

1948

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

NEWELL J. OLSEN, operating under
the name and style of NEWELL J.
OLSEN & SONS,

Plaintiff and Appellant,

vs.

ROLAND A. REESE,

Defendant and Respondent.

RESPONDENT'S BRIEF

FILED NEWELL G. DAINES,
L. DeLOS DAINES,
JUL 31 1948 Attorneys for Defendant
and Respondent.

CLERK, SUPREME COURT, UTAH

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

IN THE SUPREME COURT OF THE STATE OF UTAH

NEWELL J. OLSEN, operating under
the name and style of NEWELL J.
OLSEN & SONS,
Plaintiff and Appellant,

vs.

ROLAND A. REESE,
Defendant and Respondent.

STATEMENT OF FACTS

The appellant in his statement of facts and throughout his brief, has, contrary to the pleadings, asserted that his action is one based on quantum merit instead of one based on a written contract, which is the case. He has also taken the position that the respondent herein claimed nothing for his demurrer filed in the City Court. This assertion is also unfounded. To the foregoing, the respondent takes exception. (Tr. 5, 6 and 7.)

For the purpose of clarity in setting forth respondent's position, he is herein setting forth the pertinent parts of appellant's complaint. These are as follows:

2. That on or about the 20th day of March, 1946, the plaintiff and defendant made and entered into an agreement by which plaintiff agreed to build a basement apartment for defendant in his home at 3rd North and 4th East Street, Logan City, specifically agreeing to do and construct certain specific

and stated items, and further agreeing that "any alterations shall be paid for as extra work." Said agreement is in words and figures as follows:

BUILDING AGREEMENT

This building agreement made and entered into this 20th day of March A.D. 1946, by and between Mr. Roland Reese, as first party, and Newell J. Olsen, operating under the name of Newell J. Olsen & Sons, as second party, WITNESSETH:

That for and in consideration of the sum of \$1,150.00, to be paid in cash by first party at the rate of 65% as the work is done, balance when finished, second party hereby agrees to build a basement apartment for first party, furnishing all necessary labor and materials, exclusive of all plumbing, and all wiring. Second party more particularly agrees to do the following: * * *

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.

/s/ ROLAND A. REESE,
First Party

/s/ NEWELL J. OLSEN,
Second Party.

3. That plaintiff has fully performed his said agreement, has furnished all material and done all the work and labor, as called for in said agreement, except defendant furnished one door for which he is en-

titled to a credit of \$5.00, and except also, plaintiff did not put in wooden floor, for which defendant is entitled to an agreed credit of \$150.00, which left a balance due and owing to the plaintiff on said specified items mentioned in the contract of \$995.00

4. That in addition to performing the specific items mentioned in the contract, the plaintiff also, at the special instance and request of defendant, or defendant's wife, made and performed many alterations, for which plaintiff is entitled to pay as extra work, which are as follows: * * *
(Tr. 5, 6 and 7.)

To appellants' complaint, the respondent filed a general demurrer in the City Court of Logan City, which the City Court overruled. (Tr. 10 and 11.)

On the 20th day of February, 1948, a jury was empanelled to try the above case, and the appellant was sworn and testified. Among other things he testified that he was a general contractor having engaged in such business for about three years. (Tr. 62, 85.)

During cross examination of the appellant it was stipulated by his counsel that at the date of the execution of the contract set out in appellants' complaint, that he, the appellant, did not have a contractor's license as is required by 79-5a-1 of the Utah Code Annotated 1943. (Tr. 92 and 93.)

Upon motion of counsel for the respondent, the District Court dismissed the appellants' complaint on the grounds that the appellant failed to prove that at the

time of the execution of the contract sued upon, he was a licensed contractor in the State of Utah, and upon the further ground that the complaint did not state a cause of action. (Tr. 94.)

The appellant did not request or ask leave of the Court to amend his complaint after the trial.

