1965

J. Seal v. Carpets, Incorporated : Brief of Appellant

IN THE SUPREME
OF THE STATE

J. SEAL,

Plaintiff and Re

— vs. —

ARPETS, INCORPORA
a Utah Corporation,

Defendant and

BRIEF O

Appeal
Third Distri
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IN THE SUPREME COURT OF THE STATE OF UTAH

J. SEAL,
Plaintiff and Respondent,
— vs. —
CARPETS, INCORPORATED,
a Utah Corporation,
Defendant and Appellant.

Case
No. 10333

BRIEF OF APPELLANT

STATEMENT OF KIND OF CASE

In the lower Court, this action was brought by plaintiff to recover on an open account assigned to plaintiff for collection by a Colorado corporation, doing business as G. & P. Distributing Company, in the amount of $5,493.05 plus interest. (R-1) Defendant admitted the account and by way of affirmative defense alleged that the goods and merchandise giving rise to the open account furnished by plaintiff's assignor were defective; and by reason of said defects, defendant was damaged in excess of plaintiff's claim. (R-2 and R-3) In its Answer, defendant specifically alleged damage additionally to its business reputation from loss of good will, etc.

DISPOSITION BEFORE THE TRIAL COURT

The matter was tried before the Court without jury, Judge Stewart M. Hanson presiding, on February 2, 1965. The Court rendered Findings of Fact, Conclusions of Law and Judgment in favor of the plaintiff on its undisputed claim and allowed an offset to the defendant in the amount of $1,625.00. (R-6, R-7)

RELIEF SOUGHT ON APPEAL

Defendant, subsequent to the trial, moved the Court to amend its Findings and further moved for a New Trial. Said motions were made pursuant to stipulation of counsel and leave granted by the Court, orally rather than in writing, and argued February 19, 1965. Said motions were denied by the Court. (R-136) During the course of the trial, defendant sought to introduce particular evidence relating to damages which, upon objection by plaintiff's counsel, was excluded by the Court. From the judgment of the Court, the denial of the motions above noted and for other errors which defendant maintains were committed during the trial, defendant appeals.

STATEMENT OF FACTS

Sometime in October or November of 1962, plaintiff's assignor, G. & P. Distributing Company (hereafter referred to as G. & P.) through a sales representative, one Don Liston, made contact with Mr. William Thompson, secretary and salesman of defendant corporation,

for the purpose of selling to defendant carpeting. (R-16 and R-109) Liston had with him samples and other advertising paraphernalia and quoted prices to Thompson at the time, leaving some of the samples with him. (R-17 and R-18) Defendant was, at the time, bidding and attempting to retail carpeting to a United Homes, Incorporated, which company was constructing 36 apartments in a series of six buildings located on 33rd South and approximately 21st East in Salt Lake City, Utah. (R-17-19) Defendant furnished said United Homes with a bid on the apartment job based upon the prices quoted by Liston and furnished United Homes with samples supplied by Liston. (R-18) United Homes contracted to purchase approximately 2200 yards of said carpeting; and defendant, in turn, ordered the same from G. & P. The order was placed with G. & P. sometime in early November of 1962. (R-43 and R-44)

William Thompson testified that attached to the samples later delivered to United Homes was a printed warranty, warranting the carpet against defective workmanship and wear for a period of five years, with the exception of stairways. (R-20-22) The witness further indicated his efforts to reobtain from United Homes the samples with the warranty attached, which he testified he had attempted to get up to and including the day before the trial without success. (R-21) The existence of the warranty and its terms were corroborated by Mr. Claude Thompson, president of defendant corporation (and, incidentally, father of William C. Thompson, the previous witness). (R-88)

Mr. V. B. Witherell, President of G. & P., denied the existence of any such warranty categorically. (R-112) On cross-examination, Witherell admitted, however, that he had no direct knowledge as to what warranty his salesman, Liston, had made nor what written warranty, if any, was attached to the samples furnished by Liston to defendant. (R-112-113) On further cross-examination, he admitted that without a written guarantee that "all mills guarantee satisfaction in workmanship and materials, but no written guarantee certificate." (R-115) He was then asked if such guarantee related to the manufacture of the carpet furnished United Homes and he answered in the affirmative. Witherell, incidentally, further admitted that the salesman, Liston, was in his employ a matter of four months, leaving G. & P. sometime in December of 1962. (R-109-110)

