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Bennett Leasing Co., A Utah Corporation v. Walker Realty Inc. , A Utah Corporation, And Ralph Walker, An Individual v. M. K. Komputer Corporation, A Corporation : Brief of Third Party Defendant And Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

BENNETT LEASING CO., A UTAH Corporation, Plaintiff and Respondent, vs. WALKER REALTY INC., A Utah Corporation, and RALPH WALKER, an individual, Defendants, Third party Plaintiffs and Respondents, vs. M.K. KOMPUTER CORPORATION, A Corporation, Third party Defendant and Appellant.	Case No. 16458

BRIEF OF THIRD PARTY PLAINTIFF-RESPONDENT

Appeal from judgment of the First Judicial District
Of the State of Utah, in and for the County of Cache
Honorable Venoy Christofferson, Judge

W. Scott Barrett
BARRETT & MATHEWS
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Plaintiff-Respondent

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IN THE SUPREME COURT OF THE

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BENNETT LEASING CO., A Utah corporation, Plaintiff and Respondent, vs. WALKER REALTY INC., A Utah Corporation, and RALPH WALKER, an individual, Defendants, Third Party Plaintiffs and Respondents, vs. M.K. KOMPUTER CORPORATION, A Corporation, Third Party Defendant and Appellant.	)	Case No. 16458

NATURE OF THE CASE

Plaintiff commenced this action against Defendants on a lease agreement. Defendants filed a Third Party Complaint against M.K. Komputer Corporation asking for indemnification if they were found liable on the lease.

DISPOSITION IN THE LOWER COURT

Third Party Plaintiff-Respondants agree with the statement of the disposition of the lower Court in the Third Party Defendants brief with the additional statement that the judgment of Bennett Leasing company has now been satisfied by Defendants and Third Party Plaintiffs.

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RELIEF SOUGHT ON APPEAL

Third Party Plaintiff-Respondants ask that the decision of the District Court be affirmed and that Respondants be awarded damages and attorneys fees pursuant to the stipulations of the parties, the pleadings, and Rule 76(b) of the Utah Rules of Civil Proceedure.

STATEMENT OF FACTS

Third Party Defendants-Appellant (hereinafter referred to as M.K.) first contacted Third Party Plaintiff-Respondent (hereinafter referred to as Walker) and induced Walker to sign a purchase invoice for a computer machine. (T.p. 7) M.K. thereafter arranged the lease with Plaintiff Bennett. (hereafter referred to as Bennett) Bennett had no contact whatsoever with Walker. (T. p. 8, 37).

The M.K. salesman represented that there would be an unconditional 90-day buy back agreement but that it could not be put in writing on the original purchasing agreement because it had to go to Bennett and Bennett would not make the lease under those conditions. (T. pp-38-39). However, the salesman did write "90-day" on the sales invoice and this was construed by Mr. Morris, an officer of M.K. to mean that there was a 90-day buy back guarantee. (T.p. 79).

Thereafter Walker wrote to M.K. and asked for a written buy back agreement. (T. ppp. 66-67) (Tl.ex.6). Thereafter on or about November 11, 1977 the president of M.K. signed a buy back agreement imposing numerous conditions. An officer of M.K. testified that this was delivered to Walker but he was not

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asked to sign it. Walker testified that he never saw the written buy back agreement before the deposition of Mr. Morris was taken. (T.pp.43,62,96) Walker also testified that there were no conditions on the buy back guarantee except for payment for time actually used. (T. p. 44)

Thereafter Walker wrote numerous letters to M.K. none of which were ever responded to in writing. (T. pp.87, 173) Walker testified that even had he seen the written buy back agreement prepared on November 11, 1977 he would not have signed it because of the conditions stated therein in favor of M.K. (T.P. 175)

Although the written buy back agreement contained conditions favorable to M.K. their officers testified that even though the buyers name was on it that he didn't have to sign it unless he wanted to. (T.pp. 138-139, 141).

After writing a letter on January 20, 1978 asking that the machine be taken back by M.K. Walker received a phone call from the president of M.K. agreeing to a 30-day extension of the buy back. (T.p. 173)

ARGUMENT

I

THE GIST OF THE THIRD PARTY COMPLAINT IS BREACH OF CONTRACT AND A CLAIM FOR INDEMNIFICATION.

M.K.'s primary thrust in an attempt to get a reversal of the courts judgment is that they were somehow deceived by the court awarding judgment on a different theory than stated in the Third

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Party Complaint. This contention is frivolous and completely unsupported by the Third Party Complaint and Third Party Defendants answer thereto.

An examination of the Third Party Complaint shows that Walker entered into the lease agreements only with the understanding that there was a 90-day termination guarantee. But for that guarantee he would not have entered into a lease agreement. Based upon that Walker pleaded that if he be required to perform under the Lease agreement that he be awarded indemnification damages against M.K.

There is an allegation in paragraph six of Third Party Complaint alleging fraud for the purpose of claiming exemplary and punitive damages in the sum of $5,000.00 This paragraph was of no avail since the court awarded no such damages but awarded only indemnification.

Despite the obvious contract pleading, M.K. in its brief goes to great length to contend that it went in trying to defend a fraud action and was not properly aware of the possibility of losing on a contract action. That contention is contradicted by M.K.'s answer to the Third Party Complaint. In that answer the defense is: " Third Party Defendant alleges the defense of full performance under the contract." (emphasis added)

Even the M.K. brief under the heading "Nature of the Case" begins "This is an action based in contract where the Plaintiff respondent purchased a computer..."

