

1977

Russ Bullock, June Mundy Bullock v. Joe Bailey  
Auction Company, Et Al, Joe Bailey Auction Co. v.  
Western Surety Company : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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RUSS BULLOCK, JUNE MUNDY  
BULLOCK,

Plaintiffs and  
Appellants,

-vs-

JOE BAILEY AUCTION COMPANY,  
et al,

Defendants and  
Respondents.

JOE BAILEY AUCTION COMPANY,

Third Party Plaintiff  
and Respondent,

-vs-

WESTERN SURETY COMPANY,

Third Party Defendant  
and Appellant.

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BRIEF OF RESPONDENT

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STATEMENT OF THE KIND OF CASE

This is an action originally filed requesting an order of specific performance of a contract and a restraining order wherein a counterclaim was filed requesting damages for the issuance of a wrongful restraining order and a third-party complaint was filed requesting damages against a surety for the issuance of a wrongful restraining order. Also involved is a claim for damages for failure to pay for goods

bid for at auction.

#### DISPOSITION IN LOWER COURT

At trial the Court dismissed the Appellants' Complaint and granted judgment against Appellants and their surety for causing the issuance of a wrongful restraining order and further granted judgment against Appellants Bullock for damages caused by their failure to pay for goods bid for by them at auction.

#### RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment of the District Court for Washington County.

#### STATEMENT OF FACTS

On December 15, 1972 Respondent Joe Bailey Auction Company, as consignee, conducted an auction of certain construction equipment at Ventura, California (R. 1, R. 217, Exhibit D-1, T. 130). Under the terms and conditions of the auction, if any potential bidder had not established credit with the Respondent prior to the auction, payment for any purchases would have to be made by cash, cashier's check or personal company check accompanied by a letter of credit from a bank (Exhibit D-1, R. 217, T. 168), which payment was to be made on the date of the auction (T. 168, Exhibit D-1). At the auction the Appellants Bullock bid the sum of \$39,320 for certain well drilling equipment (T. 158, R. 1), which well drilling equipment is more fully described in the pleadings filed in this matter (R-7, R 9, R 10 and R. 217).

Credit had not been established by said Appellants as

potential bidders prior to the auction.

At the end of the auction, the Respondent requested all bidders, including the Appellants Bullock, to meet with it and settle up their accounts by making payment for the goods purchased by them at auction. The Appellants failed to make payment for the goods bid upon by them at the auction and were thereupon told by Respondent that the subject goods were not to be removed by them until payment had been made (R. 218) and that no sale had been or would be consummated to them until such payment had been made (R. 218). At that time the goods in question were physically located at the auction yard of Respondent in Ventura.

Subsequent thereto and without permission or knowledge of the Respondent the Appellants Bullock removed said equipment from Ventura, California and transported the same to the vicinity of Harrisburg, Washington County, Utah (R. 218). The Respondent, upon learning that said equipment had been moved by Appellants made attempts to locate it and finally found it in Utah. Upon learning of the location of the equipment, the Respondent caused to be dispatched from Odessa, Texas certain trucks to pick up the equipment and take it to Texas so that it could be resold. Appellants Bullock, upon learning of Respondent's intent to take possession of said equipment and the impending arrival of the trucks from Texas, obtained from the trial court a temporary restraining order restraining the Respondent from moving or otherwise dealing with the equipment (R. 8-9). The order was in effect at the time the trucks arrived from Texas and they therefor had to

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return to Texas empty. The restraining order was obtained by the Appellants Bullock from the Court without hearing. It was originally issued by the Court without it requiring that any bond be posted. Subsequent thereto, Respondent moved the Court require a bond conditioned upon the provisions of Rule 65A, Utah Rules of Civil Procedure, which requirement the Court made and such bond was subsequently filed with the Appellant Western Surety Company as surety. The amount of the bond required by the Court was \$10,000.00.

The Respondent moved to dissolve the restraining order upon various grounds as set forth in the motion which is part of the record and the hearing on that Motion was conducted by the Court on March 8, 1973. The Appellants Bullock failed to appear for the hearing of the motion and the Court thereupon ordered the restraining order dissolved (R. 22).

