1979

Dale Rucker v. Arlin Dalton : Brief of Defendant and Respondent

Utah Supreme Court

J. Dennis Frederick; Kipp and Christian; Attorney for Plaintiff and Appellant;
Ronald R. Stanger; Stanger & Brown; Attorney for Defendant and Respondent;

IN THE SUPREME COURT

OF THE STATE OF UTAH

DALE RUCKER,	:	
Plaintiff and Appellant,	:	
v.	:	Case No. 16082
ARLIN DALTON,	:	
Defendant and Respondent.	:	

BRIEF OF DEFENDANT AND RESPONDENT

RONALD R. STANGER
38 North University
Provo, Utah 84601
Attorney for Defendant-Respondent

J. DENNIS FREDERICK
KIPP AND CHRISTIAN
600 Commercial Club Building
32 Exchange Place
Salt Lake City, Utah 84111
Attorney for Plaintiff-Appellant

IN THE SUPREME COURT

OF THE STATE OF UTAH

DALE RUCKER,	:	
Plaintiff and Appellant,	:	
v.	:	Case No. 16082
ARLIN DALTON,	:	
Defendant and Respondent.	:	

BRIEF OF DEFENDANT AND RESPONDENT

RONALD R. STANGER
38 North University
Provo, Utah 84601
Attorney for Defendant-Respondent

J. DENNIS FREDERICK
KIPP AND CHRISTIAN
600 Commercial Club Building
32 Exchange Place
Salt Lake City, Utah 84111
Attorney for Plaintiff-Appellant

TABLE OF CONTENTS

Statement of the Nature of the Case 1

Disposition of the Lower Court 1

Relief Sought on Appeal 2

Statement of the Case 2

Argument 3

POINT I

THE CASE AT BAR IS AN ACTION AT LAW AND AS SUCH APPEALS MAY BE MADE ONLY UPON QUESTIONS OF LAW OF WHICH THERE ARE NONE 3

POINT II

IF THE CASE IS DETERMINED TO BE AT EQUITY THIS COURT'S REVIEW SHOULD LEND GREAT DEFERENCE TO THE FACTUAL FINDINGS OF THE TRIAL COURT AND NOT DISTURB FINDINGS BASED ON CONFLICTING TESTIMONY 4

Conclusion 6

CASES CITED

Bear River State Bank v. Merrill, 101 Utah 176, 120 P. 2d 325 (1941) 4

Bennett v. Bowen, 65 Utah 444, 238 P. 2d 240 (1925) 3

Crockett v. Nish, 106 Utah 241, 147 P. 2d 853 (1944) 5

Lyman v. Town of Price, 63 Utah 90, 222 P. 599 (1924) 3

Elias v. Lea, Utah Supreme Court Decision 14885 (unpublished opinion February 7, 1978) 6

CONSTITUTIONAL PROVISIONS CITED

Article 8, Section 9, Utah Constitution 3

IN THE SUPREME COURT

OF THE STATE OF UTAH

DALE RUCKER,	:	
Plaintiff and Appellant,	:	
v.	:	Case No. 16082
ARLIN DALTON,	:	
Defendant and Respondent.	:	

BRIEF OF DEFENDANT AND RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant,appeals from a judgment of the District Court, Fourth Judicial District, the Honorable Allen B. Sorensen, Judge. Appellant sought damages arising out of an agreement in which Respondent was to assist in construction of portions of an addition to a residence owned by Appellant.

DISPOSITION IN LOWER COURT

The case was tried before the Honorable Allen B. Sorensen, Judge, on August 24, 1978. Appellant sought damages in the amount of $20,000, attorney's fees and costs. Respondent counterclaimed for $500 balance due and costs. Respondents counterclaim was dismissed and Appellant was awarded $2,000 damages.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the trial court's Findings of Fact, Conclusions of Law and Memorandum Decision with respect to the alleged structural deficiencies in the addition.

STATEMENT OF FACTS

In early 1976, Appellant solicited Respondent's help to build an addition to Appellant's home. Respondent testified he told Appellant he was not a licensed contractor. Appellant agreed to hire a non-licensed contractor because he wanted himself and his son to do work on the project, a desire that he knew a licensed contractor would not entertain.

Appellant provided blueprints to Respondent with the construction specifications. A vague, abbreviated, written memorandum was executed with extensive oral statements attempting to clarify the intent of the parties.

Appellant made application for the building permit from the Provo Building Inspection Department for the addition. Appellant listed no contractor's name on the application and signed the application as the party responsible for the completion of the addition in accordance with Provo's Building Code.

The Respondent's work on the addition was done between August, 1976, and December, 1976. During this time Appellant was continually present and supervising the work.

Appellant made periodic payments to Respondent based upon

progress and acceptance of work. Appellant has payed $11,050.00 toward the $11,247.50 originally agreed.

After termination of Respondent's work, Appellant only once prior to instigation of legal action made mention of a requested repair (a jamming door.) When effort was made to make this repair, Appellant refused access to his premises.

ARGUMENT

POINT 1

THE CASE AT BAR IS AN ACTION AT LAW AND AS SUCH APPEALS MAY BE MADE ONLY UPON QUESTIONS OF LAW OF WHICH THERE ARE NONE.

