

1980

Edward O'Hara v. Jay A. Hall, Jr : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *O'Hara v. Hall*, No. 16820 (Utah Supreme Court, 1980).
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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

EDWARD O'HARA,)
)
Plaintiff & Respondent,)
)
-vs-) No. 16820
)
JAY A. HALL, JR.,)
)
Defendant & Appellant,)
)

APPELLANT'S BRIEF

Appeal from the Judgement of the Fifth Judicial District
Court for Millard County, Honorable D. Christian Ronnow, District
Court Judge Pro Tem, presiding.

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FILED

JUN 30 1980

Clk., Supreme Court, Utah

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STATEMENT OF THE CASE

Plaintiff and Respondents alleged a written contract wherein the Appellant Hall agreed to remodel a house for Respondents. It is alleged that Appellant Hall breached the agreement.

Defendant and Appellant answered denying that a contract to remodel the house existed. He affirmatively alleged that the document relied on by Respondents was too indefinite to be enforced and was not intended to be the agreement between the parties. Appellant Hall alleged that he was employed by the hour to assist Respondent O'Hara in the remodeling of the house, and counterclaimed to foreclose a mechanic's lien claim for wages due.

DISPOSITION IN TRIAL COURT

A Jury trial was held wherein the Honorable Judge D. Christian Ronnow, District Court Judge Pro Tem ruled that the written document was a binding contract requiring Defendant-Appellant to remodel the house for a sum certain and so instructed the jury. The Honorable Judge failed to recognize that the alleged contract was completely void of any plans or specifications for the remodeling of the house, and required the jury to determine the amount of

of damages to be assessed against Appellant Hall for the alleged breach of the indefinite contract. The jury returned a verdict against Defendant and Appellant for the net sum of \$10,237.56.

RELIEF SOUGHT ON APPEAL

Defendant and Appellant contends that the written document, Exhibit P-1, was too indefinite to be enforced, and seeks reversal of the lower Court's ruling, for an Order dismissing Plaintiff and Respondent's Cause of Action, or for a new trial.

STATEMENT OF FACTS

Defendant and Appellant Hall is a carpenter (Tr. page 115) with a C-1 remodeling license issued by the State of Utah. (Tr. page 279 and page 461). During 1976 Appellant Hall did some carpentry work for the Respondents on a barn. He was paid for his work by the hour. (Tr. page 116) As a result of the association, the Halls and the O'Haras became friends. (Tr. page 126) Thereafter on or about August 1977, the Respondents asked Appellant Hall to help remodel their house. (Tr. page 116) The parties met three times and discussed the project. (Tr. page 49-50) For example, during the meetings Respondent O'Hara told Appellant Hall he wanted a 12 x 30 ft addition put on, that he wanted to lower the ceilings in the old rooms, and wanted to remodel the upstairs. He told Appellant Hall he wanted it built with the "best stuff they had on the market." (Tr. page 50-53) Respondent O'Hara wanted the fruit room removed, a kitchen built plus a utility room. He wanted the old roof resingled with the "widest they could get." (Tr. page 53 & 54) The parties did some measuring to try and determine where the new addition would be and the location of the kitchen. (Tr. page 56)

During the conversation it was agreed that Respondent O'Haras would select and pay for the materials, and Appellant Hall would install them. (Tr. page 5 line 12-23, and page 58 line 9-11)

During the three meetings the Respondent O'Haras asked Appellant Hall if he would prepare an estimate of what it would cost to do the

remodeling work they were discussing. According to Respondent Helen O'Hara, the estimate was needed so they would know about how much money to borrow from the bank. (Tr. page 97 line 18-24)

Appellant Hall filled out a form entitled "Proposal and Contract" Exhibit P-1, signed it and gave it to Respondents. His common practice in business was to do his work on an hourly basis and had never before used the "Proposal and Contract" form. (Tr. page 128 line 25 and page 130 line 8) Appellant Hall gave the estimate to the Respondents so they would have something to take to the bank. (Tr. page 118 line 25 and 119) Appellant Hall did not intend the document to be a bid or contract for the remodeling of the house. (Tr. page 120 line 11-24, page 129 & 130, page 131 line 1-13)

The essentials of the alleged contract, Exhibit P-1 are:

"I, Jay Hall, propose to furnish all materials and perform all labor necessary to complete the following:

An addition to the old house (12'x 30') comprising family room, kitchen, and fruit room. Reshingle old roof. Install thermal pane windows in all house. Remodel bathroom in old house. Lower ceiling in living room, and install radiant heat. Remodel upstairs. Remove old porch. Remodel stairs. Install several doors in old house. (not including siding and cabinets).

