

1979

Provo City Corporation v. Nielson Scott Company, Inc. and Demetrois Agathangelides, D/B/A Greek Gardens : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

PROVO CITY CORPORATION,
Plaintiff and Respondent,
vs.

NIELSON SCOTT COMPANY, INC.,
AND DEMETRIOS AGATHANGELIDES,
DBA GREEK GARDENS,
Defendants and Appellants,

Supreme Court No.
16136

NEILSON SCOTT COMPANY, INC.,
Third-Party Plaintiff and
Third-Party Respondent,
vs.

DEMETRIOS AGATHANGELIDES,
Third-Party Defendant and
Third-Party Appellant.

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Fourth District Court
The Honorable Allen B. Sorensen

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IN THE SUPREME COURT
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Third-Party Defendant and
Third-Party Appellant.

Supreme Court No.
16136

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is a suit for breach of contract by a subcontractor for public improvements done for the City under a general contract with Nielson Scott Company, Inc. under which Demetrios Agathangelides,

dba Greek Gardens, was the subcontractor.

RELIEF SOUGHT ON APPEAL

The respondents request the Court to sustain the finding of the lower court.

STATEMENT OF FACTS

The respondent Provo City contracted with Nielson Scott Company, Inc., for the performance of a major downtown redevelopment project on Center Street in Provo. Nielson Scott in turn contracted with the appellant herein, Greek Gardens, as a subcontractor in charge of the tree planting and landscaping portion of the redevelopment project. The contract was awarded on the 11th of September, 1974 and the appellant had all of the trees provided for in the contract installed by December 10, 1975. An inspection of the trees on May 5, 1976, disclosed that 12 of the trees had died over the winter and the City through John Maas, the architect who was in charge of the job, made demand upon the appellant to replace the 12 trees.

The appellant agreed by letter (Exhibit No. 7) to replace the 12 trees but requested that replanting be postponed until November of 1976 because of the hazard to the trees in transplanting them when they were not in a dormant state. The architect, Maas, approved the delay in replanting and noted in his

testimony (see trial transcript pages 26, 27 and 31) that in the fall of the year, trees are dormant and that because of the risks of transportation in cold weather, and other factors, the risk of loss continued still upon the subcontractor until the following spring when it was possible for the first time to determine whether the trees were alive or dead.

It was stipulated during the trial that in the spring of 1977, it was observed and without dispute that all 12 of the trees that had been replanted the first time had died over the winter.

The trial court granted judgment on the basis that the responsibility to see that the trees were alive continued until the next spring. Until then, it was not possible to determine whether the trees in fact survived the winter dormant stage. The lower court made findings that the trees in fact did not ever show life and rendered judgment on the basis of the actual cost to the City of buying and installing replacement trees.

ARGUMENT

POINT I

THE SUBCONTRACTOR PROVIDING TREES
FOR A PLANTING PROJECT HAS A CONTINUING
LIABILITY UNTIL THE TREES ARE
WELL ESTABLISHED AND APPARENTLY ALIVE

The original contract referred to in the trial

as Exhibit No. 3 and particularly paragraph 31(d) on page 8, anticipates a warranty period of one year after date of "substantial completion." As the appellant sets forth in his brief, it was found that 12 of the trees installed under the contract by the subcontractor died during the first winter.

The contractor submitted to the City a written request that instead of replacing those 12 trees in May of 1976 when they were found to be dead that he be allowed to defer the replanting until the next fall. Consent was given and that consent amounted to a modification of the original contract, a novation of the original contract terms, since substantial completion had been accomplished in December of 1975.

The doctrine of modification of contract (see 12 Am. Jur. Contracts §465 at page 934) recognizes that a written contract may be modified with the assent of both parties providing that the modification be susceptible of proof and that there be consideration given. Consideration in this case, as recited in the original document (Exhibit 7) was the fact that the City's acquiescence to the delay in replanting would be of benefit to the subcontractor in that the trees would have a better chance of surviving if they were planted in the fall rather than in the late spring.

There was a reciprocal disadvantage, however, in the fact that the City would not be able to tell whether the trees actually came out of their dormant stage until after the end of the warranty period.

It is implicit from the general reading of the contract that the purpose of the warranty period was to guarantee that the trees as planted would survive at least one growing season. John Maas, who was the architect on the job, testified before the Court (trial transcript pages 29 and 31) that the extension of the time for planting the trees in the first replanting made it impossible to determine whether the second replanting would actually survive the winter until after the one-year warranty period had expired. The responsibility remained upon the subcontractor until the next spring when it was discernible whether or not the trees budded out and leafed sufficient to establish that they were in fact growing and living trees.

Our legislature has addressed the dual subjects of express warranties and implied warranty for merchantability in the Uniform Commercial Code, and particularly in Sections 70A-2-313 and 70A-2-314, Utah Code Annotated (1953), as amended.

Section 313 states:

70A-2-313. Express warranties

by affirmation, promise, description, sample.--(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

Section 314 provides:

... a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

It is the contention of the respondent that Greek Gardens is subject to both the express warranty for the one year period after substantial completion and by modification of that contract for a sufficient period of time to determine whether the substitute plants were themselves viable. The appellant, as an acknowledged landscaping contractor and nurseryman, is in fact a seller of goods of the kind which he contracted to provide for the City and is therefore, in addition, liable on the implied warranty statute.

The interpretation of warranty statutes with respect to sale of seed and nursery stock has been a prolific source of litigation and compilations of the many hundreds of cases on the subject are found in 16 A.L.R. 859, 32 A.L.R. 1241, 62 A.L.R. 451, 117 A.L.R. 470, 168 A.L.R. 581, 40 A.L.R.2d 273.

The Supreme Court of the State of Utah long

ago determined that the existence or nonexistence of either an implied or express warranty is a question of fact and if so found by the finder of fact will not be disturbed by the Supreme Court upon appeal. See Nielson v. Hermansen, 166 P.2d 536 and other cases cited therein.

The criteria for what constitutes a warranty in connection with a sale are set forth so succinctly in the Nielson v. Hermansen case that it could well have been the prototype upon which our present Uniform Commercial Code definitions of warranty could have been based.

The position taken by the appellant herein is that he acknowledged the responsibility to make one replacement of trees which breached the warranty but he sees no obligation to go beyond that point. The point of law at issue is covered well by a series of cases from California. See Ackerman v. Levy and Zentner, 45 P.2d 386 (1935); Southern California Enterprises, Inc. v. Walter, 178 P.2d 785 (1947); and Aced v. Hobbs, 360 P.2d 897.

The Ackerman case states that warranties as to nursery stock and planting seed are "prospective" --relating to the happening of a future event--and are not broken until the happening of such event.

The Southern California Enterprises case involved a cause of action based upon a breach of warranty with respect to an expensive carpet and was held to state a cause of action on a warranty of a future happening and that the Statute of Limitations did not begin to run until the future event failed to materialize. The Court further held that the Statute of Limitations was tolled as long as the manufacturer attempted to repair the imperfections in the carpet by the doing of remedial work by the seller. See 1 Willis-ton on Sales 2d, Ed. §212A page 411.

The final case cited, Aced v. Hobbs, was one involving a copper tube heating system that was installed in a home. The tubing was bedded in cement. The warranty was implied to continue past the time when a Statute of Limitations would normally have barred an action for unmerchantability. The Statute was held to commence at the time the latent defect was discovered. As pointed out in 67 Am. Jur.2d Sales §474 at pages 646 and 647, an implied warranty against a latent defect is imposed against either the manufacturer (or grower) or a nonmanufacturing seller. The real test is whether the latent defect made the product unmerchantable and not fit for the particular purpose for which it was sold.

As to the scope of the warranties, see 67 Am.

Jur.2d Sales §506 at pages 684 and 685 where the term "condition" (the same term used in the contract between the parties to this suit) as used in a warranty that fruit trees are in a good condition is synonymous with the term "quality" and refers to the living state and capacity to grow, and to living trees and is broken by furnishing trees without sufficient vitality to take root and grow. Quoting Wellington v. Frazier, 19 Ont. L.88.

Interpreting the contract in the manner suggested by appellant removed the risk of loss from the subcontractor and unfairly places it upon the purchaser of the trees and ignores the fact that the thing contracted for by the City was not just so many trees stuck in the ground but in fact was for the specified number of growing and viable trees which are able to sustain themselves through a full growing season.

POINT II

THE MEASURE OF DAMAGES FOR
BREACH OF CONTRACT IS THE
COST TO THE OTHER PARTY
TO REMEDY THE BREACH.

The subject of damages with respect to a breach of warranty for fitness varies with the nature of the article being warranted.

For instance, in the Southern California Enterprises case, which dealt with carpet which was unfit for use, the Court held that an allegation as to the purchase price when coupled with the fact that the article sold was unfit for use was sufficient to state a cause of action and the damages could amount to the cost actually paid by the buyer to the seller.

Since the original contract price between the City and the appellants herein provided for payment of \$550.00 per tree, it was not unreasonable for the Court to assess the lower figure of \$330.00 that it did based upon the evidence received. The discussion of damages in 168 A.L.R. page 591 quotes cases in which seed is involved. They hold that the measure of damages is the difference between the value of the seed sold and the value of the product that would have resulted had the seed corresponded to the warranty; or that the damages were those special damages resulting from the breach of a warranty, which damages naturally resulted from the breach. There was no liability for remote or conjectural consequences but that the recovery should be the natural or proximate result of the defendant's alleged wrong-doing

It appears, however, that the best rule is that stated by our Supreme Court in the case of Lavar

Park v. Moorman Manufacturing, 121 Utah 2d 339, 241 P.2d 914, which held that the fundamental principle of damages is to restore the injured party to the position he would have been in had it not been for the wrong of the other party. Based upon that rule, it would appear that the logical assessment of damages would be the cost to the City of redoing the work that the subcontractor had refused to do after due notice. The fact that he possibly could have done it at less expense to himself is waived when he refuses to perform and puts that duty upon the City which has an interest in seeing that the trees are planted uniformly and that their growth is uniform in appearance which would not be the case had the trees been deferred in their planting until after all litigation was completed.

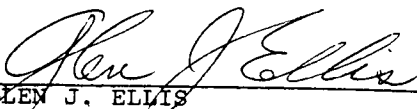
CONCLUSION

The trial court, as finder of fact, found sufficient evidence that there had occurred a breach of contract and that the express and implied warranties of fitness went beyond the contract period of one year from substantial completion, and in fact would continue on until the trees were shown to be viable for one year after planting.

The trial court likewise correctly assessed damages at actual cost of remedying the breach and not


upon some lesser figure for which appellant could have provided the trees had he elected to do so.

Respectfully submitted this 10 day of March, 1979.


GLEN J. ELLIS

CERTIFICATE OF MAILING

Ten copies of the foregoing Respondent's Brief were mailed to the Supreme Court of the State of Utah, in care of the Clerk of the Supreme Court, State Capitol Building, Salt Lake City, Utah 84110, and two copies of the same were mailed to Gordon J. Low, attorney for defendants and appellants, 175 East 1st North Street, Logan, Utah 84321; and two copies were mailed to Gerald L. Turner, attorney for defendants and appellants, 343 South 400 East, Salt Lake City, Utah 84111, this 12 day of March, 1979, first class postage prepaid.


GLEN J. ELLIS, Attorney