

1948

Newell J. Olsen and Newell J. Olsen & Sons v. Roland A. Reese : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Olsen v. Reese*, No. 7175 (Utah Supreme Court, 1948).
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In the Supreme Court of the State of Utah, F. I.

APR 20 1948

NEWELL J. OLSEN, oper-
ating under the name and
style of NEWELL J. OLSEN
& SONS,

Plaintiff and Appellant,

vs.

ROLAND A. REESE,

Defendant and Respondent.

CLERK, SUPREME COURT, UTAH

Appellant's Brief

Appeal from the District Court of the First Judicial
District of the State of Utah, in and for the
County of Cache.

Hon. Marriner M. Morrison, Judge.

LEON FONNESBECK,
Attorney for Plaintiff
and Appellant.

In the Supreme Court of the State of Utah

NEWELL J. OLSEN, oper-
ating under the name and
style of NEWELL J. OLSEN
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Plaintiff and Appellant,

vs.

ROLAND A. REESE,

Defendant and Respondent.

Appellant's Brief

STATEMENT OF FACTS

This is an appeal from a judgment of dismissal and from an order sustaining defendant's demurrer (which had long since been overruled, to plaintiff's complaint, and from the trial court's summary order dismissing plaintiff's cause of action and discharging the jury from further consideration of the case.

Appellant originally brought this suit in the city court against respondent for a balance of \$521.00, alleged to be due and owing to plaintiff for labor and materials supplied in the construction of a basement apartment for respondent in his residence. The con-

tract between the parties is in writing and is set out in the complaint. It states ten specific items which plaintiff, as second party, agreed to do (plaintiff to furnish work and materials), and then the contract continues.

“Any additional work shall be paid for by first party as parties hereto shall later agree upon. Any alterations shall be paid for by first party as extra work. Second party shall also furnish all hardware and shall do all work in a good and workmanlike manner.”

Plaintiff alleged in his complaint that he carried out and performed all of the ten specific items set out in the contract (except the wooden floor, which was unavailable, for which the parties agreed upon a credit of \$150.00). Plaintiff further alleged that in addition to the stated items in the contract, he did, at defendant's request, much additional work and performed many alterations which are specifically stated and set out in the complaint. Paragraph five of the complaint reads:

“That the total cost and expense of all of the said extra items as above enumerated to \$601.00, which together with the balance of \$995.00 due on contract as above stated, makes a total amount due plaintiff for said construction work for defendant of \$1,596.00, of which defendant has paid only the sum of \$1,075.00, leaving a balance of \$521.00, now due and owing the plaintiff, none of which has been paid.

"WHEREFORE, plaintiff demands judgment against defendant for said sum of \$521.00, together with costs of court."

Defendant filed a general demurrer in the city court, but claimed nothing for it. His demurrer was overruled, of which notice was duly given. The defendant then filed his answer. In it he admitted execution of contract as alleged; admitted that he had paid the plaintiff the sum of \$1,075.00, but denied the other allegations of the complaint. Then the answer continues:

"BY WAY OF FURTHER ANSWER AND AS A FURTHER DEFENSE, the defendant alleges that plaintiff did not do the work contracted in a workmanship manner and failed to perform certain work and labor and furnish material alleged in the plaintiff's contract; that on the 21st day of August, 1946, the plaintiff and the defendant went over all the items and work performed by the plaintiff and the defendant paid the plaintiff a balance of \$500.00 as a complete and final settlement of all the controversies between the parties hereto."

Defendant appealed from the judgment rendered against him in the city court. In the district court defendant moved and was granted leave to file an Amended Answer in which he amplifies his Further Answer and Further Defense, and specifically alleges:

"That the said contract sets forth that the plaintiff should do the work in a good and workmanship manner; that the defendant was to

furnish all first class material, furnishing all necessary labor and materials, exclusive of plumbing and wiring; and that the finishing of the rock wall and sheet rock is not in accordance with the contract and was installed in a poor workmanship manner. That the rock wall that was torn down was never replaced and was left in an unfinished condition; that the bedroom windows leak and were not installed in a workmanship manner and the hanging of doors and other work was not done in a workmanship manner, all to the damage of the defendant in the sum of \$450.00."

