

1957

William C. Moore & Co. v. Delfino Sanchez et al : Brief of Respondent

Utah Supreme Court

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Concurrence

In the
Supreme Court of the State of Utah

WILLIAM C. MOORE & COMPANY,
a corporation,
Plaintiff and Respondent,

v.

DELFINO SANCHEZ,
Defendant and Appellant.

AND

WILLIAM C. MOORE & COMPANY,
a corporation,
Plaintiff and Respondent,

v.

ILIFF GARDNER,
Defendant and Appellant.

FILED

APR 18 1957

Clerk, Supreme Court, Utah
Case No.
8607

Case No.
8608

RESPONDENT'S BRIEF

GRANT H. BAGLEY and
GRANT MACFARLANE, JR., for
VAN COTT BAGLEY,
CORNWALL & McCARTHY,
*Attorneys for Plaintiff
and Respondent.*

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In the
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WILLIAM C. MOORE & COMPANY,
a corporation,

Plaintiff and Respondent,

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DELFINO SANCHEZ,

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Case No.
8607

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8608

ILIFF GARDNER,

Defendant and Appellant.

RESPONDENT'S BRIEF

STATEMENT OF CASE

Respondent makes no objection to Appellants' consolidation of the above cases. The issues of law and the pleadings in the two cases are identical, except for an insignifi-

cant difference in dollars and dates. We will consider the two cases as one, except where evidence is dealt with.

The letter "R" refers to pages of the record on appeal; "SR" refers to pages of the supplemental record; "DS" refers to pages of the deposition of defendant Sanchez, and "DG" refers to the pages of the deposition of defendant Gardner.

STATEMENT OF FACTS

Appellants' statement of facts is inaccurate and unnecessarily involved.

The complaint alleged that the defendant executed an order in writing, requesting the plaintiff to sell to the defendant nursery stock; that by the terms of the order the plaintiff promised to pay a stipulated sum for the nursery stock, plus shipping charges within five days after shipment and receipt of the stock; that the plaintiff accepted the order, and delivered the nursery stock to a common carrier in Missouri with directions to transport it to Utah, and there surrender it to the defendant; that the nursery stock duly arrived in Utah, and was surrendered to the defendant, and that the defendant failed to pay for the stock. The complaint then stated that the order contained a promise to pay collection costs and expenses, and a reasonable attorney's fee if the account should be placed with an attorney for collection; that defendant's account was placed in the hands of an attorney for collection, and that \$75.00 was a reasonable sum to be allowed the plaintiff for attorney's fees (R. 1, 2).

The answers of the defendants were identical except for dates and figures. Three numbered defenses were interposed. The first was that the complaint did not state a cause of action. The second set up that the plaintiff was a foreign corporation, and has not qualified to do business in Utah, but was conducting business in this State as though it were fully qualified. The third consisted of admissions and denials of parts of the complaint, and also certain affirmative allegations. The only allegations in the complaint that were controverted were those relating to the contents of the order and the reasonableness of the attorney's fee. (We are aware that defendant denies the allegations in Paragraphs 1 and 2 of the complaint, but in each instance this denial is nullified by an affirmative allegation). Interwoven among the admissions, denials and allegations of the third defense are some generalizations with respect to the quality of the stock and representations made at the time the orders were taken (R. 3, 4, 5). These allegations will be considered further at a later point in this brief.

The plaintiff moved to strike the second defense from the defendants' answer upon the ground that it did not state facts sufficient to constitute a defense (R. 7). A hearing was had upon this motion, during which certain facts were admitted by appellants' attorney (SR. 2-12). The motion to strike was granted (R. 9).

Thereafter, plaintiff moved the court for a summary judgment in its favor on the ground that no genuine issue of fact was involved (R. 10). The motion was based upon the pleadings, the order of the court striking the second defense, and parts of the deposition of the defendants (R.

10). The defendants did not appear either in person or by attorney at the hearing on the motion (R. 12).

