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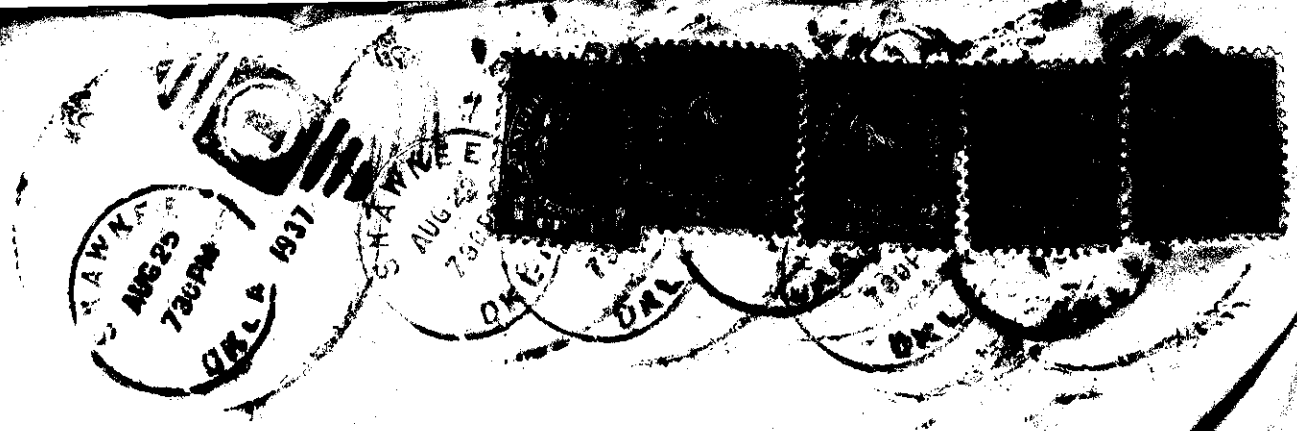

Hon. C. Guy Cutlip
Superior Judge
Seminole, Oklahoma

"Court Clerk"

IN THE SUPERIOR COURT OF SEMINOLE COUNTY, STATE OF OKLAHOMA

John Elsing Plaintiff

vs.

Oklahoma Electric Supply Company, a corporation Defendant

#2999

TRIAL BRIEF OF THE DEFENDANT OKLAHOMA ELECTRIC SUPPLY CO.

The court will recall that this action was instituted by the plaintiff, Elsing, against the defendant for damages for breach of oral warranty. The charging part of the petition as to warranty is as follows:

"That on or about the 24th day of April, 1934 plaintiff and defendant entered into an oral agreement with defendant's agent whereby defendant was to sell and plaintiff to purchase one Frigidaire refrigeration and/or air-cooling machine, including One Model A5150, 1½ H. P. Compresser, one used cooling coil and three new float valves, same to be delivered and installed by defendant in plaintiff's place of business at Seminole, Oklahoma. Said machine to be used for the purpose of cooling and preserving meats, fish, vegetables and other food products. That pursuant to said agreement the said refrigeration machinery was installed by defendant's agents in plaintiff's place of business at Seminole, Oklahoma, said machinery being connected up with and to plaintiff's meat counters, meat box, and fish box.

"That plaintiff traded in as a part consideration for the purchase of said Frigidaire machine, two used or second hand refrigeration machines, both of said used machines having a total value of $200.00 dollars, and in addition thereto, plaintiff agreed to pay the sum of $380.00 to defendant for said Frigidaire Machine, of which said sum this plaintiff paid $180.00. That the defendant's agent orally warranted said Frigidaire machine to give satisfactory service and further warranted said machine in writing against defective material and workmanship for a period of one year from date of purchase. Said warranty being marked exhibit "A" and attached hereto, and made a part hereof.

