1967

Jaeger And Branch, Inc., A Corporation v. Jim Pappas dba Jim Pappas Construction Company : Petition For Rehearing

IN THE SUPREME COURT

OF THE STATE OF UTAH

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JAEGER AND BRANCH, INC., a corporation,
Plaintiff-Respondent

vs.

JIM PAPPAS dba JIM PAPPAS CONSTRUCTION COMPANY,

Defendant-Appellant,

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PETITION FOR REHEARING

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IN THE SUPREME COURT

OF THE STATE OF UTAH

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JAEGER AND BRANCH, INC., a corporation,

Plaintiff-Respondent

vs.

Case No. 10885

JIM PAPPAS dba JIM PAPPAS CONSTRUCTION COMPANY,

Defendant-Respondent

PETITION FOR REHEARING

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In the beginning Defendant was convinced and counsel were convinced that the $6,500 check dated January 12, 1966, was made and forwarded to Los Angeles conditionally and tentatively and subject to condition precedent and were further convinced that as the result of hanky panky the check turned up in the hands of someone who pretended to be a holder in due course alleging to have taken the check in good faith and without notice.

That this Honorable Court is blinded to that general situation and instead accuses the Defendant of trying to get a shipment of carpets released by use of the check in bad faith is bewildering. This Court has decided this case as though it were a case presented by both sides on the merits and the findings of fact were the result of contested issues of fact and that the Court were free to indulge in inferences and insinuations beyond anything found by the District Court or supported by the evidence. This is contrary to the Uniform Commercial Code which Utah has adopted.

Appellant submits briefly four areas of error by this Honorable Court in arriving at its decision of November 9, 1967. (1) Facts should be resolved in favor of Appellant; (2) Defendant had a good defense to the check; (3) The burden of proof lay with the Respondent; (4) The Court misconceives the entire situation when it impugns the motives of Appellant.

(1) Facts Should be Resolved in Favor of Appellant

The Court cites Nasner vs. Burton, 2 Utah 2nd 236, 272 P. 2nd 113 (1954), as establishing the rule for review on the facts, namely; that the facts will be taken in favor of Respondent. Nasner was a case tried to a jury with both sides presenting their evidence fully and without a motion to dismiss or for judgment.

The instant case was a case tried on one side only and disposed of on a motion for judgment which required accepting the facts and the inferences therefrom against the movant.

In 53 Am. Jur., Trial, Sec 295, it is stated that "A motion for judgment for lack of evidence is, in a jury case, equivalent to a demurrer to the evidence." In the earlier section 293 the similarities are pointed out in the three motions: (1) a motion for nonsuit, (2) a motion for directed verdict and (3) a demurrer to the evidence. In the instant case the parties stipulated that production

of the check endorsed to Plaintiff made a prima facie case and cast on the defendant the burden of going forward to prove a defense. This was the first real evidence in the case and the motion of plaintiff at the close of the defendant's evidence amounted, we submit, to a demurrer to the evidence.

In Sections 433, 434 and 435 of 53 Am. Jur., Trial, the rule applicable to a demurrer to the evidence is stated to be that the truth of the evidence attached is admitted together with all reasonable inferences, that it must be taken most strongly against the party demurring and evidence unfavorable to the party attacked may be ignored by the court. Shields vs. Meyer, 183 Kan. 111, 325 P 2d 29 (1958)

5 Am. Jur. 2d, Appeal and Error, Sec 886 states that an Appellate Court reviewing "a decision granting or denying a nonsuit or a dismissal, it is usually held that the evidence is viewed in the light most favorable to the plaintiff, in whose favor inconsistencies are

disregarded and every legitimate inference is drawn on appeal." This is the rule that should have been applied by this court, treating the Appellant as though he were the plaintiff.

