

1988

John Holland, dba Property Management Systems v. Donner Crest Homeowner's Association : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. _____ IN THE UTAH COURT OF APPEALS

JOHN HOLLAND DBA PROPERTY
MANAGEMENT SYSTEMS,

P l a i n t i f f a n d
Respondent,

RESPONSE TO APPELLANT'S
MOTION FOR SUMMARY
DISPOSITION

vs.

Case No. 880603-CA

DONNER CREST HOMEOWNERS'
ASSOCIATION,

D e f e n d a n t a n d
Appellant.

Appeal from Judgment of the Third Circuit Court,
Salt Lake County, West Valley Department
Honorable Edward A. Watson, Judge

BRIEF OF RESPONDENT

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FILED

FEB 21 1988

UTAH COURT OF APPEALS

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STATEMENT OF JURISDICTION

Jurisdiction of this appeal is conferred on the Utah Court of Appeals by Utah Code Ann. 78-2a-3(2)(d), 1953 as amended, and Rule 3(a) R. Utah Ct. App.

NATURE OF THE PROCEEDINGS

This appeal is taken from a summary judgment granted in favor of the plaintiff by Judge Edward A. Watson of the Third Circuit Court of Salt Lake City, West Valley Department, Case No. 8730000531CV.

DETERMINATIVE STATUTES AND RULES

The following Statutes and Rules are believed to be determinative of the repective issues stated:

1. Statutes:

(a) Utah Code Ann. 58-50-2(2):

Any person, firm, partnership, corporation, association, or other organization, or any combination of them, who for a fixed sum, price, fee percentage, or other compensation other than wages, undertakes with another for the construction, alteration, repair, addition to, or improvement of any building, highway, road, railroad, excavation, or other structure, project, development, or improvement, other than to personalty, or any part of them. "Contractor" includes: . . . (b) any person who, by advertising or otherwise, holds himself out as a contractor, but does not include a person regularly engaged as maintenance personel to do repair, remodeling, or other work which is casual, isolated, or incental in its nature.

(b) Utah Code Ann. 58-50-9, 1953 as amended:

The licensing requirements of this chapter do not apply to: (8) any person who engages in the alteration,

repair, remodeling, or addition to or improvement of any building with a contracted or agreed value, including both labor and materials, of less than \$1,000.00, including all changes or additions to the contracted or agreed work.

2. Rules:

(a) Rule 15 (b), U.R.C.P.:

When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subverted thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

(b) Rule 54(c)(1):

Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

STATEMENT OF THE CASE

This case involves an action for sums unpaid by defendant to plaintiff for services actually performed in a satisfactory and workmanlike manner which was initiated in August, 1987 for the principal sum of \$2,521.00. Plaintiff was awarded a Summary Judgment (R. 121) by the honorable Edward A. Watson on September 27, 1988. Defendant subsequently appealed.

Plaintiff and defendant entered into a management contract (R. 1) effective September 1, 1982, which was terminated by defendant effective November 30, 1986. During the course of the agreement, plaintiff retained two subcontractors to perform certain services for and on behalf of defendant: (a) Cover Pools, Inc. for the installation of a new swimming pool cover at the Donner Crest Condominium in October, 1985, for the sum of \$606.70; and (b) HanDayMen for several individual contracts including painting interior walls, railings and other surfaces at the Donner Crest Condominium during March and April, 1986, for which defendant was charged a total of \$2,202.00. Plaintiff did not perform the services personally, nor did he retain the contractors for his own benefit, but for the benefit of defendant and at defendant's instruction.

The painting and pool cover costs were approved by the Executive Committee of defendant (management committee). Said materials and services were provided and performed in a satisfactory manner and appellant received the benefit of those

services, but has not paid respondent for those materials and services.

SUMMARY OF ARGUMENT

POINT ONE

THE STATUTE UPON WHICH APPELLANT RELIES WAS REPEALED ON JULY 1, 1987, AND WAS REPLACED WITH U.C.A. 58-50-1 ET SEQ. UNDER THE NEW STATUTE, PLAINTIFF WAS NOT REQUIRED TO HAVE SUCH LICENSING.

