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IN THE SUPREME COURT

STATE OF UTAH

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CITY ELECTRIC, a Utah corporation, Plaintiff-Respondent,	:	
vs.	:	Case No.: 18248
DEAN EVANS CHRYSLER-PLYMOUTH, a Utah corporation, Defendant-Appellant.	:	

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BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT IN AND FOR UTAH COUNTY, STATE OF UTAH.

HONORABLE J. ROBERT BULLOCK, JUDGE.

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FILED

MAY 17 1982

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This appeal is from a final order of the District Court in and for Utah County, awarding Plaintiff/Respondent a money judgment against Defendant/Appellant.

DISPOSITION IN LOWER COURT

The trial Court, the Honorable J. Robert Bullock presiding without a jury, found for the plaintiff/respondent in that defendant/appellant was liable to the plaintiff/respondent in the sum of $2,332.76 on the basis of an open account.

RELIEF SOUGHT ON APPEAL

Defendant/Appellant seeks a reversal of the judgment of the lower Court.

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STATEMENT OF FACTS

Plaintiff/Respondent, City Electric, a Utah corporation, hereinafter referred to as "plaintiff", initiated an action in the Fourth Judicial District in and for Utah County, seeking to recover a money judgment against Dean Evans Chrysler Plymouth, Inc., appellant/defendant, hereinafter referred to as "defendant", for electrical materials (the "materials").

Plaintiff delivered the materials to a construction remodeling site located in Provo, Utah. Plaintiff has a store in Orem, Utah, and at all times pertinent herein a Mr. Stewart Donald Hatch was the local manager at Orem, Utah.

Between the periods of October and December, 1978, plaintiff delivered upon a construction remodeling site known as "Johnny Rider's Backstage Restaurant" (the "construction site"), located at Provo, Utah, and/or sold certain electrical supplies and materials to be used upon the construction site, from plaintiff's own Orem store.

Plaintiff in selling and/or delivering the materials treated the same as an open account and charged the value of the same to a credit account of the corporate defendant.

The corporate defendant, at all times pertinent herein, was a duly authorized corporation and during the period of 1/12/78 to 3/12/79, M. D. Evans (Mike Evans) was an Assistant Secretary of the corporate defendant (see Exhibit P-1, Annual Report of Organization).

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Plaintiff, unilaterally, decided to treat the purchase of the materials as an open account item and charged defendant's own credit account at plaintiff's premises.

After the sale and delivery of the materials and when payment was not received by plaintiff, plaintiff initiated this action seeking to recover judgment against defendant.

Other than the maintenance of an account by defendant at the plaintiff's place of business, there was no written or oral agreement between plaintiff and defendant for the payment of the materials upon which recovery is sought.

For purposes of correcting the record and clarity in the Transcript of Trial (the "Transcript" or "Tr.") the word "written" should be substituted for the word "recent" which presently appears on p. 16, line 6, and the words "written or oral" should be substituted for the words "recent oral" as it presently appears on p. 44, line 3.

The construction site upon which the materials were used is not owned by nor is it connected with the business of the defendant.

The materials sold by plaintiff did not go to the defendant corporation nor did defendant corporation benefit from the merchandise.

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ARGUMENT

POINT I

DEFENDANT'S ACTS DID NOT CONSTITUTE AN ORIGINAL PROMISE TO PAY FOR THE DELIVERY OF THE ELECTRICAL GOODS BY PLAINTIFF, AND PLAINTIFF IS BARRED FROM RECOVERY BY THE STATUTE OF FRAUDS, §25-5-4(2) UTAH CODE ANNOTATED.

The basic issue presented in this case is whether or not there is sufficient evidence in the record to support the finding of the trial Court that defendant's acts in dealing with the plaintiff constituted an original promise to pay for the delivery of the electrical goods, made between October and December, 1978, upon a construction site known as "Johnny Rider's Backstage Restaurant" in Provo, Utah.

The record amply shows that there was not a written or oral agreement between the parties for the payment of goods delivered by plaintiff. Plaintiff, at the trial has attempted through circumstantial evidence to show that there was an implied agreement, in the form of an original promise to pay, by virtue of the two Exhibits admitted into Court. An examination however of the Exhibits and the testimony of plaintiff's witnesses, show that plaintiff failed in its burden of proof to prove that an original undertaking on the part of the defendant existed.

