

1957

Paul Sugar and Harry Ulmer dba Sugar & Ulmer v. Harry B. Miller : Brief of Appellants

Utah Supreme Court

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Clyde & Mecham; Attorneys for Plaintiffs and Appellants;

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Case No. 8639

IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
APR 25 1957

PAUL SUGAR and HARRY ULMER,
doing business as SUGAR & ULMER,
a co-partnership,

Plaintiffs and Appellants,

vs.

HARRY B. MILLER,

Defendant and Respondent.

Clerk, Supreme Court, Utah

BRIEF OF APPELLANTS

CLYDE & MECHAM

*Attorneys for Plaintiffs and
Appellants*

351 South State Street
Salt Lake City 11, Utah

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Defendant and Respondent.

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BRIEF OF APPELLANTS

STATEMENT OF FACTS

This is an action brought by the plaintiffs against the defendant seeking payment on a Promissory Note in the amount of \$2,000.00 plus interest that the plaintiffs signed as guarantors and that the defendant signed as primary obligor. The defendant counter-claimed, seeking an offset upon an alleged amount owing for the publication by the defendant of the Prospectus of Deseret Uranium Corporation.

By stipulation at the trial, the defendant confessed judgment as prayed in the Complaint (R. 9). This left as the only issue the propriety and the amount of the offset. The plaintiffs as agent for Deseret Uranium Corporation (R. 42, 43), contacted the defendant Harry B. Miller, doing business as Lorraine Press, concerning the printing of the Prospectus of Deseret Uranium Corporation (R. 10 and 12). During this first negotiation, the defendant was informed that he was to be paid out of the underwriting proceeds received by Deseret Uranium Corporation (R. 16, 47) and the defendant indicated that he understood that the money was to come from the underwriting (R. 42).

The defendant printed the Offering Circular and thereafter billed Deseret Uranium Corporation for these printing services (R. 21, 25, 27, 51), (Exs. 2, 3). The defendant carried this account on its books in the name of Deseret Uranium Corporation without any offset shown whatsoever right up to the time of trial (R. 27). The defendant also looked to the corporation for payment during the same period (R. 28).

During the period from the first negotiation up to the time of trial, the defendant, Mr. Miller, had never requested the plaintiffs to personally pay the bill (R. 24, 51), and there is nothing in writing indicating the promise of the plaintiffs to pay the bill or indicating an assumption of the responsibility for said payment (R. 27).

The underwriting by Deseret Uranium Corporation was never completed and no money was received by reason thereof (R. 44 and 50). The plaintiffs received nothing by way of consideration either from the corporation or from the defendant.

STATEMENT OF POINTS RELIED UPON

POINT I.

THAT THE STIPULATION OF THE DEFENDANT PRECLUDES THE COURT FROM MAKING A FINDING ON THE COMPLAINT OF NO CAUSE OF ACTION.

POINT II.

THAT THE COURT'S FINDING THAT PLAINTIFFS AGREED TO PAY THE DEFENDANT IS A CONCLUSION OF LAW NOT SUPPORTED BY THE FINDINGS OF FACT.

POINT III.

THAT THE COURT'S FINDING OF FACT THAT THE PLAINTIFFS AGREED TO PAY THE DEFENDANT IS BARRED BY THE STATUTE OF FRAUDS.

ARGUMENT

POINT I.

THAT THE STIPULATION OF THE DEFENDANT PRECLUDES THE COURT FROM MAKING A FINDING ON THE COMPLAINT OF NO CAUSE OF ACTION.

The Complaint (R. 1) sets forth the primary obligation of the defendant and the secondary obligation of the plaintiffs on a certain Promissory Note payable to

Continental Bank & Trust Company. The allegations of this Complaint were agreed to by stipulation (R. 9). Judgment for \$2,000.00 plus interest at 6%, totalling \$2,150.00 plus attorney's fees in the amount of \$500.00 should have been given to the plaintiffs.

