

1964

J. Seal v. Tayco, Inc. : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Seal v. Tayco, Inc.*, No. 10171 (Utah Supreme Court, 1964).

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FILED

OCT 6 - 1964

For Service on Court

IN THE SUPREME COURT
of the
STATE OF UTAH

J. SEAL,

Plaintff and Appellant,

- vs. -

TAYCO, INC.,

Defendant and Respondent.

Case No.

10171

RESPONDENT'S BRIEF

Appeal from the Third District Court for
Salt Lake County
Honorable Ray Van Cott, Jr., Judge

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UNIVERSITY OF UTAH

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STATEMENT OF KIND OF CASE

This is an action on account by Appellant who is an assignee for merchandise sold in the amount of \$3,584.42. Respondent admitted the account and claimed an offset thereto in the amount of \$2,590.00.

DISPOSITION IN LOWER COURT

The case was tried to a jury on May 18, 1964 in the District Court of Salt Lake County. The jury returned a verdict for Appellant on her assigned account and found for Respondent on its offset.

The Court entered judgment for Appellant for the difference between the account and offset in the amount of \$994.42 plus interest of \$134.00.

RELIEF SOUGHT ON APPEAL

Appellant demands that the judgment be modified so as to eliminate therefrom the offset claim of Respondent's as found by the jury.

STATEMENT OF FACTS

Plaintiff and Appellant is a bonded collection agency. The account sued on was owned by American Maganese Steel Division of the American Brake Shoe Company. Since Appellant, J. Seal, is only a nominal party in this action, Respondent will hereinafter refer to Appellant as "AMSCO" which is the trade name of the owner of the account.

Respondent, Tayco, Inc., is a Utah corporation, the stock of which at the time of the institution of this law suit was almost completely owned by one J. Verne Taylor. Prior to incorporation, the business had been conducted by Mr. Taylor as a sole proprietor (R. 37). The business had been operated as a corporation and as a sole proprietorship for approximately 15 years at the time this law suit was instituted (R. 37 and 38).

Respondent's connection with "AMSCO" went back a number of years. Respondent was a distribu-

tor for "AMSCO" and originally sold their products in Utah and eastern Nevada. The territory later included parts of Idaho. "AMSCO" manufactures electrodes, steel bar stock, and shape steels and these were the products distributed and sold in this territory by Respondent (R. 38).

Respondent was an "AMSCO" distributor in the year "1957" and in that year the setoff which is the subject matter of this law suit occurred.* In January 1957 this company obtained an order from the Palisade Dam contractors for the purchase of certain track shoes. Track shoes are the metal pads on which the crawler type vehicles travel over the ground (R. 41). A formal written purchase order was issued by Palisades contractor, dated January 30, 1957 (Ex. 1). Prior to the date of this order, Respondent's salesman had been in contact with the Palisade Dam contractors and Respondents had also been in contact with "AMSCO" regarding these parts (R. 57).

On January 25, 1957 "AMSCO" issued a written commitment regarding these track shoes (Ex. 2).

On January 31, 1957, Respondent issued its purchase order, No. 7144 to "AMSCO" for the purchase of the track shoes ordered by Palisades contractors on January 30, 1957 (Ex. 3).

*It was agreed between the parties that "AMSCO" is a foreign corporation that has never qualified to do business in this state and hence, the Statute of Limitations is not an issue in this case.

Thereafter on February 22, 1957 Respondent received a post card from "AMSCO" indicating that they had scheduled shipment one-half in April 1957 and one-half in May 1957 (Ex. 8).

It is to be noted at this point that in both the "AMSCO" (Ex. 2) and Respondent's purchase order (Ex. 3) time of delivery was clearly specified as of April 15, 1957. On March 2, 1957 Respondent wrote to "AMSCO" concerning the post card (Ex. 8) and stated as follows:

"It is necessary to determine two items in this letter. First, the card received from Mr. Spangenberg on February 22 about the above order. This order was accepted by us for delivery not later than the 2nd week in April 1957 based on authority of Mr. Dantiko and this delivery was by our customer specified as being very necessary. Hence, your card which specified one-half of the order would be shipped in April and one-half in May absolutely dismayed us.