All of the above work to be completed in a substantial and workmanlike manner according to standard practice for the sum of.....\$24,200."

After the document P-1 was prepared, the parties started the remodeling project without any plans or specifications. (Tr. page 91 line 16-21) They developed ideas and planned the remodeling as they progressed with the work. (Tr. page 106 line 22-25, and page 107)

The Respondents O'Hara would describe to Appellant Hall what they

wanted and he would follow their directions. (Tr page 74 and page 76) Respondents paid Hall for the labor he and his helper put in each week. (Tr. 72 line 5-12, page 69 line 4-8) Respondents paid out \$35,034.56 on the remodeling project, which did not include cabinets and siding, which they considered an "extra". (Tr. page 562 line 10) Of the total amount paid out, \$5,426.15 was paid to Appellant Hall for labor, and \$780 for materials not including cabinets and siding. (Tr. page 454 and 455, and page 457 line 15-23) The balance of the total sum paid out by Respondents went to various material supplies. (Tr. page 553-562) Appellant had no control over the materials purchased for the project. (Tr. page 129 line 22, and page 57 and 58) Although Hall and his helpers did order materials as needed for the work, he was doing so on behalf of the Respondent O'Haras. (Tr. page 368)

The remodeling project was substantially completed when Respondent O'Hara ordered Appellant Hall to stop work. (Tr. page 370 line 13-19; page 381 line 21-25, and page 414 line 6-21)

POINT I

The Trial Judge erred in ruling that an incomplete, indefinite writing, Exhibit P-1, was a binding remodeling contract requiring the Appellant Hall to remodel Respondent O'Hara's house for \$24,200.

ARGUMENT

Respondents filed action alleging breach of a building and remodeling contract allegedly entered into between the parties on August 15, 1977. (Exhibit P-1, Record page *A-100*) Appellant Hall answered the complaint denying that a contract existed between the parties, and alleged that he worked for the Respondents on an hourly basis and remodeled their house according to their instruction as the project progressed. Appellant counterclaimed to foreclose a mechanic's lien he had filed against the house, for wages unpaid. (Record page *14*)

Appellant Hall also filed a Motion seeking the dismissal of the complaint for the reason that the written document upon which it was based was too indefinite to be enforced. (Record page)

The point was also argued to the Court prior to submitting evidence to the jury. (Tr. page 80, 81)

The Trial Judge found the proposal and contract "bare boned" (Tr. page 81, line 8) and that "it was indefinite, that there were decisions to be made along the way. The decisions were, in fact, made along the way." (Tr. page 81, line 14-17)

The Trial Judge further stated that the written document was not only ambiguous, but that there was an appalling lack of detail, however, that parol evidence rule could be used to amplify or clarify those provisions in the contract. (Tr. page 133 line 10-25, and page 134)

The Court then ruled the written document Exhibit P-1 was a contract that the Appellant Hall could only proceed on the theory that he performed extras under the contract for which he was not paid. (Tr. page 135, line 8-19)

The Court instructed the Jury in Jury Instruction No.13:

"You are instructed that it has been established in this case that the defendant, Jay Hall, on or about the 15th day of August, 1977, entered into a written contract with Edward O'Hara to furnish all materials and perform all labor necessary to complete the following:

- An addition to the old house (30 feet by 12 feet) comprising of a family room, kitchen and fruit room.
- Reshingle old roof.
- Install thermal pane windows in all house.
- Remodel bathroom in old house.
- Lower ceiling in living room and install radiant heat.
- Remodel upstairs.
- Remove old porch.
- Remodel stairs.
- Install several doors in old house (not including siding and cabinets.)

