

1989

Michael W. Klekas v. Citram Corporation, a Utah corporation, and Jerry Spicer, a Florida resident : Brief of Respondent

Utah Court of Appeals

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BRIEF

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DOCKET NO. 89-0157 IN THE COURT OF APPEALS

STATE OF UTAH

MICHAEL W. KLEKAS,)	
)	
Plaintiff-Respondent)	Docket No. 890157-CA
)	
v.)	
)	
CITRAM CORPORATION, a Utah)	
corporation, and JERRY)	
SPICER, a Florida resident,)	Priority 14b
)	
Defendants-Appellants)	

BRIEF OF RESPONDENT

MICHAEL W. KLEKAS

Appeal from Judgment of the Third Judicial District Court
in and for Salt Lake County, State of Utah
The Honorable Frank G. Noel, Judge, Presiding

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DEPOSITED BY THE
STATE OF UTAH
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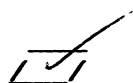
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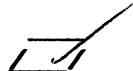


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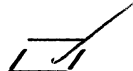


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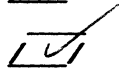
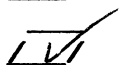
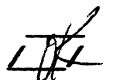


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Statement showing jurisdiction of Court of Appeals (optional with reply brief).



Statement showing nature of the proceedings (optional with reply brief).

☐ Statement of the issues (optional with respondent's and reply brief).

☒ Determinative constitutional provisions, statutes, ordinances, and rules set out verbatim OR by citation alone if they are set out verbatim in the addendum (optional with reply brief).

☒ Statement of the case (optional with respondent's and reply brief)

☒ Summary of the argument.

☒ Argument

☒ Conclusion

☐ Addendum (optional with respondent's and reply brief).

☒ Length
Appellant/Respondent--50 pages, not including addendum.
Reply--25 pages, not including addendum.
Petition for Rehearing--15 pages, not including addendum.

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corporation, and JERRY)	
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JURISDICTION

This Court has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j). This case is an appeal from the District Court and has been transferred to the Court of Appeals from the Supreme Court.

QUESTIONS PRESENTED

1. Did the trial court properly admit Exhibit 3?
2. Did the trial court properly allow oral evidence of the stock purchase agreement?
3. Did the appellant fail to prove that the purchase contract was illegal, void and unenforceable under Utah Code Ann. § 16-10-5?

STATEMENT OF DETERMINATIVE STATUTES AND RULES

Utah Code Ann. § 70A-8-319:

Statute of Frauds.

A contract for the sale of securities is not enforceable by way of action or defense unless

(a) there is some writing signed by the party against whom enforcement is sought or by his authorized agent or broker sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price; or

(b) delivery of the security has been accepted or payment has been made but the contract is enforceable under this provision only to the extent of such delivery or payment; or

(c) within a reasonable time a writing in confirmation of the sale or purchase and sufficient against the sender under paragraph (a) has been received by the party against whom enforcement is sought and he has failed to send written objection to its contents within ten days after its receipt; or

(d) the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract was made for sale of a stated quantity of described securities at a defined or stated price.

Utah Code Ann. § 16-10-5:

Right of corporation to acquire and dispose of its own shares.

A corporation shall have the right to purchase, take, receive or otherwise acquire, hold, own, pledge, transfer or otherwise dispose of its own shares, but purchase of its own shares, whether direct or indirect, shall be made only to the extent of unreserved and unrestricted earned surplus available therefor, and, if the articles of incorporation so permit or with the affirmative vote of the holders of at least two-thirds of all shares entitled to vote thereon, to the extent of unreserved and unrestricted capital surplus available therefor.

To the extent that earned surplus or capital surplus is used as the means of the corporation's right to purchase its own shares, such surplus shall be restricted so long as such shares are held as treasury shares, and upon the disposition or cancellation of any such shares the restriction shall be removed to the extent of the cost to the corporation of the shares so disposed of or cancelled.

Notwithstanding the foregoing limitation, a corporation may purchase or otherwise acquire its own shares for the purpose of:

(a) eliminating fractional shares.

(b) collecting or compromising indebtedness to the corporation.

(c) paying dissenting shareholders entitled to payment for their shares under the provisions of this act.

(d) effecting, subject to the other provisions of this act, the retirement of its redeemable shares by redemption or by purchase at not to exceed the redemption price.

No purchase of or payment for its own shares shall be made at a time when the corporation is insolvent or when such purchase or payment would make it insolvent.

