

1972

Walter Bank & Trust Company v. Wesley S. Burrows And Estella Mcarthur : Respondent's Brief

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In The Supreme Court of the State of Utah

WALKER BANK & TRUST COMPANY,
a Utah bank & trust company,

Plaintiff-appellant,

vs.

WESLY S. BURROWS, a-k-a
WESLEY S. BURROWS, et al.,

Defendant-respondent,

and

ESTELLA McARTHUR,

Intervener.

Case No.
1257

APPEAL FROM THE JUDGMENT OF
DISTRICT OFFICE IN AND FOR
COUNTY, UTAH, THE HONORABLE
CROFT, JUDGE.

RESPONDENTS' BRIEF

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and

ESTELLA McARTHUR,

Intervenor.

Case No.
12873

RESPONDENT'S BRIEF

NATURE OF THE CASE

This is an action to determine, among other things, whether Walker Bank had any interest in and to certain cattle owned by Gail C. Bailey, McKay G. Bailey, La-Faye Bailey, Gloria Bailey, Terrill W. Bailey and Colleen Bailey.

DISPOSITION IN THE LOWER COURT

The case was tried before the Honorable Bryant H. Croft sitting without a jury. The trial court entered its judgment in favor of the Baileys adjudging that Walker Bank had no interest in the cattle.

RELIEF SOUGHT ON APPEAL

Respondents, Bailey, seek to have the judgment of the trial court affirmed.

STATEMENT OF FACTS

This case involves facts additional to those set forth by the Appellant.

Gail C. Bailey was a rancher in Escalante, Utah and this lawsuit concerns cattle which Mr. Bailey had accumulated on said ranch during a lifetime of ranching and farming. The other defendants, McKay G. Bailey, LaFaye Bailey, Gloria Bailey, Terrill Bailey and Colleen Bailey are the sons and daughters of Gail C. Bailey and are concerned with the same livestock. (Tr. 2, pp. 13)*

In the first part of May, 1966, Grant Gerber, then a real estate agent in the St. George area, approached Gail C. Bailey regarding the purchase of the Bailey operation by Wesley Burrows. Gerber and Gail C. Bailey discussed the terms and then Gerber brought a contract to the Baileys for their signatures, but said contract was redrawn. (TR. 2, pp. 15).

A contract covering the sale of the Bailey cattle and land to Wesley Burrows was drafted by the attorney for the Baileys which was to be placed in escrow at a

*References to TR. 2 are to Transcript of Trial (2nd day).

bank in Parowan, Utah. The escrow was never completed because Mrs. Burrows refused to sign the documents. The contract specifically set forth that Wesley Burrows would not have an ownership in the cattle until he performed pursuant to the contract. Burrows never did so perform and never obtained title to the cattle owned by the Baileys. (Findings of Fact, No. 7).

On March 30, 1966, Wesley Burrows presented Walker Bank & Trust Company with a financial statement showing his assets to be about \$750,000.00, which financial statement did not specifically identify the assets of Mr. Burrows. In June, 1966, Wesley Burrows made application to Walker Bank & Trust Company for an \$80,000.00 loan to be secured by 700 head of cattle. Walker Bank & Trust Company made written inquiry of the County Recorders of Washington, Kane and Garfield Counties and the Utah Secretary of State to determine whether any financing statements or chattel mortgages were on file, but such inquiry did not establish any ownership of assets by Wesley Burrows. (Findings of Fact, No. 2).

Walker Bank & Trust Company never had any documentary proof that Wesley Burrows had any title ownership to the Bailey cattle or that Burrows had any mortgageable interest therein, nor did the bank ever request any proof of ownership interest in the Bailey cattle, other than Exhibit "P-30", which did not establish such interest or ownership, nor did the bank rely on cattle not branded with the "scissors" brand as security

for the loan made to Wesley Burrows. Walker Bank's loan to Burrows was made in reliance upon the personal friendship between James Hill (Walker Bank's Agent) and Wesley Burrows and whatever documents or representations Burrows made to the bank, oral or written. (Findings of Fact, No. 12).

