1983

Southeastern Equipment Co., A Georgia Corporation And William Gochis, Intervenor v. James Mauss And Engleharde Mauss dba Jim's Surplus And Storage : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

SOUTHEASTERN EQUIPMENT CO., a Georgia Corporation and WILLIAM GOCHIS, Intervenor, Plaintiffs - Respondents, vs. JAMES MAUSS and ENGLEHARDE MAUSS dba JIM'S SURPLUS and STORAGE, Defendants - Appellants.	)	CASE NO. 19041

BRIEF OF RESPONDENT

William Gochis

Appeal from a Judgment of the Third District Court in and for Tooele County, State of Utah, Honorable Scott Daniels, Judge

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Plaintiffs - Respondents,	)	
vs.	)	CASE NO. 19041
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BRIEF OF RESPONDENT

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STATEMENT OF CASE

On January 31, 1983, a Sheriff's Sale was to be conducted in order to sell, at a public sale, the following described parcel of real property:

> Lot 3 of Block 135, Plat "A", Tooele City Survey, Tooele County.

The Appellant, prior to the scheduled Sheriff's Sale, sought to stop the sale by submitting a Motion to Enjoin Sheriff's Sale. This Motion was heard on February 15, 1983. The Appellant contended, at the hearing, that a contract existed between the parties which limited the Respondent to collect only a $20.00 per month payment on the judgment of $11,540.33, which

was awarded to the Respondent on May 12, 1975. The Respondent contended, at the hearing, that no such contract ever existed. The Respondent did agree that since January of 1980 he had been receiving $20.00 per month from the Appellant to be applied on the judgment, but he did not enter into a contract with the Appellant to be forever bound to such an arrangement.

The Court found that there was no contract between the parties limiting the Respondent to receiving only $20.00 per month for payment of the judgment and denied the Appellant's injunction. The Appellant appeals from that ruling.

STATEMENT OF FACTS

In 1974 James Mauss and his wife, Engleharde Mauss were owners and operators of the business known as Jim's Surplus and Storage located in Tooele, Utah. During the operation of this business, the Mauss's borrowed money from William Gochis in order to further the business operation.

On October 12, 1974 the Mauss's, jointly and severally, borrowed $9,800.00 from William Gochis. This transaction is evidenced by the Installment Promissory Note executed by James Mauss and Engleharde Mauss. See Exhibit 1. The Installment Promissory Note bore no interest and was to be paid, in full, on November 12, 1974. The note was not paid, nor any portion of it paid, on or before November 12, 1974.

As a result of the Appellants' default, a lawsuit was instituted; and on May 12, 1975 the Court entered a judgment against the Appellants in favor of the Respondent. The Trial

Court awarded the Respondent the sum of $9,400.00, plus $2,118.33 in attorney's fees, and $22.00 in court costs. See Exhibit 2.

After the Judgment and during the next five (5) years, the Appellants made no payments on the Judgment, and the Respondent made no attempts to collect or execute on the Judgment. In late 1979 the Respondent made numerous contacts with the Appellants' attorney in an attempt to get the Appellant to start paying "something" on the Judgment.

In January of 1980, as a result of working through the Appellants' attorney, the Respondent started receiving $20.00 per month as payment on the Judgment. The Appellant's attorney, also, told the Respondent that at some point the monthly payments would be increased, and the Judgment would be satisfied. The monthly payments have never been increased, and the Judgment remains unsatisfied.

At the time Appellant started making the $20.00 per month payments, which was January of 1983, the Judgment, plus the accrued interest at the legal rate, was approximately $14,569.39. Interest was accruing at the legal rate of six percent (6%) per annum or $69.00 per month.

The Respondent never agreed, in writing or orally, to only accept $20.00 per month as payment on the Judgment. The Respondent never agreed, in writing or orally, to forgo or waive any of his legal remedies to collect on the Judgment and neither did he imply the same at any time.

Three (3) years later, when it became apparent that Appellant was not going to satisfy the Judgment and only intended to make $20.00 per month payments on the Judgment, the Respondent sought to proceed with the collection of the Judgment through a Sheriff's Sale.

The Appellant attempted to enjoin the Sheriff's Sale on the premise that the parties had entered into a contract whereby the Respondent was limited to only receiving $20.00 per month as payment on the Judgment. The Court denied the Appellant's Motion To Enjoin Sheriff's Sale on the basis that no such contract ever existed between the parties.

ARGUMENT

POINT I

THE RESPONDENT DID NOT CONTRACT WITH THE APPELLANT TO ACCEPT ONLY $20.00 PER MONTH IN PAYMENT ON THE $11,540.33 JUDGMENT AWARDED TO THE RESPONDENT.

