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Jack W. McCollum v. J. V. Clothier : Brief of Defendant and Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

JACK W. McCOLLUM,

Plaintiff and Respondent,

vs.

J. V. CLOTHIER,

Defendant and Appellant.

Case No. 7721 ,

BRIEF OF DEFENDANT AND APPELLANT

FILED

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OCT 1 1931

Clark, Supreme Court, Utah

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In the Supreme Court of the State of Utah

JACK W. McCOLLUM,
Plaintiff and Respondent,

vs.

J. V. CLOTHIER,
Defendant and Appellant.

Case No. 7721

BRIEF OF DEFENDANT AND APPELLANT

STATEMENT OF FACTS

Defendant prosecutes this appeal from a judgment in favor of the plaintiff for the sum of \$652.80.

In May, 1949, the defendant commenced an action to foreclose a mortgage of real and personal properties against the Kiest Beet Harvester Company at Hooper, Utah, for approximately \$35,000.00. Immediately thereafter the Kiest Beet Harvester Company went into bankruptcy.

In February, 1950, the Referee in Bankruptcy gave notice to defendant that he would disclaim any interest in and to the mortgaged property and would turn

over the real property and the machinery and equipment in the building thereon to the defendant on or about the 20th day of February, 1950. The plaintiff, who had been acting as night watchman for the Trustee in Bankruptcy and Miss Henrietta McGlone, a practicing attorney of Pocatello, Idaho, and J. Grant Iverson, one of the attorneys for the defendant in this matter, met at the plant for the purpose of checking the personal property and delivering possession thereof to the defendant. At that time the plaintiff stated that numerous people were interested in buying various pieces of equipment. The plaintiff stated that Mr. Iverson asked him to "line up" buyers for the machinery. The testimony of Mr. Iverson and J. D. Hooper, one of the plaintiff's witnesses, was to the effect that Mr. Iverson told the plaintiff that he would appreciate it if he would "keep track" of interested purchasers so that they might be notified at the time of the sale of the property.

The real property was sold on the steps of the Court House at Ogden, Utah, on the 1st day of August, 1950, and the machinery and equipment were sold at the plant in Hooper on the same day by the Sheriff on foreclosure sale.

The plaintiff brought this action against the defendant for services rendered in soliciting buyers for the machinery and equipment, and for expenses incurred in traveling to Los Angeles, California, Salt Lake City, Utah, Pocatello, Idaho, Vale, Oregon and numerous intermediate points.

During the course of the trial the Court indicated to the attorney for the plaintiff that it was the Court's opinion that the plaintiff had no cause of action.

After Mr. Iverson testified, he told the Court that he had one other witness, a Mr. Floyd Simpson, who had been the caretaker of the plant after the machinery and equipment had been turned over to the defendant, whose testimony he desired to take if the Court cared to hear any more testimony for the defendant. This witness was ill at his home, but the doctor's affidavit filed in the matter stated that he was not too ill to have his testimony taken at his home. The Court stated that he did not think it was necessary to have the testimony of Mr. Simpson and told Mr. Iverson to prepare findings and judgment in favor of the defendant, no cause of action. Counsel for the plaintiff asked leave to file a brief but the Court indicated that filing a brief would do him no good, that he had failed to prove a cause of action.

Counsel for the defendant prepared proposed findings and judgment and presented them to the Court. Some time later the Court indicated that he was going to enter judgment in favor of the plaintiff for \$250.00. To this the defendant objected and on a hearing upon the proposed findings and judgment in favor of the plaintiff the Court stated,

“After I announced my decision, Mr. Iverson, I saw in going over the evidence where you had used him. He, apparently with your consent and under your instructions had held the keys and showed people the place down there during the

summer, so I decided that he was entitled to compensation for that and I thought in the neighborhood of \$250.00 would be about right.”

Mr. Iverson then told the Court that he was mistaken in his recollection of the evidence. He stated to the Court that the plaintiff did not have keys to the building and that there was no evidence in the record that Mr. Iverson knew that he was showing the place to any one. The Court then stated at least Dr. Clothier had knowledge that he was showing the place and the Doctor stated that he should “continue on that.” Mr. Iverson again told the Court that his memory of the evidence was incorrect and the Court stated he would have a transcript of the evidence made and after reviewing the same would have a further hearing upon the matter. Without holding a further hearing the Court entered the judgment in favor of the plaintiff and against the defendant for \$652.80.

The defendant prosecutes this appeal on two grounds, to-wit: That the judgment is not supported by the evidence and that the Court misled counsel for the defendant in to not putting in the evidence of Floyd Simpson, indicating that the Court was satisfied with the evidence of the defendant in support of the Court’s indicated intention to enter a judgment in favor of the defendant.

The errors assigned will require a review of the evidence.

