

1979

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

vs.

PARK WEST VILLAGE, INC.,
a Utah Corporation,

Defendant and
Appellant.

Supreme Court No.
16235

Civil No. 5571

RESPONDENT'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, State of Utah
The Honorable Dean E. Conder, presiding.

Raymond Scott Berry
601 Commercial Club Building
Salt Lake City, Utah 84111

W. Scott Barrett
Barrett & Mathews
300 South Main
Logan, Utah 84321

ATTORNEY FOR PLAINTIFF/
RESPONDENT

ATTORNEYS FOR APPELLANT/
DEFENDANT

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TEXT AND TREATISES

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The Court below awarded Plaintiff contract damages in the amount of \$9,730, plus costs of Court. The Defendant's Counterclaim was dismissed, but Defendant was allowed a \$750 set-off for attorney's fees incurred in defense of the Merchant's Lien.

Subsequently, Defendant Park West Village, Inc., filed a Motion for Amendment of Findings of Fact or for a New Trial. Hearing on those Motions was held in Coalville, Utah on December 18, 1978. The Court ordered the judgment reduced by \$1,000, but denied the Defendant's other request, including the request for a new trial.

RELIEF SOUGHT ON APPEAL

On appeal, Plaintiff seeks affirmance of the lower Court decision, as consistent with both the applicable law and the facts of this case.

STATEMENT OF FACTS

On August 15, 1977, Plaintiff and Defendant entered into a written agreement whereby Plaintiff was to drill a water well for the Defendant. (Exhibit's No. 1 & 2) The contract provided alternative billing methods. Drilling would be at a specified footage rate unless Plaintiff encountered unexpected hardship conditions, in which event charges would accrue at an hourly rate of \$60.00 per hour. (Paragraph 1h of the drilling agreements)

The Plaintiff begin drilling in November of 1977, and immediately encountered unexpected hardship conditions. (Transcript p. 13) The drill site was characterized by large hard rock boulders, which substantially slowed the rate at which drilling progress could be made. (Transcript p. 14) The Plaintiff immediately informed Defendant of the situation, stating that if he were to continue, the hourly rate would have to apply. (Transcript p. 16) The Defendant consented to this arrangement. (Transcript p. 78) The lower Court, after hearing all of the evidence, concluded that the hourly rate was the applicable billing method. (Findings of Fact, paragraph no. 2)

At the time the parties entered into the drilling contract, they agreed that a portion of each amount billed was to be credited to a contemplated purchase of real estate. However, no specific piece of land was agreed upon, nor was a date of sale or purchase price mentioned. (Transcript p. 29) The lower Court, having heard the evidence relevant to this agreement, held that there was no definite agreement and it was therefore not enforceable. (Transcript P. 99) During the contract period, \$7500 was posted to the credit account. Because the lower Court found no enforceable agreement, the Court found that amount due and owing Plaintiff at the termination of the contract. (Findings of Fact, paragraph 3)

The lower Court heard conflicting testimony about contract performance. Plaintiff and Defendant each claimed that the other had breached the drilling agreement. Ultimately, the lower Court found both parties had violated terms of the agreement. (Findings of Fact, paragraphs 6,7 & 10)

The Court concluded that Plaintiff did not have sufficient grounds to abandon the drilling contract. (Findings of Fact, paragraph 10) Wrongful abandonment invalidated his claim to a Mechanic's Lien. (Findings of Fact, paragraph 10) However, at the time of contract abandonment, the Court concluded that Defendant owed Plaintiff the following amounts on the contract:

- a. Amounts credited toward contemplated real estate exchange \$7500
- b. Drilling time from February 21-March 7, 1978 1980
- c. Unpaid move-in fee 250
- TOTAL \$9730

The Court, at a post-judgment hearing on Defendant's Motion to Amend Findings of Fact reduced the total amount owed to Plaintiff by \$1,000 to reflect a payment not credited in the minute decision.