ARGUMENT AND AUTHORITIES

The District Court did not err in dismissing the appellant's complaint and its judgment should be sustained. From a reading of the appellant's complaint it is apparent on its face that he has declared upon a written agreement and not quantum meruit as appellant asserts throughout his brief. (Tr. 5, 6, 7.)

The appellant in his complaint failed to state a cause of action and it is fatally defective for the following reasons:

1. That inasmuch as appellant is a contractor within the provisions of chapter 5, title 79, Utah Code Annotated, 1943, his failure to allege and plead in his complaint that he had fully complied with the requirements of the license law and that he was a duly licensed contractor as required by the laws of this State, or the reason, if any, why no license was required, rendered his complaint fatally defective, and

2. Appellant failed to allege and plead that he had performed all of the conditions precedent required in said contract by him to be performed or the excuse for non-performance.

NECESSITY OF LICENSE

During the trial of appellant's case, his own evidence affirmatively showed that at the time of the execution and entering into of the written agreement declared upon by the appellant that he did not have a contractors license as required by the laws of this State, the contract was thus null and void.

As aforementioned, the appellant was a contractor within the provisions of the laws of this state and that his failure to have a license and to be so licensed and to allege in his complaint that he was so licensed, or the reason why no license was necessary rendered his complaint fatally defective.

The statutory provisions applicable and pertinent to this case are as follows:

“79-5a-1. License to do Business.

It shall be unlawful for any person, firm, copartnership, corporation, association, or other organization, or any combination of any thereof, to engage in the business or act in the capacity of contractor within this state without having a license therefor, as herein provided * * *

79-5a-3. “Contractor” Defined.

A contractor within the meaning of this act is a person * * *, who for a fixed sum, price, fee, percentage or other compensation other than wages, undertakes with another for the construction, altera-

tion, repair, addition to or improvement of any building 79-5a-4. Licenses — Application for — Fee — Qualifications — Rules and Regulations.

Any person, * * * desiring to obtain a license under this act shall make application in writing, * * * No license shall be issued until the department of registration is satisfied upon evidence presented and recorded as to the integrity of the applicant and that said applicant is qualified in the following respects to hold a license:"

- (1) That the applicant is of good reputation;
- (2) That the applicant has never been refused a license or had a license revoked for reasons that should preclude the granting of the license applied for * * *

79-5a-6. Unprofessional Conduct — Complaint — Hearings — Appeal to District Court.

Any person * * * may file a duly certified complaint with the department of registration charging that a licensee is guilty of one or more of the following acts or omissions: * * *

* * * If the department of registration's decision be that the licensee has been guilty of any such acts or omissions, it may suspend or cancel the contractor's license * * *

79-5a-10. Violation of Act — Penalty.

Any person * * * acting in the capacity of a contractor within the meaning of this act, without a license as herein provided, shall upon conviction thereof, if a person, be punished by a fine of not to

exceed five hundred dollars, or by imprisonment in the county jail for a term not to exceed six months, or by both such fine and imprisonment, in the discretion of the court. * * *

In the case of Dow et.al v. United States for the Use and benefit of Holley, 154 Fed. 2d. 707, the Court said:

The Federal Court in construing the foregoing act held that it was passed by legislature under its police power for the protection of the public, and that the contractors of unlicensed contractors could not be enforced.

Although Chapter 5a of Title 79 (Contractors) has not been interpreted by this Court, it has been by the Circuit Court of Appeals of the Tenth District.

“The remaining question concerns itself with the right of Holley to maintain the action. At the time the subcontract was entered into and at the time the work was done under it, he did not have a license by the State of Utah authorizing him to engage in the trade or occupation of a contractor. Title 79, Utah Code 1943, has reference generally to licenses issued by the Department of Registration for engaging in certain businesses or professions. Section 79-1-38 provides that it shall be unlawful for any person to practice or engage in the practice of any profession, trade, or occupation subject to the department without authority so to do as provided in the title. Section 79-5a-1 makes it unlawful for any person, firm, copartnership, corporation, association, or other organization to engage in the business or act in the capacity of contractor within the state without having a license therefor as therein provided, unless

