

1988

Michael Strand, Lois Strand, and Mingo Oil
Company v. David Hammons, The Estate of Herb
Hammons, and Electro Technical Corporation :
Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

John C. Green, Kim M. Luhn; Gustin, Green, Stegall and Liapis; attorneys for respondents.

Daniel W. Jackson; attorney for appellants.

Recommended Citation

Brief of Appellant, *Strand v. Hammons*, No. 880250.00 (Utah Supreme Court, 1988).

https://digitalcommons.law.byu.edu/byu_sc1/2213

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

BRIEF

UTAH
DOCUMENT
KFU
50
.A10
DOCKET NO. 860250CA

SUPREME COURT OF THE STATE OF UTAH

MICHAEL STRAND, LOIS STRAND,
and MINGO OIL COMPANY, a Utah
corporation,

Plaintiffs,

vs.

DAVID HAMMONS, THE ESTATE OF
HERB HAMMONS, (Deceased), and
ELECTRO TECHNICAL CORPORATION,
a Utah corporation,

Defendants.

Supreme Court No. 860519

88

BRIEF OF APPELLANTS

APPEAL BY PLAINTIFFS AND COUNTERCLAIM DEFENDANTS
FROM THE FINAL JUDGMENT OF THE HONORABLE
JUDITH M. BILLINGS DISMISSING PLAINTIFF'S
CAUSES OF ACTION AND ENTERING JUDGMENT AGAINST
COUNTERCLAIM DEFENDANTS

Daniel W. Jackson
The Walker Center, Suite 560
173 South Main Street
Salt Lake City, UT 84111
Telephone (801) 328-1800
Attorney for Appellant

John C. Green
48 Post Office Place
Third Floor
Salt Lake City, UT 84101

FILED
AUG 10 1987

Clerk, Supreme Court, Utah

FILED
JUN 8 1987

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

| | Page |
|--|------|
| STATEMENTS OF ISSUES PRESENTED ON APPEAL | 1 |
| STATEMENT OF THE CASE | 1 |
| STATEMENT OF FACTS | 3 |
| SUMMARY OF ARGUMENTS | 5 |
| ARGUMENTS | |
| THE SECOND PROMISSORY NOTE IN THE AMOUNT OF \$250,000 IS UNENFORCEABLE DUE TO LACK OF CONSIDERATION | 6 |
| THE CONVERSION OF THE INITIAL LOAN INTO AN INVESTMENT CONSTITUTES AN ACCORD AND SATISFACTION | 12 |
| THE TRIAL COURTS FINDING THAT NO ACCORD AND SATISFACTION WAS ENTERED INTO IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE | 16 |
| AN ENFORCEABLE CONTRACT EXISTED BETWEEN THE PARTIES REGARDING THE DEFENDANT'S AGREEMENT TO PAY PLAINTIFF'S \$500,000 | 18 |
| DAVID HAMMONS IS PERSONALLY LIABLE FOR THE \$250,000 INVESTMENT | 21 |
| CONCLUSION | 22 |
| APPENDIX | 25 |

CASES CITED

| | Page |
|---|--------------|
| <u>Bennion v. LeGrand Johnson, Const. Co., 701</u> <u>P.2d 1078 (Utah, 1985)</u> | 12, 15 |
| <u>Baggs v. Anderson, 528 P.2d 141 (Utah 1974)</u> | 10 |
| <u>Carroccia v. Todd, 615 P.2d 225 (Mont. 1980)</u> | 10 |
| <u>First Investment Co. v. Anderson, 621 P.2d 683</u> <u>(Utah 1980)</u> | 7 |
| <u>General Insurance Co. of America v. Carnicero</u> <u>Dynasty, Corp. 545 P.2d 502 (Utah 1976)</u> | 5, 8, 10, 11 |
| <u>Golden Key Realty, Inc. v. Mantas, 699 P.2d</u> <u>730 (Utah, 1985)</u> | 13 |
| <u>Hurley v. Hurley, 615 P.2d 256 (N.M. 1980)</u> | 10 |
| <u>Lawrence Const. Co. v. Holmquist, 642 P.2d 382,</u> <u>(Utah, 1982)</u> | 20 |
| <u>Petersen v. Petersen, 709 P.2d 372 (Utah, 1985)</u> | 17 |
| <u>Pierpont v. Hydro Manufacturing, Company, Inc.,</u> <u>22 Ariz. App. 252, 526 P.2d 776 (1974)</u> | 7 |
| <u>Resource Management Co. v. Weston Ranch,</u> <u>706 P.2d 1028, (Utah 1985)</u> | 7 |
| <u>Sugarhouse Finance Co. v. Anderson, 610 P.2d 1369</u> <u>(Utah 1980)</u> | 13 |

STATEMENTS OF ISSUES PRESENTED ON APPEAL

1. Whether the Court erred as a matter of law in its conclusion that delivery of \$150,000 for final payment of a prior investment can constitute consideration for a unrelated Promissory Note.

2. Whether the Trial Court erred as a matter of law in its conclusion that Electro Technical Corporation's conversion of a \$100,000 loan into an investment did not constitute an accord and satisfaction of that obligation.

