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G. L. Hackett & Co. v. Thompson Flying Service of Salt Lake City, Inc. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT of the STATE OF UTAH

G. L. HACKETT & COMPANY, a corporation,
Plaintiff and Respondent,

vs.

THOMPSON FLYING SERVICE OF SALT LAKE CITY, INC.
Defendant and Appellant.

Case No. 9613

RESPONDENT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY
HON. RAY VAN COTT, JR., JUDGE

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STATEMENT OF THE KIND OF CASE

This suit seeks damages from defendant for (1) Conversion of an airplane, or (2) Negligently damaging said airplane.

DISPOSITION IN LOWER COURT

This case was tried to a jury. A verdict and judgment were entered in favor of plaintiff and against defendant on plaintiff's Second Cause of Action (negligence) for the sum of $4,997.55.

RELIEF SOUGHT ON APPEAL

Defendant (appellant) asks for judgment in its favor as a matter of law and that failing a new trial.

STATEMENT OF FACTS

Respondent deems it necessary to include a statement of facts in this brief because the verdict of the jury is fully supported by those facts and this is not apparent from appellant's statement.

Gary Brimhall (the only witness who testified in this case) is the owner of a single engine Bellanca Cruise Master airplane (his cause of action for the destruction of this airplane was assigned to the plaintiff and respondent). Mr. Brimhall acquired the ownership of the aircraft in 1958 (R. 10). At first Mr. Brimhall stored the aircraft at the airport on 21st South Street in Salt Lake City, Utah, but preferred to have the aircraft stored at the Salt Lake Municipal Airport No. 1, where defendant maintains its facilities (R. 17). Several months after he acquired the airplane, he became acquainted with Mr. Carl Hellberg[1], who is the managing agent of defendant. These two had a discussion concerning the storage of the aircraft in the facilities maintained by defendant and appellant at Salt Lake Municipal Airport No. 1.

There was no express agreement between Mr. Brimhall and the defendant concerning the storage of the aircraft, and the only evidence of their agreement is a conversation between Mr. Brimhall and Mr. Hellberg, as testified to by Mr. Brimhall.

1 Spelled Hallberg in the record.

Q. "Well, just tell me what you said and what he said."

A. "The only thing I can remember at all would be that he said, 'Bring it over and we will take care of it.' "

Q. "He said 'Bring it over and we will take care of it?' That is the substance of what he told you, is that right?"

A. "Yes." (R. 18 & 19)

The aircraft was at first stored for some weeks in a large hangar with other planes (R. 19). Defendant also owned and operated a series of hangars called "T" hangars, which are so designated because of their distinctive shape and which can accommodate only one aircraft. Mr. Brimhall had expressed a desire for a "T" hangar, and some weeks after his arrangement was made with defendant, he was given a key to a "T" hangar and thereafter parked his aircraft in it (R. 20).

Subsequently, his airplane was stored in a "T" hangar owned by a friend. He was, however, billed for this hangar through appellant and did not know what arrangements his friend had with Thompson's (R. 21).

Still later, this hangar was sold and for some little time thereafter, the aircraft was again stored in the larger hangar with other aircraft (R. 23).

Thereafter, No. 1 "T" hangar became available and Mr. Brimhall stored his aircraft in this hangar. It was stored in this hangar until removed by defendant without the owner's permission (R. 16) to a larger hangar, where it was, on or about the 1st day of February, 1961, substantially destroyed by fire (R. 23 & 24).

We, thus see, that during the approximate two-year period that Mr. Brimhall stored his aircraft with defendant, it was kept in a large hangar with other aircraft during two separate intervals, and at other times in three separate "T" hangars. The storage charge remained the same regardless where the aircraft was stored ($30 per month (R. 25)). While stored in the "T" Hangars, Mr. Brimhall was furnished a key by defendant and the hangar door was customarily locked by Mr. Brimhall (R. 12). While the aircraft was stored in the large hangar with other aircraft, it would be parked on the ramp and stored and removed by defendant's employees (R. 30).

Appellant conceded that it had exclusive control of the airplane at the time of the fire (see pretrial order R. 5 & 6). Mr. Brimhall assumed that the aircraft had been removed from the "T" hangar to the larger hangar by appellant, because of his delinquent account (R. 30). Mr. Brimhall did not authorize defendant to remove the aircraft from

the "T" hangar to the large hangar where it was burned. (R. 16)

Respondent framed its case in two causes of action. First, it alleged that the aircraft was, on or about January 1, 1961, converted by appellant. This was based on the removal of the aircraft from the "T" hangar without permission of the owner. In its second cause of action respondent alleged that on or about February 1, 1961, the aircraft was negligently destroyed by appellant. This cause was based on the fact that the aircraft was at the time of the fire in appellant's large hangar and under its exclusive control.

