

2010

Keybank National Association v. Systems West Computer Resources, Inc., and Nancy H. Halverson : Brief of Appellee

Utah Court of Appeals

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JUDICIAL BRANCH
COURT

IN THE UTAH COURT OF APPEALS

KEYBANK NATIONAL
ASSOCIATION,

Plaintiff/Appellee,

vs.

SYSTEMS WEST COMPUTER
RESOURCES, INC., and NANCY H.
HALVERSON,

Defendants/Appellants.

No. 20100101-CA

SECOND SUPPLEMENTAL BRIEF OF APPELLEE

On Appeal from the Third Judicial District Court, Salt Lake County
Case No. 080921404, Honorable Paul G. Maughan

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SUBMITTED AT THE REQUEST OF THE COURT

TABLE OF CONTENTS

SUPPLEMENTAL ARGUMENT	1
I. The Modification Agreement is Valid and Enforceable.....	1
II. The Modification Agreement was Signed by the Parties to be Charged, Making It Enforceable Against the Borrowers Even If KeyBank Did Not Sign.	2
III. The Borrowers Cannot Dispute That They Were in Material Breach, Relieving KeyBank of Any Obligation to Continue Lending.	4
CONCLUSION	5

TABLE OF AUTHORITIES

CASES

<u>Aquagen Intern. Inc. v. Calrae Trust</u> , 972 P.2d 411 (Utah 1998)	1
<u>Atlas Corp. v. Clovis Nat'l Bank</u> , 737 P.2d 225 (Utah 1987)	4
<u>Becker v. HSA/Wexford Bancgroup, L.L.C.</u> , 157 F. Supp. 2d 1243, 1248-1249 (D. Utah 2001)	4
<u>Cessna Fin. Corp. v. Meyer</u> , 575 P.2d 1048 (Utah 1978)	1
<u>Holbrook v. Master Protection Corp.</u> , 883 P.2d 295 (Utah Ct. App. 1994)	5
<u>John Deere Co. v. A & H Equip., Inc.</u> , 876 P.2d 880 (Utah 1994)	1
<u>Provo City Corp. v. Nielson Scott Co.</u> , 603 P.2d 803 (Utah 1979)	4
<u>Resource Management Co. v. Weston Ranch & Livestock Co., Inc.</u> , 706 P.2d 1028 (Utah 1985)	1, 2
<u>Valcarce v. Bitters</u> , 362 P.2d 427 (Utah 1961)	1, 2
<u>Weightman v. Caldwell</u> , 17 U.S. 85 (1819)	3
<u>Wright Express Fin. Servs. Corp. v. ACAS Acquisition (Logex), Inc.</u> , 2007 U.S. Dist. LEXIS 84266 (D. Utah Nov. 14, 2007)	2

STATUTES

Utah Code Ann. § 25-5-4(1)(f)	2
Utah Code Ann. § 25-5-4(2)(a)(i)(A)	3

SUPPLEMENTAL ARGUMENT

By letter dated April 6, 2011, the Court requested that the parties “address the issue of whether the Modification of Business Loan Agreement and Promissory Note is an enforceable agreement.”

I. The Modification Agreement is Valid and Enforceable.

Under Utah law, the existence of a valid, enforceable contract is a question of law. John Deere Co. v. A & H Equip., Inc., 876 P.2d 880, 883 (Utah 1994). The “formation of a contract ‘requires a bargain in which there is a manifestation of mutual assent to the exchange and . . . consideration.’” Aquagen Intern. Inc. v. Calrae Trust, 972 P.2d 411, 413 (Utah 1998) (citation omitted). Thus, “[a] condition precedent to the enforcement of any contract is that there be a meeting of the minds of the parties, which must be spelled out, either expressly or impliedly, with sufficient definiteness to be enforced.” Valcarce v. Bitters, 362 P.2d 427, 428 (Utah 1961). “Contractual mutual assent requires assent by all parties to the same thing in the same sense so that their minds meet as to all the terms.” Cessna Fin. Corp. v. Meyer, 575 P.2d 1048, 1050 (Utah 1978).