The plaintiff testified first in his own behalf. He testified that he met Mr. Iverson at the plant to check

off the list of property against the inventory of the machinery. That previously he had acted as caretaker for Miss Stewart, the Trustee in Bankruptcy, as night watchman. The plant was located at Hooper and was a large brick building that had been used for the manufacture of harvesters. Some of the machinery in the building was not included in the mortgage to the defendant, and he had gone out to get buyers for the machinery for Miss Stewart. (Tr. 6) At the plant plaintiff had a conversation with Bishop Hooper, Henrietta McGlone and Mr. Iverson. The machinery was checked off to the satisfaction of Mr. Iverson and before the parties left Mr. Iverson said, "well, you line up the buyers for this machinery." Mr. Iverson said the sale would be held in about two weeks or a month. The plaintiff continued from there and got more prospective buyers for the rest of the machinery. Nothing was said about a Sheriff's Sale. (Tr. 7) He was there because he knew all the machinery and was the only one in this part of the country that did. He started making contacts immediately. The heavy type of machinery had a name plate on it from the sellers in Los Angeles, and the price list that was given to the plaintiff had prices less than he knew the value of the machinery to be, so he made a trip to Los Angeles to ascertain what machinery of that type was selling for. He received the price list from Mr. Iverson at Mr. Iverson's office. (Tr. 8) The list covered each piece of mortgaged machinery and gave the price the defendant wanted for each piece. (Tr. 9) He didn't know who prepared the

list, but it was handed to him by Mr. Iverson. There was no conversation at the time the list was handed to him, but Mr. Iverson asked him to come back to his office later. (Tr. 9) He returned later, but Mr. Iverson was not in. He contacted some firms in Salt Lake City, Western Steel, Structural Steel & Forge, Roestenburg & Sons. (Tr. 10) He made nine trips to Salt Lake City for the purpose of seeing Mr. Iverson and the buyers. Said trips were made during March and April. All of the parties contacted went to Ogden to see the machinery. (Tr. 11) Wagstaff of Wagstaff Oil was interested in a brake. Wagstaff was also interested in some of the property that belonged to the Trustee in Bankruptcy. Various companies were interested in various pieces of machinery. When he went to Mr. Iverson's office he mentioned the fact that the prices were low and that he had buyers who were getting discouraged waiting. That Mr. Iverson said the sale would be held in about two weeks or ten days. (Tr. 12) The plaintiff contacted a number of persons in and about Ogden, who were interested in various pieces of equipment. He traveled to Pocatello. He does not remember the names of any of the people he contacted there. (Tr. 13) He contacted some prospective purchasers on the north side of the highway leading to Twin Falls, but he does not remember the names. They were steel fabricators. He contacted three such prospects. (Tr. 14) He contacted Mr. Madsen in Rupert. He was interested in various items of machinery. He contacted Bauer in Paul, Idaho, who had his own business. He was willing to pay a

higher price for the machinery than was listed. (Tr. 15) He talked to Mr. Agee, president of Olson Manufacturing Company of Boise, and his chief engineer. Olson Manufacturing Company was not interested in the machinery. They were interested in the building and the land. (Tr. 16) He contacted Mr. Iverson concerning the price of the building and the land, but Mr. Iverson did not know, so he called Dr. Clothier's office in Pocatello, and Miss McGlone in Pocatello. (Tr. 17) He contacted Wesley Hansen in Vale, Oregon. He was interested in various items of equipment. He quoted him higher prices than listed on the inventory, and that he was prepared to pay the quoted prices. He talked to Mr. Henning at Weiser, Idaho. (Tr. 17) He went to Los Angeles mainly to see if the sellers of the machinery were interested in the machinery and to ascertain the actual value of the used machinery on the market. They were not interested in the buying of any of the machinery. (Tr. 18) He made nine trips to Salt Lake City, totalling between 700 and 750 miles. He traveled 650 miles on his trip to Burley and Rupert, 1,000 miles to Boise and Weiser and 1,600 miles to Los Angeles. He talked to Mr. Al Bachelor of Olson Manufacturing Company. Mr. Agee of Olson Manufacturing Company made a trip to Ogden to see if the plaintiff could line up a purchase of the real estate for him. (Tr. 19) Some of the prospective purchasers desired to make downpayments. He asked Mr. Iverson if he should take downpayments and was told, no. The plaintiff asked the advice of others and finally took downpayments and