STATEMENT OF POINTS RELIED ON

POINT I.

THE SALE OF THE NURSERY STOCK WAS A TRANSACTION IN INTERSTATE COMMERCE AND IS NOT AFFECTED BY THE STATUTE RELATING TO FOREIGN CORPORATIONS DOING BUSINESS IN UTAH.

POINT II.

THERE WAS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND PLAINTIFF WAS ENTITLED TO A JUDGMENT AS A MATTER OF LAW.

ARGUMENT

POINT I.

THE SALE OF THE NURSERY STOCK WAS A TRANSACTION IN INTERSTATE COMMERCE AND IS NOT AFFECTED BY THE STATUTE RELATING TO FOREIGN CORPORATIONS DOING BUSINESS IN UTAH.

The second defense which was stricken asserted that the contract sued upon was void, because the plaintiff, foreign corporation, was doing business in Utah without

having complied with the provisions of Sections 1 to 3, Chapter 8, Title 16, U. C. A., 1953. These sections provide in effect that every foreign corporation *before doing any business within this State* shall file certain documents in the Office of the County Clerk. Any foreign corporation *doing business within this State* and failing to comply with the statute cannot maintain any action in the courts of this State *on any contract, agreement or transaction made or entered into in Utah* by such corporation. Such contract, agreement or transaction is void as to the foreign corporation, but enforceable against it.

It is the contention of respondent that the statute referred to has no application to the transaction sued upon for the reason that in selling the nursery stock the plaintiff was engaged in interstate commerce. This statute makes void only contracts made or entered into in the State of Utah. The contract sued upon was not made or entered into in the State of Utah, but was made and entered into in a foreign state. The record is plain and uncontroverted to the effect that the order for the nursery stock was signed by the defendant in Utah and transmitted to the plaintiff in New York (R. 1-5; SR. 4-6; DS; DG.). The order provided that it should become a binding contract only after its receipt at the home office of the seller and when signed or approved by an executive of the seller, also that "this sale is made and is to be performed in the State of New York" (Ex. A. See SR. 5). The nursery stock was delivered to a common carrier outside of the State of Utah with instructions to transport it to the defendant and deliver it to him in Utah (SR. 6). The stock was received

by the defendant from the common carrier, and was planted by him (DS. 4, 5; DG. 14-16).

Both the decisions of this court and of the Supreme Court of the United States have held that the transaction involved in the case at bar constitutes interstate commerce and is not and cannot be made invalid or unenforceable by a state statute which makes void any contract made in Utah by a foreign corporation doing business in this State without a license.

In *Advance-Rumely Thresher Co., Inc. v. Stohl*, 7 Utah 124, 283 Pac. 731, the question involved was whether the sale of a threshing machine was a transaction in interstate commerce. The seller was a foreign corporation which had not complied with the laws of Utah relating to foreign corporations doing business in this State. The order for the machinery was solicited by a representative of the seller and was signed by the buyer in Utah. The order was then transmitted to the seller in Indiana. The order provided that it would not be binding upon the seller until accepted by it at its office in Indiana. The machinery was shipped from Indiana to Utah and there delivered to the buyer. A representative of the seller came to Utah to assemble the machine and put it in working condition. Upon this state of facts, this court held:

“From this evidence we are convinced the transaction in suit is an interstate one. The order was signed in Utah, sent to the Idaho branch office, and accepted by the company in Indiana. *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 5 S. Ct. 739, 28 1 Ed. 1137. We are also satisfied that the work of setting up the machinery by experts of vendor and

the adjusting of the same in order to make it work satisfactorily, although performed in this state, did not make the transaction an intrastate one as distinguished from interstate. The question is a federal one, and we are bound by the decisions of the Supreme Court of the United States. Defendant cites and relies on the case of *Browning v. City of Waycross*, 233 U. S. 16, 34 S. Ct. 578, 58 L. Ed. 828, but, since the decision in that case, the Supreme Court of the United States has fully settled the matter in the case of *York Mfg Co. v. Colley*, 247 U. S. 21, 38 S. Ct. 430, 62 L. Ed. 963, 11 A. L. R. 611, distinguishing the *Browning* Case. It was there held, citing the headnote, as follows:

“‘A provision in a contract of sale of an artificial ice plant by which the foreign corporate seller agreed to furnish an engineer who should assemble and erect the machinery at the point of destination, and should make a practical efficiency test before complete delivery, is relevant and appropriate to the interstate sale of the machinery, and, therefore, does not justify the courts of the state to which the machinery was shipped in refusing to enforce payment of the purchase price, on the theory that the corporation was doing local business in the state without having first secured the permit made by a state statute a condition precedent to the right to sue in the local courts.’

“The facts in the instant case bring it fully within the decision of *York Mfg. Co. v. Colley*, supra. Other cases in point are *Pfaudler Co. v. Westphal*, 190 Wis. 486, 209 N. W 700; *Kaw Boiler Works Co. v. Interstate Refineries, Inc.*, 118 Kan. 693, 236 P. 654.

“The mere fact that notes and mortgages were executed in Utah does not take the transaction out of interstate commerce any more than if cash had

been paid instead of the notes given. The execution of these documents is an incident to the original sale *Mergenthaler Linotype Co. v. Spokesman Pub. Co.* 127 Or. 196, 270 P. 519. The transaction involved in this case being an interstate one, the plaintiff is entitled to maintain its action notwithstanding it has never complied with the laws of the state with respect to foreign corporations doing business within the state. *Sioux Remedy Co. v Cope*, 235 U. S. 197, 35 S. Ct. 57, 59 L. Ed. 193."

To the same effect are *Miller Brewing Company v. Capitol Distributing Company*, 94 Utah 43, 72 P. 2d 1056; *Kansas City Wholesale Grocery Company v. Weber Packing Corp.*, 94 Utah 414, 73 P. 2d 1272; *Riley Stoker Corp. v. State Tax Commission*, 3 Utah 2d 164, 280 P. 2d 967.

As this court has pointed out, the decisions of the Supreme Court of the United States are controlling upon the question of what transactions constitute interstate commerce. That court has repeatedly decided that a transaction such as was had between the plaintiff and defendant in this case constitutes interstate commerce, and that the Commerce Clause of the Federal Constitution prohibits the several states from imposing any burdens thereon, or denying a party to such transaction the right to enforce the contract in the state courts.

In *International Textbook Co. v. Pigg*, 217 U. S. 91 30 Sup. Ct. 481, 54 L. Ed. 678, the plaintiff conducted a correspondence school in Pennsylvania. It employed solicitors in Kansas to procure students in Kansas to subscribe to the course. The student executed in Kansas an order for the textbooks and courses of instruction, which order was

sent by mail to the plaintiff's office in Pennsylvania. The courses of study, the textbooks, and paraphernalia were then shipped by the plaintiff from Pennsylvania to Kansas by common carrier. The plaintiff's solicitors were paid a fixed salary and commission, and they collected from the students the tuition fees for the course of study. Kansas had a statute similar to our own statutes above cited, which required foreign corporations before doing business in Kansas to file certain documents and obtain a license. Like the Utah statute, the Kansas statute provided that a non-complying foreign corporation could not maintain any action in any of the courts of Kansas on any contract made by the foreign corporation who had not complied with the statute.

