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Cove View Excavating and Construction Co. v. D. Thomas Flynn and D. Thomas Flynn Construction : Brief of Respondent

Utah Court of Appeals

Marcus Taylor; Labrum and Taylor; Attorney for Respondent.
John Burton Anderson; Anderson and Dunn; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

COVE VIEW EXCAVATING AND CONSTRUCTION CO.,

Plaintiff and Respondent,

vs.

D. THOMAS FLYNN and D. THOMAS FLYNN CONSTRUCTION,

Defendants and Appellants.

Case No. 870180-CA

#146

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT IN THE TENTH CIRCUIT COURT OF SEVIER COUNTY, THE HONORABLE DON V. TIBBS, ACTING CIRCUIT JUDGE.

Marcus Taylor
LABRUM & TAYLOR
108 North Main Street
P.O. Box 724
Richfield, Utah 84701

Attorney for Respondent

John Burton Anderson
ANDERSON & DUNN
4516 South 700 East,
Suite 330
Salt Lake City, Utah

Attorney for Appellants

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108 North Main Street
P.O. Box 724
Richfield, Utah 84701

Attorney for Respondent

John Burton Anderson
ANDERSON & DUNN
4516 South 700 East,
Suite 330
Salt Lake City, Utah

Attorney for Appellants

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MARCUS TAYLOR (3203)
LABRUM & TAYLOR
108 NORTH MAIN STREET
P.O. BOX 724
RICHFIELD, UTAH 84701

ATTORNEY FOR RESPONDENT

IN THE UTAH COURT OF APPEALS

COVE VIEW EXCAVATING AND CONSTRUCTION CO., Plaintiff and Respondent, vs. D. THOMAS FLYNN and D. THOMAS FLYNN CONSTRUCTION, Defendants and Appellants.	*	BRIEF OF RESPONDENT Case No. 870180-CA

JURISDICTION

Jurisdiction is conferred upon this Court pursuant to the provisions of Utah Code Annotated Section 78-2a-3(2)(c). The Defendants appeal a judgment rendered by the Tenth Circuit Court of Sevier County, State of Utah, the Honorable Don V. Tibbs, acting Circuit Court Judge, sitting without a jury.

ISSUES PRESENTED FOR REVIEW

1. Whether the trial Court's findings are clearly erroneous and should be set aside.

2. Whether, as a matter of law, the Plaintiff's negotiation of an instrument with a restrictive endorsement

constitutes an accord and satisfaction.

STATEMENT OF THE CASE

In 1984 the Utah Department of Transportation let a construction project for the improvement of a bridge on a public road in Sevier County. Defendants were the successful bidder for the project. During the course of construction, Defendants employed Plaintiff to furnish backhoe and pump services. Plaintiff did so at the agreed rate of $125.00 per hour for backhoe services, and $35.00 per day for pump services. The backhoe and pump services were necessitated because of unexpected excess water that season, a situation which Defendants could not meet because of the absence of similiar equipment.

Plaintiff furnished 41.5 hours of backhoe services to Defendants on May 7 through May 15, 1984, and furnished the pump for the use by Defendants through June 14, 1984. Plaintiff billed Defendants on May 25, 1984, as was its custom, and billed Defendants again at the end of June, 1984. Plaintiff's May billing to Defendants totalled $5,922.50. After receiving Plaintiff's first billing, but before receiving his second billing, Defendants tendered a check to Plaintiff for $5,000.00, the check having written thereon a restrictive endorsement that read "payment in full for all labor and materials through June 26, 1984." Upon receiving the $5,000.00

check, Plaintiff sought the advice of counsel, and thereafter cashed the check. Defendants did not respond to Plaintiff's second billing, and this suit resulted.

At trial Defendants claimed that Plaintiff did not furnish 41.5 hours of backhoe services, and that the pump was not in fact used through June 14, 1984. The Court specifically found in favor of Plaintiff on those two points. The Court also found that there was no dispute between the parties at or before the time that Plaintiff received the $5,000.00 check, and that the transaction between the parties was in the nature of an ongoing account. The Court observed that there was no meeting of the minds to effect an accord and satisfaction and viewed the restrictive endorsement as having no import.

SUMMARY OF ARGUMENT

Plaintiff presented substantial evidence to support its claim. Defendants presented conflicting evidence which the Court chose not to believe. No error exists where the trier of fact reaches its conclusions and findings upon conflicting evidence if there is some substantial evidence to support those findings.

Department of Transportation records were properly authenticated and received into evidence. The inability of the project inspector to recall some aspects of the construction project did not render those records inadmissable. His

imperfect memory would go only to the weight of his testimony.

Plaintiff's retention and negotiation of a check containing a restrictive endorsement did not constitute an accord and satisfaction because:

(a) No dispute existed between the parties at the time.

(b) The situation presented an ongoing account.

(c) Ther was no meeting of the minds so as to effect a compromise.