Following the placement of the order for the carpet, it was delivered sporadically in varying and assorted roll sizes to defendant, beginning in November and continuing through January 20, 1963. (R-23) The rolls varied in length from 30 feet to 140 feet; and the witness, William Thompson, indicated which rolls and what lengths arrived in which months. (R-26-29, See also Exhibit D-6) Said deliveries occasioned difficulty between defendant and its purchaser noted by Exhibits D-4 and D-5. (R-30-31)

William Thompson was asked if he encountered difficulties with United by virtue of the sporadic deliveries, and the court interpolated the question "delays you

mean.'' There was then a discussion by counsel with the court thereafter concerning the admissibility of evidence relative to loss of time from delay and damages therefor to which plaintiff's counsel objected. The court permitted defendant's counsel to make a proffer of proof and then ordered that such an inquiry into such an area was not permissible. The court did permit the introduction of said Exhibits D-4 and D-5 solely for their references to defects while refusing to consider the portions of each which related to delay and damages resulting therefrom.

The witness William Thompson further testified that the defendant took a loss on the installation for United Homes which he originally understood was $3,125.00, the contract price being $13,125.00, and what he understood the final settlement to be of $10,000.00. (R-33) On cross-examination, he was asked if the amount finally settled with United Homes was $11,500.00 rather than $10,000.00, and he indicated the record would have to be checked; (R-38) at which point counsel for the defendant explained to the court that defendant had attempted to locate the settlement check from United Homes without success and that it had not been obtained. Counsel for plaintiff was, later during the trial, able to produce a copy of the check in issue in the amount of $11,500.00 which was by stipulation received in evidence as Exhibit P-10. (R-50 and R-69)

The witness Claude Thompson testified about the final settlement with United Homes and, as

part of said settlement, in addition to taking the loss, whether a warranty was required to be furnished by him to United Homes. His answers were that such a warranty was furnished of necessity and that it ran for a period of three years. (R-52)

This witness was further asked about conversations with Witherell relative to the United Homes job and complaints in connection with it. He was also asked the particulars in which the carpet delivered differed from the samples originally furnished and what defects he noted. His observations and testimony will be cited in greater detail hereafter. This witness' testimony concerning his losses by virtue of the defective material furnished will also be quoted at length subsequently.

Defendant called Kenneth P. Campman, the manager of the apartment house, who testified in connection with cleaning and maintenance of the carpeting and indicated that approximately half the time the carpets in issue were cleaned by him and the other half the time he contracted to have it done professionally. (R-92) When asked about his observations of the carpeting and its condition, he indicated it was in some instances in fair condition but in other instances in such poor condition as to make the units with such carpeting difficult to rent. When asked to be specific, he said:

> "A. Rugs will sometime fray quite a bit. In much carpet there is real little — kind of worn bare, and in other cases it is just discolored. You can work on it and work on it. I know a number

of the tenants who have complained about how difficult they are to keep clean, and they just can't keep them clean." (93)

Plaintiff called, on its behalf, Mr. V. B. Witherell, known as Whitey Witherell. This witness asserted that, while he had inspected the United Homes job only the day before the trial (R-10), he insisted there were no defects in the carpet. (R-104) This opinion was based upon an inspection of "six or seven apartments." (R-105) This witness further admitted having notice of complaints relative to the quality of the carpet as early as August of 1963 (R-98-R-99). He further acknowledged receiving the formal notice of defects in a letter from counsel for defendant (admitted in evidence as Exhibit D-8) (R-117) which bears the date of October 22, 1963.

Accompanying Mr. Witherell on said inspection was a Clifford Heaps, an employee of Service Master, Incorporated, which is a furniture and carpet cleaning business. This Mr. Heaps, when called to testify, indicated that the units inspected were five and six (R-121); and he observed that some carpets had been "pilling or fuzzing up." (R-122) He admitted that such pilling, if the carpet was "continuous filament" nylon, *would be a defect.* He then admitted that the carpet in issue was "supposed to be continuous filament" nylon. (R-128)

ARGUMENT

The trial court erred in the following particulars:

(A) IN PREVENTING DEFENDANT FROM INTRODUCING EVIDENCE REGARD-

ING DELAY IN DELIVERY AND IN PREVENTING EVIDENCE FROM BEING INTRODUCED TO SHOW DEFENDANT'S LOSS OF BUSINESS AND FUTURE PROFITS.

