1973

Frank H. Fullmer v. Parley J. Baker : Respondent's Brief

Utah Supreme Court

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THE SUPREME C
THE STATE OF

ANK H. FULLMER,
Plaintiff-Respondent,

vs.

LEY J. BAKER,
Defendant-Appellant.

RESPONDENT'S

Appeal from the District C
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CASES CITED

STATUTES AND OTHER AUTHORITIES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

FRANK H. FULLMER,
Plaintiff-Respondent,

vs.

PARLEY J. BAKER,
Defendant-Appellant.

Case No. 12969

RESPONDENT'S BRIEF

NATURE OF THE CASE

This is an action in contract.

DISPOSITION BY LOWER COURT

The lower court granted judgment in favor of the plaintiff.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks affirmance of the lower court's judgment in his favor.

FACTS

Plaintiff does not agree with defendant's statement of facts as it is incomplete and not a presentation of the facts in the light most favorable to the verdict as is required on appeal. The following statement of facts is therefore submitted:

Defendant Baker is the president of "I.F.C." an essentially bankrupt Utah corporation (R.17). The plaintiff, a contractor, became acquainted with the defendant when hired to do some remodeling of some of the restaurants to which I.F.C. had granted franchises.

On several occasions defendant represented to plaintiff that I.F.C. was "going to go public." (R. 1, 101; Ex. 3-D). In reliance upon those representations the plaintiff paid defendant $5,000 for which he was to receive 20,000 shares of defendant's own I.F.C. stock (R. 69, 74). Several weeks after paying the $5,000 the defendant presented to plaintiff a written agreement reflecting the transaction (R. 67, 80). The agreement (R. 9) had been drafted by the defendant (R. 94). It provided in paragraph 2 for delivery of the shares "within one year from the date" of the agreement (March 15, 1970). In paragraph 3, that the shares would be "free from all encumbrances," and in paragraph 4, that the shares would be "properly endorsed for transfer." When he signed the agreement plaintiff asked for the stock certificate. Defendant replied that the certificate would be mailed (R. 68, 76).

Defendant neither mailed the certificate as promised nor took any steps, such as a simple diary date, to see that plaintiff received his shares in I.F.C. within the maximum time provided by the agreement (R. 95-96).

Defendant had done nothing to inform plaintiff of his whereabouts during the year following the making of the agreement. The agreement represented defendant as being from Provo (R. 9). But after time for performance had lapsed it later became necessary for plaintiff to search out defendant at his new location in Orem (Ex. 3-P).

Plaintiff's name was never entered on the corporate records as a shareholder and plaintiff never received any communication from I.F.C., such as notice of a shareholders meeting, prior to filing this action (R. 172, 68, 69). After the complaint was filed, however, the defendant phoned plaintiff and invited him to a directors meeting (R. 69, 82).

The shares of I.F.C. were never registered with the state or federal government (R. 17a, 60, 73).

Prior to filing this suit plaintiff's attorney wrote defendant pointing out defendant's total non-performance, demanding reurn of the $5,000 and offering to work out repayment terms. Defendant did not bother to respond to that letter (R. 18, 84). A second letter (Ex. 3-P) was then sent to defendant to which defendant's attorney eventually responded (R. 85, Ex. 4-P).

At trial defendant offered to produce the shares which were the subject of the parties' agreement and which defendant claimed would constitute performance by him (Ex. 2-P).

The stock certificate offered was clearly deficient. It still bore the name of the defendant and the endorsement on the back was improper and incomplete in several material respects: it was incomplete as to the number of shares being transferred, if any; it was incomplete as to the appointment of a transfer agent; and it was neither witnessed nor dated. Indeed, the only blanks filled in, plaintiff's name and defendant's signature, had been entered by defendant in pencil (R. 92; Ex. 2-P)!

The trial court heard the evidence and argument of counsel, allowed additional time for legal memoranda and then found all issues in favor of the plaintiff.

The trial court's Findings of Fact and Conclusions of Law are found in the appeal record at R. 17-19. Among other things the court found that the defendant had materially breached the agreement of March 15, 1970 in every respect, that plaintiff had fully performed, and that plaintiff was therefore entitled to rescind the agreement and have his $5,000 returned.