The defendant answered setting up a written contract, signed by both plaintiff and defendant, which contract contained a written warranty. The material part of defendants answer is as follows:

> "This answering defendant further states that the said plaintiff was delivered at the time of the execution of said contract, a duplicate thereof which contained all the terms, conditions, warranties and liabilities, and is identical with the original as set forth in defendant's exhibit "A".
>
> This answering defendant further states that on or about the 21st day of September, 1935, and after said plaintiff had made some changes in the machinery and purchased some additional machinery from this answering defendant, the said plaintiff and defendant entered into a contract in writing of that date, in which the said plaintiff agreed that there are no warranties, expressed or implied, representations, promises or statements in connection with the sale of said property, being the property described in plaintiff's petition, other than the manufacturer's warranty, as follows:
>
> 'The manufacturer warrants new Frigidaire products to be free from defects in material and workmanship under normal use and service, and the manufacturer will replace without cost to the purchaser any part or parts thereof which inspection by the manufacturer proves to be thus defective, within one year from date of delivery to original purchaser.
>
> This warranty does not apply to any material which has been subject to misuse, neglect or accident and the manufacturer does not authorize any person or representative to assume for it any other liability in connection with its products.'
>
> A full, true and correct copy of said written contract is hereto attached, marked Exhibit "B" and made a part hereof, and plaintiff further alleges and states that all oral agreements of every kind and character are merged in said written contract and said written contract supersedes all oral transactions between the said plaintiff and defendant. This answering defendant further states that the title to said property remained in said defendant."

The hearing of the testimony in this case was commenced on the 7th day of May, 1937. The plaintiff produced numerous witnesses to testify as to the loss of meats and fish at his place of business in Seminole, Oklahoma. The plaintiff also testified at great length as to the loss of meats, which he estimated to be worth $1200.00 or $1300.00, after which the case was continued until the 13th day of May, 1937.

The plaintiff made no effort to rely on the written warranties contained in the various contracts he had signed, but relied solely upon what he termed an oral warranty. No evidence was introduced to prove an oral contract, the plaintiff confining his testimony solely in attempting to establish damages for loss of meats and fish, which losses he alleged occurred between April 24, 1934 and December, 1935.

Mr. Elsing testified that Mr. Evans came to his office on April 24, 1934 and that he purchased certain merchandise from the Oklahoma Electric Supply Company, in his own words "I bought a compressor, Frigidaire Compressor", and on being asked by his attorney if he paid anything down on the machine stated:

A. They allowed me so much on my two little machines and it was so much per month until it was paid for.

Mr. Elsing was also asked the following questions by his attorney:

Q. What was the agreement between you and the defendant in relation to this machinery?

A. They said they would put that machine in there and it would work, and it would run all three of the boxes.

Mr. Carpenter, attorney for defendant, asked Mr. Elsing this qualifying question:

Q. At the time this was sold to you, did you sign a written contract?

A. I don't remember.

The plaintiff also testified in his own behalf as follows:

BY THE COURT:

Q. Do you know about how much you lost?

A. Yes sir

Q. How much?

A. I think a safe estimate would be $1200.00 and $1300.00

THE COURT:

Q. Did you keep track of the meat you lost?

A. I didn't think I would have a law-suit.

Q. They told you to weight it up?

A. One time.

Q. How much did it weigh up?

A. That night

Q. How much?

A. $74.00

Q. Did that thing ever occur again?

A. I didn't put but a little meat in.

Q. You didn't utilize the box?

A. Just a little, not much

Q. When was that $74.00 loss?

A. The next day after they put that machine in there.

MR. BISHOP:

Q. Which one.

A. The new one, the new coil.

THE COURT:

Q. Was that in July?

A. I think it was.

Q. What year?

A. 1934

The plaintiff Elsing testified on cross examination in regard to the contract signed April 3, 1934, as follows:

Q. Well if it was in April 1934, what would you say that is-- Now Mr. Elsing, I hand you here what has been marked Plaintiff's Exhibit "A" and offered in evidence. Now, when do you say that was signed, during the first transaction with the defendant, the second, or the third transaction?

A. That was 4/3/1934

Q. Well, will you answer the question?

A. That is when it was.

Q. It was signed?

A. Well it looks like the first, I though it was the second

Mr. Elsing further testified :

Q. After you installed this machine identified as defendant's "Exhibit "A" and prior to the time you re-installed the little half horse power compressor they brought back, did you lose any meat in the meantime.