Rule 803, Utah Rules of Evidence:

Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . .

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

. . .

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to

prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 804(b)(5) Utah Rules of Evidence

Hearsay exceptions.

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . .

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

STATEMENT OF CASE

Respondent has no objection to the statement of the case presented by appellant.

DISPOSITION IN LOWER COURT

A bench trial was conducted before Judge Frank G. Noel on October 24-25, 1988. The court dismissed the fraud claim against

all defendants. The court found that there was a valid contract between Michael Klekas and Citram Corporation for the purchase of 22,000 shares of stock at \$2.25 per share to be paid for within 30 days or by February 26, 1987.

The court further found that Citram Corporation breached the contract by failing to make payment for the stock and awarded plaintiff \$49,500.00 plus costs against Citram Corporation. Appellant has appealed the trial court's decision.

STATEMENT OF FACTS

On January 27, 1987, a meeting was held in Murray, Utah, attended by Jerry Spicer, Michael Klekas, Jeff Van Os, Date Olcott Thompson and a Mr. L. C. Green. In this meeting, an agreement was reached whereby Citram Corporation through its agent, Spicer, agreed to purchase 22,000 shares of Citram stock from Klekas at \$2.25 per share. TR: 104.

At the January 27, 1987 meeting, Thompson took notes regarding the agreement between Citram and Klekas. TR: 173. Mr. Thompson's notes represent an agreement between Citram and Klekas wherein Citram was to purchase 22,000 shares at 2-1/4 in 30 days. TR: 174.

A written memorandum of the oral stock purchase agreement was prepared by Van Wagoner & Stevens, the attorneys for Klekas on January 28, 1987, and was signed by Klekas and delivered via Federal Express on January 29, 1987, to Citram Corporation's address. Spicer admitted that Citram Corporation received the document. TR: 12.

At trial, evidence came in relating to the agreement between Citram and Klekas. A confirmation letter from Klekas to Citram was introduced. TR: 270. Mr. Thompson's notes taken at the January 27, 1987 meeting were introduced. Id. A Federal Express Summary showing delivery of the letter was introduced. Id. Janis Conger, the office manager from respondent's attorneys' office, testified as to her experience with Federal Express and that she kept the Federal Express Summary in the regular course of business. TR: 33-34.

The trial court found that there was a contract between Klekas and Citram for the purchase of 22,000 shares of stock at \$2.25 per share, to be paid for within 30 days. The court further found that the contract was breached by Citram finding in favor of Klekas in the amount of \$49,500 plus costs. TR: 320.

SUMMARY OF ARGUMENT

The District Court properly admitted Exhibit 3, the Federal Express Summary, as a business record of Van Wagoner & Stevens. The foundational testimony provided by Ms. Conger illustrated that she had knowledge of the business customs of Federal Express and that the summary was kept by her in the usual course of business. It was shown at trial that the business records, exception to the hearsay rule was satisfied. The trial judge was correct in admitting this evidence.

The Federal Express Summary creates a rebuttable presumption that Citram Corporation received the confirmation letter on January 24, 1987, and thus within a reasonable time. Appellant was unable to rebut this presumption at trial. The trial court was correct in holding that Utah Code Ann. § 70A-8-319 was satisfied. It cannot be shown that this decision was clearly erroneous.

Appellant has offered no evidence to show that the corporation was insolvent at the time of the agreement. Contracts are presumed legal and appellant has failed to rebut this presumption.

ARGUMENT

POINT I: THE TRIAL COURT PROPERLY ADMITTED THE FEDERAL EXPRESS SUMMARY.

Appellant argues that the trial court erred in admitting Exhibit 3, the Federal Express Summary under the business records exception to the hearsay rule (803(6) Utah Rules of Evidence) because respondent did not lay the proper foundation necessary to admit Exhibit 3. The trial judge found that the proper foundation had been laid to allow admission of the Federal Express Summary.

A. The Federal Express Summary was Properly Admitted Under the Business Records Exception.

The trial court properly admitted the Federal Express Summary under the business records exception. Utah Rules of Evidence, Rule 803(6) states that a document, in any form, of "acts, events, conditions, opinions or diagnoses," made at or near the time of occurrence of the event by a person with knowledge of the event or from information transmitted by a person with knowledge of the event, "if kept in the course of a regularly conducted business activity," and "shown by the testimony of the custodian or other qualified witness," is excluded from the hearsay rule "unless the source of information or the method or circumstances of preparation indicate lack of

trustworthiness." The trial court found Ms. Conger's testimony to be credible, trustworthy and sufficient to allow the Federal Express Summary in evidence.

In United States v. Pfeiffer, 539 F.2d 668 (8th Cir. 1976), the court held that the admission of certain delivery invoices as business records was proper where the foundational witness, even though not the one who prepared the invoice, was familiar with procedures, and was in the chain of the business activity as one who received the receipts. The court further stated that in any event the trial judge has discretion in admitting the evidence if it is otherwise trustworthy under Rule 803(24) and 804(b)(5) of the Federal Rules of Evidence. Id. at 671. See Rules 803(24) and 804(b)(5) of the Utah Rules of Evidence.

Another case which supports the trial judge's admission of the Federal Express Summary in the present case is United States v. Ullrich, 580 F.2d 765 (5th Cir. 1978). In Ullrich, the Court of Appeals affirmed the defendant's conviction and held that the records of the automobile dealership from whom the automobile had been stolen were properly admitted as business records over the objection of the defendant that there was no proper foundation because the records were not prepared by the automobile dealership. The court stated that although the documents were furnished originally from other sources, testimony illustrated that they were kept in the regular course of the dealership's

business as accounting documents and were integrated into the records of the dealership and were used by it. Id. at 771.

Finally, in United States v. Flomb, 558 F.2d 1179 (5th Cir. 1977), the court held that there was an adequate foundation for the admission of certain business records even though the records were invoices received and held by one company in its regular course of business, but were prepared and sent by another company and no testimony of the preparing company was offered. The court stated:

Although the usual case involves an employee of the preparing business laying the necessary foundation under 803(6), the law is clear that under circumstances which demonstrate trustworthiness it is not necessary that the one who kept the record, or even had supervision over their preparation testify. That the trial judge has a broad zone of discretion in evidentiary matters is a basic principle . . . [and] the court below did not cross the line in finding that the foundation required by the Federal Rules of Evidence was supplied by the witness testifying at trial.

Id. at 1183-84 (citations omitted).

Appellant argues that the trial court allowed the Federal Express Summary into evidence in error because Ms. Conger "did not testify that the said Exhibit was prepared as a business record of the office, but in fact, testified it was merely a copy of a record of Federal Express that was delivered to her by mail." Appellant's Brief at 8-9. Appellant urges that the

record must be generated by the company which seeks to found it. However, neither of the cases which appellant cites support his argument.

National Labor Relations Board v. First Termite Control Company, Inc., 646 F.2d 424 (1981), cited by appellant, involved a witness who was to lay the foundation to introduce a business record. The witness could testify only that he was responsible for paying the freight bill in question, that he did not have any interest as to its accuracy as far as the place of origin of the shipment was concerned and knew nothing of the shipping practices in question. This foundational witness was in a wholly different position than Ms. Conger who had great interest in the time and date of delivery of the Federal Express Letter as well as the cost of delivery and who testified that she was very familiar with the practices of Federal Express. TR: 32-34.

In United States v. Keplinger, 776 F.2d 678 (7th Cir. 1985), the court noted that "the business records exception contains no requirement that a 'qualified witness' must have personally participated in the creation or maintenance of a document." Id. at 693 (citations omitted). The court went on to state that:

Obviously, such a requirement would eviscerate the business records exception, since no document could be admitted unless the preparer (and possibly others involved in the information-gathering process)

personally testified as to its creation. Rather, the phrase "other qualified witness" in Rule 803(6) is to be given "the broadest possible interpretation"--the witness need only be someone who "understands the system."

Id. at 694 (citing 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 8036(6)[02] at 803-178). The trial court properly admitted the Federal Express Summary under the business records exception.

It is clear that the admission of the Federal Express Summary was not clearly erroneous. It was shown that Janis Conger was very familiar with the practices of Federal Express and kept the Federal Express Summary in the regular course of the law firm's business. The court properly admitted the Summary under Rule 803(6), even if Rule 803(6) was inapplicable, the trial court could have admitted the Federal Express Summary under Rules 803(24) and 804(b)(5).

POINT II: THE TRIAL COURT PROPERLY ALLOWED ORAL EVIDENCE OF THE STOCK PURCHASE AGREEMENT.

