

1970

A. M. Castle and Company v. H. G. Bagley : Brief of Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

A. M. CASTLE AND COMPANY
A Corporation,

Plaintiff and Respondent,

vs.

H. G. BAGLEY,

Defendant and Appellant,

Case No.
11828

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Third District Court for Salt Lake County
Hon. Leonard W. Elton, Judge

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

A. M. CASTLE AND COMPANY
A Corporation,

Plaintiff and Respondent,

vs.

H. G. BAGLEY,

Defendant and Appellant,

Case No.
11828

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF CASE

The case on appeal involves an action by Plaintiff A. M. Castle and Company (Pacific Metals Division), hereinafter called "Pacific Metals", against defendant. H. G. Bagley, hereinafter called "Bagley", to reform a promissory note and enforce it against him.

DISPOSITION IN THE LOWER COURT

The Third Judicial District Court, Salt Lake County, (Judge Leonard M. Elton) granted judgment in favor of Pacific Metals against Bagley by reforming the note to include in the body thereof the amount of "Two Thousand Two Hundred Ninety Three and 25/100 Dollars" and awarded judgment to Pacific Metals in the sum of \$2,660.13 and costs.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the judgment of the lower court in favor of Pacific Metals.

STATEMENT OF FACTS

Between approximately March 3, 1966 and May 12, 1966, upon the order of Bagley as an employee of General Metals Company (not a party to the action), Pacific Metals sold steel of the value of \$747.71 to General Metals Company, a corporation (R. 34, 35, 37, 41, 44, Plaintiff's Ex. 1, 4).

Since about May 20, 1966 or prior thereto, Bagley had a contract with persons not parties to this action to purchase a 50% stock interest in General Metals Company (R. 59). The business of General Metals Company had failed and Bagley lost money and undertook to wind up General Metals Company's business by collecting its accounts receivable, furnishing some

additional materials on contracts already in process and by other handling (R. 58, 59, 60, 63, 82).

Pacific Metals employed Bagley between May 1966 and September 1967 (R. 34, 81).

Pacific Metals received Bagley's oral promises to personally pay the old bill of \$747.71 accrued by General Metals Company and future amounts incurred covering the price of merchandise to be ordered by Bagley in finishing outstanding contracts of General Metals Company (R. 44, 45, 62, 63, 92, 93).

Between May 20, 1966 and September 13, 1966, Pacific Metals furnished further steel of the value of \$1,545.54 upon order of Bagley, which was charged on the General Metals account (R. 44 and Plaintiff's Ex. 1 and 4).

Prior to May 20, 1966, Pacific Metals knew that General Metals Company was defunct^{except} for some accounts receivable and uncompleted orders and did not sue General Metals Company (R. 63, 94).

On April 28, 1967, (while an employee of Pacific Metals), Bagley executed the subject promissory note without objection or comment in the presence of Mr. K. L. Williams, Assistant Manager of Pacific Metals, and its attorney (R. 42, 43, 56, 57). Mr. Williams testified that the promissory note was made out by its attorneys in their offices, excepting as to the date and the amount in words and figures, that Mr. Williams of Pacific Metals instructed a typist in his office just prior to

the time Bagley signed the note on April 28, 1967 to insert the amount of \$2,293.25 in words and figures in the note as well as the date of April 28, 1967 (R. 42, 43); that the secretary inserted the date of April 28, 1967 and the figure of \$2,293.25 in the upper left hand corner of the note, but through clerical inadvertence, error and mistake, failed to insert the words "Two Thousand Two Hundred Ninety Three and 25/100 Dollars" in the body of the note. The testimony of Mr. Williams is that the parties mutually intended to execute a valid and complete note contracting for payment by defendant of the specific obligation under the General Metals account of \$2,293.25 and that the note admitted into evidence was exactly the same as it was at the time it was signed by defendant on the date it bears, in the presence of Mr. Williams and his attorney (R. 42, 43).

Bagley admits signing the note but claims he did not intend to be bound to personal liability, and that he signed as a "facetious act". (R. 43, 44, 57, 75, 76).

