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

Utah Supreme Court

Young, Thatcher & Glasmann; Attorneys for Respondents;

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.

BRIEF OF RESPONDENTS FIRST SECURITY CORPORATION and FIRST SECURITY BANK OF UTAH, NATIONAL ASSOCIATION

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First Security Corporation and
First Security Bank of Utah,
National Association

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STATEMENT

To avoid unnecessary repetition, respondent First Security Bank, hereinafter referred to as bank, wishes to incorporate in its brief the statement of facts as set forth in the brief of respondent insurance company and the argument of said respondent wherever the same is applicable to this respondent. As we develop our argument, however, we will find it necessary to quote somewhat from the testimony.

STATEMENT OF POINTS

1. NO CONTRACT WAS EVER MADE BETWEEN DECEASED AND THE DEFENDANT BANK UPON WHICH PLAINTIFF CAN RECOVER AS AGAINST SAID BANK.

2. IF SUCH A CONTRACT WAS MADE, THE SAME IS VOID FOR LACK OF CONSIDERATION.

3. THERE IS NO COMPETENT EVIDENCE OF ANY AUTHORITY OF EITHER BLACKINGTON, JEPPESEN OR PORTER TO BIND DEFENDANT BANK TO ANY ENFORCEABLE CONTRACT WHICH WOULD BE BINDING UPON THE BANK.

4. IF SUCH A CONTRACT WAS MADE, THE SAME IS ULTRA VIRES AND BEYOND THE POWERS OF THE BANK.

ARGUMENT

POINT 1. NO CONTRACT WAS EVER MADE BETWEEN DECEASED AND THE DEFENDANT BANK UPON WHICH PLAINTIFF CAN RECOVER AS AGAINST SAID BANK.

It seems to be plaintiff's theory that in some mysterious manner respondent bank agreed with deceased to insure his life from the time of the execution of the loan until a policy of insurance was issued by defendant insurance company, or to state it more broadly, perhaps a continuing insurance agreement should deceased fail thereafter to obtain such a policy and

if the borrower died before an enforceable policy of insurance was issued, the bank would somehow and from some source out of its capital asset, pay or cancel the loan. Construing Mrs. Clausse's testimony in the most favorable terms, we fail to see wherein it can be even inferred that such an agreement was ever made. We quote briefly from her testimony which also encompassed all of the testimony with reference to the making of this alleged agreement:

> "We applied for a loan of $2,500.00." (Tr. 16)
>
> "Mr. Jeppesen felt that he would have to go out and appraise the property and see if it was worth the value of the $2,500.00 and he would go out possibly that afternoon. He and Carl Porter came out together on the same afternoon." (Tr. 19.)
>
> "They told him (deceased) that we would be able to get the $2,500.00 and Mr. Jeppesen stopped and explained to him that if he would come to the bank that he would have the papers drawn up and so after he *had given the note and mortgage on place,* he explained to him they had a plan, an insurance plan, on that mortgage and *told him that if he wanted it that he could pay it at the bank along with the mortgage* and we asked him how much the payments on that would be and he said around $3.00." (Tr. 20).
>
> "He explained to us that they had an agreement with the insurance company for an insurance plan in case anything should happen to him, he being the bread winner so to speak and that it would take care of the mortgage in case anything should happen to him. *He said, Lee, I would like to see you take out this plan*

so that your mortgage would be covered by it and Lee asked him what the plan was and he told him it was an insurance plan to insure the mortgage in case anything should happen to him and he asked him how much it would be and he said, well, it would be between $2.50 and $3.00 a month. He didn't write out the plan but they would send a representative to furnish the plan. My husband asked him how these payments would be made and he said it would be added to our mortgage installments and be paid to the bank along with the mortgage; so he said that they would take care of so it would be paid along with the mortgage beginning the first of the month in February. He (deceased) told him that he would like to take the insurance but he felt that it was not necessary to take the full $2,500.00 and he thought that $2,000.00 would be plenty; and Mr. Jeppesen said, well, that was O. K. and then Mr. Porter spoke up and said, Lee, I would like to see you take out the insurance plan. Mr. Jeppesen took and handed him a pamphlet of the insurance plan." Plaintiff's Exhibit "A". (Tr. 22, 23).