In Appellant's Complaint and Ammended Complaint, the relief sought has been money damages. The Utah Supreme Court has stated "Ordinarily an action for money on a contract, express or implied, is an action at law." Bennett vs. Bowen 65 Utah 444, 238 P. 240 (1925).

The Pre-trial Order states that "The parties hereto agree the same may be tried to Judge Allen B. Sorensen without a jury." Hence, the non-jury trial was held as a result of mutual agreement by the parties.

The Utah Constitution, Article VIII, Section 9 is clear wherein it provides that "in cases of law the appeal shall be on questions of law alone."

This has been restated by the Utah Supreme Court. In Lyman vs. Town of Price 63 Utah 90, 222 P. 599 (1924) the Court stated: "Under Section 9, Article 8,, Constitution (Utah) The Supreme Court in cases at

law tried before court without jury, will examine the evidence only so far as may be necessary to determine questions of law, and it will not pass upon the sufficiency of the evidence to justify finding or judgment, unless, there is no legitimate proof to support it and in no case whether tried with or without a jury, will the appellable court determine questions of fact."

The Appellant has asserted no questions of law but asks the Court to review the factual determinations of the trial Court. There being no questions of law, this appeal should be dismissed.

POINT 2

IF THE CASE IS DETERMINED TO BE AN ACTION AT EQUIT, THIS COURT'S REVIEW SHOULD LEND GREAT DEFERENCE TO THE FACTUAL FINDINGS OF THE TRIAL COURT AND NOT DISTURB FINDINGS BASED ON CONFLICTING TESTIMONY.

If this Court determines that the case at bar is at equity, it nevertheless should lend considerable deference to the trial court's finding. In Bear River State Bank vs. Merrill 101 Utah 176, 120 P. 2d 325 (1941) this Court stated:

> "The findings of the trial court will not be upset. This Court recognizes the fact that the trial court saw the witnesses, observed their demeanor and was in a better position to judge their credibility than is an appellate court with only the transcript as a basis for its conclusions. It is the duty of this Court to review and weigh the evidence in an action for legal and equitable relief and findings of the trial court are not disturbed unless wrong, Rich vs. Stephens, 79 Utah 411, 2d 295; Smith vs. Edwards, 81 Utah 244, 17 P. 2d 264. And where it is claimed that the facts found by the trial court are not supported

> by the evidence the appellants are entitled to a full review of the evidence and a determination by the Supreme Court. Zuniga vs. Evans, 87 Utah 198, 48 P. 2d 513, 101 A.C.R. 532; Williams vs. Peterson, 86 Utah 526, 46 P. 2d 674. However, findings based upon conflicting testimony such as is presented in the instant case, will not be disturbed unless it appears that the trial court has misapplied proven facts or that the findings are clearly against the weight of the evidence."

That there is competent testimony to support the trial court's decision can hardly be disputed. There was testimony that the appellant was on the job site daily (TR, pp 104 and 137), that he controlled the work (TR, pp 103 and 137), that he made decisions on key construction questions such as the depth of the excavation (TR, pp 95 and 143), the type of roof (TR, p 95), window size (TR, p 96), window height (TR, p 99), and that his wife made the decision as to interior wall texture (TR, p 96). Both parties testified concerning oral agreements surrounding the written memorandum (TR, pp 106-107 and pp 25-28). There was testimony concerning subsequent oral changes to the agreements (TR, p 106) and Appellant himself testified that his own son drew the blueprints for the addition that were to be followed by Respondent (TR, p 29). Indeed, there was so much conflicting testimony that the trial Court was heard to say, "I'm trying to find out what this contract was. It's beginning to look as if there wasn't one." (TR, p 150)

This Court, in the equity case of Crockett vs. Nish, 106 Utah 241, 147 P 2d 853 (1944), went so far as to state:

> "In examing the transcript to determine what our conclusions from the evidence will be, we are to make an independent analysis of it. If at the end of the investigation we are in doubt or even if there is a slight preponderence in our minds against the trial court's conclusions we will affirm."

And in the more recent case of Elias vs. Lea, Utah Supreme Court Decision 14885 (unpublished opinion, February 7, 1978) the Court stated:

> "The Appellants urge us to overlook the findings of the Trial Court who saw and heard the witnesses and render our own findings at variance therewith. They urge us to do because of the provisions of Article VIII, Section 9 of the Utah Constitution....
>
> "At the time the Constitution was adopted, equity matters were submitted on depositions; therefore, members of the Supreme Court were just as capable of determining the facts in an equity case as was the trial judge. By our court decision we have continued to consider the facts of an equity case on appeal, but we do not substitute our judgment of what the facts are unless the ruling of the court below is clearly against the weight of the evidence."

Consequently, there is no basis for overturning the trial court's judgment unless the facts found by the trial judge are clearly unsupported by the evidence, a situation not here in existence.

CONCLUSION

It is submitted that this case is one at law and there is nothing in the record to substantiate Appellant's contention that it is at equity. The case being one at law, only questions of law should be affirmed.

If the Court does determine the case to be one at equity, it should lend considerable deference to the trial court's decision and affirm a decision based on conflicting testimony so long as it is not clearly against

the weight of the evidence. There being an abundance of evidence in this case to support the trial Court's finding, its decision should be affirmed.

RESPECTFULLY SUBMITTED,

RONALD R. STANGER,
ATTORNEY FOR DEFENDANT-RESPONDENT