The Defendant had not paid Plaintiff the amounts listed above at contract termination, so those obligations

were still due and owing. As a matter of law, the Defendant would be entitled to set-off his Counterclaim damages against those obligations. However, the Court found that the Plaintiff's breach had not damaged Defendant in any respect. (Findings of Fact, paragraph 11).

Gardner Drilling, the company that completed the well, charged Defendant \$60.00 per hour to finish the well, the exact amount that Plaintiff was entitled to charge. (Findings of Fact, paragraph 2). The cost to Defendant of finishing the well was the same, regardless of whether Plaintiff or Gardner did the work. For this reason, and in view of the Defendant's failure to introduce other evidence as to Counterclaim damages the lower Court concluded that no such damages had been proven. (Findings of Fact, paragraph 12).

At trial, evidence was introduced regarding an Addendum to the contract, executed March 1, 1978 providing that Plaintiff would revert back to a footage basis. (Exhibit 10) This document was an unsuccessful attempt to save the contract, agreed upon just one week prior to the contract's collapse. The lower Court, by deciding that Plaintiff was entitled to charge \$60.00 per hour for all drilling time, concluded that the Addendum was never incorporated into the original contract, and was not binding on either party. (Findings of Fact, paragraph 2). The Defendant's attempt to ground his

Counterclaim damages on what the well would have cost if the addundum had been found controlling is both speculative and irrelevant.

The Plaintiff did, in fact, testify that he was a licensed drilling contractor. (Transcript P. 17, 11, 31 & 32) On the other hand, the Defendant failed to introduce any evidence that would controvert the Plaintiff's testimony on that point.

STATEMENT OF POINTS

I

CLEAR AND CONVINCING EVIDENCE INTRODUCED AT TRIAL, SUPPORTS THE LOWER COURT'S JUDGMENT AS TO DAMAGES SUSTAINED BY THE PLAINTIFF.

II

THE COURT ACTED PROPERLY IN AWARDING PLAINTIFF \$1,980 FOR DRILLING TIME AFTER FEBRUARY 21, 1978.

III

THE LOWER COURT ACTED CORRECTLY IN DENYING DEFENDANT COUNTERCLAIM DAMAGES.

IV

THE LOWER COURT ACTED PROPERLY IN REFUSING TO ENFORCE AN AGREEMENT TO EXCHANGE A SUM CERTAIN FOR REAL PROPERTY, NEITHER THE REAL PROPERTY, THE PRICE, NOR THE DATE OF EXCHANGE WERE SPECIFIED.

CONTRARY TO THE DEFENDANT'S CONTENTION, EVIDENCE WAS INTRODUCED AT TRIAL PROVING THAT PLAINTIFF WAS A LICENSED DRILLING CONTRACTOR. IN LIGHT OF THAT EVIDENCE, AND IN ACCORDANCE WITH RULE 15 (b) OF THE UTAH RULES OF CIVIL PROCEDURE, THE FAILURE TO PLEAD THAT THE PLAINTIFF WAS A LICENSED CONTRACTOR DOES NOT CONSTITUTE REVERSIBLE ERROR.

ARGUMENT

CLEAR AND CONVINCING EVIDENCE INTRODUCED AT TRIAL, SUPPORTS THE LOWER COURT'S JUDGMENT AS TO DAMAGES SUSTAINED BY THE PLAINTIFF.

The Appellant concedes that the lower Court could have legitimately found that \$60.00 per hour was the appropriate charge. (Appellant's Brief p. 8) There is, therefore, no question before this Court as to the appropriate billing method.

