

1960

Rock-ola Manufacturing Co. v. Dan Stewart Co., Inc., and Dan Stewart : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

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ROCK-OLA MANUFACTURING
CORPORATION,

Clerk, Supreme Court, Utah

Plaintiff and Respondent,

vs.

Case No.
9266

DAN STEWART COMPANY, INC.,
and DAN STEWART,

Defendants and Appellants.

BRIEF OF RESPONDENT

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ROCK-OLA MANUFACTURING
CORPORATION,

Plaintiff and Respondent,

vs.

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and DAN STEWART,

Defendants and Appellants.

Case No.
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BRIEF OF RESPONDENT

STATEMENT OF FACTS

Plaintiff-respondent has been for many years a manufacturer of commercial phonographs. Defendants-appellants are retail dealers in commercial phonographs. Since July 27, 1950, appellants have been buying and reselling respondent's goods as one of respondent's distributors, the parties having executed new distributor contracts from time to time (Exh. 2).

Between February 20, 1959, and April 1, 1959, appellants ordered eleven phonograph machines from respondent and used the machines but did not pay for them. Pursuant to the terms of the agreement between respondent and appellants (R. 42, Exh. 1), on July 1, 1959 respondent cancelled the agreement and on August 20, 1959, filed this action for the price of the machines. Subsequently respondent and appellants entered into a stipulation (R. 9) by which respondent was to have judgment on its complaint; in addition, appellants' untimely counterclaim for \$50,000.00 (R. 7) interest and costs, was permitted to remain.

At the pre-trial conference, appellants conceded that there was no basis for paragraph 1 of their counterclaim in the amount of \$851.50 and this claim was stricken (R. 24). The Court allowed appellants to file an Amended Counterclaim (R. 25), the gravamen of which was that on January 2, 1959, respondent and appellants had entered into an agreement whereby appellants had the "exclusive" right to sell respondent's products in a given territory; that respondent had breached this agreement by "conspiring" with another of its distributors, one UniCon Distributing Company of Kansas City, Kansas, to sell respondent's products in appellants' territory to a company named B & G Sales. Appellants also alleged that respondent had "fraudulently, deceitfully, and with intent to avoid said agreement and the terms thereof, and without any notice whatsoever to defendants [appellants] appointed said Baker and Gardner [B & G Sales] distributors for said machines in said territory."

At the pre-trial conference, respondent moved for summary

judgment on the ground that there was no genuine issue as to any material fact and that respondent was entitled to judgment as a matter of law. The motion was based on the record and the depositions of appellant Dan Stewart and of two witnesses called by appellants, R. J. Baker and Melvin C. Gardner (R. 24). Argument was heard and briefs were submitted (R. 28). The Court granted respondent's motion and dismissed appellants' counterclaim (R. 35).

This appeal is directed only to the trial court's order dismissing defendants-appellants' counterclaim. To prevail, appellants must show that the trial court erred in finding from the undisputed evidence that:

1. The contract between respondent and appellants was non-exclusive; and
2. The contract between respondent and appellants was not breached by respondent.

STATEMENT OF POINTS

1. The agreement under which respondent and appellants were operating did not give appellants the exclusive right to sell respondent's products in a given territory.
2. Even if the agreement had given appellants such an exclusive right, there was no breach of this agreement by respondent.
3. A summary judgment was properly awarded.

ARGUMENT

I.

THE AGREEMENT UNDER WHICH RESPONDENT AND APPELLANTS WERE OPERATING DID NOT GIVE APPELLANTS THE EXCLUSIVE RIGHT TO SELL RESPONDENT'S PRODUCTS IN A GIVEN TERRITORY.

Appellants claim (R. 25) that respondent granted them by contract an exclusive right to sell respondent's products in a given territory. In evidence of this claim appellants introduced the agreement (R. 42, Exh. 1) which is the subject of appellants' counterclaim.

