

1980

Taylor National, Inc. v. Jensen Brothers Construction Co. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

TAYLOR NATIONAL, INC., :

Plaintiff-Appellant, :

vs. :

JENSEN BROTHERS CONSTRUCTION :
COMPANY, a corporation, :

Defendant and Third Party
Plaintiff-Respondent, :

Case No. ¹⁷⁰⁹¹~~17,074~~

vs. :

JESSE R. HARRISON and WILLIAM :
J. SOULE, d/b/a VALUE REALTY :
and LEON HARWARD, :

Third Party Defendants, :
Third Party Plaintiffs, :
and Counterclaimants, :

vs. :

PAUL H. TAYLOR, JOHN DOES I :
through IV, whose true names :
are unknown, agents of Jensen :
Brothers Construction Company, :
a corporation, :

Third Party Defendants, :

LEON HARWARD, :

Third Party Defendant :
and Third Party Plain- :
tiff, :

vs. :

TAYLOR NATIONAL, INC., :

Plaintiff and Third :
Party Defendant. :

FILED

BRIEF OF APPELLANT

AUG 14 1980

APPEAL FROM THE JUDGMENT OF THE DISTRICT
COURT OF THE FOURTH JUDICIAL DISTRICT IN AND
FOR UTAH COUNTY, STATE OF UTAH,
HONORABLE J. ROBERT BULLOCK, JUDGE

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BRIEF OF APPELLANT

NATURE OF THE CASE

This is an action brought in the Fourth Judicial District Court by plaintiff-appellant, Taylor National, Inc., hereinafter referred to as plaintiff, against defendant-respondent Jensen Brothers Construction Company, hereinafter referred to as defendant, to enforce the provisions of a standard Utah County Board of Realtors Single Resident Listing Form and Sales Agency Contract. The contract provided for a commission to plaintiff pursuant to sale of the property involved and for attorney's fees in the event of breach. Jesse R. Harrison and William Soule, d/b/a Value Realty, and Leon Harward and Judith A. Harward were joined as Third Party Defendants, Third Party Plaintiffs and Counterclaimants.

DISPOSITION IN THE LOWER COURT

Judgment was rendered in favor of plaintiff, Taylor National, Inc., for commission in the amount of \$8,400.00 plus 6 percent (6%) interest to the date of judgment, but such judgment was limited in that plaintiff's right to execute on that judgment was indefinitely stayed, plaintiff was denied its statutory right of a lien on defendant's property, and the trial court furthermore refused to enforce the attorney's fee provision of the parties' contract. The date of the judgment sought to be reviewed is April 15, 1980.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks to have this court rule that the trial judge had no power or authority to issue an indefinite stay

of execution, thus denying plaintiff its inherent right to pursue judgment, that the trial court could not deny plaintiff its statutory right of a judgment lien on defendant's property, and that the provision for attorney's fees contained in the parties' contract should be enforced. Plaintiff, therefore, respectfully requests that such portions of the lower court's judgment be stricken and that plaintiff be allowed immediate execution on its judgment, granted a lien on defendant's property and be awarded reasonable attorney's fees pursuant to its contract.

STATEMENT OF FACTS

On approximately the 1st day of December, 1977, defendant, Jensen Brothers Construction Company, a corporation with its principal place of business in Utah County, listed with plaintiff, Taylor National, Inc., a corporation with its principal place of business in Utah County, certain real property for sale located at 1939 North 90 West, Orem, Utah, in accordance with a listing agreement. In July 1977, the parties entered into a standard Utah County Board of Realtors Single Residence Listing Form and Sales Agency Contract which specified that plaintiff was to receive a commission on the sale of said property, and provided for the award of attorney's fees in the event of a breach by either party. The portion of that contract providing for attorney's fees stated:

In the case of the employment of an attorney to enforce any of the terms of this agreement, I agree to a reasonable attorney's fee and all costs of collection.

(R. 80).

