

1954

Kimball Elevator Company, Inc. v. Elevator Supplies Company, Inc. : Reply Brief of Appellant

Utah Supreme Court

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Paul E. Reimann; Howard J. Cantus; Attorneys for Defendant and Appellant;

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In the Supreme Court of the State of Utah

KIMBALL ELEVATOR COMPANY,
INC., a corporation,

Plaintiff and Respondent,

vs.

ELEVATOR SUPPLIES COMPANY,
INC., a corporation,

Defendant and Appellant.

Case No. 8066

REPLY BRIEF OF APPELLANT

FILED
APR - 9 1954

Clerk, Supreme Court

PAUL E. REIMANN
720 Newhouse Building
Salt Lake City, Utah

HOWARD J. CANTUS
30 Church Street
New York City, New York

*Attorneys for Defendant and
Appellant*

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Defendant and Appellant.

REPLY BRIEF OF APPELLANT

RESPONDENT DOES NOT CONTROVERT APPELLANT'S STATEMENT OF FACTS

Rule 75 (p) (2) specifies: "If the respondent agrees with the statement of facts set forth in appellant's brief, he shall so indicate. If he controverts it, he shall state wherein such statement is inconsistent with the facts and he shall make a statement of facts as he finds them, giving reference to the places of the record supporting his statement and controverting appellant's statement."

Plaintiff and respondent does not point out wherein a single statement in the Brief of Appellant is inaccurate or unsupported by the record. Nor does the respondent refute the argument and citations of authority in the Brief of Appellant which show that the trial court committed prejudicial error. For the most part, the respondent attempts to side-step and ignore the admissions made by plaintiff at the trial which precluded the possibility of any contract whatsoever with defendant, and which admissions demonstrated that plaintiff as unsuccessful bidder made outrageous claims which are wholly repugnant to law.

Some authorities cited by respondent have no application to the actual facts of this case. Other citations support the contentions of the appellant and do not sustain the claims of respondent.

RESPONDENT MISSTATES THE FACTS

The initial sentence in the Brief of Respondent is typical of the misstatements of fact and misleading argument which characterize said brief: "This is an action between an elevator company and an elevator parts supplier."

Plaintiff did not sue defendant on any pretense that there was any subsisting contract to supply plaintiff anything. The trial court permitted plaintiff to recover for not being awarded a contract with Hotel Utah (R. 194). The amended complaint alleged an *express* oral agreement whereby defendant purportedly "agreed" to submit to Utah Hotel Company a "sup-

porting bid" in a sum \$18,000 or \$19,000 in excess of plaintiff's bid, and "violation" of such "agreement" by submission of a *firm bid* instead and acceptance of an award of a contract (R. 34-41). The theory was changed at the trial to "an implied agreement not to compete" with plaintiff, although competition was never specifically discussed (R. 632, 651).

Respondent's statement of "The Facts" on pages 2 to 26 of its brief, omits nearly all of the material facts. Such statement distorts the written instruments, particularly the numerous written offers which were never accepted and which expired. Respondent even contradicts the stipulations of fact and its own admissions by misstatement of the record. Most of the "evidence" recited was inadmissible. Respondent ignores the fact that it gave defendant very little business, and that respondent did most of its business with other companies. The fact that defendant also did most of its business with other companies is disregarded by respondent. Likewise, the respondent fails to mention that from and after 1948 the Utah Hotel Company was the customer of the defendant, not the customer of plaintiff. To avoid needless repetition, some of the misstatements and distortions by respondent are mentioned in replying to the argument of "Respondent's Positions."

STATEMENT OF POINTS FOR REPLY TO "RESPONDENT'S POSITIONS"

1. There is no factual basis for the contention that "There was an agreement not to compete."

2. If an agreement had been made to restrain defendant from submitting a bid to the owner of a building, such agreement would not have come under any exception to the anti-trust acts.

3. There was no legal consideration to support an "implied agreement" of any kind.

4. Plaintiff recognized the right of Utah Hotel Company to obtain a firm bid from defendant.

5. There was no basis for an award of any damages.

6. The trial was unfair and prejudicial to defendant.

ARGUMENT

Point I

THERE IS NO FACTUAL BASIS FOR THE CONTENTION THAT "THERE WAS AN AGREEMENT NOT TO COMPETE."

Plaintiff knows that it could not possibly argue into existence from the negotiations relating to Hotel Utah any "implied agreement" whereby defendant would be restrained from giving the hotel a bona fide bid, for the hotel was then a customer of defendant. Plaintiff had no contract with defendant of any nature or description. Plaintiff admitted that it knew the hotel wanted a bid from defendant, and that plaintiff told Pacific Elevator and Equipment Company that it was all right for Pacific to submit a bid to defendant, knowing that defendant would use such bid (if reasonable) in computing its own

bid for submission to Utah Hotel Company (R. 374-375, 573, 575). Plaintiff also admitted through its general manager that defendant made no promises (R. 589-590).

Plaintiff tries to reach back into fruitless negotiations of years past for an argument about an "implied argreement" which could not be spelled out from any competent evidence. Plaintiff relies on considerable inadmissible evidence. Such evidence not being helpful, plaintiff resorts to contradictions of the record and palpable misstatements of fact in an effort to argue into existence an "implied agreement" out of unaccepted offers and other negotiations in the past which resulted in no contracts. The misstatements of fact in the argument of respondent are shocking, and they show that the respondent cannot hope to sustain the unjust judgment by adherence to the basic facts.

