1976

Frank Robertson v. Commercial Security Bank : Brief of Appellant

Utah Supreme Court

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COURT

~~OF THE~~ STATE OF UTAH

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FRANK ROBERTSON, Plaintiff/ Respondent,	)	
-vs-	:	Case No. 14538
COMMERCIAL SECURITY BANK, Defendant/ Appellant.	)	

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BRIEF OF APPELLANT COMMERCIAL SECURITY BANK

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Appeal From Judgment Of The
Third Judicial District Court For Salt Lake County
Honorable J. E. Banks, Judge

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

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-vs-	:	Case No. 14538
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CASES CITED

IN THE SUPREME COURT

OF THE

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FRANK ROBERTSON,)

Plaintiff/Respondent, :

-vs-) Case No. 14538

COMMERCIAL SECURITY BANK, :

Defendant/Appellant.)

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BRIEF OF THE APPELLANT

* * *

NATURE OF THE CASE

Plaintiff filed suit seeking to recover the sum of Sixteen Thousand Five Hundred Dollars ($16,500.00) from Defendant on grounds that the Defendant was negligent in transmitting said funds by wire from Murray, Utah to Boise, Idaho.

DISPOSITION IN LOWER COURT

A jury trial was held before the Honorable Jay E. Banks, a Judge of the Third Judicial District, on February 24, 1976. Judgment was entered in favor of the Plaintiff and against the Defendant in the sum of Sixteen Thousand Five Hundred Dollars ($16,500.00). The judgment was entered pursuant to Plaintiff's

motion for a directed verdict at the close of the evidence.

RELIEF SOUGHT ON APPEAL

Commercial Security Bank seeks: (1) reversal of the judgment entered in favor of the Plaintiff and dismissal of said cause of action or (2) requests the case be remanded to the lower court for a new trial.

STATEMENT OF FACTS

Pharos Enterprises, a fertilizing company, was a debtor of the Plaintiff, Frank Robertson, and Carl Harrison in the sum of Sixteen Thousand Five Hundred Dollars ($16,500.00). (R6). Pharos Enterprises maintained a business checking account at the Murray Branch of Commercial Security Bank and on August 8, 1974 Pharos issued a check drawn on that account in the sum of Sixteen Thousand Five Hundred Dollars ($16,500.00), made payable to "F. Robertson and C. Harrison", as joint payees.

The check was properly endorsed by both joint payees and deposited by Robertson in the new Plymouth Branch of the Bank of Idaho. (R28). It did not clear and was returned to Robertson who contacted Harrison (an officer of Pharos) about making it good.

It was endorsed again, (see Exhibit 3-D) upon the representation that it would be paid, and sent direct to Commercial Security Bank with directions, apparently from Harrison, to wire

the funds to Bank of Idaho at Boise. Pharos made the check good by bringing in a cashiers check.

The Murray Branch of Commercial Security Bank telephoned its home office located in Ogden, Utah and requested the Ogden office, which handled all wire transfers to send the sum of Sixteen Thousand Five Hundred Dollars ($16,500.00) to "F. Robertson and C. Harrison". Commercial's correspondent bank was Continental Bank and Trust in Salt Lake City and Continental Bank and Trust was a member of the Federal Reserve System while Commercial Security Bank was not. Thus, the matter of transfer of funds through Continental contemplated a clearing of these funds through the Federal Reserve System to the Bank of Idaho at Boise. Commercial Security Bank forwarded a credit memo to Continental Bank and Trust for transfer of such funds. (Exhibit 2-D). Continental Bank and Trust then prepared a debit memo (Exhibit 1-D) which was forwarded to Commercial Security Bank and a remittance advice through Federal Reserve requesting wire of the funds to F. Robertson or C. Harrison at Bank of Idaho, Boise (Exhibit 4-D).

During transmission of the funds through Continental, the word "and" was changed to "or", so the memo read "F. Robertson or C. Harrison" rather than "F. Robertson and C. Harrison". Advice as to the funds being received was apparently given to Mr. Harrison and he called for them. The sum of Sixteen Thousand

Five Hundred Dollars ($16,500.00) was paid directly to Carl Harrison at the Bank of Idaho in Boise, Idaho. Carl Harrison failed to pay any of the funds to the Plaintiff, Frank Robertson.

