

1954

Vern B. Millard v. Jesse H. Parry et al : Respondents' Answer to Petition, and Brief for Rehearing

Utah Supreme Court

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W. D. Beatie; Attorney for Defendants and Respondents;

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IN THE SUPREME COURT OF THE STATE OF UTAH

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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.

No. 8026

Respondents' Answer to Petition, and Brief for Rehearing

FILED

AUG 20 1954

W. D. BEATIE

*Attorney for Defendants
and Respondents Parry*

Clerk, Supreme Court, Utah

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BRIEF AND ANSWER TO PETITION FOR REHEARING

ARGUMENT

Point 1. THE OPINION OF THE COURT AND THE AFFIRMANCE OF THE JUDGMENT, ARE PREDICATED ON SUBSTANTIAL MISSTATEMENTS AND OMISSIONS OF MATERIAL UNDISPUTED EVIDENCE.

Appellant refers to a portion of the last paragraph on page 2 of the opinion, which is as follows:

“It must also be noted that in the matters referred to, plaintiff relies chiefly upon alleged promises and representations of the architect, and upon the contention that the architect was agent for the defendants. An architect is not ordinarily a general agent for his employer (3 Am. Jur. 1000) and in this instance it was expressly so provided in the contract documents. Clearly he did not have authority to bind Parry on a promise of construction of another structure.”

Appellant states:

“The statement is not only an unfair statement of the contention of appellant, but it contradicts the findings submitted by respondents and adopted by the trial court.”

The above quotation from the opinion, clearly states that the architect was not a general agent of the defendants Parry. This position is substantiated by the following taken from plaintiff's Exhibit P-3, which is the general conditions of the contract:

“Art. 15. Changes in the Work.—The Owner, without invalidating the Contract, may order extra work or make changes by altering, adding to or deducting from the work, the Contract Sum being adjusted accordingly. All such work shall be executed under the conditions of the original contract except that any claim for extension of time caused thereby shall be adjusted at the time of ordering such change.”

“In giving instructions, the Architect shall have authority to make minor changes in the

work, not involving extra cost, and not inconsistent with the purposes of the building, but otherwise, except in an emergency endangering life or property, no extra work or change shall be made unless in pursuance of a written order from the Owner signed or countersigned by the Architect, or a written order from the Architect stating that the Owner has authorized the extra work or change, and no claim for an addition to the contract sum shall be valid unless so ordered."

"Art. 38. Architect's Status.—The Architect shall have general supervision and direction of the work. He is the agent of the Owner only to the extent provided in the Contract Documents and when in special instances he is authorized by the Owner so to act, and in such instances he shall upon request, show the Contractor written authority."

These contract provisions clearly show that the architect was an agent of the defendants Parry, and not a general agent to the extent of making representations to the contractor for additional construction, which would have to be within the scope of the architect agency to be binding upon the defendants Parry.

There has never been any denial that under the terms of the contract documents that the architect was the limited agent in accordance with the contract documents of the defendants Parry.

At the bottom of page 6, appellant makes this statement:

"While the architect was the agent of the owners, his representations and instructions to Mr. Millard as to what should be included in the

bid was what was to be excluded, were the representations and instructions of the owners.”

In answer to the above statement it should be firstly contended, that defendants Parry would be responsible for the statements of the architect, only within the scope of his authority, and they were limited by the contract documents as aforesaid. Secondly, the plaintiff had in his possession the plans and specifications which were the basis of his bid to be made, and there is no variance between any of the sets of plans and specifications of the plaintiff, defendants, or the set filed with the City for the permit to build.

On Page 7, appellant makes the following statement:

“The architect procured a bid on plumbing and told Mr. Millard to base his bid on that figure. He also told Mr. Millard to exclude sewer as that was to be covered by another construction project. It is undisputed that the contract documents reserve to the owner the right to let other contracts, (Exhibit P-3).”

Included within the specifications were the following statements concerning connection of the sewer and water in the building to the city mains. Under the general heading of plumbing in the specifications at page 34, under the heading “Utilities” it is provided:

“Provide and install a 1½” diameter water service with all necessary fittings as shown on the plot plan.

