

1977

Petty Motor Lease, Inc. v. Clarence L. Jolley : Brief of Defendant-Appellant

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

PETTY MOTOR LEASE, INC.,)	
Plaintiff-Respondent,)	
)	Case No.
vs.)	
)	15524
CLARENCE L. JOLLEY,)	
Defendant-Appellant.)	

BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM THE JUDGMENT OF THE THIRD
JUDICIAL DISTRICT COURT FOR SALT LAKE
COUNTY, STATE OF UTAH
HONORABLE ERNEST F. BALDWIN, JUDGE

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Clerk, Supreme Court, Utah

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IN THE
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PETTY MOTOR LEASE, INC.,)
Plaintiff-Respondent,)
)
vs.)
)
CLARENCE L. JOLLEY,)
Defendant-Appellant.)

BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF NATURE OF CASE

By its amended complaint (R. 2-9), the Plaintiff alleged that on or about the 24th day of June, 1971, Defendant entered into three lease agreements with the Plaintiff, by which the Plaintiff leased to the Defendant three automobiles, rental payments to be made on a monthly basis. Plaintiff also alleged that on or about the 24th day of June, 1971, Plaintiff and Defendant entered into another contract by which Defendant agreed to purchase the three automobiles for the sum of \$10,000.00 after the expiration of one year. Plaintiff also alleged that under the contract, Defendant assigned to Plaintiff certain

shares of stock, and that Defendant agreed to have the stock made free trading on or before the one year expiration date, at which time the Plaintiff would be able to sell the shares. The Plaintiff also alleged that the contract provided that when the stock was sold, the Plaintiff would apply the proceeds of the sale to the rental due under the terms of the leases and the balance toward the purchase price. Plaintiff also alleged that in the event the sale price of the securities was less than the amount required to pay the lease and to complete the purchase price, the Defendant had the option to pay the balance and obtain title to the automobiles or return the cars to the Plaintiff. The Plaintiff alleged that the Plaintiff was entitled to the excess of the proceeds of the sale, if any. Finally, the Plaintiff alleged that the Defendant had breached the contract in that Defendant had not made the stock free trading.

By his answer and counterclaim and affirmative defense (R. 10-13), the Defendant admitted that the Defendant and Plaintiff had entered into the three leases and a sales contract. As an affirmative defense, the Defendant alleged that the Plaintiff was estopped from

asserting breach of contract because the Plaintiff voluntarily took upon itself the responsibility to free up the stock, leading the Defendant to believe that he had no further obligation under the contract, and thereby waiving the provision in the contract requiring the Defendant to free up the stock. The Defendant in his prayer requested that the court give to the Defendant clear and free title to the three automobiles, and that the Court grant to the Defendant all sums which Plaintiff could have obtained had it diligently and properly pursued the freeing up of the stock, in excess of the purchase price of the automobiles.

DISPOSITION IN THE LOWER COURT

The matter came up for trial before the Honorable Earnest F. Baldwin on May 6, 1977. After the trial, the Court awarded the Plaintiff judgment in the amount of \$10,608.55, and dismissed the Defendant's counterclaim with prejudice. (R. 41-42) In its findings of fact, the trial court found that the Defendant did not register the shares of stock, did not receive an opinion from company counsel that registration was not required, and did not otherwise make the stock freely tradeable

as required by the contract (R. 39). From this finding of fact, the court concluded that the Defendant had breached the contract with the Plaintiff. (R. 39)

RELIEF SOUGHT ON APPEAL

Plaintiff seeks the following relief on appeal:

1. A determination by the Court that a finding of fact should be entered that the Plaintiff voluntarily took upon itself the obligation to free up the stock, leading the Defendant to reasonably believe that he no longer had any responsibility under the agreement, and that the Defendant relied thereon, reasonably believing that the Plaintiff would free up the stock itself.

2. A determination by the Court that because of the Plaintiff's actions in taking upon itself the responsibility of freeing up the stock, the Plaintiff waived the Defendant's obligation under the contract, and that the Plaintiff should be estopped from asserting that the Defendant breached the contract for failure to free up the stock.

3. A determination by the Court that the trial court committed error in allowing the Plaintiff's expert witnesses to testify concerning whether the stock could be

freed up, while refusing to allow the Defendant's expert witness to testify on the same matter.

4. A determination by the Court that the trial court applied erroneous law in regard to freeing up of stock during the course and proceedings of the trial and that its findings of fact and conclusions of law were prejudiced thereby.

5. As an alternative to the relief requested in paragraphs number 1 and 2, a determination by the Court that a new trial be granted because of the reversible errors committed by the trial court as described in paragraphs numbers 3 - 4.

