1979

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

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

PROVO CITY CORPORATION,

Plaintiff and Respondent,

vs.

NIELSON SCOTT COMPANY, INC. and DEMETROIS AGATHANGELIDES, d/b/a GREEK GARDENS

Defendants and Appellants,

Supreme Court No.

NIELSON SCOTT COMPANY, INC.,

Third-Party Plaintiff and Third-Party Respondent,

vs.

DEMETROIS AGATHANGELIDES,

Third-Party Defendant and Third-Party Appellant.

BRIEF OF APPELLANTS

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PROVO CITY CORPORATION,

Plaintiff and Respondent,

vs.

NIELSON SCOTT COMPANY, INC. and DEMETROIS AGATHANGELIDES, d/b/a GREEK GARDENS

Defendants and Appellants,

Supreme Court No. 16136

NIELSON SCOTT COMPANY, INC.,

Third-Party Plaintiff and Third-Party Respondent,

vs.

DEMETROIS AGATHANGELIDES,

Third-Party Defendant and Third-Party Appellant.

BRIEF OF APPELLANTS

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BRIEF OF APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

Appellants are appealing a judgment and decree from the Fourth District Court of Utah, County of Utah, issued October 9, 1978.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the judgment, and a findings by this Court that the responsibility for the trees in question under the contract in question rests with the Respondent and not the Appellants.

STATEMENT OF FACTS

I

The Plaintiff/Respondent is a municipal corporation with offices in Provo City, Utah, the Defendant/Appellant, Nielson Scott Co., Inc. is a corporation with its offices in Salt Lake City and Defendant/Appellant, Demetrois Agathangelides operates a sole proprietorship as Greek Gardens doing business in Logan, Utah.

On or about the 11th day of September, 1974, the Respondent awarded a certain contract to Appellant, Nielson Scott Co. for among other things not here pertinent the planting of certin trees on Center Street in Provo, Utah. A portion of that contract was sub-contracted by the Appellant, Nielson Scott to Appellant, Demetrois Agathangelides, d/b/a Greek Gardens, by written contract. (See Exhibits 1, 2, and 3.)

Pursuant to the contract and sub-contract, the sub-contractor, Demetrois Agathangelides planted the trees and the contract was substantially performed on or before December 10, 1975 (Tr. p. 7 lines 17-24.) An inspection of May 5, 1976 revealed that 12 of said trees had died. Respondent demanded, pursuant to paragraph 31(d) of Exhibit No. 3, that the Appellant replace said trees.

Appellant, Agathangelides, agreed by letter (Exhibit No. to replace said 12 trees but requested that the re-planting of the same be postponed until November, 1976 due to the possible hazard to the trees.

The 12 trees were, in fact, replaced in November of 1976. The replacement was done correctly and pursuant to the contract and the trees at that time were alive. (Tr. p. 20 line 30; Tr. p. 21, lines 1-11; Tr. p. 34, line 30; Tr. p. 35, line 1-4; Tr. p. 37, lines 11-26; Tr. p. 60, lines 15-30.)

In the Spring of 1977, it was observed and went without dispute, at trial, that the 12 trees in question had died.

The Respondent demanded that Appellants replace the trees. The Appellants refused on the basis the same was not within the warranty period of the specifications and contract.

II

Witness for Respondent testified and the Court found that the actual replacement costs of the trees were $333.00 per tree for a total expenditure of $3,950.00 and that an additional $1,723.00 was spent for labor and material related thereto.

Appellants presented testimony that reasonable costs for replacement related to labor and materials aside from the actual costs of the trees would be $50.00 or $60.00 per tree for a total of $600.00 to $720.00. (Tr. p. 73, lines 1-4)

A R G U M E N T

Point I

THE TRIAL COURT ERRED IN CONSTRUING THE CONTRACT AND SPECIFICATION WHERE THE SAME PROVIDED THAT THE APPELLANTS WERE ONLY RESPONSIBLE THEREUNDER FOR ONE YEAR AFTER THE DATE OF SUBSTANTIAL COMPLETION

The question which arises in this matter is that of the Appellant's responsibility under the terms of the contract and specifications and in connection with the trees planted. Paragraph 31 (d) of Exhibit No. 3, page 8 which provides the following:

> If within one year after the Date of Substantial Completion or within such longer period of time as may be prescribed by law or by the terms of any applicable special guarantee required by the contract documents, any of the work is found to be defective or not in accordance with the contract documents, the contractor shall correct it promptly after receipt of written notice from the owner to do so unless the owner has previously given the contractor a written acceptance of such condition. The owner shall give such notice promptly after discover of the condition. (Emphasis added)