Frank Robertson subsequently filed suit in Third District Court to recover the total sum of Sixteen Thousand Five Hundred Dollars ($16,500.00). Based upon the evidence, the trial judge found in favor of the Plaintiff pursuant to a motion for directed verdict.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN RULING THAT CARL HARRISON WAS NOT AN INDISPENSABLE PARTY TO THE SUIT.

As a general rule of law where two or more persons are listed as joint payees on a negotiable instrument, their joinder as parties in the suit is both proper and necessary. 10 C.J.S. "Bills and Notes", Section 553 (c) states:

> Where a bill, note or check is made payable to several persons or is endorsed or signed by several, they are joint holders and not only may, but must, sue jointly as such. (Emphasis added). Id. 1179.

Also see Underwood v Otwell, 153 S.E. 2d 40 (1967).

In the case at bar, the negotiable instrument had been made payable to the Plaintiff, Frank Robertson, and Carl Harrison, as joint payees in the sum of Sixteen Thousand Five Hundred Dollars ($16,500.00). The Plaintiff, Frank Robertson, while

testifying at first that Carl Harrison had no interest in the original check and he did not know why Carl Harrison's name was on the check, nevertheless indicated later that the funds properly should have been transmitted by wire subsequently in the names of F. Robertson and C. Harrison in the same fashion as the original check. (R36-37). Based on the testimony of Frank Robertson, the trial court ruled that Carl Harrison had no beneficial interest in the check. (R23). The Appellant, Commercial Security Bank, contends that the trial court erred in holding that Carl Harrison had no beneficial interest in the funds and therefore Carl Harrison was not an indispensable party to the suit.

Commercial Security Bank contends that where a negotiable instrument is made payable to joint payees, both payees on the negotiable instrument are indispensable parties to the cause of action. One (1) joint payee cannot establish ownership of the proceeds without including the other payee in the law suit and having that payee testify as to ownership.

The rule of law is that a negotiable instrument made payable to joint payees can be discharged only by both parties. Section 70 A-3-116 U.C.C. states:

> An instrument payable to the order of two or more persons: (b) if not in the alternative, is payable to all of them and may be negotiated, <u>discharged</u> or <u>enforced</u> only by all of them. (Emphasis added).

The official comment to Section 3-116 of the Uniform Commercial Code (Uniform Laws Annotated) Master Edition, Volume II, states that both payees must be included in any action to enforce the negotiable instrument.

> PURPOSES OF CHANGE: The changes are intended to make clear the distinction between an instrument payable to 'A or B' and one payable to 'A and B'. The first names either A or B as payee, so that either of them who is in possession becomes a holder as that term is defined in Section 1-201 and may negotiate, enforce or discharge the instrument. The second is payable only to A and B together, and as provided in the original section both must endorse in order to negotiate the instrument, although one may, of course, be authorized to sign for the other. Likewise, both must join in any action to enforce the instrument, and the rights of one are not discharged without his consent by the act of the other. (Emphasis added). Id. 49.

Since Carl Harrison was not made either a party Plaintiff or a party Defendant in this action and since the negotiable instrument was made payable to both Frank Robertson and Carl Harrison, the Appellant contends the trial court's ruling constitutes reversible error.

In the case of F. R. Orr Construction Company v Ready Mixed Concrete Company, 472 P. 2d 193 (1970), the Colorado Court of Appeals held that where a negotiable instrument was made payable to joint payees it could not determine the actual interest or ownership of the check without the presence of both payees. In that case a check in the sum of Two Thousand Nine Hundred Four

and .13/1.00 ($2,904.13) Dollars had been issued to Ready Mixed Concrete Co. and Terry Construction Company, as joint payees. Ready Mixed failed to obtain the endorsement of Terry and could not cash the check. Ready Mixed then sued Orr and Terry Construction Company to recover the full amount of the check. Terry Construction Company was never served with legal process as the Plaintiff was unable to locate anyone from Terry Construction Company. The Defendant, Orr Construction Co., moved to dismiss the complaint on the grounds that Terry Construction Company was an indispensable party to the case and the court could not determine ownership of the funds without including Terry Construction Company in that suit. The trial court denied Defendant's motion to dismiss and further held that the Plaintiff was entitled to recover the full amount of the check. Defendant appealed. The Colorado Court of Appeals reversed the trial court decision and held in favor of the Defendant. The Court of Appeals said that if could not determine the interest of Terry Construction Company without its presence in the case. The Plaintiff had asserted that under the circumstances of the case it was the holder of the non-negotiable chose in action and the trial court could properly

determine that the non-endorsing co-payee had no interest in the proceeds represented by the check. That was the same argument which is raised in the case at bar by the Plaintiff. Frank Robertson testified that Carl Harrison had no interest in the proceeds of the check. (R8). The trial court agreed with the Plaintiff, and held that Carl Harrison had no interest in the check and therefore was not an indispensable party. The Colorado Court of Appeals rejected this same argument, however, when it said:

> Under the facts before us, the court could not determine the interest of Terry without its presence in the case. R.C.P. Colo. 19 (a); Woodco v Lindanhal, 152 Colo. 49, 380 P. 2d 234; Weng v Schleiger, 130 Colo. 90, 273 P. 2d 356. The proper procedural steps to bring Terry before the court for a determination of its interest were not taken since it was not a party Plaintiff and since it was not a Defendant because of a failure of service of process. There is no evidence on which the trial court could find any enforceable debt or contract flowing between Plaintiff and Defendant for which the latter could be held liable; and no other theory to sustain the suit has been advanced. The trial court, in effect, rewrote the check. The judgment entered by the trial court is in error and is reversed with direction to dismiss the complaint. Id. 195.

The Appellant contends that F. R. Orr Construction Company is directly on point. In that case and in the case at bar the Plaintiffs argued that the joint payee had no interest in the proceeds represented in the check. In both cases the

trial court held that the joint payee in fact had no interest in the check and therefore was not an indispensable party. Appellant submits that under the facts of this case the trial court could not determine the interests of Carl Harrison without his presence in the case.

In Hinojosa v Love, 496 S.W. 2d 224 (1973), the Texas Court of Appeals held that in cases where a promissory note was made payable to joint payees, then both parties were considered to be indispensable in the suit. In that case a promissory note had been made payable to E. V. Love and the National Bank of Commerce of Brownsville, as joint payees. The note had been issued by Mr. L. L. Hinojosa. The note was subsequently not honored and Mr. Love sued Mr. Hinojosa to recover full payment. Mr. Hinojosa failed to respond to the complaint and the default judgment was entered for Mr. Love. Mr. Hinojosa then moved for a new trial which was later denied. Mr. Hinojosa appealed the decision and contended that since two (2) payees were listed on the promissory note, both party payees were indispensable parties to the suit. The Texas Court of Appeals held that the National Bank of Commerce of Brownsville was indeed an indispensable party and should be joined in the suit. Citing Section 3-116 U.C.C. and Rule 39 of the Texas Rules of Civil Procedure, the Court of Appeals concluded that "Proceedings in the absence of an

indispensable party was fundamental error". The judgment of the lower court was reversed and the case was remanded for trial.

Rule 19 of the Utah Rules of Civil Procedure discusses joinder of necessary parties.

> (a) NECESSARY JOINDER. Subject to the provisions of Rule 23 and of (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as Plaintiffs or Defendants. When a person who should join as a Plaintiff refuses to do so, where his consent cannot be obtained, he may be made a Defendant, or in proper cases, involuntary Plaintiff.
>
> (b) EFFECT THE FAILURE TO JOIN. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to service of process, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons, parties, as such jurisdiction over them can be acquired only by their consent or voluntary appearance; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

(Rule 23 of the Utah Rules of Civil Procedure concerns class action suits).

Carl Harrison was not joined in the suit as a party Plaintiff because Frank Robertson said he could not locate Mr. Harrison (R43) and because he believed Mr. Harrison to be judgment proof. It would have been a relatively easy thing for Plaintiff to have sued Mr. Harrison in Idaho and come armed to Utah with a judgment against Carl Harrison which would have determined the

ownership of the proceeds.

Based on the cases cited above, Appellant submits it was reversible error for the trial court to rule that Carl Harrison was not indispensable to the suit.

POINT II

THE TRIAL COURT ERRED IN GRANTING A DIRECTED VERDICT FOR PLAINTIFF.

