1975

Herring, Ltd. v. Canyon-Lincoln Mercury, Inc. : Brief of Respondents

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IN THE SUPREME COURT OF THE STATE OF UTAH

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HERRING, LTD., a Utah corporation,	:	
Plaintiff-Appellant,	:	Case No. 13974
vs.	:	
CANYON-LINCOLN MERCURY, INC., a Delaware corporation, and R.W. SAFFORD,	:	
Defendants-Respondents.	:	

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BRIEF OF RESPONDENTS

NATURE OF THE CASE

In this action the plaintiff-appellant, Herring, Ltd., ("Herring") seeks to recover damages from defendant-respondent, Canyon-Lincoln Mercury, Inc., ("Canyon") for refusal to properly ready for occupancy and use certain premises leased under a lease agreement; Canyon counterclaims seeking damages for breach of the lease agreement.

DISPOSITION IN THE LOWER COURT

The matter was tried before the Honorable John F. Wahlquist, sitting without a jury who found against Herring and for Canyon on both the complaint and the counterclaim.

RELIEF SOUGHT ON APPEAL

Herring seeks reversal of the judgment awarding Canyon damages on their counterclaim and asks that the counterclaim be dismissed with prejudice. In the alternative, Herring asks to take possession and ownership of certain trade fixtures attached to the realty which were subject to the lease agreement.

STATEMENT OF FACTS

Canyon agrees with the statement of facts set forth in Herring's brief, but Canyon feels that additional facts from the record should be included for the court's consideration.

Prior to April 6, 1972, Canyon operated a new car dealership on certain leased premises in Ogden, Utah. (T. 81). On April 6, 1972, Herring and Canyon entered into an agreement which provided that Canyon assign to Herring Canyon's interest in the several lease holds which made up the premises of the Canyon-Lincoln Mercury new car dealership in Ogden, Utah, and that Herring would buy from Canyon the lighting system for the parking lot and certain parts bins. (T. 48; Exh. 1). In October, 1972, Herring took possession of the leased premises, moved used cars from Provo to the used car lot portion of the premises, had telephones installed and prepared to do

business as a used car dealer. (T. 60). Herring also at about that time attempted to sub-let the garage portion of the leased premises to a Mr. Russo to operate a body and paint shop. (T. 60). On about October 10, 1972, Herring was informed that the garage area which was to be sub-let to Mr. Russo would have to be fire-rated and repaired at a cost of approximately $4,000.00 before a business license could be issued to operate a body shop. (T. 60). While Herring could have licensed a used car lot on the premises, Herring could not license a body and paint shop until the repairs were made or an agreement to make the repairs was consummated. (T. 60; T. 111). On October 10, 1972, Herring demanded that Canyon pay for the necessary repairs or additions to the premises. (T. 61; T. 122). Canyon declined to make the repairs but offered assistance in referring the problem to the landlord of the garage portion of the leased premises. (T. 61; T. 122). Herring, without ever contacting the landlord, then vacated the premises and returned the keys to Canyon. (T. 61). Canyon demanded payment for the lighting system and for the parts bins and demanded that Herring make the agreed lease payments to the lessors pursuant to the agreement.

Herring made no lease payments to the lessors and did not pay Canyon for the lighting system or the parts bins. (T. 61).

Canyon made the payments due the lessors on the leases. (T. 61). Canyon returned the parts bins to the lessor at the time that Canyon negotiated the release of the lease on the portion of the building containing said parts bins. The lighting system was sold to a Mr. Sherman in connection with the sub-lease of the parking lot portion of the premises to Mr. Sherman for use as a used car lot. (T. 62; T. 128; T. 129; T. 130)

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY FOUND THAT THE MUTUAL MISTAKE OF FACT UPON WHICH HERRING RELIES WAS NOT ESSENTIAL AND MATERIAL TO THE AGREEMENT AND, THEREFORE, HERRING'S QUITTING THE PREMISES AND FAILURE TO PAY ITS OBLIGATIONS CONSTITUTED A BREACH OF THE AGREEMENT ENTITLING CANYON TO DAMAGES

