
APPELLATE COURT
OF THE
STATE OF CONNECTICUT

A.C. 42602

**MERIBEAR PRODUCTIONS, INC. d/b/a MERIDITH BAER and
ASSOCIATES**

v.

JOAN FRANK, ET AL.

REPLY BRIEF OF DEFENDANTS-APPELLANTS

To BE ARGUED BY:

MICHAEL S. TAYLOR

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MICHAEL S. TAYLOR
BRENDON P. LEVESQUE
**HORTON, DOWD, BARTSCHI &
LEVESQUE, P.C.**
90 GILLETT STREET
HARTFORD, CT 06105
JURIS No. 038478
PHONE: (860) 522-8338
FAX: (860) 728-0401
MTAYLOR@HDBLFIRM.COM

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REPLY FACTS

The trial court expressly found that “George Frank, also known as Andy Frank, is not a party to the staging agreement.” (MOD at 2; A49). The plaintiff has never challenged that finding on appeal. Nevertheless, the plaintiff claims in its brief that “Mr. Frank also was a party to the contract” (Pl. Br. at 2) and makes the “fact” of George Frank’s status as a “party” to the Agreement a centerpiece of the plaintiff’s claims on appeal. (See, e.g., Pl. Br. at 1 (the “Franks” breach of the Agreement forms the basis of the underlying dispute), and at 10 (George Frank “expressly consented to the jurisdiction of the California Courts by knowingly signing a Contract that contained a forum selection clause.”))

In making its arguments, the plaintiff does not attempt to reconcile or explain the trial court finding with which they directly conflict. The plaintiff does not address the conflict between its argument and the trial court’s decision, or remedy the inherent inconsistency it creates. Instead, the plaintiff simply ignores the trial court’s decision. Nowhere in its brief does the plaintiff even mention the court’s finding that George Frank was not a party to the Agreement. Reading the plaintiff’s brief in isolation, one would believe that the idea of George Frank not being a party to the Agreement was rendered by the defendants from whole cloth.

While ignoring the trial court, the plaintiff also repeatedly relies on conclusions reached in the prior Appellate Court opinion in this case. (See Pl. Br. at 7, 8, 13). But that opinion now has been reversed by order of the Supreme Court, 328 Conn. 709 (2018), and the plaintiff’s reliance on it is therefore misplaced.

Similarly, the plaintiff claims in its brief that the trial court found in plaintiff’s favor on the breach of contract count (Count 2) “as to both Joan and George Frank.” (Pl. Br. at 4). This statement is patently false. In its opinion, the Supreme Court expressly, and conclusively, found that the trial court had not ruled on Count 2 with respect to George Frank. 328 Conn. at 725. The plaintiff subsequently withdrew that count following remand. As a

result, the trial court has made no finding and is not required to make any finding on Count 2 with respect to George Frank.

Finally, the plaintiff claims, as it has done throughout the appeals process, that it made a conversion claim at trial. (Pl. Br. at 3). This point is relevant because, as explained in the defendants' primary brief, damages intended to make the plaintiff whole under the contract would have totaled roughly \$68,000, rather than the hundreds of thousands the plaintiff was awarded. A review of the plaintiff's Amended Complaint (A21–A28) reveals only a claim that the defendants refused to make payment under the terms of the contract and the plaintiff was harmed thereby. There was no provision in the Agreement for liquidated damages, no claim for repossession of the furniture, and no claim for conversion.

REPLY ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT HELD THE CALIFORNIA COURT PROPERLY EXERCISED PERSONAL JURISDICTION OVER GEORGE FRANK

There is no dispute that a single credit card transaction guaranteeing \$19,000 to Meribear, a California-based company, was the sole basis for the trial court's determination that the California court's exercise of personal jurisdiction over George Frank was proper. The court stated, "George Frank admits that he signed a guarantee of the staging agreement with a company that has a principal place of business in California and that provides that Los Angeles is an appropriate forum." (MOD at 11–12 n.4; A58–59).

In their main brief, the defendants asserted that a simple guarantee agreement was insufficient to establish minimum contacts for a California court to exercise personal jurisdiction over a nonresident defendant. In support of this argument, the defendants cited *Sibley v. Superior Court of Los Angeles County*, 16 Cal. 3d 442, cert. denied 429 U.S. 826 (1976), in which the California Supreme Court held that a "guaranty transaction [is] not a

sufficient basis on which to sustain personal jurisdiction over the nonresident guarantor.” *Sibley*, 16 Cal. 3d at 444 (1976).

The plaintiff first attempts to undercut the importance of *Sibley* by noting that it was declined to be extended by *Automobile Antitrust Cases I and II*, 135 Cal. App. 4th 100 (2005). (Pl. Br. at 17). This argument fails for at least two reasons.

