

1960

The Continental Bank and Trust Co. v. Charles Cunningham and Winford Bunce : Brief of Appellants

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Harry E. Snow; Maxwell Bentley; Attorneys for Appellants;

Recommended Citation

Brief of Appellant, *Continental Bank and Trust Co. v. Cunningham*, No. 9138 (Utah Supreme Court, 1960).
https://digitalcommons.law.byu.edu/uofu_sc1/3490

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In the Supreme Court of the State of Utah

FILED

CONTINENTAL BANK & TRUST CO.,

Plaintiff and Respondent

v.

CHARLES CUNNINGHAM and
WINFORD BUNCE,

Defendants and Appellants

JAN 25 1960

Clerk, Supreme Court, Utah

Civil No. 9138

APPELLANTS' BRIEF

UNIVERSITY OF UTAH

JUL 10 1967

HARRY E. SNOW,
MAXWELL BENTLEY,

Attorneys for Appellants

LAW LIBRARY

PRINTERS INC., SUGAR HOUSE

TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF FACTS.....	1
SATEMENT OF POINTS.....	3
 ARGUMENT	
POINT 1. THAT THE RECORD BEFORE THE COURT SHOWS A MATERIAL ISSUE BETWEEN THE APPELLANTS AND RESPONDENT AND THAT THE ALLEGATIONS OF APPELLANTS' COUNTERCLAIM, IF PROVED, WOULD ENTITLE APPELLANTS TO RECOVER FOR DAMAGES.....	3
POINT 2. THAT WHERE THERE IS ANY GENUINE ISSUE AS TO ANY MATERIAL FACT, A MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED.....	12
CONCLUSION	14

AUTHORITIES CITED

(Cases)

<i>King v. Rubinsky</i> (1951, Tex Civ App) 241 SW2d 220....	13
<i>Michel v. Meier</i> (1948, DC Pa) 8 FRD 464.....	13
<i>Morlan v. Durland Trust Co.</i> (1952) 127 Colo 5, 252 252 P2d 98	13
<i>Nalder v. Kellogg</i> , 4 U2d 117, 288 P2d 251.....	5
<i>Shibata v. Bear River State Bank</i> (Utah) 205 P2d 251....	5
<i>Swaner v. Union Mortgage</i> (Utah) 105 P2d 342.....	5
<i>United States v. General Instrument Corp.</i> (1949, DC NJ) 87 F Supp 157	12
<i>Young v. Felornia</i> , 121 U 646, 244 P2d 862.....	12

TABLE OF CONTENTS (Continued)

TEXTS

Corpus Juris Secundum—Mortgages—page 745.....	6
Corpus Juris Secundum—Mortgages—page 746.....	6
Corpus Juris Secundum—Mortgages—page 749.....	6

STATUTES CITED

Title 44-1-31 U.C.A. 1953.....	11
Title 57-3-8 U.C.A. 1953.....	5
Rule 56 (c) Utah Rules of Civil Procedure.....	14

In the Supreme Court of the State of Utah

CONTINENTAL BANK & TRUST CO.,
Plaintiff and Respondent

v.

CHARLES CUNNINGHAM and
WINFORD BUNCE,
Defendants and Appellants

Civil No. 9138

APPELLANTS' BRIEF

The above named appellants, defendants in the District Court, appeal from the judgment entered in this cause by that court pursuant to respondent's Motion for Summary Judgment.

STATEMENT OF FACTS

Plaintiff-respondent commenced an action in the District Court to obtain a judgment against the defendants-appellants on a Promissory Note executed by the defendants in favor of the plaintiff.

Defendants, by their answer, admitted the execution of the Note and a mortgage to secure payment of same,

liability for the unpaid balance of said note and as an affirmative defense alleged that a tender of full payment had been made on January 31, 1958 to the plaintiff and denied plaintiff's right to recover for attorney's fees, court costs and interest incurred after January 31, 1958.

Defendants filed a counterclaim against plaintiff alleging the execution and delivery of the Note and Mortgage to the plaintiff, tender after maturity to the plaintiff of the full unpaid balance of said note, plaintiff's refusal to accept said tender and release the mortgage, that said refusal was because of a conspiracy with one Hal Hancock to deprive defendants of their equity in the mortgaged premises, and that said refusal to accept payment and release the mortgage prevented the defendants from redeeming the mortgaged property from a sheriff's sale on a first mortgage foreclosure and caused the defendants to be damaged by the loss of their equity in the mortgaged property.

