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# Lloyd Olsen v. Aldus D. Chappell : Respondent's Brief

# In the Supreme Court of the State of Utah

LLOYD OLSEN,
*Plaintiff,*

vs.

ALDUS D. CHAPPELL,
*Defendant.*

Case No. ~~11439~~ 10822

RESPONDENT'S BRIEF



Appeal from the Judgment of the 1st District Court for Cache County

Honorable Lewis Jones, District Judge

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## TABLE OF CONTENTS



## AUTHORITIES AND CASES CITED

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### STATEMENT OF KIND OF CASE

This is an action by Plaintiff on a promissory note to recover $4,523.92 plus costs of court.

### DISPOSITION IN LOWER COURT

The case was tried to the Court sitting with a jury. The jury returned answers to special interrogatories in favor of Defendant and against Plaintiff. The Trial Court gave judgment for the Plaintiff notwithstanding the jury's answers to the special interrogatories.

### RELIEF SOUGHT ON APPEAL

Plaintiff-Respondent, hereinafter referred to as Respondent, seeks affirmance of the Judgment of the Trial Court.

## STATEMENT OF FACTS

Respondent disagrees with Appellant's Statement of the Facts; submits that Appellant's Statement of the Facts is materially deficient; and respectfully invites this Honorable Court's attention to the record in the particulars:

One Clark J. Obray (hereinafter referred to as "Obray"), in the spring or summer of 1963, became interested in opening a "Dog n Suds" drive-inn in Layton, Utah, and entered into negotiations with John P. Olsen (hereinafter referred to as "Olsen") to purchase certain equipment to be used in the proposed operation. (Tr. 66) Obray interested Appellant in the drive-inn as an investment; and in October or November of 1963 in the Royal Bakery, Logan, Utah, Obray, Olsen, and Appellant had an exploratory meeting. (Tr. 46 and 47)

From the time of this meeting until July of 1964, the date on which Olsen and Appellant next met, (Tr. 48, Lines 29 and 30; Tr. 49, Line 1) there were, according to Appellant's testimony, two telephone conversations between Olsen and Appellant. (Tr. 51, Line 30 and Tr. 53, Lines 3-21) The record is barren of any further contact, written or oral, between Olsen and Appellant until Appellant was served a Summons in this matter, at which time Appellant called Olsen. (Tr. 56, Lines 12-14 and Tr. 58, Lines 7-12)

In the interval between the October or November meeting mentioned above and the second telephone conversation between Appellant and Olsen, (Tr. 53) the Appellant and Obray executed the note sued upon. (Tr. 6, lines 22-24; Tr. 7, lines 6 and 7) The note's execution is admitted. (Supra.) The consideration for the note were the items of personalty listed on Plaintiff's Exhibit 3, and a Bill of Sale to said items was given from Olsen to Obray and Appellant. (Tr. 14, 15, and 16) The items of property were delivered to Obray. (Tr. 75-78) Appellant at page two of his Brief points out that Appellant and Obray "as partners" executed the note but overlooked the full context from which "as partners" was extracted. That full context is as follows:

> "Clark J. Obray and Aldus D. Chappell, as Partners of Logan, Utah, *and individually . . .*" (emphasis added)

Appellant knew that a condition of the note was that it be executed by him "individually." (Tr. 48, lines 19-29) Subsequent to its execution, Appellant delivered it to Obray; (Tr. 49, lines 24-28) and Obray delivered the note to Olsen. (Tr. 68, lines 13-20)

Thereafter, (Tr. 69, lines 5-14) Appellant came to Obray's home and advised him he wanted to "withdraw from the Partnership and have nothing more to do with it;" (Tr. 69, lines 22 and 23; Tr. 51, lines 3-9) and all interest of Appellant in the Partnership was acquired by Obray. (R. 92, lines 29 and 30 and R. 93,

lines 1 and 2) Olsen was not advised that Appellant had withdrawn from the Partnership until advised of the fact by Obray at a date subsequent to the resale by Obray of the equipment purchased by Obray and Appellant from Olsen. (Tr. 70) Appellant never did advise Olsen of the termination of the Partnership. (Tr. 63, lines 7-17)

