

1948

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

Utah Supreme Court

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7160

In the Supreme Court of the State of Utah

R. J. PENMAN,

Plaintiff and Appellant,

VS.

THE EIMCO CORPORATION, a corporation,

Defendant and Respondent.

FILED

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RESPONDENT'S BRIEF

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STATEMENT OF FACTS

The court rule, requiring respondent to indicate whether he agrees with the statement of facts in Appellant's brief, in this particular case, presents a quandary to the Respondent. As respondent views the pleadings and testimony as presented in the trial court, most of the relevant facts are without dispute. A reading of appellant's brief fails to distinguish between the undisputed and disputed facts and is so arranged that respondent is lead to the conclusion that in the interest of clarity, the rule of the court can best be served by

restating the facts and particularly by segregating them into the undisputed and disputed categories.

The plaintiff filed a complaint in the City Court of Salt Lake City on September 27, 1945, in which he alleged that the defendant became indebted to plaintiff for "labor amounting to the sum of \$1563.15 and a commission amounting to the sum of \$84.55 for a total of \$1658.05," and that defendant has failed to pay any part thereof "save and except the sum of \$849.60" leaving a balance of \$808.45. (Tr. 13.) To this pleading the defendant filed an answer and counterclaim which as amended alleged that the defendant became indebted to the plaintiff in the sum of \$2204.37, but that defendant had advanced to plaintiff in connection with the work done by plaintiff the sum of \$2,519.42 (Tr. 10) and in a counter-claim defendant alleged that there was an agreement between plaintiff and defendant whereby "defendant agreed to pay plaintiff the sum of \$2.00 per ton for transporting scrap material from the Tooele Ordinance Plant to defendant's place of business in Salt Lake City and plaintiff pursuant to said contract transported 1,669,822 pounds of said scrap material, thereby earning under said contract the sum of \$1,669.82; that thereafter, said contract was modified in that defendant agreed to pay plaintiff the reasonable value of preparing certain channel iron, a part of said scrap material, and that plaintiff prepared channel iron, the reasonable value of such preparation being in the sum of \$450.00." Defendant also admitted that plaintiff earned and was entitled to the sum of \$84.55 as a commission on the sale of certain

scrap material. Defendant's counter-claim then alleges that defendant had advanced to plaintiff the sum of \$2,519.42 and that this was \$315.10 more than plaintiff had earned, and prayed judgment for that amount. (Tr. 11.) No reply or other pleading was ever filed by plaintiff to defendant's counter-claim. The case was tried in the City Court, appealed to the District Court, the present appeal lies from the Findings of Fact and Conclusions of Law and the orders and judgment made and entered in the District Court.

The plaintiff and defendant had enjoyed business relationships over a period of eight or nine years. (Tr. 68, 100.) During most of the time, the plaintiff had worked for the defendant on a contract basis, sometimes on a per-day basis. (Tr. 68.) In October, 1943, an oral contract was entered into between plaintiff and defendant whereby the defendant was to haul certain scrap steel from the Tooele Ordinance Plant to plaintiff's place of business. At that time, plaintiff was engaged in the trucking business and equipped to haul heavy steel parts. Plaintiff was dealing with Simon Rosenblatt, who represented the defendant. He went to the Tooele Ordinance Plant to view the scrap which was to be hauled into defendant's place of business in Salt Lake. (Tr. 69.) The scrap consisted of "large flat plates, some smaller flat plates, bolts and settings to put the igloo together," (Tr. 70) as well as some steel trusses used to support forms in the construction of igloos. The trusses were 12 to 14 feet long (Tr. 73) had a five-inch channel iron curved across the top, the two ends of the curve were

tied together by 1½" pipe or boiler tubing, and there were three struts running from the center of the tie up to the curved channel iron. (Tr. 74.)

The contract between plaintiff and defendant provided that plaintiff could haul the steel by either truck or rail and for each ton delivered at defendant's place of business he was to receive \$2.00. (Tr. 70.) If he shipped it by rail, the plaintiff had to pay the freight charges. (Tr. 71.)

