1973

First National Bank In Grand Junction, A National Banking Association v. Ralph Osborne and Jim L. Hudson : Appellant's Brief and Reply To Respondent's Petition For Rehearing and Brief, and Brief of the Utah Bankers Association As Amicus Curiae

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

FIRST NATIONAL BANK IN GRAND JUNCTION, a National Banking Association,
Plaintiff and Respondent,

vs.

RALPH OSBORNE and JIM L. HUDSON,
Defendants and Appellant.

Case No. 12804

APPELLANT'S BRIEF AND REPLY TO RESPONDENT'S PETITION FOR REHEARING AND BRIEF, AND BRIEF OF THE UTAH BANKERS ASSOCIATION AS AMICUS CURIAE.

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ARGUMENT

POINT I

DETERMINATION THAT HUDSON'S SIGNATURE WAS ON THE LOAN GUARANTY AGREEMENT DOES NOT ESTABLISH THAT IT WAS A VALID ENFORCEABLE CONTRACT.

In its opinion the majority of this Court said:

"When the plaintiff proved the signature on

> the Loan Guaranty Agreement to be that of Hudson, it made out a prima facie case, and the burden of going forward with evidence would fall upon the defendant Hudson. However, the ultimate burden of showing an agreement is on the plaintiff."

Both Respondent and The Utah Bankers Association agree with the foregoing statements. The Bankers Association, however, contends that the prima facie proof satisfies the "ultimate burden" unless Hudson establishes his defense of fraud (Amicus Curiae Brief p. 5), and the Respondent Bank argues that it discharged its *ultimate* burden by simply proving the signature of Hudson (Respondent's Pet. for Rehear. and Brief p. 12). Professor Corbin clearly points out that a writing, even bearing signatures, does not make a contract.

> "An unsigned agreement all the terms of which are embodied in a writing, unconditionally assented to by both parties, is a written contract. It is true that the fact that they have expressed unconditional assent must be proved by testimony of their unwritten expressions; it is not evidenced by the writing itself. But the same is true of a writing that has been signed by both parties. Writing does not make a contract, not even if the writing bears both signatures. The fact that a man has signed an apparently complete expression of the terms of a contract is indeed strong evidence that he is thereby expressing his unconditional assent. In the absence of all other evidence to the contrary, it is almost enough; but if there is other evidence to the contrary, the signature itself is not conclusive. . . . There must be satisfactory evidence that the signature was affixed

with intent to authenticate and express assent to the entire document. . . .

"A document is a 'written contract' if it has been assented to by the necessary parties as expressing fully and accurately the terms upon which they have agreed. Such a document was described by Wigmore as an 'integration' of the agreement. The question whether they have so agreed is a question of fact, one that the document itself cannot answer; extrinsic evidence of their assent to it as such is always necessary, even though the document bears the signatures of the parties. The existence of such a signed document may indeed be evidential of assent to it as an 'integration', its weight as such evidence depending upon the character and terms of the writing that it contains and upon its physical appearance; but it is never conclusive. .. . No inert instrument is proof of its own genuineness and its execution and delivery by the parties."

Appellant Hudson testified at the trial that he never knowingly signed the guaranty agreement; that the first time he saw it, and the first time he knew that a loan had been made by the Respondent Bank to Osborne, was about 10 months after the loan had been completed when representatives of the Respondent Bank made the trip to Moab to advise him that they were accelerating payment under Osborne's note; that he never received any of the money loaned to Osborne and was never contacted by the Respondent Bank or by any one else with reference to the loan prior to time representatives of the bank made said trip to Moab. (R. 58, 59) Hudson also testified that on occasions he signed papers given to him

by Osborne in the bank and that the only way his signature could have been obtained was by some trick or ruse.

The statement quoted in the Court's opinion from 38 Am. Jur. 2d, Guaranty, Section 55, at page 1058, to the effect that a guaranty agreement must conform to formal requirements pertaining to contracts, is supplemented by other observations in the same text, such as the following:

> "The enforceability of the [guaranty] promise is determined by the law of contracts; that is, the creditor can recover from the promisor only if the promise of guaranty has become a 'contract' promise. Thus, the doctrines of mutual assent, consideration, and conditions are applicable to the formation of enforceable guaranties." (38 Am. Jur. 2d Sec. 1, Guaranty)
>
> "To obligate a person . . . as a guarantor on a contract of guaranty it must be shown that the alleged guarantor was, in fact, a promisor in the contract." (38 Am.Jur.,2d Sec. 27, Guaranty)
>
> "In order to establish a cause of action against the defendant guarantor, the obligee or creditor must show that the debtor is liable on the principal obligation. The creditor must also establish the validity of the guaranty contract." (38 Am. Jur. 2d Sec. 122, Guaranty)

POINT II

HUDSON'S TESTIMONY THAT HIS SIGNATURE WAS OBTAINED BY TRICK OR RUSE IS SUPPORTED BY OTHER EVIDENCE RECEIVED AND BY EVIDENCE ERRONEOUSLY REJECTED BY TRIAL COURT.

Hudson's uncontroverted testimony was supported by evidence received, and by evidence offered but erroneously rejected. Cross examination of the vice president of Respondent Bank who handled the loan application (Mr. James W. Mackley), established that the Bank did not contact Hudson until 10 months after the loan was granted when it was learned that Osborne was leaving the Moab Bank. According to Mackley, he may have tried to telephone Hudson in Moab but if the call was tried it was not successful in reaching him. One relevant and significant aspect of the failure of the Respondent Bank to get in touch with Hudson prior to making the loan lies in the importance to Osborne that Hudson should not learn of the loan application. It was vitally essential to the success of Osborne's plan and scheme that neither Hudson nor any officer or employee of the Moab Bank should learn of the loan application and the submission of a loan guaranty agreement bearing Hudson's name. It is a fair inference from the fact that the Respondent Bank did not contact Hudson that Osborne was able to convince Mackley that it was not necessary to contact him. If the Bank had talked with Hudson by telephone or written him about the proposed loan, Osborne's fraud would have been disclosed and the loan would not have been made. Hudson would have made it very plain to the Respondent Bank that he would not guarantee any such loan.

Proof of the manner in which Osborne obtained a financial statement from Hudson—which, incidentally, was addressed to the Moab Bank, not the Grand Junc-

tion Respondent Bank—also supported Hudson's uncontroverted testimony that he knew nothing about the loan to Osborne. If Hudson had known of the proposed loan and had agreed to act as guarantor thereof, he would have addressed his financial statement to the Grand Junction Bank, not to the Moab Bank.

There is ample evidence, received and erroneously rejected, to support Hudson's uncontroverted testimony that the signature on the Loan Guaranty Agreement was obtained by trick and deception. As this Court pointed out in its opinion, "If Hudson can be believed, he was imposed upon by somebody, and the logical explanation is that it was by Osborne who so desperately needed the money to cover his peculations, and who could not get the loan without the guaranty of Hudson." It might be added, Osborne knew he could not get Hudson, or anyone else, to guaranty his loan especially if the purpose of the loan should be discovered. The desperation facing Osborne was equalled only by his cunning. He came up with a scheme that almost worked. One of the steps in the scheme was to get Hudson's signature on a loan guaranty agreement without his knowledge. The Grand Junction Bank fell in with another step in his plan, namely, to get the loan approved without Hudson's knowledge, or knowledge on the part of the officers of his bank, the Moab National Bank.

Hudson was not known to Mackley, or any other officer at the Grand Junction Bank. Hudson had never had dealings with that bank, yet Mackley chose to grant

the loan of $60,000.00 without first talking with Hudson by telephone or in person, and without any other kind of communication with him. Mackley relied entirely upon Osborne for information about Hudson and relied entirely upon Osborne's representations, implicit and explicit, as to the genuineness of the loan guaranty agreement and Hudson's signature thereon.

The evidence offered, but erroneously rejected by the trial court, as to how the money borrowed by Osborne was used, namely to try to conceal his embezzlements from the Moab National Bank, makes it clear why Osborne was careful to not let Hudson know anything about the loan or how the money was used. Obviously, if Osborne had told Hudson about the loan, Hudson would have advised the Grand Junction bank of his unwillingness to guarantee the loan. And if Hudson had learned of the real reason why Osborne needed money so desperately the loan would not only have been refused but Osborne's embezzlements would have been disclosed. Evidence of the use for which the money received from the Grand Junction Bank was used made it very clear *why* Osborne deceived Hudson and the Grand Junction Bank. That evidence was very enlightening in that it turned the spotlight on Osborne's grand plan and scheme to get money to cover substantial embezzlements from the Moab Bank. As this Court pointed out this evidence was very material in "showing a motive on the part of Osborne to procure Hudson's signature by trick or fraud."

