

1976

Harold Done v. Ronald L. Bushman : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

HAROLD DONE, dba,)	
DONE EQUIPMENT COMPANY,	:	
)	RESPONDENT'S BRIEF
Plaintiff and Appellant,	:	
)	
vs.	:	
)	
RONALD L. BUSHMAN, dba,	:	
SMOOT'S CORNER,)	No. 14623
	:	
Defendant and Respondent.)	

STATEMENT OF THE KIND OF CASE

The Plaintiff brought an action to collect the sum of \$4350.00 for the sale of a MF202 Everett Trencher sold to the Defendant. In his affirmative answer the Defendant claims the contract of purchase was rescinded because of actionable fraud on the part of the Plaintiff and further the contract was rescinded because of a breach of an implied warranty by the Plaintiff as to the fitness of the machine for a particular purpose.

DISPOSITION OF THE LOWER COURT

The court found a material breach of an implied warranty made by the Plaintiff concerning the equipment sold and did further find a material misrepresentation concerning the condition of the equipment, availability

of parts and its ability to work in rocky soil as contemplated by the parties. Rescission of the Defendant was ratified and the court entered the judgment of no cause of action upon Plaintiff's Complaint.

RELIEF SOUGHT ON APPEAL

Defendant, Ronald L. Bushman seeks to have affirmed the judgment of the Lower Court.

STATEMENT OF FACTS

We do not agree with the statement of facts as set forth by the Plaintiff. For this reason, we find it necessary to make the statement which follows:

The Plaintiff is an equipment and machinery dealer located in Delta, Utah (TR3). The Defendant was commencing the business of installing sprinkler irrigation systems (TR42 L21). The Defendant had never owned or operated a trenching machine prior to his contact with the Plaintiff (TR43 L6 through 8). On the 16th day of March, 1974 the Defendant was in contact with the Plaintiff concerning the purchase of a trencher. The Plaintiff informed the Defendant that the trencher was in good condition; that parts and materials for the machine were available at all times and that the manufacturer stood behind the product;

that the machine would handle rocky ground and could adequately handle any digging Bushman (Defendant) would have in the Marysville area. (Plaintiff's acknowledgement of statements TR9 L24; TR10 L1; TR16 L20; and TR12 L3. Defendant's testimony TR45 L15; TR46 L4; TR48 L26.)

Defendant drove to Delta to see the machine on March 16, 1974. The machine was pointed out to the Defendant, but the employee of the Plaintiff had no authorization to operate the machine, demonstrate it or discuss terms (TR24 L5 and L19). Plaintiff's employee said that he was not able to give the Defendant any information.

The trenching machine was delivered to the Defendant at his place of business in Marysville, Utah on March 22, 1974. The engine on the machine was not operating properly and so an adequate demonstration was not given (TR47 L13). A second discussion was had with the Plaintiff concerning the ability of the machine and the necessity for having parts readily available (TR46 L4; TR48 L26).

The following morning on March 23, 1974, the Defendant adjusted the carburetor on the machine and attempted to operate it. Within two feet of digging, the machine struck a rock and broke the

chain (TR49 L12). The Defendant had the chain repaired and recommenced digging. Within an additional half foot, the machine struck another rock and tore off one of the buckets from the digging chain and jammed the chain (TR50 L5 through 22). The Defendant then contacted the Plaintiff's place of business to determine where parts could be obtained so that his machine would be prepared to operate on Monday morning (TR62 L1 through 19). He called Mrs. Harold Done, the bookkeeper for the Plaintiff, and secured the manufacturer's number. He called by telephone and found the manufacturer had been out of business for more than ten years (TR62 L1). He then called the number of another equipment dealer given to him by Mrs. Done, the dealer told him that he carried no parts for the machine (TR63 L1). He made a third call and found a dealer with some parts. In this conversation the dealer talking to the Defendant wanted to know, "If the slip clutch on the machine released" (TR64 L7). The dealer said the slip clutch was a part of the machine when it left the factory (TR64 L12). Defendant investigated and

found no slip clutch on the machine (TR64 L29) and that the machine had been modified to remove the slip clutch (TR65 L1 through 8).

Upon learning these facts, the Defendant advised the Plaintiff on March 23, 1974 not to cash his check for the purchase of the machine and that he was terminating the contract. Thereafter, on March 25, 1974, the following business day, he contacted his bank and stopped payment on the purchase money check (TR66 L23 and TR67 L1). The purchaser then within a 24 hour period notified the seller that he was terminating the agreement because of misrepresentations.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY MADE THE FOLLOWING FINDINGS OF FACT:

(Record E23 and 24)

1. THAT ON OR ABOUT THE 22ND DAY OF MARCH, 1974, THE PLAINTIFF DID DELIVER TO THE DEFENDANT A CERTAIN EVERETT TRENCHER FOR THE DEFENDANT'S USE IN THE MARYSVALE, PIUTE COUNTY AREA.
2. THAT THE PLAINTIFF REPRESENTED THAT THE TRENCHER WAS IN GOOD CONDITION; THAT PARTS AND MATERIALS FOR THE MACHINE WERE READILY AVAILABLE AND THAT THE MACHINE WAS SUITABLE FOR USE IN THE MARYSVALE AREA AND THAT THE MACHINE COULD WORK IN ROCKY GROUND.

