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H.F. Shillington, individually and by herself v. Yoho Automotive, inc. : Reply Brief

Utah Court of Appeals

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Jerry J. Kaufman; Thorpe, North and Western; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

H. F. SHILLINGTON, individually and by himself, Defendant, Appellant vs. YOHO AUTOMOTIVE, INC. Plaintiff, Respondent.	APPEAL CASE NO. 88-0[redacted] ARGUMENT PRIORITY CLASSIFI[redacted] CATION, CATEGORY NO. 14(b[redacted]

REPLY BRIEF OF APPELLANT

Appeal from the decision of the Third Judicial District Court
In and For Salt Lake County, State of Utah.

HONORABLE DAVID S. YOUNG
DISTRICT COURT JUDGE

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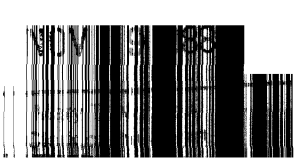

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REPLY TO SUMMARY STATEMENT OF FACTS

Because Plaintiff has not rebutted seventy-six of the eighty cases that were cited by Defendant it is very difficult to argue the Law and the facts if they are not rebutted. It is obvious that the Plaintiff chose to either ignore the authorities or could not find cases in point to substantiate their position. Further, Plaintiff erroneously states that RTEM was "established under the supervision of Shillington". RTEM was a new franchise, but was a separately incorporated entity independently operating (Respondent's Brief, p.3, para. 4).

Mr. Shillington continually denied being personally responsible for any goods (para. 12, p. 2, Shillington Affidavit dated September 18, 1987, Addendum No. 3 to Appellant's Brief).

Plaintiff mistakes the record as "facts" when he says that Plaintiff approved credit only after Defendant agreed to be personally responsible. In fact Mr. Yoho did not see the guaranty until his deposition (p. 14, l. 1-2, Yoho Deposition, Addendum No. 9 to Appellant's Brief). In fact the approval space in the agreement was left blank (p. 14, l. 12-14, Yoho Deposition). Plaintiff asserts a reliance theory and states at page 4 of his brief, "Based upon the strength of that application . . . Plaintiff provided goods . . .", when in fact the Plaintiff's own testimony was that shipment was made in April 1984 some four months prior to the credit application being signed by Mr. Shillington. Further, Vern Yoho thought the application was signed by Mr. Shillington prior to the shipment of

goods (Yoho Depo, p. 14, l. 17-24), when in fact it was four months later (Lancaster Depo, p. 1, para. 4 & 6).

Plaintiff also glosses over the protest and denial of Mr. Shillington wherein he stated he didn't understand what he was signing in response to heavy examination by Plaintiff's counsel (Shillington Depo, p. 35, l. 3-9). Mr. Shillington also denied he knew what he was signing (Lancaster Affiavit, p. 2, para. 8, and Shillington Affidavit, p. 2, para. 7, 8 & 12, Addendum No. 3). If anything, this created a major issue of fact which should be submitted to a full trial for testimony.

SUMMARY OF ARGUMENT

The Plaintiff states, and in a rather cavalier manner, and what appears to be without a complete review of the record (and with his emphasis added), that,

> "Most importantly, the Defendant has never, by any sworn statement, stated he did not understand that he was signing a personal guaranty of RTEM's obligation."

The record is replete with testimony from many parties that Moe Shillington signed under protest and did not know what he was signing and didn't personally deal with or guaranty RTEM's obligation, but most fatal is that Plaintiff merely had to go to Defendant's brief and a quick perusal of Addendum No. 3 thereto at page 2, paras. 8 & 12 of Mr. Shillington's Affidavit, and he would have discovered the following language in a sworn statement:

> "12. I never agreed to be personally liable for 'any liability' incurred by RTEM, Inc., nor did I intend to guarantee the debts of RTEM, Inc."

> "8. . . . I did not read it. I did not understand what it contained nor did I intend on signing a guaranty instrument. I signed it in protest . . .".

It is obvious that Plaintiff chose to ignore the language, just like he chose to ignore the delivery date. The ambiguities did exist because of oversite and error by his company.

It is true that the Supreme Court will not overturn if there is amble evidence to support the ruling below. In the case at bar, not only was there, respectfully, an abuse of judicial discretion but also a ruling in contradiction to the disputed evidence. This runs squarely against the case authorities and more specifically, Nevada State Bank v. Snowden, 449 P.2d 254 (Nev. 1959).