The Respondent adamantly denies the existence of any contract with the Appellant to accept only $20.00 per month on a Judgment exceeding $11,000.00. The Respondent denies there was any offer, acceptance or consideration in order to consumate a valid contract.

The Appellant did not offer to pay $20.00 per month on the Judgment with the intent to form a contract, and the Respondent did not receive the $20.00 per month with the intent to form a contract with the Appellant. The Respondent had made several contacts with Appellant's attorney trying to get the Appellant to pay "something" on the Judgment. These conversations took

Appellant's attorney and the Respondent resulted in an ad hoc understanding that the Appellant would begin making $20.00 per month payments; and that, at some point in time, the Appellant would increase that monthly payment. The fact that Respondent received these $20.00 per month payments is not an "acceptance" with the intent to contract as required by law to form a contract. Mr. Gochis was elated to receive "any" type of payment from the Appellant after he had received no payments for almost five (5) years.

Even assuming that the Court finds that there has been an offer and an acceptance in the traditional sense of contract law, the alleged contract between the parties is not valid because it is not supported by the essential element of valuable consideration. The classical definition of consideration is as follows:

> "A valuable consideration in the sense of the law, may consist either in some right, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given suffered or undertaken by the other." (Contract Law by Charles Knapp.)

In the case at bar, the debt owed to Respondent was reduced to Judgment in May of 1975. The amount owed to the Respondent at that time was $11,540.33. The Judgment became, and is today, a pre-existing obligation owed to the Respondent.

Appellant's counsel originally argued and represented to the Trial Court that "in this case the consideration is that the Defendant (Appellant) was repaying the obligation to the Intervening Plaintiff (Respondent)". See Paragraph 4 of Page 4

of Defendant's (Appellant), Memorandum in Support of Motion to Enjoin Sheriff's Sale. Now, before the Appellate court, Appellant's counsel is arguing that the consideration for the alleged contract should be the doctrine of promissory estoppel and/or that the Appellant has relied upon the understanding of the parties to her legal detriment. See Pages 4 and 5 of Appellant's Brief.

It is a well established principal that the doctrine of promissory estoppel may be applied, in certain cases, as a substitute for consideration. Appellant's counsel cites Sugarhouse Finance Co. v. Anderson, 610 P.2d 1369 (1980), as a case illustrating this principal. Although this case has some similarity to the facts of the present case, it has nothing to do with the doctrine of promissory estoppel.

Judge Durham determined that the principal of accord and satisfaction ruled the outcome of the case not promissory estoppel. In Sugarhouse Finance Co. v. Anderson, Mr. Anderson had incurred a different legal detriment as a result of satisfying the debt he owed to Sugarhouse Finance. Mr. Anderson had borrowed the money elsewhere to satisfy the debt, thereby detrimentally relying on the parties' agreement.

> "In effect, defendant had agreed to transfer the debt represented by plaintiff's judgment to a third party, thereby immediately satisfying the obligation owed to plaintiff. This was something defendant had no legal obligation to do; by law, plaintiff could only move by levy of execution ... already owned by the defendant - plaintiff could not legally require defendant to incur additional obligations to satisfy the judgment. By so doing,

POINT II

THE CONTRACT, IF ANY, BETWEEN THE PARTIES IS BARRED BY THE STATUTE OF FRAUDS.

The Utah Code Annotated, Section 25-5-4, 1953, as amended, states as follows:

> "In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:
>
> "(1) Every agreement by its terms is not to be performed within one year from the making thereof."

The Appellant argues that the alleged contract is memorialized in the legal sense in the letter which Mr. Barrie Vernon sent to the Respondent on February 8, 1980, thereby satisfying the Statute of Frauds.

It is obvious that a $20.00 per month payment on a Judgment in excess of $11,000.00 will not satisfy the same within one (1) year. Therefore, a writing or an acceptable memorandum of that agreement must be in writing.

Mr. Vernon's letter of February 8, 1980 does not set forth or memorialize the terms or conditions of any contract. The only thing Mr. Vernon does do is to represent that the Appellant will be making $20.00 per month payments but, also, immediately begins to dispute the amount due pursuant to the 1974 Promissory Note. That issue was determined by the Trial Court in the original case which reduced the Promissory Note to a Judgment of $11,540.23, not $[illegible] as stated in Mr. Vernon's letter.

The letter is, also, not signed by the person to be charged by it, namely the Appellant nor the Respondent. I strongly urge

the Court that a letter sent to a person by another's attorney disputing the amount owed, which, by the way, had already been reduced to judgment, and rehearsing events which allegedly occurred several years prior, that this "writing" does not meet the criteria of Section 131, Restatement (Second) on Contracts (1981).