Moreover, “[f]or a promise to be legally enforceable, it must be supported by consideration.” Resource Management Co. v. Weston Ranch & Livestock Co., Inc., 706 P.2d 1028, 1036 (Utah 1985). “Consideration is an act or promise, bargained for and given in exchange for a promise.” Id. Any act or promise, bargained for and given in exchange for a promise, constitutes consideration. See id.

In this case, the Modification of Business Loan Agreement and Promissory Note (R. 972–76), dated October 2, 2006 (the “Modification Agreement”), is valid and enforceable. It clearly “spell[s] out” the “express” terms of the parties’ agreement, and thereby evidences “a meeting of minds of the parties . . . with sufficient definiteness to be enforced.” See Valcarce, 362 P.2d at 428. It is also supported by consideration—including, for example, the Borrowers’ payment of an extension fee and release and waiver of claims, in exchange for KeyBank’s agreement to extend the loan term, which KeyBank actually did. (R. 972–73, 977–80.)

II. The Modification Agreement Was Signed by the Parties to be Charged, Making It Enforceable Against the Borrowers Even If KeyBank Did Not Sign.

Further, the Modification Agreement was signed by the Borrowers, as required by statute to be enforceable. “The general rule in Utah is that a credit agreement is void unless it is in writing and signed by the party to be charged with the agreement.” Wright Express Fin. Servs. Corp. v. ACAS Acquisition (Logex), Inc., 2007 U.S. Dist. LEXIS 84266 (D. Utah Nov. 14, 2007) (unpublished/attached); see also Utah Code Ann. § 25-5-4(1)(f) (“(1) The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement: . . . (f) every credit agreement.”). This is based on the well-settled and universally recognized principle that an agreement “need only be signed by that party who is sought to be charged.” Weightman v. Caldwell, 17 U.S. 85, 89 (1819) (citations omitted).

The Utah Code defines “credit agreement” to mean “an agreement by a financial institution to: (I) lend, delay, or otherwise modify an obligation to repay money, goods, or things in action; (II) otherwise extend credit; or (III) make any other financial accommodation.” Utah Code Ann. § 25-5-4(2)(a)(i)(A). Here, the Modification Agreement was made by KeyBank to “lend,” “modify,” “extend credit,” and make other “financial accommodation[s]” for the benefit of the Borrowers, based on the original Promissory Note, dated January 10, 2001. (R. 934–35.) Accordingly, the Modification Agreement constitutes a “credit agreement” for which a signature “by the party to be charged with the agreement” is required for enforceability.

Although KeyBank did not sign the Modification Agreement, the Borrowers—the parties who were “sought to be charged” with the Modification Agreement—did. Moreover, all subsequent modifications and change in terms agreements executed by the parties (see R. 977–80) demonstrate KeyBank’s acceptance and ratification of the Modification Agreement and the Borrowers’ understanding that the Modification Agreement was valid and enforceable.

A party can indicate its intention to enter into a binding contract through its actions rather than its signature. It is axiomatic that a party may become bound through its performance to a contract that it has not signed . . . It is a fundamental contract law that the parties may become bound by the terms of a contract even though they did not sign the contract, where they have otherwise indicated their acceptance of the contract, or led the other party to so believe that they have accepted the contract. . . . It is established that a signature is not always necessary to create a binding agreement. . . . It is likewise established that the purpose of a signature is to demonstrate “mutuality of assent” which could as well be shown through the conduct of the parties. . . . That [a party] failed to sign the agreement is immaterial for any written contract though signed only by one of the parties binds the other if he accepts it and both act in reliance on it as a valid contract. . . . If

a person has accepted a written agreement and has acted upon it he is bound by it

Becker v. HSA/Wexford Bancgroup, L.L.C., 157 F. Supp. 2d 1243, 1248-1249 (D. Utah 2001) (citations omitted).

As a matter of undisputed fact and law, the parties entered into subsequent agreements on the strength of the prior Modification Agreement. (R. 977-80.)

