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La Vere Kidman et ux v. Lavine H. White et al : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

LA VERE KIDMAN, et ux.,
Plaintiffs and Respondents,

vs.

LAVINE H. WHITE, et al.,
Defendants and Appellant,

KEITH S. JONES,
Third Party Plaintiff,

vs.

WILLIAM E. WADE et ux., et al.,
Third Party Defendants.

FILED
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Supreme Court, Utah

Case No.
9704

BRIEF OF RESPONDENTS

Appeal from Judgment of the Third District Court
for Salt Lake County

HONORABLE RAY VAN COTT, JR., JUDGE

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

This is an action on a contract and a cross-claim on a similar contract by the third party beneficiaries to effect collection of two notes that are claimed to be incorporated by reference into the contracts and are now in default. Both contracts were entered into by Lavine H. White and William E. Wade and Erma M. Wade.

DISPOSITION IN THE LOWER COURT

At pre-trial in the District Court of Salt Lake County, the Honorable Ray Van Cott, Jr., construed the two agreements to incorporate the two notes and entered Summary Judgment in favor of the Kidmans and against Lavine H. White and against Keith S. Jones and the Wades, who admitted liability on the one note. This Summary Judgment was in the amount of \$4,568.07, together with interest at the rate of six per cent per annum from March 4, 1960, to May 1, 1962, and at eight per cent thereafter until paid, and attorney's fees in the amount of \$714.68. The Court also entered Summary Judgment in favor of Keith S. Jones and against Lavine H. White and against the Wades, who admitted liability on the other note. This Summary Judgment was in the amount of \$550.00, together with interest at the rate of six per cent per annum from March 1, 1960, to May 1, 1962, and reasonable attorney's fees in the amount of \$195.00, and reimbursement for any amounts Keith S. Jones is required to pay on the Summray Judgment granted the Kidmans.

Lavine H. White is now appealing from these two Summary Judgments.

CONTENTION OF RESPONDENTS

Respondents contend that the District Court correctly construed the agreement of Lavine H. White to mean that she assumed the obligation of the Wades

on the Conditional Sales Note to Kidmans and the obligation on the Promissory Note to Jones, and properly determined that she had no defense which had any merit or upon which reasonable men could differ. Therefore, the Summary Judgments should be affirmed.

STATEMENT OF FACTS

In appellant's Statement of Facts an assignment from Keith Jones to William E. Wade and Erma M. Wade has been quoted at length, but has no bearing on the issue raised on this appeal. Also appellant has left out of her Statement of Facts items that do have a bearing on the issue in question. Therefore, respondents set forth the Statement of Facts as follows:

Keith Jones, in order to start a Drive-In business located at 3325 South 23rd East, Salt Lake City, Utah, purchased some equipment from LaVere Kidman and Leah O. Kidman, giving as security for the payment thereof a Conditional Sales Note, dated July 21, 1957, in the amount of \$6,500.00, to be paid at the rate of \$100.00 a month, with interest at six per cent, and providing that in the case of default the total amount still outstanding would become immediately due, and for attorney's fees if suit was necessary to effect collection of the note. (R. 4-6).

Keith Jones made all payments as they came due (R. 31) until the principal had been reduced to \$5,408.72. (R. 8).

On March 31, 1959, William F. Wade and Erma M. Wade purchased the Drive-In business from Keith S. Jones, giving as part of the consideration therefor their agreement to assume and perform Keith S. Jones' obligations on the said Conditional Sales Note (R. 7-9), and also gave to Keith S. Jones their Promissory Note in the amount of \$641.28, which provided for payment of \$25.00 or more a month, with interest at the rate of six per cent, and in case of default provided for attorney's fees and acceleration of due date on outstanding principal. (R. 8, 16).

William F. Wade and Erma M. Wade kept up the payments on the Conditional Sales Note (R. 31) until the principal amount was paid down to \$4,568.07 (R. 30), and kept up the payments on the Promissory Note to Jones (R. 31) until the principal on it was paid down to \$550.00. (R. 19).

On February 4, 1961, Lavine H. White took over the business from the Wades and as consideration therefor entered into two agreements with the Wades. One agreement was to assume and pay off in full the Wade obligation on the said Conditional Sales Note owing to the Kidmans (R. 10) and the other agreement was to assume and pay off the Wade obligation on the Promissory Note owing to Keith S. Jones. (R. 19).

Lavine H. White defaulted on both notes. (R. 31). In order to effect collection of the Conditional Sales Note the Kidmans brought this action against White, Jones and the Wades. (R. 1-10). In order for Jones to

protect his interests and to effect collection of the Promissory Note of Wades to him, he brought a cross-claim against White and the Wades. (R. 15-19).

