

1964

Gordon L. Weight v. Harry B. Miller : Brief of Respondent

Utah Supreme Court

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Layne B. Forbes; Attorney for Plaintiff and Respondent;

Merrill K. Davis; Attorney for Defendant and Appellant;

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In the Supreme Court of the State of Utah

JUN 11 1964

GORDON L. WEIGHT,

Plaintiff and Respondent,

- vs. -

**HARRY B. MILLER, and HARRY B.
MILLER, dba LORRAINE PRESS,**

Defendant and Appellant.

Clerk. Supreme Court, Utah

Case No.

10037

BRIEF OF RESPONDENT

Appeal from a Judgment of the Third Judicial
District Court for Salt Lake County

Honorable Merrill C. Faux, Judge

LAYNE B. FORBES

Pioneer Savings Building
Bountiful, Utah

Attorney for Plaintiff and Respondent

MERRILL K. DAVIS

53 East Fourth South Street
Salt Lake City 11, Utah

Attorney for Defendant and Appellant

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Defendant and Appellant.

Case No.

10037

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is an action by Plaintiff Gordon L. Weight to recover on a promissory note in the amount of \$1,200.00 and executed in his favor by Defendant Harry B. Miller on the 2nd day of January, 1960.

DISPOSITION IN THE LOWER COURT

The District Court of Salt Lake County, State of Utah, with Judge Merrill C. Faux presiding, awarded judgment to Plaintiff in the amount of \$1,200.00, \$92.00 interest, attorney's fees in the amount of \$348.33 and \$15.00 costs.

RELIEF SOUGHT ON APPEAL

Defendant Harry B. Miller seeks reversal of the decision of the lower court. Plaintiff Gordon L. Weight seeks affirmance of the lower court's decision.

STATEMENT OF FACTS

Respondent shall hereinafter be referred to as Plaintiff and Appellant shall hereinafter be referred to as Defendant.

Plaintiff accepts Defendant's Statement of Facts except in certain particulars noted as follows. Plaintiff does not concede that Plaintiff initiated the conversation with respect to entering into an employment agreement. Plaintiff denies that Defendant was specifically relying upon the payment by Plaintiff of the balance of \$3,800.00 in order to purchase a certain printing press. Plaintiff does not agree that Defendant often reminded him that the balance of \$3,800.00 was due but states affirmatively that the Plaintiff did not specify any particular time within which the balance should be paid. (R-11) Plaintiff asserts that he did not state to the bookkeeper Ruth Marks on the 18th of January, 1960, that he was employed elsewhere at the time. (R-40) Plaintiff further asserts that he did not break appointments with customers and did not evidence a loss of interest in his work. Plaintiff further denies that Defendant ever offered to pay him stock of the corporation as payment of the promissory note. (R-21)

On the 1st day of October, 1959, Plaintiff and Defendant entered into an Employment Agreement. The terms are essentially as set forth in Defendant's Statement of Facts. Previously the Plaintiff had paid to the Defendant \$1,200.00 The Agreement contemplated a

promissory note representing the investment made by Plaintiff. One such note was initially prepared for signature but was not signed by the Defendant. (R-10, 29, 30) During December, 1959, the Defendant became dissatisfied with Plaintiff's performance, (R-28), reminded him of such, discussed the matter with Mr. Montgomery, Plaintiff's attorney at the time (R-98), and as a result of such dissatisfaction stated to Plaintiff that he would discontinue paying him a salary and instead pay him a 10% commission of sales. R-28) As a result of such condition imposed Plaintiff became dissatisfied with the working relationship and the employment arrangement was mutually terminated.

As a cumulation of such termination the Defendant executed a promissory note on January 2, 1960, representing the initial amount invested by Plaintiff. (R-3, 39, 73, and P-1). Since the money was invested in September, 1959, the note was dated as of September, 1959, in order to entitle Plaintiff to interest from that date. (R-73).

ARGUMENT

POINTS URGED FOR AFFIRMING DECISION OF LOWER COURT

POINT I.

THE LOWER COURT DID NOT ERR IN HOLDING THAT THE EMPLOYMENT AGREEMENT WAS MUTUALLY TERMINATED AND THAT THE PROMISSORY NOTE IN THE AMOUNT OF \$1,200.00 WAS EXECUTED SUBSEQUENT TO SUCH TERMI-

NATION AND THEREFORE HAD NO RELATIONSHIP WITH THE EMPLOYMENT AGREEMENT.