In the July, 1964 meeting between Appellant and Olsen, according to Appellant's testimony, Olsen told Appellant " . . . that Obray had sold it and that he had made $6,000 cash on the deal and that I (Appellant-sic) was very foolish to have gotten out of this deal and not been participating in the profits that he'd made." (Tr. 64, lines 7-12) Olsen gave Appellant no indication on this conversation that Appellant had been released from liability on the note. (Tr. 64, lines 25-28 and Tr. 65)

Obray sold the Layton Dog n Suds drive-inn without ever having operated it at a profit of approximately $8,000.00 (Tr. 89, lines 15-17, Tr. 91) to one Groves. (Tr. 92, lines 26-28)

The Appellant stipulated that Respondent is the owner of the note. (Tr. 6, lines 22-30 and Tr. 7, lines 6 and 7) Payments on the note, all of which were made by Groves, totaled $650.00; (Tr. 14) and the payments were applied to the note leaving an admitted balance of $4,523.92, the amount prayed in the Complaint (R. 1)

and the amount for which judgment was granted. (R. 41 and 42)

## ARGUMENT

POINT I. THE TRIAL COURT ACTED PROPERLY WITHIN ITS PREROGATIVE AND CORRECTLY AWARDED JUDGMENT FOR PLAINTIFF NOTWITHSTANDING THE JURY'S ANSWERS TO SPECIAL INTERROGATORIES, AND THERE IS NO BASIS IN FACT FOR FINDING A MODIFICATION OF THE PROMISSORY NOTE SUED UPON BY PLAINTIFF.

Appellant has no argument with the general proposition that:

> "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." (89 C.J.S. 344)

However, in order for the jury verdict to stand, it must be supported by some competent evidence.

The jury verdict in the instant case was not supported by competent evidence and, in fact, was contrary to the express testimony of the Appellant. When being cross examined, Mr. Chappell testified as follows:

> Q. (by Mr. Hoggan) . . . Have you at any

time received a release of your liability on this promissory note?

A. No, Sir. Not written.

Q. Well, do you claim to have received a release of any kind?

A. Yes, I felt when I discussed with Clark--

Q. Not what you felt, but do you claim to have received a release of any kind?

A. A verbal release, yes.

Q. Who from?

A. *Mr. Obray.*

Q. *Have you at any time ever received a release from Mr. Olsen?*

A. *No, Sir.*

Q. Or from anyone acting in his behalf?

A. No.

Q. *Or from System Finance Company?*

A. *No.*

Q. *Or from the Plaintiff in this action?*

A. *No.*

Not withstanding this unequivocal testimony by the Appellant, the jury found an amendment to the note consisting of a deletion of Appellant's name therefrom. (R. 36) This course of conduct the jury said consisted of four elements. They are:

1. The conversation on the street between Plaintiff and Defendant, in which the Plaintiff in

effect expressed knowledge that the Defendant was not a member of the partnership. (R. 37)

This finding by the jury presumably has reference to the conversation between Olsen and Appellant in July of 1964 and not between Appellant and Respondent. The record of Appellant's testimony on this conversation (Tr. 64, lines 2-15) shows that what Olsen in fact did was to chide Appellant for getting out of the partnership. Nothing in that conversation could be construed as an intimation by Olsen that Appellant was released on the note.

This conversation is analagous to the situation where two men "as partners and individually" borrow money to buy a common stock. One withdraws from the partnership and the other stays in. The stock goes up and the man who stays in makes a profit. But does the fact that the one man withdrew from the partnership relieve him of obligations incurred in borrowing money during the existance of the partnership in the absence of an express release? Respondent submits not. The continuation or severence of the relationship between Chappell and Obray was a matter of their personal concern. What they did or did not do to settle their affairs with each other cannot affect a debt incurred during the partnership as partners in the absence of an express release from the creditor. Appellant admits to never having received such a release.

