EPSTEIN v. KANSAS CITY LIFE INSURANCE COMPANY.

4-2718

Opinion delivered November 7, 1932.

RECEIVERS—LOSS IN INSOLVENT BANK.—A receiver and the surety on his bond are liable to account for and pay into court all moneys which have come into his hands as receiver, and are not discharged by insolvency of the bank in which the moneys were deposited.

Appeal from Chicot Chancery Court; *E. G. Hammock,* Chancellor; affirmed.

STATEMENT BY THE COURT.

This appeal is prosecuted by appellant, surety on a receiver's bond, from a judgment holding him liable as surety for the payment of certain money collected by the receiver and deposited by said receiver in the Chicot Trust Company, which failed, resulting in the loss of the amount so deposited.

The Sunnyside property was in litigation and D. S. Clark was appointed receiver to perform certain duties specified, and required to make bond in the sum of $1,000. He was to take charge of funds in the registry of the court, and to rent the place and collect the rents, etc. He filed with the clerk his bond, with a penalty of $1,000, with Sam Epstein, appellant, as surety thereon, conditioned as follows: "Whereas the said D. S. Clark has been appointed receiver in the above-styled cause; now therefore, if the said D. S. Clark shall faithfully discharge the duties of receiver in the aforesaid suit and obey the orders of the court therein, then this obligation is to be void; otherwise to remain in full force and effect."

The receiver filed his report on April 6, 1931, stating that the Sunnyside property in litigation, and for which he was appointed receiver, was rented to Sam Epstein for

the year 1930 at a rental of $5,000; that, on November 15, 1930, Saturday, Epstein paid to him, as receiver, the rental of $5,000; and that on the same day the money was deposited by him in the Chicot Trust Company, Lake Village, Arkansas, to his credit, D. S. Clark, receiver. That on the morning of November 17, Monday, said bank failed to open its doors for business, and was taken over by the State Bank Commissioner for liquidation.

It was further stated that the receiver made the deposit without any knowledge of the insolvency of the bank, and had no reason to think that it was insolvent, but had every reason to believe that said bank was solvent, and was so advised by its president, who practically controlled it, on November 14. That he acted with due diligence and prudence in making such deposit, and that, if the money was lost, it was through no fault of his. Prayed that the deposit be declared a trust fund, that he be discharged as receiver, and that his bondsman be released.

On April 6 appellee company filed its motion for judgment against the receiver and Sam Epstein, surety on the bond, alleging his appointment and qualification, that he had rented the Sunnyside plantation to Sam Epstein for $5,000 for the year 1930, and the contract was approved by the court; and that Clark qualified as receiver and gave bond in the sum of $1,000 with Sam Epstein as surety. A copy of the bond was exhibited with the motion; that the receiver received payment of the rental money, but failed and refused to pay same over to appellee when requested to do so, and that it was entitled to the rental and to judgment against the receiver for $5,000 and Sam Epstein, surety, for $1,000, and prayed judgment accordingly.

In response to the motion, Epstein admitted he had executed the bond, but denied liability thereon, alleging that the receiver had collected the $5,000 for which the plantation was rented, and deposited same in the bank until he could obtain an order of the court authorizing him to pay it out; that the bank was open for business

when the deposit was made; that neither the receiver nor Epstein, his surety, had any knowledge that it was in an insolvent condition, but, on the contrary, believed, and had every right to do so, that said bank was solvent; and that in making the deposit the receiver acted as any prudent man would have done in depositing the money in what was regarded a solvent bank; that the bank failed on the 17th day of November, none of the money deposited by the receiver having been taken therefrom; denied liability on the bond, quoting the conditions already set out.

A demurrer was filed to appellant's response and sustained by the court, and, appellant declining to plead further, judgment was rendered against the receiver for the amount deposited in the bank and against Epstein, the surety, in the sum of $1,000, from which he prosecutes this appeal.

James R. Yerger, for appellant.

Carmichael & Hendricks, for appellee.

KIRBY, J., (after stating the facts). It is undisputed that the receiver collected the $5,000 rental as receiver, which he failed to pay into the court, though ordered to do so, and, upon appellee's motion for judgment against Clark as receiver for $5,000 and Sam Epstein, surety on his bond, for $1,000, the amount of the bond signed by the surety, the judgment was rendered.

Appellant insists that he was not bound, under the terms of the bond, to pay the amount of the penalty thereof for the money collected by the receiver and deposited by him in the bank which failed, resulting in the loss thereof. It is true the condition of the bond is not in the language provided in the statute, § 8600, Crawford & Moses' Digest, but it is in accordance with the requirements of the provisions of § 8614 thereof, requiring the receiver to execute a bond with one or more sureties approved by the court, in such form as the court shall direct, "to the effect that he will faithfully discharge the duties of receiver in the action and obey the orders of the court therein." The powers of such receiver are designated

in § 8615 of the Digest, to receive rents, collect debts, etc.; and the receiver and his surety under the bond, conditioned as it is to the effect that he will faithfully discharge the duties of receiver in the action and obey the orders of the court therein, were bound to the payment into the court of all moneys or assets which shall come into his hands as receiver in the case, according to the order of the court, as though it had been so expressly stipulated in the language of the statute, said § 8600, Crawford & Moses' Digest.

If there had been no statement of it relative to the execution of the bond and its liability under the later statute, which is in nowise in conflict, but is in harmony, with the first statute, a surety on a receiver's bond would have been bound to account for and pay over moneys collected by the receiver upon the order of the court. In *National Surety Company* v. *Byrd,* 179 Ark. 688, 17 S. W. (2d) 876, the court held that the receiver and the sureties on his bond were bound to account for and pay into the court, when required by its order, all money and assets coming into his hands as such receiver, and the failure to make such payment was not excused by the insolvency of a bank in which such funds were deposited. It was there said:

"The receiver is an officer of the court appointing him, and the condition of the receiver's bond, as prescribed by statute, is different from that required of administrators, the receiver being bound to account for and pay into court all money or assets which shall come into his hands as such receiver, and in that respect like the bonds of public officials, requiring them to account for and pay over money coming into their hands as such. Sections 1096, 2832, 10,029, Crawford & Moses' Digest.

We find no error in the record, and the judgment is affirmed.