

1972

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

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In The Supreme Court of the State of Utah

E. KEITH HOWICK,

Plaintiff-Respondent

-vs-

BANK OF SALT LAKE,

Defendant & Appellant

Party Plaintiff

Appellant

-vs-

RICHARD A. ROBERTS and

ROBERTS MERCHANDISE

MART, a corporation,

Third Party Defendant

Respondent

BRIEF OF RESPONDENT
E. Keith Howick

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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 RESPONDENT

E. Keith Howick

STATEMENT OF THE CASE

This action was filed to require the Bank of Salt Lake, Appellant, to honor a certain savings Certificate of Deposit which said Bank refused to honor upon presentation by E. Keith Howick, Respondent, and which had been assigned to the Respondent by Robert Merchandise Mart (Third Party Defendant and Respondent) for payment of attorney's fees.

DISPOSITION IN THE LOWER COURT

On November 30, 1971 the Third District Court of Salt Lake County, the Honorable Stewart M. Hansen presiding, rendered summary judgment in favor of Respondent, said order being duly signed on December 1, 1971.

RELIEF SOUGHT ON APPEAL

The Plaintiff-Respondent submits that the decision of the District Court should be affirmed.

STATEMENT OF FACTS

Appellant's Statement of Facts omits several important details, therefore, Respondent feels that an additional Statement of Facts is necessary to clarify and supplement some of the statements made in Appellant's Brief. The term Respondent used herein refers solely to Plaintiff-Respondent, E. Keith Howick.

During the early part of 1968, Respondent was approached by Third Party Defendants-Respondents to perform various legal services in connection with formation of a corporation and all necessary legal work pertaining to the filing and receiving of a public offering in the State of Utah. (R. 13) Thereafter, a Retainer Agreement was signed by promoters on March 20, 1968 retaining Respondent to perform these services. All necessary legal work pertaining to said retainer was performed including many additional amend-

ments and resubmissions because of changes requested by the promoters.

Thereafter, an additional Agreement was signed by the promoters on the 21st day of August, 1968 which fairly represented the attorney's fees due Respondent and which included as security for the payment of said fees the Certificate of Deposit which is the subject of this suit. (R. 14)

The said Agreement of August 21, 1968 and Certificate of Deposit were taken by Respondent based upon representation made by Third Party Defendant-Respondent that no incumbrances of any kind were attached or committed to said Certificate. Third Party Defendant-Respondent submitted to Respondent herein copies of their Balance Sheet and Accountant's letter, both having date of August 20, 1968, wherein no liabilities nor indebtedness of any kind were listed pertaining to Roberts Merchandise Mart and no incumbrances to any item under "Cash On Hand And In Bank" were listed. (R. 40)

It was an integral part of the latter Agreement that should the attorney's fees not be paid within two weeks prior to the redemption date of the said Certificate that said Certificate would be assigned to Respondent as payment for said fees. That on November 18, 1968, Mr. Richard A. Roberts did formally assign said Certificate to Respondent. Respondent presented said Certificate to Appellant at approximately 9:30 A.M. on

November 19, 1968 for redemption whereupon said Appellant refused to honor same. (R. 14, 15)

That when Respondent presented the Certificate of Deposit for redemption he was informed that Appellant claimed a security interest in said document. That this was the first time Respondent had any notice of any security claim against the said Certificate. (R. 15) Further, it is noted that the Certificate of Deposit has no marks of any kind upon either the face or the reverse side of said document indicating a claimed security interest in said document by Appellants. (R. 14)

The Appellant had not perfected its claim as required under the Utah Uniform Commercial Code up to the time of presentation and did not file the necessary documents until approximately 11:23 A.M. on November 19, 1968, approximately two hours after Respondent had presented the Certificate for redemption. (R. 15) It is the contention of the Respondent that the record adequately shows sufficient evidence to justify affirming of the Lower Court.

