1956

Coombs and Company of Ogden, Inc. v. James E. Reed dba James E. Reed Company : Brief of Appellant

Utah Supreme Court

George E. Bridwell : Attorney for Appellant;

IN THE SUPREME COURT
of the
STATE OF UTAH

COOMBS and COMPANY of OGDEN, INC.

Plaintiff and Respondent,

—vs.—

JAMES E. REED, d/b/a JAMES E. REED COMPANY,

Defendant and Appellant.

Case No. 8506

BRIEF OF APPELLANT

GEORGE E. BRIDWELL
Attorney for Appellant

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STATEMENT OF FACTS

Plaintiff and Defendant were uranium stock brokers. Defendant agreed to sell a certain stock to plaintiff for $2,760.00.

Defendant breached the agreement and admits it.

When said stock order was given and received, it was known by both parties that said stock was for resale and was promised to customers of plaintiff.

Plaintiff, upon failing to receive delivery, refunded all of its customers money, and to the date of trial, no customer had instituted legal proceedings of any nature against plaintiff.

Plaintiff, if it had received said shares would have made the sum of $240.00, only: R-24, lines 24 to 28. There is no dispute as to that.

Plaintiff entered suit, claiming entitlement to the sum of $6,000.00, less the amount due for the stock. That was the basis upon which the trial court awarded Judgment to plaintiff. The $6,000.00 figure is the admitted value of the stock at the date delivery should have been made, there having been an increase in market value.

Plaintiffs are no longer in business, and were not at date of trial, their Broker's license having been previously suspended.

Plaintiff purchased no stock on the open market to replace what was not delivered.

The only money loss to plaintiff was its commissions it would have received, to-wit: $240.00.

The trial court, in effect, ruled that it is none of a defaulter's business what a claimant's actual loss is, but that market value at date of breach is the sole determiner of damages.

The novel question thus raised by this case is this:

What is the purpose of a law suit? To get rich or to get whole?

POINT I.

THE PROPER MEASURE OF DAMAGES IN A CONTRACT ACTION IS MONEY LOSS SUFFERED.

ARGUMENT

The plaintiff, had the contract been fully performed as agreed, would have been entitled to and would have received $240.00, only, R-29, Line 2.

This sum Defendant is desirous of paying and so stated at the trial of the cause.

Plaintiff did not replace any of the stock not delivered. R-28.

Plaintiff was not sued by any of its customers to whom the stock was promised and it refunded all of their money in February, 1955. See interrogatories and answers, numbers 2, 3 and 5.

It is felt to be elemental that actual money loss, only, should be the measure of damages.

As was stated in *Oakland California Towel Company v. Sivilis,* 126 Pac. 2d 651:

> "The only matter to be considered is the detriment suffered or the benefit lost as a result of the breach."

And in *Noble v. Tweedy,* 203 Pac. 2d 778, the Court held:

> "The law seeks to put the complaining party in the same position as if the contract had been performed."

In the case of *Texas Company v. Pensacola Maritime Corporation,* 279 Fed. 19, 24 ALR 1336, there was an almost identical fact situation as in this case. The defendant agreed to sell certain quantities of oil to plaintiff at a specified price, the oil to be re-sold to two others.

Defendant did not perform. The two sub-vendees did not demand performance from plaintiff, nor did plaintiff replace the oil at the market value.

Plaintiff sued, praying as damages the difference between contract price, the contract breached, and market value at date of breach.

The court rejected this theory of entitlement, saying:

> "The purpose of the law is to award to the plaintiff the actual damages he has sustained. The rule that, where a contract for the sale of goods is breached, the measure of damages is the difference between the market price and contract price, is only a rule for the ascertainment of damages which have been suffered, and;
>
> "WHERE THE EVIDENCE SHOWS THAT THE ACTUAL DAMAGES HAVE BEEN LESS THAN SUCH DIFFERENCE, THE RECOVERY SHOULD BE LIMITED TO SUCH ACTUAL DAMAGES." (Emphasis supplied.)

The Court, in the above cases cited the following with approval, all standing for the same proposition:

> *Foss v. Heineman,* 144 Wis. 146, 128 N.N. 881;
> *Cincinnati Siemens-Lungren Gas Co. v. Western S.C. Gas Company,* 152 U.S. 200, 38 L. Ed. 2411, 14 Sup. Ct. Rep. 523;

3 *Williston, Contr.* Sec. 1386;
Isaacson v. Crean, 165 N.Y. Supp. 218;
Wertheim v. Chicontimi Pulp Company, 16 Com. Cas. 297.

In another case wherein the factual situation was identical with the one at bar the court recognized the right of a purchaser of coal to recover not only the profits which would have been realized on a resale, but also the amount of damages sustained by a subpurchaser by reason of the breach of contract, but held that such damages could not be recovered where the contract between the vendee and his sub-vendee would require construction in order to determine the vendee's liability for damages, and such liability had not been determined.

Maryland Coal and Coke Company v. Quemahoning Coal Company, 4th C.C.A. 176 Fed. 303.

In the case at bar, each individual contract with each of plaintiff's sub-vendees would have to be interpreted in order to determine what plaintiff's liability is, if any. Such inquiry would involve in its scope such things as mutual cancellation, recission, estoppel, waiver, laches. Such inquiry was not had in this action and could not be had without protracted litigation.

Further, it is doubtful, speculative, and a very remote possibility that any suits by plaintiff's sub-vendees will ever be instituted, as plaintiff has been out of business since November, 1955, and all money refunded by plaintiff in the month of February, 1955.

CONCLUSION

The rule that the measure of damages in a breach of contract action is the difference between contract price and market value at date of breach should only be applied in the absence of proof of other damages.

Where actual damages are proved to be less, that is the measure that should be awarded.

This court should not announce that a litigant may get rich in a lawsuit, but only that he should recover his loss caused by the breach.

Respectfully submitted,

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Mailed two true copies hereof to Plaintiff-Respondent's attorney, Richard W. Campbell, 2324 Adams Ave., Ogden, Utah, this ..... day of ....., 1956.

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