Defendant relies upon a repealed statute in its effort to avoid paying for services which were satisfactorily performed and for which it received the benefit. Under the current applicable statute, plaintiff is not required to obtain a license to perform the services in question here. Because plaintiff is not required to be licensed under the applicable statute, it is entitled to enforce the provisions of its contract.

POINT TWO

EVEN IF THE OLD STATUTE IS FOUND TO BE CONTROLLING, IT IS TO BE CONTRUED WITH THE PURPOSE OF THE STATUTE IN MIND ON A CASE BY CASE BASIS.

Several cases discuss the purpose and application of both the former and current statute. These indicate that the legislature, the administrative agency involved, and the courts have intended to liberalize the application of the statute upon which defendant relies and that its application should be made on a case by case basis. In this case, both justice and equity demand that plaintiff be paid for the work performed in good faith for defendant.

POINT THREE

THE COURT CAN DO EQUITY IN THIS CASE.

The Supreme Court is acutely aware of the danger of unjust enrichment in a strict enforcement of the statute in question here. Defendant has no need of the protection of this statute. It, in fact, admits that it has received the value of the services performed and that the work performed was satisfactory. The plaintiff was unaware of a need to be licensed or to retain licensed persons to perform services, if indeed this is required, nor was he aware that the independent contractors retained were not so licensed. To punish him in spite of his lack of knowledge, and lack of culpable motive would unjustly enrich defendant contrary to the intent of the statute.

POINT FOUR

PLAINTIFF IS ENTITLED TO RELY ON THE GROUNDS
OF UNJUST ENRICHMENT AND QUANTUM MERUIT EVEN
THOUGH NOT SPECIFICALLY PLED.

The third prayer for relief in respondent's Amended Complaint (R. 16) states, "For such other and further relief as the court deems just and equitable in the premises." The trial court judge is therefore able to make such judgments as he deems just. Defendant suffered no disadvantage from the addition of these causes of action to plaintiff's Complaint. They made no objection concerning an inability to meet the new issues and should therefore now be precluded from objecting.

POINT FIVE

BY ENTERING INTO THE MANAGEMENT CONTRACT, DEFENDANT WAIVED THE DEFENSE UPON WHICH IT RELIES.

The management agreement protects the plaintiff from mistake of fact or law and any error of judgment except in cases of willfull misconduct or gross negligence. Defendant has not alleged, nor could it, that this is a case of willfull misconduct or gross negligence. It should not now be allowed to change the contract and unustly benefit thereby.

POINT SIX

THE COURT CANNOT GRANT APPELLANT'S MOTION FOR SUMMARY JUDGMENT.

Defendant is not entitled to a Summary Judgment which dismisses plaintiff's cause of action because there are many bases upon which plaintiff may recover, e.g. on the contract, on the basis of quantum meruit, on the basis of unjust enrichment, or on the basis of waiver.

ARGUMENT

POINT ONE

THE STATUTE UPON WHICH DEFENDANT RELIES WAS REPEALED ON JULY 1, 1987, AND WAS REPLACED WITH U.C.A. 58-50-1 ET SEQ. UNDER THE NEW STATUTE, PLAINTIFF WAS NOT REQUIRED TO HAVE SUCH LICENSING.

The statute upon which defendant relies was repealed completely on July 1, 1987. The Contractor's Division which was empowered under that statute to enforce the provisions thereof was dismantled and all provisions for its enforcement were

extinguished. In its place was enacted U.C.A. 58-50-1 et seq. This statute is administered by the Division of Professional Licensing, a completely separate entity. They do not investigate or prosecute any violations of the new statute without at least \$10,000.00 of proven damages inn a complaint submitted by a municipality. (See U.C.A. 58-50-4(1)(b), 1953 as amended.)

Because there is no mechanism to enforce the provisions of the old statute, the Division of Professional Licensing investigates, prosecutes and enforces only the provisions of the new statute regardless of the date of the infraction.

Under the new statute, plaintiff would not have been required to obtain a general or specialty contractor's license.

