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Jack W. McCollum v. J. V. Clothier : Brief of Plaintiff and Respondent

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.

No. 7721

BRIEF OF PLAINTIFF AND RESPONDENT

FILED

OCT 26 1951

Clerk, Supreme Court, Utah

CLYDE C. PATTERSON,
RICHARD L. STINE,
*Counsel for Plaintiff
and Respondent.*

I N D E X

Page No.

STATEMENT OF FACTS..... 1

ARGUMENT 8

POINT I.

THE FINDINGS OF FACT AND JUDGMENT
ENTERED THEREON ARE SUPPORTED
BY THE EVIDENCE AND ARE NOT CON-
TRARY THERETO 8

POINT II.

THE COURT DID NOT MISLEAD COUNSEL
FOR DEFENDANT INTO NOT PUTTING IN
THE EVIDENCE OF FLOYD SIMPSON FOR
THE COURT DID NOT INDICATE ITS IN-
TENTION TO ENTER JUDGMENT FOR
THE DEFENDANT UNTIL BOTH SIDES
HAD RESTED, AND FURTHER, DEFEND-
ANT'S OWN NEGLIGENCE WAS THE CAUSE
OF LOSING SIMPSON'S TESTIMONY, AS-
SUMING THAT IT WOULD HAVE BEEN

BENEFICIAL15

CONCLUSION17

CASES CITED

City Ice & Fuel Co. v. Bright, 73 Fed. (2) 461.....	14
Gleason v. Salt Lake City, 94 Utah 1, 74 P. (2) 1225	13
Harris v. Ogden Steam Laundry Co., 39 Utah 436, 117 P. 700	15
Miller v. Stephens, 195 N.W. 481.....	14
Spencer v. Spencer, 64 N.E. 947.....	14
Williams v. Jones, 182 P. 391.....	13

TEXTS CITED

12 Am. Jur. 474-475	17
58 Am. Jur. 512, Section 3.....	12
58 Am. Jur. 514, Section 6.....	12
3 Page on Contracts, 2nd Ed., Section 1442.....	14

STATUTES CITED

Rule 58 A (b), Utah Rules of Civil Procedure.....	9
Rule 58 A (c), Utah Rules of Civil Procedure.....	9

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STATEMENT OF FACTS

Since the judgment subsequently was entered in favor of the plaintiff, we accordingly restate the facts in most particulars in accordance with the evidence most favorable to the plaintiff, as it was the prerogative of the court subsequently to believe such evidence rather than possibly conflicting evidence offered by the defendant.

Mr. Iverson, one of defendant's attorneys, and his attorney of record in the matter of the foreclosure of his mortgage on the Kiest property, obtained plaintiff's

name and telephone number from Margaret Stewart (Tr. 60 and 61), the Trustee in Bankruptcy of the Kiest property after it went into bankruptcy in the middle part of 1949, and who had disclaimed any interest in said mortgaged property, for the purpose of having the plaintiff acquaint him with the various items of machinery covered by the mortgage. Previously, the plaintiff had been employed by the Kiest people and had also rendered services for Miss Stewart as a salesman for some of the Kiest machinery not covered by the mortgage and as a watchman on the premises. At Mr. Iverson's request (Tr. 6), the plaintiff met him at the plant. This, of course, was after he had been relieved of his duties for Miss Stewart, whom he had labored for in an excellent manner (Tr. 60). Present at this meeting also were Miss Henrietta McGlone, defendant's other counsel, and J. D. Hooper, who was employed as a watchman. The machinery was checked off and identified and then the matter of how the machinery was to be disposed of was discussed and just before they left, Mr. Iverson told the plaintiff to line up buyers for the machinery (Tr. 7). Plaintiff asked Iverson how soon the sale of the machinery was to come about, and he was told two weeks. Upon asking if he could be sure he was then informed "better make it a month". This request was made outside the plant when they were ready to leave (Tr. 35). There was some talk when they were in the plant and Mr. Iverson there had asked plaintiff to "keep track" of the buyers that were interested. The plaintiff, through his efforts in Miss Stewart's behalf had made contact with a number of

persons interested in purchasing certain of these items of machinery, and it was in lining up and keeping track of these purchasers and contacts made through these purchasers that the plaintiff, at the request of the defendant's agent and with the knowledge of both defendant and his agent, rendered beneficial services which the defendant availed himself of. Never at any time during these conversations was a sheriff's or judicial sale talked about, and plaintiff knew at the time what a judicial or sheriff's sale was (Tr. 7 and 36).

