1962

Carpenter Paper Co. v. William R. Brannock and Clifford Webb : Brief of Respondent

Utah Supreme Court

Louis M. Haynie; Attorney for Respondent;
Clarence J. Frost; Attorney for Appellant;

IN THE SUPREME COURT
of the
STATE OF UTAH

CARPENTER PAPER COMPANY, a Corporation,
Plaintiff & Respondent,

vs.

WILLIAM R. BRANNOCK, dba Bill's Dairy Queen,
Defendant & Appellant,

vs.

CLIFFORD WEBB,
Third-Party Defendant.

CASE No. 9627

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third District Court for
Salt Lake County
Honorable Marcellus K. Snow, Judge

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STATEMENT OF THE CASE

Commencing May 15, 1959, and terminating November 23, 1960, the Plaintiff sold and delivered goods and merchandise consisting of paper and supplies to Defendant. As of November 23, 1960, and as of the date of the bringing of this action, the unpaid balance on the account, exclusive of interest, was $1,022.56.

DISPOSITION IN LOWER COURT

Case was tried to Judge Marcellus K. Snow, sitting without a jury. A judgment was rendered in favor of the Plaintiff in the amount of $1,022.56 with interest thereon to the date of judgment at the rate of 6% per annum from the 1st day of January, 1961, together with Plaintiff's costs, from which judgment the Defendant has appealed.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment and judgment in his favor as a matter of law.

STATEMENT OF FACTS

On or about the 15th day of May, 1959, the Defendant met with Mr. E. E. Brown, the general manager of Carpenter Paper Company, in Salt Lake City and opened up an account in his own name with the Plaintiff Carpenter Paper Company. Thereafter, and pursuant to the express contract between the parties, the Plaintiff delivered goods and merchandise to the Defendant, doing business as Bill's Dairy Queen, located at 1521 South State Street, Salt Lake City, Utah. Thereafter, a course of dealings existed between the parties by which orders would be received from the manager of Bill's Dairy Queen, one Clifford Webb or other employees; the merchandise would be delivered,

and payments were received on the account periodically. The amount which remains unpaid on the account for merchandise sold and delivered is not in dispute; both parties agreeing that the correct amount is $1,022.56. Defendant contends that subsequent to October 30, 1959, Mr. Clifford Webb managed the business for himself, and not for Mr. Brannock. Mr. Brannock, in his testimony, alleges no notice of the alleged transfer from Brannock to Webb of the business whatsoever and Mr. Webb in his testimony denies that any notice was ever given. Both Mr. E. E. Brown and Mr. Gerald R. Hyde of the Carpenter Paper Company deny that they received any notice of any alleged transfer of the business from William R. Brannock to Clifford Webb.

ARGUMENT

POINT I.

"That there was no transfer from Defendant Brannock to Webb (of) Defendant's business, Bill's Dairy Queen."

This finding was made by the Court pursuant to the issues as specified in the pre-trial order contained on page 16 of the transcript. The first issue there framed by the Court is (1) Was there transfer from Defendant to Webb of Defendant's business, Bill's Dairy Queen? To this the Court has answered in the negative. On this point the evidence is somewhat in conflict, however, the

Court is justified in its finding that there was no lease for the following reasons:

1. Mr. Webb in his statement, page 87, line 29 of the transcript, in answer to the question, "Now did you ever lease this business from Mr. Brannock?" answered on page 88, line 1, "Answer. "I never leased it. No." Now thereafter and continuing in his testimony from line 2 through line 22, page 88, the witness, Mr. Webb, alleges therein that at some time during 1960 the Defendant Brannock attempted to enter into a lease arrangement through a written instrument, but that Mr. Webb refused to sign the same. At no time during the testimony introduced by Defendant was any such instrument introduced. Furthermore, the findings were justified by the evidence through the statement of Mr. Brannock himself, who reported to the Court commencing on page 109, line 29 through line 15 of page 110, wherein it is specified that the telephone listing, the account with the power company, the sales tax license, and perhaps the city license all continued in the name of William R. Brannock. The findings of the Court were proper in that any proposed lease by Mr. Brannock as testified to by the Messrs. Stanger (an employee) and Borg (a supplier) was nothing more than a sham and not a bona fide lease at all.

