

1988

H.F. Shillington, individually and by himself v. Yoho Automotive : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

H. F. SHILLINGTON, individually :	:	APPEAL
and by himself, :	:	Case No. 88-0036-CA
Defendant-Appellant, :	:	
-vs- :	:	Priority Classification
YOHO AUTOMOTIVE, INC., :	:	No. 14b
Plaintiff-Respondent. :	:	

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
JUDGE DAVID S. YOUNG

BRIEF OF THE RESPONDENT YOHO AUTOMOTIVE, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii - iv
PROCEEDINGS BELOW AND JURISDICTION	2
SUMMARY STATEMENT OF FACTS	3
SUMMARY OF ARGUMENTS	4
ARGUMENT	6
POINT I. There is Ample Evidence to Support the Ruling of the Trial Court.	6
POINT II. The Reliance of Defendant on §70A-3-606 Is Inappropriate.	7
POINT III. The Personal Guaranty Signed By the Defendant is Not Ambiguous	8
POINT IV. The Personal Guaranty is Supported By Consideration	11
POINT V. The Defendant Was Not Coerced.	12
POINT VI. Defendant's Appeal to Equity Is Inappropriate	13
CONCLUSION	14
CERTIFICATE OF MAILING	16

TABLE OF AUTHORITIES

STATUTES

<u>§70A-3-102, Utah Code Annotated</u> (1953) as amended	5
<u>§70A-3-104, Utah Code Annotated</u> (1953) as amended	8
<u>§70A-3-606, Utah Code Annotated</u> (1953) as amended	5, 7

CASES

<u>Big Butte Ranch, Inc. vs. Holm,</u> 570 P.2d 690 (Utah 1977)	9
<u>Big Cottonwood Tanner Ditch, Co. vs. Salt Lake City,</u> 740 P.2d 1357 (Ut.App. 1987)	9
<u>Buehner Block, Co. vs. U.W.C. Associates,</u> 792 P.2d 892 (Utah 1988)	9
<u>DeCristofaro vs. Security National Bank,</u> 664 P.2d 167 (AK. 1983).	10
<u>Diamond Fruit Growers, Inc. vs. Goe, Co.</u> 242 Oregon 397, 409 P.2d 909 (1966).	14
<u>Imperial Refinerites Corp. vs. Morrissey,</u> 119 N.W.2d 872 (Iowa 1964)	13
<u>Land vs. Land,</u> 605 P.2d 1248 (Utah 1980).	13
<u>Mackey vs. Philzona Petroleum, Co.,</u> 93 Ariz. 87, 378 P.2d 906 (1963)	14
<u>Northern State Construction, Co. vs. Robbins,</u> 457 P.2d 187 (Wash. 1969).	11
<u>Ranier National Bank vs. Lewis,</u> 30 Wash. App. 419, 635 P.2d 153 (1981)	11

TABLE OF AUTHORITIES

Continued. . .

<u>Starks v. Field,</u> 89 P.2d 513 (Wash. 1929)	13
<u>Utah Valley Bank vs. Tanner,</u> 636 P.2d 1060 (Utah 1981).	9
<u>West v. West,</u> 15 Utah 2d 87, 387 P.2d 686 (1963)	9

PROCEEDINGS BELOW AND
JURISDICTION

The Complaint of Plaintiff, in the Court below, sought recovery of the sum of Twenty Thousand Eight Hundred Fifteen Dollars and 64/100 (\$20,815.64) representing auto parts and supplies sold by the Plaintiff to the Defendant business known as RTEM, Inc. Specifically, Plaintiff sought to recover from the Defendant Shillington by reason of a written personal guaranty given by the Defendant in connection with the sale of the goods to RTEM.

After the answer of the Defendant Shillington, a Motion for Summary Judgment was filed by the Plaintiff. (R. 82.) That Motion was accompanied by an Affidavit of Vern K. Yoho, the President and Chief Executive Officer of the Plaintiff (R. 79), as well as Memorandum of Points and Authorities. (R. 85.)