ARGUMENT

POINT I

DEFENDANT NEVER MADE A PROPER OR TIMELY TENDER OF PERFORMANCE

Defendant argues without supporting authority or reason, that time was not the essence of the parties' agreement because the contract did not so specifically state. Defendant even claims at page 4 of his brief that "the law is clear" in this regard.

The contract, however, is clear and unambiguous as regards the time for performance.

> "2. Baker agrees to convey to Fullmer within one year from the date hereof [March 15, 1970] 20,000 shares of . . . I.F.C. . . . ." (R. 9).

The tender of performance, therefore, was required within the time already stated. Only when a contract is silent as to the time of performance is one allowed, what defendant now argues, a reasonable time for performance. 17A C.J.S. 682, *Contracts* § 482 (1963).

Defendant's claim at page 4 of his brief that failure to deliver the shares within the year was "inadvertent" is unsupported by the record; the evidence is to the contrary. Defendant was extremely indifferent, if not scheming, with regard to his contractual obligations. He never made so much as a simple diary record to assure delivery of the shares within the maximum time required (R. 95, 96). He moved from Provo to Orem after making the contract and did not inform plaintiff of his whereabouts (R. 9, Ex. 3-P). He could easily have mailed the shares to plaintiff as promised but he did not (R. 68, 76). Indeed defendant was so indifferent to plaintiff's interests that he ignored even the first demand letter from plaintiff's attorney (R. 18, 84-85).

Defendant again misstates the facts at page 7 of his brief where he speaks of the plaintiff's intention "not to perform." Such a statement is incredible in light of the fact that plaintiff had fully performed every obligation of the contract as found by the trial court (R. 18 — Finding of Fact No. 16).

Defendant's argument under Point I is also fatally defective in that it assumes a critical element the trial court specifically rejected: that a proper tender was ever made. A tender of performance is never sufficient unless it is tender in accordance with the terms of the contract.

> "[A] tender which does not conform to the contract is the same as no tender at all. The tenderer must do and offer everything that is necessary on his part to complete the transaction, and must fairly make known his purpose without ambiguity.
>
> * * *
>
> "The tender . . . must be definite and certain in character . . ." 17A C.J.S. 684, 685, *Contracts* § 486 (1963).

Defendant's tender was indefinite, ambiguous and not in conformance with what the contract required: The stock certificate offered at trial had never even been seen by the plaintiff prior to that time (R. 18, Finding 15); it was made out in the defendant's name and the claimed endorsement on the back was pencilled in, incomplete, and therefore ambiguous in several material aspects (Ex. 2-P). This lead the trial court to properly conclude:

> "5. The certificate . . . produced at trial by the defendant was incompletely and ineffectively endorsed." (R. 18-19).

Even if the endorsement had been legally sufficient the shares themselves did not conform with the contract terms as they were not "free from all encumbrances" as required by paragraph 4 of the parties' agreement (R. 19, Conclusion No. 6). This is discussed further under Point III of this brief.

Defendant's claimed tender was also untimely:

> "In the absence of a statute providing otherwise, it is no defense to an action for breach of contract that performance was tendered after the action was commenced." 17A C.J.S. 683, *Contracts* § 482 (1963).

With regard to defendant's duty under paragraph 2 of the agreement to "convey to Fullmer within one year," the trial court found that:

> "7. The defendant *never* transferred or conveyed to the plaintiff . . . any shares of . . . I.F.C." (R. 19) (Italics added).

Defense counsel admitted to the propriety of that Finding, as concerns the total lack of any conveyance prior to trial, as evidenced by its own proffered Conclusion of Law No. 7 which incorporates all of the above language (R. 25).

The court recognized early that there was a question whether a tender has been made (R. 61) and invited defense counsel to offer its evidence as it had the burden of proving a proper tender (R. 64). The court made no Conclusions of Law that there was a proper tender (R. 18, 19). Defense counsel in his motion to amend the Conclusions of Law moved for a Conclusion that a proper tender had been made, (R. 25) but the trial court rejected that suggested amendment (R. 33, 34).

Defendant's tender being both improper and untimely it was legally no tender at all.