A. Yes sir.

Q. How much?

A. $3.00 to $4.00 worth a day.

Q. How much did you lose in all?

A. $2.00, $3.00 or $4.00 or $5.00 worth a day

Q. For a period of approximately thirty days?

A. All them four months.

On the 13th day of May, 1937 the plaintiff Elsing again took the witness stand, with certain invoices which were introduced in evidence upon which he had marked certain parts of the invoices " spoiled ". Testifying in each and every instance that either Mr. Evans, who was the service man for the Oklahoma Electric Supply Company, or Mr. Bishop, the secretary, had made certain oral statement about making the refrigerator satisfactory.

At no time does the plaintiff attempt to bring himself within the rule, or establish the written contract but pre-sistently steers clear of the written contract, and attempts to void and contridict its terms by testifying to oral state-ments, which he claims were made by the agent of the defendant.

There were no books kept of any losses for spoiled meats, and only in one instance did the witness testify that he weighed up the meat and fixed the value at $74.00. All of the other testimony would be to certain items or certain parts of invoices which he produced, on which he had marked spoiled. The plaintiff produced some other witnesses to testify to having carried spoiled meat away from his place of business, also produced some witnesses who testified that they had purchased spoiled meat.

The allegations in plaintiff petition as to loss of meat, fish and other food products are:

"That during the summer season of the year 1934, said Frigidaire machine failed to properly cool said meat box, fish box and meat counter as Defendant's agent warranted to plaintiff it would do; that as a result of said machine failing to properly perform as warranted that meat, fish and other food products in said meat box, fish box, and meat counter belonging to this plaintiff became spoiled and unfit for human consumption and that the reasonable wholesale value of said foods so spoiled and lost was $500.00.

"That thereafter, to-wit: during the months of June, July and August, 1935, said Frigidaire machine failed to property cool said meat box, fish box and meat counter as defendant's agent warranted to plaintiff it would do, that the terms of the warranty in this respect were wholly false, and that as a result of said machine failing to properly perform as warranted that meat, fish and other food products in said meat box, fish box and meat counter belonging to this plaintiff became spoiled and unfit for human consumption and that the reasonable wholesale value of said foods so spoiled and lost was $600.00.

These two paragraphs contained all the allegations in plaintiffs petition pertaining to the spoiling of meat, and are each and all based upon which plaintiff contends were oral warranties, though at the time he made his first trade with the defendant, being on or about the 24th day of April, 1934, he entered into a written contract, which contract contained the only warranties that could have been made to the plaintiff by the defendant, which are those contained in the exhibit to defendants answer, the original of which were introduced in evidence by the defendant at the time of trial, either on the cross examination of the plaintiff, or while the defendant was putting on his defense, and all of plaintiffs testimony was to the oral warranties was an attempt to vary the terms of the written contract and written warranties entered into at the time of the sale.

The testimony shows that the last contract entered into between the plaintiff and the defendant, and which contract contains the warranties, was for one New C-960 Frigidaire Cooling Unit, dated September 21, 1935.

The testimony of Mr. Bishop shows that this was put in some sixty days prior to the signing of the contract, with the understanding that the plaintiff, Elsing, should use the same thirty days before making the contract for purchase, but the defendant waited some sixty or more days before requesting him to sign the contract after he had had an opportunity to determine whether or not the unit worked satisfactorily.

The testimony further showed, and the same is not disputed that at the time of the signing of the contract the plaintiff Elsing had no complaint in regard to the manner in which the machine had worked, neither did he complain about the loss of any meats, fish or food products. This contract was introduced in evidence and contains the following provision:

> "There are no warranties, expressed or implied, representations, promises or statements in connection with the sale of said priperty other than the manufacturer's warranty, as follows:
>
> "The manufacturer warrants new Frigidaire products to be free from defects in material and workmanship under normal use and service, and the manufacturer will replace without cost to the purchaser any part or parts thereof, which inspection by the manufacturer proves to be thus defective, within one year from date of delivery to original purchaser.
>
> "This warranty does not apply to any material which has been subject to misuse, neglect or accident and the manufacturer does not authorize any person or representative to assume for it any other liability in connection with its products."

These various written contracts could certainly not be invalidated by any oral statement made by the plaintiff and certainly if the allegations in plaintiffs petition are correct, and his testimony in endeavoring to substantiate his allegations is correct, this unit was in during the greater

part of the time during June, July and August, 1935, when he alleges to have lost $600.00 by reason of spoiled meat, fish and other food products.

