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J. Golden Barton Motor Co. v. Calvin D. Jackson : Supplemental Brief of Respondent

Utah Supreme Court

Adam M. Duncan; Attorney for Plaintiff and Respondent;

IN THE SUPREME COURT

State of Utah

J. GOLDEN BARTON MOTOR COMPANY, INCORPORATED

Plaintiff and Respondent

vs.

CALVIN D. JACKSON

Defendant and Appellant

Case No. 9011

SUPPLEMENTAL BRIEF OF RESPONDENT

JOHN ELWOOD DENNETT

Attorney for Plaintiff and Respondent

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POINT THREE

THE DEFENDANTS FAILURE TO PERFORM ONE OF THE TWO AVAILABLE ALTERNATIVES UNDER THE CONTRACT CONSTITUTED A BREACH OF CONTRACT.

POINT FOUR

THE PROPER MEASURE OF LEGAL DAMAGES IS THE CONTRACT PRICE LESS THE WHOLESALER'S DELIVERED PRICE TO THE RETAILER.

POINT FIVE

IN LIEU OF LEGAL DAMAGES, STIPULATED LIQUIDATED DAMAGES SHOULD BE AWARDED UNLESS IT IS FOUND THAT EITHER (1) THE SUM STIPULATED IS A "PENALTY", OR (2) THE SUM IS DISPROPORTIONATE TO THE LEGAL DAMAGES THE REPUDIATEE WOULD BE ENTITI TO.

POINT SIX

THE AWARD FOR STIPULATED DAMAGES SHOULD BE GIVEN TO PLAINTIFF OR IN THE ALTERNATIVE THE CASE SHOULD BE REMANDED TO ASSESS ACTUAL COMPENSATORY DAMAGES UNDER THE RULE OF STEWART VS. HANSEN.

ARGUMENT

POINT ONE

AN ENFORCEABLE CONTRACT WAS ENTERED INTO BETWEEN PLAINTIF AND DEFENDANT.

The brief of the appellant urges the position that no contract was entered into between plaintiff and defendant. This position is untenable in light of the facts.

The court need only to look at the final portions of the negotiations between plaintiff and defendant to determine whether there in fact was a contract between plaintiff and defendant. This court should apply the "reasonable man" test in evaluating and interpreting the acts of plaintiffs and defendants in terms of their legal meaning and effectiveness.

Ignoring the preliminary negotiations, when the offer of 36 monthly payments of $100.00 was rejected by the plaintiff and counter-offer of $112.00 per month was made, and defendant said, "Well, I guess that will be alright." Reasonable men would have to agree that a contract came into being.

Perhaps defendant feels that "Dean's mistake" rescinded or cancelled the contract. It is too fundamental to need citation that the bilateral contracts cannot be unilaterally rescinded or cancelled.

When the plaintiff attempted to raise the figure to $118.74, (which, by the way, would not result in a usurious contract, this monthly repayment [36 x $118.74] would result in a repayment of $4,274.64 or in an excess of $694.64 over the unpaid principal balance of $3,580.00. The maximum legal rate provided by UCA 15-1-2a(3) would be 1% per month or 36% of $3,580.00 or a finance charge of $1,288.80); this in no way changed the rights of the parties. Had the plaintiff attempted to enforce the payments of $118.74 against the defendant, the defendant could have effectively resisted.

If the alternative is this court interprets the subsequent acts of the plaintiff and defendant as being a mutual rescission of contract which provided for $112.00 payments, then this court must decide what interpretation is to be attached to the tender and delivery of the $3,680.00 check, (albeit its payment was conditional). The only reasonable meaning that can be given this overt act is that it manifested the defendants assent to the terms of the $118.74/month contract, RESERVING, HOWEVER, THE OPTION of alternatively performing the contract to purchase by securing his own financing elsewhere and paying an additional $100.00 for the automobile.

What other meaning could it have in view of the fact that the writing of the check was induced by, was responsive to, and was executed pursuant to the written option to finance elsewhere noted on the edge of the contract?

The whole transaction should be viewed as of the time it was entered into. The question of whether or not there was in fact a contract should be determined by ascertaining the intent of the parties as may be reasonable inferred or concluded from their acts and words. What inference can be drawn exept the intention of the defendant to say, by his acts and words, "I accept your contract providing for alternative performance," and will perform one alternative or the other.

POINT TWO

ALTHOUGH THE PERFORMANCE OF ONE OF THE ALTERNATIVES UNDER THE CONTRACT WAS CONDITIONAL, THE CONTRACT WAS UNCONDITIONAL IN REQUIRING THE PERFORMANCE OF ONE OF TWO ALTERNATIVES.

