

1988

John Holland, dba Property Management v. Donner Crest Homeowners' Association : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 88-0603

JOHN HOLLAND, dba
PROPERTY MANAGEMENT

Plaintiff and Respondent

vs.

DONNER CREST HOMEOWNERS'
ASSOCIATION,

Defendant and Appellant

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Case No. 880603-CA

Priority Classification No.
14 b

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

REPLY BRIEF OF APPELLANT

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FILED

MAR 28 1989

IN THE UTAH COURT OF APPEALS

JOHN HOLLAND, dba)	
PROPERTY MANAGEMENT)	
)	Case No. 880603-CA
Plaintiff and Respondent)	
)	
vs.)	
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DONNER CREST HOMEOWNERS')	
ASSOCIATION,)	Priority Classification No.
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SUMMARY OF ARGUMENT

POINT ONE

PLAINTIFF DID NOT CROSS-APPEAL AND THUS CANNOT ARGUE THAT UTAH CODE ANN. 58-50-1 ET SEQ. (1987) IS THE OPERATIVE STATUTE CONTROLLING THIS LITIGATION

The Trial Court correctly found that the statute in effect when the contract was entered into and the work in question performed required plaintiff to be licensed, and the contract between plaintiff and defendant is unenforceable. Plaintiff was not exempt from the licensing requirement, nor were his subcontractors. Current enforcement practices of the Division of Professional Licensing are not an issue in this case.

POINT TWO

PLAINTIFF IS BOUND BY THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT THE STATUTE IN EFFECT WHEN THE CONTRACT WAS ENTERED INTO AND THE WORK IN QUESTION WAS PERFORMED REQUIRED PLAINTIFF TO BE LICENSED, AND THAT THE CONTRACT SUED UPON IS UNENFORCEABLE

Plaintiff did not cross-appeal. Cases cited by plaintiff are clearly distinguishable from the facts in this case.

POINT THREE

PLAINTIFF DID NOT MOVE TO AMEND PLAINTIFF'S COMPLAINT BUT PLAINTIFF MOVED FOR SUMMARY JUDGMENT ON THE MANAGEMENT CONTRACT ONLY AND NOT ON GROUNDS OF QUANTUM MERUIT OR UNJUST ENRICHMENT

Plaintiff fails to address the fact that the judgment entered was \$287.31 more than requested or supported by the

record. There is nothing in the record supporting plaintiff's claim that he was unaware that he or his subcontractors were required to be licensed. Cases cited by plaintiff do not apply. Plaintiff fails to cite any authority contrary to the Utah cases cited by defendant which hold that unlicensed persons statutorily barred from collecting compensation on a contract for work done cannot alternatively recover on a theory of quantum meruit or unjust enrichment.

POINT FOUR

DEFENDANT DID NOT WAIVE ANY DEFENSES

Plaintiff is asserting as a defense the protection afforded defendant as a member of the general public and of the class protected by the contractor licensing laws.

POINT FIVE

THE TRIAL COURT SHOULD HAVE GRANTED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The case cited by plaintiff does not apply. Plaintiff fails to cite any authority contrary to that cited by defendant requiring the trial court to view the facts and circumstances in a light most favorable to defendant in defendant's opposition to plaintiff's Motion for Summary Judgment.

ARGUMENT

POINT ONE

PLAINTIFF DID NOT CROSS-APPEAL AND THUS
CANNOT ARGUE THAT UTAH CODE ANN. SEC. 58-50-1
ET SEQ. (1987) IS THE OPERATIVE STATUTE
CONTROLLING THIS LITIGATION

Plaintiff suggests and argues Point One of the Brief of Respondent essentially that:

(a) Under the provisions of Utah Code Ann. Sec. 58-50-1 et seq. (1987) [Contractors Licensing Act] (the "Act") plaintiff would not be required to obtain a license as a general or specialty contractor and was excepted from the licensing requirement because plaintiff was engaged as maintenance personnel to perform repairs, having an agreed value, including labor and materials, of less than \$1,000;

(b) The current Utah Division of Professional Licensing does not investigate or prosecute violations of the Act involving less than \$10,000;

(c) Plaintiff was unaware that the independent contractors hired by plaintiff were unlicensed;

(d) The Division of Professional Licensing looks to the 1987 Act regardless of the date of infraction;

(e) Under the current Act, plaintiff is not required to be licensed and therefore can enforce the provisions of the contract.

