1975

Mynard A. Jacobson and Mildred Jacobson v. Edwin C. Hoffman and Alice Hoffman: Brief of Respondent

Utah Supreme Court

Gordon C Low; Hillyard and Gunnell; Attorney for Respondent.
Ted S Perry; Attorney for Appellant.

IN THE SUPREME COURT
OF THE STATE OF UTAH

MYNARD A. JACOBSON and
MILDRED JACOBSON,

Plaintiffs and Respondents)

vs. Case No. 14146

EDWIN C. HOFFMAN and
ALICE HOFFMAN,

Defendants and Appellants)

BRIEF OF RESPONDENT

Appeal from Judgment of the First Judicial District Court
for Rich County, Utah
Honorable VeNoy Christoffersen, Judge

Gordon J. Low
140 East Second North
Logan, Utah
Attorney for Plaintiffs-
Respondents

Ted S. Perry
444 North Main Street
Logan, Utah
Attorney for Defendants-
Appellants

IN THE SUPREME COURT

OF THE STATE OF UTAH

MYNARD A. JACOBSON and
MILDRED JACOBSON,

Plaintiffs and Respondents)

vs. Case No. 14146

EDWIN C. HOFFMAN and
ALICE HOFFMAN,

Defendants and Appellants)

BRIEF OF RESPONDENT

Appeal from Judgment of the First Judicial District Court
for Rich County, Utah
Honorable VeNoy Christoffersen, Judge

Gordon J. Low
140 East Second North
Logan, Utah
Attorney for Plaintiffs-
Respondents

Ted S. Perry
444 North Main Street
Logan, Utah
Attorney for Defendants-
Appellants

TABLE OF CONTENTS

AUTHORITIES CITED

IN THE SUPREME COURT

OF THE STATE OF UTAH

MYNARD A. JACOBSON and
MILDRED JACOBSON,

Plaintiffs and Respondents

vs. Case No. 14146

EDWIN C. HOFFMAN and
ALICE HOFFMAN,

Defendants and Appellants

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This is an action for an accounting arising from a farm lease with Defendants as Lessors and Plaintiffs as Lessees.

STATEMENT OF FACTS

The Defendant's Statement of Facts requires extensive revision and correction as it is both argumentative and states portions of the facts appearing to be favorable only to the Defendants without setting forth all the facts.

Pertinent and unarguable facts are that on November 10, 1972 the parties entered into an agreement wherein the Plaintiffs were to lease a ranch from Defendants for the

period of one year. Rather than recite here provisions of the agreement, it is on record with the Court as Plaintiff's Exhibit #1. The findings of sums owing, as stated in the Findings of Fact and Conclusions of Law, are accurately repeated in the last paragraph of Defendant's Statement of Facts.

ARGUMENT

POINT I:

THE LOWER COURT FULLY CONSIDERED ALL THE PROVISIONS OF THE CONTRACT IN ARRIVING AT THE JUDGMENT.

The Defendant's argument that the Lower Court reached its decision disregarding Paragraph IIA(7) of the contract is erroneous. The issue with which that paragraph addresses itself is the replacement of cattle lost by death or culled from the herd. There is no dispute that 51 of the wiener calves were sold by the parties jointly but for the Defendant to argue that they were to be replaced under Paragraph II A (7) is bordering on the absurd. When the lease commenced the Plaintiff received with the ranch, among other cattle, 46 wiener calves. These calves were sold at the Riverton auction and the parties divided the proceeds so that the Defendant received the proceeds for the base weight and half of the gain weight. The Plaintiff received only one-half of the gain weight as the agreement provided.

For the Defendant now to argue that those 46 wiener calves should have been replaced is directly contrary to not only the clear wording of the Paragraph II A (7) in question,

but also directly contrary to the Defendant's own testimony.

As stated in Civil No. 612 of the Reporter's Transcript of Proceedings, p, 89, lines 24-32:

> MR. LOW: Why wasn't the 46 replaced also?
>
> MR. HOFFMAN: Well, there's another paragraph besides that.
>
> Q Ed, why didn't you replace the 46? Why did you say that you just replaced the 30? A Well, the 46 weren't to be replaced. They were just sold out. They were mine to start with, and we sold them out and I took the money off the part that I owned before the contract was signed, which we figure at 300 pounds.
>
> Q So that is the reason the 46 figure was put in there?
>
> A Yes. To specify how many calves I owned at the start of it.

There was in addition to the above a great deal of testimony from both parties regarding the "Riverton" sale and replacement of cattle. (See Tr. page 28-34; 55, 71, 78, 79, 86-89). Special review should be made by the Court of pages 88, 89, 116 of the transcript relating to the replacement of cattle under Paragraph II A (7). The Lower Court considered at great length with counsel the replacement of cattle under Paragraph II A (7) of the contract. The Court is referred especially to pages 144 through 146 of the transcript.

