1970

Hein'S Turkey Hatcheries, Inc. v. Nephi Processing Plant, Inc. and Milton T. Harmon, and Roger D. Jorgenson : Respondent's Brief

In The Supreme Court of the State of Utah

HEIN'S TURKEY HATCHERIES, INC.,
Plaintiff,

-vs-

NEPHI PROCESSING PLANT, INC. and MILTON T. HARMON, and ROGER D. JORGENSON.
Defendants.

Case No. 11822

RESPONDENT'S BRIEF

On Appeal from the District Court of the Fifth Judicial District of the State of Utah, in and for Juab County

Hon. C. Nelson Day, Judge

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STATEMENT OF FACTS

Plaintiff disagrees with the following statements in defendant's statement of facts:

(1) **The sale of turkey poults was on open account.** This is not supported by the record. The amounts due were evidenced by promissory notes, Exh. P-1, P-2, P-3, and contract, Ext. P-4.

(2) **During discussion in chambers at trial, defendants moved the court for a dismissal of plaintiff's complaint for failure to allege compliance with licensing and testing and Pollorum Disease control laws of the State of Utah.** The record does not show such

a motion was made by defendants.

(3) **During discussion in chambers, defendants moved for dismissal on ground the allegations and exhibits of plaintiff showed on their face the promissory notes charged to individual defendants were paid.** The record does not show such a motion.

In addition, plaintiff alleges the following facts:

Plaintiff Hein's Turkey Hatcheries, Inc., sold defendant Nephi Processing Plant, Inc., turkey poults in 19664 for a price of $59,452.50

Nephi gave Hein's a number of promissory notes in 1964, the last three of which were dated June 4, 1964, June 18, 1964, and July 2, 1964, (plaintiff's Exh. P-1, P-2 and P-3).

Nephi paid on these notes in 1964 35,000.00
($10,000.00 on November 14 and $25,000.00 on December 30). There is no evidence of direction by Nephi as to where the $35,000.00 was to be applied. It was applied by Hein's to the earliest notes, leaving an unpaid principal balance on the three unpaid notes, P-1, P-2 and P-3, at the end of 1964, of 24,452.50

In 1965 Hein's sold Nephi Turkey poults totaling 66,814.50
which was reduced by agreement (See Exh. P-4) to: 62,000.00
In 1965 Nephi paid on this account the amount of 43,888.85
($35,888.85 on November 22, 1965, and $8,000.00 on December 22, 1965)
leaving a balance on the 1965 transaction on December 22, 1965, of 18,111.15
which was reduced by 1,541.40
as a credit for feed stuffs sold to R. J. Weight, and further reduced at the time of trial by stipulation, in the amount of 1,000.00
leaving unpaid on the 1965 transaction: 15,569.75

The foregoing account set forth as Schedule "D" in plaintiff's

complaint (Record pp. 5) was stipulated as being correct by counsel for defendant after reducing the 1965 transaction balance by an additional $1,000.00 Abstract of minute entry record between pp. 42 and 43.

The signatures on the promissory notes (Exh. P-1, P-2 and P-3) were stipulated at the trial as genuine by counsel for defendants.

POINT I

THE TRIAL COURT'S DENIAL OF DEFENDANTS' MOTION TO FILE AN AMENDED ANSWER WAS PROPER.

Defendant filed a motion for leave to file an amended answer on September 5, 1968 (Record pp. 26). The matter was never presented to the court for argument until the beginning of the trial on January 27, 1969. At that time the defendant for the first time presented an amended answer to the court and counsel asking leave of court to file it. The amended answer presented (Record pp. 35-37) January 27, 1969, raised for the first time an affirmative defense that plaintiff had not complied with the Utah law requiring a hatchery to obtain a license to sell and comply with testing and Pullorum Disease control measures. The amended answer further raised the issue for the first time that plaintiff was a foreign corporation not licensed to do business in Utah. It also raised the defense of a condition precedent not having been met.

The defendants had from September 5, 1968 to January 27, 1969 to bring their motion for leave to file an amended complaint to the court for disposition, but did not do so. Although the rules of the Fifth District placed the motion on the law and motion calendar without further notice, unless defendant's counsel appeared in court when the motion was called, the motion would not be heard by the court, but would be passed. The record is absent any indication that the motion was brought to the attention of the court on a law and motion day prior to

the day of trial. Certainly the trial court did not abuse its discretion in denying leave to file an amended complaint at that late date.

At the trial, plaintiff's counsel discovered that a blank space had not been filled in in the prayer of his complaint omitting the dollar amount claimed against Nephi. This dollar amount appeared in Schedule "D" of the complaint (Record pp. 5) and the court merely allowed plaintiff to insert the dollar amount in paragraph 4 of the prayer (Record pp 2, Line 21).

