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# IN THE SUPREME COURT OF THE STATE OF UTAH

LLOYD OLSEN,
*Plaintiff,*

vs.

ALDUS D. CHAPPELL,
*Defendant.*

Case No. ~~11430~~ 10822

APPELLANT'S BRIEF

Appeal from the judgment of the First District Court of Cache County

Honorable Lewis Jones, Judge

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FILED
APR 5 - 1967
Clerk, Supreme Court, Utah

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# IN THE SUPREME COURT OF THE STATE OF UTAH

| | |
|---|---|
| LLOYD OLSEN,<br>*Plaintiff,*<br><br>vs.<br><br>ALDUS D. CHAPPELL,<br>*Defendant.* | Case No. 11439 |

## APPELLANT'S BRIEF

### STATEMENT OF KIND OF CASE

This is an action by the Plaintiff on a promissory note to recover principal and interest.

### DISPOSITION IN LOWER COURT

The Case was tried to a jury. The jury returned special interrogatories in favor of the Defendant and against the Plaintiff. The Trial Court gave judgment for the Plaintiff notwithstanding the interrogatories.

### RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment for the Plaintiff and judgment in Defendants favor as a matter of law or a new trial in the alternative.

## STATEMENT OF FACTS

On the 20th day of January, 1964 the Defendant and one Clark J. Obray "as partners" executed a promissory note to John P. Olsen in the amount of $5,173.92 in exchange for certain restaurant equipment. Pl. Ex. No. 1.

A chattel Mortgage was given to secure the promissory note. Pl. Ex. No. 3. Defendant upon execution of the note handed it to Mr. Clark J. Obray, who then delivered it to John P. Olsen (hereinafter called Mr. Olsen.) Tr. 11, Deposition of Mr. Olsen p. 5.

During the negotiations Mr. Olsen heard a discussion between Defendant and Obray that Defendant wanted a formal partnership or corporation formed before entering the business. Tr. 48. No formal partnership was entered into nor was a corporation formed. Tr. 48.

Soon after the execution of the note, the Defendant notified Mr. Olsen that he did not desire to go forth with the purchase of the equipment for which the note was given. Tr. 53 line 3-9. Similar notice was given by Mr. Obray Tr. 70. Defendant then without any further being done, withdrew. Thereafter Mr. Olsen forwarded all papers pertinent to the business and sale to Mr. Obray; Franchise was sent to Mr. Obray Tr. 22, all correspondence sent to Obray, Tr. 23, 41.

The equipment inventoried in the chattel mortgage, Ex. No. 3, was placed in a "Dog 'n Suds" Drive In Restaurant in Layton, Utah by Mr. Obray. Mr. Obray sold the Layton restaurant in May of 1964 to a Mr. Groves

who made payment on the contract to Mr. Olsen of $650.00. Tr. 14. Mr. Olsen protested the lack of payment on the note to Mr. Obray but not to Defendant. Ex. 7. Mr. Obray took all of the profit from the sale of the Layton Restaurant and invested it in a Salt Lake City restaurant. Mr. Olsen at this time was working for Dog 'n Suds and handled the promotion of the Salt Lake City restaurant, and dealt exclusively with Mr. Obray. Mr. Olsen and Mr. Obray established a course of conduct as follows:

A. Mr. Obray paid a $25.00 "transfer fee' to transfer the franchise into his name, Tr. 36.

B. Lease for Layton restaurant in Obrays name cnly. Tr. 55.

C. Utility bills in name of Obray only. Tr. 55.

D. Defendant was not a party in contract with Dog 'n Suds, Tr. 57, 72.

E. Defendant was not a party in sale to Mr. Groves. Tr. 58, 72.

F. Defendant received no demand from Mr. Olsen upon sale to or default by Groves. Tr. 58.

G. Mr. Olsen sent no letters or copies of letters to Defendant. Tr. 58, 74 Ex. 5, 6, 8, and 9.

H. Defendant signed no papers in evidence as a partner, except the note and mortgage.

The Defendant and John P. Olsen, after the telephone conversation in March (Tr. 53-54) had a conversation on the street in Logan, Utah, in July of the same year, in which Mr. Olsen stated that Mr. Chappell had made a mistake by getting out of the partnership, and that the remaining partner had made a profit from the business. Tr. 53-54. A similar conversation was had by Mr. Obray in Salt Lake City with Mr. Olsen, Tr. 71.

