

1997

Kim Rinderknecht v. Lance Luck : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

KIM RINDERKNECHT,)
)
Plaintiff-Appellant,)
)
vs.)
)
LANCE LUCK,)
)
Defendant-Appellee.)

Priority No. 15
Case No. 970343-CA

BRIEF OF THE APPELLANT

Appeal from the Final Judgment of the
Eighth Judicial District Court of
Duchesne County, Roosevelt Department, State of Utah
Honorable Lyle Anderson, Presiding

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FILED

Utah Court of Appeals

AUG 29 1997

Julia D'Alessandro
Clerk of the Court

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LANCE LUCK,)	
)	
Defendant-Appellee.)	

BRIEF OF THE APPELLANT

STATEMENT OF JURISDICTION

Jurisdiction in the Utah Court of Appeals is conferred by virtue of Utah Code Ann. § 78-2a-3 and Rule 3 of the Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

Did the trial court err in its application of Utah Code Ann. § 70A-2-201(3) (b) as the basis for its Ruling and Judgment granting Defendant's Motion for Summary Judgment?

Did the court err in finding that a contract had not been admitted to by Defendant in light of the meaning and intent of Utah Code Ann. § 70A-2-201(3) (b) ?

Did the trial court's err in its granting of Defendant's motion for summary judgment?

STANDARD OF REVIEW

The Court of Appeals reviews the trial court's interpretation and application of Utah Code Ann. § 70A-2-201(3)(b), which poses a question of law, for correctness, giving no deference to the trial court's legal conclusions. Bonham v. Morgan, 788 P.2d 497, 499 (Utah 1989); Asay v. Watkins, 751 P.2d 1135 (Utah 1988).

The Court of Appeals reviews the trial court's finding that Luck did not admit the existence of a contract "for clear error, reversing only where the finding is against the clear weight of the evidence, or if [it] otherwise reach[es] a firm conviction that a mistake has been made. ProMax Development v. Mattson, 322 Utah Adv. Rep. 35, 38 (Utah Ct. App. 1997). See State v. Goodman, 763 P.2d 786 (Utah 1988); Cummings v. Cummings, 821 P.2d 472 (Utah Ct. App. 1991).

The Court of Appeals reviews the trial court's dismissal of Rinderknecht's complaint for correctness, giving no deference to the trial court's legal conclusions. First Sec. Bank of Utah v. Creech, 858 P.2d 958, 963 (Utah 1993).

DETERMINATIVE AUTHORITY

1. Utah Code Ann. § 70A-2-201, and specifically, Utah Code Ann. § 70A-2-201(3)(b).

2. Rule 56, Utah Rules of Civil Procedure, and specifically, Rule 56(c), Utah Rules of Civil Procedure.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This appeal is from a Ruling rendered April 4, 1997 and a Judgment on Lance Luck's Motion for Summary Judgment rendered May 7, 1997 in the Eighth Judicial District Court of Duchesne County, Roosevelt Department, State of Utah. The Judgment summarily dismissed Kim Rinderknecht's complaint.

B. COURSE OF PROCEEDINGS

Plaintiff-Appellant (Rinderknecht) filed a Complaint on October 22, 1996, alleging breach of a oral contract for the purchase and sale of cattle. (R. 1-5). Defendant-Appellee (Luck) filed an Answer on November 20, 1996, wherein he asserted statute of frauds. (R. 22).

Luck filed a motion for summary judgment on February 7, 1997, (R. 27), along with a memorandum, (R. 30), and an affidavit, (R. 36). Rinderknecht filed memorandum in opposition to Luck's motion on February 25, 1997, (R. 45), along with an affidavit, (R. 42).

Luck filed a reply memorandum on March 6, 1997, (R. 59).

The lower court issued its ruling on April 4, 1997, (R. 78), and entered its judgment based thereon on May 7, 1997, (R. 81).

C. DISPOSITION IN TRIAL COURT

The trial court issued a ruling granting Defendant's Motion for Summary Judgment and dismissing Plaintiff's Complaint. (R. 78-80). In its ruling, the Court stated as follows:

The court has reviewed all of [Defendant's] pleading in this case, including his affidavit, and finds that [Defendant] has not admitted the existence of a contract. It is true, as [Plaintiff] notes, that the pleadings exception to the statute of frauds will never be applicable against a contesting defendant who is well versed in the law (or who has an attorney who is so versed). The pleading exception is designed to fulfill the expectation of merchants who are either not versed in the law or who are too honest to deny the existence of an unwritten contract. However, the purpose of the statute of frauds is frustrated if raising the defense is treated as an admission that a verbal contract exists.

(R. 79).

The trial court signed its Judgment on April 28, 1997 and filed it May 7, 1997, wherein the Court stated the following:

Defendant's Motion for Summary Judgment is granted. Plaintiff's cause of action is barred by the Statute of Frauds found in Utah Code Ann. Section 70A-2-201. Plaintiff's reliance on an exception to the Statute of Frauds found in 70A-2-201(3) is misplaced. The Court has reviewed all of Defendant's pleadings in this matter, including Defendant's Affidavit and finds that Defendant has not admitted the existence of a contract.

(R. 81-82).

STATEMENT OF FACTS

Defendant stated in paragraph 3 of his affidavit in support of his motion for summary judgment as follows:

On or about July 11, 1996, I had a telephone conversation with Plaintiff Kim Rinderknecht during which I offered to sell him 240 head of cattle (steers and heifers). . . . The sales price was 58 cents (\$0.58) per pound for steers and 52 cents (\$0.52) per pound for heifers.

(R. 36-37). Defendant also stated the above in his memorandum supporting summary judgment. (R. 31).

Defendant states in paragraph 4 of his affidavit and paragraph 2. of the relevant facts attached to his memorandum supporting motion for summary judgment as follows:

Plaintiff proposed to pay \$7,200.00 as a deposit, with the balance of the sales price being paid upon completion of the contract, or the delivery of the cattle.

(R. 37 and R. 31).

Defendant further states in his affidavit that he had not received the deposit check or written contract as of August 1, 1996. So he called Plaintiff on that day to discuss Plaintiff's intentions. According to Defendant's Affidavit, Plaintiff indicated that Defendant would receive the check and written contract within a few days. (R. 37). The above is also stated in defendant's memorandum supporting motion for summary judgment. (R. 31).

Defendant states that as of August 20, 1996, he had still not received the deposit check and written contract. So he called Plaintiff again on that date. He could not reach the Plaintiff. So he sold the cattle elsewhere. (R. 37).

Defendant states in paragraph 6 of his statement of Relevant Facts in his memorandum supporting summary judgment that he sold the cattle at a price less than the "contract price with Plaintiff." (R. 32).

