1964

Douglas K. Holland v. Sandi Brown : Brief of Respondent

Utah Supreme Court

Allen M. Swan; Attorney for Plaintiff-Respondent;
John Elwood Dennett; Attorney for Defendant-Appellant;

IN THE SUPREME COURT
of the
STATE OF UTAH

DOUGLAS K. HOLLAND, dba
American Homes Company,
Plaintiff and Respondent,

vs.

SANDI BROWN, aka
Mrs. W. S. Terry,
Defendant and Appellant.

Case No.
10011

RESPONDENT'S BRIEF

Appeal from the Judgment of the
3rd District Court of Salt Lake County
Hon. Marcellus K. Snow,
Judge

Allen M. Swan
428 American Oil Building
Salt Lake City, Utah
Attorney for Plaintiff-Respondent

John Elwood Dennett
1243 East 2100 South, No. 600
Salt Lake City 6, Utah
Attorney for Defendant-Appellant

TABLE OF CONTENTS

STATUTES CITED

TEXTS CITED

CASES CITED

IN THE SUPREME COURT
of the
STATE OF UTAH

DOUGLAS K. HOLLAND, dba
American Homes Company,
Plaintiff and Respondent,

vs.

SANDI BROWN, aka
Mrs. W. S. Terry,
Defendant and Appellant.

Case No.
10011

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

Defendant's Statement of the Kind of Case launches into a history of the present litigation in the City Court of Salt Lake City prior to its appeal by defendant to the District Court of Salt Lake County. Since the trial in the District Court is a trial de novo such explanation is unnecessary. Defendant also attempts to explain on page 2 of her Brief why the trial took place in her absence. Apparently we are to believe that counsel did not learn of the trial date until the day before, although the date had

been assigned at pretrial more than 90 days prior, and that his request for a continuance was denied. As a matter of fact, the record shows no Motion for a Continuance, and it is the writer's recollection that no such motion was ever made and that counsel's only concern with a conflict in the Murray City Court on the day of trial was that he be permitted to go to Murray to handle a matter which could be disposed of promptly and return, which request was granted during the noon recess.

STATEMENT OF FACTS

Defendant in her Statement of Facts attempts to paint a picture of fast talking cookware salesmen who "prey" on unmarried girls between 18 and 21 years of age. As a matter of fact, the plaintiff is a married student at the University of Utah with a family to support and has been engaged for eight years in Salt Lake City in selling waterless cookware, china, stainless steel and other similar items (Tr. 21). His reputation for honesty and fair dealing is not in dispute. The market for the merchandise plaintiff handles, as defendant well knows, is primarily among unmarried girls who are contemplating marriage, since these items are often sought by young ladies to make part of their trousseau (Tr. 3).

Mr. Merrill Davidson who solicited the particular sale in question made an initial contact and an appointment to call back the following Friday which was defendant's day off (Tr. 4). At this time, he offered the defendant a "package" including some "premiums," for a price certain (Tr. 5, 6). Mr. Davidson testified as to a discussion concerning a "lay-away" arrangement, where-

by defendant, in view of her financial situation, could pay as little as $5.00 a month until the full contract price was paid, and if she were able at any time to increase the payments to $14.98 per month, a new contract would be executed (Tr. 8,10). Delivery would immediately be made in such event since plaintiff would then be able to sell the new contract to a finance company and get his money back with which to replenish his stock of merchandise. The defendant signed the conditional sales agreement for the $5.00 per month, paid Merrill Davidson $1.09 to bind the contract and then, in about a week, she contacted Mr. Davidson and expressed a desire to cancel because "her mother was sick and she had experienced some unexpected bills" (Tr. 12).

Counsel for defendant has failed to quote the trial record with respect to the real reason for cancellation of the contract. Mr. Davidson testified that when he called on Miss Brown after she requested cancellation of the contract, he found a salesman from a competing company, a Mr. Roger Phillips of Casual Living Company, in Miss Brown's apartment (Tr. 13). Miss Brown made the statement that she was going to buy their merchandise instead of that of plaintiff and Davidson informed her that this would be foolish in that Miss Brown might then become liable on two contracts. The salesman from Casual Living told Mr. Davidson that "this is a competitive business and we feel that this type of lay-away contract is fair game for us and we just like to go out and cancel them and get the girls on these other contracts" (Tr. 14). Douglas K. Holland testified that when he and his wife later visited defendant's apartment, they were informed that Casual Living's merchandise was there (Tr. 27).

