

1992

Leonard D. Udell v. Dan Whiting : Brief of Appellee

Utah Court of Appeals

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Dan Whiting; Pro Se Appellee.

Ronald H. Goodman; Attorney for Appellant.

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BRIEF

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IN THE UTAH COURT OF APPEALS

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CKET NO. 920451CA

LEONARD D. UDELL

Plaintiff-Appellant,

vs

DAN WHITING

Defendant-Appellee

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Case No. 920451 A

BRIEF OF APPELLEE

Appeal from a final Judgement entered in a civil action in the
Fourth Circuit Court in and for Utah County, State of Utah, Judge
Joseph T. Dimick.

DAN WHITING
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Payson, Utah 84651

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FILED

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

LEONARD D. UDELL)	
)	
Plaintiff-Appellant,)	Case No. 920451 A
)	
vs)	
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DAN WHITING)	
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Defendant-Appellee)	

BRIEF OF APPELLEE

Appeal from a final Judgement entered in a civil action in the Fourth Circuit Court in and for Utah County, State of Utah, Judge Joseph T. Dimick.

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TABLE OF AUTHORITIES

STATUTE CITED

Utah Code Annotated, Section 70A-3-607

STANDARD OF REVIEW

THE STANDARD OF REVIEW FOR THIS COURT WOULD BE TO DETERMINE IF THE TRIAL COURT WAS CORRECT IN FINDING THAT AN ACCORD AND SATISFACTION HAD RESULTED. THE SUPPORTING AUTHORITY WHICH APPELLEE BELIEVES DETERMINATIVE OF THIS ISSUE IS UTAH CODE ANNOTATED, SECTION 70A-3-607.

STATUTE

Utah Code Annotated, Section 70A-3-607, "The negotiation of an instrument marked "paid in full," "payment in full," "full payment of a claim," or words of similar meaning, or the negotiation of an instrument accompanied by a statement containing such words or words of similar meaning, does not establish an accord and satisfaction which binds the payee or prevents the collection of any remaining amount owed upon the underlying obligation, unless the payee personally, or by an officer or employee with actual authority to settle claims, agrees in writing to accept the amount stated in the instrument as payment in full of the obligation."

IN THE UTAH COURT OF APPEALS

LEONARD D. UDELL,)	
)	
Plaintiff-Appellant)	Case No. 920451-A
)	
vs)	
)	
DAN WHITING)	
Defendant-Appellee)	

STATEMENT OF THE FACTS

Over a period of two months in 1988, defendant Dan Whiting made four purchases from plaintiff Leonard D. Udell, of certain equipment owned by Mr. Udell, and signed a promissory note for each purchase. The terms of the notes were as follows:

A. First note--Signed February 11, 1988, for \$2200. If the amount was not paid within 90 days, there would need to be interest accruing at ten percent.

B. Second note--Signed February 11, 1988, for \$350. Interest would be at the rate of one percent per month.

C. Third note--Signed March 7, 1988, for 2500. The interest would be at ten percent if not paid within three months.

D. Fourth note--Signed April 14, 1988, for \$250.

The total owed from the four notes was \$5200.

Mr. Whiting was unable to reach Mr. Udell and discuss fully the condition of the equipment because Mr. Udell was out of state at various locations. Therefore, Mr. Whiting wrote Mr. Udell a letter dated 12/23/92. In the letter, he described the condition of the equipment and the reasons why he felt full price of notes

should not be paid for it. In paragraph 15 of that letter, he stated that he felt, because of the condition of the equipment that \$1600 was all that he owed Mr. Udell. He also states that he was enclosing a check which would "reflect payment in full for everything in which we entered into. Acceptance of this check will reflect that you agree to the same."

Mr. Udell personally endorsed, in writing, the said check.

SUMMARY OF ARGUMENT

Based on Utah Code Annotated, Section 70A-3-607, Appellant Udell's personal endorsement and negotiation of Appellee Whiting's check in reference to Appellee Whiting's letter of 12/23/92 reflected a meeting of minds thus Accord and Satisfaction.

