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R. J. Penman v. The Eimco Corporation : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

R. J. PENMAN,
Plaintiff and Appellant,

— vs. —

THE EIMCO CORPORATION,
a corporation,
Defendant and Respondent.

Appellant's Brief

Appeal from the District Court of the
Third Judicial District, in and for Salt Lake County.
The Honorable Clarence E. Baker, Judge.

FILED E. LEROY SHIELDS,
Attorney for Plaintiff.

MAR 31 1948

CLERK, SUPREME COURT, UTAH

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STATEMENT OF THE CASE

The plaintiff and appellant above brought this action in the City Court of Salt Lake City, Salt Lake County, State of Utah, to recover from the defendant and respondent the sum of \$808.45, together with interest from and since February 15, 1944, and plaintiff's costs, said sum alleged in the complaint to be due the plaintiff from the defendant for certain work performed by the plaintiff for the defendant at the Tooele Ordnance Depot in Tooele County, State of Utah. It is

alleged that the plaintiff was employed by the defendant to go to the Tooele Ordnance Depot to cut, load and haul in certain arch steel trusses that had been used as ceiling joists for ammunition igloos. The object of cutting the trusses at Tooele was so that they could get a larger freight load on the car so that the freight rate would be held down to a minimum and that in cutting the trusses into pieces it was necessary that plaintiff employ certain men with acetylene torches and that the cost of the cutting of the trusses was a total of \$1563.50, and that there was owing on another account the sum of \$84.55, which was admitted, making a total due of \$1658.05 upon which account there had been paid the plaintiff the sum of \$849.60, and that there was a balance due of \$808.45, together with interest at the legal rate from and since the same became due. To the complaint the defendant and respondent filed its answer admitting the allegations of paragraph 1 of the complaint and alleging that the defendant became indebted to the plaintiff in the sum of \$2,204.37 for the preparation and transportation of steel scrap from the Tooele Ordnance Depot to Salt Lake City, Utah, and denies the remaining allegations, and in further answer alleges that they advanced to the plaintiff in connection with the service \$2,519.42 and denies that the defendant is indebted in any sum to the plaintiff, and then allege a counter-claim wherein they allege that the defendant employed the plaintiff to transport certain steel from the Tooele Ordnance Plant to the Salt Lake City plant of the defendant at the agreed price of \$2.00 per ton, and that he entered upon said employment and earned

upon said contract the sum of \$1669.82, and admit that thereafter the contract was modified in that the defendant agreed to pay the defendant a reasonable value for preparation of certain channel iron, a part of said scrap material, and that the plaintiff prepared the same, and that the reasonable value of the preparation was the sum of \$450.00, plus a sales commission of \$84.55. That they then plead that pursuant to the contract the defendant advanced to the plaintiff the sum of \$2,519.42, and that the same was \$315.10 more than the sum earned by the plaintiff under the contract and then alleged that the plaintiff abandoned the contract and failed to finish the preparation and hauling of said scrap material. They then pray that the plaintiff take nothing by his complaint and that the defendant have judgment against the plaintiff for \$315.10.

STATEMENT OF FACT

The plaintiff appeals from the judgment of the court denying the plaintiff recovery upon his said complaint and granting the defendant judgment upon his counter-claim in the sum of \$45.30. The facts in the case are as follows:

The plaintiff who had been in times past employed by the defendant to do certain work for them was employed to haul from the Tooele Ordnance Depot to Salt Lake City to the defendant's place of business certain steel igloo arches at \$2.00 per ton. The freight upon these shipments on the railroad was 65c per ton based

