1959

Aetna Loan Co. v. Fidelity Deposit Co of Maryland : Brief of Appellant

Utah Supreme Court

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Case No. 9059

IN THE SUPREME COURT
of the
STATE OF UTAH

AETNA LOAN COMPANY, a Colorado corporation,

Plaintiff and Respondent,

—vs.—

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland corporation,

Defendant and Appellant.

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

STATEMENT OF FACTS

This is an action by the plaintiff upon a blanket fidelity bond in the face amount of $100,000 executed by American Bonding Company of Baltimore, now merged with the defendant Fidelity and Deposit Company of Maryland. The bond insures plaintiff against loss caused by the fraud or dishonesty of any employee. Plaintiff alleged in its complaint:

> "4. That while the said bond was in full force and effect, Harold Knowles of Denver, Colorado, one of the employees covered by the bond, fraudulently converted to his own use money and property belonging to plaintiff in the amount of Eleven Thousand One Hundred Fourty-Two Dollars and Fourteen Cents ($11,142.14)." (R. 1)

The defendant contends that the bond was canceled as to Harold Knowles by certified letter and that it should not have to stand the expense of trial on the issue of whether or not Knowles fraudulently converted plaintiff's monies. The trial court denied defendant's motion for summary judgment based on the cancellation of coverage and this Honorable Court on July 20, 1959, granted the defendant's petition for an interlocutory appeal. The case is now before the court on the basis of the judgment roll transmitted pursuant to the order granting an interlocutory appeal.

The facts concerning the cancellation of coverage are simple. Plaintiff Aetna Loan Company is a Colorado corporation engaged in the business of selling and financing the sale of house trailers in Denver, Pueblo, Grand Junction, Casper, Boise, Cheyenne, Wichita, Billings and Colorado Springs (R. 21). Ken Garff is president, David Freed is vice president and David A. Robinson is secretary-treasurer. Its headquarters is in Salt Lake City at 531 South State Street. At the date it acquired the bond here involved (March 7, 1956) (R. 7) it employed at least 52 personnel who, as a part of their regular duties, handled money of the insured company (R. 21). The bond

form is standard in the surety industry and provided blanket coverage for all employees of the plaintiff. The bond contains the standard clause covering:

> "Cancelation as to Any Employee
>
> "SECTION 12. This bond shall be deemed canceled as to any Employee: . . . (b) at 12 o'clock night, standard time as aforesaid, upon the effective date specified in a written notice served upon the Insured or sent by mail. Such date, if the notice be served, shall be not less than fifteen days after such service, or, if sent by mail, not less than twenty days after the date of mailing. The mailing by the Underwriter of notice, as aforesaid, to the Insured at its Principal Office shall be sufficient proof of notice." (R. 6)

Mr. Harold Knowles' name does not appear on the original personnel list which is dated February 1, 1956. Sometime after the bond was written and before July 2, 1956, Mr. Knowles replaced Bill Goetschius at the Denver West Lot (R. 18).

Within three months after writing the bond, Mr. Ronald D. McGregor, branch manager of the defendant was notified that the business reputation of Harold Knowles was not good and he therefore caused an investigation to be made which revealed an unsatisfactory history of former employment and lack of veracity (R. 15). Mr. McGregor then proceeded to follow the provisions of Section 12 (b) of the bond by mailing by certified mail the following letter to the insured (R. 12):

"American Bonding Company
"Salt Lake City 1, Utah
"July 2, 1956

"CERTIFIED MAIL

Aetna Loan Company
531 South State
Salt Lake City, Utah

Attention: Mr. Holboth

Re: Bond 165 407—Aetna Loan Company, etal
Blanket Fidelity Bond
Harold Knowles - Aetna Trailer Sales, Inc., Denver, Colorado

"Gentlemen:

"Our investigation of Mr. Harold Knowles has not been satisfactory, and we are unwilling to continue coverage of him under the above bond. Please take notice therefore that cancelation of coverage as to Harold Knowles will be effective in accordance with Section 12 of the bond 20 days after your receipt of this notice.