During the time such listing agreement was in effect, but after substantial work and effort on the part of plaintiff to sell said property, defendant sold the property to one Leon Harward, for the price of \$140,000.00. On the basis of the sale by defendant to Harward, plaintiff became entitled to commission of six percent (6%) of sale price, to-wit: \$8,400.00. (R. 7). Demand was made upon defendant to pay said commission and defendant failed and refused to do so. (R. 8).

Plaintiff in its complaint asked for the sum of \$8,400.00 plus the legal rate of interest on such sum and reasonable attorney's fees, by the terms of the listing agreement. (R. 8). Jesse R. Harrison and William J. Soule, d/b/a Value Realty, and Leon Harward and Judith A. Harward were joined as Third Party Defendants, Third Party Plaintiffs and Counterclaimants. Trial was held on December 12, 1979, before the Honorable Judge J. Robert Bullock. At that time plaintiff's counsel, Jackson Howard, testified as to reasonable attorney's fees. (R. 443). There were no objections to his testimony and, in fact, both parties stipulated that such amount was reasonable. (R. 446). On January 16, 1980, the trial court's original findings of fact, conclusions of law and judgment were rendered. Plaintiff's objections to such findings, conclusions and judgment were filed on January 22, 1980. The trial court's amended findings of fact, conclusions of law and judgment were rendered on April 15, 1980. (R. 151). In its amended judgment, the trial court stated:

Plaintiff, Taylor National, Inc., is entitled to a judgment against defendant Jensen Brothers Construction Company in the sum of \$8,400.00 plus 6% interest from and after December 9, 1977, to date of judgment, but limited in equity as follows:

a. Execution thereon should not issue against Jensen Brothers Construction Company and the same should not constitute a lien on real property owned by Jensen Brothers Construction Company.

b. Plaintiff, Taylor National, Inc., acting in the name and in behalf of Jensen Brothers Construction Company, should be entitled to pursue the judgment of Jensen Brothers Construction Company against third party defendants Leon Harward, Jesse R. Harrison and William J. Soule, d/b/a Value Realty and Continental Value Realty, for the benefit of plaintiff Taylor National, said plaintiff to apply the proceeds of any such recovery toward its judgment against defendant Jensen Brothers Construction Company.

(R. 299). (Emphasis added.) The trial court also refused to award plaintiff attorney's fees as provided in the contract between the parties. (R. 289).

Plaintiff objects to this judgment in its entirety on the grounds that the trial court had no authority to so limit its judgment, and on May 9, 1980, filed its notice of appeal. (R. 312).

POINT I

THE TRIAL COURT HAD NO POWER TO INDEFINITELY STAY PLAINTIFF'S ABILITY TO EXECUTE ON ITS JUDGMENT AND SUCH LIMITATION SHOULD, THEREFORE, BE STRICKEN.

The law in this State pertaining to the stay of executions is set forth in Rule 62(a), Utah Rules of Civil Procedure.

This rule states:

Execution or other proceedings to enforce a judgment may issue immediately upon the entry of the judgment, unless the court in its discretion and on such conditions for the security of the adverse property as are proper, otherwise directs.

An immediate execution is proper, therefore, unless the court authorizes a temporary stay of execution. Nothing in this rule contemplates an indefinite stay of execution on the judgment entered before it and there is no authority in this State which could sustain the indefinite stay of execution entered in this case.

The Utah Supreme Court has explicitly stated that the prevailing party in an action has a right to execute on its judgment and that a court may not refuse to do so, or grant an indefinite injunction. Johnson v. Johnson, 544 P.2d 65 (Utah 1975); Livermore v. Hodgkins, 54 Cal. 637, 638; Zent v. Zent, 281 N.W.2d 41 (Minn. 1938). The Utah Supreme Court in Ketchum Col. v. Christensen, 48 Utah 214, 159 P. 541 (1916), stated:

In any matter of litigation or dispute of which the inferior court has jurisdiction and it has regularly proceeded

to judgment and has judicially determined and declared the rights of the parties to the proceeding, then the court may not exercise its discretion with regard to whether it will or will not enforce a judgment thus regularly entered. When the judgment is once entered and under law is an enforceable judgment, the party in whose favor it is rendered has a clear right to have the same enforced and if anyone tries to interfere with that right it is also the clear duty of the court to enforce the judgment. . . . The court may not arbitrarily or capriciously or for any reason except a sufficient legal reason refuse to act when the fact is conceded that the enforcement or the enjoyment of the fruits of the judgment as the case may be, is denied. . . . To permit such a course would be tantamount to permitting a court to enter a judgment but thereafter deny its enforcement. . . . The law gives plaintiff the right to have the judgment enforced and imposes the duty upon the court to enforce it and no discretion is vested in the court whether it will enforce the judgment or not.

