

2001

Harold K. Beecher v. Salt Lake City Corporation : Petition for Rehearing

Utah Supreme Court

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DEC 6 1975

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

IN THE SUPREME COURT OF THE STATE OF UTAH

HAROLD K. BEECHER AND
ASSOCIATES,

Plaintiff-Appellant,

vs.

SALT LAKE CITY CORP. AND
SALT LAKE COUNTY,

Defendants-Respondents.

Case No.

13610

APPELLANT'S PETITION FOR REHEARING AND BRIEF OF AUTHORITIES

Appeal from Summary Judgment of Dismissal by
District Court of Salt Lake County, Utah
Honorable D. Frank Wilkins, *Judge*

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DEC 8 1975

**IN THE SUPREME COURT
OF THE
STATE OF UTAH**

HAROLD K. BEECHER AND
ASSOCIATES,

Plaintiff-Appellant,

vs.

SALT LAKE CITY CORP. and
SALT LAKE COUNTY,

Defendants-Respondents.

Case No.
13610

APPELLANT'S PETITION FOR REHEARING

Comes now Harold K. Beecher and Associates, Plaintiff-Appellant herein, and moves the Court for rehearing of the above entitled case by reason of error by the Supreme Court in misconstruing or overlooking material facts, basing the decision on incorrect principals of law, overlooking applicable decisions and misapplication of law to the facts and status of the case, all of which materially affected the resulting decision of the Court. The following is a brief statement of the points wherein the Supreme Court is believed to have erred in it's decision: (see brief for additional details and explanations)

POINT I

THE COURT ERRED IN CONCLUDING THAT PLAINTIFF'S CONTRACTURAL CLAIM WAS A CLAIM IN "QUANTUM MERUIT" AND IN CONCLUDING THAT THE WRITTEN CONTRACT WAS "NEVER CONSUMMATED."

POINT II

THE COURT ERRED IN ATTEMPTING TO REWRITE THE CONTRACT FOR THE PARTIES

POINT III

THE COURT ERRONEOUSLY BELIEVED THAT THE CASE HAD BEEN TRIED ON IT'S MERITS AND APPLIED RULE THAT JUDGMENT WOULD NOT BE REVERSED ". . . UNLESS ALL REASONABLE MINDS COMPEL SUCH A FINDING . . .," WHEREAS RULE THAT COURT SHOULD SURVEY EVIDENCE AND ALL REASONABLE INFERENCES FAIRLY TO BE DRAWN THEREFROM IN THE LIGHT MOST FAVORABLE TO APPELLANT SHOULD HAVE BEEN APPLIED, SINCE APPEAL IS FROM ADVERSE SUMMARY JUDGMENT

POINT IV

TARDINESS OF COUNSEL IN FILING REPLY BRIEF SHOULD NOT AFFECT DECISION ON THE MERITS

POINT V

APPELLANT IS CONSTITUTIONALLY ENTITLED
TO A WRITTEN DECISION STATING THE REA-
SONS FOR THAT DECISION

POINT VI

THE COURT ERRED IN CONCLUDING THAT
PLAINTIFF'S CLAIM WAS STALE

WHEREFORE, Appellant prays for rehearing of
this matter on the merits and upon the grounds stated
in Appellant's brief and reply brief, and for reversal of
the summary judgment and for an order remaining
the case for trial on the merits.

Respectfully submitted,

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**IN THE SUPREME COURT
OF THE
STATE OF UTAH**

HAROLD K. BEECHER AND
ASSOCIATES,

Plaintiff-Appellant,

vs.

SALT LAKE CITY CORP. and
SALT LAKE COUNTY,

Defendants-Respondents.

Case No.
13610

APPELLANT'S BRIEF AND AUTHORITIES IN
SUPPORT OF MOTION FOR REHEARING

STATEMENT OF THE CASE

Suit on written contract for additional architectural fees for extra expenses for services performed. See also statements of the case contained in Plaintiff's original and reply briefs.

DISPOSITION IN LOWER COURT

Judge Wilkins granted summary judgment of dismissal just before he resigned as a District Judge, some ten months after partial pre-trial hearing.

RELIEF SOUGHT ON APPEAL

Order reversing summary judgment of dismissal and remanding the case for trial on the merits.

STATEMENT OF FACTS

Plaintiff incorporates by reference the statement of facts contained in the original and reply briefs filed herein.

It appears that the Supreme Court misunderstood the nature of Plaintiff's claims, apparently believing that the claim for extra services were based upon "quantum meruit" of "valebant" (apparently misspelled since no such word can be located in the dictionary). Plaintiff's claim is based upon the express terms of a written contract (Reply brief Point I, P. 4-9; R. 27 & 36).

