

1962

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

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.

La Mar Duncan; Attorney for Appellant;

Recommended Citation

Brief of Appellant, *Tangaro v. Marrero*, No. 9603 (Utah Supreme Court, 1962).
https://digitalcommons.law.byu.edu/uofu_sc1/3985

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
JUN 10 1962
LAW LIBRARY
6-1962

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

APPELLANT'S BRIEF

Appeal from the Judgment of the Third Judicial
District in and for Salt Lake County.

Hon. Joseph G. Jeppson, Judge

La MAR DUNCAN
208 Phillips Petroleum Bldg.
Salt Lake City, Utah

Attorney for Appellant

I N D E X

Statement of The Kind of Case	1
Disposition of Lower Court	2
Relief Sought on Appeal	2
Statement of Facts	2
Argument	
Point I	
The Court erred in its ruling in favor of Defendant and against Plaintiff in its finding that a new note had been signed and the Defendant Rivera co-signed had been discharged.	4
Point II	
The Court acted arbitrarily in its refusal to permit Plaintiff to re-open to offer further testimony that there was no new note when there was some doubt in the Court's mind as to whether such evidence had been offered	7
Conclusion	9

CASES CITED

Adams vs. Hildebrand, 51 Cal. App 2nd 117, 124 P.2d 80	8
Amore vs. DeVesta, 125 Cal. App 410, 13 P 2nd 986	8
Cox vs. Tyrone Power Enterprises Inc., 49 Cal. App 2nd 383, 121 P.2nd 829	8
Franklin Discount Co. vs. Ford, 27 N.J. 473, 143 Atl. 2d 161, 73 ALR 2nd 1316	6
Holmes vs. Nelson, 7 Utah 2nd 435, 362 P.2nd 722	4
Hughes vs. Schwartz, 51 Cal. App 2nd 362, 124 P.2nd 886	8
Leipert vs. Honold, 39 Cal. 2nd 462, 247 P.2nd 324 299 ALR, 1185	8
Mack vs. Reading Co., 377 Pa 135, 103 Atl 2nd 749 41 ALR 2nd 927	6
Noffart vs. Southern Pac. Co., 33 Cal. App 2nd 591 92 P 2nd 436	8
Sanford vs. Wilcox, 13 Cal. App 2nd 193, 56 P2nd 548	8
Tornell vs. Munson, 80 Cal. App 2nd 123, 181 P.2nd, 112	9
Tripceвич vs. Compton, 25 Cal. App 2nd 188, 77 P.2nd 286	8
Tummuly vs. Peerless Stages, 96 Cal. App 410, 13 P2nd 986	8
Uptown Appliance and Radio Co. Inc. vs. Flint, et al 122 Utah 298; 249 P 2nd 826	7

IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiff-Appellant

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

Defendants-Respondents

Case No.
9603

APPELLANT'S BRIEF

Appeal from the Judgment of the Third Judicial
District in and for Salt Lake County.

Hon. Joseph G. Jeppson, Judge

STATEMENT OF THE KIND OF CASE

This is a suit on a promissory note in which the makers, AUGUSTINE LOPEZ MARRERO and EVANGELINE LOPEZ borrowed money from Plaintiff and JACINTO RIVERA, signed the note as a surety.

DISPOSITION IN LOWER COURT

This case was tried before the Honorable Joseph G. Jeppson, sitting without a jury. After hearing the evidence Judge Jeppson found the issues in favor of Defendant Rivera and against Plaintiff holding that the note had been discharged by Marrero and Lopez signing a new note. Marrero had been discharged in bankruptcy and listed the note as one of the obligations. Plaintiff made a motion for new trial on the ground that there was insufficient evidence to justify the decision and that it is against law. The motion was denied.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment and judgment in his favor as a matter of law, or that failing, a new trial.

STATEMENT OF FACTS

Plaintiff owned and operated a loan business in Bingham Canyon, Utah. On or about April 26, 1957, Defendant Marrero came to Plaintiff's place of business and borrowed \$2,586.00 and signed a promissory note for that amount. Plaintiff informed Marrero that he had to have a co-signer with security. Defendant Marrero obtained Defendant Rivera, who owned real property in Bingham Canyon, and a woman Evangeline Lopez, with whom he was living. The money was received by Defendant Marrero. Under the terms of the note, Defendants agreed to pay \$50.00 each payday until the note with interest was paid in full.

The payments of \$50.00 were made until Defendant Marrero, who was then working for Kennecott, went on

a four day a week shift. He then requested Plaintiff to reduce payments to \$25.00 each pay day until he, Marrero went back to a full five day week shift. Plaintiff testified he first obtained permission for such a change from Defendant Rivera and that Rivera consented. This continued until April 4, 1959 when Defendant Marrero filed his voluntary petition in bankruptcy.

