1978

Melinda Rudd, Administratrix of The Estate of Hy Rudd v. Mel Parks : Brief of Plaintiff-Respondent

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

MELINDA RUDD, Administratrix of the Estate of Hy Rudd,	)	
Plaintiff and Respondent,	)	
vs.	)	Case No. 15491
MEL PARKS,	)	
Defendant and Appellant.	)	

BRIEF OF PLAINTIFF-RESPONDENT

* * * * * * *

Appeal from the Judgment of the Third
Judicial District Court in and for
Salt Lake County, Utah
Honorable Maurice Harding, Judge

* * * * * * *

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NATURE OF THE CASE

Plaintiff - Respondent accepts statement of Defendant - Appell adding only that the covenant not to compete was an integral part of a sa and purchase agreement of a business for the sum of One Hundred Ninety-Tw Thousand Dollars.

DISPOSITION IN LOWER COURT

The District Court for Salt Lake County held the death of Sell Hyman Rudd, (Plaintiff-Respondent) did not terminate the obligation of Bu Mel Parks, (Defendant-Appellant) to make payments set forth in a covenant to compete which is a part of an integrated contract to buy and sell a bus iness for an agreed price of $192,000.00.

RELIEF SOUGHT ON APPEAL

Plaintiff-Respondent seeks to have decision of District Court affirmed.

STATEMENT OF FACTS

Through correspondence initiated by Defendant-Appellant (Rudd) consisting of three letters (Plaintiff's Exhibit 4) Deceased, Hyman Rudd, entered into a firm agreement to sell his business to Defendant-Appellant, Mel Parks, (Parks) for the sum of $192,000.00 and Mr. Parks accepted.

The letter dated September 19, 1973, stipulating the terms of t sale, drafted by Defendant-Appellants, provided the "Total Purchase price" at $192,000.00 and would be allocated in specific included amounts to thre items.

Shortly prior to sale, deceased Seller, the father of two minor high school age children (Melinda and Jeffery) had a serious heart attack,

and this was his reason to sell. Both facts were known to Appellant, Parks (R 255-256, Lns. 27-10) Mr. Rudd died of an acute heart attack on October 29, 1975.

Plaintiff-Respondent accepts all factual statements of Defendant-Appellant not contradictory to the foregoing.

STATEMENT OF POINTS

I. THE AGREEMENT OF DEFENDANT-APPELLANT, BUYER, AND DECEASED SELLER IS A SINGLE, ENTIRE, INTEGRATED CONTRACT SUPPORTED BY A SINGLE CONSIDERATION A STATED SINGLE PURCHASE OF $192,000, FORMALIZED IN THREE INSTRUMENTS AT THE DESIGN OF THE BUYER, WITH MONEY ALLOCATIONS TO EACH ARBITRARILY DETERMINED BY BUYER AFTER HIS CONSULTATION WITH AND ADVICE OF A TAX ADVISER.

II. MR. RUDD, HIS PERSONAL REPRESENTATIVE AND HEIRS HAVE FULLY OBSERVED THE COVENANT NOT TO COMPETE.

III. SELLER DREW THE CONTRACT, PROVIDED FOR PAYMENT OF A TOTAL SUM, AND IN COVENANT NOT TO COMPETE STATED THE PROVISIONS ARE TO APPLY TO AND BIND THE HEIRS, EXECUTORS AND ASSIGNS, AND SAID CONTRACT SHOULD BE STRICTLY CONSTRUED AGAINST DRAFTOR, WHO SHOULD NOT BE RELIEVED FROM HIS OBLIGATION TO PAY BY AN ACT OF GOD.

IV. BOTH FACTS AND LAW REQUIRE IN EQUITY THE AFFIRMATION OF THE JUDGMENT OF THE LOWER COURT TO PREVENT FORFEITURE AND UNJUST ENRICHMENT.

ARGUMENT

POINT I

THE AGREEMENT OF DEFENDANT-APPELLANT, BUYER, AND DECEASED SELLER IS A SINGLE, ENTIRE, INTEGRATED CONTRACT SUPPORTED BY A SINGLE CONSIDERATION A STATED SINGLE PURCHASE OF $192,000, FORMALIZED IN THREE INSTRUMENTS AT THE DESIGN OF THE BUYER, WITH MONEY ALLOCATIONS TO EACH ARBITRARILY DETERMINED BY BUYER AFTER HIS CONSULTATION WITH AND ADVICE OF A TAX ADVISER.

