1966

Young Electric Sign Company v. John R. Newbold dba Stereo Villa : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

YOUNG ELECTRIC SIGN COMPANY, a Corporation,

Plaintiff & Respondent

vs.

JOHN R. NEWBOLD dba STEREO VILLA,

Defendant & Appellant

Case No. 10632

BRIEF OF APPELLANT

Appeal from the Judgment of the
Third District Court for Salt Lake County
Honorable Leonard W. Elton, District Judge

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STATEMENT OF THE KIND OF CASE

Appeal from order granting summary judgment on question of whether seller is entitled to repossess sign sold on conditional sale, retain payments made to time of repossession, resell the sign, retaining the proceeds thereof for its own use and benefit, giving defendant no credit therefor, and sue for the remainder of the purchase price.

DISPOSITION IN LOWER COURT

On January 18, 1966, the Honorable Joseph Jepps judge of the district court, ordered the action dismiss granting permission to refile an amended complaint o move the court to reconsider. Plaintiff filed a motion reconsider which was heard before another judge of t district court, Honorable Leonard W. Elton, who grant summary judgment for the plaintiff.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the order of Judge Elt granting summary judgment, and a reinstatement of t original order of dismissal.

STATEMENT OF FACTS

On October 31, 1963, defendant purchased a sign f use in his business from defendant for the total price $277.95. See exhibit P-1 included in the record here Defendant paid $100.00 down and agreed to pay the b ance of $177.95 in two equal monthly installments beg ning with the month of January, 1964, with interes thereon at the rate of 8% per year on all past due insta ments. Defendant defaulted in his payments immediate thereafter, and has paid nothing on the contract exce for the $100.00 down payment. Plaintiff subsequently possessed the sign and resold it. Thereafter, apparently reliance upon the provisions of paragraph 4 of the co tract which provided that in the event of default plaint could remove the sign from defendant's premises "a retain the same and the payments theretofore ma thereon by the vendee for the use of said SIGN," a paragraph 6 which provided the "SIGN has no valu

when repossessed, suit was commenced for the full amount of the contract balance of $177.95. The matter was brought on for pretrial before Judge Jeppson who entered the following order:

> "The court was of the opinion that it was against public policy for the plaintiff to obtain the repossession of the sign, together with the full purchase price, and inasmuch as the defendant was not in a position to show that the merchandise was lawfully foreclosed, and that the defendant was credited with the value of the merchandise at the time of repossession, the Court at Pretrial dismissed the action with permission given to the plaintiff to file an amended complaint on or before the 28th day of January, 1966. In the event it is not filed, this dismissal is with prejudice."

The court also granted permission to bring the matter on for reconsideration provided a motion for such was filed before the said 28th day of January. A motion was filed and hearing thereon continued to the 19th day of April, 1966 at which time it was heard before Judge Leonard W. Elton, another judge of the Third District Court who granted summary judgment for the plaintiff. (R-13)

Plaintiff thereafter filed his notice of appeal (R-14) and it is at this point that the case is now before the Supreme Court.

ARGUMENT

POINT I

THE HEARING BEFORE JUDGE ELTON INVOLVIN(THE EXACT SAME ISSUES OF FACT AND LA\ THAT HAD ALREADY BEEN RULED UPON B\ JUDGE JEPPSON WS IMPROPER AND CONTRAR\ TO ACCEPTED PRINCIPLES OF JUDICIAL ADMIN ISTRATION

It has long been a principle of the common law tha courts of equal jurisdiction will not interfere with pro ceedings before another court or before another judge o the same court. During the time when the law and equit courts were separated, equity oft times intervened in pro ceedings before the law courts to correct or prevent a injustice, but even there, such interferance was cautiou ly and judiciously interposed.

Since the merger of both the law courts and the equit courts into one court, it has been the practice for cour of equal jurisdiction to refuse to review the actions o judgments of one another. The district courts of the Stat of Utah, of course, have both law and equity powers com bined into one and the same court, and it is therefo improper for one division of the District Court of Sa Lake County to overrule or interfere in any manner wit the rulings of any other division.

The Montana Court has had occasion to rule on th very matter, and the case of State ex. rel. Carrell District Court, 50 Mont. 428, 147 P. 612, is precisely i point. In June, 1912, in department 2 of the District Cou in Lewis and Clark County, one Joseph J. Carrell wa

appointed guardian of the person and estate of one Mary Murphey, an incompetant some 80 years old. In January, 1915, the daughter of Mary Murphey, one Mrs. Nett, petitioned to have her mother declared competent. The hearing was held in department 2 and the petition denied.

