

1940

Max Fausett v. General Electric Contracts Corporation and William Holdaway : Brief of Respondent Max Fausett

Utah Supreme Court

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In the Supreme Court of the State of Utah

MAX FAUSETT,

Plaintiff and Respondent,

vs.

GENERAL ELECTRIC CONTRACTS
CORPORATION, a foreign corporation,
and WILLIAM HOLDAWAY,
Defendants and Appellants.

No. 6251

BRIEF OF RESPONDENT MAX FAUSETT

F. B. HAMMOND

Attorney for Respondent.

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No. 6251

REPLY BRIEF OF PLAINTIFF AND RESPONDENT

Max Fausett, the respondent, files this his Reply to the Brief of the appellant, General Electric Contracts Corporation.

MOTION TO DISMISS APPEAL.

Respondent has filed herein his Motion to Dismiss this Appeal because it was taken before any final judgment was entered by the Trial Court. The Judgment Roll reveals the entry of the following documents on the respective dates: Judgment on the Verdict, entered January 24, 1940; plaintiff's Memorandum of Costs, filed January 24, 1940; appellants' Motion For New Trial, filed January 26, 1940; Appellants' Motion to Retax Costs, filed January 29, 1940; Judgment of Remittitur, entered February 19, 1940; Order Denying Motion For New Trial, entered February 19, 1940; Notice of Appeal and Bond, filed February 21, 1940; Order Retaxing Costs entered April 25, 1940.

There was no final or appealable judgment in this case until April 25, 1940, at which time the court made its order reducing plaintiff's costs by \$18.40. The appeal taken February 21, 1940, was therefore premature. The appellant seems to agree with this conclusion and even goes further, for on page 29 of its brief, it says:

"There is nothing in the record to show exactly what the judgment now is in this matter."

It is stated in 4 C.J.S., page 204, Section 108:

"There is a diversity of authority as to whether a final judgment must include a recovery for costs.

"In some states a judgment is not deemed final for the purpose of an appeal, until the costs are taxed or awarded and inserted therein, unless under statute or rule of court the right to costs has been waived, and the judgment is complete and final on its face. In other jurisdictions, however, it is held under their statutes that, although the costs have not been ascertained and stated, when every other matter is disposed of, the judgment is final for the purpose of appeal."

In *Perkins vs. Sierra Nev. S. M. Co.*, 10 Nev. 411, the Court quotes and approves the following:

"A judgment or decree is final that disposes of the issues presented in the case, determines the costs, and leaves nothing for the future consideration of the court. When no further action of the court is required in order to determine the rights of the parties in the action, it is final; when the case is retained for further action it is interlocutory."

See also,

Nevada First National Bank of Tonopah v. Lamb, (Nev.) 271 Pac. 691;

Elsman vs. Elsman, (Nev.) 3 Pac. 2d, 1071;

Richter vs. Lukaszewicz, (Wis.) 171 N. W., 671;

In St. Louis, I. M. & S. R. Co. vs. Southern Express Co., 108 U. S. 24, 2 S. Ct. 6, 27 L. Ed., 639, it is stated:

“The Supreme Court of the United States has defined a final judgment for the purpose of an appeal to be one that ‘terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined.’”

Until costs are inserted, an execution could not cover them.

If a judgment leaves necessary further judicial action, it is not final.

Freeman on Judgments, Vol. 1, 4th Edition, page 18;

Shurtz vs. Thorley, 90 Utah 381, 61 Pac. 2d 1262;

Johnson vs. Solomons et al., (Cal.) 12 Pac. 2d 140;

Boxwell vs. Greeley Union National Bank, (Colo.) 5 Pac. 2d 868;

Standard Steam Laundry vs. Dole, 24 Utah 469, 58 Pac. 1109.

In Oldroyd vs. McCrea, 65 Utah 142, 235 P. 580 at 588, the court says a judgment is not final until it states:

“What the prevailing parties shall receive and what the losing party is required to do, pay or discharge, and in that way adjudicates and disposes the matters in controversy.”

When the appellant contested the respondent's costs it put that matter in controversy and until it was settled it could not be determined how much the appellant was required to pay the respondent.

Robison vs. Salt Lake City, 37 Utah 520, 109 Pac. 816;

Cantwell vs. McPherson, (Idaho) 29 Pac. 102.

In this last case cited, the defendant recovered a judgment of non-suit and for his costs. He did not file a Cost Bill within the statutory time. On appeal the defendant contended that the judgment was not final because costs were not inserted. The court agreed with the defendant on that proposition of law, but held that the defendant waived his right, to file a Cost Bill and therefore the judgment became final. The Idaho Statute cited by the court in support of its ruling is substantially the same as Section 104-44-14 of the 1933 R. S. U.