In People v. District Court, 46 Colo. 386, 104 P. 484 (1909) the Colorado Supreme Court restated the same general rule:

It is a mockery of justice to give one a judgment and then deny him the means of enforcement. Every court has the inherent power and authority and upon it rests the duty of enforcing its own judgments and decrees . . . were it otherwise, judgment and decrees of course would be empty and meaningless things.

It is the substantive right of a judgment creditor, therefore, to enforce collection of its judgment against any and all property of the debtor, and Rule 62(a), Utah Rules of Civil Procedure, cannot be construed to authorize an indefinite stay of execution. In Jones v. District Court of City and County of Denver, 135 Colo. 468, 312 P.2d 503

(1957) the Colorado Supreme Court addressed this issue:

No rule of procedure adopted by this court can be so construed as to curtail, repeal or limit the substantive rights and liabilities created by acts of the legislature. This court has no such power.

Only a temporary stay of execution is proper, therefore. In Conrad v. Medina, 47 A.2d 562 (Mun. Ct. App. Dist. Col. 1946) the court stated that a trial judge was correct in holding that he had no power to order an indefinite stay:

Courts have discretionary power to temporarily stay execution of their own judgments. The exercise of judicial discretion, however, must not be founded upon what an individual judge believes are abstract ideas of justice, but upon recognized legal or equitable principals. The principal grounds for which stays have been allowed are the pending of a timely appeal or motion, material facts occurring subsequent to the judgment and antecedent facts showing fraud in the rendition of the judgment or want of jurisdiction apparent on the record.

In Eaton v. Cleveland St. L. & K. C. Ry. Co. CC, 41 F. 421, 422 (Cir. Ct. E.D. Mo. 1890) the court stated:

While the power to temporarily stay execution on its judgment resides in every court, it must be conceded that it is a power that ought to be cautiously exercised, in other words, it ought not to be arbitrarily used, nor should an execution be withheld because it is inconvenient for a judgment debtor to pay his debts.

See also Sam Savin, Inc. v. Burdsal, 61 Ohio App. 539, 22 N.E.2d 914 (1939); Cutler Assoc. Inc. v. Merrill Trust Co., 395 A.2d 453 (Me. 1978).

It is proper by analogy to consider Federal Rule of Civil Procedure 62(a) and its interpretation by federal courts.

Winegar v. Slim Olson, Inc., 122 Utah 487, 252 P.2d 205

(1953). The federal rule grants a 10 day automatic stay of execution, but after the ten day period has expired and before the filing of a notice of appeal, the district court is without power to stay an execution of a final decree. In United States v. One 1962 Ford Galaxy Sedan, 41 F.R.D. 156 (S.D.N.Y. 1966) the government asserted that the solicitor general had not decided whether to appeal or not and argued that the court under its broad equity powers could stay execution until the government decided what it would do. Judge Tenney, however, ruled that the court had no power to grant a stay longer than the automatic ten day period provided for in the rule.

It is clear, therefore, that a district court has no power to grant an indefinite stay of execution, and that it is an inherent right in the prevailing party to execute on a judgment. In the case at bar, however, the trial judge stated that plaintiff, Taylor National, Inc., was entitled to a judgment against defendant Jensen Brothers Construction Company for the sum of \$8,400.00, plus 6% interest from and after December 9, 1977, except that it is inequitable for plaintiff to execute against Jensen Brothers Construction Company or otherwise take liens or encumber Jensen Brothers Construction Company assets as a result of any judgment in favor of plaintiff. (R. 290). This judgment is clearly

contrary to the established authority in this state and is devoid of meaning since it constitutes a total inconsistency. Plaintiff has a legal right to judgment and the trial court had no authority to invoke some vague equity power in an attempt to exercise control over the legal right of execution obtained by the plaintiff.