A writ of habeas corpus was immediately sued out in behalf of Mrs. Murphey in department 1, another department of the same court. The writ was issued, hearing held in department 1, and Mrs. Murphey discharged. The guardian, however was not relieved of his duties in regard to the estate, and consequently appealed to the Supreme Court. The order discharging Mrs. Murphey was overruled on the ground, among others, that the discharge on the habeas corpus writ was based upon the fact of the competency of the respondent which fact had already been adjudicated in department 2 on the petition to have her restored to competency. The court said:

> "That adjudication should have ended the matter, except for causes arising subsequently thereto. The two departments of the district court are coordinate. Neither possesses any appellate or supervisory control over the other, and when one has spoken upon a matter properly before it, a due sense of propriety alone ought to be sufficient to stay interference by the other."
>
> "When the application for restoration was denied in dept. No. 2, Mrs. Nett (Mrs. Murphey's daughter) was forbidden by statute (Section 6324 Rev. Codes) the right to renew it before the other department, and yet if this order now under review be permitted to stand, she will have accomplished by indirection the very thing she is forbidden to do directly."

Section 6324 Rev. Codes, now 93-1101 Rev. Codes, 194
is substantially identicle with 78-7-19, U.C.A., 1953, whic
provides as follows:

> "REPEATED APPLICATIONS FOR ORDERS FOR
> BIDDEN - If an application for an order, made to
> judge of a court in which the action or proceeding
> pending, is refused in whole or in part, or is grante
> conditionally, no subsequent application for the sam
> order can be made to any other Judge except of
> higher court; but nothing in this section applies t
> motions refused for any informality in the papers o
> proceeding necessary to obtain the order, or to mo
> tions refused with liberty to renew the same."

The statute, of course, merely gives the force of statu
law to the principle as it has been observed by the cour
for centuries, making clear, however, that mere failu
of formality would not be a bar to a renewed motion o
the same grounds. The reason for the rule is well stat
in the case of Lutey Bros. v. Jackson, County atty., et. a
(Montana 1918), 179 P. 459.

> "It must therefore be constantly borne in mind tha
> while there may be more than one department co
> stituting a district court in this state, it is still b
> one court—one judicial establishment—and the a
> tion of one of the judges in a matter rightfully pen
> ing in the attachment proceeding before him co
> tinued until the matter could be finally and com
> pletely disposed of, and was absolute. While the o
> servance of this principle might be required o
> grounds of judicial comity and courtesy, it is a ru
> essential to the dignity and just authority of eve
> court, and its proper observance is necessary in ord
> that unseemly and discreditable conflicts may
> avoided."

The requirements of judicial comity and courtesy alone would be enough to require a reversal of the order of Judge Elton in this case. Add to that the mandate of Statute law forbidding repeated applications to different judges upon the same grounds, and the proposition becomes inescapable.

The statute does provide that nothing therein shall apply to motions denied with liberty to renew the same. This provision can only make sense if read to mean with liberty to renew the same before a different judge. Apart from statute, the common law has forbidden repeated applications, even to the same judge, on the same grounds once a ruling has been had on the merits. Even before the same judge a motion to be renewed must be based upon a new state of facts or conditions, or upon excusable neglect of the moving party to present the facts as they were at the original hearing. See 60 C.J.S. Motions and Orders, Section 44 et. seq.

In the instant case no new matter of fact or of law was alleged or argued before Judge Elton. In fact the motion as submitted (R-10, 11) recited that "Said motion shall be based on the pleadings of the parties hereto and the Law of Contracts." This, of course was the very ground upon which the motion was argued in the first place before Judge Jeppson.

POINT II

THE PURPORTED JUDGMENT OF JUDGE ELTON GRANTING SUMMARY JUDGMENT TO PLAINTIFF IS INVALID FOR THE REASON THAT THE ORIGINAL ORDER OF JUDGE JEPPSON DISMISSING PLAINTIFF'S COMPLAINT WAS NEVER VACATED OR SET ASIDE.

The pretrial order dated January 18, 1965, signed by Judge Joseph Jeppson states that "the Court at Pretrial dismissed the action with permission given to the plaintiff to file an amended complaint on or before the 28th day of January, on or before the 28th day of January 1966. In the event it is not filed, this dismissal is with prejudice." The court then granted permission to argue a motion to reconsider provided said motion were filed before the said 28th day of January. Pursuant to motion filed January 27, 1966, the matter was reheard before Judge Elton and summary judgment given plaintiff.

As a matter of good practice, and in order to avoid confusion the court must vacate a prior order before entering a new or different order pertaining to the same subject matter. As the record now stands, the plaintiff's complaint was dismissed with prejudice and the same plaintiff later granted summary judgment on the complaint that had been previously dismissed. No order vacating or setting aside the dismissal was ever entered. For this reason the order of summary judgment should be reversed and the matter remanded to the district court for rehearing before the proper judge.

POINT III

PUBLIC POLICY, PRINCIPLES OF COMMON LAW, AND THE PROVISIONS OF THE UNIFORM SALES ACT REQUIRE THE PLAINTIFF TO MAKE HIS ELECTION—RESCIND THE SALE AND RETAKE THE SIGN; CONFIRM THE SALE AND SUE FOR THE PURCHASE PRICE; OR RETAKE THE SIGN, SELL IT FOR THE BEST POSSIBLE PRICE REASONABLY OBTAINED AND CREDIT DEFENDANT WITH THE NET AMOUNT RECOVERED.

The law of sales, both under the common law, and the Uniform Sales Act clearly dictates a reversal of the order granting summary judgment in this case. The case of I.X.L. Stores Co. v. Moon (1916), 49 U. 262, 162 P. 622 is a case decided one year prior to the adoption of the Uniform Sales Act in Utah, and is exactly in point with the instant case. In that case the plaintiff had sued on two notes given in connection with a conditional sale contract. About 30 days after the goods were sold and delivered to the defendant he became convinced he could not pay for them, called the plaintiff and asked them to take the goods back. Plaintiff thereupon took all of the said goods and sued for the full purchase price upon the notes. The trial court gave judgment as a matter of law to the defendant. The Utah Supreme Court affirmed.

The court stated the question involved thusly:

> "What are the legal rights of a vendor of personal property as against the vendee in case the vendor retains the title of the property until the purchase price is fully paid and in case of default of payment of the purchase price, or any part thereof, the vendor

repossesses himself of the property which is the subject of sale, either with or without the consent of the vendee?"

In answer to the question the court stated:

"We are clearly of the opinion when the plaintiff, although at the request and with the consent of the defendant, unconditionally repossessed itself of the property which was the subject of the conditional sale and retained the same, it waived any other remedy that it might have had under the contract, and it is now precluded from maintaining an action upon the notes or for the purchase price of the goods. The court, therefore, committed no error in its conclusion of law and in entering judgment for the defendant . . . "Of course the vendor cannot take two bites out of the same cherry. He may not with one hand treat the contract as rescinded, and retake the goods, and with the other treat it as in force, and sue on it as subsisting and recover full compensation for its breaches without even offering to give credit for reasonable value of the goods taken and repossessed. As the authorities say, he may not have the goods and at the same time the full purchase price. That, in effect, it what the appellant claims, and that is what we say and decide he may not do . . . Here the appellant chooses, unconditionally, to retake and repossess, and then also seeks to enforce the contract and recover full compensation thereon as though there had been no retaking. *He may not do that.*" (Emphasis added)

The court cited and relied upon the following texts and authorities: I Mecham on Sales, sections 615; 616 Cyc 896; Parke v. White River L. Co., 101 Cal. 37, 35 P. 442 (wherein the California court stated that "the plaintiff could either recover the property or sue for the purchase

price. But the pursuit of one remedy necessarily excluded the other. It (the plaintiff) was not entitled both to the purchase price and the property."); Bailey v. Hervey, 135 Mass. 174; Butler v. Hildreth, 5 Metc. (Mass.) 49; Frisch v. Wells, 200 Mass 429, 86 N.E. 775, 23 L.R.A. (N.S.) S 144; Holt Mfg. Co. v. Ewing, 109 Cal 353, 42 P. 435; Smith v. Barber, 153 Ind. 322, 52 N.E. 1014. For other cases on this point see Sales, Key No. 479 (11), Sales, Cent. Dig. Section 1431. The above case is typical of the many jurisdictions requiring the seller to make his election, and denying him the opportunity to pursue mutually exclusive remedies. Plaintiff in the instant case must either (1) sue for the purchase price, in which case he is required to redeliver the sign; (2) rescind the sale and take the sign back unconditionally; or (3) retake the sign, resell it for the buyer's account, credit him with the net amount realized, and sue for the difference between the market value (most likely evidenced by the price obtained from a reasonable attempt to sell at a fair price) and the contract price. In any event, the seller cannot retake the sign unconditionally, which amounts to a rescission, and at the same time sue for the full purchase price.

78 C.J.S., Sales Section 389 states:

> "Where the seller has once elected his remedy, he may not thereafter elect, resort to, or pursue another and inconsistent one."
>
> "The seller may not pursue two inconsistent remedies at the same time, either in the same action or in different actions, and, where he has once elected his remedy, he may not thereafter elect, resort to, or pursue another and inconsistent one."

In the case of Bresslin - Griffitt Carpet Co. v. Asador-

ian, Mo. App., 145 S.W.2d. 494 as quoted in 78 C.J.S. 10 note 17, it was held that:

> "Where a portion of goods which had been sold an delivered, was returned to the seller, the seller coul refuse to accept the goods and sue for the full pu chase price, accept the goods at the invoice price an so credit the buyers account, or sell the goods f the buyer's account at the best price obtainable an sue for the difference between the proceeds of suc sale and the invoice price of the goods."

Section 60-4-2, U.C.A., 1953 provides the remedi available to the unpaid seller:

> "(1) Subject to the provisions of this title, notwith standing that the property in the goods may hav passed to the buyer, the unpaid seller of goods, such has:
>
> (a) A lien on the goods or right to retain them f the price while he is in possession of them.
>
> (b) . . .
>
> (c) A right of resale as limited by this title
>
> (d) A right to rescind the sale as limited by th title.

This section, outlining the remedies available to th unpaid seller clearly limits him to the above alternativ as limited by 60-4-9 (When and how resale may be mad and 60-4-10 (When and how seller may rescind the sale Plaintiff obviously has not chosen to rescind the sale, an the only remedy available to him against the goods is exercise his right of lien or of resale, either of which r quires a sale of the goods and credit to the buyers a count.

Apart from the rights against the goods outlined by chapter 4 of the U.C.A. as discussed above, the seller would have an action for breach of contract as provided for in chapter 5. 60-5-1 (1) provides that an action may be maintained for the price where the property or title to the goods has actually passed to the buyer. This provision is not applicable to the instant case for the reason that the sign was sold under a title retaining contract, and defendant never received title to the goods. Consequently 60-5-1 (3) delimits the seller's rights as follows:

> "Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 60-5-2 (4) (providing for action where the goods have not been accepted) are not applicable the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter hold by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price."

Section 60-5-2 provides for resale and credit where the goods have not been accepted, and under 60-5-1 (3) the only condition upon which plaintiff could retain the goods as he has done here, without resale is where they are not readily resalable, and even there he must stand ready to deliver when the price is paid. Evidence in the instant case would show that the sign was readily resalable, was in fact resold, and that the seller has in all ways since repossession, regarded the sign as his own property and not that of the buyer. The whole tenor of the law, both at common law, and under the Uniform Sales Act contemplates that the goods are to be resold and credit given

to the buyer for the price obtained. The Utah court in Holland-Cook Mfg. Co. v. Consolidated Wagon & Machine Co., 49 U. 43, 161 P. 922 held that the measure of damages, in an action by the seller to recover the price of the goods sold, is a matter of general law. The plaintiff in the instant case utilized the conditional sales agreement as a security device for the payment of the purchase price. Under the conditions extant in this case he is not entitled to retain his security, resell it for a substantial price, and still hold the defaulting buyer for the full purchase price.

Plaintiff, even under general contract law would be required to do all that he reasonably could to avoid or mitigate his damages. See Stimpson on Contract 1954 edition, page 538. Nor is a penalty, even though provided for in the contract recoverable. Stimpson on Contract p. 534.

The court, in granting summary judgment for the plaintiff had to have relied on the provisions in paragraphs 4 and 6 of the conditional sale contract. Paragraph 4 if applied to the facts in this case constitutes a forfeiture which neither the law nor equity will allow. If the provisions of paragraph 4 were merely an attempt to determine damages in advance, and the attempt was reasonable, it could be sustained on that ground, but that is a matter of fact to be determined by the court and the jury at trial, and cannot properly be disposed of by means of a summary judgment.

Paragraph 6, on the other hand is an attempt to determine in advance what the evidence will be. The fact that the parties stipulated that the sign has no value if re

possessed should be considered by the court or jury in arriving at the damages to be awarded; but again, it is not conclusive, and should be submitted along with other evidence. This is especially true in this case where the evidence would show that the sign was in fact resold for a substantial price, which fact, contrary to the statement in the agreement, more properly establishes the market price for the sign which is the only criterion upon which to base additional damages.

CONCLUSION

From the foregoing, it is evident that the order granting judgment to the plaintiff should be reversed, the order of dismissal previously granted should be reinstated, and the matter remanded to the district court of further proceedings.

Respectfully submitted,

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