1972

Braswell Motor Freight Lines, Inc. v. Bank of Salt Lake : Brief of Appellant

In The Supreme Court of the State of Utah

BRASWELL MOTOR FREIGHT LINES, INC., a corporation,

Plaintiff-Appellant,

vs.

BANK OF SALT LAKE, a corporation,

Defendant-Respondent.

BRIEF OF APPELLA

APPEAL FROM THE JUDGM
THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY, THE
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In The Supreme Court of the State of Utah

BRASWELL MOTOR FREIGHT LINES, INC., a corporation,

Plaintiff-Appellant,

vs.

BANK OF SALT LAKE, a corporation,

Defendant-Respondent.

Case No. 12784

BRIEF OF APPELLANT

STATEMENT OF CASE

Appellant instituted this proceeding to recover the amount of $574,031.32 which was deposited in appellant's account with respondent and thereafter paid out by respondent without the authority or direction of appellant. After preliminary discovery procedures were completed, respondent moved the lower court for a Summary Judgment of no cause of action on appellant's complaint for the following reasons:

> * * * "that there are no legitimate issues of fact and that plaintiff's claim is barred by the following provisions of Utah Code Annotated,

> 1953, as amended, Sections 22-1-1, 22-1-9 and 70A-3-405, and the holding of Sugarhouse Finance Company v. Zions First National Bank, 21 Utah 2d Reports (68), 440 P.2d 809 (869)." (R. 93)

Thereafter, appellant moved the lower court for a summary judgment interlocutory in character as to the issue of liability pursuant to Rule 56, Utah Rules of Civil Procedure, on the ground that:

> * * * "the pleadings, depositions, interrogatories and answers thereto show that there is no genuine issue as to any material fact, and that the (Appellant), Braswell Motor Freight Lines, Inc., is entitled as a matter of law to a judgment in its favor on the issue of liability." (R. 98)

DISPOSITION IN LOWER COURT

Appellant's Motion for Summary Judgment was denied by the lower court with the exception of the amount of $24,523.90 which remained on deposit in appellant's account at the commencement of this proceeding and for which Summary Judgment was entered in favor of appellant and against respondent. With respect to all other issues, namely, the liability of respondent to appellant for the amount of $549,507.42 which had been withdrawn from appellant's account prior to the commencement of this proceeding, the lower court

granted respondent's Motion for Summary Judgment against appellant, no cause of action.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the judgment of the lower court insofar as the same denies appellant's Motion for Summary Judgment relating to the liability of respondent to appellant for the funds withdrawn from appellant's account prior to the commencement of this proceeding and a reversal of the judgment of the lower court insofar as the same grants respondent's Motion for Summary Judgment and relieves respondent from any liability to appellant for the funds withdrawn from appellant's account.

STATEMENT OF FACTS

On the 3rd day of July, 1969, Mr. William M. Kendall, one of respondent's checking account customers since February 17, 1969 (R 33), appeared at the respondent Bank of Salt Lake and expressed a desire to open a corporate account in the name of Braswell Motor Freight Lines. During discussions with Joanne Sullivan, New Accounts Secretary, Earl Weaver, Cashier and Norton Parker, President of respondent, Mr. Kendall reported that he was an agent for Braswell Motor Freight Lines negotiating for the purchase of a dormant trucking authority in the State of Utah. (R 32)

The Application to open a corporate account was prepared by Joanne Sullivan and discloses that Braswell

Motor Freight Lines is a corporation and that the account was to be a commercial-corporate account. (R 42) The account was opened on the 3rd day of July, 1969, in the name of Braswell Motor Freight Lines, Account Number 110-197, with an initial cash deposit of $50.00. (R 25)

Respondent accepted a Corporation Account signature card for Account Number 110-197 in the name of Braswell Motor Freight Lines. The signature card was signed by William M. Kendall as "President" of the depositor (R 42) and the same was accepted by respondent notwithstanding the oral representation of William M. Kendall that he was only a negotiating agent for Braswell Motor Freight Lines. (R 32)

Respondent admittedly failed to obtain a certified copy of a resolution of the Board of Directors of Braswell Motor Freight Lines authorizing the opening of the account and designating the individuals authorized to make withdrawals. (R 27)

The Corporation Account signature card previously referred to incorporates the conditions set forth on the reverse side thereof, ". . . as a part of this contract." (R 41) The reverse side contains an "Authorizing Resolution" that certifies the directors of the corporation opening the account have adopted a resolution authorizing the officers whose names appear on the reverse side to sign checks against funds of the corporation. The "Authorizing Resolution" portion of the signature card was never completed and executed by Braswell Motor

Freight Lines. Respondent accepted the incomplete signature card without any other form of corporate resolution.