Yours very truly,

Ronald D. McGregor, Manager

RDM:lmr
cc: Ensign Insurance Agency
cc: General Fidelity Div., Home Office"

The receipt for the certified letter (No. 599447) (R. 12, 15) and return receipt signed by Aetna Loan Company are attached to the back of Mr. McGregor's affidavit (R. 16).

The affidavit of David A. Robinson, secretary-treasurer and attorney for the plaintiff filed in opposition to the motion for summary judgment, does not dispute the allegations of Mr. McGregor's affidavit in the following matters and such facts are therefore to be taken as true. *Zampos v. United States Smelting Refining and Mining Company*, 206 F.2d 171, 174. After receipt of the letter of cancellation, plaintiff continued to keep Harold Knowles in its employment (Compare R. 15 to R. 18). A year later, on July 18, 1957, the plaintiff mailed a new list of employees to defendant (R. 25). This list does not have plaintiff's name upon it, but the 37 names thereon and business locations indicate that it refers to Aetna Loan Company. The name of Harold Knowles appears as manager at Denver, Colorado.

There was no accompanying letter with the list of employees nor oral conversations whatsoever requesting defendant to reinstate Harold Knowles under the bond (R. 16). There was no contractual agreement whereby coverage of the bond was subsequently extended to Harold Knowles. These are the material relevant facts about which there is no genuine issue and upon which defendant contends that it is entitled to a judgment as a matter of law.

The affidavit of David A. Robinson filed in opposition to the motion for summary judgment did controvert several statements made by Ronald D. McGregor, but the issues raised thereby are inmaterial and irrelevant and do not justify submission of the case to a jury. First, McGregor's affidavit alleged that the bond ". . . was written on a three-year premium basis; that in order to ascertain the risk and compute the premium when the bond is initially written it is necessary to have a list of employees furnished to determine the number of positions to be bonded, the various individual responsibilities and access to monies, etc.; that after the bond is written there is no requirement that new lists of employees be furnished, new employees being automatically covered under the bond . . . that the list of employees furnished by plaintiff to the defendant in July of 1957 was wholly unsolicited and was surplusage as far as the defendant was concerned . . ." (R. 15, 16). The three-year computation of premium is shown at the bottom of defendant's Exhibit A (R. 21). The bond being written on a three-year basis, no new list of employees was necessary to recompute the premium until 1959. Mr. Robinson stated in his affidavit that he believed the bond was written on an annual premium basis . . . "that it is not true that after the bond was written there was no requirement of new lists or of automatic coverage of new employees, there having been many exchanges of communications between the plaintiff and the defendant and its agents with reference to this bond, as hereinafter more fully stated; that affiant believes the list of employees furnished to the defendant

as of July 17, 1957 and more particularly hereinafter referred to, was not unsolicited, but was sent pursuant to the request of defendant's agent;" (Charles Vadner) (R. 18).

However, no correspondence is attached to Mr. Robinson's affidavit to substantiate the statement that the list was sent pursuant to the request of defendant's agent. The affidavits are entirely in accord that the defendant has written fidelity bonds for the Ken Garff Company since 1946, such bond being designated as bond number 53-61-367 (R. 26, 31). The Aetna Loan bond being sued upon is number 165-407. The companies have common officers, share the same home office and are in identical businesses, but are separate entities, bonded under separate bonds. The Ken Garff Company bond was rewritten on October 31, 1956 (R. 31) and thereafter Mr. McGregor wrote to Mr. Robinson and requested that individual applications be obtained from the approximate 20 trailer managers employed by Ken Garff Trailer Sales and Ken Garff Sales, Inc. (R. 26, 23). Individual applications secure to the bonding company the individual indemnity agreement of the bonded employee. As Mr. McGregor's letter states, ". . . when the employees understand they are bonded it has a valuable morale effect." (R. 23). The personnel list is merely used to compute the premium when the bond is first written. Thus the defendant requested individual applications for bond number 53-61-367 by letter of May 22, 1957 (R. 23), July 10, 1957 (R. 24), July 18, 1957 (28), and September 24, 1957 (R. 29). But all these letters are attached as exhibits

to Mr. Robinson's affidavit to back up his insinuation that there were many exchanges of communication between the plaintiff and the defendant and its agent *with reference to this bond*, i.e. Aetna Loan Company (underscoring added.) All the above letters of Mr. McGregor plainly refer to the Ken Garff Company bond, and not the Aetna Loan bond number 165-407.

