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Charles B. Petty, Maggie C. Petty, Rachelp. Lunt, Norma P. Strasser, Utahna P. Belnap, Leila P. Shipp, Neuman C. Petty, John K. Russell, Trustee, and Howard O. Miller, Trustee, Partners of Petty Investment Company, A Partnership Doing Business In the State of Utah v. Gindy Manufacturing Corporation :Defendant-Respondent's Brief

In the
Supreme Court of the State of Utah

HARLES B. PETTY, MAGGIE C.
ETTY, RACHEL P. LUNT,
ORMA P. STRASSER, UTAHNA
BELNAP, LEILA P. SHIPP,
UMAN C. PETTY, JOHN K.
SSELL, Trustee, and HOWARD
MILLER, Trustee, Partners of
TTY INVESTMENT COMPANY,
partnership doing business in
State of Utah,
Plaintiffs-Appellants,

— vs. —

NDY MANUFACTURING COR-
PORATION, a corporation,
Defendant-Respondent.

Defendant-Respondent'

ppeal From the Judgment of the Thi
for Salt Lake County
Honorable Joseph G. Jeppson, J

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TABLE OF CONTENTS

AUTHORITIES CITED

Cases Cited

TABLE OF CONTENTS — (Continued)

TEXTS CITED

In the
Supreme Court of the State of Utah

CHARLES B. PETTY, MAGGIE C. PETTY, RACHEL P. LUNT, NORMA P. STRASSER, UTAHNA P. BELNAP, LEILA P. SHIPP, NEUMAN C. PETTY, JOHN K. RUSSELL, Trustee, and HOWARD O. MILLER, Trustee, Partners of PETTY INVESTMENT COMPANY, a partnership doing business in the State of Utah,
Plaintiffs-Appellants,

— vs. —

GINDY MANUFACTURING CORPORATION, a corporation,
Defendant-Respondent.

Case No. 10274

Defendant-Respondent's Brief

STATEMENT OF KIND OF CASE

Originally this was an action by Plaintiffs-Appellants for the recovery of $13,000 plus interest and costs from Defendant-Respondent on one of two alternative theories, namely, fraud and deceit or breach of contract (R. 23-25). In their brief on appeal, Plaintiffs-Appellants assert the

action is one of promissory estoppel, an entirely new theory from those relied upon in the trial court.

DISPOSITION IN THE LOWER COURT

The case was tried before the Honorable Joseph G. Jeppson, sitting without a jury. At the close of Plaintiffs-Appellants' evidence, the Court granted Defendant-Respondent's motion for dismissal of Count I and of Count II of Plaintiff-Appellants' Amended Complaint (R. 106, 197, 150) and judgment of dismissal with prejudice was entered under date of October 23, 1964 (R. 59-60).

RELIEF SOUGHT ON APPEAL

Plaintiffs-Appellants seek not only reversal of the judgment of dismissal by the lower court but also the award by this Honorable Court of a money judgment in their favor (apparently overlooking or ignoring the fact that the judgment of dismissal was entered at the close of Plaintiffs-Appellants' evidence) or, in the alternative, an order granting a new trial.

STATEMENT OF FACTS

The factual assertions set forth in the Statement of Facts contained in Plaintiffs-Appellants' brief which covers some twenty-four pages are so combined with argument of the case, Defendant-Respondent finds itself compelled to include the following statement of the material facts of the case for the assistance of the Court.

On September 28, 1962, G. H. Mickelson was a franchised distributor or dealer of trailers manufactured by Gindy (referring to Gindy Manufacturing Corporation, Defendant-Respondent herein) in a specified territory, including the State of Utah, pursuant to a written agreement executed on or about March 1, 1962 (R. 87, Ex. 2). On September 28, 1962 Mickelson called upon C. B. Petty, the managing partner of Petty Investment Company, a partnership, seeking a loan of $12,000 (R. 97). Prior to that time, Petty Investment Company had made loans to either Mickelson or Freeway Trailer Sales, Inc., a corporation of which Mickelson was President, part of which had not been repaid as of September 28, 1962 (R. 92-94). In order to obtain the new loan of $12,000, Mickelson offered Mr. Petty an assignment of commissions from Gindy on the sale of trailers in the amount of $17,000, of which $12,000 would be applied on the new loan and the remaining $5,000 on the prior indebtedness (R. 97). In support of such offer, Mickelson exhibited to Mr. Petty a written document entitled "Assignment of Monies" (Exhibit 5), to which was attached Addendum "A" setting forth the "deals in process" covered by the assignment together with the respective dollar amounts which Mickelson represented he would realize from each one and the total of $44,300 (R. 98).

