2001

# Herbert Burton and Florence Burton v. Alan H. Coombs, Carla H. Coombs, Four Seasons Motor Inn. Inc., and Four Seasons Motor Inn II, Inc. : Reply Brief

Utah Supreme Court


David E West; Attorney for Respondent.
Alan H. Coombs; Attorney for Four Seasons.

IN THE SUPREME COURT OF THE STATE OF UTAH

HERBERT BURTON and FLORENCE BURTON, his wife,

Plaintiffs and Respondents,

vs.

ALAN H. COOMBS, CARLA H. COOMBS, his wife, FOUR SEASONS MOTOR INN, INC., a Utah corporation, and FOUR SEASONS MOTOR INN, II, INC., a Utah corporation,

Defendants and Appellants.

Case No. 14245 ~~14254~~

APPELLANTS' RESPONSE TO CROSS-APPEAL

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT
OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF UTAH
IN AND FOR THE COUNTY OF WASHINGTON
THE HONORABLE J. HARLAN BURNS, DISTRICT COURT JUDGE

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APPELLANTS' RESPONSE TO CROSS-APPEAL

## STATEMENT OF KIND OF CASE

This is a Cross-Appeal by plaintiffs to require the defendants to perform a settlement offer made prior to and at the beginning of the trial court.

## DISPOSITION IN THE LOWER COURT

After a trial before the Honorable J. Harlan Burns, sitting without a jury, the Court found that the defendants

were not bound by the later acceptance of an offer of settlement made at the beginning of the trial. Other issues were decided by the trial court which the defendant appealed to this court. However, those other appellate issues have been dismissed by stipulation of plaintiffs, Herbert and Florence Burton, and defendant, Four Seasons Motor Inn, Inc. The only issue remaining to be heard by this court is the Cross-Appeal of respondents. Even though defendants are no longer appealing any issues, for the sake of clarity, they will still be referred to as the appellants.

## RELIEF SOUGHT ON APPEAL

Appellants seek to have the determination of the lower court affirmed as to respondents' Cross-Appeal.

## STATEMENT OF FACTS

DEFENDANTS MADE AN OFFER OF SETTLEMENT AT THE BEGINNING OF THE TRIAL COURT. THE PLAINTIFFS REJECTED DEFENDANTS' OFFER AND THEN LATER TENDERED ACCEPTANCE. THE COURT PROPERLY RULED THAT PLAINTIFFS' ACCEPTANCE WAS NOT BINDING UPON DEFENDANTS.

In an effort to preclude the necessity of a trial, as well as to avoid the claim for anticipatory breach, defendants filed with the court, about a week before trial, a pleading which was entitled "Reaffirmation of Tender of Performance." (T-13) By this pleading, the defendants not only reiterated their tender

to allow the plaintiffs to resume their management of the first motel under the terms of the written Management Agreement, but they, in addition, offered to change the name of the second motel, an act not even required by the terms of the Management Agreement. Such a tender by the defendants was obviously made in an attempt to induce plaintiffs to forego their right of action for anticipatory breach. However, plaintiffs' counsel, in his opening statement at the commencement of trial, rejected the defendants' pleaded tender. (T-3) Even when defendants' counsel, in his opening statement, reasserted a tender of performance in an effort to settle the anticipatory breach claim, the plaintiffs refused to accept it and instead proceeded with the litigation on the issue of anticipatory breach as well as other issues. (Respondents' Brief, page 19).

The effect of plaintiffs' failure to accept the tender of performance at the commencement of the trial was to then require the defendants to continue to assert and prosecute their counterclaim based upon the plaintiffs' breach of the Management Agreement. This included the claim that the plaintiffs had breached the contract by both non-performance and by repudiation. Obviously, the position which the defendants were then forced to assert became totally inconsistent with any continuing tender of performance since their counterclaim asserted

that the breach by the plaintiffs had the effect of rescinding the contract so as to relieve the defendants of any performance thereunder. Thus, after the taking of testimony at trial commenced, the parties were pursuing the litigation of their claim. The defendants were contending that the plaintiffs had breached the contract and had thereby brought it to an end and the plaintiffs were asserting the same against the defendants.

As a part of their testimony during the first day of trial, each of the plaintiffs in turn testified under oath that they could not perform the Management Agreement. (T-74-78). Two concise rejections are:

> "Q In light of what has happened over the past year and a half do you think you could go back and work with Mr. Coombs in an employee-employer relationship?
>
> A I couldn't." (T-74).
>
> " . . . All of these things go to show that Mr. Burton feels that he could not, could not continue to work under that arrangement, would not want to." (T-78).

Such was an additional clear repudiation of the contract and a clear, express rejection of the defendants' previously-offered tender of performance.

After the plaintiffs had fully presented their evidence, defendants made a motion to dismiss the plaintiffs' claim for anticipatory breach and presented arguments in support of said motion, noting reasons why the plaintiffs

had failed to prove the claim. Other motions and arguments were also made by the defendants at that time. The court then recessed the proceedings to consider the various motions, and after having done so, the court called all counsel into chambers and outlined his views on the merits of the motions, indicating, among other things, that the court's impression was that the plaintiffs' evidence on anticipatory breach was insufficient. Thus, at that time, the plaintiffs were informed that they had, in effect, failed to prove their claim on the issue of anticipatory breach.