"Will you please advance your schedule to meet the promised quotation given by Mr. Dantiko by airmail 1-23-57, Quotation No. 125-I-187, this was specified as sure of delivery by April 15, 1957, Order placed on this basis."

On April 10, 1957 Palisades contractors forwarded a telegram to Respondent which stated as follows:

"Cancel our Order 56-2150 for three sets, 26-inch shoes for HD tractors, because of fail-

ure to meet the requirements.

S/ D. W. Kelley, Palisades Contractors”
(Ex. 4)

Thereafter on May 4, 1957 Respondent again wrote to “AMSCO” and stated in part as follows:

“This letter is to acquaint you with the situation at Palisades. We contacted the boys there and they say they are not in a position to take the 26-inch shoes which they ordered and then cancelled, their No. 56-2150, our Order 7144 (Ex. 9).”

The above Exhibits comprise the documentary evidence relating to the purchase of the track shoes. Mr. J. Verne Taylor also testified concerning the transaction. On direct examination he testified that “AMSCO” never billed Respondent for the track shoes and in fact that only 100 of them were ever made and that these were not made or available until the latter part of May 1957 (R. 46-47). Additionally Mr. Taylor testified that after he had received the post card which purported to change the date of delivery, he talked to Mr. Ed Welsh who was head of the foundry and was advised by him that he would do his best to meet the April 15, 1957 deadline (R. 62-63).

“AMSCO” contends that this documentary evidence and the testimony of Mr. Taylor does not show a breach of contract entitling Respondent to damages. Under the points of argument that follow,

Respondent will show that this evidence shows a contract, a breach thereof by "AMSCO" for which damages by way of setoff were properly awarded by the jury.

ARGUMENT

POINT I.

"AMSCO" WAS LIABLE FOR DAMAGES FOR BREACH OF CONTRACT.

Appellant argues that Paragraph 4 (c) of Exhibit 2 ("AMSCO" quotation) effectively insulates it from Respondent's claim for damages for breach of contract.

Paragraph 4 (c) of the "AMSCO" quote (Exhibit 2) reads:

"(c) Seller shall not be liable for any delays or defaults hereunder by reason of fire, floods, acts of God, labor troubles, inability to secure raw materials, acts of government, or other causes beyond reasonable control. In the event of any such delay, the date of delivery shall be extended for a period equal to the time lost by reason of the delay. In no event shall seller be liable for special or consequential damages."

Appellant concedes that none of the causes for delay mentioned in Paragraph 4 (c) are applicable to this case and further concedes that it would be more desirable had the last sentence of the above quotation be placed in a separate paragraph.

The question before the lower court as before this court is the proper construction of that paragraph. The lower court correctly ruled that the paragraph means that the seller shall not be liable for delays caused by extraordinary reasons and that in no event would seller be liable for special or consequential damage by reason of delay from extraordinary causes. "AMSCO" wrote this contractual provision. Under settled law, the provision must be construed most strongly against the maker. *Maw vs. Noble*, 10 Utah 2d 440, 354 P. 2d 121.

Appellant contends that Paragraph 4 (c) means that it is not liable for special or consequential damage for any reason. Questions immediately arise. Is "AMSCO" liable for any delay? Is it liable for breach of warranty? Is it liable for misdelivery? If "AMSCO" intended to immunize itself from all liability and place its customers completely at its mercy, surely it would have inserted a separate paragraph in Exhibit 2 and insulated itself with appropriate language.

The interpretation adopted by the lower court is correct. The lower court simply held that the meaning of the last sentence of Paragraph 4 (c) must bear some relationship to the terms preceding it. It cannot be taken out of context and given universal application. A logical interpretation of the paragraph is that "AMSCO" is not liable gener-

ally for extraordinary causes and in no event is liable for special or consequential damages occasioned by the extraordinary causes mentioned in the paragraph.

“AMSCO” cites the case of Eastern Brass and Copper Company, Inc. vs. General Electric Supply Corporation, 101 F. Supp. 410 in support of its position. The case is easily distinguishable. The contract in the Eastern Brass case (*supra*) did have a paragraph providing immunity from extraordinary causes. In a separate paragraph the contract provided:

“We shall not under any circumstances be liable for special or consequential damages on account of delay in furnishing merchandise contracted for or on account of the use or re-sale of such merchandise.”

