1969

Bank of Commerce v. F. Leland Seely, Et Al. : Appellant's Brief

In the Supreme Court of the State of Utah

BANK OF COMMERCE,
a Utah banking corporation,
Plaintiff and Respondent,
vs.
F. LELAND SEELY, et al,
Defendant and Appellant.

Case No. 11665

APPELLANT'S BRIEF

Appeal from Judgment of the First Judicial District Court, Box Elder County, State of Utah
The Honorable Lewis Jones, Judge

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STATEMENT OF KIND OF CASE

This is an action wherein plaintiff bank claims it loaned money to the Defendants F. Leland Seely and Grace T. Seely, his wife, and that the plaintiff is entitled to be repaid. The Defendant F. Leland Seely claims that pursuant to a request by officers and directors of the plaintiff bank, he did accomodate the plaintiff bank, its officers and directors, by signing a promissory note for which he received no consideration.

DISPOSITION IN LOWER COURT

Plaintiff filed a motion for summary judgment. The defendants made motion in open court for leave to amend their answer on file. Plaintiff's motion for summary judgment was based upon the pleadings, exhibits, affi-

davits, and counter-affidavits on file. The Court denied defendants' motion for leave to amend their answer and granted plaintiff's motion for summary judgment as to the Defendant F. Leland Seely and denied plaintiff's motion for summary judgment as to the Defendant Grace T. Seely.

RELIEF SOUGHT ON APPEAL

That the Supreme Court reverse the decision of the lower court by setting aside the summary judgment and remand to allow the defendant to amend his answer, and for trial on the merits.

STATEMENT OF FACTS

On or about the first day of May, 1965, defendant was contacted by James Jamieson, an officer and director of the plaintiff bank. Jamieson explained that as an officer and director of the Bank of Commerce, he could not obtain a loan from the plaintiff bank as others could. Jamieson stated that he would make arrangements for a loan in the name of the defendant, but that it would actually be the loan of James Jamieson. He told the defendant that this procedure was acceptable with the plaintiff bank and assured the defendant this was the way that director loans were handled. The defendant agreed to accommodate James Jamieson and the plaintiff bank, and was notified by Mr. Jamieson in early May.

1965, that the necessary arrangements had been made with the plaintiff bank and the defendant could go to the bank at his convenience. On May 10, 1965, the defendant went to the plaintiff bank in Magna, Utah, with his son Glen M. Seely. At the bank, defendant was introduced to a man who was identified as C. R. Canfield. Mr. Canfield requested that defendant sign a promissory note for $25,000 and endorse a check of the same amount which he had on his desk. Upon signing the note and endorsing the check, Mr. Canfield retained both check and promissory note. No instructions were given by the defendant to Mr. Canfield or to any other party concerning the disposition of the funds. No payments were made on the promissory note by the defendant. On November 29, 1965, the defendant, to again accomodate James Jamieson and the plaintiff bank, signed a second promissory note of same amount, which was marked "renewal". No payments were made on this note by the defendant, and on May 20, 1966, the defendant once again accomodated James Jamieson and the plaintiff bank by signing a third promissory note which was marked "renewal" and which reflected a reduction in principal of $5,000. The foregoing transactions and additional renewals occurred over a period of about four years. James Jamieson, as an officer and director, terminated his association with the plaintiff bank and now the plaintiff bank, although an accommodated party, looks to the defendant for the balance of the indebtedness.

STATEMENT OF POINTS

POINT I

THE TRIAL COURT COMMITTED ERROR IN THE SEELY CASE BY GRANTING SUMMARY JUDGMENT TO THE PLAINTIFF UNDER THE CIRCUMSTANCES PRESENTED.

POINT II

THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S MOTION FOR LEAVE TO AMEND HIS ANSWER.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED ERROR IN THE SEELY CASE BY GRANTING SUMMARY JUDGMENT TO THE PLAINTIFF UNDER THE CIRCUMSTANCES PRESENTED.