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The only witness that could possibly connect the defendant with the plaintiff and the subsequent delivery of goods by plaintiff to the restaurant is a person by the name of Donald R. Sturgill. A review of Mr. Sturgill's testimony shows that, during October, 1978, he was employed by the defendant as a car salesman reporting directly to the sales manager (Tr. p. 8, lines 5-6). His prior employment had also consisted of acting as an outside salesman for the plaintiff.

Upon learning that a Mr. Rider and Mike Evans were interested in remodeling their restaurant he volunteered to assist them in obtaining ". . . a good price on what they needed" for the electrical supplies in such remodeling (Tr. p. 9, lines 14 - 17). Mr. Sturgill also informed the manager of the plaintiff at the time that the materials sought to be purchased from the plaintiff were to be used in connection with the restaurant. (Tr. p. 9, lines 28 - 30, to p. 10, line 1). Specifically, in answer to plaintiff's question Mr. Sturgill stated that he did not instruct City Electric to charge merchandise to the plaintiff's account but stated: "By no means did I instruct. I requested and asked whether they [Johny Rider and Mike Evans] could establish an account "Tr. p. 10, lines 5 - 6).

Viewing Mr. Sturgill's testimony consisting of three and a half pages in the record (Tr. p. 7 line 1 to p. 10, line 12)

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in the light most favorable to plaintiff, no evidence whatsoever was produced that can even be remotely construed as a promise by defendant to pay for the materials which plaintiff delivered to the restaurant site.

As a matter of fact the only inference that can be made from Mr. Sturgill's testimony is that Mr. Rider and Mr. Evans, individually, in their efforts to remodel their restaurant, sought, the help of Mr. Sturgill, as a former employee of the plaintiff, to ascertain prices and open an account for their own credit with the plaintiff (Tr. p. 9, lines 14 - 20). Therefore, the credit extended by plaintiff was given to the individuals and not the defendant.

It is plainly clear that there is no evidence in the record whereby Finding of Fact No. 6 to wit,

> "6. Mike Evans instructed that the purchases were to be charged to defendant's account with plaintiff"

can be sustained.

Only from the testimony of Mr. Sturgill could one possibly extract such an inference; however, upon reviewing the same (Tr. p. 7 to p. 10) no such inference can be made. The substance of Mr. Sturgill's testimony is that he had a telephone conversation with plaintiff's agent inquiring as to prices. When specifically asked about whether or not he instructed anyone as to the charging of merchandise to the defendant's account, he replied:

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By no means did I instruct. I requested and asked whether they could establish an account.

(Tr. p. 10, lines 5 - 6; emphasis added).

Since defendant had already an account open with plaintiff it would not be necessary for Mr. Sturgill to ask on behalf of defendant. It is obvious from the testimony as shown on page 9 of the transcript that it was ". . . Mike and Johnny were involved in the restaurant and that they would be purchasing materials." (Tr. p. 9, lines 29 - 30, emphasis added), and not the defendant; plaintiff was fully aware of that fact at the time it sold the materials.

It is respectfully submitted that in order to arrive at the finding, as suggested by the trial court, that defendant became liable as a promissor, for an original promise to pay, plaintiff had to produce some modicum of evidence either express or implied showing the intent of the defendant to be bound to pay for the materials. For instance plaintiff failed to prove that the defendant corporation promised to pay after the materials were delivered; or, that, the defendant corporation acting through any of its authorized representations impliedly, promised to pay because it had any direct or indirect pecuniary interest in the transaction; or that there was a promise by defendant corporation to pay; or, that the furnishing of the materials was for the benefit of the defendant.

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It is clear that plaintiff failed in its burden of proof to show any remote connection between the corporate defendant and the furnishing of materials by plaintiff for the remodeling of a restaurant owned by Rider and Evans.

Part of Finding of Fact #14, to-wit:

> 14 . . . These invoices [October 8, 1978 and October 9, 1978] were paid in December by defendant.

cannot be sustained by the evidence. There is no reference whatsoever in the record that defendant corporation paid for the items and invoices recited therein. The only evidence in the record is that those two invoces were paid, however, no testimony or other documentary evidence exists to show if the defendant corporation paid the two invoices dated October 8 and October 9, 1978. (Tr. p. 12, lines 28 - 30; p. 13, lines 1 - 24). Plaintiff is merely bootstrapping his case on the theory that if payment was made, it was made by the defendant; however the inference should be made that Johnny Rider and/or Mike Evans paid for the items charged on those dates, and in view of Mr. Sturgill's testimony relating who wanted the construction done (Tr. p. 8, lines 19 - 30; p. 9, lines 12 - 20); . . . it is the only permissible inference.

