1968

Continental Thrift and Loan Company v. John L. Allen and Phyllis S. Allen Vs. Willliam Kelson and Roy Collard and Maurice anderson : Appellant's Brief

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vs.

L. ALLEN
PHYLLIS S. ALL
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— vs. —

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AURICE AND
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IN THE SUPREME COURT OF THE STATE OF UTAH

CONTINENTAL THRIFT AND LOAN COMPANY,
Plaintiff and Appellant,
— vs. —
JOHN L. ALLEN and PHYLLIS S. ALLEN,
Defendants and Third Party Plaintiffs,
— vs. —
WILLLIAM KELSON and ROY COLLARD,
Third Party Defendants,
and
MAURICE ANDERSON,
Intervenor and Respondent.

Case No. 11299

APPELLANT'S BRIEF

STATEMENT OF CASE

This case involves an action by plaintiff and appellant who obtained a judgment against defendants and also an assignment of a judgment obtained by defendants against third party defendant, Roy Collard. Plaintiff and appellant executed upon an automobile registered in the name of Roy Collard and Maurice Anderson.

Maurice Anderson intervened in the action claiming that the automobile was owned solely by him.

The question presented for determination herein is whether or not Roy Collard owned any interest in the automobile and, if so, what the extent of that ownership interest was.

DISPOSITION IN THE LOWER COURT

Intervenor obtained an Order to Show Cause based upon his affidavit seeking an order directing plaintiff and appellant to release the custody of the automobile in question and to deliver possession of same to him. Upon a hearing of the matter the District Court of Salt Lake County issued its order directing that plaintiff forthwith release possession of the automobile and deliver it to intervenor. It is from this order that plaintiff and appellant appeals.

RELIEF SOUGHT

Appellant seeks a reversal of the order of the lower court and reinstatement of the order of execution originally entered by the lower court.

STATEMENT OF FACTS

On June 1, 1964, plaintiff obtained a judgment against defendants, John L. Allen and Phyllis Allen, for the sum of $8,703.88. At the same time, defendants obtained a judgment against third party defendant, Roy Collard, for the same amount as the judgment that was

rendered against him (R. 1). Later, on January 11, 1965, defendants, Allen, assigned their judgment against third party defendant, Collard, to plaintiff (R. 3). Pursuant to the assignment of said judgment and on April 15, 1968, plaintiff obtained an order of execution from the lower court on the unexempt property of Roy Collard (R. 4). In accordance with the directions in the executon an employee of the Salt Lake County Sheriff's Office levied on a 1968 Cadillac 2-Door Hardtop automobile and stored the vehicle at the Broadway Garage in Salt Lake City (R. 5, 6).

Shortly after the action of the sheriff's office in levying upon the automobile, Maurice Anderson filed his Petition For Interpleader claiming that even though the Certificate of Title showed himself and Roy Collard to be the owners of the vehicle, Mr. Collard did not have any interest in the automobile (R. 6, 7). The court permitted the interpleader (R. 9) and upon an affidavit of Roy Collard, (R. 10, 11) the court issued its Order to Show Cause ordering plaintiff to appear in court on a day certain to show cause why the Cadillac automobile should not be delivered to Maurice Anderson upon the ground that he had the sole ownership interest in the vehicle (R. 12).

It seems that on approximately January 25, 1968, Roy Collard was indebted to Maurice Anderson in the approximate sum of $30,000 (R. 24 T. 2). In that date Mr. Collard went to see Mr. Anderson "with a proposition to buy an automobile." Collard told Anderson that he had a promotion which had just reached the state of

completion and he needed to make several trips to consummate the deal quickly (R. 25 T. 3). Anderson was apparently advised by Collard that if he would loan him the money to buy a car, he, Collard, could pay Anderson what was owed to him in a very short time (R. 25, T. 3). Upon these assurances Mr. Anderson bought Mr. Collard the automobile and took a promissory note from him for the purchase price (R. 25 T. 3).