Plaintiff's Exhibit 4 consists of letters between Defendant-Appellant as offeror and deceased Seller as final acceptor.

Appellant's First offer, dated September 6, 1973, was for $180,00 with included sums allocated to stipulated items within the assets of a business.

Appellant's Second offer, Dated September 19, 1973, was for $192, with a change in value allocations calculated to bestow greatest benefit to Buyer. The tax detriments to the Seller almost nullify the $12,000 purchase price increase.

	Appellant's 1st Offer	Appellant's 2nd Offer
	$180,000 Inc.	$192,000 Inc.
Goodwill:	$15,000	$15,000
Covenant Not To Compete:	65,000	95,000
Equipment:	100,000	82,000
Interest:	6 1/2% on unpaid bal.	Included in $192,000

The tax consequences of the change has a traumatic negative impac on the net returns of the Seller and a positively beneficial result for the Buyer. The capital gains return to Seller was reduced by lessening the valu of the equipment and the portion taxed to the Seller as ordinary income increased by increasing the amount allocated to the Covenant Not To Compete.

It is an arbitrary change in value determination. Since the Covenant Not To Compete protects the good will (capital assets), how does Buyer, the Defendant-Appellant, justify the $30,000 increase in value of the non-compete element without an increase in value of the good will element? Further, there was an actual decrease in the value of the quipment schedule (Capital Gain to Seller) to meet Seller's demand of a $12,000 increase in Total Purchase Price to $192,000. It is apparent from these negotiations that the business was valued as a whole and the allocations were arbitrarily determined for tax purposes.

The Transcript establishes that the changes were calculated by Buyer to his advantage. Appellant testified his tax adviser established the final $95,000 value for the Non-Compete Agreement so he could deduct that sum as an operating expense, and without this allocation, he would not buy. (R 254 Ln 9 to end and R 255 to Ln 19) "That was the only terms on which I would buy".

At the time of the deliberations, the effect of the death of Rudd on the performance of the contract never entered Parks' mind - "Didn't think anything about death" (R 342 Lns 19; R 250 and 251 Lns 147).

The purpose of a non-compete covenant is to protect the good will of a business. Allen vs. Rose Park Pharmacy 120 U, 608; 237 P2d 823, and Appellant's Brief page 16).

How does he then justify as reasonable a $95,000 value for the protection of a business asset whose value he assesses for tax purposes at only $15,000?

How does Defendant-Appellant justify almost 50% of the total purchase of a business to protect its good will (one of its included assets whose value is less than 8% of the purchase price)?

A $95,000 purchase price for the covenant not to compete buys Appellant no more protection insofar as recovery for breach is concerned than $60,000. Unlike insurance, increase of premium does not increase coverage.

There is no stipulation for liquidated damages and if Rudd has violated the contract, Defendant-Appellant's recourse would not have been refusal to make contract payments, but he would have been entitled to recover as damages only loss of profits.

The consideration for the covenant was the principal sum of $95,000 but such sum, as an accommodation to the Buyer, was payable over a period of time to spread the payments over a period of years.

POINT II

MR. RUDD, HIS PERSONAL REPRESENTATIVE AND HEIRS HAVE FULLY OBSERVED THE COVENANT NOT TO COMPETE.

This contract is not analogous to a contract requiring affirmativ personal services such as the contract of a singer or dancer. Obviously, the contract of a singer or dancer is terminated on death since that person can no longer perform the services required and it is well settled that the impossibility of performance terminates the contract.

In this case, Mr. Rudd was not required to do an affirmative act but to refrain from performing acts.

With one notable exception, human experience indicates that Mr. Rudd will not return from death to establish a competing business. Mr. Rudd has in fact performed the ultimate act that assures and guarantees the Defendant-Appellant that his good will is secure from competition by Mr. Rudd!

Those cases and authorities cited by Appellant's Counsel to indicate that performance is discharged by death relate to performance or to exclusive rights for performance and are not applicable to this situation.