STATEMENT OF FACTS

1. At the trial, the Defendant testified that he had a telephone conversation with Newman Petty, President of the Plaintiff Corporation, and that during the course of the conversation, Mr. Petty told him that he would prefer to have his own attorney provide an opinion in regard to freeing up the stock and that Defendant replied that this arrangement would be fine with him. (Transcript 69.)
Graham Dodd, a Salt Lake Attorney, testified that the

Defendant had come to him, requesting that he free up the stock. Mr. Dodd testified that he started to do research on the problem, but after two or three weeks received a phone call from the Defendant requesting that he spend no more time on the problem because Mr. Petty had decided to retain his own lawyer to issue an opinion to free up the stock. (Transcript 64.)

2. At the trial, there was exhaustive evidence that the Plaintiff went to extensive effort to free up the stock by itself:

a. Mr. Petty testified that before May or June of 1973, he contacted Thomas Blomquist, Counsel for the Corporation which had issued the stock, and talked to him several times about the freeing up of the stock. During the course of their conversations, Mr. Blomquist suggested that Mr. Petty call a certain attorney in California and ask him about the freeing up of the stock. (Transcript 13 - 14.)

b. Mr. Petty testified that he called this attorney in California, but was told that the attorney would object to freeing up the stock and would not give a letter of recommendation on it. (Transcript 14.)

c. Mr. Petty testified that after his communication with the attorney in California, he contacted Richard Byrd, a Salt Lake Attorney, requesting that Mr. Byrd undertake to free up the stock, and that Mr. Byrd subsequently investigated the matter. (Transcript 14.)

d. Mr. Petty testified that he had at least two more conversations with Mr. Blomquist, asking him to do whatever was necessary to free up the stock, but that Mr. Blomquist had told him that it couldn't be done and that the company would object to it. (Transcript 15.)

e. Richard Byrd testified that he was contacted by Mr. Petty who requested him to free up the stock. Mr. Byrd testified that Mr. Petty provided him with copies of the stock certificates, and sent him a letter including copies of the agreements entered into between the Plaintiff and the Defendant. Mr. Byrd also testified that he had had various conversations and communications with Mr. Petty in regard to the freeing up of the stock. (Transcript 28 - 31.)

f. Thomas Blomquist, Attorney for the company which issued the stock, testified that Mr. Petty had contacted him, requesting his opinion as to whether the stock

could be freed up. (Transcript 43.)

3. The contract specified that the Defendant was to have the stock freed up by June 23, 1972. (Exhibits 1-P, 1-P(A), 1-P(B), 1-P(C)).

4. Mr. Petty testified that he was busy trying to get the stock freed up himself as late as May or June of 1973. (Transcript 13.)

5. Mr. Petty testified that he had had several conversations with the Defendant wherein Mr. Petty expressed his concern because the stock had not been freed up. Mr. Petty testified that he told the Defendant that it was the Defendant's responsibility to free up the stock. (Transcript 12 - 13.)

6. At the trial, Mr. Richard Byrd, a Salt Lake attorney, was called as a witness by the Plaintiff and was allowed to testify concerning whether the stock could have been freed up. (Transcript 29 - 30.)

7. At the trial, Mr. Thomas Blomquist, an attorney, was called as a witness by the Plaintiff and was allowed to testify as to the law of freeing up of stock, expressing his opinion to the court that the stock could not have been freed up. (Transcript 48 - 50.) Counsel for the Defendant

made strenuous objection to the introduction of this evidence. (Transcript 45 - 47.)

8. After the testimony of Thomas Blomquist, the court made the comment that "....it is crystal clear to me this stock was not and could not at this stage become free trading." (Transcript 53.)

9. At the trial, Counsel for the Defendant called to the witness stand, Graham Dodd, a Salt Lake Attorney, ^{to} ask his opinion as to whether the stock could have been freed up. (Transcript 64.) At this point, the Attorney for the Plaintiff objected to the introduction of this evidence on the ground that it was irrelevant because "....the restrictive legend in the certificate requires an opinion of corporate counsel, not of some independent attorney." (Transcript 64.) The Court sustained the objection without comment. (Transcript 64.) The Attorney for the Defendant then made an offer of proof that Mr. Dodd would have testified that he could have issued an opinion that the stock could have been freed up. (Transcript 65.)

ARGUMENT

POINT I.