U.C.A. 58-50-2(2), 1953, as amended defines "Contractor" as:

Any person, firm, partnership, corporation, association, or other organization, or any combination of them, who for a fixed sum, price, fee percentage, or other compensation other than wages, undertakes with another for the construction, alteration, repair, addition to, or improvement of any building, highway, road, railroad, excavation, or other structure, project, development, or improvement, other than to personalty, or any part of them. "Contractor" includes: . . . (b) any person who, by advertising or otherwise, holds himself out as a contractor, but does not include a person regularly engaged as maintenance personell to do repair, remodeling, or other work which is casual, isolated, or incidental in its nature."

Plaintiff was just such a person that subsection (b) intended to except from the licensing requirement. Plaintiff was hired by defendant as a property manager with responsibilities including the collection of assessments from the unit owners, payment of expenses, making contracts for various services, hiring, discharging, and supervising labor performed on the

property, as well as make or cause to be made repairs and alterations. The repair, remodeling or other work performed by plaintiff for defendant was "casual, isolated, or incidental in its nature," and therefore does not come under the scope of this statute.

Furthermore, U.C.A. 58-50-9, 1953 as amended, states that: "The licensing requirements of this chapter do not apply to: (3) any person who engages in the alteration, repair, remodeling, or addition to or improvement of any building with a contracted or agreed value, including both labor and materials, of less than \$1,000.00, including all changes or additions to the contracted or agreed work."

Plaintiff's services to defendant included the installation of a new swimming pool cover at the Donner Crest Condominium in October, 1985, for the sum of \$606.70, and several separate painting jobs performed during March and April, 1986, which totalled \$2,202.00, but each individual job was less than \$1,000.00 (R. 54).

Additionally, it should be noted that plaintiff did not perform the work or provide the materials in dispute, but simply engaged the services of two independent contractors to perform work approved by defendant's executive committee. Plaintiff was unaware, as was defendant that these independent contractors were unlicensed until well after the institution of this suit.

The only possible statute upon which defendant could rely is

U.C.A. 58-50-9, 1953 as amended, because it is the only statute in existence and the only one with an administrative agency in existence to enforce its terms. Even the Division of Professional Licensing has indicated that they look to the new statute, regardless of the date of infraction. Under the new statute, plaintiff was not required to be licensed and can therefore enforce the provisions of the contract.

POINT TWO

EVEN IF THE OLD STATUTE IS FOUND TO BE CONTROLLING, IT IS TO BE CONSTRUED WITH THE PURPOSE OF THE STATUTE IN MIND ON A CASE BY CASE BASIS.

In Fillmore Products, Inc. vs. Western States Paving, Inc., 561 P. 2d 687, 689 (Utah 1977), the court discussed the purpose and application of the former statute. They stated:

"There is no doubt that the purpose of the licensing statute relating to contractors, supra, is protection of the public. But this court has recognized the harshness of declaring contracts of non-licensees void or unenforceable. . . it is inequitable and unjust to rule as a matter of law on summary judgment that the defendant can take the benefit of the plaintiff's labor and refuse to pay for it. . . . Therefore, the general rule will not doubt continue to be maintained as the "general" rule, while still permitting the court to consider the merits of the particular case and to avoid unreasonable penalties and forfeitures. Although many courts yearn for a mechanically applicable rule, they have not made one in the present instance. Justice requires that the penalty should fit the crime; and justice and sound policy do not always require the enforcement of licensing statutes by large forfeitures going not to the state but repudiating defendants."

Only a few months later, the court again indicated the need for a case by case determination in Meridian Corporation vs. McGlynn-Garmaker Company, 568 P.2d 1110, 1111 (Utah 1977). They

stated, "The entire object of the statute is protection of the public against fraudulent and illegal practice, which have always been recognized as a distinct characteristic of statutes." There has been no allegation by defendant, nor could there be, that plaintiff's practice in supplying them exactly what they requested constituted fraudulent or illegal practice, nor could defendant claim the public needs protection from this type of activity.

Justice Crockett in dissent in the same case wrote, "In this instance, the statute merely provides that one who acts without a license shall be guilty of a misdemeanor. If the legislative intent had been that such contracts were void, the statute should have so declared. My conclusion is that to deny the plaintiff any recompense for the work performed imposes a penalty not provided for by the statute and one which permits the defendants to have an unfair and unjust advantage." Id. at p. 1111.