ARGUMENT

POINT I

SUBSTANTIAL EVIDENCE WAS RECEIVED TO SUPPORT THE FINDINGS OF THE COURT

Defendants attack the findings of the Court contending that they are clearly erroneous. The problem with that approach is simply that they wanted the trier of fact to believe their testimony and discount that of Plaintiff whereas the Court did the opposite. Plaintiff presented competent and substantial evidence to support its claim which the Court chose to believe. Specifically, Defendants cite the following findings in arguing that the Court was in error:

(a) That Plaintiff furnished 41.5 hours of backhoe services to Defendants.

(b) That no dispute regarding hours billed to Defendants existed when Defendants delivered a $5,000.00 check

to Plaintiff containing a restrictive endorsement.

(c) That the $5,000.00 check represented a progress payment.

However, each of the foregoing finds ample support in the evidence. Mr. Grundy, Plaintiff's president and the backhoe operator, testified to the following:

(a) That the agreed hourly rate for the backhoe was $125.00 (T.9).

(b) That excess water problems necessitated use of the backhoe for a number of days more than was anticipated by Defendants (T.9,10).

(c) The excess water also indicated use of a larger pump than Defendants owned and they rented such from Plaintiff at the rate of $35.00 per day (T.11).

(d) Plaintiff customarily bills the last weekend of each month and consistent with that policy billed Defendants on May 25, midway through the project (T.11).

(e) 41.5 hours of backhoe work was performed (Exhibit #13), (T.12).

(f) Defendants continued to use Plaintiff's pump after the May 25 billing (T.12).

(g) The pump was used through June 14. (T.13).

(h) Plaintiff's final billing to Defendants was sent June 27 (Exhibit #14), (T.14).

(i) Plaintiff received the $5,000.00 check on

June 30 which was after sending the second billing (T.16).

(j) No dispute arose before the $5,000.00 check was received by Plaintiff (T.30,31,33,34).

(k) When Plaintiff received the $5,000.00 it was considered as simply payment on account but also as an improper effort by Defendants to avoid full payment (T.36,16).

The construction inspector for the Utah Department of Transportation testified that he supervised and inspected the job in question on a daily basis (T.40), that high water created the need for greater excavating (T.41,42), and that Defendants had insufficient equipment (T.43). He confirmed the hourly rates for the backhoe and pump (T.44), and identified construction records which corroborated the testimony of Mr. Grundy (T.49, 50).

Mr. Flynn's testimony was at odds with Plaintiff's evidence but his credibility became questionable when he claimed that the Department of Transportation records were false (T.85,86,89). The picture becomes clearly focused when he admits that the high water problems caused a one month time delay in completing the project (T.92).

When the trial Court is called upon to resolve issues of fact based upon evidence which is in conflict, and makes findings as to those facts which he finds to be convincing, then those findings will not be disturbed on appeal as long as there is some substantial evidence to support them. Bountiful

v. Swift, Utah, 535 P.2d 1236 (1975); McCarren v. Merrill, Utah, 389 P.2d 732, (1964); Derry v. Farr, Utah, 645 P.2d 649 (1982); Hal Taylor Associates v. Unionamerica, Inc., Utah, 657 P.2d 743 (1982).

Defendants next claim that the Department of Transportation records were improperly admitted, but confuse their argument by questioning the competency of the state inspector to testify (page 7, Brief of Appellant).

As to the admissibility of the records (exhibit #15), the evidence confirmed that they were part of the Department of Transportation project file and that Mr. Munroe, as project inspector was the author of them (T.47,48,49). The documents were also accompanied by a certification of an official custodian. Clearly they were properly received under the public records exception to the hearsay rule. Rule 803 (8), Utah Rules of Evidence.

POINT II

THE COURT CORRECTLY APPLIED THE LAW TO THE CASE

Defendants' final argument is that the Court failed to follow the law as expressed in the case of Marton Remodeling v. Jensen, Utah, 706 P.2d 607 (1985). If the facts of the case were as Defendants want them to be, then Marton Remodeling would possibly have application. However, the facts as found by the Court were at odds with the theory of Defendants. Marton Remodeling simply states the general common law rule

that where there exists a single unliquidated claim following completion of the job or project in question, or a bona fide dispute over the total amount due, then the parties to the transaction may resolve their differences by the making of a compromise offer by the debtor and the acceptance of that offer by the creditor. Defendants claim that Marton Remodeling is applicable to the instant matter because there existed a dispute concerning the total amount due, and that there existed a single and unified claim. However, the Court found to the contrary on those two points. The ruling of the Court specifically states that no dispute existed between the parties at the time that Defendants tendered the $5,000.00 check, and that the transaction between them was an ongoing account. In that regard, the Court stated:

> The Court makes a specific finding that -- the Court finds that there was no accord and satisfaction in this matter, that accord and satisfaction is based on the meeting of the minds of the parties that they have agreed that that will be in settlement of the claim. The Court finds under the circumstance of this case, no accord and satisfaction was ever reached. The Court finds that just sending a check marked "Paid in full", without there even being an indicated dispute by either party, is not fair, not proper, and the Court finds that this was an ongoing account, and the pump was on the premises, and being used for the -- at the time, and the Court finds that there's no accord and satisfaction. And the restrictive endorsement had no effect, and

> the Court finds it unfair even sending it, a check like that in payment of services. The Court finds that the records of the State Department of Transportation indicate that there was the equipment on the job, being used. The Court finds that the parties agreed to pay, or the Defedant agreed to pay $125.00 an hour and the hour rate is billed by the Plaintiff, and as, which appears to the Court by this DOT records, that the equipment was used on the premises for that period of time. T. 118, 119.