“Provide all necessary material and labor for the installation of a 4” diameter soil pipe sewer

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

Under the heading “Waste and Vent System” at page 35 of the specifications, it provides as follows:

“Provide a complete system of waste and vent piping as necessary and connect to sewer system.”

The specifications, including the above quotations, including the water and sewer system, were in the hands of the plaintiff prior to signing of the contract for \$82,000 on January 29, 1951, such that plaintiff on the signing of the contract agreed to the specifications for construction as above quoted.

The plot plan has been discussed numerous times by appellant. Subsequent to January 29, 1951, the date of the signing of the contract, a plot plan was evolved and given to the plaintiff, so that there was a plot plan on the project, prior to the necessity for use of the same.

Reference is here made to Article 3 of Exhibit P-3, which is the general conditions of the contract which is as follows:

“Art. 3. Detail Drawings and Instructions.—
The Architect shall furnish with reasonable promptness, additional instructions by means of drawings or otherwise, necessary for the proper execution of the work. All such drawings and instructions shall be consistent with the Contract Documents, true developments thereof, and reasonably inferable therefrom.”

It should be supposed that all drawings for the construction of the eleven unit building were not com-

plete in every detail, as to those instances at the latter part of the construction, such as connecting sewer and water systems, but the plot plan was furnished, the specifications provided for the water and sewer systems to be connected and the architect Johnson testified that it was anticipated that there would be a complete system of waste and vent piping and connected to the sewer system of Salt Lake City (R. 357) and that there would be a water system connecting the 11 unit apartment to the Salt Lake City water system. (R. 358).

Appellant numerous times during the brief has referred to the bid obtained by the architect (Ex. P-4) and (Ex. 17), an estimate sheet attached to a statement dated December 14, 1950 of the architect. Counsel for appellant seems to utterly disregard that portion of Exhibit P-4, except the last yellow sheet which bears date of January 8, 1951. Attention is called to page 4 of Exhibit P-4, in which it is recited in the bid of Grant Barnes on the plumbing the following:

“Sewer — approx. \$2.20 per foot —	
Estimate 150	\$330.00
Water service 35c per foot—	
Estimate 100	35.00”

These two items are included within the original bid of Grant Barnes and total \$5,666.53. Counsel for appellant completely disregarded the itemized bid which includes the estimate for water and sewer service, and takes a subsequent bid, dated January 8, 1951 and relies upon the same.

It would seem to counsel for the defendants Parry, that plaintiff having had great experience in general contracting, which he has, that he would have noticed some discrepancy between the two bids, of Exhibit P-4, and Exhibit 17, and which bids defendants Parry never did see until in another law suit in December of 1951. It might be that Page 4 of Exhibit P-4 has never been seen by counsel for appellant or has been entirely disregarded in his argument.

At page 8 of the appellant's brief, he states:

“The opinion likewise does not mention the fact that defendant Parry had in his possession Exhibit D-27 dated December 14, 1950, which stated as the cost of the plumbing the exact amount of Exhibit P-4 which specifically declared that sewer and water were not included.”

Exhibit D-27 is the D. A. Olsen Company's installation order signed by Vern Millard, dated April 15, 1951, and was never seen by defendants Parry until March of 1953, during a trial when he obtained this exhibit from Mr. Olsen for the purpose of having the exact amount of the heating contract determined. As before stated, Exhibit P-4 included the page 4 which counsel for plaintiff disregards, was never in the possession of defendants Parry until it was taken from Case #94041 for the purpose of this trial, and therefore was handled between the architect and the plaintiff.

Exhibit D-27 says nothing at all about plumbing, but has reference to installation of the heating system.

Counsel for appellant makes the further statement on page 8 of his brief:

“When the heating was decided upon after the contract documents were signed, the heating costs were in excess of the allowance which the architect instructed Mr. Millard to provide in his bid.”

Exhibit 27 discloses that the heating contract was entered into by the plaintiff with D. A. Olsen Company for the sum of \$7,875.00, yet the estimate of the architect, which is on the last page of B-17 indicates that the heating and hot water system, based on architect's estimate was the sum of \$8,100.00, so that in effect the contract was let for \$225 less than the architect's estimate.

