1989

Tracy Collins Bank and Trust Company, Trustee, and Lewis W. Butcher v. Crossland Savings, FSB, fka Western Savings and Loan Company : Brief of Respondent

Utah Court of Appeals

DOCKET NO. 890640-CA IN THE UTAH COURT OF APPEALS

TRACY COLLINS BANK & TRUST COMPANY, Trustee, and LEWIS W. BUTCHER, Plaintiffs/Appellants,	:	
vs.	:	Case No. 890640-CA
CROSSLAND SAVINGS, FSB, fka WESTERN SAVINGS & LOAN COMPANY, Defendant/Respondent.	:	Consolidated No. 890641-CA

BRIEF OF RESPONDENT

APPEAL FROM TWO SUMMARY JUDGMENT RULINGS IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE RAYMOND S. UNO PRESIDING

J. RANDALL CALL
THOMAS M. MELTON
PRINCE, YEATES & GELDZAHLER
City Centre I, Suite 900
175 East Fourth South
Salt Lake City, UT 84111
ATTORNEYS FOR
DEFENDANT/RESPONDENT

DOUGLAS G. MORTENSEN #2329
KRIS C. R. LEONARD #4902
MATHESON, MORTENSEN & OLSEN
648 East First South
Salt Lake City, UT 84102
Telephone: (801) 363-2244
ATTORNEYS FOR
PLAINTIFFS/APPELLANTS

ARGUMENT PRIORITY: 14(b)

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JURISDICTION OF COURT OF APPEALS

This appeal arises out of two Orders of the Third District Court dated July 3, 1989, and August 11, 1989. Both Orders granted defendant/Respondent's (hereinafter "Respondent") two separate Motions for Summary Judgment. This Court is vested with jurisdiction to hear and decide this Appeal pursuant to Utah Code Ann. §§ 78-2-2(3)(i) and 78-2-2(4) (1953, as amended), Rule 4A, Rules of the Utah Court of Appeals, and that certain Notice dated October 31, 1989, of the Office of Clerk, Supreme Court of Utah.

STATEMENT OF NATURE OF PROCEEDINGS

These proceedings arise out of a breach of contract action initiated by plaintiff/appellant Lewis W. Butcher and Tracy Collins Bank & Trust Company (collectively referred to herein as "Butcher") against respondent CrossLand Savings, FSB, formerly known as Western Savings and Loan Company, on March 4, 1987. The trial court granted Respondent's Motion for Summary Judgment on August 11, 1988, on the grounds that two of Butcher's claims were barred by the statute of limitations set forth at Utah Code Ann § 78-12-23 (1953, as amended). The trial court granted Respondent's second Motion for Summary Judgment on July 3, 1989, on the grounds that all challenged disbursements were properly authorized. Appeal was taken from these rulings on August 3, 1989.

STATEMENT OF ISSUES

Respondent does not dispute the Statement of Issues as set forth in Butcher's Brief at p.1.

DETERMINATIVE LAW

Rule 56(c), Utah Rules of Civil Procedure:

> . . . The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Section 78-12-23, Utah Code Ann. (1953, as amended):

> Within six-years:
>
> (2) an action upon any contract, obligation, or liability founded upon an instrument in writing, except those mentioned in Section 78-12-22.

STATEMENT OF FACTS

Respondent agrees with Appellants' Statement of Facts as set forth in their Brief dated January 16, 1990, with the following modifications and additions:

1. The disbursement dates cited by Appellants are correct, except that the third disbursement occurred upon March 4, 1981, rather than March 1, 1981.

2. On or about December 9, 1980, Appellant Lewis W. Butcher ("Butcher") signed a written Authorization authorizing

Respondent to disburse funds from his construction loan account. The Authorization provides:

> In connection with our loan, as captioned above, we hereby authorize you to make all checks necessary as payoffs, direct to the parties concerned.

3. All of the disbursements made by defendant were approved by either Butcher or his designated agent and contractor, Jerry Willmore. The contractor's Authorizations for Payment and Receipts and Lien Releases may be found in the Record at pp. 78-94.

4. Respondent maintained a proper Loan Disbursement Record, which also provides a record of regular inspections performed at the construction site. Other than the blanket Authorization, Respondent received no special instructions regarding the disbursement of funds.

SUMMARY OF ARGUMENTS

ARGUMENT I. The written Authorization executed by Butcher is clear and unambiguous. Parol evidence may not be admitted to vary or alter the plain language of the written agreement between the parties.

ARGUMENT II. Utah Code Ann. § 70A-4-406 does not toll the commencement of the statute of limitations for breach of contract set forth in Utah Code Ann. § 78-12-23. Two of Appellants' four claims are barred by the statute of limitations.