On or about June 15, 1966, Walker Bank & Trust Company made the \$80,000.00 loan to Wesley Burrows and took from Wesley Burrows a Livestock Chattel Mortgage covering 700 head of Hereford cattle and the increase thereof located in Garfield, Kane and Washington Counties bearing the "scissors" brand, which said brand was registered to Wesley Burrows. On about June 21, 1966, Walker Bank & Trust Company filed a Financing Statement with the Utah Secretary of State listing Wesley Burrows as debtor, Walker Bank as creditor, and showing 700 head of Hereford cattle, together with the increase thereof, branded with the "scissors" brand and located in Garfield, Kane and Washington Counties, as the security. At the same time Walker Bank disbursed the first \$30,000.00 of the \$80,000.00 loan to Wesley Burrows. At the time the Financing Statement was filed, Wesley Burrows had no ownership interest in the Bailey Cattle and the Financing Statement as filed did not identify any Bailey cattle as being included in such livestock security. (Findings of Fact, No. 2).

On or about January 5, 1967, Gail Bailey filed a Real Estate Sales Agreement covering the Bailey Cattle

and real property with the Garfield County Recorder. (Findings of Fact, No. 7). This Contract specifically identified all of the brands involved in the sale, the metes and bounds description of land where the cattle were to be kept until the Contract was paid in full and complied with the Uniform Commercial Code regarding Financing Statements. (Exhibit D-43).

Prior to that time on or about June 30, 1966, Gail C. Bailey executed Exhibit "P-30" which states: "This is to certify that I delivered to Wesley S. Burrows 311 cows and 12 bulls." The handwritten words "Bill of Sale" at the top of the said document was not there at the time said document was delivered by Gail Bailey to Burrows. The words "Bill of Sale" were not written on the document by the Baileys. (Findings of Fact, No. 5).

The Baileys did not learn that Walker Bank claimed an interest in their cattle until January, 1967, and at that time Mr. Gail C. Bailey went to Salt Lake City, Utah, to the Walker Bank Building where he advised Mr. Hill (Walker Bank's agent) that he (Gail Bailey) had a Mortgage on all the cattle with the "pitchfork" brand and Mr. Hill indicated that the cattle on which Walker Bank had a Mortgage, carried the "scissors" brand. (Findings of Fact, No. 14). (TR. 2, pp. 29, 30 and 44).

Wesley Burrows advised Walker Bank (Mr. Hill) of the fact that the Baileys had an interest in these cattle prior to June, 1966. (TR. 2, pp. 55).

Mr. Burrows advised Walker Bank that he intended to purchase the Bailey herd, but that he did not own the cattle. (TR. 2, pp. 56).

ARGUMENT

POINT I

WALKER BANK DID NOT OBTAIN A SECURITY INTEREST IN THE BAILEY CATTLE BECAUSE BURROWS DID NOT LAWFULLY OBTAIN POSSESSION OF THE GOODS.

The appellant, Walker Bank, refers this court to the recently decided case of *Wilson v. Burrows, et al.*,Ut.2d.....,P.2d..... (1972), Case No. 12394, claiming that that case is dispositive of the instant action. This statement simply is not true. In the *Wilson case, supra*, the court concluded that Under Sec. 70A-2-401(2), U.C.A. (1953) the Wilsons had given Walker Bank a security interest in the animals because of a valid conditional sales contract which stated:

“The Seller agrees to release all cattle to the Buyer so that he may put them under loan in his own name.”

The court concluded that this Agreement, together with the actual transfer of physical possession, gave to Walker Bank a security interest.

Section 70A-9-113, U.C.A. (1953) provides:

A security interest arising solely under the chapter of Sales (Chapter 2) is subject to the provisions of this chapter except that to the extent and so long as the debtor does not have or does not *lawfully* obtain possession of the goods***

- (a) No security agreement is necessary to make the security interest enforceable.
- (b) No filing is required to perfect the security interest; and
- (c) The rights of the secured party on default by the debtor are governed by the chapter on Sales (Chapter 2).

In the *Wilson case, supra*, reliance was placed on the case of *Pugh vs. Stratton*, 22 Ut.2d 140, 450 P.2d 463 (1969) to determine that the possession of the cattle was unlawfully obtained. The Majority in *Wilson*, rejected this contention because, the Majority concluded, the Wilson's intended to allow Mr. Burrows to Mortgage the cattle and therefore the Court concluded that the contracts were not void because they violated the requirements of *Pugh vs. Stratton, supra*.

