1953

Marie C. Clausse v. First Security Corporation et al : Brief of Appellant

Utah Supreme Court

Herbert B. Maw; Attorney for Plaintiff and Appellant;

Case No. 7930

IN THE SUPREME COURT
of the
STATE OF UTAH

MARIE C. CLAUSSE, Administratrix of the Estate of LEON L. CLAUSSE, Deceased,

Plaintiff and Appellant,

vs.

FIRST SECURITY CORPORATION, a corporation, FIRST SECURITY BANK OF UTAH, a corporation, and AMERICAN NATIONAL INSURANCE COMPANY, a corporation,

Defendants and Respondents.

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BRIEF OF APPELLANT

HERBERT B. MAW,
Attorney for Plaintiff and Appellant.
214 Boston Bldg.
Salt Lake City, Utah

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BRIEF OF APPELLANT

The parties are referred to herein as follows: Marie C. Clausse, administratrix of the Estate of Leon L. Clausse, deceased, as appellant; First Security Bank of Utah, as the Bank; and American National Insurance Company, as the Insurance Company.

This is an appeal from an order of the trial court granting a non-suit as to both respondents at the con-

clusion of the appellant's case, without submitting the matter to a jury.

STATEMENT OF FACTS

This is an action on an oral contract entered into by Leon L. Clausse, deceased, with the respondents. The details of the contract are as follows: Mr. and Mrs. Leon L. Clausse, on or about the 18th day of December, 1948, mortgaged their home in Ogden, Utah, for $2,500.00 with the respondent bank. Mr. S. T. Jeppesen and Mr. Carl Porter represented the bank in this transaction. After having approved the said loan, Mr. Jeppesen and Mr. Porter, both Vice-Presidents of the said bank, proposed to Mr. Clausse that he insure the mortgage under "The First Security Mortgage Cancellation Plan," and explained to him that by contracting with the respondent bank for said plan, his mortgage would be insured so that in case of his death it would be paid off and cancelled. Mr. Clausse accepted their offer and agreed to insure said mortgage under the plan for $2,000.00 and also agreed that the mortgage insurance premiums should be added by the respondent bank to his monthly mortgage installments, the first of which was to be paid on February 1, 1949 at the bank. Mr. Clausse was informed at said time by Mr. Jeppesen that his mortgage protection would begin when the note and mortgage were signed and would continue throughout the life of the mortgage. Mr. Clausse agreed to make written application for insurance through a representative to be sent to his home by the bank, and was later advised by letter

dated December 27, 1948, that said representative would call to explain the Mortgage Cancellation Plan which had been worked out by the bank with the respondent Insurance Company, and "which at a very nominal cost, will guarantee the payment of your mortgage for you in case of your death * * *." (Plaintiff's Ex. "C").

On January 5, 1949, Mr. Reynolds Blackington, local representative of the respondent Insurance Company, called on Mr. Clausse at his home, stated that he had been sent there by Mr. Jeppesen to go over the mortgage insurance plan (Tr. p. 30). He took Mr. Clausse's application for $2,000.00 of insurance on his life, made the defendant bank the beneficiary, and informed Mr. Clausse that the mortgage insurance was in effect then (Tr. pp. 36, 96). He also stated that the premiums should be paid monthly at the respondent bank as arranged with Mr. Jeppesen. On the next day, Mr. Clausse was examined by the Insurance Company doctor who told him that he had passed. No policy was ever delivered to Mr. Clausse. On January 24, 1949, Mr. Clausse suddenly died from a heart attack, before the first premium on the mortgage insurance was due. Both the respondent bank and Insurance Company refused to pay off the mortgage as agreed.

ASSIGNMENTS OF ERROR

The plaintiff makes the following Assignments of Error.

