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Packaging Corporation of America v. William W. Morris : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF

THE STATE OF UTAH

PACKAGING CORPORATION OF AMERICA, Plaintiff-Respondent, vs. WILLIAM W. MORRIS, Defendant-Appellant.	Case No.

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BRIEF OF APPELLANT

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BRIEF OF APPELLANT

NATURE OF THE CASE

This was an action by a packaging manufacturer to recover on a personal guaranty allegedly executed by Defendant Morris ("Morris") on behalf of a now defunct corporation.

DISPOSITION OF CASE IN LOWER COURT

The lower court awarded Plaintiff Packaging Corporation of America ("PCA") judgment in the amount of Twenty Thousand Dollars ($20,000.00) together with court costs of Twenty Eight Dollars ($28.00) and attorney's fees of Two Thousand Dollars ($2,000.00).

RELIEF SOUGHT ON APPEAL

Defendant-Appellant seeks reversal of the lower court's judgment.

STATEMENT OF FACTS

Defendant William Morris was a shareholder of Hawkeye Investment Company ("Hawkeye Investment"), a Nevada corporation. Early in 1971, Hawkeye Investment purchased the assets of Bakker's Royal Dutch Cookies in Utah through a court-appointed receivership. The corporation leased the premises and operated the cookie plant at Draper, Utah. (Trial Record /hereinafter cited as "R."/ at 2-3). At about the same time, Hawkeye Investment began dealing with PCA who agreed to supply Hawkeye Investment with cookie cartons for its product. Since the business was new and experiencing cash flow problems, PCA at first refused to extend credit to Hawkeye Investment and all orders were shipped C.O.D. (R. 49, 59-60).

In early 1971, Morris and William Birkinshaw ("Birkinshaw"), the President of Hawkeye Investment, approached the credit manager of PCA to see if there was a possibility that Hawkeye Investment could get an open account with PCA. PCA's area credit manager agreed to open an account if the account were personally guaranteed by an individual with an interest in Hawkeye Investment. (R. at 6). Both Morris and Birkinshaw signed, as co-guarantors, a personal guaranty

for Ten Thousand Dollars ($10,000.00) at that time. (R. at 67).

Once the account was opened, PCA extended credit to Hawkeye Investment over and above the limits of the $10,000.00 personal guaranty without notice to Morris. (R. at 36-37). By January 31, 1972, PCA's area credit manager estimated that PCA had extended credit to Hawkeye Investment amounting to approximately $22,000.00 or $23,000.00. (R. at 33). In February, 1972, PCA approached Morris for an extended personal guaranty to cover this excess credit. (R. at 8, 18). At no time was Morris ever informed that the outstanding indebtedness was already well above the $20,000.00 level. (R. at 36-37, 86-87). After some negotiation, PCA prepared a $20,000.00 guaranty form with specifically designated signature lines for both Birkinshaw and Morris. (R. at 12, 17). The form was first sent to Morris who signed it on the understanding that Birkinshaw would also sign, and that his agreement was predicated on Birkinshaw's action. (R. at 84-85). The form was then returned to PCA which failed to obtain Birkinshaw's signature (R. at 12, 17).

Morris is not a resident of Utah. His discussions with PCA personnel were nearly all conducted through long distance telephone from Nevada where he resides. He was in the state of Utah only twice in each of the two years from 1971 to 1972. These visits related to his business interests within the state; they did not concern the personal guaranties Morris had signed. (R. at 88-89).

ARGUMENT

POINT I

THE LOWER COURT JUDGMENT IS INVALID BECAUSE THE COURT LACKED PERSONAL JURISDICTION OVER THE DEFENDANT.

In holding that it had personal jurisdiction over Morris, the lower court ignored a long line of cases from this Court holding that there can be no long-arm jurisdiction asserted unless the defendant's contacts with the forum state relate directly to the transaction from which the claim allegedly arose.

