1959

Bernard L. Rose v. Louis Strike : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

BERNARD L. ROSE,
dba Commercial Factors,
Plaintiff,

— vs. —

LOUIS STRIKE,
Defendant.

Case
No. 9097

BRIEF OF APPELLANTS

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STATEMENT OF FACTS

In this action the plaintiff seeks to recover from the defendant the face amount of an account receivable of one C. M. Roestenburg & Sons, Inc., which account was assigned by said C. M. Roestenburg & Sons, Inc., to the plaintiff.

After issue was joined, each of the parties hereto separately moved for summary judgment in his favor.

A pre-trial proceeding was held in the trial court and, as a result, the following pre-trial order, as amended, was made (R 9.):

"The above-entitled matter came regularly before the court for pretrial on March 17, 1959. The parties were present in person and were also represented by counsel as follows:

"For the plaintiff, Merrill K. Davis, Esq.

"For the defendant, Leonard Elton, Esq.

"The following matters are not in dispute, and no proof will be required to establish them at the trial of this lawsuit:

"1. Plaintiff and defendant each bought accounts receivable from C. M. Roestenburg and Sons, Inc.

"2. A check from Convair, of which Exhibit 1 is a photostatic copy, was sent to C. M. Roestenburg and Sons, Inc., in payment of invoices which had been assigned to defendant and plaintiff, plaintiff's interest therein being $2305.00.

"3. An officer of C. M. Roestenburg and Sons, Inc., asked the defendant if he would take the check and pay the plaintiff or if Roestenburg should give the check to plaintiff and have plaintiff pay the defendant, and the defendant replied, 'Give me the check.'

"4. Roestenburg gave the defendant the Convair check on or about the 5th day of August, 1958.

"5. The plaintiff notified the defendant by phone on August 8, 1958, to pay the $2305.00 direct to plaintiff.

"6. The defendant refused plaintiff's request by phone and paid the $2305.00 to C. M. Roestenburg and Sons, Inc.

"7. The defendant held the Convair check until the 11th day of August, 1958, when he deposited it in his bank account, and on said 11th day of August, 1958, defendant gave C. M. Roestenburg and Sons his check for $2305.00, representing the difference between the amount which he had coming for accounts receivable assigned by Roestenburg to him and the amount of the check sent by Convair to C. M. Roestenburg and Sons, Inc., said Strike check being marked Exhibit 2.

"8. On August 11, 1958, C. M. Roestenburg and Sons, Inc., in the presence of the defendant cashed the defendant's check for $2305.00, after being identified by defendant.

"9. Exhibit 3 is a photostatic copy of the invoice under which plaintiff claims the $2305.00.

"10. On August 8, 1958, C. M. Roestenburg and Sons, Inc., sent to the plaintiff a check marked Exhibit 4, at the request of plaintiff and after defendant had refused to pay plaintiff the $2305.00, and referred him to Roestenburg, and this check was deposited by the plaintiff in his bank account and was dishonored by the maker's bank for lack of funds on August 12, 1958, and notice of said dishonor was received by the plaintiff on August 13, 1958, said notice of dishonor being marked Exhibit 5 and attached to Exhibit 4.

"11. Defendant knew that plaintiff was purchasing accounts receivable from C. M. Roestenburg and Sons for about a month before the Convair check was received by C. M. Roestenburg and Sons, Inc.

"It is ordered that unless counsel for the parties hereto notify the court to the contrary within five days from the mailing of a copy of this order to said counsel, that the foregoing will be considered by the court as the undisputed facts in this case, and the court will rule upon the respective motions heretofore made by each party for judgment.

"Dated at Salt Lake City, Utah, this 18th day of March, 1959."

/s/ A. H. Ellett
Judge

Based upon the foregoing pre-trial order, the trial court made and entered its judgment in favor of plaintiff and against defendant (R. 16). It is from this judgment that this appeal is taken by the defendant.

STATEMENT OF POINTS

Point I.

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF.

Point II.

THE TRIAL COURT ERRED IN REFUSING TO GRANT THE MOTION OF THE DEFENDANT FOR SUMMARY JUDGMENT.

ARGUMENT

Point I.

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF.

Point II.

THE TRIAL COURT ERRED IN REFUSING TO GRANT THE MOTION OF THE DEFENDANT FOR SUMMARY JUDGMENT.

