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Edward E. Valcarce v. Reed Bitters and Roma Bitters : Brief of Respondents

Utah Supreme Court

Olson & Calderwood; Charles P. Olson; Attorney for Respondents;

In the Supreme Court of the State of Utah

EDWARD E. VALCARCE

Plaintiff and Appellant,

—vs.—

REED BITTERS and his wife, ROMA BITTERS,

Defendants and Respondents,

Brief of Respondents

Case No. 9323

Appeal from the District Court of the First Judicial District of the State of Utah In and for the County of Cache

Honorable Lewis Jones, Judge

OLSON & CALDERWOOD
By CHARLES P. OLSON
Attorney for Respondents

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STATEMENT OF FACTS

Defendant's statement of facts will be brief, for the reason that due to the nature of plaintiff's appeal it will be necessary for the Court to consider the entire record in determining whether or not the appeal is meritorious.

The facts are comparitively simple. In January, 1958, plaintiff needed some mink, breeder stock, for his mink ranch in Box Elder, County. (tr. 21, 33). He purchased 150 females and 30 males, broken down into pastels, aleutians and sapphires, from defendant. (tr. 19, 57) Plaintiff gave defendant at this time a check for $1,500.00 and a note, the one in litigation, for $2,700.00. (tr. 27, 59)

Plaintiff himself testified that at the time of this transaction that male mink were worth $35.00 each and the female worth $20.00 each. (tr. 26, 27,) On these prices alone plaintiff got value for the note and check. (tr. 27).

Plaintiff himself told Norman Christensen, a Logan businessman, that he got value for the note. (tr. 37, 40)

Independent expert witnesses, mink ranchers by trade, testified that they were acquainted with the defendent's mink and testified that the fair cash market value of the mink was $40.00 or above for the female and $75.00 or higher for the male. (tr. 48, 49, 55)

The trial Court found that plaintiff got value for his note. (Finding of Fact 1)

Elmer Erickson, another Logan Businessman, testified that plaintiff told him, several months after the note was executed and delivered, that he was going to pay the note. (tr. 91, 92)

The further facts are that at the time of said sale and purchase, the plaintiff talked about the possibility of defendant Reed Bitters ranching some mink, if he had a good season and could spare them, at the plaintiff's ranch. (tr. 60, 86, 139, 140) No definite agreement was arrived at. (tr. 86, 139, 140, 195, 196)

That thereafter, around the 1st of June, 1958, plaintiff, in order to secure financing on his mink, required defendant to sign a statement, (Ex. 2) that he, defendant,

had no interest in any mink on plaintiff's ranch. (tr. 62) This paper, in the mind of the defendant, foreclosed him from later on entering into any ranching agreement with plaintiff. (tr. 151, 154, 158)

That trial Court found there were no other agreements between the parties which the court could recognize as a contract or agreement capable of being enforced, said arrangements between the parties being too indefinite for the court to recognize. (Find of Fact 2) This, of course, precluded the necessity of ruling on the effect of Exhibit 2.

ARGUMENT

This case was tried before the District Judge sitting without a jury. He heard the testimony of the witnesses and confronted them face to face. His findings are supported by the evidence and his conclusion of law is supported by the findings. Both the findings and the conclusions support the judgement. We see no basis upon which appellant can rely to have this judgement reversed by this Court.

Actually, there appear to be three points involved:

1. Did plaintiff receive value for the note he seeks to have cancelled?

2. Was there an enforceable side agreement entered into between the parties?

3. If the answer to No. 2 is yes, did the plaintiff preclude performance of it by defendant by requiring defendant to sign Exhibit 2.

The trial court answered the first question in the affirmative and the second question in the negative, thereby rendering a decision on the third point unnecessary.

Points 1 and 2: Did plaintiff receive value for the note he seeks to have cancelled? Was there an enforceable side agreement entered into between the parties?

In deciding these two points against the plaintiff, the trial Court was deciding questions of fact, based upon conflicting evidence. He resolved the evidence against the plaintiff. His judgement should be affirmed.

As was held in *Osborn* vs. *Peters,* (1927) 69 U. 391, 255 Pac. 435, where there is substantial evidence to support the trial courts findings, the evidence being conflicting, the Supreme Court will affirm the judgement supported by said findings.

In other words, it is not the function of the Supreme Court to pass upon the weight of the evidence, nor to determine conflicts therein, but to examine it soley for the purpose of determining whether of not the judgement finds substantial support in the evidence. *Sine* vs. *Salt Lake Transp. Co.* (1944), 106 U. 289, 147 P. (2d) 875, at 878.

The above cases were law cases, but the basic rules

seem to prevail in equity cases also. See *Nokes* vs. *Continental M. & M Co.* (1957) 6 U. (2d) 177, 308 P. (2d) 954, wherein this Court said:

> "Where there is a conflict in the evidence, the findings of the trail court will not be disturbed if the evidence preponderates in favor of the finding; nor, if the evidence thereon is evenly balanced or it is doubtful where the preponderance lies; nor, even if its weight is slightly against the finding of the trial court, but it will be overturned and other finding made only if the evidence clearly preponderates against his finding."

The evidence which gives support to the trial courts findings is cited in the statement of facts, herein, and to avoid duplication, will not be repeated here.

Concerning the question of a side agreement, the trial court summed the matter up very aptly in his remark: (tr. 217)

"I can't bring myself to enforce a speculative, inchoate contract where I can't figure out what the terms were. I find that there was some talk about a side contract, but for the life of me I can't find out what the terms of it were. *** I just can't take my needle and thread and weave a contract."

The transcript of record amply bears out the Court's finding that the arrangements between the parties were too indefinite for the Court to recognize. See tr. 86, 139, 140, 195 and 196.

In making said finding and the above statement, the court was correctly stating the law on this point. The trial court has no power to make a contract for the parties. 45 Am. Jur. p. 587, Reformation of Instruments, Sec. 8.

> "A court has no power to supply an agreement which was never made or to alter or amend a contract which the parties themselves have understandingly made, for it is the province of the Court to enforce contract, not make or alter them. The Court in recognizing the equity cannot make such a contract as it thinks the parties ought to have made or would have made, if better informed."

Point 3: If there were an enforceable agreement between the parties, did the plaintiff preclude performance of it by defendant by requiring defendant to sign Exhibit 2.

In construing Exhibit 2, plaintiff and appellant would have us read into it a statement by defendant that he, the defendant, has no claims against plaintiff, by way of promissory note, or otherwise. Of course it does not say that. Exhibit 2 states that defendant has no claim, mortgage or lien of any kind on the mink on the plaintiff's mink ranch.

This statement, in the mind of any reasonable businessman, would preclude him from placing his mink on such a ranch. In the event defendant did do so, and plaintiff's mortgagee forclosed on plaintiff, defendant would

have lost such mink because when he stepped in to assert his ownership, the mortgagee would merely flash Exhibit 2 at defendant and preclude him from asserting such ownership. In other words, defendant would be estopped to assert his ownership as against third persons relying on the statement in the same manner that plaintiff is estopped from forcing defendant to ranch mink with him after requiring defendant to sign Exhibit 2.

CONCLUSION

The District Judge had the benefit of having the parties to the transactions before him, and based on the evidence presented by them, he entered findings of fact, conclusions of Law and judgement in favor of the dedendants below, respondents here. These findings of fact are supported by the evidence, and the conclusions reached from these findings are fair ones and reasonable ones. They support the judgement entered by the Court.

In our opinion ,the judgement below should be affirmed.

Respectfully submitted,

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By Charles P. Olson
Attorneys for Defendants
and Respondents.