Plaintiff filed a Reply to said Further Answer denying that the \$500.00 check was delivered to plaintiff or accepted by plaintiff as full settlement; denied the allegations of poor workmanship:

"Plaintiff denies that the defendant suffered the sum of \$450.00 or any sum whatsoever on account of alleged poor workmanship or defective material, but alleges that he, the plaintiff, did his work in a reasonable and workman like manner and with as good material as was available and as plaintiff could buy on the market at said time. Plaintiff denies all other allegations in said further answer not herein admitted or qualified."

On the 20th day of March, 1948, a jury was duly impaneled to try the above case. After statement to the jury by court and respective counsel, plaintiff was duly sworn and testified in his own behalf. After testifying that he carried out and performed all of the specific items of construction stated in the con-

tract, he further testified that in addition he did, at defendant's request, a considerable amount of extra work (Tr. 29) as follows:

(a) Plaintiff put in a French door in place of common door (Tr. 30), actual extra cost, \$6.00, which he charged.

(b) Plaintiff built and installed dinette cabinet and small cabinet in kitchen in place of dinette counter (Tr. 31), actual extra cost, \$50.00, which he charged.

(c) Plaintiff installed a small built-in book case, including casing and painting the same, (Tr. 33), cost \$15.00, which he charged as extra.

(d) Plaintiff built and installed a large linen closet in place of an ordinary clothes closet (Tr. 34), cost \$50.00, which he charged as extra.

(e) Plaintiff built and installed one additional linen closet (Tr. 35), cost \$40.00, which he charged as extra.

(f) Plaintiff built entrance into washroom, cement steps, side walls, etc., at a cost of \$125.00, which he charged as extra. (Tr. 36).

(g) Plaintiff cut cement wall and built and installed double window in southeast bedroom (Tr. 36), cost \$50.00, which he charged as extra.

(h) Plaintiff constructed cement window wells, (Tr. 37), cost \$30.00, which he charged as extra.

(i) Plaintiff replaced cement floor in kitchen, and washroom, sheet-rocked and painted hallway, etc., (Tr. 39), cost \$200.00, which he charged as extra.

(j) Plaintiff varnished sheet-rock before papering, (Tr. 40), cost \$10.00, which he charged as extra.

(k) Plaintiff installed base boards on entire basement, (Tr. 40), cost \$25.00, which he charged as extra.

Plaintiff testified that these extra items totaled \$601.00; that considering what had been paid (\$1,075.00), there was still due and owing to the plaintiff, a balance of \$521.00 (Tr. 41).

Thus it will be seen that the defendant had actually paid the amount in full due under the written contract,—for the ten specific items therein set forth,—and in addition \$80.00 on the \$601.00 due for extra work and alterations; leaving a balance of \$521.00, still due and owing to the plaintiff for said extra work and materials.

On cross-examination, (Tr. 42), counsel did not question plaintiff on his testimony given on direct examination, but commenced asking appellant if he was a licensed contractor at the time the contract was signed. Appellant answered, "Yes, sir, I was licensed, as can be verified by the State." Then counsel asked appellant when he took out his license. Witness answered, "I don't recall." We objected to this line of cross-examination as it was outside the issues. (Tr. 43).

MR. DAINES: I demurred to the complaint, Mr. Fonnesebeck, on a general demurrer.

THE COURT. Objection overruled.

Then proceedings took place, in which the court summarily sustained defendant's demurrer and dismissed plaintiff's case. (Tr. 43 to 53.)

