

1988

# Marcos Industrial Supply Inc. v. Richard M. Swain : Brief of Appellant

Utah Court of Appeals

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Dexter L. Anderson; Attorney for Appellant.

Dallas H. Young, Jr.; Attorney for Respondent.

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IN THE UTAH COURT OF APPEALS

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|--------------------------------|---|--|
| Marcos Industrial Supply, Inc. | ) |  |
|                                | ) |  |
| Plaintiff-Respondent,          | ) |  |
|                                | ) | Case No. 880 <sup>609</sup> <del>517</del> -CA |
| vs.                            | ) | Priority Classification                        |
|                                | ) | 14(b)  |
| Richard M. Swain,              | ) |  |
|                                | ) |  |
| Defendant-Appellant,           | ) |  |

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BRIEF OF THE APPELLANT

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Appeal from a Final Judgment of the  
Fourth Judicial District Court of Millard County  
The Honorable Cullen Y. Christensen, presiding  
Judge of the above-entitled Court

---

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Defendant-Appellant

**FILED**

FEB 28 1989

Mary T. NOCHT

IN THE UTAH COURT OF APPEALS

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|--------------------------------|---|-------------------------|
| Marcos Industrial Supply, Inc. | ) |                         |
|                                | ) |                         |
| Plaintiff-Respondent,          | ) | 609                     |
|                                | ) | Case No. 880517-CA      |
| vs.                            | ) | Priority Classification |
|                                | ) | 14(b)                   |
| Richard M. Swain,              | ) |                         |
|                                | ) |                         |
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## TABLE OF CONTENTS

|  | <u>Page</u> |
|--|-------------|
| <u>JURISDICTION.</u> . . . . .                                     | 1           |
| <u>NATURE OF PROCEEDINGS</u> . . . . .                             | 1           |
| <u>ISSUES PRESENTED FOR REVIEW</u> . . . . .                       | 1           |
| <u>DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ETC.</u> . . | 2           |
| <br><u>STATEMENT OF THE CASE</u> . . . . .                         | <br>2       |
| <u>Proceedings Below.</u> . . . . .                                | 2           |
| <u>Statement of Facts</u> . . . . .                                | 3           |
| <br><u>SUMMARY OF ARGUMENT</u> . . . . .                           | <br>6       |
| <br><u>ARGUMENT I</u> . . . . .                                    | <br>7       |
| <br><u>ARGUMENT II</u> . . . . .                                   | <br>10      |
| <br><u>CONCLUSION</u> . . . . .                                    | <br>18      |

## TABLES OF AUTHORITIES

| <u>CASES:</u>  | <u>Page</u> |
|--|-------------|
| <u>Roods v. Roods</u> , 645 P.2d 640 (Utah 1982) . . . . . | 10          |
| <br><u>STATUTES:</u>                                       |             |
| 70A-2-204, Utah Code Annotated . . . . .                   | 2           |
| 70A-2-709(1)(b)(1980). . . . .                             | 2           |

IN THE UTAH COURT OF APPEALS

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

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BRIEF OF APPELLANT

JURISDICTION

This Court has jurisdiction under 78-2a-3(2)(J), Utah Code Annotated, 1953 as amended.

NATURE OF PROCEEDINGS

This appeal is taken from a final judgment entered in favor of Plaintiff-Respondent (hereinafter referred to as "Marco") by the Honorable Cullen Y. Christensen, Fourth Judicial District Court, relative to an action concerning a written contract wherein Marco sued to collect back an advance payment of money paid as required by the contract, and Defendant-Appellant (hereinafter referred to as "Swain") countersued to offset damages he suffered by the breach of the contract by Marco.

ISSUES PRESENTED FOR REVIEW

Did the trial court error in returning Plaintiff's advance payment where Plaintiff breached the written

agreement to buy scrap materials from Defendant and Defendant suffered damages as a result of the breach in an amount greater than the advanced payment?

