

1967

Howe Rents Corporation v. John Worthen, dba, Exotic Swimming Pool Company : Respondent's Brief

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

FILED

HOWE RENTS CORPORATION, JUL 29 1966

Plaintiff-Respondent,

Clerk, Supreme Court, Utah

vs.

Case No.

10582

JOHN WORTHEN, dba Exotic
Swimming Pool Company,

Defendant-Appellant.

UNIVERSITY OF UTAH

JAN 13 1967

RESPONDENT'S BRIEF

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Appeal from Judgment of Third District Court in
and for Salt Lake County, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

HOWE RENTS CORPORATION,
Plaintiff-Respondent,

vs.

JOHN WORTHEN, dba Exotic
Swimming Pool Company,
Defendant-Appellant.

Case No.
10583

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action at law based on a written contract of bailment for damage done to plaintiff's equipment while in the possession of the defendant as bailee thereof.

DISPOSITION IN LOWER COURT

The case was tried before the lower court, sitting without a jury, and, after receiving in evidence

the contract and the stipulations of counsel as to the facts, judgment was granted to plaintiff. Defendant made a motion to the lower court for a new trial, which motion was denied.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks affirmation of the judgment of the lower court.

STATEMENT OF FACTS

The plaintiff operates an equipment rental business located at 2375 South State Street, Salt Lake City, Utah. On August 4, 1962, at approximately 6:00 P.M., the defendant came to plaintiff's business establishment and leased from plaintiff a large mortar mixer which was delivered to the defendant and retained by him in his possession under his sole care and keeping until August 6, 1962, at approximately 5:00 P.M. (R. 25, 26). Defendant, in connection with the rental of the mortar mixer, signed and executed a rental agreement, and paid a deposit on said rental in the amount of \$50.00. The rental agreement, as executed by defendant, stated in part:

"Lessee acknowledges receipt of the equipment in good working condition and repair, and agrees to return it in as good condition, subject to reasonable wear and tear, and Lessee shall be liable for all damage to or loss of the equipment regardless of cause until it shall have been returned to and receipted

for by the Lessor. . . . None of the above equipment . . . shall . . . be removed from the county in which it was delivered to the lessee except by prior written consent of lessor . . .” (Exh. P. 1)

On August 6, 1966, at approximately 5:00 P.M., while defendant was traveling north on U. S. Highway 89 near Ogden, Weber County, Utah, the mortar mixer became detached from defendant's vehicle, overturned and was damaged. This incident occurred approximately 47 hours after defendant first gained possession of the mortar mixer and outside of the county in which it was delivered to the lessee.

The allegations set forth in the last three paragraphs of appellant's Statement of Facts are not included in the Findings of Fact of the lower court (R. 25-27).

STATEMENT OF POINTS

POINT I

A CONTRACT ALLOCATING THE RISK OF LOSS OF A BAILED CHATTEL MAKING THE BAILEE THE INSURER THEREOF DOES NOT VIOLATE PUBLIC POLICY AND IS ENFORCEABLE ACCORDING TO ITS TERMS.

A. The rights and obligations of parties to a contract of bailment are determined by the provisions of the contract.

B. The contract provision in question does not violate public policy.

C. Defendant's liability with respect to the bailed chattel is explicitly stated in the contract.

POINT II

APPELLANT SEEKS ON APPEAL RELIEF NOT WITHIN THE SCOPE OF REVIEW OF THE SUPREME COURT.

A. The granting or denial of a motion for a new trial is not a final judgment from which an appeal lies.

B. Plaintiff's negligence and the cause of damage to plaintiff's chattel are not issues before the Court.

ARGUMENT

POINT I

A CONTRACT ALLOCATING THE RISK OF LOSS OF A BAILED CHATTEL MAKING THE BAILEE THE INSURER THEREOF DOES NOT VIOLATE PUBLIC POLICY AND IS ENFORCEABLE ACCORDING TO ITS TERMS.

A. *The rights and obligations of parties to a contract of bailment are determined by the provisions of the contract.* Plaintiff in this action is seeking to be indemnified for damage done to his rental equipment while it was in the possession of the defendant bailee for a period of nearly 47 hours. The defendant contended at the trial of this matter that any damage done to plaintiff's equipment was proximately caused by plaintiff's own negligence in a-

taching the leased mortar mixer to defendant's vehicle. The trial court ruled as a matter of law that plaintiff was entitled to recover from defendant for the damage done to plaintiff's mortar mixer, and in so doing, assumed that plaintiff was negligent, and that such negligence was the proximate cause of the damage to the mixer, and, therefore necessarily held that the negligence of plaintiff, if any, would constitute no defense to plaintiff's claim under the terms of the agreement. (R. 26, 27)

Therefore, the only issue before the Court on this appeal is: Is the provision in the contract of bailment, placing absolute liability for damage to the bailed chattel upon the appellant, enforceable?

The general rule is that the terms of a contract of bailment determine the rights, duties and liabilities of the parties, and that while the care to be exercised by the bailee under a general contract of bailment is fixed by law, the obligations of the parties under a special contract of bailment are fixed primarily by the terms of the contract itself. 8 Am. Jur. 2d *Bailments*, §121, p. 1015.