The Plaintiff offered the check, which was stipulated to be a prima facie case putting upon the Defendant the burden of proceeding with his evidence. The Defendant's burden was to show that he had a defense to the check in the hands of the payee, under the Uniform Commercial Code, Section 70A-3-307(3) U.C.A., 1953. The motion for judgment, therefore, was directed to the narrow issue of whether Defendant, taking the evidence with inferences therefrom favorably to the Defendant had shown that it had a defense to the check. This evidence will be discussed under the next point.

Had the motion for judgment been denied, Plaintiff would then have been required to produce evidence that it was a holder in due course by reason of which the defense of the maker of the check was cut off. That was the meat of the case as Defendant viewed the

matter and the District Court never reached it. This Court discusses the evidence as though the Plaintiff had put forward its proof. Plaintiff preferred to make a motion for judgment attacking the existence of a defense to the original check rather than risk cross examination of his witnesses.

Under the negotiable instrument law there was a split in the authorities, some holding, as did Utah, that where the maker of a note defended by showing a defect in the instrument, the holder had the burden of proof by a preponderance of all the evidence of showing that he was the holder in due course, although some courts simply required the holder to go forward with evidence without the risk of non-persuasion. (See 12 Am.Jur. 2d, Bills and Notes Sec 1212) But under the Uniform Commercial Code the law is plain as set out in Section 1213 of 12 Am.Jur. 2d, Bills and Notes, as follows: "After it is shown that a defense exists a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course.

"Until it is shown that a defense exists, the issue as to whether the holder is a holder in due course does not arise. Where it is shown that a defense exists the Plaintiff may, if he so elects, seek to cut off the defense by establishing that he is himself a holder in due course, or that he has acquired the rights of a prior holder in due course. On this issue he has the full burden of proof by a preponderance of the total evidence. He must sustain this burden by affirmative proof that the instrument was taken for value, that it was taken in good faith, and that it was taken without notice."

(2) Defendant Had a Good Defense to the Check

It is uncontested that on January 11, 1966, the Defendant had overpaid Allo Distributing for all merchandise received by it to that date (R. 74). It is further undisputed that Allo had requested an advance on additional furnishings not covered by the original contract and that Defendant had concluded to make such an advance (R. 50-51) provided Allo would not only release the carpets, but would ship the balance of the merchandise the receipt of which would result in shortage to Allo of $1,000.00 without the check and overpayment or advance payment of $5,000 to $5,500 if the check were honored (R. 53).

This was made plain in the conversation between Pappas and Allo Distributing and is not challenged in the record. Pappas specifically said in the first telephone conversation that he would forward the check provided Allo would ship out the remainder of the material under the first order of Appellant. He called again to say that the truck had not arrived, that he would stop payment on the check if the goods were not received on Tuesday, January 18th (R. 51). He called again on the day the payment on the check was stopped and informed Allo that the goods had not been received and receiving no satisfactory response proceeded to stop payment on the check on January 18, 1966. There is no dispute in the evidence that the check was made conditioned upon shipment of additional goods and there is no dispute that the goods were not shipped and that therefore in the hands of Allo Distributing the check was not valid.

The carpets were wrongfully held up since Appellant had overpaid Allo for all goods received to that date, including the carpets

(3) The Burden of Proof Lay With the Respondent

Section 70A-3-307 (3) deals with the burden of establishing both defenses to the check and being a holder in due course and provides: "(3) After it is shown that a defense exists a person claiming the right of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course." And the establishing of a defense is covered by Section 70A-3-306 U.C.A., 1953, of the Uniform Commercial Code and includes a sub-section (c). "The defenses of want or failure of consideration, non-performance of any condition precedent, non-delivery, or delivery for a special purpose." It is the position of Appellant here that there was a condition precedent to liability on the check and that the condition was not satisfied. It follows that the burden has shifted to the Plaintiff under Section 70A-3-307 (3), who must establish that he is in all respects a holder in due course, and who offered no evidence in support of that position.

