

1979

John Darger, D.B.A. Custom Drilling v. Park West Village, Inc., A Utah Corporation : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN DARGER, d.b.a.
CUSTOM DRILLING,

Plaintiff and
Appellee,

vs.

PARK WEST VILLAGE, INC.,
a Utah Corporation,

Defendant and
Appellant

16235
Civil No. 5571

APPELLANT'S BRIEF

Appeal from a Judgment in Favor of the Plaintiff and
an Order Denying Defendant's Motion for a New Trial
In the District Court of the Third Judicial District
In and For Summit County, Utah
The Honorable Dean E. Conder, Judge.

Raymond Scott Berry
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ATTORNEY FOR RESPONDENTS

ATTORNEYS FOR APPELLANT

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MAR 22 1979

Clerk, Supreme Court of Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN DARGER, d.b.a.
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Plaintiff and
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vs.

PARK WEST VILLAGE, INC.,
a Utah Corporation,

Defendant and
Appellant

Civil No. 5571

APPELLANT'S BRIEF

NATURE OF THE CASE

This is an action brought by John Darger, d.b.a. Custom Drilling, for Foreclosure of a Mechanic's Lien and for Damages in the sum of Eleven Thousand Four Hundred Eighty Dollars (\$11,480.00). Defendants, Elwood L. Nielsen and Park West Village, Inc., a corporation, answered, denying that the lien was timely filed and alleging that the Plaintiff had abandoned the contract and was not entitled to any further payments. The Counter-Claim alleged that Defendants were forced to hire another driller to complete the well and thereby incurred damages.

DISPOSITION IN LOWER COURT

The Trial Court, the Honorable Dean E. Conder, Judge, found that the Plaintiff had willfully abandoned the contract and moved off the premises, but that Plaintiff was, nevertheless, entitled to judgment for Nine Thousand Seven Hundred Thirty Dollars (\$9,730.00). The Court also found that the liens were not timely filed and that Defendant would be entitled to subtract Seven Hundred Fifty Dollars (\$750.00) for attorney's fees leaving a judgment balance of Eight Thousand Nine Hundred Eighty Dollars (\$8,980.00) plus costs of Two Hundred Twenty-five Dollars and Seventy Cents (\$225.70).

Thereafter, Defendants filed a Motion to Amend the Findings and For a New Trial. The Court reduced the Judgment by One Thousand Dollars (\$1,000.00) at the Hearing but denied Defendant's Motion for a New Trial. The Court further denied Defendants any damages on their Counter-Claim.

RELIEF SOUGHT ON APPEAL

Appellant requests that the Court reverse the Order of the lower Court denying Appellant's Motion for a New Trial or, in the Alternative, that the Judgment be Reversed as being contrary to the facts and the law and that Appellant be awarded damages according to the undisputed proof pursuant to their Counter-Claim.

STATEMENT OF FACTS

On August 15, 1977, Plaintiff and Defendant corporation entered into two (2) agreements whereby Plaintiff agreed to drill a well charging Fifty Dollars (\$50.00) a foot for the Sixteen (16) inch portion of the well and Thirty Dollars (\$30.00) a foot for the Twelve (12) inch portion of the well. The agreements provided for an hourly rate at Sixty Dollars (\$60.00) instead of a per-footage basis if bedrock was encountered or if there were unexpected hardship conditions to contractor. (Exhibits 1 and 2) Payment was to be made partially in cash and partially by a credit from the Defendant to the Plaintiff for a future trade of real property. (TR 10) Plaintiff made periodic billings where he showed a request for part of the billing in cash and the rest to be credited. (Exhibits 4 - 8) As of the February 21, 1978 billing, Defendant was paid in full as to the cash billings. This is shown by Exhibit 9 which is a March 23, 1978 statement showing that the only amounts due through February 21, 1978, were the amounts credited.

On the 1st of March, 1978, Plaintiff and Defendant entered into an Addendum Agreement, in writing (Exhibit 10), whereby Plaintiff agreed to go back to a Forty Dollar (\$40.00) a foot charge for the balance of the well and Defendant agreed to pay One Thousand Dollars (\$1,000.00) every two weeks. Defendant

did pay \$1,000.00 on March 15, 1978 (Exhibit 12). However, Plaintiff did no further work after March 7, 1978, but abandoned the contract on that date and moved off his equipment on or about March 23, 1978. On March 23, 1978, Plaintiff rendered a statement (Exhibit 9) which attempted to charge Sixty Dollars (\$60.00) an hour from February 21 to March 7, 1978 for a sum of One Thousand Nine Hundred Eighty Dollars (\$1,980.00) and also attempted to convert into demand for cash payments the amounts previously credited. Plaintiff also attempted to charge Two Hundred Dollars (\$200.00) a day for stand-by time to March 22, for an additional Two Thousand Dollars (\$2,000.00). The total claim was Eleven Thousand Four Hundred Eighty Dollars (\$11,480.00). No credit was given for the One Thousand Dollars (\$1,000.00) paid on March 15, 1978 nor was any credit given for a Seven Hundred Dollars (\$700.00) payment made on March 1, 1978, the day the Addendum was signed. Payments were made by the Defendant in the total sum of Ten Thousand Three Hundred Dollars (\$10,300.00) through March 15, 1978. (Exhibit 12).