Thereafter to the extent that defendant proved his entitlement to a judgment in excess of the judgment rendered in favor of the plaintiffs, he would be entitled to judgment and an offset against the plaintiffs' judgment.

Here the Court in giving judgment to the defendant, disregarded the interest and the attorney's fees stipulated to by the defendant and to which the plaintiffs were entitled.

Plaintiffs' contention on this point is necessarily applicable only in the event that plaintiffs' contention on Point II and III do not prevail.

POINT II.

THAT THE COURT'S FINDING THAT PLAINTIFFS AGREED TO PAY THE DEFENDANT IS A CONCLUSION OF LAW NOT SUPPORTED BY THE FINDINGS OF FACT.

The Court in it's Findings of Fact No. 3, erroneously concludes that the plaintiffs *agreed* (italics added), to pay the defendant for the printing. This agreement is a conclusion of law which is not substantiated by any Finding of Fact made by the Court. Whether or not there was an agreement was one of the primary issues in

the law suit, and whether or not the evidence in the record established an agreement is a Conclusion of Law. Therefore, neither the conclusion as to the agreement nor the Conclusions of Law designated as such are substantiated by any Findings of Fact by the Court. There just is no appropriate finding to support these conclusions.

POINT III.

THAT THE COURT'S FINDING OF FACT THAT THE PLAINTIFFS AGREED TO PAY THE DEFENDANT IS BARRED BY THE STATUTE OF FRAUDS.

At the conclusion of defendant's case, plaintiffs moved to dismiss urging the Statute of Frauds as a basis therefor. Said motion was denied and the Court thereafter made its finding that the plaintiff agreed to pay the defendant for the printing. This finding and the subsequent conclusion that the defendant is entitled to judgment are both barred by the Statute of Frauds.

Plaintiffs maintain that recovery based upon any statements made by the plaintiffs constituting an agreement to pay the defendant is barred by the following Section of the Statute of Frauds, Title 25-5-4, Utah Code, Annotated, 1953, as amended.

"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."

Those factors to be considered in determining whether or not a promise comes under the aforesaid Statute are as follows:

(a) *Credit Relied Upon.* If defendant, Miller, relied solely upon the credit of the plaintiffs, and the other following elements are favorable, then the promise of the plaintiffs is an original promise not within the Statute of Frauds. However, if any reliance is placed upon the credit of Deseret Uranium Corporation, then the plaintiffs' promise is collateral and is within the Statute of Frauds. The general rule is stated in *49 Am. Jur. 61* at p. 418:

"It may be asserted generally that an undertaking which renders the promissor a guarantor or surety upon a debt owing by a third person who is primarily liable is within the Statute of Frauds whether made before, after or contemporaneously with the inception of the third persons liability provided the promisee knows or has reason to know of the guarantee or suretyship relation. The Statute is applicable where credit is extended primarily to the old debtor or where the tenor of the entire transaction is that the promissor purposed to help out the old debtor and verbally promised to pay his debt."

In the case of *Eilertsen vs. Weber*, 255 Pac. 2nd 150 (Oregon) the Court stated:

"Whether a promise is original or collateral before there is any delivery of materials or services by a creditor may ordinarily be determined by this test: Did the parties understand that the seller was extending credit for the materials or

labor on the credit of the party sought to be charged or to him only as a guarantor of payment should another fail to pay.”

In the case of *Gutowsky vs. Halliburton Oil Well Cementing Company*, 287 Pac. 2nd 204 (Okla.), the Court held:

“If credit is given solely to the promissor, it is an original promise and not within the Statute of Frauds, but if any credit be given to the third party, the defendants’ promise is collateral and must be in writing. Nor does it matter upon which of the two parties the plaintiff principally depends for payment so long as the third party is at all liable to him to do the same thing which the defendant has engaged to do.”

