

1956

Richard Whipple v. Harold Fuller : Brief of Appellant

Utah Supreme Court

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Case No. 8409

In The Supreme Court of the State of Utah

FILED

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RICHARD WHIPLE,

Plaintiff and Respondent,

— vs. —

HAROLD FULLER,

Defendant and Appellant,

— vs. —

DON C. CHRISTENSEN,

Third Party Defendant
and Respondent.

Clerk, Supreme Court, Utah

APPELLANT'S BRIEF

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Received two copies of the foregoing brief this day
of February, 1956.

Respondent

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In The Supreme Court of the State of Utah

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Plaintiff and Respondent,

— vs. —

HAROLD FULLER,

Defendant and Appellant,

— vs. —

DON C. CHRISTENSEN,

Third Party Defendant
and Respondent.

Case
No. 8409

APPELLANT'S BRIEF

STATEMENT OF FACTS

On June 3, 1951, Richard Whipple, respondent and plaintiff, entered into a written sub-contract agreement with Don C. Christensen, respondent and third party defendant, a licensed contractor, thereby undertaking to furnish, install, alter, change, repair and remove certain plumbing and plumbing fixtures in, to, on and about a building owned by Harold Fuller, appellant and defendant, in Salt Lake City, Utah, for the agreed contract sum of \$1,513.00 and that the said plaintiff did so furnish, install, alter, change, repair and remove said plumbing and plumbing

fixtures. Defendant had theretofore entered into a contract with third party defendant and others for the remodeling of said building in the sum of \$5,770.00 which has been paid to the third party defendant. Defendant did not take out a bond at the time of his contract with the third party defendant. On June 3, 1951, plaintiff was a licensed journeyman plumber but had not applied for a contractor's license, nor has he since been licensed as such. Plaintiff alleged in his complaint that he was a licensed contractor and sought recovery in the amount of \$1,646.50 and interest on the contract. Prior to hearing evidence the Trial Court granted the plaintiff's motion to amend over the defendant's objection based on surprise and the complaint was amended to include an allegation that the agreed contract sum was the fair and reasonable value of the services rendered and a prayer for judgment for reasonable value. Prior to the trial at the request of counsel for third party defendant an indemnity agreement between defendant and third party defendant was admitted in evidence by the stipulation of all parties and was used and referred to throughout the trial. The contract read, in part, "It is expressly understood that the parties of the first part (third party defendant and wife) will save the party of the second part (defendant) harmless from any claims of laborers or materialmen arising out of the remodeling . . . of the building at 105 "B" Street in Salt Lake City, Utah." At the close of plaintiff's evidence defendant moved for a judgment of non-suit on the grounds that the plaintiff had not proved that he was a licensed contractor and moved for leave to amend his complaint to plead and seek recovery against the third party defendant on the contract admitted and used by stipulation. The Trial Court denied both mo-

tions. Judgment was rendered for the plaintiff and against the defendant in the amount of \$1,350.00 and for the third party defendant and against the defendant, no cause of action. From these orders and judgments defendant appeals.

STATEMENT OF POINTS

I

PLAINTIFF, AN UNLICENSED SUB-CONTRACTOR, COULD NOT MAINTAIN AN ACTION AGAINST THE DEFENDANT AND THE COURT ERRED IN NOT GRANTING A NON-SUIT AND IN GRANTING JUDGMENT IN FAVOR OF THE PLAINTIFF.

II

THE COURT ERRED IN GRANTING PLAINTIFF'S MOTION TO AMEND HIS COMPLAINT AND IN DENYING DEFENDANTS MOTION TO AMEND HIS THIRD PARTY COMPLAINT.

ARGUMENT

I

PLAINTIFF, AN UNLICENSED SUB-CONTRACTOR, COULD NOT MAINTAIN AN ACTION AGAINST THE DEFENDANT AND THE COURT ERRED IN NOT GRANTING A NON-SUIT AND IN GRANTING JUDGMENT IN FAVOR OF THE PLAINTIFF.

The plaintiff introduced no evidence that he was a licensed contractor and the defendant introduced uncontradicted evidence that the plaintiff had never been licensed prior to

the time of trial, nor had the plaintiff ever applied for a contractor's license.

