

1975

Wash-A-Matic Inc., a Utah coporation v. Willis Rupp, a/k/a Willie Rupp : Brief of Appellant

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

DEC 6 1975

BRIGHAM YOUNG UNIVERSITY,
J. Reuben Clark Law School

WASH-A-MATIC, INC., a Utah corporation,

Plaintiff and Appellant,

vs.

WILLIS RUPP, a/k/a WILLIE RUPP,
Defendant and Respondent.

Case No.

13688

BRIEF OF APPELLANT

Appeal from an Order of Third District Court
for Salt Lake County
Honorable Ernest F. Baldwin, District Judge

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FILED

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

WASH-A-MATIC, INC., a Utah corporation, <i>Plaintiff and Appellant,</i> vs. WILLIS RUPP, a/k/a WILLIE RUPP, <i>Defendant and Respondent.</i>	} Case No. 13688
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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an action to review a Judicial Decision of the District Court of Salt Lake County, State of Utah, the Honorable Ernest F. Baldwin, presiding, dismissing an action brought by the Appellant for breach of contract.

DISPOSITION OF CASE BY LOWER COURT

Appellant filed a complaint in the lower court seeking damages for breach of a contract entered into between the parties. The issues were tried to the Court sitting without a jury and thereafter, Findings of Fact, Conclu-

sions of Law and Judgment were entered holding that there was no binding contract between the parties, that Appellant was not, therefore, entitled to an award of damages, and that Respondent was entitled to a judgment of dismissal.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the judgment of the lower court dismissing Appellant's complaint and pursuant thereto directing entry of judgment in favor of the Appellant for \$12,136.70 in accordance with Appellant's prayer for relief.

STATEMENT OF FACTS

Sometime during the Spring of 1971 a Mr. Pitcock contacted Bert Nelson, a service representative for Nelson Service and said that a friend, Willis Rupp, was interested in a car wash installation (R. 60, 65, 70, 71). Shortly thereafter Nelson personally contacted Rupp and discussed with him the size and type of the possible car wash installation (R. 60). Nelson then contacted Jack Thurmond, President of Wash-A-Matic, the local distributor for car wash equipment manufactured by Livingston Industries, Inc. (hereinafter "Livingston") (R. 61). Wash-A-Matic indicated its interest in this installation and a meeting was subsequently held between Nelson, Thurmond and Rupp at Rupp's office. The possible locations, size of and financing of the prospective car wash was discussed (R. 63, 65, 71). Rupp, Nelson, and Thurmond also personally viewed two alternative sites

for installation of the car wash with the preferred location being at Rupp's office at 4500 South and Redwood Road in Salt Lake County (R. 72). Rupp also assured them that the proper zoning for installation of a car wash would be no problem (R. 63, 72).

At a second meeting between the same individuals, two leasing firms, Capital Goods and Leasing and Equipment Leasing of California, (hereinafter "Equipment Leasing") were specifically discussed as a possible method of financing. It was agreed that the equipment was to be purchased from Livingston, the manufacturer, and Rupp also expressed the desire that the equipment be installed by the fall of 1971 (R. 73). During the summer of 1971 in either the month of June or July, Ted Martin, a representative of Equipment Leasing, visited Salt Lake (R. 74). While in Salt Lake Martin met with Thurmond, Douglas J. Davis (the vice-president of Wash-A-Matic) and Rupp in Rupp's office. Possible sites for construction of the car wash were viewed and Mr. Rupp again assured all present that zoning was no problem (R. 75).

On August 5th, Thurmond and Rupp met again in Rupp's office. Rupp indicated that he wanted to get the car wash in by fall. Thurmond responded that a signed order would have to be executed with a deposit of \$200.00 before the equipment could be ordered (R. 76, 143, 144). Pursuant thereto, Exhibit 1-P was duly executed and the deposit paid (R. 76).

Alternative forms of financing were discussed, including bank financing, leasing and a cash purchase from Rupp's own funds (R. 74, 80, 153). Rupp was at that time negotiating with Capital Goods and Leasing and Exhibit 2-P showing an installed price for the equipment was prepared by Wash-A-Matic and sent to Capital to aid in such negotiations (R. 78, 79). Capital subsequently rejected the lease (R. 79). As soon as he learned of the Capital Goods and Leasing rejection, Thurmond contacted Rupp and asked if he wanted to go with Equipment Leasing (R. 80). Rupp agreed and within a week, Rupp met with Thurmond and Davis at the offices of Wash-A-Matic (R. 80). A conference telephone call was placed to Mr. Martin of Equipment Leasing. Martin discussed the information and documents that would be necessary to obtain Rupp's credit approval (R. 81, 82). Rupp subsequently supplied the necessary information and documents (R. 82).