such persons, firm, corporation, association, or other organization is particularly exempted by the act. Section 79-5a-2 provides certain exemptions but they do not have bearing here. The presently material part of section 79-5a-3 provides that a contractor shall include any person who for a fixed sum or price, other than wages, undertakes for another any excavation, and that the term contractor, as used in the act, shall include subcontractor. Section 79-5a-4 deals with the making of applications for licenses as a contractor and the issuance of such licenses. And section 79-5a-10 provides a penalty for acting in the capacity of a contractor without having a license. Neither these statutory provisions nor any others called to our attention provide in express language that a contract employing an unlicensed contractor to perform services falling within the field of his trade shall be unenforceable. But the statutory requirements to obtain a license before engaging in the trade is a police regulation for the protection of the public, *Smith, v. American Packing & Provision Co.* 102 Utah 351, 130 P. 2d. 951; a penalty is provided for the violation of the statutory exaction; and it is the well settled general rule that in ordinary circumstances, a contract entered into by an unlicensed person in contravention of the statutory provisions of this kind will not be enforced. *Wedge wood v. Jorgens*, 190 Mich. 620, 157 N.W. 360; *Hickey v. Sutton*, 191 Wis. 313, 210 N.W. 704; *Sherwood v. Wise*, 132 Wash. 295, 232 P. 309, 42 A.L.R. 1219; *Lund v. Bruflat*, 159 Wash. 89, 292 P. 112; *American Store Equipment & Construction Corporation v. Jack Dempsey's Punch Bowl, Inc.*, 283 N.Y. 601, 28 N.E. 2nd. 23; *Massie v. Dudley*, 173, Va. 42, 3 S.E. 2d. 176; *Board of Education v. Elliott*, 276, Ky. 790, 125 S.W. 2nd 733."

The Supreme Court of this State in the case of Anderson vs. Johnson, 108 Utah 417, 160 P. 2d. 275, construed chapter 2 of title 82, Utah Code Annotated 1943, our statutory provisions regulating real estate brokers and real estate salesmen. This act is similar to the statute in question. This court, in an opinion by Justice Turner held that such statutes were enacted under the police powers of the state and for the protection of the public. The Court said:

“It is apparent that the statutes were enacted, not to provide revenue, but to provide for registration and regulation of those engaged in the real estate business. The license fee is so nominal that no other conclusion is tenable. In Koeberle v. Hotchkiss, 8 Cal. App. 2d. 634, 48 P. 2d. 104, 107, Justice Crail stated: “The primary purpose of the Real Estate Brokers’ Act was to require real estate brokers and salesmen to be ‘honest, truthful and of good reputation.’”

The Supreme Court of Wisconsin in the case of Hickey et.al v. Sutton, 210 N.W. 704, held that a contract entered into by an unlicensed architect as required by the statutes of this state was void. The Court said:

“The only conflicting authorities with reference to the rule that the failure to procure license bars recovery for services rendered is in those cases where the statute which requires a license as a revenue measure and not for the protection of the public. There is no conflict in the authorities upon the rules that the failure to procure a license bars recovery where the license is enacted as a police measure for

the protection of the public. The rule applies with equal force whether the requirement is sought upon a written contract or quantum meruit. If the necessity of procuring a license could be avoided by neglecting to make the contract and those recovering upon quantum meruit, an easy way out would be found to nullify the contract.

It is not necessary that the pleadings should raise the question that the appellant has not procured the license required."

In the construction of a statute similar to ours, the Supreme Court of Virginia in the case of *Massie vs. Dudley*, 3 S.E. 2d. 176, said:

"It is a well settled principle of law that the Courts will not be a part to enforce an agreement made in furtherance of objects forbidden by statutes or by common law, or general policy of law, or to recover damages for its breach, or when the agreement has been executed in whole or in part by payment or money to recover it back * * * The law refuses to enforce illegal contracts, as a rule, not out of regard for the party objecting, nor for any wish to protect his interest, but from reasons of public policy. When even, therefore, the illegality of the contract appears whether alleged in the pleadings or made known for the first time in the evidence, it is fatal to the case * * * The law not enforce contracts founded in its violations."

