1982

State of Utah v. Shannon W. Richmond : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

C & J INDUSTRIES, INC., a corporation, A. ROBERT COLLINS and GLADE N. JAMES,

Plaintiffs-Appellants,

vs.

EDWARD O. BAILEY and RUTH C. BAILEY, his wife,

Defendants-Respondents.

Case No. 18327

APPELLANTS' BRIEF

APPEAL FROM THE DECISION OF THE
THIRD DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE DEAN E. CONDER, JUDGE

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TABLE OF CONTENTS

Cases Cited

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STATEMENT OF THE CASE

This is a contract dispute. At issue is whether the acts of Plaintiffs-Apellants triggered an acceleration clause in a contract which provides:

> "In the event Buyer desires to sell or assign, transfer or convey Buyer's rights under this contract or Buyer's interest in said premises then and in that event the Buyer must pay in full the outstanding balance due on this contract prior to said transaction."

It is the position of Plaintiffs-Appellants that:

1. C & J Industries is clearly identified as buyer in the Uniform Real Estate contract; and

2. The only liability of Collins and James in respect to the Uniform Real Estate contract is as guarantors; and

3. The sale of a portion of the real estate by Collins and James as individuals did not trigger the acceleration clause.

STATEMENT OF THE PROCEEDINGS

This case was tried in the Third Judicial District Court of Salt Lake County, Utah, on remand from the Utah Supreme Court. The Honorable Dean E. Conder, Judge, presided at the hearing.

The case had been remanded by the Supreme Court to determine the question of agency.

> "It is apparent from the second contract -- and the Baileys consistently point out -- that the buyer under the first contract, C & J, is not the seller under the second contract. It is therefore necessary to remand this matter for a determination of whether, in acting as sellers under the second contract, Collins and James were acting for C & J." C & J Industries v. Bailey, 618 P.2d 58 (Ut. 1980).

After all exhibits had been admitted and all witnesses had been examined, Judge Conder made a finding from the record that C & J Industries was a de facto corporation at the time of the second contract, and that if Collins and James were

buyers under the original contract, then the question of agency was not important (TR. 59, 60). Judge Conder then requested briefs on the question he had put earlier as to whether the signatures of Collins and James in the Uniform Real Estate Contract made them "buyers" on that contract (TR. 58). He thus identified the issue he thought was decisive as, "Who is it that is under contract here?" (TR. 59). Both parties submitted post-hearing memoranda in support of their respective positions.

On March 17, 1982, judgment was entered for Defendants-Respondents holding that the Appellants, by their actions, had triggered the acceleration clause of the Uniform Real Estate Contract.

RELIEF SOUGHT ON APPEAL

Appellants seek to have the decision of the lower court reversed.

STATEMENT OF FACTS

On April 13, 1978, Edward O. Bailey and Ruth C. Bailey, as sellers, entered into a Uniform Real Estate Contract with C & J Industries, as buyer. At the same time, a separate document entitled "Guaranty" was executed between the Baileys

and A. Robert Collins and Glade N. James who personally and individually guaranteed performance of C & J Industries (Ex. P-1, ¶1). The signature block on both documents appeared as follows:

SELLER:
/s/ Edward O. Bailey
Edward O. Bailey

/s/ Ruth C. Bailey
Ruth C. Bailey

BUYER:
C & J INDUSTRIES INCORPORATED
By /s/ A. Robert Collins

/s/ A. Robert Collins
A. Robert Collins

/s/ Glade N. James
Glade N. James

On March 9, 1979, Collins and James sold a portion of the property to Mr. and Mrs. Burgie. Shortly thereafter, the Baileys sent a document to C & J, Collins and James, the gravamen of which was that the second contract, with Collins and James as sellers, breached the terms of the first contract in which C & J was the buyer. Paragraph 3(a) of the first contract provides:

> "In the event Buyer desires to sell or assign, transfer or convey Buyer's rights under this contract or Buyer's interest in said premises then and in that event the Buyer must pay in full the outstanding balance due on this contract prior to said transaction."

