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# Harold Fuller v. Favorite Theaters of Salt Lake City : Brief for Appellant

Utah Supreme Court

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Gordon I. Hyde; Attorney for Appellant;

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# In the Supreme Court of the State of Utah

HAROLD FULLER,

*Appellant,*

vs.

Case No. 7640

FAVORITE THEATERS OF SALT  
LAKE CITY, a Corporation,

*Respondent*

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## BRIEF FOR APPELLANT

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## BRIEF FOR APPELLANT

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### STATEMENT OF FACTS

This is an action for damages for breach of a contract made between "Masterpiece Productions," a New York corporation, and "Favorite Theaters of Salt Lake City," a corporation of the state of Washington.

Masterpiece Productions agreed to supply a schedule of films to Favorite Theaters to be delivered within a specified period and Favorite agreed to schedule and play said films.

Favorite thereafter notified Masterpiece that it refused to go on with the contract. Masterpiece, after attempting to obtain performance from Favorite without success, assigned all rights of action for damages arising out of said agreement to Harold Fuller, the plaintiff-appellant.

• Fuller sued for breach of contract and Favorite defended that the contract was not assignable and therefore any assignment of a right to money damages was void. The trial court ordered a pre-trial to decide whether the clause was a bar to such an assignment and held that it was.

From the pre-trial order dismissing the complaint and from the judgment rendered thereon of "no cause of action" the plaintiff appeals.

The only issue before the court on this appeal is whether a clause prohibiting the assignment of the contract also prevents the assignment, after breach, of rights of action arising out of the breach.

## STATEMENT OF POINTS

### POINT I

A CLAUSE FORBIDDING THE ASSIGNMENT OF THE CONTRACT BY ONE PARTY "WITHOUT THE WRITTEN CONSENT OF THE OTHER," DOES NOT PRECLUDE AN ASSIGNMENT OF A RIGHT OF ACTION ARISING OUT OF A BREACH OF SAID CONTRACT.

The defendant, at the pre-trial, moved that the plaintiff's complaint be dismissed on the ground that, since the contract

was not assignable, any attempt to assign a right of action arising out of a breach of this contract was not effective and the plaintiff-assignee could consequently have no standing in court.

It is submitted that the court below failed to see the very important distinction between an assignment of the contract and an assignment of a *right to damages* arising out of the defendant's breach of the contract.

Every case cited by counsel for the defendant in his brief to the Court below stood only for the following propositions:

- a. A contract may be so personal in its nature that it cannot be assigned.
- b. The parties may provide against assignment of a contract.

None of these cases were in point. In the case before this court the contract had been breached and performance was no longer possible. All that remained was a duty upon the defendant to pay the liquidated damages agreed to in the contract. Such a right to damages is universally held to be assignable even though the contract was not.

The clause upon which the respondent relies reads as follows:

"ASSIGNMENT UPON SALE OF THEATER—

SIXTH: This license shall not be assigned by either party without the written consent of the other, and the sale or transfer by the Exhibitor of all or any part of his interest in the theatre specified herein shall not relieve him of his obligations hereunder without the

written consent of the Distributor at its home office in New York City first had and obtained."

The court below in granting the defendant's motion to dismiss, in effect held that as a matter of law such a clause prevented any assignment of rights of action resulting from a breach of the contract. It is respectfully submitted that the language of the clause clearly shows that the only intent of the parties was to prohibit the assignment of performance of their respective duties under the contract. Such clauses are standard clauses in contracts where the parties desire to bargain for the performance of each other, but once the contract is breached and performance can no longer be had, it does not bar an assignment of any rights of action accruing as a result of the breach. In this case the parties desired the performance of each other but when the defendant-respondent refused to take the films as agreed, performance by the assignor of the plaintiff-appellant was no longer possible, and the plaintiffs assignor had a right to the payment of money damages which right could be assigned.

In the case of *Sackman v. Stephenson*, 11 N. Y. S. 2d 69, the court was presented with an identical problem and it correctly distinguished between an assignment of the contract and an assignment of a right of action arising out of a breach of the contract. In that case a correspondence school agreed to teach, counsel, and supply materials for study to the defendant in consideration for the defendant's promise to pay for the service in monthly installments. The defendant failed to pay as promised. The school then assigned the contract for collection to Sackman. The defendant set up as a defense

(just as Favorite Theaters has done in our case) that the contract was not assignable and thus the plaintiff-assignee had no standing to sue for the breach of the contract. The trial court so held.

The Supreme court in reversing the trial court correctly observed:

"The contract at bar is a contract of a personal nature involving the relation of personal confidence, individual instruction under the supervision of a teaching staff and practical experience in the Institutes training laboratory.