The Utah Long Arm Statute, UTAH CODE ANNOTATED, Sections 78-27-22, et seq., has been construed several times by the Utah Supreme Court. Plaintiff asserts jurisdiction over Defendant Morris under its statutory provisions which state:

> Any person . . . whether or not a citizen or resident of this state, who in person or through an agent does any of the following . . . acts, submits himself . . . to the jurisdiction of the courts of this state as to any claim arising from: (1) the transaction of any business within this state . . . . /Emphasis added/

UTAH CODE ANNOTATED, Section 78-27-24 (1953).

But Plaintiff's reliance is misplaced. Implicit in the statute are the "fundamental notions of due process" announced by the United States Supreme Court in the landmark decision International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945):

> /I/n order to subject a defendant to a judgment in personam, if he be not present within the

> territory of the forum, he /must/ have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' /Emphasis added/

The essential minimum contacts required by the Utah Long Arm Statute, as it has been interpreted by this Court are lacking in this case. Morris' meeting in Draper, Utah during 1971, his two visits to Utah during 1971 and his two visits during 1972 were not related to the personal guaranty. Morris was simply overseeing his business interests in the state. Therefore, the lower court did not have in personam jurisdiction over Defendant under any of the statute's provisions.

This Court's recent decision in Mack Finanacial Corp. v. Nevada Motor Rentals, Inc., 529 P.2d 429 (Utah, 1974) illustrates a critical aspect of Section 24 which Plaintiff seems to have entirely overlooked. In that case, the defendant Nevada corporation entered into a contract to purchase trucks from the plaintiff, who maintained a business office in Utah. The contracts were entirely negotiated in Colorado and signed in Denver. Defendant drove the trucks to Utah and at one point sent an agent to Salt Lake City to obtain permission to assign the purchase contracts for the trucks to a third party. When the assignee failed to make payments the plaintiff instituted suit against the Nevada defendant, alleging that the acts

of the defendant in Utah satisfied the minimum contacts requirement for purposes of a suit on the purchase price. Noting that the act of driving in the state would give Utah courts jurisdiction of cases arising from injuries arising from such driving, the Court reversed the lower court and held that the contacts of defendant in Utah were not sufficient to establish a business presence for purposes of the suit on the purchase price.

It seems clear that a suit questioning the validity of the assignment in the Mack Financial case as well as one involving a truck accident would have been properly maintainable in Utah. But the Court, without specifically citing it, applied the explicit provision of Section 24 that jurisdiction is invoked only "as to any claim arising from" the enumerated acts. It does not matter that a defendant may have had extensive contacts with the state of Utah wholly irrelevant to the subject matter of the lawsuit. If the acts from which the claim arose do not have one of the statutory nexes with the state of Utah, there is no basis for the extension of jurisdiction to a non-resident defendant.

In several recent decisions construing Section 24, this Court has held that non-resident defendants with even greater contacts connected with the respective plaintiff's causes of action were not subject to the jurisdiction of the Utah courts. In Transwestern General Agency v. Morgan, 526 P.2d 1186 (Utah, 1974), the defendant,

through his insurance agent, initiated contact with a Utah insurance agency to obtain liability insurance. This single contact was held insufficient to establish in personam jurisdiction in the insurance company's suit to recover an earned premium on the policy. In the instant case, the initial contact in negotiating the guaranty document was made by Plaintiff in the state of Nevada, and there was no connection with the state of Utah with respect to the guaranty itself.

In Kocha v. Gobson Products Co., 525 P.2d 580 (Utah, 1975), the defendant manufactured wire merchandise racks, one of which arrived through the stream of commerce in Utah and injured the plaintiff. The Court held that no sufficient connection with Utah causing the injury had been shown.

In Hydroswift Corp. v. Louie's Boats & Motors, Inc., 27 Utah 2d 233, 494 P.2d 532 (1972), plaintiff sued to recover the purchase price of boats sold from Utah to an Oregon defendant on a theory that by failing to pay the price defendant had converted the boats, causing injury to plaintiff in Utah. The Court rejected the argument as insufficient to meet the minimum contracts requirement of the due process clause.