It also appears that the Supreme Court felt that "... a three-quarter million dollar . . ." architectural fee was too high and that Beecher was not entitled to be paid any additional fees (although that issue had not been tried on the merits and the question of the reasonableness of that fee was not passed upon by the lower court).

It further appears that the court believed that Plaintiff's claim was stale ("... bit of rigor mortis . . ."), however the long period of time involved in the design

and construction of the facility creates a misleading impression. The claim was not in fact stale as is illustrated by the following important dates:

March, 1960 — contract signed employing architect

June, 1963 — construction commenced

January, 1969 — claims filed by Plaintiff with Salt Lake City and Salt Lake County (R. 3)

April 22, 1970 — defendant's letter terminating service of Plaintiff (R. 71)

July, 1970 — contractor completes construction work

July, 1970 — Plaintiff's claims denied by Salt Lake City and Salt Lake County (R. 76 & 77)

April, 1971 — this lawsuit filed (R. 1)

It is obvious from the foregoing dates that the length of time involved in the design and construction of the facility ($10\frac{1}{4}$ years), and the time (over $1\frac{1}{2}$ years) consumed by Defendants in deciding whether or not to pay the claims or to arbitrate the dispute as requested by Plaintiff (R. 72 - 77) consumed the bulk of the time. The actual lawsuit was filed in less than 9 months after the Defendants denied Plaintiffs claims and less than 1 year after formal termination of Plaintiff's services. Surely commencement of a lawsuit within 9 months after negotiations broke down and the cause of action accrued does not justify dismissal of the lawsuit without a trial on the merits, particularly where

substantial issues of fact remain for trial which if resolved in favor of Plaintiff would entitle Plaintiff to win. (See P. 15 - 18 of Plaintiff's original brief and P. 12-14 of reply brief).

ARGUMENT

POINT I

THE COURT ERRED IN CONCLUDING THAT PLAINTIFF'S CONTRACTURAL CLAIM HAS A CLAIM IN "QUANTUM MERUIT" AND IN CONCLUDING THAT THE WRITTEN CONTRACT WAS "NEVER CONSUMMAED."

Plaintiff's lawsuit seeks payment of expense of extra architectural services furnished at the request of Defendants, which are claimed pursuant to a written contract (R. 27 & 36), which contract expressly provides for payment to Plaintiff for extra services or expenses caused by changes ordered by the owner. Plaintiff's claim (R. 60-69) asks for reimbursement for expenses actually incurred by Plaintiff in performing those extra services and is not based upon "quantum Meruit" as assumed by the Court. The Court also erroneously assumed that the contract had not been "consumated." The contracts between the parties were all in writing (R. 27, 36 & 45) and were executed by all parties. The parties performed under those contracts over a period of years and those contracts were all fully performed and concluded except payment by Defendants to Plaintiff for extra expenses and services.

See Plaintiff's original and reply briefs for discussion of the reasons why the Court erred in granting

summary judgment of dismissal, particularly pages 13-15 of original brief and pages 4-9 & 14 of reply brief, (concerning Plaintiff's contractual right to be paid extra compensation for the extra work done.) Issues of fact remain for trial on the question of whether under the facts alleged, plaintiff is entitled to extra compensation for the extra work, which disputed facts, and all inferences favorable to Plaintiff drawn therefrom, should for purposes of this appeal be considered in the manner most favorable to appellant, and which disputed fact issues preclude summary judgment. *DAV v. Hendrixson*, 9 U.(2d) 152, 340 P. 2d 416; *Hatch v. Surgarhouse Finance Co.*, 20 U.(2d) 156, 434 P.2d 758; *Thompson v. Ford Motor Co.*, 16 U.(2d) 30, 395 P.2d 62; *Bullock v. Deseret Truck Center, Inc.*, 11 U.(2d) 1, 354 P.2d 559.

The Supreme Court appears to have weighed the evidence in affirming the dismissal, rather than to construe conflicting claims in the light most favorable to Plaintiff against whom summary judgment had been entered, as required by law. See *singleton v. Alexander*, 19 U.(2d) 292, 431 P.2d 126. Because of the court's basic mistake of construing the facts under rules applicable to cases that have been tried on the merits, rather than applying the correct rules applicable to summary judgment cases, the Court should grant a rehearing and should reconsider the arguments set forth in the original and reply briefs filed herein by Plaintiff.

POINT II

THE COURT ERRED IN ATTEMPTING TO RE-
WRITE THE CONTRACT FOR THE PARTIES

The majority opinion of the Supreme Court recites the amount of fee already paid to the architect, (\$609,000.00 +) the amount of extra fees claimed (\$130,000.00 +) (a total of less than \$740,000.00 if the claims were allowed, on a construction project of about \$11,750,000.00) (R. 99), concludes (erroneously) that the claim asserted by Plaintiff would bring the total architectural fee to nearly one million dollars, then indicates that the Plaintiff appears to be claiming a perpetual pension. The question of the reasonableness of the fee is not an issue in the case. The Court is not in a position to determine the reasonableness of the architectural fee, particularly without permitting the parties to present evidence concerning the reasonableness.

