

1999

Keith M. Jonsson v. Reed Bromley, Bromley Farms, a Utah Corporation, and Utah Valley Egg and Poultry, a Utah Corporation : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KEITH M. JONSSON,	:	
Plaintiff and	:	
Appellee	:	990970
vs.	:	Appeal No. 99070-CA
REED BROMLEY, BROMLEY FARMS,	:	District Court No. 970400247 CV
a Utah Corporation, and UTAH VALLEY	:	
EGG & POULTRY, a Utah	:	Priority No. 15
Corporation,	:	
Defendants and	:	
Appellants.	:	
	:	

BRIEF OF APPELLEE

Appeal from the October 13, 1999, Order and Judgment of the Honorable Gary D. Stott,
District Judge of the Fourth Judicial District Court, Utah County, Utah.

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Utah Court of Appeals

OCT 11 2000

Paulette Stagg
Clerk of the Court

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Plaintiff and	:	
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JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1999).

DETERMINATIVE RULES AND STATUTES

Issue 1. The pertinent statutory provisions governing the award of damages for a seller's breach, as occurred in this case, appear at Utah Code Ann. §§ 70A-2-711, -713, - 715 (1999). (Set forth verbatim in Appellant's Addendum 1).

Issue 2. The pertinent statutory provisions governing the propriety of awarding prejudgment interest appear at Utah Code Ann. §§ 15-1-1 (1999), set forth verbatim as follows:

15-1-1. Interest rates - Contracted rate - Legal rate.

(1) The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract.

(2) Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.

(3) Nothing in this section may be construed in any way to affect any penalty or interest charge that by law applies to delinquent or other taxes or to any contract or obligations made before May 14, 1981.

STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN LOWER COURT.

Defendants have appealed the trial court's Judgment, dated October 13, 1999, entered

after a bench trial, awarding Plaintiff, Keith M. Jonsson, the sum of \$46,400, plus prejudgment interest in the amount of \$13,533, and costs in the amount of \$600, for a total Judgment of \$60,533 plus post judgment interest.

B. STATEMENT OF FACTS.

1. On March 4, 1996, Plaintiff Keith Jonsson purchased from Defendants, a generator, electrical equipment and a feed truck (R. 353, at p.12:2-11), (Plaintiff's Exhibit 1).

2. Defendant Reed Bromley agreed with Plaintiff Keith Jonsson, that Mr. Jonsson could leave the generator and electrical equipment at the Bromley Farm in order to allow that Mr. Bromley's electrical power remain connected to egg processing equipment and chicken sheds, so Bromley could sell the egg processing equipment; and also, to avoid turning off the electrical power to a residence owned by Reed Bromley's father (R. 302 at p. 23:22-25, p. 24:1-20).

3. In October of 1996, Defendant Reed Bromley falsely represented to Plaintiff Keith Jonsson that the generator and switching unit had been taken to Salt Lake City to be serviced (R. 272, Memorandum Decision).

4. Defendant Reed Bromley had actually sold the generator and switching equipment to a third party; and after Plaintiff Keith Jonsson had discovered that Defendant Reed Bromley had sold the equipment, Reed Bromley represented to Mr. Jonsson that if Mr. Jonsson would find out the replacement cost of the generator and switching equipment, he, Reed Bromley would replace such equipment that he had admitted to Mr. Jonsson, he had

wrongfully sold (R. 353 at p. 82:15-25, at p. 83, p. 1-2, R. 353 at p. 147:23-24, R. 353 at p. 149:20-25).

5. Plaintiff Keith Jonsson determined that the replacement value of the generator and switching equipment would be approximately Thirty-Six Thousand (\$36,000) to Forty-Six Thousand (\$46,000) Dollars, and relayed this information to Defendant Bromley, who thereafter refused to talk to Keith Jonsson (R. 353 at p. 150:5-7).

6. Defendant Reed Bromley sold the equipment he had previously sold to Plaintiff Keith Jonsson in order to protect real property that his company owned, which subsequently sold for 2.2 Million Dollars (R. 353 at pages 150, 151:1-21).

7. Richard Mitchell, an electrician with a degree in math and physics, who had been engaged in the business of an electrician since 1994, and had continuously provided maintenance services to Defendant Bromley Farms for approximately 30 years, was familiar with the generator. He was employed by Plaintiff Keith Jonsson to disconnect and move the generator (R. 353 at pages 19-21).

8. Richard Mitchell testified that the generator had a value of between Twenty-Three or Twenty-Four Thousand (\$23,000 through \$24,000) Dollars; and that the switching equipment had a value of Six to Eight Thousand (\$6,000 through \$8,000) Dollars (R. 353 at p. 28).