After oral argument, the Trial Court entered judgment in favor of the Plaintiff and against the Defendant Shillington. The Court ruled that there were no genuine issues as to material facts regarding the fact of Shillington's execution of an unambiguous personal guaranty.

It is from that judgment that the Defendant Shillington filed this Appeal. The matter was originally appealed to the Utah Supreme Court and was then transferred to this Court pursuant to Rule 4A of the Rules of the Utah Court of Appeals.

SUMMARY STATEMENT OF FACTS

As this Court is aware, the decision of the Trial Court with respect to factual matters is not to be disturbed unless there can be shown that there was no basis in the record for the findings made and that the decision of the Trial Court was an abuse of discretion. In this case the following facts are undisputed and have not been disputed by the Defendant Shillington:

1. The Plaintiff at all times pertinent to this action was a corporation in the business of supplying auto parts and supplies to retail jobbers. (R. 86.)

2. The Defendant Shillington operated a franchising business known as "Mr. Parts". Under the Defendant Shillington's program, a retail auto parts franchise would be set up under the name "Mr. Parts" with the assistance of Shillington. (R. 86.)

3. The Defendant Shillington was a primary customer of the Plaintiff and used the Plaintiff as the major source of supply for the initial inventory to a new franchise operation. (Shillington Depo. Pg. 10.)

4. The Defendant RTEM was a new franchise established under the supervision of Shillington, and was for the purpose of retailing auto parts. (R. 86.)

5. When the Plaintiff was asked to supply the initial inventory for RTEM, the request was denied because of the lack of

financial stability of Mr. Eldon Mecham, one of the principals of RTEM. (Yoho Depo. Pg. 10.)

6. Only after Shillington agreed to be personally responsible for the goods sent to RTEM did the Plaintiff approve the extension of credit. (Yoho Depo. Pg. 12.)

7. The Defendants RTEM and Shillington executed an application for credit with the Plaintiff. (Shillington Depo. Pg. 21.)

8. Based upon the strength of that application for credit, and upon Shillington's promise to pay, Plaintiff provided goods and services to the Defendant RTEM, including the initial inventory merchandise on open account. The balance due on that open account was, at the time judgment was sought, Twenty Thousand Eight Hundred Fifteen Dollars and 64/100 (\$20,815.64). (R. 86.)

9. The Defendant Shillington signed the credit application as a guarantor of the sums due for the merchandise delivered to the Defendant RTEM. (Shillington Depo. Pg. 21.)

10. The Defendant Shillington admits that he understood he was guarantying the obligations of RTEM. (Shillington Depo. Pgs. 31-35.)

SUMMARY OF ARGUMENTS

The position of the Plaintiff is that the entry of Summary Judgment by the Trial Court was well supported by the undisputed facts and that this Court should not disturb that ruling. In

specific response to the issues raised by the Defendant Shillington, Plaintiff argues as follows:

1. Whenever there is ample evidence to support the ruling of the lower court, this Court must not impose a different decision. In the case at hand there is more than enough evidence to support the ruling of the Trial Court. The simple fact is that the Defendant agreed to sign a personal guaranty of the RTEM obligations in order to induce Plaintiff to deliver the inventory. The Trial Court did nothing more than enforce that obligation.

2. The Defendant's reliance upon §70A-3-606 of the Utah Code Annotated is not only factually inapplicable but legally inappropriate. The Defendant attempts to argue that the Plaintiff has somehow impaired the collateral. However, §70A-3-606(1)(b) deals exclusively with the holder of a negotiable instrument. See, §70A-3-102. There is no negotiable instrument in the case at hand; §70A-3-606 is therefore inapplicable.

3. The remainder of the arguments of the Defendant center around the contention that the agreement signed by the Defendant is somehow ambiguous. However, any such ambiguity is the product of the arguments of counsel and is not based in fact. The document is, in itself, clear. The spaces which were left blank do not create an ambiguity. Most importantly, the Defendant has never, by any sworn statement, stated that he did not understand that he was signing a personal guaranty of RTEM's obligation.

