

1993

Loretta Penfold Records v. Gary M. Briggs : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DOCKET NO.

930776-CA

LORETTA PENFOLD RECORDS, aka)
LORETTA GALLENT,)
Plaintiff/Appellee,) Case No. 930776-CA
vs.) Trial Court No. 920000001
GARY M. BRIGGS,)
Defendant/Appellant.) Priority No. 15

BRIEF OF APPELLEE

Appeal from an Order of the
First Judicial District Court,
Cache County, State of Utah,
The Honorable Gordon J. Low Presiding

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FILED

Utah Court of Appeals

JAN 19 1994


Mary T. Noonan
Clerk of the Court

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BRIEF OF APPELLEE

JURISDICTION

The District Court entered its Memorandum Decision on August 5, 1993 followed by a Memorandum Decision on September 9, 1993, and one on September 15, 1993. The Order was filed the same day, September 15, 1993.

STANDARD OF REVIEW

POINT I

STATUTE OF LIMITATIONS

The Defendant in this case has shifted positions regarding which state's law applies several times. First, it was Utah (see Defendant's Memorandum in Support of Summary Judgment, Rec. 171), then Colorado or Texas (see Defendant's Reply Memorandum, Rec. 210), then Louisiana and Texas (see Hearing Tr. p. 24), then Texas (see Brief of Appellant). The District Court held that since the action was based on contract, the action was timely filed in any of these states. The Defendant conceded at the hearing on the Motions for Summary Judgment that there was no statute of limitations problem if this is an action based on contract. (Hearing

Tr. p. 26, lines 5-6; pp. 37-38) See Allen v. Greyhound Lines, Inc., 583 P.2d 613 (Utah 1978), where the Supreme Court would not disturb the trial court's findings on applicability of statute of limitations when supported by substantial, competent evidence.

POINTS II AND III

SUMMARY JUDGMENT

The Defendant fails to state that the District Court found that there was no genuine issue of material fact in dispute and that was the basis for granting summary judgment. That is the standard set forth in Heglar Ranch, Inc. v. Stillman, 619 P.2d 1390 (Utah 1980), (summary judgment is appropriate if the pleadings and all other submissions, such as depositions, affidavits, etc., show that there is no genuine issue as to any material fact and this does not preclude summary judgment simply whenever "some fact remains in dispute").

POINT IV

JOINDER OF THIRD PARTIES

The standard of review in this area is that a trial court's determination properly granted under Rule 19 will not be disturbed on appeal absent an abuse of discretion. Seftel v. Capital City Bank, 767 P.2d 941 (Utah Ct. App. 1989), aff'd sub nom. Landes v. Capital City Bank, 795 P.2d 1127 (Utah 1990).

STATUTES

The text of the following statutes is set forth in Addendum A attached hereto: 6 Del. C. §§ 8-301, 8-302, 8-317, and 8-319(d), Louisiana Civil Code art. 1832, 1759, 3133, 3141; Utah Code Ann. §§ 70A-8-301, 70A-8-302, 70A-8-317, 70A-8-319(d), 78-12-35, and 78-12-45.

STATEMENT OF THE CASE

Statement of Additional Undisputed Material Facts

1. Defendant's statement of facts relating to the year 1981 fails to mention that he became aware of the limited partnership while he was in Louisiana which is where he lived before going to California for a short time and he returned to Louisiana and lived there (with a short period of time in Colorado) before finally moving to Texas. (Depo. Tr. pp. 6-8.)

2. Defendant was living in Lafayette, Louisiana in 1986 when the offer was made to discount the Crane Limited Partnership promissory note. (Ex. 1A.) The letter accepting the offer was mailed to the attorney handling the matter in Lafayette, Louisiana. (Ex. 4.) Digicrane, Inc. was a Louisiana corporation that was a wholly owned subsidiary of Digitran, Inc. (Ex. 19, p. 1, ¶4.)

3. The relationship between the various entities and the nature of the transaction entered into by the Defendant in this case are all set forth clearly in the offering circular included as Ex. 19 in Defendant's deposition and the AGREEMENT TO PREPAY CLASS A OR CLASS B NOTE which was signed by Defendant in connection with the offering is set forth in Ex. 4 (Addendum B) of Defendant's deposition. (Depo. Tr. pp. 34-38.)

4. When Defendant prepaid \$30,400 under the AGREEMENT TO PREPAY CLASS A OR CLASS B NOTE (Ex. 4), he was released from further obligations on the note which was due on December 31, 1990 and was promised \$30,400 worth of stock in Digitran, Inc. at \$.75 per share (or 40,533 shares of stock). (See Depo. Tr. p. 29, line 14.)

5. Because of securities law restrictions on the issuance of stock in Digitran, Inc. at that time, the delivery of the 40,533 shares was delayed. (See Plaintiff's affidavit, Rec. 205, Depo. Tr. 42.)

6. When the delivery was delayed, Defendant went to the Digitran office in Lafayette, Louisiana (Depo. Tr. p. 41, lines 24-25) where at Defendant's insistence, Plaintiff delivered a stock certificate representing 32,190 shares in Digitran, Inc. (which shares were owned by her personally) "as security that good faith performance would be followed through with by Digitran/Digicrane." (Quoting Defendant's deposition, Tr. p. 42, line 19-20. See also Depo. Tr. p. 57, line 21.)

7. The stock power which Plaintiff signed at the time was obtained by Defendant who was working with Merrill Lynch as a stock broker and was done at the insistence of Defendant so that it would be effective as security or collateral. (Depo. Tr. p. 42, line 3 and Depo. Tr. p. 57, line 21.)

8. The Defendant describes the security arrangement as something other than an irrevocable transfer: "I would have the option to use it [the stock] as my own if I felt it necessary to fulfill unpaid debts relative to Digicrane/Digitran." And the time for exercising this option (or default on the security agreement) was uncertain. (See Depo. Tr. p. 44-45, lines 17-25 and 1-15.)

9. The underwriting process continued through 1988 and various documents were prepared and forwarded to Defendant for his

information and signature. (See Exs. 8, 9, 10, 20, 21, 22, 32, and 33.)

10. Because of the delay, Defendant was paid \$1,824 in interest. (See Ex. 8 and Depo. Tr. p. 53, lines 3-5.)

11. On November 22, 1988, 40,533 newly issued shares of stock in Digitran, Inc. was issued to Defendant. (See Plaintiff's affidavit, Rec. 205, Depo. Tr. p. 42.)

12. The stock certificate 4206 issued on August 8, 1990, for 32,190 shares, represents the shares which were pledged to secure issuance of the 40,533 shares issued on November 22, 1988. The pledged stock was to have been returned to Plaintiff at that time. Plaintiff did not discover that the pledged stock had been put into Defendant's name until she was reviewing stock transfers which had been sent to her by the stock transfer agent some time later. (See Exs. 11, 12, 13, and 14 and Plaintiff's affidavit, Rec. 205.)

13. Plaintiff was involved in the relocation of Digitran, Inc. from Louisiana to Utah at the time and believed that her secretary had retrieved her stock from Defendant at the time the new shares were issued. (See Plaintiff's affidavit, Rec. 205.)

14. Defendant was served personally in Utah with the summons and complaint. (See return on service, Rec. 006.)

SUMMARY OF ARGUMENTS

POINT I

The Defendant argues that Utah's borrowing statute bars the Plaintiff's action, but fails to acknowledge the exception set forth in the statute (Utah Code Ann. § 78-12-45) which is that it

affords the protections of Utah law to Utah residents who incur causes of action outside the state. That is the case here since Plaintiff is now a Utah resident. See Allen v. Greyhound Lines, Inc., 583 P.2d 613 (Utah 1978). He also ignores the triggering event for the running of the statute of limitations, namely the transfer of the 32,190 shares of stock into his name on August 23, 1990 which would make the filing of the action timely even under the Texas two year statute for conversion. The District Court did not even reach that issue because the Court found that Plaintiff's action was based on contract and therefore, as conceded by Defendant, would come under the shortest statute on contracts--four years.

The state with the most significant contacts and the focus of all the activities until Plaintiff moved to Utah is Louisiana which has a ten year statute on pledge agreements. This is also the law which would be "borrowed" under Utah Code Ann. § 78-12-45 for the benefit of Plaintiff.

POINT II

Defendant misstates the basis for the District Court's decision granting Plaintiff summary judgment. It is very clear from the transcript of the hearing and the Court's memorandum decisions that summary judgment was granted because there was no dispute as to any material facts as set forth with particularity on pages 2-4 in the Court's August 4, 1993 Memorandum Decision. (Rec. 244-246.)

In addition, Defendant fails to acknowledge the difference between parol evidence and extrinsic evidence. The District Court utilized documents signed by the Defendant starting with the AGREEMENT TO PREPAY CLASS A OR CLASS B NOTE in clarifying what transpired between the parties. The only parol evidence which was considered came from Defendant's own deposition and was used to explain the relationship of the Irrevocable Stock Power to the transaction between the parties. Ex. 34, which seems to be a big issue for Defendant, is not even considered by the District Court in its ruling.