A motion for directed verdict is governed under Rule 50 (a) U.R.C.P. and is usually granted only where the court is convinced that reasonable minds could not differ as to the evidence. When a motion for a directed verdict is made, the trial court is required to view the evidence in light most favorable to the party against whom the motion is made. In Anderson v Gribble, 30 U. 2d 68, P. 2d 432 (1973), the Utah Supreme Court said:

> The motion, although labeled a non-suit, was a motion for a directed verdict under Rule 50 (a) U.R.C.P. Upon a motion for a directed verdict, the trial court is obligated to view the evidence in the light most favorable to the party against whom it is directed. This court will sustain the granting of a motion only if the evidence were such that reasonable men could not arrive at a different conclusion.

(Also see Smith v Thornton, 23 U. 2d 110, 458 P. 2d 870 (1969); Rhiness v Dansie, 24 U. 2d 375, 472 P. 2d 428 (1970).

Commercial Security Bank submits that if the evidence in this case were viewed in a light most favorable to the Bank, then

reasonable men could differ as to the conclusion reached and therefore, the motion for a directed verdict was in error, though we submit the indispensable party argument should have disposed of the case.

An examination of the evidence clearly leaves a question in one's mind. Robertson testified that Harrison had no interest in the proceeds and he had no idea why his (Harrison's) name was on the check (R8, R30). He also testified that Harrison's name should properly have been on the subsequent remittance in whatever form that might have taken (R37). Louis N. Sylvester, Jr., an assistant treasurer and C.P.A. for Pharos testified that John Smith, President of Pharos, told him to make the check payable to both Robertson and Harrison (R50). The reason given was that John Smith wanted Harrison to realize the check was a final settlement. (R51). No further explanation was given. The Plaintiff, Robertson, did not testify as to any instructions he gave the bank as to how any remittance should be made out or delivered. He had no conversation with anyone representing the defendant bank until some time after Harrison had received the funds. John Mallacher, Vice President of the bank, told of two phone calls. The first, advising that the first Pharos check had not cleared, and the second, a request to wire the funds but not in any particular manner (R53). The calls, he

said, could have been from either party.

When the first check bounced, it was returned to Robertson who turned it over to Harrison for further handling after each endorsed it again. Robertson had nothing further to do with the matter relying on Harrison to bring him the funds.

The record indicates that Pharos Enterprises was a debtor of both Frank Robertson and Carl Harrison (R6). If the money had been paid to Frank Robertson only, who is to say that the bank might not now be facing a suit at the hands of Mr. Harrison. This was the dilemma confronting the bank when the matter of ownership was in question, and all parties not before the court.

It is Appellant's contention that since it was never clear why both names were listed on the check, the jury should have been given the opportunity to determine if the Plaintiff was entitled to keep all of the proceeds or only a portion thereof. Since several explanations were offered and since the evidence should be viewed in a light most favorable to the Bank, Appellant contends that reasonable minds could differ and therefore, the directed verdict should not have been granted.

POINT III

A NEGOTIABLE INSTRUMENT MADE PAYABLE TO JOINT PAYEES IS ENFORCEABLE ONCE THE INSTRUMENT IS PROPERLY ENDORSED BY BOTH PAYEES. DELIVERY TO ONE IS DELIVERY TO BOTH.

The general rule of law is that a negotiable instrument made payable to joint payees can be discharged only by both parties. Section 70 A-3-116 U.C.C. states:

> An instrument payable to the order of two or more persons: (b) if not in the alternative is payable to all of them and may be negotiated, discharged or enforced only by all of them.

Since the negotiable instrument in this case was made payable to "F. Robertson and C. Harrison", it could only be negotiated, discharged and enforced by both payees. Section 70 A-3-202 U.C.C. defines "negotiation" as:

> Negotiation is the transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order, it is negotiated by delivery with any necessary endorsements; if payable to bearer, it is negotiated by delivery.
>
> (3) An endorsement is effective for negotiation only when it conveys the entire instrument or any unpaid residue. If it purports to be of less, it operates only as a partial assignment.

