

1989

K & K Insurance Agency v. Salt Lake Typewriter, Inc., a Utah corporation : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS

BRIEF

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DOCKET NO.

890077

IN THE UTAH COURT OF APPEALS

K & K INSURANCE AGENCY,
PLAINTIFF/RESPONDENT,

v.

SALT LAKE TYPEWRITER, INC.,
A UTAH CORPORATION,

DEFENDANT/APPELLANT.

RESPONDENT'S BRIEF

CASE NO. 890077-CA

ARGUMENT PRIORITY:
14 (B)

Appeal from the granting of a Summary Judgment against Defendant/Appellant on October 26, 1988, and denial of Defendant's Motion to Alter, Amend or Vacate the Order granting Summary Judgment on February 8, 1989, entered in the Third Circuit Court, State of Utah, Hon. Eleanor Van Sciver, presiding.

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FILED

MAY 24 1989

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

K & K INSURANCE AGENCY,)	RESPONDENT'S BRIEF
)	
PLAINTIFF/RESPONDENT,)	
)	CASE NO. 890077-CA
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STATEMENT OF JURISDICTION AND NATURE OF THE CASE

This court has jurisdiction over this Appeal pursuant to Utah Code Ann. Sec. 78-2a-3(g) (1988, as amended).

This Appeal is taken from summary judgment entered against the Appellant in the Third Circuit Court, Salt Lake County, State of Utah, Salt Lake Department, and denial of Appellant's motion to alter, amend or vacate, pursuant to Rule 59, Utah Rules of Civil Procedure.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was the granting of Plaintiff's motion for summary judgment proper?
2. Did the court properly exclude Appellant's affidavits at the motion for summary judgment hearing on October 12, 1988?
3. Did the court properly refuse to grant Appellant's Rule 59 motion?

DETERMINATIVE STATUTES AND RULES

UTAH CODE ANNOTATED Sec. 70A-2-608, U.C.A. (1953, as amended) Uniform Commercial Code, Addendum A to this brief. Sec. 70A-2-711, U.C.A. (1953, as amended) Uniform Commercial Code, Addendum B to this brief.

UTAH RULES OF CIVIL PROCEDURE, Rule 56, contained in Addendum C to this brief, Rule 6(d) "For Motions-Affidavits. . . except as otherwise provided in Rule 59(c) opposing affidavits may be served not later than 1 day before the hearing,...."

STATEMENT OF THE CASE

K & K Insurance Agency, Inc., Plaintiff/Respondent, (herein, K & K), took delivery of a Hermes 51 computer-type typewriter with screen from Salt Lake Typewriter, Inc., Defendant/Appellant, (herein S. L. Typewriter), on March 30, 1987 and purchased it for (\$2,977.92) Two Thousand Nine Hundred Seventy-Seven Dollars and Ninety-Two Cents on July 29, 1987. (R. 2).

The typewriter was defective and never made operational by S. L. Typewriter. (R. 20). K & K filed a complaint seeking relief for revocation of acceptance under Sec. 70A-2-608 U.C.A. (1953, as amended) Uniform Commercial Code, and rescission thereunder. (R. 1).

K & K filed a motion for summary judgment supported by the affidavit of Mary B. Strang (attached as Addendum "D" hereto) the Manager of K & K. (R. 19). At the hearing on October 12, 1988, S. L. Typewriter presented the affidavit of Douglas Thompson (Addendum B to Appellant's brief) (R. 53) and some other affidavits. Counsel for K & K objected on the grounds of untimeliness and the court sustained the objection and the affidavits were disallowed. (R. 105 pg. 3 L. 3-16). Counsel for K & K also objected to the affidavit of Odell L. Sanders (Addendum C to Appellant's brief) under Rule 56(e) as being opinion, conclusory and failing to set forth facts that would be admitted into evidence. (R. 105 pg. 4-5). The court granted K & K's summary judgment motion. Counsel for K & K also represented

to the court that the typewriter had been fixed by another repairman prior to the hearing on October 12, 1988. (R. 105 pg. 10 L. 8-21). S. L. Typewriter's counsel at the hearing was Gayle Dean Hunt, Esq. At the hearing no memorandum of law was filed by Mr. Hunt and he argued Sec. 70A-2-602 U.C.A. (1953, as amended) Uniform Commercial Code, (Rejection of Goods) rather than Sec. 70A-2-608, U.C.A. (1953, as amended) Uniform Commercial Code, (Revocation of Acceptance) as was argued by K & K. (R. 105 pg. 7).

S. L. Typewriter hired present counsel, Ephraim H. Fankhauser, Esq., who filed a motion to alter, amend or vacate which was heard on December 14, 1988 and denied at that time. S. L. Typewriter claimed "surprise" on newly discovered evidence based on a "surprise" visit to K & K's offices after the October 12, 1988 hearing and learning that the typewriter was operating. (R. 106 pg. 5). S. L. Typewriter claimed that this information was concealed or not made known to the court on October 12, 1988. (R. 106 pg. 7).

