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Brigham City Sand & Gravel v. Machinery Center Inc. et al : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

BRIGHAM CITY SAND & GRAVEL, a corporation, GUY HIGLEY and KNOWLTON BROWN, Plaintiff-Appellants, vs. MACHINERY CENTER, INC., VERA M. JENSEN and THE JENSEN TRUST, STERLING M. JENSEN, GWEN J. EMMETT JONES and IRENE J. SANFORD, Trustees, Defendant-Respondents, vs. R. J. HARRIS MACHINERY AND LEASING COMPANY and R. J. HARRIS, Third Party Defendants.	Case No. 16325

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is a suit brought by Brigham City Sand and Gravel, et al., against Defendant-Respondents, Machinery Center, Inc., for return of personal property and against Defendants, Vera M. Jensen, and the Jensen Trust, Sterling M. Jensen, Gwen J. Emmett Jones and Irene J. Sanford, Trustees, for the return of personal property, and in the alternative, for damages for the conversion of the personal property.

DISPOSITION IN LOWER COURT

Upon motion by counsel for Machinery Center, Inc., the Honorable James S. Sawaya, District Judge, Third Judicial District, in and for Salt Lake County, Utah, dismissed with prejudice Plaintiff-Appellants' Complaint.

RELIEF SOUGHT ON APPEAL

The Respondents seek affirmance of the Lower Court's Order of Dismissal on the ground that no error was committed.

STATEMENT OF FACTS

Plaintiff-Appellants' Statement of Facts fails to emphasize certain facts important to disposition of this matter. Defendant-Respondents, Machinery Center, Inc. (hereinafter Machinery Center) do not dispute the facts as stated, but present the following statements for purposes of clarification.

Machinery Center purchased certain property from Third-Party Defendants, R.J. Harris Machinery and Leasing Company and R.J. Harris (hereinafter R. J. Harris) and received for said equipment a Bill of Sale in January, 1975. R. J. Harris had previously purchased the machinery from Vera M. Jensen and the Jensen Trust, Sterling M. Jensen, Gwen J. Emmett Jones and Irene J. Sanford, Trustees (hereinafter Jensen, et al.), in October, 1974. Jensens, et al., allege that the equipment had been abandoned by Plaintiff-Appellants, Brigham City Sand and Gravel, (hereinafter Plaintiff). The abandonment had occurred upon real property owned by the Trust.

In 1977, Plaintiff brought suit against Machinery Center seeking only the return of the personal property. Machinery Center, by way of Third Party Compl

brought suit against its vendor, R. J. Harris, seeking damages for breach of warranty of title should Plaintiff be successful in its suit. Plaintiff then amended its Complaint to bring suit against Jensens, et al., seeking return of the personal property or, in the alternative, damages in the sum of $12,000.00. In response, Jensens filed a Counterclaim against Plaintiff alleging trespass. At this juncture, R. J. Harris filed a Cross-Claim against Jensens, et al., praying for indemnification on any judgment recovered by Machinery Center.

Prior to trial, Plaintiff executed a compromise settlement agreement, whereby Jensens paid Plaintiffs $2,500.00 in settlement of all claims and under which Plaintiff agreed to indemnify Jensens for any liability which Jensens may incur as a result of R. J. Harris' Cross-Claim.

Immediately prior to trial, Machinery Center moved the Trial Court for an Order of Dismissal upon the grounds that in settling the matter with Jensens, et al., Plaintiff had elected its remedy to pursue that of recovery of the value of the property and should therefore be barred from seeking return of the property. Since Plaintiff had sued Defendant, Machinery Center, for the return of the property, and not for damages for conversion, the Trial Judge found that plaintiff had elected one of two inconsistent remedies and that the remedy elected had been satisfied and therefore, dismissed Plaintiffs' Complaint with prejudice.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN HOLDING THAT PLAINTIFF, IN ELECTING AN INCONSISTENT REMEDY AND OBTAINING SATISFACTION THEREON, WAS BARRED FROM PURSUING AN ALTERNATIVE INCONSISTENT REMEDY.

The Trial Court, in its Judgment, states:

> . . .(in) accepting damages in the amount of $2,500.00 from defendants, Jensen, et al., plaintiffs have elected a remedy of damages and have compromised and settled the said claim and are thereby precluded from pursuing the defendant, Machinery Center, Inc., for the return of said property, which would result in double recovery . . .

Judgment, page 2. So stating, the Court correctly applied the applicable law to the facts of this case. Plaintiffs brought suit against Machinery Center for return of specific property, a distinct common law remedy, and then subsequently brought suit against the Jensens, et al., for damages based on the theory of conversion and, in the alternative, for the return of the specific property (inconsistent remedies). They have elected one of the inconsistent remedies and, through settlement, have obtained satisfaction with respect to the elected remedy.

Machinery Center does not contend that the Utah Rules of Civil Procedure do not allow pleading of inconsistent remedies in the alternative. Rule 8, Utah Rules of Civil Procedure, clearly states that this practice is allowed. However, respondent does contend that Rule 8 has not abolished the Doctrine of Election of Remedies in the State of Utah.

In the case of Cook v. Covey-Ballard Motor Co., 69 Utah 161, 253 P. 196 (1927), the Supreme Court of Utah stated the rationale and application of the doctrine of election of remedies. The Court explained:

> The doctrine of an election rests upon the principle that one may not take contrary positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves a negation or repudiation of the other, the deliberate and settled choice of the one, with knowledge or means of knowledge of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again.

253 P. at 200. The Court further stated:

> The true rule seems to be (1) that there must be, in fact, two or more coexisting remedies upon which the party has the right to elect; (2) the remedies thus open to him must be alternative and inconsistent; and (3) he must by actually bringing an action or by some other decisive act, with knowledge of the facts, indicate his choice between these inconsistent remedies.

253 P. at 199.

The Court of Civil Appeals of Texas, in the case of National Surety Co. et al. v. Odle, et al., 40 SW 2d 876, (Tex. Ct. Civ. App. 1931) dealt with the problem of applying the doctrine of election of remedies to a case involving facts similar to the case now before the Court. In this decision, Odle had brought suit in a Justice Court to recover a specific bale of cotton or, in the alternative, to recover its value. Under a Writ of Sequestration, the bale was seized by the constable. Odle recovered judgment for the cotton bale or, in the alternative, its value. Judgment directed the constable to deliver the bale to Odle. Odle then brought suit in County Court on a conversion theory and recovered a money judgment. The Appeals Court allowed Odle to recover costs not recovered in the Justice Court, but refused to allow recovery for the bale's value. In its decision, the Court explained:

> Plaintiff had at his election two remedies for redress of the injury resulting from the theft of the bale of cotton in controversy in this case. One of such remedies was to sue for the recovery of the specific property. The other was to treat the possession thereof by defendants, and their refusal to surrender the same on demand, as a conversion, and sue for the value thereof. Such remedies were inconsistent, and the assertion of one was necessarily a waiver of the other, except in the alternative that the remedy first sought had proved unavailable. A suit for specific property involves a persistent and continuing claim by the plaintiff of title to the property sued for, and invokes the aid of the

> court to effect its restoration. A suit for conversion treats the unlawful acts of appropriation by the defendant as having divested the plaintiff of his title and invokes the aid of the court to secure compensation therefor by an award of its value as damages in lieu thereof. (Emphasis added)

40 SW 2d at 877. The Court found that Odle had elected his remedies when the constable had seized the bale on Odle's behalf under the Writ and that since Odle technically had obtained the return of the bale and therefore had obtained satisfaction of the Justice Court Judgment, he was barred from bringing the new suit for conversion.

In this matter, Plaintiff-Appellants have brought suit against Machinery Center for the return of the specific property in question. As stated in Odle, supra, this suit involves a claim that title to the property has remained in the plaintiff. Plaintiff then amended its Complaint to bring suit against the Jensens, et al., to return the specific equipment or, in the alternative, for damages for conversion. Conversion treats the acts of defendants as divesting plaintiff of title and seeks compensation for the property's value. In the acceptance of money damages, pursuant to the compromise agreement with Jensens, Plaintiff has clearly taken action constituting an election between two inconsistent remedies, and has obtained satisfaction of the elected remedy. As stated in Cook, supra, Plaintiff has indicated his choice between inconsistent remedies by taking the decisive act of settling for damages without obtaining a return of the property from Jensens, et al.

> The compromise and settlement of a suit constitutes such an election as will preclude plaintiff from thereafter prosecuting an action upon a theory inconsistent with that on which the former action was maintained.

28 C.J.S. Election of Remedies, Section 11. Therefore, in making this election, Plaintiff is thereafter barred from seeking the inconsistent remedy of return of the property from Machinery Center.

Plaintiffs are correct in quoting Farmers and Merchants Bank v. Universal C.I.T. Credit Corporation, 4 Ut. 2d 155, 289 P.2d 1049 (1955) for the applicable law to be applied under the doctrine of election of remedies. However, Plaintiffs are mistaken as to Universal C.I.T.'s application to the facts herein. As pointed out in Odle, supra, the remedies of return of specific property and of damages for conversion are clearly inconsistent remedies due to their reliance upon inconsistent facts. To recover on the theory of return of property, Plaintiffs must show that title remained in Plaintiffs. To recover on a conversion theory, Plaintiffs must show that title has been divested from Plaintiffs by Defendants' actions. Since Plaintiffs have elected by a settlement with Jensens, et al. to settle on the basis of the conversion theory, Plaintiffs cannot now allege inconsistent facts necessary to support a claim for return of the property against Machinery Center, since the settlement of the elected remedy operates as res judicata with respect to the facts supporting the elected remedy of damages for conversion.