The charging part as to loss of trade is as follows:

> "That as a result of said machine failing to operate as warranted by defendant, and said food products being lost to this plaintiff, that plaintiff was unable to furnish and supply the wants and demands of his customers; that as a result thereof plaintiff lost his patronage and trade and his profits were greatly diminished to plaintiff's damage in the sum of $250.00

> "That as a result of said machine failing to operate as warranted by defendant and said food products being lost to this plaintiff, that plaintiff was unable to furnish and supply the wants and demands of his customers, that as a result thereof plaintiff lost his patronage and trade and his profits were greatly diminished to plaintiff's damage in the sum of $300.00

~~That as a result thereof plaintiff lost his patronage and trade and his profits were greatly diminished to plaintiff's damage in the sum of $300.00.~~

The plaintiff does not attempt to say when these losses as set out in one paragraph as $250.00 and the loss of $300.00 as set out in another paragraph took place, neither does he attempt to introduce any testimony to determine when the losses took place. The only attempt that we can recall in the testimony to prove any of these allegations is the testimony that he lost the patronage of Gus Patterson, who operated a cafe and possibly one or two others. Patterson was produced as a witness and testified that he received spoiled meat from the plaintiff and therefore quit trading there. The plaintiff testified that Patterson trade was very large and that he made a profit of 50% thereon. These allegations and the proof introduced thereon were merely sepculative and could not be an element of damages in a case of this character.

The plaintiff also alleged in his petition that the operation of said machine cost plaintiff from $16.00 to $21.00 per month for water alone, said bills being far in excess of the maximum amount warranted by defendant to this plaintiff, and to plaintiff damage in the sum of $50.00.

No evidence was introduced to establish this allegation, and the only time it was referred to in the evidence was when the plaintiff was asked:

Q. What did they say about the water bill?

A. That it was not half as expensive.

Plaintiff was asked:

Q. You say you averaged $25.00 a month increase in your water and electric bills for how many months?

Objection to this question was sustained as not being the proper way to prove it.

Q. Do you have your cards?

A. No sir, I never kept them.

Q. Do you remember how much they were in the year 1933 for the months of June, July, August and September?

To which question objections were sustained.

Therefore there was no proof of any increase in either the electric or water bills.

The next allegation that plaintiff made in his petition in regard to damages is as follows:

> "That on or about the 1st day of December, 1935 defendant's agents removed and carried away said frigidaire machine from plaintiff's place of business and refused and still refuse to reimburse plaintiff for any amount or sum which plaintiff paid defendant for said machines; that at the date of removal of said machine plaintiff had paid defendant a total of $314.00 upon the purchase price of said machine. That as the result of said wrongful removal of said machine, plaintiff was damaged in the sum of $314.00."

There was no testimony introduced on this allegation and no proof attempted to be made as to the value of the machine when it was put in or when it was taken out. The evidence submitted on behalf of both the plaintiff and the defendant was that the plaintiff took the machine out himself, and notified the defendant to come and get it. That the defendant in compliance with said notice did come and remove the machine.

Under the allegations in plaintiffs petition he attempts to set up at least four separate and distinct counts for damages, and divides his counts for damages for loss of meat and fish and food products into two counts, and his loss of profits into two counts, as he claims that he lost meat in the year 1934, during the months of June, July and August, in the amount of $500.00, and during the same months in the year of 1935 in the amount of $600.00. That he lost profits in the sum of $250.00, as set forth in one paragraph of his petition, and that he lost profits in the sum of $300.00, as set out in another paragraph of his petition. He does not state in what years these losses were sustained, neither is the same clear in his testimony.

Having given a resume of the allegations of the petition and the testimony, we wish to answer the plaintiffs argument before going into a discussion of the legal propositions.

Plaintiff seems to lay great stress upon the statement attached to the plaintiffs petition in the introductory part of his brief, but in his argument he gets entirely away from the written statement and argues solely from the standpoint of an oral warranty, citing numerous authorities based upon the case of Fairbanks Morse & Company v. Miller, 80 Okla.265, 195 Pac. 1083.

