

1969

Kaiser Aluminum & Chemical Sales, Inc. v. Jack E.
Lords, Beth C. Lords And Western States
Wholesale Supply : Brief of Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

KAISER ALUMINUM & CHEMI-
CAL SALES, INC.,

Plaintiff and Respondent,

vs.

JACK E. LORDS, BETH C. LORDS
and WESTERN STATES WHOLE-
SALE SUPPLY

Defendants and Appellants.

Case No.

11-170

BRIEF OF RESPONSE

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

Hon. Merrill C. Faux, Judge

Senior & Senior

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FILED

JUN 12 1969

Clerk, Supreme Court, Utah

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and WESTERN STATES WHOLE-
SALE SUPPLY

Defendants and Appellants.

Case No.
11470

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

This is an action by respondent Kaiser Aluminum & Chemical Sales, Inc. against appellants Jack E. and Beth C. Lords on their written guaranty for the prompt payment and performance of obligations of Western States Wholesale Supply.

DISPOSITION IN THE TRIAL COURT

A default judgment was entered against the corporate defendant for failure to answer. The case against the individual defendants was tried to a jury, and judgment was entered against the individual defendants.

RELIEF SOUGHT ON APPEAL

The individual defendants seek to have the judgment set aside on the ground that the trial court erred in rejecting an offer of proof of an alleged agreement to release them from their guaranty.

COUNTER-STATEMENT OF FACTS

Appellants' statement of the facts involved in this appeal (Br. 2-3) does not set forth all of the facts of record pertinent to the question before this Court and respondent, therefore, desires to make this counter-statement of facts.

This is an appeal from a judgment entered against Jack E. Lords and Beth C. Lords on July 22, 1968, (R. 59) after a trial by jury. The Lords were sued upon their individual guaranty given in July 1965 and the question presented by this appeal is whether the judgment should be set aside because the Trial Court rejected an offer of proof of an alleged agreement whereby the respondent, in November 1965, took promissory notes from the Lords' corporation in satisfaction of their individual guaranties.

In July 1965 the Lords guarantied in writing to pay any account incurred with the respondent, Kaiser Aluminum & Chemical Sales, Inc., by Western States Wholesale Supply of which Mr. and Mrs. Lords were president and vice president, respectively. The guaranty, Kaiser's standard form (R. 121), reads in full as follows:¹

¹A copy of the guaranty was Plaintiff's Exhibit 1-P at the trial (R. 121) and is before this Court.

Kaiser Aluminum & Chemical Sales, Inc.
300 Lakeside Drive
Oakland 12, California

Gentlemen:

For and in consideration of your extending credit to Western States Wholesale Supply Co., Inc., a Utah corporation (hereinafter called the Principal), and for and in consideration of future shipments which you may make to them upon your standard published terms and conditions, we, the undersigned, Jack E. and Beth C. Lords, hereby jointly and severally guarantee prompt and faithful payment and performance by said Principal of any and all orders it may place with you and which are accepted by you, all in accordance with the provisions, terms and conditions appearing on your Standard Acknowledgement Form used in acknowledging and accepting said order or orders, and we hereby consent to any changes, modifications or additions to said acknowledged or accepted orders or any concessions or indulgences thereunder, and we further waive any and all notices of default, non-performance or demand upon said Principal or upon us, as well as prior prosecution by you of rights or remedies against said Principal to enforce payment or performance, it being agreed that upon default in payment or performance by said Principal, we shall immediately be liable hereunder without prior demand or notice.

This shall constitute a continuing Guaranty Agreement which will remain in full force and effect until we notify you, in writing, of cancellation hereof; provided, however, that any such cancellation shall not alter or affect any obligations or promises which we have assumed or made hereunder with respect to any orders for aluminum materials placed by said Principal with you

and accepted by you prior to receipt by you of said notice of cancellation.

In the event of nonpayment of principal or interest when due, the undersigned hereby agrees to pay all costs of collection including attorneys fees.

Dated this 29th day of July, 1965.

/s/ Jack E. Lords

/s/ Beth C. Lords

After merchandise had been shipped by Kaiser to Western States, and after some of the merchandise had been returned to Kaiser, for which a credit was given, a complaint was filed against the Lords asking judgment for \$8,265.97, together with attorney fees of \$1,450.00. (R. 1-2.) The complaint alleges that Kaiser had sold goods and building materials to Western States for the sum of \$8,265.97, that payment had been demanded of Western States and of Lords pursuant to their guaranty, and that payment had not been made.