M.K.'s contention that Walker recovered on a theory not pleaded is completely unsupported by the pleadings or the rec

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The court awarded exactly the relief that was prayed for in the Third Party Complaint i.e. that if Walker was required to comply with the lease agreement that Walker be indemnified by judgment against M.K. The only mention of fraud in the Third Party Complaint is in connection with a request for punitive and exemplary damages which were not awarded by the court.

Thus, M.K.'s contention that Walker's judgment is based exclusively on contract, while he pleaded only the tort of fraud, is not correct. In any event it is clear from the record that the case was tried on the theory of contract and no objection whatsoever was ever made at the trial by M.K. counsel.

Where a case is tried on the theory of a contract liability it cannot be claimed on appeal that recovery should have been allowed on the theory of tort liability. 5 Am Jur 2nd 45; Stovall vs. Newell 158 Or. 208, 75 P. 2d 346.

A defect of the pleadings which might have been remedied by an amendment if objection had been made cannot ordinarily be complained of the first time on review, where there has been a trial on the merits. 5 Am Jur 2nd 59. Where a case has been tried upon the theory that the issues involved therein were sufficiently raised by the pleadings, the insufficiency of the pleadings in that respect cannot be urged in a reviewing court. 5 Am Jur 2nd 60; Idaho State Bank vs. Hooper Sugar, 74 Utah 24, 276 P. 659.

A pleading on which the decision to appeal from is based will be liberally construed by the Appellate court in support of the decision appealed from, especially where the pleading has not

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been objected to in the court below or the specific objection raised on appeal has not been made in the court below. 5 Am Jur 2nd 316; Robins vs. Roberts 80 Utah 409, 15 P. 2d 340.

II

THE EVIDENCE IS MORE THAN ADEQUATE TO SUPPORT THE COURT'S FINDINGS.

M.K. argues in point 2 of the brief that there was insufficient evidence to support finding number 8. In making that argument M.K. assumes that its' written buy back agreement binds Walker. It was executed by its president but never executed by Walker, nor even seen by Walker until after the trial had commenced. Thus, conditions imposed by M.K. unilaterally can hardly determine whether or not Walker had complied with the agreement. There is considerable conflicting testimony on this point but Walker's testimony is clear and unequivocal. And was believed by the court.

Walker testified that he never saw the buy back agreement before the Morris deposition taken after the litigation commenced. (T. 43,62,69) Walker also said that there were no buy back conditions stated by the salesman except that he would pay a pro-rate amount for the time the machine was actually used. (T.p. 44 Walker further stated that it was represented to him by M.K. that they would buy the computer back if he was unhappy with it for any reason (T. p. 54-55).

As a matter of law a written buy back agreement, never communicated to the beneficiary of the agreement, which contains conditions favorable to the guarantor cannot be binding on the beneficiary.

It is therefore submitted that there was more than sufficient evidence to support finding number 8.

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III

WALKER SHOULD BE AWARDED ATTORNEY's FEES, DAMAGES AND COSTS.

In most jurisdiction the reviewing court may assess a penalty or damages on finding that the appeal was taken frivolously or for the purpose of hindering or delaying justice. 5 Am Jur 2nd 447. This is specifically provided for in Rule 76 (b) of the Utah Rules of Civil Proceedure where it is provided that the court may award damages that may be just if it finds that the appeal was taken for delay.

In some jurisdictions the award of attorney's fees on appeal is within the discretion of the court hearing the appeal and this applies in Utah. 5 Am Jur 2nd 446; Swain vs. Salt Lake Real Estate and Investment Company 3 Utah 2d 121, 279 P. 2d 709.

Although the judgment of the court below is not clear on whether or not Walker should have attorney's fees against M.K. such fees were prayed for in the Third Party Complaint. Further, it was stipulated by all counsel that $1,000.00 was a reasonable attorney's fees for the prevailing party or parties. (T. p. 171)

This should be in addition to the judgment Bennett was awarded against Walker plus $1,000.00 attorney's fees for Bennetts' attorney.

While damages will not be awarded for delay where the appeal was apparently taken in good faith, an appeal is considered to have been taken for purposes of delay, where there was no question of law involved and there was evidence to sustain the judgment. 5 Am Jur 2nd 447; Texas and P.R. Co. vs. Prater 229 U.S. 177, 57 L ed 1139, 33 S. Ct. 637.

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CONCLUSION

It is submitted that there is no foundation in law whatsoever for this appeal. M.K. was fully aware of the contractural nature of an indemnification claim which was clearly set forth in the Third Party Complaint. M.K. tried the case on that theory and made no objections whatsoever to the admission of evidence on the theory of breach of contract and Walker's right to indemnification.

There is more than sufficient evidence to support all of the findings of fact. The only lack of evidence urged by M.K is conflicting evidence advanced by the M.K. witnesses which conflict the trial court resolved in favor of Walker.

It is therfore respectfully submitted that the judgment should be affirmed and that Walker should be entitled to damages and attorney's fees and costs on appeal.

DATED this 14 day of February 1980.

W. Scott Barrett
Attorney for Respondent

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MAILING CERTIFICATE

I hereby certify that I sent a true and correct copy of the foregoing Brief of Respondent to Attorney for Appellant, Stephen W. Farr, 205-26th Street Suite, 34, Ogden, Utah 84401 on this 15 day of February 1980.

Fawn Marotz
Secretary

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