Respondent concedes that since 1960 it has been the practice of respondent to secure such a corporate resolution and that respondent has had, and continues to have, corporate resolution forms available for use by corporate depositors. (R 36) The fact remains that this practice was not followed in this matter.

It is further admitted by respondent that at no time did respondent inquire into the corporate or financial status of Braswell Motor Freight Lines (R 26), or the relationship of William M. Kendall to Braswell Motor Freight Lines. (R 33) As a matter of fact, William M. Kendall was never employed by Braswell Motor Freight Lines in any capacity for any purpose. (Deposition of J. V. Braswell, p. 26) Respondent further concedes that it honored Kendall's request to hold the monthly statements at respondent's banking house for Kendall's pick-up rather than forward the same to the corporate owner of the account. (R 31)

The account was opened July 3, 1969 with a $50.00 cash deposit. (R 25) On July 10, 1969, a deposit of $134,136.12 was made to Account Number 110-197 and subsequent deposits and the dates thereof were as follows: January 30, 1970, $145,649.44; April 14, 1970, $103,108.98; June 22, 1970, $92,275.82; and, August 13, 1970, $98,810.96. (R 28) All of the deposits were by checks drawn on the Oak Cliff Bank & Trust Com-

pany of Dallas, Texas, by Braswell Motor Freight Lines, Inc., payable to Braswell Motor Freight Lines. (R 76, 77, 78) On deposit, all of the checks were endorsed "For Deposit Only". (R 76, 77, 78)

There were a total of 21 withdrawals from Account Number 110-197, with 16 withdrawals being by checks drawn by William M. Kendall payable to cash as follows: July 20, 1969, $85,000.00 and July 28, 1969, $500.00; (R 75) August 5, 1969, $20,000.00 and August 8, 1969, $20,000.00; (R 72) September 5, 1969, $4,500.00; (R 69) December 5, 1969, $3,000.00; (R 67) February 17, 1970, $96,500.00; (R 64) March 6, 1970, $25,000.00; (R 60) April 14, 1970, $3,000.00; (R 57) May 4, 1970, $40,000.00 and May 22, 1970, $35,000.00; (R 54) July 10, 1970, $42,500.00; (R 49) August 4, 1970, $25,000.00 and August 5, 1970, $14,500.00; (R 46) September 2, 1970, $40,000.00 and September 17, 1970, $25,000.00. (R 44)

In addition, five withdrawals were accomplished by checks drawn by William M. Kendall payable to the Astro Auto Center as follows: March 18, 1970, $20,000.00; (R 60) May 1, 1970, $25,000.00; (R 54) May 29, 1970, $5,000.00; (R 51) July 10, 1970, $10,000.00; (R 49) and, August 28, 1970, $10,000.00. (R 44)

Ten cashier's checks were issued by respondent after William M. Kendall had indorsed to respondent various checks payable to cash. Six cashier's checks named William M. Kendall as payee; (R 43, 49, 54, 62,

64) one named Ben Martin and Co.; (R 62) one named Security Pacific National Bank; (R 64) one named M. D. Werts and one named W. H. Werts. (R 75)

The subtotal of the above enumerated 21 withdrawals, excluding the cashier's checks because the amounts thereof are included in the withdrawals payable to cash, amounts to $549,500.00. Two additional withdrawals that occurred July 25, 1969, in the amounts of $5.75 and $1.67 (R 28) bring the total withdrawals to $549,507.42.