Plaintiff states in his affidavit that on July 11, 1996, the telephone conversation as presented in Defendant's affidavit did in fact occur. (R. 14). Plaintiff further states that on that same day he mailed a deposit check and written memorandum of the agreement. (R. 14). Plaintiff also states that on that same day he also entered into a similar agreement on the telephone to sell the same cattle to a feedlot in reliance on the agreement with Defendant. (R. 14-15).

Plaintiff states in his affidavit that the first telephone conversation between the parties following the July 11, 1996 telephone conversation occurred several days later. (R. 14 and R. 43). Plaintiff further states that the Plaintiff offered to hand deliver the check and written contract to Defendant but Defendant said that would not be necessary, and that he, the Defendant, would call Plaintiff in a day or two if he still had not received the

check. (R. 15 and R. 43).

Plaintiff denies that Defendant attempted to reach him at any time following the telephone conversation near the end of July 1996. (R. 15 and R. 43-44). Plaintiff states that he has, and did have at that time, an answering machine on his telephone as is always reachable. (R. 43).

Plaintiff was contractually committed to fulfill his obligation under the agreement with the feedlot and sustained damages as a result. (R. 4-5).

Plaintiff filed a Complaint against Defendant on November 4, 1996, alleging breach of contract. (R. 1-10).

On January 31, 1997, Defendant filed a Motion for Summary Judgment. (R. 27-29).

On March 27, 1997, the Eighth Judicial District Court of Duchesne County, State of Utah, Roosevelt Department, issued a ruling granting Defendant's Motion for Summary Judgment and dismissing Plaintiff's Complaint. (R. 78-80). In its ruling, the Court stated as follows:

The court has reviewed all of [Defendant's] pleading in this case, including his affidavit, and finds that [Defendant] has not admitted the existence of a contract. It is true, as [Plaintiff] notes, that the pleadings exception to the statute of frauds will never be applicable against a contesting defendant who is well versed in the law (or who has an attorney who is so versed). The pleading exception is designed to fulfill the expectation of merchants who are either not versed in the law or who are too honest to deny the existence of an unwritten contract. However, the purpose of

the statute of frauds is frustrated if raising the defense is treated as an admission that a verbal contract exists.

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The Court signed its Judgment on April 28, 1997 and filed it May 7, 1997, wherein the Court stated the following:

Defendant's Motion for Summary Judgment is granted. Plaintiff's cause of action is barred by the Statute of Frauds found in Utah Code Ann. Section 70A-2-201. Plaintiff's reliance on an exception to the Statute of Frauds found in 70A-2-201(3) is misplaced. The Court has reviewed all of Defendant's pleadings in this matter, including Defendant's Affidavit and finds that Defendant has not admitted the existence of a contract.

(R. 81-82).

SUMMARY OF ARGUMENT

The trial court's Ruling and Judgment granting Defendant's Motion for Summary Judgment was based on an error in the Court's application of Utah Code Ann. § 70A-2-201(3)(b). The weight of legal authority is clearly contrary to basis upon which the trial court dismissed plaintiff's complaint.

The court was in error in finding that a contract had not been admitted to by Defendant within the meaning and intent of Utah Code Ann. § 70A-2-201(3)(b).

The trial court's granting of Defendant's motion for summary judgment was an error as a matter of law because genuine issues of material fact exist. The weight of legal authority suggests that, in light of Utah Code Ann. § 70A-2-201(3)(b) and UCC § 2-201(3)(b),

and in light of the meaning and intent of these statutory provisions, summary dismissal of a complaint upon the basis of the Statute of Frauds is never appropriate.

ARGUMENT

I. The trial court's Ruling and Judgment granting Defendant's Motion for Summary Judgment was based on an error in the Court's application of Utah Code Ann. § 70A-2-201(3)(b).

The standard of review applied to the trial court's interpretation of statutes which pose question of law is for correctness, giving no deference to the trial court's legal conclusions. Bonham v. Morgan, 788 P.2d 497, 499 (Utah 1989); Asay v. Watkins, 751 P.2d 1135 (Utah 1988).

Utah Code Ann. § 70A-2-201(3)(b) (UCC § 2-201(3)(b)) states as follows:

A contract which does not satisfy the requirements of Subsection (1) but which is valid in other respects is enforceable if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of the goods admitted

The only published Utah case that Appellant has found that has considered the application of the above statute is the case of Lish v. Compton, 547 P.2d 223 (Utah 1976). In Lish, the facts state

that the Plaintiff and Defendant had a discussion on the telephone regarding the sale of 15,000 bushels of wheat. Plaintiff claimed that the terms were agreed to over the telephone. Approximately two weeks after the telephone conversation, Plaintiff mailed to Defendant a written confirmation of the telephone call. Defendant later sold his wheat to someone else. Plaintiff sued for breach of a verbal contract. Defendant acknowledged in Court that had he received the written confirmation within a more reasonable time, he would have considered himself "bound thereby." The Plaintiff took the position that this acknowledgment by the Defendant had the effect of excepting this transaction from the statute of frauds pursuant to Utah Code Ann. § 70A-2-201(3)(b). However, the Court held that the acknowledgment of the Defendant was merely a hypothetical statement and did not constitute an admission as to the existence of a contract. The Court further noted that "[t]he fact appears to be that neither in his pleading nor otherwise did the Defendant acknowledge that there was a valid and binding contract." The Court thus ruled that Utah Code Ann. § 70A-2-201(3)(b) did not apply to except this transaction from the statute of frauds.

Legal authorities have cited the Lish case for the proposition that a hypothetical statement does not constitute an admission as to the existence of a contract for purposes of UCC § 2-201(3)(b).

Timothy E. Travers, Annotation, Construction and Application of UCC § 2-201(3)(b) Rendering Contract of Sale Enforceable notwithstanding Statute of Frauds, to extent it is Admitted in Pleading, Testimony, or otherwise in Court, 88 A.L.R.3d 416, 427 (1978); 67 Am. Jur. 2d, Sales § 204. The Lish Case is distinguishable from this case in that there is no indication in Lish that the Defendant admitted to anything aside from the fact that a telephone conversation occurred and there is no hypothetical statements in this case.

If Lish is applied as legal authority for the proposition that there was no admission in this case or that the Defendant must admit in explicit terms the existence of a valid and binding contract, first, it is not likely that such a case will ever happen and there is, therefore, no purpose for UCC § 2-201(3)(b), and second, it will be against the overwhelming majority of the case law of the other jurisdictions. See generally, Travers, supra 88 A.L.R.3d 416. However, the court in this matter, in ruling that there was no admission and in declaring the alleged contract barred by the statute of limitations, clearly applied Lish for the proposition that, in order for UCC § 2-201(3)(b) to apply, the defendant would have had to admit not only explicit terms of a contract but explicitly that in his opinion it is legal and binding and that the statute of frauds does not apply because of UCC § 2-

201(3)(b). Based on the following authorities, and on the previously cited A.L.R. and Am. Jur. discussions, it is clear that the Court in this case applied the statute in error.

