

1968

Harold D. Rainford v. William R. Rytting and Suzanne H. Rytting : Brief of Plaintiff and Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

HAROLD D. RAINFORD

Plaintiff and Respondent

vs.

WILLIAM R. RYTTING AND
SUZANNE H. RYTTING

Defendants and Appellants

} Case No.
11276

BRIEF OF PLAINTIFF AND RESPONDENT

Appeal from a Summary Judgment of the
District Court of Salt Lake County,
Honorable Stewart M. Hanson, Judge

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Clark, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

HAROLD D. RAINFORD

Plaintiff and Respondent

vs.

WILLIAM R. RYTTING AND
SUZANNE H. RYTTING

Defendants and Appellants

Case No.
11276

BRIEF OF PLAINTIFF AND RESPONDENT

STATEMENT OF THE KIND OF CASE

This is an action for the purchase price of stock, which contract of purchase was unconditionally guaranteed by the defendants. Payments were not made in accordance with the contract. This suit was commenced against the defendants, the unconditional guarantors.

DISPOSITION IN THE LOWER COURT

Summary Judgment was granted in favor of plaintiff and against the defendants.

RELIEF SOUGHT ON APPEAL

Respondent asks the court to affirm the Summary Judgment of the Trial Court.

STATEMENT OF FACTS

Plaintiff does not agree with the statement of fact of defendants because it is not complete, nor entirely accurate, and makes statements of fact which are not contained in the record as if they were. Therefore, plaintiff and respondent present the following:

The defendants operated a ladies dress shop in Yakima, Washington known as The Carriage House, Inc., a corporation. The store was operated by Mr. and Mrs. Rytting and plaintiff was an inactive officer and stockholder (R. 33). The plaintiff had purchased 25 shares of stock in the corporation. The defendants at all times managed and operated the store and defendants became desirous of purchasing plaintiff's stock so the defendants and plaintiff entered into a contract, Exhibit "A" a copy of which is at the end of this Brief, the subject matter of this lawsuit, by the terms of which The Carriage House, Inc. would purchase the 25 shares of stock of the plaintiff. That said agreement was guaranteed by the defendants personally, which guarantee is as follows:

“Undersigned hereby personally guarantee full payment and performance of the above conditional sales contract by The Carriage House, Inc.”

/s/ William R. Rytting

/s/ Suzanne H. Rytting

By the terms of the agreement the stock was to be paid for at the rate of \$100.00 per month, commencing on the 10th day of August, 1966 together with 6% interest.

That the contract provided that to secure the obligation the vendor should retain the title and possession of said stock, but that the defendants should have all the rights to the said stock including the right to vote said stock and receive dividends therefrom, stock only to be held as security. None of the assets of the corporation were held as security.

Paragraph 7 specifically provides that the contract contained the entire agreement between the parties.

That after the purchase of the stock from plaintiff, defendants Ryttings, disposed of all of the inventory and merchandise by sale and also disposed of all of the store fixtures, and were to take the corporate structures to Utah (R. 23, 33). Plaintiff received no fixtures or accounts receivable (R. 32, 34).

Defendants answered that the contract was illegal, void or voidable and no consideration. (R. 16) At no place in their answer did they say that the plaintiff got either fixtures or accounts receivable or plead payment. (R. 5)

In no affidavit did the defendants unequivocally state that the plaintiff got any equipment or collected any money. Defendants in the answer to the interrogatories merely say that defendants CLAIM plaintiff did. (R. 16)

In the Affidavit of John S. Moore, (R. 23) it states the Ryttings took the books to Utah, and this has not been denied by defendants.

Defendants were the operators of the business at the time the contract was entered into. That if said corporation liabilities exceeded its assets and was valueless on May 27, 1966, the date of the contract, such information was known to the defendants herein, but unknown to plaintiff. (R. 33, 34)

That the defendants made all of the decisions as officers and directors and stockholders and said corporation pertaining to its liquidations and moving to Utah and sale of stock. (R. 33)

The contract is clear that Mr. Rainford was to have nothing further to do with the company. Rainford had no right to vote the stock. The stock was being voted by the Ryttings. It is very clear in the contract that all of the corporation authority was to be vested in the Ryttings after the contract was entered into.

The contract provides for the payment of money only. Nothing was said about liquidating accounts receivable or sale of air conditioner in the contract.

Defendants in their Brief say the understanding that the proceeds of sale and money from the accounts receivable to be paid to plaintiff was arrived at prior to and existed contemporaneous with the execution of the agreement.