Notwithstanding the irregular circumstances surrounding the opening, deposits and withdrawals regarding Account Number 110-197, respondent did not contact appellant until respondent had permitted $524,-507.42 to be withdrawn by William M. Kendall from Account Number 110-197. On September 17, 1970, according to respondent's Answers to Interrogatories:

> "Earl Weaver, Cashier of Bank of Salt Lake, in a telephone conversation with Mr. Henry Jones (an employee of appellant) on September 17, 1970, queried Mr. Jones as to whether it was proper for William M. Kendall to withdraw a large amount of cash from the Braswell Motor Freight Lines account. Mr. Jones indicated that he was not aware that Braswell Motor Freight Lines had an account with Bank of Salt Lake and that it did not sound proper but that it was possible that Mr. Braswell was engaged in a private transaction with

> Mr. Kendall, that Mr. Braswell was out of town and unable to be reached, and that on the possibility that there was a special arrangement with Mr. Braswell, Mr. Weaver should release the $25,000.00 cash withdrawal to William Kendall." (R 34)

It is interesting to note that when respondent finally concerned itself with the propriety of the arrangement and the conduct of William M. Kendall, respondent knew whom to contact, namely, Braswell Motor Freight Lines, Inc., Dallas, Texas, appellant herein. Had respondent acted in such a manner before permitting the withdrawals, appellant would not have suffered the loss of $549,507.42 from its Account Number 110-197.

After the telephone conversation of September 17, 1970, wherein appellant was first advised as to the existence of the account and the dealings of William M. Kendall, appellant advised respondent by letter under date of September 21, 1970, that the account was unauthorized and that William M. Kendall was not authorized to open the account. (R 79) The withdrawal of $25,000.00 on September 17, 1970, was the last withdrawal from Account Number 110-197.

On June 7, 1971, a representative of Ernst & Ernst submitted its Standard Bank Confirmation Inquiry to respondent. (R 95) The information requested therein was to assist Ernst & Ernst, a certified public ac-

counting firm, in their servicing of the account of Braswell Motor Freight Lines, Inc., Dallas, Texas, appellant herein. The Standard Bank Confirmation Inquiry was executed by John W. Twelves, Vice President, Bank of Salt Lake, and admitted that as of the close of business on December 31, 1970, Account Number 110-197, in the account name of Braswell Motor Freight Lines, Inc., had a balance of $24,523.90. (R 97) This balance was awarded to appellant by the lower court. However, the lower court denied appellant's claim against respondent for the amount of $549,507.42, withdrawn from appellant's account without authority and for general damages.

ARGUMENT

POINT I

THE OPENING OF THE CORPORATE ACCOUNT CREATED A LEGALLY PROTECTABLE RELATIONSHIP BETWEEN APPELLANT AND RESPONDENT.

A. APPELLANT IS THE SAME CORPORATE ENTITY AS THE DESIGNATED OWNER OF ACCOUNT NUMBER 110-197.

William M. Kendall opened Account Number 110-197 in the name of Braswell Motor Freight Lines. Appellant submits that Braswell Motor Freight Lines and Braswell Motor Freight Lines, Inc., of Dallas,

Texas, appellant herein, are one and the same corporate entity. In *Merchandise Reporting Co., Inc. v. Weiss & Golding,* 168 So. 336 (La. 1936), the court stated at page 342:

> "It is common knowledge that corporations frequently do not use the words 'incorporated' or 'limited,' which form a part of its corporate name."

Also, in *Goldberg, Bowen & Co. v Dimick,* 169 Cal. 187, 146 P. 672 (1915), the court stated at page 673:

> * * * "There is, as we have seen, a practical identity of the name of the payee in the notes and the title of the plaintiff, and, even if there were a variation, the rule is that where the parties to a contract can be ascertained, and an action is prosecuted in the name of the real party, an error in the name of the promisee as decribed in the promise is not a proper basis of defense." * * *

The entire area relating to the effect of the addition or deletion of "Inc." in a corporate designation is summarized in 6 *Fletcher Cyclopedia Corporations (Perm. Ed)*, "Name", Sec. 244, at p. 186, (Revised Volume 1968), as follows:

> "The omission of a part of the name of a corporation, when the name consists of several words, will not affect the validity of an instrument, if the corporation intended can be identified, and the same may be said of the

> erroneous inclusion of a word or words, such as the word 'the.' *The addition or omission of the term 'Inc.' is not material where it is apparent that such abbreviation merely means a corporation and is descriptive merely*, and not an essential part of the name." * * * (Emphasis added)