Otherwise, the loans would previously have come due, and the Borrowers would already have been in default for failure to pay when due. Either way, summary judgment based on the Borrowers' defaults was appropriately granted.

III. The Borrowers Cannot Dispute That They Were in Material Breach, Relieving KeyBank of Any Obligation to Continue Lending.

There can be no dispute that the Borrowers committed numerous material breaches and defaults under the loan documents, including the Modification Agreement. "The law is well settled that a material breach by one party to a contract excuses further performance by the non-breaching party." Holbrook v. Master Protection Corp., 883 P.2d 295, 301 (Utah Ct. App. 1994).

In this case, the Borrowers indisputably breached the Modification Agreement and other loan documents by failing to provide accounts receivable information to maintain their borrowing base, failing to provide financial statements, failing to maintain the minimum assets-to-liabilities ratio, failing to provide tax returns, becoming insolvent, failing to provide Halverson's personal financial information, and failing to disclose a change in ownership and material adverse change in financial condition, among other things. See Appellee's Br., pp. 10–12 (citing the record). The District Court correctly

concluded that these various breaches and defaults were material, that the Borrowers did not dispute them, and that KeyBank was entitled to summary judgment as a result. Because of these breaches, the Borrowers are and were in no position to allege that KeyBank had an obligation to continue lending to them, under the Modification Agreement or otherwise.

CONCLUSION

For the foregoing reasons, together with those reasons set forth in KeyBank's original and first supplemental briefs, this Court should affirm the District Court's judgment.

DATED this 19th day of April, 2011.

VAN COTT, BAGLEY, CORNWALL &
McCARTHY

By: 

Stephen K. Christiansen
Gerald H. Suniville
Seth M. Mott
Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify that I caused two (2) true and correct copies of the within and foregoing **SUPPLEMENTAL BRIEF OF APPELLEE** to be mailed, postage prepaid, this 19th day of April, 2011, to the following counsel of record:

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A handwritten signature in black ink, appearing to read "M. Boley", is written over a horizontal line.

ATTACHMENT

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Citation: **2007 U.S. Dist. LEXIS 84266**

*2007 U.S. Dist. LEXIS 84266, **

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WRIGHT EXPRESS FINANCIAL SERVICES CORPORATION, Plaintiff, vs. ACAS ACQUISITION
(LOGEX), INC., ET AL., Defendants.

Case No. 2:06CV1039DAK

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

2007 U.S. Dist. LEXIS 84266

November 14, 2007, Decided

November 14, 2007, Filed

PRIOR HISTORY: Wright Express Fin. Servs. Corp. v. ACAS Acquisition (Logex), Inc., 2007
U.S. Dist. LEXIS 81359 (D. Utah, Nov. 1, 2007)

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff was a company that established two lines of commercial credit for defendant parent corporation. The court granted plaintiff's motion for summary judgment and entered judgment against the parent in the amount of \$ 3,442,802 for failing to pay its obligations under the agreements. Plaintiff presently brought the motion for summary judgment for the same amount against the other two defendants, the parent's wholly-owned subsidiaries.

OVERVIEW: Plaintiff brought the summary judgment motion against the subsidiaries because it claimed that the parent was just a shell holding company. The parent was the only signatory to the two written line of commercial credit agreements with plaintiff. One of the agreements was pursuant to a Master Card agreement. The subsidiaries admitted that they had failed and refused to pay the amounts owed to plaintiff under the agreements, but asserted that they were not responsible for the parent's agreements. The parent suffered severe financial problems and had been unable to pay its debts. Plaintiff claimed that under Utah Code Ann. § 25-5-4(2)(e), which was part of the Utah Statute of Frauds, the subsidiaries were liable to it under the cardholder agreements that they received when it shipped the credit cards to employees of the subsidiaries and they used them for the business purposes of the subsidiaries. The court did not believe that plaintiff's recourse was in the Statute of Frauds. Rather, plaintiff appeared to have adequate recourse under its unjust enrichment claim and under contract law. The court allowed defendants 20 days to submit a surreply on the unjust enrichment claim.


