

1983

Claron D. Bailey v. Deseret Federal Savings And Loan Association : Respondent's Supplement

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SUPREME COURT OF UTAH
STATE OF UTAH

CLAYTON D. BAILEY,)
)
Plaintiff-Respondent,)
)
vs.) Case No. 18961
)
DESERET FEDERAL SAVINGS AND)
LOAN ASSOCIATION,)
)
Defendant-Appellant.)
)

RESPONDENT'S SUPPLEMENT

Respondent supplements respondent's brief with a request for attorney's fees pursuant to the Utah Rules of Appellate Procedure, Rule 33(a) claiming that appellant's appeal is frivolous, and filed for the purpose of delay of justice and harrassment of the plaintiff-respondent. Respondent ordered a transcript of the bankruptcy court hearing which is the center of appellant's claims. The transcript did not arrive until 10 months later on the 28th day of October, 1983. Respondent had already filed its brief on the 11th day of August, 1983. Upon discussion with the clerk of the Court after the new rules came into effect, respondent feels issue of costs and attorney's fees can now properly be raised under Rule 33(a) by a motion or by supplementation of its brief.

The transcript raises a serious question as to the motives and substance of the appeal. In support of this contention, respondent argues as follows:

POINT I: BASED ON THE TRANSCRIPT OF THE BANKRUPTCY COURT HEARING ATTACHED AS APPENDIX I, IT WAS THE CLEAR AND UNEQUIVOCAL INTENT OF THE BANKRUPTCY COURT TO ABANDON THE PROCEEDS OF SALE TO DETERMINATION BY THE STATE COURT. HENCE, THE APPEAL IS DILATORY, FRIVOLOUS AND IN BAD FAITH.

The essence of the defendant's appeal rests on the bankruptcy court's dismissal of respondent's verified complaint as being res judicata upon issues tried in the State Court. While that issue may be at first blush seem legitimate, an examination of the discussion of the bankruptcy court with respect to the instant case shows a clear and unequivocal intent of the bankruptcy court to abandon the proceeds of the trustee's sale and to allow the distribution of those proceeds to be challenged in the state court. The full text of the argument before the bankruptcy court is attached as Appendix I for the convenience of the court.

In summary, the transcript shows the following:

The plaintiff brought an action in bankruptcy court attacking the loan transactions between the bankrupt and Deseret Federal and asking for the trust deed to be set aside or for alternative relief of damages or to be allowed to cure the loan. Deseret Federal made a motion to dismiss the bankruptcy action at the hearing. Mr. Garrett made among others the following arguments:

[I] find nothing in the bankruptcy law that would authorize the court to entertain these proceedings. (Appendix I, transcript page 3, lines 12 and 13.)

* * * So my position, your Honor, in order that this record be clear, is that this complaint be dismissed and if this lien claimant claims other rights, he can exercise those independently of this court * * *. (Appendix I, page 4, transcript lines 17 through 19.)

In response, Mr. Ivins explained his position at the conclusion of which the court made the following statement:

THE COURT:

I see that does clarify matters somewhat in my mind if this Deseret Federal resells the property in the next period of time, a difficult period of time to do so, I would expect, and obtains additional proceeds -- lets say an additional \$5,000.00 -- your client makes no claim on that additional \$5,000.00 but seeks only the right to look over Deseret's shoulders at this point to see that the amount they bid is properly distributed pursuant to state law?

MR. IVINS:

Right, to the secured creditors. * * * (Appendix 1, page 7, line 10 through page 7, line 20.)

After further comment by Mr. Garrett, the court continued:

THE COURT:

I wonder, Mr. Ivins, if based on the apparent status of things at this point, which was not the one you sought last Friday, but the status which we find today, it does appear that the trustee makes no claim to that \$48,000.00, that there is no interest in the estate in that money and that since you claim no interest in any funds which may be due the estate, that is -- those over and above the sale, your present sale price, which may result from the second sale -- there is nothing for this court to concern itself with.

MR. IVINS:

That is fine with me as long as the order doesn't prejudice our right to, you know, look over the shoulder as you said of the trustee, Deseret, on the \$48,974.00. (Appendix 1, page 8, line 17 through page 9, line 5.)