To begin with, the facts of this case fit snugly within *Sibley* and no expansion or extension of its rationale is required. As is, *Sibley* is fatal to the plaintiff’s assertion that the California court had personal jurisdiction over George Frank. In *Sibley*, a nonresident party executed a guaranty agreement outside the state of California and never traveled to California in connection with that agreement. The court below specifically held that George Frank was not a party to the Agreement. (MOD at 2; A49). George Frank’s only tie to the state of California is a credit card authorization for \$19,000, which purported to be the initial payment under the Contract his wife had entered into with the plaintiff. *Id.* This alone was the basis for the trial court’s determination that the California court had specific jurisdiction over Mr. Frank, and this fact aligns this case squarely with *Sibley*.

Moreover, the plaintiff is unable to explain how *Automobile Anititrust* helps its position. It is true that the court there failed to extend *Sibley*, but it did so on an issue tangential to the issue in this case. The court there stated, “to the extent that this issue turns on the trial court’s factual findings on conflicting evidence, we note that in certain circumstances, a trial court may reasonably infer that an act done outside of California may have been intended to cause and did cause an effect in this state. (*Sibley v. Superior Court, supra*, 16 Cal.3d at p. 446, 128 Cal.Rptr. 34, 546 P.2d 322.) **However, a trial court cannot be compelled to draw an**

inference of jurisdiction if the facts are conflicting on this issue. (See pt. III.D., *ante.*)” (Emphasis added.) *In re Auto. Antitrust Cases I & II*, 135 Cal. App. 4th 100, 123 n.14 (2005).

Automobile Antitrust thus does not expand a court’s ability to exercise personal jurisdiction over acts done outside of California, as was discussed in dicta in *Sibley*, but actually gives courts greater authority to *refuse* to draw an inference of jurisdiction. The plaintiff’s assertion that *Automobile Antitrust* somehow bolsters its case is without merit. The portion of *Sibley* that *Automobile Antitrust* declined to extend is, read most charitably, simply irrelevant. At worst (for the plaintiff), it can be read to grant California courts additional leeway in declining to exercise jurisdiction.

Finally, *Automobile Antitrust* was a class action brought against four nonresident foreign defendants: Honda Motors Co., Ltd of Japan; Volkswagen AG of Germany; Nissan Motor Ltd. Of Japan (Nissan); and the Canadian Automobile Dealers’ Association. *Id.* at 105. The trial court concluded that it lacked personal jurisdiction over the defendants and the plaintiff appealed. *Id.* A court’s personal jurisdiction analysis of three international car companies who sell millions of cars all over the world is different than one involving a man who uses his credit card to purchase a service from a California company. The analysis in *Automobile Antitrust* hinged on whether the plaintiffs could offer some proof that the parent auto companies were involved in the conspiracy within the state as alleged by the plaintiffs. *Id.* at 118. There is nothing of the sort here and the plaintiff’s citation to *Automobile Antitrust* is of no value in this case.

The plaintiff next attempts to distinguish *Sibley* from this case on its facts. (Pl. Br. at 17). It claims that the guarantor in *Sibley* was guaranteeing the performance of a commercial venture and obtained no direct benefit from activity in California. (*Id.*) By contrast,

presumably, though he was not a party to the contract for staging services, Mr. Frank stood to benefit from the services offered by Meribear.

First, the house was owned by Joan Frank alone. Second, as the defendants noted in their main brief, the plaintiff's construction would subject anyone who made a credit card purchase—presumably for something of value, since a credit card purchase for no value would be pointless—to potential litigation on the other side of the country. This cannot be the rule.

Indeed, the plaintiffs do not seriously argue that the guarantee alone was a proper basis for jurisdiction. Instead, they repeatedly suggest that, because George Frank was a *party* to a contract with a California-based company, California properly could exercise jurisdiction over him. Because he was unquestionably *not* a party to the Contract, as the trial court held, the contract cannot form a proper basis for jurisdiction. Even if he had been a party to the Contract, it is not at all clear—and the plaintiff has not demonstrated—that being a party to a contract with a California company, where all services, discussion and negotiations take place in Connecticut, is sufficient to confer jurisdiction in California. But this Court does not have to answer that latter question, because George Frank signed only a guarantee, and that is not sufficient.

Further, *Sibley* cited to *Belmont Industries, Inc. v. Superior Court*, 31 Cal. App. 3d 281 (1973), where a nonresident contracted with a California corporation for drawings utilized in fabricating steel frameworks. *Id.* at 288. The California court held that “it is petitioner's activity that must provide the basis for jurisdiction. We find no purposeful activity by petitioner from which it can be inferred that it intended to conduct business in California.” *Id.* This, despite the fact that Belmont had obviously gained something of value from the resident company

and had engaged in extensive negotiations. The line the plaintiff attempts to draw therefore is not recognized as being determinative of whether a California court may legitimately exercise personal jurisdiction over a nonresident party. (The plaintiff also notes that there was a dissent in *Sibley*, but the plaintiff does not explain—and the defendants cannot discern—what weight could possibly be placed on a dissent in a California case that has been recognized as good law in that state for nearly forty years).