In an effort to confirm the commissions represented by Mickelson, Mr. Petty then contacted the Gindy office in Pennsylvania either by telegram or telephone (R. 98, 109) and inquired if the assignment in the amount of $17,000 would be honored and if it was in order (R. 98,

110). The written "Assignment of Monies" prepared by Mickelson was not then available to the Gindy officials being in the hands of Mickelson and Petty in Salt Lake City, Utah. Mr. Petty received an immediate reply to such inquiry that same day in the form of a telegram from Mr. S. E. Walters, Jr., Treasurer of Gindy, dated September 28, 1962 and addressed to Petty Investment Company, a copy of which is Exhibit 1 in this matter (R. 98-99). Said telegram reads as follows:

> "WILL WITHHOLD FIRST SEVENTEEN THOUSAND DOLLARS IN COMMISSION TO FREEWAY AND OR G. H. MICHELS N FOR PAYMENT TO YOU THEY HAVE SUFFICIENT ORDERS IN OR PENDING TO MORE THAN COVER THIS."

After receipt of said telegram, Mr. Petty gave Mickelson Petty Investment Company check No. 1378 for $12,000 which appears to be dated 9-30-62 (R. 100, Ex. 4). In return, Mickelson delivered the Assignment of Monies (Exhibit 5) bearing his signature and dated September 28, 1962 to Mr. Petty (R. 102). Thereafter, Petty Investment Company received the sum of $4,000 from Gindy representing commissions earned by G. H. Mickelson on the sale of trailers to Interstate Motor Lines (R. 101, 149). No commissions other than such $4,000 were earned by Mickelson subsequent to September 28, 1962 (R. 149).

In addition to the foregoing statement of facts, defendant respectfully submits that plaintiffs' factual recitation is inconsistent with the facts in evidence in the

following particulars. In the last paragraph on page 8 of plaintiffs' brief and continuing on page 9, it is stated that Mr. Petty would make the new loan to Mickelson only if Gindy would represent that it had orders from Mickelson out of which the $17,000 would definitely be paid. The evidence in the record is that Mr. Petty's inquiry of Gindy was directed simply to confirmation of the assignment offered by Mickelson. Mr. Petty's own testimony on the subject appears on pages 98 and 99 of the record as follows:

> Q. Prior to giving him the $12,000 did you make any attempt to confirm those commissions?
>
> A. Yes.
>
> Q. How, Mr. Petty?
>
> A. I sent a wire asking if the assignment from Glen Mickelson or Freeway Trailers in the amount of $17,000 would be honored, if it was in order.
>
> Q. Did you receive a reply to that telegram?
>
> A. Yes, promptly — very promptly.
>
> * * * *
>
> Q. I will show you the document, Exhibit No. 1 in this case, and ask you if that was the reply to your telegram?
>
> A. Yes, it is.

In the second paragraph on page 14 and continuing on page 15, plaintiffs state that Mr. Petty asked Gindy for a representation that it then had on hand "orders," "not deals in process," which would produce at least $17,000 of commissions and also that Gindy learned Mr. Petty would not rely on the assignment offered by

Mickelson. A similar statement is contained in the last five lines on page 17. Such statements relative to the substance of Mr. Petty's inquiry of Gindy are contrary to the evidence as is clearly shown by the above quoted testimony and, furthermore, there is no evidence in the record that Mr. Petty refused the assignment out of hand, but rather, the evidence is that he accepted it and relied upon it as the basis of his agreement with Mickelson after receipt of the telegram from Gindy confirming that it had sufficient orders in or pending to cover the same (R. 98, 101, 102).