upon a load of sixty thousand pounds. The plaintiff after shipping a few car loads found that he could only load fifteen tons on a car or thirty thousand pounds of weight. However, he was charged for the full capacity of the car and instead of paying freight on the amount loaded in the car was required to pay freight on double the amount loaded, or where the freight rate was 65c per ton for a full car load, it increased to \$1.30 per ton for the amount the plaintiff could load in a car. After the trusses reached the place of business of the defendant in Salt Lake City they were cut up into pieces with acetylene torches. This being a fact and being known by the plaintiff, he approached the man in charge for the defendant and requested that he be permitted to do the cutting of the trusses at the Tooele Ordnance Depot before they were loaded and in order that he could get a full load on a railroad car. This privilege was granted to the plaintiff by the defendant. However, no price was fixed at the time of the granting of the privilege to be paid for the cutting. The agreement to cut the igloos at the Tooele Ordnance Depot was a separate contract between plaintiff and defendant and had nothing to do with and did not interfere with the \$2.00 per ton price for transporting it from the Tooele Ordnance Depot to the defendant's place of business at Salt Lake City, but was a separate contract for doing the cutting. After this arrangement was made, the plaintiff went back to the Tooele Ordnance Depot with several acetylene torch operators, together with the torches and cut up the igloo arches into pieces, it requiring eight cuts to each arch, and during the cutting

process the defendant advanced to the plaintiff the sum of \$849.60 for oxygen, employees' wages, etc. The amount charged for cutting at the Tooele Ordnance Depot was as follows:

Acetylene torch operators, \$3.00 per hour with time and one-half for over time. That under this arrangement, there were 304 hours, amounting to \$912.00 for the straight time and \$283.50 for the over time, a total of \$1195.50. For the other labor performed there, the plaintiff charged at the rate of \$2.00 per hour. (Tr. p. 8.)

Then there was charged \$25.00 per trip to Salt Lake City with a truck to haul out supplies to do the cutting, for four trips, \$100.00. (Tr. p. 9) and \$84.50 due on a commission, making a total due the plaintiff of \$1658.05 on that particular job, of which sum the defendant paid \$849.60, leaving a balance due the plaintiff from the defendant the sum of \$808.45. (Tr. p. 10.)

and for this amount the plaintiff sues the defendant.

It was further shown by the evidence that very shortly after all of the cutting was done at the Tooele Ordnance Depot, the defendant terminated the plaintiff's hauling contract so that he was unable to haul the material which he had cut down under the special contract. Upon the trial of this case the court found the issues against the plaintiff "no cause of action" and in favor of the defendant for \$45.30.

The case was first tried in the City Court of Salt Lake City and the court there rendered a judgment for the plaintiff and against the defendant for the sum of

\$609.95, together with costs. From this judgment the defendant appealed to the Third Judicial District Court of Salt Lake County. Said Notice of Appeal having been served on the 6th day of February, 1947. On the 28th day of May, 1947, the said Appeal had not been docketed with the Clerk of the District Court, although the same was transferred to the District Court of Salt Lake County on the 8th day of February, 1947, two days after the Notice of Appeal was served and filed. On the 28th day of May, 1947, 108 days after the record reached the District Court of Salt Lake County, the plaintiff filed a motion with the District Court to dismiss the appeal for failure to docket the appeal within the statutory period of thirty days after the same was received by the Clerk of the District Court, and upon the filing of this motion, the motion was granted and the court entered its order dismissing the appeal and directing the Clerk of the Court to return the files and records to the Clerk of the City Court of Salt Lake City. On the fifth day of June, 1947, the defendant filed a motion to reinstate the appeal basing the motion upon the fact that the Clerk of the District Court had agreed to advise the defendant when the record reached his office and asking that the order of the court dismissing the appeal be set aside and the appeal be reinstated through the defendant's mistake, inadvertance and excusable mistake and neglect. All of which was never established or shown. Upon the filing of this motion the plaintiff then again filed an affidavit and motion for the dismissal of the appeal, and on the 16th day of June, 1947, the court vacated its former order dismissing the

appeal and denied the plaintiff's affidavit and motion of June 11th to dismiss the appeal and permitted the defendant to file and docket the appeal in the District Court.

ASSIGNMENTS OF ERROR

Comes now the appellant and makes the following assignments of error upon which he will reply for a reversal of judgment appealed from in this cause:

1. That the court erred in making and entering its order vacating and setting aside its former order dismissing the appeal and in reinstating the action in the District Court and also erred in denying the defendant's motion based upon affidavit served and filed June 11, 1947, to dismiss the appeal.