At any rate, the request for individual applications from the Ken Garff Company trailer lot managers caused Mr. John A. Halboth, manager of Aetna Trailer Sales and Loan Company to write to Mr. Charles Vadner on June 14, 1957 and state, "I am sure that due to the recent turnover in personnel there are employees now in our employment that are not bonded. . ." (R. 22). This is a misapprehension on the part of Mr. Halboth of the terms of the BLANKET bond and this erroneous notion persists in Mr. Robinson's affidavit wherein he contends that it is not true that new employees are automatically covered by the bond (R. 18) and that the Blanket Bond Personnel List is attached to and becomes a part of the bond (R. 18). These contentions will be dealt with under Point II of defendant's argument. As the factual record now stands the branch office of defendant requested Mr. Robinson to obtain individual applications from the trailer lot managers of the Ken Garff Company only and besides forwarding these applications, the management of both companies forwarded a new personnel list covering the employees of the plaintiff corporation, which latter list they believe was orally requested by Charles Vadner, the defendant's agent. Mr. Robinson's affidavit

is erroneous and misleading wherein it states that the personnel list for Aetna Loan Company employees was forwarded *in response* to Mr. McGregor's requests for individual applications from Ken Garff Company trailer managers (R. 19).

The affidavit of Mr. Robinson is further misleading wherein he alleges:

> "That on June 7, 1957 defendant advised plaintiff that Harold James Knowles and other persons were accepted on fidelity bonds as evidenced by letter, a copy of which is attached hereto as Exhibit G."

It must be remembered that plaintiff did not submit the personnel list with Knowles name on it until July 18, 1957, so obviously the letter dated June 7, 1957, Exhibit G, (R. 27) has no bearing or reference to the bonding company's accepting Knowles on the blanket fidelity bond. Exhibit G is a letter written by the defendant's Denver branch office assistant manager to the Colorado Motor Vehicle Dealers' Administration enclosing a continuation certificate for the $1,000 motor vehicle dealers bond for Harold James Knowles. A copy was sent to Aetna Trailer Sales in Salt Lake City. This is a license bond, not a fidelity bond. It is conditioned that said dealer "shall perform his duties as an automobile salesman without fraud or fraudulent representations" in accordance with Section 13-11-10 Colorado Revised Statutes, 1953 (R. 31). In consideration of executing said license bond, defendant obtained the indemnity agreement of Aetna

Trailer Sales, Inc., of Jefferson County, signed by Ken Garff, president (R. 31).

STATEMENT OF POINTS

POINT I.

IT IS UNDISPUTED THAT THE BLANKET FIDELITY BOND WAS CANCELED AS TO HAROLD KNOWLES BY CERTIFIED LETTER.

POINT II.

A BLANKET FIDELITY BOND AUTOMATICALLY COVERS NEW EMPLOYEES, NOT JUST EMPLOYEES REFERRED TO ON AN ATTACHED LIST.

POINT III.

THERE WAS NO AGREEMENT, NOR ESTOPPEL REINSTATING COVERAGE AS TO HAROLD KNOWLES UNDER THE BOND.

ARGUMENT

POINT I.

IT IS UNDISPUTED THAT THE BLANKET FIDELITY BOND WAS CANCELED AS TO HAROLD KNOWLES BY CERTIFIED LETTER.

The pertinent provision of Rule 56(*e*) U.R.C.P. provides:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Considering section 12(b) of the bond (R. 6), the certified letter of cancellation of coverage (R. 12) and the receipt for certified mail and return receipt signed by Aetna Loan Company, it is clear that the bond was properly and effectively canceled as to Harold Knowles. There is no issue of fact:

(1) That the bond provides that coverage may be canceled.

