No. 14,110

IN THE

United States Court of Appeals

For the Ninth Circuit

A. L. KAYE,
Plaintiff-Appellant,

vs.

BANK OF FAIRBANKS,
a Banking Corporation,
Defendant-Appellee.

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

Cases

Texts

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I.

FACTS.

For the purpose of clarity and brevity, we shall hereafter refer to the plaintiff-appellant as "Kaye" and to the defendant-appellee as "Bank".

Due to the obvious fact that counsel for Kaye went considerably beyond the record in stating the case in his brief, it seems necessary to clarify the fact situation with a brief resume.

Kaye filed his complaint against the Bank on November 7, 1952, wherein he alleged that on the 23rd

day of October, 1952, Kaye had on deposit in the Bank the sum of $1,480.00 in a special checking account, and that this money was the property of Kaye.

Kaye further alleged that on the 23rd day of October, 1952, the Bank wrongfully and willfully converted and disposed of said sum to its own use, and unlawfully refused to allow Kaye to withdraw the said money from the Bank.

The complaint prayed judgment in the sum of $1,480.00, together with interest, costs and attorney's fees. (Tr. 3, 4.)

The Bank answered admitting paragraphs I and II of complaint and denying paragraph III. The Bank also included in its answer, two affirmative defenses—first, that the complaint did not state facts sufficient upon which to base a claim against the defendant Bank and, secondly, that the funds deposited by Kaye in the Bank were the property of Kaye and were deposited without instructions and were not a special fund; that at the time of said deposit, Kaye was indebted to the Bank in a sum far in excess of said deposit, and that the said indebtedness was due and owing by Kaye to the Bank at that time, and, therefore, the Bank applied said funds on deposit as a part payment of the indebtedness due the Bank from Kaye. (Tr. 4-6.)

The cause came on for trial on the merits before the Court without a jury on the 8th day of October, 1953.

The testimony produced by Kaye at the trial showed conclusively that at the time the Bank debited Kaye's account for the sum of $1,480.00, as shown by Plaintiff's Exhibit "A" (Tr. 10, 11) Kaye was indebted to the Bank in a sum in excess of $12,000.00; that there were no instructions or restrictions on withdrawals against Kaye's account; that the withdrawals included in Plaintiff's Exhibit "A" were for attorney's fees and expenses incurred by the Bank in bringing a suit to foreclose the mortgages securing the indebtedness, and that the notes representing the $12,000.00 indebtedness by Kaye to the Bank provided that if the note were not paid at maturity and were placed in the hands of an attorney for collection, or suit were brought thereon, the makers of the notes agreed to pay all costs of collection, including a reasonable attorney's fee. (Tr. 25-32, Defendant's Collective Exhibit No. 1.)

The indebtedness evidenced by Defendant's Collective Exhibit No. 1 was due and owing prior to the time the Bank debited Kaye's account.

Kaye, himself, testified that on October 24, 1952, he had an account in the Bank and that this account was charged with the said sum of $1,480.00. (Tr. 33.) At no time during the testimony did Kaye make any statement that the account was a special one and not subject to regular withdrawals. At no time did Kaye deny being indebted to the Bank far in excess of the amount debited by the Bank.

At the conclusion of the testimony and arguments, the trial Court found in favor of the Bank and against Kaye, and entered findings of fact, conclusions of law, and judgment accordingly. (Tr. 34-39.)

II.

ARGUMENT.

In his statement of points on appeal, Kaye had enumerated three. In his specification of errors in his brief, Kaye has but one point; namely, that the Court erred in that its judgment is contrary to the evidence and contrary to the applicable law. After the statement of this point, Kaye proceeds, in his argument, to quote out of context from opinions and citations and various texts, apparently without ascertaining whether or not the quotations accurately sum up the points involved. Nobody in the whole world knows better than the Appellate Court that sentences out of context rarely mean what they seem to say!

It is well settled that when a depositor is indebted to a Bank, and the debt is mutual—that is, between the same parties in the same right—the Bank may apply the deposit, or such portion thereof as may be necessary, to the payment due it by the depositor, provided there is no express instruction to the contrary and the deposit is not specifically applicable to some other purpose. (7 *Am. Jur.* Sec. 629; *U. S. v. Butterworth-Judson Corporation,* 267 U.S. 387.)

