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

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

NOV 16 1959

BERNARD L. ROSE,
dba Commercial Factors,
Plaintiff and Respondent,

—vs.—

LOUIS STRIKE,
Defendant and Appellant.

State, Supreme Court, Utah

Case

No. 9097

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

ADDITIONAL STATEMENT OF FACTS

Respondent accepts the statement of facts as set forth in defendant's brief but calls the court's attention to allegations in plaintiff's amended complaint which were admitted in defendant's answer. These should be considered as part of the fact statement:

"The amount of the Convair check received by Roestenburg and delivered to Strike was \$7,376 (Exhibit I). Amended Complaint, Par. 3 (R3); Answer, Par. 5 (R6 and 7).

“Strike filed a complaint for the foreclosure of a mortgage on the Roestenburg Plant, and a decree of foreclosure was made and entered the same day by virtue of a voluntary appearance, waiver, and consent on the part of the Roestenburg Company not more than 5 days after the refusal by Strike to pay Rose. Plaintiff’s amended complaint, Par. 6 (R4); Defendant’s answer, Par. 8 (R7).”

ARGUMENT

POINT I

THE COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR PLAINTIFF FOR THE REASON THAT THE PLEADINGS AND THE ADMISSIONS ON FILE SHOW THAT THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT, AND PLAINTIFF WAS ENTITLED TO THE JUDGMENT AS A MATTER OF LAW.

Argument under Point I is the argument required to substantiate the other numbered points herein. The statement of facts alone, not including the foregoing additions thereto, are those which the trial court deemed the requisite material facts in order to hold for plaintiff.

POINT II

DEFENDANT WAS TRUSTEE OF AN EXPRESS TRUST WHEREIN PLAINTIFF WAS THE BENEFICIARY.

Strike knew Rose had a \$2,305 equity in a \$7,376 Convair check because he was offered the alternative of taking entire check and paying Rose, or permitting Rose to have check and paying him (Strike). Strike made his election to act as trustee when he said, “Give me the check,” and took it.

We have a trustee certain, a corpus certain, a purpose certain, and a specified beneficiary of the trust.

Knowledge of the beneficiary is not essential to the creation, existence or validity of a trust where other acts and declarations of the trustor and trustee are sufficient to give rise to it. Nor is the beneficiary's acceptance of, or assent to, the trust necessary to its creation and validity. Acceptance is presumed until rejected by beneficiary since the trust is beneficial to him.

54 Am. Jur. 121, Section 145 which cites Am. Law Inst. Restatement; Trusts, Vol. I, Section 36.

POINT III

IN THE ALTERNATIVE, DEFENDANT WAS TRUSTEE OF A CONSTRUCTIVE TRUST, WHEREIN PLAINTIFF WAS BENEFICIARY.

Let us examine in chronological sequence the facts crucial to this controversy.

1958

- July 4th: Strike knew that Rose was purchasing Roestenburg invoices. Pretrial Order, Par. 11 (R10).
Rose purchased Convair invoice Number 11768 C in the sum of \$2,305. Exhibit 3. Pretrial Order, Par. 9 (R10).
- August 4th: Convair drew check for \$7,376. Exhibit 1.
- August 5th: Roestenburg endorsed and delivered Exhibit 1 to Strike. Pretrial Order, Par. 4 (R9).
- August 8th: Rose demanded money from Strike. Strike refused and sent Rose to Roestenburg. Pretrial Order, Pars. 6 and 10 (R9 and 10).

- August 8th: Rose demanded money from Roestenburg, received check for \$2,305 and deposited. Exhibit 4. Pretrial Order, Par. 10 (R10).
- August 11th: Strike delivered his check for \$2,305 to Roestenburg. Pretrial Order, Par. 7 (R10).
- August 11th: Roestenburg *cash*ed Strike check at Strike's bank in presence of Strike who identified Roestenburg as proper person to cash a check of a corporate payee. Exhibit 2. Pretrial Order, Pars. 7 and 8 (R10).
- August 12th: Check to Rose (Exhibit 4) dishonored by maker's bank. Pretrial Order, Par. 10 (R10).
- August 13th: Plaintiff received notice of dishonor. Pretrial Order, Par. 10 (R10).
- August 13th: Strike files complaint for foreclosure of Roestenburg Plant. Plaintiff's Amended Complaint, Par. 6 (R4) and Defendant's Answer, Par. 8 (R7).
- August 13th: Strike takes decree of foreclosure by consent. (R4 and 7).