(2) That the defendant canceled in accordance with the terms of the bond, as to Harold Knowles, the same person named in plaintiff's complaint.

(3) That plaintiff received the certified letter of cancellation dated July 2, 1956.

The following quotations from volume 72 Corpus Juris Secundum, Principal and Surety fully substantiate defendant's contention that it is entitled to a judgment as a matter of law:

> "§ 91 The liability of a surety is measured by the terms of his contract, and while he is liable to the full extent thereof, such liability is strictly limited to that assumed by its terms.
>
> "§ 117 In conformity with the principle discussed supra § 91, that the liability of a surety is measured by his contract, it may be said in general terms that, in the absence of earlier termination by release, mutual agreement, or operation of law ordinarily the termination of a surety's liability is governed by provisions of the contract, if any.
>
> "§ 131. In a proper case, a surety may terminate the contract of suretyship by sufficient

notice to such effect and thereby release himself from further liability; and such right sometimes exists by reason of statutory or contractual provisions. * * *

"Contractual provisions. A surety may expressly reserve in his contract the right to terminate it by notice. . ."

POINT II.

A BLANKET FIDELITY BOND AUTOMATICALLY COVERS NEW EMPLOYEES, NOT JUST EMPLOYEES REFERRED TO ON AN ATTACHED LIST.

While the court may consider it immaterial, whether or not the bond was written on a three-year premium basis or an annual premium basis; whether or not the bond automatically extends coverage to new employees and whether or not the personnel list is attached to and becomes part of the bond, defendant believes that it will be helpful to explain the mechanics of how the bond was written in order to show by way of background that defendant had no duty to restate or reaffirm its position to plaintiff that Knowles was not reinstated under the bond. It should be kept in mind that this is a primary commercial BLANKET bond. By its terms Aetna Loan Company, et al. is insured against any loss of money or property caused by the fraud or dishonesty of *any* employee or employees (R. 5). *There is no reference to coverage being limited to a list of employees attached to the bond.* The definition of employee in Section 3 is stated to be one or more of the natural persons while in the regular service of the insured in the ordinary course of the insured's

business *during the term of this bond* (R. 5). The plain unambiguous terms of this BLANKET bond fully substantiates Mr. McGregor's allegation that new employees are automatically covered under the bond; that there is no intermediate charge for new employees hired by the insured during the term of the bond nor is there any rebate allowed for employees leaving the service of the insured (R. 16).

But in spite of such plain language, Mr. Robinson's affidavit states:

> ". . . that retaining Harold Knowles in the employ of plaintiff was not a failure to heed the purported letter of cancellation and was not inconsistent with the bond written by American Bonding Company . . . that it is not true that after the bond was written there was no requirement of new lists or of automatic coverage of new employees . . ." (R. 18)

It is on the basis of such allegations as these that the trial court denied the motion for summary judgment "for the reason that there exist substantial issues of fact between the parties." (R. 32)

The plaintiff never offered its original copy of the bond into evidence. The defendant did attach a true and correct copy of the bond to its answer. Yet Mr. Robinson's affidavit states:

> "That the copy of bond attached to the answer of the defendant is not complete, there having been attached thereto a Blanket Bond Personnel List. . ."

The defendant's Exhibit A (R. 21) is the original personnel list which shows in the upper right hand corner that it was written on a three-year basis "2-1-56-59." Mr. McGregor's reply affidavit sets forth the fact "that by obtaining the bond on such basis, plaintiff received a discount of one-half year's premium less 5%; that by writing the bond on a three-year premium basis, no new list of employees was necessary until March 7, 1959." The effective date of the bond was changed from February 1, 1956, to March 7, 1956, by rider attached to the bond (R. 7) to conform to the desire of the insured. Mr. McGregor's affidavit explained that the personnel list is obtained when the bond is initially written to *compute the premium*. The list itself states:

> "FOR BRANCH OFFICE OR GENERAL AGENT'S USE ONLY Shows classification of each position and also your premium computation."

