1957

Crane Co. v. Utah Motor Park, Inc. : Brief of Respondent

Utah Supreme Court

Rich, Elton & mangum; H. Wright Volker; Attorneys for Defendant;

IN THE SUPREME COURT OF THE STATE OF UTAH

CRANE CO., a corporation,
Plaintiff and Appellant,

— vs. —

UTAH MOTOR PARK, INCORPORATED, a corporation,
Defendant and Respondent

Case No. 8713

Respondent's Brief

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STATEMENT OF FACTS

The statement of facts set forth by appellant is substantially correct, but we feel that the issues raised by the Answer should be stated and one or two additional facts shown.

Defendant, in paragraph 2 of its Answer (R3) denied that it entered into a contract with Walsh for the construction, addition or repair of a building or buildings as alleged in paragraph IV of the Complaint (R1); but on the other hand alleged its transaction with Walsh was for the *purchase* of a boiler which had theretofore

been sold to Walsh by the plaintiff (Crane). Defendant also denied that plaintiff (Crane) *furnished the boiler to defendant at the instance of Walsh,* as alleged in paragraph VI of the Complaint (R2), but on the other hand alleged in paragraph 4 of the Answer that the boiler was *sold to defendant* by Walsh, the then owner thereof with full right to sell the same.

There were other defenses alleged but the pre-trial hearing had not proceeded to a consideration of those matters, and, of course, no trial was had because, upon presentation of the invoice (Exhibit 1) the trial court held that plaintiff had by its own evidence failed to establish a case, and had in fact established the defense alleged by defendant.

Counsel states, which is a fact, that plaintiff (Crane) recommended to defendant that it purchase the boiler from Walsh. Plaintiff (Crane Co.) also expressly directed how the transaction had to be handled; viz., as a sale by it (Crane) to Walsh and as a re-sale by Walsh to defendant (R8, 9).

Also, as a part of the pre-trial hearing it was expressly admitted by plaintiff (Crane Co.) that prior to sale of the boiler to defendant it (Crane) passed title to Walsh (R6). We quote from the record:

> "THE COURT: I think that ends the lawsuit. I think the document itself shows that it was a sale to Walsh and that the company having parted with their title would not be able to follow it past the man they sold it to, into the Utah Motor Park's improvement.

MR. RICH: That's what the sales act says too.

THE COURT: Yes.

MR. BOYER: I don't think there is any question about that, but we can't follow — that we passed the title, and it went into your place. There is no question about that. The same thing would be true in every case where you have got a mechanic's lien. The title passes to the stuff that goes into the place, to the plumber, to the workman or whoever the man is, the mechanic who is doing the job.

THE COURT: You have to sell at retail to do that, don't you?

MR. BOYER: I don't think so.

THE COURT: There has to be a sales tax collected on it.

(Discussion)

MR. RICH: I move to dismiss the case, for summary judgment.''

Thereupon, the motion to dismiss and for summary judgment was granted.

STATEMENT OF POINTS

1. The Court properly dismissed Plaintiff's complaint because:

(a) Plaintiff's evidence showed Walsh Plumbing Company, from whom defendant purchased the boiler, to be a retailer, not a contractor; and

(b) Plaintiff's evidence showed that at the time the boiler was acquired by defendant, plaintiff had parted with title; hence could not have been the one that furnished it to defendant.

ARGUMENT

(a) PLAINTIFF'S EVIDENCE SHOWED WALSH PLUMBING COMPANY, FROM WHOM DEFENDANT PURCHASED THE BOILER, TO BE A RETAILER, NOT A CONTRACTOR.

It was the decision of the trial court, and we respectfully submit that it is sound law, that the statute in question here was intended to cover the relationship of contractor and materialman, not the relationship of wholesaler and retailer, as evidenced in this case by the endorsement on the invoice.

Utah has three statutes, all somewhat related, for the protection of *materialmen* who *furnish* materials to *contractors,* to be included in the owner's property pursuant to a contract for the erection or repair of a building. They are: The Mechanics Lien Law, Title 38, Chapter 1; the law relating to Public Contracts, Title 14, Chapter 1; and the law relating to Private Contracts, Title 14, Chapter 2. In each and all of those laws the basic relationship that has to be established to come within the benefits of the protective provisions of the law, is that of contractor and materialman.

Those statutes were never intended to, and do not cover other types of relationships pertaining to the handling and sale of personal property.