Despite the fact that Plaintiff did not encounter bedrock or hardship, all of the billings were on a Sixty Dollar (\$60.00) an hour basis, even after the Addendum Agreement of March 1, 1978, which specifically stated the charges after that date would be on the basis of Forty Dollars (\$40.00) a foot. Plaintiff admitted that the One Thousand Dollars (\$1,000.00) paid on or

about the 15th of March, 1978, had never been credited and that the claim should be reduced to Ten Thousand Four Hundred Eighty Dollars (\$10,480.00). (TR 28)

Plaintiff never charged on a per foot basis but began immediately charging Sixty Dollars (\$60.00) an hour. (TR.35 - 36)

Plaintiff admitted that he never hit bedrock (TR 36). He also admitted that the "hardship conditions" was the cold weather. (TR 37) Plaintiff also admitted that the only other condition that he considered a "hardship" was hitting rocks and boulders, but that he reasonably anticipated hitting rocks and boulders drilling a well in that area. (TR 39)

Through the February 21 billing, and as of March 1, 1978, Defendant had paid Nine Thousand Two Hundred Dollars (\$9,200.00) and had been billed for cash payments of only Nine Thousand Three Hundred Dollars (\$9,300.00). (TR 47 - 48)

Plaintiff drilled only two days for a total of Thirteen (13) Hours after March 1. (TR 50)

After the Plaintiff abandoned the well, the Gardner Drilling Company was hired by Defendant to complete the well and their total billing was Ten Thousand Three Hundred Forty-four Dollars and Twenty-four Cents (\$10,344.24) to drill an additional One Hundred Three (103) feet. (TR 62) Had Plaintiff completed the well pursuant to the Addendum Agreement of March 1, the 103 feet would have cost Forty Dollars (\$40.00) a foot or Four Thousand One Hundred Twenty Dollars (\$4,120.00).

Gardner Drilling encountered no bedrock and no hardship. (TR 64 - 65) Had Gardner had the original contract and commenced the well themselves, their charge would have been Forty-five to Fifty Dollars (\$45 - \$50) a foot. (TR 66) The Gardner Drilling Company invoices were, in fact, paid by Defendant. (TR 74)

Plaintiff did not file a well driller's report with the State as required by UCA §73-3-22 within thirty (30) days of a abandonment of the well. (TR 76)

Plaintiff did not plead nor did he prove that he was a licensed contractor.

STATEMENT OF POINTS

I

DESPITE A FINDING THAT THE PLAINTIFF WILLFULLY BREACHED THE CONTRACT BY ABANDONING THE WELL, THE COURT AWARDED PLAINTIFF MORE THAN HE WAS ENTITLED TO UNDER THE CONTRACT.

II

THE COURT ERRED IN ALLOWING PLAINTIFF ONE THOUSAND NINE HUNDRED EIGHTY DOLLARS (\$1,980.00) FOR DRILLING TIME AFTER THE ADDENDUM AGREEMENT.

III

DESPITE UNCONTRADICTED TESTIMONY AND EVIDENCE THAT THE DEFENDANT SUFFERED DAMAGE BY THE ABANDONMENT, THE COURT ERRED IN REFUSING TO AWARD ANY DAMAGES ON DEFENDANT'S COUNTER-CLAIM.

IV

THE COURT ERRED IN AWARDING CASH DAMAGES TO THE PLAINTIFF DESPITE THE PARTIES' DEFINITE AGREEMENT THAT SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$7,500.00) WOULD BE A CREDIT AGAINST A FUTURE REAL PROPERTY EXCHANGE.

V

THE COURT ERRED IN REFUSING TO MAKE A FINDING AS TO WHETHER PLAINTIFF WAS A LICENSED CONTRACTOR WHEN PLAINTIFF NEITHER PLEADED NOR PROVED HE WAS LICENSED.

VI

CONCLUSION

ARGUMENT

I

DESPITE A FINDING THAT THE PLAINTIFF WILLFULLY BREACHED THE CONTRACT BY ABANDONING THE WELL, THE COURT AWARDED PLAINTIFF MORE THAN HE WAS ENTITLED TO UNDER THE CONTRACT.