Within a short time after completion of the documentation, Thurmond received a call from Martin informing him that Rupp's credit had been cleared and that the financing was set (R. 82, 87, 115 and Depo. of Ted Martin at p. 8). Immediately thereafter Thurmond called Rupp and stated that financing had been approved and that the papers for Rupp's signature would be forthcoming. Upon hearing that his credit had been cleared, Rupp was elated, and stated "Let's get the equipment out here and get it going, get it installed" (R. 87). Based upon Rupp's re-

quest, Thurmond placed a call to Livingston and requested that they expedite the contract and ship the equipment.

Equipment Leasing needed a purchase order from Wash-A-Matic to complete the paper work on the lease. After discussing whether Rupp wanted the lease to cover only the equipment price or include an installed price Rupp elected the complete installation package (R. 89). Exhibit 3-P reflecting that price was prepared at Rupp's office sometime during the forepart of October, 1971, and was sent to Equipment Leasing (R. 93).

At or about that same time, the equipment arrived in Salt Lake, having been shipped directly to Rupp (R. 94). The first shipment consisted of some fasteners and a sign which Rupp accepted (R. 142). Wash-A-Matic received notice that the equipment had in fact been shipped through an invoice from Livingston showing the date of shipment and the cost of the equipment (Ex. 4-P and R. 94, 95). A few days after receipt of the invoice, Thurmond received a call from Livingston indicating that Rupp had refused acceptance of all but the first small shipment of the equipment (R. 96). Upon learning of this refusal, Thurmond contacted IML Trucklines who verified that the equipment was still on the dock (R. 96). Thurmond then called Rupp. For the first time in some six months since representatives of Wash-A-Matic first contacted Rupp he indicated that he had a zoning problem on his property which prevented him from installing the equip-

ment.¹ Nonetheless, he indicated that he was sure the problem could be worked out and that the equipment should be held here (R. 96).

Over the next several months Rupp apparently tried to resolve the zoning problem which he had encountered. By letter dated January 7, 1972 Rupp advised Equipment Leasing of his zoning problems and thanked them again for holding the commitment of funds for the purchase and lease of the equipment (Ex. 9-P). Equipment Leasing, concerned that the equipment had never been installed and the lease closed, wrote a letter to Rupp dated January 14, 1972 requesting that Rupp supply Equipment Leasing with a \$1,000.00 deposit to "tie up the money that we have arranged for you until you get your land problems solved" (Ex. 8-P). Equipment Leasing had obtained a commitment from the Chase Manhattan Bank of New York City to supply the funds for the purchase of the equipment by Equipment Leasing (Dep. of Mr. Martin, at pp. 8, 9 and Ex. 10-P). As of the January 14, 1972 letter, the only thing Rupp had to do to retain the commitment of funds until such time as he had resolved his zoning problem was supply Equipment Leas-

¹ Although the parties consistently referred to Rupp's problem as zoning, it was not in fact a question of appropriate zoning. Rather, Salt Lake County refused to issue Rupp a building permit, unless Rupp donated to Salt Lake County a 10 foot wide strip of ground for the purpose of widening 4500 South (R. 154). Rupp refused to donate the strip and was thus unable to make the car wash installation at the 4500 South site. It should be pointed out, however, that Rupp represented that alternative sites were available and that if the installation could not be made at the 4500 South site, he would install the car wash elsewhere (R. 72).

ing with the \$1,000 deposit (Depo. of Mr. Martin, p. 9 and R. 141, 142, Ex. 8-P). The deposit was never sent (R. 141, 142). Even then, however, Equipment Leasing sent no termination notice to Rupp and the negotiations continued.

As a result of Rupp's request to hold the equipment here, the equipment was stored either at IML or in a warehouse until approximately July of 1972 at a cost of \$200.00. The storage charges were paid by Livingston and rebilled to Wash-A-Matic (R. 99 and Ex. 7-P). In July or August of 1972, nearly a full year after Rupp had ordered the equipment, Thurmond and Rupp had a telephone conversation wherein Rupp stated he no longer wanted the equipment that had been shipped and stored at his express request nearly 10 months previous (R. 99-100).