ARGUMENT

POINT I

THERE IS AMPLE EVIDENCE TO SUPPORT
THE RULING OF THE TRIAL COURT

This Court is well aware that the standard for review of the lower Court's decision is that such ruling cannot be disturbed where there is ample evidence to support the same. This Court cannot gainsay the decision of the Trial Judge unless it is clearly shown that there has been an abuse of discretion.

The Plaintiff has set out the specific facts which are undisputed in the record upon which the Trial Court made its decision. The Defendant has not raised any dispute as to those facts. The Defendant has attempted, merely, to create a smoke screen so as to obscure the undisputed nature of these facts. The statement of Defendant's counsel that the facts are disputed does not create such a dispute.

The undisputed facts are that the Defendant granted a Mr. Parts franchise to RTEM and wanted to purchase the initial inventory from Plaintiff. Plaintiff would not allow the inventory to go out until the Defendant, himself, had agreed to personally guaranty the obligation of RTEM. Only after that promise was received did the merchandise leave the control of Plaintiff. The Defendant understood what he was signing and knew that he was obligating himself to the Plaintiff.

POINT II

THE RELIANCE OF DEFENDANT ON §70A-3-606 IS INAPPROPRIATE

A good portion of the Brief of the Defendant is taken up with a discussion of §70A-3-606(1)(b), Utah Code Annotated (1953), as amended. The Defendant attempts to argue from this section of the statute that the Plaintiff lost its right to recover against the Defendant on the basis that there was an "impairment" of the security. The Defendant's argument is that something which the Plaintiff did with respect to the goods sold to RTEM prevents the Plaintiff from recovering the balance due against this Defendant. This argument must fail for the following reasons:

1. Nowhere in the Brief of the Defendant, nor in any pleadings filed with the Trial Court, did the Defendant raise an issue as to the disposition of collateral. In other words, there is no factual basis for the Trial Court, or this Court, to believe that there was any "impairment" of the collateral. If the Defendant honestly believed that such was the case, he should have set forth, by some competent evidence, his belief.

2. Even if there were some credible evidence upon which the Trial Court could have made a ruling that there was a possibility of impairment, it is clear from the statute itself that the same does not apply to the facts of this case. The section cited specifically provides:

The holder discharges any party to the instrument to the extent that without such parties consent the holder

The term "instrument" in the statute is defined at §70A-3-102 as follows:

"Instrument" means a negotiable instrument.

One need only look at §70A-3-104 to know that the personal guaranty of the Defendant does not qualify as a "negotiable instrument".

The Defendant relies upon a statute which is clearly inapplicable to the case at hand. The issue of impairment of security under the Uniform Commercial Code simply has no relevance to the issues before this Court.

POINT III

THE PERSONAL GUARANTY SIGNED BY THE DEFENDANT IS NOT AMBIGUOUS

A majority of the remaining arguments raised by the Defendant, those involving the intent of Mr. Shillington, and the blank spaces left in the document, have, as their central theme, the alleged ambiguity of the agreement itself. In other words, in order for this Court to adopt any one of these arguments, this Court must first find that the Trial Court erred in ruling that the agreement was, itself, unambiguous.

This Court is well aware of the controlling rule of law when dealing with contractual interpretation. The Supreme Court of Utah has, on numerous occasions, held that the meaning of a

contract is to be determined, where possible, from the language used in the document itself. Where that language is unambiguous, it is the duty of the Court to enforce the agreement. See, Buehner Block, Co. vs. U. W. C. Associates, 792 P.2d 892 (Utah 1988); Big Cottonwood Tanner Ditch, Co. vs. Salt Lake City, 740 P.2d 1357 (Ut.App. 1987).

In addition, the Utah Supreme Court has held that the intent of the parties is to be shown from the language of the contract whenever possible. See, Utah Valley Bank vs. Tanner, 636 P.2d 1060 (Utah 1981); Big Butte Ranch, Inc. vs. Holm, 570 P.2d 690 (Utah 1977).

