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IN THE SUPREME COURT OF THE STATE OF UTAH

UNIVERSAL C.I.T. CREDIT CORPORATION, a corporation,
Plaintiff and Appellant,

vs.

RICHARD D. NELSON, and JESSE E. NELSON, d/b/a HOLLADAY USED CARS, and RICHARD D. NELSON, and JESSE E. NELSON, as individuals,
Defendants and Respondents.

Case No. 10300

FILED
JUL 15 1965
Clerk, Supreme Court, Utah

APPELLANT'S BRIEF

Appeal from the Order of Dismissal With Prejudice of the Third District Court in and for Salt Lake County Honorable Merrill C. Faux, Judge

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ALAN D. FRANDSEN
Attorney for Appellant
366 South State Street
Salt Lake City, Utah

[AL]AN H. BISHOP
[Att]orney for Respondents
[...] South State Street
[Sal]t Lake City, Utah

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APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

Appellant is seeking to recover against the Respondent Jesse E. Nelson for the indebtedness incurred by the partnership, Holladay Used Cars, based on the theory that Respondent Jesse E. Nelson was a partner in the business with his son, Respondent Richard D. Nelson.

Appellant further contends that Respondent Jesse E. Nelson executed a peronal guarantee to the Appellant guaranteeing the payment of any indebtedness that might be owed by Holladay Used Cars or Respondent Richard D. Nelson.

DISPOSITION IN LOWER COURT

The matter was set for trial, evidence and witnesses were heard by the Court, sitting without a jury. The Respondent Richard D. Nelson admitted that the Appellant was entitled to a judgment against him on all six of the causes of action set forth in the complaint. As to the Respondent Jesse E. Nelson the Court held that there was not a partnership between the Respondents and the documents obtained from the Respondent Jesse E. Nelson were obtained by misrepresentation. The complaint as it concerns Respondent Jesse E. Nelson was dismissed with prejudice, no cause of action.

RELIEF SOUGHT ON APPEAL

Appellant seeks the reversal of the Order of Dismissal with prejudice of no cause of action as to Respondent Jesse E. Nelson.

STATEMENT OF FACTS

Appellant is a consumer finance concern that is in the business of financing automobile dealers at both

the wholesale and retail level. Respondent Richard D. Nelson was actively engaged in selling used cars under the name of Holladay Used Cars, in Salt Lake County, Utah. It was represented to Mr. Don Hawker, a sales representative of the Appellant, by Respondent Richard D. Nelson that Respondent Jesse E. Nelson was in partnership with him, although his father would not take an active part in the business in that he was employed with another automobile concern.

These representations were made to Mr. Don Hawker in June or July of 1962 when he contacted the Respondent Richard D. Nelson to solicit the Holladay Used Cars' finance business. Shortly thereafter, Mr. Hawker contacted the Respondent Jesse E. Nelson and informed him of the discussions with his son concerning establishing credit lines to Holladay Used Cars. Respondent Jesse E. Nelson was told on this occasion that a personal financial statement would be required in connection with his association with Holladay Used Cars. Mr. Hawker asked whether or not he was a partner of Holladay Used Cars, and Respondent Jesse E. Nelson admitted he was. A couple of days later, Mr. Hawker called upon the Respondent Jesse E. Nelson to secure his personal financial statement on the Appellant's form (Exhibit 5-P). On this same occasion, it was Mr. Hawker's best recollection that Respondent Jesse E. Nelson executed Appellant's personal guarantee form. However, subsequent developments indicate this guarantee never did reach the Appellant's credit department.

The Appellant's applications and forms (Exhibits 1-P through 3-P) were executed on behalf of Holladay Used Cars by Richard D. Nelson, as partner.

The Appellant's credit department in Seattle, Washington, in a routine investigation found that the customary guarantee form was absent from the Holladay Used Car file. Mr. Hawker was requested by the Appellant to secure the missing form. On February 26, 1963, Mr. Hawker contacted Respondent Jesse E. Nelson and secured the guarantee (Exhibit 10-P). Respondent Jesse E. Nelson read the guarantee and the contents of it was explained to him; he understood he was personally guaranteeing Holladay Used Cars and Respondent Richard D. Nelson. A copy of said guarantee was given to Respondent Jesse E. Nelson. During this visit there was conversation by Mr. Hawker to the effect that the Holladay Used Car business was doing fine. The evidence is not clear as to whether or not this conversation took place before or after the execution of the guarantee.