The trial court properly allowed testimony concerning oral communications and statements made at a meeting between the parties on January 27, 1987. Such testimony was allowed into evidence, not to contradict or modify the written terms of the agreement between appellant and appellee, but rather was allowed

into evidence for foundational purposes to support and give credibility to the actual written agreement.

Appellant argues that in order for the court to hear oral evidence of the contract for the sale of securities, the court must be satisfied that the applicable statute of frauds provision was met. That simply is not the law and, the cases cited by appellant, do not support his argument. Even so, as argued in Point I, the court had sufficient evidence before it and was satisfied that Section 70A-8-319(c) was met (e.g., the January 28, 1987 confirmation letter from Klekas to Citram and the handwritten notes of Thompson taken at the January 27, 1987 meeting).

At trial, the court found that subsection (c) was satisfied by the confirmation letter sent on January 28, 1987, acknowledgement of receipt of which was proved by the Federal Express Summary. Appellant contends that subsection (c) was not met because it requires that the writing in confirmation must be received within a reasonable time by the party against whom enforcement is sought or at least before the filing of the complaint. Appellant's Brief at 13 and 15.

Appellant argues that "he did not recognize the name of the person shown on Exhibit 3 as the person who accepted the Federal Express package, one J. Goforth." Appellant's Brief at 5.

Appellant argues even if the Federal Express Summary was properly admitted, there is still no evidence that he received the letter within a reasonable time because Goforth was not proved to be an agent or employee of Citram. Appellant's Brief at 6-7. Appellant also states that Jerry Spicer's deposition testimony, in which Spicer admitted receiving the letter, is insufficient because Spicer couldn't remember when he received the letter and, therefore, it had not been proved that he received it before the action was commenced. This argument is without merit.

The use of the Federal Express Summary as evidence that a letter has been received is analogous to a return of service of process. The return stands as evidence that certain procedures have been complied which make it very likely that the person to be served will receive the service documents.

For example, Rule 4 of the Utah Rules of Civil Procedure allows personal service to be made on a person by leaving a copy at his usual place of abode with some person of suitable age and discretion there residing. If service is accomplished in this manner, the affidavit of the one who made the service is proof of service. Similarly, Rule 5 of the Utah Rules of Civil Procedure allows service of pleadings and other papers to be made by delivering a copy to the party or leaving it at his office with a person in charge, and if no one is in charge by leaving it in a conspicuous place therein. The rules assume that when the

statutory procedures are complied with, it is very likely that the service of process will be received. If the procedures are followed, the return of service is proof of service.

In the present action, the delivery person for Federal Express left the letter with Ms. Goforth who signed for the letter. Spicer has never disputed that the address where the letter was left was his proper business address. Spicer even admits that he did receive the letter, but he does not remember when. TR: 12.

The Federal Express Summary creates a rebuttable presumption that Spicer received the letter confirming the oral contract for the sale of stock on the date indicated by the Federal Express Summary, January 29, 1987. **Appellant** offered no evidence whatsoever to rebut that presumption.

The trial court properly received the letter meeting the statute of frauds, and it was not error to allow the oral testimony about the stock purchase agreement.

POINT III: THE DEFENDANTS FAILED TO PROVE THAT THE PURCHASE CONTRACT WAS ILLEGAL, VOID OR UNENFORCEABLE UNDER UTAH CODE ANN. § 16-10-5.

A. Appellant Cannot Raise Issues on Appeal that Were not Raised at Trial.

Appellant argues that "there was no evidence produced at trial to show that Citram had ever earned any income which would enable it to have earned any surplus available to purchase its own shares." Appellant's Brief at 16. Appellant first raised this argument in closing argument before Judge Noel in the District Court. TR: 312. Although there was no evidence in the record supporting this contention.

Appellant argued that Spicer had no authority to bind the corporation to a contract to purchase stock because there was no resolution of the board of directors. TR: 311. It was appellant's contention that since the corporate code provides that a corporation cannot purchase its own shares without earned surplus, it must have a corporate resolution to purchase its own shares. TR: 312, lines 16-18.

Now, on appeal, appellant argues not that the purchase of the shares was unauthorized, but that the purchase violates Utah Code Ann. § 16-10-5. Such was not raised below at trial and cannot be raised de novo on appeal.

B. Appellant Has Failed to Meet its Burden of Proof.

Appellant misunderstands the burden of proof with respect to proving the illegality of the contract. Since it is the appellant who asserts illegality as an affirmative defense to enforcement of the contract, it is appellant's burden to prove that, in fact, the contract was illegal.

