

1977

Kirk Nelson dba Nelson Sheet Metal v. Richard Watts dba Richard Watts Construction Company and Leon Carver : Brief of Respondent

Utah Supreme Court

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Lyle W. Hillyard; Attorney for Defendant-Appellant;

Dale M. Dorius; Attorney for Plaintiff-Respondent;

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IN THE SUPREME COURT
OF THE STATE OF UTAH

KIRK NELSON dba NELSON SHEET)
METAL,)

Plaintiff and Respondent,)

vs.)

Case No. ~~14956~~
14596

RICHARD WATTS dba RICHARD WATTS)
CONSTRUCTION COMPANY and LEON)
CARVER,)

Defendants and Appellant.)

BRIEF OF RESPONDENT

Appeal from Judgment of the First Judicial
District Court for Cache County, Utah

Honorable Ronald O. Hyde

Dale M. Dorius
P. O. Box U
29 South Main Street
Brigham City, Utah 84302
Attorney for Plaintiff-
Respondent

Dale W. Gillivard
178 East First North
Logan, Utah 84321
Attorney for Defendants-
appellant

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TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT.	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	2
ARGUMENT	3
POINT I: THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JURY VERDICT FOR RESPONDENT	3
POINT II: THE RESPONDENT SUSTAINED HIS BURDEN OF PROOF IN THE LOWER COURT	6
POINT III: THE LOWER COURT DID NOT ERROR IN OVERTURNING THE VERDICT	6
CONCLUSION.	7

CASES CITED

	Page
<u>Price v. Sinnett</u> , 460 P, 2d 837, 840 (Nev., 1969)	6
<u>Alvarado v. Tucker</u> , 2 U2d 16, 268 P.2d 986 (1954)	6
<u>Burnett v. Reyes</u> , 188 Cal. App. 2d Supp 878, 256 P.2d 91.	6
<u>Lund v. Phillips Petroleum Co.</u> , 351 P. 2d 952 (Utah 1960)	6

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KIRK NELSON dba NELSON SHEET)
METAL,)

Plaintiff and Respondent,)

vs.)

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RICHARD WATTS dba RICHARD WATTS)
CONSTRUCTION COMPANY and LEON)
CARVER,)

Defendants and Appellant.)

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an action to recover on an oral contract for performance of work in construction of a federal building.

DISPOSITION IN LOWER COURT

This case was tried before a jury. Judgment was granted for Plaintiff, here Respondent, in the amount of \$1,678.18 without interest or attorney fees.

RELIEF SOUGHT ON APPEAL

To have the decision of the Lower Court affirmed by this Court on appeal.

STATEMENT OF THE FACTS

The Respondent, Kirk Nelson, dba Nelson Sheet Metal, in the latter part of 1969 and in 1970, did work on a building in Logan, Utah, known as the Logan Armory Building. The Appellant, Richard Watts, was the general contractor on said building. That in the latter part of November or the first part of December, 1969, the Respondent, Kirk Nelson, met with the Appellant, Richard Watts, at the Logan Armory and the Respondent was told by the Appellant to do the sheet metal work on the Logan Armory and Appellant would pay Respondent directly for the work performed. That the Appellant was present during times that the Respondent was doing the sheet metal work on said building. Further, the Respondent had several subsequent conversations with the Appellant regarding the work. Further, the Respondent had several subsequent conversations with the Appellant regarding payment. The Respondent had no agreement with Leon Carver either written or oral, that Leon Carver would be responsible for the bill. That Leon Carver eventually filed bankruptcy but did not list the Respondent herein as a creditor in said bankruptcy.

That a witness, John Henry Bott, was present during the conversation between the Respondent and Appellant in which the Appellant, Mr. Watts stated that he would pay the

billing of time and materials. Mr. Leon Carver testified that he was not paid by the Appellant for any work done by the Respondent herein. Mr. Leon Carver further testified that he was not part of the agreement made between Appellant and Respondent for the sheet metal work.

ARGUMENT

I. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JURY VERDICT FOR RESPONDENT.

The lower Court instructed the Jury in its original instruction as follows: "If you find that there was a promise to answer for the debt, default or miscarriage of another, you must also find that the agreement to do so was in writing signed by the party to be charged, unless you also find that the creditor parted with value or entered into an obligation under circumstances such that would make the party making the promise the principal debtor and the person in whose behalf it was made his surety.

In other words, if Richard Watts promised to pay Kirk Nelson only if Leon Carver did not, then the promise must be in writing. The promise does not have to be in writing if Richard Watts made an original promise to pay Kirk Nelson directly."