ASSIGNMENT OF ERRORS

ERROR NO. 1. The court erred in overruling plaintiff's objection and in permitting defendant's counsel, on cross-examination, to question plaintiff as to whether he had a contractor's license at the time the contract was signed. (Tr. 43)

ERROR NO. 2. The court erred in sustaining defendant's demurrer which had previously been overruled, without any prior notice or motion to reinstate the demurrer or any notice that defendant claimed anything under his demurrer (long since overruled). (Tr. 47)

ERROR NO. 3. The court erred in holding that as a condition precedent to the bringing of an action or to the stating of a cause of action, that the plaintiff must allege in his complaint that he was at the time of the contract a licensed contractor. (Tr. 47)

ERROR NO. 4. The court erred in holding, apriori, that plaintiff was a contractor, and that he was not a licensed contractor, when those questions were in dispute, the plaintiff having testified as to the

extra work done for which he was sueing, and that he was licensed, and an issue of fact had thus been raised on those questions on which plaintiff was entitled to go to the jury.

ERROR NO. 5. The court erred in stating to counsel for defendant, "If you make a motion to dismiss, I'll grant it."

ERROR NO. 6. The court erred in dismissing the plaintiff's case as follows:

"The record may show that the case is dismissed on the grounds that the plaintiff has failed to prove that at the time of the execution of this agreement that he was a licensed contractor of the State of Utah and upon the further ground that the complaint does not state a cause of action." (Tr. 52).

ERROR NO. 7. The court erred in making and entering its Judgment of Dismissal of said cause.

ARGUMENT

(A) PLEADING AND PROCEDURE

I desire first to discuss the questions here involved, from the standpoint of pleadings and procedure,—the necessity of pleadings to raise the question here presented, to-wit: did the plaintiff have a contractor's license?

It will be noted that the defendant's general de-

murrer had long since been overruled; that the defendant had claimed nothing for it. It had been filed simply as a time demurrer, so far as court or counsel for plaintiff were advised.

It will also be noted that after defendant appealed to the district court from the judgment rendered for the plaintiff in the city court, that he filed an amended answer, in which he amplified all of his defenses to plaintiff's cause of action, but pleaded no defense whatsoever based on the ground that plaintiff did not have a contractor's license.

That was a defense (if it existed) which defendant kept to himself and it was sprung as a surprise and as an "ace in the hole", by which defendant apparently hoped to (and in fact did) score a knockout, a dismissal of plaintiff's case, without meeting the issues on the merits. If counsel answers that he did not learn about that defense himself until a few days before the trial, the answer is that he knew about it in plenty of time to advise or serve notice on plaintiff's counsel that such a defense would be made at the trial. But had defendant so notified plaintiff, the surprise element would have been lost, for plaintiff would then have been prepared to meet that defense.

Our Statute, Section 104-29-2, requires that a judgment must be on the merits of a case, except in the specific cases of judgment of dismissal or nonsuit, provided for in Section 104-29-1. It is respect-

fully submitted that the judgment of dismissal entered herein was error, for it does not come within any of the provisions of Section 104-29-1.

“Pleadings are intended to form the foundation of the proof to be submitted on the trial, and should advise the parties to an action what the opposite party relies upon either as a cause of action or defense or objection as the case may be.” (31 Cyc. 43-4.)

It is submitted that the underlying thought back of the above rule and the sections of our statute, regulating pleadings and court procedure, is to avoid surprises and have all suits and actions of litigants, so far as possible, tried and settled on their merits.

To this same end, to avoid surprises and misunderstandings, Section 104-9-1 specifically provides what the Answer must contain by way of defense to plaintiff's complaint. Thus:

“The answer of the defendant must contain:

(1) A general or specific denial of each material allegation of the complaint controverted by the defendant, or any knowledge or information thereof sufficient to form a belief; or a specific admission or denial of some of the allegations of the complaint, and also a general denial of all the allegations of the complaint not specifically admitted or denied in the answer.

(2) A statement of any new matter constituting a defense or counter-claim.”

These statutory and well established court rules

and regulations should, I submit, be kept in mind when determining proper procedure under Section 79-5a-1, requiring contractors to take out a license.

That Section (79-5a-1) provides: "It shall be unlawful for any person . . . to engage in the business or act in the capacity of a contractor without having a license therefor as herein provided."

It will be noted that there is no statutory provision providing that a contract entered into by an unlicensed contractor shall be void. Neither are there any statutory provision stating that an unlicensed contractor may not bring suit or may not recover on his contract, or may not bring action to recover for the reasonable value of services rendered,—for the labor and material furnished and supplied by plaintiff, of which defendant has had the use and benefit. The statute merely makes the act of engaging in business as a contractor—undertaking to do definite construction work for a fixed price,—without a license, *malum prohibitum*.

