

LIBERIA UNITED BANK, INC. (LUBI) by and thru its President, Petitioner, v. **HIS HONOUR TIMOTHY Z. SWOPE**, Assigned Circuit Judge, Civil Law Court, Sixth Judicial Circuit, Montserrado County, and **NOUHOME BOUKOUN**, by and thru its Legal Representative, **ABDALLAH DAOU**, Respondents

APPEAL FROM RULING OF THE JUSTICE IN CHAMBERS DENYING THE PETITION FOR THE ISSUANCE OF A WRIT OF CERTIORARI.

Heard: April 12, 1999. Decided: June 4, 1999.

1. An answer which both denies and avoids is properly dismissible for inconsistency and contradiction.
2. Where an answer both denies and avoids, the defendant will be ruled to a general denial of the allegations contained in the complaint.
3. A pleading may state as a counter-claim against an opposing party any claim triable in the court in which the action was brought and belonging to the same class as the claim made by the opposing party.
4. The contract of a guarantor is his own separate contract; it is in the nature of a warranty by him that the thing guaranteed to be done by the principal shall be done, and is not merely an engagement jointly with the principal to do the thing.
5. A guarantor, not being a joint contractor with his principal, is not bound to do what the principal has contracted to do, like a surety, but only to answer for the consequences of his principal's default.
6. A surety is an insurer of the debt, while a guarantor is an insurer of solvency of the debtor.
7. A party who pleads affirmatively should admit the truthfulness of the claim of the plaintiff before justifying or denying that such plaintiff is not entitled to the claim made by him and that the defendant is excused from liability in such a case due to the conduct of the plaintiff.
8. A plea in justification or excuse admits the facts alleged by the plaintiff, but in effect denies that the plaintiff had at anytime any good cause of action.

Co-respondent Abdallah Daou, legal representative of a local foreign currency exchange agency, brought an action of damages for wrong against petitioner bank, in

the Civil Law Court of the Sixth Judicial Circuit, Montserrado County, alleging among other things that petitioner froze and withheld its two separate accounts, thereby denying access to its accounts in contravention of the law. Petitioner bank filed its answer, denying the truthfulness of the complaint and at the same time asserting a plea of justification. Finding the bank's answer to be evasive and contradictory, the judge dismissed it, and placed the bank on bare denial. Not satisfied with this ruling, the bank filed a petition for a writ of certiorari to the Supreme Court.

The Justice in Chambers also found the petitioner's answer to be evasive and contradictory, and accordingly denied and dismissed the petition, from which ruling petitioner appealed to the Supreme Court *en banc* for final review and determination.

The Supreme Court upon review of the records, noted that the answer filed by petitioner was evasive, contradictory and inconsistent, and that it denies and at the same time justifies the allegations of the plaintiff. Accordingly the Court *affirmed* the ruling of the Chambers Justice, holding that the trial judge properly dismissed petitioner's answer and ruled it on bare denial.

Charles Abdulai of the Watch Law Chambers, Inc. appeared for petitioner. *Francis S. Korépor, Sr.*, of the Tiala Law Associates, Inc. appeared for respondents.

MR. JUSTICE SACKOR delivered the opinion of the Court.

This is an appeal from the ruling of Mr. Justice Morris denying the writ of certiorari in an action of damages for wrong during the October, A. D. 1996 Term of this Court. Mr. Justice Morris denied the issuance of this writ on grounds that the answer of the petitioner bank was evasive, contradictory, and inconsistent, thereby upholding the ruling of the trial judge dismissing the answer of the petitioner on the law issues.

The facts gathered from the records in this case show that correspondent herein, Abdallah Daou, legal representative of Nouhome Boukoun, a local foreign currency exchange agency, brought an action of damages for wrong on the 23rd day of April A. D. 1997 against the Liberian United Bank, petitioner herein, at the Sixth Judicial Circuit Court for Montserrado County. The plaintiff alleged among other things that the petitioner froze and withheld its two separate accounts thereby denying the plaintiff, access to his accounts in contravention of the law.