THERE IS NOT SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDINGS OF FACT, AND THE TRIAL COURT ERRED IN NOT ENTERING A FINDING OF FACT THAT THE PLAINTIFF TOOK UPON HIMSELF THE OBLIGATION TO FREE-UP THE STOCK, LEADING THE DEFENDANT TO REASONABLY BELIEVE THAT HE NO LONGER HAD ANY RESPONSIBILITY UNDER THE AGREEMENT, AND THAT THE DEFENDANT RELIED THEREON, REASONABLY BELIEVING THAT PLAINTIFF WOULD FREE UP THE STOCK ITSELF:

The basic rule of appellate review is that a presumption arises that the judgment is sound, and the appellate court reviews the evidence in the light most favorable to the prevailing party. Branel v. Utah State Road Commission, 465 P.2d 534 (Utah, 1970); Rivas v Pacific Finance Company, 397 P.2d 990 (Utah, 1964). However, under some circumstances this presumption can be overcome. In Hardy v. Hendrickson, 495 P.2d 28, 29, this Court stated:

On appeal the evidence is viewed in the light most favorable to sustain the lower court, and the findings will not be disturbed unless they are clearly against the weight of the evidence....

Also, in Branel, supra at 535-536, this Court stated:

The Foundational Rule on this aspect of procedure is that it is the trial judge's prerogative to find the facts; and this includes judging the credibility of the witnesses and the evidence and drawing whatever reasonable inferences may fairly be derived therefrom. It is therefore more accurate to say that on review we survey the evidence in the light favorable to the findings, whichever party they may favor; and that they will not be disturbed on appeal if they are supported by substantial evidence.

It is apparent from the foregoing rules of law that the Supreme Court of Utah will find a trial courts finding of facts to be erroneous if it can be shown that the weight of evidence is clearly against the findings; or if it can be shown that there is no substantial evidence to support them. In the instant case, a survey of the record indicates that the weight of evidence is clearly against the findings of fact, and that in relationship to the weight of the evidence, there is no substantial evidence to support the findings of fact the way they presently stand.

The vast weight of the evidence clearly shows that the Plaintiff took upon himself the obligation and the responsibility to free up the stock and that the Defendant relied upon this assumption of responsibility on the part of the Plaintiff, and thereafter reasonably believed that his obligation under the contract to free up the stock had been extinguished. The Defendant testified that Newman Petty, President of the Plaintiff Corporation, specifically told him that he would assume this responsibility. Graham Dodd, a Salt Lake attorney, testified that the Defendant came to him, requesting that he endeavor to free up the stock, but that subsequently the Defendant requested that

he discontinue his work on the problem for the reason that Mr. Petty had decided to retain his own lawyer to issue an opinion to free up the stock. There was exhaustive evidence during the course of the trial that the Plaintiff went to extensive effort to free up the stock by itself. The evidence showed that Mr. Petty contacted three different lawyers in regard to the matter and had many communications and conversations with each attorney. One of the attorneys, Richard Byrd, verified the fact that the Plaintiff was busy trying to free up the stock itself by testifying that Mr. Petty came to him with stock certificates and copies of various documents requesting that he help him free up the stock. Another attorney, Thomas Blomquist, testified that Mr. Petty contacted him many times in regard to the matter. The only evidence whatsoever in the record that contradicts the above evidence is the uncorroborated testimony of Mr. Petty that he told the Defendant that it was his responsibility to free up the stock. In light of the great weight of evidence showing that the Plaintiff had assumed the responsibility to free up the stock, it cannot be said that this uncorroborated testimony by Mr. Petty is substantial evidence to support the findings of fact by the

trial court.

It is true, of course, that it is the trial court's prerogative to judge the credibility of witnesses, and the Appellate Court is usually bound by the trial court's determination of the issue of credibility. Thus, it might be argued that the trial court simply decided that the testimony in favor of the Defendant's position was not credible, and that the testimony in favor of the Plaintiff was credible. However, if this position is accepted by the instant Court, then a serious problem arises. This is because Mr. Petty's testimony is contradictory in and of itself. First of all, Mr. Petty testified that he specifically told the Defendant that it was his responsibility to free up the stock. Then, subsequently, Mr. Petty elaborately described the many efforts that he underwent himself to free up the stock. Thus, Mr. Petty's testimony as to the extensive efforts he underwent to free up the stock, clearly belies his testimony that he had not assumed the responsibility for freeing up the stock. The findings of fact, therefore, must be based on a very curious determination of credibility by the trial court. The trial court must have determined that Mr. Petty was telling the truth insofar as

his testimony related to his allegation that he had not assumed the responsibility for freeing up the stock, but disbelieved his testimony insofar as it related to the extensive efforts undergone by himself to free up the stock. Thus, the trial court's determination of this issue is specious at best. Because of this irregularity, it cannot be said that the findings of fact are "supported by substantial evidence", and it is apparent that the findings of fact are "clearly against the weight of evidence."

