1954

Vern B. Millard v. Jesse H. Parry et al : Reply Brief of Appellant

Utah Supreme Court

Paul E. Reimann; Attorney for Plaintiff and Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

VERN B. MILLARD,
Plaintiff and Appellant,

— vs. —

JESSE H. PARRY and ELSIE H. PARRY, his wife,
Defendants and Respondents,

STRAND ELECTRIC SERVICE COMPANY, a corporation, and OTTO DREWS,
Defendants.

Case No. 8026

Reply Brief of Appellant

PAUL E. REIMANN
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CASES AND AUTHORITIES CITED

(NONE)

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MISSTATEMENT OF RECORD BY RESPONDENTS

The respondents do not dispute the rules of law cited by the appellant. Nor do despondents show wherein the appellant has failed to state the facts in accordance with the record, as required by Rule 75 (p)(2) in the event of disagreement with the Statement of Facts in the Brief of Appellant. Throughout their brief, respondents misstate some of the salient facts, and make a number of misleading statements which distort the

picture of the events. Respondents quote from defendant Parry, but avoid quoting or referring to his admissions on cross-examination, ignoring the rule that testimony is no better than where it is left on cross-examination.

The respondents attempt to make it appear that the appellant as general contractor failed to do what he agreed to do, and they gloss over the undisputed fact that he followed the instructions of the architect who was the agent for defendant Jesse H. Parry until termination of services on July 19, 1951. Respondents also sever some of the evidence from its context to present a misleading perspective of the facts.

For example, on page 3 of their brief they state that "Prior to the signing of the contract discussion was had as to the type of windows which were known as Pella units", and that the specifications stated that such windows shall "be installed according to the manufacturer's direction as part of the carpentry contract." Respondents ignore the undisputed testimony that plaintiff stated that he was unfamiliar with that type of window, and that he wanted to know how much to allow for costs of installation. The architect told plaintiff not to figure any cost for installation, as most of said windows would be installed in masonry and would be set by the brick masons. The architect admitted that he so instructed the plaintiff. Respondents also quote from page 34 of the specifications:

> "provide all necessary material and labor for the installation of a 4-inch diameter soil pipe sewer

from the building and connecting to the city sewer as shown on the plot plan."

There was no plot plan in existence at that time. The specifications do not state that the general contractor shall do that particular work. Article 35 of the contract document reserves the right to the owner to let other contracts in connection with the work. The architect as agent of the respondents, specifically told Mr. Millard not to figure on the sewer or water as those items would be taken care of by the owners under a different contract.

The architect also told plaintiff not to bid on more than a 9-inch wall at the top story. The architect in giving instructions on bidding, told plaintiff to exclude those specific items, and also to base his bid on the plumbing figure which expressly excluded the sewer and water lines. Defendant Parry went ahead and constructed the sewer in his own way, disregarding the plot plan which came out in April 1951, and even increased the cost by use of cast iron pipe and by running the line diagonally across the front of the property. He did not bill plaintiff for that cost nor for any other excluded item. No claim was made until the time of trial that plaintiff had any obligation to do any of the work which the architect told plaintiff to exclude in making up his bid and in reducing his bid at the request of the architect who was the agent of the Parrys.

One of the worst distortions in the Brief of Respondents, relates to the stipulation dated April 10,

1953. It was signed by plaintiff at the request of defendants Parry to enable the Parrys to "stop the running of interest". In preparing the findings of fact, conclusions of law and judgment, counsel for the respondents twisted and distorted the stipulation into a purported agreement to relieve the Parrys of liability for accrued interest and costs due to their willful failure to pay.

In arguing Point 1, respondents avoid reference to the fact that the counterclaim of defendant Parry was dismissed and no appeal was taken from said portion of the judgment. The respondents had a judgment entered against plaintiff in the sum of $435.30, which was based upon a misquotation of the stipulation, and which was inconsistent with the dismissal of the counterclaim. The contention that plaintiff could have objected timely, is unwarranted, for the judgment had already been entered before plaintiff's attorney was able to contact the trial judge.

In arguing Point 2, the respondents evade the facts by saying that the defendants Parry denied there was any lienright. The findings show that there was a valid lienright, for there was money due and owing from November 1951 which was unpaid at the time of trial. The contention that plaintiff did not object to the order for release of the lien, contradicts the record, for plaintiff stated in the release that he executed the same under compulsion and that he intended to have the

portion of the judgment requiring the same, vacated on appeal.