The transaction was handled by Mr. Anderson making his check payable to Carleson Cadillac Company in the amount of $8,200.00 in payment of the car (R. 25, T. 3). The vehicle, a 1968 Cadillac 2-Door Hardtop Fleetwood Eldorado, was registered and titled in the names of Roy Collard and Maurice Anderson, and as part of the same transaction Collard delivered his promissory note in the amount of $8,200.00 dated January 25, 1968, to Mr. Anderson (R. 25, T. 3). There is no evidence to show that Mr. Collard transferred title to the automobile and certainly no evidence of any kind to establish the fact that Mr. Collard transferred title to the vehicle to Mr. Anderson prior to the time the automobile was levied upn by Continental Thrift and Loan.

On these facts the lower court found that Maurice Anderson was the sole owner of the automobile in question and ordered that the vehicle be released from the writ of execution and delivered to Mr. Anderson.

It is from that order that this appeal is taken.

ARGUMENT

POINT I

THE COURT ERRED IN FINDING THAT DEFENDANT, ROY COLLARD, DID NOT HAVE ANY OWNERSHIP INTEREST IN THE AUTOMOBILE IN QUESTION.

The testmony of Mr. Anderson, taken at the time of the hearing on his Order to Show Cause against plaintiff, is significant though short. Taking the testimony as it is, and presenting it as favorably as one can for Intervenor it seems obvious to plaintiff that Mr. Anderson had no ownership interest in the Cadillac automobile at any time and it was not intended by either himself or Mr. Collard that he have any. It is equally as obvious that what Mr. Anderson attempted to do was obtain security for the promissory note delivered to him from Collard.

Anderson testified that Collard came to him and said that "he had a promotion which had just reached the state of cmpletion and he needed a car very badly and with this car he would be able to consummate the deal very quickly because he had several trips" to make (R. 25, T. 3). Mr. Anderson further stated that Collard said that if he (Anderson) would loan him (Collard) the money to buy a car he was sure he could pay Anderson what he owed him in a very few days or a few weeks.

It was testified by Mr. Anderson, "So I bought him this car and took a note for it" (R. 25, T. 3).

Later in his tesitmony Mr. Anderson was asked the following question by his attorney, Eldredge Grant, to which he responded:

> Q. The purpose of your buying the automobile for Mr. Collard was to give him the opportunity to earn the money to pay you back?
>
> A. That is right.

The testimony of Anderson as it relates to what both he and Collard said and what they intended is (1) that Collard desired to borrow $8,200 from Anderson so that he could buy a car, thus indicating that he wanted to own the car and owe Anderson for the purchase price; (2) that Anderson approved of the suggestion and he therefore bought Collard the automobile, indicating that Collard was the owner of it and not Anderson; and (3) that Anderson took and accepted Collard's note for the purchase price of the car, indicating that both parties intended that the automobile was Collard's and the promissory note with the obligations evidenced thereby was Anderson's, thus giving Anderson the right to proceed against Collard upon a negotiable instrument if he failed to repay the purchase eprice of the car.

Appellant's position is buttressed in this regard by Mr. Anderson, who stated that on May 3, 1968, Mr. Collard transferred the title to him (R. 25, T. 3, R. 26, T. 4) and that this was done for title purposes only:

> Q. So the car has, for title purposes, been given back to you?
>
> A. That is right.

Here again it is apparent that after plaintiff levied upon the automobile Mr. Collard transferred title of it to Mr. Anderson so that for title purposes only, and not for purposes of showing who was the actual owner Anderson would appear as the owner of the car. It could not be more obvious then that this move was a flagrant attempt by both Collard and Anderson to defeat the legitimate efforts of Collard's creditors to partially satisfy its judgment.

According to the great weight of authority, ownership of a motor vehicle may be evidenced by possession of a certificate of title relating to such vehicle, although such documents do not ordinarily establish conclusively the ownership of such vehicle, but are merely prima facie evidence of it. 7 Am. Jur. 2d, Automobiles and Highway Traffic, Secs. 23 et seq. In this regard Utah follows the general rule establishing that the certificate of title to an automobile is only prima facie evidence of ownership and that the presumption created thereby is rebuttable. *Jackson* v. *Jones,* 97 Utah 41, 89 P. 2d 235; *Swartz* v. *White,* 80 Utah 150, 13 P. 2d 643; *Ferguson* v. *Reynolds,* 52 Utah 583, 176 P. 267. Other Utah cases supporting this proposition, although not dealing directly with this identical question, are *Dahl* v. *Prince,* 119 Utah 556, 230 P. 2d 328; *Stewart* v. *Commerce Insurance Company of Glens Falls, N. Y.,* 114 Utah 278, 198 P. 2d 467.