In Quaney v. Tobyne, 689 P.2d 844 (Kansas 1984), the Plaintiff, a rancher, sued the Defendant, a feed lot operator, for breach of an oral contract to purchase cattle. In Defendant's in-court testimony, he stated (1) he was to purchase 285 steers at 65 cents per pound, (2) he was satisfied with of quality of the steers, (3) the steers were to be weighed at a specified place, (4) the loading date would be around October 1, 1982, and (5) he would make a down payment of \$8,000. At trial, the defendant admitted to further conduct which suggested that he recognized the existence of a contract although he did not explicitly admit that the contract was legal and binding.

In applying UCC § 2-201(3)(b), the Kansas Supreme Court in Quaney stated the following:

In the case now before us, we are required to consider the "admission" made by the defendant, Lowell Tobyne, in the course of the litigation. This requires us to consider any admissions made in his pleadings, testimony, or otherwise in court to the effect that a contract for sale was made.

Id. at 849. Summarizing 88 A.L.R.3d 416 the Kansas court also stated as follows:

It has been stated by the courts that the purposes of [UCC 2-201(3)(b)] are (1) to provide that a party cannot admit the existence of an oral contract for the sale of

goods and simultaneously claim the benefit of the statute of frauds, (2) to prevent the statute of frauds from becoming an aid to fraud, and (3) to expand the exceptions to the nonenforceability of oral contracts under the statute of frauds.

In determining what constitutes an admission under UCC 2-201(3)(b) the Kansas court in Quaney went through a rather lengthy discussion and began by citing Lewis v. Hughes, 346 A.2d 231 (Md. 1975) (a case involving the breach of an oral contract for the purchase of a mobile home) as "[a] leading case in this area." The court in Lewis held the following which was quoted by the court in Quaney:

Statute of frauds is satisfied . . . when the party denying the existence of the contract and relying on the statute takes the stand and, without admitting explicitly that a contract was made, testifies to facts which as a matter of law establish that a contract was formed.

Quaney, 689 P.2d at 849. The court in Quaney also cited Dangerfield v. Markel, 222 N.W.2d 373 (N.D. 1974) (a case involving the breach of an oral contract for the sale of potatoes) for the proposition "that the parties against whom an oral contract is sought to be enforced need not admit there is a contract or admit the contract in the exact terms claimed" and for the proposition that "if a fair consideration of the party's testimony, and its implications under the circumstances established by the record, establishes the claimed agreement, it will be enforced." Quaney, 689 P.2d at 849.

The court in Quaney also cited Cargill Inc., Commodity Marketing Div. v. Hale, 537 S.W.2d 667 (Mo. Ct. App. 1976) (a case involving the breach of an oral contract for sale of soybeans). The Court in Cargill found that the following exchange upon cross-examination was sufficient to establish defendant's admission under UCC § 2-201(3)(b) even though defendant denied that there had been a meeting of the minds:

Q. Didn't you agree to sell these beans to [plaintiff's manager] over the phone for a certain price?

A. Yes, sir.

Cargill, 537 S.W.2d at 669.

Regarding the question of what constitutes an admission, the court in Quaney also quoted 2 Anderson, Uniform Commercial Code § 2-201:216, pp. 116-117 (3rd ed. 1982) as follows:

There is an admission for the purpose of UCC § 2-201(3) when there is a manifestation that fairly communicates the concept that the party has admitted the existence of the contract. It is not necessary that there be an express declaration that the party "admits" the making of an oral "contract." It is sufficient that his words or conduct reasonably lead to that conclusion.

.
When a party admits facts the legal consequence of which is that there is a contract, it is to be concluded that there has been an admission of the existence of the contract. The fact that the party does not appreciate or understand that the subsidiary facts admitted by him have the effect of creating a contract or that he is unwilling to state that they did does not negate the fact that a "contract" has been admitted. On this basis, it has been held that there is an "admission" so as to take an oral contract out of the statute of frauds when the party

denying the existence of a contract and pleading the statute of frauds testifies to facts from which it can be concluded that a contract had been formed, even though he does not expressly admit that a contract was formed.

Quaney, 689 P.2d at 850.

Quaney also quoted 2 Williston on Sales, § 14-9, p. 306 (4th ed. 1974) as follows:

The mere fact that a party has, by pleading, testimony or otherwise in court admitted to the existence of a contract does not mean that it is an admission of every individual term of the contract between the parties. Of course, if the party against whom enforcement is sought admits to the terms of the contracts seriatim, it would be extremely difficult to visualize a situation where the trier of facts would not find that an oral agreement between the parties had not in fact taken place.

Quaney, 689 P.2d at 850.

Finally, the court in Quaney held as follows:

From our analysis of this testimony, we have concluded that, although the defendant did not openly and frankly admit to an oral agreement, his testimony sufficiently establishes that an oral agreement existed. The defendant acknowledged all the principal terms of the agreement. The parties had agreed on a price per pound, type and quality of the cattle, place of loading, place of weighing, and the down payment. Although the defendant never paid the down payment or drew up a written contract as he volunteered to do, we hold that his testimony contained admissions of his statements and actions sufficient to satisfy the requirements of [UCC § 2-201(3)(b)].

Id. at 852.

The following cases also include similar analyses and similar holdings based on similar facts: Hale v. Higginbotham, 188 S.E.2d 515 (Ga. 1972) (involving breach of oral contract for sale of milk

base); Quad County Grain, Inc. v. Poe, 202 N.W.2d 118 (Iowa 1972) (involving breach of oral contract for sale of corn); and, URSA Farmers Cooperative Co. v. Trent, 374 N.E.2d 1123 (Ill. App. Ct. 1978) (involving breach of oral contract for sale of soybeans).

The North Dakota Supreme Court rereviewed the Dangerfield case on a second appeal and quoted the official comment on UCC § 2-201(3)(b) as follows:

If the making of a contract is admitted in court, either in a written pleading, by stipulation or by oral statement before court, no additional writing is necessary for protection against fraud. Under this section it is not longer possible to admit the contract in court and still treat the Statute as a defense. However, the contract is not thus conclusively established. The admission so made by a party is itself evidential against him of the truth of the facts so admitted and of nothing more; as against the other party, it is not evidential at all.

Dangerfield v. Markel, 252 N.W.2d 184, 189 (N.D. 1977). The court in this Dangerfield opinion also quoted 3 Bender's Uniform Commercial Code Service, Duesenberg & King, Sales and Bulk Transfers, § 2.04[3], pp. 2-80, 2-81 as follows:

The theoretical justification for the Code rule, which explicitly extends to testimony as well as a pleading, is that a voluntary admission of the existence of a contract should result in loss of the statute as a defense. The statute should not be used to perpetrate frauds, and if under oath the existence of a contract is admitted, the use of the statute should thereupon be denied. The effect of the rule is that it allows the party asserting the contract to present his oral evidence in proof of its existence.