DETAIL OF ARGUMENT

In Buehner Block Company v. U.W.C. Assoc., 752 P.2d 892 (1988), erroneously cited by Plaintiffs as Vol. 792 and is distinguished on its facts. The Court there, held that language in a commitment letter imposed no obligation on a lender to require bonding. There, it was an interpretation of language already in the contract, not as here, omitted language creating uncertainty. Also, there was no "duty" language as implied by Plaintiff. Plaintiff then cites Big Cottonwood Tanner Ditch v. Salt Lake City, 740 P.2d 1357 (Ut. App. 1987) which does not exactly stand for the language cited. This was a declaratory judgment case and Plaintiff assumes the very fact in issue in the case which was to be decided by the Court, i.e., that the document is not ambiguous. The Court said in Big Cottonwood

document is not ambiguous. The Court said in Big Cottonwood Tanner Ditch v. Salt Lake City, Id., "Where the language is ambiguous it is the duty of the Court to enforce the agreement (emphasis added)". In our case the credit application was ambiguous and as a result of Plaintiff's own fault. Futher the Court emphasised that the contract should be looked at if it ". . . is possible." We agree with that Hornbook Law. However, you cannot interpret intent and use construction rules where essential terms are omitted. There isn't even a date in the document. Plaintiff agrues Utah Valley Bank v. Tanner, 636 P. 2d 1060 (Ut. 1981) and Big Butte Ranch, Inc. v. Holm, 670 P.2d 690 (Ut. 1977). In Utah Valley, Id., there are unrelated facts. There the Court held that the trial judge erred in allowing extrinsic evidence as to the motivation of a co-signer. There was no ambiguity issue, no omitted terms, as here, and no challenge as to intent of the signer as in our case.

The Big Butte case, Id., states correct law in that intent may be shown from the contract, however, it goes further in the well reasoned opinion to state, ". . . and if the meaning is ambiguous or uncertain and consider parole evidence of the parties intentions." It states as a rule to allow parole evidence to assist in determining intent which is the gravaman of this case. Mr. Shillington was denied his opportunity to show what his intentions were. Ms. Lancaster, the Yoho employee, should have been allowed to be called as a witness to verify Mr. Shillington's state of mind.

Again, Plaintiff asserts at page 10, para. 2 of his brief that Defendant never, under oath, stated he did not understand the paper or didn't guarantee. This has been repeatedly controverted and is the basis for allowing Defendant to have his day in court. (See Shillington Deposition, Addendum No. 8, p. 34, l. 1-9; p. 35, l. 3-5. Also, Lancaster Affidavit, Addendum No. 4, p. 2, para. 8. Shillington's Affidavit, Addendum No. 3, p. 2, paras. 7, 8, & 12). Plaintiff misstates the evidence in his first paragraph on page 11 of his brief. He states, ". . .Mr. Yoho testified that he allowed goods to be sent to RTEM only after receiving the promise of Mr. Shillington to be personally responsible . . ." Yet Vern Yoho in his deposition (Addendum No. 9, at p. 14, l. 2-3), stated he thought the day of the deposition was the first he saw the credit application. Which side of the confused and contradictory argument do we believe? The only credible evidence before the Court was that Vern Yoho hadn't seen the document and therefore could not have sent goods, ". . . only after receiving (emphasis added). . .", the alleged promise of Moe Shillington. There is no other assertion anywhere that your undersigned counsel can recall wherein the Plaintiff's even hint that Defendant agreed to be personally liable and we challange the Plaintiff to come forth with that tangible evidence!

Vern Yoho actually testified that the document was signed (and he erroneously assumed prior to delivery) in April

1984 (p.14, Yoho Deposition), when in fact it wasn't signed until August 1984 which was many months after the initial delivery of goods. Plaintiff cites at page 11 of his brief the case Ranier National Bank v. Lewis, Wash. App. 419, 635 P.2d 153 (1981). This case is strongly distinguished on its facts and also it is secondary authority. There Mrs. Lewis signed a guarantee on the date the bank extended the loan. Mr. Lewis signed subsequently. However, and not like our case, Mr. Lewis sent a letter of confirmation. The bank also confirmed by letter. Mr. Lewis also telephone the Bank Manager confirming the guarantee. None of these additonal corroborating factors exist in the Yoho/Shillington case. Here, Defendant has always disputed his lack of an understanding of the facts and the document itself. In fact, the Ranier case, Id., said there was no fact showing Mr. Lewis ever denied knowledge of the guaranty. In our case the affidavits and depositions all corroborate Mr. Shillington's testimony of lack of understanding and no intent to guarantee.

The Plaintiff at page 12 asserts that credit was extended solely on the promise of Mr. Shillington's promise. However, there is no citation or reference to any such promise. When was such a promise made? Where? Who was present? Where in the record is it shown? The only evidence that can be construed as Moe Shillington's promise (because none other is alleged) is the fatally defective credit application. That was three to four months after Plaintiff delivered the goods. No CREDIT could have been extended based on reliance of Moe

Shillington's signature. Therefore, there could be no reliance on a Shillington promise (we contest that one was made) and which was never intended.

Plaintiff argues Starks v. Field, 89 P.2d 519 (Wash. 1929) and Imperial Refineries Corp. v. Morrissey, 119 N.E. 2d 872, (Iowa 1964) at page 13 of his brief. In Starks, Id., there was a quiet title action. Plaintiff cites several propositions but none related to our case other than in a general sense. He argues at p. 13 of his brief, "The pressure must be wrongful." Those are exactly the facts argued by Mr. Shillington. There were threats to Mr. Shillington and allegations that his business would be in jeopardy over the loss of the "high roller" program and would be disastrous (Addendum No. 3, p. 4, para. 18). This was unrebutted! It is ludicrous to argue this type of conduct was permissible and is obvious that the actions were wrongful.

Plaintiff says Defendant had alternatives available but mentions none. Mr. Shillington was petrified to think of losing his business. He protested immediately to Ms. Lancaster.

The case Land v. Land, 605 P.2d 1248 (Ut. 1980), is well known to this Court since the Honorable Christine Durham, now a Justice, was upheld on appeal. There, the Court, and very wisely so, interpreted the meaning of the word equity. We agree with that proposition. However, we disagree with the lower Court in our case as Mr. Shillington was foreclosed from a trial and thereby precluded from asserting any equity principals whatsoever because of the summary ruling.

Plaintiff also argues Mackey v. Philzona Petroleum Co., 93 Ariz. 87, 378 P. 906 (1963) and Diamond Fruit Growers, Inc. v. Goe Company, 242 Ore. 397, 409 P.2d 909 (1966). In Mackey, Id., the Arizona Court rejected the California case of Chung v. Johnston, 128 Cal.App. 2d 157, 274 P.2d 922, which stands for the exact opposite proposition to that quoted in the Yoho brief at p. 14. California, we submit is a more influential jurisdiction to our Court, would give relief against the conduct which is merely thoughtless and inadvertant. But our case is even stronger because it was Mr. Yoho who was thoughtless and inadvertant. It was he who had the control of the company and the documents and yet chose not to exert such control. He didn't know when the application was signed or when the goods were delivered. He shipped prior to any signature and didn't even know that. The Mackey Court dealt with reformation and recission, but did remand to allow the sellers their day in court. That is all we ask. The Diamond Fruit, Id., case is distinguished on its facts There three or four partnerships were transferred to a corporation to avoid obligations. The Court held it would look through the form to the substance and thereby pierce the corporate veil to enforce the contract. There was a sense of surreptitious conduct there which did not exist in our case. All of the cases referred to in our Opening Brief and the rebuttal in our Reply Brief herein urge strongly that the Defendant should have been given his day in Court and should not have been denied the opportunity to present evidence as asserted.

CONCLUSION

Initially, we agree with Plaintiff's argument entitled, "Point II" at p. 7 of his brief and hereby withdraw that allegation of error only.

For the arguments and cases submitted in this Reply and the Opening Brief we respectfully pray that the Court reverse the lower Court decision and remand for trial below. We urge this Court to recognize that there are major factual disputes to be decided. The lower Court did abuse its discretion and summarily decided against the Defendant. The issues of intent, knowledge, protest, the ambiguity of a document because of the blanks, the failure to include a date and the failure to include important language should not be decided at a summary proceeding.

Defendant respectfully requests that this Honorable Court remand for trial below.

DATED this 7 day of November, 1988.

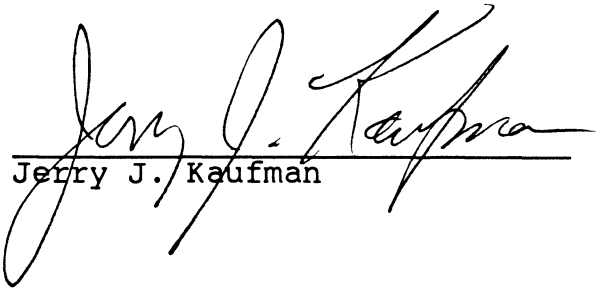
Respectfully submitted,

THORPE, NORTH & WESTERN

Jerry J. Kaufman
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I do hereby certify that I caused four true and correct copies of the foregoing REPLY BRIEF OF THE APPELLANT, H. F. Shillington to be mailed, postage prepaid, to Duane R. Smith, Poole, Cannon & Smith, 4885 South 900 East, Suite 306, Salt Lake City, Utah 84117, Attorney for Plaintiff/Respondent this 9th day of November, 1988.



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