Appellants filed a declaratory judgment action in the Third Judicial District Court of Salt Lake County seeking, among other things, a declaration that C & J be permitted to continue to make monthly payments under the contract as originally agreed and that the facts of the case did not operate to accelerate all future payments. Appellants' motion for summary judgment was granted and Respondent appealed to this Court which reversed the decision of the trial court and remanded the case for determination of whether Collins and James as sellers in the second contract were acting for C & J.

ARGUMENT

I

IF COLLINS AND JAMES WERE NOT BUYERS UNDER THE UNIFORM REAL ESTATE CONTRACT WITH THE BAILEYS, OR IF COLLINS AND JAMES WERE NOT ACTING AS AGENTS OF C & J INDUSTRIES INCORPORATED WHEN THE PROPERTY WAS SOLD TO A THIRD PARTY, THEN THE SALE OF A PORTION OF THE REAL ESTATE TO THE BURGIES DID NOT TRIGGER THE ACCELERATION CLAUSE IN THE FIRST CONTRACT.

Paragraph 3(a) of the Uniform Real Estate Contract with the Baileys provides for acceleration of the outstanding contract balance if the Buyer "desires to sell or assign, transfer or convey Buyer's rights under this contract."

There are two ways in which the transfer of a portion of the property to the Burgies could have been done by the Buyer

under the Uniform Real Estate Contract. First, if Collins and James were principals to that contract, they would be considered buyers for the purpose of the acceleration clause. Second, if Collins and James were acting as agents for C & J Industries in making the sale, then the transfer would also be by the buyer since the acts of the agents of a corporation are the acts of the corporation. Miller v. Arnal Corp., 632 P.2d 987 (Ariz.App., 1981).

II

THE EXECUTION OF CONTEMPORANEOUS INSTRUMENTS OF CONTRACT AND GUARANTY SHOWS THAT THE PARTIES DID NOT INTEND THAT COLLINS AND JAMES WOULD BE BOUND AS PRINCIPALS TO THE UNIFORM REAL ESTATE CONTRACT WITH THE BAILEYS.

The trial court regarded the issue of who was a party to the Uniform Real Estate Contract as decisive to the case (TR. 58, 59, 60). This issue arises because of the nature of the signature block on the Uniform Real Estate Contract and the Guaranty agreement (TR. 56, Ex. P-1). This point had not been briefed by counsel (TR. 57) and both submitted post-trial memoranda.

The issue of whether or not unqualified signatures on a contract purportedly made by a corporation bind the signers as principals to the contract has been frequently litigated. The cases cited in Respondents' post-trial memorandum are typical of

those holding that the signers are principals to the contract. Although the cases express similar circumstances, they are clearly distinguishable on three points. First, the corporation was not identified in the body of the contract as buyer. Second, the signatures were all qualified by the office of the buyer as a member of the corporation. Finally, the personal possessive "we", or some form indicating personal liability of the signers, was the descriptive term used in describing liability in the body of the contract.

In Taylor v. Reger, 48 N.E. 262 (Ind., 1897), the promissory note read:

> "Pendleton, Indiana, Aug. 31, '88. On or before September, 1891, we promise to pay to the order of Lorenzo D. Reger the sum of Four Hundred Dollars, with six per cent interest from date, payable annually, and attorney's fees, value received, without any relief from valuation or appraisement laws.
>
> "The Pendleton Glass Company
> /s/ by B. F. Alman, President
> C. B. Orvis, Vice Presidnet
> Charles H. Roach, Secretary
> A. B. Taylor)
> Benj. Rogers) Directors
> J. R. Boston)"
>
> (Emphasis added.)

The court determined the intent of the parties from the instrument and held that the signers were individually liable because the wording of the contract was "we promise to pay".

In Savings Bank v. Central Market, 54 P. 273, (Cal. 1898), the contract was signed as "Central Market Company" by its president, secretary, treasurer, and some individual stockholders. The stockholders argued that their signatures appeared only as ratification of the contract and were not intended to bind them individually for the corporate debt. The court again emphasized the wording "we promise to pay" in holding the stockholders individually liable on the contract. The court went on to say that if the body of the contract had said "the Central Market Company promises to pay", then the signatures of the stockholders would have been meaningless.

Derman v. Brennaman, 149 P. 273 (Okla., 1915) also involved a contract that read "we promise to pay". In that case, the court allowed parol evidence to determine the intent of the parties to be bound as individuals.

