

1981

## Strevell Paterson v. Michael R. Francis : Respondent's Brief

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

STREVELL PATERSON

Plaintiff and Respondent

vs.

MICHAEL R. FRANCIS, }

Defendant and Appellant

17598

RESPONDENT'S BRIEF

Appeal from the Summary Judgment  
of the Third District Court for  
Salt Lake County, State of Utah

Honorable Kenneth Rigtrup, Judge

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and Appellant

FILED

JUL -9 1981

IN THE SUPREME COURT  
OF THE STATE OF UTAH

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Plaintiff and Respondent	)
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[illegible]

vs.

ff-respondent, Strevell Paterson (hereinafter  
sight suit against defendant-appellant, Michael R.  
er "defendant"), based on defendant's personal  
bts of Mountain Lands Sports, Inc. (hereinafter

On December 9, 1980, plaintiff's Motion for Summary Judgment was heard in the Third Judicial District Court of Salt Lake County before the Honorable Kenneth Rigtrup. On December 29, 1980, the Court entered an Order granting plaintiff's motion.

Plaintiff seeks affirmance of the Order of the District Court.

## STATEMENT OF FACTS

Defendant's Statement of Facts contains certain inaccurate and irrelevant information, and, therefore, plaintiff restates the facts as follows:

On January 19, 1977, defendant executed a written guaranty agreement (hereinafter the "Guaranty") whereby he agreed to personally guaranty payment of the purchase price of all goods and merchandise sold to Mountain Lands by plaintiff. (R. 6). In answer to plaintiff's Request for Admissions, defendant admitted the execution of the Guaranty and the authenticity of the copy thereof exhibited to the Complaint. (R. 28).

On April 1, 1978, defendant entered into an agreement with David J. Toussaint by which defendant purported to sell all the assets of Mountain Lands to Toussaint. (R. 36-42). The agreement was stated to be effective as of the date of its execution on April 1, 1978. (R. 36).

On April 5, 1978, defendant, purporting to act in a representative capacity for Mountain Lands, executed and delivered to plaintiff a promissory note (hereinafter the "Note") in the principal amount of \$14,990.95. (R. 5). In answer to plaintiff's Request for Admissions, defendant admitted the execution of the Note and the authenticity of the copy thereof exhibited to the Complaint. (R. 27-28). Defendant further admitted that the Note was given to evidence a debt from Mountain Lands to plaintiff for past open account purchases of goods and merchandise. (R. 28).

On April 14, 1978, defendant, purporting to act in a

representative capacity for Mountain Lands, entered into a security agreement (hereinafter the "Security Agreement") granting plaintiff a security interest in all the inventory, equipment, and other personal property owned by Mountain Lands to secure the Note of April 5, 1978. (R. 35).

On June 5, 1979, plaintiff obtained a judgment against Mountain Lands on the Note in the Third District Court of Salt Lake County for \$16,511.41, with interest thereon at the rate of 12% per annum. (R. 7-8).

Despite repeated demands by plaintiff, defendant refused to pay the amount owing from Mountain Lands to plaintiff. Plaintiff then brought this action seeking to enforce defendant's compliance with the Guaranty.

### ARGUMENT

#### POINT I

THE ORAL RELEASE AGREEMENT ALLEGED BY  
DEFENDANT WOULD BE UNENFORCEABLE AS A  
MATTER OF LAW UNDER THE STATUTE OF FRAUDS.

Defendant argues that the District Court erred in granting plaintiff summary judgment based on the Guaranty because the parties allegedly entered into an oral agreement which released defendant as a guarantor. The oral release alleged by defendant would be unenforceable as a matter of law under the statute of frauds, and, therefore, does not create a material issue of fact which would preclude summary judgment in this action.

Section 25-5-4, Utah Code Ann. (2d repl. vol. 1976)



provides, in relevant part:

In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:

\* \* \*

(2) Every promise to answer for the debt, default or miscarriage of another.

\* \* \*

The Guaranty executed by the defendant was a promise to answer for the debt of Mountain Lands. As such, the Guaranty was within the statute of frauds, and was required to be in writing and subscribed by the defendant. The requirements of the statute of frauds were fully satisfied by the written Guaranty, which bears the defendant's signature.