Plaintiff carefully refrains from mentioning any of the following facts which were either stipulated at the trial, established by admissions of plaintiff, or from other undisputed evidence including written documents: (a) Plaintiff, except for occasional purchases of replacement parts by catalog number, obtained numerous detailed written bids from defendant, but in a period of 23 years plaintiff actually accepted only 7 of the offers, and one of the 7 contracts was later canceled (Exhibit 46). The five contracts since 1931 have been small jobs. (b) Although repeatedly getting bids from defendant, plaintiff never at any time purchased from defendant any dumb-waiter elevators, elevator controls or related equipment. Such items have been purchased from Pacific Elevator and Equipment Company, from Energy Company, and other firms.

(c) Just as most of plaintiff's business has been awarded to other companies, particularly with respect to equipment of any size, most of defendant's business has been awarded to it by companies other than plaintiff. (d) Excluding the passenger elevator projects and the dumb-waiter projects at Hotel Utah, by 1950 the plaintiff had ceased to even request the defendant to submit a bid for any substantial part of an elevator modernization project, as plaintiff had become the territorial representative of Pacific. (e) From and after February 1948, Utah Hotel Company was the customer of the defendant, not the customer of plaintiff. (R. 243-244, Exhibit 3, R. 415, 461, 480, 482, 503, 505, 520-521, 847, 858-859).

In the teeth of the foregoing facts summarized from the Brief of Appellant, plaintiff attempts to argue that there was some kind of nebulous "implied agreement" which precluded defendant from entering into a binding contract with defendant's own customer, Utah Hotel Company. Plaintiff cites no authority to support its absurd contentions. As pointed out hereinafter, some of the cases cited by plaintiff show that defendant acted entirely within its rights.

As part of a misleading argument, on page 3 and on page 26 of the Brief of Respondent, plaintiff attempts to picture itself as an "original contractor" and the defendant as a mere "supplier as its very name designates it to be." Thus, plaintiff makes the absurd attempt to restrict and curtail the corporate powers and operations of defendant to that of a "supplier" because of the name, "Elevator Supplies Company, Inc." Of course, plaintiff cites no authority for such untenable argument. The fact is that plaintiff itself never acted as an original con-

tractor on any new construction, and at no time did plaintiff act as an original contractor except in the specific instances where plaintiff was awarded a contract by the building owners. Of the numerous projects on which plaintiff became an original contractor, in only 6 instances did any contractual relationship arise between plaintiff and defendant. The only one of any consequence was a subcontract awarded to defendant on Hotel Utah 24 years ago. The other five were only small contracts, and they did not begin to encompass the various types of equipment manufactured and sold by defendant.

The declaration of respondent on page 26 that "through a long course of business dealings the defendant established itself as a supplier and the plaintiff as an original contractor," is patently false. From 1931 to 1950 the defendant supplied plaintiff only a few times. Except for some occasional purchases of replacement parts from defendant by catalog number, (which could not be procured from some other company), the plaintiff always requested the defendant to submit written bids on some particular portion of a specific project on which plaintiff wanted a price quotation (R. 461). During said entire 20 year period ending August 1950, out of the numerous bids plaintiff procured from defendant, plaintiff awarded only 5 contracts other than the one which was cancelled. Each of the 5 contracts was relatively small, and except for 1 of them, each was a contract which called for materials to be installed; so that even as to the few items covered by contracts, defendant was not a mere supplier as plaintiff has pictured defendant to be, but a subcontractor. The contention that defendant was merely a "supplier as its very name designates it to be," is a myth.

Plaintiff purchased very little from defendant. In fact, plaintiff purchased most of its equipment from companies other than defendant. Plaintiff admitted that defendant did not quote and sell exclusively to plaintiff (R. 846, 856-858). Contrary to the assertions that plaintiff purchased control equipment from defendant, at no time did plaintiff ever issue a purchase order for any control equipment (R. 480-482). Plaintiff generally purchased from companies other than defendant, the type of equipment which performed the same functions as equipment manufactured by defendant (R. 486, 510-518). On page 5 of the Brief of Respondent a claim is made which contradicts the express admissions of plaintiff:

“At no time did the plaintiff company receive or request quotations on systems competitive to that furnished by the defendant (R. 302-303).”

By the simple expedient of denying that the equipment purchased by plaintiff from other manufacturers was not “competitive,” the plaintiff attempts to make it appear that it was dealing exclusively with defendant, when most of the equipment plaintiff purchased, whether on an installed or uninstalled basis, was purchased from companies other than defendant. Inasmuch as “synchron control” is a trade-name of one type of relay control manufactured by defendant, plaintiff’s pious declaration that it never asked a competitor of defendant to quote on such materials, begs the question. It is like saying that plaintiff never purchased a Chevrolet or offered to purchase such particular make of automobile from Ford Motor Company. Control equipment is of various makes and manufacture, all designed to perform certain definite functions.

The record shows conclusively that time after time the plaintiff requested quotations from defendant on dumb-waiter elevators, but in each instance where plaintiff became the original contractor the plaintiff purchased such type of equipment from companies other than defendant (R. 503, 505, 874, 948-949). Exhibit 14, a letter from plaintiff to defendant in June 1950, admits that plaintiff purchased such equipment from another company. Exhibits 32, 39, 41 and 46 show that companies *other than plaintiff* purchased from defendant dumb-waiter elevators.

