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A. Fred Fleming v. Fleming Felt Company et al : Brief of Respondent in Answer to Petition for Rehearing

Utah Supreme Court

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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

RESPONDENT'S BRIEF IN ANSWER TO PETITION FOR REHEARING

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POINT NO. I

THE COURT HAS PROPERLY GRANTED RESTITUTION FOR BREACH OF CONTRACT BY AWARDING FLEMING THE VALUE OF HIS INVENTORY HE PUT INTO THE BUSINESS.

This Court has properly determined that the trial court clearly regarded the conduct of the Felts as a substantial breach of their contract with Fleming, thus rendering it impossible

for Fleming to continue performance and excusing him from further performance.

In view of this material and substantial breach of the contract by the Felts, this Court properly awarded restitution to Fleming as a remedy, even thought the claim of fraud was not sustained.

The Restatement of Contracts sets forth the well-settled rule that restitution may be granted for a material and substantial breach of contract, as follows:

> "(1) For the total breach of a contract, the injured party can get judgment for the reasonable value of a performance rendered by him, measured as of the time it was rendered, less the amount of benefits received as part performance of the contract and retained by him, . . . " Section 347, Restatement of Contracts.

The comment on sub-section (1) also states as follows:

> "b. When the remedy given for breach of a contract is money damages, the amount awarded is determined with the purpose of putting the injured party in as good a position as he would have occupied, had the contract been fully performed by the defendant. In granting restitution as a remedy for breach, however, the purpose to be attained is the restoration of the injured party to as good a position as that occupied by him before the contract was made. It is obvious that neither remedy may fully attain the purpose for which it exists. In some cases the remedy of restitution involves the restoration to the plaintiff of a specific thing (see § 354); but in the great majority of cases this remedy merely requires a payment in money by the defendant of the value of the consideration received by him from the plaintiff as a part or full performance of the contract. The consideration so received may be of any

kind, commonly consisting of services rendered, forbearance given, money or other property transferred, or the use of property temporarily enjoyed."

"e. The remedy in damages for a breach of contract by the defendant is available without regard to whether the breach is total or partial. The alternative remedy of restitution, however, is available to the plaintiff only in case the defendant's breach of contract is a total breach (defined in § 313). It must be a breach that prevents further performance by the plaintiff, or that gives him the privilege of refusing any further performance of the contract on his own part."

"(I) Damages and restitution are alternative remedies, only one of which will be given as a remedy for a breach of contract." Section 384, Restatement of Contracts.

The comments on sub-section (I) also states as follows:

"a. The remedy of restitution is given only when there is a total breach justifying the plaintiff in regarding the primary contractual obligation as at an end and acted upon by him as having that effect. The defendant's breach is regarded as final, and thereafter only one action for breach of the contract can be maintained. If the plaintiff is given judgment for his money back or for the restoration of the status quo in another form, he will not also be awarded the value of the performance that was promised him."

To the same effect are the following citations:

"The right to rescind is an extreme one and does not arise from every breach, and the general rule is that a rescission will not be permitted for a slight or casual breach of the contract, but only for such breaches as are so substantial and fundamental as to defeat the object

of the parties in making the agreement." 17 CJS, Contracts, Section 442, page 906.

"Williston on Contracts, vol. 3 § 1467, p. 2614, says: 'In truth rescission is imposed in invitum by the law at the option of the injured party, and it should be, and in general is, allowed not only for repudiation or total inability, but also for any breach of contract of so material and substantial a nature as could constitute a defense to an action brought by the party in default for a refusal to proceed with the contract.' See also, Black on Rescission of Contracts, §§ 198, 199; Tighe v. Empire Bond & Mortgage Corporation, 144 Misc. 146, 258 N. Y. S. 278."

"If, however, the vendors terminate the contract without right or cause, the vendee could rescind and recover the amount paid on the contract." *Dastrup, et al., vs. Swuin, et al.,* 179 Fed. Rep. 2d 862.

Citing Brown vs. Cleverly, 93 Utah 5470 P. 2d, 881
McBride vs. Setwart, 68 Utah 12, 249, P. 114

Tremonton Inv. Co. vs. Horne, 59 Utah 156, 202 P. 547.

In the case of *McBride vs. Stewart,* (Utah) 249 P. 114, 48 A.L.R., 267, the Court held as follows:

"The plaintiff in this action accepted the breach of the contract upon the part of defendants and brought this action to recover what she had paid, less the reasonable rental value of the premises. As was clearly her right, she elected to take as damages the amount paid, less the benefit she received, and that is what the court granted her in the judgment. She did not elect to sue for profits or the value of the property if it exceeded the value of the contract price, but was content to recover back what she paid."