POINT II.

UNDER UTAH LAW, A PARTY TO A CONTRACT, THROUGH HIS WORDS, ACTS, OR CONDUCT, CAN EFFECTIVELY WAIVE AN OBLIGATION UNDER THE CONTRACT OWED TO HIM BY THE OTHER PARTY.

This Court, in Davis v. Payne and Day, Inc., 348 P. 2d 337, 339 (Utah, 1960), stated:

It is a well established rule of law that parties to a written contract may modify, waive, or make new terms notwithstanding terms in the contract designed to hamper such freedom.

The Court, in articulating this rule of law, stated in Calhoun v. Universal Credit Company, 146 P. 2d 284, 287 (Utah, 1944):

Where one by his conduct has caused the other to believe that he has waived a provision which was

placed there for his benefit, and considers the contract in full force and effect, common honesty between men requires that, if he subsequently desires to enforce the provision, reasonable time must be given the other party to comply with the terms of the contract.

It is apparent from the foregoing language by the Supreme Court of Utah that the principal of waiver applies in the contract situation, and that a party may waive a provision in a contract which was for his benefit. In the instant case, it is apparent that the Plaintiff waived the provision in the contract requiring the defendant to free up the stock within a year after the three lease agreements were entered into, taking upon itself the responsibility to do so. Three things lead to this conclusion. First, the evidence at the trial showed that Mr. Petty himself went to exhaustive and extensive efforts to free up the stock. Secondly, the Defendant testified that Plaintiff released him from the obligation. Thirdly, Mr. Petty obviously had waived the provision in the contract, because even as late as one year after the date upon which Defendant's "obligation" to free up the stock had matured, Mr. Petty was still busy talking to attorneys and trying to get the stock freed up himself. The Plaintiff, therefore, cannot now complain that the Defendant failed to execute this term of the contract, and

the Plaintiff should be estopped from asserting breach of contract.

POINT III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE PLAINTIFF'S EXPERT WITNESSES TO TESTIFY CONCERNING WHETHER THE STOCK COULD HAVE BEEN MADE FREELY TRADEABLE, WHILE NOT ALLOWING THE DEFENDANT'S EXPERT WITNESS TO TESTIFY ON THE SAME MATTER.

At the trial, the court allowed the Plaintiff to introduce evidence concerning whether the stock could have been made freely tradeable. Richard Byrd, a Salt Lake attorney, testified concerning this matter and Thomas Blomquist, despite objections of the Defendant, was allowed to give his opinion that the stock could not have been freed up. The court refused to allow the Defendant's witness, Graham Dodd, a Salt Lake attorney, to give his opinion that the stock could have been freed up.

This appears to have been an abuse of judicial discretion, since the question of whether stock may become freely tradeable is a question of fact. A corporation's refusal to free up stock may be wrongful depending upon the facts of the case. See Melville v. Wantschek, 403 F.Supp. 439 (E.D.N.Y., 1975); Travis Investment Co. v. Harwyn Publishing Corporation, 288 F. Supp. 519 (S.D.N.Y., 1968).

In Travis Investment Co., supra at 527, the court recognized that refusal to transfer certificates without justification was wrongful:

Therefore, plaintiff has not proved that Harwyn's refusal to transfer the shares was wrongful and in violation of its duty to plaintiff; and Harwyn has established that its refusal to transfer the shares ...was reasonable.

After the testimony of Mr. Blomquist was concluded, the court then made the comment: "I think it is crystal clear to me this stock was not and could not at this stage become free trading." Obviously, the court's conclusion was unjustified because it had not allowed the Defendant's witness to testify on this matter. The court's conclusion also was prejudicial because the outcome of the case could have been conceivably different if the court would have believed that the stock could have been made freely tradeable. It is evident that if the court believed that the stock could not have been freed up, then the question of waiver on the part of plaintiff would not have been relevant to the court's consideration. Thus, the court might have disregarded competent evidence on the question of waiver and estoppel simply because it did not feel it relevant.

The foregoing is respectfully submitted.

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I certify that I mailed two (2) copies of the foregoing BRIEF OF DEFENDANT-APPELLANT to Wayne G. Petty of Moyle and Draper, 600 Deseret Plaza, Salt Lake City, Utah 84111, Attorneys for Plaintiff-Respondent, this 23d day of January 1978, postage prepaid.

RANDALL BUNNELL