It is conceded that the Court could legitimately find that the parties had agreed by their conduct to a Sixty Dollar (\$60.00) an hour charge rather than a per footage charge as the agreements provided. However, even conceding the \$60.00 an hour was proper, as of March 1, when the Addendum Agreement was entered into, Plaintiff was completely paid up according to the agreement of the parties. (Exhibit 12) The Court expressly found that the Defendant was paid in full as of the time of the Addendum Agreement but nevertheless awarded the Plaintiff cash payment instead of a real property exchange as was agreed by the parties and further rewarded the Plaintiff for the breach of the contract by giving him more than he was entitled to under the terms of the contract.

The evidence is uncontradicted that the Plaintiff did not give any credit to the Defendant for a Seven Hundred Dollar (\$700.00) payment on March 1, and a One Thousand Dollar (\$1,000.00) payment on March 15. At the Defendant's

objections to the Court's findings, the Court did correct part of the error by deducting another \$1,000.00 from the judgment, representing the March 15th payment. However, the \$700.00 payment, which Plaintiff did not credit on his invoices (TR - 50) (Exhibit 4 - 8), the Court gave no credit for.

While the finding of a trial judge on conflicting evidence should not be disturbed on appeal unless clearly wrong, if the evidence is undisputed and the judge's findings rest on inferences drawn therefrom, the appellate court is in as good a position as the trial judge to draw the appropriate inferences. *Picerne vs. Redd*, 72 RI 4, 47 A 2d 906, 166 ALR 397.

II

THE COURT ERRED IN ALLOWING PLAINTIFF ONE THOUSAND NINE HUNDRED EIGHTY DOLLARS (\$1,980.00) FOR DRILLING TIME AFTER THE ADDENDUM AGREEMENT.

Over Defendant's objections, the Court found that the Plaintiff was owed One Thousand Nine Hundred Eighty Dollars (\$1,980.00) for drilling done between February 21 and March 7, 1978. However, at least two days of that drilling time were after the Addendum Agreement which should have been charged, if at all, on a per footage basis. Plaintiff admitted the validity of the Addendum Agreement yet the

Court ignored the clear meaning. In any event, the Seven Hundred Dollars (\$700.00) paid on March 1, 1978, would reduce that amount.

A finding of fact made by a court acting without a jury will not be sustained on appeal if it is clearly against the weight or preponderance of the evidence or is not supported by any substantial evidence or is clearly erroneous or is not supported by any reasonable view taken of the evidence. In re: Goldsberry 95 Utah 379, 81 P. 2d 1106.

III

DESPITE UNCONTRADICTED TESTIMONY AND EVIDENCE
THAT THE DEFENDANT SUFFERED DAMAGE BY THE
ABANDONMENT, THE COURT ERRED IN REFUSING TO
AWARD ANY DAMAGES ON DEFENDANT'S COUNTER-CLAIM.

The evidence is absolutely uncontradicted that the Defendant suffered damages by reason of the abandonment by the Plaintiff of his contract. Nevertheless, the Court found that there was "insufficient evidence" to establish any damages. It is submitted that this is clearly erroneous and that the law and the facts are uncontradicted and to the contrary.

A court's findings reached without full consideration of admissible evidence bearing on the issue cannot stand. Trudeau vs Lussier 123 Vt 358, 189 A 2d 529, 10 ALR 3d 1188, 76 AM JUR 2d 210.

It is well established that if a party who agrees to perform services abandons the contract after part performance, the other party may recover for any excess in the costs of doing the remainder of the work over what he would have paid under the contract." 22 AM JUR 2d 77

At the trial, by documentary evidence and by the testimony of William Hill for Gardner Drilling Company, it was established without contradiction that the Defendant was required to pay Gardner Drilling Company Ten Thousand Three Hundred Forty-four Dollars and Twenty-four Cents (\$10,344.24) to complete the well. At Forty Dollars (\$40.00) an hour, as Plaintiff agreed in the Addendum Agreement of March 1, 1978 (Exhibit 10), the well would have been completed for Four Thousand One Hundred Twenty Dollars (\$4,120.00). Mr. William Hill testified to a Three Hundred Dollar (\$300.00) mobilization charge; Two Hundred Nine Dollars (\$209.00) for grout; One Thousand Two Hundred Twenty-five Dollars (\$1,225.00) for pipe, leaving a drilling and testing cost of Eight Thousand Six Hundred Ten Dollars (\$8,610.00). Thus, Defendant clearly suffered damages for the difference between \$8,610.00 and \$4,120.00, or Four Thousand Four Hundred Ninety Dollars (\$4,490.00) plus the additional move-in charge of \$300.00. This latter item is clearly justified since the Court, in its

judgment, awarded Two Hundred Fifty Dollars (\$250.00) extra damages to Plaintiff for a move-in charge. (TR - 67)

It has been said that where uncontradicted evidence admits only of one conclusion, a finding contrary thereto cannot stand on appeal. Strong vs United States 46 F 2d 257, 79 ALR 150, 5 AM JUR 2d 289.

IV

THE COURT ERRED IN AWARDING CASH DAMAGES TO THE PLAINTIFF DESPITE THE PARTIES' DEFINITE AGREEMENT THAT SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$7,500.00) WOULD BE A CREDIT AGAINST A FUTURE REAL PROPERTY EXCHANGE.

Despite the uncontradicted evidence that both parties contemplated that the amounts credited on Plaintiff's invoices would be paid in real property and not in cash, the Court, in effect, awarded Plaintiff for his breach of the agreement in abandoning the well by giving him a cash award rather than property. The reasoning, apparently, is that neither party could be required to accept real property. However, this does not necessarily follow since neither party has been given an opportunity to satisfy the obligation in real property. Since the parties agreed to a medium of payment other than money, the Court cannot make a new agreement for the parties. "Payment does not necessarily import the delivery of money, and an agreement

by which the obligor may satisfy the obligation in property or services is valid and enforceable.....Payment may be made in merchandise or any commodity other than money, which the parties to the transaction agree shall be accepted as payment." 60 AM JUR 2d 633 An obligee may waive his right as to the medium of payment of the obligation. For example, he may waive payment in money. 60 AM JUR 2d 632, Shipman vs District of Columbia, 119 US 148; 1 S Ct 134

V

THE COURT ERRED IN REFUSING THE MAKE A FINDING AS TO WHETHER PLAINTIFF WAS A LICENSED CONTRACTOR WHEN PLAINTIFF NEITHER PLEADED NOR PROVED HE WAS LICENSED.

In its Motion for Amendment of the Findings of Fact and for a New Trial, Defendant specifically requested that a finding should be made that Plaintiff did not plead he was a licensed contractor. The Court made no such finding. The Court was aware of the importance of such a finding as is indicated in the record. (TR - 7) Nevertheless, it is apparent from the record that the Plaintiff neither pleaded nor proved that he was a licensed contractor as required by Utah law. Section 73-3-25 UCA; Mosley vs Johnson 22 U 2d 348; 453 P. 2d 149.

VI

CONCLUSION

It is submitted that the Court's findings that the Defendant suffered no damage are contrary to the uncontradicted evidence. It has been held that a finding contrary to uncontradicted evidence cannot stand on appeal. *Woodman vs Knight* 85 Id. 453, 380 P 2d 222; *Wyoming Farm Bureau vs. May* 434 P 2d 507.

It is submitted that the Trial Court did not carefully consider the evidence as is apparent from its overlooking the One Thousand Dollar (\$1,000.00) payment made March 15, 1978, which Plaintiff admitted he did not credit. The Seven Hundred Dollar payment made March 1, 1978, was not credited nor was it later allowed by the Court as was the \$1,000.00 payment. These are items which are purely documentary. The cancelled checks are in evidence and it has been held under Federal Rule Section 52 (a) that, where findings of fact are based on purely documentary evidence and are erroneous, they may be set aside. *United States vs Singer Manufacturing*, 374 US 174 10 L. ED 2d 823.

It has also been held that if the appellate court is left with a definite and firm conviction that a mistake has been committed, it has the duty of reversing the trial

court's findings. Lassiter vs. Guy F. Atkinson, Co. 176 F 2d 984; 21 ALR 2d 1313. It is therefore respectfully submitted that the decision of the Trial Court should be reversed with instructions to reduce the judgment in favor of Plaintiff by the Seven Hundred Dollar (\$700.00) payment not credited, and to award Defendant damages on its Counter-Claim in the sum of Four Thousand Four Hundred Ninety Dollars (\$4,490.00) plus the additional move-in charge of Three Hundred Dollars (\$300.00).

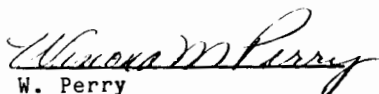
DATED this 27th day of March, 1979.

A handwritten signature in cursive script, appearing to read "W. Scott Barrett", written in dark ink. The signature is fluid and stylized, with a long horizontal stroke extending from the end.

W. Scott Barrett
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I mailed true and correct copies of the foregoing Appellant's Brief to Raymond Scott Berry, Esq., Attorney for the Plaintiff, at 32 Exchange Place, Salt Lake City, Utah 84321, first class, postage prepaid on the 28th day of March, 1979.


W. Perry