At that time there was a balance owing of \$1,083.50 (Tr. 11).

Plaintiff thereupon made demand upon Defendant Rivera for payment of the balance owing upon said note. Upon his refusal this action was commenced.

After hearing this matter, the Court, sitting without a jury, found the issues in favor of Defendant Rivera, against Plaintiff. The Court, at the time of its ruling found that there was a new note; that the old note was discharged.

On the issue of usury and the effect of the co-maker changing the terms of the payments the Court specifically made no ruling or decision (Tr. P. 82).

Plaintiff thereupon made a motion for new trial upon the grounds, among others of:

- (1) error in law and
- (2) insufficiency of the evidence to justify the decision at that it against law. The Court denied the motion.

From the decision at the time of trial and the Court's further ruling denying Plaintiff's motion for new trial, Plaintiff appeals.

ARGUMENT

POINT I

THE COURT ERRED IN ITS RULING IN FAVOR OF DEFENDANT AND AGAINST PLAINTIFF IN ITS FINDING THAT A NEW NOTE HAD BEEN SIGNED AND THE NOTE WHICH DEFENDANT RIVERA HAD BEEN DISCHARGED.

In this case the Plaintiff, according to the ruling of the Court, released the only security which he had, to wit, Rivera, and loaned Marrero more money.

The Court had to believe Marrero when he testified (Tr. 27 p. 17 to 25) Plaintiff, Tangaro, in substance told him he would make a new note without Rivera to secure it.

In the case of *Holmes vs. Nelson*, 7 Utah 2nd 435, 326 P.2nd 722 the Court held the evidence was insufficient to sustain the verdict. Mr. Justice Crockett:

“The prerogative (to set aside the verdict of the jury) should only be exercised when in the view of the trial Court, it seems clear that the Jury had misapplied or failed to take into account proven facts; or misunderstood or disregarded the law; or made findings clearly against the weight of the evidence so that the verdict is offensive to his sense of justice to the extent that he cannot in good conscience permit it to stand.”

The testimony of Marrero, who had discharged his obligations by going into bankruptcy regarding a new note does not make sense. He wanted the Court to believe that Tangaro had him sign a new note and gave him more money without the signature of Defendant Rivera. (Tr. 30 line 25-30) (Tr. 31 1-30).

Marrero indicates that with all the payments which he made he did not get a receipt. However, the book tallys with the note and according to Plaintiff's testimony all payments were made.

We submit that the testimony of the witness and Defendant Marrero just doesn't sound like the transaction of an ordinary business man, nor is it supported by any of the weight of the evidence. (Tr. 43 Lines 6-23).

Q. When did he say he was going to make a new note?

A. He told me he gave me that new note in blank, like that one, to sign. I signed it and he told me to bring my wife down to sign it too, and he say, "No, just you and your wife is enough" and he said — he give me \$150.00 and the necklaces, — the two necklace I buy from him."

He say he going to figure how much the 2 necklaces and the \$150.00 and put it together for the old note, and he going to give me the old note after Christmas, the old note is going to be paid already, he say.

Q. That was before Christmas, wasn't it?

A. Yes, when I signed the new note in blank, sir.

Q. Christmas of '58?

A. Yes.

This testimony the Court believed. On the other hand Marrero testified Tangaro did not give him full credit for the months paid (Tr. 30 Lines 0-30).

However, when the receipts were compared with the credits on the note they came out exactly and the evi-

dence appeared clear that Tangaro gave him full credit for all payments. (Tr. 44 lines 2 to 26).

Most of the testimony and discussion by the Court and counsel pertained to the question of usury. The Court even permitted Mr. Maw to amend his answer to allege usury (Tr. 77 line 22-30).

There was considerable evidence about whether or not the changing of the terms of the note, by reducing the payments from \$50.00 to \$25.00 was with the consent of the guarantor. (Tr. 12 line 14-30) (Tr. 13 line 1-30) (Tr. 45- 1-30).

However, the Court chose to avoid these questions of law and to make its ruling on the factual question and to believe Marrero that a new note had been made.

In *Mack vs. Reading Co.* 377 Pa.135, 103 At. 2nd 749 41 ALR 2nd 927 the Court in discussing this very question stated; 'If in the opinion of the Court, the verdict of a jury indicates a capricious disregard of persuasive testimony, the judicial remedy is a setting aside of the verdict and the granting of a new trial.'