Under these cases and particularly the Gutowsky case, it is apparent that the promisee, Miller, must have looked solely to the plaintiffs for payment in this matter. The evidence does not sustain such a position by the defendant. The fact that defendant, Miller, looked to the corporation rather than to the plaintiff is evidenced in many ways. He was told at the very outset that the money was to come from the underwriting of the company (R. 16, 47); he, himself, admitted that he was looking to the corporation for payment nearly up to the time that the law suit was filed (R. 28); his billings were all made to the corporation and not to the plaintiffs (R. 21, 25, 27, 51); no demand in writing or otherwise was made to the plaintiffs for the payment of this amount (R. 24); and finally, the defendant carried the account on its books in the name of Deseret Uranium Corporation

never showing an alleged offset for payment of the \$2,000.00 (R. 27, 28).

The last fact involving the record of the account is vitally important in the determination of the reliance by the promisee upon the credit of the promissor. The rule is set forth in *49 Am. Jur. 94* as follows:

“The fact that goods are charged on the books of a merchant to the person for whose use they were furnished is prima facie evidence, at least that they were sold on his credit, and not exclusively on the credit of the person orally promising to be responsible for the price; and the fact that at the time the goods are delivered to the third person they are charged to both the promissor and such third person has been held not to be sufficient to render an original undertaking.”

In the case of *Wood vs. Dodge*, 120 N.W. 774 (S.D.), the Court said:

“In determining to whom, as between the promissor and the person for whose benefit the promise is made, the credit was actually given, an important consideration is the manner in which the creditor entered the transaction in his books. Evidence that the goods sold were charged to the person to whom they were delivered strongly tends to show that the vendor gave credit to him and relied upon him for payment, and therefore, that the promise of another to be answerable for the debt was, at most, a collateral undertaking.”

In this connection, see also *McMillan vs. Dickover*, 248 Pac. 154 (Ore.), 59 A.L.R. 181.

In view of the foregoing facts, it is impossible to find that the defendant relied entirely upon the credit of the plaintiffs in the furnishing of the printing of the Prospectus. Defendant's own witness rebuts this position in indicating that defendant was told at the outset that the money was to come from the underwriting. Furthermore, the Prospectus, at Page 7, indicates the obligation of the company to pay for the printing services out of the underwriting proceeds. The defendant in printing the Prospectus would certainly be aware of such a provision.

(b) *Consideration to Promissor.* In order that the promise to pay can be considered as an original promise, there must be an independent consideration benefiting the promissor. However, as stated in *49 Am. Jur.* 73, p. 425; the mere existance of consideration does not make the promise an original one:

“The provision that a man should not be held in his promise to pay the debt of another unless the agreement is in writing does not render unnecessary a consideration for such promise when written. As has been well said, if the circumstances of the promise having been founded on a consideration is sufficient to take it out of the statute, the law is precisely the same now as it was before the statute was passed, and one of the most important statutes, has by construction become a dead letter.”

In the case at bar, no consideration was to pass to the plaintiffs, other than that to which they were already entitled for the acquisition of properties and for the

rendering of services for the corporation (R. 10, 11 and 12). There is no evidence of any independent consideration or benefit passing to the plaintiffs by reason of the printing of the Prospectus. The plaintiffs benefited only indirectly from the printing of the Prospectus and any benefit accruing to the plaintiffs was no more and no different than that accruing to the corporation.

The case of *Jannsen vs. Curtis et al*, 47 Pac. 2nd 662 (Wash.), involved the case of a principal stockholder who controlled the corporation and who orally promised to pay the corporation's obligation. The Court in holding that the promise was within the Statute of Frauds stated:

“The promise was to answer for the debt of the corporation. Not being in writing, it will not support an action unless there was some benefit or consideration different from that accruing to the corporation itself.”

This line of cases is discussed in 8 A.L.R. 1195, 35 A.L.R. 2nd 906. Again in the case of *King vs. Schnall*, 57 N.W. 2nd 287 (Neb.), the Court held that:

“A consideration to support a promise not in writing to pay the debt of another must operate to the advantage of the promissor, and place him under a pecuniary obligation to the promisee independent of the original debt, which obligation is to be discharged by the payment of that debt.”

