

1955

Royal Audrey Backus v. Gus S. Hooten and Ella H. Hooten : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

ROYAL AUDREY BACKUS,
Plaintiff and Appellant,

vs.

GUS S. HOOTEN and ELLA H.
HOOTEN,
Defendants and Respondents.

Case No. 8375

FILED

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BRIEF OF APPELLANT

Supreme Court, Utah

**ON APPEAL FROM THE DISTRICT COURT OF THE FIFTH
JUDICIAL DISTRICT OF THE STATE OF UTAH,
IN AND FOR BEAVER COUNTY.
HON. WILL H. HOYT, JUDGE**

CLINE, WILSON & CLINE,
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Attorney for Respondents

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In the Supreme Court of the State of Utah

ROYAL AUDREY BACKUS,
Plaintiff and Appellant,

vs.

GUS S. HOOTEN and ELLA H.
HOOTEN,
Defendants and Respondents.

Case No. 8375

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an appeal taken by the plaintiff from a judgment dated March 30th, 1955, and filed and entered April 4th, 1955, dismissing the plaintiff's complaint on the ground that said complaint does not state a claim on which relief can be granted, Hon. Will L. Hoyt, Judge. (Rec. 10).

For the purpose of this appeal all of the facts pleaded in plaintiff's complaint, excepting the allegations of Paragraph XI thereof, must be taken as true. Paragraph XI alleges a legal conclusion presenting a point of law which is the crux of this appeal.

The material allegations of the complaint are short, and for the convenience of the Court we deem it advisable to set them forth verbatim.

Comes now the plaintiff above named, and for cause of action against the defendants and each of them, alleges:

1. That the said defendants are now and have been during all of the times herein stated, husband and wife, and residents within Beaver County, State of Utah;

2. That on or about the 1st day of November, 1952, and prior thereto, one Jerry Busby was in the business of levelling land and making improvements on lands so that the same would be susceptible of irrigation and proper cultivation; that on or about the 1st day of November, 1952, the defendants herein entered into a contract with the said Jerry Busby by which said Busby was to level a number of acres of land for them on their premises situated in Beaver County, Utah, and more particularly described as the north one-half of the northeast one-quarter of Section 36, Township 28 South of Range 11 West, S. L. M., for a sum far in excess of Five Hundred Dollars (\$500.00), the exact amount of which this plaintiff does not know;

3. That the defendants herein did not obtain from the said contractor, Jerry Busby, the bond for the benefit of themselves, as the owners of said land, and for the benefit of those who would furnish materials and labor in the performance of said contract as contemplated by and required by Chapter 2, Title 14, Sections 14-2-1 and 14-2-2, R. S.

U. 1953;

4. That the said contractor, Jerry Busby, was insolvent, and depended for necessary labor and materials and machinery and equipment to complete his said contract, upon such credit as he might obtain from laborers, materialmen, and those able to furnish him with the necessary machinery and equipment and upon their reliance of a right to the statutory bond aforesaid conditioned for the payment of their accounts.

5. That this plaintiff extended credit to the said Jerry Busby, and delivered to him certain machinery and equipment to be used and which were used in levelling of defendants' said lands and thus making improvements thereon, believing that the said defendants herein had either procured a bond, as provided by the act aforesaid, or that they would themselves be responsible for the reasonable rental value of the said machinery and equipment thus used for the benefit of their premises.

6. That this plaintiff delivered the said machinery and equipment to the said contractor Busby on or about November 1st, 1952, and that plaintiff is informed and believes and therefore alleges that the said Busby used machinery and equipment in the levelling of said lands commencing with the said date, and continually thereafter until December 15th, 1952.

7. That the said Contractor Busby agreed to pay for the rental of the said machinery and equipment the sum of \$850.00, and which sum was the reasonable rental value thereof for the period it was so used; that no part of the said sum has been paid by the said Busby, or anyone in his behalf, or

by the defendants herein, excepting the sum of \$408.00, thus leaving a balance of \$442.00 remaining unpaid, all of which said sum is now due and payable.

