1974

Wash-A-Matic, Inc. v. Willis Rupp : Brief of Respondent

SUPR

STA

WASH-A-MATIC
corporation,

WILLIS RUPP,
D

Appeal fr

Honorable

PUGSLEY, HA
CAMPBELL &
GLEN E. DA
WALTER J.
315 East Sec
Salt Lake Cit
Attorneys for Ap

LORRAINE PRESS

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

CASES CITED

TABLE OF CONTENTS—Continued

STATUTES AND RULES

SECONDARY LAW MATERIALS

TABLE OF CONTENTS—Continued

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

WASH-A-MATIC, INC., a Utah corporation,

Plaintiff and Appellant,

-vs-

WILLIS RUPP, a/k/a WILLIE RUPP,

Defendant and Respondent,

Case No. 13688

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant sought review of a decision of the District Court of the Third Judicial District, Salt Lake County, State of Utah, dismissing appellant's action for breach of contract against respondent.

DISPOSITION IN LOWER COURT

Appellant filed the instant action against the respondent on the 15th day of September, 1972, alleging breach of contract. An answer was duly filed and the matter tried on March 21, 1974, before the Honorable

Ernest F. Baldwin, Jr., Judge. On the 8th day of April, 1974, Judge Baldwin entered judgment for the respondent and against plaintiff dismissing plaintiff's cause of action.

RELIEF SOUGHT ON APPEAL

Respondent submits that this Court should affirm the trial Court's judgment.

STATEMENT OF FACTS

Respondent submits the following Statement of Facts as being more in keeping with the proposition that on appeal the facts will be reviewed in a light most favorable to the trial Court's verdict.

The appellant's complaint alleged that on or about the 5th day of August, 1971, appellant and respondent entered into a written contract for the purchase, by respondent, of a car wash and related equipment (R. 53). Appellant further alleged that the equipment was delivered to the respondent pursuant to the contract which was refused and that as a result appellant sustained damages.

Mr. Bert Nelson, a service representative for Nelson Service and Livingston, received information from a friend that the respondent might be interested in a car wash (R. 60). Mr. Nelson met with Mr. Rupp in the summer of 1971. Rupp indicated he was interested. In view of the type of car wash in which Rupp had an interest, Mr. Nelson felt it would be best to contact Mr. Jack Thur-

mond of Wash-A-Matic, the appellant (R. 61). Mr. Thurmond received word from Nelson that Rupp may be a good car wash prospect (R. 70). Mr. Thurmond met with Rupp at his office and discussed the pros and cons of a car wash operation. Initially they did not discuss cost but merely equipment that might be reasonable for the location at 4700 South Redwood Road (R. 71). Rupp was of the opinion that he did not have any zoning problems because there had been an auto wrecking yard at the site previously (R. 135). Several days later, Nelson and Thurmond again met at Rupp's office and discussed various means of financing with one means being leasing of the car wash to be obtained through Wash-A-Matic, through Capitol Goods and Leasing Company (R. 72). Alternative locations were considered and a Mr. Martin of Equipment Leasing later also examined Rupp's property but no arrangements were made at that time for any lease (R. 75). There was also discussion about obtaining financing locally either through a bank or through a leasing company (R. 153, 72).

On October 5, 1971, Rupp executed an order for equipment (Exhibit P-1). That order expressly provided that it was "subject to financing and equipment selection" and that the $200 check given at the time of the execution of the order was refundable if financing was not arranged. Exhibit 1-P also provided:

> This contract is contingent upon the availability to the purchaser of financing as set forth on the front of this contract. Upon ap-

> proval of purchaser's credit, purchaser will execute such forms and papers as are required by the finance factor as evidence of indebtedness and the security therefore, and furnish co-makers and guarantors, if required.

According to Mr. Thurmond, the President of appellant Wash-A-Matic, the original order form was drawn up to get the equipment into operation (R. 76). The "subject to financing" portion of the contract was handwritten by Thurmond (R. 76). Thurmond testified:

> . . . the contract was subject to financing arrangement of financing. He had made application for financing but had not been approved at that particular time.
>
> Q. Is that the reason why that phase was placed--
>
> A. That is the reason the phase was put in there that if he was unable to arrange his financing or if we were unable to arrange the financing we would refund his money and he wouldn't be under any obligation.

Exhibit 2-P, a similar order, unsigned by Rupp, was submitted to Capitol Leasing, a local corporation, to obtain financing for Mr. Rupp whereby he could acquire the car wash. Capitol Leasing declined the contract a week or two after it was submitted (R. 79, 137). Thereafter, Thurmond suggested that financing be obtained through Mr. Martin of Equipment Leasing in California (R. 73).

Mr. Rupp submitted some original credit papers to Mr. Martin. Exhibit 3-P was a form prepared by Thurmond for submission to Equipment Leasing to obtain financing. Exhibit 3-P was never executed by Rupp. Thereafter, Equipment Leasing requested additional statements from Rupp concerning his financial condition. Rupp thereafter supplied Equipment Leasing with additional information but never saw a lease agreement nor was he advised as to what the terms of any lease would include (R. 139). Thurmond asked Livingston Industries, a manufacturer of car wash equipment, to go ahead with the equipment "on confirmation of the financing." (R. 93). Thurmond never saw any lease agreement or proposed lease agreement between Equipment Leasing and respondent (R. 113). It was up to the Equipment Leasing company to purchase the equipment from Wash-A-Matic and lease it to Rupp if they were to finance the activity (R. 114). Exhibit 3-P was never executed by Equipment Leasing and in order for a sale to occur a sale and lease agreement still had to be executed (R. 118). Equipment Leasing never executed a contract to purchase from the appellant with a view towards leasing back to Rupp (R. 119). After Rupp had submitted the additional financing documents to Equipment Leasing, it requested an additional $1,000 (R. 141) and Rupp advised Martin that he did not have $1,000 at that time (R. 150, 151). Rupp was never approached with any form of a lease proposed by Equipment Leasing for financing the acquisition of the car wash (R. 151). No arrangement was consumated with Equipment Leasing.

The deposition of Ted Martin of Equipment Leasing indicated that he had a commitment for funding through Chase-Manhattan Bank (Deposition 9). That he never worked out a schedule of payments for Rupp (Deposition 12). He indicated that Equipment Leasing would actually draw up the lease for the transaction between his company and Rupp, but he couldn't say if any lease was ever presented to Rupp (Deposition 19). He indicated the purchase order would have to be different and that it would reflect that the car wash equipment was sold by Wash-A-Matic to Equipment Leasing and leased to Rupp (R. 21). That before they would finance the matter, the lease would have to be signed by their customer (Deposition 33, 34), and that the lease would have to be submitted to Chase-Manhattan to obtain the bank's approval (Deposition 20). When the $1,000 was not forthcoming from Rupp, the credit extended by Chase Manhattan expired within 30 days (Deposition 11).

Car wash equipment was shipped by Livingston Industries at appellant's request to Rupp before any financing had been arranged and although one or two items were initially kept on his property, Rupp refused the major shipment (R. 96). Rupp indicated that he, Thurmond and Martin subsequently attended a zoning hearing in Utah and that Rupp was unable to obtain zoning and building approval. Wash-A-Matic thereafter returned the equipment to Livingston Industries. The trial Court found that the parties entered into the agreement subject to financing and equipment selection, that

respondent was unable to obtain financing locally (R. 12), that respondent was advised that financing was available through Equipment Leasing of California subject to approval of defendant's credit, acceptance by Equipment Leasing Company's bank and the execution of a lease acceptable to the bank and Equipment Leasing. That no lease relating to the acquisition of the car wash equipment was ever submitted to the respondent for execution. The Court concluded as a matter of law and fact that there was no binding contract or agreement between the parties (R. 13).

ARGUMENT

POINT I

THE FINDINGS OF THE TRIAL COURT TO THE EFFECT THAT THERE WAS NO BINDING CONTRACT OR AGREEMENT FORMULATED BETWEEN THE PARTIES IS SUSTAINED BY THE EVIDENCE AND SUPPORTED BY LAW.

The respondent submits that the appellant's contention that as a matter of law the findings of the trial court are insufficient to sustain the judgment is without merit. The order which respondent executed, Exhibit 1-P, provides two separate legal standards upon which to determine whether there was a binding contract. The reverse of the contract provides that it was "contingent upon the availability to the purchaser of financing as set forth on the front of the contract." Further, it provides that such contracts and agreements as were neces-

sary to the financial factor would be executed by the purchaser. On the front of the contract in the handwriting of John Thurmond, President of the appellant, there was written "subject to financing and equipment selection" and it was noted that the deposit check of Rupp was refundable if financing was not arranged. The order was prepared by the appellant both in printed form and in handwritten form. Under these circumstances, the contract is to be construed in a light most favorable to the respondent and against the appellant to the extent that there is any ambiguity. In *Seal v. Tayco, Inc.*, 16 Utah 2d 323, 400 P.2d 503 (1965) this Court observed:

> In addressing this problem, certain principles should be kept in mind. The first is that in case of uncertainty as to the meaning of the contract, it should be construed most strictly against its framer, Amsco. A particularized application of this well-recognized doctrine is that it seems manifestly unfair to permit one who formulates a contract to so fashion it as to mislead the other party by setting forth a clearly apparent promise or representation in order to induce acceptance, and then designedly 'burying' elsewhere in the document, in fine print, provisions which purport to limit or take away the promise, and/or preclude recovery for failure to fulfill it.

In *Skousen v. Smith*, 27 Utah 2d 169, 493 P.2d 1003 (1972) citing numerous prior cases from this Court it was stated:

> It is axiomatic that language in a written instrument is interpreted more strongly against a scrivener who executes it.

Appellant may not take the language on the reverse of the contract and limit the handwritten language on the front of the contract which clearly evidences a condition precedent that financing be arranged before the respondent was to be bound. As the trial Court's findings indicate, the parties had considered three separate forms of financing: Direct purchase, local bank financing, and leasing. If leasing were to be the accepted means of financing which was that means most preferred by the appellant, it would be necessary for the lessor to purchase the property from the appellant through it own factoring and lease to the respondent. No lease agreement was ever prepared, which was a condition to such financing. Also, the respondent had been refused local lease financing. Additionally, it was necessary for the parties to agree upon the terms of any financing. In *Trans Trust S.P.R.L. v. Danubian Trading Co., Ltd.*, [1952] 2 Q.B. 297, the court considered a stipulation in a contract for the sale of goods which related to the opening by the buyer of a banker's confirmed credit. The court observed:

> What is the legal position of such a stipulation? Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the

> stipulation 'subject to the opening of a credit' is rather like a stipulation 'subject to contract.' If no credit is provided, there is no contract between the parties.

In *Associated Inv. Co. v. Cayias*, 55 Utah 377, 185 Pac. 778 (1919) this Court approved the following language, "Conditions precedent call for the performance of some act or the happening of some event after a contract is entered into and upon the performance or happening of which its obligations are made to depend." In 17 Am. Jur. 2d *Contracts* § 321, it is observed:

> A condition may be precedent either to the existence of a contract or to an obligation immediately to perform the contract. A condition precedent to an obligation to perform calls for the performance of some act or the happening of some event after a contract is entered into, upon the performance or happening of which the obligation to perform immediately is made to depend.

See also *Restatement of Contracts*, § 250. Therefore, before there was any obligation on the part of Rupp to pay any money or accept delivery of any goods it was necessary that the factoring and financing arrangements be worked out. This was acknowledged by Mr. Thurmond in his own testimony.

The appellant cites *Wilson v. Gray*, 226 P.2d 726 (Cal. App. 1951) for a contention that the condition precedent was met. This case does not support appellant's

position. In that case, the parties had a specific contract and amount in mind and the actual financing was not dependent upon a third party contracting with any of the other parties by way of lease or purchase. Even so, the Court held there had to be an *agreement* on the part of the prospective creditor to make the loan contemplated. By the testimony of Mr. Martin in the instant case before any loan would in fact be made or an agreement to make a loan, as distinct from a mere willingness, there had to be prepared a lease agreement which required the approval of the Chase-Manhattan Bank. Thus, the terms of the lease-sale-re-lease agreement were critical to obtaining financing and those terms simply had not been established. Further, before such terms were arrived at, the Chase Manhattan Bank foreclosed the availability of the funds to Equipment Leasing Company. Additionally, it became apparent that the contract could not be financed because of the commercial inability to maintain the object of the contract, to wit: the construction of the carwash, since approval could not be obtained. At best, the "subject to financing" provisions on the front of the contract merely made Exhibit 1-P an agreement to agree. The term "financing" must be considered more than merely a willingness to extend credit. In *Reese v. Walker*, 151 N.E.2d 605 (Ohio Mun. 1958) the court held that where securing of necessary financing by the purchasers was a condition precedent to proceeding under the terms of a contract for purchase, but where the contract did not specify what was meant by necessary fi-

nancing, that only the purchasers could determine what finances they needed. With reference to the term, the court observed:

> In the Court's judgment the phrase 'contingent upon securing necessary financing' would mean to a layman 'If we can borrow the money we need to finance the purchase on terms we can repay'. Defendant argues that plaintiffs were able to borrow the amount they needed and therefore did get 'necessary financing.' ***But 'financing' in its ordinary meaning connotes more than simply the face amount of a loan.*** It includes the interest rate, the term, the rate of repayment and other terms and conditions. It means a loan on terms that the borrower can repay. Under the contract as executed only the buyers can determine what financing they need. Having signed the contract without specifying what financing was 'necessary financing', the seller is in no position to complain if the buyers state they needed a loan with payments as a certain rate. Of course, buyers must show good faith. They cannot defeat the contract by their own fault. They must honestly determine what kind of a loan they need and must make a bona fide effort to obtain it. This, the evidence shows, is what plaintiffs did in the case now before us.
>
> The condition precedent to consummation of the contract having been impossible of fulfillment, the contract is terminated and plaintiffs are entitled to a return of their earnest

> money deposit as prayed for. Entry may be presented accordingly. (Emphasis added).

Thus, the subject to financing provision of the agreement between appellant and respondent required more than just the interest of Equipment Leasing in ultimately financing the acquisition of a car wash by Rupp. Many things were required to be done.

In *Davison v. Robbins*, 20 Utah 2d 338, 517 P.2d 1026 (1973), this Court recognized that under such circumstances there is no binding contract. In that case this Court observed:

> This writing constituted a mere expression of a purpose to make a contract in the future, for the whole matter was contingent on further negotiations. The trial court erred in its conclusion that the writing constituted a valid, enforceable contract.

See also, *Valcarce v. Bitters*, 12 Utah 2d 61, 362 P.2d 427 (1961). In the instant case the agreement between appellant and respondent must be construed againt respondent. This Court has consistently held the facts on appeal are to be viewed in a light most favorable to the party prevailing below and if any evidence of record will support the trial Court's conclusions they should be sustained, *Coombs v. Perry*, 2 Utah 2d 381, 275 P.2d 680 (1954). The trial Court's Findings of Fact and Conclusions of Law being supported by evidence of record, it

must be concluded that there was no binding contract between appellant and respondent.

POINT II

THE APPELLANT'S CONTENTION THAT THE SUBJECT TO FINANCING CLAUSE WAS EITHER WAIVED OR EXCUSED BY RESPONDENT'S CONDUCT CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL AND IS NOT SUPPORTED BY THE EVIDENCE.

The appellant raises three contentions as to why the condition precedent in the agreement between appellant and respondent should not govern this appeal. Appellant contends the condition of financing was waived, excused or an oral contract existed independent of the written contract for the purchase of the equipment. An examination of the appellant's complaint shows that none of these three concepts were plead. An examination of the Court's Findings of Fact and Conclusions of Law indicates that no findings or conclusions were made on any of these concepts. Consequently, it is obvious that appellant is raising each of the three theories for the first time on appeal. It has long been the accepted rule in this jurisdiction that a position not presented to the trial court may not be raised for the first time on appeal. *State By and Through Its Road Commission v. Larkin*, 27 Utah 2d 295, 495 P.2d 817 (1972); *In re Ekker Estate*, 19 Utah 2d 414, 432 P.2d 45 (1967); *Huber v. Deep Creek Irrigation Co.*, 6 Utah 2d 15, 305 P.2d 478 (1956); *Drum-*

mond v. Union Pacific Railroad Co., 111 Utah 289, 177 P.2d 903 (1947). It is therefore submitted that each of these contentions should be dismissed as inappropriate for this appeal.