The note and mortgage executed by the Defendant was delivered to John P. Olsen, who claims to have delivered it to Systems Finance. The record shows no assignment. However, Systems Finance assigned the note to the Plaintiff for suit. Mr. John P. Olsen (Tr. 34) claims ownership of the note, then on Tr. 34, disclaims ownership of the note. Mr. Olsen acknowledges that he received payment on the note from Mr. Groves. (Tr. 14.) and the same were not credited to the note (Tr. 19) and that he failed to give any credit for the payments upon filing the original complaint. Tr. 19. The promissory note does not provide for the payment of interest, as such provision had been struck from the contract, yet, Mr. Olsen provided in said note for principal payments in excess of the principal balance, claiming it as "bank rate interest" (Tr. 44) and then admits that the amount actually due is the face amount less the payment, with no additional amount as interest, Tr. 44. Mr. John P. Olsen immediately upon recross examination stated that he would have kept the "bank rate interest" had the same been paid to him. Tr. 44-45.

Systems Finance sent to the Defendant a notice of delinquent payments which was sent by the Defendant

to Mr. Obray and the finance company was notified that the Defendant was not part of the transaction. Tr. 55, 56, thereafter no further communications were sent to him and no further demands made upon him. Tr. 56.

Upon the commencement of the suit, the Defendant called Mr. John P. Olsen in Illinois and asked him why the action was commenced. Mr. Olsen said that he had no intention of hurting the Defendant; "that he knew that the Defendant was not a party in the transaction and that Mr. Olsen was in hopes that the suit against the Defendant would bring pressure to bear on Mr. Obray thereby coercing Mr. Obray to pay the account." Tr. 56, 57.

The Defendant, upon cross-examination, Tr. 62, 63, stated that he claimed he had been released from the partnership by Mr. Obray (Tr. 62) and that he had not received a release from Plaintiff as "I never felt that we were in an association with Mr. Olsen." Tr. 63. Mr. Chappell candidly admits that the matter was handled poorly. Tr. 63.

## ARGUMENT

POINT I. THE TRIAL COURT ERRED AWARDING JUDGMENT TO THE PLAINTIFF NOTWITHSTANDING THE JURY INTERROGATORIES AND PURSUANT THERETO MAKING FINDING NO. 4. OF THE FINDINGS OF FACT. AND CONCLUSION NO. 1 OF THE CONCLUSIONS OF LAW.

This matter was tried before a jury, who were submitted special interrogatories. The Trial Court found

contrary to the jury findings. In view of the jury's findings the evidence in this case should be viewed most favorable to the Defendant. Johnson v. Cornwall Warehouse Company, 389 P. 2d 710, 15 Ut. 2d 172; also Seybold vs. Union Pac. R. Co. 239 P. 2d 174; 121 Ut. 61. 5 C.J.S. 1247.

Viewing the evidence most favorable toward the Defendant and viewing disputed evidence for the Defendant it would appear that Mr. Olsen, Mr. Obray and the Defendant had negotiated for some time as to the purchase of the restaurant equipment. That Mr. Olsen knew by reason of the conversation stated on Tr. 47, 38, that a business organization was contemplated between Obray and the Defendant. That after the execution of the note, the Defendant talked to Mr. Olsen and informed him that he was not joining in the venture with Mr. Obray. Mr. Olsen inquired as to Mr. Chappells reasons for not staying in the venture and asked as to the whereabouts of the note, sued upon. Tr. 53. Mr. Olsen denies this conversation.

Mr. Obray then stated that he would continue alone. Tr. 69, and informed Mr. Olsen of this fact. Tr. 70. Thereafter from the record, it shows, as stated in the statement of Facts, that all business dealings with regards to the note, were had between Mr. Olsen and Mr. Obray. Systems Finance notified the Defendant by mail of the delinquency, and upon return correspondence by the Defendant, advising them that he was not a party, no further demands were made upon him. The conversation on the street between Defendant and Mr. Olsen indicated

his knowledge and consent to the deletion of the Defendants name from the note and mortgage. No party made demands upon the Defendant until the action was commenced, and at that time the Defendant called Mr. Olsen, inquired as to what Mr. Olsen was doing and was told that, Mr. Olsen knew he was not a party to the transaction, and that the suit was an effort to apply pressure to Mr. Obray to force him to pay the bill even though he had taken out bankruptcy.