Between October, 1943 and January, 1944 the plaintiff moved from the Tooele Ordinance Plant to defendant's yard in Salt Lake City around one and one-half to two million pounds of scrap steel. Some was moved by truck and some by rail. (Tr. 71.) That which was moved by rail cost the plaintiff sixty-five (65) cents a ton freight charges, if he loaded a car to its minimum capacity. If the car was not loaded to its minimum, he still had to pay the minimum charge for the car, which increased the cost per ton. (Tr. 103.) When plaintiff came to haul the steel trusses, he found he could not load sufficient to make up a minimum car and plaintiff knew that when received at the defendant's yard, the trusses were cut up into smaller pieces so that it could be remelted. (Tr. 71, 72.) So in the first part of January, 1944 (Tr. 75) plaintiff went to Mr. Rosenblatt representing defendant and according to plaintiff's testimony the following happened:

- Q. And you went to Mr. Rosenblatt and suggested you could cut them as cheap as they could cut them in their own yard?

- A. I didn't say as cheap. I said we could cut them with a torch out there.
- Q. Did you say that would be as cheap?
- A. I don't think I mentioned the price. I said when they come in the yard they would be cut.
- Q. You thought by cutting it out there you would get a greater tonnage?
- A. We knew it. (Tr. 72.)
- Q. In order to get greater tonnage, it was to your advantage because of the freight you had to pay, wasn't that right?
- A. Yes.
- Q. It was to your advantage to cut the trusses at Tooele because you could get a greater tonnage on your cars. Isn't that right?
- A. Yes. (Tr. 73.)

Mr. Rosenblatt's testimony as to the same conversation was recorded as follows:

- Q. He wanted to cut it up so he could load more tonnage in the cars?
- A. At his own benefit. (Tr. 102.)
- Q. What did he say about that?
- A. I told him at first I didn't think he could do it advantageously. He said he could cut it much cheaper out here in the yard than he could out there, and he said he (sic.) would make a greater difference by loading it in a car—if he only got 30,000 in the car his freight was \$1.30 a car (sic.) instead of 65¢ a ton.

Q. What did you tell him?

A. I told him to go ahead and do that cutting and we would make extra allowance to him on the job when finished, based on our own costs in our own yard.

Q. Based on your costs?

A. Yes, certainly. * * * *

Q. You told him you wouldn't allow him to do the cutting where the cost was greater than it was in your own yard?

A. That is correct. (Tr. 103.)

Plaintiff proceeded to employ some torchmen to cut up the trusses. He paid the men who used the torches \$1.00 an hour for straight time and \$1.50 for over-time. (Tr. 76.) The torchmen worked 304 hours straight time, 63 hours over-time. He paid common labor 80c an hour (Tr. 76) and they worked 133 hours at straight time. He paid them \$1.20 an hour for four hours over-time. (Tr. 77.) He also purchased between \$133 and \$140 worth of acetylene (Tr. 78) and made four trips in hauling acetylene and oxygen from Salt Lake to Tooele. Some of the trips were return hauls from delivering scrap steel and some were not, (Tr. 78) and plaintiff testified that the reasonable value of the four trips was \$25.00 per trip or a total of \$100.00. (Tr. 79.) There was no dispute in the testimony concerning the number of hours worked or as to whether they were paid for at straight time or over-time. The difference was that plaintiff sought to establish that the reasonable value of cutting the trusses at Tooele should not be the amount

which he had to pay for labor, acetylene and oxygen, but that cutters' wages should be figured at \$3.00 an hour instead of the \$1.00 paid, and \$4.50 overtime instead of the \$1.50 paid, and that common labor should be \$2.00 an hour straight time and \$3.00 overtime. (Tr. 64, 65, 69.) About February 15, 1944, the oral contract upon which the parties had been working came to an end because Mr. Penman was not delivering the required tonnage. He hadn't been on the job all the time and hadn't been cutting any additional trusses or hauling any. (Tr. 108, 109.) During the term of the contract, that is, from October, 1943 to February 15, 1944, Mr. Penman had been paid by the defendant a total of \$1800.00 in cash. (Tr. 105.) These payments had been made at irregular times, generally on Saturdays when he needed money to meet payroll and pay bills. (Tr. 104.) In addition to that, he had charged to the defendant materials, principally oxygen and acetylene to the amount of \$163.02, and the defendant had paid freight charges on rail shipments from Tooele to the extent of \$556.40, making a total advanced by defendant upon the contract during the term thereof of \$2,519.42. (Tr. 105.) On February 15, after the plaintiff had quit hauling, he met with Mr. Rosenblatt, representing the defendant. Mr. Rosenblatt presented to him a statement which is in evidence as Exhibit "A," showing the number of pounds of material shipped by rail and that by truck, cash advanced, and that before any allowance was made for cutting the channel pipe that the plaintiff was overdrawn to the amount of \$849.60. On the bottom of the statement