In *Franklin Discount Co. vs. Ford* 27 NJ 473, 143 Atl. 2nd 161, 73 ALR 2nd 1316, the Court in its opinion stated:

"Upon motion for new trial the trial Judge must weigh the evidence and if it be so overwhelming on one side 'as to give rise to inescapable conclusion of mistake, passion, prejudice or partiality it cannot serve to support the judgment.' "

POINT II

THE COURT ARBITRARILY IN ITS REFUSAL TO PERMIT PLAINTIFF TO REOPEN TO OFFER FURTHER TESTIMONY THAT THERE WAS NO NEW NOTE WHEN THERE WAS SOME DOUBT IN THE COURT'S MIND AS TO WHETHER SUCH EVIDENCE HAD BEEN OFFERED.

In summation the Court stated that there was no denial on the Plaintiff's part of having made a new note.

During Plaintiff's cross-examination and all the way through his testimony, Plaintiff, in discussing the adding on of interest states that the reason it was added on, was because Defendants would not sign a renewal note. (Tr. 21, line 4-12) When Plaintiff's counsel requested leave to reopen to make this more clear to the Court he was refused. (Tr. 82 line 3-9)

Again, Plaintiff, on cross examination stated in response to Mr. Maw's question; "that the additional loan by Marrero, payments thereon were credited in a separate column on the note. (Tr. 19-line 30 Tr. 20 line 1-10)

We are aware of the fact that the matters herein complained of by the trial Judge were somewhat discretionary, but this discretion cannot be arbitrary. This Honorable Court in *Uptown Appliance & Radio Co. Inc. v. Flint*, etal, 1952, 122 Utah 298, 249 P.2nd 826 pointed out that the matter of granting a new trial was discretionary with the trial Judge, but that there could not be an abuse of this discretion.

"Van Cott, Jr. District Judge:

"It is axiomatic in this State that the decision of the trial Judge in reference to the granting or refusing

of motions for new trials is a discretionary matter, provided there is not an abuse of discretion and there is reason to believe that a miscarriage of justice would result if refused.”

In the present case the Court, after discussing with counsel, usury and the effect upon the surety of reducing the amount of the payments, decided to believe the statement of the Defendant Marrero, who had nothing to lose because of a bankruptcy bar and held there was a new note. The Court’s refusal to permit Plaintiff to reopen or to examine the record, after the Court expressed an opinion that there was no testimony of Plaintiff regarding a renewal note, was, we respectfully submit arbitrary and an abuse of discretion.

In *Liepert v. Honold* 39 Cal. 2nd 462, 247 P. 2d 324, 29 ALR 1185 the question of abuse of discretion was discussed as follows:

“The decision on limiting the new trial appropriately rests in the discretion of the trial judge. It is presumed that in passing upon the motion he has weighed the evidence and the possibility of prejudice to the defendant. His decision will not be reversed on appeal unless an abuse of discretion is shown. *Tumelty v. Peerless Stages*, 96 Cal App 530, 532, 274 P 430; *Amore v. Di Vesta*, 125 Cal App 410, 413, 13 P2d986; *Sanford v. Wilcox* 13 Cal App 2d 193, 194, 56 P2d 548; *Tripcevich v. Compton*, 25 Cal App 2d 188, 191, 77 P2d 286; *Noffart v. Southern Pacific Co.* 33 Cal. App. 2d 591, 602 92 P2d 436; *Cox v. Tyrone Power Enterprises Inc.* 49 Cal. App 2d 383, 390, 121 P2d 829; *Adams v. Hildebrand*, 51 Cal App 2d 117, 118, 124 P 2d 80; *Hughes v. Schwartz*,

51 Cal App 2d 362, 364-365, 124 P 2d 886; *Tornell v. Munson* 80 Cal App 2d 123, 124, 181 P 2d 112.

Such an abuse is shown when the damages are inadequate, the record discloses that the issue of liability is close, and other circumstances indicate that the verdict was probably the result of prejudice, sympathy or compromise or that for some other reason the liability issue has not actually been determined.

CONCLUSION

In conclusion we respectfully submit that there was no evidence of any value to support Defendant's story that Plaintiff would write a new note and release Rivera from the old one and in addition give Marrero more money.

This is contrary to reason and supported only by the statements of Marrero and his common law wife, after he had gotten out of the payment of the note through his discharge in bankruptcy.

There was no competent evidence to support the testimony of Defendant Marrero that Plaintiff had made a new note and discharged the first one by so making the new note.

We further respectfully submit that the Court, after spending nearly the entire time of trial discussing usury and the question of the effect upon Rivera's liability by Plaintiff's permitting Defendant Marrero to make smaller payments while he was out of work, and then refusing to permit Plaintiff to clear up by his testimony any ques-

tion of a new note, when the trial Judge stated from the bench that he did not recall Plaintiff having denied the making of another note, was purely arbitrary and an abuse of the Court's discretion.

Based on the record we thereby submit Plaintiff is entitled to a new trial.

Respectfully Submitted

LaMAR DUNCAN
Attorney for Appellant