The bank filed its answer on the 3rd day of May A. D. 1997, denying the complaint of the plaintiff. The defendant bank, specifically in Count 5 of its answer, denied ever freezing plaintiff's accounts, or releasing funds from said accounts or dishonoring plaintiff checks. Instead, the defendant bank counter-claimed the amount of US\$14,500.00, representing foreign checks counter-endorsed by plaintiff alongside the named payees of the church which were encashed by the bank but later dishonored by the drawee bank in America. The defendant bank also contended in said count thereof, that the plaintiff was liable since he guaranteed payment in the event the checks were dishonored. Defendant maintained that it would credit plaintiff's accounts should he refund the value of the dishonored checks amounting to the sum of US\$14,500.00. Finally, defendant bank alleged in count 8 of its answer that the plaintiff defrauded the said bank and fraudulently deprived the bank of its hard currency, thereby demanding restitution of the amount from the plaintiff. A reply was filed and pleadings in this case rested.

The trial judge, His Honour Timothy Z. Swope, ruled on the law issues on the 29th day of October A. D. 1997 and dismissed the bank's answer thereby placing the defendant bank on a bare denial on grounds that its answer was evasive and contradictory. The judge also ruled that the bank has adequate remedy at law to institute a separate and distinct action against the plaintiff for his counter-endorsement of said checks.

On the 7th day of November A. D. 1997, the defendant bank fled to this court upon a seven-count petition for a writ of certiorari. The alternative writ was accordingly issued, served, and returned served. The respondents filed a six-count returns. The petition was assigned, heard, and denied on the 22nd day of May, A. D. 1998, by Mr. Justice Morris, then presiding in Chambers of this court. Mr. Justice Morris basically denied the issuance of this writ on grounds that petitioner bank denied the truthfulness of the allegations as contained in the plaintiff's complaint and at the same time set a plea of justification of the plaintiff's claims. Thus, Mr. Justice Morris held that the petitioner bank's answer was a bad plea which was evasive and contradictory. The petitioner bank being dissatisfied with the ruling of the Chambers Justice, excepted thereto and prayed for an appeal to this court *en banc* for final review and determination.

The petitioner contended in count 4 of its answer and argued before this Court that the trial judge distorted the entire issues raised in the answer and ruled that it was a separate and distinct action against a person counter-endorsing a check rather than holding the plaintiff liable in a counter-claim upon the contract he entered with the

Bank by this counter-endorsement. Petitioner averred that the issue of plaintiff counter-endorsing alongside with the named payees of the dishonored instrument was raised in its answer, but did not claim the attention of the trial judge when he ruled that the petitioner has a separate and distinct course of action against the plaintiff

It is also argued by petitioner that the trial judge dismissed its entire answer placing it on a bare denial without specifically stating what counts in the reply were sustained against which count in the answer. Petitioner strongly maintained that the dismissal of its answer placing it on a bare denial will prevent petitioner from introducing into evidence the dishonored foreign checks counter-endorsed alongside by Co-respondent Daou with the named payees during the trial.

Petitioner argued that the ruling of the trial judge that counter-endorsing a check is criminal in nature is erroneous and that Co-respondent Daou should be held liable in a civil action when the named payees do not have the financial capability and were all charged with criminal offenses through the same act. Thus, petitioner stressed that the trial judge failed to pass upon the issue of counter-claim pursuant to the Civil Procedure Law, Rev. Code 1:9.9.

The second issue raised and argued by petitioner is that the ruling of the trial judge on the law issues is erroneous, in that, it manifestly prejudices the rights of the petitioner for which certiorari will lie to review and correct such an immediate order or interlocutory judgment, for which petitioner prayed this Court to grant certiorari and remand the case for the disposition of the law issues.

The respondents contended that the counter-claim raised by the defendant, petitioner herein, is criminal in nature and does not belong to the same class, in that the petitioner in count 8 of its answer alleged that the plaintiff defrauded and fraudulently deprived the petitioner of its hard currency in the amount of USD\$14,500.00 dollars. As such, the respondents argued that the counter-claim of the petitioner bank was not properly made in the context of Civil Procedure Law, Rev. Code 1:9.9, because of the criminal nature of the same claim.

The third issue raised and argued before this court is that an answer which both denies and avoids is properly dismissible for inconsistency and contradiction, in that, the petitioner did not admit or confess the truthfulness of unlawfully freezing the plaintiffs accounts but denies and sets a plea for justification. In this regard, respondents maintained that the petitioner's answer was bad, evasive and

contradictory and was therefore dismissed by the trial judge and that the ruling of the Chambers Justice confirming the dismissal of the petitioner's answer is sound in law.