For the sake of clarity in the argument, the plaintiff, Bernard L. Rose, doing business as Commercial Factors, will be referred to herein as "Rose"; the defendant, Louis Strike, will be referred to as "Strike"; and C. M. Roestenburg and Sons, Inc., will be referred to as "Roestenburg."

The two points involved herein will be argued and considered together, since consideration of either issue involves a full consideration of the other issue.

The trial court herein failed to provide the parties and this Court with a memorandum of its decision, and the defendant Strike, now finds himself in the position of speculating and conjecturing as to the legal theory upon which the judgment is founded. Defendant Strike, therefore, is required to point to the several situations which might have existed in the mind of the trial court.

It appears that the only possible situations are: (1) that no legal status or relationship existed between Rose and Strike, or between Rose and Roestenburg, except for the handling of a check in an ordinary and usual busi-

ness manner; or, (2) that Strike was some sort of a fiduciary.

Assuming, but not admitting, the fiduciary relationship between Strike and Roestenburg, the pre-trial order shows no abuse or betrayal of the confidence reposed. The contrary appears. Strike returned to Roestenburg the sum of $2305.00, representing the exact difference between the amount of the Strike account receivable and the Convair check (R. 10). It is clear that no benefit or enrichment resulted to Strike. Such circumstances could not possibly have created a trust for the benefit of Rose.

This court in *Renshaw* v. *Tracy Loan & Trust Company,* 87 Utah 359, 35 P. (2) 298, made it unmistakably clear:

> "* * * The existence of the fiduciary relationship alone is not sufficient to create a trust. There must also be 'a betrayal of the confidence reposed or some breach of duty imposed under it.' Howe v. Home & Ogden Ball Bearing Co. (C. C. A.) 154 F. 820, 819; 65 C. J. 479.
>
> Having established the fiduciary relation, the burden was still upon plaintiff to show such betrayal of that relationship as would give rise to the constructive trust. Scott v. Crouch, 24 Utah, 377, 67 P. 1068; Taylor v. Bunnell, 211 Cal. 601, 296 P. 288; 65 C. J. 491."

This was repeated in the same case later reported in 87 Utah 364, 49 P. (2) 403:

> "* * * While the fiduciary relationship is a prerequisite to the creation of a constructive trust, such as we are here considering, yet the trust

> does not arise until that relationship has been betrayed or violated. It is the confidential relationship plus the abuse of the confidence thus imposed, that authorizes equity to construct a trust for the benefit of the party whose confidence has been abused." * * *

Rose complains of Strike because Strike did what the ordinary and reasonable businessman would have done — return the difference of $2305.00 to the party from whom it was received.

The legal and equitable problems involved herein can be clearly understood by consideration of the alternative situations set out in paragraph (h), Section 330 of the Restatement of the Law, Trusts (2d), which states:

> "h. TRUST FOR A PARTICULAR CREDITOR OF THE SETTLOR. If a debtor delivers money or other property to a third person, not an agent of the creditor, with instructions to use the money or other property to pay the creditor, the third person may be a trustee for the debtor, or on the other hand he may be a trustee for the creditor. Whether the third person is trustee for the debtor or is trustee for the creditor depends upon the manifestation of intention of the debtor.
>
> If the transfer of the property to the third person was made by the debtor in pursuance of an agreement with the creditor, the terms of the agreement are controlling on the question whether the third person is trustee for the creditor. Where the creditor agrees that if the property is transferred to the third person he will release his claim against the debtor, it is clear that the third person becomes trustee for the creditor. Even though the creditor does not agree to release his claim, and

even though he does not agree to forbear from enforcing his claim, ordinarily where the transfer is made in pursuance of an agreement with the creditor, the third person becomes trustee for the creditor.

If the transfer of the property to the third person was not made in pursuance of any agreement with the creditor, the inference is that the trust is for the debtor and not for the creditor, and the debtor can revoke the trust at any time without the consent of the creditor. In such a case the transfer is ordinarily made by the debtor simply for his own convenience, without any intention to confer upon the creditor irrevocable rights. Even in such a case, however, the debtor may manifest an intention to create a trust in favor of the creditor and to give him an interest in the property of which the debtor cannot subsequently deprive him by revoking the disposition.

