

1976

Harold O. Bjork et al v. April Industries, Inc. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

HAROLD O. BJORK, HERMAN A.)
BJORK, BEATRICE A. WILCOX)
and ARTHUR ANDERSON,)
)
Plaintiffs-Respondents,)
)
vs.)
)
APRIL INDUSTRIES, INC., a)
Delaware corporation,)
)
Defendant-Appellant.)

Case No. 14620

BRIEF OF APPELLANT
APRIL INDUSTRIES, INC.

NATURE OF CASE

Appellant is the defendant in this action. Plaintiffs brought suit for damages alleging defendant's breach of an agreement to register their shares in a public offering of other common shares of defendant's stock. Plaintiffs also sought judgment ordering defendant to issue to plaintiffs new stock certificates without any restrictive legend.

PRIOR PROCEEDINGS

After the trial of this matter in March of 1975 the district court ordered defendant to issue unrestricted certificates but refused to award plaintiffs any damages.

of this year this Court ruled that plaintiffs were entitled to damages for defendant's breach of the registration agreement. On remand the trial court entered judgment (1) requiring defendant to issue new certificates without restrictive legend and (2) awarding damages and accrued interest in the amount of \$55,239.28.

RELIEF SOUGHT ON APPEAL

Appellant submits that plaintiffs are not entitled to the inconsistent remedies of money damages and an order requiring defendant to issue new stock certificates. Therefore, defendant seeks a ruling of this Court that plaintiffs are not entitled to money damages. Alternatively, appellant requests an order requiring defendants, as a condition to the recovery of damages, to renounce any claim or interest in the shares in question. In addition, appellant seeks a ruling from this Court that the prejudgment interest awarded to plaintiffs was excessive and improper.

STATEMENT OF FACTS

In September of 1969, plaintiffs, as members of the Board of Directors of Alta Helena Mining and Milling Company, issued to themselves 16,000 common shares of the

company's stock.¹ This issuance was made to compensate the plaintiffs for past services rendered to the company. The certificates representing ownership of these shares were stamped with a restrictive legend stating that the shares could not be freely sold or transferred. Plaintiffs also obligated the company to include the shares being issued to them in any future public offering of the company's common stock. This inclusion was to be at no expense to plaintiffs.

In February of 1972 defendant offered its stock for sale to the public. The offering price was \$13.00 per share. None of the shares belonging to plaintiffs were included in this offering. In May of 1974 plaintiffs filed suit because of defendant's failure to include their shares in the 1972 offering.

The trial court in its original judgment entered in April of 1975 found that (1) the September agreement was valid and enforceable, that (2) the plaintiffs' shares had not been

1. Defendant April Industries, Inc. is the successor through merger to Alta Helena Mining and Milling Company. As part of such merger transactions April Industries' common shares were recapitalized so that each one of the present April Industries shares represents 4 shares of the old Alta Helena Mining and Milling Company. Thus the original 16,000 shares now represent 4,000 shares.

included in the offering, and that (3) the plaintiffs had waived any right they might have had to damages. The trial court then gave plaintiffs judgment and ordered defendant to issue to plaintiffs new stock certificates without any restrictive legend.

This Court, in an opinion filed March 12, 1976, reversed the lower court's ruling on plaintiffs' damage claims and remanded the case with instructions to enter a money judgment for plaintiffs. Bjork, et al v. April Industries, 547 P.2d 219 (Utah 1976).

