1976

Young Electric Sign Co. v. Basil Vetas : Brief of Appellant

Utah Supreme Court

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J. Thomas Bowen; Attorney for Plaintiff and Respondent;

IN THE S

OF THE

STATE OF

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YOUNG ELECTRIC S
COMPANY,

Plaintiff/
Respondent,

-vs-

BASIL VETAS dba
SIR BASIL'S,

Defendant/
Appellant.

Appeal from
Third Judicial Distr
the Honorable

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and Respondent.

IN THE SUPREME COURT

OF THE

STATE OF UTAH

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YOUNG ELECTRIC SIGN COMPANY,	)	
Plaintiff/ Respondent,	)	
-vs-	)	Case No. 14653
BASIL VETAS, dba SIR BASIL'S,	)	
Defendant/ Appellant.	)	

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BRIEF OF APPELLANT

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Appeal from a Judgement of the
Third Judicial District, in and for Salt Lake County,
the Honorable Ernest F. Baldwin, Judge.

* * *

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BRIEF OF APPELLANT

NATURE OF THE CASE

The complaint in this case was filed by Young Electric Sign Company (here called 'Young') alleging Basil Vetas (here called 'Vetas') to be in default under a sign rental agreement and asking a money judgment. Vetas denied the allegations.

DISPOSITION IN LOWER COURT

Trial was held May 11, 1976, before the Honorable Ernest F. Baldwin, sitting without a jury. The District Court found Vetas in default, and entered judgment against him for $1,612.54.

RELIEF SOUGHT ON APPEAL

Vetas asks this Court to reverse the lower court judgment.

STATEMENT OF FACTS

In 1961, Vetas signed with Young a "Rental Agreement" calling for installation of an electric sign at Vetas' drive-in establishment, 999 Washington Boulevard, Ogden. This agreement is a printed form used by Young. (Ex 8-D). Vetas paid $660 deposit, and agreed to pay $110 per month during the 96 month lease time. Young to maintain the sign (par. g); Vetas to pay all sales tax and electricity charges (par. e).

The sign was duly built and installed by Young in 1961, at a cost to it of $4,680.14 (R-119). Both parties performed fully under the agreement through January of 1963, when a new contract was executed, replacing the original (Ex 9-D). This contract left intact the original sign, but called for Young to install some lighted plexiglass panels on Vetas' building at the same location. The new "rental agreement" (Ex 9-D) called for 96 monthly payments by Vetas of $135.00, with the other terms of the agreement identical to the 1961 contract. No work was performed on the original sign; the 1963 work installed by Young on the building was at a cost to it of $2,696.35 (R-120).

Both parties again performed under the contract until the late fall of 1967. A new contract was then executed. Vetas needed the payments to be less than $100 per month, and after negotiation the new contract called for payment of $99.17 per mont for a new term of 96 months. (Ex 3-D). At the time the contract was executed Vetas was in arrears 4 payments, or $558.92 (Ex 1-D). No new work or construction of any nature was done at this time by Young (R-79); the new contract related solely to the then existing pole sign (installed in 1961) and panel lighting (installe in 1963).

The only dispute between the parties as to the execution

of the 1967 agreement relates to the $660 deposit. All agree it was still a deposit as of December 1967. Gilbert, manager of Young, testified the deposit was, in December of 1967, simply credited to Vetas' account (R-136). This was done he stated to compensate for an error of $1,200 he made in calculating the new contract price (R-85). Vetas denied he had ever been informed by Young the deposit was being used or charged off (R-150). Exhibit 3-D, the original white contract signed December 5, 1967 by both parties, and kept in the custody of Young, reflects the $660.00 deposit still being held by Young (par. 4).

The Trial Court resolved this controversy against Young (R-58) and allowed it as a credit to Vetas on sums found owing Young in 1973 and 1974.

