1969

John W. Christensen v. Lelis Automatic Transmission Service, Inc. : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN W. CHRISTENSEN,
Plaintiff-Appellant,

vs.

LELIS AUTOMATIC TRANSMISSION SERVICE, INC.,
Defendant-Respondent.

Case No. 11847

APPELLANT'S BRIEF

Appeal from the Judgment of the District Court of Salt Lake County Hon. Emmett Brown, District Judge

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CASES AND AUTHORITIES CITED

TEXTS:

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STATEMENT OF THE KIND OF CASE

This is an action for misrepresentation which induced Appellant to enter into a contract which respondent had no intentions to fulfill, and refused to fulfill, and for breach of contract.

DISPOSITION IN LOWER COURT

The complaint was dismissed in the lower court upon motion of the respondent.

RELIEF SOUGHT ON APPEAL

Appellant desires this Court to reverse and remand to the lower Court for trial.

STATEMENT OF FACTS

Respondent is a corporation dealing in the business of repairing and replacing automatic transmissions in automobiles. In connection with its business it advertises extensively in inter-state commerce (R.1), intending the public to rely upon said advertisements (R.1) and to come to respondent for repairs and new transmissions. Appellant had read respondent's advertisements and in reliance thereon, when his transmission failed him, had his car towed by respondent to respondent's place of business and transmission replaced (R.1) pursuant to the price schedule set out in part 4 of Exhibit "A" attached to the complaint (R. 6). Thereafter respondent replaced another part of the differential and the torque converter (R. 3) and charged appellant $384.77, including costs of towing, plus a time differential of $45.31, making a total of $430.18 (R. 8). Appellant requested a guarantee as represented in the advertisement at the time of taking delivery of his car and was then informed for the first time that he had the highest coverage given which was a 12,000 mile guarantee plus a 12,000 mile warranty (R. 3 and 9), rather than the advertised 100% labor and 100% parts.

Appellant took his car and before 12,000 miles had been driver, the transmission broke down and appellant returned his car to respondent who refused to honor the contract and repair the transmission at respondent's expense (R. 4).

Appellant lost employment and filed this suit for damages.

ARGUMENT

POINT I. PUBLIC OPINION DEMANDS HONESTY IN ADVERTISING.

For several years there has been great agitation in the United States about having truth in advertising. One of the great social movements of our time is to require honesty in all forms of labelling and all forms of advertising. It has become such a social problem that the Federal Government is moving into the field and the Federal Trade Commission has been bringing actions against various companies for unfair and deceptive advertising. Most of these cases are settled before the Federal Trade Commission.

In the Salt Lake Tribune of December 2, 1969 there was a newspaper report typifying the action the Federal Government is taking. A copy of the newspaper clipping is set out below:

> "The Federal Trade Commission accused the Firestone Tire & Rubber Co. Monday of unfair

and deceptive advertising when it offered tires at reduced prices but sold them at higher prices.

"The FTC charged that the Firestone ads offered tires at significant reductions from actual prices. But in some cases, the commission said, tires were sold at prices substantially above the advertised price.

"The commission said it found reason to believe federal law had been violated and that it would issue a formal complaint under procedures which allow a company to settle such allegations in a consent order."

It is incumbent upon each citizen of the United States when he feels that companies are advertising deceptively, unfairly and untruthfully to take a stand on the matter. In this case the appellant has done so.

In the opinion of counsel this is a growing field and the Courts must look not only to the wording of the law, but to the necessity of creating honesty and fair dealing between sellers and buyers. The days of caveat emptor should be, if they are not already, permanently gone.

POINT II. NEWSPAPER ADVERTISEMENTS CONSTITUTE A CONTINUING OFFER IN INTERSTATE COMMERCE TO ALL MEMBERS OF THE PUBLIC WHO READ THEM.

Restatement Contracts P. 28 says:

"An offer may be made to a specified person or persons or class of persons, or it may be made

to anyone or everyone to whom it becomes known. The person or persons in whom is created a power of acceptance are to be determined by the reasonable interpretation of the offer."

17 Am. Jur. 2nd 372 states:

"P. 34. TO WHOM OFFER MAY BE MADE; OFFER BY NEWSPAPER; CIRCULAR, OR ADVERTISEMENT.

"An offer need not be addressed to a particular individual in order to constitute a proposal which may be converted into a contract by acceptance. A binding obligation may even originate in advetrisements addressed to the general public. A positive offer may be made by an advertisement or general notice in a newspaper or circular.