2. The Court erred in denying the plaintiff judgment in the trial of said action in the District Court and entering judgment in favor of the defendant in said case.

3. The Court erred in denying plaintiff's motion for a new trial.

ARGUMENT

The evidence in this case shows in effect the following facts:

That the plaintiff had for sometime previously and upon various occasions been employed by the defendant

to do certain work for the defendant, and that the work in question was to haul some steel girder irons which had been made for the purpose of building roofs on the government igloos; that they were a sort of truss affair made with channel iron and were approximately 15 feet long and braced at the inner part. (Tr. 5.) That the intention was that these pieces of material were to be loaded into cars and shipped to Salt Lake City at \$2.00 per ton, the plaintiff paying 65c per ton freight, leaving him a net balance for handling the material of \$1.35 per ton. It was shown that the cars could carry 30 tons or 60,000 pounds, however, after shipping a few car loads the plaintiff found that he could only load 15 tons of material on the car, but would have to pay freight on a full 60,000 pound car which would increase his freight per ton to \$1.30, leaving him only 70c per ton net on the material; that upon learning that he would lose money in the operation, he approached the defendant, Mr. Rosenblatt of the defendant company, and entered into a contract with him to cut the channels before loading so that he could get a full car load of 60,000 pounds on the car, to which Rosenblatt consented and agreed. (Tr. p. 6.) Pursuant thereto the plaintiff went ahead and cut 1960 of these trusses which included eight cuts to the truss; that in doing this work it was necessary for the plaintiff to hire three torch men and two other men to do the work advantageously; that the plaintiff agreed with the defendant that he would cut the material down on a time basis and would charge for time and material to cut the trusses down. (Tr. p. 7); that pursuant to that contract the acetylene torch men worked

304 hours and 63 hours over time, and that the reasonable value of said work was \$3.00 per hour for the men with the machines for straight time, with time and one-half for over time, or \$4.50 per hour for the over time; that such amounted to \$1195.50. That the reasonable value for the other two men working was \$2.00 per hour and time and one-half for over time. (Tr. p. 8.) That there were four hours over time and that there would be 137 hours straight time; that he made four trips to Salt Lake City with the truck to haul out acetylene and materials for use on the job at \$25.00 per trip, a total of \$100.00 for that work; that there was \$84.50 due to him as commission on another account. (Tr. p. 9.) This would make a total due to the plaintiff in the sum of \$2519.42, and that on said job the defendant had advanced to the plaintiff the sum of \$1658.05, leaving a balance due the plaintiff from the defendant of \$808.45. (Tr. p. 10.)

It seems that the defendant rendered a statement to the plaintiff, marked "Exhibit A" in which it was shown on advances, on the cutting down job that there was money due the defendant from the plaintiff on this contract, and that that amount figures \$1658.05, which the plaintiff subtracted from the amount due him of \$2466.50, and leaving the same balance of \$808.45. (Tr. p. 11.) There is a discrepancy in the account of \$52.92, but the evidence does not disclose what it consists of.

The defendant upon cross examination attempted to illicit from the plaintiff that he agreed to cut the

irons in the field at the same price the defendant could cut them in the shop at Salt Lake City, to which the plaintiff answered, "I didn't say as cheap. I said we could cut them with a torch out there." (Tr. p. 16.) That there were eight cuts made on each truss. (Tr. p. 18.) That the plaintiff paid for the acetylene used on the job \$133.00 to \$140.00. (Tr. p. 22.) That there was no pipe on the channel. (Tr. p. 24.)

On redirect examination, the plaintiff testified that the regular price for cutting material with acetylene torches was \$3.00 per hour and that was true of the local shops in Salt Lake City; that after he got all of the arches cut up and ready to ship, he was taken off the job by the defendant and was not permitted to haul the material into Salt Lake City, and that he was deprived not only of the extra money due him for the cutting but for his profit in hauling of the same also. (Tr. p. 26.) That the trusses had to be cut either at Tooele on the job or here in Salt Lake City. (Tr. p. 27.)

