1976

Commercial Fixtures and Furnishings, Inc. v. Eldon Adams et al : Brief of Respondents

Utah Supreme Court

IN THE SUPREME COURT IN AND FOR THE STATE OF UTAH

COMMERCIAL FIXTURES AND FURNISHINGS, INC., a Corporation of Utah,

Plaintiff-Appellant,

-vs- : CASE NO.

ELDON ADAMS, an individual, and NEW LIFE HEALTH SPA, by and through ELDON ADAMS,

Defendants-Respondents.

BRIEF OF

On appeal from a Judgment of the
Court of Utah County, Honorable

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FILED

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT

OF THE STATE OF UTAH

COMMERCIAL FIXTURES AND FURNISHINGS, INC., a Utah Corporation, Plaintiff and Appellant, -vs- ELDON ADAMS, an individual, and NEW LIFE HEALTH SPA, by and through, ELDON ADAMS, Defendants and Respondents.	Case No. 14700

BRIEF OF RESPONDENT

NATURE OF THE CASE

Appellant sued Respondent, ELDON ADAMS, for the price of goods sold by Appellant to GREAT OUTDOORS, INC., and/or WILLIAM LEWIS FORSYTH, its principal officer and stockholder. Respondent was the Lessor of the property under lease to GREAT OUTDOORS, INC., to the site of which property the goods in question were delivered by Appellant. GREAT OUTDOORS, INC. breached its lease and Respondent brought action for such breach, terminated the lease, and re-possessed the property pursuant to Court Order and Judgment. Appellant seeks to recover its claim against GREAT OUTDOORS, INC., and/or WILLIAM LEWIS FORSYTH from the Respondent, Lessor, on the theory of unjust enrichment.

DISPOSITION IN THE LOWER COURT

Following two pre-trial hearings with no factual disputes

finally appearing, the matter was submitted to the Court on simultaneous motions for summary judgment, supported by simultaneous memoranda and argument and reply memoranda of the Appellant and Respondent. Judgment of no cause of action was rendered against the Appellant and in favor of the Respondent by the Honorable GEORGE E. BALLIF, District Judge.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the judgment of the trial Court affirmed by the Supreme Court.

STATEMENT OF FACTS

Respondent, ELDON ADAMS, is the owner of property at 1640 South State Street, in Orem, Utah. On or about March 1, 1974, Respondent leased said property, by written lease, to GREAT OUTDOORS, INC., a Utah corporation. Under the terms of the lease, the Lessee, at its sole expense, agreed to complete such improvments in and upon the property as its business needs might require and to promptly pay and discharge all costs and expenses incident thereto, to the end that no liens would be placed upon or against the leased property.

Thereafter, GREAT OUTDOORS, INC., the Lessee, and/or WILLIAM LEWIS FORSYTH, its principal officer and stockholder, on their own behalf and on their own initiative, contracted with the Appellant for the purchase of materials to be used in the completion of such improvements, which contract was negotiated with the understanding between the Lessee and/or WILLIAM LEWIS FORSYTH and the Appellant that the Lessee was and would continue to be solely responsible for the payment of the price of such materials. Materials were then

furnished by the Appellant to the Lessee and were subsequently incorporated in the building on the leased premises by the Lessee.

The Lessee subsequently defaulted in the performance of its covenants in the lease of the Respondent's property and action was instituted by the Respondent in the Fourth Judicial District Court of Utah County to terminate the lease and regain possession of the property. By judgment of the Court, the lease was terminated and the property restored to the Respondent. The Appellant filed no claim of lien against the property or the interest of the Lessee therein and the time limited for filing such lien has expired.

The Respondent was not privy to any contract between the Appellant and the Lessee, and the Appellant has never instituted any action to recover the price of said goods from the Lessee, GREAT OUTDOORS, INC., and/or WILLIAM LEWIS FORSYTH, but instead, seeks to recover its claim from the Lessor of the property.

ARGUMENT

POINT I

THE LESSOR OF PROPERTY IS NOT RESPONSIBLE FOR THE COSTS OF REPAIRS OR IMPROVEMENTS THERETO INCURRED BY THE LESSEE.

