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Amy J. Walters v. National Beverages, Inc., a Corporation, and Streator Chevrolet Company, a Corporation : Brief of Respondent Streator Chevrolet Company

Utah Supreme Court

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In the Supreme Court of the State of Utah

AMY J. WALTERS,

Plaintiff and Appellant,

vs.

NATIONAL BEVERAGES, INC., a corporation, and STREATOR CHEVROLET COMPANY, a corporation,

Defendants and Respondents

Case No. 10582

BRIEF OF RESPONDENT STREATOR CHEVROLET COMPANY

Appeal from the Summary Judgment
of the Third District Court for Salt Lake County
Honorable A. H. Ellett, Judge

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STATEMENT OF THE KIND OF CASE

This is a contract action in which plaintiff has sued defendants for breach of a contract respecting the award of prizes in a sweepstakes drawing contest.

DISPOSITION IN LOWER COURT

The trial court granted defendants' motion for summary judgment.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks to have the summary judgment set aside and the case remanded for trial.

STATEMENT OF FACTS

Those facts set forth in appellant's statement of facts are accurate. However, certain other undisputed facts must be brought to the attention of the court in addition to those stated by appellant.

Appellant gave the following pertinent testimony as to her understanding and intention with respect to the drawing (R.41, pp. 26 & 27):

"Q Mrs. Walters, directing your attention to the time prior to the drawing at the Streator Chevrolet Company, and particularly to the times during which you were making out and depositing entry blanks, now, during that period of time did you have an understanding as to whether or not the prizes were to be awarded in the exact sequence of the tickets drawn?

A I took it that they would be drawn as it looked like it said on the entry blank.

Q Well, I—

A And I certainly prayed my name would be drawn first.

Q Well, what I want to know is what your understanding was.

A That's how I understood it.

Q And you expected that at the time of the drawing at the Streator Chevrolet Company, the first prize would be drawn first, the second second, and so on through the whole of the 25 or 26 prizes; is that true?

A Yes.

Q And that was your understanding when you—

A The highest value first.

Q And was that your understanding when you prepared, made out and deposited all of the entry tickets which you did prepare, make out and deposit?

A That's right. I wouldn't have bothered with it if I had known it was otherwise.

Q I see. But that was your clear understanding?

A Yes.

Q Now, did that understanding change at any time prior to the contest?

A No."

Respondents' intention and understanding is set forth in the following paragraph of the affidavit of Mr. Trager, a managing agent (R. 7 & 8):

"6. That at the time the general offer was first made by defendants to award the listed prizes to the winners of the drawing and at all times subsequent thereto defendants understood and intended that the order of drawing was to be that selected by them, and defendants had no reason to suppose that plaintiff had a different understanding of the offer."

The order of drawing selected by defendants was, as indicated in appellant's brief, five Pepsi-Cola winners first, then the fifth prize winner, five more Pepsi-Cola winners, then the fourth prize winner, etc., with the last ticket drawn being the winner of the first prize.

ARGUMENT

POINT I

NO VALID CONTRACT WAS MADE BETWEEN PLAINTIFF AND DEFENDANTS WITH RESPECT TO THE SWEEPSTAKES DRAWING BECAUSE THE PARTIES HAD A DIFFERENT INTENT AND UNDERSTANDING WITH RESPECT TO A MATERIAL ELEMENT, THE ORDER OF DRAWING.

This defendant does not deny that a unilateral general

offer was made by the defendants. The terms of that offer are contained on Exhibit P-1 (R. 33) which is the entry blank. This defendant further agrees that a contract can be formed by the unconditional acceptance of a unilateral offer, and that the acceptance may be made by the act of the offeree in properly filling out a contest blank and depositing it for drawing for prizes.

However, even when the purported offer is relatively uncomplicated, and the acceptance may be by the doing of a simple act, all other elements necessary to the formation of a contract must be present. For example, there must be a legal consideration, mutual assent or meeting of the minds, reasonable certainty as to material terms, and absence of extrinsic fraud, duress or illegality.

This respondent bases this point of its argument on the proposition that the offer is either silent, uncertain, or ambiguous with respect to the order in which the prizes were to be assigned to the tickets drawn, or, if one prefers, the order in which the tickets being drawn were to be assigned to the prizes. With the offer being thus lacking in clarity, reasonable minds could come to different, yet reasonable, conclusions as to the order of assignment of prizes or tickets, and each could intend different terms. If each party intended the *same* order of assignment of prizes, a contract would result, but if each party, without knowledge of the differing intendment of the other, had a *different* understanding as to the order of assignment of prizes to tickets drawn, the requisite mutual assent, meeting of the minds, would be missing and no contract would be formed.