On May 28, 1976, the trial court entered its second judgment ordering defendant to issue to each of the plaintiffs new certificates without restrictive legend for 1,000 shares of defendant's common stock. In addition, each plaintiff was awarded judgment in the amount of \$10,982.50 with interest in the amount of \$2,827.32, for a total judgment of \$55,239.28. (R. 11)

The damage calculation was as follows: This Court's opinion held the measure of damages to be the highest price during the public offering less the stock's present value. (See 547 P.2d at 221) Plaintiffs presented evidence that the highest price during the offering was 12.75 dollars. (R. 8,9) Fr

this number was subtracted a sales commission, typical for transactions in stocks like defendant's, of 7%. The resulting figure was 11.8575 dollars per share. Plaintiffs' evidence also showed that the stock was worth 87 1/2 cents a share on March 12, 1976. (R. 5) By subtracting .875 dollars from 11.8575 and multiplying by 1,000, the number of shares held by each plaintiff, a damage figure of \$10,982.50 was computed. To this figure was added prejudgment interest of \$2,827.32, computed at 6% from February 3, 1972, the date of the offering.

ARGUMENT

I. The trial court awarded plaintiffs inconsistent remedies and unjustly enriched them.

In its second judgment, the trial court awarded plaintiffs inconsistent remedies. Plaintiffs are to receive an amount in damages virtually equivalent to what they would have received had they sold their shares in the public offering.² The trial court also told plaintiffs that they could

2. Since April's stock has declined in value, the offset for the present value of the stock is very small. The present value of the stock reduced the amount of the judgment by only \$875.00 for each plaintiff, or a total reduction of \$3,500.00

keep their shares. Thus, plaintiffs are to receive the proceeds from the sale of their stock without actually selling that stock.

In Farmers & Merchants Bank v. Universal C.I.T. Credit Corp., 4 Utah 2d 155, 289 P.2d 1045 (1955), the Utah Supreme Court articulated the doctrine of election of remedies as follows:

"The doctrine of election of remedies applies as a bar only where the two actions are inconsistent; . . ." (289 P.2d at 1049)

In Rogers v. United Western Minerals Co., 8 Utah 2d 1, 326 P.2d 1019 (1958), the plaintiff sued for past due installments under a contract for the sale of certain mining claims. In its complaint plaintiff sought both a reconveyance of these claims and the allegedly past due amounts. Though the case was reversed on other grounds, the Utah Supreme Court explicitly stated that the plaintiff could not recover both a reconveyance of the claims and the past due amounts. Plaintiff had, so the court held, at some point to make an election so that it would not be awarded inconsistent remedies.

In Midvale Motors, Inc. v. Saunders, 19 Utah 2d 403, 432 P.2d 37 (1967), the plaintiff brought suit on a uniform real estate contract for alleged delinquencies in the monthly

payments due under the agreement. Plaintiff's complaint sought both a recovery of the delinquent amounts and cancellation of the contract. The Court held that these two remedies were inconsistent and that plaintiff at some point during the proceedings had to elect between them.

A Colorado case factually very similar to the instant action is Thornburg v. Homestead Minerals Corporation, 513 P.2d 219 (Colo. App. 1973). Plaintiff sought damages against the defendant corporation and its attorneys for profits allegedly lost during the time when the defendants refused to remove a restrictive legend from her certificates.

The evidence showed that in February of 1969 the plaintiff purchased a large block of shares in the defendant corporation. Her certificates bore the legend "investment stock not subject to transfer until the 29th day of March, 1969." On the March date plaintiff was told by the corporation's attorney, who was also its secretary, that the restriction could not be removed. Plaintiff then brought suit in Utah against the defendant corporation seeking removal of the restrictive legend. Plaintiff was successful in this action, and on October 30, 1970, new certificates

were issued to her.