Plaintiff fails to recognize that plaintiff did not cross-appeal the judgment of the Trial Court which

specifically held that "the statute in effect when the contract was entered [into] and the work in question was performed required plaintiff to be licensed" (Findings of Fact Para. 3), and that the "contract between plaintiff and defendant is unenforceable" (Conclusions of Law Para. 1). Such Findings and Conclusions are the law of this case. As such, plaintiff cannot now urge this court that the 1987 Act is the operative statute controlling this litigation.

Plaintiff suggests that the painting performed at defendants' condominium complex during March and April, 1986 represented several individual painting jobs of less than \$1,000 each, but which totaled \$2,202. Plaintiff neglects to point out that such painting was performed pursuant to a bid submitted to plaintiff dated August 25, 1985 for a price of \$2,400 (R. 33), that the painting cost to plaintiff was \$2,057 and plaintiff charged defendant \$2,202, that the \$2,521 amount sought by plaintiff in his action herein represents the balance claimed to be due plaintiff under the contract for work performed by plaintiff and his subcontractors, and the actual amount for such services exceeded \$2,521 (See Affidavit of John Holland, Para. 9. R. 85).

There is nothing in the record substantiating or supporting plaintiff's claim concerning the current enforcement practices of the Division of Professional Licensing. However, such current practices are not an issue

in this litigation since plaintiff's action is based solely upon the contract and does not involve enforcement, investigative or prosecutorial functions of an administrative agency, nor is there anything in the record to support plaintiff's claim that plaintiff was unaware that the independent contractors hired by plaintiff were unlicensed.

POINT TWO

PLAINTIFF IS BOUND BY THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT THE STATUTE IN EFFECT WHEN THE CONTRACT WAS ENTERED [INTO] AND THE WORK IN QUESTION WAS PERFORMED REQUIRED PLAINTIFF TO BE LICENSED, AND THAT THE CONTRACT SUE UPON IS UNENFORCEABLE.

As stated above, plaintiff did not appeal the judgment of the Trial Court or its Findings of Fact or Conclusions of Law, nor did plaintiff cross-appeal. As such, plaintiff is bound by the Trial Court's Findings of Fact and Conclusions of Law that plaintiff was required to be licensed and the contract sued upon is unforceable.

In Point Two of Brief of Respondent, plaintiff argues that the contractor licensing statute must be construed on a case by case basis, and cites in support of such argument the case of Fillmore Products, Inc. v. Western States Paving, Inc., 561 P.2d 687 (Utah 1977). That case is clearly distinguishable from the instant case in that in Fillmore, the Court considered the following circumstances to be of controlling significance:

In this case it is clear that an unlicensed subcontractor is dealing with a licensed general or original contractor. And the defendants have not disputed that the entire sewer project was under the supervision of a licensed project engineer, that all of the work had to meet the specifications and requirements of the general contract and that all of the work had to be approved and accepted by the project engineer before any payment was made by the Town of Ferron.

561 P.2d 690.

In the Fillmore case, the project engineer was a licensed private engineering firm known as Call Engineering, Inc., which did have an inspection responsibility with respect to the construction work, the plaintiff was acting as a subcontractor under the direct supervision of a licensed general or original contractor, and the plaintiff's work had to be approved and inspected by the project engineer before any payment could be made to plaintiff. The Fillmore decision noted that the defendant in that case did not fall within the protected class that otherwise had adequate forms of protection that compensated for the plaintiff's inadvertent failure to renew an expired license. No similar facts appear in this case since neither plaintiff nor its subcontractors were ever licensed at the time the contract was entered into or the work performed (R. 51, 52, 56).

Plaintiff next cites in support of his position the dissenting opinion in the case of Meridian Corp. v.

McGlynn Garmacker Co. 567 P.2d 1110 (1977). The majority opinion, however, held that even though the plaintiff was duly licensed in another state but not licensed as a contractor in the state of Utah, the license in such other state could not be substituted for the Utah license, and thus the plaintiff contractor was precluded from recovering on its construction contract in Utah. The decision stated, citing prior Utah cases, that it was necessary for a plaintiff, where a license is required, to allege that he had a license in order to state a cause of action. The Supreme Court stated:

This Court has held that the contracts of unlicensed contractors are void. In the case of Olsen v. Reese we held:

[C]ontracts made by an unlicensed contractor when in violation of a statute passed for the protection of the public are held to be void and unenforceable. Our statute is so worded as to indicate legislative intent to protect the citizens from irresponsible contractors.

* * *

Plaintiff in this case is aware of our clear prior holdings; however, he urges us to overrule the case of Olsen v. Reese . . . This we refuse to do.

567 P.2d 110-111 (1977 Utah)

POINT THREE

PLAINTIFF DID NOT MOVE TO AMEND PLAINTIFF'S COMPLAINT, BUT PLAINTIFF MOVED FOR SUMMARY JUDGMENT ON THE MANAGEMENT CONTRACT ONLY AND NOT ON GROUNDS OF QUANTUM MERUIT OR UNJUST ENRICHMENT.

Plaintiff suggests in Points Three and Four of Respondent's Brief that the Trial Court correctly granted summary judgment to plaintiff on the ground of unjust enrichment. Plaintiff fails to address, however, the fact that the Trial Court entered judgment for plaintiff in an amount of \$287.31 more than requested by plaintiff and contrary to the evidence that the balance due under the contract was \$2,521.39 (See Affidavit of John Holland, Para. 9. R. 85; Para. 5 Plaintiff's Motion for Summary Judgment. R 81). In support of plaintiff's argument. Plaintiff cites the case of Platt v. Locke 358 P.2d 95 (1961). That case is clearly distinguishable from facts in this case in that plaintiff in Platt initiated an action on a contract seeking the balance due for the construction of a swimming pool. The defendant claimed that Platt was not duly licensed as a specialty contractor to construct swimming pools, as required by the Contractors Licensing Act and Rules and Regulations adopted by the Division of the Contractors in effect at that time. Platt, however, had been and was a licensed general contractor when the contract was entered into and sued upon and was unaware of

the specialty classification requiring a specialty license to construct a swimming pool. As soon as Platt received notification from the Division of Contractors on May 12, 1958, he obtained a specialty contractors license for the construction of swimming pools on May 13, 1958. The Utah Supreme Court held that under those unusual circumstances the plaintiff was not barred from recovering under his construction contract, and especially since he was otherwise licensed as a general contractor.

Plaintiff argues in Point Three that "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 were not so licensed." Such statement is totally incorrect in that it is controverted that plaintiff was unaware of the licensing requirement and there is nothing in the record to support such statement by plaintiff as to the knowledge, or lack thereof, by plaintiff.

Plaintiff next relies on the cases of First Security Bank of Utah v. Colonel Ford, 597 P.2d 859 (Utah 1979), Christopher v. Larson Ford Sales, 557 P.2d 1009 (Utah 1977) and Lewis v. Moultrie 627 P.2d 94 (Utah 1981). Yet those cases deal with Rules 15 (b) and 54 (c) (1) of Utah Rules of Civil Procedure. This case has not been tried but

only submitted to the Trial Court essentially on agreed facts for its determination of Motions for Summary Judgment made by the respective parties herein. Although the Trial Court may enter findings or a judgment based on an unpleaded issue actually tried by express or implied consent, no actual trial of issues has occurred in this case. Plaintiff has only moved for Summary Judgment (R. 80-83) on his Amended Complaint (R. 14-16) for the amounts claimed due under the contract, and at no time has plaintiff moved to amend his Complaint.

Plaintiff fails to cite any authority contrary to the cases of Wilderness Building Systems, Inc. v. Chapman, 600 P.2d 866, 768 (Utah 1985) and Mosely v. Johnson, 22 Utah 2d 345, 453 P.2d 149 (1969) which holds that unlicensed persons statutorily barred from collecting compensation on a contract for work done cannot alternatively recover on a theory of quantum meruit or unjust enrichment, which cases are cited at pages 8 and 9 of the Brief of Appellant.

POINT FOUR

DEFENDANT DID NOT WAIVE ANY DEFENSES

Plaintiff suggests in Point Five of his Brief that by entering into the Management Agreement with plaintiff (R. 1-3), the defendant waived its defenses in this litigation. In support of such suggestion, plaintiff cites Para. 3 (c) of the Management Agreement which 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 willful misconduct or gross negligence." Plaintiff fails to recognize that defendant is not trying to impose liability upon defendant for any particular act or omission, but defendant is merely asserting the protection it is afforded as a member of the general public by the contractor's licensing law duly enacted by the legislature of this state for the purpose of protecting defendant and other citizens of the class of which defendant is a member. A declared purpose of the statute is to require of each applicant for a contractors license to "demonstrate a degree of experience and general knowledge of the building, safety and health laws of the state and of the principles of the contracting business reasonably necessary for the safety and protection of the public." See Utah Code Ann. Sec. 58A-1a-8 (1) (b) (1985), Utah Code Ann. 58-50-6 (1) (b) (1987). Sanctions apply to contractors who do not obtain required licenses including criminal penalties. An unlicensed contractor may not utilize the courts of this state for collection of compensation without alleging and proving that he was a properly licensed contractor when the contract was sued upon and the alleged cause of action arose (Utah Code Ann. Sec. 58A-1-26 (1981), Utah Code Ann. Sec. 58A-1a-13 (1985), Utah Code Ann. Sec. 58-50-11 (1987). Criminal penalties are

imposed for contracting without a license by Utah Code Ann. Sec. 58A-1a-5 (1985), Utah Code Ann. Sec. 58-50-16 (1987).

There is nothing in the record to support plaintiff's claim that defendant in any manner waived any of the defenses raised by defendant. Defendant asserts that any such waiver by defendant would be contrary to public policy and ineffective.

POINT FIVE

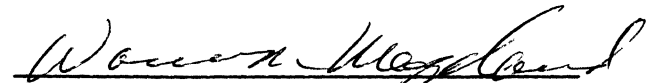
THE TRIAL COURT SHOULD HAVE GRANTED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In support of plaintiff's claim in Point Six of the Brief of Respondent that the Trial Court cannot grant appellant's motion for summary judgment, plaintiff cites the case of Wilkinson v. St. Paul Fire & Marine Insurance Co. of St. Paul of Minnesota, 16 U.2d 204 398 P.2d 207 (1965). However that case deals not with motion for summary judgment but deals with a motion to dismiss a third party complaint for failure to state a cause of action upon which relief can be granted. Plaintiff fails to cite any authority contrary to the cases cited by defendant at page 10 of the Brief of Appellant to the effect that the Trial Court failed to view all of the facts and circumstances in a light most favorable to defendant in defendant's opposition to plaintiff's motion for summary judgment.

CONCLUSION

For the reasons stated in the Brief of Appellant, and for the reasons stated herein, defendant urges this Court to reverse the judgment of the Trial Court and order entry of Summary Judgment in favor of defendant.

Respectfully submitted this 28 day of March,
1989.


WARREN M. WEGGELAND
Attorney for Defendant and
Appellant

MAILING CERTIFICATE

I hereby certify that I mailed four (4) copies of the foregoing Reply Brief of Appellant to Wendy G. Bates, Attorney for Plaintiff and Respondent, 4126 South 3055 West, West Valley City, Utah 84119 this 28 day of March, 1989, postage prepaid.