It is well established under Utah law that any agreement which purports to alter or amend an agreement within the statute of frauds must also be in writing and subscribed. In Combined Metals, Inc. v. Bastian, 267 P. 1020, 1035 (Utah 1928), the Court held:

[T]he original contract to be binding and enforceable, and to satisfy the statute of frauds, was required to be, as it was, in writing and subscribed by the parties sought to be charged. To alter or modify any of its material parts or terms by a subsequent agreement required one also to be in writing and so subscribed. . . .

This principle was unequivocally reaffirmed in Zions' Properties, Inc. v. Holt, 538 P.2d 319, 322 (Utah 1975), in which the Court said:

It is elementary that when a contract is required to be in writing, the same requirement applies with equal force to any alteration or modification thereof.

The oral release agreement alleged by defendant purports to alter the obligation created by the Guaranty. Such an alteration is within the statute of frauds, and is void and unenforceable unless it is in writing and properly subscribed. Because the alleged oral release agreement does not comply with the requirements of the statute of frauds, it cannot constitute a valid defense to plaintiff's suit on the Guaranty.

In his Brief on Appeal, defendant argues that the alleged oral release agreement is excluded from the statute of frauds by section 25-5-6(3), Utah Code Ann. (2d repl. vol. 1976). In so arguing, defendant completely misconstrues the language of that section. The portion of the statute relied upon by defendant provides as follows:

A promise to answer for the obligation of another in any of the following cases is deemed an original obligation of the promisor and need not be in writing:

\* \* \*

(3) Where the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancel the antecedent obligation, accepting the new promise as a substitute therefore. . . .

\* \* \*

The quoted language deals with a situation in which a person agrees to assume the debt of another and thereby becomes solely liable to the obligee of the debt. Section 25-5-6(3) would

only be applicable in the instant case if the defendant had agreed to become solely liable for the existing debt of Mountain Lands, and, in consideration therefore, plaintiff had cancelled Mountain Lands' obligation. Neither of those things occurred in this case. Defendant does not claim to have become solely liable for the obligation, and it has never been suggested by either party that the alleged release acted to cancel the existing obligation of Mountain Lands. Consequently, section 25-5-6(3) cannot be construed to apply to the Guaranty or the alleged release agreement in this case.

The remainder of defendant's argument at Point II.A. of his Brief deals with the parole evidence rule. Discussion of the parole evidence rule is inapposite as plaintiff did not assert the parole evidence rule as a basis for its Motion for Summary Judgment, and it was not discussed or considered by the District Court in its ruling.

## POINT II

### THE ORAL RELEASE AGREEMENT ALLEGED BY DEFENDANT WOULD BE UNENFORCEABLE FOR LACK OF CONSIDERATION.

#### A. The Alleged Release Agreement Must Be Supported by Consideration to Be Valid.

A release agreement, like any contract, must be supported by consideration to be valid. See Holbrook v. Webster's, Inc., 7 Utah 2d 148, 320 P.2d 661, 663 (1958). Accordingly, it is universally recognized that "where there is no consideration to support the creditor's promise to release the guarantor from

his contractual liability under the guaranty, the promise is not binding and is not a defense to an action by the creditor on the guaranty." 38 Am.Jur.2d Guaranty §80 (1968); 38 C.J.S. Guaranty §68 (1943); Anno. 126 A.L.R. 1241 (1940).

Contrary to the universal authority, defendant argues at Point II.B. of his Brief that no consideration was required for the alleged release agreement. In support of this argument, defendant cites section 70A-3-408, Utah Code Ann. (repl. vol. 1980). This section falls under the Commercial Paper chapter of the Utah Uniform Commerical Code. Specifically, section 70A-3-408 deals with negotiable instruments and obligations. Obviously, a release agreement cannot be characterized as either a negotiable instrument or an obligation within the meaning of the Commercial Paper chapter of U.C.C. Moreover, it is readily apparent that plaintiff did not agree to give the alleged release "in payment of or as security for an antecedent obligation" owed to the defendant, as section 70A-3-408 contemplates. Defendant's reliance upon section 70A-3-408 to support his argument that no consideration was required for the alleged release agreement is completely misplaced.

Defendant's reliance on A.M. Castle & Co. v. Bagley, 467 P.2d 408 (Utah 1970) is similarly misplaced. That case was decided under section 70A-3-408 and might be cited for the proposition that no consideration was necessary to support the Note given by Mountain Lands to plaintiff, but it has no applicability to the issue of whether consideration was required to support the alleged release agreement.

