1983

U-M Investments, A Utah Limited Partnership v. Dale v. Ray, et al. And Terrell L. Bird And Janet L. Bird v. Ross A. Ray And Perry Ray : Brief of Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

U-M INVESTMENTS, a Utah limited partnership,	)	
Plaintiff,	)	
-vs-	)	Case No. 19121
DALE V. RAY, et. al.,	)	
Defendants,	)	
	)	
TERRELL L. BIRD AND JANET L. BIRD,	)	
Appellants,	)	
-vs-	)	
ROSS A RAY and PERRY RAY,	)	
Respondents.	)	

BRIEF OF RESPONDENTS

An appeal from a Judgment of the Fifth District Court of Iron County the Honorable Robert F. Owens, District Court Judge Pro Tem.

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CASE LAW

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NATURE OF THE CASE

This matter was brought before the Court on Motion for Entry of Judgment on a Supersedeas Bond.

DISPOSITION IN THE LOWER COURT

The trial court denied Appellants' Motion for Entry of Judgment on the Supersedeas Bond.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the lower court's judgment. Respondents seek affirmance of said order.

STATEMENT OF FACTS

Ross A. Ray and Perry Ray signed a document entitled "Supersedeas Bond" on the 22nd day of March, 1982, which was filed in Civil No. 7563 and Supreme Court Case No. 18216. A judgment had been entered in the above-entitled action against certain of the named Defendants. An appeal was taken to the Supreme Court of the State of Utah and the subject supersedeas bond was subsequently filed on May 21, 1982, with the clerk of the District Court of Iron County. The appeal was subsequently dismissed by the Supreme Court of the State of Utah and Defendants and Cross-claimants Terrell L. Bird and Janet L. Bird moved the District Court for an entry of judgment on the supersedeas bond for the full amount of the lower court's judgment together with interest thereon. The sureties on said bond resisted the entry of said judgment. The trial court denied Appellants Motion for Judgment on Supersedeas Bond on March 10, 1983.

ARGUMENT

POINT I: THE OBLIGATION OF A SURETY UPON A BOND IS TO BE STRICTLY CONSTRUED

In Crane v. Buckley, 203 U.S. 441, 51 L Ed 260, 27 S Ct 56, the U.S. Supreme Court stated, "It is elementary that the obligation of sureties upon bonds is strictissimi juris and not to be extended by implication or enlarged construction of the terms of the contract entered into." 5 Am.Jur. 2d Appeal and Error 1029 states, "Liability under an appeal or supersedeas bond is strictly determinable by the express terms of the contract of undertaking. The obligation is upon the undertaking, an instrument in writing, not upon the judgment." This same general rule is cited in 5B C.J.S. Appeal and Error §2008. See also 2 R.C.L. Appeal and Error §267. The law is clear that an undertaking on appeal is to be construed strictly according to its terms. As further evidence of this general rule, the Court is directed to the case of Woodle v. Settlemyer, 71 Or. 25, 141 P.205 (1914). This case dealt with an action by Claude P. Woodle against the surety on the undertaking entered into on the appeal from the original judgment. The court dismissed the action on the undertaking on the grounds that the appeal was never perfected and thus no liability could be imposed upon the surety pursuant to the conditions of the bond. However the court was very succinct in its discussion concerning the liability which is to be imposed upon sureties on such undertakings. The court quoted from 32 C Y C., page 73, as follows:

> Sureties are said to be favorites of the law, and a contract of suretyship must be strictly construed to impose upon the surety only those burdens clearly within its terms, and must not be extended by implication or presumption. This rule is followed both at law and in equity. Id. at 206.

In 2 Brandt on Suretyship and Guarantee, (3rd edition) §513, it states, "Sureties on an appeal bond are bound only according to the terms of their contract." Id., at 206. In Phoenix Manufacturing Co. v. Borgardus, 231 Ill. 531, 83 N.E. 285, the court said:

> The law is well settled that the undertaking of a surety is to be strictly construed, and his liability not to be extended by construction. Id. at 206.

In State of Maryland v. Dayton, 101 Md. 598, 61 A. 624, the court states:

> As to the general principle applicable to a case of this kind there can be no question. It is familiar law that the contract of sureties upon an official bond is subject to the strictist interpretation. They undertake for nothing which is not within the strict letter of their contract. The obligation is strictissimi juris and nothing is to be taken by construction by the obligors. They have consented to be bound to a certain extent only, and their liability must be found within the terms of that consent. Id. at 206.

