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Kimball Elevator Company, Inc. v. Elevator Supplies Company, Inc. : Brief in Answer to Petition for Rehearing

Utah Supreme Court

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

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AUTHORITIES AND STATUTES

No statutes nor decisions are cited in this Brief in Answer to Petition for Rehearing.

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

BRIEF IN ANSWER TO PETITION FOR REHEARING

POINTS STATED IN ANSWER TO PETITION

Defendant and appellant Elevator Supplies Company, Inc., comes now and respectfully files this Brief in Answer to Petition for Rehearing, and defendant and appellant respectfully submits that the decision of this Honorable Court dated July 21, 1954, is just and correct, and that the decision is predicated upon the facts and rendered strictly according to

law. The defendant and appellant alleges that the petition for rehearing misstates the facts and misconstrues the decision. Said petition is entirely without merit and should be denied. Said petition for rehearing is answered under the following points:

1. There was no competent proof of any "implied contract" to submit to the jury; consequently, there is no basis for the contention "That the Court in its decision on file herein has not considered the findings of fact arrived upon by the jury."

2. There is no substance to the argument of plaintiff "That the Court in its decision has made irreconcilable statements relative to the issues."

3. The argument "That the Court has misconstrued the facts in its application of the law and has committed error thereby," disregards the admitted facts and the essential elements of a contract.

4. The claim "That through its decision the Court would commit an injustice," is specious, since only the plaintiff sought to perpetrate injustice.

ARGUMENT

Point 1

THERE WAS NO COMPETENT PROOF OF ANY "IMPLIED CONTRACT" TO SUBMIT TO THE JURY; CONSEQUENTLY, THERE IS NO BASIS FOR THE CON-

TENTION "THAT THE COURT IN ITS DECISION ON FILE HEREIN HAS NOT CONSIDERED THE FINDINGS OF FACT ARRIVED UPON BY THE JURY."

The decision of this Honorable Court is inexorably right. There is no merit to the petition for rehearing. Plaintiff misconstrues the opinion of the Court, and contradicts the record on appeal. In declaring that this Court "has not considered the findings of fact arrived upon by the jury," the plaintiff entirely disregards the basic error of the trial judge in submitting the case to the jury when there was no competent evidence of any "implied agreement." Plaintiff quotes from a number of the prejudicially erroneous instructions of the trial court, as if it were perfectly proper to invite the jury to ignore the admissions made by plaintiff and the stipulations of the parties as well as the undisputed fact that defendant never told plaintiff that it would refrain from giving anyone a bona fide bid. This Court properly held that there was no competent evidence of any "implied agreement not to compete," and consequently there was nothing to submit to the jury.

By its petition for rehearing, plaintiff would have this Court disregard all of the elementary rules of contract. Plaintiff in effect asks this Court to reverse itself and to hold that an "agreement not to compete" can be *implied* from a series of stale unaccepted written offers and other fruitless negotiations which did not even mention the subject of competition. The decision is correct, for the evidence demonstrated that there was no legal consideration to support any agreement, there was never any discussion of the subject, and there was no meeting of the minds. The admissions of plaintiff and

the stipulated facts as well as other undisputed evidence, were all fatal to the contentions of plaintiff that there was some kind of an "implied agreement not to compete with the plaintiff."

There is no substance to the contention that it was "understood" that defendant was to submit a "mere estimate and not a firm bid" to Utah Hotel Company. Hotel Utah had been a customer of defendant for over two years—a fact which plaintiff would like this Court to forget. Plaintiff itself presented the evidence which conclusively proved that plaintiff knew Utah Hotel Company wanted a *firm bid* from defendant on the entire modernization project, and that plaintiff recognized the right of defendant to submit such bid and made no objections to it, but on the contrary told Pacific Elevator and Equipment Company that it was all right to submit a bid to defendant on a portion of the project, knowing that defendant would use such bid in its overall bid.