The rule of law set forth in the Uniform Commercial Code states that an instrument made payable to joint payees must be negotiated by both payees. This act of negotiation is accomplished when the instrument is properly endorsed by both payees. The Utah case law supports the proposition that a

negotiable instrument made payable to joint payees must be endorsed by both payees. In Pacific Metals Company v Tracy-Collins Bank and Trust Company, 21 U. 2d 400, 446 P. 2d 303 (1968), the Supreme Court held that the Defendant bank was liable for honoring a check which was made payable to joint payees but which was endorsed only by one payee. In that case, the check was made payable to the Plaintiff and to Olympus Heating as joint payees. The Defendant bank honored the check upon the endorsement of Olympus Heating only, without the endorsement of Plaintiff. Plaintiff brought suit against the Defendant bank and alleged the check should not have been paid to Olympus Heating because it did not contain the endorsement of both payees. The trial court granted a summary judgment in favor of the Plaintiff. The Supreme Court of Utah, in affirming that judgment, said:

> The nature of a check is an order by its maker to its bank or depository that the face amount be paid to the payee he designates, and it is noticed to anyone accepting the check that the signature of all payees are required. This requirement is just as binding on the drawee bank as upon anyone else. For examples of cases which well illustrate this principle are Crahe v Mercantile Trust and Savings Loan, 129 N.E. 120 and Midland Savings and Loan Company v Tradesmen National Bank of Oklahoma City, 57 F. 2d 686 (C.C.A. Tenth).
>
> Consistent with that reasoning and in harmony with our view of the law, the Defendant, Bank of Salt Lake, having failed to obtain the endorsement of both payees, is likewise liable to Pacific Metals on

> the check but the Plaintiff, of course, is limited to one recovery of its money. (Emphasis added). Id. 503.

In the instant case, there is no question but that the negotiable instrument was properly endorsed by both joint payees. The Plaintiff contended that the funds were paid to one payee, Carl Harrison, and that such funds should have been paid directly to both payees.

The Appellant respectfully submits that the law only requires the endorsement of both payees, and not that the negotiable instrument be paid directly to both payees. This contention is supported in the case of Continental Bank and Trust Company v People's National Bank and Trust Company, 217 Pa. Super. 371, 274 A. 549 (1970). In that case the bank had paid a negotiable instrument to one of two joint payees without obtaining the endorsement of the other payee. However, in the dictum of the opinion the court concluded that if the negotiable instrument had been properly endorsed by both joint payees, the sum could be paid to either payee. The court said:

> Section 4-401 (1) of the code provides that a bank may charge against its customer's account only items that are 'properly payable'. Without the supplier's endorsement the item was not 'properly payable'. Cf. Pacific Metals Company v Tracy-Collins Bank and Trust Company, 21 U. 2d 400, 446 P. 2d 203 (1968). Thus Continental had no right to charge its customer's account and was liable to its customers for the amount of the item. Continental Bank and Trust Company v Philadelphia National Bank, 92 Monpg. Cty. L. Rep. 35,

> 38 (1969). See Pacific Metals Company v Tracy-Collins Bank and Trust Company, Supra. However, if both endorsements had been obtained, the item would have been 'properly payable' when it was presented to Continental. In that case Continental could have charged its customer's account without incurring liability. People's failure to require the additional endorsement thus resulted in Continental's liability to its depository. (Emphasis added). Id. 550.

In the case at bar the check issued by Pharos Enterprises was payable to "F. Robertson and C. Harrison" as joint payees. The check was properly endorsed by both payees but was subsequently returned for insufficient funds. Pharos Enterprises then deposited a cashiers check with Commercial Security Bank in order to make the original check good. During transmission of the funds by wire, an error apparently was made in changing the word "and" to "or". Frank Robertson contended that because of the error in wiring funds from Appellant's bank to the Bank of Idaho , the funds were erroneously paid to Carl Harrison. Appellant submits that the error made in this case in changing the word "and" to "or" had no material affect upon the transaction because the negotiable instrument was properly endorsed by both joint payees. Since the original check was properly endorsed, the proceeds could be paid to either of the joint payees. The fact that the check was returned for insufficient funds did not void or cancel the check. A new check was not issued to replace the original check.

The cashiers check which was deposited by Pharos Enterprises at Appellant's bank was designed to cover and insure that the original check would be paid in full. Assuming arguendo that the error had not occurred, the negotiable instrument would have been paid either to Carl Harrison or Frank Robertson, because the negotiable instrumen was properly endorsed by both parties. The error did not affect the payment of the negotiable instrument. The negotiable instrument woul have been paid to either party upon proper endorsement, regardless of the error.

We further point out that delivery of a check to one of two payees is tantamount to delivery to both. See Gillespie v Riley Management Corporation, (Illinois) 301 N.E. 2d 506 (1973).

CONCLUSION

We respectfully submit the judgment entered in favor of Plaintiff and against Defendant should be reversed and/or a new trial granted.

Respectfully submitted,

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