On page 9 of appellant's brief, he states:

“When defendant Parry constructed the sewer, he did not use soil pipe, which is the least expensive type of construction, but he used cast iron which cost several times more, and instead of laying the line directly to the street as shown on the master plan, he ran it diagonally and much deeper which made the line considerably longer and more costly.”

Counsel for defendants Parry would refer counsel for appellant to Exhibit 42, which is a statement and cancelled check attached, to George Chase in the sum of \$426.82 covering payment for the pipe used by the defendants Parry at his own cost of installing the sewer and on which he was given credit during trial as being an item within the contract terms to be done on the part

of the plaintiff. The third from the last item on Exhibit 42 shows that there was 220 feet of 4" soil pipe used, which cost \$220.00, so that the defendants did use soil pipe in this construction.

Counsel for appellant further, at the bottom of page 9, states:

“The reason the Court did not find anything to disturb the findings is possibly because the Court overlooked the fact that the trial court based its allowance not on cost-plus 10% but on a theory of “reasonable value,” which amounted to only a small fraction of actual costs incurred by plaintiff.”

If counsel for appellant would take the time to examine page 72 of the record, he would discover that there is an itemized list covering the entire page of where the court granted to the plaintiff 10% overhead plus 10% contractor's fee, which totaled the sum of \$7,230.34, for extras.

On page 73 of the record, is further itemized those items upon which the contractor was allowed 10%, where the work was done by a subcontractor. The plaintiff in this instance received his 10% over the subcontractor's costs, thus the trial court never did determine the extras upon a “REASONABLE COST BASIS” but on those items performed by the plaintiff himself of extra costs, the trial court included 10% overhead and then a 10% contractor's fee to make the total for each item of extra.

Point 2. THE COURT HAS IN EFFECT DENIED THE PLAINTIFF HIS CONSTITUTIONAL RIGHTS OF APPEAL BY PREDICATING ITS DECISION ON A STATE OF FACTS MATERIALLY AT VARIANCE WITH THE RECORD MADE IN THE DISTRICT COURT.

On this matter, it seems to counsel for respondents that counsel for appellant is implying that the decision is based on facts not in the record, which has been disputed to the best ability of the writer of this brief.

Point 3. THE OPINION DISREGARDS ONE OF THE FLAGRANT ERRORS OF THE TRIAL COURT BY IGNORING THE DISTINCTION BETWEEN RECOVERY FOR CHANGES ON THE BASIS OF COST PLUS 10% AS AGREED UPON, AND THE MUCH LOWER BASIS OF "REASONABLE VALUE" ADOPTED BY THE LOWER COURT.

The statement of counsel for appellant under this point relates chiefly to the last portion set forth in detail under Point 1, under a theory of "REASONABLE ALLOWANCE" against cost-plus 10% for extras. Again pages 72 and 73 of the record, which are findings of the trial court, specifically itemize each item allowed by the court as being extras on this construction job.

Counsel for appellant at page 11 of his brief states.

"In effect, the trial court said Mr. Millard was entitled to his actual costs plus 10% as even the defendants testified that such was the agree-

ment, but in contradiction of such decision, the court deprived Mr. Millard of thousands of dollars of his actual costs by allowing him only a small fraction thereof."

As this court has said in its opinion, the trial court meticulously examined each item of extras from 1 through 60 and in several instances determined that the items charged as extras were included within the original contract, and therefore were not chargeable as extra items.

Point 4. THE DECISION IS CONTRARY TO LAW.

At page 12 of appellant's brief, he states:

"It makes no difference whether the agent was specifically directed by the owners to make the particular statements he made. The fact is that he was engaged to line up materials (which is one of the functions of the general contractor).

It might be well to reflect on how it happened that the architect in this instance was hired. The architect and the plaintiff were at the site one morning when defendant Parry appeared and it was through the contractor and his recommendations that the architect became employed.

It must be admitted that the contractor did additional work upon adjacent property of the defendants Parry, as well as certain changes on this particular job, namely installation of garbage disposals, sliding doors on the bedroom closets, paving of the driveway and park-

ing area, changing of the type of glass in the louvers of some of the rooms in three apartments, all such items which were requested by the defendants were paid for by the defendants without any question.