Wash-A-Matic attempted to sell the equipment without success since it was specially manufactured and too large for any other than available locations (R. 100). As a result, the equipment was shipped back to Kansas City to the manufacturer (R. 100).

Inasmuch as the equipment was refused, Livingston Industries paid the freight charges both to and from Salt Lake City and rebilled Wash-A-Matic for those charges as part of their regular monthly statements (R. 102 and Ex. 5-P and 6-P). Introduction of the actual invoices was objected to by counsel for Rupp and the court reserved ruling thereon until the end of trial. In light of the court's ruling that financing had not been obtained

as required by the contract, the issue of admissibility of the damage exhibits became moot and was not resolved by the court. The same was true of Exhibit 7-P, the invoices of Livingston to Appellant with respect to the storage charges for storing the equipment while in Salt Lake City.

It is important to note that at no time during the stormy 18 month history of this off-again on-again contract, did Rupp complain about or question financing. In fact, Rupp expressly admitted that financing was no problem since he could have arranged for this financing himself if Equipment Leasing had not (R. 153). Rupp acknowledged that it was not a lack of financing but the problem of zoning, which was not a condition of the contract, which led to his ultimate rejection of the equipment (R. 154).

ARGUMENT

POINT I.

THE LOWER COURT'S CONCLUSION THAT THERE WAS NO BINDING CONTRACT BETWEEN THE PARTIES FOR THE REASON THAT THE CLAUSE "SUBJECT TO FINANCING" HAD NOT BEEN FULFILLED, IS CLEARLY ERRONEOUS.

On or about August 5, 1971, Appellant and Respondent entered into a sales agreement wherein Respondent agreed to purchase and Appellant agreed to sell certain car wash equipment for a stated price of \$25,785.01. Upon

execution of the agreement, Respondent paid a \$200.00 deposit, receipt of which was acknowledged by Appellant (Ex. 1-P). Under the section entitled "Special Instructions" the agreement was made "subject to financing" and Appellant agreed to refund the deposit "if financing not arranged."

The conclusion of the lower court, holding that the clause "subject to financing" was not satisfied is clearly erroneous and unsupported by the evidence. In fact, the record shows quite the contrary — that financing was made available, that there was a binding contract and that Appellant is entitled to damages for the breach thereof.

The purpose and intent of the term "subject to financing" is made clear by examination of the provisions on the reverse side of the agreement which provide in part:

If other than a cash sale, this contract is subject to acceptance by the seller after approval of purchaser's credit by finance factor at its home office. Acknowledgment to the purchaser by letter of acceptable credit by the finance factor shall be deemed acceptance by the seller.

The contract is contingent upon the availability to the purchaser of financing as set forth on the front of this contract. *Upon approval of purchaser's credit*, purchaser will execute such forms and papers as are required by the finance factor as evidence of indebtedness and the security therefor, and furnish co-makers and guarantors if required. [Emphasis added.]

It doesn't take a seer stone to decipher what was intended by the condition "subject to financing". It wasn't necessary that Respondent have a completed loan with money in hand. "Subject to financing" meant subject to "*credit approval*". In other words, financing in the context used herein means loan commitment.

This is certainly neither a strained nor unique construction of the term. The home building industry, for example, has operated for years on this very system. A prospective purchaser enters into an earnest money agreement with a contractor for the purchase of a new home to be constructed by the contractor. The earnest money agreement is, of course, subject to buyer's financing. The buyer then obtains credit approval for a loan covering the purchase price from a local lending institution. The lending institution so advises the contractor and construction is commenced. Upon completion of the home and occupancy by the buyer, the loan is closed, the documents signed and the funds disbursed. At what point does the earnest money agreement become a binding contract? Could the buyer walk away at any time prior to the actual completion of construction and closing of the loan without any liability to the contractor, claiming that the earnest money agreement was not binding because he had not yet been financed? The absurdity of such a contention is obvious, and yet that is precisely how the lower court defined "subject to financing" in the instant case.

That the lower court's interpretation of the clause

“subject to financing” was erroneous is further bolstered by the decision in *Wilson v. Gray*, 102 Cal. App. 2d 63, 226 P. 2d 726 (1951). There the defendant entered into an agreement with plaintiff giving plaintiff the exclusive option to secure for defendant a sum of money needed to purchase certain timber lands. Plaintiff was unable to secure the necessary funds within the option period and a second agreement was then worked out. Plaintiff would continue his efforts to “secure the necessary financing” and if he did so before defendant was able to secure the said financing from other sources, then the original agreement would be reinstated and plaintiff would be entitled to his fee. Defendant obtained a loan commitment on August 18. Plaintiff obtained the necessary funds on August 19. The loan commitment obtained by defendant did not actually result in an escrow of funds until August 20 and the documents were not prepared or the loan closed until September 4, more than two weeks after plaintiff had obtained the funds. Plaintiff claimed that he had obtained the necessary financing first and demanded payment of his fee. Defendant refused and plaintiff filed action.

