

1995

First Security Bank of Utah v. Donald Schaub : Petition for Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

First Security Bank of Utah,
a national banking association,

Plaintiff and Appellee,

v.

Donald Schaub,

Defendant and Appellant.

Case No. 950131-CA
Lower Docket No. 930900162

PETITION FOR REHEARING

Appeal from the Second District Court, State of Utah
Honorable Michael D. Lyon Presiding

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**UTAH COURT OF APPEALS
BRIEF**

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The Court's affirmance of the District Court's summary judgment should be reconsidered because it assumes a material fact which is plainly disputed in this record; to wit, that both parties had equal access to the Bank's records of debtor's account. This point is asserted in good faith and not for delay.

Appellant does not dispute the general principle relied upon by the Court that a duty of disclosure does not arise where both parties have equal access to relevant information. The Court does not appear to disagree with appellant's contention that a duty would ordinarily arise on the part of a bank, which solicits a guarantee of a Small Business Association loan to provide "working capital", to disclose that the proceeds will chiefly discharge a pre-existing debt to the bank.

The Court appears to hold that such duty is vitiated where the guarantor signs as "secretary" of the debtor. There are no cases indicating that mere designation as "secretary" waives ordinary protections from fraud. The basis of the ruling must be a presumption that

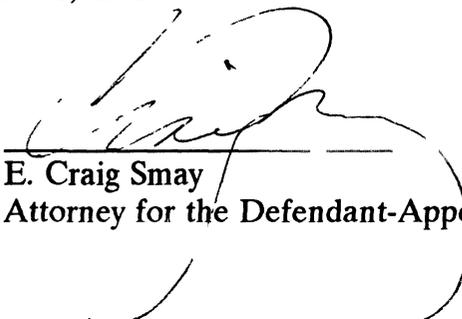
the secretary of a corporation will ordinarily know the status of the corporation's finances, or that a bank may so presume: thus, disclosure to a "secretary" is not required.

The Court, however, for purposes of a motion for summary judgment, may not presume facts which are rebutted in the record. Sorenson v. Beers, 585 P.2d 458 (Utah 1978). Reliance upon a finding of fact, presumed or otherwise, which is disputed in the record, invalidates summary judgment. Mountain States Tel & Tel. Co. v. Atkins, Wright & Mills, 681 P.2d 1258 (Utah 1984).

The record in this matter contains appellant's unrebutted affidavit that, despite the designation as "secretary", he had no access to the corporation's account with plaintiff bank, for the reason that the bank divulged that information only to the president of the corporation and his personal assistant. That is, the evidence is at least disputed whether appellant had any access to the relevant information, and, further, whether the bank could presume anything from the designation as "secretary", as it knew whether it had withheld the information. The bank filed no counter-affidavit on these matters.

The fact central to the ruling, that appellant was designated "secretary" in the guarantee, is undisputed, but meaningless. The presumption underlying it, that appellant had access to the bank's information about corporate debt, is at least disputed. Summary judgment was improper. This matter should be reversed and remanded for trial on the facts.

Respectfully submitted this 21st day of October, 1995.

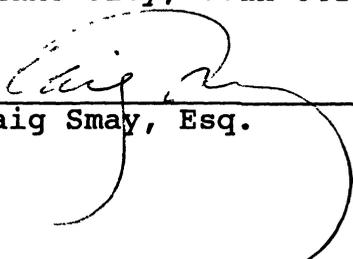


E. Craig Smay
Attorney for the Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing "PETITION FOR REHEARING" to be mailed, postage prepaid, this 22nd day of October, 1995 to the following:

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