During July 1962 and through March 1963 the Appellant was floorplanning the motor vehicles for Holladay Used Cars. It was the practice during this period of time for Respondent Richard D. Nelson to appear at the Appellant's place of business and secure the title of the motor vehicle in exchange for a Holladay Used Cars bank check in the amount of the indebtedness of the motor vehicle.

Approximately two weeks after the execution of

Respondents' guarantee and particularly on March 12, 1963, the Appellant was informed by its bank that several of the Holladay Used Cars bank cheks were not clearing the bank and being returned to the Appellant's bank with the annotation "Refer to Maker." It was determined that the returned checks had amounted to approximately $12,000.00 and within a week this indebtedness grew to approximately $19,000.00 in insufficient funds checks. Demand was made by the Appellant on both Respondents to pay the sum of the indebtedness and both refused.

STATEMENT OF POINTS RELIED UPON

POINT I

THE TRIAL COURT COMMITTED ERROR WHEN IT FOUND THAT THE RESPONDENT JESSE E. NELSON WAS NOT A PARTNER WITH HIS RESPONDENT SON IN HOLLADAY USED CARS.

ARGUMENT

In reviewing the facts before us by examining the record and the exhibits, we find that on the initial contact by Mr. Hawker of the Appellant corporation with Respondent Richard D. Nelson that he represented that his father would be associated with Holladay Used Cars as a partner. Shortly thereafter Mr. Hawker

called upon Respondent Jesse E. Nelson and asked him if he was a partner in Holladay Used Cars and said he was. (Tr. p. 24, l. 21). He was also advised that he would have to furnish personal financial information and Respondent Jesse E. Nelson said he would be happy to do so (Tr. p. 24 l. 27).

Respondent Jesse E. Nelson submitted to the Appellant his financial statement with his signature on a form provided by the Appellant (Exhibit 5-P). Under the law a person is bound to know the contents of any written instrument which he signs and he is bound by the terms and provisions thereof.

In applying for Appellant's floorplan accommodations and submitting other customary forms supplied by the Appellant the Respondent Richard D. Nelson executed the documents as a partner (Exhibits 1-P through 3-P).

The exhibits and direct conversational contacts with the Respondents establish the fact that the Respondents represented to the Appellant that they were partners in Holladay Used Cars.

It might be true that an actual partnership did not exist as between the Respondents but as to third persons, a partnership liability may be predicted not only upon the fact of the actual creation of a partnership relation between the parties by their contract or agreement to become partners, but also upon the conduct and dealings of the parties under circumstances creating the appearance of a partnership relation when

there is no actual contractual undertaking which would create as between the parties themselves the status of partnership, and even though they may have expressed their intention, unknown to such third persons, not to become partners. It may be sufficient that by their conduct the parties appear to become partners. See 40 Am Jur, Partnership, Section 71.

The Uniform Partnership Act provides that where a person, by words spoken or written, or by conduct, represents himself or consents to another's representing him to anyone as a partner in an existing partnership, or with one or more persons not actually partners, he is liable to any such person to whom such representation has been made who has, on the faith of such representation, given credit to the actual or apparent partnership. The Uniform Act is substantially identical to Section 48-1-13, Utah Code Annotated, 1953.

The Respondent Jesse E. Nelson became subject to the liabilities of partners with his son by knowingly submitting financial statements directed to the Appellant and was negligent in permitting his son to hold themselves out as partners. The liability as a partner of a person who holds himself out as a partner, or permits others to do so, is predicated on the policy of the law seeking to prevent frauds on those who lend their money on the apparent credit of those who are held out as partners. Although persons mean not to be partners at all, and are not partners inter sese, they may be partners notwithstanding, as to third persons.

This liability as partners may arise contrary to their own intentions. The question is not what the parties intended by their contract, but whether third persons had a right to rely on their joint credit.

The Appellant exercised due diligence in ascertaining the facts and had reasonable grounds for believing that Respondent Jesse E. Nelson was a partner.