That defendants were the active operators of the business and knew the financial condition of the corporation and knew whether its liabilities could be paid when they entered into the contract, and they contracted in the light of this knowledge.

ANSWERING DEFENDANT'S ARGUMENT

POINT I

SUMMARY JUDGMENT WAS PROPERLY GRANTED.

Plaintiff in his Motion for Summary Judgment (R. 22) states that there is no genuine issue as to any material facts, and that plaintiff is entitled to judgment as a matter of law complying with Rule 56 (c). This is the rule of law which is set out in 3 cases cited on page 5 of the defendants' Brief, which rule plaintiff has pleaded and contends he has complied with.

This court is constantly deciding cases involving summary judgments. Rule 56 has numerous cases cited in the 1967 pocket supplement. Plaintiffs attorney has counted 51 cases cited under Rule 56 in Shepards Utah Citations of June 1968. Plaintiff thinks that the judges of this court have their ideas about summary judgment and therefore, will only make comment on the three cases cited by the defendants, and cites one of the last cases on Summary Judgment decided by this court on January 27, 1968, which we hereinafter discuss.

In the *Bullock vs. Deseret Dodge Truck Center, Inc.* 11 Ut. 2d 1, 354 P.2d 559, this court holds that plaintiff was entitled to summary judgment. In the Bullock case plaintiff and defendant had entered into a written contract, no provision in the contract for the duration of the employment and the court holds that where there is no provision in the contract it may be terminated by either party at any time. The court enforced the agreement it wouldn't let a party vary the terms of the written agreement.

Plaintiff is objecting in this case to the defendants' trying to vary the terms of the written agreement by oral evidence contending it could establish a different contract on facts known when the contract was entered into.

In the case of *Frederick May & Company vs. W. Prescott Dunn and Tracy Collins Trust Company*, 13 U.2d 40, 368 P.2d 266. The court sustains the Summary Judgment because of the fact that the plaintiff had not proved that he complied with the terms of the contract in that they had secured a purchaser of Keith O'Brien.

In the instant case the contract provides that the stock is to be paid for in money and defendants are trying to vary the terms by saying it should be paid for from the proceeds of the air conditioner and accounts receivable. We submit that as a matter of law, this cannot be done.

The case of *Sumner Hatch et al v. Sugarhouse Finance Company* found at 434 P.2d 758, 20 U.2d 156, the court held in that case that Summary Judgment should not have been granted because there was a question of fact as to the reasonableness of attorney fees and Judge Ellett in his opinion set out that the question of attorney fees between attorney and client should be tried because the relationship of the public and the attorneys are concerned. There was a question of fact in that case as to what was a reasonable attorney fee. It is not analogous to the case at bar in which there is no factual situation, but merely the enforcement of a contract and not allowing it to be varied by oral evidence.

The case mentioned above to be discussed is the case of *Oliver H. Preston v. George P. Lamb*, 436 P.2d 1021, 20 U.2d 260, and we think that head note 2 is very applicable to our case, and we quote from the second headnote as follows:

“2. Judgment, key 185.1 (1)

To be of effective use in determination of motion for summary judgment, affidavit must set forth such facts as would be admissible in evidence. Rules of Civil Procedure, rule 56 (e).”

We contend that in this case that any evidence of the contract to take the air conditioner or the accounts receivable would be varying the terms of the written contract and would come clearly under the above quotation.

POINT II

THE SALE OF THE STOCK WAS NOT VOID BUT AN ENFORCEABLE AGREEMENT AND AN ABSOLUTE GUARANTEE CAN BE ENFORCED EVEN THOUGH ORIGINAL OBLIGATION IS INVALID.

Defendants in their Brief say that the conditional sales agreement was and is illegal, and thus is void and unenforceable, claiming that The Carriage House, Inc. could not buy its own stock.

Defendants cite the case of *Schwab v. Getty*, 145 Wash. 66, 258 Pac. 1035, 54 A.L.R. 1382. We point out to the Court that the Schwab case was decided in 1927, and relates to an old statute which absolutely prohibited a corporation from dealing in its own stock. Sub-paragraph (1) of RCW 23.01.120 was passed in 1933. Sub-

paragraph (2), which is the one quoted on page 8 of appellant's brief was passed in 1947, Chapter 195, § 1, Laws of 1947.

That under the business corporation act of Washington, as it existed prior to July 1967, a corporation under Revised Code of Washington 23.01.120,

“shall have the power to purchase, hold, sell and transfer shares of its own capital stock; provided, that no such corporation shall use its funds or property for the purchase of its own shares of capital stock when such use would cause any impairment of the capital stock of the corporation.”