POINT III

Not only did the Court not err in setting forth clearly the undisputed facts on which it based its ruling, but clarified them in the Findings of Fact, which is what is required under the cases cited by Defendant. The Court identified the parts of the record which sustained its findings that the facts are undisputed. The cases clearly hold that a trial court may consider, in ruling on a motion for summary judgment, the pleadings, depositions, affidavits and admissions on file. The facts not in dispute clearly are sufficient to sustain the District Court's ruling.

POINT IV

The Defendant continually tries to bring issues into this case which the District Court earlier ruled were not relevant since they did not relate to the parties in the instant case. The Defendant filed a motion to join additional parties which the court duly considered and denied. This ruling was based on sound reasoning

and should not be disturbed since it did not constitute an abuse of discretion.

ARGUMENT

POINT I

PLAINTIFF'S CLAIM IS NOT BARRED UNDER ANY OF THE APPLICABLE STATUTES OF LIMITATIONS

The key issue as discussed in detail at the hearing on the Motions for Summary Judgment and as conceded by Defendant's counsel is whether this is an action covered by the limitations statute on contracts. (See Hearing Tr. pp. 26, 37-38.) If it is, then the limitations statutes of Louisiana, Texas, Colorado and Utah are all at least four years and the action was timely filed. That is, in fact, what the District Court found. (See Findings of Fact, ¶1, Rec. 259-260, and Hearing Tr. pp. 46-47, lines 25, 1-3.)

Under any analysis, including conflict of laws rules, Plaintiff's complaint was timely filed. Initially, Defendant asserted in his Memorandum Re: Motion for Summary Judgment (Rec. 171), that the Utah statute of limitations applied. Plaintiff, in response, cited Utah Code Ann. § 78-12-35 which tolls an action when a person is absent from the state. See Van Tassell v. Shaffer, 742 P.2d 111 (Utah Ct. App. 1987). See also, Lawson v. Tripp, 95 P. 520 (1908). Under this statute the time would be tolled from the time Digitran, Inc. moved to Utah in 1988 until now except for the few days that Defendant has been in the state for stockholder meetings or his deposition. Defendant then decided that Texas or Colorado law must apply. (See p. 4, Rec. 210, of

Defendant's Reply to Plaintiff's Memorandum, "The cause of action in this case did not accrue in the State of Utah but accrued in the State of Colorado or Texas which are the residences of the Defendant at the time of the transaction.") Then it was Louisiana or Texas (Hearing Tr. p. 24) and finally, Texas in his appeal brief.

Even under Defendant's shotgun approach, the calculations are faulty. The agreement which commenced this whole transaction was signed by Defendant on or about December 3, 1986. (See Depo. Ex. 4 and Depo. Tr. p. 37.) The pledge of Plaintiff's stock was entered into October 8, 1987, but according to Defendant's own testimony, the trigger on when he could exercise his "option" to redeem the collateral if Digitran, Inc. did not perform was uncertain. In fact, the actual transfer of the stock certificate which was pledged, namely certificate number 2939, was not effected until August 23, 1990, after Digitran's obligation was already satisfied. The law is clear that a transfer of stock requires the following steps: (1) indorsement and delivery of the stock certificate by the transferor to the transferee; (2) delivery of the stock certificate by the transferee to the transfer agent of the corporation for registration in its books; (3) examination of the certificate by the transfer agent; (4) recordation of the transfer; and (5) cancellation of the old certificate and delivery of the new certificate to the transferee. See, B.Y.U.J. Legal Stud. Summary of Utah Corporate Law §6.35 (1982). Assuming arguendo that Defendant converted Plaintiff's stock, this did not

occur until Defendant requested the issuance of the stock in his name and the stock was issued on August 23, 1990. (See Depo. Ex. 11.) This action was filed January 3, 1992, so even under the Texas two year statute relating to conversion this action was timely filed.

However, neither Texas or Colorado meet the criteria set forth in Defendant's own brief. If the criteria for establishing the law which should be applied is as set forth by Defendant, an examination of those criteria leaves Texas and Colorado sadly lacking. Until Digitran, Inc. and the plaintiff moved to Utah all of the significant contacts relating to the execution of the original contract (the AGREEMENT TO PREPAY CLASS A OR CLASS B NOTE); the pledge of the stock to secure the original contract; the payment of the interest because of the delay; and the delivery of the 40,533 shares in satisfaction of the original contract took place in Louisiana. The only act which did not involve Louisiana was the transfer of stock certificate 2939 by Defendant in 1990 effected by him through the stock transfer agent in New York. The only contact with Texas is that is where the Defendant was living at that time. All of the other transactions occurred while he was in Louisiana or Colorado. At all times the Plaintiff's residence and the principal office of Digitran, Inc. was either in Louisiana or Utah. In fact, the borrowing statute cited by Defendant, Utah Code Ann. § 78-12-45 would allow the action to be maintained in this state even if it had expired in Louisiana. (See Allen v. Greyhound Lines, Inc., 583 P.2d 613 (Utah 1978).)

However, it had not expired in Louisiana. The statute of limitations, (known in Louisiana as the prescriptive period) is ten years as set forth in the following analysis. Since Louisiana does not adhere to the common law doctrine evidenced by the Statute of Frauds because it follows the Napoleonic traditions of a Civil Code, the law of obligations governs contracts within the state. Generally, Louisiana law does not require that a contract be in written form, and it may be proved by testimony, or by presumption. La.Civ. Code art. 1832. Moreover, good faith shall govern the conduct of the parties in whatever pertains to the obligation. La.Civ. Code art. 1759.

The District Court found that a contract had been entered into between the parties regarding the ultimate delivery of 40,533 shares to Defendant. Thereafter, because of a delay in the delivery of this stock, Plaintiff entered into a pledge (or security agreement) relating to 32,190 shares of her own personal stock pending issuance of the stock in favor of Defendant by Digitran, Inc. Under Louisiana law, a pledge is a contract by which one debtor gives something to his creditor or the creditor of another as security for a debt or obligation. La. Civ. Code arts. 3133, 3141. Louisiana courts agree that the prescriptive period (i.e., period of limitations) in such a case is ten years. See, Franklin v. Bridges Loan and Investment Company, Inc., 371 So.2d 294 (La. App. 2d Cir. 1979).

Not only would the Defendant's assertion that the execution of the stock power constitute a completed transfer be inconceivable

under Louisiana law, but there are thousands of brokers around the country who hold their clients' stock who would be surprised. In light of the fact that Defendant was a licensed stock broker and understands the fiduciary responsibility which a broker has to ascertain the nature of the arrangement under which stock and stock powers are delivered, it appears disingenuous at best to assert the stock transfer was effected on October 8, 1987. Defendant has already admitted in his deposition that Plaintiff's personal stock was delivered as security to assure performance by Digicrane/Digitran.

POINT II

DEFENDANT HAS NO TENABLE BASIS ON WHICH TO ASSERT A BAR TO INTRODUCTION OF EXTRINSIC EVIDENCE

Defendant misconstrues the District Court's decision in this case. The Court clearly stated that the basis for granting summary judgment was a finding that there were no material facts which were in dispute. (Hearing Tr. pp. 59-60; August 5, 1993 Memorandum Decision, Rec. 244; Findings of Fact, Rec. 261.) The Court clearly outlined the facts not in dispute on pages 2-4 of the August 5, 1993 Memorandum Decision (Rec. 261-263).

The Defendant attempts to direct attention away from the basic agreement. That agreement was signed by the Defendant and his wife on December 3, 1986 and is entitled AGREEMENT TO PREPAY CLASS A OR CLASS B NOTE. As stated by the Court in the Memorandum Decision,

It is undisputed that Defendant entered into an agreement to prepay the class note to Digitran. As a part of the agreement Defendant elected to pay \$30,400, half the value of the original note, in

cash to Crane Development Limited Partnership. The following was part of the consideration given to Defendant for the prepayment: (1) Defendant's promissory note would be canceled and delivered to him (2) Digicrane would execute an amendment to the Guaranty and Assumption Agreement, (3) Defendant would receive one share of Common Stock from Digitran for each \$0.75 contributed by Defendant in cash upon the execution of the Agreement. Defendant paid the \$30,400 and was guaranteed to receive the stock by June 1, 1986.

The Court then recites the undisputed facts surrounding the subsequent transactions and concludes as follows:

The 32,190 shares of stock given to Defendant by Plaintiff were admittedly given as 'security for a good faith performance.' They were delivered at a time when Digitran had still not delivered the 40,533 shares of stock pursuant to the prepayment agreement. There was no other clear obligation at that time to Defendant Defendant has received the stock promised him in the prepayment agreement. Defendant has filed to establish why he is entitled to retain the other 32,190 shares.

It also appears that Defendant is throwing up a red herring when he argues that the Court's decision rested on parol evidence. That is not what the Court said. On page 2, Rec. 244, of the Memorandum Decision the Court stated, "Defendant argues that exhibit 6, the Irrevocable Stock Power, is the only admissible evidence of the transaction concerning the 32,190 shares of stock." The Court also pointed out that the Defendant did not want any other document or testimony to be admitted in evidence. The Court ruled that Ex. 6 was only one of a series of documents in a transaction between Plaintiff and Defendant and that other evidence should be admitted "... explaining the context and understanding of the parties at the time of transfer."

It would appear that Defendant's motivation in trying to exclude extrinsic evidence (not parol evidence) has a lot to do with the fact that documents signed by him establishes the nature of the transaction which is the subject of this case and it is consistent with Plaintiff's assertions. In fact, the ruling by the District Court is consistent with the ground rules which allow an examination of the circumstances surrounding this transaction. See, Sprouse v. Jager, 806 P.2d 219 (Utah Ct. App. 1991); (can look to extraneous evidence to determine intent); Sparrow v. Tayco Const. Co., 206 Utah Adv. Rep. 8 (Utah Ct.App. 1993). The fact is that the delivery of the stock power and stock certificate to Defendant by Plaintiff were part and parcel of a transaction which was commenced with the execution by Defendant and his wife of the document entitled AGREEMENT TO PREPAY CLASS A OR CLASS B NOTE in December 1986. That agreement contemplated the payment by Defendant of \$30,400, his release from obligation on a note, and the delivery of stock in Digitran, Inc. to him at a value of \$.75 per share. Without reference to that document nothing which happens after that is comprehensible. There was a check paid by Defendant to Digicrane, Inc.; a release signed by Digitran, Inc.; an agreement to deliver shares; a pledge of stock to Defendant of Plaintiff's personal shares pending availability of new issue Digitran stock; and delivery of the appropriate number of shares (40,533) to Defendant--all taking place after the signing of the original agreement.

As set forth in Gregerson v. Jensen, 617 P.2d 369 (Utah 1980), several documents may be construed together notwithstanding the fact that they are not all signed by the party to be charged as long as some nexus is shown between them. In that case the Court looked to a deed which contained just the names of the parties and a detailed legal description of some real estate but which had not been recorded or signed to find an agreement between the parties. The Court stated: "Parol evidence will be considered if it convincingly shows that the signed and unsigned writings are connected to one another and have been assented to by the parties."

That case is cited in Machan Hampshire Properties, Inc. v. Western Real Estate & Development Co., 779 P.2d 230 (Utah Ct. App. 1989) cited by Defendant which actually supports Plaintiff's position.

These cases go beyond what needs to be established here. As alluded to above, unless the transfer of the 32,190 shares of stock was gratuitous and done in isolation from any other contact the Plaintiff and Defendant had between themselves, it has to be placed in the context of that relationship.

In the simplest view of this whole transaction, you merely ascertain the number of shares Defendant was entitled to under his agreement, namely 40,533. Then you calculate how many he actually did get: 72,723 shares, (and there is no assertion anywhere that he gave any additional consideration for any additional shares)-- subtract the difference: 32,190 shares, and that is what is owed to Plaintiff. Defendant can try to confuse the issue, but that is the bottom line.

In a more sophisticated fashion, the transaction as originally formulated in Louisiana where it took place was an agreement to convey stock, followed by a pledge which was clearly enforceable under Louisiana law, followed by delivery of the stock, which delivery had been secured by the earlier stock pledge, followed by the return of the stock pledge. Unfortunately, the Defendant was not forthcoming with the cancellation of the stock pledge and consequently this action had to be filed.

Defendant's position that no parol evidence can be introduced to explain the context for the delivery of a stock certificate and a stock power actually misses the point. First, the District Court ruling did look to extrinsic evidence--not parol evidence for the establishment of an agreement. Second, Defendant's argument is like saying that a check for the payment of the purchase of some property cannot be connected with the transaction to which it relates unless it is signed by both parties. It is ludicrous to take that position. That is like saying that if a person has overpaid by mistake for an obligation that he is not entitled to a refund because you cannot introduce extrinsic evidence to explain the relevance of a check which constituted the overpayment.

POINT III

THE DISTRICT COURT'S RULING IS SOUND AND IS BASED ON UNDISPUTED FACTS IN THE RECORD

Contrary to Defendant's assertions, the District Court did not rely on the admission of Ex. 34 to find that Defendant had breached his agreement with the Plaintiff. In fact, this is what the

District Court ruled, namely that this is a contract action and was based on the AGREEMENT TO PREPAY CLASS A OR CLASS B NOTE, (Depo. Ex. 4). Defendant's own characterization of the delivery of the stock was that it was "... security for the good faith performance ... by Digicrane/Digitran." (Depo. Tr. p. 42, lines 19-20.)

Defendant establishes the number of shares he was entitled to under the agreement as 40,533 shares. (Depo. Tr. p. 29, line 14.) A stock certificate number 4111 in the amount of 40,533 shares was duly delivered to Defendant on November 22, 1988. (See Plaintiff's affidavit, Rec. 205, Depo Tr. p. 42.) An interest payment to compensate him for delay in the amount of \$1,824 was made to him in April 1988. (See Depo. Ex. 8.) The agreement has been fully performed and Defendant has failed and refused to deliver Plaintiff's stock to her, but merely says that it is being held for some undefinable and unquantifiable reason. (See Depo. Tr. pp. 44-46.)

Under Point II above, Plaintiff explains the Louisiana law formulation of a pledge of corporate stock. As in many other areas of the law, Louisiana's situation is quite unique. It is instructive to examine the arrangement between the Plaintiff and the Defendant in relationship to Plaintiff's personal stock as it would generally be viewed under Article 8 of the Uniform Commercial Code. This is the law that would be applicable in both Delaware (Digitran, Inc.'s state of incorporation) and Utah.

While Utah's version of Article 8 was amended rather extensively in 1989, and there are some conflict of laws questions

which could be analyzed, the basic principle is the same. Under both Delaware and Utah law there is protection given to a "bona fide purchaser" of securities to whom a stock certificate is transferred if said purchaser has no notice of an adverse claim or is not aware that the transferor owns only a limited interest in the security. The purchaser acquires the rights in the security which his transferor had or had actual authority to convey. See Utah Code Ann. § 70A-8-301 and 6 Del. C. § 8-301. "Bona fide purchaser" under both Utah and Delaware law is logically defined as "a purchaser for value in good faith and without notice of any adverse claim" "Adverse claim" includes a claim that a transfer was or would be wrongful or that a particular adverse person is the owner of or has an interest in the security. See Utah Code Ann. § 70A-8-302 and 6 Del. C. § 8-302. There is also the concept under section 8-301 of a "limited interest" in a security: "The creation or release of a security interest in a security is the transfer of a limited interest in that security."

Section 8-317 has to do with the protection of innocent third parties and indicates that a creditor's lien is not a restraint on transfer to a third party for new value, but the lien applies to the proceeds of the transfer in the hands of the secured party. See Utah Code Ann. § 70A-8-317 and 6 Del. C. § 8-317. As is the case in other areas of the law, a person who has notice of a defect or claim cannot take free of such defect or claim. In this case, the Defendant cannot hide behind rules which were not intended to

protect him. There is no way he qualifies as a bona fide purchaser for value in good faith without notice.

Finally, there is a very interesting omission in Defendant's brief involving the statute of frauds applicable to the sale of investment securities. Utah Code Ann. § 70A-8-319(d), (which is the same as 6 Del. C. § 8-319(d)) states an exception to the requirement of a writing to meet the statute of frauds:

A contract for the sale of securities is not enforceable by way of action or defense unless: ...
(d) The party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract was made for the sale of a stated quantity of described securities at a defined or stated price.

Perhaps that is why Defendant changed his admissions to denials in his amended answer to Plaintiff's complaint since the admissions establish the existence of an agreement between the parties for a guarantee using Plaintiff's personal shares. Be that as it may, the publication by Defendant of his deposition constitutes the necessary admissions, particularly the price and number of shares he was to receive (Depo. Tr. p. 29, lines 4-14) and the existence of a security or collateral arrangement (Depo. Tr. p. 42, line 19-20 and Depo. Tr. p. 57, line 21).

POINT IV

THE DISTRICT COURT'S RULING NOT TO JOIN ADDITIONAL PARTIES IS NOT AN ABUSE OF DISCRETION

The first motion filed by Defendant in this case trying to obfuscate the issues was for the joinder of additional parties. After the submission of memoranda on this issue and an examination

of the record the District Court declined to add additional parties. As set forth in Seftel v. Capital City Bank, 767 P.2d 941 (Utah Ct. App. 1989), aff'd sub nom. Landes v. Capital City Bank, 75 P.2d 1127 (Utah 1990), the trial court's determination properly entered under Rule 19, Utah Rules of Civil Procedure, will not be disturbed absent an abuse of discretion.

The argument made by Defendant in support of his position to join additional parties contradicts his argument that the District Court looked to inadmissible parol evidence. Rather than referring to extrinsic evidence signed by the party to be charged, Defendant would have this Court resort to parol evidence (correctly defined) to establish some claim for royalties that is not apparent except in Defendant's own mind. Refusal to do so does not demonstrate an abuse of discretion on the part of the trial court.

In fact, this argument was raised again in the hearing on the motions for summary judgment, and the trial judge reiterated that one of the bases for his earlier ruling was that a Utah court did not even have jurisdiction over the parties which Defendant was attempting to join. (Depo. Tr. p. 103, lines 13-20)

CONCLUSION


Not only has Defendant failed to establish that he has any right to the additional 32,190 shares for which Plaintiff has had to sue, but based on the undisputed facts and the law as determined by the District Court, Plaintiff is entitled to judgment as a matter of law. As complicated as Defendant has tried to make this case, it is really quite simple. Defendant signed an agreement and

pursuant to that agreement received all that he was entitled to, but he has failed to return the collateral, which was to guarantee the performance of Digitran, Inc., to its rightful owner the Plaintiff.

It is clear that the District Court's ruling is well-founded and should be sustained.

DATED this 19 day of January, 1994.

HILLYARD, ANDERSON & OLSEN



GARY N. ANDERSON
Attorney for Appellee




(Original Signature)


CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the above and foregoing APPELLEE'S BRIEF was mailed, postpaid, to the following this 19 day of January, 1994:

George W. Preston
Joseph M. Chambers
Preston & Chambers
Attorneys for Defendant
31 Federal Avenue
Logan, UT 84321



Gary N. Anderson



(Original Signature)

ADDENDUM A

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TITLE 6. COMMERCE AND TRADE
SUBTITLE I. UNIFORM COMMERCIAL CODE
ARTICLE 8. INVESTMENT SECURITIES
PART 3. TRANSFER

6 Del. C. @ 8-301 (1992)

-301. Rights acquired by purchaser

(1) Upon transfer of a security to a purchaser (Section 8-313), the purchaser acquires the rights in the security which his transferor had or had actual authority to convey unless the purchaser's rights are limited by Section 8-302(4).

(2) A transferee of a limited interest acquires rights only to the extent of the interest transferred. The creation or release of a security interest in a security is the transfer of a limited interest in that security.

HISTORY: 5A Del. C. 1953, @ 8-301; 55 Del. Laws, c. 349; 64 Del. Laws, c. 152, @

NOTES:

LEGISLATIVE STUDY COMMENT

(1) Shelter Provision. Like @ 58 of the NIL, 6 Del.C. @ 158, @ 8-301(1) of the UCC provides that if a purchaser of a security has not been a party to any fraud or illegality affecting the security, he acquires such rights in the security as his transferor had or had power to transfer. However @ 8-301(1), like its counterpart in @ 3-201(1) of Article 3 of the Code, denies protection to a former holder who had notice of the fraud or illegality even though he was a participant therein.

The definition of "adverse claim" contained in @ 8-301(1) was added to make clear that an "adverse claim" may include one asserted by a person not himself entitled to protection of the security.

(2) Rights Acquired By A Bona Fide Purchaser. Section 8-301(2) provides that a bona fide purchaser in addition to acquiring the rights of a purchaser also acquires the security free of any adverse claim. Under @@ 6 and 7 of the STA, 8 Del. C. @@ 186 and 187, if the indorsement or delivery of a certificate was obtained by fraud, duress, mistake or without authority or after the owner's death or legal incapacity, the possession of the certificate could be reclaimed unless the certificate had been transferred to a purchaser for value in good faith without notice of any facts making the transfer wrongful. Section 57 of the NIL, 6 Del.C. @ 157, provided that a holder in due course held that the instrument free from any defect of title to prior parties and free from defenses available to prior parties among themselves and could enforce payment of the instrument for the full amount against all parties liable thereon.

Under the Code, the protection accorded to a bona fide purchaser does not depend on the security's negotiability or non-negotiability as it does under the

5. Purchasers from a bona fide purchaser and bona fide purchasers are protected so long as the security qualifies as such under the provisions of @ 8-102, supra, irrespective of whether or not the security qualifies as a negotiable instrument under @ 3-104 of Article 3 of the Code.

(3) Partial Transfer. Section 8-301(3) is new statutory law. It is not clear whether the term "limited interest" refers to quantity or quality.

INITIATION CROSS REFERENCES:

"Bona fide purchaser". Section 8-302.

"Delivery". Section 1-201.

"Holder". Section 1-201.

"Notice". Section 1-201.

"Party". Section 1-201.

"Person". Section 1-201.

"Purchase". Section 1-201.

"Purchaser". Section 1-201.

"Rights". Section 1-201.

"Security". Section 8-102.

PROVISIONS APPLICABLE TO ENTIRE ARTICLE

VISOR'S NOTE. --The Delaware Study Comments, which appear in the bound volume, were written in conjunction with the adoption and enactment of the Uniform Commercial Code in 1967. These Delaware Study Comments may be, in part, superseded by the amendments to the Uniform Commercial Code enacted by 64 Del. Laws, c. 152.

REVISION OF ARTICLE. --64 Del. Laws, c. 152, effective July 13, 1983, repealed and reenacted this Article, substituting present @@ 8-101 to 8-108, 8-201 to 8-208, 8-301 to 8-321 and 8-401 to 8-408 for former @@ 8-101 to 8-107, 8-201 to 8-208, 8-301 to 8-320 and 8-401 to 8-406. No detailed explanation of the changes made by the 1983 Act has been attempted, but, where appropriate, the historical citations to the former sections have been added to the corresponding sections of the revised Article.

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6 Del. C. @ 8-302 (1992)

8-302. "Bona fide purchaser"; "adverse claim"; title acquired by bona fide purchaser

1) A "bona fide purchaser" is a purchaser for value in good faith and without notice of any adverse claim:

(a) Who takes delivery of a certificated security in bearer form or in registered form, issued or indorsed to him or in blank;

(b) To whom the transfer, pledge or release of an uncertificated security registered on the books of the issuer; or

(c) To whom a security is transferred under paragraph (c), (d)(i) or (g) of Section 8-313(1).

2) "Adverse claim" includes a claim that a transfer was or would be wrongful or that a particular adverse person is the owner of or has an interest in the security.

3) A bona fide purchaser in addition to acquiring the rights of a purchaser (Section 8-301) also acquires his interest in the security free of any adverse claim.

4) Notwithstanding Section 8-301(1), the transferee of a particular certificated security who has been a party to any fraud or illegality affecting the security, or who as a prior holder of that certificated security had notice of an adverse claim, cannot improve his position by taking from a bona fide purchaser.

REVISION: 5A Del. C. 1953, @ 8-302; 55 Del. Laws, c. 349; 64 Del. Laws, c. 152, @

NOTES:

LEGISLATIVE STUDY COMMENT

A bona fide purchaser is defined more broadly than the holder in due course under § 52 of the NIL, 6 Del.C. @ 152. Under the NIL the holder in order to qualify as a holder in due course had to take an instrument that was complete and regular upon its face, before it was overdue and without notice that it had previously dishonored. The purchase also had to be in good faith and for value and without any notice of any infirmity or defect in title.

"Value" is more broadly defined in @ 1-201(44) of the Code than it was in @@ , 26 and 27 of the NIL, 6 Del.C. @@ 125, 126 and 127, and @ 22 of the STA, 8 L.C. @ 200.

Under the Code, even though the security is incomplete or altered and even though a purchaser obtains a security after its maturity date, he may nevertheless qualify as a bona fide purchaser. See @@ 8-203, 8-206, supra and 305, infra.

INITIAL CROSS REFERENCES:

"Adverse claim". Section 8-301.
"Bearer form". Section 8-102.
"Delivery". Section 1-201.
"Good faith". Section 1-201.
"Indorsed". Section 8-308.
"Notice". Section 1-201.
"Purchaser". Section 1-201.
"Registered form". Section 8-102.
"Security". Section 8-102.
"Value". Section 1-201.

ER NOTE: For more generally applicable notes, see notes under the first section of this part, article, subtitle or title.

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6 Del. C. @ 8-317 (1992)

-317. Creditors' rights

(1) Except to the extent otherwise provided or permitted by §§ 169 and 324 of Title 8, §§ 365, 366 and Chapter 35 of Title 10, and subject to the exceptions subsections (3) and (4) hereof, no attachment, sequestration or levy upon a certificated security or any share or other interest represented thereby which outstanding is valid until the security is actually seized in this State by an officer making the attachment, sequestration or levy but a certificated security which has been surrendered to an issuer of this State may be reached by a creditor by legal process upon the issuer in this State.

(2) An uncertificated security registered in the name of the debtor may not be reached by a creditor except by legal process upon the issuer in this State, provided the issuer is an issuer of this State or has its principal place of business in this State.

(3) The interest of a debtor in a certificated security that is in the possession of a secured party not a financial intermediary or in an uncertificated security registered in the name of a secured party not a financial intermediary or in the name of a nominee of the secured party may be reached by a creditor by legal process upon the secured party.

(4) The interest of a debtor in a certificated security that is in the possession of or registered in the name of a financial intermediary or in an uncertificated security registered in the name of a financial intermediary may be reached by a creditor by legal process upon the financial intermediary on whose books the interest of the debtor appears.

(5) Unless otherwise provided by law, a creditor's lien upon the interest of a debtor in a security obtained pursuant to subsection (3) or (4) is not a restraint on the transfer of the security, free of the lien, to a third party for new value; but in the event of a transfer, the lien applies to the proceeds of the transfer in the hands of the secured party or financial intermediary, subject to any claims having priority.

(6) A creditor whose debtor is the owner of an interest in a security is entitled to aid from courts of appropriate jurisdiction, by injunction or otherwise, in reaching the interest or in satisfying the claim by means allowed by law or in equity in regard to property that cannot readily be reached by ordinary legal process.

STORY: 5A Del. C. 1953, @ 8-317; 55 Del. Laws, c. 349; 64 Del. Laws, c. 152, @

NOTES:

UNLAWFUL STUDY COMMENT

Section 8-317(1) corresponds substantially with @ 13 of the STA, except that the STA permitted levy or attachment without actual seizure if transfer by the holder was enjoined. Section 8-317(1), as recommended by the UCC draftsmen, would not permit a levy under any circumstances without physical seizure of the security. Section 13 of the STA was not enacted by Delaware.

The language set forth above in the Delaware draftsmen's revision of @ 8-317(1) is similar to the language contained in 8 Del.C. @ 202 on "Effect on attachment and sequestration laws" except that references to 8 Del.C. @ 169 (the situs provisions of the Delaware Corporation Law) and 10 Del. Chap. 35 (the statutory authorization for attachment) have been inserted to assure that the existing law would not be changed by enactment of the Code.

Section 8-317(2) is identical to @ 14 of the STA which was enacted as 8 Del.C. @ 193.

DEFINITIONAL CROSS REFERENCES:

"Creditor". Section 1-201.

"Issuer". Section 8-201.

"Security". Section 8-201.

EFFECT OF 1983 AMENDMENT. --The amendment of this section in 1983 was not intended to modify or affect the operation of the situs statute, 8 Del. C. @ 169, or the attachment mechanisms employed to bring stock into court. *Castro v. ITT Corp.*, Del. Ch., 598 A.2d 674 (1991).

DEFENSE BY ISSUER. --The Delaware amendment to subsection (1) of this section means that the apparently unconditional right of a holder of a valid stock certificate to require a transfer of the stock on the company's books to him and the issuance of a new certificate is, in Delaware, subject to a possible defense by the issuer: That the shares were adjudicated lost, stolen or destroyed, and the bond required under 8 Del. C. @ 168 and which was fixed in that adjudication would be insufficient fully to cover the cost, somehow measured, of the prospective double issuance. *Castro v. ITT Corp.*, Del. Ch., 598 A.2d 674 (1991).

FOR NOTE: For more generally applicable notes, see notes under the first section of this part, article, subtitle or title.

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6 Del. C. @ 8-319 (1992)

-319. Statute of frauds

A contract for the sale of securities is not enforceable by way of action or defense unless:

(a) There is some writing signed by the party against whom enforcement is sought or by his authorized agent or broker, sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price;

(b) Delivery of a certificated security or transfer instruction has been accepted, or transfer of an uncertificated security has been registered and the transferee has failed to send written objection to the issuer within 10 days after receipt of the initial transaction statement confirming the registration, payment has been made, but the contract is enforceable under this provision only to the extent of the delivery, registration or payment;

(c) Within a reasonable time a writing in confirmation of the sale or purchase and sufficient against the sender under paragraph (a) has been received by the party against whom enforcement is sought and he has failed to send written objection to its contents within 10 days after its receipt; or

(d) The party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract was made for the sale of a stated quantity of described securities at a defined or stated price.

HISTORY: 5A Del. C. 1953, @ 8-319; 55 Del. Laws, c. 349; 64 Del. Laws, c. 152, @

NOTES:

AWARE STUDY COMMENT

Under @ 4 of the Uniform Sales Act, 6 Del.C. @ 704, a contract for the sale of goods or choses in action of \$500 or more was enforceable only if some note or memorandum in writing of the contract or sale was signed by the party to be charged or his agent, or in lieu of such a writing the contract was enforceable if there was acceptance and receipt of a part of the items of sale, or part payment, or if the goods were to be manufactured by the seller specially for the buyer and were not suitable for sale to others in the ordinary course of the seller's business.

Section 8-319 makes material changes in the statute of frauds provisions of

4 of the Uniform Sales Act and in some important respects also differs from the Statute of Frauds provision contained in @ 2-201 of the Code, supra.

Under @ 8-319(a) any contract for the sale of securities is covered regardless of the amount. In addition a quantity and a price term must be included in the writing signed by the party against whom enforcement is sought his authorized agent or broker which indicates that a contract has been made for the sale of the stock.

Section 8-319(b) differs from the comparable provision in @ 4 of the Uniform Sales Act but is substantially in accord with @ 2-201(3) (c). Section 8-319(b) provides that the oral contract for the sale of a security is enforceable only to the extent that delivery of a security has been accepted or payment has been made.

Section 8-319(c), comparable to the provision of @ 2-201(2), supra, binds the recipient of a confirmatory memorandum of the sale or purchase where the sender is bound by the memorandum, unless the recipient objects to its contents within a days after its receipt. No comparable provision is found in @ 4 of the Uniform Sales Act, 6 Del.C. @ 704. The merit of such a provision is that it would eliminate the situation which arose under the Sales Act where the sender of a memorandum could be bound under the Statute of Frauds, but the recipient could choose to be bound or not be bound depending on whether or not the market or other conditions were favorable to him.

Section 8-319(d) providing that an admission in a judicial proceeding is sufficient to make an oral contract enforceable to the extent of the stated quantity of described securities at a defined or stated price is analogous to @ 2-201(3) (b), supra, except that @ 2-201 merely required a quantity term and did not require a stated price term. There is no comparable provision in @ 4 of the Uniform Sales Act, 6 Del.C. @ 704.

The provisions of @ 8-319 will not be applicable to the transactions between a broker and his customer unless the broker sells securities to his customer. If the broker is merely purchasing the securities as an agent for his customer then the relationship is one of principal and agent rather than seller and buyer and @ 8-319 is inapplicable.

DEFINITIONAL CROSS REFERENCES:

"Action". Section 1-201.
"Delivery". Section 1-201.
"Party". Section 1-201.
"Purchase". Section 1-201.
"Security". Section 8-103.
"Send". Section 1-201.
"Sign". Section 1-201.
"Written" and "writing". Section 1-201.

FOOTER NOTE: For more generally applicable notes, see notes under the first section of this part, article, subtitle or title.

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CIVIL CODE

BOOK III. OF THE DIFFERENT MODES OF ACQUIRING THE OWNERSHIP OF THINGS

TITLE III. OBLIGATIONS IN GENERAL

CHAPTER 1. GENERAL PRINCIPLES

La. C.C. art. 1759 (1992)

1759. Good faith

Good faith shall govern the conduct of the obligor and the obligee in
every pertains to the obligation.

LA. C.C. ART. 1832 (1992) printed in FULL format.

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CIVIL CODE

BOOK III. OF THE DIFFERENT MODES OF ACQUIRING THE OWNERSHIP OF THINGS

TITLE III. OBLIGATIONS IN GENERAL

CHAPTER 5. PROOF OF OBLIGATIONS

La. C.C. art. 1832 (1992)

1832. Written form required by law

When the law requires a contract to be in written form, the contract may not be proved by testimony or by presumption, unless the written instrument has been destroyed, lost, or stolen.

Art. 3132. Termination of arbitration

The submission and power given to the arbitrators are put at an end by one of the following causes:

1. By the expiration of the time limited, either by the submission or by law, though the award should not be yet rendered.

2. By the death of one of the parties or arbitrators.

3. By the final award rendered by the arbitrators.

4. When the parties happen to compromise touching the thing in dispute, or when this thing ceases to exist.

C.C. arts. 1813, 1876, 1932, 3071, 3105, 3131.

R.S. 9:4324.

TITLE XX—OF PLEDGE

Editor's note. Chapter 9 of the Louisiana Commercial Laws (R.S. 10:9-101 to 10:9-605) became effective on January 1, 1990. This Chapter regulates the creation of conventional real security in most movables and supplants the laws governing pledge (pawn) with a single device, the "security interest". R.S. 10:9-102 declares that all security interests, if subject to Louisiana law, are governed by Chapter 9 of the Louisiana Commercial Laws.

Art. 3133. Pledge, definition

The *pledge* is a contract by which one debtor gives something to his creditor as a security for his debt.

C.C. arts. 1756, 1891, 1906 to 1908, 1913, 1914, 1916, 1971, 2705 et seq., 2926, 3068, 3135, 3140 et seq., 3221, 3477.

R.S. 1:59, 9:4321, 9:4331 to 9:4343, 9:5391, 9:5521 to 9:5538, 10:9-102, 10:9-206, 10:9-307.

Art. 3133.1. Relation to Chapter 9 of the Louisiana Commercial Laws

This Title shall apply to pledges of movables that are delivered prior to the time Chapter 9 of the Louisiana Commercial Laws becomes effective, including without limitation those pledges that may secure future obligations and lines of credit, as well as to pledges entered into on or after the time Chapter 9 of the Louisiana Commercial Laws becomes effective that are exempt or otherwise excluded from coverage thereunder.