With the burden of proof on the Plaintiff and with the Plaintiff having made a

Defendant's evidence and before putting on his own defense, the posture of the case is that Appellant's evidence and all reasonable inferences therefrom must be resolved in Appellant's favor as to establishing a defense and as to whether Respondent is a holder in due course. It is, of course, possible that the Court can hold that there is not a defense to the check from the evidence adduced with all inferences resolved in favor of the Defendant. This we doubt, and hence this appeal.

Appellant's quarrel with the opinion of the Court is that the Court did not approach the problem as provided in the Uniform Commercial Code, but gave Appellant the burden of proof and then proceeded under a rule which resolved all issues of fact in favor of the prevailing party.

(4) The Court Misconceived the Entire Situation When it Impugns the Motives of Appellant.

There is no finding of fact which remotely suggests that the Defendant acted in bad faith in its negotiations with Allo Distributing over the delivery of the check in

exchange for merchandise due, largely paid for, and undelivered by Allo which was a failing corporation.

The evidence is plain that the Defendant informed the Plaintiff that its relations with Allo Distributing had broken down and that Defendant was apprechensive lest he have to pay for merchandise twice, and that Allo had represented to Defendant that the Plaintiff had been paid in full for its merchandise, as had all other suppliers (R. 49) and (R. 50).

Far from wishing to take advantage of Allo Distributing the Defendant testified that he was willing to make an advance payment on merchandise as yet not ordered or selected to help Allo out, so long as there was full performance of the contract under delivery (R. 50 to 53).

It was the Los Angeles people who were trying to pull a shenanigan. Allo was specifically informed by repeated phone calls that the check would not be honored unless the remaining merchandise were shipped. The

carpets were overpaid and released on January 11th. This was not the problem Appellant was making phone calls about after January 11th. Although protesting that the shipment had left, the facts are that it never did leave and never arrived and Allo therefore knew that it was in possession of a check which was not valid because of a condition precedent. Having previously told the Appellant that Jaeger and Branch had been paid in full Allo proceeded to deliver the check to Jaeger and Branch which had also had conversation with Defendant and Mrs. Voorhees and knew of the Defendant's concern about the entire matter, and also knew that someone had told Defendant that Jaeger and Branch were holding up the carpet shipment. Jaeger and Branch are therefore charged with knowing that the delivery of the check was conditional and several conditions had been discussed with Don Moreland: (a) carpets were being held up for some kind of payment or reason; (b) the relationship between Allo and Defendant had

deteriorated indicating differences over finances or deliveries; (c) additional money was being sent to Allo; (d) the money was not owing to Allo as the Appellant had indicated that it was fearful of paying for merchandise coming from Allo Distributing; (f) no merchandise was delivered by the Plaintiff to Allo Distributing in connection with this check which was therefore simply a payment on account; (g) Plaintiff was sufficiently uncertain about the check that it made a long distance phone call to the Walker Bank in Salt Lake and more to the point could have returned the courtesy of the Defendant's phone calls of January 11th and inquired about the true state of affairs.

All of these circumstances cast a shadow on the acceptance of the check by the Plaintiff and if inferences be properly drawn in favor of the Appellant and against the Plaintiff who refused to go forward with his evidence, it reasonably appears that Plaintiff had notice that there was something wrong with the transaction and was not a holder in due

Appellant's Brief at Pages 17 to 23. At least there was enough evidence with inferences therefrom to require Plaintiff to show that he was a holder in due course.

CONCLUSION

The Court should reconsider its decision. The rule of Nasner vs. Burton should not be applied to these facts, but the rule of the Uniform Commercial Code, Sec 70A-3-307, U.C.A. 1953. When so viewed th facts establish a defense to the check in the hands of Allo Distributing. At that juncture the Plaintiff was compelled to go forward with evidence that it was a holder in due course. Instead, it made a motion for judgment which amounted to a demurrer to the evidence of Defendant-Appellant. It was error to grant this motion and the judgment of the District Court should be reversed.

Appellant respectfully requests a rehearing in this matter.

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