Was Swain's evidence on the amount of damages he suffered insufficient to sustain an offset against the advance payment he retained from Marco?

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ETC.

U.C.A. 70A-2-204 and U.C.A. 70A-2-709(1)(b)(1980).

STATEMENT OF THE CASE

Proceedings Below

This contract action was filed by Marco to recover an advance payment made by Marco to Swain under a written agreement (Exhibit No. 1) wherein Marco agreed to purchase a large quantity of scrap materials located in both Millard County, at Swain's scraping yard (hereinafter referred to as the "Utah Yard"), and at the Nevada Test Site, Mercury, Nevada (hereinafter referred to as the "Nevada Site"), from Swain. (Tr. pages 9-10.) The contract required that Marco pay Swain in advance. Marco failed to take all the material described in the agreement and filed this suit to recover his over-advancement of moneys. (R. page 110, Finding #9.) Swain counterclaimed for an offset representing his damages resulting from Marco not taking all the material. (R. pages 1-7.)

The lower court found that even though Marco did not take substantial amounts of material described in the agreement, he was not obligated to do so and since he had paid \$14,374.77 more than he had taken in material, he was entitled to recover that sum, plus interest and cost, from Swain. The court found that Swain's evidence on his damages resulting from breach of contract was insufficient and his counterclaim was dismissed. (R. pages 114-119.)

#### STATEMENT OF FACTS

Marco is in the business of buying salvaged scrap metal materials and exporting to overseas markets. In the instant case, Marco was buying material to sell to a Taiwan Company, Choge Din Ent. Co., L.T.D. (hereinafter referred to as "Choge Din").

Swain is in the business of buying and salvaging scrap metal materials and reselling the same to buyers and consists of such materials as Marco purchased. Swain maintains a salvage yard in Millard County, Utah, but he also salvages material at other locations wherever he may buy material for salvage.

On or about July 23, 1986, Swain bid on and purchased a large amount of salvage aluminum and copper coaxial wire located at the Nevada Site and sold by the U.S. Government. Swain was contacted by Mr. Klinn, a broker, who advised



Swain he had a buyer for the Nevada Site material and set up a meeting between Swain and Marco in Las Vegas, Nevada. A first meeting was held between Swain, Marco, Klinn and a representative from Choge Din. At the meeting samples were examined and the materials were discussed but no deal was made. Marco could not go onto the Nevada Site because of his non-citizen status so arrangements were made for him to visit the Utah Yard to view some of the Nevada Site material that had been hauled there by Swain. (Tr. pages 107-109.) (Tr. pages 6-12.)

On September 8, 1986, Marco met Swain at the Utah Yard and spent the better part of the day viewing materials. During the course of the day, the materials that had been hauled up from the Nevada Site and other quantities and types of scrap material Swain had on hand at the Utah Yard were examined. (Tr. pages 6-12.)

The parties viewed quantities and types of materials Swain had on hand at the Utah Yard, talked price, and finally came to an agreement that was reduced to writing, setting forth a description of each type of material and price per pound. (See Exhibit No. 1.) Also in the written agreement the parties described the material to be taken from the Nevada Site and approximated the tonnage at 750,000 pounds. The intent was that Marco would take all the

material meeting those descriptions from the Utah Yard and the Nevada Site that Swain had on hand. Marco failed to take any amount of several of the described items. The lower court found in Finding No. 9 and 11 (Record pages 117-118), that the following materials were not taken by Marco:

|   |                  |
|---|------------------|
| 120,000 lbs. motors . . . . .                           | 5-1/2 cents/lb.  |
| 44,000 lbs. synchronizer rings . . .                    | 6 cents/lb.      |
| 44,000 lbs. miscellaneous copper/<br>aluminum . . . . . | 11-1/2 cents/lb. |
| 82,000 lbs. electrical wire and<br>coaxial . . . . .    | 19 cents/lb.     |

The court also found that Marco took 736,000 lbs. of material from the Nevada Site but failed to take 92,400 pounds of the material from the Nevada Site. Swain had to haul that amount to Fillmore, Utah, to remove it from the Nevada Site at an expense and loss to him.

Marco took twenty-five (25) containers from the Nevada Site and five (5) containers from the Utah Yard. He was personally present when the containers were loaded in Fillmore. He admitted he did not take large quantities of the lower grade material that he had viewed and agreed to take per the September 8, 1986 agreement.

On November 14, 1986, the parties met in Las Vegas. Marcos complained about the quality of material. They discussed a credit to offset or settle the complaint. Swain was willing to give a \$4,000.00 credit if Marco would take

the rest of the material. Marco did not take any more material. Swain wrote Marco a letter, dated November 26, 1986, trying to get Marco to take the balance of the material. (Exhibit #6) Marco had his attorney, Earl R. Steen, write Swain a series of demand letters, demanding repayment and declaring the contract void. (Exhibit Nos. 12, 13, 14, and 15.) Marco's advance payments amounted to \$14,374.77 more than the value of the material that was taken.

#### SUMMARY OF ARGUMENT

1. The lower court erred in granting Marco judgment by returning his advance payment as Marco admitted he did not complete his contract to purchase scrap materials from Swain; where the court found as a fact 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.

2. The lower court erred in ruling that Swain's evidence on damages was insufficient. Swain testified from his own personal knowledge concerning the amount of material that was not taken and the reduced sales prices and values. He produced, by affidavit, the only written evidence he had concerning his resale of the material in mitigation of

damages, the amount of material resold, and the sale prices of the resold items. The court erred in ruling Swain's evidence on damages was insufficient as Marco produced no evidence in rebuttal of the damages testified to by Swain. (R. 146)

The lower court erred in not granting Swain judgment for the damages he sustained in the sum of \$22,152.00, offsetting the advance payment of \$14,374.77, for a net judgment in favor of Swain in the sum of \$7,777.23, plus interest and court costs, where the court found that Marco had not taken all the material he agreed to take; Marco admitted he had not taken all the material; and Swain's evidence showed he suffered damages as a result of lower resale prices for the material not taken; and other special damages.

#### ARGUMENT

##### I.

The provisions of the Utah Uniform Commercial Code on "Sales", U.C.A. 70A-2-204, are applicable to this case.

"Formation in general."

"(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."

"(3) Even though one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract, and there is a reasonable certain basis for giving an appropriate remedy."

U.C.A. 70-A-2-204(1) is applicable because there is no question both parties intended to contract one with the other. Exhibit No. 1 was formally written and signed by both after extensive discussions and examinations. Even though quantity was not exactly stated, both parties examined the actual material to be included under the contract through their own trained eyes, and reduced their observations into descriptions. They then proceeded, but Plaintiff ceased performance before all the material was taken.

U.C.A. 70A-2-204(3) is especially applicable because it provides that a contract does not fail for indefiniteness simply because a term is left open if the parties intended a contract and there is a reasonable basis for giving an appropriate remedy.

In this case it was reasonable for the lower court to find that Marco was to take all of the aluminum coaxial and copper wire Swain was salvaging at the Nevada Site, including the balance of 92,400 lbs. which Swain had to haul to Fillmore at an expense to him. It was reasonable for the lower court to find that Marco was to take all the material Swain had at the Utah Yard meeting the descriptions cited in the contract. The lower court did not.

It was reasonable for the lower court to find damages in favor of Swain equal to his testimony, affidavit and documentation. U.C.A. 70A-2-709(1)(b)(1980) provides that the measure of damages when the buyer fails to pay the price when it becomes due is the price of "goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price..."