Subsequent thereto the Respondent filed a Counterclaim against the Appellants Bullock claiming damages for wrongful issuance of a restraining order and for failure to pay for the auctioned equipment as agreed. In addition, the Appellants' surety, Western Surety Company, was joined in the lawsuit with a claim against it for damages because of the issuance of the wrongful restraining order. At trial of the matter the Court granted judgment dismissing Appellants' Complaint and in favor of Respondent and against Appellants Bullock and Appellant Western Surety Company as follows:

a. Judgment for damages for causing the issuance of a wrongful restraining order against Respondent from

moving said equipment in the amount of \$3,307.46, the expense of sending certain trucks from Odessa, Texas to Utah and return empty because the restraining order forbade the moving of said equipment.

b. Judgment for \$2800.00 for salary expense incurred by Respondent in getting said equipment ready to move plus arranging for the same, which equipment could not be moved because of said restraining order.

In addition, the Court granted judgment against Appellants Bullock and not their surety for \$750.00 for loss of commission on the auction of the subject equipment conducted at Ventura and \$500.00 for costs of subsequently selling the equipment to a third party. Request was made by the Respondent for damages measured by the sale of the equipment to a third party for a sum less than that bid by Bullock but the Court refused to grant judgment for that amount. At no time from the date of the original auction sale up to the date of the entry of the judgment did the Appellants Bullock ever tender to Respondent the money for the amount bid by them at the auction.

The expenditures for the aforementioned trucks made by Respondent are evidenced by Exhibits D-3 and D-4 with additional itemizations contained in Exhibits D-5 and D-6. The expenditures for salaries on the part of Respondent are evidenced in part by Exhibits D-7, and D-8 and in part by the testimony of Joe Bailey of Respondent whose testimony

## ARGUMENT

### POINT ON APPEAL

THE COURT DID NOT ERR IN GRANTING JUDGMENT IN FAVOR OF RESPONDENT AND AGAINST APPELLANTS AS SET FORTH IN ITS JUDGMENT ON FILE HEREIN.

Rule 65A (b), Utah Rules of Civil Procedure, deals with the issuance of temporary restraining orders in Utah. In that regard, the rule reads in part as follows:

" . . . In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matter(s) of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order . . . ."

As quoted, the rule requires that the party obtaining the temporary restraining order must proceed with his application for a preliminary injunction and if he fails to do so the court is required to dismiss the temporary order. The minute entry of the court dated March 8, 1973 found on page 22 of the record herein is clear that the Appellants Bullock failed to appear and proceed with their application. As a result, the court did not err in dissolving the temporary restraining order.

Authority exists to the effect that if a party obtains a temporary restraining order without notice and then fails to continue proceeding with it to temporary injunction thereby causing the order to be dissolved, that such failure or discontinuance, if made independently and without the connivance and consent of the other party, is binding



upon the party obtaining the temporary order and his sureties and conclusively establishes as against them the wrongfulness of the temporary restraining order. 42 Am. Jur. 2d, 1177; 91 A.L.R. 2d 1313; Janssen v. Shown (CA 9 Or.) 53 F. 2d 608. Apparently these authorities also hold that there is no difference between a case where the complainant voluntarily dismisses his suit and one where he abandons it so that a judgment or decree of dismissal is entered for want of prosecution. Beech v. United States Fidelity and Guaranty Co., 54 Idaho 255, 30 P. 2d 1079.

In the event Utah chooses to follow the above authority then there can be no question but that Appellants caused to be issued what is legally a wrongful temporary restraining order and they and their surety are liable to Respondent for its damages caused by the issuance thereof.

In reading Appellants' brief it becomes apparent that they are relying in the main upon the provisions of the Utah Commercial Code contained in Title 70A, Utah Code Annotated 1953 as amended. In that regard, the court's attention is called to the fact that the auction involved in the fact situation between the parties took place at Ventura, California and not in Utah and as a result under applicable doctrines of conflicts of law it would appear that California law would be applicable. In addition, Section 70A-1-105, Utah Code Annotated 1953 as amended, in the absence of an agreement between the parties, would seem to limit the operation of the Utah Commercial Code to "transactions bearing an appropriate relation to this state". As the only

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relationship Utah had to the subject transaction is the fact that the goods involved ended up here it would appear that Utah law would not properly be cited in dealing with the issues of this case other than as to the temporary restraining order. On the other hand, as California has also adopted the Uniform Commercial Code and it is substantially similar to ours to the best belief of counsel, Respondent will give the citations of the applicable Utah Statutes as he sees them.