ARGUMENT

From the evidence and testimony produced at trial, Mr Udell personally endorsed the check for \$1600.00 which was marked clearly "Payment in Full as per letter 12/23/92" He cashed it with full knowledge that the letter accompanying the check stated in paragraph 15 that "Acceptance of this check will reflect that you agree to the same."

If Mr. Udell did not agree to the same, he should not have accepted the check.

Through his personal endorsement Mr. Udell reflected that he

did "agree to the same" thus a meeting of the minds constituting an accord and satisfaction.

CONCLUSION

Based on the foregoing argument, the Defendant, Appellee requests this court to find in agreement with the Trial Court Ruling.

Dated this 14 day of November, 1992.



Dan Whiting, Appellee Pro Se

CERTIFICATE OF SERVICE

I hereby certify that I mailed four true and correct copies of the foregoing brief of Defendant-Appellee postage prepaid, to Ronald H Goodman, Attorney for Plaintiff-Appellant, 8 North Center, P.O. Box 727, American Fork, Utah this 16 day of November, 1992.

A handwritten signature in cursive script, appearing to read "Dan Whiting", is written over a horizontal line.

Dan Whiting, Appellee Pro Se

FOURTH CIRCUIT COURT, STATE OF UTAH
UTAH COUNTY, AMERICAN FORK DEPARTMENT

LEONARD D. UDELL,

Plaintiff,

vs.

DAN WHITING,

Defendant.

RULING

Case No. 920000339

After considering the evidence, the Court finds the Plaintiff's cashing of defendant's check to be accord and satisfaction, and finds for the defendant and against the plaintiff, no cause of action.

DATED this 16th day of June, 1992

BY THE COURT:

Joseph A. Smith

Circuit Judge

MAILING CERTIFICATE

I certify I mailed a copy of the above Ruling, postage prepaid, on June 17, 1992 to the following:

Ron Goodman

P.O. Box 727

American Fork, Utah 84003

Dan Whiting

4692 W. 10000 South

Payson, Utah 84651

Karen D. Hansen

Deputy Court Clerk

mining accommodation status. *see* Utah Farm Prod. Credit Ass'n v. Watts, 737 P.2d 154 (Utah 1987), *Mooney v. GR & Assoc.*, 746 P.2d 1174 (Utah Ct. App. 1987).

Default judgment.

Failure to reserve rights under Subsection (1)(a) could not be used to set aside default judgments against debtors under Rule 60(b)(6) of the Utah Rules of Civil Procedure, because the subsection does not apply to judgments and the rule applies only where a judgment has been satisfied, released, or discharged and not to questions relating to the merits of the underlying claim. *First Sec. Bank v. Aarian Dev. Corp.*, 738 P.2d 1019 (Utah 1987).

Extension of time to pay note.

Where borrower executed two promissory notes in favor of the bank and the borrower's parents as cosigners were accommodation parties, and thus sureties, on the notes, the parents were discharged from further liability on the notes where, after borrower defaulted, the bank and borrower entered into an agreement to extend the time of payment on the notes by means of refinancing and execution of another note without the consent of the parents and without an express reservation of rights; fact that refinancing note may have been invalid would not affect the parents' discharge from liability since it is the agreement that is controlling and not whether the agreement is necessarily binding. *First Nat'l Bank v. Egbert*, 663 P.2d 85 (Utah 1983).

Impairment of collateral.

Holder's surrender of securities pledged re-

leases indorser only pro tanto, to extent of impairment of security. *Utah State Nat'l Bank v. Livingston*, 69 Utah 284, 254 P. 781 (1927).

Partial discharge.

When the person against whom a right of recourse exists is partially discharged, others who are also sureties are also discharged, but only to the extent that the rights have been impaired. *Utah Farm Prod. Credit Ass'n v. Watts*, 737 P.2d 154 (Utah 1987).

Waiver.

Language in a guaranty agreement "the liability of the Guarantors shall not be affected, released or exonerated by release or surrender or any security held for the payment of any of the debts heretofore mentioned," effectively waived any defense based on impairment of collateral. *Continental Bank & Trust Co. v. Utan Sec. Mtg., Inc.*, 701 P.2d 1095 (Utah 1985).