Without any pleadings or notice by defendant (other than a general demurrer for which nothing was at that time claimed), the trial court took the position that the question of plaintiff having a license might be raised at any time, and that a contract entered into by an unlicensed contractor (thereby assuming and impliedly finding that plaintiff was a contractor and that he was unlicensed) was wholly void. That as a

condition precedent to the stating of a cause of action by the plaintiff, it was necessary and mandatory that plaintiff allege that he was a licensed contractor. And, as the plaintiff had not so alleged in his complaint, the trial court considered the plaintiff's case fatal and irreparable, and not only sustained the general demurrer (previously overruled), but ordered the case to be dismissed, and thereafter, on March 30, 1948, made and entered its Judgment of Dismissal of said case.

Appellant submits that such arbitrary rulings and judgment were gross injustice and constitute reversible error. That inasmuch as the statute does not declare that a contract by an unlicensed contractor is void or unenforceable, nor that an unlicensed contractor may not recover for work performed or for materials supplied, that plaintiff's contract was valid and his complaint stated a cause of action.

Appellant submits that if defendant claimed a defense on the ground that plaintiff had no contractor's license, it was his duty in view of the provisions of our statute, to plead such defense, or, by special demurrer or motion, raise such defense.

Appellant further submits that the rulings and judgment of dismissal by the trial court imposed penalties and hardships on the plaintiff, not required or contemplated by the statutes here involved, Sections 79-5a-1,—10. Appellant contends that as said statutes are penal in their nature and are a restriction on the

plaintiff's civil rights, they should be strictly construed; that the court should not go beyond the clear expressed intent of the statute, particularly when the nature of the business here involved (work and materials furnished by plaintiff in the construction of an apartment), is considered.

Appellant respectfully submits that the better and more modern rule is that when a person engages in business such as contractor, without first procuring the license, (assuming plaintiff had done so which we do not admit), which the statute requires for the privilege of doing such work, he incurs the penalties which the statute in such case provides, and none other. That if further penalty or hardship are to be imposed for doing such act (furnishing, or undertaking to furnish, work and materials as a contractor), which the Legislature has made *malum prohibitum*, if done without a license, then such additional penalty should be imposed by the statutes, through the Legislature and not by the courts.

In the annotation on this question, 118 A.L.R. 646, we read.

"In a considerable number of the recent cases, stress or reliance appears to be placed upon the absence of any specific provision declaring void or unenforceable the contract of an unlicensed person. See, for example, *John E. Rosasco Creameries v. Cohen* (N. Y.) (reported herewith), and also other cases set out under headings "Food dealers" and "Liquor dealers", *infra*. And it

was stated, *arguendo*, in *Patterson vs. Southern R. Co.* (1938) 214 N. C. 38, 198 S. E. 364, that the trend of authority was to the effect that 'when a person engages in a business without procuring the license which the state requires for the privilege,' he incurs the penalties which the statutes pertaining to the license provide, and none other."

In the *Rosasco* case, the New York Court uses this language:

"We have here a statute which provides that milk dealers shall not sell milk unless duly licensed. The statute imposes penalties for its violation by way of fine and imprisonment, but it does not expressly provide that contracts made by milk dealers shall be unenforceable. Nothing in this statute reveals an implied intent to deprive unlicensed dealers of the right to recover the reasonable value of the milk sold by them, and where the wrong committed by the violation of the statute is merely *malum prohibitum*, and does not endanger health or morals, such additional punishment should not be imposed unless the legislative intent is expressed or appears by clear implication . . . Illegal contracts are generally unenforceable. Where contracts which violate statutory provisions are merely *malum prohibitum*, the general rule does not always apply. If the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy or appropriate individual punishment, the right to recover will not be denied."