Contrary to the contention of respondent on pages 26 to 27 of its brief that "It was uniform practice for the plaintiff to submit specifications on a job to the defendant and request quotations on elevator materials f. o. b. or on control systems installed at the job site," the exhibits introduced by plaintiff show that in 1950 (except on the Hotel Utah projects) the plaintiff limited its requests for defendant to bid to small items only. The plaintiff did not even request any bid on control systems in 1950 on the Charleston Apartments, Congress Hotel, University Heights Apartments, and Deseret News Building. The plaintiff as representative of Pacific Elevator and Equipment Company requested quotations on the control systems from Pacific, not from defendant (R. 510-518).

On the Park Building job in 1949, plaintiff asked defendant to bid on the relay controls as well as other equipment to Murphy Elevator Company. In 1950 plaintiff asked for a direct bid which defendant submitted. Later on, plaintiff requested defendant to submit a bid on only a very small portion of the job, excluding entirely the controls. The plaintiff

awarded a contract for the controls to Pacific Elevator and Equipment Company (R. 510-518).

The argument on page 28 of the Brief of Appellant is contrary to the facts:

“The parties to this action were never competitors nor did they ever deal at arm’s length. The plaintiff was selling the defendant’s supplies and control systems and it was incumbent upon plaintiff to deal with the defendant after the plaintiff had urged the customer to use defendant’s system and after plaintiff made its bid based upon quotations received from the defendant.”

The plaintiff was not selling defendant’s supplies. Plaintiff was neither the agent nor territorial representative of defendant. On the other hand plaintiff was territorial representative of Pacific Elevator and Equipment Company, which manufactured and sold equipment which performed the same functions as equipment manufactured by defendant. Plaintiff finally admitted at the trial that it purchased from others the type of equipment manufactured and sold by defendant (R. 505). Plaintiff certainly was not urging any building owner to use defendant’s equipment, when plaintiff was not even taking a bid from defendant on most of the equipment manufactured by defendant, but on the other hand was taking bids from and issuing purchase orders to Pacific Elevator and Equipment Company. Such was the situation in 1950.

Plaintiff furnished no specifications on Hotel Utah. It was not the plaintiff that had defendant’s materials specified on that job. The defendant had been contracting with Utah Hotel

Company since February 1948, and it was the management of the hotel which specified defendant's equipment. On page 19 of the Brief of Respondent it is stated that when Hotel Utah informed the plaintiff that the hotel wanted a bid from defendant, Mr. Connole of Kimball suggested Westinghouse Electric Company. Since Westinghouse would not likely quote on defendant's equipment, there is no substance to the pretense that plaintiff was trying to sell defendant's equipment. Plaintiff knew that the hotel wanted defendant's equipment used as far as possible, and the attempt to discourage the hotel from getting a bid from defendant and to induce the hotel to get a bid from Westinghouse, refute the claim that plaintiff was trying to sell defendant's equipment.

The plaintiff attempts to make it appear that plaintiff was responsible for having defendant's equipment specified in the Medical Arts Building, which defendant ultimately installed under a contract with Murphy Elevator Company. However, Alma J. Janke, plaintiff's own witness, testified that it was on his own recommendation that Elevator Supplies control equipment was specified on the job, following various conversations with Roy C. Smith and after making an inspection trip to defendant's plant. Mr. Janke, who was formerly an employee of Otis Elevator Company, knew that Otis manufactured equipment which performed similar functions (R. 452, 454).

On page 11 of its brief, respondent states that in 1949 defendant submitted a proposal on an elevator project at the Pioneer Memorail Building. Plaintiff fails to mention that defendant submitted an identical bid to Elevator Service and

Supply Company of Salt Lake City, and that it was not the plaintiff, but Elevator Service and Supply Company which awarded the contract to defendant.

On page 12 plaintiff states that Mr. Connole of Kimball and Mr. Smith of Elevator Supplies Co., Inc., went together to the Dooley Building in 1948, and that defendant furnished plaintiff cuts and illustrative material. Plaintiff neglects to mention that defendant furnished the same information to other companies, including Elevator Service and Supply Company and the Montgomery Elevator Co. On page 27 respondent further states:

“ . . . Frequently representatives of the parties would consult and collaborate on specifications and designs most suitable for the customer. On many occasions representatives of both parties would jointly confer with a customer or building owners and thereafter—based upon quotations made by the defendant to the plaintiff—plaintiff would bid the overall and complete job . . .”

The statement is highly misleading. The defendant also went to building owners with representatives of other elevator companies. Defendant was interested in selling its own equipment, and also to ascertain how its equipment could be synchronized with equipment which would remain or with equipment which might be installed by others. Plaintiff could cite only 3 instances where defendant's representative ever went to a building owner with plaintiff's representative. One was the Medical Arts Building in 1947, on which defendant was ultimately awarded a contract by Murphy Elevator Company. Another was the Dooly Building in 1948 which defendant bid to two different companies although never awarded any

contract, and the other was the Continental Bank Building in 1949. The statement on page 13 to the effect that defendant participated with plaintiff and Pacific in the preparation of "an engineer's estimate" is wholly unsupported by the record (R. 343). Mr. Connoles represented to defendant that the Continental Bank Building management wanted a bid on the project, and after plaintiff twice procured bids from defendant which defendant prepared at considerable expense to defendant, the plaintiff did not even bother to submit a bid to Continental Bank Building management (R. 475-477).