3. THAT WITHIN 24 HOURS IT WAS DETERMINED THAT THE MACHINE WAS NOT IN GOOD CONDITION; THAT IT HAD BEEN MODIFIED AND DID NOT CONTAIN A SLIP CLUTCH TO PERMIT THE MACHINE TO WORK IN ROCKY GROUND AND THE MACHINE DAMAGED ITSELF WITHIN THE FIRST ONE FOOT OF DIGGING OPERATION; THEREAFTER IT WAS DETERMINED THAT PARTS WERE NOT AVAILABLE SINCE THE MANUFACTURER HAD GONE OUT OF BUSINESS.
4. THAT WITHIN A PERIOD OF 24 HOURS THE DEFENDANT GAVE NOTICE THAT THE CONTRACT TO PURCHASE THE TRENCHER WAS RESCINDED BECAUSE OF THE MATERIAL MISREPRESENTATIONS AND BREACH OF WARRANTIES BY THE SELLER.

The foregoing Findings of Fact challenged by the Plaintiff are supported by clear and convincing evidence introduced at trial and by direct admissions of the Plaintiff. The Plaintiff does not fairly analyze the evidence in a light favorable to the Defendant as the prevailing party.¹

The Plaintiff states that Defendant was "a dealer in equipment". That is not factual. Upon examination, the Defendant stated, "I am a sprinkler irrigation contractor" (TR42 L21). The Defendant had not owned or operated a trencher before his contact with the Plaintiff (TR43 L9). When asked if he had been using a trencher, the Defendant states, "No, up until October

¹ *Latimer vs. Katz* 508 P2d 542; 29 Utah 2d 280; *First Security Bank of Utah vs. Wright* 521 P2d 563.

of 1973 we just sold the (sprinkler) equipment, we didn't do any installation work, then in October of 1973 we bought a backhoe and begin the installation at that time" (TR43 L10 through 15).

In March of 1974, the Defendant became interested in a trencher for a specific job in Junction, near Marysvale, Utah. He telephoned the Plaintiff to inquire about a machine. The Defendant described the telephone conversation with the Plaintiff:

"He described the machine to me and how it was set up, which was all Greek to me at that time, I didn't understand. So I didn't, couldn't get the picture of the machine, so I asked him if I could come over and see it" (TR44 L1 through 9).

The Plaintiff gave him the name of his employee, Mr. Barlow Cahoon.

Mr. Cahoon was contacted and he took the Defendant out to see the machine. The machine was not operated. Barlow Cahoon in his testimony explains the reason for not demonstrating the machine:

(TR24)

Q At the time you were showing Mr. Bushman the trencher you did not operate the machine, do any digging, is that correct?

A That's right.

Q And why didn't you do any digging with it?

A Because I wasn't authorized to dig with it.

Q Now, you were asked to show the machine, weren't you?

A. Yes.

Q And you say you weren't authorized to go any further and actually operate it in a digging position?

A Not at that time.

Q Were you instructed not to dig with it?

A No sir.

Q So your instructions were just to show the machine but not permit it to be operated?

A That's right.

After the Defendant had been over and viewed the machine, but not able to operate it, he was then asked what happened next:

(TR45)

A I came on home and later, at a later date, a day or next day I called Mr. Done. I don't remember exactly what day it was, I called Mr. Done on the telephone and asked him about the machine, what kind of condition it was in, that at that point I hadn't been able to make any real -- any intelligent decisions at all because I'd just seen the machine operate in place.

Q Do you recall what you were told?

A Well, yes. I told Mr. Done that the machine was going to work -- it was going to be operated in the Marysville area; that it was in rocky ground and that I had to have a machine that would handle rocks because I was going to -- most of my business was in the Marysville area at the time and the job that we had specifically in mind was in Junction, which is not that far away, it is in the same valley there. And he told me that he had lined a canal bank with rocks, riprap that had been dumped in a windrow and scooped them up with this machine and placed the rocks with the machine and that it was a good rock digging machine and that we'd be well satisfied with its operation in our area.

The Defendant also asked the Plaintiff about parts:

(TR46 L4 through 8)

A Well, I asked him then if the machine, if parts were available and he said it was made by Everett Trencher Manufacturing Company and that they were a good company and they stood behind their product and that parts were readily available.