A series of cases that is more directly on point is annotated in 82 A.L.R.2d 435, and deals with unqualified signatures accompanied by qualified signatures if there has been a disclosure that dealings are with a corporation. If the contract listed the buyers as obligors in the plurality, particularly with the use of the personal pronouns "we" or "us", then the unqualified signer was held individually

liable. Caphart v. Dodd, 66 Ky. (3 Bush) 584 (1868); Whitney v. Sudduth, 61 Ky. (4 Met.) 296 (1863); Wiwi v. Tebbs, 24 N.E. 624 (Ohio, 1938).

> "In the few cases holding defendants-signers not personally liable on an instrument containing a qualified signature as well as defendants' unqualified ones, the name of the corporation appeared in the body as the promisor. The defendants-signers of a note in Yowell v. Dodd, 66 Ky. (3 Bush) 581 (1868) were said to not be personally liable on the note which stated 'the president and the directors of the [company] will pay' and bore the signature qualified by 'pres.' preceding four unqualified signatures. Whether the note bound defendants individually was a question of intention to be determined from what appeared on the face of the writing, said the court, distinguishing other cases involving similar notes in that here no personal pronounds were used and no several promises to pay appeared. . . ." (Emphasis added.) 82 A.L.R.2d 436. (Note that Yowell and Caphart were apparently in the court and against the same defendant.)

The issue of an unqualified signature on a contract was examined in Carlesimo v. Schwebel, 197 P.2d 167 (Cal., 1948). The contract had a signature block as follows:

> "The Feldheym Co., Inc.
> /s/Dave Schwebel
> Dave Schwebel"

The plaintiff argued that Schwebel was individually liable for the contract. The argument was that since "by" did not appear before Schwebel's name, he must have been presumed to be acting in an individual capacity. The plaintiff relied on

cases where nowhere in the contract the name of the principal appeared and where the court held the signer individually liable. The court in Carlesimo held those decisions inapplicable because the plaintiff was on notice that a corporation was the principal to the contract. Parol evidence was admitted to show that Schwebel signed merely as an agent.

The preceding cases are authority for the proposition that where the contract on its face shows that only a corporation was intended by the parties to be bound, unqualified signatures do not individually bind the signers. Parol evidence has been allowed to show intent of the parties when the intent was not clear from the face of the contract.

The rules of interpretation that determine the intent of the parites to contracts are clearly laid out in case law. It is fundamental that the intent of the parties should first be ascertained from the four corners of the instrument itself, second from the other contemporaneous writings concerning the same subject matter, and third from extrinsic evidence of the intentions, if necessary. Continental Bank & Trust Co. v. Bybee, 306 P.2d 773 (1957). Where two or more instruments are executed by the same parties contemporaneously, or at different times in the course of the same transaction, and concern the same

subject matter, they will be read and construed together so far as determining respective rights and interests of the parties even though one or both of the agreements do not refer to each other. Bullfrog Marina, Inc., v. Lentz, 501 P.2d 266 (Ut, 1972). In actions on contracts, the intentions of the parties are controlling and normally these intentions will be found from the instrument. Oberhansly v. Earle, 572 P.2d 1384 (Ut., 1977).

Applying the principles of contract law to the instant case and drawing on case law that determines the binding effect of a signature on an individual, it must be concluded that Collins and James are not principals to the Uniform Real Estate Contract.

The Uniform Real Estate Contract clearly sets forth in its body that the agreement is between the Baileys as sellers and C & J Industries as buyer (Ex. P-1, ¶1). No argument can be made that the Baileys did not know they were contracting with a corporation. Since the body of the contract did not propose to bind anyone except C & J Industries, the unqualified signatures of Collins and James are not binding on them as individuals. Carlesimo; Yowell; Central Market, supra.

Examination of the contemporaneous documents, the Uniform Real Estate Contract and the Guaranty reveals that none of the parties intended that Collins and James be bound

as principals to the Uniform Real Estate Contract. The intent of the parties is controlling as to the binding effect of the agreement. Oberhansly, supra. If the parties intended that Collins and James were to be principals to the contract, then there would be absolutely no need for execution of the Guaranty agreement as any such agreement would be superfluous. The very terms of the Guaranty manifest the intent of the parties on the Uniform Real Estate Contract. C & J Industries is clearly identified as the buyer in the Guaranty with Collins and James to be held personally liable for its debts. All references to "Buyer" in the contract and the Guaranty refer solely to C & J Industries.