After additional argument regarding the procedural aspects that should be pursued and a discussion of the potential discharge reflected in the \$48,947.14 bid, the court felt as follows:

I believe in this instance that the absence of the trustee as Mr. Garrett suggests, is based upon the trustee's representations made at the initial application for the temporary restraining order and that there is no interest which he asserts in the money, at least money which was paid at the initial sale; therefore, I believe it is unnecessary for Deseret Federal to account further to the court for monies which were involved in the sale which occurred at the first of this week. The order still stands in that any future sale must be done consistent with the court's order and must result in an accounting to the court. There being no interest of this court in the sale proceeds, on the sale which has already occurred, I can see, and since your client, Mr. Ivins, concern is only with those proceeds, it appears to the court appropriate to grant the motion to dismiss and the motion is granted. You may prepare an order, Mr. Garrett. (Appendix I, page 14, line 10 through page 15, line 2.)

The clear intent of the bankruptcy court was manifest. An order dismissing the case was drafted by Mr. Garrett and entered. When the intended action was then taken by Bailey and when it was proved in state court that Deseret Federal had overcharged and that there were excess proceeds, Mr. Garrett then bootstrapped an argument into an appeal based on the ambiguity of his own order.

CONCLUSION

The actual transcript of the bankruptcy court hearing resulting in the order of dismissal makes clear the frivolous nature of the bank's appeal. An appeal brought for the bank's purpose of teaching a small lien claimant a lesson, deserves the award of all of the respondent's attorney's fees and costs incurred in this appeal to be determined by the district court at an evidentiary hearing.

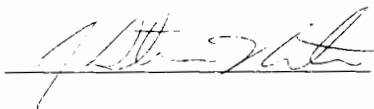
RESPECTFULLY SUBMITTED this _____ day of January, 1984.

NEWTON & IVINS

J. STEVEN NEWTON
Attorney for Plaintiff-Respondent

CERTIFICATE OF DELIVERY

I hereby certify that on the 16th day of January, 1985, I delivered a true and correct copy of the foregoing RESPONDENT'S SUPPLEMENT to Edward M. Garrett, Joseph E. Hatch, GARRETT AND STURDY, 311 South State, Suite 320, S.L.C., UT 84111.



COPY

IN THE UNITED STATES BANKRUPTCY COURT
 FOR THE DISTRICT OF UTAH
 CENTRAL DIVISION

-o0o-

CLARON BAILEY, et al.,)	
)	
Plaintiffs,)	No. C 78-01047
)	
vs.)	
)	No. C 78-01048
DESERET THRIFT, et al.,)	
)	
Defendants.)	

TRANSCRIPT OF PROCEEDINGS

Taken at: 350 South Main, Salt Lake City, Utah

Taken by: Ernest M Sanchez, Jr.

Date: November 13, 1983

From the Reporting Offices of:

Capitol Reporters

P. O. Box 1477, Salt Lake City, Utah 84110

(801) 363-7939

1 Tuesday: November 13, 1979:12:15 p.m.

2
3 THE COURT: William Radmall, 78-01047 and 78-010
4 Counsel?

5 MR. IVINS: Jim Ivins, Your Honor, for the
6 plaintiff Claron Bailey and apparently John Green isn't
7 here who is the trustee.

8 MR. GARRETT: Edward M. Garrett for the Deseret
9 Federal Savings and Loan Association.

10 THE COURT: You may proceed.

11 MR. IVINS: Your Honor, as you are aware, we had
12 the restraining order signed on this on Friday in the
13 neighborhood of 10:00 o'clock. By the time we got the word
14 to Mr. Garrett, attorney for Deseret and the trustee, the
15 sale had been conducted and although there maybe some
16 questions about, you know, setting aside that sale or at
17 least holding it in abeyance until this is determined
18 because the trustee or the beneficiary bid, the amount of
19 their note at the sale, there wasn't an interested party
20 bonafide purchaser for value on it.

21 I have discussed it with my client after reviewing
22 the figures that Mr. Garrett gave to me at the sale and we
23 are willing to restrict our action to the proceeds of the
24 sale.

25 In other words, what we would like to do is to

1 continue our action with regard to the proceeds of the sale
2 and of the trustee account for -- in accordance with the
3 Utah Code 57-1-29 where it talks about the disposition of
4 proceeds of the sale by a trustee and make sure that
5 they've accounted properly for the proceeds and continue
6 our action either in this court or if the trustee abandons
7 those claims, well, then we can go over to state court and
8 do that.

