1960

Budget System, Inc. v. Budget Loan and Finance Plan : Appellant's Reply Brief

Utah Supreme Court

Louis H. Callister; Nathan J. Fullmer; Attorneys for Appellant;

IN THE SUPREME COURT
of the
STATE OF UTAH

BUDGET SYSTEM, INC.,
Plaintiff and Respondent,

vs.

BUDGET LOAN AND FINANCE PLAN,
Defendant and Appellant.

Case No. 9224

APPELLANT'S REPLY BRIEF

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The respondent on page 4 of its brief refers to a letter written by J. S. Monosson, at that time house counsel of Budget Finance Plan (the holding company of appellant) and addressed to the American Buyers Credit Company, who had purchased the stock of Budget System, Inc. This letter was admitted in evidence as Exhibit P-11 (Transcript of Proceedings, page 46) and considered by the trial court over the objections of appellant (Transcript of Proceedings, page 45) that such evidence was incompetent, immaterial and irrelevant.

The appellant in this reply brief wishes to show

that such a letter should not have been admitted in evidence and considered by the trial court in making its decision; that such evidence is inadmissible and cannot be considered in this cause.

STATEMENT OF POINTS

POINT I.

OUT OF COURT ADMISSIONS BY AN ATTORNEY NOT DISPENSING WITH THE PROOF OR INFLUENCING THE PROCEDURE IN THE CASE ARE INADMISSIBLE UNLESS THE ATTORNEY HAD SOME SPECIAL AUTHORITY TO MAKE SUCH STATEMENTS.

POINT II.

AN ATTORNEY HAS NO IMPLIED CONSENT TO SURRENDER ANY SUBSTANTIAL RIGHT OF HIS CLIENT, OR IMPAIR OR DESTROY HIS CLIENT'S CAUSE OF ACTION.

ARGUMENT

POINT I.

OUT OF COURT ADMISSIONS BY AN ATTORNEY NOT DISPENSING WITH THE PROOF OR INFLUENCING THE PROCEDURE IN THE CASE ARE INADMISSIBLE UNLESS THE ATTORNEY HAD SOME SPECIAL AUTHORITY TO MAKE SUCH STATEMENTS.

Respondent on page 4 of its brief refers to Exhibit P-11 and quotes the words of Mr. Monosson, house counsel for Budget Finance Plan, in his letter to the American Buyers Credit Company to the effect that appellant's organization had been unable to utilize the name used by its other offices by reason of the fact that the name "Budget Plan"

was pre-empted by Mr. Barker, the predecessor in Salt Lake City of the American Buyers Company. Respondent on page 11 of its brief states further that the above statement of Mr. Monosson coincides with the decision reached by the trial court and therefore should conclude the matter. In other words, respondent and the trial court are holding the appellant for the statement of its house counsel which was an out of court admission by an attorney and not made for the specific judicial purpose of dispensing with the proof or for influencing the procedure in the actual case.

It will be noted that the American Buyers Company, to whom the letter (Exhibit P-11) was addressed, is not the plaintiff in this action and was nothing more nor less than the purchaser of the common stock of the plaintiff. Mr. Monosson apparently was not acquainted with all of the facts in this case as in his letter he refers to the predecessors of American Buyers Company. The plaintiff and respondent is the successor to Mr. Barker and not the American Buyers Company. In this case there is no question that a letter to a stockholder should not be admissible. Although he was secretary of the company, his letter was in capacity as counsel.

The courts have uniformly held that an attorney employed without reference to pending litigation

is but an agent, and his authority to bind his principal by his admissions is not affected by the fact that he is an attorney at law, except insofar as that fact may reflect upon the apparent scope of the agency. *Brown v. Hebb* (Md. 1934) 175 A. 602.

Carroll v. Pratt (Minn. 1956) 76 NW2d 693 is a key case in this area of the law holding that the attorney-client relationship does not of itself supply the attorney with authority to make extra judicial admissions on behalf of his client, and the attorney's authority to make such statements is measured by the same tests of express or implied authority as are applied to other agents. In that case the defendant's attorney, in an out of court admission, said that he had investigated the ditch in controversy and had found that the defendant had not completed his work in respect to the ditch and that he would try and get the defendant to finish the work. The court held that the defendant was not bound by this statement of his attorney and they laid down the following rule of law: Out of court admissions of fact by an attorney, whether written or oral, which have not been made for the specific judicial purpose of dispensing with the proof or for influencing the procedure in the case are inadmissible in evidence against his client, unless it appears that aside from his mere employment in connection with pending or prospective litigation the attorney had some special authority.