The parties negotiated the contracts, put them in writing, had them approved by their respective boards, and caused them to be executed by duly authorized officers. (R. 27, 34, 36 & 45). No claim has been made by Defendants that they are not bound by those contracts. The function of the Court is to construe those contracts according to the intention of the parties as expressed within the four corners of those contracts. *Nagle v. Club Fontainebleau*, 17 U(2d) 125, 45 P.2d 346; *Gates v. Daines*, 3 U.(2d) 95, 279 P.2d 458. The Court is required to construe the contract made by the parties rather than to

make a contract for the parties. *East Mill Creek Water Co. v. Salt Lake City*, 108 U. 315, 159 P.2d 863.

How the parties fare under a contract is not the concern of the courts, and in the absence of some unconscionability, a contract should be enforced according to the meaning of its terms as intended by the parties insofar as that can be ascertained. *Holley v. Federal-American Partners*, et al., 29 U.(2d) 212, 507 P.2d 381. It should be of no concern to the Supreme Court whether or not the court believes that the architectural fees are excessive and the decision of this court should not be affected by whether or not the court believes that Salt Lake City and Salt Lake County made a good or bad contract with Plaintiff. *Wingets, Inc. v. Bitters*, 28 U.(2d) 231, 500 P.2d 1007.

POINT III

THE COURT ERRONEOUSLY BELIEVED THAT THE CASE HAD BEEN TRIED ON IT'S MERITS AND APPLIED RULE THAT JUDGMENT WOULD NOT BE REVERSED "... UNLESS ALL REASONABLE MINDS COMPEL SUCH A FINDING ...," WHEREAS RULE THAT COURT SHOULD SURVEY EVIDENCE AND ALL REASONABLE INFERENCES FAIRLY TO BE DRAWN THEREFROM IN THE LIGHT MOST FAVORABLE TO APPELLANT SHOULD BE APPLIED, SINCE APPEAL IS FROM ADVERSE SUMMARY JUDGMENT.

The concurring opinion affirms dismissal by the trial court based upon the erroneous belief that the case had been tried and accordingly that the evidence should

be construed in support of the judgment and should not be reversed unless reasonable minds could not compel the finding of the trial court. We agree that this would be the proper rule had the case been tried and if the appeal were from a judgment entered after that trial. No trial has been held. Summary judgment dismissing the case was entered after partial pre-trial (R. 249). All disputed issues of fact should, for purposes of this appeal, be resolved in the manner most favorable to Plaintiff. *DAV v. Hendrixson*, 9 U.(2d) 152, 340 P.2d 416; *Thompson v. Ford Motor Co.*, 16 U. (2d) 30, 395 P.2d 62.

Issues of fact remain for trial which if resolved in favor of Plaintiff would entitle Plaintiff to win, thereby precluding summary judgment. See P. 15-18 of Plaintiff's original brief and P. 12-14 of Plaintiff's reply brief filed herein.

POINT IV

TARDINESS OF COUNSEL IN FILING REPLY BRIEF SHOULD NOT AFFECT DECISION ON THE MERITS.

In the last paragraph of the majority opinion of the court counsel for Plaintiff is chastized for late filing of the reply brief. That criticism is probably justified, however counsel assumes that the decision was not affected thereby. *McKean v. Mountain View Memorial Estates, Inc.*, 17 U. (2d) 323, 411 P.2d 129.

POINT V

APPELLANT IS CONSTITUTIONALLY ENTITLED
TO A DECISION STATING REASONS FOR THAT
DECISION

The majority opinion of the Supreme Court fails to consider the points raised by Plaintiff in the original or reply brief, or the points raised by Defendants in their brief, except to the extent that it alludes to the contract never really being "consummated" (see discussion on page 4-5 above), and indicates that Plaintiff's claim is stale ("bit of rigor mortis" — see discussion on page 2-3 and 10-11). The opinion concludes that "No salutary purpose would be served here in relating the pros and cons, . . ." of the positions of the parties.

Rule 76(a), URCP, reads in part as follows:

" . . . Every decision of the court, together *with the reasons therefor concisely stated*, shall be given in writing . . ." (emphasis added)

Article VIII, Section 25, of the Constitution of the State of Utah reads in part as follows:

"When a judgment . . . is . . . affirmed by the Supreme Court, *the reasons therefor shall be stated concisely in writing*, signed by the judges dissenting therefrom, may give the reasons of his dissent in writing over his signature."