The evidence in this case was that the subject note did not pay General Metals Company's bill of \$2,293.25, but was given and accepted as security for the payment of General Metals obligation. Bagley had previously indicated that he would give Pacific Metals security for said indebtedness of \$2,293.25 in the form of an assignment of the uniform real estate contract under which Bagley and his wife were purchasing their

residence (R. 44, 45, 46, 82, Plaintiff's Ex. 3). However, this assignment was never obtained.

After the maturity of the note Bagley refused to pay the obligation and Pacific Metals brought this action to reform the note to include the words "Two Thousand Two Hundred Ninety Three and 25/100" in the body thereof and to enforce the note against Bagley as his personal obligation.

Bagley collected some of the accounts receivable and used some of the proceeds (\$1,109.15) to pay salary to himself as an agent or employee of General Metals (R. 73, 84). Plaintiff's Exh. 53).

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY REFORMED THE SUBJECT INSTRUMENT AND THEREBY MADE THE AMOUNT CERTAIN AND THE INSTRUMENT ENFORCEABLE.

Utah Code Annotated, 1953, as amended, reads:

"70A-3-115. Incomplete instruments. — (1) When a paper whose contents at the time of signing show that it is intended to become an instrument is signed while still incomplete in any necessary respect it cannot be enforced until completed, but when it is completed in accordance with authority given it is effective as completed."

The trial court specifically found as fact (R. 27) that an omission in the body of the note of the words "Two Thousand Two Hundred Ninety Three and 25/100 Dollars" had been made by clerical error and that

" . . . at the time of signing plaintiff and defendant mutually intended that this personal note be executed by defendant as a valid and complete instrument to secure payment by defendant personally of the specific obligation of \$2,293.25 charged to the General Metals Company account."

Based upon this finding of mutual intent and mistake, the trial court ordered the note reformed to include the missing words in the body thereof (R. 28). It is noted that the testimony which the trial court believed was that the figure of "\$2,293.25" appeared on the upper left hand corner of the note at the time it was signed by Bagley (R. 42, 43). The Record contains ample evidence to support the trial court's findings and conclusions.

45 Am. Jur., p. 596 provides:

"Section 25. - Negotiable Instruments — The general equity jurisdiction to reform written instruments so that they will express the true agreement of the parties extends to negotiable instruments such as bills of exchange, and promissory notes (citing cases)."

45 Am. Jur., p. 601, et. seq. provides:

“III. Defects Correctible.

“Section 34. Generally. — In general, a written instrument may be reformed as to any material defect, whether it is in regard to a common-law or statutory requisite. . . . So also, although there is some authority to the contrary, the court may supply omitted provisions, whether the omission was due to mutual mistake, or was the result of a mistake of one of the parties accompanied by the fraud or inequitable conduct of the other, although, of course, intentional omissions will not be supplied (citing cases)”

POINT II

CONSIDERATION WAS NOT NECESSARY WHERE THE SUBJECT NOTE WAS GIVEN AS SECURITY FOR THE PAYMENT OF AN ANTECEDENT DEBT, BUT ADEQUATE CONSIDERATION WAS PRESENT IN THIS CASE. THE STATUTE OF FRAUDS DOES NOT ASSIST APPELLANT IN THIS CASE.

Utah Code Annotated, 1953, as amended reads:

“70A-3-408. Consideration. Want or failure of consideration is a defense as against any person not having the rights of a holder in due course (Section 70A-3-305), except that no consideration is necessary for an instrument or obligation thereon given in payment of or as security for an antecedent obligation of any kind. Nothing in this section shall be taken to displace any statute outside this act under which a promise

is enforceable notwithstanding lack or failure of consideration. Partial failure of consideration is a defense pro tanto whether or not the failure is in an ascertained or liquidated amount."

Particular attention is directed to the wording of 70A-3-408.

" . . . *except that no consideration is necessary for an instrument or obligation thereon given in payment of or as security for an antecedent obligation of any kind.*" (Italics ours).

