

1975

John P. Jordan; David J. Wagstaff, etc. v. Remco Inc., a Utah Corporation, et al. : Brief of Respondent

Utah Supreme Court

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**In the Supreme Court
of the State of Utah**

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BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

JOHN P. JORDON,

Plaintiff,

vs.

REMCO, INC., a Utah Corporation,
et al.,

Defendants and
Appellants.

DAVID J. WAGSTAFF, etc.,

Third Party Plaintiff
and Respondent

vs.

REMCO, INC., et al.,

Third Party Defendants
and Appellant.

No. 13690

BRIEF OF RESPONDENT

FIFTH DISTRICT COURT FOR IRON COUNTY,

STATE OF UTAH,

THE HONORABLE J. HARLAN BURNS, JUDGE

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FILED

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In the Supreme Court of the State of Utah

JOHN P. JORDON,

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This case actually involves the rights of the parties on a lien foreclosure, based upon a labor and material mans lien on a sub-contract agreement for the dry-wall work on an apartment house in Cedar City, Utah. At an earlier hearing, the court had ordered the lien discharged upon the payment into court of a specific sum determined by the court. While the lien had actually been released by court order, the matter still arises under Title 38, Utah Code Annotated, 1953, as amended.

DISPOSITION IN THE LOWER COURT

The Honorable J. Harlan Burns, District Judge, awarded judgement against the defendant Remco, Incorporated, only, for the sum of \$5,990.14, being \$4,064.94, on the contract, interest in the amount of \$325.20, together with \$1,600.00 attorney fees, and ordered a satisfaction of judgment, when said sums were paid out of the sums posted with

the clerk, and in addition awarded judgment of no cause of action, on the cross-claim and counter-claim of Remco, Incorporated.

RELIEF SOUGHT ON APPEAL

The respondent seeks to have the judgment affirmed.

STATEMENT OF FACTS

The parties entered into a sub-contract agreement which is Plaintiff's exhibit 2, entered in evidence, as is often the case, each party blames the other for the matter not working, however it is undenied that paragraph 5 of the contract, required almost immediate payment of the materials, and about the only basis Wagstaff could enter into the contract was, being able to buy his materials in bulk. Doing this should have been advantageous for both parties. It was admitted that when Mr. Wagstaff moved off the job, these materials were not paid for and that the contract was never current at any time thereafter. The appellant failed to provide the Supreme Court with a complete transcript and the Respondent has provided the Supreme Court with a reporters transcript of the opening statements of counsel and items of this nature. In this short transcript this may be found beginning at page 12, line 14, and continuing to page 12, line 23. The only point that should have been tried after these admissions, was the amount of damages of Wagstaff.

Wagstaff did not at any time refuse to go back onto the job, he took the position at all times that he was obligated to complete the job, that he was ready and willing to do same as soon as the payments were available so that he could pay the people that he was obligated to. There is no question that at all times, from the time Wagstaff put materials on the job, and Remco failed to pay for same in accordance with the contract, up to the time of the trial, there was money due and owing to Wagstaff, and that at any and all times during that period, he was entitled to a lien under the provisions of Title 38, Utah Code Annotated, 1953, as amended, and that he did file such a lien. There is some argument over the amount of the lien, however, at the time of the lien, said lien was not filed in sufficient size, and the payments made thereafter, more than totaled the lien.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY FOUND THE DEFENDANT HAD BREACHED THE CONTRACT.

In the first place Wagstaff is entitled to have the trial court action viewed in the light most favorable to him in view of the decision that has been rendered and this has been upheld by the Supreme Court of the State of Utah, in the case of Buehner Block Co. vs. Glezo's, 6 Utah 2nd, 226, 310 Pacific 2nd, 517, also the case of Beck vs. Jeppsson, 1 Utah 2nd, 127, 262 Pacific 2nd, 760.

There is no argument that Remco failed to pay in accordance with the terms of the contract, in paragraph 5 thereof, also from the nature of the case, it was quite apparent that Remco was in trouble financially in as much as the plaintiff John P. Jordon filed a lien and started a foreclosure on same, and his amended complaint included besides Remco, Incorporated, and Robert Richins, eighteen other defendants, seventeen of which had filed liens. The big end of these liens were actually discharged by agreement, by the payment of the lien costs plus twenty five percent, (25%). At anytime there is money due and owing on a sub-contract for the construction of a building, under the terms of the contract, there is a breach of contract.

While Remco took the attitude that they had reservations about paying, there was actually only one item that came up that in anyway was proper to pay, and that would not have come up had Remco complied with the contract and made the payments. The liens complained of pertaining to Cranmer and Christensen, would never have been filed, had the payments been made. The Internal Revenue Service levied on Remco, for a transaction from outside the contract, which was paid by Remco after the lien was filed although they indicated four months before payment, they had payed same. This is the only item from outside the job that ever entered into the picture. In all probability had Remco paid promptly, this would not have entered into the picture.

POINT II

THE TRIAL COURTS DISMISSAL OF REMCO'S CLAIM FOR FAILURE TO CANCEL LIEN WAS PROPER.

This counterclaim and cross-complaint was brought under the provisions of Utah Code Annotated 38-1-24, providing for \$20.00 a day payment for a failure to cancel lien after notice. There is no question as to the statute involved in this particular transaction, however the only way that this could be brought into effect, would be if the money was tendered, in conformity with the lien. This was not done. The money was never tendered, and there is no proof in the transcript whatsoever of any tender of any item. There is only an offer of payment upon release of the lien, and the offer was couched in a sum satisfactory to Remco, and not satisfactory to Triangle. There was never an actual tender, and even with a proper amount, the statute would not be applicable until there is a tender, or payment. As long as there is a bonafide argument over the amount due, even tender of a lesser amount, would not place the matter under this penalty. This position is upheld in *Brimwood Homes, Inc., vs. Knudsen Builders Supply Co.*, 14 Utah 2nd 419, 385 Pacific 2nd, 982. This was a situation where lien rights were not waived and the court held that they could be collected together with attorney fees and failure to release futures, was not actionable.

This lien was not placed for an exaggerated amount, contrary to the allegations of Remco. At the time of placing the lien, it was actually placed for an amount less than what was coming. When one deducts from it the Internal Revenue Levie, which had not been paid at the time the lien was placed, together with the other items of employees of Triangle, which were later paid direct, amounts in excess of that which Triangle felt proper, and the lien should have been greater than it actually was. There was no time from the filing of the lien until the payment after trial, that money was not owed to Triangle.

POINT III

THE TRIAL COURT DID NOT ERROR IN HOLDING THAT TRIANGLE NEITHER HAD TO FINISH THE DRY WALL WORK OR PAY THE AMOUNT TO HAVE THE WORK FINISHED, OR PAY FOR MATERIALS REQUIRED TO COMPLETE THE JOB.

There is no question that Triangle had sufficient materials on the job to complete same, these materials were taken over by Remco. There is also no question that Remco was told by Triangle, that at anytime the matter was paid, that they would be quite happy to come along and complete the job. They were never advised that Remco was hiring other people and having other people do the work. There is no question that almost all contractors follow a habit of when they think they are going to be able to charge it against the sub-contractor, of paying out without hesitation anything that they happen to think of. The trial court held that only the proper costs of completing the job to Triangle, should be deducted from what they had coming. The amounts that Triangle admitted were proper and would have cost Triangle, had they completed the job, were deducted. The reference in the Appellants Brief, in Young vs. Hansen, 117 Utah 591, 218 Pacific 2nd, 666, is not in point, in as much as this is a contract on sale of property, and nothing to do with a building contract. The same is true on the case of Perkins vs. Spencer, 121 Utah 468, 243 Pacific 2nd, 446, same is not in point in as much as it is a purchase contract on real estate, and is not a building contract and conditions are different. Also those items in the other liens that Triangle felt were proper items, when applied to its contract, were allowed as offsets in the amount determined by the court.

POINT IV

THE COURT DID NOT ERROR IN FINDING THAT THERE WAS NO ESTOPPEL ON THE CONTRACT WHEN TRIANGLE CONTINUED WITH ITS PERFORMANCE AFTER THE BREACH OF THE SPECIAL PROVISIONS OF PARAGRAPH 5, PROVIDING FOR PAYMENT OF MATERIALS.

There is no question that any bonafide contractor tends

to work things out, and had money been coming shortly, that Wagstaff or Triangle, as he was doing business, would not have stood on a breach. There is no question that he put his own money into the transaction for a considerable period of time to the point that he was in trouble with Internal Revenue on other items, that he performed as long as he could on his own finances. However, there was continuing failure to make other payments and continuing breaches.

The Appellant cites Prudential Federal Savings & Loan Association, vs. Hartford Accident & Indemnity Company, 7 Utah 2nd 366, 325 Pacific 2nd 899, as authority, that a breach of an insubstantial nature, which is severable and does not vitally change the transaction, and does not release the other party completely from performing his obligations under contract, but gives rise to right for damages for any loss occasioned thereby should be authority for the Appellants position. This Prudential item, was enforcement of a new contract which was entered into in writing after the breach, and is completely out of point. The new contract covered the matter. Also when one starts talking about insubstantial breaches, the failure to pay a material payment of \$14,580.00, on a \$49,000.00, contract is not insubstantial.

POINT V

THE COURT DID NOT ERROR IN AWARDING ATTORNEY'S FEES.

There is no question of an amount due and owing under the contract, although money had been posted, this was still a lien action, and although the lien had previously been released by court order, upon the posting, the Shupe case upholds the courts action. Percentages set forth by Appellant in his brief, in point 5, do not take into consideration the other amounts paid after the filing of the lien.

Without any question the Shupe case upholds the position of the court, pertaining to attorney fees, and as long as this action is under a lien, even though the money had been posted, the provisions of Title 38-1-18, Utah Code Annotated, apply. In addition to the Shupe case, which is found at 18 Utah 2nd, 134, 15 Pacific 2nd, 246, the case of Brimwood Homes vs. Knudsen Builders Supply Company, applies, this is found as 14 Utah 2nd, 419, 385 Pacific 2nd 982. Actually

this Brimwood case in most instances is very similar to the case at bar and decides most of the points set forth therein, with the exception that in the instant case we do not have the question of any release.

The first part of the first paragraph in the conclusion in the Appellants Brief, is an admission that the trial court was correct in all of its findings.

CONCLUSION

There was no failure to perform on the part of Triangle, and the Appellant has admitted that they did not make the payments as indicated and has admitted that they did not ask or advise Triangle that they were going to complete the job.

Under these conditions, the action of the trial court should be affirmed.

Respectfully Submitted,

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Attorney for Respondent.