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John Soter and Tom Soter v. Zeke Snyder and Strevell-Paterson Finance Company : Brief of Appellants

Utah Supreme Court

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

JOHN SOTER and TOM SOTER,
Plaintiffs and Appellants,

— vs. —

ZEKE SNYDER and STREVELL-
PATERSON FINANCE COMPANY,
a corporation,
Defendants and Respondents.

APPELLANTS' BRIEF

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PATERSON FINANCE COMPANY,
a corporation,
Defendants and Respondents.

Civil No.
6180

APPELLANTS' BRIEF

STATEMENT OF THE CASE

This is an action to cancel and rescind a lease and conditional sales agreement, both documents having been entered into on the 14th day of November, 1952, between the plaintiffs as lessees and purchasers and the defendant Zeke Snyder as lessor and seller. The defendant Strevell-Paterson Finance Company is alleged to be the pledgee of the instruments for a loan procured from it

by defendant Snyder. The complaint also prays for judgment against Snyder in the sum of \$12,400.00 paid in connection with the conditional sales agreement (Tr. 1-11).

Plaintiffs allege, as the inducement for the execution of the lease and conditional sales agreement, that Snyder fraudulently represented the business theretofore conducted on the leased premises, the Delmar Lounge at 315 South Main Street, Salt Lake City, Utah, to be a profitable one; that the net profit realized for each of the two prior years was approximately \$7800.00 and that the gross sales for each of the two years prior to the execution of the agreements exceeded the sum of \$50,000.00 (Tr. 1). The plaintiffs allege that in truth and in fact, as Snyder well knew, the representations were false in that the business had not been a profitable one and had not realized the profit claimed to have been made nor had the business grossed over \$50,000.00 in sales for the two years preceding the agreement (Tr. 2).

The defendant Snyder denied the allegations of fraud, pleaded estoppel and a waiver of any alleged fraud and, by counterclaim, a breach of the conditional sales agreement, prayed judgment for the unpaid balance with interest and costs of suit and that the payment of the judgment "be secured by the defendant Zeke Snyder's title retaining lien upon all of the personal property covered in said contract." (Tr. 12-14).

In an amendment to the answer both defendants pleaded further estoppels against the plaintiffs, one to the effect that on February 24, 1953 the plaintiffs approved the conditional sales agreement and, in writing, stated that they had no charge-off or set-off against the amount to which they were then allegedly indebted to the defendant Snyder, and the other that the plaintiffs knew Snyder was negotiating for a loan from the defendant corporation and that the statement of the balance due on the agreement was a condition precedent to the making of such loan (Tr. 16-18).

The case was tried to a jury, which returned a special verdict on two propositions, to-wit:

“Zeke Snyder did not state in substance to John and Tom Soter: ‘I grossed over \$50,000.00 in 1951.’” (Tr. 245).

“Zeke Snyder did not state in substance to John and Tom Soter: ‘In 1951 I made a net profit of between seven thousand and eight thousand dollars.’” (Tr. 246).

The trial court entered findings and conclusions of law on the jury’s special verdict (Tr. 249-251), declared the conditional sales agreement in default and ordered judgment of no cause of action against the plaintiffs and a judgment in favor of Snyder in the sum of \$10,600.00, with interest from the 2nd day of October, 1953 at the rate of 6% per annum “and that upon the payment in full of said judgment together with interest, defendant Zeke Snyder shall deliver to the plaintiffs John Soter and

Tom Soter full title to all of the personal property set forth in that certain Conditional Sales Agreement dated November 14, 1952.”

The Conditional Sales Agreement, Exhibit B attached to the complaint (Tr. 3-6), provides in paragraph 6 thereof that if the purchasers shall fail and neglect to make any of the payments specified or within 30 days thereafter, then the seller may at his option declare the entire sum then remaining unpaid to be due and payable and upon failure of the purchasers to pay said sum seller may retake possession of the property. The purchasers by said agreement, the plaintiffs herein, waive any action for trespass or damages for the retaking of the property and specifically agree that in that event the seller may retain all installments previously paid by purchasers as and for compensation for the use of said property by the purchasers. It is to be noted that the agreement does not contemplate a personal judgment against the purchasers nor does it provide any remedy other than repossession.

The clerk entered a judgment (Tr. 252) pursuant to the findings and conclusions of the trial court, which findings and conclusions omit any reference to the affirmative defenses of waiver, estoppel and the like urged by each of the defendants and which matters are, therefore, not before this court on this appeal.

The judgment as entered is for no cause of action as to the plaintiffs and for the sum of \$10,600.00 in favor

of the defendant Snyder on the Conditional Sales Agreement, with the language with respect to the delivery of title upon payment of the judgment as set forth above.

