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M. S. Costello v. John I. Kasteler and Uranium Chemical Corporation : Brief of Respondent

Utah Supreme Court

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Case No. 8759

**IN THE SUPREME COURT
of the
STATE OF UTAH**

UNIVERSITY UTAH

MAY 3 1958

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M. S. COSTELLO,

Respondent,

vs.

JOHN I. KASTELER, and URANIUM
CHEMICAL CORPORATION,
a Corporation,

Appellants.

FILED
MAR 28 1958
Clerk, Supreme Court, Utah

BRIEF OF RESPONDENT

**GREENWOOD and SWAN and
E. EARL GREENWOOD, JR.**

Attorneys for Respondent

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BRIEF OF RESPONDENT

STATEMENT OF FACTS

(Respondent will be referred to as plaintiff and appellants will be referred to as defendants herein.)

Plaintiff agrees, generally, with the statement of facts set forth by defendants in their brief.

STATEMENT OF POINTS

POINT I.

THE COURT DID NOT ERR IN PERMITTING RESPONDENT TO AMEND HIS AMENDED COMPLAINT.

POINT II.

THE COURT DID NOT ERR IN RENDERING JUDGMENT IN FAVOR OF THE RESPONDENT AND AGAINST THE APPELLANTS, WITH INTEREST, ON THE BASIS OF THE REASONABLE VALUE OF THE SERVICES RENDERED.

POINT III.

THE COURT DID NOT ERR IN RENDERING JUDGMENT AGAINST THE APPELLANTS JOHN I. KASTELER AND URANIUM CHEMICAL CORPORATION, JOINTLY AND SEVERALLY, OR, IF THE COURT ERRED, THE ERROR SHOULD BE CORRECTED BY THIS COURT OR BY REMAND TO THE TRIAL COURT WITHOUT A RETRIAL.

ARGUMENT

POINT I.

THE COURT DID NOT ERR IN PERMITTING RESPONDENT TO AMEND HIS AMENDED COMPLAINT.

Both the original complaint and the amended complaint, prior to the amendment complained of, contained an allegation that the reasonable value of said services is the sum of \$1,155.00 (Tr. 1, 8, 9).

The trial court permitted plaintiff to amend his amended complaint at trial prior to the presentation of any evidence, over defendant's objection. Defendants, in the third paragraph of their brief, page 7, concede that:

“* * * the court permitted the plaintiff to amend his amended complaint by interlineation to insert the following words *both in the complaint and in the prayer* (emphasis ours) of the complaint, to wit: ‘or the reasonable value of said services.’”

In permitting the amendment over defendants' objection, the trial court took the position that the inclusion of the allegation of reasonable value in both the original complaint and the amended complaint, prior to the amend-

ment complained of, constituted adequate notice to defendants that plaintiff would proceed on the theory of an express contract or upon the doctrine of quantum meruit, and that defendants had an opportunity to meet the issues presented.

In support of the trial court's position, we cite the following:

Christensen v. Johnson, 61 P. 2nd. 697, Utah.

The essential facts of the *Christensen vs. Johnson* case as they relate to this case are as follows: Plaintiff filed a complaint for services rendered in which it was alleged, in part, as follows:

“‘Between the 9th day of April, 1952, and the 14th day of March, 1953, plaintiffs performed professional services for said defendant at his special instance and request, which said services consisted of * * *; that said services were of the fair and reasonable value of \$300.00, which sum defendant agreed to pay for said services upon completion thereof.’”

The trial court gave judgment for the plaintiffs and defendant appealed. The appellate court affirmed judgment for plaintiffs and on *page 600*, in part, said:

“As we understand appellant, he claims that there is a material variance between the allegations of the complaint and the evidence given in support thereof in that (1) the complaint is founded upon an express contract while plaintiff's evidence at most merely tends to support a cause of action based upon the doctrine of quantum meruit and (2) * * *. Neither of such contentions

[referring to (1) and (2)] can be successfully maintained. It will be observed that it is alleged in the complaint that the services were rendered at the special instance and request of the defendant and that the fair and reasonable value thereof is \$300.00. Such allegations state a cause of action without the allegation that defendant promised to pay for the services. * * *

Rule 15 (a), Utah Rules of Civil Procedure, 1953, provides, in part:

“* * * 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.”

Rule 15 (b), Utah Rules of Civil Procedure, 1953, provides, in part:

“* * * if evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.”

The trial court decided that justice required that the amendment be allowed. Defendants failed to convince the court that the amendment and the admission of evidence pursuant to the amendment would prejudice defendants or that grounds for a continuance existed.

In view of the *Christensen v. Johnson* case, it appears

that it would have been proper for the court to admit evidence at the trial of this case on the theory of quantum meruit under the amended complaint without the amendment which was allowed. If this is so, defendants could not complain of the amendment nor could they claim surprise. In any event, it appears that after leave to amend was granted, the trial court could decide the case on the theory of quantum meruit. It is noted that Mr. Kasteler gave evidence as to the reasonable value of the services rendered, but the trial court chose to believe the evidence of plaintiff (Tr. 51).