Mr. Max C. Carpenter, manager of Hotel Utah, called as a witness for plaintiff, not only testified that the bid submitted by plaintiff was so unacceptable that he did not care to invite Kimball to submit any other bid; but that he asked defendant to submit a firm bid on the overall job. He testified that he told Mr. Roy C. Smith, district manager of defendant, that he expected defendant to present a straight-forward bid which could be accepted by the hotel (R. 248). Mr. Charles M. Henker, who testified for plaintiff, stated that defendant asked Pacific Elevator and Equipment Company to submit a bid on a portion of the elevator modernization on an installed basis; that Mr. Henker said it would be all

right "if it is all right with the Kimball Elevator Company," as Kimball was the territorial representative of Pacific (R. 673-674, 688). Mr. Henker also testified that he came to Salt Lake City with Roy C. Smith to make a thorough survey of the job "down to the last detail, preparatory to making up a *firm bid* to Elevator Supplies Company" (R. 676). When he arrived in Salt Lake City, Mr. Henker told Mr. Connole that he had been requested by Elevator Supplies Company to give a bid on a portion of the Hotel Utah job on an installed basis, and that he wanted to be sure that Mr. Connole had no objections. Mr. Connole told him that he knew that the hotel management had requested additional bids (R. 718). In consequence of that discussion, after being assured that plaintiff had no objections, Pacific submitted to defendant a *firm bid* dated September 7, 1950 (R. 717). Pacific then gave plaintiff a revised bid in view of what Pacific and defendant had learned from an inspection of the job site, but plaintiff did nothing about the revised bid from Pacific.

Mr. Connole admitted that he told Mr. Henker it was all right to submit a bid to defendant (R. 572). He also testified: "The Elevator Supplies Company requested the information from Mr. Henker, and Mr. Henker refused to give it to them, *until he had my permission* and that it was *finally understood that I knew they were bidding it*" (R. 572). He also testified that Mr. Henker told him that "Elevator Supplies Company was bidding on this job and had asked Pacific Elevator and Equipment to furnish them a quotation. He told me that he could not give them a quotation, because we were figuring the job and representing them—unless it was with

our permission. I told him it was all right" (R. 573). When asked if Roy C. Smith ever told him that defendant would not submit a bona fide bid to Hotel Utah, Mr. Connole answered, "No" (R. 589). When asked whether he tried to keep Hotel Utah from getting a bid on the over-all job from defendant, Mr. Connole answered: "I was never aware that Elevator Supplies would bid the job. I wasn't trying to keep them from it" (R. 579).

Notwithstanding there was no competent evidence of any "implied contract," plaintiff argues in effect that since the trial court permitted the jury to "find" that a "contract" of such a nature existed, this Court should uphold the verdict which was contrary to the facts and contrary to law. If carried to its ultimate conclusion, such an argument would dispense with all appellate courts.

The argument of plaintiff misquotes the decision of this Court. Plaintiff makes assertions which are beside the point and which are predicated on false assumptions, as illustrated by the following comment:

" . . . and although the Court further recognizes in its decision that Kimball had a right to exact a covenant from Elevator Supplies that it would not compete, in consideration of an understanding that Kimball would sub-let part of the work to Elevator Supplies; and further that it is not only permissible but common practice for a wholesaler to contract not to sell to retail customers . . . The Court rules against the plaintiff."

There is no evidence that Kimball Elevator Company ever "exacted a covenant from Elevator Supplies that it would

not compete." Nor is there any evidence that Kimball ever promised to sub-let part of the work to Elevator Supplies Company, Inc., when Kimball requested bids. The requests for bids will be searched in vain for any such suggestion. No such pretense was ever made at the trial. Furthermore, the exhibits clearly show that plaintiff generally did not award any contract to defendant, notwithstanding the numerous bids defendant submitted upon express request of plaintiff. In the case of dumb-waiter elevators, Kimball requested bids on repeated occasions and always obtained such bids from defendant, *but Kimball invariably awarded the contracts to competitors of defendant*. While plaintiff asked defendant for quotations on control equipment, plaintiff never at any time awarded a contract or purchase order to defendant for any type of control equipment. With respect to the Park Building job in 1950, plaintiff admitted that it procured successive bids from defendant on controls, and on other portions of the work; yet, the contract on the controls was awarded to Pacific Elevator and Equipment Company. The written instruments conclusively demonstrate that in 1950 there could not have been any "understanding" to award defendant the portions of elevator construction on which plaintiff asked defendant to bid, for the reason that plaintiff awarded nearly all of the elevator construction work to Pacific Elevator and Equipment Company (of which firm plaintiff was the territorial representative).