Shortly thereafter, plaintiff sued in Colorado claiming damages. During the period when her shares were restricted the market price for the stock was as high as \$8.00 per share; by the time the restriction was removed, the price was only 55 cents a share. The trial court granted defendant's motion for summary judgment; this ruling was affirmed on appeal:

"The defendants are correct in their contention that plaintiff's election to seek clear title to the certificates thereafter estopped her from seeking damages in a subsequent action for lost profits on sales she might have made while the transferability of the stock was being wrongfully withheld. The test of whether an election of remedies has been made when suit is filed under one theory, so as to estop a subsequent suit under an ultimate theory, is whether the relief sought is inconsistent." (513 P.2d at 220) (Emphasis added)

The Thornburg opinion cited with approval Owen v. Merts, 240 Ark. 1080, 405 S.W. 2d 273 (1966). In this Arkansas case plaintiffs sued for specific performance of a contract for the sale of shares of stock in the Pine Bluff National Bank. The Arkansas Supreme Court, in ruling that the plaintiffs could enforce the contract, specifically rejected plaintiffs' claim that they were entitled to damages for the decline in the value of the stock after their offer

to purchase had been rejected. This ruling was based on the general rule that one cannot recover both specific performance and damages.

Both Thornburg, supra, and Merts, supra, relied upon Virginia Public Service Co. v. Steindler, 166 Va. 686, 187 S.E. 353 (1936) where the Virginia Supreme Court rejected plaintiff's argument that he could compel the transfer of a stock certificate into his name and also receive damages for the decline in the stock's value between the time the transfer should have been made and the date when it was actually completed. As the court stated:

"The question for decision may be thus put: Is the holder of a certificate of stock, who elects to sue in equity to compel the transfer of the stock to his name, after receiving the same together with all dividends accumulated during the controversy, with interest thereon, and after selling the stock pending the litigation, entitled to recover of the corporation damages measured by the decline in the market value of the stock between the date the transfer should have been made and when it was actually made, when such decline was due to no fault of the corporation?

Although the question is not free from difficulty, we think it must be answered in the negative. . . .

By their form of action the complaintants have insisted that they were the equitable

owners of the stock as of the date it should have been transferred to them. They have demanded that they be clothed with all of the incidents of ownership as of that date, and on this theory they have obtained the transfer, and have collected all dividends on the stock, with interest. They have thus obtained every right which a stockholder has as of the desired time.

But one of the incidents of ownership of property, which complainants overlooked, is that property is subject to depreciation as well as appreciation in value. This is a risk which every owner of property assumes. It is a risk which the complainants took when they asked that they be placed in the position of owners of the stock as of August, 1931." (187 S.E. at 355, 356)

The inconsistent recovery condemned in Thornburg, Merts, and Steindler was granted to plaintiffs by the trial court's judgment. The defendant must pay damages because plaintiffs could not sell their stock. Yet, the judgment also tells defendant that it must issue to plaintiffs new certificates for that stock. Defendant must also pay to plaintiffs whatever dividends may be declared; it must also permit plaintiffs to vote the shares. Defendant is in effect being told: "You are going to have to pay for those shares, but you are not going to be allowed to buy them."³

3. Plaintiffs' claims can be analogized to the law of sales.

A simple example trenchantly demonstrates the error of the trial court's judgment. Let us assume that defendant pays plaintiffs money damages and issues to them the new certificates. In the interim the price of plaintiffs' stock rises. Let us assume it once again reaches \$13.00 a share. Plaintiffs will then be able to sell their stock and realize a double recovery on their 1,000 shares. In the meantime, they will have received whatever dividends have been issued by the company and they will have been able to vote their shares.

Plaintiffs assert that they are entitled to what they would have received had their shares been included in the 1972 offering; they are seeking the equivalent of either (1) specific performance or (2) an action for the price. If they are asking for what is in effect specific performance, plaintiffs must obviously give up the ownership of their shares. The same is true of an action for the price. Under both the Uniform Commercial Code and pre-Code law an action for the price is only possible where the seller has delivered goods to the defaulting buyer or the risk of loss has passed from the seller to the buyer. See U.C.C. §2-709. A seller is not entitled to sue for the sales price and at the same time keep the goods to be sold. The obvious reason for this rule is to prevent the seller from being unjustly enriched by being paid for goods which he is going to keep.