This rule is further stated in 8 Am. Jur. 2d. *Bailments*, §137, p. 1032, as follows:

"A bailee may enlarge his legal responsibility for the subject of the bailment by contract, express or implied, even to the extent of making himself absolutely liable as insurer for the loss or destruction of goods committed to his care; this is true even of gratuitous bailees. As a general rule, if there is an express or implied agreement by the bailee which

clearly goes beyond his ordinary obligation as implied by law, he will be held to his agreement. In such cases the bailment contract controlling and must be enforced according to its terms, irrespective of the fact that less onerous liability is imposed by law on bailees of the same class generally."

The special contract of bailment under consideration here expressly provides that "Lessee shall be liable for all damage to or loss of the equipment regardless of cause . . ." (Exh. p. 1) This provision allocated between the parties herein which of them would bear the risk of loss of the rental equipment during the interval of time during which the appellant had exclusive control of the bailed article.

Applying the general rule stated above to the contract in the instant case requires that appellant's duty with respect to damage to the mortar mixer is established by the terms of the written contract of bailment, and that defendant is liable to plaintiff for the damage thereto.

Such an allocation is a reasonable object of contract, since a bailor, after delivering a chattel to a bailee, no longer has possession and control of that chattel, and is in no position to examine the article bailed, and cannot, therefore, rectify any discoverable defects after it has left his possession.

B. The contract provision in question does not violate public policy. The defendant has attacked the contractual clause which is relied upon by plaintiff to recover for the damage done to his equipment as being contrary to public policy since, as contended

by defendant, this contract, if enforced, would have relieved plaintiff of a duty of care which plaintiff owed to the general public. In support of this argument, he cites the following cases: *Union Pacific Railroad Company v. El Paso Natural Gas Company*, 17 Utah 2d 255, 408 P. 2d 910; *Hunter v. American Rental Inc.*, 371 P. 2d 131 (Kan.); *Otis Elevator Co. v. Maryland Casualty Co.*, 33 P.2d 974 (Colo.). Clearly, none of these cases can be held to stand for the proposition that it is violative of public policy for a bailor of equipment to contract with a bailee of that equipment for the bailee to become absolutely liable to insure that the article which is bailed will be returned in the same condition in which it left the bailor's possession. These cases can only be construed to hold that it may be violative of public policy to allow a negligent party to a contract to exonerate himself from a duty of care owed to the *public* where his negligence results in damage to the non-negligent contracting party, or to some third party, and which negligence is not specifically anticipated by the contract under consideration. This is especially true in the *Union Pacific Railroad Company* case, *supra*, in which the plaintiff sought indemnification from the owner of a pipeline from a claim for damages asserted by the estate of an employee of the pipeline company killed in a collision with one of the railroad company's trains while the employee was on route to do maintenance work on the pipeline. The court there held that the provision in the written contract between the parties whereby the pipeline company promised to indemnify the railroad from any liabil-

ity for injury to any person, where such injury arose out of the existence of the pipeline, did not provide the railroad with a cause of action against the pipeline company for the type of loss involved. Because the collision occurred 1½ miles from the location of the pipeline, the court held that there was no causal connection between the collision and the pipeline and stated:

“The fair import of the entire provision considered together in context as it should be is that the damages guaranteed against should have at least some causal connection with the construction, existence, maintenance or operation of the pipeline other than an incident which happened merely coincidental to its existence.”

That case, therefore, cannot be held to mean that any contract which would insure against the negligence of one of the parties thereto will violate public policy, and the court, in its opinion, implies that such a contract would guarantee against certain damages which have a causal connection with the subject matter of the contract. Clearly there is no such causation problem in the instant case, as the type of damage done to plaintiff's equipment was precisely the type of injury anticipated by the agreement between the parties. The *Union Pacific Railroad* case is, therefore, inapplicable to the case at bar.

Hunter v. American Rentals, Inc., supra, is also not in point since that case dealt only with an attempt by a bailor to avoid liability for his negligence by relying on exculpatory clauses in the contract.

bailment, where the damage involved was extensive personal injury to the bailee and damage to the bailee's personalty. This far-reaching type of indemnification is not what is being sought by plaintiff in this action. The only loss that occurred in the instant case was the damage done to plaintiff's mortar mixer, the bailed chattel, and this damage occurred while the mortar mixer was in the possession of the defendant. Defendant suffered no damage at all to his person or property, and plaintiff is only seeking to assert the contractual provision in the agreement by which defendant bound himself to become absolutely liable for any damage done to plaintiff's mortar mixer while it was in defendant's possession.

