

1959

J. Golden Barton Motor Co. v. Calvin D. Jackson : Brief of Appellants

Utah Supreme Court

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In The Supreme Court

UNIVERSITY UTAH

of the State of Utah

AUG 1959

J. GOLDEN BARTON MOTOR COM-
PANY, INCORPORATED,

Plaintiff,

vs.

CALVIN D. JACKSON,

Defendant.

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Case No.

~~6871~~
9011

BRIEF OF APPELLANTS

FILED

APR 21 1959

Clerk, Supreme Court, Utah

BEN G. BAGLEY

Attorney for Defendant.

In The Supreme Court

of the State of Utah

J. GOLDEN BARTON MOTOR COM-
PANY, INCORPORATED,

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vs.

CALVIN D. JACKSON,

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BEN G. BAGLEY

Attorney for Defendant.

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In The Supreme Court

of the State of Utah

J. GOLDEN BARTON MOTOR COM-
PANY, INCORPORATED,

Plaintiff,

vs.

CALVIN D. JACKSON,

Defendant.

Case No.

6871

BRIEF OF APPELLANTS

STATEMENT OF THE CASE

This action was commenced on December 20, 1957, for specific performance of an alleged contract whereby the defendant, CALVIN D. JACKSON, according to the claim of the complaint entered into a written agreement with the plaintiff, J. GOLDEN BARTON MOTOR COMPANY, INCORPORATED, to purchase a new Mercury Automobile from plaintiff and gave plaintiff checks in the sums of \$500.00 and \$3,680.00 respectively. The automobile was never delivered to the defendant and he stopped payment upon the \$500.00 check. The defendant answered denying that there was a contract between the parties. On March 8, 1958, the deposition of the defendant was taken before Lois P. Crowder in the office of the plaintiff's attorney. On June 10, 1958, the plaintiff made a written motion for

summary judgment, in favor of the plaintiff, of forfeiture of the sum of \$500.00 for nonperformance of the contract by the defendant, and the defendant made an oral motion for summary judgment of dismissal. These motions were argued and at the request of the court, counsel presented written memoranda of authorities. On December 15, 1958, the court made and entered its Findings of Fact, Conclusions of Law and Judgment in favor of the plaintiff for the sum of \$500.00, as a forfeiture of liquidated damages.

STATEMENT OF FACTS

The only evidence before the court consists of the defendant's deposition and four exhibits identified therein. The essential facts as disclosed by these sources are as follows:

Calvin Jackson, the defendant, went to the plaintiff's place of business and during a conversation asked Dean Roberts, the plaintiff's salesman, how much the defendant could purchase a Mercury Parklane for. The salesman said, "For \$500.00 I can get you that car for about \$100.00 a month for 36 months." (Deposition, Page 13) The defendant assented to this and at the request of plaintiff's salesman, executed and delivered his check in the sum of \$500.00. (plaintiff's exhibit "2") and signed an invoice and order, (plaintiff's exhibit "1") whereupon the price of the automobile had been stated as \$4,080.00, and on the left-hand side had been written, "payable in 36 installments of \$100.00." (Deposition, Page 13 and 14) The salesman said that before this could become a contract he would have to have it confirmed by the sales manager. He then showed the contract to the sales manager, who wrote over the figure "\$100.00"

the figure "112" and some odd cents. He brought this back to Jackson and said, "this will have to be \$112.00." (Deposition, Page 14) Jackson said, "well, I guess that will be alright," but did not, in writing, acknowledge any change in the contract and no new contract was drawn. (Deposition, Pages 19, 20, 21 and 24) After this, however, the salesman went back to the sales manager and came back to Jackson saying, "Dean made a mistake. The payments will have to be \$118.00 a month." (Deposition, Page 14) Jackson said, "I can't make those payments." Meanwhile, without Jackson's authorization and *over his signature, the plaintiff's agent had written over the figures previously placed there-* upon the figure, "118.74." When the defendant refused to accept these payments, the plaintiff's agents insisted that they were going to run the contract through Commercial Credit for financing upon those terms. The defendant insisted that he could not meet these terms and that he was not willing to meet them and stated that he would contact Continental Bank and see what he could do about financing the automobile. (Deposition, Pages 14 and 15) He gave his check to the plaintiff for \$3,680.00, upon which he wrote a statement to the effect that it was to be cashed or used only when or if the automobile should be financed. (Plaintiff's Exhibit "3") The plaintiff's agents then wrote an additional provision upon the invoice and order form to the following effect: "Cal has alternative for financing from Continental Bank. \$100.00 more if he does finance." (Deposition, Pages 20 and 21) Thereupon the defendant left the plaintiff's place of business and on the following day stopped payment upon the \$500.00 check. (Deposition, Page 18.)