deposited them in the bank, but later gave the deposits back. (Tr. 20) He had a conversation with Dr. Clothier in his office in Pocatello in July, 1950. His purpose in going to see the Doctor was to find out what he wanted for the building and the land, and at that time he told the Doctor how he was doing in disposing of the machinery. The Doctor told him that he wanted approximately Five Thousand (\$5,000.00) Dollars for the building. The Doctor desired to know who the prospective purchaser was and although the prospect was the Olson Manufacturing Company, he told the Doctor that his project was a subsidiary of Morrison-Knudsen. He had promised the Olson Manufacturing Company that he would not disclose their identity. (Tr. 21) The Doctor apparently wrote to Morrison-Knudsen and asked if they were the parties interested in the property, but they stated that they were not. The property was bid in at the foreclosure sale for \$30,000.00 (Tr. 22) At the foreclosure sale the plaintiff was present. He was handed a list of machinery by the Deputy Sheriffs in charge of the sale and asked to point out the various items of machinery listed. Some of the persons he had contacted were present at the sale. (Tr. 23) The property sold in many instances for more than the appraised list prices. He started working in machinery in February, 1946. He sold machinery for Kiest. He was acquainted with some machinery salemen and had talked to them. (Tr. 24) He knows what machinery salesmen are paid. They received not less than \$350.00 a month in commission and expenses. They are allowed six cents a mile for

driving an automobile. (Tr. 25) The value of his services that he performed for Dr. Clothier would be \$500.00 a month. He figures he should be paid for two months, and that he would be willing to settle for two months' pay and mileage at the rate of six cents a mile. (Tr. 26) He would not have told Mr. Iverson or Dr. Clothier or Miss McGlone that he did not expect to receive remuneration. The Judge then asked if the plaintiff ever told Mr. Iverson or Dr. Clothier or Miss McGlone that he did expect to receive remuneration, to which he answered,

“Oh well, that dates back a little earlier. When Simpson was finding so much trouble in getting his pay, well that is when I gave up after about two months and ten days or thereabouts, and just took the buyers, prospective buyers, out to the plant when they came by the house, so when I did give up why I had mentioned the fact several times, I felt awfully sorry for the Doctor, that he lost so much. That was my one reason for getting more for the machinery than what was originally asked, but certainly I would never have gone to all the trouble and all the traveling” (Tr. 27)

The plaintiff was then asked if he ever asked Mr. Iverson or Dr. Clothier for any pay. He answered that the day of the sale he asked about it and Mr. Iverson said he would talk to the Doctor. Later that day Mr. Iverson said that the Doctor was in a “foul mood” so he decided to go into town and put a lien on the property. He went to town to the sheriff's office and the buyers talked him out of putting a lien on the property, so he

just let it go. (Tr. 28) He never heard anything either from the Doctor or Mr. Iverson concerning any compensation. (Tr. 28) That he had a conversation with Miss McGlone in the hospital during the summer. (Tr. 29) That he can't remember anything that was said in the conversation with Miss McGlone other than the machinery was talked about. (Tr. 29) The plaintiff had been selling parts and other equipment for the Trustee in Bankruptcy at the plant prior to the time the defendant took the plant over, and that on the day the plant was taken over by the defendant, the plaintiff stated that a number of people had come who were interested in buying the machinery if and when it was sold, and that the plaintiff had spent considerable time showing these pieces of machinery and talking to people about the machinery if and when it should be sold. (Tr. 34) The plaintiff never furnished the defendant with a list of any names of prospective purchasers but he mentioned them to Mr. Iverson. (Tr. 37) The plaintiff started working for Miss Stewart in selling the machinery that belonged to the Trustee in 1950 and worked for her for two weeks or a week. (Tr. 39) He was paid five or ten per cent of the sale price of machinery as commission and \$5.00 a day for taking care of the plant. He worked for seven days taking care of the plant before it was turned over to the defendant. He did not recall how much he was paid as compensation for Miss Stewart for selling the machinery. He sold it on a percentage basis which varied from five to ten per cent, but did not recall the sale price of any of

the machinery. (Tr. 39, 41) He had no other work between February 20th and May 1, 1950, except that of the defendant. He was connected with the Marine Corps Reserve and attended Reserve meetings, and that was all. Plaintiff was then asked if the signature on a set of interrogatories was his, to which he answered, yes. He was then asked if Interrogatory 12, which reads, "What was your employment between February 27, 1950 and May first 1950?" was answered "Active duty with the Marine Corps and reserve duty and the partnership." (Tr. 41) The answer was then read again to the plaintiff as follows, "Active duty with the Marine Corps, supposedly working for Iverson and night watchman for Miss Stewart for seven days." Plaintiff then stated that the partnership was not formed until July 1st, and that he was not working for the partnership between February 27 and May 1st. (Tr. 42) He was told by Mr. Iverson not to accept any money from the prospective purchasers, but some of them insisted that he take it, which he did and deposited it and later returned the money. (Tr. 44) He was advised to do so by Miss Stewart. (Tr. 44) In June, plaintiff asked Mr. Iverson if he could use the building to repair lifter loaders and was told that he would have to check with Miss McGlone. (Tr. 45) The plaintiff told Mr. Simpson that he had asked Miss McGlone's consent to use the plant and thereafter he used the plant for nine days and paid Mr. Simpson for his time spent there. (Tr. 46) The first day plaintiff was given a key by Mr. Iverson, which he turned immediately to Mr. Hooper.

