1971

John Deere Company of Moline v. Harold Behling And Jean Behling, Co-Partners, Doing Business As J & H Livestock & Farms : Brief of Appellant's Reply Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN DEERE COMPANY OF MOLINE, a corporation,
Plaintiff and Respondent,

vs.

HAROLD BEHLING and JEAN BEHLING, co-partners, doing business as J & H LIVESTOCK & FARMS,
Defendants and Appellants.

Case No. 12205

APPELLANT'S REPLY BRIEF

Appeal from the District Court of Emery County, Honorable Henry Ruggerri, Presiding

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The facts are adequately stated in the Appellant's Brief and will not be repeated here.

STATEMENT OF POINTS

This reply brief will discuss the following points argued in the Respondent's Brief.

1. The appellants are entitled to assert defenses against the assignee.

2. Appellants did not waive their implied warranties with respect to respondent.

ARGUMENT

I.

THE APPELLANTS ARE ENTITLED TO ASSERT DEFENSES AGAINST THE ASSIGNEE.

Respondent cites the provisions of the note (R. 64) to support its contention that appellants waived any possible claim they might have against respondent. The note provides that the buyer "will settle all claims of any kind against Seller directly with Seller and if Seller assigns this note I (we) will not use any such claim as a defense, setoff or counterclaim against any effort by the holder to enforce this instrument." (R. 64). It is evident from the wording that the above quoted provision of the note relates only to defenses the buyer has against the Seller, Jensen Equipment Company, who was the other party to the contract and not to defenses which may be available against respondent. Respondent also relies upon the provisions of 70A-9-206 UCA 1953, the wording of which is reproduced in its brief. The statute states that for an assignee to be entitled to enforce an agreement to settle all claims with the Seller the assignee must have taken the assignment "in good faith and without notice of a claim or defense". In the present case respondent, who was the assignee, took the

assignment of the note with notice that at the time of assignment all items purchased with the note had not been delivered to appellant as Jensen Equipment Co. did not have the items on hand and such items had to be ordered from respondent company. (R.63) In addition, respondent did make implied warranties independent of any warranties of Jensen Equipment Co. which appellants did not expressly waive as is discussed under point II of this brief. Because of respondent's breach of its implied warranties, such breach as discussed in appellant's brief at page 8 constitutes a defense against respondent, not Jensen Equipment Co.

Respondent at the time it accepted the assignment, if in fact it did in view of the fact that there is no assignment executed in favor of respondent only to John Deere Co. (R. 65), did so with knowledge that there was in fact a defenes to the time sale agreement and note at the time of assignment. The fact that respondent may have thought the missing equipment would be delivered does not erase the notice it had that the equipment was not delivered and allow respondent to close its eyes to the defense when all equipment never was delivered.

Respondent cited Anglo California Trust Co. v. Hall, 61 Utah 223, 211 Pac. 991, for the proposition that a buyer could waive his right to assert defenses he has against his seller against an assignee. In that case there was no showing of the assignee's participation in the consummation of the original contract nor was

there any showing that the assignee took the assignment with notice of defenses. These factors and the above statute, 70A-9-206 UCA 1953, distinguish the case from the present case.

The other cases cited on page 8 of respondent's brief similarly do not show notice on the part of the assignee of a defense when the assignment is made.

The bold face type relating to warranties set out on page 7 of Respondent's Brief relates only to Jensen Equipment Co. and not to respondent. This point is discussed on page 5 of this brief.

II

APPELLANTS DID NOT WAIVE THEIR IMPLIED WARRANTIES WITH RESPECT TO RESPONDENT.

Respondent states that there is no evidence to support the statement that respondent is a manufacturer of farm equipment. By the same token there is no evidence in the record and none was cited by respondent to support its statements that respondent is not the manufacturer or wholesale distributor; appellants purchased a John Deere tractor and John Deere Equipment. In plaintiff's Exhibit No. 3 a letter from John Deere Company, it is stated, " . . . John Deere Company sells equipment on a wholesale basis to its dealers . . . " This is an indication that respondent is a manufacturer or wholesale distributor. It should

further be noted that the respondent is named as "John Deere Company of Moline" in this lawsuit as its proper name. In respondent's brief at page 8 several cases are cited in which John Deere is given several names, i.e., John Deere Plow Company, John Deere Company of Indianapolis, John Deere Company of St. Louis and in the trial it was stated that there are several branches of John Deere (R. 76).

To add to the confusion of names, the time sale agreement in the present case was assigned "To: John Deere Company" (R. 65). There is no endorsement to John Deere Company of Moline, respondent herein, nor showing of respondent's right of possession of said instrument or authority to sue upon the time sale agreement.

Appellants have not expressly waived the implied warranties with respect to the manufacturer John Deere because the time sale agreement between appellants and Jensen Equipment Co. expressly states the following as part of the agreement:

> "In selling the goods covered by this order, Seller is not acting as agent of the manufacturer or of any wholesale distributor *nor does it have any authority to make any representations or warranty on behalf of the manufacturer or wholesale distributor,* but Seller is an independent dealer and has sold the goods for its own account as such." (Emphasis added) (R. 65).

The intent of the above language is to prevent the dealer from making representations on behalf of the

manufacturer or wholesale distributor; therefore, Jensen Equipment Co. did not have authority to obtain or attempt to obtain a waiver of the manufacturer's or wholesale distributor's implied warranties with respect to a complete unit such as a tractor. In view of this, the manufacturer, its agents and wholesale distributors are still bound by their implied warranties as they have not been "excluded or modified" as provided in Section 70A-2-316 UCA 1953.

CONCLUSION

Respondent at the time of the alleged assignment had notice of defenses to the note in question, which defenses were against respondent and as such were thus not waived by the provisions in the note relating to defenses against seller. In addition, Jensen Equipment Co. had no authority by the terms of the time sale agreement to obtain a waiver of implied warranties in behalf of respondent and thus respondent is bound by its implied warranties. This case should therefore be reversed and a new trial granted.

Respectfully submitted,

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