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James Korobas v. James A. Henderson : Brief of Respondent

Utah Supreme Court

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Henderson

In the Supreme Court of the State of Utah

JAMES KOROBAS,

Plaintiff and Appellant,

vs.

JAMES A. HENDERSON,

Defendant and Respondent

Case

No. 8636

RESPONDENT'S BRIEF

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Clerk, Supreme Court, Utah

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JAMES KOROBAS,

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JAMES A. HENDERSON,

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} Case
No. 8636

RESPONDENT'S BRIEF

Respondent agrees with the Statement of Facts in appellant's brief with the exception of the sentence stating, "The court also decided, as a matter of law, which defects were latent." (Appellant's Brief, page 5.) The court merely attempted to set out which defects would be in issue at the trial. In doing so the court did exclude from issue any defects which were so obviously patent that no reasonable juror could ever hold them to be otherwise. The court did leave in issue any defects where evidence might show them to be latent rather than patent (R. 39, 40, 43).

STATEMENT OF POINTS

1. The court's interpretation of paragraph 15 of the contract was correct.
2. The court did not err in ruling that certain defects were patent and others latent.
3. The court did not err in failing to award an attorney's fee to plaintiff.

ARGUMENT

1. *The court's interpretation of paragraph 15 of the contract was correct.*

Appellant contends that paragraph 15 of their contract prohibits claims for wrongful acts and neglects if not brought within a specified time, but does not affect claims for failure to perform the work required by the contract or for performing it otherwise than as required by the contract (Appellant's Brief, page 6.) Appellant relies upon the definitions of "reimbursement," "wrong" and "neglect" to show this paragraph applies to claims in the nature of a tort, rather than contract.

In so arguing, appellant has overlooked both grammatical construction and the general proposition of the paragraph. The first phrase of paragraph 15 states: "If either party to the contract shall suffer *damage in any manner . . .* "

In the first sentence of his brief appellant tells us, "It is elementary that a cause of action for *damages* arises upon breach of a contract . . . " Citing 12 Am. Jur., Contracts, 388, and 9 Am. Jur., Building and Construction Contracts, 116. It

would seem that the provision for "damage in any manner" should clearly embrace damages for breach of contract.

Words or terms appearing later in the sentence should not alter this clear construction when those terms are subject to varying connotations. Appellant cites Black's Law Dictionary (3d Ed.) definition of "reimbursement" and "wrong" to show that this paragraph was meant to cover tort and not contract claims. While "reimbursement" is not generally used in referring to rights of action for breach of contract, it does adequately describe the recovery of damages for breach of contract. When one party breaches a contract the other party suffers a legal wrong. When the injured party is awarded the difference between the value of the performance promised and the value of the performance received it can be said that he is being reimbursed for this legal wrong.

Appellant states: "The word 'wrong' has been stated to signify, in its most usual sense, 'an injury committed to the person or property of another, or to his relative rights unconnected with contract.' " Citing Black's Law Dictionary (3d Ed.) page 1862, and that: "'Neglect' is ordinarily used in connection with tortious conduct," with no authority cited for this proposition (Appellant's Brief, page 7). Looking to Black's Law Dictionary (3d Ed.), page 1863, we find that "wrong," in a more extended signification, "includes the violation of a contract, a failure by a man to perform his undertaking or promise is a wrong or injury to him to whom it was made." At page 1229 "neglect" is defined as, "Omission or failure to do an act or *perform a duty*," and "the term means to omit, as to neglect business or payment or duty or work,

and is generally used in this sense. It does not generally imply carelessness or imprudence, but simply an omission to do or perform some work, duty or act." It is submitted that appellant has confused the terms neglect and negligence when he states, " 'Neglect' is ordinarily used in connection with tortious conduct."

Thus, it can be seen that a reasonable interpretation of this first sentence of paragraph 15 of the contract, considering the definitions of the words involved, could be said to limit the time within which a claim may be brought for failure to perform the work required by the contract, or for performing it otherwise than as required. It is to be noted that the parties to the contract were not attorneys. They did not place a strict, legal interpretation upon the terms in their agreement. The grammatical and ordinary sense of the words in a contract is to be adhered to in construing the agreement. 9 Am. Jur., Building and Construction Contracts, § 8; 12 Am. Jur., Contracts, § 232 et seq. "Words chosen by the contracting parties should not be unnaturally forced beyond their ordinary meaning or given a curious, hidden sense which nothing but the exigency of a hard case and the ingenuity of a trained and acute mind can discover." 12 Am. Jur., Contracts, § 236.