This case we do not think is in point. Miller Bros. purchased from Fairbanks Morse Company a certain tractor engine, known as 30-60 Horse Power Engine. That is to say that it could be used both as a tractor and as a stationary engine. Miller Bros. complained of the engine for the reason that it would not develop the power either as a tractor or as a stationary engine, as represented by the Fairbanks Morse Company. Miller Bros. defaulted in the payment of a note for a part of the purchase price, Fairbanks Morse Co. filed suit against the defendant Miller Bros. to recover on the note. They defended on the ground that the engine was not what it was represented; that it had given considerable trouble; that it would not develop the horse power that it was represented to develop, and Judge Kennemer in his opinion on the petition for rehearing said:

> "Now before the plaintiff is entitled to recover the purchase price it must furnish what it sold; and disregarding any warranty whatever, it agreed to furnish a 30-60 horse power tractor engine, and in addition to agreeing to sell that kind of a tractor it specifically warranted that it has tested the engine and that it would develop its rated horse power. To hold that the plaintiff was releived from this solemn obligation on account of the provisions of the contract that a delivery to the carrier of the tractor consigned to the buyer waived any claim that the defendants have by reason of the warranty would be to render that part of the contract of sale in which the plaintiff agreed to furnish an engine of 30-60 horse power a nullity"

There are no allegations or proof offered in the case at bar that the defendant did not furnish the kind of a machine it agreed to furnish, neither is there any allegation or proof that the machine did not develop the amount of power it was intended to develop. Neither is there any allegation or proof that the compressor and the other machine furnished by the defendant did not correspond to the description, and that it would not be suitable to perform the ordinary work which the described machine was manufactured to do. The main question in the Fairbanks Morse case is that the engine furnished was not the kind of an engine described, and that it did not, and never would at any time develop the horse power designated by the seller. This was the deciding question in the Fairbanks Morse v. Miller case.

The other case cited by the plaintiff was Ransom v. Robinson Packer Co. 159 Okl. 212, 250 Pac. 119, was decided on the question as to whether or not the answer of the defendant was sufficient to entitle the defendant to introduce evidence as to his defense for breach of warranty of fitness, and the court held that the answer did not set up a defense to the claim if the allegations could be sustained by evidence, and reversed the case where the court sustained a demurrer to the defense. The court saying -

> "There was evidence reasonably tending to sustain the defense set up in the answer and the court erred in sustaining the demurrer to defendants evidence and in directing a verdict for plaintiff."

In the case at bar there is a specific warranty in writing binding upon both the plaintiff and defendant. This question has been before the courts of this state numerous times, and as this is the main proposition argued by the plaintiff, we desire to specifically call this point to the courts attention.

In the case of Abdo v. Zero Air, 17 Pac. (2d) 389, 161 Okl. 93, the court says:

> warranty in such terms as import a legal obligation, without any uncertainty as to the object or extent of liability or remedy if such warranty fail, both parties are conclusively bound by its terms, and are entitled only to the relief contained in its provision."

This is the last case on this subject by our courts that we are able to find. The record as stated by the court is:

> "The record discloses that plaintiff and defendant entered into an agreement relative to the sale of said machine on April 22, 1928, which instrument was in writing and signed by both parties. Said instrument contains the statement: 'This order states the entire agreement for the purchase of said goods and is not modified by any verbal agreement.' Said instrument also contained three paragraphs stating the guaranty upon said machine and the conditions necessary for the performance of all conditions of said guaranty."

Each of the contracts in the case at bar state:

> "There are no warranties, expressed or implied, representations, promises or statements in connection with the sale of said property other than the manufacturer's warranty"

One of these contracts was signed by Mr. Elsing on April 24th, 1934, and the other one on the 21st day of September, 1935,

The court in the case of Hope v. Peck 38 Okla. 581 132 Pac 344, speaking through Mr. Justice Williams, in one of the very early cases, uses this language.

> "Where parties to a contract have stipulated what course shall be pursued by the vendee in the event the warranty fails, such provision must be followed by the vendee in seeking to enforce the guaranty."

This rule has been followed as shown in Abdo v. Zero Air, Inc. supra.