The trial court in its instructions to the jury, Instruction No. 11 (Tr. 241), instructed:

“You are instructed that the gross sales for the Delmar Lounge in the year 1951 were \$40,866.99, and that the net profits for that year were not in excess of \$2,321.28.”

The defendant Snyder on direct examination testified in effect that he told the Soters that he made a good living out of the Delmar because he had paid twenty-eight hundred dollars a year on his home and that with the life insurance that he carried on himself and his wife he presumed it would cost him in the neighborhood of five thousand dollars (Tr. 179). Snyder also testified on direct examination that he made a statement with respect to the amount of money that he was drawing out of the business.

“Q. What did you say?

A. Seventy-eight hundred dollars—twenty-eight hundred dollars payments on my home and possibly five thousand living expenses.” (Tr. 179-180).

On cross examination Snyder testified that at the Canton Cafe, where the deal was made (Tr. 172-173), he stated that he had been making a good living out of the business.

“Q. You told them further that you were paying twenty-eight hundred dollars on your home—

A. That is right.

Q. —per year, and it cost you approximately five thousand dollars to live yourself, your wife’s insurance and your own insurance and your necessities?

A. That is correct.

Q. So five thousand added onto twenty-eight hundred makes seventy-eight hundred dollars?

A. That is correct.

Q. That’s what you told them that you were taking out of the business?

A. That is right.” (Tr. 201-202).

The Soters testified that Snyder stated that he was not only clearing between seven and eight hundred dollars a year, but that he was grossing fifty thousand to sixty thousand a year and had grossed over fifty thousand dollars for the year 1951 (Tr. 27). While Snyder denied that he stated that his gross business was from fifty to sixty thousand dollars a year and specifically in the year 1951 (Tr. 179), he, nevertheless, admitted saying that his gross business averaged fifty thousand dollars a year not including 1952, and failed to mention that in 1951 his business had dropped down to approximately forty thousand dollars (Tr. 206).

After the return of the special verdict a motion for new trial was timely made (Tr. 254), one of the grounds being that of insufficiency of the evidence to justify the verdict and judgment and that the judgment and verdict is against law and the evidence, which motion was thereafter denied (Tr. 255).

We have not attempted to set forth above all of the evidence in the case but only that part of the record sufficient, we believe, to warrant a reversal of the judgment appealed from and to point to the error of the trial court in denying the motion for a new trial, which we urge upon the following:

STATEMENT OF POINTS

POINT 1.

THE FINDING OF THE JURY THAT SNYDER DID NOT STATE IN SUBSTANCE THAT HE GROSSED OVER FIFTY THOUSAND DOLLARS IN 1951 IS CONTRARY TO THE EVIDENCE AND ALL OF THE REASONABLE IMPLICATIONS THEREOF.

POINT 2.

THE FINDING OF THE JURY THAT SNYDER DID NOT STATE IN SUBSTANCE THAT IN 1951 HE MADE A NET PROFIT OF BETWEEN SEVEN AND EIGHT THOUSAND DOLLARS IS NOT SUPPORTED BY THE EVIDENCE BUT IS IN DIRECT CONFLICT WITH THE TESTIMONY OF SNYDER HIMSELF, BOTH ON DIRECT AND CROSS EXAMINATION.

POINT 3.

THE JUDGMENT OF \$10,600.00 IN FAVOR OF THE DEFENDANT SNYDER IS A MONEY JUDGMENT WHICH IS CONTRARY TO LAW AND TO THE CONTRACT OF THE PARTIES.

ARGUMENT

POINT 1.

WHERE THERE IS AN ENTIRE FAILURE OF EVIDENCE TO SUPPORT THE VERDICT, THE VERDICT AND JUDGMENT WILL BE SET ASIDE.

This court has repeatedly held that in a law case, if there is any substantial competent evidence to support the findings, they will not be disturbed. See *Sproul v. Parks*, 116 Utah 368, 210 P. 2d 436, and *Wyatt v. Baughman*, Utah, 239 P. 2d 193. But where there is no substantial evidence in the case to support the finding then the judgment will be set aside. *Carter v. Standard Acc. Ins. Co.*, 65 Utah 465, 238 P. 259.

