

1977

Ronald P. Stubbs v. Lyman W. Hemmer : Brief of Respondent

Utah Supreme Court

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McCune & McCune; Attorneys for Appellant Dale M. Dorius; ATTORNEY RESPONDENT

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

| | | |
|---------------------------|---|----------|
| RONALD P. STUBBS, |) | |
| |) | |
| Plaintiff and Appellant, |) | |
| |) | |
| vs. |) | Case No. |
| |) | 14801 |
| |) | |
| LYMAN W. HEMMERT, |) | |
| |) | |
| Defendant and Respondent. |) | |

BRIEF OF RESPONDENT

Appeal from Judgment of Fourth Judicial District Court,
Utah County, State of Utah, Honorable J. Robert Bullock,
District Judge

Dale M. Dorius
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P. O. Box U
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FILED

JAN 13 1977

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IN THE SUPREME COURT OF THE STATE OF UTAH

| | | |
|-------------------------|---|------------|
| RONALD P. STUBBS, |) | |
| Plaintiff - Appellant, |) | Brief |
| vs. |) | of |
| |) | Respondent |
| LYMAN W. HEMMERT, |) | |
| Defendant - Respondent. |) | No. 14801 |

STATEMENT OF THE KIND OF CASE

This is an action by appellant on a note and a Counterclaim action by respondent for breach of contract. That the appellant's alleged mortgage had been released. The appellant and respondent had stipulated there would be no issue at the time of trial regarding the amounts due and owing the appellant and the only issue at the time of trial was the question of damages on the respondent's Counterclaim.

DISPOSITION IN LOWER COURT

Plaintiff was granted judgment in the amount of \$810.00 on the unpaid note and \$150.00 for attorney fees. The Defendant - Respondent was granted judgment on his Counterclaim in the sum of \$62.04 for unpaid utility bills and \$200.00 damage for breach of contract by the Appellant in wrongfully removing cooling equipment.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the decision of the lower court affirmed by this court of appeal.

STATEMENT OF FACTS

On February 3, 1971, plaintiff and defendant entered into an agreement whereby plaintiff would buy defendant's home in Provo, Utah and transfer to defendant all of plaintiff's interest in a store in Santaquin, Utah which plaintiff had run as a grocery store until December 31, 1970 (T27). Plaintiff was allowed a sales price of \$13,000.00 for said store (T7:12), \$8,700.00 of which was applied as a down payment on the purchase of defendant's home and the balance of \$4,300.00 was reduced to a note (Exhibit "A" of Complaint, R100; pre-trial order, R44).

The original earnest money receipt and exchange agreement provided that two walk-in collers and their cooling equipment were to be part of the exchange and sale (D1).

Plaintiff executed a Warranty Deed in favor of defendant to the store on February 18, 1971, and defendant and his now deceased wife gave plaintiff a mortgage on said store dated February 20, 1971, to secure plaintiff's \$4,300.00 note from defendant (Exhibits "A" and "B" of Complaint, R100). Both the Warranty Deed and mortgage were recorded in the office of the Utah County Recorder on February 23, 1971.

That the mortgage was released by the escrow holder.

That the Defendant made all payments on the mortgage with the exception of \$810.00 which Defendant claimed as an offset for Plaintiff's breach of contract.

That the exchange agreement provided that Plaintiff would not remove the cooling equipment and walk-in coolers and the same would be left intact with the building. That the Defendant admitted and stipulated at the time of trial the amount of \$810.00 was still due and owing and demanded an offset.

That the Defendant's attorney has performed considerable services for the Defendant in obtaining the offset awarded by the lower court.

POINT' I

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY ADMITTING THE EARNEST MONEY RECEIPT AND EXCHANGE AGREEMENT INTO EVIDENCE WHEN SAME HAD NOT BEEN EXTINGUISHED AND MERGED BY EXECUTION AND DELIVERY OF THE WARRANTY DEED AS THE EXCHANGE AGREEMENT PROVIDED FOR EXCHANGE OF CERTAIN PERSONAL PROPERTY AND CONDITIONS OF THE SALE.

The general doctrine of merger does not apply in this case as the facts are as follows:

The parties entered into an exchange agreement dated February 18, 1971, in which the Plaintiff would buy Defendant's home in Provo, Utah, and in consideration for the purchase of said home, the Plaintiff would transfer to the Defendant all of Plaintiff's interest in a store in Santaquin, Utah. That the exchange agreement specifically provided that certain personal properties would remain intact and would remain part of the consideration which Defendant was to receive from the Plaintiff for the sale of his home. That the Plaintiff breached said agreement by removing two compressors from the walk-in collers. Therefore, Reese Howell Co. vs. Brown, 48 U 142, 158 P. 684 (Utah 1916) would not apply in this case as the exchange agreement dealt with personal properties.

The lower court in the above case held that the Defendant having prevailed on his counterclaim, is not liable for Plaintiff's attorney fees in defending against

said Counterclaim. That attached and marked as Exhibit
"A" is the Memorandum Decision.

POINT II

THE COURT DID NOT COMMIT ERROR BY AWARDING DEFENDANT JUDGMENT ON HIS COUNTERCLAIM TOGETHER WITH INTEREST FROM THE DATE OF REMOVAL OF THE PERSONAL PROPERTY AND THE VALUE OF SAID PERSONAL PROPERTY WAS BASED UPON COMPETENT PROOF.