On appeal from the lower court’s decision in favor of defendant, the court summarized plaintiff’s contention at 226 P. 2d 727-28 as follows:

Appellant further contends that mere negotiation of a loan resulting in the purchase of the property by defendants, as found by the trial court, was not sufficient to terminate Appellant’s rights under the agreement but that an

actual completion of the loan was necessary in order to cancel his rights.

In rejecting that contention and affirming the lower court's decision, the Appellate Court said at 226 P. 2d 728:

We are convinced that a reasonable construction of the words "secure the necessary financing" when read in the light of the entire agreement between the parties, cannot be construed to require more than an *agreement* on the part of a prospective creditor to make the loan contemplated. To interpret the words so used as Appellant would have use do would only lead to more confusion. Where one construction would make a contract unreasonable or unfair, and another construction, equally consistent with the language, would make it reasonable, fair and just, the latter construction is the one that must be adopted. [Emphasis as in original.]

The record in the instant case is uncontradicted that Respondent had obtained "credit approval" and that the finance factor, Equipment Leasing, had agreed to provide the necessary funds for the purchase of the car wash equipment.

Respondent by his own choice sought to finance purchase of the car wash equipment through a leasing arrangement with Equipment Leasing (R. 79-80). Respondent, in compliance with the request of Equipment Leasing, supplied them with a variety of information and documents pertaining to Respondent's credit approval

(R. 82). Shortly thereafter, Mr. Ted Marin of Equipment Leasing advised both Jack Thurmond, the President of Appellant, and Respondent, that Respondent's credit had been approved (R. 82 and Depo. of Ted Martin, p. 8). In a letter dated January 7, 1972, from Respondent to Mr. Martin, Respondent apologized for the extended delay in closing the lease transaction as a result of some zoning problems and then acknowledged the agreement of Equipment Leasing to provide financing in the following words:

We are sorry for the delay, and greatly appreciate your holding this financing available for us.

(Ex. 9-P). Approximately a week later, in a letter dated January 14, 1972 from Mr. Martin to Respondent, Mr. Martin reaffirmed the commitment of Equipment Leasing to provide the necessary funding and requested a \$1,000.00 deposit from Respondent in order to extend the commitment (Ex. 8-P).

Admittedly, at that point no funds had changed hands and could not until the appropriate lease documents were prepared and executed. Again, admittedly, such documents were never executed and the funds were never disbursed. But that simply is not the issue. Whether the lease was signed or even prepared is immaterial! Only two questions need be asked and their answers are clear. Had Respondent received credit approval? Yes. Had Equipment Leasing agreed to supply the necessary funds? Yes. To say that Equipment Leas-

ing's agreement to supply funds was subject to Respondent's execution of the necessary lease documents is to say nothing more than the obvious. That was equally true in *Wilson v. Gray, supra*, but that did not detract from the validity of the agreement to supply financing. This is equally true in every credit transaction involving a loan commitment. Nevertheless, reasonable men justifiably rely upon that commitment and proceed to materially and unalterably change their positions in reliance thereon. That is all that was contemplated by the term "subject to financing" in the instant sales contract and as soon as Respondent had obtained credit approval and the agreement of Equipment Leasing to supply the necessary funds, financing, within the meaning of the sales contract, was secured and the contract was binding.

Conditions precedent, such as that involved here, must be looked at fairly in the context in which they are used and in which they are intended to operate. As noted in the case of *Pacific-Wyoming Oil Co. v. Carter Oil Co.*, 31 Wyo. 314, 226 P. 193 (1924), the court in discussing the effect of conditions precedent in a contract stated at 226 P. 198:

These cases illustrate the proposition that, in the absence of a specific provision in the contract showing a contrary intention, the law considers a condition fully performed when the purpose evinced by the contract can be said to have been fairly carried out.