OUTCOME: Plaintiff's motion for summary judgment with respect to the Statute of Frauds was denied. The motion on plaintiff's unjust enrichment claim was ordered briefed according


to the schedule set forth by the court.


CORE TERMS: card, unjust enrichment, summary judgment, credit agreement, cardholder, charge cards, subsidiary, conferee, owing, admit, inequitable, signature, recourse, user, commercial credit, credit lines, amount owed, written agreements, oral argument, consolidated, centralized, signatory, shipment, billings, reply


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Contracts Law > Statutes of Frauds > Exceptions > General Overview 


HN1  See Utah Code Ann. § 25-5-4(2)(e).


Contracts Law > Statutes of Frauds > Requirements > Signatures 

HN2  Unsigned form credit agreements, identical in all respects to the agreements signed between a plaintiff and a defendant parent corporation, forwarded to known related parties covered by signed agreements, cannot create separate obligations on the part of the subsidiaries. [More Like This Headnote](#)

Contracts Law > Statutes of Frauds > Requirements > Signatures 

HN3  The general rule in Utah is that a credit agreement is void unless it is in writing and signed by the party to be charged with the agreement. Utah Code Ann. § 25-5-4(1)(f) (Supp. 2007). The U.S. District Court for the District of Utah is unwilling to expand the exception to the Statute of Fraud's signature requirement, which applies when there is no written credit agreement, to a situation where the card user was a user contemplated by and/or covered by existing signed agreements. [More Like This Headnote](#)




Contracts Law > Types of Contracts > Implied-in-Law Contracts 

HN4  Under Utah law, to establish a claim of unjust enrichment, a plaintiff must prove: (1) a benefit conferred on one person by another; (2) the conferee appreciates or has knowledge of the benefit; and (3) the conferee retains the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value. [More Like This Headnote](#)

Available Briefs and Other Documents Related to this Case:

U.S. District Court Motion(s)

COUNSEL: [***1**] For Wright Express Financial Services, a federally-insured Utah Industrial Bank, chartered through the laws of Utah, Plaintiff: Jeffrey L. Shields , Mark L. Callister , LEAD ATTORNEYS, CALLISTER NEBEKER & MCCULLOUGH, SALT LAKE CITY, UT.

For ACAS Acquisition (Logex), a California corporation, Logex, a Delaware corporation, Logistics Express, Defendants: Alan L. Sullivan , LEAD ATTORNEY, Amber M. Mettler , Matthew L. Lalli , SNELL & WILMER (UT), SALT LAKE CITY, UT.

JUDGES: Dale A. Kimball , United States District Judge.

OPINION BY: Dale A. Kimball 

OPINION

MEMORANDUM DECISION AND ORDER

This matter is before the court on Plaintiff Wright Express Financial Services Corporation's Motion for Summary Judgment. The court held a hearing on the motion on October 11, 2007. At the hearing, Plaintiff was represented by Mark Callister, and Defendants were represented by Matthew Lalli and Amber Mettler. The court took the motion under advisement. The court has carefully considered all pleadings, memoranda, and other materials submitted by the parties. The court has further considered the arguments made by counsel at the hearing and the law and facts relevant to the motions. Now being fully advised, the court enters the following Memorandum [*2] Decision and Order.

BACKGROUND

On December 5, 2005, Plaintiff Wright Express Financial Services entered into a Business Charge Account Agreement ("Fleet Charge Agreement") with Defendant ACAS Acquisition, Inc. ("ACAS"). Under this Agreement, Plaintiff established a line of commercial credit for ACAS in the amount of \$ 3 million. Also, on December 29, 2005, ACAS entered into a Corporate Card Program Master Agreement with Plaintiff. Under this MasterCard Agreement, Plaintiff established a line of commercial credit for ACAS in the amount of \$ 350,000. This amount was increased to \$ 600,000 in March 2006, and then increased again to \$ 1,600,000 in April 2006.

