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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 : Plaintiffs-Appellant's Reply Brief

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

PLAINTIFFS-APPELLANT'S REPLY BRIEF

APPEAL FROM THE JUDGMENT OF THE 3RD DISTRICT COURT FOR SALT LAKE COUNTY, HONORABLE JOSEPH G. JEPPSON, JUDGE.

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TABLE OF CONTENTS

AUTHORITIES CITED

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STATEMENT OF MATERIAL QUESTIONS

Respondent's answering brief is so at variance on the facts and inferences of fact and so non-responsive to part of the issues, that plaintiff regards a reply brief as desirable to sharpen the issues in this case.

Appellant regards the following as the questions to be decided:

1. Did Mickelson act as a franchised distributor for Gindy Manufacturing Co. (herein called Gindy) or was Freeway Trailer Sales, Inc. (herein called Freeway) at all times the soliciting agent of Gindy in securing and forwarding orders from prospective purchasers for Gindy trailers?

2. As regards plaintiff, is defendant estopped to say that Freeway did not earn commissions on the Milne and 1st interstate orders which after September 22, 1962 turned out to be fictitious and which were on that date innocently misrepresented to plaintiff as true orders to induce definite and substantial action on its part.

3. Did Freeway under the applicable law of agency earn commissions on the Morrison and Peebles orders?

4. Does defendant's telegram of September 22, 1962 to plaintiff, in light of its wording and the material surrounding circumstances, create an action of promissory equitable estoppel against defendant as an "Informal contract without assent or consideration" as spelled out in Section 90 of the Restatement of contracts and the judicial interpretation of that Section, or is it only an acknowledgement of an assignment of commissions to be earned?

VITAL DISAGREEMENTS ON FACTS AND INFERENCES OF FACT

The first disagreement on the facts is as to the relation among Gindy, Freeway and Mickelson. Defendant's brief, page 18, side-steps the facts which establish the legal relation of these parties. It states:

> On September 28, 1962, G. H. Mickelson was a franchised distributor or dealer of trailers manufactured by Gindy — pursuant to a written agreement executed March 1, 1962.

Plaintiff refers to the facts stated in its original brief, pages 9 to 11 inclusive, which show conclusively the facts to be, that Mickelson never purchased and resold even one, single trailer, which by legal definitions is the established meaning of the phrase "franchised distributor or dealer." The facts are that on September 22, 1962 and ever since March 1, 1962, Freeway, a Utah, Mickelson-dominated corporation was in fact and law by the undisputed documentary and oral evidence the soliciting agent of Gindy.

Freeway had earlier advertised in the yellow pages of the telephone directory as Gindy's representative (R. 30). Freeway had solicited for, secured and sent to Gindy the eight orders and so-called orders for trailers listed on page 21 of plaintiff's original brief. The assignment of commissions to plaintiff was from Freeway (Ex. 5).

Defendant's telegram referred to orders from Freeway and/or Mickelson (Ex. 1). The loan by plaintiff of $12,000 induced by reliance on Gindy's telegram was made to Freeway (Ex. 4). Mickelson testified that the agreement of March 1, 1962 was intended to be an agreement between Gindy and Freeway (R. 87).

Mr. Walters, Treasurer of Gindy, expressly rejected the idea that Mickelson ever acted as "a franchised distributor or dealer of Gindy trailers."

> Mickelson had a concession from us in mid-August. The billing on this would be handled by him. We billed and then the invoice went unpaid for a substantial time. We contacted Milne truck to determine why and he denied he had the trailer or even ordered it (R. 128).
>
> Q. When did you become aware of . . Mickelson's financial difficulties, Mr. Walters? . . .
>
> A. Well, it was common knowledge Mickelson had financial problems as long as I remember (R. 121).
>
> Q. Under your agreement with Mr. Mickelson he was to receive payment for these trailers and then pay independently for them, wasn't he? . . .
>
> THE WITNESS: No (R. 122).

There is no evidence in this case which would call for a conclusion that the corporate entity of Freeway shall be disregarded according to the fac-

> A. That was the facts — *exactly as they were understood.* (Italics for emphasis.)

Respondent studiously avoids mentioning the six factors which fulfill the requirements of an action of promissory equitable estoppel as outlined by Pomeroy, *Equity Jurisprudence*, 5th ed., 1941, Vol. 3, Section 805. (See plaintiff's original brief pp. 6-7.) It is understandable why this is so. The very first factor as a basis of an action is that,

> 1. There must be conduct — acts, language, or silence — *amounting to a representation* or concealment of a material fact. (Italics supplied for emphasis.)

It is the representation relied upon, and acted upon, in a definite and substantial manner by the representee which determines the scope and ambit of the promise. It is reliance and substantial action in reliance on that representation which causes the law to invoke estoppel against the representor and which will not allow it to deny the particular representation on which the actor relied — otherwise injustice to the relying actor would result.

