1965

Lyle Bolger v. Beth Edwards and Clyde L. Edwards : Appellant's Brief

In the Supreme Court of the State of Utah

LYLE BOLGER,
Plaintiff and Appellant,

—vs.—

BETH EDWARDS and CLYDE L. EDWARDS,
Defendants and Respondents.

APPELLANT'S BRIEF

Appeal from the Judgment of the
Court for Utah County, Honorable
District Judge

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TABLE OF CONTENTS

CASES CITED

In the Supreme Court of the State of Utah

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BETH EDWARDS and CLYDE L. EDWARDS,
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Case No. 10261

APPELLANT'S BRIEF

Appealed from the Fourth Judicial District Court
The Honorable Joseph E. Nelson, *Judge*

STATEMENT OF NATURE OF THE CASE

This case is brought on a promissory note which Plaintiff contends has been only partially satisfied and Defendants contend no promissory note has been executed, and further that any obligation owing was satisfied by a return of certain merchandise from said Defendants to said Plaintiff Appellant.

DISPOSITION IN LOWER COURT

The lower court held no promissory note was executed and that there was a return of certain merchandise, satisfying any obligation owing by the Defendant to the Plaintiff, and entered its decree dismissing the complaint of the Plaintiff with prejudice on the 30th day of October, 1964.

RELIEF SOUGHT ON APPEAL

Plaintiff Appellant requests the judgment of the lower court be reversed and that a judgment be granted in favor of the Plaintiff Appellant in the sum of $354.28, together with interest at the rate of eight per cent per annum from the date of judgment until paid in full, and costs incurred herein.

STATEMENT OF FACTS

For some time prior to March 5, 1960, the Plaintiff Appellant, Mrs. Lyle Bolger, and the Defendant Respondent Beth Edwards represented Stanley Products Company for the sale of certain merchandise in the particular locale in which they resided. While both parties were so engaged, the Defendant Mrs. Beth Edwards purchased from time to time certain merchandise from the Plaintiff paying the Plaintiff upon delivery of the goods (Tr. 8). Shortly prior to March 5, 1960, Plaintiff ceased doing business for Stanley Products Company and had a large supply of merchandise in stock. There is some conflict in the testimony as to whether or not the Plaintiff requested Defendants to store the merchandise or whether it was to be sold to the Defendants by the Plaintiff. However, on the 5th day of March, 1960, Defendants and each of them, Beth Edwards and Clyde Edwards, drove to the home of the Plaintiff in Salt Lake City from their home located in Orem, Utah, and received certain merchandise which was stored in a duplex owned by the Plaintiff. At this time they executed a document identified as Plaintiff's Exhibit 1, which is purported to be a promissory note (Tr. 9). Said note provided for payment

of $75.00 or more per month until the total sum of $422.98 had been paid. In the amended answer of Defendants (Page 9, Record on Appeal) the Defendant Beth Edwards admitted execution of said note, but it was contended that the document was not a promissory note, and further that the Defendant Clyde Edwards did not execute the same. On cross-examination the Defendant Beth Edwards stated that the note was not a complicated document and that she understood it (Tr. 36). There is no testimony given to the effect that Defendant Clyde L. Edwards did not understand the document that he later admitted executing (Tr. 50). The Plaintiff testified that the consideration for said promissory note was the merchandise admitted to have been received by the Defendants, an inventory of which was made at the time that the merchandise was picked up, and introduced into evidence as Defendant's Exhibits 2 and 3.

Mrs. Bolger testified that there was never any conversation made relative to the storing of said merchandise for her (Tr. 10), although the Defendants each contended to the contrary. The Plaintiff alleged in the amended complaint (Page 7, Record on Appeal) that the Defendants had returned certain merchandise in the value of $43.70 in partial satisfaction of said promissory note, and had paid in addition $25.00 in cash, which was to apply as a credit upon said promissory note, thereby leaving a balance due and owing to the Plaintiff from the Defendants and each of them in the sum of $354.28. The Defendant Mrs. Edwards testified that a receipt for certain merchandise which was received by the Plaintiff

was given to the Plaintiff (Tr. 42) and further that when anyone picked up merchandise she filled out a receipt card. The Plaintiff's testimony corresponds with that of the Defendant in this instance (Tr. 17). The Defendant Beth Edwards testified that after March 5, 1960, the date of the note, she was under no obligation for any sum of money to the Plaintiff (Tr. 36). Plaintiff's Exhibit 7 was then presented to the Defendant Beth Edwards, which was a letter dated October 5, 1960, from Mrs. Edwards to Mrs. Bolger, indicating a check in the amount of $25.00 was enclosed, and that Mrs. Edwards intended to pay off the balance as quickly as possible.