Three days elapsed before Rose demanded payment from Strike. Strike immediately refused and referred Rose back to Roestenburg. Previous points dwell on the fact that Strike had possession of funds in which he had no equitable right, for he knew they belonged to Rose. His refusal at this time was a wilful and wrongful conversion of the \$2,305 in his possession.

At this point, if at no other, he became the constructive trustee of these funds, and he was duty bound to assure the ultimate delivery of them to Rose. At this point there can be no question that Strike was unjustly enriched in the sum of \$2,305. Whatever obscure reasons possessed Strike to decide to divest himself of these funds on August 12th, four days after refusing to pay Rose, and to reconvey them to Roestenburg did not absolve him of the responsibility of seeing that Rose was paid. As a matter of fact, reconveying the funds to Roestenburg was itself a breach of trust since they violated the purpose for which they were given to Strike.

A trustee cannot resign a trust except:

- (a) with permission of a proper court, or
- (b) in accordance with the terms of the trust, or
- (c) with the consent of all the beneficiaries if they have capacity to give such consent. Am. Law Inst. Restatement, Section 106.

Did Strike carry through with his duty to see that Rose was paid? Strike, instead, completely disregarding his responsibility, drew a check payable to the Roestenburg and Sons Corporation. Exhibit 2. He then went to his own bank (Exhibit 2) with an officer of the Roestenburg Company. Note that this was not the bank of the Roestenburg Company. Exhibit 4. At his own bank he identified this individual as the proper officer of the Roestenburg Corporation to cash this draft. Exhibit 2.

Respondent asks the court to superimpose this picture upon the background of a signed appearance, waiver, and consent which permits the appellant here to file an

action and secure a decree of foreclosure on the entire plant and equipment of Roestenburg just two days later. The complete picture is one which exudes a fiduciary relationship, or one of peculiarly intimate knowledge on the part of Strike as distinguished from Rose. This picture not merely has the aura of a constructive trust; it also has its aroma.

POINT IV

DEFENDANT WAS A TRANSFEREE OF TRUST FUNDS, NOT PROTECTED AS A BONA FIDE PURCHASER, AND COULD PROPERLY BE PROCEEDED AGAINST IN MONEY HAD AND RECEIVED.

On receipt of a check for \$7,376 (Exhibit 1) from Convair, Roestenburg became a trustee with Rose and Strike as beneficiaries, entitled to the sums of \$2,305 and \$5,071, respectively, charged with the duty of distributing to each the amount due him.

Possession of this check did not establish a debtor-creditor relationship between him and either party. Roestenburg recognized that he had no right to the proceeds of the check. Rather than deposit it, he endorsed it and offered delivery to Strike, with the express condition simultaneously made and accepted, that Strike pay Rose. Pretrial Order, Par. 3 (R9).

Strike's actions deny a debtor-creditor relationship between any of the parties by the fact that Strike accepted the Convair check for an amount covering both his and Rose's invoices, rather than requiring settlement of his account in the exact amount by Roestenburg's check and leaving Rose to his own devices for collection.

Since notice to Strike of Rose's equity was obvious, then it follows as a matter of law that he took this equity clothed with the trust. *Russell vs. Clark*, 7 U.S. 69, 3 L. Ed. 271.

While respondent does not question Roestenburg's motive in conveying to Strike, there is no doubt that a conversion took place of the trust property to which Rose was entitled. The acceptance by Strike with all of the knowledge Strike had of the transaction—even if not compounded by Strike's refusal three days later to pay Rose and sending him instead to Roestenburg for his money while it was still in Strike's possession — is sufficient to hold him liable and accountable as a constructive trustee.

