

1963

Mastic Tile Division of the Ruberoid Company v. Acme Distributing Co. et al : Brief of Appellants

Utah Supreme Court

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Hanson & Garrett; Attorneys for Plaintiff and Respondent;

Beaslin, Nygaard & Coke; Attorneys for Defendants and Appellants;

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APR 1964
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IN THE SUPREME COURT OF THE
STATE OF UTAH

MASTIC TILE DIVISION of the
RUBBEROID COMPANY a corpora-
tion,

Plaintiff-Respondent

—vs.—

ACME DISTRIBUTING COM-
PANY, a corporation, W. N. BEES-
LEY, SR. and SCOTT L. BEESLEY,

Defendants-Appellants.

APPELLANTS' BRIEF

Appeal from the District Court of Salt Lake County, Utah
Honorable Stewart M. Hansen, Judge

BEASLIN, NYGAARD & COKE

By HENRY S. NYGAARD

*Attorneys for Defendants-
Appellants*

513 Boston Building
Salt Lake City, Utah

HANSEN and GARRETT

By Edward M. Garrett

Attorneys for Plaintiff-Respondent

520 Continental Bank Bldg.
Salt Lake City, Utah

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IN THE SUPREME COURT OF THE
STATE OF UTAH

MASTIC TILE DIVISION of the
RUBBEROID COMPANY, a corpo-
ration,

Plaintiff-Respondent

—vs.—

A C M E DISTRIBUTING COM-
PANY, a corporation, W. N. BEES-
LEY, SR. and SCOTT L. BEESLEY,

Defendants-Appellants.

Case No.
9957

APPELLANTS' BRIEF

STATEMENT OF THE KIND OF CASE

This case involves two basic causes of action in contract: first, a manufacturers action on a promissory note, chattel mortgage and open account against the defendant distributor, a Utah corporation; second, the manufacturers action against W. N. Beesley, Sr. and Scott L. Beesley personally on an assignment.

DISPOSITION IN LOWER COURT

The lower court granted the plaintiff's motion for summary judgment against the individual and corporate defendants. All defendants appeal from the judgment and the amended judgment.

RELIEF SOUGHT ON APPEAL

All defendants seek reversal of the judgment and amended judgment and judgment in favor of the defendants on the assignment and note as a matter of law, or that failing, a trial on the merits.

STATEMENT OF FACTS

The facts of this case are very intricate and involved and at best require a careful examination of all the instruments as well as the pleadings.

The plaintiff, Mastic Tile, is a manufacturer of tile and various other products which are sold to distributors for local sale. The defendant, Acme Distributing Company, did purchase from the plaintiff a number of its products for sale in Utah. During the several years immediately preceding March 10, 1961, the plaintiff sold goods on open account to Acme Distributing Company. By March 10, 1961, the said defendant corporation owed

to the plaintiff \$81,278.91 on open account. At this point the plaintiff insisted that the defendant corporation reduce the obligation on the open account to a promissory note. An agreement was executed on March 10, 1961 whereby the open account in the sum of \$81,278.91 was reduced to a promissory note secured by a chattel mortgage on all the merchandise to be sold to Acme by the plaintiff as well as merchandise then in the inventory of Acme. Secondly, the note was secured by an assignment of all accounts receivable, both present and future, which represented sales of the plaintiff's products.

It is important to note that the entire indebtedness of any type or nature which was due from the defendant, Acme Corporation, to the plaintiff was reduced to and embodied in the March 10 promissory note and agreement and that no other obligation was due to the plaintiff from the defendant at that time. The agreement further provided that the defendant corporation would pay the sum of \$2,000 per month at 3% per annum. The agreement then provided that the plaintiff would allow the defendant to purchase on a limited open account basis by providing that the open account must be paid within 75 days from the invoice date. A 2% discount was granted if paid within 60 days. It was the intent of the parties to liquidate the note as rapidly as possible and to prevent further indebtedness.

