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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiff-appellant, :

v. : CASE NO. 14700

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

Defendants-respondents:

BRIEF OF APPELLANT

NATURE OF THE CASE

Appellant sued respondents for the sum of \$3810.69 for goods sold to Sportsmen's Spa #2, the predecessor health spa business to the New Life Health Spa. Sportsmen's Spa #2 failed to pay the appellant and Sportsmen's Spa #2 was taken over by the respondent when its lease with respondent was terminated. Respondent has used and continues to use and benefit from the appellant's sale materials in the operation of the successor health spa business and is being unjustly enriched thereby.

DISPOSITION IN LOWER TRIBUNAL

Following two pre-trial hearings and the submission of briefs, the matter was submitted to the court on simultaneous motions for summary judgment. Judgment of no cause of action was rendered against the appellant by the Honorable George E. Ballif, Judge, on July 12, 1976.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the judgment of the lower court by reason of error of law and for judgment in its favor as per

FINDINGS OF FACT

Appellant sold certain specially milled and prepared wood materials in June and August, 1974 to Sportsmen's Spa #2, 160 South State, Orem, Utah at an agreed upon price of \$3149.87. With the addition of interest the amount prayed for totaled \$3810.49. It was stipulated by the parties that if appellant is entitled to recover it would be entitled to the latter sum.

The goods were delivered by appellant to the buyer and were paid for. The goods were installed in the health spa building on the above premises. It should be noted as to this that the Findings of Fact issued by the court state as follows:

a. Eldon Adams leased the premises and the property contract to Great Outdoors, Inc. which was to operate Sportsmen's Spa

b. Under the terms of the lease the lessee was to install and complete the improvements in the premises to operate a health spa business therein.

c. The lessee bought materials specially made for the premises from the appellant and installed them in the premises pursuant to the lease with the respondent.

d. The lessee defaulted on its lease with respondent whereupon the respondent brought an action to regain possession of the premises and to terminate the lease. This was accomplished on January 24, 1975.

Furthermore it is a fact that the respondent, once it regained possession of the premises, changed the name of the health spa

business on such premises to New Life Health Spa and it has since continued to operate a health spa business there utilizing and benefitting from the materials of appellant's which were installed in said business property which have not been paid for.

Attention is invited to the Decision of the court issued by the Court on 27 May 1976. There the Judge states that the respondent-defendant had no knowledge or acquiescence in the arrangements between Sportsmen's Spa #2 and Appellant. In view of respondents recitation of fact in the findings it is clear that the Sportsmen's Spa #2 did order and install materials in the premises to organize and operate a health spa business pursuant to a lease with respondent. Specific notice of the sale of goods by appellant to Sportsmen's Spa #2 by the respondent is not known but certainly respondent knew or should have known such materials of necessity were being obtained and installed in view of the lease.

The decision also states that plaintiff-appellant was on notice of the ownership of the property by defendants-respondent. The record is devoid of any such notice and such was not the case.

Respondent's health spa business is in all respects a successor business to that operated by Respondent's lessee, Sportsmen's Spa #2. In such business respondent is using and profiting from the goods of the appellant for which appellant has not been compensated in any manner. Shortly following the delivery of such goods the lessee became bankrupt or insolvent and the lessee and its principal officer, William Forsyth, are judgment proof.

A SUCCESSOR BUSINESS, WHICH RETAINS AND USES FOR ITS BENEFIT IN SUCH BUSINESS UNPAID FOR MATERIALS WHICH IT OBTAINED FROM AN INSOLVENT, DEFAULTING BUYER, IS OBLIGATED TO PAY THE SELLER FOR SUCH MATERIALS OR RETURN THEM BY REASON OF UNJUST ENRICHMENT.

It should be noted at the outset that this is not a case involving a sale or the rights of parties to a sale under the laws of Utah and the Uniform Commercial Code. The rights of seller and buyer as expressed therein are not in issue. This is a case of unjust enrichment, a remedy not excluded from the said code to one who has delivered goods and, without payment, such goods in the hands of a successor business entrepreneur, is profiting thereby.

No code provision abolishes the right of a supplier of materials to look for relief to a third party using such materials under the circumstances here obtaining. In the absence of such specific displacement the equitable doctrine of unjust enrichment survives and is applicable. Utah Code Annotated, 1953, Section 70A-1-103 states:

"SUPPLEMENTARY GENERAL PRINCIPLES OF LAW APPLICABLE. Unless displaced by the particular provisions of this act, the principles of law and equity... shall supplement its provisions."

The doctrine of unjust enrichment being alive and well warrants the relief appellant seeks. This was the view expressed by the Court in a closely similar case in Fleming vs. Wineberg, 455 P 2d 600, Ore. (1969) . It should be noted that this case was decided following the adoption of the Uniform Commercial Code. There a seller delivered cattle to a buyer. The buyer took possession but failed to pay the seller. The buyer's assignee creditor took possession of the cattle from the buyer and profited

to utilize and benefit from them in a successor business operation to that of the buyer. The court ruled that this was an unjust enrichment on the part of the assignee-creditor, the defendant, who was sued by the seller and that the defendant had to pay the seller for the cattle. The court said:

"... The facts, however, support the granting of restitution on the grounds of unjust enrichment... While it is true that the defendant offered at the trial to return the cattle it is equally true that until his appearance on the witness stand his conduct was ample evidence that he intended neither to pay for the cattle nor to return them. His dealings with the cattle, for tax and business purposes, were all inconsistent with any intent to return the cattle to the buyer.

Restitution is said to be applicable in any situation in which one person is accountable to another on the ground that otherwise one would unjustly benefit or the other would unjustly suffer loss. Restitution includes but is not limited to the subject area of 'quasi contracts'....

While it is true that one can take an assignment of property without being bound to pay for the property, one can be required to make restitution in order to prevent unjust enrichment. It is clear that the defendant used the cattle as his own.... His appropriation of the cattle without either returning them or paying for them amounted to unjust enrichment."

It would appear significant and important that in the Fleming case and the case at hand the third party creditor taking unpaid for property is using the same in a profit making business enterprise and is not in possession of same as a by-stander possessor. It was no defense there and should be none here that the third party creditor took the property in consequence of a debt. Whether or not the third party creditor was made whole or not does not seem probative. The creditor's claimed losses in his dealings with the defaulting buyer should not obviate the right of the seller to recover otherwise he is made to unjustly enrich one to assuage a loss yet suffer a loss of his own. The equities here and in the Fleming case are clearly with the seller

and not with the third party who is actively using the unpatented property in a continuing profit making business enterprise.

The findings and conclusions of the court and the decision refer to privity of contract as a bar to recovery of the amount herein. This does not appear to constitute such a bar for it is clear that the doctrine of unjust enrichment allows recovery by reason of privity but in spite of privity to prevent inequity. See *Matarese v. Moore-McCormack Lines*, 158 F 2d 631, where the Court stated:

"The doctrine of unjust enrichment or recovery in quasi contract obviously does not deal with situations in which the party to be charged has by word or deed legally consented to assume a duty toward the party seeking to charge him. Instead it applies to situations where as a matter of fact there is no legal contract but where the person sought to be charged is in possession of money or property which in good conscience and justice he should retain.... When this is true the courts impose a duty to refund the money or the use value of the property to the person to whom in good conscience it ought to belong."

It is likewise true that the recovery on the basis of unjust enrichment arises not out of the intent of the parties but in opposition to such. *Koehring Co. v. National Automatic Tool* 257 F Supp. 282, affirmed on appeal, 385 F 2d 414. At 66 Am 2d, Restitution and Implied Contracts, Section 2, it states:

"A quasi contract has no reference to the intention or expressions of the parties. The obligation is imposed despite, and frequently in frustration of their intent. For a quasi contract neither promise, nor privity, real or imagined, is necessary.... When a case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfill that obligation. The duty, thus favors the foundation of a quasi contractual obligation is frequently based on the doctrine of unjust enrichment."

The right of an unpaid seller to recover its property or the price therefor from a third party creditor who keeps and uses such property in business is not a Uniform Commercial Code issue nor does it require privity, exhaustion of remedies against an insolvent buyer or application of security or lien principles. *Mahon v. Stowers*, 510 F 2d 139; *Fleming v. Wineberg*, supra and *Johnson v. Robinson*, 203 F 2d 135. In each case the buyer had become insolvent and the property was in the possession of a third party creditor to the buyer who was benefitting from the property and in each the court permitted recovery against the creditor by the seller. Neither in law nor in equity will a plaintiff be required to pursue a remedy against an insolvent who is out of business as a precondition to suit against a third party who succeeded to the business and is profiting from the seller's property. *U.S. v. Landsverk*, 144 F Supp. 708.

Attention is invited to *Paschall's Inc. v. J. P. Dozier*, 407 SW 2d 150, Tenn. 1966. There the plaintiff furnished labor and material in performing improvements on the bathroom of a house rented from the defendant by the defendant's daughter. The daughter repaired the bathroom at the instance of herself but with the knowledge of the father-landlord. The daughter dealt with the plaintiff solely and failed to pay for the work and materials furnished. After she became insolvent the plaintiff sued the landlord house owner on the basis of unjust enrichment. The court pointed out that the plaintiff had lost its security and lien rights but that defendant had general knowledge improvements were being made. The court held for the plaintiff and pointed out that the plaintiff did not have to exhaust remedies as against an insolvent buyer nor was lien law applicable and unjust enrichment required that the defendant pay plaintiff for the property he was using and enjoying. In the case at hand the facts for plaintiff are much strengthened by the fact that

Eldon Adams and New Life Health Spa is operating a successor business and profiting from the plaintiff's unpaid for materials. The court said:

"Based upon the foregoing authorities, we hold that when a materialman... furnishes labor or materials which benefit the property of a person with whom there is no privity of contract, an action on quantum meruit may lie against the landowner to recover the reasonable value of ... said materials so furnished

See also Costanzo v. Stewart, 453 P 2d 526, Ariz. 1969 where the Arizona Supreme Court sanctioned recovery by the plaintiff on the basis of unjust enrichment. The court said that adherence to the lien law was not required nor was privity nor was the action barred by the Statute of Frauds, unjust enrichment being a separate, approved basis of recovery.

CONCLUSION

It should be noted that in the case at hand the plaintiff has furnished materials to a business operated by a lessee of the defendant-owner of the premises. Defendant knew that the lessee was improving the premises and readying them for operation of a health spa business and that on such course the materials furnished by the plaintiff were essential. Lessee failed to pay for the materials and the defendant took possession of the premises and the business itself. It changed the name but continues to operate on site a profit making health spa business. In so doing it is using and profiting from the plaintiff's sale materials. On such basis the plaintiff is entitled to either be paid for the property at the stipulated price or to be permitted to retake possession of its property.

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