It is clear from the foregoing discussions, that both the legislature, the administrative agency and the courts have intended to liberalize the application of the statute upon which defendant relies. And as the Fillmore case emphasizes, each application of the statute must be on a case by case basis.

In this case, plaintiff in good faith provided services to defendant, fully expecting that defendant would pay for them as they had agreed. This reliance was justified because plaintiff had performed numerous other similar services for defendant during the course of the management contract and had been paid in

full for those services. It was only at the termination of the management agreement that defendant refused to pay for the final satisfactorily performed work by plaintiff for its benefit. It is not only fair, but justice demands that plaintiff be paid for the work performed.

Defendant has no need of the protection of this statute. Plaintiff did not perform the work personally, but simply retained the services of two independent contractors. Plaintiff was unaware that those independent contractors were unlicensed. Defendant received goods and services and was satisfied with them, but now seeks to escape paying for the value it has received.

POINT THREE

THE COURT CAN DO EQUITY IN THIS CASE.

The trial court is one of equity as well as law and came to an equitable result in this case. Many of the previously quoted excerpts from Utah cases indicate that the Supreme Court is acutely aware of the danger of unjust enrichment in a strict enforcement of the statute in question here. In a landmark case, Baugh vs. Darley, 184 P.2d 335, 337 (Utah 1947), the court discussed the elements required for a cause of action in unjust enrichment. It states,

"Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another. The benefit may be an interest in money, land, chattels, or choses in action; beneficial services conferred; satisfaction of a debt of duty owed by him; or anything which adds to his security or advantage. . . . However, one might perform work or services intended for his own benefit, or for the

benefit of another, in reliance upon as distinguished from in pursuance of an unenforceable agreement. Generally, unless such services enhance or benefit the property of the defendant or otherwise confer on him a direct benefit, they do not form the basis for a contract imposed by law because there is no "unjust enrichment" as that term is used in law. Where such services operate to confer a direct benefit upon the defendant, they may be recoverable."

This has happened here. Defendant has received a direct benefit from the services of plaintiff and plaintiff should be entitled to recover with or without an enforceable contract because defendant requested, accepted and benefitted from those services.

In addressing the issues of unjust enrichment and quantum meruit in a case where a contractor failed to obtain a license because he was unaware that such a license was needed the court said,

"Undoubtedly these contractor's license statutes were intended to protect the general public. So ordinarily the failure of a contractor to obtain the required license before engaging in such business would prevent a recovery. . . . A holding that a contractor such as plaintiff who entered into a specialty contract with no knowledge or notice that a license therefor was required under these circumstances might work grave hardship to such contractor. For without any notice or knowledge or lack of diligence in finding out such a requirement such a contractor might be barred from recovering for honest and efficient services rendered because he did not know that a specialty license was required." Platt vs. Lock, 358 P.2d 95, 97 (Utah 1961).

Again, it is uncontroverted that plaintiff was unaware that there was a need for such licensing, if indeed there is such a need, either for himself or the independent contractors he retained for defendant's behalf. He was further unaware that the independent contractors retained were not so licensed. To punish

him in spite of his lack of knowledge, and lack of culpable motive would unjustly enrich defendant.

POINT FOUR

APPELLANT IS ENTITLED TO RELY ON THE CAUSES
OF UNJUST ENRICHMENT AND QUANTUM MERUIT EVEN
THOUGH NOT SPECIFICALLY PLED.

The third prayer for relief in plaintiff's Amended Complaint states, "For such other and further relief as the court deems just and equitable in the premises." The trial court judge is therefore able to make such judgments as he deems just. He ruled that justice required that plaintiff be paid for services rendered satisfactorily and good faith.