(B) THE JUDGMENT DID NOT CONFORM TO THE EVIDENCE ADDUCED.

At the outset, defendant-appellant wishes to acknowledge that the trial court did apparently adopt defendant's position in granting an offset to it, and defendant-appellant has no quarrel with the court's conduct in that connection but claims error in that the court below did not consistently adopt defendant's full position; nor did it go far enough in permitting and considering evidence of offset legitimately arising out of the facts of this case.

(A) IN PREVENTING DEFENDANT FROM INTRODUCING EVIDENCE REGARDING DELAY IN DELIVERY AND IN PREVENTING EVIDENCE FROM BEING INTRODUCED TO SHOW DEFENDANT'S LOSS OF BUSINESS AND FUTURE PROFITS.

The witness, William Thompson, testified that at the time the original order to G. & P. was made, a deadline of December 31 for delivery was imperative. The questions and answers are as follows:

"Q. And in that connection was there any discussion — was there any discussion with Tom —

THE COURT: "Don."

MR. MADSEN: "Don." Excuse me. Thank you, your Honor.

Q. (By MR. MADSEN) Relating to the time of delivery, or the nature of this particular order?

A. It was specified in our bid we would be completed approximately the 31st of December, and he was pushing, trying to get his units completed so he could rent them. They are not making too much money when they are empty.

Q. Mr. Sorensen, you are referring to?

A. So this urgency was impressed upon Don, that these rolls had to be here, and we would have delivery of said—" (R. 24)

Then following his testimony of the extended period of delivery running through January 20, with its accompanying difficulties. The record shows as follows:

"Q. Now, let me hand you what has been marked — Did you encounter difficulties with your customer by virtue of these deliveries?

THE COURT: Delays, you mean?

MR. HANSEN: I am going to object to this as being beyond the issues of this answer.

THE COURT: You don't set this forth in your answer.

MR. MADSEN: We will have to amend it. We talk about our damages by virtue of the carpeting material, and if that isn't broad enough we would like to include the manner in which it was delivered, as well as the quality of the material.

THE COURT: The rules provide you have to do that within 5 days.

MR. MADSEN: I think it is probative, your Honor. It goes to the total problem. Let me make a proffer of proof, and then if you wish to object—

MR. HANSEN: I would object to any proof being made on that point.

THE COURT: He is going to make the proffer at this time.

MR. MADSEN: I point out, and referring to this delivery matter, your Honor, it runs to the question of the difficulty that my clients subsequently had in the matter of collections of their account, and further the resulting damage of their being unable to continue business on further installations with this same customer. It relates indirectly to the total product furnished. It is a matter of when as well as what.

The letters I was about to introduce relate both to the quality of the carpet, as well as to the matters of the delays of installation, and we are pointing out the fact that the delay was in large measure the plaintiff's assignor's responsibility and problem, that totally and accumulatively was involved in the loss that we sustained in the matter, and indirectly the present problem and loss that we are now facing yet, and we claim a loss.

We refer then generally to the word "defective" in our pleading. If that isn't broad enough in our pleading we would like leave to amend. I don't believe it is a matter of surprise or notice. The facts are as certainly in the plaintiff's knowledge as ours.

MR. HANSEN: It is certainly a matter of surprise, your Honor. We came to defend on one proposition.

THE COURT: The Pretrial Order limits it to that. I will accept your proffer and sustain his objection.

MR. MADSEN: We will introduce most of these exhibits for the limited field of the quality in the carpet.

THE COURT: I will receive the matter of delivery over Mr. Hansen's objection, so if you decide to appeal the record will be complete.

MR. MADSEN: Thank you, your Honor.

Q. (By MR. MADSEN) Mr. Thompson, do you, in the course of your business, supervise the correspondence and the other related documents you receive, in the course of your business?

A. The majority of them, yes.

Q. I hand you what has been marked "Exhibit 4."

THE COURT: "Exhibit D-4."

(The document referred to was marked, "Exhibit D-4," for identification.)

Q. (By MR. MADSEN) And ask you if in fact the original letter was received in your office?

A. Yes, it was.

MR. MADSEN: Counsel, this is a carbon, but if you would, to take the carbon given to me rather than the original received by my client, and if we can put it in with this witness, I would rather do so.

MR. HANSEN: Why don't you just furnish the original?

MR. MADSEN: We have tried to locate the original at the defendant's place of business without

success. If we find the original we will insert it in place of the carbon.