The document which is the subject matter of this action, when read in total, specifically sets out to whom the credit is to be extended (RTEM) and then contains the following language:

The undersigned, in consideration of the delivery of merchandise by [Yoho Automotive] to the above applicant, agrees personally to assume any liability incurred by the above company and guarantees that payment will be made strictly according to the terms set forth herein.

Directly below this language, the Defendant affixed his signature. (R. 10.) The Defendant simply could not have misunderstood or been mislead as to the clarity of the language and what its effect would be.

The cases cited by the Defendant, without exception, deal with contracts, both oral and written, which were uncertain. The case of West v. West, 15 Utah 2d 87, 387 P.2d 686 (1963), quoted

by the Defendant at page 11 of his Brief specifically makes the finding that the documents, in that case, were "ambiguous and uncertain". No similar uncertainty exists in the document which is the subject matter of this case.

Similarly, in the Alaska case of DeCristofaro vs. Security National Bank, 664 P.2d 167 (AK. 1983), cited by the Defendant at page 10 of his Brief, the Court specifically held that there was an ambiguity as to a non-competition clause in a contract. The Court therefore ruled that summary judgment was not appropriate. Again, no similar ambiguity exists in the present case.

What the Defendant really wants this Court to believe is that because certain blanks in the form which he signed were left unfilled, the contract is, therefore, unenforceable. In other words, the Defendant equates blanks in the contract with ambiguity.

However, at no time does the Defendant allege, by way of sworn statement, that he did not understand what he was signing or that he did not intend to guaranty the obligation of RTEM. Rather, the Defendant spends much time indicating that he did not like the idea of signing the guaranty. The fact that he did not like the idea and, therefore, signed "under protest" does not exculpate the Defendant from his liability. Indeed, the very fact that he was protesting his signature indicates that he understood what the intent was.

POINT IV

THE PERSONAL GUARANTY IS
SUPPORTED BY CONSIDERATION

In the Court below, the Plaintiff testified through its President, Mr. Vern K. Yoho. As has been indicated in the Summary Statement of Facts, Mr. Yoho testified that he allowed goods to be sent to RTEM only after receiving the promise of Mr. Shillington to be personally responsible for the debt of RTEM. Mr. Yoho further testified that without that promise he would never have allowed credit to be extended to RTEM. (Yoho Depo. Pg. 12.)

The rule of law is that where there is reliance upon a promise to guaranty the debt of another, even if the actual guaranty is signed later, there is consideration for the guaranty. This is the specific holding of Ranier National Bank vs. Lewis, 30 Wash. App. 419, 635 P.2d 153 (1981).

Indeed, in Northern State Construction, Co. vs. Robbins, 457 P.2d 187 (Wash. 1969), cited by the Defendant on pages 23 and 24 of his Brief, the Court dealt specifically with that fact situation. In Northern, the Plaintiff, in reliance upon a promise of another to guaranty the debt, allowed credit to be extended. When the guarantor attempted to get out of his liability, the Court held that his promise to pay, upon which reliance was made, was supported by consideration.

Again, the cases cited by the Defendant are simply factually irrelevant. In the Moorcraft decision cited by the Defendant on page 26 of his Brief, there was no involvement of the guarantor in the debt created by the third party. In other words, there was no reliance by the Plaintiff on the promise of the guarantor to pay.

In the case at hand the credit was extended solely upon the basis of the promise of the Defendant to be personally responsible. That fact is undisputed and uncontested by the Defendant. The consideration for the agreement to pay was the actual extension of credit. Therefore, the Defendant cannot now claim that his promise to pay was unsupported by consideration.

POINT V

THE DEFENDANT WAS NOT COERCED

One of the more unique arguments made by Defendant is that he was somehow the object of "business Compulsion" in the signing of the personal guaranty. One can only suppose that this argument is the natural outgrowth of Defendant's belief that he signed the document "under protest". However, the facts of this case do not come even close to a case of wrongful compulsion or coercion. The Courts have long held that business compulsion is not established merely by proof that the consent of the party was obtained by the pressure of financial circumstances, or by the fact that one party insisted upon a legal right and the other

yielded. The pressure must be wrongful. See, Starks v. Field, 89 P.2d 513 (Wash. 1929). Furthermore, action taken by one as a result of a deliberate choice of available alternatives cannot ordinarily be attributed to duress. See, Imperial Refineries Corp vs. Morrissey, 119 N.W.2d 872 (Iowa 1964).