ARGUMENT

POINT I

THE LOWER COURT DID NOT COMMIT ERROR IN GRANTING RESPONDENTS MOTION FOR SUMMARY JUDGMENT BECAUSE APPELLANT FAILED TO COMPLY WITH STATUTORY REQUIREMENTS TO PRESERVE ITS CLAIMED LIEN.

It is evident from a careful reading of the Utah Uniform Commercial Code that the Certificate of Deposit, which is the subject matter of this case, is regulated and governed by two principal chapters. At first glance, one might assume that the only chapter pertinent in the case is Chapter 3—COMMERCIAL PAPER (70A-3). This topic and area will be discussed in POINT II. However, it is also evident that Chapter 8 INVESTMENT SECURITIES (70A-8) also applies in this situation.

“SECURITY” by definition of 70A-8-102 is an instrument which:

- (i) is issued in bearer or registered form;
and
- (ii) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in the area in which it is issued or dealt in as a medium of investment; and
- (iii) is either one of a class or series or by its terms is divisible into a class or series of instruments; and
- (iv) evidences a share, part or portion or other interest in property or in an enterprise or evidences an obligation of the issuer. *Id*

It is evident that a Certificate of Deposit fits these several categories. First, it is made in "registered form" i.e. it specifically specifies the entity entitled to the security and it is specifically numbered and recorded by said number on the records of the issuer for the purpose of transfer and or redemption. It meets criteria (ii) in that it is both commonly recognized in the area in which it is issued and Certificates of Deposit are dealt in as a medium for investment. It also meets (iii) in that it is one of a class or series as issued by the issuer and finally (iv) is met in that it evidences an obligation of the issuer to pay a sum certain.

In addition, Section 70A-8102 (b) notes that:

"A writing which is a security is governed by this Chapter and not by Uniform Commercial Code—Commercial Paper even though it also meets the requirements of that Chapter. This Chapter does not apply to money." *Id.*

By inserting this Section the Legislature made it clear that many items could be classified as a security but that specifically "money" could not be.

The above statutory argument having been presented to the Trial Court at the time of the Motion Respondent further submits the following case law in support of said argument.

In *Superintendent of Insurance of State of New York -vs- Bankers Life and Casualty Co., D.C.N.Y., 300 F.Supp 1083, 1100 (1963)*, this matter was dealt

with as dicta and the Court noted that "Certificates of Deposit issued for cash by banks could be considered equivalent of an 'evidence of indebtedness' and would be 'securities' within the meaning of the Securities Act." Id.

Further investigation leads us to the general rule that Certificates of Deposit are generally dealt with as a promissory note when they are "payable on return thereof properly endorsed" and are "in legal effect a promissory note payable on demand, and principles applicable to such notes should be applicable to Certificates of Deposit." (Union Guardian Trust Co., -vs- Emery, 290 N.W. 841, 845 (1940)). It is further generally accepted that promissory notes are treated as securities (Wagner -vs- Scherer, 85 NYS 894, 895, 89 App. Div. 202 (1903)).

It has also been held in estate law that the "term 'securities' when used in a will can mean any and all evidences of debt, such as a promissory note." (Huckabee -vs- Hansen, 422 S.W.2d 606 (1967)). A check was even held as a security in Hawkins -vs- Sanford, D.C. Ga., 53F, Supp 988, 989 (1944).

Thus the Certificate of Deposit issued in this case can be classified as a security and thus falls under Uniform Commercial Code 70A Chapter 8.

Appellant in this matter claims a prior lien on this security. To determine whether this claim is valid we must see if the Appellant meets the criteria of 70A-8-

103 specifically legislated for the requirements of a valid issuers lien.

“A lien upon a security in favor of an issuer thereof is valid against a purchaser only if the right of the issuer to such lien is noted *conspicuously* (emphasis added) on the security.”
Id.

It is evident from even a glance at the Certificate of Deposit in question that there is no indication of any kind whatsoever on the security; therefore, no claim could or should be allowed.

