1978

M. Elaine Brown v. Wendell v. Miller : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

M. ELAINE BROWN, :

Plaintiff-Respondent, :

vs. : Case No. 15,638

WENDELL V. MILLER, :

Defendant-Appellant. :

BRIEF OF RESPONDENT

Appeal from a Judgment of the Fourth Judicial District Court for Utah County, State of Utah, Honorable J. Robert Bullock, presiding.

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NATURE OF THE CASE

The plaintiff sued the defendant on a promissory note, and the defendant counterclaimed to have the entire transaction set aside and his down payment returned to him.

DISPOSITION IN THE LOWER COURT

The case was tried to the Court. The Court found in favor of the plaintiff on her Complaint and dismissed the defendant's Counterclaim, no cause of action, from which rulings the defendant appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks to have the decisions of the Trial Court sustained and the defendant's appeal dismissed.

STATEMENT OF FACTS

In April, 1977, the parties entered into an Agreement whereby the defendant agreed to purchase a restaurant supply business, then known as L. D.'s Fine Foods, from the plaintiff for $7,500.00.

The defendant, Mr. Miller, paid the sales price by paying to the plaintiff $3,750.00 in cash and by executing and delivering to the plaintiff a promissory note in the amount of $3,750.00. The minor corrections currently appearing on the face of the Promissory Note were made subsequent to execution and delivery of the note at the request of Mr. Miller and with his consent.

Thereafter, the defendant made no payments on the note and the plaintiff filed her Complaint to recover the amount thereof together with attorney's fees and costs. The defendant answered, admitting that he signed and delivered the subject promissory note and that he had made no payments pursuant to the terms thereof; defendant raised the affirmative defense of misrepresentation.

In addition, the defendant counterclaimed, demanding judgment in the amount of the initial cash payment of $3,750.00 and for a declaration that the subject promissory note was null and void, the grounds therefore apparently being, duress and lack of consideration.

At trial, the defendant assumed the responsibility to go forward. (T-2).

The defendant put forward at trial little or no competent evidence on this issue of misrepresentation and duress. For example, the defendant admitted twice that neither the plaintiff nor any of her representatives made any untrue statement with respect to the business with which the plaintiff dealt in the Price, Utah area. Similarly, the only apparent reference to duress are Mr. Miller's statements that a Mr. Chiever, the real estate agent, was in a rush to finish up the closing and the the promissory note signed so that he (Mr. Chiever) could go to his mother's funeral. Consistent therewith, the appellant's brief deals only with the defense of lack of consideration, and accordingly, the scope of this brief will be restricted to that issue.

With respect to consideration, the record discloses the following: The plaintiff had developed a business called L. D.'s Fine Foods, which operated in the area of Price, Utah. The plaintiff had developed a business relationship with approximately 20 businesses in the Price area. Mrs. Brown periodically called on each of the businesses where as often as possible, she received an order for food products and other restaurant supplies. Thereafter, Mrs. Brown would purchase the ordered items from local supply houses and deliver the same to her customers and receive payment either in cash or by a later billing.

When Mr. Miller agreed to purchase the distribution business, Mrs. Brown took him with her on her rounds,

where she taught him the route and taught him where she purchased her supplies and taught him the customary method by which she billed her customers. She identified for Mr. Miller all of her customers, she took him into the various businesses and introduced him to the managers thereof as the new owner of her business, she gave him the name L. D.'s Fine Foods, but advised him not to use the name, (for which advice he was unhappy), and, she terminated her business relationship with her customers.

Mr. Miller now operates the business on a part-ti basis and apparently realizes less profit than Mrs. Brown d

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DETERMINED THAT THE PLAINTIFF-RESPONDENT HAD GIVEN ADEQUATE CONSIDERATION TO THE DEFENDANT-APPELLANT.

The record shows that the respondent transferred to the appellant, as consideration, an on-going and continuing business, in its entirety. The respondent had established a food distribution business called "L. D.'s Fine Foods." As part of the sale thereof to the appellant, the respondent identified all of her customers (approximate 20 in number) to the appellant, and introduced the appella to them as owner of the business. The respondent spent two days with the appellant taking the appellant to the various businesses, introducing him and teaching him the route she customarily followed and the various proceedures used in the business. In addition, she introduced the

appellant to a major wholesaler of the business and she gave him general advice on operation of the business and use of the business name which she also transferred to him. The respondent thereafter terminated her business relationship with her customers in favor of the appellant.

The respondent concurs with Point I of the appellant's brief which, as applied to this case, is to the effect that the respondent must give adequate consideration to the appellant. However, the burden of showing the respondent's failure to give adequate consideration is the affirmative burden of the appellant where, as here, the appellant stipulated at trial to the prima facie case of the respondent. General Insurance Company of America v. Carnicero Dynasty Corporation, 545 P.2d 502 (Utah 1976).

