1957

Buehner Block Co. v. Nick Glezos et al : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

George H. Searle; Attorney for Appellant;

In the Supreme Court of the State of Utah

BUEHNER BLOCK COMPANY, a corp., and SOUTH STATE BUILDERS SUPPLY COMPANY, a corp.,
Plaintiffs and Respondents,

—vs.—

NICK GLEZOS, HARRY HONG, CHARLES C. McDERMOND, COPA SUPPER CLUB, a corp., and VALLEY AMUSEMENT ENTERPRISES, INCORPORATED, a corp.,
Defendants and Appellant.

Case No. 8591

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

GEORGE H. SEARLE
Attorney for Appellant

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In disposing of this case, the court has stated that other errors are assigned which are deemed not of sufficient importance to warrant discussion. It is admitted that appellants appeal was long and possibly contained some inconsequential arguments. Because of this and counsel's failure to focus this court's attention on what is felt by appellant to be a main issue that this petition for rehearing is tendered.

Wherefore, appellant prays that the judgment and decision of the court be re-examined and that the points

raised by this petition be set for argument.

A brief in support of this petition is filed herewith.

GEORGE H. SEARLE

Attorney for Appellant and Defendant Harry Hong

BRIEF IN SUPPORT OF PETITION FOR REHEARING

POINT I.

THE JUDGMENT OF THE COURT IS ERRONEOUS UNDER THE LAW OF THIS JURISDICTION.

The problem of partnership liability in this case is secondary and should be considered only after the primary problem of whether or not a cause of action exists for unjust enrichment.

Eccles Lumber Co. v Martin, 31 Utah 241, referred to by this court in turning down appellant's present appeal states:

> "A mechanic's lien is statutory, and not contractual and a lien cannot be acquired unless the complaint complies with the statutory provisions."

As set forth in this court's opinion in this case it is stated that the statute requires that the notice of lien contain "the name of the owner (of the property) if known, the person to whom the labor materials were

furnished; the terms of the contract; the dates when the first and last materials were furnished; a description of the property; and a statement of the lienor's demand."

Plaintiff Buehner Block Co. recite in their "Notice of Lien" that they agreed to furnish material to C. C. McDermond who was a building contractor, under a sales contract made between the said C. C. McDermond and the plaintiff Buehner Block Co. by the terms of which plaintiff Buehner Block Co. agreed to furnish materials as required and the said C. C. McDermond agreed to pay the plaintiff Buehner Block therefore in full on or before the tenth of the month following the month of purchase. (Exhibit 2)

Plaintiff South State Builders Supply recite in their "Notice of Lien" that they furnished materials to Spencer Van Noy, who was the general contractor, under a contract made between Glezos and Spencer Van Noy, by the terms of which plaintiff South State Builders Supply did agree to furnish and deliver materials and said Spencer Van Noy and Glezos did agree to pay plaintiff South State Builders Supply therefore. (Exhibit 4)

It is submitted that all of said materials agreed to be furnished were so furnished not under an implied sales contract as contemplated in an unjust enrichment action where a contract is implied by law, but were furnished under express contracts of sale. These contracts set forth in writing the materials furnished, the terms of

the contract, and all essential and necessary elements of an express contract. (Exhibits 1 and 3)

At page 35 of appellant's original brief, appellant referred to this problem.

There being an express contract in being between plaintiffs and named individuals under which the materials were furnished, an implied or Quasi Contract action cannot exist. The law on this matter is set forth in 12 Am. Jur. 505, Sec. 7.

> "There cannot be an express and an implied contract for the same thing existing at the same time. It is only when parties do not expressly agree that the law interposes and raises a promise. No agreement can be implied where there is an express one existing."

Citing cases, footnotes 19 and 20 cites the Utah case of *Verdi vs. Helper State Bank,* 57 Utah 502, 196 P 225, 15 ALR 641, in which the court states:

> "A contract may not be implied where an express contract exists."

Also:

> "In a law case the verdict cannot be sustained on appeal if the evidence does not support the allegations of the complaint, even though the evidence might have supported findings in plaintiff's favor, if the allegations of the complaint had been different, and were subject to amendment after introduction of evidence, since the Supreme Court has not original jurisdiction in such cases, and cannot enter judgment merely because it thinks one or the other of the parties is entitled to prevail."

See also Summary of American Law by Clark, Subject Quasi Contracts, page 289 for complete and concise digest of this subject.

The introduction and reliance upon Exhibits 1 and 3 might support findings in plaintiff's favor, but the same should be based upon an express contract action and not an unjust enrichment action.

Plaintiffs in their original brief at page 15 beginning with the last paragraph thereon recognized this by stating, "2. The record supports an express contract between plaintiffs and defendant McDermond." Again beginning on line 6 at page 17, plaintiffs state: "We have no argument with appellants cases cited for the proposition that there can be no implied contract where an express contract exists between the same parties, but contend there is no conflict between the express and implied contracts herein."

It is submitted that there must be a conflict, and plaintiffs contention that *there is no conflict between the express and implied contracts* herein, is an impossibility.

It is further submitted that foreclosure of the liens should in this case be made in conformity with the terms of an express contract and not as was done by the trial court which found the terms of the contract to be based upon an implied by law contract of unjust enrichment.

CONCLUSION

The judgment and order isued by this court in this cause should be reconsidered and the judgment of the

lower court should be reversed dismissing plaintiffs cause of action or remanding the same back for a new trial and appellant awarded his costs.

Respectfully submitted,

GEORGE H. SEARLE

Attorney for Appellant and Defendant Harry Hong