Plaintiff argues that defendant "worked with" plaintiff to "get business together." The implication is that plaintiff always purchased from defendant, which is contrary to the admitted facts. Plaintiff admitted that it purchased similar equipment from other companies (R. 503, 505). Likewise, plaintiff admitted that defendant did not quote and sell exclusively to the plaintiff (R. 846, 856-858). On pages 6 to 16 of the Brief of Respondent, reference is made to numerous requests for bids and submission of bids, only one of which was ever accepted by plaintiff. The one contract which came into being was later cancelled. In more than 20 years the plaintiff accepted only 7 offers out of the multitude of offers procured from defendant. Through a long course of getting bids from defendant, with few exceptions, plaintiff awarded contracts to other companies. Of the total of 6 contracts which were awarded to defendant, each one was in utmost detail, and not one contained any covenant that defendant would either deal with the plaintiff in the future or refrain from dealing with a particular person or group of persons.

The contract on the Walker Bank Building awarded to defendant by plaintiff was cancelled at the request of plaintiff. On page 9 of its brief respondent makes the following claim with respect thereto: "Plaintiff protected the defendant on the job by insisting that as a condition to the cancellation the defendant be awarded the supply of electrical power door operators (R. 356)." Such assertion is not a fair statement of the competent evidence. The defendant had a binding contract with plaintiff, and such contract could not be cancelled without consent of defendant. Defendant obtained \$2,000 from the building management as the maximum amount plaintiff would have to pay defendant for cancellation. Plaintiff paid only \$1,000 to defendant which certainly did not "protect" defendant when it had incurred expenses of \$2,000 (R. 435-440). Furthermore, plaintiff had nothing to do with defendant's submission of a bid to Otis Elevator Company on the furnishing and installation of door operating mechanisms. Otis asked defendant for a bid because the Otis equipment would not fit into the openings (R. 870). If Otis could have made its own equipment work, it would not have asked defendant to install any of defendant's equipment. The case illustrates the fact that defendant treated all elevator companies alike by allowing a discount of 10% from list price.

On page 29 plaintiff states in defiance of all rules of contract, and contrary to the evidence:

" . . . The defendant through its long course of dealings merely promised it would not quote direct to a building management where plaintiff had requested a quotation from the defendant and plaintiff had thereafter submitted a bid to the building management."

Never at any time did plaintiff impose any such restriction in any request for bid, and notwithstanding the defendant went into the most minute detail in submitting a written bid to plaintiff as well as to other companies, the subject of refraining from competition is not mentioned in any bid submitted either to plaintiff, to Murphy, Montgomery, Elevator Service and Supply Company, or any other company. Furthermore, *plaintiff disregards the fact that there could be no contract when there was an unaccepted offer*. When we examine the six contracts which plaintiff actually awarded, each one relates to a specific project and there is no covenant to transact any business on some other project nor to refrain from dealing with the owner. What plaintiff still seeks to do is to create a fictitious "implied agreement" out of a series of unaccepted offers and other fruitless negotiations which came to naught. Plaintiff says in effect that the failure of defendant in one instance or a series of instances to submit a bid directly to the owner of the building implied a negative promise to refrain in the future from submitting any bid to a building owner. The argument is absurd.

In this case, Utah Hotel Company had been the customer of defendant since February 1948. Defendant was an *original contractor* from 1948 to 1950 on the sale and delivery of repair equipment (R. 243-244, 770-771, 779-782). Nevertheless, in contradiction of the testimony of its witness Max C. Carpenter, plaintiff repeatedly makes the unfounded statement that prior to September 27, 1950, defendant had not acted as an original contractor in Utah. Even if plaintiff had been right instead of wrong, it would have been entirely immaterial, for

the defendant had the absolute right to change its own policy and begin to operate as an original contractor at any time. Certainly the defendant did not have to consult plaintiff nor any other elevator company. Plaintiff infers that once having acted as a subcontractor for plaintiff on some project, defendant thereafter could not operate on some other project as an original contractor. The plaintiff cites no authority for such a concept as it is contrary to every fundamental rule of freedom of contract.

Plaintiff seeks to obscure the fact that plaintiff obtained its bid from defendant on Hotel Utah dated June 14, 1950, by falsely representing that the hotel was awarding the job to plaintiff. Plaintiff neglects to mention, of course, that such bid obtained by deceit was never accepted and never resulted in a binding contract whatsoever, and that said bid was withdrawn by letter dated September 8, 1950, after plaintiff's bid was rejected by Utah Hotel Company. After the defendant submitted a new bid to plaintiff following submission of a bid to Utah Hotel Company, and after Pacific submitted its revised bid to plaintiff on September 15, 1950, *the plaintiff did not even bother to submit a new bid to Utah Hotel Company.* In September 1950 plaintiff was in the same position as if it had never submitted a bid at all.

