1940

Dohrman Hotel Supply Company v. Beau Brummel, Inc. : Brief of Appellant

Utah Supreme Court

O. W. Carlson; J. M. Carlson; Attorneys for Defendant;

IN THE

Supreme Court of the State of Utah

DOHRMAN HOTEL SUPPLY CO.,
a corporation,
Plaintiff and Respondent.

vs.

Beau Brummel, Inc.,
a corporation,
Defendant and Appellant.

Case No. 6207

Brief of Appellant

O. W. CARLSON,
J. M. CARLSON,
Attorneys for Defendant.

INDEX OF CITATIONS

IN THE

Supreme Court of the State of Utah

DOHRMAN HOTEL SUPPLY CO.,
a corporation,
Plaintiff and Respondent.

vs.

Beau Brummel, Inc.,
a corporation,
Defendant and Appellant.

Case No. 6207

Brief of Appellant

STATEMENT OF THE CASE

Dohrman Hotel Supply Company, a foreign corporation, with offices and stores at Los Angeles and San Francisco, brought suit against Appellant for certain restaurant equipment or the value thereof. The complaint alleges no contract or agreement but alleges

simply that the plaintiff is the owner of and entitled to immediate possession of certain restaurant fixtures, equipment and utensils, and though demand has been made for their return, defendant has failed to deliver the same (Ab. 1 and 2), and that the value of the property is $555.08. The alleged value was increased by amendment to $900 over a year later (Ab. 3 and 4).

Beau Brummell, Inc., denied the alleged ownership by plaintiff and set up two affirmative answers—First, that a certain thermotainer charged as part of the purchase price in a contract of sale was defective in construction and design and would not render the service for which it was sold and purchased and that defendant returned the same to plaintiff and claims a deduction of $500 from the total purchase price by way of recoupment. Second, that defendant and plaintiff entered into an agreement of settlement by which plaintiff agreed to accept the thermotainer on return and allow a credit of $375 and that defendant shipped the thermotainer back and sent a check for $152.44, the balance of the purchase price.

By way of reply plaintiff admits the return of the thermotainer and receipt of check for $152.44, but denies the alleged warranties and denies the alleged agreement of settlement.

STATEMENT OF FACTS

It was stipulated that the contract of sale between the parties included many articles not delivered by plaintiff so that the price of the articles delivered was $2412.26 and a carrying charge of $80.41 was added making the price of goods plus carrying charge, $2492.67. Plaintiff

also admitted cash payments received amounting to $1966.33 in addition to the $152.44 tendered with the return of the thermotainer. Thus, defendant maintains the amount paid plus the credit allowed for the return of thermotainer plus the $152.44 settled the agreed purchase price of $2492.17 thus:

Cash paid	$1966.33
Return of thermotainer	375.00
Balance tendered	152.44
Total	$2493.77

Over objections by defendant that the sales agreement was not competent to prove reservations therein under the complaint, which is a general allegation of ownership, the contract was admitted and read to the jury. Don Nelson, an employee of plaintiff, testified that the value of the property including the thermotainer in possession of plaintiff is about $900 to $1000, although he had not seen any of it for two years. Attorney for plaintiff testified that he told Mr. Glaus before this suit that he would have to pay a balance due or plaintiff would take the property, but Glaus replied there was no balance due. Plaintiff then rested.

Defendant produced several witnesses to prove the settlement agreement alleged in its answer and the warranties as to the thermotainer and its uselessness for the purpose for which it was sold. The parts of the testimony pertinent to the issue before this Court will be referred to in the argument later herein. The issues raised in the lower court as grounds for the directed verdict was

that the authority of the plaintiff's agent, Don Nelson, to make a settlement contract was not proved; and that there was not sufficient evidence admitted to prove an express or implied warranty, or the breach thereof, so as to entitled defendant to return the thermotainer and receive credit or recoupment. The Court directed a verdict in favor of plaintiff for the possession of the merchandise or the sum of $526.34 the value thereof, which verdict was signed by the jury as ordered. Ten days later the Court made a judgment on the verdict but increased the amount of the judgment from $526.34 to $678.52 plus costs and disbursements.

Motion for new trial was made by defendant (Ab. 39) and denied and a motion to retax costs was made by defendant and was granted in part (Ab. 41).

Appellant's Assignment of Errors (Ab. 43) assigns as error the directing of the verdict, the entering of judgment on the verdict and the denying of appellant's motion for a new trial. Also, appellant assigns as errors denial of appellant's motion to retax costs and the allowance of various cost items, as well as the overruling of defendant's obpjection to the admission of certain evidence.

POINTS AND AUTHORITIES

Sufficiency of evidence to submit to the jury the question of Don Nelson's authority to make the contract alleged.

