

2001

Kent W. Holman and Alfred G. Kessler, dba Golden Spike Reality and Construction v. Blair W. Sorenson and Marjean Sorenson : Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

KENT W. HOLMAN and
ALFRED G. KESSLER, dba
GOLDEN SPIKE REALTY
AND CONSTRUCTION,

Plaintiff-Respondent,

vs.

Case No. 14305

BLAIR W. SORENSON and
MARJEAN SORENSON,

Defendant-Appellant.

PETITION FOR REHEARING

Appeal from Judgment of the District Court of the
Third Judicial District
in and for Salt Lake County, State of Utah

Honorable James S. Sawaya,
Judge

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AUTHORITIES CITED

(No authorities cited.)

IN THE SUPREME COURT
OF THE STATE OF UTAH

KENT W. HOLMAN and
ALFRED G. KESSLER, dba
GOLDEN SPIKE REALTY
AND CONSTRUCTION,

Plaintiff-Respondent,

v.

BLAIR W. SORENSON and
MARJEAN SORENSON,

Defendant-Appellant.

Case No. 14305

PETITION FOR REHEARING

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME
COURT OF THE STATE OF UTAH:

Pursuant to Rule 76(e), Utah Rules of Civil
Procedure, Appellant respectfully petitions the Court
for a rehearing of the decision entered by the Court on
November 1, 1976; and states and alleges that the Court has
erred in the following particulars:

1. The Court erred in stating that appellants
counsel gave no reference in his brief as to where in the record
certain "agreements" concerning contract credit might be found
and in stating that the record itself does not support these
agreements.

2. As a consequence of the foregoing errors, the Court ruled incorrectly that the trial court had accurately computed the measure of damages based on its finding of mutual breach.

ARGUMENT

POINT I

THE COURT'S STATEMENT THAT "COUNSEL FOR APPELLANTS STATES THERE WERE CERTAIN AGREEMENTS MADE, BUT DOES NOT GIVE ANY REFERENCE IN THE RECORD AS TO WHERE THEY MAY BE FOUND," IS ASTOUNDING.

In their brief appellants argued that when the trial court gave appellants "credit" of \$6,779 that purportedly included costs of completion, it in fact gave them nothing more than plaintiffs (respondents) agreed they had coming as adjustments to the original contract price for work performed or paid for by appellants. This Court understood the argument but states that nowhere in appellants brief, or in the record, is there any reference to this "agreement".

Appellants have reason to believe that this remarkable conclusion arises primarily from a sentence commencing at the bottom of page 10 of their brief:

"So without consideration of extras or the costs plaintiffs avoided by not finishing the work or the amount the Sorensons (defendants) paid to complete the unfinished work, the parties agreed

at trial that the status of the contract was as follows:

[here is set out an itemization of the credits to owner.] (Emphasis on words "at trial" deleted; other emphasis added.)

It is true that no citation to the record appears in this sentence. But the sentence can only be construed as a summary or conclusionary sentence; otherwise, the word "so" at its beginning would make no sense. But the court seems to have given it the contentious reading that it is a bare statement of fact.

1. Appellant did cite the record in its brief.

The sentence set forth above recapitulates and summarizes the three paragraphs immediately preceding it in Appellants Brief:

This error seems to have arisen from the court's misapprehension of the agreement between the parties at the time work was terminated. At trial the parties agreed on certain points concerning the contract, but the meaning of this agreement seems to have been misunderstood by the court below.

Both parties agreed that the contract price was \$56,000. Plaintiffs agreed that defendants should be given credit against this price for \$1,000 for a fence on the property which was included in the original contract price, but which, it was later agreed, defendant would install at his own expense (P-11, R. 82). On plaintiff's "Damage Recapitulation" (Ex. P-11, App. B), "contract credits to owner" are stated at \$5,648. These credits are not itemized on P-11, but they are on defendants' damage summary; [footnote omitted]

A. Light Fixtures	\$ 400
B. Mansaard Roof	420
C. Painting	1,300
D. Floor Covering	3,178
E. Building Plans	<u>350</u>

These items total: \$5,648

This corresponds to the "credits" admitted by plaintiffs.

All of these items were included as part of the original contract price, but were in fact provided, installed, paid for, or performed by the owner, Mr. Sorenson. He was, accordingly, given credit for them against the contract price. Mr. Sorenson also claimed \$31 for a fire insurance premium which he paid, and at trial the plaintiffs agreed he should be given credit for this amount (R. 225). Finally, it was agreed that Mr. Sorenson should be given credit for the \$100 earnest money paid upon the execution of the Earnest Money Agreement (P-11, App. B).

In this quotation from the brief, the citations to the record are underscored; they were not in the original.

Moreover, in a footnote at page 12 of the brief, plaintiff's explanation of "contract credits" is set forth from the record with a citation to the page:

Mr. Holman described the "contract credits" as follows:

Q. Now, can you explain to us what the item labeled Contract Credits to the Owner consists of?

A. Yes. They are credits given to the owner for items that he took on and did on his own such as floor coverings, the shingling, the painting and I think there was a couple other miscellaneous things. I don't see them on my list that itemizes them now.

Q. Was that figure arrived at after negotiations between you and Mr. Sorrellson?...

A. On the different items--on each of the different items the amount for floor covering was agreed on. It was a matter of the cost breakdown. That's what was allowed for in the cost breakdown on the place and so that's what he got. The painting, that's what was allowed in the--in the cost breakdown and that's what he received there...." (R. 99)

In view of this, appellants are mystified at the Court's statement that no references to the record are given.

POINT II

THE RECORD, AS CITED IN APPELLANTS ORIGINAL BRIEF, AND AS RECITED IN THE PRECEDING PAGES, ESTABLISHES THAT THERE WAS NO DISPUTE AS TO "CONTRACT CREDITS" AND ADJUSTMENTS TO THE OWNER.

The contract credits that plaintiffs admit are set out at page 2 of this Court's opinion. The following summary recapitulates these credits and sets forth the page in the record or the Exhibit number wherein the citation to such "admission" might be found:

- | | | |
|-------------------------------|---------|--|
| 1. Earnest Money | \$ 100 | Exhibit P-11, page 1, "Paid through May 30, 1974 (including Earnest Money)." |
| 2. Contract Credits to owners | \$5,648 | Ex. P-11, p. 1; (R. 99). (Set out page 12 of Appellants Brief). |

Item 2. comprises the following:

a. Light fixtures			"...couple of other
\$400			miscellaneous things
b. Building Plans			..." (R. 99)
\$350			
c. Floor Covering			"They are credits given
\$3,178			the owner for... floor
d. Mansaard roof			coverings, the shingling,
\$420			the painting..." (R. 99)
e. Painting			
\$1,300			
3. Fire insurance	\$	31	(R. 225) cited at page
			10 of Appellants Brief.
4. Fence	\$1,000		Ex. P-11 "Offset credit
			for fence (to be completed
			by owner." (See also record
			at p. 82). Cited at p. 10
			of appellant's brief.
Total		\$6,779	

It should be remembered the Exhibit P-11 is plaintiffs' exhibit, prepared as a summary of their damages and admitted into evidence as such. The citations to the testimonial evidence are plaintiffs' explanation of this exhibit.

In view of this, it seems that this Court has ruled that "agreed" cannot mean "in agreement upon" or "no dispute" in the sense that the sentence,

"The parties agreed that the status of the contract was as follows:"

might mean,

"The parties were in agreement that the status of the contract etc., "

or

"There was no dispute between the parties that the status of the contract etc."

Appellants admit that if the first sentence requires a handshake between the parties or some such affirmative act, no citation to the record was or could be given. They submit, however, that if it could bear the second or third meaning, the record and their brief supports it.

Stating the matter somewhat differently, plaintiffs (respondents) themselves submitted to the court evidence that defendants were entitled to "credits" or "adjustments" on the contract price amounting to \$6,779.

The Court in its opinion implies that defendants were overreaching in their claim for damages on their counterclaim. Be that as it may, they are entitled at least to what plaintiffs granted them.

POINT III

THE TRIAL COURT ERRED IN ITS COMPUTATION OF DAMAGES

In its opinion, this Court stated,

If there was such an agreement, then it is obvious the trial court omitted from his findings the cost of completion of the job. However, as stated before, there is no record of any such agreement and we must presume it did not occur.

Appellants respectfully submit that this and other portions of the opinion make too much of a single word—a word perhaps unwisely chosen by appellants' counsel. It is further respectfully submitted that this Court could, based upon the Record and the Appellants Brief, have written

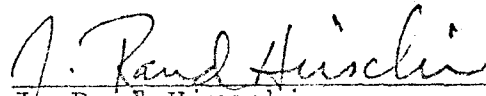
"Since plaintiffs did not dispute that defendants had these credits coming, then it is obvious the trial court omitted from his findings the cost of completion of the job."

CONCLUSION

For the reasons hereinabove stated, Appellants respectfully request that this petition for rehearing be granted, that the opinion of this Court entered November 1, 1976, be vacated, and that the matter be remanded for further proceedings.

RESPECTFULLY SUBMITTED,

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