Pfund, Frederick vs Lemp, Adam 1854 St. Louis Co. 351/1

575/16

Ryland off

Powell L # 580
assigned & delivered to
Kackell, Wm
L manufacturing Vinegar

State of Missouri }
County of St. Louis } Be it remembered that heretofore to wit: on the Twelfth day of January A.D. Eighteen Hundred and fifty three was filed in the office of the Clerk of the St Louis Court of Common Pleas within and for the County aforesaid a certain petition which is in the words and figures following to wit:

Petition.

Adam Lemp Plaintiff } In the St. Louis Court of Common Pleas St Louis County To the February Term 1853.
against
Frederick Pfund Defendant }

Plaintiff states that defendant by his promissory note hereto annexed dated July Twenty Ninth Eighteen Hundred and fifty One promised to pay to the order of Adam Lemp five hundred dollars ~~on~~ or before the first day of January Eighteen Hundred and fifty three without defalcation or discount bearing interest at the rate of six per cent per annum and for value received

Plaintiff says that said Adam Lemp on the twenty Ninth day of July Eighteen Hundred and fifty One assigned by endorsement and delivered said Note to John Wm Rackell and that said John Wm Rackell on the day of 1853 assigned by endorsement and delivered said note to plaintiff

Plaintiff states that the amount of said note and the interest are yet due plaintiff and for which he asks judgment

Hudson & Thomas
attys. for plaintiff

Adam Lemp plaintiff makes oath and states that he believes the above petition and the matters therein as stated are true

Sworn to & Subscribed before me this 10th day of January 1853 } Adam Lemp.

P. Tiffett Clk.

The note referred to in above petition is in the words and figures following to wit:

St Louis July 29th 1851

2

On or before the first day of January 1853 I promise to pay to the order of Adam Lemp the sum of Five Hundred dollars without defalcation or discount bearing interest at the rate of six per cent per annum and for value received

$500,00

F. Pfund.

Endorsed. St. Louis July 29th 1851

For me to the order of John Wm Raeckel. Adam Lemp

Pay to Adam Lemp John Wm Raeckel

S. Magoffen

Thereupon issued the following Summons to wit.

The State of Missouri

Summons

To the Sheriff of St. Louis County, Greeting:

We command you to summon Frederick Pfund to appear before the judge of our St Louis Court of Common Pleas on the first day of next term thereof, to be held at the City of St. Louis, within and for the County of St Louis on the first Monday of February next then and there to answer the complaint of Adam Lemp as set forth in the annexed petition and have you then and there this writ

Witness Philip Tippett Clerk of our said Court with the seal thereof hereto affixed at office in the city of Saint Louis this 20th day of January in the year of Our Lord one thousand Eight Hundred and fifty three

P Tippett Clerk

Thereupon the Sheriff made the following Return.

Shff's Return.

Executed this writ in St Louis County, January 30th 1853 by delivering a certified copy of the within writ and petition as furnished by the Clerk to the within named Frederick Pfund

Jno M. Speer Sheriff

By Wm H Sparks Dept.

And afterwards to wit on Feby 9th 1853 the defendants filed his answer herein which is in the words and figures following to wit:

Answer.

Adam Lemp Plaintiff
vs
Frederick Pfund Defendant

In the St. Louis Court of Common Pleas Feby Term 1853

8

Saint Louis County ss

Defendant in answer to plaintiffs petition says he does not deny that he executed to the plaintiff the note set forth in plaintiffs petition, this defendant averring that he does not owe plaintiff the amount of said note or any part thereof, for the reason that he has not received any consideration therefor and for a more full and perfect answer, why the said plaintiff ought not have and receive judgment on said note against the defendant he says that in July Eighteen Hundred and fifty One the plaintiff was engaged in the manufacturing and selling of vinegar in St. Louis and said plaintiff in consideration of the sum of One thousand dollars to be paid by the defendant to the plaintiff, this plaintiff bargained and sold to defendant his vinegar stand Casks and other utensils used in and about the manufacturing of vinegar together with the use of plaintiffs name as manufacturer of said vinegar, also the use of the stands then occupied by plaintiff for that purpose, as long as there should be room (and also for the consideration aforesaid that the plaintiff would not manufacture any vinegar whilst the defendant continued said Business

Defendant says that in consideration of the aforesaid agreement which was verbally had between him and plaintiff, but which was the consideration that moved defendant to make said purchase & give said note, he paid to the plaintiff the sum of five hundred dollars and executed for the remaining five hundred dollars the note sued on in this cause that defendant under said contract took possession of the stand and contents as aforesaid and entered

4

into the business of manufacturing vinegar using the name of plaintiff as agreed upon, but so it was hardly a year elapsed after said agreement when the plaintiff in total violation and disregard of the contract agreement and understanding between plaintiff and defendant as aforesaid entered into the manufacturing of vinegar in the City of St Louis when the defendant was engaged in said business, deprived defendant from using the stand when there was plenty of room for said purpose and using plaintiffs name as manufacturer, defendant says that the main consideration for said purchase of said vinegar establishment from plaintiff for the sum as aforesaid was the use of the stand and name of plaintiff as well that plaintiff should not whilst defendant was carrying on said business embark in the same on his plaintiffs account all of which considerations the plaintiff has failed to keep and perform on his part according to the agreement and understanding upon which said note was executed, Wherefore defendant says that the consideration of said note has wholly failed and he is not bound to pay the same & prays judgment against plff for costs

Hart & Runyan & Dicks
Defts attys.

Frederick Pfund the defendant makes oath and says he believes the above answer and the matters therein as set forth are true.

Frederick Pfund

Sworn to & Subscribed before me this 9th day of February A.D. 1873.

William Webb Justice of the Peace.

5

And afterwards to wit on 28th Feby 1834 plaintiff filed his "motion to strike out parts of answer" in the words and figures following to wit:

Adam Lemp Pltff
vs
Frederick Pfund Deft

Court of Common Pleas
February Term A. D. 1834

Motion to strike out parts of Ans.

And at this day comes plaintiff and moves the Court to strike out of defendants answer all such parts of his defence therein set up which refer to a supposed verbal agreement, whereby plaintiff in selling his vinegar establishment to defendant, also sells to him the good will thereof, and by means of which the plaintiff moves to be restrained from manufacturing vinegar in St. Louis City, so long as defendant was engaged in said business, the said portion of defendants answer being marked in pencil brackets marks and to which the attention of the Court is herewith called, for the reason that the said defence so set up bears on its face its utter invalidity and illegality, in such agreement, if legal in itself, being valid unless it is in writing, signed by the party to be charged therewith, or his agent lawfully thereto authorized

Hudson Thomas & Kribben
attys for Pltff.

And afterwards the following further proceedings were had in this cause to wit: Wednesday March 1st 1834

"Now at this day come the parties by their respective attorneys and on motion leave is given the plaintiff to file an additional reason to strike out the whole of the defendants answer and for judgment and the same is accordingly filed, and said motion, together with the plaintiffs motion to strike out parts of defendants answer, being submitted to the Court, and the Court being fully advised of and concerning the premises it is ordered that said motion, to strike out the whole of said answer and for judgment be overruled, and that the motion to strike out parts of said answer be sustained.

Motion to strike out parts of Ans. Sust.

6 And the plaintiff further moves to strike out the entire answer of deft. as filed and moves for judgment in the cause for want of a sufficient answer for the reason that said supposed defence is illegal void and no defence to plaintiffs action the supposed defence being a demand founded upon breach of contract, which cannot be pleaded as defence to plaintiffs action.

additional Reasons to strike out Defts ans.

Hudson Th & Kribben. P. Q.

And afterwards to wit: On Saturday March 4th 1834 the plaintiff filed the following motion to strike out entire answer of Defendant as follows:

Motion to strike out Defts Ans

Lemp vs Pfund — Court Common Pleas. February Term 1834

At this day comes plaintiff and moves the Court to strike out the entire answer of Deft in said suit for the reason that it contains no legal or equitable defence to plaintiffs action and moves for judgt. against defendant for want of any answer sufficient in law, for the amount of the Note sued on & interest &c

Hudson Th & Kribben
attys for Plffs.

And on the same day the following further proceedings were had in this cause to wit:

Adam Lemp vs Frederick Pfund — Now at this day come the parties by their respective attorneys and thereupon the motion of the plaintiff this day filed herein to strike out the defendants answer and for judgment being heard and by the Court here fully understood it is considered by the Court that the said motion be sustained; and on motion of the said plaintiff No jury being required this cause is all and singular submitted to the Court and the Court being fully advised of and concerning the premises doth offer the damages of said plaintiff sustained by reason of the premises in his petition mentioned at the sum of five hundred and seventy seven dollars and sixty cents therefore it is considered by the Court that the plaintiff recover of the de-

Judgment

7th

fendant the damages aforesaid in form aforesaid, as afore-
said and also his costs herein expended and have thereof
execution.

And afterwards the following further proceedings were had
in this cause to wit: Wednesday 12th April 1854

Appeal granted.

Adam Lemp
vs
Frederick Pfund

On motion of the defendant by his
attorney an appeal is allowed him to
the Supreme Court from the judgment
herein and thereupon said defendant files a Bond with
Frederick Pfund as principal and John Puff as secu-
rity which Bond is acknowledged by the obligors and ap-
proved by the Court:

Which said Bond is in the words and figures following
to wit:

Know all Men by these presents, that we Frederick
Pfund as principal, and John Puff as surety are held
and firmly bound unto Adam Lemp in the sum of Eight
Hundred dollars, for the payment of which well and
truly to be made, we bind ourselves our heirs executors
and administrators, jointly and severally, firmly by these
presents, sealed with our seals and dated at St. Louis this
12th day of April A.D. 1854

The Condition of the above obligation is such, that whereas
Frederick Pfund has appealed from the judgment rendered
against him and in favor of Adam Lemp in the St. Louis
Court of Common Pleas for the sum of Two hundred &
seventy seven dollars and sixty cents together with costs
Now if the said appellant will pay all costs and da-
mages that may be awarded against him occasioned
by such appeal and shall prosecute his appeal and
shall perform such judgment as shall be given by the
supreme Court, and such as the Supreme Court may
direct the St. Louis Court of Common Pleas to give
and if the judgment or any part thereof be affirmed that
he will comply with and perform the same so far as it
may be affirmed; and will pay all damages and

8th

costs which may be awarded against him by the supreme Court then this obligation to be void, otherwise to remain in full force and effect.

Acknowledged and approved this 12th April 1854.

Frederick Pfund Seal
John Puff Seal

Attest. C. W. Hicks
Clerk.

State of Missouri
County of St Louis } ss. I Charles W. Hicks Clerk of the St. Louis Court of Common Pleas within and for the County aforesaid certify the above and foregoing to be a full true and complete transcript of the record and proceedings in the above entitled cause as fully as the same remains of Record in my Office

In Testimony whereof I hereto set my hand and affix the seal of said Court at Office in the City of St. Louis this 14th day of June A. D. Eighteen Hundred and fifty four.

C. W. Hicks Clerk

Index

Petition	1	Mo to strike out answer	Page 6
Sum's & Shff Return	2	Mo. Sust'd & Judgt.	" 6
Answer	3	Appeal granted	" 7
Mo. to strike out parts of Answer	5	Bond filed	" 7
Mo. to strike out parts of Answer Sust'd	5		

127

(16)

March. T. 1855

Adam Lemp res.

vs. ⅌

Federick Pfund. appt

Transcript of Record.

Hart v. Jecko

Deft. atty.

Filed 6th October 1854.

Wm. L. Glanville

Clerk

Clks fee $ 3.00 pd by atty Hart

127

(a)

No 122

Adam Lemp. resplt.

vs

Fredrick Pfund applt.

Motion to affirm judgment.

Hudson & Thomas
&
Kribben
for respondent

Filed 23 October 1864.
Wm L Glarmin
ck

(4)

In the Supreme Court
October Term 1854

Adam Lamp Respondent
against
Heinrich Spund appellant

And the said Respondent comes into court here and moves the court to affirm the judgment of the court of Common Pleas rendered herein for. the reason that no exception was taken to the opinion of the court in ~~overruling~~ sustaining the motion of the plaintiff to strike out the answer of the defendant. and in rendering judgment for plaintiff.
2nd There is no bill of exceptions in the cause

Hudson & Thomas & Kribben
for Respondent

Frederick Pfund Appellant } In the Supreme
vs } Court
Adam Lemp Appellee } October Term 1854.

And now comes said Appellant and says that in the acts, opinions, and decisions of the St Louis Court of Common Pleas there is manifest error and therefore prays that the same may be revised, reviewed and reversed by your Honorable Court and said Appellant sets forth the following as cause and reason why he says there is manifest error therein.
Because the court below ought not to have sustained the demurrer to the answer of appellant, as the same constituted a good & valid defence to plaintiffs action

Hunt & Jeffs
for appellant

Said appellee says there is no error

Hudson & Thomas
& Krekel for appellee

Supreme Court

October Term 1854.

No 122.

Frederick Pfund Appellant

vs.

Adam Semp Appellee

Assignment of errors

Filed 23d Oct. 1854,
Wm L. Glannie
Ck
Joinder filed 24th Oct. 1854

Hart & Jecko
for Appellant

(12)

State of Missouri } In the Supreme Court
Saint Louis County } March Term A.D. 1855

Semp vs. Pfund.

Statement of the Case by Adam Semp resp.

The only question before this Court is whether the Court below erred in sustaining plaintiff's motion to strike out defendant's answer and for judgment.

But the assignment of Errors does not show this. It presents to the Court as the only Error that: "The Court below ought not to have sustained the demurrer to the answer of appellants, as the same constituted a good and valid defence to the plaintiff's action"

There is a joinder of Error on this assignment.

Now: There is no such demurrer; in fact, under the Code, there be can be no demurrer to an answer.

The motion to strike out is not preserved by any Bill of Exceptions and is not part of the Record.

No exceptions appear whatever to the action and ruling of the Court below.

There being nothing therefore before the Court, neither demurrer, motion, nor exceptions the judgment below must be affirmed.

Anderson & Thomas & Kribben
attys for Plff. Resp.

127

Lemp Respond.

vs.

Pfund - appellant

Statement of case by

~~Defendant~~.

Plaintiff

Filed 14th April 1855
W L Glamier
c

Kribben

(88)

Lamp vs Pfund

In this case, the Court below on motion struck out the Defendants answer, and judgment was then given for want of an answer —

The plaintiff not requiring a jury the Court assessed the damages — The Defendant prayed for an appeal and brings the case here —

There is no motion for new trial — no exceptions taken to any act or judgment of the Court below — No motion saved and put on record by any Bill of Exceptions and there is no Bill of Exceptions saved in the case — There is nothing on the record for this Court to look into — and there is no reason why the case should be here —

Judgment is affirmed the other judges concurring

J. V. Rylander

127

Lemp vs Pfund

Union

Ryland

Filed 4 June 1855
Wm S Glanville
Ch

(30)

Adam Lemp appellee
against
Fredrick Pfund appellant

In the Supreme court March Term 1858

Appellees brief

The appellee sued the appellant upon a promissory note for fifty hundred dollars The appellant admits the execution of the note but says he does not owe the amount of said note or any part thereof for the reason that he received no consideration therefor.

That in 1851 the appellee was engaged in the manufacturing of vinegar in St Louis and for the consideration of one thousand dollars sold the establishment casks, stands and utensils used in manufacturing vinegar to appellant, who paid therefor 500 dollars in cash and gave the note sued on for the balance. that the appellee also at the same time verbally agreed that he would not manufacture vinegar while the appellant continued the business. that this promise and the promise to ~~let~~ permit the appellant to use certain stands formed the consideration that moved the appellant to execute said note That "hardly a year had elapsed after said agreement was made" when the appellee in violation of the contract entered into the manufacturing of vinegar in St Louis and deprived the appellant of the use of the stands. and says therefore the consideration has failed

The appellee filed a motion to strike out the answer for the reason that the matters therein contained constitute no defence to

the action. which motion was sustained and judgment rendered for the appellee No exception was taken to the action of the court in sustaining the motion.

1. The judgment ought to be affirmed for the reason that no exception was taken to the opinion of the court in sustaining the motion to strike out the answer. This point has frequently been decided by this court.

2. There was no want or failure of consideration. the promise of the appellee was a good consideration for the promise of the appellant, Bird vs. Foy 8 Mo. 574. Chitty on Contracts p. 40. . See also Chapman vs Eddy 13 Vermont. R. 205. 4. B. Monroe 582

3. The breach of the contract on the part of the appellee can constitute no defence here, the damages being unliquidated, and the subject of a distinct and separate action
Beach & Eddy vs Curles admr. 15 Mo. R. 105.
Templeton vs Jackson 13. Mo. R. 18.
See particularly the cases of Mondell vs Steele 8 Meeson & Welsby's Exchequer R. 858 and Kelly vs Case 2. Carters Indiana R. 231.
In these cases the true distinction is taken between a case where the defendant is permitted to show in reduction of damages that the goods ~~sold and~~ delivered are not such as the party contracted for. and where he cannot reduce the amount sued for by showing special damages resulting from a breach of contract.

Hudson & Thomas
attys for appellee

No 127

Adam Lemp appellee

v

Frederick Pfann appellant

Appellees Brief

Hudson & Thomas
for appellee

Frederick Pfund
appt.
vs
Adam Lemp
respt.

Supreme Court of Missouri

Brief. Points & Authorities by Harkon Jicko for appellant.

The action of plaintiffs is upon an unnegociable note - for $500 executed by defendant to plaintiff - to this the defendant answers alleging for what the note was given and charging a want of consideration motions were made to strike out parts of answer was sustained - another motion with additional reasons filed to strike out the whole of the answer was sustained & thereupon judgment rendered in favour of plaintiff.

1st The Court below committed error in sustaining the motion to strike out part of the answer. as that part so stricken out was a good defence to the plaintiffs cause of action to wit "want of consideration for said note.

2nd The Court below committed error in sustaining the motion to strike out the defendants answer - the answer was a good, legal & valid

defence to plaintiffs action.

Want of consideration is a good & valid defence to the note sued on & it was properly pleaded.

The reason given by plaintiff in his motion to strike out parts of defendants answer is "that the defence so set up bears on its face its utter invalidity & illegality - no such agreement if legal in itself being valid unless it is in writing signed by the party to be charged thereby or his agent lawfully thereto authorised. If this be true as alleged by the plaintiffs in this motion, then we say that it being alleged that there was the consideration for which the note was executed. the defence is a good one: just as good as a note given for gaming or any other illegal consideration, or on any contract where the one of the contracting parties fails to perform his part of said contract.

The point made however by the plaintiff in his motion is not the law. the language used in the 5th & 6 sec of the act Frauds & Perjuries Rev Code 1845. page 531. in no way prevents us who gave our notes to plaintiff in consideration of the purchase of a vinegar establishment - good will of the same, use of name, & in consider

=ation that plaintiff should not manufacture any vinegar whilst defendant was carrying on said business from setting up the said state of facts as the consideration for which the note sued on was given to plaintiff & alleging his failure to give us the consideration by violating the same. which in effect in Law is a plea of failure of consideration

Suppose as stated by plaintiffs in his motion to strike out parts of answer the fact be that the note was given in consideration of a contract barred by the Statute of frauds and Perjuries - will it be contended that we cannot set up that the plaintiffs have given us no consideration for the note. We take it that if the Court below was of the opinion that we could not. that this Court will look well into the Case before it would countenance such a view of the case as legal

Hunt & Jacks
for appt

127

Frederick Pfund
appts

vs

Adam Lemp
respts

Brief. Points and
Authorities by
Hal O Peko
for appts