1987

Dana Meier v. Hobbs and Sons : Reply Brief

Utah Court of Appeals

Dean H. Becker; attorney for appellant.
Dana Meier; pro se.

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COURT OF APPEALS

STATE OF UTAH

DANA MEIER,	:	
	:	
Plaintiff and Respondent	:	
	:	APPELLANT'S REPLY BRIEF
vs.	:	
	:	
HOBBS AND SONS,	:	
	:	Docketing No. 87-0028
Defendant and Appellant.	:	140

APPELLANT'S REPLY BRIEF

An reply brief to the Respondent's brief on appeal from the Small Claims Court, Salt Lake Department, Fifth Circuit Court, Salt Lake County, State of Utah

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Respondent, pro se

Dana Meier

Counsel for Appellant

Dean H. Becker, attorney

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FACTUAL BACKGROUND AND REPLY TO RESPONDENT'S RECITATION OF THE FACTS

Appellant denies the following assertations of fact made by Respondent:

1. That E.L. Cline Co. was unable to complete the work of installing the sewer lateral.

Response: The Appellant is not E.L. Cline Co., and E.L. Cline Co. is not a party to this action, nor were they called as witnesses in this matter. The ability of E.L. Cline Co. to perform the work on the sewer is not an issue in this matter, and their testimony has not been solicited in this matter.

2. That most, if not all, of the corporate officers of Hobbs and Sons were employed by E.L.Cline Co. in management and supervisory positions.

Response: Only George Hobbs of the Hobbs and Sons (organized after the installation of the sewer lateral) was employed by E.L.Cline Co. in a supervisory position. Hobbs & Sons has no legal, equitable, social or political tie or relationship with E.L. Cline Co.

3. That by mutual agreement of all parties involved, the Appellant completed the work on Whitewood Estates #2.

Response: The work completed by Hobbs and Sons on the subdivision was in completing the business of raising the manholes. This work was performed well after the installation of the sewer lateral by the responsible subcontractor, and did not affect the area surrounding the alleged break in the sewer line.

4. That the subject sewer lateral from the sewer main to the property line of lot 95, Whitewood Estates #2, was damaged by the tooth of a backhoe as the subcontractor for the developer was backfilling the sewer lateral trench.

Response: The Appellant argued at the trial of the matter that the damage to the sewer lateral occurred at a later time after the completion of the original installation. In fact, there is no proof or eyewitness account by either party regarding the occurence of the damage to the sewer lateral, and it is mere speculation by all parties regarding the date of the occurence.

There were no findings by the Court regarding the cause of the break in the sewer line, and the above statement by the Respondent is mere speculation.

5. That the sewer lateral installation project was completed in 1981.

Response: The sewer installation was completed, without question, in 1979 as evidenced by the exhibits to the Appellant's Brief. The entire project may not have been completed until 1981, but for the purposes of the instant case, the project of installing the sewer laterals was completed in 1979.

6. That appellant guaranteed all the work to the Taylorsville-Bennion Improvement District.

Response: The appellant did not guarantee the work to the Improvement District, as the appellant did not perform the work on the premises. The Improvement District did mistakenly send a letter to Hobbs and Sons indicating that Hobbs and Sons was to guarantee the work for a year, but as Hobbs and Sons did

not perform the work, they could not guarantee the work.

7. That the Appellant verbally agreed to pay for damages incurred due to his neglect.

Response: The Appellant denies any such verbal agreement. However, even if the Respondent believed such an assertation was made, any such promise is barred by the Statute of Frauds and by lack of consideration.

8. That George Hobbs II worked on the project and caused the damage.

Response: George Hobbs II neither worked on the project nor was he employed by E.L. Cline Co.

At the conclusion of the hearing in the small claims court, Hobbs and Sons asserts that the small claims judge spoke to the Respondent and requested the Respondent to submit a timetable of events which took place in this matter. Hobbs and Sons was not given the opportunity to reply to the matters presented by the Respondent to the judge, and therefore requests that the Court review the following recitation of facts as understood by Hobbs and Sons:

Following the completion of the installation of the water and sewer lines by E.L. Cline Co. in September of 1979, both a mirror test and an air test were conducted on the the lines, revealing that the sewer lateral was in proper working order. Also indicating that the sewer line was properly functioning was the government inspector, Bud Frye, who submitted his approval of the project.