Herring argues in its brief that the "impossibility of appellant to use the premises as a new and used car lot was essential to the agreement and further was the sole reason for appellant's execution of the agreement." The principle is well established that a mutual mistake of fact renders a contract voidable or subject to reformation

only if the mistake related to an essential or material fact. RESTATEMENT OF CONTRACTS, Section 502, p. 961; 17 AmJur 2d Contracts Section 143, p. 490; 17 C.J.S. Contracts Section 144, p. 894; Davies v. Lahann, 145 F.2d 656 (10th Cir. 1944); Ashworth v. Charlesworth, 119 Utah 650,231 P.2d 724 (1951); Ross v. Harding, 391 P.2d 526 (Wash. 1964); Sine v. Rudy, 27 Utah 2d 67, 493 P.2d 299 (1972).

The Supreme Court of the State of Washington in Ross v. Harding, supra, stated the test in the following terms:

> "The mistake of fact must, however, be as to a fact which is material. 12 AmJur Section 126, p. 618. It has been said that the true test as to materiality is whether the contract would have been entered into had there been no mistake." 391 P.2d at 533.

Since the record shows that neihter party was aware of the necessity of the repairs to the garage portion of the premises prior to entering into the agreement, (T. 61) the trial court properly considered the issue to be whether the mistake was material--whether the parties would have contracted had they known the true facts. The trial court, as trier of fact, expressly found that the parties would have entered into the contract even if both parties had been aware of the necessity of the repairs. (T. 46). The

trial court, in its memorandum opinion, found the facts to be as follows:

> "Plaintiff [Herring] regretted entering into the contract but prepared to go forward. Plaintiff [Herring] moved some 30 cars onto the lot [and] prepared to enter the used car sales business. They hoped to recoup part of their possible losses by renting the garage out as a body shop. On October 10, they discovered that this could not be done without an expenditure of approximately $4,000.00 in repairs to the building to bring it in compliance with the fire code of Ogden city. The combination of the prospects of an additional $4,000.00 in expense and the temptation to use this development as an excuse for leaving the area finally caused them to voluntarily leave the lot over the protest of the defendants [Canyon].
>
> The defendant's [Canyon] claim for damages on the counterclaim is reasonable, with the following exception. The defendants [Canyon] had rented to the plaintiff [Herring] that the premises could be used for a dealership for a car business in general, which representation was true, but neither party knew that the $4,000.00 modification expense would be involved.
>
> This modification expense would not have prohibited the making of the contract in the first instance but would have required some adjustments in their calculations. The court, therefore, concludes that had the parties known the necessity that plaintiff [Herring] would have not absorbed the $4,000.00 but would have insisted that the defendants [Canyon] bear this loss and that the defendants [Canyon] would have accepted. The court, therefore, lowers the debt against the plaintiff [Herring] and awards damages not for $11,025.00 but for $7,025.00. (T. 46).

Herring, in asserting that the mutual mistake was "essential" to the agreement and, therefore, legally sufficient to rescind said agreement asks this court to review the facts and make a determination as to the facts which is different than the determination made by the trial court. Herring's argument is contrary to the established law announced many times by this court that decisions by the trier of fact will not be disturbed on appeal if there is any evidence to support them. This court has held that it will not overrule the trier of fact "unless the evidence so unerringly pointed to a contrary conclusion that there existed no reasonable basis for the finding." Cottrell v. Grant Union Tea Company, 5 Utah 2d 187, 299 P.2d 622 (1956). Accord, Aagard v. Dayton and Miller Red-E Mix Concrete Company, 12 Utah 2d 34, 361 P.2d 522 (1961).

The findings of a trial court will be reversed only if the finding "did such violence to common sense as to convince the court that no fact trier, acting fairly and reasonably, would refuse to make such a finding . . ." Ray v. Consolidated Freightways, 4 Utah 2d 137, 289 P.2d 196, 201 (1955). Accord, Wood v. Taylor, 8 Utah 2d 210, 332 P.2d 215 (1958). So long as there is evidence to

support a factual determination, this court will not reverse such determination even though this court may disagree as to the factual decision. Brigham v. Moon Lake Electric Association, 24 Utah 2d 292, 470 P.2d 393 (1970). The policy of upholding all reasonable factual findings of the trial court is based in part upon its advantaged position in factual matters. Peterson v. Holloway, 8 Utah 2d 328, 334 P.2d 559 (1959); Child v. Child, 8 Utah 2d 261, 332 P.2d 981 (1958). The question before this court then becomes "are the findings that were actually made by the trial court supported by any evidence?" General Insurance Company v. Lewis, 121 Utah 440, 243 P.2d 443 (1952). Since this court is concerned only with the question of whether there is evidence upon which the trial court could find that the mistake of the parties concerning the necessity of $4,000.00 in repairs was not a material fact which was essential to the agreement, Canyon will confine its argument to noting the evidence in support of that finding.

The evidence in support of the trial court's finding is compelling. The record shows that Herring approached Canyon concerning obtaining the premises since Herring knew that Canyon was constructing a new automobile

dealership facility and would be moving from the facility that Canyon was then using as a new car dealership. Herring was interested in obtaining the Mazda franchise in the city of Ogden and needed a suitable premises to conduct a new car franchise. (T. 81). After Herring failed to obtain the Mazda dealership, Herring attempted to obtain the Subaru dealership for Ogden. (T. 82). At the time Herring entered into the agreement with Canyon to lease the premises, it was contemplating utilizing the premises for a new car dealership. An officer of Herring testified concerning the value to Herring of obtaining a new car dealership in the city of Ogden:

> Q. What value would you place on it?
>
> A. I don't follow you.
>
> Q. What value would [you] place on that Subaru dealership that you testified that you lost because you did not have the premises in Ogden to put those cars on?
>
> A. The loss, you mean?
>
> Q. Yes. The value. What was that worth to you?
>
> A. Well, it's hard to say, but had we had the franchise during that time and during the crisis, we could have made probably a hundred thousand. (T. 95).

From this the trier of fact could and properly did infer that Herring would not have abandoned the possibility of obtaining needed premises for a new car dealership from which it expected to earn $100,000 because of the necessity of remodeling to the extent of $4,000.00.

The record also shows that it was not impossible to use the premises as a new or used car lot but that said use was possible if the necessary repairs were made, (T. 46) that Herring could have operated the premises as a used car lot without making the necessary repairs if they had not attempted to sub-let the rear garage portion as a body and paint shop (T. 61); and that the premises were in fact sub-let by Canyon to another party and that party operated a used car lot on the premises. (T. 128).

This evidence clearly supports the trial court's determination that the parties would have entered into the lease agreement so that Herring could obtain a premises on which to operate their contemplated new car dealership even if the parties had known of the necessity of the $4,000.00 in repairs in order to make the rear portion of the premises suitable for an auto body and paint shop.

The trial court's determination that the parties would merely have adjusted the lease payments in view of the necessity of the repairs and the trial court's subsequent reduction of the damages awarded to Canyon on their counterclaim certainly do not do "such violence to common sense as to convince the court that no fact trier, acting fairly and reasonably, would refuse to make such a finding . . ." Ray v. Consolidated Freightways, supra.

Since the trial court's findings that the mistake of the parties was not essential to the agreement was amply supported by the evidence on the record, the remedy of recision of the agreement was not available to Herring in this case and their quitting of the premises and failure to pay was a wrongful breach of the agreement which entitled Canyon to damages. 1/

1/ Herring mistakenly relies on Sine v. Rudy, supra. In Sine v. Rudy a zoning restriction, of which neither party was aware, rendered the purpose of the contract impossible of performance. Also, the negotiators in Sine v. Rudy were out of their elements in negotiating an agreement. Sine v. Rudy is illustrative of the type of situation in which a mistake justifies recision of a contract. The fact of which the parties were not aware was of such significance that it rendered the performance of the contract impossible and made it clear that the parties would not have entered into the agreement had they known of that fact. In addition, the agreement, on its face, was painfully insufficient to create a proper contractual relationship. In the instant case, both parties were knowledgeable persons represented by counsel throughout the negotiation and formation of the agreement. In addition, the fact about which the parties were mistaken, was not one which would render the performance of the contract and the intentions of the parties impossible of performance.