Contrary to the assertions of plaintiff, there was no proof of any "common practice for a wholesaler to contract not to sell to retail customers." Plaintiff's own witness, Mr. Charles M. Henker, expressly stated that there was no such

practice. The argument of plaintiff would not be in point anyway, for Utah Hotel Company had been and was then the customer of defendant, not the customer of plaintiff. Nor was there any evidence that defendant was a mere wholesaler, nor that plaintiff was a retailer for defendant. Plaintiff was not a "distributor" for defendant in any sense. Likewise, there was no evidence that defendant was a "supplier of plaintiff," for the evidence showed that in 23 years plaintiff purchased very little from defendant. Plaintiff was not even a regular customer. The dealings were only occasional, and plaintiff never purchased anything from defendant if plaintiff could make a better deal with someone else. Most of defendant's business was with other companies, and that fact was known to plaintiff. Although defendant issued catalogs, the plaintiff invariably asked defendant to submit written bids on equipment, except occasionally in the case of repair parts which plaintiff could not purchase from some other company. In more than 23 years, notwithstanding the numerous bids submitted by defendant at the specific requests of plaintiff, the plaintiff awarded defendant only 7 contracts, one of which was later canceled. During all of those years of negotiations, plaintiff did not even hint that it expected defendant to refrain from giving an honest bid to someone else. The argument of plaintiff ignores the admission of Mr. Connole at the trial that the subject of refraining from competition was *never discussed* (R. 632). There was no competent evidence that plaintiff ever asked defendant to refrain from giving a bid to any person or to a class of persons.

This Court did not hold that under the circumstances of this case plaintiff could have exacted from defendant a

covenant not to compete. However, it is not a question of what the parties might have done, but a question of what they actually did. In this case the subject of competition was never discussed. There was *no consideration* furnished by plaintiff to support any kind of an agreement, express or implied; and there was *no meeting of the minds* on "refraining from competition, for not even the plaintiff ever thought of such an idea until suit was instituted.

Counsel for plaintiff does not point out any competent evidence which could possibly spell out any of the essential elements of a contract, express or implied. If an "implied contract" could be fashioned out of the nebulous negotiations which came to naught—out of expired unaccepted offers and other fruitless negotiations, there is no situation in which a jury with sufficient imagination could not "find" a contract in spite of the lack of the meeting of minds and the absence of consideration and all other essentials of a valid contract.

The argument of plaintiff also seeks to avoid the uncontradicted testimony introduced by plaintiff which showed that the relations between plaintiff and Hotel Utah were unsatisfactory; that plaintiff had previously installed equipment which did not work successfully, and that plaintiff's bid to the hotel was not satisfactory in either form or content; and that the hotel management was unwilling to communicate further with plaintiff, and requested defendant to submit a firm bid on the entire modernization project.

The trial court should have granted the motion for a directed verdict, inasmuch as there was no competent evidence of the meeting of the minds nor of any legal consideration

nor any other essential elements of a contract to submit to the jury. There was no acceptance of an offer to give rise to a contract. Counsel for plaintiff has attempted to supply deficiencies in the evidence by arguments which are contrary to the evidence. The decision is right, and the criticism of it by plaintiff is without factual or legal basis.

Point 2

THERE IS NO SUBSTANCE TO THE ARGUMENT "THAT THE COURT IN ITS DECISION HAS MADE IRRECONCILABLE STATEMENTS RELATIVE TO THE ISSUES."

The plaintiff makes the unfounded assertion that this Honorable Court "has made irreconcilable statements relative to the issues." Plaintiff makes statements which are irreconcilable with the record on appeal.

On page 10 plaintiff takes issue with this Court for saying that "Hotel Utah indicated that it wanted another bid and there is no showing that it expected or desired anything other than a bona fide one." Plaintiff has no basis for complaining about that statement in the opinion, for plaintiff's own witnesses proved such to be the fact. Now plaintiff wants to erase that fact by saying that the "desires" of Hotel Utah "were not at issue before the trial court or the jury." Contrary to such assertion, the desires of Hotel Utah were very much in point. As owner of the property which was to be remodeled, Utah Hotel Company had the right to decide what work should be done, who should bid on the project and to whom

an award of a contract should be made. Utah Hotel Company was paying for the work. It had the unquestioned right to obtain a bona fide bid from defendant with which it had been doing business regularly for over two years. Any interference with such rights of Hotel Utah would be wrongful.