3. Whether the Trial Court erred as a matter of law in its conclusion that Defendants did not agree to pay Plaintiffs \$500,000 for the purchase of a 40% interest in Mingo 13-13 oil well.

4. Whether the Court erred as a matter of law in concluding that Defendant W. David Hammons was not personally liable under the investment Agreement.

STATEMENT OF THE CASE

On or about October 27, 1982, Gregory G. Skoradas, Esq. filed the Complaint in the instant case as Attorney for Plaintiffs Michael Strand, Lois Strand and Mingo Oil Company. On or about November 23, 1982, Defendant W. David Hammons filed

his answer to Plaintiffs' Complaint. On or about December 27, 1982, Defendant Estate of Herb Hammons (deceased) filed its answer. On or about November 23, 1982, Defendant Electro Technical Corporation filed its answer and counterclaim in which it sought to collect \$350,000 from Mingo Oil Company and Mike Strand.

On May 18, 1983, the Court entered Summary Judgment against Counterclaim Defendants. On September 16, 1983, the Trial Court granted Counterclaim Defendants relief from that Judgment pursuant to Rule 60(b) Utah Rules of Civil Procedure because it found that W. David Hammons had submitted a false and fraudulent Affidavit in support of the Counterclaim Plaintiff's Motion for Summary Judgment.

The matter came on for trial before the Honorable Judith M. Billings on July 30, 1986. Following presentation of Plaintiffs' case the Trial Court dismissed all actions against the Defendants and proceeded to hear the Counterclaim Plaintiff's case. Following trial on the Counterclaim the Court entered judgments against the Counterclaim Defendants. Plaintiffs and Counterclaim Defendants filed Notice of Appeal from the Judgment on September 19, 1986.

STATEMENT OF FACTS

On or about December 1, 1981, Plaintiff Michael Strand and Defendant Herb Hammons began discussing Defendants' participation in the drilling of an oil well on the Overland Dome Oil Field, Carbon County Wyoming. Following some initial conversations, Plaintiff Strand offered to sell to Defendants a 5% interest in the well for \$100,000.00. (Transcript p. 106, lines 10-11). At the time of these negotiations, Mr. Strand needed \$100,000 for payment of an expense relating to the drilling of the well. On December 1, 1981, Herb Hammons loaned \$100,000 to Mike Strand and received from him a hand written Promissory Note evidencing that debt. (Exhibit 1-D). The note called for repayment of the \$100,000 on December 10, 1981 and was given so that Defendants would have additional time to decide if they wanted to make an investment in the well.

According to the testimony of David Hammons, the Defendants made their decision to invest in the well sometime around the middle of December, 1981. At that time they agreed to acquire 40% of the well by paying \$250,000 in cash and giving Mingo Oil Company a promissory note for an additional \$250,000. (Transcript, p. 111, lines 19-25). As part of this decision, the Defendants converted the initial obligation of \$100,000 which was evidenced by the first Promissory Note into the investment and decided to invest an additional \$150,000 in cash. (Transcript, p. 149-150, lines 23-8).

Following their acceptance of Plaintiffs' offer to sell 40% of the Well for \$500,000, the Defendants delivered the remaining \$150,000 investment to Mike Strand. At the time of that delivery, Mingo Oil Company gave Defendant Electro Technical Corporation a Promissory Note for \$250,000 which was guaranteed by M & L Investments. (Exhibit 2-D). The Plaintiffs alleged that this second Promissory Note evidenced a renewal of the initial \$100,000 obligation and an additional \$150,000 debt. (Transcript, p. 13, lines 5-9). However at trial, Defendants contested Plaintiffs' position and Defendant David Hammons testified that; (1) the \$250,000 note had nothing to do with the original obligation; (Transcript, p. 107-108, lines 22-6); (2) the original obligation was converted to an investment (Transcript, p. 133, lines 11-16); and (3) the decision to invest the additional \$150,000 was made prior to the receipt of the second Promissory Note. (Transcript, p. 134, lines 17-21). In fact, Defendant Hammons testified that the Promissory Notes stood on their own. (Transcript, p. 108, line 24).

After the payment of the monies and conversion of the prior obligation, the Parties instructed counsel to draw up the legal documents memorializing the agreement and Defendant Electro Technical Corporation took advantage of the tax credit created by the \$500,000 investment. (Transcript, p. 77, lines 3-8). Before the formal documents were signed, Defendant David

Hammons and Plaintiff Mike Strand executed an informal statement which memorialized their Agreement. (Exhibit P-12). Formal Agreements and a Promissory Note in the amount of \$250,000 were never executed by the Defendants because of the death of Herb Hammons and the initiation of an unrelated Chapter 11 proceeding which stopped all activities on the Overland Dome Oil Field, including completion of the oil well in question.

SUMMARY OF ARGUMENTS

First Argument: Lack of Consideration: The Second Promissory Note (Exhibit 2-D) is unenforceable for lack of consideration. Counterclaim Plaintiff delivered \$150,000.00 Mingo Oil Company on December 30, 1981 as payment for its investment in Mingo 13-13 Oil Well pursuant to a prior agreement between the parties. At the time the money was delivered Mingo Oil Company executed the note in question. Counterclaim Plaintiff's prior contractual obligation to pay the money means that the delivery of the \$150,000 can not constitute consideration for the execution of the Promissory Note. General Insurance Co. of America v. Carnicero Dynasty, Corp. 545 P.2d 502 (Utah, 1976).

