1958

A. Fred Fleming v. Fleming Felt Company et al : Appellants' Petition for Rehearing

Utah Supreme Court

McKay, Burton, McMillan & Richards; Harold R. Boyer; Attorneys for Defendants and Appellants;

IN THE SUPREME COURT OF THE STATE OF UTAH

A. FRED FLEMING,
Plaintiff and Respondent,

— vs. —

FLEMING FELT COMPANY, a corporation, and JOSEPH H. FELT and MARIE FELT,
Defendants and Appellants.

Case No. 8732

APPELLANTS' PETITION FOR REHEARING

McKAY, BURTON, McMILLAN AND RICHARDS
720 Newhouse Building
Salt Lake City, Utah

and HAROLD R. BOYER
1409 Walker Bank Building
Salt Lake City, Utah

Attorneys for Defendants and Appellants

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The appellants, Fleming Felt Company, a corporation, and Marie Felt, petition the Court for a rehearing in the above entitled cause, the Court by its opinion filed March 31, 1958, having affirmed, with modification, the judgment of the trial court.

McKAY, BURTON, McMILLAN & RICHARDS

By Reed H. Richards

720 Newhouse Building
Salt Lake City, Utah

Harold R. Boyer

Harold R. Boyer
1409 Walker Bank Building
Salt Lake City, Utah
Attorneys for Defendants and Appellants

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APPELLANTS' BRIEF IN SUPPORT OF PETITION FOR REHEARING

POINT NO. 1

THE COURT HAS APPLIED AN INCORRECT MEASURE OF DAMAGE

This Court has determined on appeal that the evidence in the record supports the finding of the trial court to the effect that the Felts breached their contract with Fleming, thereby entitling Fleming to damages. Fleming was awarded damages in the sum of $13,512.00, which, as the Court says, "is the value of the inventory he had put into the business." In this determination the Court has ignored the measure of damages which the law has established for breach of contract.

This Court has apparently adopted the theory that the measure of damage is what Fleming put into the business. To award Fleming the value of his original inventory completely ignores the increase or decrease in the value of his share in the business from the time of merger to the date of the breach.

The business was operated from August 31, 1953, to June, 1955, under the management of Fleming. Assume there had been a substantial growth in the business during this period. Should not Fleming have the benefit of the proportionate increase in value of his interest and recover substantially more than $13,512? On the other hand, suppose that because of his mismanagement, or due to some other factor not the fault of the Felts, the value of the business declined, resulting in a proportionate decrease in the value of Fleming's interest in the business at the time of the breach. In such case should the Felts be required to bear the whole burden thereof? Obviously not, and that there was in fact a substantial loss prior to the breach is no mere supposition. The only financial statement admitted in evidence shows that there had been a substantial impairment of capital. The business was losing money long prior to the breach. Exhibit 12-P (R. 265).

The adoption of the value of Fleming's original inventory, $13,512, as a measure of damage is arbitrary and substitutes convenience of calculation for justice and equity.

It is submitted that under the circumstances of this case the proper measure of damage is to allow Fleming the value of his interest in the business *as of the date of the breach,* not the value of his inventory nearly two years earlier. He should be allowed the same proportion of the inventory at the time of the breach as his original inventory was of the total original inventory.

There is no evidence that the parties made any contributions to capital other than their original inventories, nor is there any claim that either of the parties failed to obtain salary or dividends to which he was entitled. Thus, an award of damages based upon a principle which allows Fleming his proportionate value of the inventory at the time of the breach is fair and equitable.

However, as to the value of Fleming's interest in the business at the time of the breach there is no evidence in the record. If Fleming is to prevail he has the burden of proving the amount of his damage. This he has failed to do. Therefore, the judgment of the trial court should be reversed, or, in the alternative, if this Court is of the opinion that Fleming should prevail in spite of such deficiency in the proof, the case should be remanded to the trial court to permit the introduction of additional evidence.

Furthermore, in awarding to Fleming the value of the inventory he had put into the business, $13,512.00, the Court has ignored the fact that Fleming received and still has 13,512 shares of stock in the Fleming Felt Company.