That the condition "subject to financing" has in the in-

stant case been "fairly carried out" is evidenced by the testimony of the defendant on cross examination in regard to the matter of financing:

Q. It was the building permit that was holding you up, wasn't it?

A. That and the dedication of the ground.

Q. You weren't really concerned, were you, Mr. Rupp, about financing at that point. It was building permit and zoning that was causing you problems, wasn't it?

A. That, and I wanted to see what I was going to pay for, which I hadn't ever been exposed to.

Q. But you had no concern, did you at that time, that the money was there available for you and that the financing had been arranged if you wanted to take advantage of it?

A. I don't think it was ever brought up. Financing was — has never been too much of a problem.

Q. For you?

A. That's right.

Q. You always felt you could get it financed, didn't you?

A. We probably could have if this had failed but we never pursued anything.

Q. So it was really a problem of building permit, wasn't it, Mr. Rupp?

A. It was a large obstacle.

MR. DAVIES: I don't have any further questions.

(R. 154.)

The decision of the lower court holding that such condition had not been met is clearly erroneous and must be reversed.

POINT II.

THE "SUBJECT TO FINANCING" CLAUSE
WAS EITHER WAIVED OR EXCUSED BY
REASON OF THE STATEMENTS AND
CONDUCT OF THE RESPONDENT.

A. *The "Subject to Financing" Clause was Waived.*

The evidence is conclusive that the Respondent's desire to have the car wash operational before Fall of 1971 caused the Appellant to notify Livingston to begin manufacture of the goods. Respondent was insistent that the equipment was to be installed by the Fall of 1971 (R. 73). On cross examination he reluctantly admitted that he told Mr. Thurmond, the President of Appellant, of his desire to have the equipment installed:

Q. Had you ever talked about that with Mr. Thurmond.

A. Of the time element?

Q. Of the need to get the equipment ordered so we would have — you would have it here and installed by the fall.

A. Probably did.

(R. 143-44.)

Whatever the reason behind Respondent's desire to have the car wash operational by Fall of 1971, the important fact is that after Exhibit 1-P was signed the equipment was ordered from Livingston at the insistence of Respondent. He was not forced or coerced into signing the sales contract, and failed to dissent or object when the equipment was ordered at his insistence.

Exhibit 1-P on its face provides "THIS ORDER IS SUBJECT TO ACCEPTANCE BY OUR HOME OFFICE AND CANNOT BE CANCELLED AFTER MANUFACTURE BEGINS." Even if the "subject to financing" clause was not fulfilled, (which, as noted in Point I, it clearly was), the fact remains that the Respondent ordered the car washing equipment which was specially designed and manufactured to fit his property. Any notice of the repudiation of the sales contract was not received until after the car washing equipment was manufactured and shipped to Utah. The Respondent in accepting the performance on the part of the Appellant without asserting the condition of financing thus waived his right to later assert the condition. *Corbin on Contracts* § 752 at 707 (1952). As stated in 17 Am. Jur. 2d, *Contracts*, § 392 at 838:

The performance of a condition may be waived by an action in reliance upon a representation that the performance of a condition will not be insisted upon; and such a representation may

be inferred from customary conduct. The performance of conditions is dispensed with where the performance thereof is waived by acceptance of performance differing from that required by the contract.

This court has ruled on the question of the waiver of a condition precedent in *Ahrendt v. Bobbitt*, 119 Utah 465, 229 P. 2d 296 (1951). The case involved an assignment of a debt which was subject to the condition precedent of payment of certain funds. In holding that the condition could be waived the court at 229 P. 2d 297 quoted with approval from 17 C. J. S. *Contracts* § 491 as follows:

[P]erformance of a condition precedent to taking effect of one contract may be waived by the acts of the parties in treating the agreement as in effect.

See also *Reynolds Metals Co. v. Electric Smith Construction Equipment*, 4 Wash. App. 695, 483 P. 2d 880 (1971); *Gilmore v. Hoffman*, 123 Cal. App. 2d 313, 266 P. 2d 833 (1954); *Concannon v. Yewell*, 16 Ariz. App. 320, 493 P. 2d 122 (1972).

Respondent now claims that the condition precedent "subject to financing" was never fulfilled and he is thereby not bound by the sales agreement. Yet he ordered and even encouraged early delivery. He accepted partial delivery of the goods when they were shipped to Salt Lake (R. 142). As late as January 7, 1972 he related by letter to Mr. Martin of Equipment Leasing, "We are very anxious to get underway with the car wash as soon as

possible, and get same in operation" (Ex. 9-P). The inferences to be drawn from such conduct are clear. Respondent was not concerned with financing. He admitted it was no obstacle (R. 154). He wanted the equipment and he got it. He must not now be excused from the consequences of his own actions.