In the instant case the offer consisted of Ex. P-1 (R.

33), which is the entry blank. It is specified in the offer that the Corvair coupe was to be first prize and the other four major prizes were to be those thus designated. The offer then said "*the next* 20 *winners each receive* 12 *cases of Pepsi-Cola.*" The only reference in Ex. P-1 to the *manner of selection* of winners is the statement:

> "4. Winners will be selected by a drawing to be held at Streator Chevrolet, 3:00 p.m., Nov. 28, 1964."

There is a significant difference between a designation of the *order and rank of the prizes* being awarded (that is, which shall be the first, which, the second, and so forth) and a designation of the *manner by which the one who is to have the prize* shall be selected. The reference to the "next 20 winners" referred to, and was a part of, the designation of the *order and rank of the prizes,* i.e., which prize shall take which place in the order of *ranking.* The statement "Winners will be selected by a drawing" is a designation of the manner in which the winners are to be selected. Nowhere in the offer is there a statement as to which ticket drawn shall be given which prize.

The undisputed evidence in this case is that the offeror intended and believed that it reserved the right and power to designate the order in which the tickets drawn should be assigned to the prizes, and that the offeree, Mrs. Walters, intended and believed that the first ticket drawn would, as a matter of contract, get the "First Prize." She did not intend that Streator Chevrolet have any power or right to designate a different order of assigning prizes, no matter how fair or impartial the method to be designated may be.

The record on this point is short and clear. Mrs. Wal-

ters' position is stated in her disposition (R.41, pp. 26 & 27), which reads as follows:

"Q Mrs. Walters, directing your attention to the time prior to the drawing at the Streator Chevrolet Company, and particularly to the times during which you were making out and depositing entry blanks, now, during that period of time did you have an understanding as to whether or not the prizes were to be awarded in the exact sequence of the tickets drawn?

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A And I certainly prayed that my name would be drawn first.

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Q And you expected that at the time of the drawing at the Streator Chevrolet Company, the first prize would be drawn first, the second second, and so on through the whole of the 25 or 26 prizes; is that true?

A Yes.

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A That's right. I wouldn't have bothered with it if I had known it was otherwise.

Q I see. But that was your clear understanding?

A Yes.

Q Now, did that understanding change at any time prior to the contest?

A No."

The defendants' position is clearly stated in the affidavit of Mr. Trager, a managing agent (R. 7 & 8). It is uncontested and reads as follows:

"6. That at the time the general offer was first made by defendants to award the listed prizes to the winners of the drawing and at all times subsequent thereto defendants understood and intended that the order of drawing was to be that selected by them, and defendants had no reason to suppose that plaintiff had a different understanding of the offer."

None of the parties claims the other to have been aware of the difference in their understandings of the purport of their supposed agreement.

Under these circumstances is there a legal contract between plaintiff and defendants that the first ticket drawn shall be the winner of the first prize and the second ticket drawn the winner of second prize? We think not. The texts and cases hold that, under such circumstances as are here present, the law recognizes in favor of each of the parties the meaning he or she had intended, and no contract has been made.

Williston on Contracts, Third Edition, Sec. 95 states:

"***If every word and every act had but one permissible meaning, it would not be necessary in considering the formation of contracts to inquire into the intent of a speaker or actor; but since this is not the case, if an expression, in view of the circumstances

under which it is used, may fairly mean either of two things, each party, unless he is in some way responsible for the error, may attach his own interpretation. Therefore, where a phrase of a contract has no obvious meaning, or is reasonably capable of different interpretations, and is in fact differently understood, there is no contract. The error in language may relate to the object to which the apparent agreement relates, it may relate to the persons with whom it is made, or to any of its terms.***"

A portion of Note 5 to the above quoted text gives a specific example as follows:

"In *Peerless Glass Co.* v. *Pacific Crokery Co.* 121 Cal. 641, 54 P. 101, plaintiff replied to an inquiry 'freight allowance from Converse 74 cts.' The defendant understood this was the freight rate, the inquirer that it was a discount. The court held it could not say that these words justified one interpretation more than the other, therefore, there was no contract."

Section 605 of *Williston on Contracts, Third Edition,* includes the following text on pages 360 and 361 thereof:

"It may be supposed that A used the words in a sense different from that in which B understood them, but that A had no reason to suppose that his understanding would not also be B's, and B on his part had no reason to suppose that his understanding would not also be A's. In such a case, the law recognizes in favor of each party the meaning he intended, therefore, no contract has been made. The same rule applies where both parties know or have reason to know of the ambiguity."