POINT II

THE LOWER COURT DID NOT COMMIT ERROR IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT IN THAT THERE IS NO MATERIAL ISSUE OF FACT REMAINING TO BE DESCRIBED AT TRIAL.

Appellant either refusing or neglecting to deal with the law discussed under Point I relies in his argument solely on the defense that a material issue of fact is in existence which should go to the jury and therefore summary judgment should not be allowed.

To support this, Appellant uses Thompson -vs- Ford Motor Co., 16 Utah 2d 30, 395 P. 2d 62 (1964); however, that case is easily distinguished from this. The

Thompson case was one dealing with two very difficult questions (1) negligence and (2) proximate cause. Considering the justification of judgment by summary judgment in these matters the Court said, "The issue of proximate cause presents an even more difficult absolute to the granting of summary judgment." (Id. p. 34)

Further Appellant relies on Singleton -vs- Alexander, 19 Utah 2d 293, 431, p. 2d 125 (1967) wherein the Court specifically distinguished the differences between that case and the one before it now. Again the Court was deciding the difficult issues of (1) negligence and (2) standard of care. The Court again stated, as it did in Thompson, that these cases were not easily decided by summary judgment but then went on to say "summary judgments are more frequently given in contract cases because of greater ease in determining the factual issues. In tort claims defendants frequently rely on affirmative defenses of . . . and such defenses are just as easy to establish as are matters of contract." Id p. 294.

Thus the Court itself distinguishes these cases from the one at bar by determining that issues such as negligence, proximate cause and standard of care are difficult and not easily susceptible to summary judgment but that tort and contract issues are much easier to decide the issues of fact.

Respondent contends that this case obviously is not one of negligence, proximate cause or standard of care

but that it aligns itself with contract issues and therefore, summary judgment is an appropriate remedy.

Respondent submits that from the documents of record in this case that there is ample evidence submitted by Respondent to overcome all claims of Appellant and that from Appellant's evidence submitted that there is no possible evidence made by Appellant which if presented at trial could materially affect the outcome of this case.

It is this issue that the Court has squarely dealt with before. In the case of Dupler -vs- Yates, 10 Ut 2d 251, 351 P. 2d 624 (1960), the Court determined the merits of summary judgment when it said the "primary purpose of summary judgment procedure is to pierce allegations of pleadings and show that there is no genuine issue of material fact, *although an issue may be raised by the pleadings*, (emphasis added) Id p. 269.

The requirements of proof to show the non-existence of a material fact was said to be "less than that required to prove a matter of affirmative defense." Id p. 268.

Respondent has continuously herein submitted documentation sufficient to show that no issue of fact exists and Appellant has continuously relied on nothing more than oral averments that one does. As a matter of public record, the public offering for Roberts Merchandise Mart indicates that no liabilities exist against any asset listed and this is so noted and prepared by the accountants who stated such and Respondent asks the

Court to take judicial notice of said public document on file with the Utah Securities Commission.

POINT III

THE LOWER COURT DID NOT COMMIT ERROR IN GRANTING RESPONDENTS MOTION FOR SUMMARY JUDGMENT HEREIN BECAUSE APPELLANT AT ALL TIMES FAILED TO COMPLY WITH FILING REQUIREMENTS IN ORDER TO PRESERVE IT'S CLAIMED LIEN.

Appellant had within its availability to protect itself against any claims to the said Certificate of Deposit. It was the issuer of said Certificate and as such could have kept it in its possession. It did not do so but deliberately let it go into the market place unmarked.

Further, Appellant could have been fully and amply protected by merely filing with the Secretary of State for the State of Utah pursuant to the Uniform Commercial Code 70A-9-401 (b) again, they failed to do so. Such negligence on the part of Appellant's cannot now be overcome by mere oral averments of notice.

CONCLUSION

On the basis of the foregoing arguments, authorities and documents of record, it is submitted by Re-

spondent, E. Keith Howick, that the Trial Court should be affirmed.

Respectfully submitted,

HOWICK & RUDD

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