G. HENRY STARTUP, a witness for the plaintiff, testified as follows:

That he was a practical engineer and engaged in buying and selling government surplus. That in 1944, he was working for the Monsey Iron and Steel Company as a practical engineer; that he is familiar with the operation of acetylene torches, and that all jobs in Salt Lake City regulated by the OPA was \$3.00 per hour as the prevailing price, which included men and equipment. (Tr. p. 28.) He further testified that work out

in the field, as was done on these trusses at Tooele, was different and that a man in a shop at Salt Lake City could do two to three times as much cutting as he could out in the field where these trusses were cut, and he again testifies that \$3.00 per hour would be a reasonable sum for such cutting, and that his statement of the price per hour for such work in Salt Lake City in the shops in 1944 when this work was done would be \$3.00 per hour. (T. p. 29.)

The defendant then called a Rufus Erickson as a witness who testified that he was a material cutter for the Eimco Corporation in Salt Lake City and has been since 1928; that he had cut a good many of the trusses in question; that he has cut up in the shop 130 trusses in an eight hour shift, but that he made three less cuts on each truss than was made by the plaintiff in this case. (Tr. p. 33.) That he works on a regular basis of 95c per hour in the shop with everything furnished him. To which question and answer the plaintiff made an objection which was overruled by the Court. Upon cross examination the witness testified that he was paid time and one-half for over time and Sundays, and that everything was furnished him including all material, torches, oxygen and everything necessary to make the cuts in the shop. (Tr. p. 36.)

A. H. HOLTMAN, a witness for the defendant, testified as follows:

That he was engaged in buying and preparing scrap iron for melting purposes. (Tr. p. 36.) That when asked what would be a reasonable cost value on an

hourly basis on the cutting, the witness answered. "I guess that would vary. If he paid his man \$3.00 an hour, which I thought was high; I was hiring men cheaper at that time. What were you paying your men? I was paying my men \$1.20 an hour." (Tr. p. 38.)

When the witness was asked upon cross examination if he had ever cut any of these trusses, he answered that he never did. He testified that if the pipes were full of oil and scale iron, they would be more difficult to cut, and when asked how much more difficult, stated that would be hard to say. (Tr. p. 39.)

It will be noted that in this man's testimony on page 37 and again on page 39, the transcript has been changed with a red pencil. We deem that this change was unauthorized and we are unable to determine how a reporter could have mistaken the words he wrote in the transcript for the red pencil corrections, and we assume that the reporter got the testimony correct from the witness.

Upon redirect examination the witness testified that it would take twenty minutes to cut up one truss, and that he was mistaken when he said it would take ten minutes, but on further redirect examination he did not seem to know anything about the matter in question. (Tr. pages 42 and 43.)

SIMON ROSENBLATT, a witness for the defendant testified as follows:

"That he is an official of the Eimco Corporation, being the secretary thereof; that he manages scrap iron

and salvage for said company; that he had known the plaintiff for eight or ten years, and that during that time they had a number of contracts with him. That he entered into a contract with the plaintiff to haul material from the Tooele Ordnance Depot at Tooele to the company's place of business at \$2.00 per ton. That at the suggestion of the plaintiff, he was permitted to cut up the pipe at the field in order that he might haul a greater load on the cars; that he agreed to the arrangement, but in telling the plaintiff to go ahead and that they would make an extra allowance to him when the job was finished, but it would be based upon their own costs in their own yard. At his counsel's suggestion he said that he would not allow the plaintiff to do the cutting if the cost was greater than in the defendant's own yard. (Tr. p. 47.) That they advanced money to him every Saturday to meet his payroll and pay his bills. (Tr. p. 48.) Plaintiff's Exhibit No. "1" was then shown to the witness. (Tr. p. 49.) At which time the witness was asked the following questions and made the following answers.

"Q. Did you have any discussion with him then concerning the last line which appears on there, 'special allowance yet to be made for cutting channel pipes'?