Each of these facts were presented to the jury and when asked whether or not Plaintiff (and his predecessors) and Mr. Obray by a course of conduct, made the Defendant aware that he was deleted as a party to the note and mortgage.

The jury in detail stated that Mr. Olsen and Mr. Obray did infact delete the Defendants name from the note and gave the following reasons:

A. Conversation on the street.

B. Correspondence written by Mr. Olsen exclusively to Mr. Obray.

C. Failure of Plaintiff to demand payment from Defendant.

D. Transfer of Dog 'n Suds to Mr. Obray individually, specifically omitting the name of the Defendant.

E. Fact that Mr. Obray sold the business without Defendants consent.

For these reasons it seems to be clear that the jury gave weight to the testimony they believed, and found for the Defendant. The jury found that there was a verbal agreement to release the Defendant from the note, either before or after delivery. The jury also by implication found that Mr. Olson was not being candid with the court in not revealing in the original Complaint the payments made upon the note, and in charging interest through an increase in the payments while crossing out the provision for the payment of interest in the note.

The trial judge erred in overruling the findings of the jury. 89 C.J.S. 344.

> "A special finding by the jury is binding on, and may not be ignored or disregarded by the court, provided it is relevant and material to the issues warranted by the evidence and does not contain an unwarranted conclusion of law, and has not been set aside on proper grounds."

> See Nuquist vs. Bauscher, Idaho 227 P. 2d 83.

> "The general rule is that a special finding by the jury in a law action is binding on any, not to be ignored or disregarded by the court . . . . . . "

See Todd vs. Borowski, 111, 166 N.W. 2d 296, also Whelan vs. Gould, Minn. 106 N.W. 2d 893, and Majerus vs. Guelsow, Minn. 113 N.W. 2d 450, where the Supreme Court of Minnesota stated:

> "It would seem that the trial judge should have the same powers with regard to special verdicts or special interrogatories as he has with regard to general verdicts. It is fundamental that a court in its discretion

may set aside a general verdict under certain circumstances. If that is so, why should it not also have a right to set aside a special verdict or special interrogatories under similar circumstances? When he determines that the evidence is conclusive against the jury's verdict, he can enter judgment notwithstanding the verdict in the case of general verdict; and in the case of a special verdict or special interrogatories, he can set aside the answers and substitute contrary answers therefore . . . (Citing Minnesota Rules of Civil Procedure.) As stated in Sorlie v. Thomas, 235 Minn. 509, 51 N.W. 2d 592. A jury's verdict on specific fact questions "is binding on the court as a general verdict in a law action as is subject to the same rules as to setting it aside for insufficiency of evidence." In other words, answers to special interrogatories or special verdicts are not simply advisory; but at the same time they are no more final than a general verdict. If certain answers find no support in the evidence, the trial judge may set them aside; his action will be upheld on appeal unless clearly erroneous . . . . . . . . . The question then is whether there is competent evidence tending to support the jury's findings. If there is, then the trial court committed error in setting them aside."

The Defendant contends that there is competent evidence to support the findings of the jury and therefore the Trial Court's decision to set aside the special interrogatories was against the manifest weight of evidence.

POINT II. THE TRIAL COURT ERRED IN REFUSING TO GIVE JUDGMENT FOR THE DEFENDANT AND AGAINST THE PLAINTIFF PURSUANT TO THE ANSWERS TO SPECIAL INTERROGATORIES AS FOUND BY THE JURY.

This is an action at law. Therefore the jury was not acting in an advisory capacity but the trial judge was bound to take the jury's findings subject to the qualifications set forth in Point I.

The jury found that by a course of conduct and certain conversations, that the Plaintiff and his predecessors had effecuated a modification of the contract, releaving the Defendant from liability although not physically erasing Defendant's name.