However, respondent further contends that the evidence in the instant case does not justify the application of any of these doctrines. The trial Court in Findings 5 through 9 found:

> 5. That subsequent to the subscribing to the document by the parties, plaintiff and defendant continued negotiations with respect to the type and availability of car wash equipment and sought to find financing of the equipment.
>
> 6. That in connection with the negotiations, defendant:
>
> (a) Contacted his bank;
>
> (b) Contacted the Capitol Goods Supply and Leasing Company of Salt Lake City; and
>
> (c) Contacted Equipment Leasing of California, at San Bernardino, California.
>
> 7. Defendant was unable to obtain from his bank or Capitol Goods Supply and Leasing Company the necessary financing.
>
> 8. Defendant was advised financing was available to him by Equipment Leasing Company of California subject to approval of de-

fendant's credit, acceptance by Chase Manhattan Bank, N.A., of New York, New York of appropriate documentation, including an executed lease acceptable to the bank. That no appropriate documentation, no prepared lease nor execution lease was submitted to Chase Manhattan Bank.

9. That a lease relating to the subject matter of negotiations was never submitted to the defendant for execution by him by any financial institution, the plaintiff or any leasing company.

To these findings appellant made no objection.

Waiver

In *Ahrendt v. Bobbitt*, 119 Utah 465, 229 P.2d 296 (1951) this Court recognized that a condition precedent to a contract could be waived. In that case, the assignee in a particular contract setting had a right to receive particular consideration but treated the contract as in effect without receiving consideration. By analogy a waiver of the condition precedent in this case could only be found if Mr. Rupp having a right to treat the contract as not obligating him until he secured financing went ahead and performed the contract without having secured the financing. The evidence in this case simply does not sustain a finding of such conduct. In 17 Am. Jur. 2d *Contracts* 392, it is stated:

Conditions precedent may be viewed by the party in whose favor they are made. The

> performance of a condition precedent may be waived, by the party in whose favor it is stipulated, either expressly or by implication resulting from his acts or conduct. *'Waiver,' when used in connection with the required performance of a condition, has its usual meaning of a voluntary and intentional relinquishment of a known right.* (Emphasis added).

In the instant case the findings of the Court and the evidence clearly indicate there was no intention on the part of Mr. Rupp to waive his right to select equipment or to secure financing before the contract would become binding. He submitted papers to one company to obtain financing and was refused. At the request of Thurmond, an effort to obtain financing through Equipment Leasing was made and the financing was never accomplished. At no time did Mr. Rupp ever indicate that he was willing to go forward with the transaction until appropriate financing had been secured. The appellant attempts to invoke the provisions of the agreement that indicate that the contract cannot be cancelled "after manufacture begins." However, this language which must be construed in harmony with other sections and against the appellant if ambiguous merely means that the contract after having become fully in effect cannot be cancelled. There was no effort made on Mr. Rupp's part to cancel the contract rather the contract never came to fruition since financing was never obtained. Under the facts of record, it cannot be said that there was a knowing and intentional waiver of the condition precedent by Rupp. It was

Thurmond who wanted the order evidenced by P-1 in order to start manufacturing. Although Rupp was anxious to get moving Rupp did not indicate he would purchase without financing.

Excused

The appellant contends that the condition precedent to respondent's liability under their agreement was excused by the conduct of respondent. The findings of the trial court demonstrate the substantial effort made by respondent to obtain financing. The appellant contends that respondent did not exercise good faith in his effort to obtain financing because he did not advance the $1000 requested by Equipment Leasing. Nothing could be further from the truth. The respondent submitted financial information to Capitol Goods and Leasing and was refused credit (R. 79). Thereafter at Wash-A-Matic's request, arrangements were made to obtain leasing financing through Mr. Martin of Equipment Leasing. Rupp supplied initial information. He always indicated a desire to go forward with the project. Martin of Equipment Leasing requested additional information from Rupp subsequent to the initial information provided. Rupp submitted the additional information (R. 146). Martin asked for an additional $1000; Rupp had already deposited $200 and his agreement required no more. Rupp didn't have $1000 cash and advised Martin of that fact and indicated he would see what he could do (R. 151). In the meantime, the 30 day credit commitment lapsed (Deposition p. 11). However, before any financing could