In that case the contract specifically provided the area in which the seller was insulated from liability. There is no such preciseness of language in this case. The provision contended for by “AMSCO” is contained in a paragraph which mentions delay caused by extraordinary events. Clearly it is restricted to those events.

The last contention of Appellant under its Point I. is that the damages in this case awarded to Respondent were special and not general and, therefore, eliminated by the obscure language of Paragraph 4 (c).

Respondent lost its profit on the re-sale of this merchandise by reason of Appellant's breach of contract. What we are here concerned with is whether loss of profits is special or general damage. Appellant cites no case or other authority for its statement that the damages in this case are special damage.

The distinction between general and special damage is not always an easy one to make. It depends in great part upon the facts of each individual case. The general rule is stated in 25 CJS (damages) Section 138:

“Whether or not recovery may be had for, or proof made, of loss of profits under a general allegation of damages depends, of course, on whether or not such damages are on the facts involved to be considered general or special. Under some authorities, where the wrong complained of consists of or occasions the breach of contract the loss of profits arising from the breach may be recovered under a general allegation of damage, particularly where such loss is the natural and necessary result of the breach of contract. Under others, however, a loss of profits resulting from breach of contract are considered special rather than general damages and must be pleaded to permit recovery thereof.”

By definition, general damages are those that naturally and necessarily flow from the wrongful act, while special damages are such as naturally but

not necessarily flow therefrom. In the Utah case of Anderson et al vs. Jensen et al, 71 Utah 295, 265 P. 745, it is stated:

“General damages, this court has held ‘are the natural and proximate consequences of, and are traceable to the act complained of and those damages which are probable, traceable to, and necessarily result from the injury . . . and may be shown under the general allegation of the complaint. Only those damages which are not probable and the necessary result of the injury are termed “special” and required to be stated specially in the complaint.’ ”

The question in this case is whether the loss of profits are damages such as naturally and necessarily flow from the breach (general damage) as opposed to those damages which naturally but do not necessarily flow therefrom (special damage). The distinction in this case is readily apparent from the documentary evidence on file. On Exhibit 3, the purchase order of Respondent, it is clearly stated that this order is for re-sale to Palisades Contractors and it is also clearly stated that the customer specified delivery to be within two weeks of April 1, 1957. It logically follows that “AMSCO” knew that the order was one for re-sale and that the customer had specified a particular delivery date. Quite clearly “AMSCO” knew that the probable and natural result of its breach by failing to deliver timely would be the loss of profit on the sale. This is general damage.

For a distinction, we again refer to Exhibit 3, the Respondent's purchase order. It also states:

"This is only the beginning for this company. They have 40 tractors, so please process this order at once and try and beat their delivery requirements."

Were the damage in this case a claim for loss of profits on this future business, then there might be some merit to the assertion that that claim was one for special or consequential damage.

The principle is aptly stated in 15 Am. Jur. (damages) Section 152:

"According to some authorities, the line of distinction between profits which are remote, consequential, or not within the contemplation of the parties and those which are proximate and absolute and certain and within the contemplation of the parties seems to rest in the question whether they are to arrive directly out of the contract in question or its subject matter and to constitute the immediate fruits of the contract or whether they are to result from collateral engagements or enterprises."

In this case the damages claimed are the direct and proximate result of its breach. They would be consequential only if the collateral enterprise of obtaining the future business of the customer were involved.

In summary, it is the position of Respondent that the contractual language of Exhibit 2 does not insulate "AMSCO" from claims for either special or general damage except as those which might arise from extraordinary events. This is the correct interpretation of their agreement and the one adopted by the trial court. Even assuming, arguendo, that "AMSCO" is not liable for special damage, still their position is untenable because the offset allowed by the jury in this case is general damage and "AMSCO" concedes that it is liable for general damage.

POINT II.

THE CONTRACT OF SALE PROVIDED FOR DELIVERY BY APRIL 15, 1957 AND WAS BREACHED BY "AMSCO" WHEN IT DID NOT DELIVER TIMELY.