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY RULED THAT PLAINTIFFS FAILED TO PROVE DEFENDANT MADE ANY FALSE REPRESENTATIONS OR INTENDED OR UNDERTOOK TO DECEIVE PLAINTIFFS.

The First Count in plaintiffs' Amended Complaint sets forth a claim in fraud and deceit. The essential elements required to sustain such a claim are that a representation was made as a statement of fact, that such representation was untrue and known to be untrue by the party making it, or was recklessly made, that it was made with intent to deceive and for the purpose of inducing the other party to act upon it, and that he did in fact rely on it to his injury or damage. 23 Am. Jur. 773, *Fraud and Deceit* § 20. It is a well established principle of hornbook law that the plaintiff has the burden of

proving each of the required elements of fraud and that his failure to prove any one of such elements is fatal to his claim.

In the instant case, the plaintiffs alleged, among other things, that the representations contained in the telegram of September 28, 1962 sent by defendant's agent were false, were known to be false when made, and were made for the purpose of deceiving and defrauding plaintiffs. As said telegram is very brief and for the convenience of the Court, we again quote its exact language relied upon by plaintiffs in support of such allegations:

> "WILL WITHHOLD FIRST SEVENTEEN THOUSAND DOLLARS IN COMMISSION TO FREEWAY AND OR G. H. MICHELS N FOR PAYMENT TO YOU THEY HAVE SUFFICIENT ORDERS IN OR PENDING TO MORE THAN COVER THIS."

The trial court held that plaintiffs' evidence failed to prove that such representations were false or were made with the intention of deceiving the plaintiffs.

We submit that this holding by the lower court is overwhelmingly supported by the record. The critical language of the telegram, in so far as a factual representation is concerned, is the statement "they have sufficient orders in or pending." In analyzing such language, the trial court recognized that "orders" are not the equivalent of "sales" nor do they constitute "contracts." *Schaffran* v. *Mount Vernon-Woodberry Mills,* 70 F. 2d 963 (C.C.A.N.J. 1934). Order is defined in Funk

and Wagnalls *New Standard Dictionary* as "a commission or instruction to supply, negotiate for, purchase or sell something." In *American Seeding Machine Co. v. Commonwealth*, 152 Ky. 589, 153 S.W. 972 (1913), the court considered an order as "merely an offer or request by a would-be purchaser to another to send, sell, or ship him the goods desired." We submit that the distinction between the terms "orders" and "sales" as they are commonly used in the business community is, or should be, readily apparent to the average businessman and particularly so to one of Mr. Petty's experience. Hence, the repeated assumption in plaintiffs' brief that Mr. Petty was entitled to construe the language in question as a representation that Gindy had "sales" rather than just "orders" is entirely erroneous and without justification. It is extremely difficult for us to imagine how Mr. Petty, with all of his experience and particularly his unfavorable experience with Mickelson, possibly could have failed to recognize that at least some of said "orders" might not materialize into "sales."

Further strengthening this conclusion is the fact that the meaning imparted by the word "orders" was significantly qualified by the words "in or pending" immediately following. Although these words are virtually ignored throughout plaintiffs' brief in their construction of the September 28th telegram as it affected Mr. Petty, we submit that they are very important in the determination of the truth or falsity of Gindy's representation. The ordinary meaning of the word pending necessarily suggests that there were undecided or un-

certain factors in connection with the orders in question. Hence, the telegram is simply not capable of the construction urged by plaintiffs that Gindy made a definite and absolute representation it had *sales* from Mickelson on which he had earned $17,000. Therefore, if the qualifying language "in or pending" was not considered by Mr. Petty, it most certainly should have been.

Testing the facts against the representation actually made and not that now imagined by the plaintiffs, the evidence affirmatively and very clearly demonstrates that the defendant did in fact have "orders in or pending" on September 28, 1962 sufficient to cover the specified amount. The major part of the examination of Mr. Walters by plaintiffs' counsel, which constitutes approximately two-thirds of the entire transcript of testimony, is devoted to consideration in great detail of numerous documents representing and pertaining to such orders. Viewed from the negative, Gindy did not represent that it was unconditionally indebted to Mickelson for $17,000. It did not represent that Mickelson had produced sales on which he had earned $17,000. It did not represent that the "orders in or pending" would in fact materialize into sales or earned commissions. The fact that some or all of such orders subsequently failed to materialize into completed sales is entirely irrelevant to the question of the truth or falsity of the representation made. There being no false representation, plaintiffs' claim in fraud and deceit was properly dismissed.

