

1972

E. Keith Howick v. Bank of Salt Lake v. Richard A. Roberts And Roberts Merchandise Mart : Brief of Appellant

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.D. Gary Christian and Brent J. Moss; Attorneys for Appellant

Recommended Citation

Brief of Appellant, *Howick v. Bank of Salt Lake*, No. 12742 (1972).
https://digitalcommons.law.byu.edu/uofu_sc2/5564

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

E. KEITH HOWICK,

Plaintiff-Respondent.

- vs -

BANK OF SALT LAKE,

Defendant & Third Party

Plaintiff - Appellant.

- vs -

RICHARD A. ROBERTS and

ROBERTS MERCHANDISE, INC.

a corporation,

Third Party Defendant

Respondent.

BRIEF OF APPEAL

KEITH
D. G.
528
Salt Lake

E. KEITH HOWICK, Esq.

1025 East 2100 South
Salt Lake City, Utah 84106

Attorney for Plaintiff-Respondent

THOMAS P. VUYK, Esq.

53 East Fourth South
Salt Lake City, Utah

Attorney for Third Party Defendant

TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE....	1
DISPOSITION IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT:	
POINT I.	
THE LOWER COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT IN THAT THE DETERMINATION OF WHETHER OR NOT RESPONDENT HAD NOTICE OF APPELLANT'S ALLEGED SECURITY INTEREST IN THE SAVINGS CERTIFICATE OF DEPOSIT PRESENTS A MATERIAL ISSUE OF FACT AS TO RESPONDENT'S STATUS AS A HOLDER IN DUE COURSE OF SAID CERTIFICATE.	4
CONCLUSION	7
STATUTES CITED	
Utah Code Ann., §70A-3-104 (1953)	5
Utah Code Ann., §70A-1-201 (20) (1953)	5
Utah Code Ann., §70A-3-302 (1953)	6
R 56 (c) Utah Rules of Civil Procedure (1953 as amended)	4

TABLE OF CONTENTS (Continued)

Page

CASES CITED

Singleton v. Alexander, 19 Utah 2d 293, 431 P.2d 126 (1967)	6
Thompson v. Ford Motor Co., 16 Utah 2d 30, 395 P.2d 62 (1964)	6
Verdi v. Helper State Bank, 37 Utah 402, 196 P. 225 (1921)	5

IN THE SUPREME COURT OF THE STATE OF UTAH

E. KEITH HOWICK,
Plaintiff-Respondent,

- vs -

BANK OF SALT LAKE,
*Defendant & Third Party
Plaintiff - Appellant,*

- vs -

RICHARD A. ROBERTS and
ROBERTS MERCHANDISE MART,
a corporation,
*Third Party Defendant -
Respondent.*

Case No.
12742

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an action on a savings certificate of deposit assigned to Keith Howick (respondent) by Roberts Merchandise Mart (third party defendant and respondent) as payment of attorney's fees and in which certificate the Bank of Salt Lake (defendant and third party plaintiff and appellant) claims a security interest.

DISPOSITION IN LOWER COURT

On December 1, 1971 the Third District Court of Salt Lake County, the Honorable Stewart M. Hanson presiding, rendered summary judgment in favor of respondent.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the judgment of the Third District Court set aside and the case remanded for trial on the issues.

STATEMENT OF FACTS

The facts developed from the Affidavits, Pleadings and Interrogatories on file herein are substantially as follows:

During 1968, the Respondent, Mr. Keith Howick, performed various legal services for Richard A. Roberts and the Roberts Merchandise Mart, Third Party Defendants and Respondents. This work included the incorporation of a new corporation, that being, the Roberts Merchandise Mart together with the preparation and filing of a prospectus with the Utah Securities Commission and giving legal advice to the parties involved in connection with the venture. (R. 13) Also, during that year, the Bank of Salt Lake loaned money to Roberts Merchandise Mart for operating capital and took as security for said loan, a 90-day Savings Certificate of Deposit dated August

19, 1968 in the amount of \$5,000.00. (R. 6, 17) That Certificate of Deposit was then delivered to Roberts Merchandise Mart at its request, supposedly to aid in a determination as to whether or not said Certificate was an asset or liability in connection with the financial information requested by the State when a corporation comes into existence. This Certificate of Deposit was then taken by the Respondent, Mr. Howick, to be applied toward payment of his attorney's fees that were due on November 5, 1968 and was considered by him to be a negotiable instrument in payment of said fees. (R. 2, 16, 21)

On November 18, 1968, Roberts Merchandise Mart made an assignment of the Certificate of Deposit to Mr. Howick and he, in turn, attempted to negotiate the same on November 19, 1968. On that date, the Bank of Salt Lake refused to honor the Certificate informing Respondent that it had been pledged as security on a loan from the Bank to Roberts Merchandise Mart. (R. 2, 15)

