1982

Harley Jepsen and Lima Jepsen v. Mark Tenhoeve et al : Brief of Appellant on Appeal

Utah Supreme Court

W> Scott Barrett; Barrett & Mathews;
James C. Jenkins; Malouf, Malouf & Jenkins;

SUPREME COURT OF THE STATE OF UTAH

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HARLEY JEPSEN and LIMA JEPSEN, Plaintiff/Appellant.	)	
vs.	)	Case No. 18090
MARK TENHOEVE, STEVE BROWN, and INTERWEST PACIFIC CORP., a Utah corporation, Defendant/Appellee	)	

APPELLANT'S BRIEF ON APPEAL

Appeal from the Decision of the District Court of Cache County, State of Utah, the Honorable VeNoy F. Christofferson, Judge, setting aside Jury Verdict in Favor of the Plaintiffs and Against Defendant Mark Tenhoeve.

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vs.

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STATEMENT OF NATURE OF CASE

Plaintiffs filed this action against two Individual and one Corporation Defendant in May of 1980 asking for damages for breach of agreement against all three Defendants and asking further for damages from the sale of their dairy herd and young stock. Plaintiffs alleged that the Individual Defendants induced them to sell their dairy herd, upon which they depended for their livelihood. The Individual Defendants also induced Plaintiffs to sell their young stock for the sum of $14,000.00, which $14,000.00 was appropriated by the Defendants.

While all Defendants appeared by the same counsel, the Answer of Defendant Brown was later stricken by the Court for his failure to appear for his deposition. Prior to trial,

Defendants' attorneys withdrew their representation as attorneys for Brown and Interwest Pacific Corporation and the Corporation and Brown were not represented at the trial.

DISPOSITION IN LOWER COURT

This case was heard before the Honorable VeNoy Christofferson and a jury on August 25th and 26th, 1981.

The Jury returned a Verdict against Mark Tenhoeve for $4,000.00 and against the Defendant Interwest Pacific Corp. for $40,000.00 on the 26th of August, 1981. This Verdict was not entered in the Judgment Book and, on September 18, 1981, the Court ordered the Verdict and the Judgment entered nunc pro tunc as of August 26, 1981.

On the 28th of September, 1981, Defendant's counsel mailed and filed a Memorandum in Support of Defendant Tenhoeve's Motion for Dismissal and Directed Verdict or Alternatively, Judgment Notwithstanding the Verdict. This Memorandum was not supported by Motion nor had any Motion previously been made for a Directed Verdict. Plaintiff's counsel filed a Memorandum of Points and Authorities in Support of a Motion to Strike on the ground that the Defendant's Memorandum was not timely.

On the 6th day of October, 1981, Defendant's counsel filed a Motion to Vacate the Judgment on the ground that it was rendered before a decision was made on the Motion to Dismiss. Plaintiffs had no opportunity to respond since on the 7th day of October the Court entered an Order Vacating the Judgment.

Plaintiff's counsel filed a Memorandum of Points and Authorities in Opposition to the Motion to Dismiss or for a Directed Verdict on the 8th of October, 1981.

On the 30th day of October, 1981, the Court rendered a Memorandum Decision granting the Defendant's Motion to Dismiss as to Tenhoeve. Thereafter, the Court entered an Order of Dismissal as to Tenhoeve and vacated the jury verdict against Defendant Tenhoeve. From this Memorandum Decision and order, the Plaintiffs have appealed.

RELIEF SOUGHT ON APPEAL

Appellants seek to have the decision of the lower court reversed wherein, in spite of the jury verdict against the Defendant Tenhoeve, the Court dismissed the action amd vacated the Verdict as to Tenhoeve.

STATEMENT OF FACTS

Prior to September, 1979, Defendants Brown and Tenhoeve contacted the Jepsens about selling their farm at Mink Creek, Idaho. The proposal was that Defendants Brown and Tenhoeve would exchange the farm with a Mr. Balls for other property. (R.T.65) The Jepsens were induced to reduce their price by $15,000.00 which Defendants Brown and Tenhoeve represented would be their real estate commission. (R.T. 4) Tenhoeve was a licensed real estate broker working for Countryside Properties. (R.T. 106)

Due to the fact that Balls did not want the dairy herd, Tenhoeve induced the Jepsens to sell the herd. (R.T. 59-60) They were reliant upon the herd for their income, grossing over $8,000.00 per month of which $4,000.00 was gross profit used primarily to pay mortgage expenses.

Tenhoeve and Brown signed an earnest money agreement in their individual capacity although the name of Interwest Pacific Corporation appeared at the top of the document. (Exhibit 1)

It later appeared that Balls did not want the property and an agreement was drafted by the Defendants' attorney whereby the Jepsens would sell to Interwest Pacific Corporation. The nature of the corporation was not explained to them and they supposed at all times that Tenhoeve and Brown were the purchasers. (R.T. 68) Although preliminary drafts were viewed by Jepsens' attorneys, the final document containing considerable changes of substance and importance to the Jepsens was signed in Defendants' office at 7:00 p.m. when Jepsens' counsel was out of town. Thereafter, and within 6 weeks, Tenhoeve induced the Plaintiffs to sell their young stock for $14,000.00 and then induced the FHA to endorse the check over to Defendants. (R.T. 57) Thus, by this device, the Defendants regained a substantial portion of the $20,000.00 downpayment.

At the time the contracts were entered into, all Defendants, including Tenhoeve, knew that Interwest Pacific could not perform on the contract unless it resold the property by the time

a $110,000.00 payment became due in April of 1980. The corporation had no way of making that payment except by resell of the property. (R.T. L03) Tenhoeve also testified that he was not a licensed real estate broker for Idaho, where the property was located, (R.T. 106) but denied that the way the sale was set up was a gimmick to avoid the Defendant's lack of an Idaho license. The substance of the transaction, however, indicates very clearly Interwest, through Brown and Tenhoeve, entered into the agreement to purchase only with the idea of resale. Such a device would not have been necessary if the Defendant Tenhoeve had been licensed in Idaho.

Shortly after the contract was executed, Tenhoeve tried to sell some of the Jepsen equipment but was prevented from doing so by Mr. Jepsen. (R.T. 98-99)

Although the final draft of the agreement executed by the Jepsens at 7:00 p.m. in the absence of their counsel, provided for the release of the young stock and some hay for the downpayment, the original documents did not so provide. (Plaintiff's Exhibit 2, 3) Further, the bill of sale which was supposed to have gone into escrow provided that nothing, by way of real or personal property, would be released to the Defendant until the full purchase price was paid. (Plaintiff's Exhibit 5)

Within six weeks of the final agreement, the Defendants decided, in early January, 1980, to turn the property back to

the Jepsens. (R. T. 102) This was in spite of the fact that they had until April to make the first payment of $110,000.00. (R. T. 93)

Tenhoeve admitted receiving a letter dated February 27, 1980, alleging liability on the part of himself and Brown and the real estate firm of Country Side Properties. However, Tenhoeve made no response to the letter (R.T. 110) (Defendant's Exhibit 2)

ARGUMENT

I. THE COURT ERRED IN VACATING THE VERDICT OF THE JURY AS TO TENHOEVE WHEN NO PROPER MOTION FOR A DIRECTED VERDICT WAS MADE.

Rule 50(b) clearly provides that....."not later than 10 days after the entry of judgment a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have a judgment entered in accordance with his motion for directed verdict..."

This rule is designed to help streamline and implement procedural niceties that are necessary to insure that a judgment notwithstanding the verdict does not violate a party's right to a jury trial. The failure of a defendant to move for a directed verdict at the close of all the evidence as required by 50(b) bars later consideration of its motion for a judgment notwithstanding the verdict. (Guglielmo vs. Scotti & Sons 58 FRD 413(DC. PA. 1973)

In the instant case, all Defendant Tenhoeve did was make a motion to dismiss at the conclusion of Plaintiff's evidence. There never was a motion for a directed verdict at the close of all the evidence.

II. IN ANY EVENT, DEFENDANT'S MOTION FOR DISMISSAL, WHETHER OR NOT IT BE CONSIDERED A MOTION FOR A DIRECTED VERDICT, CAME TOO LATE.

Rule 58(a) provides that..."Unless the court otherwise directs, and subject to the provisions of Rule 54(b), judgment upon the verdict of jury shall be forthwith signed by the clerk and filed...."

The Court made no direction either written or oral that the Verdict should not be entered. "In the absence of a contrary direction by the court, it is the duty of the clerk to enter judgment forthwith on a general verdict, and judgment should not be postponed until the amount of costs can be determined." Danzig vs. Virgin Isle Hotel 278 F2d 580 (CA 3rd 1960))

Since the clerk's office had not entered the Verdict and since it should have been done so as a matter of course, the Judgment presented to the Court was simply a direction to the clerk to enter the Verdict nunc pro tunc as of the date it was rendered. It is therefore submitted that the Court should not have set aside that Verdict ex parte without notice to Plaintiff's counsel.

Further, the Court specifically stated after the Verdict had been rendered, that counsel for the Defendant Tenhoeve had fifteen days in which to file any further motions. Nothing was filed until September 28, 1981, more than a month after the Jury rendered its Verdict. Even at that time no motion was filed, but only a memorandum.

III. THE COURT ERRED IN SETTING ASIDE THE VERDICT AGAINST TENHOEVE SINCE THERE WAS MORE THAN SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT AGAINST HIM.

"Judgment notwithstanding the verdict cannot be granted where there are factual issues for the jury to decide and it cannot be said that no reasonable man would hold as the jury did." Williams vs. Capital Transit Co. 215 F2d 487 (DC. APP 1954)

There is abundant evidence that Tenhoeve was acting as a principal. He was sued in his individual capacity. He did not object to a letter directed to him contending that he was individually liable (R.T. 110) He didn't object to the insurance being in his personal name. (R.T. 142) (Exhibit 8) He knew that the corporation was defunct and that it could not perform at the time it entered into the agreements with the Jepsen's. (R.T. 103) He also signed the Earnest Money Receipt in his individual capacity. (Exhibit 1) (R.T. 105)

The above were all facts from which the Jury could easily have concluded that there was individual liability on the part of Mr. Tenhoeve. He also acted as a real estate salesman and told the Jepsens that they were reducing the asking price $15,000.00 to take care of his commission. (R.T. 4)

Further, Mrs. Jepsen testified that they did not know they were dealing with a corporation as the purchaser since she thought Interwest Pacific was some sort of financing agency. (R.T. 24) She testified, under oath, that she always thought that Brown and Tenhoeve were the Buyers. (R.T. 24) The jury apparently believed at least some of the factual assertions set forth above and the Court, therefore, erred in vacating the Verdict against Tenhoeve.

"A party is not entitled to judgment notwithstanding the verdict or to a new trial on the ground that the verdict was against the weight of the evidence unless there can be but one reasonable conclusion without weighing the credibility of the witnesses." Eisenberg vs. Smith 263 F2d 827 (CA 3rd 1959)

There is also considerable evidence that Plaintiffs were induced to sell their dairy herd and suffered considerable damages thereby by the representations of Tenhoeve. The evidence clearly showed that Tenhoeve was acting as an independent real estate agent, as well as individually, and as a

corporate officer, and the jury could very easily have found personal liability based on those uncontradicted facts.

"A trial court is justified in pre-empting a jury's verdict only when it has no foundation in fact and the court, in the exercise of judicial discretion, would be required to set it aside. To be insufficient to support a verdict, the evidence must all be one way from which only one reasonable inference can be drawn. U.S. vs. Hess 341 F2d 444 (CA 10 1965)

"It is only where there is complete absence of probative facts to support the conclusion reached by the jury that the verdict may be ignored." Plainter's Manufacturing vs. Protection Mutual Insurance 380 F2d 869 (CA 5 1967)

"A judgment notwithstanding the verdict should not be granted unless the evidence, together with all inferences that can be drawn therefrom, is so one-sided that reasonable men could not disagree on the verdict. This means that a judgment for defendant notwithstanding the verdict can be affirmed only if the evidence viewed in a light most favorable to the plaintiff is such that all reasonable men would agree that defendant was not liable." O'Neil vs. W. R. Grace & Co. 410 F2d 908 (CA 5 1969)

"In ruling on a motion for a directed verdict, or a judgment notwithstanding the verdict, the court must take the view of the evidence most favorable to the party against

whom the motion is made, and determine whether the evidence is legally sufficient to take the case to the jury or to support the verdict." Wilson vs. Nu-Car Carriers, Inc. 256 F2d 332 (CA 3 1958)

IV. CONCLUSION

As appears from the record, no proper Motion for a Directed Verdict was ever made. Even the written Memorandum, filed more than a month after the return of the Verdict, was only a memorandum in support of a motion which was never made orally or in writing. Further, there was an abundance of evidence to support the Verdict against Mr. Tenhoeve. There is no legal requirement known to counsel which would require that the Verdict against Mr. Tenhoeve and that against the corporation be in exactly the same amounts.

IT IS THEREFOR RESPECTFULLY SUBMITTED that the Court's Order setting Aside the Verdict should be reversed and the Jury Verdict against Mr. Tenhoeve be reinstated.

DATED this 26 day of February, 1982.

W. Scott Barrett
Attorney for Plaintiff/
Appellant

MAILING CERTIFICATE

I hereby certify that a true and accurate copy of the foregong Appellant's Brief on Appeal was mailed to James C. Jenkins, Attorney for Defendant/Appellee, at 150 East 200 North, Suite D, Logan, Utah 84321, this 26 day of February, 1982.

Winona Perry