Pages 9 and 10 of appellants' brief are largely devoted to the proposition that there is a lack of mutuality of obligation in the instant contract, and authorities are cited for the proposition that when such lack of mutuality exists in an agency contract, the contract will be declared void. It appears that appellants contend that there is in the instant case such a lack of mutuality of obligation, and that therefore the agreement is void. It would seem that if appellants were correct, they would have an extremely difficult time bringing suit for damages for the breach of a void contract.

Nowhere between the four corners of the subject contract does it appear that either party intended the agreement to grant an exclusive right to sell.

This agreement was marked as Exhibit "1" in connection with the deposition taken of defendant Dan Stewart (R. 43, p. 3). At line 26, page 4 of this deposition, the question was asked:

"Q. Let me call your attention to this provision of Exhibit '1' and I am referring to paragraph 3 which is captioned 'Primary Sales Territory'—'The following territory is hereby allotted to distributor'—and you were the distributor, weren't you?

A. Yes.

Q. 'As the territory which said distributor is primarily responsible for selling Rock-Ola equipment and distributor agrees to use his best efforts diligently to promote the sale of and to sell Rock-Ola equipment in said territory. Distributor agrees that Rock-Ola shall not be obligated or liable to distributor in any manner whatsoever for or on account of orders or sales of Rock-Ola equipment (including parts and accessories) obtained or made by any other distributor or by any other person or persons whomsoever in said described territory; but Rock-Ola agrees that during the term of this agreement, unless sooner terminated as in this agreement set forth, and subject to its rights under paragraph 6 hereof, Rock-Ola will not sell new Rock-Ola equipment to any other distributor having an established place of business in said described territory.'

A. Yes.

Q. Now is that the provision you claim gives you the exclusive?

A. Yes, sir."

It will be noticed that the caption to the above set forth paragraph 4 is in large print, and states "Primary Sales Territory." Paragraph 4 sets forth the territory in which the distributor will be primarily responsible for selling Rock-Ola equipment. The obvious inference here is that the parties contemplated other parties selling Rock-Ola equipment in the same territory. Indeed, paragraph 4 set forth above spells out

unequivocally that the respondent "*shall not be obligated or liable to distributor in any manner whatsoever for or on account of orders or sales of Rock-Ola equipment obtained or made by any other distributor or by any other person or persons whomsoever in said described territory.*" Thus, not only did the parties contemplate the possibility of sales in this territory by some other person, but contracted that in such an event, the manufacturer [respondent] would not be liable in any manner to the dealer [appellants].

For the purpose of indicating the intentions of the parties in entering into the subject contract, appellants introduced at the pre-trial conference (R. 31) certain former agreements entered into between appellants and respondent, which agreements were dated January 1, 1954, July 27, 1950, and January 1, 1955 (Exh. 2). According to appellants, at page 6 of their brief:

"The other agreements for previous years, introduced and received at the pre-trial, used the word 'exclusive' distributor. The word 'exclusive' was deleted from the 1959 contract. However, the 1959 distributor agreement was and is by its terms an exclusive agreement, even though the word 'exclusive' has been deleted."

However, a perusal of these prior agreements indicates that appellants are not completely accurate. The contract of July 27, 1950, states in paragraph 1:

"Rock-Ola hereby grants to distributor and distributor hereby accepts appointment as a *non-exclusive* distributor * * * ."

The 1954 and 1955 agreements state, respectively, in paragraph 1:

"Rock-Ola hereby grants to distributor and distributor hereby accepts appointment as the *exclusive* distributor * * * ."

And in paragraph 5:

"Distributor agrees not to sell Rock-Ola equipment directly or indirectly to any person, firm or corporation whose place of business is located outside distributor's allotted territory."

The governing agreement, that of January 1, 1959 (R. 42, Exh. 1), omits any such mention of the words "exclusive appointment and states that the territory allotted to the distributor is the territory in which the distributor is "primarily responsible" for selling Rock-Ola equipment; nor does the instant agreement contain any restriction against selling outside of the territory. Pages 1 and 2 of the 1955 and 1954 contracts have the word "exclusive" printed at the bottom of the first page. The 1959 contract does not have the word "exclusive" at the bottom of the first page, nor indeed, does it appear anywhere in the contract. Clearly, the parties expressly negotiated the point of exclusiveness at each new contract. Appellants had operated under both exclusive and non-exclusive contracts in the past, and knew that each year a new contract was negotiated (R. 43, p. 4).

