

1980

Delivery Service And Transfer Company, A Utah Corporation v. Heiner Equipment & Supply Company, A Utah Corporation : Brief of Respondent And Cross Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Leonard W. Burningham; Attorney for Defendant and Appellant David E. West; Attorney for Respondent

Recommended Citation

Brief of Respondent, *Delivery Service and Transfer v. Heiner Equipment & Supply*, No. 17172 (Utah Supreme Court, 1980).
https://digitalcommons.law.byu.edu/uofu_sc2/2394

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
OF THE
STATE OF UTAH

DELIVERY SERVICE AND TRANSFER)
COMPANY, a Utah corporation,)

Plaintiff, Respondent)
and Cross-Appellant)

vs.)

Case No. 17172

HEINER EQUIPMENT & SUPPLY)
COMPANY, a Utah corporation)

Defendant and Appellant.)

BRIEF OF ~~RESPONDENT AND CROSS-APPELLANT~~

An appeal from a judgment of the
Third District Court of Salt Lake County,
the Hon. Homer F. Wilkinson, District Judge

ARMSTRONG, RAWLINGS, WEST
David E. West
1300 Walker Bank Building
Salt Lake City, Utah

Attorneys for Plaintiff
Respondent and Cross-Appellant

Leonard W. Burningham
411 East 100 South
Salt Lake City, Utah 84111

Attorneys for Defendant
and Appellant

F I

MAR

IN THE SUPREME COURT
OF THE
STATE OF UTAH

DELIVERY SERVICE AND TRANSFER)
COMPANY, a Utah corporation,)

Plaintiff, Respondent)
and Cross-Appellant)

vs.)

Case No. 17172

HEINER EQUIPMENT & SUPPLY)
COMPANY, a Utah corporation)

Defendant and Appellant.)

BRIEF OF RESPONDENT AND CROSS-APPELLANT

An appeal from a judgment of the
Third District Court of Salt Lake County,
the Hon. Homer F. Wilkinson, District Judge

ARMSTRONG, RAWLINGS, WEST & BROWN
David E. West
1300 Walker Bank Building
Salt Lake City, Utah 84111

Attorneys for Plaintiff,
Respondent and Cross-Appellant

Leonard W. Burningham
411 East 100 South
Salt Lake City, Utah 84111

Attorneys for Defendant
and Appellant

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF KIND OF CASE.....	1
DISPOSITION IN THE TRIAL COURT.....	1
RELIEF SOUGHT ON APPEAL.....	2
STATEMENT OF FACTS.....	2
ARGUMENT	
POINT I THE TRIAL COURT COMMITTED ERROR IN ORDERING THE DEFENDANT TO REPAIR THE CRANE RATHER THAN AWARDING A MONEY JUDGMENT.....	4
CONCLUSION.....	6

AUTHORITIES CITED

Polyglycoat Corporation vs. Holcomb, 591 P.2d 449.....	4
Randall vs. Tracy-Collins Trust Company, 6 Utah 2d 18, 305 P.2d 480.....	5
Restatement of Contracts, Section 384.....	5

IN THE SUPREME COURT
OF THE
STATE OF UTAH

DELIVERY SERVICE AND TRANSFER)
COMPANY, a Utah corporation,)

Plaintiff, Respondent)
and Cross-Appellant)

vs.)

Case No. 17172

HEINER EQUIPMENT & SUPPLY)
COMPANY, a Utah corporation)

Defendant and Appellant.)

BRIEF OF RESPONDENT AND CROSS-APPELLANT

STATEMENT OF KIND OF CASE

This is an action resulting from a contract to repair the transmission to a crane. Plaintiff, the owner of the crane, claimed that the repair work was not done in a workmanlike manner and brought suit to recover the amount of the repair bill which had been paid to the Defendant.

DISPOSITION IN THE TRIAL COURT

The case was tried to the court, sitting without a jury. The Court found that the crane's transmission was not repaired properly by the Defendant and that the Plaintiff received no benefit from the job; the Court then granted judgment in the nature of specific performance, ordering the

Defendant to repair the crane or in the alternative that it be repaired in another shop.

RELIEF SOUGHT ON APPEAL

Respondent and Cross-Appellant seeks to have the judgment modified on appeal. It is believed that the trial court committed manifest error in awarding specific performance. A money judgment is sought for a refund of the amount of the repair bill.

STATEMENT OF FACTS

Plaintiff, Delivery Service and Transfer Company (hereinafter referred to as "Delivery Service"), is a local trucking company and the owner of a crane which is the subject of this litigation. The transmission of the crane needed to be overhauled and it was taken to the Defendant, Heiner Equipment and Supply Company (hereinafter referred to as "Heiner"), for repair. The cost of the repair job was \$3,535.18, which was paid prior to the time the transmission was delivered back to Delivery Service.