This latter provision has been interpreted in *Jackson v. Cologrossi*, 50 Wn. 2d 572, 313 P.2d 697, to the end that repurchase is limited to cases where such repurchase will not diminish the corporation's ability to pay its debts, or lessen the security of its creditors. In the instant case, where the corporation was disposing of all of its physical assets in the State of Washington with the intention of going to Utah to engage in business, the agreement to purchase, when executed, did not in any way diminish the corporation's ability to pay its debts or lessen the security of its creditors.

In the *Jackson v. Cologrossi* supra the corporation went into bankruptcy and its trustee brought a suit where assets of the corporation have been used to repay the purchase of stock. The instant case is not a suit by the corporation, nor a suit by any creditor of the corporation to recover assets to pay their claims. This defense is being used that the entering into the contract was illegal.

The entering into the contract was not illegal. It was something which the corporation could contract to do providing it would not affect their creditors. No evidence that any creditor has not been paid.

The *Jackson v. Cologrossi* case is not a case like the one at bar, where the sole owners of the corporation, the defendants, purchased the stock of the other remaining stockholder in the corporation. The creditors are in no manner affected. This defense would not be available to the managers or owners of the corporation, but merely by the creditors.

Admittedly, the Jackson case says what the appellants quote. However, the important aspects of that case is that the trial court found there was no earned surplus with which to pay. The transaction was treated as though a cash payment had been made, and as of that date the corporation was unable to pay its debts in the usual course of business and was rendered still further insolvent by the re-purchase payment. The importance of this point becomes more clear if the Court will look at *Burk v. Cooperative Finance Corporation*, 62 Wn. 2d 740, 384 P.2d 618. This case involved the validity of a stock repurchase agreement by a cooperative, and the court held that RCW 23.01.120 did relate to cooperatives as well as general corporations. In that particular case, the Court cited with approval *In re West Waterway Lumber Co.*, 59 Wn. 2d 310, 367 P.2d 807, and although this is not quoted in the Burke case, the Court in the West Waterway case did say:

“Until the enactment of what is now RCW 23.01.120 (2) in 1947, corporations could not repurchase shares of their own stock.”

The Burk decision, after referring to the applicability of the statute, then sets forth the rule that the application depends on the solvency of the corporation when the note became due, not when it was issued, and later near the end of the decision, the Court discusses the primary point, which we believe of consequence, when, in discussing whether some of the obligation might not be collectable the Court says:

“This proration is justifiable because as previously discussed the re-purchase of stock is not void at its inception; rather, it is the impairment of capital resulting from the re-purchase payment which is verboten.”

In the instant case the contract was valid, it only being that the corporation could have defended on a suit if payments were not made on the grounds that the payment would impair the capital stock, but this does not mean that the obligation is not a proper one.

On Page 9 of the Brief, the appellants state that at the time of the execution of the agreement, the corporation's liabilities exceeded its assets and that it was unable to pay its debts in the usual course of business, which fact was only known to the defendants and not to the plaintiffs. However, under the Burk case, this is immaterial and they have failed to show that the corporation, when the payments became due, was unable to pay its debts or was insolvent.

On Page 10, the appellants quote from the case of *Robey v. Walton Lumber Company*, 17 Wash. 2d 242, 135 P.2d 95, 145 A.L.R. 924, but unfortunately they do not make a complete quote of the rule set forth in that case. There is in that case a statement that one of the exceptions to the general rule that the liability of the principal debtor measures and limits the liability of the guarantor is that the guarantee may stand by itself, though the obligation guaranteed is unenforceable, where it can fairly be said that such was the intention of the parties. This same rule is found in *A. M. Castle & Co. v. Public Service Underwriters*, 198 Wash. 576, 89 P.2d 506. An even better case is *Backus v. Feeks*, 71 Wash. 508, 129 Pac. 86 wherein it is said that a guaranty contract may stand by itself though the obligation guaranteed is invalid. The instant case involves one of an absolute guarantee that the obligation is not invalid under the Burk case, although it might be unenforceable.

Another case which might be of assistance to the Court is *Amick v. Baugh*, 66 Wn. 2d 298, 402 P.2d 342. In this case there is a good discussion of what an absolute guarantee is, and it falls right in line with the other cases.

