

1995

John Jay Donohue v. Jean Claude Mouille and Vern E. Krogman : Reply Brief

Utah Court of Appeals

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DOCKET NO. 95-0517-CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

JOHN JAY DONOHUE,	:	
	:	Third District Court
Plaintiff & Appellant,	:	Civil No. 930905429CN
	:	Priority No. 15
vs.	:	Appellate Court No. 95-0517-CA
	:	
JEAN CLAUDE MOUILLE and	:	
VERN E. KROGMAN,	:	Appeal from Judgment in the
	:	Third District Court
Defendants & Appellees.	:	Honorable Frank G. Noel

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS

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ARGUMENT

Point One

THE DISTRICT COURT ERRED IN FINDING THAT THE PLAINTIFF AND THE DEFENDANTS ENTERED INTO AN ORAL AGREEMENT TO SELL THE 1986 KENWORTH TRACTOR TO DEFENDANT KROGMAN

A. Standard of Review.

While the Defendant concurs with the Plaintiff's statement of the standard of review, the Defendant improperly suggests that an additional standard of review exists in this case which prevents this Court from overturning the Decision of the trial court. The Defendant suggests in his brief at page 15 that this Court can not overturn the District Court's decision because only the District Court could determine the credibility of the witnesses. The Defendant is wrong. As stated in the Plaintiff's Brief, page 23-24, the standard of review for reviewing a district court's findings of fact is that they may not be set aside unless clearly erroneous and "due regard" must be given the opportunity of the trial court to judge the credibility of the witnesses. Cambelt Int' Corp. v. Dalton, 745 P.2d 1239, 1242 (Utah 1987). Whether a legal oral contract existed is a question of law which is reviewed for correctness. John Deere Co. v. A & H Equipment, Inc., 876 P.2d 880, 883 (Utah App. 1994).

In this case, however, this court is not confronted with a credibility question. Even if one discounts or ignores all of the testimony of the Plaintiff, there remains no evidence to find that a contract existed between the Plaintiff and the Defendant Krogman to sell the 1986 Kenworth to Defendant The Defendant admits in his brief at page 15 that the District Court's findings of a contract were not based upon the testimony of the Plaintiff. Krogman. Instead, the Defendant asserts that the District Court's findings of a contract were based upon the testimony of Mr. Mouille, the Defendant Krogman, and John K. Rice. Accordingly, credibility between the Plaintiff and the Defendant is not at issue within the standard of review. Therefore, this court should review the evidence to determine whether the findings support the legal conclusion that a contract existed. John Deere Co., supra.

B. Defendant's Statement of Facts.

The Plaintiff contends that many of the Defendant's Statement of Facts are misleading because they are taken out of context from the trial testimony. The Plaintiff contends that the more accurate and complete recitation of facts are set forth in the Plaintiff's Brief because the Plaintiff was charged with

marshaling the evidence and he complied with this requirement.¹ However, the Plaintiff will only object to three of the Defendant's Statement of Facts and label them bald assertions.

The Defendant's Statement of Facts, No.'s 10, asserts as a fact that "Plaintiff Donohue and Defendant Krogman entered into a verbal agreement..." This is purely a conclusion of Defendant's counsel. No witness testified any "verbal agreement" was entered into during this meeting. Instead, both Defendants testified that these discussions were mere negotiations. (Transcript, p. 130 and p. 193-194). Both Defendants testified they understood during this meeting that the discussions were conditioned upon signing a subsequent written agreement, which never occurred. (Id., p. 129-131 and p. 193-194). Accordingly, Defendant's Statement of Fact No. 10 is nothing more than a bald assertion.

The Defendant's Statement of Fact No. 11 is likewise a mere assertion. For the same reasons set forth above, this was nothing more than a mere discussion. Further, Defendant Krogman did not testify that the Plaintiff would provide him a title--only that he would receive a title once he paid

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The Defendant has raised no concern or objection concerning the adequacy of the Plaintiff's marshaling of the evidence.

Mouille the \$1000.00 per month payments. (Transcript, p. 156).

The Defendant's Statement of Fact No. 19 is highly misleading. In fact, Mr. Rice testified that he had been approached by the Defendant Mouille to prepare two new agreements. (Transcript Supplement, p. 4). He prepared the documents and faxed them to Mr. Mouille. (Id. P. 7 and 9). He testified that the Plaintiff did not have any input into the drafting of the documents. (Id., p. 8). He then subsequently discussed only the assignment of the Lease Agreement with the Plaintiff by telephone in only a cursory manner:

“A. I had prepared two documents, one of which I hadn't even discussed with Mr. Donohue yet.