17 Am Jur 2d page 829, refers to "The prevention by an act of God of full performance of the entire contract..." whereas in this case, full observance is assured by the act of God.

There is no specific provision in the covenant relating to the

effect of the death of the Covenantor (Rudd) and the general authority is stated as follows: 17A Corpus Juris Secundum, Contracts page 626,

> "However, it has been said that, with a few exceptions, contracts do not die with the contractor unless they contain a provision to that effect; and a contract will be construed as subject to an implied condition of survivorship only when the continued existence of a party is assumed as the basis of the agreement."

17 Am Jur 2d, Contracts page 865,

> "The test for determining whether a particular contract is discharged by death has been said to be whether it is of such a character that it may be performed by the promisor's personal representative..."

In the instant case, the personal representative of the deceased has exclusive right to the name of the deceased and she and/or the heirs could have entered a competing business or could have refrained from so doing. They and each of them refrained, and therefore the contract has been fully observed.

POINT III

SELLER DREW THE CONTRACT, PROVIDED FOR PAYMENT OF A TOTAL SUM, AND IN COVENANT NOT TO COMPETE STATED THE PROVISIONS ARE TO APPLY TO AND BIND THE HEIRS, EXECUTORS AND ASSIGNS, AND SAID CONTRACT SHOULD BE STRICTLY CONSTRUED AGAINST DRAFTOR, WHO SHOULD NOT BE RELIEVED FROM HIS OBLIGATION TO PAY BY AN ACT OF GOD.

Mr. Parks (Defendant-Appellant) in drafting the instrument that is the subject of this case, could have provided that Mr. Rudd would receive a certain payment for each month in which he did not compete until the death of Mr. Rudd and that the contract would terminate on death and not be payable to the heirs, executors and assigns. Mr. Parks did not avail himself of these alternatives, but to the contrary provided for the payment of the sum of $95,000 and for his convenience made the sum payable in monthly installments

over a period of years to a given specific date. Mr. Parks further provided that the contract was binding on the heirs, executors and assigns of the parties.

The Covenant Not to Compete in essence combines two agreements:

1. A Promissory note in the amount of $95,000 payable to Mr. Rudd, his heirs and assigns, and payable in installmen
2. An agreement of Mr. Rudd not to compete with Mr. Parks.

If Mr. Parks had paid the $95,000 coincidentally with the executio of the contract rather than conveniencing himself by making the payments over a period of time, then, assuming, arguendo, that the death of Mr. Rudd was a breach of contract, Mr. Parks would have to attend the Court and show the damages incurred by Mr. Parks as a result of the untimely death of Mr. Rudd. Such damages, if any there were, may or may not have been equal to the sum of $1,500 per month. It is not equitable for Mr. Parks to now claim that because he, in drafting his contracts, developed for himself a convenient payment program, that the monthly payments constitute an agreement in relation to liquidated damages.

The Trial Court found the intent of the parties at the time of signing was to create a package deal as a result of which Buyer got all he dealt for and he should pay a full purchase price of $192,000; $95,000 of which was attributed, for the tax and business purposes of the Buyer, to a covenant not to compete (R 192, 193 and Findings of Fact 13 and 14).

The Court concluded, "The entire Contract of Sale of the Salt Lake Sanitation Business was one contract involving a total consideration of $192,000 which consideration for business purposes and tax benefits of the

Buyer, was divided into three parts, and the Defendant is not excused from the payment of any portion of the purchase price."

Argument supporting Points I and II are adequate to establish the premise of Point III as it applies to the instant case.

Reference to the Covenant Not to Compete instrument itself (Exhibit 1P) gives additional support.

The instrument is dated October 1, 1973 and stipulates non-competition "For a period of five years from the date hereof".

It stipulates payment of $95,000. No payments were required for the first three months. The first payment of $65,000 was required on January 20, 1974, and thereafter, monthly installments of $1,500 on the 20th day of each successive month until the purchase price was paid in full. The time periods are not identical date intervals and show them to be totally independent and severed of each other. The totality of the amount due and the specified final date of payment give proof of the totality and indivisibility of the payment in this instrument. This covenant falls within the framework of an entire agreement with a total six figure price of $192,000.