Second Argument: Accord and Satisfaction: The Counterclaim Plaintiff admitted that the original obligation was converted into an investment pursuant to an Agreement between the parties. This subsequent Agreement calling for a different

performance discharged the original obligation and constituted an Accord and Satisfaction as a matter of law.

Third Argument: Accord and Satisfaction: The Trial Court's finding that testimony presented at trial did not establish the existence of an Accord and Satisfaction is not supported by substantial evidence.

Fourth Argument: Substantial Evidence: The Trial Court's finding that there was no meeting of the minds regarding the Defendants obligation to pay Plaintiffs \$250,000 is not supported by substantive evidence.

Fifth Argument: Substantial Evidence: The Trial Court finding that there was no evidence submitted that the Defendants were personally obligated to Plaintiffs is clearly erroneous and not supported by substantial evidence.

FIRST ARGUMENT

THE SECOND PROMISSORY NOTE IN THE AMOUNT OF \$250,000 IS UNENFORCEABLE DUE TO LACK OF CONSIDERATION

In support of its Counterclaim, Electro Technical Corporation presented the testimony of David Hammons (hereinafter Hammons). Hammons testified on direct examination that Counterclaim Plaintiffs did pay at least \$250,000.00 to Mingo Oil Company. (Transcript p. 145, lines 10-13). Based on this

testimony and the testimony Hammons presented during the Plaintiffs' case, the trial court found that Counterclaim Plaintiff gave \$150,000 to Counterclaim Defendants and concluded as a matter of law that the delivery of said money constituted valid consideration for the issuance of the Promissory Note by Mingo Oil Producers the repayment of which was guaranteed by M & L Investments.

The Court's finding of fact, to wit, that Counterclaim Plaintiff gave \$150,000 to or for the benefit of Mingo Oil Company, is not contested by Appellants. However, the associated conclusion of law that the giving of this money constituted valid consideration for the Promissory Note is clearly erroneous and must be reversed on appeal.

A Promissory Note is not in and of itself a debt but rather is merely evidence of indebtedness between the maker and the payee. See Pierpont v. Hydro Manufacturing, Company, Inc., 22 Ariz. App. 252, 526 P.2d 776, 778 (1974). For a Promissory Note to be legally enforceable, it must be supported by consideration. Resource Management Co. v. Weston Ranch, 706 P.2d 1028, 1036 (Utah 1985). Promissory Notes such as the ones in question in the present case which are not negotiable instruments carry no presumption that they were issued for a valuable consideration. See First Investment Co. v. Anderson, 621 P.2d 683, 687 (Utah 1980). Therefore, consideration for the

issuance of the second note by Mingo Oil Company must be established by the Counterclaim Plaintiff as part of its prima facia case. See General Insurance Co. of America v. Carnicero Dynasty Corp., 545 P.2d 502, 505 (Utah 1976). No evidence was presented at trial to support the conclusion that any indebtedness existed between Mingo Oil Company and the Counterclaim Plaintiff at the time the \$250,000 note was executed. In fact, Hammons, who was the sole witness called by the Counterclaim Plaintiff, testified that no money was loaned to Mingo Oil Company in December of 1981. (Transcript, p. 150, lines 19-23).

In direct contradiction to the court's conclusion that some indebtedness existed between Mingo Oil Company and the Counterclaim Plaintiff, Hammons testified that he negotiated an agreement whereby Counterclaim Plaintiff agreed to pay \$250,000 and issue a Promissory Note for \$250,000 as consideration for the acquisition of a 40% interest in an oil well which was being drilled by Mingo Oil Company. (Transcript p. 123, lines 3-25). And, Hammons testified that this was the only agreement entered into between Mingo Oil Company and the Counterclaim Plaintiff. (Transcript, p. 124, lines 4-5).

Hammons testified that the Counterclaim Plaintiff made its decision to invest the money with Mingo Oil Producers prior to the execution of said Promissory Note (Transcript p. 134,

lines 17-21), and made a partial payment of \$100,000 toward the investment on or about December 18, 1981, when the decision was made. (Transcript p. 149-150, lines 23-5). Finally, Hammons testified that for the total investment of \$500,000 the Counterclaim Plaintiff did receive a 40% interest in the oil well in question.

In the face of this evidence, the trial court concluded as a matter of law that the delivery of the \$150,000 to Mingo Oil Producers, which was made in payment for Counterclaim Plaintiff's investment, constituted consideration for the Promissory Note in question. That conclusion is contrary to applicable law and must be reversed on Appeal.

The evidence is undisputed that Counterclaim Plaintiff decided sometime during the middle of December, 1981, to make an investment with Mingo Oil Producers. (Transcript, p. 105, lines 20-23).

An Hammons explained:

Q. And who -- you invested the money with Mingo Oil Company.

A. That is correct.

Q. And the investment decision was made prior to the Promissory Note.

A. Which Promissory Note?

Q. To the second Promissory Note.

A. Yes, to the \$250,000.00 Promissory Note.

(Transcript, p. 134, lines 14-21).

