1978

Craig Mecham and John Hedman v. Myron L. Benson and Ellen Benson : Appellants' Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

CRAIG MECHAM and JOHN HEDMAN,	)	
Plaintiffs - Appellants,	)	Case No.
vs.	)	15649
MYRON L. BENSON and ELLEN BENSON,	)	
Defendants - Respondents.	)	

APPELLANTS' BRIEF

Appeal from District Court of

Salt Lake County, Utah

Honorable James S. Sawaya

STEVEN F. ALDER
234 East 3900 South
Salt Lake City, Utah 84107

ATTORNEY FOR PLAINTIFFS - APPELLANTS

MARK S. MINER
525 Newhouse Building
Salt Lake City, Utah 84111

ATTORNEY FOR DEFENDANTS - RESPONDENTS

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BRIEF OF PLAINTIFFS - APPELLANTS

NATURE OF THE CASE

Appellants brought an action against Respondents to recover moneys paid as guarantors of respondents note with bank and to recover costs of repossession of a mobile home. Respondents counter-claimed for damages alleging fraud.

DISPOSITION IN LOWER COURT

The case was tried to a jury upon a general verdict. The jury found for defendants - respondents and against plaintiffs - appellants and awarded respondents damages.

RELIEF SOUGHT ON APPEAL

Appellants seek to have the jury verdict dismissed as to them-

selves or in the alternative for a new trial on issues in error.

STATEMENT OF FACTS

Appellants were owners of a corporation, Majestic Homes, Inc. whose business was the sale of mobile homes. (T-3) Respondents approached appellants and inquired about the purchase of certain homes. Appellants showed respondents a certain mobile home that had been used for some time as a demonstrator model (T-17) and were told they could purchase the home at a discount because of its prior use. (T. 12, 13) Respondents inspected the home, (T. 12, 13, 97) noted certain defects (T-113, 108-9, 97) and agreed to purchase the home for a price below the normal price for that type of mobile home. (T. 12)

Respondents moved into the home and lived there for about 9 months when they ceased to make payments on their loan and then moved from the home without notice to appellants. (T-103) Appellants attempted to contact the respondents to obtain payments, but received no response to their inquiries. Appellants had ceased doing business as Majestic Homes, Inc., but remained secondarily liable on Respondents' note to the bank, and maintained by virtue thereof a security interest in the home. Accordingly, appellants made respondents payments to the bank and then after notice to respondents resold the abandoned mobile home. (T-28)

Appellants then commenced legal proceedings to recover the payments made on their behalf and to recover costs of repossession. Appellants also sought to recover the deficiency between the resale price and the loan balance which was also paid to the bank by appellants.

ARGUMENT

I

APPELLANTS ARE NOT LIABLE FOR THE CLAIM BROUGHT AGAINST THEM AS AGENTS OF MAJESTIC HOMES, INC.

At the trial no evidence was introduced to show that the appellants were the alter ego of the corporation from whom they purchased the mobile home. There was no introduction of evidence to show identity of interests or disregard of the corporate entity by the appellants. (T. 44-47)

Appellants sued respondents as individuals for moneys expended, but did not thereby consent to personal liability for their prior acts as agents of the corporation.

(TR. 44-47)

Absent a finding that there had been a disregard of the corporate entity the appellants as officers and directors could only be liable in contract if they had signed the contracts personally. However, all documents were signed by appellants on behalf of the corporation.

(TR. 44-47)

Although the respondents' pleadings alleged fraud by the appellants there was no proof of fraud nor finding of fraud by the Court. (TR. 125-127) This court has found in Tintic Indian Chief Mining and Milling Co v. Clyde, 79 Utah 337, 10 P. 2d 932 ( ) that it is necessary to allege and prove actual fraud showing that the directors or stockholders did not act in good faith.

These normal protections to officers and directors of corporations are extended and corporate existence is continued for this purpose beyond the time of dissolution of the corporation.

The corporate entity is continued by Utah Code Annotated Section 16-10-100 and 16-10-101 (1953) as amended. These sections expressly provide that an action properly brought against the corporation may be defended in the corporate name after the corporations dissolution.

The record shows that there was no fraud by the appellants as alleged. (TR. 125-127) The respondents testified at trial and in their affidavit that they knew the mobile home had been used, and were told it was used by the appellant Craig Mecham. (TR. 97, 106-108) Respondents also inspected the home and were aware of certain needed repairs; (TR. 113) they bought the home with knowledge that it was sold for a lower price because of its prior use. (TR. 12-13) Respondents failed to show that the appellants or either of them knowingly and with intent to mislead the respondents failed to reveal all material facts known to them to the respondents. (TR. 35-36, 40, 54, 98)

Although respondents witness testified that a mobile home was blown over prior to sale there was no proof that it was in the respondents mobile home nor that the appellant had any knowledge that it had blown over. (TR. 91-92) The witness testifying that one had blown over also testified that it was not damaged to any degree. (TR. 94) Therefore, even if it had been shown that the respondents trailer had blown over it would not follow that appellant would have known of that the fact would have been material to the respondents had they known.

The law has always required proof of fraud by clear and convincing evidence that there was a material mis-representation and that the respondents relied on the mis-representation to their detriment. Obeg v. Sanders, 111 Utah 507, 184 P 2d 229 (1947), 234; Dilworth v. Lauritzen, 424 P2d 136, 18 Utah 2d 386 (1967).