MR. HANSEN: He has testified he received the original of this?

MR. MADSEN: Yes.

MR. HANSEN: But it isn't the original of this?

MR. MADSEN: Yes.

MR. HANSEN: No objection.

MR. MADSEN: Thank you.

THE COURT: It will be received.

(The document, previously marked "Exhibit D-4," for identification, was received in evidence.)

MR. HANSEN: This is, of course, subject to the objection we made on it?

THE COURT: Yes.

Q. (By MR. MADSEN) I hand you document D-5, and ask you if that was received in the course of business?

(The document referred to was marked "Exhibit D-5," for identification.)

A. Yes, it was.

MR. HANSEN: We make the same objection, it is not within the issues, your Honor.

THE COURT: Subject to that objection it will be received for the purpose of making the record complete.

(The document referred to was marked "Exhibit D-5," for identification was received in evidence.)" (R-28-R-31.)

Exhibits D-4 and D-5, therefore, were admitted solely for the purpose of making the record complete, rather than running to the issue of delay and damages therefrom. This court will note that Exhibit D-4 (a letter from United Homes' attorney, David West) in its first paragraph cancels United's order for the carpeting in issue and points out in the second paragraph that such cancellation is because of delay in delivery. Exhibit D-5, also, in its first two paragraphs concerns itself with delay and the second sentence of the third paragraph alone refers to quality in the following language: "Also, you have not put the same quality carpet in the apartments that you showed me." Clearly, defendant's customer, as well as the defendant, were concerned as much with time of delivery as with the quality of the carpet; and both were subsequently alleged in defendant's answer herein (R-2 and R-3) and specifically therein the defendant alleged loss of future business and good will of the customer. The witness William Thompson was later asked if his company had done any subsequent business with United Homes as follows:

> "Q. Have you had any further opportunity to install carpet for United Homes subsequently?
>
> A. No.
>
> Q. When this job was originally bid, was that a possibility?
>
> A. Very possible.
>
> MR. HANSEN: I am going to object to that as being speculative.
>
> THE COURT: The objection will be sustained.

MR. MADSEN: I think it goes to the question of possible future business and loss to him, your Honor.

MR. HANSEN: Same objection.

THE COURT: Objection sustained." (R-35 and R-36.)

The only other reference to continued business with United Homes got into the record obliquely from the testimony of Claude Thompson as follows:

> "A. Well, at that time we had taken quite a loss on this Sorensen job, and these contract jobs you take at a very close margin anyway, and even if everything comes out as you planned, very often you sustain a loss rather than a profit. And in this case this United Homes were in the process of building a great quantity of these apartment houses around the country, and I gave my own bill—"

At this point, counsel for plaintiff interrupted. (R-54 and R-55)

While the undersigned is aware that speculative and unknown damages are not admissible in an action for breach of contract, still, estimated future profits are recoverable if, in fact, competent evidence is introduced to provide a sufficient basis to show their certainty. Hence, the Restatement of the Law of Contracts, paragraph 331, provides:

> "(1) Damages are recoverable for losses caused or for profits and other gains prevented by the breach only to the extent that the evidence affords

a sufficient basis for estimating their amount in money with reasonable certainty."

In this vein is the following citation from 15 Am. Jur., damages § 150:

> "But it must be borne in mind that since porfits are prospective they must, to some extent, be uncertain and problematical, and so, on that account or on account of the difficulties in the way of proof, a person complaining of breach of contract cannot be deprived of all remedy, and uncertainty merely as to the amount of profits that would have been made does not prevent a recovery. The law does not require absolute certainty of data upon which lost profits are to estimated, but all that is required is such reasonable certainty that damages may not be based wholly upon speculation and conjecture, and it is sufficient if there is a certain standard or fixed method by which profits sought to be recovered may be estimated and determined with a fair degree of accuracy. It has been said that the most definite rule that can be drawn from the cases would seem to be that if by any chance or under any condition of affairs then existing the profits might not have accrued though the wrongful act had not intervened, there can be no allowance of profits lost as damages; but if, except for the wrongful act, there must have been profits notwithstanding any other circumstances existing at the time of the perpetration of the wrong, the question of their speculativeness and contingency is absolutely negatived. It is usually the right of the innocent party to prove the nature of his contract, the circumstances surrounding and following its breach, and the consequences naturally and plainly traceable to it, and then it is for the jury, under proper instructions as to the rules of damages, to deter-

mine the compensation to be awarded for the breach.''

