2001

Demetrios Agathangelides v. KeithShaw : Petition for Rehearing

Utah Supreme Court

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THE SUPREME COURT FOR THE STATE OF UTAH

DEMETRIOS AGATHANGELIDES and
DIANE AGATHANGELIDES, husband
and wife, and GREEK GARDENS, a
Utah Corporation,
Plaintiffs/Respondents,

vs. Case No.19113

KEITH SHAW and SANDRA SHAW,
husband and wife, each individually,
and d.b.a. SPRING COLOR SYSTEMS, INC.
Defendants/Appellants.

RESPONDENTS' PETITION FOR REHEARING

PETITION TO AFFIRM JURY VERDICT
ENTERED IN THE
FIRST DISTRICT COURT FOR BOX ELDER COUNTY,
JUDGE OMAR J. CALL, PRESIDING

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LIST OF ALL PARTIES

Plaintiff/Respondents, Demetrios Agathangelides, Diane Agathangelides, husband and wife, and Greek Gardens, a Utah Corporation

Defendants/Appellants, Keith Shaw and Sandra Shaw, husband and wife, each individually, and d.b.a. Spring Color Systems, Inc.
Defendants/Appellants.

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CASE SETTING

Petitioners request the court grant a Rehearing, pursuant to Rule 35 Rules of the Supreme Court, of the decision authored by Justice Durham and filed July 15, 1987. Counsel for the Petitioner certifies this Petition is presented in good faith and not for delay.

The points of law or fact which the Petitioner claims the court has overlooked or misapprehended in this decision are as follows:

> I. The promissory note was negotiable and accepted by Plaintiffs in lieu of cash and was independently enforceable from the purchase agreement.
>
> II. Because the triar of fact determined the Defendants themselves had breached the contract, the trial court properly decided that the mutual breach estopped the Defendants from recovering on the Counterclaim.

ARGUMENT

The judgment below was rendered after jury verdict and careful consideration by the trial judge who was familiar with the history of the arguments and had presided at several hearings, one "near-trial", and one completed trial.

I

THE NOTE WAS SEPARATELY ENFORCEABLE

The court granted partial summary judgment on the promissory note because the judge considered the note to be independently enforceable and because Defendants before trial admitted their liability to pay the amount of the note. The Counterclaim was based on the purchase agreement. The court concluded the Plaintiffs' right to collect on the note was absolute, although the Defendants might have a basis to recover on their Counterclaim. The trial court considered these two documents separately.

Since any Counterclaim would have to be on the purchase agreement rather than the note, the trial court determined Defendants' possible recovery on the Counterclaim could be an offset on the amount due on the note. However, he also determined any such recovery was independent of the note. In either case, Plaintiffs were entitled to partial summary judgment on the note. Appellants spent considerable part of their Brief treating the argument that the note and the agreement were not independent since they were written at the same time. However, the facts support the judgment because these documents were prepared by the Defendants' counsel, the note was independent, and Defendants had admitted the note was unpaid in the exact amount claimed. The triar of fact was justified in treating the note separately. In its decision filed July 15, 1987, this court does not appear to address the question of treating the purchase agreement separately from the negotiable note. It would seem that to throw out a

partial summary judgment, the court would need to explain this departure from the trial court's action. The trial court treated the documents independently. Respondents' Briefed this issue on pages 7 through 12 of the Respondents' Brief filed October 3, 1983.

The form of the jury verdict was determined by the court after the trial evidence was in. The judge concluded that under the facts presented, Defendants' only possibility for recovery was if the Plaintiff was guilty of unfair competition and the Defendants had not breached the purchase agreement. The special verdict form asked whether none, either or both parties breached the purchase agreement. It did not ask about breach of the promissory note, which the trial court considered to be a separate document, and severable from the agreement. Defendants' liability on the note had been ruled on by the court's March 15, 1983 Memorandum Decision which recites the Defendants had acknowledged, in chambers prior to trial, their obligation on the note, plus interest. In its July 15, 1987 Opinion this court did not find the promissory note to be either conditional or indefinite, as it found in Calfo v. D. C. Stewart Company, 717 P2d. 697 (Utah 1986). For that reason, it was altogether proper for the trial court to grant the partial summary judgment.

II.

