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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 : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

LORIN J. ELLISON, HARRY G. ANDERSON and WILLIAM A. DAWSON, dba Famous Foods, a limited partnership, and BILL A. BAYES, administrator with the Will annexed of the estate of Harry G. Anderson, deceased,

Plaintiffs and Respondents,

vs.

L. B. JOHNSON and LYMAN E. PASSEY,

Defendants and Appellants.

No. 10550

RESPONDENTS' BRIEF

Appeal from the Judgment of the Third District Court for Salt Lake County Hon. A. H. Ellett, Judge

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STATEMENT OF FACTS

The Respondents agree with the Statement of Facts set forth in Appellants' Brief with the exception of the statement that one of the plaintiffs (Lorin J. Ellison) represented to the defendants that the monthly payments of Five Hundred Forty-five Dollars ($545.00) for twenty-nine (29) months and Four

Hundred Forty-five Dollars ($445.00) per month thereafter would pay out the agreement during the term of the Robinson lease. The record discloses (R. 69) that the defendants offered to prove by the testimony of the defendant, Lyman Passey, that Mr. Ellison represented to him that the agreement sued upon would be paid out by the end of the Robinson lease. This, of course, is Mr. Passey's statement and is not confirmed by Mr. Ellison. In fact, the trial court (R. 66) suggested that counsel for defendants call the plaintiff, Mr. Ellison, as his first witness if they expected to prove mutual mistake. Instead, counsel offered only the testimony of defendant, Lyman E. Passey.

We also call attention to the proffered proof of the defendant Passey (R. 69), that Mr. Ellison, with the approval of Mr. Passey, changed the monthly figure by increasing the amount and initialed it by the side of the agreement. An examination of the agreement (R. 2) (Pl. Ex. 1, R. 63) discloses that the figure $545.00 was blurred and the last figure "5" was made plainer by inserting the figure in ink above the blurred figure. The only change thus made was a correction of a $5.00 typographical error (R. 70).

It is the contention of the Respondents that these exceptions to the facts, as stated by the Appellants, are minor and have no bearing on the decision in this case and that the trial court was correct in granting its Summary Judgment *Sua Sponte* on the pleadings and statements of counsel.

STATEMENT OF POINTS

1. Judgment in this case is not required to be supported by Findings of Fact and Conclusions of Law, it being in the nature of a Summary Judgment and the fact that findings and conclusions were not filed until nineteen (19) days after the judgment is harmless error.

2. On the basis of the pleadings, answers to interrogatories and statement of counsel, the trial court was justified and not in error in failing to find a mutual mistake and failure of consideration.

3. Parol evidence was inadmissable to vary the terms of the written instrument.

ARGUMENT

1. JUDGMENT IN THIS CASE IS NOT REQUIRED TO BE SUPPORTED BY FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT BEING IN THE NATURE OF A SUMMARY JUDGMENT AND THE FACT THAT FINDINGS AND CONCLUSIONS WERE NOT FILED UNTIL NINETEEN (19) DAYS AFTER THE JUDGMENT IS HARMLESS ERROR.

Rule 52 (a) of the Utah Rules of Civil Procedure provides that findings are unnecessary on decisions or motions under Rule 12 or 56 (Summary Judgment).

It is a matter of record that the judgment in this case was in the nature of a summary judgment based on the pleadings and statement of counsel and would come within the scope of Rule 56 thereby making the filing of findings and conclusions unnecessary. The pleadings, including the answers to the written interrogatories and statement of counsel clearly indicate that there was no genuine issue as to any material fact. Failure to make findings in such a case is not reversible error if, when found, they must necessarily have been adverse to the appellant. *Groome v. Ogden City,* 10 Utah 54, 37 Pac. 90; *Petty v. St. George Garage,* 60 Utah 126, 206 Pac. 720.

Rule 61, Utah Rules of Civil Procedure provides:

> "No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or any of the parties is ground for granting a new trial *or otherwise disturbing a judgment* or order unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceedings must disregard any error or defect in the proceedings *which does not affect the substantial rights of the parties.*" (Emphasis added.)

In this case the findings were not filed until nineteen (19) days after the judgment and then only on suggestion of Counsel for Defendant. Did this failure affect the substantial rights of the parties? We think not. This court has held, under a rule similar to Rule 61,

that the failure to make findings under facts similar to those in the present case is harmless error and not grounds for reversal. *In Re: Love's Estate,* 75 Utah 342, 285 Pac. 299; *Snyder v. Allen,* 51 Utah 291, 169 Pac. 945.

2. ON THE BASIS OF THE PLEADINGS, ANSWERS TO INTERROGATORIES AND STATEMENT OF COUNSEL, THE TRIAL COURT WAS JUSTIFIED AND NOT IN ERROR IN FAILING TO FIND A MUTUAL MISTAKE AND FAILURE OF CONSIDERATION.