Moreover, this conversation is vague and indefinite at very best on the question of whether Appellant was released. It has efficacy, if at all, only in what Appellant in this own mind made of it. In this connection the Court's attention is invited to 17 Am. Jur. 2nd on Contracts, Section 465 on Modification at page 935 where the author states:

> "The mental purpose of one of the parties to a contract cannot change its terms, *nor are indefinite expressions sufficient to establish a binding agreement to change the formal requirements of a written contract.*" (emphasis added)

Also, in the case of Cruse v. Clawson (Montana) 352 P2d 989, there is this significant statement at page 994:

> "*However, mutual cancellation must be clearly expressed and shown, and acts and conduct of the parties to be sufficent must be clear, convincing, and inconsistent with the existence of the contract.*" (emphasis added)

As a second element in the alleged course of conduct, the jury found:

> 2. The correspondence written by the Plaintiff in regards to payment of the business debts, because of lack of reference to the Defendant as being joinaly responsible, is sufficient evidence in our minds that the Plaintiff agreed to the deletion of the Defendant's name from the contract. (R. 37)

It is pertinent to observe that the Court asked the jury:

> 3(a). Did Plaintiff and Clark J. Obray, by any course of conduct *of which Defendant was made aware,* ever inform Defendant in substance and effect that the note now sued on was amended by deleting defendant's name therefrom? (emphasis added) (R. 36)

Appellant in presentation of his evidence laid great stress on the point that he was totally unaware of any dealings and correspondence between Olsen and Obray. (See testimony of Appellant Tr. 54-55 and the testimony of Obray Tr. 78 and 83)

It seems inconsistent to say that Appellant was unaware of anything which transpired between Olsen and Obray; to testify himself that he had no dealings with Olsen after he told him he was out of the partnership; (Tr. 58) and yet, in the face of all this, say that the jury's finding that there was a course of conduct "of which Defendant was aware" (R. 36 Interrogatory No. 3(a) ) is based on competent evidence.

The jury's third and fourth findings on a course of conduct (R. 37) can be treated together. They are:

> 3. The transfer of the franchise from the Plaintiff to Clark Obray, without the Defendant's name being placed upon it.
>
> 4. The fact that Clark Obray sold the business without the Defendant's participation in any way is in our opinion a course of action which would inform the Defendant that his name was deleted from the contract.

When the Appellant withdrew from his partnership with Obray, Obray acquired all interest of Appellant in the equipment which was consideration for the note sued upon. (See the testimony of Obray Tr. 92, lines 29 and 30, and Tr. 93, lines 1-6) Obray sold the equipment and business in which it was installed without ever having operated it but after his partnership with Appellant was terminated. (Tr. 92, lines 26-27)

Inasmuch as Obray, upon termination of the partnership with Appellant, acquired the property rights and interests of Appellant, it is entirely consistent for Olsen (presumably the person referred to in the jury's answer as Plaintiff) to have dealt entirely with Obray. Obray simply sold what he owned himself, and the fact that Appellant was not consulted could hardly be characterized as a course of conduct ". . . of which Defendant was aware" and which released Appellant on the note.

In addition, Appellant testified that when demand was made upon him for payment by System Finance Company, he sent the notices to Obray with notation, "I, of course, am not involved in this situation. Will you please have me taken off." (Tr. 55) Appellant acknowledges by the statement ". . . have me taken off," that he was on. Appellant also testified that he never advised Olsen of the termination of the partnership (Tr. 63, lines 14-17) and that Olsen never did

anything to indicate to Appellant that Appellant was not being held liable on the note. (Tr. 65, lines 15-26)

The Trial Court, after reflecting on all of the evidence, was led to conclude:

> THE COURT: I think that the Court has carried in its mind all the way through was not any question about inconsistencies in the answers by the triers of the fact, *but the fact that there was insufficient facts to justify the Court ever submitting it to the jury.* (emphasis added) (Tr. 129-130)

The case of Majerus vs. Guelsow, Minn. 113 N.W. 2d 450, cited by Appellant at page eight of his Brief gives ample authority to the Court for entering judgment for Plaintiff in this case, notwithstanding the jury's findings.