The record, however, was clear that this was not correct and the court was advised of this information by K & K's Counsel on October 12, 1988. (R. 105 pg. 10 L. 8-21). The court denied S. L. Typewriter's motion and this appeal ensued. At the hearing on December 14, 1988, S. L. Typewriter attempted to re-introduce the affidavit of Doug Thompson (Addendum B to Appellant's brief) which had been excluded at the summary judgment hearing on October 12, 1988 as well as the affidavit of Odell L. Sanders

(Addendum C to Appellant's brief) which failed to meet the requirements of 56(e). (R. 106 pg. 11-12).

STATEMENT OF FACTS

K & K purchased a Hermes 51 Typewriter (computer-like with screen) from S. L. Typewriter in July 29, 1987 for (\$2, 977.92) Two Thousand Nine Hundred Seventy-Seven Dollars and Ninety-Two Cents. (R. 2 para. 7-9). The typewriter was to be the personal typewriter of Mary B. Strang. (R. 19 Addendum "D"). From the beginning, the typewriter had problems with the memory (R. 19-20, para. 5). S. L. Typewriter made several service calls and failed to correct any of the problems (R. 20 para. 6). S. L. Typewriter often failed to respond to calls for service and to keep service appointments. (R. 20 para. 7). S. L. Typewriter claimed that a surge protector was necessary to use the machine and protect the memory storage. (R. 20 para. 9). K & K, on the advice of S. L. Typewriter, used the recommended surge protector but the machine continued to malfunction. (R. 20 para. 10). K & K continued to use an older Hermes 51 Typewriter (K & K owned a previous model) which operated along side the newer typewriter in dispute without problems and without the surge protector on the same circuit. (R. 89 para. 3, affidavit of Robert Kaufman attached as Addendum "E" hereto).

The surge protector was inexpensive costing (\$79.68) Seventy-Nine Dollars and Sixty-Eight Cents (R. 7) but was returned because it did nothing to remedy the problem. (R. 89

para. 6). The problem with the typewriter's memory was that the memory could be erased without warning. All work would have to be redone each time the memory cleared. (R. 20 para. 13). S. L. Typewriter was never able to find the cause of the problem. (R. 20 para. 15).

At the hearing for summary judgment, S. L. Typewriter's counsel, then Mr. Hunt, attempted to submit some counter-affidavits including that of Donald Thompson (Addendum B, Appellant's brief) (R. 105 pg. 2-3) which the court disallowed as being untimely filed. (Rule 56(c), Rule 6(d)). The remaining affidavit of Odell L. Sanders (Addendum C, Appellant's brief) failed to comply with Rule 56(e). (R. 105 pg. 4-5). S. L. Typewriter failed to file a brief of supporting law and improperly argued untimeliness of rejection and still continues to do so under Sec. 70A-2-602. (R. 105 pg. 7) whereas K & K had briefed and pleaded under a theory of revocation of acceptance under Sec. 70A-2-608. (R. 105 pg. 10). The affidavit of Mary. B. Strang was prepared as of May 18, 1988. (Addendum D) The hearing on motion for summary judgment was continued from June 10, 1988 to October 12, 1988. At the hearing on October 12 1988, the court was specifically told by K & K's counsel that the machine had been repaired.

"Now, as recently - - the machine had sat there for some time, and as recently, I believe as two months ago, another repairman came out to fix some other machines. He took the - - got into this machine, and found the bare wire and did fix it . . . " (R. 105 pg. 10 L. 8-21).

K & K finally, after promises made by S. L. Typewriter to

make the typewriter operable, were not kept and after the surge protector failed to remedy the problem on February 29, 1988 (after sending the wrong notice to itself on February 5, 1988) sent S. L. Typewriter notice of revocation of acceptance (R. 11 Exhibit. C). Receiving no response, K & K filed its complaint on March 22, 1988.

After the typewriter was delivered on March 30, 1987, until it was paid for on July 29, 1987 and thereafter S. L. Typewriter promised that the typewriter would be replaced or made operable. (R. 89 para. 3).

S. L. Typewriter, after promising several service calls, never returned to make the machine operable. (R. 20 para. 7). Just prior to two court proceedings, S. L. Typewriter called and said they would send a repairman to fix the typewriter but never did and failed at any time to do so. (R. 89 para. 5).

In April, 1988 an Associated Business Products repairman who was on the premises to repair other office equipment, volunteered to look at the typewriter, at no charge, and after removing the cover, found a broken wire which made the machine inoperable. (R. 89 para. 6). There never was the need for a surge protector and was was not the problem with the machine. (R. 89 para. 6). This information was disclosed to the court and counsel for S. L. Typewriter at the October 12, 1988 summary judgment hearing. (R. 105, pg. 10 L. 18-21).

