2001

Richard R. Black, Patricia Black v. Dr. James S. Boyce : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

RICHARD R. BLACK, D.D.S. and PATRICIA BLACK, his wife, Plaintiffs and Appellants, -vs- DR. JAMES S. BOYCE, Defendant and Respondent.	Case No. 14358

RESPONDENT'S BRIEF

On appeal from a Judgment of the Fourth Judicial District Court of Utah County, Honorable George E. Ballif, Judge

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BRIEF OF RESPONDENT

NATURE OF THE CASE

Plaintiffs sued defendant for damages for an alleged breach of contract.

DISPOSITION IN THE LOWER COURT

The matter was tried to the Court and the Court entered its judgment in favor of defendant and against the plaintiffs, no cause of action.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the judgment of the trial Court affirmed by the Supreme Court.

STATEMENT OF FACTS

On June 5, 1964, the plaintiffs and defendant entered into an agreement whereby defendant was to sell to plaintiff,

Richard R. Black, thirty (30) shares of common stock in a corporation known as "Orem Professional Plaza, Inc.", for the sum of $3343.20, payable in sixty (60) monthly installments of $55.72 each, commencing on July 20, 1964. The name and address of the purchaser was shown on the "Installment Note", which contained the agreement. (Ex. 2).

On July 7, 1967, the plaintiff purchaser was in default on his payments and because of the hassle defendant had gone through in trying to collect his money (Tr. 18) he wrote plaintiff, at the address given on the agreement, stating that he wanted the balance due paid to him within ten (10) days, and that if he did not hear from plaintiff within that time he would offer the stock to the other members of Orem Professional Plaza, Inc. for the balance owing on the note. (Ex. 8). The defendant personally saw that the letter was picked up at his office by the postman, (Tr. 19) and said letter was never returned to him. (Tr. 18).

Defendant heard nothing from plaintiff in response to his letter and on August 7, 1967, he sold the stock to Dr. Alred and LaGeorge Music Company for the difference between what plaintiff had paid and what he still owed on the note, (Tr. 15, 16) with the understanding that the plaintiff could purchase the shares from them within a reasonable time. (Tr. 17).

Plaintiff denied having received defendant's letter of July 7, 1967. (Tr. 29). However, plaintiff stated that he called the defendant in December of 1967 to "ask if he still had my stock". (Tr. 25).

In December, 1967, plaintiff sent defendant a check for two payments in the amount of $111.76, and defendant either deposited the money or tried to cash the check with the intention of paying the money over to Dr. Alred in behalf of plaintiff, but the check was returned marked "insufficient funds", and defendant did nothing else about it. (Tr.12). Had that check been paid it would not have made plaintiff current on his contract. (Tr.31).

Plaintiff sold his original thirty (30) shares in the corporation to LaGeorge Music Company, who thereafter occupied plaintiff's original space in the building, (Tr.23) and in 1968 plaintiff delivered that stock to the music company for a price of $5000.00. (Tr.30).

Plaintiff never made any effort to pay defendant the balance due and owing for the stock. (Tr.38).

Shortly after August 27, 1967, the plaintiff was told by Molly Alred that she was holding the Boyce stock and that he could redeem it if he so wished. (Tr.47). Until the 15th of November, 1968, the plaintiff could have obtained the defendant's stock by paying the balance due. (Tr.50, 51).

ARGUMENT

POINT I

THE TRIAL COURT DID NOT COMMIT ANY ERROR IN ADMITTING EXHIBIT 8 IN EVIDENCE AND IN CONCLUDING FROM ALL OF THE EVIDENCE THAT PLAINTIFF DID RECEIVE NOTICE AND DEMAND FOR PAYMENT.

The letter in question was addressed to Richard R. Black at 291 South State, Orem, Utah. On the agreement of the parties Richard R. Black at that same address was shown as the purchaser. (Ex.2). There was positive testimony that the postman took the letter. (Tr.19). The letter was never returned to the sender. (Tr.19). Plaintiff denied having received the letter.

The question whether or not the rebutting evidence is sufficient to overcome the presumption of receipt has generally been held to be one for the jury to determine in the particular case. 91 ALR 161, at page 114. In Brown v. Fraternal Accident Assn., 18 Utah 265, 55 Pac. 63, the Supreme Court of Utah ruled that the addressee's secretary's denial of receipt of the letter raised a conflict of evidence and presented a question for the jury to determine.

In this case there was other evidence that supported the trial court's conclusion that the letter was received. If the plaintiff did not receive the letter why would he call defendant to ask him if he still had the stock? Why would he ask Molly Alred if she had Dr. Boyce's stock?

The Court should also note the language in plaintiff's Exhibit 6, a letter from plaintiff to defendant in December of 1967 - "Try to stay healthy Jim - the world is full of vultures".

The trial Court had an opportunity to observe and hear the witnesses and his conclusion that the letter was

received is supported by competent evidence.