take place bank approval of the lease was necessary (Deposition p. 20), and it would be necessary that a new purchase order between Wash-A-Matic and Equipment Leasing be made out which was never done (Deposition p. 21). Wash-A-Matic and Equipment Leasing never did what was necessary to consummate the transaction. All parties dropped the possibility of financing when building approval was refused. Rupp, Thurmond and Martin all attended a hearing in an effort to overcome the building permit obstacle but could not do so (R. 142, 154).

The *Restatement of Contracts* § 295 provides:

> If a promisor *prevents* or *hinders* the occurrence of a condition, or the performance of a return promise, and the condition would have occurred or the performance of the return promise been rendered except for such prevention or hinderance, the condition is executed, and the actual or threatened nonperformance of the return promise does not discharge the promisor's duty, . . ." (emphasis added)

The evidence and findings of the Court in no way support a prevention or hinderance on the part of Rupp, rather they show an earnest effort on the part of Rupp to do what was necessary to go forward with the contemplated project. However, all parties to the transaction could not consummate the deal. In *Haymore v. Levinson*, 8 Utah 2d 66, 328 P.2d 307 (1958) this Court applied the principle of the restatement, but the facts showed a deliberate and wilful action by a party to pre-

vent the performance of a contract. The facts of this case and the findings of the Court show no comparable conduct.

Oral Contract

The appellant argues that if the written sales agreement is unenforceable because of a failure to meet the condition precedent that there was nevertheless an oral contract enforceable by the provisions of Section 70A-2-201(3)(a), Utah Code Annotated, 1953.

It should be noted that appellant did not plead an oral contract or plead for such relief in the alternative but rather plead and relied upon the written agreement between the parties. The Court made no findings on the matter and it appears that appellant is raising the matter for the first time on appeal. Even so, appellant's argument is not sustainable. The referenced section only comes into operation when there is "a contract which does not satisfy the requirements of subsection (1) of 70A-2-201." In the instant case, the parties did reduce their agreement to writing and under such a condition *that* contract governs the relationship between the parties. The statutory remedy only applies when the parties had not otherwise reduced their contract to writing. As is noted in Hawkland, Vol. 1, *A Transactional Guide to the Uniform Commercial Code,*

> The fact that a seller manufactures some special goods does not prove that the buyer requested him to do so. Of course, the excep-

> tion only deprives the buyer of the protection of the Statute of Frauds, and he can still defeat a fraudulent effort to thrust a non-existent agreement upon him by showing that no contract was made.

In effect ,the failure of the condition precedent means that no contract was in fact made.

Further, the Record does not support the conclusion that the goods were unique to Rupp's situation. Wash-A-Matic had two leads to sell the equipment but it did not meet what the potential customers wanted. Thereafter, the equipment was shipped back to the manufacturer (R. 100). This is not sufficient evidence of specially manufactured goods as would show special peculiarity to the respondent. See, *Lee v. Griffin*, 1 BEST & S 272 (1860).

POINT III

RESPONDENT IS NOT LIABLE TO APPELLANT FOR INCIDENTAL DAMAGES OR LOSS OF PROFITS.

Incidental Damages

The appellant contends that the respondent should be liable for incidental damages it incurred as an aggrieved seller. This would include the cost of warehousing the rejected car wash equipment and freight charges, § 70A-2-710, Utah Code Annotated 1953 provides for incidental damages, but only where they result from a

breach of contract. Since in the instant case there was no breach of contract by Rupp, appellant is not entitled to hold respondent liable for incidental damages.

Further, the appellant failed to prove incidental damages. In an effort to prove incidental damages appellant offered into evidence Exhibits 5 through 7-P. Contrary to appellant's assertion, the court ruled the Exhibits inadmissible. With reference to Exhibits 5 and 6-P, the Court sustained the objection on the ground of hearsay noting:

> THE COURT: I sustained the objection, but I'm certain that IML has copies of all the charges, if we have to we can get them. I will sustain it at this time. Maybe if you have anything to indicate that that is sufficient for damages of what they were charged I will listen to it on that basis.
>
> MR. DAVIES: I would appreciate, Your Honor, having an opportunity --
>
> THE COURT: I am not precluding you from making a further offer but at this time I will sustain the objection.