After the summary judgment hearing on October 12, 1988, S. L. Typewriter made a "surprise" visit to the office of K & K and

found the typewriter operating. (R. 106 pg. 7). Even though this was clearly represented to the court on October 12, 1988, at the summary judgment hearing. (R. 105, pg. 10 L. 18-21). S. L. Typewriter claimed this discovery as the basis for its motion under Rule 59 which was heard by the court on December 14, 1988 and denied. The court was annoyed because of S. L. Typewriter's tactics in failing to timely file its affidavits, and S. L. Typewriter's change of counsel who attempted to re-submit affidavits, (Addendum B), which the court had previously disallowed, and to re-argue the summary judgment motion based on a "surprise" visit which merely confirmed information already presented to the court on October 12, 1988 and which S. L. Typewriter incorrectly represented on December 14, 1988 to the court at its Rule 59 motion and to this court in its brief.

SUMMARY OF ARGUMENT

The court properly granted summary judgment when considering affidavits that were untimely presented by S. L. Typewriter as well as the affidavit which was presented and failed to comply with Rule 56(e) for the proper form of an admissible affidavit. The court subsequently, when the affidavits were attempted to be re-introduced, properly denied S. L. Typewriter's Rule 59 motion to amend, alter or vacate summary judgment.

The court properly concluded that there were no genuine issues of fact and appropriately entered summary judgment against S. L. Typewriter.

This case involves revocation of acceptance under the

Uniform Commercial Code 70A-2-608. The Appellant argued and still insists that there must be rejection within a reasonable time. A buyer may revoke his acceptance of goods whose non-conformity substantially impairs its value to him if he has accepted it on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured or without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances. This court properly found that K & K accepted the typewriter with the assurance of S. L. Typewriter, that it would be made to work properly by a surge protector or otherwise, and S. L. Typewriter ignored or refused to make the typewriter operate properly. Another repairman repaired a broken wire at no charge. This fact was clearly represented to the court at the summary judgment hearing on October 12, 1988 as the record reflects.

The Appellant's argument of a "surprise" visit and discovery that the typewriter was operating after the October 12, 1988, summary judgment hearing has absolutely no merit. There was no surprise, no concealment of material facts and no newly discovered evidence. S. L. Typewriter re-argued a motion it had already lost and attempted to present affidavits whose admission was already denied because they were untimely. S. L. Typewriter failed even in its second attempt on its Rule 59 motion and still fails to set forth specific facts showing that there is a genuine issue for trial.

ARGUMENT

POINT I.

THE GRANTING OF SUMMARY JUDGMENT WAS PROPER SINCE THE APPELLANT FAILED TO TIMELY FILE ANY AFFIDAVITS OR MATERIALS TO SHOW THAT THERE WAS A MATERIAL ISSUE OF FACT FOR TRIAL.

When a party opposes a properly supported motion for summary judgment and fails to file any responsive affidavits or other evidentiary materials allowed by Subdivision (e) of Rule 56, the trial court may properly conclude that there are no genuine issues of fact unless the face of the movant's affidavit affirmatively discloses the existence of such an issue. Franklin Financial v. New Empire Development Co., 659 P.2d 1040 (Utah 1983); Cowen and Co., v. Atlas Stock Transfer Co., 695 P.2d 109 (Utah 1984); Busch Corp v. State Farm Fire & Cas., 743 P.2d 109 (Utah 1987).

In support of its motion for summary judgment, K & K set forth the material facts supported by the affidavit of Mary B. Strang.

At the hearing for motion for summary judgment, K & K argued "Revocation of Acceptance" under Section 70A-2-608 U.C.A. (1953, as amended) Uniform Commercial Code. (Addendum A attached hereto). Sec. 70A-2-608 states:

- "(1) The Buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it
 - (a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
 - (b) without discovery of such nonconformity if his acceptance was reasonably induced either

- by the difficulty of discovery before acceptance or by the seller's assurances.
- (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

K & K, after purchase of the typewriter, found that it had unknown defects. The seller, S. L. Typewriter, insisted that additional equipment be purchased to wit: a surge protector. K & K purchased the surge protector and yet the typewriter continued to malfunction. S. L. Typewriter was called to service the machine and was never able to fix it although S. L. Typewriter promised to remedy the situation.

After each failure to cure the defect, S. L. Typewriter would say that the problem was something else and that S. L. Typewriter would fix on their next trip. Even after the typewriter was supposedly fixed, it would fail to function. The typewriter sat idle for months, except for periodic attempts of S. L. Typewriter to repair it.