Mrs. Edwards at this time admitted an obligation but attempted to explain that said obligation was for a sales party she had put on for Mrs. Bolger (Tr. 36 and 37). The Defendant Beth Edwards then testified that this obligation was completely paid within a week or ten days from that time (Tr. 39). Plaintiff's Exhibit 8 was then introduced, which was admitted to be a letter from Mrs. Edwards to Mrs. Bolger postmarked February 24, 1961 which indicated Mrs. Edwards wanted to know the balance owing to Mrs. Bolger. No satisfactory explanation was given as to the purpose of such a letter inasmuch as Mrs. Edwards claimed to owe nothing at this time.

Mr. and Mrs. Edwards testified that Mr. and Mrs. Bolger and their son came to the said Defendant's home at a time they were unable to recall definitely, and picked up all the merchandise listed on Defendant's Exhibits 5 and 6. They further testified that each item was boxed and as it was removed from the basement of the De-

fendant's home, it was typed on a list by Mrs. Bolger (Tr. 32, 53, 54), and that the merchandise was placed in the automobile of the Plaintiff, and said return of merchandise satisfied any obligation which was outstanding.

The Plaintiff and the husband of the Plaintiff testified that they did receive certain merchandise but only that valued as set forth in the amended complaint herein, and that nothing further was removed from the home of the Defendants.

STATEMENT OF POINTS

POINT ONE

THE FINDING THAT PLAINTIFF'S EXHIBIT 1 WAS INTENDED ONLY TO EVIDENCE DELIVERY OF MERCHANDISE IS NOT SUPPORTED BY THE EVIDENCE AND IS CONTRARY TO SUBSTANTIAL EVIDENCE AND OVERWHELMING WEIGHT THEREOF.

Appellant is cognizant of the rule that this Court will not weigh evidence and will sustain a judgment in law action if the same is supported by competent substantial evidence. However, the Court has stated in *Jensen vs. Howell,* 75 Utah 64, 282 P.2d 1037:

> "In this jurisdiction the binding effect of findings of a trial court in law cases is different from that in equity cases. In the former the findings as a general rule are approved if there is sufficient competent evidence to support them and ordinarily are not disturbed unless it is manifest that they are so clearly against the weight of evidence as to indicate a misconception or not a due consideration of it."

The Court further stated in the case of *Seybold v. Union Pacific Railroad Company,* 121 Utah 61, 239 P.2d 174, in reversing the findings of the jury:

> "If there is any substantial competent evidence upon which a jury, acting fairly and reasonably, could make the finding, it should stand, but if the finding is no plainly unreasonable as to convince the court that no jury, acting fairly and reasonably, could make such a finding, it cannot be said to be supported by substantial evidence."

There is no testimony supporting the finding that the Plaintiff's Exhibit 1 is merely evidence of delivery of merchandise and not a promissory note, except the self-serving statements of the Defendants, and these are contrary to the written evidence which was introduced. All of the parties testified that Exhibit 1 was executed by the Defendants on the 5th day of March, 1960 (Tr. 9, 50, 58). Further, Mrs. Edwards testified that the document was not a complicated one and that she understood it. It is evident that the document speaks for itself and it sets forth no factors which would inidicate it was to be accepted as a delivery receipt, although an attempt was made to have the Court so interpret.

In the case of *Taylor v. Morris,* 163 Cal. 717, 127 P. 66, at Page 68, the Court stated:

> "But of course the court was not bound to accept this explanation and it is well recognized as a matter of law as well as of plain common sense that an account of a transaction given in contemporaneous writing when no differences have arisen is to be prefered to a substantial oral

> explanation at variance with the writing given after differences have arisen."

To the same effect is the decision in the case of *Smith v. Goethe*, 159 Cal. 628, 115 P. 223, wherein the Court stated:

> "The uncertain statements of Carmichael made years after the event under examination should not be permitted to prevail against the formal written declaration of the parties made at the time of the transaction and as part of it."

Appellant calls attention to the answer to the amended complaint wherein the Defendant Clyde Edwards' attorney states plainly that Exhibit 1 was not executed by the Defendant Clyde Edwards, and that it was not until said Defendant was required to answer under oath that he admitted that his signature was placed upon Defendant's Exhibit 1.

Accepting the testimony of the Defendants to the intent of the said Exhibit 1, in the light of all the evidence to the contrary, is harsh, unfair and inequitable.

Further evidence of an existing obligation was given, although an attempt was made to explain away said evidence, when Mrs. Edwards was specifically asked whether she was indebted to the Plaintiff in any fashion after the date of the promissory note of March 5, 1960. Defendant Mrs. Edwards emphatically denied that she was obligated from the date and thereafter there was nothing owing by Mrs. Edwards to the Plaintiff (Tr. 36). Where-

upon, Mrs. Edwards was confronted with Plaintiff's Exhibit 7, which was a letter bearing date of October 5, 1960, from Mrs. Edwards to the Plaintiff, indicating that the Defendant Mrs. Edwards was sending a check for $25.00 and would send more in the future.