Kirschbaum and Company v. Blair, 98 Vir. 35, 34 S.E. 895 states as part of the syllabus:

> But, having ascertained what the contract is, he is bound by this alone. There is no implied liability resting on him. His liability is always strictissimi juris and is not to be extended by implication or construction. Id. at 206 and 207.

Childs on Suretyship and Guarantee, at pages 124 and 125, states:

> While a surety is denominated a favorite of the law, there is a very limited field for the application of this doctrine. The nature of the contract invokes equitable consideration, but the general rules for the construction of contracts are not excluded thereby. This liability will not be extended by implication and his contract is strictly construed. . . . In cases of doubt the doubt is solved generally in his favor. Id., at 207.

The sureties in the instant case signed an undertaking binding themselves to pay a sum of money under certain conditions. Pursuant to the undertaking which Ross A. Ray and Perry Ray signed, they bound themselves as follows:

> Now therefore, in consideration of the premises and of such appeal, the undersigned, Ross A. Ray and Perry Ray, does hereby undertake and promise, on the part of appellants, that said appellants will pay all damages and costs which may be awarded against it on the appeal or on a dismissal thereof, not exceeding, One Hundred Twenty-Eight Thousand Five Hundred Dollars ($128,500.00), with interest thereon at the rate of Twelve Percent (12%) per annum from December 29, 1982, to which amount the undersigned Ross A. Ray and Perry Ray acknowledges itself bound.

Giving the above cited language a strict interpretation, as is required, the sureties only bound themselves to pay the damages and costs which would be awarded by the appellate court and they did not bind themselves to pay the judgment or any portion thereof. In Dailey v. Sawatzky, 211 P.2d 298 (Okla., 1949) the court stated that "the liability of a surety under a supersedeas bond is contractual, is to be determined by the provisions of the bond, and the surety cannot be held liable beyond its terms." In the above cited case, the Oklahoma statutes provided certain provisions for taking an appeal to the Supreme Court. These provisions were provided for in statute. The supersedeas bond given did not follow the statutory language, nor did it obligate the sureties under the precise terms of the statute. The Oklahoma Supreme Court, in determining the extent of the surety's liability stated:

> It is asserted by plaintiff that the court evidently had in mind this section at the time the bond was approved, and although the bond was not conditioned as provided by this section the sureties are nevertheless liable for damages as thereby provided. This contention cannot be sustained. The provisions of the above statute cannot be read into the bond. (Emphasis added)

In the instant action, this Court is faced with a similar situation. Utah's Rules of Civil Procedure, Rule 73(d), provides:

> Whenever an appellant entitled thereto desires a stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond.

It is not disputed that the Utah Rules of Civil Procedure require that a supersedeas bond be conditioned upon the payment of the entire judgment. It is disputed, however, that the instant bond is conditioned for the payment of such sum. In the Daily v. Sawatsky case, supra., the Oklahoma court further discussed the statutory provisions relating to the conditions of appeal bonds. The court stated that while it was true that the applicable sections set out the conditions of such bonds, the bonds are not presumed to contain such provisions, nor are those

provisions read into a bond as a part thereof. "The extent of liability upon a supersedeas bond is to be gathered from the provisions of the bond." Id. at 800. The Oklahoma court further cited the case of Williams v. Edwards et. al. 163 Okla. 246, 22 P.2d 1026, 1031, in which the court said:

> It is the contention of the plaintiff in this cause that appropriate provisions should be treated as appearing in the bond even though they are absent therefrom, on the theory that the statute itself should be considered as a part of the bond. With this contention we cannot agree . . . . The sureties on a supersedeas bond will be held only in accordance with the contract that was executed and that the court is not authorized to rewrite the contract and thereby impose upon such surety liability which they did not assume.

The Appellants would apparently have this Court interpret the instant bond as containing all the provisions outlined in U.R.Civ.P., rule 73(d). In fact the instant bond does not contain such language or provisions, nor does it even mention Rule 73(d). This Court is without authority to insert conditions in the bond which Appellants merely hope are there.