The District Court in a pre-trial hearing construed the two agreements of Lavine H. White to mean that she had assumed the Wades' obligation on the two notes, including the penalties in the event she defaulted, and determined that she had no meritorious defense to the action commenced to effect collection of the notes. The Court granted a Motion for Summary Judgment, holding all defendants liable to the Kidmans for the amount still owing on the Conditional Sales Note, together with interest and attorney's fees. The Court also granted Jones' motion for Summary Judgment, holding White and the Wades liable for the amount still owing on the Promissory Note, together with interest and attorney's fees. (R. 25-26).

ARGUMENT

POINT I

THE DISTRICT COURT CORRECTLY INTERPRETED THE TWO AGREEMENTS OF LAVINE H. WHITE WITH WILLIAM E. WADE AND ERMA M. WADE.

It appears to be Lavine H. White's contention that the two agreements hereinafter set forth in full merely obligated her to pay \$4,568.07 at \$100.00 per month, and \$550.00 at \$25.00 per month, whereas, it

was the judgment of the lower court and respondent's contention that she assumed the Wade obligations, which included the penalties provided in those obligations in the event she defaulted. The only part of the lower court's judgment that is being questioned is whether or not Lavine H. White is subject to the provision of acceleration, interest and attorney's fees provided in each of the two obligations she assumed.

**A. B O T H A G R E E M E N T S C L E A R L Y
P R O V I D E T H A T L A V I N E H . W H I T E
A G R E E D T O A S S U M E T H E W A D E S '
O B L I G A T I O N I N F U L L A N D N O T
M E R E L Y T O P A Y A C E R T A I N
A M O U N T O F M O N E Y .**

The agreement with reference to the Conditional Sales Note owing to the Kidmans reads as follows:

“In consideration of the transfer of all right, title and interest of WILLIAM E. WADE and ERMA M. WADE, his wife, in and to all personal property, located at 3325 South 2300 East, Salt Lake County, Utah, I hereby agree to assume and pay off in full the obligation of William E. Wade and Erma M. Wade, to Woodbury Corporation (Mr. LaVere Kidman) in the amount of \$4,568.07 at the rate of \$100 per month. /s/ Lavine H. White.” (R. 10).

The agreement with reference to the Promissory Note owing to Jones reads as follows:

“In consideration of the transfer of all right, title and interest of WILLIAM E. WADE

and ERMA M. WADE, his wife, in and to all personal property located at 3325 South 2300 East, Salt Lake County, Utah, I hereby agree to assume and pay off in full the obligation of William E. Wade and Erma M. Wade, to Mr. Keith S. Jones, in the amount of \$550.00 at the rate of \$25 per month.

/s/ Lavine H. White.” (R. 19).

In both of the agreements it is clear and unambiguous that Lavine H. White agreed to assume the Wade obligation. The amounts referred to in each agreement clearly indicate an attempt to give some identification of the obligation and was not an attempt to describe all of the terms of the obligation assumed.

As a matter of grammatical construction, Lavine H. White agreed to assume and pay off in full the obligation of the Wades and not as appellant contends, that she agreed only to pay the amounts specified. If the agreements were only to pay certain amounts and not assume the obligation, the parties would have so indicated by appropriate language—for instance, “I agree to assume and pay the amount of . . .” But when Lavine H. White agreed to assume and pay off in full the obligation, she was obligated to do so, and was required to perform the obligation in accordance with the terms of the obligation, which not only require her to pay the outstanding amounts at the amounts per month specified, but also subjected her to the penalties provided in the obligation in the event she defaulted. She is the one who defaulted and it was entirely her

own doings that brought the default provisions of both notes into play.

It should be further noted that the parties used the word “and” between the word “assume” and the words “pay off,” making it clear that Lavine H. White did not merely assume *to* pay off the amounts referred to, as contended by appellant, but agreed to assume *and* pay off in full the obligation.

The amounts stated in each agreement stated the amounts understood by the parties to be presently owing on each obligation, and were not intended as a statement of the complete obligation assumed. Appellant, by her strained interpretation of the agreements, claims that she is not even liable for the interest on the two notes. It is contrary to all common business sense to contend that the Wades would give Lavine H. White possession of the property and have her pay only the principal on the property, and leave themselves obligated to keep up the monthly interest payments. Both the terms of the agreement and common sense make it clear that Lavine H. White assumed the full obligations of the Wades with reference to the property of which she took possession.

B. BOTH AGREEMENTS CLEARLY REFERRED TO ANOTHER INSTRUMENT. THEREFORE, THE ORIGINAL AGREEMENT AND THE INSTRUMENT REFERRED TO MUST

BE CONSIDERED AND CONSTRUED AS ONE.