If the personnel list had been required or solicited annually by the bonding company as Mr. Robinson's affidavit implies, there would have been a new personnel list dated March 7, 1957, and March 7, 1958. Plaintiff did not, and cannot furnish any documentary evidence to substantiate its notion that a new list of employees was required to be furnished annually to be attached to the bond. No other personnel list was furnished after July 18, 1957 covering any other new employees. Plaintiff has not presented any letters to defendant or its agent whereby it requested that new employees be covered, as personnel changes may have required.

This blanket bond required no such attention to each change in personnel. Therefore when the list of July 18, 1957 was received by defendant's Salt Lake City branch office, with Harold Knowles' name upon it, there was no duty placed upon defendant to once again state and declare that the bond had been canceled as to him. The list was not received on any anniversary date — merely prompted by defendant's request for individual applications from the Ken Garff Company. *The fact that Aetna Loan Company furnished the personnel list with Knowles name upon it merely indicates that it chose to keep Knowles in its employment despite the fact he was not bonded.* There is no law that a bonding company has a duty affirmatively and repetitiously to declare that an employee is not covered under the bond. As authority for defendant's statement that the cancellation clause in the bond is standard throughout the industry, see Stearns, Law of Suretyship, Fifth Edition, Form 6 in Appendix, page 545.

POINT III.

THERE WAS NO AGREEMENT, NOR ESTOPPEL REINSTATING COVERAGE AS TO HAROLD KNOWLES UNDER THE BOND.

The record is clear that the blanket fidelity bond was canceled, and that no request or agreement to reinstate Knowles under the bond was made. Plaintiff's contention that nevertheless there is coverage must be based on some sort of an estoppel. But plaintiff never filed any Reply setting forth an estoppel. Rule 8(c) provides:

> "In pleading to a preceding pleading, a party shall set forth affirmatively . . . estoppel . . . and any other matter constituting an avoidance or affirmative defense."

In *Collett et al. v. Goodrich*, 119 Utah 662, 231 P.2d 730, the opinion of Mr. Chief Justice Wolfe states:

> "At page 9 of volume 120 A.L.R., a comprehensive collection of cases sustains the author's conclusion that the majority view requires a party who has the opportunity to do so to specially plead an equitable estoppel. Where the estoppel is not pleaded it is inadmissible, *Homberger v. Alexander*, 11 Utah 363, 40 P. 260; *Berow v. Shields*, 48 Utah 270, 159 P. 538; *Barber v. Anderson*, 73 Utah 357, 274 P. 136; *Tracy Loan & Trust Co. v. Openshaw Inv. Co.*, 102 Utah 509, 132 P.2d 388. 'The object of the declaration is to give the defendant fair notice of the case he is called into court to meet.' *Homberger v. Alexander*, supra."

This rule is salutary, for if properly followed in the instant case it would have demonstrated to plaintiff and the trial court that the burden was upon the plaintiff of setting forth sufficient facts to demonstrate an estoppel. Plaintiff's affidavit does not do so. It does not state that any request was made to reinstate Knowles. No evidence was adduced of a promise or indication that the bonding company considered or agreed to reinstate him. Nothing is shown that a representation was made which justified plaintiff in concluding that Knowles was covered despite the letter of cancellation.

In *Ravarino v. Price*, 123 Utah 559, 260 P.2d 570, this court stated:

"Generally, the doctrine of equitable estoppel is applicable only when a misrepresentation is made as to past or present facts; however, an exception is recognized when a misrepresentation as to the *future* operates as an abandonment of an existing right on the party making the misrepresentation. 21 C.J. 1142; Bigelow on Estoppel (6th Ed.) 637. Actually this exception is a limited application of the doctrine of promissory estoppel. 31 C.J.S., Estoppel, § 80. The general principle of promissory estoppel is embodied in the Restatement of the Law of Contracts, Sec. 90, under the heading of 'Informal Contracts Without Assent or Consideration," as follows:

> " 'A promise which the promissor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise.'