Paragraph number seven of the Findings of Fact, Conclusions of Law and Judgment is also instructive. It reads, in part, as follows:

> However, Plaintiff did not intend said account to be satisfied upon receipt of $5,000.00, consulted counsel with reference thereto, and negotiated said check without intending same to satisfy the account, and accordingly, no accord and satisfaction occurred between the parties with reference to said check.

In making the foregoing observations, the Court undoubtedly had in mind the specific sequence of events which occurred between the parties. Plaintiff sent its intitial billing to Defendants on May 25, 1984, and that billing reflected equipment services through that date. When Defendants sent their $5,000.00 check to Plaintiff, they did not have Plaintiff's second billing which requested payment for equipment services through June 14, 1984. The $5,000.00 check was sent to Plaintiff on June 26, 1984, and Plaintiff's second billing to Defendants was sent on June 27, 1984. It is likely those two items crossed one another in the mail. Defendants

had use of Plaintiff's large pump at least through June 14, 1984, and thus, when the $5,000.00 check was sent to Plaintiff, it was done so with clear knowledge on the part of Defendants that the first billing did not represent charges for the entire project. That is the very type of ongoing account, or progress payment situation, that the Court found to exist, and the type which removes the situation from application of an accord and satisfaction under circumstances similiar to those in Martin Remodeling.

The situation in the instant case is very much like that of Allen-Howe Specialties v. U.S. Const., Inc., Utah, 611 P.2d 705 (1980). In Allen-Howe, the Court stated, at page 710:

> An accord and satisfaction is a method of discharging a contract. The payment of a part of a debt (in situations such as the one at hand), does not discharge it, even though the debtor exacts a promise that it will do so. The debtor, by making part payment is doing nothing more than he is legally obligated to do; and, therefore, he gives the creditor no consideration for the promise that part payment will be accepted to discharge the entire debt.

The restrictive endorsement on the back of the $5,000.00 check reads "payment in full for all labor and materials to 6-26-84." As mentioned, Defendants did not have Plaintiff's billing for services between May 25, 1984 and June 14, 1984 when that endorsement was placed on the check, although Defendants were well aware that they had had the use of Plaintiff's pump during that period of time. In any event,

such an endorsement, will not, as a matter of law, trigger an accord and satisfaction. In Hintze v. Seaich, Utah, 437 P.2d 202 (1968), the Supreme Court of Utah had occasion to construe a restrictive endorsement which accompanied a check containing language that "this is the balance of your account in full". The holding in Hintze was similiar to the holding of the trial Court in the instant matter. At page 208 of the Hintze opinion, we find the following:

> In the claim of Mr. Williams, it is clear that there was no meeting of the minds that the acceptance of the check was to be in complete settlement of the dispute. The voucher attached to the check did not state that the money was to be returned if it was not so accepted. We think the trial Court was correct in holding that there was not an accord and satisfaction in connection with Mr. Williams.

The Court in Hintze also relied upon the general statement of the law as found in 1 AmJur2d, Accord and Satisfaction, Section 15, wherein it states:

> The mere fact that the creditor receives a check or other remittance from his debtor for less than the amount which the creditor claims, with knowledge that the debtor claims to be indebted to him only in the amount paid, does not result in an accord and satisfaction.

The trial Court was correct in its ruling. There was no dispute between the parties when Plaintiff received the $5,000.00 check, nor could there have been, since Defendants did not even know the total hours of equipment use which Plaintiff was claiming at that time because Defendants had not

received Plaintiff's final billing. Without a dispute, and with an ongoing account, the type of accord and satisfaction which Defendants desire could not have occurred.

CONCLUSION

The judgment of the trial Court should be affirmed with costs on appeal to Respondent.

DATED this 9th day of October, 1987.

LABRUM & TAYLOR

By _____
MARCUS TAYLOR

MAILING CERTIFICATE

I herewith and hereby certify that four copies of the foregoing BRIEF OF RESPONDENT was placed in the United States mail at Richfield, Utah, with first-class postage thereon fully prepaid, this 9th day of October, 1987, addressed as follows:

John Burton Anderson, Esq.
ANDERSON & DUNN
4516 South 700 East, Suite 330
Salt Lake City, Utah 84107

_____
MARCUS TAYLOR