Q. "Then from the first day you didn't ever have a key to the plant?"

A. "That is right. We thought it better that one man keep the key, and each time that a prospective buyer came up there, I had to contact Mr. Simpson and have him come over to the plant too, so that all—there was always one man with the key and one man responsible, and not two."

Every time anybody came to see the plaintiff, he took them out and contacted Mr. Simpson and quite often people would come by the plaintiff's house and he would call Mr. Simpson and tell Mr. Simpson to meet them at the plant. (Tr. 47) The plaintiff stated,

"From the 1st day of April when I had given up the thing as a washout, it wasn't worth my trouble any more, but I felt obligated to the buyers because I contacted them and put them off so long, I took it on my own when they came by the house, I would go out there which I didn't put down on this expense or mileage or anything else, I'd go out there and show them the machinery."

(Tr. 48) He never had any conversation about his compensation with either Miss McGlone or the Doctor or Mr. Iverson.

Q. "Did you ever confer with me (Mr. Iverson) concerning any of these trips to California, Weiser, Boise, Pocatello, or Salt Lake?"

A. "Well, there was a couple of times when you said I had to contact Miss McGlone or the Doctor in Pocatello. You sure as the devil can't walk. You can't go out and get buyers for machinery. I don't know of another

salesman that calls on these prospective buyers on the phone.”

Q. “Just answer the question.”

THE COURT: “He answered the question. He definitely said ‘no’.”

Plaintiff was asked when he was ever told to contact the Doctor or Miss McGlone, other than when he asked if he could use the property. He stated he did not know. (Tr. 48) Plaintiff did not know whether any company from Salt Lake City attended the sale. He did not recall anyone who attended the sale from Weiser, Idaho, or Vale, Oregon, or Boise, Idaho. (Tr. 50) The trip to Vale, Oregon and the trip to the Weiser, Idaho, were the same trip. (Tr. 51) When the plaintiff went to see Mr. Agee and the Olson Manufacturing Company at Boise, it was with the idea of selling the building. The plaintiff never had any written authorization or agreement authorizing him to act as agent to sell the real property. The Doctor told him to go ahead and “line up” this buyer in Boise and that the Doctor wanted approximately \$5,000.00 for the building. (Tr. 53) That the plaintiff never had any written authorization to sell machinery, plant or equipment from either Miss McGlone, the Doctor or Mr. Iverson. The real reason for the trip to Vale, Oregon, and Weiser, Idaho, was to talk to Mr. Hansen and Mr. Henning about making parts for Kiest machines so that the farmers could have parts for their machines. (Tr. 54) The plaintiff was asked whether prior to the foreclosure sale he contacted Mr. Iverson to give him the names of

any prospective buyers, to which the plaintiff answered, no. Plaintiff's counsel then stated,

“Now, if the Court please, the record is that this sale now took place on the second day of August, and this action involves work and labor during the months of March and April. I submit the question is entirely incompetent, irrelevant, and immaterial, not relating to these issues.”

A discussion ensued between the Court and counsel on both sides, and the Court finally stated as follows:

“Oh, I think the question is entirely whether he was employed or not. As to the August sale, I don't see that is material. He was out there on his own. He thought he was. If he thought he was employed and he wasn't, it doesn't make any difference, and if he was under employment, his theory of the employment is, he was taking bidders down there to pick up the property and go. So I don't think the August sale has anything to do with it.” (Tr. 56)

Plaintiff then testified that a number of people he had contacted who lived near Ogden were at the sale. (Tr. 56, 57) That either Miss McGlone or Mr. Iverson gave plaintiff the key to the plant which he immediately turned over to Mr. Hooper. (Tr. 58)

Margaret Stewart was then sworn and testified.

She stated she was acquainted with Mr. McCollum. That he acted as watchman and contact man for the sale of certain pieces of machinery which were not under the mortgage to Dr. Clothier. (Tr. 60) She gave Mr. Iverson the telephone number of Mr. McCollum. She told Mr. Iverson it would be necessary to have a watch-

man. There was no conversation with Mr. Iverson concerning what he planned to do with the machinery. She turned the keys and combination of the safe over to Mr. Iverson in her office. After the machinery was turned over to Mr. Iverson, she discovered that she still owned some of the machinery. She contacted Mr. Iverson and asserted her title as Trustee to such property. (Tr. 61, 62)

Mr. J. D. Hooper was then called by the plaintiff to testify.

He stated that he resided at Hooper, Utah. He was present at the plant when Mr. McCollum, Mr. Iverson and Miss McGlone were there. He was then asked the following question and gave the following answer:

Q. "Could you relate to the court in substance, or as you recall, exactly what was said?"

A. "I would say that I would like to make a little explanation, if that is permissible. Mr. McCullum was there to show that the properties that were listed on the inventory were in the building, and as Mr. Iverson went from machine to machine, Mr. McCullum went along as he called the list; rather, Mr. McCullum took him to each respective piece of machinery, and in some of the cases he said so and so, somebody was interested in the purchase of this particular piece of machinery."