In considering the soundness of the trial courts' findings and judgment this court may indulge in the presumption that the judgment was valid and was based upon competent evidence. The evidence and all inferences that fairly and reasonably may be drawn therefrom must be viewed in light most favorable to it. The burden here is upon the Defendant in affirmatively showing that the trial court was in error. The following authorities are cited in support of the foregoing propositions: *Charlton v. Hackett*, 11 U 2d 389, 360 P2d 176 (1961); *Cheney v. Rucker*, 14 U2d 205, 381 P2d 86 (1963).

The trier of fact can best judge the credibility of the witness and the weight to be given the evidence for he can observe firsthand their demeanor, forthrightness and candor. *Jones v. California Packing Corp.*, 121 U 612, 244 P2d 640; *Page v. Federal Security Insurance Co.*, 8 U2d 226, 332 P2d 666 (1958).

The evidence substantiates the court's findings that the parties had terminated the employment relationship and that the note in question was executed after such termination and, therefore, had no relationship with the employment agreement. In support of such contention Plaintiff submits the following points:

(1) The Defendant was dissatisfied with the performance of the Plaintiff and especially so in December, 1959. (R-72, 76). He felt so keen about the matter that the Defendant left Plaintiff notes or memos reminding him about the fact that he was not earning as much as

he was being paid. (R-27).

(2) The Defendant contacted Mr. Montgomery, Plaintiff's attorney at the time, and discussed the matter with him. On that occasion the Defendant stated that he was "afraid he was going to have to let him go." It is significant that the Defendant felt so keenly about the matter that he felt prompted to discuss the matter with Mr. Montgomery. (R-98).

(3) Between January 2, 1960, and January 18, 1960, the Defendant had no contact with the Plaintiff and did not call him in order to inquire as to the reason for the Plaintiff not working. Such action on Defendant's part was certainly consistent with the position that the Defendant considered the employment relationship terminated (R-85, 86).

(4) In December, 1959, the Defendant imposed as a condition of future employment that the Plaintiff should be paid on a 10% commission basis instead of a regular salary. Such condition was at variance with the terms of the Employment Agreement. The commission basis was to be retroactive to December 15th. The Defendant refused to pay the Plaintiff for the last two weeks in December. (R-27, 28).

(5) The Plaintiff too was dissatisfied with the employment relationship. Defendant had not allowed him to participate in management and it was not his understanding that he should remain permanently as a salesman. (R-27, 28).

(6) On January 2, 1960, the Defendant at Plaintiff's request, executed the promissory note on a blank printed form secured from an office supply company. (R-39, 73, P-1. The note was initially dated January 2, 1960, but this date was crossed out and the date September 1, 1959, was inserted. This was for the sole reason of entitling the Plaintiff to interest from the date of his initial investment. (R-73). It is significant that the note made no mention of the Employment Agreement or that the proceeds should be paid in stock. (P-1). The note was made after the termination of the Employment Agreement and is unequivocal with respect to the mode of payment.

(7) The Plaintiff and Defendant conversed about the repayment of note at a time subsequent to its execution. This conversation took place outside of the State Purchasing Office of the State Capitol. On that occasion the Defendant evidenced some concern about the Plaintiff trying to "peddle the note" and thereupon indicated that he would pay off the note. (R-21, 22). No mention was made, however, about paying the note off in stock.

(8) While it is true, as Defendant asserts, that the initial investment was made in contemplation of subsequently receiving stock in the Lorraine Press after it was incorporated, it was also true that these matters never did materialize during the course of Plaintiff's employment. It is also true that a note was prepared

for Defendant's signature. (R-10, 29, 39). This note was never signed. The note that eventually was executed was executed after the agreement was terminated and was not the note contemplated in the agreement. It was not for the same amount and made no reference to the contract or agreement and made no reference to the fact that the payment should be made in stock.