Summary Judgment, Rule 56, is a carefully limited procedural device to be employed only when there are no affidavits in good faith, evidence, or inferences which, when viewed in the light most favorable to the losing party raise any issue of material fact upon which relief

can be granted. *Brandt vs. Springville Banking Co.,* 10 Ut. 2d 350, 353 P.2d 460 (1960); *Bullock vs. Desert Dodge Truck Center, Inc.,* 11 Ut. 2d 1, 354 P.2d 559 (1960); *Tanner vs. Utah Poultry & Farmers Co-op,* 11 Ut. 2d 353, 359 P. 2d 18 (1960). For the very reason that summary judgment prevents litigants from fully presenting their case to the court, courts should be reluctant to invoke this remedy.

Defendants in the *Seely* case pleaded affirmative defenses and submitted affidavits to the court in factual support of their defense. Reduced to its essentials, the defense is that there was no consideration for the contract executed between the parties, and that the plaintiff holder of the promissory note based thereon is not a holder in due course entitled to be free of that defense. (Sec. 44-1-59, Utah Code Annotated, 1953). Indeed, as to renewals, note the parallel statutory provisions in the Uniform Commercial Code, Section 70A-3-306:

> Unless he has the rights of a holder in due course any person takes the instrument subject to
>
> (a) All valid claims to it on the part of any person; and
>
> (b) all defenses of any party which would be available in an action on a simple contract; and

> (c) the defenses of want or failure of consideration, nonperformance of any condition precedent, nondelivery, or delivery for a special purpose (section 70A-3-408);

The plaintiff bank is no transferee holder at all, but an original party to the agreement. Further, Section 70A-3-408 of the Utah Code, adopted in 1966, merely codified the existing law on this point when it states: "Want or failure of consideration is a defense as against any person not having the rights of a holder in due course. . ."

In no sense is the plaintiff bank a "holder in due course" entitled to be free of this defense. Section 70A-3-302 of our Utah Code clearly requires, among other things, that the instrument be taken for value, in good faith, and "without notice. . . of any defense against or claim to it on the part of any person". The bank would be charged with the knowledge of its agent-executive officer, and by its own course of dealing which defendants were prepared to show. Section 70A-3-304 is explicit: even a purchaser for value has "notice of a claim against the instrument when he has knowledge that a fiduciary has negotiated the instrument in payment of or as security for his own debt or in any transaction for his own benefit or otherwise in breach of duty".

As reflected by the pleadings of plaintiff, the affidavit of C. R. Canfield, and by the pleadings and counter-affidavits of Defendant F. Leland Seely, the facts are in direct opposition.

The bank's representations as to the facts are:

1. Defendant F. Leland Seely applied for a loan.

2. Defendant F. Leland seely signed the original promissory note of May 10, 1965, and a series of renewal notes.

3. Defendant F. Leland Seely received the money and gave instructions for its disbursement.

The contentions of the Defendant F. Leland Seely are:

1. James Jamieson, an officer and director of the plaintff bank applied and arranged for the loan and assured the defendant this was the way that officer and director loans were handled by the plaintiff bank.

2. Defendant F. Leland Seely states that he signed the original promissory note dated May 10, 1965, and the series of renewal notes as a third party to accomodate the plaintiff bank and director James Jamieson, and that, further, the bank through its officers knew of the arrangements and, in fact, received and accepted payments on the note from Jamieson.

3. Defendant F. Leland Seely states that he received no money and gave no instruction as to disbursement and

that said monies were retained by Mr. C. R. Canfield, Vice President of the plaintiff bank.

Counsel for the defendant-appellant, argued at the hearing that the foregoing facts are disputed and that there does exist between the plaintiff bank and defendant a bona fide dispute of material fact. (Pages 9-11, Transcript of Proceedings). This Court since its decision in *Dupler vs. Yates,* 10 Ut. 2d 251, 351 P.2d 624 (1960), has uniformly held that if there is an uncontroverted affidavit and there is no dispute of a material fact, then the court may grant a summary judgment, but if there is a counter-affidavit or if there are material facts in dispute, then to grant a summary judgment would be reversible error. See also *Larsen vs. Christensen,* 21 Ut. 2d 219, 220, 443 P.2d 402 (1968); *Fox vs. Allstate Insurance Company,* Ut. 2d , P.2d (1969).

Defendant-appellant and Mr. Glen M. Seely filed counter-affidavits and set out facts that were not only a mere denial of the plaintiff's contentions that the defendant applied for the loan, received the money and gave instructions for its disbursements, but also has raised material issues of fact as to defendant's contention that the plaintiff and its agent James Jamieson were the parties accomodated and that the plaintiff has on previous occasion used this scheme and procedure for making bank officer and director loans.

It also appears the lower court was convinced that material issues of fact were raised as on Page 1 of the Transcript of Proceedings, the Court states:

> From reading the affidavit of the Seelys and this bank officer, the two parties haven't diametrically met the issues on the question of consideration, as I recall it. That's why I spoke out at the beginning, because the Defendant Leland Seely indicates in his affidavit that he went to the bank to accommodate Jamieson and the bank. He doesn't say he went in there to accommodate his son-in-law, which the bank officer said he went in there for, so right off the bat there is an issue of fact apparently, unless you can explain it away.

And on Page 2 of the Transcript, the Court states:

> Well, I'll put it to you this way. Either you produce them or I will grant the motion summarily. All right, get them down here. There are some omissions that need to be amplified, and I'm shooting from the hip. I may have to take all of this back.

Counsel for the defendant-appellant could not reach and produce the defendants for questioning at that time. The defendants were not subpoenaed and had no notice they would be requested to appear. It appears the court has shifted the burden of proof from the plaintiff to the defendant in the matter of the summary judgment. However, if you accept the defendant's version of the facts,

plaintiff would not be entitled to judgment, because "An accommodation party is not liable to an accommodated party, regardless of their apparent relation upon the paper." (11 Am Jur 2d Pages 609-610)

POINT II

THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S MOTION FOR LEAVE TO AMEND HIS ANSWER.

Rule 15(a) of Utah Rules of Civil Procedure, states that leave to a party to amend his pleading shall be freely given when justice so requires.

This is a case where the motion for summary judgment was filed 30 days after the filing of the complaint. No adequate time was given for interrogatories or depositions. Parties to these transactions were scattered throughout the Nation in New York, Airzona, California and Utah. Prior to the time for hearing the motion for summary judgment, defendant was denied time to fully discover the information necessary to protect his interests and property when such information was primarily in the possession of plaintiff.

Counsel for the defendant at the hearing made motion to the lower court for leave to amend defendant's answer. (Paragraph 1 of Page 11, Transcript of Proceed-

ings.) This motion was made for the reason as counsel argued that since the time of filing defendant's answer, he had been made aware of at least three other occasions wherein the plaintiff has given loans in the name of a third party for the purpose of accommodating the plaintiff and its officers and directors. In these transactions, the loans were paid by the accomodated officers and directors of the plaintiff (Pages 9-10, Transcript of Proceedings).

In the third paragraph of defendant's counter-affidavit, the defendant makes mention of this scheme used by the plaintiff and states that James Jamieson, the plaintiff's officer and director, assured him that this was the way these types of officer and director loans were handled. These facts are also stated in the third paragraph of the counter-affidavit of Mr. Glen M. Seely.

Certainly, the foregoing facts raised are material, and give rise to an affirmative defense which the defendant has the right to assert. If plaintiff's version of the facts are shown in a trial on the merits then certainly the plaintiff in this matter before the court is the accommodated party and under the law would be estopped from asserting its claim against the defendant. 11 Am. Jur. 2d, pages 599, 609, and 610.

CONCLUSION

The Supreme Court should reverse the decision of the lower court by setting aside the summary judgment and remand to allow the defendant to amend his answer, and for trial on the merits.

Respectfully submitted,

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Mailed a copy of the foregoing, postage prepaid, to Rendell N. Mabey, Attorney for Bank of Commerce, the Plaintiff and Respondent, at 1700 University Club Building, Salt Lake City, Utah 84111, on the 7th day of August, 1969.

Gerald L. Turner