A. As to Respondent Bank.

The Trial Court erred:

1. In granting the Respondent Bank's motion for a non-suit on the ground that there were not sufficient facts to warrant the cause being submitted to a jury, because;

a. Appellant's evidence regarding an oral contract between Leon L. Clausse and the Respondent Bank should not have been stricken by the trial court.

b. The stricken evidence states sufficient facts concerning said oral agreement to be submitted to the jury.

B. As to the Respondent Insurance Company.

The Trial Court erred:

1. In granting the Respondent Insurance Company's motion for a non-suit on the ground that there was not sufficient facts to warrant the cause being submitted to a jury, because;

a. Appellant's evidence regarding an oral contract between Leon L. Clausse and the Respondent Insurance Company should not have been stricken by the trial court.

b. The stricken evidence states sufficient facts concerning said oral agreement to be submitted to the jury.

ARGUMENT

APPELLANT'S EVIDENCE REGARDING AN ORAL CONTRACT BETWEEN LEON L. CLAUSSE AND THE RESPONDENT BANK SHOULD NOT HAVE BEEN STRICKEN BY THE TRIAL COURT.

Though the Court below did not state the grounds upon which it found that there were not sufficient facts to warrant the cause being submitted to a jury, it seems clear that it based its said ruling on the proposition that the testimony of the plaintiff and of Roscoe Clausse should be stricken on the grounds presented by the bank. Consequently the legality of the non-suit is contingent upon the correctness of the Courts ruling on the bank's motion to strike the testimony of said two witnesses. The appellant will, therefore, first discuss said motion.

The bank's motion to strike the testimony of the plaintiff and of Roscoe Clausse was based "upon the ground that there is no evidence that either S. T. Jeppesen or Carl Porter or J. D. Madson, or either of them, had authority to bind this defendant bank in any enforceable oral contract as alleged in plaintiff's complaint, and that if any such agreement was made, the agreement would be unenforceable against this bank unless they had authority to bind the bank." (Tr. P. 71, L. 6 to 13)

The motion to strike all of the testimony concerning the statements made by Reynolds Blackington with respect to said agreement was based upon the ground that "there is no evidence in this case that Blackington had any authority of any kind whatsoever to bind the defendant,

the First Security Bank, and that any declarations made by him would be purely hearsay statements made without any authority whatsoever." (Tr. P. 70, L. 24-30)

On this point the law is very clear that the plaintiff had no burden to prove that either of said bank officials or representatives had authority to bind the bank. The real question is not whether they had such actual authority but whether the contract they made with the deceased on behalf of the bank was within *the apparent scope* of their authority as officers and representatives of the bank. Story on Agency P. 126, Par. 114 writes:

> "It may be stated as a general proposition that the officers of a bank are held out to the public as having authority to act according to the general usage, practice, and course of business of such institutions, and that their acts, within the scope of such usage, practice, and course of business, bind the bank in favor of third persons, having no knowledge to the contrary."

7 Am. Jur. 161 Par. 225:

> "When a bank opens its doors for business with the public and places officers in charge, persons dealing with them in good faith, and without any notice of any want of authority, will be protected where an act is performed in the apparent scope of the officers authority, whether the officer is actually clothed with such authority or not."

In Union Savings & Trust Co. vs. Krumm, 152 Pac. 681 on P. 684 the court states the rule as follows:

> "The real question is, were the acts done within the apparent scope of his authority in view of

> all of the circumstances or more correctly speaking, *was the evidence capable of justifiable inferences sufficient to take the question to the jury?* The rule is well settled that persons dealing with corporate agencies have the right to rely upon the apparent authority of those in charge of the corporate business, and for acts done within the scope of such apparent authority the corporation is bound."

Bank of America et al vs. Slotcky confirms the doctrine that

> "As an executive officer of the bank he is presumed to have acted within the scope of his authority until a showing is made to the contrary."