In urging that the contract entered into was conditional, the appellant has confused the meaning of a "conditional" contract and a contract requiring performance in the "alternative."

Quoting the case of Crane vs. Peet 4 A 72 at 78; 43 NJ Eq553 WORDS AND PHRASES, under the caption of Alternative Contracts says, "(an alternative contract is) a contract which gives either the promisor or the promisee the option of electing between one of two or more alternative performances.

Alternative contracts are such as by their terms may be performed by doing either of several acts at the election of the party from whom performance is due." (See also 1 Sutherland on Damages p. 471).

POINT THREE

THE DEFENDANT'S FAILURE TO PERFORM ONE OF THE TWO AVAILABLE ALTERNATIVES UNDER THE CONTRACT CONSTITUTED A BREACH OF CONTRACT.

Referring to Section 325 of the Restatement of Contracts we read:

> Breach of a contract that requires performance of one of two or more alternatives that the promisor may elect may be caused by (a) failure to perform at least one of the alternatives within the rule stated in Section 314 of the Restatement of Contracts.

The question is strictly academic whether or not one of the alternatives being conditional, the rule of law was changed. Since it was the defendants perrogative to choose between his alternatives, it makes no difference that the performance of one of the alternatives was conditional, and the other was unconditional.

Upon the completion of the contract, the defendant had his choice of the two alternatives:

1 Pay the balance on the contract at $112.00

per month in accordance with the contract terms. (or $118.74 per month if the court finds that this was the contract.)

(2) Secure his own financing elsewhere and pay off the entire balance by permitting the plaintiff to negotiate the conditionally issued check.

Obviously the plaintiff could not require the defendant to perform both alternatives. If the defendant elected to perform alternative #1, this would act as a condition subsequent, voiding the check which had been issued heretofore. If the defendant elected to perform alternative #2, this would be complete performance of the contract and would terminate his obligation to make future monthly installments. The third alternative, which the defendant chose, namely perform neither alternative, is a breach.

If the defendant had elected alternative #1 or alternative #2, the plaintiff would have had no cause to complain, then according to the terms of the contract, this was a matter of free choice to the defendant.

However, if the defendant refuses to perform either alternative, it is immaterial that the contract provided for alternative performance. This is the same as a simple repudiation of a singular covenant to perform a given act.

POINT FOUR

THE PROPER MEASURE OF LEGAL DAMAGES IS THE CONTRACT PRICE LESS THE WHOLESALER'S DELIVERED PRICE TO THE RETAILER.

The proper rule of law be applied in cases such as this flows from the concept that if a breach conferred a benefit upon plaintiff as well as causing him damages, the measure of recovery is the difference between the damage and benefit.

McCormick, DAMAGES, states the rule as follows: (Sec.40)

"Where a defendant's wrong or breach of contract has not only caused damage but has also conferred a benefit upon plaintiff which he would not otherwise have reaped, the value of this benefit must be credited to defendant in assessing damages."

Obviously the plaintiff cannot recover the entire contract balance from the defendant, because the defendant's breach has left the plai[illegible] on his hands which he would

have otherwise been compelled to purchase from the manufacturer.

McCormick at Section 147 continues:

"For example, an automobile dealer sues a customer for refusal to carry out a contract to purchase a car. The market value of a new car is (usually) the standard retail price of that model, but defendant's breach has not increased the possibility of finding a new customer for such a car. From the agent's point of view, the supply of new cars from the factory is unrestricted, but the finding of new customers is limited, and is not simply a matter of offering the article upon a ready and practically unlimited market, as in the case of wheat, cotton, and the like. It requires elaborate advertising, expensive demonstrations and continued solicitation. The plaintiff recovers, then, the agreed price, less what he has really been saved, that is, less the cost of the car from the factory. (Citing Torkmian vs. Russell, 90 Conn. 481, 97 A 760 (1916), and Stewart vs. Hansen, 62 Utah 281, 218 Pac. 959, ALR 340).

Section 173 of McCormick on Damages (page 661) elaborates on this principal further:

In the absence of an "available market" for goods, not only may the seller have open the choice of fixing his damages by a resale, but he may often have available still other formula for measuring his loss. He may claim compensation in the amount of the difference between what it has cost him to acquire the goods from others. . . and the contract price. The difference is the seller's prospective direct (gross) profit . . . Not infrequent are cases of actions by dealers against customers for refusal to accept automobiles purchased. Neither "resale price" nor "market value" gives any adequate relief, since the dealer would ordinarilly re-sel at regular list price, and the market value of the car can be said to be the same as the contract price.

The Utah Supreme Court has adopted this principal in the case of Stewart vs. Hansen cited supra, and it is submitted that this is good law, and still the law in Utah.

POINT FIVE

IN LIEU OF LEGAL DAMAGES, STIPULATED LIQUIDATED DAMAGES SHOULD BE AWARDED UNLESS IT IS FOUND THAT EITHER (1) THE SUM STIPULATED IS A PENALTY, OR (2) THE SUM IS DISPROPORTIONATE TO THE LEGAL DAMAGES THE PLAINTIFF WOULD BE OTHERWISE ENTITLED to.

The statement of law in this jurisdiction is set forth in Bramwell Investment Co. vs. Uggla, 81 Utah 85, 16 Pac. 2nd 913 at 916.

> This court is committed to the doctrine that, where the parties to a contract stipulate the amount of damages that shall be paid in case of a breach, such stipulation is, as a general rule, enforceable, if the amount stipulated is not disproportionate to damages actually sustained.

This court has never departed from this position, and this general rule is even cited approvingly in the leading case of Perkins vs. Spencer, 443 P 2nd 446 at page 449, which refused to sustain the liquidated damages stipulation upon the special facts of that case.

Certainly, upon special findings of fact, the court may invoke exceptions to the general rule, as it is done in Young vs. Hansen, Croft vs. Jensen, and Perkins vs. Spencer, and others cited in appellant's brief. One need only to read the cases to see why. In each case the court has found, as matter of fact that either (1) the stipulated damages were a penalty or (2) the stipulated damages were disproportionate to the actual damages.

POINT SIX

THE AWARD FOR STIPULATED DAMAGES SHOULD BE GIVEN TO PLAINTIFF OR IN THE ALTERNATIVE THE CASE SHOULD BE REMANDED TO ASSESS ACTUAL COMPENSATORY DAMAGES UNDER THE RULE OF STEWART VS. HANSEN.

It is common knowledge that a $4,000.00 automobile has a greater dealer mark-up than $500.00 and if the rule of Stewart vs. Hansen were applied to this case, the plaintiff should recover judgment in excess of $1,000.00. The defendant should let "well enough" alone, and not urge this court to look beyond the stipulated damages. If the plaintiff is willing to accept an amount stipulated, although substantially less than his legal damages, as liquidating damages, the defendant has no cause to complain. The plaintiff is not urgir the issue of disproportionate damages, and the defendant, in his own interest and welfare, should cease to urge it.

This Honorable Court has raised the question of the status of a non-negotiated check as being the basis of a deposit forfeiture. Upon reflection, this counsel believes that this is only a collateral issue.

The real question is not whether or not the plaintiff has actually received the deposit shown, but was the face value thereof the agreed measure of liquidated damages the seller should receive if the buyer breached his contract.

Oft times a credit is given for a trade-in. Would it be reasonable to argue that the seller would have received nothing from the buyer until the "trade-in" had been liquidated (sold)? Would it be reasonable to argue that a "side note" would be unenforceable if it were given as a symbol of the liquidated damages agreed upon. Suppose a "bearer bond" or "American Express Travelers Checques" or a "postal money order" or a "cashier's check" had been given as a deposit.

While a non-negotiated check is technically a chose in action, in our modern business world it is the equivilant of cash. Bearer government bonds, Travelers Checques, postal money orders, bank drafts also fall in this category of choses in action. Are we going to require that prospective purchasers made deposits in currency? (which technically is also only chose in action, being Treasury Certificates, Silver Certificates, or Federal Reserve Notes.)

If this be the feeling of this court, then this counsel respectfully urges that no damages is so disproportionate to actual damages that the stipulated damage should be re-examined and case should be remanded to assess damages under the rule of Stewart vs. Hansen.

CONCLUSION

A valid contract, requiring alternative performance was entered into between plaintiff and defendant. Defendant refused to perform either alternative, and thusly breached his contract. Plaintiff would have been entitled to compensatory damages, but because he has agreed to a lesser sum as liquidated damages, he must limit himself to such amount.

WHEREFORE plaintiff prays that the judgment of the Distr Court be sustained, or in the alternative, that the case be remanded to ascertain the actual compensatory damages based u a rule of law set forth in point four above, and that the plaintiff have his costs of this appeal.

Respectfully submitted

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for Plaintiff