Respondent had been informed by William M. Kendall that he was a negotiating agent for a company known as Braswell Motor Freight Lines. (R 32) The inclusion of the "Inc." would have been merely descriptive of the corporate status of the company, a fact which could have been safely presumed by respondent. Respondent could not have been misled or deceived by the deletion of the "Inc." on the name of the corporate account of Braswell Motor Freight Lines when, in fact, respondent completely failed to concern itself and investigate the corporate or financial status of the designated owner. (R 26) Furthermore, respondent's acceptance of the account as a commercial-corporate account would eliminate any question regarding the corporate status of Braswell Motor Freight Lines. (R 41, 42)

As a factual matter, when respondent finally became suspicious of William M. Kendall's dealings and attempted to verify Kendall's authority with the owner of the account, respondent contacted appellant, Braswell Motor Freight Lines, Inc. (R 34) Appellant's ownership of Account Number 110-197 is further confirmed by respondent's reply to the Standard Bank

Confirmation Inquiry executed by John W. Twelves, Vice President, Bank of Salt Lake, respondent, wherein it was stated that Account Number 110-197 was in the name of Braswell Motor Fright Lines, Inc. (R 97)

B. APPELLANT WAS THE OWNER OF THE FUNDS DEPOSITED IN ACCOUNT NUMBER 110-197.

The funds credited to Account Number 110-197 were represented by checks drawn on the bank account of Braswell Motor Freight Lines, Inc., and payable to Braswell Motor Freight Lines (R 76, 77, 78), the same corporate entity.

By indorsement of appellant's checks "For Deposit Only" and the deposit and credit thereof to appellant's account, the funds remained appellant's even though appellant was unaware of the opening of Account Number 110-197 and the deposits credited thereto. In *American Lumber Sales Co. v. Fidelity Trust Co.*, 127 Me. 32, 141 A. 102 (1928), the District Manager of a corporation opened an account in the name of the corporation without the company's knowledge or authority. Withdrawals were subsequently accomplished by checks signed by the District Manager as agent for the company but for purposes foreign to the company's business. The court held the bank liable for the unauthorized withdrawals and stated at 141 A. 104:

> "Upon receiving the deposit from the district manager for the credit of the plaintiff com-

> pany, the relation between that company and the defendant was that of depositor and banker, and the defendant became the debtor of the plaintiff for the amount of the deposit placed to its credit. Heath v. New Bedford Safe & Deposit, etc., Co., 184 Mass. 481, 69 N.E. 215. *The deposit was the plaintiff's property even though its existence was unknown.* Brown v. Daugherty (C.C.) 120 F. 526. Having accepted the deposit, a bank is protected in paying out the deposit only where it has an order from the owner of the deposit himself or one authorized to act for him." * * * (Emphasis added)

Money deposited to the account of another is presumed to belong to or be due to the owner of the account, even though the initial opening of the account is unknown to the owner of the funds deposited therein. *Westerly Community Credit Union v. Industrial National Bank of Providence,* 103 R. I. 662, 240 A.2d 586 (1968). In the instant matter, appellant's ownership of the funds deposited to Account Number 110-197 is more than a mere presumption. The uncontested fact is that the subject checks were drawn by appellant, made payable to appellant, indorsed "For Deposit Only" and deposited in appellant's account.

C. A RELATIONSHIP EXISTED BETWEEN APPELLANT AND RESPONDENT WHEREBY RESPONDENT COULD PERMIT

WITHDRAWALS FROM ACCOUNT NUMBER 110-197 ONLY ON THE AUTHORITY OF APPELLANT.

Having established the ownership of Account Number 110-197 and the funds deposited therein, the next question is what relationship exists between a bank and the owner of a corporate account. This relationship is set forth in *Laws v. United States,* 66 F.2d 870, wherein it is stated at page 873:

> "The relation between a bank and its depositor is that of debtor and creditor, and the bank may not pay out a deposit without the authority or direction of the depositor, and it may not properly charge an unauthorized payment to the deposit."