Sometime after the manholes were raised by Hobbs and Sons in 1981, the sewer lateral was connected to the residence where the Respondent now resides. After this connection was made by Nelson Excavating Co., another test was conducted which indicated that there was no problem with water flowing through the sewer line to the housemain. The system was in proper condition, indicating the soundness of the work performed.

Nelson Excavating Co. also installed a clean-out to the top of the ground, backfilling the trench to the top. According to Hobbs and Sons, it is very likely that after the installation of the clean-out by Nelson Excavating, someone grating around the clean-out during the construction of the residence knocked off the top of the clean-out, resulting in a rock obstruction. Thereafter, someone operating a roto-rooter machine probably pushed the rock obstruction from the base of the clean-out to a location under the sidewalk. A later inspection indeed showed that there were obstructive rocks in the location.

Nelson Excavating was then called to take out the obstruction, and Hobbs and Sons argues that the damage to the sewer lateral occurred when Nelson Excavating performed its excavation of the location, which activity produced the teeth marks in the pipe.

LEGAL ARGUMENT

A. SHOULD THE APPELLANT BE A PARTY TO THIS ACTION?

On page five of the Respondent's brief, the Respondent makes a completely unsupported allegation:

> [On] September 10, 1979, the sewer lateral which extends from the sewer main to the property line of Lot 95, Whitewood Estates #2, was damaged by the tooth of a backhoe as the subcontractor for the developer was backfilling the sewer lateral trench.

If this unsupported allegation is taken as a true assertation, which statement the Appellant does not accept, the critical question then arises as to who was the subcontractor for the developer working on the sewer lateral at the time the damage allegedly occurred? As admitted in the Respondent's brief on page five, E.L. Cline Co., not Hobbs and Sons, was retained by Arnold Development to install the water and sewer lines for Whitewood Estates #2. The inspection form completed by the government inspector on September 10, 1979 identifies E.L. Cline Co. as the subcontractor whose work was being inspected. (See also, Appellant's Exhibits C and D-1 throught D-8). There is also the evidence of payment from Arnold Development to E.L. Cline Co. for services performed, which check is dated September 26, 1979.

The Respondent makes numerous unsupported allegations in his brief, which allegations are mere conjecture when compared with the material in the record. The Respondent further states as apparent support for his claim that:

> [A]t the time Michael Hobbs was hired as foreman for E.L. Cline Co., he was also the vice-president of Hobbs and Sons and also the licensed contractor which allowed Hobbs & Sons to do business in the construction industry."

Even if admitted, the mere fact that Michael Hobbs was hired by E.L. Cline while reputedly an officer for Hobbs and Sons

does not transfer responsibility for the performance of a contract by E.L. Cline Co. to Hobbs and Sons. That E.L. Cline Co. employed persons who also happened to be corporate officers of Hobbs & Sons is a fact which in no way serves to diminish the fact that if E.L. Cline Co. was working on the sewer lateral when the complained of damage allegedly occurred, E.L. Cline Co. continues to be the entity to answer a charge of negligence, not Hobbs and Sons.

Respondent mentions that Hobbs and Sons completed the work on the project pursuant to a mutual agreement between Arnold Development Co., E.L. Cline Co. and Hobbs and Sons. Arnold Development Co. did have an open account which allowed Hobbs and Sons to raise the manholes to final grade. But again, this was a task separate and apart from, and performed subsequent to, the installation of the sewer lateral.

Respondent also argues on page eight of the brief that testimony was entered at the time of the trial that the break in the sewer lateral did occur outside of the property line. Whether the break occurred outside or within the property line is actually not relevant to the case, since the real question is whether the work was under the direction and responsibility of E.L. Cline Co. or Hobbs and Sons. It is established that E.L. Cline Co. was working on the sewer lateral at the time the alleged break occurred, which work and responsibility was not connected in any manner with the work and responsibility of Hobbs and Sons.

The question posed by the Respondent as to why Hobbs and Sons did not contact the Improvement District to "correct the misunderstanding that the Improvement District had concerning the completion of the work and the one-year guarantee." The Appellant responds that Hobbs and Sons never had any responsibility, contractual or otherwise, to install or guarantee the work on the water and sewer lines, and a misdirected letter from the Improvement District certainly does not impose any such obligation.