Respondents averred that certiorari will not ordinarily be granted before the termination of a matter in the trial court unless it appears that the trial court abused its power to the prejudice of the petitioner. Respondents contended that the trial judge has not abused his discretion to the prejudice of the petitioner.

Respondents argued that the petitioner bank upon accepting the checks, was satisfied that the drawer existed; that his signature was genuine and that he had the capacity and authority to draw the instrument; and of the existence of the payee and his capacity to endorse the instrument. Respondents strongly contended that plaintiff's representative, Abdallah Daou, was not a payee in the context of the law, and that the payees of the checks in question were available and took full responsibility for their own acts and that the defendant should have directed its action of recovery against such payees. The respondents therefore requested this Honourable Court to dismiss petitioner's petition and order the trial court to resume jurisdiction over this case and proceed with its trial. The facts and circumstance in this case present the following issues for the determination of this case:

1. Whether or not defendant's answer is dismissible for inconsistency when it denies plaintiff's claims but sets a plea of justification.
2. Whether or not defendant's counter-claim is cognizable before the trial court.

We shall decide the issues in the reverse order. As to the issue relating to defendant's counter-claims, petitioner contended that a check issued to a third party is a negotiable instrument and any person who endorses such instrument alongside with the named payee is liable upon contract into which he enters with the encashing bank by this endorsement. As such, petitioner maintained that the trial judge erroneously ruled that the petitioner has a separate and distinct action against the plaintiff who counter-endorsed the checks for the purpose of identifying the named payees. The respondents on the other hand contended that count 8 of petitioner's answer alleged that plaintiff defrauded and fraudulently deprived the petitioner bank of the sum of US\$ 14,500.00, representing the amount of the dishonored checks counter-endorsed by the plaintiff. Hence, respondents argued that defendant did not raise a valid counter-claim in keeping with law, in that, the plaintiff's claim is civil in nature but the counter-claim of defendant is criminal in nature and therefore not cognizable before the court as it does not belong to the same class as the claim made by the plaintiff.

A recourse to our statute governing counter-claims in our jurisdiction reveals that "a pleading may state as a counter-claim against an opposing party any claim triable in the court in which the action was brought and belonging to the same class as the claim made by the opposing party, as those classes are defined by section 6.1 of this title". Civil Procedure Law, Rev. Code 1: 9.9. A counter-claim is permissible in our jurisdiction by a pleading of a defendant against an opposing party for any claim triable in the court wherein the action is instituted and such claim belongs to the same class as the claim made by the opposing party. The counter-claim should therefore be cognizable in the trial court and also belong to the same class of plaintiff's claim. In this case, the court observes count 8 of petitioner's answer wherein the petitioner, defendant in the court below, asserted that the plaintiff defrauded and fraudulently deprived the petitioner of its hard currency of US\$14,500, the value of the dishonored checks counter-endorsed by the plaintiff. This court holds that the defendant's counter-claim is criminal in nature and does not belong to the same class as the claim made by the plaintiff. Defendant's counter-claim raised the issue of criminality by alleging that the plaintiff defrauded the defendant bank and fraudulently deprived the said bank of the amount of US\$14,500.00 for the dishonored checks. The allegation of defendant, petitioner herein, is cognizable before a criminal court which has trial jurisdiction in such cases made and provided by law. Hence, it is not cognizable before the trial court wherein this case before us was instituted by the plaintiff, co-respondent herein, and does not belong to the same class as the claim made by the plaintiff. The defendant did not therefore raise a valid counter-claim in the trial court in contemplation of the above quoted statute.

Petitioner also alleged in count 5 of its answer that the plaintiff is liable as a guarantor for the payment of the value of said checks in the event the checks were dishonored. The respondents contended in their brief that Co-respondent Daou counter-endorsed the checks for the purpose of locating and identifying the named payees of the Church, and that the Church wrote the president of the petitioner bank on May 18, 1993 assuming full responsibility for the dishonored checks should the petitioner bank send photocopies of said checks to the Church for handling in the interest of refunding the amount thru the foreign mission. The respondents also argued that the petitioner bank neither submitted the photocopies of the checks to the Church nor commenced any form of action against the Church members who were present and available.

Law writers have held that "the contract of a guarantor is his own separate contract; it is in the nature of a warranty by him that the thing guaranteed to be done by the

principal shall be done, and is not merely an engagement jointly with the principal to do the thing. A guarantor, not being a joint contractor with his principal, is not bound to do what the principal has contracted to do, like a surety, but only to answer for the consequences of his principal's default. A surety is an insurer of the debt. A guarantor is an insurer of solvency of the debtor. " 11 AM. JUR. 2d., *Bills & Notes*, § 533.

The language of the above quoted universal principle of law clearly shows that a guarantor is secondarily liable in the event of nonperformance or non-payment by principal. In other words, the liability of a guarantor who signs a contract of guaranty of payment upon a negotiable instrument by endorsement, as in the instant case, has a secondary nature of the obligation of such a person upon the default of his principal but not primarily liable. The petitioner has the right to sue the plaintiff upon the contract of guaranty immediately upon failure of the principal debtor, the Spiritual Church of Christ located in Clara Town, which claims the full responsibility for the payment of the value of the dishonored checks. The communication of the Church to the petitioner bank taking full responsibility of the dishonored checks negates petitioner's averment that the plaintiff guaranteed payment in the event the checks were dishonored. It was therefore incumbent upon the petitioner bank to have instituted an action against the church whose members were payees of the dishonored checks for restitution of the value of said checks. The trial judge therefore properly ruled that the petitioner bank has a separate and distinct course of action against the plaintiff who counter-endorsed the dishonored checks as a guarantor. We shall now decide the second and final issues in this case which is whether or not defendant's answer is dismissible for inconsistency when it denies plaintiff's claim but sets up a plea of justification.

A careful perusal of count five of petitioner's answer denying freezing plaintiff's accounts or dishonoring its checks, but counter-claiming the sum of US\$14,500.00 as value for the foreign checks counter-endorsed by plaintiff and encashed by the petitioner bank but later dishonored by the payer bank in the United States of America. In count 7 of petitioner's answer, petitioner also contended that plaintiff's accounts will be credited should he refund the said amount.

Justice Morris, the Chambers Justice, ruled on the issue of the consistency of petitioner's answer as follows:

"This Court says that the averments contained in petitioner's answer deny freezing the accounts or dishonoring any checks of the plaintiff but counterclaim the amount

of US\$14,500.00 for reason earlier stated in this ruling. This counter-claim of petitioner bank denies plaintiff's access to its accounts as evidenced by the refusal of the petitioner bank to accept and encash plaintiff's two (2) checks dated April 28, 1993 in the amount of LD\$20,500.00; June 30, 1993 LD\$25,000.00. Further, said court also classifies the plaintiff as a guarantor instead of an endorser. This means that plaintiff is secondarily liable upon the failure and default of the named payees to reconstitute the amount of the checks. BLACKS LAW DICTIONARY 705

The petitioner's answer denies the claim made by the plaintiff and at the same time sets up a plea of justification of plaintiff's claim. As far back as in 1907, this Court held that "when an answer both denies the truthfulness of the complaint and sets up the plea of justification, it is evasive and contradictory, and is properly ruled out by the trial court "*Ditchfield v. Dossen*, 1 LLR 492 (1907).

In the case, *Shaheen v. Compagnie Francaise De L' Afrique Accidental*, 13 LLR 278, 293 (1958), this Court also held that "where an answer both denies and avoids, the defendant will be ruled to a general denial of the allegations contained in the complaint." In that case, appellant Shaheen instituted an action of debt against a French business firm, alleging that he deposited with the French firm the sum of \$48,800.00 and obtained a receipt thereof. Upon application for withdrawal of said amount, the company failed and refused to pay. The company filed an answer raising several issues in addition to denying the receipt of the amount and at the same time alleging that its books had shown that the amount of \$48,800.00 sued for had already been withdrawn. The trial judge dismissed the company's answer upon the responsive pleading of the plaintiff for its evasiveness and contradiction. This court confirmed the judgment of the trial court.