Respondent contends this provision covers assumption of an antecedent obligation of a *third party* (italics ours) as well as assumption of an antecedent obligation of the maker of a note.

Anderson's Uniform Commercial Code, Vol. 1, page 644, 1961 Edn., provides:

"3-408:1. Official Code Comment.

"Purposes of Changes:

"1 . . .

"2. The "except" clause is intended to remove the difficulties which have arisen where a note or a draft, or an endorsement of either, is given as payment or as security for a debt already owed by the party giving it, *or by a third person . . .*" (Italics ours).

Respondent contends that no requirement of consideration exists in that the subject promissory note was executed by Bagley for the purpose of securing payment of the antecedent debt of General Metals Com-

pany and the new purchases ordered by Bagley which were charged on the General Metals Company account.

— Consideration did exist in this case in that Pacific Metals furnished additional merchandise on order of Bagley; Pacific Metals employed Bagley — (Bagley was employed by Pacific Metals at the time he executed the note); Pacific Metals relied upon Bagley's promises to give a personal note and upon the note when given as Bagley's personal obligation and did not sue General Metals Company (Bagley had a contract to purchase 50% of General Metals stock).

Appellant on pages 1, 2 and under Point II of his brief at page 5 seems to imply that the Statute of Frauds was asserted at trial to bar plaintiff from attempting to hold defendant for the antecedent debt of another, or that the Supreme Court should consider the Statute in aid of appellant.

The defense of the Statute is required under the Utah Rules of Civil Procedure 1953, as amended, Rule 8(c), to be pleaded as an affirmative defense. This was not done in this case and appellant is not entitled to raise the question on appeal.

Respondent contends that the subject promissory note subscribed by Bagley is a writing which, when coupled with plaintiff's exhibits 1 and 4, would constitute writings sufficient to satisfy the Statute of Frauds.

See *Corbin on Contracts*, 1950 Edition, Vol. 2, page 732-33-34, which reads:

“Section 508. Character of writings that contain the memorandum . . . Promissory notes, checks, and bonds ordinarily do not express the terms of an agreement, but may be used to supplement other writings. When they do indicate the terms of the contract they may themselves constitute a sufficient memorandum (citing cases).”

POINT III

THE SIGNATURE OF DEFENDANT DOES APPEAR ON THE SUBJECT NOTE AND THE COURT DID NOT ERR IN AWARDING JUDGMENT BASED UPON THE NOTE.

Bagley's testimony with respect to his signature on the note which he signed was characterized variously by him as a “facetious” act; to get Pacific Metals “off my neck”; not as his real signature intended to bind him personally; as a signature to bind General Metals Co., a corporation; as a meaningless signature on a piece of paper of which he did not know the legal effect; as a signature that he made while secretly observing an omission of the amount in the body of the note without bringing his observation to anyone's attention.

Such testimony is incredulous. All of the evidence and the exhibits clearly establish the signature as that of Bagley and the trial court so found indicating that

Bagley intended by the signature to create personal liability. Promising to execute an assignment of his equity in a real estate contract on his residence as security for payment and furnishing a copy of said contract to Pacific Metals' attorney (Exh. 5) indicates that he regarded the note as a personal undertaking, even though the assignment did not materialize. Other documents (P. Exhs. 4 & 5) bear Bagley's signature or initials for comparison of signatures.

Respondent respectfully suggests that the points asserted herein and the findings of fact and conclusions of law filed by the trial court (R. 27, 28) are amply supported by the evidence after full trial of the issues and the Supreme Court should review the evidence and the reasonable inferences that may be fairly drawn therefrom in the light most favorable to the findings and judgment. *Newton vs. State Road Commission* (Utah Supreme Court No. 11465 filed January 6, 1970).

CONCLUSION

Based upon the record in this case and upon the authorities cited, respondent A. M. Castle and Company (Pacific Metals Division), respectfully prays that this court affirm the judgment entered in the trial court.

Respectfully submitted,

**GREENWOOD AND MESERVY and
E. EARL GREENWOOD, JR.**

Attorneys for Respondent