You are further instructed that in the said agreement it is established that all of the above work was to be completed in substantial and workmanlike manner, according to standard practices. That the same was to be done for the payment of \$24,400.00."

(Tr. page 586 and 587)

Also Jury Instruction No. 18:

"You are instructed that it has been established that the defendant was acting as an independent contractor and started work in August, 1977 following the execution of the said contract."

(Tr. page 580 line 5-8)

Prior to signing the contract document, the parties had three meetings and discussions concerning the planned remodeling project. The discussions were general in nature about what the Respondent O'Haras would like to have done. On several items they asked Appellant Hall's advice. (Tr. page 50-59) Thereafter the alleged contract Exhibit P-1 was signed by the parties. (Tr. page 60-61)

On direct examination Respondent Ed O'Hara was asked what the \$24,200 figure would include. His answer was everything that was listed in the contract, except siding, cabinets, a porch railing, and the painting. (Tr. page 65 line 20-25, page 66 line 1-14) Thereafter an immediate exchange arose between the Trial Judge, Respondent O'Hara and Respondent's counsel about what was or was not included in the contract. (Tr. page 66, 67, & 68)

On cross-examination, Respondent O'Hara, in response to questions about what was included in the contract, stated that the work was planned as the project progressed, part of his testimony is set out below:

"the building went up and as it went up, then he'd ask me "Where do you want this? Where do you want that?"

We had to have a building up before we could decide where we wanted it." (Tr. page 74 line 1-4)

"My wife told him where she wanted the kitchen." (Tr. page 74 line 18)

"Q. Now, when did your wife and you tell him where you wanted the kitchen?

"A. I guess after he had the siding up." (Tr. page 74 line 21-23)

"Q. When was it decided how many thermo-pane windows would be installed in the house?"

"A. As the sides went up with the building, new addition, he wanted to know, "where did you want the windows?" (Tr. page 76 line 5-9)

Other than the instructions given by Respondents to Appellant Hall, after the contract was signed, as the project progressed, there were no other plans and specifications outlining the work which Appellant Hall was supposed to do under the contract. After several pages of questions and answers on the subject (Tr. page 89, 90, 91) the Trial Judge concluded that there were no formal plans and specifications. (Tr. page 91 line 16-21, and page 107 line 13-19)

Yet in spite of the total lack of detail in the document, and lack of any plan or specification, and in spite of the Respondent's own testimony that plans and details of layout and construction were made by the Respondents and dictated to the Appellant Hall as the remodeling work progressed, the Trial Judge ruled that Exhibit P-1 was a remodeling contract for which the Appellant Hall was responsible. (Tr. page 135 line 8)

In the case of Hansen v. Snell 354 P2d. 1070, 11 UT 2d, 64, the Supreme Court of Utah considered a case where a defendant signed a real estate broker's agreement allegedly agreeing to sell her property, which stated:

"Price \$43,000 cash. Terms to suit the seller.

The broker found a buyer who was willing to pay \$43,000 cash or "on terms to suit the seller." The defendant seller refused to sell, and the Supreme Court held the "would be" contract unenforceable against the defendant. The Supreme Court stated:

"The terms and the amounts in which the payments should be made and also the rate of interest on the deferred balance are part of the 'terms' of a real estate sales

contract. The importance of the interest rate as one of the 'terms' of such a contract is made emphatic by the controversy which has here developed.

"In order for a contract to be binding, it must spell out the obligations of the parties with sufficient definiteness that it can be performed. (emphasis added)

The alleged construction contract between O'Hara and Hall is completely silent on essential plans and specifications which are always included in similar construction contract. The purported contract leaves unanswered such questions as What is the addition to be constructed of, brick, block, lumber, mud, rocks or what? Is plaster to be used or drywall? How many windows or doors and where? Tar paper, asphalt or shake shingles? What size thermal pane windows, how many and where? New fixtures in the bathroom or used? Repaint or wall paper in the bathroom? New floor? What does "remodel upstairs and stairs mean? How many doors is "several doors".