The stated purpose of the court for informing the parties concerning its impressions after the defendants' motions had been made was to induce further good faith settlement negotiations between the parties in the hope of terminating continued litigation on the remaining issues. Thus, during the ensuing noon recess, the attorneys for the parties assembled for the purpose of settlement discussions. During the course of such discussions, certain alternative proposals for settlement were discussed and rejected by plaintiffs.

Upon return of the parties from lunch, and immediately before the trial resumed, plaintiffs' counsel approached counsel for the defendants and announced that the plaintiffs were simply going to tender into court an acceptance of the tender of

performance filed by the defendants before trial. In effect, the plaintiffs completely bypassed the court-induced negotiations for a compromise and instead rushed back into court in an attempt to accept the tender of performance which had been made before trial and after their sworn testimony that they could not, under any circumstances, perform the Management Contract because of their adverse feelings towards Mr. Coombs and a long list of other circumstances, which Mr. Burton, with the prompting of his attorney, detailed to the court. (T-74-78).

In other words, the plaintiffs attempted to take advantage of the situation before the court formally recorded its granting of the defendants' motion for dismissal of the anticipatory breach action. This they did by attempting to quickly accept the pre-trial tender of performance without giving any explanation or assurance to the court or to Mr. Coombs as to how they could perform the contract in view of their prior testimony.

If the plaintiffs were to succeed by such a maneuver, they would stand to get more than they were entitled to under the Management Agreement, i.e., a change of the name of the second motel, an inducement held out to plaintiffs prior to trial. This they would get without ever having to give any consideration therefor. The reason they didn't have to give

up anything was because, by this time, they had received information from the court that their claim for anticipatory breach was essentially without value. They, in effect, at that point had nothing to give.

At no time have the plaintiffs, or either of them, demonstrated by any testimony or act that their purported acceptance of the pre-trial offer of performance was in good faith. In fact, all indications and reasonable inferences are to the contrary. In view of the circumstances under which the plaintiffs attempted acceptance and the later testimony of Mr. Coombs concerning his observations regarding plaintiffs' good faith, the burden rested with them to come forth with some testimony or other evidence to satisfy the court on this point.

Under all the circumstances, the defendants must now assert that the court should rule that the plaintiffs' attempted acceptance of the defendants' offer of performance tendered by way of pleading before commencement of the trial was not effective for the following reasons:

1. The acceptance was not made in good faith, but was a simple legal maneuver in an effort to gain unfair advantage of the defendants at a time when both the court and the defendants were attempting in good faith to solicit a compromised settlement.

2. The attempted acceptance of the pre-trial tender of performance was not made until after it had been both expressly and impliedly rejected by the plaintiffs.

3. The said attempted acceptance fails since the plaintiffs did not furnish the consideration which the defendants had bargained for in making the tender.

It will be recalled that Mr. Coombs testified at the conclusion of the defendants' evidence that he would not be adverse to having the plaintiffs return to the management of the motel if he could be satisfied that the plaintiffs were acting in good faith. Unfortunately, however, the plaintiffs have done nothing to demonstrate any measure of good faith since the dispute between the parties arose at the end of April 1973. The evidence presented by the parties at the trial of this case rather overwhelmingly demonstrates the lack of good faith of the plaintiffs. Evidence of their bad faith includes, but is not limited to, (1) the plaintiffs' consistent position since April 28, 1973, that they would not return to work even though they left their management responsibilities without any prior notice and under circumstances which imposed a definite hardship upon the defendants; (2) the plaintiffs' sworn testimony at trial that they could not return to a management of the motel; (3) the obvious hate for the defendants demonstrated by Mrs Burton at

the time of her emotional flare-up during her testimony on the first day of trial; (4) the plaintiffs' unwillingness to engage in good faith settlement negotiations after the court had requested them to do so during the noon recess of the second day of trial; (5) the total failure of the plaintiffs to introduce any evidence to support their questioned good faith in attempting acceptance of the defendants' pre-trial tender; (6) the plaintiffs' attempt to accept the defendants' pre-trial tender of performance only after they had completed the presentation of their evidence and had received substantial notice from the court that they had failed to prove their anticipatory breach cause of action; and (7) the plaintiffs' apparent unwillingness to disavow their sworn testimony that they are incapable of again reassuming their management responsibilities.

Plaintiffs have further demonstrated their propensity to act in bad faith by their admitted intentional design to remain unemployed until after the trial of this case had been concluded.

All of the foregoing compels one to properly conclude that the defendants are justified in concluding that the plaintiffs are not in good faith and that they are not likely to suddenly reverse their past attitudes and practices so as to re-establish a harmonious working relationship in the future, a harmony which is essential to the proper operation of the business.

