

1997

Kim Rinderknecht v. Lance Luck : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 970343-CA

IN THE UTAH COURT OF APPEALS

KIM RINDERKNECHT,)	
)	Case No. 970343-CA
Plaintiff/Appellant,)	
)	Priority 15
vs.)	
)	
LANCE LUCK,)	
)	
Defendant/Appellee.)	

BRIEF OF APPELLEE

Appeal from the Eighth Judicial District Court of
Duchesne County, Roosevelt Department, State of Utah
The Honorable Lyle Anderson, District Judge

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PARTIES TO THE PROCEEDING

All of the parties to this proceeding are listed in the
Caption.

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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. §78-2a-3(2)(j).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Plaintiff's statement of the issues presented for review contains general allegations of error which are disfavored by the Rules of Appellate Procedure. See Utah R. App. P. 9(5). The properly framed issues are as follows:

1. Whether a contract was ever formed between the parties as Plaintiff failed to accept Defendant's offer to purchase his cattle because the offer required acceptance by performance, and Defendant never received the required deposit of \$7,2000.00 and a written contract?

2. Whether admissions of preliminary contract negotiations, which never resulted in a binding contract, constitute "admissions" sufficient to take an oral contract outside the bar of the Statute of Frauds?

STANDARD OF REVIEW

Because the issues raised here involve the propriety of a grant of summary judgment, this Court reviews the decision for correctness. See Universal Underwriters Ins. Co. v. State Farm Mut. Auto. Ins. Co., 925 P.2d 1270, 1272, 1273 (Utah Ct. App. 1996) and Stevenson v. Goodson, 924 P.2d 339, 350 (Utah 1996). Whether there was a contract formed is a question of law which is decided

by the Court and is reviewed for correctness. Herm Hughes & Sons, Inc. v. Quintek, 834 P.2d 582, 583 (Utah Ct. App. 1992).

STATUTES AND REGULATIONS

Utah Code Ann. §70A-2-201

(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).

Utah Code Ann. §70A-2-206

(1) Unless otherwise unambiguously indicated by the language or circumstances

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

. . .

(2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

STATEMENT OF THE CASE

This case involves the straightforward review of the trial court's application of the Statute of Frauds found in Utah Code Ann. §70A-2-201 et.seq. to prevent a party from alleging and enforcing an oral "contract" that never came into existence. Appellant urges on appeal that there was an oral agreement between the parties which was enforceable and admitted by the Defendant in an Affidavit. Defendant/Appellee denies there was ever an enforceable agreement because Plaintiff failed to properly or timely accept it. In addition, Defendant did not admit the existence of an enforceable contract based on the policy underlying the Statute of Frauds that negotiations which never consummate in a contract should not be enforced by Courts. Because the trial

court concluded there was no agreement, nor an admission to create an exception to the bar of the Statute of Frauds, it dismissed Plaintiff's Complaint on a Motion for Summary Judgment.

STATEMENT OF FACTS¹

1. Plaintiff is a livestock dealer in Uintah County, Utah. (Record 1-2, hereinafter referred to as R., Complaint paras. 1, 4.)

2. Defendant is a livestock owner, who resides in Duchesne County. (R. 36, Affidavit of Lance Luck, paras. 1, 2.)

3. Plaintiff commenced an action against Defendant which alleged a breach of an alleged oral contract for the sale of cattle. (R. 2, Complaint para. 5.)

4. Defendant answered the Complaint and raised a number of defenses, including that a contract was never formed and that the Statute of Frauds barred Plaintiff's alleged breach of contract. Specifically, Defendant denied the allegations as to the existence of an agreement. The Answer containing the denial reads as follows:

6. Defendant denies that Plaintiff and Defendant entered into an agreement as alleged in paragraph no. 5 and affirmatively alleges that Defendant offered to sell the cattle described in paragraph no. 5 to Plaintiff.

¹Plaintiff's Statement of Facts offers much more than the facts, and includes Plaintiff's commentary on and an analysis of the "facts." As such, the Statement of Facts is argument and should not be relied on by the Court. The facts stated herein are undisputed.

7. Defendant admits that Plaintiff proposed to pay \$7,200.00 as a deposit, with the balance of the sales price being paid upon the completion of the contract, as alleged in paragraph no. 6, but denies there was ever a promise, an agreement or a contract and consequently no payments were made.

