1982

Richard W. Ringwood v. Foreign Auto Works Inc et al : Brief of Appellant

Utah Supreme Court

Robert C. Fillerup; Frederick A. Jackman; Attorneys for Respondents;
Nick J. Colessides; Attorney for Appellant;

IN THE SUPREME COURT

OF STATE OF UTAH

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RICHARD W. RINGWOOD,

Plaintiff-Appellant,

vs.

FOREIGN AUTO WORKS, INC., a Utah corporation, MASSIMO C. POGGIO, REBECCA JANE POGGIO and HOWARD R. FRANCIS,

Defendants-Respondents.

Case No.: ~~15908~~ 18249

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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 Allen B. Sorensen
Judge

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AUTHORITIES CITED

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BRIEF OF APPELLANT

NATURE OF THE CASE

This is an appeal from a dismissal of appellant's Complaint in trial court wherein appellant brought an action on a promissory note.

DISPOSITION IN LOWER COURT

Trial court heard the case and concluded no cause of action, dismissing with prejudice.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the trial court's judgment.

STATEMENT OF FACTS

This is an action on a promissory note executed near November, 1978, relating to a transaction between appellant Richard W. Ringwood and the individual respondents Massimo Poggio, Rebecca Jane (Mrs. Massimo) Poggio, and Howard R. Francis and the corporate respondent Foreign Auto Works.

In October 1976, Mr. Ringwood owned a corporation known as Richard Ringwood, Inc., in which he owned 19,500 shares of stock and Mr. Poggio was the sole shareholder of a corporation known as Foreign Auto Works. At that time Mr. Ringwood, Mr. Poggio and Mr. Francis entered into an agreement whereby the two corporations would merge and each would receive an appropriate number of shares of stock of the survivor corporation, Foreign Auto Works. (See Exhibits 26 and 27.)

Two years later, in mid 1978, Mr. Poggio and Mr. Francis entered into negotiations wherein they agreed to purchase Mr. Ringwood's 15,000 shares of stock for $100,000.00. On or about November 8, 1978, an agreement was signed which included the terms of a backdated promissory note and further provided that the stock be placed in escrow until the time of performance; subsequently the share certificate, promissory note and agreement of November 8, 1978 were all placed in escrow. (See Exhibit 23.) Payments were made for approximately one year reducing the principal by almost $20,000.00 but in November 1979, payments ceased. (See Exhibit 24.)

Mr. Ringwood made demand for payment pursuant to the terms of the promissory note. When payment was still not made, he filed action in the Fourth District Court of the State of Utah, Utah County. The trial court held the November 8, document (see Exhibit 22) to be superseding of the promissory note, and basing its decision upon some terms of that agreement dismissed the complaint and counterclaims each with prejudice.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ITS FAILURE TO CONSTRUE ALL EXHIBITS TOGETHER WHEN MAKING ITS DECISION.

The general rule is that, absent fraud, an apparently complete agreement is presumed to contain the whole agreement. Eie v St. Benedicts Hospital, 638 P.2d 1190, 1194 (Utah 1981). However, that presumption should be made only when it is integrated, when it is adopted by the parties as their final and complete expression of agreement. Restatement, Contracts §228.

A. The November 8, agreement was not integrated.

In the instant case, the November 8, 1978, agreement was held by the trial court to supercede the promissory note dated October 1st (but not executed until late October as evidenced in transcript, P. 69, 70), because the agreement contained many of the same terms as the note (see Memorandum decision). But the escrow agreement, (Exhibit 23), contrary to the

trial courts' holding, clearly shows that the November 8 agreement (Exhibit 22) was not considered by the parties as the whole of the agreement. Besides the share certificates of Ringwood's stock being placed in escrow, both the agreement and the promissory note were included. The escrow agreement provides that payments will be made per terms of the promissory note and the escrow payment ledger (Exhibit 24) and defendant's ledger book (Exhibit 17) show payment was made following the provisions of the promisosry note. Certainly if the parties intended the agreement to be the whole, the note would not have been held in escrow and payments would have been made as provided by the terms of the agreement.

B. In the absence of an integrated document, all evidence must be construed together with the intent of the parties.

The Utah Supreme Court, in Bullfrog Marina, Inc., v. Lentz, 28 Utah 2d 261, 501 P.2d 266 (1973) stated that

> ". . . where two or more instruments were executed by the same parties contemporaneously or at different times in the course of the same transaction, and concern the same subject matter, they will be read and construed together. . ." (emphasis added).

Id at 271, citing Strike v. White, 91 Utah 170, 176, 63 P.2d 600 (1936). The Ninth Circuit Court, in applying Utah law agreed. "[W]e have labeled "elemental" the proposition that they [two or more written agreements contemporaneously executed as part of one completed transaction] must be construed together." In Re Steen 509 F.2d 1398, 1403 (Ninth Circuit 1975).

In the instant case, the agreement of November 8 and the promissory note even if, as the trial Court assumed, may not have been executed simultaneously, however, the inescapable conclusion is that they were executed in the course of the same transaction, concerning the same subject matter. Therefore, they should be construed together as the whole contract.

Also to be considered in the intent of the parties.

> "[T]he meaning and effect to be given a contract depends upon the intent of the parties; and that this is to be ascertained by looking at the entire contract and all of its parts in their relationship to each other. . ."