In *Walker Bank & Trust Co. v. First Security Corp.,* 9 Utah 2d 215, 341 P.2d 944 (1959), this Court stated at 9 Utah 2d 218:

> * * * "Between the bank and depositor it (the relationship) is that of debtor-creditor to the extent of the customer's balance, (citing cases) and it is the bank's duty to pay up to that amount to anyone on the depositor's order and in conformity with his direction," * * *

The same basic relationship of debtor-creditor exists between a bank and a depositor notwithstanding the

fact that the depositor was unaware of the opening of the account. In *Nationwide Homes v. First-Citizens Bank & Trust Co.*, 267 N.C. 528, 148 S.E.2d 693 (1966), plaintiff's employee opened a checking account in plaintiff's name by forging the signature of plaintiff's officer. The opening of the account was unknown to plaintiff and the employee used the account to pay some of the plaintiff's bills but misappropriated the remainder. The court stated at 148 S.E.2d 697:

> "When funds were deposited in the defendant Bank for credit to an account opened, and later carried on its books, in the name of the plaintiff, a relation of debtor and creditor between the Bank and the plaintiff was thereby created." * * *

Respondent attempts to negate its duty to appellant by reliance on the Fiduciary Act set forth in 22-1-1 et seq. *Utah Code Anno.* 1953 (as amended). However, even a cursory examination of the Fiduciary Act reveals that the same is not applicable to the facts of the instant case.

A "fiduciary" is defined in Section 22-1-1, *Utah Code Anno.* 1953 (as amended), as:

> * * * "a trustee under any trust, expressed, implied, resulting or constructive, executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, *agent, officer*

> *of a corporation,* public or private, public officer, and any other person acting in a fiduciary capacity for any person, trust or estate." (Emphasis added)

It is established that William M. Kendall was never an officer of appellant. In fact, Kendall was never employed by appellant in any capacity for any purpose. (Deposition of J. V. Braswell, p. 26)

The absence of any actual relationship between Kendall and appellant reduces any claim of agency by respondent to one of "ostensible authority". In ***Barclay Kitchen, Inc. v. California Bank,*** 25 Cal. Rptr. 383 (Cal. D.C. of App., 1962), plaintiff's employee induced the defendant bank to accept deposit slips reflecting several depository transactions when the deposit should have reflected a single check. The court recognized the employee's authority to fill out deposit slips but held that that authority did not include the making of deposit slips that inaccurately reflected the nature of the deposit. The court stated at 25 Cal. Rptr. 386:

> * * * "*it is elementary that an agent's authority cannot be delineated by his own representations.* (Citing cases) This rule is not changed when the relationship of the parties is bank and depositor (Citing cases); and where the depositor is a corporation the bank has a legal duty to ascertain that the acts of the agents of the corporation are authorized. (Citing

cases) *Having accepted the deposits in question, admittedly irregular, without some effort to ascertain the agent's authority beyond her own representations, Bank cannot now absolve itself from liability by asserting an ostensible authority in the agent where in fact no authority was given.*

Additionally it may be noted that the issue of ostensible authority is a question of fact." * * * (Emphasis added)

At the time Account Number 110-197 was opened, July 3, 1969 (R 25), the only source of "ostensible authority" was supplied to respondent by William M. Kendall, the purported agent. Without anything more than Kendall's statements, the commercial-corporate account was opened with an initial cash deposit by Kendall of $50.00. (R 25) One week later, July 10, 1969 (R 28), Kendall made the next deposit, a check drawn by appellant and payable to appellant in the amount of $134,-136.12. (R 76)

Respondent continued to accept Kendall's self-declared and unsupported statements as authority to deal freely with the commercial-corporate account and never requested or received supporting documentation. Admittedly, respondent never investigated Kendall's alleged relationship with appellant. (R 33)

On September 17, 1970 (R 34), approximately fifteen months after Account Number 110-197 had

been opened and $524,507.42 withdrawn therefrom, respondent finally became suspicious of Kendall and telephoned appellant. (R 34) Had such a simple inquiry been made by respondent on July 3, 1969, one week before any checks had been drawn on appellant's Oak Cliff Bank & Trust Company account for subsequent deposit with respondent, the damages now complained of by appellant would not have occurred.

Respondent may not raise the Fiduciary Act as a legitimate defense because Kendall simply does not meet the definition of a fiduciary. Further, the Fiduciary Act refers to misconduct and breach of the obligation by an "authorized" or "empowered" fiduciary. Kendall was never a fiduciary of appellant by definition and certainly was never authorized or empowered to make withdrawals from appellant's corporate account. A fiduciary obligation may not be violated when it does not in fact exist.