The list of the machinery showing the prices at which the items were to sell was given plaintiff previously by Mr. Iverson at his office in Salt Lake City (Tr. 9 and 10), and plaintiff was told on that occasion to call back in half an hour, as to what for apparently he was not told, but when he returned Mr. Iverson had gone so the plaintiff had to make another trip to Salt Lake to see him (Tr. 10).

Plaintiff then proceeded to contact firms in Salt Lake, Ogden, Pocatello, Boise, Weiser, Paul, Rupert and Burley, Idaho, and Vale, Oregon, and also made a trip to Los Angeles to contact the manufacturer of the machinery. The contacts at Boise, Weiser and Vale were all on the same trip. He made no less than nine trips to Salt Lake and went to Mr. Iverson's office every time and was able to see and talk to him the greater number of these trips about prospective purchasers and prices (Tr. 11, 36 and 37). He made three trips to Pocatello, Idaho, on one of which he visited the defendant and Miss McGlone for the purpose of discussing the

price of the building and talking about the machinery, and on the other two he contacted fabricating steel plants on the outskirts of town who were interested in some of the machinery (Tr. 13, 14 and 50). Everyone whom plaintiff contacted was interested in one or more of the various items and they all came to see them (Tr. 11), calling upon the plaintiff when they would come and he would take them out to the plant to view the machinery. They were all prepared to pay more than the price listed on the price list (Tr. 11—19). Some of the intended purchasers demanded that plaintiff take down payments on the merchandise, so plaintiff sought Mr. Iverson's advice and was directed not to take any money (Tr. 20). This he did, however, and deposited it in a special account. Later when the date of the sale dragged on, certain of them became disinterested and plaintiff gave their money back as he did ultimately to all of them (Tr. 20).

Plaintiff had a conversation with Dr. Clothier in Pocatello sometime in June or July, as he recalls, concerning the land and buildings and also the machinery. His main purpose in going to Pocatello at that particular time was because he had a purchaser lined up who was interested in the land, but he also told the doctor how he was coming in disposing of the machinery. The following conversation took place at that meeting, and this is uncontradicted in the record (Tr. 21 and 22):

“A. Well, my big purpose in going to see him was to find out what he wanted for the building and the land then of course I told him how

I was doing in disposing of the machinery or having prospective buyers, but I was able to get from him the approximate amount he was going to ask for the building and the land, and he told me he said, "somewhere around five thousand dollars, maybe a little more," and that was mainly the information I went after.

"Q. You testified previously you had obtained, or that you had contacted persons who were interested in the land?

"A. Yes.

"Q. Specifically the Olson Manufacturing Company?

"A. Yes.

"Q. Did you mention that fact to Doctor Clothier?

"A. Well, when the president of the Olson Manufacturing Company came down here, he asked me to line up the buyers for him. He wanted to be kept anonymous. When I was talking to Doctor Clothier, why he was very much interested in who this buyer would be and I didn't want to tell him, but he kept, well he kept asking so I said, "well, it's a subsidiary of Morrison-Knudsen," but he promised he wouldn't say a word to anybody about it, and then he still had set the price close to five thousand dollars. I guess I no sooner left his office than he must have dropped a letter off to Morrison-Knudsen and asked if they were the parties interested in the property. They wrote back and said "no," which was right. They weren't. The persons that were interested, I never did let their names get out until after the sale."

Before the sale, plaintiff mentioned to Mr. Iverson that he had obtained better prices for the machinery than those listed on the list he was furnished (Tr. 22). Particularly he remembers a shear that was outside the building which had some pieces stolen from it and he several times asked Mr. Iverson what the new price on it was to be in its stripped down condition; however, he was never told and the new price was not put on it until the day of the sale (Tr. 22 and 23).

There were persons present at the sale whom the plaintiff had contacted and he heard them bid and have items struck off to them at lower prices than they were prepared to pay for them according to his contacts (Tr. 23 and 24).

The plaintiff is a qualified expert in dealing and selling the type of machinery in question, having started working in machinery in 1946 and having sold machinery for Kiest. He understood any and all types of machinery necessary for the fabrication of steel. He knew what machinery salesmen drew as salary, and that they drew not less than \$350.00 a month in commissions and expenses, and what they drew as mileage allowances. The value of his services for the defendant he figured to be \$500.00 a month, and mileage at the rate of six cents a mile. He stated that he would settle for two months' compensation even though his services extended beyond that (Tr. 24, 25 and 26).

