1964

Universal Investment Co. v. Carpets, Inc. : Brief of Respondent

Utah Supreme Court

Mabey, Ronnow & Madsen; Gordon A. Madsen; Attorneys for Defendant-Appellant;
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IN THE SUPREME COURT OF THE STATE OF UTAH

UNIVERSAL INVESTMENT COMPANY,
Plaintiff-Respondent,

vs.

CARPETS, INCORPORATED,
Defendant-Appellant.

Case No. 10165

RESPONDENT'S BRIEF

Appeal from a Judgment of the Third District Court in and for Salt Lake County
Honorable Ray Von Cott, Judge

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Case No. 10165

RESPONDENT'S BRIEF

STATEMENT OF KIND OF CASE

The Appellant's statement of the kind of case is essentially accurate, except that in addition to the express warranty set forth in the contract documents the plaintiff further relied upon implied warranties as to the fiitness for the purpose for which the drapes in question were intended.

DISPOSITION BEFORE A TRIAL COURT

The matter was tried to a jury on April 15 through 17, 1964, and a verdict was returned by the jury in favor of the plaintiff in the amount of $3,750.00 to which the Court added an attorneys fee of $751.83 as had been agreed to by defendant at the time of pretrial (R. 12).

RELIEF SOUGHT ON APPEAL

Plaintiff and Respondent ask that the verdict and judgment below be affirmed and that this court order other and further attorneys fees to plaintiff to cover this appeal.

STATEMENT OF FACTS

Appellant's Statement of Facts, so far as it goes, is essentially correct. As relates to the warranty period in issue, however, attention is called to the fact that the guarantee, as originally given, was for a period of five years (Exhibit 1—letter attached) and the pretrial order was to the effect that Exhibit 2 did not change this guarantee period (R. 12-13). Nevertheless, the trial court held, and instructed, that the warranty period was to and including September 16, 1963. The draperies in question were originally, as the contract required, white(Exhibit 1). They had changed to variegated darker colors, spotted and streaked with different colors

and shades (R. 100) and cleaning made no difference in them (R. 97). As relates to the draperies in Unit 117, which first became discolored, appellant's statement that the testimony was that iodine or other stain had been placed on them is erroneous, the testimony, in fact, simply being that Mr. Thompson, defendant's agent, had contended that such was the reason for discoloration (R. 94 and Exhibit 6). The testimony of all witnesses at the trial showed that such conjecture was erroneous, as essentially all of the other drapes subsequently changed color in the same manner.

The testimony of plaintiff's witnesses was all to the effect that in the industry a change in color during a warranty period is considered to be a defect (R. 138, 168).

ARGUMENT

(A) THE TESTIMONY OF THOMAS FRANK REGARDING VALUATION AND DAMAGES WAS PROPERLY ADMITTED.

Plaintiff's witness, Ronald Sweitzer, testified with regard to the fact that the drapes in question became streaked and spotty and were continuing to change during the time he was the manager. He stated that cleaning had no effect on the changed condition of the drapes (R. 97). Mr. Sweitzer testified that as of the latter part of June, 1963 approximately 50% of the drapes were real bad and the others were changing

color in the same manner (R. 99). Mr. Sweitzer testified that he left the Susan Kay Arms Apartments as manager on August 1, 1963 (R. 90) and that at that time 99% of the drapes had deteriorated and changed color (R. 100 and 101), he stating that all except about one-half dozen single drapes had changed color (R. 106).

As a basis and foundation and in connection with the introduction of Exhibits 8, 9 and 10, which were the sample curtains, and to show that these samples were representative of curtains in the apartment at the time Sweitzer left, when essentially all of them had changed color, we call attention to Mr. Sweitzer's testimony as follows (R 106).

> "Q. Now, Mr. Sweitzer, you testified that by the time you left there the curtains in all of the apartments, with the exception of half a dozen single ones, had changed color?
>
> A. I did, yes.
>
> Q. What would you say in regard to the situation as to whether or not the samples which you furnished here are representative generally of all of the curtains?
>
> A. I would say that the two drapes that are discolored are representative of all of the rest of the drapes that are in the apartments."

It will be observed that this was considerably prior to September 16, 1963, which date the Court instructed was the end of the warranty period. Furthermore, and

as confirmation of such testimony by Mr. Sweitzer, plaintiff's witness, Thomas J. Denkers, testified that when he became manager on January 1, 1964 essentially all of the drapes in the Susan Kay Arms were discolored and badly streaked (R 129). Accordingly, there was ample evidence that essentially all of the drapes had failed within the warranty period.

We submit that the testimony above set forth specifically identified Exhibits 8, 9 and 10 as being essentially in the same condition as were the drapes generally in the apartments prior to the end of the warranty period. Accordingly, a proper foundation was certainly laid for the testimony of Mr. Frank. Furthermore, it should be borne in mind (1) that Mr. Frank's testimony as to value was not tied expressly or exclusively into Exhibits 8 ,9 and 10, except as to the type of material therein (R 169), and (2) that he was testifying as an expert.

