1976

Centurian Corporation v. Fiberchem, Inc. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

-oOo-

CENTURIAN CORPORATION,)

Plaintiff, Respondent,)

vs) Case No. 14583

FIBERCHEM, INC.,)

Defendant-Appellant.)

BRIEF OF RESPONDENT

Appeal from Judgment of the District Court of the
Third Judicial District
In and For Salt Lake County, State of Utah.

Honorable Stewart M. Hanson,
Judge

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NATURE OF THE CASE

Plaintiff-Respondent Centurian Corporation, hereinafter referred to as "Centurian", brought this action alleging breach of contract for the purchase and sale of goods. Defendant-Appellant Fiberchem, Inc., hereinafter referred to as "Fiberchem", denied the contract and asserted an affirmative defense of alter ego asserting the check delivered to it was for payment on the account of Centurian Custom Boats, Inc., hereinafter referred to as "Boats".

DISPOSITION IN LOWER COURT

The District Court for the Third Judicial District in

for Salt Lake County, State of Utah, The Honorable Stewart M. Hanson presiding, granted plaintiff judgment in the amount of $3,300.00 together with interest and costs. Defendant's defense of alter ego and counterclaim based upon alter ego, was dismissed for lack of evidence to support fraud or trickery and further Fiberchem had actual knowledge of the former business being defunct.

RELIEF SOUGHT ON APPEAL

Centurian seeks an order of this Court affirming the judgment rendered by the trial court.

STATEMENT OF FACTS

Fiberchem's "Statement of Facts" is so distorted and does not reflect the findings of the Lower Court that Centurian is compelled to accurately state the facts as they are.

Centurian Custom Boats, Inc., a Utah corporation, which later changed its name to Centurian Boats, Inc., was incorporated on October 14, 1968 (Ex. 11-d). Thereafter until January 22, 1972 Centurian Boats, Inc. engaged in the manufacture of boats and had some 20 to 30 employees. On January 22, 1972 a fire occurred at the plant of Centurian Boats, Inc., which completely destroyed the plant and terminated all activity of Centurian Boats, Inc. (R. 91).

Fiberchem had, prior to the fire, sold to Centurian Boats, Inc. on open account goods and materials from its inception to the date of the fire (R. 198). After the fire in January, 1972 Fiberchem did not sell to either Centurian, Inc. or Centurian Boats, Inc. any materials and/or goods until August, 1973 (R. 200).

Approximately two weeks before August 1, 1973, Centurian through Richard Nickles, called Fiberchem and asked to order some resin and cloth. Thereafter Mr. Nickles delivered Centurian's check with its accompanying voucher, (Exs. 1-P and 2-P) to Fiberchem (R. 94, 135 and 136). Mr. Schwab, Fiberchem's manager, acknowledged receipt of Exhibit 1-P and forwarded the check to Seattle (R. 184-185).

Centurian never did receive the materials ordered and Fiberchem applied Exhibit 1-P on Centurian Boats, Inc. old account which had been written off. Repeated demands were made upon Fiberchem for delivery of the goods ordered on August 1, 1973 via telephone (R. 95, 96). Finally on January 25, 1974 Centurian Corporation wrote Fiberchem informing Fiberchem that a legal action would be commenced (Ex. 13-d).

Centurian Corporation was organized August 1, 1969 (Ex. 12-d) and was a "holding" company organized to purchase

real estate and later molds and jigs. In the fall of 1971 Centurian attempted to get into limited production of boats for the first time (R. 93). Centurian historically has kept separate books and records and has had a different tax number from that of Centurian Boats, Inc. (Ex. 7-P). The Companies have had different stockholders and at the critical time Centurian's controlling owners were other persons that Richard Nickles (R. 114, 115; Ex. 6-P, 7-P and 19-P). Centurian Boats, Inc.'s quarterly returns reflected a number of employees (Ex. 19-P), while showing a gross sales of $472,848. during 1969 (Ex. 6-P). After the fire in January, 1972, Centurian Boats, Inc. was allowed to die a natural death (R. 110, 111).

Fiberchem admitted the contract between the parties (R. 200) and further that Exhibit 8-P was a true and correct billing for goods and services purchased by Centurian Custom Boats, Inc. (R. 30). Monthly billings were received by Centurian Custom Boats, Inc. from Fiberchem showing all purchases to be billed to Centurian Custom Boats, Inc. (Ex. 8-P; R. 98, 212-213). Fiberchem had actual knowledge of the fire, that Centurian Custom Boats, Inc. was out of business from and after the fire, that no order for materials had been received from the date of the fire through August 1973, and that Fiberchem had written the Centurian Custom Boats, Inc. account off as a bad debt on July 13, 1973 (R. 198-202). Finally, Fiberchem failed to take any action on its part to ascertain who they were dealing with,

while Mr. Schwab personally advised Mr. Nickles on setting up Centurian Corporation, (R. 96, 203, 141-142, 198).