In Buehner Block Company vs. Glezos, 6 Utah 2d 226, 310 P. 2d 517, this Court reviewed the facts to determine whether the evidence supported the finding of a partnership. It was held that all of the facts combined to provide ample basis for the finding of a partnership to a creditor even though, as between the individuals, no real partnership existed. The facts before this Court in our case more than abundantly support the fact that Respondent Jesse E. Nelson was a partner in that Mr. Hawker confronted him and examined him as to whether or not he was a partner during their first meeting in July of 1962.

POINT II

THE TRIAL COURT COMMITTED ERROR WHEN IT FOUND THAT THE APPELLANT HAD KNOWLEDGE OF THE INSUFFICIENT FUNDS CHECKS AND WAS AWARE OF THE INDEBTEDNESS OF HOLLADAY USED CARS WHEN THE PERSONAL GUARANTEE OF RESPONDENT JESSE E. NEL

...WAS EXECUTED AND FINDING SAID GUARANTEE WAS OBTAINED BY MISREPRESENTATION.

ARGUMENT

Mr. Hawker testified that it was the best of his recollection that Respondent Jesse E. Nelson executed a personal guarantee form at their first meeting in July of 1962. However, subsequent developments indicated that it never got to Appellant's credit department (Tr. p. 25 l. 22).

On February 26, 1963, Mr. Hawker secured the second personal guarantee (Exhibit 5-P). It is the Respondents' contention that at the time the said guarantee was executed that the Appellant had knowledge of the no-account checks and Mr. Hawker's representation to Respondent Jesse E. Nelson that the Holiday Usd Car business was doing fine was knowingly false or made recklessly without knowing the true facts. The Trial Court agreed with this contention in dismissing Appellant's complaint with no cause of action.

Miss Kathleen McGraw, an employee of the Appellant duing February and March of 1963, was the employee in charge of taking bank checks from Respondent Richard D. Nelson and releasing the chattel mortgages and delivering the motor vehicle titles. Miss McGraw testified from the Appellant corporate records the dates the checks were received and the dates the

titles were released. (Tr. p. 149 l. 7 through 150 l. 13). All of the checks received and titles released, which constitutes the Respondents' indebtedness, were released after March 1, 1963. The transactions took place after the execution of the said personal guarantee. Surely the Appellant would not have continued to release the motor vehicle titles if it had known that the Holladay Used Car business was in extreme financial difficulty and had knowledge that their bank checks would not be honored. The record is completely void of any evidence that the Appellant had knowledge of the Respondents' financial difficulty on February 26, 1963.

In Brazee vs. Morris, 68 Ariz. 224, 204 P.2d 475, it was held that fraud is never presumed nor can it be found to exist, on a mere suspicion as to possibilities thereof. Fraud must be established by clear and convincing evidence.

The burden of proving fraud rests upon the Respondents and the record is barren of any facts constituting fraud on the part of the Appellant.

It should be noted from the record (Tr. p. 103, l. 7, p. 110 l. 19) that the conversation that took place on February 26, 1963 between Mr. Hawker and Respondent Jesse E. Nelson at the time of the execution of the said guarantee was of a general, time passing conversation. There is some conflict of facts in the record as to whether or not Mr. Hawker's remark that Holladay Used Car businss was doing fine was made before or after the execution of the said guarantee.

This raises the issue of whether or not there was reliance by Respondent Jesse E. Nelson upon the statement made by Mr. Hawker. It appears that Respondent Jesse E. Nelson relied upon the fact that his son had already signed the guarantee (Tr. p. 102 l. 21) and not upon the statement made by Mr. Hawker. The comment made was of such a nature that it was not reasonably calculated to deceive Respondent Jesse E. Nelson; it did not induce him to do that which otherwise he would not have done.

CONCLUSION

It is respectfully submitted by the Appellant that the lower Court erred in dismissing the Appellant's complaint with no cause of action. The Court committed two errors in order to reach its decisions to wit: finding that a partnership did not exist and finding the personal guarantee was secured by misrepresentation. Appellant submits its case on the facts as disclosed by the record and the law applicable to the issues of this case.

Respectfully submitted,

ALAN D. FRANDSEN

Attorney for Plaintif and Appellant

366 South State Street
Salt Lake City, Utah