A tenant who makes repairs to or improvements on demised premises does so at his own cost, and he cannot involve his landlord in the expense thereof without the landlord's consent (49 Am Jur 2d 702, Section 765). A tenant has no inherent power to bind his landlord for the cost of improvments or repairs made by him to the premises, and, as a general rule, the tenant's creditors have no greater right to charge the land with the value thereof than the tenant would have. (49 Am Jur 2d 702, Section 765, citing AMERICAN BONDING COMPANY v. PUEBLO INVESTMENT COMPANY (CA. 8), 150

F. 17; WALTER v. SPERRY, 86 Conn. 474, 85 Atlantic 739; BROWN v. WARD, 221 N. C. 344, 200 SE 2d 324; GRIZZLE v. RUNBECK, 74 Arizona 92, 244 P 2d 1160; KNAUSS v. HALE, 164 Idaho 218, 131 P 2d 292). In the absence of special circumstances, the tenant cannot, by a contract with a third person, subject the landlord's reversion to a mechanic's lien for the cost of improvements upon the demised premises, although, of course, the Lessee's own interest in the leasehold might be subject to such lien. (49 Am Jur 2d 702, Section 765).

Our mechanic's lien law, Section 38-1-3 Utah Code Annotated, 1953, as amended, recognizes that such liens can attach "only to such interest as the owner may have in the property." (See BUEHNER BLOCK COMPANY v. NICK GLEZOS, et al, 6 Utah 2d 226, 310 P 2d 517, wherein the Court recognizes that the Lessee's interest under a lease may be reached through a mechanic's lien, but not the interest of the Lessor, under normal circumstances). On principle, there is no better reason why a creditor dealing with a Lessee should be permitted to pursue his claim against the Lessor, personally.

In the absence of statute or of an agreement between the parties, there is no obligation on the part of the Lessor to pay the Lessee for improvements erected by the latter upon the demised premises, even though the improvements are such that by reason of their annexation to the freehold they become a part of the realty and cannot be removed by the Lessee. So, in the absence of statute or of any agreement as to improvements, the Lessee is not entitled to a lien therefor, in view of the rule that the Lessor

assumes no liability for improvements made unless he expressly agrees to be responsible therefor. Moreover, ordinarily, creditors of a tenant have no greater right to charge the land with the value of improvements made by the tenant than the tenant would have, (49 Am Jur 2d 718, Section 777; annotation at 25 ALR 2d 885, Sections 1 and 3) and the mere consent of the Lessor to the making of such improvements does not render the Lessee the agent of the Lessor so as to bind the Lessor to pay the costs thereof. (Annotation 163 ALR 992). In order for a tenant (or tenant's creditor) to recover for the cost of repairs, alterations, or improvements there must be a distinct agreement on the part of the landlord to pay for them. (49 Am Jur 2d 828, Section 860, citing ZANNIS v. FREUD HOTEL COMPANY, 256 Michigan 578, 240 N.W. 83, 80 ALR 534).

Directly in point in connection with the foregoing proposition is the case of HOWARD v. SOCIETA DI UNIONE E BENEFICENZA ITALIANA, et al, a California case reported at 145 P 2d 694, where the Court said:

> "We are cited to no authorities which justify a conclusion that under evidence such as was adduced in this case, appellant is liable for the debts of the association merely because the structure was erected upon its land with its consent. There is no evidence that plaintiff's assignors relied upon the agreement between the society and the association or upon any conduct or representation or inducement on the part of the society or upon the fact that the land upon which the structures were erected belonged to the society..... There is no evidence that the society ever assumed or agreed to pay any of the debts of the association. Testimony is to the contrary and there is no evidence from which any contract between the society and the creditors can be implied or upon which an equitable lien can be premised."

In the case before this Court, it is clear that there was no reliance whatever by the Appellant on the credit of the Respondent and, in fact, the lease itself expressly imposed upon the tenant

alone the responsibility for the payment of the costs of any improvements or repairs made to or upon the property by it.

