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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

AMY J. WALTERS,
Plaintiff-Appellant,

— vs. —

NATIONAL BEVERAGES, INC., a corporation, and STREATOR CHEVROLET COMPANY, a corporation,
Defendants-Respondents.

Case No. 10589

FILED

JUL

Brief of Respondent National Beverages

Appeal From the Summary Judgment
Third District Court for Salt Lake
Honorable A. H. Ellett

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IN THE SUPREME COURT OF THE STATE OF UTAH

AMY J. WALTERS,
Plaintiff-Appellant,

— vs. —

NATIONAL BEVERAGES, INC., a corporation, and STREATOR CHEVROLET COMPANY, a corporation,
Defendants-Respondents.

Case No. 10582

Brief of Respondent, National Beverages, Inc.

NATURE OF CASE

This is an action for breach of contract, wherein Plaintiff claims that her participation in a prize contest sponsored by defendants constituted a contractural relationship, and that she was entitled to the award of the first prize of such contest, a 1965 Corvair Monza sport coupe; that her damages are the value of that motor vehicle.

DISPOSITION OF CASE IN LOWER COURT

The trial court granted the motions for Summary Judgment of the defendants, no cause of action.

NATURE OF RELIEF SOUGHT ON APPEAL

The plaintiff seeks reversal of the Summary Judgment in favor of defendants.

STATEMENT OF FACTS

This defendant is in substantial agreement with the facts set forth in the Brief of Plaintiff, as reflecting the facts embraced in the record of the case. This defendant does take exception to the conclusion claimed by plaintiff that the entry blank or form sets forth an order of prize drawing. This defendant would also clarify that the plaintiff has actively participated in hundreds of prize contests (Deposition of plaintiff, R-41, p. 4) and in this particular contest deposited in excess of three hundred (300) entry stubs (Deposition of plaintiff, R. 41, p. 15); and that entries of plaintiff were taken to Streator Chevrolet Company and some deposited by plaintiff, her husband, daughter and friends. (Deposition of plaintiff, R-41, pp. 15, 32). There is no indication in the record that plaintiff personally deposited the entry stub in question.

ARGUMENT

POINT I

NO CONTRACTUAL RELATIONSHIP EXISTED BETWEEN THE PLAINTIFF AND DEFENDANTS.

In the deposition of plaintiff she testifies in reference to this defendant:

"No, I didn't have a contract with them, no."

(Deposition of plaintiff, R-46, p. 6)

The plaintiff, however, claims in her brief the existence of a contract, which it is submitted is error, for there is a want of consideration, and even assuming that an offer was made by defendants, there has been no acceptance by the plaintiff.

(*A.*) *There is a want of consideration.*

Nowhere in the complaint does plaintiff set forth facts which show the existence of such consideration as will support a contract. It is fundamental that consideration is an essential element of a contract; a naked promise cannot constitute a contract or be enforced and that want of consideration is a defense for nonperformance of a promise. 17 Am. Jur. 2d, Contracts, Sec. 86, pp. 428-429.

The 1956 Case of *Dumas* v. *Todd, et al,* (Ga.) 92 S.E. 2d 265, involved a factual situation wherein auctioneers offered to give a Ford automobile to the winner of a drawing, which was held in connection with an auction, and which required the presence of the con-

testant to win. The plaintiff deposited entry tickets in the container provided, and his name was drawn; the plaintiff was present but could not produce a stub to match the winning ticket, which requirement had been imposed without prior notice. Defendants refused to give plaintiff the automobile and action was brought for recovery of the value.

The Court in *Dumas* affirmed a denial of recovery, holding in part that there was no "* * * contractual relationship shown, because of lack of consideration. * * * The fact that the Ford in the instant case was offered to encourage people to attend the auction does not constitute consideration, it shows motive, but not legal consideration * * *." (at 266)

It is submitted that the foregoing decision is applicable here, that there is a want of consideration in the instant case, and hence no contractual relationship between the parties.

(*B.*) *Assuming that an offer has been made by defendants, there has been no acceptance by the plaintiff.*

The plaintiff in her legal argument has assumed performance on her part of all rules of the contest in question. Conceding for argument only that the advertisement of the contest and publication of the rules constituted an offer, Query: Where in the complaint, or other pleadings, or record, does the plaintiff allege, assert, or plead compliance with all of the terms of the offer, or printed rules of the contest? No such compliance is indicated.