At page 14 of appellant's brief, he again refers to a substitute of "REASONABLE ALLOWANCE" theory instead of full recovery on the basis of contractor's cost-plus 10%. This matter has been covered before.

Appellant's counsel further in the second paragraph of page 14 says:

"It cost a lot of money to correct the mistakes in the architect's plans."

The defendants Parry are well aware of that fact, having been allowed by the court the larger item in dispute which was the fact that the floor joists in the east end of the apartment ran in the wrong direction such that the air conduits could not be concealed in the ceiling which required the furring down of those walls and which cost based upon the testimony of plaintiff's superintendent on the job was allowed by the court.

On page 15 of appellant's brief he refers to an exhibit in case No. 94041 as to the statement of defendants Parry to the fact that they had employed under an oral contract the architect for architectural and supervisory services, covering the erection of an 11 unit apartment at the rear of 160 South 13th East Street, Salt Lake City, Utah. There has never been any question but that Defendant Parry hired the architect about December 14, 1950.

Point 5. THE DECISION MISCONSTRUES THE STIPULATION OF THE PARTIES, AND EXCEEDS THE JURISDICTION OF THIS COURT BY REACHING OUT TO COVER A PORTION OF THE JUDGMENT FROM WHICH NO APPEAL WAS TAKEN.

In answer to the question of the matter of the stipulation of payment of subcontractors, we again set forth paragraph 5 of the stipulation:

“5. That as to the particular portions of said claims so paid with respect to which it shall finally be adjudged that plaintiff is liable, said defendants Jesse H. Parry and wife shall be entitled to credit in the above entitled cause as of the date payment of claims is made (which credit shall be in addition to the payment heretofore made to plaintiff and/or to materialmen or subcontractors).”

The last paragraph of appellant's brief at point 5 states:

“The Parrys willfully delayed payment for two years and caused the running up of interest and costs, and the Court unjustly makes the plaintiff liable for the defaults of the Parrys.”

The best answer which the writer of this brief has to this statement is Article 32 of the General Conditions of the contract as follows:

“Art. 32. Liens.—Neither the final payment nor any part of the retained percentage shall become due until the Contractor, if required, shall deliver to the Owner a complete release of all liens arising out of this Contract, or receipts in full in lieu thereof and, if required in either case, an affidavit

that so far as he has knowledge or information the releases and receipts include all the labor and material for which a lien could be filed."

Point 6. THE DENIAL OF INTEREST ON SUMS DUE AND OWING TO PLAINTIFF IS CONTRARY TO LAW, AND AMOUNTS TO MAKING A CONTRACT FOR THE PARTIES WITHOUT ANY MEETING OF MINDS.

At page 16 of appellant's brief in the first paragraph, he states:

"The opinion states that the plaintiff billed defendants on the wrong basis, and that therefore interest did not accrue."

This court made no such statement in its opinion, but on page 2, first paragraph it made the following statement:

"That billing however was for a balance claimed by plaintiff to be owing upon the whole construction upon a cost-plus basis. The court found, and we think correctly, that there was no contract for construction of the building on the cost-plus basis. That billing therefore cannot be considered a billing for the extras referred to."

The opinion therefore does not state that it was on the wrong basis, but merely states it was not billed under the contract of January 29, 1951 for extras.

Counsel further on page 17 states:

"The contract documents required in full within 30 days after completion of construction. Completion was bound to cover extras and changes. Defendants ordered most of the changes and knew about them."

The answer to that question has before been set forth by Article 32, that the balance on the contract is not due until such time as there has been delivery by the contractor, of evidence of payment of bills to materialmen and subcontractors, which was not the case even at the date of trial.

CONCLUSION

It has been the endeavor of the writer within this brief to point out that the opinion as originally rendered by this court has completely covered all points raised by appellant on his appeal.

Both during the trial of this matter, which was long and tedious, there was much time devoted to extras alleged on the part of appellant, and the opinion of this court has in detail covered each point raised by appellant sufficiently and based upon ample record, such that consideration of this court, based upon petition for rehearing should not change the results.

WHEREFORE, respondents respectfully pray that the petition for rehearing be denied and that remittitur in this matter issue.

Respectfully submitted

W. D. BEATIE

*Attorney for Defendants
and Respondents Parry*