A provision that defendants "jointly and severally guarantee payment when due of any and all obligations of borrower to bank now existing or which may hereafter arise of whatsoever nature and however represented, whether secured or unsecured" deals with the guarantors' liability for any loans made to the debtor, whether secured or unsecured, not with any waiver relating to collateral. Construed strictly against the bank, it does not explicitly waive any subrogation rights to collateral. *Valley Bank & Trust Co. v. Rite Way Concrete Forming, Inc.*, 742 P.2d 105 (Utah Ct. App. 1987), cert. denied, 765 P.2d 1277 (Utah 1987).

COLLATERAL REFERENCES

Am. Jur. 2d. — 11 Am. Jur. 2d Bills and Notes § 939.

C.J.S. — 10 C.J.S. Bills and Notes §§ 468, 472 et seq.

A.L.R. — Who is "party" discharged on negotiable instrument to extent of holder's unjustifiable impairment of collateral, under UCC § 3-606(1)(b), 93 A.L.R.3d 1283.

What constitutes unjustifiable impairment of collateral, discharging parties to negotiable instrument, under UCC § 3-606(1)(b), 95 A.L.R.3d 962.

Key Numbers. — Bills and Notes — 256, 301, 437.

70A-3-607. Accord and satisfaction.

The negotiation of an instrument marked "paid in full," "payment in full," "full payment of a claim," or words of similar meaning, or the negotiation of an instrument accompanied by a statement containing such words or words of similar meaning, does not establish an accord and satisfaction which binds the payee or prevents the collection of any remaining amount owed upon the underlying obligation, unless the payee personally, or by an officer or employee with actual authority to settle claims, agrees in writing to accept the amount stated in the instrument as full payment of the obligation.

December 23, 1991

Gus:

After talking to you on the phone the last time, I felt that it was time that you heard my side of this story.

The equipment that I received from you was in terrible condition. Much worse than I was led to believe.

The maxi sneaker had to have everything on it completely replaced, except for the frame, and one rear end. The engine block was broken, the pumps were bad, the radiator was ruined, the grill was gone, the plow was ruined. The only thing I used off the plow was the vibrator box and I had to replace the bearings in it. Two tires were completely ruined. The hood was ruined, the seat was gone, the hydraulic tank was broken and the fuel tank was ruined. The main gear box was burned and seized and locked up tight.

The 1981 Chev was a mess. The camshaft (two lobes) were flat. One head was broken, the radiator was bad, the clutch and pressure plate were burned up. I had to replace two bearing seals and set of gears in the transmission. The throwout bearing was gone, the emergency brake and cable were completely gone. The wiring under the dash board was ruined. The front grill was smashed out, the hood was dented in, both doors were dented and cracked from hitting the mirrors. The windshield was broken. The back bed had to be completely re-done. The upper and lower pivot pins in the front end were totally shot and needed to be replaced. The tie rod ends were totally shot and needed replaced. The tie rod ends needed replaced from lack of grease and repair. Only one head light and one tail light on the whole truck worked. The brake shoes were shot. The whole truck in general had to be completely rebuilt at high cost both in money and my time.

The 1972 Ford had one head broken and burnt up, both exhaust manifolds were cracked and needed replaced, the radiator was broke, the cab was in extremely bad condition. The front grill was missing, the chrome around the front head lights was missing. The clutch, pressure plate and bearings were burnt up and needed replaced. The flatbed was just junk and was entirely junked out. The wiring needed completely replaced. The rear end seal was leaking and needed replaced. Both transmission seals were leaking, the windshield was broken. All the tires were ruined and needed replaced. The power steering pump was bad and needed replaced. The steering box seals and bearings were shot, the tie rod ends were all totally shot and needed replaced. The brake shoes were ruined. The upper and lower pivots on the A-frame and front end needed replaced. The body mounts were rusted out and needed rebuilt. I put hundreds of hours work of work and a lot of money.