Finally, defendant cites section 70A-2-201(1), Utah Code Ann. (repl. vol. 1980) to support his argument that no consideration was necessary for the alleged release agreement. Defendant apparently intended to cite section 70A-2-209(1) which provides: "An agreement modifying a contract within this chapter needs no consideration to be binding." By its own terms, this section applies only to contracts within the Sales chapter of the U.C.C. The Guaranty in the instant case was not a contract for the sale of goods, and, therefore, section 70A-2-209 would have no applicability to an agreement purporting to release the Guaranty.

B. The Alleged Release Agreement Did Not Constitute an Accord and Satisfaction and Was Not Supported by Consideration.

Defendant argues at Point II.C. of his Brief that the alleged release was given in exchange for the Note and Security Agreement of Mountain Lands and that this arrangement constituted an accord and satisfaction. This argument is without merit because no consideration was given for the alleged accord.

To be valid an accord and satisfaction must be supported by consideration. As the Court stated in the recent case of Sugarhouse Finance Co. v. Anderson, 610 P.2d 1369, 1372 (Utah 1980):

Accord and satisfaction arises where the parties to an agreement resolve that a given performance by one party thereto, offered in substitution of the performance originally agreed upon, will discharge the obligation created under the original agreement. Essential to its validity are, (1) a proper subject matter; (2) competent parties; (3) and assent or meeting

of the minds of the parties; and (4) a consideration given for the accord. Where the underlying claim is disputed or uncertain ("unliquidated"), the obligor's assent to the definite statement of performance in the accord amounts to sufficient consideration, as it constitutes a surrender of the right to dispute the initial obligation. Where, however, the underlying claim is liquidated and certain as to amount, separate consideration must be found to support the accord; otherwise the obligor binds himself to do nothing that he was not already obligated to do and the obligee's promise to accept a substitute performance is unenforceable.

Defendant argues that the Note of Mountain Lands was given in compromise of the claims of the parties, and, therefore, constituted sufficient consideration for the accord. This argument has no foundation in the record. Defendant did not submit to the District Court any affidavit or other sworn statement averring that plaintiff's claim against Mountain Lands was disputed or unliquidated. The only evidence before the District Court indicated that the Note was given to evidence a liquidated obligation. In paragraph 6 of his answer to plaintiff's Request for Admissions, defendant admitted:

Defendant admits that the promissory note referred to [in] Request for Admission No. 2 was given to evidence past sales of goods on open account and other amounts owed to Strevell Paterson by Mountain Lands Sports, Inc. . . .

Defendant's statement that the Note was given to "evidence" an "open account and other amounts owed" clearly indicates that plaintiff's claim against Mountain Lands was liquidated in character.

Accord and satisfaction is an affirmative defense,

and the burden is upon the defendant to prove its essential elements. Defendant failed to file with the District Court any affidavit or other sworn statement avering that the Note was given to compromise an unliquidated claim. Where the only evidence in the record as to the character of the claim for which the Note was given is defendant's admission that the Note was given to "evidence" an "open account and other amounts owed," the District Court did not err in holding as a matter of law that the alleged accord was not given in consideration for the compromise of an unliquidated claim.

Regardless of whether plaintiff's claim against Mountain Lands was liquidated or unliquidated, defendant's theory of accord and satisfaction suffers from other fatal defects. First, defendant persistently argues that the release agreement allegedly made by him in his individual capacity was supported by consideration flowing between plaintiff and Mountain Lands. Defendant has never claimed that he personally gave any consideration for the alleged release agreement. Instead, he claims that the corporation's act of giving the note and security agreement supplied consideration for his personal release. This attempt to merge his personal identity with that of Mountain Lands is inconsistent with defendant's position that he is not personally obligated for the corporation's debts.

An even more fundamental defect exists in defendant's argument that the act of Mountain Lands in giving the Note and Security Agreement constituted an accord and satisfaction or was separate consideration for the alleged release agreement. This

defect appears on the face of the record on appeal to this Court. Defendant concedes in his Statement of the Facts at pages 2-3 of his Brief that, "on or about the first day of April, 1978, Defendant MICHAEL R. FRANCIS, sold all interest he owned in the Corporation to DAVID J. TOUSSANT." The agreement upon which defendant bases his statement that he divested himself of all interest in the corporation was executed on April 1, 1978 and was stated to be effective as of the date of its execution. (R. 36-42). Significantly, the Note and Security Agreement signed by defendant, purporting to act in a representative capacity for Mountain Lands, were not executed until April 5, 1978 and April 14, 1978 respectively. Because defendant admits that he sold all his interest in Mountain Lands as of April 1, 1978, it must also be taken as admitted that he was without right, title or authority to subsequently execute a promissory note on behalf of the corporation or pledge the corporation's property as security for the Note. Obviously, the Note and Security Agreement executed by the defendant after the date on which he admits he sold all his interest in the corporation were of no value whatsoever and could not constitute valid consideration for the alleged oral release agreement.