Rule 73(d) is in accord with Rule 62(d) of the U.R.Civ.P. Rule 62(d) states:

> When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay, unless such a stay is otherwise prohibited by law or these rules. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court.

Rule 62(i) states:

> The adverse party may except to the sufficiency of the sureties to the undertaking filed pursuant to the provisions of this rule at any time within days after written notice of the filing of such undertakings; and, unless they or other sureties within 10 days after service of the notice of such

> exception, justify before a judge of the court in which the judgment was entered, or the clerk thereof, upon not less than 5 days notice to the party excepting to such surety of the time and place of justification, execution of the judgment is no longer stayed.

It is apparent from reading the document entitled "Supersedeas Bond", contained in the file, that said bond does not comply with the statutory language found in Rule 73(d). The bond is not conditioned for the satisfaction of the judgment in full together with costs, interest and damages for delay as required by said rule. It should be noted however that the Utah Rules of Civil Procedure give the respondent ample opportunity to take exception to the sufficiency of that bond. By taking such an exception, the respondent in the appeal can insure that the supersedeas bond filed is sufficient and adequate under Rule 73(d). The Respondents in the instant action did not file such an exception. They merely assumed that the bond was adequate to cover the entire judgment. This assumption was ill founded and cannot now be relied upon by the Respondents to hold the sureties liable for sums they did not obligate themselves to pay.

It is clear that the sureties in the instant action did not undertake to pay the judgment rendered by the District Court. As it was stated in the Woodle v. Settlemyer case, "It is the province of courts to construe contracts, but not to make them for parties." Woodle, supra. at 207.

The Rays' obligation as sureties on the supersedeas bond in the instant action is limited by the terms of their undertaking. Their obligation extends only to those damages and costs which were awarded against it on the appeal or a dismissal thereof. The appeal to the

Supreme Court of Utah was dismissed by the Court. The Supreme Court did not award any additional damages as a result of the appeal nor did they award any costs on the appeal. Thus the Rays have no liability under the supersedeas bond executed by them. To impose liability upon the Rays under the supersedeas bond for the total amount of the judgment would require this Court to rewrite the contract signed by the Rays and provide for an additional condition for payment of said judgment. This Court is without authority to make such a reformation.

POINT II: THE CONDITION TO PAY ALL DAMAGES AND COSTS DOES NOT INCLUDE THE OBLIGATION TO PAY THE UNDERLYING JUDGMENT

During the oral argument on this motion, the Trial Court advanced the proposition that a supersedeas bond conditioned to pay all damages awarded on the appeal or a dismissal thereof included the amount of the lower court's judgment. Such proposition is not supported in the law and is contrary to the strict interpretation given to such bonds as outlined in Point I of this argument. Support for the argument that such an appeal bond does not extend to payment of the original judgment is found in Omaha Hotel Co. v. Kountze, 107 U.S. 609. In this case the U.S. Supreme Court analyzed the liability imposed upon a surety by giving an undertaking on appeal. In that analysis the court defined the term "all damages and costs", by saying that

> According to the English law, the terms "all damages and costs," would only cover the damages for delay, security for the original judgment being expressly provided for by separate words. Id. at 612.

the question arose in that case as to what damages were to be awarded due to the breach of the appeal bond. The court distinguished those cases wherein the statute made specific provision for coverage of the original judgment and those statutes wherein the bond is to be conditioned generally for all damages and costs. In the instant action our Utah Rules of Civil Procedure specifically provide for a supersedeas bond to include the statement that it is conditioned upon the satisfaction of the judgment, in order to be effective as a supersedeas bond. The bond signed by Ross A. Ray and Perry Ray is not so conditioned. 2 R.C.L. Appeal and Error §270 states:

> A condition frequently encountered in appeal bonds is one providing for the payment of all damages resulting from the appeal. Such a provision includes only such damages as are the natural and proximate result, and does not necessarily require the payment of the judgment recovered.

