

1977

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

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

WESTERN READY MIX CONCRETE
COMPANY, a corporation,

Plaintiff-Respondent,

vs

RICHARD RODRIGUEZ, JEANE C.
LeCHEMINANT and

Defendants,

EDGAR KELLEY,

Defendant-Appellant.

Case No. 14811

BRIEF OF RESPONDENT

Appeal From The Judgment Of The
Third Judicial District Court For
Salt Lake County, State of Utah
Honorable Stewart M. Hanson, Sr., Judge

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Case No. 14811

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This is an action to foreclose a materialman's lien and for failure to post a bond as required by Title 14-2-1 et. seq. of the Utah Code Annotated.

DISPOSITION IN THE LOWER COURT

The case was tried to the Court without a jury. The District Court, Judge Stewart M. Hanson, Sr., found the issues in favor of plaintiff-respondent and awarded judgment for the sum of \$558.21, attorney's fees of \$300.00, costs of Court of \$33.10 and a decree of foreclosure against the appellant.

RELIEF SOUGHT ON APPEAL

Affirmance of the judgment and decree of the Lower Court.

IDENTIFICATION OF THE PARTIES AND EXPLANATION OF ABBREVIATIONS

Western Ready Mix Concrete Company, the plaintiff and respondent, will hereinafter be referred to as the plaintiff, or where appropriate, by name. Mr. Edgar Kelley, the defendant and appellant, will hereinafter be referred to as the defendant, or where appropriate, by his name. Mr. Rodriguez, the contractor, will hereinafter be referred to as contractor, or where appropriate, by his name.

"R" refers to a page reference in the record of the case. Exhibits are noted by number with "P" referring to plaintiff and "D" referring to defendant.

STATEMENT OF FACTS

Plaintiff, Western Ready Mix, brought an action to foreclose a materialman's lien and under the provisions of Title 14-2-1 of the Utah Code Annotated against the defendant, Edgar Kelley. Mr. Kelley, as the owner of the real property located at 941 South Fourth East, Salt Lake City, Utah, entered into a written contract for the construction of improvements on said property with Richard J. Rodriguez on or about December 17, 1974. (R 80-82, Exhibit 1-P). Kelley paid Rodriguez a total of \$3,408.00 for labor and materials under the contract with Rodriguez. (R 109, Exhibit 4-D). Rodriguez purchased from plaintiff cement which was used in construction of improvements on the real property owned by Mr. Kelley. (R 85-86, Exhibit 2-P). A bond was not posted by either Mr. Kelley or Mr.

Rodriguez. (R 83, 85). Rodriguez did not pay plaintiff for the cement and plaintiff filed a notice of lien against the property of Mr. Kelley for the unpaid concrete. (R 95, Exhibit 3-P). Mr. Kelley made no payments to Western Ready Mix. (R 83). When Mr. Kelley made payments to Mr. Rodriguez, he did not designate the items of account to which the payment was to be applied. (R 109-110). Mr. Rodriguez claimed he had purchased cement prior to the deliveries of January 9, 1975, and he was on a C.O.D. basis. (R 111). That he paid \$600.00 to Mr. Van Roosendaal of plaintiff corporation on or before January 9th or 10th, 1975, or maybe before that. (R 111-112). Plaintiff's Exhibit 2-P showed Mr. Rodriguez was not on a C.O.D. basis, but a charge basis on January 10, 1975. The claimed payment by Mr. Rodriguez was shown to have been made on February 2, 1975. (R 107). There was no payment to Mr. Rodriguez by Mr. Kelley on or about February 1, 1975 and the last payment was February 19, 1975. (R 109-110, Exhibit 4-D). Mr. Rodriguez owed plaintiff the sum of \$2,247.21 for concrete purchased on account for other jobs as well as the Kelley job, prior to, during and after the Kelley job. (R 89,115).

Plaintiff takes issue with the statement of defendant in his brief at page 6 that Mr. Woodbury did not explain why the cement delivered of January 9th and 10th were not marked either C.O.D. or charge. Mr. Woodbury stated that the fact some of the invoices were not marked charge was due to the mechanical fault of the dispatcher. (R 105).

