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Doxey-Layton Company v. Brigham G. Holbrook And Betty N. Holbrook : Respondent'S Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

DOXEY-LAYTON COMPANY,
a Utah Corporation,
Plaintiff and Respondent,

vs.

BRIGHAM G. HOLBROOK and
BETTY N. HOLBROOK, his wife,
Defendants and Appellants,

CASE NO. 12021

RESPONDENT'S BRIEF

Appeal from Judgment of the
Third District Court in and for Salt Lake County
Hon. D. Frank Wilkins, Judge

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TABLE OF CONTENTS

AUTHORITIES CITED

Cases

Statutes

TABLE OF CONTENTS (continued)

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STATEMENT OF THE CASE

This is an action for the foreclosure of a real estate mortgage pledging real property for payment of an indebtedness admitted to be owing from Defendants to Plaintiff. There is no issue as to amount or validity of debt, but only as to its maturity.

DISPOSITION BY TRIAL COURT

The case was tried to the court without a jury which afterwards granted judgment in favor of Plaintiff-Re-

spondent as sought by the complaint. The language of the trial court in addressing counsel for Defendants at the conclusion of the trial is quoted from the transcript (P. 80) as follows:

"I'm ruling totally against you and your clients".

Thereafter, a motion for new trial was duly made, argued and denied. Finally, a Defendant's motion for Relief from Judgment pursuant to Rule 60-B was duly made, argued and denied.

RELIEF SOUGHT ON APPEAL

Defendants as Appellants appeal from the original judgment dated January 20, 1970 and (according to a supplemental notice of appeal dated, July 1, 1970) also from the denial of the trial court to allow a new trial pursuant to Defendants' motion for Relief from Judgment pursuant to Rule 60-B. Appellant does not pursue the matter of Rule 60-B in Appellants' Brief filed herein, having included the desired evidentiary material in the record by stipulation of counsel. Respondent does not include within the scope of this brief any point or argument with respect to the supplemental notice of appeal regarding Rule 60-B.

Defendant-Appellant seeks reformation of the mortgage contract presumably by mandate to the trial court.

STATEMENT OF FACTS

Defendant-Appellant Brigham G. Holbrook is experienced in building, having previously constructed two du-

plexes and a commercial building (Tr. p. 52). He made application to Plaintiff-Respondent for a real estate construction loan to be disbursed in progress installments during the course of construction by first mortgage thereon. The negotiations covered several months and were primarily verbal. The testimony concerning the status of the application at the date of the mortgage as to the securing of a commitment for a long term (20 year amortization) loan at 6% interest is in conflict. The evidence viewed most favorably to ~~Appellant~~ Resp. (Tr. pages 28-9) indicates that Appellant as borrower was aware of the necessity of securing a commitment from a willing "take-out" lender to purchase the loan from Plaintiff, who was acting as a mortgage broker for an as yet undetermined permanent lender. (Tr. p. 54 lines 22-5) Because of Holbrook's anxiety or impatience in the securing of such a commitment and starting construction, prompted by his desire to return to Mexico, he executed the first in a series of five promissory notes (Ex C) previously furnished to him in blank as to the typewritten portions including the maturity date pending securing of such a commitment. He entrusted the signed note to Mrs. Holbrook for her signature and delivery to Plaintiff. The evidence best supports the execution by signature of Mrs. Holbrook (who at all times was the sole record legal owner of the property) only after completion in full, including maturity and explanation of its terms. (Tr. p. 27) The four renewal notes were each fully completed prior to execution by each Defendant, the latest (fifth) in the series of notes being the note sued upon. The extensions of maturity were represented in the four renewal notes,

each executed by Defendants upon maturity of the prior note at the written request of Plaintiff and during their extended joint attempts to secure a long term commitment. (Deposition Brigham G. Holbrook, February 13, 1969 page 14) Holbrook refers to threats from Plaintiff (meaning demands for payment) in signing the renewal notes. (Tr. p. 16 lines 1-11). Actual construction of the apartment was accomplished during the term of the original note by a general contractor hired by Holbrook with fund withdrawal from the mortgage loan account authorized through the agency of a brother-in-law of Holbrook who was himself in Mexico during most of the construction term.

ARGUMENT

POINT I

THIS APPEAL IS SUBJECT TO DISMISSAL FOR FAILURE TO FILE THE RECORD ON APPEAL AS PRESCRIBED BY RULE 73 (g).

The Rule in question reads as follows:

> "(g) Filing Record on Appeal. The record on appeal as provided for in Rule 75 shall be filed with the Supreme Court within 40 days from the date of filing the notice of appeal; except that, when more than one appeal is taken from the same judgment, the district court may prescribe the time for filing, which in no event shall be less than 40 days nor more than three months from the date of filing the first notice of appeal. In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal, *if its order for extension is*

made before the expiration of the period for filing as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than three months from the date of filing the first notice of appeal. A copy of every order extending or modifying the time for filing the record on appeal shall be transmitted to the Supreme Court by the clerk of the court in which the order was made." (emphasis added)

The record on the appeal was not filed for over 3 months after the notice thereof and not until after Respondent's motion to Dismiss appeal was filed herein. No order for any extension of time was ever made or applied for to the district court. Thereafter two extensions were granted ex parte by this court. The Rule cited does not provide for such a procedure. Being aware that the practice of both the district court and Supreme Court is most liberal in these mattters in favor of allowing the tardy filing, Respondent suggests that the Rule should either be followed and his appeal dismissed or amended to reflect the liberalities of practical application.

POINT II

APPELLANTS HAVE FAILED TO OVERCOME THE PRESUMPTION OF REGULARITY AND PLAIN MEANING OF THE NOTES AND MORTGAGE AS TO MATURITY PRESCRIBED.

Defendants have the burden of overcoming a presumption of regularity created from the language of each note and the mortgage instrument. These documents must be construed together to arrive at a prescribed maturity for the debt. 36 Am Jur, Mortgages Sec. 123. Ap-

pellants argue that the language of the mortgage referring to "installments" requires a reformation to extend the ultimate maturity. The mortgage document is submitted to contain language capable of securing either an indebtedness amortized by installments, or bearing a fixed maturity, or a combination of both, as may be set forth in the note specifically referred to. The mortgage executed by Defendants in the action (Ex "B") includes the following:

> "The mortgagor covenants and agrees with mortgagor as follows: 1. That he will, promptly pay the principal of and interest on the indebtedness evidenced by the said note, *at the times and in the manner therein provided.*" (emphasis supplied)

A fair and reasonable construction of the mortgage would require a conclusion that reliance must be upon the note for any indication of payment schedule.

This court has consistently announced the principle of construction above indicated including the recent decision American Savings and Loan Association v. Blomquist 21 Utah (2) 289 where the unanimous opinion includes the following:

> "The courts proceed on the theory that the note and mortgage, though separate insruments, are not separate contracts, but, being executed at the same time and in the course of the same transaction, constitute a single contract. Accordingly, the note and mortgage are construed as a single contract, and an acceleration provision in the mortgage operates on the note, the same as upon the mortgage itself and matures the notes for all purposes."

Defendants argue that examination alone of Exhibit "C" (the original note) compels a conclusion of an unauthorized insertion in the note. While the only testimony is in contradiction of Defendants' speculation (Tr. p. 24-5) it is submitted that (1) the conclusion is not all that obvious, (2) that a contrary conclusion is a required legal presumption not attacked in this action, (Farmers and Stockgrowers Bank v. Pahvant Valley Land Company 165 p. 462) and that (3) in the absence of instruction from Defendants, Plaintiff as payee was authorized to complete any blanks whether by a single insertion into a typewriter or not. The presumption is given statutory blessing as follows:

> 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.
>
> (2) If the completion is unauthorized the rules as to material alteration apply (section 70A-3-407), even though the paper was not delivered by the maker or drawer; *but the burden of establishing that any completion is unauthorized is on the party so asserting.* (emphasis added)

Defendants correctly point out that the original note was signed in 1963 while the Negotiable Instruments Law was applicable preceding the Utah Uniform Commercial Code, supra. Defendant's brief (p. 10) however cites an inapplicable section of the NIL dealing with alteration of instruments, being sections 44-1-126 and 44-1-127 (uniform act sections 124 and 125 respec-

tively). The applicable section of the NIL is 44-1-15 (uniform act section 14) dealing with completion as follows:

> 44-1-15. Blanks — When may be filled. — Where an instrument is wanting in any material particular the person in possession thereof has prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But, if any such instrument after completion is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

The distinction and significant applicable rule of law is made clear by no less an authority than Britton, Handbook on the Law of Bills and Notes, Hornbook Series, Chapter 2, pages 324-5, sec. 82:

> "While the difference between the facts which constitute a filling in of blanks and the facts which constitute a material alteration in the ordinary case is clear, the problem is sometimes raised. The filling in of a blank for the time of payment comes within the protection of Section 14, and is not a material alteration under Section 124."

That the burden of proof is on the party asserting lack of authority. See Brannan, The Negotiable Instrument Law, Annotated, 1926. In the instant case Defendants gave no instruction upon delivery of the 1963 note (Tr. p. 13-14) and the presumption of authority to complete blanks remains unassailed. (See Farmers and Stockgrowers Bank case, supra.) Even under the now repealed NIL, Plaintiff was entitled to a legal presumption of authority, and Defendants have been found wanting in any efforts to reverse. See Plescia v. Humphries, 121 U 355, 241P(2)1124. Defendants knew (as did plaintiff) that a long term refinance would be requisite to payment of interim or construction financing and Defendant Holbrook acknowledged that he was aware of the requirement. (Tr. p. 54 lines 22-25). He, as evidenced by his actions, assumed the risks of securing the same if possible with equally favorable terms and within the time provided by the interim financing.

Defendants' original and subsequent application for permanent financing through the agency of Plaintiff as a potential servicing agent are not tantamount to a commitment for a 20 year loan which both parties recognized must come from elsewhere. Any conflict in testimony regarding any conversation relating to success in securing the desired commitment as an inducement to signing the note and mortgage for one year should be resolved in favor of Respondent. (Tr. p. 28 lines 25-30 continuing p. 29 lines 1-13)

POINT III

THE CLAIM OF APPELLANTS TO EQUITABLE RELIEF OF REFORMATION TO CREATE A NEW MORTGAGE BETWEEN THE PARTIES IS BARRED BY CONDUCT OF APPELLANTS AMOUNTING TO WAIVER, AND LACHES.

Defendants admit having a complete understanding of their position as lacking permanent financing subsequent to the return from Mexico and the happening of certain events including appraisers visiting the property for loan purposes. Specifically, Defendants admit there was never any question as to Plaintiff's version of maturity following about October 1, 1964. After that date, Defendants performed each of the following acts:

1. Signed four renewal notes complete with successive maturity dates.

2. Actively engaged in showing the property for further lending.

3. Applied to Plaintiff itself for an additional consolidated loan to construct 9 more adjoining units. (Tr. p. 64-5)

4. Purchased adjoining property for additional units. (described in counterclaim)

5. Tendered installment payments substantially less than in amounts requisite for a 20 year and 6% amortization (Ex. "G") and (Tr. p. 68-9) and with full knowledge that they were not sufficient.

6. Refused to increase his monthly payments during the interim loan term (as extended by renewals) to an amount sufficient to equal a 20 year schedule of amortization. (See Exhibit attached to Defendant's motion for Relief from Judgment pursuant to Rule 60-B and affidavits pertaining thereto.)

These are not the acts of a borrower who claims, or indeed ever intends to claim, that he has had a permanent loan ab initio. "Waiver" is the intentional relinquishment of a known right. (Words and Phrases) American Savings and Loan vs. Blomquist, supra. It may be express or implied. The above acts provide something of each.

Beyond the acts amounting to waiver, Defendants have also been guilty of equitable laches in failing to assert a claimed right of reformation for over four years after admitted knowledge of the true loan status in 1964 until such relief is sought by counterclaim in this action. Such conduct amounts to a manifest intent to protect an admittedly favorable rate of interest for as long as possible including adding to the period of negotiation the term of litigation, and recognizing an economy where the cost of money from borrowing is less, even at the statutory rate on Judgments, than is currently available elsewhere.

CONCLUSION

No matter what position the court may take with respect to the succession of notes, the important prin-

ciple is one of thinking clearly as to the nature of the debt and the burden of proof on maturity. It is really not essential to a valid mortgage that *any* note exist *at all.* There need be no writing whatever so long as the debt be proved. Jones on Mortgages 8th Ed. p. 425.

Arguendo, if the time for payment was left *uncertain* (which is really not true here) then the debt must be classified as *payable on demand.* Wiltsie on Mortgage Foreclosure 5th Ed. p. 43. If *no time* for payment is expressed, the same result obtains. Wiltsie, supra.

Even if the court reaches the difficult position of finding sufficient evidence to overcome the expressed maturity, which the trial court could not, and even if Defendants as borrowers could be found to be the proud owners of a 20 year 6% mortgage (which was admittedly sought after by both parties but never quite became a reality) which loan be imposed on Plaintiff-Respondent by judicial revision of their contract, the results of this action must be the same since Defendants are still in default by their own admission, and the application of the acceleration terms provided.

The judgment of the trial court should be affirmed.

Respectfully submitted,

Lewis S. Livingston