The testimony on the agency of Don Nelson and the contract for the return of the thermotainer is as follows:

Don Nelson was the agent for Dohrman Hotel Supply Company and was the only representative here in 1935 (Ab. 30). He had been plaintiff's sales representative sinc 1929 continuously. Correspondence from Nelson was received by the company in May, 1935, about Beau Brummel account (Ab. 28). He sold restaurant equipment, also collected money and checks for plaintiff, also reported on complaints of customers, had attended to taking back merchandise in dealings with customers and returned defective materials complained about; was the only representative of plaintiff here in 1935 and prior thereto (Ab. 29 and 30). Discussed with customers their complaints. He tried to sell the thermotainer, when it was here, to the U. A. C. He had no instructions from the company (plaintiff) at that time. Mr. Glaus complained about the defects of the steam table purchased on the contract. It was not constructed as ordered. Nelson gave Glaus orders to employ a tinner and have it fixed and charge the bill to plaintiff. Glaus did so and received credit from plaintiff for the expense. Defendant dealt with Nelson on all previous transactions, collections and sales (Ab. 14, 25). Mr. Glaus complained to Nelson about the thermotainer in March, 1935, and the second time he came herein May defendant complained that the thermotainer would not work. It had been taken out and stored. Glaus said something would have to be done about it. Nelson said he could move it in his territory. He said he could take it and sell it on his next trip (Ab. 13). On his next trip further complaints were made by defendant. Nelson said he would write his house. In a

day or two Nelson reported he had a wire from his house and said if defendant wanted to take a loss of $125 on the thermotainer they would take it back but defendant would have to pay the freight and crating. Nelson did not tell what he wrote (Ab. 14, 18, 24). Exhibit L, a letter from respondent dated June 8, 1935, reads that a proposition will soon be made on the thermotainer. (All the foregoing evidence is not contradicted and almost all admitted). Further evidence of plaintiff's is that no telegram was shown defendant by Nelson and no conversation about buying dishes (Ab. 16, 17, 25). Don Nelson testified he showed Mr. Glaus the telegram which he received from the Los Angeles office. The purported telegram or copy was introduced over objections of defendant. It reads:

"Don Nelson:

Will accept return thermotainer at twenty-five percent discount from purchase price, freight prepaid to Los Angeles provided order you mention is placed with Los Angeles unit satisfactory credit terms.

C. E. McCoskey."

Some orders were given Nelson for dishes at about that time. Gave order for $100 worth. Defendant was compelled by the insurance company to replace in the Mayflower Syracuse china which only the Z. C. M. I. could sell. There is no dispute as to the fact that the letter Nelson wrote, to which the telegram was a reply, was not shown to defendant. Plaintiff offered in evidence a letter never seen by defendant, and purporting to be the letter Don Nelson wrote to Mr. McCloskey in Los

Angeles. Over objections of defendant that it was self-serving and immaterial it was received as Exhibit M. This letter notes that it is from Los Angeles, California, and reads in part that Glaus had paid $500 for the thermotainer "and ever since I have made this territory he has been trying to get us to sell it or give him full credit for it", and in effect Glaus would give an order "for the goods he will need for the Mayflower which will run around 2 or 3 thousand if we will take back the thermotainer."

Appellant contends that the foregoing facts present sufficient evidence to submit to the jury the question of the authority of Don Nelson to make the agreement, for and on behalf of respondent, that was testified to by Mr. and Mrs. Glaus, namely, that appellant should return the thermotainer and prepay the freight to Los Angeles for the credit of $375 or at a 25% loss (Ab. 14, 16, 17, 18, 24-25 and Ex. 2). The agency is admitted. The only question is as to the extent of Nelson's authority. The evidence of past dealings by Nelson show authority to adjust claims, hear and settle complaints as to defects of merchandise and take return of goods as well as order repairs of equipment sold by respondent, and make collections. Secret instructions given by respondent to Nelson contrary to his apparent authority, and not known to appellant, do not prevent respondent from being bound by agent Nelson's agreement. We cite the following authorities in support of our foregoing contention:

The fact of agency and extent thereof is one for the jury:

2 Corpus Juris, Section 731 (2), p. 960:

"When any evidence is adduced tending to prove the existence of a disputed agency its existence or nonexistence is as a general rule a question of fact for the jury, aided by proper instructions from the court, even though the evidence is not full and satisfactory; and in such cases it is error for the court to take the question from the jury by directing a verdict, by instruction, by nonsuit, or by sustaining a demurrer to the evidence. * * * But even where the facts are undisputed, if different conclusions can reasonably be drawn therefrom, the question should be submitted to the jury."