Looking to the manifest purpose of paragraph 15, we see the unreasonableness of the construction placed upon these words by the appellant. The paragraph limits to not later than the time of final payment in which claims can be made against a party who causes the other party any damage. This is a common provision in building contracts. The purpose is obviously to prevent the owner from making final payment,

accepting the building, and then raising a claim for a defect which was discoverable at a time when the builder could have remedied the situation with ease. Constructing a building is a complex undertaking. Many minor discrepancies are liable to occur in violation of the plans and specifications. Certain materials may not be immediately available, whereas their equivalents are readily accessible. Policy and progress require flexibility in such situations. American courts are united in holding a substantial performance as being sufficient to comply with the terms in a building contract. *Omaha v. Hammond*, 94 U. S. 98, 24 L. ed. 70; *Jacob & Youngs v. Kent*, 230 N. Y. 239, 129 N. E. 889, 23 A.L.R. 1429, rehearing denied in 230 N. Y. 656, 130 N. E. 933, 23 A.L.R. 1435; *Harrild v. Spokane School District*, 112 Wash. 266, 192 P. 1, 19 A.L.R. 811.

Paragraph 15 of appellant's brief allows an owner to secure adequate and reasonable performance of his plans and specifications, and yet prohibits him from continually harassing the builder, who has moved his labor and equipment on to new projects, with claims which should, and could, have been made prior to accepting the building.

With this construction of paragraph 15 the meaning of the exception found in the last sentence of the paragraph is apparent. This exception did not broaden the meaning of "wrongful act" or "neglect." Nor did the trial court necessarily look at the exception as if it had been thrown into the contract by someone who didn't know what was coming next, as appellant suggests. (Appellant's Brief, page 9.) This clause did except from the limitation as to when a claim may

be brought, any claim for faulty work or materials where the parties expressly stipulate otherwise.

Appellant notes that paragraph 15 is the same as Article 31 of the standard contract used by the American Institute of Architects, and contends that in the A.I.A. contract the paragraph has not been used to apply to faulty workmanship and materials. Appellant cites Article 20 of the standard contract used by the American Institute of Architects to support this proposition. (Appellant's Brief, page 10.) Article 20 does not necessarily support this position. No authority supports appellant's proposition.

Respondent submits that the purpose of the exception clause in paragraph 15 was to except any claim for damages from this paragraph which would come under Article 20 of the A.I.A. contract. Inasmuch as Article 20 or its equivalent was not included in the contract under consideration, the excepting clause did not prevent claims for failures to perform the work required by the contract from being brought under paragraph 15. There are no other provisions in the contract between appellant and respondent relating to faulty work or materials. Therefore, the parties must have intended paragraph 15 to cover claims of this nature.

As appellant points out, the contract in question was drawn by a scrivener employed by appellant. (Appellant's Brief, page 11.) Respondent does not agree that the court construed "against the plaintiff." (Appellant's Brief, page 11.) Appellant should not be heard to question the reasonable construction placed upon the contract. The circumstances, words used, and positions of the parties show that the court

did correctly ascertain the intention and manifest assent of the parties.

2. The court did not err in ruling that certain defects were patent and others latent.

Appellant also contends that the court erred in ruling as a matter of law that certain defects were patent and others latent. Appellant claims he “should have been permitted to show what the circumstances were and what type of inspection would have been necessary to discover the defects.” (Appellant’s Brief, page 12.)

Appellant had two opportunities to show what the circumstances were. First, at the pre-trial conference before Judge Ellett, appellant was given ample opportunity, and was even encouraged, to come forth with sufficient information or evidence in order to determine the issues involved. Secondly, at the trial on the merits, appellant did rest its case without bringing forth any evidence whatsoever as to the circumstances which he now claims he was denied the right to show. In addition to these two opportunities, depositions were taken of both Mr. James Korobas and Mr. James A. Henderson prior to the pre-trial conference.

At the pre-trial conference, Judge Ellett attempted to set forth the matters which would be in issue at the trial. The court made an attempt to have the circumstances brought forth, questioning appellant’s attorney, “I suppose you have that information or wouldn’t have put it in your complaint, and if you have it, I ought to know it now” (R. 40). When appellant’s attorney admitted he did not know to what extent the

building was not square, Judge Ellett said, "If you will advise Mr. Bird ten days before trial the amount it is out, I will leave it in" (R. 41). Appellant's attorney agreed to this, yet respondent's attorney has never been advised as to this matter.

Appellant's attorney made no attempt to offer any evidence or show any circumstances as to any of the claimed defects at the pre-trial conference. Appellant's attorney was silent during Judge Ellett's determination of what defects were and what defects were not in issue (R. 41 and 42). On page 43, line 18 of the record, we find:

The court: " . . . The issues then would be to try those matters that I have set forth unless counsel can show me that the patent defects are not excluded under paragraph 15."

Mr. Roe: "I want to be free to refer to the whole contract, of course, in so doing."