A. Yes, I did.

Q. What was the purpose of that discussion?

A. I told him at that time we would arrive at some mutual understanding, just what he was entitled to for that payment.

Q. Did you have any discussion in dollars and cents what that should be.

A. Not at that time, no.

Q. Did he ever submit a statement to you what he thought he would be entitled to for the cutting of pipes?

A. Never.

Q. Never submitted any statement to you at all?

A. No, never.

Q. Did you have any further discussion with Mr. Penman concerning the fair and reasonable value for cutting these pipes between February 15, 1944, the date of Exhibit "A" and the time the suit started?

A. No, he had never been around." (Tr. pages 50 and 51.)

That the arrangement with Mr. Penman became at an end because he wasn't delivering the tonnage, and that they had to have scrap in their yard for his customers; that he told the plaintiff that, and that was about the time that he handed him the statement. (Tr. p. 52.)

On cross examination the witness testified that after the trusses were cut up at Tooele, the plaintiff was taken off the job by the defendant, his contract being terminated; that when this contract for cutting was made with the plaintiff he told him that the job would be based upon the Salt Lake shop price basis, but that it was never discussed between them as to what that cost was. (Tr. p. 54.) That the witness then testified that he was

sent a letter by an attorney for the plaintiff and that the attorney came with the plaintiff to his office and later talked to the witness about this very matter in controversy, and that in that discussion he refused to pay the money demanded but did not offer to pay anything different than that demanded or to indicate to the plaintiff what his claims were concerning the account. (Tr. p. 56.) The witness then testified as follows:

“Q. But you knew this work was being done out there by Mr. Penman, didn't you?

A. Yes.

Q. And you agreed to it?

A. I can't answer that yes or no.

Q. I am not asking that; I am asking whether you agreed on a price?

A. I told him if he wanted to cut some pipes out there to his own advantage, to go ahead and do it.

Q. You intended to pay him for it?

A. I told him I would.

Q. You intended to pay a reasonable value for it?

A. Not the kind of profit set out there.

Q. I didn't ask that question; you intended to pay a reasonable value for it?

A. Based on our cost of cutting it in our own yard.

Q. You certainly wouldn't expect me to do it and pay more than we could do it in our own yard, would you?

Q. Who was present?

A. Just he and I.” (Tr. p. 57.)

The defendant then closed its case and the plaintiff was called back for another question. He was asked:

“Q. Mr. Penman, I will ask you whether or not during any conversation you had with Mr. Rosenblatt concerning this matter, if he ever told you the amount they would pay would be based on their costs in the shop there?

A. No, he didn’t.

Q. Not at any time?

A. No.

Q. Was there ever anything said about the price?”

A. No.” (Tr. p. 58.)

Concerning the dismissal of the appeal, it will be noted that the court entered an order dismissing the same without the motion having been served upon the adverse party. An application was made to recall the order, and when that matter was heard and the application recalled because of no notice, the plaintiff then filed another motion to dismiss the appeal which motion had been duly served upon the defendant in the action. The court denied that motion.

It will be noted that the transcript of the City Court of the record had been in the District Court lying there and not filed for a period of four months, and the defendant in support of his motion filed an affidavit setting forth the ground upon which his motion would be

based, which affidavit recited the purported grounds for the position of the plaintiff in the matter, and in that affidavit he recites that the fee was paid to the Clerk of the City Court on the appeal on the 7th day of February, 1947; that the clerk of the District Court failed to notify the attorneys for the defendant when the record was received from the Clerk of the City Court, and that the docketing fee was not paid because no request or notice had been received from the Clerk of the District Court according to agreement and failure to pay the fee was due to the mistake, inadvertance and excusable mistake by the attorneys for the defendant. Just why the plaintiff in the action had to be charged with an agreement between the defendant and the Clerk of the District Court we have been unable to determine, and the affidavit does not enlighten us. Neither does the affidavit state what constituted the mistake, inadvertance and excusable neglect by the attorneys for the defendant. Only carelessness could be responsible for their neglect to docket the appeal as these men have been practicing law for a good many years and undoubtedly were familiar with the rules of the court in taking appeals, and the plaintiff submits that the affidavit was not sufficient to justify the court in denying the plaintiff's motion to dismiss the appeal. The plaintiff had already paid the cost of docketing the appeal for the purpose of its dismissal.