Appellant argues under its Point II. that the contract between the parties provided for delivery of one-half the order in April, 1957 and one-half in May, 1957 and that, therefore, there was no breach of contract by "AMSCO" at the time Respondent's customer cancelled its order.

The documentary evidence in this case shows that on January 25, 1957 "AMSCO" issued its quotation on the goods to be sold. This quotation specifically provided shipment by April 15, 1957.

On January 31, 1957 Respondent forwarded its purchase order for material set forth in the quote for shipment April 1, 1957 (Ex. 3). Respondent

also stated in that order that its customer specified shipment to be within two weeks of April 1, 1957.

On February 6, 1957 from the "AMSCO" general office at Chicago Heights, Illinois, a letter (Ex. 7) was forwarded to Respondent accepting the order. A completed contract existed at that time.

This contract was breached by "AMSCO" on February 22, 1957 when it chose to change the date of shipment from April 1, 1957 or at the latest April 15, 1957 (the shipping date specified in its quotation) to shipment of one-half the order in April and one-half in May (Ex. 8).

Thereafter Respondent wrote to "AMSCO" (Ex-5) and stated that the attempted change of delivery date was not acceptable. Respondent requested an advance of delivery date to meet "AMSCO's" promised quotation. Interestingly, "AMSCO" never replied. Then it did not even meet or attempt to meet any delivery date, either contractual or otherwise, and only 100 of the track shoes were ever made and these were not available until the latter part of May, 1957 (R. 46).

Appellant seems to say that whether a contract existed and was breached in this case was a question of law for the trial court and not a matter of fact to be determined by the jury. The lower court submitted these questions to the jury under Instruction

No. 2. Appellant does not claim error in this Instruction, but rather contends that as a matter of law there was no breach of contract.

“AMSCO” refers to its acceptance of the order stating that it was conditional as to date of delivery. What the “general office” had to say concerning this is as follows:

“Within the course of the next few days, you will receive formal acknowledgement from each of the foundries mentioned above, and at the same time, will receive information concerning shipment of the material.”

Does “information concerning shipment” mean that “AMSCO” has the right to alter the date specified in its quotation which provided shipment on April 15? Does it in fact have anything to do with date of shipment at all? It might very well mean information concerning method and route of shipment.

These are questions of fact upon which reasonable men might disagree and hence, they are jury questions.

In the lower court, “AMSCO” offered no testimony concerning the formation or breach of this contract or any testimony concerning the meaning of any term contained in the documentary evidence. Indeed in its Brief, it cites no authority for its conclusion that these are questions of law for the trial court.

The law does not support Appellant's contention. In 53 Am. Jur. (trial) Section 255 it is stated:

"Where one party to an action affirms and the other denies the existence of a contract, and the evidence introduced is conflicting, but there is evidence from which a contract may be inferred, the jury should determine the fact of the existence or non-existence of the contract . . . but the question whether informal writings such as letters, telegrams, and other documentary evidence show that a contract was entered into must often be left to the jury . . ."

Again in the same volume of American Jurisprudence at Section 274, P. 232 it is stated:

"An issue as to whether a contract or warranty has been breached is ordinarily, in cases tried before a jury, a question for the jury to determine from the facts and circumstances in proof, assuming that these facts are not undisputed or that different inferences may be drawn therefrom."

See also the dissenting opinion in Hawaiian Equipment Company vs. Eimco Corporation, 115 Utah 590, 207 P.2d 794.

POINT III.

THE CONTRACT WAS BREACHED BY "AMSCO" AND NOT CANCELLED BY MUTUAL CONSENT.

Under Point III. of Appellant's brief, it argues (1) the contract was cancelled by mutual consent and (2) if not so cancelled, Respondent is estopped to assert the claim.

As to the claim of rescission by mutual consent, Appellant cites no factual evidence in the Record to support its contention with the exception of Respondent's letter of May 4, 1957 which advises "AMSCO that Respondent's customer had cancelled and, therefore, Respondent was cancelling the order. At this time there had been no delivery and at least 19 days had expired from the promised date of delivery.

Respondent had a legal right to cancel the contract when "AMSCO" failed to deliver. 12 Am. Jur. (contracts) Section 438.