On cross examination the Plaintiff confirmed the discussion concerning availability of parts, the condition of the machine and the ability of the machine to dig in rocky ground with the following:

(TR16 L19 through 26)

Q But you told him that he could dig rocks?

A I told him it would dig rocks. I told him it was in good shape but I didn't guarantee nothing.

Q And you told him the machine was in good shape?

A Yes sir.

Q Then you had another discussion where he was concerned about the availability of parts?

A Yes sir.

The Plaintiff also admitted discussion concerning the area where the machine would be used:

(TR14)

A He (Defendant) just told me where he was from, I believe he said Marysvale and he would be using it.

Q The Marysvale area?

A Uh huh.

The Plaintiff admitted the machine did not have a slip clutch and explained the reason for a slip clutch:

(TR17)

Q At least then this machine so long as you had it has never had a slip clutch?

A No; never has.

Q Now, what would be the purpose of a slip clutch on a digging machine of this type?

A It would be if there was too much strain it would slip, as we all know.

Q So that if you got into too heavy a rocks the clutch would slip and you wouldn't tear the machine up would be the primary purpose?

A That is the primary purpose, yes.

The Plaintiff was also asked:

(TR18)

Q Now, were you aware that the manufacturer of this particular machine has been out of business for some ten years?

A I am now, I wasn't then.

The Defendant testified concerning his efforts to try the machine the day following its delivery on March 22, 1974. On March 23, 1974 the machine was taken out and lowered to an operating level. Within the first foot of operation the machine hit a rock and broke the chain. The chain was repaired and the attempts to operate were resumed. Within a half of a foot the machine hit another rock and tore off one of the buckets (TR49 L50). The Defendant then attempted to call the manufacturer, at the number which was pointed out to him by the Plaintiff and contained on a brass plate attached to the machine (TR51 L1 through 6). The Defendant found the manufacturer was out of business (TR62).

The Defendant then contacted the Plaintiff concerning the matter and was told that the Plaintiff's wife had an address of part suppliers. Mrs. Done gave the Defendant further addresses.

The Defendant called the other numbers. The first

two numbers did not have any parts. They reported to the Defendant that the manufacturer of the trenching machine had been out of business for over ten years and that parts were only available on a salvage basis. On the third call the Defendant found the dealer had some parts in stock and other parts he said may be available on a salvage basis. The dealer had acquired old machines and was dismantling them. The dealer inquired about the problem and then asked if the slip clutch had not released. This was the first the Defendant knew the machine was designed with a slip clutch to prevent the very breakage he had encountered. He investigated and found the vehicle had been modified and no slip clutch existed (TR62 through 66 - See also Exhibit #6). The modification made the machine unsuitable and unreliable in the rocky lands near Marysville.

The Defendant then examined the machine in detail and found in addition to a missing slip clutch:

- (a) Upper digger bearings were worn out. (See Exhibits D2, 2A and D5; TR52 through 53)
- (b) Shaft supporting digger bearings showed excessive wear (TR53 L8).

- (c) Lower bearings were excessively worn.
(See Exhibits D3, 2A, D4 and 4A; TR53
through 54).

While the bearings should have no play, they actually had one to one and one half inches of play (TR59).

Within 24 hours and upon March 23, 1974, the Plaintiff was notified of the rescision of the contract because of the misrepresentation of the machinery and told not to deposit the purchase money check (TR66 L23 through 29). On the following business day on Monday the payment of the check was stopped by the Plaintiff's bank (TR67 L1).

Based upon the testimony of the Plaintiff and the Defendant concerning the transaction, we believe the court properly entered Findings of Fact 1 through 4 herein shown.

POINT II

THE EVIDENCE BEFORE THE COURT WAS CLEAR
AND CONVINCING ON THE QUESTION OF FRAUD.

The evidence is clear and convincing upon each of the elements of fraud required to be proved by the Defendant, which elements are set in the leading cases of *Stuck vs. Delta Land and Water Company*, 63 Utah 495; 227 Pacific 791 and *Pace vs. Parrish*, 122 Utah 144; 247 P2d 273.

The Plaintiff made false representations as to existing material facts. The representations were made knowingly or recklessly for the purpose of inducing reliance thereon and the Defendant reasonably relied upon the representations to his injury.

Since the facts and references to the record set forth in considerable detail under the Statement of Facts and under Point One of our Argument, we can best summarize by reference to Findings of Fact numbers 2 and 3 as made by the Lower Court:

2. That the Plaintiff represented that the trencher was in good condition; that parts and materials for the machine were readily available and that the machine was suitable for use in the Marysvale area and that the machine could work in rocky ground.
3. That within 24 hours it was determined that the machine was not in good condition; that it had been modified and did not contain a slip clutch to permit the machine to work in rocky ground and the machine damaged itself within the first one foot of digging operation; thereafter it was determined that parts were not available since the manufacturer had gone out of business.