In this case all the materials at the Nevada Site meeting the description were identified to the contract, and also all the material at the Utah Yard. Swain tried and succeeded in selling most of the material at reasonably good prices to E.D.S. Enterprises. He testified from personal knowledge concerning the weights and values of the materials that were left. Based on his experience in the business, he stated his opinion that the materials left after the sale to E.D.S. was one-half of what Marco had agreed to pay for them. Under the provisions of the Uniform Commercial Code, Swain was entitled to his damages as a result of Marco's failure to complete the contract. Those damages were readily calculated, and the lower court erred in not granting Swain his damages in the form of a set-off and net judgment against Marco.

The lower court held that the best evidence rule bound Swain's testimony and evidence on damages. The best

evidence rule does not so provide. The rule is set out in the Utah Rules of Evidence, Rule 1001-1008.

Rule 1001 provides that an original writing must generally be produced, if there is such a writing. But a writing is not required where a party seeks to prove a fact which has an existence independent of any writing. Roods v. Roods, 645 P.2d 640 (Utah 1982).

In this case Swain produced the only written documents he had on the question of damages, mitigation and resale of some of the material. The original contract for the resale to E.D.S. was produced as evidence, via affidavit, allowed by the court. (See Record page 25.) The amount of material resold was produced on Swain's original notes. (Record page 26.) These documents satisfied the best evidence rules. All other evidence on damages was produced independent of any documents, from Swain's personal knowledge. (See Argument II below for references.)

#### ARGUMENT II

Plaintiff's Exhibit #1 is the handwritten contract entered into between the parties. It basically described an agreement between the parties for the sale and purchase of scrap material from two different locations, i.e. Swain's Utah Yard and also from the Nevada Site. The written agreement was prepared after several meetings and discus-

sions between the parties. Marco had examined samples of the material from the Nevada Site. He had also examined all of the material in the Utah Yard. The parties had identified the subject matter of this contract and agreed upon a price per pound for the various items.

Even though the contract did not specify the amount of material to be taken from the Utah Yard, the contract provided:

"...also included is material at Swain's property in Utah."

Following this phrase is a detailed description and price list of the various types of material. Swain testified that the parties intended to include all the scrap material he had at the Utah Yard. (Tr. page 106, lines 10-20.)

At page 52 of the transcript of the trial, Marco was looking at Exhibit No. 1 and states that the list represented what he looked at in Swain's yard and said in line 3:

"Thank you. Yes, those are the materials in this yard at that moment."

Marco then answered in the affirmative that he had seen each of the different described items. At page 53, lines 17-25, he stated he was looking at piles of material on the ground. On pages 54 and 55, Marco answered affirmatively that he was



agreeing to buy all the material he examined in the Utah Yard. At page 54, line 18, the question was asked: -

"But was it clear in your mind that you were going to buy these materials that I have just read to you off of this list, you were going to buy those materials that you saw?

Answer (line 21) by Marco:

Yes.

Question (line 24):

Okay, and you agreed upon a price?

Answer (line 25):

Yes."

On page 12 of the transcript, on direct examination, Marco told his attorney "everything" was included. when asked about quantity, line 25, Marco answered:

"Oh. Everything, that took, we took a look there, and we inspect material, and we settle price..."

Marco admitted on cross-examination that he did not take all of several of the items listed in the contract and none of some.

At page 71 of the transcript, lines 18-21, Marco admitted he did not take all of the 40 or 50 thousand pounds of motors and bearings listed in the agreement, and none of the steel/brass synchronizers. Knowing that he had not taken all of the material listed in the agreement, at page 82, lines 6-16, Marco admitted he had his attorney write a

letter, dated December 31, 1986, terminating the contract. Marco stated at page 82, lines 20-22, that he had not purchased any material from the Utah Yard, which was contrary to his written agreement and earlier testimony.

From the contract and testimony of Marco on both direct and cross-examination it is clear that Marco was going to take all of the described material from the Nevada Site also. He did take most of it, but not all. The 750,000 pounds was recited as an estimate, yet Marco knew he was to take at least that much material. At page 14 of the transcript, line 16, in answer to his counsel, Marco stated:

"Just as to quantity, we could not get in to see. So just Mr. Swain, he talks about approximately 750,000 pounds, the quantity. That's a quantity he told me, he told me, quote to me."

At page 43, line 5, in response to his counsel's questions, Marco stated:

"The coaxial, because of when the things happen, we understand we owed almost a finish all of the quantity he talked to me, he said 750,000 pounds. But we almost finished those quantities, yes, at that time."

At page 76 of the transcript, Marco again admitted he knew he "almost" (but didn't) take all the material he was to take from the Nevada Site.

At line 15 on cross-examination, the question is asked:

"Question: Almost?

Answer: Yes, almost to finish.

Question: But not all?

Answer: I think this, if even we bought one more container, the quantity already over the, over the quantity he give to me, is the closer amount."

Marco knew he had not taken all the Nevada Site material, yet he wanted his advance deposit back and terminated the contract through his attorneys letters. (See Exhibit Nos. 12, 13, 14, and 15.)

At pages 102-105 of the transcript, Swain testified that Marco was present when the five containers were loaded from the Utah Yard material on hand and that Marco directed the loading, wanting specific higher grade material, while his buyers were present. (Page 103, line 6.)

Swain testified at page 104, line 3, that there was material left in the yard that Marco did not take. There were synchronizer rings, motors, and one container each of electrical and lowgrade wire. Marco wanted to then move back to the Nevada Site and then come back to the Utah Yard and finish. He never finished taking the material from either location. At page 105, line 20, Swain testified that two empty containers were hauled from Utah back to the Nevada Site and:

"Answer: ...we hauled those back to Mercury to put coaxial on them and then he said that after we finished the test site, he would come back and

finish the material here. (Referring to the Utah Yard.)

Question: Did he ever do that?

Answer: No, Sir, he didn't."

At pages 120 and 121 of the transcript, Swain testified that the 120,000 pounds of motors and copper bearings described in the contract were not taken at the 5-1/2 cents per pound; that the 44,000 pounds of synchronizer rings and green generator motors at six cents a pound described in the contract were not taken; only part of the "electrical and electronics," "aluminum coaxial wire," and "miscellaneous copper and aluminum wire and connectors" were taken; and all the "gold" and "silver" and "telephone plugs" were taken.

At page 122 of the transcript, Swain testified that there was 92,400 pounds of wire that was not taken by Marco from the Nevada Site which Swain had to haul to Utah in order to complete his contract with the government at the Nevada Site.

Following a series of objections and rulings on the grounds of "best evidence" (pages 134-140), while Swain was attempting to testify concerning the damages he suffered from Marco's failure to take all the material, the court allowed the parties to submit further evidence on damages by affidavit. (Tr. page 141, line 11.)

Swain then submitted additional evidence on damages, via affidavit and documents, which appear at the record, pages 66-71. Swain attempted to mitigate his damages by reselling some of the material to another scrap metal dealer, i.e. E.D.S. Enterprises. (R. page 25.)

Swain's affidavit, page 66 of the record, states that the material he resold to E.D.S. was the same material similarly described in his agreement with Marco (Exhibit No. 1 herein). In fact, the same descriptive words are used in both agreements, i.e.:

|                             | <u>Marco's Agreement</u> | <u>E.D.S. Agreement</u> |
|-----------------------------|--------------------------|-------------------------|
| Aluminum coaxial and copper | .21 cents                | .18 cents               |
| Electrical and electronics  | .19 cents                | .09 cents               |
| Motors and copper bearings  | .05-1/2 cents            | .02-1/2 cents           |

In the "E.D.S." agreement, the prices are set out and they are less in each case than prices set out in the agreement with Marco:

1. Three cents per pound less for the aluminum and coaxial and copper hauled up from the Nevada Site;
2. Ten cents per pound less for the electrical and electornics located at the Utah Yard; and
3. Three cents per pound less for the motors and copper bearings located at the Utah Yard.

Swain's affidavit also establishes the amount of material under each description which was actually sold to E.D.S. at the reduced prices. He recorded the actual

weights sold to E.D.S. and they are set out on page 26 of the record.

1. Aluminum coaxial and copper  
92,350 pounds at .18 cents/lb.
2. Electrical and electronics  
84,360 lbs. at .09 cents/lb.
3. Motors and copper bearings  
92,280 lbs. at .02-1/2 cents/lb.

The damage on these items actually resold to E.D.S is easily calculated:

|   |                 |
|---|-----------------|
| .03 cents x 92,350 lbs. of aluminum<br>coaxial and copper . . . . . | \$ 2,770.50     |
| .10 cents x 84,360 lbs. of electrical<br>and electronics. . . . .   | 8,436.00        |
| .03 cents x 92,280 lbs. of motors and<br>copper bearings. . . . .   | <u>2,768.40</u> |
| TOTAL:  | \$13,374.90     |

Swain's affidavit and testimony (Tr. pages 101-146) shows that he had a balance of 27,720 lbs. of motors and copper bearings left, 44,000 lbs. of steel/brass synchronizer rings and green motors left, and 44,000 lbs. of miscellaneous copper and aluminum wire and connectors left. Swain testified that these materials are worth one-half of what Marco agreed to pay for the material. (Tr. page 143.)

Swain's damages resulting from Marco's failure to take materials which were not resold and still on hand are calculated as follows:

|  |            |
|--|------------|
| 27,720 lbs. at 2-1/4 cents/lb. . . . . | \$ 623.70  |
| 44,000 lbs. at 3 cents/lb. . . . .     | \$1,320.00 |
| 44,000 lbs. at 5-3/4 cents/lb. . . . . | \$2,530.00 |

Finally, Swain testified that it cost him two cents per lb. to load the material from the Nevada Site that Marco did not take, and \$1.00 per mile to haul it up to Fillmore, totaling \$4,473.00. (Tr. pages 122-124.)

Defendant's damages are summarized as follows:

|  |                 |
|--|-----------------|
| Loading and hauling of Nevada Site<br>wire from Nevada to Fillmore . . . . . | \$ 4,008.00     |
| Loss on sale of Nevada Site wire . . . . .                                   | 2,770.50        |
| Loss on sale of electrical wire<br>from Utah Yard . . . . .                  | 8,200.00        |
| Loss on sale of motors and copper<br>bearings . . . . .                      | 2,700.00        |
| Decreased value of motors on hand. . . . .                                   | 623.70          |
| Decreased value of synchronizer<br>rings on hand. . . . .                    | 1,320.00        |
| Decreased value of miscellaneous<br>wire on hand . . . . .                   | <u>2,530.00</u> |

TOTAL DAMAGES: \$22,152.20

As a result, Defendant's net damages are calculated as follows:

|       |                  |
|-------|------------------|
|       | \$22,152.20      |
| Less: | <u>14,374.77</u> |
|       | \$ 7,777.43      |


#### CONCLUSION

Judgment should be entered in favor of Defendant on his Counterclaim in said amount. Plaintiff's cause of

action, Count 1 of the Complaint, concerns the \$14,374.77 overpay- ment, which is not disputed by Defendant except for any connotation that it was the result of wrongdoing on the part of Defendant. It was not. The overpayment results from the scheme of advance payments agreed upon between the parties in the September 8th agreement.

In fact, the overpayment proves the Plaintiff knew he had agreed to take more material than he had received. The overpayment resulted from the last cash transfer Plaintiff made on October 28, 1986. Thereafter, Plaintiff terminated the agreement and started demanding that Defendant return his money. (See Exhibit 12.)

DATED this 28 day of February, 1989.

  
DEXTER L. ANDERSON  
Attorney for Defendant-  
Appellant



CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing BRIEF OF APPELLANT to Respondent's Attorney, Dallas H. Young, Jr., 48 North University Avenue, P.O. Box 672, Provo, Utah 84603, postage prepaid, this 28th day of February, 1989.

Patricia Bingham