In this action, the trial court found in the Findings of Fact, No. 7:

A contract covering the sale of the Bailey cattle and land to Wesley Burrows was drafted by the attorney for the Baileys which was to

be placed in escrow at the bank in Parowan, Utah. *The escrow was never completed because Mrs. Burrows refused to sign the documents. The contract specifically set forth that Wesley Burrows would not have an ownership interest in the cattle until he performed pursuant to the contract. Burrows never did so perform and never obtained title to the cattle owned by the Baileys. *** (Emphasis added).*

The instant case does not couple physical possession with the intent to mortgage as was found in *Wilson, supra*. Wesley Burrows never obtained lawful possession under Sec. 70A-2-401 (2), U.C.A. (1953) and the Baileys could not be required to file to perfect their security interest. Possession of the cattle was obtained by Wesley Burrows unlawfully and in violation of the Uniform Commercial Code requirements as set forth in Sec. 70A-2-401 (2) U.C.A. (1953).

POINT II

WALKER BANK DID NOT OBTAIN A SECURITY INTEREST IN THE BAILEY CATTLE BECAUSE THE FINANCING STATEMENT FILED BY WALKER BANK WAS DEFECTIVE.

Sec. 70A-9-110, U.C.A. (1953) requires a Financing Statement to reasonably identify what is described.

Walker Bank filed a Financing Statement on or about June 21, 1966, purporting to cover 700 head of

Hereford cattle in the area of Washington, Kane and Garfield Counties. This is a "shotgun" method of attempting to cover every critter in the three stated counties which Wesley Burrows tried to possess or control. It carried one brand, the "scissors", and was not sufficient to identify any of the Bailey Cattle on the date it was filed. The trial court found that Wesley Burrows had no interest in the cattle at the time the Financing Statement was filed and the Financing Statement as filed did not identify any Bailey Cattle as being included in such livestock security. Therefore, the first Financing Statement is void and of no force and effect. The second Financing Statement is also vague, uncertain and attempts to cover almost the same cattle except that the "pitchfork" brand was included. This second statement does not conform to **Sec. 70A-9-110, U.C.A. (1953)**, even with the inclusion of the "pitchfork" brand and should be declared void.

POINT III

RESPONDENTS FILED A REAL ESTATE SALES AGREEMENT OF WHICH WALKER BANK HAD KNOWLEDGE AND THIS PRECLUDES WALKER BANK FROM ASSERTING A LIEN ON BAILEY CATTLE.

The trial court found that the first Financing Statement filed by Walker Bank was void and of no force and effect because it did not comply with **Sec. 70A-9-110 U.C.A. (1953)**. Respondent contends that

the second Financing Statement is also void for the same reasons, but if the court determines the second Financing Statement is not unreasonably vague then it is second in priority to the Real Estate Sales Agreement recorded by the Baileys' for the reasons that follows:

On or about January 5, 1967, the Baileys filed a Real Estate Sales Agreement covering the Bailey cattle and real property with the Garfield County Recorder. (Findings of Fact, No. 7). On February 8, 1967, Walker Bank filed a Financing Statement with the Utah Secretary of State.

Walker Bank had knowledge of the Bailey lien at the time it filed this Financing Statement and it is precluded from asserting a lien prior to the Baileys under 70A-9-401 (2) of the Uniform Commercial Code which provides:

"A filing which is made in good faith in an improper place or not in all of the places required by this Section is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this chapter and is also effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement."

Walker Bank had notice of the lien claimed by the Baileys prior to filing of February 8, 1967.

Walker Bank knew Gail Bailey had some connection with the cattle involved prior to the time Wesley Burrows received any monies from the bank. (TR. 68-72).

Wesley Burrows testified that he advised Walker Bank by and through their agent, Mr. Hill, prior to the loan, that he (Burrows) was going to purchase the cattle from the Baileys. (TR. 2, 55). At that time Mr. Hill was told that Burrows wanted to purchase the Bailey operation and that there would be approximately 700 head of cattle to be pledged at the conclusion of the acquisition of three ranches, which included the Bailey Ranch. (TR. 2, 56).