9 THE COURT: That you do you wish to make
10 comment?

11 MR. GARRETT: Yes. I do, Your Honor

12 I wish to identify at this time what was served
13 and as was served on Mr. Ivins yesterday and I delivered it
14 personally. It is a motion to dismiss this complaint.
15 Yesterday was the 12th. I'm identifying at this time, Your
16 Honor, a motion to dismiss and notice of hearing which
17 we've noticed up for this day, also.

18 My thought on the matter is that the complaint
19 identified in this action simply did not give the Court any
20 jurisdiction to issue a temporary restraining order or any
21 other order in this matter. The Court had already, in
22 September of this year, entered an order authorizing the
23 Deseret Federal Savings and Loan Association as trustee to
24 sell this property pursuant to state law at a trust deed
25 sale which was duly noticed and the property sold.

1 The term of that order is such, Your Honor, that
2 after the sale, the Deseret Federal will offer that
3 property, again, in a commercially reasonable manner to
4 determine if additional funds can be received and if they
5 are, we were directed to deposit that with the trustee or
6 with the Court for further disposition.

7 Now, what has happened here is a lien complaint
8 being about an eight hundred dollar lien which is
9 attempting to defeat that sale and defeat the prior order
10 of the Bankruptcy Court or to, in some manner, jeopardize
11 our position in that property.

12 Find nothing in the Bankruptcy Law that would
13 authorize the Court to entertain these proceedings. The
14 trustee, I assume, has the power to do as he will see fit
15 with this property and has done so. I would think that the
16 fact that he isn't even here would indicate his lack of
17 interest in the subject matter of this particular case.

18 We are under an order from this Court now to recover
19 this property in a commercially reasonable manner to see if
20 we can resell it for a substantially -- not a substantially
21 higher sum but a higher sum than we paid at the sale and if
22 we do that, that money comes back for disposition by the
23 Court. If we cannot, I assume we have to report to the
24 Court that fact and take such other measures as we deem
25 necessary or take our loss on the property or whatever to

1 dispose of it.

2 I might mention to the Court also that the only
3 basis that I can see that a lien claim can come in is on
4 the legal basis that the notice of default had not run its
5 full three-month course at the time of the bankruptcy.

6 Now, in researching that point, I find no law
7 applicable; however, it has been well settled law that if a
8 bankruptcy intervenes during the period of redemption under
9 a mortgage foreclosure that the period of redemption is not
10 terminated in anyway. I would think that the same
11 principal applies here. In other words, the 90 days does
12 still run and ran in this case.

13 Now, under the law, anyone having an inferior lien
14 or any lien against property has a right to rehabilitate
15 that with the trustee during that period of time. They are
16 not stayed from that and I would think the same principal
17 would apply. So my position, Your Honor, in order that
18 this record be clear, is that this complaint be dismissed
19 and if this lien claimant claims other rights, he can
20 exercise those independently of this Court but even then, I
21 don't see how he can exercise any rights at this time
22 because we are under that prior order of this Court and
23 told what to do with the property.

24 THE COURT: Your jurisdictional argument, Mr.
25 Garrett, as far as I understand it, that the trustee no longer

1 claims any interest in the property and therefore, the
2 Court has no further jurisdictional over the property?

3 MR. GARRETT: Well, I think that the -- no, I
4 think the Court has jurisdiction over the property but it
5 is pursuant to the prior Court Order. I think the Court
6 elected to, at that time, say this is what I want you to do
7 and we are carrying out that order.

8 THE COURT: Well, if the court still has
9 jurisdiction over the property, it would still have
10 jurisdiction to amend its order; would it not?

11 MR. GARRETT: Yes but I'm saying it doesn't have
12 jurisdiction to entertain this complaint from this creditor.

13 THE COURT: Mr. Ivins, it wasn't clear to me or
14 your present position isn't exactly clear to me. As I
15 understand it, under the circumstances you are willing to
16 live with the present sale and you're willing to live with
17 the Court's earlier order requiring Deseret Federal to sell
18 the property again and account to the Court and to the
19 trustee and you may wish to make some claim on funds which
20 are over and above the funds which will be due Deseret
21 Federal which may be available from this second sale.