On the day of the sale, August 2, 1950, the plaintiff asked about pay for his services, and Iverson said he would talk to the doctor, but plaintiff never did hear from either of them after that (Tr. 27 and 28).

Plaintiff talked with Henrietta McGlone, the doctor's other counsel, in Pocatello, Idaho in the hospital, on the same day he spoke with the doctor. Their conversation dwelt with the machinery, the land and the buildings and what the doctor was asking for them. He also made inquiry for Mr. Simpson, the caretaker, as to his wages (Tr. 29). He stated that he had authority to ask about Simpson's pay (Tr. 37).

At the close of the evidence and after considerable argument and comment by the court and counsel, it ruled that plaintiff had failed to make out a cause of action and held for the defendant. Between this time and the time that defendant's proposed findings and judgment were submitted, the court apparently changed its mind and felt that the defendant and/or his agent, Mr. Iverson, had used the plaintiff and that he was entitled to some compensation, and that \$250.00 would be about right. Accordingly, he directed counsel for plaintiff to draw findings and judgment based thereon to which defendant filed objections which were heard by the court on April 16, 1951. At the hearing on plaintiff's first proposed findings and judgment, counsel for defendant and the court differed in their recollections as to the evidence, and the court ordered a transcript of plaintiff's testimony prepared and the matter to be heard at a later date. After reading the testimony the court apparently changed its mind again and decided that the plaintiff was entitled to more than he had first given and ordered counsel for plaintiff to prepare the findings and judgment appealed from, to which the defendant

also filed objections. Counsel for plaintiff was duly notified by the clerk of the court that the hearing on these objections was set for June 4, 1951, and upon this day counsel attended court prepared to argue same, and sat through the entire law and motion calendar waiting for defendant's counsel to arrive. The clerk informed the court that counsel had been noticed, but he nevertheless failed to appear, and at the end of the calendar the findings and judgment appealed from were signed in open court.

While plaintiff's evidence attempted to embrace services and mileage to Los Angeles, California, Salt Lake City, Utah, Pocatello, Idaho, Vale, Oregon, and Boise, Rupert, Paul, Burley and Weiser, Idaho, we call attention to the fact that plaintiff recovered only for four trips to Salt Lake from Ogden and return, and two trips to Pocatello, Idaho and return plus services in the sum of \$600.00 which the court subsequently felt should compensate the plaintiff for the time and effort expended in the defendant's behalf, and which would be roughly equivalent to two months' wages. This award is what is before the court now.

ARGUMENT

POINT I.

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

It should be pointed out that appellant's repeated use of the opinions expressed by the court during the

trial of the cause, which admittedly favor him, at this stage of the proceeding are not material and serve to show nothing more than what the court's thoughts were at the moment during the trial. Further, there is no judgment unless and until signed by the Judge and he has the prerogative of changing his mind if subsequently the evidence should strike him the other way. Rule 58 A (b) Utah Rules of Civil Procedure provides as follows:

“(b) Judgment in Other Cases. Except as provided in subdivision (a) hereof and subdivision (b) (1) of Rule 55, all judgments shall be signed by the judge and filed with the clerk.”

And (c) provides:

“(c) When Judgment Entered; Notation in Register of Actions and Judgment Docket. A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.”

Appellant's remarks as to plaintiff's trips to Vale, Oregon and every other place indicated also do not seem material for the reason that plaintiff recovered only for two trips to Pocatello, Idaho and four trips to Salt Lake City.

We call attention to the fact that J. D. Hooper, a witness for the plaintiff, stated that what he testified to was all that was said in his presence, “something to that effect,” (Tr. 65), which, of course, was all that he

was called upon for, but this does not preclude other conversation concerning the matter to have taken place away from his presence and hearing, which, of course, plaintiff has testified to (Tr. 35).

Miss McGlone testified that nothing was said concerning any employment at that time, but it must be remembered that we here seek to recover not on the basis of a specific and express contract, but on one implied from the request of Mr. Iverson and the subsequent knowledge and encouragement from both the doctor and Mr. Iverson, and, of course, on the basis that the doctor availed himself of the benefits of plaintiff's labors in his behalf. Plaintiff has so testified and the trial court subsequently believed him (Tr. 21, 22 and 36).

