

1962

Western Machinery Co. v. H. K. Riddle and E. J. Mayhew : Respondents and Cross-Brief of Appellant

Utah Supreme Court

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MAY 2 1962

In the Supreme Court of the State of Utah

WESTERN MACHINERY COMPANY
A Corporation,

Plaintiff-Appellant,

—vs.—

H. K. RIDDLE and E. J. MAYHEW,
*Defendant-Respondent and
Cross-Appellant.*

11 1962

no Court, Utah

Case No.
9611

RESPONDENTS and CROSS-APPELLANT'S BRIEF

Appeal and Cross-Appeal from the Third Judicial
District Court of the State of Utah in and for
Salt Lake County
Honorable Stewart M. Hanson, Presiding

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In the Supreme Court of the State of Utah

WESTERN MACHINERY COMPANY
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—vs.—

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*Defendant-Respondent and
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} Case No.
9611

RESPONDENTS and CROSS-APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action on an agreement for the transfer of personal property arising out of the failure of Defendants to complete payment under the agreement and the subsequent repossession and resale by Plaintiff.

DISPOSITION IN LOWER COURT

The Lower Court, sitting without a jury, found that the agreement was a rental contract, and allowed Plaintiff the rentals it claimed, plus cost of repairs and the cost of repossession, less the proceeds of the resale of the property.

RELIEF SOUGHT ON APPEAL

Cross-Appellant and Defendant E. J. Mayhew seeks reversal of the Judgment of the Lower Court and the entry of a decree dismissing Plaintiff's complaint with prejudice.

STATEMENT OF FACTS

On or about January 29, 1960, Defendants E. J. Mayhew and H. K. Riddle signed the Plaintiff's form of "RENTAL AGREEMENT" as modified. (Exhibit "1," Record Page 2). It stated that the Plaintiff leased to the Defendants a specifically described piece of machinery. Typed immediately below the description appears the following clause:

"Upon receipt of final payment, Western Machinery Company agrees to execute a 'Bill of Sale' to transfer Title of this Tractor Shovel to H. K. Riddle and E. J. Mayhew."

The front of the document further provides that Defendants agree to pay as "rental" the sum of \$511.00 per month.

Deleted from the printed form is the following clause:

"Said rent is to begin on the day the said property is delivered to Lessee, and is to end on the day said property is returned by said Lessee to Lessor, at"

The contract then provides:

"Said property is hereby leased for a term of 24 Months Minimum Guaranteed."

The balance of the paragraph in the printed form, which was deleted, read :

“and if Lessee retains said property after the expiration of said term, such retention shall be construed as a continuance of this Lease, at the same rental, and under the same terms, until said property is so returned to Lessor, at the place above specified. At any time after the expirations [sic] of said original term, upon THREE (3) days written notice to be given by Lessor to Lessee, Lessee agrees to return said property to Lessor, at said place.”

On the reverse side of the printed form appear certain general conditions; the last printed provision thereon, which was deleted, read as follows :

“Lessee further agrees to use said property for only one shift of eight (8) hours per day of twenty-four (24) hours. If Lessee desires to use said property for more than eight (8) hours in any one twenty-four (24) hour day then such additional time is to be paid for by Lessee on a pro-rata basis at the same rate as herein provided.”

The machine was delivered to Defendant H. K. Riddle and maintained on property owned by him until Plaintiff repossessed it. The value of the machine at the time the agreement was entered into was \$10,950.00. The cost of repossessing the machine was \$217.84, and the cost of repairs made prior to resale by Plaintiff after repossession was \$804.68. The Defendant H. K. Riddle paid \$1,000.00 to apply on the agreement on March 2, 1960; there were no payments applied on the contract thereafter.

Plaintiff repossessed the machine in April, 1961, and sold it in "June or July" of 1961 for \$6,400.00. (Record page 32). No portion of the proceeds of sale was credited to Defendants' account. (Record, page 32). Plaintiff claimed unpaid "rentals" for the "lease" of the machine of \$7,176.00.

The Lower Court concluded that the agreement was a rental agreement, allowed the rentals of \$7,176.00 plus transportation charges of \$217.84, and cost of repairs of \$804.68, and reduced the sum thereof by the proceeds of the sale, \$6,400.00, and gave Plaintiff judgment for \$1,798.52 and attorney's fees in the sum of \$500.00.

ARGUMENT

POINT I.