In First Security Bank of Utah v. Colonial Ford, 597 P. 2d 859 (Utah 1979), the court cited Rule 15(b) and Rule 54(c)(1), Utah Rules of Civil Procedure and then stated,

"Whatever else may be said about whether it is mandatory or discretionary under the rules just quoted to grant such a motion to amend, it could not be made plainer that the underlying purpose of the rules is that judgment should be granted in accordance with the law and the evidence as the ends of justice require; and that **this is true whether the pleadings are actually amended or not.**" (Emphasis added)

Plaintiff has not yet made a Motion to Amend to specifically include causes of action in unjust enrichment and quantum meruit. Defendant's counsel was, however, well aware of plaintiff's intent to rely on those principles before the hearing on the parties' respective Motions for Summary Judgment because they were extensively argued in plaintiff's Response to Defendant's Motion for Summary Judgment R. 91-95). Defendant's counsel did not object to said principles being argued, nor did he request or

make a representation that he needed additional time in which to respond to those arguments.

Pleadings are never more important than the cause before the court. It is desirable for pleadings to set forth definitely framed issues, but justice requires liberal amendment as long as the opposing party has adequate opportunity to meet the newly raised issues. (See Lewis v. Moultree, 627 P. 2d 94, 98 (Utah 1931)).

In Christopher v. Larson Ford Sales, 557 P. 2d 1009, 1011 (Utah 1977), the Utah Supreme Court stated:

"It is true that our rules require that the basis of claim must be stated with reasonable certainty and clarity, so the other party will have notice of what he is obliged to meet. But it is also held that if the issue is actually tried, so that a party suffers no disadvantage therefrom, he is precluded from complaining about it."

Defendant suffered no disadvantage from the addition of these causes of action to plaintiff's complaint. It made no objection concerning an inability to meet the new issues and should therefore now be precluded from complaining about it.

POINT FIVE

BY ENTERING INTO THE MANAGEMENT CONTRACT,
DEFENDANT WAIVED THIS DEFENSE.

Paragraph 3(c) of the Management Agreement (R. 1-3) entered into by the parties provides that, "The Agent shall not be liable for any error of judgment or for any mistake of fact or law, or for anything which it may do or refrain from doing hereafter, except in cases of willfull misconduct or gross negligence."

If plaintiff did violate the statute, it certainly was only due to a mistake of law, from which the management agreement

protects plaintiff. Defendant waived its right to the statutory defense it now claims on September 1, 1982, when it entered into the original contract. It should not now be allowed to change the contract and unjustly benefit thereby.

POINT SIX

THE COURT CANNOT GRANT APPELLANT'S MOTION FOR SUMMARY JUDGMENT.

Wilkinson v. St. Paul Fire and Marine Insurance Company of St. Paul, Minnesota, 16 Utah 2d 204; 398 P. 2d 207, 208 (1965), states:

"In considering a motion to dismiss a complaint, both the district court and this court on review are to survey its allegations in the light most favorable to the plaintiff, and grant the dismissal only if the plaintiff could not in any event establish a right to recover."

There are many bases upon which respondent may recover, e.g. on the contract, on the basis of quantum meruit, on the basis of unjust enrichment, or on the basis of waiver. Appellant is therefore not entitled to a Summary Judgment which dismisses respondent's Complaint.

CONCLUSION

It is apparent that the trial court came to a just decision which should be upheld by this court when it granted summary judgment in favor of plaintiff and against defendant. Plaintiff urges this court to affirm the judgment of the trial court and award plaintiff his costs of this appeal.

RESPECTFULLY SUBMITTED this 21 day of February, 1989.

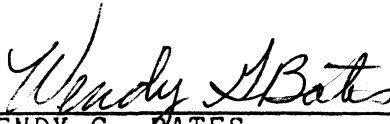


WENDY G. BATES
Attorney for Plaintiff and Respondent

MAILING CERTIFICATE

I hereby certify that on February 17, 1989, I mailed four true and correct copies of the foregoing in an envelope addressed to the following and by depositing the same, sealed, with first class postage pre-paid thereon, in the United States Mails at West Valley City, Utah:

Warren M. Weggeland, Esq.
Attorney for Defendant and Appellant
850 Donner Way #403
P. O. Box 8022
Salt Lake City, Utah 84108



WENDY G. BATES

CERTIFICATE OF DELIVERY

I hereby certify that on the 21st day of February, 1989, I delivered seven copies of the foregoing to the Utah Court of Appeals located at 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah.