1929

James Monaghan v. T.G. Alexander : Reply Brief

Utah Supreme Court

Wallace Calder; attorney for appellant.
Charles DeMoisy; attorney for respondent.

In the Supreme Court of the State of Utah

October Term, 1929.

JAMES MONAGHAN,
Plaintiff and Respondent,
vs.
T G ALEXANDER,
Defendant and Appellant.

APPELLANT'S REPLY BRIEF

WALLACE CALDER,
Attorney for Appellant

CHARLES DeMOISY,
Attorney for Respondent

In the Supreme Court of the State of Utah

JAMES MONAGHAN,
Plaintiff and Respondent,
vs
T. G. ALEXANDER,
Defendant and Appellant.

Respondent's statement of the law of damages as contained in the last paraghaph of his brief cannot be accepted as a safe criterion without the qualifications and limitations usually embodied therein. The rule as set forth in Corpus Juris is as follows: "Stated in broad terms, however, the measure of damages is such sum as will compensate the person injured for the loss sustained, with the least burden to the wrongdoer consistent with the idea of fair compensation, and with the duty upon the person injured to exercise reasonable care to mitigate the injury, according to the opportunities that may fairly be or appear to be within his reach,, and the same rule obtains whether the loss is claimed for injury to property, personal injury, or breach of contract, since the only compensation which the law can compel is a compensation in money, it must be measured by something which will measure the pecuniary loss, and the measure to be applied must be a real and tangible one." (17 C. J. 844)

Under the appropriate subheading dealing with contracts the measure of damage on a basis of market value is in harmony with our statutory rule set out in appellant's brief, (17 C. J. 866 including note 25.)

Respondent contends that market value cannot be applied as a measure of damage in this case for the

reason that along with the sale of the hay is included pasturage and the use of corrals and sheds for feeding, all for the lump sum of $1200.00, without specifying what part for pasturage, etc. Why should that make any difference so long as the full $1200.00 is deducted from the total damages? Market value does not enter into the question of deductions but is a limitation and measure as to allowable expenditures. Assuming that the market value of the hay was $6.00 per ton and that respondent paid $10.00 per ton, our contention is that the market price, six dollars, and not the amount paid, ten dollars, should be used in ascertaining whether there has been any damage. We submit that a mere statement of what plaintiff paid for hay without any showing as to when he bought or what the market price was when he should have bought, is wholly insufficient so far as the evidence is concerned. He is not relieved from his duty to exercise reasonable care to mitigate the injury merely because the price of hay is not separately stated in the contract. The only difference is that in case of a partial breach where the consideration is a gross sum the plaintiff has an additional burden of showing the amount of consideration apportionable to the part of the contract alleged to have been breached, (See 61 A L R 94 "C. Where consideration is in gross," being a part of an exhaustive annotation on "Damages for Breach of Covenants of Title" in which general rules of damages are also applied.)

In the case of Duggins vs Colby (145 Pacific 1042, 45 Utah 335,) case directly in point, the judgment of the lower Court was reversed on acount of the failure of the lower Court to determine the market value.

"The trial Court should not make a finding of fact where there is no evidence to support it, and its judgment thereon will be reversed." Hathway vs United Tintic Mines Company (132 Pacifis 388).

In the present case the plaintiff submitted a bald statement of his expenditures given in the form of conclusions and rested his case without a word of testimony as to the market value of the hay and the pasturage covered by the contract. A mere statement in the testimony that the plaintiff was compelled to make certain expenditures and that the expenses were necessary cannot be equivalent to testimony as to the market value of the hay and pasturage. (17 Cyc. 209) If he was compelled to make the expenditures for the reason that he purchased it at the market price he should have stated so. If on the other hand he was compelled to pay more than the market price because of his destructive manner of using the leased premises where the feeding was to have been done, as cutting expensive fences, and killing out the hay, the price which he was compelled to pay could not be accepted as evidence of market value.

Nor can the need for a direct showing as to market value be dispensed with by a mere conclusion that the hay was bought at the cheapest possible expense. So many elements foreign to the question of market value may enter into such a conclusion as for instance: inefficiency, lack of diligence, or personal misfortune of the purchaser. If such were the rule the party claiming to have been injured could delay his purchase until the price became unreasonably high indifferent as to the rise in price so long as the expense could be charged to the other party.

There is only one just and fair rule for the measurement of the damages in such cases and that is the market price as provided by our statute. The fact that the question of cheapness alone is not a safe rule, is clearly shown by plaintiff's testimony on that particular point as recited on page seven of the abstract.

For the third year of the contract his expenditures were $3,044.75 on a Twelve Hundred Dollar Contract.

As to the next year he says: "The fourth year I did my best to cut that down—get the hay cheaper. My expenses amounted to only $1551.00."

We submit that in view of the fact that there is no evidence whatsoever that the prices paid were the market price and no finding on the question of market value that the judgment should be set aside and the case remanded for new trial.

Respectfully submitted,

WALLACE CALDER,

Attorney for Appellant.