POINT II

THE TRIAL COURT DID NOT ERR IN HOLDING THAT PLAINTIFF NEVER AT ANY TIME TENDERED PAYMENT TO CURE THE DEFAULT, NOR EVER TENDERED FULL PAYMENT OF THE OBLIGATION TO DEFENDANT.

References by appellants in their Brief to the Utah Uniform Commercial Code are inapplicable in this case.

The effective date for that statute (Title 70A) was midnight, December 31, 1965, and it applied only to transactions entered into after that date. (Title 70A-10-101 and 70A-10-102(2), Utah Code Annotated, as amended.) In the instant case there is no dispute but that the plaintiff and defendant entered into their transaction in June of 1964. (Ex.2).

Appellants cite no other authority.

As a general proposition, the failure of one party to an entire contract to pay an installment when due is such a breach as will absolve the other party from all obligation to perform while the default continues. 17 Am Jur(2) 884; Restatement of Contracts, paragraphs 280, 306.

POINT III

THE TRIAL COURT DID NOT ERR BY RULING THAT THE DEFAULT OF THE PLAINTIFF PRECLUDED RECOVERY OF DAMAGES FROM DEFENDANT.

A party who seeks to recover damages from the other party to a contract for a breach must show that he, himself, is free from fault in respect to performance of a dependent

promise, or counter-promise, or a condition precedent. 17 Am Jur(2) paragraph 441, page 898.

The authorities cited by appellants relate to a situation where a plaintiff, himself, is not in default.

Perry v. Woodall, 20 Utah(2) 399, 438 P(2) 813, involved the question of recession based on fraud or misrepresentation. Wingets, Inc. v. Bitters, 28 Utah(2) 231, 500 P(2) 1007, involved a summary judgment and the court on appeal held that there was a genuine issue of fact as to whether the seller was required to give buyer thirty days notice to remedy a default and the case was remanded for trial.

POINT IV

THE COURT DID NOT ERR IN RULING THAT THE PLAINTIFF WAS IN DEFAULT UNDER THE CONTRACT.

Plaintiff admits he was in default in the amount of at least $65.98, which is more than one monthly payment.

In Williamson v. Wanless, (Jan.30, 1976) Utah,545 P(2) 1145, every payment due including those up to the date of trial, had been tendered to the plaintiffs or to their attorney. In addition, that case arose under a 1971 agreement which made it subject to the Uniform Commercial Code provisions.

In this case the plaintiff was not treated harshly. The defendant's letter to plaintiff is as follows: (Ex.8)

"July 7, 1967

Dr. Richard R. Black
291 South State
Orem, Utah

Dear Dick:

I have written you several times recently and you have ignored any reply. As per the terms of the contract I am asking that the balance of the note be paid in full in 10 days. If you do not reply I will offer the stock you contracted for to the other members of the Orem Prof. Plaza, Inc. for the balance owing on the note.

Very truly yours,
James S. Boyce, D.D.S."
(Underscoring supplied)

The defendant waited one month during which time he heard nothing whatever from the plaintiff. On August 7, 1967, he sold the stock for the balance due on the note to the other members of the Orem Professional Plaza Corporation with the understanding that the plaintiff could redeem the stock from them. The plaintiff was told in November of 1967 by Molly Alred that she held the stock and that he could redeem it.

The payment of some $111.00 he sent to the defendant in December of 1967, would not have brought him current and in any event that check was returned by the bank marked "insufficient funds".

The plaintiff in this case never tendered the money to bring his contract current nor has he ever offered to pay the balance due on the note even to this time.

There is evidence that would support a conclusion that the plaintiff couldn't meet his obligations at that time. On November 30, 1967, he was delinquent for the months of June, July, September, October, and November for the rent on the premises where he had his dental office. (Plaintiffs' Ex. 9).

POINT V

THE RULING OF THE TRIAL COURT IS FULLY SUPPORTED BY THE EVIDENCE.

The letter that the plaintiff received from an attorney in behalf of his landlord was not an eviction notice and it had absolutely nothing to do with the purchase of the stock. That letter, Exhibit 9, gave him the alternative of paying his delinquent rent or to vacate.

The reason nothing was done about the check plaintiff mailed to defendant in December of 1967, was because that check was not honored by the bank and was returned marked "insufficient funds".

The City of Orem was not a "boom town" in 1967, nor was land going for premium prices at that time. About that time the plaintiff in this action sold his one-third interest in the corporation for a mere $5000.00. The property boom started in 1969, about the time plaintiff filed his lawsuit in this case.

Since the plaintiff was in default, has at all times remained in default, and has never yet even tendered performance on his own part, there is just no way that he could be

entitled to damages against the defendant.

Even if the plaintiff could establish his right to damages there is absolutely no evidence upon which an award of damages could be made. This case involved a minority interest in a corporation. The plaintiffs estimate or opinion that the land the corporation owned was worth $100,000.00 without a showing of how much the corporation owed, could certainly not be a basis for any kind of an award.

CONCLUSION

The decision of the trial Court is supported by competent evidence, is not contrary to law, and should be affirmed by the Supreme Court.

Respectfully submitted,

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