Vetas duly paid his installments under the new agreement until the winter of 1973-74. As of December 1, 1973, Young claimed Vetas owed 6 payments, including December (Ex 6-P, R-112). A demand letter (Ex 4-D) was sent by Young to Vetas threatening to, among other things, disconnect his electricity and repossess the sign. Vetas paid another payment of $103.63 on December 26 (Ex 5-D, R-113) reducing the payments owed to 5 (R-127) or $587.54.

Suit was filed by Young (R-2) alleging default in payments of $585.54 as of December 1, 1973, and asking liquidated damages

plus arrearage and attorney fees.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN FINDING VETAS IN DEFAULT UNDER THE CONTRACT.

It is not disputed that Vetas was in arrears through December of 1973, 5 payments at $99.17 per month, plus sales tax and interest, or $584.54. This is what Young alleged, and Vetas does not dispute the accuracy of the delinquent payments. Yet, Vetas was not in default because of three key facts:

1) As of December, 1973, Vetas no longer had a $660.00 deposit showing on Young's books. Gilbert, Young's manager, testified this had been taken off and applied in 1967 to compensate for an error made in computing the 1967 contract (R-85, 136). Krantz, the bookkeeper for Young, said the $660.00 had been credited to Young as a set off against the miscalculation of the new contract (R-122). The money was never credited to Vetas' account (R-122) and was not used to pay past due installments in 1967 or 1973 (R-124). No records were available to show what had actually happened to the $660.00, Young was not able to locate them for trial (R-121).

2) Ex 1-D, the calculation sheet used by Young in figuring the 1967 contract, shows the past due installments in November of 1967 ($558.92) being included in the new contract, in fa

being more than included by reason of a monthly charge of $8.61 for 96 months, representing the $558.92 plus 8 years' interest of $268.29. This confirms Vetas' deposit was never used to apply on back due installments.

3) The Trial Court found (R-58) there was insufficient evidence for it to determine the disposition of the deposit, and therefore found Vetas was entitled to a credit of $660.00.

It is well to note, in addition to the above, that no written documentation of the alleged use of the deposit was ever offered. Vetas denied ever being informed prior to suit the deposit had been set off or used (R-150).

What we are saying here is that Young had in fact appropriated Vetas $660.00, but improperly so! Therefore, since he was entitled to that credit in 1976, he surely was also entitled to it in 1973 when Young declared him in default and filed suit. The question is not the same as whether the tenant is entitled to have a security deposit off set on his demand against unpaid rentals. He may, or may not, and we do not ask this court to address itself to that issue.

In our case, the deposit had in fact been appropriated by Young. It originally appeared in his account as a credit (R-122) but did not as of December 1973. The complaint (R-2) denies the

existence of such deposit. Vetas was entitled to that credit of $660.00 in December of 1973; his obligation was less than $600, he was not then in default. Nevertheless, Young declared him in default, refused to maintain the sign after January 1, 1974, and filed this suit. Young was the party in default, for its admitted failure to maintain the sign after January 1, 1974 (R-109). Since Young failed to perform when Vetas was not in default, it is not entitled to recover. See 17 Am Jur 2d, Contracts, §425, Newsom v. Liberty Sign Co. Tex. 1967, 416 S.W. 2d 442.

POINT II.

THE TRIAL COURT ERRED IN FINDING THE LIQUIDATED DAMAGE PROVISION OF THE CONTRACT REASONABLE.

The Trial Court found (R-58) the lease provision (par. 8) with reference to liquidated damages reasonable. Upon such finding, it gave Young judgment for 75% of the rentals from February, 1974, through May, 1975. It did so even though it was undisputed Young performed absolutely no maintenance during the period, and repossessed the sign in February, 1975.

The original cost of the sign and 1963 building panels was $7,376.00, (R-119, 120). During the period 1961 through 1973 Vetas paid over $17,000.00 in rentals to Young (Ex 5-D). No improvements were made by Young during this period.