The law is settled in this jurisdiction and all other jurisdictions that an agreement to do that which a party is already required to do by law or by contract does not constitute consideration for a new promise. See Baggs v. Anderson, 528 P.2d 141, 142 (Utah 1974); Hurley v. Hurley, 615 P.2d 256, 260 (N.M. 1980); Carroccia v. Todd, 615 P.2d 225, 228 (Mont. 1980). It is equally well settled that where consideration is lacking there is no contract. See General Insurance Co. of America v. Carnicero Dynasty Corp. 545 P.2d 502, 504 (Utah 1976).

In the present case, the Counterclaim Plaintiff was required by a contract which it had entered into on or about December 18, 1981, to pay to Mingo Oil Producers the total cash amount of \$250,000. (Transcript, P. 133, lines 19-20). Partial payment under that Agreement was effectuated during the middle of December. (Transcript, P. 131, lines 23-25). On or about December 30, 1981, Counterclaim Plaintiff paid the additional amount of \$150,000 to Mingo Oil Company. At the time it made the payment, it received a Promissory Note from Mingo Oil Company in the face amount of \$250,000. Because the Counterclaim Plaintiff was obligated by prior contract to make that payment, the delivery of the \$150,000 can not as a matter of law constitute consideration for the promissory note in question.

This case is factually similar to the case of General Insurance Co. of America v. Carnicero Dynasty, Corp. 545 P.2d 502 (Utah 1976). In that case, an indemnity agreement was signed after an original agreement was entered into by the parties. The facts in General Insurance indicated that an agreement was entered into between the parties under which the Plaintiff became legally bound to make certain payments prior to the time the payments were actually made and related indemnity agreements were signed. Based on those facts, the Supreme Court concluded that the indemnity agreements under which plaintiffs sought recovery were lacking in consideration and therefore were not enforceable contracts. Id. 545 P.2d 505.

Similarly in the present case, the Promissory Note signed on December 30, 1981, and the accompanying guarantee of the indebtedness represented thereby is not enforceable. The testimony of the Counterclaim Plaintiff's only witness is clear and unequivocal. The Counterclaim Plaintiff made a decision to invest the money in question with Mingo Oil Company prior to the execution of the second Promissory Note, (Transcript p. 134, lines 14-21), and the Counterclaim Plaintiff did not pay any money or other consideration to Mingo Oil Company in the form of a loan or debt during December 1981. (Transcript, p. 150, lines 15-23).

Under these facts, the Trial Courts conclusion of law that the investment of \$150,000 based on a decision made during the middle of December and partially performed constitutes consideration for the Promissory Note in question is clearly erroneous and must be reversed on Appeal.¹

SECOND ARGUMENT

THE CONVERSION OF THE INITIAL LOAN INTO AN INVESTMENT CONSTITUTES AN ACCORD AND SATISFACTION

At the trial, Counterclaim Defendant contended that the Counterclaim Plaintiff's decision to convert the initial loan into an investment in the oil well constituted an accord and satisfaction of the indebtedness. Following the trial the Court found that "there was no accord and satisfaction on said note." (Judgment p. 3; Transcript of Judge's Ruling, p. 3, lines 20-22). This ruling evidences a misunderstanding of the law involving accord and satisfaction and a misapplication of the facts under that law.

An accord and satisfaction arises when the parties to a contract enter into a new agreement offered in substitution for the original contract which calls for a different performance that will discharge the original obligation. See Bennion v.

¹In its oral ruling the Court announced that the Counterclaim Plaintiff could not recover pre-judgment interest on the \$250,000 Promissory Note. However, in the final written judgment pre-judgment interest was awarded. This contradiction represents, in essence, a clerical mistake that this Court can remedy summarily upon Appeal.

LeGrand Johnson Construction Co., 701 P.2d 1078 (Utah, 1985).

An accord and satisfaction need not be in writing. See Golden Key Realty, Inc. v. Mantas, 699 P.2d 730 (Utah 1985).

To establish an accord and satisfaction, the party claiming its existence must prove the following elements: (1) a proper subject matter; (2) competent parties; (3) assent or meeting of the minds; and (4) a consideration given for the accord. Sugarhouse Finance Co. v. Anderson, 610 P.2d 1369, 1372 (Utah 1980). All of these elements were established in the present case by the Counterclaim Defendants in relation to the \$100,000 Promissory Note.

There is no question that Counterclaim Defendant Strand received \$100,000 and issued the first Promissory Note as evidence of that obligation. (Transcript p. 106-107, lines 23-2). At the Trial, Hammons testified that this initial obligation or loan was converted to an investment in the Mingo 13-13 well. (Transcript p. 131, lines 18-25; p. 133, lines 8-16; p. 149-150 lines 23-1).

The testimony presented at trial revealed the purchase by the Counterclaim Plaintiff of a 40% interest in Mingo 13-13 oil well. The exact terms of that agreement were that Counterclaim Plaintiff would pay \$250,000 cash and promise to pay an additional \$250,000 to acquire the 40% interest.

(Transcript p. 123-124, lines 1-1). A portion of the \$250,000 cash was the conversion of the prior \$100,000 obligation into the investment. (Transcript p. 133, lines 8-20; p. 149-150, lines 23-14).