The plaintiff brought suit in a State court of Kansas to collect the tuition fee from a student who had received and used the course of instruction, but who refused to pay upon the ground that the plaintiff had not complied with the above mentioned Kansas statute. The Supreme Court held that the contract between the plaintiff and defendant was part and parcel of an interstate transaction, that the Kansas statute imposed an unlawful burden upon such interstate transaction, and expressly decided that the attempt of Kansas to deny plaintiff access to its courts for the enforcement of the contract was a violation of the Federal Constitution. The court said:

"It is the established doctrine of this court that a State may not, in any form or under any guise, directly burden the prosecution of interstate business. But such a burden is imposed when the corporation of another State, lawfully engaged in interstate commerce, is required, as a condition of its

right to prosecute its business in Kansas, to make and file a Statement setting forth certain facts which the State, confessedly, could not control by legislation. It results that the provision as to the Statement mentioned in §1283 must fall before the Constitution of the United States, and with it—according to the established rules of statutory construction—must fall that part of the same section which provides that the obtaining of the certificate of the Secretary of State that such Statement has been properly made shall be a condition precedent to the right of the plaintiff to maintain an action in the courts of Kansas. * * *

The *International Textbook case* has been followed and approved in so many cases that it would require pages of this brief to cite.

We do not concede that there is any possibility of the defendants' counsel being able to sustain his sweeping claim that the plaintiff has been extensively engaged in business in Utah. The point is that it is immaterial whether the plaintiff was engaged in business in Utah without a license. Regardless of its activities in Utah outside of the transactions with the defendants, the Constitution of the United States requires that those transactions be upheld.

Defendants' counsel had no answer to the trial court's observation that the most the defendants could probably prove was that the plaintiff had engaged in a number of interstate transactions similar to those sued upon in these actions (SR. 8).

The question presented by the motion to strike is not whether the issue of doing business in Utah is one of fact

to be determined after trial. The controlling inquiry is whether that issue is immaterial. The authorities to the effect that the transaction is interstate in character demonstrate that the issue is immaterial. Appellants' brief completely ignores the point.

POINT II.

THERE WAS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND PLAINTIFF WAS ENTITLED TO A JUDGMENT AS A MATTER OF LAW.

Appellant's brief touching the above point consists almost entirely of citations of authorities which announce the elementary proposition that a summary judgment can be sustained in only those cases where no genuine issue of fact is involved. There is no discussion of any claimed issue of fact in this case other than the bare assertion that the answer put in issue "the question as to whether or not there had been a complete failure of consideration in the delivery of the goods to the defendant," also "the question of damages due to the misrepresentations and misstatements of the agents of the plaintiff."

We submit that the asserted issues with respect to failure of consideration and misrepresentation exist only in appellant's brief. Neither of these defenses was presented in the defendant's answer. Each is an affirmative defense and must be set forth in the answer (Rule 12(b) U. R. C. P.).

All that is there stated with respect to consideration is that said "purported nursery stock was of no value as nearly all of said stock was dead upon arrival," and a denial that "any award of attorney's fees should be made in that there has been a complete failure of consideration in the goods as shipped by plaintiff to defendant" (R. 3-5). These allegations are not sufficient to raise the issue of failure of consideration. See *County v. Hobbs*, 72 Iowa 69, 33 N. W. 368, 17 C. J. S. Section 555, page 1190.

The plea of fraud is likewise insufficient to present any defense. Rule 9(b) U. R. C. P. requires that in all averments of fraud the circumstances constituting the fraud must be stated with particularity. These circumstances or elements of fraud which must be particularly stated are that the representation must be of a fact as distinguished from opinions, conclusions and sales talk. *Stuck v. Delta Land & Water Company*, 63 Utah 495, 227 Pac. 791. Second the representations must be reasonably relied upon. *Lewis v. White*, 2 Utah 2d 101, 269 P. 2d 865, and damage must have resulted from the reliance upon the representations. *Baird v. Eflo Investment Company*, 76 Utah 232, 289 P. 112; *Campbell v. Zions Cooperative Home Building & Real Estate Company*, 46 Utah 1, 148 Pac. 401.