Certainly under the above principals, it cannot be said that there was any consideration passing to the promissor, the plaintiffs, sufficient to support an original promise to pay the printing bill.

(c) *Primary Obligation Not Extinguished.* The third factor to consider in determining whether or not the alleged promise to pay is an original or collateral obligation is the status of the corporation's obligation. If the obligation continues after the promise is made, the promise is collateral.

In the case of *Richardson Press vs. Albright*, 224 N.Y. 497, an officer of the company promised to see that the printing debt of the company was paid. The promisor had a controlling interest in the company. The account was carried by the printer under the company name. Judge Pound in giving the decision of the Court, held that even though there might be a new consideration to the defendant (the promisor) and even though he might have a beneficial interest in the accomplishment of the printing, the primary debt of the corporation remained. He stated:

“The tenor of the entire transaction was that defendant purposed to help out the Oceanic Company and verbally promised to pay its debts the ancient purpose of the Statute of Frauds was to require satisfactory evidence of the promise to answer for the debt of another person, and its efficacy should not be wasted by unsubstantial verbal distinctions.”

In the case of *Mid-Atlantic Appliances, Inc. v. Morgan*, 73 S.E. 2nd 385 (Virginia), 35 A.L.R. 2nd 899, the Court held that notwithstanding the promise of the corporation officer to pay the debt of the corporation, the corporation's debt still remained unextinguished and that, therefore, the officer's promise was a collateral promise

within the application of the Statute of Frauds. This principal is well annotated in 35 A.L.R. 2nd 906.

Certainly in the case at bar, the obligation of Deseret Uranium Corporation remained in existence notwithstanding the alleged promise by the plaintiffs to pay the debt. This is evidenced by the fact that as we have indicated above, the defendant, Miller, himself indicated in answer to the question: "You were still expecting the corporation to pay the full amount of the bill?", he answered, "Oh, definitely, because Mr. Ulmer called me about it and asked me that question. And so did Paul Sugar. They both called me." This is further evidenced by the fact that the corporation was continually billed for the services, the records of the defendant showed the account in the name of the corporation without any offset of the alleged personal payment of \$2,000.00, and by the fact that the Prospectus represented that certain monies from the proceeds of the underwriting were to be used for the printing expenses.

SUMMARY

The facts involved in the subject case and the contention of the defendant with respect thereto afford us an excellent example of the necessity of the application of this section of the Statute of Frauds. Upon the bare verbal claim of the defendant, the plaintiffs here have had placed upon them a liability of \$2,468.00. This, notwithstanding the fact that no definite terms as to the time or as to the terms of payment have been shown by the defendant. Such uncertainty accompanying such

a liability should not be resolved in favor of the defendant merely upon his lone understanding of the facts.

To shift to the plaintiffs an obligation clearly that of Deseret Uranium Corporation should require not merely an uncertain verbal statement, but rather a written instrument clearly defining the terms of the transaction. Here the plaintiffs relied upon the defendant being paid from the underwriting proceeds. The defendant, however, did not rely entirely upon the plaintiffs. He was clearly told, as is indicated by defendant's witness, that the payment would be out of the underwriting proceeds. To submit the plaintiffs to the possibility of such uncertainty and such liability as is here attempted is one very good reason for adhering to the concepts of the Statute of Frauds.

In view of the foregoing authorities and of the application of the facts of the case at bar to the legal principles established by said authorities, Appellants respectfully maintain that the judgment of the lower Court be reversed, that the defendant take nothing by his Counter-Claim and that plaintiffs have judgment in accordance with the Complaint and Stipulation pertaining thereto.

CLYDE & MECHAM

By

Elliott Lee Pratt

*Attorneys for Plaintiffs and
Appellants*

351 South State Street
Salt Lake City 11, Utah