Mr. Holland further testified that as a result of defendant's breach he lost net profits of $100.00, being the difference between the cost of the merchandise and the selling price, less the expenses of the sale (Tr. 28,29). He stated that there was no available market for the cookware upon the cancellation of the contract by defendant, except by making the same door-to-door contacts including demonstrations as had been made in the negotiation of the original contract (Tr. 49).

The Court upon reviewing the verdict of the Jury to the effect that Plaintiff was entitled to nominal damages of $1.00, plus $75.00 attorney's fees, entered judgment notwithstanding the verdict on plaintiff's motion for $100.00, plus the attorney's fee as fixed by the Jury.

ARGUMENT

POINT ONE

A conditional sales contract was entered into between the parties which was valid and enforceable. There is no evidence whatever of a failure of the minds to meet. Since defendant had no witnesses at the trial to testify as to her understanding of the contract, the jury, on proper instruction, found a contract solely on the basis of the testimony of Mr. Davidson. It was clear from his testimony that the term "lay-away" had an agreed meaning between the parties to the contract. No merchandise was actually "laid away," but delivery was not to occur until such time as the contract balance was paid, or a new contract entered into increasing the monthly payment. Since there was no contradiction as to this understanding between the

parties, the Court rightfully refused all instructions submitted by the defendant respecting "lay-away contracts."

POINT TWO

The plaintiff's measure of damages in this case should be his lost profits. The only figure testified to by any witness representing damages in this case was the figure $100.00 as established by Douglas K. Holland (Tr. 29). The fact that the jury returned a verdict in favor of the plaintiff indicates they found the contract to be valid and enforceable, but the assessment of damages was without any rhyme or reason whatever. The Court simply interposed the $100.00 as justified by the evidence for $1.00 which was without any evidence to sustain it. Complete absence of any evidence to sustain a verdict has uniformly been held to be a basis for granting a judgment notwithstanding the verdict. Morby v. Rogers, 122 Ut. 540,252 P2d 231.

Defendant contends that the plaintiff's damages are restricted by Title 60-5-2 UCA 1953. That section is set forth in full at Page 16 of defendant's brief and emphasis is placed on that portion of the statute which reads:

> Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

It is interesting to note that Paragraph 2 of the same statute stresses that "*the measure of damages is the loss directly and naturally resulting in the ordinary course of events from the buyer's breach of contract,*" and that Paragraph 4, after emphasizing that plaintiff must mitigate his damages states, "*the profits the seller would have made if the contract or the sale would have been fully performed shall be considered in estimating such damages.*"

The provisions of the Uniform Sales Act have been fully treated in annotations at 44 ALR 215 and 108 ALR 1482 entitled "Measure of Damages for Buyer's Repudiation of or Failure to Accept Goods Under Executory Contract." Many cases are discussed in the annotations and of particular interest is the general discussion found at 108 ALR pp. 1483, 1484, where it is stated, "the guiding principle is to give the seller the benefit of his contract," and, further:

> While express provision is made in the Uniform Sales Act, in force in many states, with respect to the measure of damages for a buyer's breach, it is said that the seller is not in every case limited to one of the measures of damages in that act. (Quoting Morrison vs. M. Finkovitch (1927), 37 Georgia App. 57, 138 SE 517).

After reading the two annotations cited in ALR the writer is of the opinion that the measure of damages as the difference between contract price and the market price at the time and place of delivery is subject to modification, particularly when it appears that the seller will not be given the benefit of his contract by such a strict interpretation of the act. This is fully borne out by the

Utah case which would seem to be controlling on the subject, Stewart vs. Hansen, 62 Ut. 281, 218 Pac. 959, 44 ALR 340. In that case the action was commenced by an automobile dealer for damages based upon the buyer's refusal to accept an automobile after entering into a contract of purchase. The Court held that on the buyer's refusal to accept the automobile, the seller could recover as damages *the profits he would otherwise have realized and was not limited to the difference between the contract price and the market price.* At Page 961, the reasoning is set forth as follows:

> If we keep in mind the fact that if in cases like the one at bar the general rule of damages for breach of contracts of sale by the purchaser is adopted, then the dealer of necessity must in every case be the loser by reason of the fact that he loses all compensation for his time and efforts in attempting to effect a sale, or in effecting it, of a car and in demonstrating it to the prospective purchaser and receives nothing for rent, advertising and other 'overhead' expenses.

How is the situation of the automobile dealer in the Stewart v. Hansen case any different from that of the cookware dealer in the instant case? In the Stewart v. Hansen case the court adopted the law as stated in the Connecticut case of Torkomian vs. Russell, 90 Conn. 481, 97 Atl. 760. Connecticut had adopted the Uniform Sales Act and the section found at 60-5-2 UCA 1953 was therein construed. The Court stated:

> In the absence of special circumstances requiring a different rule, the damages recoverable by a vendor for refusal to take goods contracted

for is the difference at the time and place of delivery between the contract price and the market price. But we recognize that this rule is not an unbending one, that the circumstances may require its modification in order to effectuate the cardinal purpose, 'just compensation for the loss incurred'; and the loss must be such as 'may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract.'