The Utah Supreme Court uphold this principle in the following language:

> "It is a general principle of the law of agency, running through all contracts made by agents with third parties, that the principals are bound by the acts of their agents which fall within the apparent scope of the authority of the agents, who have dealt with these agents in good faith. That general principle of agency is universally recognized and applied by the courts, and is laid down by every text-writer who has written on the subject of agency." Harrison vs. Auto Security Co., 70 Utah 11, 257 Pac. 677.

So also did the Supreme Court of Utah accept this rule of "Indicia of Authority" in Jones vs. Commercial Investment Trust Co., 64 Utah 139, wherein the court quoted from Glass vs. Cont. Guarentee Corp., 88 So. 876 (28 A.L.R. 312) as follows:

> "But where an owner consigns personal property to a dealer in such goods with express or implied authority to sell or deliver or consign to another personal property with indicia of ownership, or authority to sell but with title reserved in the owner until the payment of the purchase price, a purchaser who pays value for such goods and gets possession thereof without notice of the terms and conditions of the original delivery, consignment or sale, obtains a good title as against the original owner, which will in general, prevail against the latters reserved title."

This rule is well stated in 13 Am. Juris. 870, Par. 890 as follows:

> "It is a fundamental and well settled rule that when, in the usual course of the business of a corporation, an officer or other agent is held out by the corporation or has been permitted to act for it or manage its affairs in such a way as to justify third persons who deal with him in inferring or assuming that he is doing an act or making a contract within the scope of his authority, the corporation is bound thereby, even though such officer or agent has not the actual authority from the corporation to do such an act or make such a contract."

The real question in the instant case is not, therefore, as the bank contended, whether the said officers and agents of the bank actually had authority to make the contract in question with Mr. Clausse. The appellant had no burden to prove such authority. *The vital point is whether said officers and agents of the bank acted in such a way as to justify Mr. Clausse, who dealt with them,*

in believing or assuming that they were making a contract within the scope of their authority as agents of said corporation. The determination of this fact was a matter for the jury, and not the court, to decide.

Let us now apply the above rule of law to the facts of this case. The evidence shows that Mr. S. T. Jeppesen and Mr. Carl Porter were both Vice Presidents of the Bank, and that Mr. J. D. Madsen was Assistant Vice President. Mr. Jeppesen was in charge of real estate loans for the bank. All three of said officers had offices in said bank. Mrs. Clausse went into the place of business of the bank and applied for a loan on the Clausse home to Mr. Jeppesen and, as a result of her application, the two said vice presidents went to said home and appraised it on behalf of the Bank for a loan. After having approved a loan for $2,500 on said home, and while they were still on the premises of the deceased, they handed Mr. Clausse a printed pamphlet relating to a Mortgage Cancellation Plan. (Ptf's Ex. A) The said pamphlet referred to said plan as "The First Security Mortgage Cancellation Plan". The deceased was urged by said bank officers to insure his mortgage under said plan. When Mr. Clausse agreed to do so, arrangements were made by said officials for him to pay the premiums on said mortgage insurance to the bank with the installments of his mortgage. On the day that the note and mortgage were signed by Mrs. Clausse in Mr. Jeppesen's office in the bank, he informed her that Mr. Clausse had "authorized him to go ahead with the insurance," and that he would send an agent out to her home to write up a policy. (Tr. P. 25, L. 16 to

21) Subsequently on December 27, 1953 Mr. J. D. Madsen, Assistance Vice President of the Bank sent to Mr. Clausse what appears to be a form letter in which he advised Mr. Clausse that "In line with the policy of many loan companies who recognize this fact, we have worked out with the American National Insurance Company a plan, which at a very nominal cost, will guarantee the payment of your mortgage for you in case of your death." He then wrote that he was asking Reynolds Blackington, local representative of the said Insurance Company, to call and explain the plan, and assured him that, "You may listen to his explanation *without feeling that he is there to sell you additional life insurance, but rather to explain to you a plan which we believe is very desirable.*" (Ptf's Ex. B and C)

Certainly under such circumstances, the deceased was justified in believing that the officers were acting within the scope of their authority from the bank and were representing the bank when they presented him with a pamphlet described as "The First Security Mortgage Cancellation Plan" and urged him to insure his mortgage under it. The arrangements made with said bank officers to add the insurance installments to the mortgage installments together with the assurance in the letter written by Mr. Madsen, Asst. Vice President of the Bank, that the plan was one that had been worked out between the two respondents and was not a life insurance plan, was additional assurance to Mr. Clausse that all of the officers and agents who contacted him relating to it were acting for said bank.