The trial court by its Memorandum Decision, attached and marked Exhibit "A" found that the Plaintiff was responsible for the removal of the compressors from the premises contrary to the agreement that said compressors would remain. The trial court found that it had competent admissible evidence to show the value at the time of the removal to be the sum of \$100.00 each. Therefore, Judgment was awarded in the sum of \$200.00 plus legal interest at the time of the removal.

Plaintiff's witness, Mr. Larry Hopkins, testified as follows:

Q. And what type of compressors were they?

A. They were three-quarter horse Frigidaire combination air and water.

Q. And what horse power were they?

A. Three-quarter horse.

Q. On. You said that. Okay. Now in your opinion what would be the reasonable value of those compressors at the present time?

A. Like I told you, if they were taken like they

usually sell used equipment, you get 60 percent of the wholesale price out of them, and the wholesale on a three-quarter horse machine is around 320 bucks. That's for a new one. You get 60 percent of that.

Q. Would the 60 percent value be for a reconditioned compressor?

A. Yes. That would be for one that they had gone through the motor and put new belts and cleaned it up.

Q. Okay. Now what value would you give for the compressor that you inspected yesterday in the present condition that it's in?

A. About a hundred apiece. There was two of them.

POINT III

THE COURT DID NOT ABUSE ITS DISCRETION AND DID NOT COMMIT ERROR BY AWARDING PLAINTIFF \$150.00 IN ATTORNEY FEES.

That the Plaintiff and Defendant stipulated at the pre trial that there was no issue on Plaintiff's Complaint and Defendant stipulated the damage due and owing was as alleged and the only issue raised at the trial under the pre trial order was the question of Defendant's Counterclaim. That the lower court found that the Plaintiff was responsible for the removal of the two compressors from the premises contrary to the agreement that the said compressors would remain.

The Defendant having prevailed on his Counterclaim, the lower court found the Defendant was not liable for Plaintiff's attorney fees in defending against said Counterclaim and the Plaintiff, therefore, was awarded attorney fees for the stipulated amount of \$810.00 and the court awarded Plaintiff \$150.00 as a reasonable attorney fee. The attorney fees awarded were not inadequate. 57 ALR3rd 475, 2 (a).

That 78-37-9 UCA 1953, as amended, provides that attorney fees should be fixed by the court. That in this case, the Defendant having prevailed on his counterclaim, the lower court held that the Defendant was not required to pay Plaintiff attorney fees in defending against said counterclaim.

CONCLUSION

The Judgment of the lower court should be affirmed
and respondent awarded his costs.

Respectfully Submitted,

Dale M. Dorius
P. O. Box U
29 South Main Street
Brigham City, Utah 84302

Attorney for Respondent

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DISTRICT COURT OF UTAH COUNTY,
STATE OF UTAH

RONALD P. STUBBS,

Plaintiff,

vs.

LYMAN W. HEMMERT and
ALTA B. HEMMERT, his wife,

Defendants.

Civil No. 42014

MEMORANDUM DECISION

Having heard the evidence and arguments of counsel,
and having heretofore taken the matter under advisement,
the Court now rules, holds and decides as follows:

1. The amount owing plaintiff on the note and
mortgage is the sum of \$810.00 together with interest as
provided therein, less a set-off in the amount of \$62.04.

2. Plaintiff is responsible for the removal of
two compressors from the premises contrary to an agreement
that they would remain. The Court believes the competent
admissible evidence shows the value of the compressors at
the time of their removal to be the sum of \$100.00 each.
Accordingly, defendant is entitled to judgment on his counter-
claim for \$200.00 plus legal interest from the time of the
removal. There is no evidence, other than speculative, as
to damage to the building on account of the wrongful removal.

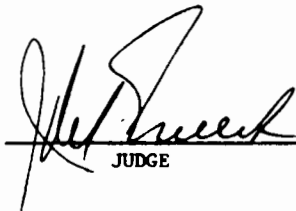
3. Having prevailed on his counterclaim, defendant
is not liable for plaintiff's attorney's fees in defending
against it. Accordingly, plaintiff is awarded attorney's
fees for the foreclosure only, and the sum of \$150.00 is
determined to be a reasonable fee.

4. Plaintiff is entitled to costs.

Counsel for plaintiff is directed to prepare detailed findings and decree consistent with this memorandum decision and submit them to opposing counsel for approval as to form within seven days from the date hereof.

Dated this 30th day of July, 1976.

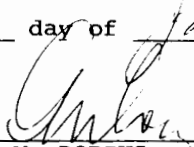
BY THE COURT:


A handwritten signature in black ink, appearing to read "H. B. ...", is written over a horizontal line. Below the line, the word "JUDGE" is printed in capital letters.

CC: George M. McCune, Esq.
Dale M. Dorius, Esq.

CERTIFICATE OF MAILING

Mained two copies of the foregoing Brief of Respondent
to Mr. George M. McCune, Attorney at Law, 96 East 100 South,
Provo, Utah 84601, on this 13 day of Jan, 1977.



DALE M. DORIUS