Point No. II.

FLEMING'S DAMAGE SHOULD FURTHER BE REDUCED BY THE VALUE OF HIS 13,512 SHARES OF STOCK OF THE FLEMING FELT COMPANY.

Appellants contend that if Fleming were to receive the value of his share of the business at the time of the breach — or the original value of his inventory for that matter — such value should be reduced by the value of the shares of stock still remaining in his hands. The award of damages as it now stands is inequitable and unjustly enriches Fleming.

The basic rule governing the measure of damages for breach of contract is well settled:

> "The measure of damages in the case of a breach of contract is the amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented or the breach of it has entailed. In other words, the person injured is, so far as it is possible to do so by a monetary award, to be placed in the position he would have been in had the contract been performed. Another statement of the rule is that, where one party to a contract repudiates it, the other party is entitled to recover the value of the contract to him at the time of its breach." 25 C. J. S., Damages, Sec. 74, p. 563.

Nor should Fleming be put in a better position by a recovery of damages for the breach of the contract than he would have been if there had been performance. *United Protective Workers* v. *Ford Motor Co.*, 223 F. (2d)

49 (CCA-7, 1955); *Blair* v. *United States,* 150 F. (2d) 676 (CCA-8, 1945).

Following this well established rule for the determination of damages, the contract should be analyzed to see what Fleming would have had had the contract been fulfilled, and then a determination should be made as to how the breach affected the same.

Turning to the first matter: What would Fleming have had had the contract been fulfilled? Basically he would have had two things: (1) a position as general manager of the Fleming Felt Company, and (2) 13,512 shares of stock of the company.

Now, the Court has sustained the finding of the trial court that there has been a breach of the contract, the result being that Fleming has lost his position as general manager of Fleming Felt Company. *But he still has the 13, 512 shares of stock of Fleming Felt Company.*

What is the measure of his damage? As for the first element the Court has correctly interpreted the record, "There was no proof that his wages or income would have been greater than he received from the Fleming Felt Corporation during the period; nor that he otherwise suffered damage."

As for the second element of his damage, he still has his 13,512 shares of stock in the company. On this point he has not been damaged at all unless the breach of the contract has diminished the value of the shares. Cer-

tainly there is no evidence in the record of this being the case. On the other hand, the 13,512 shares were accepted at the outset as the value of the Fleming merchandise.

It is therefore submitted that since Fleming would have continued to possess the 13,512 shares of stock of the Fleming Felt Company if the contract had not been breached, he should not have more than this upon the breach.

However, the record is entirely devoid of any evidence of a diminution in the value of the Fleming stock. The burden of such a showing was Fleming's. The judgment of the trial court should therefore be reversed or, in the alternative, the case should be remanded to the trial court for a determination of the diminution in value, if any, of Fleming's 13,512 shares of stock by reason of the breach.

On the other hand, if the Court grants to Fleming the value of his inventory put into the corporation in August, 1953, or the value of Fleming's interest in the business at the date of the breach, as contended for in Point No. I, then surely, there should be deducted from such a figure the value of the 13,512 shares of stock of Fleming Felt Company he retains in his possession. Otherwise, Fleming will be unjustly enriched.

The case of *Eastern Terminal Lumber Co.* v. *Stitzinger,* 35 F. (2d) 333 (CCA-3, 1929) followed the correct rule here contended for. In that case the firm of Stitzinger & Co. entered into a contract with the Lumber Company

whereby it became the selling agent for the Lumber Company in designated areas. The contract was to exist for some ten years, though on this point there was some dispute. Stitzinger was to receive commissions on sales of lumber. In addition, Stitzinger was to purchase capital stock of the Lumber Company to the extent of $15,000 to $25,000 at par of one hundred dollars per share. In the course of performance under the contract, Stitzinger subscribed and paid for 150 shares, amounting to $15,000. Some months after entering into the contract the Lumber Company canceled the contract and commenced a suit to recover amounts claimed to be due on certain orders for lumber, etc. Stitzinger counterclaimed, charging the Lumber Company with breaching the contract, and sought to recover damages consisting principally of two items: (1) anticipated profits, and (2) damages which it suffered on account of the stock that had been purchased.

