1977

Vernon S. Cheever and Charlie Garofolo v. Orval R. Schramm and Harold L. Christensen : Appellants' Reply Brief on Appeal

Utah Supreme Court

Ray M. Harding; Attorney for Appellants;
Cullen Y. Christensen; Attorney for Respondents;

IN THE SUPREME COURT OF UTAH

STATE OF UTAH

VERNON S. CHEEVER and CHARLIE GAROFOLO, Plaintiffs and Respondents,	)	
vs.	)	Case No. 15147
ORVAL R. SCHRAMM and HAROLD L. CHRISTENSEN, Defendants and Appellants.	)	

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APPELLANTS' REPLY BRIEF ON APPEAL

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APPEAL FROM A JUDGMENT OF THE
FOURTH DISTRICT COURT OF UTAH COUNTY,
HONORABLE GEORGE E. BALLIF, JUDGE.

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This brief is respectfully submitted in reply to those arguments which have been raised in Respondents' Brief.

REPLY TO PLAINTIFFS' ARGUMENT - POINT I

In Plaintiffs' Brief it is stated that since the Defendants took over operation of the business involved in this litigation, they have waived the conditions precedent to the formation of a contract. This is not the case. The Plaintiffs are arguing that since they allowed the Defendants to begin operation of the business before completing the conditions precedent to the formation of a valid contract, the Defendants have in some way

mysteriously waived their right to the Plaintiffs' performanc those conditions precedent referred to in the parties Earnest Money Agreement. It would be a great inequity for this Court allow the Plaintiffs to work this type of injustice upon the Defendants. Further the Plaintiffs cite the case of Ahrendt Bobbitt, 119 U 465, 229 P2d 296 for the proposition that this allows the performance of a condition precedent to the format of a contract to be waived by an act evidencing such intentio That case is not controlling in this situation, as the party case clearly intended to waive any condition precedent as he suing a third party based upon the validity of the Contract. in this case, there is no clear intention of waiver expressed the Defendants' operation of the business involved in this li while they were waiting for the condition to be fulfilled by Plaintiffs. When the Defendants discovered that the Plaintif not intend to comply with the conditions of their Agreement, timely vacated the premises. Therefore, the conditions prece to the formation of a contract in this case were not complied and the Defendants must therefore prevail.

DEFENDANTS' REPLY TO PLAINTIFFS' ARGUMENT - POINT II

The proof of fraud must be by clear and convincing e as stated by the Plaintiffs, but none of the cases the Plaint cite state that the proof must be undisputed.

Further, as stated Appellant Defendants' Brief, and by the case authority therein: "In a case of active misrepre

tation, it is no answer... to say that the party complaining of the misrepresentation had the means of making inquiries." The Plaintiffs represented to the Defendants that "business was so good they had to quit advertising." (TR page 82), and that the "Business was earning a gross income of approximately TEN THOUSAND DOLLARS ($10,000.00) per month" (TR page 83), as well as other material misrepresentations covered in detail within Appellant Defendants' Brief. Now the Plaintiffs are arguing that since they made the books and records of their business available to the Defendants, they should not now be held to their misrepresentations. This argument is clearly contrary to the case law as handed down by this Court in the case of Beyener vs. Continental Dry Cleaners, Inc., 598 P2d 898 (1976), as the Plaintiffs are attempting to impute fault to the Defendants for merely believing what was said by the Defendants.

The evidence is clear that the Plaintiffs fraudulently attempted to sell a business to the Defendants which was losing over FIVE THOUSAND FIVE HUNDRED DOLLARS ($5,500.00) every three (3) months, as shown by the Plaintiffs own records, Plaintiffs' Exhibit No. 7. (R, page 95).

It is also apparent from the transcript that the Plaintiffs made no attempt to disclose to the Defendants the facts that the business they were about to purchase was in fact a losing operation. Instead, the Plaintiffs stated how good business was. (TR, page 24 and 82).