Cited by way of footnote to the above paragraph is the case of *Anvil Mining Company* v. *Humble,* 153 U. S. 540, 38 L. Ed. 814, 14 S. Ct. 876, and an L.R.A. Annotation, 1915 B, 114. Refusal to permit any such evidence as requested in the proffer above noted, defendant-appellant maintains, was error and unduly restricted defendant in attempting to show its losses resulting directly and proximately from G. & P.'s conduct.

(B) THE JUDGMENT DID NOT CONFORM TO THE EVIDENCE ADDUCED.

Defendant-appellant maintains that the controlling law in this fact situation was enunciated by this court in the case of *J. Seal* v. *Carpets, Incorporated,* 13 Utah 2nd 147, 369 Pac. 2nd 493 (1162). The cited case involved the same two parties presently before the court today but arose out of a different fact situation; however, it still bears some striking similarities to those before the court in this action. In the cited case, plaintiff was suing on an open account for an out-of-state assignor, which assignor was in the carpet wholesaling business. Such are the facts here.

Further in the cited case there was a third party importer also involved, which is not the case here; and there was a fourth party, Factor-Collection Agency, not present here. There are two other major distinctions between the facts of the former case and those present

here. They are: In the cited case, plaintiff-assignor's sales agent inspected the installation of the carpet in defendant's customers' homes and gave direct repeated assurances to defendant that such defective carpet would be replaced or that defendant would be indemnified therefor. In the facts before the bar, plaintiff's assignor's agent made only one inspection of the United Homes installation, the day before the trial, and insisted that the carpeting was not defective. Also, in the cited case defendant had actually incurred expenditures for replacement of defective carpet, while in the case at bar, he gave only testimony as to what is anticipated will be necessary to expend to replace the defective carpeting. In all other material particulars, the cases are congruent.

The opinion of this court, written by Justice Henriod reads:

> "There appears ample, sufficient, substantial, competent and believable evidence, viewed favorably for defendant, to support the trial court's conclusion."

The second memorandum decision of Judge Hanson, dated February 19, 1965, in which defendant's motions to amend and ask for a new trial were denied, reads in part as follows:

> "The court, after viewing the premises, was of the opinion that any lay person, by examining the rugs in question, could determine that the rug in the easterly portion of the buildings was not the same type or quality of the rugs in the other buildings."

It added:

> "The rug in the easterly apartment, which had been referred to as "pilling," was not of the same quality as the other rugs, *and the Court had no way of adjusting between the parties the difference between the value thereof,* and thus afforded the defendant an offset in the sum of $1,625.00, which was the amount that defendant claimed it lost on the contract with defendant's purchasers." (R-136 and R-137) (Emphasis added)

This restrictive holding, defendant contends, was error, since there was competent and unimpeached evidence before the court from which he could and should have "adjusted between the parties the difference between the value thereof." It was the testimony of Mr. Claude Thompson as follows:

> "Q. And have efforts been made by you to resolve the matter in terms of replacement of carpeting?
>
> A. Yes.
>
> Q. And do you have any estimate at this time as to how much in the way of replacement is going to be needed?
>
> A. I would say 50 per cent of the units, or better.
>
> Q. And do you have any estimate as to what the cost of replacement is going to be, in terms of understanding there are 2,200 yards on the job. Half of that would be 1,100 yards. At what minimum yard cost, your cost, would such a replacement run in dollars and cents?
>
> A. Well, just something — even on the same basis as this, my cost would be in the neighborhood of five or six thousand dollars. I did ascertain some

of the labor involved in renewing and replacing new carpet.

Q. Replacing the comparable quality?

A. Even the comparable quality of this would be at least that much." (R-60)

Cost of replacement of such carpeting forms a legitimate and competent element of damage, and evidence in that connection, was admitted as above noted. Such evidence, though it was an estimate, was not impeached and not contradicted. The current law in this area is well-enunciated in the case of *Hoenstine* v. *Rose,* 131 Montana 557, 312 Pac. 2nd 514, 517 (1957). That action was one for recovery for damages to a vehicle where the vehicle in question had not, in fact, been repaired at the time of trial. The Montana Supreme Court there said:

> "It is not a condition precedent to recovery for items of damage necesesary to put plaintiff's wrecked vehicle in the condition it was before the accident that plaintiff should have first incurred an indebtedneess therefor or that he should have actually expended or paid the sum claimed in replacing or repairing the damaged parts. Chambers v. Cunningham, 153 Okl. 129, 5 P. 2d 378, 78 A. L. R. 905; Kincaid v. Dunn, 26 Cal. App. 686, 148 P. 235, 236; Menefee v. Raisch Improvement Co., 78 Cal. App. 785, 248 P. 1031, 1032; J. J. Clarke Co. v. Toye Bros. Yellow Cab Co., La. App. 1945, 22 So. 2d 298, 300; Newman v. Brown, 228 S. C. 472, 90 S.E. 2d 649, 635."