The dump truck to begin with had a jammed transmission. When I pulled it out, two gears were broken. The clutch and pressure plate bearing and throw out bearings needed replaced. The radiator

was broke, both main leaf springs were broke and needed replaced. The dump bed was left half full of asphalt. It had to be jack-hammered out. When I got it out, the bed was split from the back almost to the cab. It had to be cut, welded and straightened to even make it usable. The tail gate is bent and unclosable, seals on the hydraulic pump that lifts the bed were shot. The tanks were full of water. It only had three usable tires. The wiring was shot. Two side windows were broken and both mufflers were rotted out. The brake shoes were worn out.

The Ditch Witch trencher had to have the boom, chain, bearings on the trenching unit completely replaced. All drive bearings in the trencher were shot and needed replaced. The engine had been run out of oil and needed overhauled. The gas tank was broken and could not be fixed. It needed replaced.

The main frame and engine mounts were cracked and needed welded. The handle bars were bent and needed re-done. Both drive chains needed replaced. The belt drives were burnt up and all belts needed replaced. The Ditch Witch trailer needed bearings. It needed the wiring replaced. One fender was bent and had to be taken off and straightened. The trailer hitch was bent. Both safety chains were gone.

The John Deere trailer's deck was totally shot, the fenders were dented and split. The light brackets were broke off, the tilt pins in the tongue were worn out. The main frame was broken on the deck. Two sprocket springs and spring pins were worn out all the way around. The tandem rocker brackets were totally worn out. The brake shoes and electric brake shoes were shorted and needed replaced. The wiring was shot (it was just dragging), wheel bearings were shot from lack of grease. The seals were shot, the hitch was totally broken. The trailer jack had been drug and had ruined the worm gear, the foot pin bracket and the handle. They all needed totally replaced.

I never did get the roller, and I kept the air tamper, the case backhoe bucket, and the air compressor in storage for you for two years. I hauled them from American Fork to Payson, stored them and then returned them to you when you got back to Utah. The price of a storage unit runs \$25.00 per month and that cost can be calculated and brought to date along with other costs, if necessary. If you remember, I spent one full day over at your yard working on winterizing your equipment trying to save what I could. I also spent one full day hauling away pipe, conduit etc. to make way for the new owners. The fuel tanks that you had me store for you are still at my yard. They cannot be sold for scrap because of environmental aspects. To even get rid of them, you have to pay to have them environmentally removed. The buried drop contract that I bought from you, I never recieved one job from. It cost me \$3540.00 that year to maintain liability insurance for it and never got one cent from.

At the time you signed the titles over to me, you said if I would get you a \$2000.00 truck, we would call it even. I found several trucks, but you had left the country again and I wasn't able to get ahold of you.

As per our conversation on the phone the last time, you asked why I didn't return the stuff to you, if you remember, you were out of

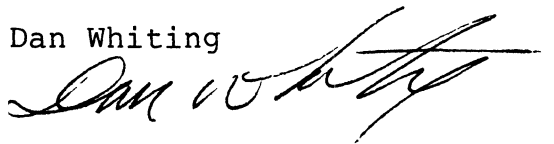
state. Your wife kept calling me for money to go back and see you. I would give her what I could because I didn't feel it would be right to take the stuff over and dump it on her with you away. I thought when you came back around, that we would work things out. But when you were gone for so long, I decided I had better start fixing stuff up so I could use them and get my initial investment out of them because it was apparent that you wouldn't be able to pay back that initial investment.

Since our July 30, 1989 discussion about the \$2,000.00 truck, I have paid you \$400.00 against the equipment besides prior payments.

I feel in all honesty, that \$1600.00 is all, at the very most, that I owe you. I am enclosing a check for that amount and referencing it with this letter. This check will reflect payment in full for everything in which we entered into. Acceptance of this check will reflect that you agree to the same.

Although I want to have this settled amicably, if there are any problems that arise where my name or livelihood are threatened, my attorney will proceed with any future dealings.

Dan Whiting

A handwritten signature in cursive script, appearing to read "Dan Whiting", written in dark ink.