ARGUMENT

THE TRIAL COURT DID NOT ERR IN AWARDING JUDGMENT TO PLAINTIFF AND DENYING DEFENDANT'S DEFENSE OF ALTER EGO.

Appellant asserts that this case involves the believability of the witnesses. This proposition is not only erroneous but a complete misstatement of the law. In Bramel v Utah State Road Commission, 24 Ut 2d 50, 465 P2d 534 (1970) the rule on appellate review is clearly enunciated by the following language found at page 52 of the Utah Reporter:

> "It is sometimes stated that the rule on appellate review is that we survey the evidence in light most favorable to the prevailing party. But this is not true where the court has made express findings otherwise. The fundamental rule on this aspect of procedure is that it is the trial judge's prerogative to find the facts; and this includes judging the credability of the witnesses and the evidence, and drawing whatever reasonable inferences may fairly be derived therefrom. It is therefore more accurate to say that on review we survey the evidence in light favorable to the findings, whichever party they may favor; and that they will not be disturbed or appealed if they are supported by substantial evidence."

The record discloses that plaintiff is entitled to a judgment based solely on the testimony of Mr. Fred Schwab, the manager of Fiberchem. Fiberchem admitted all of the purchases through January 1972 were for the "Boat" company and not Centurian by the following Request for Admission:

> "Admit that Exhibit 'B' (Exhibit S-P) attached hereto is a true and correct copy of the billings for goods and services purchased by Centurian Custom Boats, Inc. through and inclusive of dates on said Exhibit.
>
> ANSWER: Admitted." (R. 30).

Fred Schwab received the check from Centurian and forwarded it to the Seattle office. Mr. Schwab was not certain whether the stub of the check was attached, but did declare that "in the normal course of events he would have forwarded the whole thing to Seattle" (R. 184-185).

Mr. Schwab admitted to at least one telephone conversation in which demand was made by Centurian for the delivery of the materials (R. 196-197), while Mr. Nickles testified of several telephone conversations, wherein demand for the product had been made (R. 95-96). Both parties agree that the letter, Exhibit 13-d, was sent by Centurian and received by Fiberchem. Fiberchem admitted that the materials ordered were never delivered (R. 195-196).

Appellant, in view of the law which counsel for the Appellant acknowledges in his brief, cannot deny that there is substantial evidence which supports the findings of fact and conclusions of law of the Trial Court.

II

THE RECORD IS VOID OF ANY EVIDENCE OF FRAUD OR TRICKERY

It is asserted that the Trial Court applied the wrong standard to establish the defense of alter ego. The Trial Court in the Memorandum Decision stated there was:

> ". . .no showing of fraud or any other evidence of trickery or intent to confuse the defendant. Secondly, the order was placed by the plaintiff over a year after Centurian Custom Boats had ceased to do business, and the defendant, through its agents, was well aware of the fact that Centurian Custom Boats had ceased to do business. Thirdly, the account of Centurian Custom Boats had been written off prior to the issuance of the check and fourthly, the defendant never attempted to determine the existence of two corporations." (R. 56)

Even a casual review of the cases cited and relied upon by Appellant disclosed that the Trial Court was correct in the application of the law. The leading case relied and cited by Appellant, Chatterley v. Omnico, Inc., 26 Utah 2d 88, 485, P2d 667 declares with simplicity the rule of law by the following language found at page 670 of the Pacific Reporter:

". . .(S)ome element of unfairness, something akin to fraud or deception, must be present in order to disregard the corporate fiction."

The general law is concisely stated in 18 AmJur 2d, Corporations § 14, page 560, wherein it is stated:

". . .(T)he principle of piercing the fiction of the corporate entity is, however, to be applied with great caution, and not precipitately."

Again at 18 AmJur 2d, Corporations §15, page 561, it states:

". . .(E)ach case involving disregard of corporate entity must rest upon its special facts. The corporate entity is generally disregarded where it is used as a cloak or cover for fraud or illegality."

There is no evidence of fraud or trickery. But there is evidence which supports the findings of the Trial Court's Memorandum Decision. Fiberchem, through Fred Schwab, testified about this knowledge of the fire of January, 1972 which stopped the operations of Centurian Custom Boats, Inc.:

"Q. (By Mr. Brown) Mr. Schwab, did you know the company had a fire down there in 1972?

A. Yes.

. . . . . .

Q. January of '72 to August of '73 how much material did they purchase from Fiberchem, anybody that is associated with Mr. Nickles purchase from you?

A. Probably none.

. . . . . .