The alleged contract (Plaintiff's Exhibit "1") upon which the plaintiff's claim is based is on a printed form and contains the following written provisions:

Purchaser's Name: Cal Jackson

Please enter my order for used Parklane 2 Dr. Hardtop

Cash Selling Price	<u>\$4,000.00</u>
--------------------	-------------------

We will get
1958 Plates

Sales Tax	<u>\$ 80.00</u>
-----------	-----------------

License & Transfer of Title	<u>\$ 6.00</u>
-----------------------------	----------------

Total Cash Selling Price	<u>\$4,080.00</u>
--------------------------	-------------------

Payable in 36 Installments of "\$118.74"

Additional Information:

Cal has alternative for financing
from Continental Bank.

\$100 more if he does finance.

Deposit herewith	<u>\$ 500.00</u>
------------------	------------------

Unpaid Cash Price	
-------------------	--

Balance	<u>\$3,580.00</u>
---------	-------------------

By /s/ George Karoulis

(Sales Manager or Officer of the Company)

The figure "\$118.74" is obviously written over some
other figure which by the handwriting has become illegible.

STATEMENT OF POINTS

POINT I

**NO CONTRACT WAS EVER FORMED BETWEEN
THE PLAINTIFF AND DEFENDANT.**

POINT II

EVEN IF THE PARTIES HAD FORMED A BINDING CONTRACT IT WAS, BY ITS TERMS, CONDITIONAL AND THE CONDITIONS UPON WHICH IT DEPENDED HAD NOT BEEN PERFORMED; THEREFORE, SUCH CONTRACT IS UNENFORCEABLE.

POINT III

EVEN ASSUMING AN UNCONDITIONAL CONTRACT BETWEEN THE PARTIES AND A BREACH OF THE SAID CONTRACT, THE PLAINTIFF SHOWED NO DAMAGES FOR SUCH BREACH, AND THERE IS NO GROUND SHOWN FOR THE FORFEITURE OF \$500.00 AS LIQUIDATED DAMAGES THEREFOR.

ARGUMENT

POINT I

NO CONTRACT WAS EVER FORMED BETWEEN THE PLAINTIFF AND DEFENDANT.

It is fundamental in the law of contracts that for the formation of a valid contract there must be a mutual assent or meeting of the minds. (12 Am. Jur. 515.)

A contract is not made so long as in the contemplation of both parties thereto something remains to be done to establish contract relations. (12 Am. Jur. 519.)

A qualified or conditional acceptance does not make a binding contract and destroys the original offer so that a later unqualified acceptance cannot form a contract. (12 Am. Jur. 543, Section 53.)

Where a portion of a contract relating to the terms of payment is left for future determination, the contract is incomplete and no action premised thereon is maintainable.

(HIWAY MOTOR COMPANY VS. SERVICE MOTOR COMPANY, 68 Utah, 65, 249 Pac. 133.)

In the present case, it is impossible to determine from the evidence the price which was to be paid for this automobile. It could be \$4,100.00, \$4,080.00, \$4,086.00, \$4,180.00, \$4,186.00, \$4,774.64, or any one of several other different prices computed by different combinations of the plaintiff's contradictory figures.

If, as alleged in the complaint, there was a contract, when and how was it formed? At the time when Jackson had signed the invoice and order and delivered his check in the sum of \$500.00, there was no contract between the parties because this proposal had not yet been accepted by Barton Motor's authorized agent. At this point it constituted only a unilateral offer upon the part of Jackson.

At the time when the figure \$100.00 was changed by the plaintiff's agent to \$112.00 there was no contract between the parties because while Jackson indicated his assent to this change, he did not actually accept it and this was later withdrawn by the plaintiff's sales manager by writing over this figure the figure "\$118.74."

After this higher figure was inserted, there never was any assent upon Jackson's part to the terms of the altered instrument. Quite to the contrary, the evidence clearly shows that this proposal was persistently refused by the appellant.

The only authority cited by the plaintiff is its Memorandum of Authorities and the one on which the district court apparently based its decision is the case of JENSEN'S

USED CARS vs. JAMES T. RICH, (7 U, 2d 276, 323 Pac 2nd, 259.) The facts in the Jensen case as stated in the opinion of this court are as follows:

"On August 12th or 13th the plaintiff's agent delivered a used car to the defendant who gave the agent a \$200.00 check and signed a conditional sales contract in blank. *This contract was not used.* On August 17th the defendant stopped payment on the check. *Nevertheless, on the next day, August 18th, the defendant signed another conditional sales contract that contained clear, complete terms including the price.* The defendant admitted all this. He has paid nothing. *After having possession of the car three months,* it was picked up because of the defendant's default in payment." (Emphasis ours)

Certainly the Jensen case is not authority for the fact that a contract had been formed between the parties in the present case. There, as shown by the above statement of facts, while a blank contract was signed originally, this contract was not used and a later clear and complete contract was signed. Under the evidence here before the court it is impossible to determine even the price for which the automobile was to be sold.

POINT II

EVEN IF THE PARTIES HAD FORMED A BINDING CONTRACT IT WAS, BY ITS TERMS, CONDITIONAL AND THE CONDITIONS UPON WHICH IT DEPENDDED HAD NOT BEEN PERFORMED; THEREFORE, SUCH CONTRACT IS UNFORCEABLE.

