1969

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

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. 10[illegible]

Appeal From the Judgment of the
Third District Court for Salt Lake County,
HONORABLE STEWART M. HANSON, *Judge*

BRIEF OF RESPONDENT

ROBERT B. HANSEN
HANSEN & SUMSION,
65 East Fourth South
Salt Lake City, Utah
Attorney for
Plaintiff-Respondent

GORDON A. MADSEN
MABEY, RONNOW, MADSEN
& MARSDEN
574 East South South
Salt Lake City, Utah
Attorneys for Defendant-
Appellant.

TABLE OF CONTENTS

CASE

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

KIND OF CASE WITH DISPOSITION IN LOWER COURT

Respondent agrees with appellant's Statement of Kind of Case and the Disposition Before the Trial Court.

RELIEF SOUGHT ON APPEAL

Respondent agrees with appellant's Relief Sought on Appeal except it omitted the fact that plaintiff has cross-appealed in this case (R138) to attack the offset to his claim allowed in the lower court and seeks to have the judgment amended accordingly.

STATEMENT OF FACTS

The testimony of William Thompson referred to in respondent's Statement of Facts was actually a non-responsive volunteer, self-serving declaration made during the course of voir dire examination after a motion to strike similar testimony regarding a written guarantee as not being the best evidence (R20). Even if it qualifies as evidence in such a state of the record, the testimony with respect thereto contended that the particular guarantee was seen by Mr. Sorensen of United Homes and David West, his attorney (R23), and that its form was a standard written form but neither of said persons nor any written form were produced to corroborate this secondary source of evidence although the need to fortify it was recognized by the production of Claude Thompson, defendant's president (R88).

Respondent's claim that Exhibits D4 and D5 were received for the limited purpose of proving defects is entirely without support in the record for the court clearly explained it was receiving the same solely to complete the record for appeal on the issue of late delivery only. In addition, Exhibits D4 and D5 do not relate to *defects* (the word used is quality), and, in fact, appellant-defendant did not even offer them for the proof of defects but as to the quality of the carpet (R29).

In addition to the testimony of Clifford Heaps referred to in defendant's brief, he also testified that the

"fuzzing" he saw would not per se indicate any defects (R123). He was the only independent carpet expert who testified in this case. Victor carpet is a continuous filament nylon. If there was pilling in a continuous filament it would be defective. The pilling here was not Victor carpet (R128) and there is no proof that the quality carpet ordered and paid for in the apartment where there was pilling was continuous filament carpet. If the carpet sold were not continuous filament carpet, the "pilling" is no indication of its being defective. Some of this carpet was the cheapest nylon carpet made (R101).

Defendant's brief assumes and implies that the "carpet in issue" is all the same quality. This is not the fact. Both Mr. Witherell, President of plaintiff's assignor, and Clifford Heaps, the independent carpet expert, testified that the quality was not uniform (R101 and 122 respectively).

No proffer on the issue of damages to the business was made by appellant-defendant as claimed by it on Page 16.

A(1). THE TRIAL COURT PROPERLY SUSTAINED OBJECTIONS TO THE INTRODUCTION OF EVIDENCE AS TO DELIVERY, AN ISSUE NOT RAISED IN THE PLEADINGS OR THE PRETRIAL ORDER.

Appellant-defendant contends now on Page 13 of its brief that both the issues of timely delivery and the

quality of the carpet were contained in its Answer (R-2 and R-3) and, in particular, implies that such were inherent in its claim for damages for future business and customer good will. Respondent-plaintiff submits that neither issue was raised in the Answer of appellant-defendant and the issue of timely delivery was not within the issue framed by the Pretrial Order (R-4), which was solely the issue of whether the carpet sold in this case was defective, the only issue raised by appellant-defendant's pleading. Appellant-defendant impliedly acknowledged this by stating it would like to amend its Answer after the trial court properly ruled that a claim of "defective carpet" did not encompass the issue of whether it was delivered timely (R28).

The appellant-defendant did not make a formal motion to amend its pleading or the Pretrial Order and does not urge that the denial of any such motion was an error. Had such a motion been made, it would be within the discretion of the trial court to grant or deny it, but the denial of it certainly would have been proper and not an abuse of discretion since the witnesses respondent-plaintiff would need to meet such issue would have to come out of state and could not have been produced on the day its other witness had come from out of state for this trial.

A(2). THE TRIAL COURT DID NOT EXCLUDE ANY EVIDENCE RELATIVE TO LOSS OF BUSINESS AND FUTURE PROFITS.

On this issue the court sustained respondent-plaintiff's objections to a question calling for an answer as to what was "possible" after the answer was in that it was "very possible." (R36) The answer is immaterial but it was not striken and is in evidence for what it is worth. The appellant-defendant apparently assumed that the trial court would not allow any further evidence of a speculative nature, which was probably a correct assumption, but there is nothing in the record that indicates the court excluded any evidence on this issue, including the above, and the appellant-defendant's assertion on Page 16 of its brief that there was a proffer on this point (which it implies was denied) is not correct.

B. THE JUDGMENT DID CONFORM TO THE EVIDENCE EXCEPT TO THE EXTENT AN OFFSET WAS ALLOWED.

Respondent-plaintiff agrees that the holding of this court in *Seal v. Carpets, Inc.,* 13 Utah 2nd 147, 369 P 2d 493, to the effect that the judgment of the trial court should be affirmed if it is supported by legally sufficient evidence canvassed favorably to the prevailing party sets forth the legal principle to be applied in this case. Because this appellant-defendant prevailed in that case where the defects were admitted and the only issue was the damages to offset against the seller's claim is certainly no reason for it to do so here since the facts are not only totally different, as acknowledged by appellant, but, in addition, this party did not prevail in the trial court in this case. Hence, appellant's survey of the

evidence in this case most favorable to the party which did not prevail is directly opposite to the approach directed by the cited case which appellant urges should control.

The evidence viewed most favorably to respondent sustains the finding that the carpeting here was not defective. The only independent expert on carpets who testified was Clifford Heaps. He testified that it was not defective (R122). Such evidence was ample, sufficient, substantial, competent and believable and supported the main conclusion and judgment of the court in this case.

Respondent respectfully submits that the main problem with this case has been the confusion of three legal theories advanced by appellant at trial in addition to the one on which the issues were framed and the case tried and the acceptance in part by the court of one of those theories in reaching its decision. Specifically, the case was pleaded and the issues framed at pretrial on the sole theory of allegedly defective carpeting (technically an alleged breach of express or implied warranty as to merchantability or general fitness). At trial, appellant-defendant expressly urged the allowance of an offset on the additional grounds of (1) late delivery (technically a partial failure of considerations for improper performance), and impliedly for (2) liability under a guarantee regarding wear except on stairways, and (3) breach of warranty of correspondence of goods sold to the sample.

The court expressly excluded evidence on (1) as discussed above. As to (2), it expressly found there was no written guarantee as to wear (R137). The court based its allowance of any offset solely on the theory of (3) as to the carpeting in the "easterly apartment" but, in the absence of any proof as to the difference in value, used the amount of the entire discount defendant allowed to its customer which apparently was based mainly on the delay in appellant-defendant's performance (Ex. D5), which would relate to theory (1) above, which was rejected by the court.

To the extent that the court found that none of the carpet was defective (the trial court's Further Memorandum of Decision, which was prepared by the court, clearly so states and superseded the prior Findings of Fact submitted by plaintiff's counsel — on the mistaken assumption that the offset must be based on the sole issue framed and tried), the evidence clearly is sufficient to support it.

C. THE COURT ERRED IN ALLOWING AN OFFSET OF $1,625.00.

Unless a judgment is sufficiently supported by the evidence, it should not be upheld on appeal. Respondent-plaintiff has cross — appealed on the grounds that the offset allowed in this judgment does not have a sufficient legal basis in the evidence.

Aside from the procedural objection to allowing an offset on a basis other than the issues of the case and accepting the most favorable view of the conclusions of Claude Thompson with respect to "Sunday Samples," the evidence is devoid of any proof as to appellant-defendant's damages as a result, as the trial court pointed out in its Further Memorandum Decision (R136). First, because there was no proof as to either the amount of carpet involved (the court found only the easterly apartment carpet was of inferior quality); second, because there was no proof as to the difference in value between that portion of the carpet purchased and that portion of the carpet received. The burden of proof as to damages as well as to liability to sustain any offset rested upon appellant-defendant and it failed to sustain its burden.

This case seems indicative of a trend for purchasers to buy on the basis of price and, if the merchandise does not satisfy as well as that of a higher quality and corresponding price, to allege and seek to prove it must have been defective. It's perhaps natural for a judge to want to do something for both sides (usually there are two sides to a story), but respondent submits justice is not done when any available figure is used as a substitute for legal proof. If necessity required it in the interest of justice, it is submitted that the figure of $270.00 (Exhibit P-9) would be more logical.

CONCLUSION

The judgment of the lower court should be amended to eliminate the offset or, at least, to reduce it to $270.00 and to affirm the judgment as so modified.

Respectfully submitted,

ROBERT B. HANSEN
HANSEN & SUMSION
65 East 4th South
Salt Lake City, Utah
Attorneys for Defendant-Appellant.