8. That plaintiff is informed and believes and therefore alleges that the contract price for leveling said lands, stipulated for between the defendants and said contractor, if devoted entirely to the payment of labor and materials and the rental of said machinery, would have paid said accounts in full; that during the progress of said work, the defendants paid or caused to be paid to the contractor some of the contract price, but took no precautions to have the said contractor pay this plaintiff's account in full, or in the event the said defendants did not pay the said contractor any part of said contract price, then they have received the benefit of the work so done by the contractor as aforesaid without paying anything therefor;

9. That after commencing the said contract as aforesaid the said contractor defaulted in the full performance of his contract, leaving the contract only partially performed and some of the work uncompleted, and that the said defendants were compelled to and did thereafter complete the said work, or cause the same to be done.

10. That by reason of the said defendant's failing to procure a bond from said Busby, as provided by the statute, they were unable to compel the said Busby, or his sureties, to complete the contract; and by reason of the foregoing conditions this plaintiff has no means of collecting her account as aforesaid, except from the said defendants.

11. That under the said statute as aforesaid, and

by reason of the foregoing conditions and facts, the said defendants are personally liable to this plaintiff for the balance due her as the reasonable rental value of the said machinery and equipment as aforesaid. (Rec. 3-6).

The defendants filed a motion to dismiss the complaint upon the ground that it failed to state a claim upon which relief could be granted. (Rec. 7).

Thereafter the motion was argued and submitted to the Court, who filed a memorandum of decision thereon and held that the complaint did not state a claim upon which relief could be granted and ordered the complaint dismissed. (Rec. 9).

Accordingly, the Court then made its written order sustaining the motion and dismissing the complaint, and "ordered, adjudged and decreed that * * * the complaint be and the same is hereby dismissed." (Rec. 10).

From the above order and judgment this appeal is prosecuted.

**STATEMENT OF THE POINT RELIED UPON
BY APPELLANT**

That the Trial Court erred in determining and holding that the complaint did not state a claim upon which relief could be granted;

That the Trial Court erred in granting the respond-

ents' motion to dismiss the complaint;

That the Trial Court erred in making and entering its judgment dismissing said complaint.

The above points involve but one legal principle, and can and should be argued together.

ARGUMENT

The plaintiff contends her complaint states a cause of action against the defendants, under the provisions of Section 14-2-1 and Section 14-2-2, U.C.A. 1953. The defendants contend to the contrary.

The material portions of the above statutory provisions are:

14-2-1. The owner of any interest in land entering into a contract, involving \$500 or more, for the construction, addition to, or alteration or repair of any building, structure or improvement upon land shall, before any such work is commenced, obtain from the contractor a bond in a sum equal to the contract price, with good and sufficient sureties, conditioned for the faithful performance of the contract and prompt payment for material furnished and labor performed under the contract. Such bond shall run to the owner and to all other persons as their interest may appear; and any person who has furnished materials or performed labor for or upon any such building, structure or improvement, payment for which has not been made, shall have a direct right of action against the sureties upon such bond for the reasonable value

of the materials furnished or labor performed, not exceeding, however, in any case the prices agreed upon;

14-2-2. Any person subject to the provisions of this chapter, who shall fail to obtain such good and sufficient bond * * * shall be personally liable to all persons who have furnished materials or performed labor under the contract for the reasonable value of such materials furnished or labor performed, not exceeding, however, in any case the prices agreed upon.

It becomes necessary to construe Sec. 14-2-1 and to determine whether a most strict and narrow construction shall be given to the terms *or improvement upon land and labor performed under the contract*, or whether a liberal construction shall be given to these provisions of the statute to effectuate the obvious intent of the statute.

The complaint alleges that the defendants entered into a contract with one Busby, a contractor, to level a number of acres of land for them on their premises and that the contract price was a sum far in excess of \$500.00; that the bond contemplated by Section 14-2-1 was not exacted from the contractor; that the plaintiff furnished and delivered to the contractor certain machinery and equipment which was used in the levelling of the defendants' land and making improvements thereon, the same being furnished on credit believing that the defendants had either procured the statutory bond or that they themselves would be responsible for the reasonable rental

value of the machinery and equipment; that the contractor agreed to pay for the rental of the machinery and equipment the reasonable value thereof, to-wit, \$850.00, no part of which was paid excepting \$408.00, leaving a balance of \$442.00; that the contractor defaulted in the work which defendants completed, and because of the contractor's insolvency plaintiff has no means of collecting her account except from the defendants.