POINT II

DEFENDANT'S TOTAL NON-PERFORMANCE GAVE PLAINTIFF THE RIGHT TO ELECT RESCISSION OR SUE FOR DAMAGES.

Defendant's argument in Point II totally ignores the well-established principle of election of remedies by claiming plaintiff's only remedy for defendant's total breach was damages.

In *Pool v. Motter,* 55 Utah 288, 185 P. 714, 715 (1919) the court set forth what it recognized as the "general rule" with regard to rescission:

> "If a contract is entire, and remains executory in whole or in part, and one party fails to perform what it is his duty to do under the contract, and the other party is not in default, the latter may rescind the contract."

In *Sidney Stevens Implement Co. v. Hintze,* 92 Utah 264, 67 P.2d 632 (1937) the appellant challenged, as does the defendant-appellant in this case, the right to rescind a contract simply for breach thereof. The court in *Hintze* reaffirmed the right to rescind the contract or recover damages:

> "[The] breach of . . . a covenant which goes to the whole consideration of a contract, gives the injured party the right to rescind a contract, or to treat it as broken and to recover damages for a total breach." 6 P.2d at 638.

The requisite conditions of *Pool v. Motter* and *Sidney Stevens Implement Co. v. Hintze* also exist in this case: plaintiff had fully performed under the contract, defendant had failed totally to perform as required, the defendant's breach in every material respect went to the whole consideration of the contract, and plaintiff made a proper election to rescind. The trial court's Findings were therefore totally within the framework of long-established legal principles:

> "2. Defendant's breach constituted a material and essential obligation to be performed under the contract which was not severable.
>
> * * *
>
> "4. Plaintiff was properly entitled to rescind the agreement . . . ." (R. 18).

Nothing hampered defendant's ability to perform as required other than his own apparent indifference to the obligations which flowed from the agreement he himself drafted. He should not now be heard to complain of the legal consequences brought about by his own inaction. Defendant's conduct falls within the admonition of *Lawson v. Woodmen of the World,* 88 Utah 267, 53 P.2d 432, 435 (1936):

> "They seek to accept the benefits of the contract, but avoid the full force of its obligations. This they cannot do."

POINT III

THE TRIAL COURT PROPERLY HELD THAT THE UNREGISTERED SHARES OF I.F.C. WERE ENCUMBERED.

Defendant drafted the agreement which is the subject of this suit (R. 17, 94). Paragraph 3 of that agreement represented and warranted that the shares to be conveyed would be "free from all encumbrances." Defendant challenges in Point III the trial court's Conclusion of Law No. 6 (R. 19) that the shares were not free from encumbrances.

The trial court's conclusion that the shares were not free from encumbrances was based upon a realistic look at the consequences of owning unregistered securities. A basic principle under both the state and federal securities acts is that all shares must be registered unless entitled to some exemption, which exemption the seller of unregisterd securities has the burden of proving. *Utah Code Ann.* § 61-1-7 provides:

> "It is unlawful for any person to offer or sell any security in this state unless it is registered under this act or the security or transaction is exempted under Section 61-1-14."

Section 5 of the Securities Act of 1933 (15 U.S.C. §77e) is similar to *Utah Code Ann.* § 61-1-7 and confers federal jurisdiction over any transaction which makes use of the mails or other instrumentalities of interstate commerce. Federal jurisdiction is easily acquired. In *Schillner v. H. Vaughan Clarke & Co.*, 134 F.2d 875 (2d Cir. 1943) the court upheld federal jurisdiction over a transaction in which the only element of interstate commerce was use of the mails for delivery of the certificates after the transaction had been consummated without the use of any other element of interstate commerce.

A discontented purchaser of unregistered securities need only plead the unregistered status of the shares and then shift the heavy burden of proof upon the seller. Surely one who can sell his securities only under threat of potential legal action by the state or federal government or the purchaser has shares which are "encumbered" in every practical application of the word.