Only after S. L. Typewriter refused to repair the typewriter any longer did K & K realize that the (\$2,977.92) Two Thousand Nine Hundred Seventy-Seven Dollars and Ninety-Two Cents spent on the typewriter was wasted. K & K revoked its acceptance after learning that S. L. Typewriter would no longer attempt to cure the defects that kept the machine from functioning. It was reasonable that K & K assume that S. L. Typewriter would be able to repair the typewriter. K & K had been assured by S. L. Typewriter that only more time was needed to cure the defect. S.

L. Typewriter never did cure the defect. K & K notified S. L. Typewriter within a reasonable time after it became apparent that S. L. Typewriter either could not, or would not, repair the typewriter. The Uniform Commercial Code recognizes the problem of recovering payments for rejected goods. K & K, by revoking its acceptance of a defective typewriter, is entitled to the remedies of Sec. 70A-2-711. K & K under Utah law and the Uniform Commercial Code, is entitled to judgment as a matter of law. (See Lockhart v. Anderson, 646 P.2d 678 (Utah 1982)).

While there may exist minor disputes between the facts proposed by the papers, there exists no genuine factual dispute. Recently, the United States Supreme Court clarified the "genuine factual issue" under Rule 56 of the Federal Rules of Civil Procedure, which is identical to Utah's Rule 56. In Anderson v. Liberty Lobby, 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986) the court stated:

"Rule 56 (e) provides that, when a properly supported motion for summary judgment is made, the adverse party' must set forth specified facts showing that there is a genuine issue for trial'... Rule 56 (c) provides that the trial judge shall then grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. There is no requirement that the trial judge make findings of fact. The inquiry performed is the threshold inquiry of determining whether there is the need for a trial-whether, in other words, there are genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party...

The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find, by a preponderance of the evidence that the Plaintiff, is entitled to a verdict - - 'whether there is [evidence]

upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.'"

The U.C.C. does not allow for excuses from the seller regarding a defect. The buyer has only to prove the defect and revoke acceptance to recover the purchase price. It does not matter how hard S. L. Typewriter tried to cure the defects. It only matters that S. L. Typewriter failed to cure. That was clearly established in the affidavits of Mary B. Strang and Robert D. Kaufman (Addendum D & E) which were uncontroverted.

At the hearing on motion for summary judgment on October 12, 1988, S. L. Typewriter attempted to introduce the affidavit of Donald Thompson (Addendum B, Appellant's brief) which the court rejected as being untimely. Rule 56(c), provides that adverse party, prior to the day of hearing may serve opposing affidavits and Rule 6(d), provides that opposing affidavits may be served not later than (1) one day before the hearing. Accordingly, the court held that the affidavit was untimely filed and disallowed its use at the summary judgment hearing.

The court also had before it the affidavit in opposition to motion for summary judgment executed by Odell L. Sanders.

The court found that this affidavit failed to meet the requirements of Rule 56(e) which are "supporting or opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissable in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein". Sworn or certified copies of all papers

or parts thereof referred to in an affidavit shall be attached thereto or served therewith. See also Rainford v. Rytting, 22 Utah 2d 252, 451 P.2d 769 (1969); Treboggan v. Treboggan, 699 P.2d 747 (Utah 1985). The court readily found that the rambling dissertation in letter format dated, April 13, 1988, failed to comply with the requirements of the rule. An affidavit does not comport with the requirements of this rule where it reveals no evidentiary facts but merely reflects the affiant's unsubstantiated opinions and conclusions in regard to the transaction. Walker v. Rocky Mt. Recreation Corp., 29 Utah 2d 274, 508 P.2d 538 (1973). More importantly, S. L. Typewriter failed to set forth any specific facts upon which there was a material dispute or issue for trial which could only lead the judge to the conclusion that there were none and that K & K was entitled to judgment as a matter of law.

POINT II.

THE APPELLANT CONTINUALLY INCORRECTLY ARGUES TIMELINESS OF REJECTION AND NOTIFICATION OF REJECTION UNDER SEC. 70A-2-602 U.C.A. (1953, AS AMENDED), UNIFORM COMMERCIAL CODE, WHEN THE COMPLAINT AND MOTION FOR SUMMARY JUDGMENT BEFORE THE COURT WERE BASED UPON REVOCATION OF ACCEPTANCE UNDER SEC. 70A-2-608 U.C.A. (1953, AS AMENDED), UNIFORM COMMERCIAL CODE.

S. L. Typewriter, at the motion for summary judgment hearing on October 12, 1988, failed to respond to K & K's arguments under Sec. 70A-2-608 Uniform Commercial Code (supra) but rather mistakenly argued Sec. 70A-2-602 and still continues to do so. Revocation of acceptance, was argued by K & K Insurance.

S. L. Typewriter's reliance on Sec. 70A-2-602, which

provides for rejection of goods after their delivery, is misplaced and obviously S. L. Typewriter failed to address the issues raised by 70A-2-608 and gave the trial judge no alternative but to grant K & K's motion for summary judgment.