The question then arises, if the court in its discretion can permit a party appealing a case from the City Court to the District Court to pay the filing fee

for the docketing of the appeal in the District Court four months after the papers have reached the District Court on the appeal, and after a motion had been made to dismiss the appeal, and pursuant to said motion the docketing fee had been paid for such purpose, without any showing upon the part of the party neglecting his appeal, then we ask the question how long can such a condition exist before one would be entitled to have an appeal dismissed? If it can go on for four months, we see no reason why it then could not be increased to twenty-four months or even more, if the court happened to be extra discretionary at the time the application was made. We cannot conceive that the law permits such a procedure. The statute is rather specific in the time allowed for this purpose, and we would assume that some extraordinary situation must exist to relieve an appellant of such a situation, such as perhaps the illness of the attorney for the appealing party or some other situation that could not with reasonable diligence be remedied. We cannot conceive that this court's discretion can relieve a party under the circumstances existing in this case.

In the case of Little vs. Blank, this court reviewed this particular situation in 31 Utah 222 at 227, as follows:

“The statute expressly provides that, on motion, appeals may be dismissed when the papers were not filed and the advance fee required therefor was not paid within thirty days after the transcript was received by the clerk. This provision of the statute was evidently intended to

insure promptness in the filing of the papers in cases appealed in order that such cases may be brought to trial in the district court without unnecessary or unreasonable delay. If the rule contended for by appellant should obtain, the party appealing would have it in his power to either indefinitely postpone the trial of the case in the district court or force the respondent to file the papers in that court and pay the advance fee required by law, and thereby, in effect nullify the provisions of section 3750 under consideration."

Again in the case of Hoffman v. Lewis, 87 Pac. 167 at 170, we have the following:

"In view of the foregoing, we will now proceed to examine into the petitioner's rights under the law giving appeals from justices' courts. Such appeals are purely statutory, and the statutes granting them must in all respects be at least substantially complied with. The appeal in this case was dismissed upon the ground that the sureties did not justify respecting their qualifications, as required by law. Section 3747, Revised Statutes of 1898."

We submit then that in this case the court abused its discretion in denying the plaintiff's motion to dismiss the appeal after plaintiff had paid the cost of filing said papers for such purpose, and had made a motion to the court to dismiss the appeal.

Now, concerning the main case, it appears that there is not any law involved in the case or perhaps we better say the law is very well settled concerning the matter involved, and that is, does the evidence adduced at the

trial of the case justify the decision of the court in denying the plaintiff's right to recovery and granting a judgment against the plaintiff in favor of the defendant.

It will be noted that the evidence of the plaintiff in fixing the amount of money earned is rather definite, that is, as to the time he put in with his hired men and equipment and under his figures it is shown that he had a balance due him upon the completion of the work of \$808.45. (Tr. p. 10.) Mr. G. Henry Startup, a disinterested witness testified for the plaintiff and stated that he was definitely familiar with prices paid upon the market for the kind of work performed by the plaintiff, and that he was also familiar with the OPA regulation price on the work in question, and that it was \$3.00 per hour. (Tr. p. 28). And the particular work performed was submitted to the witness and he testified that \$3.00 per hour was a very reasonable sum to be paid for that kind of work, and that it could not be done for that price at the time he was testifying. (Tr. p. 29.) This would be where the party who performed the work paid all of the cost incident thereto such as was done in this case.

We have searched the testimony of the defendant in this case and we do not find any contradictory testimony to this proposition in their evidence, and particularly all of the testimony of the defense was based upon days pay work by men in the shop on a steady salary or wage.

We, therefore, submit that the court erred in its decision and judgment in this case, and that the plaintiff is entitled to a reversal of the same and to a further order of this court directing the district court to dismiss the plaintiff's appeal and remand the same back to the city court for execution of its judgment as obtained therein.

Respectfully submitted,

E. LEROY SHIELDS,
Attorney for Plaintiff.