The Federal Securities and Exchange Commission has established rules directed to transactions in unregistered securities. The obvious intent and effect of these rules is to encumber or hinder, the free trading of unregistered securities. Rule 144 of the Securities and Exchange Commission is only one of several rules which present major limitations on trading unregistered securities. Among the several requirements of Rule 144 are the following:

(1) The person for whose account the securities are sold must have been the beneficial owner of the securities for a period of *at least* two years prior to the sale, and

(2) There must be available at the time of the sale "adequate current public information" with respect to the issuer of the securities (in this case, I.F.C. Corporation).

Surely one who owns property which he cannot legally resell for a minimum of two years owns property which is "encumbered."

Likewise, where a shareholder, such as plaintiff would have been, has no power or authority to make available "adequate current public information" about the issuer company he is in an encumbered position with regard to those securities.

In 1966 a practicing lawyer and law professor, Edward E. Shea, published an article dealing with the practical problems inherent in any sale of unregistered securities. His article appeared in 43 Univ. of Detroit Law Journal 572 and was titled: "A Practical Look at the Securities Laws Restrictions on Sales by Owners of Unregistered Stock." The article is well written and detailed. It was considered by Judge Baldwin in the judgment he rendered for plaintiff. Its conclusion is directed to practicing lawyers and sounds a warning:

> "Unless and until amendments such as those discussed . . . are adopted, *even the most practical lawyer will be unable to remove all complications* faced by his clients who own or wish to purchase unregistered stock." *Id.* at 602 (Italics added.)

Where, as attorney Shea warns, even the "most practical lawyer" will have trouble with the legal complications of a transaction in unregistered securities, the same transaction is surely much more cumbersome and fraught with legal implications where handled by a layman.

The trial court wisely kept sight of these facts in holding the I.F.C. securities were not free from encumbrances as required by the contract.

Defendant argues a *non sequitur* in Point III by claiming that because the word "encumbrance" is most often applied to real property transactions it has no application to the contract he himself drafted for the sale of personal property.

To have warranted that the shares would be "free from all encumbrances" and then argue that such language should be ignored is blatantly inconsistent and self-serving.

The best argument defendant can make is that "free from all encumbrances" is ambiguous. That, however, would only mean that the ambiguity should be construed against the defendant, the drafter of the instrument, and in favor of the plaintiff thus supporting the trial court's judgment. *Guinand v. Walton*, 22 Utah 2d 196, 459 P.2d 467, 469 (1969).

In determining the meaning to be applied to "free from all encumbrances" the trial court considered, in addition to those things already mentioned, the advice of *Plain City Irrigation Co. v. Hooper Irrigation Co.*, 11 Utah 2d 188, 356 P.2d 625 (1960):

> "The beginning point of interpretation of a contract is an examination of the language used in accordance with the ordinary and usual meaning of the words used . . . ." 356 P.2d at 627.

The ordinary and usual meaning of "encumbrance" as defined by Webster is:

> "1. State of being encumbered; perplexity; trouble. 2. That which encumbers; *a burden that impedes action or motion, or renders it difficult or laborious; an impediment.*" *Websters New International Dictionary* 843 (2d Ed. 1957) (Italics added.)

The trial court applied the ordinary and usual meaning of "encumbrance" to the transaction between the parties and properly found the defendant could not produce shares which were "free from all encumbrances" as required by the parties' agreement. That decision was realistic and based upon proper legal principles and should therefore be affirmed.

CONCLUSION

The agreement between the parties was drafted by the defendant. Plaintiff had fully performed under that agreement even prior to his signing by paying $5,000 to defendant. The agreement required defendant to convey to plaintiff properly endorsed unencumbered shares by March 15, 1971. On that date defendant had done nothing towards performance. He had even moved out of the town where the agreement represented he lived without informing plaintiff. He was forced to admit at trial he never took any steps even to remind him of his duty of performance.

Defendant's complaints to this court are nothing more than uphappiness with the proper legal consequences of his own disinterest in keeping his part of the bargain. Had he been even half as concerned with his obligations after taking plaintiff's money this appeal would not now be before this court.

The trial court applied proper principles of Utah law to the credible facts developed at trial. Its judgment should be affirmed.

Respectfully submitted,

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Served the foregoing Brief by mailing two copies thereof to Ralph J. Marsh, Deseret Building, Salt Lake City, Utah 84111, Attorney for Appellant, this 15th day of February, 1973.