B. The "Subject to Financing" Clause was Excused.

In a letter dated January 19, 1972, Mr. Martin of Equipment Leasing requested a One Thousand Dollar (\$1,000) deposit from Respondent which would continue to "tie the money up". This was required to hold the financing until such time as the Respondent's recently revealed land problems were solved. The deposit was to be in the office of Equipment Leasing by January 20, 1972. This money was not sent by the Respondent. The plain fact of the matter is that the Respondent was trying to stall the actual payment of funds until he "straightened his land problems out".

When a contract of sale is subject to the condition precedent of the purchaser's obtaining financing the courts are unanimous in holding that the purchaser must make diligent efforts to obtain financing. In *White & Bollard, Inc. v. Goodenow*, 58 Wash. 2d 180, 361 P. 2d 571 (1961), a broker sued for his real estate commission. The seller had accepted an offer contingent upon purchaser obtaining satisfactory financing within a period of 90 days from date of execution of the agreement. In discussing the effect of such requirement the court stated at 361 P. 2d 575:

[T]he promise which he made was, not to secure the financing, but to endeavor to do so, and to purchase the property if he was successful. In agreeing to immediately seek and use his best efforts to secure financing, the purchaser promised to do positive acts.

In *Reese v. Walker*, 77 Ohio L. Abs. 583, 151 N. E. 2d 605 (1958), the plaintiffs were prospective buyers who made a written offer to purchase a certain parcel of real estate, pursuant to standard form real estate contract "contingent upon securing necessary financing". The financing arranged by the buyers was unsatisfactory to the sellers and the buyers sued for the return of their earnest money offer. At 151 N. E. 2d 608, the Court discussed the obligation of the buyer as follows:

Of course, buyers must show good faith. They cannot defeat the contract by their own fault. They must honestly determine what kind of loan they need and must make a bona fide effort to obtain it.

Here Respondent not only failed to use and exercise diligent effort in obtaining financing, but actually hindered its obtainance. Month after month the payment of the deposit was delayed based upon Respondent's representations to Equipment Leasing that he was having difficulty with the zoning of the land the car washing equipment was to be placed upon. If the financing was being held up it was not by the Appellant or Equipment Leasing.

When the occurrence of a condition is within the

control of one party to a contract, that party is under an implied promise to use best efforts to fulfill the condition. The party cannot remain totally aloof and then rely on the failure of a condition as an excuse for non-performance of his contractual obligation. Failure to use best efforts excuses the condition. *Tyson v. Tyson*, 61 Ariz. 329, 149 P. 2d 674 (1944). The *Restatement of Contracts*, § 295 at 428 clearly states the rules as follows:

If a promisor prevents or hinders the occurrence of a condition, or the performance of a return promise, and the condition would have occurred or the performance of the return promise been rendered except for such prevention or hindrance, the condition is excused, and the actual or threatened nonperformance of the return promise does not discharge the promisor's duty, unless

(a) the prevention or hindrance by the promisor is caused or justified by the conduct or pecuniary circumstances of the other party;
or

(b) the terms of the contract are such that the risk of such prevention or hindrance as occurs is assumed by the other party. [Emphasis added.]

If the condition "subject to financing" ran to the benefit of Appellant, then it is elementary that Appellant could on its own volition waive the condition. *Gilmore v. Hoffman*, 123 Cal. App. 2d 313, 266 P. 2d 833 (1954). If the condition "subject to financing" was for the benefit

of Respondent, then Respondent was under a duty to use diligent efforts in obtaining financing. The record is void of any facts indicating that the Respondent was refused any documents from the finance factor, Equitable Leasing, and by his own conduct, Respondent failed to tender a deposit to hold the financing. Such action excuses the condition.

C. Oral Contract Absent the Condition.

Even assuming arguendo that the written sales agreement is unenforceable because of the failure of a condition precedent Respondent's actions give rise to an enforceable oral contract. Section 70A-2-201(3) (a) Utah Code Annotated (Repl. vol. 1968) provides that an oral agreement is nevertheless enforceable even though in violation of the statute of frauds if

the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement

Respondent's actions clearly meet each of the statutory requisites. The car wash equipment, because of its unusual size, had to be specially manufactured for the Respondent (R. 100). Again due to its unusual size, the equipment was not suitable for sale to other prospective

purchasers even though Appellant attempted without success to make a sale of the equipment. Respondent ordered the goods, requested their manufacture and delivery, accepted partial delivery thereof, and did not give any notice of repudiation until some ten months after the equipment had in fact been manufactured and delivered to Salt Lake City. Such actions constitute an enforceable oral contract without any condition precedent concerning financing.