If a debtor delivers money or other property to a third person with instructions to use the money or other property to pay the creditor, the third person may be merely an agent of the debtor. Whether he is an agent or a trustee depends upon whether title to the property passes to the third person or whether the third person merely has possession of the subject matter. See § 8. If the third person is merely an agent of the debtor, the debtor can at any time terminate the agency and compel the third person to deliver the property back to him." * * *

As to the manifestation of the intent of Roestenburg, the pertinent and pointed facts reveal that while Strike held the check, and prior to its deposit, Roestenburg had

delivered its check to Rose for the said sum of $2305.00 (R. 10); that at the same time that Strike deposited the Convair check, Strike gave Roestenburg his check for $2305.00, and Roestenburg then immediately cashed the Strike check and received the money (R. 10); that the Roestenburg check to Rose was not dishonored until after the Strike check had been cashed and Roestenburg had received the funds (R. 10); that there is no showing of any agreement between Roestenburg and Rose, and that there is no showing of any agreement between Strike and Rose. In fact, there were no agreements at all between these parties. The manifest intention of Roestenburg clearly was to retain control of the $2305.00 and it did just that. The trial court did not find, nor could it, that Strike knew or should have known of any breach of trust or anticipated breach of trust by Roestenburg. The law does not presume wrongful or dishonest acts, nor does the law require businessmen to presume and anticipate wrong and dishonesty, *Beagley* v. *United States Gypsum Co.*, 116 Utah 337, 209 P. 2d 750. Actually, Strike had every reason to believe that the Roestenburg check to Rose was good, since he gave Roestenburg a check in an amount sufficient to cover the Roestenburg check to Rose.

Scott on Trusts, Volume 2, page 1608, contains this comment:

> "* * * Even though the transferee did not receive the property with actual knowledge of the breach of trust, yet if after receiving actual knowledge while he still retains the property he refuses to

> restore it to the trust, it would seem that the beneficiary can charge him with the value of the property at the time of such refusal with interest thereon, or with its value at the time of the decree with the income which he has received therefrom.
>
> Where, however, the transferee has not disposed of the property, and did not receive it with actual knowledge of the breach of trust, and did not refuse to restore it after receiving such knowledge, it would seem that if he is ready and willing to restore the property to the trust with any income which he has received from the property while he held it, *he should be under no further liability.*" * * * (Emphasis supplied)

Strike was not only willing to restore the $2305.00 to Roestenburg, but he actually did deliver this sum to Roestenburg.

Rose made his demand upon Strike and, at the same time he demanded, and received, a check from Roestenburg (R. 10). Suppose the Roestenburg check to Rose had been honored. Further, and in addition, suppose that Strike had delivered $2305.00 to Rose. Certainly, no sane person would contend that Rose should have both. Also, what would Strike's position have been with Roestenburg if he had delivered the $2305.00 to Rose? Wouldn't he have run the risk of making himself liable to Roestenburg? Rose, by his very act of demanding and receiving the Roestenburg check made his intention manifest, and it was simply this — Rose was playing both ends against the middle. This does not give rise to equity.

In its final analysis, this case boils down to a situation where Rose purchased an account receivable from Roestenburg and, for reasons known only to himself, failed to give notice of the assignment to Convair, the debtor. (This inference appears reasonable for the reason that the Convair check was made payable only to Roestenburg) (Exhibit P-1). Rose assumed this risk, and the debtor, Convair, paid the account to the only debtor known to it, Roestenburg. Roestenburg, which then held the funds, $2305.00, as a constructive trustee for its assignee, Rose, violated and failed in its duty to Rose.

The Court's attention is called to the fact that the pre-trial order makes no reference to the Second Cause of Action in the plaintiff's complaint. The reason for this is that the plaintiff made no effort to justify himself as a "protected assignee" under the provisions of Title 9, Chapter 3, Utah Code Annotated, 1953, as amended. As a matter of fact, counsel for plaintiff, in effect, abandoned this cause of action. The assignment to Rose was not a "written assignment for value, signed by the assignor," as required by Section 4 of the Accounts Receivable Act (Exhibit P-3).

CONCLUSION

Rose and the trial court would now impose the burden upon Strike of assuming a responsibility, not because of any dereliction of duty, dishonesty or unfaithful act of Strike, but because Rose voluntarily exposed himself to

a risk which resulted in a loss to him because his assignor, not Strike, failed to perform his duty. It is inconceivable that the decision arrived at by the trial court could be justified in either law or equity.

Appellant submits that the trial court erred in the various rulings and acts set forth under the points herein presented and argued.

Respectfully submitted,

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