* * *

The defendants, as vendors or contractors, were entitled to show what a Lozier Six car would have cost them, in the same way a manufacturer might show the cost of an article manufactured by him. The defendants would thus recover the profits they would have made had the plaintiff carried out his contract. In such a case profits are not speculative, but certain and ascertainable and the legitimate fruits of the contract.

In referring to the decision in the Torkomian case, the Utah Supreme Court at Page 961 of Pacific Reporter stated that it:

took all matters into consideration and its fairness and justice in that regard are commendable and wholesome in that it affords just and fair compensation to the seller without inflicting the slightest injustice upon the purchaser and is an inducement to all men to meet the obligations assumed by them in their contracts. Moreover the rule adopted gives the seller the fruits of his bargain which is a matter that should always be considered in applying the measure of damages in any case.

It is further submitted that in the instant case the strict interpretation of the Uniform Sales Act cannot be applied because there is no "available market for the goods." A cursory reading of the two ALR annotations cited will satisfy the reader that the merchandise involved in those cases usually is of the nature of timber, coal, hogs, horses, milk and other such commodities, which do have an available market. If a buyer breaches a contract to purchase these commodities, the seller can usually immediately turn to an open market where a price is readily obtainable for the merchandise. The merchandise sold by plaintiff in the instant case is a good deal different in that when the buyer repudiates her contract, the seller cannot turn to an available market, but rather must go through the very same process which he went through in the first instance in seeking out the new customer through referrals or door-to-door canvassing, demonstrating the merchandise to the satisfaction of the new buyer and obtaining the signature of the new buyer on the contract. These are the very things the Supreme Court of Utah discusses in the Stewart v. Hansen case, which, in the opinion of the Court, constituted such circumstances as would justify a departure from the strict rule. As stated by the annotater at 108 ALR 1487:

> Of course, the circumstances may be such that it is impossible or impracticable to apply the rule allowing the seller the difference between the contract price and the market price at the time and place of delivery. *This is true where the goods have no market value, or where the rule if applied would work serious injustice.* In such cases the rule is generally disregarded, the courts holding that as a measure of damages, it is of value only so far as

> it puts the parties in the position they would have been in if the contract had been carried out and that where it does not lead to this result, other criteria must be employed.

In the Georgia case of Morrison vs. Finkovitch, supra, the Court stated:

> The rule which * * * allows recovery of the difference between the contract price and the market price at the time and place of delivery is founded upon the just theory *that the seller on rejection of the goods may take them into the open market and obtain the current price for them.*

The plaintiff's testimony in the instant case that the goods could be sold by "going out and knocking on doors and just rounding up a new customer" (Tr. 49) does not, by implication, mean that there is an "open market" and "current price" available for the goods. As stated by Mr. Holland, "It's just like making a sale all over again. You can't just call on someone to buy it. You have to go out and find someone" (Tr. 49).

McCall vs. Jennings, 26 Utah 459, 73 Pac. 639 cited by defendant contains an instruction "correctly setting forth the law in the abstract, but inapplicable when applied to the pleadings in the case." Since the case was reversed on other grounds it is difficult to determine what weight should be attached to the decision as it treats damages for breach of executory contracts. It is noteworthy that no discussion is made of special circumstances as in Stewart vs. Hansen, supra. Love vs. St. Joseph Stock Yards Co. 51 Utah 305, 169 Pac. 951, treats damages in the breach of an executory contract to purchase horses,

an example of property for which there is an "open" and "available" market and is thus distinguishable on its facts.

POINT THREE

The contract contemplates the payment of an attorney's fee. The fact that defendant breached the contract before delivery could be made, thus making the provision respecting repossession and sale inapplicable, should not deprive plaintiff of a reasonable attorney's fee for enforcing the contract to recover damages for its breach.

CONCLUSION

The law permits plaintiff in this case the benefit of his bargain. If the defendant now considers her contract to be a foolish one, she should not expect this Court to act as her guardian. She was of legal age at the time of the contract and fully understood its terms. She chose to accept the "legal advice" of a competing cookware salesman and refused to perform her obligations under the contract. It is respectfully submitted that the judgment notwithstanding the verdict of the Trial Court should be affirmed.

ALLEN M. SWAN
Attorney for Plaintiff and Respondent
428 American Oil Building
Salt Lake City, Utah