After getting back the crane Plaintiff claimed that it had not been properly repaired, that it had bad oil leaks and was unuseable, and that several of the parts were missing (R 69-70). These allegations were denied by Heiner.

The matter was tried to the Court, and after hearing the testimony from conflicting witnesses the Court resolved

the factual issues in favor of Delivery Service and made the following findings (R-33);

4. After picking up the overhauled transmission and having the same reinstalled in the crane, it failed to function properly, particularly in that it leaked oil and had bad slippage.

5. The Court finds from the evidence presented that the transmission was not overhauled in a workmanlike manner; that it was not repaired properly; that the work was warranted by the Defendant; and that Plaintiff received no benefit from the amount that it paid to Defendant.

6. When Plaintiff picked up the crane transmission from the Defendant some of the parts were missing. Plaintiff was required to purchase new parts to replace the parts that were missing at a cost of \$1,479.94.

After having made the above findings the Court, rather than awarding Delivery Service the judgment it was seeking, ordered Heiner to repair the crane transmission within fifteen (15) days and to provide Delivery Service with a new warranty; in the event Heiner refused to make the repairs Delivery Service was ordered to take the transmission to another shop and then come back to Court for entry of a judgment for the cost of the repair (R-35, 36). The trial court also awarded Delivery Service a judgment for two-thirds (2/3) of the value of the missing parts (R-34, 35).

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED ERROR IN ORDERING THE DEFENDANT TO REPAIR THE CRANE RATHER THAN AWARDING A MONEY JUDGMENT

At this posture of the case the findings of fact of the trial court are unchallenged.^{1/} The findings state that the transmission was not overhauled in a workmanlike manner, that it was not repaired properly and that Plaintiff received no benefit from the amount that it paid to the Defendant.

Delivery Service sought relief in this action by way of rescission and restitution of the money it paid to Heiner. The general rule governing rescission is stated in Polyglycoat Corporation vs. Holcomb, (Utah 1979) 591 P.2d 449 as follows:

As a general proposition, a party to a contract has a right of rescission and an action for restitution as an alternative to an action for damages where there has been a material breach of the contract by the other party. What constitutes so serious a breach as to justify rescission is not easily reduced to precise statement, but certainly a failure of performance which "defeats the very object of the contract" or "[is] of such prime importance that the contract would not have been made if default in that particular had been contemplated" is a material failure.

^{1/} Heiner filed a Notice of Appeal on June 30, 1980. After obtaining numerous continuances in which to file a brief, the Appellant on January 29, 1981 filed a motion to withdraw the appeal which was promptly granted. Thus, the only matter before the Court is the Respondent's cross-appeal. The Respondent does not challenge the findings of fact by the trial court.

Applying the above to the instant case it is obvious that a material breach has occurred. See also Restatement of Contracts, Section 384; the illustration at page 720 is precisely on point:

A pays \$100 to B in return for the latter's promise to do an agreed service. B commits a total breach, rendering no performance whatever. A can get judgment for either compensatory damages, measured by the rules stated in §§327-346, or for the restitution of \$100; but he cannot get both remedies.

It is also fundamental that specific performance is a limited type of remedy and should only be awarded when there is no adequate remedy at law or where an award of damages would be inadequate. Randall vs. Tracy-Collins Trust Company, 6 Utah 2d 18, 305 P.2d 480.

In summary, Delivery Service claims that it is entitled to a money judgment of \$3,535.18 for the following reasons:

1. Rescission is clearly a proper remedy.
2. Specific performance is not a proper remedy.
3. Delivery Service has not elected specific performance as a remedy, even if it were proper.
4. No party to this action has ever sought specific performance.
5. Because of the time delays, Delivery Service doesn't want specific performance.

6. Specific performance is not in any event a practical remedy anyway because Heiner is no longer in business.^{2/}

CONCLUSION

Based upon the arguments and authorities as cited herein, Delivery Service, the Cross-Appellant, respectfully requests that the judgment be modified and that it be awarded an additional money judgment for \$3,535.18, plus interest from date of payment and costs.

Respectfully submitted,

ARMSTRONG, RAWLINGS, WEST & BROWN

David E. West
1300 Walker Bank Building
Salt Lake City, Utah 84111

Attorneys for Respondent and
Cross-Appellant

^{2/} Appellant's motion to withdraw its appeal on file herein alleges as a ground for the motion that Heiner was dissolved by operation of law on December 31, 1980.