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HARRY COHEN v. FINK PIANO COMPANY, INC.

No. 9

COURT OF APPEALS OF MARYLAND

160 Md. 440; 153 A. 664; 1931 Md. LEXIS 94

February 19, 1931, Decided

PRIOR HISTORY: [*1]** Appeal from the Baltimore City Court (**ULMAN,** J.).

Action by the Fink Piano Company, Inc., against Harry Cohen. From a judgment for plaintiff, defendant appeals. Affirmed.

The defendant's prayers were as follows:

First.—The court instructs the jury that the burden is upon the plaintiff to establish its case by a fair preponderance of affirmative testimony and if the mind of the jury is in a state of equipoise or even balance, then the verdict of the jury must be for the defendant. (Granted.)

Second.—The court instructs the jury that if they find from the evidence that, at the time the defendant agreed to purchase the 'radio' mentioned in the evidence, the plaintiff represented to the defendant that said radio was a good and perfect instrument and would give satisfaction to the defendant and if they find that the defendant relied on said representations as an inducement of such purchase by the defendant, and further find that thereafter the defendant complained to the plaintiff that said radio was imperfect, and thereupon, if the jury so find, the plaintiff did take back said imperfect radio, if they so find, and replaced it on several occasions with another, if **[***2]** they so find, and if they find that the defendant again complained to the plaintiff about said replaced radio and if the jury find, that then the plaintiff agreed to take back said replaced radio and deliver to the defendant a new radio of the same make and kind, as first delivered to the defendant, but did substitute said radio first delivered to the defendant and taken back by the plaintiff as imperfect, if they so find, and further find that the defendant on trying the same notified the plaintiff that said radio was imperfect and unsatisfactory and demand that the plaintiff take the same way if they so find, then the plaintiff is not entitled to recover and the verdict of the jury must be for the defendant. (Granted.)

Third.—And if the jury find for the defendant under the defendant's second prayer then the defendant is entitled to recover from the plaintiff such sum of money as they shall find the defendant paid to the plaintiff on account of said radio. (Granted.)

Fourth.—The court instructs the jury that if they find from the evidence that at the time the defendant agreed to purchase the radio mentioned in the evidence, the plaintiff represented to the defendant that **[***3]** the said radio was selective, sensitive, free from static and 'barrel' or hollow sound, and if they further find that the defendant relied upon the representations of the plaintiffs, if they so find, and further find that the representations of the plaintiff, if they so find, induced the defendant to purchase said radio, and if they further find that the said radio was not as represented, then the plaintiff is not entitled to recover. (Refused.)

DISPOSITION: Judgment affirmed, with costs to appellee.

HEADNOTES: *Action for Price — Instructions.*

That plaintiff's prayer, which was granted, required the jury to find more than was necessary, involved merely surplusage which in no way prejudiced defendant.

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In an action for the price of a radio, it was proper to reject a prayer of defendant which excluded from the jury's consideration the hypothesis of defendant's acceptance of the radio, of which there was competent testimony.

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COUNSEL: Eldridge Hood Young, with whom were Young, Crothers & Settle on the brief, for the appellant.

Louis J. Sagner and David Ash, submitting on brief, for

the appellee.

JUDGES: The cause was argued before BOND, C. J., PATTISON, URNER, ADKINS, OFFUTT, DIGGES, PARKE, and SLOAN, JJ.

OPINIONBY: ADKINS

OPINION:

[664] [*442]** ADKINS, J., delivered the opinion of the Court.

The appellee sued the appellant for the balance alleged to be due for a radio and certain cartage charges. The suit was brought on the common counts.

According to the testimony on both sides, the understanding was that radios were to be sent on approval. Joseph Fink, an officer **[**665]** of the plaintiff, with whom the defendant **[***4]** dealt, testified that, after a trial of the first radio sent out, which was a Radiola–62, defendant said, "It is the best one I have heard yet, but in order to satisfy me, I want you to send me another Radiola–62 out"; that in about two weeks the defendant returned and said, "That is not as good as the first one, but they tell me the Stromberg–Carlson is a wonderful set"; that, upon witness remarking that this would be the third set, defendant agreed to pay the cartage, whereupon the set was sent out; that later defendant returned, saying he would like to try another make of which he had heard, and that also was sent; that, after some days, defendant came back and asked, "Have you still got that first Radiola–62 you sent out," witness replied in the affirmative, and defendant said, "You send that out, and if it is O. K. I will send you a check by Monday"; that witness made a special price with defendant of $315 plus cartage amounting to $12, and delivered the set; that in about ten days defendant came back and said, "Mr. Fink, that set is fine, it works beautifully, but I want to just try a couple more days"; that witness sent a service man to go over the radio with defendant so **[***5]** that he might be satisfied, and after that defendant came in and promised to send a check by the following Monday. This was not done, but later defendant gave an employee of plaintiff, who was sent to collect, a check for $155; that the first four sets were sent on approval, but, when the first set was finally sent out, it was not on approval, but was delivered after defendant decided to take it.

[*443] The defendant's version was different, but the jury found a verdict for the plaintiff. This appeal is from the judgment on that verdict.

There were four exceptions reserved to rulings on evidence, and one to the rulings on the prayers. We find no prejudicial errors in the rulings on evidence. Nothing was adduced by the questions objected to which could reasonably be supposed to have affected the verdict.

Plaintiff's granted prayer instructed the jury that, if the defendant had ample opportunity to examine the various radios sent to him on approval and finally accepted the last one and paid unconditionally $155 on account, then the verdict must be for the plaintiff.

We find no error. If the prayer required the jury to find more than was necessary, that would be merely surplusage **[***6]** in no way prejudicing the defendant. We find nothing in it that tended to confuse. The case of *Philipsborn v. Fineman, 148 Md. 188, 129 A. 31,* cited by appellant, has no bearing on the facts of this case. There is no question of recoupment here.

The proposition of law in the prayer is correct, as applied to plaintiff's testimony; and no defense set up by the defendant was excluded from the consideration of the jury. The objection raised by appellant that it submitted to the jury a question of law, even if valid, cannot be considered here, as there was no special exception on that ground. Code, art. 5, sec. 10.

Defendant's theory was clearly presented in his three granted prayers. His fourth prayer was properly rejected. It excluded from the consideration of the jury the hypothesis of acceptance by defendant, of which there was competent testimony.

Finding no reversible error in the rulings, the judgment must be affirmed.

Judgment affirmed, with costs to appellee.