Mr. Frank is an interior designer and specifier, dealing in merchandise of the type involved in this action and obviously eminently qualified to testify as an expert with regard to such matters (R 163, 164). He testified that in the interior decorating industry and in the industry involving furnishing and sales of draperies that if the material changes color at any time within a warranty period it would be considered a defect (R 168). Frank was a qualified expert witness and could testify as to values even on the basis of a hypothetical question, which, in fact, he did (R 169-

172). His testimony related to the difference in value of drapes of the type involved if free from defects as against their value with the defects which caused them to change color during the warranty period. As regards such values and damages, he said that such drapes, without such defects, were worth approximately $7,200.00, but with defects which caused them to change color during the warranty period, their value was 15% to 20% of what it would otherwise be, or reduced to dollars, $1,400.00 to $1,500.00 (R 171-172).

We submit that there was ample and proper basis and foundation for the testimony of Mr. Frank as to valuation and otherwise, and that his and the other evidence amply supported the jury's verdict.

(B) DEFENDANT'S MOTION TO DISMISS AT THE CLOSE OF PLAINTIFF'S EVIDENCE WAS PROPERLY DENIED.

In addition to the testimony referred to hereinabove in connection with sub-heading A of this Argument, Mr. Gordon Harry, obviously the best qualified man who testified at the trial as relates to the color changes and the reasons therefor (R 132-135) testified that a change of color is in the industry considered a defect which would come within a warranty against "latent defects, faulty material," etc. (R 138). He further testified that his examination and testing of the materials, confirmed by a laboratory report, showed that the material had fluorescent dyes in it and by that alone

it would be considered in the industry as "unserviceable" (R 144), he stating there is no way of removing discoloration from fluorescent dyes (R 188).

Accordingly, there was an abundance of testimony from the witnesses for the plaintiff to establish, most conclusively,

(1) That the warranty as against latent defects and faulty material, etc., did include a warranty that the color would not change;

(2) That the drapes were in fact defective, and such defects appeared during the warranty period;

(3) That the defect was one which could not be cured; and

(4) The extent of plaintiff's damages.

(C) THE COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A DIRECTED VERDICT MADE AT THE CLOSE OF THE TRIAL.

Essentailly, the only basis for Appellant's contion that a motion for a directed verdict should have been granted, absent the granting of a motion to dismiss at the end of plaintiff's evidence, is based upon testimony of Mr. Claude Thompson, Mr. Hughes and Mr. Holt, who were witnesses called by the defendant. The most that could be said with regard to any of such testimony was that it contradicted testimony of the plaintiff's witnesses so that the jury was required to

weigh the testimony of the various witnesses and determine which witnesses they would believe and the weight which they would give to the testimony of the various witnesses based upon their apparent experience, qualifications, candor and demeanor on the witness stand. Such being the case, there being substantial evidence to support the plaintiff's contention as set forth in Arguments A and B above, the jury was entitled to consider the evidence, and having done so to return a verdict thereon.

(D) THERE WAS NO ERROR IN THE COURT'S STRIKING THE FINAL PARAGRAPH OF INSTRUCTION NO. 5 TO THE JURY, AND IN ANY EVENT THE DEFENDANT CANNOT ASSERT ANY ERROR BECAUSE HE FAILED TO OBJECT TO SUCH INSTRUCTION GIVEN OR OMITTED BY THE COURT .

Counsel for the Appellant and Defendant was, of course, in the courtroom during all the time the Court was reading the instructions to the jury. Defendant's counsel took no objections or exceptions to Instruction No. 5 nor to any instructions whatsoever, either as to those given or those omitted by the Court (R 270). Such being the case, defendant may not now assign as error the Court's instruction as actually given. See Rule 51, Utah Rules of Civil Procedure. See, also, *McCall vs. Kendrick,* 2 Utah 2d 364, 274 P. 2d 962.

In any event, we submit that the instruction as given by the Court did in fact properly state the law.

(E) THERE WAS NO ERROR COMMITTED BY THE COURT IN REFUSING TO RECALL THE JURY IN CONNECTION WITH ALLEGED ERRORS OF COUNSEL FOR PLAINTIFF IN HIS ARGUMENT.

There is, of course, nothing in the record with regard to the argument of counsel and plaintiff emphatically denies there was anything improper therein. Defendant did not, during or at the time of the argument, make any objection thereto and it was only after the jury had been out for some time that he complained with regard to it. The only thing in the record which would indicate what the defendant complained of was his reference to the fact that plaintiff's counsel in his closing argument called attention to language in Exhibit 2. (R 270). This was an exhibit admitted in evidence by the Court in its entirety and without reservations or without objection by the defendant (R 70).

If in fact there was anything at all bordering upon an improper argument, which we emphatically deny, the defendant waived any right to except thereto by failing to take such exception at the time the statements were made and during the argument rather than to wait until the jury had been out for some time before calling the matter to the attention of the Court. *John-*

son vs. Union Pacific, 35 Utah 285, 100 P. 390. We submit there was no prejudicial error in connection with this matter.