Q. (By Mr. Brown) Did you visit their plant?
A. When?
Q. After the fire.
A. I drove by and saw the damage, yes.
Q. Was it capable of operation?
A. No.
Q. Pardon?
A. Obviously, no.
Q. So you knew they were not operating, didn't you, manufacturing boats, did you not?
A. Yes, that is correct.
Q. You had not sold them anything up to this occurring conversation where Mr. Nickles was going to pay the $3,300.00?
A. That is correct.
Q. That was after a period of time where the account was written off as a bad debt?
A. Yes. I--." (R. 201-202)

Again Mr. Schwab testified:

BY MR. BROWN:

"Q. Mr. Schwab, who approves or disapproves credit for an open account, for a Fiberchem account?
A. It is normally done in Seattle at that time. Can I say how it was done?
Q. Done in Seattle and for a Salt Lake account. Did Seattle ask you to make any inquiries as to whom you were dealing with?
A. Yes.
Q. And did you comply with that?
A. Yes.
Q. You testified, I thought, in your direct examination, that the first sale to Mr. Nickles' associates companies, whatever they are, was probably in, I though, late in '69 or perhaps '70, is that correct?
A. Yes.
Q. Did you make inquiry of the Secretary of State's office at that time to determine what company you were dealing with?
A. No, I did not.
Q. In fact, you obviously were dealing with a company, weren't you?
A. Yes.
Q. You weren't dealing with Mr. Nickles personally, were you?
A. No.

Q. You had to deal with some company, but you didn't call the Secretary of State's office, did you?
A. No.
Q. (By Mr. Brown) Wouldn't there have been that information displayed to you if you had called the Secretary of State?
A. I don't know. I didn't check out like that.
Q. And in fact the account was set up in Seattle for Centurian Custom Boats, Inc.?
A. Yes.
Q. And that is the way it has always been carried by Seattle from Day One?
A. Yes.
Q. To the present time?
A. It appears to be, yes." (R. 197-199).

It is apparent from the mouth of Fiberchem that there was no trickery or fraud. Fiberchem had knowledge of a corporate customer, set up the account for the proper company, to wit: Centurian Custom Boats, Inc., sold to Centurian Custom Boats, Inc., through and inclusive of the fire. After a period of some eighteen months, Centurian placed an order, paid for that order, and never received the goods. Fiberchem attempted to apply funds for the new order on the Centurian Custom Boats, Inc., account.

Appellant cites the case of Amoss v. Bennion, 18 Utah 2d 251, 420, P2d 47 (1966) in support of piercing the corporate veil based on alter ego. However, in Amoss, supra, the President and sole stockholder signed an agreement to sell real property individually as well as in his capacity as President of the Corporation. This Court declared:

"Mr. Bennion later raised the question as to his authority to bind the corporation,

> that technically held title to the property--but the record pretty clearly reflects that the corporation was his alter ego, he having full control, with no one in a position to object to his transactions, nor to offend him. We think and hold that the record indicates a one-man operation and a ratification of his actions."

In Amoss the corporation was attempting to void the agreement by fraud or trickery by asserting lack of authority, clearly distinguishable from the instance case wherein Fiberchem had actual knowledge of all the transactions.

In Western Securities Co. v. Spiro, 62 Utah 623, 221 P. 856 (1923), the person sought to be held used a corporate structure for his sole benefit by declaring in his answer to the complaint that:

> "Said Clark informed the defendant that said Clark for business reasons had assumed, and was then using, the Western Securities Company as the name by which said Clark would frequently be known in his personal dealings and transactions with defendant, and that at the time of the dealings and transactions set forth in the answer, where the name Western Securities Company was used, the plaintiff and said Clark represented to defendant that the name Western Securities Company was being used as an assumed name by said Clark in those particular dealings and transactions and each of them, and it was understood and agreed by and between plaintiff and defendant and said Clark that, although such dealings and transactions were in form dealings and transactions between said Western Securities Company and the defendant, they were, nevertheless, in fact dealings and transactions between said Clark and the defendant."

Again clearly distinguishable in that the parties intended the transactions be treated as the transactions of Clark individually.

In Stine v. Girola, 9 Utah 2d 22, 337, P2d 62 (1959) this Court again stressed the need for fraud or trickery by the following language found at page 63 of the Pacific Reporter:

> ". . .(A)lthough the defendant, State Underwriters, Inc., is a legal entity, nevertheless such corporate existence as an entity separate and distinct from its shareholders may be ignored if necessary to circumvent the fraudulent purposes of shareholders in its organization or management." (Emphasis supplied)

III

THE TRIAL COURT PROPERLY FOUND A CONTRACT WAS ENTERED INTO.

Fiberchem simply ignores the evidence in support of the Trial Court's judgment while asserting the evidence it deems should have been persuasive. This same condition existed in Omnico, supra, wherein this Court declared:

> ". . .(I)t seems to be another of the constantly recurring situations where the parties, with an eye single to the rightness of their own contentions, each select and place emphasis on those aspects of the evidence which tend to support their own point of view. Inasmuch as it is a matter upon which reasonable minds might differ the traditional rule of review applies and is dispositive of the issue here: that it is the prerogative of the trial court to