Added by Acts 1989, No. 137, § 16, eff. Sept. 1, 1989. Amended by Acts 1990, No. 1079, § 7, eff. Sept. 1, 1990.

Editor's note. According to Section 22 of Acts 1989, No. 137, Article 3133.1 became effective on September 1, 1989.

Acts 1989, No. 137, § 20 provides:

"It is the intent of the Legislature in enacting this Act to amend the preexisting Louisiana security device laws to accompany and accommodate implementation of Chapter 9 of the Louisiana Commercial Laws (R.S. 10:9-101, et seq.) as previously enacted under Act 528 of 1988. It is further the intent of the Legislature that these preexisting Louisiana laws, including without limitation the various statutes and code articles amended and reenacted under this Act, not be expressly or impliedly repealed by Chapter 9 of the Louisiana Commercial Laws, but that such laws remain in effect and be applied to preexisting secured transactions and, at times when so provided, be applied to secured transactions subject to Chapter 9 of the Louisiana Commercial Laws."

R.S. 1:59.

Art. 3134. Kinds of pledge

There are two kinds of pledge:

The pawn.

The antichresis.

C.C. art. 3135.

R.S. 9:4321, 9:5521 to 9:5538.

Art. 3135. Pawn and antichresis distinguished

A thing is said to be pawned when a movable thing is given as security; and the antichresis, when the security given consists in immovables.

C.C. arts. 3068, 3133, 3134, 3154 et seq., 3176 et seq.
R.S. 9:4321.

CHAPTER 1—GENERAL PROVISIONS

Art. 3136. Obligations enforceable by pledge

Every lawful obligation may be enforced by the auxiliary obligation of pledge.

* Note error in English translation of French text; "enforced" should be "secured."

C.C. arts. 1761, 1913, 1983, 2004, 3138 et seq.

R.S. 1:59, 9:4331 to 9:4334, 9:5391, 10:9-206.

Art. 3137. Conditional obligation as basis for pledge

If the principal obligation be conditional, that of the pledge is confirmed or extinguished with it.

C.C. arts. 1767 to 1776, 1913, 3138.

Art. 3138. Effect of nullity of principal obligation

If the obligation is null, so also is the pledge.

C.C. arts. 3136, 3137, 3139, 3209, 3282, 3288.

Art. 3139. Natural obligation as basis for pledge

The obligation of pledge annexed to an obligation which is purely natural, is rendered valid only when the latter is confirmed and becomes executory.

C.C. arts. 1760 to 1762, 1842 to 1844, 1948, 1950, 2302, 3036, 3138, 3282, 3288, 3295.

Art. 3140. Object of principal obligation

Pledge may be given not only for an obligation consisting in money, but also for one having any other object; for example, a surety. Nothing prevents one person from giving a pledge to another for becoming his surety with a third.

C.C. arts. 1971, 1972, 3068, 3133, 3297, 3298, 3506(20, 21).

R.S. 10:9-206.

Art. 3141. Pledge for debt of another

A person may give a pledge, not only for his own debt, but for that of another also.

C.C. arts. 1910, 1978, 3133, 3295.

Art. 3142. Things susceptible of being pledged

A debtor may give in pledge whatever belongs to him.

But with regard to those things, in which he has an ownership which may be divested or which is subjected to incumbrance, he can not confer on the creditor, by the pledge, any further right than he had himself.

C.C. arts. 2452, 2934, 3133, 3143 et seq., 3290.

C.C.P. art. 426.

R.S. 10:7-501, 10:7-502.

Art. 3143. Pledgor's rights at date of pledge

To know whether the thing given in pledge belonged to the debtor, reference must be had to the time when the pawn was made.

C.C. arts. 3142, 3144.

R.S. 9:5391.

Art. 3144. Subsequent acquisition of ownership of thing pledged

If at the time of the contract the debtor had not the ownership of the thing pledged, but has acquired it since, by what title soever, his ownership shall relate back to the time of the contract, and the pledge shall stand good.

C.C. arts. 3142, 3208, 3432.

R.S. 9:4341.

Art. 3145. Pledge of property of another, necessity for consent of owner

One person may pledge the property of another, provided it be with the express or tacit consent of the owner.

C.C. arts. 1843, 1919, 1977, 2031, 2035, 2452, 2933, 2934, 3146, 3147, 3506(30).

R.S. 10:7-501, 10:7-502.

Art. 3146. Implied consent of owner

But this tacit consent must be inferred from circumstances, so strong as to have [leave] no doubt of the owner's intention; as if he was present at the making of the contract,* or if he

70A-8-208. Effect of signature of authenticating trustee, registrar or transfer agent.

(1) A person placing his signature upon a certificated security or an initial transaction statement as authenticating trustee, registrar, transfer agent, or the like, warrants to a purchaser for value of the certificated security or a purchaser for value of an uncertificated security to whom the initial transaction statement has been sent, if the purchaser is without notice of the particular defect, that:

- (a) the certificated security or initial transaction statement is genuine;
- (b) his own participation in the issue or registration of the transfer, pledge, or release of the security is within his capacity and within the scope of the authority received by him from the issuer; and
- (c) he has reasonable grounds to believe that the security is in the form and within the amount the issuer is authorized to issue.

(2) Unless otherwise agreed, a person by so placing his signature does not assume responsibility for the validity of the security in other respects.

History: L. 1965, ch. 154, § 8-208; 1989, ch. 218, § 17.

Amendment Notes. — The 1989 amend-

ment, effective April 24, 1989, so rewrote Subsection (1) as to make a detailed analysis impracticable.

COLLATERAL REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d Commercial Code § 88.

C.J.S. — 18 C.J.S. Corporations §§ 253 et seq., 444; 19 C.J.S. Corporations § 1162 et seq.

Key Numbers. — Corporations ⇌ 108, 149, 466 et seq.

PART 3 PURCHASE

70A-8-301. Rights acquired by purchaser.

(1) Upon transfer of a security to a purchaser under Section 70A-8-313, the purchaser acquires the rights in the security which his transferor had, or had actual authority to convey unless the purchaser's rights are limited by Subsection 70A-8-302(4).

(2) A transferee of a limited interest acquires rights only to the extent of the interest transferred. The creation or release of a security interest in a security is the transfer of a limited interest in that security.

History: L. 1965, ch. 154, § 8-301; 1989, ch. 218, § 18.

Amendment Notes. — The 1989 amendment, effective April 24, 1989, substituted "transfer of a security to a purchaser under Section 70A-8-313" for "delivery of a security" in Subsection (1); substituted "unless the purchaser's rights are limited by Subsection 70A-8-302(4)" for "except that a purchaser who has himself been a party to any fraud or illegality affecting the security or who as prior

holder had notice of an adverse claim cannot improve his position by taking from a later bona fide purchaser" in Subsection (1); deleted the former second sentence of Subsection (1), construing "adverse claim"; deleted former Subsection (2), which read "A bona fide purchaser in addition to acquiring the rights of a purchaser also acquires the security free of any adverse claim;" redesignated former Subsection (3) as (2); substituted "transferee" for "purchaser" and "transferred" for "purchased"

(2) Statements as provided in Section 70A-8-408, notices, or the like, sent by the issuer of uncertificated securities and instructions as provided in Section 70A-8-308 are neither negotiable instruments nor certificated securities.

(3) In any action on a security:

(a) unless specifically denied in the pleadings, each signature on a certificated security, in a necessary indorsement, on an initial transaction statement, or on an instruction, is admitted;

(b) if the effectiveness of a signature is put in issue, the burden of establishing it is on the party claiming under the signature, but the signature is presumed to be genuine or authorized;

(c) if signatures on a certificated security are admitted or established, production of the security entitles a holder to recover on it unless the defendant establishes a defense or a defect going to the validity of the security;

(d) if signatures on an initial transaction statement are admitted or established, the facts stated in the statement are presumed to be true as of the time of its issuance; and

(e) after it is shown that a defense or defect exists, the plaintiff has the burden of establishing that he, or some person under whom he claims, is a person against whom the defense or defect is ineffective as provided in Section 70A-8-202.

History: L. 1965, ch. 154, § 8-105; 1989, ch. 218, § 6; 1991, ch. 5, § 79.

Amendment Notes. — The 1991 amend-

ment, effective February 11, 1991, corrected a punctuation error in Subsection (3)(e).

PART 3

PURCHASE

70A-8-302. “Bona fide purchaser” — “Adverse claim” — Title acquired by bona fide purchaser.

(1) A “bona fide purchaser” is a purchaser for value in good faith and without notice of any adverse claim:

(a) who takes delivery of a certificated security in bearer form or in registered form, issued or indorsed to him or in blank;

(b) to whom the transfer, pledge, or release of an uncertificated security is registered on the books of the issuer; or

(c) to whom a security is transferred under the provisions of Subsection 70A-8-313(1)(c), (d)(i), or (g).

(2) “Adverse claim” includes a claim that a transfer was or would be wrongful or that a particular adverse person is the owner of or has an interest in the security.