POINT III

WHILE THE OLD RULE WAS THAT REPRESENTATIONS AND PROMISES AS TO THE FUTURE DO NOT ORDINARILY CREATE AN ESTOPPEL THE PRESENT RULE WHICH ACCELERATED AS AN EXCEPTION UNDER THE

REPEATED APPLICATION OF SECTION 90 OF THE RESTATEMENT OF CONTRACTS NOW IS THE GOVERNING RULE IN SUCH CASES WHEN ACTION OF DEFINITE AND SUBSTANTIAL CHARACTER IS INDUCED THEREBY.

The following statement of law is made in 31 C. J. S., Section 80 at pages 289-290:

> "Notwithstanding the unaminity of the courts with respect to — the statement of the general rule" (p. 290) that "ordinarily a representation as to the future or a promise cannot create an estoppel" (p. 289) "representations to the future or promises have been enforced or permitted to operate as an *equitable estoppel* if to do otherwise would perpetrate a fraud or cause injustice in a case where the representation or promise" (or both together) "has been made to induce action and has in fact induced action on the part of the party setting up the estoppel. This exception has come to be known as the doctrine of promissory estoppel.' In such cases it is held that the party making the promise" (*or representation and integrated promise*) "is estopped to assert the lack of consideration therefor." (pp. 290-291) (Italics added for emphasis and applicability to the instant case.)

The 1963 Cumulative Supplement to 31 C. J. S., Section 80 cites 93 cases decided in 17 states and the United States Courts which approve the so-called exception to the old general rule. See accord: American Jurisprudence, Estoppel, Sections 52 and 53.

A CASE IN POINTS

A leading case in point is *People's National Bank v. Lynebarger Construction Co.* (1951) 219 Ark. 11, 240 S. W. 2d 12, 48 A. L. R. 2d 1086.

The defendant contractor importuned the bank to make weekly advances of funds to a subcontractor for the meeting of payrolls. The bank was to take assignments of payments due and to come due from the contractor to the subcontractor. The bank made the advances on representations of the contractor of periodic estimates of amounts to become payable to the subcontractor in the next pay period. On August 12th the contractor represented that $16,000.00 would become due on the following September 15th one month and four days later. The subcontractor became bankrupt in the meantime and did not finish the job.

The contractor had overestimated the amount to be paid on the contract, a fact discovered later to be overestimated by a sum of $11,996.07. Upon action, the bank was allowed recovery of the amount advanced, namely $11,996.07 on strength of the representation of the contractor as to a future probability which turned out to be an innocent, but false representation, if future occurrences could be proved by the contractor. Estoppel prevented such proof.

The governing rule is stated by the Arkansas Court as follows:

> He who by his language or conduct leads another to do what he would not otherwise

> have done, shall not subject such person to loss or injury by disappointing expectations on which he relied.

The rule as stated by the Arkansas Supreme Court is pertinently applied to the varying fact situations in the 93 cases cited in the 1963 Suppliment to 31 C. J. S., Sec. 80. It should be applied in this case.

Williston & Thompson, Contracts, 1938 ed., Sec. 1508 indicate that today the defendant would be estopped in a *Derry v. Peek* case 14 A. C. 337.

The Oregon Supreme Court in applying the fraud-preventing doctrine usually called promissory estoppel — sometimes called simply equitable estoppel — in the case of *Schafer v. Fraser* (1955) 206 Or. 446, 290 P. 2d 190, 48 A. L. R. 2d 1087 adopts a highly descriptive phrase from tort law. Instead of using the customary terminology of the representator-promissor's intent that his language should, or expectation that his language would, induce the contemplated kind of conduct, the court uses the tort test for this factual requirement, namely, that of "forseeability by the representator-promissor as a reasonable man" that his language will induce "conduct of the kind which occurred."

Respondent argues that Gindy "did not represent that the 'orders in or pending' would in fact materialize into sales or earned commissions." (Respondent's brief, p. 9.)

If we were dealing only with a law action of deceit requiring scienter concurrent with the representation that would be true. But the fraud or injustice spoken of in promissory equitable estoppel is not concerned with scienter. It is concerned with the fraud or injustice which will occur to the plaintiff if the defendant is not estopped to say that the orders which he represented would easily produce $17,000 of commissions have not produced (for this case) $9,500.00.

Respondent's argument as to the futuro nature of the representation assumes that we are not discussing whether the facts of this case are one in which equitable estoppel should be applied against defendant to prevent injury to the plaintiff. Certainly respondent will be forced to admit that if the court in looking for the six requirements for invoking the doctrine of equitable estoppel and finds them, then defendant will be estopped to say, that its representation that it had on hand "orders in or pending" "to more than cover this" ($17,000) "did not materialize into sales or commissions."

We respectfully submit that the factual requirements of promissory, equitable estoppel as outlined on pages 6 and 7 of plaintiff's original brief are fully made out and that relief should be granted to plaintiff as prayed in its original brief in this case.

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