POINT III

THE COURT CORRECTLY DENIED DEFENDANT'S MOTION
TO ALTER, AMEND OR VACATE PURSUANT TO RULE 59
U.R.C.P. IN THAT THERE WAS NO "SURPRISE" OR NEWLY
DISCOVERED EVIDENCE.

S. L. Typewriter, in its brief, argues that at the hearing on October 12, 1988, that K & K did not make known to the court that on that date the typewriter was operational. This representation is entirely incorrect and contrary to the record which states:

"Now, as recently - - the machine had sat there for some time, in as recently, I believe is two months ago, another repairman came out to fix some other machines. He took the - - got into this machine, and found the bare wire and did fix it but, nonetheless, the U.C.C. provides that upon revocation, we're entitled to our money back.", (R. 105,pg. 10 L. 18-21).

It was upon S. L. Typewriter's claim to non-disclosure of this fact that it claimed it should have been entitled to a new trial or to alter, amend or vacate the previous judgment under Rule 59 which is clearly not the case. There was no newly discovered evidence and there was no fact that was withheld from or misrepresented to the court at the summary judgment hearing on October 12, 1988. S. L. Typewriter's reliance on their "surprise" visit to K & K's place of business did not divulge any new facts which were not already divulged previously to the court. As S. L. Typewriter has failed even as of this date to

list the material facts on which there is a dispute, there are no issues upon which this matter should be tried.

CONCLUSION

The court properly granted motion for summary judgment under Rule 56 when the court had before it a properly executed affidavit of K & K. S. L. Typewriter failed to timely file opposing affidavits and the affidavit that it did file, failed to meet the requirements of Rule 56(e) and the case law which in effect, left K & K's motion for summary judgment unopposed. S.L. Typewriter failed to brief or argue revocation of acceptance under the Uniform Commercial Code but incorrectly argued and continues to argue rejection after delivery.

At the hearing for motion for summary judgment, it was disclosed by K & K that the typewriter, on that date, was operable and there was no misrepresentation or other newly discovered evidence as claimed by S. L. Typewriter in its "surprise" visit. The record totally belies the contentions made by S. L. Typewriter in this regard.

Respectfully submitted on this 24th day of May, 1989.



JOHN B. ANDERSON
Attorney for Respondent

Delaney
MAILING CERTIFICATE

I hereby certify that four (4) copies of the foregoing Brief of Respondent were hand delivered to: Ephraim H. Fankhauser, Attorney for Appellant, at 243 East 400 South, Suite 200, Salt Lake City, Utah 84111, this 24th day of May, 1989.

John B. Auch

k&kbrf

ADDENDUM A

- (b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
- (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.
- (3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

History: L. 1965, ch. 154, § 2-608.

Cross-References.

Effect of acceptance, 70A-2-607.
 Improper delivery, buyer's rights, 70A-2-601.
 Proof of market price, 70A-2-723.
 Reasonable time, 70A-1-204.
 Rightful rejection, manner and effect, 70A-2-602.
 Waiver of buyer's objections by failure to particularize, 70A-2-605.

"Reasonable time."

What constitutes a "reasonable time" for revocation of acceptance under this section is usually a question of fact to be determined in light of the circumstances of the particular case, and the supreme court upon review will not disturb a finding on the issue unless there is no reasonable basis in the evidence to sustain it. *Christopher v. Larson Ford Sales, Inc.* (1976) 557 P 2d 1009.

Where purchasers of a motor home, upon finding a number of defects in the vehicle, sought to rescind the contract the day after

it was entered, but were persuaded by the seller to retain the vehicle and take it on a planned trip to California, during which time the already noted problems persisted and new ones became manifest so that the day after they returned home purchasers again attempted rescission, they acted within a "reasonable time" within the meaning of this section. *Christopher v. Larson Ford Sales, Inc.* (1976) 557 P 2d 1009.

Collateral References.

Sales ⇔ 179, 427.
 77 CJS Sales § 225; 78 CJS Sales § 520.
 67 AmJur 2d 919 to 926, Sales §§ 710 to 716.

Measure and elements of buyer's recovery upon revocation of acceptance of goods under UCC § 2-608 (1), 65 ALR 3d 388.

Time for revocation of acceptance of goods under UCC § 2-608 (2), 65 ALR 3d 354.

What constitutes "substantial impairment" entitling buyer to revoke his acceptance of goods under UCC § 2-608, 98 ALR 3d 1183.

70A-2-609. Right to adequate assurance of performance.

- (1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.
- (2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.
- (3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

Deduction of damages from the price, 70A-2-717.

Notice and notification, 70A-1-201.

Performance or acceptance under reservation of rights, 70A-1-207.

Reasonable time, 70A-1-204.

Revocation of acceptance in whole or in part, 70A-2-608.

Waiver of buyer's objections by failure to particularize, 70A-2-605.

Warranty against infringement, 70A-2-312.

"Reasonable time."

Where purchasers of a motor home, upon finding a number of defects in the vehicle, sought to rescind the contract the day after it was entered, but were persuaded by the seller to retain the vehicle and take it on a planned trip to California, during which time the already noted problems persisted and new ones became manifest so that the day after they returned home purchasers again attempted rescission, they acted within a "reasonable time" within the meaning of this section. *Christopher v. Larson Ford Sales, Inc.* (1976) 557 P 2d 1009.

Collateral References.

Indemnity ⇐ 10, 12; Sales ⇐ 179, 285, 288 (2), 427.

42 CJS Indemnity § 15; 77 CJS Sales §§ 218, 225, 339, 346; 78 CJS Sales § 520.

67 AmJur 2d 554 to 559, Sales §§ 399 to 401.

Acceptance after agreed time of delivery as waiver of damages on account of seller's delay, 80 ALR 322.

Buyer's acceptance of delayed installment of goods as waiver of similar default as to later installments, 32 ALR 2d 1128.

Buyer's acceptance of part of goods as affecting right to damages for failure to complete delivery, 169 ALR 595.

Form and substance of notice which buyer of goods must give in order to recover damages for seller's breach of warranty, 53 ALR 2d 270.

Misrouting as affecting duty of the buyer to accept goods, 46 ALR 1120.

Purchaser's use or attempted use of articles known to be defective as affecting damages recoverable for breach of warranty, 33 ALR 2d 511.

Right of seller as condition of delivery to insist on or resort to means not provided by contract to assure payment, 44 ALR 443.

Seller's right to retain down payment on buyer's unjustified refusal to accept goods, 11 ALR 2d 701.

Seller's waiver of sales contract provision limiting time within which buyer may object to or return goods or article for defects or failure to comply with warranty or representations, 24 ALR 2d 717.

Sufficiency and timeliness of buyer's notice under UCC § 2-607 of seller's breach of warranty, 93 ALR 3d 363.

Use of article by buyer as waiver of right to rescind for fraud, breach of warranty, or failure of goods to comply with contract, 41 ALR 2d 1173.

DECISIONS UNDER FORMER LAW

Counterclaim of buyer.

Breach of promise or agreement on part of seller to furnish demonstrator does not defeat the right of seller to recover for goods sold, but saves to the purchaser the right to offset by way of counterclaim for any damages which may have been sustained by reason of the failure of the seller to perform that part of its agreement. *Detroit Vapor Stove Co. v. Farmers' Cash Union* (1923) 61 U 567, 216 P 1075.

Proffer return of goods by buyer.

Where a horse was bought with the knowledge of both parties that he was to be used for breeding purposes and the horse proved to be sterile but died before it could be returned, buyer was not barred from recovery by his failure to proffer the return of the carcass nor could seller raise his own good faith as a defense where no fraud was claimed or shown as it was assumed by the court that both parties acted in good faith in respect to the defective horse. *Ericksen v. Poulsen* (1964) 15 U 2d 190, 389 P 2d 739.

70A-2-608. Revocation of acceptance in whole or in part.

- (1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it
 - (a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

ADDENDUM B

of warranty, signing of satisfaction card by defendant without reading its contents, on representation of seller's agent that it only contained statement that agent was present, did not estop defendant from denying state-

ment of satisfaction in card. Consolidated Wagon & Machine Co. v. Wright (1920) 56 U 382, 190 P 937, distinguished in 75 U 124, 283 P 731.

70A-2-710. Seller's incidental damages. Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

History: L. 1965, ch. 154, § 2-710.

Bullock v. Joe Bailey Auction Co. (1978) 580 P 2d 225.

Damages incidental to resale.

Seller had no right to damages incidental to resale where buyer failed to make payment after delivery and seller had retained no security interest in the goods nor had any right to repossess by means of self-help.

Collateral References.

Sales ⇔ 370, 384, 391 (1).
78 CJS Sales § 477 et seq.
67 AmJur 2d 751, 810, Sales §§ 560, 613.

70A-2-711. Buyer's remedies in general — Buyer's security interest in rejected goods.

- (1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (section 70A-2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid
 - (a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or
 - (b) recover damages for nondelivery as provided in this chapter (section 70A-2-713).
- (2) Where the seller fails to deliver or repudiates the buyer may also
 - (a) if the goods have been identified recover them as provided in this chapter (section 70A-2-502); or
 - (b) in a proper case obtain specific performance or replevy the goods as provided in this chapter (section 70A-2-716).
- (3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (section 70A-2-706).

History: L. 1965, ch. 154, § 2-711.

Buyer's rights on improper delivery, 70A-2-601.

Cross-References.

Buyer's damages for breach in regard to accepted goods, 70A-2-714.