The trial was filled with conflicting testimony as to number of cattle replaced, sold, returned and received and the trial court took it all into consideration including Paragraph II A (7) in arriving at its decision. The matter was further complicated by conflicts within the Defendant's

own testimony, and two conflicting copies of the agreement with notations thereon which the Defendant was unable to explain (Tr. p. 116).

In specific response to Defendant's last paragraph of his Point I, the argument fails to take into consideration both the facts presented at trial and the clear meaning of the several provisions of the contract.

It is obvious that Paragraph II A (7) is to protect the base herd of cows from decrease from death or decrease by necessity of having to cull them from the herd for age, health or other reasons. If otherwise were the case, then Paragraph II A (4) would be mostly simply surplusage. The parties sold 51 wiener calves as above stated, but the Defendant received the cash for the animals. (Tr. page 79, lines 26-27) It appears that he wants to sell cattle, take the money, then have the Plaintiff replace all the calves sold. If that interpretation of the contract were to be accepted the Defendant could sell all cows, calves, bulls, and heifers that were on the ranch when he turned it over to Plaintiff and then, take the cash therefrom, then require the Plaintiff to replace all the cattle sold at the termination of the contract.

It is well settled that the Court must construe all provisions of the contract in relationship to the whole and not to rewrite the contract. 17 Am. Jur. 2d, Contracts, §242-248, 252, 258. 259.

The Lower Court heard all of the testimony and

evidence, gave consideration to the various paragraphs of the contract and interpreted it accordingly.

The Lower Court did not ignore the provisions of Paragraph II A (7) but even as indicated in the above cited pages of transcript, considered that paragraph with counsel and in examining the witness himself.

The Defendant's contention that the paragraph II A (7) was ignored is simply unsubstantiated and erroneous.

POINT II:

THE COURT CONSIDERED ALL OF THE EVIDENCE RELATING TO THE "SMALL TRACTOR" AND BASED HIS JUDGMENT THEREON.

As the Defendant points out the Plaintiff upon cross examination said:

> Q Have you any estimate of the reasonable value of that rental?
>
> A No, I don't, but I'd be willing to pay $2.00 an hour for that.
> (Tr. page 74, lines 6 and 7)

It is obvious from his answer that in an effort to ameliorate the problem of the small tractor the Plaintiff said he had no estimate as to its rental value but he would be willing to allow $2.00 per hour for the tractor's use.

The Defendant's testimony regarding the tractor was no more explicit and also indicated he did not really have an estimate as to the reasonable value of the trailer as

follows:

> Q Now the small tractor, do you have an opinion as to what a reasonable hourly rate would be for that tractor?
>
> A Oh, I imagine maybe $3.00. I'm not sure. (Tr. page 102, lines 14-16)

Contrary to Defendant's contention in his brief, neither party was able to give an estimate as to reasonable rental value of the small tractor.

The Court then was required to look to additional evidence in finding a rental value.

The contract does not specify what machinery was to be used or under what arrangements except as provided in Paragraph IV B.

It could easily be construed from uncontested testimony that there was to be no charge for the small tractor. (Tr. page 40, lines 1 and 2).

The small tractor was an "old, old" tractor and worth little and used little and did not rent very high. (Tr. page 74, lines 2-6).

The Court is of course permitted to take all the evidence into consideration in arriving at its findings. There was no testimony as to a reasonable value except as given by the Defendant. The Court was justified in finding the rental value at $1.00 per hour.

It is obvious from the testimony by the Defendant

that he was inflating the value of the equipment (Tr. page 149, lines 17-19.)

In any event the Court found for the Defendant as to the number of hours the tractor was used despite testimony from the Plaintiff that it was used only half as much. The sum allowed was $150.00. Certainly the Plaintiff was not harmed as the Court found a figure that in light of the testimony appeared equitable.

The Court made the determination based upon the evidence provided, meager and contradicting as it may have been, and such is not basis for reversal (See 5 Am. Jur. 2nd Appeal and Error §841).

CONCLUSION

The Lower Court through a trial on an accounting under a ranch lease, listened to testimony, often conflicting, which transcribed into over 150 pages of record, reviewed provisions of the contract and based his conclusions on the evidence presented and the law applicable. The Defendant's contention that Paragraph II A (7) of the contract was ignored is without basis as is also his allegation that the Court erroneously arrived at the small tractor rental figure. The Lower Court judgment should be affirmed.

Respectfully submitted,

Gordon J. Low
Attorney for Plaintiff-Respondents

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Brief of Respondent, was mailed, postage prepaid, to the Defendants-Appellant's Attorney Ted S. Perry at 444 North Main Street, this _____ day of July, 1975.

Marilyn D. Salisbury