POINT II

THE TRIAL COURT CORRECTLY RULED THE EVIDENCE PRESENTED BY PLAINTIFFS WAS INSUFFICIENT TO SUPPORT A CLAIM IN CONTRACT.

By their Second Count, plaintiffs allege a claim based upon breach of agreement. The telegram of September 28, 1962 is relied upon as the written agreement. It is readily apparent from the evidence that such telegram does not constitute a binding contract as alleged by plaintiffs for two reasons: first, there is no consideration to Gindy, the party claimed to be bound by the writing; and second, the language of the telegram does not constitute an absolute promise or agreement to pay Petty Investment Company the sum of $17,000. Neither is it capable of construction as a guarantee. We submit that these deficiencies are sufficiently self-evident that it requires no citation of authority or belaboring the argument to conclude that there was no formal contract. This conclusion is apparently conceded by plaintiffs as their brief makes no attempt to sustain their original claim of breach of contract.

While the telegram does not constitute a contract between the parties herein, we do not dispute that it does constitute acknowledgment of an assignment from a third party. To the extent that Mickelson or his corporation Freeway Trailer Sales, Inc. earned commissions on the "orders in or pending," Gindy agreed to pay such commissions over to Petty in accordance with the instructions from Mickelson. Pursuant to such agree-

ment, Gindy did pay Petty Investment Company the $4,000 commission on the sale to Interstate Motor Lines. Viewing the legal relationship between the parties as that of assignee-assignor, the trial court correctly found that plaintiffs offered no evidence whatever that Gindy had paid any commissions to Mickelson or Freeway rather than to Petty, nor that Gindy was holding any commissions due Mickelson or Freeway. Mickelson himself did not claim Gindy owed him anything. Hence, Gindy in no way violated its agreement to honor and comply with the assignment given by Mickelson to Petty Investment Company.

In their brief, plaintiffs assert the further theory that the court should hold Gindy responsible to Petty for commissions on certain orders which failed to materialize into sales because Gindy refused to consummate the transactions. The burden of this argument is that Mickelson produced purchasers ready, willing and able to buy and that Gindy, without justification, refused to sell to them. While the principle thus stated might be true as a general proposition, it is simply not applicable to the facts of this case.

The specific situations referred to by plaintiffs are not simply cases of Mickelson submitting orders providing for cash payment on delivery. Rather, the orders in question were submitted subject to the purchaser obtaining credit terms and many of these transactions became extremely complicated because of the large amount of investment required for the type of equipment involved and the necessity of adequately securing those

parties providing the financing. Such was the case of the large Peebles order relied upon by plaintiffs in this connection (R. 115-120). Furthermore, the evidence shows that where credit was involved, Gindy either provided the financing itself or placed it with one of its banking connections *with recourse* (R. 125, 126).

Hence, when Mickelson submitted orders requiring credit from Gindy in order to accomplish the sale, it most certainly was Gindy's prerogative to exercise its independent judgment before extending credit the same as if no distributor were involved. Whatever duties Gindy may have had to its distributor, they unquestionably did not include an absolute obligation to extend credit to any third party the distributor happened to produce. Plaintiffs' argument that Gindy's involvement in this aspect of the matter was none of its business and that it was unwarranted in delaying completion of the transactions in question until the would-be purchaser satisfied Gindy's conditions for obtaining the necessary credit is not only erroneous but preposterous.

POINT III

PLAINTIFFS' THEORY OF PROMISSORY ESTOPPEL IS INAPPLICABLE TOO THE INSTANT CASE SINCE DEFENDANT PERFORMED THE ONLY PROMISE WHICH IT MADE TO PLAINTIFFS.

As pointed out earlier, the plaintiffs place primary reliance in their brief on appeal on an entirely new theory of the case, promissory estoppel. Their argument

asserting this theory is initially predicated on Section 90 of the *Restatement of Contracts* (1932) which reads as follows:

> "A promise which the promissor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise."