Contrary to the Defendant's contention, the lower Court did not find that the Plaintiff was paid in full as of March 1, 1978. The lower Court specifically found that the Defendant had not paid the \$250 move-in fee that was due at the beginning of contract performance. (Findings of Fact, paragraph 6) Other evidence was conflicting as to the account status as of March 1, 1978. Plaintiff maintained that there was an arrearage of that date not shown on the billing statements (Transcript p. 70). Defendant concedes that the amounts

paid fell short of the amounts billed by \$100.00. (Appellant's Brief P. 5) The lower Court, after having reviewed all the evidence, found that the Plaintiff was not justified in abandoning the contract. However, it does not follow from that finding that Plaintiff had been paid in full, as Appellant maintains. To the contrary, the Court issued Findings of Fact showing substantial sums due and owing Plaintiff. (Findings of Fact, paragraph 5, 6 & 7)

The evidence presented as to the credit allowed for the \$700 payment of March 1, 1978 was conflicting. (Transcript p. 48) Defendant maintained that no credit had been given. Plaintiff maintained that it had been taken into account, but was not reflected in the final billing statement. Apparently, Appellant feels the Court should have believed the Defendant rather than the Plaintiff. The \$1000 payment of March 16, 1978 was credited to the Defendant's account by a post judgment order of the Court, amending the Judgment by reducing it by \$1000.

The Defendant is asking this Court to reverse the trial Court's judgment as to the amount of damages Plaintiff was entitled to under the contract. In Utah, on an appeal from a judgment in Plaintiff's favor, the Plaintiff is entitled to have the appellate court consider all of the evidence, and ever

inference and intendment fairly arising therefrom, in a light most favorable to him. Toomer's Estate vs. Union Pacific Railroad Co. 121 Utah 37, 239 P. 2d 163 (1951). The only question before this Court is whether there is substantial evidence to support the verdict. Horsely vs. Robinson, 112 Utah 327, 196 P. 2d 163 (1947). The Defendant's contention that the evidence as to the amount owed was uncontradicted is not supported by the record.

II

THE COURT ACTED PROPERLY IN AWARDING PLAINTIFF \$1,980 FOR DRILLING TIME AFTER FEBRAURY 21, 1978.

The Defendant contends that the \$1,980 awarded Plaintiff for drilling time after February 21, 1978 was improper, because it was based on the hourly rate of \$60.00 per hour rather than the footage rate mentioned in the Addendum. The lower Court specifically refused to apply the provisions of the Addendum because it never went into effect. Plaintiff testified that because the Defendant failed to meet certain conditions subsequent to the Addendum, it was never incorporated into the contract. (Transcript p. 51) The lower Court properly concluded that damage should not be based on an ambiguous last minute attempt to save the contract which, in fact, collapsed immediately thereafter.

Once again, the Defendant is asking this Court to

substitute its own factual conclusions in place of those of the lower Court. The lower Court's decision on the issue of Plaintiff's damages was supported by substantial evidence, as Plaintiff's testimony below reveals.

III

THE LOWER COURT ACTED CORRECTLY IN DENYING DEFENDANT COUNTERCLAIM DAMAGES.

Defendant's contention that the lower Court erred in failing to award Counterclaim damages is without merit. The Court below specifically found that Plaintiff was entitled to charge Defendant \$60.00 per hour for work done at the well. William Hill, of Gardner Drilling, the company that completed the well, testified that his company charged Defendant \$60.00 per hour to finish the well. (Transcript , p. 62). The Court considered this testimony and correctly concluded that the cost of finishing the well would have been the same, regardless of whether Plaintiff or Gardner did the work.

Defendant attempts once again to argue that because the court did not accept Defendant's version of the facts the Court below was in error. Defendant states that if the Court had accepted the \$40.00 per foot rate of the Addenda as controlling, the cost of the Plaintiff's finishing the well would have been less than that of Gardner Drilling. However, after hearing all of the evidence, the Court specifically held that Plaintiff was entitled to charge Defendant \$60.00 per hour.

(Findings of Fact, paragraph 2). The Defendant is merely arguing that if the Court had accepted its version of the facts, the results would have been different. The Court below correctly decided that Counterclaim damages could not be based upon such speculative savings.

IV

THE LOWER COURT ACTED PROPERLY IN REFUSING TO ENFORCE AN AGREEMENT TO EXCHANGE A SUM CERTAIN FOR REAL PROPERTY, WHERE NEITHER THE REAL PROPERTY, THE PRICE, NOR THE DATE OF EXCHANGE WERE SPECIFIED.