The complaint does not go into detail as to how or in what manner or to what extent the levelling of land is an improvement; but if the defendants by answer or at a pre-trial contend that such work is not a permanent improvement, then at a trial the plaintiff would provide such evidence in detail. Also at a trial the plaintiff would prove that the heavy and expensive power machinery would be considerably more economical, efficient and speedy than the old method of levelling ground by hand or by team and scraper or Fresno. Also the plaintiff could prove at a trial, if it was denied, that the work done was a permanent improvement, that farming lands could not be efficiently irrigated unless lands were levelled and that such permanent improvement was economical, necessary and valuable, effecting a very considerable saving in the use of water.

We believe the Court can take judicial notice that the levelling of land is a permanent improvement, and

that such work is commonly and generally done by power machinery and what is commonly known as "land planes" powered by tractors. Unlike plowing of land, planting of crops, etc., which likely could be classified as annual work and not an improvement in the sense contemplated by the statute, the levelling of land is as permanent an improvement upon land as would be the construction of a reservoir or the excavation necessary for a cellar or basement under a home.

We cannot believe that the word "improvement" upon land following the words "building, structure" was ever intended to be limited to a building or structure or something of that nature built *upon* the ground. It will no doubt be contended by the defendants that the language "construction" of an improvement should be given a strict interpretation as being limited to erecting some building or placing something on the ground by and with new materials. We contend that when earth is moved, high spots in land removed, low spots filled in, and the contour of the ground made level for good irrigation that the work done is *the construction of an improvement on land*.

The Utah Supreme Court has had occasion to construe and rule upon the statute in question in two cases, to-wit: *Rio Grande vs. Darke*, 50 Utah 114, 167 Pac. 241, and *Liberty Coal and Lumber Co. vs. Snow*, 53 Utah 298,

178 Pac. 341.

In the *Rio Grande vs. Darke* case the primary question was whether the statute was constitutional. However, Justice Thurman, in a well considered opinion, made the following observation (page 246 of 167 Pac.):

“The aim and purpose of our mechanic’s lien law manifestly has been to protect, at all hazards, those who perform the labor and furnish the materials which enter into the construction of a building or other improvement.”

In the *Liberty Coal vs. Snow* case the factual situation is different, but the court made the following general observations concerning the statute in question:

“A mere cursory reading of Section 1 of said chapter shows that its terms are very broad and sweeping. * * * The purpose of the statute is to prevent the owners of land from having their lands improved with the materials and labor furnished by third persons, and thus to enhance the value of such lands, without becoming personally responsible for the reasonable value of the materials and labor which enhances the value of those lands. The owner may, however, escape personal liability by obtaining the bond required by the statute * * *”

This Court in the case of *Mellen vs. Vondor-Horst Bros., et al.*, 44 Utah 300, 140 Pac. 130, in construing Section 1400x Compiled Laws of Utah, 1907, which was the forerunner of 14-1-1 U.C.A. 1953, stated:

“The statute we have quoted is, in and of itself, highly remedial, and must thus, in furtherance of justice, receive a liberal construction and application so as to accomplish its real purpose and object.”

In principle the same rule of construction should be applied to Section 14-2-1; the only difference being that Sec. 14-1-1 deals with contracts pertaining to public work, buildings, etc., and Section 14-2-1 deals with private contracts—each section providing for a bond to protect those furnishing labor and/or materials, and each section followed by another section creating a direct liability for failure to procure such bond. (See Sections 14-1-3 and 14-2-2 U. C.A. 1953).

Most certainly an individual under the private contract statutes is not and should not be in a more enviable and favorable position than a county, municipal corporation, board of education or state institution, board or association under the public contract statutes.

There can be no question that Section 14-2-1 is a highly remedial statute, and should receive a liberal construction and application so as to accomplish its real purpose and objection. Moreover, such a statute should be governed by the same principles of liberal construction as the mechanic's lien law since it is designed to protect persons furnishing labor and/or materials for the benefit of a land owner. In *Utah-Pacific Digest*, Vol.

26, Sec. 5, will be found numerous cases from all Western jurisdictions holding "the lien of mechanics, artisans and materialmen, is favored in law, because those parties have, in part, created the very property on which the lien attaches" and "lien statutes being remedial in their nature, should be liberally construed" and "lien statutes, being equitable in purpose and remedial in nature, are to receive a liberal construction."

This Court has expressed itself on the question in the case of *Elwell vs. Morrow*, 28 Utah 278; 78 Pac. 605, in which it is said:

"The weight of authority is to the effect that the well established rule that remedial provisions of statutes are to be liberally construed applies to and should be followed in proceedings to foreclose mechanics' liens."