We submit that this doctrine can be readily disposed of as inapplicable in the instant case by a simple analysis of its purpose and operation. From the language quoted above, the apparent purpose of the doctrine of promissory estoppel is to enforce, under certain circumstances, promises unsupported by consideration in order to prevent injustice otherwise unavoidable.

In attempting to sustain their position by the application of this doctrine, plaintiffs assume throughout their argument that Gindy made a promise which it failed or refused to perform. This fallacious assumption entirely ignores the fundamental question presented by this appeal. For if Gindy made no promise, or performed any promise which it did in fact make, then it necessarily follows that the doctrine in Section 90 of the Restatement has no application whatever by definition. Hence, this brings us squarely back to the very questions considered in Points I and II above.

Without repeating all of the arguments, we believe that they more than amply demonstrate that Gindy complied fully with the only promise it made which was to

pay over to Petty the first $17,000 of commissions earned by Mickelson or Freeway. This is not a case of Gindy promising Petty it would pay the said sum *in any event* and then refusing to perform after Petty had acted in reliance thereon. If such were the facts, consideration of the doctrine of promissory estoppel would be reached. Instead, the facts are that Gindy did exactly what it said it would do even though there was no consideration for its agreement. There being no unfulfilled promise, there is no injustice to prevent and no need or occasion to apply an estoppel. Hence, promissory estoppel and Section 90 of the restatement are simply not applicable to this case and the even more difficult questions discussed in plaintiffs' brief, such as whether or not promissory estoppel can be applied to a promise of future conduct and whether or not such a promise must constitute a manifestation that the promissor intends to abandon an existing right which he possesses, are never reached.

This conclusion is well illustrated by the entirely distinguishable fact situations of the cases cited and relied upon in plaintiffs' brief. The case of *Seymour* v. *Oelrichs*, 156 Cal. 782, 106 P. 88 (1910), involved an employment contract for a period of ten years where the defendants had promised to put the agreement in writing but failed to do so after the plaintiff had acted in reliance thereon. Upon being discharged, the plaintiff brought action on the oral promise and promissory estoppel was invoked to estop the defendants from asserting the statute of frauds as a defense in order to prevent them from shielding themselves by their failure to do the very thing they

promised. *Ravarino* v. *Price et al.*, 123 Utah 559, 260 P. 2d 570 (1953) involved an oral promise of a landowner to sign an Earnest Money Receipt for the sale of real property and to complete the sale as proposed. The defendants again plead the statute of frauds as a defense. In *Easton* v. *Wycoff*, 4 Utah 2d 386, 295 P. 2d 332 (1956) the unfulfilled oral promise opposed by the same defense was failure to draw and execute a written lease agreement which would comply with the statute of frauds pursuant to terms orally agreed upon by the parties.

In the language of the plaintiff's brief, the purpose of promissory estoppel is fraud prevention. We submit that since the defendant fulfilled its only promise there is no fraud to prevent. As this court stated in *Papanikolas et al.* v. *Sampson et al.*, 73 Utah 404, 274 P. 586 (1929) quoting from 12 R.C.L. pp. 237, 238, "There can be no fraud where there is nothing wrong, and fraud cannot be deduced or inferred from that which the law pronounces honest." Hence, the plaintiffs herein are not entitled to relief under the theory of promissory estoppel.

CONCLUSION

In conclusion, the defendant submits that the answer to one basic question here presented is dispositive of all three of the alternative theories of fraud and deceit, contract and promissory estoppel advanced by plaintiffs. The question is: What did Gindy promise or agree to do by the telegram of September 28, 1962? We submit that the evidence clearly shows that Gindy did no more

than agree to honor an assignment from G. H. Mickelson by withholding from the assignor and paying over to Petty Investment Company the first $17,000 of commissions earned by G. H. Mickelson or Freeway Trailer Sales, Inc. Since Gindy has fully performed such agreement, plaintiffs are not entitled to relief under any of the alternative theories. Therefore, the defendant respectfully urges that the decision of the lower court be affirmed.

Respectfully submitted,

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