Again referring to the case of *Robey v. Walton Lumber Company*, 17 Wash. 2d 242, 135 P.2d 95, 145 A.L.R. 924, this case was cited by the plaintiff to the trial court and the instant case is an absolute guarantee and on page 102 of the Pacific, Column 2, Paragraph 17, it states:

“(17) All of the authority seem to hold that where the guaranty is absolute, and provides for the payment of a specified sum or sums at fixed periods, liability of the guarantor becomes fixed on default of the principal. We are satisfied that the guaranty here in question is an absolute and unconditional one.

In the instant case, the guarantor, by express words, absolutely and unconditionally guaranteed the payment of the principal and interest of the bonds. The time of payment and the amount due were definitely fixed by the bonds themselves and by the trust mortgage.”

Under the *Robey v. Walton Lumber Company* case it is an absolute guarantee and the liability affixed as if it was contracted originally by the Ryttings and in fact that is where the contract was. That the defendants do not allege or set out payment or that there was an agreement after the contract was entered into that as payment of the contract the air conditioner was given to the plaintiff or that accounts receivable were to be given to the plaintiff as payment.

POINT III

THE TERMS OF A WRITTEN CONTRACT CANNOT BE VARIED BY PAROL EVIDENCE.

This is a very fundamental rule, but we wish to quote this general well-known rule from 30 Am. Jur 2d, Sec. 1016 page 149 as follows:

“1016 Generally.

The well-established general rule is that where the parties to a contract have deliberately put their engagement in writing in such terms as im-

port a legal obligation without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the entire engagement of the parties, and the extent and manner of their undertaking, have been reduced to writing, and all parol evidence of prior or contemporaneous conversations or declarations tending to substitute a new and different contract for the one evidenced by the writing is incompetent. Stated otherwise, the intention of the parties as evidenced by the legal import of the language of a valid written contract cannot ordinarily be varied by parol proof of a different intention. A narrower statement of the rule appears in some cases to the effect that the parol evidence rule excludes only evidence of the language used by the parties in making the contract other than that which is furnished by the instrument itself. THE RULE IS ALSO STATED TO EXCLUDE THE COLLOQUIUM OR ORAL NEGOTIATION LEADING TO THE VERY CONTRACT, WHICH THE PARTIES CONSUMMATED BY REDUCING IT TO WRITING.

The parol evidence rule as applied to contracts is simply that as a matter of substantive law, a certain act — that is, the act of embodying the complete terms of an agreement in a writing — becomes the contract of the parties. The rule comes into operation when there is a single and final memorial of the understanding of the parties; when that takes place, prior and contemporaneous negotiations are excluded, or as is sometimes said, the written memorial supersedes these prior or contemporaneous negotiations."

There are a number of Utah cases in the Pacific digest, all of which affirm the general rule above set out, and this court, speaking through Justice Henriod in the case of *Jensen's Used Cars v. James T. Rice*, 7 U 2d 276, 323 P.2d 259, reaffirms this doctrine in the following language and we quote from Paragraph 3 Page 260-261 and the entirety of Paragraph 4:

(3) Elementary it is that in construing contracts we seek to determine the intentions of the parties. But it is also elementary and of extreme practical importance that we hold contracting parties to their clear and understandable language deliberately committed to writing and endorsed by them as signatories thereto. Were this not so business, one with another among our citizens, would be relegated to the chaotic, and the basic purpose of the law to supply enforceable rules of conduct for the maintenance and improvement of an orderly society's welfare and progress would find itself impotent. * * * The rule excluding matters outside the four corners of a clear, understandable document, is a fair one, and one's contentions concerning his intent should extend no further than his own clear expressions.

(4) It was urged correctly that to admit matters outside a contract would do violence to the principle that one is bound by his manifestations of assent, and that, irrespective of such contention, such matters properly are excludable by the parol evidence rule, — which rule, counsel suggests, is one of substantive law rather than one of evidence. Whatever kind one calls it, the rule that excludes such evidence is a common sense rule.

CONCLUSION

We submit that there is no competent evidence mentioned in the affidavit which would require the introduction of evidence, and the defendants should not be allowed to vary the terms of the written contract.

That under Washington statutes and cases, a Washington corporation may purchase its own stock and it is not void.

That the defendants signed an absolute guarantee and under Washington law are liable whether the corporation would be liable or not.

We submit the Judgment of the trial court should be sustained.