On March 10, 1961 a supplemental agreement (said agreement was not included in the pleadings before the court when the summary judgment was granted) was executed. This supplemental agreement provided in paragraph 2 that if the note and the open account are current, moneys collected on the assigned accounts receivable may be used in the ordinary course of business. It further stated that payments received shall first be applied to the oldest item or charge on the account. The oldest item or charge on the account is represented by the promissory note. The intent of the agreement and supplemental agreement was clear. The open account was to be kept current and all proceeds received from the sale of plaintiff's products were to be applied against the note in order to liquidate that obligation as quickly as possible.

At this point in order to fully understand the case it must be understood that Acme Distributing Company was a Utah corporation engaged in the business of selling wholesale, various products. Prior to January, 1961, the primary stockholder was W. N. Beesley, Jr., who sold his stock interest in the corporation to his father, W. N. Beesley, Sr. and his brother Scott L. Beesley. At the time of the sale W. N. Beesley, Jr. owed Acme Distributing Company \$21,979.73 for advances and loans. W. N. Beesley, Sr. and Scott L. Beesley agreed to assume this obligation. On March 10, 1961, at the same time the agreement, supplemental agreement, note and chattel

mortgage were executed, an assignment of \$21,979.73 claim of Acme distributing Company against W. N. Beesley, Jr. was made to the plaintiff corporation. The plaintiff insisted that W. N. Beesley, Sr. and Scott L. Beesley acknowledge and consent personally to the assignment. The assignment provides:

“This assignment shall be a part of that certain agreement between them dated March 10, 1961.”

This assignment has become the basic point of contention between the plaintiff and the defendant in this litigation. The defendants all contend that no consideration was given for this assignment and that the purpose and intent of the assignment was to secure the \$81,278.91 note and upon payment of the note the security would be discharged. The plaintiff's pleadings do not indicate what consideration, if any, was paid nor are there any findings of fact or conclusions of law to indicate upon what theory the court granted the summary judgment.

On December 20, 1961, there was an extension and modification agreement wherein it was agreed that the original note of \$81,278.91 had been reduced to \$55,500|00, that the interest rate would be reduced from 3% to 2% per annum and that the monthly payments would be reduced from \$2,000 per month to \$750 per month. It was further agreed in paragraph 4 that the sales rebates

which had originally been credited against the promissory note would hereafter be credited against the open account in order to reduce the open account which was becoming quite large.

During the course of business from March 10, 1961 to and including approximately December 1, 1962, the promissory note obligation was reduced to \$47,250.00. However, the open account had increased from 0 dollars to approximately \$35,020.49. The defendant corporation was in default. In order to avoid an immediate foreclosure by the plaintiff corporation on all of the accounts receivable and the inventory, the plaintiff and the defendant corporation mutually agreed to have the inventory returned to the plaintiff corporation for full credit less freight expense and to cooperate in the collection of the assigned accounts receivable for the benefit of the plaintiff corporation. The plaintiff corporation, upon accepting the inventory, gave credit to the defendant corporation of \$20,487.40. The plaintiff corporation further gave defendant corporation \$19,668.27 credit on accounts receivable. There was approximately \$7,353.54 in uncollected accounts receivable. Plaintiff also gave to the defendant corporation \$782.11 credit for sales rebate. The total credit was \$40,937.78. The plaintiff also received the \$7,353.54 in assigned accounts receivable not yet collected making a grand total of \$48,291.32 either on hand in the form of uncollected accounts receivable or fully granted credit given by the plaintiff to the defendant.

The plaintiff then made its motion to the court for a summary judgment. The court, upon examining the documents and hearing arguments by counsel, granted a summary judgment against W. N. Beesley, Sr. and Scott L. Beesley personally in the sum of \$21,979.73 on the basis of the assignment and \$19,005.73 together with interest in the amount of \$960.00 and attorney's fees in the sum of \$4,500.00. The judgment made no distinction between the amount owing on the note and the amount owing on the open account.