POINT III.

APPELLANT IS ENTITLED TO ITS INCIDENTAL DAMAGES INCLUDING THE AMOUNTS PAID TO LIVINGSTON AS REIMBURSEMENT FOR FREIGHT AND STORAGE CHARGES.

As a result of the finding of the lower court that the sales agreement was unenforceable, the lower court did not make any final determination on the issue of damages and ultimately failed to rule on the admissibility of Appellant's damage exhibits, Exhibits 5-P through 7-P. This evidence was clearly admissible, however, and Appellant is entitled to its reasonably incurred incidental damages.

The express language of the sales contract (Ex. 1-P) provides that the goods were to be shipped F. O. B. from Kansas City. Respondent refused to accept part of the shipment upon its arrival in Salt Lake. After unsuccessful

ful efforts to sell the car washing equipment were made, the equipment was shipped back to the manufacturer in Kansas City. Utah Code Annotated, § 70A-2-710 (Repl. vol. 1968) provides:

Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with the return or resale of the goods or otherwise resulting from the breach.

On direct examination, Mr. Thurmond, an officer of Appellant, testified as follows in regard to the shipment of the equipment:

Q. How was the freight handled or to be handled on the shipment of this equipment, Mr. Thurmond?

A. The freight was to be handled collect and paid by Mr. Rupp. Insomuch as he did not accept the entire shipment Livingston ended up billing us for the freight out to Salt Lake, and they in turn billed us for the storage while it was in the warehouse, and they in turn billed us for the shipment back to — freight back to Kansas City from Salt Lake.

THE COURT: Do I understand all the equipment was returned to —

MR. DAVIES: Returned to the manufacturer.

THE WITNESS: To Kansas City.

THE COURT: Does the original contract mention the word whether that price was F. O. B. manufacture or deliver to Salt Lake or where?

MR. DAVIES: It indicates F. O. B. Kansas City, Your Honor, if I'm not mistaken.

THE COURT: All right. I haven't had a chance to see it yet.

(R. 101.)

Appellant's Exhibits 5-7 are invoices from Livingston to Wash-A-Matic for freight and storage costs amounting to \$4,080.57. When the Respondent failed to pay the freight and storage charges, the charges were billed to the manufacturer who then billed Appellant.

The costs were paid by Appellant as indicated by the following testimony of Mr. Thurmond:

Q. (By Mr. Davies) Mr. Thurmond, let me show you what has been marked as Exhibit 5-P and ask you if you can identify that for us, please?

A. Yes, this is the invoice on Mr. Rupp's equipment for the freight bills and invoiced to Wash-A-Matic.

Q. From who.

A. From Livingston to us for the cost of getting the equipment out here.

Q. This is the cost of shipping the equipment to Salt Lake?

A. This is the cost of shipping the equipment to Salt Lake.

THE COURT: What number is that?

MR. DAVIES: Exhibit 5-P, Your Honor.

THE COURT: Freight charges to Salt Lake?

MR. DAVIES: Yes, Your Honor.

Q. (By Mr. Davies) Was that freight bill subsequently — excuse me, was Livingston, Inc. subsequently reimbursed for the freight cost pursuant to that invoice by Wash-A-Matic?

Q. Yes, that is billed against us and we are responsible for it.

THE COURT: The question was, "Did you pay it?"

THE WITNESS: I pay on a monthly statement, I don't know if there was an actual check written out for that amount, no.

Q. Was this bill then added to your regular statement.

A. Billed and added to our regular statement as our invoices.

Q. And you pay that statement on a monthly basis?

A. Yes.

Q. Let me show you now what has been marked, Mr. Thurmond, as Exhibit 6-P and ask you if you can identify that for us, please?

A. Yes, this is an invoice also on Mr. Rupp's equipment for the return of the equipment to the manufacturer, Livingston Industries, at which they have invoiced and billed us for and put on our statement.

Q. And would your answers with reference to 6-P concerning payment of that invoice be the same as it was for Exhibit 5-P?

(R. 102.)

Mr. Thurmond's testimony concerning Exhibit 7-P, the invoices for storage charges, was similar (R. 106).