The Lords answered on March 28, 1967, denying generally that they were indebted to Kaiser, and alleging in particular that any indebtedness of theirs by reason of the guaranty had been satisfied as follows (R. 4):

1. That on or about the 1st day of October, 1966, the plaintiff, acting through and by its duly authorized agent and credit manager Kirk McVean, entered into an accord and satisfaction with the defendants whereby the plaintiff received back its merchandise which was in the possession of the defendants and of the Western States Wholesale Supply and West States Construction, in consideration that the plaintiff would fully satisfy

any indebtedness or obligation that the plaintiff might have against the defendants or either of them, growing out of the instrument sued upon by the plaintiff or otherwise.

No mention was made of an alleged agreement a year earlier in November 1965 to release the Lords from their guaranty when Kaiser took promissory notes from Western States.

After a conference with counsel, a Pretrial Order was filed on April 1, 1968, in which the issues to be tried were set forth as follows (R. 17):

STATEMENT OF ISSUES

The issues to be tried in this case are as follows:

I. Was there a settlement of the account of Western States Wholesale Supply in full with the plaintiff either by an accord and satisfaction or otherwise.

II. If not, was there an agreement by the plaintiff upon the return of certain merchandise to release the defendants from any liability on their guarantee for any balance owing to the plaintiff by Western States Wholesale Supply.

III. If not, what amount is due and owing to the plaintiff on the Western States Wholesale Supply account and are the defendants, or either of them, liable therefor.

IV. If Western States Wholesale Supply is made a party defendant as hereinafter considered, what amount, if any, would plaintiff be entitled to recover against Western States Wholesale Supply.

Again, no mention was made of an alleged agreement in November 1965 to release the Lords from their guaranty.

An Amended Complaint (R. 19-22) was later filed on April 22, 1968, in which a Second Claim for Relief was added alleging, as against Western States, that the sum of \$8,265.97 was due and unpaid on a note from Western States dated November 1, 1965. Judgment was asked against the Lords and against Western States for \$8,265.97 and attorney fees of \$1,450.00. (R. 19-21.)

On June 27, 1968, a default judgment was entered against Western States in the amounts requested in the Amended Complaint. (R. 36-37.)

At the trial on July 9, 1968, the Lords' Answer was accepted as an answer to the Amended Complaint (R. 108), and the Trial Court refused to set aside the default judgment against Western States (R. 111), and then, for the first time, after the jury had been impaneled, counsel for Lords asserted that there had been an agreement whereby the Lords' guaranty was released when Western States gave its note to Kaiser on November 1, 1965 (R. 111-112). The issue was discussed at length by the Trial Court and counsel for both parties, and an offer of proof was made which the Trial Court refused for failure to raise the issue at the pretrial conference. (R. 111-118.) Counsel for Kaiser had no notice that the issue would be raised, was not prepared to meet the issue at the trial, and claimed surprise. (R. 114, 115, 117.)

The testimony before the jury was directed primarily to events that transpired in October and November

1966 when Mr. Lords and Mr. Kirk McVean, district credit manager for Kaiser since May, 1966 (R. 120), met in Salt Lake City to discuss Kaiser's account with Western States and the latter's financial difficulties. There was a conflict of testimony over the question whether Kaiser had agreed to release the Lords from their personal guaranty in connection with their return of certain merchandise to Kaiser in November 1966.

McVean Testified (R. 119-132) that he obtained for Kaiser a financing statement to protect merchandise in the Western States warehouse (R. 122) and that he told Mr. Lords that Kaiser would take the merchandise back if the then balance of the Western States account, \$6,300, would be paid (R. 123-124). McVean denied that any mention was made during his negotiations with Mr. Lords of releasing the Lords from their personal guaranty. (R. 132.) The debt owing to Kaiser was not paid but some of the merchandise was returned to Kaiser without authorization and Kaiser decided to accept it and to give the Lords credit for it. (R. 124-125.)

Lords testified (R. 133-143) that he was unwilling to return the merchandise, that he preferred to sell it for the profit he could expect, and that he agreed finally to return the merchandise after consulting his attorney, on the assurance that Kaiser would release the Lords from their guaranty (R. 138).

