1969

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

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

ANK OF COMMERCE, a Utah bank-
ing corporation,
Plaintiff and Respondent,

vs.

, LELAND SEELY, et al.,
Defendant and Appellant.

RESPONDENT'S

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peal from Judgment of the
Box Elder Co
The Honorable

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IN THE

SUPREME COURT

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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

RESPONDENT'S BRIEF

STATEMENT OF KIND OF CASE

This is a suit for breach of a promissory note signed, executed and delivered to the appellant and for the recovery of principal, interest and attorneys' fees thereon.

DISPOSITION IN LOWER COURT

The trial court granted the respondent's Motion for a Summary Judgment declaring that as the result of the appellant's default on a promissory note respondent was entitled to recover principal, interest and attorneys' fees.

RELIEF SOUGHT ON APPEAL

The respondents seek affirmance of the summary judgment.

STATEMENT OF FACTS

The appellant's statement of facts is not complete. It is not based on or referenced to the record, nor does respondent agree with appellant's statement that no instructions were given concerning the disposition of the proceeds of the note. Appellant also, throughout his statement of the facts makes reference to the conduct of a James Jamieson. The statements of Jamieson and his conduct are not relevant. This will be discussed in respondent's argument. Therefore the respondent submits the following statement of fact.

On or about May 10, 1965 appellant F. Leland Seely, with his son, Glen Seely, came to the respondent bank and made, executed and delivered to the bank for valuable consideration a certain promissory note in the principal sum of $25,000.00 with interest thereon at the rate of 6% per annum due and payable six months from the date thereof. (R. 28, 37). At the time the note was signed appellant instructed C. R. Canfield, Vice President of said respondent bank, to take the proceeds of the note and give a cashier's check payable to his son Glen in the amount of $5,000.00 and deposit the balance of the proceeds of $20,000.00 in the account of Galaxy Realty, a corporation, the president of which was at that time Glen Seely. Thereafter appellant endorsed a check and left it with the bank. (R. 28, 33, 41, 44).

Thereafter on November 29, 1965 a renewal note was signed for $25,000.00 extending the time for payment on the original note. (R. 37). Following this other renewal

notes dated May 20, 1966, December 16, 1966, October 17, 1967 and June 6, 1968 were executed inasmuch as the prior notes were in default. When the renewal note of December 16, 1966 was in default, respondent agreed not to bring suit against the appellant if he and his wife would sign a renewal note dated October 17, 1967. It was contemplated that this note would be secured by real property in Box Elder County, Utah. However, the security interest was never perfected. (R. 29). All of the said promissory notes with the exception of the original note of May 10, 1965 and the note of October 17, 1967 had the words "Renewal" written or typed on the face of the instrument. (R. 31, 36, 37). When the note of May 20, 1966 was executed, the interest rate on the same was increased to 6½ percent. Likewise, when the note of June 6, 1968 was executed, the interest rate was increased to 7½ percent. (R. 31, 37). As a result of appellant's default on the note of June 6, 1968, appellant commenced this suit.

STATEMENT OF POINTS

1. The Judgment Granting Recovery on the Promissory Note is Fully Supported by the Record and the Law.

2. The Trial Court Was Correct in Denying Appellant's Oral Motion for Leave to Amend His Answer.

ARGUMENT

1. THE JUDGMENT GRANTING RECOVERY ON THE PROMISSORY NOTE IS FULLY SUPPORTED BY THE RECORD AND THE LAW.

Rule 56(c) of the Utah Rules of Civil Procedure, summarized, requires that two elements be satisfied before summary judgment will be granted.

1. There is no genuine issues as to any material fact.

2. The moving party is entitled to judgment as a matter of law.

In analyzing the evidence on appeal to determine the validity of a summary judgment, this court has stated in *Thompson* v. *Ford Motor Company*, 16 Utah 2d 30, 395 P. 2d 63 (1964):

> "On summary judgment the adverse party is entitled to have the court survey the evidence and all reasonable inferences fairly to be drawn therefrom in the light most favorable to him."

As a method of determining whether any genuine issue of any material fact exists, respondent has compared the allegations of its complaint and supporting affidavit filed by C. R. Canfield with the answer on file herein and the affidavits of Glen and F. Leland Seely. In making said comparison the following uncontroverted facts in the chronological order of the case become apparent:

1. Glen M. Seely and appellant went to the respondent Bank of Commerce on or about May 10, 1965 and signed and delivered to the bank a promissory note in the sum of $25,000.00 payable in six (6) months from the date thereof at the rate of six (6) percent interest. (R. 28, 37).