Plaintiffs state that the settlement has been engineered in such a way that double recovery will not occur. Plaintiff sets out three scenarios as guidance for the Trial Court. However, Plaintiff has failed to realize that the causes of action between the various parties are not so interrelated that the findings on the different matters will fall into line under a "domino theory". Any attempt to avoid the bar of election of remedies by the Plaintiff should have been made before settlement and not at this later date by the development of scenarios.

POINT II

APPLICATION OF THE DOCTRINE OF ELECTION OF REMEDIES TO THE FACTS OF THIS CASE IS CONSISTENT WITH EQUITABLE CONSIDERATIONS.

The suit before the Court was precipitated by the negligent actions of the Plaintiff, Brigham City Sand and Gravel. According to Jensens, et al., owners of the real property upon which the equipment was located, the equipment had been abandoned and unused from 1968 until 1974, a period of six years. Jensens, et al. also understood that the City of Brigham was insisting that steps be taken to remove the equipment which constituted a hazard to children who played in the area. (R.90) Plaintiff, Higley, admits that the property was last operated in 1970. (R. 79) His Answers to the Interrogatories also show that although he lived in Mantua, Utah, approximately five miles from the location of the equipment, Higley did not discover that the property had been removed until Spring, 1975. (R. 81) R. J. Harris had purchased the equipment in October, 1974, more than six months prior to the date of Higley's discovery. (R. 54) By the time Plaintiff had discovered the sale to Harris, the equipment had been sold to the Defendant, Machinery Center. (R. 24) Machinery Center had purchased the equipment after checking with the Secretary of State to determine if there were security interest filings against the equipment and received a Bill of Sale for the equipment. (R. 24)

Machinery Center recognizes that under certain circumstances, application of the Doctrine of Election of Remedies can produce harsh results, and that consequently, courts are sensitive to equitable principles in applying the doctrine. However, the facts shown above clearly indicate that the equities in this matter lie with Machinery Center.

Clearly, the equitable maxim that "equity aids one who has been vigilant" should apply to the facts of this case for the benefit of the Defendant, Machinery Center. If Plaintiffs had taken the steps necessary to properly notify the parties, especially Jensens, et al., that the property was not abandoned, either in writing or through actions, rather than remaining silent for a period of five or six years, the conversion by Jensens, et al., would not have occurred. Moreover, if Plaintiffs had been vigilant in their care and maintenance of the property, they could have discovered the fact of Jensens, et al., sale of the property soon after its occurrence, and therefore, could have prevented the subsequent sale to Machinery Center, an innocent party and bona fide purchaser without notice.

The equities tilt in Machinery Center's favor when the maxim "equity will help only those who help themselves" is applied. Under the circumstances of this case, Plaintiffs had within their control, all of the avenues to protect their property from the conversion that occurred. Since Plaintiffs' omission precipitated the circumstances resulting in Plaintiffs' claim for damages, one must conclude that the equities favor Machinery Center since it purchased without notice, for value, from a dealer in the regular course of business, after making prudent inquiries regarding the existence of other claims. If this maxim is followed, the Court should hesitate to take action to rescue Plaintiffs from the circumstances which have resulted from their own actions.

If the Court concludes that equitable considerations are applicable,

the Court should bear in mind that Plaintiffs have received $2,500 from Jensens, et al., in settlement. To refuse to apply the Doctrine of Election of Remedies will allow Plaintiffs to recover both damages and the property, a circumstance which the Doctrine of Election of Remedies was developed to avoid. Indeed, this case is one for the application of the Doctrine of the Election of Remedies. Plaintiffs' failure to act prudently has created a situation under which Machinery Center, an innocent purchaser, would suffer damage. Plaintiffs' voluntary election of an inconsistent remedy, damages, and the settlement thereof, should bar further claim to the property. The Court should, therefore, refuse to extricate Plaintiff from a situation caused by Plaintiffs' own actions.

CONCLUSION

The Trial Court was correct in holding that Plaintiff had made an election of remedies and was thereby barred from pursuing an alternative inconsistent remedy against Respondents. In compromising and settling the case on a conversion-damages theory, Plaintiff has clearly taken steps showing an election between the conversion-damages theory and the alternative, but inconsistent, return of specific property theory. Case law clearly supports the Trial Judge's finding that due to Plaintiffs' election, and satisfaction, Plaintiffs are barred from seeking return of the property. Further, the equities clearly preponderate in favor of an application of the Doctrine of Election of Remedies and the Judgment of the Lower Court should be affirmed.

Respectfully submitted this
27 day of June, 1979.

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CERTIFICATE OF MAILING

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