As Mr. Hammons testimony clearly establishes:

Q. (By Mr. Jackson): So you are now saying there is no agreement between you and Mr. Strand and your brother and Mr. Strand that the monies you contributed on December 1, of 1981 would be converted to an investment in the Well?

A. No, I think that it was converted to an investment.

Q. There was an Agreement that it would be converted; is that Correct.

A. That is correct.

(Transcript p. 131, lines 18-25).

During the trial the evidence established and Hammons admitted that the Counterclaim Plaintiff did in fact receive a 40% interest in the deep test well, Mingo 13-13, pursuant to the Agreement between the parties. (Transcript, p. 134, lines 2-4). It is very interesting that Hammons testified that one of the reasons the investment was made was to take advantage of certain tax shelters that would be created by the investment. Mr. Hammons openly admitted that if the Counterclaim Plaintiff had lent the money, rather than investing it, it would have been unable to obtain the advantages of those tax advantages. (Transcript, p. 114, lines 14-18). The Counterclaim Plaintiff's intent and the essence of the Agreement to convert the prior loan was explained by Hammons when he stated:

A. We were getting additional information on the oil field. When it became obvious, or obvious to us, that we weren't going to be repaid by the terms of this note on the 10th, and that the middle of the month came and went and he (Strand) still didn't have any money, we found out that the security he had given us on this Hundred-Thousand Dollars was already encumbered more than the value of the security, we weighed the possibilities of putting additional money in rather than walking away from this or trying to seek the return.

Q. Did you reach some decision about this?

A. Yes, we did, some further analysis and working with Mr. Wisan and having conversations with him and repeated conversations with Mr. Strand and his staff, which includes a geologist that was on the staff with him, and the private independent or so-called independent information that he had in his office regarding the field we decided maybe we could go ahead and try to make the best out of a bad situation and invest the other money and plus get the tax credit.

(Transcript p. 104-105, lines 24-16) (Emphasis Added).

This decision by the Counterclaim Plaintiff to convert the prior loan into an investment in the oil well constitutes a substitute agreement calling for a different performance in discharge of the prior obligation, and therefore, an accord and satisfaction. See Bennion v. LeGrand Johnson, Const. Co., 701 P.2d 1072 (Utah, 1985). Simply stated, there was an offer to sell the Counterclaim Plaintiff a 40% interest in the oil well for \$250,000 plus a promissory note in that amount. There was an acceptance of that offer and a conversion of the prior loan into the investment, and the Counterclaim Plaintiff received the 40% interest for which it had bargained. An accord and satisfaction was entered into by the parties and the original obligation evidenced by the \$100,000 Promissory Note should have

been discharged. The Trial Court's conclusion to the contrary constitutes reversible error.

THIRD ARGUMENT

THE TRIAL COURTS FINDING THAT NO ACCORD AND SATISFACTION WAS ENTERED INTO IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Although the Trial Court did not render formal findings of fact and conclusions of law, in ruling from the bench, it stated:

The Defendants on the Counterclaim, Mr. Strand and Mingo Oil, claim that there was subsequently an accord and satisfaction in that the Plaintiff, Electro Technical Corporation, through its officers, the Hammons brothers, agreed that this note would be cancelled and that the \$100,000.00 would become an equitable investment in the Mingo Oil 13-13 partnership.

Based upon the testimony the Court is not persuaded that there was an accord and satisfaction. . .

(Transcript of Courts ruling, p. 3, lines 13-21).

There is absolutely no evidentiary support for the Court's finding that the \$100,000 did not become an equitable investment. Again and again in his testimony, Hammons reiterated the fact that the original loan of \$100,000 was converted to an investment. Therefore, that portion of the Trial Court's decision is clearly erroneous and not supported by substantive evidence.

The direct testimony of Hammons establishes that the initial loan was in fact converted to an investment. As he explained:

Q. (By Mr. Jackson): So are you now saying there is no agreement between you and Mr. Strand and your brother and Mr. Strand that the monies that you contributed on December 1, or 1981 would be converted to an investment in the well?

A. No, I think that it was converted to an investment.

Q. There was an Agreement that it would be converted; is that correct?

A. That's correct.

(Transcript p. 131, lines 18-25).

Mr. Hammons also testified that one of their motivations at the time the loan was converted to an investment was the tax shelter that could be created by the investment. (Transcript p. 114, lines 5-13). During the trial, Mr. Hammons testified that he and his brother understood that if the money had been loaned to Mr. Strand no tax shelter would have been created. (Transcript, p. 114, lines 14-18). Yet in the face of this unrebutted testimony the trial court was not persuaded that the initial loan of \$100,000 was converted into an investment.

Previously, in this brief, Appellant pointed out that an accord and satisfaction arises when the parties to a contract agree that a certain performance offered in substitution of the performance originally agreed upon will discharge the obligation created under the original agreement. See Petersen v. Petersen,

709 P.2d 372, 374 (Utah, 1985). While this Court must look at the evidence in the light most favorable to the trial court's findings, in a case such as the present where the Counterclaim Plaintiff called a single witness, this court can not ignore the admissions of that witness and the inferences which flow naturally therefrom and blindly uphold the decision of the trial court.

