1965

National American Life Insurance Co. v. Bayou Country Club, Inc. : Brief of Appellant on Rehearing

Utah Supreme Court

Peter W. Billings; Jeanett C. Douglas; Fabian & Clendenin; Attorneys for Amicus Curiae;
Robert W. Hughes; Brayton, Lowe & Hurley; Attorneys for Plaintiff-Appellant;
Nolan J. Olsen; Attorneys for Defendant-Respondent;

IN THE SUPREME COURT
of the
STATE OF UTAH

NATIONAL AMERICAN LIFE INSURANCE COMPANY, successor to CONTINENTAL REPUBLIC LIFE INSURANCE COMPANY,

Plaintiff-Appellant,

—vs.—

BAYOU COUNTRY CLUB, INC., a UTAH Corporation; FIDELITY INDUSTRIAL CREDIT CO., a Utah Corporation; WESTERN ACCEPTANCE CORP., a Utah Corporation, BRYCE WADE; FAMILY BUILDING CREDITS COMPANY, a Utah Corporation; KEITH R. NELSON d/b/a A.A.A. ELECTRIC SERVICE; WASATCH PLUMBING SUPPLY CO., a Utah Corporation; STANDARD BUILDERS SUPPLY COM., INC., a Utah Corporation; S. F. FREDRICKSON & MRS. PAUL H. HUPP d/b/a/ HUPP REFRIGERATION COMPANY formerly known as PAUL H. HUPP COMPANY; LA MAR KAY d/b/a QUALITY ELECTRIC MOTOR REPAIRS; EDDIE A. BUTTERFIELD d/b/a COOK, INC.; ROBISON DISTRIBUTING COMPANY, INC., a Utah Corporation; WETHERBEE FIXTURE CO.; WILLIAMS BUILDING SUPPLY COMPANY, a Utah Corporation; CLYDE V. BUXTON d/b/a BUXTON HEATING & AIR CONDITIONING; TOWN & COUNTRY INTERIORS; STATE TAX COMMISSION OF THE STATE OF UTAH; ELDRID S. BUNTING d/b/a SCHOPPE SHEET METAL COMPANY; INDUSTRIAL COMMISSION OF THE STATE OF UTAH; NEELEY INC., a Utah Corporation; INTERMOUNTAIN ASSOCIATION OF CREDIT MEN, a Utah Corporation; UNITED STATES OF AMERICA; any and all other persons or corporations claiming any right, title, or interest in or to the property as in this complaint described, said parties being unknown to plaintiff.

Defendants-Respondents.

Case No. 10138

BRIEF OF APPELLANT ON REHEARING

Appeal from a Judgment of the Third District Court
for Salt Lake County
Honorable Merrill C. Faux, Judge

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IN THE SUPREME COURT
of the
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NATIONAL AMERICAN LIFE INSURANCE COMPANY, successor to CONTINENTAL REPUBLIC LIFE INSURANCE COMPANY,

Plaintiff-Appellant,

vs.

BAYOU COUNTRY CLUB, INC., et al.,

Defendant-Respondents.

Case No. 10138

BRIEF OF APPELLANT ON RE-HEARING

STATEMENT OF POINTS AND ARGUMENT

POINT 1.

THE DECISION IGNORES THE FACT THAT MATERIAL FACTS ARE CONTROVERTED.

POINT 2.

THE DECISION IGNORES THE FACTUAL BASIS FOR AN ESTOPPEL.

POINT 3.

TREBLE DAMAGES SHOULD NOT BE IMPOSED UNTIL THE BORROWER HAS BEEN INJURED.

POINT 4.

THE DISCOUNT SHOULD NOT BE TREBLED.

ARGUMENT

POINT 1.

THE DECISION IGNORES THE FACT THAT MATERIAL FACTS ARE CONTROVERTED.

The decision states that summary judgment can properly be granted if the pleadings, etc., show without dispute the party is entitled to prevail. The decision then recites documentary evidence in support of various findings stating that the record supports these findings. The question should not be what can supported but rather what the contentions are. The summary judgment was entered at pretrial and therefore was no opportunity to file affidavits or otherwise show plaintiff's evidence. The decision denies plaintiff its day in court to show that Bayou owed Nelson $15,000. The decision recites that Bayou denies that it owed such a debt to Nelson, but neither this court nor the lower court was in a position to decide whether there was or was not a $15,000 debt due from Bayou to Nelson, because none of plaintiff's evidence thereon has ever been presented to any court. It seems inconceivable that no court is interested in whether or not there was in fact a satisfaction of a debt from Bayou to Nelson, as well as a discount by plaintiff.

