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

Utah Supreme Court

Case No. 8506

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

Respondents Brief

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STATEMENT OF FACTS

Plaintiff and defendant were uranium stock brokers, doing business in Utah. Defendant was engaged in underwriting the sale of Wyoming Uranium Corporation stock. Defendant agreed to sell 100,000 shares of this stock to plaintiff, and pursuant thereto, plaintiff sold all 100,000 shares to plaintiff's customers at a price of 3c per share, or $3,000.00, and collected this money from the customers. (R-26). Plaintiff and defendant contracted the sale and purchase of this stock as principals. (Plaintiff's Exhibit 2). The contract price for the 100,000 shares was $2,760.00, which amount was tendered to defendant by plaintiff and accepted by defendant. (R-35).

Subsequently, defendant breached the contract of sale and refused to deliver the 100,000 shares of stock. (R-39). Plaintiff did not purchase another 100,000 shares on the market because it was not in a financial position to advance $3,000 of its own money for the purchase of the stock at 6c per share. (R-52). Plaintiff then refunded its customers money and entered this action against the defendant. To the date of the trial, no action had been instituted against plaintiff by these customers, and no customer had released plaintiff of liability for non-delivery of this stock. (R-51).

Upon trial of the action, the trial court, Hon. David T. Lewis presiding, found plaintiff had suffered damages as a result of defendant's failure to deliver the stock in the amount of $3,240.00, which represents the difference between the contract price and the market price at the date delivery should have been made.

POINT 1

THE PROPER MEASURE OF DAMAGES IN AN ACTION FOR FAILURE TO DELIVER UNDER A CONTRACT OF SALE, IS THE DIFFERENCE BETWEEN CONTRACT PRICE AND MARKET PRICE AT THE TIME DELIVERY SHOULD HAVE BEEN MADE.

ARGUMENT

The Uniform Sales Act, Section 67, provides the measure of damages to be applied in cases where the seller fails to deliver the contracted goods. This section of the Uniform Sales Act is embodied in Utah law

by Section 60-5-5, U. C. A. 1953, which provides as follows:

> Action for failing to deliver goods (1) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for nondelivery.
>
> (2) The measure of damages is the loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract.
>
> (3) Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

It will be noted that sub. (2) provides a general measure of damages that is to apply in the usual situation. Sub. (3) of this section provides for the measure of damages that will prevail in a specific situation, where there is an *available market.* Clearly, in a situation meeting the requirements of sub. (3), the measure of damages specified therein will prevail over the general provision in sub. (2). This rule was announced in the case of *Goldfarb v. Campe Corp.,* 164 NY Supp. 583, wherein the court stated:

> "That although, in an "action for failing to de-

liver goods," subdivision 2 of Section 148 provides that "the measure of damages is the loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract," this is applicable to goods for which "there is an available market," as for the goods here in controversy, only upon taking into account the provisions of subdivision 3, by which the buyer of such goods is entitled to receive *at least* the difference between contract price and the market price at the time and place of delivery, and may recover a greater sum by pleading and proving special circumstances showing that his actual proximate loss was greater than that difference." (italics supplied.)"

Norwood Lumber Corporation v. McKean, et al, 3rd C.C.A., 153 F. 2nd 753, involving damages for failure to deliver, announced the same rule:

> "The measures of damages for failure to deliver goods contracted for is set out in the Uniform Sales Act which is law in Pennsylvania. Damages are given, under the statute, for the loss "directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract." If there is an available market for the goods the rule as to damages is crystallized into a rule that recovery is the difference between the contract price and the market price."

Therefore, under Utah law, and the Uniform Sales Act, since the goods in question are shares of a corporate stock actively traded on the market (R-39), it is sub. (3) that will provide the measure of damages in this case. Sub. (3) expressly provides for the establishment of damages greater than the difference between

contract price and market price, but makes no provision that damages can be less than that amount.

The clear portent of this section is that when a seller fails to deliver, and there is an available market for the goods, the measure of damages can not be less than the difference between contract price and market price at the date the goods should have been delivered.

Brightwater Paper Co. v. Monadnock Paper Mills, (Mass.) 68 F. Supp. 714, was a case very similar to this one. In that case the plaintiff agreed to turn over all its orders for paper from a certain company to defendant, and defendant agreed to deliver the paper so ordered. Plaintiff was to receive a commission of 3 to 5% on these sales. The defendant refused delivery, and plaintiff sued for the difference between contract and market price, while defendant contended that plaintiff's only damages were the lost commissions. The court said:

> "(13) In the light of the construction put upon the agreements here, viz., that plaintiff's obligation was to turn over to the defendant all of Courier's No. 4 bond business and the defendant agreed to become the plaintiff's supplier for Courier's and other customers' requirements, it would appear that the plaintiff intended to put the paper to a limited and less advantageous use than selling it in the open market, although there is nothing in the main contract which specifically limits the plaintiff in its use of the paper to be purchased. It could sell it in the open market if it saw fit. There is authority to the effect that in such a case the buyer's damages would be limited to his actual loss. Cf Williston on Contracts (Rev.

Ed.) Sec. 1386, p. 3877. It is doubtful that Sec. 67 of the Uniform Sales Act was considered in deciding these cases. Cf Isaacson v. Crean, Sup. 165 N. Y. S. S. 218. Section 56 (3) of the Mass. Sales Act, Gen. Laws, c. 106, Sec. 56 (Sec. 67 of the Uniform Sales Act), which provides that a buyer's "measure of damages, in the absence of special circumstances showing proximate damages of a *greater* amount, shall be the difference between the contract price and the market or current price of the goods at the time when they ought to have been delivered . . . (emphasis mine), compels the conclusion here that the measure of damages under Count 1 is not the loss of commissions but the difference between the contract and the market price."

Another case with similar facts decided under the Uniform Sales Act is *Iron Trade Products Co. v. Wilkoff Co.,* Penn., 116 A 150. Defendant sold to plaintiff, and plaintiff contracted for resale. Defendant refused to deliver, and plaintiff sued, claiming the difference between contract price and market price, while defendant said the lost profits of the resale were the only damage. The court quoted Sub. (3) of the Sales Act, and then said:

"Defendant contends the rule of damages above stated does not apply here because of plaintiff's contract for resale, and that in no event can plaintiff recover more than would have been its profits thereon, . . . Defendant also cites Foss v. Heineman, 144 Wis. 146, 128 N. W. 881, which, while not in all respects parallel, may seem to support its contention. Even so, we can not follow it, in view of our own rule as above stated. Plaintiff's vendee was not a party to the con-

tract in suit, nor mentioned therein; and, while the rails in qusestion were seemingly intended for him, other like rails would have filled his contract. The fact that a vendee has resold the goods contracted for is of no moment unless made a part of the contract; for, if not, he is entitled to the benefit of his bargain, regardless of the disposition he may intend to make of the property involved . . . "

Of like effect is the decision of *Goldfarb v. Campe Corp.,* supra, wherein the court held that the defendant could not prove circumstances reducing damages below the differences between contract price and market price, saying:

> "That Section 148, subds. 2 and 3, do not authorize the renouncing vendor to plead or prove "special circumstances" showing that the proximate damages (e.g., the loss which the vendee necessarily sustained) was less than the difference between the contract price and market price, even though, before the date for delivery arrived, the vendor offered to do that which would enable the vendee to have full and prompt performance and avoid any loss at all."

If plaintiff had purchased replacement stock on the market following defendant's refusal to deliver, there can be no question but that plaintiff's damages would be the difference between contract price and market price paid. The fact that plaintiff did not so purchase is of no moment, if there is an available market. For cases to this effect, we submit:

Saxe v. Penokee Lumber Co. 54 *N. E.* 14
Lady Ester Lingerie Corporation v. Goldstein 21 So. 2nd 398
Goldfarb v. Campe Corp., Supra

Defendant claims the result of the trial court's ruling is to make litigants rich, rather than to make them whole. We submit this is not true. In the contract of sale that existed between plaintiff and defendant, plaintiff had the right to have delivered 100,000 shares for $2760. This was a valuable right, a contract right, existing solely in plaintiff corporation, and not in plaintiff's customers or any other persons or parties. At the time of his refusal, defendant was obligated to deliver 100,000 shares then worth $6000 for only $2760. For reasons not apparent from the record, defendant refused delivery, thereby saving $3,240 by refusing to deliver the stock. Now defendant claims that plaintiff's rights under this contract were worth only the sum of $240 lost commissions. If defendant's contention were accepted, the effect would be to make defendant $3,000 richer as a reward for his *own* breach of contract.

Defendant cites the case of *Texas Company v. Pensacola Maritime Corporation,* 279 Fed. 19, 24 ALR 1336, as authority for his contention. We submit that this case is no authority for that contention inasmuch as the case was not decided under the provisions of the Uniform Sales Act. The same objection applies to the case of *Maryland Coal and Coke Company v. Quemahoning Coal Company,* 4th C. C. A. 176 Fed. 303, which was decided prior to enactment of the Uniform Sales Act.

CONCLUSION

The measure of damages applied by the trial court in this case is correct. In any case where an available market for the goods in question is shown, damages

could not be less than the difference between contract price and market price. This result is both logical and just, because any lesser measure will deprive plaintiff of the benefit of his bargain.

The damage plaintiff has sustained by reason of defendant's failure to deliver the stock is in the amount of $3,240, and the judgment of the trial court should be affirmed.

Respectfully submitted,
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Mailed two true copies hereof to Defendant-Appellant's attorney, George E. Bridwell, Suite 506 Judge Building, Salt Lake City, Utah, this 30 day of August, 1956.

Richard C. Campbell