Furthermore, the contents of the letter show no legal detriment to the Appellant as and for consideration to bind such an arrangement.

Appellant cites Guinand v. Walton, 22 Utah 2d 196, 450 P.2d 467 (1969), in support of the memorandum theory. The letter in that case was signed by the persons who were incurring a legal detriment. They were exchanging business assets to secure the employment from another person. The Appellant in the present case suffered no legal detriment.

Appellant argues that the alleged oral contract was partially performed and therefore it should be taken out of the Statute of Frauds and made totally enforceable. Appellant cites Price vs. Lloyd, 31 Utah 86, 86 P.2d 767 (1906) and Jensen v. Whitesides, 13 Utah 2d 193, 370 P.2d 765 (1963) in support of that argument. A careful reading of both of these cases indicated that the agrieved party in each case had fully performed their part of the oral agreement; and as a result thereof, the oral agreement was enforced notwithstanding the Statute of Frauds. I suggest to the Court that the proposition that controls when partial performed oral agreements should be

taken out of the Statute of Frauds is as follows: When an oral contract is not performable within one (1) year and should be in writing according to the applicable Statute of Frauds and the oral agreement is fully performed on one side then by the great weight of authority the Court may make the oral contract enforceable. The rationale being that this avoids the injustice which would result if the party who had received the others performance could use the Statute of Frauds to escape his own obligation. Dutton v. Interstate Investment Corporation, 19 Cal.2d 65, 199 P.2d 138 (1941).

Therefore, partial performance of an oral contract not performable within one (1) year can only make enforceable that portion of the oral contract which has been performed.

It is obvious that the Appellant, by paying $20.00 per month, would not pay off a Judgment of $11,540.33, plus the accruing interest at the legal rate, within one (1) year; and therefore, any agreement of this nature should have been in writing. Assuming that the Court finds an oral agreement existed, then only that portion of the agreement which has been performed is enforceable.

POINT III

THE DOCTRINE OF PROMISSORY ESTOPPEL IS NOT APPLICABLE TO THE CASE AT BAR.

Promissory estoppel is an equitable remedy that should be imposed to prevent fraud, serious injury or some manifest injustice. Appellant cites Glitsos v. Kadish, 4 Ariz. App. [illegible]

418 P.2d 129 (1966) as a case evolving the doctrine of promissory estoppel. In that case, an agreement had been reached between the parties whereby the plaintiff did not foreclose on the mechanic's lien which he held in reliance upon the defendant's promise to pay the $681.46 debt. The defendant never paid the debt and the six (6) month statute time limit expired in which to foreclose on the lien. The defendant then denied any liability on the debt. The Court held that the defendant was estopped from denying the liability and may be sued in a personal action regardless of the fact that the time for foreclosing on the lien had expired.

The Court determined that Kadish's forbearance of not foreclosing on the lien may not have had "consideration" in the traditional sense, "but he certainly forebore in reliance upon Appellants promise to pay". Glitsos v. Kadish, p. 132. Furthermore, Kadish would have been substantially injured as a result of that forbearance if the Court allowed Glitsos to deny his liability.

The Appellant has not, in these proceedings, forborne or suffered any legal or equitable injury to the rights or interests she may have, or had, as a result of paying $20.00 per month on the Judgment. Nor has she suffered any injustice as a result of the Respondent patiently accepting only $20.00 per month as payment on a Judgment of $11,540.33, plus interest at the legal rate, over a three (3) year period of time. The legal

interest alone on the Judgment and compounded interest, is currently accruing at $125.00 per month.

The Court would be creating a manifest injustice for the Respondent if it allowed the Appellant to continue making the $20.00 per month payments on the Judgment

CONCLUSION

In summary, it is the Respondent's position that in the absence of any offer, acceptance or consideration that there is no valid contract between him and the Appellant. Any payment the Appellant has made to Respondent should not be deemed to be "consideration" for the creation of any new contract because the Appellant is only paying on a pre-existing duty which was created when a Judgment was rendered against the Appellant in May of 1975.

The alleged contract was, and is, non-performable within one (1) year and is required to be in writing according to Section 25-5-4, Utah Code Annotated. In order for Appellant to have the oral agreement, if any, taken out of the Statute of Frauds, she must allege and prove that she has fully performed her part of the agreement, which Appellant has not done. Partial performance is not sufficient to take the entire contract out of the Statute of Frauds.