By saying that "The Hotel Utah is not a party to this proceeding," plaintiff seems to take the position that the rights of the hotel company should be disregarded. If there had been an agreement such as pleaded in the amended complaint, whereby it was alleged that defendant was to submit a bid \$18,000 or \$19,000 higher than the bid previously submitted by plaintiff, such an agreement would have been collusive and void as a fraud against Hotel Utah. Plaintiff, of course, went to trial on a theory which contradicted the theory of its amended complaint, in claiming that there really was no agreement for defendant to submit a bid to Hotel Utah at all, but an "implied agreement" to *refrain* from submitting a bid. Apparently, plaintiff took the position that the mere act of submission of a bid by defendant to plaintiff, gave rise to an "implied agreement," although there was no consideration, no acceptance of any offer, and no possible contract. Plaintiff changed its theory every time it seemed convenient to do so, and there was never any substance to any claim made by plaintiff.

Plaintiff even tries to contradict this Court on the basis of hearsay and other incompetent evidence. For example, plaintiff says that Mr. Connole "told" Mr. Jerry Smith of Hotel Utah that the hotel could use a bid from defendant "as an estimate." The testimony of Mr. Connole was incom-

petent as hearsay, for no representative of defendant was present. However, even the hearsay evidence does not bridge the gap for the plaintiff. Suppose for the sake of argument, (contrary to the actual testimony of Jerry Smith, given later), that Mr. Connole had actually told Jerry Smith (building superintendent of Hotel Utah, who had no authority to make contracts) that Hotel Utah could use the bid it received from defendant as "an estimate." *Just how could that fetter Hotel Utah?* Mr. Connole would have been presumptuous indeed to make such a statement. *And just how could such an alleged remark have prevented defendant from submitting a bona fide bid as requested by Utah Hotel Company?* Defendant did not promise to refrain from giving a firm bid. The evidence is conclusive that the only kind of a bid solicited by the hotel from defendant was a bona fide bid; and since the hotel had been a customer of defendant Elevator Supplies Company, Inc., for over two years, the hotel management expected a straight-forward bid from defendant. Such evidence was produced by plaintiff's own witness, Mr. Carpenter, manager of Hotel Utah.

Plaintiff tries to infer that someone on behalf of Hotel Utah agreed to receive "a mere estimate" from defendant. Not even Kimball's manager, Mr. Connole, made any such claim. Mr. Connole admitted that Jerry Smith stated that the hotel wanted a *bid* from defendant on the entire project. Mr. Connole made no pretense that he spoke to Mr. Carpenter, who was the only one who could make any contract for the hotel. An examination of Mr. Connole's testimony discloses that he made no claim to Jerry Smith that there was any agreement between plaintiff and defendant which would make

it impossible for defendant to submit a firm bid. What Mr. Connole attempted to do was to see if he could talk Jerry Smith and Hotel Utah out of getting a bid from defendant. Mr. Connole suggested that the hotel get a bid from Westinghouse. He knew the hotel wanted firm bids and not mere "estimates." Mr. Connole even resorted to misrepresentation by falsely saying to Jerry Smith that it would be useless to get a bid from defendant because it "would be identical with the bid" submitted by plaintiff. The bid which defendant submitted was vastly different from the abortive bid submitted to the hotel by plaintiff.

Plaintiff contradicts the record with impunity by claiming that Hotel Utah would have "received identical equipment" and a complete renovation at "lower cost" "if the defendant had remained true to its contract and submitted an estimate to the hotel rather than its firm quotation."

There was no contract whatsoever, and there was no possible meeting of the minds to refrain from submitting an honest bid to anyone. Never at any time prior to suit did plaintiff even pretend that there was any contract. When suit was filed plaintiff alleged *an express collusive agreement* to submit a bid. At the pre-trial conference, plaintiff apparently realized that it could not prevail on any claim that there was an express agreement for defendant to present a bid, particularly a bid which would have been collusive and void. Plaintiff abandoned the theory of its pleadings and claimed an "implied agreement" *to refrain from submitting a bid to Hotel Utah*. Plaintiff abandoned one fictitious claim and adopted another which was entirely inconsistent with the one

pleaded. In neither case did plaintiff allege any consideration, nor state a valid contract.