> "The act or acts from which the law implies any contract, must, in every instance, be voluntary and the law will never imply a promise to pay where it would be unjust to the party to whom it would imputed and contrary to equity so to imply it. Further, the law will not imply a promise against the express declaration of the party to be charged, made at the time of the supposed under taking....." (66 Am Jur 2d 944, Section 2)

While the Appellant in this Court takes the position that the case is bottomed on the principle of "unjust enrichment" and that the provisions of the Uniform Commercial Code and other statutory laws of the State of Utah are inapplicable, this position is contrary to the position taken by it at the trial level where copious references to the Uniform Commercial Code were set out in the Appellant's trial memoranda. It is submitted, however, that in considering the question from the equitable standpoint of "unjust enrichment" as applied to a third party who was not privy to the contract or transaction between the Appellant and the Lessee of Respondent's property who purchased the Appellant's goods reference to some provisions of the Utah Uniform Commercial code are pertinent and appropriate. For example, as an alternative to a money judgment against the Respondent on the theory of "unjust enrichment" the Appellant has alleged that it is entitled to enter upon the premises and remove its property. Title 70 A-9-313, Utah Code Annotated, 1953, as amended, provides in part:

> "(1) the rules of this section do <u>not</u> apply to goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work, and the like, and no security interest in them exists under this chapter unless the structure remains personal property under applicable law....."

The above cited section further provides under sub-paragraph three (3) thereof that even where a security interest attaches to goods after they become fixtures, such security interest, if any, is invalid against:

> "Any person with an interest in the real estate at the time the security interest attaches to the goods and who has not, in writing, consented to the security interest or disclaimed an interest in the goods as fixtures."

It is clear, therefore, that the seller of goods which become incorporated into a structure on land owned by a third party in the manner of lumber, bricks, tile, cement, glass, metal work, and the like, obtains no security interest in such property except on the basis of a duly executed and filed security instrument and financing statement perfected by the seller as provided by title 70A-9-302, Utah Code Annotated, 1953, as amended, and even if such security interest in the property is perfected through the execution and filing of such security instrument and financing statement, it is invalid as against any person with an interest in the real estate at the time the security interest attached to the goods unless the owner of such real estate consented, in writing, to such security interest or disclaimed an interest in the goods as fixtures, neither of which actions has been taken by the Respondent in this case, who is the owner of the realty. If there is no security interest, therefore, in the Appellant as against the actual purchaser of the goods, there can certainly be no security interest in those goods as against the Lessor of the property which would entitle the Appellant to enter upon the premises and remove the goods therefrom.

Further, the Uniform Commercial Code provides that the seller may reserve title or collect on delivery, but if neither procedure is employed, the result is a sale on credit and title passes to the buyer on delivery. (70A-2-310 and 401, Uniform Commercial Code, UCA 1953, as amended.) In the instant case, the Appellant did not reserve any title and failed to collect full payment for the goods on delivery. As a result title passed directly to the Lessee-buyer. Title 70A-9-113 of the Uniform Commercial Code (UCA 1953 as amended) also specifically provides that when a debtor has obtained possession of goods or materials from a seller, no security interest in such materials can arise or be claimed by the seller without an appropriate security instrument and financing statement duly perfected, and even in that case, such security interest would be ineffective as against the owner of the realty. All of these sections negate, at least by inference, any valid claim of the Appellant to the property or against the Respondent, personally, predicated on principles of "unjust enrichment" or otherwise.

POINT II

THERE WAS NO UNJUST ENRICHMENT OF THE RESPONDENT IN THIS CASE SUCH AS TO RENDER HIM RESPONSIBLE FOR THE PAYMENT OF THE APPELLANT'S CLAIM.

Out of this entire transaction, the Respondent has sustained a substantial loss. He has not profited in any degree from the actions of his tenant.

One is not unjustly enriched by retaining benefits involuntarily acquired which law and equity give him absolutely without any obligation on his part to make restitution (66 Am Jur 2d 946, Section 3, citing BUELL v. ORION STATE BANK, 327 Michigan 43, 41

NW 2d 472; MEHL v. NORTON, 201 Minnesota 203, 275 NW 843, 113 ALR 1055). Further, a basic principle underlying the rules in regard to restitution and "unjust enrichment" is that a person who officiously confers a benefit upon another is not entitled to restitution therefor. Policy ordinarily requires that a person who has conferred a benefit either by way of giving another services, or by adding to the value of his land, or by paying his debt, or even by transferring property to him, should not be permitted to require the other to pay therefor, unless the one conferring the benefit had a valid reason for so doing. Where a person has officiously conferred a benefit upon another, the other may be enriched but is not considered to be unjustly enriched. The rule thus has the effect of penalizing those who thrust benefits upon others, and protecting persons who have had benefits thrust upon them, assuming, without admitting, that there was a "benefit" in the instant case. In other words, any party has a right to decline to permit another to perform an act on his account and he is not liable under "implied contract" for benefits forced upon him, especially where there was no request by the Respondent for what the Appellant did and the Appellant occupied the position of a "volunteer". (66 Am Jur 2d 948, Section 5).

> "The mere fact that a third person benefits from a contract between two other persons does not make such third person liable in quasi-contract, unjust enrichment, or restitution." (66 Am Jur 2d 960, Section 16, citing: UTSCHIG v. McCLONE, 16 Wisconsin 2d 506, 114 NW 2d 854).
>
> "Moreover, where a third person benefits from a contract entered into between two others persons, in the absence of some misleading act by the third person, the mere failure of performance by one of the contracting parties does not give rise to a right of restitution against the third person."

(66 Am Jur 2d 960, Section 16, citing: UTSCHIG v. McCLONE, supra).

"In other words, a person who has conferred a benefit upon another, by the performance of a contract with a third person, is not entitled to restitution from the other merely because of the failure of performance by the third person." (66 Am Jur 2d 960, Section 16, citing: RESTATEMENT, RESTITUTION, Section 110).

"Ordinarily, the law imposes liability to pay for services rendered by another only when the person for whose benefit they were conferred requested their rendition. As a general rule, where a person performs labor for another without the latters request, however beneficial such labor may be, he cannot recover therefor." (66 Am Jur 2d 966, Section 23, citing: TILLEY v. COOK COUNTY, 108 U.S. 155, 26 L. Ed. 374).

Before there can be a contract implied for services rendered and accepted there must, of course, be in fact an acceptance. Moreover, the party sought to be charged must be in a situation where he is entirly free to elect whether he will or will not accept the work, and where such election will or may influence the conduct of the other party with reference to the work itself. Where a structure is permanently affixed (or a repair made) to real property belonging to an individual without his consent or request, he cannot be held responsible because of its subsequent use. It becomes his by being annexed to the soil, and he is not obliged to remove it to escape liability. He is not deemed to have accepted it so as to incur an obligation to pay for it, merely because he has not chosen to tear it down, but has seen fit to use it. (66 Am Jur 2d 969, Section 24, citing: PARSHLEY v. THIRD M. E. CHURCH, 147 N.Y. 583, 42 N.E. 15; ZOTTMAN v. SAN FRANCISCO, 20 Cal. 96; SUTTON v. UNITED STATES, 256 U.S. 575, 65 L. Ed. 1099, 41 S. Ct. 563, 19 ALR. 403).

POINT III

THERE CANNOT BE AN EXPRESS AND IMPLIED CONTRACT FOR THE SAME THING EXISTING AT THE SAME TIME.

In this case, it is undisputed that there was an express contract between the Appellant and GREAT OUTDOORS, INC., the Lessee of the property, and/or its principal officer and stockholder, for the furnishing of the materials upon which the Appellant's claim against the Respondent is based. It is only when parties do not expressly agree, that the law interposes and raises a promise, and no agreement can be implied where there is an express agreement existing. (66 Am Jur 2d 948, Section 6, citing: VERDI v. HELPER STATE BANK, 57 Utah 502, 196 Pac. 225, 15 ALR 641. In the above cited Utah case, the Court said:

> "It is axiomatic that where an express contract exists, one may not be implied."

Thus, an express contract precludes the existance of a contract implied by law or a quasi-contract. (66 Am Jur 2d 949, Section 6, citing: numerous cases from the U.S. Supreme Court and various State Courts). Inasmuch as the fundamental basis of a claim of "unjust enrichment" is "implied contract", that claim in the instant fact situation is untenable.

POINT IV

APPELLANT CANNOT PROCEED IN AN EQUITABLE ACTION AGAINST THE RESPONDENT OWNER AND LESSOR OF THE PROPERTY UPON WHICH THE IMPROVEMENTS WERE MADE WITHOUT FIRST EXHAUSTING ITS LEGAL REMEDIES AGAINST THE PARTY WHO EXPRESSLY CONTRACTED FOR THE MATERIALS.

The Appellants action against Respondent is in the nature of a creditors bill or suit and jurisdiction for such a proceeding can be acquired, if at all, only after the Appellant has exhausted

all of its remedies at law and demonstrates this fact to the Court. It is the established general rule that a creditor cannot come into equity to obtain satisfaction of his claim out of property not reachable by normal legal process until he has exhausted his remedie at law and shown them to be unavailing, and he must allege and prove the fact of such exhaustion as a condition precedent to invoking the aid of equity. (21 Am Jur 2d 9, Section 7). Moreover, it is the rule that before he can come into equity, the creditor must have exhausted his legal remedies against the real, as well as the personal, estate of the principal debtor. (21 Am Jur 2d 9, Section 7).

In view of the foregoing general rule, a creditor who seeks equitable relief to accomplish that purpose must, in order to comply with that rule, not only obtain a judgment against the principal debtor as a condition precedent to his right to such relief, but must, in addition, be able to show that an execution has been issued in the form and manner required by law and has been returned unsatisfied in whole or in part. His complaint in equity must contain an allegation to this effect or show a legal and sufficient excuse for not doing so. (21 Am Jur 2d 18, Section 21.) See also, SEFTON v. SAN DIEGO TRUST AND SAVINGS BANK, 106 P 2d 974, in which the Court held that a "creditors bill" is an extraordinary proceeding in equity and can only be resorted to after a judgment creditor has exhausted all his legal remedies and has failed to collect his judgment, or it is made to appear that legal remedies would be unavailing. In the case before this Court, the Appellant has neither alleged nor proved such precedent action or any reason why such action would have been unavailing.

POINT V

ANY CLAIM OF THE APPELLANT AGAINST THE RESPONDENT IS BARRED BY THE STATUTE OF FRAUDS.

The claim of the Appellant against the Respondent is essentially a claim that the Respondent is required to answer for the debt of another and any claim in this category is required by the statute of frauds to be in writing. (25-5-4 and 25-5-5, Utah Code Annotated, 1953).

The principal cases of FLEMING v. WINEBERG, 455 P 2d 600, and PASCHALL'S INC. v. J. P. DOZIER, 407 SW 2d 150, cited by Appellant are not analogous to the case before this Court and do not constitute precedents supportive of the position of the Appellant. The FLEMING v. WINEBERG case involved an action by a seller of cattle to compel the assignee of the buyer to pay for the livestock. The cattle in that case were sold under a title retaining contract which entitled the seller to repossess his security in the event of non-payment and is not remotely in point with the facts of the present case. The PASCHALL'S, INC. v. J. P. DOZIER case turned primarily on the relationship between the defendant owner of the property and the purchaser of the goods and services, who was his daughter, and the unjust enrichment attributed to that transaction was predicated solely upon that relationship.

CONCLUSION

The inescapable conclusion from the facts of this case and the arguments and citations presented is that the motion of the Respondent for summary judgment of no cause of action as against the Appellant was properly granted and judgment of the trial Court

to that effect should be affirmed. The facts of this case are not consistent with any conclusion that a judgment based on "unjust enrichment" against the Respondent, who was not privy to the contract betweeen the Appellant and the Lessee of the property, is warranted or justified on any equitable consideration and the judgment of the trial Court should, therefore, be affirmed.

Respectfully submitted,

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