ARGUMENT

POINT I

THE DECISION OF THE LOWER COURT AS THE TRIER OF
FACT WAS CORRECT IN LAW AND FACT

The main thrust of defendant's appeal is that the Trial Court rejected defendant's contention that Section 58-23-14.5 of the Utah Code Annotated 1953 applied to the facts and evidence of this case. The cited section provides:

"Any owner or contractor in making any payment to a materialman, contractor or sub-contractor 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 sub-contractor, or materialman, such sub-contractor 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 sub-contractor 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 sub-contractor or materialman, and that when such payment was received by such sub-contractor or materialman he did not demand a designation of the account and of the items of account to which such payment was applied." (Emphasis Added).

The defendant, Mr. Kelley, made no payments to Western Ready Mix. (R 83). At the time Mr. Kelley made payments to Mr. Rodriguez, the contractor, he did not designate the items of account to which it was to be applied, and that at no time when he made payments to Mr. Rodriguez did he designate for what the payments were made, whether it was for materials or labor, as required by the provisions

of the above statute. (R 109-110). Whether or not there has been a designation by the contractor, Mr. Rodriguez, was questionable in the mind of the Court, as evidenced by the Court's memorandum decision, the findings of fact and conclusions of law. (R 32-33, 38-41). The Lower Court, in its memorandum decision, found and concluded:

"2. That defendant's motion to dismiss, which was again renewed at the conclusion of defendant's defense, should be denied upon the grounds and for the reasons that the Court is of the opinion that the section above referred to does not relate to the situation now before the Court, and furthermore that 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 are kept in the usual course of business."

It is clear that the Lower Court found that the testimony of Mr. Rodriguez as to the claimed designated payment to the plaintiff on the Kelley job was questionable in light of the other evidence presented. The Lower Court, as the trier of fact, has the opportunity to observe the demeanor of the witnesses during the time that they testify, and as to whether or not the testimony given by the witness is sufficient to maintain the burden of proof required by law to sustain a defense or proposition of the party asserting the same.

In this case, the defendant had the burden of producing evidence which would prove the defense asserted, and to persuade the trier of fact that his evidence is more credible or entitled to the greater weight. In the case of Koesling v. Basamaklis, 539 P.2d 1043, this Court stated:

"A proponent of a proposition has the burden of producing evidence which proves or tends to prove the proposition asserted and to persuade the trier of fact that his evidence is more credible or entitled to the greater weight."

"Where proponent of a proposition has the burden of persuading the trier of fact by a preponderance of the evidence, he carries that burden through out the trial and, having adduced sufficient evidence to show existence of the proposition, and having thus met his burden of production, he nevertheless suffers the risk or nonpersuasion or disbelief." (Emphasis Added).

Conceding for the sake of argument only that defendant produced evidence which tended to prove the defense asserted, it is clear from the record that defendant failed in his burden of persuasion where considerable conflict existed in the evidence presented. Where the Lower Court, as the trier of fact, was in a much better position to observe the demeanor of the witnesses and their testimonies, and determine the weight to be given to the evidence presented, this Court is under duty to assume that the Trial Judge believed those aspects of the evidence which support his findings. Cornia v. Cornia, 546 P.2d 890. It is well established in our law, that on appeal, evidence and all inferences which can reasonably be drawn therefrom, must be viewed in light favorable to findings made and conclusions drawn by the Trial Court. Cutler v. Bowen, 543 P.2d 1349; Wagstaff v. Remco, Inc., 540 P.2d 931; Tates, Inc. v. Little America Refinery Company, 535 P.2d 1228.

Defendant had not only the burden of proof as to the defense claimed, but the burden of persuasion. It is clear from the memorandum decision of the Court and the findings of the Court

that defendant failed in this burden. The testimony of the case, and the evidence presented, clearly support the Trial Court in its determination that Section 58-23-14.5 is not applicable in this case under the evidence presented, and the decision of the Lower Court must be affirmed.

POINT II

PLAINTIFF WAS ENTITLED TO JUDGMENT AGAINST DEFENDANT
ON ITS CLAIM UNDER SECTION 14-2-2 U.C.A. 1953

Assuming, for the sake of argument only, that the Lower Court had found that Section 58-23-14.5 applied to this case under the facts and evidence presented, and was a defense to the lien action of plaintiff, plaintiff would have been entitled to a judgment against defendant on its claim under Section 14-2-2 Utah Code Annotated 1953. Section 14-2-2 provides:

"Any person subject to the provisions of this chapter, who shall fail to obtain such good and sufficient bond, or to exhibit the same, as herein required, shall be personally liable to all persons who have furnished materials or performed labor under the contract for the reasonable value of such materials furnished or labor performed, ***." (Emphasis Added).