The doctrine of Incorporation by Reference has been applied frequently when the courts have been called on to interpret a written instrument, and the two agreements the Court is now being called upon to construe require this rule of construction to be applied.

Both of the agreements of Lavine H. White clearly make reference to other instruments, and the rules of construction require that "effect must be given to writings incorporated into the contract by reference" *Oberg v. City of Los Angeles*, 132 C. App. (2d) 151, 281 Pac. (2d) 591, 596 (1955).

The Utah Supreme Court has consistently stated this to be a proper rule of construction. In *Miller v. Hancock*, 67 U. 202, 246 Pac. 949, 953, and in *Mathis v. Madsen*, 1 U. (2d) 46, 261 Pac. (2d) 952, 956, the Court stated:

"Respondent cites cases to the effect that separate writings may be construed together as containing all the terms of a contract, though only one be signed by the party to be charged; (citing cases). The doctrine of these cases is well-nigh elementary. It is at least supported by the great weight of judicial opinion."

This rule of construction has been stated in *Bell v. Rio Grande Oil Co.*, 23 C. App. 2d 436, 73 Pac. (2d) 662, 663 (1938), as follows:

"A written agreement may, by reference expressly made thereto, incorporate other written

agreements; and in the event such incorporation is made, the original agreement and those referred to must be considered and construed as one.” (Citing cases).

Other cases stating the same rule: *Cerino v. Oregon Physicians Service*, 202 Ore. 474, 276 Pac. (2d) 397, 401; *Holbrook v. Fazio*, 84 C. App. (2d) 700, 191 Pac. (2d) 26, 123.

The Arizona Supreme Court in *Climate Control, Inc. v. Hill*, 86 Ariz. 180, 342 Pac. (2d) 854, 859, has made it clear that the agreement need not specifically state the other instrument to be incorporated in the agreement before the rule of incorporation by reference is applied, but mere reference to it is sufficient:

“ . . . it has long been settled, without a dissenting voice, that parties may incorporate into agreements by mere reference, other writings or agreements or records, and thereby make the latter an essential part of the contract.”

The Arizona Supreme Court made it clear in the same case that merely because a meaning can be given to a clause without considering the instrument referred to does not prevent the court as a matter of law from construing the instrument referred to with the signed agreement:

“A judicial interpretation of a contract does not reach a point where the meaning of some clause can be said to be in doubt upon merely arriving at a conclusion that such clause may, as an abstract proposition, be given either of two meanings. A clause in a contract, if taken by

itself, often admits of two meaning, when from the whole contract there is no reasonable doubt as to the sense in which the parties use it."

So it is with the interpretation of the two agreements of Lavine H. White. It is possible to give a strained interpretation of what obligation was being assumed if the last part of the agreement is read separately, but when the complete agreement is read it becomes clear that Lavine H. White was purchasing personal property and as consideration for that property was assuming the obligations the Wades had undertaken with reference to the property.

Lavine H. White was not merely purchasing personal property and paying so much money for it, but rather she was buying personal property being used in a going business by taking possession of the property and assuming the obligations which went with possession and use of the property. Lavine H. White well knew the obligations that went with this personal property was a Conditional Sales Note owing to Kidmans and a Promissory Note owing to Jones, and she was not ignorant, nor has she at any time in these proceedings claimed to be ignorant of the contents of these two notes.

POINT II

THE DISTRICT COURT DID NOT CONSIDER PAROL EVIDENCE BUT CON-

STRUED THE AGREEMENTS AS A MATTER OF LAW.

The appellant under Point II of her brief contends that “the only logical way that the lower court could have reached its decision to include attorney’s fees, an acceleration clause and interest in this contract was to admit parol evidence to further define the word “obligation.” This inference and contention have no basis, but on the contrary the record clearly indicates that parol evidence was not considered.

The pre-trial order clearly states the basis for the court’s opinion. With reference to the obligation owed by Wades to Kidman, the Court stated:

“Eugene Hansen, counsel for Mrs. White, claimed defendant was not liable under said conditional sales note but the Court *after reviewing Exhibit C* of the amended complaint ruled as a matter of law that said defendant was bound by terms of said conditional sales note.” (R. 25).

Exhibit C is Lavine H. White’s agreement to assume and pay off Wades’ obligation to Kidman. (R. 10).