. . .

10. Defendant denies that there was an agreement to perform as alleged in paragraph no. 13 and alleges that no agreement was reached in that Plaintiff failed to deliver to Defendant any contract or money as an acceptance of Defendant's offer to sell livestock.

(R. 23.)

5. Defendant has not admitted the existence of the contract, as alleged in Plaintiff's paraphrased "Statement of Facts." The relevant, verbatim statements contained in the Affidavit are as follows:

2. I am a cattle rancher and typically sell my cattle once a year at one time.

3. 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 cattle sales price was 58 cents (\$0.58) per pound for steers and 52 cents (\$.52) per pound for heifers.

4. 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.

5. I never received a deposit check or any writing from the Plaintiff relating to the sale of the cattle.

6. Because Plaintiff did not send the deposit check or a contract or any other confirming correspondence, I contacted him to discuss his intentions. On or about August 1, 1996, I spoke with Plaintiff who indicated that I would probably receive the contract and check in the next few days.

7. Because I had not received a deposit check, a contract or any other confirming correspondence from Plaintiff on or about August 20, 1996, I again called Plaintiff to discover whether he wanted to buy the cattle or not. I was unable reach Plaintiff.

8. Since I never received any money, contract or other agreement from Plaintiff relating to the sale of the cattle. I sold the cattle at the Video Auction at the price that was being offered at that time.

(R. 36-37.)

SUMMARY OF ARGUMENT

The record is absolutely clear that Defendant never accepted the offer made by the Plaintiff. Defendant offered to sell the cattle in such a way that acceptance was conditioned upon receipt of a deposit of \$7,200.00, and a written contract. Defendant's Affidavit indicates that the offer was made on July 11, 1996, and that as of late August, 1996, the time cattle sales are generally consummated, the Plaintiff had not accepted the offer because Defendant had not received the down payment or a written contract. Plaintiff acknowledges in his Affidavit in Opposition to Summary Judgment that he received a telephone call from Defendant in which

the Defendant informed him that he had not received the check, but did nothing to insure that the check was received.

The record is absolutely clear that Defendant made no admission as to the existence of an alleged oral contract. On appeal, Plaintiff assumes, and dogmatically insists, that Defendant's Affidavit "admits" the existence of a contract. A review of the Affidavit belies the truthfulness of that assertion, as a matter of law.

Utah law is abundantly clear that the fact that a party admits to pre-contract negotiations does not create a binding contract. Indeed, on facts indistinguishable from these in the case at bar, the Utah Supreme Court held that the Statute of Frauds bars an attempt to enforce pre-contract negotiations, or even an alleged oral agreement that is not reduced to writing. See Lish v. Compton, 547 P.2d 223 (Utah 1975). The Court should apply Utah law and ignore factually distinct cases from foreign jurisdictions which offer no insight to the issue before this Court.

Plaintiff's proposed policy would require all Courts to allow the trier of fact to determine whether the admission exception to the Statute of Frauds exists in any case where the Statute of Frauds is raised as a defense, and further defeats the purpose of the Statute of Frauds, and the purpose of Summary Judgment. The long-standing policy against the enforcement of oral contracts

demands that the Court affirm the trial court's conclusion that the alleged oral agreement is barred as a matter of law.

ARGUMENT

I. THE ALLEGED ORAL CONTRACT IS UNENFORCEABLE BECAUSE PLAINTIFF FAILED TO ACCEPT DEFENDANT'S OFFER TO PURCHASE CATTLE AND NEVER PERFORMED AS REQUIRED.

This is a simple case involving contract formation issues. Plaintiff's claim is barred because the parties' negotiations never resulted in an enforceable contract. To state it bluntly, Plaintiff never accepted the offer extended by the Defendant.