"AMSCO" had no right to cancel the agreement after it defaulted in performance except by a further agreement founded upon adequate consideration. Evidence of such agreement and consideration is completely lacking in this case.

The finding of the jury that "AMSCO" breached the agreement precludes the assertion that it was mutually rescinded. Further, this issue was submitted to the jury under the Court's instruction No. 5 and resolved against appellant.

"AMSCO" then claims under its Point III. that if the contract was not rescinded, Respondent is nonetheless estopped to assert the claim by reason of delay. Without citing evidence or legal authority "AMSCO" simply states that its credulity is stretch-

ed beyond the breaking point to imagine that even Mr. Taylor could believe that Respondent had a justifiable claim.

“AMSCO” failed to point out to this Court that it has never qualified to do business in this state and elected to assign this claim for suit rather than appear in its own name and subject itself to the full jurisdiction of the Courts of this state. Other claims of Respondent for amounts far exceeding the “AMSCO” claim were the subject of this law suit below and were excluded by the Court as a matter of law. The timidity of “AMSCO” to subject itself to the jurisdiction of the Courts of this state can be ascribed in part to the fact that it knew at all times that these claims by Respondent were pending against it. Also, since Respondent could not assert its claim in this state until “AMSCO” sued, there was no delay.

A complete answer to Appellant’s estoppel argument is that it was never an issue in the trial below. “AMSCO” offered no evidence in this regard and requested no instructions.

Even further, delay cannot be the basis for estoppel unless the other party has materially changed its position to its prejudice, 19 Am. Jur. (estoppel) Section 59. There is no evidence of change of position in this case.

POINT IV.

MITIGATION OF DAMAGE WAS NOT AN ISSUE IN THE TRIAL COURT.

Under Point IV. of its brief, "AMSCO" argues that Respondent was under a duty to mitigate its damage.

Here again we are cited no evidence in support of Appellant's proposition that Respondent could have obtained a reasonable substitute for the goods in the market and thereby reduce or eliminate its damage.

Here again the issue was never raised in the trial court and no instructions were requested so that the issue could be put to the jury.

If a seller who breaches a contract claims that the buyer could have mitigated the damage, it is up to the seller to prove it. This rule is clearly stated in 46 Am. Jur. (sales) Section 707. We quote:

"The burden of proving that the damages alleged to have been sustained by the Buyer have been prevented or mitigated by his actions rests on the seller as the party charged with responsibility for breach of the contract."

This burden was never undertaken in the trial court by Appellant.

POINT V.

TIME WAS OF THE ESSENCE OF THIS CONTRACT.

The argument of Appellant that time was not of the essence of this contract can be answered very

simply by referring to Ex. 3 which is the purchase order of Respondent. It says:

“THEY SPECIFY:

DELIVERY DATE TO BE WITHIN 2
WEEKS OF APRIL 1, 1957.

SHIP AS COMPLETED FOR IF THESE
COULD BE RECEIVED BY THE 1ST. OF
APRIL THEY WOULD BE MOST HAPPY
AND THEIR START FOR SPRING WORK
WOULD BE ADVANCED THAT MUCH.”

It is difficult to conceive of how a lay person could better state that time was of the essence of this sale.

And here again, this issue was never raised in the trial court.

POINT VI.

THE DAMAGES AWARDED BY THE JURY TO RESPONDENT WERE PROPER.

Without attempting to mathematically analyze in every respect and detail the damages awarded by the jury in this case, suffice it to say that the amount of their award of \$2,590.00 was within the figure of \$2,799.84 set forth in Appellant's Brief.

CONCLUSION

Respondent believes that the only proper question before this court is the construction of the docu-

mentary evidence submitted to the jury in this case. These documents clearly show an agreement between these parties for the sale and delivery of certain track shoes. This issue was submitted to the jury and the jury found a contract and also found that it had been breached by "AMSCO."

Many issues raised on this appeal were never raised by Appellant in the trial court. Much of the argument of Appellant relates to issues that were properly submitted to the jury and determined against Appellant.

There is no error in the record and the verdict of the jury is correct in all respects.

Respectfully submitted,

HANSON & GARRETT