It is obvious from this statement by the Court in the pre-trial order that the Court applied the “incorporation by reference” rule of construction and did not consider parol evidence. The Court’s statement clearly states that “after reviewing Exhibit C,” meaning that it construed the contract as it was written. The Court states that after reviewing Exhibit C it ruled as a matter

of law that Lavine H. White was bound by terms of said conditional sales note. In other words, Lavine H. White's agreement, as shown by Exhibit C, referred to the Conditional Sale Note in such a way that the terms of the Conditional Sale Note were incorporated by reference into the agreement.

With reference to the Promissory Note owing to Jones, the Court stated in the pre-trial order the following:

“Respecting the claim of Keith S. Jones vs. Lavine H. White, wherein plaintiff seeks to recover the sum of \$550.00 and attorney's fees in the amount of \$195.00, together with interest thereon at the rate of 6% per annum from March 1, 1960, the Court held that she has no meritorious defense to this claim. Therefore judgment is entered for said amount.” (R. 26).

This order by the District Court makes it clear that not only were the terms of the Promissory Note incorporated by reference into the agreement, but the Court determined as a matter of law that White has no meritorious defense to this claim. According to the decision of the Seventh Circuit Court in *Whiting Stoker Co. v. Chicago Stoker Corporation*, 171 Fed. (2d) 248, 251 (1949), this was a determination which the Court may properly make.

“A possibility of doubt is not sufficient, for it is out of such possibilities that controversies arise. It is the duty of the court to ascertain by judicial interpretation, not whether a doubt may be asserted, but whether any ambiguity really exists.” (Citing cases).

As stated by appellant\$ on Page 8 of her brief, quoting from Moore's Federal Practice, Section 56:15:

"The function of a summary judgment is to avoid a useless trial . . . In ruling on a motion for a summary judgment the court's function is to determine whether such a genuine issue exists, not to resolve any existing factual issues."

The pre-trial order clearly shows that the District Court determined that a trial would be useless because the contract was not ambiguous so as to require parole evidence, and that Lavine H. White had no meritorious defense to present at a trial.

There is no indication in either the pre-trial order granting summary judgment or any other place in the record that any parole evidence was considered by the Court in construing the agreements of Lavine H. White.

POINT III

SUMMARY JUDGMENT WAS PROPER BECAUSE THE AGREEMENTS WERE NOT AMBIGUOUS SO AS TO REQUIRE PAROLE EVIDENCE TO INTERPRET THEM AND LEVINE H. WHITE HAS NO MERITORIOUS DEFENSE.

Merely because more than one interpretation can be claimed of an agreement is not sufficient to require the Court to proceed with trial and hear parole evidence

before construing the agreement. "The question of whether an ambiguity exists is to be determined by the court as a question of law." 17 CJS 1287.

According to the holding in *Whiting Stoker Co. v. Chicago Stoker Corporation*, 171 Fed. (2d) 248, 251 (1949) :

"A contract is ambiguous if, and only if, it is reasonably or fairly susceptible of different constructions; it is not ambiguous if the court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends. 17 C.J.S., Contracts, Sec. 294, and cases there cited. Contracts are not rendered ambiguous by the mere fact that the parties do not agree upon their proper construction. (Citing cases). . . . A possibility of doubt is not sufficient, for it is out of such possibilities that controversies arise. It is the duty of the court to ascertain by judicial interpretation, not whether a doubt may be asserted, but whether any ambiguity really exists." (Citing cases).

The District Court has assumed its proper responsibility in this case and determined whether or not any ambiguity exists in the two agreements. The Court has also assumed its proper responsibility in determining whether or not a meritorious defense exists and has determined that none exists.

There is no ambiguity in the language of these two agreements. The language is absolutely clear that Lavine H. White assumed the obligations the Wades

owed to Kidmans and to Jones. The Wades had only one obligation to the Kidmans and only one obligation to Jones, and it is these two obligations that the District Court has ordered Lavine H. White responsible for.

The law as stated in *Terrill v. Laney*, 200 Okla. 308, 193 Pac. (2d) 296, 300 (1948), makes it clear that there are no grounds for a trial in this case.

“The language used in a contract is to govern its interpretation and, if such language is clearly explicit and does not involve uncertainty, the words used are to be understood in their ordinary and proper sense, and, when the language is plain and unambiguous, extrinsic evidence as to its meaning is not admissible. In such situation, the construction of the contract is for the court and not the jury.”

CONCLUSION

Respondents respectfully submit that the District Court has correctly assumed its responsibility of determining whether or not the two agreements of Lavine H. White were ambiguous. Further, the Court has properly determined that no ambiguity exists and has applied correct rules of construction in making an interpretation of the agreements, giving the proper Summary Judgment against Lavine H. White in conformance with the plain meaning of the two agreements.

Therefore the District Court's Summary Judgments
should be affirmed.

Respectfully submitted,

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