The airplane had an agreed value of $8,500 before the fire, and a salvage value of $1,250, afterward. It was also agreed that defendant was entitled to an offset of $2,252.45 for sums owing by Gary Brimhall for storage and service up to the time of the fire.

The court submitted two verdicts to the jury. One verdict was based on the theory of conversion, and the other on the theory of negligence. The difference was in the item for salvage value. If the aircraft was converted by defendant, plaintiff was entitled to recover the value of the aircraft less the setoff. Title would have passed. If the aircraft was negligently damaged, title would not pass and defendant would be entitled to credit for the salvage

value. The jury returned a verdict in favor of plaintiff and against defendant for the sum of $4,997.55, based on plaintiff's theory of negligence.

ARGUMENT

POINT I.

THE FACTS SHOW THAT PLAINTIFF WAS ENTITLED TO RECOVER UNDER EITHER THE THEORY OF CONVERSION OR THE THEORY OF NEGLIGENCE.

Respondent is entitled to recover from appellant under either the theory of negligence or conversion and this concept is clear when the course of dealings between the parties is examined. Particularly their relationship when the aircraft was removed from the "T" hangar to the large hangar, where it burned.

For the sum of $30 per month, appellant agreed to store the aircraft. The aircraft was stored in a large hangar with other aircraft, and stored and removed by defendant's employees. This gives rise to a simple bailment contract. These facts are identical with those of *Wyatt* vs. *Baughman*, 239 Pacific 2d 194 (Utah), wherein it was held that where the defendant for a consideration agreed to store the aircraft of the plaintiff's a simple contract of bailment arose.

However, when the aircraft was stored in the "T" hangar, a different relationship is implied from the facts. The hangar accommodated only one aircraft; the owner kept the hangar locked and stored and removed the aircraft himself. Here, the owner had control of the premises and this distinguishes the two relationships. While the aircraft was stored

in the "T" hangar, the relationship of landlord and tenant came into being.

> 32 Am. Jur. Landlord & Tenant Section 2 "The relation of landlord and tenant is created by contract, either express or implied, by the terms of which one person designated "tenant" enters in possesssion of the land under another person known as landlord."

The aircraft was converted if it was wrongfully removed from the "T" hangar by defendant (see the lower court's instruction, R. 64). When the defendant without the permission of the owner removed the aircraft from the "T" hangar to the large hangar over which it had exclusive control, the owners cause of action for conversion was complete. It was assumed by the owner, Mr. Brimhall, that the aircraft was moved from the "T" hangar because he was delinquent in his account for storage with appellant (R. 27). Appellant offered no evidence to rebut this testimony.

Appellant, by argument, seeks to justify seizing possession of the aircraft on the ground that it had a landlord lien on the aircraft for its unpaid storage and repair bill. Assuming that appellant had such a lien, nothing in our law gives him the right to seize possession of the tenant's property, except by following the statutory attachment proceeding 38-3-3 U. C. A. 1953 (see also 32 Am. Jur. Landlord & Tenant Section 583, where it is stated

in effect that the statutory lien of the landlord must be enforced by Judicial proceedings and that the landlord has no right to seize the property of the tenant, and is liable for conversion if he does.)

Thereafter until the fire, appellant had exclusive control of the aircraft. A bailment relationship again came into being because appellant was still storing the aircraft, had control of it, and still claimed its storage charges (see the answer of appellant at Record P. 4). At this point in time, respondent validly claimed that the appellant was negligent and the issue was properly submitted to the jury.

Appellant contends in substance that respondent cannot rely at the same time on both the relationship of landlord and tenant and bailor or bailee and conversion and negligence, and that respondent was bound to elect on which theory it would proceed. Appellant's argument assumes that respondent relied on two theories at the same time. From what has been shown above, respondent did not rely on two theories at the same time. But rather, relied on successive causes of action based on different relationships existing at different periods of time.

Both issues were properly submitted to the jury and the jury was correctly instructed.

Appellant has attempted to support its argument by reference to the case of *United Fire Insurance Co.* vs. *Paramount Fur Service*, 156 N. E. 2d

121 (Ohio). We do not gain the same impression from reading this case as does the appellant. We quote from appellant's brief at P. 7:

> "Plaintiff proceeded against the original bailee upon the theory of conversion. However, recovery against the bailee was limited to the sum of $100, that being the agreed value of the cost according to the contract of bailment. Plaintiff then sought to recover against the sub-bailee upon the theory of negligence. The court held that having elected to treat the original bailee as a converter, the owner could not take the inconsistent position of suing the second bailee for loss resulting from negligence."

There is as we read the case, nothing in the decision to indicate that the owner had proceeded against the original bailee on the theory of conversion, and on the sub-bailee on the theory of negligence. This action was brought against the sub-bailee only for negligence. From our reading of the case, it is nowhere stated by the court that the plaintiff had proceeded against the original bailee or for conversion.

POINT II.

THE EVIDENCE FULLY SUPPORTS THE VERDICT.

Appellant, under Point II of its argument, seems to contend (1) That the relationship of landlord-tenant had not been terminated at the time of the fire, and (2) Assuming that the relationship had terminated, that at most, appellant was merely a gratuitous bailee, and liable only for gross negligence.

It must again be borne in mind that appellant had agreed to take care of the aircraft for $30 a month (R. 19). This was the original bailment contract. Appellant offered no evidence at all, and did not in any manner show that the agreement of the parties had terminated prior to the fire. Indeed, defendant in its answer (R. 4) states: "That at the time of the fire mentioned in plaintiff's complaint, plaintiffs assignor was indebted to defendant for *storage* charges on his airplane, and for fuel, lubrication, services, maintenance, and repairs in the amount of $2,252.45." (Italics supplied) This amount includes a charge for storage for the month in which the fire occurred.

Appellant claimed and was given full credit for this storage and repair bill. It is therefore clear, that when appellant shortly before the fire acquired possesssion of the aircraft, it did so with expectation of

compensation for storing the aircraft. Under these facts, the contract of bailment remained in existence.

Appellant then argues that a bailment relationship did not exist at the time of the fire because there was no evidence to show that the 30-day landlord's lien period had elapsed prior to the fire. We are given no authority to support the proposition and cannot see how the fact that appellant had a statutory lien would prevent it from being a bailee in this instance. But even further, when appellant seized possession of the aircraft, he had achieved without legal process all that could be achieved with it, because our statute merely gave the landlord a possessory remedy before judgment, 38-3-1 to 8, UCA 1953. Appellant in a sense had perfected its lien and by so doing became a bailee of the aircraft.

If we assume that the tenancy had not terminated between the date the aircraft was seized and the date of the fire, this assumption cannot aid appellant because the duty of care incumbent upon a landlord that seizes the property of a tenant is the same as that of a bailee, and upon destruction or damage to the property, the same presumption of negligence arises.

> 52 C.J.S. Landlord & Tenant, Section 695. "... Where the property distrained is injured while in custody of the landlord, the burden is on him to rebut the presumption of negligence; but the jury are to determine whether

the landlord's negligence occasioned the injury."

Appellant then argues that if the tenancy had terminated, it was then only a constructive or gratituitous bailee at the time of the fire and therefore, chargeable only with gross negligence. Appellant was, however, a compensated bailee, as reference to the facts and issues before the trial court will show. Again we repeat, that appellant had agreed to store the aircraft for $30 per month and this basic agreement between the parties had never been terminated. Appellant charged for and claimed this amount up to and including the time of the fire. Appellant expected compensation for its services and it may be inferred from the testimony of the owner of the aircraft, that it was moved to the larger hangar because appellant was not receiving the expected compensation. Appellant offered no evidence to the contrary.

Appellant's claim that it was at most a gratuitous bailee was never raised in the trial court. On the contrary, appellant requested the following instruction which was given verbatim by the trial court:

> "In connection with plaintiff's second count, you are instructed that the only duty upon the part of the defendant, with respect to the safekeeping of the Brimhall airplane stored in the defendant's hangar was to exercise reasonable care for said airplane, that is to say, the same degree of care as would be

exercised by a reasonably prudent person under the same circumstances.

The defendant was not an insurer of the safety of the Brimhall airplane. By this is meant that it is not liable merely because such personal property was destroyed. It is liable only if it did some act or thing with reference to the care of such airplane as an ordinarily prudent person, similarly situated, would not have done; or if it failed to do some act or thing with reference to their care which an ordinarily prudent person, similarly situated, would have done. In other words, the defendant was required to exercise such ordinary care and diligence with reference to the care of said airplane to prevent injury thereto while under its control, as a person of ordinary prudence would have exercised in caring for property of the same kind, in the same situation, and under the same or similar circumstances or conditions. It is required to exercise such ordinary care with reference to the property as an ordinarily prudent person, engaged in the same business would have exercised under similar circumstances and conditions."

We thus see that in the trial court appellant urged that the duty incumbent upon it as regards the aircraft was that of ordinary care. For the first time on appeal, appellant claims that it is liable only for gross negligence. Appellant, however, is bound by its theory and instruction of ordinary negligence adopted by the trial court. See *Pettingiall* vs. *Perkins*, 277 P. 2d 185 (Utah).

POINT III.

THE COURT CORRECTLY INSTRUCTED THE JURY AS TO THE RIGHTS AND DUTIES OF THE PARTIES AND THE LAW APPLICABLE TO THE CASE.

Appellant in Point III of its argument attacks the lower court's instruction No. 6. This instruction reads:

> "If you find from the evidence in this case that the relationship between Brimhall and the Thompson Flying Service was that of bailment and, if you further find that Brimhall's airplane was damaged as a result of a fire while it was in the possession of the defendant you may infer from that fact the defendant was negligent and that his negligence was the proximate cause of the damage to the airplane. Such an inference does not amount to a preponderance of the evidence but you may use such inference as a basis for finding by a preponderance of the evidence that the defendant was negligent."

This instruction embodies the principle that in a case of bailment where the bailed property is damaged while in possession of the bailee, a presumption of law arises that the bailee was negligent. Where the bailee offers evidence of his freedom from negligence, the presumption disappears, but the inference of negligence remains to be determined by the jury together with all other evidence. Where, as in the case at bar, the bailee offered no evidence of its freedom from negligence, the bailor is entitled to a directed verdict.

Wyatt v. *Baughman*, 239 P. 2d 193 (Utah)
Romney v. *Covey Garage*, 111 P. 2d 545 (Utah)

Thus, in the Wyatt case, supra, the court said:

> "From the foregoing analysis of the terms 'presumption' and 'inference', it must be apparent that what we referred to in the above quotation from the Sumsion case as a 'presumption', prior to introduction of evidence to contradict it, is truly a rebuttable 'presumption of law'. It is sufficient in the absence of evidence negativing negligence to warrant a directed verdict for the plaintiff, when the bailment and loss, damage or destruction of the bailed property is established. But the presumptive element of the assumption disappears from the case upon presentation of some contravening evidence. The 'inference', however, which was inherently part and parcel of the 'presumption of law', continues in the case after the presumption of law itself has disappeared, . . ."

Appellant then argues that the instruction is not applicable because if appellant was a bailee at all, it was gratuitous bailee and liable for only gross negligence, and that gross negligence cannot be inferred. We are given no authority for this proposition and the general law seems to be to the contrary.

> 6 Am. Jur. Bailments, Sec. 364. "Generally no distinction has been made in the cases in regard to presumption of negligence or burden of proof, whether the bailment was for mutual benefit or for the sole benefit of the bailor or of the bailee, the only difference be-

ing in the degree of care required; and properly no distinction should be made in these classes, the question on whom lies the burden to prove care or negligence being apparently unaffected by the degree of care or negligence which must be proved."

Appellant's argument is further met by reference to the facts and theory of defense. First, we see the basic agreement between the parties for storage of the aircraft for the sum of $30.00 per month. Second, is appellant's claim for *storage* up to and including the time of the fire. Third, destruction of the aircraft while in appellant's exclusive possession. Fourth, appellant's theory and instruction that it owed the aircraft owner the duty of ordinary care.

These facts and appellant's admission as to its duty of ordinary care clearly show a compensated bailment and bring the case squarely within the rule of the Wyatt case, supra. The giving of an instruction relative to the inference of negligence as embodied in the court's instruction No. 6 was, therefore, proper.

CONCLUSION

Respondent proved a bailment and loss of the bailed property. It was then incumbent upon appellant to offer evidence that it was free from negligence. No such evidence was produced by appellant and respondent was, therefore, entitled to judgment as a matter of law. The jury verdict reaching the same result is, therefore, valid.

Respectfully submitted,

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