POINT 2.

THE DECISION IGNORES THE FACTUAL BASIS FOR AN ESTOPPEL.

The decision states that if Bayou and Nelson conspired to create a usurous loan, there may be justification for a different ruling as to estoppel. The decision

then states that the record shows "plaintiff could not very well say it did not have knowledge of the note, while at the same time, by word and action, admit it was aware of the fact, and that the note was part of the consideration in granting the loan." This language shows that the court has not seen the question raised. Plaintiff was aware and expected that there should be a *discount* of $12,500 and that $2000 should be paid by the closing escrow holder to Nelson as a fee, but it was not aware of the fact that there was a $15,000 *note* from Bayou to Nelson.

The note either represented a valid obligation, the discharge of which would have resulted in Bayou's having received value at the time plaintiff received the benefit of a discount, which would eliminate usury, or it represented a fictitious obligation which was solely of Bayou's and Nelson's making. There is no evidence that plaintiff knew of the note, and a great deal of evidence that Nelson and Bayou's officers prepared and submitted the note to the closing agent, to induce him to disburse the funds. Bayou, under the authorities the decision recognizes as correct, should be estopped to assert the invalidity of the note.

POINT 3.

TREBLE DAMAGES SHOULD NOT BE IMPOSED UNTIL THE BORROWER HAS BEEN INJURED.

The decision ignores the generally recognized rule of law set forth in *McBroom v. Scottish Mortgage & Land Investment Company*, 153 U.S. 318, 328, 38 L.Ed. 729, 733, 14 S. Ct. Rep. 852, that until the borrower is out of pocket

more than the principal, there should be no imposition of a treble damage penalty.

POINT 4.

THE DISCOUNT SHOULD NOT BE TREBLED.

The decision states that $14,500 was "withheld from the defendant." If it was withheld, it would not be a "payment." Yet, the decision illogically concludes that it was a bonus paid by defendant and not a discount.

The decision states that "as of the time when the loan was executed the $14,500 became money which was then the personal property of defendant," but defendant Bayou had no control over the $14,500. The check was held in escrow by the closing agent, McGhie Abstract Company. No money was to be disbursed unless $14,500 was withheld. It was the escrow holder who had control of the proceeds, not Bayou. There is no basis for the conclusion that at the time of the closng the $14,500 became the money of the defendant. The decision assumes that this transaction is one in which $65,000 was paid over to Bayou to do with it what it wished and then Bayou, of its own accord, paid $14,500 to plaintiff as interest. That is just not what any of the evidence indicates. The court ruled, as a matter of law that the $14,500 *could* not have resulted in a discharge of the claim by Nelson against Bayou. If this is so, how can the court rule that Bayou in fact had any interest in the $14,500? If Bayou had control over, and beneficial interest in the $14,500, it certainly could have discharged its debt therewith.

If, instead of giving the escrow holder a check for $65,000 with instructions to withhold $14,500, plaintiff had given the escrow holder $50,500 for delivery to Bayou with instructions that nothing be withheld, the substance of both transactions would be identical. Yet this decision would result in a difference in penalty of $29,000 based solely upon form rather than substance, for it would be impossible for this court to hold that in the latter instance there should be anything other than a forfeiture of the $14,500 discount. One penalty is twice that of the other, although in both instances the borrower obtains the same amount.

Under Point 1 the court looked at what it, as a matter of law, concluded to be the substance of the transaction, that a discount was intended, and would not even permit plaintiff to establish that Bayou received a beneficial interest in any of the $14,500, yet under Point 4 it ignores the substance and looks merely at the form it previously ignored. In ruling as it did on Point 1, the court has denied plantiff the opportunity of proving that Bayou did in fact get a beneficial interest in any of the $14,500, and yet, under Point 4, the court rules as a matter of law, that Bayou *did* receive a beneficial interest therein.

Trebling $14,500 trebles not only the $12,500 retained at the closing for the benefit of plantiff, but also $2000 retained by Nelson.

We urge that trebling of the $14,500 or any portion thereof is an excessive penalty which will have illogical results in future decisions.

CONCLUSION

The court should, on reconsideration, remand the case for a trial of the disputed issues with directions that nothing should be trebled.

Respectfully submitted,

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