2. The proceeds of the note were paid as follows: A $5,000.00 cashier's check payable to Glen Seely and $20,-

000.00 deposited to the account of Galaxy Realty, a corporation, the president of which was at that time Glen M. Seely, son of the appellant. (R. 28).

3. At the same time and place as the note of May 10, 1965 was signed, appellant endorsed a check and left the check with Mr. C. R. Canfield. (R. 41, 44).

4. That at the time the promissory note fell due, Glen M. Seely delivered $5,000.00 to the bank, picked up a renewal note, took it to the appellant, who signed it. (R. 41, 42).

5. Renewal notes were signed and delivered to the bank by appellant on November 29, 1965 in the sum of $25,000.00 and thereafter on May 20, 1966 and December 16, 1966, each in the sum of $20,000.00. However, the note of May 20 was for interest at six (6%) percent while the note of December 16 was for interest at six and one-half (6½%) percent. (R. 29, 37, 44).

6. The renewal note of December 16, 1966 was in default and respondent agreed not to bring suit on the same in return for appellant and his wife executing a renewal note dated October 17, 1967 in the amount of $19,000.00. It was contemplated that this note would be secured by real property located in Box Elder County, Utah. (R. 29, 36, 44).

7. Appellant executed a bank authorization card authorizing respondent to contract for credit or group life insurance. (R. 29, 38).

8. On June 6, 1968, appellant executed and delivered to plaintiff a promissory note in the amount of $19,000.00 with interest thereon at the rate of seven (7%) percent which note was due and payable on or before December 6, 1968. (R. 16, 23).

In appellant's brief reference is made to a James Jamieson. Inasmuch as the allegation as to his conduct and activity were prior to the time the original note of May 10, 1965 was executed, they are irrelevant and not a "material fact" necessary for the determination of this case. The above uncontroverted facts clearly show that all of the essential requirements for a valid, negotiable instrument were met. Inasmuch as appellant has not raised any questions concerning the negotiability of the instrument, respondent will not discuss this matter further.

The appellant's brief on page 5 states that their sole affirmative defense is one of "no consideration". Respondent in its complaint in paragraph 2 (R. 16) alleged that a promissory note of June 6, 1968 was given for valuable consideration by the appellant. The appellant, in his answer (R. 23) specifically denies consideration as to his wife, Grace Seely. However, it is unclear as to whether the appellant denies consideration as to himself. In the appellant's first and sole affirmative defense denial again is made specifically in respect to his wife. The denial as to the appellant is not clear and is couched as follows:

> "That this is a lack of consideration for the obligation allegedly owed by defendants, and the note is void and without effect." (R. 23).

Interpreting this statement most favorably to appellant, the question of lack of consideration would appear to be an issue in the case. Determination must, therefore, be made as to whether this issue is one of a genuine material fact or is a question of law.

In 11 Am. Jur. 2d, Bills and Notes, § 216, it states:

> "Consideration is not always a fact question. If all facts concerning the issue of consideration are without dispute, such issue becomes a question of law."

On page 7 of the appellant's brief, certain facts are set forth as being in direct opposition. Upon a comparison of these facts with the record before the court, the following should be noted:

1. It is immaterial who applied for the loan. The facts are clear that F. Leland Seely signed the original promissory note of May 10, 1965 and a series of renewal notes thereafter. (R. 28, 29, 40, 41).

2. The allegations as to Jamieson again are not relevant in this case inasmuch as they go to events prior to the execution of the note.

3. The only issue raised by the pleadings and the record in this case concerns whether or not consideration was given by the appellant for the note which he executed. No dispute exists as to how the proceeds of the loan were to be distributed. (R. 28). The question of who gave instructions is therefore immaterial inasmuch as the facts are clear that the appellant received value for the promise to pay, that value being reflected in the way in which the

proceeds were distributed, and the fact that he endorsed a check at the time of execution of the original note. (R. 41, 44).

Since all facts concerning the issue of consideration are therefore without dispute, a determination must now be made as to whether respondent is entitled to judgment as a matter of law.

Appellant argues throughout his brief that the bank is not a holder in due corse and therefore subject to the defense of lack of consideration. Argument is also made that the bank was the party accommodated. A question of whether or not the bank was a holder in due course need not be considered by the Court inasmuch as it is not the position of the respondent that it was a holder in due course. The question of an accommodation party is also not an issue because under no circumstances could the facts be interpreted to hold that the bank was the party accommodated. The accommodation would have to go to a third party to the instrument such as Glen Seely or Jamieson. The facts would indicated that appellant was an accommodation maker and therefore his liability would be the same as that of any other maker of a negotiable instrument. See 11 Am. Jur. 2d, Bills and Notes, § 539; Utah Code Annotated, 1953, 44-1-30, repealed January 1, 1966, but substantially re-enacted in the Utah Uniform Commercial Code, Section 3-415.

Respondent contends that in at least three particulars consideration was given by the appellant for the note of June 6, 1968:

1. Extension of Time. The note of June 6, 1968 was the last renewal note in a chain of renewals dating from the original note executed and delivered on May 10, 1965 and the consideration for it came from renewal notes given by the appellant to extend the payment of time on the original obligation. It is clear from the weight of authorities that an extension of time for the payment of a note is consideration. This position is set forth clearly in 11 Am. Jur. 2d, Bills and Notes, § 230 wherein it states:

> "Extension of time for the payment of an existing legal obligation is consideration for an undertaking on commercial paper as to all who sign it, whether the undertaking is by the one owing the original obligation or a third person, . . ."

Each of the renewal notes subsequent to the original note, with the exception of the note of October 17, 1967 had written across its face, either in hand or by typewriter, the word "Renewal". The only inference that can be drawn from this fact is that the renewal notes were executed to give to appellant an extension of time for payment of the balance of the principal due and owing on the original obligation. Furthermore, consideration for an extension of time for commercial paper may also be shown where an agreement to pay a higher rate of interest is executed. See also 11 Am. Jur. 2d, Bills and Notes, § 303. Again, the record shows clearly that on at least two occasions renewal notes were issued at a higher interest figure, to-wit: December 16, 1966 increased to 6½% (R. 37); June 6, 1968 increased to 7%. (R. 31).

2. Forbearance To Sue. Just as an extension of time may be consideration for a promise on commercial paper, so actual forbearance or a promise to forbear to sue on a claim shall be adequate consideration for a promise on commercial paper. Authority for this position is set forth clearly in 11 Am. Jur. 2d, Bills and Notes, § 230:

> "Similar to an extension of time, actual forbearance or a promise or agreement to forbear to sue on a claim on which the creditor has a right to sue, or to exercise any legal right is consideration for a promise on commercial paper . . ."

The record is clear that the renewal of October 17, 1967 was signed because the bank had agreed not to bring suit against F. Leland Seely for his delinquency on the note of December 16, 1966 which was in default. (R. 29).

3. Part Payment. 11 Am. Jur. 2d, Bills and Notes, § 303, is authority for the proposition that a payment before maturity of a part of the amount of the instrument, either principal or interest, is sufficient consideration for the extension of payment. This factor is also present in this case inasmuch as $5,000.00 was paid by Glen Seely at the time the original note fell due. (R. 41, 44).

2. THE TRIAL COURT WAS CORRECT IN DENYING APPELLANT'S ORAL MOTION FOR LEAVE TO AMEND HIS ANSWER.

During the argument on respondent's motion for summary judgment, appellant made a motion to amend his answer so that other facts could be pleaded. (R. 10).

Rule 15(a) of the U.R.C.P. allows amendment only when justice so requires. This determination is within the discretion of the court.

Since no written amendment was proposed it is difficult to know the content of the proposed amendment. Apparently it was to the activities of Jamieson. (R. 10). Since this is the only indication of the proposal given by counsel for appellant, nothing new or of substance would have been contained in the amendment, nor would the amendment have resulted in any substantial change in the issues.

Therefore, according to *Dupler* v. *Yates*, 10 Utah 2d 251, 351 P. 2d 624, 637 the decision of the trial court was correct:

> "While rule 15(a) U.R.C.P. provides that leave to amend shall be freely given when justice so requires the liberality of the rule is not without limit particularly when nothing new or of substance is contained in the proposed amendment. The permitting of amendments to pleadings rests in the sound discretion of the trial court and we find no abuse of that discretion in this case.
>
> "Furthermore, an unverified amendment of a pleading should not be allowed to defeat a motion for summary judgment if the amendment did not effect any substantial change in the issues that were originally formulated in the pleadings."

CONCLUSION

The Motion for Summary Judgment was properly granted because there is no genuine issue of any material fact in the case at bar. The plaintiff was, as a matter of law, entitled to the judgment granted.

Respectfully submitted,

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