Neither is plaintiff seeking to require defendant to indemnify him for damage done to third parties by reason of some negligence committed by plaintiff, as was the situation in *Otis Elevator Company v. Maryland Casualty Company*, supra. That case dealt with an attempt by a negligent party to relieve himself of his duty to the public where third parties were injured due to that negligence. A different issue altogether would be presented by the instant case if the assumed negligence of plaintiff had resulted in injury to another vehicle on the highway or even to defendant's vehicle. To prevent such negligence, it might be proper to hold that an attempt to relieve oneself by contract from a duty owed to the public does violate public policy. However, where the only damage done is to plaintiff's equipment while it is still in the hands of the defendant, such public policy

clearly does not apply since no publicly protected interest has been invaded. Therefore, the allocation by contract of the burden of the risk of loss of bailed chattel is a legitimate object of contract, and should be upheld even against the asserted defense that the loss was proximately caused by the negligence of the bailor. Indeed, the public policy of freedom of contract is best served by enforcing such provision, *Weik v. Ace Rents*, 87 N.W. 2d 31 (Iowa), and the contract provision in issue here should be enforced.

C. *Defendant's liability with respect to the bailed chattel is explicitly stated in the contract.* Finally, defendant argues that the language used in the disputed contractual provision did not specifically include the words "including negligence of the lessor" and was, therefore, not explicit enough to advise defendant that his liability extended to this degree. While, as a general rule, such contracts are strictly construed, the court in *Griffiths v. Broderick*, 27 Wash. 2d 901, 182 P.2d 18, 175 A.L.R. 1, states that express words against negligence need not be used, and that if it is clear from the language used that the parties intended to cover losses arising from the negligence of the indemnitee, this is sufficient. It is difficult to see how more comprehensive or inclusive language could have been used than words which stated: "Lessee shall be liable for all damage to or loss of equipment *regardless of cause.*" (Emphasis added.) If plaintiff had used the phrase "including negligence of the lessor" in the contract, the

it might be open to question whether the provision was limited to liability only for such negligence as was stated by the court in *General Accident Fire & Life Assurance Corporation v. Smith & Oby Company*, 272 F. 2d 581, 77 A.L.R. 2d 1134.

The obvious intent of the provision in question clearly and unmistakably makes the defendant absolutely liable as insurer for the loss or destruction of the equipment which was committed to his care. To hold otherwise would be to render the words "regardless of cause" devoid of any rational interpretation.

POINT II

APPELLANT SEEKS ON APPEAL RELIEF NOT WITHIN THE SCOPE OF REVIEW OF THE SUPREME COURT.

Although appellant fails to pray in his brief for any relief from the Court, nevertheless, if the statement under the heading RELIEF SOUGHT ON APPEAL (Appellant's Brief p. 1) constitutes a prayer for relief, such relief is not available to appellant on this appeal insofar as he prays for a judgment in his favor, or for a new trial.

A. *The granting or denial of a motion for a new trial is not a final judgment from which an appeal lies.* The foregoing proposition is supported in *Haslam v. Paulsen*, 15 Utah 2d 185, 389 P.2d 736; *Klinge v. Southern Pacific Company*, 89 Utah 284, 57 P.2d 367; 4 *Am. Jur. 2d Appeal & Error* § 123, p. 638. Defendant's appeal, then, is properly taken

only from the judgment in the instant case, and not from the Order denying his motion for a new trial. An appeal from a denial of a motion for a new trial is proper only where the lower court has abused its discretion in denying or granting the moving party's motion. *Crellin v. Thomas*, 122 Utah 122, 247 P.2d 264. Defendant has not contended in his Brief that the trial court abused its discretion in denying his motion for a new trial and consequently appellant is not entitled to any relief from this Court by reason of the lower court's denial of that motion.

B. *Plaintiff's negligence and the cause of damage to plaintiff's chattel are not issues before this Court.* In POINT I of his Brief, appellant attempts to establish, on the basis of allegations contained in his Answer to plaintiff's Complaint, and his Affidavit in support of his motion for a new trial, that plaintiff was negligent in attaching the mortar mixer to defendant's vehicle, and that such negligence was the proximate cause of the damage to the mixer. The lower court, however, in holding defendant liable as a matter of law, assumed, as is stated above, that plaintiff was negligent, and that such negligence was the proximate cause of such damage. Appellant's recital of the contents of Title 41-6-148.40 Utah Code Annotated, 1953 (obviously enacted by the Legislature for the protection of the public, a fact which appellant states in the heading to POINT I of his brief), is irrelevant to the issue before the Court, i.e., the enforceability of the portions of the rental contract set forth above since

the trial court had no need to consider the issues of negligence and causation. The most that could be granted defendant on this appeal is a remand for trial on the issue of his asserted defense that plaintiff negligently attached the mortar mixer to defendant's vehicle, and that the negligence of plaintiff was the proximate cause of the damage to the mortar mixer, and this can only be granted in the event this Court reverses the trial court's holding that the contract between the parties is determinative of defendant's liability.

Therefore, the Supreme Court on this appeal can neither render judgment for defendant, nor grant him a new trial.

CONCLUSION

It is respectfully submitted that the contract provision in question does provide for absolute liability on the part of defendant for the damage done to plaintiff's mortar mixer while in the possession of defendant, that such provision is valid and that it should be enforced according to its terms.

Respectfully submitted,

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