In the Rosasco case, the New York statute provided:

"Section 257. Licenses to milk dealers. No milk dealer shall buy milk from producers or others or deal in, handle, sell or distribute milk unless such dealer be duly licensed as provided in this article. It shall be unlawful for a milk dealer to buy milk from or sell milk to a milk dealer who is unlicensed, or in any way deal in or handle milk which he has reason to believe has previously been dealt in or handled in violation of the provisions of this chapter."

Thus the New York statute was very similar in its provisions to our statute 79-5a-1. The penalty for violation of each of said statutes is almost identical.

In the Rosasco case, the defendant pleaded as an affirmative defense that plaintiff was not licensed as a milk dealer during the period when it sold milk to the defendant.

That, we submit, is the proper rule of pleading and procedure in cases of this kind, where the statute does not make the contract void, nor prohibits recovery if done without a license. The plaintiff's undertaking as contractor (building a basement apartment), not being declared void by statute, and considering our housing shortage, certainly could not be said to be against, or in violation of public policy; nor can it be claimed that the statute was enacted as a police measure.

In the case of Garwin vs. Gordon, 14 Pac. 2nd 264 (N.M.), an unlicensed real estate broker sued for the balance of his commission alleged to be due him. Judgment was entered in his favor by the trial court. Appellant contended that plaintiff in that case was not entitled to judgment because he had failed to show he was in possession of a broker's license. The New Mexico Supreme Court, although observing that as a general rule brokers who fail to take out a license in violation of statute cannot recover a commission, yet in view of the fact that the New Mexico statute fails to provide that a broker's contract for sale of real estate is void, or that an unlicensed broker may not recover for services rendered, said:

"We hold that a broker regularly engaged in the business as an occupation, at least unless the transaction is shown to have occurred at a time when its commission constitutes a misdemeanor (30 days after notice from the assessor), may recover compensation for a sale effected when he was without such license."

If we are correct in our analysis and contention as to pleading and procedure in these cases, then we submit the complaint herein did state a cause of action, and that the court erred in permitting counsel, over our objection, to question plaintiff on cross examination (without any previous notice or pleading) whether he had a contractor's license.

And the court likewise erred in sustaining the general demurrer (which had long since been over-

ruled and for which nothing had been claimed at the time), and likewise erred in dismissing the plaintiff's case.

**(B) DEFENSE NOT AVAILABLE
TO DEFENDANT**

Appellant further maintains that said judgment of dismissal and said rulings of the court here complained of, were error for the claimed defense of invalidity of contract, and are not available as a defense to defendant in case at bar, because:

(1) Plaintiff's suit to collect the balance due him of \$521.00, is not based on the written contract; but it is a suit on a quantum merit basis for the extra work and materials, as set forth in the complaint and testified to by plaintiff, furnished and supplied in each instance by the plaintiff at the defendant's instance and request, in addition to the items stated in the contract. Hence the argument of invalidity of said contract dated March 20th (because no license was issued to plaintiff until March 22nd), has no application to and does not effect plaintiff's right to recover the reasonable value for the extra work and materials performed and supplied by plaintiff in addition to the contract, (and after license had been issued to plaintiff).

(2) Appellant submits that defendant is furthermore precluded and estopped from asserting or contending that the contract set forth in the complaint

is void, for the reason that the defendant has pleaded and asserted a portion of said contract as part of his defense to the plaintiff's action;—an alleged failure on the part of the plaintiff to perform his work “in a good and workmanlike manner as provided in the contract”. Defendant admits that said contract was duly executed. The defendant is thus relying upon and asserting a provision of the said contract as his defense to the plaintiff's action, to-wit: the provision in the said contract that “second party shall do all work in a good and workmanlike manner”; which defendant alleged plaintiff failed to do. Defendant should not be permitted to assert or claim that the contract is void because entered into by the plaintiff without a contractor's license, and at the same time admit the contract and set up provisions of the same as a defense to plaintiff's action, when plaintiff seeks to recover for work and materials furnished under said contract. And certainly, he should not be permitted to do so when the plaintiff is seeking to recover on a quantum merit basis for extra work and materials supplied by the plaintiff at the defendant's request, in addition to the provisions of the contract.