2 Corpus Juris, Section 733, p. 962:

"Where the nature and extent of an authority orally conferred upon an agent are to be determined upon conflicting evidence, or to be implied from the facts and circumstances, the questions as to the nature and extent of the agent's authority and whether the particular act in controversy was in the scope of his authority are usually questions of fact for the jury, guided by proper instructions from the court, and in such cases it is error to take the question from then by nonsuit, instruction, or direction of verdict."

2 Corpus Juris, Section 602, p. 921.

Secret instructions do not relieve the principal from liability:

Page on Law of Contracts, Vol. 3, p. 3018, Sec. 1760:

"Outside of the class of public agents the actual authority conferred by a principal upon his agent is practically inaccessable to the public at large. Accordingly, persons who do not know what the agent's authority is, are justified in

dealing with him upon the assumption that he has authority which the principal indicates by his conduct that the agent possesses."

Page on Law of Contracts, Vol. 3, p. 3021

"The principal may be estopped to deny the authority of the agent by actively holding him out to the world as his agent. Thus, private instructions contrary to the apparent authority of the agent and not known to the person dealing with him, or an uncommunicated revocation of the agent's authority, do not prevent the principal from being bound by the contract of the agent made in his behalf with a person acting in good faith."

Mechem on Agency, Vol. 1, Sec. 730

"As has already been pointed out a conflict is often deemed to arise between 'authority' and 'instructions,' and the rule is constantly declared to be that 'an apparent authority cannot be limited by secret instructions—' "

Mechem on Agency, Vol. 1, Sec. 734

"The test is, were the alleged instructions designed and calculated to fix and determine the character of the agent, or merely to prescribe the manner in which he should exercise the powers incident to a character already or otherwise imposed? As bearing upon this, were the alleged instructions designed to be made known to those dealing with the agent or concealed, and, as bearing upon this, would their disclosure promote or defeat his purpose which the principal had in mind.—"

There is no dispute that Nelson was plaintiff's agent and was authorized to contract for the return of the thermotainer for a $375 credit and that appellant relied upon

such authority and freighted the thermotainer at his expense back to respondent. The instruction to Nelson that he was to make the contract if he received the order spoken of was a secret one and never intended to be communicated to appellant, for such disclosure to appellant would amount to the agent's saying—you may take a loss of $125 by the return of the thermotainer and we will make out of you a good profit on a big order. Such a disclosure would not promote a $2000 or $3000 sale of merchandise but would defeat the purpose of the principal. There was no intention on the part of McCloskey that Nelson should disclose the unusual limitation that an order should be first obtained for $2000 or $3000 before the $375 credit could be allowed for the return of a $500 machine. The failure of the principal to disclose to appellant the unusual limitation referred to is regarded in law as a representation that no limitation exists: See Meechem, Vol. 1, Sec. 735.

DEFENSE OF WARRANTY

The evidence in brief in support of this defense of appellant's answer is as follows:

The thermotainer is an electrically operated table to take the place of a steam table and has a cabinet arrangement for retaining foods for long periods of time. It is supposed to have some advantage over the steam table because of its construction (Ab. 28). It is supposed to keep foods hot and moist ready for serving (Ab. 13, 22 and 23). But this thermotainer dried food out so there

were constant complaints from customers. It was defective right off the reel. It took me (Glaus) a long time to be convinced it would not work (Ab. 15-16). It was not adaptable to appellant's use. I (Glaus) could not tell what the defect was because I am not a mechanic. It was sold to me to work on the same principle as a steam table for the kitchen (Ab. 18-19). If it would work we would never have taken it out of service. Leland Hogan, the service man of Utah Power and Light Co., was called time and again to see what was the matter with it. He came once or twice a week for a period of time. Tried using it after each attempt at adjustment but it dried the meats up (Ab. 23-24). Three witnesses so testified. Wrote letter of complaint to Dohrmans (Ab. 25). Complained to Nelson. Nelson admitted the complaints (Ab. 30). Thermotainer is so constructed cooks could not alter inside construction. The average layman doesn't know anything about it (Ab. 30). Never been another machine around just like it. Hogan, the service man, said could not remedy the trouble though he has serviced many similar ones (Ab. 20-21). Did everything that could be done without changing the manufactured pattern or construction. But reports that it did not work were made after each attempt at adjustment. Hogan has studied this kind of equipment and even built them.

Manager of respondent who made the sale of the thermotainer said it is one of the finest pieces of equipment of all; that it originally cost $1500 and that he would guarantee it (Ab. 12).

The defense of breach of warranty is pleadable; see

Cobbey on Replevin (2nd Ed.), Sec. 795, p. 421:

"* * * In replevin by seller of goods, after notes given in payment therefor and secured by mortgage thereon have become overdue, defendant may show payment in part and damages from breach of warranty. A breach of warranty may be used as a cause for an original action, a counter-option of the warrantee. When used as a defense it is by way of recoupment; that is, it cuts back and destroys the plaintiff's fight to recover."

