1978

Polyglycoat Corporation v. Steven Holcomb dba Steve Holcomb Distributing : Brief of Respondent

Utah Supreme Court

Wendell E. Bennett; Attorney for the Appellant;
Verl C. Ritchie; Raymond Child; Attorneys for the Respondent;

IN THE SUPREME COURT

OF THE STATE OF UTAH

POLYGLYCOAT CORPORATION, :

Plaintiff-Respondent, :

No. 15779

-vs- :

STEVEN HOLCOMB, dba :
STEVE HOLCOMB DISTRIBUTING,

:

Defendant-Appellant.

:

RESPONDENT'S BRIEF

Appeal from a Judgment of Directed Verdict
of the Third Judicial District Court of Salt Lake County
The Honorable Bryant H. Croft, Judge

VERL C. RITCHIE
RAMON M. CHILD
400 Ten Broadway Building
Salt Lake City, Utah 84101

Attorneys for Respondent

WENDELL E. BENNETT
370 East 500 South
Salt Lake City, Utah

Attorney for the Appellant

IN THE SUPREME COURT

OF THE STATE OF UTAH

POLYGLYCOAT CORPORATION,

Plaintiff-Respondent,

-vs-

STEVEN HOLCOMB, dba
STEVE HOLCOMB DISTRIBUTING,

Defendant-Appellant.

No. 15779

RESPONDENT'S BRIEF

Appeal from a Judgment of Directed Verdict
of the Third Judicial District Court of Salt Lake County
The Honorable Bryant H. Croft, Judge

VERL C. RITCHIE
RAMON M. CHILD
400 Ten Broadway Building
Salt Lake City, Utah 84101

Attorneys for Respondent

WENDELL E. BENNETT
370 East 500 South
Salt Lake City, Utah

Attorney for the Appellant

TABLE OF CONTENTS

AUTHORITIES CITED

OTHER CITATIONS

Rule 15(b) FRCP

IN THE SUPREME COURT

OF THE STATE OF UTAH

POLYGLYCOAT CORPORATION, :

Plaintiff-Respondent, :

-vs- :

STEVEN HOLCOMB dba :
STEVE HOLCOMB DISTRIBUTING,
:

Defendant-Appellant. :

NATURE OF THE CASE

This is an action brought by the plaintiff to collect on an account for goods sold; and a counterclaim by the defendant-appellant for damages resulting from an alleged breach of a distributorship contract.

DISPOSITION BELOW

The trial court prior to trial, granted plaintiff's Motion for Summary Judgment on its complaint which was unopposed by the defendant-appellant. Following a two and one-half day trial on the defendant's counterclaim to a jury, the Hon. Bryant H. Croft, one of the judges of the Third Judicial District Court of Salt Lake County, granted a judgment of directed verdict in favor of plaintiff-respondent on defendant-appellant's counterclaim for breach of a distributorship contract.

RELIEF SOUGHT ON APPEAL

Plaintiff-respondent seeks affirmance of the trial court's judgment of directed verdict. It appearing that defendant-appellant has abandoned his appeal of the Summary Judgment granted in the same action, plaintiff-respondent also seeks affirmance of that Summary Judgment.

STATEMENT OF FACTS

Defendant-appellant (hereinafter "appellant") had been delinquent in the payment of his account from the start of the verbal contract of distributorship (R. 504, 514, 516, 517). Plaintiff-respondent (hereinafter "respondent"), Polyglycoat Corporation, was told at the time the distributorship agreement (Exhibit D-3) was signed on February 7, 1976, that appellant needed the contract so that he could obtain financing or money to pay the bills and that was the only reason that the distributorship agreement was signed (R. 531).

Holcomb paid Polyglycoat only by the case of material sent to him. Each case contained twelve maintenance kits with warranties and two quarts of the base product. Each case was intended to allow twelve new car purchasers to receive cars with an application of Polyglycoat base and a maintenance kit with warranty (R. 644).

Experience proved too much base product was supplied. Holcomb sold that to dealers for $140 to $150 per quart (R. 642, 645). He received the sole benefit of these sales (R. 647).