The citation on page 8 of defendants' brief shown as "71 C.J.S. at Page 496, Par. 281;" is out of context. The full paragraph in which the quotation appears is as follows:

71 C.J.S., Section 281, pp. 596-597.

* * *

"Surprise. If an amendment, in other respects proper, does not surprise the adverse party, it may be properly allowed, and leave to amend will be liberally granted where the proposed amendment will not so change the case as to cause surprise to the other party. On the other hand, no party should be called into court prepared to try one issue and then be required to try another, of which he then for the first time has notice, and the discretion of the court should be exercised so as to prevent surprise. Whether or not an amendment will cause surprise depends largely on circumstances.

"* * *"

The citation on page 8 of defendants' brief shown as "71 C.J.S. at Page 602, Par. 282;" is out of context. The

full paragraph in which the quotation appears is as follows:

71 *C.J.S.*, Section 282, pp. 601-602.

“* * *

“In general, pleadings may be amended at or during the trial, the allowance or refusal of amendments at such time being largely within the discretion of the trial court and dependent on the character of the proposed amendment. It is error for the court arbitrarily to refuse a trial amendment where such amendment is required in the interest of justice. On the other hand, under the general rule that an amendment will be refused where it would be prejudicial to the rights of the adverse party, as discussed Section 281 b, an amendment at the trial will not be allowed where it would so result. The opposite party will be granted an opportunity to make a showing for a continuance, if surprised by an amendment allowed at the trial.

“* * *”

Regarding the citation on page 8 of defendants' brief, 100 P. 848, *Bowers, et ux. v. Good, et ux., Washington*, the complaint in this case alleged an express contract, breach and sought damages. Respondents answered with a general denial. On the day of trial respondents filed over appellant's objection an amended answer in which the respondents denied the contract as alleged by appellants and set up an affirmative defense of an oral contract of sale, failure of respondents to perform, settlement and a release. The appellants contended that the court committed error in permitting an amended answer to be filed on the day of trial, that a new issue had been raised and that appellants were not prepared.

The court held that the objection was not well taken and the amendment was upheld. It appears that this citation is dicta.

Regarding the citation on page 9 of defendants' brief, *Safeway Cab Service Company of Oklahoma City v. Gadbury*, 27 P. 2nd 434 Oklahoma, this was a personal injury case wherein the trial court permitted an amendment of the petition which alleged a back injury to allege that the accident augmented a prior osteoarthritic condition. The appellate court held that this did not constitute error. It appears that this citation is dicta.

In view of the foregoing, we submit that the trial court committed no error in allowing the amendment.

POINT II.

THE COURT DID NOT ERR IN RENDERING JUDGMENT IN FAVOR OF THE RESPONDENT AND AGAINST THE APPELLANTS, WITH INTEREST, ON THE BASIS OF THE REASONABLE VALUE OF THE SERVICES RENDERED.

If defendants in Point II of their brief, are arguing that there was no express contract, plaintiff admits that the trial court expressly decided that the contract involved was a contract implied in law for the reasonable value of the services rendered.

If defendants are contending that the decision and findings of the trial court on the basis of an implied contract are not supported by the evidence, plaintiff contends that the evidence adequately supports the decision and findings. We cite the following: Plaintiff testified that defendant Kasteler requested plaintiff to

perform services and did not identify himself as the agent of the Uranium Chemical Corporation (Tr. 18, 19, 20). Plaintiff testified he performed the services (Tr. 26), and it was stipulated that 770 tons of earth were hauled by plaintiff (Tr. 28). Plaintiff testified as to the reasonable value of the services performed (Tr. 29, 30). Defendants also gave testimony as to the reasonable value of said services (Tr. 51).

The trial court found defendant John I. Kasteler contacted plaintiff and requested plaintiff to perform services, found that John I. Kasteler did not identify himself as the agent of the Uranium Chemical Corporation, found that \$1.50 per ton was the reasonable value of said services, and found that Uranium Chemical Corporation received the benefit of said services (Tr. 70, 71).

The other matters argued by defendants which relate to the propriety of the amendment and the opportunity of defendants to produce witnesses are dealt with in Point I of this brief.

Defendants further state that the trial court chose to disregard certain testimony. Weighing the evidence and judging the credibility of the witnesses is the proper function of the trier of fact, and the decision of the trial court as to these matters is entitled to considerable weight on appeal.

It is submitted that the trial court did not err in rendering judgment against both defendants with interest, on the basis of reasonable value of said services for

any of the reasons cited by defendants in Point II of their brief.

POINT III.

THE COURT DID NOT ERR IN RENDERING JUDGMENT AGAINST THE APPELLANTS JOHN I. KASTELER AND URANIUM CHEMICAL CORPORATION, JOINTLY AND SEVERALLY, OR, IF THE COURT ERRED, THE ERROR SHOULD BE CORRECTED BY THIS COURT OR BY REMAND TO THE TRIAL COURT WITHOUT A RETRIAL.