Dangerfield, 252 N.W.2d at 190. The Dangerfield court also quoted

enlightening language out of the opinion in Kohlmeyer & Company v. Bowen, 192 S.E.2d 400, 405 (Ga. 1972) (a case involving the application of a UCC provision almost identical to UCC § 2-201(3)(b) but dealing with the sale of securities), as follows:

[T]here is no requirement that defendant admit the entire terms of the contract as contended for by the plaintiff but only that he admit a contract of sale of a state quantity of described securities at a defined or stated price. This is sufficient to take the parol contract out of the statute so that it can be proven and enforced as proven.

Based on the above authorities, the Court's ruling and judgment in this case as quoted above applied the law in error.

II. The court was in error in finding that a contract had not been admitted to by Defendant within the meaning and intent of Utah Code Ann. § 70A-2-201(3)(b).

The Court of Appeals reviews "the trial court's findings of fact for clear error, reversing only where the finding is against the clear weight of the evidence, or if [it] otherwise reach[es] a firm conviction that a mistake has been made. ProMax Development v. Mattson, 322 Utah Adv. Rep. 35, 38 (Utah Ct. App. 1997). See State v. Goodman, 763 P.2d 786 (Utah 1988); Cummings v. Cummings, 821 P.2d 472 (Utah Ct. App. 1991).

The trial court clearly erred in finding that the defendant in this case did not admit to the existence of a contract within the

meaning of Utah Code Ann. § 70A-2-201(3)(b).

III. The trial court's granting of Defendant's motion for summary judgment was an error as a matter of law because genuine issues of material fact exist and because summary judgment is inappropriate in light of the meaning and intent of Utah Code Ann. § 70A-2-201(3)(b).

This Court has stated as follows:

Recognizing that the party adversely affected by the summary judgment has not had an opportunity for trial, the court views the facts in the light most favorable to that party.

Estate Landscape v. Mountain State Telephone, 793 P.2d 415 (Utah Ct. App. 1990). See also V-1 Oil Company v. Utah State Tax Commission, 323 Utah Adv. Rep. 5, 6 (Utah 1997).

The Utah Supreme Court has stated as follows:

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Utah Rules of Civil Procedure 56(c); Allen v. Ortez, 802 P.2d 1307, 1309 (Utah 1990).

This Utah Supreme Court has stated the following as the standard for review of the trial court's dismissal via summary judgment:

We review a summary judgment for correctness, affording no deference to the trial court's legal conclusions.

First Sec. Bank of Utah v. Creech, 858 P.2d 958, 963 (Utah 1993).

According the following quoted line of cases under UCC § 2-201(3)(b), the meaning and intent of UCC § 2-201(3)(b) is that summary judgment on the ground that the alleged contract is barred or unenforceable is never appropriate by the clear language of the statute. Again, Utah Code Ann. § 70A-2-201(3)(b) states in pertinent part as follows:

A contract which does not satisfy the requirements of Subsection (1) but which is valid in other respects **is enforceable if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court** that a contract for sale was made, .
. . .

(emphasis added). This statute contemplates that there will be more than a summary dismissal of the Plaintiff's complaint before the statute of frauds is applied to bar enforcement of a oral contract. Therefore, assuming that the court was proper in determining that the Defendant did not admit to the existence of a contract in his affidavit, summary judgment was still improper. Because of the affidavit, there remains many questions regarding the telephone conversation of July 11, 1996, regarding the parties' conduct following the telephone conversation, and regarding the parties' prior course of dealing with each other, with others, and the general course of dealing between cattle traders and ranchers. There certainly remains questions about whether or not there was an oral contract between the parties and whether or not defendant will

further admit to the existence of the contract through discovery and in court testimony.

Again, the official comment on UCC § 2-201(3)(b) states as follows:

If the making of a contract is admitted in court, either in a written pleading, by stipulation or by oral statement before court, not additional writing is necessary for protection against fraud.

Thus the purpose of the statute is frustrated if the complaint to enforce an oral contract is summarily dismissed. The Court of Appeals of Georgia follow this line of reasoning in Garrison v. Piatt, 147 S.E.2d 374 (Ga. Ct. App. 1966). The Garrison Court reversed a demurrer to a petition alleging breach of a oral contract for sale of a trailer on the ground that the granting of a demurrer is contrary to the intent of UCC § 2-201(3)(b). The court stated as follows:

Since a contract, which is within the statute at the time of filing the petition or cross action, can become enforceable by admission only in the case itself by the party charged, rather than admissions made outside the case prior to the filing of the petition or cross action, it would therefore, be contrary to the intention and purpose of the statutory change to permit the sustaining of a demurrer to a petition or cross action upon such a contract based on the ground that such petition or cross action shows upon its face that the contract is within the statute of frauds when it may become enforceable by acts occurring after the petition or cross action is filed. If a demurrer on this ground should be sustained to the petition, the plaintiff is denied his opportunity of determining on a trial whether the making of the contract would be admitted and thus made enforceable for the first time. By these changes in the statute of

frauds, it is clearly the intent of the legislature that the enforceability of a contract, which on its face may be within the statute, is tested by the answer, testimony or plea of the party charged, and not merely by the allegations in the petition or cross action brought to enforce the contract. It follows, therefore, that a petition upon such a contract which is valid in other respects is not demurrable because it shows on its face that it is within the statute of frauds.

Id. at 375.

In the case of M & W Farm Serv. Co. v. Callison, 285 N.W.2d 271 (Iowa 1979), a case involving the breach of a oral contract for the purchase of LP gas tanks, the Iowa Supreme Court stated the following:

M & W's key assertion is that Callison's claims against M & W are based on the contract which the pleadings indisputably reveal was unwritten and therefore unenforceable. In its view, any controverted facts relating to the alleged oral contract are immaterial because of the contract's unenforceability. Hence, it contends that an adjudication by trial court was appropriately based on the undisputed material facts.

What these assertions ignore is that the remaining disputed facts raise the possible applicability of at least two exemptions from the UCC Statute of Frauds.

Id. at 274. The court further stated as follows:

By ruling that the Statute of Frauds rendered unenforceable Callison's alleged oral agreement for the rental of tanks, trial court foreclosed Callison from the opportunity of eliciting an admission by M & W of the contract in court, on cross-examination or otherwise. He was denied the right implied by [UCC § 2-201(3)(b)] to prove the applicability of an exception to the UCC Statute of Frauds through events which might yet occur in court.

. . . .

. . . [T]he Statute of Frauds . . . may not be raised by a motion to dismiss. . . . [T]he Statute of Frauds is simply a rule of evidence, which governs only the manner of proving a contract, not its validity. Thus, the party resisting the Statute should be given the opportunity to prove the alleged contract in two statutorily recognized ways: by the opposing party's failure to deny the existence of the contract in its responsive pleading and by the opposing party's emitting oral evidence of the contract.

Id. at 275.