There is no excuse for plaintiff to say that Hotel Utah would have "received identical equipment" "at lower cost" if defendant had not submitted a firm bid to Utah Hotel Company. Plaintiff's abortive bid omitted a number of essential items, which refutes the contention that the hotel would have received identical equipment at less cost. There was no evidence that the hotel management would accept plaintiff's unsatisfactory bid. Plaintiff's own witness, Mr. Carpenter, testified that the hotel had had unsatisfactory dealings with plaintiff in the past, and that the bid of August 16, 1950, was wholly unacceptable to the hotel and the management refused to consider it further. He also said the hotel did not care to invite Kimball to submit any further bid. Thus, the contention that plaintiff would have been awarded the contract is a myth. Plaintiff neither had a contract with Hotel Utah nor with defendant. No reasonable mind could possibly reach the conclusion from the evidence that plaintiff would have been awarded the contract by Hotel Utah. And there was no one to blame except the plaintiff.

Plaintiff also criticizes this Court for saying that defendant understood that it was to submit a bona fide bid. The plaintiff's own evidence would preclude any other conclusion. Although Mr. Connoles testified that he told Mr. Roy C. Smith, district manager of defendant corporation, to submit a "supporting bid" to Hotel Utah, when pressed to state what Roy C. Smith said in response to the alleged request, Mr. Connoles admitted that *he could not remember* just what Roy C. Smith

said to him (R. 578). Consequently, there was no competent proof that defendant even made a naked promise.

It is obvious that there was no consideration of any kind furnished by plaintiff which could have made any promise binding, even if a promise had been made (of which there is no competent evidence), and even if such a promise could have been legal. Of course, even if plaintiff had asked defendant to submit to Hotel Utah something other than an honest bid, such a request could not have imposed any obligation on defendant. Plaintiff had no supervision over the affairs of defendant. If Kimball had become so arrogant as to attempt to dictate to Elevator Supplies Company, the latter certainly would not have had to pay any attention to such impudent conduct of Kimball. No one in his right mind would have the audacity to say that defendant had a duty to give Hotel Utah a dishonest bid. Plaintiff attempts to dignify a fictitious or collusive bid by calling it "an engineer's estimate."

There is no basis in the record for the argument that defendant misled the plaintiff. No tort claim was ever pleaded. There was no evidence that defendant ever misled the plaintiff, and no such claim was made at the trial. As pointed out hereinafter, the only party guilty of any misleading tactics and misrepresentations was the plaintiff.

The argument that defendant had not previously bid on an entire modernization job is irrelevant. It does not show any meeting of the minds to preclude defendant from submitting a bid to the owner of property. The evidence was undisputed that defendant submitted bids to other firms, and most of

defendant's business was with other companies. There is no evidence of any meeting of the minds between plaintiff and defendant nor any of the other essential elements of a contract, express or implied; and plaintiff admits there was no express contract.

Counsel for plaintiff says, "We respectfully challenge" the findings made by this Court "in opposition to the conclusions of the jury who had opportunity to peruse the documentary evidence." Plaintiff overlooks the fact that it was not the function of the jury to construe the written instruments; and if the trial court had construed those instruments offered by plaintiff according to their tenor, the case would not have been submitted to the jury. Those instruments consisted of requests for bids, and written offers which had never been accepted. Under no circumstances could any trier of the facts acting as a reasonable mind "find" an "implied contract not to compete" from the numerous stale written offers which had never been accepted.

This Honorable Court has not made any "irreconcilable statements" relative to the facts or the applicable principles of law. It is the argument of plaintiff in its petition for rehearing which is irreconcilable with both facts and law.

Point 3

THE ARGUMENT "THAT THE COURT HAS MIS-CONSTRUED THE FACTS IN ITS APPLICATION OF THE LAW AND HAS COMMITTED ERROR THEREBY",

DISREGARDS THE ADMITTED FACTS AND THE ESSENTIAL ELEMENTS OF A CONTRACT.