(3) A bona fide purchaser in addition to acquiring the rights of a purchaser under Section 70A-8-301 also acquires his interest in the security free of any adverse claim.

(4) Notwithstanding Subsection 70A-8-301(1), the transferee of a particular certificated security who has been a party to any fraud or illegality affecting the security, or who as a prior holder of that certificated security had notice of an adverse claim, cannot improve his position by taking from a bona fide purchaser.

History: L. 1965, ch. 154, § 8-315; 1989, ch. 218, § 32.

Amendment Notes. — The 1989 amendment, effective April 24, 1989, in Subsection (1), inserted the designations, substituted "certificated security wrongfully transferred" for "security or" in (a), substituted "certificated security representing" for "security evidencing" in (b), and added (c); in Subsection (2), inserted "of a certificated security," substituted "a new certificated security" for "new security," and

deleted "the provisions of this chapter on unauthorized indorsements" following "against him under"; in Subsection (3), substituted "certificated security, or to compel the origination of a transfer instruction" for "security," substituted "the transfer of a certificated or uncertificated security enjoined and a certificated security" for "its transfer enjoined and the security"; and made stylistic and punctuation changes throughout.

COLLATERAL REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d Commercial Code § 108.

C.J.S. — 18 C.J.S. Corporations § 439, 19 C.J.S. Corporations § 1159 et seq.

A.L.R. — *Lis pendens* in suit to compel stock transfer, 48 A.L.R.4th 731.

Key Numbers. — Corporations ⇐ 134, 148, 466 et seq.

70A-8-316. Purchaser's right to requisites for registration of transfer, pledge, or release on books.

Unless otherwise agreed, the transferor of a certificated security or the transferor, pledgor, or pledgee of an uncertificated security on due demand must supply his purchaser with any proof of his authority to transfer, pledge, or release or with any other requisite necessary to obtain registration of the transfer, pledge, or release of the security; but if the transfer, pledge, or release is not for value, a transferor, pledgor, or pledgee need not do so unless the purchaser furnishes the necessary expenses. Failure within a reasonable time to comply with a demand made gives the purchaser the right to reject or rescind the transfer, pledge, or release.

History: L. 1965, ch. 154, § 8-316; 1989, ch. 218, § 33.

Amendment Notes. — The 1989 amendment, effective April 24, 1989, substituted "of a certificated security or the transferor, pledgor, or pledgee of an uncertificated security on due

demand must" for "must on due demand" in the first sentence; inserted "pledge, or release" three times in the first sentence and once in the second sentence; inserted "pledgor, or pledgee" in the first sentence; and made stylistic changes throughout.

COLLATERAL REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d Commercial Code § 109.

C.J.S. — 18 C.J.S. Corporations § 435 et seq.; 19 C.J.S. Corporations § 1159 et seq.

Key Numbers. — Corporations ⇐ 130 et seq., 466 et seq.

70A-8-317. Creditors' rights.

(1) Subject to the exceptions in Subsections (3) and (4), no attachment or levy upon a certificated security or any share or other interest represented thereby which is outstanding is valid until the security is actually seized by the officer making the attachment or levy, but a certificated security which has been surrendered to the issuer may be reached by a creditor by legal process at the issuer's chief executive office in the United States.

(2) An uncertificated security registered in the name of the debtor may not be reached by a creditor except by legal process at the issuer's chief executive office in the United States.

(3) The interest of a debtor in a certificated security that is in the possession of a secured party who is not a financial intermediary or in an uncertificated security registered in the name of a secured party who is not a financial intermediary, or in the name of a nominee of the secured party, may be reached by a creditor by legal process upon the secured party.

(4) The interest of a debtor in a certificated security that is in the possession of or registered in the name of a financial intermediary or in an uncertificated security registered in the name of a financial intermediary may be reached by a creditor by legal process upon the financial intermediary on whose books the interest of the debtor appears.

(5) Unless otherwise provided by law, a creditor's lien upon the interest of a debtor in a security obtained pursuant to Subsection (3) or (4) is not a restraint on the transfer of the security, free of the lien, to a third party for new value; but in the event of a transfer, the lien applies to the process of the transfer in the hands of the secured party or financial intermediary, subject to any claims having priority.

(6) A creditor whose debtor is the owner of an interest in a security is entitled to aid from courts of appropriate jurisdiction, by injunction or otherwise, in reaching the interest or in satisfying the claim by means allowed at law or in equity in regard to property that cannot readily be attached or levied upon by ordinary legal process.

History: L. 1965, ch. 154, § 8-317; 1989, ch. 218, § 34.³

Amendment Notes. — The 1989 amendment, effective April 24, 1989, inserted Subsections (2), (3), (4), and (5), renumbering former Subsection (2) as present (6); in Subsection (1), inserted "certificated" twice, inserted "Subject to the exceptions in Subsections (3) and (4)," and substituted "reached by a creditor by legal process at the issuer's chief executive office in the United States" for "attached or levied upon

at the source"; substituted "an interest in a security is" for "a security shall be" and "the interest" for "such security" in Subsection (6); and made stylistic changes throughout the section.

Cross-References. — Water stock, apportionment upon sale of land, redemption from mortgage foreclosure, § 78-37-6.

Writs of attachment, Rules of Civil Procedure, Rule 64C.

COLLATERAL REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d Attachment and Garnishment §§ 39, 305; 15A Am. Jur. 2d Commercial Code § 110.

C.J.S. — 7 C.J.S. Attachment § 182; 21

C.J.S. Creditors' Suits § 14; 33 C.J.S. Executions §§ 98, 99.

Key Numbers. — Attachment ⇐ 165, 166; Creditors' Suit ⇐ 8; Execution ⇐ 131, 132.

70A-8-318. No conversion by good faith conduct.

An agent or bailee who in good faith, including observance of reasonable commercial standards if he is in the business of buying, selling, or otherwise dealing with securities, has received certificated securities and sold, pledged, or delivered them or has sold or caused the transfer or pledge of uncertificated securities over which he had control according to the instructions of his principal, is not liable for conversion or for participation in breach of fiduciary duty although the principal had no right to deal with the securities.

History: L. 1965, ch. 154, § 8-318; 1989, ch. 218, § 35.

Amendment Notes. — The 1989 amendment, effective April 24, 1989, inserted "certificated" and "or has sold or caused the transfer or pledge of uncertificated securities over

which he had control," substituted "to deal with the securities" for "to dispose of them," and made punctuation changes.

Cross-References. — Bailee not liable for good faith delivery pursuant to warehouse receipt or bill of lading, § 70A-7-404.

NOTES TO DECISIONS

Bailment.

A defendant was charged with obtaining property under false pretenses where he was asked to keep stock certificates until the owner returned from a trip, but had them transferred

to his own name; a mere bailee has no authority to transfer certificates. *State v. Jenson*, 74 Utah 527, 280 P. 1046 (1929) (decided under prior law).

COLLATERAL REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d Commercial Code § 111.

C.J.S. — 2A C.J.S. Agency § 221; 8 C.J.S. Bailments §§ 97, 98; 12 C.J.S. Brokers § 129 et seq.

Key Numbers. — Bailment ⇐ 21; Brokers ⇐ 100 et seq.; Principal and Agent ⇐ 159(2).

70A-8-319. Statute of frauds.

A contract for the sale of securities is not enforceable by way of action or defense unless

(a) there is some writing signed by the party against whom enforcement is sought or by his authorized agent or broker sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price; or

(b) delivery of the security has been accepted or payment has been made but the contract is enforceable under this provision only to the extent of such delivery or payment; or

(c) within a reasonable time a writing in confirmation of the sale or purchase and sufficient against the sender under Paragraph (a) has been received by the party against whom enforcement is sought and he has failed to send written objection to its contents within ten days after its receipt; or

(d) the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract was made for sale of a stated quantity of described securities at a defined or stated price.

History: L. 1965, ch. 154, § 8-319.

Cross-References. — Contract for sale of goods, statute of frauds, § 70A-2-201.

NOTES TO DECISIONS

Oral c.o.d. arrangement.

Oral c.o.d. arrangement whereby buyer of stocks paid broker only when stock was delivered to buyer was not void where within 24 hours after each transaction, broker sent to

buyer written confirmation thereof and broker never received a written objection from buyer. *Prince-Covey & Co. v. Strand*, 29 Utah 2d 224, 507 P.2d 708 (1973).

(b) Subsection (a) provides for actions not yet barred, and also acts retroactively to permit actions under this section that are otherwise barred.

(2) As used in this section, "asbestos" means asbestiform varieties of:

- (a) chrysotile (serpentine);
- (b) crocidolite (riebeckite);
- (c) amosite (cummingtonite-grunerite);
- (d) anthophyllite;
- (e) tremolite; or
- (f) actinolite.

History: C. 1953, 78-12-33.5, enacted by L. 1988, ch. 208, § 2.

Effective Dates. — Laws 1988, ch. 208 be-

came effective on April 25, 1988, pursuant to Utah Const., Art VI, Sec. 25

78-12-34. Repealed.