54 Am. Jur. 197, Section 254 declares:

"HOLDING TRANSFEREE AS CONSTRUCTIVE TRUSTEE.— The person to whom a transfer of trust property constituting a wrongful conversion of the trust property and a breach of trust is made, when not protected as a bona fide purchaser for value, is liable and accountable as a constructive trustee in invitum and ex maleficio or de son tort. His liability commences at the moment of the transfer of trust property to him and continues until there is full restoration to the beneficiary. Such a transferee acquires no title whatever; he merely takes the place of his transferor, and becomes chargeable with the execution of the trust to the same extent that such grantor was chargeable before the transfer. He and the original trustee may be held liable and accountable as joint and several trustees."

He may be proceeded against in money had and

received. Independent School Dist. vs. Common School Dist. (Idaho) 55 Pac. (2) 44, 105 ALR 1267.

POINT V

BENEFICIARY IS ENTITLED TO SEEK AND RECOVER TRUST FUNDS WHEREVER HE MAY FIND THEM, IF NOT BARRED BY A BONA FIDE HOLDER FOR VALUE, AND FAILING TO RECOVER THEM, MAY PROCEED AGAINST A WRONGDOING TRUSTEE.

“OPTIONS OF BENEFICIARY AS TO RE-COURSE.—The beneficiary of a trust has, in general, an option between following trust property or its proceeds and recovering damages for its wrongful conversion.” *Lathrop v. Bampton*, 31 Cal 17, 89 Am Dec 141; *Zohos v. Marefolos*, 48 Idaho 291, 281 P 1114; *Bohle v. Hasselbroch*, 64 NJ Eq 334, 51 A 508, 61 LRA 323; *Chaves v. Myer*, 18 NM 368, 85 P 233, 6 LRA(NS) 793. *Anno*: 26 ALR 6, s. 35 ALR 747, 55 ALR 1275, and 102 ALR 374; 7 Ann Cas 554.

“Furthermore, an election to pursue the trust property or products thereof, where the pursuit fails in part, does not bar a proceeding to enforce personal liability for the deficiency.” *United States v. Carter*, 217 US 286, 54 L ed 769, 30 S Ct 515, 19 Ann Cas 594.

POINT VI

NO DEBTOR - CREDITOR RELATIONSHIP EXISTED BETWEEN PLAINTIFF AND THE ORIGINAL TRUSTEE—SETTLOR. THEREFORE, THE LAW CITED BY APPELLANT IS NOT APPLICABLE.

The Renshaw Case cited by appellant involves the following facts: Plaintiff, with other employees, for a long time deposited money with Walker Department Store, his employer. This was according to an encour-

aged and pronounced policy of the store which paid 6 percent interest semi-annually on these deposited accounts. The employees had had repeated assurances that their money was safe and no matter what happened, the employees would get their money first.

The store went broke with insufficient assets to pay all of the creditors, including these depositors. The plaintiff attempted in the first appeal to establish a constructive trust and in the second, a specific trust. The Court in denying relief to plaintiff set forth as a measure of a trust, not only the establishment of a fiduciary relationship but also a breach of this relationship. The Court pointed out that there were no limitations on the department store in its use of the funds or the purposes to which they could be used, and the company was free to expend them as it saw fit. *Renshaw v. Tracy Loan & Trust Co.*, 87 Utah 359, 35 P. (2) 298; *Renshaw v. Tracy Loan & Trust Co.*, 87 Utah 364, 49 P. (2) 403.

In the instant case our facts fit the law as established by the *Renshaw Case*, differing materially from its facts. In the *Renshaw Case* the Court particularly pointed out a debtor-creditor relationship, with freedom in the debtor to use the funds as he pleased, while in the instant case, Roostenburg could distribute Convair receipts only to Rose and Strike. He had no freedom of expenditure.

With respect to appellant's other citations in the Restatement of Law, these also deal with a debtor-creditor relationship. In the instant case both Strike and Rose bought and paid cash for invoices. They did not lend the Roestenburg Company money. There is no concept in the law whereby a debtor-creditor relationship can spring up in an executed sale. No such relationship was contemplated or created here.

The test is: according to the facts before the Court, could either Rose or Strike have demanded payment or sued Roestenburg before it received the Convair check?

CONCLUSION

Since there is sufficient in the agreed facts from which a court could conclusively find that a trust had been established wherein Strike was the trustee and Rose was the beneficiary and that there was a breach of this trust, then the trial court had no alternative but to grant plaintiff's motion for summary judgment.

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