The Appellant has suffered no legal detriment at all as a result of the fact that the Respondent has been extremely patient in accepting her small monthly payments prior to proceeding with other legal remedies. If the Court did allow the ad

[illegible] understanding to continue, the Judgment and the accruing interest would never be paid and the Appellant would be making $50.00 per month payment in perpetuity.

Therefore, the Respondent prays that the Court uphold the decision of the Trial Court in favor of the Respondent by remanding the matter to the Third District Court in and for Tooele County, and thereby allowing the Respondent the right to execute on his Judgment.

Respectfully submitted this 8th day of July, 1983.

Douglas F. White

DOUGLAS F. WHITE
Attorney for Plaintiff-Respondent
Prudential Plaza
185 North Main Street, Suite B-1
Tooele, Utah 84074

CERTIFICATE OF HAND DELIVERY

I hereby certify that two (2) copies of this Brief were delivered to Barrie A. Vernon, Attorney for Defendant-Appellant, 275 South Main Street, Tooele, Utah, on this 8th day of July, 1983.

Douglas E. White

DOUGLAS E. WHITE
Attorney for Plaintiff-Respondent

EXHIBIT 1

I ALLMENT PROMISSORY NOTE

$ 9,800   Tooele City, Utah October 12, 1974

... severally, promise to pay to the order of WILLIAM GOCHIS ... at

... St ... in Tooele ... Utah or at such other place as the holder hereof

... the sum of Nine Thousand Eight Hundred DOLLARS ($9,800.00), XXXXXXXXXXXXXXXXXXXXXXXXXX

be paid in full November 12, 1974

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXX

XXXXXXX PERCENTAGE RATE XXXXXXXXXXXXXX%

... installment is not paid in full within 10 days after its due date, a charge may be assessed of $ NA ..., or at holder's election, an amount ... the annual percentage rate stated above times the unpaid amount of the installment from the due date of the installment until paid in full.

... holder deems itself insecure or if default be made in payment in whole or in part of any installment at the time when or the place where the same ... due and payable as aforesaid, then the entire unpaid balance, shall, at the election of the holder hereof and without notice of said election, at once ... due and payable. In event of any such default or acceleration, the undersigned, jointly and severally, agree to pay to the holder hereof reasonable ... fees, legal expenses and lawful collection costs in addition to all other sums due hereunder. Any balance unpaid on maturity of this note shall bear ... thereafter, both before and after judgment, at the annual percentage rate stated above.

Presentment, demand, protest, notice of dishonor and extension of time without notice are hereby waived and the undersigned consent to the release of any ... or any part thereof, with or without substitution.

25 N. 7th St   James J. Mauss

JAMES J. MAUSS

...

ENGELHARDE MAUSS

EXHIBIT 2

J. THOMAS SUSICH
Attorney for Plaintiff
P.O. Box 316
Tooele, Utah 84074
Phone: 882-0854

IN THE DISTRICT COURT OF TOOELE COUNTY

STATE OF UTAH

---oooOooo---

SOUTHEASTERN EQUIPMENT
[illegible]
[illegible] William
Goehis, Intervenor,

Plaintiff,

vs.

JAMES MANCO and
[illegible]
[illegible]

Defendant.

---oooOooo---

Civil No. 8203

The action by plaintiff-intervenor, William Goehis, against defendants came on regularly for hearing before the Honorable Gordon R. Hall on Monday, March 10, 1975 at 1:30 p.m. Plaintiff-intervenor, William Goehis, was represented by Mr. J. Thomas Susich, Esq. of Tooele, Utah and defendants were represented by Mr. Barrie Vernon, Esq. of Tooele, Utah. The court having heard the testimony and having examined the proofs offered by the respective parties, and the court being fully advised in the premises, and having filed herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith; now therefore, by reason of the law and findings aforesaid, now therefore upon the motion of J. Thomas Susich, attorney for plaintiff-intervenor,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that plaintiff-intervenor, William Goehis, do have and recover of defendants, [illegible] severally the sum of $3,40[illegible]

plus $[illegible],118.33 attorneys fees and $22.00 in costs of suit, for a total of $11,540.33, to be paid to said plaintiff-intervenor.

Dated this 12 day of May, 1975.

By the court:

[illegible], District Judge

I certify that I sent a true and correct copy of this Judgment to Mr. Ferrie Vernon, Attorney at Law, P.O. Box 5[illegible]1, Tooele, Utah 840[illegible], by U.S. Mail, postage pre-paid, on the [illegible] day of [illegible], 1975.

STATE OF UTAH
County of Tooele

[illegible]

Judgement

[illegible] 5 [illegible] May [illegible] 81

File No. E287

By K.J. [illegible]

Recorded Filed May 10 1975