This instrument further stipulates, "It is expressly understood that the stipulations aforesaid are to apply to and bind the heirs, executors and administrators of the respective parties".

The law requires every effort must be made to give reasonable interpretation to a contract and must strictly construe against the party drawing it (Guinand vs. Walton 22 U2d 196; 450 P2d 467) especially if a forfeiture is involved, Wingets, Incorporated vs. Bitters 28 U2d 231; 500 P2d 1007. It follows that this sentence particularly highlighted by its introduction means that the Estate of Hy Rudd will pay damages to the Buyer to

compensate for acts of competition by the minor children of the Seller should he die during the five years.

The Court found the children had not competed (Findings of Fact [R192] Finding #10).

Ulmann vs. Sunset-McKee Co., March 1955 9th Circuit, 221 Fed 2d 128, supports the judgment here. The parties in the Trial Court stipulated deceaased was to refrain from competition during the three years he was to draw a monthly pension, after he completed a working career with Sunset-McKee. The Circuit Court of Appeals reversed the Trial Court which upheld Company's refusal to pay after employee's death declaring:

> Page 132. "But the Court chooses primarily to uphold the contract as binding for the reason that the consideration to support the Company's obligation is to be found in Ulmann, Sr. being required not to compete by soliciting for any other employer his so called 'protected accounts' ..."

The cases cited by Defendant-Appellant are readily distinguishable from the matter here, and are not entitled to consideration.

First case is Keller vs. California Liquid Gas, August, 1973 Wyo., 363 Fed Supp 123. Defendant, California Gas Co. bought two businesses, a wholesale liquid gas company and a liquid gas appliance company from the Sellors. Terms of sale of the business are not stated in the Covenant Not to Compete nor are they referred to in any way. Ancillary to the sale of the above businesses, Sellers, by separate agreement, also entered into a 10 year non compete agreement by sellers for which buyers were to pay $100,000 in 10 yearly installments of $10,000 each, on October 30th of each succeeding year. Sellers crashed in an air accident the year following sale.

Central to Court's decision was the fact that the children of the deceased who are co-plaintiffs, had aggressively competed against defendant.

The Court, treating this fact, declared:

> Page 128. "The right to specific performance depends upon circumstances and conditions in addition to the existence of a valid contract. Though the contract be free from fraud, mistake or other feature that would authorize a Court to set it aside, equitable relief may be denied if in acting under it plaintiffs have resorted to unfair conduct. These are all expressions commonly used in elaboration of the hoary maxim, 'He who comes into equity must come with clean hands'...Plaintiffs would ask the Court to allow them to compete against the Defendant while still requiring payments under a covenant, which as shown, has ceased to exist. The Court cannot be party to such an unconscionable bargain."

It dealt with the death issue terminative of the not to compete clause because these were frowned upon as in restraint of trade.

The Keller contract was not entire in the sense that it was integrated with the other elements of the purchase in a single price.

The Keller case further made no provision about heirs and administrators as the instant case.

Interesting is the observation of the Circuit Court in the Ulmann case (supra):

> Page 133. "While always a court must seek to divine the intent of the parties, it may be doubtful if the parties here ever put their minds to the question of 'Suppose Ulmann Sr. dies', yet the underlying tenor of the agreement seems to be that the Company was willing to reward Ulmann, Sr. with a total of $5,400 payable in 36 installments of $150 each..."
> Also, (8,9)"...If the construction of the agreement here (which seems to have been designed and executed by the sales department) is an unsatisfactory one for Sunset-McGee, it is a matter within the company's power to correct in drawing future contracts.

but if there is a doubt, the employee (or his estate), if the employer selects the words, should have the advantage of his boss's language which is susceptible of two intrinsically reasonable but opposite constructions." (Emphasis added)

In Jones vs. Servel, Inc., Indiana, 1962, 186 NE (2) 689, the deceased was not only not to compete during the relevant period, but was al required to perform affirmatively:

> Page 691. "You will ... act in an advisory capacity, as a consultant to this corporation and any of its subsidiaries in connection with any matters relative to the business and affairs of said corporations, it being understood that you will hold yourself available to render the services which are required of you hereunder and will not engage in any other business or activities ... or maintain a place of residence, which in any case unreasonably interferes with performance by you hereunder..."