The intent of the parties can clearly be ascertained from the documents. Where resolution of the controversy depends on the meaning to be given documents, the trial court is in no better position and is no better able to determine the meaning of documents than is the Supreme Court; hence, as to such an issue, the standard presumptions of credibility and verity to be accorded the findings and judgments of the trial court do not apply. Lake v. Hermise Associates, 552 P.2d 126 (Ut. 1976).

III

THE GUARANTY EXECUTED BY THE PARTIES WAS A VALID GUARANTY AGREEMENT AND CANNOT BE READ OR INTERPRETED TO EXTEND THE LIABILITY OF COLLINS AND JAMES TO BECOME PRINCIPALS ON THE CONTEMPORANEOUS UNIFORM REAL ESTATE CONTRACT.

Commercial Credit Corp. v. Chisholm Bros. Farm Equip. Co., 525 P.2d 976)Id., 1974) defines guaranty as an undertaking or promise that is collateral to the primary or principal obligation and that bonds a guarantor to performance in the event of non-performance by the principal obligor.

The guaranty by James and Collins was to,

> ". . .be personally bound to guaranty the performance of said corporation [C & J] in each and every covenant and agreement under said contract. . .in order that said Buyer [C & J] may purchase said property, said A. Robert Collins and Glade N. James desire to guaranty the performance of said corporation."

Inasmuch as Collins and James promised, in writing, to answer personally for the debts of C & J Industries, the requisites of a guaranty have been met.

In their post-trial memorandum, Respondents claimed that the last portion of the Guaranty created joint liability for Collins and James with C & J, all as principals to the contract. Respondents relied on the final clause of the Guaranty to support this conclusion:

> "Each and all of the parties to said Uniform Real Estate Contract are jointly and severally bound to perform the obligations, covenants and agreements of said contract, said Edward O. Bailey and Ruth C. Bailey, his wife, as Seller, and said C & J Industries Incorporated, a corporation, as Buyer, and said A. Robert Collins and Glade N. James, individually and jointly."

This last clause again refers to C & J Industries as "Buyer". The reference to the joint and individual liability refers to the liability that had just been created in the guaranty agreement. The guaranty of an individual is not to be extended by implication beyond the express limits or terms of the instrument or its plain intent. Industrial Inv. Corp. v. Rocca, 596 P.2d 100 (Ida., 1979). Any attempt to expand the obligation of a guarantor to that of principal on the contract he guarantees must be held to be improper.

Automotive Manufacturers Warehouse, Inc., v. Service Auto Parts, Inc., 596 P.2d 1033 (Ut., 1979), cited by Respondents in their post-trial memorandum, does not support extension of a guarantor's liability. That case involved a security agreement whereby inventory was assigned as collateral and in no way was an actual personal guaranty involved. Service argued that the security agreement was in fact a guaranty and that liability of a guarantor cannot be extended to make him a principal to the contract. The court held that the agreement was not

a guaranty because it was not a promise to answer personally for the debts of another. The court then went on to hold that the security agreement was an admission of personal liability on the original agreement.

IV

THE AGENCY QUESTION WAS NOT LITIGATED AND THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S HOLDING ON THE THEORY THAT COLLINS AND JAMES ACTED AS AGENTS OF C & J INDUSTRIES IN SELLING A PORTION OF THE PROPERTY ON THE CONTRACT TO BURGIE.

The words of Judge Conder at the end of the hearing show that he felt the agency question was not decisive in the case.

> "Now, the evidence before me is that both individuals assumed that they were signing as though it was their personal property. But there has been a dissolution and now in their hands, and not acting as agents for the corporation. But, if those same individuals are buyers under Exhibit 1 and are, therefore, bound by Paragraph 3A, it isn't going to make any difference whether or not they were acting as the agents on the sale of Exhibit 2, or whether or not they were selling personally." (R. 59, 60)
>
> "That's the question really. That's Justice Wilkins who is raising that. Who is under contract here?" (R. 59)

The court found that C & J Industries was a de facto corporation at the time of the Burgie contract, and that as a corporation could have signed the contract. (R. 59)

Finding of Fact No. 8 on Page 3, signed March 26, 1982, states:

> "The court also finds that A. Robert Collins and Glade N. James were in fact buyers under the first contract, or in the alternative, were acting as agents for C & J Industries in the second contract."