Appellant's Exhibits 5, 6 and 7 are duplicate originals and are admissible, pursuant to Utah Code Annotated, § 78-25-16 (1953). Respondent admitted the documents were received by the Appellant from Livingston (R. 106), but argued that they were not admissible, on the ground that they were hearsay. On the basis of this objection, the lower court reserved ruling on the admissibility of the exhibits until the close of trial (R. 104). The ruling was never forthcoming.

Rule 63(13) of the Utah Rules of Evidence provides:

Business Entries and the Like. Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness:

Invoices have been universally held to be business entries. See Annotations found in 17 A. L. R. 2d 235 and 83 A. L. R. 806.

For example, in *Zerbinos v. Lewis*, 394 P. 2d 886 (Alaska, 1964), a driver sued for injuries received when his vehicle was struck by another vehicle driven by the defendant. The plaintiff contended that the trial court committed reversible error by admitting into evidence two receipts purportedly issued to the defendant for money paid to a service station for services rendered on her car, including items for brake adjustment and brake fluid about two months prior to the accident. The court held that on the question of the admissibility of the receipts that they were not hearsay.

Similarly, *Fidelity & Deposit Co. of Md. v. Wood*, 88 Okla. 95, 212 P. 132 (1923), involved a suit on a burglary insurance policy which required keeping a set of books. The court held that original invoices of merchandise purchased were admissible and not considered hearsay.

Under the present facts, Mr. Thurmond as president of Appellant testified as to the actual amount of incidental damages paid and insured as a result of the breach of contract by the Respondent. Appellant's Exhibits 5-7 are invoices reflecting such expenditures and should be admissible as further evidence of the incidental damages suffered by Appellant as a result of Respondent's breach of contract.

POINT IV.

LOSS OF PROFITS IS A PROPER MEA-

SURE OF DAMAGES FOR BREACH OF CONTRACT.

Exhibit 4-P as admitted into evidence is the bill and invoice from Livingston to the Appellant for the cost of the car-washing equipment ordered by the Respondent. The amount stated on the face of the invoice is \$17,698.88. The difference between the contract price of \$25,755.01 as found on Exhibit 1-P and Appellant's cost of \$17,698.88 is \$8,056.13. Under Utah law the amount of \$8,056.13 is a proper measure of damages for Respondent's breach of contract. § 70A-2-708 Utah Code Annotated (Repl. vol. 1968).

As stated in 67 Am. Jur. 2d *Sales* § 652 at 847-50:

The Uniform Commercial Code appears to follow the view that a dealer, manufacturer's agent, or middleman should have as a measure of damages his lost profits where the buyer has breached. This eliminates the unfair and economically wasteful results arising under the older law when fixed price articles were involved. The Uniform Commercial Code permits the recovery of lost profits in all appropriate cases, which would include all standard priced goods; and the normal measure there would be list price less cost to the dealer.

The Respondent is, in addition to the incidental damages suffered by Appellants, liable for the loss of profits of the Appellant.

CONCLUSION

The issues presented on this appeal are far from complicated. The court is faced with a simple and classical contractual dispute. Two parties entered into a sales agreement. The agreement was made subject to the purchaser's obtaining financing. The purchaser, by his own choice, sought to finance the purchase of the equipment set forth in the agreement through a lease arrangement.

After submission of the requisite financial information by the purchaser to the leasing company, said company approved the purchaser's credit and both verbally and in writing committed the funds necessary to purchase the equipment. The equipment, which had to be specially manufactured, was ordered and shipped to Salt Lake City. The purchaser accepted the first partial shipment and requested that the remaining equipment shipped subsequently be held in Salt Lake City pending determination of certain land problems.

When the purchaser could not work out his land problems to his satisfaction (which land problems were in no way a condition precedent to the validity of the contract) he unilaterally decided not to go through with the purchase, refused delivery of the balance of the equipment and refused to pay for the same. As justification for this flagrant breach of contract, the purchaser now contends that since he had not yet received the lease documents for his signature and since no funds had changed hands, he was not yet financed and there was no binding contract.

Reduced to its simplest terms, this appeal asks the question: What does the condition "subject to financing" in a sales contract mean? Does it require a completed financial transaction including preparation and presentation for execution of all necessary documents or is the condition fulfilled when the purchaser's credit is approved and a loan commitment given? It is submitted that both the contract itself, normal commercial usage, and the relevant case law require acceptance of the latter definition. Based thereon, the decision of the lower court to the contrary must be reversed.

Respectfully submitted,

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