The court itself was confused as to whether it could rightfully issue an indefinite stay of execution, as evidenced by the Honorable Judge Bullock's statements. During the course of oral arguments following plaintiff's objection to the proposed findings of fact and conclusions of law, plaintiff's counsel, Jackson Howard addressed the Court:

MR. HOWARD: . . . if we have a right to judgment that is a legal right. Equity does not have any control over a legal right that is obtained . . . you can't deprive us of our rights under the law without due process. That is unconstitutional.

THE COURT: That may be.

MR. HOWARD: "17. The court finds . . ."

THE COURT: "I worry about that one."

(R. 816, 817). (Emphasis added.)

The trial court was confused as to whether plaintiff's right to execute was to be stayed until further order of the court or indefinitely. The judge first stated:

THE COURT: But you are restrained and enjoined from levying execution until further order of the court. And that is going to stay.

(R. 825). (Emphasis added.) Thereafter, however, the judge stated:

THE COURT: What about this, "application for further order of the court as herein provided"? Why did I do that: "plaintiff, Taylor National, Inc. should be and is restrained and enjoined from levying execution upon its judgment until further order of the court." . . . What did I have in mind? I can't remember.

(R. 825). (Emphasis added.) Thereafter the judge struck from the record the phrase, "until further order of the court", making the indefinite stay of execution even more ambiguous and vague.

Moreover, the trial judge reiterated that he was unsure of his power to issue an indefinite stay of execution:

THE COURT: . . . I intended it to be a judgment with no strings on it whatsoever, except when I got to paragraph 4; and I said in paragraph 4 that it would, that they are restrained and enjoined. And I don't know whether I have got that power or not. But, nevertheless, I did, restrained and enjoined from levying execution on the judgment . . . and that bothers me. Because I really don't know if I have the power to give a judgment and restrain them on execution on an equitable basis.

(R. 834).

The lower court, therefore, realized that it was without power to deny plaintiff its right to execute upon its judgment obtained against defendant. Such an indefinite restriction totally emasculates the judgment which plaintiff obtained against defendant. As such, these provisions render the judgment obtained by plaintiff useless, and are contrary to established precedent and public policy of this State. Plaintiff, therefore, respectfully requests that the portion

of the trial court's judgment denying it the right to execute on its judgment be stricken.

POINT II

THE TRIAL COURT WRONGFULLY PREVENTED JUDGMENT FROM OPERATING AS A LIEN ON DEFENDANT'S PROPERTY.

The law pertaining to judgment liens is set forth in U.C.A. 78-22-1, which unconditionally creates a judgment lien in favor of the prevailing party as against the real property of defendant. This section states:

From the time the judgment is docketed it becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in the county in which the judgment is entered, owned by him at the time or by him thereafter acquired during the existence of said lien. A transcript of judgment rendered in a district court of this state, in any county thereof, may be filed and docketed in the office of the clerk of the district court of any county, and when so filed and docketed it shall have, for purposes of lien and enforcement, the same force and effect as a judgment entered in the district court in such county. The lien shall continue for eight years unless the judgment is previously satisfied or unless the enforcement of the judgment is stayed on appeal by the execution of a sufficient undertaking as provided by law, in which case the lien of the judgment ceases.

Until the lien expires, therefore, the creditor is statutorily guaranteed a lien on the unexempt property of the debtor, existing at the time of the judgment or acquired thereafter. The Utah Supreme Court and the majority of

states with similar statutes have unconditionally upheld this legal principle. Gray v. Stevens, 5 Utah2d 361, 302 P.2d 273 (1956); Belnap v. Blaine, 575 P.2d 696 (Utah 1978); Yergensen v. Ford, 16 Utah2d 39, 402 P.2d 696, 698 (1965); Utah Co-Op Ass'n v. White Dist. and Supply Co., 120 Utah 603, 237 P.2d 262, cause remanded to Utah2d 391, 275 P.2d 687 (1954); Webster v. Roderick, 64 Wash.2d 814, 394 P.2d 689 (1964); Jones v. St. Francis Hospital and School of Nursing, Inc., 225 Kan. 649, 594 P.2d 162 (1979).