This did not prejudice the defendants in the slightest. They were presented with nothing new. In view of the stipulation that the accounting in Schedule "D" of plaintiff's complaint was accurate, the court could base its permission to allow the addition of the dollar amount upon Rule 15 (B) Utah Rules of Civil Procedure, since the court might well have been satisfied that the complaint should be so amended to conform to the evidence.

POINT II

THE COURT CORRECTLY HELD THE SIGNERS OF THE GUARANTEE PORTIONS OF THE PROMISSORY NOTES INDIVIDUALLY LIABLE.

The individual defendants, Milton T. Harmon and Roger D. Jorgensen signed the face of the notes in behalf of Nephi Processing Plant, Inc. Exh. P-1 and P-2 are signed Nephi Processing Plant, Inc., (typewritten) by Milton T.Harmon (signature) President, Roger D. Jorgensen (signature) Secretary. Exh. P-3 is signed Nephi Processing Plant Inc., (typewritten) by President Milton T. Harmon (signature), Secretary Roger D. Jorgensen (signature).

On the reverse side of the promissory notes the language of the guarantee is:

> "For value received, we hereby guarantee the payment of the within note, consent to any extension of time guaranteed by the maker, and waive protest, demand and notice of non-payment thereof, and in case suit or

action is instituted upon this guarantee for the collection of the within note, we promise to pay such sum as the court may adjudge reasonable as attorney fees in such suit or action."

The guarantee on Exh. P-1 is signed:

/s/ Milton T. Harmon, directors (hand printed)
/s/ Roger D. Jorgensen, director (hand printed)
/s/ M. L. Harmon

The guarantee on Exh. P-2 is signed:

/s/ Milton T. Harmon, director (hand printed)
/s/ M. L. Harmon

The guarantee on Exh. P-3 is signed:

/s/ Milton T. Harmon, director (hand written)
/s/ Roger D. Jorgensen

The guarantee portions of the notes are clearly separate from the face of the note. The language makes clear that the personal guarantee of the signers is given; otherwise, why was the guarantee signed at all?

In Am. Jur. 2d, Sec. 1344, Pp. 750, we read:
"If the officer is acting on his own behalf, he is personally liable, notwithstanding he signs his name in his official capacity. In accordance with the rule as to agents generally, a director, officer, or agent who signs a corporate contract containing a promise in the proper form for an individual is not relieved from personal liability by the addition to his name of an affix such as "director," "President," or the like; such terms are regarded as descriptio personae—that is, a term descriptive of the person rather than the relationship in which he signs the agreement." See also 33 ALR 1354, 51 ALR 319, 54 ALR 1391.

In this case there is no ambiguity in the instruments as is

claimed by the defendant and the trial court correctly held parol evidence inadmissible to vary the terms of a written instrument. Last Chance Ranch Co. vs Erickson, 25 P 2nd 952, 82 Utah 475, Fox Film Corporation vs Ogden Theatre Co., 17 P 2nd 294, 82 Utah 279, 90 ALR 1299, Strike vs White, 63 P 2nd 600, 91 Utah 170, Farr vs Wasatch Chemical Co., 143 P 2nd 281, 105 Utah 272. Starley vs Deseret Foods Corp., 93 Utah 577, 74 P 2nd 1221 (1938), cited by appellant also stands for this proposition. In that case, Grant Morgan has signed the note in question in a position as maker without designating his corporate capacity as secretary. The court held he was precluded from showing by parol evidence that he signed not in his individual capacity.

In the case before this court, the persons who signed for the corporation—to bind the corporation—sign a guarantee on the reverse side of the note where they are referrd to in the body of the text of the guarantee by the pronoun "we" in two places. If the intention of the signers of the guarantee portion had been to "guarantee" payment by the corporation, it would have been a useless and senseless act since the corporation was already liable as maker. Further, would not the logical way for the corporation to sign such a guarantee be in the same or similar manner as the notes were signed on the face? The way the guarantee was signed indicates that the signers intended to be personally bound and added the words "director" or "directors" in one instance, as a term descriptive of the person and not to define the capacity in which they signed.

POINT III

THE COURT PROPERLY HELD $24,452.50, ACCRUED INTEREST AND ATTORNEY FEES WERE DUE ON TH PROMISSORY NOTES, EXH. P-1, P-2 and P 3, FROM BOTH NEPHI AND THE INDIVIDUAL DEFENDANTS.

By stipulation counsel for defendants admitted the accounting in Schedule "D" of plaintiff's complaint was correct. The ac-

counting shows that as of the end of 1964, $35,000.00 had been paid on the notes given in 1964, and that $24,452.50 was the principal balance owing on the last three notes given that year.