In light of the caselaw, the circumstances surrounding the Defendant's execution of the agreement, which he knew would obligate him as a personal guarantor of RTEM's debts, does not rise to the level of "business compulsion". The Defendant was reluctant and didn't want to create a hassle. (Shillington Depo. pg. 35.) He had alternatives available, however, and no wrongful pressure was brought to bear upon him. Clearly, his choice was freely made and he is bound by it.

POINT VI

DEFENDANT'S APPEAL TO EQUITY IS INAPPROPRIATE

Finally, the Defendant appeals to what can only be described as the "conscience" of this Court. The Defendant argues that "as a matter of equity" it is "unfair and unconscionable" to hold Mr. Shillington liable on such a document, to enforce a guaranty for any liability without definition and limitation and to allow the Plaintiff to capitalize "on their own errors and negligence".

The Utah Supreme Court, in the case of Land vs. Land, 605 P.2d 1248 (Utah 1980) declared:

Equity is not available to reinstate rights and privileges voluntarily contracted away simply because one has come to regret the bargain made. Id. at 1251.

Likewise, in Mackey vs. Philzona Petroleum, Co., 93 Ariz. 87, 378 P.2d 906 (1963), the Arizona Supreme Court held that with regard to business transactions between men of sound minds, dealing at arms' length, equity will not give relief against merely thoughtless or inadvertent conduct. See also, Diamond Fruit Growers, Inc. vs. Goe, Co., 242 Oregon 397, 409 P.2d 909 (1966).

The Defendant's sense of morality and justice seems misguided. What is fair is to enforce the agreements of competent adults. What is unfair is to allow a party to avoid his just debts.

CONCLUSION

There is, without doubt, no basis for the appeal taken by the Defendant. The Defendant clearly knew what he was doing and understood the effect of his signature on the personal guaranty. The language of the guaranty is clear and understandable to men of ordinary intelligence. The Plaintiff clearly relied upon the Defendant's promise to pay.

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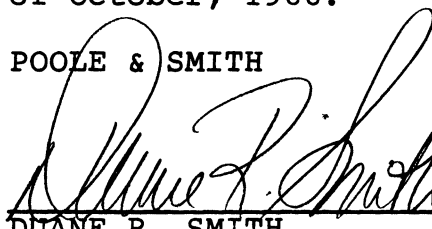
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It is respectfully suggested that the decision of the Trial Court was entirely appropriate and should be affirmed by this Court. Moreover, the Plaintiff should be entitled to its costs incurred in Defending this appeal, as well as the attorney's fees incurred as are agreed to by the Defendant in the written guaranty.

Dated this 14th day of October, 1988.

POOLE & SMITH

A handwritten signature in cursive script, appearing to read "Duane R. Smith", is written over a horizontal line.

DUANE R. SMITH

Attorneys for Plaintiff/Respondent

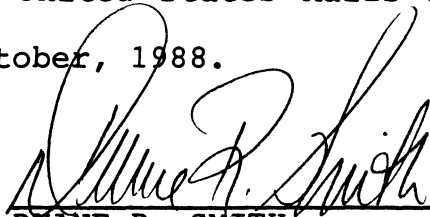
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CERTIFICATE OF MAILING

I do hereby certify that I caused to be mailed a true and correct copy of the foregoing BRIEF OF THE RESPONDENT YOHO AUTOMOTIVE, INC. to the following:

Jerry J. Kaufman, Esq.
Attorney for Defendant-Appellant
THORPE, NORTH & WESTERN
9662 South State Street
Sandy, Utah 84070

and by depositing the same, sealed, with first-class postage prepaid thereon, in the United States Mails at Salt Lake City, Utah this 14th day of October, 1988.



DUANE R. SMITH