The pleadings and Affidavits of Mr. Howick indicate that when he took the Certificate of Deposit, he did so without any knowledge of a security interest therein by the Appellant, Bank of Salt Lake. (R. 15) On the other hand, the Appellant, via its pleadings, Affidavits and Interrogatories, avers to the contrary that Mr. Howick as attorney for Roberts Merchandise Mart, in fact, either had actual or at least constructive notice of Appellant's security interest in said Certificate. (R. 19, 20, 21)

ARGUMENT

POINT I

THE LOWER COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT IN THAT THE DETERMINATION OF WHETHER OR NOT RESPONDENT HAD NOTICE OF APPELLANT'S ALLEGED SECURITY INTEREST IN THE SAVINGS CERTIFICATE OF DEPOSIT PRESENTS A MATERIAL ISSUE OF FACT AS TO RESPONDENT'S STATUS AS A HOLDER IN DUE COURSE OF SAID CERTIFICATE.

The Utah Rules of Civil Procedure, Rule 56C, concerning Summary Judgments provides:

“. . . The Judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. . .” *Id.*

Appellant submits that there is a material fact at issue in this case according to the Affidavits, Interrogatories and pleadings on file herein. That being, whether or not the Respondent, Mr. Howick, took the Certificate of Deposit without any knowledge of Appellant, Bank of Salt Lake's, security interest therein. Appellant alleges that the Respondent was aware at the time he took the Certificate of Deposit in payment of his attorney's fees for setting up the corporation that the Bank of Salt Lake had a security interest therein. (R. 19, 20, 21) However, on the other hand, Respondent, Mr. Howick, alleges that

he was not aware of any security interest in said Certificate of Deposit when he acquired the same in payment of his attorney's fees. (R. 15)

Thus, the issue of fact is framed and now it must be determined whether or not that issue is material to the outcome of this case.

A Certificate of Deposit has been recognized to be a negotiable instrument by this Court, *Verdi v. Helper State Bank*, 37 Utah 402, 196 P. 225 (1921); Utah Code Ann. § 70A-3-104 (1953). Further, respondent, Mr. Howick, avers that he took said Certificate as a negotiable instrument in payment of his attorney's fees, (R. 16) and the instrument itself meets the requirements for negotiability in that it is signed by the maker or drawer and contains an unconditional promise to pay a sum certain at a definite time, (R. 17) all in accordance with Utah Code Ann., § 70A-3-104 (1953). Thus, when the Respondent took the assignment of the Certificate of Deposit for payment of his fees, he became a holder under Utah Code Annotated, Section 70A-1-201 (20) (1953), which provides:

“ ‘Holder’ means a person who is in possession of a document of title or an instrument or an investment security drawn, issued or endorsed to him or to his order or to bearer or in blank.” *Id.*

The next question that arises is whether or not the Respondent, Mr. Howick, qualifies for the preferred status of “holder in due course” of the instrument which would then free him from any claims that the Bank of

Salt Lake may have on said instrument. Concerning the status of holder in due course, Utah Code Ann., § 70A-3-302 (1953) provides:

“(1) A holder in due course is a holder who takes the instrument

(a) for value; and,

(b) in good faith; and,

(c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.” *Id.*

Thus, it is evident that the issue as to Respondent’s notice of Appellant’s security interest in the Certificate of Deposit is material to the determination of whether or not the Respondent qualifies as a holder in due course thus enabling him to take the instrument free from the security interest that Appellant claims in said Certificate of Deposit.

This Court has said in *Thompson v. Ford Motor Co.*, 16 Utah 2d 30, 395 P.2d 62 (1964) that before granting a Motion for Summary Judgment, the adverse party is entitled to have the Court survey the evidence and all inferences to be drawn therefrom in the light most favorable to him, and, further, in *Singleton v. Alexander*, 19 Utah 2d 293, 431 P.2d 126 (1967) this Court held that the trial court is not to consider the weight of the testimony nor the credibility of the witnesses, but simply to determine whether or not there is a disputed issue of the material fact. Appellant submits that the Affidavits, Interrogatories and pleadings on file herein

and referred to above clearly raise an issue as to whether or not the Respondent had notice of Appellant's security interest in the Certificate of Deposit that Respondent took in payment for his attorney's fees and that the determination of whether or not Respondent did in fact have notice, either actual or constructive, must be made before a determination can be made as to Respondent's status as a holder in due course thus allowing him to negotiate the Certificate free from any claim Appellant may have therein.

CONCLUSION

On the basis of the foregoing arguments and authorities, it is submitted by Appellant, Bank of Salt Lake, that the trial court erred in granting Respondent, Mr. Keith Howick's, Motion for Summary Judgment because there does exist a disputed issue of material fact.

Respectfully submitted,

KIPP AND CHRISTIAN

D. Gary Christian
Brent J. Moss