In 1965 the parties entered into a contract, Exh. P-4, which fixed the balance owing at $62,000.00. $43,888.85 was paid by defendant in November and December of 1965, and there is no evidence in the Record that the defendants specified how this money was to be applied when it was paid. Defendants could have specified that the 1964 note balance was to be paid out of the $43,888.85 paid in November and December, 1965, **but they did not do so.**

Without direction from the party making payment, plaintiff had a perfect right to apply the $43,888.85 on whichever of defendant's obligations it chose, and according to the accounting it applied this money to the 1965 obligations. Jackson et ux vs Cope, et al, 266 P 2nd 500, 1 Utah 330, Utah State Building Commission for use and benefit of Mountain States Supply Co., vs Great American Indemnity Co., 140 P 2nd 763, 105 Utah 11. It should be noted that the brief of defendant indicates the 1965 obligations were represented by notes. This is incorrect. The contract, Exh. P-4 sets out the 1965 dealings.

In any event, defendant never moved the court for judgment on this ground as stated by defendants in "Error No. 4" of their brief. (Appellant's brief pp. 4). The only place in the entire record where this defense is raised is in a proposed amended answer filed by defendants without leave of court. (Record pp. 35).

POINT IV

A MOTION FOR DISMISSAL OF PLAINTIFF'S ACTION FOR REASON OF PLAINTIFF'S FAILURE TO ALLEGE COMPLIANCE WITH UTAH CODE ANNOTATED 4-9-2 THROUGH 4-9-6 (PULLORUM DISEASE OF POULTRY) WAS NEVER MADE TO THE COURT, AND EVEN IF IT HAD BEEN MADE SHOULD NOT BE GRANTED.

In defendant's answer, filed November 12, 1967, it was alleged that "the complaint of plaintiff fails to state a cause of action." (Record pp. 10). At no time thereafter did defendants move to dismiss the complaint because of a failure to state a cause of action.

In any event, an allegation of failure to comply with the statute concerning Pullorum Disease of Poultry is a matter of affirmative defense and should have been pleaded as such in the answer as required by Utah Rules of Civil Procedure 8 (C), also see 2 Moore's Federal Practice 1689-1690.

Even if it be considered that the matter was properly before the court, the law is not that plaintiff must show compliance with the Pulloram Disease of Poultry Statute as an essential element of its cause of action. The cases cited by defendant to support this proposition on pp. 16 and 17 of defendant's brief deal with contractors' licenses; not poultry inspection as here. Here, defendant asks the court to let Nephi obtain goods in excess of $50,000.00 in value without paying for them, if in fact, the requirements of the Pullorum Poultry Statute were not met by plaintiff. In Rosasco Creameries vs Cohan, 276 N.Y. 274, 11 NE 2nd 908, 118 ALR 641, the court in permitting recovery noted that if the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract and the denial of relief is wholly out of proportion to the requirements of public policy or appropriate individual punishment, the right to recover will not be denied. There is no such prohibition against suit in the Utah Pullorum Poultry Statute.

POINT V

RECOVERY SHOULD STILL BE HAD AGAINST THE INDIVIDUAL GUARANTORS, HARMON AND JORGENSEN, EVEN IF THE COURT HELD THAT RECOVERY SHOULD BE DENIED AGAINST NEPHI PROCESSING PLANT INC.

The Pullorum Statute, if it has any applicability here, is for

the benefit of the buyer of the turkey poults, Nephi. The terms of the guarantee are unconditional and the individual guarantors are not that class of persons protected by the Statute. The seller may very well have resolved to eliminate the possibility of just such a defense as this, by obtaining a personal guarantee.

CONCLUSION

The trial court should be affirmed because:

(1) There is no dispute as to the amount owing.

(2) The plaintiff could apply money paid by defendants on whichever accounts and notes defendants owed, since defendants gave no direction as to application; therefore the trial court correctly allocated what was owing among Nephi and the individual defendants, Harmon and Jorgensen.

(3) Failure to allege compliance with Utah Pullorum Disease of Poultry Act was not fatal to plaintiff's complaint.

(4) In any event, defendant should have raised failure to comply with Pullorum Disease of Poultry Act as an affirmative defense.

(5) The court correctly refused to permit defendant to file an amended complaint on the day of the trial.

(6) Even if no cause of action was stated against Nephi, or if an amended answer should have been allowed to be filed, recovery should still be allowed against individual defendants Harmon and Jorgensen on the unpaid balance of Notes P-1, P-2, and P-3, based upon the guarantee they signed.

Respectfully submitted,

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