This court granted Plaintiff's summary judgment and entered judgment against ACAS in the amount of \$ 3,442,802.33 for failing to pay its obligations owing under the agreements. Plaintiff claims, however, that ACAS is just a shell holding company. Therefore, Plaintiff brings this motion for summary judgment for the same amount against the other two defendants, Logex Corporation and Logistics Express, Inc. ("LEI"), both of which are wholly-owned subsidiaries of ACAS. Defendant LEI is a company in the business of transporting gas and other [*3] related products. LEI is a subsidiary of Defendant Logex, which, in turn, is a subsidiary of ACAS.

ACAS was the only signatory to the written agreements with Plaintiff. However, ACAS sent the combined financial and asset information of ACAS, Logex, and LEI when it was applying for the credit. In December 2006, Plaintiff requested that Logex and LEI sign the agreements as well. LEI and Logex refused to execute the agreements.

Pursuant to the Fleet Charge Agreement and the MasterCard Agreement between Plaintiff and ACAS, Plaintiff issued charge cards to employees, representatives, or agents of Logex and LEI who were authorized by ACAS to use the charge cards in connection with business operations. The charges on these cards were made under the credit lines established by Plaintiff as a result of the agreements with ACAS. ACAS admits that the \$ 3,442,802.33 owing to Plaintiff for charges made by employees of Logex and LEI were incurred pursuant to the credit line provided to ACAS. Defendants Logex and LEI were aware that their employees were charging business-related expenses on the cards issued by Plaintiff.

Included in each shipment of Fleet charge cards to employees of Logex and LEI was [*4] a copy of the Wright Express Business Charge Account Agreement. The Cardholder Agreement states, "Your use of your account indicates your acceptance of this Wright Express Business Charge Account Agreement." The Fleet charge cards contained the statement: "Use of this card constitutes acceptance of the terms and conditions of the cardholder agreement under which this card was issued, as amended from time to time." The Fleet Cardholder Agreement between Plaintiff and ACAS provides that the "business card holder" agrees to pay "the face amount of all such credit obligations created by use of a Card."

Included in each shipment of MasterCards was a copy of the MasterCard Cardholder Agreement, which states, "Any use of your Card or Account confirms your acceptance of the terms and conditions of this Cardholder Agreement." On the back of each Mastercard issued to these

employees was a statement that reads, "Your card is issued and serviced by Wright Express Financial Services Corporation pursuant to license by MasterCard International. Its use is subject to the terms and conditions of your Card Member Agreement." The MasterCard Cardholder Agreements provides that each entity receiving a card [*5] under the MasterCard Agreement is responsible to pay the full amount owed on the Account.

The parties appear to dispute that the MasterCard Agreement included a provision whereby the parties agreed to centralized billings. The parties also dispute whether centralized billings is relevant to the issues presented in this motion.

Defendants Logex and LEI admit that they have failed and refused to pay the amounts owed to Plaintiff under the Fleet Charge Agreement and the MasterCard Agreement. Logex and LEI assert that they are not responsible for ACAS's agreements. ACAS has suffered severe financial problems and has been unable to pay its debts.

DISCUSSION

Plaintiff's Motion for Summary Judgment

Although Plaintiff has already obtained judgment against ACAS for the amount due and owing under its agreements, Plaintiff argues that ACAS is merely a holding company with no real ability to pay the debt. Therefore, Plaintiff seeks judgment against Defendants Logex and LEI for the same amount it received judgment against ACAS.

Plaintiff claims that under Utah Code Annotated Section 25-5-4(2)(e), Logex and LEI are liable to Plaintiff under the cardholder agreements that Defendants received when Plaintiff [*6] shipped the credit cards to employees of Logex and LEI and used them for the business purposes of Logex and LEI. Section 25-5-4(2)(e), which is part of the Utah Statute of Frauds, provides as follows:

HN1 (e) A credit agreement is binding and enforceable without any signature by the party to be charged if:

- (i) the debtor is provided with a written copy of the terms of the agreement:
- (ii) the agreement provides that any use of the credit offered shall constitute acceptance of those terms; and
- (iii) after the debtor receives the agreement, the debtor, or a person authorized by the debtor, requests funds pursuant to the credit agreement or otherwise uses the credit offered.