While the above authorities fully sustain our position that the plaintiff was entitled to judgment on the pleadings, there are additional grounds to support the judgment appealed from. The motion for summary judgment was based upon the depositions of the defendants, as well as upon the pleadings and other matters of record. A reference to the depositions is all that is necessary to dispose of

any claimed defense based upon either failure of consideration or fraud. With respect to the condition of the nursery stock upon its arrival, defendant Gardner admitted that the stock corresponded exactly to that order and was in proper condition for planting (DG. 14-17). All of it was planted, and all of it grew (DG. 19-23). It is true that there is some testimony that a small part of the stock winter killed, which was undoubtedly due to the very unusual winter which followed the planting. This defendant's testimony precludes any possible finding that any part of the stock was dead upon arrival. He never notified the plaintiff or made any complaint that any of the stock was dead, or that it failed to grow, and no request was made for any replacement (DG. 19-23).

Although the deposition of defendant Sanchez is contradictory and uncertain in some respects, it is clear to the effect that he planted all of the stock, and that only a few items failed to grow (DS. 5-7). He also failed to make any complaint or request any replacements (DS. 8).

The contract provides that plaintiff will replace all nursery stock that fails to live the first year, provided the purchaser has paid as agreed and the stock was promptly planted on arrival and given proper care (Ex. A). It provides further that no cash discount or refund is allowed for any nursery stock that does not grow (Ex. A). In view of these provisions of the contract and the facts admitted by the defendants in their depositions, any defense predicated upon failure of consideration fails as a matter of law.

The consideration for the defendant's promise to pay was the plaintiff's promise to transfer the list of nursery

stock and to replace any of the stock that failed to grow the first year. The plaintiff has not failed or refused to perform its undertaking. It has never received any notice that any of the stock failed to grow the first year, and no request for replacement has ever been made. Since the plaintiff is not in default under the contract, there has been no failure of consideration.

The recent decision of this court in *Van Tassell, et al. v. Lewis, et al.*, 118 Utah 356, 222 P. 2d 350, is in point upon the question of claimed failure of consideration. This was an action to set aside a deed from the plaintiff Van Tassell to the defendant Lewis covering real property in Duchesne County. The consideration for the conveyance was the undertaking of the defendant to pay a certain sum of money and perform other acts. The promise to perform one of these acts was made after the conveyance. The other acts were performed and the money was paid. This court held there was no failure of consideration. We quote from the opinion:

“In order for the plaintiffs to prevail in this action brought by them to cancel their deed to the Duchesne property on the ground that there has been a failure of consideration for the conveyance, it is incumbent upon them to demonstrate that they have not received everything that they bargained for as payment for that property. * * *”

This is the situation presented in the case under consideration. The plaintiff is not in default and has not refused to comply with its promise to replace any stock that failed to grow, because it has never been notified that any of the stock failed to grow and has never been requested

to replace any of it. Even if it be assumed that the pleadings raise an issue with respect to failure of consideration, the depositions of the defendants conclusively establish that the defense is not available to the defendants.

The depositions of the defendants likewise dispose of any defense based upon fraud, even if we indulge the violent assumption that such a defense was raised by the pleadings. Each defendant was positive that no representations with respect to the quality or character of the nursery stock was made by any representative of the plaintiff (DS. 8-9; DG. 27). Gardner did testify that some statements were made with respect to the price or value of the stock, but these constituted no more than mere opinions and "puffing" statements (DG. 27, 28). The authorities above cited demonstrate that no actionable misrepresentation was made, and that a defense predicated upon fraud cannot be sustained.

Rule 56(c) provides that a judgment shall forthwith be rendered upon motion if the pleadings, depositions, and admissions on file show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. The pleadings, depositions, and admissions on file in this case show no genuine issue as to any material fact, and plaintiff was entitled to a judgment in its favor as a matter of law.

CONCLUSION

The trial court committed no error in striking the allegations in the answer to the effect that plaintiff was doing business in Utah without a license. These allegations are immaterial and constituted no defense to the plaintiff's claim.

No error was committed in granting the plaintiff's subsequent motion for a summary judgment in its favor. Under the pleadings, the depositions and admissions, no genuine issue of fact was presented, and plaintiff was entitled to recover as a matter of law.

We respectfully submit that the judgment should be affirmed.

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