Wells on Replevin, p. 518.

"* * * and generally whatever demand the defendant has growing out of the same subject matter as the plaintiff's claim, may be recouped."

Shipp on Replevin, p. 512.

"Sec. 551 (12) Counter-Claim.—The term Counter-claim is used in code procedure to include what is contemplated under the common law procedure, both as a set-off and recoupment. For this reason there is some confusion in the books. The true rule regarding a counter-claim seems to be this: where a claim arises out of the same transaction which is the basis of the replevin, i. e., when it is in the nature of a recoupment it may be interposed in replevin; but where it is in the nature of a set-off, i. e.; consisting of damages not arising from the same transaction, but from matters outside of it, it cannot be interposed in replevin."

Williston on Contracts, Vol. 2, p. 1514.

"The theory of recoupment is that plaintiff's damages are cut down to an amount which

will compensate him for the value of what he has given."

In this case there is an express warranty as shown by the evidence and a guarantee of fitness. But there is also an implied warranty that the thermotainer was reasonably fit for the described purpose of keeping cooked meats and vegetables hot and moist for later serving and perform the functions of a steam table; see

Revised Statutes of Utah, Title 81, ch. 1, Sec. 15.

"(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he is the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

"(6) An express warranty or condition does not negative a warranty or condition implied under this title, unless inconsistent therewith."

See M. H. Walker Realty Co. v. American Surety Co., 211 P. 998, 60 U. 435.

Starr Piano Co. v. Martin, 7 Pac. (2nd) 383 at 386.

In this case action for instalments was brought on a conditional sales contract and defendant counter-claimed for breach of warranty of fitness for the purpose for which sold. The Court said:

"* * * Furthermore, in a sale such as this there would be an implied warranty that the equipment which was contracted to be sold for a particular purpose, of which the proposed seller had

full knowledge, was reasonably fit for such purpose.

Chicago Stell Foundry Co. v. F. M. Crowell Co., 14 Pac. (2nd) 1105.

This is an action for goods sold and defendant counter-claimed for breach of warranty and defectiveness of material sold. Judgment on the counter-claim was affirmed. The Court said:

"Where an article of personal property is sold for a definite purpose made known to the seller, and the seller represents that the article will perform that particular purpose, there is a warranty of fitness which protects the purchaser and for which the seller is liable, in event the article fails to do what it was sold to do."

Williams vs. Lowenthall, 12 Pac. (2nd) 75 at 78.

(6, 7). "It may be conceded that, notwithstanding the absence of an express warranty of fitness, nevertheless the circumstances presented by the evidence were such that a warranty that the instrument was fit for the purpose for which it was sold was raised by implication of law."

55 Corpus Juris 757.

"The fact that an article has a trade name does not negative the existence of an implied warranty of fitness for a particular purpose when it is purchased, not by name, but for a particular purpose and supplied for that purpose. * * *"

Whether there was an express or implied warranty that the thermotainer was fit for the particular purpose for which it was sold, is a question of fact for the jury; see:

Sperry Flour Co. vs. De Moss, 18 Pac. (2nd) 242.

"Whether there was implied warranty that flour sold under trade-name was fit for particular purpose, and breach thereof 'held' for Jury."

Appellant submits that the trial court erred in refusing to submit to the jury the defense of breach of warranty; that there was sufficient evidence of warranty by respondent of the fitness of the thermotainer for its use as a piece of kitchen equipment and there is certainly abundant evidence of its total unfitness for the purpose for which it was sold.

Appellants submit also that sufficient evidence to go to the jury was submitted in support of appellant's defense of agreement of settlement by return of the thermotainer for the credit of $375. Assignments 1, 2, 3, 6 and 7, and 21 of Appellant's assignment of errors pertain to the direction of verdict, judgment thereon and denial of appellant's motion for new trial. Said assignments of error are fully discussed in the foregoing.

Assignments of error numbered 4 and 5 pertain to the cost bill. Taxable costs are entirely creatures of the statute and only those costs specifically provided for are taxable.

Hirch v. Ogden, 51 Utah 553 at 563.

"Costs are only recoverable by force of the statute, and allowance of them, in any case will depend on the terms of the statutes."

11 Cyc. 204 to the same effect.

Parks v. Sutton, 60 Utah 356 at 365.

Houghston v. Barton, 49 Utah 611.

There is no statutory provision for allowance of item for clerk's fees for taking a deposition as described in assignment of errors number 5. And witness fees are made taxable only for witnesses who attend court; see section 28-5-8 and 20-8-24 of 1933, Revised Statutes. Also the statutes are silent on premium for a cost bond for which respondent lists an item of $30.

Respectfully submitted,

O. W. CARLSON,
J. M. CARLSON,
Attorneys for Defendant.