We proceed upon the premise that the verdict must be plainly wrong and if it be manifestly against the weight of the evidence it is the duty of the court to set it aside. *People v. Swazey*, 6 Utah 93, 21 P. 400, and *United States v. Brown*, 6 Utah 115, 21 P. 461. In the latter case this Court stated:

“The only question presented is, does the evidence warrant the verdict? In the case of *U.S. v. Harris*, 19 Pac. Rep. 197, where the same question was presented, this court stated the principles

which shall govern as follows: 'The jury are the judges of the facts, and, in order to justify this court in reversing the order refusing a new trial, it must appear that there was an entire absence of evidence, or that the evidence so clearly preponderates in favor of the prisoner as to suggest the possibility that the verdict was the result of misapprehension or partiality. It is not enough that the court might have arrived at a different result.' We are satisfied with the rule thus stated, and it only remains to test the case at bar by it."

The general rule is stated in 3 *Am. Jur.*, Appeal and Error, Section 890, pages 450-451, as follows:

"But while a reviewing court hesitates to set aside a verdict on the ground of insufficiency of the evidence, especially when the trial judge has refused to do so, still if it is flagrantly contrary to the evidence and the court is convinced that an injustice has been done, it will and should set it aside, not only in criminal, but also in civil, cases."

A special verdict or special findings of the jury are also to be set aside if they have no support in the evidence or are contrary thereto. To this effect is 53 *Am. Jur.*, Trial, Section 1089, pages 755-756:

"In the absence of evidence to support a material finding, it may be set aside or stricken from the record, and in the discretion of the court judgment may be entered in accordance with the undisputed evidence in the case, or the verdict may be set aside entirely and a new trial granted."

In the instant case it was a conceded fact, and the court so instructed the jury by its Instruction No. 11, that

gross sales for the Delmar Lounge in the year 1951 were \$40,866.99 and the net profits for that year not in excess of \$2,321.28. As to the gross business done for the year 1951 the issue was pin-pointed by the interrogatory to the jury:

“The jury is directed to indicate with an X in each question below whether they find proposition (A) or proposition (B) to be true. Before you can find proposition numbered (A) in any question to be true, it must be found by a clear and convincing preponderance of the evidence.

(A) Zeke Snyder stated in substance to John and Tom Soter: ‘I grossed over \$50,000.00 in 1951.’

(B) Zeke Snyder did not state in substance to John and Tom Soter: ‘I grossed over \$50,000.00 in 1951.’

-----X-----” (Tr. 245)

Aside from the form of the so-called proposition and the stripping from the same of the element of misrepresentation upon which the complaint is based and which is the ultimate fact, as contrasted with the words “did not state,” the question submitted is still open to what Snyder might have necessarily intended by his statements because the question that the jury is to answer is whether Snyder stated “in substance” that he grossed over \$50,000.00 in 1951. Literally Snyder testified:

“Q. Did you ever make the statement, Mr. Snyder, to either Tom or John Soter or his father at any time that you did fifty to sixty thousand

dollars' worth of business a year and specifically in the year 1951?

A. No.

Q. Were you ever asked a statement how much business did you do in the year 1951?

A. No." (Tr. 179).

By the use of the terms "state in substance" in the so-called interrogatory we take the position that the court did not intend that the jury construe the evidence in the literal sense. We point to Snyder's testimony on cross examination:

"Q. Yes. Now, Mr. Snyder, you stated that in this conversation you had at the cafe in response to how much business you were making, that you had been averaging around fifty thousand a year. Is that right?

A. For the number of years that I have had it, not including '52, the average, the approximate average, in fact, I said approximately fifty thousand dollars a year.

Q. You didn't mention that in 1951 the average had dropped from fifty-seven thousand down to forty thousand, did you?

A. That wasn't an average." (Tr. 206).

Snyder's testimony conveys the definite idea, by way of a representation, that there was no substantial difference between the pin-pointed year of 1951 and the other years as far as gross earnings were concerned, particularly in light of the fact that he did not disclose that the gross earnings in 1951 had dropped to \$40,866.99.

While special verdicts have their proper place, nevertheless they can be abused by over simplification which works an injustice. It is submitted that the answer of the jury as above set forth does not find support in the evidence and is in fact contrary thereto. The complaint alleged the misrepresentation to be that the yearly gross sales for two years prior to the transaction exceeded the sum of \$50,000.00.

The next proposition that the jury answered was as follows:

“(A) Zeke Snyder stated in substance to John and Tom Soter: ‘In 1951 I made a net profit of between seven and eight thousand dollars.’

(B) Zeke Snyder did not state in substance to John and Tom Soter: ‘In 1951 I made a net profit of between seven thousand and eight thousand dollars.’

-----X-----.” (Tr. 246).

The answer that the jury made to the foregoing is contrary to the evidence. As pointed out above Snyder on cross examination testified that at the Canton Cafe, where the deal was made, he told the Soters that he had been drawing out of the business seventy-eight hundred dollars a year and that he so calculated the amount because he paid twenty-eight hundred dollars on his home and expended approximately five thousand dollars in living together with the payment of premiums on his and his wife’s insurance (Tr. 201-202). His testimony was the same on direct examination (Tr. 179).

It is demonstrated, we believe, that the only two propositions answered by the jury do not find support in the evidence but are directly contrary thereto.

POINT 2.

THE JUDGMENT ON THE COUNTERCLAIM OF THE DEFENDANT SNYDER IS CONTRARY TO LAW AND TO THE CONTRACT OF THE PARTIES.

Paragraph 6 of the Conditional Sales Agreement, Exhibit A attached to the complaint (Tr. 3-6), provides as follows:

“If the Purchaser shall fail or neglect to make any of the payments specified, or within thirty (30) days thereafter, then the Seller may, at his option, declare the entire sum then remaining unpaid then to be due and payable and upon failure of the Purchasers to pay said sum, Seller may retake possession of the said property, free from all claims whatsoever, and to that end and without notice to the Purchasers, the Seller is hereby authorized to enter said premises and without legal process to take and remove said property. The purchasers hereby waive any action for trespass or damages therefor and Seller in that event may retain all installments previously paid by Purchasers as and for compensation for the use of said property by the Purchasers.”

By the foregoing the parties have agreed that repossession of the property, title to which is reserved by Snyder, is the only remedy in the event of a breach of the contract by the Soters, the amounts theretofore

paid by them being forfeited as fixed and liquidated damages for the use of the property. It is a familiar rule that where the parties have bargained for a specific remedy in the event of a breach of contract the court cannot rewrite the contract nor grant relief not so bargained for. In *Corbin on Contracts*, Vol. 3, Section 541, it is said:

“In judicial opinions it is often stated that ‘the courts do not make a contract for the parties’ and that the parties must be content to perform and to receive performance in accordance with their own agreement. Such statements are usually made in a case in which the court refuses to make an implication that one party is asserting and the other is denying. It is true that a court never makes a contract for litigating parties; but court and jury may find that the parties made a contract when in fact they did not; and the court may decree the existence and enforcement of a quasi contract not created by mutual assent. Also, when the parties have themselves so far satisfied legal requirements that the court is willing to hold that a contract has been made, it will compel performance in accordance with what it believes to be required by good faith and fair dealing.”

The judgment in the instant case in favor of the defendant Snyder and against the Soters for \$10,600.00 is a judgment for the balance of the purchase price and not contemplated by the contract of the parties.

In the case of *American-Lafrance Fire Engine Co. v. Bagge*, 276 P. 1066 (Cal.), it was held:

“* * * the seller explicitly limited its right, in the event of a failure to receive payment in a certain amount during 120 days after the sale, to repossess itself of the property mentioned in the contract, and having set forth these facts in its complaint in the first cause of action therein, it proceeded to do exactly what the trial court stated—‘pleaded itself out of court.’ It had but one remedy under the conditional contract of sale, and its pleadings show that the plaintiff has mistaken its remedy so far as the first cause of action is concerned.”

As in the *American-Lafrance* case, supra, the conditional sale contract in the instant case does not give the seller an election as to whether he would repossess himself of the property or declare the entire purchase price due and institute suit for the unpaid portion thereof. Snyder’s only remedy is to retake possession of the property, retaining all installments previously paid by the Soters as and for compensation for the use of the property by them. This remedy is expressly contracted for and the judgment of the trial court ignores the contract in both its letter and the spirit of the same by granting a personal judgment for the unpaid balance in favor of Snyder and against the Soters.

CONCLUSION

Our rules of procedure are calculated, of course, to do substantial justice between the parties but the instant case demonstrates, we believe, that an over simplification

can have the opposite effect. A review of the entire form of special verdict will disclose that the jurors, to hold for the plaintiffs, would have been required to answer eight questions and to hold for the defendants they were required to answer but two questions, and that in answering the eight questions for the plaintiffs there would have had to have been a constant reference back to questions that might have already been answered. The form of special verdict used in this case is confusing and, although not calculated to do so, had the effect of suggesting a course of least resistance for the seven of the eight jurors returning the verdict to agree on the two questions and then go about their own personal business. Such precise pin-pointing is, we respectfully submit, contrary to the realities of jury trials. But once a special verdict has been returned with the answers reduced to a focal point as was done in this case in the two questions that the jury did answer then, when it is shown that the verdict is not supported by but is contrary to the evidence, a new trial in the interests of justice should be promptly granted. Furthermore, the judgment on Snyder's counterclaim should not be permitted to stand as the same is contrary to the explicit language of the agreement and the remedy bargained for by the parties.

The judgment appealed from should be reversed and the cause remanded with such instructions as to the Court may seem proper.

Respectfully submitted,

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