At the conclusion of the trial written instructions were given to the jury including special interrogatories requested by counsel for the Lords (R. 176) one of which reads as follows (R. 48) :

Proposition No. 1

It was the intention of the parties that Western States Wholesale Supply return the merchandise it had on hand, and that Kaiser Aluminum and Chemical Sales, Inc. was to receive back said merchandise in full settlement of the account, and relieve Jack E. Lords and Beth C. Lords of their obligation as guarantors.

(Strike out one) True False

If you have answered "True" on Proposition No. 1, then the court will find that the account sued upon has been paid in full, and that the defendants, Jack E. Lords and Beth C. Lords, are entitled to judgment against the plaintiff, "No cause for action." In that event, you will not be required to answer Proposition No. 2.

If you have answered "False" to Proposition No. 1, the court will find in favor of the plaintiff and against Jack E. Lords and Beth C. Lords on their guarantee for the amount of the judgment obtained against Western States Wholesale Supply, which is in evidence before you. In that event, you will be required to answer Proposition No. 2.

The jury responded to Proposition No. 1 by striking the word "False". (R. 48.)

The Lords moved for a new trial on several grounds. (R. 62.) After a hearing (R. 155) at which the rejected offer of proof of the 1965 agreement was discussed (R. 171-178), the motion was denied (R. 178).

This appeal is limited to the rejection of the offer of proof of the 1965 agreement. (Br. 2, 4.)

ARGUMENT

THE TRIAL COURT CORRECTLY
REJECTED THE OFFER OF PROOF OF
THE ALLEGED 1965 AGREEMENT

There was no error in the Trial Court's ruling on the offer of proof of the alleged 1965 agreement either at the time of trial or in connection with the motion for new trial. This is so for two reasons. In the first place, the issue was not properly before the Court, and, secondly, the testimony of appellant Jack Lords contradicts the offer of proof and shows the proof to be without substance.

I. *The alleged agreement was not properly before the Court:* — More than a year after the Answer and the Pretrial Order had been filed and after the jury had been impaneled and Plaintiff was ready to proceed with its case on the issues before the Trial Court, counsel for the Lords raised the issue of an alleged agreement in 1965 to release the Lords from their guaranty upon which they had been sued. (R. 111-112.)

In the Answer and at the pretrial conference the defense was in alleged accord and satisfaction arising from a financing statement which Kaiser obtained for merchandise in the Western States warehouse and the return of the merchandise to Kaiser in October and November 1966. (R. 4, 15-18.) Kaiser was prepared to meet the issue of accord and satisfaction in 1966 and had sent its officer, Mr. McVean, who dealt with Mr. Lords in 1966, to testify at the trial. There was no one to testify for Kaiser in the issue of an alleged agreement in 1965.

Kaiser properly claimed surprise and objected to the offer of proof. (R. 114-118.)

A pretrial order is the Trial Court's statement of what the parties have admitted or agreed upon and when the order has been entered it "controls the subsequent course of the action" except when adherence to the order would result in manifest injustice. Rule 16, U.R.C.P. The rule provides in pertinent part as follows:

RULE 16

PRE-TRIAL PROCEDURE; FORMULATING ISSUES

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

- (1) The simplification of the issues;
- (2) The necessity or desirability of amendments to the pleadings;

* * * * *

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. * * *

The parties to litigation are bound by their agreement, as set forth in the pretrial order, and "may not introduce at the trial issues not among those included in

the order.” *Moore’s Federal Practice*, 3d ed., vol. 3, Para. 16.19, and federal cases there cited.² See also the annotation at 22 A.L.R. 2d 599. While there are numerous cases where pretrial orders have been set aside or modified for good cause, we are not aware of a case where a party has been permitted to raise an issue at the last moment to the surprise and detriment of the other party who was without notice and, consequently, unprepared to try the issue. We submit that it would have been “manifest injustice” to Kaiser to proceed to try the issue of the alleged 1965 agreement.

II. *The testimony of Jack Lords contradicts the offer of proof and shows the offer to be without substance:* — There is a direct contradiction between the testimony of Mr. Lords and the offer of proof as to conditions upon which the Lords’ guaranty was allegedly released. According to the offer of proof, the guaranty was released in return for notes issued by the Lords’ corporation, Western States, in November 1965. (R. 111-112; Br. 4-5.) But Lords testified (R. 133-143) that he unwillingly agreed to return certain merchandise to Kaiser a year later in 1966 and only upon the condition that the guaranty would then be released. Pertinent portions of Mr. Lords’ testimony on direct examination are as follows- (R. 136, 137, 138):

Q. Did you meet him, [McVean] again, at a subsequent time?

A. Yes; he came back into Salt Lake in the first part of October, which, apparently, was the

²The federal cases are pertinent since our Rule 16 is patterned after Rule 16 of the Federal Rules of Civil Procedure.