Apparently the court granted the judgment in accordance with the affidavit supporting the plaintiff's motion for summary judgment. The said affidavit set up the accounting between the parties and prorated the inventory between the note and the open account and applied all of the accounts receivable to the note. If such were the case, the defendant contends that it was improper in that both the inventory, chattel, and assigned receivable secured the note, and that by proper application of the collected funds and merchandise the note would have been discharged or nearly so, and that by prorating the inventory between the open account and the note, the proper payment of the note was avoided.

The court granted the plaintiff's motion for summary judgment although the defendant did file through their attorney a counter-affidavit and a motion by the defendant that the summary judgment be granted in

favor of the defendants, W. N. Beesley, Sr. and Scott L. Beesley for no cause of action on the theory that the assignment executed by Acme Distributing Company and the defendants personally was only as security and that upon payment of the note there was no further need for the assignment. The Court denied this motion. Subsequent to this denial by the Court, the defendants did file a motion to reconsider the court's action which was also denied except that the amended judgment was ordered by the court providing that as the uncollected accounts receivable were collected, the sum should apply against the judgment. From these rulings of the court all of the defendants filed notice of appeal.

STATEMENT OF POINTS

POINT I.

THAT THE COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT BECAUSE THERE WERE MATERIAL ISSUES OF LAW AND FACT.

POINT II.

THE COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THAT THE COURT AS A MATTER OF LAW ERRONEOUSLY CONSTRUED THE LEGAL INSTRUMENTS BY PRORATING INVENTORY ITEMS BETWEEN THE OPEN ACCOUNT AND THE NOTE AND BY GRANTING A JUDGMENT WHICH MADE NO DISTINCTION BETWEEN THE NOTE AND THE OPEN ACCOUNT.

POINT III.

THE COURT AS A MATTER OF LAW ERRED IN NOT FINDING THAT AT THE TIME THE ASSIGNMENT WAS EXECUTED, MARCH 10, 1961, IT WAS FOR SECURITY PURPOSES ONLY.

POINT IV.

THE COURT AS A MATTER OF LAW ERRED IN GRANTING JUDGMENT AGAINST THE INDIVIDUAL DEFENDANTS, W. N. BEESLEY, SR. AND SCOTT L. BEESLEY, BECAUSE THE PLEADINGS CLEARLY ESTABLISH THAT BY PROPER APPLICATION OF MONEYS RECEIVED, THE NOTE SECURED BY THE PERSONAL ASSIGNMENT WAS LIQUIDATED THEREBY RELIEVING PERSONAL DEFENDANTS OF FURTHER LIABILITY, SINCE THE ASSIGNMENT WAS MADE AS SECURITY FOR THE DEBT WHICH EXISTED AT THE TIME OF THE ASSIGNMENT AND NOT FOR FUTURE DEBTS.

ARGUMENT

POINT I.

THAT THE COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT BECAUSE THERE WERE MATERIAL ISSUES OF LAW AND FACT.

The undisputed law in this jurisdiction as well as other jurisdictions is that summary judgments will be granted only when there are no material issues of law or fact in dispute. Therefore the court should not grant

summary judgments where there are meritorious claims and defenses. In the case of *Kidman v. White v. Jones, third party plaintiff, v. Wade, third party defendant*, 378 Pac 2d 898 p. 900, the Court said :

“In confronting the problem presented on this appeal we have been obliged to remain aware that a summary judgment, which turns a party out of court without an opportunity to present his evidence, is a harsh measure that should be granted only when, taking the view most favorable to a party’s claims and any proof that might properly be adduced thereunder, he could in no event prevail. That both parties hereto make plausible arguments that the contract in question is so manifestly in their favor that reasonable minds could not see if the other way is a pointed commentary of the ability of the human mind to rationalize in its own interests. It is equally so upon the desirability and the propriety of resolving any doubts in favor of permitting courts and juries to settle such disputes rather than ruling upon them summarily as was done here.”