This Court in the cases of Cole v. Park 5 U2d 263, 3[illegible] P2d 623, (1956); Elder v. Clawson 14 U2d 379, 384 P2d 802, (19[illegible] Utah National Bank of Provo v. Oliver, 523 P2d 1222, (1974), fo[illegible] that an action for fraud lies not only when active misrepresen[illegible] are made, but also when mere non-disclosures of material matte[illegible] are involved. The profitability of a business operation is su[illegible] a material matter; therefore, even if the Court does not accep[illegible] evidence of the misrepresentations as clear and convincing, th[illegible] fact that there was no disclosure is undisputed.

Therefore, the above cited cases are controlling, an[illegible] Appellant Defendants' must prevail in this appeal.

DEFENDANTS' REPLY TO PLAINTIFFS' ARGUMENT - POINT III

Even if there was no fraud, and even if the express conditions precedent to the formation of a Contract had been completed by the parties, the Plaintiffs would still be entitl[illegible] only the TWO HUNDRED DOLLARS ($200.00) in earnest money, which paid by the Defendants.

The only writing between the parties in this case is Uniform Earnest Money Receipt and Offer to Purchase. (Plaint[illegible] Exhibit 1). This instrument which one of the Plaintiffs himse[illegible] drew up and which must therefore be construed against him stat[illegible] at lines 39 and 40:

> "In the event the Purchaser fails to pay the balance of said purchase price, or complete said purchase as herein provided, the amounts paid herein shall, at the option of the Seller, be retained as liquidated and agreed damages."

The money referred to above is that TWO HUNDRED DOLLARS ($200.00) paid by the Defendants to the Plaintiffs on February 1, 1976, as evidenced by line 4 of Plaintiffs' Exhibit 1. This money was paid by the Defendants to the Plaintiffs and kept by the Plaintiffs (TR pages 17 and 22). This Court has held on no less than FOUR (4) occasions that the above provision for liquidated damages in case of breach of contract, followed by retention of the earnest money by the Seller, constitutes an exercise of the Seller's option; and therefore, limits his recovery for damages to the amount of the earnest money. (See Dowding vs. Land Funding Limited, 555 P2d 957, (1976); Close v. Blumenthal, 11 U2d 51, 354 P2d 856, (1960); McMullin v. Shimmin, 10 U2d 142, 349 P2d 720,(1960); Andreasen vs. Hansen, 8 U2d 370, 335 P2d 404, (1959).)

The trial Court's award of any damages in this case was therefore in error, and the Defendants pray that if this Court finds a valid Contract did exist between the parties, that it remand this case to the lower Court for a determination of damages consistent with the above cited decisions of this Court. Further, the Defendants seek that the Plaintiffs' prayer for attorney's fees on this appeal be disregarded, and that the Defendants be awarded reasonable attorney's fees pursuant to the Contract between the parties in the sum of FIVE HUNDRED DOLLARS ($500.00) as expenses incident to this appeal.

CONCLUSION

The Plaintiffs fraudulently attempted to sell a losing operation to the Defendants. Plaintiffs failed to complete the conditions precedent to the existence of a binding Contract between

the parties, and the Defendants therefore vacated the Plaintiff premises in recision of any agreement between the parties. The Defendants' actions in vacating the premises were based upon t fraud of the Plaintiffs, and the Plaintiffs' failure to comply the contractural conditions precedent to the agreement between parties. The Plaintiffs having sued the Defendants for an all breach of contract were wrongfully awarded damages grossly in e of those provided for by the parties themselves. The Defendant seek to have this Court reverse the decision of the lower Court and remand the case for determination as to the amount of Defe damages to be awarded; or, in the alternative, the Defendants to have this case remanded for a new trial.

Respectfully Submitted,

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CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) copies of the foregoing Appellants' Reply Brief on Appeal to Respondents' Attorney, CULLEN Y. CHRISTENSEN, 55 East Center Street, Provo, Utah 84601, on this day of August, 1977, postage prepaid.

SECRETARY