ARGUMENT

I. THE AUTHORIZATION SIGNED BY BUTCHER IS UNAMBIGUOUS.

The District Court properly determined the Authorization signed by Butcher was clear and unambiguous. After review of the Authorization and Butcher's claims, the court determined that the purpose of the Authorization was plainly set forth in the four corners of the document. No extrinsic evidence should be permitted to contradict or vary the clear language of the Authorization.

Butcher advances two arguments on appeal. First, he contends that the Authorization "amends" the loan agreement between the parties. This argument may be dismissed for three reasons.

Butcher raises this issue for the first time on appeal. Nowhere in the record did Butcher present to the trial court that the Authorization was an "amendment" or "change" to the other loan documents he executed contemporaneously. This Court may not address legal arguments raised for the first time on appeal.

A second reason for denying this argument is that there is no evidence to support Butcher's claim that the Authorization is "an amendatory change to the original contract terms." (Appellant's Brief at p. 8.) Butcher admits all of the documents were signed contemporaneously. The Authorization in no way varies or alters the terms of the other loan documents.

Finally, parol evidence is only admissible in instances where the amendment is ambiguous or requires additional evidence to make its meaning clear. Clear, unambiguous written additions to a contract do not require extrinsic interpretive evidence. For example, in Abrams v. Financial Service Co., 13 Utah 2d 343, 374 P.2d 309 (1962), the amendment contradicted terms of the original agreement. No such contradiction exists in the instant case.

Butcher's second argument is that the Authorization is inherently unclear and extrinsic evidence is required to interpret the "true meaning" of the document. The trial court's failure, according to Butcher, to find there was an integrated agreement, opens the door to any extrinsic evidence the parties deem necessary. This argument contradicts Utah precedent and common sense.

The decision to permit extrinsic or parol evidence begins with an examination of the written instrument. "[I]n delivering the intent of a contract the language of the instrument itself should first be looked to, and unless there is some ambiguity or uncertainty, there is no justification for attempting to vary it by extrinsic or parol evidence." Williams v. First Colony Life Insurance Company, 593 P.2d 534, 536 (Utah 1979). The language of the Authorization at issue in the instant case is in no way unclear or ambiguous.

Butcher claims that, despite the plan language of the

Authorization, he was to "retain control over all disbursements requested by the contractor." (R. 102.) This Court's acquiescence to Butcher's contention that he was to retain control over all disbursements would render the Authorization meaningless. If, as Butcher claims, the agreement required his authorization for each individual disbursement, there would have been no reason for the execution of the Authorization.

This common sense interpretation of the Authorization is supported by Butcher's own actions. There were a number of disbursements made pursuant to this Authorization (R. 79-94). Butcher does not claim that all of the disbursements were violative of his agreement with the bank. Instead, Butcher seeks to selectively interpret the Authorization, in the face of its written terms, to suit his own ends.

Contrary to Butcher's assertions, a court need not always find that a contract is integrated to exclude parol evidence. The Utah Supreme Court holds that only "in some cases, it will be necessary for a trial judge to rule on the issue of integration as a preliminary or foundational matter." Colonial Leasing Co. v. Larsen Bros. Construction, 731 P.2d 483, 487 (Utah 1986)(emphasis added). Where an instrument is clear on its face, the determination of integration need not be made. Williams v. First Colony Life Insurance Company, 593 P.2d 534, 536 (Utah 1979).

Further, Butcher's assertions regarding the

Authorization and interpretation are inadmissible in any event. Butcher seeks to persuade the Court that Respondent was not authorized to disburse funds without his consent. Evidence which would contradict or vary the language of the Authorization is inadmissible.

In Rice, Melby Enterprises, Inc. v. Salt Lake County, 646 P.2d 696 (Utah 1982), the Utah Supreme Court determined that parol evidence may not be used to vary the terms of an agreement clear in its facts. It held:

> In the instant case, plaintiff is attempting to prove that the original contract contemplated conditions not specified in the writing which clearly would change its meaning. Parol evidence may therefore not be admitted to show that the defendant "promised" to do anything other than as is stated on the face of the agreement.

Id. at 698.

Similarly, Butcher seeks to contract the clear terms of the Authorization through parol evidence.

The trial court correctly found there was no genuine issue of material fact in this case. Butcher admits to executing the Authorization. The language of the Authorization is clear and unambiguous. The trial court's decision should be affirmed.

II. BUTCHER'S CLAIMS FOR RELIEF FOR TWO DISBURSEMENTS ARE BARRED BY THE STATUTE OF LIMITATIONS.

All parties agree the statute of limitations found at

Utah Code Ann. § 78-12-23 (1953) governs this dispute. That statute provides in part:

> Within six years:
>
> (2) An action upon any contract, obligation, or liability founded upon an instrument in writing, except those mentioned in Section 78-12-22.

All parties also agree that the statute of limitation period commences to run when a breach of a contract occurs. (Appellant's Brief, p. 11.) Butcher claims, however, that this universal standard is suspended in any dispute between a bank and its depositors. Again, Butcher's argument lacks authority and common sense.