That part of the Uniform Commercial Code dealing with the passage of title to goods it contained in Title 70A, Chapter 2, commencing with Section 401, Utah Code Annotated 1953 as amended. As counsel understands the commercial code if the parties' intention as to passage of title can be determined then that intention governs. In addition, Section 70A-2-401 (2) states in part that unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods.

It will be recalled in the present fact situation, that the evidence is uncontrovered that delivery of the goods to Appellants was not to be made until they had paid for them. As a result, title to the subject goods did not pass to the Appellants and they therefor had no right to interfere with the right of possession of the Respondent or, in the event they wrongfull took possession of the same, his effort to regain possession.

Appellants argue that the provisions of the commercial code dealing with auctions apply. In this regard, it is to be noted that the lower court made a specific finding that the payment for the goods was a condition precedent to any sale of them to Appellant by Respondent. As a result, it cannot be reasonable contended that title to the goods involved in the auction conducted in California passed when the hammer fell at the auction.

The law governing the remedies given to a seller when the buyer fails to make payment when due is set forth in Section 70A-2-703, Utah Code Annotated, 1953 as amended. This section gives the seller the right to withhold delivery of the goods and to resell them and recover damages for the failure of the buyer to perform. Section 70A-2-710, Utah Code Annotated 1953 as amended allows the seller to recover incidental damages including any commercially reasonable charges in connection with the return or resale of the goods or otherwise resulting from the breach. The damages granted to Respondent would fall under this section other than those for causing the issuance of a wrongful restraining order.

It is true in this case that the resale of the goods was made at private sale with no notice to the Appellants as required by 70A-2-706 UCA 1953 as amended. On the other hand as counsel for Respondent understands that section the notice requirement is only applicable when damages for the difference between the original sale price and the resale price are to be awarded which in this case they were not.

The auction sale conducted by Bailey in California had, as a condition precedent to the consummation of a "sale" and the passage of title, the provision that either payment would be made for the goods or satisfactory credit be arranged, all of which Appellants failed to meet. As a result and while the auction sale may have given rise to a "contract to sell" no actual sale took place and title to the goods and possession of the same did not pass. Bailey, therefore, was entitled to possession of the goods until payment was made, which possession he retained.

When the Appellants took possession of the goods and removed them to Utah they did so wrongfully and Bailey, in fact, did not legally lose the right of possession of the goods although he did lose physical possession for a time. By his coming to Utah to re-take possession of the goods physically he was merely exercising his right to the possession he already legally had. It follows, therefore, that the restraining order issued at the request of the Appellants had no legal basis as they did not have the right to have possession or to withhold possession from Bailey. As a result they and their surety are liable for any damages caused by the issuance of the temporary restraining order.

The evidence is uncontroverted that the sum of \$3,307.00 was expended by Respondent in causing certain trucks to travel to Utah from Texas and return to pick up the equipment. These trucks had to return to Texas empty because of the issuance of the restraining order. Respondent is therefore

The evidence is further uncontrovered that the sum of \$2800.00 was expended by Bailey for salaries to aid in obtaining the possession of the equipment, which possession was bared by the restraining order. As a result the Respondent is entitled to judgment against the Appellants Bullock and their surety for that amount.

The law allows incidental damages for the failure of the Appellants to perform their agreement by paying for the goods involved. The trial court granted Respondent judgment against Appellants Bullock for \$750.00 for lost commission on the first auction sale and \$500.00 for the costs of resale of the property. It is submitted that such damages and costs are connected reasonably with the failure of the Appellants Bullock to perform and that portion of the judgment should be allowed to stand.

#### CONCLUSION

It is respectfully submitted that the judgment of the lower court should be affirmed.

RESPECTFULLY SUBMITTED.

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