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Malouf Investment Co. v. Roger Boyer et al : Brief of Plaintiff-Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

MALOUF INVESTMENT COMPANY,)
 Plaintiff-Appellant,) Case No. 18107
 vs.)
ROGER BOYER, KEM C. GARDNER)
and J. P. KOCH, INC., a)
corporation,)
 Defendants,)
J. P. KOCH, INC.,)
 Respondent.)

BRIEF OF PLAINTIFF-APPELLANT

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and J. P. KOCH, INC., a)
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 Defendants,)
J. P. KOCH, INC.,)
 Respondent.)

NATURE OF THE CASE

This is an appeal from an Order of Dismissal granted upon motion of respondent, J. P. Koch, Inc., before answering or otherwise pleading to appellant's Complaint. Plaintiff's Complaint alleges breach of express and implied warranties of Koch in designing and installing heating and air-conditioning in a building for Boyer and Gardner, and acquired by plaintiff through an exchange of properties. The defendant, Koch, claims lack of privity between plaintiff and Koch as an absolute defense.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the Order of Dismissal.

STATEMENT OF FACTS

Respondent, J. P. Koch, Inc. was the heating and air-conditioning subcontractor hired by J. Ron Stacey Construction, who in turn was hired by the defendants, Roger Boyer and Kem C. Gardner, for construction on an office building located at the Salt Lake International Center known as Lindbergh Plaza (I). Subsequent to Boyer's and Gardner's having taken possession of the building and occupancy by their tenants, on or about November 3, 1977, the plaintiff-appellant acquired the building in a real estate trade. The plaintiff brought this action claiming breach of warranty and consequential damages against Boyer and Gardner upon their written warranty against any construction defects for a period of one year from closing and against Koch for breach of express and implied warranties in designing, supplying materials, installing and attempting to repair the heating and air-conditioning system.

Plaintiff, Malouf, alleged that it assumed possession by its tenants and immediately was confronted with problems association with the heating and air-conditioning system which services the entire building through an interconnected system. Boyer, Gardner and Koch were immediately and continually, within the ensuing year from closing, advised of the defects in the heating and air-conditioning system and of the numerous complaints of tenants concerning the failure of the system to maintain any reasonable degree of uniform temperature conducive

to human occupancy; that the system operated too cold in winter and too warm in summer and could not be regulated after repeated attempts by Koch, and that Koch continued its efforts to remedy the defects until about May 1980 and thereafter Koch refused to further attempt to remedy the defects. Plaintiff further alleges that it had engaged other heating and air-conditioning consultants who have determined and advised that the system as installed was defective in design, material and installation and have further advised that the old system supplied by Koch and warranted by Boyer and Gardner be removed and replaced with a new system. Accordingly, Malouf has submitted and received bids of \$160,000.00 and \$110,000.00 and has accepted the low bid, under which about \$50,000.00 had been expended to date of filing of the Complaint; and that Malouf expended of \$30,290.15 before accepting the new bid in an effort to render the system operable. The Complaint also alleged that the performance of Koch in designing, supplying and attempting to repair the system was not workmanlike, and not in compliance with the express and implied warranty to provide an operable, reasonably efficient heating and air-conditioning system.

Before answering, Koch moved to dismiss "upon the grounds that the plaintiff's Complaint fails to state a claim against said defendant upon which relief can be granted". The issue argued before the Third District Court was whether privity of contract is a necessary element in plaintiff's claim against

Koch. The Court granted the motion to dismiss.

ARGUMENT

POINT I

A UTAH STATUTE GRANTS THE PLAINTIFF A RIGHT OF ACTION UPON THE WARRANTY AS A THIRD-PARTY BENEFICIARY AND NO PRIVITY IS REQUIRED.

A Utah statute enacted in 1977 provides:
(of)

"70A-2-318. Third-party beneficiaries or warranties express or implied. A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends."

The Utah statute is broader in scope than the Uniform Commercial Code in that the latter restricts beneficiaries to persons in the household as follows:

"§2-318. Third Party Beneficiaries of Warranties Express or Implied. A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section."

A 1961 annotation in 75 ALR 2d 39 at page 69 indicates that the statute itself provides privity if the plaintiff is a party bearing a relationship to the seller within the wording of the statute. We quote from the annotation:

"§11. Effect of statutes.

In some jurisdictions, statutes providing for warranties which accompany sales state that such warranties run not only in favor of the buyer but also in favor of persons bearing a particular relationship

to the buyer. If a jurisdiction whose statute so provides is one which applies a strict requirement of privity in a breach of warranty suit arising out of product-caused injury, the injured person, if he was not himself the buyer of the product, may seek to establish the existence between himself and the buyer of a relationship of the kind to which the statute refers."

The defendant cited to the trial court the case of Daughtry v. Jet Aeration Co., 592 P.2d 631 (Wash. 1979) contending that the Washington court considered the same statute as 70A-2-318, Utah Code Annotated as amended in 1977. However, the Washington statute 62A-2-318 contained in the Washington Uniform Commercial Code extends the warranty "to any natural person who is in the family or household of his buyer or who is a guest in his home". This limitation is not contained in the Utah provision which excludes the above-quoted limitation of the Washington statute, and as such was not pertinent to the Daughtry decision and was mentioned only in the dissent opinion to indicate the trend of public policy toward the requirement of privity. Daughtry had sued Jet alleging a breach of warranty in the failure of a home sewage system manufactured by Jet. Daughtry engaged Seltviet to obtain and install a sewage treatment system. Seltviet acquired the equipment from Jet's distributor, installed the system and charged Daughtry for installation and a mark-up on the cost of the equipment. The appellate court held that privity of contract was lacking between Jet and Daughtry and was a necessary element. However, the majority did not construe the statute since the Washington statute applies to personal injuries and is not

applicable to property damage. The dissent urged the elimination of the privity requirement in absence of statute relating to property loss or damage, citing these reasons among others:

(1) There should be an extension of the strict liability rule of Section 402A Restatement (Second) of Torts to apply to property damage and economic loss.

