

1975

Lloyd E. Lish v. Dean Compton : Brief of Appellant

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

LLOYD E. LISH, JR.,)
)
 Plaintiff and)
 Respondent,) Case No. 14111
)
 vs.)
)
 DEAN COMPTON,)
)
 Defendant and)
 Appellant.)

Appeal from Judgment of the First
Judicial District Court for Box
Elder County, Honorable VeNoy
Christofferson, Judge

Attorney for Defendant
and Appellant

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FILED
AUG 7 - 1975

Clerk, Supreme Court, Utah

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to plaintiff within ten days thereafter.

DISPOSITION OF CASE IN LOWER COURT

The lower court submitted special interrogatories to the jury and granted judgment to the plaintiff for \$13,150.00 damages against the defendant.

NATURE OF RELIEF SOUGHT ON APPEAL

Defendant appeals for a determination that the purported contract did not exist, was unenforceable under the statute of frauds, the defendant being a farmer and not a merchant, and the purported confirmation having not been mailed within a reasonable time, actual notice of rejection having been received and admitted in open court by the plaintiff, and in any event the computation of damages was erroneous.

STATEMENT OF FACTS

Defendant for 25 years, either alone or with his father, has been a hay and grain farmer, (Tr. 100). He has never sold these commodities for anyone other than himself nor any that wasn't produced on his farm, (Tr. 126). The plaintiff had previously, both hauled and bought defendant's grain, (Tr. 128-131). The facts

are that on August 2, 1973, one or more telephone conversations between the parties occurred regarding the price of defendant's rye infested red wheat crop at his Sublet, Idaho Farm. Plaintiff's version of the telephone conversation appearing at (Tr. 18-18-31) and the defendant's version appearing at (Tr. 132-133) and both versions indicating that defendant would let his wheat go if he could get \$3.30 or \$3.31 per bushel and plaintiff stating that he would see if he could get that price. Thereafter plaintiff contacted Pillsbury and received a confirmation of sale to them (Tr. 19-4). No further contact or communication between the parties occurred until August 15, 1973, when defendant phoned plaintiff to see if plaintiff would haul defendant's wheat and plaintiff indicated (Tr. 29-17-24) he knew what the problem would be and told him among other things "you don't have any wheat, I've sold it - didn't you get my confirmation - ".

The confirmation, Exhibit 2, was dated August 3, but appeared in plaintiff's pad of confirmations as No. 21 and followed Nos. 19 and 20, both dated August 13, Nos. 16, 17, and 18, all dated August 8 and No. 15 dated August 4, and was followed by Nos. 22 and 23 dated August 14. (Tr. 68) (Def's Ex. #11)

On August 2, 1973 plaintiff claims to have sold the same 15,000 bushels of 'as is' wheat to Pillsbury at \$3.45 per bushel, but in fact is filling this Pillsbury contract with other wheat (Tr. 82-29) and (Exhibit 10) beginning on August 9th, six days before receiving notice of objection to his claimed contract with defendant. The market price of No. 1 red wheat on August 2 (Tr. 63-14) and on August 3, (Exhibit No. 4) at Ogden, Utah, was \$3.63 per bushel, an apparent difference in 'as is' wheat and No. 1 red wheat of 18¢ per bushel. There was no other direct evidence of the difference in 'as is' and No. 1 red wheat market price introduced at the trial, although in addition to the apparent indication of 18¢ difference on August 3, plaintiff in his testimony (Tr. 111-lines 14-20) applied a 19¢ per bushel difference in September 1973. The price of No. 1 red wheat fluctuated sharply and rose by as much as 90¢ per bushel by August 8, 1973, (Tr. 79-32) yet no confirmation or other notice was mailed by the broker to the farmer until August 14, even though plaintiff by his own admission knew there would be trouble and almost the first thing asked by him on the 15th was whether or not the confirmation had been received.

ARGUMENT

POINT I.

THE COURT ERRED IN SUBMITTING THE QUESTION OF WHETHER OR NOT A CONTRACT EXISTED TO THE JURY.

It would seem clear the court should not have submitted to the jury the question of whether or not a contract was entered into between the parties when the facts show that the plaintiff's allegation of the date of the contract was August 3, by Exhibit 2 purporting to confirm a contract "of this day" on August 3, and no contact or communication occurred between the parties on August 3. Further, it appears (Tr. 82-29) that plaintiff was buying wheat as early as August 9 and had applied at least three loads to the Pillsbury contract prior to the time he mailed his purported confirmation to the defendant or received notice of the rejection of such confirmation (See Also, Exhibit 10).