2. With respect to the proposition wherein it is alleged that the Defendant Webb acknowledged the debt by having listed the same in the Bankruptcy Schedule, constituting page 9 of the transcript (cer-

tified copy) indicates merely that a case has been filed in the Third District Court in and for Salt Lake County in the State of Utah, No. 130646, in which the Defendant Clifford Webb is listed as a Third Party Defendant. This filing constitutes the entire acknowledgement by Webb in his bankruptcy filing of the responsibility for the obligation.

POINT II.

"That there was no notice, actual or constructive, of a contemplated transfer of Defendant's business from Defendant Brannock to Webb."

1. The second question proposed by the Court of the pre-trial order was as follows: (2) Did Plaintiff have notice, actual or constructive, of the transfer of Defendant's business to Webb? In this respect, the finding of the Court is not entirely consistent with the question as posed by the pre-trial Court in that the word "contemplated" has been added therein. For this purpose we shall limit our arguments only to the questions of whether or not there was notice, actual or constructive, of a transfer of the business from Brannock to Webb if there was in fact any such transfer. As a matter of law, once the Court has found that ther was no transfer, notice would not be material. In the interest of time, however, and in order to present an accurate brief on the evidence which is now before the Court, and on the assumption that there was in

fact a transfer of the business and a transfer of the responsibilities incidental thereto, we shall herein touch upon the question of notice. The Plaintiff does not deny, speaking through Mr. Brown, that they are aware of the type of business which Mr. Brannock operates in this community; and the evidence is not in dispute as to the number of years over which the parties have done business or of the amount of business done. Statements alleged by counsel for Appellant with respect to the opening of the business in the early part of 1959, are not in controversy, that being the time at which the account was established and one of the primary elements of Plaintiff's case. Counsel for Appellant in his brief on page 8 alludes to the fact that Mr. Hyde, the operational manager of the Plaintiff, denied that he knew of a subsequent transfer of this business in November, 1960. Respondent has examined the brief and has been unable to find any such denial, nor is he able to find that counsel has referred to on page 50 under line 51 which subsequently acknowledges knowledge of a transfer. It is admitted that thereafter (November, 1960) a clerical error was effected on the books of the Plaintiff which was immediately corrected as soon as notice of the error was brought to the proper parties. This touches only upon the amounts which was erroneously listed on this account and subsequently transferred to the Hi-Jinks Company account (the subsequent operators of the business.) No claim was made for the amounts incurred by the Hi-Jinks Company by the Plaintiff at any time.

2. Plaintiff makes no claim whatsoever for amounts incurred by the other operators of the Dairy Queen stores in Salt Lake City. According to the testimony of Mr. Brown, as well as that of Mr. Brannock, this is the only store which Mr. Brannock operated personally.

3. The other ingredients which Defendant seeks to specify touching upon the question and notice concern itself with the checks, the color of which was subsequently changed (Exhibits D-8, 10, 11, 13, 14 and 15); upon the fact that Mr. Webb, the manager of the establishment throughout the entire tenure of business, signed the checks subsequent to November 1, 1959, and upon the fact that the account was not paid as expeditiously subsequent to November 1, 1959, as prior thereto. The Court is reminded of the fact that Mrs. Brannock was able to sign checks on this account both prior to and subsequent to the alleged transfer of the business and that the Court is justified in its findings that neither the change in color of checks, nor the signature thereon, imparts any reasonable notice, if notice at all.