Contracts of this kind are not pure sales contracts, but have some of the characteristics of agency and factorage contracts, *Bendix Home Appliances, Inc. v. Radio Accessories Company*, 129 F.2d 177 (8 Cir., 1942). In *Indiana Road Machinery Company v. Lebanon Carriage and Emplement Company*, 25 K.L.R. 1763, (Ky. Court of Appeals) 78 S.W. 861 (1904), the Court said:

“An exclusive agency will not be created by implication where the words of the contract do not naturally import this meaning.”

In *Dabath Electric Company v. Suburban Electric Development Company*, 332 Penn. 129, 2 A.2d 765 (1938), an action was brought by a dealer against the distributor for accounting of sales made by another agent appointed for the same territory, based upon the theory that the plaintiff had an exclusive agency contract with the distributor for the sale of its appliances. The Court said that had the parties contemplated an exclusive agency contract they would have so provided in the written contract. The Court then held that no exclusive agency was created by implication from language of provisions in the contract referring to “the dealer, his territory,” and “the dealer’s territory”; or from a reservation of a right in the distributor to increase or decrease the agent’s territory, or from the requirement that the agent send the distributor copies of its installation reports, lists of prospective purchasers, etc., and that the agent maintain installation and repair service.

The cases cited by appellants on pages 3, 4 and 5 of appellants’ brief are set forth as authority for the interpretation of the subject contract. These are cases interpreting contracts wherein it is stated that the contracts are to be exclusive, but where it is not clear whether the spelled-out exclusiveness goes merely to the agency or the right to sell, a distinction which is made in 2 Am. Jur., Agency, § 307:

“Whether or not an agent who is given an exclusive agency or right to sell specified property or goods of the principal, or is given the exclusive right to sell the same within the specified territory is entitled to

compensation in the event that such property or goods are sold, or are sold within the certain territory, by the principal or by another agent, depends upon the interpretation of the contract of employment. According to the cases and the American Law Institute Restatement of the Law of Agency, a contract to give an 'exclusive agency' to deal with specified property is ordinarily interpreted as not precluding competition by the principal personally, but only as precluding him from appointing another agent to accomplish the result. On the other hand, a grant of an 'exclusive agency' to sell, i.e., the exclusive right to sell the products of a manufacturer or dealer in a specified territory, is ordinarily interpreted as precluding competition by the principal in any form within the designated section. In other words, a distinction has been made between an 'exclusive agency' and an exclusive right to sell, the principal having a right to sell without the payment of compensation to the agent in the former case, but not in the latter."

Appellants do not cite cases going to the issue of whether or not the instant agreement gave appellants the *exclusive right to sell* respondent's products in a given territory, but rather that the contract itself spelled out exclusiveness, and was ambiguous only as to whether the exclusiveness was an exclusive agency or an exclusive right to sell.

The agreement herein (R. 42, Exh. 1) is an integrated contract between the parties, and indeed, appellant Dan Stewart does not claim otherwise, page 4, line 6 of his deposition (R. 43):

"Q. Is that the agreement on which you rely in this proceeding?

A. Mainly, yes.

Q. Is there any other agreement?

A. No, that would be the full agreement, as far as I know."

However, appellants contend on page 6 of their brief that the subject agreement "was and is by its terms an exclusive agreement even though the word 'exclusive' has been deleted." Appellants rely for their contention on paragraph 22, which states:

"Distributor shall not sell nor solicit or receive orders for any products manufactured by any company other than Rock-Ola which competes with Rock-Ola equipment whether current year or prior year equipment. This restriction will not apply to the sale of used equipment or parts."

This provision pertains only to appellants in their capacity as distributor and has a legitimate business purpose without regard to any restrictions on the manufacturer.