According to the testimony of Mrs. Clausse and Roscoe Clausse, Mr. Blackington told the deceased that he had been sent by the Bank officers, and confirmed the statement of said bank officers that the premiums were to be paid at the bank each month beginning February 1, 1949, and that the mortgage insurance was at that time in effect. The application for life insurance made the Bank the beneficiary, which fact alone was justification for the deceased to conclude that the insurance he was at that time applying for was a part of "the plan" and was for the protection of the bank in case of his death. He was, furthermore, justified in assuming that the said Insurance Company agent was representing both the bank and the Insurance Company from what he said and did on that occasion.

Certainly the facts of the case warranted the matter being submitted to the jury for the purpose of determining whether the deceased was justified in believing and assuming that those who contacted him with respect to the Mortgage insurance plan were representing the Bank and were acting within the apparent scope of their authority from the Bank, and that he was contracting for mortgage insurance and not life insurance, as the Bank contended.

THE STRICKEN EVIDENCE STATES SUFFICIENT FACTS CONCERNING SAID ORAL AGREEMENT TO BE SUBMITTED TO THE JURY.

The evidence relating to the oral contract regarding the First Security Mortgage Cancellation Plan which

was entered into between Leon L. Clausse, deceased, and the two respondents was presented by the plaintiff and Roscoe Clausse. Their testimony was stricken by the court on motion of the respondents in so far as it applied to them. The testimony of those two witnesses definitely stated that an offer of mortgage insurance had been made by Mr. S. T. Jeppeson and Carl Porter, both Vice Presidents of the Respondent Bank, to the deceased, and that it was acceptable by him. The consideration — monthly premiums to be paid by the deceased to the bank — had been agreed upon and the deceased had authorized the bank to add the insurance premiums to his monthly payments on his note and mortgage, in return for which the bank agreed to cancel the mortgage in case of his death. The testimony was definite that the insurance took effect on the signing of the note and mortgage. Both the deceased and the bank were competent to enter into such a contract, and the oral agreement was supported by written proof. (Ptf's Exs. A, B & C)

This court has repeatedly held that in considering a motion to dismiss or a non-suit for insufficiency of the evidence, as in the instant case, "all of the plaintiff's evidence together with all legitimate inferences that can be deducted therefrom must be conceded to be true. For the purposes of the motion, the defendant admits every inference deducible from any facts that were proved." In such matters it is the duty of the court "to consider facts well pleaded and admitted as true, and to give plaintiff the benefit of every legitimate inference and intentment which may fairly and legitimately arise from the

evidence." Kitchen vs. Kitchen, 83 Ut. 370, 28 Pac. 2nd 180; Smith vs. Columbus Buggy Co., 40 Ut. 580, 123 P. 580; Dunn vs. Salt Lake & O. R. Co., 47 Ut. 137, 151 P. 979.

If the testimony of the plaintiff and of Roscoe Clausse is permitted to stand by this court, it is apparent from the record that there is ample evidence of an oral contract between Leon L. Clausse and the two respondents to be submitted to the jury.

APPELLANT'S EVIDENCE REGARDING AN ORAL CONTRACT BETWEEN LEON L. CLAUSSE, DECEASED, AND THE RESPONDENT INSURANCE COMPANY SHOULD NOT HAVE BEEN STRICKEN BY THE COURT.