Section 58-6-1, Utah Code Annotated, 1953, provides that "It shall be unlawful for any person . . . to enage in the business or act in the capacity of contractor . . . without having a license therefor" and U. C. A. 1953, 58-6-10, provides penalties of fine and imprisonment, or both, for acting in such a capacity while unlicensed. A contractor is defined in 58-6-3 U. C. A., as follows:

"A contractor . . . is a person . . . who for a fixed sum . . . undertakes with another for the construction, alteration, repair, addition to or improvement, of any building . . . or other structure . . . or any part thereof; provided, that the term contractor . . . shall include sub-contractor"

That the plaintiff was acting as a contractor within the meaning of the code is attested to by the term of his contract, the allegations of his complaint and his stipulations on appeal. It cannot be argued with any less impunity that a licensed plumber is exempt from securing a contractors license while acting as such than it can be that a licensed doctor, dentist or optometrist would be exempt from securing such a license under similar circumstances. That the legislature intended such a construction is manifest in the language of U. C. A. 1953, 58-18-14, (regulating plumbers) enacted in 1937, four years after the act regulating contractors was on the books, which reads:

"The general provisions of Title 58, . . . including the prohibitions and penalties thereof, shall be applicable to the administration and enforcement of this act, in so far as they are not in conflict herewith."

The one act is obviously designed to protect the public from bad plumbing and the other to protect it from bad contractors and sub-contractors. Inversely, a licensed contractor could surely not maintain that he did not need a license to do actual plumbing work. Further, the penalty for acting as a contractor without a license is a \$500.00 fine, U. C. A., 58-6-10, while the penalty for carrying on the trade of plumbing without a certificate is a \$300.00 fine, U. C. A. 1953, 58-18-14 and 58-1-39. The two sections are also distinguishable in the causes for which licenses issued thereunder may be revoked, U. C. A. 1953, 58-6-6, and 58-18-8. In the California case *Kirman V. Borzage*, 65CA.2d 156 150 P. 2d 3, the Second District Court of Appeals in applying similar licensing statutes ruled that a licensed plumber could not maintain any action in the courts resulting from undertaking to do plumbing work on a contract basis without showing that the plumber had a contractor's license. To argue that the work done by the plaintiff was done under a prime contractor who was licensed and that the plaintiff is thus exempt from the provisions of the act requiring contractors to obtain licenses as such is to reduce the language of the legislature whereby "subcontractors" are specifically included within the scope of the act to complete absurdity and meaninglessness since there can never be a subcontractor without a prime contractor and hence all subcontractors could escape the clear intent of the statute by the means of this guise.

The Supreme Court of this state has twice ruled that the contracts of persons who fall within the prohibition of the act regulating contractors and who fail to comply with its provisions are void and has wisely based such decisions on the strong public policy of not allowing a violator of a statute prohibiting specific acts to recover anything from the public,

whose protection the statute contemplates, for the commission of the specific acts prohibited by the statute. *Olsen v. Reese*, 114 U. 411, 200 P. 2d 733, and *Eklund v. Elwell*, 116 U. 521, 211 P. 2d 849. The general rule in such cases is clearly set forth in 30 A. L. R. 843, and in 42 A. L. R. at page 1227:

“It is well settled that, where the statute is enacted for the protection of the public, and expressly prohibits under penalty, and there is nothing in the language which indicates an intent to limit its scope to the exaction of a penalty . . . and there is nothing in the subject matter to justify a presumed intent on the part of the law makers to relieve the wrongdoer from the ordinary consequences of a forbidden act, a contract made without having procured the required license *creates no right of action which a court of justice will enforce.*” (Italics supplied by appellant);

and in 53 CORPUS JURIS SECUNDUM 714:

“Where a contract is unenforceable by one of the parties thereto by reason of his noncompliance with a license . . . law, *such party may not recover for services which he has performed under such contract.*” (Italics supplied by the appellant.)

The rule rests squarely and soundly on the compelling public policy of denying relief indirectly as against one of a group protected by the licensing act on behalf of the unlicensed plaintiff through the guise of the implied promise of the quantum counts or unjust enrichment that which such plaintiff cannot recover directly on his contract. In other words where the legislature has passed a constitutional act for the protection of the public making unlawful and penalizing certain acts of business and professional people and such people can protect themselves against the criminal and civil consequences thereof

by the simple expedient of complying with the act, the courts will not dignify the prohibited actions by intervening on the criminal's behalf and permit him to recover on his contract or upon any other grounds at the expense of one whom the statute is clearly designed to protect. It would make little sense indeed to declare the contracts of unlicensed persons void and unforceable on the grounds that the courts will not dignify an illegal act by enforcing the criminal's contract rights and then erect an enforceable implied contract or promise to pay for the benefits derived by the defendant from the plaintiff's criminal acts.