Conn v. Whitmore, 9 Utah 2d 250, 342 P.2d 871 (1959), was decided before the enactment of Section 24, but involved an identical Illinois statute. In that case, this Court gave three factors supporting its decision that an Illinois extension of jurisdiction was

invalid: (1) the out-of-state buyer (a Utah buyer outside of Illinois) had not taken the initiative; (2) the contract was consummated outside of Illinois; and (3) no damage was done to the citizens of Illinois by the defendant's failure to make payments to the plaintiff. In the instant case, the contract was consummated in the state of Nevada, and no injury has been done to any citizen of Utah by any action of Defendant Morris.

None of the acts alleged by Plaintiff establish any nexus whatever between the negotiations concerning the signing of the document from which this claim arose. Morris' four visits to the state of Utah during 1971 and 1972 were not made in connection with the $20,000.00 guaranty. It was undisputed at trial that Morris came into the state on those occasions to look after business interests separate from the guaranty. (R. at 88-89). The alleged acts were therefore, as a matter of law, insufficient to confer jurisdiction on the lower court with respect to the claim before it.

POINT II

THE TRIAL COURT ERRED IN FINDING THAT THE GUARANTY WAS COMPLETE AND THEREFORE ENFORCEABLE AGAINST MORRIS.

Though the matter has naturally not been the subject of frequent litigation in Utah, it is well settled law that a guaranty containing the conditional signature of one proposed guarantor, subject to the additional signature of another party, is not valid without the subsequent signature of the other party. This Court recognized this

principle in State Bank v. Burton-Gardner Co., 14 Utah 420, 423, 48 P.402, 403 (1897):

> Undoubtedly the law is that one or more persons may sign a note or guaranty, and deliver it to the payee with the agreement that they shall not be bound unless other persons named shall sign also; and, if such other persons do not sign, that those signing shall not be held.

As the Court in Wall v. Eccles, 61 Utah 247, 252, 211 P. 702, 704 (1922) noted, the issue "presents a mixed question of law and fact".

There is yet another rule that applies to this issue in the case at bar. The Utah Supreme Court has long recognized the fundamental rule that vague, ambiguous, or uncertain terms in a contract should be strictly construed against the document's framer. General Appliance Corp. v. Haw, Inc., 30 Utah 2d 238, 516 P.2d 346 (1973); Seal v. Tayco, Inc., 16 Utah 2d 323, 400 P.2d 503 (1965); See Financial Corp. v. Prudential Carbon & Ribbon Co., 29 Utah 2d 238, 507 P.2d 1026 (1973).

In Seal v. Tayco, Inc., 16 Utah 2d 233, 500 P.2d 503 (1965), this Court applied the principle to find the plaintiff liable on defendant's counterclaim despite ambiguous language in the contract which purportedly exculpated plaintiff from liability for special or consequential damages. The Court stated:

> /I/n cases of uncertainty as to the meaning of the contract, it should be construed most strictly against its framer . . . . /I/t seems

> manifestly unfair to permit one who formulates a contract to so fashion it as to mislead the other party by setting forth a clearly apparent promise or representation in order to induce acceptance, and then designedly burying elsewhere in the document . . . provisions which proport to limit or take away the promise and/or preclude recovery for failure to fulfill it.

Id. at 326,400 P.2d at 505.

This Court recognized the principle would also apply to ambiguous terms contained in a personal guaranty in General Appliance Corp. v. Haw, Inc., 30 Utah 2d 238, 516 P.2d 346 (1973). That case involved shareholders who withdrew from an unprofitable carpet retailing corporation which had incurred debts to plaintiff. The shareholders formed a new corporation, to carry on the business. Since plaintiff refused to deal with them otherwise, the shareholders executed a personal guaranty making them "responsible for the payment of the purchase price of . . . merchandise . . . sold or delivered" to the new corporation. When plaintiff brought suit to hold the shareholders liable for debts of the first corporation which had been assumed by the new corporation, this Court denied recovery, stating:

> The guaranties were drawn by plaintiff, and if there were any uncertainty or ambiguity as to the meaning of the terms of the contract, it would be construed strictly against the framer.

Id. at 241, 516 P.2d at 347-48. But the Court went on to find that there was no ambiguity because the term "sale" clearly did not include prior debts assumed by the new corporation.