The trial court erred in its finding that it was the intent of the parties that the corporate defendant would pay for the materials delivered by plaintiff on the construction site.

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The circumstances and facts of the case as presented by plaintiff fail to show the intent of the defendant to pay for materials ordered by third parties. The record is devoid of any evidence, express or implied, where an inference can be made that the credit by plaintiff was extended to defendant. There were no words, oral or written, used by defendant in making a "promise" to pay for the materials delivered by defendant. There is no evidence that the plaintiff was induced by defendant to deliver the materials to the construction site, nor that the goods were furnished by defendant relying upon the credit or the request of the defendant.

In Sugar v. Miller, 6 U 2d 433, 315 P 2d 862 (1957) this Court found that there was an original promise to pay for the delivery of services by the defendant, by examining the circumstances and the intent of the parties, in determining liability. In the Sugar case, there were express representations and inducements and furthermore, the defendant in that case was extending the credit only upon those representations.

In the instant case a review of the records clearly shows an absence of any evidence, from which an inference can be made as to the liability of the defendant.

The best that can be said for plaintiff's case is that, defendant had an open account with the plaintiff, and that defendant delivered materials valued at $2,332.76 upon a remodeling site known as "Johnny Rider's Backstage Restaurant", and that there was no record of a written objection by the corporate defendant regarding the invoices sued upon, and that the

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prices charged on the invoices were "fair" or that the purchaser was treated fairly.

It appears from the record that the plaintiff was actually relying upon the credit of Mr. Sturgill rather than the corporate defendant because Mr. Hatch, plaintiff's store manager, in answer to plaintiff's counsel's questions stated:

> Q. And so, in other words, you were giving a more favorable price to this account that you otherwise would to this type of customer?
>
> A. Yes, sir.
>
> Q. Why did you do that?
>
> A. Well, I knew Dave Sturgill, and he had been a friend of mine, and he asked me to do him a favor.
>
> (Tr. P. 34, lines 3 - 9).

It is also clear that plaintiff knew at the time that Mr. Sturgill was not an authorized representative or agent of the defendant. Mr. Hatch testified as follows:

> Q. Mr. Hatch, you said Mr. Sturgill was a friend of yours?
>
> A. Yes, an acquaintance, a friend, yes.
>
> Q. You knew he was working for Dean Evans Chrysler-Plymouth, Inc.?
>
> A. I knew he was, did you say?
>
> Q. Yes.
>
> A. Yes, I knew he was.

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Q. Did you know what capacity he was working in?

A. He was a car salesman.

Q. You knew that he did not have any managerial capacity in that dealership, did you not?

A. I did not know that, but I assumed he did not.

Q. All right. During this period of time that you and he had a conversation, you assumed that he did not have any managerial capacity?

A. True.

Q. Is that correct?

A. Yes.

(Tr. p. 36, lines 1 - 19).

Mr. Hatch's further testimony showed clearly and unequivocally that plaintiff knew at the time of the ordering of the materials for whom the materials were intended:

Q. You were aware of the delivery of the remodeling project of the Backstage Restaurant?

A. I was.

Q. Mr. Sturgill told you that?

A. Yes.

(Tr. P. 37, line 25 - 29).

In conclusion in reviewing the record of the testimony of the witnesses and the documentary evidence there is not a preponderance of evidence supporting the finding of liability by the Court against the corporate defendant.

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It is respectfully submitted that plaintiff's claims against the corporate defendant are barred by the provisions of the Statute of Frauds, §25-5-4(2), wherein it is stated that:

> 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.

A review of the record clearly indicates that it was not the intent of the parties that the defendant should be liable for charges made to its account with the plaintiff by third parties. Plaintiff has failed in its burden of proof in showing by preponderance of evidence, that the requisite elements of intent existed in order to charge the defendant with liability.

POINT II

THERE WAS NO APPARENT AUTHORITY FOR DEFENDANT'S ACCOUNT TO BE USED BY THIRD PARTIES, NOR RATIFICATION OR ACCEPTANCE OF THE CHARGES MADE THEREIN.