Building materials, heating and air-conditioning equipment, lighting equipment, roofing, paint, doors, awnings, windows, hot water tanks, boilers, bricks, machinery, wallpaper and all types of fixtures may, when included within the purview of a building contract, become lienable items when furnished to a *contractor* by a materialman. But the same type of equipment may also be purchased at retail from any of the many retailers handling those items. We have no doubt the members of this Court will take judicial notice of the fact that lumber, doors, windows, cement and all types of building materials may be purchased at retail direct from the lumber yards and mills; and that all types of appliances and equipment may be purchased *at retail* in Z. C. M. I., Sears, and any one of the many retail stores handling heating equipment, appliances, and other types of "ready-for-installation" improvements for the home or farm.

Had it been intended by the Legislature that persons purchasing materials and equipment *at retail* from a *retailer* had to take out a bond to protect the wholesaler or jobber and other middlemen in the chain of title back to the manufacturer, it would have so stated in clear language; and it would also have provided for the *retailer* to give a sworn affidavit to the purchaser setting forth the name of the wholesaler or jobber from whom it was originally purchased, together with a statement

showing the status of its account with the wholesaler. The ridiculous situation thus resulting from an attempt to apply this law to a retailer-wholesaler relationship is evident.

A contractor-materialman relationship stands on an entirely different basis. In that relationship the *materialman* is the *retailer* and the contractor is the user or consumer, as the sales tax law clearly states.

It is no longer an open question in this State as to the status of the contractor as the consumer, so far as the sales tax is concerned. It was thoroughly discussed and decided in *Utah Concrete Products Corp.* v. *State Tax Commission,* 101 Utah 513, 125 Pac. 2d 408. It was unanimously held that the contractor is the user or consumer not a retailer, as shown in Exhibit 1. The Supreme Court of Arizona, citing the above Utah case as authority, gave the unanswerable reason for the rule in *Duhame* v. *State Tax Commission,* 179 Pac. 2d 252, in the following language:

> "* * * While perhaps a contractor may be making a sale in the loose sense of the word, and while, in that loose sense it might also be a sale at retail, he is certainly not making a sale at retail of tangible personal property which is the necessary meaning of the term 'sale' when used in this Act. By the definitions in this Act a contractor when fabricating personalty into realty neither sells, resells, sells at retail, nor can he be considered a retailer."

If, therefore, Walsh had been a contractor for defendant, as plaintiff now alleges in paragraphs IV and VI

of the complaint in an attempt to bring this transaction within the scope of this law, the plaintiff (Crane Co.) would have been liable to the State of Utah for sales tax on the transaction. If, on the other hand, the transaction was, as found by the trial court, and as shown by the invoice (Exhibit 1), a wholesaler-retailer transaction, then Walsh was a retailer, *not a contractor,* and Crane Company was a wholesaler selling to a retailer, *not a materialman* selling to a *contractor.*

The stamped endorsement on the invoice is the statutory form outlined in Sec. 59-15-2 (c) and (d) for identification of the wholesaler-retailer relationship.

A contractor is defined by our statute (58-6-3) as one who for a *fee* undertakes to construct, alter or repair buildings, etc. The *fee* represents the skill, responsibility and integrity of the contractor in producing the final result, and is the pay of the contractor for services rendered. On the other hand, a *retailer* sells for a given *sales price* and the difference between the sales price and the cost is profit — not a fee for services.

Counsel quotes from two Utah cases: *Liberty Coal and Lumber Co.* v. *Snow,* 53 Utah 298, 178 Pac. 341, and *Rio Grande Lumber Co.* v. *Darke,* 50 Utah 114, 167 Pac. 241. We have no quarrel with the law announced in those cases. In each of them the contractor relationship to the owner was undisputed — in fact admitted. The cases had to do with other points of law. If, on the other hand, Mr. Darke and Mr. Snow had purchased the materials from Rio Grande Lumber Co., and Liberty Coal & Lum-

ber Co., respectively, at retail, *and paid for it* to the *retailer,* and then some wholesaler, jobber or manufacturer had tried to sue them for failure to get a bond from Rio Grande Lumber and Liberty Coal Co., as retailers, the result would, we are confident, have been different.

The status of this transaction was determined as of the time when it occurred, when Crane Co. stamped the invoice and made the sale. It cannot now be switched back to suit the advantage of Crane Co.

Crane Company is a distributor of builders' hardware and appliances. Many sales by it are undoubtedly made to retailers. It also, undoubtedly, makes sales in substantial volume to contractors for incorporation into building projects. On sales to retailers Crane Company pays no sales tax, passes title to the retailer and the retailer has any lien right that may exist as materialman. On sales to contractors, Crane Company is a retailer, pays the sales tax to the State as a retailer under our law, and in that case Crane Company has the lien right as materialman. In the case at bar Crane Company chose to be a wholesaler and not a materialman.

Having taken the position at the time of sale that Walsh was a *retailer* making a sale of personal property to defendant, we respectfully submit that the trial court was correct in its decision that such status controls now and destroys this cause of action.

(b) PLAINTIFF'S EVIDENCE SHOWED THAT AT THE TIME THE BOILER WAS ACQUIRED BY

DEFENDANT, PLAINTIFF HAD PARTED WITH TITLE; HENCE COULD NOT HAVE BEEN THE ONE THAT FURNISHED IT TO DEFENDANT.

Under the Sales Act, Sec. 60-2-3 (Rule 1) the title to personal property sold by a wholesaler to a retailer for resale passes to the retailer when the contract is made.

The attorney for plaintiff did not dispute this. In fact, he admitted it (R. 6). If title passed to Walsh, then Walsh was the one that would have the right to protection as materialman, *as owner of the property,* under whatever laws, statutes, or agreement as might be involved for its protection. Walsh was the *third party* of whom this court was speaking in the Liberty Coal case.

This very question was before the California Court in *Harris & Stunston, Inc.* v. *Yorba Linda Citrus Ass'n,* 26 Pac. 2d 654. California has incorporated its Mechanic's Lien Laws into one composite law, but, as stated by this court in *Rio Grande Lumber Co.* v. *Darke,* supra, cited by appellant, its essential features are the same as our statutes. In the Harris case, above, the plaintiff, a wholesaler, had sold some water softeners to one W. F. Cruller, a plumber, who in turn sold them to the named defendant. Plaintiff, the wholesaler, then filed a lien against defendant's property and tried to take the position that it, the wholesaler, was a materialman and that Cruller, the retailer, was a contractor — exactly the thing the Crane Company is trying to do in this case. The trial court found that Cruller was a seller, not a contractor,

and the wholesaler appealed. We quote from the decision sustaining the trial court as follows:

> "The appellant contends that one W. F. Cruller was a subcontractor employed to do plumbing and similar work on the buildings in question; that he was the statutory agent of the respondent within the meaning of section 1183 of the Code of Civil Procedure; and that it furnished these softeners to Cruller as such agent. It is respondent's contention that Cruller, in furnishing the water softeners, was not a subcontractor but was himself a materialman. The court found that Cruller sold the water softeners to the respondent at an agreed price and installed them upon the property; that the water softeners when sold to the respondent were the property of Cruller; that the respondent paid Cruller in full; that nothing was due to the appellant on account of said water softeners; and that the respondent was not entitled to a lien. It was further found that the appellant, through its authorized agents, induced and requested the respondent to purchase these water softeners from Cruller; that in reliance upon this the respondent in good faith purchased the same from Cruller; and that Cruller acted as a materialman in selling the machines to the respondent.
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> * * * * *
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> "Cruller testified that he was in the wholesale plumbing and heating business; that he maintained a store; that among other things, he handled water softeners; that he sold these softeners to the respondent and installed them; that he bought them from the appellant and sold them to the respondent; that the appellant billed him for them and he billed them to the respondent; that the respondent had paid him in full; that he was later forced into bankruptcy; that he had had sim-

ilar water softeners on display in his store for seven or ten years before this time; that he had previously bought water softeners from the appellant and sold them to other parties; that this deal was handled in all respects similar to prior transactions except that these softeners were shipped direct to the respondent's place of business instead of being sent to his store and then reshipped; and that in all other cases the appellant had not attempted to collect direct from his customers. It appears that the water softeners were sold by Cruller to the respondent at an agreed price and that an additional amount was paid for their installation. While the latter amount does not appear, the evidence indicates that it was only a fraction of the purchase price.

"We think this evidence supports the findings and conclusions of the trial court and that the same may not be disturbed. It seems clear that this case belongs to that class where a finished article is sold, the installation thereof being merely incidental and a part of the delivery. Under such circumstances the trial court correctly held that *Cruller* was a materialman and not a subcontractor acting as the agent of the owner." (Emphasis added)

We respectfully submit that under the undisputed evidence in this case as shown by the plaintiff's invoice presented at the pre-trial conference, the trial court correctly ruled that plaintiff was not a materialman, but was a wholesaler, and that Walsh was not a contractor but a retailer, and that defendant was not liable to plaintiff.

Respectfully submitted,

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