As distributor for Polyglycoat, he knew he was supposed to use his best efforts to represent the manufacturer (R. 646).

Holcomb knew that if Walter Fiveson had known of Holcomb's activities in selling excess sealant, printing bogus warranties and ordering counterfeit bottles at the time of signing the distributorship agreement, Exhibit D-3, he would have been upset (R. 670). When Holcomb first heard from Fiveson after Fiveson learned of the duplicity, Fiveson was so angry he said he didn't care about the money, he only wanted to see Holcomb "up the river" (R. 670).

At the very time that appellant proposed the written contract, he had already devised and undertaken a scheme to sell fake products in the containers identical to those of Polyglycoat and had, in fact, ordered bottles with that logo and had ordered counterfeit warranties with the language copied from the Polyglycoat Corporation warranties (R. 669). One case of counterfeit warranties and bottles were, in fact, delivered to a customer, i.e., Duaine Brown, by appellant's agent and employee, Brad Parkinson, about February 18, 1976 (Exhibit 41-P, R. 591, 698, 699). Although Holcomb denied authorizing the delivery of the bogus products, he admitted picking the shipment up from Duaine Brown (R. 698). Appellant, by his own testimony, acknowledged that as of February 1, 1976 (six days prior to the time the distributor agreement was signed), he had purchased

certain materials from Jenson Distributing Company, Salt Lake City, consisting of cleaners and various waxes and bottles, to experiment with those products to see if, when placed in the counterfeit bottles, they would be compatible with the Polyglycoat sealant (R. 656).

The appellant also admitted on cross-examination that at the time he was in Las Vegas in February of 1976, on the occasion of signing Exhibit D-3, that he had already ordered printed warranties counterfeiting those of the respondent, and that he had already ordered sixteen ounce bottles with the Polyglycoat logo on them (R. 669).

Appellant had no authority, implied or otherwise, to either manufacture the bottles with the Polyglycoat label or to print and reprint the warranty or to sell the excess sealant or to market the product in any manner inconsistent with the regular instructions and method of doing business of Polyglycoat Corporation. The respondent specifically informed appellant that the excess product was to be disposed of by giving the dealers extra amounts so that they could do their used cars and demonstrators. Such was viewed as being a good-will gesture (R. 526). The distributors, including appellant, were to be given a rebate or some other kind of remuneration for product returned to respondent (R. 527).

The scheme was called to the attention of Polyglycoat

officials in Las Vegas in the latter part of March, 1976, when Brad Parkinson, a former employee of appellant, became concerned about possible criminal prosecution and recourse against him (R. 707, 708, 714, 716, 717).

Appellant was then terminated as a distributor on March 27, when respondent learned of the scheme to pass off certain of appellant's product as those of Polyglycoat in counterfeit bottles and with false printed warranties (R. 537, 538, 740 and Exhibit 20-D). The termination of the distributorship agreement was both verbal and in writing (R. 740, Exhibit 20-D).

ARGUMENT

POINT I

THE TRIAL COURT DID NOT COMMIT ERROR IN GRANTING PLAINTIFF-RESPONDENT'S MOTION FOR A DIRECTED VERDICT WHERE THERE WAS A SUBSTANTIAL SHOWING OF BAD FAITH AND NO MORE THAN A SCINTILLA OF EVIDENCE OF GOOD FAITH

It is inconceivable that a careful reading of the record will reveal more than the slightest evidence of good faith on the part of the appellant. The trial court was amply justified in finding that reasonable men could not differ in concluding that fraud and the lack of good faith and the presence of substantial bad faith was established by clear-cut, unequivocal evidence. The scheme was admittedly motivated by profit without the knowledge or consent of respondent and could

not, under any stretch of the imagination, be said to be evidence of good faith. The undisputed facts indicate a clear intention on the part of the appellant not to perform the contract in good faith; but on the contrary, to pirate the trademark and warranties of Polyglycoat. In addition, the concealment by and failure of Holcomb to disclose to respondent the details of the scheme or of his intentions at the time Exhibit D-3 was signed, clearly constitute a fraud. The Restatement of the Law of Contracts, Second, Section 473, states: "A contractual promise made with the undisclosed intention of not performing it is fraud."