Counsel for the Respondent urges the Court that with respect to Defendant's Exhibit 16, an inter office memo dictated by Mr. E. E. Brown to a Mr. Mueller of the executive office that said letter contains some sort of declaration to the effect that notice was delivered by Brannock the preceding year, that the Court should bear in mind that this letter was dictated in

1961, some months after termination of the account, and then only does the notice refer to something which Mr. Brannock was saying he had previously said. The only notice, page 61, line 1 through 13, touches upon a memo which Mr. Hyde had dictated into the account (Exhibit D-9) on the day that the attempt was made to collect the account during the year 1960. At that time the record indicates Brannock had made a request that Carpenter Paper "hold up" until he (Brannock) could start a legal action against some third party. To counsel this indicates nothing more than an attempt on the part of Defendant Brannock to confuse the issue with matters which are not in evidence. Brannock himself was on the stand, had opportunity to testify as to whether or not he had given notice to Carpenter Paper or any of its representatives, and chose not to do so for the obvious reason that no notice was in fact given.

4. Exhibit D-9, touching upon the question of notice, states merely as follows: "On April 28, 1960, I called you regarding a past due balance on the account at that time and I asked for clarification as to who was running it. You stated that because of your situation at that time you would be responsible for all bills incurred, but that your manager Cliff was running the place." The use of the words "your manager" would not be inconsistent with the fact that he was "actually running the place" inasmuch as it is presumed normal that a manager would be in fact running an establishment. The important phase of these words appears to be in the question of who was in fact

the proprietor and this seems to flow generally from the erroneous connotation that the proprietor and manager must be the same person. In that letter, dated November 7, 1960, nothing is said whatsoever which would impart notice from the Defendant to the Plaintiff that there had actually been a lease and a transfer of responsibility for charges incurred by said business.

POINT III.

"Defendant William R. Brannock is indebted to Plaintiff for goods sold and delivered in the amount of $1,022.56."

Counsel for Appellant now seeks to attack the ledger which was submitted in evidence even though the same was introduced without objection (P 29 L 21-22). The account was orignially opened up by Mr. Brannock himself (P 26 L 22-30). At no time thereafter, did the Plaintiff look to anyone else for payment other than Mr. Brannock himself. No filing was made at any time of a certificate to operate under an assumed name with Salt Lake County or with the State of Utah (P 110 L 13-14). Actually the first page of the ledger was not missing as specified by counsel (P 43 L 7-11). At that time Mr. Hyde was merely going over the ledger sheets which were in his hands and assumed he did not have the first one even though subsequently (line 12-14) the same was produced as page 1 thereof, was received in evidence and is

now contained in the record. Thereafter, with reference to Exhibits P-4, P-5 and P-6, the same were introduced merely for the purpose of building a foundation to the ledger itself. Mr. Hyde testified (P 40 L 17 through P 41 L 23) what must be done prior to the time that an item is billed on the ledger card. Mr. Hyde was able to testify as to routine which is followed showing that an item is actually delivered and priced correctly prior to being placed on the ledger.

2. The basis of the action based upon merchandise or goods sold and delivered had its origin in the old common law action of Assumpsit. Reading from 4 Am. Jur. P 496, we quote the following:

> "Assumpsit has to a considerable extent supplanted the old common law action of account, as being more simple and less expensive. But there is a real distinction between assumpsit and account rendered, for one action is based on a duty to pay, whereas the other is based on a duty to account. When the promise, express or implied, involves the duty of direct payment to the plaintiff, assumpsit is the proper form of action; where the duty is not direct, but one of outlay in the performance of a trust or business which from its nature requires an exhibit of the sums expended before the direct duty can arise, the legal requirement is to render an account, and assumpsit will not lie until the balance is ascertained."