In Moline Plow Company vs. Wilson, 74 Okla. 89, 176 Pac. 970, the court says:

> "When a sale is accompanied with a written warranty in such terms as import a legal obligation, without any uncertainty as to the object or extent of such warranty, nor as to extent of liability or remedy if such warranty fail, both parties are conclusively bound by its terms, and are entitled only to the relief contained in its provision."

We have already called the courts attention to each separate paragraph and count in plaintiffs petition, and nowhere does plaintiff bring himself within the statute of this state for either breach of warranty, of quality, or fitness, Section 9976 O. S. 1931, provides:

> "The detriment caused by the breach of warranty of the quality of personal property, is deemed to be the excess, if any, of the value which the property would have had, at the time to which the warranty referred, if it had been complied with, over its actual value at the time."

Section 9977 O.S. 1931 under Breach of Warranty of Fitness:

> "The detriment caused by the breach of a warranty of the fitness of an article of personal property for a particular purpose, is deemed to be that which is defined in the last section, together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose."

The Court in the case of Moline Blow Company v. Wilson (supra) says:

> "Upon the trial of a case for the breach of a warranty of fitness for a particular purpose, it is necessary to prove the value of the property with its infirmity and [illegible] been as warranted, together with the loss incurred in an effort in good faith to use it for the purpose warranted, and in the absence of such proof the purchase price is prima facie its value as warranted.

In the case at bar the plaintiff does not attempt to prove the purchase price or any other value.

The court in the body of the opinion in Moline Blow Company v. Wilson, supra, says:

> "The record in this case nowhere shows what the Adriance was worth, if anything, at the time it is alleged to have been delivered to the defendant, nor is there any evidence in the record whatever which shows, or tends to show, what it would have been worth if it had been as warranted. (citing) Spaulding Mfg. Co. v. Cooksey, 34 Okl.790, 127 Pac.414, in which the court said
>
> 'Measured by this rule, defendant was not entitled to recover anything on his cross-petition under the evidence in this case, as there is a total failure to prove damages as required by this section of the statute (referring to statute above quoted)

The same rule is laid down by this court in the case of Murray Co. v. Palmer, 55 Okl. 480, 154 Pac. 1137. In this case the question came up on an instruction, and the court said:

"It is not error to refuse this instruction, inasmuch as it was not applicable to the issues raised by the pleadings, in this, that the cross petition was not based upon a failure of consideration, but upon a breach of warranty, and damages resulting therefrom, and this instruction did not correctly state the measure of damages in an action for breach of warranty of contract of sale. The measure of damages in an action for breach of warranty "in quality" is set out in Section 2865, Rev. L. 1910, and where damages are claimed for breach of warranty "in fitness" of the article sold, as in the case at bar, the rule for measuring the damage is set out in Section 2866. The application of these statutory rules for the measure of damages is illustrated in many decisions of this court. Osborne & Co, v. Walther, 12 Okl. 20,69 Pac.953; Continental Gin Co. v. Sullivan, 150 Pac.953; Kansas City Hay Press Co. v. Williams, et al, 151, Pac.862; Rogers Lumber Co. v. Judd Lbr. Co. 153 Pac.150 It therefore appears that the refusal of this instruction was not error."

This is purely an action on what the plaintiff alleges - An oral contract of warranty and not for recision on grounds of fraud. In Myers v. Greenwald Construction Company v. Silina Gravel Co. 136 Okl. 214, 277 Pac. 274, The court makes the clear distinction between an action for damages on rescision of a contract and an action for breach of warranty.

"An action for a breach of the warranty is an action on the contract, whereas the gist of an action for fraud and deceit is not any breach of the contract, but that the party has been lead, to his damage, by fraud, into making it"

Thompson v. Libby 36 Minn. 287, 31 NW.52

"A defrauded party cannot treat an alleged fraudulent representation as terms of a contract, such representations constitute only grounds for avoiding liability under the contract, and cannot be a covenant of the instrument itself".