ALL OF THE DEFENSES RAISED WERE WITHIN THE TERMS OF THE PRE-TRIAL ORDER, AS AMENDED, AND APPELLANT WAS FULLY APPRISED OF SAID DEFENSES.

Plaintiff seems to contend that Defendant was not entitled to claim or show that the rental agreement was anything other than that (Plaintiff's Brief Page 3). However, the defenses raised both at the time of trial and here were set forth in the Pre-Trial Order, as amended, (Record, Pages 9-13). The Rules of Civil Procedure provide that the Pre-Trial Order

"recites the action taken at the conference, the amendments allowed to the pleadings and the agreements made by the parties as to any of the matters considered, and which limits the issues

for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. . . ." (*Rule 16, Utah Rules of Civil Procedure*)

POINT II.

THAT THE COMPLAINT FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED AND THEREFORE DEFENDANT'S MOTION TO DISMISS, MADE AT THE OUTSET OF THE TRIAL AND AT THE CONCLUSION OF PLAINTIFF'S CASE, SHOULD HAVE BEEN GRANTED.

The agreement attached to Plaintiff's Complaint and introduced as Exhibit 1 in the case shows on its face that it is a Conditional Sales Contract as a matter of law. (See Point III, *infra*).

Since Plaintiff and Appellant never altered its theory of the case, to-wit, that the contract was a rental agreement, both its Complaint and its case in chief had to stand or fall on that theory.

Consequently, Defendant's Motion to Dismiss made at the outset of the trial (Record, Page 18) should have been granted. Also the Motion to Dismiss Plaintiff's Complaint made at the close of Plaintiff's case (Record, Pages 27-28) should have been granted. Both of these motions were expressly reserved and the Lower Court expressly saved Defendant his rights by virtue of said motions (Record, Page 28, Lines 21 to 23).

POINT III.

THAT THE AGREEMENT AS DRAWN IS NOT A RENTAL OR LEASE AGREEMENT BUT IS A CONDITIONAL SALES CONTRACT.

It has already been called to the Court's attention that the form agreement has been modified as set forth in the Statement of Facts. You will note that the contract contains an express provision that upon receipt of the 24-month guaranteed payments the Plaintiff will transfer title to the Defendants. There is no requirement that the Defendants exercise any option or take any steps or do anything further to acquire title after making payment for the 24-month period. Most of the significant portions of the form agreement which would indicate a lease have been deleted.

A general statement of the law applicable to this situation is contained in 47 *Am. Jur.* 23, *Sales, Section* 836 which reads as follows:

“... A conditional sale contemplates the passing of title at some time to the vendee and the payment of the purchase price; a bailment contemplates that title shall not pass and that the property shall be returned to the bailor or disposed of as he directs. (See 6 *Am. Jur.* 162, *Bailments, Section* 35.) Of the cases wherein the courts have had to determine the character of agreements as being either conditional sales or bailments, a large majority possess the following characteristics: The parties are styled ‘bailor’ and ‘bailee,’ or ‘lessor’ and ‘lessee;’ the contract states that the one party delivers to the other on hire the property forming the subject matter of the contract; and it is provided that the re-

ceiver of the property shall make certain payments, termed 'rentals,' amounting in all to the full value of the property, that the legal title or right of property shall remain in the person delivering the property, and that when all of the payments have been made the receiver of the property shall become the owner thereof. Contracts of this character have been held in a majority of jurisdictions to constitute conditional sales or absolute sales with mortgage back to secure the price, and not bailments or leases. (Citing many cases and Anno: 17 ALR 1466, s. 43 ALR 1262 and 92 ALR 335; 9 LRA 373; 12 LRA 446; 7 Am. St. Rep. 262; 35 Am. St. Rep. 495; 46 Am. St. Rep. 296; 94 Am. St. Rep. 249; 12 Ann. Cas. 876 . . .)

“The test most frequently applied is whether the so-called ‘lessee’ is obligated to accept and pay for the property at some future time, or, on the other hand, whether his primary obligation is to return or account for the property to the so-called ‘lessor’ according to the terms of the ‘lease.’ In the latter case, according to the weight of authority, the transaction is a bailment. (See 6 Am. Jur. 167, Bailments, Section 38.)”

The above comments are confirmed and amplified in 17 *ALR* 1421 at 1466, 43 *ALR* 1247 at 1256, 92 *ALR* 304 at 323 and 175 *ALR* 1366 at 1397.

In 17 *ALR* 1421 at page 1466 there appears a whole line of cases supporting Defendant’s position that a contract of the kind at issue here is a conditional sales contract, which cases are prefaced by the remarks:

“As heretofore remarked many contracts containing a reservation of title provision are in the form of a lease, or contain language more apt for

a lease or a hire than for a conditional sale. In construing such contracts, the test generally applied to determine the character is as to whether a return of the property is within the rights of the transferrer [sic]; if he is required or is entitled to return the property, in lieu of paying the purchase price, the contract will be construed to be a lease, but if he is obligated to pay the purchase price, even though it is referred to as rental, the contract will be construed to be a sale—generally a conditional sale.”

In 43 *ALR* 1247 at 1258 it is reported:

“That the contract is one of conditional sale and not of lease, is more evident where no conditional payment is required, as where the lessor agrees to execute and deliver a bill of sale for the property upon the completion of the payments specified in the contract. *Vorenberg v. American House Hotel Company* (1923) 246 Mass. 108, 140 NE 297.”

Again at 92 *ALR* 304 at 323 the following is reported:

“A so-called contract of lease by which the lessee binds himself at once and irrevocably for a rental equal to the full value of the thing leased, and is to become owner thereof when the so-called rental is all paid in full, and without the payment of any further consideration, is nothing else than a conditional sale disguised under the form of the lease; but the contract by which a party binds himself to pay in installments a certain sum for the use of a thing, with the privilege of becoming the owner thereof upon paying a further sum, for which, however, he has not bound himself absolutely is simply a lease with an option to purchase.. and is not a contract of sale. *Byrd v. Cooper* (1928) 166 La. 402, 117 So. 441.”

Again in 175 *ALR* 1366 at 1397 it is reported:

“Although the contract may refer to the payments to be made as rent, if it also provides that title shall pass when such rent is paid in full, it is a conditional contract of sale. *Billiter v. Ledbetter-Johnson Contractors* (1939) 60 Ga. App. 1, 2 S.E. 2d 677.”

In this case we have a delivery of the property to the Defendants, an unconditional promise to pay 24 monthly payments of \$511.00 each, under an agreement that when those payments are made the Plaintiff will transfer title to the Defendants without any further payment by Defendants or without an exercise of any option by Defendants, or indeed without any further act by Defendants. There is no right of the buyers to return the property and in fact the portion of the form contract which would give the plaintiff the right to terminate the lease and take back the property has been deleted by the parties. There is no question but what this is a conditional sales contract as a matter of law and not a rental or lease agreement.

POINT IV.

THE PLAINTIFF-APPELLANT HAVING REPOSSESSED AND SOLD THE PROPERTY WHICH WAS THE SUBJECT OF THE CONDITIONAL SALES CONTRACT, IT IS NOT ENTITLED TO ANY FURTHER RECOVERY.

The agreement which is the subject of this action is a conditional sales contract. It contains no provision that Western Machinery Company was entitled to hold the Defendants liable for any deficiency in the event of

repossession and resale. It is undisputed that the Plaintiff repossessed the machinery which is the subject of the contract. Thereafter it retained the property for "several months." (Record, page 32, line 14). Therefore, Plaintiff is precluded from any further recovery from Defendants at this point.

It is the great weight of authority that where a conditional sales contract contains no provision for repossession, resale and assessment of any deficiency against the buyer, the seller, by repossessing, elects his remedy and is precluded from suing buyer for the purchase price or any part thereof. 37 *ALR* 91, 83 *ALR* 959, 99 *ALR* 1288, and 49 *ALR* 2d 15 at 66. These annotations contain cases too numerous to cite individually, but they clearly support the proposition just stated.

The same general proposition is supported in the case of *IXL Stores Company v. Moon* (1916) 49 Utah 262, 162 P. 622. In that case the court asks the question, "What are the legal rights of a vendor of personal property as against the vendee in case the vendor retains the title to 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 the Court cites authority stating that the vendor has a choice of remedies. He can treat the contract as rescinded and recover his goods, in which case he foregoes any other remedy. He may treat the contract as breached and sue for his damages. He may waive return of the goods and

sue for the purchase price, or he may sue for specific performance holding the goods as security therefor. The Court held that the vendor had rescinded the contract because he had repossessed the properties and treated them as his own.

Note that in the case at bar the vendor has done the very same thing. It has repossessed the equipment, caused repairs to be made thereon and has waited "several months" to sell the machinery. It certainly treated the machine as its own; it did not even bother to account to the Defendants for the sale price when it was sold.

The case of *Franz v. Hair*, (1930) 76 Utah 281, 289 P. 130, 83 ALR 990 cites the *IXL* case as good law. Down to the present day courts have held this to be good law. See *Gauntt v. Ivie*, 29 Ill. App. 2d 186, 172 NE 2d 366; *Webb v. Litz* (Ala. App.) 902 So. 2d 915.

Of particular interest in this connection is the case of *International Harvester Co v. Bauer* (1917) 82 Ore. 686, 162 P. 856, (as reported in 37 ALR 91 at 93) in which it was held that where a contract of conditional sale was in the form of a lease, with a provision that, in the event of the default of the Buyer, the Seller may resume possession of the property and apply the amount paid as earned rentals, the retaking of the property by the Seller amounts to a rescission of the contract which relieves the Buyer from further obligation for the balance due on the purchase price.

POINT V.

THAT IF THE PLAINTIFF WERE ENTITLED TO REPOSSESS AND SELL THE PROPERTY WHICH WAS THE SUBJECT OF THE CONDITIONAL SALES CONTRACT AND HOLD THE DEFENDANT LIABLE FOR ANY DEFICIENCY, IT DID NOT DILIGENTLY PROCEED TO REPOSSESS AND SELL THE MACHINERY OR TO GET THE BEST PRICE OBTAINABLE THEREFOR, AND SO IS ENTITLED TO NO RECOVERY.

The Plaintiff herein did not take any steps to limit or mitigate its damage after the default. Although the contract was in default very early in the life of the agreement, Plaintiff did not repossess the property for a period of thirteen months, and then did not resell the property for a considerable time after repossession.

It is uniformly held that a seller under conditional sales contracts must proceed with diligence to protect his interest if he intends to hold the defaulting purchaser for any deficiency. *Knudsen Music Co. v. Masterson* (1952) 121 Utah 252, 240 P.2d 973. See also 49 *ALR* 2d 15 at Pages 25 and 66. The cases cited therein as well as the *Knudsen* case hold that if the seller is entitled to recover any deficiency against the buyer for the difference between the unpaid contract price and the proceeds of the resale after repossession, the seller must proceed diligently. Since this was not done here, the Plaintiff is barred from any recovery.

POINT VI.

THAT ASSUMING THE CONTRACT IN QUESTION IS IN FACT A RENTAL AGREEMENT, THE PLAINTIFF

OWED DEFENDANT AN OBLIGATION TO MITIGATE THE DAMAGE, WHICH IT DID NOT DO, AND IS THEREFORE ENTITLED TO NO RECOVERY.

Defendant and Cross-Appellant contends that the contract in question must be found to be a conditional sales contract as a matter of law. In the event, however, the Court should hold that the contract is a rental agreement, then Plaintiff would be unjustly enriched if its claims were allowed.

Plaintiff is suing for rental payments for seventeen months in the total sum of \$7,176.00. In addition, the Plaintiff has received payments of \$1,000.00 on the contract. On top of that, it has repossessed the machinery which is the subject matter of the contract and has sold the same for \$6,400.00. If judgment is granted as prayed, the Plaintiff would receive a total of \$14,576.00 from the transaction, plus all of its costs and attorneys' fees.

The retail price of the machinery is \$10,950.00. If judgment were granted as prayed, the Plaintiff would make a profit on the transaction equal to \$3,626.00. It would make a profit of \$2,312.00 over and above its original contract price, which already contemplated a profit.

It surely cannot seriously be contended that any rental agreement would justify this result. It was expressly agreed between the parties by the terms of the written contract that upon the payment of the total sum of \$12,264.00, Plaintiff would transfer title to the equipment to Defendants. Are they entitled to make an

additional \$2,312.00 clear in the event of default?

There is no question but what Plaintiff owed a duty to Defendant upon repossession to mitigate its damages. It should at least apply the proceeds of the resale to the credit of Defendants' account, or in the alternative, have re-leased the property to another lessee and credited the proceeds of said rental to Defendants' account. Not having done this, Plaintiff must be precluded from recovery.

SUMMARY

Based upon the foregoing points it is contended that Plaintiff is precluded from any recovery because the contract is a conditional sales contract and because Plaintiff repossessed the equipment and thus rescinded the contract; that in any event, Plaintiff did not proceed with diligence to secure its right against the equipment and that it is precluded from recovering on that basis also.

In the event the court concludes the contract is a rental agreement, then it is respectfully submitted that Plaintiff is still barred from recovery. Any other holding would be unconscionable and would give undue profit to the Plaintiff.

Respectfully submitted,

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