There are cases which have interpreted an appeal of supersedeas bond conditioned upon the payment of costs and damages to include the payment of the underlying judgment. However these cases can be distinguished from the case at bar. Several of these cases can be found at 124 A.L.R. 497. The annotated case gives the main distinguishing feature in those decisions which have interpreted an appeal bond to include the condition of payment of the judgment. In Martin v. Clarke, 105 Fed. 2d 684, the court interpreted the bond which was conditioned upon payment of all damages and costs that may be awarded to include the underlying judgment. However in that case, the court noted that the bond was read in light of the law, the procedure and the order which directed the bond to be made. The lower court had entered an order granting the appeal pursuant to a Federal statute. The order allowing the

appeal set the bond at a sum certain and conditioned it as required by law to operate as a supersedeas and cost bond. The distinguishing feature of that case is that the lower court entered its order setting out the conditions of the bond pursuant to the statute. The court held that even though the bond did not contain any language reciting that the bond was conditioned upon the payment of the lower court's judgment, the court's order made such language applicable. The above-referenced annotation cites several cases in which the court made a similar decision in regards to imposing liability upon the surety for the amount of the judgment. In each of those cases the court found that the bond was to be construed in light of the lower court's order granting the appeal.

In the instant action, the lower court did not issue an order allowing the appeal or setting the terms of the bond. The above-cited annotation states:

> The weight of authority seems to be to the effect that a bond which is not in terms conditioned for the payment or satisfaction of the judgment but for the payment of damages and costs cannot by construction be given that effect . . . even though a statute required that a bond given on appeal be conditioned that the appellant, if unsuccessful, should pay and satisfy the judgment which should be rendered by the appellate court. Id. at 505.

In Brace v. Squire, 2 D Chip (Vt.) 49 (1824), held that, under a bond given on appeal, conditioned that the plaintiff answer all damages and costs, the obligation of the surety did not embrace the payment of the amount of the original judgment. The undertaking to answer all damages and costs merely amounted to an undertaking to pay all the actual damages which the defendant should sustain in consequence of the appeal, and the cost legally taxable. 124 A.L.R. 497 at 505. The above annotation also states:

> So, although a statute at the time a bond to take a writ of error was given provided that the person applying for writ of error should execute a bond with sufficient security to be approved by the court, conditioned for prosecuting the writ of error to effect, and to pay and satisfy the judgment which should be rendered in the cause by the Supreme Court, the bond actually given being conditioned that if the appellant should well and truly prosecute to affect his writ of error to the Supreme Court of Errors and Appeals, and if he should pay all costs and damages that might be adjudged or awarded against him by said court, then such bond should be null and void, the court in La Tourette v. Baird, (1824) minor (ALA) 325, held that the surety on the bond might not be held liable for the original debt or principal judgment of the trial court. Id. at 505 and 506.

The same result was reached in Fidelity and C Company v. Superior Court, 139 Cal. App. 615, 34 P.2d 736 (1934). The statute provided that a written undertaking be executed in double the amount named in the judgment and was to be conditioned upon the appellant paying the amount of the judgment and the damages and costs which might be awarded against him on the appeal in the event the appeal was affirmed. The bond actually given was conditioned that the appellant would pay all damage and cost which might be awarded on appeal, or dismissal thereof. It was held that [illegible] undertaking neither contained a provision that the surety would be bound "in double the amount named in the judgment or a provision that the surety will "pay the amount directed to be paid by the judgment" as affirmed, it did not cover the payment of the amount of the judgment. 134 A.L.R. 497 at 506. In adhering to the same rule in Rickle and M'Allister v. M'Combs, 2 YERG (Tenn.) 83 (1822), the court pointed out that nothing could be added to the condition of the bond as given, for "otherwise man would be bound, not by the contracts they had entered into, but by

what the court might presume they intended to enter into." In §3 of the above-cited annotation, there are several old state court decisions reciting this same basic principal. The premise being that to hold a surety liable for the payment of the original judgment would be to hold him beyond the terms of his bond, which cannot be done.

The bond signed by Ross and Perry Ray is conditioned upon the payment of all damages and costs. Although the Utah Rules of Civil Procedure state that a supersedeas bond must be conditioned upon the payment of the underlying judgment, the Rays did not undertake to provide such security. The respondents in that action had ample opportunity, pursuant to the Utah Rules of Civil Procedure, to require additional security. Their reasons for not doing so cannot be argued before this Court at this late date in an attempt to expand the terms of the original bond and to impose liability upon the Rays, which liability they did not expressly undertake. The bond signed by the Rays is not conditioned upon the payment of the underlying judgment and the Birds are not entitled to a judgment against the sureties for the amount of said judgment.