The section of the statute relied on by plaintiff is found in 70A-2-201:

(2) "Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of

subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received."

This statute indicates that the writing must be in confirmation of a prior contract, Such contract would have had to have been completed on August 2, not August 3.

Obviously neither plaintiff nor defendant treated the events of August 2, as completing a contract, the plaintiff waiting until he had sold 15,000 bushels of 'as is' red wheat and having received a confirmation thereof and having begun filling that contract with other purchases. Plaintiff was well aware of the necessity for giving notice of the purported sale to the defendant as evidenced by his own testimony (Tr. 29-17 to 24) he asked if defendant had received confirmation, and knowing that the defendant was going to tell him he wouldn't follow through.

POINT II.

THE COURT ERRED IN SUBMITTING TO THE JURY THE QUESTION OF WHETHER THE PURPORTED WRITING (CONFIRMATION) WAS RECEIVED WITHIN A REASONABLE TIME.

Whether plaintiff backdated to August 3, the purported confirmation No. 21, Exhibit No. 2 on the 14th of August as it would appear from the other confirmations which he was making on a more or less regular basis from August 2, to August 15, or whether he simply held the confirmation until the 14th of August is unknown. However, in

light of the fact that plaintiff was well aware of the rapidly fluctuating market, was regularly preparing confirmations of other sales, it would seem on its face so clear as to not require argument, that plaintiff delayed an unreasonable length of time in forwarding the confirmation.

"Reasonable Time" means as soon as circumstances will permit. *Lund vs. St. Paul M. & M. R. Co.* 71 Pac 1032 31 Wash 286.

Generally "Reasonable Time" is a question of law; *Alsam Holding Company vs. Consolidated Tax Payers Mutual Insurance Company*, N.Y.S. 2nd 498.

"Reasonable Time" means so much time as is necessary under the circumstances. *State vs. Commissioners of Cascade County* 296 Pac 1 89 Montana 37.

"Reasonable Time" may be defined generally to be so much time as is necessary under the circumstances for a reasonable, prudent and diligent man to do conveniently what the contract or duty requires should be done, having regard for the rights and possibility of loss, if any, to the other party to be affected. *Citizens Bank Bldg. vs. Ellen E. Wertheimer* 180 SW 361 126 Arkansan 38. Similar language used in *Minnesota, Kentucky Cases*.

"Reasonable Time" if facts are clearly established or are undisputed, is a question of law. *Hill vs. Hobart* 16 Main 164. "Reasonable Time" is so much time as is necessary under the circumstances to do conveniently

what the contract or duty requires should be done in a particular case. A "Reasonable Time" when no time is specified is a question of law and depends on the subject matter and the situation of the parties. Colefax County vs. Butler County 120 NW 444 83 Nebraska 803.

POINT III.

THE COURT COMMITTED ERROR IN SUBMITTING TO THE JURY THE QUESTION OF WHETHER OR NOT DEFENDANT WAS A 'MERCHANT'.

The court committed error in submitting to the jury the question of whether or not defendant was a 'merchant'. The record is clear that defendant was a farmer only, with the exception of a short period of time when he hired out as a mechanic. Defendant never sold or bought wheat for anyone other than himself and other than the sale of his own wheat has never dealt in grain, or otherwise by his occupation held himself out as having knowledge or skill peculiar to the grain trade nor has he employed an agent or broker or intermediary who by his occupation holds himself out as having such knowledge or skill. Defendant should have been allowed to answer these questions even though without his answering such questions there is no evidence whatever in the record which would justify finding this defendant to be a merchant. We believe the case of Cook Grains Inc. vs. Paul Fallis, an Arkansas Case, 395 S.W. 2nd 555, 239

Ark 962, wherein the court pointed out that a farmer farming 550 acres of soybean land,

"if the general assembly had intended that in the circumstances of this case a farmer should be considered a merchant and therefore liable on an alleged contract to sell his commodities, which he did not sign, no doubt clear and explicit language would have been used in the statute to that effect. There is nothing whatever in the statute indicating that the word 'merchant' should apply to a farmer when he is acting in the capacity of a farmer, and he comes within that category when he is merely trying to sell the commodities he has raised"

correctly states the law as it should be applied in Utah, and in the instant case.

POINT IV.