The general rule, undisputed by Butcher, is that "a cause of action as right of action arises the moment an action may be maintained to enforce it, and the statute of limitations is then set in motion." O'Hair v. Kounalis, 23 Utah 2d 355, 463 P.2d 799, 800 (1970), citing Last Chance Ranch Co. v. Erickson, 82 Utah 475, 493, 25 P.2d 952 (1933). In a breach of contract case, the statute of limitations ordinarily begins to run when the breach occurs. Frederickson v. Knight Law Corporation, 667 P.2d 34, 36 (Utah 1983), citing M. H. Walker Realty Co. v. American Surety Co., 60 Utah 435, 211 P. 988 (1922).

Butcher asserts four instances of breach. As the statute of limitations runs from the date of each asserted breach, his right to recover expired on February 12, 1987, and

February 19, 1987, for the allegedly wrongful February 12, 1981 and February 19, 1981, disbursements.

The novel theory forwarded by Butcher has no precedent in any court. Butcher asserts that the provisions of Utah Code Ann. § 70A-4-406 tolls the commencement of the limitations period established by § 78-12-23 for up to one year. Section 70A-4-406 provides:

> (1) When a bank sends to its customer a statement of account accompanied by items paid in good faith in support of the debit entries or holds the statement and items pursuant to a request or instructions of its customer or otherwise in a reasonable manner makes the statement and items available to the customer, the customer must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature or any alteration on an item and must notify the bank promptly after the discovery thereof.
>
> (4) Without regard to care or lack of care of either the customer or the bank a customer who does not within one year from the time the statement and item are made available to the customer discover and report his unauthorized signature or any alteration on the face or back of an item or does not within three years from that time discover and report any unauthorized indorsement is precluded from asserting against the bank such unauthorized signature or indorsement or such alteration.

This attempt to join the two statutes into a seven year statute of limitations period is without legal basis and completely unsupported by the facts of this case.

A simple review of § 70A-4-406 reflects that it applies to a bank customer's unauthorized signature or

alteration of an item charged to his account. That is not the gravamen of plaintiff's Complaint. Instead, Butcher has alleged the bank violated a contractual obligation arising out of certain loan payments to third parties. The tortured legal argument forward by Butcher is not even supported by his own pleadings.

The threshold requirement of § 70A-4-406 is not even met. Here, there is no alteration to an "item" which triggers the protections and time periods of § 70A-4-406. All of the authorities cited by Butcher construing § 70A-4-406 involve forged instruments, not alleged breaches of contract, and are therefore inapplicable to this case.

Butcher claims that the Utah decision of State ex rel. Baker v. Intermountain Farmers Ass'n, 668 P.2d 503 (Utah 1983), supports his curious marriage of Utah Code Ann. § 78-12-23 and § 70A-4-406. The Utah Supreme Court in Baker, however, reviewed the commencement of the limitations period for claims under Utah's Uniform Disposition of Unclaimed Property Act, Utah Code Ann. § 78-44-1, et seq. In Baker, the court found that the statutory limitations period began to run when a debt is due and payable. The Baker case did not in any way address breach of contract actions, when the commencement date arises at the time of breach. Further, Baker did not permit the "tacking" of two limitations periods as Butcher contends.

There is simply no substantive rule of law which

supports Butcher's claims. The rules governing a bank's relations with its depositors and notification requirements do not encompass breach of contract actions posited by depositors.

Finally, Butcher's own pleadings fail to support his curious theory. The Complaint clearly sets forth a breach of contract claim, not a failure to pay a debt claim. The alleged wrongful act arose out of a putative breach of the loan documents (specifically the Authorization) not any alleged depositor-bank relationship.

CONCLUSION

Butcher provided the Respondent with a specific, written Authorization to perform certain acts. Respondent performed those acts in accord with the Authorization. Now, almost ten years after the execution of the Authorization, Butcher is attempting to contradict its specific terms with parol evidence. The clear and unambiguous terms of the Authorization bar Butcher's tardy attempts.

Further, Butcher's attempt to re-cast his pleadings into a new theory are futile. Butcher filed his breach of contract action too late to recover on two of his alleged claims. There is no precedent, in Utah or elsewhere, for Butcher's claim that Utah Code Ann. § 70A-4-406 extends the time for a filing of a breach of contract.

The District Court's decisions in both instances were correct. This Court should affirm those decisions.

DATED this 21st day of February, 1990.

PRINCE, YEATES & GELDZAHLER

Thomas M. Melton
J. Randall Call
Attorneys for Respondent

MAILING CERTIFICATE

I hereby certify that, on the 22nd day of February, 1990, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing BRIEF OF RESPONDENT to the following:

Douglas G. Mortensen
Kris C. R. Leonard
MATHESON, MORTENSEN & OLSEN
Attorneys for Appellants
648 East First South
Salt Lake City, UT 84102

2983F