In Reissman International Corp. v. J.S.O. Wood Products, Inc., 10 UCCRS 1165 (N.Y. Civ. Ct. 1972), the New York court denied a motion for summary judgment in a case involving the sale of wood cabinets upon the basis that a summary judgment is inappropriate in light of UCC § 2-201(3)(b). The court stated as follows:

Whether or not plaintiff may, through the use of discovery proceedings after answer obtain a testimonial admission of the alleged contract from defendant has not yet been passed upon in New York. This court concludes that it may

. . . .
"The statute was not designed to protect a party who made an oral contract, but rather to aid a party who did not make a contract, though one is claimed to have been orally made for him."

This motion was brought on prior to any discovery proceedings. The possibility exists that plaintiff there or on trial may be able to obtain an admission by defendant of the entire contract as claimed.

Id. at 1167-1168. (cites omitted).

In light of the above authorities, if it were the intent of UCC § 2-201(3)(b) that a complaint alleging an oral contract which

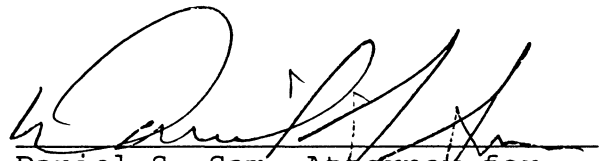
on its face is within the statute of frauds may be summarily dismissed, which is what happened in this case, then the application of UCC § 2-201(3)(b) can always be avoided with a summary judgment. However, this is clearly not the intent of the statute and the trial court's granting of defendant's motion for summary judgment was in error.

CONCLUSIONS

Appellant respectfully urges this court to reverse the Judgment granted below and instruct the lower court to find that a contract has been admitted, that the statute of frauds defense may not be considered, and remand the matter for trial on the remaining issues.

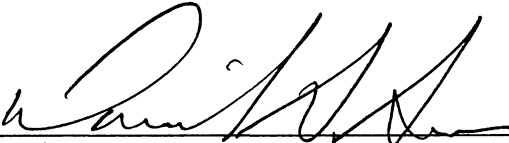
DATED this 29th day of August, 1997.

Respectfully submitted,


Daniel S. Sam, Attorney for
Plaintiff- Appellant

CERTIFICATE OF MAILING

I, Trisha Hamner, do hereby certify that I mailed first class, postage prepaid, two (2) true and correct copies of the foregoing Brief of the Appellant, on this ____ day of August, 1997, to: Gayle F. McKeachnie/Clark A. McClellan, McKEACHNIE & ALLRED, P.C. Attorneys for Defendant-Appellee, 121 West Main Street, Vernal, Utah 84078.



~~Trisha Hamner, Secretary~~
Daniel S. Sam

tues rinderkn.app

ADDENDUM

- A. Utah Code Ann., § 70A-2-201
- B. Utah Code Ann. § 78-2a-3
- C. Rule 3, Utah Rules of Appellate Procedure
- D. Rule 56, Utah Rules of Civil Procedure
- E. Reissman International Corp. v. J.S.O. Wood Products, Inc., 10 UCCRS 1165 (N.Y. Civ. Ct. 1972)

thereto but not described in Subsection (1) or of timber to be cut is a contract for the sale of goods within this chapter whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any third-party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale.

History: L. 1965, ch. 154, § 2-107; 1977, ch. 272, § 3.

NOTES TO DECISIONS

Sand and gravel.

A contract to provide sand, gravel, and aggregate is a contract for the sale of goods, governed

by the UCC. Salt Lake City Corp. v Kasler Corp., 855 F. Supp. 1560 (D. Utah 1991)

COLLATERAL REFERENCES

C.J.S. — 77A C.J.S. Sales § 15.

PART 2

FORM, FORMATION AND READJUSTMENT OF CONTRACT

70A-2-201. Formal requirements — Statute of frauds.

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of Subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

(3) A contract which does not satisfy the requirements of Subsection (1) but which is valid in other respects is enforceable

(a) 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; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Section 70A-2-606).

History: L. 1965, ch. 154, § 2-201.

Statute of frauds generally, Chapter 5 of Title

Cross-References. — Price payable in money, goods, realty, or otherwise, § 70A-2-304.

25.

NOTES TO DECISIONS

ANALYSIS

Acceptance and receipt of goods.
Admission of contract's existence.
Application.
"Between merchants" exception.
Confirmatory memorandum.
Contract for work.
Definitions.
Modification of contract.
Part performance.
Pleading statute.
Proving nature of agreement.
Purpose.
Requirements.
Stock transactions.
Sufficiency of memorandum or writing.

Acceptance and receipt of goods.

It is a question for jury to determine whether or not defendant is to be deemed to have accepted the goods by his failure to reject them within a reasonable time. *Lauer v. Richmond Coop. Mercantile Inst.*, 8 Utah 305, 31 P. 397 (1892) (decided under former law).

Either words or conduct may be sufficient to show acceptance of goods although the inference to be drawn from either should be clear and unequivocal. *James Mack Co. v. Bear River Milling Co.*, 63 Utah 565, 227 P. 1033, 36 A.L.R. 643 (1924) (decided under former law).

Manual and actual receipt of the goods is not required; symbolic, constructive, or implied possession is sufficient. *Hudson Furn. Co. v. Freed Furn. & Carpet Co.*, 10 Utah 31, 36 P. 132 (1894) (decided under former law).

Admission of contract's existence.

Admission by party to a transaction between a merchant and a nonmerchant that he would have considered himself bound by their oral agreement if he had received confirmation of it within a reasonable time did not bring into operation the provisions of Subsection (3)(b) and validate the otherwise unenforceable agreement. *Lish v. Compton*, 547 P.2d 223 (Utah 1976).

Application.

Where buyer was in possession of wheat as bailee and after oral contract for sale thereof was entered into he requested extension of time to pay for wheat, oral contract was taken out of statute of frauds. *James Mack Co. v. Bear River Milling Co.*, 63 Utah 565, 227 P. 1033, 36 A.L.R. 643 (1924) (decided prior to adoption of Uniform Commercial Code).

Because amount involved in oral contract for sale of turkey poult was in excess of \$500, plea of statute of frauds precluded its enforcement. *Tanner v. Childers*, 108 Utah 455, 160 P.2d 965 (1945) (decided under former law).

"Between merchants" exception.

Since a farmer, party to a transaction with a grain dealer, was not a "merchant" within the meaning of this section, Subsection (2) did not apply and the statute of frauds rendered unenforceable an oral agreement to sell the farmer's whole wheat crop, valued substantially in excess of \$500. *Lish v. Compton*, 547 P.2d 223 (Utah 1976).

Where buyer was in possession of wheat as bailee and after oral contract for sale thereof was entered into he requested extension of time to pay for wheat, oral contract was taken out of statute of frauds. *James Mack Co. v. Bear River Milling Co.*, 63 Utah 565, 227 P. 1033, 36 A.L.R. 643 (1924) (decided prior to adoption of Uniform Commercial Code).