The court further stated in the case of *Samms v. Eccles*, 11 Utah 2d 289, 358 Pac. 2d 344 at p. 355:

“A motion for summary judgment is in effect a demurrer to the claims of the plaintiff, saying: assuming they are true, no right to recover is shown. It is regarded as a harsh measure which the courts are reluctant to sanction because it deprives the adverse party of an opportunity to present the evidence concerning her grievance

for adjudication. For this reason plaintiff's contentions must be considered in the light most to her advantage and all doubts resolved in favor of permitting her to go to trial; and only if when the whole matter is so viewed, she could, nevertheless, establish no right to recovery, should the motion be granted."

In another Utah case, *Morris v. Farnsworth Motel*, 123 Utah 289, 259 Pac. 297 the Supreme affirmed a summary judgment; however at page 299 the Court stated:

"Although we are sensitive of the duty of courts to safeguard the right of citizens to have grievances fully tried on the merits to courts and juries under proper circumstances, this does not lead to the necessity or desirability of such submission where, taking the evidence and all fair inferences therefrom most favorable to a plaintiff, all reasonable minds must yet conclude that his own lack of due care proximately contributed to cause his injury."

That this is the general law is further supported in 41 Am. Jur. Sec. 342 at p. 525.

"If there are issues of fact, the motion for summary judgement is denied, or, in some jurisdictions, the issues are narrowed to the material facts which are actually and in good faith controverted. If there are no questions of fact, the judge applies the law in accordance with the admitted facts as disclosed by the affidavits. The

situation corresponds to that of a judge directing a jury to render a verdict on admitted facts in the plaintiff's favor.

"These affidavits stand on a different footing than those in which the trial judge is determining a question of fact on affidavits. If the affidavit of defense shows a substantial issue of fact, summary judgment should not be ordered even though the affidavit is disbelieved. If the affidavits on the one side and on the other are directly opposed as to the facts shown, the case must go to trial. Oral evidence is not admissible, nor are interrogatories propounded for the purpose of discovery, where the statutes or rules under which they are propounded do not contemplate their use."

Applying these basic principles of law to the instant case the pleadings clearly show material issues exist. First, there is a dispute as to the allocation of funds obtained from the return of merchandise inventory and collected accounts receivable. The plaintiff contends that the inventory may be prorated between the balance owing on the note and the balance on the open account. The defendants all contend that all of the accounts receivable and all of the inventory returned must be applied to the note as is clearly set forth in the agreement of March 10, 1961.

Secondly, the plaintiff and defendants take opposite positions as to the purpose of the assignment which was

executed March 10, 1961. The plaintiff's complaint alleges merely that the assignment was executed on March 10, 1961 and are entitled to judgment on the assignment. The defendants, however, in their answer and in the counter affidavit opposing the motion for summary judgment specifically allege that no consideration was given for the assignment and that the only purpose for the assignment was for security purposes. The assignment was to secure the promissory note dated March 10, 1961. It is apparent that this difference of opinion cannot be resolved from the pleadings alone. It would be necessary to have testimony taken in order to determine what was the actual intent and purpose of the assignment.

Thirdly, there is a material issue with reference to what, if any, attorney's fees should be granted to the plaintiff and charged against the defendant corporation. Paragraph 10 of the plaintiff's affidavit supporting his motion for summary judgment alleges that reasonable attorney's fees are: "\$4700.00 applicable to the note and \$3500.00 applicable to the chattel mortgage." The defendants, in paragraph 7 of their counter affidavit, contended it is not possible to have attorney's fees assessed both on the promissory note and a second attorney's fee on the chattel mortgage which secures the note. This certainly would be a duplication of attorney's fees. Despite this dispute as to assessment of attorney fees, the Court awarded an attorney fee of \$4500.00 and in no

way indicated whether it was based upon the note, the chattel mortgage, or both. With reference to attorney fees it is further alleged by the defendants that by proper application of the credits the notes might very well be satisfied, in which event *no* attorney fees could be assessed. Therefore, it is apparent that the Court must make a distinction as to moneys owed on the note and moneys owed on the open account before attorney fees can be assessed. The lower court apparently ignored this important distinction.