The same courts have held that such judgments liens are of a purely legal character and courts are not given the equitable power to expand or alter the judgment lien so as to make exceptions or qualifications for a particular case. Davidson v. Root, 11 Ohio 98; Boyle v. Bagg, 10 Utah2d 203, 350 P.2d 622 (1960); Conrad v. Everich, 50 Ohio St. 476, 35 N.E. 58 (1893); Savings and L. Corp. v. Bear, 155 Va. 312, 154 S.E. 587 (1930); Federal Farm Mortg. Corp. v. Walker, 115 Utah 461, 206 P.2d 146 (1949); Harris v. Southwest Bank, 133 Okla. 152, 271 P. 683 (1928). Even a temporary stay of execution or an injunction against enforcement does not necessarily result in the destruction of a lien predicated upon the judgment. Cook v. Martin, 75 Ark. 40, 87 S.W. 625 (1905); 46 Am.Jur.2d 518, Judgments, §325.

It has been clearly established, therefore, both by case law and statutory authority, that it is not within the trial court's discretion to blatantly disregard the statutorially granted lien on a judgment debtor's property. In the case at bar, however, the trial court granted plaintiff

a judgment in the amount of commission due against defendant Jensen Brothers Construction Company (R. 299), but indefinitely estopped plaintiff from pursuing such judgment and held that said judgment "should not constitute a lien on real property owned by Jensen Brothers Construction Company. (R. 299). Such a judgment is clearly erroneous since U.C.A. 78-22-1 cannot be abrogated by the action of the lower court. The court had no authority to make such a judgment since, by the operation of this statute, when the court's judgment was docketed in this action on June 26, 1980, a lien automatically arose upon all the real property owned by defendant Jensen Brothers Construction Company. By the very terms of the statute the lien arose and there is no authority in this state which would allow the trial court to abrogate the existence or effectiveness of such a lien. The judgment of the lower court purports to do so, however, and the nature of its restriction is to prevent any lien upon the property of the defendant from arising as an incident to the judgment rendered. Such restrictions are clearly contrary to §78-22-1 and established precedent, and the plaintiff, therefore, respectfully requests that such a decision by the trial court be stricken and reversed.

POINT III

THE TRIAL COURT WRONGFULLY REFUSED TO ENFORCE THE ATTORNEY'S FEE PROVISION INCLUDED IN THE PARTIES' CONTRACT.

In a law case, such as the case at bar, attorney's fees are properly awarded when an agreement or contract between

the parties so provides. Biesinger v. Behunin, 584 P.2d 801 (Utah 1978); Stubbs v. Hemmert, 567 P.2d 168 (Utah 1977). The Utah Supreme Court in Biesinger v. Behunin, supra, stated that a lower court erred in not awarding attorney's fees where there was a provision providing for such in the contract and where a sworn statement signed by the plaintiff's attorney was admitted into evidence along with direct testimony which clearly set forth the number of hours spent on the case and the attorney's hourly rate. Since this evidence remained uncontested by defendant, the Court stated that the judgment should properly have included attorney's fees.

Reasonable attorney's fees, therefore, should be allowed when the contract between the parties so provides, and such provisions should be given a broad rather than narrow or restrictive meaning. Kammert Bros. Enterprises, Inc. v. Tanque Verde Plaza Co., 102 Ariz. 301, 428 P.2d 678 (1967); Colvin v. Superior Equ. Co., 96 Ariz. 113, 392 P.2d 778 (1964); Commercial Standard Ins. Co., 86 Ariz. 288, 345 P.2d 210 (1959); Leventhal v. Krinsky, 325 Mass. 336, 90 N.E.2d 545 (1950); Fenner & Shea Const. Co. v. Wadkins, 32 Colo. App. 364, 511 P.2d 924 (1973); Zambruk v. Perlmutter 3rd Generation Builders, Inc., 32 Colo. App. 276, 510 P.2d 472 (1973).

The general rule, therefore, is that a provision in a contract or stipulation for the award of attorney's fees in the event of breach is valid; it is regarded as a reasonable

provision for reimbursement or indemnity to the creditor. For an extensive list of cases supporting this principal see 17 Am.Jur.2d 517 §164. These cases indicate that before enforcement of the provision will be allowed, certain facts must be established. The cases are not uniform as to what precise facts must be shown, but it is deducible from the decisions that a showing must be made as to one or more of the following: (1) that the fee or expenses were actually paid or a liability to pay them was incurred, (2) that the stipulated amount is reasonable, and (3) the value of the services rendered by the creditors attorney in connection with the collection of the debt. See 41 A.L.R.2d 303 §9. As long as these general requirements are met, as they have been in the case at bar, a provision within the body of a contract to pay an attorney's fee is a valid and binding obligation, not to be ignored by the court. The Utah Supreme Court in McCormick v. Swen, 36 Utah 6, 102 P. 626 (1909), stated:

Prima facie the amount agreed upon should be assumed as the proper fee to be allowed and unless it is clearly obvious to the court or is made to appear that the amount stipulated for is unjust, oppressive, or unreasonable in view of all the circumstances of the case the stipulated amount should be allowed.

A contract such as the one in the case at bar providing for attorney's fees to the prevailing party in event of a breach, is analogous to U.C.A. §78-37-9 which provides for attorney's fees in the event of breach or default in mortgage

foreclosure cases. In Mason v. Mason, 108 Utah 428, 160 P.2d 730 (1945), the Utah Supreme Court stated:

In view of the court's conclusion of law that the plaintiff was entitled to and did, pursuant to the terms of the note and mortgage, declare the entire principal and interest immediately due and that she was legally entitled to thereupon foreclose this mortgage, the contract for a reasonable attorney's fee in the event of foreclosure must be recognized . . . it follows as a matter of course that the court must find what is a reasonable attorney's fee and include such amount in its judgment.

Mason, supra at 733. (Emphasis added). See also Jensen v. Lichtenstein, 45 Utah 320, 145 P. 1036 (1915); Kurtz v. Ogden Canyon San. Co., 37 Utah 313, 108 P. 14 (1910).

In the case at bar, the contract between the parties provided:

In the case of the employment of an attorney to enforce any of the terms of this agreement, I agree to a reasonable attorney's fee and all costs of collection.

(R. 80).

The trial court granted judgment to plaintiff, Taylor National, Inc., but withheld reasonable attorney's fees.

(R. 289). During the trial on December 12, 1979, plaintiff's counsel, Jackson Howard, presented direct testimony as to the amount of attorney's fees:

MR. HOWARD: My name is Jackson Howard, I am a lawyer, I am licensed to practice in the State of Utah. I have been admitted to practice since June of 1950. I have been employed by Taylor National Real Estate Company to represent them in this matter. To date I

have spent 13-1/4 hours in their case and clerks in my office have spent 8-3/4 hours in this case. The Taylors have been billed for the services. I have rendered the sum of \$918.75, and for the services by other people in the office \$131.25, they have been billed costs and expenses on thereof \$146.10; for a total fee and cost total of \$1,050.00, plus \$146.10. It is my judgment that the charges made are reasonable and that the costs expended were necessary in order to pursue their cause of action. I believe that the charges made are compatible with charges made by lawyers of similar experience under similar circumstances and similar cases. It is my estimate that it will take at least ten more hours to complete the matters that are pending, including the time in court this day and reviewing findings of fact, conclusions of law and judgment at some subsequent date. That would indicate an additional amount of fee approximately \$750.00. I am available for cross-examination.

THE COURT: Do you care to cross-examine?

MR. NORTON: I have one question.

CROSS EXAMINATION

BY MR. NORTON:

Q. The deposition of Mr. Paul Taylor is a part of your cost?

A. Yes.

THE COURT: What is it? What are the costs?