Cure by seller of improper tender or delivery, 70A-2-508.

Installment contract, 70A-2-612.

ADDENDUM C

and the defendant allowed to plead consistent with our declared policy that in case of uncertainty, default judgments should be set aside to allow trial on the merits. *Locke v. Peterson*, 3 Utah 2d 415, 285 P.2d 1111 (1955).

Default judgment and writ of garnishment were properly set aside where trial court failed to obtain jurisdiction over defendant because summons was not timely issued. *Fibreboard Paper Prods. Corp. v. Dietrich*, 25 Utah 2d 65, 475 P.2d 1005 (1970).

Where appellants, plaintiffs in a civil action, promptly objected to date set for trial on the ground that their counsel had an already

scheduled appearance in another court on that date, but due to fact that there were no law or motion days between time objection was filed and trial date, objection was never heard, refusal to set aside default judgment entered when appellants failed to appear on trial date was an abuse of discretion. *Griffiths v. Hammon*, 560 P.2d 1375 (Utah 1977).

Cited in *Utah Sand & Gravel Prods. Corp. v. Tolbert*, 16 Utah 2d 407, 402 P.2d 703 (1965); *J.P.W. Enters., Inc. v. Naef*, 604 P.2d 486 (Utah 1979); *Katz v. Pierce*, 732 P.2d 92 (Utah 1986).

COLLATERAL REFERENCES

Brigham Young Law Review. — Reasonable Assurance of Actual Notice Required for In Personam Default Judgment in Utah: *Graham v. Sawaya*, 1981 B.Y.U. L. Rev. 937.

Am. Jur. 2d. — 47 Am. Jur. 2d Judgments §§ 1152 to 1213.

C.J.S. — 49 C.J.S. Judgments §§ 187 to 218.

A.L.R. — Necessity of taking proof as to liability against defaulting defendant, 8 A.L.R.3d 1070.

Appealability of order setting aside, or refusing to set aside, default judgment, 8 A.L.R.3d 1272.

Defaulting defendant's right to notice and hearing as to determination of amount of damages, 15 A.L.R.3d 586.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255.

Failure to give notice of application for default judgment where notice is required only by custom, 28 A.L.R.3d 1383.

Failure of party or his attorney to appear at pretrial conference, 55 A.L.R.3d 303.

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 A.L.R. Fed. 190.

Key Numbers. — Judgment ⇐ 92 to 134.

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a

trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Compiler's Notes. — This rule is similar to Rule 56, F.R.C.P.

Cross-References. — Contempt generally, §§ 78-7-18, 78-32-1 et seq.

NOTES TO DECISIONS

ANALYSIS

Affidavit.
 —Contents.
 —Corporation.
 —Inconsistency with deposition.
 —Necessity of opposing affidavits.
 —Resting on pleadings.
 —Sufficiency.
 —Hearsay and opinion testimony.
 —Superseding pleadings.
 —Unpleaded defenses.
 —Verified pleading.

ADDENDUM D

JOHN B. ANDERSON #091
WILLIAM A. SOMPPI #4916
ANDERSON & HOLLAND
Attorneys for Plaintiff
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Salt Lake City, UT 84102
Telephone: (801) 363-9345

IN THE FIFTH JUDICIAL CIRCUIT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

K & K INSURANCE AGENCY,)	
)	
Plaintiff,)	
)	AFFIDAVIT OF MARY B. STRANG
vs.)	
)	CIVIL NO. 883003265-CV
SALT LAKE TYPEWRITER, INC.,)	
a Utah corporation,)	JUDGE ELEANOR S. VAN SCIVER
)	
Defendant..)	

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

MARY B. STRANG, being first duly sworn, upon oath,
states the following:

1. That Affiant is over eighteen years of age and has personal knowledge concerning the facts of this case.
2. That Affiant is the Manager of K & K Insurance Agency.
3. That the Hermes 51 Typewriter purchased from Salt Lake Typewriter was to be the personal typewriter of the Affiant.
4. That the Affiant first received the typewriter on May 30, 1987 and payment was sent to Salt Lake Typewriter in July, 1987.
5. That from the beginning the typewriter had problems

with the memory, the screen, missing covers, broken paper holder and other features that failed to function.

6. That Salt Lake Typewriter made several service calls and failed to correct any of the problems.

7. That Salt Lake Typewriter often failed to respond to calls for service and to keep service appointments.

8. That Salt Lake Typewriter on one occasion kept the machine for three weeks and could not find the cause of the problems.

9. That Salt Lake Typewriter claimed that a surge-protector was necessary to use the machine and protect the memory storage.

10. That K & K Insurance, on the advice of Salt Lake Typewriter, used the recommended surge-protector but the machine continued to malfunction.

11. That Salt Lake Typewriter is the only distributor for Hermes products in the Salt Lake area and the only supplier for ribbons, the platten and speciality items for Hermes products.