If a contract was ever formed between the parties, it would have to be by the delivery of the defendant's check

to the plaintiff in the sum of \$3,680.00, and its acceptance by the plaintiff. The check referred to (Plaintiff's Exhibit "3") has written upon it a statement to the effect that "this check must be held until and if I secure a loan for the amount and release this to be cashed." At this point in the negotiations, the plaintiff's agent wrote upon the invoice and order under which it claims, the words, "Cal has alternative for financing from Continental Bank, \$100 more if he does finance." Jackson did not subscribe this alteration in the contract nor any of the previous ones.

If at this point a contract was formed between the parties then such contract was subject to the terms and conditions stated, the principal one of which was the condition that Jackson obtain financing from Continental Bank upon the automobile. This condition was never performed.

SECTION 60-1-11, UTAH CODE ANNOTATED, 1953, which is one of the provisions of the Uniform Sales Act provides as follows:

"EFFECT OF CONDITIONS (1) Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale, or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first mentioned party may also treat the non-performance of the condition as a breach of warranty"

There is no evidence of any promise or undertaking upon the part of the defendant to finance the automobile and the writing upon the invoice and order form is entirely

that of the plaintiff's agents and should be construed most strongly against the plaintiff.

POINT III

EVEN ASSUMING AN UNCONDITIONAL CONTRACT BETWEEN THE PARTIES AND A BREACH OF THE SAID CONTRACT, THE PLAINTIFF SHOWED NO DAMAGES FOR SUCH BREACH, AND THERE IS NO GROUND SHOWN FOR THE FORFEITURE OF \$500.00 AS LIQUIDATED DAMAGES THEREFOR.

The judgment of the District Court is for forfeiture of \$500.00 as liquidated damages for the nonperformance of an alleged contract by the defendant. There is no evidence before the court of any actual damage suffered by the plaintiff for the breach of the alleged contract.

It is well established in the law of our state that where parties to a contract stipulate the amount of liquidated damages that shall be paid in case of a breach, such stipulation and contract is not enforceable if the amount of the forfeiture is disproportionate to the amount of damages actually suffered by the claiming party. This rule is announced and illustrated in a long and consistent line of cases including PERKINS VS. SPENCER, 121 U. 468, 243 Pac. 2nd 446; YOUNG VS. HANSEN, 117 U. 591, 218 Pac. 2nd 666; CROFT VS. JENSEN, 86 UTAH 13; 40 Pac. 2nd 198; MALMBERG VS. BAUGH, 62 Utah 331, 218 Pac. 975; WESTERN MACARONI MANUFACTURING COMPANY VS. FIORE, 47 Utah 108, 151 Pac. 984; and McINTOSH VS. JOHNSON, 8 Utah, 359; 31 Pac. 450.

In the present case, there is no evidence before the court which would indicate that the plaintiff has suffered

any damage at all. If it has sold the automobile which it claimed to have sold to the defendant, then it is difficult to see wherein its damage lies. The defendant has introduced as an exhibit an application for certificate of title upon the automobile which has been signed in blank by the defendant but which has obviously never been filled out and presented to the Tax Commission (Plaintiff's Exhibit No. 4) It would appear, therefore, that the plaintiff has made no effort to actually transfer title to the automobile to the defendant. The rule illustrated by the above-quoted cases is founded on sound principle of equity that a forfeiture which is disproportionate to actual damages is, in effect, a penalty and would result in the unjust enrichment of the person receiving the same. Neither the facts before the court nor the plaintiff's memorandum shows anything which would justify a forfeiture in this case.

In the case of Jensen's Used Cars vs. Rich, Supra, the Supreme Court upheld a forfeiture of \$200.00 upon a used car which the defendant had held and used for some three months after a contract was signed between the parties. Obviously, this case cannot be taken as authority for the plaintiff's position that it should receive a forfeiture of \$500.00 where the defendant never accepted nor received the automobile and where the plaintiff retained the exclusive possession, title and right to the disposition of the automobile.

CONCLUSION

The holding of the District Court in the present case is of grave concern to this appellant because it appears to be contrary to all of the fundamental and accepted rules

of law. If upheld, this decision would extend the sound principle announced in the case of *Jensen's Used Cars vs. Rich, Supra*, to include a case such as the present one where an automobile dealer, simply by changing the terms of a contract over the other party's signature, may impose upon such party whatever terms he might choose. The evidence here is clear that while the changes were made in Jackson's presence, they were made unilaterally without his consent and even over his protests and objections. Certainly a person who signs a form should not, by that fact, become the unwilling victim of the other party's greed and caprice.

The appellant knows of no case under the laws of the State of Utah, or elsewhere, under which the decision can be justified. Certainly, the *Jensen* case is distinguishable upon the fact and law. An extension of the ruling in that case to cover the present circumstances would appear to place automobile dealers in a preferred class under the law, in that they are not subject to the ordinary and accepted laws concerning the formation of contracts.

Upon the basis of the foregoing the appellant submits that the decision of the District Court in the instant case should be reversed.

Respectfully submitted,

BEN G. BAGLEY

*Attorney for Defendant
and Appellant*