7A C.J.S. 424 states that:

"a modification of a contract may be effected by an explicit agreement to modify, either in writing or parol, but the agreement to modify a contract need not be expressed and the fact of agreement may be implied from a course of conduct in accordance with its existance.

17A C.J.S. 429 states:

Modification must be made by the contracting parties or someone duly authorized to modify, and one party to a contract cannot alter its terms without the assent of the other parties; the minds of the parties must meet as to the proposed modifications . . . . So, the fact of agreement may be implied from a course of conduct in accordance with its existance. Assent may be implied from acts on one party in accordance with the terms of a change proposed by the other; and assent to new terms of performance, even if invalid as a contract will serve as an estoppel excusing what otherwise would be a default.

The case of Lee v. Lee, Mich. 165 N.W. 655 is in point. Here a son orally contracted with his father to

buy his farm. Sixteen years later the son died and his wife stayed on the farm, performed the agreements for two years. The court held that the father recognized the daughter-in-law as a party to the contract by reason of her work and acts. The Court held that had the father insisted upon his rights at the death of the son the situation would be different. The court likened this situation to the situation where the original party and the successor party entered into a new written agreement. In the case at bar, Plaintiff had knowledge of the Defendants withdrawal from the partnership, and thereafter accepted Mr. Obray as the only responsible party for about two years, conducting all correspondence with Mr. Obray, making all demands upon Mr. Obray. It was only after Mr. Obray became a bankrupt that Mr. Olsen sought remedy against the Defendant as a last resort to force Mr. Obray to pay the bill by putting Defendant in a position of paying Mr. Obray's obligations.

The case here before the court concerns itself with the modification of contracts not the recission or release of the parties. The Defendant and Mr. Obray verbally agreed to abandon the partnership that had existed. Mr. Olsen was notified of this abandonment and through his course of conduct indicated that he had modified the contract to the extent that Mr. Obray was the sole purchaser of the equipment and therefore received delivery of the equipment.

This writer cannot find a case decided by this Court directly in point. It would appear that the case is of first impression, and that the decisions of other jurisdictions must be viewed.

See: Matanuska Valley Farmers Coop vs Monaghan, Alaska 188 F. 2d 906.

Turner v. Williams, Michigan, 19 N.W. 2d 100.

Wormsbecker v. Donovan Const. Co., Minn., 76 N.W. 2d 643.

Mitchell v. Rende. Minn., 30 N.W. 2d 27.

The last case cited and the following case stands for the proposition that no new considerations is needed where the contract is executory that is modified as the consideration for the initial agreement by Mr. Obray is sufficient to support the modification. Todd Brothers vs. Federal Coop Insurance Corp. 132 N.W. 2d 778.

## CONCLUSION

In this case the evidence indicates and the Defendant admits that he handled the transaction poorly. This fact alone does not leave the Defendant without a remedy. Mr. Olsen did not, in writing, consent to the modification of the agreement from a partnership of Chappell and Obray to Obray alone, nor did he agree in writing to the sale by Obray to Groves, yet he accepted the payments on the contract by Mr. Groves and made demand upon Mr. Obray only for an additional lump sum payment. He thereby accepted the benefits of the contract and demanded additional benefits from Obray alone under the contract. Had Mr. Chappell, and the Defendant, at this time been a party to the agreement it would have been a prime time for demand upon Defendant for an additional payment. Exhibit No. 7.

Mr. Chappell had had nothing to do with the property since he signed the note. The disposition and subsequent sales of the property have been handled by Mr. Obray and by Mr. Olsen representing Dog 'n Suds. Mr. Olsen is the person with the knowledge.

The contract was modified to exclude the partnership and insert the name of Mr. Obray, Mr. Obray then assigned it to Mr. Groves, and through some procedure the property is in the possession of Mr. Wallace Tr. 103-107. Mr. Olsen knew of the developments, the payments, made the demands, collected the money, and still asserts a mortgage upon the property. He has accepted all the benefits from Obray and Groves and did not through a period of two years, when sales and defaults occurred, contact the Defendant. When bankruptcy closed the doors, then and only then, did he make his first move toward the Defendant in an attempt to use the lawsuit against the Defendant to force a bankrupt to pay his obligations, knowing that the Defendant was not a party to the contract.

Respectfully submitted,

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