1990

Graybar Electric, Inc. v. James Lewis, Lewis Electric : Reply Brief

Utah Court of Appeals

Kyle W. Jones; Attorney for Appellee.
La Var E. Stark; Attorney for Appellant.

DOCKET NO. 900466CA

IN THE UTAH COURT OF APPEALS

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GRAYBAR ELECTRIC, INC.,	:	
Plaintiff/Appellee,	:	REPLY BRIEF OF APPELLANT
vs.	:	
JAMES LEWIS, d/b/a LEWIS ELECTRIC,	:	Case No. 900466-CA
	:	Second Judicial District Court, Weber County
Defendant/Appellant	:	890903456

Priority #16

APPEAL FROM JUDGMENT FROM SECOND JUDICIAL DISTRICT COURT, WEBER COUNTY, UTAH, JUDGE STANTON M. TAYLOR

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(NO NEW AUTHORITIES CITED)

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DETAILS OF ARGUMENT

1

THE BRIEF OF PLAINTIFF MISSTATES THE RECORD REGARDING FURNISHING OF INVOICES AND COMPLETION OF THE JOB

Plaintiff's Brief at page 17 states that at the time of trial Plaintiff had not received all of the invoices requested because the job was not totally completed. Whereas, the fact of the matter is that at the time of trial the job had been completed and there had been a final inspection. All of the final invoices recently issued were timely mailed to counsel for Plaintiff at his former address. The invoices arrived at his new address on the first day of the trial and he had them with him the morning of the second day of the trial.

The statement in Plaintiff's Brief that the job had not been completed at the time of trial does not conform to the

facts. The job had been completed and there had been a final inspection. There may have been left punch list items.

TR Vol. I, page 3:

> "...The Court: Mr. Stark? Mr. Stark: Your Honor, the -- the job has been completed to the extent that there's been a final inspection, and there may be-- may be a punch list, but all of the invoices with respect to the electrical materials portion of it are in.
>
> I received copies and mailed copies to counsel. He says he's changed his address in the last about twenty days.
>
> Mr. Jones: About three weeks. Mr. Stark: Or something like that. We've also sent to him an analysis of -- an up-to-date analysis of what the claim for damages is based on the original bid and based on the invoices that we have now received from Whitehead Electric and Electrical Wholesale.
>
> I've got copies here for him and we did mail copies and I cannot account for his statement that he hasn't received them because they were placed in the mail to him."

2

THERE WAS NO FINDING ON THE MATTER OF DAMAGES NOR WAS ONE REQUIRED

Plaintiff's Brief claims that Defendant did not carry his burden of proof with respect to damages. In view of the ruling of the trial court of no cause for action, the

question of damages was not reached by the Judge although as pointed out in Defendant's Brief there is ample evidence in the record to sustain such an award.

3

THE RECORD ESTABLISHES THAT DEFENDANT ACCEPTED PLAINTIFF'S LOW PRICE AND THAT THERE WAS DETRIMENTAL RELIANCE

Plaintiff's Brief at item 9, pages 6 and 7, and at page 10 states that there was no acceptance by Plaintiff of the first bid of Defendant.

Whereas, the Transcript, Vol. I at page 61 indicates the following:

> "Q. When you got this price from Graybar at, you say about 9:30 on the 20th of July, in the morning, who did you talk with? A. Kerry Pusey. Q. He gave you that figure? A. Yes. Q. Did you have any further discussion with respect to that figure? A. Did I what? Q. Did you have any further discussion with him with respect to that figure? A. I told him I was going to use it and was it all right and he said yes. Q. Okay."

The trial judge's ruling is as follows (TR Vol II, pages 142 and 43):

> "I think there is a distinction between what's moral and what's legal, and it seems to me that if somebody calls up and says, we'll do it for a certain price, that they should -- they should do it for a certain price.

From the standpoint of the law, there is no -- there is obviously no contract because a contract requires offer and acceptance and there's no offer, or there's no acceptance. A bid is in the nature of an offer, and there's actually no acceptance of that offer until after-- after the contract is accepted by the general or the general receives the bid and then accepts the subcontract and so on.

And under the law of contracts, any time a party to a contract wants to withdraw, they have a right to withdraw an offer any time prior to acceptance. That's-- I think that's where the doctrine of Promissory Estoppel comes into play because of situations like this. It's not the classic offer/acceptance situation.

Under Promissory Estoppel if somebody submits a bid relying upon that bid, the Court's going to come along later and say, well, we're -- we're going to estop the -- the subcontractor from denying the fact that they have -- that they have made a bid at a particular figure and that the contractor relied upon that bid.

The thing that's lacking in this case, of course, is the reliance. When -- when Graybar contacted Mr. Lewis and indicated to him that it was a mistake and that they could not go with the lower bid, when he submitted his bid then he wasn't relying upon that -- there wasn't the detrimental reliance that would be normally required in a Promissory Estoppel situation.

He submitted his bid based upon a hope

> that he would be able to -- to get the material for the lower price, but in this case it appears to be a vain hope. So Promissory Estoppel will fail based on the fact that there wasn't a reliance upon the Graybar figure, that's the $213,400. So the Court reluctantly finds no cause on the second action or the second cause of action."

At what point in time would there have been detrimental reliance?

If Defendant had left his office for the bid depository or had filed his bid at the depository prior to notice of the claimed error, there would have been detrimental reliance.

On the other hand, if Defendant had received notice of the claimed error early enough to have revised his bid forms and still submit on time at the depository, there would not have been detrimental reliance.

However, where, as in this case, Defendant did not have sufficient time to change his bid forms after notice of the claimed error and still submit on time, there was detrimental reliance.

Plaintiff's Brief speculated what Defendant could have done regarding changing his bid. However, the solid evidence is that Defendant accepted Plaintiff's low price and relied on it in working up his bid forms. The evidence clearly

established that Defendant did not have time to change his bid after the attempted price withdrawal by Plaintiff. There is no finding to the contrary.

CONCLUSIONS AND RELIEF SOUGHT

The award of damages to Defendant is necessary to prevent injustice. The judgment of the trial judge ought to be reversed and the case remanded for entry of judgment for damages in favor of Defendant.

Respectfully submitted this 11th day of July, 1991.

LaVar E. Stark

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing REPLY BRIEF OF APPELLANT to Kyle W. Jones, Attorney for Plaintiff/Appellee, 36 South State Street, Suite 2650, Salt Lake City, UT 84111; postage prepaid this 11th day of July, 1991.

LaVar E. Stark