This case is a matter of great importance and concern to the Plaintiff and involves a substantial sum of money believed to be justly owed to Plaintiff by Defen-

dants. Plaintiff believes that a careful consideration of the points raised in it's briefs will compel an order reversing the summary judgment and remanding the case for trial on the merits. Plaintiff's reply brief fully responds to the matters raised by Defendants in their brief and clearly shows that issues of fact remain for trial which if resolved in favor of Plaintiff would entitle Plaintiff to judgment against Defendants, thereby precluding summary judgment. *Dupler v. Yeates*, 10 U. (2d) 251, 351 P.2d 624.

Plaintiff is constitutionally entitled to a decision of the Court stating the reasons for the decision, and the issues of law raised by the appeal are matters which are ripe for determination by this court as precedent for later similar disputes. A more detailed decision which considers the various legal issues raised by the parties appears to be appropriate and justifies rehearing of this matter.

POINT VI

THE COURT ERRED IN CONCLUDING THAT PLAINTIFF'S CLAIM WAS STALE

The majority opinion of the Court indicates that Plaintiff's claim is stale ("... bit of rigor mortis ..."). The court was misled by the long period of time consumed in designing and constructing the facility after the original contract with the Plaintiff was entered into (10 $\frac{1}{4}$ years), and by the time consumed by Defendants

in considering the claims of Plaintiff and finally deciding not to pay those claims (1½ years). (See detail of dates on pages 2-4 above).

Plaintiff commenced the lawsuit less than 1 year after it's services were formally terminated by Defendants (R. 71) and less than 9 months after Plaintiff's claim was formally denied by Defendants (R. 76 & 77). Plaintiff's claim was not in fact stale and the lawsuit was commenced on a timely basis. That error of fact requires rehearing of this case on the merits.

CONCLUSION

To justify rehearing or modification of a decision of the Supreme Court a strong case must be made that the court has seriously erred, and that the error materially affects the result. *Cummings v. Nielson*, 42 U. 157, 129 P. 619. Matters justifying rehearing or modification of a decision include situations where the court has (a) misconstrued or overlook some material fact, (b) has overlooked some statute or decision, (c) has based the decision on some wrong principal of law, (d) has misapplied or overlooked something which materially affects the result, (e) has failed to correctly state the law, etc. *Beaver County v. Home Indemnity Co.* 88 U. 1, 56, 52 P.2d 435. *Cummings v. Nielson*, supra. The Court seriously erred in a manner which materially affected the result in this case.

The court erroneously concluded or construed each

of the following material facts in arriving at it's decision, each of which if accurately considered would compel reversing of the summary judgment and remanding of the case for trial on the merits:

1. The Court construed Plaintiff's claim as a claim in "quantum Meruit," whereas Plaintiff's claim is based upon a written contract and seeks reimbursement for expenses actually incurred and itemized.

2. The Court concluded that the contract between the parties was "never consummated," whereas the contracts between the parties were in writing, signed by the parties, and were fully performed by the parties, except payment by Defendants to Plaintiff for extra services and expenses. (See Point I above.)

3. The Court apparently concluded that the architect had been paid enough and that it's claim for additional compensation was excessive and unreasonable, whereas that issue was not raised by the Defendant, was not the basis of the decision in the lower court and no evidence has been presented concerning that issue. If reasonableness or architectural is to be litigated then the pleadings should be amended to raise that issue and issues of fact as to the reasonableness of the fee will remain for trial, which disputed issues precluded the trial court granting summary judgment or affirming of that summary judgment by this court. (See Point II above.)

4. The concurring opinion obviously concluded that the case had been tried and applied the rule applicable

to cases that have been tried, that the decision of the trial court should be affirmed unless reasonable minds could not conclude that the judgment of the lower court was correct. The case was dismissed by the lower court by summary judgment and accordingly the Supreme Court should have applied the summary judgment rules which requires that all disputed facts and inferences therefrom be resolved in favor of Plaintiff for purposes of the appeal. If the proper rule of construction is applied the case must be remanded for trial to resolve the disputes of fact. (See Point III above.)

5. The Court erred in concluding that Plaintiff's claim was stale (bit of rigormortis). See discussion on page 3 & 10 above for dates involved in transactions between the parties and timeliness of filing of lawsuit. The lawsuit was filed less than one year after Defendants terminated Plaintiff's services (R. 71) and less than 9 months after Plaintiff's claims were denied by the Defendants. The claims were filed on a timely basis and should be tried on the merits. (See discussion on page 10 above.)

6. The court failed to consider the fact that Defendants had acknowledged liability to Plaintiff on a part of Plaintiff's claim (see page 6 of Plaintiff's original brief); that Plaintiff is contractually entitled to be paid for extra services and expenses under the terms of the written contract (see page 13-15 of original brief and page 4-9 of reply brief); or to consider the six disputed

issues of fact detailed on pages 15-18 of original brief (items A thru F), each of which require a trial on the merits and would entitle Plaintiff to win if resolved in favor of Plaintiff.

Respectfully submitted,

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