Again quoting from the body of the opinion:

"It will be observed also that the nature and extent of relief provided in the case of rescision is entirely different from the measure of damages arising from breach of warranty of fitness. Under rescission the parties are simply put back in statu quo, but Sections 5989 C.O.S, 1921 (sections 9976 O.S.1931 Supra) And Section 5990 (Section 9977 O.S. 1931 Supra)

Since the gist of plaintiffs action is based upon breach of warranty and not rescission he is bound by the statutes and the construction thereof by our appellate courts:

Binkley vs. Ball, 127 Okl. 197, 260 Pac. 1

Murry Co. v. Palmer 55 Okl. 480 154 Pac. 1137

Western Silo Co. v. Cousins 76 Okl.154
184 Pac. 92

Moline Plow Co. v. Wilson 74 Okl. 89

Spaulding Mfg. Co. v. Cooksey, 34 Okl 790
127 Pac. 414.

In the light of these decisions and under the statutory provisions governing the rule, we think there is a total failure of proof on behalf of the plaintiff to establish any damages against the defendant in this case.

The plaintiff also plead under one paragraph in his petition, in addition to the other damages claimed, damages in the sum of $250.00 for loss of business, and in another paragraph of his petition $300.00 for loss of profit in business, but does not state in either paragraph when or under what circumstances the damages took place. Both the allegations in the petition, and the proof attempted to be introduced are so highly speculative that it is hardly necessary to cite authorities, yet we desire to call the courts attention to Section 9963 O.S. 1931 giving the definition of damages for breach, as follows:

> "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom. No damages can be recovered for a breach of contract, which are not clearly ascertainable in both their nature and origin."

In the case of Baker & Strawn v. Miller & Jones Bros. 109 Okl. 184, 235 Pac. 476, the court said:

> "Damages claimed for breach of contract cannot be recovered unless they are clearly ascertainable, both in their nature and origin, and it must be made to appear that they are the natural and proximate consequence of the breach of the contract and not speculative and contingent."
>
> "The words 'clearly' and 'ascertainable' used in Section 5976 O.O.S. 1921, taken together, mean without obscurity, obstruction, confusion, or uncertainty, and the damage claimed must be made reasonably certain, and where, as in the instant case, the profits sought to be recovered are dependent upon the happening of certain contingencies and are dependent upon luck or chance, they are too remote, speculative and uncertain to entitle plaintiffs to recover."

And in the body of the opinion the court says:

> "The amount found by the jury upon the testimony in this case, at best could only be a matter of surmise, conjecture, and guesswork, and as a matter of law, based upon the record and testimony in this case, we are forced to conclude that the damages awarded in this case by the jury should not be allowed to stand, and we are clearly of the opinion that the court committed error of law in submitting the case to the jury upon this count of the petition, and that the judgment of the trial court should be [redacted] and is hereby reversed."

The facts in this case, as to the proof and especially as to the paragraph of plaintiff's petition, in which he asks for $250.00, and in another paragraph for $300.00 for loss of profit certainly does not come within the statutory provision, or the interpretation placed upon the statute by the court in any of the cases:

This same rule is laid down in Bokoshe Smokeless Coal Company v. Bray 55 Okl. 446, 155 Pac. 226, Davies, et al v. Southerland, et al, 123 Okl. 149, 256 Pac.32, Baker & Strawn v. Miller & Jones Bros, 109 Okl. 184, 235 Pac. 476, Muskogee Co. v. Yahola Sand Co. 60 Okl. 196, 159 Pac. 898.

In the case of Davies, et al v. Southerland, et al (supra) the court in the syllabus says:

> "Damages claimed for breach of contract cannot be recovered unless they are clearly ascertainable, both in their nature and origin, and it must be made to appear that they are the natural and proximate consequences of the breach of the contract, and not speculative and contingent."

The rule is also well settled in this state that to collect damages, other than the difference between the value of the property in the condition it was in, and the value it would have been had it been as warranted is the sole measure of damages, unless other elements were contemplated by the parties to the contract. There are no other elements of damages shown by the contract to have been contemplated by the parties hereto, and there was no effort made on behalf of the plaintiff to prove the value of the property under any circumstances, or to bring himself within the statutory provision of breach of warranties of "quality" Section 9976 O.S. 1931, or breach of warranty of "fitness" 9977 O. S. 1931, and the cases construing these sections.

We respectfully submit that the plaintiff has neither by his pleadings or proof established any element of damages against the defendant in any sum.

Respectfully submitted

Saunders & Carpenter

ATTORNEYS FOR DEFENDANT