Plaintiff's reply admitted the execution of an assignment of said note and mortgage to the said Hal Hancock and denied that said assignment was part of a conspiracy to enable Hancock to deprive the defendants of their equity in the mortgaged premises and denies that a tender of the amount due was made by the defendants to the plaintiff on January 31, 1958.

Depositions of R. M. Worsley, agent for plaintiff corporation, and defendants were taken. Requests for Admission and Answers thereto and the Affidavit of R. M. Worsley were filed and constitute part of the Record on

Appeal. A Motion for Summary Judgment was filed by plaintiff on August 6, 1959 and a Hearing on said Motion was held in the District Court on August 19, 1959. Counsel argued the Motion however there was no testimony or evidence introduced. After hearing the arguments of counsel and defense having stated that the counterclaim contained the facts which constituted defendants' claim the Court granted plaintiff's motion and dismissed defendants' counterclaim. From that judgment of dismissal the defendants have brought this appeal.

STATEMENT OF POINTS

POINT I

THAT THE RECORD BEFORE THE COURT SHOWS A MATERIAL ISSUE BETWEEN THE APPELLANTS AND RESPONDENT AND THAT THE ALLEGATIONS OF APPELLANTS COUNTER CLAIM, IF PROVED, WOULD ENTITLE APPELLANTS TO RECOVER FOR DAMAGES.

POINT II

THAT WHERE THERE IS ANY GENUINE ISSUE AS TO ANY MATERIAL FACT, A MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED.

ARGUMENT

POINT I

THAT THE RECORD BEFORE THE COURT SHOWS A MATERIAL ISSUE BETWEEN THE

APPELLANTS AND RESPONDENT AND THAT THE ALLEGATIONS OF APPELLANTS COUNTER CLAIM, IF PROVED, WOULD ENTITLE APPELLANTS TO RECOVER FOR DAMAGES.

The record shows: (a) That on January 31, 1958 plaintiff was the owner and holder of the promissory note and mortgage of defendants. (Defendant's Counterclaim—paragraphs 5, 14, 15, 18 and 19; plaintiff's Amended Complaint — paragraphs 1 and 2 and copy of Note attached; Deposition of Robert M. Worsley—page 4, line 9; page 15, lines 13 through 30 and page 16, lines 1 through 12, lines 18 through 30; page 27, line 23 through page 28 and to page 29, line 5, page 30, line 13 through 25). Plaintiff denies that it was the owner and holder of the promissory note and mortgage on January 31, 1958. (See Affidavit of R. M. Worsley.)

(b) That the defendants offered and attempted to pay said note and obtain a release of the mortgage on January 31, 1958. (See Defendants Counterclaim, paragraph 18; Deposition of Robert M. Worsley—page 19, line 13 through 17; page 29, line 13 through 15; page 21, line 24 through 30.) Plaintiff denies defendants' tender. (See Plaintiff's Reply, paragraph 18.)

(c) That plaintiff refused to allow defendants to pay the note and obtain a release of said mortgage. (Defendants' Counterclaim, paragraph 19; Deposition of Robert M. Worsley, page 16, line 18 through 30.)

(d) That plaintiff knew defendants would lose a substantial sum of money if they (defendants) were not allowed to redeem the property from the foreclosure sale

and that payment to plaintiff was prerequisite to the right to redeem from the foreclosure sale. (Defendants' Counterclaim, paragraphs 17 and 18; Deposition of Robert M. Worsley, page 21, line 34 through 30.) This is denied by plaintiff. (See Plaintiff's Reply, paragraph 18.)

(e) That the refusal of plaintiff to allow defendants to pay the note and obtain a release of said mortgage caused damages to the defendants. (Defendants' Counterclaim, paragraph 20; Deposition of Winford Bunce, page 43, line 11 through 23.)

From the foregoing it is apparent that the Record shows a material issue to exist between plaintiff and defendants.