Counsel for plaintiff attempts to take issue with this Court for holding inadmissible the conclusions of Mr. Charles M. Henker. The quoted portions of the testimony of Mr. Henker set out on pages 13 to 17 of the petition for rehearing, certainly do not justify any alteration of the decision of this Court. The trial court should have sustained the objections to the conclusions of Mr. Henker, wherein he stated his "impressions" rather than the conversations. Council for plaintiff assumes that if a witness says he cannot relate a conversation word for word, he can draw conclusions and give his "impressions" instead of relating the substance of what was said by the persons involved in a conversation. The text statements quoted by plaintiff on pages 18 and 19 do *not* aid the position of the plaintiff, for they are not in point. None of them state that a witness can resort to conclusions.

There is no merit to the contention that this Honorable Court has misconstrued the facts in its application of the law. Plaintiff appears to be unwilling to deal with the salient facts. The testimony of Mr. Henker, which plaintiff neglected to quote, illustrates the viciousness of the statement of "impressions" and conclusions, for Mr. Henker later admitted that Pacific Elevator and Equipment Company was asked to give defendant a *firm bid*; that it was necessary to make a trip to Salt Lake City for that purpose, and that Pacific was unwilling to give defendant a firm bid on a portion of the job without a clearance from plaintiff, since plaintiff was territorial representative of Pacific.

The plaintiff sought to establish the untenable claim that an implied agreement to refrain from competing with an offeree can be created out of a series of expired unaccepted written offers and other negotiations which had terminated months previously, in which offers and negotiations there was not even any hint of refraining from submitting a bid to anyone else. Such a concept is contrary to elementary rules of contract which require an offer to be accepted in order to result in a valid contract. It is not the Supreme Court of Utah which is in error as inferred by plaintiff. The plaintiff is in error for assuming that a contract can be implied from stale unaccepted offers which do not even suggest that either the offeror or the offeree entertained any such idea as contended by plaintiff.

Point 4

THE CLAIM "THAT THROUGH ITS DECISION THE COURT WOULD COMMIT AN INJUSTICE," IS SPECIOUS, SINCE ONLY THE PLAINTIFF SOUGHT TO PERPETRATE INJUSTICE.

In the teeth of plaintiff's own admissions in the record, counsel for plaintiff makes the absurd argument that the "undisputed facts are contrary to the decision of July 21," and that "this Court would commit a dire injustice, in that the plaintiff would not only lose a contractual right, but also be held as a party to a collusive agreement."

This Court does not deprive plaintiff of any contractual right, for no such contractual right as contended for by

plaintiff ever came into existence. Furthermore, this Court is entirely right as to what it says about a collusive agreement. If plaintiff had entered into an agreement with defendant whereby defendant agreed to refrain from submitting a bona fide bid to Utah Hotel Company, when both parties knew the hotel sought good faith bids, such an agreement would have been collusive and void as a fraud on the hotel company as owner of the property. That would have been especially true in this case where the hotel company had been a customer of defendant for over two years, and relied on defendant to furnish an honest bid.

The decision of this Court fosters justice. What plaintiff seeks is not justice, but injustice to defendant. Prior to the date when suit was filed, plaintiff never made any claim to anyone that there was any kind of agreement existing between plaintiff and defendant, express or implied. From the time suit was filed until the date of pre-trial conference, the only kind of agreement which plaintiff alleged was *an express collusive agreement* whereby defendant supposedly promised *to submit a bid* to Utah Hotel Company in an amount \$18,000 or \$19,000 in excess of the bid previously submitted by plaintiff. Plaintiff alleged that in "violation" of such "agreement" defendant made a *firm bid* and accepted an award of the contract (R. 34-41). Thus, plaintiff asserted an express agreement to submit a collusive bid which was patently void. The cases cited by plaintiff on pages 20 and 21 of its petition for rehearing, are not in point, for plaintiff alleged matters which would show that plaintiff was barred from recovery as a matter of law.

Obviously, plaintiff did not expect to prevail on any such theory. Consequently, at the pre-trial conference plaintiff sought to escape from its plea of an illegal collusive agreement by asserting something entirely different—an implied agreement *to refrain from submitting any firm bid..* Nothing was stated which could be construed to amount to legal consideration for any “implied agreement” of any kind. The trial court should have summarily disposed of plaintiff’s fictitious and illegal claims by granting the motion to dismiss.