On the 7th day of January, 1967, Gail Bailey and his wife, Donna contacted Mr. James Hill at the Walker Bank Building in Salt Lake City, Utah. (TR. 2, 27). At that time Mr. Bailey asked Mr. Hill if Walker Bank had a mortgage on the Bailey cattle. Mr. Hill indicated that the "pitchfork" cattle which carried the Bailey brand were not mortgaged. (TR. 2, 29). Mr. Bailey advised Mr. Hill that the Baileys had a First Mortgage on the cattle carrying a "pitchfork" brand. (TR. 2, 30). Mrs. Donna Bailey testified that the conversation with Mr. Hill took place in the first part of January, 1967, and that Walker Bank was advised by Mr. Bailey that a lien was claimed by the Bailey's on cattle carrying a "pitchfork" brand. (TR. 2-43, 44).

Within one month, on or about February 8, 1967, Walker Bank filed a Financing Statement identical

to their statement of June 21, 1966, with the exception that the "pitchfork" brand was included.

The knowledge of the Bailey lien, which Walker Bank chose to ignore, precludes them from asserting a priority over the Baileys at this time.

All of the cattle which were purportedly covered by Walker Bank's Financing Statement were located on Bailey property under a Conditional Sales Contract which required said cattle to remain on said property until payment was made in full. The land on which the cattle were kept was in the Bailey name and a proper recordation of the description of the land was in the Courthouse in Garfield County, Utah. The Baileys were on or near the land at all times attempting to preserve their interest in the property and chattels and were available for inquiry from anyone desiring to know their interest in the land and the chattels. The filing of the Baileys was made in good faith in the county where the land was located. The cattle were described by number and markings and the agreement complied with the requirements, relating to Financing Statements as set forth in Sec. 70A-9-110 U.C.A. (1953).

It has been held that where the transferee of the collateral has knowledge of the existence of the prior security interest such interest is effective as against him although there has not been the proper filing required for perfection. *U.S. v. Thompson*, (D.C. Ark.) 272 F.Supp. 774, aff. (CA8) 408 F.2d 1075. In the instant case Walker Bank had knowledge of the security in-

terest of the Baileys and this interest must be effective against that bank in order to compliment equity and to avoid a situation where one is advised, but through a technicality can avoid his duty to inquire of one whom he knows has an interest in the security proposed by the borrower.

A lien creditor cannot create interest superior to an unperfected security interest if the lien creditor has knowledge of the unperfected security interest. *Stanley v. Fabricators Inc.*, Alaska, 459 P.2d 467 (1969). A lien creditor acquires his interest by operation of law and the Alaskan court holds that knowledge can create an inferior interest in the lien creditor. Walker Bank has control over its interest and whether it will loan the money, whereas the lien creditor does not, so it stands to reason that Walker Bank should be placed under a higher standard of care.

James K. Hill, agent for Walker Bank, went onto the property of the Baileys prior to the loan of any money to Wesley S. Burrows, but said agent did not inquire concerning the interest of any of the landowners, although he knew they did claim an interest. (TR. 67, 68, 82, 84). Walker Bank never made any check with the brand inspector or anyone else concerning the brand of Wesley S. Burrows and what cattle carried same. (TR. 87). Wesley S. Burrows did not provide Walker Bank with a bill of sale or any other indicia of title to the Bailey cattle. As stated by James K. Hill, he and Wesley Burrows had been acquainted since the year

1960 in business, church and social affairs. (Tr. 61, 62, 63). Wesley Burrows was considered one of the more affluent members of the community, San Jose, California, where Burrows and Hill first became acquainted. James K. Hill, agent for Walker Bank, did not rely on any financing statement or 700 head of unidentified cattle, he relied upon the honesty, reputation and good business acumen of Wesley S. Burrows. (Findings of Fact, No. 12).

The facts are abundantly clear that Walker Bank chose to ignore any claim on the part of the Baileys because they wanted to make Mr. Burrows a loan and they wanted the cattle as security only to show the loan was properly made because they knew the reputation of Mr. Burrows and they knew he would repay the loan as required.

CONCLUSION

Walker Bank, through its agent, James K. Hill, was on the property of Gail Bailey prior to the completion of the Real Estate Sales Agreement between Mr. Bailey and Mr. Burrows. Walker Bank made the loan to Mr. Burrows prior to the time the agreement between Bailey and Burrows was signed. Walker Bank filed its first Financing Statement prior to the time of execution of any contract between the Baileys and the Burrows. Walker Bank knew about the Baileys and the Bank did not inquire.

The trial judge, after reviewing all of the evidence, felt that the Bank was careless in its handling of the Burrows affair and a judgment of no cause of action was rendered. I respectfully request this court to affirm the decision of the trial judge.

Respectfully submitted,

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