7th of October—excuse me; and, at this time he indicated that Kaiser was interested in taking the merchandise back. They were not only interested, they wanted to take the merchandise back; and, at this time, I had just gotten a release of the attachment to where I could get the merchandise out; and I told him that I would want to keep his merchandise because I had some sales lined up for it, and such; and he said, no, that Kaiser wanted the merchandise; and I told him I didn't want to return it, and he kept insisting that they did want the return of merchandise; and I told him, at this time, that I felt, if the merchandise were returned, that I wanted to be released from the guarantee because of the amount of money that was involved in the sale—the retail sale of the merchandise would more than take care of the obligation against the Western States Wholesale Supply, which my wife and I, personally, had guaranteed.

Q. Did you mention, also, the wife's obligation on the guarantee?

A. Well, yes; our name is signed; She is, personally, guaranteed on the guarantee also.

* * * * *

THE COURT: What did you say; what did he say?

A. I told him the only way the merchandise could be sent back was with the fact I would be released; that my wife and myself would be released from this personal guarantee—would be only way that this merchandise returned. And, at this time, he said it would be fine, that he had approval and that this would be all right.

* * * * *

- Q. Let me show you what has been marked and accepted here as the Defendant's Exhibit 2-D;³ will you examine it and see if that is the document you signed, for him?
- A. Looks like it; I am sure it is, yes.
- Q. What, if anything, was the consideration or the inducement for your signing this document?
- A. The signing of that document gave the merchandise back and released me, my wife, and myself from our personal guarantee.
- Q. Would you have signed this document if he had refused to consent to that proposition?
- A. No, sir; I contacted my attorney on the matter, as Mr. McVean said; went to see my attorney, at that time—Mr. Knowlton.
- Q. At the consideration of that assurance, you did sign this document?
- A. Yes.

* * * * *

This appeal arises from a suit upon a guaranty, and Mr. Lords' defense, in his own words, was that the guaranty existed in 1966 and that he agreed to return certain merchandise to Kaiser only upon the condition that Kaiser would release the guaranty in 1966. This testimony is in direct conflict with the offer of proof of a 1965 agreement and there can be no substance to the offer since Mr. Lords, as his testimony reveals, considered himself and his wife to be bound by their guaranty when Mr. McVean met them in 1966.

³Def. Ex. 2-D is the financing statement obtained by Kaiser (The 1965 notes from Western States to Kaiser were also marked as Def. Ex. 2-0 (R. 172) but were not received in evidence.)

Although the jury did not believe Mr. Lords when he testified that Kaiser agreed to accept the returned merchandise in satisfaction of the guaranty, Mr. Lords' own testimony as to the guaranty existing in 1966 must stand. In the face of that testimony, the offer of proof was properly rejected and the motion for a new trial was properly denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Trial Court was correct and should be affirmed.

Respectfully submitted,

SENIOR & SENIOR

Claron C. Spencer

Attorneys for Respondent

June 9, 1969

IN THE SUPREME COURT
OF THE STATE OF UTAH

KAISER ALUMINUM & CHEMICAL
SALES, INC.,

Plaintiff and Respondent,

vs.

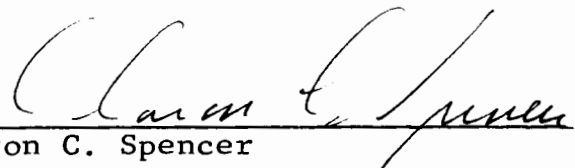
JACK E. LORDS, BETH C. LORDS
and WESTERN STATES WHOLESALE
SUPPLY,

Defendants and Appellants.

Case No.
11470

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the Brief of Respondent in the above-captioned case were served upon Horace J. Knowlton, Esq., Attorney for Appellants, 214 Tenth Avenue, Salt Lake City, Utah, by deposit in the United States mail, postage prepaid, this 12th day of June, 1969.


Claron C. Spencer