appeared the following: "Special allowance yet to be made for cutting channel pipes." From what the evidence discloses, this statement was accepted by plaintiff and not questioned, and plaintiff at no time ever submitted to defendant a statement as to what he thought was the reasonable value of services rendered in cutting the pipe at Tooele. (Tr. 106.)

The foregoing, in the opinion of counsel for respondent, constitutes a statement of the undisputed facts as disclosed by the pleadings and evidence as they relate to the merits of the law suit as disposed of by the Honorable Clarence E. Baker. Appellant, however, has by his appeal questioned the order of the Honorable Roald A. Hogansen entered June 16, 1947 (Tr. 26.) denying plaintiff's motion to dismiss defendant's appeal to the District Court from the City Court of Salt Lake City. The facts relative to this matter are as follows: The judgment in the City Court was made and entered the 29th day of January, 1947. (Tr. 8.) No notice of judgment was ever served by plaintiff upon defendant.

On the 7th day of February, 1947, plaintiff duly filed in the Third Judicial District Court of Salt Lake County a notice of appeal. (Tr. 4.) At the same time that the notice of appeal was filed with the clerk of the District Court, counsel for defendant tendered to the clerk of the court the statutory filing fee for said appeal, but the clerk there and then refused to accept said filing fee and alleged as grounds that the records from the City Court had not yet been received from the clerk of

the City Court. The clerk agreed to notify counsel for defendant as soon as the record from the clerk of the City Court had been received. The clerk never at any time advised counsel for defendant (Tr. 18, 19.) that the record from the City Court had been received.

On May 28, 1947, counsel for plaintiff, without notice to defendant, presented a motion to dismiss defendant's appeal from the City Court and the Honorable Roald A. Hogansen entered an Order dismissing said appeal and ordering the files and records to be returned to the City Court. (Tr. 3.) Thereafter, on June 5, 1947, defendant served and filed a motion to reinstate the appeal and relieve defendant from default for failure to pay filing fees as provided by law, on the grounds that notice of plaintiff's motion to dismiss had not been served on defendant and upon other equitable grounds, which motion was served upon counsel for plaintiff and an affidavit setting forth, the tender of filing fee and the refusal of the clerk to accept same, clerk's agreement to notify counsel for defendant, and his failure to do so was served and filed in support of said motion. (Tr. 18, 19.) On June 11, the matter was argued before the Honorable Roald A. Hogansen.

There is also in the file an Affidavit and Motion of plaintiff filed June 11, 1948. (Tr. 23.) This asks the court to dismiss the appeal. It does not show that notice of this motion was given defendant, which accounts for the vacuum in the transcript relative to the facts as they exist at that time, and the reasons that motivated the

judge in denying the motion. The Honorable Roald A. Hogansen set aside the order dismissing defendant's appeal and refused to grant plaintiff's motion of June 11 to dismiss the appeal. (Tr. 26.)

ARGUMENT

The first problem is to determine the terms of the contract sued upon by plaintiff. It is undisputed that the original contract was entered into in October, 1943, which was substantially as follows:

1. Plaintiff was going to haul certain scrap steel from the Tooele Ordinance Plant to defendant's yard in Salt Lake City.

2. Plaintiff had the choice of shipping it by rail or hauling it by truck; in either event the transportation charges were paid by plaintiff.