Of similar import in a related area of medical bills as an element of damage, whether or not the same are

paid, was ruled on in the California case of *Brown* v. *Guarantee Insurance Company,* 155 Cal. App. 2d 679, 319 Pac. 2d 69, 66 A. L. R. 2d 1202 (1958). There the court quoted a Wisconsin case of *Schwartz* v. *Norwich Union Indemnity Company,* 212 Wisc. 593, 250 North West 446.

> "The court reasoned as follows (250NW at page 446): 'One who has been subjected to a judgment by reason of fraud practiced upon him by another standing in the relation of insurer is entitled to relief even though he has not paid the judgment. A cause of action in his favor arises and his damage occurs when the liability becomes thus fixed. Neither the right of action nor the maesure of damages depends upon the fact of payment.''

The record discloses considerable testimony of Mr. Claude Thompson as to specific defects in the merchandise in the following testimony received both on direct and cross-examination.

> "Q. Have you had occasion to examine these two exhibits, "D-2" and "D-3"?
>
> A. Yes, I have.
>
> Q. And would you be able to distinguish any differences between the two?
>
> A. Yes, I would.
>
> Q. What would the difference be?
>
> A. I would say one would be about one-third lighter than the other.
>
> THE COURT: Let's say then, a difference, one will be of, say, yardage?

Q. (By MR. MADSEN) That is "D-2."

A. "D-2" would feel to me about a third heavier than this one, which is "D-3."

Q. Any other distinguishing differences between the two?

A. Yes, sir.

Q. What is that?

A. "D-2" has a double scrim back on it, which is an advantage to a piece of carpet.

Q. Have you heard, are you familiar with the phrase, what they call the "Sunday sample?"

A. Yes, I have.

Q. What does that generically mean in the industry?

A. A "Sunday sample" is referred to in the industry as a mill representative coming to you with a heavier sample, a fine piece of carpeting, and when you get the roll it is much lighter than represented.

Q. Would you characterize the samples of the carpets that went into the United Homes, the rolls that went into United Homes, as opposed to the samples, as originally furnished, as that category?

MR. HANSEN: Just a minute. Have you finished your question?

MR. MADSEN: Yes.

MR. HANSEN: We will object to it as self-serving, calling for a conclusion, and not the best evidence.

MR. MADSEN: We have qualified him. It does call for a conclusion, your Honor.

MR. HANSEN: Object further on the grounds no proper fundation has been laid for opinion evidence.

Q. (By MR. MADSEN) Mr. Thompson, how long have you been in the carpeting business?

A. Thirty-two years.

Q. Have you had occasion to examine samples furnished you by mill representatives?

A. Thousands of them.

Q. And rolls of carpets subsequently furnished?

A. Thousands of them.

Q. Have you had occasion to examine the samples furnished your company by G. & P. Sales?

A. Yes.

Q. Did you have occasion to examine rolls of carpet subsequently furnished to you by G. & P. Sales?

A. Yes.

Q. Do you have an opinion regarding the representative quality of the samples as compared to the rolls of carpet furnished? You can answer that question "Yes," or "No."

A. Yes.

Q. What is that opinion?

A. That the rolls were not anywhere representative of the samples that were supplied us by G. & P. Sales.

Q. Is that what is generally called in the trade a "Sunday sample?"

A. Yes." (R-56—R-58)

By way of explanation, it had previously been established through the witness William Thompson that Ex-

hibit D-2 was a piece of carpet from the earlier rolls supplied and Exhibit D-3 was a piece of carpet from the later rolls of carpet supplied by G. & P. (R-25)

On cross-examination:

> "Q. Let's go to Exhibit "D-3." Is it your testimony "D-3" is defective?
>
> A. Yes, sir. Any time, Mister, you can take a piece of carpet and do this to it, it is not very good (indicating).
>
> Q. Tell me now what you mean by "D-3" as being defective.
>
> A. Being thinner than it was assured it would be, in construction. That it was not proper. There were voids and lines through it that should not have been there. They are still there, and you can see for yourself, Sir, if you don't believe me." R-67)

And further:

> "Q. You mentioned this was a defective carpet that we have here, "Exhibit D-3." Would you tell us again, were the defects right in this particular carpet?
>
> A. In this particular carpet?
>
> Q. Yes.
>
> A. I could probably show you. There is a couple right through the woof.
>
> Q. Isn't that a result of something being torn out of it though?
>
> A. I don't know. It is what happens that indicates that it isn't put together very well, that type of broadloom.

Q. That is without the scrim?

A. It hasn't scrim, but it has rubber or latex that is supposed to hold it together." (R-74—R-75)

The witness also, at some length, pointed out the difficulties and waste encountered by the odd-sized rolls of carpet received, by reason of the varying sized rolls furnished by G. & P. as follows:

"Q. You have testified, I believe, on the original direct. Well, excuse me. Let me strike that. I wanted to ask, you heard the testimony of your son relating to the size of the various rolls from being as high as 100 yards and from 30 yards. Is there any distinction about large rolls and small rolls in a job like this?

A. Yes, indeed there is.

Q. What is that.

A. Where here we are laying a lot of rooms, in that case, carpet, the larger the roll the bigger the advantage. It requires lesser seams, fewer seams, and we can plan the cuts of the roll of carpet with literally not any waste. If rolls come in small, we accept a roll of 30 and 40 feet as a small roll, a partial roll. There is so much loss in laying a room, or any series of rooms.

Q. What kind of cuts—

MR. HANSEN: I am going to object to this as being irrelevant to the issues of this case. There is no claim it wasn't properly cut, and that seems to be what his—

MR. MADSEN: We are getting around to the word "defective," and what our Pretrial Order is meant to cover. We indicate a loss. I presume, therefore, the manner in which it was produced and delivered, I presume the amounts in which

it was finished, I presume the caliber of each roll as it was produced is relevant or material.

THE COURT: I can see where some of this business about the rolls might be proper, because everybody knows if rolls are coming from one plant or from another plant there might be a little variation in color.

MR. MADSEN: Exactly, your Honor, and I think that is within the issues of this case as we have tried to define them.

THE COURT: Go ahead.

Q. (By MR. MADSEN) Would you indicate what that occasions, therefore, when the rolls are shorter?

A. May I elaborate just a little bit on this?

Q. Would you please? That is what I am asking.

A. What this matter considered, to delegate the jobs to our installers, a job to oversee the cutting and the installation, and when we lay — when we come and lay out a job, if we were doing this room we would want as few seams in a broadloom roll as possible to make, and if we take a roll 30 feet long and this room would be 27 feet, and the least cut to fill out would not match that roll, dye-lot-wise, there is a tremendous amount of waste.

Q. Tell me, what do you mean by "dye-lot?"

A. If we ordered this very patch today it would be ten shades off, your order. If it comes out the same shade, the amount of yarn, it is the same color, or if it doesn't it varies.

Q. It varies?

A. Unless it is the same dyelot it varies in color detail.

Q. When you have a number of small rolls as opposed to large rolls, the resulting match—
A. Yes, sir.

Q. May cause waste?
A. It is difficult—'' (R-83—R-84)

In view of the fact that complaints on this carpet were timely conveyed, according to defendant's evidence, as early as December, 1962, (R-78-R-79) and acknowledged by Witherell as having been received at least by August 22, 1963 (R-98-R-99); and, in further view of the fact that plaintiff's assignor had been unwilling to admit any liability or defectiveness, notwithstanding his own expert witness admitting that the pilling observed was a defect (R-128), the defendant-appellant should not be precluded from an offset solely for the reason that it has not expended the estimated funds on replacement carpet herein.

CONCLUSION

In all other particulars, the Facts and the Law of the *J. Seal* v. *Carpets, Incorporated* case cited above are controlling here. The defendant should be entitled to an offset which, under the evidence, far exceeds plaintiff's claim. The ruling of the trial court should accordingly be reversed with instructions that plaintiff's complaint be dismissed, no cause of action. In the alternative, the case should be remanded with the instructions that the court conduct a new trial allowing defendant to introduce evidence not admitted as noted under point A above.

Respectfully submitted,

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