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Peggy Bezner v. Continental Dry Cleaners, Inc., Bert Harry : Reply Brief

Utah Supreme Court

E. H. Fankhauser; Cotro-Manes, Warr, Fankhauser and Beasley; Attorney for Respondent.
John B. Anderson; Attorney for Appellants.

IN THE SUPREME COURT OF THE STATE OF UTAH

PEGGY BEZNER,

Plaintiff and Respondent,

-vs-

CONTINENTAL DRY CLEANERS, INC., a Corporation, and BERT HARRY,

Defendants and Appellants.

Case No. 14119

REPLY BRIEF OF APPELLANTS

Appeal From The Judgment Entered In The Third Judicial District Court, In And For Salt Lake County, State of Utah, The Honorable Ernest F. Baldwin, Judge

JOHN B. ANDERSON
610 East South Temple
Salt Lake City, Utah 84102

Attorney for Appellants

E. H. FANKHAUSER of
COTRO-MANES, WARR, FANKHAUSER
& BEASLEY
430 Judge Building
Salt Lake City, Utah 84111

Attorney for Respondent

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JOHN B. ANDERSON
610 East South Temple
Salt Lake City, Utah 84102

Attorney for Appellants

E. H. FANKHAUSER of
COTRO-MANES, WARR, FANKHAUSER
& BEASLEY
430 Judge Building
Salt Lake City, Utah 84111

Attorney for Respondent

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REPLY BRIEF OF APPELLANTS

In accordance with Rule 75(p)(1) and (2) Utah Rules of Civil Procedure, the appellants submit the following in reply to respondent's brief on appeal.

POINT I

THE TRIAL COURT DID NOT ERR IN REFUSING TO AWARD RESPONDENT GREATER DAMAGES THAN IT AWARDED SINCE RESPONDENT FAILED TO MEET HER BURDEN OF PROOF THAT SHE WAS ENTITLED TO A GREATER AWARD.

In Point III of Respondent's Brief, respondent raises the contention that trial court erred in allowing $3,719.00 to defendants as reasonable rental for the equipment under the contract which was attached to respondent's complaint as Exhibit A. The court made no such award or finding. The judgment on the verdict (R. 31) merely recites that respondent is entitled to damages on her claim for rescission in the sum of $9,600 plus $1,070 interest.

An examination of respondent's amended complaint shows that the prayer in respondent's complaint requested rescission of the

contract between plaintiff and defendant being Exhibit A and restitution of plaintiff to all sums paid under said contract being approximately $12,000. The basis of the respondent's first cause of action was that the execution of the contract Exhibit A for the sale of In-And-Out Dry Cleaners to respondent was a fraudulent representation by appellant. Respondent acknowledges that under Erisman v. Overman, 11 Utah 258, 358 P.2d 85 (1961) that appellants would be entitled to some consideration for the use of the equipment during the time that respondent was in possession. In the Erisman case, the court denied rescission where the plaintiff sat on her rights for a period of approximately a year and recognized that plaintiff had a legitimate claim under the contract for the benefit conferred on the defendant. In this case, since the respondent put a cause of action in fraud, respondent had the burden of proving the fraud and the damages which arose as a result of the fraud. The contract in question provided in Paragraph 2 (R. 144) for a $10,000 initial payment in two payments with a balance of $30,000 being paid in equal monthly installments over a ten-year period. Respondent paid the equal monthly installments for all but the last two months of which she was in possession being a little over $300 per month. The general rule as to the burden of proof as to damages is set forth in 22 Am. Jur. 2d., Damages, § 296, where it is stated:

> "As a rule, the burden of proof is upon the plaintiff to show the fact and extent of the injury and to show the amount and value of his damages, whether the action is a breach of contract or for tort."

In 37 Am. Jur. 2d., Fraud and Deceit, § 449, it is observed:

> "The burden of proof of injury sustained through reliance upon a false representation rests upon the party who alleges fraud. He must prove that he has suffered a loss or has been prejudiced by the fraud to the extent requisite to warrant the grant of the relief which he seeks. Thus, it is incumbent upon one seeking to rescind a contract for fraud to prove whatever element of injury from the fraud is requisite to the relief sought. Damage or prejudice from fraud is not ordinarily presumed. Hence, one seeking to recover damages for fraud in a law action must prove that he has suffered a loss directly from, and as a clear and necessary consequence of, the fraud to an extent so definite and ascertainable that an award providing for the payment to him of a sum properly compensating him for the fraud practiced upon him, or granting him adequate relief by way of recoupment or cross complaint, may be made.
>
> "The plaintiff must prove the extent of the damages he contends resulted from the fraud; and where he alleges that he sustained a loss therefrom, he must prove the method by which he suffered the loss. To justify the application of either the 'benefit of the bargain' or the 'out of pocket' measure of damages, the complainant must prove the actual value of the property purchased, at the time of purchase. Also, in order to have damages measured by the benefit of the bargain, or by the amount required to make a representation good, the party seeking damages for a false representation concerning property sold to, or received in exchange by,him, must produce evidence of what the property would have been worth if it had been as represented." (Emphasis added.)

In Pace v. Parrish, 122 Utah 141, 247 P.2d 273 (1952), this Court stated with reference to prior Utah cases that "measure of damages for fraud is a difference between value of property purchased and the value it would have had if the representations were true."

In Dilworth v. Lauritzen, 18 Utah 2d 386, 424 P.2d 136 (1967), the court noted that "Utah follows the majority rule which is the difference between the actual value of what he received and the value thereof if it had been as represented." In Lamb v. Bangart, 525 P.2d 602 (Utah 1974), the same standard was reiterated by the Court. Therefore, it was respondent's burden to prove the measure of the damages to which she was entitled on rescission.

Respondent had the burden of proving that the value of the equipment which she possessed for approximately nine months during which time she paid a sum of a little over $300 a month was not equal to the benefit conferred but was less than the money she had actually paid out during that time. The record is silent as to any evidence from the plaintiff that the possessory value of the equipment held and used during the period in which she was in occupancy was not equal to the sum paid during that time especially considering that for two months of her occupancy, she failed to make equipment payments.

The instant case is not unlike that recently decided by the Court in Wagstaff v. Remco, 540 P.2d 931 (Utah 1975). In that case, this Court approved the trial court's action of allowing a general contractor who had frustrated a subcontractor's performance of a contract the amount of expenses reasonable and necessary to complete the job. In the instant case, the trial court simply entered judgment for the respondent-plaintiff for the amount of damages proved but where respondent-plaintiff did not prove that the value of the possessory interest in the

equipment possessed was less than the money paid during the time of the possession there was no right to recover additional damages. The burden of proving damages was on respondent and the evidence supports the conclusion of the trial court that no greater damages than those awarded was in fact proved by respondent.

POINT II

RESPONDENT'S CROSS APPEAL CONTENTION AS TO APPELLANTS BREACH OF THE LEASE AGREEMENT WAS NOT PROPERLY PRESERVED FOR APPELLATE CONSIDERATION AND IS OTHERWISE WITHOUT MERIT.

Rule 74(b) of the Utah Rules of Civil Procedure governs cross appeals and provides that the party desiring to cross appeal "shall file a statement of points on which he intends to rely on such cross appeal" within the time provided by Rule 75(d) URCP. Rule 75(d) URCP provides that a statement of points on cross appeal shall be filed within ten days after service and filing of appellant's designation. On the instant case, the designation of record on appeal was filed on June 17, 1975. On June 23, 1975, respondent filed a cross appeal and statement of points. No statement of point was contained in the cross appeal relating to the refusal of the trial court to submit the factual question of breach of the lease Exhibit B (R. 146) to the jury (R. 4). Thereafter, an amended cross appeal was filed on June 26, 1975. The amended cross appeal purported to incorporate as a statement on appeal the contention raised in Point IV of respondent's brief. The appellants contend that since neither Rule 74(b) or 75(d) nor Rule 15 of the Utah Rules of Civil Procedure sanction amended cross appeals that no amended cross appeal may be filed after the statement of points on an original cross appeal has in fact been filed. Rule 15(a) provides

in part: "Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party . . ." In the instant case, consent of appellant was not obtained before amendment nor was leave of court obtained. Consequently, it is submitted that the contention raised in Point IV of respondent's brief has not properly been preserved on appeal.

The respondent contends in Point IV of her brief "that the rescission of the contract for purchase of fraud warrants a rescission and cancellation of the lease in that they were interdependent." (Respondent's Brief, p. 27). An examination of the pleadings in the instant case reveal that in respondent's amended complaint, second cause of action, she contended that appellants breached their lease agreement (Exhibit B) (R. 166). In her prayer, respondent asked for judgment against the defendants for the sum of $300 for damages occasioned to the respondent by reason of breach of the lease agreement (R. 141, 142). There was no request made by respondent for rescission. Consequently, any claim for rescission is raised the first time on appeal. It is well settled law in the State of Utah that a theory of recovery not submitted to the trial court cannot be considered for the first time on appeal. General Appliance Corporation v. Haw, Inc., 30 Utah 2d 238, 516 P.2d 346 (1973); Clegg v. Lee, 30 Utah 2d 242, 516 P.2d 348 (1973). Consequently, any contention of the respondent's that the lease Exhibit B was interdependent with the rescission cause of action relating to Exhibit A is not properly before the court.

Further, it should be noted that in the final contention in Point IV, respondent requests the court reverse the lower court and enter judgment in favor of respondent in the sum of $350. If respondent's amended cross appeal is properly before the court it is limited by the issue framed in Paragraph 3 that the trial court erred in "refusing to submit" the issue to the jury. Consequently, the request for relief in Point IV of respondent's brief is outside the scope of the preserved issue on appeal. Further, it is worth noting on this point that the respondent's brief on Page 26 asks for judgment in the sum of $350 whereas on Page 22 of respondent's brief, respondent indicates that the evidence from respondent indicated that the damages were only $330. Further, respondent's amended complaint asked for only $300 in damages and respondent's requested instruction No. 27 (R. 72) asks for damages in the sum of $297.50. It is apparent from this jumbled approach to this issue that respondent has not cautiously and analytically treated the issue and it is without merit.

The trial court refused to submit the issue of breach of lease Exhibit B (R. 146) because the trial court concluded there was no factual conflict in need of jury resolution. An examination of Exhibit B (R. 146) discloses that in the 5th paragraph, respondent agreed to the following circumstances:

> "The said parties of the second part accept this Lease and the premises described therein in the condition and state of repair they are now in, and agree to occupy the same in a lawful manner and will keep the water pipes and their connections,

> sewage pipes and their connections, upon said premises, at all times, in good condition and state of repair . . . ." (Emphasis added).

In the 6th paragraph, respondent agreed to the following additional terms:

> "That the party of the first part shall not be liable for any damage occasioned by failure to keep said premises in repair and shall not be liable for any damage done or occasioned by or from plumbing, gas, water, steam or other pipes or sewage, or the bursting, leaking, or running of any washstand, tank, water closet or waste pipe in above, upon, or about said building or premises, nor from damage occasioned by water arising from acts or neglect or co-tenants or other occupants of the same building." (Emphasis added).

Respondent now contends that since the 13th paragraph of the contract required appellant to keep the premises and exterior of the leased building in good condition and state of repair that there was a failure to comply with the terms of the lease. The factual evidence before the trial court failed to show that the premises were in any different condition as to state of repair on the day of the execution of Exhibit B than the day of the alleged water damage to the premises. Further, there is no evidence of record whatsoever to support a contention that the water damage sustained by respondent was the result of any defect in the exterior portion of the premises or building. The evidence at the time of trial clearly indicated that any damage that may have been caused was the result of a drain pipe backing up, freezing and water spilling over into the area damaged. (T. 363, 381, 360, 205-207, 226). Further, Paragraph six of the lease expressly excludes the appellants from liability for damage occasioned by water. Thus, it is clearly apparent that

Paragraphs 5 and 6 of Exhibit B as interpreted by the trial court precluded submissions of the issue to the jury as there was no factual basis left in dispute that warranted jury consideration. Point IV of respondent's brief therefore is unmeritorious and respondent should take nothing by way of cross appeal.

CONCLUSION

It is apparent from an examination of the respondent's claims on cross appeal that respondent's position is one of complaining about her own failure to submit credible evidence sufficient to sustain her contentions. The trial court carefully considered the issues raised by the matters before this Court in respondent's cross appeal and found them unmeritorious. Respondent's cross appeal should afford respondent no relief and the case should be reversed on the basis of the contentions set forth in appellant's brief and either dismissed or a new trial awarded.

Respectfully submitted,

JOHN B. ANDERSON
610 East South Temple
Salt Lake City, Utah 84102

Attorney for Appellants