Utah courts recognize that in cases involving the Uniform Commercial Code where an offer is not accepted as required in the Code, there is no enforceable contract between the parties. Herm Hughes & Sons, Inc. v. Quintek, 834 P.2d 582 (Utah Ct. App. 1992); See also Johnson Tire Serv. Inc. v. Thorn, Inc., 613 P.2d 521 (Utah 1980) (refusing to enforce part of UCC contract where there was not proper acceptance of the offer). In the Herm Hughes case, the Plaintiff, a general contractor, sued the Defendant, a subcontractor, seeking to recover the difference between a bid price which was offered during on-going negotiations between the parties, and the higher price actually paid to another subcontractor for furnishing the materials, after negotiations with the Defendant broke down. The Court ruled in favor of the Defendant, and rejected Plaintiff's claim, ruling that the bid, the

offer, was not enforceable as a contract because the Plaintiff had not accepted it.

Utah Code Ann. §70A-2-206(2) recognizes that:

[w]here the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

In this case, the Affidavit of Defendant expressly indicates that his offer made on July 11, 1996, was conditioned upon an acceptance of the contract in the form of a down payment of \$7,200.00 and a written contract, which Defendant never received. (R.37, Affidavit of Lance Luck, paras. 4-7.)

Plaintiff acknowledges in his Affidavit in Opposition to the Motion for Summary Judgement that Defendant informed him that he had not received the check for a down payment. In spite of that knowledge, Plaintiff took no action to insure that the check was received. After Defendant had heard nothing from the Plaintiff by August 20, 1996, approximately six weeks after the offer was made and near the end of the cattle sales season, Defendant sold the cattle to another buyer because he correctly concluded that the offer had lapsed. Thus, under the admitted facts in the

Affidavits, this Court should conclude that there was no acceptance of Defendant's offer, and affirm the decision of the trial court.²

II. UTAH CASE LAW EXPRESSLY PRECLUDES THE ARGUMENT OF THE SO-CALLED "ADMISSION EXCEPTION" TO THE STATUTE OF FRAUDS RAISED BY THE PLAINTIFF IN THIS CASE.

Notwithstanding the enormous problem with acceptance of the offer in this case, which is not addressed in Plaintiff's brief, even under the facts and law as stated by Defendant, the trial court's decision was correct. The issue presented by the Plaintiff to this Court has been decided by the Utah Supreme Court in Defendant's favor in the case of Lish.³ Although Plaintiff refers to the Lish case in its brief and attempts to distinguish it, Plaintiff's efforts at distinguishing the two cases are decidedly unconvincing. Indeed, Defendant suggests that the holding in Lish

²Plaintiff argued below that Defendant had an undefined obligation to contact Plaintiff after August 20, 1996, approximately six weeks after the offer was made to sell the cattle, and again inform him that he had not received the check and contract, which constituted acceptance of the offer. Such a position is properly rejected out of hand because it attempts to improperly redirect the burden of properly accepting the offer on the party who is making the offer. Such a position makes no sense.

³Plaintiff cites several cases from outside Utah in support of his position. Defendant does not believe a tit-for-tat on the holdings of these cases will assist the Court in its decision. For the most part, Plaintiff has no quarrel with the holdings of the cases from outside the state of Utah, as well as the plain language of Utah Code Ann. §70A-2-201(3)(b), which recognizes that where there is an admission as to the existence of a contract, it can act as an exception to the statute of frauds. These cases cannot change a non-admission into an admission, no matter how many times they are quoted.

absolutely precludes a good faith argument by Plaintiff that the trial court's decision should be overturned on appeal in this case.

In Lish, the Plaintiff, a grain broker, brought an action against a wheat farmer, alleging--as here--breach of a verbal contract for the sale of a wheat crop. Interestingly, unlike here, the Plaintiff in Lish sent a written confirmation of the sale of the wheat approximately two weeks after the conversation in which the alleged oral agreement was reached. The Plaintiff sued attempting to enforce the alleged agreement. The Defendant in Lish, as has Defendant here, raised a defense based on the Statute of Frauds.

In Lish, the trial court allowed the case to go to a jury, who answered interrogatories in favor of Plaintiff and determined that there was a binding oral contract for the sale of the grain crop. The Supreme Court reversed the jury verdict and held, as a matter of law, that the Statute of Frauds precluded the Plaintiff from recovering on the alleged oral contract. The evidence adduced at trial, and which the Supreme Court concluded as a matter of law established there was no oral contract, is as follows:

1. That on August 2, 1973, the Plaintiff Lish telephoned the Defendant Compton and talked about the purchase of the latter's wheat crop soon to be harvested.
2. That the price discussed, and which Plaintiff claims was agreed upon, was \$3.30 per bushel for about 15,000 bushels.