The Counterclaim Plaintiff's only witness Hammons testified that he and his brother made a voluntary and conscious decision to accept Mingo Oil Company's offer to convert their initial loan and make an additional \$150,000 as an investment in Mingo 13-13 oil well. He admitted that the loan was in fact converted to an investment and further admitted that one of the reasons for the conversion was the tax shelter created thereby. He testified that if the loan was not converted to an equity investment no tax shelter would have been created. And, he testified that the conversion was made pursuant to an agreement with Mingo Oil Company. Those direct admissions establish all the elements of an enforceable accord and satisfaction.

FOURTH ARGUMENT

AN ENFORCEABLE CONTRACT EXISTED BETWEEN THE PARTIES REGARDING THE DEFENDANT'S AGREEMENT TO PAY PLAINTIFF'S \$500,000

Following the presentation of the Plaintiffs' case, the Trial Court granted the Defendants' Motion to Dismiss based upon

its conclusion that there was no meeting of the minds as between Defendant Electro Technical Corporation and the Plaintiffs to a note or an Agreement by Defendants to pay Plaintiffs the sum of \$250,000. During its ruling, the Court admitted that it was confused by the evidence and "distressed because she believes that whatever the intentions of the parties were it is impossible for this Court, on the basis of the record, to determine. (Transcript of Trial, p. 143, lines 3-9). Appellants respectfully disagree with this observation. The testimony presented at the trial clearly established that the parties entered into an agreement under the terms of which, Defendants would pay \$500,000 for an interest in Mingo 13-13 oil well. It is equally clear from the record that the Agreement called for a \$250,000 cash payment and the execution of a Promissory Note in the amount of \$250,000.

The evidence on that issue could not have been clearer. Mr. Hammons testified that:

A. "We had agreed to a Promissory Note to be executed for a like amount, \$250,000.00, and that would be paid from the proceeds of the well.

* * *

Q. And you agreed to execute a Promissory Note for \$250,000; is that correct?

A. That was the Agreement, yes, it was.

(Transcript, p. 123-124, lines 24-1; 6-9).

This Agreement was in fact memorialized by a written document signed by both parties (Exhibit P-12). At no time during the trial, did Hammons deny that the parties had reached an agreement regarding the investment of \$500,000 in the form of \$250,000 cash and a \$250,000 promissory note.² However, notwithstanding the direct admissions of the Defendants, the trial court found that there was no Agreement as to the \$250,000. The fact that the Defendants agreed to execute a promissory note in the amount of \$250,000 was not even an issue in the trial. (Pre-Trial Order). The only question before the Trial Court was whether or not the Defendants' obligation under this oral agreement to pay the additional \$250,000 was conditioned upon the receipt of proceeds from production of the well in question. As Mr. Hammons testified.

A. We had agreed a Promissory Note to be executed for a like amount, \$250,000.00, and that would be paid from the proceeds of the well.

(Transcript p. 123-124, lines 24-1).

Based on their agreement to execute a Promissory Note in the amount of \$250,000, the Defendants took a total tax write off of \$500,000. The only issue to be resolved by the trial court was whether the payments of the obligation from the

²The law is established in Utah that if a written agreement is intended to memorialize an oral agreement, a subsequent failure to execute the written document does not nullify the oral contract. Lawrence Const. Co. v. Holmquist, 642 P.2d 382, 384 (Utah, 1982).

proceeds of the well was a condition precedent to Defendants' obligation to pay the \$250,000 or simply a term included for the convenience of the parties. The Trial Court failed to address this issue and overlooked the direct admissions of the Defendants in concluding there was no agreement. This constitutes reversible error and requires the case be remanded for a new trial on this issue.

FIFTH ARGUMENT

DAVID HAMMONS IS PERSONALLY LIABLE FOR THE \$250,000 INVESTMENT

Following the Plaintiffs case, the Trial Court dismissed the Plaintiffs action against W. David Hammons individually based on its observation that:

"Court does not believe there is any evidence in the record at this point that either Mr. David Hammons or his deceased brother Mr. Herb Hammons, individually obligated themselves on any of the claims set forth by the Plaintiff. (Transcript of Trial, p. 139 lines 14-20).

Plaintiffs' Exhibit No. 12 was admitted into evidence at the trial. That document which was signed by the Defendant David Hammons states; "this \$550,000 is exclusive of the original \$250,000 for interest in the deep test and a note in favor of Mingo Oil in the amount of \$250,000. In principal this represents our mutual agreement. . ." In addition, Hammons testified repeatedly that when the decision to acquire a 40% interest in Mingo 13-13 was made by him and his brother, they

had not decided if they would make the investment as their names of the name of the wholly owned corporation. (Transcript p. 111, lines 4-9).

The record reflects evidence in contradiction to the trial court's conclusion that the Hammons brothers did not individually obligate themselves in relation to the investment and the promise to pay \$250,000. Therefore the court's ruling is clearly erroneous and constitutes reversible error.