For these reasons, the Court correctly found actionable fraud which would permit the rescission of the contract.

POINT III

THE COURT CORRECTLY FOUND THE PLAINTIFF
HAD WARRANTED THE FITNESS OF THE TRENCHER
FOR DIGGING IN ROCKY SOIL NEAR THE MARYS-
VALE AREA.

The Plaintiff expressly warranted the trencher
he sold would dig rocks when he was advised it would
be used in rocky ground near Marysvale, Utah
(Defendant's Testimony TR45). The Plaintiff acknow-
ledges, "I told him it would dig in rocks" (TR16 L20).
Plaintiff also acknowledged a discussion of the place
of use of the machine in the following:

(TR14 - Done)

A He just told me he was from, I believe he
said Marysvale and he would be using it.

Q In the Marysvale area?

A Uh huh.

The sales representation of the Plaintiff
constituted an express warranty under the following
provision of the Utah Sales Act:

(70A-2-313 Utah Code Annotated, 1953)

EXPRESS WARRANTIES BY AFFIRMATION, PROMISE,
DESCRIPTION, SAMPLE.

- (1) Express warranties by the seller are
created as follows:
 - (a) Any affirmation of fact or promise
made by the seller to the buyer
which relates to the goods and
becomes part of the basis of the

bargain creates an express warranty that the goods shall conform to the affirmation or promise.

After the seller (Plaintiff) was informed the trencher would be used in the rocky ground of Marysvale, his judgment was requested as to the suitability of the machine. The seller advised the machine was fit for the purpose (TR14 and TR45 through 46). An implied warranty of fitness was also made under the following statute:

(70A-2-315 - Utah Code Annotated, 1953)

IMPLIED WARRANTY - FITNESS FOR PARTICULAR PURPOSE.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is . . . an implied warranty that the goods shall be fit for such purpose.

The foregoing express warranty and implied warranty was breached. The machine was not suitable for operating in rocky soil primarily because it had no slip clutch. For some unknown reason the machine was modified to remove the clutch installed by the original manufacturer. Therefore, the machine had no way of relieving stress when solid obstacles were encountered.

The machine broke down twice in less than two feet of trenching. The trencher in its first rock encounter broke the digging chain. The chain was repaired and the machine then tore off a digging bucket.

The Plaintiff explained the reason for a slip clutch:

(TR17 L23 through 28)

A I don't know of no modification of that machine.

Q At least then this machine so long as you had it has never had a slip clutch?

A No, never has.

Q Now, what would be the purpose of a slip clutch on a digging machine of this type?

A It would be if there was too much strain it would slip, as we all know.

Q So that if you got into too heavy a rocks the clutch would slip and you wouldn't tear the machine up would be the primary purpose?

A That is the primary purpose, yes.

The fact the modified machine would not work in rocky ground was further aggravated since parts were not available to repair it.

POINT IV

THE DEFENDANT GAVE IMMEDIATE AND TIMELY NOTICE OF RECISION. NO GROUNDS EXIST FOR THE DOCTRINE OF ESTOPPAL OR LACHES.

Plaintiff contends that Defendant did not act in a timely manner concerning his desire to return the trencher and rescind the contract.

The controlling Utah Statutes are:

(Section 70A-2-607 (3) (a), U.C.A. 1953)

The buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach . . . ;

(Section 70A-2-608 (2), U.C.A. 1953)

Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it . . .

The Defendant's action was as timely as possible. The trencher was delivered to him in Marysvale on March 22nd. On march 23rd, he attempted to use the machine and did discover the grounds for rescision. On March 23rd and within a 24 hour period, he contacted the Plaintiff and informed him of the difficulty and advised him of the rescision of the contract.

Defendant told Plaintiff not to deposit the purchase money check (TR66). The next business day, March 25th, the Defendant called his bank and stopped payment on his check to Plaintiff (TR67).

After notification of rescision, the Plaintiff had the obligation of picking up the machine at its place of delivery. The Plaintiff reasonably could

have been charged storage because of his failure to do so (See *Christopher vs. Larson Ford Sales, Inc.* 557 P2d 1009).

CONCLUSION

The District Court should be affirmed in its findings that the trenching equipment was misrepresented to the Defendant and there was a breach of sales warranty as well as actionable fraud upon which to base the Defendant's rescission of the purchase contract.

We respectfully submit the decision of the Lower Court should be affirmed.

Respectfully submitted,


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CERTIFICATE OF MAILING

I hereby certify that on the 28th day of April,
A. D., 1977, two copies of the within and foregoing
Brief of Respondent, Ronald L. Bushman, were served
upon the following by U. S. Mail, postage prepaid:

Mr. Eldon A. Eliason
Attorney at Law
Delta, Utah 84624



Attorney for Respondent
Ronald L. Bushman