These are all questions which point out a complete lack of certainty in the alleged contract as to what defendant's obligations were. The lack of plans and specifications in the alleged written agreement is certainly no less important than the terms and amount of payment and interest rates were in the Hansen v. Snell case just recited. The lack of understanding between the parties and this resulting lawsuit was created by the lack of plans and specifications which would have detailed the duties and obligations of Appellant Hall had they been present. This lack of understanding is aptly demonstrated by Respondent Helen O'Hara's final testimony at the trial on cross-

examination. She testified that the contract included building two "dormers." (Tr. page 566 line 17-20) The contract does not even mention dormers. Mrs. O'Hara testified that the contract included shake shingles, (Tr. page 566 line 21-23) where the contract stated only "reshingle roof". She testified that the construction of a new porch was included in the contract, (Tr. page 566 line 24, page 567 line 1-7) where the contract said only "Remove old porch." Mrs. O'Hara testified that the construction of extra closets in the house was part of the contract, where closets are not mentioned in the contract at all. (Tr. page 568 line 14-19) She testified that the removal and closing in of two large windows was part of the contract. (Tr. page 569 line 7-9) The contract does not mention such work. Mrs. O'Hara stated that lowering the ceiling in the bedroom was part of the contract whereas the contract only states "Lower ceilings in living room."

Contracts indefinite as to work or property to be done for the price recited in the agreements, renders it just as unenforceable as if the price itself was missing. A promise to erect a building where the deminsions and plans are not specified, or which refers to plans and specifications as a part of a contract though no plans and specifications are attached, are examples of such contracts that are too indefinite to be enforced. Williston on Contracts 3rd Edition § 42, page 35.

A specific case in point is the Klimek vs. Perisich case found at 371 P.2d 956. The case was decided by the Supreme Court of Oregon and essentially had identical facts as this case now before the Court. The plaintiff in the Klimek case alleged a contract against defendant

requiring the defendant to remodel an old house into a rooming house with so many rooms for \$10,000. The Jury found for the plaintiff, but the Trial Judge entered Judgement notwithstanding the verdict and plaintiff appealed.

The Supreme Court of Oregon affirmed the lower Court's decision, reasoning as follows:

"There is in fact no evidence as to the manner or extent to which the building was to be remodeled other than that it should be partitioned to accomodate a certain number of rooms; whether the remodeling required the replacement of floors and stairways; the rooms to be finished of lathe and plaster or 'dry walls', painted or papered; whether the wiring was to be replaced, or used or new plumbing fixtures installed....the Trial Court correctly held that there was no contract."

The Superior Court of Pennsylvania also considered the validity of an indefinite building contract, in Halowich v. Amminiti 154 A.2d 406, 190 Pa. Super. 314. The Court at page 409 stated:

"the written agreement...omits many indispensable items.the agreement does not show whether the house was to be a single story or a two-story structure. It did not specify the number of bedrooms, or whether or not there was to be a kitchen, a living room, or dining room; the number and kind of windows; the number of closets and electrical outlets; and other essential information."

The Pennsylvania Court found that the contract was not enforceable, even though there were a set of plans and blueprints which the parties used and relied on.

In this case Respondent O'Hara can not point to similar plans and specifications, but only to the contract itself and the acknowledgement that plans were discussed and developed as the project progressed. In fact, the Respondent O'Haras themselves

did not know what they thought was included until after the project was substantially completed. (Tr. page 566-570)

The District Court of Appeals, Second District, Division 3, State of California, considered a similar building agreement in Ellis v. Kloff, 216 P.2d 15 96 Cal. App. 2d 471. Defendants leased property from plaintiff for use in an automobile sales agency. The lease provided

"the lessee agrees to improve said premises by the construction of a building or buildings as soon as building conditions reasonably permit. It is understood that this obligation of the lessee is one of the elements of the consideration to be given by the lessee..." Any building or structure constructed by the lessee shall comply strictly with the building code."