Confirmatory memorandum.

Where two elephant merchants agreed over the telephone to the sale and purchase of the animal "Peggy," and buyer sent seller a letter confirming the terms of the sale agreement, the statute of frauds was satisfied, since it did not appear that seller had objected to the memorandum in writing. *Miller v. Kaye*, 545 P.2d 199 (Utah 1975).

Contract for work.

Oral agreement whereby company agreed to build auto trailer for use in business by cash register salesman was not a sale but a contract

(3) The judges of the Court of Appeals shall elect a presiding judge from among the members of the court by majority vote of all judges. The term of office of the presiding judge is two years and until a successor is elected. A presiding judge of the Court of Appeals may serve in that office no more than two successive terms. The Court of Appeals may by rule provide for an acting presiding judge to serve in the absence or incapacity of the presiding judge.

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals. In addition to the duties of a judge of the Court of Appeals, the presiding judge shall:

- (a) administer the rotation and scheduling of panels;
- (b) act as liaison with the Supreme Court;
- (c) call and preside over the meetings of the Court of Appeals; and
- (d) carry out duties prescribed by the Supreme Court and the Judicial Council.

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court.

History: C. 1953, 78-2a-2, enacted by L. 1986, ch. 47, § 45; 1988, ch. 248, § 7.

NOTES TO DECISIONS

Stare decisis.

A rule of law pronounced by a panel of the Court of Appeals governs all later cases involving the same legal issues decided by other

panels of that court and all courts of lower rank. *Renn v. Utah State Bd. of Pardons*, 904 P.2d 677 (Utah 1995).

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

- (a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;
- (b) appeals from the district court review of:
 - (i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and
 - (ii) a challenge to agency action under Section 63-46a-12.1;
- (c) appeals from the juvenile courts;
- (d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;
- (e) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;
- (f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence,

except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

History: C. 1953, 78-2a-3, enacted by L. 1986, ch. 47, § 46; 1987, ch. 161, § 304; 1988, ch. 73, § 1; 1988, ch. 210, § 141; 1988, ch. 248, § 8; 1990, ch. 80, § 5; 1990, ch. 224, § 3; 1991, ch. 268, § 22; 1992, ch. 127, § 12; 1994, ch. 13, § 45; 1995, ch. 299, § 47; 1996, ch. 159, § 19; 1996, ch. 198, § 49.

Amendment Notes. — The 1992 amendment, effective April 27, 1992, added Subsection (2)(h) and redesignated former Subsections (2)(i) through (j) as Subsections (2)(i) through (k).

The 1994 amendment, effective May 2, 1994, substituted "Board of Pardons and Parole" for "Board of Pardons" in Subsection (2)(h) and inserted "Administrative Procedures Act" in Subsection (4).

The 1995 amendment, effective May 1, 1995, substituted "School and Institutional Trust

Lands Board of Trustees, Division of Sovereign Lands and Forestry actions reviewed by the executive director of the Department of Natural Resources" for "Board of State Lands" in Subsection (2)(a).

The 1996 amendment by ch. 159, effective July 1, 1996, substituted "Division of Forestry, Fire and State Lands" for "Division of Sovereign Lands and Forestry" in Subsection (2)(a).

The 1996 amendment by ch. 198, effective July 1, 1996, deleted former Subsection (2)(d), listing appeals from circuit courts, and redesignated former Subsections (2)(e) to (2)(k) as (2)(d) to (2)(j).

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

Cross-References. — Composition and jurisdiction of military court, §§ 39-6-15, 39-6-16

NOTES TO DECISIONS

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Decisions of Board of Pardons
Extraordinary writs
Final order
Habeas corpus proceedings
Post-conviction review
Scope
— Sentence reduction
Cited

Decisions of Board of Pardons.

The Court of Appeals hears appeals from orders on petitions for extraordinary writs challenging decisions of the Board of Pardons, except when the petition additionally challenges the conviction of or sentence for a first degree felony or a capital felony. Then the appeal is to be heard by the Supreme Court. *Preece v House*, 886 P2d 508 (Utah 1994).

Extraordinary writs.

The Court of Appeals had jurisdiction over a petition for a writ of mandamus directed against a judge of the district court based on its authority under this section to enforce compliance with a prior order and to issue writs in aid of its appellate jurisdiction. *Barnard v Murphy*, 882 P2d 679 (Utah Ct App 1994).

The term "original" in § 78-2-2(2) adds nothing to the Supreme Court's writ jurisdiction — and its absence in Subsection (1) takes nothing from the jurisdiction of the Court of Appeals — because jurisdiction over petitions for extraordinary writs necessarily invokes a court's jurisdiction to consider a petition originally filed with it as opposed to its appellate jurisdiction over cases that originated elsewhere. *Barnard v Murphy*, 882 P2d 679 (Utah Ct App 1994).

Because, under this section, the Court of

TITLE II.
APPEALS FROM JUDGMENTS AND ORDERS OF
TRIAL COURTS.

Rule 3. Appeal as of right: how taken.

(a) **Filing appeal from final orders and judgments.** An appeal may be taken from a district or juvenile court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney fees.

(b) **Joint or consolidated appeals.** If two or more parties are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may file a joint notice of appeal or may join in an appeal of another party after filing separate timely notices of appeal. Joint appeals may proceed as a single appeal with a single appellant. Individual appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party, or by stipulation of the parties to the separate appeals.

(c) **Designation of parties.** The party taking the appeal shall be known as the appellant and the adverse party as the appellee. The title of the action or proceeding shall not be changed in consequence of the appeal, except where otherwise directed by the appellate court. In original proceedings in the appellate court, the party making the original application shall be known as the petitioner and any other party as the respondent.

(d) **Content of notice of appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment or order, or part thereof, appealed from; shall designate the court from which the appeal is taken; and shall designate the court to which the appeal is taken.

(e) **Service of notice of appeal.** The party taking the appeal shall give notice of the filing of a notice of appeal by serving personally or mailing a copy thereof to counsel of record of each party to the judgment or order; or, if the party is not represented by counsel, then on the party at the party's last known address.

(f) **Filing and docketing fees in civil appeals.** At the time of filing any notice of separate, joint, or cross appeal in a civil case, the party taking the appeal shall pay to the clerk of the trial court such filing fees as are established by law, and also the fee for docketing the appeal in the appellate court. The clerk of the trial court shall not accept a notice of appeal unless the filing and docketing fees are paid.

(g) **Docketing of appeal.** Upon the filing of the notice of appeal and payment of the required fees, the clerk of the trial court shall immediately transmit one copy of the notice of appeal, showing the date of its filing, the docketing fee, and a copy of the bond required by Rule 6 or a certification by the clerk that the bond has been filed, to the clerk of the appellate court. Upon receipt of the copy of the notice of appeal and the docketing fee, the clerk of the appellate court shall enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the trial court, with the appellant identified as such, but if the title does not contain the name of the appellant, such name shall be added to the title.