To the same effect are the following cases: *Board of Education et. al v. Ellitt* 125 S.W. 2d. 733. *Wedge-wood v. Jorgens* 137 N.W. 360.

The American Store Equipment & Construction Corporation, Appellant v. Jack Dempsey's Punch Bowl, Inc. 28 N.E. 2d. 23.

Boxer v. Schroeter et. al. 7 N. 2d. 262. Maddox v. Yocum 31 N. E. 2d. 652.

Kirkman et. al. v. Borzag 150 P. 2d. 3.

Phillips v. McIntosh et.al. 124 P. 2d. 835.

As pointed out by the foregoing authorities, when a statute declares that it shall be unlawful to perform certain acts, without a license, and imposes a penalty for violation; contracts for such acts are necessarily void and incapable of enforcement. In this respect our statutes present a stronger case for these being within the State police power and for the protection of the public in that they provide that such contracts are not only unlawful and provide a penalty for their violation but they also provide among other things that the department of registration, before issuing a license, must find the applicant to be a person of good reputation and integrity, that he has never been refused a license or had a license revoked for good reason. (79-5a-4, Utah Code Annotated 1943.) Our act further provides that a license may be revoked for professional misconduct. (79-5a-6, Utah Code Annotated, 1943.) In view of the foregoing can it be said that our act is not for the protection of the public, and passed as a police measure?

That the appellant is a contractor within the provision of Title 79-5a-3, Utah Code Annotated, 1943, is apparent from the face of the complaint, for in the contract set out therein it declares:

"This building agreement * * * for and in consideration of the sum of \$1150.00 to be paid in cash by the first party at the rate of 65% as the work is done, balance when finished, the second party agrees to build a basement apartment for first party, furnishing all necessary labor and materials * * * Any additional work shall be paid for by first part as parties hereto shall later agree upon. Any alterations shall be paid for by first party as extra work." (Tr. 5 and 6.)

We call your attention to the pertinent part of 79-5a-3, Utah Code Annotated 1943:

"Contractor" Defined.

A contractor within the meaning of this act is a person * * * who for a fixed sum, fee percentage or other compensation other than wages, undertakes with another for the construction, alteration, repair, addition to or improvement of any building * * * other than to personalty, or any part thereof * * *"

That the appellant is a contractor within the meaning of the act is plain as the consideration for the services to be rendered and the materials furnished was fixed, except as to extras and this was to be agreed upon by the parties. The only exception which takes a person out of the act as a contractor is when the compensation received is in wages. The appellant in suing for the extras which the appellant alleged he furnished, did not sue for wages but for what he regarded as a proper cost for labor and materials. Wages are paid for at an hourly, weekly or monthly rate, and appellant's claim here is not based upon any such a basis.

PLEADINGS

As the appellant herein is a contractor within the provisions of chapter 5a, title 79, Utah Code Annotated, 1943, and he is seeking to recover for services rendered as such, he must allege facts which show that he was licensed at the time that the contract was entered into or that he was exempted therefrom, and in failing to do so, he did not state a cause of action. (Tr. 5 and 6.)

The Supreme Court of this state in the case of Smith vs. American Packing Provision Company, 102 Utah 351, 130 P. 2d, 951, has so ruled. This was the case in which an action was brought by an architect for services rendered, the licensing of which is also controlled by title 79, Utah Code Annotated 1943. In an opinion written by Justice McDonough, the Court said:

“The appellant contends that all of the matters raised by the defendant constitute matters of defence which plaintiff does not have to negative. However, the general rule is that 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 performed, so that he was exempted from the class required to have such license.”

That the rule as announced by this Court is in accord with the weight of authority is apparent from the authorities.

53 C.J.S. page 716, section 59a, says:

"It is incumbent on a person whose right to recover on a contract is dependent on his having been licensed to plead and prove, as a part of his cause of action, that he had fully complied with the requirements of the license law, or else to plead and prove that under the circumstances, the requirement was not applicable and he was not required to take out a license or pay a license tax * * *."