On page 26 of the Brief of Respondent it is admitted that officials of Hotel Utah "were openly antagonistic to the plaintiff's cause," but plaintiff contends that "prior to the filing of the lawsuit the plaintiff enjoyed a very good business relationship with the Hotel Utah and with its personnel." The record refutes the last quoted statement, for the hotel ceased

to do business with plaintiff back in February 1948 due to dissatisfaction over a small service elevator installed by plaintiff which had to be removed, and also due to failure of plaintiff to give the hotel good service. The business relation between plaintiff and the hotel went down to zero. Beginning in February 1948 the hotel contracted direct with defendant, and the hotel was the customer of defendant (not the customer of plaintiff) thereafter. When Kimball submitted its incomplete bid dated August 16, 1950, to Utah Hotel Company, the hotel not only rejected such bid which omitted 15 essential items, *but the hotel refused to even entertain any further bid from plaintiff* (R. 263-264, 822).

Plaintiff never accepted any offer it obtained from defendant on Hotel Utah. In fact Mr. Connole testified that Kimball never accepted a proposal from a proposed contractor until or unless Kimball was awarded the contract (R. 435). Plaintiff furnished defendant no specifications on the hotel elevator modernization or dumb-waiter elevator installation projects. The plaintiff had no contract, express or implied.

It is stated on page 20 that Mr. Henker of Pacific testified that he thought the hotel management wanted a "check bid, and naturally it was going to be higher." Reference to said incompetent statement is disposed of by his admission on cross-examination that he came to Salt Lake City for the purpose of making a detailed investigation of the project for the purpose of submitting to defendant a firm bid (R. 676, 716-718). Pacific not only submitted a firm bid on September 7, 1950, but it accepted a purchase order from defendant. *The plaintiff ignores the fundamental rule that the testimony*

of a witness is no stronger than where it is left on cross-examination.

Plaintiff relies on incompetent evidence of Mr. Connole who contradicted the terms and provisions of Exhibit "I" dated August 16, 1950, by saying that said bid included all of the work stated in defendant's bid except the drive sheaves. At least 15 items essential to the job were omitted. Utah Hotel Company did not regard the bid as satisfactory, and it had the unquestioned legal right to reject that bid, which it did on August 17, 1950, before it called upon defendant to submit a bid on the overall job (R. 246-247, 263-264, 787-788). Plaintiff never bothered to submit any further bid to the hotel although both Pacific and defendant submitted new bids early in September 1950 in the light of conditions which they learned from the hotel management (R. 542).

Since the bid dated September 12, 1950, to plaintiff (Exhibit LLL) was submitted to plaintiff by defendant *after* defendant had already submitted a bid on the overall projects to the hotel (Exhibits J and 4), the argument of plaintiff that defendant impliedly promised not to give a bid to the building owner is absurd. It is impossible to imply something which contradicts the known facts. The text quoted from by plaintiff on pages 27 and 28 does not hold that a contract can be implied from an unaccepted offer, nor a promise implied which contradicts the facts. There is no competent evidence of any agreement.

Point 2

IF AN AGREEMENT HAD BEEN MADE TO RESTRAIN DEFENDANT FROM SUBMITTING A BID TO THE OWNER OF A BUILDING, SUCH AGREEMENT WOULD NOT HAVE COME UNDER ANY EXCEPTION TO THE ANTI-TRUST ACTS.

On pages 28 and 29 of the Brief of Respondent it is argued:

“It is neither the intent nor purpose of the Sherman Act or the Clayton Act to nullify or abolish agreements necessarily made in the ordinary and regular channels of trade . . . ”

First of all, there was no agreement at all, as plaintiff failed to accept any offer made by defendant to plaintiff with respect to Hotel Utah in 1950. In the second place, an agreement to refrain from submitting an honest bid to the owner of a building could not possibly be an agreement “necessarily made in the ordinary and regular channels of trade,” for there is no trade if there is no contract, and without acceptance of an offer to sell there is no contract. Plaintiff also makes the following specious contention:

“ . . . The plaintiff, without such an understanding, would find itself in the anomalous and always risky position of seeking quotations from the defendant, then attempting to compete on a price to the customer. American free enterprise would suffer, if such were the law.”

American free enterprise does not countenance agreements whereby a manufacturer and a prospective occasional

purchaser agree that the manufacturer shall refrain from selling to any particular person or to any group of persons. American free enterprise would be destroyed if the owner of property could not get a bona fide offer from a responsible firm which it has patronized for over two years. The idea that a property owner cannot sell to his own customer is not free enterprise. It is anything but "free enterprise" if the owner cannot get a competitive bid on the same type of equipment and materials the owner specifies. The other companies with which defendant did most of its business made no such specious claim as plaintiff makes.

Defendant went as far as it could legitimately go in allowing all elevator companies a uniform discount from list price of 10%, since the building owner could not get such a discount. The plaintiff infers that a party is never safe in bidding if the manufacturer *underbids*. Such is not the case here, as the defendant did not give Utah Hotel Company a lower bid, but defendant gave the plaintiff a lower bid by offering plaintiff the usual elevator company discount, but such discount was not offered to Utah Hotel Company.

Plaintiff has the audacity to say that the "agreement" which it tries to argue into existence would not tend to a restraint of trade or monopoly. The very nature of such agreement is to restrain the owner from getting a bona fide bid and would not only tend toward monopoly, but it would be a criminal offense as a conspiracy under the Sherman Act.

All the way through its argument, plaintiff ignores the fact that Utah Hotel Company was the customer of defendant, not the customer of plaintiff; and that upon the withdrawal of

defendant's original offer of June 14, 1950, the parties were in the same position as if no offer had been made, for at that time plaintiff's bid to the hotel had been rejected. Defendant did not submit its new offer to plaintiff (also subject to the elevator company discount of 10%) until *after* defendant had submitted its bona fide offer on the entire project to Hotel Utah at the request of the hotel company. *Since the defendant had already given the hotel a bona fide offer, there could not possibly have been any "implied promise" on the part of defendant to refrain from giving the hotel a bona fide bid.*

Of the various cases and texts cited by plaintiff in its brief, not one of them states that defendant did not have the right to do just exactly what defendant did in this case. Not a single case is offered to show that the submission of a bid to a prospective original contractor "implies an agreement to refrain from submitting a bid directly to the owner." No case can be found, for such contention is utterly contrary to law. The case of *Seymour Mfg. Co. v. Derby Mfg. Co.*, 94 Conn. 311, 109 A. 395, on which the trial court held defendant was precluded from submitting a bid to Utah Hotel Company is clearly not in point; for that case involved a bailment of plaintiff's goods. The court in that case held in effect that since the plaintiff furnished defendant the copper from which the defendant agreed to manufacture copper bands for plaintiff under an express written contract defendant could not bid against plaintiff with respect to such bailments of plaintiff's property.

This case did not involve any *materials* of plaintiff. The plaintiff did not furnish defendant anything. The defendant

was using its own materials. Contrary to the assertions of plaintiff, plaintiff did not furnish any specifications. The other cases cited by plaintiff in its brief refute the contentions of plaintiff. As pointed out in *Federal Trade Commission v. Raymond Bros. Clark Co.*, 263 U. S. 564, 44 S. Ct. 162, 68 L. Ed. 448, 30 A. L. R. 1114, cited by respondent at page 32, a wholesaler may stop dealing with a manufacturer if he does not like the manufacturer's policies or if "he thinks such manufacturer is undermining his trade by selling either to a competitive wholesaler or to a retailer competing with his own customers." The same case holds that if one of them does an act which would be lawful in and of itself, it might become a conspiracy prohibited by law "if the result be hurtful to the public or the individual against whom the concerted action is directed."

The rule cited by plaintiff in 36 Am. Jur. at 504 refutes the contention of plaintiff, for it holds that where a person is not bound by contract (and certainly the defendant was not bound by contract to plaintiff when plaintiff failed and neglected to accept any of its offers), he might refuse to sell his property to any other person (such as plaintiff), "and any loss or injury thereby inflicted upon the other person is *damnum absque injuria*, and gives rise to no legal liability."

The cases cited by plaintiff to the effect that a restraint may be reasonable where a party imposes the restraint to protect his business have no application to this case. Defendant imposed no restraint. The plaintiff was not the territorial agent nor in any sense the representative of defendant. Plaintiff had no authority over defendant. The restraint which

plaintiff seeks to impose upon defendant retroactively certainly was not necessary to protect the business of defendant. Plaintiff practiced deceit on both defendant and upon Utah Hotel Company in an effort to prevent the hotel from getting a bona fide bid from defendant. Plaintiff sought to deprive the hotel of an honest bid by a responsible party and to monopolize the bidding. Furthermore, whatever method of doing business had been practiced in the past by the defendant was not subject to the dictates of plaintiff as an occasional purchaser. The defendant alone had the right to change that method and it did not have to consult the plaintiff about it as there was no existing contract with which such a change could interfere.

Plaintiff cannot bring within any exception to the Sherman Act its scheme to deprive Hotel Utah of its right as a customer of defendant, to obtain a bona fide bid from defendant. Plaintiff was properly frustrated in its corrupt and vicious scheme to deprive the hotel company of its rights as a property owner to obtain a bona fide bid from defendant.

Point 3

THERE WAS NO LEGAL CONSIDERATION TO SUPPORT AN "IMPLIED AGREEMENT" OF ANY KIND.

On page 36 of its brief respondent tries to create consideration out of negotiations which failed:

"Defendant does not recognize the time, effort and expense occasioned on plaintiff's part in securing good will, local contacts, copies of specifications, and esti-

mations including the defendant's materials and relay systems on a job . . . ”

All of those acts were done for the benefit of the plaintiff. The plaintiff certainly does not claim to be indebted to defendant for the enormous expense which defendant was put to in submitting to plaintiff scores of bids in utmost detail on numerous projects during a period of 23 years which were never accepted. After inducing the defendant to submit two separate bids on the Continental Bank Building, which involved defendant in substantial expense, the plaintiff did not even bother to submit a bid to the building management. To quote further misstatements of plaintiff:

“ . . . It was shown by a positive preponderance of the evidence that the plaintiff constantly and without exception attempted to convince the prospects of the superior quality of the defendant's signal and relay control system; that plaintiff did not seek quotations on such systems from the defendant's competitors; that the defendant knew plaintiff was dealing exclusively with the defendant in this regard; and that defendant knew plaintiff was estimating and including defendant's equipment specifically in its quotations to the customer or building owners . . . ”

The contention that plaintiff was “constantly and without exception” trying to convince the prospects of the “superior quality of the defendant's signal and relay control system” is utterly false, as demonstrated by the fact that in 1950 plaintiff was not trying to get anyone to use defendant's relay control systems. The plaintiff did not invite defendant to bid on such systems, but invited Pacific Elevator and Equipment Company to quote on controls on the Charleston Apartments, the Deseret

News Building, Congress Hotel, and University Heights Apartments. The reverse of plaintiff's statement is true, for in 1950 only on Hotel Utah did plaintiff ask defendant to bid on controls, and that was due to the fact that the hotel had indicated that it wanted bids on defendant's equipment. When Kimball was informed by the hotel that the hotel wanted a bid from defendant on the overall job, plaintiff tried to discourage the hotel from getting a bid from defendant, and even recommended that Hotel Utah procure a bid from Westinghouse which would not likely use any of defendant's equipment. Such is an example of how plaintiff "constantly and without exception" tried to get defendant's materials used. A further classic example relates to dumb-waiter elevators on which plaintiff requested bids from defendant on many occasions, yet without exception plaintiff purchased such equipment from competitors of defendant (R. 480-482). The contention that plaintiff did not seek quotations on such equipment from defendant's competitors and "that the defendant knew plaintiff was dealing exclusively with the defendant in this regard," completely defy the facts (R. 510-518). There were never any exclusive dealings, and in 23 years the plaintiff accepted only 7 of the multitude of offers it procured from defendant. Certainly, there was *no consideration* furnished by failure to accept numerous offers, and no contracts resulted from such unaccepted offers.

Plaintiff further indulges in patent misstatements of fact on page 36:

" . . . Also there was certainly a promise from the defendant to the plaintiff that when plaintiff requested

and secured a quotation on Elevator Supplies material and thereafter based thereon made plaintiff's bid to the customer including defendant's material, that defendant would not bid directly to that customer . . ."

Defendant *made no promise* except what was detailed specifically in writing in its bids. Those promises could not become binding without acceptance. The subject of competition or refraining from competition never arose in any discussion. Plaintiff still insists that an unaccepted offer creates an implied agreement on the part of the offeror to do something or to refrain from doing something which was never the subject of any negotiations. The following contention is likewise without substance:

" . . . There was also a promise running from the plaintiff to use defendant's material since it was unequivocally established such was all plaintiff ever specified and estimated."

An offeree promises nothing by merely receiving a bid. Since there was no acceptance and consequently no contract, there was no promise of any kind and no consideration. But it is rather shocking to read statement after statement which is utterly false. Plaintiff knows very well that it never at any time purchased a dumb-waiter from defendant, notwithstanding the many quotations thereon which plaintiff procured from defendant. Such equipment was invariably purchased by plaintiff from companies other than defendant. Plaintiff knows very well, too, that it never at any time purchased any control equipment from defendant, but that it purchased control equipment from Pacific Elevator and Equipment Company (R. 480-482, 486, 510-518).

On pages 37 and 38 plaintiff has the audacity to say:

“ . . . The defendant company, after having associated with plaintiff for more than twenty-five years, would now assert that the representation of the plaintiff and the close business association of the parties was absolutely of no value.”

What does plaintiff mean by saying defendant “associated” with plaintiff? The claim of “representation” is entirely false. Plaintiff now seeks to appoint itself “representative” of defendant. How “close business association” could there be in a situation where plaintiff in 23 years induced defendant to submit offers on numerous jobs, but when awarded contracts plaintiff invariably *failed* to purchase anything from defendant except in 6 specific instances? The preparation of bids over a period of years, nearly all of which were unaccepted, constituted a liability, not an asset to defendant.

On page 38 the plaintiff continues to indulge in misstatements, none of which show any consideration whatsoever. The contention that “it was of direct value to the defendant to have its equipment quoted for sale,” infers that plaintiff was quoting to prospective customers on defendant’s equipment when such was not the case. Likewise, there is no basis to the assertion that “there was an irrevocable commitment made by the Kimball Elevator Company to the Elevator Supplies Company to purchase the material, if the plaintiff were awarded a job.” The contention is palpably false, since plaintiff repeatedly obtained bids from defendant and then purchased the same type of equipment from Pacific and from other companies. The concept that defendant might have obtained some imaginary benefit from something complimentary which plain-

tiff might have said on some occasion about defendant's equipment, could not constitute any consideration nor create a contract to refrain from submitting a bid to anyone except plaintiff in the future.

The entire argument that there was consideration for an "implied agreement" which was supposed to have arisen out of an *unaccepted offer* is absurd.

Point 4

PLAINTIFF RECOGNIZED THE RIGHT OF UTAH HOTEL COMPANY TO OBTAIN A FIRM BID FROM DEFENDANT.

There is no competent evidence of any agreement to refrain from submitting a bona fide bid to Utah Hotel Company. The hotel having been a customer of defendant for more than two years, any agreement between plaintiff and defendant whereby defendant would refrain from giving the hotel a bona fide bid would have been fraudulent and void.

On page 41 plaintiff says that any "quotation by Elevator Supplies could only be an estimate," which is not true. The contention that the "facts were on the table as far as plaintiff and the hotel were concerned" is unfounded as far as plaintiff is concerned. Nor were there any "forthright statements to the Hotel Utah by Connole," as alleged on page 42. Plaintiff knew the hotel wanted a bid on the entire job from defendant. Plaintiff sought to prevent submission of such bid in the first instance by falsely representing to defendant that Kimball

was going to be awarded the job, then by telling the hotel building superintendent that it would do no good to ask defendant for a bid (R. 523-524, 786-787, 818).