A restriction on the distributor, such as paragraph 22, is feasible and usual in business dealings to protect the manufacturer who is expending sums on advertising and promotion of its wares, which advertising and promotion redounds to the benefit of the distributor as well as to that of the manufacturer. The manufacturer in effect lends its name and reputation to the dealer, allows the dealer to hold himself out as one of the manufacturer's dealers and in return requires the dealer to bend all his efforts toward promoting only its wares. The manufacturer hopes thus to increase sales and insure adequate customer service. In addition the dealer must carry a full line and not merely fast moving items. There is nothing unfair about such an arrangement and indeed it is standard procedure

in practically every industry between manufacturers and distributors. Surely the appellants would not have the Court believe that parties cannot enter into such a contract.

As shown above, the agreement did not bestow upon appellants the exclusive right to sell respondent's products, nor did the parties contemplate such an exclusive agreement. Moreover, the respondent could not contract with appellants to refuse to sell its merchandise to any other person or distributor at its factory without being in danger of possible violation of statutes prohibiting restraint of trade, such as the Sherman Act.

II.

EVEN IF THE AGREEMENT HAD GIVEN APPELLANTS SUCH AN EXCLUSIVE RIGHT, THERE WAS NO BREACH OF THIS AGREEMENT BY RESPONDENT.

Even assuming a straining of the subject agreement so as to read into it an exclusiveness which obviously is not present, the facts elicited through discovery procedure have demonstrated that there was no breach of such an agreement.

Appellants apparently contend that:

1. Respondent wrongfully cancelled appellants out as a dealer of respondent's merchandise;
2. Respondent sold its products directly to B & G Sales, an independent dealer of commercial phonographs;
3. Respondent conspired with UniCon Distributing Company of Kansas City, Kansas, one of respondent's dealers, to sell respondent's products to B & G Sales indirectly; and

4. Respondent financed such sales.

On page 7 of their brief, appellants state that Mr. Stewart received a letter on July 7, 1959, sent on July 1, 1959, terminating the dealer agreement between appellants and respondent and refer to page 21 of Mr. Stewart's deposition. The testimony of Mr. Stewart should be read in full context, beginning at page 20, line 14, and continuing through line 20, page 21:

"A. The answer to that is that we were still planning on selling Rock-Ola equipment. *Because of not paying the \$9,000 debt owed, the franchise was cut off and given to B & G Sales.* Therefore, we have a number of parts which is useless to us, and have a number of sales which we were unable to fulfill.

Q. Now, you say that Rock-Ola cancelled your agreement. When was that?

A. To the best of my knowledge four months ago. I don't have the exact date.

Q. That would be around June, July of 1959, is that right?

A. Around July, yes—July 1st.

Q. And how did they cancel it?

A. They just started to shipping the B & G Sales (sic).

Q. Did they notify you they were cancelling it?

A. No, they didn't.

Q. They did not?

A. No.

Q. What you they do other than ship to B & G?

A. They sent me a registered letter which I didn't

get, and also a copy of it was sent to the B & G, which I later found out they were the new distributor.

Q. You say they sent you a registered letter which you didn't get?

A. That's right.

Q. You mean it wasn't delivered or you refused to receive it?

A. I was out of town at the time and nobody signed for it and they sent it back to them.

D. Do you know what was in that letter?

A. I heard later that it was—through the B & G—I heard later that it was appointing the B & G as their new distributor.

MR. DUNCAN: Will you ask him to fix the date of that letter, as near as you can?

A. That would be around July the 1st.

Q. Now do you claim that Rock-Ola did not have the right to cancel the agreement

A. *No, I don't claim that."*

Appellants state at page 8 of their brief that respondent shipped some machines "directly to Salt Lake City from Rock-Ola - - Stewart purchased one of these machines and saw the label and serial numbers on the other." Appellants refer to appellant Dan Stewart's deposition, pages 11 and 12. A closer look at the deposition (R. 43) shows otherwise. See page 11, line 28 and page 12, lines 1 through 19:

"Q. Do you know that any of them were shipped direct by Rock-Ola to Salt Lake City?