(Amended effective October 1, 1992; November 1, 1996.)

COLLATERAL REFERENCES

Brigham Young Law Review. — Reasonable Assurance of Actual Notice Required for In Personam Default Judgment in Utah: *Graham v. Sawaya*, 1981 B.Y.U. L. Rev. 937.

Am. Jur. 2d. — 46 Am. Jur. 2d Judgments § 265 *et seq.*

C.J.S. — 49 C.J.S. Judgments §§ 187 to 218.

A.L.R. — Necessity of taking proof as to liability against defaulting defendant, 8 A.L.R.3d 1070.

Appealability of order setting aside, or refusing to set aside, default judgment, 8 A.L.R.3d 1272.

Defaulting defendant's right to notice and hearing as to determination of amount of damages, 15 A.L.R.3d 586.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255.

Failure to give notice of application for default judgment where notice is required only by custom, 28 A.L.R.3d 1383

Failure of party or his attorney to appear at pretrial conference, 55 A.L.R.3d 303.

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 A.L.R. Fed. 190.

Key Numbers. — Judgment ⇐ 92 to 134.

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that

there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Compiler's Notes. — This rule is similar to Rule 56, F.R.C.P.

Cross-References. — Contempt generally, §§ 78-7-18, 78-32-1 et seq.

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Specific facts are required to show whether there is genuine issue for trial. *Reagan Outdoor Adv., Inc. v. Lundgren*, 692 P.2d 776 (Utah 1984).

When a motion for summary judgment is made under this rule, the affidavit of an adverse party must contain specific evidentiary facts showing that there is a genuine issue for trial. *Treloggan v. Treloggan*, 699 P.2d 747 (Utah 1985).

Affidavits submitted by plaintiff that con-

bility of unconscionability, and the necessity for a hearing is thereby obviated.

Having established that the semiconductors sold to Macarr were not warranted for merchantability and fitness, the third-party defendant is entitled to a dismissal of the third-party complaint. Settle judgment.

INTERNATIONAL HARVESTER CO. v. PIKE

Arkansas Supreme Court, February 15, 1971, rehearing denied
May 10, 1971
249 Ark 1026, 466 SW2d 901

[¶ 1201, ¶ 2316] **Conspicuousness of disclaimer of warranties.**

Disclaimer clause in warranty of a truck was ineffective to disclaim implied warranties since it was not conspicuous, in that it was printed in small, narrowly spaced type. In addition, there was evidence that the warranty was delivered to buyer some time after the sale was made, constituting a unilateral attempt of the seller to limit its obligations.

Appeal from Circuit Court, Hot Spring County.

BROWN, Justice. Appellee Earl Pike obtained judgment for personal injuries and property damage against International Harvester Company and its Malvern distributor, Burks Motors, Inc., as a result of a mechanical failure of appellee's International transport truck, which failure substantially wrecked the transport and caused serious injuries to appellee. This appeal is by International, in which several points for reversal are submitted and to which we shall later refer. . . .

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Since the case must be reversed because of the errors we have discussed, we shall touch only on those remaining points of appellant which are likely to arise upon retrial.

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3. The court erred in giving instructions and submitting interrogatories to the jury pertaining to breach of warranty. The trial court, by appropriate instructions and an interrogatory, submitted the issue of implied warranty of merchantability. The trial court refused to submit the question of express warranty, apparently for the reason that the warranty had, according to its terms, ex-

pired. The third paragraph of the written warranty has the disclaimer provision:

"This warranty is in lieu of all other warranties, express or implied, including without limitation, warranties of MERCHANTABILITY and FITNESS FOR PARTICULAR PURPOSE, all other representations to the original purchaser, and all other obligations or liabilities, including liability for incidental and consequential damages, on the part of the Company or the seller. No person is authorized to give any other warranties or to assume any other liability on the Company's behalf unless made or assumed in writing by the Company, and no person is authorized to give any warranties or to assume any liabilities on the seller's behalf unless made or assumed in writing by the seller."

With the exception of what we have reproduced in caps the remainder of the lettering is smaller than the type appearing on this page, and the lines are narrowly spaced. We cannot classify it as being conspicuous, which is one of the requirements of a disclaimer. *Marion Power Shovel Co. v. Huntsman*, 246 Ark 152, 437 SW2d 784 [6 UCC Rep 100] (1969); *Mack Trucks v. Jet Asphalt*, 246 Ark 101, 437 SW2d 459 [6 UCC Rep 93] (1969). Furthermore, there was substantial evidence that the warranty was delivered to appellee some time after the sale was made, constituting "a unilateral attempt of a party to limit its obligations." *Mack Trucks v. Jet Asphalt*, supra. The court was correct in submitting the issue of implied warranty.

Reversed and remanded.

HARRIS, C. J., and HOLT, J., are of the opinion that the trial court was correct in refusing to submit to the jury the issue of appellee's negligence.

REISSMAN INTERNATIONAL CORP. v. J. S. O. WOOD PRODUCTS, INC.

New York Civil Court, New York County
New York Law Journal, June 6, 1972, p 2

[¶ 2104, ¶ 2201] **Statute of frauds.**

A contract for the sale of goods for a price in excess of \$500 was enforceable where the purchaser sent the seller a signed purchase order, both parties were merchants, and the seller made no objection within ten days after receipt of the order.

[¶ 2201] Statute of frauds—effect of admission of existence of contract.

An action to recover damages for defendant's alleged failure to deliver goods covered by a purchase order will not be dismissed on motion, even though the purchase order was not signed, where discovery proceedings have not been had, since it is possible that plaintiff either through discovery or at the trial may obtain an admission from defendant that a contract was made, which under § 2-201(3)(b) would render the contract enforceable to the extent of the quantity of goods admitted. Compelled testimony may be treated as an admission under § 2-201(3)(b).

UCC Sections Cited: § 2-104(1), § 2-201(1), (2), (3)(b).

EVANS, J. In this motion for damages sustained by reason of defendant's failure to deliver 144 cabinets out of a total of 250 ordered, under two purchase orders, defendant moves for summary judgment dismissing the complaint on the ground that there is no writing signed by the defendant and therefore claims that the action is barred by the Statute of Frauds UCC § 2-201.

Defendant also counterclaims for \$1,764 representing the unpaid balance of 63 cabinets, and a delivery charge.

The documents submitted by plaintiff in opposition to the motion consist, in pertinent part, of two purchase orders which were sent to defendant. The first, No. 71-131 for 50 cabinets is signed by the plaintiff; the second, No. 71-132 for 200 cabinets, is unsigned. With respect to the purchase order 71-131, the statute has been satisfied. Sub-paragraph (2) provides that "Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received." Both parties are merchants, UCC § 2-104(1) and the purchase order was signed by the sender and no objection thereto was made by defendant within the ten day period allowed by the statute.