Peck & Sons, Inc., v. Lee Rock Products, Inc., 30 Utah 2d 187, 515 P.2d 446, 448 (1973), see also Driggs v. Utah State Teachers Retirement Board, 105 Utah 417, 142 P.2d 657 (1943) and Maw v. Noble, 10 Utah 2d 440, 354 P.2d 121 (1960). Various other exhibits clearly show that the parties did not mean for the terms of the agreement to be looked at as superseding all others.

The escrow agreement, as previously discussed, included both the note and the agreement as well as providing for payment as per terms of the promissory note; payment was made in accordance with the terms of the note (Exhibits 17, 24); and in a letter to Mr. Poggio as president of Foreign Auto Works (Exhibit 4), the corporation's attorney, Glen Ellis, stated "[t]he original only [of the promissory note] should be signed and delivered at the time of the execution of the formalized agreement," exhibit 4, paragraph 2. These exhibits clearly show that the parties intended that the note and agreement be construed at together, and in fact they were treated as part and parcel of the same transaction by the defendants.

POINT II

THE AGREEMENT OF NOVEMBER 8, 1978, WAS NOT A NOVATION OF THE PROMISSORY NOTE.

A novation is a substituted contract and implies the elimination of an existing debt or obligation and its transition into a new one between the same or other parties. Cooke v. McAdoo 85 NJL 692, 90 A. 302 (1914). The new contract must be so radically different from the old that it necessarily supersedes the old. Elliot v. Whitney, 215 Kan. 256, 524 P.2d 699, 704 (1974).

In the present case, there is no extinction of an old debt. The same transaction - the sale of 15,000 shares of Foreign Auto Works stock for $100,000 - is represented. Nor are there new parties to the agreement to create a novation. Both the agreement and the note were signed by Mr. Poggio as president of Foreign Auto Works, as well as by each of the individual respondents individually. The only difference is that they also signed the agreement as shareholders and officers of the corporation. The trial court found this to be a tax dodge rather than a true novation. This reasoning is supported by a letter from the respondents' attorney to Ringwood's attorney (see Exhibit 2) wherein he states that

> ". . .they would be best off for the corporation to buy back the 15,000 shares of stock and simply decrease the number of outstanding shares. The reason for that is that the corporation can retire the stock without my clients having to pay individual income tax on the amounts of money that are paid to Mr. Ringwood and they would, of course prefer to do that. . ."

Exhibit 2, paragraph 4. See also transcript P. 46, 47.

The conduct of the parties during and after the making of the agreement clearly indicates that a novation was not intended. 6 Corbin on Contracts §1293, p. 190, states that it is the intention of the parties which should decide whether there truly is a novation. This court agreed that the intent, whether

or not there is novation, is implied from the facts and circumstances surrounding the transaction and the conduct of the parties thereafter. Robison v. Hansen, 594 P.2d 867, 870 (Utah 1979), citing United Security Corp. V. Anderson Aviation Sales Co., Inc. 23 Ariz. App. 273, 532 P.2d 545, 547 (1975).

Those factors previously discussed in Point I, such as the escrow agreement and the letter to Mr. Poggio from his attorney clearly show that there was no intention to create a novation.

Such writings controvert both the terms of the promissory note and those of the formal agreement. In the letter from Poggio and Francis' attorney to Ringwood's attorney (Exhibit 2), he states that one-fifth of the stock should be released at the end of each year, because one-fifth of the consideration would have been paid at that time and "since [his] clients [would] own all of the stock. . ." Exhibit 2, paragraph 1. Respondents subsequently performed for one year paying one-fifth of the consideration.

The November 8 agreement (Exhibit 22) provides that if the buyer defaults in payment, the money already paid would be considered payment for an option to purchase. Exhibit 22 paragraph 9. With as large of an amount as was paid about $20,000.00 and one-fifth of the total amount is rather a stiff amount to pay for an option. The most reasonable remedy would be that provided by the note (Exhibit 1), where Ringwood may make demand and then bring suit if needed.

CONCLUSION

When looking at the evidence, the trial court should have taken it all into consideration in order to construe the entire agreement. The record indicates that the intention of the parties was not that the November 8 agreement could supersede the promissory note, but that they should be construed together. This is especially supported by the escrow agreement entered into after the November 8 agreement.

The conduct of the parties during the time of and after the transaction also indicates that there was no novation, but that some terms not included in the note should be added. The "new" agreement was not radically different from the original, nor was there an actual substitution of any new parties to the contract.

Mr. Ringwood should therefore be allowed to recover upon the terms of the promissory note and appeals to this Court for a decision holding the same.

DATED this 1st day of June, 1982.

Respectfully submitted,

Nick J. Colessides

NICK J. COLESSIDES

MAILING CERTIFICATE

Mailed two (2) copies of the foregoing Brief of Appellant to Robert C. Fillerup, attorney for defendants Poggio and Foreign Auto Works, Inc., 1325 South 800 East #305, Orem, Utah 84057, and Frederick A. Jackman, attorney for defendant Howard R. Francis, 1325 South 800 East #300, Orem, Utah 84057, postage prepaid, this 1st day of June, 1982.

Mark J. Coleman