Both Defendant and Plaintiff admit that at the time the contract was entered into it was agreed that a portion of the drilling charges would be deferred, for subsequent credit against a contemplated real estate purchase. Neither the property, its price, nor the date of exchange were specified. The lower Court found this agreement too vague to be enforceable.

That decision was in accordance with Utah Law. In Bunnell vs. Bills, 14 Utah 2d 83, 368 P. 2d 596 (1962), this Court held that a contract can be enforced by the Court only if the obligations of the parties are set forth with sufficient definiteness that it can be performed. Other Utah cases supporting this basic principal of contract law are annotated at 8A Pacific Digest 37, Contracts §9 (2).

There is no dispute that \$7500 was credited toward the contemplated exchange. However, rather than give birth to further litigation, the Court wisely ordered the Defendant to pay the Plaintiff the specific amount credited, in currency. In the event that these parties can agree on a parcel of property, an appropriate price, and a sale date, there is nothing to prevent Plaintiff and Defendant from using the \$7500 as originally contemplated.

V

CONTRARY TO THE DEFENDANT'S CONTENTION, EVIDENCE WAS INTRODUCED AT TRIAL PROVING THAT PLAINTIFF WAS A LICENSED DRILLING CONTRACTOR. IN LIGHT OF THAT EVIDENCE, AND IN ACCORDANCE WITH RULE 15 (b) OF THE UTAH RULES OF CIVIL PROCEDURE, THE FAILURE TO PLEAD THAT THE PLAINTIFF WAS A LICENSED CONTRACTOR DOES NOT CONSTITUTE REVERSIBLE ERROR.

Plaintiff, in fact, testified that he was a licensed drilling contractor, contrary to the Defendant's assertion. (Transcript 7,11,31 & 32) It is also a fact, that the Defendant introduced absolutely no evidence that would contradict Plaintiff's repeated assertions that he was a licensed contractor.

It is true, that the Plaintiff failed to plead in his Complaint that he was a licensed contractor. It is also true that the Defendant failed to raise this defense.

affirmatively or otherwise, in the defense pleadings. However, these errors were remedied by the above-noted trial dialogue, wherein the defense was both raised by the Defendant and answered by the Plaintiff.

In addition, Rule 15 (b) of the Utah Rules of Civil Procedure provides that when issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

In view of the Plaintiff's trial testimony, the Defendant's failure to produce rebuttal evidence, and Rule 15 (b) of the Utah Rules of Civil Procedure, Defendant's contention that Plaintiff's pleading omission is grounds for a reversal is totally without merit.

CONCLUSION


On Appeal, Defendant is attempting to have this Court substitute new Findings of Fact, ones more favorable to the Defendant, in place of the findings of the Court below. The Defendant's repeated contention that the evidence was uncontradicted is without support in the trial record.

This Court has held that appellate review is limited to the determination of whether or not there is competent evidence to support the judgment of the trial Court. Dahnken vs. George Romney and Sons Co., 111 Utah 2d 471, 184 p.2 211 (1947).

Even a cursory review of the record reveals that substantial competent evidence was introduced which can and does support the trial Court findings. That is not to say that Plaintiff's evidence was uncontroverted. It was. However, the lower Court, after having heard and considered all evidence presented by both sides, accepted the Plaintiff's position on certain points. On appeal, the Defendant is merely arguing that the trial Court should have accepted its version of the facts rather than the Plaintiff's version.

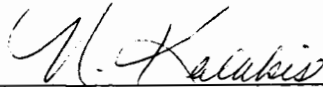
Plaintiff respectfully submits that this Court should reject Defendant's attempt to have a second hearing on the facts at the appellate level.

DATED: April 27, 1979.


Raymond Scott Berry
Attorney for Appellant
Defendant

CERTIFICATE OF SERVICE

I hereby certify that I mailed true and correct copies of the foregoing Respondent's Brief to W. Scott Barrett, Esq., Attorney for the Defendant, at Barrett & Mathews, 300 South Main, Logan, Utah 84321, first class, postage prepaid on the 27th day of April, 1979.



N. Kalakis