To the same effect are the following cases: Kirkman vs. Borzage, 150 P. 2d. 3; Phillips v. McIntosh, 124 P. 2d. 835; Meinhard vs. Stillwell Realty Company, 169 S.E. 732; Maddox v. Yocum, 31 N.E. 2d. 652; Rosenfield v. Jeffra, 1 N.Y.S. 2d. 388; Clark vs. Eads, 165 S.W. 2d. 1019; Swift v. Kelly, 133 S.W. 901; Hoxsey vs. Baker, 246 N.W. 653.

FAILURE TO ALLEGE PERFORMANCE

Appellant further fails to state a cause of action as he did not allege in his complaint that he performed all of the conditions precedent in the contract required by him to be performed, or the excuse of non-performance, if any (Tr. 5, 6 and 7.)

In paragraph 3 of his complaint, appellant alleged: " * * * plaintiff has duly performed his said agreement, has furnished all the material and done all the work and labor as required for said agreement, except defendant furnished one door, for which he is entitled to a credit of \$5.00, and except also plaintiff did not put in a wooden floor, for whom the defendant is entitled to agreed credit of \$150.00 * * *."

The appellant thus by his pleadings negatives his performance. He admitted none-performance and yet

he fails to allege the reason for such non-performance. That is, whether it was waived or consented to by the respondent.

The contract further provides that as to additional work for which appellant is suing that its "costs" were to be determined by the parties:

"* * * Any additional work shall be paid for by first party as parties shall hereto later agree upon, and any alterations shall be paid for by first party as extra work." (Tr. 6.)

The appellant notwithstanding the provisions of the contract requiring the parties to the agreement to fix the cost of additional work or extras, failed to allege the reason, if any, why they did not agree to the cost of such items. (Tr. 5 and 6.)

The law is that it is necessary in a suit upon a contract that the party declaring thereon must either allege performance or an excuse for non-performance. The Supreme Court of Oregon in the case of Ball vs. Daud, 37 P. 70, in a similar factual situation, held that where a contract provided that in the event of alterations or additions, the value thereof should be appraised by an architect and that he should fix the amount that should be paid for such alterations and additions. The Court said:

"In Meyers v. Construction Co., 20 Or. 603, 27 Pac. 584, it was held that where a contract provided that disputes arising between parties should be submitted

to some certain person for settlement, whose decision should be final, it was incumbent upon the plaintiff, in an action upon the contract, to allege and prove a compliance with that condition, or at least that a reasonable effort had been made to comply with the stipulation; and thus the distinction in *Scott v. Avery*, supra, was established as the rule of interpretation in this state."

An then again the Court said:

"* * * The plaintiff having set out a copy of the contract, and not having alleged a compliance with its conditions, his complaint was demurrable. *Myers v. Construction Co.*, supra; 2 *Estee*, Pl. & Pr. (3d Ed.) Section 3183. By answering to its merits, and not pleading in abatement, it is contended that the defendant has waived her right to insist upon the provisions of the contract. The object of a plea in abatement is to show to the court some allegation of fact that does not appear from the pleadings. *Koenig v. Nott*, 2 *Hilt.* 328. The complaint having set out the contract containing the provision to refer, the Court was in possession of the fact, and there was no need for a plea in abatement. Failing to allege, after setting out the contract, that the amount due had been ascertained in the manner therein required, the complaint did not state facts sufficient to constitute a cause of suit (*Myers v. Construction Co.* supra,) and this objection is not waived by failure to demur or answer (*Hill's Code*, Section 71), and may be urged on appeal (*Evarts v. Steger*, 5 *Or.* 147). The complaint not having stated a cause of suit, the decree will therefore be reversed, and the complaint dismissed."

It would thus seem that in this particular case, the appellant for the reasons above stated has failed to state a cause of action. Although he alleged performance he qualified it without stating the reason for such no-performance, and particularly failed to state why the parties to the agreement did not fix the cost for the extra work, for which he seeks to recover.