For cases of sister jurisdictions in this regard see *Lynn* v. *Herman,* 72 Cal. App. 2d 64, 165 P. 2d 54; *Fredcrico* v. *Universal C.I.T. Credit Corp.,* 140 Colo. 145, 343 P. 2d 830; *Starr* v. *Welch,* (Okla.) 323 P. 2d 349; *Dicillo*

v. *Osborn,* 204 Or. 171, 282 P. 2d 611; *Jenkin* v. *Anderson,* 12 Wash. 2d 58, 120 P. 2d 548, Supplemented 12 Wash. 2d 58, 123 P. 2d 759.

Appellant contends, and it believes not without a good deal of merit, that the evidence shows that even though the title to the Cadillac automobile disclosed both Maurice Anderson and Roy Collard as the owners thereof, in fact Roy Collard was intended to be and was the true and sole owner thereof. The implications of a contrary finding are so fraught with inequities as to Mr. Collard that one can be assured that he did not intend Mr. Anderson to be the sole owner of the vehicle. Otherwise the parties have put Mr. Collard in the ridiculous and unbelievable position of having borrowed the sum of $8,200 to buy an automobile, having given a promissory note for the purchase price and being obligated to Anderson on that and then finding himself in the unenviable situation of not owning the autombile for which he is obligated to pay.

Certainly it should be apparent that neither Collard nor Anderson intended this to be the result. It should be equally apparent that what they did intend was that Collard own the automobile and that he owe Anderson for the purchase price pursuant to the promissory note. Again, it seems obvious that by having his name on the certificate of title, both Mr. Anderson and Mr. Collard attempted and intended that Anderson have security for payment of the promissory note given him by Collard.

POINT II

THE COURT ERRED IN ORDERING THE AUTOMOBILE RELEASED FROM PLAINTIFF'S EXECUTION BECAUSE INTERVENOR'S ATTEMPT TO RETAIN A SECURITY INTEREST IN THE VEHICLE WAS DEFECTIVE.

Appellant incorporates by reference into Point II of this brief th eargument and law set forth in Point I.

Section 70A-9-103(4) Uniform Commercial Code, U.C.A., 1953, provides as follows:

> "Notwithstanding subsections (2) and (3), if personal property is covered by a certificate of title issued under a statute of this state or any other jurisdiction which requires indication on a certificate of title of any security interest in the property as a condition of perfection, then the perfection is governed by the law of the jurisdiction which issued the certificate."

Section 70A-9-302 Uniform Commercial Code, U.C.A., 1953, provides as follows:

> "(1) A financial statement must be filed to perfect all security interests except the following:
>
> * * * *
>
> (3) The filing provisions of the chapter do not apply to a security interest in property subject to a statute
>
> (a) * * * *
>
> (b) of this state which provides for central filing of security interests which is not inventory held for sale for which a certificate of title is required under the statutes of this

state if a violation of such a security interest can be indicated by a public official on a certificate or a duplicate thereof.

(4) A security interest in property covered by a statute described in subsection (3) can be perfected only by registration or filing under that statute or by indication of the security interest on a certificate of title or a duplicate thereof by a public official."

The transaction that occurred between Mr. Anderson and Mr. Collard is not covered by the Commercial Code. One therefore must go to the Motor Vehicle Act of the Code in order to determine the requisites for validity of an encumbrance on the automobile. The following Code provisions of U.C.A., 1953, are applicable:

"41-1-37. Certificate of title — Contents. The certificate of title shall contain upon the face thereof the identical information required upon the face of the registration card and in addition thereto a statement of the owner's title and of all liens and encumbrances upon the vehicle therein described, and whether possession is held by the owner under a lease, contract of conditional sale, or other like agreement. Said certificate shall bear thereon the seal of the department.

