1963

Joseph Blackett dba Joe's Motor and Trailer Sales v. Financial Indemnity Company and S. D. Loder : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT of the STATE OF UTAH

JOSEPH BLACKETT, dba JOE'S MOTOR AND TRAILER SALES,

Plaintiff and Appellant,

vs.

FINANCIAL INDEMNITY COMPANY and S. D. LODER,

Defendants and Respondents.

Case No. 9940

RESPONDENT'S BRIEF

Appeal From The Judgment Of The Third Judicial District Court, In And For Salt Lake County, State Of Utah

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NATURE OF CASE

Plaintiff brought this action in the District Court against Defendant insurer to recover under a Dealers' Mobile Home Policy for loss to a mobile home resulting from collision or upset.

DISPOSITION IN LOWER COURT

At the pre-trial hearing, the Court, upon review of the pleadings, examination of the provisions of the plaintiff's Policy (Exhibit P-1), the purchaser's policy (Exhibit D-2), and a review of the testimony given by plaintiff in his deposition, ruled as a matter of law that defendant's policy did not cover the loss claimed by the plaintiff and accord-

ingly entered Findings of Fact, Conclusions of Law and a Judgment of Dismissal from which plaintiff appeals.

STATEMENT OF FACTS

The plaintiff and his wife, Erma Blackett, are partners in a business dealing in mobile homes (trailer homes), (Depo. P. 4). Erma Blackett is also a licensed insurance agent to write policies of insurance on mobile homes (Depo. P. 5-6). She countersigned as agent the policy on which plaintiff seeks recovery. (Exhibit P-1). On June 20, 1961, Burt Nelson, a salesman working for plaintiff, agreed to sell S. D. Loder a used 40-foot Nashua Trailer (Depo. P. 11). Plaintiff, upon learning that the trailer was to be deliverd to Holbrook, Arizona, refused to confirm the sale. S. D. Loder then agreed to pay an additional $100.00 for the trailer to cover permits, drivers wages and other costs of delivery, whereupon plaintiff closed the deal and sold Loder the trailer (Depo. P. 14-15). S. D. Loder paid cash for the trailer at that time (Depo. P. 13 L. 16), and effective June 21, 1961, he insured the trailer in his name against loss from fire, theft or collision with Farmers Insurance Exchange (Exhibit D-2).

On June 22, 1961, the trailer was tipped over and destroyed near Flagstaff, Arizona, while the plaintiff's employee, Joe Perez, was in the process of delivering the trailer to Loder at Holbrook, Arizona.

The defendant's policy, among other things, insures mobile homes held by the insured (plaintiff) pending delivery after sale, *except as to loss for which the interest of the purchaser is covered by insurance.* (Exhibit P-1. Auto Dealers' End Monthly Reporting Form "A", para. 1).

ARGUMENT

THE LOWER COURT CORRECTLY HELD THAT THERE WAS NO COVERAGE UNDER THE DEFENDANT'S POLICY.

It is clear under the terms of the defendant's policy that plaintiff has no coverage after the sale of a trailer and pending delivery, if the purchaser has obtained insurance. It is not disputed that at the time of the loss the purchaser, S. D. Loder, had obtained insurance covering the type of loss that occurred. Plaintiff in his Brief contends, however, that at the time of the loss there had not been a completed sale and that the policy provision, therefore, does not apply.

The rules governing when property passes from seller to buyer are set forth in Title 60, Chapter 2, Utah Code Annotated, 1953. Section 60-2-2 provides:

> "*Property in specific goods passes when parties so intend.* (1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract,

the conduct of the parties, usages of trade and the circumstances of the case."

Under the facts in this case, what were the terms of the contract? What was the conduct of the parties and the circumstances of the case which indicates the intent of the parties as to when the property should pass? S. D. Loder paid cash for the trailer on June 20, 1961, at the time the price was agreed upon. (Findings of Fact Para. 5, Depo. P. 13, L. 16). He insured the trailer in his name effective the following day and before delivery was made or even started (Exhibit D-2). With regard to the sale, plaintiff testified in his deposition as follows:

Commencing on Page 12, Line 22:

"Q. Was there a completed sale of this trailer to Mr. Loder?

"A. "Yes."

Commencing again on Page 14, Line 14:

"A. When I came back from Wisconsin, Burt Nelson had sold the trailer. I told Burt right off the bat and I told Loder, 'I will not sell you this trailer under these conditions.'

"Q. You mean for this amount of money?

"A. This amount of money. I says, 'in the first place, you sold it too damn cheap.' I says, 'The next place is, we have got to deliver it six or seven hundred miles.' I don't know how many miles it was, but I don't think I missed it very far.

"Q. Go ahead.

"A. I said, 'I can't deliver this trailer for this kind of money.' (Discussion off record). So Loder agreed to pay one hundred more dollars for the trailer, which would cover the permits and driver's wages and so forth, to deliver it.

"Q. So you closed the deal at that point?

"A. Closed the deal at that point.

"Q. And you sold the trailer to him?

"A. Yes.

"Q. At the time you got back and found that your salesman had made the sale on the trailer, did you consider that it was a completed sale?

"A. No. All deals had to be okayed by me.

"Q. And on his agreement to pay an additional $100.00, you okayed it?

"A. Yes."

Commencing again on Page 15, Line 26:

"Q. So you had a completed sale before you ever started out?

"A. That is definite on all mobile homes. We do that."

It is apparent not only from the conduct of the parties but from the plaintiff's own testimony that both buyer and seller intended and considered the sale of the trailer completed. Title 60-2-3 provides:

"*Rules of ascertaining intention.* Unless a dif-

ferent intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule (1) Where there is an unconditional contract to sell specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, is postponed."

The facts in this case fall well within the provisions of Rule (1) and even in the absence of a clear intent by the parties, the property under this rule would already have passed to the buyer at the time the loss occurred. Such was the ruling of this Court in *Jones vs. Commercial Investment Trust*, 64 Utah 151, where the Court in its opinion at pages 163 said:

"The intention must be determined from a consideration of the nature and terms of the contract, usages of trade, the conduct of the parties, and the circumstances of the case. If no contrary intention appears from such a consideration, the law presumes, where the contract pertains to a specific chattel, in a deliverable state, that the parties intend the title to pass when the contract is made, and this is true regardless of the fact that payment of the price or delivery of the goods, or both, be postponed."

Plaintiff in his argument relies on the provisions of Rule (5) under Section 3, which provides:

> "If a contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or have reached the place agreed upon."

Even assuming the absence of a contrary intent, the facts in this case do not fall within the terms of Rule (5). Rule (5) contemplates that, under the agreement, delivery is to be made by the seller at his own expense either by delivery himself or by payment to a carrier of the shipping expenses. In this case the expense of transporting the trailer from Salt Lake City to Holbrook, Arizona, was borne by S. D. Loder by his payment of an additional $100.00 on the purchase price to the plaintiff.

The plaintiff in his Brief concludes that the trial Court must have found that plaintiff had no insurable interest in the property in order to reach its conclusions and judgment. Such a finding is not necessary to the court's ruling. The plaintiff may well have had an insurable interest as bailee but as stated at the outset, there is no coverage under the defendant's policy *where the property is held by the insured pending delivery after sale, if the interest of the purchaser is covered by insurance.*

CONCLUSION

It is respectfully submitted that the evidence and the law applicable thereto clearly supports the findings and judgment of the Court below and the judgment should be affirmed.

Respectfully submitted.,

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