Thus, it can be seen that appellant did have an opportunity to refute this narrowing of the issues, but declined to do so, relying solely on showing that patent defects are not excluded under paragraph 15.

Federal Courts operating under a similar rule providing for pre-trial conferences have pointed out the necessity for free disclosure by all of the parties if such a conference is to function properly. *Lockwood v. Hercules Powder Co.*, 7 F.R.D. 24 (D.C. Mo. 1947), noticed that one of the vital purposes of a pre-trial conference under Rule 16 is to acquaint parties and court with real issues of fact and law in a case so they may be intelligently informed as to what questions will be for determination at a trial on the merits. *Brown v. Christman*,

126 F. 2d 625, 75 U.S. App. D.C. 203, 1942, pointed out that pre-trial conferences under Rule 16 reduce congestion of dockets and are important to the individual litigant as reducing expense and delay. Appellant's attorney did not make the slightest effort to put forth any evidence as to the circumstances at the pre-trial conference. This was after taking the depositions of both parties. It therefore seems unreasonable for him to now tell the Supreme Court that he should have been permitted to show what the circumstances were.

On November 29, 1956, the proceedings show:

"The Court: "All right. Then to get this matter before the court, may it be heard at this time on the merits instead of tomorrow at ten o'clock?"

Mr. Roe: "It may, yes."

Mr. Bird: "Yes, that's agreeable."

The Court: "All right."

Mr. Roe: "*Paintiff rests, your Honor.*" (R. 49 and 50.)

Thus, again appellant had an opportunity to show the facts, yet did not do so.

It is to be noted that at the pre-trial conference appellant waived a jury trial (R. 47). Appellant had two opportunities to inform the court of the facts and circumstances of his claimed defects, and did not avail himself of either. He should not now be heard to say that he should have been permitted to show "the circumstances."

We agree with appellant that under certain circumstances an incorrectly sloping roof is no more patent than mold in

ketchup. The court agreed with appellant. At line 26 on page 39 of the record we find the court saying:

“ . . . that the issue would be limited to the following matters set forth in paragraph 4 of the plaintiff's complaint: Whether or not the roof was faulty in construction so as to cause leaking or whether the leak is caused by reason of conduct on the part of plaintiff's agents in climbing on the roof before it had settled.”

It can be seen that the incorrectly sloping roof was made an issue to be determined at a trial. In view of these facts appellant cannot now contend that he should have been permitted to show the circumstances. He was permitted but did not do so.

3. The court did not err in failing to award an attorney's fee to plaintiff.

Appellant contends that the court erred in failing to award to plaintiff a reasonable attorney's fee for enforcement of the contract.

Appellant made no request at the trial for an award of attorney's fee. Quite the contrary, appellant's attorney was apprehensive that he was the one who would be required to pay costs (R. 49). Page 49, line 16 of the record shows:

Mr. Roe: "It probably would. About the costs, would your order include that I have to pay him any costs, or each party bear its own, or how do you want to work that?"

The Court: "He won't have any costs if you dismiss now."

Mr. Bird: "Our counter claim."

The Court: "Two and a half?"

Mr. Bird: "I don't believe we did. I don't believe we have."

The Court: "You have got a counter-claim—two and a half."

Mr. Bird: "Each party to stand its own costs, then."

The Court: "All right. Then to get this matter before the court, may it be heard at this time on the merits instead of tomorrow at ten o'clock?"

The matter of attorney's fee was considered at the pre-trial conference, where it was agreed that the winning party, "if it goes to suit," would be entitled to reasonable attorney's fee in the sum of Three Hundred Dollars (R. 47). The court requested the defendant to study the situation with regards to making a settlement. Defendant's attorney pointed out that for three hundred dollars Mr. Henderson could do some work towards settling unless he is awfully stubborn (R. 47). The tender of \$137.60 made on November 29, 1956, was made, and was so understood by both parties, in order to avoid having to bring the matter "to suit." Whether this amount was actually due plaintiff was questionable, but defendant made the tender in order to avoid the possibility of having to pay three hundred dollars in case the matter went "to suit."

The court did not err in refusing to award an attorney's fee to the plaintiff. Defendant's tender was made prior to the matter going "to suit." The defendant had judgment at the trial for no cause of action, with a direction for each party to bear its own costs (R. 50). It was wisdom for the court to let attorney's fees fall the same way.

CONCLUSION

The trial court correctly construed Paragraph 15 of the contract under consideration to apply to claims for faulty workmanship or materials. The court gave appellant ample opportunity to show the facts and circumstances as to every claimed defect. Appellant took depositions, had a pre-trial conference, a hearing before the court in settlement of the matter, and a trial on the merits. Appellant should therefore not be heard to say that he "should have been permitted to show what the circumstances were." The judgment of the trial court should be affirmed.

Respectfully submitted,

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