1969

Reliable Furniture Company v. American Home Assurance Co., Western Genearal Agency, and General Adjujstment Bureau : Reply Brief of Appellant

IN THE SUPREME [illegible]

OF THE [illegible]

STATE OF [illegible]

RELIABLE FURNITURE [illegible]

Plaintiff and [illegible]

vs.

AMERICAN HOME ASSUR[illegible]

WESTERN GENERAL A[illegible]

GENERAL ADJ[illegible]

[illegible]

REPLY BRIEF [illegible]

Appeal from the Judgment [illegible]

Salt Lake [illegible]

Hon. D. Frank [illegible]

REX J. HANSON
702 Kearns Building
Salt Lake City, Utah

PAUL A. RENNE
1 Maritime Plaza
Golden Gateway Center
San Francisco, California

Attorneys for Respondents

TABLE OF CONTENTS

Cases Cited:

IN THE SUPREME COURT OF THE STATE OF UTAH

RELIABLE FURNITURE COMPANY,
Plaintiff and Appellant,

vs.

AMERICAN HOME ASSURANCE CO., WESTERN GENERAL AGENCY, and GENERAL ADJUSTMENT BUREAU,
Defendants and Respondents.

Case No. 11656

REPLY BRIEF OF APPELLANT

INTRODUCTION

The brief filed by Respondents raises points not covered by the Judgment of the trial court (R-34) or the Brief of Appellant. Accordingly, we feel it essential to file this reply brief to meet such arguments.

POINT 1.

NEGOTIATION OF THE AMERICAN DRAFT DID NOT CONSTITUTE A FULL AND FINAL SETTLEMENT

As Appellant pointed out in its first brief, page 6, release is an affirmative defense that must be pleaded and has not been pleaded by any Respondent in this case. Now, in Respondent's brief we are faced with another affirmative defense not pleaded—accord and satisfaction (page 12, Respondent's brief).

Utah cases have steadfastly held the doctrine of accord and satisfaction to be an affirmative defense that must be

pleaded. Rule 8, (c) U.R.C.P. F.M.A. Financial Corporation v Build, 17 U. 2d 80, 404 P.2d 670, (1965), Hintze vs Seaich, 20 U. 2d 275, 437 P.2d 202 (1968).

The endorsement and negotiation of a check bearing a release statement does not constitute a release, or accord and satisfaction as a matter of law. Dillman v Massey Ferguson, Inc. 13 U. 2d 142, 369 P.2d 296 (1962). In that case a check was delivered with an accompanying letter stating it represented "the amount due in full to complete recent buy-back on your account". Under the facts of that case, a further suit as to matters between the parties was not barred.

In Bennett v Robinson's Medical Mart, Inc. 18 U. 2d 186, 417 P.2d 761, (1966), there was a dispute between employer and employee as to commissions due. The employee endorsed and negotiated a check with the wording "Payment in full of the account stated below—Endorsement of check by payee is sufficient receipt." This language did not constitute a release, or accord and satisfaction, since the employee disputed the amount as payment in full.

Hintze vs Seaich, supra, involved yet another dispute between employer and employee as to commissions due. The employee endorsed and cashed a check with this language on it: "This is the balance of your account in full." A finding of the trial court that this did not constitute an accord and satisfaction (or release) was upheld by this court.

Respondent's brief (page 13) anticipates an argument that payment of an undisputed amount due will support a release for a disputed amount. It cites Williston to support this argument. However, it ignores the fact that this court has ruled just the opposite, namely, that payment of a lesser undisputed sum will not release the debtor from a claim to a larger disputed amount. See F.M.A. Financial

Corporation vs Build, supra, and Reliable Furniture Co. vs Fidelity and Guaranty Inc. Underwriters, 16 U. 2d 211, 398 P.2d 685 (1965).

POINT II.

THERE WAS NO RATIFICATION OF THE EVENTS OF JUNE 19 BY THE ACTION OF SAM HERSCOVITZ.

At the outset, "ratification" would appear to be another designation for the doctrine of "waiver"; and although not specifically set out in 8 (c), U.R.C.P., it is an affirmative defense that must be pleaded. It has never been pleaded by any defendant.

In Respondent's brief, certain Utah cases are cited in support of this point and criticism leveled at Purvis vs Penn R. Co., 198 F.2d 631 (3rd C.C.A. 1952) as inapplicable. A brief review will show Purvis to be much closer factually than any of the citations of Respondent.

The first authority, 77 ALR 2 Page 427, states a general rule as to ratification. This same annotation, at Page 434, describes an essential element of ratification, intention:

> "While a contract voidable for duress may be ratified, either by express consent, or by conduct inconsistent with any other hypothesis than that of approval, still the intention to ratify is an essential element and is at the foundation of the doctrine of waiver or ratification."
>
> Again, at page 449 it is stated:
>
> "Lack of intention to ratify has also been held to preclude a finding of ratification."

The facts in our present case, viewed (as they must be) favorably to plaintiff, reveal anything but an intention to ratify.

The testimony was that Herscovitz believed, when he endorsed and deposited the draft, that he was not concluding the claim against American. R-140, 141. He flatly denied any intention to ratify, R-141 line 21:

> "Q. And by so doing, you intended to be paid for any claim arising out of the business interruption loss, didn't you?
>
> A. Absolutely no intent whatsoever."

This testimony is supported by his objections to the size of the settlement to Jack Day, (R-137, 210), his immediate call to Mr. Holmes, his insurance agent (R-104) and consultation with counsel (R-106), his holding the draft for eight or nine days (R-106) and his immediate filing of suit on August 11, 1961 (R-1).

The next authority Respondent presents is State vs Barlow, 107 U.292, 153 P.2d 647 (1944). The factual background of that case is a bigamy prosecution; the defendant claimed Utah anti-poligamy laws were the result of duress and coercion from the federal government. It is indeed difficult to see its applicability to the present case.

Next Respondent offers Farrington vs Granite Stake Fire Insurance Co., 120 U. 109, 232 P.2d 754 (1951). This case upheld a jury verdict against an insurer. The plea of ratification, or waiver, was (page 118) "* * * not controlling in the case." The issue was not determined as a matter of law, as Respondent seeks to do in our case. Factually the case is far different from ours, as the attempted recission was first made over one year following the fire and knowledge of all the facts.

LeVine vs Whitehouse, 37 Utah 260, 105 P.2d (1910), did not deal with waiver or ratification as a matter of law,

but as one of fact. Delay in claiming fraud for 11 months after discovery of it, without protest, supported a finding of ratification.

Next cited is Taylor v. Moore, 87 U.493, 51 P.2d 222 (1935). The holding was simply that a purchaser of lands who delayed any attempt to rescind for nearly 3 years after learning of the fraud was not entitled to rescind. He was, however, entitled to a jury trial on the question of damages resulting from the fraud.

The final authority Respondent relies on here is McKellar Real Estate v. Paxton, 62 U. 97, 218 P. 128 (1923). This case holds a purchaser of real property cannot keep the land and rescind the contract. It is difficult to argue with this holding, but it does not appear relevant here.

It may be that Respondents would prevail with a jury verdict on the issue of ratification. The jury could indeed find that Sam Herscovitz intended to ratify the $12,900 settlement and is bound thereby. If a jury so found, we would have no quarrel if the evidence is sufficient to support such a finding. But clearly, the evidence is not sufficient to rule as a matter of law that ratification was accomplished. As was stated in Purvis, the entire transaction and surrounding circumstances must be considered, not simply the fact of endorsement of a draft at a particular time and place. Any reasonable look at the evidence will show there is a jury question to be resolved on the issue of ratification.

Respondent raises a number of questions in its Brief, all centering on the question of what "compelled" Reliable to endorse and negotiate the draft when it did. These are fair questions to put to Herscovitz, and to argue the answers forthcoming to the jury. But this approach completely misses the thrust of the complaint itself. What is the distinction be-

tween the present case, and a hypothetical one where the person seeking relief had been paid in cash and retained it for 9 days (or some other figure) without further protest? In our case, Reliable v. Fidelity & Guaranty, 16 U.2d 211, 398 P.2d 685 (1965) has ruled that tender of the money is not essential to the maintenance of this suit. Is there a magic difference, then, between pocketing the proceeds of the settlement immediately or in holding it for 9 days? In either case, tender has not been made prior to suit, and the time question is simply one for the jury.

It should be remembered that Reliable desperately needed money during this period. Also, to get the stock loss payment, Herscovitz had to sign a proof of loss for $12,900 on the business interruption loss. True, the proof of loss was not a receipt, but it was a statement under oath that would certainly be used against him in any further attempt to recover his actual loss. Under these circumstances, his action in holding the draft for 9 days is just one of the facts to be reviewed on the question of release, not the controlling fact as a matter of law.

POINT III.

THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE ALLEGATIONS OF FRAUD.

Respondent gives lip service to the rule that evidence must be reviewed favorably to the party suffering from an involuntary dismissal, but in fact recites disputed facts favorable to his position.

Appellant's brief sets out specifically the elements of fraud and the facts relied upon to support that claim. Respondent's brief attacks the evidence supporting the element of reliance. Herscovitz testified he relied upon the misrepresentations of Day and Ball (R-138):

"Q. So you didn't rely on what he said at all as having any bearing in any way?

A. Of course I did."

Also, at (R-102):

"Q. Did you sign this Proof of Loss, Mr. Herscovitz, on the business interruption claim?

A. At approximately six-thirty I reconciled myself that I had to sign it if I was going to get the draft for the inventory."

To attempt to counter this by saying Herscovitz was aware of his rights (Respondent's brief page 21) is meaningless. He knew what they were doing was wrong, but he certainly believed (and relied upon) what they told him. Respondent seems to assume that since Herscovitz realized they were acting improperly he must therefore have known the statements made were false. This is patently wrong! Just because something is improper does not mean it is not a fact. When the general agent for American and Fidelity told Herscovitz the companies' position, Herscovitz of course believed that is in fact what it was. Any reasonable person would. Nor does his consultation with counsel contradict this evidence. Advice from counsel as to what the companies could legally and properly do in no way changes Herscovitz' reliance upon what they in fact were doing. There is no evidence that Herscovitz knew of the falsity of the representations. Instead, the evidence uniformly shows that Herscovitz did believe the statements, did rely on them, and took such action under the circumstances to protect Reliable as best he could.

POINT IV.

THERE IS ADEQUATE EVIDENCE TO IMPOSE LIABILITY UPON AMERICAN, WESTERN AND GAB FOR THE ACTIONS OF MR. DAY AND MR. BALL.

The trial court made no findings in its judgment on the issue of agency or apparent authority. R-34-36. Respondents have now seized upon this in another attempt to bolster the judgment.

As to Western, Jack Day was Vice President and half owner of that business. If he did not have authority, or apparent authority to speak and act for Western it is hard to visualize a fact situation where any person could bind a company.

As to American, Jack Day (through Western) was the general agent of American in the State of Utah. A showing the principal did not authorize the particular act of the agent will not defeat recovery where, as here, the agent clearly has apparent or ostensible authority to represent the principal. Se Farrington vs Granite State Fire Ins., 120 U. 109, 232 P.2d 754 (1951).

Finally, the issues of liability to GAB are directed to the cause of action in fraud for damage. Ball was the representative of GAB in charge of the settlement of the interruption claim in the American policy. He was the person to negotiate the claim with Reliable, and the statement he made was clearly in the course of conducting his principal's business, that of settling the claim of Reliable on the American policy. The other elements of fraud being present, the evidence will support a jury verdict against GAB for the misrepresentations of Ball in the transaction.

CONCLUSION

The arguments raised by the Respondent are, we submit, essentially arguments for the jury. There is, of course, evidence Respondent can effectively use to support its position that Reliable, by endorsement of the check, released its claim against Respondents. But to so hold as a matter of law is to seize upon one isolated factor, the passage of 8 or 9 days time, and concentrate on that fact to the exclusion of all other evidence.

The transaction must be viewed as a whole in the light of circumstances then prevailing. As such, a jury could well find the settlement complained of was the direct result of the duress and fraudulent representations of defendants through their agents.

A new trial should be granted.

Respectfully submitted,

PETE N. VLAHOS
Eccles Building
Ogden, Utah

RICHARD W. CAMPBELL
2324 Adams Avenue
Ogden, Utah

ATTORNEYS FOR APPELLANT