In arguing Point 3, respondents make the unwarranted assertion that plaintiff did not make any claim for extras, Items 41 to 60, until the time of trial and that defendants were therefore exempted from liability for interest. Liability did not accrue from billing, but from performance of the work, which was completed in November 1951. Furthermore, Exhibit P-14 was prepared after trial started to itemize the various changes and increased costs because defendants at the trial made the claim for the first time that recovery could only be had for any amount in excess of $82,000, as "extras". All of those items were included in the billing on a cost-plus basis October 30, 1951, and in the corrected billing of December 28, 1951. The statement that the defendants Parry did not know anything about the cost-plus basis until January 1952 is utterly false, as Mr. Parry admitted that Mr. Millard presented Exhibit P-8 to him on October 30, 1951. Exhibit P-9 was issued as of December 28, 1951, because of discovery of some errors. The fact that the bookkeeper gave the Parrys some statements as late as November 1951 on "extras" is immaterial, as the Parrys who were running things to suit themselves, had conferences with the bookkeeper. Mr. Millard did not authorize the bookkeeper to issue those statements. Anyway, they related to the period prior to discharge of the architect, and they were not complete.

The testimony of Mr. Parry is quoted to the effect that the original contract was not abandoned notwith-

standing he dismissed the architect, and also that he agreed to pay Mr. Millard the 10% theretofore being withheld. Exhibit P-13 shows that the testimony of defendant Parry is false, as neither he (nor his wife who wrote the checks) paid the 10% which had been withheld. The billings were on a cost-plus basis after July 19, 1951. There was a general billing on October 30, 1951, covering the entire job on a cost-plus basis. The final billing of December 28, 1951, was a correction of the one dated October 30, 1951. Not only did the Parrys fail to register any objection to the one dated December 28, 1951, but they made at least two payments in accordance with the instructions of the letter which accompanied such billing. They did not see fit to have their attorney confer with counsel for plaintiff, as they were invited to do, and which they would have done if they then had believed they had any reasonable basis for questioning the propriety of any item, or the method of billing.

By argument of Point 4, respondents contend that the foreclosure action failed, and that respondents were therefore entitled to costs and attorney fees. Their claim is a classic misstatement of the record, for the court found that at the time of trial there was money due and owing for construction, which had not been paid. The only purpose of such an action is to collect the money owing. Respondents have ignored the law as well as the facts.

In arguing Point 5, respondents admit that plaintiff had a right to terminate the contract if there was loss due to the interference of the Parrys, page 25 of Brief of Respondents. Claim is made that the evidence shows that the Parrys were at the job site only 15 minutes per day. The testimony relied on is incredible for the reason the Parrys professed to know just what the men were doing, and shows that they talked to the men who were working and ordered many changes; yet they claim they did not interfere. There is no dispute about the fact that there were heated controversies between the architect and the Parrys over interference, and that plaintiff repeatedly complained about the greatly increased costs occasioned thereby.

Respondents are consistent only in ignoring most of the salient facts. They assert that the figures written on the plumbing bid by the architect show computations for sewer pipe and water service. Those figures were not a part of that bid. The architect did not testify that he told plaintiff to include sewer and water in his bid. He testified exactly to the contrary.

In arguing Point 6, respondents disregard the undisputed facts, and claim that plaintiff was liable for the installation of the sewer when he was told not to include it in his bid, and also despite the fact that defendant Parry did not bill plaintiff nor claim any offset until the time of trial. He even was awarded an offset for running a longer sewer line with the increased cost of iron pipe.

In arguing Point 7, respondents take the attitude that plaintiff is "hooked" by some statement on extras issued by the bookkeeper without the knowledge of plaintiff and without his authorization, particularly when they related to events prior to abrogation of the contract. Respondents gloss over the fact that they had conferences with the bookkeeper, and claimed they were "getting nowhere". They were running the job, but they now want to leave plaintiff with over $20,000 of the costs which they caused him to incur.

Respondents admit that Mr. Merrill, foreman, testified to various costs of additional work and changes. There was not a matter of guesswork on his part as to costs, even if the items were to be charged as "extras", for every conceivable attempt was made to break down his testimony as to details. He knew exactly what he was talking about. Respondents ignore the fact that their own testimony was that "extras" were to be paid for not on some disputed basis of "reasonable value", but on the basis of "cost plus 10%", and respondents refused to pay the costs or any portion thereof. Mr. Merrill is not under obligation to Mr. Millard. No one disputed his testimony as to the actual costs. There were some attempts to show that someone might estimate them at a lesser figure, but that was not competent evidence.

CONCLUSION

Respondents have not directly disputed any facts related by plaintiff. The Brief of Respondents does not question the rules of law cited in the Brief of Appellant. Respondents have distorted the picture, which illustrates that respondents were trying to get a free ride for an apartment house worth at least $24,000 more than they originally bargained for, at the expense of appellant.

It is respectfully urged that respondents raise no genuine dispute as to the facts and law as submitted in the Brief of Appellant, and that the appellant is entitled to the relief sought in his original brief.

Respectfully submitted,

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Attorney for Plaintiff and Appellant.