The fundamental rule relating to apparent or ostensible authority of an officer of a corporation is that the corporation is bound by the acts of an officer if he acts in the usual course

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of the business of the corporation in such a way as to justify to third persons who deal with him in inferring or assuming that he is doing an act or making a contract within the scope of his authority. However, apparent or ostensible authority is . . . "limited and governed by the character of business in which the corporation is engaged". 19 Am Jur 2d, §1164, p. 591.

The facts of the instant case clearly disclose that at the time plaintiff sold and delivered the electrical supplies and materials to the restaurant construction site, plaintiff knew that defendant corporation was engaged in the business of selling automobiles. Plaintiff knew that the materials were to be used for the remodeling of a restaurant (Tr. p. 37, lines 25 - 30), and there is no evidence in the record that there was any connection between the restaurant remodeling and the corporate defendant. As a matter of fact, the contrary clearly appears in the record from the evidence of plaintiff's first witness (Mr. Sturgill) when in response to plaintiff's counsel's questions he replied that Johnny Rider and Mike Evans were remodeling "their" restaurant and needed electrical supplies and furthermore, he, Mr. Sturgill, specifically related to Don Hatch the following:

> A. I had talked to Don and told him who the restaurant was for, yes. I told him that Mike and Johny were involved in the restaurant and that they would be purchasing materials. (Tr. P. 9, lines 28 - 30, p. 10, line 1).

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For defendant to assert at the time of the trial (Tr. p. 51, lines 12 - 25) that it relied upon the corporate defendant to get paid is an argument contrary to the plaintiff's own elicitation of the facts.

It is clear that the trial court totally misinterpreted the law of apparent or ostensible authority in analyzing the facts before it and those findings of fact are not supported by any evidence whatsoever in the record. Plaintiff simply knew from the beginning, around October 1978, who was going to get the materials and who was going to pay for them. The only witness upon which plaintiff relies to make its case of apparent or ostensible authority (Mr. Surgill), clearly and unequivocally told plaintiff's manager, Mr. Hatch, who was ordering and who was going to use the materials. From the testimony of the record no other inference can be made as no shred of evidence, let alone a preponderance of evidence, exists to make the defendant corporation liable for the debts of a third party.

Mr. Hatch's testimony certainly did not produce any evidence showing that the plaintiff had any express or implied authorization by the defendant to charge defendant's account with the purchases. Mr. Hatch's testimony on that point, is that he looked up the ". . . computer print-out for addresses and open accounts . . .", found one for the corporate defendant, and he, himself, unilaterally, decided to charge defendant's account. (Tr. p. 38, lines 23 - 30).

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The record cannot sustain Finding No. 13 to-wit,

> 13 Plaintiff relied upon defendant's credit with plaintiff in selling material and granting the more favorable price.

in that neither Mr. Middlestead, nor Mr. Hatch, plaintiff's agent ever asserted or implied that they relied upon the credit of the defendant in selling the materials. Any such inference by the Court is reversible error.

The case for the "reliance upon the credit of defendant" and upon the "apparent authority" theories of plaintiff's case is attempted to be reached through a circuitous route commencing with a telephone conversation which plaintiff's agent Don Hatch had with a former employee of plaintiff (Sturgill), who at the time was a salesman for defendant, who (Sturgill) had a conversation with Mike Evans, who told him that they (Rider and Evans) wanted to obtain fair prices for electrical materials. As a matter of fact, defendant's counsel's motion to strike the conversation between Mr. Hatch and Mr. Sturgill, having been made and renewed, was overruled by the court. (Tr. p. 29, lines 23 - 30; Tr. p. 30, lines 13 - 22; Tr. p. 36, lines 20 - 23; Tr. p. 37 lines 1 - 7). It is respectfully submitted that any evidence of the telephone conversation between Mr. Sturgill and Mr. Hatch should have been excluded, and the failure of the trial to do so, is reversible error; in any event it certainly does not factually support the findings made by the trial Court.

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CONCLUSION

Defendant submits that the lower Court erred in all material respects in finding for the plaintiff an assessing liability against the defendant, and that this Court should enter its order reversing the judgment of the trial Court and dismissing plaintiff's Complaint with prejudice.

Respectfully submitted,

NICK J. COLESSIDES
Attorney for Defendant/Appellant

MAILING CERTIFICATE

Served three (3) copies of the foregoing brief to Geoffrey Heath, Attorney for Plaintiff/Respondent, American Plaza II, Suite 400, 47 West 200 South, Salt Lake City, Utah 84101, by mailing the same, postage prepaid, this 17th day of May, 1982.

NICK J. COLESSIDES
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