Thus in *Sherwood v. Wise*, 132 W. 295 232 P 309, decided in 1925, an unlicensed architect was precluded from recovering either his contract price or the reasonable value of his services performed thereunder. In *Alvarado v. Davis*, 115 C. A. 782, 6P. 2d 121, it was held that a statute similar to the Utah Statute was for the protection of the public and the Court said:

“We need not decide whether the lien was timely, because the failure to comply with the act relating to the registration and licensing of contractors *bars recovery*.”
(Italics supplied by appellant)

In *Cash v. Blackett*, 87 C. A. 2d. 233, 196 P. 2d 585, an unlicensed California contractor was precluded from foreclosing a mechanic's lien since the work done grew out of an unenforceable contract. An unlicensed architect has no right of action to recover for his services. *Gionti v. Crown Motor Co.*, New Jersey 1942, 26 A. 2d 282. The following language was used in *Board of Education v .Elliot* a Kentucky case decided in 1939, 276 Ky. 790, 125 S. W. 2d 733:

“The purpose of the act requiring architects to be licensed is to safeguard life, health and property, and one

assuming to act as an architect, who has not procured a license, cannot maintain an action for services."

In *Harris v. Clark*, 81 Ind. A. 494, 142 N. E. 881, decided in 1924, it was held that an unlicensed attorney could not recover either upon his contract or upon an implied promise to pay for the reasonable value of legal services performed. *Baer v. Tippet*, 34 C. A. 2d 33, 92 P. 2d 1028, decided in 1939 not only held that an unlicensed architect has no right of recovery for his services but refused to allow the reasonable value of his services as a contractor since the contract in question called for the performance of both types of services even though the plaintiff was licensed as a contractor at the time. The Pennsylvania Court was faced with the construction of statutes similar to the ones in question wherein penalties of jail and fines were imposed on the practice of engineering and architecture without a license and the plaintiff brought an action in assumpsit (quantum counts) in a case decided in 1940, and the Court held:

"It is well settled that the courts will not lend their aid to the enforcement of unlawful contracts which are founded upon transactions in violation of a public policy declared by the legislature . . . "The clear purpose and intent of the act . . . is that the transaction of business contrary to law should not receive the aid of courts, by permitting recovery of commissions . . . " (quoting *Golder v. Rabinowitz*, 190 A. 407:) There is no force to plaintiffs contention that the penalties imposed by these statutes are intended to be the sole punishment for infractions thereof. If the courts were to enforce such unlawful contracts the relatively small fine to which violators of the law are made subject would be insufficient to discourage repeated violations . . . it would be a hardship if defendant were permitted to evade a just obligation . . . But it is a hardship created by

plaintiffs own conduct and not by the harshness of the rule of law.” *F. F. Bollinger Co. v. Widman Corp.*, 14 A. 2d 81.

Hickey v. Sutton, 210 N. W. 704, decided in Wisconsin in 1926, cites *Sherwood v. Wise*, supra, with approval and goes on to say:

“There is no conflict in the authorities upon the rule that the failure to procure a license bars recovery where the license is exacted as a police measure for the protection of the public . . . The rule applies with equal force whether the requirement is sought upon contract or upon quantum meruit. If the necessity of procuring a license could be avoided by neglecting to make the contract and then recovering upon quantum meruit, an easy way would be found to nullify the statute.”

It was held that an Idaho collection agency who had not procured the proper license under an act making such failure a misdemeanor could not sue in any court. *Goranson v. Brady-McGowan Co.*, 48 I. 261, 281 P. 370, wherein the Court said:

“Compliance with and enforcement of the statute is as effectively accomplished by not allowing an unauthorized party to carry on the collection business or sue in connection therewith as to not allow such person to collect compensation therefor after the services have been rendered.”

The general rule laid down in the case of contracts and rights of unlicensed persons is simply an application of the broader general rule which is expressed in 12 AMERICAN JURISPRUDENCE 713, Section 209:

The maxims “ex turpi causa non oritur actio” and “ex dolo malo non oritur actio,” founded as they are on sound morals, have for a long time been applied by courts in the practical administration of justice. Under

the doctrine expressed in these maxims, it has been said that no court will allow itself to be made the instrument of enforcing obligations alleged to arise out of an agreement or transaction which is illegal. In other words, no action can be based on an illegal agreement. The rule rests upon the broad ground that no court will allow itself to be used when its judgment will consummate an act forbidden by law. It has its foundation in the policy of discouraging illegal and corrupt agreements by refusing all judicial aid to the parties to them. This rule applies to any agreement which is illegal, immoral, or against public policy or prohibited by public law, and to any agreement which has for its purpose the commission of a crime or is forbidden by statute. Such agreements cannot be enforced by one party against the other, either directly by asking the court to carry them into effect or indirectly by claiming damages or compensation for breach of them. An agreement contrary to public policy will not be enforced, though in the particular instance no actual injury may have resulted to the public and the parties were not conscious that they were doing a thing which the law did not approve . . . The illegality of an agreement may be insisted upon by persons not parties thereto, where claim founded on the agreement is asserted against them."