Fourth, a supplemental agreement dated March 10, 1961, was not made part of the pleadings by the plaintiff. The defendants have argued that all of the documents must be before the court in order to have a full understanding of the case. The defendants in their answer and their counterclaim have alleged the existence and importance of the Supplemental Agreement which is an integral part of the Agreement itself. Paragraph 2 of the supplemental agreement states: "Payments to Acme on said assigned account shall be applied to the oldest item or charge on the account." The defendants contend that all of the assigned accounts receivable apply to the note and carry out the general intent of the parties that the note was to be liquidated as rapidly as possible. To some extent, the plaintiff must agree with this position because in their pleadings they allege that all of the accounts receivable collected were credited to the note. Enlarging upon this intent, it becomes increas-

ingly apparent that it was the desire of the parties to provide as much security as possible on the note obligation.

POINT II.

THE COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THAT THE COURT AS A MATTER OF LAW ERRONEOUSLY CONSTRUED THE LEGAL INSTRUMENTS BY PRORATING INVENTORY ITEMS BETWEEN THE OPEN ACCOUNT AND THE NOTE AND BY GRANTING A JUDGMENT WHICH MADE NO DISTINCTION BETWEEN THE NOTE AND THE OPEN ACCOUNT.

The judgment against the personal defendants in the sum of \$21,979.73 was granted on the assignment and was not considered by the Court as security on the note. A judgment of \$19,005.73 was against the corporation only and made no distinction as to whether it applied to the note or the open account. The interest in the sum of \$960 and the attorney's fee of \$4500 were judgments against the corporation only but it is not known whether the interest or attorney fees were based on the note or the open account. In determining what was intended by the parties it is necessary to construe all of the instruments together, one of which was not included in plaintiff's complaint. The basic agreement is the document entitled "Agreement" and dated March 10, 1961 and this document clearly spells out the intent of the parties in that Paragraph 2 provides:

"To secure the payment of said promissory note Acme agrees: (a) to execute and deliver to Mastie a chattel mortgage . . . (b) to sell, assign, and transfer to Mastie all its accounts receivable . . ."

Then referring to Paragraph 4 the agreement states:

"“From and after the 1st day of January, 1961, all purchases from Mastie by Acme shall be at 2% discount if paid within 60 days from the invoice date and net if paid thereafter provided that all payments to Mastie shall be the net invoice amount and if paid within the discount period Mastie agrees to credit the discount to the unpaid balance of the promissory note mentioned above provided further that all invoices shall be paid not later than 75 days from invoice date.”"

It is apparent from these two provisions of the agreement that the note was to be fully secured and paid off as rapidly as possible pursuant to the terms of the agreement and that the open account was to be kept current at all times thus preventing the building up of a large open account which had created the trouble in the beginning. Therefore, at the time of the execution of the agreement the old open account was reduced to a promissory note and there was no other indebtedness owing by the defendant corporation to the plaintiff.

The assignment, dated March 10, 1961, provide in the last paragraph :

“It is agreed by Acme Distributing Company, Inc. and Mastic Tile Division of Rubberoid Company, assignor and assignee, respectively, that this assignment shall be a part of that certain agreement between them, dated March 10, 1961.”

It is obvious that at the time this assignment was executed the only outstanding obligation was the note; therefore it must necessarily indicate that the intent of the parties was to protect the plaintiff against the possibility of loss on the note, there being no other obligation in existence at that time to which the assignment could apply. This is especially true when no consideration was given for the assignment.

The supplemental agreement dated March 10, 1961, in Paragraph 2 states :

“Payments to Acme on said assigned account shall be applied to the oldest item or charge on the account.”

The agreement provides that the receivable shall be assigned as security to the promissory note. Therefore, it is logical and certainly the intent of the party that the funds from the assigned receivables are to be applied toward the payment of the note. If the assigned accounts

receivable were to be used in the payment and liquidation of the open account, this in effect would destroy the very purpose of the original assignment which was to secure the note itself. The reading of the documents together conclusively points out that it was the plaintiff's intent to compel the liquidation of the old account by paying off a promissory note at the rate of \$2000 per month. The open account, in order to be kept current, must be paid not only from the revenues derived from the sale of the plaintiff's products but also from the revenues derived generally from all sales. Certainly no one can contend that the sale of the plaintiff's products alone would give sufficient profit to both liquidate the note and the open account.