POINT III: A SUPERSEDEAS BOND IS NOT EFFECTIVE UNTIL APPROVED BY THE COURT

Rule 62(d) of the Utah Rules of Civil Procedure states that a supersedeas bond and the resulting stay is not effective until the bond is approved by the court. In the instant action no such approval was ever given, nor did the Court ever issue its order staying execution of the judgment pursuant to the posting of the supersedeas. The judgment appealed from was not entitled to a stay of execution until such time as the Court had approved the supersedeas bond

filed by the Appellants. The bond in this matter was filed with the clerk of the court on May 21, 1982, and was sent to the Birds' attorney. The Birds' attorney did not take any action whatsoever in regards to the amount of the bond, or the conditions of the bond or see if the bond was effective as a supersedeas. He should not, at this time, be allowed to seek judgment against the sureties on a bond that never became effective.

POINT IV: REBUTTAL TO APPEALLANTS' AUTHORITIES

This point is given as a brief reubttal to several of the authorities cited by the Appellants in their appeal brief. Aviation Credit Corporation v. Connor Airlines, inc., 307 F.2d 685 (5th Cir. 1962), dealt with how interim proceeds from the subject property were to be distributed where the supersedeas bond did not cover the entire mortgaged debt. Such a situation does not exist in the instant case. It is further stated that the real intent of the sureties in the instant case can be determined from the fact of the supersedeas bond itself.

Beehive Medical Electronics, Inc. v. Industrial Commission, 583 P.2d 53 (Utah 1978); Quagliana v. Exquisite Home Builders, Inc., 538 P.2d 301 (Utah 1975), deal with the idea that a contract impliedly contains laws of the state existing at the time: THE Beehive case deals with the anti-discrimination and the impairment of obligations under contracts provisions of the Utah Constitution and the Quagliana case deals with the zoning requirements of a city. These cases are drastically different than the case at bar and have no application to the bond filed by the Respondents.

The Stangl v. Todd, 554 P.2d 1316 (Utah 1976) case holding for the proposition that contracts are to be

construed in the manner to effectuate valid contractual relations, it is stated that the bond in question in the instant case is a valid contractual obligation of the Respondents and that the language contained in the bond itself can be construed in clear and unmistakable terms, which terms (to pay all damages and costs which may be awarded on the appeal) represent the purpose for which the bond was executed.

It is agreed that the policy of the law in Utah is to look with disfavor upon semi-concealed or obscure self-protecting provisions in a document as stated in the Christopher v. Larsen Ford Sales, Inc., 557 P.2d 1009 (Utah 1976) case. This case, however, is inapplicable in the instant action as the bond submitted by the respondents is in clear and unequovical terms and contains no semi-concealed or obscure self-protecting provisions. The cases of Wagstaff v. Remco, Inc., 540 P.2d 931 (Utah 1975); and Wells Fargo Bank v. Midwest Realty and Finance Company, 554 P.2d 882 (Utah 1975), are likewise inapplicable to the instant action as the bond which is the subject of this action does not contain any uncertainties or ambiguities which need be resolved by this Court.

CONCLUSION

It is the well accepted and general rule that appeal or supersedeas bonds are to be strictly construed according to the terms of the bond itself. The Court is not in a position to imply a construction of said bond that is not expressly provided therein. Nor does the Court have authority to impose liability upon the sureties of the bond consistent with the provisions of a state statute, unless those statutory provisions were expressly made a part of the bond. Our Utah rules provide that a supersedeas bond is

be conditioned upon satisfaction of the judgment in full together with costs, interest and damages for delay or for any modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award. These conditions are separate and distinct items and they may not be lumped together into one item or term. Damages are not cost, interest or the judgment, nor does the judgment constitute damages, interest or costs. The pure and simple reading of the supersedeas bond posted in this matter makes it apparent that it is not conditioned upon the payment of the underlying judgment. The Appellants' appeal should be dismissed.

RESPECTIVELY submitted this 21st day of July, 1983.

Snow & Nuffer
A Professional Corporation

By LaMar J Winward
LaMAR J WINWARD
Attorney for Ross A Ray and
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MAILING CERTIFICATE

I hereby certify that on the 21 day of July, 1983, I served a copy of the foregoing BRIEF OF RESPONDENTS, on David E. West, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

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Debbie Wayburn
Secretary