By stipulation and undisputed testimony the terms and conditions of the contract were substantially performed on December 10, 1975 (Tr. p. 7 lines 17-25; Tr. p. 16, line 26; Tr. p. 42 lines 20-29.) On May 5, 1976, six months latter, and still within the one year period described in paragraph 31 (D) above, the Appellants were notified of the death of 12 trees. In connection therewith, said trees were replaced, still within the one year period, in November of 1976. The testimony and all the evidence was that the trees were correctly replaced and they were alive at the time they were replaced. (Tr. p. 21, line 7; Tr. p. 37 line 26; Tr. p. 40, lines 24-25; Tr. p. 60, line 19-30; Tr. p. 61, 1-8.)

The Appellant's obligation under the contract ended on December 10, 1976. Thereafter, the trees were the

responsibility of the Respondent. The Lower Court has apparently held that, for some unknown reason, the liability of the Appellants continued on until the Spring of 1977 or one and one-half years after the date of Substantial Performance, despite paragraph 31(D) of Exhibit No. 3.

The trees were replaced and the architect testified that he was in charge of inspection and approval of the project and testified that the job was done correctly, the replanting was done properly and the trees were alive. The Appellant, Agathangelides, testified they were alive when planted and that the reason for their death was, in all likelihood, the harsh winter. It is the Appellant's position that the liability for the trees, subsequent to December 10, 1976 falls upon the Respondent's in this matter, pursuant to the terms of the contract and that the Trial Court erred in placing responsiblity and liability therefore upon the Appellants.

In so holding, the Trial Court took it upon itself to re-write the contract.

It is a fundamental principal that a Court may not rewrite or make a new contract for the parties under the guise of construction. The contract may only be enforced within its terms and the Court cannot attempt to make better or more equitable agreements between the parties than they themselves made. (17 AmJur2d 242)

Had the parties agreed to be bound by terms other than those written in the contract, they must have agreed to the same. It is not for the Trial Court to add terms or to rewrite the

agreement (Genola Town et al. v. Santaquin City, et al. 111 P2d 372, 100 Utah 62 [1941])

Under the contract, the warranty period and the Appellants responsibility was one year from the day of substantial performance. The Trial Court essentially rewrote the warranty period from one year to one and one-half years in so doing, erred.

Point II

THE MEASURE OF DAMAGES IS THE REASONABLE COST OF REPLACEMENT AND NOT ACTUAL COSTS.

The testimony before the Court was that the actual cost of replacement of the trees related to labor was $1,7[illegible] (See Exhibit 2; Tr. p 45; Tr. p. 54) Appellants produced testimony at trial that a reasonable cost for the same labor related to the replacement of the trees was $50.00 to $60.00 per tree for a total of $600.00 to $720.00. (Tr. p.73) The Court erred in granting to the Respondent judgment for $1,7[illegible] as the only testimony as to reasonable value and costs for damages was $600.00 to $720.00 rather than $1,723.00.

The judgment for $1,723.00 as and for costs of repair was excessive even though it may have been actual cost. The Respondent has the responsibility of keeping the costs of repair/replacement at a reasonable level and if its acts exceed that level recovery cannot be had for the excess.

The Courts of this State and others have long adherred to the "cost of repairs" rule in cases of this nature

and that cost is the reasonable cost. Maricope County v. Welsh and Olborg Architects, Inc. 494 P2d 44, 16 Ariz. App.439 [1972]; Keller v. Deseret Mortuary Co. 455 P2d 197 23 Utah 2d [1969]; 22 AmJur2d [Damages] 148, Restatement of the Law of Contracts 346[1][a][1].)

CONCLUSION

The Trial Court erred in extending the warranty period of the contract in question. The dead trees were replaced within the one year period, it was done properly and accepted to Respondent. At that point the Appellants liability ended. The fact that the trees did not make it through the harsh winter does not expose the Appellants to liability.

The Court erred in granting actual costs to Respondants rather than reasonable costs.

The judgment of the trial Court should be reversed.

Respectfully Submitted,

Gordon J. Low
Attorney for Defendants and Appellants

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Brief of Appellants, was mailed, prepaid to Gerald L. Turner (1 copy) 343 South 400 East, Salt Lake City, Utah 84111, and Glen J. Ellis (2 copies) P. O. Box 1849, Provo, Utah 84601, and (11 copies) to the Supreme Court, Salt Lake City, Utah, 84111 this 16th day of February, 1979.

Teresa Olsen

Teresa Olsen - Secretary