12. That problems with the typewriter's memory was that the memory would be erased without warning.

13. That with the failing typewriter memory, all work would have to be redone each time the memory cleared.

14. That the memory failed as many as several time per day.

15. That Salt Lake Typewriter never was able to find the cause of the problem.

FURTHER, AFFIANT sayeth naught.

worked properly from March 30, 1987 the date it was delivered to April, 1988, or eleven (11) months after the Plaintiff had possession and failed to operate for seven (7) months after it was paid for.

FURTHER, AFFIANT sayeth naught.

DATED this 2nd day of ^{December} ~~November~~, 1988.

Robert D. Kaufman
ROBERT D. KAUFMAN, Affiant

SUBSCRIBED AND SWORN to before me this 3rd day of November, 1988.

Wm. B. Shiang
Notary Public
Residing in Salt Lake City, UT

My Commission Expires:

12/2/89

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 5th day of ^{December} ~~September~~, 1988, a true and correct copy of the foregoing Affidavit of Robert D. Kaufman, was mailed, postage prepaid to Defendant's Attorney E. H. Fankhauser, 243 East 400 South, Suite 200, Salt Lake City, UT 84111.

ADDENDUM E

JOHN B. ANDERSON #091
ANDERSON & HOLLAND
Attorneys for Plaintiff
623 East First South
P. O. Box 11643
SALT LAKE CITY, UT 84147-0643
Telephone: (801) 363-9345

IN THE THIRD JUDICIAL CIRCUIT COURT IN AND FOR
SALT LAKE COUNTY, SALT LAKE DEPARTMENT, STATE OF UTAH

K & K INSURANCE AGENCY,)	
)	AFFIDAVIT OF ROBERT D. KAUFMAN
Plaintiff,)	
)	
vs.)	CIVIL NO. 883003265-CV
)	
SALT LAKE TYPEWRITER, INC.,)	JUDGE ELEANOR S. VAN SCIVER
a Utah corporation,)	
)	
Defendant.)	

STATE OF UTAH)
 : ss
COUNTY OF SALT LAKE)

ROBERT D. KAUFMAN, being first duly sworn, upon oath,
deposes and says:

1. That he is the owner of K & K Insurance Agency, the
Plaintiff above-named.

2. On March 30, 1987, the Hermes 51 Typewriter was
delivered to 654 South 900 East, Salt Lake City, Utah, K & K's
offices. K & K had an older Hermes 51 Typewriter which was in
operation at that location. The new Hermes 51 Typewriter never
worked properly, i.e. would lose its memory and all settings;
while K & K was located at 654 South 900 East. After allowing
the Defendant to take the machine for three weeks and after
purchasing a surge protector on June 1, 1987, the machine still
did not work properly.

3. Based upon the promises of the Defendant that it would be replaced or corrected to Affiant's satisfaction and needs, Affiant paid the Defendant the purchase price on July 29, 1987, Check #4574 in the amount of \$2,977.92. The Defendant, after promising several service calls, never returned to make the machine work properly. The surge protector did not cure the problem. The older Hermes machine continued to operate without a surge problem or protector on the same circuit on which the new machine failed to operate properly.

4. In October, 1987, the company moved its offices from 654 South 900 East to 4001 South 700 East, Suite 520. The machine was still not working properly. On February 5 and 29, 1988 because the new machine was still not working properly and the Defendant did not replace it or repair it, Affiant instructed his attorney to revoke acceptance. On March 23, 1988 this action was filed for replacement of the machine or rescission or refund of the purchase price since the machine still failed to operate properly.

5. Just prior to two court proceedings, the Defendant called and said that they would send a repairman to fix the machine but never did and to this date have failed to do so.

6. In April, 1988 Associated Business Products repairman who was on the premises to repair other office equipment, volunteered to look at the Hermes 51 Typewriter and after removing the cover, found a broken wire which made the machine inoperable. There never was the need for a surge protector and this was never a problem with the machine.

7. The machine was repaired by someone other than the Defendant four months after the action was filed and five months after the Plaintiff had revoked acceptance. The machine had not

DATED this 18th day of ¹⁴⁰⁰~~April~~, 1988.

Mary B. Strang
MARY B. STRANG, Affiant

SUBSCRIBED AND SWORN to before me, a Notary Public, this 18th
^{May}~~April~~ day of ~~April~~, 1988.

Robert L. Crawford
Notary Public
Residing in Salt Lake City, Utah

My Commission Expires:

12-2-89

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 20th day of ^{May}~~April~~, 1988, a true and correct copy of the foregoing Affidavit of Mary B. Strang, was mailed, postage prepaid to Odell Sanders, President, Salt Lake Typewriter Company, 777 South State Street, Salt Lake City, UT 84111.

Walter L. Bailey