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J. Seal v. Tayco, Inc. : Reply Brief of Appellant

Utah Supreme Court

Hanson & Garrett; Attorneys for Respondent;
Hansen & Sumsion; Attorneys for Appellant

IN THE SUPREME COURT
of the
STATE OF UTAH

J. SEAL,
Plaintiff and Appellant,

vs.

TAYCO, INC.,
Defendant and Respondent.

Case No. 10171

REPLY BRIEF OF APPELLANT

Appeal from Judgment of Third District Court for
Salt Lake County
Hon. Ray Van Cott, Jr., *Judge*

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ARGUMENT

POINT I

"AMSCO" WAS NOT LIABLE FOR SPECIAL DAMAGES UNDER THE EXPRESS TERMS OF THE CONTRACT IN QUESTION AND THE DAMAGES AWARDED TO RESPONDENT BY THE DISPUTED OFFSET WAS FOR SPECIAL DAMAGES.

Respondent has failed to advance any meaning whatsoever for the exculpatory sentence involved in this case and asks this Court to interpret the paragraph in question as having exactly the same meaning without it as with it in. Such construction is, of course, contrary to law.

In 12 Am. Jur., (Contracts) Section 241 it states the law as follows:

> "Such an interpretation must be adopted as will render the whole agreement operative, if it can, consistently and reasonably be done. So far as possible effect will be given to all the language and to every clause of the agreement. No word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument. An interpretation which gives reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable. Only when parts of a written agreement are so radically repugnant that there is no rational interpretation that will render them effective and accordant must any part perish."

Realizing this Court would probably refuse ~~reverse~~ to eliminate entirely the exculpatory sentence in question, Respondent seeks to avoid its application in this case on the grounds that the damages allowed in the disputed offset were not in fact special damages.

The main reason for distinguishing between general and special damages relates to the necessity to plead the special circumstances on which the latter are based in in order to be recoverable. If a party entitled to damages has suffered a loss greater than would normally follow a breach of contract because of special circumstances (such as the loss of profits on an existnig contract, as here) and these circumstances were known to

the other party when the contract was formed, these additional damages are recoverable if properly pleaded. There is no question of proper pleading of Respondent's loss of profit, but could the respondent have recovered for them(setting aside for the moment the effect of the exculpatory contract limitation) if they had not been specially pleaded? If not, they are special damages and within the contract exclusion in question.

In 15 Am. Jur. (Damages), Sec. 321, it states:

> "One who desires to recover for loss of prospective profits for breach of a contract must allege the facts and circumstances and knowledge of the situation brought home to the other party at the time the contract was entered into."

(citing *Goodwin & Southern R. Co.*, 125 Ga. 630, S.E. 720)

Respondent appears to classify as special damages only those that are so speculative and remote, arising out of possible future business, that they would not be recoverable regardless of how expressly they were pleaded.

The fact that the amount recoverable as special damages is necessarily greater and in addition to general damages is the very reason why a seller who can not guarantee a delivery date because the goods must be manufactured needs to eliminate exposure as to them even in ordinary circumstances although willing, as here,

to assume liability for the usual damages except where the causes of delay are extraordinary.

The trial judge recognized that the damages sought to be offset were special and so denominated them in his instructions (R 70, 71).

Footnote number 18 to the authority cited by Respondent on this point (15 Am. Jur. (Damages) Sec. 152 says:

> "No court in modern times, howsoever extreme may be its holding, permits the recovery of prospective profits *as special damages* unless they came within the limits laid down in Hadley vs. Boxendale." *American R .Exp. Co. vs. Steinberg,* 208 Ky. 251, 270 S.W. 756, 42 ALR 705. (Underscoring added)

POINT II

THE CONTRACT OF SALE DID NOT PROVIDE FOR DELIVERY BY APRIL 15, 1957, AND SO WAS NOT BREACHED BY APRIL 10, 1957.

Appellant does not quarrel with the law cited by Respondent to the effect that questions concerning the existence of and breach of contract are jury questions when the facts are in dispute. Here, however, the facts are not in dispute and Respondent has failed to point out in the record *any* evidence that "AMSCO" had agreed to a delivery date of April 1st. Certainly none

of the documentary evidence shows it and Mr. Taylor's testimony that Mr. Welch said after February 22, 1957, "He would do his best to meet the April 15, 1957 deadline" would not supply any such proof for good businesses always seek customer satisfaction beyond their legal liability.

POINT III

THE CONTRACT WAS CANCELLED BY MUTUAL CONSENT.

Respondent contends that any evidence of an agreement of recession and consideration to support it is "completely lacking in this case." Appellant submits that Exhibit 9, the letter of May 4, 1957, from Mr. Taylor to AMSCO containing "Please . . . cancel our order No. 7144 for Palisades Contractors" and Mr. Taylor's testimony that "AMSCO" never billed for these tract shoes (R46, 47) and that he "considered I had cancelled it and I didn't do any more about it" (R 59) although he saw "AMSCO's" representative about monthly for nearly two years thereafter (64, R 67), all of which was cited in the Brief of Appellant, clearly established a mutual agreement to cancel the order and a mutual agreement to rescind an executory contract provides adequate legal consideration as each party thereby suffers a legal detriment in giving up his rights to performance or damages from the other (17 C.J.S. (Contracts) Sec 391). There was no conflict in the evidence on this point to make it a jury question so its submission to the jury was error.

POINT IV

MITIGATION OF DAMAGES.

This point is abandoned by appellant since not raised in the trial court.

POINT V

TIME OF ESSENCE.

This point is abandoned by appellant since not raised in the trial court.

POINT VI

THE AMOUNT OF OFFSET ALLOWED BY THE JURY IN EXCESS OF $1,694.40 WAS NOT SUPPORTED BY THE EVIDENCE.

All of the evidence of this point was documentary and the only possible difference in the price of the track shoes payable by the buyer in determining his profits would be whether the shoes ordered were the *non* skid type ($44.00/100# less discount/dozen) or not ($34.65/100 less discount/dozen) as quoted on Exhibit 2 and *all* of the evidence on this point shows that the *non* skid type were ordered (Exhibit 3). Under these circumstances, it is not surprising that Respondent made no effort whatsoever to point to *any* evidence that would jusitfy the amount of the jury award in this case.

Certainly this Court can not properly allow an award to stand which is not supported by the evidence merely because it is less than the amount requested by the successful party as Respondent argues on this point.

CONCLUSION

The contract in question absolved "AMSCO" of any liability for special damages and the offset of special damages awarded Respondent in the lower court should be set aside and judgment entered for Appellant for the admitted liability of the account sued on. Even if this were not so, there was no contract by "AMSCO" for delivery prior to the time of cancellation by Respondent's assignor or any such contract was rescinded by mutual consent so the result should be the same.

Even if Appellant is in error as to the above conclusions, the judgment should be increased to $1,790.62 plus interest since no evidence supported any offset in excess of $1,694.40.

Respectfully submitted,

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