POINT III

THERE IS NO NEED FOR CLARIFICATION OF THE COURT'S DECISION, AND THE PETITION FOR REHEARING SHOULD BE DENIED.

In its brief Amicus Curiae the Utah Bankers Association state (at page 7):

> "It is imperative that the rules pertaining to the validity and enforceability of such guaranties be clear and fixed, and ones on which bankers in this state may rely. Any lack of clarity in this area—and particularly when such lack of clarity stems from this state's highest court—will result in banks not risking their loans when the enforceability of guaranties securing the loans is so shrouded in doubt."

There is no lack of clarity in the Court's Decision. The Court simply pointed out two things:

> 1. The validity and enforceability of loan guaranty agreements will be determined in the same manner that the validity and enforceability of other contracts are determined.
>
> 2. This "is a case in contract and the plaintiff has the burden of showing that Hudson agreed to be a guarantor for the Osborne note," and "the ultimate burden of showing an agreement is on the plaintiff."

It is surprising to find that Respondent Bank and the Bankers Association find any ambiguity in those statements. Respondent Bank asks this question in its brief (page 6):

> "Does this mean that Bank has the ultimate burden of proving the *absence* of fraud?"

What the Court said was that Respondent Bank had the burden of proving that Hudson "agreed to be a guarantor for the Osborne note." If Respondent Bank cannot prove such a promise by Hudson, then it cannot prove a valid and enforceable contract. This is a matter that should have been the first concern of Respondent Bank when Osborne applied for the loan and submitted to the Bank a paper purporting to be a valid promise by Hudson to guarantee Osborne's note.

The Utah Bankers Association in its Brief, Amicus Curiae, also states:

> "It is essential for the future of sound banking practice in this state that banks be in a position to secure valid and enforceable guaranties with respect to commercial and personal loans. The unavailability of such guaranties will simply mean that such loans may not be made."

To that statement we respectfully express the view that the Grand Junction Bank should have determined the validity and enforceability of the loan guaranty agreement prior to the granting of the loan rather than postpone that inquiry until after there has been a default and action brought against the alleged guarantor. In this case a simple inquiry by the Respondent Bank of Hudson would have disclosed Osborne's fraudulent actions and prevented the granting of the loan.

If a lending bank would protect itself—prepare itself to successfully bear the ultimate burden of showing

the validity of a contract to which it is a party—it would make inquiry as to the genuineness and enforceability of a purported guaranty agreement prior to the granting of the applied for loan. The law does not extend to a lending bank the privilege of being so unconcerned with the validity of such an agreement that it totally refrains from contacting the other party to the agreement who is completely unknown to the bank. A lending bank is not legally excused from liability if it relies solely upon representations as to genuineness made by the debtor, who is not a party to the guaranty agreement.

In the situation involved in this case it would have taken only a minimal effort on the part of Respondent Bank to contact Hudson, the other party to the agreement. A completed telephone call, a letter or any other form of communication to Hudson informing him of Osborne's application for a $60,000.00 loan and of the loan guaranty agreement purporting to bear his signature, would have brought to light Osborne's fraudulent conduct, and the loan would not have been made. This, indeed is an unusual situation. One party to a guaranty agreement, to whom the other party is a complete stranger, doesn't even consider it advisable, let alone necessary, to go to the trouble of getting in touch with the other party before granting a loan application for $60,000.00. The plea of Respondent Bank to be protected from its own folly, and to allow it to recover from an innocent person who knew nothing about the loan and never formed any intention of acting as guarantor of this, or any other loan, is a plea for a degree of paternal-

ism unmatched in any other segment of society or in any other area of our economy. In effect Respondent Bank takes the position that even though Hudson did not promise to guarantee Osborne's loan the Bank should be permitted to recover the $60,000.00 from him, plus approximately $30,000.00 in costs and attorney's fees—and that regardless of whether the loan guaranty agreement was a valid contract or a totally invalid contract the Bank should recover. If the position taken by the Respondent Bank were sustained great harm would be done. Banks would be encouraged to refrain from inquiring as to the validity of contracts they enter into and permitted to recover from innocent parties. The Court should reaffirm its holding that the validity and enforceability of loan guaranty agreements will continue to be determined as the validity and enforceability of other contracts are determined.

CONCLUSION

The Petition for Rehearing should be denied.

Respectfully submitted,

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