The plaintiff also attempts to use George Frank's affidavit in earlier litigation to suggest that he was a party to the Agreement. (See Pl. Br. at 11). More specifically, George Frank signed an affidavit stating that "On or about March 13, 2011, we entered into a written contract, [The Contract], setting forth the terms of our agreement."

It is not clear what this statement means, and it is certainly possible that George Frank was simply attempting to facilitate a joint claim against the plaintiff by him and his wife in an earlier litigation (one that undoubtedly would have been defended with the argument that he was not a party to the Contract). Mr. Frank's ambiguous statement about the parties to the Contract is irrelevant, however, and the plaintiff's attempt to introduce this parole evidence is improper.

Neither the plaintiff nor the defendants have ever claimed that the terms of the Agreement are unclear or ambiguous. Indeed, the facts about the Agreement are largely undisputed. There is thus no need for interpretation beyond the plain meaning of the words used. Parole evidence "offered solely to vary or contradict the written terms of an integrated contract is, therefore, legally irrelevant. When offered for that purpose, it is inadmissible not because it is parole evidence, but because it is irrelevant." *Alstom Power, Inc. v. Balcke-Durr, Inc.*, 269 Conn. 599, 609 (2004). Because the plaintiff concedes that this was an

integrated contract, parole evidence has no place in this Court's interpretation of the parties' intent.

II. THE HSSA APPLIES TO THE CONTRACT

The question presented by this issue is one of first impression, but its analysis is relatively straightforward. First, either the language in General Statutes § 42-134a(5), which states that a "home solicitation sale" does not include a transaction "pertaining to the sale or rental of real property" is ambiguous or it is not. The defendants contend that the language refers only to the sale or rental of actual real estate. The plaintiff contends that it applies to any sale of any goods or services that might be used in conjunction with the sale of real estate.

The Court must decide whether only one of these constructions is reasonable, and apply the unambiguous statute accordingly; or that both are reasonable, and then decide which of the two reasonable constructions most closely meets the apparent legislative purpose. The ultimate question is whether the legislature intended to exclude only those sellers who were actually selling real estate, or intended more broadly to exclude anyone selling anything that might have some relation to the sale of the property.

The plaintiff spends considerable time in its brief on side arguments that are irrelevant to these central questions. For example, the plaintiff claims that the Franks contacted Meribear and asked for a proposal to stage the house, apparently suggesting that this conduct brings the Agreement outside the scope of a home solicitation sale. (Pl. Br. at 23). But several pages earlier, the plaintiff cites the language of the statute, which provides that a home solicitation sale includes proposals made "in response to or following an invitation by the buyer." (Pl. Br. at 18). So, the inference suggested by the plaintiff is baseless.

The plaintiff also insists throughout its brief that the purpose of the Agreement was to facilitate the sale of the Franks' property. But the defendants have never challenged this point and do not dispute that the staging services were intended by both parties to facilitate the sale of the home. By raising this point, the plaintiff simply begs the question that is at the heart of this appeal: whether the HSSA exclusion applies only to the transfer of real property, or applies to the sale of ancillary goods and services, like staging services, that undisputedly are intended to facilitate property sales. The plaintiff's insistence on this point brings us no closer to answering the relevant question.

The HSSA applies to door-to-door sales of goods and services, but not real estate. There is no exception for particular categories of goods and services, and creating one would undermine the original and most important purpose of the statute. The HSSA was intended to create strict requirements to ensure that homeowners were not susceptible to predatory home solicitation sales. Under the plaintiff's construction, for example, a lawn care company could make a home solicitation sale on Day 1—when the property owner intended to remain in her home—and the lawn care company would be bound by the statute, including the obligation to provide notice of the buyer's right to cancel the agreement. But if the lawn care company returned to make exactly the same sale on Day 2—when the property owner had decided to sell the home and also decided that the lawn should be trimmed to make the home more attractive to potential buyers—then the statute and its protections would not apply, even though the conduct of the lawn care company remained the same in both instances. Because the point of the statute is to regulate conduct, the purchaser's intent with regard to using the product cannot be determinative. (The plaintiff never argues that the Agreement otherwise meets the requirements of the HSSA).

Connecticut amended the HSSA in 1976 to conform to the Federal Trade Commission regulations governing door-to-door sales. (A148). The legislative history of the federal act suggests that staging services were not contemplated as being excluded from the protections of the Act. (A149). The legislative history specifically contemplates that transactions similar to the provision of staging services, such as when a consumer engages a real estate broker to sell his home, “may fall within the class of transactions to which the rule would apply.” Federal Register, V. 37, No. 207 p. 22948 – Thursday, October 26, 1972; (A149).