The right of a Bank to apply a depositor's funds held by the Bank to the payment of his indebtedness presupposes: (a) that the funds deposited in the Bank by the depositor were the property of the latter, (b) that the funds were deposited without restrictions and was not a special fund; and (c) an existing indebtedness then due and owing from the depositor to the Bank. Where the right to make such application has accrued, the Bank may do so without notice to the depositor. (*Miche on Banks and Banking,* Volume 5A, 1950 Edition, page 278, Sec. 115(a).)

A complete examination of the record discloses that all of the particular conditions mentioned above, and contained in *Miche on Banks and Banking* were present in the case at bar; thus it is apparent that the question is moot as to the Bank's right to offset Kaye's deposit. *Nelson v. Bank of America National Trust and Savings Association,* 173 P. (2d) 322. See also: *Continental National Bank v. Moore,* 299 F. 270, wherein this Ninth Circuit Court of Appeals held that the right of setoff attaches on money of a customer deposited with a bank in the usual course of business.

Kaye argues that with the suit to foreclose on file, it was incumbent on the Bank to show that the security was inadequate, and cites certain cases, namely, the *Forastiere* case and *Seaboard Finance Company* case on page 10 of his brief to support this argument. However, Kaye overlooks the fact that the general rule in Alaska is that a litigant may pursue as many

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remedies as he has, but can have only one recovery. For this reason the *Forastiere* case does not apply, because it turns upon the construction of a Massachusetts statute which is at variance with the concurrent or cumulative remedies rule. (18 *Am. Jur.* Sec. 13, page 136; *Schaffer v. Sellar,* 64 P. (2d) 1334.)

The same situation obtains in the *Seaboard Finance Company* case which was decided upon the express terms of a Utah statute and consequently is inapplicable here. The Utah statute mentioned specifically prohibits offset by the Bank until the security had been exhausted. The applicable Alaska law has no such provision.

On page 11 of his brief, Kaye argues that it is generally held that attorney's fees cannot be allowed where the amount is not stipulated, unless there is proof of the value of the attorney's services, and cites several cases, none of which is applicable here since the Alaska law does not require proof before the trial Court can fix attorney's fees. The *Getman* case, the *Holland Packing Company* case, and the *Holmes* case cited by Kaye on page 11 of his brief all were decided by the Supreme Court of Oklahoma in construing an Oklahoma statute which is different from the Alaska law, and, consequently, these cases have no bearing on the case at bar. The *Beindorf* case also cited by Kaye on page 11 of his brief again was an Oklahoma case in which the Court held that a contract between two parties which did not provide for attorney's fees would not permit the Court to allow fees in an action on the contract. Again we

wish to point out that this is not applicable for two reasons—in the first place the Alaska law is different from the Oklahoma statute, and, secondly, the notes signed by Kaye and admitted in evidence as Bank's Exhibit No. 1 all specifically provide for the payment of attorney's fees in addition to principal and interest.

For some strange reason, Kaye cites "11 C.J. page 282" in the second paragraph on page 11 of his brief. This citation is completely meaningless since it refers to "The Last Clear Chance Doctrine" and obviously was not even checked by Kaye's counsel.

Kaye argues on page 11 of his brief that attorney's fees are limited in amount to such sum as the evidence shows to be reasonable. The question of reasonableness of fees in this case was never presented. At no time did Kaye ever object to the amount of attorney's fees, nor is there any allegation contained in his complaint that the fees are unreasonable, and there was no testimony to the effect that the fees were unreasonable. Therefore, the cases cited by Kaye are inapplicable.

In the conclusion of Kaye's brief, his counsel has resorted to the antiquated and outmoded and shoddy trick of personal vituperation against the Bank and its attorney. Kaye's counsel could well take heed of the admonition given by Joseph Addison when he once said, "It is ridiculous for any man to criticize the works of another if he has not distinguished himself by his own performances."

It is an unbelievable arrogance to suggest that the members of this distinguished Court of Appeals could be misled by such inaccurate interpretation of the facts and the law. It occurs to me that a quotation from an eminent member of the Circuit Court of Appeals for the District of Columbia can well be used to sum up my feeling on the matter: "We can sometimes bear with an amiable knave, but a fool has no place in a profession such as ours."

III.

CONCLUSION.

It is respectfully urged that from all of the facts and circumstances and evidence introduced at the trial, and from all of the law applicable to these facts, it is obvious that the trial Court did not err in finding for the Bank and that the judgment of the trial Court is wholly supported by the law and the evidence, and should be affirmed.

Dated, Fairbanks, Alaska,
May 24, 1954.

Respectfully submitted,
MAURICE T. JOHNSON,
Attorney for Defendant-Appellee.