, because he has breached that trust duty, may not hold

> the guarantor liable. Also, the guarantor, if the security had not been lost, would have been subrogated to the creditor's right to resort thereto, and hence, having been deprived of this right by the creditor's act, the guarantor is not liable on the contract of guaranty."

In the case of Behlen Mfg. Co. v. First National Bank of Englewood, (Colo., 1970) 472 P.2d 703, the Supreme Court of Colorado pointed out that the above-quoted section from Am Jur was the law but went on to point out that there is little difference between the law of suretyship and guaranty with respect to the loss of security. This case quotes other authority to the proposition that the failure to record and perfect a security interest would release an unconditional guarantor from an obligation, to the extent of the market value of security which was lost.

Idaho follows the general rule and in the case of Industrial Inv. Corp. v. Rocca, 100 Idaho 228, 596 P.2d 100, quotes from other Idaho cases and reaffirms the proposition that:

> "It is a fundamental principal of the law of guaranty that, with respect to additional security for the payment of a debt, the creditor stands in the position of a trustee for the guarantor, and, if a creditor surrenders or impairs collateral security without the consent of the guarantor, the latter is released to the extent of such negligent loss, impairment, or surrender." (citing other Idaho authority)

The Supreme Court of Washington in the case of Warren v. Washington Trust Bank, (Wash., 1979) 598 P.2d 701, follows the same rationale as the Idaho court and then goes on to state:

> "This rule does not depend upon the contract between the surety and the creditor, but results from equitable principals inherent in the relationship of surety and principal. It is equitable that the property of the principal, pledged for the payment of the debt, should be applied to that purpose, and is grossly inequitable that in such case the property should be diverted from that purpose and the debt thrown upon a mere surety."

The Restatement of Law, Security § 132 states:

> "Where the creditor has security from the principal and knows of the surety's obligation, the surety's obligation is reduced pro tanto if the creditor
>
> (a) surrenders or releases the security, or
> (b) wilfully or negligently harms it, or
> (c) fails to take reasonable action to preserve its value at a time when the surety does not have an opportunity to take such action.

To the same effect see: Florida Bahamas Lines v. Steel Barge "star 800" of Nassau, (5th Cir, 1970) 433 F.2d 1243 and the numerous cases decided under § 132 of the Restatement.

The plaintiff seeks to avoid the affect of the law above stated by quoting from the Uniform Commercial Code, 70A-9-501, UCA, 1953 as amended. However, it is respectfully submitted that this particular section of law is inapplicable in that the issue between the creditor and guarantor is not whether or not the creditor may proceed against the guarantor without foreclosing its security but whether or not the creditor, through its actions, has lost the security for itself as well as for the benefit of the guarantor, who would be subrogated to the rights of the creditor in the event that the creditor did not foreclose upon the security in the first instance.

In the case now before the court, the collateral security which should have been given, by assignment to the plaintiff, was lost to the guarantors by the failure of the bank to perfect its interest in this mortgage by assignment and recordation of that assignment, consequently, it is submitted that the Uniform Commercial Code is not applicable in the instant case.

Additionally, it is to be noted that the plaintiff took other collateral security in the form of accounts receivable and monies due, not only from Western Ready Mix Concrete Corporation but from two other debtors besides, no record having been established by affidavit in the instant case as to what happened to the proceeds from those obligations. This certainly creates a material question of fact which the trial court had not resolved at the time that it rendered its decision granting partial summary judgment.

In the affidavit of Phillip W. Johnson (R-169-170) a former assistant vice president of the plaintiff stated that:

> "4. That he was instructed by his superiors at Zions First National Bank to take as collateral an assignment of all receivables of M-K Investment Co. and also to take an assignment in favor of Zions First National Bank of the real estate mortgage held by M-K Investment Co. as security for its loan to Western Ready Mix Concrete Corporation.
>
> "5. The loan was completed upon this arrangement with the assignments of receivables and the assignment of mortgage duly taken."

The record shows that such was not the case, in that Zions did not collect the accounts receivable which amounted to many millions of dollars over the period of time from May 3, 1977, through the summer of 1978, nor did it perfect the recording of the assignment of the mortgage, which has now been foreclosed in an action brought in the Third Judicial District Court against Western Ready Mix Concrete Corporation.

SUMMARY

It is respectfully submitted that there remained material questions of fact which were not determined by the trial court at the time of the hearing on the motions for summary judgment and these material facts still remaining unresolved, the trial court erred in granting partial summary judgment against the guarantors in this matter.

It is further submitted that as a matter of law, the plaintiff having failed to perfect the collateralization of the loan or to proceed against such collateral, it is not entitled to judgment against the guarantors or that such judgment, if granted at all, should be reduced by the value of the collateral which was lost.

It is respectfully submitted that the partial summary judgment should be reversed and the matter remanded back to the trial court for a hearing on its merits.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of May 1982, I mailed by United States Mail, postage prepaid, two copies of Appellants Paul W. Nielsen and William D. Maxwell's Brief to the following:

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