3. For this service, defendant was to pay plaintiff the sum of \$2.00 per ton delivered at its yard.

It seems that by January, 1944, plaintiff had loaded and transported most of the smaller and heavier pieces of steel which made up heavy cars leaving the trusses. This fact is demonstrable by the description of the materials given by plaintiff (Tr. 70) and the fact that he testified that the reason for going to the defendant and asking if the trusses could be cut up was because a car of trusses failed to meet the minimum weight requirements of the railroad. (Tr. 72, 73.) In other words, the alteration in the agreement made in January, 1944 was not only at the instance of the plaintiff, but for plaintiff's

benefit and in the modification or change in the agreement, there was no advantage to defendant. Now, the terms of the alteration seem to be rather clear, that is, that the defendant was going to pay plaintiff in addition to the loading and transportation charge of \$2.00 a ton some reasonable amount for cutting up the trusses.

The only dispute seems to be the reasonableness of the amount which was to bear some relationship to defendant's cost of cutting the trusses in their own yard. Mr. Rosenblatt for defendant testified, and very clearly, that when Mr. Penman came in, he first told him he didn't think he could cut the trusses out at Tooele any cheaper than they could be done in the yard. Penman insisted that he could and then Mr. Rosenblatt told him "I told him he could go ahead and do that cutting and we would make an extra allowance to him when the job was finished based on our costs in our own yard." (Tr. 103.) In any event, most plaintiff should recover for cutting the trusses is a reasonable amount.

Defendant maintains that in determining reasonableness the following must be taken into account, first, that the alteration in the contract was at the instance of the plaintiff, so that he could load minimum tonnages on freight cars and avoid paying higher than 65c a ton transportation charge; second, that human experience would indicate that a person situated as was defendant would not have voluntarily, and without any consideration, consent to pay more for having a job done at Tooele than defendant was then and there able and

actually doing in Salt Lake. Now, let us look at the figures for just a moment. The plaintiff actually paid out by way of money to cut the trusses which he did cut at Tooele according to his own testimony the following sums :

Wages for torchmen straight time.....	\$304.00
Overtime Wages for torchmen.....	94.50
Wages for day labor.....	106.40
Overtime for day labor.....	4.80
For acetylene gas	133.00
For oxygen gas	61.60

In addition thereto claimed for transportation of materials from Salt Lake to Tooele even though part of this was a back haul, after the delivery of steel under the transportation contract the sum of..... 100.00

TOTAL.....\$804.30

Now, this was the plaintiff's actual expenses according to his own testimony and it may have been higher than defendant's cost of cutting the same scrap in its own yard because, first, at the time the agreement was entered into Mr. Rosenblatt told plaintiff that he thought it would cost more to cut at Tooele than in defendant's yard (Tr. 103) and, second, because plaintiff was not skilled or experienced in cutting scrap and preparing it for re-melting. His business was that of trucking. (Tr. 69.)

Now, by way of contrast, plaintiff sought to have the court believe that the reasonable value of cutting the trusses at Tooele should be for him to be paid \$3.00

an hour for torchmen instead of the \$1.00 he actually paid. Plaintiff testified that the reasonable value of cutting was as is hereinbelow in Column One set forth, compared with his actual cost set forth in Column Two:

	Plaintiff Claimed Wages <i>Column I</i>	Wages Actually Paid by Plaintiff <i>Column II</i>
Torchmen—straight time.....	\$3.00	\$1.00
Torchmen—over time.....	4.50	1.50
Common labor—straight time.....	2.00	.80
Common labor—over time.....	3.00	1.20

The difference in the claim of plaintiff and defendant's position accounts for the entire difference between the amount sued for by plaintiff, to-wit, the sum of \$1,658.05 and the amount found by the court as being reasonable for the services rendered, to-wit, the sum of \$804.30. True enough, plaintiff produced a witness, by name, Startup, who had had limited experience with torch operation who attempted to testify that \$3.00 per hour was a reasonable charge.

On the other hand, defendant produced Rufus Erickson, a welder who had been in the business since 1928 (Tr. 88) who testified that he had cut these trusses in the defendant's yard and had cut off as many as 130 pipes in an eight-hour shift (Tr. 89). That he was paid at the rate of 95c an hour. He only made five cuts instead of eight, the five cuts being to sever the tie across the bottom of the arch. For the purposes of illustration, let us reduce the problem to one of cuts. Let us reduce the average number of cuts from 130 trusses that Mr.

Erickson could do to 100 trusses per eight hour shift. Then let us increase Mr. Erickson's hourly rate from 95c to \$1.00 which plaintiff paid his men. We have a situation something like this. In an eight-hour day, Mr. Erickson made 500 cuts or 65.5 cuts per hour. Now, on the 1900 trusses that Mr. Penman claims he cut there would be a total of eight times that number or 15,200 cuts. Now dividing this by 65.5 we get 232 hours or a total labor cost of \$232.00. The court allowed Mr. Penman \$304.00 for this particular item.

So, it is respectfully submitted that there was more than ample testimony to support the findings made by the court that the actual award made to plaintiff for the work done there was his cost. His profit should have come from the advantage to him of being able to load minimum weight cars and thereby keep his freight cost to a minimum. As a last item, we must call to the court's attention the fact that a statement was rendered defendant by plaintiff on the 15th day of February, 1944, which showed that plaintiff was indebted to defendant in the sum of \$849.60 and also made mention of the fact that no allowance had yet been made for cutting the channel pipe. The plaintiff at no time ever submitted a statement to defendant as to what he thought was a reasonable amount or how a reasonable amount could be arrived at and the plaintiff let the matter go until September 25, 1945 or for more than a year and a half before taking any steps in connection with it at all, and even then made no written demand upon plaintiff or ever suggested an amount which was reasonable. It seems entirely pro-

bable that plaintiff's reason in letting the matter go for so long was because he believed the amount of the cutting he did was worth less than the amount \$849.60 which he owed defendant and thought it would be well "to let a sleeping dog lie."

It is respectfully submitted that the findings of the court are clearly supported by the testimony and the preponderance thereof and on its merits the case should be affirmed.

The appellant apparently assigns as error the order of Judge Hogansen under date of June 16, 1947 denying plaintiff's motion to dismiss the defendant's appeal. It will be recalled that on May 28, 1947 Judge Hogansen entered an ex parte order dismissing the appeal and ordering the papers returned to the clerk of the City Court. On June 5th a motion to reinstate the appeal and relieve the defendant of default was served and filed. The first ground for setting aside the order was that the order of dismissal had been made without notice to the defendant. On June 11, 1947, Judge Hogansen granted the motion to set aside the order of dismissal on that ground. (Tr. 25.) The only question left goes to the propriety of Judge Hogansen's order of June 16, 1947 denying plaintiff's Affidavit and Motion filed June 11th asking that the appeal be dismissed. (Tr. 23.) It will be noted that this Affidavit and Motion and the entire record fails to show that any notice was given defendant. The record, however, does show a minute entry (Tr. 25) that counsel for the defendant was present

at the time plaintiff presented and filed the Affidavit and Motion and that it was agreed to proceed and hear the motion. The motion was made pursuant to Section 104-77-9, Utah Code Annotated, 1943, the pertinent part of which is as follows: "An appeal may be dismissed, on notice, in the discretion of the court, for any of the following causes: (1) That the papers were not filed in the district court and the advance fee required therefor paid within thirty days after the transcript was received by the clerk." Now, for an understanding of the problem, we must also refer to the manner of taking an appeal from the City Court. Section 104-77-3, Utah Code Annotated, 1943 referring to the appeal, says: "The appeal shall be taken by filing a notice thereof with the justice, or in the clerk's office of the district court to which the appeal is taken and serving a copy on the adverse party." In the case at bar, the notice was captioned and filed in the Third Judicial District Court of Salt Lake County and copy was served upon plaintiff. Section 104-77-5 Utah Code Annotated 1943 provides: "Upon filing the notice of appeal and undertaking required in the next succeeding section, *or upon receiving notice from the clerk of the district court* that the appeal has been filed and perfected in the clerk's office and the payment of the fees of the justice for making the transcript, the justice shall within five days transmit to the clerk—etc." Now what happened in this matter is set forth in the affidavit in support of a motion to reinstate appeal (Tr. 18, 19) where affiant says: "That on or about the 7th day of February, 1947, he filed on behalf of said

defendant notice of appeal and undertaking on appeal—that on said February 7, 1947, he tendered to the clerk of the district court of the Third Judicial District in and for Salt Lake County, State of Utah check in payment of statutory filing fee of said appeal; that the clerk then and there refused to accept said check because the record in the City Court of Salt Lake City had not been filed; that said notice and undertaking on appeal were left with the clerk of said court with the understanding that when the clerk received the record from the clerk of the City Court the attorneys for defendant would be notified and the payment of fees would then be made.”

The affidavit continues to the effect that no notice of any nature was ever given by the clerk of the City Court that the record on appeal had been received in the clerk’s office. It is noted that under Section 104-77-5 there is no time specified, in which the clerk of the district court, after receiving notice of appeal and undertaking, must notify the clerk of the City Court, so herein we have a complete hiatus, in which not only several days but several months could elapse before the clerk of the City Court is notified and before the transcript on appeal is forwarded to the clerk of the District Court. In the case of

Christensen v. Christensen, 173 Pac. 383, Utah
1918,

the statement of facts disclose that the notice of appeal was filed with the clerk of the District Court on the 22nd day of December, 1917 and the record on appeal was not filed with the clerk of the District Court

until the 9th day of February, 1918.

It is quite apparent that the designers and drafters in the code of civil procedure in the State of Utah have endeavored to devise a scheme by which the party with knowledge of the facts must advise the other party before any advantage can be taken of that fact: witness, requirement for serving notices of court action upon demurrers, motions, etc., when the opposing party is not present, requirements of serving notice of judgment, cost bills, notices of appeal, etc. In this instance, however, the burden is upon the appellant from the City Court or Justice's Court to determine when the transcript on appeal from the Justice's or City Court is received in the District Court, and we recognize there is no legal justification for relying upon the promise of the clerk to notify you when it is received, but it does seem to be a perfectly human thing to do.

Section 104-77-9 above cited supra clearly makes it discretionary with the court as to whether a cause may be dismissed for failing to pay the fee within thirty days after the transcript is received by the clerk. The sentence uses the word "may" be dismissed and also says in the "discretion" of the court. The court in the case of

Benson v. Ritchie, 230 Pac. 572, 64 Utah 278,
Utah 1924,

in passing upon this same section said "No doubt some discretion is vested in the District Court for the reason that a motion to dismiss an appeal may be interposed on the 31st day after the papers have been received by the clerk, and it may be made to appear while such is

the fact, there, nevertheless is some good and legal cause why the fee was not paid strictly within the thirty days or that there is some other valid reason why the appeal should not be dismissed.” In the case of

Little v. Blank, 87 Pac. 708, 31 Utah 222,
Utah 1906,

cited by appellant the court recognized that an adequate excuse would justify the court in refusing to deny a motion to dismiss where the court said at the end of the opinion “at least there is no adequate excuse offered as to why these things were not done within the time the law requires they shall be done. Under these circumstances, we do not think it was an abuse of discretion on the part of the court in dismissing the appeal.”

We believe, as counsel for the defendant, that we have read all of the Utah cases which have construed or dealt in any way with the section under consideration and aside from those dealing with jurisdiction, the appellate court has in all instances seen fit to affirm the discretion of the trial court. There is no adequate record of the proceedings which occurred before the trial judge relative to the argument and discussion surrounding plaintiff’s motion to dismiss the appeal. The following can only be suggested from the record: The complaint was filed September 27, 1945, the answer and counterclaim January 10, 1946. No trial date was fixed until January 24, 1947, over a year after the case was at issue. And also that although defendant’s motion to dismiss was denied June 16, and notice of that fact given to plaintiff on June 17, still no demand for trial was made until

October 15, 1947, so clearly there is nothing in the record to indicate that plaintiff was in any hurry to get the case disposed of or that any prejudice occurred to plaintiff by reason of the delay caused by defendant failing to discover that the record on appeal had been transmitted from the clerk of the City Court to the Clerk of the District Court.

It is respectfully submitted that the Findings of Fact and Conclusions of Law and Judgment are well founded and supported in the testimony and clearly by the great preponderance thereof. Plaintiff has failed to show any abuse of discretion by the District Court in denying his motion to dismiss. It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

FABIAN, CLENDENIN, MOFFAT & MABEY,
Attorneys for Respondent