In the case of Richardson vs. Rogers, (Minn.) 35 N. W. 270, the court held:

“The costs properly constitute a part of the judgment, and unless they are waived or released by the prevailing party, he is as much entitled to have them included as other relief. For the purposes of an appeal the cases in New York and in Wisconsin hold under substantially similar statutory provisions, that a judgment is not perfected until the costs are inserted and hence the time of appeal does not run against the defeated party

until they are properly taxed and included in the judgment. 2 N. W. 98, 32 N. W. 42, 5 How. Pr. 360, 45 Barb. 352, 42 Barb. 444."

In the case of Luke vs. Avera, (Ga.) 85 S. E. 121, the plaintiff sued the defendant Sheriff because he refused to sell certain goods under execution. After hearing, the court ordered the Sheriff to sell the goods and said:

"Let the question of costs remain open for further order. Judgment and order signed in open court, this March 23, 1914."

The appeal was dismissed because the judgment was interlocutory.

THE COURT ERRED IN RETAXING COSTS HEREIN (Abs. 85).

On the opening day of Court, to-wit, January 16, 1940, Sylvia Fausett, Margaret Woolsey, Rose Fausett, Elva Fausett and Elvan Woolsey were duly and regularly sworn as witnesses for the plaintiff (Tr. 11). These witnesses, except Elvan Woolsey were in attendance at all sessions of the court, to-wit, four days, and Elvan Woolsey attended but the first session of the court, (See Judgment Roll page 133). The defendants moved to limit the fees to two days' attendance, to-wit January 16th and January 17th, for the first five above named, and alleged that Elvan Woolsey was entitled to no fee because he did not testify. Elvan Woolsey was sick and unable to attend court on the 17th and respondent's attorney wanted defendant's attorneys to stipulate as to what he would testify to if he were present (Tr. 134) but attorneys could not agree on his testimony. It was then discovered that his brother, Myron Woolsey, was present in court

and could testify to the same facts that Elvan Woolsey would have testified to.

The defendants took two days to put on their testimony after which respondent and plaintiff put on rebuttal testimony. Respondent had no way of calculating how much time defendants would need for their testimony and it was necessary for him to have his witnesses present in court to give rebuttal testimony, if necessary, as soon as defendants had concluded. Elvan Woolsey, after being sworn, was entitled to one day's fee and mileage even though he became sick thereafter and could not testify. The other witnesses were entitled to four days' fees.

See,

Crawford vs. Abraham, 2 Oregon 163;
 Cole vs. Ducheneau, 13 Utah 42, 44 Pac. 92;
 Smith vs. Nelson, 23 Utah 512, 65 Pac. 485.

Appellant General Electric Contracts Corporation grounds its appeal on three propositions set out on pages 10 and 11 of its Brief. The first is "There is no unlawful repossession of the refrigerator by William Holdaway" for the reason "that at no time was the contract current." Respondent denies the premise and the alleged proof thereof.

PLAINTIFF WAS NOT IN DEFAULT AT DATE OF REPOSSESSION OF REFRIGERATOR.

Mrs. Max Fausett made most of the payments (Tr. 52). She made some to General Electric Contracts Corporation direct (Tr. 16) and some to William Holdaway (Tr. 258). The first monthly payment of \$10.00 was due August 28, 1938. From that date to May 28, 1939, the

date of the repossession, there matured ten payments or a total of \$100.00. Mr. Lyon, for appellant, said he had received \$75.00 during that period (Tr. 216) but the evidence shows the Fausetts were not given credit for \$40.00 paid during that time as follows: \$10.00 paid by Mrs. Fausett during "winter months" of 1938-1939. She paid this to William Holdaway on the refrigerator account (Tr. 84). He, however, without authority from her, applied it to her private account to him (Tr. 85). Holdaway never denied that she paid him this \$10.00 on the refrigerator account. She ordered it paid on that account. The General Electric Contracts Corporation ratified payments by her to Holdaway (Tr. 236) so, that payment of \$10.00 must be acknowledged; \$15.00 was paid by Max Fausett to William Holdaway on the refrigerator account March 14, 1939 (Tr. 53). At the same time he said he paid \$10.00 on his private account with Holdaway. Holdaway never denied receiving this \$15.00 and he introduced Exhibit Thirteen, which is a credit to Fausett of \$10.00 on his private account on March 14, 1939. Mr. Lyon said he never received that \$15.00 from William Holdaway (Tr. 237), so that payment of \$15.00 must be acknowledged. \$15.00 was paid in currency the "fore part of May," 1939 to Holdaway (Tr. 86). This payment is corroborated by mother of Mrs. Max Fausett (Tr. 115). Holdaway failed to send this sum to General Electric Contracts Corporation and it was never credited (Tr. 237).