The assertion that Mr. Henker was of the impression that the hotel wanted a "check bid or an estimate," and that "any estimate given by them to the hotel would be so much higher that necessarily the job would automatically go to Kimball," disregards the complete revision of Mr. Henker's testimony on cross-examination when he stated that he came to Salt Lake City for the purpose of making a detailed examination at the job site for the purpose of making a *firm bid* to Elevator Supplies Co., Inc. (R. 676, 716-718). Plaintiff tries to evade the admissions of plaintiff that Mr. Connole told Mr. Henker that it was all right for Pacific to give defendant a bid, as plaintiff knew that defendant was bidding on the job (R. 572-573). Pacific was plaintiff's principal, and Pacific declined to give a firm quotation until it was assured by plaintiff that it was all right to do so (R. 674). The plaintiff has nothing to complain about, for it recognized the right of the hotel as the customer of defendant to obtain a bid in good faith from defendant, and also the absolute right of defendant to submit a firm bid.

The admissions of plaintiff shatter all pretense of some "implied agreement not to compete." No such "agreement" could have existed at all, and certainly, no such "agreement" could have been implied in the face of the admissions of plaintiff that it told Pacific it was all right to submit a bid to defendant, when plaintiff knew such bid would be used in defendant's bid to Utah Hotel Company.

Point 5

THERE WAS NO BASIS FOR AN AWARD OF ANY DAMAGES.

Plaintiff glosses over the fact that notwithstanding Mr. Connole testified that the Kimball bid of August 16, 1950, was supposed to cover the whole job, there were at least 15 items which had been omitted and that the costs which plaintiff omitted from its alleged "estimate" (which was prepared after this suit was instituted), would have precluded the possibility of any profit and would have resulted in a loss.

There is no basis in the record for the assertion that "The plaintiff invited the court and jury to scrutinize its books and records." Exhibit SSS was prepared after this suit began. It was wholly incompetent and prejudicial.

There is no factual basis for the assertion that Roy C. Smith "repeatedly indicated that the Kimall people knew their business."

There is no foundation for the assertion that Utah Hotel Company would have allowed plaintiff to install its name-plates in the elevator cabs. In the first place, plaintiff precluded itself from getting the job by its indisposition to submit a satisfactory and complete bid. Furthermore, the management of Hotel Utah would not allow name-plates except the name of the cab manufacturer in small letters on the capacity plates (R. 249, 259-260, 834-835). There was no competent evidence that the hotel's consent could have been obtained. The owner does not have to permit advertising.

The cases cited by plaintiff on page 50 do not sustain the position of the plaintiff that plaintiff could advertise itself as the manufacturer when it manufactured none of the equipment. In no event could an installer advertise without the consent of the owner, and there was no such consent. There was no proof that plaintiff would have been awarded a contract, and no proof that it would have been allowed to install any name-plates. Consequently there could have been no damage.

Point 6

THE TRIAL WAS UNFAIR AND PREJUDICIAL TO DEFENDANT.

Plaintiff does not point out wherein a single error cited by appellant was "harmless" error. In the first place, the trial court should have dismissed for failure to state a cause of action. In the second place, the defendant was entitled to a directed verdict of no cause of action. In the third place, the trial court violated numerous rules of law and due process at the trial. As pointed out in the Brief of Appellant, the court proclaimed a fictitious "preliminary contract of negotiations"—something alien to the law. The court permitted plaintiff to introduce incompetent evidence. The court also excluded evidence of the defendant. The court first ruled that whether there had been exclusive dealings would be immaterial. Then after it was stipulated that the dealings were not exclusive either on the part of plaintiff or of defendant, the court

charged the jury that it could find an implied agreement not to compete from "exclusive dealings." The court misdirected the jury. The court refused to construe the written instruments, and permitted the jury to find an implied contract from unaccepted offers and other negotiations which had terminated unsuccessfully. The court refused to present defendant's theory to the jury. Yet the plaintiff says that the trial was fair. The record shrieks of prejudicial error. The trial court neglected to cure the prejudicial error in denying defendant's motion for judgment.

CONCLUSION

The Brief of Appellant points out numerous prejudicial errors. The Brief of Respondent does not squarely controvert the Brief of Appellant. Instead, respondent misstates the facts, ignores the admissions of plaintiff, and distorts the written instruments.

The plaintiff proved no agreement, since it admitted it did not accept the offers it procured on the Hotel Utah in 1950. This case arises out of the refusal of defendant as successful bidder to pay a "commission" to plaintiff as unsuccessful bidder. No claim of any "agreement" not to give Hotel Utah a bona fide bid was made until after this action was instituted. The claims of plaintiff are fictitious in fact and in law.

There is no basis for the verdict nor for the adverse rulings and judgment of the trial court. Defendant respectfully re-

quests this Honorable Court to reverse the judgment in accordance with the request in the Brief of Appellant.

Respectfully submitted,

PAUL E. REIMANN
720 Newhouse Building
Salt Lake City, Utah

HOWARD J. CANTUS
30 Church Street
New York City, New York

*Attorneys for Defendant and
Appellant*