The petitioner strongly relies on the case *Clara Town Engineers et al. v. Tucker*, 23 LLR 211 (1974), wherein this court held that "A trial court cannot rule a case to trial on a bare denial after dismissing the answer on one point only without ruling on all the issues of law raised by the pleadings." In the *Clara Town Engineer's* case, Arthur Tucker brought an action of damages for personal injuries to his person against the Clara Town Engineer Inc. The defendant filed an answer raising several issues including among others, contributory negligence and that the complaint was inconsistent. The trial judge did not pass upon all the legal issues raised in the defendant's answer, but dismissed the entire answer on ground that it was inconsistent and evasive because the said answer denied the truthfulness of the complaint and set up the plea of justification. The defendant was ruled to a bare denial. The jury, following a trial, awarded Appellee Tucker the sum of \$8,101.00, which verdict was confirmed by the

trial judge. This Court upon appeal reversed the judgment of the lower court and remanded the case for proper trial for reasons that the trial judge did not rule on all the issues of law but dismissed defendant's answer on one point.

In the instant case, the trial judge passed upon the issue of defendant's counter-claim that the defendant has a separate and distinct remedy at law against the plaintiff for counter-endorsing the dishonored checks. Secondly, the judge also ruled that one who passes a bad check is cognizable before criminal court for theft of property. In other words, count 8 of the petitioner's answer as stated earlier, charges the plaintiff for defrauding the petitioner bank and fraudulently depriving said bank of the sum of US\$14,500.00. The trial judge therefore disposed of the issues of law as raised in the pleadings of the parties in this case. The facts and circumstances in the *Clara Town Engineer* case and the case at bar are not analogous.

In the case *Benson v. Johnson*, 23LLR 290, 294 (1974), this Court held that "when an answer in a proceeding both denies and avoids, the defendant will be ruled to a general denial of the allegations contained in the complaint." In the *Benson* case, appellee Johnson brought a suit for discovery against C. A. Benson, surviving executor of the estate of his mother's husband. Appellee Johnson asked appellant Benson to disclose to him the location of the property and turn same over to him. The executor filed an answer denying his association with the estate, and at the same time contended that the deed from Mary Morris to James N. Ferguson was not genuine so the testator could not devise the property containing the five acres of land. The trial judge dismissed the answer and ruled appellant Benson to a bare denial. The trial judge rendered a final judgment subsequent to trial, placing appellee Johnson in possession of the property. Appellant Benson appealed to this court. This court held that the answer was clearly evasive, contradictory, inconsistent and presented to triable issue with respect to the disclosure and discovery of the property.

Our statute provides for affirmative defenses in our jurisdiction. The relevant statutory provision provides that "in pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, duress, estoppel, failure of consideration, fraud, illegality, injury by a fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense." Civil Procedure Law, Rev. Code 1: 9.8(4). It is an elementary principle of law, procedure and practice in our jurisdiction that a party who pleads affirmatively, should admit the truthfulness of the claim of the plaintiff before justifying or denying that such plaintiff is not entitled to the claim made by him and

that the defendant is excused from liability in such a case due to the conduct of the plaintiff.

It is further held that "the defense of new matter, either expressly or by implication, admits the averments of the complaint, and alleges facts that destroy their effect or defeat them. In other words, this defense concedes that the plaintiff once had a good cause of action, but insists that it no longer exists." 61 AM. JUR. 2d, *Pleadings*, § 153. Moreover, it is held that "A plea in justification or excuse admits the facts alleged by the plaintiff, but in effect denies that the plaintiff had at any time any good cause of action, either because the conduct of the defendant is justified in law, or because he is excused from liability in a particular case through some act or conduct of the plaintiff." *Ibid.*, § 157.

A careful perusal of the records in this case indicates that the defendant bank did not admit the truthfulness of plaintiff's claim as contained in the complaint, but denies plaintiff's averments and at the same time sets up a plea of justification of plaintiff's claim. Thus, the answer of the petitioner is evasive, contradictory and inconsistent as it denies and at the same time justifies the allegations of the plaintiff, co-respondent herein. The trial judge properly dismissed petitioner's answer and ruled it on bare denial. We are therefore reluctant to disturb the ruling of the trial judge dismissing petitioner's answer, but to affirm the ruling of the Chambers Justice denying the issuance of the writ of certiorari.

Wherefore and in view of the foregoing, it is the candid opinion of the Honourable Court that the ruling of the Chambers Justice denying the issuance of the writ of certiorari should be, and the same is hereby affirmed. The alternative writ is ordered quashed and the peremptory writ denied. The Clerk of this Court is hereby ordered to send a mandate to the Court below informing the judge presiding therein to resume jurisdiction of this case and proceed with its trial in keeping with law. Costs are assessed against the petitioner. And it is hereby so ordered..

Petition denied.