There is no justification for the argument of plaintiff on page 21 that “justice and fair dealing are sponsored” by plaintiff’s theory of the case. A scheme to submit a fictitious bid is fraudulent. Likewise any agreement to prevent an owner of property from getting an honest bid is anything but “justice and fair dealing.” Either scheme would be illegal, and give rise to a cause of action in favor of the victim. The further assertion on the part of the plaintiff that if the decision of July 21 is not reconsidered, “this court sanctions breach of contract, unfair dealing and dishonesty,” is downright impudent. There was no contract which could possibly be breached, since no contract ever came into existence on any such subject.

This Court does not sanction unfair dealing and dishonesty by rendering its decision, but quite the contrary. The plaintiff, however, sought to perpetrate injustice by attempting to exact thousands of dollars from the defendant by fictitious claims, without any semblance of consideration.

Plaintiff resorted to unfair tactics not only with defendant, but also with Hotel Utah. Mr. Connole induced the defendant

to submit its bid dated June 14, 1950, by falsely representing that Kimball was being awarded the modernization contract. Mr. Connole knew that statement was false, and he knew that the hotel wanted other bids, and that the hotel management had never promised to award the contract to plaintiff. When plaintiff learned that the hotel management wanted a bid from defendant on the entire modernization project, Mr. Connole tried to discourage the hotel from getting such a bid by falsely representing that the bid from defendant would be identical with the one submitted by plaintiff. The evidence is conclusive that the bid submitted by plaintiff was incomplete and omitted numerous essential items, and the bid submitted by defendant was entirely different, not only as to price, but as to substance and form.

As unsuccessful bidder, plaintiff was guilty of perpetrating a series of injustices. First, plaintiff wrongfully attempted to exact from defendant as successful bidder, a 10% "commission" although plaintiff knew defendant had never promised any commission or any other "cut," and plaintiff knew it was not employed by defendant. When defendant refused to submit to such an outrageous exaction, plaintiff tried to coax Utah Hotel Company to pay a "commission" which could not have been owing under any possible stretch of the imagination. When that scheme was rebuffed, plaintiff unconscionably attempted to induce Utah Hotel Company to cancel its contract with defendant on the passenger elevators and to issue a contract for the same price to the plaintiff (R. 590-591, 238, 240, 250-251, 239-240). Plaintiff admitted that defendant never told plaintiff at any time that defendant would give plaintiff a "cut" out of the job if the hotel company awarded

the contracts to defendant and that there were no promises (R. 589-590).

Plaintiff made further attempts to perpetrate injustice, in the effort to get something for nothing, by filing suit on a claim of a purported collusive agreement for defendant to submit a bid, and finally by claiming breach of an "implied agreement" not to submit a firm bid. Plaintiff wasted thousands of dollars of the time of the courts as well as subjecting the defendant to the unjust burden of defending against spurious claims.

Defendant has no disagreement with the general rule cited by plaintiff to the effect that where a contract exists, which is capable of a construction in accordance with fair dealing and justice, the courts will adopt such construction. Such rule has no application here, for there was no contract of any kind since plaintiff did not accept any offer of defendant to bring any contract into being. Furthermore, the citations furnished by plaintiff to the effect that agreements may be legal if made to protect rights and there is no purpose to injure or defraud others, are not in point. There were no contract rights for plaintiff to protect; but even if there had been an agreement to submit a bid which would not be a firm bid, such an agreement would have been one to injure or defraud Hotel Utah, and the agreement would have been void. However, plaintiff had no agreement of any kind with defendant, legal or illegal. Plaintiff had no contract rights with Utah Hotel Company to protect. Plaintiff neglected to submit a bid which covered the items required by the hotel, so that plaintiff had no hope of being awarded a contract.

The conduct of plaintiff in attempting to exact thousands of dollars from defendant as successful bidder, by one wrongful scheme after another, is reprehensible, to say the least. This Court correctly and appropriately ruled against the plaintiff in accordance with law and in harmony with the facts.

CONCLUSION

The decision of this Honorable Court is right and just. It remedies a grievous injustice. There is neither factual nor legal basis for disturbing the decision of this Court handed down on July 21, 1954. The petition for rehearing filed by plaintiff misstates the facts, misconstrues the decision of this Court, and makes unwarranted objections. There is no merit to the petition for rehearing, for it does not seek to promote justice, but injustice. Said petition for rehearing should be denied without further hearing or argument.

Respectfully submitted,

PAUL E. REIMANN and
HOWARD J. CANTUS,
Attorneys for Appellant.