The law on the subject of modification of contracts is well stated in 17 Am. Jur.2nd on Contracts under the section titled "Modification" at page 935, Section 465, where we read:

> "To be effective as a modification, the new agreement must possess all the elements necessary to form a contract. *A modification of a contract requires the assent of both, or all, parties to the contract.* Mutual assent is as much a requisite element in effecting a contractual modification as it is in the initial creation of a contract.
>
> "The mental purpose of one of the parties to a contract cannot change its terms, nor are

> indefinite expressions sufficient to establish a binding agreement to change the formal requirements of a written contract. A request, suggestion, or proposal of alteration or modification, made after an unconditional acceptance of an offer, and not assented to by the opposite party, does not affect the contract then in force and effect by reason of the acceptance. One receiving an offer to change a contract to which he is a party is held to be under no obligation to answer it; and his silence cannot be construed as an acceptance where nothing else is shown. Mere negotations between the parties will not suffice to produce a modification. *Before that result can be accomplished, the negotiations must ripen into a mutual, valid, and enforceable agreement to modify the old contract.*" (emphasis added)

Counsel for Respondent submits that there is nothing in the record to establish, either by word or conduct, a ". . . mutual assent . . ." to its modification by release of Defendant from liability.

The closest Utah case in point which counsel has been able to locate is Green v. Garn, 11 Ut. 2d 375, 359 P2d 1050. In that case, Green sold a business to Garn and as part of the consideration for the sale took a promissory note for $5,000. Garns were unable to make a go of the business, and Green told them if they would list the property through him, he would make certain concessions on a sale, including release of Garns when a new contract was negotiated. Garns did not list through Greens but rather sold the business

through another broker to Messers. Burrows, Jensen, and Payne. Burrows, Jensen, and Payne defaulted, and Garns sued them. Green filed a suit in intervention and claimed the $10,000 which Burrows, Jensen, and Payne owed Garns.

Garns argued that since Green claimed against Burrows, Jensen, and Payne, he had released Garns. This argument is analogous to the argument of Appellant that he was released because Olsen attempted to collect from and dealt with Obray. The Utah Court at page 1053 said:

> "The fact that he (Green) was willing to accept and claimed the right to receive payment of $10,000 from Burrows, Jensen, and Payne does not discharge the obligation of the Garns . . ."

Garn further argued that the conduct of Green in surrendering possession to Garn who in turn surrendered possession to Burrows, Jensen, and Payne was conduct amounting to abandonment by Green of his rights against Garn. This is analogous to Appellant's claim that Obray's conduct in taking possession and operating the equipment amounted to a release by Olsen of Appellant and an acceptance of Obray. The Utah Court observed at page 1053:

> "But it does not follow from the Garn's surrender of the premises that Green surrendered his rights."

The Court then stated that the:

> ". . . offer of Green to allow the Garns to try to work out some means to help their predicament certainly cannot be construed as an abandonment of his rights under his contract with them." (Ibid 1053-54)

Again, the Court in concluding there was no such conduct by Green as to evidence a release of Garns said:

> "Green never entered into a new contract with the purchasers of the Garns' interests." (Ibid p. 1054)

Nor did Olsen ever enter into a new agreement with the purchaser of Appellant's interest. The reason is clear. Olsen never intended to or did release Appellant.

## CONCLUSION

The evidence in this case led the learned Trial Court inexorably to its Conclusion and Judgment in in this matter. The Court bottomed that Judgment on sound facts and acted within its judicial prerogatives with discretion and candor. The Trial Court's Judgment should be affirmed.

Respectfully Submitted,

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