Although there are different rules, the majority opinion in the United States seems to be that after discovery of the undisclosed principal for whom the agent was acting, judgment cannot ordinarily be had against both the principal and agent. However, the cases are in conflict under the "Pennsylvania view," and the California cases apply a well-considered modification or exception to the general rule. It is clear that both the agent and the undisclosed principal may be sued in the same action under any of the theories mentioned.

Defendants contend that it is the obligation of plaintiff to elect whether he will take judgment against the agent or the undisclosed principal. The California cases require the agent or the undisclosed principal to require an election or the right is waived and judgment may be granted against both.

At page 14 of their brief, defendants cite the case of *Love, et al. v. St. Joseph Stockyards Company*, 169 Pacific 951, Utah. The facts of this case show that the agent was given a written release and thereafter an action was instituted against the undisclosed principal. The trial court dismissed the action, the plaintiff appealed

and this court affirmed the dismissal. Hence, this case does not decide the point in issue. Plaintiff has not located a Utah case which directly resolves the issue.

On page 15 of defendants' brief, defendants cite from the case of *Ewing v. Hayward, et al.*, 195 Pacific 970, California, (1920). This is an action against Hayward and others as co-partners. The trial court gave judgment against all defendants jointly and defendant, the Newmark Grain Company, appealed. On page 974, the court states, in part:

"The evidence being insufficient to support the finding of agency, the judgment cannot stand. It is therefore needless to discuss any other point urged. The judgment is reversed as to the defendant, Newmark Grain Company."

The quotation from the above case cited by defendants on page 15 of their brief is from a concurring opinion written by P. J. Finlayson, is dicta and does not set forth the California law on the point in issue.

The annotation in *118 A.L.R.* at page 707 reads, in part, as follows:

"b. *Waiver of right to compel election.* It has been held that the rule that the plaintiff before the close of the case must elect whether he will take judgment against the one or the other is subject to an exception, or modification, which holds that the right to compel an election is waived by failure to demand or move for that remedy during the course of the trial. *Craig v. Buckley* (1933) 218 Cal. 78, 21 P. (2nd) 430. (Citing other cases) * * *."

In a 1951 case upholding a judgment against both undisclosed principal and agent, the California court, in *McEwen v. Taylor*, 234 P. (2nd) at page 757, said in part:

“Concerning appellant’s contention that in taking judgment against Doudouris, respondent elected to hold him and release appellant, it appears in the foregoing quotation from *Klinger v. Modesto Fruit Company*, that our courts have held that in such an action as this, election is not required until and unless the party entitled to the benefit of an election seeks by motion or otherwise to compel the election to be made and if no such action be taken by him, then he has waived the right to compel such an election, and judgment against both the agent and undisclosed principal may be upheld. (Citing cases) * * *.”

At page 759, the same court said, in part:

“* * * the right to an election operates in favor of the principal and agent, and it is their duty to seasonably make the demand. Such duty does not rest upon the plaintiff or third party creditor. (Citing cases) * * *.”

In the case of *Joseph Melnick Building and Loan Association, et al. v. Link Building and Loan Association, et al.*, 64 A. (2d) 773, Pennsylvania, (1949), the Pennsylvania court said at page 776, in part:

“This court has decided that the third party has the option to proceed against either the agent or his principal, or both, *but is entitled to one satisfaction.* (emphasis theirs). This principle was established in the leading case of *Beymer v. Bon-sall*, 79 Pa. 298, which has been consistently followed. (Citing cases) * * *.”

The same court further states at *page 777*, in part:

“If under the Pennsylvania rule, the third person *may* proceed against either the agent or the undisclosed principal or both, the liability is *joint* and *several*. (emphasis theirs) (Citing cases) * * *.”

The Pennsylvania view permits pursuit of both agent and principal until the claim is satisfied and follows the analogy of the prevailing American law allowing a creditor beneficiary a similar double right. Under the Pennsylvania rule no exception is necessary to justify what are exceptions under the other view, permitting judgment against both the agent and principal if the objection has been waived because not made in time.

Under the evidence and the findings here, whether the Utah law is controlled by the general rule or the modifications or exceptions to it, plaintiff would have been entitled to judgment against defendant John I. Kasteler as the agent of an undisclosed principal or against Uranium Chemical Corporation, the undisclosed principal, if an election had been made, whether the duty to require an election is upon plaintiff or defendants. The issues have been fully tried and it would be a useless act to require a new trial on these issues if the decision and findings of the trial court are supported by the evidence, which we submit they are.

Should the Supreme Court of the State of Utah decide so to do, they have the power to strike the judgment against one of the defendants or remand the case to the trial court with directions to strike one of the defendants upon the election of plaintiff. If the court

should decide that judgment against one of the defendants should be stricken, the plaintiff is willing to elect, and hereby does elect, to hold defendant John I. Kasteler liable as the agent of an undisclosed principal and stipulates that the judgment against defendant Uranium Chemical Corporation may be stricken.

Respectfully submitted,

GREENWOOD *and* SWAN *and*
E. EARL GREENWOOD, JR.

Attorneys for Respondent