That defendants would be entitled to recover for damages if the allegations of the Counterclaim were proved the Court's attention is directed to Title 57-3-8 U.C.A. 1953 which read as follows:

"If the mortgagee fails to discharge or release any mortgage after the same has been fully satisfied, he shall be liable to the mortgagor for double the damages resulting from such failure. Or the mortgagor may bring an action against the mortgagee to compel the discharge or release of the mortgage after the same has been satisfied; and the judgment of the court must be that the mortgagee discharge or release the mortgage and pay the mortgagor the costs of suit, and all damages resulting from such failure."

In *Swaner v. Union Mortgage Co.*, a Utah case, 105 P2d342, the Court stated:

“The holder of a mortgage renders himself liable to statutory penalty for refusing to release mortgage upon sufficient tender, although holder claims that tender is insufficient.”

Also see *Nalder v. Kellogg*, 4 U2d 117, 288 P2d 456; *Shibata v. Bear River State Bank* (Utah case) 205 P2d 251.

Corpus Juris Secundum on Mortgages, commencing at page 745 states:

“Damages are recoverable for a wrongful refusal to release or satisfy a mortgage after payment; and in many jurisdictions a remedy is provided by statutory provision which, being generally regarded as penal, are strictly construed.

“While it has been said that there is no right of action at common law for damages for failure to satisfy a mortgage, independently of statute a right of action exists for damages for refusal, after payment, to reconvey property deeded as security or to release or discharge a mortgage. * * *

Page 746: A right of action exists when the debt secured has been paid in full or tendered or all other legal conditions have been fulfilled, and plaintiff is entitled to the release or satisfaction demanded and refused.

“In order to make out a right of action, it is necessary to show that plaintiff is entitled to the release or satisfaction demanded and that the debt secured by the mortgage has been paid in full, or that the whole amount justly due has been tendered, including any fees and costs accrued and the statutory allowance, * * *

Page 749: The complaint or petition should state all the facts necessary to establish plaintiff's

right to recovery. It should show plaintiff's title to maintain the action, and should describe the mortgage and show the relation of the parties to be that of mortgagor and mortgagee, and should aver distinctly the payment of the debt secured or other full performance of the conditions of the mortgage, and the demand for entry of satisfaction and refusal thereof, and that the expenses of filing and recording such release were paid or tendered to the holder of the mortgage. * * *

Defendants alleged in their counterclaim that plaintiff, on January 8, 1958, entered into a fraudulent and corrupt conspiracy and agreement with one Hal Hancock and executed a purported assignment of said promissory note and mortgage (par. 14); that no delivery of the note was made and that there was no consideration to support said assignment (par. 15) and that said purported assignment was made to enable the said Hancock to attempt to redeem the mortgaged property in his (Hancock's) name and deprive the defendants of their equity in said property (par. 16).

The Affidavit of Robert M. Worsley, filed by the plaintiff states:

AFFIDAVIT

"Robert M. Worsley being first duly sworn deposes and says:

1. That he is an employee of the Continental Bank & Trust Company, plaintiff herein, and is personally familiar with the transactions which are the subject of this action.

2. That on February 3, 1956, defendants executed and delivered to plaintiff a promissory note, a copy of which is attached to plaintiff's complaint.

3. That on June 10, 1957, defendants executed a mortgage to secure said promissory note, which note was then in default, and said mortgage was delivered to affiant.

4. That on April 30, 1957, First Security Bank commenced an action to foreclose the mortgage on the same property, which mortgage was prior to the mortgage of Continental, and on July 8, 1957, property securing said mortgage was sold at foreclosure sale by the sheriff of Grand County, and was purchased by First Security Bank, subject to the right to redeem within six months from that date.

5. That on January 8, 1958, the last day for redemption of the property as provided by law, Continental was approached by one Hal Hancock and did assign its interest in the promissory note and mortgage which it held on said property under the terms and conditions reflected in the assignment and letter executed by Hancock and Continental, copies of which are attached to this affidavit and incorporated herein by reference.

6. That on January 31, 1958, the assignment to Hancock was still in effect.

7. That said mortgage and promissory note were not reassigned to Continental by Hancock until about September 2, 1958.

Dated this 6th day of August, 1959.

S/ROBERT M. WORSLEY

Subscribed and sworn to before me this 6th day of August, 1959.

S/RUTH ATKINSON

Notary Public

Residing at Salt Lake City, Utah

My commission expires: 9-1-59"

A copy of the Assignment is attached ^{to} ~~at~~ the Affidavit and is here set forth in full:

“ASSIGNMENT OF REAL ESTATE MORTGAGE

KNOW ALL MEN BY THESE PRESENTS, That the Continental Bank and Trust Company, a Utah state banking corporation with its principal place of business at Salt Lake City, Utah, the party of the first part, for and in consideration of the sum of Twenty One Hundred Thirty Three and 47/100*****Dollars (\$2133.47) to it in hand paid by Hal Hancock the party of the second part, the receipt whereof is hereby acknowledged, does by these presents, grant, bargain, sell, assign, transfer and set over unto the said party of the second part, a certain mortgage, bearing date of June 10th 1957, made and executed by Charles Cunningham & Wilford Bunce, Mortgagors, to the party of the first part, mortgagee, and recorded on June 10th 1957, in Book 7-K of Mortgages, at page 42-43, in the office of the county recorder of the County of Grand, State of Utah.

TOGETHER with the indebtedness and promissory note therein described, and the money due and to become thereon, with interest as provided in said note and mortgage.

IN WITNESS WHEREOF, the said party of the first part has caused these presents to be executed by its officer thereunto lawfully authorized and its corporate seal to be hereunto affixed this 8th day of January, 1958.

THE CONTINENTAL BANK AND TRUST
COMPANY

By S/ GLEN STEFFENSON,
Assistant Vice President

(Acknowledgment)

A copy of the Letter agreement referred to in the Affidavit is attached to the Affidavit and is here set forth in full:

The Continental Bank & Trust Company
P. O. Box 1770
Salt Lake City, Utah

I propose to redeem the following described property located at Moab, Grand County, Utah, upon which the Continental Bank & Trust Company owns a second mortgage. To wit:

Beginning at Northwest corner Blk 25 running thence South 131 feet; East 171 feet, North 131 feet; West 171 feet to beginning.

I will execute to the Continental Bank & Trust Company a note which shall be due and payable on or before the 20th day of January in the amount of \$2133.47. In return for said note, The Continental Bank will assign to me that certain mortgage dated on June 10, 1957, wherein Charles Cunningham and Winford Bunce appear as mortgagors and the Continental Bank & Trust Company appears as Mortgagee, which mortgage was recorded on June 10, 1957, Entry No. 282514, Book 7-K, pages 42-43, in the office of the County Recorder, Grand County, Utah. With this assignment of the real estate above referred to, I propose to redeem the property above described from the sheriff's sale held pursuant to the action brought by the First Security Bank, and in the event I am unable to redeem the property, then I will assign the real estate mortgage above referred back to the Continental Bank & Trust Company, and in exchange, it is my understanding that the Bank will return the promissory note executed on January 8, 1958 by me in favor of the Continental Bank in the amount of \$2133.47.

(S) Hal Hancock"

Appellants contend that respondent was the owner and holder of the note and mortgage on January 31, 1958, supported by the record as follows: (a) The retention at all times of the promissory note by the respondent. Robert M. Worsley testified commencing on page 4, line 6 (Deposition of Robert M. Worsley) as follows:

Q. Did you deliver this assignment and the promissory note and mortgage to Mr. Hancock at that time?

A. No. The mortgage was delivered to him with a photostat of the note. We retained the original note. We had a side written guarantee. I don't mean guarantee, but agreement covering that.

Q. Explain that to us, will you?

A. Yes, the original note was available when and if our other agreement was breached.

Q. What other agreement was that?

A. Well, it is contained in the agreement basically that if they were able to redeem the property—"

Title 44-1-31 U.C.A. 1953 provides

"An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder completed by delivery."

(b) The purported assignment of the Note and mortgage was totally lacking in consideration and by the terms of the side agreement (letter) executed by Hancock and the respondent said assignment, even if valid, was

ineffectual on January 31, 1958. The above referred to Letter (side written guarantee) provides that the consideration for the assignment was a conditional promise to pay \$2133.47 which condition was that Hancock would be able to redeem the property prior to January 20, 1958. There was no redemption of the property prior to January 20, 1958, and hence no obligation to pay Continental and therefor consideration to support the assignment was totally lacking.