"Mr. Jeppesen told me he would prepare that (note and mortgage) and I could come into the bank and get the mortgage and note x x x x I went to the bank and got the note." (Tr. 24)

"Jeppesen told me that Lee had authorized him to go ahead with the insurance, that he would send the representative out and it would be added to the installments to be paid at the bank and that he would send him out; that he didn't write the insurance, the mortgage insurance, but he would send a representative out to the house." (Tr. 25)

"Later we received a letter from the bank with respect to the mortgage plan. December 27, 1948." Exhibit "B". (Tr. 26)

Plaintiff then testified that later Mr. Blackington called at her home and, over the objection of respondent that it was hearsay as against the bank, she was permitted (pro forma) to relate the conversation with Blackington. (See Tr. 30).

"He (Blackington) said he had come out as Mr. Jeppesen had asked him to come out and go over the mortgage plan with Lee and myself. He also represented the insurance or the plan that was with the First Security Bank." (Tr. 30)

"The first premium was to be paid February 1st, 1949." (Tr. 32).

"Blackington said he would have the doctor come for examination of applicant. Dr. Kearns came to make the examination about January 6th or 7th." (Tr. 32)

Over the further objection of the bank, the court permitted plaintiff to answer the following:

"Q. Was there anything said by Blackington in this conversation as to when the insurance on the home or the mortgage would take effect?"

to which she answered:

"A. It would take effect immediately all during the period of the mortgage." (Tr. 35, 36)

On cross examination plaintiff testified that after she first talked to Jeppesen about obtaining the loan and after Jeppesen and Porter had appraised the property they told her that the home was of sufficient

value to justify making the loan and that they would make the loan and that they did make the loan. (See Tr. 33) That she understood when she signed the note and mortgage that they were to receive the $2,500.00; that the transaction respecting the making of the loan was completed on December 18, 1948. (See Tr. 44) She understood the plan. It was to take out a life insurance policy on Lee's life so that if he died while the policy was in force the proceeds from the insurance policy would be used to pay the mortgage indebtedness. She further understood that there had to be an insurance policy taken out and maintained before the plan could work. (See Tr. 46).

After some further questioning the following question was asked and answer made:

> "Q. So you knew that the bank wasn't going to pay it unless there was a policy issued by the insurance company so that the insurance company would pay the policy, didn't you?"
>
> "A. Yes." (Tr. 48)
>
> "Q. Sure, there had to be a policy issued. You understood that?"
>
> "A. That is right." (Tr. 48, 49)

There is nothing in the foregoing evidence, construed most favorably in plaintiff's favor, which can by the remotest possibility be construed to mean that the bank agreed to pay off the note or cancel the indebtedness if the borrower died before a valid policy of insurance was written, nor can it be construed as an

agreement that the insured would be covered by insurance from the date the mortgage was made. The converse clearly appears. The bank merely suggested a method whereby, independently of the loan, a borrower could by taking insurance protect his family against loss by purchasing an insurance policy on his life and for his own convenience permit the borrower to pay the insurance monthly at the bank along with the monthly payments on the loan. Construed most favorably to the plaintiff, it can mean no more than a conditional offer or an agreement on condition that if and when the borrower obtained such a policy and paid the premiums thereon bound the insurance company by the terms of a policy, that the bank would act as a collecting agent for the parties in the matter of collecting the premium and remitting to the insurance company.

POINT 2. IF SUCH A CONTRACT WAS MADE, THE SAME IS VOID FOR LACK OF CONSIDERATION. It is our position that the alleged agreement relative to insurance (granting for argument's sake that there was such an agreement) was wholly independent of the making of the mortgage. The evidence quoted supra shows clearly that the mortgage was fully consummated by the bank on the strength of the security offered by the borrower; that the note and mortgage was executed and the money paid before Blackington called upon the borrowers relative to obtaining an application for insurance. The borrowers' loan was approved when the home was appraised on December 18, 1948. The claimed agreement was alleged to have

been entered into after this date. If such is the case, then the borrowers gave no consideration whatsoever for the alleged promise on the part of the bank.