It is also clear that fraud has been proved under Section 471 of the Restatement which defines fraud: "'Fraud' as used in the Restatement of this Subject unless accompanied by qualifying words means . . . (b) concealment or (c) non-disclosure . . ." Under the present circumstances, such non-disclosure is fraud, without more. See also the Restatement of the Law of Contracts, Second, Section 472. The distributorship agreement could not have ripened into an enforceable contract because of the active concealment of the appellant of the fact that he had in bad faith unfairly engaged in competition and fraudulently made arrangements to counterfeit respondent's bottles and warranties and to palm off his own packages as Polyglycoat products.

Certainly, such non-disclosure could not be privileged

under the Uniform Commercial Code. Appellant was held to dealing in good faith, meaning "honesty in fact" and that good faith and honesty was imposed as an obligation in every facet of the performance and promises under the contract. The Code, as it is a part of the law of Utah, states: "Good faith means honesty in fact in the conduct or transaction concerned" (U.C.A., 1953, 70A-1-201(19)). The Code further provides that: "Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement" (U.C.A., 1953, 70-A-1-203). The case of Tumber v. Automation Design & Mfg. Corp., 130 N.J. Super. 5, 324 A.2d 602 (1974) cited at page 6 of appellant's brief, points out the increased standards of good faith required by merchants under the Code.

A careful analysis of the cases cited by appellant in his brief will reveal that they more fully support the trial court's position and that of respondent than that of appellant. None of the cases cited by appellant under Point I of his argument are directly on point. They involve cases where the issue is whether the party is a "buyer in the ordinary course of business" or "holder in due course." The case of Walter E. Heller & Co., Inc. v. Convalescent Home, 49 Ill.App.3d 213, 265 N.E.2d 1285 (1977), is cited by appellant for the proposition that good faith is particularly a jury issue and the defense of the lack of good faith cannot be resolved purely as a matter

of law. However, the case involved a pleading question and the dismissal of an amended answer at the pleading stage on the grounds that it raised an insufficient defense as a matter of law. The court pointed out that the defense could not be resolved as an issue of law "because of . . . evidentiary matters relevant to plaintiff's honesty in fact in this particular transaction." (265 N.E.2d at 1291) The situation presented in that case is clearly different than the situation here where, after a full trial of the issues, the trial court directed a verdict. Appellant's attempt to persuade this court that a directed verdict cannot be entered in such case is untenable.

The undisclosed sales by Holcomb of quart cans of Polyglycoat sealant in competition with respondent, even before the execution of the distributorship agreement, constitutes a breach of the distributorship agreement under 70A-2-306(2), U.C.A., 1953, which provides:

> " * * *
>
> "(2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes, unless otherwise agreed, an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote the sale."

In the instant case there is no substantial contradictor evidence on any material point; and the trial court, in directing the verdict, did view the evidence most favorably to appellant in accordance with the Utah law. The trial court's analysis of the good faith issue clearly shows that it considered the evidence in accordance with the Utah law and decisions and that

reasonable persons could not arrive at any conclusion other than there was an absolute lack of good faith on appellant's part and overwhelming evidence of his bad faith as shown by the uncontroverted evidence and by his own admissions.

POINT II

THE TRIAL COURT DID NOT ERR IN GRANTING PLAINTIFF-RESPONDENT'S MOTION FOR A DIRECTED VERDICT WHERE THERE WAS A FAILURE OF EVIDENCE OF DAMAGE

Certainly, the trial court would not be required to submit the case to the jury on the issue of damages when there was an absolute failure of proof of damages. The appellant's own evidence fails to show a loss of profit of any kind. The most elementary rules of law provide that damages for breach of contract must be proved with reasonable certainty. Wilcox v. Regester, 417 Pa. 417, 207 A.2d 817, 842 (1965), states the rule as follows:

> There can be no award for breach of contract (except in certain cases an award of nominal damages) when there is no evidence produced by which the jury can measure the damages. Damages cannot be awarded by guesswork. The Restatement of the Law of Contracts, Sec. 331, lays down the following: "Damages are recoverable for losses caused or for profits and other gains prevented by the breach only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty." In Rice v. Hill, 315 Pa. 166, 172, 172 A. 289, 291, this Court held: "Damages are never presumed; the plaintiff must establish by evidence such facts as will furnish a basis for their assessment, according to some definite and legal rule."