The agreement provides that in the event of default on the payments on the note, there can be foreclosure proceedings against the security. Rather than have a foreclosure through the Court, the inventory and the accounts receivable were returned to the plaintiff. The plaintiff did apply all of the proceeds from the accounts receivable that had been collected to the note. However, the plaintiff prorated the returned inventory between the balance of \$47,250.00 on the note and the \$35,020.49 on the open account. The affidavit supporting the plaintiff's motion for summary judgment clearly sets out this proration accounting. It is contrary to the provisions of the agreement which was prepared by the plaintiff and signed by the defendants. It is apparent

that the basic reason for the proration in violation of the agreement was to leave a large balance still owing on the note which could then be liquidated by funds obtained from the assignment, and in this way compel personal liability. All of the inventory credits and all of the accounts receivable credits should have been applied to the promissory note pursuant to the agreement. As pointed out in the Statement of Facts this would have resulted in reducing the balance on the note from \$47,250 to \$6,312.22. Therefore, by proper construction of the instruments there could have been no greater personal liability on the assignment than \$6,312.22 plus costs and attorney fees as provided by the note. However, it must be kept in mind that at the time the action was commenced, there was still approximately \$7,353.54 in assigned accounts receivable not yet collected. If this amount had been collected in full, the note would have been fully satisfied. In such an event there would have been no personal liability whatsoever.

The only other instrument of significance is the Extension and Modification Agreement dated December 20, 1961. Paragraph 1 of that instrument indicates that the note had been reduced to \$55,500.00. Because of the reduction of the balance, the monthly payments and interest rates were reduced. However, to further protect the obligation of the note, Paragraph 4 provided that sales rebates which had heretofore been applied to the note would in the future be credited against the open

account to prevent the open account from getting too large. This modification in itself bears out the intent of the parties in fully securing a note in the first instance, and that there was originally no intent to secure in any fashion the open account. It was only when the open account began increasing in size that steps were taken to in some way prevent the recurrence of another huge indebtedness.

Considering all of these instruments together in the light of the original intent of the parties the Court was in error in prorating the inventory against the balance owing on the open account as well as the note. The court should have followed the instruments of the parties and applied all of the merchandise returned to the note. Following this construction of the instruments, the findings of attorney fees, interest, and personal liability would have been substantially different.

POINT III.

THE COURT AS A MATTER OF LAW ERRED IN NOT FINDING THAT AT THE TIME THE ASSIGNMENT WAS EXECUTED, MARCH 10, 1961, IT WAS FOR SECURITY PURPOSES ONLY.

The only existing debt between the plaintiff Mastic Tile and the defendant Acme Distributing Company, Inc., at the time of the March 10 agreement was the \$81,278.91 open account which was reduced to the promissory note.

This debt had arisen as a result of past purchases on open account. No further loan was extended to the defendant at the time of the note. It was contemplated that further purchases would be made on open account but that the plaintiff did not want the accounts to raise above a nominal level and prolong or increase the insecure financial position of the defendant, Acme Corporation. It was possible at the time of the agreement that Acme may never have incurred further debts on open account. The plaintiff contends that there was a general assignment of the W. N. Beesley, Jr. obligation. If there were a general assignment of that obligation, the plaintiff would have the legal right to collect the full value of the assignment from W. N. Beesley, Jr., W. N. Beesley, Sr., and Scott L. Beesley regardless of any other agreement the parties may have entered into. This would give the plaintiff the right to collect \$21,979.73 on the assignment. This right would exist in addition to and regardless of any other right to collect on the note. The plaintiff had the right to collect on the note whether or not there was an assignment and whether the assignment was general or merely as security. No one disputes the \$81,278.91 indebtedness; however, if the assignment is to be considered general in character and given for good and valuable consideration, and the note also considered valid as the plaintiff contends, the plaintiff would have the legal right to collect not only the \$81,278.91 but the additional ~~\$81,278.91~~ ^{\$21,979.73} making a total of 103,259.64. It is inconceivable that individuals, whether they be officers or

not, would place themselves in the unprotected position of making themselves personally liable by an outright grant of \$21,979.73 whether the note was paid or not.