Another expression of the basic principle is the rule in *Jackson* v. *Schine Lexington Corp.* (Kentucky 1947) 205 SW2d 1013. There the court held that an attorney has no power to prejudice his client by admissions of fact made out of court, because an agency such as the attorney-client relationship does not carry the implication of authority to make binding admissions other than in the general management of the litigation. The court also laid down the principle that a written admission has no more efficacy than an oral one. *McGary* v. *McGary* (Pa. 1898) 43 W.N.C. 268, held that it was proper to exclude from evidence a letter written by the defendant's attorney to one having the custody of the deed, wherein language was used inconsistent with the contention of the client that the deed had been delivered to her. In other words, these cases hold that written admissions of fact made by an attorney out of court cannot be used against his client unless they were made for the specific purpose of dispensing with proof or influencing the procedure in a cause, or unless it appears that the attorney had some special authority to act for his client out of court and that the admissions were properly related thereto.

It is the policy of the law to encourage interchanges between parties to a pending or prospective litigation in the hope that they will solve their prob-

lems out of court. If every out of court statement by an attorney was admissible in evidence an attorney would be afraid to make any opinion or admission, and as a result parties to a pending or prospective litigation would seldom, if ever, be able to reach a compromise, nor would there be any cooperation between the parties to speed up the judicial process.

Coirre v. *Arrow Exterminating Co.* (N.Y. 1951) 108 N.Y. Supp. 603, held that a statement inconsistent with plaintiff's testimony by plaintiff's counsel to the defendants was hearsay, and to treat the statement as binding would be against public policy because such a ruling would virtually do away with the friendly interchange of views between opposing counsel.

It is evident from the above cases, which are the great weight of authority, that the attorney-client relationship does not of itself supply the attorney with authority to make extra judicial admissions. The only exceptions are:

1. Admissions dispensing with the proof in the case or influencing the procedure in the case.

2. Admissions in the general management of the litigation.

3. Where the attorney has special authority to make such admissions.

The written statement of Mr. Monosson in his

letter to the American Buyers Company was merely his opinion as to the state of the name "Budget" and was not made to dispense with proof or influence the procedure in any pending or prospective litigation, nor was the admission made in the general management of any litigation. Mr. Monosson's position was one of giving advice and opinions on matters affecting his company, but this does not mean that every opinion and bit of advice that he renders binds his company and can be used by an adversary in some future proceeding. To so hold would be to severely curtail the usefulness and purpose of a house counsel, for he would be afraid to make any statement for fear that something he might say would prove detrimental to his client in future litigation. The policy of the law is to encourage interchange between adverse and potentially adverse parties in the hope that an out of court settlement can be made.

POINT II.

AN ATTORNEY HAS NO IMPLIED CONSENT TO SURRENDER ANY SUBSTANTIAL RIGHT OF HIS CLIENT, OR IMPAIR OR DESTROY HIS CLIENT'S CAUSE OF ACTION.

It is also the contention of appellant that Mr. Monosson had no express or implied authority to write in a letter a statement which in the future had the possibility of impairing or destroying a right or cause of action of his client, and therefore Exhibit P-11 should not have been admitted in evi-

dence by the trial court. The following case law bears this out.

The California District Court of Appeal in *Bice* v. *Stevens* (Cal. 1958) 325 P2d 244, laid down the following rule of law when it said on page 251 of the opinion: "The law does not favor snap judgment. The policy of the law is to have every litigated case tried on its merits; and it looks with disfavor upon a party who regardless of the merits of the case attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary . . ." In that case the court held that a client was not bound when his attorney dismissed one of the defendants "with prejudice" by mistake and without his client's consent.

The Utah Supreme Court has given credence to this line of reasoning by way of dicta in *Rackham* v. *Rackham* (Utah 1951) 230 P2d 566, when it said: "* * * an attorney has no authority to enter into a stipulation relative to the substantial rights of his client without his client's consent * * *" In the case of *Gagnon Company* v. *Nevada Desert Inn* (Calif. Sup. Ct. 1955) 289 P2d 466, the court held that the conduct and management of the action is entrusted to the judgment of plaintiff's attorney, who decides what should be contested and what point should be taken or abandoned, in absence of special instructions by the client, but he ordinarily does

not have implied authority to do an act which will effect surrender or loss of his client's substantial rights as the client determines the objective to be obtained.

CONCLUSION

The appellant therefore contends that Exhibit P-11 should not have been admitted into evidence, because the courts uniformly hold that out of court admissions by an attorney which do not dispense with the proof or influence the procedure or management of the litigation are inadmissible unless the attorney had some special authority. This is the case here as has heretofore been shown. Also an attorney may not surrender any substantial right of his client or impair, compromise, or destroy his client's cause of action as plaintiff claims was done by Mr. Monosson in this case by his letter. Lastly, public policy decries holding appellant's attorney for something he might have said prior to the litigation.

WHEREFORE, appellant respectfully submits that Exhibit P-11 was improperly offered by respondent and improperly admitted by the trial court and therefore should not be considered by this Honorable Court.

Respectfully submitted,

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