CONCLUSION


The Trial Court heard the testimony of the principal witnesses concerning various transactions. The admissions of the sole witness called by the Defendants/Counterclaim Plaintiff established that those parties loaned \$100,000 to Plaintiff Mike Strand and following his default under the terms of a promissory note evidencing that indebtedness entered into an agreement to convert that debt into an investment in an oil well. In addition to the conversion of the original debt the Defendants agreed to pay Plaintiffs an additional \$150,000 cash and issue a \$250,000 promissory note to acquire a 40% interest in that well.

That agreement which was entered into by the parties and partially performed was a valid enforceable agreement which constituted an accord and satisfaction of the original

obligation. The payment of the additional \$150,000 pursuant to the investment decision can not constitute consideration for the Promissory Note signed by Mingo Oil Producers. The trial court's conclusion of law to the contrary must be reversed upon Appeal.

The testimony of Defendant W. David Hammons established by a preponderance of the evidence that he and his brother individually accepted the investment offer presented by Plaintiffs and are bound there under to pay Plaintiffs \$250,000. The trial courts failure to accept the admissions of that witness and rule on the question of whether or not that obligation was conditional requires that the Plaintiffs case be remedied for a new trial.

Dated this 7th day of June, 1987.

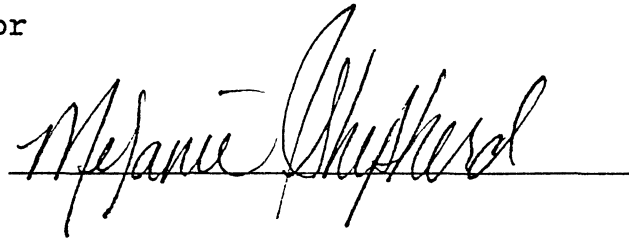


Daniel W. Jackson

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June, 1987, I mailed a true and correct copy of the foregoing document, postage prepaid, addressed to the following individual:

John C. Green
48 Post Office Place, Third Floor
Salt Lake City, UT 84101

A handwritten signature in cursive script, reading "Melanie Shepherd", is written over a horizontal line.

APPENDIX

JOHN C. Green
Attorney for Defendants
48 Post Office Place, Third Floor
Salt Lake City, Utah 84101
Telephone: (801) 532-6996

IN THE THIRD JUDICIAL DISTRICT COURT, IN AND
SALT LAKE COUNTY, STATE OF UTAH

-----ooo0ooo-----

| | | |
|--------------------------------|---|--------------------------|
| MICHAEL STRAND, LOIS STRAND | : | JUDGMENT |
| and MINGO OIL COMPANY, | : | |
| a Utah corporation, | : | |
| | : | |
| Plaintiffs, | : | Civil No. C82-8686 |
| | : | |
| vs. | : | |
| | : | Judge Judith M. Billings |
| DAVID HAMMONS, THE ESTATE OF | : | |
| HERB HAMMONS, (Deceased), and | : | |
| ELECTRO TECHNICAL CORPORATION, | : | |
| a Utah corporation, | : | |
| | : | |
| Defendants. | : | |
| <hr/> | | |
| ELECTRO TECHNICAL CORPORATION, | : | |
| a Utah corporation, | : | |
| | : | |
| Counterclaim | : | |
| Plaintiff, | : | |
| | : | |
| vs. | : | Civil No. C-83-3934 |
| | : | |
| MINGO OIL COMPANY, a Utah | : | |
| corporation, and MICHAEL | : | |
| STRAND, | : | |
| | : | |
| Counterclaim | : | |
| Defendants. | : | |

The above-entitled matter having come on regularly
for trial before The Honorable Judith M. Billings, Judge

of the above-entitled Court, on the 30th day of July, 1986. Plaintiff Michael Strand was present with his attorney Daniel W. Jackson. The defendant W. David Hammons was present and he together with all defendants were represented by attorney John C. Green. The Court then heard the testimony of the witnesses on plaintiffs' Compliant and defendants' attorney having made a motion to dismiss at the close of plaintiffs' case in chief, and the Court having first found that plaintiffs failed to meet their burden with reference to any liability on the part of defendants, W. David Hammons and the Estate of Herb Hammons, and having further found that there was no meeting of the minds as between defendant, Electro Technical Corporation, and the plaintiffs relative to a note or an agreement by defendants to pay plaintiffs the sum of \$250,000.00. The Court then concluded that plaintiffs were not entitled to Judgment against any of the defendants.

The Court then heard the testimony on defendants' Counterclaims and having found that the defendant, Electro Technical Corporation, has maintained two Promissory Notes in its possession. The first one was defendants' Exhibit "1," was executed on December 1, 1981, for the benefit of Electro Technical Corporation and was executed by Mr.

Michael Strand. The Court finds this Note to be clear on its face, that the Note was executed in exchange for \$100,000.00 in cash, which was given by an officer of Electro Technical Corporation for the benefit of Mingo Oil Corporation, a partnership of Mr. Strand's. The Court finds that there was no accord and satisfaction on said Note even if such oral agreements were not barred by the Statute of Frauds.