The rule, however, applies to an *executed* contract. Here the defendant breached the contract. The monthly installments all fell due before the action was started. The plaintiff's assignor, however, did not assign an executed contract, but a right to recover damages based on a contract which the defendant breached. *A chose in action may be assigned which was all that was done in this case. There is no defense to the action.*"

The rule is clearly stated by Professor Williston in his famous treatise on contracts:

"A contract which was too personal for assignment may, *on its breach*, give rise to an assignable action for damages." *Williston on Contracts Rev. Ed.*, Sec. 412 at p. 1190.

Again this fundamental distinction is observed by the editors of *Corpus Juris Secundum* "Assignments No. 31":

"A right of action for damages for a breach of contract may be assigned, *even though the contract itself is not assignable.*"



In *Marsh v. Perkins*, 230 N. Y. S. 406, the court was concerned with this very problem and correctly restated the rule. The plaintiffs conceded in that case that the contract itself was not assignable but contended (as the plaintiff-appellant did in the case before this court) that the cause of action arising out of the broken contract was assignable. The court in holding the assignment valid said:

"The sole point raised by the defendant on its motion to dismiss the complaint is that the rights of the defendant under the contract of September 21, 1925, are not assignable and that the plaintiffs, as his assignees, are therefore without standing to maintain this action."

"It is their contention that they are relying not upon an assignment of the agreement proper, but rather upon the transfer to them, *AFTER BREACH*, of such causes of action as Tench may have possessed . . . by reason of their failure to comply with the contract."

After stating this issue, which is the exact issue that is before the court in the instant case, the court quotes "Williston" as cited in this brief *supra* and held:

"In Williston on Contracts, the author points out that *AFTER BREACH* a cause of action based thereon may be assigned, *although the contract itself was theretofore non-assignable*. The motion is accordingly denied."

This court correctly distinguished between the contract and a cause of action arising as a result of a breach of a contract. There is good reason to limit the performance of a personal contract to performance by the parties to it. There is no reason

to limit one in whose favor a cause of action has arisen from assigning his right to money damages after a breach of the contract.

In *Trubowitch v. Riverbank Canning Co.*, 182 P. 2nd 182, the court went further and allowed an assignee of a contract which was made specifically not assignable to enforce a term of the contract. In that case A and D had a contract involving the sale of a shipment of tomato paste. The contract contained a provision that in the event of breach, the parties would submit the controversy to an arbitration board to determine the equities and assess the damages and costs. The contract contained the following clause:

"This contract is not assignable and goods sold hereunder are not to be shipped or diverted to any destination other than that herein specified, without consent of the seller."

P, assignee of the contract, sued to enforce the arbitration clause and have damages assessed for the breach. D plead in answer to the plaintiff's complaint "that defendant never at any time consented to any assignment of said contract" p. 185. (*The same defense was set up by Favorite Theaters in this case*). The case was submitted to the court on briefs just as it was in the case now on appeal before this honorable court. The trial court held, just as the trial court did in the case before this court, that plaintiff had no standing to compel defendant to arbitrate the controversy and dismissed plaintiff's complaint.

The plaintiff on appeal from this judgment contended that the assignment of a right to have money damages assessed was

assignable even though the contract clause prohibited the assignment of the contract. The court said:

"It is established that a provision in a contract or a rule of law against assignment does not preclude the assignment of money due or to become due under the contract (Butler v. San Francisco Gas & Electric Co., 168 Cal. 32, 41, 141 P. 818; Taylor v. Black Diamond Coal Min. Co., 86 Cal. 589, 590, 25 P. 51; Dixon-Reo Co. v. Horton Motor Co., 49 N.D. 304, 191 N.W. 780; see 76 S.L.R. 1307; 2 Williston on Contracts Rev. Ed. #422) *or of money damages for the breach of the contract.*" (Citing long line of cases so holding together with 2 Williston, Contracts Rev. Ed. Sec. 412, p. 1180; 4 Am. Jur. 237, 239, 240; 6 C.J.S. Assignments #31, p. 1080.) p. 185."

It might be of interest to the court to note, that even in the cases where the contract specifically provides that any claims arising under the contract cannot be assigned, the courts hold that such a clause does not prevent an assignment of a right of action:

"A provision in a policy against assignment does not apply to assignment after loss, *and a specific provision against such an assignment is null and void*, as inconsistent with the covenant of indemnity and **CONTRARY TO PUBLIC POLICY.**" *Southwest Bell Telephone Co. v. Ocean Accident Corp.*, 22 F. Supp. 686.

## SUMMARY

The trial court erred in holding that paragraph six in the contract prevents a valid assignment, after breach, of a right

to liquidated damages arising as a result of the respondent's failure to perform the contract.

The clause does not, by any possible construction prevent an assignment of this chose in action. The intention of the parties was clearly to prevent the assignment of performance to a stranger and not to prevent the assignment of a right to money damages.

Respectfully submitted,

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