The California District Court of Appeals held the agreement to build unenforceable, primarily on the grounds that it violated the Statute of Frauds. The Court stated at page 20:

"Although the term of a contract need not be stated in the minutest detail, it is requisite to enforceability that it must evidence a meeting of the minds upon the essential features of the agreement, and that the scope of the duty and limits of acceptable performance be at least sufficiently defined to provide a rational basis for the assessment of damages."

POINT II

The Trial Judge erred in not submitting the question of whether or not the parties intended the proposal and contract document, Exhibit P-1, to be the controlling agreement between them concerning the house remodeling project, or whether it was intended for some other purpose.

ARGUMENT

In answer to Plaintiff and Respondent's complaint, Appellant Defendant alleged that he agreed to do remodeling work for the Plaintiff on an hourly basis; that all materials were to be furnished by Plaintiff and Plaintiff would direct the work. Appellant and Defendant Hall affirmatively denied that the "Proposal and Contract" document, Exhibit P-1, was intended to be the controlling agreement between the parties for the remodeling of the house. He further affirmatively alleged that the document was intended as his estimate of the cost of the work contemplated by the Plaintiff, which was not intended to be an offer to contract, so that the Plaintiffs would know how much money they needed to borrow to finance their remodeling project. (Paragraph 3, Answer and Counterclaim Record page 14)

The Answer and affirmative defense was supported by the evidence at the trial. Appellant Hall testified that he had previously done work for the Respondent O'Hara on a ceramics barn project on an hourly wage basis. (Tr. page 116 line 7-18) He construed himself and his wife as good friends with the Respondents.

The Respondents again sought his service to remodel their house and he agreed to do so on an hourly wage basis. (Tr. page 120).

Appellant Hall testified that the Proposal and Contract, Exhibit P-1, was prepared by him at the request of Respondent as a favor to friends so they would have an estimate of how much it would cost to remodel their house. They needed the estimate so they would

know how much to borrow from the bank to finance the project. (Tr. page 118 line 25, page 119)

Appellant Hall's testimony as to the intent of the document was supported by the testimony of Respondent Helen O'Hara. The Respondent Helen O'Hara, on direct examination, stated that they (Respondents) asked Appellant Hall for the document because they wanted to go to the bank and get just the amount they would need. (Tr. page 97 line 18-24)

The above testimony of Appellant Hall and Respondent O'Hara was given to the Court out of the presence of the Jury during the Court's hearing to determine whether or not the Proposal and Contract was an enforceable contract between the parties. (Tr. page 39-40) Thereafter, the Trial Judge ruled that the document was a binding contract between the parties for the remodeling of the house. (Tr. page 135 line 8-9) At the trial before the Jury, the Trial Judge refused to allow Appellant's attorney to ask questions concerning Appellant Hall's hourly employment with the Respondents.

At page 382 line 22 and page 383 of the Transcript, the following testimony and Court rulings are found:

"Q: (By Appellant's counsel directed at Respondent Helen O'Hara)

"All right, so you paid him every week for the labor that he put in during the week?"

A: "Right."

By the Court: "Mr. Anderson, at this point, I'm going to have to tell you that I've already ruled that this is a contract and your questioning this witness, now, getting it over into an employer/employee relationship I hold to be irregular.

I have ruled Exhibit P-1 is a contract, made by a general contractor, to do certain work on remodeling. I cannot let this jury listen to any evidence, at this

point, on your theory that he was working for wages... apparently, they paid this man every week. I don't want to make any more comments particular, to indicate any frame of mind that I have, other than to say that since I have ruled as a matter of law, after a two-hour hearing, that there was a contract entered into by Mr. Hall, as a general contractor, and the O'Haras as his clients. I will not allow this Jury to listen to evidence about wages. Wages is a part and parcel of an employer/employee relationship. I have repudiated that. I will so advise this Jury.""

