FILED
United States Court of Appeals
Tenth Circuit

AUG 14 1989

ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BOWIE LIVESTOCK COMMISSION, INC.,

Plaintiff,

BAGBY LAND AND CATTLE, INC.

Plaintiff-Intervenor,

v.

CONTINENTAL FEDERAL SAVINGS AND LOAN ASSOCIATION,

Defendant-Cross-Claimant-Appellee,

and

JERRY LYNN FINLEY, doing business as Southern Cross Cattle Co.; ROBERT OLIVER; and MOLLY GOETTELMAN,

Defendants,

and

v.

MARVIN HOLLAND AND OUACHITA PCA,

Third-party-defendants,

and

JOHN ROSSO, doing business as John Rosso Cattle Co.,

Third-party-defendant-Appellant.

No. 87-2876
(D.C. No. 86-0812-A)
(W.D. Oklahoma)

ORDER AND JUDGMENT*

Before **MOORE, ANDERSON**, and **BRORBY**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Appellant Rosso, a third party defendant, appeals from an order of the district court granting defendant-cross claimant, Continental Federal Savings and Loan Association's cross-motion for summary judgment. The court also directed entry of final judgment as to this claim pursuant to Rule 54(b).

Plaintiff Bowie Livestock commenced suit against defendants, Continental Federal Savings and Loan, Jerry Lynn Finley, Molly Goettleman, and Robert Oliver for collection of a draft executed by Finley against his account at Continental Federal. Continental Federal deposited $76,440.37, the balance of Finley's account, into the court registry and interpleaded third party defendants, all of whom had claims against the account. Rosso counterclaimed against Continental Federal. He alleged that Continental Federal was accountable, as a matter of law, for $75,875.00, the face

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

amount of a check Finley had issued to him, because it had failed to settle for it before midnight of the banking day of receipt amount. See Okla. Stat. tit. 12A, § 4-302.[1]

Rosso deposited the check from Finley with the First National Bank of Stigler, Oklahoma, which sent it through normal banking channels for collection. Continental Federal returned the check unpaid marked "refer to maker." On February 5, 1986, First National Bank sent the same check to Continental Federal by certified mail.[2] Continental Federal received it February 10 and returned it February 11.

On appeal, Rosso argues that even though Continental Federal complied with the second phrase of § 4-302 by returning the check prior to the bank's midnight deadline, it must be held accountable because it did not settle for it on the banking day of receipt. Rosso argues that § 4-302 contains two deadlines, both of which must be met in order for the bank to avoid being held accountable:

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1 Okla. Stat. tit. 12A, § 4-302 provides:

> In the absence of a valid defense such as breach of a presentment warranty . . ., settlement effected or the like, if an item is presented on and received by a payor bank the bank is accountable for the amount of
>
> (a) a demand item other than a documentary draft whether properly payable or not if the bank, in any case where it is not also the depositary bank, retains the item beyond midnight of the banking day of receipt without settling for it or, regardless of whether it is also the depositary bank, does not pay or return the item or sent notice of dishonor until after its midnight deadline.

2 This is a valid method of presentment. See Okla. Stat. tit. 12A, § 4-204(2)(a).

the bank must settle[3] for the item before midnight of the banking day of receipt[4] and it must pay, dishonor, or return the item before its midnight deadline.[5]

When interpreting a statute a court must "seek out and ascertain the legislative intent. Where the language of the statute is clear, plain and unambiguous, the duty of interpretation does not arise and rules designed to aid doubtful meanings do not come into play." Pueblo Aircraft Serv. Inc. v. City of Pueblo, 679 F.2d 805, 811 (10th Cir. 1982), cert. denied, 459 U.S. 1126 (1983).

Here the language is clear. The two phrases are separated by the word "or." In the first phrase, the bank has the right to conditionally settle an item. This right is taken away in the second phrase, and the bank may only pay, dishonor, or return the item. We reject the idea that the legislature did not knowingly construct the phrases as they appear. If, as Rosso argues, the second phrase does something unintended to the first the legislature alone has the power to rewrite the statute. Joseph v. United States Civil Serv. Comm'n, 554 F.2d 1140, 1155 (D.C. Cir. 1977)("[W]e cannot rewrite the statute to compensate for

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3 Settle means "to pay in cash, by clearing house settlement, in a charge or credit or by remittance, or otherwise as instructed. A settlement may be either provisional or final." Okla. Stat. tit. 12A, § 4-104(j).

4 The banking day is defined as "that part of any day on which a bank is open to the public for carrying on substantially all of its banking functions." Okla. Stat. tit. 12A, § 4-104(c).

5 The bank's midnight deadline is "midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later." Okla. Stat. tit. 12A, § 4-104(h).

unforeseen circumstances. That power belongs to the legislature alone"). Here the legislature clearly intended "or" to mean "or." We are well aware of the rule of statutory construction that the courts are not to interpret a statute in a manner to eliminate part of the statute. That does not happen here. The phrases are separate. Appellant is proceeding on the incorrect premise that the phrases are equivalent.

The judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge