

1988

Marco Industrial Supply Inc. v. Richard M. Swain : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

MARCO INDUSTRIAL SUPPLY, INC.,)	
)	
Plaintiff-Respondent,)	
)	
vs.)	Case No. 880517-CA
)	Priority Classification
RICHARD M. SWAIN,)	14(b)
)	
Defendant-Appellant.)	

880609-CA

BRIEF OF THE RESPONDENT

APPEAL FROM JUDGMENT, JUNE 6, 1988, OF THE
FOURTH JUDICIAL DISTRICT COURT, MILLARD COUNTY
HONORABLE CULLEN Y. CHRISTENSEN, DISTRICT JUDGE

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FILED

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COURT OF APPEALS

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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction by virtue of the Appellant's appeal from a judgment entered in Civil Action No. 8329 in the Fourth Judicial District Court in and for Millard County and the assignment of the case to this court by the Supreme Court of the State of Utah.

ISSUES PRESENTED

Appellant claims that the trial court erred in granting plaintiff judgment for \$14,374.77 for the overpayment on a written contract and denying defendant relief on defendant's counterclaim for damages for breach of the same contract.

Appellant makes two points, each one apparently asserting that the evidence presented did not support the trial court's decision.

STATEMENT OF THE CASE

Appellant's "Statement of the Case" contains inaccuracies which require plaintiff to make its statement of the case.

In 1986 the plaintiff, Marco Industrial Supply, Inc. (Marco) was in the business of buying scrap material in the United States for resale to a company in Taiwan, Chog Din Ent. Co., L.T.D.

In September of 1986, Marco's representative, Marc Chien, (Chien) learned that the defendant, Richard M. Swain, (Swain), a Utah resident, had been the successful bidder for a quantity of salvage metal which was located at a United States' facility, the

Mercury Test Site, in the State of Nevada. (Tr. 5).

A meeting was arranged at Las Vegas, Nevada at which meeting Chien observed samples furnished by Swain of the kinds of materials located at the Test Site. (Tr. 6).

Later, on September 8, 1986, Chien travelled to Fillmore to visit Swain's yard.

While at Swain's yard, Chien inspected salvage material and signed a handwritten agreement prepared by Swain which affected materials at the Nevada Test Site and materials at Swain's yard near Fillmore. (Plaintiff's Exhibit 1, Tr. 14).

The terms of Plaintiff's Exhibit 1 provided that Marco would purchase approximately 750,000 pounds of

"aluminum coaxial and copper located at Mercury Test Site \$.21 per pound delivered to Long Beach. Also included is material at Swain's property in Utah."

The writing, Exhibit A, listed types of salvage located at Swain's yard, fixed the prices for each type of material but did not describe a quantity to be purchased. (See Plaintiff's Exhibit 1).

Materials were purchased by Marco and were shipped from Nevada and Utah to Tawain in large metal containers which were about 40 feet in length. By October 28, 29 containers had been shipped. Twenty-four were shipped from Nevada, five from Fillmore. The 25 containers shipped from Nevada contained materials which totaled 737,000 pounds. Marco paid Swain when

Marco was advised by telephone by Swain that the materials had been shipped. A total of \$210,052.00 was paid which exceeded by \$14,374.77 the agreed prices of the material delivered. The fact of the overpayment was not disputed. (Tr. 100).

Chien testified that when the shipped materials arrived in Taiwan they were not as had been agreed. He testified that 30 to 40 percent of the materials were not as agreed. (Tr. 18). As recited above, the materials had been paid for when Swain gave notice that they had been shipped. (Tr. 14, 15). Marco notified Swain of the claimed discrepancy between the goods purchased and those received. Two meetings were held at Las Vegas to attempt to negotiate a settlement over the claimed deficiency. The settlement negotiations were unsuccessful. Marco then sued to recover its excess payments and Swain counterclaimed claiming damages for the breach by Marco of the terms of Plaintiff's Exhibit 1.

The essence of Swain's appeal is two-fold. The first claim is that Marco agreed to purchase all of the materials of the kinds listed on Exhibit 1 which were located at the Fillmore yard and did not do so. The second claim is that Marco agreed to purchase all of the materials which Swain had purchased at the Mercury Test Site and that Marco did not do so. Swain claims that the figure 750,000 was intended as an approximation of all the materials at

the Test Site which Swain claims Marco had agreed to purchase, not an approximate amount of material which Marco was required to purchase. The trial court found that the written agreement (plaintiff's Exhibit 1) was written by Swain and should be most strongly construed against him. The court held that Marco was not obligated to take more materials than it had purchased. The court further held that Swain's evidence did not establish that he, Swain, had been damaged.

ARGUMENT

POINT I

THE EVIDENCE SUPPORTED THE TRIAL COURT'S FINDINGS THAT THERE WAS NO INDENTIFICATION TO THE CONTRACT OF ANY GIVEN QUANTITY OF MATERIALS OF THE FILLMORE YARD

In Swain's "Summary of Argument", paragraph 1 at page 6 of his brief, he makes two claims. The first is that

Marco did not take all the material he agreed to take; and where Swain presented competent evidence showing he suffered damages far in excess of the advance payment, which evidence was not disputed in any manner by Marco.

Both of those statements are incorrect. Only two witnesses were called. On the critical issues the trial court chose to believe Chien rather than Swain.

The trial court held in Finding of Fact Number 6 that Marco did not agree to purchase all of the material at Swain's yard:

No quantity of material at the Utah site was ever specified, but plaintiff estimated the pile of scrap viewed by the parties contained approximately 5 containers; defendant estimates that such pile contained 12 to 14 containers.

(Record 100, 107).

A glance at Exhibit 1 will confirm that it does not specify a quantity. The contract, plaintiff's Exhibit 1, was written by Swain. The court ruled that its terms should be construed against him and in favor of Marco. The contract did not specify a quantity and the trial court was not persuaded that Marco had agreed to purchase all material located at Swain's yard.

In Western Fidelity v. Gibbons & Reed Co., 492 P.1d 132, 27 Utah 2d (1971) the court stated:

Where appellant's position is that trial court erred in refusing to make certain findings essential to its right to recover, and it insists that the evidence compels such findings, it is obligated to show that there is credible and uncontradicted evidence which proves those contended facts with such certainty that all reasonable minds must so find; conversely if there is any reasonable basis, either in the evidence or from the lack of evidence, upon which reasonable minds might conclude that they are not so convinced by a preponderance of the evidence, then the findings should not be overturned.

To the same effect is Searle v. Searle, 522 P.2d 697 (Utah 1974):

Actions of trial court are indulged with a presumption of validity, and burden is upon appellant to prove such serious inequity as to manifest clear abuse of discretion.

See also R. C. Tolman Const. Co., Inc. v. Myton Water Assn., 563 P.2d 499 (Utah 1976) and Leon Glazier & Sons, Inc. v. Larsen, 491 P.2d 226, 26 Utah 2d 429 (1971).

See also Jeffries v. Jeffries, 752 P.2d 909 (Utah App. 1988), where the court stated: "When examining court's findings of fact,

reviewing court defers to those findings unless they are clearly erroneous."

At page 100 of the transcript, Chien testified that on September 8, 1986 he estimated that Swain's yard contained about five containers of materials. Swain testified that the yard contained between 12 and 14 containers of material. (Tr. 107). No evidence was presented with respect to any inventory records as of September, 1986. No business records were produced which would have enabled the trial court to find the quantity of material located at Swain's yard on September 8, 1986. The only evidence was the estimate of Swain and the estimate of Chien. In addition to the fact that there was no competent evidence as to the quantity of material present in September, the court properly found the plaintiff's Exhibit 1 did not specify any quantity of goods to be purchased.

POINT II

MARCO SATISFIED THE QUANTITY REQUIREMENT OF THE CONTRACT.

The trial court held that since plaintiff's Exhibit 1 was written by Swain that it should be construed against Swain and in favor of Marco. (Conclusions of Law No. 1, Record 119).

The purchase of 737,000 pounds of materials satisfied Marco's obligation to purchase approximately 750,000 pounds of goods.

Marco purchased more than 98% of the quantity of aluminum and copper coaxial cable specified by plaintiff's Exhibit 1.

The court's finding that the purchase of 737,000 pounds satisfied the contract requirement is well supported by the authorities.

The case of Holland v. Rea, 48 Mich. 218, 12 N.W. 167 (1982) held that delivery of 473,000 of an agreed 500,000 feet of logs amounted to substantial performance. See also, in Polhemer v. Herman, 45 Cal. 573 (1873), a delivery of 47,315 pounds of wool was held a sufficient compliance with a contract requiring the delivery of "about" 53,000 pounds. In this case, Marco purchased 737,000 out of 750,000 pounds specified. Certainly purchase of .9816% of approximately 750,000 represents compliance with the contract terms.

POINT III

THE TRIAL COURT FOUND THAT SWAIN DID NOT SUPPORT HIS DAMAGES CLAIM BY A PREPONDERANCE OF CREDIBLE EVIDENCE.

At trial, Swain did not produce any records showing the amount of goods he had in inventory on hand at any time. He produced no written records to show purchases of goods, no records of quantities of inventory on hand at any particular time nor any records of sales.

It appears that Swain operated his business strictly on a cash basis and kept no written records reflecting his business activities. There wasn't any evidence other than Swain's oral testimony to support Swain's claim as to the quantity of goods

located at the Mercury Test Site nor at Fillmore or whether the material had been sold, and if sold, at what price.

Swain sought to prove his damages solely by oral testimony regarding the quantities and kinds of goods not purchased by Marco. He sought to testify about the sales price and the quantities of each kind of goods sold.

At the trial, Judge Christensen sustained objections to Swain's oral testimony as to the quantities of materials sold by Swain which Swain agreed that Marco had agreed to purchase. The court also denied admission to Swain's testimony concerning the sales price of the materials which Swain said that Marco did not purchase. When Swain sought to testify, counsel for plaintiff objected that the offered testimony was not the best evidence. The objection was sustained. (Tr. 135).

A better objection would have been that the evidence was not relevant by reason of Rule 403 of the Utah Rules of Evidence.

The court was concerned (Tr. 135) that Swain sought to prove his damages by his oral testimony and that he did not offer any business records or other evidence to support his parol testimony. The court referred to figures being pulled out of the air to support Swain's claim. (Tr. 135) The court was not satisfied with Swain's testimony concerning Swain's claimed damages absent any business records to support his testimony.

At Swain's request, the judge granted Swain a five day period

to supplement the record with written records evidencing the quantities and prices of sales to which Swain testified. (Tr. 140). No such records were ever produced. Instead, Swain offered an affidavit and a hand written summary saying essentially the same things to which he had testified at trial. (R. 21-26). No business records were produced.

The only evidence furnished by Swain as to the quantities, kinds of goods or prices at which the salvage materials were sold was his parol testimony and an affidavit signed by him. No supporting documentary evidence of any kind was furnished. In the absence of any written evidence of records of purchase, sale or ownership of the goods to which Swain testified, it was clearly within the discretion of the court to find that the evidence offered in support of Swain's claim did not satisfy his burden of proof.

CONCLUSION

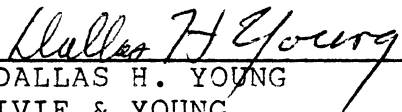
On disputed evidence, the trial court found that plaintiff was entitled to judgment for the sum of \$14,374.77 by reason of an undisputed payment for goods not received.

On disputed evidence the court found that defendant and counterclaimant had not proved breach of contract nor damages.

The record shows credible competent evidence to support the trial court's findings, and a lack of credible evidence to support defendant's defense or his counterclaim.

The trial court's judgment should be affirmed.

Dated this 6 day of April, 1989.



DALLAS H. YOUNG
IVIE & YOUNG
Attorneys for Plaintiff

MAILING CERTIFICATE

I hereby certify that I caused to be mailed, postage prepaid,
four true and correct copies of the foregoing Brief of the
Respondent to the following on this 6 day of April, 1989.

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