Q. You discussed this assignment of lease with him?

A. Just by mention, yes, sir.

Q. You told him the terms and conditions of it?

A. No.” (Id., p. 8).

As to the Plaintiff's “willingness to enter into the agreement”, as asserted by the Defendant, Mr. Rice testified that the Plaintiff only committed to reviewing the documents once they had been sent to him for review:

Q. Would it be accurate to say, Mr. Donahue had never seen exhibit number 11 nor the lease agreement that you just described?

A. That is accurate.

Q. Ok. Is it accurate that Mr. Donahue merely indicated that he would review and consider it once you talked with him on the telephone?

A. That's correct. (Id., p. 9).

There is a substantial difference between committing to review a document and committing to agree to a document. The Defendant's Statement of Fact that the Plaintiff told Mr. Rice that he was willing to enter into the alleged agreement is therefore highly misleading and improper.

C. No Meeting of the Minds

The Defendant agrees that there must be a meeting of the minds in order for a contract or novation to be enforced. Brief of Appellee, p. 18. The Defendant also agrees that the proof of an oral contract and its terms must "must be clear, definite, mutually understood, and established by clear, unequivocal and definite testimony, or other evidence of the same quality." Holmgren Brothers, Inc. v. Ballard, 534 P.2d 611, 614 (Utah 1975) and Brief of "Appellee, Id. This is particularly appropriate where the Lease Agreement between the Plaintiff and Mouille, Exhibit P-3, contains a paragraph, Paragraph 16, which requires any assignments to be in writing. The Defendant attempts to meet this rigorous standard by attempting to convert the meager discussions between the parties into a binding agreement and by ignoring the other arguments raised by the Plaintiff in his Brief to this Court on this issue.

The Plaintiff does not dispute the fact that the parties engaged in

discussions over the 1986 Kenworth Tractor. However, these discussions were never consummated into any form of a verbal agreement, much less a written agreement. The Defendant has completely failed to address the points raised by the Plaintiff.

First, the Defendant fails to explain or rebut the undisputed fact that the conversations at Mouille's Mother's house were considered by both Defendant Krogman and Mouille as "mere negotiations". (Testimony of Mouille, Transcript, p. 130). (Testimony of Krogman, Transcript, p. 193-194). Negotiations do not constitute a binding agreement. Discussions also do not constitute a binding agreement. Otherwise, no reasonable person would engage in any discussion concerning a transaction for fear that someone would assert an agreement existed by reason of the discussions alone. Clearly more is required.

Second, the Defendant fails to explain or rebut the undisputed fact that Defendant Krogman and Mouille knew and understood during these discussions that any agreement was conditioned upon the signing of a subsequent written document, which never occurred. In fact, Mouille testified to this fact in response to a question from the District Court Judge himself! (Testimony of Mouille, Transcript, p. 131). Defendant Krogman also testified

that he understood that the talks were conditioned upon a written document. (Testimony of Krogman, Transcript, p. 193-194). Further, Defendant Mouille testified that the Plaintiff *did not agree* at Mouille's Mother's house that he would consent to the sale even when the written documents were prepared and presented to him. (Testimony of Mouille, Transcript, p. 130). Clearly, these discussions did not result in any meeting of the minds.

Third, the Defendant fails to adequately explain or rebut the undisputed fact that the Lease Agreement between the Plaintiff and Mouille, Exhibit P-3 or Addendum D to Brief of Appellant, was never canceled or modified. The Defendant admits this undisputed fact in his Brief, p. 26. And, both Mouille and Krogman testified at trial that it was never canceled or modified. (Testimony of Mouille, Transcript, p. 130 and Testimony of Krogman, Transcript, p. 192-193). The Defendant attempts to explain this conundrum by asserting, without any evidence, that a separate agreement was somehow created between the Plaintiff and Defendant Krogman. Brief of Appellee, p. 26. Not only does the Defendant fail to cite any record testimony for this bald assertion, it makes absolutely no sense. Why would the Plaintiff enter into

two agreements for the same vehicle?² Why would Mouille want Plaintiff to enter into a separate sales agreement with Krogman if Mouille was still on the hook on the Lease Agreement? The Defendant's argument is nonsensical. If the Lease Agreement between the Plaintiff and Mouille was never canceled or modified, then the Plaintiff had every right to declare a violation and repossess his vehicle.

Fourth, the Defendant fails to adequately explain or rebut the testimony of John K. Rice. In order to avoid the damning testimony of Mr. Rice, the Defendant had to mischaracterize his testimony before this court. The Defendant asserts in his Brief at page 21-22 that Mr. Rice's testimony confirmed the alleged verbal agreement between the parties. The Defendant further asserts that Mr. Rice drafted a written agreement to "memorialize" the verbal agreement between the parties. Such is not true.³ Mr. Rice was

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However, it does make sense to find that two agreements existed in this case. One between the Plaintiff and Mouille, which is the Lease Agreement, Exhibit P-3, and one between Mouille and Defendant Krogman which Mouille violated by again making promises to Krogman that he could deliver title when he couldn't. This scenario is consistent with the evidence in this case of other similar verbal agreements between Mouille and Krogman for the purchase and sale of tractors where Mouille took Krogman's money and couldn't deliver.