22 Have I restated your position essentially correct?

23 MR. IVINS: Yes, Your Honor. I think there are
24 two different aspects of the proceeds of the sale or the
25 proceeds of the property but for one thing, there are the

proceeds of the sale. The Deseret bid on that Friday which are, as I understand it from Mr. Garrett, \$48,974.14. That is what they bid at the sale.

Now, they have got an obligation by the prior order from this Court to account for any excess that they are able to receive from the property or any amount in excess of this amount from the property in a commercial and reasonable sale.

I'm willing to concede that and let that go to the trustee in bankruptcy although that was not -- that was the very purpose of our lawsuit on Friday; however, because the stated amount here, I don't want any order in this Court to prejudice our right to have examined by a Court this stated sale price.

Under the trust deed statute, they are supposed to pay from the proceeds, first, the cost and expenses of the sale including a reasonable trustee and attorney fee; then they are to pay the obligation upon which the trust deed is based and then they are to deposit any further balance surplus with the County Clerk if they so show or pay it to the party or persons entitled thereto according to the law.

What we are willing to settle with, although we were not on Friday, but after discussing with the client and the problems involved, we have decided that we are willing to limit our action to the lessor proceeds that

1 they have already bid and paid themselves at the sale and
2 anything they obtain from the property above that, we are
3 willing to let go by the board and let the trustee in
4 bankruptcy do that.

5 So any order by this Court we would like to not
6 prejudice our right either to continue in this Court or to
7 go or to state court and determine whether or not they have
8 complied with the state for requirements on the proceeds of
9 the sale.

10 THE COURT: I see. That does clarify matters
11 somewhat in my mind if this Deseret Federal resells the
12 property in the next period of time, a difficult period of
13 time to do so, I would expect, and obtains additional
14 process -- let's say an additional five thousand dollars --
15 your client makes no claim on that additional five thousand
16 dollars but seeks only the right to look over Deseret's
17 shoulders at this point to see that the amount they bid is
18 properly distributed pursuant to state law?

19 MR. IVINS: Right, to the secured creditors. In
20 other words, it is our position that the secured creditors
21 on the property -- their interest their priority to the
22 property has now transferred to those proceeds of
23 approximately 49,000 and we ought to have the same pecking
24 order in the proceeds as we would have had on the property
25 but you are right, we will concede that the property --

1 lawsuit ought to stand until they have accounted and if
2 this Court wants to determine it, fine.

3 If you want to abandon those proceeds completely,
4 then we will take it to the state court and that is the
5 reason we are in this court right now is because the
6 conflict had to do with was the responsibility of the
7 trustee and by the trustee, I mean Deseret, and trustee in
8 bankruptcy, Mr. Green, to the secured creditors with regard
9 to this property.

10 There was an actual conflict where the stay was
11 only partially removed in their judgment and so that is why
12 we are in this court because this court maintains strings
13 on the property. We would have done better in state court,
14 you know, on several accounts had the trustee abandoned
15 completely with just a condition but they didn't and so
16 that is why we are here and I think it would be improper
17 for the court to dismiss the lawsuit and then still keep
18 these ties and require them to account here.

19 I think they ought to cut it off and let it go to
20 state court or keep our lawsuit in that so that we are a
21 party to that accounting.

22 THE COURT: Well, I believe that argument has some
23 merit. What is the amount due Deseret Federal?

24 MR. GARRETT: Your Honor, I'm not sure I brought
25 that part of the file with me. I didn't. I have no reason,

1 however, to dispute the figure that Mr. Ivins gave you,
2 forty-eight thousand something.

3 THE COURT: You agree, Mr. Ivins, that is the
4 approximate amount?

5 MR. IVINS: I wrote it down the same time I
6 delivered the order, \$48,947.14. I wrote it down in his
7 office so I'm sure I wrote it down properly.

8 THE COURT: That was the sales price?

9 MR. IVINS: That is what they bid. That included
10 their cost and attorney fees.

11 MR. GARRETT: That's right. What they want to
12 attack here, Your Honor, I believe is attorneys fees. I
13 think that is what it all boils down to.

14 THE COURT: What about the amount after attorneys
15 fees?

16 MR. GARRETT: Ten percent of the principal and
17 interest.

18 THE COURT: Which ten percent?

19 MR. GARRETT: Well, the figure that would add to
20 the principal and interest to bring it up to 48,000.

21 MR. IVINS: Approximately, \$4,500 was the amount
22 of your secured interest.

23 THE COURT: That is the amount of your secured
24 interest?

25 MR. IVINS: Your Honor, we have acquired because

1 of our interest intended to attempt to secure this loan.
2 We have acquired all of the junior interests. In other
3 words, the junior interests are a second trustee in favor
4 of Ivory and Company which was in the face amount of \$4,500
5 of which we received an assignment.

6 We have a mechanics lien on it for eight hundred
7 eighty dollars plus attorneys fees and the third interest
8 in it is approximately a \$2,500 judgment lien in favor of
9 Western Ready Mix which was obtained by six months before
10 the filing of the bankruptcy petition.

11 THE COURT: Therefore, if you were to prevail in
12 your attack on these fees, there would still be nothing for
13 unsecured creditors in the estate?

14 MR. IVINS: That is the way we feel about it and
15 that is the way we felt about the whole property and the
16 reason we were interested in the property was because of
17 this nine percent loan. If we could cure it and go in,
18 there is one other aspect.

19 There were supposed to have been eight thousand
20 eight hundred undisbursed loan proceeds that Deseret had
21 not disbursed to Mr. Radmall and it was our intent, we
22 thought that if we could acquire the property for ten or
23 eleven thousand dollars by curing all of the back payments
24 and then obtain those undisbursed loan proceeds of
25 approximately eighty five hundred or nine thousand dollars

and apply them to the construction cost of fifteen thousand with the underlying nine percent loan which my client could as a contractor, complete the house and come out and get his money back and that is what we basically had in mind initially and then we just got in further and further and that is -- what we want now is just an accounting of the undisbursed loan proceeds, the attorneys fees, the principal, interest, whatever cost and expenses that have added to it because of just the state of the file shows that it has varied over the last year from forty thousand dollars to fifty five thousand by their statements and now, the final one is forty-nine and we wanted to know exactly how they arrived at that and what they did with those funds and so on but it is our position that the trustee would have no interest in it because the secured creditors would get all of that equity.

So it is not a matter that we think this Court is ultimately going to get anything out of it. We are only here because of the representations of Mr. Green and Mr. Garrett that they are obligated by this court order to do certain things with the property and that is where we are in this court.

MR. GARRETT: I think I ought to clarify one thing, Your Honor. I was under the impression that this lien claim with the \$875 lien really hasn't put out anything

1 except his lien, his acquired interest for the purpose of
2 this proceeding, I don't think they put out any money for
3 it.

4 THE COURT: Thank you.

5 Well, it appears to the Court from your representations
6 that even if no attorneys fees were paid, there would be
7 nothing available for unsecured creditors based upon the
8 interest which you have procured on other secured
9 creditors.

10 I believe in this instance that the absence of
11 the trustee as Mr. Garrett suggests is based upon the
12 trustee's representations made at the initial application
13 for the temporary restraining order and that there is no
14 interest which he asserts in the money, at least money
15 which was paid at the initial sale; therefore, I believe it
16 unnecessary for Deseret Federal to account further to the
17 Court for the moneys which were involved in the sale which
18 occurred.

19 At the first of this week, the order still stands
20 in that any future sale must be done consistent with the
21 Court's order and must result in an accounting to the Court.
22 There being no interest of this Court in the sale proceeds,
23 on the sale which has already occurred, I can see, and
24 since your client, Mr. Ivins, concern is only with those
25 proceeds, it would appear to the Court appropriate to grant

1 the motion to dismiss and the motion is granted.

2 You may prepare an order Mr. Garrett.

3 MR. GARRETT: Thank you, Your Honor.

4 (Whereupon, hearing adjourned)

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REPORTER'S CERTIFICATE

I, Ernest M Sanchez, do hereby certify that the foregoing pages 1 through 15, inclusive, comprise a full, true and correct transcript of the proceedings had upon the hearing of the above-entitled matter on November 13, 1983, and that said transcript contains all of the evidence, all of the objections of counsel, and all matters to which the same relate.

DATED this 28th day of October, 1983.


COURT REPORTER