A. Oh, yes, yes.

Q. How do you know that?

A. I know the one that I bought was shipped direct, because I know that one.

Q. How do you know that?

A. How do I know? It came in the crate. The crate had the labels on it when we picked it up.

Q. What labels?

A. *The UniCon labels to B & G Sales.*

Q. And how would that show it was shipped from Rock-Ola?

A. It also had Rock-Ola's labels.

Q. How did that show it was shipped direct by Rock-Ola to Salt Lake City?

A. How would that? *Now actually I don't claim that; I don't know for sure?*

The positive showing by appellant Dan Stewart that there were no shipments made by respondent to B & G Sales was amply corroborated by one of the witnesses called by appellants, Mr. Melvin C. Gardner [the G of B & G Sales], who testified at page 26 of his deposition (R. 44) that he no longer was employed by the B & G Sales Company, and on page 28 that he no longer owns any stock in said company. At page 30, Mr. Gardner testified definitely that he knew there was never any merchandise shipped directly from Rock-Ola Manufacturing Company to B & G Sales Company. At page 32 of his deposition, he testified that he received all the merchandise that came to B & G Sales and here again stated that no merchandise ever came from respondent to B & G Sales.

Appellants' amended counterclaim (R. 25) alleges the breach in 1959 of a contract made in January of 1959. However, on page 7 of their brief, appellants maintain that respondent sold a new current model machine to B & G Sales all through 1958. On cross-examination (R. 44, p. 37), Mr. Gardner's testimony was as follows:

"Q. I believe you testified that you were a mechanic?

A. Yes.

Q. Did you take care of the repairing of these machines?

A. Yes.

Q. Where would you obtain the parts to repair them, the Rock-Ola machines?

A. From Dan Stewart Company.

Q. Did you ever obtain any from Rock-Ola?

A. *No, they wouldn't sell them to us.*

Q. *Did you ever ask them to?*

A. *Yes.*

Q. And they refused to sell them to you?

A. Said we would have to buy them through the Dan Stewart Company.

Q. I believe you mentioned there were some older models and then you mentioned some newer models. By 'newer', do you mean new?

A. Well, the policy that UniCon had, they wouldn't sell any new. They would sell us floor samples or a year old or older.

Q. Had they been used?

A. *Yes, they had been used."*

Thus the record shows that the respondent did not sell any equipment, new or used, in Utah other than to appellants, and further, that B & G Sales Company never received any new equipment from UniCon Distributing Company, Inc., which company appellants admit (R. 43, p. 14, l. 7) is merely a distributor of Rock-Ola Manufacturing Company and completely independent of respondent, located, incidentally, in Kansas City (R. 43, p. 14, l. 10) rather than in Wichita, as alleged in appellants' amended counterclaim (R. 26). Indeed, appellants admit (R. 43, p. 15, l. 6-8) that respondent could do nothing to stop B & G Sales from selling to any one in appellants' territory.

Appellants complain on page 8 of their brief that respondent financed purchases made by B & G Sales from UniCon Distributing Company, Inc. The record discloses (R. 42, Exh. 2) that four conditional sale agreements for the purchase of phonographs were executed by R. J. Baker and Ellen M. Baker, whose addresses appeared on the contract as 140 South Kansas Street, Wichita, Kansas, in favor of UniCon Distributing Company, Inc. One of these four agreements was dated January 20, 1958, and stated that the said Bakers would pay to the order of UniCon Distributing Company, Inc., the sum of \$9,788.80 in 24 monthly payments. This paper was sold by UniCon Distributing Company, Inc., to respondent and the said Baker is still making payments thereon (R. 44, p. 6, l. 16-29). The other contracts were discounted to various banks (R. 44, p. 6, l. 4). Appellants apparently would have the Court believe that the purchase of a single conditional sale contract from a distributor by a manufacturer, when on the face of it, the paper shows that the merchandise was

destined for an address within that same distributor's territory, would amount to wilfull fraud upon another distributor.

III.

A SUMMARY JUDGMENT WAS PROPERLY AWARDED.