DEFENDANTS COULD NOT RECOVER ON THEIR COUNTERCLAIM BECAUSE DEFENDANTS THEMSELVES BREACHED THE PURCHASE AGREEMENT

Although the partial summary judgment reserved certain affirmative defenses to be presented at trial, most were resolved before trial. By the time trial was over, the court was well aware that there was no evidence on certain points, and that others had been waived. For example, the issue of personal liability on the note was resolved by stipulation before trial in chambers. The court in its pre-trial conference determined to allow the Plaintiffs to attempt to pierce Defendants' corporate bail. To avoid this, Defendants stipulated that any judgment could be entered against all the Defendants. The judgment entered after the jury verdict reflects that. In contesting some of the findings of the court after the verdict, the Defendants at one point presented their own form for the final judgment. Even their proposed form of the judgment provided joint and several liability against all the Defendants. Thus, the issue of joint liability was resolved, properly included, and should not be an issue in a new trial.

Another affirmative defense was to been failure to give proper credit. However, the Court did not find enough evidence for that issue to present it to the jury. Thus, the remaining Counterclaim question to go before the jury would be if one party unfairly competed with the other. The court ruled as a matter of law, in making the jury verdict form, that if there was a mutual

breach that neither party would recover for unfair competition. There had been no evidence of actual damages by Defendants on that point. In all cases, the trial court found all the affirmative defenses applied to the purchase agreement dated June 27, 1979, and not the promissory note.

A. MUTUAL BREACH ESTOPPED DEFENDANTS' COUNTERCLAIM

Since the only remaining affirmative defense for consideration by the jury was unfair competition, the court properly estopped both parties from recovering if the other also breached. This is fundamental law. A person who has broken a contract cannot enforce it or recover on it. See Lowe v Rosenlof, 12 U2d 190, 364 P2d 418 (1961). In addition, even if the Plaintiffs breached the non-competition portion of the agreement as the Defendants did, that should not be a reason for a new trial as an offset to the note, because the note is separate.

> A parties' failure to perform an independent stipulation of a contract does not bar his right to recover for the other parties' breach, or excuse such other party from performing the stipulations made by him.
> 17A CJS Contracts, Section 453

Furthermore, the trial judge's ruling that if both parties breached the agreement the Defendants would not be able to recover on their Counterclaim, is consistent with general law as stated at 17A CJS Contracts, Section 473, that "a breach of contract by one party may be such as to permit the other party to

abandon it and to sue at once for his entire damages." Thus, since the Plaintiffs had accepted a negotiable note, their entire damages was the unpaid purchase price, which was primarily for the equipment to which Defendants had already given a secured interest to a lender other than the Plaintiffs. Utah has recognized severability of contracts in Green v. Palfreyman, 109 Utah 291, 166 P2d 215 (Rehearing denied 109 U 308, 175 P2d 213) (1946), which held:

> Where there has been a breach by one party of a severable part of a contract, the other party is not excused from performance of his promises relating to other parts of the contract. . . . If there was a breach by Plaintiff, it does not justify a forfeiture of his share of profits under the contract . . . Id. 219

The special form of verdict asking for the jury to rule on whether either, both or neither party had breached was adequate for other reasons, which makes a need for re-trial moot. In Schick v. Ashton 7 U2d 152, 320 P2d 664 (1958) and Commercial Security Bank v. Hodson 15 U2d 388, 393 P2d 482 (1964), this court said whether promisor has made and kept his promise is a jury question where the evidence is in conflict, and that it is a jury question to determine whether damages were suffered and the contract breached. The general rule which must be read with these holdings is that it is a question of law whether particular facts amount to a breach; and, that it is a question of fact whether the particular facts in fact occurred. 17A CJS Contracts

Section 630. In this particular trial, neither side objected to the judge's decision to allow the jury to decide whether a breach had taken place. Even though the jury said both sides breached the purchase agreement, it is still a question of law whether the acts are a breach of the contract. The trial judge, having everything before him, decided neither side would be entitled to recover for damages for the unfair competition element, the only element remaining in the affirmative defenses, if the jury found both breached. There is no need for a remand or reversal of the jury's decision or the entry of the judgment in this fact situation.

CONCLUSION

The trial court was justified by the facts before it in deciding the note was separately enforceable from the purchase agreement. Plaintiffs were entitled to partial summary judgment. During the trial it became apparent that the only Counterclaim issue for the injury was breach of the purchase agreement. The law applied to the facts justified the Court's conclusion that there should be no recovery on the Counterclaim if Defendants also breached. All issues raised in the Counterclaim were considered at the trial or were waived by the parties. The trial court correctly ruled that the Defendants were estopped or had

waived any right to recover on their Counterclaim in the context of this trial. The Petitioners respectfully request the court rehear the matter, and affirm the judgment as entered.

RESPECTFULLY SUBMITTED THIS 23rd day of July, 1987.

Raymond N. Malouf

MAILING CERTIFICATE

I hereby certify that on the 28th day of July, 1987, four true and correct copies of the foregoing PETITION FOR Rehearing, CASE NO. 19113, was mailed postage prepaid to the following:

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