In addition to recouping the cost of the installation over the term of the contract, Young had other items of expense,

namely, maintenance, insurance and taxes. In this case, using a percentage of original cost as a basis, Gilbert, Young's manager, testified that included in the monthly payment of $99.17 were the following: (R-90)

Maintenance	$50.00
Taxes	15.00
Insurance	15.00

Maintenance cost records could not be found by Young. However, testimony was given by the credit manager (R-114) that 1973 maintenance costs were $175.00.

With regard to taxes, again no records could be found but Gilbert testified Young paid taxes on the signs of $3.75 per month (R-135).

The third element, insurance, is in a state of doubt. Gilbert testified Young was self insured (R-90). Krantz testified Young was self insured on property damage (R-116) and had blanket coverage on liability. No evidence was offered as to the expense of this coverage to Young.

In December, 1973, Young declared the contract in default and terminated maintenance and service (Ex 4-D, R-91, 109). Since the sign had no value to Young (Ex 3-D, par. 8; R-78) insurance would immeidately be reduced to the extent it was self insured. The cost of the liability insurance, which is unknown but could

not be great, would continue until it was junked. The taxes, assessed in January, would continue through the year 1974. Maintenance, of course, ceased to be any factor.

By December of 1973, Vetas had already paid 12 years on the original sign, and 10 years on the 1963 additions. All payments were made under 8 year or 96 month leases, and certainly by then Young had long since recouped the original cost of the installations. Nevertheless, Vetas has to pay $1,188.00 to Young, representing the liquidated damages of 75% of the months from February of 1974 to May, 1975 at $99.17 per month.

Restatement of the Law, Contracts, Section 339 provides:

> "§ 339. LIQUIDATED DAMAGES AND PENALTIES.
> (1) An agreement, made in advance of breach, fixing the damages therefor, is not enforceable as a contract and does not affect the damages recoverable for the breach, unless
> (a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and
> (b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation. "...

This principle is generally recognized as controlling in these neon sign and other rental cases, see Ray v. Electrical Products, Wyo. 1964, 390 P2 607; Electrical Products Consolidated v. Sweet, 10th C.C.A. 1936, 83 F2 6. The lessor is entitled to recover only its actual damage for breach of contract in such cases, Sweet, supra.

We submit both requirements of §339 are violated here. First, the 75% figure does not reasonably relate to the real damage, and second, Young has years of experience, and could accurately figure those damages in advance.

We note of the $99.00 payment, $50.00 per month was allocated to maintenance, $15.00 to taxes and $15.00 to insurance, a total of $80.00. As previously set out, the tax figure was actually $3.75 per month. The self insurance or damage would terminate since Young's position is the sign was valueless. The maintenance figure terminated also, as of January 1, 1974.

Therefore, under the evidence Young's costs during the 16 months it was awarded 75% of rentals were only $3.75 per month. Even assuming it was entitled to the other $19.17 ($99.17 - $80.00) per month as finishing payment on the original sign (which we dispute) nevertheless Young was awarded about $75.00 per month for 16 months when its actual cost was $3.75, or at most $22.94 ($19.17 + $3.71). It is fine to say Young is entitled to the benefit of its bargain; and some cases (see Young Electric Sign Co. v. Capps, Idaho 1971, 492 P2 57) have held 75% of unpaid rentals is reasonable. Each case must stand on its own proof, and Young Electric calculated, in negotiating the contract, maintenance at $50.00, taxes at $15.00 and insurance at $15.00.

Using these figures, the ones the parties contracted

with reference to, Young after January 1, 1974 eliminates insurance, maintenance, and $11.25 of taxes. We submit there was no 'reasonable forecast of actual damage' and Young is not entitled to the penalty imposed on Vetas for liquidated damages.

CONCLUSION

We submit Young, not Vetas, was in default under this contract when suit was filed. We further submit the damages awarded of $1,188.00 were a penalty and should be stricken from the judgment.

Respectfully,

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Attorney for Appellant, Basil Vetas