POINT II

HERRING HAS NO LEGAL RIGHT IN AND TO THE CAR LOT LIGHTING SYSTEM AND PARTS BINS WHICH WERE SUBJECT TO THE AGREEMENT SINCE THEY BREACHED THEIR AGREEMENT TO PURCHASE AND CANYON SOLD THE LIGHTING SYSTEM AND CONVEYED THE PARTS BINS TO THIRD PERSONS PURSUANT TO CANYON'S STATUTORY RIGHTS AND DUTIES.

Herring asks the court in their brief to award them possession of the used car lighting system and parts bins which were subject to the agreement between the parties "in the event the court should find appellants should pay for the car lot lights and equipment. . ." The trial court did not determine whether or not Herring had to pay for the car lot lighting system and parts bins but rather that they were liable for damages for breach of their agreement. The judgment of the trial court awarded damages to Canyon on its counterclaim for failure to make lease payments and for the damages suffered by Canyon by reason of Herring's failure to pay for the used car lighting system and the parts bins. (T. 62).

The trial court was applying the statutory law of the State of Utah in making that award of damages. Utah Code Annotated 1953, Section 70A-2-703 sets forth the remedies of a seller when a buyer is in breach. The Section reads in part:

> Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any good directly affected, and, if the breach is of the whole contract, then also with respect to the whole undelivered balance, the aggrieved seller may
>
> . . .
>
> (d) Resell and recover damages as hereafter provided. (Section 70A-2-706);
>
> (e) Recover damages for non-acceptance (Section 70A-2-708) or in a proper case of the price (Section 70A-2-709);

Section 2-706 of the Utah Uniform Commercial Code authorizes a seller to resell the property when the buyer is in default under Section 2-703. Section 2-706 sets the seller's damages as the difference between the contract price and the resale price providing the resale is made in a commercially reasonable manner. The trial court awarded Canyon damages of the difference between the contract price for the goods involved and the proceeds of the resale by Canyon.

Utah Code Annotated 1953, Section 70A-2-706(1) states:

> . . . The seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price . . .

The record shows that after Herring failed to pay for the lighting system, Canyon resold the lighting system to a Mr. Sherman who was sub-leasing a portion of the premises for operation as a used car lot. (T. 129). The record also shows that the parts bins which were subject to the agreement were surrendered to the landlord of the portion of the premises containing them when the landlord released Canyon from its obligations under the lease. (T. 130). Although Herring made a motion to amend certain of the proposed findings of fact and conclusions of law (T. 50) it did not challenge the good faith of Canyon or the commercial reasonableness of Canyon's disposition of the property. Canyon should, therefore, be entitled to its awarded damages. The provisions of the Utah Uniform Commercial Code further provide that the car lot lighting system and the parts bins are free of any claim of Herring in the hands of third person purchasers. Utah Code Annotated 1953, Section 70A-2-706(5). This court in upholding the trial court's judgment on Canyon's counterclaim is not forcing Herring to "pay for" the goods involved, but rather is awarding statutority prescribed damages for the breach of the contract relating to those goods.

CONCLUSION

The record shows a mutual mistake of fact. The trial court, after hearing the evidence, found it neither essential nor material. The trial court, therefore, properly applied the law to deny Herring's prayer for recision and to grant Canyon's counterclaim. The trial court also properly applied the Utah Uniform Commercial Code to award damages which amounted to the difference between the contract price and the amount realized on resale. The trial court then reduced damages to compensate Herring for the loss occasioned by the immaterial mistake. The trial court acted in accord with the law and with the evidence. Canyon, therefore, respectfully requests that the trial court's judgment be affirmed.

DATED this 26th day of November, 1975.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 26th day of November, 1975, two (2) copies of the BRIEF OF RESPONDENT were delivered to Carl J. Nemelka, attorney for appellant, 610 East South Temple, Salt Lake City, Utah, 84102.

R. Jeffrey Taylor
Attorney for Defendant-Respondent