B. THE STATUTE OF LIMITATIONS IS NOT COMPLIED WITH BY THE RESPONDENT

Respondent questions the validity of the September 10, 1979 inspection form signed by Inspector Bud Frye (Hobbs and Sons Exhibit D-1) to the extent that the form constitutes a "certificate of substantial completion," arguing that the form was not issued by a government agency and does not give an approval of any kind for the work completed. But the fact exists that a governmental inspector did inspect the work performed by E.L. Cline Co. and signed an inspection form and certified that the work was completed. There was no more work to be performed by E.L. Cline Co. in installing the water and sewer lines, and the authorized inspector certified the work was completed to the requirements and satisfaction of the proper authorities.

While the entire subdivision was not finally approved until approximately two years later, the specific work performed by E.L. Cline Co. in installing the sewers was certified as

completed by September 10, 1979, thus giving to E.L. Cline the necessary release for E.L. Cline to receive its payment for the work performed. Thus, there is no question that the Statute of Limitations began running on September 10, 1979.

Respondent also mistakenly suggests that the Statute of Limitations could begin running on November 16, 1985 since the "nature of the defect was such that any reasonable person could not detect the damage to the sewer line until the sewer lateral from the house was installed and operable, November 16, 1985. The Utah Supreme Court has conclusively ruled that Section 78-12-25.5 commmences running "at the completion of construction and not at the time of discovery of negligence." Hooper Water-Improvement v.Reeve (642 P.2d 745, 746, 1982). As the Court states, the legislative intent behind Section 78-12-25.5 is to protect "persons performing or furnishing the design, planning, supervision of construction" from indefinite liability. Id. at 747. Therefore, the time in which the respondent could reasonably have detected the damage to the sewer line is not the determining factor in the running of the seven year Statute of Limitations. Rather, the running of the Statute of Limitations starts with the September 10, 1979 certificate from the governmental inspector.

C. THERE IS NO RELATIONSHIP CREATING A DUTY BETWEEN THE PARTIES

Respondent states on page ten that "there is some question as to what part of the work was completed by E.L. Cline Co. and what part of the work was completed by Appellant." As mentioned

above, Hobbs and Sons provides ample evidence that E.L. Cline Co. was the party performing the construction of the water and sewer lines, and that at a later date, Hobbs and Sons did perform work on the project by simply raising the manholes to street level. But at no time was Hobbs and Sons working on or about or with the sewer lateral which is the subject of this matter.

Respondent points out in his brief that "if the Appellant did not do the actual installation of the water and sewer line, then the Appellant was negligent by guaranteeing the water and sewer lines . . . without verifying if the lines had been installed properly and according to the Salt Lake County specifications." This absurd argument cannot possibly impose liability for the performance of another on Hobbs and Sons, especially since there is in evidence a certificate that indeed the lines were "installed properly and according to the Salt Lake County specifications." The mistaken forwarding of the letters by the Improvement District and others does not change the fact that the construction was performed by E.L. Cline Co.

Respondent relies on the case of Stewart v. Cox, 362 P.2d 345 (Cal. Sup. Ct. 1961), in support of his argument that privity of contract does not need to exist between the subcontractor and the homeowner in order to hold the subcontractor liable to the homeowner for property damage. While this may be a true statement of the law, the question presented in this matter is not whether the subcontractor is liable, but which subcontractor is liable? Is the liable party Hobbs and Sons which only did work on raising manholes, or is the liable party E.L. Cline and Sons

which installed the sewer lateral? In Stewart, the plaintiffs could readily determine the identity of the subcontractor, while in the instant case, the Respondent is unable to establish that any party other party than E.L. Cline Co. installed the sewer lateral and therefore may be, if the other difficulties in this matter are overcome, the responsible party.

SUMMARY

Under all arguments presented by Hobbs and Sons does Hobbs and Sons have the right to set aside the judgment of the small claims court. The Respondent's position is clearly mistaken both regarding the facts of the matter and the application of the law in this case. First, Hobbs and Sons should not be parties to this action, as they performed no services with respect to the construction of the sewer lateral. Second, the Statute of Limitations bars any recovery, regardless of the responsible party. And third, there is absolutely no relationship between Hobbs and Sons and the Respondent creating or implying or supposing any responsibility or duty between the parties.

Therefore, Hobbs and Sons respectfully prays that the Court reject the position of the Small Claims Court and dismiss the above entitled actions.

Dated this 22nd day of May, 1987

DEAN H. BECKER
Attorney for Appellant

CERTIFICATE OF DELIVERY

I hereby certify that on the _____ day of May, 1987, I hand delivered a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to the following:

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_____