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Deseret Company v. JSJ Corp : Reply Brief of Plaintiff-Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

DESERET COMPANY, a Delaware corporation, Plaintiff-Appellant, v. JSJ CORPORATION, a Delaware corporation, Defendant-Respondent.	)	Case No. 16992

REPLY BRIEF OF PLAINTIFF-APPELLANT DESERET COMPANY

On Appeal From the Third Judicial District In and For Salt Lake County, Utah

The Honorable Bryant H. Croft

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I. INTRODUCTION

This is an action to rescind a contract for a custom-made pharmaceutical packaging machine manufactured by defendant-respondent JSJ Corporation (hereinafter defendant) and sold to plaintiff-appellant Deseret Company (hereinafter plaintiff). The machine, which cost over $90,000.00, was installed at plaintiff's Sandy, Utah, facility under the supervision of defendant's employees, who traveled to Utah to oversee the work. The machine has never functioned properly despite several on-site repair efforts by defendant's employees. Plaintiff brought suit seeking to have the machine removed from its Sandy plant and to have the money that it has already paid--some $62,000.00--returned. The trial court dismissed the complaint for lack of personal jurisdiction over the defendant, and this appeal is from that dismissal.

In its brief, defendant takes issue with portions of plaintiff's Statement of Facts. Plaintiff does not believe that the disputed facts are material to the resolution of this matter,

so plaintiff will not argue them further. The issues between the parties involve not the facts, but their legal significance, so this reply will be confined to those legal issues.

As a prefatory matter, it is worth noting the timing of the trial court's decision in relation to significant recent decisions of this Court. The defendant's motion to quash was granted on February 19, 1980, and that order was amended by stipulation of the parties on March 5. On March 4 and March 6, 1980, this Court issued two highly significant opinions on the subject of in personam jurisdiction. Plaintiff argued in its brief that the exercise of jurisdiction in this case was mandated not only by the new cases but by Utah law as it existed prior to those decisions. In its brief, defendant couched its arguments in terms of those decisions, tacitly acknowledging the proposition that the controlling case law is that which exists at the time of the appeal. Without conceding that the exercise of jurisdiction would have been improper under prior case law, plaintiff restricts its arguments in this reply to the effect of those recent decisions.

II. ARGUMENTS

1. All matters argued by plaintiff in its brief are properly before this Court.

In its complaint, plaintiff alleged that:

> Defendant has transacted business and is doing business in the State of Utah pursuant to the applicable provisions of the Utah "long-arm" statute, and is subject to the jurisdiction of the above-entitled court.

(Complaint, ¶ 8). In its brief to the trial court in opposition to defendant's motion to dismiss for lack of personal jurisdiction, plaintiff argued that three sections of the Utah long-arm statute, Utah Code Ann. § 78-27-24 (1977), are pertinent to this action. They are:

> (1) The transaction of any business within this State;
>
> (2) Contracting to supply goods and services in this State;
>
> (3) The causing of any injury within this State whether tortious or by breach of warranty

Utah Code Ann. § 78-27-24(1)-(3) (1977).

Defendant asserts in its brief to this Court that the issues on appeal must be confined narrowly to the pleadings (Respondent's Brief at 8). Defendant contends that the only subsection of the long-arm statute properly invoked by plaintiff is subsection (1) relating specifically to "transaction of business." This is unrealistically restrictive. While plaintiff used the phrase "transaction of business" in its complaint, it did so in a general and inclusive fashion, and referred to "relevant" provisions of the long-arm statute without specifying which provisions it considered those to be. Moreover, in its brief to the trial court, plaintiff fully argued the applicability of all three sections of the statute. (Plaintiff's Memorandum in Opposition to Motion to Quash Service of Process and/or to Dismiss at 3-5, 7-8). Thus, the rule that issues may not be raised for the first time on appeal is not violated in this case. The purposes of that rule are to prevent surprise and prejudice to the successful party below, and to promote judicial

economy by barring piecemeal presentation of legal theories. Neither of those purposes is in any way jeopardized by considering all of plaintiff's arguments on appeal in this case. Plaintiff is within the scope of its pleadings, and no issue is being presented to this Court that was not fully presented to the trial court. The defendant has not and cannot allege surprise or prejudice, nor can judicial economy be undermined by considering the applicability of all of the provisions of the long-arm statute in this action.

2. Defendant transacted business within the State of Utah.

The Utah Code defines "transaction of business" as follows:

> Activities of a nonresident person, his agents or representatives in this State which affect persons or businesses within the State of Utah.

Utah Code Ann. § 78-27-23 (1977). Plaintiff has claimed that defendant falls under the ambit of that provision both by virtue of an agent's 1975 visit to Utah in an effort to persuade plaintiff to purchase one of defendant's machines, and by sending technicians to Utah to install and later attempt to repair the machine in question. Defendant tries to avoid the clear implication of those activities within the State of Utah by saying that the initial visit to Utah by one of its representatives did not result in the purchase of a machine (Respondent's Brief at 3-4). Such an asserti is conclusory at best. While it may be true that the trip did not immediately bear fruit for defendant, it is undisputed that plainti sent samples of packaging materials and specifications to defendant

plant in Michigan in 1977, and the contract for the machine in question ensued. Plainly, plaintiff would not have invited a bid proposal from a manufacturer with whom it had no previous contact. Thus, it cannot be said that a salesman's visit to Utah in 1975 did not prompt the initiation of negotiations leading to the purchase of this machine in 1977.

Defendant claims that the installation and repair activities in Utah do not constitute transaction of business because they are not the activities "which give rise and/or result in appellant's claim" (Respondent's Brief at 9). Defendant makes this argument by asserting that installation and repair efforts were undertaken pursuant to an installation contract, while plaintiff has alleged a breach of a manufacturing contract. This argument depends on defendant's assertion that what is involved are two contracts, not one. That argument is simply unsupported by the facts. The document in question consists of four pages, all of which are marked "Dake Proposal No. 40247 (B)." (See attachment to complaint). Defendant's form Sales Agreement and the specifications for this particular machine are marked as pages 2 and 3 of that proposal. The Dake Installation Policy, which defendant contends is a separate contract, is marked page 4 of 4 in "Dake Proposal No. 40247(B)," and is signed by Lee S. Kihnke for Dake. That is the only place in the four-page proposal in which a signature appears.

The document in question, then, consists of four pages, all with the same proposal number and marked as pages 1 through 4

of 4. The document is signed once and only once--at the bottom of page 4. The document was drafted by the defendant. It is difficult to take seriously defendant's allegations that such a document is anything but a single, unified contract, or that defendant understood it as anything else. This cause of action arises out of that single contract, and activities undertaken pursuant to one of its provisions necessarily amount to "transaction of business" within the meaning of Utah Code Ann. § 78-27-23 (1977).

Defendant further contends that a single transaction or occurrence within the State of Utah cannot support jursidiction under subsection (1) of the long-arm statute (Respondent's Brief at 10). In support of that conclusion, defendant cites the concurrence of Justice Stewart in the case of Burt Drilling, Inc. v. Portadrill, 608 P.2d 244 (Utah 1980). In that concurring opinion, Justice Stewart observed that in the past, the Court had generally required more than a single act to sustain long-arm jurisdiction under the "transaction of business" provision. Therefore, Justice Stewart would have preferred the Court to base its exercise of jurisdiction on subsection (3), relating to the causing of injury by breach of warranty within the state. In citing the concurrence, however, defendant ignores the plurality opinion in that case, which squarely held that a single transaction by an out-of state manufacturer whose only activity in Utah was an attempt to repair a defective piece of equipment was sufficient to sustain jurisdiction within the meaning of subsections (1), (2) or (3). 608 P.2d at 247. Defendant's citation is to dicta in a concurrence. Plaintiff,

however, points to the square holding of the case in question, which fully supports its position.

3. Defendant contracted to supply services in Utah.

Defendant's brief did not dispute the proposition that it contracted to supply services within the State of Utah. Defendant argues, however, that the services were supplied pursuant to the installation contract, while the cause of action arises out of the manufacturing contract (Respondent's Brief at 10-11). Again, this argument is predicated on the two-contract theory. That theory, as noted previously, is without a basis in fact. In making such an argument, defendant is attempting to invoke the holding of Roskelley & Co. v. Lerco, Inc., 610 P.2d 1307 (Utah 1980). In that case, the plaintiff brought an action for a commission allegedly due on a sale of goods from a non-resident manufacturer to a Utah purchaser. All of the contacts relating to the alleged oral contract to pay the commission occurred out of state. This Court held jurisdiction improper, because the allegedly breached oral contract for a commission and the contract to furnish goods to a Utah manufacturer were completely separate. The two contracts were negotiated at different times, for different consideration, and among different parties. The facts of Roskelley, then, are quite unlike those in the present case. Moreover, the language of Roskelley itself directs the assumption of jurisdiction in a case such as this. The Roskelly Court said:

> Here, defendant's purposeful activities within this State consisted of its sale of equipment ultimately destined for installation in this

> State, and its entry into this State for the purpose of overseeing the installation of that equipment. These contacts would be sufficient for the establishment of limited jurisdiction if this litigation concerned an action for breach of warranty or negligence in installing the equipment. . . . but this plaintiff cannot avail himself of such contacts for the purpose of his claim on an entirely different contract.

610 P.2d at 1312 (emphasis supplied). Thus, defendant's effort to apply Roskelley favorably must fail. In that case, an out-of-state manufacturer had contracted to supply goods to a Utah business Just as in this case, defendant's employees entered the State of Utah only for the purpose of installation and service of the equipment involved. As this Court made a point of noting, those contacts would be sufficient to sustain jurisdiction in "an action f breach of warranty." Id. Defendant's case, then, argues for, not against, the exercise of jurisdiction in this case.

4. Defendant caused injury in the State of Utah within the meaning of the long-arm statute.

The final relevant provision of Utah's long-arm statute allows the assertion of jurisdiction over a nonresident who causes "any injury within this State whether tortious or by breach of warranty." Utah Code Ann. § 78-27-24(3)(1977). Defendant argues that this provision is inapplicable because plaintiff seeks rescission of the contract rather than monetary damages (Respondent's Brief at 14-15). The plain import of the statutory directive, however, is that Utah's courts should exercise jurisdiction over legally cognizable warranty or tort claims. The provisio

does not suggest that the particular type of remedy sought is important. Defendant cites no authority for the rather strange proposition that when a Utah court sits as a court of equity, its jurisdiction has a smaller geographical reach than when it sits as a court of law.* It is submitted that defendant has done absolutely nothing to negative the application of subsection (3) of the long-arm statute to this cause of action.

5. Defendant has not distinguished controlling Utah case law.

On March 4, 1980, after the trial court's granting of defendant's motion to dismiss for lack of personal jurisdiction, this court decided the case of Burt Drilling, Inc. v. Portadrill, 608 P.2d 244 (Utah 1980). The facts are virtually identical to those in this case. In Burt, a Utah corporation contacted a California manufacturer and arranged to purchase some well drilling equipment. The contact was initiated by the Utah plaintiff. It was negotiated

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* Defendant makes this argument somewhat more difficult to grasp by immediately abandoning it. It does so by citing Hydroswift Corp. v. Louie's Boats & Motors, Inc., 27 Utah 2d 233, 494 P.2d 532 (1972), for the proposition that the causing of financial injury within Utah will not support Utah's exercise of jurisdiction. That case, however, says no more than that an out-of-state act causing financial injury does not come under the purview of the long-arm statute merely because the aggrieved party is a Utahn, an argument plaintiff does not make. This argument is also inconsistent with the idea propounded by defendant that plaintiff is not seeking damages. Plaintiff again suggests that the reach of the long-arm statute depends on defendant's acts, not on the remedy sought by plaintiff.

without any representative of the defendant having set foot within the State of Utah. The machine was delivered not to Utah, but to Colorado. From there, it was taken first to New Mexico, where it broke, then finally to Utah, where it continued to malfunction. At that point, the defendant sent a repair crew to Utah in an unsuccessful effort to fix the machine. On those facts, this Court reversed a trial court's dismissal for lack of personal jurisdiction and remanded for trial.

Defendant attempts to distinguish the Burt case by saying that the record there indicated that the defendant was a nationwide corporation, which could reasonably be expected to defend suits in distant forums (Respondent's Brief at 20-21). While that may have been the case, it was not mentioned by the Court. In this case, evidence of the nationwide character of defendant's business appears in a form far more persuasive than any affidavit--the machine, manufactured in Michigan, was installed in plaintiff's plant in Sandy, Utah. Were defendant not a multi-state concern, it would not have been willing or able to make that transaction. Second, defendant claims that in Burt, defendant retained a security interest in the machinery, and that the existence of such an interest was crucial. The opinion, however, does not sustain that interpretation. While the Court alluded to the existence of the security interest, it saw that merely as evidence of the purposeful nature of the defendant's act. 608 P.2d at 247. The dissent in Burt undercuts this argument by pointing out that no agreement was ever filed in Utah or any other state, and that whatever form the document in

question took, it could have no legal status as a security agreement. 608 P.2d at 253. Plainly, then, that point was not dispositive in Burt.

6. Subjecting defendant to Utah's jurisdiction would not violate Due Process.

Defendant devotes much of its brief to the citation of cases from other jurisdictions which held, under facts similar to these, that the exercise of jurisdiction would offend due process notions embodied in the Fourteenth Amendment to the United State Constitution (Respondent's Brief at 15-18). Such cases are of doubtful value. The most recent one is fourteen years old. In few fields of law has evolution occurred as rapidly or continuously as in the expansion of in personam jurisdiction. Experience with long-arm statues has indicated that justice is well-served by interpreting them liberally. Therefore, it does defendant little good to point out that a Texas court denied jurisdiction in a similar fact situation in 1966 (Respondent's Brief at 18), or that the Fourth Circuit Court did so in 1956 (Respondent's Brief at 17). It is quite likely that this Court would have refused to exercise jurisdiction in the Burt Drilling case fifteen years ago.

In a companion case to Burt Drilling, Mallory Engineering, Inc. v. Ted R. Brown & Associates, No. 15530 & 15544 (Utah, March 6, 1980), this Court held that a nonresident supplier of goods could be subject to Utah jurisdiction when it manufactured "products for interstate distribution," and when the amount in controversy was sufficient to dissuade the nonresident from defaulting. (Slip Op.

at 4). Defendant attempts to distinguish Mallory by arguing that in that case, unlike this one, defendant had contracted to supply goods in the State of Utah (Respondent's Brief at 22). Here, the contract called for shipment "F.O.B. Dake's plant of manufacture." (See attachment to complaint). By that term, defendant was obliged to deliver the finished machine to an unspecified carrier for transportation to Utah. The fact that the "carrier" turned out to be a truck owned by plaintiff was not a material provision of the contract. If the mere fact that a contract called for F.O.B. shipment were sufficient to defeat a buyer's invocation of long-arm jurisdiction, the reach of such statutes would be drastically curtailed by the ubiquity of such terms.

III. SUMMARY AND CONCLUSION

This is an action for rescission of a contract to purchas a large packaging machine. The machine was to be manufactured at defendant's Grand Haven, Michigan, plant, for use at plantiff's Sandy, Utah facility. Pursuant to the purchase contract, the machine was installed under the supervision of factory-trained technicians that defendant sent to Utah from Michigan. The machine has never functioned properly, despite repair efforts made by workers sent from Michigan by the defendant. When efforts to resolve the dispute failed, this litigation ensued. The trial court dismissed the action for lack of personal jurisdiction over the defendant, and plaintiff took this appeal.

In its brief to this Court, plaintiff argued that a series of recent decisions on long-arm jurisdiction require a

reversal of the trial court's dismissal of this action. In response, defendant has made three major arguments. First, defendant has argued that there are two contracts between the parties in this case. They argue that all Utah contacts occurred pursuant to an installation contract, which it contends was properly performed, whereas this action arises out of an alleged breach of a separate manufacturing contract. As plaintiff has shown, both the manufacture and installation of the machine in question were undertaken pursuant to a four-page writing numbered pages one through four of four and signed only once, at the bottom of page four. Plainly, both parties contemplated that a single, unified contract governed their relationship.

Second, defendant has argued that the only issue properly before this Court is whether it "transacted business" within the meaning of subsection (1) of Utah's long-arm statute. Defendant premises this argument on a highly restrictive reading of the complaint. However, the applicability of three subsections of the long-arm statute was fully argued to the trial court.

Finally, defendant contends that the exercise of jurisdiction in this case would violate the due process provisions of the constitution. Defendant supports that argument by citing a number of relatively old cases from other jurisdictions that have so held. However, the concept of due process in relation to long-arm jurisdiction is hardly static. Decisions of other courts handed down between 15 and 25 years ago are of little relevance in

light of recent Utah case law directing the assumption of jurisdiction in cases factually indistinguishable from the present action.

For the foregoing reasons, this Court should reverse the lower court's dismissal of this action for lack of personal jurisdiction, and should remand the matter for trial on the merits.

Respectfully submitted this 3 day of December, 1980.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of December, 1980, I caused to be served upon Gifford W. Price and Lisa M. Pearson, of and for Callister, Green & Nebeker, attorneys for defendant-respondent, Kennecott Building, Suite 800, Salt Lake City, Utah 84133, two copies of the foregoing Reply Brief of Plaintiff-Appellant Deseret Company, by depositing the same in the U. S. Mail, postage prepaid.