

WESTERN CAROLINES TRADING COMPANY, Plaintiff

v.

HIDEYOS ORRUKEM, Defendant

Civil Action No. 236

Trial Division of the High Court

Palau District

March 12, 1963

Action by company against employee for shortages in merchandise at branch store of which employee was manager. The Trial Division of the High Court, Chief Justice E. P. Furber, held that since company failed to carry out promises which would have reduced or prevented losses, and which could have reduced at least one-half of later shortages after company was on notice of previous losses, damages would be apportioned between the parties.

1. Agency—Generally

Rules of common law are applicable in Trust Territory where principal-agent relationship is involved in dispute. (T.T.C., Sec. 22)

2. Agency—Generally

Under rules of common law, employee who is manager of company's branch store in Palau is in legal terms an "agent" and the company a "principal."

3. Agency—Apportionment of Liability

Liability of agent to principal can be avoided, terminated, or reduced by breach of contract by principal, his contributory fault, or his failure to mitigate damages.

4. Agency—Apportionment of Liability

Where damage is caused by agent's failure to perform his contract, but some damage could have been avoided by exercise of reasonable effort on part of principal, damages will be apportioned between them by court.

5. Agency—Apportionment of Liability

Where damage for losses is apportioned between agent and principal, court will separate from total damage that portion which could reasonably have been avoided by principal's doing his part properly.

6. Agency—Apportionment of Liability

If, after discovery of previous shortage at branch store, company re-opens branch and fails to keep its promises to make inventories and hold down credit extended to branch, it is on notice of danger of further shortages.

7. Agency—Apportionment of Liability

Where company is on notice of previous shortage at branch store and danger of further shortage, company could have avoided at least one-half of later shortage by reasonable effort and proper performance of its promises to make inventories and hold down credit extended to branch.

8. Agency—Apportionment of Liability

Where company and manager of its branch store agree that certain percent of shortages at branch will be charged to manager's personal account, effect of agreement is to assign manager the accounts receivable of branch as of date of agreement.

FURBER, *Chief Justice*

OPINION

There is little dispute as to the basic facts involved in this action. The action turns almost entirely on the conclusions to be drawn from those facts.

The plaintiff company hired the defendant Hideyos as manager of its Koror Branch about December 1957 when he was already employed full time by the company as its Export Manager and was expected to continue as such so that it was well known he could not personally supervise the operations of the Koror Branch except outside of normal working hours. His employment as Branch Manager began under an oral agreement, later confirmed in writing, by the terms of which he agreed to be responsible for shortages of the branch and the company agreed to make inspections of the branch and take an inventory of it at least once a month. The purpose of these inspections and inventories was stated orally to be so that there would not be any losses. The terms of the agreement prohibited sales by the branch on credit, but the company's then General Manager told Hideyos that he would probably have to make some sales on credit but to keep these down to a total of \$300.00 at any one time.

Both parties were careless about the performance of their agreement and seem to have been extraordinarily

passive about protecting their interests, each expecting the other to take the initiative. There is no question but what the company soon failed to take inventories monthly. There is some evidence these were taken quarterly, but if so, neither side took any active steps to protect its interests as the result of any of them, except that of February 9, 1959, until the company had decided to close the branch and took possession of the merchandise, cash, and account books there on October 12, 1961, when another inventory was taken. Those two inventories are the only ones of this branch of which the company still has a record. The defendant Hideyos received from the company a "Comparative statement of Inventory Records, All Branches located in Koror" which showed a shortage of \$693.13 at this branch based on an inventory shown as having been taken December 5, 1958, but the President of the Company told him not to worry about that as there might be some mistake about it and they would check it further.

The inventory of February 9, 1959, showed a shortage of over \$2,000.00 and the branch was closed for a few days. (It has now been agreed that the net shortage at the time of that inventory was \$2,381.67.) Hideyos wanted to resign as Branch Manager, but he, and the company's General Manager, and its President finally agreed that the shortage less 15% (which was the discount then allowed employees on their personal purchases) would be charged to Hideyos' personal account, that the company would check the records further and give Hideyos the benefit of any errors found which reduced the shortage, that the value of the goods at the branch would be limited to \$750.00, and that inspections and inventories of the branch would be made regularly in the future to hold down or prevent losses. With this understanding the branch was reopened and Hideyos continued as Manager of it, and also

as full time Export Manager of the company. A substantial part of the shortage at that time was alleged to be represented by accounts receivable, which Hideyos was told to collect and turn in to be credited on his account, but he didn't do so and neither side now has any records showing what these were.

In accordance with a previously established policy of the company, 30% of Hideyos' salary and commissions otherwise due from the company were credited on his personal account, which now included 85% of the shortage of the branch shown by the inventory of February 9, 1959.

The promised inspections and inventories were not made regularly, though they were requested several times by the defendant. Neither side observed the \$750.00 limitation agreed upon as the maximum credit, if it may be called that, to be extended by the company to the branch. When the branch was closed October 12, 1961, there was a net shortage from operations since February 9, 1959, of \$8,265.58 after allowing full credit for all accounts receivable for which the company could locate records.

[1-3] This is a situation governed primarily by the rules of common law under the provisions of Section 22 of the Trust Territory Code. Under the terms of their agreement Hideyos was in legal terms an "agent" and the company a "principal". The basic applicable rule is stated as follows in American Law Institute's Restatement of the Law, Agency 2nd, Sec. 415:—

"The liability of the agent to the principal can be avoided, terminated, or reduced by a breach of contract by the principal, his contributory fault, or his failure to mitigate damages."

See also: 3 Am. Jur. 2nd, Agency, § 333 notes 14 and 15. This is in accordance with a general principle of the law of contracts. Restatement of the Law of Contracts, Sec. 336(1) and Comment (a) on it.

[4, 5] Where as here damage has been caused by the defendant agent's failure to perform his contract, but it clearly appears that some of this damage could have been avoided by the exercise of reasonable effort on the part of the plaintiff principal, the damages have to be apportioned between them by the court (where as in this instance it is hearing the matter without a jury) as best it can by trying to separate from the total damage the part that could reasonably have been avoided by the plaintiff's doing his part properly. 15 Am. Jur., Damages, § 27, especially notes 2 and 3 on p. 423.

[6, 7] No evidence has been presented to show just when the company had actual notice that there was a shortage in the operations of the branch after the reopening following the discovery of the shortage of February 9, 1959, but that shortage plus the company's failure to keep the promise of its General Manager and its President that inspections and inventories would be made regularly in the future and its failure to hold the credit extended to the branch down to \$750.00 as it had undertaken to do, certainly put it on notice that there was danger of further shortage. From the facts disclosed, the court considers the company, by reasonable effort and the proper performance of its agreement, could have avoided at least one half of the later shortage.

Applying the principles discussed above to the facts disclosed in this action the court finds that the defendant was indebted to the plaintiff company as follows at the time of the bringing of this action:—

<i>Item</i>	<i>Explanation</i>	<i>Amount</i>
1.	85% of shortage shown by inventory of February 9, 1959	\$2,024.42
2.	One half of shortage shown by inventory of October 12, 1961	4,132.79

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3.	Total charges for shortages of Koror Branch	\$6,157.21
4.	Credit for overpayment of personal account considered apart from the above shortages	334.72
5.	Balance due	<u>\$5,822.49</u>

[8] The court considers that the effect of the agreement of the parties concerning the re-opening of the Koror Branch in 1959 was to assign to the defendant Hideyos the accounts receivable of the branch as of February 9, 1959. Therefore no deduction is made for these.

JUDGMENT

It is ordered, adjudged, and decreed as follows:—

1. The plaintiff Western Carolines Trading Company is granted judgment against the defendant Hideyos Orrukem for five thousand eight hundred twenty-two dollars forty-nine cents (\$5,822.49) principal and interest from the date of filing of the complaint to the date of this judgment amounting to four hundred thirty-four dollars seventy-one cents (\$434.71), making a total of six thousand two hundred fifty-seven dollars twenty cents (\$6,257.20), plus costs of this action taxable under the first sentence of Section 265 of the Trust Territory Code.

2. If the plaintiff has had any such taxable costs besides the one dollar (\$1.00) fee for filing the complaint and the two dollars fifty cents (\$2.50) trial fee shown by the Clerk's records, it is to file a sworn itemized statement of them within ten (10) days of the entering of this judgment. Otherwise, only the three dollars fifty cents (\$3.50) costs mentioned above will be allowed.