9. Plaintiff Keith Jonsson paid Richard Mitchell Twenty-Five Hundred (\$2,500) Dollars to disconnect and move the switching equipment (R. 353 at p. 78:3-15).

10. Jim Yates, who had been in the business of selling equipment for approximately

30 years, testified that the generator was worth between Twenty-Five and Thirty-Five Thousand (\$25,000 through \$35,000) Dollars, based on the price of a new generator and the hours that the subject generator had on it. (R. 353 at p. 117:16-23).

11. Mr. Yates testified that he did not know what the switching equipment was worth (R. 353 at p. 113).

SUMMARY OF ARGUMENT

ARGUMENT I: The trial court made findings as to Plaintiff's damages. The trial court utilized U.C.A. §§ 70A-2-711, 713 and 715 (1999), as the basis for its measure of damages and made findings that Plaintiff was entitled to a return of his purchase price, (70A-2-711), the market value of the equipment (70A-2-713) and incidental damages (70A-2-715). The trial court's findings as to the foregoing damages were supported by the evidence, and were proper under the requirements of the applicable Uniform Commercial Code Sections.

ARGUMENT II: The trial court's findings as to the market value of the generator and switching equipment was determined in accordance with fixed "rules of evidence and appropriate standards of value," which entitled Plaintiff to prejudgment interest. Further, the award of prejudgment interest in accordance with the policy considerations, which are the basis for an award of prejudgment interest, awarded Plaintiff damages for the delay in the money owed to him and prevented the Defendants from being benefited by failing to pay the money that they knew was owed to Plaintiff in November of 1996.

ARGUMENT

I. THE TRIAL COURT CORRECTLY CALCULATED THE PLAINTIFF'S DAMAGES

Appellants argue that the trial court miscalculated the damages under U C A § § 70A-2-711, 713, 715. Such is not the case. U C A § 70A-2-711(1) (b) provides as follows:

(1) Where the seller fails to make delivery or repudiate or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, an with respect to the whole if the breach goes to the whole contract (Section 70A-2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid (emphasis added)

(b) recover damages for nondelivery as provided in this chapter (Section 70A-2-713)

U C A § 70A-2-713(1) provides as follows:

(1) Subject to the provisions of this chapter with respect to proof of market price (Section 70A-2-723), the measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this chapter (Section 70A-2-715), but less expenses saved in consequence of the seller's breach

U C A § 70A-2-715 (1) provides as follows:

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach

The trial court applying the above provisions of the Uniform Commercial Code stated in it's

Memorandum Decision

The Code specifically provides for compensatory remedies for aggrieved buyers in U C A § 70A-2-711(1) “[T]he buyer may . . . in

addition to recovering so much of the price as has been paid . . . (b) recover damages for nondelivery as provided in this chapter (Section 70A-2-713) ”

Utah Code Annotated § 70A-2-713 then provides for expectational damages in the event of a seller’s breach

Subject to the provisions of this chapter with respect to proof of market price (section 70A-2-723), the *measure of damages for nondelivery or repudiated by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this chapter (Section 70A-2-715), but less expenses saved in consequence of the seller’s breach*

Incidental damages, pursuant to U C A § 70A-2-715(1) “include *expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any reasonable expense incident to the delay or other breach.*”

According to the UCC, Mr Jonsson is entitled to recover (1) the amount he paid Defendants under the contract for the goods he did not receive, (2) the difference between the market and contract prices for the goods, and (3) incidental damages he has incurred as a result of his performance under the breached contract (Memorandum Decision, R 269-270)

The trial court, according to the exact wording of the statute, awarded Plaintiff Keith Jonsson the \$5,900 that he had paid to Defendants for the purchase of the generator and switching equipment and calculated the Judgment as follows

Accordingly, Plaintiff Keith Jonsson is entitled to a judgment against the Defendants, Reed Bromley and Utah Valley Egg & Poultry, Inc , jointly and severally in the amount of Forty-Six Thousand Four Hundred (\$46,400) Dollars (which is the total of \$5,900 (amount paid less value of feed truck) + \$38,000 (value of generator and switching unit) + \$2,500 (sum paid to Richard Mitchell), together with interest thereon at the legal rate of 10% per annum from November 14, 1996 through the present, pursuant to

Section 15-1-(2) Utah Code Annotated (\$13,533), together with Plaintiff's costs in the amount of Six Hundred (\$600) Dollars (R. 292, Findings of Fact and Conclusions of Law, page 12).

Defendant's argument that the trial court made a mathematical error is simply contrary to the trial court's calculations as set forth in the trial court's Findings of Fact and Conclusions of Law. Pursuant to the Uniform Commercial Code, Plaintiff was entitled to a return of the money that he paid to the Defendants (\$5,900) + the fair market value of the generator and switching equipment (\$38,000) + his incidental damages (\$2,500) for a total of Forty-Six Thousand Four Hundred (\$46,400) Dollars, to which was added the prejudgment interest of \$13,533, and Plaintiff's costs in the amount of \$600 for a total judgment of Sixty Thousand Five Hundred Thirty-Three (\$60,533) Dollars.

II. THE TRIAL COURT CORRECTLY AWARDED PREJUDGMENT INTEREST ON THE PLAINTIFF'S DAMAGES

Defendants argue that the trial court erred in awarding prejudgment interest because Plaintiff's experts varied in their opinion as to the value of the generator and electrical equipment, and the Court therefore had to make a judgment call on the damages that were not fixed at the time of the breach. An examination of the facts indicate that Defendant's position is not well-taken.

Richard Mitchell, an electrician, testified that the electrical switching equipment had a value of Six to Eight Thousand (\$6,000 to \$8,000) Dollars; and the trial court found that the value of the switching equipment was Eight Thousand (\$8,000) Dollars.

Additionally, Richard Mitchell opined that the value of the generator was between Twenty-Three and Twenty-Four Thousand (\$23,000 to \$24,000) Dollars.

Jim Yates, an equipment dealer, who had been engaged in the business of selling equipment

for approximately 30 years, testified that the market value of the generator was between Twenty-Five and Thirty-Five Thousand (\$25,000 to \$35,000) Dollars. Jim Yates gave no opinion as to the value of the switching equipment. Based upon combined testimonies of Mr. Mitchell and Mr. Yates, the trial court found the value of the generator to be Thirty Thousand (\$30,000) Dollars, and the switching equipment to have a value of Eight Thousand (\$8,000) Dollars. It should also be noted that Mr. Jonsson, after consulting several dealers, advised Defendants at the time of the breach that it would cost between Thirty-Six (\$36,000) and Forty-Six Thousand (\$46,000) Dollars to replace the generator and switching equipment (R. 353 at p. 150).

Prejudgment interest should be awarded when the damages can be ascertained by “fixed rules of evidence and known standards of value, ” Fell v. Union Pac. Ry. Co., 88 P. 1003 (Utah 1907) In accordance with this standard and based upon a narrow range of properly presented market value evidence, the trial court found the value of the generator and switching equipment to be Thirty-Eight Thousand (\$38,000) Dollars, and Plaintiff’s consequential damages to be Twenty-Five Hundred (\$2,500) Dollars, and applying U.C.A. §§ 70A-2-711, 713, awarded a total judgment of Forty-Six Thousand Four Hundred (\$46,400) Dollars, plus prejudgment interest from November 1996, through the date of judgment (\$13,533). It is critical to note at trial, Defendants did not put on any testimony as to the value of the generator and switching equipment; and therefore failed to present any evidence requiring the trial court to exercise its discretion, as between the parties, in determining damages. Apparently, Defendants were content to have Mr. Yates testify as to value because as Mr. Yates testified, he was “friends” with both parties which made it difficult for him to testify (R. 353 at p. 122:14-25).

Defendants argue that it is appropriate to deny prejudgment interest if the amount of the

damages are not known at the time of the breach, because the breaching party cannot tender the amount the amount owed. That is not the situation in this case. The trial court found that Defendant Reed Bromley had wrongfully sold the generator and switching equipment to a third party having previously misrepresented to Plaintiff Keith Jonsson, that the equipment purchased by Plaintiff was being serviced in Salt Lake City (R. 272, Memorandum Decision). Upon Defendant Reed Bromley admitting that he had wrongfully sold the equipment, he told Plaintiff Keith Jonsson to find a comparable generator, and that he would replace the generator and switching equipment that he had wrongfully sold. Based upon this representation, Mr. Jonsson verified with several dealers, that the generator and switching equipment had a value of between Thirty-Six Thousand (\$36,000) and Forty-Six Thousand (\$46,000) Dollars, which information, Mr. Jonsson relayed to Mr. Bromley. Accordingly, contrary to Defendant's position, that he did not know how much to tender to Plaintiff Keith Jonsson, the evidence is clear that in November of 1996, Defendant was very much aware of the fact that the damages were approximately Forty-Six Thousand (\$46,000) Dollars, which is very close to the principal judgment of \$46,400 that the trial court awarded Plaintiff.