The Court finds that a second Promissory Note was executed by Mike Strand, President of Mingo Oil Company, and by Mike Strand, a General Partner of M&L Investments. The Court further finds the Note to be clear on its face and finds that Electro Technical Corporation gave \$150,000 in cash as consideration for this Promissory Note, that even though the total of \$250,000 was not given for the Note, that was the bargain struck between the parties, therefore, the defendant and counterclaim plaintiff, Electro Technical Corporation, is entitled to Judgment on both Notes, together with interest from the date of execution, costs of Court and attorney's fees. The Court having heard the proffer of counsel John Green relative to the rates charged and counsel Daniel Jackson having stipulated to the reasonableness of the rates.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

A. Counterclaim plaintiff, Electro Technical

Corporation, be, and it is hereby, entitled to Judgment against Michael Strand as follows:

| | |
|---------------------------|---------------------|
| PRINCIPAL: | \$100,000.00 |
| INTEREST TO JULY 30, 1986 | \$ 91,550.00 |
| COSTS: | \$ 7.50 |
| ATTORNEYS FEES: | \$ 1,651.50 |
| TOTAL: | <u>\$193,209.00</u> |

Together with after accruing costs and interest at a rate of 20% per annum.

B. Counterclaim plaintiff, Electro Technical Corporation, be, and it is hereby, granted Judgment against Mingo Oil Company and M&L Investments, jointly and severally as follows:

| | |
|----------------------------|---------------------|
| PRINCIPAL: | \$250,000.00 |
| INTEREST TO JULY 30, 1986: | \$112,450.00 ✓ |
| ATTORNEY'S FEES: | \$ 2,477.25 |
| COSTS: | \$ 7.50 |
| TOTAL: | <u>\$364,934.75</u> |

Together with after accruing costs and interest at a rate of 12% per annum.

DATED this ____ day of August, 1986.

JUDITH M. BILLINGS
DISTRICT COURT JUDGE

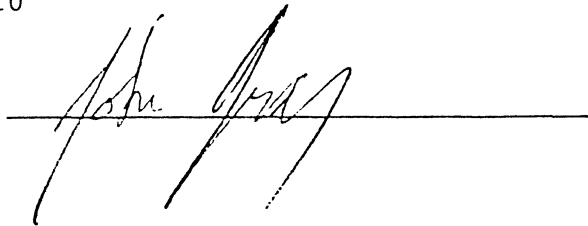
APPROVED AS TO FORM:

Daniel W. Jackson
Attorney for Plaintiffs

CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand delivered a copy of the foregoing Judgment to the following attorneys for plaintiffs, on this 11th day of August, 1986, addressed as follows:

Daniel W. Jackson
Jeffrey W. Wilkinson
Jackson & Wilkinson
Attorney at Law
40 East South Temple, Suite 310
Salt Lake City, UT 84111

A handwritten signature, appearing to read "John Gray", is written over a horizontal line.

December 30, 1981


PROMISSORY NOTE

For value received, MINGO OIL COMPANY, a Utah corporation, promises to pay to the order of ELECTRO TECHNICAL CORPORATION, a Utah corporation, at 2072 West 2300 South, Salt Lake City, Utah, the sum of Two Hundred Fifty Thousand and No/100 (\$250,000.00) on January 9, 1982.

In the event of any default, MINGO OIL COMPANY agrees to pay to the holder hereof reasonable attorneys' fees, legal expenses and lawful collection costs.

Presentment, demand, protest, notice of dishonor and extension of time without notice are hereby waived.

MINGO OIL COMPANY

By 
Mike Strand
President

Guaranteed by:

M & L INVESTMENTS
a Utah partnership

By 
Mike Strand
A General Partner

Whereas Mike and Lois Strand, the owners of Mingo Oil Company are in need of financial assistance to clear up debts on and develop Mingo Oil's interest in the Overland Dome Field and whereas David Hammonds and Herb Hammonds have access to the approximate sum of \$550,000 deemed necessary to expedite such development and clear outstanding obligations, Mike and Lois Strand, et, al, being the biggest creditors on the Overland Dome Field and also owners of all the production equipment on said field, the debts to Mike and Lois Strand, et al, amounting to the sum of \$6.2 million and the value of the equipment being \$3.2 million for a total of \$9.4 million, feel it is in their best interest and the interest of said development to reduce the total amount of the above figure by 50% and either reorganize the existing company of Mingo Oil or organize a new company under the Wyoming law with a equal division both to the Strands and to the Hammonds for their contribution of \$550,000 and the reduction of the liabilities and values of the equipment by 50% to \$4.7 million. This \$4.7 million will be carried as a liability against the new organization as will the \$550,000 contributed by the Hammonds. This \$550,000 is exclusive of the original \$250,000 for interest in the deep test and a note in favor of Mingo Oil in the amount of \$250,000. In principal this represents our mutual agreement, the details and formal documents are to be commenced by Nick Murdock, Mingo's Wyoming counsel, as soon as possible.

Mike Strand
David Hammonds

Promissory Note

For value received, I, Mike Strand,
promise to pay to the order of Electro
Technical Corporation at 2072 West
2300 So., Salt Lake City, Utah, the
sum of One hundred thousand dollars
(\$100,000.00) on December 10, 1981,
at an annual rate of twenty percent
(20%).

In the event of any default, the
undersigned agrees to pay to the holder
hereof reasonable attorneys' fees, legal
expenses & lawful collection costs.

Presentment, demand, protest, notice of
dishonor & extension of time without
notice are hereby waived.

Mike Strand