POINT III

THE COURT DID NOT ERR IN ALLOWING PLAINTIFF TO AMEND ITS REPLY TO THE COUNTERCLAIM

The case of Wirtz v. Savannah Bank and Trust Co., 362 F.2d 857 (5th Cir. 1966) cited at page 11 of appellant's brief, is inapposite. That case dealt, inter alia, with a motion to amend an answer pursuant to Rule 15(b) of Federal Rules of Civil Procedure. This rule allows amendment of pleadings to conform to the evidence adduced at trial "/w/hen issues not raised by the pleadings are tried by express or implied consent of the parties . . ." The court found that factually, the question involved was not tried "by the express or implied consent of the parties." (362 F.2d at 861) In the case at bar, the amendment of the pleadings was prior to trial and hence the cited case is not controlling.

Neither should appellant be allowed to claim that fraud was not pled with specificity in light of the fact that at the time the Motion to Amend Reply was argued to the trial court, appellant did not argue that the Amended Reply did not plead fraud with specificity, nor was the offer of a continuance made by the respondent accepted by appellant. Likewise, appellant did not raise this issue in his motion for a new trial (R. 155-156). Respondent's Motion to Amend Reply with the proposed Amended Reply attached was hand-delivered to counsel

for appellant on January 30, 1978 (R. 72), and no mention of lack of specificity is made in Defendant's Memorandum in Support of its Claims in This Action, presented to the court on February 6, 1978 (R. 77-92).

Fraud was pled in appellant's Amended Reply. The sufficiency of the pleading was a question to be resolved in the considered discretion of the trial court. The cases cited by appellant to support his view that the form of the Amended Reply was improper are all trial court opinions. On appeal, the discretion of the trial court in granting or denying amendments to pleadings should not be interfered with absent a showing of abuse of that discretion. (See, e.g., Lewis & Queen v. S. Edmundson & Sons, 113 C.A.2d 705, 248 P.2d 973 (1952)) No such abuse of discretion can be shown here.

Since fraud was pled in the Amended Reply, the case of Bunge Corp. v. Recker, 519 F.2d 449 (8th Cir. 1974) is not in point. Accepting that lack of faith is akin to fraud, the pleading of fraud would, in the case at bar, reasonably cover lack of good faith.

Appellant cannot reasonably be allowed to claim surprise and prejudice because respondent was allowed to amend its reply to the counterclaim to refer to the "underlying fraud and concealment on the part of the Defendant at the time of the execution of the contract." This is particularly true in view

of the fact that from the outset of this action on April 27, 1976, the respondent has continuously alleged that appellant unlawfully infringed its trademarks and counterfeited Polyglycoat's bottles and warranties without authorization and in unfair competition. From the outset of this action, appellant has been apprised that respondent was claiming its acts to be fraudulent and in fact obtained a restraining order and injunction based upon the appellant's acts constituting infringement of the trademark and from using the fake bottles and warranties (R. 621). It is clear that fraud and deception are the gist of such action and the amendments allowed by the court did not, in any way, surprise appellant or prejudice him in the defense of the action.

CONCLUSION

It is respectfully submitted that the trial court was entirely within its judicial province when it granted plaintiff-respondent's motion for directed verdict. It is abundantly clear from the record that there was an absolute lack of good faith on the part of the defendant-appellant. The jury should not be allowed to speculate in cases where there is no morw than a scintilla of evidence of good faith, and that from the defendant-appellant's self-serving declarations. It is submitted that the evidence is so conclusive on both the issue of good

faith and on the issue of damages and there being no showing of an abuse of the discretion of the trial court, that the action of the trial court should be affirmed.

Respectfully submitted,

VERL C. RITCHIE

R. M. CHILD

Attorneys for Plaintiff-Respondent