"The question whether an advertisement in a newspaper or circular letter constitutes an offer is dependent upon the language of the particular advertisement or circular, the intention of the parties, and the circumstances. Accordingly, in a number of particular cases an advertisement in a newspaper would constitute a contract, while in other instances the contrary result was reached. A study of the cases shows a tendency to regard a newspaper advertisement or circular letter as an invitation to make an offer, rather than an offer the acceptance of which would consumate a contract, unless a contrary intent was indicated by the advertisement or letter itself. The test of whether a binding obligation may originate in advertisements addressed to the general public is said to be whether the facts show that some performance was promised in positive terms in re-

> turn for something promised. The view has been taken that in order for an advertisement or circular letter to constitute an offer rather than an invitation to negotiate, it should set forth the terms on which the contract is to be based."

In the instant case the offer in the advertisement was clear and unambiguous, i.e. "Free towing".

POINT III. THE OFFER WAS ACCEPTED AND A BINDING CONTRACT AROSE WHEN PLAINTIFF CALLED DEFENDANT TO TOW IN PLAINTIFF'S CAR AND REPLACE THE TRANSMISSION.

No more unequivocal acceptance of the offer can be imagined than appellant acting in pursuance thereof and having his car towed in and ordering the transmission replaced in accordance with the printed advertisements.

In the case of Willis vs. Allied Insulation Co. 174 So. 2nd 858, the Louisiana Supreme Court said at page 861:

> "In the Court's opinion, there is no question that the defendant was obligated to pay the plaintiff at least $450.00 per month for the two months provided he was not dismissed for failure to work. When the plaintiff answered the advertisement and was accepted for the job there was in full force and effect a binding employment contract. A newspaper advertisement may constitute an offer, acceptance of which will consummate a contract and create an obligation in

offeror to perform according to terms of publisher offer." Johnson v. Capital City Ford Company, Inc. (LaApp.) 85 So. 2d 75.

"Here the employer cast the lure of future employment to prospective employees by means of a newspaper advertisement. 'It must further be remembered that the words of the advertisement were of course chosen by defendant-dealer, and if any ambiguity exists as to their meaning, it must be resolved against their composer.' Johnson v. Capital City Ford Company, Inc., (LaApp.) 85 So. 2d 75."

In the instant case the words in the advertisements were chosen by the respondent and any ambiguity must be resolved against respondent.

In Johnson v. Capital City Ford Company, 85 So. 2nd 75 at 79 the court said:

"In Louisiana and elsewhere a newspaper advertisement may constitute an offer, the acceptance of which will consummate a contract and create an obligation in the offeror to perform according to the terms of the published offer; cases cited"

In Lefkowitz v. Great Minneapolis Surplus Store, 86 N.W. 2nd 689, where there was an offer in an advertisement and the store refused to perform, the store was held liable for damages and the court said:

"Where offer is clear, definite and explicit and leaves nothing open for negotiation, it constitutes an offer, acceptance of which will complete the contract."

This point is so elementary that counsel for appellant hesitates to labor it further but refers the honorable Court to Williston, Contracts 3rd Ed. 32; Bull v. Talcott, 2 Root (Conn.) 119; Baxter v. Camp, 71 Conn. 245, 41 A. 803; Vico Ari. Soc. v. Brumfiel, 112 Ind. 146, 1 N.E. 382; Anderson v. St. Louis Public Schools, 122 Mo. 61, 27 S.W. 610; McLaurin v. Hamer, 165 S.C. 411, 164 S.E. 2; Oliver v. Henley (Tex) 21 S.W. 2nd 576.

See also 157 A.L.R. 744 which has an annotation covering points II and III

POINT IV. A VALID EXISTING CONTRACT MAY NOT BE MODIFIED WITHOUT CONSIDERATION.

17 C.J.S. 428 states:

> "A modification of a contract being a new contract . . ., a consideration is necessary to support the new agreement."

12 Am. Jur. 986 states it more fully:

> "While there are some expressions in the cases which seem to dispense with the necessity of consideration for a modification of a contract, a modification can be nothing but a new contract and must be supported by a consideration like every other contract, unless it can be supported on principles of estoppel or waiver. Both parties must receive consideration. Where a written contract is either totally abandoned and annulled or simply altered or modified in some of its terms, this is done only by a distinct and sub-

stantive contract between the parties, founded on some valid consideration."

In Bamberger Co. v. Certified Productions, 48 P. 2nd 489 at 491, 88 Utah 194, this court stated:

> "Parties may orally modify an agreement in writing where the original contract is not required by the Statute of Frauds to be in writing, at *least where there is consideration for such modification.*" (Emphasis added)

In the instant case the contract was complete upon the ordering of the work to be done and no consideration passed thereafter for modification of the contract.

CONCLUSION

In the instant case a valid, existing contract was entered into between the appellant and respondent at the moment appellant answered respondent's advertisement and had his car towed to respondent's place of business for the purpose of repairing and/or installing a new transmission. No agreement of modification of the contract for towing and installation was ever thereafter made and respondent was obligated to perform in accordance with the terms of its advertised offer. By virtue of its failure so to do it should be held liable for all damages naturally flowing from its wilfull breach of contract.

Respectfully submitted,

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