3. That Plaintiff made a notation of this agreement in his notebook on that day and that he committed this same 15,000 bushels of wheat to the Pillsbury Mills at Ogden for \$3.45 per bushel, to be delivered upon the harvesting of the wheat.

4. That on August 14, 1973, Plaintiff sent a confirmation which was received by Defendant on August 15, 1973.

Id. at 223-24.

In Lish, During examination of the Plaintiff at trial, he admitted that had he received a copy of the written confirmation sooner than two weeks after the alleged conversation, he would have been bound to perform under the contract. Based on that "admission," the Plaintiff argued that the Defendant admitted the existence of the contract, and could not rely on a Statute of Frauds defense. The Supreme Court rejected the argument out of hand. The Court stated:

The provision in the statute that if a party 'admits in court that a contract for sale was made' simply recognizes the obvious, that if he acknowledges a valid and binding contract, he should be bound thereby.

Id. at 226

In analyzing whether such an admission has been made, the court stated that:

Fairness requires that the Defendant's position be ascertained from the total posture of his defense, rather than by taking a hypothetical statement from his testimony and treating it as a statement of fact.

Id. at 226

Clearly, the "evidence" in the case at bar, which calls into question the alleged admission of Defendant, is similar to that in Lish which was inadequate as a matter of law. In essence, all the Defendant Mr. Luck "admitted" in his Affidavit here is that there was a conversation between the parties in which they discussed the sale of cattle and the price of the sale, and the conditions of such a sale and the means of acceptance--similar to that in the Lish case, except the Plaintiff in the Lish case went the additional step and sent a document that purported to confirm the agreement. Such an admission, if it can be called that, certainly does not admit the existence of a valid contract which trumps a Statute of Frauds defense. As in Lish, Defendant here would have agreed that he would have been bound by the alleged contract, had the Plaintiff properly accepted the offer by paying the amount of the deposit as consideration. However, because Plaintiff never accepted the contract, and gave no consideration, there was nothing to enforce.

In this case, Plaintiff takes the position, to the exclusion of all the disclaimers in the Answer, and the Affidavit, that a statement regarding contract negotiations and the means of acceptance demonstrates the existence of a contract. Stated another way, Plaintiff's position is that the fact that Defendant admits he and Plaintiff discussed the sale of cattle, and terms of

the sale, creates a binding contract, even though the contract was never accepted and the conditions to create a binding contract were never fulfilled. In effect, Plaintiff argues the same hypothetical that existed in the Lish case, i.e., that if the parties had entered into a written agreement that contained the terms discussed in conversation and had Plaintiff properly accepted the terms, Defendant would have been bound to them. Who could dispute that position, if it were true? However, as is apparent from the Affidavits, Defendant never admitted in any form the existence of a binding, enforceable contract, or terms that could be construed to be a contract. The Affidavit is abundantly clear that all Defendant admitted to is that the parties had entered into negotiations for the sale of cattle, which were never concluded and which did not result in an enforceable contract. When the alleged admission is viewed in context, it is difficult to understand how this innocuous statement somehow overcomes the time honored protections of the Statute of Frauds. The short answer is that it cannot.

III. PLAINTIFF'S ATTEMPT TO CREATE A FACTUAL ISSUE FAILS.

Plaintiff asks this Court, again based on authority from foreign jurisdictions, to conclude that in cases involving the so-called admission exception to the Statute of Frauds defense, a trial court can never enter judgment against the party claiming the

existence of the contract on a Motion for Summary Judgment. Given the fact that no contract was ever formed, or that no admission was ever made, the Court need not seriously consider this position. Nevertheless, in the spirit of completeness, Defendant will address the issue raised.

The strength of Plaintiff's position is undermined not only by the quality of its cited authority, but also by the policy it advocates. First, two of the three cases Plaintiff cites in support of its position involve Motions to Dismiss filed and decided prior to filing an Answer, and not Motions for Summary Judgment. Accordingly, the procedural posture of the cases cited, and the case at bar, are so completely different that the horrors presented in Plaintiff's block quotes are not present in this appeal. In this case, Defendant has answered the Complaint and presented affidavit evidence that supports its Motion for Summary Judgment. Accordingly, the cases involving Motions to Dismiss and the policy they advance, simply offer no assistance in deciding this case.