By the terms of the Letter agreement between respondent and Hancock, assuming for the purpose of argument that the Assignment and Letter agreement were valid transactions, on January 31, 1958 Hancock didn't owe the respondent any money because there had been no redemption and was only obligated to return the unrecorded Assignment of Mortgage. Continental (respondent) held the original note and the only persons to whom it could look for payment were the appellants.

POINT II

THAT WHERE THERE IS ANY GENUINE ISSUE AS TO ANY MATERIAL FACT, A MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED.

In *Young v. Felorina*, 121 U. 646, 244 P. 2d 862 the court stated:

"If there is any genuine issue as to any material fact, the motion should be denied."

In *United States v. General Instrument Corp.* (1949, DC NJ) 87 F Supp 157, the court stated:

“that on motions for summary judgment, it is not for the court to resolve disputed questions which appear in issue but to determine whether a question of fact is present; however, the facts being determined, a court is not precluded from adjudicating the legal consequences to be drawn from undisputed facts.”

In *Morlan v. Durland Trust Co.* (1952) 127 Colo 5, 252 P2d 98 the court pointed out that:

“summary judgment is properly granted only where the facts are clear and undisputed, and quoted with approval from a federal district court decision (*Michel v. Meier* [1948, DC Pa] 8 FRD 464) that “in passing upon a motion for summary judgment, it is no part of the court’s function to decide issues of fact but solely to determine whether there is an issue of fact to be tried.”

Attention is directed to *King v. Rubinsky* (1951, Tex Civ App) 241 SW2d 220, where the court stated:

“On hearing the motion for summary judgment the court’s prerogative is to determine, if possible, whether there is a genuine controversy between the litigants. If it is clear there is none, then it is his duty to grant the motion. If the matter is reasonably doubtful the motion would be refused. The court should not decide the controverted issues in the case. These should be submitted to the court or jury upon trial of the case upon its merits. If this was not the rule a party could easily be deprived of his constitutional right to a trial by jury. * * * We find no fault with the rule and believe it is a just one for its intended purpose. However, we feel that proceedings under it should be had with a great deal of caution and in no event should a summary judgment be granted unless

it is made to appear with reasonable certainty that there is no genuine issue in the case. Otherwise it would become the means of depriving a litigant of valuable substantive rights."

Rule 56(c) Utah Rules of Civil Procedure provides that 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.

The record discloses various substantial controverted issues between plaintiff and defendants and therefor the lower courts dismissal of defendant's Counterclaim on plaintiff's motion for summary judgment was error.

CONCLUSION

At the hearing on respondent's motion for summary judgment no evidence or testimony was presented, however arguments of counsel were heard. As there is no transcript nor findings of fact by the court it is difficult for appellant's counsel to know the basis for the court's dismissal of appellants' counterclaim. The Affidavit of Robert M. Worsley is controverted by the allegations of defendants' counterclaim, the Letter attached to and made a part of said Affidavit, and Mr. Worsley's deposition as pointed out above. The allegations of defendants' counterclaim were materially controverted by respondent's Reply, Mr. Worsley's deposition and Mr. Worsley's Affidavit.

Did the appellants owe the respondent a sum of money on January 31, 1958? Respondent says, No," and appellants say, "Yes."

Was respondent's assignment on January 8, 1958 valid and still in effect on January 31, 1958 or was it fictitious and entered into for the purpose of enabling one Hancock to redeem the mortgaged property in his own name and deprive the appellants of their equity in said property? Respondent states the Assignment was valid and still effective on January 31, 1958. Appellants contend the record shows the assignment not effective or in force on January 31, 1958, that it was executed without any consideration, that its execution had no effect whatever on the ownership of the Note and was executed for the purpose of enabling Hancock to redeem the property in his own name and deprive the appellants of their equity in the property.

Appellants believe substantial issues are shown by the record to exist and unless said issues can be presented to the court or jury appellants will be deprived of valuable substantive rights.

The trial court's judgment dismissing appellants' counterclaim should be reversed and the case remanded for trial.

Respectfully submitted.

HARRY E. SNOW,
MAXWELL BENTLEY,

Attorneys for Appellants