The Court further refused Appellant's requested Jury Instruction wherein the Appellants ask that the Jury be instructed that if it found that the Proposal and Contract, Exhibit P-1, was not intended by the parties to be a binding agreement, either because it was made up for some other purpose, or that it did not reflect what the parties intended to do, then it must find for the Defendant. (Record page 48). The Court's exclusion of the issue of whether or not the parties intended the document to be the controlling agreement was error, because the issue is a question of fact which the Jury should have determined. The position is particularly fortified by the evidence presented to the Court cited above where even the Respondent's testimony supported the testimony of Appellant Hall.

The law is set out in Trial 75 AmJur 2d page 443 § 401:

"The determination of the intent of the parties to make a contract, as gathered from what they did and said, is normally a question of fact for the Jury. Thus the question of....whether a writing expresses the intention of the parties are questions for the Jury."

The Court's denial of the defense raised by the pleadings and

supported in the evidence was a denial of the Appellant's right to a trial by a Jury, where Appellant and Defendant filed his written demand for Jury trial and paid the required fee. Constitution of Utah Article I, § 10; Utah Rules of Civil Procedure Rule 38 and 39.

As a result of the position taken by the Court on the contract, the Honorable Judge continually instructed the Jury that they must determine the damages to be assessed against Appellant Hall, and that they could only decide in favor of Appellant Hall on extras he might have performed for Respondents. (Tr. page 562-565) The result was to force the Appellant Hall and his attorney to attempt to try the case before the Jury on a theory inconsistent with the Appellant's answer and his theory of the case, which was highly prejudicial to Appellant and confusing to Appellant and the Jury as well.

CONCLUSION

Appellant Hall and Respondents O'Hara discussed remodeling Respondent's house during August 1977. Respondents needed an estimate of what it would cost to do the work they discussed and asked Appellant for an estimate so they could take it to the bank. Appellant gave his estimate on a form entitled "Proposal and Contract," but he did not intend it to be a bid or contract to remodel the house for a lump sum. The contract was lacking in details of construction and no plans or specifications were made. The parties started the project and worked on it for several months, developing ideas and plans as the work progressed. Respondents told Appellant what they wanted and he built it. They paid

Appellant his wages each week and paid material men for material used in the project. The Respondent ordered Appellant off the job.

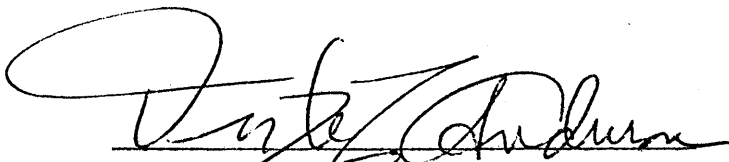
They then sued Appellant for breach of contract for the difference between what they spent on the project, \$35,034, and the alleged contract price of \$24,200, plus damages for faulty work.

The Trial Judge ruled the contract enforceable and instructed the Jury to determine the amount of damages to be assessed against Appellant. The Judge also refused to allow the Jury to determine whether or not the parties intended the contract to be the controlling agreement between them.

Appellant takes the position that since the contract allegedly called for extensive remodeling work, unsupported by any detail in the contract itself, with no plan and specification setting forth the obligation of Appellant, that it is too indefinite and uncertain to be enforced against him.

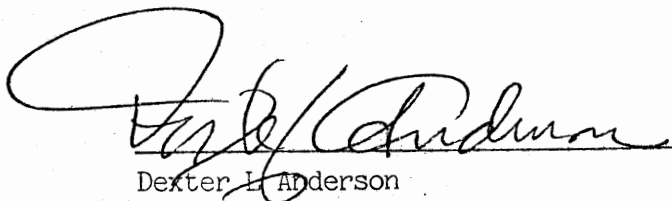
Appellant also takes the position that since he disputed the existence of a contract to remodel the house for a sum certain, and that the document was intended for other purposes, the Court erred in not submitting the issue of intent of the parties to the Jury.

Respectfully submitted this 30 day of June, 1980.



Dexter L. Anderson
Attorney for Defendant and Appellant

I hereby certify that I mailed two (2) true and correct copies of the foregoing document APPELLANT'S BRIEF to Eldon A. Eliason, Attorney for Plaintiff and Respondent, Delta, UT 84624, postage prepaid this 30 day of June, 1980.



Dexter L. Anderson