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Dohrman Hotel Supply Company v. Beau Brummel, Inc. : Petition for Rehearing

Utah Supreme Court

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

NO. 6207.

IN THE SUPREME COURT OF THE

STATE OF UTAH.

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DOHRMAN HOTEL SUPPLY CO.,
a Corporation,

Plaintiff and Respondent,

-vs-

BEAU BRUMMEL, INC.,
a Corporation,

Defendant and Apellant.

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PETITION FOR REHEARING.

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

CASE NO. 6207.

IN THE SUPREME COURT OF THE

STATE OF UTAH.

[illegible]AN HOTEL SUPPLY CO.,
[illegible]rporation,

Plaintiff and Respondent,

-vs-

[illegible] BRUMMEL, INC.,
[illegible]rporation,

Defendant and Appellant.

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PETITION FOR REHEARING.

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Comes now the above named appellant and respectfully

[illegible]tions and represents as follows:

1. The Court in arriving at its decision indulged an

[illegible]neous assumption, we respectfully submit, in that the

[illegible]rt in its opinion states:

> "The only authority he (Nelson) would have to make a settlement would be such authority as was granted by his company in answer to his communication."

[illegible]h assumption precludes, of course, a consideration of the

[illegible]tion as to whether or not the respondent under all cir-

cumstances held out Nelson as an agent clothed with apparent authority to act for respondent respecting the matters about which Nelson wrote. The evidence disclosed that respondent was fully advised as to what appellant desired respecting the thermotainer and under those circumstances wired Nelson, made no communication directly to appellant and knew or must have known that appellant would deal with Nelson in the usual way. It is a matter of common knowledge that businessmen believe or will believe the representations of agents especially when the principal is as far removed as the principal in this case. The Clauses acted in accordance with business custom and it must be presumed that respondent was familiar with such a custom. It is true that no evidence of custom is introduced but we submit that it is a matter of common knowledge respecting business affairs businessmen customarily rely upon what an agent says and do not distrust him or go to the pains of insisting upon a display of some evidence of authority. Our contention under all the surrounding circumstances is that Nelson was clothed with apparent authority to deal fully respecting the thermotainer and a settlement on account of the same and that appellant acted reasonable in relying upon that apparent authority.

2. Since the surrounding circumstances and the
y in which respondent chose to deal with appellant
sthed Nelson with apparent authority to deal fully res-
sting the thermotainer, Nelson was not a general agent
r any and all purposes but an agent ostensibly authorized
represent his principal for all purposes of settlement
specting the thermotainer. The qualification, therefore,
the telegram as to securing an order amounted to a secret
struction. Consequently the Court's assumption in its
inion in the following language:

> "His (Nelson) actions or representations could not enlarge that authority."

cludes the necessary consideration of a question of fact,
mely: whether or not respondent under all the circumstances
sthed Nelson with apparent authority.

3. It was a question of fact we contend to be passed
on by the jury as to whether or not the conduct of respon-
nt constituted a holding out of Nelson as an agent authorized
deal with appellant respecting the thermotainer in the
nner disclosed by discussions between the appellant and
lson and the contents of Nelson's letter to his principal.

4. The Court made the following observation in its
inion:

> "One dealing with a supposed agent is under the duty to ascertain just what his capacity is. Nelson's representations could not en-

large the scope of the agency, nor did Nelson attempt to enlarge his authority."

s observation and assumption again precludes a consideration facts and circumstances that bear upon the question of arent or ostensible authority. Did respondent under all circumstances really hold Nelson out as an agent with arent authority to deal fully with appellant respecting the ntainer? Nelson was undoubtedly an agent but what was extent of his authority? The telegram alone cannot be conive. It was a question of fact as to whether or not the send- of a telegram to Nelson with the knowledge that appellant dealing with him in the usual way, or as businessmen marily deal, constituted a holding out of Nelson as gent apparently authorized to particularly deal with that was set out in Nelson's letter. The Court we dit has considered only one phase of the evidence, to what the telegram authorized rather than the writing elson's letter and the fact that no communication was directly with appellant and that appellant, therefore, d deal with Nelson under the circumstances as one hed with authority to answer appellant's queri s, eals, etc., respecting the thermotainer. It seems that Court in its opinion overlooked the necessity of

a jury's determing the facts.

5. With respect to implied warranty the Court observed as follows:

> "There is no evidence that the salesman knew the requirements the thermotainer must meet. Under such conditions, the rule of caveat emptor applies."

The Court in such assumption we believe is erroneous. Nelson fully explained what the thermotainer was for and that it was a patented device covering a peculiar method of handling foods and preserving the same. In view of Nelson's explanation as well as the conversation between Glaus and the salesman at San Francisco it is clear as a matter of fact that the seller knew the requirements the thermotainer must meet. Hence there was an implied warranty that the thermotainer would do the work and meet the requirements for which it was designed

WHEREFORE, appellant respectfully petitions for a rehearing and reconsideration in the above entitled cause.

J. W. Carlson

J. W. Carlson

ATTORNEY FOR APPELLANT.