It was contended before the trial court that the plaintiff having furnished machinery and equipment to the contractor is not protected by and does not come within the purview of Sec. 14-2-1 because the bond which is required thereby shall be conditioned for the faithful performance of the contract and prompt payment for material furnished and labor performed thereunder; and that the furnishing of machinery and equipment on a rental basis is neither furnishing material or performing labor.

We assume that a land owner who has completely ignored the provisions of Section 14-2-1 and failed to

protect himself by taking a bond from the contractor, cannot claim to be in a more favorable position than the surety who executes the bond for the benefit of the contractor. What is the liability of the surety who executes a bond "conditioned for the faithful performance of the contract and prompt payment for material furnished and labor performed under the contract," as required by the statute? Is not the liability of the land owner equal to that of the surety, or may the land owner reap an advantage by failing to procure the bond?

We think the answer is to be found in the case of *J. F. Tolton Inv. Co. vs. Maryland Casualty Co.*, 77 Utah 226, 293 Pac. 611. This case was decided in 1930, and has never been overruled or modified, in whole or in part. On the contrary it is cited with approval in the case of *McCormick Saeltzer Co. vs. Haidlen*, 6 Pac. 2nd 255 (Cal), and the same rule followed in *Shoshone Lumber Co. vs. Fidelity & Deposit Co. of Maryland*, 24 Pac. 2nd 690 (Wyo.).

Referring to the *Tolton vs. Maryland Casualty* case, supra, a bond was given pursuant to the provisions of Sec. 14-1-1 on a road building project. The contractor subcontracted a portion of the job and the defendant Maryland Casualty Co., as surety, executed a bond conditioned that the subcontractor "shall well and truly pay all and every person furnishing material or performing

labor in and about the construction of said roadway all and every sum or sums of money due him, them or any of them for all such labor and materials for which the subcontractor is liable." The statute requires a bond conditioned "that the contractor will promptly make payment to all persons supplying labor or materials used in the prosecution of the work." We see no difference between the statutory language and that used in the bond in question, so far as the conditions are concerned.

A claim was made by the plaintiff and its assignors, that the surety was liable under the terms of the bond for small parts and accessories for automobiles and trucks used in the work, for gasoline, oil and grease for use in machinery used on the job, for hauling coal, oil and grease from railroad to highway construction, and *for rental for engine used by highway subcontractor in constructing the highway*, as well as for groceries and supplies furnished for boarding house conducted by the subcontractor.

The claim was resisted on the ground that these items did not constitute either labor or materials used in the prosecution of the work. In sustaining the plaintiff's right to look to the surety for payment of these items, this court went far beyond the liability claimed in the case at bar against the land owner. However, since one of the claims involved was for the rental of an en-

gine, we deem it appropriate to quote from the Court's opinion on that point:

“The last item in dispute is the plaintiff's claim amounting to \$74.25, the balance due for rental of an engine used on the job. As in the case of most of the other items in dispute, there is a conflict in the decisions as to whether a charge of this kind is within the contractor's bond. There are many cases upon the subject which are collected in an annotation found in 44 A.L.R. 381. Without further reference to the cases it may be said that under the liberal statute of interpretation to which we are committed, we conclude that the charge in question is within the obligation of the bond and that the surety was properly held liable therefor.”

This court also stated:

“As a general proposition, bonds of this kind do not secure payment for permanent equipment furnished the contractor * * * The purpose and intent of the bond is to secure payment for those things which go into the work or contribute to its completion.”

The Court in the Tolton case reviewed the large number of cases cited by both the appellant and the respondent, and it would serve no useful purpose to quote at length from that opinion since no doubt the case itself will be read, analyzed and digested by this Court. Suffice it to say that this Court has announced what it believes to be the weight of authority and is committed to

the liberal doctrine.

In the later California case, *McCormick Saeltzer Co. vs. Haidlen*, 6 Pac. 2nd 256, the same question was before the court, and the court said:

“The rule seems to be now well established that bonds furnished under the Public Works Act of this State are to be liberally construed to effect the manifest purpose of the statute; the theory being that the statute here under consideration was intended to cover all those things which contributed to the improvement, whether directly or physically going into the construction, or indirectly by being entirely used or consumed in the construction. (Citing numerous cases), In a number of these cases it was held that rental of machinery, money expended on the hiring of teams, money spent for provisions, equipment, etc., are all recoverable against the surety.”