Thus is it manifest that the general rule of law, based as it is on ancient and sound principals; public policy; and the rules announced in the cases cited deny the plaintiff any standing in a court of justice whether his cause sound in contract, quantum meruit or unjust enrichment. What then is his standing in the instant cause based as it is on the defendant's failure to post the bond required by U. C. A. 14-2-1 and 2? Does the court have any greater compulsion to grant relief, thus circumventing the criminal and civil sanctions of the act regulating contractors? Logical extension of the general rule and in fact the terms and reasoning of the general rule

itself would dictate not. Would the Court lessen the effectiveness of the prohibitions imposed for the protection of the public by the statute regulating contractors by zealously enforcing the letter of a statute obviously designed to protect a special class — materialmen and mechanics? The act requiring an owner to post a bond can only become effective in protecting materialmen and mechanics in the event that a contractor runs true to the apparent natural propensities of the class and does the very things that U. C. A. 58-6-6 seeks to regulate, i.e., 1) abandons the contract, or 2) diverts the funds from a specific contract. The one act thus regulates and prohibits certain acts by contractors and protects the general public therefrom by making the violation of the act a misdemeanor and impliedly denies violators civil redress in the courts of this state and the other protects materialmen and mechanics from the selfsame acts by contractors by requiring a bond to be posted in their behalf and granting them a special right of action against the owner if such bond is not posted. Surely a contractor violating the provisions of the first cannot seek the benefits of the latter. The act requiring the bond cannot under any possible interpretation be deemed per se to protect the general public from these propensities of contractors. It merely dictates that the public shall protect mechanics and materialmen and indirectly itself by demanding a bond from the contractor at its own cost whether it pay for the same directly or indirectly as an additional cost of the building project contemplated. The “any person” of U. C. A. 14-2-1 and 2, must surely be held to be limited to those acting in good faith and complying with the licensing and other regulations of the sovereign who grants this special right of action to such special group, the right of action being unknown to the common law. This statute should not weaken appellant’s position nor confer

upon respondent some new standing before the courts since the act does not create a new statutory cause of action in favor of materialmen and mechanics, it merely gives an existing right of action (quantum meruit for reasonable value) to materialmen and mechanics against one not theretofor liable.

“Where the parties are in *pari delicto* the law will leave them where it finds them. “12 AMERICAN JURISPRUDENCE 721. “The view that no relief should be given in such a case seems to have been applied ever since the celebrated case in which a highwayman sought to compel his associates to account for the proceeds of their enterprise.” 12 AMERICAN JURISPRUDENCE 729. Surely there was never a more sound application of this principal than in the instant case where the plaintiff consummated a prohibited act in an unlawful manner and the defendant failed to post a bond as required by law. The only departure from this rule is to be observed where one party is held to be less guilty than the other, hence not in *pari delicto*. Surely, if a departure from the rule is to be made in the instant case one who violates a provision of a statute requiring a bond for which violation no criminal consequences are imposed is much less in guilt than one who violates an act passed for the protection of the public the acts in violation thereof being prohibited, declared to be unlawful and constituting a misdemeanor.

II

THE COURT ERRED IN GRANTING PLAINTIFF'S MOTION TO AMEND HIS COMPLAINT AND IN DENYING DEFENDANT'S MOTION TO AMEND HIS THIRD PARTY COMPLAINT.

“A party may amend his pleading once as a matter of course . . . Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires . . .” UTAH RULES OF CIVIL PROCEDURE, Rule 15 (a). Rule 15 (b) provides:

“When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time ,even after judgment; but failure to so amend does not affect the result of the trial of these issues.”

The contract which the defendant and third party plaintiff sought to plead and recover under by amendment was introduced in evidence at the trial pursuant to a stipulation of all the parties solicited by the third party defendant immediately prior to the trial itself. The document was provided by the third party defendant and was used and referred to throughout the course of the trial. At the close of the plaintiff's case third party plaintiff sought the amendment before it put on any evidence of its own and the motion was denied. In the light of the express provisions of the rules above defendant and third party plaintiff was prejudiced thereby, particularly in the light of the Trial Court's decision to allow an amendment in the plaintiff's behalf alleging a new cause of action against the defendant prior to the introduction of any evidence.

CONCLUSION

The Trial Court committed reversible error in failing to grant defendant's motion for a non-suit and in failing to allow the defendant and third party plaintiff to amend his complaint to conform to the evidence introduced by the third party defendant upon the stipulation of all parties to the action. The judgment of the Trial Court should be reversed, and the cause should be remanded. Defendant-appellant should be awarded the costs of this appeal.

Respectfully submitted,

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