The plaintiff does not attack this central premise, other than to call the legislative history produced by the defendants “minimal.” The plaintiff produces no legislative history of its own, because there is none that supports its view, but relies instead on the argument that the trial court’s broad interpretation of the language “pertaining to the sale or rental of real property,” is the only possible interpretation. As defendants explained in their primary brief, the language of the HSSA can be read to exclude only transactions for real property, covering all other home solicitation sales, including transactions closely related to the sale or rental of real property, such as broker services. Because the language is susceptible to at least two reasonable interpretations, the plaintiff’s argument must fail.

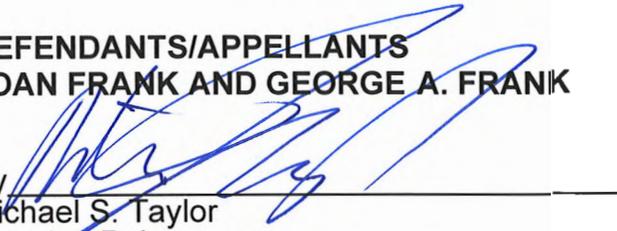
Moreover, the defendants’ construction offers clarity to those who are obligated under the statute. The trial court’s construction bases the statutory protections on the *use* to which the consumer intends to put the goods. But there is no mechanism to guarantee that any door-to-door seller necessarily will be aware of the use the purchaser intends to make of the purchased goods. Perhaps the seller will share that information, perhaps not. There certainly is no means for a seller to require that sort of disclosure. Under the plaintiff’s construction, without knowing the intended use, the seller will not know whether her conduct is or is not

governed by the HSSA. This uncertainty is eliminated if the statute turns on the *nature* of the thing being sold, rather than on the *use* the purchaser intends to make of it.

CONCLUSION

WHEREFORE, for the above stated reasons and those set forth in the defendants' primary brief, the defendants urge this Court to reverse the judgment of the trial court and direct that judgment enter for the defendants.

**DEFENDANTS/APPELLANTS
JOAN FRANK AND GEORGE A. FRANK**

By 
Michael S. Taylor
Brendon P. Levesque
HORTON, DOWD, BARTSCHI & LEVESQUE, P.C.
90 GILLET STREET
HARTFORD, CT 06105
JURIS NO. 038478
PHONE: (860) 522-8338
FAX: (860) 728-0401
MTAYLOR@HDBLFIRM.COM

CERTIFICATION

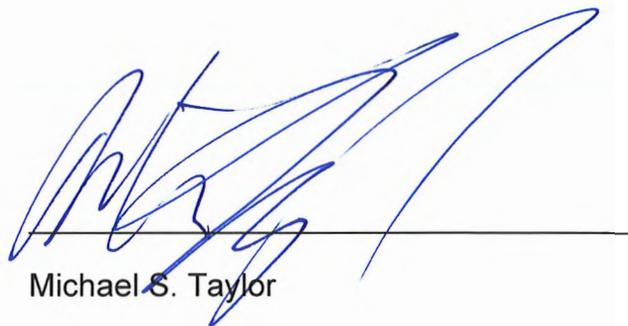
Pursuant to Practice Book § 62-7(b), I hereby certify that: (1) a copy of the brief was emailed on February 14, 2020, to each counsel of record listed below; (2) the brief does not contain any names or personally identifiable information that is prohibited from disclosure or any such information has been redacted; and (3) the brief and appendix comply with all applicable rules of appellate procedure.

Pursuant to Practice Book § 67-2(g), I hereby certify that: (1) a copy of the electronically submitted brief was emailed on February 14, 2020, to each counsel of record listed below; and (2) the electronically submitted brief does not contain any names or personally identifiable information that is prohibited from disclosure, or any such information has been redacted.

Pursuant to Practice Book § 67-2(i), I hereby certify that: (1) in compliance with Practice Book § 62-7, a copy of the brief was sent on February 14, 2020 to each counsel of record listed below; (2) the briefs being filed with the appellate clerk are true copies of the brief submitted electronically pursuant to Practice Book § 67-2(g); (3) the brief does not contain any names or personally identifiable information that is prohibited from disclosure or any such information has been redacted; and (4) the brief complies with all provisions of Practice Book § 67-2.

Anthony J. Labella
Ury & Moskow, LLC
883 Black Rock Turnpike
Fairfield, CT 08625
(203) 610-6393
(203)610-6399 – fax
anthony@urymoskow.com

Christopher Charles Vaughn
160 Fairfield Woods Road, Suite 14
Fairfield, CT 06825
Phone: (203) 515-7626
Fax: (203) 333-0751
ccvaugh@gmail.com



Michael S. Taylor