Q. "Were there any particular talk that came to your hearing concerning employment of Mr. McCullum by Mr. Iverson with regard to finding buyers for the machinery there and with regard to a sale?"

A. "Yes. As Mr. McCullum would say, 'someone is interested in this piece' or that piece or the other near the close of the inventory that is what I call it, looking at it. Mr. McCullum then said 'a number of people are interested in these.' Mr. Iverson said something like this, 'well, I wish you would keep track of them. When the sale is coming on let them know,' or something to that effect."

Q. "Did Mr. Iverson make any request of Mr. McCullum to continue to find buyers?"

A. "No. That's all that he said in my presence. Something to that effect." (Tr. 65)

Thereupon, the plaintiff rested.

Miss Henrietta McGlone was then called to testify. She stated that she was a duly licensed and practicing attorney, practicing in Pocatello, Idaho, with her office in Pocatello. That she had been the attorney for Dr. J. V. Clothier for some time. That in June, 1950, Mr. McCollum called upon her in the hospital and made inquiry as to when the sheriff's sale would be held of the personal property at the Kiest plant, and that she referred plaintiff to Mr. Iverson. Mention was made of the real property and of its sale for about \$5,000.00 or \$10,000.00. (Tr. 66) She asked the plaintiff what interest he had in the property and its disposition and he stated that he hoped to be employed to haul the personal property away from the plant when it was sold. She was at the plant on the 20th day of February when Mr. McCollum checked out the property, but that nothing was said at that time concerning any employment of Mr. McCollum to sell

the property. At that time she employed Mr. Simpson to take care of the property, and she had taken care of the matter of his compensation and employment from the beginning. (Tr. 67)

J. Grant Iverson was then called to testify.

He stated he had acted as the attorney for Dr. Clothier in the foreclosure action. At the plant he, in company with Mr. McCollum, Mr. Hooper and Miss McGlone, checked the property as inventoried. The inventory was one prepared by the Trustee in Bankruptcy which had not only a list but the appraised value of the various pieces of machinery. At that time he had two or three copies of the inventory, one of which was given to Mr. McCollum. That as the list was checked item by item, Mr. McCollum stated that there were a number of people who were interested in various items. Mr. Iverson told him that when the sale came off he would appreciate very much having all the buyers he could get and would appreciate it if he would keep track of those buyers. Mr. McCollum asked what prices would be charged and was told that it would be a public sale but that the list would give the appraised values and that at the sale the appraised values would probably be bid by the defendant. (Tr. 68, 69) At the sale the appraised values in each instance were bid by the defendant and it was then thrown open for further bid. The defendant bought in, in that manner, approximately \$2,600.00 worth of personal property, and other bidders bought in approximately \$5,000.00 worth of property. After

the conversation of February 20, Mr. McCollum went to the office of Mr. Iverson twice. Mr. McCollum never made any report of any prospective buyers. (Tr. 69) Nothing was ever mentioned concerning traveling as much as a mile by the plaintiff. The plaintiff had never asked for any expenses for any trip and there was never any discussion of any remuneration he was to receive. However, on the day of the sale, at the plant on the first of August, after the sale was over, or during the course of the sale, the plaintiff said to Mr. Iverson, "some of these men are here bidding because I contacted them. Don't you think the doctor ought to pay me something." He was then told that the matter would be referred to Miss McGlone and that she mentioned it to the Doctor, but the Doctor refused to make any payment to the plaintiff. (Tr. 70) That Mr. McCollum made two visits to the office of Mr. Iverson, one about the first of March and the second about ten days later, and that no other conversation was ever had between the plaintiff and Mr. Iverson until about June when the plaintiff asked if he could use the premises to repair some lifter loaders and was told to contact Miss McGlone on that matter. After the sale, plaintiff told Mr. Iverson that he could have gotten more than had been realized at the sale if it had been left up to him to sell the property. (Tr. 72) Miss Stewart gave the keys to Mr. Iverson and turned over everything at that time. (Tr. 73) Mr. Simpson was employed by Miss McGlone and Mr. Iverson, acting together. That the release of the inter-

est of the Trustee in Bankruptcy in and to the personal property was filed on the 19th day of April. (Tr. 72) The defendant was delayed in foreclosing the mortgage because the original note and mortgage which had been placed in escrow in the First Security Bank in Ogden three or four years before had been misplaced. (Tr. 75) The Court and counsel for the plaintiff then engaged in a discussion at which time the Court made the following remark,

“Well, that is all right, but I have still got to choose between Mr. McCullum’s word and Mr. Iverson’s as to what the conversation was. Now, you put on two witnesses, both Mr. Hooper and Miss Stewart, and no part have they been able in any single instance to substantiate Mr. McCullum’s statement as to what there was. Now, if there was an agreement between Mr. Iverson and your man Hooper, it tends more to prove Mr. Iverson’s statement than it does Mr. McCullum’s. Miss Stewart just told you out and out there is nothing she heard.”

Again the Court said,

“It’s still basic, you can’t go out and volunteer to do something and then ask that. There must be an implied contract somewhere, in other respects it doesn’t meet the statute of frauds, or something that there was such an agreement. Now, I fail to see there was such an agreement on which to base quantum meruit.” (Tr. 78)

The Court further said,

“Whether he did or not, so far as it comes up now, Mr. McCullum, the best that he said, according to Mr. Hooper and that is what I am

now going on, 'I am in contact with a lot of people that are interested in buying this property.'"

The Court again said,

"Mr. Iverson says, 'well, keep them in mind and notify them at the time the sale comes.'

Well, that doesn't anticipate any going out or bringing them in.'" (Tr. 79)

Again the Court stated,

"Notify them of the sale. That's what Mr. Hooper says.'" (Tr. 80)

The Court further said,

"He now comes in and wants compensation for going out and canvassing."

Counsel for plaintiff then stated,

"He did that and Mr. Iverson knew that was going on."

The Court then stated,

"Well he didn't say that, so I don't know as I understand it. He said he didn't know he had gone out to a single place. He never told him he was going out and never asked for any expense of going out and never authorized him to go out in the first place, so if he went out voluntarily on his own without any promise at all, nor is there any evidence that he stood by and watched him do that.'" (Tr. 80)

The Court further said,

"All he said in that conversation was, he said, 'I've contacts that are interested in buying this machinery.'"

The Court further said,

"And he said, 'keep them in mind and notify them at the time of the sale.'"

Plaintiff's counsel then stated,

“And thereafter this man went out and made these trips and as a result of these trips and his efforts, he kept these people's interest alive and fresh and had them at the sale at the time of the sale.”

Then the Court replied,

“He hasn't done anything about it for three months before the sale.” (Tr. 81, 82)

Mr. Iverson testified that he had no idea Mr. McCullum was making any effort to sell the mortgaged property. He did not tell the plaintiff that he shouldn't deposit any money and did not give the plaintiff the list of the property at his office. (Tr. 85)

The defendant then indicated to the Court that he was ready to rest unless the Court felt it was necessary to have the testimony of Mr. Floyd Simpson, who had acted as caretaker at the plant and who was too ill to attend Court, but whose testimony could be taken at his home. The Court stated it was not necessary to have his testimony. (Tr. 90) Counsel for plaintiff then asked leave to file a brief, but the Court replied,

“Frankly, Mr. Patterson, I don't see how you could change my opinion. I think you have failed to show that there is any foundation, any agreement, that he enticed him by anything that was said by Mr. Iverson.”

Counsel for plaintiff again asked for an opportunity to file a Memorandum of Authorities. The Court stated,

“I can’t see how you can do it with the evidence you have. Your own witnesses, Mr. Hooper and Miss Stewart, and Mr. McCullum in his own statement showed that he had no reason to believe they knew that he was making the trips to Los Angeles, Burley, Boise, Payette, Weiser, they had no reason to believe that he was making trips. There certainly could be no basis for his actions. No, I think I will determine it, because I can see no reason why. At this time I’ll hold that the plaintiff having failed to sustain his action by a breach has no cause of action.”

POINTS RELIED UPON FOR A REVERSAL OF THE JUDGMENT

The defendant and appellant relies upon the following points for reversal of the judgment appealed from.

POINT ONE

The findings of fact that the plaintiff performed work, labor and services for the defendant at the defendant’s instance and request, and was required to and did drive his automobile at the request of the defendant’s agent, are not supported by the evidence and are contrary to the evidence, and the judgment entered upon said findings of fact is not supported by the evidence.

POINT TWO

The Court misled counsel for defendant and appellant in to not putting in evidence the testimony of Floyd Simpson, by indicating that the Court was satisfied with the evidence of the defendant in support of the Court’s indicated intention to enter a judgment in favor of the defendant.

ARGUMENT

POINT ONE

THE FINDINGS OF FACT AND JUDGMENT ENTERED THEREON ARE NOT SUPPORTED BY THE EVIDENCE AND ARE CONTRARY TO THE EVIDENCE.

The finding of fact that the plaintiff performed work, labor and services at the request of the defendant, or his agent, was not supported by the evidence.

As the Court said during the trial to counsel for the plaintiff:

“Well, that is all right, but I have still got to choose between Mr. McCullum’s word and Mr. Iverson’s as to what the conversation was. Now, you put on two witnesses, both Mr. Hooper and Miss Stewart, and no part have they been able in any single instance to substantiate Mr. McCullum’s statement as to what there was. * * * It’s still basic, you can’t go out and volunteer to do something and then ask that. There must be an implied contract somewhere, * * * Now, I fail to see there was such an agreement on which to base quantum meruit.” (Tr. 78)

The plaintiff said he was told to “line up buyers” for the machinery. To “line up” apparently is a stock phrase with Mr. McCollum. He used it several times during his testimony. He testified that the Olson Manufacturing Company was interested in buying the real property and that

“They made a trip down here previously to that to ask me to *line up* the sale of the building and land for them. They wanted it.” (Tr. 53)

He further stated that he went to Pocatello to see Dr. Clothier about the sale of the building and

“The Doctor told me to go ahead and *line up* this buyer in Boise.” (Tr. 53)

Is it likely that the representative of the Olson Manufacturing Company, Dr. Clothier and Mr. Iverson all used the phrase “line up”?

Plaintiff’s witness, J. D. Hooper, was at the plant when plaintiff said he was employed by Mr. Iverson. Mr. Hooper testified,

“Mr. McCullum said, ‘a number of people are interested in these.’ Mr. Iverson said something like this, ‘well, I wish you would keep track of them. When the sale is coming on let them know,’ or something to that effect.”

Plaintiff’s counsel then asked him,

“Did Mr. Iverson make any request of Mr. McCullum to continue to find buyers.”

He answered,

“No.” (Tr. 65)

Miss McGlone was present at the conversation between the plaintiff and defendant at the plant. She testified that nothing was said at that time concerning any employment of Mr. McCollum to sell the machinery. (Tr. 67)

She further testified that she asked Mr. McCollum in June in Pocatello what interest he had in the property and its disposition, and he told her he hoped to be employed to haul the personal property away from the plant when it was sold.

Mr. Iverson testified that the plaintiff stated that

there were a number of people who were interested in various items, and that he told Mr. McCollum that he would appreciate it if he would keep track of them. (Tr. 68, 69)

Before the trial the plaintiff answered some written interrogations. Interrogatory 12 was:

“Interrogatory No. 12. What was your employment between February 27, 1950 and May 1, 1950?

“Answer to Interrogatory No. 12. Active duty with the Marine Corps and reserve duty and supposedly working for Iverson and the partnership, and as night watchman for Miss Stewart for 7 days.”

After the plant and equipment were taken over by the defendant, it was discovered that some of the machinery was not included in Dr. Clothier's mortgage, and so belonged to Miss Stewart as Trustee in Bankruptcy. She hired Mr. McCollum to sell that machinery. (Tr. 61, 62, 39)

The plaintiff testified that he started working for the defendant in the latter part of February, 1950, but without any notice to the defendant, or anyone else, he quit about May 1, 1950. (Tr. 48)

He testified that he never had any conversation as to what his compensation would be, either with Miss McGlone or Dr. Clothier or Mr. Iverson. (Tr. 48) And never mentioned compensation to any one until the sale on August 1, 1950, three months after he had quit.

He stated that he never gave the names of any

prospective purchasers to Mr. Iverson. (Tr. 56) And that he never conferred with any one about the trips he claimed to have made to Los Angeles, Boise, Pocatello, Vale, Weiser or anywhere else. (Tr. 78) The only value that his services could have possibly been to the defendant would have been to notify the defendant of prospective purchasers in time for the defendant to notify those prospective purchasers of the sale. True, some persons that he had contacted may have been at the sale, but he had talked to prospective purchasers about the machinery long before he met Mr. Iverson. He talked to them while he was selling machinery for Miss Stewart and probably while he was working at the plant during June on his own private business.

The findings entered in this case stated that between the 20th day of February, 1950, and the 2nd day of August, 1950, defendant became indebted to the plaintiff. Plaintiff testified that he quit about May 1, 1950. Plaintiff's complaint alleges that work was done over a period of over sixty days from February 27, 1950, to May 1, 1950. During the trial, plaintiff was asked if he contacted Mr. Iverson after he learned when the foreclosure sale would be held to give him the names of prospective buyers. Plaintiff's attorney objected that the question was irrelevant because the action involved work and labor during the months of March and April and the sale was not held until August. The Court sustained the objection. (Tr. 55, 56) The findings included compensation for two trips to Poca-

tello. These, according to Mr. McCollum, were made in June (Tr. 66) and July (Tr. 21), two or three months after Mr. McCollum said he quit.

As the Court said at the conclusion of the trial to counsel for the plaintiff,

“Mr. McCullum in his own statement showed that he had no reason to believe they knew that he was making the trips to Los Angeles, Burley, Boise, Payette, Weiser, they had no reason to believe that he was making trips. There certainly could be no basis for his actions. * * * At this time I'll hold that the plaintiff having failed to sustain his action by a breach has no cause of action.” (Tr. 90, 91)

Five weeks after the trial, in explaining why he thought the plaintiff should be awarded something, the Court said,

“ * * * I saw, in going over the evidence, where you had used him. He, apparently with your consent and under your instructions, had held the keys and showed people the place down there *during the summer*, so I decided that he was entitled to compensation for that, * * * Anyway, he took people down there who came to his house, apparently with the knowledge of you and Mr. Clothier or at the suggestion of Clothier. * * * He testified he called on Doctor Clothier in Pocatello and he said ‘continue on that.’ I didn’t allow him the trips he claimed to make, but I do think he was entitled to compensation for that work he did.” (Tr. 91, 92)

The record is totally devoid of the evidence stated by the Court as his excuse for reversing himself.

The plaintiff testified that from the first day of

the meeting at the plant he did not ever have a key to the plant. (Tr. 46, 47)

The Court's recollection of the conversation between plaintiff and Dr. Clothier is not supported by the record. The only conversation, according to the plaintiff, that he had with Dr. Clothier was in July, 1950, two or three months after Mr. McCollum had quit and the record does not disclose that the Doctor said "continue on that" or any words to that effect. (Tr. 21) Nor is there any evidence in the record that Mr. Iverson knew that the plaintiff was showing machinery to any one.

The plaintiff had talked to prospective buyers before he met Miss McGlone, Mr. Hooper and Mr. Iverson at the plant. He had sold parts there for Miss Stewart. He sold machinery after that date for Miss Stewart. It is fair to assume that his trips to Salt Lake City were for the purpose of selling machinery for her and his contacting buyers in and about Ogden was for the same purpose. His trips to Vale and Weiser were not for any business of the defendant but to make arrangements for someone to make parts for users of Kiest Beet Harvesters. (Tr. 54) He traveled to Boise and Pocatello because Mr. Agee of Olson Manufacturing Company of Boise asked him to line up the sale of the building and the land for them. They wanted it. (Tr. 53). The people he saw and the traveling he did were in connection with these other matters, but he chose to ascribe them to his supposed employment by the defendant.

As the Court told counsel for plaintiff at the close of the evidence,

“Frankly, Mr. Patterson, I don’t see how you could change my opinion. I think you have failed to show that there is any foundation, agreement, that he enticed him by anything that was said by Mr. Iverson.” (Tr. 90)

There is nothing in the evidence from which to base the Court’s change of opinion.

POINT TWO

THE COURT MISLED COUNSEL FOR THE DEFENDANT AND APPELLANT IN TO NOT PUTTING IN THE EVIDENCE OF FLOYD SIMPSON BY INDICATING THAT THE COURT WAS SATISFIED WITH THE EVIDENCE OF THE DEFENDANT IN SUPPORT OF THE COURT’S INDICATED INTENTION TO ENTER A JUDGMENT IN FAVOR OF THE DEFENDANT.

The Court, for some time before counsel for the defendant indicated that he was ready to rest unless the Court desired the evidence of Mr. Simpson, had stated repeatedly that it was his opinion that the plaintiff had no cause of action. The Court stated that he did not think it was necessary to get the testimony of Mr. Simpson. In this particular the defendant was seriously prejudiced. Mr. Simpson would have testified that Mr. McCollum took no one to the plant between the time that he finished selling the machinery for Miss Stewart, which was a week or two after he was supposedly employed by the defendant, and the time that he was in possession of the plant for the purpose of repairing lifter loaders,

which was some time in June, after he had stated that he had quit his employment.

A situation very similar to the case at Bar was before the Court in *Harrison v. Harrison*, 29 Pac. 572. The facts and decisions are summarized in the head-note as follows:

“Where, during the progress of a trial to the court, the judge informed the defendant, before he had introduced all of his evidence, that the court was ready to decide the case without further evidence, that he did not think additional testimony would affect the decision, but would hear anything of a different nature from that already offered, held that, under the facts and circumstances of this case, where the evidence preponderated largely in favor of the defendant, and the decision of the court was against him, the remarks of the court had a tendency to mislead the losing party, and prevent him from having a fair and impartial trial.”

In the case cited the Court at no time indicated that he thought the defendant was entitled to a judgment, but merely stated that he thought no different result would be obtained by the introduction of any additional evidence. The defendant merely assumed that the Court would rule in his favor. However, in the case at Bar the Court said repeatedly that under the evidence the plaintiff had no cause of action and when asked if the Court would care to have the testimony of Mr. Simpson, he stated that it was unnecessary.

CONCLUSION

In view of the matters heretofore discussed, the defendant submits that the Court erred in entering judgment in favor of the plaintiff. For the reasons hereinbefore pointed out it is submitted that the defendant is entitled to a judgment, no cause of action, and his costs on this appeal.

Respectfully submitted.

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