(F) THE COURT COMMITTED NO ERROR IN REFUSING TO GRANT JUDGMENT NOTWITHSTANDING THE VERDICT.

The argument as relates to the other points involved fully cover this assignment and we submit that no error was committed.

(G) THE COURT COMMITTED NO ERROR IN REFUSING TO GRANT DEFENDANT'S MOTION FOR A NEW TRIAL.

The whole basis for plaintiff's argument that a new trial should be granted is that subsequent to the trial, through an examination of the fabrics involved, appellant and defendant found a thread which they feel would have thrown some additional light on the matter if it had been previously discovered and called to the attention of the jury. We call the attention of the Court to the fact that the Exhibits 8, 9 and 10 (in connection with which this thread is supposed to have been found) were tendered to and available to the defendant and appellant for examination, for testing, or whatever else they desired to do, at least from the date of the pretrial, which was on February 24, 1964 (R 258). The trial of the case was not held until April 15, 1964. Appellant cannot surely claim any surprise in the nature of newly discovered evidence, which appel-

lant could not with reasonable diligence have discovered had it chosen to take these exhibits and drapes and examine them when they were available to defendant prior to the time of the trial, and in fact during the progress of the trial. Defendant chose simply to ignore these draperies. Defendant cannot surely be heard to say that since it did not diligently prepare for the trial and since it was unsuccessful in the trial below by reason of lack of such diligence, it ought now have another opportunity to present the evidence which it should have developed and presented at that trial. This in a nutshell is the contention of the defendant in urging that a new trial should be granted on the ground of this so-called newly discovered evidence.

Furthermore, the only thing which appellant suggests is that had the matter been discovered at or prior to the trial it would have been something which would have made some other or further conflict in the evidence. It would, in other words, have been merely cumulative of defendant's other testimony. There is nothing in fact to show that such evidence could reasonably be expected to have changed the results of this trial or the opinion and conclusions of the jury.

Furthermore, the uniform rule of law seems to be that in connection with a motion for a new trial the question as to whether the newly discovered evidence if presented at the retrial of the case would probably produce a different result is a question addressed to the sole discretion of the trial judge, whose action

will not be disturbed in the absence of a manifest showing of abuse of discretion. *Dankert vs. Lamb Finance* Company, 304 P. 2d 199. The rule was recently reenunciated in Utah in *Uptown Appliance & Radio Company vs. Flint,* 249 P. 2d 826, wherein the Court stated:

> "It is axiomatic in this State that the decision of the trial judge in reference to the granting or refusing of motions for new trials is a discretionary matter, provided there is not an abuse of discretion and there is reason to believe that a miscarriage of justice would result if refused."

(H) THE COURT SHOULD ORDER AND DIRECT ADDITIONAL REASONABLE ATTORNEY'S FEES, COVERING THIS APPEAL, BE ADDED TO THE JUDGMENT BELOW.

The written agreement between the parties hereto, which agreement was the one containing the warranties sued upon, provided for payment of attorneys fees by a defaulting party in the enforcement of such agreement (Exhibits 1 and 2). The Court below directed the inclusion in the judgment of attorneys fees in the amount of $751.83 in accordance with defendant's agreement at the pretrial (R 12). Obviously, such attorneys fees did not include, nor contemplate, attorneys fees reasonably expended by plaintiff and chargeable against the defendant in connection with an appeal to this Court and such ought be awarded and added to the judgment below.

In *Hahn vs. Hahn* (Cal.) 226 P. 2d 519, a suit was brought on a promissory note. The lower court awarded $836.00 as attorneys fees. Plaintiff contended he was entitled to additional attorneys fees in connection with an appeal taken from the judgment below. The Appellate Court found $300.00 to be a reasonable fee and said: "The purpose of a provision for attorneys fees is to indemnify the creditor against the necessity of paying an attorneys fee, and to enable him to recover the full amount of his debt without deduction for legal expenses".

Again in *Cirimele vs. Shinazy* (Cal.) 285 P. 2d 311, the Court, in awarding additional attorneys fees for services in the appellate court, stated: "Under the rule of *Kirk vs. Culley,* 261 P. 994, we may find the reasonable value of such attorneys fees without remanding the cause to the trial court."

Again in *Dankert vs. Lamb Finance Company,* 304 P. 2d, 199 (Cal.), the Court stated: "A contract for a reasonable attorneys fee in enforcing its provisions embraces an allowance for legal services rendered upon appeal as well as during the trial".

We submit that this Court has the jurisdiction and power, in its discretion, to appraise the legal services shown by the record to have been rendered in connection with this appeal and having adjudicated the value of such services to direct the addition of the fair value thereof to the judgment entered in the court below.

See in addition to the above cited cases, *Kirk vs. Culley*, 261 P. 994 (Cal. 1927).

CONCLUSION

Respondent respectfully suggests that no basis whatsoever has been shown for appellant's contention that the Court below committed error and respondent respectfully urges that the judgment below be affirmed, with the request, however, that this Court determine and assess further and additional attorneys fees to be added to said judgment to compensate the plaintiff in connection with this appeal.

Respectfully submitted,

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