In summary, whether defendant argues that the consideration for the alleged release was the compromise of the claim underlying the Note or the giving of the Security Agreement, the result is the same. Having concedely sold all his interest in Mountain Lands as of April 1, 1978, defendant could not and did



not give anything by his subsequent execution of the corporate Note on April 5, 1978 or the Security Agreement covering corporate inventory on April 14, 1978.

### POINT III

DEFENDANT'S GUARANTY OF PAYMENT WAS ABSOLUTE, AND, THEREFORE, PLAINTIFF WAS NOT REQUIRED TO PURSUE ITS CLAIM AGAINST THE PRINCIPAL DEBTOR.

Defendant argues in Point III of his Brief that plaintiff's suit on the Guaranty is barred because plaintiff has not demonstrated what steps have been taken to pursue its claim against Mountain Lands. This argument is without merit because defendant's guarantee was absolute, and, therefore, plaintiff was not required to take any steps to pursue its claim against Mountain Lands before suing on the Guaranty. It is universally held, and has been expressly so stated by this Court, that a guaranty of "payment," as opposed to a guaranty of "collection," is absolute in nature. Westinghouse Credit Corp. v. Hydro Swift Corp., 528 P.2d 156, 158 (Utah 1974); 38 Am.Jur.2d, Guaranty §110 (1968); see also, section 70A-3-416, Utah Code Ann. (repl. vol. 1980). "[Where] the guaranty is absolute, the creditor need not pursue any claim which he might have against the debtor's property before proceeding against the guarantor." 38 Am.Jur.2d, Guaranty §110 (1958).

As the Court observed in Westinghouse, supra:

Whether a creditor . . . has a duty to pursue the debtor . . . as a predicate to action against a guarantor . . . depends on the nature of the guarantor's promise.

The Guaranty executed by the defendant provides:

[W]e hereby guarantee and hold ourselves personally responsible for the payment at maturity of the purchase price of all such goods, wares, and merchandise so sold and delivered whether evidenced by open account or note. (Emphasis added). (R. 6).

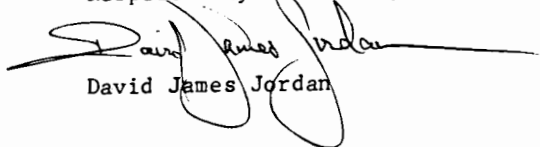
By guarantying "payment" of the indebtedness of Mountain Lands rather than the collection thereof, defendant became obligated to honor the Guaranty without regard to any action taken by the plaintiff in pursuit of its claim against the principal debtor. Having given his absolute guaranty, defendant may not now argue that plaintiff has not properly pursued collection efforts against Mountain Lands.

#### CONCLUSION

The District Court correctly held that no valid release agreement existed between the parties, and that defendant was liable to plaintiff on his personal guaranty. The oral release agreement alleged by defendant would be invalid and unenforceable as a matter of law either because it did not comply with the requirements of the statute of frauds or because it was not supported by valid consideration. Defendant's guaranty of payment was absolute in nature, and, therefore, plaintiff was not required to pursue collection efforts against the principal debtor before instituting suit on the Guaranty.

The Order of the District Court should be affirmed.

Respectfully submitted,

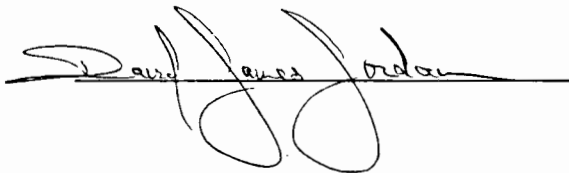
  
David James Jordan

CERTIFICATE OF MAILING

THIS IS TO CERTIFY that two copies of the foregoing  
were mailed this 8th day of July, 1981, postage prepaid, to:

GARY H. WEIGHT  
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A handwritten signature, likely of Gary H. Weight, is written over a horizontal line. The signature is stylized and cursive.