The agreement (R. 42, Exh. 1) which is the subject of appellants' counterclaim (R. 25), is clear and unequivocal. There is no ambiguity to be construed as to whether or not this agreement is an agreement for an exclusive franchise to sell new machines in the territory set forth.

However, assuming *arguendo* that the agreement was "exclusive", the record is devoid of any facts showing (1) a sale of *new* Rock-Ola equipment in appellants' territory by anyone other than appellants, or (2) fraud or "conniving" of any type on the part of respondent. Appellants have merely attempted, by their pleadings and brief, to raise an innuendo of fraudulent conduct on the part of the respondent, with no facts to support such an innuendo. Indeed, if any such facts did exist, it would seem that, at the very least, affirmative showing other than mere hints of chicanery would be forthcoming from Ronald C. Barker, who was the attorney for R. J. Baker (R. 44, p. 22, l. 18-22), and apparently quite close to his business (R. 44, p. 15, l. 29). But the questioning of his erstwhile client failed to disclose any actions other than those of an independent merchant who bought where he could (R. 44, p. 12, l. 14-30, p. 13, l. 1-16), sold where he could (R. 44, p. 11, l. 7-21), and didn't mind who knew it (R. 44, p. 17, l. 14-18).

In *Holland v. Columbia Iron Mining Company*, 4 Utah 2d 303, 293 P.2d 700 (1956), it was alleged that the defendant, through its president, had conspired to defraud plaintiff's predecessors in connection with a business transaction. The trial court granted the defendant's motion for summary judgment on the basis of the pleadings, depositions, and affidavits comprising the record. The Utah Supreme Court said in upholding the trial court:

"We do not feel that appellant can be permitted to draw favorable inferences from these facts. Inferences are made for the purpose of aiding reason, not to override it. Inferences are nothing more than the probable or natural explanation of facts. Common sense and reason dictate that evil inferences should not be permitted to be drawn from routine business transactions where there are no other circumstances. To hold otherwise would throw the door open for an attack on each and every transaction that one might enter into."

In *Alvarado v. Tucker*, 2 Utah 2d 16, 268 P.2d 986 (1954), the Utah Supreme Court said, in affirming the trial court's summary judgment in favor of defendant:

"The burden was upon the plaintiff * * * ; such a finding of fact could not be based on mere speculation or conjecture, but only on the preponderance of the evidence. This means the greater weight of the evidence, or, as is sometimes stated, such a degree of proof that the greater probability of truth lies therein, a choice of probabilities does not meet this requirement. It creates only a basis for conjecture, upon which a verdict of the jury cannot stand."

Apparently, appellants would like the Court to believe that in this case there are many facts that don't meet the eye.

If such facts do exist, why are they not in the record? In *Abdulkadir v. Western Pacific Railroad Company*, 7 Utah 2d 53, 318 P.2d 339 (1957), the Court said:

"The first attack plaintiff makes upon the summary judgment is that the procedure is too hasty. He says that if the case had been allowed to come to trial in its regular turn on the calendar, he might have been able to produce another witness or witnesses. This contention is without merit. The accident happened over a year before the motion for summary judgment was entered. There was no reasonable assurance that the witness referred to, a resident of California, might be found within a reasonable time, or at all, nor that his testimony would help plaintiff if available. Speaking generally, it is to be assumed that when a plaintiff files his action, he has sufficient evidence to demonstrate a right to recover. All he is entitled to is a reasonable opportunity to marshal and present such evidence."

CONCLUSION

Appellants admit that they obtained over \$9,000 worth of goods from respondent for which they have not paid. Their only defense is a naked claim that respondent perpetrated a fraud upon appellants and that respondent breached a contract which appellants contend is void. The lower court gave more than ample opportunity to appellants to come forth with some showing of facts sufficient to establish fraud or a breach of contract. This appellants could not do and the trial court was faced with a record replete with admissions and testimony conclusively establishing that:

1. There was no fraudulent conduct by respondent;

2. The subject contract did not establish an exclusive agency; and

3. Even if the contract had been exclusive, there had been no breach thereof.

The trial court should be affirmed.

Respectfully submitted,

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