

1978

M. Elaine Brown v. Wendell v. Miller : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

M. ELAINE BROWN,

Plaintiff-
Respondent,

vs.

Case No. 15,638

WENDELL V. MILLER,

Defendant-
Appellant.

BRIEF OF APPELLANT

Appeal from a Judgment of the Fourth
Judicial District Court for Utah County, State of Utah,
Honorable J. Robert Bullock, presiding.

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DISPOSITION IN THE LOWER COURT

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RELIEF SOUGHT ON APPEAL

Appellant submits that the alleged contract sued upon was totally devoid of consideration and therefore the transaction should be set aside. The promissory note should be voided, and the appellant should have judgment against the respondents for the \$3,750.00 down payment.

STATEMENT OF FACTS

In April, 1977, the plaintiff offered to sell the defendant for \$7,500.00 a "business" that she had started six months previously. The "business" consisted of buying restaurant supplies such as food, paper products and chemicals from wholesale houses in Salt Lake City, Utah, and reselling them to restaurants and diners in Price, Utah.

Mr. Miller, the defendant, paid \$3,750.00 cash down payment and a like amount in the form of a promissory note. In the course of the transaction, there was an earnest money agreement and a promissory note, but there never was any written contract defining the rights of the parties.

The plaintiff operated the business from her home in Provo, Utah, under the name "L.D.'s Fine Foods." The plaintiff requested that the defendant use a

different name when he started selling in Price.
(Record at 14.) There were no assets involved in the sale: no delivery vehicles, no inventory, no accounts receivable. The only thing allegedly transferred in the sale was the supposed "good will" of the business.
(Record at 32 - 33.)

Both parties sued -- Mrs. Brown to enforce payment of the promissory note and Mr. Miller to void the contract and have his down payment returned.

ARGUMENT

POINT I

A CONTRACT MUST BE SUPPORTED BY CONSIDERATION TO BE VALID AND LEGALLY ENFORCEABLE.

The above statement is basic contract law needing no supporting citations. Reference to 17 C.J.S. Contracts Section 71 will provide ample authorities. It is treated briefly here merely because it is the major premise of a syllogism herein. The minor premise, to be treated in Point II, is that there was no consideration in this case; the conclusion is that the transaction should be set aside.

The Restatement of Contracts, Section 75, defines consideration as follows:

Consideration for a promise is

(a) An act other than a promise, or

- (b) A forbearance, or
 - (c) The creation, modification or destruction of a legal relation, or
 - (d) A return promise,
- bargained for and given in exchange for the promise.

We must examine this case to see if the plaintiff gave anything that would qualify as consideration in return for the defendant's \$7,500.00. If she did not, then the contract is not legally enforceable and the \$7,500.00 must be returned to the defendant. See General Insurance Company of America v. Carnicero Dynasty Corporation, 545 P.2d 502 (Utah 1976).

POINT II

THE ONLY CONSIDERATION
ALLEGED BY THE PLAINTIFF
WAS "GOOD WILL," YET THERE
WAS NO GOOD WILL TO BE
TRANSFERRED HERE.

"Good will" is a term of art in the law. It is used to refer to a somewhat ethereal quality -- the likelihood that customers will patronize a particular business. The elements that constitute good will have been delineated by the courts. In Vercimak v. Ostoich, 118 Utah 253, 221 P.2d 602 (1950), this Court stated that "one of the elements in good will is continuity of place." 221 P.2d at 604.

The chief elements of good will are continuity of time and continuity of place. Good will means an established business at a given place with the patronage that attaches to the name and location. Avery v. Lyons, 331 P.2d 906, (Kan. 1958).

"A firm or trade name is regarded as inseparable from good will." O'Hara v. Lance, 267 P.2d 725 (Ariz. 1954.)

"Good will has no existence as property in and of itself but is an incident of a continuing business having locality or name." Lerner v. Stone, 252 P.2d 522 (Colo. 1952).

The only thing the plaintiff claims to have sold is the "good will" of the business. The deposition of Larry Brown, who is the plaintiff's husband and has served as advisor and counselor to her (and with whom the defendant primarily dealt in the sale), is quoted as follows:

Question: Did the \$7,500.00 figure include any inventory?

Answer: No.

Question: Did it include any accounts receivable?

Answer: No.

Question: Did it include any tangible property of any kind?

Answer: The good will of the business.

Question: Did it include any tangible products of any kind?

Answer: No. (Deposition of Larry Brown at 5 - 6.)

The plaintiff reiterated this fact in her testimony at trial. (Record at 32 - 33.)

At the request of the plaintiff, Mr. Miller did not use the name of L.D.'s Fine Foods, although he desired to do so. (Record at 14.)

The plaintiff conducted a "business" out of her home for less than six months under a name that was not transferred in the sale. There was no product that carried the firm name. The plaintiff did not agree to forbear from competing with Mr. Miller after the sale. Therefore, it cannot be said that there was transferred any continuity of time, location or name; hence, there was no good will and no consideration.

POINT III

EVEN IF THERE HAD BEEN ANY GOOD
WILL TO SELL, IT COULD NOT BE
BARGAINED AND SOLD INDEPENDENTLY.

Courts of law and taxation authorities have struggled with the concept of good will. Out of this struggle have grown several time-honored doctrines governing the sale or disposition of good will. One of the cardinal rules is that good will has no existence as property in and of itself but is an

incident of a continuing business having locality or name. Lerner v. Stone, supra.

In a case dealing with this issue the Utah Supreme Court elaborated on this principle. In Jackson v. Caldwell, 18 Utah 2d 81, 415 P.2d 667 (1966), this Court stated:

Good will is property, so recognized and protected by law. As such it is subject to bargain and sale. There has been a rather general acceptance by the courts that good will exists as property incidentally to other property rights and is not susceptible of being owned and disposed of separately from property rights to which it is an incident.
[Citations omitted.]

. . .

It has been repeatedly held that there can be no "good will" so-called, of a business which depends for its existence upon the professional qualities of the persons who carry it on.

SUMMARY

The plaintiff supposedly sold a "business" to Wendell Miller, the appellant, for \$7,500.00. In reality, Mr. Miller got nothing. The only thing allegedly sold was the "good will of the business," which was nonexistent in the first place, and which can't be sold in and of itself in the second place. Since there never was any consideration, and hence no valid contract, Mr. Miller should have his money

restored to him, and his note cancelled.

Respectfully submitted this 5th day of
April, 1978.


RICHARD D. BRADFORD

CERTIFICATE OF MAILING

Mailed 2 copies of the foregoing
Appellant's Brief to Richard S. Dalebout, 60 East 100
South, Suite 100, Provo, Utah 84601, this 5th day
of April, 1978, first class postage prepaid.


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