In this case we have not alleged that any of these goods were actually and specifically ordered by Mr. Brannock. Generally speaking, the Plaintiff assumes that

the orders were turned in by Mr. Webb, the manager of the establishment for Mr. Brannock throughout this entire period of time, but they might have been submitted by other persons. With respect to delivery, the Plaintiff does not maintain that these items were actually delivered to Mr. Brannock personally. There is actual privity between the parties in that the account was established by Mr. Brannock himself. Thereafter the account was paid by checks drawn on the account of Bill's Dairy Queen, a proprietorship owned and operated by Mr. Brannock. Nothing was done in the course of dealing between the parties to change the arrangement which was established originally. Items delivered prior to November 1, 1959, although not delivered to Mr. Brannock personally, were paid for by Mr. Brannock. Items delivered subsequent thereto were delivered in the same course and according to the same arrangement as prior thereto and checks were received in payment therefor on checks drawn under the name and account of "Bill's Dairy Queen". The business records which were introduced by the Plaintiff were for the purpose of indicating that the goods were actually sold and delivered to the establishment; that the price therefor was in accordance with the general terms and agreements of the parties, and that there remains unpaid on the goods sold and delivered the amount of $1,022.56.

POINT IV.

"The Court erred in admitting Exhibit P-1, and Exhibits P-4, P-5, and P-6 and (incompetent to justify the conclusion or judgment)."

The point brought up by the Appellant herein appears to be in two parts, namely:

1. The error in admission of the documents and

2. The allegation that the same are incompetent to justify judgment.

With respect to the former we urge the Court herein that the same were admitted without objection in each instance, and that the same cannot be objected to upon appeal. Nevertheless, we feel these exhibits are competent and material. Arguments on this point have heretofore been presented. With respect to the competency of the same to justify the judgment we have the following:

1. The establishment of the account by Brannock.

2. The course of dealing between the parties from May 15, 1959, through October 30, 1959.

3. The continued course of orders and deliveries subsequent thereto to the termination of the account in October of 1960.

4. The introduction of the ledger showing the balance to be $1,022.56 on the said account.

5. The introduction of P-4 which indicates the type of orders used by the company.

6. The introduction of Exhibits P-5 and P-6, which trace one particular order from the time it is ordered until it appears on the ledger and a statement by Mr. Hyde (P 41 L 15) in which he states that each and every entry on the ledger (P 41 L 6 through 9) is supported by background information identical with that on the item introduced.

Both Mr. Brown and Mr. Hyde testified as to the accuracy of Exhibit P-1. Mr. Brown is the general manager and Mr. Hyde is the credit manager under whose direction the ledger was kept in the regular course of business.

CONCLUSION

A good deal of what counsel for Appellant discusses in his brief touches upon the accuracy of the account. This matter is actually discussed at the time of pre-trial and no question whatsoever is raised as to the accuracy of the balance due. The issues resolved at the pre-trial were only three:

1. "Was there a transfer of the business?"

2. "Did the Plaintiff have notice, actual or constructive, of the transfer of the business?" and

3. "Even though there was a transfer to Webb and notice thereof to the Plaintiff, did the Defendant promise to pay for subsequent deliveries to Webb in reliance upon which the Plaintiff made the subsequent deliveries?"

We have touched upon the first two points and very little is in evidence with respect to the third. An issue of law was raised at the pre-trial and disposed of as follows:

1. The Court rules in favor of the Plaintiff that if it should be agreed that the facts would show without dispute that after a course of dealing with Plaintiff, Defendant dropped out of the business and substituted Webb in his place but gave no notice of the change, either actual or constructive to Plaintiff; that the Plaintiff relying on Defendant's credit, continued to make the sales and deliveries to Bill's Dairy Queen.

From the evidence as discussed herein, the Court has ruled that there was actually no transfer or lease of the business from the Defendant to Mr. Webb. Following thereafter the Court concludes that there was no notice actual or constructive of the transfer of the business. In view of these facts and in accordance with the trial court, it is respectfully urged your Honor-Court that the judgment of the trial court be affirmed. The Appellant does not urge the Court to make a change in the findings as a matter of fact, but only urges that change be made as a matter of law. We see no justification for his contentions.

Respectfully submitted,

L. M. HAYNIE
Attorney for Respondent