Finally, the Court impliedly recognized that the principle could have applicability in a case similar to the one at bar, Financial Corp. v. Prudential Carbon & Ribbon Co.,29 Utah 2d 238, 507 P.2d 1026 (1973). In that case plaintiff sued defendants to recover on a personal guaranty allegedly executed by defendants on behalf of their corporation. One defendant argued that he was not bound by the guaranty because he had signed it solely in reliance upon plaintiff's false representation that the other defendant had already signed. The Court rejected this defense only because the other defendant was estopped to deny his signature on the guaranty.

The case at bar is an instance where the rule should apply. Plaintiff prepared the $20,000.00 guaranty with two signature lines designated for Morris and Birkinshaw. Morris was thus led to believe that this guaranty, like the $10,000.00 guaranty executed earlier, was to be a joint and conditional guaranty, enforceable only if Birkinshaw also signed. But the Plaintiff did not even ask Birkinshaw to sign the document and now seeks to recover the entire amount from Morris. It is submitted that the Court should apply the rule recognized in the above cases and it should construe the terms of the guaranty contract, including its misleading signature designations,

strictly against the Plaintiff, its framer. As the Court noted in Seal v. Tayco, Inc., supra, Plaintiff should not be permitted to benefit from the uncertainty and ambiguity it created in drafting the contract. It is submitted that this Court should support the intent of the parties and find that the contract was a joint and conditional guaranty, not enforceable against Morris alone.

POINT III

THE GUARANTY IS UNENFORCEABLE FOR LACK OF CONSIDERATION.

It has long been recognized that a guaranty is not enforceable unless it is supported by consideration. Such consideration may be in the form of a benefit to the guarantor or a detriment to the creditor. In Armstrong v. Cache Valley Land & Canal Co., 14 Utah 450, 48 P.690 (1897), this Court held that a personal guaranty for defendants' note was not enforceable because defendants had given bonds and securities as collateral for the note, and the guaranty was not supported by any other consideration. In essence, the Court reasoned, defendants derived no benefit from the guaranty.

Consideration may also come in the form of assurances and inducements made prior to execution of the principal contract. But where the plaintiff enters into a contract without any expectation or assurances that it will be personally guaranteed, courts generally have held the guaranty unenforceable for lack of consideration. For example, in Northern State Construct. Co. v. Robbins., 457 P.2d 187

(Wash. 1969), the Supreme Court of Washington held that since the guaranty was dated after the principal construction and there was no indication that a guaranty was expected, the guaranty was without consideration and unenforceable. See Gelco IVM Leasing Co. v. Alger, 6 Wash. App. 519, 494 P.2d 501 (1972). (Guaranty held unenforceable for lack of consideration where principle five-year lease contract was entered into prior to guaranty without indications that guaranty was expected).

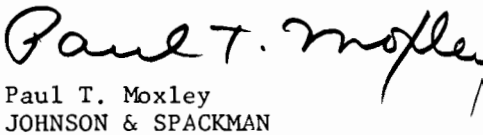
In the case at bar, Defendant Morris likewise received no benefit from executing the personal guaranty. Late in 1971, before the $20,000.00 guaranty was executed, PCA had extended over $20,000.00 in credit to Hawkeye International, well beyond the $10,000.00 amount covered by the first guaranty. It was not until early in 1972 that Plaintifff PCA finally asked Defendants to execute a second guaranty for $20,000.00. Prior to that time Defendant had made no assurances, nor had PCA requested any. Since Defendant received no benefit and Plaintiff incurred no detriment for the $20,000.00 guaranty, it is not supported by consideration and therefore, unenforceable.

CONCLUSION

The judgment of the lower court against Defendant Morris should be reversed. The lower court did not have personal jurisdiction over Morris to render judgment. Moreover, the guaranty is unenforceable

because of its conditional nature and because it was not supported by consideration.

Respectfully submitted,



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Certificate of Service

The foregoing Brief of Defendant-Appellant William W. Morris was served upon Plaintiff-Respondent Packaging Corporation of America by mailing, postage prepaid, two copies to its attorney, Lauren N. Beasley, of Cotro-Manes, Warr, Fankhauser & Beasley, at 430 Judge Building, Salt Lake City, Utah, 84111, this 16 day of June, 1976.

/s/
Paul T. Moxley