Mrs. Edwards attempted to explain the obligation was for a sales party which she had put on for the Plaintiff, and that within a week or ten days she had paid everything owing in full (Tr. 39), again emphasizing that nothing further was owing to the Plaintiff from that time. Mrs. Edwards then was confronted with Plaintiff's Exhibit 8 which was a letter postmarked February 24, 1961, from Mrs. Edwards to the Plaintiff, requesting information as to the amount owing from the Defendant to the Plaintiff. The Defendant Mrs. Edwards was unable to offer any satisfactory explanation for the letter. All of the documents evidence an obligation owing from the Defendants to the Plaintiff, and none support the allegations that the promissory note, Plaintiff's Exhibit 1, was a receipt of delivery. Defendants were credited $25.00 for cash payment, together with return of merchandise in the amount of $43.70, pursuant to the pleadings filed herein.

POINT TWO

THE FINDING THAT THE DEFENDANTS RETURNED CERTAIN MERCHANDISE, THEREBY SATISFYING ANY OBLIGATION REPRESENTED BY PLAINTIFF'S EXHIBIT I, IS CONTRARY TO THE EVIDENCE AND OVERWHELMING WEIGHT THEREOF.

The finding that the Defendants returned the merchandise in question, thereby satisfying the obligation represented by Plaintiff's Exhibit 1, relies solely upon the self-serving statements of the Defendants. It is not substantiated by any reliable evidence. Mrs. Ida Elliott testified that she observed some boxes being removed from the home of the Defendants by the Plaintiff, but did not know how many were removed (Tr. 58) and was only present for a few minutes during the transfer (Tr. 59). Plaintiff had by the pleadings admitted receipt of $43.70 in returned merchandise, and Mrs. Edwards testified that she had made receipt cards out to Mrs. Bolger, and that was her general practice (Tr. 42). However, she offered no further evidence of receipt cards for the balance in question. Mr. Edwards further testified that at the time Mrs. Bolger was alleged to have picked up the bulk of the material, she received no written document or any receipt from Mrs. Bolger, (Tr. 43) even though she had testified earlier that it was her practice always to make out receipt cards upon delivery of merchandise. (Tr. 42) The Defendant Mrs. Edwards later testified that as the merchandise was taken from her basement, the Appellant Mrs. Bolger typed up a list (Tr. 32). Mr. Edwards stated that as merchandise was taken from the shelves and boxed, Mrs. Bolger typed a list and Mrs. Edwards checked the items as they were taken from the basement and loaded into the Bolger automobile by Mr. Bolger and his son and Mr. Edwards and his son (Tr. 52).

It is not within the realm of possibility that 602

items could be listed as they were removed from the Bolger home in March, 1960, transported to the Edwards home in Utah County and unloaded in a basement, without concern as to the order in which the merchandise was placed on shelves, and then several months later be reboxed and removed from the basement in the exact order as they were taken from the original storage area of the Plaintiff Mrs. Bolger. This is precisely what the Defendants ask the Court to believe, as the list of merchandise, Defendant's Exhibits 5 and 6, is purported to be a list of the merchandise which was removed from the basement of the Edwards home, and which conforms in exact sequence to the list set forth in Defendants' Exhibits 2 and 3, which is a list of the merchandise originally taken from the Plaintiff's premises (Tr. 54).

The Edwards set forth said Exhibits 5 and 6 to be the receipts by Plaintiff to the Defendants for the merchandise in question. There is no signature or any documentary evidence to establish the fact that said exhibits werein fact receipts. It is apparent that they are merely duplicate copies of of the original list which was prepared by the Plaintiff when the merchandise was sold in March, 1960, by the Plaintiff to the Defendants.

It is further noted that the Defendant Beth Edwards testified that the invoices which were given to the Plaintiff evidencing a return of certain merchandise contained certain items that were in the original delivery to the Defendants (Tr. 17 and 31). Yet the list shown in Defendant's Exhibits 5 and 6 shows exactly the same ma-

terial as listed in the original exhibit listing the merchandise (Defendant's Exhibits 2 and 3) without the removal of any of the items set forth in said invoices.

CONCLUSION

Defendants' evidence that the promissory note was used as a receipt for merchandise and their evidence of the return of all of the merchandise to the Plaintiff is so unreasonable that it should be rejected as a matter of law.

As this court said in *Continental Bank & Trust Company vs. R. W. Stewart,* 4 Utah 2d 228, 291 P. 2d 890, 892:

> "While it is true that the testimony of a witness such as Mr. Cheney would ordinarily be regarded as sufficient to compel the affirmance of the trial court's finding, that is not necessarily so under all circumstances. Defendant is correct in arguing that even though the testimony standing alone might be sufficient to support a finding, it must always be appraised in the light of all the attendant circumstances and countervailing testimony. If when so viewed, it appears so clearly and palpably unreasonable that no fact trier, acting fairly and reasonably, could accept it, then it must be rejected as a matter of law, and the fact determined otherwise. This is particularly so here where Mr. Cheney had such a vital personal interest in the controversey, since it obviously would be greatly to his advantage if he could fix upon Mr. Stewart the responsibility of paying this large unsecured personal debt."

Respectfully submitted,

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