

1977

O.B. Oberhansly, Dennis Wilcox And Robert May v. Don B. Earle, Betty Earle And Rainbow Properties Corporation, A Utah Corporation : Brief of Appellants

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Oberhansly v. Earle*, No. 14820 (Utah Supreme Court, 1977).

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IN THE SUPREME COURT OF THE STATE OF UTAH

O. B. OBERHANSLY, DENNIS
WILCOX and ROBERT MAY,

Appellants,

vs.

DON B. EARLE, BETTY EARLE
and RAINBOW PROPERTIES
CORPORATION, a Utah cor-
poration,

Respondents.

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Case No. 14820

BRIEF OF APPELLANTS

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FILED

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STATEMENT OF THE NATURE OF THE CASE

Appellants Dennis Wilcox and Robert May appeal from the judgement of the District Court of the Fourth Judicial District in and for Uintah County which granted these appellants an award in equity of \$2,040.93 and denied these appellants enforcement of an agreement between the parties to this suit.

DISPOSITION IN THE LOWER COURT

A trial on the merits was held on the 24th day of March, 1976 in the District Court of the Fourth Judicial District in and for Uintah County, the Honorable J. Robert Bullock presiding and sitting without a jury. After hearing all the evidence and having taken the matter under advisement, the court issued a memorandum decision and subsequently issued finds of fact and conclusions of law holding the agreement ambiguous and ambivalent. The court further determined that although the agreement was not enforceable, equitable principles indicated that legal relationships had been created and that plaintiffs were entitled to damages in the amount of \$4,040.93. Upon motion by defendants the award was reduced to \$2,040.93.

RELIEF SOUGHT ON APPEAL

Appellants Dennis Wilcox and Robert May seek to have the lower court's order set aside and to have this court enter an

order upholding the agreement between the parties and holding defendants liable for checks drawn on insufficient funds in accordance with Utah Statutes.

STATEMENT OF FACTS

On or about December 6, 1974 plaintiffs and defendants entered into an agreement whereby defendants were to purchase all of the Capital Stock in Basin Distributing Co. for \$6,000.00; defendants were given the option to stay in the premises until they decided to move, paying \$350.00 per month as rental; defendants were given the option to use a truck so long as they maintained the lease on said truck. (See Exhibit 5) Exhibit 5 also indicates that defendants were to purchase all of Basin Distributing inventory at the price of \$4,040.93. (TT, 54) Plaintiffs admitted receiving a \$500.00 down payment for the Capital Stock in Basin Distributing (TT, 53) and all parties admitted that the balance on the Capital Stock in Basin Distributing was evidenced by a promissory note in the amount of \$5,500.00. (See Exhibit 1) It was also admitted by all parties that a \$350.00 check for rent from December 6, 1974 to January 6, 1975 was paid, received, deposited and enured to the benefit of plaintiffs. (TT, 26) All parties further admit that a \$1500.00 cash down payment was made on the inventory. (TT, 50)

Defendant Betty Earle admitted making and giving a check in the amount of \$1540.93 to plaintiffs to be applied towards inventory. (TT, 23) Plaintiff Dennis Wilcox testified at some length that this check was presented for collection and was

returned unpaid. (TT, 40-42) It was further admitted by defendants that a \$1500.00 check with date of January 6, 1975 was received as payment on inventory and was not honored by the bank on which it was drawn. (See Defendant's Answer, R. 6) Defendants also admitted giving a second \$350.00 check to be applied as January 6, 1975 rent to plaintiffs and that it, too, was returned unpaid. (See Defendant's Answer, R. 6)

There was some question as to when, in fact, defendants assumed control of Basin Distributing Company. The Earnest Money Receipt recites that defendants assumed control on December 6, 1974. (See Exhibit 5) Defendant Don B. Earle testified that he did not assume control until December 16, 1974. (TT, 62) Mr. Earle further testified that he operated Basin Distributing Company from December 16, 1974 until about two weeks after February 3, 1975. (TT, 70 and 76)

It was brought out at trial that neither of the defendants complied with the statutory licensing provisions of the Utah Code with respect to distributors of alcoholic beverages. (TT, 101-103) It was further received into evidence that defendants were aware that there were laws to be complied with but that they were not fully apprised of their substance; that plaintiff O. B. Oberhansley agreed to maintain his license until such time as defendants could obtain theirs and, in fact, did so.

