1963

Carl W. Thorstensen v. Sid Weese : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

CARL W. THORSTENSEN,
Plaintiff and Respondent,

vs.

SID WEESE,
Defendant and Appellant.

Case No. 9899

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

STATEMENT OF FACTS

The Statement of Facts set out in the Appellant's brief and the facts stated in the Appellant's Disposition in Lower Court are inconsistent with the facts stated in the record.

The record discloses that the Appellant and Respondent entered into a stock purchase agreement on December 28, 1961, wherein the Respondent agreed to sell to the Appellant 64 shares of stock in Ogden

Utah Knitting Company at the agreed price of $50.00 per share and for a total sum of $3,200.00. The terms of the agreement provided that $2,000.00 would be paid to the Respondent at the time the agreement was executed and the remaining $1,200.00 would be paid at $100.00 per month beginning with January 31, 1962. The Respondent received the $2,000.00 down payment and the January and February, 1962, installments. The Appellant refused to pay the remaining ten installments and the Respondent brought an action for Breach of Contract and was awarded $1,000.00 for damages by the Trial Court.

The Appellant and Respondent, at the time of entering into the purchase agreement, were officers of the Company. The Appellant was hired by the Company in February, 1956, as the Comptroller and later he became the Secretary of the Company. In October of 1961 he became the Manager of the Company; throughout the entire period, he received a salary (Tr. 20, 24). The Respondent was Vice President of the Company and was inactive and was nothing more than Vice President in name only (Tr. 5, Tr. 24).

In the latter part of January, 1962, it was determined by the Company's Accountant that the Corporation sustained an operating loss of $159,289.00 for the year 1961, the loss was not determined in July, 1962 (Tr. 52). The accountant testified that during the period of July, 1961 to January, 1962 there were certain factors indicating that the Corporation was in

financial difficulty and may collapse. The accountant testified that during this period there was a shortage of cash and the management should have observed that factor (Tr. 60). The Appellant during this period was the Manager of the Company, and had control of the books and was working with the books every day (Tr. 25). The accountant further testified that he could have determined the approximate value of the shares of stock in the Company in December of 1961 if a physical inventory would have been taken (Tr. 57).

The Appellant offered to purchase said shares of stock at the price of $50.00 per share and the Appellant made his offer based upon his knowledge of the records of the Corporation, being active in the Corporation for over a five-year period and his being Secretary of the Company (Tr. 33). The Appellant prior to entering into the agreement had knowledge that the L.D.S. Church had been contacted concerning the sale of the assets of the Company to the Church (Tr. 37). Contact had been made with the Church up until February, 1962 and the Appellant stated in February, 1962 that it looked like the Church was interested in taking over the Company and it looked as if the share holders, after paying all of the indebtedness, would come out with the shares of stock in the Company worth $70.00 per share. At the time the Appellant stated it looked as if the Church would take over the assets of the Company, the Appellant was not in default on the stock purchase agreement (Tr. 63).

STATEMENT OF POINT

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE FINDINGS OF THE COURT THAT THE STOCK ON OR ABOUT DECEMBER 28, 1961, HAD VALUE, AND BOTH PARTIES WERE ASSUMING THE RISK IN ENTERING INTO THE STOCK SALE, AND THERE WAS NOT A MUTUAL MISTAKE AS TO VALUE OF SAID STOCK.

ARGUMENT

Point

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE FINDINGS OF THE COURT THAT THE STOCK ON OR ABOUT DECEMBER 28, 1961, HAD VALUE, AND BOTH PARTIES WERE ASSUMING THE RISK IN ENTERING INTO THE STOCK SALE, AND THERE WAS NOT A MUTUAL MISTAKE AS TO VALUE OF SAID STOCK.

The eight statements of facts outlined in support of the Appellant's four points are inconsistent with the facts as indicated in the record.

The Appellant's second statement of fact that both the Appellant and Respondent believed as a fact that the stock had substantial value, is incorrect, in that the Respondent testified he did not have knowledge of the

value of the stock at the time of entering into the agreement; the Appellant offered the Respondent the sum of $50.00 per share and the Respondent accepted that offer (Tr. 7).

It is stated in 12 Am. Jur., Contracts, Section 132:

> "If parties to an agreement indicate an intention to be bound irrespective of the existence of certain facts and to take the risk of their nonexistence, the validity of their agreement is not at all dependent upon the existence of such facts. On the other hand, if the parties indicate an intention not to be bound unless certain facts exist, the nonexistence of such facts prevents any contractual duty, such facts being intended to operate, and operating, as a condition precedent to obligation.
>
> "Where the parties are conscious that the existence of particular facts is doubtful and make their agreement on this assumption, the nonexistence of such facts does not affect the validity of the agreement, the risk of their existence being taken by the party." Sears v. Grand Lodge, A.O.U.W. 163 NY 374, 57 N.E. 618, 50 LRA. 204; Thiel v. Miller, 122 Wash. 52, 209 P. 1081, 26 A.L.R. 523.

In Corbin's Hornbook on Contracts in Section 605, he discusses what is market value and what establishes market value and he states that each party is in the market when he contracts and the Section further states this language:

> "In making this contract of exchange, either party may be mistaken in his estimate of market

value, mistaken as to the appetite of others for the commodity. He finds that he can not sell for as much as he paid. Practically never is there such a mistake as will justify recission. The parties are conscious of the uncertainty of value. Value is one of the principle subjects of agreement. Each party is consciously assuming the risk of error of judgment. As to this, by business custom, by prevailing mores, by social policy and by existing law, the rule is caveat emptor. It is also in equal degree, caveat emptor."

The Appellant's third statement of fact that at the time the agreement was executed the stock had no value is untrue in that the L.D.S. Church had been contacted prior to the parties entering into the stock purchase agreement and the Church was interested in the purchase of the assets of the Company up until the latter part of February, 1962. At this time the Appellant believed that each share of stock would have a value of $70.00 after all of the Company's indebtedness had been paid (Tr. 63).

The Appellant's fourth statement of facts that the value of the stock could not be established by either the Appellant or the Respondent at or prior to the execution of the agreement is incorrect, in that the accountant testified that the Company had indication of a financial collapse between July, 1961 and January, 1962 (Tr. 60). The accountant further stated in his testimony that the value of the shares of stock could have been determined in December of 1961 if a physical inventory had been taken. During the aforesaid period

the Appellant was working with the books of the Company every day and was also managing its operation.

The Appellant's sixth statement of facts that the Appellant relied upon the same source of information as the Respondent in fixing value is incorrect in that the Appellant had been a salaried full time employee with the Company as Comptroller for a period in excess of five years prior to his entering into the agreement, and he had also become the Secretary of the Company (Tr. 20, 24). In the fall of 1961 the Respondent became the acting Manager of the Company in addition to his other duties. During this period the Respondent was Vice President of the Company and played a very inactive role in that the Respondent's occupation was that of a life insurance agent (Tr. 4).

It is stated in 19 Am. Jur., Equity, Section 57:

> "Where it appears that the parties to an instrument had equal knowledge or equal means of obtaining knowledge of the facts, and no surprise or imposition is shown, the mistake is often held to lay no foundation for equitable interference, being said to be strictly damnum absque injuria." Belt v. Mehen, 2 Cal. 159, 56 Am. Dec. 329; Bibber v. Carville, 101 Me. 59, 63 A. 303, 115 Am. St. Rep. 303; McCobb v. Richardson, 24 Me. 82, 41 Am. Dec. 374.

The general law in this area is further stated in 19 Am. Jur., Equity, Section 58:

> "In some circumstances relief will not be granted upon a showing simply that the com-

plainant, at the time of the disputed transaction, was ignorant of, or mistaken as to, some matter of fact; it must be made to appear that his ignorance was excusable. The conclusion is that he is not entitled to relief where the evidence shows that he was "negligent" or that he could and would have ascertained the facts by the exercise of "due" or "reasonable diligence", or where he had "means of knowledge" or "might have ascertained the truth". In other words, mistake to constitute equitable relief, must not be merely the result of inattention, personal negligence or misconduct on the party applying for relief. The issue as to whether the complainant did or did not exercise the requisite activity or diligence is not to be determined, of course, with reference to the facts and circumstances which attend the transaction. Where the complainant's mistake or ignorance of facts has brought about a legal situation which must result in loss or prejudice to one of the parties to the transaction, relief will be denied if the evidence shows that they were equally well situated to be informed as to the facts."

There can be no doubt that the Appellant had much more information in fixing the value of the shares of stock than the Respondent. The applicable Utah law is stated in White v. Snell, 35 Utah 434, 100 Pac. 927 (1909), wherein this Court said:

> "But where the parties in entering into a contract stand upon an equality with respect to each other and with regard to the subject matter of the contract, courts ought not to interfere merely because one side or other must assume or discharge a burden which was not anticipated when

the contract was entered into, provided such a burden comes within the terms of the contract. If the business of the corporation had been profitable during the duration of the agreement in question, respondents no doubt would insist upon the terms of the agreement, and their right to have them enforced could not well be questioned so long as all of the stock holders receive the proportional benefits to which they were entitled. The mere fact that the enterprise resulted in a loss is no reason why a Court should interfere."

The Appellant's seventh statement of facts that there is no consideration for Appellant's promise to pay, and for the payments actually made is incorrect in that the Appellant was purchasing 64 shares of stock that had value at the time of entering into the agreement. These shares had value up until February, 1962 when the L.D.S. Church indicated they may buy all of the assets of the Company.

The Appellant is asking for the rescission of the stock purchase agreement based upon equitable doctrines and in seeking rescission the complainant must act timely. The Appellant did not initiate an action for rescission when he learned of the financial collapse of the Company in the latter part of January, 1962. He elected to continue to make his monthly payments with the knowledge that the L.D.S. Church was interested in purchasing the assets of the Company and the possibility he could realize a handsome profit from the stock purchase agreement.

CONCLUSION

Respondent submits his case on the facts in this case as disclosed by the record and the law applicable to the issues of this case.

Respectfully submitted,

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By Alan D. Frandsen
Attorneys for Respondent