The insurance company motion to strike the testimony of the plaintiff and of Roscoe Clausse pertaining to any conversations between the deceased and their agent, Reynolds Blackington, was made "On the ground that it tends to vary the terms of a written instrument, and that no evidence has been introduced to show the authority of Mr. Blackington to alter or amend the contract evidenced by the written application. I further move to strike the testimony of Mrs. Clausse, any conversations between her and her husband and representatives of the First Security Bank of Utah, on the ground that such testimony is hearsay as to the American National Insurance Company in this state, that there is no evidence to indicate that any officers of the First Security Bank had authority to speak on behalf of the Insurance Company." (Tr. P. 68 L. 24 to L. 7 P. 69)

Its motion for a directed verdict was made "on the ground and for the reason that plaintiff has failed to show or establish any contract between the defendant insurance company and plaintiff's decedent, plaintiff's deceased husband; that plaintiff has failed to show any authority on behalf of Reynolds Blackington, or any of the officers of the First Security Bank of Utah, to make a contract on behalf of the American National Insurance Company other than the written application exhibit "1", which expressly states on its face that the liability of the company may be had, only by, only in accordance with the terms of such application, and that no officer, no agent of the Insurance Company has authority to vary the terms." (Tr. P. 69 L. 13-24)

At no time has the appellant introduced evidence which tends to vary the terms of the written application of the deceased for life insurance. She admits that the application was made and does not dispute any part of it. This is not a suit on said application for life insurance, and the appellant contends that the making of it to the respondent Insurance Company wherein the Respondent Bank was the beneficiary, was one of the things which had to be done by the deceased in order that he might receive protection on his mortgage under the Mortgage Cancellation Plan which he was informed had been worked out between the Respondent Bank and the Respondent Insurance Co. (Ptf's Exhibit "C"). The evidence indicates that said requirement was a part of an arrangement between the two said respondents for their mutual benefit. In fact the bank's letter of Decem-

ber 27, 1948 to the deceased specifically states that what Mr. Blackington—the Insurance Company's Agent—was to present to the deceased was "not to sell you additional life insurance, but rather to explain to you a plan, etc." The plan which was explained to the deceased by said agent was the same one which Mr. Jeppesen and Mr. Porter of the bank had previously explained: one of mortgage insurance, which he said was then in effect. The evidence clearly indicates that his making of the application for insurance and the subsequent taking of a physical examination, were done for the benefit of the two respondents and not for the deceased. He was merely doing what he was required to do under his Mortgage Cancellation Agreement. He had no direct interest in the Life Insurance Policy, except what might have accrued to him from it under the Cancellation agreement if he had lived to pay off the mortgage. Consequently the testimony objected to in no way tendered to vary the terms of the said application.

The second motion made by the Insurance Company was based on the proposition that appellant showed no authority for Mr. Blackington or the said officers of the First Security Bank to make an oral contract on behalf of the Insurance Company.

The rule of law relating to the *apparent authority* of corporation officers was discussed above in this brief. The same rule applies to the agents of insurance companies, as clearly stated in *Payne* vs. *New York Life Ins. Co.*, 23 P. (2d) 6, as follows after the court had stated

that it was acquainted with the limitation of authority of soliciting agents to bind the Company:

> "There is another rule which should not be overlooked. It must be borne in mind, when considering the general rule quoted above. As in the case of agencies in general, an insurance company is bound by all acts, contracts, or representations of its agents, whether general or special, which are within his *real or apparent* authority, notwithstanding they are in violation of private instructions or limitations upon his authority, of which the person dealing with him, acting in good faith, has neither actual or constructive knowledge."

In holding that an insurer was liable for soliciting agents' conduct within the *apparent* scope of his authority in the absence of evidence that the one relying thereon knew of the agent's limitations, the Court said in the case of *Continental Casualty Co.* vs. *Linn,* 226 Ky. 328, 10 S.W. (2d) 1079, on p. 1081:

> "Soliciting agents are entrusted with power to obtain business for the companies they represent and the consequent profits of the companies are obtained by them. An insurance agent represents his company and stands in its place in his community. Ordinarily, he is the only person the policy holder knows and deals with in his transactions with the insurer. He is dealt with on the faith of his authority to do those things which he claims and has the ostensible right to do."