More importantly, Plaintiff's far reaching position would preclude trial courts from dismissing cases founded on alleged oral contracts based on the Statute of Frauds, without a determination of the trier of facts that there were no admissions that might take the case outside the bar of the Statute of Frauds. In essence, it

would require a trial in every Statute of Frauds case. Utah courts have not taken such a far reaching position. The ancient doctrine of the Statute of Frauds was created to protect parties from facing difficult evidentiary problems created by alleged oral contracts, and to prevent parties from "the peril of perjury and error" that is "latent in the spoken promise." Ravarino v. Price, 260 P.2d 570, 578 (Utah 1953) (citing Justice Cardozo in Burns v McCormick, 233 N.Y. 230, 135 N.E. 273, 274 (1922)). Accordingly, the very purpose of the statute is to summarily dispose of fraudulent claims of oral contract which are easily fabricated and difficult to defeat. The Alabama Supreme Court recognized, in a case similar to the case at bar, that the problem created by the "admission exception" is that it would make it difficult to summarily dismiss cases, like this one, where there is a dispute whether the parties ever entered into an oral contract--the very type of case the Statute of Frauds was designed to prevent.

In fact, the controversy in the evidence over the agreement indicates the very purpose of the Statute of Frauds--to prevent such controversies. If the agreements had been in writing, this controversy may never have developed."

Cox v. Cox, 292 Ala. 106, 289 So.2d 609 (1974).

The Utah Court of Appeals has expressly recognized that where the legislature has enacted the Statute of Frauds it is appropriate for a trial court to dismiss a case summarily even though there is

a factual dispute whether there was an alleged oral agreement between the parties. See Wardley Corp Better Homes and Gardens v. Burgess, 810 P.2d 476 (Utah 1991).⁴ In Wardley, the Court recognized that the Statute of Frauds placed the risk on certain parties if they chose to proceed without a written contract.

In this case, Plaintiff, a merchant involved in the buying and selling of cattle, knew or should have known of the risks of proceeding without a written contract. Once Plaintiff elected to proceed along a perilous path without a written agreement, in an area which is governed by the bar of the Statute of Frauds, he should not be allowed to avoid the summary dismissal of the case based simply by claiming that there might be an "admission" from the Defendant on the stand.⁵

⁴Contrary to the position taken by Plaintiff in his brief, if this case were to go to the jury, Defendant would not be allowed to present additional evidence about customs and practices in the industry or a prior course of conduct. Defendant's own cases recognize that if evidence as to the existence of an admission is to be decided by the trier of fact, the contract must be established through the alleged admission, and not collateral evidence. See Dangerfield v. Marvel, 222 N.W.2d 373 (N.D. 1974).

⁵Utah courts have routinely held that summary judgment based on the statute of frauds is appropriate. See Downtown Athletic Club v. Horman, 740 P.2d 275 (Utah Ct. App. 1987) (granting summary judgment denying attempt to enforce an alleged oral modification to an agreement).

CONCLUSION

This Court should sustain the lower court's decision dismissing Plaintiff's Complaint as a matter of law.

DATED this 26th day of September, 1997.

McKEACHNIE & ALLRED, P.C.
Attorneys for Defendant/Appellee

BY: Gayle McKeachnie
Gayle F. McKeachnie

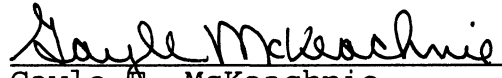
BY: Clark B. Allred
Clark B. Allred

MAILING CERTIFICATE

Gayle F. McKeachnie, attorney for Defendant/Appellee certifies that he served the attached BRIEF OF APPELLEE upon counsel by placing two true and correct copies thereon in an envelop addressed to:

Mr. Daniel S. Sam
Attorney at Law
319 West 100 South, Suite A
Vernal, Utah 84078

and deposited the same, sealed, with first class postage prepaid thereon, in the United States Mail at Vernal, Utah, on the 26th day of September, 1997.


Gayle F. McKeachnie