Mr. Kelley was asked specifically whether or not he had requested a bond be posted by Mr. Rodriguez of any type. The testimony of Mr. Kelley was as follows:

"(R 83). Q When you commenced the construction of these improvements did you request a bond be posted by Mr. Rodriguez of any type?

A I discussed this with Richard at the time and he said that, "If you require a bond it will cost you more money." And I was anxious to save the money. Again I will just have to plead ignorance as far as this is concerned, which I know

is no excuse apparently.

Q Did you post a bond, or did Mr. Rodriguez post a bond?

A No.

Q Neither one, is that correct?

A No."

The testimony of Mr. Rodriguez as to the posting of a bond was as follows:

"(R 85). Q I take it you did not post a performance bond in connection with this contract?

A No, I didn't."

Mr. Rodriguez also testified that the concrete purchased by him was used in the improvements on Mr. Kelley's property. (R 86, Exhibit 2-P). Mr. Rodriguez also testified that the amount of concrete that was used on the Kelley job was approximately 30 or 40 yards, and was for an amount in excess of \$800.00. (R 85).

A reading of Section 58-23-14.5 clearly indicates that it is not applicable to a claim under Section 14-2-2. In the case of Roberts Investment Company v. Gibbons & Reed Concrete Products Company, 22 U.2d 105, 449 P.2d 116, this Court held that the materialman was entitled to recover for materials furnished to the contractor and used in constructing improvements on the property of the owner, even though the owner had obtained release of claims from the materialman at the time he paid bills for materials used by him, and the Court determined that the notice of lien sought to be foreclosed in the action was deficient and no claim would lie therefore. Thus, had the Lower Court found in favor of defendant on his motion to dismiss based upon the defense raised, it would not have precluded plaintiff from recovering judgment against

defendant Kelley on its claim under Section 14-2-2 U.C.A. 1953, in that no bond was posted by either the defendant or the contractor as required by law. There would not have been an award of attorney's fees had the Court based its judgment upon this portion of plaintiff's claim.

POINT III

AWARD OF ATTORNEY'S FEES TO DEFENDANT WOULD NOT BE PROPER UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE

Defendant claims that he is entitled to an award of attorney's fees should he be successful on this appeal and cites his authority therefore Section 38-1-18 U.C.A 1953, and the case of Palombi v. D & C Builders, 22 U.2d 297, 452 P.2d 325.

At the time of trial, defendant failed to present any testimony to the Court as to what would be a reasonable attorney's fee should the Court find that defendant was the successful party under this action. It has been the law in the State of Utah for a considerable time that the award of a reasonable attorney's fee is a question of fact to be determined by the Lower Court upon evidence presented. In the case of Hatch v. Sugarhouse Finance, 20 U.2d 156, 434 P.2d 758, this Court stated:

"Issues as to quantity and reasonable value of legal services rendered by attorneys to defendant were presented, precluding summary judgment for attorneys seeking to recover for services rendered ***."

In the case of Wallace v. Build, Inc., 16 U.2d 401, 402 P.2d 699, the Court stated:

"Question as to what is reasonable attorney's fees in

contested matter is not necessarily controlled by any set formula, and what is reasonable depends on number of factors, including amount in controversy, extent of services rendered and other factors which Trial Court is in advantaged position to judge."

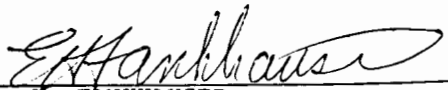
Thus, it can be seen that the claim for attorney's fees on the part of defendant, should defendant be successful on this appeal, would not be proper under the present status and circumstances of this case.

CONCLUSION

The testimony and evidence presented in this case clearly supports and sustains the Lower Court in its findings and conclusions of law as set forth in its memorandum decision. The Lower Court, as the trier of fact, properly concluded that Section 58-23-14.5 of the Utah Code Annotated did not apply to the facts and circumstances of this case, and the judgment rendered was proper. The decision of the Lower Court should be affirmed.

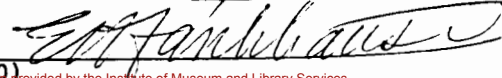
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I personally delivered two (2) copies of the foregoing Brief to HOMER F. WILKINSON, ESQUIRE, 1000 Continental Bank Building, Salt Lake City, Utah, on this 24 day of March, 1977.


(10)