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Both Defendant Krogman and Mouille failed to recall any meeting with Mr. Rice or asking him to prepare any documents. (Transcript, p. 132 and 193).

initially contacted by Mr. Mouille on March 24, 1992 (some 60-90 days after the alleged conversation at Mouille's Mother's house) and Mouille told Mr. Rice what Mouille wanted in the agreements. (Transcript Supplement, p. 4). Mr. Rice testified that he drafted two agreements without any discussion with the Plaintiff. (Id., p. 8). Mr. Rice drafted an "Assignment of Lease", Exhibit P-11, which contained a consent clause for the signature of the Plaintiff. He also drafted a new lease agreement between the Plaintiff and Haul Away Transport, Inc., which was Mouille's new corporation. (Id.) Mr. Rice then faxed the documents to Mouille on March 31, 1992 for Mouille's review and approval. (Id., p. 8 and 9). Mr. Rice testified that he never saw the documents again. (Id.). Mr. Rice testified that he had a telephone conversation with the Plaintiff a week or two after March 31, 1992. (Id., p. 7). Mr. Rice testified that he only discussed the assignment and did not discuss the other new lease agreement between the Plaintiff and Haul Away Transport, Inc. (Id., p.8). Mr. Rice testified that he *did not* discuss or inform the Plaintiff of the terms or conditions of the assignment. (Id.). In reply, the Plaintiff merely replied that he would review the document when it was ready for his signature and consider them. (Id., p. 8 and 9). Mr. Rice did not discuss any of the details of any alleged oral agreement between the Plaintiff and Defendant Krogman.

Nor did Mr. Rice confirm that any agreement existed. Instead, Mr. Rice's testimony confirmed the fact that all of the parties believed that no agreement existed unless it was in writing and signed by the Plaintiff, which never occurred.

No meeting of the minds occurred in this case. The Defendant's arguments to the contrary are undermined by clear, indisputable, and positive evidence which the Defendant has failed to rebut or explain away.

D. Manifestations of Assent

The Defendant asserts that this Court should ignore the fact that no written agreement or written consent was signed by the Plaintiff and should find the meager discussions between the parties sufficient because the Plaintiff "manifested" his assent to the Defendant's asserted verbal agreement in several alleged ways. The Defendant's arguments are without evidentiary support and are wholly devoid of merit.

The Defendant claims the Plaintiff's assent was manifested by "allowing Defendant Krogman to drive the Kenworth truck for 16 months." Brief of Appellee, p. 25. Again the Defendant is misleading the court. Following the discussion at Mouille's Mother's house in January, 1992, the Defendant Krogman had no further contact with the Plaintiff at all until

September 21 or 23, 1993. (Testimony of Krogman, Transcript, p. 196). All of Krogman's contacts were with Mouille during this period of time. The undisputed evidence was that the Plaintiff did not know that Krogman had the vehicle. (Testimony of Plaintiff, Transcript, p. 63). In fact, the Plaintiff thought that Mouille was continuing to use the Kenworth at Haul Away Transport, Inc.⁴ (Id., p. 35). Therefore, the Plaintiff did not "allow" the Defendant to use the vehicle.

The Defendant claims the Plaintiff's assent was manifested by Mouille's telephone call to the Plaintiff requesting a payoff figure on the note to Associates. Not true. Mouille did not testify that he was calling for anyone other than himself.

The Defendant claims the Plaintiff's assent was manifested by the fact that the Plaintiff did not make any payments to Associates on the vehicle and that the Plaintiff did not pay any tractor insurance, taxes, licenses, etc., during the period the alleged agreement was in place. Again the Defendant is misleading the Court. Under the Lease Agreement between the Plaintiff and

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Indeed, there would be no way for the Plaintiff to know that Defendant Krogman was exercising any individual control over the vehicle. Defendant Krogman drove the vehicle for Mouille for almost a year prior to the alleged oral agreement. (Testimony of Mouille, Transcript, p. 89-90). By all appearances nothing had changed.

Mouille, Exhibit P-3, which was admittedly never canceled or modified, the Plaintiff was not obligated to pay any of these items. This was Mouille's responsibility.

Finally, the Defendant claims that the Plaintiff's assent was manifested by his failure to demand either the \$500.00 payments or the return of the vehicle from Mouille. The Plaintiff testified he didn't do so because he and Mouille had been long term friends, because he knew Mouille was in financial trouble and needed to support a large family, and because he believed Mouille would ultimately pay the amounts. (Testimony of Plaintiff, Transcript, p. 35). Indeed Mouille testified to the same effect, "He knew I would honor it." (Testimony of Mouille, Transcript, p. 108).

The Defendant fails to explain away or rebut the undisputed conduct of the parties after the alleged oral agreement was formed which demonstrates no assent. The Defendant failed to explain why all of his contacts after the alleged oral agreement were with Mouille and not the Plaintiff, why the Defendant contacted Mouille for the payoff and not the Plaintiff, why the Defendant initially demanded title from Mouille and not the Plaintiff, or why Mouille sent \$505.00 to Defendant Mouille on August 30, 1993 so that the Defendant could return the Kenworth to the Plaintiff, as demanded by the

Plaintiff. The Defendant also failed to explain away or rebut the fact that the Defendant claimed his agreement was with Mouille, and not the Plaintiff, in the Defendant's adversary complaint in the United States Bankruptcy Court against Mouille. This subsequent conduct clearly manifests no assent to any discussions which may or may not have occurred at Mouille's Mother's house.

Point Two
THE DISTRICT COURT ERRED IN CONCLUDING THAT
THE ALLEGED ORAL AGREEMENT WAS NOT BARRED
BY UTAH'S STATUTE OF FRAUDS

The Defendant asserts that Utah's Statute of Frauds doesn't apply due to part performance by Defendant Krogman. While the Plaintiff agrees with this legal principle, the facts do not support the concept. Here, the undisputed evidence was that Mouille and Krogman engaged in a work-credit system and Mouille continued to pay Associates as he had in the past. There was no evidence that the Plaintiff was aware that Mouille was paying Associates pursuant to any work-credit system between Mouille and Krogman. As the Supreme Court has noted, in order for part performance to remove a contract from the Statute of Frauds, the performance must be "clear and definite."

Martin v. Scholl, 678 P.2d 274, 275 (Utah 1983).

In order to avoid this requirement, the Defendant asserts that Mouille

was the Plaintiff's agent. (Brief of Appellee, p. 30). However, there was no evidence, nor any argument made, in the District Court to support this position. The District Court did not make any finding to this effect either. Indeed, the evidence suggests that Mouille was acting in his own self interest. Whose interests was he serving when he pocketed Krogman's \$5,763.29 which was sent by Krogman in good faith to pay off the balance to Associates?

Point Three
THE DISTRICT COURT ERRED IN DISMISSING
PLAINTIFF'S COMPLAINT

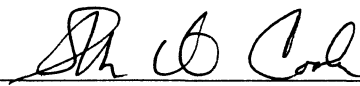
The Defendant does not dispute the Plaintiff's argument that this Court may remand this case to the District Court with instructions to enter a judgment for the Plaintiff in the amount of \$17,390.86 if this Court rules that no enforceable verbal agreement existed between the Plaintiff and Defendant. The only defense the Defendant has to the Plaintiff's claims is that of the alleged verbal agreement and, if that fails, the Plaintiff is entitled to a judgment without any further hearing.

CONCLUSION

The District Court erred in finding that an oral agreement existed and it erred in dismissing the Plaintiff's Complaint. The Plaintiff respectfully

requests this Court to reverse the District Court and to remand with instructions to enter judgment in favor of the Plaintiff and against the Defendant Krogman for \$17,390.86, interests, and costs. The Plaintiff respectfully requests his costs on appeal.

DATED this 16 day of October, 1995.



STEPHEN W. COOK
Attorney for Appellant

CERTIFICATE OF SERVICE

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

STEPHEN W. COOK, being first duly sworn, says:

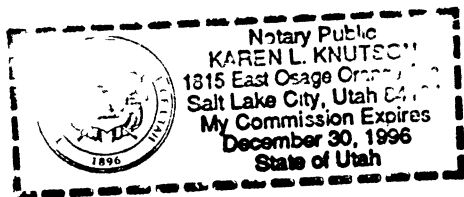
That he is the attorney for Plaintiff/Appellant herein; and that he served the attached BRIEF OF APPELLANT upon:

Randall L. Skeen
SKEEN & RASMUSSEN
Attorney for Defendant-Appellee (Krogman)
4659 South Highland Drive
Salt Lake City, Utah 84117

by placing a true and correct copy thereof in an envelope and depositing the same, sealed, with first-class postage prepaid thereon, in the United States Mail at Salt Lake City, Utah on the 16 day of October, 1995.


STEPHEN W. COOK

SUBSCRIBED AND SWORN to before me this 16 day of October, 1995.




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