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No. 34 of 1932.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF ONTARIO.
(APPELLATE DIVISION).

BETWEEN—

J. P. STEEDMAN - (Defendant) *Appellant*

— AND —

FRIGIDAIRE CORPORATION

(Plaintiff) *Respondent.*

RESPONDENT'S CASE.

CASE OF THE RESPONDENT.

RECORD.

1. This is an appeal by the Defendant in the Action from a Judgment of the Appellate Division of the Supreme Court of Ontario, delivered the 17th April, 1931, varying the Judgment of the Trial Judge, the Honourable Mr. Justice Raney, dated the 14th April, 1930. The action arises out of a contract for the sale by the Plaintiff-Respondent to the Defendant-Appellant of a Frigidaire electrical refrigeration system.

pp. 48, 49.

p. 43.

Ex. 1 p. 51, et seq.

Ex. 2 p. 55.

2. On 3rd May, 1928, the parties entered into an agreement in writing for the sale by the Respondent to the Appellant for the sum of $24,000 of certain refrigerators, counters and other refrigerating apparatus necessary for the equipment of a large market then owned by the Appellant and situate at the corner of Barton and Ottawa Streets, in the City of Hamilton, Ontario, and known as the "East-"End Market," and also as the "B. & O. Market." The Appellant contemplated re-selling or letting on hire-purchase to his tenants in the market all or part of the said apparatus.

Ex. 1 p. 51. et seq

Ex. 2 p. 55.
Ex. 3 p. 55.
Ex. 4 p. 56.

Ex. 1 p. 51, et. seq.

3. The contract of the 3rd May, 1928, consisted of a tender by the Respondent and an acceptance by the Appellant in the form of a letter of that date, which reads:—

Ex. 2 p. 55.

"I accept your contract as per your tender of this date for $24,000 payable "$2,400 cash and for the balance I agree to furnish notes of the tenants "payable according to the usual terms and conditions of the paper discounted "by the General Motors Acceptance Corporation, fifty per cent. of the cash "payment made by the tenants of the stalls enumerated in the tender to be "repaid to me until I have been reimbursed the $2,400."

Ex. 4 p. 56, et. seq.

Ex. 5 p. 62.

p. 14, ll. 21-25, p. 15, l. 22.

4. On the 11th July, 1928, certain changes and additions were made to the contract, the total contract price thereby becoming $32,436·51, of which amount the Appellant paid $2,400 in the month of May, 1928, leaving a balance of $30,036·51. It was agreed by Counsel at the trial that there was no dispute as to the balance due.

p. 15, ll. 5-7. p. 34, l. 14. p. 38, l. 40.

p. 34, l. 42 to p. 35, l. 5. p. 35, ll. 33-36.

5. The installation of all the apparatus the subject matter of the contract was completed ready for use by the 31st July, 1928. It has remained *in situ* ever since, and at the date of the trial, the 26th November, 1929, portions of it had been let to various tenants.

6. The Appellant failed to furnish to the Respondent any notes of tenants for the payment of the balance of the contract price, and ultimately, on the 12th June, 1929, the Respondent brought this action against the Appellant claiming the said balance of $30,036·51 as damages for breach of contract consisting in failure to furnish the said notes or alternatively for work done and goods sold and delivered.

pp. 1-3. p. 2, l. 40, to p. 3, l. 2.

p. 4, ll. 15-35.

7. Before the trial began, the Appellant had in substance raised no defence save that he was not bound to furnish notes until he found tenants, that he had not at the time of suit found any tenants, and that the action was accordingly premature.

p. 9, l. 35, et seq. p. 10, ll. 1-5. p. 40. p. 42, ll. 4-18.

8. At the opening of the trial of the action before the Honourable Mr. Justice Raney, at Hamilton, on the 26th November, 1929, the Appellant was given leave to amend the Defence by setting up that the Respondent had promised to one Lord, an Agent of the Appellant, a secret commission on the sale of the refrigeration system, and asked for rescission of the contract and damages. The amended Defence, as ultimately delivered, is to be found on page 5 of the Record.

p. 5, ll. 1-15.

9. No evidence was given at the trial that it was physically possible to remove all or any part of the apparatus from the market.

On the contrary, it was proved that the Appellant was then engaged in attempting to let to tenants further portions thereof. p. 35, l. 40, to p. 36, l. 8.

10. The learned Trial Judge, in a written judgment delivered on the 14th April, 1930, came to the conclusion that the Respondent's claim should be dismissed with costs because of the promise of the commission to Lord, and he allowed the Appellant's counterclaim, and directed repayment of the $2,400 "down-payment" with interest, giving leave to the Respondent to remove the electrical refrigeration system from the Appellant's market, subject to its undertaking to restore the premises to the condition in which they were before the installation. The formal judgment is at page 43 of the Record. pp. 41, 42. pp. 41, 42. p. 43.

11. The Respondent appealed to the Second Divisional Court of the Supreme Court of Ontario, the Appeal being heard on the 15th December, 1930, by Latchford, C.J., and Magee, Riddell, and Fisher, J.J.A. The Judgment of the Court, delivered on the 17th April, 1931, by Riddell, J.A., was to the effect that the Appellant was not entitled to rescission of the contract because the parties could not be restored to their original positions, the Appellant having operated the refrigerating apparatus; but that the Appellant was entitled to such damages as he might prove to be assessed by the Master. pp. 44, 45. pp. 46, 47.

12. The formal judgment of the Appellate Division declared that the Respondent was entitled to recover $34,109·06 less anything that the Appellant might recover by way of damages, and that the Appellant was entitled to such damages as he might be able to prove he had suffered by reason of the promise of commission; and referred it to the Local Master of the Court at Hamilton to enquire and report what amount of damages the Appellant was so entitled to recover. pp. 48-49.

13. The Respondent submits that the judgment of the Appellate Division is right and should be affirmed, for the following among other

REASONS.

1. Because the parties cannot be restored to their original positions.

2. Because the refrigerating apparatus has been leased by the Appellant to his tenants and has been used by his tenants since before November 1928.

3. Because there was no evidence before the Court to show that it was physically possible to remove any of the apparatus from the Appellant's market.

4. Because the property in the said apparatus passed to the Appellant on the 31st July, 1928.

5. Because the Appellant is not entitled to any relief other than by way of damages.

D. N. PRITT.

WILLIAM J. BEATON.

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