MR. HOWARD: The costs are \$146.10. The expenditures have been for filing fees with the county clerk's office, for service fees, for a variety of copies of the documents that we have had to make, and for the depositions, the costs of Mr. Roundy at \$90.80.

THE COURT: \$90.80?

MR. HOWARD: \$90.80.

THE COURT: Okay. Anything further?

MR. NORTON: No further questions.

THE COURT: Do you have any?

MR. BRADFORD: No.

THE COURT: Okay, you may step down.

MR. HOWARD: Your honor, I have suggested, to counsel that I have contacted Mr. Ray Ivie, who said he would file an affidavit with the court here before concerning attorney's fees, and I would proffer that if he were called that the testimony that I have given concerning fees and that the fees stated are in fact reasonable, just and proper within the standards applicable to lawyers who practice in Utah county. If you want me to call him, I will. But I think he will just testify accordingly and I have his affidavit which I have heretofore filed. Would you stipulate that if he were called his testimony would be such?

MR. BRADFORD: I would so stipulate.

MR. NORTON: So stipulate.

MR. HOWARD: Thank you, your honor. Plaintiff rests.

(R. 443,444). (Emphasis added.)

It is clear and evident that no questions nor objections were raised as to Mr. Howard's testimony and that both parties stipulated that such fees were reasonable.

Since attorney's fees were an integral part of the contract between the parties, the court may not rightly give judgment in favor of plaintiff and refuse to enforce the

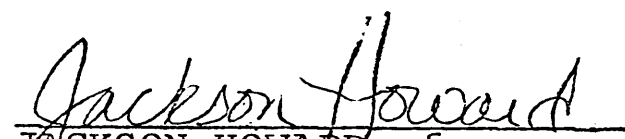
provision regarding such fees. The parties all agreed and stipulated that the proof in respect to the fees was reasonable, the only question for the court to decide, therefore, was whether plaintiffs were entitled to attorney's fees. Since the provision regarding such fees existed, it was valid and binding and the attorney's fees, as a matter of right, were to be awarded to plaintiff. The court cannot change the contract and bar plaintiff from enforcing the original provisions. Plaintiff is entitled to the benefits of its contract. Since the court granted judgment in favor of the plaintiff and stated that it was entitled to the commission which was the subject of the breach, it cannot deprive plaintiff of the attorney's fee, a material part of that contract.

CONCLUSION

The judgment of the trial court is highly inconsistent in this matter. The trial judge purports to allow for the enforcement of the contract against a breach by the defendant, Jensen Brothers Construction Company, but at the same time in the name of "equity" purports to deny execution of that judgment, takes away plaintiff's statutorily guaranteed right of a lien on defendant's property, and denies enforcement on the clause respecting attorney's fees. Plaintiff's action, however, is not an action in equity. An action to enforce a contract is an action at law, and the parties must be bound by the terms and provisions of their contract which are not against public policy or otherwise unenforceable in

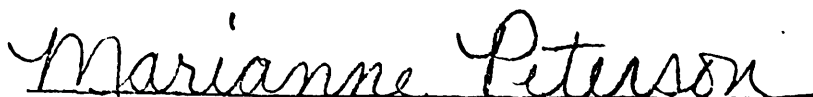
this state. The trial court was clearly against the established weight of authority in holding that plaintiff be indefinitely enjoined from executing on their judgment, and has no power to ignore U.C.A. §78-22-1 regarding judgment liens, nor does it have the authority to refuse enforcement of the attorney's fee provisions in its contract. Plaintiff therefore respectfully requests that these portions of the trial court's judgment be stricken and that plaintiff be allowed to execute on their judgment, be given their guaranteed lien against defendant's property, and be awarded a reasonable attorney's fee.

DATED this 11th day of August, 1980.


JACKSON HOWARD, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Plaintiff

MAILING CERTIFICATE

I hereby certify that on the 11th day of August, 1980, I personally mailed two (2) copies of the foregoing Brief of Appellant to Mr. A. Dennis Norton, Attorney for Defendant-Respondent, 200 South Main #700, Salt Lake City, Utah 84101.


SECRETARY