The Fausetts were between two cross-fires and it is immaterial that they did not know how much was due on the contract. It was the duty of the General Electric Contracts Corporation and William Holdaway to treat them fairly and credit them with payments made on the refrigerator account made to both of them. \$40.00 added to the \$75.00 makes \$115.00 they had paid up to "fore part of May," 1939. That sum took care of all payments up to and including the May, 1939 payment and left \$5.00 over paid

when the refrigerator was unlawfully repossessed on May 28, 1939.

EXTENSION OF TIME

The respondent was not in default for the further reason that extensions of time in which to make payments were granted him from time to time. Exhibit A, the contract, recites that time is the essence, but it also states that,

“If payments are not made within fifteen days after due date,”

buyer must pay a late charge. Fifteen days' grace are thus specifically given, together with an undertermined further time upon payment of late charge. The various letters that comprise Exhibit 8 show “late charges” made and show various extensions of time. Where extensions of time are granted to pay installments, the buyer is entitled to reasonable notice that such extensions are discontinued.

Columbia Airways vs. Stevens, 80 Utah 215,
14 Pac. 2d 984.

Bearslee vs. North Paint Finance Corp., (Wash.)
296 Pac. 155.

The acceptance of \$15.00 on “fore part of May,” 1939 by defendant Holdaway for defendant General Electric Contracts Corporation, waived all past defaults, by Fausetts, if any there were.

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Hoppin vs Munsey (Cal.) ~~189~~ Pac. 398, 400.

Newell vs. E. B. & A. L. Stone Co. (Cal.) 184
Pac. 659.

Noyes vs. Schlegel (Cal.) 99 Pac. 726.

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Gray vs. Pelton (Ore.) 135 Pac. 755.
 Cornely vs. Campbell (Ore.) 186 Pac. 563.
 Kohler vs. Lundberg 4 Utah 339, 180 Pac. 590.
 Gosling vs. Jones, 70 Utah 49, 257 Pac. 1058.
 Cameron vs. Purbaugh (Wash.) 227 Pac. 858.

THE DEFENDANT WILLIAM HOLDAWAY WAS AN
 AGENT OF DEFENDANT GENERAL ELECTRIC CON-
 TRACTS CORPORATION

The appellant's second ground for appeal: There is no evidence that William Holdaway was acting as agent for General Electric Contracts Corporation in repossessing the refrigerator, is not founded in the evidence, in fact the opposite is true. Plaintiff's Exhibit G is a blank copy of a trust receipt or an agreement between Carbon Furniture & Appliance Company, succeeded to by defendant and appellant William Holdaway, which is called the floor plan in the evidence (Tr. 149 and Tr. 165) and was in use by the appellant in the year 1938 (Tr. 175). Part of Exhibit G. reads:

"The undersigned before the termination of this Trust may sell said property for account of General Electric Contracts Corporation, to a bona fide purchaser at retail for cash, for not less than the sum indicated in column 5 on the reverse side hereof as to each product covered hereby, and immediately after such sale, the undersigned shall deliver the proceeds thereof to General Electric Contracts Corporation, and until such delivery shall

hold such proceeds in trust for General Electric Contracts Corporation separate from the funds of the undersigned."

"The undersigned" on this document, of course, is Carbon Furniture & Appliance Company. Pursuant to the authority in Exhibit G the General Electric Contracts Corporation furnished Carbon Furniture & Appliance Company with Conditional Sale Contracts in blank, and on July 7, 1938 the Carbon Furniture & Appliance Company sold respondent the refrigerator and drew the contract on one of those blanks (Exhibit A) on which appears these words in addition to the contract:

"Original for General Electric Contracts Corporation."

At the end of the contract, these words also appeared:

"Buyers credit statement must be filled out and dealer must execute assignment."

These are words of a command from a principal to his agent or master to his servant.

Part of Exhibit B is:

"All warranties, terms and provisions of an agreement between the undersigned and General Electric Contracts Corporation are made a part hereof by reference, and upon which General Electric Contracts Corporation relies upon making this purchase."

By the provisions of the floor plan, the dealer (Carbon Furniture & Appliance Company) paid 10% on the refrigerator in question to Graybar Electric Company.

After the dealer signed the trust receipt, Exhibit G, the Carbon Furniture & Appliance Company was under no further obligation to Graybar Electric Company. General Electric Contracts Corporation then paid Graybar the balance on the refrigerator and thereafter the Carbon Furniture and Appliance Company disposed of the refrigerator "for an account of General Electric Contracts Corporation" and was obliged "to deliver the proceeds thereof" to General Electric Contracts Corporation (Tr. 151-152). This is a principal and agent set-up.

The "warranty, terms and provisions of an agreement," mentioned in Exhibit B, referred to defendants' Exhibit 1 which is Application And Agreement of Carbon Second Hand Store of Price, Utah, which is none other than Carbon Furniture & Appliance Company, succeeded to by the defendant William Holdaway. Part of this agreement recites:

"You shall have the sole right to make collections on all Accounts and we agree not to solicit or make any collections or repossession in respect to any Accounts sold to you, nor to accept the return of nor make any substitution of any Equipment covered thereby except pursuant to your instructions, and to forward to you promptly all communications, inquiries or remittances, which we may receive in reference to said Accounts."

Pursuant to those provisions the defendant William Holdaway could not solicit or make collections from Max Fausett or repossess the refrigerator "except pursuant" to instructions from the appellant General Electric Contracts Corporation. Pursuant to Exhibit G and Exhibit B and Exhibit One, General Electric Contracts Corporation became the owner of the Fausett contract. Pursuant to Ex-

hibit One General Electric Contracts Corporation advised William Holdaway as follows:

Exhibit 8, letter of November 9, 1938, appellant General Electric Contracts Corporation requested defendant William Holdaway to,

“contact the customer at once to see that the customer makes his payments.”

Exhibit 8, letter of November 22, 1938:

“. advise what arrangements you have made with the customer if you have not collected the September and October 29 instalments.”

Exhibit 8, letter of March 23, 1939:

“Dear Bill:

“It will be possible for you to take the refrigerator without having to take replevin action. If you once get hold of it, don’t give it back to him until he pays the entire balance of \$81.64, plus \$2.50 late charges. Will you please advise me what results you have on this account.

H. P. Gough.”

Exhibit 8, letter of May 11, 1939:

“Dear Bill:

“If you have not already done so, suggest you replevin the merchandise.”

Exhibit 10, page 2,

“Customer refuses to pay as agreed. You are repossessing.”

These are all words of command from a principal to his agent or a master to his servant, and it makes no difference which. The facts are: Notwithstanding, Holdaway had collected from Fausett \$15.00 currency a short time before receiving this order to repossess and had failed to send it to the General Electric Contracts Corporation, he waited until the Fausetts were all away from home and then took the refrigerator upon demand of appellant General Electric Contracts Corporation.

Under Exhibit G and Exhibit One, the General Electric Contracts Corporation controlled the acts of William Holdaway in connection with the Fausett contract.

“If such a right or control belongs to the principal or master the person doing the work is not an independent contractor, but is an agent or servant. It is to be noted in this connection that it is not actual interference in the work that denotes the agency, it is the right to interfere that makes the difference between an independent contract and a servant or agent.” *Chatalain vs. Thackery*, _____ Utah _____, 100 Pac. 2d at 199.

Appellant not only had the right to interfere in the Fausett contract because it required Holdaway to sign an agreement, Exhibit One, which recites:

“You (General Electric Contracts Corporation) shall have the sole right to make collections on all Accounts and we agree not to solicit or make any collections or repossessions in respect to any Accounts sold to you, nor to accept the return or not make any substitution of any Equipment covered thereby except pursuant to your instructions, and to forward to you promptly all communications, inquiries or remittances, which we may receive

in reference to said Accounts,”

but it actually did interfere in the collection and re-possession of the Fausett refrigerator. It ordered Holdaway to make contacts with and collect from Fausetts. Pursuant to such order he made some collections he never sent in. It ordered him to repossess (Exhibit Ten) and acting upon that order, he did repossess the refrigerator (Tr. 83). Exhibit One gives appellant the right to demand that Holdaway repossess as well as repurchase the contract. By that agreement General Electric Contracts Corporation protected itself not only with the financial ability of Holdaway, but it further protected itself with the right of “repossession” of the property. The plaintiff has fully and completely established the agency of Holdaway to appellant. Exhibits A, B. One and Ten all show that only the person who owned the title to the refrigerator, held the power and authority to repossess it. As late as June 28, 1939, at least thirty days after the unlawful repossession, the appellant General Electric Contracts Corporation still owned the legal title to the refrigerator and had in its possession Exhibit A, the Contract of Sale. Exhibit H is an assignment in blank dated June 28, 1939, signed by J. H. Strube. It is found on the same sheet as Exhibit B. It was in existence when the contract was returned from appellant’s New York office to its Salt Lake City office (Tr. 300). June 19, 1939, the Contract of Sale was in the New York office (Tr. 89) and it remained there until June 28, 1939, as aforesaid. Only the appellant General Electric Contracts Corporation could legally order a repossession and it did so order it on May 12, 1939 (Exhibit Ten), and its agent, William Holdaway, under that order, unlawfully repossessed respondent’s refrigerator on that date. We submit there was sufficient evidence for the Jury to find and William Holdaway was the agent of the General Electric Contracts Corporation in repossessing the refrigerator, and the ap-

pellants' second ground for appeal must fail.

INSTRUCTIONS OF THE COURT

The appellant's Third Ground for Appeal is based on alleged errors in the Court's instructions as to damages.

The Court instructed the Jury generally on the subject of damages correctly. If appellant had desired any specific instructions on damages, it was its duty to make such request. It did not do so, so it cannot now complain.

See,

Griffins vs. Clift, 4 Utah 462, 11 Pac. 609.

Thackery vs. Union Portland Cement Co., 64 Utah 437, 231 Pac. 813.

Re Hansen's Will, 50 Utah 207, 167 Pac. 256.

Everts vs. Worrell, 58 Utah 238, 197 Pac. 1043.

Even if the court erred in not instructing the Jury that they must deduct the amount unpaid on the contract from the value of the refrigerator, such error was harmless because plaintiff eliminated from the judgment the amount General Electric Contracts Corporation claimed still due, to-wit, \$66.64 (Judgment Roll page 141). Such remittitur was allowed by the court (Judgment Roll page 145). If the court were in error by failing to specifically instruct as to damages, a new trial should not be granted on that point because the said remittitur has accomplished what a new trial would do on that objection.

The repossession was unlawful, as pointed out above. On the 19th day of June, 1939, the appellant still had the contract of sale (it was then in its New York office for safe keeping. Tr. 184). Respondent was not in default, as pointed out above. On that date, respondent tendered ap-

pellant payment of \$66.75, which was a few cents more than the amount claimed by appellant (Exhibit D). Appellant's agent William Holdaway, told Elva Fausett, mother of respondent and plaintiff Max Fausett, a day after repossession, that the refrigerator was taken "to protect it," because respondent's house was vacant and that Holdaway had told the company it was vacant (Tr. 129). This agent further told her that she could have the refrigerator back by paying the full balance of \$66.64 (Tr. 129). Pursuant to that promise, Mrs. Max Fausett, wife of respondent, tendered the appellant payment, as aforesaid. The check was refused, not because it was not a currency payment, but because the agent said Holdaway claimed the Fausetts still owed him on a private account (Tr. 90). In the first part of June, 1939 (Tr. 135) Holdaway would have given the refrigerator back to the Fausetts if they had paid him the balance of the private account against them (Tr. 137). The remittitur was not made because respondent owed the \$66.64, because the evidence shows he only owed \$26.64 to finish paying the contract out, but it was made because appellant claimed there was \$66.64 still due. Respondent gave up the \$40.00 difference so as to evade any possibility of a New Trial on the Court's failure to instruct that the balance due on the refrigerator should be deducted from the present value thereof.

Appellant, in its Brief, points out alleged discrepancy between witnesses concerning the depreciation of the refrigerator. The Jury exercised its rights to believe one witness against another and the appellant cannot disturb its verdict on that point where there is some evidence to support the verdict.

This case reveals a situation where the parties were not dealing at arm's length, but it is a situation where a powerful corporation dictates all the terms of the contract,

everyone of which is to its advantage. It then trusts the collection of it to an agent who has a private account against the buyer. The buyer is careless with his receipts and he does not know at any time just how much he owes on the contract. The agent misapplied at least \$10.00 paid to him on the contract, and credited it to his private account against the buyer. He, the agent, failed to account entirely for \$30.00 more paid to him on the contract. The corporation becomes impatient and orders repossession, not knowing the account is not in default. The corporation is not to be punished because it is powerful and technical in its contracts, nor because it demands what is due it on the due date; but everything it did and everything its agents said and did that benefit these unsophisticated buyers should be strictly construed against the corporation and in the favor of the buyer. They were not on equal terms with the corporation. They were completely within its power and this court should see to it that that power was not abused.

The Appeal should be dismissed and the Judgment allowed to stand with the addition of \$18.40 to plaintiff's costs, which sum was deducted by the court from the Plaintiff's Cost Bill, without authority of law.

Respectfully submitted.
F. B. HAMMOND,
Respondent's Attorney

SEE TYPEWRITTEN BRIEFS
FOR NO. 6251