In footnote 2 of Appellant's Brief (quoting from Castillo v. Atlanta Cas. Co., 939 P.2d 1204 (Utah Ct. App. 1997), Appellant states:

This Court will add prejudgment interest to a trial court's judgment only when the market value of the loss is clearly determined by the testimony of an expert witness, not the discretionary judgment of the trial judge. Castillo, 939 P.2d at 1206. The decision in Castillo furthers the policy of compensating the injured party for a delay in payment that could be measured by facts and figures before trial. The decision lies in contrast to the case at hand, where the trial judge chose to weigh the opinions of others and then apply his own best judgment in determining the market value of the loss. Thus, Mr. Bromley could not have known before trial what amount he owed after his breach, and should not be punished for not paying when the

amount was not ascertainable or calculable (Appellant's Brief, Page 12)

Defendant's assertion as set forth above, that he did not know the amount of the damages is contrary to the evidence which establishes that Defendant Reed Bromley knew the amount of the damages as early as November 1996

This Court in Castillo v Atlanta Cas Co., 939 P 2d 1204 at 1212 (Utah App 1997), referenced above, stated

In Utah, prejudgment interest "represents an amount awarded as damages due to the opposing party's delay in tendering the amount owing under an obligation" *L & A Drywall, Inc .v. Whitmore Constr. Co.*, 608 P 2d 626, 629 (Utah 1980) *Accord Hermes Assocs. v. Park's Sportsman*, 813 P 2d 1221, 1224 (Utah Ct App 1991), *Vasels v. LoGuidice*, 740 P 2d 1375, 1378 (Utah Ct App 1987), 22 Am Jur 2d *Damages* § 82 (1988) *See also Trail Mountain Coal Co. v. Utah Div. of State Lands & Forestry*, 921 P 2d 1365, 1370 (Utah 1996) (stating that, as matter of public policy, prejudgment interest compensates party for depreciating value of amount owed and deters intentional withholding of money owed), *cert. denied*, --- U S ----, 117 S Ct 1017, 136 L Ed 2d 894 (1997) It may be awarded where "damage is complete, the loss can be measured by facts and figures, and the amount of loss is fixed as of a particular time" *Andreason v. Aetna Cas. Sur. Co.*, 848 P 2d 171, 177 (Utah Ct App 1993)

In November of 1996, Defendant Reed Bromley knew that Plaintiff Keith Jonsson's damages were between Thirty-Six (\$36,000) and Forty-Six (\$46,000) Thousand Dollars, after Mr Jonsson had determined the value of the generator and switching equipment that Mr Bromley had agreed to replace

Defendant Bromley chose to breach the contract and wrongfully sell equipment previously sold to Plaintiff Jonsson in order further Defendant Bromley's own economic interests Mr Bromley needed the money that he received from selling the equipment to a third party to preserve an asset

that was subsequently sold for 2.2 Million Dollars. In accordance with the policy set forth in Castillo, “as a matter of public policy, prejudgment interest compensates party for depreciating value of amount owed and deters intentional withholding of money owed” (Castillo at page 1212).

The narrow range of testimony from which the trial court determined the value of the generator and electrical equipment was very close to what Plaintiff Keith Jonsson had advised Defendant Reed Bromley were his damages, as early as November 1996, both of which values were based on market values.

Under the facts of this case, Defendants should not be rewarded for intentionally withholding money from Plaintiff and Plaintiff should not be further damaged for the depreciating amount owed him, because Plaintiff’s experts testified to a slight variation in market value.

Accordingly, the trial court under the facts of this case and in accordance with the policy considerations set forth in Castillo, properly awarded Plaintiff Keith Jonsson prejudgment interest to compensate him for the depreciating value of the amount owed, and avoided benefiting Defendants for “intentionally withholding of money owed.”

CONCLUSION

The trial court correctly applied its findings in accordance with U.C.A. §§ 70A-2-711 through 715, in determining Plaintiff’s damages.

The trial court correctly awarded prejudgment interest under the facts of this case, and the Judgment in the amount of Sixty Thousand, Five Hundred, Thirty-Three (\$60,533) Dollars, should be affirmed.

DATED this 11th day of October, 2000.

PERKINS, SCHWOBE & McLACHLAN

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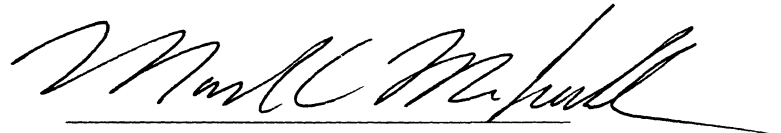
MARK C. MCLACHLAN

Attorney for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 11 day of October, 2000, I caused to be hand delivered
two true and correct copies of the foregoing BRIEF OF APPELLEE, to:

J. THOMAS BECKETT
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