The standard of review in this court for pronouncements of the trial court is that they will only be upheld if there is substantial, competent evidence supporting that pronouncement. Hutcheson v. Gleave, 632 P.2d 815 (Ut., 1981); Fisher v. Taylor, 572 P.2d 393 (Ut. 1977); Dalton v. Dalton, 307 P.2d 894 (Ut., 1975).

In determining whether or not agency relation exists, the burden of proof is upon the person asserting the relation. Salt River Valley Water Assn. v. Giglio, 549 P.2d 162 (Ariz., 1976); Transamerica Leasing Corp. v. Van's Realty Co., 427 P.2d 284 (Ida., 1967); Hininger v. Judy, 398 P.2d 305 (Kan., 1965); First Nat. Bank of Twin Bridges v. Sant, 506 P.2d 835 (Mont., 1973); Moss v. Vadman, 463 P.2d 159 (Wash., 1969). The law will not presume the existence of agency. Agee v. Gant, 412 P.2d 155 (Okla., 1966); True v. High Plains Elevator Machinery, 577 P.2d 991 (Wyo., 1978). The party asserting agency must show its nature and extent. Coe v. Esau, 377 P.2d 815 (Okla., 1963).

In this court, the issue of the existence of agency was examined in Wilkerson v. Stevens, 403 P.2d 31 (Ut., 1965). The issue in Wilkerson was whether or not a realtor was liable when the real estate agent in his employ absconded with funds when the realtor had no listing agreement and knew nothing of the transaction. This Court said there was no agency relationship and gave the following reasoning:

> "From the facts recited, it will be seen that there is no indication that the alleged agent intended to be acting for the principal, nor that the alleged principal had any such intention with respect to such agent. . . ." Wilkerson, supra.

In addressing the question of whether an officer of a corporation acts as an agent for the corporation signing the contract, this Court stated:

> "Supporting of the testimony is the fact noted above that there was a substantial space left for the signature of the president of the corporation [to ratify the contract], presumably after appropriate consideration and action thereon by its board of directors. No officer or agent of a corporation has any authority to make a contract to sell its real estate without such action. Foster v. Blake Heights Corp., 530 P.2d 815, 818 (Ut., 1974). (Emphasis added.)

The issues of intent of the principal, C & J Industries, to have Collins and James act as agents through a resolution of the board of directors was never litigated. The only evidence in that regard was that Collins and James thought

C & J Industries was defunct (R. 58). This being the case, there could be no intention on their part to act for C & J as agents or to make a resolution as directors of C & J to take corporate action. Where the burden of proof rested on Baileys, they have clearly failed to support any allegation of agency. The only argument in this matter appears in their Memorandum in Support of Defendants' Defense and Counterclaim to the Allegations of the Plaintiffs' Complaint that was filed with the court at its request after the hearing. On Page 11, Point II 1(1), a summary argument is made in favor of agency. The argument assumes agency from the fact that Collins and James were officers of C & J. Such presumption is clearly not the law. Agee, True, supra.

The trial court was clearly in error in finding that there was an agency relationship because there is no substantial evidence to support that conclusion; the issue was not litigated; and Respondents failed in meeting the burden of proof of that issue.

CONCLUSION

The provision of Paragraph 3A of the Uniform Real Estate Contract between C & J Industries and the Baileys was not triggered by the sale to the Burgies. The intent of the parties as manifest by the contemporaneous documents will not support a conclusion that Collins and James were principals to

the contract of sale. There was no substantial evidence adduced at trial that would support a finding that Collins and James acted as agents of C & J Industries in entering into a contract to sell part of the real property covered in the original contract. Collins and James' liability as guarantors may not be extended to make them principals on the contract they guaranteed.

For the foregoing reasons, Appellants respectfully petition this court to reverse the decision of the lower court.

Respectfully submitted,

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