ARGUMENT

THE LOWER COURT ERRED IN FINDING THE AGREEMENT
AMBIGUOUS AND AMBIVALENT AND IN DECLINING TO
ENFORCE SAID AGREEMENT.

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The lower court, without stating why, indicates in its memorandum opinion that the agreement between the parties is ambiguous and ambivalent and that all collateral agreements are ambivalent, ambiguous and loose. Apparently the lower court decided that since there was ambiguity the contract was not enforceable. The fact that some ambiguity exists does not in and of itself render a contract unenforceable, and it is appellants' contention that the required amount of ambiguity was not present in this case.

The general rule is well stated in 17 Am Jur 2d, Contracts, §76, wherein it states:

The degree of definiteness and certainty required has been variously stated. It is said that it must be possible to ascertain the full meaning with reasonable certainty, or that the obligations of the parties must be reasonably certain....The agreement must be certain and unequivocal in its essential terms either within itself or by reference to some other agreement or matter....It has been said that an agreement to be binding must be sufficiently definite to enable the court to determine its exact meaning and fix definitely the legal liability of the parties.

Absolute certainty is not required, however; only reasonable certainty is necessary. A contract is not subject to the objection that it is indefinite so long as the parties can tell when it has been performed, and it is enough if, when that time arrives, there is in existence some standard by which performance can be tested. (emphasis added)

Applying these standards to the contract in this case, it becomes clear that this contract is not so indefinite that it is unenforceable. The contract provides for several different items of sale. It provides for the sale of a distrib-

butorship for the stated price of \$6,000.00, \$500.00 to be paid on December 6, 1974 as a down payment and \$500.00 a month beginning January 10, 1975 until paid in full with interest at 7% on the unpaid balance, the monthly payments including the interest; 2) it provides for the sale of inventory that was to be counted on December 6, 1974, said sale to be in an amount different from the \$6,000.00 previously mentioned and quite easily determined by the court to have been \$4,040.93; 3) it provides for a rental option at \$350.00 per month should the buyers wish to remain in the building and further provides that at the expiration of 8 months the rental would increase if buyers were still present on the premises; 4) finally it provides that in the event buyers wish to continue the lease on the truck they, buyers, will pay sellers \$1,000.00 and that buyers will assume all obligations after December 6, 1974 and that any bills already paid will be refunded to sellers.

It is not appellants' contention that the contract is completely clear, but appellants do contend that the contract is sufficiently clear in its major points that reference to other facts will clarify the minor problems completely. For example, with respect to the rental clause: it was defendants' contention in their pleading that they did not rent the building per se. Appellants do not argue that point and defendants' position is entirely consistent with the contract. Appellants' contention in the lower court was not that defendants had rented the building per se, but only that in accordance with the terms of the contract, defendants did, in fact, occupy the building and since they had occupied, defendants owed rent for the period of their occupancy. The question then before the court was not whether or

not the contract was ambiguous but whether or not defendants had occupied the building for the period of time specified in appellants' complaint. If there was any question as to whether or not defendants understood the terms of the rental clause a cursory look at the evidence admissible to clarify any supposed ambiguity on the part of defendants would clearly indicate that they knew perfectly well what the clause meant. They paid \$350.00 rent in December and tendered a bad check in the same amount in January. Both checks were admittedly for rent. From the evidence, therefore, there can be no question that defendants understood what the clause meant. Dennis Wilcox testified that he knew that defendants were present and occupying the building until March of 1975. (TT, 43) That testimony was uncontradicted by way of rebuttal or cross-examination even though ample opportunity was available to defendants to do so.

Similarly, with respect to the truck, any ambiguities were cleared up quite quickly. The evidence was quite clear in identifying the truck. (TT, 44) The only question was whether or not the defendants had exercised their option to continue leasing the truck. No time limit is specified for the exercising of the option but a reasonable time would certainly be applicable. The evidence again indicated that for the entire time that the defendants owned and operated the Basin Distributing Company they had use of the truck. (TT, 44) That testimony was uncontradicted and indicated that the defendants used the truck for approximately two months. With their knowledge that the truck was under a lease, they knew that payments would have to be made either by themselves or by plaintiffs. The question is, once again, did the defendants exercise the option and not is the contract ambiguous.

Each of the other points in the contract was similarly explainable and the evidence tended to show that each of the parties knew precisely what was demanded of him by the contract. The fact that the contract was placed on Earnest Money Receipt and Offer to Purchase is really of no significance. None of the parties argued that they did not receive a parcel of land and it is quite apparent from the document that it was never intended as a sale of land. All parties were well informed as to the items being sold or exchanged. Although certainly an awkward method of procedure such a circumstance without more does not meet the criteria of ambiguity.

Of significance in this context is the comment of the judge in the lower court at the end of the trial and appellants include this comment with all due respect and deference to the judge.

THE COURT: You will submit it without argument? All right. I'll take this matter under advisement. I would only make this comment, and probably should not make it, but it sounds to me as if something that could have been avoided just plain wasn't because of negligence, and perhaps a loss occurred that might never to have occurred.(sic) Doesn't appear from my observation of the evidence that there's any dishonesty, any intent to take advantage of anybody in any respect. There was just plain negligence on the part of somebody that resulted in an unfortunate loss. Because there is no question but what there is a loss.

Although it is certainly difficult to view negligence and observe a loss that is not a reason to invalidate a valid contract, rather it is grounds for apportioning responsibility

and allocating damages if any exist based on applicable duties.

Therefore, appellants submit to the court that this contract does not meet the criteria for non-enforcement because the contract was not ambiguous.

POINT II

THERE WAS SUFFICIENT CONSIDERATION AND PERFORMANCE TO UPHOLD THE AGREEMENT.

The law dealing with partial performance and partial failure of consideration is discussed in 17 Am Jur 2d, Contracts, §398. The Utah Supreme Court has agreed with the statement in Am Jur 2d as a general principal of law in Prudential Federal Savings and Loan Association v. Hartford Acc. and Ind. Co., 7 Ut.2d 366, 325 P.2d 899 (1958). At 325 P.2d 903 the general rule of law is stated to be precisely as Am Jur indicates. The general principle is that failure of consideration is not a sufficient excuse for non-performance of a promise unless the failure goes to the essence of the contract.

For purposes of this point, appellants will assume that they were required to give "signed agreements with the Beer Companies to show they have exclusive right to sell in this area." Furthermore, for purposes of this point, appellants will admit that they did not give signed agreements. In so admitting, appellant does not admit that it did not perform the contract. Appellant simply admits that it did not give signed documents to defendants indicating exclusive rights.

Having admitted the above, the question then becomes: Was
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this such a lack of consideration that defendants are now free from performing their promises? The answer to that question must be no.

The cited authorities indicate that the lack of consideration must go to the heart of the agreement. If the lack of consideration is insubstantial, then the defendants cannot decline to perform. They may collect damages for the failure, but they must perform their part of the agreement.

In the case at bar, the allegation of the counterclaim was that the failure to tender to the defendants signed agreements caused the business to fail. At the trial defendants tried to prove that this was the case. There was extensive treatment of this issue and the court declined to grant defendants counterclaim because there was no showing that defendants were in any way damaged by the failure of appellants to tender the signed agreements. (TT, 70-80). At the termination of this long discourse between counsel and the court and the questions of evidence, the court stated:

Well, I've got to have in order to hold for the defendant, it seems, on its Counterclaim it seems to me that I have to have some kind of evidence that the sellers here did not perform their bargain or did not deliver what they were required to deliver and that the failure or delivery resulted in damage to the defendant. (TT, 80)

Such evidence was not forthcoming, in spite of the fact that the court allowed defendants four weeks extension to produce witnesses to testify as to the damage caused by the plaintiff's lack of signed agreements. The burden of proof was not met.

The evidence that was produced tended to show that the defendants

were able to continue operating the business with no damage whatsoever. The fact that Schlitz refused to sell defendants any more beer was in no way linked to the actions of plaintiffs. Under these circumstances defendants must perform their promises because they have no excuse for non-performance.

POINT III

THE COURT ERRED IN NOT ENFORCING THE
UTAH CODE WITH RESPECT TO CHECKS WRIT-
TEN ON INSUFFICIENT FUNDS.

Under this point appellants will assume, arguendo, that the failure of plaintiffs to give defendants actual written documents was a failure of consideration. Even under these circumstances it was error for the court to not have enforced against defendants the Utah Statutes prohibiting the writing of checks drawn on insufficient funds and providing for the remedies prayed for in plaintiffs' complaint.

In 2 ALR 643 there is an extensive examination of the severability of contracts and when a contract can be divided so that failure of consideration in one area of the contract does not destroy the entire contract. In effect, the case law indicates that if the contract is not simply one whole or entire sale whereby if one part fails all the parts fail, the contract is severable into its parts and failure of consideration for one part does not release a defendant from complying with promises made in other parts of the contract. The ALR discussion points out that one of the tests is: Can the plaintiff point

to a separate sale price for each item? The article goes on to indicate that this test does not mean that if one were selling twenty cars and simply divided the total sale price by twenty one has arrived at a separate sale price for each item. The test requires that there not be a total sale price for the entire "package" but that each item almost be listed separately with its own price or that there be almost an entire separate agreement for each item or group of items or that in some way the payment can be apportioned to each item.

Applying these principles to the case at bar, it is quite clear that the rental agreement is a completely separate item within the meaning of the rules stated above. The purchase of the inventory is also a separate item as is the leasing of the truck. Each item is separate and distinct. None of the items depend on any of the others to make them a whole contract. For example, the consideration for the inventory is the inventory itself. Plaintiffs promised to place the inventory in the hands of the defendants for the defendants promise to pay cash for the articles. Similarly, the consideration for the rental agreement was the giving up of the building space by the plaintiff to the defendant. Finally, the consideration for the lease clause was the giving of the use of the truck to the defendants on the assumption that the defendants would also continue the lease payments. In each case the consideration for the clause is a separate and distinct act on the part of the plaintiff, and in each case a separate and distinct amount of money or purchase price is applicable to the distinct items.

Under these circumstances the writing of checks drawn on insufficient funds for the payment of rent and for purchase

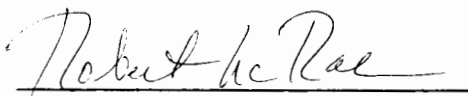
of Basin Distributing inventory cannot be excused because the contracts were unenforceable. The contracts were enforceable, as appellants have demonstrated under previous points of this brief. Furthermore under the discussion of this point, even if the lack of signed agreements is a lack of consideration for a part of this contract, it is not a sufficient lack of consideration as to eradicate the defendants promises under other provisions of the contract because the contract was severable.

Defendants admitted in their answer that the checks on January 6, 1975 had been written and returned by the banks marked "refer to maker." The banks notified defendants of these two checks and defendants failed to comply with the statutory procedure to cure the defect in a timely manner and, indeed, continue to refuse to do so. Under these circumstances, plaintiffs should have been awarded damages for these checks and reasonable attorney's fees.

SUMMARY

The agreement which is at issue in this case was an enforceable agreement. Defendants did not perform under the agreement as they promised and plaintiffs, in being damaged thereby, should have received judgement as prayed for in their complaint.

DATED this 30th day of April, 1977.



Robert M. McRae
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Salt Lake City, Utah 84111

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing, postage prepaid, to Mr. Reese C. Anderson, Attorney for Respondent, 512 East Second South, Salt Lake City, Utah, 84102 and to Mr. George E. Mangan, Attorney for Plaintiff O. B. Oberhansley, P. O. Box 788, Roosevelt, Utah 84066, on this the ^{21st}~~30th~~ day of ^{May}~~April~~, 1977.