This argument included serving on Board of Directors and officer of any subsidiary to which he might be elected.

The facts of Jones vs. Joy Manufacturing, Mo. 1964, 381 SW 2d 86 involves a contract of employment whereby,

> Page 862. ""Joy hereby agrees to continue the employment of Jones in the position of District Manager of its Coal Machinery Division ... during the term and subject to the provisions of this agreement."

Jones died during the life of the contract.

In the context of the facts, we, too, can endorse Appellant's quote. (Appellant's Brief, page 25). Obviously, the ability to perform the affirmative acts terminated on his death.

POINT IV

BOTH FACTS AND LAW REQUIRE IN EQUITY THE AFFIRMATION OF THE JUDGMENT OF THE LOWER COURT TO PREVENT FORFEITURE AND UNJUST ENRICHMENT.

Seller's heart trouble known to Buyer motivated sale and permitt

Buyer to allocate values arbitrarily to items constituting Seller's business to Buyer's best tax interest without relation to actual values of elements.

The Trial Courts Findings supported by the evidence carries its own dignity.

From the standpoint of equity, if death as an act of God excuses performance then a judgment should not require a forfeiture, when a deliberate breach entails only such damages as the aggrieved party could prove. Carried to a logical conclusion, neither the decedent seller with heart attack, so known by buyer, who had sold with arbitrary values imposed by the buyer, nor that buyer who claims he hadn't given a thought to the death of the seller at the time of entering into the contract, could contend it was the intent of the parties that buyer be absolved from payment if seller died. Against the backdrop of buyer's drawing non compete instrument dated October 1, 1973 with the initial payment due January 20, 1974, is it reasonable to accept Defendant's contention that buyer was relieved of the obligation to pay any consideration, if seller were to have died on January 19, 1974?

An act of God having excused the observance of this negative covenant, it is incumbent on the Court to determine the equities of both parties in terms of benefits received as well as services performed.

Although this is not a proper instance of frustration, Castagno vs. Church, Utah, Aug. 1976; 552 P2d 1282, states a principle regarding damages which does equity here:

> Page 1284. "If it was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed."
>
> .
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> .
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> .
>
> "a vendee has the right to insist upon performance by the vendor to the extent the latter is

> able to perform with an abatement in the purchase price equal to the value of the deficiency or defect."

and, the Defendant-Appellant has proved no damage.

To find for Defendant-Appellant would require a finding that the parties impliedly agreed that Seller's remaining alive was a condition precedent to Buyer's monthly payment and that the liquidated agreed damages wer equal to the unpaid portion of the price. The Court by so doing would graft two new provisions in the contract neither of which was in the contemplation of the parties.

CONCLUSION

Plaintiff-Appellant agrees "There is no question that the parties intended that a covenant not to compete be a part of a sales transaction bet Hyrum Rudd and Mel Parks", as stated in Appellant's Brief (Conclusion). The is no question that Parks offered $180,000 and when this was refused, offere $192,000 which was accepted. There is no question, the included value eleme was maneuvered by Parks under expert tax guidance without regard to value of the constituting assets of the business; without concern or thought to the consequences of the death of Hy Rudd, though he knew of Rudd's state of health, but only with concern for beneficial tax consequences to the Buyer.

If Appellant's intent was not to continue payments after the deat of Rudd, he could have removed the uncertainty from the provision when he wrote the instrument.

It is respectfully submitted that the decision of the Trial Court sitting as a court of equity should be affirmed.

DATED this ____ day of April, 1978.

Respectfully submitted,

BERNARD L. ROSE

IRVING H. ZIELE
Attorneys for Plaintiff-Respondent

CERTIFICATE OF DELIVERY

I hereby certify that I delivered a copy of the Brief of Plaint and Respondent of Appeal from the Judgment of the Third Judicial District Court, Case No. 15491 to the Attorney for the Defendant and Appellant by hand delivering the same on this _____ day of April, 1978, to Vaughn W. North, 10 West First South, Suite 700, Salt Lake City, Utah 84101.

RECEIVED AND ACCEPTED

(Signature)

(Date)