The evidence shows that the appellant Craig Mecham acted in total good faith revealing all the defects of which he was aware and offering complete opportunity to inspect and reject the trailer if unsatisfied. Respondents have not proved that they were damaged. At most they have shown mutual mistake which is insufficient to invoke personal liability. Respondents had the burden of proving that there was a material mis-representation upon which they relied and which caused pecuniary damage and that respondents would have acted differently had the mis-representation not been made. Respondents failed in their proof to ~~share~~ show these elements by clear and convincing evidence. There was no proof of loss of benefit of the bargain or of the difference between the actual value and value represented. Accordingly respondents failed to meet their burden of proof. Obeg v. Sanders, 111 Utah 507, 184 P2d 229 (1947), 234; Pace v. Parrish, 122 Utah 141, 247 P2d 273, (1952).

It was also error to permit the jury to consider the issue of liability for fraud without requiring specific interrogatories (as requested TR.131) as to whether the jury in fact found intentional mis-representations and that such mis-representations were material and were relied on by the respondents for their damage. Failure to provide specific interrogatories resulted in the usurpation of the questions of equity from the judge by the jury.

II

AS A MATTER OF LAW RESPONDENTS' COUNTERCLAIM WAS BARRED BY THE CONTRACTS' EXPRESS PROVISIONS AND BY RESPONDENTS' FAILURE TO GIVE NOTICE OF REJECTION

A

Respondents contend that the contract was partially filled in out of their presence. It was disputed at trial whether the terms of finance charge and percentage rate were in fact filled in at the time of signing. Assuming the jury determined this issue in favor of respondents it is nevertheless clear that the parties had agreed on these terms of the contract and that if it was not filled in at signing it was later filled in in accordance with the understanding of the parties. (TR.16, 51-52, 79-83)

In any event the parties did review, sign and receive a copy of the Installment Sale and Security Agreement (TR.14) and conformed their action to the terms thereof for about 8 months. (TR. 20)

In its releveant parts the Agreement provides:

> "This Agreement constitutes the entire agreement of the parties and may not be altered or amended except by written agreement of the parties."

In addition, under Seller's Warranties in bold face type the Agreement provides:

> "Seller makes... no warranties express or implied respecting the property sold except title, and expressly excludes any implied warranties of merchantability or fitness."

The parties also signed as part of the agreement to purchase the home the Mobile Home Purchase Agreement and Down Payment Receipt. On this document in handwritten additions the appellants clearly wrote "as is" on each item regarding the mobile home, its exterior and interior and its contents.

This reflects the facts which the appellants admitted at trial (TR.113, 114) that they inspected the home (TR.12, 97) and noted certain defects; that the

were aware of the prior use of the mobile home; (TR. 17-18) and that they were aware of their obtaining a discounted price because of the prior use and needed repairs. (TR. 12.13) Additional repairs were requested and admitted at trial to have been made by the appellants. (TR. 115)

The Utah Uniform Commercial Code (U.U.C.C.) is applicable to this matter since it involves the sale of goods. Section 70A-2-316 U.U.C.C. subsections (2) and (3) provide:

> (2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing, must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous...
>
> (3) Notwithstanding subsection (2) (a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is",...

Thus the acts of the appellants fully complied with the statutory provisions for exclusion of warranty. In light of the particular nature of the sale of a priorly used item after full inspection, it was error for the court to allow the jury to decide respondents counterclaim since the verdict was contrary to the privisions of the Utah Commercial Code providing for the protection of seller's of merchandise.

In Tibbits v. Openshaw 18 Utah 2d 442, 425 P2d (1967), this Court enforced the "as is" language with regard to a sale of land. The legislative mandate is much clearer in this case, and the parties exclusion of warranties is as extensive and clear.

B.

Secondly, the respondent failed to give reasonable notice of

rejection or otherwise inform the appellants of any reason for dissatisfaction as required by Utah Commercial Code, Section 70A-2-606(1) U.C.A. states:

> Acceptance of the goods occurs when the buyer (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will accept them in spite of their non conformity, or (b) fails to make effective rejection... but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them;...

Section 70A-2-607(3) sets forth the effect of an acceptance:

> Where tender has been accepted (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy;

In this case respondents each failed to make an effective rejection of the mobile home. After inspecting the home and finding some alleged defects the buyers accepted it nevertheless. (TR. 106, 108) Appellants were under no obligation to take responsibility for any defects since the terms of the two written agreements as well as the understanding of the parties was that all warranties were waived. However, appellants did undertake to make some repairs when requested. Respondents however continued to indicate that they accepted the mobile home and failed to notify of any rejection. Rather, they ceased making payments, moved out, and refused to respond to respondents' demands for payment or explanation for lack of any. Not until almost two years later and 6 months after appellants had commenced suit did the respondents set forth the alleged defects and counterclaim of rejection. This is not notice within a reasonable time and therefore respondents should have been barred as a matter of law from any remedy.

This case is controlled on this point by the almost identical case of Chrysler Credit Corp. v. Burns, 527 P 2d 655 (Utah, 1974) where this Court held that the failure to object for two years where there were express waivers of warranty precluded the buyer of a mobile home from raising the defense of latent defects as a defense to sellers suit for payment. See also, Knudsen Music Co. v. Masterson, 121, Utah 252, 240 P 2d 973 (1952).

CONCLUSION

As a matter of law the respondents failed to prove the elements of fraud. By so doing they can not properly invoke the personal liability of the appellants for their acts as agents of the seller corporation. In addition, the seller corporation properly and clearly excluded all warranties of merchantability and fitness in two separate documents and through the parties understanding. Respondents failed to give notice of their rejection of the mobile home and were thereby barred from raising the alleged defects as a defense to appellants suit for payment.

Respectfully submitted this 30th day of May, 1978.

STEVEN F. ALDER

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Appellants Brief was mailed to Respondents' attorney, Mark S. Miner, at 525 Newhouse Building, Salt Lake City, Utah 84111, this 30 day of May, 1978.

STEVEN F. ALDER