(2) The Washington Statute RCW 62A.2-318, relating to personal injuries eliminates the requirement of privity:

"Thus the notion of privity is tacitly rejected in this section and nowhere in the code is privity expressly made a prerequisite to recovery for breach of warranty."

(3) The official comment to the Uniform Commercial Code 2-318 states that it was not intended to confine the causes of action of a buyer and is to serve as a guideline for the case law to eliminate the requirement of privity in other appropriate circumstances.

Our Utah statute, in not restricting 2-318 to personal injuries, appears to have accomplished by statute that which the official comment to the Uniform Commercial Code 2-318 suggested could be accomplished by case law.

The Daughtry case, upon which the trial court apparently relied, at the representation of the defendant that the Washington statute was identical to Utah's and that the Washington court expressly required privity under the statute, is the only case cited by the defendant to overcome the application of 70A-2-318 Utah Code Annotated to the plaintiff's claim. The review of the

Daughtry case above shows that the Washington court was not in fact dealing with 2-318 of the Uniform Commercial Code nor was that provision identical to Utah's 70A-318.

POINT II

THE REQUIREMENT OF PRIVITY IS DIMINISHING.

An annotation in 16 ALR 3d 683 at page 687 summarizes the demise of the requirement of privity as follows:

"[a] The 'citadel of privity' appears to have been all but razed, at least those parts of its walls which encompassed the action for personal injury caused by the defective product, and it seems to be almost as well established that the same is true as to the cases where the defective product causes injury to other property. Indeed, with the obsolescence of the privity concept as to actions for injuries of these kinds, the old distinctions between warranty and tort actions appear also to be on their way out, actions of both types being subsumed under the newly recognized, or at least newly named, action for strict liability in tort."

This Court in *Ernest W. Hahn, Inc. v Armco Steel Co.*, 601 P.2d 152, adopted the Restatement of Law of Torts, Section 402A against a manufacturer of steel joists used in a shopping mall whose roof collapsed causing property damage.

While the element of "danger" is not so great in the failure of a heating and air-conditioning system as in the case of a collapsing roof, yet the loss of use of the property by reason of failure of the heating and air-conditioning system leads to comparable commercial loss. This court reviewed the history of Strict Products Liability and Breach of Implied Warranty in *Hahn*, and quoted from the California case of *Greenman v. Yuba*

Power Products, Inc., (1963) 59 Cal. 2d 57, 377 P.2d 897:

" we fastened strict liability on a manufacturer who placed on the market a defective product even though both privity and notice of breach of warranty were lacking."

POINT III

KOCH WAS A "SELLER" WITHIN THE DEFINITION OF THE UNIFORM COMMERCIAL CODE.

Koch as the contractor providing and installing an air-conditioning system is a seller bound by the provisions of 70A-2-315 which provides:

"70A-2-315. Implied warranty-fitness for particular purpose. Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose."

This Court construed this section in affirming that the installer of an air cooler for a jewelry store was a seller subject to a provision in 81-1-15 UCA 1943 which was substantially the same as 70A-2-315, in Carver v. Denn, 117 U 180, 214 P.2d 118. The Court held that the contractor could not avoid liability on the grounds that he was an "installer" rather than a "seller". We quote in part from Comment 3 of the opinion.

"We believe the activities of the plaintiff amounted to considerably more than those of a mere installer. It is true that he did the installation work, and that he was called in to give an estimate on what the installation would cost. But in his estimate he included the cost of all the equipment to be used in the installation and he provided and sold all of the equipment, presumably at a profit, which the defendant agreed to purchase"

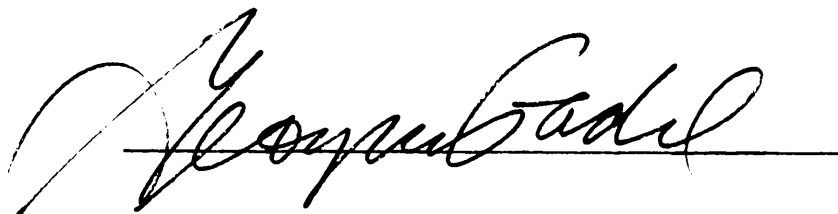
We fail to see how the plaintiff can be the seller for the purpose of receiving the profits from the transaction and then successfully establish himself a mere installer for the purpose of avoiding the responsibilities of a seller."

In view of the Utah statutes, 70A-2-315 and 318, it would seem unnecessary to cite other Utah cases on the issue of privity, where Koch is deemed a seller.

CONCLUSION

This Court should reverse the order dismissing the Complaint as against Koch and remand the cause to the trial court for further proceedings.

Respectfully,

A handwritten signature in black ink, appearing to read "Joseph B. Adair", written over a horizontal line.