Respondent relies on Section 70A-3-405, *Utah Code Anno.,* 1953 (as amended). The portion of said statute that respondent attempts to apply to the instant matter provides as follows:

> "(1) An *indorsement* by any person in the name of a named payee is *effective* if
>
> (c) an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest." (Emphasis added)

The difficulty inherent in applying the above cited statute to the facts of the instant case is that there is no dispute that the "indorsement" by William M. Kendall was effective to accomplish a deposit of the funds in Account Number 110-197. The five checks that constitute the total deposits were all indorsed "For Deposit Only" (R 76, 77, 78), and said indorsement effectively resulted in a credit to appellant's Account Number 110-197.

The issues presented by a forged payee indorsement are completely separate and distinct from the issue of the liability of a depository bank that permits unauthorized withdrawals from a corporate account.

It may here be noted that Article 3 of the Uniform Commercial Code is designated "Commercial Paper", and the provisions relating thereto are subject to the provisions of the Article on "Bank Deposits and Collections" (Article 4) and "Secured Transactions" (Article 9). See Section 70A-3-103, *Utah Code Anno.* 1953 (as amended).

Section 70A-4-103, *Utah Code Anno.* 1953 (as amended), provides, in part:

> "(1) The effect of the provisions of this chapter may be varied by agreement *except that no agreement can disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care or can limit the measure of damages for such lack or failure*; but the

> parties may by agreement determine the standards by which such responsibility is to be measured if such standards are not manifestly unreasonable." (Emphasis added)

Respondent's lack of good faith and failure to exercise ordinary care are clearly evidenced by its failure to adhere to normal banking standards concerning a commercial-corporate account and withdrawals therefrom.

D. RESPONDENT VIOLATED ITS DUTY TO APPELLANT BY PERMITTING UNAUTHORIZED WITHDRAWALS FROM ACCOUNT NUMBER 110-197 AND RESPONDENT IS LIABLE TO APPELLANT FOR DAMAGES RESULTING THEREFROM.

As stated in 10 *Am. Jur.2d,* Banks, Sec. 548, on page 522:

> "Of necessity, a corporation can act only through its officers and agents, and if a corporation is to draw checks, certain of its officers or agents must act in that respect for it and may be lawfully authorized for such purpose. When, however, a corporation opens a deposit account with a bank, the latter, before paying checks thereon, must be satisfied that the officer or officers signing the checks on behalf of the corporation are authorized to do

> so; if the bank pays without question, it takes the risk of being held still liable for the amount irregularly paid in such fashion." * * *

See also 5A *Michie on Banks and Banking,* Section 177, "Deposit of Corporation", wherein it is stated at page 442:

> "It is held that a bank is not the trustee, *quasi trustee,* factor, or agent of a corporate depositor, but its debtor only, and must determine the question whether the officer signing checks is authorized to do so, at its peril." * * *

It is conceded that respondent failed to obtain a certified copy of a resolution by the Board of Directors of Braswell Motor Freight Lines, Inc., wherein the opening of Account Number 110-197 was authorized and William M. Kendall was designated as a duly authorized officer, director or agent to make withdrawals. (R 27) Respondent chose to accept a Corporate Account signature card that set forth an Authorizing Resolution on the reverse side thereof, but which was not completed and executed. This incomplete signature card is the only justification advanced by respondent for permitting the withdrawls complained of by appellant.

In *Pacific Indemnity Co. v. Security First National Bank,* 56 Cal. Rptr. 142 (Cal. Ct. of App. 1967), one Brown devised a scheme to defraud his employer by causing the employer to issue checks which Brown

convinced the bank to cash or deposit to his personal account. In reversing the lower court, the Court of Appeals, after considering the relevant provisions of the Uniform Commercial Code, held that the loss was caused by the negligence of the bank which could have prevented the embezzlement by the exercise of ordinary care and recognition of standard banking practices, which it had "codified" in its own house rules. The court observed at 56 Cal. Rptr. 155:

> * * * "Therefore, the issue was not whether or not a duty existed to *'verify'* Brown's *'authority'* to direct payment of these checks contrary to the notations appearing upon the face of the instruments *but whether or not respondent's employees acted reasonably in assuming Brown had any authority whatsoever in the premises. That is to say, before any question of verification of authority can arise there must, at least, be some appearance of authority* which then may or may not require verification. In the instant case, the record is wholly devoid of any such evidence unless it can be said as a matter of law that every employee of unknown rank who comes into possession of a check made payable to others for specified purposes has the *apparent authority* to receive and appropriate the proceeds thereof to his own personal benefit." (Some emphasis added)

Appellant respectfully submits that the lower court should have ruled as a matter of law that respondent, its officers and employees, failed to act reasonably in assuming that William M. Kendall had any authority to withdraw funds from the subject account. The following facts among others support such a conclusion: (1) Kendall was the only individual with whom respondent dealt and his self-serving representations were accepted without question; (R 33) (2) the signature card accepted by respondent was executed by Kendall as "President" of Braswell Motor Freight Lines (R 42) contrary to the representation that he was only a negotiating agent; (R 32) (3) the "Authorizing Resolution" on the reverse side of the signature card was never executed even though the application set up the account as a commercial-corporate account; (R 42) (4) no other form of authorizing resolution was requested or demanded by respondent; and (5) respondent's compliance with Kendall's curious request that the monthly statements be held for pick-up rather than mailed to the owner of the corporate account. (R 31)

The fact that a valid deposit was accomplished would not relieve respondent from its duty to permit only authorized withdrawals. As stated in *Paton's Digest of Legal Opinions,* Vol. 1, page 106, "Even authority to indorse and deposit does not justify an implication of authority to draw checks."

In *Barclay Kitchens, Inc. v. California Bank, supra,* the court stated at 25 Cal. Rptr. 389:

> "Here, bank was not innocent. * * * Its employees admittedly departed from the 'ordinary course' of their banking business. They should have been alert to Mrs. Gianopulus' misrepresentation of authority."

Respondent's assumption of Kendall's authority predicated solely on Kendall's representations in no way constituted the exercise of ordinary care and adherence to standard banking practices. Section 70A-4-103, *Utah Code Anno.*, 1953 (as amended).

The court further stated in *Pacific Indemnity Co. v. Security First National Bank, supra,* at 56 Cal. Rptr. 156:

> "In the instant case, of course, Brown's forgery of the check orders was not the primary cause of the loss herein and respondent's employees admittedly violated several rules of ordinary banking practice, *any one of which would have prevented the successful consummation of Brown's fraudulent scheme."* * * * (Emphasis added)

The concurring opinion states at 56 Cal. Rptr. 159:

> "In the present case Brown forged instruments under which he was able to put moneys IN a particular Bank. The Bank acted properly in receiving the moneys, and in this phase of

the matter no harm was done. But in the second aspect of the transaction — paying moneys OUT or crediting an account from which moneys could be withdrawn—the Bank failed to take any steps to determine where the credits derived from the checks properly belonged. * * * Instead of doing this, the Bank accepted Brown's request to credit them to his personal account without the slightest semblance of actual, apparent, or ostensible authority for so doing, and indeed without even requiring his endorsement on the checks. The entire scheme to defraud was made possible by the use of the Bank's name as payee on the checks, for if Brown had made himself payee he could never have got the checks issued. The essence of the the trick was to get money IN the Bank and then rely on the Bank's disinterest in what happened thereafter to get it OUT and away. When the Bank permitted moneys or credits to come into its possession, it came under a duty to disburse them under proper authority, and for its failure to do so it may be held liable. (Citing cases)"

The "essence of the trick" in the instant case was respondent's careless assumption of Kendall's authority to make withdrawals from the corporate account. Without this, the scheme could not have succeeded; with it, the way was clear. Had respondent adhered to normal banking practices and standards and not blindly ac-

cepted Kendall's self-serving declarations regarding his agency and authority to withdraw the funds, appellant would have recovered the $549,507.32 exactly as it did the $24,523.90 that remained on deposit at the commencement of this proceeding.

SUMMARY

Appellant respectfully submits that the judgment of the lower court should be reversed insofar as the same grants respondent's Motion for Summary Judgment and denies appellant's Motion for Partial Summary Judgment, and the matter should be remanded to the lower court for a determination of the damages appellant is entitled to recover from respondent.

Respectfully submitted,

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