1977

Western Ready Mix Concrete Company, A Corporation v. Richard Rodriguez And Jeane C. Lecheminant v. Edgar Kelley : Brief of Appellant

Utah Supreme Court

E.H. Frankhauser; Attorney for Plaintiff-Respondent

IN THE SUPREME COURT

OF THE STATE OF UTAH

WESTERN READY MIX CONCRETE COMPANY, a corporation,

Plaintiff-Respondent.

vs.

RICHARD RODRIGUEZ and JEANE C. LeCHEMINANT,

Defendants,

EDGAR KELLEY,

Defendant-Appellant.

BRIEF

Appeal from the Judgment
Salt Lake
Honorable

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Cotro-Manes, Warr, Fankhauser
& Beasley
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430 Judge Building
Salt Lake City, Utah 84111

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IN THE SUPREME COURT

OF THE STATE OF UTAH

WESTERN READY MIX CONCRETE COMPANY, a corporation,	)	
Plaintiff-Respondent.	)	
vs.	)	Case No. 14811
RICHARD RODRIGUEZ and JEANE C. LeCHEMINANT,	)	
Defendants,	)	
EDGAR KELLEY,	)	
Defendant-Appellant.	)	

BRIEF OF APPELLANT

STATEMENT OF NATURE OF CASE

This is an action by respondent, Western Ready Mix Concrete Company, for the failure of appellant to post a bond as required by Section 14-2-1 of the Utah Code Annotated, 1953, and for the foreclosure of a notice of lien placed on appellant's property by the respondent for materials used in the improvement of appellant's real property.

DISPOSITION IN THE LOWER COURT

The case was tried in the District Court of Salt Lake County before the Honorable Stewart M. Hanson, Sr., who found in favor of the respondent and awarded judgment in the sum of $559.21, together with attorney fees of $300.00, costs of court of $33.10, and a decree foreclosing respondent's lien on appellant's real property.

Appellant filed an objection to the Findings of Fact and Conclusions of Law on the grounds that they were not in accordance with the facts and evidence adduced at trial and were unclear and ambiguous. Appellant further moved the court for a new trial on the grounds that the evidence did not justify the verdict and there was an error in law (R. 42-44) which the court denied. (R. 47-48)

RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of the judgment entered by the trial court, costs of court and attorney fees.

STATEMENT OF FACTS

Appellant, on or about the 17th day of December, 1974, entered into a contract with Richard J. Rodriguez (referred to the contractor) to improve appellant's real property, located at 941 South 4th East, Salt Lake City, Utah. (R. 82, P.E. 1) Appellant paid Rodriguez in full for the improvements with three checks, dated December 24, 1974, for $1,000.00; January 9, 1975, for $1,150.00 and February 19, 1975, for $1,258.38. (R. 109, D.E. 4) Rodriguez ordered the cement that was used on appellant's property from the respondent and received it on six different occasions, being January 9, 1975; January 10, 1975; February 6, 1975; February 10, 1975; February 10, 1975 and February 12, 1975. (R. 86, P.E. 2) Respondent claims that Rodriguez failed to pay for the cement he received. Rodriguez' testimony is that on or about the 9th or 10th of January, 1975, he paid to the respondent $600.00 in cash and stated this was to pay for the cement in the Kelley job. (R. 112-113) Respondents testified they did receive $600.00 from Rodriguez and they receipted it in their books on the 2nd day of February, 1975, but that nothing was stated as to what account it was to apply to. (R. 107)

Respondent further stated they did have a number of accounts with Rodriguez (R. 96) and according to company policy, they applied the $600.00 to the oldest account without demanding of Rodriguez a designation of what account the money should be applied to. (R. 108)

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN THE LAW THAT APPLIES IN THIS CASE.

At the close of respondent's case, appellant made a motion to dismiss based upon Section 58-23-14.5 of the Utah Code Annotated, 1953. (R. 38) The motion was taken under advisement by the court and after the appellant presented his evidence, the motion was denied.

Section 58-23-14.5 UCA, 1953 provides:

> Any owner or contractor in making any payment to a materialman, contractor, or subcontractor with whom he has a running account, or with whom he has more than one contract, or to whom he is otherwise indebted, shall designate the contract under which the payment is made or the items of account to which it is to be applied.
>
> When a payment for materials or labor is made to a subcontractor, or materialman, such subcontractor or materialman shall demand of the person making such payment a designation of the account and the items of account to which such payment is to apply. In any case where a lien is claimed for materials furnished or labor performed by a subcontractor or materialman, it shall be a defense to such claim that a payment made, by the owner to the contractor for such materials has been so designated, and paid over to such subcontractor or materialman, and that when such payment was received by such subcontractor or materialman he did not demand a designation of the account and of the items of account to which such payment was to be applied.