Section 16-10-5 of the Utah Code allows a corporation to purchase its own stock provided that there is unreserved earned surplus and provided that, at the time of the purchase, the corporation is not insolvent or would not become insolvent by the purchase. While the insolvency of the corporation may invalidate the transaction, "the burden of proof is on the corporation to show insolvency or that the transaction will render the corporation insolvent." 18B Am. Jur. 2d § 2073. See also Vowterras v. Argo Compressor Service Corporation, 441 N.Y.S. 2d 562 (1981) (burden not met where there was no information in the record indicating whether the corporation could have obtained financing in order to satisfy its obligations, and given that the corporation appeared to have a true surplus, there was a substantial likelihood that it could have obtained such financing).

Appellant argues that since the financial statements of Citram dated July 23, 1986, indicate that Citram had no earnings

or losses for the years ending December 31, 1983, 1984 and 1985, and showed a net loss of \$94,848.40 through July 23, 1986, there was no evidence at trial to show that Citram had ever earned any income which would enable it to have earned surplus available to purchase its own shares. Appellant's Brief at 16. However, it is appellant's burden to prove the lack of earned surplus because he raises it as a defense to avoid enforcement of the contract. Appellant offered no proof at trial showing that Citram did not have any surplus to purchase the shares at the date the agreement was made, January 27, 1987. The only financial documentation offered at trial was offered by plaintiff/respondent in Exhibit 7, however, this documentation did not contain any financial information relevant to the date of the agreement. The date of the agreement was approximately six months subsequent to any financial information reflected in Exhibit 7. Appellant has failed to offer any evidence which establishes that the corporation was insolvent or did not have surplus available on January 27, 1987.

Finally, the case cited by appellant to support his argument is inapposite. Appellant cites the court to White v. Western Empire Life Insurance Company, 11 Utah 2d 227, 357 P.2d 483 (1960) for the proposition that the Utah Court has held that a purchase by a corporation of its own shares "cannot be allowed unless the court makes a specific finding that the corporation has sufficient earned surplus to allow for the purchase."

Appellant's Brief at 17. This is a misleading reference to White. Nowhere in White does the court hold, as appellant states it does, nor is the language cited by appellant even found in White. White involved a purchaser of corporate stock who brought suit against the corporation to enforce an agreement made by the president of the corporation to resell the purchaser's stock at a designated price increase. The corporation argued that the agreement by the corporation to repurchase its own stock was void as a matter of law and that it was error for the trial court to find that the contract was not void. The court, citing Title 16-12-16(f), Utah Code Ann. (1953) (apparently the predecessor to 16-10-5), stated that "the [trial] court found, on substantial evidence, that it would not impair the assets lacquired as consideration for the sale of shares, in which event repurchases are exempt from the interdiction against corporate purchase of its own shares." Id. at 484. The court held that the corporation had to accept responsibility for the agreement to resell.

Appellant has utterly failed to show any evidence in the record which would affect the validity of the trial court's decision.

C. The Stock Purchase Agreement is Presumed Legal.

It is a general rule of construction that contracts are presumed legal and enforceable. Walsh v. Schlecht, 429 U.S. 401 (1977). See also W.R. Hall Transp. & Stor. Co. v. Gunnison Mining Co., 388 P.2d 768 (Colo. 1964), ("courts do not presume an intention on the part of parties to a contract that it be performed in an unlawful manner when, under the contract, a lawful performance may be accomplished"); Fisk v. Newsum, 513 P.2d 1035 (Wash. 1973) (the statute prohibiting a corporation from purchasing its own stock except out of unreserved and unrestricted capital surplus does not prevent an agreement for the future purchase of stock out of earned surplus; it only prohibits the actual purchase if, at the time the purchase is made, there is insufficient unreserved and unrestricted capital surplus to do so). Thus, there is a presumption that a stock purchase agreement is legal and that the intention of the parties is not to form an illegal contract. Appellant offered no evidence to rebut this presumption. The trial court was correct in upholding the contract.

CONCLUSION

This Court should affirm the judgment of the trial court. There has been no showing that the trial judge was incorrect in his interpretation of the law nor has it been shown that his factual decision was clearly erroneous.

DATED: June 26, 1989.

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By:


Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief of Respondent was mailed this 26th day of June, 1989, by depositing the same in the United States mail, postage prepaid, to:

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