It is the second element of damages that is analogous to the instant case. Stitzinger sought to recover the full $15,000 that had been paid for the stock, claiming that this was an element of damage which was suffered on account of the cancellation of the contract. The Lumber Company claimed, of course, that no damage was sustained.

It is submitted that the Circuit Court correctly applied the law in disposing of this question. The trial court entered a directed verdict for the Lumber Company. The Circuit Court if Appeals for the Third Circuit reversed the trial court, and on the point in question said:

"They ask damages for the $15,000 which they were required to spend as an item in the contract and offer to surrender the stock. What that damage is, if any, is a question for the jury under proper instructions of the court. When one party enters upon the performance of a contract and is prevented from so doing without fault on his part, one distinct item of damage is his outlay and expenses less the value of the materials on hand, and it does not lie in the mouth of the party who has wrongfully put an end to the contract to say that the other has not been damaged, at least to the amount of what he has been induced fairly and in good faith to lay out and expend, after making allowance for the material on hand. The outlay for this stock was made in good faith, without which the contract would not have been made. It is now in the nature of so much material in the hands of the defendants. What the value is should be decided by the jury in resolving the question of damages. United States v. Behan, 110 U. S. 338, 345, 4 S. Ct. 81, 28 L. Ed. 168; Press Publishing Co. v. Reading News Agency, 44 Pa. Super. Ct. 428.

"In refusing to submit the questions of damage to the jury, the learned District Judge fell into error, and the judgment is reversed and a new trial granted."

In other situations where the party claiming a breach of contract has certain property on hand as a fruit of the contract, the courts have always required that this be taken into consideration in determining the damages suffered. *Bradley* v. *Nevada-California-Oregon Ry.,* 178 P. 906 (Nev. 1919); *Spitzer* v. *Pathe Exchange,* 23 P. (2d) 308 (Cal., 1933); *Superior Tube Co.* v. *Delaware Aircraft In-*

dustries, 60 F. Supp. 573 (Dist. Ct., D. Del. 1945); *White River Levee Dist.* v. *McWilliams Dredging Co.,* 40 F. (2d) 873 (CCA-8, 1930); *Moline Furniture Works* v. *Club Holding Co.,* 274 N. W., 338 (Mich., 1937); *Bremhorst* v. *Phillips Coal Co.,* 211 N. W. 898 (Iowa, 1927); *Guerini Stone Co.,* v. *P. J. Carlin Constr. Co.,* 248 U. S. 334, 63 L. Ed. 275; *United States* v. *Behan,* 110 U. S., 338, 28 L. Ed. 168.

Nor would it be proper to require Fleming to return his stock to Fleming Felt Company and then grant Fleming the initial value of his merchandise inventory or the value of his interest in the business. That would be rescission and would not be proper in view of the determination by this Court that the basis for rescission does not exist.

It is therefore apparent that even the general theory of damages adopted by the Court requires that rather than the value of his initial inventory, Fleming be awarded his proportionate interest in the business at the time of the breach, and that this value be reduced by the value of the 13,512 shares of stock of Fleming Felt Company remaining in his hands.

Fleming has also failed in sustaining his burden in this regard, and the decision of the trial court should be reversed or, in the alternative, the case should be remanded to the trial court for the determination of (1) the value of Fleming's interest in the business at the time of the breach, and (2) the value of Fleming's stock at that time — Fleming to be awarded the difference.

It is therefore respectfully submitted that the judgment of the trial court should be reversed or, in the alternative, the case should be remanded to the trial court for the purposes herein set forth.

Respectfully submitted,

McKAY, BURTON, McMILLAN & RICHARDS

By Reed H. Richards

720 Newhouse Building
Salt Lake City, Utah

Harold R. Boyer

Harold R. Boyer
1409 Walker Bank Building
Salt Lake City, Utah

Attorneys for Defendants and Appellants