FURTHER ANSWERING APPELLANT'S BRIEF

The appellant herein complained that although he did not assign it an error, the Court erred in refusing to permit him to amend his complaint.

In this respect the record discloses that at the beginning of the trial the appellant requested the Court for leave to amend his complaint, and that leave to amend was granted. (Tr. 43 and 44.) That thereafter the appellant never requested or asked leave of the Court to amend his pleadings, (Tr. 43 and 9.) from the instant of the Court calling the case to trial until the dismissal of the action. The record further discloses that the action was dismissed on the 20th day of February, 1948 (Tr. 43 and 97) and that between this date and the signing of the judgment and Dismissal by the Court on the 30th day of March, 1948, the appellant did not ask leave of the Court to amend his complaint.

Even assuming that appellant was in a position to assign such as error it would appear from the amended rules of Practice Rule 8 and from the decision of this state, that the matter will not be considered by the Court for the reason that it was not assigned as error.

However, we would like to call the attention of the Court to what we regard as a misapplication by the appellant of the Utah case of *Smith vs. American Packing Company*, supra. The appellant cited this case as authority for the statement that the Court erred in failing to permit him to amend. In the *Smith vs. American Packing Company*, supra, the appellant requested leave to amend and the right was denied by the trial Court. The court said at pages 959 and 960:

“The defects which we have mentioned are not discussed by either the lower court in the memorandum ruling or demurrer or in the brief of the respondent. They are matters which ordinarily can be corrected by amendment at any time prior to judgment without prejudice to the opposing party. In view of the fact the amended complaint is deficient in essential allegations, we would be compelled to uphold the judgment of the district court if the court had merely sustained the demurrer and had not denied the plaintiff leave to amend * * *”

That the appellant is in no position to complain for his failure to amend inasmuch as he himself elected to stand on his pleadings. He at no time made any request or asked leave of the Court to amend as aforementioned.

The appellant also assigns as error the Court's statement to counsel for the respondent “If you make a motion to dismiss, I will grant it.” That the Court was not only within its province in making such a statement, but that it was its duty to do so, is the holding of the case in *Hickey et. al v. Sutton*, 210 N.W. 704, supra. This was a case involving an illegal contract. The Court said:

"If the objection be not made by the party charged it is the duty of the Court to make it on its own behalf. The Courts owe it to the public, justice and to their own integrity to refuse to become parties to contracts essentially violating morality of public policy, by entertaining actions upon them. It is the judicial duty always to turn a suitor upon such a contract out of Court whenever and however the character of the contract is made to appear."

Although the appellant did not assign as error, he alleges in his brief that the Court erred in holding that the appelleant was a contractor and was unlicensed. That these were questions for the jury to decide. He claimed that there was a dispute in the evidence. We again call the Court's attention to the fact that this was not assigned as error and that such cannot be taken advantage of under the rules of this Court, even assuming that such was error. However, we would like to call the Court's attention to the fact that the evidence in this respect is not in conflict. The contract was entered into on the 20th day of March, 1948 (Tr. 5, 62 and 85), and counsel stipulated that on this date the appellant did not have a contractor's license. (Tr. 92 and 93). This is the only evidence in the record as to the question of whether or not the appellant did not have a contractor's license at the date of the execution of the agreement, and that evidence is thus not in dispute. American jurisprudence in this respect sets out the law to be as follows:

"12 Am. Jur. page 744, section 225:

Determination by Court or Jury. — Inveiw of the fact that the sources of public policy are usually legisla-

tion and judicial decisions, the question whether a particular agreement is contrary to public policy is ordinarily to be determined by the Court, and not by the jury. This is so at least where the facts are conceded or not disputed.

We thus respectfully submit that in view of the reasons heretofore set forth that the judgment of the trial Court should be sustained.

Respectfully submitted,

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L. DeLOS DAINES,
Attorneys for Defendant
and Respondent.

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