The Lower Court found that the Appellant, Richard Watts made an original promise to pay Respondent, Kirk

Nelson directly. That the Respondent, Kirk Nelson negotiated directly with the Appellant Richard Watts as is indicated in the Transcript of Proceedings and following testimony on page 6, lines 11 through 30:

Q. Could you tell us who was present at the time this conversation took place?

A. There was Mr. Watts, Mr. Carver, Mr. Bott and myself.

Q. And could you tell us, if anything, what was said during this conversation if you recall?

A. Yes, The conversation was that I did not bid the job. I didn't give Mr. Carver a bid on the job, and that I knew for a fact that Mr. Carver was in financial trouble and that I could not do a job for him.

Q. Okay. And could you tell us what the conversation was between you and Mr. Watts and Mr. Carver at this time?

A. Yes. I told Mr. Watts that if I did the work I would have to be doing it for him, that I didn't feel that Mr. Carver could pay for it.

Q. And could you tell us, if anything, what Mr. Watts said to this?

A. Mr. Watts told me that he was paying all the bills and to get busy and get the job done and he would see that it was paid for.

Further, the Appellant, Richard Watts, agreed to pay Kirk Nelson directly, and therefore, there is no need for a writing as this was not a promise to pay in behalf of a third person. That the Appellant's promise to pay Respondent, Kirk Nelson, directly is further indicated in the Transcript of Proceedings by witness John Henry Bott, on page 18, lines 11 through 21 as follows:

A. Well, from what I recall, it was talked about-- Mr. Nelson stated that he would't work for Mr. Carver because he was having financial problems, and he told Mr. Watts that if it was to be done that he'd have to do it under his jurisdiction, and from what I understood--

MR. HILLYARD: I'm going to object to what he understood. He can relate the conversation.

Q. Okay. Just relate what Mr. Watts said.

A. Mr. Watts stated that he would pay the billing of the time and material, and that's the only thing that I can remember of it, sir.

Further, witness Leon Carver, testified in the Transcript of Proceedings, page 21, Lines 16 through 18 as follows:

Q. And did you have any agreement with Mr. Nelson that you would pay him for that work?

A. No.

II. THE RESPONDENT SUSTAINED HIS BURDEN OF PROOF IN THE LOWER COURT.

That there was a direct, oral contract between the Appellant, Richard Watts and Respondent, Kirk Nelson. Further, in Instruction No. 1, the Court indicated that the promise does not have to be in writing if the Appellant, Richard Watts made an original promise to pay Kirk Nelson directly. "It is the duty of the Jury to be governed by the instructions and when given, they become the law of the case whether right or wrong." Price v. Sinnett, 460 P, 2d 837, 840 (Nev., 1969).

In Alvarado v. Tucker, 2 U. 2d 16,268 P.2d 986 (1954) and Burnett v. Reyes, 118 Cal, App. 2d Supp. 878, 256 P.2d 91 93. A "preponderance" means "The greater weight of the evidence, or as sometimes stated, such degree of proof that the greater probability of the truth lies herein." Alvarado, supra, at 988. However, these cases were clearly followed by the jury in lieu of the testimony as outlined in point I.

III. THE LOWER COURT DID NOT ERROR IN OVERTURNING THE VERDICT.

After a careful reading of the evidence presented, it is apparent that the jury verdict is supported by the facts. There is substantial evidence to support Appellant's and Respondent's oral contract. The jury has not conjectured or speculated, but had substantial evidence upon which to base

There are no grounds for overturning a jury verdict such as this. It is plainly apparent that the jury has not abused its prerogatives by refusing to accept Appellant's story. The case of Lund v. Phillips Petroleum Co., 351 P. 2d 92, 50 Wash. 2d 100, and cases cited therein would not apply herein. In this case, there is uncontroverted credible evidence in which the jury applied the proven facts. Clearly the jury did not ignore substantial evidence which was detrimental to the Appellant and the verdict should not be overturned.

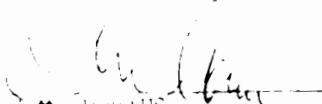
CONCLUSION

The preponderance of evidence shows an agreement was made between Appellant Richard Watts, and Respondent, Kirk Nelson in _____, 1967, which indicates a direct promise to Appellant, Richard Watts to pay Kirk Nelson _____ and this promise need not be in writing.

Therefore, judgment of all parties involved and for those entitled thereto, the judgment of the lower court should be affirmed with interest and awarded his costs.

WITNESSE MY HAND AND SEAL OF OFFICE _____ Day of _____,

1967.


EARL M. TOKIUS
Attorney for Respondent
P.O. BOX 11
100 North Main Street
Salt Lake City, Utah 84302

CERTIFICATE OF MAILING

I hereby certify that I mailed eleven (11) copies of the foregoing brief of Respondent to the Utah Supreme Court of Utah, two (2) copies to the Defendants-Appellant's attorney, LYLE W. HILLYARD, at 175 East First North, Logan, Utah 84321, this 17th day of , 1976.