From the foregoing evidence the court could have justifiably held that the employment agreement was terminated in a number of ways. Written contracts may be rescinded by oral agreements. 12 Am. Jur., Contracts § 432; Restatement, Contracts. Vol. 2 § 407. They may also be rescinded or terminated by implication as a result of the acts of the parties. An example of such is where the contracting parties subsequently make a new contract inconsistent with the term sof the former agreement, as Plaintiff and Defendant did in the present case. 12 Am. Jur., Contracts, §433; Restatement, Contracts, Vol. 2, §508; Copper King Mining Co. v. Hanson, 52 Utah, 605, 176 P. 623. On January 2, 1960, some three months after the execution of the employment agreement, the Defendant executed the note in question. And as has been repeatedly stated this note made no mention of the employment agreement or that the preceeds should be paid in stock. Therefore, such note was inconsistent with the terms of the former agreement.

The lower court could also have based its decision on the fact that the contract was rescinded or termin-

ated because of a material breach by the Defendant. It 12 Am. Jur., Contracts, § 440; Restatement, Contracts, is well settled that a material breach warrants rescission. Vol. 2, § 397; McBride v. Stewart, 68 Utah 12; 249 Pac. 114. Certainly the Defendant's apparent refusal to sign the initial promissory note prepared or his refusal to pay the Plaintiff a wage would constitute material breaches.

POINT II.

THE LOWER COURT DID NOT GO BEYOND THE SCOPE OF THE PRE-TRIAL ORDER IN DETERMINING THAT THE EMPLOYMENT AGREEMENT WAS MUTUALLY TERMINATED AND THAT THE PROMISSORY NOTE WAS NOT QUALIFIED BY THE TERMS OF THE AGREEMENT.

The Pre-Trial Order states as follows: "The only question for the trial court to determine will be whether or not the note in question is any part of the contract attached to the answer." The inquiry and testimony during the trial related to whether or not the note in question was a part of the employment agreement. Much of the testimony dealt with whether the Plaintiff and Defendant terminated their employment relationship. This testimony was certainly material to the basic question involved, for if the employment relationship was terminated as the court found then the promissory signed note into evidence.

Plaintiff's cross examination exceeded the scope of Defendant's direct examination. That one exception was with respect to the admission of the original un-

It is well settled that a party may not complain to the appeal court about the improper admission of evidence which he himself has introduced or elicited. 5 Am. Jur., Appeal and Error, § 562, 717. Lowman v. Kuecker, 246 Iowa 1227, 71 NW2d 586, 52 ALR 2d 1380.

CONCLUSION

Plaintiff respectfully contends that the trial court did not err in holding that the promissory note in question was a separate and distinct obligation from the employment agreement. Even though the note related to the initial \$1,200.00 investment by Plaintiff it was executed after Plaintiff and Defendant mutually terminated their relationship. The note made no mention of the employment agreement or that it was to be paid in stock. The court did not go beyond the scope of the pre-trial order; the evidence from which the court based its findings was supplied by Defendant's witnesses and was submitted without objection from Defendant that the testimony was beyond the scope of the pre-trial order. The pre-trial order limited the issues to an inquiry as to whether or not the note in question was related to the employment agreement. Implicit within such inquiry was the determination whether or not the employment note which was subsequently executed was not part of the contract as Defendant contends.

The lower court did not alter the terms of the employment agreement by requiring that re-payment

of Plaintiff's investment be made in "money" instead of "stock" as Defendant alleges. The court held, and justifiably so, that the employment contract was terminated at the time the note was executed. Therefore, it had no relationship with the agreement. As such the note existed as a separate obligation according to the terms therein which provided for the payment in money.

The Defendant's point that the trial court went beyond the scope of the pre-trial order is not well taken. All of the evidentiary matters considered were necessary and incidental to the basic question established by the pre-trial order. Even assuming that the court exceeded the scope of the pre-trial order. Defendant's position is without merit. The doctrine of "Waiver" and "Invited Error" have application here. It is significant that with the exception a few basic inquiries submitted to Plaintiff by his counsel on direct examination, (R-2, 3) all of the testimony elicited was from defendant's witnesses. The Defendant even made the Plaintiff his witness. The testimony upon which the trial court based its decision was elicited from Defendant's witnesses. It is noteworthy that with one exception the Defendant did not object to the admission of the testimony of the various witnesses nor did he object that the scope of agreement was operative at the time the note was executed. The court held that it was not, and rightly so.

Respectfully submitted,

LAYNE B. FORBES

Attorney for Plaintiff & Respondent