Respectfully submitted,
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EXHIBIT A

CONDITIONAL SALE OF STOCK AGREEMENT

This Agreement made and entered into this 27th day of May, 1966, by and between HAROLD D. RAINFORD, hereinafter referred to as "Vendor," and THE CARRIAGE HOUSE, INC., a Washington corporation, hereinafter referred to as "Vendee,"

WITNESSETH:

WHEREAS, Vendor is presently the owner of twenty-five (25) shares of stock in THE CARRIAGE HOUSE, INC., a Washington corporation; and,

WHEREAS, it is the desire of the parties hereto to provide for the sale by the Vendor to Vendee of the Vendor's interest and shares of stock in said corporation,

NOW, THEREFORE, in consideration of the mutual covenants, conditions and provisions hereinafter set forth and the payments to be made, it is hereby agreed by the parties hereto as follows:

1.

Subject to the terms and conditions of this agreement as set forth below, Vendor does hereby sell and assign, and Vendee does hereby purchase, Vendor's said twenty-five (25) shares of stock in said corporation, the shares of stock being evidenced by stock certificate No. 3.

2.

The purchase price for said shares of stock is TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500.00), to bear interest at the rate of six percent (6%) per annum from the 10th day of August, 1966, payable as follows:

At the rate of ONE HUNDRED DOLLARS (\$100) per month, commencing on or before the 10th day of August, 1966, and on or before the 10th day of each succeeding month until the principal and interest is fully paid; provided, however, that the entire obligation, plus accrued interest, shall be payable in full on or before the 10th day of February, 1968. From each monthly payment there shall first be deducted interest upon the unpaid balance of the principal indebtedness at the rate of six percent (6%) per annum, and the remainder of each monthly installment shall be applied to the reduction of the principal indebtedness.

3.

For the purpose of securing the obligation of Vendee, the Vendor shall retain the title and possession of said shares of stock (as evidenced by the said stock certificate) until full and final performance of Vendee's obligation herein, and thereafter Vendor shall deliver the possession of the said certificate and properly endorse the same to the Vendee.

4.

Until this contract has been fully performed by Vendee and satisfied by Vendor, the books and records of the company shall at all times show the interest of the Vendor in the shares of stock hereby sold to the Vendee. Vendee shall have all rights to said stock, including the right to vote said stock and receive dividends thereon; provided, however, that Vendee shall have no right to transfer, sell, mortgage, pledge, encumber or otherwise dispose of said stock or any of the rights or obligations incident to the ownership in any manner until full satisfaction of this contract.

5.

Time is of the essence of this contract, and if Vendee fails or neglects to comply with any of the terms, cov-

enants or conditions of this contract, becomes insolvent, makes an assignment for the benefit of creditors, or is adjudicated a bankrupt, or if a receiver is appointed to administer the affairs of Vendee, then Vendor shall have the right and option to (a) terminate this contract and immediately re-assert absolute ownership of the stock sold hereby, retaining all monies therefor paid on this contract by Vendee as liquidated damages for the non-fulfillment of this contract, and the use and depreciation of the property interest for which said stock is evidence, and thereupon all right and interest of the Vendee in the stock hereby sold shall cease and terminate; or (b) to declare the entire remaining balance due hereunder forthwith due and payable and bring suit and recover judgment therefor, together with a reasonable sum as attorneys' fees.

6.

It is agreed and understood that any action at law or equity arising out of this contract between the parties hereto shall lie in the Superior Court of the State of Washington in and for Yakima County. In the further event of litigation between the parties hereto relating to the rights or duties arising out of this contract, the prevailing party in such litigation shall be entitled to recover attorneys' fees in addition to costs taxable by law, the amount thereof to be fixed by the court.

7.

There are no conditions or provisions of this agreement between the parties hereto relating to the subject matter of this contract which are not contained herein, nor representations nor warranties not expressly contained herein. This contract contains the entire agreement between the parties hereto.

8.

No waiver by Vendor of any default, delay or breach by Vendee shall operate as waiver of any subsequent default, delay or breach by Vendee.

9.

This contract shall be binding upon and enure to the benefit of the parties hereto, their heirs, assigns, personal representatives and successors; provided, however, that Vendee shall not assign, transfer or in any way attempt to dispose of the stock sold, nor of Vendee's rights under this contract without prior written consent of Vendor. Any such attempted assignment, transfer or disposal without the consent of Vendor shall be void.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands the day and year first above written.

/s/ Harold D. Rainford
Vendor

THE CARRIAGE HOUSE,
INC., Vendee

By Suzanne H. Rytting /s/
President

Undersigned hereby personally guarantee full payment and performance of the above conditional sales contract by The Carriage House, Inc.

/s/ Wm. R. Rytting

/s/ Suzanne H. Rytting