To the foregoing principle, (that the respondent must give adequate consideration, with proof of her failure to do so being the burden of the appellant) the respondent adds the following two general points:

> The first point is stated in 17 Am Jur 2d, Contracts § 102:
>
> It is fundamental that adult persons suffering from no disabilities have complete freedom of contract, and ordinarily the courts will not inquire into the adequacy of the consideration for their contracts. . . . The legal sufficiency of a consideration for a promise does not depend upon the comparative economic value of the consideration and of what is promised in return. In other words, the relative values of a promise and the consideration for it do not affect the sufficiency of the consideration and whatever consideration a promisor assents to as the price of his promise is legally sufficient.

The second point is stated in Jackson v. Caldwell, 18 Utah 2d 81, 415 P.2d 667 (1966), which is a leading case dealing with contracts and so called "good will":

> This court has consistantly held in this type of a case it reviews questions of facts most favorable to the findings of the trial court, and traverses only if the evidence or lack of it renders it clearly necessary to do so. Jackson v. Caldwell, supra at 672.

Following all of the foregoing principles, the trial court correctly declined to substitute its judgment for the consideration bargined for by the parties. The court further correctly granted judgment to the plaintiff-respondent on the record herein which shows that the defendant-appellant stipulated that the plaintiff-respondent had established her prima facie case; which record also shows, after the defendant's case was completed, that the plaintiff had transferred to the defendant a continuing business in its entirety.

POINT II

THE COURT CORRECTLY REFUSED TO RULE THAT THE SALE OF A CONTINUING BUSINESS, IN ITS ENTIRETY, CONSTITUTES LACK OF CONSIDERATION.

The Court correctly ruled that the case law cited by the appellant is not pursuasive on the record that the sale by the respondent of a continuing business, in its entirety, which had been previously established as a sole propritership under an assumed name, which was transferred as part of the sale, is insufficient to stand as consideration for the transaction between the parties.

We refer specifically to the Utah cases of Jackson v. Caldwell, 18 Utah 2d 81, 415 P.2d 667 (1966) and Vercimak v. Ostoich, 118 Utah 253, 221 P.2d 602 (1950), which are generally consistant with case law from other jurisdictions on this subject. Like many other cases, these involve disputes rising out of the dissolution of professional partnerships which are held in Utah to have no independent good will. Jackson v. Caldwell, supra at Page 670.

The Utah Supreme Court in Jackson v. Caldwell noted that "good will" as it is variously defined, (1) is property, (2) can be bargained and sold, and (3) cannot be sold separately from property rights to which it is an incident. Jackson v. Caldwell, supra at Page 670.

In the present case the Court was correct in its handling of the legal issues relating to good will as the same have been stated in Jackson v. Caldwell, supra. The Court was correct because the respondent sold her business in its entirety to the appellant and she ceased engaging in that business herself. Thus, all things whether tangable or intangable to which the good will in L. D.'s Fine Foods had attached passed totally to the appellant.

The language from Jackson v. Caldwell, supra, that good will cannot be disposed of separately from property rights to which it is an incident, is footnoted to the Alabama case of Yost v. Patrick, 245 Ala. 275, 17 So.2d 240 (Alabama 1940). The relevant quotation in Yost v. Patrick is a quotation from 38 C.J.S. "Good Will."

Examining the article on good will in Title 38 C.J.S. reveals the following at Section 8 thereof under the title "Sale in Connection with Property to Which Incide

> Good will, being always incident to some particul place, name, property, or business to which it inseparably adhears, can be sold, assigned, or otherwise transferred only in connection with a transfer of the thing to which it is incident, se supra Section 3.
>
> . . .
>
> If the property, business, or right to which a good will adhears is sold or otherwise transferre the good will, although not specifically mentione passes to the transferree as an incident thereto. (emphasis added)

That good will must pass together with the propert business, or the right to which it adhears, appears to be a well settled requirement. The appellant's position that good will can only be transferred when it is attached to some form of tangible property, is not correct. Good will may just as well apply to a business or a right which are not themselves tangible.

In the present case, the Court was correct in its view that the plaintiff-respondent had effectively transferred t the defendant-appellant the fruits of her work and enterpri which together with the training that she supplied and the good will she had developed constitutes sufficient consider

This court properly should view the facts in the record in a manner most favorable to the findings of the trial court and whereas here, the defendant-appellant faile to establish his affirmative defense of lack of considerat either as a matter of fact or as a matter of law, the ru

of the trial court should be upheld.

SUMMARY

The Trial Court held, and the record clearly shows, that the plaintiff-respondent gave legally sufficient consideration to the defendant-appellant in exchange for $7,500.00. The burden was on the defendant to show the insufficiency of consideration, which burden was not met. The Trial Court found all factual and legal issues in favor of the plaintiff-respondent and that judgment should be affirmed.

Respectfully submitted this 15th day of June, 1978.

RICHARD S. DALEBOUT

CERTIFICATE OF DELIVERY

I hereby certify that I delivered 2 copies of the foregoing Respondent's Brief to Richard D. Bradford, 359 West Center Street, Provo, Utah, on this 15th day of June, 1978.

ALAN RUDD