In Murray v. Americare Medical Designs, Inc. 123 Ga. App. 557, 181 S.E.2d 871 (1971), the plaintiff, who had supplied plans and supervised construction of a medical building being erected by the defendants, brought suit for breach of the construction agree-
ment.

The stock may not, of course, increase in value; but that is hardly the point. The real point is that plaintiffs will be able to hold their stock and thus speculate on a possible future price rise after having been paid in damages virtually the entire value of the shares.

II. Plaintiffs are foreclosed from recovering damages because of a ruling of the trial court from which plaintiffs took no appeal.

At trial in March of 1975 plaintiffs attempted on a highly technical theory of conversion to tender their

On a petition for rehearing after judgment for the plaintiff the issue concerned the ownership of certain cabinets and hardware items to be placed in the building. The court found that the evidence as to the location and ownership of the cabinets was conflicting. It resolved the dilemma by holding that the defendant would, by paying the judgment, be entitled to take possession of the cabinets and other hardware items. As the court stated:

"It is obvious, however, that when this defendant pays off the judgment against him representing damages equivalent to the purchase price of the casework and hardware he becomes by that fact the owner of the merchandise and entitled to whatever value it may have, since to allow the plaintiff or the manufacturer full payment plus goods involved would result in an unjust enrichment. In this connection see Code Ann. 109A-2-709. [The Georgia Provision of Section 2-709 of the Uniform Commercial Code]." (181 S.E.2d at 873-874) (Emphasis added)

shares into court and by thus renouncing any interest in the shares claim the entire offering price of the stock as damages.⁴ The trial court quite properly rejected this tender. (R.381) Plaintiffs did not appeal this ruling and never at any time during subsequent proceedings have they questioned its correctness.

The trial court's ruling on plaintiffs' proffered tender is significant for two reasons. First, the ruling should have limited plaintiffs' recovery to the removal of the restrictive legend from their certificates. Under prevailing rules of appellate practice, plaintiffs' failure to appeal the ruling should preclude any appellate award of damages. Cf. In Re Jones Estate, 99 Utah 373, 104 P.2d 210 (1940); Aiken v. Less Taylor Motor Co., 110 Utah 265, 171 P.2d 676 (1946); Keller v. Wixom, 123 Utah 103, 255 P.2d 118 (1953); Pettingill v. Perkins, 2 Utah 2d 266, 272 P.2d 185 (1954).

Second, their attempted tender shows that plaintiffs understood that they needed to choose the remedy they were

4. In the prior and related case of Lowe v. April Industries, 531 P.2d 1297 (Utah 1975) the plaintiffs elected at trial to renounce all interest in their April shares and thus were able to collect damages for both conversion and for defendant's breach of the registration agreement. This election in the prior action was, unlike the instant case, accepted by the trial court.

to pursue. They understood that they could not recover damages equivalent to the sales price for the shares and, at the same time, keep those shares. It would be ironic to suggest that plaintiffs, having failed on their attempt to give up their shares, should be able to keep those shares and yet recover damages because those shares were not sold.

III. The lower court's judgment, in effect, deprives defendant of its property without due process of law.

Because defendant is, in practical effect, being compelled to buy stock which plaintiffs' are keeping, defendant is being deprived of the property for which it is paying. This case thus takes on the dimensions of deprivation of property without due process of law in violation of both the 14th Amendment to the U.S. Constitution and Art. I, sec. 7 of the Constitution of the State of Utah. Cf., e.g., Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624 (1960); Fuentes v. Shevins, 407 U.S. 67, 92 S.Ct. 1983 (1972); Snaidach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 2d 349 (1969); Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011 (1969).⁵

5. Cf. the statement in Lynch v. Household Finance Corporation,

In Buttrey v. Guaranteed Securities Co., 78 Utah 39, 300 Pac. 1040 (1931) this Court held that a purchaser's cause of action for stock sold in violation of a Utah Blue Sky Law survived the legislature's repeal of the act. She could still sue after repeal because her right to sue was a vested property right; this right could not be taken from her by a judicial ruling that her claim was extinguished by the act's repeal.