Id.

In this case, Plaintiff sent copies of the Fleet Charge Agreement and MasterCard Cardholder Agreement to certain officers of Logex and LEI along with cards that were used by those officers. Defendants, however, contend that it is inappropriate to apply an exception to the Statute of Frauds in this situation because there is a signed agreement between Plaintiff and ACAS for the credit that was used.

HN2 Unsigned form credit agreements, identical in all respects to the agreements signed between Plaintiff and ACAS, forwarded to [*7] known related parties covered by signed agreements, cannot create separate obligations on the part of the subsidiaries. If such actions could create new contractual obligations between the parties, it would violate the integration clauses in the Credit Agreements. Both agreements state that they contain the entire agreement between the parties and that no modification is valid unless set forth in a written agreement signed by both parties.

HN3 The general rule in Utah is that a credit agreement is void unless it is in writing and signed by the party to be charged with the agreement. Utah Code Ann. § 25-5-4(1)(f) (Supp. 2007). The court is unwilling to expand the exception to the Statute of Fraud's signature requirement, which applies when there is no written credit agreement, to a situation where the card user was a user contemplated by and/or covered by existing signed agreements. Although the court does not condone a party's actions to avoid payment of their credit obligations, the court does not believe that Plaintiff's recourse lies in the Statute of Frauds. Rather, Plaintiff appears to have adequate recourse under its unjust enrichment claim and under contract law.

There are potential **[*8]** ambiguities in the agreements with respect to Logex's and LEI's potential liability under the agreements. Defendants argue that under the terms of the agreements they are not liable for the credit agreements entered into between Plaintiff and ACAS, and this court should not expand liability to known third parties who were not made signatories to the agreements. The signed agreements identify only ACAS as the company responsible to pay Plaintiff. But ACAS's credit application to Plaintiff consisted of Consolidated Financial Statements that included the accounts of ACAS, Logex, and LEI. In other words, ACAS used the assets of Logex and LEI to obtain credit from Plaintiff. For purposes of this motion, the court need not resolve factual issues relating to Logex and LEI's liability on the written credit agreement executed by ACAS.

However, the summary judgment motion now before the court also seeks summary judgment on Plaintiff's unjust enrichment claim. **HN4** Under Utah law, to establish a claim of unjust enrichment, a plaintiff must prove: (1) a benefit conferred on one person by another; (2) the conferee appreciates or has knowledge of the benefit; and (3) the conferee retains the benefit under **[*9]** such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value. *Bluffdale City v. Smith*, 156 P.3d 175, n.2, 2007 UT App 25 (Utah Ct. App. 2007).

In this case, the CFO of Logex and ACAS submitted a credit application that represented ACAS as a consolidated company comprised of the assets of Logex and LEI. Both defendants admit that charge cards issued by Plaintiff were used by Logex or LEI employees for business expenses. Having used their assets to obtain credit from Plaintiff that was in fact used in the operation of their business, allowing Logex and LEI to retain this benefit without payment to Plaintiff would be inequitable.

Based on the record presently before the court, the court is prepared to rule in Plaintiff's favor on the unjust enrichment claim. Nevertheless, the court recognizes that Plaintiff did not move for summary judgment on its unjust enrichment claim until its reply memorandum, and neither party directly addressed the issue at oral argument. In addition, Defendants changed counsel between the briefing of the motion and oral argument. Because Defendants have not addressed the unjust enrichment claim, the court will allow Defendants **[*10]** twenty days to submit a surreply on the unjust enrichment claim. Plaintiffs may then submit a final reply on the issue within ten days. The court will then issue its ruling on the unjust enrichment claim without a further hearing.

CONCLUSION

Based on the above reasoning, Plaintiff's Motion for Summary Judgment with respect to the Statute of Frauds is DENIED. The motion on Plaintiff's unjust enrichment claim shall be briefed according to the schedule set forth above.

DATED this 14th day of November, 2007.

BY THE COURT

/s/ Dale A. Kimball

DALE A. KIMBALL

United States District Judge







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