With reference to Exhibit 7-P the Court also sustained a similar objection stating:

> THE COURT: I in effect will sustain it, but I will reserve ruling. My indication is that it shouldn't be received as not the best evidence and being hearsay.

MR. WEGGELAND: Yes, Sir.

THE COURT: I would reserve ruling on it. If I'm wrong that leaves the burden upon Mr. Davies.

MR. DAVIES: That's correct, Your Honor. I understand that.

These exhibits were apparently prepared by Livingston, Inc. and there was no foundation offered further on the part of the appellant as to their preparation. Appellant did not further renew its offer of these evidentiary items. Under these circumstances, they cannot complain. The general rule is stated in 88 ALR 2d 12 at page 124 as follows:

> The quite generally prevailing rule deducible from the cases is that where evidence offered and objected to has been excluded conditionally or temporarily, it becomes incumbent upon the party who sought to introduce such evidence to renew his effort in that respect at a later, appropriate stage of the trial by offering the evidence again or at least by resuming a line of interrogation directed toward getting such evidence into the record; and if he fails to so actively renew his efforts to introduce the evidence he ordinarily will be precluded from contending on appeal that it was erroneously excluded or that there was error in the court's conditional or temporary ruling.

See also, *State ex rel Simms v. Collier*, 93 Idaho 19, 454 P.2d 56 (1969). The court having made a provisional ruling and the appellant having failed to thereafter make an appropriate offer of testimony, the appellant cannot claim error on appeal. See *Mace v. Tingey*, 106 Utah 420, 149 P.2d 832 (1944).

Further, the trial Court's ruling was clearly correct. Rule 63(13) Utah Rules of Evidence provides for the admission of business entries "if the judge finds that they were made in the regular course of a business at or about the time of the act . . . and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness." In the instant case, no foundational testimony was offered as to the preparation of the records or even to show that Livingston in fact prepared them. They were merely copies of matters sent to Wash-A-Matic. There was no showing that they were in fact business records kept in the regular course of business. The purposes of Rule 63(13) Utah Rules of Evidence are to leave it to the judge to determine whether the sources of information upon which the records are based reflect trustworthiness. Comment, Rule 63(13) Uniform Rules of Evidence in *Jones, Evidence*, 6th ed. Vol. 4 page 420. Invoices that do not have sufficient foundation as to their authenticity are not properly admitted. *United States v. Rappy*, 157 F.2d 964 (2nd Cir. 1946); Annotation 21 ALR 2d 773. In the latter Annotation, it is noted at page 776:

> While it is well settled that these statutes should be liberally interpreted so as to do away with the anachronistic rules which gave rise to their need and at which they were aimed, there must apparently be some verification and authentication to make documentary evidence sought to be introduced thereunder admissible.

See also, Polasky and Paulson, *Business Entries, From Common Law to The New Uniform Rules of Evidence (With a Glance at The Utah Development)* 4 *Utah Law Review* 327 (1955). Consequently, appellant's claim for incidental damages must be rejected.

Loss of Profits

Respondent acknowledges that under Section 70A-2 708(2) Utah Code Annotated, 1953, that loss of profits may be an appropriate measure of damages in some cases. However, before the appellant would be entitled to loss of profits it would be necessary that there be a breach of binding contract. Since the evidence supports the trial Court's determination that there never was an obligation on the part of the respondent to accept goods from the appellant the appellant is not entitled to any damages for loss of profits.

CONCLUSION

The evidence when viewed in a light most favorable to the trial Court's ruling clearly supports the Findings

and Judgment of the trial Court. The arguments raised by the appellant on appeal, some for the first time, in no way justify reversing the Findings and Judgment of the trial Court. This Court should affirm.

Respectfully submitted,

GERALD G. GUNDRY
610 East South Temple
Salt Lake City, Utah 84102
Attorney for Respondent