The American Law Institute Restatement of the Law of Contracts, Sec. 71, provides as follows:

"Except as stated in Secs. 55, 70, the undisclosed

understanding of either party of the meaning of his own words and other acts, or of the meaning of the other party's words and other acts, is material in the formation of contracts in the following cases and in no others:

"(a) If the manifestations of intention of either party are uncertain or ambiguous, and he has no reason to know that they may bear a different meaning to the other party from that which he himself attaches to them, his manifestations are operative in the formation of a contract only in the event that the other party attaches to them the same meaning.***"

This court, speaking in the case of *E. B. Wicks Co.* v. *Moyle,* 137 P.2d 342, 103 Ut. 554, decided in 1943, affirmed the above rules as prevailing in Utah by holding as follows:

" 'In order that there may be an agreement, the parties must have a distinct intention common to both and without doubt or difference. Until all understand alike, there can be no assent, and, therefore, no contract. Both parties must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode is agreed on by which it may be settled, there is no agreement, although it is not necessary that all of the terms of the contract be settled by a single act, but the parties may settle on one term at a time, and their contract becomes complete when the last term is agreed on.' 17 C.J.S., Contracts, Sec. 31, p. 359."

Newton Oil Co. v. *Bockhold, et al,* 176 P.2d 904, 115 Colo. 510, (1946) holds as follows:

"A fundamental contractual requirement is that of certainty. The minds of the parties must have met. Where one party may have intended a certain obliga-

tion, and the other party intended a different one, and from the wording of the instrument itself there is no rule by which the true intention can be determined no contract results. 'The offer must not merely be complete in terms, but the terms must be sufficiently definite to enable the court to determine whether the contract has been performed or not.' 1 Page on the Law of Contracts, page 135, Sec. 95. 'As a promise may insufficiently specify the prices to be paid, so the consideration for which the price is to be paid may be left equally uncertain, and in such a case it is not usually possible to invoke the standard of reasonableness in order to give the promise sufficient definiteness to make it enforceable.' 1 Williston on Contracts, Revised Edition, page 119, Sec. 42. 'The court can supply some elements in a contract, but they cannot make one; and when the language in a contract is too uncertain to gather from it what the parties intended the courts cannot enforce it.' Ryan v. Hanna, 89 Wash. 379, 154 P. 436. 'A court will not undertake to enforce a contract, unless by some lawful means it can ascertain and know just what the contract bound each party to do.' Lester v. Hinkle, 193 Ind. 605, 141 N.E. 463, 465. 'An offer must be so definite in its terms, or require such definite terms in the acceptance, that the promises and performances to be rendered by each party are reasonably certain.' Restatement of the Law—Contracts, p. 40, Sec. 32."

Richards v. *Kuppinger*, 278 P.2d, 395, 46 Wash. 2d 62 (1955), shows the law of that state to be in accord with the above. In that case the court states:

"It is perfectly clear that there was no meeting of the minds between appellant and respondent, and hence no express contract of sale. Nor can we find any 'implied contract' between them. Both express and implied contracts grow out of the intention of the

contracting parties and in each case there must be a meeting of the minds before there can be a contract. McKevitt v. Golden Age Breweries, 14 Wash. 2d 50, 126 P.2d 1077; Troyer v. Fox, 162 Wash. 537, 298 P. 733, 77 A.L.R. 1132."

It was, of course, incumbent upon the offerors to select a method of assigning prizes to tickets that is honest, fair and equitable. The method chosen and used was openly announced and publicized on the day of the drawing and well ahead of the drawing. No person objected. So far as respondents know, appellant does not urge that the method selected was unfair, rather, she urges that the method chosen was not that provided by the contract. It is difficult to suppose that plaintiff would urge that the offer bound the offeror to award first prize to the holder of the first ticket drawn if she had been the owner of the twenty-sixth ticket drawn instead of the second.

The argument above is directed to the contentions of Point I and Point II of appellant's brief. Point III is discussed by the respondent, National Beverages, Inc., in its brief. This respondent adopts and includes herein by reference the arguments and authorities set forth in the brief of the respondent, National Beverages, Inc.

CONCLUSION

Respondent, Streator Chevrolet Company, contends that the question of whether the document constituting the offer in this case is silent, uncertain or ambiguous with respect to the order of *drawing* may be determined by the court as a matter of law and is not an issue of fact. Admittedly this document constitutes the *only rep-*

resentation of the terms of offer relied upon by appellant. The trial court has decided this question of law in favor of respondents. The trial court further determined that the differing intendments and understandings of the parties on the point at issue precluded the formation of a contract between them. With these issues thus determined, the trial court properly granted respondents' motion for summary judgment. For the reasons set forth in the briefs of the respondents, the decision of the trial court should be affirmed, with costs to respondents.

Respectfully submitted,

EARL D. TANNER

Counsel for Respondent

Streator Chevrolet Company