Section 1455 of Williston on Contracts states as follows:

> "The right of rescission and restitution generally exists as an alternative remedy to an action for damages where there has been repudiation or a material breach of a contract, and is most commonly exercised when the aggrieved party has performed fully or in part, and wishes to recover what he has given or its value."
>
> "A material breach warrants rescission. There may be a rescission if there is a failure to perform a substantial part of the contract or one of its essential terms." 12 Am. Jur., Sec. 440, P. 1021, citing many cases.
>
> "Where a party has partially performed a contract on his side and a renunciation is made by the other party in the course of performance, or where such other party prevents or makes further performance impossible, the party injured may treat the contract as rescinded and sue at once on a quantum meruit to recover for what he has performed or what has been paid by him." 12 Am. Jur., Sec. 442, P. 1024.

As an alternative to damages for breach, respondent clearly alleged in his Complaint rescission and restitution for breach of contract and also included a count for quantum meruit (R. 2, 3, 4, 5, 6, 7), and in view of the fact that the claim of fraud was not sustained on appeal, this resulted in a loss of the interest during the time Fleming was in the business; this being the only modification of the Judgment of the lower court. The above citations clearly indicate that respondent is entitled to the value of his inventory at the time it was placed in the business.

As stated in the Opinion of this Court:

> "Inasmuch as the trial court determined that the disruption of the business arrangement resulted from

breaches by the Felts, it was proper to justify Fleming's withdrawal and to award him the value of the inventory he had put into the business, which it found to be $13,512.00."

POINT NO. II

FLEMING IS REQUIRED TO RETURN THE 13,512 SHARES OF STOCK OF THE FLEMING-FELT COMPANY UNDER THE DECISION OF THE COURT AND THE JUDGMENT SHOULD, THEREFORE, NOT BE REDUCED BY REASON OF SAID SHARES.

Fleming would not have purchased the 13,512 shares of stock of the Fleming Felt Company if he could not act as general manager and purchase the remainder of the outstanding 25,234 shares of stock owned by the Felts, as provided in the contract.

These 13,512 shares of stock are of no actual value to Fleming in view of the appellants' breach of contract. It is only fair and equitable that the stock be returned to the appellants and the respondent receive the value of his merchandise. Otherwise, the appellants would be rewarded for their breach of contract and unjustly enriched.

Loss of profits to Fleming as a measure of damage could not, under the circumstances, be ascertained with any degree of reasonable certainty, and the plaintiff elected, therefore, to recover the value of his merchandise put into the business and tendered the shares of stock to the defendants.

There was no inventory of the Fleming Felt Company taken on June 8, 1955, which could be used as a basis for determining the value of its assets at that time.This could only

be determined by conjecture. Even the inventory used in Exhibit 12-P (R. 265) was estimated and was an arbitrary computation, incompetent to show a loss, and Mr. Owen Sumsion, a certified public accountant, so testified.

In view of the speculative nature of profits to the respondent, the court properly granted restitution as is indicated in 25 C.J.S. 577, Sec. 78:

> "Profits may be too remote and speculative to be capable of the clear and direct proof required by law, and in such case plaintiff is confined to his loss of actual outlay and expense. Failure to prove profits, however, will not prevent a recovery for outlay and expense." *U. S. vs. Behan,* 110 US 338, 28 L. Ed. 168.

The claim of the appellants that the business was losing money is strictly supposition, unsupported by the evidence in view of Owen Sumsion's testimony concerning Exhibit 12-P (R. 131, 191), and the finding of the lower court that "Fleming kept or offered to keep and to perform all of the provisions of said agreement." Even if the company had lost money, it would have been due to the Felts' actions in preventing Fleming from carrying out his duties, since a further finding by the court was that defendants "refused to permit plaintiff to carry out his duties as general manager."

The Stitzinger case, cited by the appellants, is not in point and can be distinguished since in that case Stitzinger sought anticipated profits and, in addition, the amount paid for the stock. The cases cited above make it clear that both the value of the performance, and the outlay, plus expenses, cannot be granted. They are alternative remedies, only one of which

may be awarded. In the case at bar the respondent was only granted one of the two alternative remedies.

Under the Judgment of the lower court (R. 275), as modified, it is clear that Fleming must return the 13,512 shares of stock upon payment of the Judgment. The stock must be returned in restoring the status quo in granting restitution, and there is, therefore, no need to determine what, if any, doubtful value these minority shares in a closed corporation would have to Fleming.

Petition for Rehearing should be denied and the Decree of this Court sustained.

Respectfully submitted,

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