Appellant's statement that plaintiff quit without notice seems unsupported and, in fact, was denied by the plaintiff (Tr. 47, 48 and 55).

While the court in the April 16th hearing on objections to the first set of plaintiff's findings might have been mistaken in its recollection of the evidence as to plaintiff having a key to the premises, the evidence is uncontroverted to the effect that plaintiff had access to the plant through the caretaker and made trips there during the course of the summer to show prospective purchasers the machinery (Tr. 11, 26, 46, 47 and 48). This evidence stands uncontradicted in the record. The court in this same hearing might have been mistaken also as to its recollection of Dr. Clothier's exact remarks

with respect to his knowledge of plaintiff's activities, but it was not mistaken in its thought that Dr. Clothier had knowledge that the plaintiff was performing services in his behalf with respect to the machinery and the land also, although nothing is claimed as to the land. This evidence is uncontroverted in the record also (Tr. 21 and 22).

It is interesting to note that on cross-examination, Mr. Iverson was not too clear in calling to mind the events that transpired. I invite the court's attention to pages 70, 71, 72 and 85 of the transcript. With respect to the price list talked about he testified as follows on cross-examination (Tr. 85-86):

“Q. And you say you didn't give him this list at your office?

“A. As I remember, I gave him that list the day we were at the plant. I had two or three copies of the list and we were using one list to check off the items as we checked from item to item to see whether or not he was turning over everything that belonged to us. I had two or three copies of it. I think I gave him one that day. He asked what the stuff was worth.

“Q. Are you willing to say now categorically whether you did or didn't?

“A. No, I couldn't say that categorically.”

Attention is also called to Mr. Iverson's testimony on direct examination wherein he related the conversation with the plaintiff at the plant specifically with respect to the sale (Tr. 68).

“* * * and I told him that when a sale came we would very much appreciate having all the buyers that we could get, and I would appreciate it if he would keep track of those buyers, and he asked what prices would be charged, and I said, ‘well, it will be a sale, but I can give you what it’s appraised for.’ ”

Nowhere is there mentioned anything about a judicial sale. Mr. Iverson also admitted on pre-trial that there was no doubt but what a number of people may have attended the sale through plaintiff’s efforts. This was the recollection of the court (Tr. 79).

The general rule as to recovery on quantum meruit under common counts of assumpsit is set out in 58 Am. Jur. 512. It is there said in Section 3 dealing with the subject generally:

“A promise to pay the reasonable value of services performed by one person for another although there is no express agreement as to the compensation thereby implied where the circumstances warrant an inference of a promise to pay for such services if where the conduct of the person for whom the work was done is such to justify an understanding by the person performing work that the former intended to pay for it.” Citations.

Section 6 deals with acceptance of services; receipt of benefit. It is there said:

“In the absence of anything to indicate a contrary intention of the parties, where one performs for another a useful service of a character that is usually charged for, and such service is rendered with knowledge and approval of the recipient who either expresses no dissent or avails

himself of the services rendered, the law raises an implied promise on the part of the recipient to pay the reasonable value of such services." Citations including a pronouncement by the Supreme Court of Utah to this effect in the case of *Gleason v. Salt Lake City*, 94 Utah 1, 74 P. (2) 1225.

It is true that in the instant case nothing was said concerning compensation, but I submit that this relates only to what the amount of compensation was to be, not to whether or not compensation was to be paid. Attention is invited to the case of *Williams v. Jones*, 182 P. 391, where the plaintiff was requested by the defendant to perform certain services. The defendant urged strongly that there was no evidence at all to that effect and relied on a question and answer in the record on examination of the plaintiff to this effect:

"Was there any agreement between you and Mr. Jones as to what you were to charge or not?"

"No, nothing said about that at all."

The court, on page 392 said:

"Obviously, this relates only to what the amount of the charge was to be and not to whether a charge was to be made."

I submit that such is the situation in the case at bar. In the same case further on, the Court had this to say, citing C.J. and R.C.L.:

"A mere request or direction to the plaintiff would be enough to warrant an inference that it was to be paid for in the absence that it was to be gratuitous or that the plaintiff was to be compensated in some other manner."

Attention is also called to the case of *City Ice and Fuel Company v. Bright*, 73 Federal (2) 461, wherein the law implied a contract to pay for information from circumstances that the parties to whom the information was furnished recognized its merit, accepted it and made full use of it as a basis for the purchase of a business. There was no express agreement to pay the plaintiff for the information. It was held that the jury was not precluded from considering the value of such information under the common counts of assumpsit in the plaintiff's action for compensation.

Mr. Justice Holmes in *Spencer v. Spencer*, 64 N.E. 947 said this:

“Again it is not necessary that the defendant should have believed that the plaintiff expected pay. If, as a reasonable man he should have understood from what he knew that such was the expectation, he would be bound by accepting the services.”

In *Miller v. Stephens*, 195 N.W. 481, it is said:

“Where there is no express contract, a contract may be implied; in fact, where one engages or accepts beneficial services of another for which compensation is customarily made and naturally anticipated, and although there be no express stipulation between the parties for wages or price, the law implies an understanding or intent to pay the value of the services rendered.”

In 3 Page on Contracts, Second Ed., Section 1442, it is said:

"If services are rendered at the request of the person for whom they are rendered, or if the benefits are accepted voluntarily by such person, there is an implied promise on his part to make reasonable compensation therefor if no express contract has been made, if the services are such as are ordinarily paid for and if the party who rendered them was not bound to render them without compensation."

We submit that the facts of this case fully permit the application of the foregoing rules of law.

It is further submitted that this being an action at law, if there is any substantial evidence to support the judgment, this court will not interfere, and likewise will not attempt to pass upon what weight should be given to particular evidence or statements made by witnesses. This is the province of the trial court. *Harris v. Ogden Steam Laundry Co.*, 39 Utah 436, 117 P. 700.

POINT II

THE COURT DID NOT MISLEAD COUNSEL FOR DEFENDANT INTO NOT PUTTING IN THE EVIDENCE OF FLOYD SIMPSON FOR THE COURT DID NOT INDICATE ITS INTENTION TO ENTER JUDGMENT FOR THE DEFENDANT UNTIL BOTH SIDES HAD RESTED, AND FURTHER, DEFENDANT'S OWN NEGLIGENCE WAS THE CAUSE OF LOSING SIMPSON'S TESTIMONY ASSUMING THAT IT WOULD HAVE BEEN BENEFICIAL.

At the outset we believe that counsel is mistaken when he states that the court, for some time before counsel for defendant indicated he was ready to rest unless the court desired the evidence of Mr. Simpson, had repeatedly stated it to be his opinion that plaintiff had no cause of action. The record does not support this.

It shows comment by the court and between counsel and the court (Tr. 78-82) and then a resumption of cross-examination (Tr. 83) and a bit of redirect and then defendant rested with the remark about Mr. Simpson (Tr. 89-90). We challenge anyone to glean from these comments and argument (Tr. 78-82) an indicated intention on the part of the court to enter a judgment for the defendant. The next comment of the court was after both sides had rested (Tr. 90). Then the court indicated that he had an opinion and Mr. Patterson could not change it.

It occurs to us that perhaps counsel was not particularly diligent with respect to the witness Simpson. If his testimony was so important and the absence of it so prejudicial, why did counsel not come armed with his deposition. We never did receive notice of the taking of his deposition, and we seriously doubt that he would have testified as counsel indicates in view of plaintiff's testimony relative to Simpson's wages (Tr. 29, 37).

There is nothing before us to show any diligence with respect to obtaining a deposition, or diligence in the other matters requisite to obtaining a continuance. The witness was never subpoenaed nor was he ever tendered any fees, so we fail to see how defendant was prejudiced other than by his own conduct. The most that can be said in favor of this proffered testimony is that if it would have been as defendant indicates then it still would not have entitled defendant to a continuance, because its value is merely cumulative or impeaching,

and it must be shown to be more than that. We invite the court's attention to 12 Am. Jur. 474 and 475 in support of our position in this matter.

CONCLUSION

It certainly does stretch the imagination to contemplate that Mr. McCollum undertook to perform these services at the request of Mr. Iverson and with the subsequent assent and encouragement of Dr. Clothier as a complete gratuity, and it is completely unreasonable to assume that they expected and were led to believe that he was doing it for nothing. That they knew he was carrying on this work is unquestioned. One cannot deny that these services were performed at their request, that defendant knowingly enjoyed the benefits of them and reasonably should be expected to pay their worth.

We submit that the court did not err in entering judgment in favor of the plaintiff.

Respectfully submitted,

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RICHARD L. STINE,
*Counsel for Plaintiff
and Respondent.*