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Joe Tangaro dba Tangaro Loan and Lewelry v. Augustine Lopez Marrero, Jacinto Reneen (Rivera) and Evangeline Lopez : Brief of Respondent

Utah Supreme Court

Herbert B. Maw; Attorney for Respondent;

IN THE SUPREME COURT
of the
STATE OF UTAH

JOHN TANGARO, d.b.a TANGARO LOAN AND JEWELRY,

Plaintiff-Appellant,

vs.

AUGUSTINE LOPEZ MARRERO, JACINTO RENEEN (RIVERA) and EVANGELINE LOPEZ,

Defendants-Respondents.

Case No. 9603

RESPONDENT'S BRIEF

Appeal from the Judgment of the Third Judicial District in and for Salt Lake County.
Hon. Joseph G. Jeppson, Judge

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CASES CITED

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STATEMENT OF FACTS

This was an action to recover the balance of $1,083.50 claimed by plaintiffs remaining unpaid on a promissory note executed on April 26, 1957 by the defendants Augustine Lopez Marreo and his wife, Evangeline Lopez, in favor of the plaintiff. The defendant, Jacinto Rivera, was a co-signer and received no benefits therefrom. The note provided for payments at the rate of $50.00 on each payday of Marrero, which came every

two weeks. Marrero was employed by Kennecott Copper Corporation at Bingham Canyon, Utah, and at the time of the execution of the note worked five days each week. Payments were made regularly in the sum of $50.00 until March, 1958, at which time the working week at Kennecott was reduced to 4 days, thereby materially lowering the income of defendant Marrero. By mutual agreement between plaintiff and Marrero, the instalments on the note were reduced to $25 per pay day at said time. These reduced payments were made when due by Marrero until April, 1959, at which time he filed a petition for bankruptcy in the U. S. District Court. On the date of said filing there was a balance owing on said note of $1,083.50, according to the testimony of the plaintiff, to which had been added the sum of $156.60 interest to cover the extended period resulting from the decreased payments. Demand was then made by plaintiff on the defendant co-signer, Jacinto Rivera, for the same, and upon his failure to respond, court action was commenced for its collection.

At the trial and in his pleadings, the defendant Rivera presented three defenses, to-wit:

1. That the note had been paid in full.

2. That the reduction of the instalment payments on the note by plaintiff without his consent or knowledge relieved him, as co-signer, from liability.

3. That usurious interest had been charged by plaintiff and that all interest should therefore be cancelled.

The Court heard th case without a jury and found in favor of defendant on the first defense listed above, holding that the note had been paid in full by Marrero and his wife, and finding No Cause of Action against defendant, Rivera. The Court withheld its decision of Points 2 and 3. Plaintiff then presented a motion for a new trial which was denied.

THE EVIDENCE

The undisputed evidence at the trial relating to the payment of the note was presented by defendants Marrero and his wife, Evangeline, who had been discharged in bankruptcy. They testified that during December, 1958, they purchased some jewelry from plaintiff and borrowed from him Christmas money in the sum of $150.00. At that time it was agreed that the cost of the jewelry together with the $150.00 should be added to the balance owing on the old note, which Rivera had co-signed and that a new note should be excuted by Marrero and his wife without a co-signer and the old note returned to Marrero. Marrero and his wife then both signed in blank a note which was provided by plaintiff with the understanding that plaintiff would complete it and that the old note would then be returned to Marrero as soon as the full amount of the new note could be determined by plaintiff.

On this point, Marrero testified as follows: Tr. P. 33, L. 18.

"Q. So he said the new note was to be what?

A. The new note and the $150 and he have to figure how much the necklaces and put it with the $150 and how much I owe on the old note, and he said the old note would be paid after he made the new one, and he give me the new note for me and my wife to sign, in blank, and he say after Christmas he figure how much the necklace and the $150 and how much money I got in the old note, and put it together and give me the old note paid off.

THE COURT: Say that again.

THE WITNESS: He say that after Christmas he figure how much the necklace and the $150 and how much I owe on the old note, put it together, and give me the paid off—the old note.

Q. Did he say what he was going to do with the old note?

A. He said the old note would be all paid and he give it to me.

Q. What would he do?

A. He said he give it to me after Christmas because he be busy. I told him "That's all right."

THE COURT: Did you sign the new note?

THE WITNESS: Yes.

THE COURT: Who else signed it?

THE WITNESS: My wife.

THE COURT: What did the new note say, when you signed it?

THE WITNESS: He say in blank, Sir—he say he going to fix him up after figure up after Christmas.

THE COURT: Thank you. That is all.

Q. (Mr. Maw) Was anything said about Mr. Rivero signing the note?

A. No, sir. He say my wife and I just on the new note, because I been pay my payments straight.

Q. Did you ask him anything concerning anyone else signing?

A. Yes. I told him I needed to bring Mr. Rivero to sign the new note. He say "No," just me and my wife would be enough.

Q. Then what did you do with the note that you signed in blank?

A. I give it to him. He say he going to give me the old one after Christmas."

(Tr. P. 35, L 4)

"Q. Did you ever mention it to him after Christmas?

A. Well, after Christmas when I go to make payment I asked for old note.

Q. What did he say?

A. He say he have no time to fix it, he say maybe the next pay day."

Mr. Marrero continued by stating that he asked for the old note on three different occasions and was finally told by plaintiff that he had torn the note to pieces and thrown it away.

Mr. Marrero repeated the same account in cross-examination. See Tr. pages 37 to 53.

Mrs. Evangeline Lopez's account of the making of the new note in payment of the old one is found in Tr. P. 57 and 58.

Though the plaintiff testified in direct examination, in cross examination and in rebuttal, *he at no time denied that a new note had been given in payment of the old one,* nor did he refute the testimony of Marrero or his wife regarding the same. Consequently the undisputed testimony shows clearly that the note sued upon had been paid in full by the substitution of a new note.

ARGUMENT

PLAINTIFF'S FIRST POINT

In answer to plaintiff's first point in his brief that the Court erred in its finding that the new note had replaced the old one, it seems clear that there was no evidence upon which the Court could have arrived at any other conclusion. If there had been no new note, certainly the plaintiff would have denied it. The fact that there was no denial of the several pages of testimony of Marrero and his wife concerning the new note as a substitute for the old one confirms the truthfulness of testimony of Marrero and his wife. Certainly their testimony cannot be brushed off, as plaintiff attempts to do in his brief, with a statement that "The testimony of Marrero, regarding a new note, does

not make sense." As a matter of fact, it makes good sense. Marrero had never missed a payment on his note. he had reduced the principal to less than one-half of the original amount of the note. He borrowed money from plaintiff in lesser amounts on several occasions and had paid his debts in full. It is natural that plaintiff would consider him as being a good risk without a co-signer now that the note had been reduced so greatly. This coupled with the fact that Marrero was permanently employed at Kennecott and was able to make his regular payments gave plaintiff plenty of reason for not insisting on a co-signer.

PLAINTIFF'S SECOND POINT

Plaintiff's second point that the Court was arbitrary in refusing to permit the plaintiff to reopen his case to offer additional testimony seems untenable on its face.

The transcript shows that after the case had been closed and submitted on the evidence, the Court asked the following:

Tr. P. 82, L. 3.

"Mr. Duncan, was there any testimony from the plaintiff concerning the renewal note?

MR. DUNCAN: I think that the plaintiff denied that.

THE COURT: I do not recall any testimony on that.

MR. DUNCAN: If there is any doubt about there not being a new note, I will move to reopen.

THE COURT: Motion denied."

From the above it appears that there was no doubt in the Court's mind that there was a new note so there was no need of additional testimony to prove that there was.

Certainly there is nothing in the above statements which in any way indicate that the Court acted arbitrarily in refusing at that time when both parties had rested and submitted their cases, to permit the plaintiff to do that which he had had ample opportunities to do during the trial, but had deemed it undesirable to do, namely introduce evidence either in support or opposition of the evidence presented by defendant.

CASES IN POINT

The major issue before the court, which covers both of the point discussed in plaintiff's brief, relates to the proposition of whether the trial court, sitting without a jury, erred in denying plaintiff's motion for a new trial.

This court has repeatedly held that it will not disturb the decision of the trial court in granting or denying a new trial if there is substantial evidence to support its action, even though the evidence on material issues might be highly conflicting.

As early as the year 1881 this Court, in the case of *Newton vs. Brown,* 2 Utah 126, stated the law as follows:

> "When the motion for a new trial is founded upon the insufficiency of the evidence to support the verdict and judgment, a large discretion is vested in the court below, in refusing or granting the motion. It must plainly appear that this discretion has been abused before the Appellate Court will interfere with this action in granting the motion on this ground."

Shortly afterwards the Court, in the case of *Davis vs. Utah Southern R.R. Co.,* 3 Utah 218, wherein a jury had awarded judgment to the plaintiff, a similar statement of the law was made. In that case the defendant had moved for a new trial and its motion was granted by the trial court, whereupon the plaintiff appealed.

This Court stated the law in that case as follows:

> "The appellant's proof of negligence was very meager and unsatisfactory, and was met by proof quite as strong, if not more convincing, of the entire absence of any negligence, unskillful, or reckless management of the respondent's engine on the occasion referred to. To say the least, the evidence on this point was conflicting. Where there is a substantial conflict of evidence on a material point, this court will not reverse the discretion exercised by the District Court in granting a new trial."

From the dates of these early decisions this Court has consistently affirmed the actions of trial courts in

granting or denying motions for new trials whenever there was evidence in the record in support of its findings. This rule was followed in the following cases: *Utah State National Bank vs. Livingston,* 69 Utah 284-154, P. 281; and *James vs. Robertson,* 117 P. 1068, wherein Justice Frick wrote on page 1073:

> "In a case where the question is whether the defendant was guilty of negligence or not, the plaintiff need, however, merely to show a state of facts from which the jury may logically infer negligence; and if the jury believe plaintiff's evidence from which the inference of negligence may be deducted it may be, and ordinarily is, sufficient to sustain a finding of negligence; and this is so, even if defendant disputes all of plaintiff's evidence, or produces evidence from which the jury might find that the injury complained of was due to a cause or causes for which the defendant was not responsible."

Justice Woolfe quoted from *James vs. Robertson,* supra, as follows in the case of *King vs. Union Pacific R.R. Co.,* 212 P.2nd 692, on P. 694-95:

> "In cases like the one before us where all other assignments fail, and the only available assignment is that the evidence does not justify the verdict of the jury, and where the trial court has refused to grant a new trial, all that we are authorized to do is look into the evidence to ascertain whether there is any substantial evidence in support of every material element which plaintiff is required to establish in order to recover. If there is such evidence, then so far as we are concerned, the verdict must stand, although

in our judgment, if we passed on the facts, the verdict on the whole evidence should have been to the contrary. Nor can we under the guise of reviewing an abuse of discretion by the trial court in refusing to grant a new trial upon the ground that the verdict is not supported by the evidence, pass upon the weight of the evidence. what the district judge might or even should have done in this regard we may not do for him, simply because he refused to do it."

Referring to the case of *Belford vs. Allen* (Okla.) 80 P2nd 676, Justice Woolfe continued:

> "The court held that where the evidence is conflicting the trial judge has the duty to weigh the evidence and to approve or disapprove the verdict, and if the verdict is such that in the opinion of the trial court, it should not be permitted to stand and it is such that he cannot conscientiously approve it and besides it should be for the opposite party, it is his duty to set it aside for a new trial."

From the above decisions as well as from numerous others rendered by this Court, it seems clear that the rule is well established that the trial court has a wide discretion in the matter of deciding whether a motion for a new trial should be granted or denied; that it is the trial court which has the responsibility of weighing the evidence and of approving or disapproving the verdict; and that the appellate court will sustain its action on appeal if the record discloses substantial evidence in support of the conclusion that has been reached by the trial court.

A review of the evidence in the instant case reveals that all of the evidence on the issue as to whether the old note was paid by a new one was in the affirmative. In fact, though the plaintiff testified on two occasions during the trial—one during direct examination and the other in rebuttal—he presented no evidence to the contrary and did not deny any of the testimony presented by defendant on that issue. Nothing has been pointed out in plaintiff's brief which indicates in any way that the trial court's decision was not supported by substantial evidence in the record that the note sued upon had been paid. There is no conflicting evidence on the point at issue upon which the trial court rendered its decision for all of the testimony supports the decision of the court.

The charge of the plaintiff that the court acted arbitrarily in refusing to grant his motion for a new trial is related in no way to the evidence of the trial, but is based on the refusal of the court to permit him to reopen the case after it had been submitted, for the purpose of doing what he had had numerous opportunities during the trial to do, namely present evidence regarding the new note. Such a refusal by the trial court was proper.

CONCLUSION

Defendant respectfully submits to the court that before plaintiff could prevail in his appeal herein, he must establish from the record that the decision of the

trial court in finding for the plaintiff and in denying plaintiff's motion for a new trial was unsupported by substantial evidence; and also that the weight of the evidence in the record was contrary to the court's decision. This he has not done and could not do, for there was no testimony to support such a claim.

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