It is universally held by the courts that the good faith of the parties is a proper element to be considered. As stated at 27 Am. Jur. 2d, Equity, Section 20:

> "Bad faith is held to be a ground for equitable relief or to constitute a foundation therefor. It is said that the good faith of the defendant is a proper and fundamental subject to be adjudged, and that good faith or bad faith or intent when constituent and essential in a cause of action or defense is a fact and may be alleged and proved as such."

Defendants feel that there is a presumption from the evidence that the plaintiffs acted in bad faith in belatedly attempting to accept the defendants' pre-trial tender and that the court should so find.

Defendants are reluctant to assert purely legal defenses to the plaintiffs' attempted acceptance of the defendants' pre-trial tender of performance since it is foreign to the spirit in which they made their tenders. However, such legal defenses do exist, and we cannot help but feel we are justified to assert them under the circumstances because the attempted acceptance was, in the opinion of the defendants, a bad-faith technical legal maneuver geared to take unfair advantage of the defendants in light of the circumstances as they existed at the time. We feel compelled, in the interest of justice, to assert such defenses so as to properly preclude the plaintiffs from benefiting from such an act. Such defenses

include the claim that the offer had been rejected before accepted and was, therefore, not outstanding at the time of attempted acceptance, plus the claim that there was no consideration to support an agreement.

We feel that the court should consider the fact that the plaintiffs' stated acceptance of the tender was made (1) after it had been rejected by the plaintiffs' counsel in his opening statement (the plaintiffs make this admission on page 19 of their appeal brief) and (2) after the plaintiffs themselves had rejected it by sworn testimony to the effect that they were incapable of returning to the management of the motel. (T-74-79, parts quoted above). It is elementary law that an offer which is rejected ceases to be an outstanding offer. (17 Am. Jur. 2d, Section 39, Rejection by Offeree)

> "An offer is terminated by rejection and cannot thereafter be accepted so as to create a contract. Having once rejected the offer, the offeree cannnot revive it by tendering acceptance.
>
> "Any words or acts of the offeree indicating that he declines the offer, or which justify the offeror in inferring that the offeree intends not to accept the offer or give it further consideration, amounts to a rejection."

It also seems apparent that after the offer was made and not accepted, the offer was effectively withdrawn when the defendants were then forced to proceed with litigation of the respective claims that the contract had been terminated by renunciation.

Furthermore, defendants feel that the court should consider the fact that the pre-trial tender by the defendants was in anticipation of avoiding litigation on the plaintiffs' claim of anticipatory breach. The court should thus recognize that for the plaintiffs to be able to accept the tender of performance after defendants had already been forced to litigate that issue is to impose an agreement without granting the defendants the benefit of what they bargained for. In other words, the result of deciding that the acceptance was proper is to let the plaintiffs "have their cake and eat it too." The plaintiffs were required to give up nothing at the time of their announced acceptance. They had already been given their day in court, and they had been given substantial notice by the court that they had failed in their proof on the anticipatory breach issue. What then did they contribute as consideration? Furthermore, why should they now be awarded the right to have the name of the motel changed? What benefits did the plaintiffs bestow upon the defendants in exchange for the defendants' concessions?

It seems inescapable that justice requires a resolution of this issue in favor of the defendants, not the plaintiffs, as the lower court concluded. It is fundamental in appellate review that the respondent (in this instance, the responding defendant)

is entitled to have the court consider all the evidence in the light most favorable to him. Toomers Estate vs. Union Pacific Railroad Company, 121 Utah 37, 239 Pac. 2d 163. The reviewing court will not substitute its judgment for that of the trial court and is not concerned with a preponderance of the evidence, but only with the question of whether there is substantial evidence to sustain the judgment. Leon Glazier and Sons, Inc., vs Larson, 26 Utah 2d 429, 491 Pac. 2d 226. On appeal, the evidence in favor of the respondent must be considered to the exclusion of contrary evidence. Hoggan & Hall & Higgins, Inc. vs. Hall, 18 Utah 2d 3, 414 Pac. 2d 89. The court is further obliged to consider uncontradicted evidence in composite with all of the other evidence. Super Tire Market vs. Rollins, 18 Utah 2d 122, 412 Pac. 2d 132.

## SUMMARY

1. Offer of settlement was submitted in writing to the court and again restated during defendants' opening arguments.

2. Plaintiffs' attorney rejected said offer and proceeded with his evidence. (R-19).

3. Defendant, Burton, rejected the offer a second and third time during his testimony. (T-74-79).

4. An offer once rejected cannot be revived.

5. Acceptance was in bad faith.

## CONCLUSION

Based upon all the arguments and authorities as cited herein, the respondent on this Cross-Appeal urges the court as follows:

1. To affirm the trial court in its decision that the defendants were not bound by their offer of settlement.

2. To award defendants' costs of court and reasonable attorney's fees for this appeal.

DATED the 8th day of November, 1976.

Respectfully submitted:

Alan H. Coombs

ALAN H. COOMBS
Attorney for Defendants,
Four Seasons Motor Inn II
and Alan H. Coombs

I hereby certify that I served a copy of the foregoing Appellants' Response to Cross-Appeal to David E. West, attorney for respondents, at his address, 1300 Walker Bank Building, Salt Lake City, Utah 84111, this _____ day of November, 1976.

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