National Surety vs. Bratnobar Lumber Co., 122 Pac. 337 (Wash), involves a claim for furnishing horses on a job.

Multnomah County vs. United States F & G Co., 180 Pac. 104 (Ore.), involves a claim for horses rented and held that services of horses constituted “labor” within the meaning of the bond.

We believe the Oregon Supreme Court in the case of *Multnomah County vs. U. S. F & G Co.*, 170 Pac. 525, at page 527, has stated the situation with greater clarity

and emphasis than could the plaintiff, and we quote:

“According to the strict legal definition of the term “labor and material” the use of the engine would not be embraced therein. There can be no question but that the service of the machine in the actual grading of the highway, as alleged in the complaint, is covered by the language of the contract and bond * * * Statutes like the one in question have usually been and should be given a liberal construction so as to carry out the legislative intent and effect the purpose contemplated by the law. * * * In the case at bar if the work mentioned had been performed by the exercise of the muscles of laborers, there would have been no question but that the same was protected by the statute. With the hard surface road pavement coming into vogue, new methods of road construction utilizing high power machinery, equipment and appliances have superseded the old mode of construction with pick and shovel. It seems to us that it was intended by the enactment, as expressed by the lawmakers, that the construction of an improvement, such as a paved highway, should be paid for; that in order to carry out the intent of the law it was the right and duty of the county officials to require a bond protecting the payment of obligations incurred for labor or material approximating the construction work. Plainly the bond and contract in question made such provisions and nominated the item sued for. The language of the statute indicates that the lawmakers had in mind the modern conditions prevailing at the time of the enactment. (And on page 526 of 170 Pac. in this case, it is said: The act and the bond are susceptible of a more liberal construction than the lien statutes).

In *Fuller vs. Brooks*, 246 Pac. 369 (Okl), the same question was before the court and it was urged that the defendants were only liable under the statutory bond for the value of such material as was used in the improvement and cited several cases to support this contention. The court said:

“Several of the cases involve the enforcement of mechanic’s lien between materialmen and the owners of the improvements. The defendants desire to make the rule applicable to the enforcement of the mechanic’s lien, as the guide in construing the bonds given pursuant to Section 7486, *supra*. The liability upon a bond given pursuant to Section 7486 is not always measured by the rule applicable to the enforcement of the mechanic’s lien between the owner of the improvements and the materialmen. There is a distinction to some extent between the principles applying in the respective cases. * * * The rule for determining the defendant’s liability for the value of the material involves in this case is whether the particular materials were consumed in the course of the construction of the improvements. We cannot see any difference between the nature of human force and mechanical force expended in the construction of a public improvement. Certainly the defendants are liable for the physical efforts of the laborers. We cannot see any distinction between individual force consumed and expended and that of mechanical force and power expended and consumed in doing the same work. In fact, common experience has proven that much of the labor formerly done by persons can be accomplished by mechanical means for less expense.”

We concede that most of the cases cited, particularly those having to do with the question of whether rentals for machinery shall be considered as "furnishing material or performing labor," are cases in which bonds were given under the *public contracts* statute and not under the *private contracts* statute. It will be noted that our public contracts statute (Sec. 14-1-1) is designated as "Bond to protect mechanics and materialmen." Our private contracts statute (Sec. 14-2-1) has the identical designation. There can be no question but what the object and purpose of each statute is the same and the conditions of the bond required is the same, to-wit: "for the faithful performance of the contract and for the prompt payment for material furnished and labor performed under the contract. The language of the two statutes differ slightly in the manner of expression, but the difference is in words only, not intent or substance. The one substantial difference is that under the public contracts statute, a bond is required irrespective of amount since no lien can attach to public works, and under the private contracts statute the bond is required when the amount is in excess of \$500.00. We submit, therefore, that the principles governing the construction and interpretation of the public works statute are controlling in the construction and interpretation of the private contracts statute.

CONCLUSION

We conclude, therefore, that the plaintiff's complaint does state facts sufficient to entitle her to the relief sought, that is, the unpaid rental value of the machinery furnished and we submit that the judgment should be reversed and the case remanded for further proceedings.

Respectfully submitted,

CLINE, WILSON & CLINE,

Attorneys for Appellant.