Smith vs. Brown
50 Utah, 27
165 Pac. 468

Van Tassell vs. Lewis
.....Utah.....
222 P. 2nd. 350

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84 P. 2nd. 431

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POINT 3. THERE IS NO COMPETENT EVIDENCE OF ANY AUTHORITY OF EITHER BLACKINGTON, JEPPESEN OR PORTER TO BIND DEFENDANT BANK TO ANY ENFORCEABLE CONTRACT WHICH WOULD BE BINDING UPON THE BANK. There is no competent evidence of any authority of Blackington, Jeppesen or Porter to bind defendant bank to a contract of the nature and scope contended for by plaintiff. The court admitted pro forma and over the objection of bank, conversations between Blackington and plaintiff out of the presence of any officer or official of the bank.

A. Blackington was merely a local agent of defendant insurance company and even as between himself and his employer he had very limited authority. (See respondent insurance company's brief, pages 15 to 22) By what process of reasoning can it be said he had any authority to bind the bank by his alleged statement that the insurance would take effect immediately. (See Tr. 36). He clearly had no actual authority and we certainly fail to see how he could have any implied authority. He was sent out at the suggestion of the bank to solicit an insurance policy on the life of the deceased. That was the extent of his authority.

B. We further contend that neither Jeppesen or Porter had the authority to bind defendant bank in the making of a contract of the nature and scope contended for. However, we prefer to discuss this matter under point 4.

POINT 4. IF SUCH A CONTRACT WAS MADE, THE SAME IS ULTRA VIRES AND BEYOND THE POWERS OF THE BANK. It is alleged in the amended complaint and admitted in the answer that "defendant First Security Bank of Utah is a corporation organized under the laws of the United States Government being a national bank." Defendant therefore derives its powers from the provision of the national banking act found in Title 12, U.S.C.A. and particularly under Chapter 2, Section 24, Page 18. The following statements as to the powers and limitations of national banks are all annotated in the code and supported by the Federal and U. S. decisions.

A. The powers conferred upon national banks should not be interpreted to authorize injurious policy unless fair construction of language clearly requires it.

B. The measure of powers of national banks is the statutory grant and powers not conferred by Congress or denied.

C. The powers of a national bank are defined and limited by the acts of Congress authorizing the creation of such institutions.

D. National banks cannot generally exercise any powers except those expressly granted or incidental to carrying on business.

E. National banks may exercise only such powers as are created or authorized by federal laws.

If we understand appellant's position clearly, she is seeking to bind defendant bank by an alleged oral agreement made by one of its Vice Presidents and a local life insurance agent to the effect that the bank would insure the life of the borrower to the extent of Two Thousand Dollars during the period from the date of the making of a loan until a valid insurance policy was thereafter issued by an insurance company authorized to engage in the insurance business; or else that Jeppesen agreed that if the borrower died before a valid policy was so issued the bank would cancel the indebtedness without the payment of the obligation.

The following is self evident:

A. Under the powers conferred on a national bank there is not included therein the power or authority to engage in the insurance business in any form whatsoever.

B. Before engaging in the insurance business a corporation must comply with the requirements of the insurance code of the State of Utah and qualify and be under the supervision of the insurance commissioner. It is not contended that defendant bank was so qualified. We contend that if it can be successfully asserted that there was an absolute unconditional agreement made between Jeppesen, Porter and Blackington on the one hand, and the deceased and his wife on the other, that such an agreement was clearly beyond the power or authority of Jeppesen or any other officer or employee of the bank. Such an agreement would be ultra vires and beyond the power and scope of any of its officers. While of course the amount involved is not large yet if Jeppesen and an insurance agent could make this agreement, then by the same token they could make an agreement involving a loan of One Hundred Thousand Dollars or possibly a Million Dollars. Once the power is admitted, the limit would be unqualified.

A mere statement of the problem illustrates why national banks are limited in the scope of their powers. For the safety of the depositors, creditors and stockholders and to insure relative safety of our financial structure, no such power to fritter away the corporate assets of a national bank can or should be allowed.

We submit that the court was in error in admitting even pro forma the evidence offered by the plaintiff with respect to conversations between herself and husband and Blackington, Jeppesen and Porter but of course the error was corrected when the court granted our motion to dismiss the action. We contend the court was clearly right in granting this motion and that the order of the court should be sustained.

Respectfully submitted,

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