"41-1-38. Certificate of title — Signature of owner — Notation of liens. — The certificate of title shall contain upon the reverse side a space for the signature of the owner and the owner shall write his name with pen and ink in such space upon the reverse side forms for assignment of title or interest and warranty thereof by the owner with space for notation of liens and encumbrances upon the vehicle at the time of a transfer.

"41-1-80. Filing liens and encumbrances. — No conditional sale contract, conditional lease, chattel mortgage, or other lien or encumbrance or title retention instrument upon a registered vehicle, other than a lien dependent upon possession, is valid as against the creditors of an owner acquiring a lien by levy or attachment or subsequent purchasers or encumbrances without notice until the requirements of sections 41-1-81 to 41-1-87 have been complied with.

"41-1-81. Filing instrument creating lien or encumbrance. — There shall be deposited with the department a copy of the instrument creating and evidencing such lien or encumbrance, which instrument is executed in the manner required by the laws of this state with an attached or endorsed certificate of a notary public stating that the same is true and correct copy of the original and accompanied by the certificate of title last issued for such vehicle.

"41-1-82. Instruments to accompany application for original registration. — If the vehicle is of a type subject to registration hereunder but has not yet been registered and no certificate of title has been issued therefor then the certified copy of the instrument creating such lien or encumbrance shall be accompanied by an application by the owner in usual form for an original registration and issuance of an original certificate of title. In every such event such application shall be accompanied by the fee or fees as provided in this act.

"41-1-85. Filing effective to give notice. — Such filing and the issuance of a new certificate of title as provided in sections 41-1-81 to 41-1-84, shall constitute constructive notice of all liens and en-

cumbrances against the vehicle described therein to creditors of the owner, or to subsequent purchasers and encumbrances."

As the statutes indicate, no lien or encumbrance or title retention instrument upon a registered vehicle, other than a lien dependent upon possession, is valid as against the creditors of the owner acquiring a lien by levy or attachment.

In the instant case, Continental Thrift and Loan obtained a lien against the Cadillac automobile by reason of a levy of execution on May 2, 1968 (R. 5). At that time even though both Mr. Anderson and Mr. Collard were shown as the owners of the vehicle in question, it is clear that both men intended that Mr. Collard was the owner of the car and that Mr. Anderson was shown as an owner, not because he in fact was one, but because he was attempting to secure payment of the promissory note.

No lien or encumbrance instruments have ever been filed by or on behalf of Anderson and certainly no lien or encumbrances shown on the title. Inasmuch as the statutes of this state specify the method by which a lien against an automobile is perfected, and inasmuch as Anderson's attempt to perfect his lien was not in accordance with these statutes, his attempt thereat was defective and he has no valid lien on said automobile.

CONCLUSION

Plaintiff respectfully asserts that the position taken by it in Points I and II of this brief are well taken.

In this regard plaintiff again contends that Anderson had no ownership interest in the automobile. His name was put on the title only to secure payment of the promissory note. Anderson bought the car for Collard and took Collard's note in exchange. Plaintiff levied upon the automobile on May 2, 1968, and Anderson testified, although there is no documentary evidence thereof, that on May 3, 1968, Mr. Collard transferred the automobile to Mr. Anderson. It is of interest to note that this transfer occurred the day after plaintiff levied on the vehicle. This action on the part of Collard and Anderson raises the question that if both Anderson and Collard actually believed Anderson to be the owner of the automobile why was it necessary for Collard to transfer title to Anderson on May 3. If they both considered Collard to be the owner and the action on May 3 was designed to protect Anderson, then their action was too late to affect plaintiff's levy of execution.

Based upon the foregoing argument and authorities, plaintiff takes the position that this court should reverse the order of the District Court directing plaintiff to release possession of the 1968 Cadillac automobile and deliver it to intervenor and order the reinstatement of the order of execution on said vehicle originally entered by the lower court.

Respectfully submitted,

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