It is universally held that the question whether an agent had such ostensible authority is a question for the jury.

The facts of this case with respent to the Insurance Company are of such a nature as to raise a strong inference that both Mr. Blackington and the officers of the First Security Bank were representing both of the respondents in their dealings with Mr. Clausse relating to the Mortgage Cancellation Plan. The bank sent Mr. Blackington to the deceased. He presented the same information to the deceased regarding the plan as the bank officials had done. The bank declared in writing that the Mortgage Cancellation Plan had been worked out between the two respondents. This was not denied by the insurance company agent. The making of the bank the beneficiary in the life insurance application and the instructions to pay the premiums to the bank each point to the fact that the mortgage insurance project was a joint one of the respondents.

The insurance application was made out on January 5, 1949 and was in the possession of the Insurance Company for a period of 19 days before the death of the applicant. If the mortgage plan was not a joint one as it was stated to be in the bank's letter to the deceased, then the Insurance Company had plenty of time in which to inquire into the reason why it was to receive its premiums from the bank, and why the bank was sending the Insurance Company's agent to its customers, and to advise the deceased as to the true facts concerning its connection with the Mortgage Insurance Plan. The fact that it did nothing of the sort, certainly gave the deceased plenty of reason to believe that the agent of the Insur-

ance Company and the officers of the bank were representing both of the respondents.

It is inconceivable that a large and reputable bank like the First Security Bank of Utah, would make the representations it did through its officers and in a printed pamphlet (Ptf's Ex. "A") and by letter to the deceased (Ptf's Exs. "B" and "C") and send an insurance company agent to its customers without having worked out a joint program with the Insurance Company, particularly in view of the fact that insurance companies lend money on real property in competition with banks. So likewise is it inconceivable that the insurance company's agent could carry on as Mr. Blackington did in the instant case without the company knowing what representations were being made by him to the bank's customers. Sound reason based upon the facts of this case says that the Mortgage Cancellation Plan as presented to the deceased by the representatives of both the bank and the insurance company was a joint one as it was represented to the deceased as being, and that Blackington, Jeppesen, Porter, and Madsen ostensibly represented both respondents as to it. Certainly there was sufficient evidence that such was the case to be submitted to the jury, particularly in light of the following statement of the Court in the case of *Dunn* vs. *S.L. & O. Ry. Co.*, 151 P. 979, on p. 981:

> "Nor is it material whether the evidence upon the question — is strong or weak. By interposing a motion for a non-suit the defendant not only admitted every fact directly proved, but likewise admitted every inference deducible from any facts that were proved."

THE STRICKEN EVIDENCE STATES SUFFICIENT FACTS TO CONSTITUTE A BINDING ORAL CONTRACT BETWEEN THE DECEASED AND THE INSURANCE COMPANY.

Just as the stricken testimony of the plaintiff and Roscoe Clausse presented the elements of a binding oral agreement between the deceased and the bank, so did it prove a verbal agreement between the Insurance Company and the deceased, which should have been submitted to the jury, as has been pointed out before in this brief.

CONCLUSION

From the law and the facts discussed herein the appellant respectfully contends that the trial court erred in granting a non-suit and in refusing to submit to the jury the appellant's evidence concerning an oral agreement on a Mortgage Cancellation Plan between the deceased, Leon L. Clausse, and the two respondents. Appellant prays that the order of the lower court be set aside and that this court grant a new trial on the grounds discussed herein, and that she have costs.

Respectfully submitted,

HERBERT B. MAW,

Attorney for Appellant.
214 Boston Bldg.
Salt Lake City, Utah