"Promissory estoppel is historically rooted as a substitute for consideration, *Allegheny College v. National Chautauqua County Bank*, 246 N.Y. 369, 159 N.E. 173, 57 A.L.R., 980, per Cardozo, C.J., citing 1 Williston on Contracts, Secs. 116, 139; however, it is applied where the promise of the promisor as to his future conduct constitutes the intended abandonment of an existing right on his part. (Discussion of cases) The common element in these cases is that the promise as to future conduct constitutes a manifestation that the promissor will abandon an existing right which he possesses."

There being no dispute that the bond was canceled as to Knowles in 1956, it became plaintiff's burden to

plead an estoppel and present evidence in support thereof to show how defendant abandoned an existing right which it possessed. This principle is expressed in *Zampos v. United States Smelting Refining and Mining Co.*, 206 F.2d 171 at 174 as follows:

> "But where the moving party presents affidavits, or depositions, or both, which taken alone would entitle him to a directed verdict, if believed, and which the opposite party does not discredit as dishonest, it rests upon that party at least to specify some opposing evidence that he can adduce which may reasonably change the result. *Radio City Music Hall Corp. v. United States*, 2 Cir., 135 F.2d 715; *Gifford v. Travelers Protective Association*, 9 Cir., 153 F.2d 209."

Defendant pointed out in its petition for interlocutory appeal that the matter of requesting individual applications under the Ken Garff Company bond, and of writing a $1,000 license bond only indicate that plaintiff had rather frequent correspondence with defendant about other matters, but wholly failed to request reinstatement of Knowles. About this, — there is no GENUINE issue of fact.

Defendant respectfully submits that under the doctrine of the following cases, it was error for the trial court to have denied defendant's motion for summary judgment.

> "Plaintiff first questions the summary judgment upon the grounds that it cannot be properly based upon an affirmative defense. No authority is cited in support of this contention; but the

authority is to the contrary! (Citing cases) The motion for summary judgment is for the purpose of expediting procedure and obviating trials where no genuine issue of fact exists. 2(citing cases) Where an affirmative defense is stated, such as a valid release, which would defeat the cause of action, it is the duty of the court to grant a judgment based thereon." *Ulibarri v. Christenson*, 2 Utah 2d 367; 275 P.2d 170.

"It is true, indeed, that a summary judgment is a drastic remedy which the courts are, and should be reluctant to use. 6(citing cases) Yet it does have a salutary purpose in the administration of justice in not requiring the time, trouble and expense of trial, when the best showing the plaintiff can possibly claim would not entitle him to a judgment. 7(citing *Zampos v. U.S. Smelting, Ref. & Min. Co.*, 10 Cir., 1953, 206 F.2d 171) *Holland v. Columbia Iron Mining Co.*, 4 Utah 2d 303, 310; 293 P.2d 700.

"We are in accord with the idea that the right of trial by jury should be scrupulously safeguarded. 2(citing cases) This, of course, does not go so far as to require the submission to a jury of issues of fact merely because they are disputed. If they would not establish a basis upon which plaintiff could recover, no matter how they were resolved, it would be useless to consume time, effort and expense in trying them, the saving of which is the very purpose of summary judgment procedure. 3(citing authority) *Abdulkadir v. Western Pacific Railroad Company*, 7 Utah 2d 53, 318 P.2d 339."

The issue of law in the present case is whether or not the plaintiff insured can reinstate an employee under

a blanket fidelity bond, as to whom coverage has been expressly cancelled by certified letter, without oral or written request so to do, but merely by forwarding a personnel list of 37 names with such employee's name included thereon. This is far more simple and clear cut than the issue of release of a death claim in the *Ulibarri* case, the issue of collusive fraud in the *Holland* case and the issue of contributory negligence in the *Abdulkadir* case.

The conclusion is inescapable that defendant chose to keep Knowles in its employment, despite the fact he was not covered under the bond.

Defendant wishes to thank this Honorable Court for granting its petition for interlocutory appeal. As stated in the *Abdulkadir* case, supra:

> "If (submission to a jury of issues of fact merely because they were disputed) would not establish a basis upon which plaintiff could recover, no matter how they were resolved, it would be useless to consume time, effort and expense in trying them, the saving of which is the very purpose of summary judgment procedure."

Respectfully submitted,

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