The plaintiff contends that there was consideration paid for the assignment. This would require testimony because the pleadings of the plaintiff do not, in any way, indicate what if any consideration was given. On the other hand, the defendants repeatedly contended that the assignment was for security only and that the personal defendants did not intend to hold themselves out for personal liability on an unlimited basis. The defendants should have a right in Court to present their position.

POINT IV.

THE COURT AS A MATTER OF LAW ERRED IN GRANTING JUDGMENT AGAINST THE INDIVIDUAL DEFENDANTS, W. N. BEESLEY, SR. AND SCOTT L. BEESLEY, BECAUSE THE PLEADINGS CLEARLY ESTABLISH THAT BY PROPER APPLICATION OF MONEYS RECEIVED, THE NOTE SECURED BY THE PERSONAL ASSIGNMENT WAS LIQUIDATED THEREBY RELIEVING PERSONAL DEFENDANTS OF FURTHER LIABILITY, SINCE THE ASSIGNMENT WAS MADE AS SECURITY FOR THE DEBT WHICH EXISTED AT THE TIME OF THE ASSIGNMENT AND NOT FOR FUTURE DEBTS.

At the time of the assignment of the defendant, Acme Distributing Company, Inc., was in serious financial trouble, and the defendants contended that the debts

existing at the time should be consolidated into one note and that the note should be secured by the assignment as well as the accounts receivable and chattel mortgage. It was not the intent of the parties that there should be a substantial future additional extension of credit. In fact, the documents indicated there was not to be any type of substantial extension of lines of credit but that the open account was to be kept current at all times. Therefore, there was no need to apply the assignment as security for any future debts between the defendant and the plaintiff. If the assignments were to apply to future debts or some other obligation than the note, then the agreement must specifically so state. The Colorado Supreme Court in expressing the general rule on this subject stated in *Horton v. McFerson*, 30 Pac. 2d, 256 94 Colo. 361, at p. 258:

“... a pledge to secure a specific debt cannot be held by the pledgee as security for any other obligation, except by express agreement between the pledgor and pledgee.”

The intention of the parties in this situation was that the assignment was only for the note and not for future debts. Even if the parties had intended that the assignment was for the future open account indebtedness which may or may not have arisen, the pledge for the future accounts would have been ineffective because it was not expressly included in the assignment. This rule is based on sound reasoning. A pledge in the hands of a

pledgee remains the property of the pledgor and he has the right to decide how the property should be disposed of subject to the limited rights of the pledgee. It is presumed that the pledgor did not intend to give away any rights in the property which he did not do so expressly.

The intention of the parties being to liquidate the note and to absolutely prevent any future obligation in accumulating, it is inconceivable that the assignment could have been for a future debt which they were attempting to avoid in every way possible.

CONCLUSION

In conclusion it is submitted :

1. The Trial Court has erred in granting a summary judgment in that there are material issues of law and fact which may be resolved only by the Court hearing testimony.

2. The ruling of the Court in allowing a proration of inventory credits between the open account and the note is contrary to the instrument itself.

3. The documents themselves clearly establish the intent of the parties to liquidate the existing obligation and to prevent future indebtedness.

4. The assignment was for security purposes only and the personal liability was limited to securing a promissory note to the extent of the assignment. Upon the payment of the note, the security in the form of the assignment was discharged or should have been discharged.

THEREFORE, the summary judgment should be reversed and the matter remanded to the District Court for a trial on its merits.

Respectfully submitted,

BEASLIN, NYGAARD & COKE

By HENRY S. NYGAARD

*Attorneys for Defendants-
Appellants*

513 Boston Building
Salt Lake City, Utah