THE COURT ERRED IN SUBMITTING TO THE JURY THE QUESTION OF WHETHER OR NOT THE DEFENDANT HAD ADMITTED AN ORAL CONTRACT FOR SALE OF WHEAT.

Both the pleadings and all of defendant's testimony in court denied the existence of a contract between the parties and there was no evidence before the jury that the defendant admitted in his pleadings, testimony or otherwise in court that a contract was made. The court erroneously allowed in over objection testimony of what could have been no more than a compromise offer or gift to the prejudice of the defendant. But even having allowed that testimony in, it was not an acknowledgment in court of the existence of a contract. The court

itself should have decided the question as a matter of law, and the submission to the jury of the question was prejudicial to defendant.

POINT V.

ADEQUATE NOTICE OF REJECTION WAS ACKNOWLEDGED BY PLAINTIFF'S SENDER AND SHOULD HAVE BEEN TREATED BY THE COURT AS SUFFICIENT WITHOUT THE REQUIREMENT OF WRITTEN NOTICE OF REJECTION.

The notice of rejection which plaintiff acknowledged in open court to have received August 15th verbally from the defendant should have been as a matter of law treated as sufficient notice of rejection without requiring written notice. There seems no valid reason why verbal rejection acknowledged in open court to have been received should be given less affect than would be given an acknowledgment in court of the existence of a verbal contract.

POINT VI.

THE COURT ERRED IN THE COMPUTATION OF DAMAGES.

Even though plaintiff plead damages of \$23,850.00 and some testimony of purchases by plaintiff after August 15th was erroneously admitted in evidence to the prejudice of defendant, it is clear from the record and from the arguments of counsel and from the statute that the most

that plaintiff could be entitled to as damages would be the difference in price of 'as is' wheat on the 3rd day of August as compared to the 15th day of August when plaintiff was advised that he would get no wheat under his claimed contract. Plaintiff's exhibits and testimony all point to the fact that No. 1 red wheat on August 2nd and 3rd was \$3.63 per bushel at Ogden and the price on August 15th was \$4.37 per bushel. Thus the maximum damages that could have been suffered by plaintiff was 74¢ per bushel. Since plaintiff did not haul defendant's wheat from Sublet, Idaho to Ogden, Utah, the court's use of the \$3.30 figure was obviously error, and the court's submission to the jury of the question of the market value of 'as is' wheat was error under the circumstances. The jury's finding of \$4.25 market value of 'as is' wheat on August 15th cannot be reconciled with the evidence and particularly with Exhibit 4 and 5 or the other testimony relating to the Ogden Market price of No. 1 red wheat.

Further the evidence clearly shows and is undisputed (Tr. 18-16 to 22) wherein plaintiff testified that the only wheat under consideration was what wheat the defendant was in the process of harvesting or was about to harvest on his Sublet, Idaho farm. This figure produced

was in fact 12,000 bushels. (Tr. 137-31) Damages therefore could not exceed 74¢ times 12,000 bushels or \$8,880.00. However, defendant was entitled to two credits thereon even by the acknowledgment of the plaintiff's testimony that he was authorized to apply 983 bushels in September at \$3.30 per bushel, Ogden, to the alleged contract. Further the plaintiff was saved the 15¢ per bushel freight or trucking expense from Sublet, Idaho to Ogden, Utah. So that as to those 983 bushels, plaintiff did not suffer the 74¢ per bushel loss (\$727.42) and in fact saved 15¢ per bushel freight (\$147.45) expense for a total of \$874.87 that should have been deducted (\$8,880.00 minus \$874.87) thus \$8,005.13 would be the maximum damages possibly suffered by plaintiff.

CONCLUSION

If any significance is to be given the words 'merchant' and 'reasonable time' as used in the statute, then this seems a compelling case to determine that a full time farmer whose only brush with brokers or merchants comes when he sells his own produce once a year, is a 'farmer' rather than a 'merchant'. Likewise to permit a broker engaged full time in buying and selling grains, to delay 12 or 13 days while he makes purchases and sales and

confirmations at rapidly increasing prices, to reap the benefit of his unexplained and unnecessary delay shocks the conscience. Such result should be avoided either by determination that the delay was unreasonable, or that having acknowledged in open court receipt of notice of rejection of the purported confirmation not yet delivered, such actual notice should be deemed at least equivalent to the ten day written notice which would have protected even a 'merchant'.

Respectfully submitted,

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