To the contrary and as an example, Rule 2 of the rules of the contest provides:

> "Take your entry blank to the Streator Chevrolet showroom for deposit in the Sweepstakes barrel. And don't forget, while you're at Streators be sure to look over the all-new exciting line of Chevrolets for '65." (R-33)

There is no claim that plaintiff complied with the rules by her personally taking the entry blank in question to the showroom aforementioned; in fact the testimony of plaintiff is:

> "* * * My husband went in and deposited, my daughter went in and deposited them, and my friend went in and deposited for me." (Deposition of Plaintiff, R-41, p. 15. See also p. 32)

It is elementary that there must be an unqualified acceptance of an offer to sustain a contract. The plaintiff has not alleged in her complaint compliance with all of the terms of the rules of the contest, and therefore no binding contract has come into existence. See 17 Am Jur 2d, Contracts, Sec. 40, p. 378.

POINT II

IF A CONTRACT EXISTS BETWEEN PLAINTIFF AND DEFENDANTS IT IS UNENFORCEABLE.

Article VI, Section 28, of the Constitution of Utah provides:

> "The Legislature shall not authorize any game of chance, lottery or gift enterprise under any pretense or for any purpose."

The aforementioned provision is declaratory of the public policy in Utah, and any game of chance, lottery or gift enterprise is in contravention thereof. *Commercial Travelers Insurance Co.* v. *Carlson,* 104 U. 41, 137 P. 2d 656.

A contract against public policy is unenforceable. As is stated in 17 Am. Jur. 2d, Contracts, Sec. 174, p. 532:

> "* * * As a settled general rule, agreements or contracts against public policy are illegal and void. An agreement or contract made in violation of established public policy is not binding and will not be enforced. * * *"

Plaintiff has characterized the contest and her participation therein as contractual in nature; *if* this be the case, the so-called agreement would be in the nature of a game of chance, lottery or gift enterprise, and would offend the constitutional declaration aforementioned. We submit that such an agreement would be void and unenforceable.

This conclusion is further supported by Section 76-27-9, U.C.A. 1953, which provides:

> A lottery is any scheme for the disposal or distribution of property by chance among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle or gift enterprise, or by whatever name the same may be known.

Plaintiff's contention that a contract exists presupposes the existence of valuable consideration in support thereof. As heretofore set forth in Point I, we do not agree with the conclusion that either consideration or a contract exists. Nevertheless, if there be consideration, then the contest would be a lottery in contravention of Section 76-27-10, U.C.A. 1953, and any resulting agreement would be illegal and unenforceable.

It is the general rule, and the law in Utah, that no private right can arise from participation in a lottery, for the Court will grant no relief to a party to a lottery, or lend its aid in enforcing any agreement thereunder. In *Blair* v. *Lowham,* 73 U. 599, 276 P. 292, the plaintiff brought an action for the value of a one-half interest in an automobile under a verbal agreement between plaintiff and defendant to pool their admission tickets to a Labor Day celebration at Lagoon Resort. The automobile was awarded the defendant who held the winning ticket, which was determined, by chance, to entitle the holder to the automobile. Defendant denied plaintiff's claimed interest.

The Court in reversing a judgment in favor of plaintiff stated:

> "* * * The sole reliance here is upon transactions prohibited by law. Courts will not grant either of the parties relief in such cases * * *." (at 294)

See also *Maughs* v. *Porter,* (Va.) 161 SE 242, (1931); *Dennis* v. *Weaver,* (Ga.) 121 S.E. 2d 190 (1961).

It is therefore submitted that any contract or agreement deemed to result from the contest in question would be void and not enforceable.

POINT III

THE DRAWING PROCEDURE FOLLOWED IN THE CONTEST WAS NOT UNFAIR OR PREJUDICIAL, OR IN VIOLATION OF ANY RIGHT OF PLAINTIFF.

The order of drawing of the contest was not specifically set forth in the announcement or rules of the contest. The entry form listed the prizes of gifts to be awarded, not the order of drawing. The prizes so listed were in sequence of value.

The drawing procedure adopted was fair to all participants. The chance of the plaintiff to win a prize, including the most valuable prize, was neither diminished, diluted, or decreased by virtue of the drawing procedure adopted. Each entry of the plaintiff had the same mathematical chance of selection as that of any other participant, no more, no less.

The plaintiff did not object to the procedure followed, although she had reasonable opportunity to do so; such failure constitutes a waiver to object, and she is estopped to object now.

This defendant adopts by reference and incorporates herein all points and argument of the brief of Streator Chevrolet Company, respondent herein.

CONCLUSION

The Judgment of the lower Court should be affirmed for the reasons heretofore set forth.

Respectfully submitted,

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