(C) COURT ERRED IN ENTERING JUDGMENT
OF DISMISSAL WITHOUT GRANTING
PLAINTIFF LEAVE TO AMEND
HIS COMPLAINT

Appellant further contends that even though this Court should hold that plaintiff was duty bound to

allege in his complaint that he was the holder of a contractor's license "at the time he engaged in the business or acted in the capacity of a contractor", that the complaint did not state a cause of action without such allegation, that the question whether plaintiff held a contractor's license could be raised at any time, even under a demurrer (for which defendant claimed nothing at the time and which had long since been overruled), and that the court properly sustained such demurrer; appellant contends that the trial court still erred in dismissing plaintiff's case and entering judgment of dismissal without granting plaintiff leave to amend his complaint.

In this respect, case at bar is very similar to the recent case of *Smith v. American Packing Company*, 130 P. 2nd 951, where the lower court sustained demurrer to the complaint on the ground that it did not appear that plaintiff had an architect's license; the court holding that plaintiff was suing for services rendered as an architect.

In the *Smith* case, no permission was granted plaintiff to amend his complaint and the trial court entered judgment on the demurrer dismissing plaintiff's case, in the same manner as the trial court sustained the demurrer and dismissed the plaintiff's action in case at bar. This Court held in the *Smith* case, that although the demurrer to the complaint was properly sustained (for special reasons which this Court there observed), the trial court erred in

entering its judgment of dismissal of the case without granting leave to the plaintiff to amend his complaint. Appellant submits that the same error was made in the case at bar, even though, as stated, this Court should hold that the demurrer was properly sustained.

In the Smith case, *supra*, this Court made a couple of observations which we think have application to case at bar:

(a) This Court said. "The purpose and intent of statute under consideration have a direct bearing regarding the sufficiency of the allegations of the complaint." Appellant submits that that rule should apply in construing the sufficiency of the allegations of the complaint, in case at bar, and in reaching the conclusion that plaintiff's complaint did state a cause of action, without affirmatively alleging that the plaintiff had a contractor's license. That this is so not only because this is a suit on quantum merit, but also because the statute does not provide that plaintiff's contract is void, or that the plaintiff, as a contractor, may not recover for work performed and materials supplied without a license.

(b) In the Smith case, this Court further observed:

"As a general rule where a person seeks recovery for professional services for which a

license is required as a condition precedent to the rendition of such services for a fee, such person must allege and prove facts which show he was licensed at the time such services were rendered."

We do not think that general statement should control all cases where statute requires a license, irrespective of whether or not the statute provides that no action may be brought, or no recovery may be had by the plaintiff, if he held no license. In support of the last quoted statement, this Court cites two cases,—Westbrook vs. Nelson, 67 Pac. 884 (Kan.), and Hoxey vs. Baker, 246 N.W. 653 (Ia.). In the Kansas case the plaintiff, a physician, was suing for services rendered. The statute provided that "In no case shall any person violating this act receive compensation for services rendered." The Kansas Court held that the plaintiff had to allege in his complaint, in order to state a cause of action, that he held a physician's license. The Iowa case, *supra*, was likewise a physician suing for services rendered and the Iowa Court likewise held that under the statute requiring that a person who practices medicine must obtain a license, and denying the right to sue for services rendered without a license, a person who practices medicine without a license cannot recover compensation for such services rendered, and that the plaintiff must allege and prove that he is a licensed physician.

Hence, we submit that the general statement made by this Court in the Smith case (to the effect

that plaintiff must allege and prove facts showing that he was licensed at the time services were rendered), should be held to apply to cases where the statute requires a license as a condition precedent to the collection for services rendered, but it is not controlling and should not be held to apply to case at bar where the statute has not made the issuance of a license to a contractor, a condition precedent to the contractor recovering for labor or materials furnished by him as a contractor without a contractor's license.

In case at bar the plaintiff is not suing for a fee, nor for personal services rendered. This suit is brought for work performed and materials furnished to defendant, but for which he now seeks to avoid payment on the technicality that plaintiff did said work and furnished said materials without a license. Hence this case is much like the Rosasco milk case, *supra*, where the New York Court held that in the absence of statute prohibiting an action by a contractor, or prohibiting any recovery for milk sold without a license, the plaintiff could sue for and was entitled to recover for the milk actually sold and delivered by him, even without a license.

Case at bar is also similar to the case of Rock Island Lumber & Coal Company vs. E. A. Wales Mill Co., 212 Pac. 97 (Kan.), where it was held that failure on the part of a lumber dealers to comply with an ordinance imposing a license on such dealer and subjecting those who fail to take out a license to a fine; the Kansas Court said:

"It does not, in terms or by necessary implication, make it unlawful for a lumber and coal dealer to sell his wares in case of omission to pay the tax, the penalty is imposed for neglect to pay the tax before engaging in business, and, paraphrasing the concluding portion of the opinion in *Simmons v. Oatman*, by weight of more recent authority and by the better reason, the fact that the plaintiff had not paid \$10 license fee is not available to the defendant to defeat an otherwise valid lien for material furnished to improve his property.

"The judgment of the district court is reversed, and the cause is remanded for further proceedings."

In the *Lumber Company* case, *supra*, the Kansas Court reviews a number of earlier cases from that state, quoting from the case of *Manker v. Tough*, 98 P. 792 (Kan.), as follows:

"Why should one party to a contract be allowed to avoid the payment of debts he has contracted to pay, and thus gain an unconscionable advantage, because the other party deliberately, or through inability or mere oversight, has failed to discharge an obligation to the city, when there is available to the city both a civil remedy for the wrong and a penal remedy against the wrongdoer? Was it any benefit to the city in *Yount v. Denning*, *supra*, that one party was relieved from paying the other an agreed compensation for services actually rendered, or in *Mayer v. Hartman*, *supra*, that one party was enabled to cheat his neighbor out of coal worth nearly \$1,000?"

We submit the same question could be asked in case at bar. Why should the defendant be allowed to avoid payment of his just debt which he has agreed to pay, either by express contract or by implied agreement, and thus gain an unconscionable advantage over the plaintiff, because (as claimed by defendant) plaintiff did not have his contractor's license issued to him until two days after the contract was signed, but that he had it during the whole period while said work was done?

(D) THE COURT ERRED IN DECIDING QUESTIONS OF FACT AWAY FROM THE JURY, AND IN ARBITRARILY RULING ON SAID DISPUTED QUESTIONS OF FACT, AND IN HOLDING, APRIORI, THAT PLAINTIFF WAS A CONTRACTOR AND WAS UNLICENSED, WHEN THE UNDISPUTED EVIDENCE ADDUCED WAS TO THE CONTRARY, OR AT LEAST WHEN SAID QUESTIONS WERE IN DISPUTE.

Was plaintiff suing, in case at bar, as a contractor? Did the plaintiff have a contractor's license? The trial court, by dismissing plaintiff's case, in effect held and decided both of those two important questions of fact adverse to the plaintiff, even though a jury had been duly sworn and impaneled to try the case and had in fact heard part of the evidence.

(1) Appellant's first contention under this heading, is, that as there is undisputed evidence in the record, indicating a contrary conclusion to that

arrived at by the trial court, the plaintiff was at least entitled to have both of those questions of fact submitted to and decided by the jury, if the court deemed that a decision thereon was necessary in order for plaintiff to recover.

(2) Appellant contends that the court erred in holding, in effect, that plaintiff was suing as a contractor. It is true that plaintiff sets forth the contract in his complaint and alleges that he carried out and completed all of the items specified in the contract. But the plaintiff also alleged that defendant had paid the sum of \$1,075.00, which (considering the credit of \$150.00, on account of flooring) paid the contract in full and \$80.00 over, to be applied on the extra work and materials furnished by plaintiff. This extra work was done as the work under the contract progressed, and in each instance it was done at defendant's instance and request.

The plaintiff not only alleged in his complaint the various and specific items of the said extra work, but he also specifically testified to each item of said extra work and alterations. That he had performed the same, in each instance at defendant's request. Also the reasonable and fair value of said extra work and material ordered by defendant and for which defendant thereby impliedly promised and agreed to pay. Hence it will be seen that what plaintiff was and is suing for is the balance \$521.00, still due the plaintiff as the reasonable value of said extra work and materials so furnished.

That being true, can it be said he is suing as a contractor? We think not. Section 79-5a-3 defines a contractor as follows:

"79-5a-3. Contractor Defined. A contractor is a person . . . who for a fixed sum, price or fee, undertakes with another for the construction, alteration, repair of any building . . . or any part thereof."

There is no evidence that there was any fixed or agreed price in advance for any of these extra items. Plaintiff testified that defendant or his wife requested that these extra items (additions or alterations) be put in; that he put them in, and the reasonable and fair price for same. Plaintiff's testimony is not disputed. Under said facts, appellant submits that he could not be classified as a contractor under the above statute, nor held to be suing as a contractor, so far as the present case is concerned, for the amount due for said extra work is all that is involved in case at bar.

Hence, we submit there was no necessity for the court to decide the question whether or not the plaintiff was a contractor, or whether he had a contractor's license. Those questions were immaterial so far as the case at bar is concerned; since plaintiff is not suing as a contractor, as that term is defined by statute. Hence the court erred in holding that the plaintiff was suing as a contractor and in dismissing plaintiff's case upon the ground that plaintiff had not alleged that he held a contractor's license at the time.

(3a) Appellant further submits that the court erred in holding that plaintiff did not have a contractor's license at the time the contract was signed. It is true that the contract is dated at the top as of March 20, 1946, and that the letter from the State Department of Registration (to which we stipulated), stated that plaintiff's license was issued to him March 22, two days later. But plaintiff testified that the contract was not signed until several days after the date it bears. This testimony is not contradicted. Plaintiff also testified that his license had been issued to him at the time the contract was signed. That testimony also stands uncontradicted.

That testimony of the plaintiff,—that the contract was actually signed some time,—“several days”—after the date it bears. (Tr. 53), and that his license had been issued to him before that contract was signed, should have been accepted by the court, for there is no evidence to the contrary.

Yet the trial judge, (after he had sent the jury out), contrary to said definite and undisputed testimony of plaintiff,— that he had his license at the time the contract was signed,— arbitrarily decided that plaintiff had not shown that he was the holder of a contractor's license at the time the contract was signed, and dismissed plaintiff's case for said reason.

(3b) Appellant further contends that the trial court also erred in dismissing plaintiff's case on account of the implied finding that plaintiff did not hold

a contractor's license at the time the contract was performed. Even exclusive of plaintiff's testimony, the evidence conclusively shows that **plaintiff did have his license while he carried out and performed the said contract, and as well as while said extra work was being done.**

This evidence was supplied by the defendant. The letter from the State Department of Registration, to which we stipulated, stated plaintiff's license was issued to him March 22, 1946, two days after the date of the contract. The license was issued for and covered the year 1946. Hence there can be no question but that plaintiff did have his license **at the time he actually engaged in the business or actually acted in the capacity of a contractor,** and that is all that the statute requires.

We do not believe that any fine could be assessed or imposed against the plaintiff for a violation of the statute, (doing work as a contractor without a license) for merely signing a contract, if no actual construction work was ever undertaken; nor until actual construction work was engaged in by the contractor. If that be correct, then the important time when the contractor must have his license, under the statute, (before a penalty could be imposed), is the time when he actually undertakes to perform the work in question for which a license is required. As we have noted, the plaintiff not only testified that he had his license during said period, but the admitted evidence from the State Department of Registration

show that the license was issued to him two days after the date of the contract, which would thus conclusively show that plaintiff had his license while the work was being done. In addition to that, we have shown that plaintiff also testified that he had his license at the time when the contract was actually signed. We have also shown that the necessity of a contractor's license to plaintiff does not apply in case at bar, so far as the present suit is concerned, for that is an action on quantum merit for the extra work and materials supplied at the defendant's request.

For each and all of the above and foregoing reasons, we submit that the court below made gross error in dismissing the plaintiff's case.

Respectfully submitted,
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and Appellant.

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