The case before the court falls squarely within this statute. It appears that the legislature intended to eliminate situations where a property owner pays a contractor for improving

his real property and the contractor pays the materialman with whom he has a number of accounts but fails to designate what account the payment shall be applied to, and the materialman goes ahead on his own and merely applies it to the oldest account, or the account that would suit the materialman the best. The legislature saw fit to place the responsibility directly on the shoulders of the materialmen to demand of the contractor exactly what account the payment should be applied to.

I refer the court to the testimony given by Mr. Murl C. Woodbury, who is the Credit Manager with respondent company. (R. 88, 107, 108)

Q Mr. Woodbury, I believe you stated you have other accounts with Mr. Rodriguez, is that correct?

A That is correct. . . .

Q O.K. In other words, this January, February, March of 1975, what amounts do you show that Mr. Rodriguez paid on any account which you have with him?

A May I look it up, Sir?

Q Sure.

A The last cash receipt I show here, Sir, is on the 2nd day of February, 1975.

Q And what does that show?

A $600.00.

Q And what account has that been credited to?

A To the eldest invoices. . . .

Q Do you have a personal knowledge of why it was charged to the oldest account?

A Yes.

Q Will you so state?

A Yes. Unless the invoice so states the amount automatically is thereby applied to the oldest invoices.

Q Is that your policy?

A Yes, sir.

Q And did you make any personal investigation or contact Mr. Rodriguez and ask him as to what account that should be applied to?

A Usually Mr. Rodriguez brought in the amounts.

Q No. I asked you did you make any contact with Mr. Rodriguez and ask him what account this should be applied to?

A No, sir.

I also call the court's attention to the testimony of Mr. Rodriguez in a conversation he had with Mr. Van Roosendaal, the President of the respondent company, who refused to deliver the cement until he was paid. Mr. Rodriguez stated that he paid him $600.00 and told him it was to apply on the Kelley job. (R. 112-113)

Mr. Woodbury states that this payment was receipted into their record on February 2, 1975, and Mr. Rodriguez states that to the best of his recollection the money was paid on January 9 or 10, 1975. (R. 12)

The court in its Memorandum Decision seemed to put some weight on this conflict in testimony wherein it stated: (R. 32-33)

> . . . the testimony of Rodriguez offered by the defendants in connection with their defense does not jibe with the exhibits introduced and received by the court, particularly those of the plaintiff, which records were kept in the usual course of business.

The court refused to explain just exactly what records they were referring to when the appellant objected to the

Conclusions of Law and asked that they be clarified. (R. 47-48) It appears that the court is referring to the cement delivery orders for some are dated after the respondent received the $600.00. It is interesting to note that Mr. Woodbury testified that Rodriguez was a bad account and that he had been on C.O.D. Yet he did not explain why the cement deliveries of January 9 and 10 were not marked either C.O.D. or charge. (R. 99, 101) This seems to indicate that the amount had been paid and Mr. Rodriguez had a credit with the company, but later the $600.00 was applied to the oldest account and Mr. Rodriguez was then put on charge. Mr. Woodbury's only explanation when asked why they were not C.O.D. stated that this was a management decision. (R. 102, P.E. 2)

Appellant submits that this is exactly the type of situation that the legislature could foresee happening and the only thing that is material is that the contractor paid $600.00 to the materialman which he admits receiving and further admits that he failed to demand of the contractor a designation of the account to which the payment should have been applied.

All other matters as to conflicting testimony of dates and exhibits are immaterial in view of the statute.

POINT II

APPELLANT IS ENTITLED TO REASONABLE ATTORNEY FEES.

The respondent brought this action under Title 38, Chapter I of the Utah Code Annotated to foreclose a mechanics lien and claims it is entitled to attorney fees pursuant to Section 38-1-18, UCA, 1953, which provides:

> In any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorney's fee, to be fixed by the court, which shall

be taxed as costs in the action.

The court will note that this section provides that the successful party shall be entitled to recover reasonable attorney fees. I refer the court to the case of Palombi vs. D & C Builders, 22 Utah 2d 297, 452 P.2d 325. In that case a lien had been filed and the opposing party who was successful in defense of the foreclosure action was claiming an attorney fee and the court stated:

> It will be noted the statute confers the benefit not only on the one who asserts the lien but upon the "successful party"; in this instance the plaintiff, who defended against the lien.

In view of the fact that respondent was awarded attorney fees by the trial court, the appellant, if successful in defense of the action, should also be awarded attorney fees.

CONCLUSION

In view of the record of this case and the statute and authority cited herein, it should be determined by the court that the contractor paid the respondent the amount to cover the Kelley job and the respondent failed to demand a designation of which account the payment should have been applied which is in violation of the protection given the property owner by the legislature.

The court also in reversing the decision of the trial court should award attorney fees to the appellant, being the successful party on the appeal.

Respectfully submitted,

Homer F. Wilkinson
Attorney for defendant-appellant

CERTIFICATE OF DELIVERY

I hereby certify that I personally delivered two copies of the foregoing to E. H. Fankhauser, Attorney for Plaintiff-Respondent, at 430 Judge Building, Salt Lake City, Utah 84111, this day of February, 1977.