

1966

Lorin J. Ellison, Harry G. anderson and William A. Dawson, Doing Business As Famous Foods, A Limited Partnership, and Bill A. Bayes, Administrator With the Will Annexed of the Estate of Harry G. anderson, Deceased v. L.B. Johnson and Lyman E. Passey : Appellant's Brief

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MAY 5 - 1966

Cl. & Supreme Court

WEN J. ELLISON, HARRY G. ANDERSON and WILLIAM A. DAWSON, all business as Famous Foods, a limited partnership, and BILL A. BAYNE, associated with the WHI annexed of the late Harry G. Anderson, deceased.

— 498 —

JOHNSON and LYMAN

APPELLANT

Appeal from the Judge
Court No.
Ex. A

A. A. HARRISON
Kingdom Way
Salt Lake City, Utah
Says for Respondents

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In The Supreme Court of the State of Utah

LORIN J. ELLISON, HARRY G. ANDER-
SON and WILLIAM A. DAWSON, doing
business as Famous Foods, a limited part-
nership, and BILL A. BAYES, administra-
tor with the Will annexed of the estate of
Harry G. Anderson, deceased,

Plaintiffs and
Respondents,

No. 10550

- vs -

L. B. JOHNSON and LYMAN E. PASSEY,
Defendants and
Appellants.

APPELLANTS' BRIEF

STATEMENT OF THE KIND OF CASE

This action was brought by plaintiff to recover money alleged to be due under a written contract for the sale of the remaining term of a leasehold together with certain store equipment.

DISPOSITION IN THE LOWER COURT

The court granted Judgment Sua Sponte on the pleadings and statement of counsel.

RELIEF SOUGHT ON APPEAL

Reversal and remand for trial.

STATEMENT OF FACTS

The dispute before the court arises from the sale by the plaintiffs to the defendants of the remaining term of a lease on a store building, including fixtures and inventory, located at 1322 East 2100 South, Salt Lake City, Utah. See Plaintiffs' Exhibit 1.

The owners of the property, T. E. Robinson and wife, had leased the land to the plaintiffs for a fifteen-year term by a lease, dated August 14, 1947 upon the agreement of the Lessees to construct a store building thereon. (R. 39-43). The plaintiffs sold their leasehold interest to the defendant L. B. Johnson and to his son Merrill Johnson. This sale was terminated by an agreement dated November 1, 1955. It was agreed by the parties that the amount due on the L. B. Johnson-Merrill M. Johnson property lease agreement was \$39,650.92. See Exhibit 1.

The lease agreement sued on, Exhibit 1, was prepared by plaintiff Lorin J. Ellison who represented to the defendants that the monthly payments of \$545 for 29 months and the monthly payments of \$445 per month thereafter would pay out the lease agreement during the term of the Robinson lease. (R. 69). The defendants paid each monthly payment until April 1, 1963 (R. 11-15). Although the term of the Robinson lease expired on February 14, 1963, the defendants held over until April, 1963, when they were evicted. At the time the defendants were evicted the remaining payments on the lease agreement

amounted to \$4778.35. The defendants refused to pay after their eviction from the premises and this suit resulted.

The plaintiffs filed suit to recover the payments which fell due after the eviction and the defendants answered alleging mutual mistake and failure of consideration (R. 9-17). Plaintiffs' motion for summary judgment (R. 21) based on an interrogatory (R. 18) was denied. The case was pre-tried (R. 28-30) and was set for trial.

On the morning of the trial the court called a conference of counsel in chambers, a transcript of which is included in the record of this case. (R. 64-75). After a short discussion of the case the trial judge stated: "The plaintiff may have judgment as prayed based on the pleadings and the statement of counsel." The defendants thereupon made an offer of proof as follows:

"MR. SKEEN: Well, now, in order to make a record, I would like to make an offer—

THE COURT: Yes.

MR. SKEEN: —of proof.

THE COURT: Sure.

MR. SKEEN: Comes now the defendants and offer to prove by the testimony of Lyman Passey, who is present in the courtroom, that the lease agreement sued upon in this case was prepared by the sellers, the plaintiffs; that Mr. Passey met with Mr. Ellison, one of the plaintiffs, at the A.G. or the O.P. Skaggs office,

and at that meeting a question was raised by Mr. Ellison as to the amount of the monthly payments for the first twenty-nine months, and Mr. Ellison indicated that the figure he had in the draft of lease was not sufficient to pay out the debt during the term of the Robinson lease which is dated August 14, 1947. Mr. Ellison with the approval of Mr. Passey thereupon changed the monthly figure by increasing it and initialed it by the side of the agreement, and he stated that with that change the lease agreement sued upon would be paid out during the term of the Robinson lease. Mr. Passey accepted Mr. Ellison's word as to the computations because as obviously it was a very detailed and complicated mathematical problem to figure out the amortization and the amount that would be paid on principal and interest each month and finally arrived at the payment of the amount the parties agreed to pay.

· · ·
MR. SKEEN: Back on the record. Defendants will—or offer to show by—also by the testimony of Mr. Passey that—well, here it is—that the extra payments of a hundred dollars a month for twenty-nine months were calculated by Lorin Ellison to adequately pick up the delinquent payments under a previous contract dated February 16, 1952, between Famous Foods and L. B. Johnson and Merrill M. Johnson. I finally found that. I have it here.” (R. 69, 71).

The trial court gave judgment for the plaintiffs as prayed, together with interest and attorneys' fees. The judgment is dated January 6, 1966, nunc pro tunc as of January 5, 1966. Findings of Fact and Conclusions of Law were signed and filed on January 24, 1966.

STATEMENT OF POINTS

1. The judgment is not supported by Findings of Fact and Conclusions of Law.

2. The court erred in denying a trial on the issues of mutual mistake and partial failure of consideration.

3. Parol evidence was admissible.

ARGUMENT

1. THE JUDGMENT IS NOT SUPPORTED BY FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The rule that Findings of Fact and Conclusions of Law must be filed before the entry of judgment has long been established in Utah. *Kahn vs. Central Smelting Co.*, 2 Utah 371, reversed on another point, 102 U.S. 641, 26 Law. Ed. 266; *Fisher vs. Emerson*, 15 Utah 517, 50 P. 619; *Billings vs. Parsons*, 17 Utah 22, 53 P. 730.

Rule 52(a) Utah Rules of Civil Procedure provides:

"In all actions tried on the facts without a jury or with an advisory jury, the court shall, unless the same are waived, find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgement . . . Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b)."

It is a matter of record that the case was before the court for a trial on the issues; that an offer of

proof was made by defendants and rejected; that no waiver was made by defendants; and that no motion was before the court.

It is also a matter of record that the Findings of Fact and Conclusions of Law were signed on the 24th day of January, 1966, 19 days after the judgment became effective.

In addition it should be noted that what purport to be Findings of Fact are, except for finding No. 2 concerning attorneys fees, in reality Conclusions of Law.

It is apparent that the actions of the court pointed out above are breaches of the Rules which constitute reversible error.

2. THE COURT ERRED IN DENYING A TRIAL ON THE ISSUES OF MUTUAL MISTAKE AND PARTIAL FAILURE OF CONSIDERATION.

The law is well settled that in case of a mutual mistake of a material fact a written instrument will be reformed by a court of equity to carry out the intentions of the parties.

The rule is stated by Williston as follows:

“Where a written agreement is not in conformity with the actual intention of the parties in a material matter, a court of equity will reform the writing in accordance with that intention if innocent parties will not be affected thereby. The jurisdiction is confined

to writings, but as to them it is clear." 5 Williston on Contracts, Rev. Ed., Section 1547.

This rule has been adopted and followed in Utah in several cases. *Naisbitt vs. Hodges*, 6 Utah 2d, 116, 307 P.2d 620 (1957); *Sine vs. Harper*, 118 Utah 415, 222 P.2d 571 (1950); *Greene*, *Mistake in the Utah Law of Contracts*, 7 Utah Law Review 304 (1961).

In *Sine vs. Harper*, *supra*, a case in which a deed was reformed for a mutual mistake, Mr. Justice Lattimer explained the standard:

"That evidence be clear and convincing does not require that it be undisputed in all details. It would be most unusual to have a trial on the merits where witnesses did not disagree on some of the circumstances, on parts of conversations, and on some of the facts. The test of clear and convincing is whether, taking the evidence as a whole, it preponderates to a convincing degree in favor of the plaintiffs. If it does, then it meets the test . . . "

In the present case the defendants offered to prove by a witness in the courtroom that it was the intention of both parties that the Lease Agreement sued on would be paid out by the end of the term of the Robinson Lease (R. 69, 71). This was obviously a material part of the agreement, and, in fact, a primary inducement for the contract. The payments of \$545 per month for the first 29 months and the payments of \$445 per month thereafter although not broken down as between rent for the building and payment for the inventory and equipment, contained a large rent component. This fact is evident

from a reading of the Robinson lease which required the Lessees (plaintiffs) to construct thereon an O.P. Skaggs system store **with all costs of construction of the building to be paid by the Lessees.** The lease provided further that Lessees would pay taxes to the extent of \$500 per year, and that upon the termination of the lease the building would be the property of the Lessors. (R. 39-43).

Under the Lease Agreement between the parties hereto, Exhibit P-1, the defendants assumed the obligations of the Robinson lease and took possession of the inventory and fixtures. The surrounding circumstances indicate strongly that all parties intended that the rent and purchase price of the inventory and equipment would be paid out of the operation of the grocery store.

The defendants made an offer of proof to show a mutual mistake of fact (namely, the intention that the Lease Agreement would be paid out upon the termination of the Robinson lease). That the Robinson lease terminated about 11 months before the pay-out on the Lease Agreement is evident from the fact that when the defendants were evicted from the premises unpaid installments at the rate of \$445 per month amounted to \$4778.35. During this period of 11 months, the defendants would be required to pay rent on a building from which they had been evicted.

This point was argued to the trial court (R. 65)

and was disposed of by the comment, "They have got no help coming because they would have just had to pay more each month." This was error because, in effect, it forced the defendants to continue to pay rent on a building from which they had been evicted. There was a partial failure of consideration. The injustice is evident and the defendants were entitled to a day in court and to equitable relief. A question might well be raised as to what equitable relief should be granted under the facts related above. The cases hold that the circumstances of each case must be examined and justice should be done. See Greene, "Mistake in the Utah Law of Contracts", *supra*. One obvious item of relief should be the elimination of the "rent component" from all payments after the eviction from the premises.

We are aware that in a case involving mutual mistake a court of equity considers the circumstances of each case and particularly such matters as (1) negligence of the complaining party, and (2) whether an innocent third party will suffer if equitable relief is granted. With respect to the first item the monthly payments for a period of nine years were to be applied, first, to accrued interest and, second, to the principal. The mathematical computation of an amount to be paid each month to pay out the \$39,650.92 during the period from November 1, 1955, to February 14, 1963, is involved and complicated beyond the abilities of most people. Whether the defendants were justified in relying upon the representations by the plaintiff, Lorin Ellison, that

the pay-out and the termination of the Robinson lease would occur at the same time is one of the questions which should have been considered by the trial court after hearing evidence. With respect to item (2) it is apparent that no third party would be adversely affected by the granting of equitable relief.

In any event, the defendants were entitled to the benefit of the rule of Bullock vs. Deseret Dodge Truck Center, Inc., 11 Utah 2d 1, 354 P.2d 559, 561 (1960):

"A summary judgment must be supported by evidence, admission and inferences which when viewed in the light most favorable to the loser shows that 'there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' Such showing must preclude all reasonable possibility that the loser could, if given a trial, produce evidence which would reasonably sustain a judgment in his favor."

See also Rule 56, Utah Rules of Civil Procedure.

Defendants submit that there is more than a "reasonable possibility" that they could produce evidence that would support a judgment in their favor.

3. PAROL EVIDENCE WAS ADMISSIBLE.

The rejection of the defendants' offer of proof (R. 69, 71) cannot be sustained on the theory that it was not admissible under the parol evidence rule.

The use of parol evidence to prove the exist-

ence of a mutual mistake of fact is well established in Utah. In recognizing this, Mr. Justice Latimer for the court in *Sine vs. Harper*, *supra*, said:

“Appellant is in error in her contention that testimony concerning the mistake was inadmissible because it varied the terms of a written contract. If such a contention could be sustained, then the equitable theory of reformation of contracts would not apply to written instruments. The right to reform is given, at least in part, so as to make the written instrument express the bargain the parties previously orally agreed upon. When a writing is reformed, the result is that an oral agreement is by court decree made legally effective although at variance with the writings which the parties had agreed upon as a memorial of their bargain. The principle itself modifies the parol evidence rule.

Williston on Contracts, Rev. Ed., Vol. 5 Section 1552, states the rule as follows:

“The right of reformation whenever allowed is necessarily an invasion of the parol evidence rule, since when equity reforms a writing it enforces an oral agreement at variance with the writing which the parties had agreed upon as a memorial of their bargain. This limitation is necessary to work justice, and there seems no more reason to object to it in case of reformation than in case of rescission for fraud or mistake. In either case unless the mistake precludes the existence of a contract at law, it should not be denied that the writing correctly states the actual contract or conveyance which has been made, but since it is inequitable to allow the enforcement of it, and since justice requires the substitution of another in its place, equity gives relief where reformation is appropriate, and to that end necessarily admits any relevant parol evidence.’ ”

CONCLUSION

The court erred in denying a trial of the material issues of mutual mistake of fact and failure of consideration, and in entering a judgment without supporting findings of fact and conclusions of law.

It is respectfully submitted that the judgment must be reversed and the case remanded for a trial on the equitable issues presented by the pleadings.

E. J. SKEEN

CRAIG G. ADAMSON

Attorneys for Appellants