The facts in this case are clear and uncontroverted except for the minor differences set forth in the Statement of Facts. They are as follows:

On the 1st day of November, 1955, the plaintiffs, as sellers, and the defendants, as buyers, entered into a simple unequivocal bargain and sale agreement. This agreement provided that the plaintiffs sold to the defendants their lease on that certain store building located at 1322 East 21st South in Salt Lake City, Utah, together with market equipment described in the inventory attached to the agreement. This agreement could have been more aptly described as a sales agreement rather than a lease agreement. The defendant buyers agreed to pay for said lease, inventory and equipment the sum of Thirty-nine Thousand Six Hundred Fifty and 92 100 Dollars ($39,650.92), payable Five Hundred

Dollars ($500.00) on the 1st day of November, 1955, Five Hundred Forty-five Dollars ($545.00) on the 1st day of each month thereafter for a period of twenty-nine (29) months, "then $445.00 *on the 1st day of each month until the balance of said sum, together with interest, as hereinafter specified, has been paid.*" (Emphasis added.)

The agreement also provides:

> "The buyers accept all of said property in its present condition *and agree to assume the lease on said premises with the owner thereof and to be bound by all of the terms and conditions thereof as the seller has been heretofore.*" (Emphasis added.) (R. 44-45.)

In accord with the terms of this agreement, the plaintiffs delivered the fixtures, inventory and lease to the defendants and the defendants made payments to the plaintiffs for over nine (9) years and at the same time made monthly payments to the landlord (Doctor Robinson) for the rental on said property. At the time their lease expired in February of 1963, the defendants were notified by the landlord that he would be unable to renew their lease because the State Road Commission was taking the property for a road-widening project. The defendants held over for two (2) months beyond the end of their lease and were then forced to vacate. At this time, there remained a balance owing to the plaintiffs of Five Thousand Seventeen and 25/100 Dollars ($5,017.25) together with interest. The above facts are admitted by the defendants and are not controverted.

To justify their refusal to pay the amount admittedly remaining unpaid under the agreement (R. 18 and R. 20), the defendants claimed there was a mutual mistake and failure of consideration inasmuch as they were led to believe by one of the plaintiffs (Mr. Ellison) that the installment payments would pay the agreement out by the end of the lease which they purchased from the plaintiffs.

There are numerous decisions by this court, including several by the present membership of the court, holding that a contract can be reformed for mutual mistake but setting down certain tests which must be met before reformation is allowed.

A very scholarly discussion of these questions has been made by Mr. J. Thomas Greene in his article published in the Utah Law Review, Vol. 7, 1961, No. 3, entitled "Mistake in the Utah Law of Contracts" (a single copy of this treatise is enclosed with Respondents' brief). Mr. Greene sums up the general conclusions after applying the rules laid down in the numerous decisions by this court as follows:

> "The well-settled general rule in Utah is that a mistake on the part of one party only is not redressable. Typical statements of the rule are as follows:
>
> "Equity will not reform a written contract unless the mistake is proved to be the mistake of both parties.
>
> "A contract will not be reformed for a unilateral mistake.

> "A mistake on one side of a unilateral mistake of fact is ground for reversal only when such mistake is induced by fraud." Starley v. Deseret Foods Corp., 93 Utah 577, 74 P.2d 1221.

In the case of *Sine v. Harper,* 222 P.2d 571, relied upon by the Appellants, the facts were conclusive that a vital mistake was made by both parties and the court stated:

> "As a matter of fact any other finding would have rendered an absurd result, absurd in the sense that the reason for the contract known to both parties would have been utterly ignored."

Applying the above reasoning to this case, the reverse would be true. The plaintiffs and defendants entered into a contract for the payment of an agreed amount of money in monthly installments. There is no contention made by the defendants that the balance sued upon has been paid. Defendants' only contention is that they were informed by the plaintiffs that the contract would pay out sooner than it did and, therefore, they are excused from paying the balance under the contract. If this reasoning were to be followed, the result would, under the holding in the *Sine v. Harper* case, have been "absurd in the sense that the reason for the contract known to both parties would have been utterly ignored."

Aside from being clear and convincing, as defined in the Harper case, the proffered evidence in this case indicates that no mistake was made as to the amount owing to the plaintiffs. This court has held that in the absence of some misconduct on the part of the plaintiffs

the defendants cannot be released from the consequences of its improvidence merely because the bargain is burdensome or unprofitable. *Allen v. Bissinger,* 62 Utah 226, 219 Pac. 539.

The only excuse offered by the defendants for not determining the payout period prescribed under the contract was as stated in the proffered testimony of the defendant Passey that:

> "He 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 would be paid on principal and interest each month and finally arrived at the payment of the amount the parties agreed to pay." (R. 69.)

This court has also held that unilateral mistake is of no legal significance when documents are signed without reading or without ascertaining the legal consequences of the document. *Garff Realty v. Better Building, Inc.,* 120 Utah 344, 234 P.2d 842; *Accord v. Coombs,* 123 Utah 49, 254 P.2d 621.

It has also been held that where the person knows the facts of the case but is ignorant of the legal consequences, he cannot claim mutual mistake. *Board of Education of Sevier School District v. Board of Education of Piute School District,* 85 Utah 276, 39 P.2d 340; *Andrus v. Blazzard,* 23 Utah 233, 63 Pac. 888.

This court has also held in *Ashworth v. Charlesworth,* 119 Utah 650, 231 P.2d 724, at page 728, that:

"Even assuming a mistake was made by the defendants, they were guilty of such carelessness in not seeing what they should have seen and in not obtaining readily available information that the trial court was not obligated to relieve them of their own neglect. The fault, if any, in this case appears to fall heavily upon the shoulders of the defendants."

See also Pomeroy on Equity Jurisprudence 856 "B" Fifth Edition, 1951.

This brings us to the contention of the Appellants on page 8 of their brief that the alleged mutual mistake of fact "required the defendants to pay rent on a building from which they had been evicted." The undisputed facts are that the issues sued upon in this case involve a bargain and sale agreement. The plaintiff sold to the defendants for an agreed sum their lease, inventory and fixtures. The defendants paid the rent to the landlord (Doctor Robinson) for over nine (9) years until the lease expired. There is no mention in the agreement that any rents were to be paid to the plaintiffs nor were any paid nor was this suit brought to compel defendants to pay rent on a building from which they had been evicted. This suit was brought to collect the unpaid balance which both parties agree remains unpaid under the terms of the agreement.

The trial court was correct in finding: (R. 67-68)

"Then you (the defendants) have got to go out now because you would only have had to pay out more. If they hadn't made a mistake, you would have to have paid more each year."

We submit that under the undisputed facts in this case, the defendants were entitled to summary judgment *Sua Sponte* and that the rule quoted by Appellants from *Bullock v. Deseret Lodge Truck Center, Inc.,* 11 Utah 2d 1, 354 P.2d 559, 561 (1960), gives the Appellants no support for their position. The rule quoted in this case is as follows:

> "A summary judgment must be supported by evidence, admissions 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 the moving party is entitled to judgment as a matter of law.*" (Emphasis added.)

In this case there is no genuine issue as to any material fact. The defendants agreed to pay a fixed sum of money in monthly installments until the account was paid in full. The claim of the defendants that they were led to believe that the contract would pay out sooner than it did is not a material fact and would not sustain a judgment in their favor. To do so would deprive the plaintiffs of the fruits of their bargain and would result in an inequity.

3. PAROL EVIDENCE WAS INADMISSIBLE TO VARY THE TERMS OF THE WRITTEN INSTRUMENT.

The parol evidence rule is found in 78-25-16, Utah Code Annotated, 1953. It reads as follows:

> "There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases . . . ."

Then follows a list of exceptions, none of which apply to this case.

The general rule under this statute has been discussed in *Fox Film Corporation v. Ogden Theatre*, 82 Utah 279, 17 P.2d 294. The court in this case held:

> "In the absence of fraud or mistake, parol evidence is not admissable to contradict, vary or add to or subtract from the terms of a valid written instrument."

See also *McCornick v. Levy*, 37 Utah 134, 106 Pac. 660; *Moran Inc. v. First Security Corp.*, 82 Utah 316, 24 P.2d 384; *Last Chance Ranch Co. v. Ericksen*, 82 Utah 475, 25 P.2d 952; Jones on Evidence, Second Edition, 285, Page on Contracts, Vol. 4, 2164.

It is recognized that oral testimony can be received to correct a mistake which results in an injustice and to, of course, modify the parol evidence rule. *Sine v. Harper, supra,* and *Fox Film Corporation v. Ogden Theatre, supra.*

However, the alleged mistakes claimed by the defendants in this case do not involve a material fact, nor would they result in an injustice so as to bring them within the exception of the parol evidence statute (arguments on this question are covered in Point No. 2).

The defendants argue that because they did not have the use of the building beyond the term of their lease they were unable to operate their store and thus procure the means by which to pay plaintiffs the balance due under the contract. (R. 68). This, under the authorities cited, offers no excuse. *Allen v. Bissinger, supra.*

In this case, the Utah Supreme Court stated:

> "There is no claim of misrepresentation or fraud against the defendant. It may well be that the reports proved useless and of no value to defendant, and that in volume and price they exceeded its expectations, but in the absence of some misconduct on the part of the plaintiff, the defendant cannot be relieved from the consequences of its improvidence, merely because the bargain is burdensome and unprofitable."

See also Fujikaya v. Sunrise Water Company, 158 F.2d 490, 492 and A.L.R.2d 27.

CONCLUSION

There was no mutual mistake of any material matter which would justify the court in setting aside the parol evidence rule nor would any injustice result if the defendants were required to comply with the terms of their contract. On the other hand, it would be inequitable to permit the defendants to avoid payment of the sums which admittedly remain unpaid on the contract sued upon. There were sufficient facts admitted

by the defendants through their pleadings, offer of proof and Statement of Counsel to justify the summary judgment of the trial court and the same should be affirmed.

Respectfully submitted,

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