The second purchase order, No. 71-132 for 200 units sent by plaintiff to defendant, presents further problems. It was unsigned, and defendant denies that there was such a contract. UCC § 2-201(3)(b) provides that a contract, itself not sufficient because it was not signed, is enforceable "if the party against whom enforcement is sought admits in his pleadings, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted."

Although defendant, in his answer, has denied the existence of the contract alleged by plaintiff, the affidavits submitted show that one invoice sent by defendant to plaintiff, refers to purchase order No. 71-132, although the invoice is limited to 42 cabinets. Whether or not plaintiff may, through the use of discovery proceedings after answer obtain a testimonial admission of the alleged contract from defendant has not yet been passed upon in New York (see *Weiss v. Wolin*, 20 Misc2d 750). This court concludes that it may, and therefore the portion of the motion seeking a dismissal of the complaint is denied at this time. _

Although one respected commentator has stated that such compelled testimony is not to be regarded as an admission, (see *Ander-son*, Uniform Commercial Code, 2d Ed § 2-201:45, p 281), the authority cited by him for that proposition states that lawyers and judges are not in agreement on that point. *Hawkland, Sales and Bulk Sales*, 1958 p 31. The various reports of the Law Revision Commission show that it considered that the required admissions might be compelled; see 1953 Law Revision Commission Report, Recommendations and Studies, 65 "O", p 17, 18 and its 1955 Study of the Uniform Commercial Code, at p 371.

In its 1957 Report, at p 23 the commission states that the 1953 proposal would include admissions by way of pleadings, bills of particulars, depositions, affidavits, admissions pursuant to notices to admit, and oral testimony, and its 1960 report at page 271 states "In the 1957 revision of the Code the 1952 version was changed to provide that the contract is not enforceable beyond the quantity of goods admitted and to make it clear that it applied to admissions on cross-examination."

The Statute of Frauds, designed to [prevent] perjurious proof of an oral contract, has had ambiguous treatment by the courts. Some have held that the requirement of a writing was an indispensable formality and a substantive requirement rendering an oral contract entirely void; others have created exceptions where justice required.

The limitations have been questioned, since the purpose of the statute is fully satisfied if the defendant admits, in the particular action, the making of the contract as claimed by plaintiff (see *Stevens, Ethics and the Statute of Frauds*, 37 Cornell Law Quarterly, 1952 p 355). Other jurisdictions have reached this conclusion. In *Cohn v. Fisher*, NJ Supreme Ct, Jan. 24, 1972, 10 UCC Rep 372, not yet otherwise reported, the court reaching this conclusion under the Uniform Commercial Code, said, "The statute was not designed to protect a party who made an oral contract,

but rather to aid a party who did not make a contract, though one is claimed to have been orally made for him". (See also, *Garrison v. Platt*, 113 Ga App 94, 147 SE2d 374 [3 UCC Rep 296] 1966; *In re Particle Reduction Corp.*, USDCED Penna, Jan. 10, 1968, Bankruptcy No. 29817; 60 Berks LJ 65, 5 UCC Rep 242).

This motion was brought on prior to any discovery proceedings. The possibility exists that plaintiff there or on trial may be able to obtain an admission by defendant of the entire contract as claimed.

Plaintiff has not opposed defendant's motion for judgment on its counterclaim, except as to the price per cabinet, which is the sole issue remaining as to the counterclaim. That issue should be tried together with the plaintiff's claim. The motion for summary judgment dismissing the complaint, and for judgment on the counterclaim is accordingly denied.

**BRIDGEWATER WASHED SAND & STONE CO., INC. v.
BRIDGEWATER MATERIALS, INC.¹**

Massachusetts Supreme Judicial Court, May 15, 1972
282 NE2d 912

[¶ 2201] **Statute of frauds.**

Where a written contract for the sale of land and certain materials thereon and an oral agreement explaining some of the language and terms of the written agreement were breached by the seller's failure to turn over to the buyer some of the materials, the whole agreement was enforceable against the seller under § 2-201 since the seller had received the full consideration from the buyer.

UCC Section Cited: § 2-201(1), (3)(c).

Before TAURO, C. J., CUTTER, SPIEGEL, REARDON and HENNESSEY, JJ.

James D. St. Clair for the defendants.
Harold Rosenwald for the plaintiff.

CUTTER, J. The plaintiff (the buyer) seeks to recover from the corporate defendant (Materials) the value of stockpiled sand and gravel or stone removed from three parcels of land sold (except for part of one parcel on which there was an asphalt plant) by

¹ . . .

Materials to Gerald I. Bern or his nominee. The buyer became Bern's nominee. An agreement of purchase and sale (the original agreement) was executed on May 24, 1965.² A supplementary agreement, dated June 21, 1965, defined by metes and bounds the land to be excepted from the conveyance (the excepted parcel) and created certain easements in favor of the buyer as to the excepted parcel. Lorusso, Materials' president and treasurer (fn 1), signed each agreement individually as well as for Materials. An auditor, who made findings described below, assessed damages, recoverable by the buyer, at \$50,150. Subject to the defendants' exceptions, a Superior Court judge denied their motion to recommit the auditor's report, and allowed a motion for judgment for the buyer on the auditor's report. The case is before us on the defendants' bills of exceptions.

The land sold consisted of about seventy acres in Bridgewater. The excepted parcel contained about 6.2 acres. The original agreement (par 2) provided that the "sale . . . shall include the sand and gravel plant . . . on the [sold] premises, all equipment listed . . . and processed and unprocessed sand and gravel." It further provided (par 3), after referring to the excepted parcel, "Any sand and gravel removed from *this area* at any time after passing of papers, and any sand, gravel or stone stockpiled in this area at the time of passing of papers shall be the property of the [b]uyer, and the [b]uyer shall have the right to enter the area to remove it for a reasonable . . . time" (emphasis supplied). The supplementary agreement of June 21, 1965 (probably executed on June 22), made a similar provision, in terms clearly applicable to the excepted parcel.³ Materials and Lorusso apparently assume that papers passed on June 22, 1965, although this is by no means wholly clear from the auditor's report.

The parties stipulated before the auditor that the original agreement and the supplementary agreement "constitute the *written* agreements between the parties." From oral testimony of "witnesses for . . . the plaintiff [the buyer] and the defendants [i. e. Materials and Lorusso] . . . attorneys and . . . accountants who

² The auditor referred in various places to this date as May 21, but it was agreed at the arguments that the correct date was May 24. In quoting the auditor's report, this correction has been made.

³ The supplementary agreement provided (par 5) "that the purchase price was allocated by the parties as follows: \$100,000 for the land; \$70,000 for the building; and \$10,000 for the stockpiles." The auditor found that these allocations were not "an expression of the accurate value of . . . [the] inventory . . . or . . . stockpiles but" represented figures "insisted upon by . . . [Materials and Lorusso] for tax purposes."