If defendant has to pay for plaintiffs' stock, it should not be deprived of that stock by the type of judicial ruling condemned in Buttrey. To hold otherwise is to take appellant's property without due process.

IV. The trial court's judgment awards to plaintiffs an excessive amount of prejudgment interest.

405 U.S. 543, 92 S.Ct. 1113 (1972):

"The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." (92 S.Ct. at 1122) (Citations omitted)

As stated, each of the plaintiffs was awarded \$2,827.32 as prejudgment interest. This award was excessive because it permitted the recovery of interest computed from February 3, 1972, when in fact the amount of plaintiffs' damages was not ascertainable until March 12, 1976; any prejudgment interest to be awarded should only run from this March date and not from February of 1972.

The Utah rule on prejudgment interest was established in Fell v. Union Pacific Railroad Company, 32 Utah 101, 88 Pac. 1003 (1907). The case involved plaintiff's claim that livestock being shipped by him on defendant's railroad either died or lost weight because of a delay in shipment.

The trial court allowed plaintiff interest from the time when he first made demand on the defendant for the claimed damages. The Supreme Court held that the award of such interest was proper. In doing so it laid down the following test for determining the propriety of prejudgment interest:

"The true test to be applied as to whether interest should be allowed before judgment in a given case or not is, therefore, not whether the damages are unliquidated or otherwise, but whether the injury and con-

sequent damages are complete and must be ascertained as of a particular time and in accordance with fixed rules of evidence and known standards of value, which the court or jury must follow in fixing the amount, rather than be guided by their best judgment in assessing the amount to be allowed for past as well as for future injury, or for elements that cannot be measured by any fixed standards of value. The same rule under the same conditions would of necessity apply to actions for breach of contract." 88 Pac. at 1007
(Emphasis added)

The Utah Supreme Court has recently cited with approval the quoted language from Fell in Utah Pipeline Corporation v. White Superior Company, 546 P.2d 885 (Utah 1976). In this recent case the Utah Supreme Court held that prejudgment interest was measurable from the date of the destruction of the compressor, because its value was clearly ascertainable as of that date. See also Gillespie v. Blood, 81 Utah 306, 17 P.2d 822 (1932); St. Joseph Stock Yards Co. v. Love, 57 Utah 450, 195 P. 305 (1921).

This Court's opinion on the first appeal awarded plaintiffs damages for the "difference between the present market value and the highest price obtainable during the period of the breach which we perceive would be the highest price reached during the public offering less sales cost." (547 P.2d at 221) In its reference to "present market value,"

the Court presumably meant March 12, 1976, the opinion's date. Thus, plaintiffs' damages were calculated by subtracting the value of the stock on March 12, 1976, from the value on the date of the February, 1972, public offering. Thus, the damage computation was not complete, final and fixed until March 12, 1976, and under the rule of Fell the earliest date from which interest could be allowed would be March 12, 1976.

The choice of the March 12th date is critical to the amount of both damages and of prejudgment interest. If, for example, the value of the April Industries stock had been more than 87 1/2 cents on March 12, 1976, the plaintiffs' judgment would be less and the prejudgment interest would be correspondingly reduced. If damages were being measured from any date other than March 12, 1976, both the damages and the amount of any permissible prejudgment interest would be different.

CONCLUSION

For the reasons set forth in this brief appellant April Industries, Inc., respectfully submits that this Court should reverse the lower court's judgment and remand this

case with instructions that plaintiffs be awarded no money damages. Alternatively, appellant would request that this Court reverse the lower court's judgment with instructions that plaintiffs be required to renounce any claim or interest which they have in their stock as a condition to the recovery of damages. Finally, appellant seeks a ruling of this Court that the award of prejudgment interest from February 3, 1972, was erroneous.

Respectfully submitted,

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