Repeals. — Section 78-12-34 (L. 1951, ch. 58, § 1, C. 1943, Supp., 104-12-34), providing that there is no limitation in actions to recover

bank deposits of money or property, was repealed by Laws 1981, ch. 16, § 1.

ARTICLE 3

MISCELLANEOUS PROVISIONS

78-12-35. Effect of absence from state.

Where a cause of action accrues against a person when he is out of the state, the action may be commenced within the term as limited by this chapter after his return to the state. If after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-35; 1987, ch. 19, § 4.

NOTES TO DECISIONS

ANALYSIS

"Absence" from state.
 —Nonresident motorists.
 Applicability of section
 —Nonresidents.
 —Personal representative of estate.
 Burden of proof.
 Computation of time.
 —Periods of absence.
 Construction of section.
 —Strict.
 Foreign corporation.
 —Pleadings and evidence.
 Laches.
 —Accounting.
 Purpose of section.

Residence within state
 —Continual.
 —Proof of presence.
 —Defendant's family.
 —Statute tolled.

"Absence" from state.

—Nonresident motorists.

Nonresident motorists were not "absent" from the state so as to toll running of statute of limitations, although they left state immediately after automobile collision and remained without state, as they had an agent in person of secretary of state upon whom process could have been served. *Snyder v. Clune*, 15 Utah 2d 254, 390 P.2d 915 (1964).

agreement was made; (2) by the debtor/obligor of the settlement agreement (or by a third party at the debtor's direction); and (3) the payment was made to the creditor under the settlement agreement. *Butcher v. Gilroy*, 744 P.2d 311 (Utah Ct. App. 1987).

Verbal agreement.

A verbal agreement or new promise based upon a prior agreement barred by statute comes within this section. *Whitehill v. Lowe*, 10 Utah 419, 37 P. 589 (1894) (decided under prior law).

COLLATERAL REFERENCES

Am. Jur. 2d. — 51 Am. Jur. 2d Limitation of Actions § 325 et seq.

C.J.S. — 54 C.J.S. Limitations of Actions § 261.

A.L.R. — Promises to settle or perform as estopping reliance on statute of limitations, 44 A.L.R.3d 482.

Promises or attempts by seller to repair goods as tolling statute of limitations for breach of warranty, 68 A.L.R.3d 1277.

Key Numbers. — Limitations of Actions ← 146.

78-12-45. Action barred in another state barred here.

When a cause of action has arisen in another state or territory, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state and who has held the cause of action from the time it accrued.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-45.

NOTES TO DECISIONS

ANALYSIS

Applicability of section.

—Counterclaim.

—Act occurring in other state.

Choice of laws.

—Utah court.

Exception to section.

—Assignee of resident's claim.

—State resident.

—Accrual of cause of action.

Applicability of section.

This section is a general provision applying to causes of action that arise in a different state and are not reduced to judgment. *Pan Energy v. Martin*, 813 P.2d 1142 (Utah 1991).

—Counterclaim.

—Act occurring in other state.

Where defendant's counterclaim for malpractice occurring in Idaho was barred by the Idaho statute of limitation, it would be barred here under this section. *Lindsay v. Woodward*, 5 Utah 2d 183, 299 P.2d 619 (1956).

Choice of laws.

—Utah court.

In wrongful death action by Utah resident

against Colorado residents, in which Utah court had quasi in rem jurisdiction, Utah court applied Utah law on matter concerning the statute of limitations, including the tolling thereof. *Rhoades v. Wright*, 622 P.2d 343 (Utah 1980), cert. denied, 454 U.S. 897, 102 S. Ct. 397, 70 L. Ed. 2d 212 (1981).

Exception to section.

—Assignee of resident's claim.

Resident of Utah, who acquired claim upon which he based his right of action by virtue of assignment after cause of action had accrued thereon, did not come within exception to this section. *Lawson v. Tripp*, 34 Utah 28, 95 P. 520 (1908).

—State resident.

—Accrual of cause of action.

Only those persons who are Utah residents as of the date their cause of action arises come within the exception to this section. *Allen v. Greyhound Lines*, 583 P.2d 613 (Utah 1978).

ADDENDUM B

AGREEMENT TO PREPAY CLASS A OR CLASS B NOTE

The undersigned is a Limited Partner in Crane Development Limited Partnership and owns One (1) Unit(s) in such Partnership.

The undersigned hereby agrees to prepay the Class A or Class B Note contributed to the Partnership upon its formation, on the following terms and conditions:

The undersigned submits with this agreement (check as applicable):

X I elect to pay ^{\$ 30,400} all cash. I submit cash in the amount of ~~\$34,500~~ per Unit or \$_____ by check made payable to Crane Development Limited Partnership.

_____ I elect to pay no cash immediately. I attach a promissory note in the principal amount of \$38,000 per Unit.

_____ I elect to pay partially in cash and partially by execution of a promissory note. I enclose cash in the amount of \$_____. I also attach a promissory note in the principal amount of \$_____, determined by the following formula:

$$\text{Amount of Investor Note} = \left[1 - \frac{\text{amount of cash paid}}{\$34,500} \right] \times \$38,000$$

The undersigned further represents that all material documents, including the Private Placement Memorandum, date October 30, 1986, records, books, and any materials which he has requested pertaining to this investment have been made available to him; and that they have been reviewed by him or his advisors prior to signing this document, and he has had the opportunity to ask questions of the principals of Digitran or the Partnership.

Except as disclosed to the Partnership and Digitran in writing, the undersigned warrants that the Common Stock to be acquired by him is to be made solely on his own behalf for investment purposes of further re-sale or with a view to distribution or fractionalization thereof.

The undersigned is aware that the Common Stock is highly speculative, and subject to substantial risks, and that he is capable of bearing the high degree of economic risk and burdens of such acquisition, including, but not limited to, the possibility of the complete loss of all capital; the loss of all anticipated tax benefits and any adverse tax consequences; the lack of a

public market; and limited transferability such that it might not be possible to readily liquidate this investment so that his ownership thereof might continue indefinitely.

No federal or state agency has made any finding or determination as to the fairness for public investment, nor any recommendation or endorsement of the Common Stock; and the Common Stock has not been registered with the Securities and Exchange Commission, or with any state agency; nor is any registration to be obtained in the future.

I understand that, in consideration of this prepayment:

(i) DigiCrane, Inc. will cancel and deliver to the Partnership, for return to me, my Class A or Class B Note;

(ii) DigiCrane, Inc. and I will execute an amendment to my Guaranty and Assumption Agreement, so that I will guarantee only so much of the Partnership Note as is evidenced by my Investor Note (in principal and interest);

(iii) The Partnership Note will be credited by DigiCrane, Inc. with an amount equal to the difference between: (A) the outstanding principal balance on any Class A or Class B Note; and (B) the total of cash and the principal amount of my Investor Note;

(iv) DigiCrane will issue to me its shares of Common Stock, as follows:

(A) I will receive one share of Common Stock for each \$0.75 contributed by me in cash upon execution of this Agreement.

(B) As I pay installment payments on my Investor Note, I will be entitled to have issued to me a number of shares of the Common Stock of DigiCrane Systems, Inc. determined by reference to the last price, as published in the OTC "Pink Sheets" as of the last day of the calendar quarter immediately preceding such installment payment. I will receive shares at such price, less a 10% discount. Common Stock will be issued to me promptly after the end of the quarter in which such installment payments are made.

(v) I agree that my Investor Note may be paid or prepaid out of any cash distributions made to me by the Partnership.

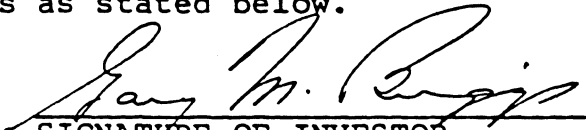
(vi) I hereby waive and forever discharge any and all claims which I may have had, whether known or unknown, liquidated or contingent, against the Crane Development Limited Partnership;

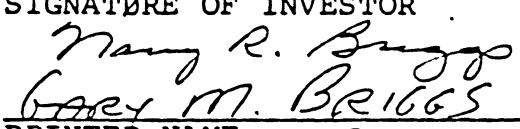
Digitran Svstems, Inc.; Digitran, Inc.; DigiCrane, Inc.; their officers, employees, agents or attorneys, in relation to my agreeing to become, or becoming a Limited Partner in the Partnership, or in relation to my execution and delivery of my Class A or Class B Note.

(vii) I understand that the Common Stock to be issued to me will not be registered; that it will be "restricted" under Rule 144 of the Securities Act of 1933; that it will not be freely transferable; and that the stock certificate will bear a legend to that effect.

(viii) I also understand that this is a taxable transaction.

(ix) I represent that I have read the Private Placement Memorandum dated November 10, 1986, and that I have obtained competent advice with regard to those portions of the memorandum which I did not understand. I acknowledge that there exist certain risk factors and conflicts of interest. I represent that my correct domicile and address is as stated below.


SIGNATURE OF INVESTOR


PRINTED NAME

NANCY R. BRIGGS


ADDRESS

LITTLETON, CO. 80120