1982

Frank R. George v. Oren Limited and Associates : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

FRANK R. GEORGE, dba GEORGE & SON CONSTRUCTION,	:	
Plaintiff-Respondent	:	
vs.	:	Case No. 18359
OREN LIMITED & ASSOCIATES, A Partnership,	:	
Defendant-Appellant	:	

BRIEF OF APPELLANT

Appeal from a Jury Verdict and Judgment of the Second Judicial District Court in and for Davis County, State of Utah

Honorable Calvin Gould, Judge

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This action was brought by FRANK R. GEORGE, dba GEORGE & SON CONSTRUCTION, Plaintiff-Respondent, against OREN LIMITED & ASSOCIATES, a Partnership, for judgment of $42,687.57, plus interest, costs and attorney's fees for services and materials provided in the installation of a sewer line, culinary water service, and road grading, and for a lien against the property so served.

Defendant counterclaimed for damages for breach of contract in timely performance.

Defendant further claimed as an affirmative defense that Plaintiff was not a licensed contractor and therefore unable to maintain the action.

DISPOSTION BELOW

Trial of this action was to a jury, who by special interrogatories, awarded the Plaintiff damages against the Defendant in the amount of $58,482.41 and attorney's fees of $2,700.00.

Prior to trial, Defendants moved for an Order of Dismissal (R-131) which was heard before The Honorable Judge Douglas Cornaby and the motion denied, pending evidence to be submitted at trial (R-139-140).

The motion was renewed at time of trial (Transcript p. 141) and was denied.

After entry of verdict, Defendant filed a Motion for Judgment of Dismissal Non Obstante Veridico (N.O.V.) (R-249-250). The motion was heard on Wednesday, March 3, 1982, pursuant to notice (R-259). The motion was denied (R-261) and judgment on the verdict entered.

Defendant appeals the denial of an Order of Dismissal of The Honorable Judge Douglas Cornaby entered February 8, 1982 (Transcript p. 141) and the denial of a Motion to Dismiss on March 5, 1982.

RELIEF SOUGHT ON APPEAL

Defendant-Appellant seeks to have the jury verdict and the judgment entered thereon reversed and vacated and the Plaintiff's Complaint dismissed. Defendant-Appeallant alleges that failure to grant Judgment of Dismissal was an error in law.

STATEMENT OF FACTS

Plaintiff-Respondent GEORGE and Defendant-Appellant entered into a series of construction contracts in May of 1979 whereby Plaintiff-Respondent GEORGE would trench and install a sewer line, a water line, grade and blacktop, as well as install curb, gutter and sidewalls on certain subdivision property in Davis County, Utah (Exhibitis "B", "C", "D" and "E").

At the time of entering into the contract to provide improvements to the land, the Plaintiff-Respondent was not licensed with the Department of Business Regulation as a contractor in any capacity (Transcript p. 17-18). Plaintiff-Respondent GEORGE had licensed for the year 1969 and had not re-licensed until 1980. In connection with the reasons for which Plaintiff-Respondent was not licensed, on page 53 of the Transcript, he states:

"Q Any other reason you didn't license in 1970 or in subsequent years?

A Yes, there was a reason.

Q What was that?

A I didn't like the bureaucracy that dominated that sort of thing."

On page 64 of the Transcript Plaintiff-Appellant states:

"Q You indicated, Mr. George, you didn't like the

bureaucracy. Why didn't you like the bureaucracy of the licensing department?

A Well, it was my contention they were revenue raising agencies. They are not a regulator. They don't know whether I know what I am doing or not."

JOSEPH KAPLAN, chief executive officer of OREN LTD., a recent immigrant, one of the partners, did not know the Plaintiff-Respondent FRANK GEORGE (transcript p. 205). Mr. Kaplan responded:

"Q At the time you entered into the contract, did you know Mr. George?

A No.

Q Had you ever met him?

A My first and only meeting was at Jim Bird's office until yesterday.

Q That was your last meeting until yesterday?

A Yes.

Q Would you have contracted with Mr. Bird if you had known he was not licensed?

A You mean Mr. George?

Q I mean Mr. George, I am sorry.

A I don't think so. I would have inquired what licensing means in America. But I don't believe I would because.

Q I have no further questions."

The Plaintiff-Respondent GEORGE stated (Transcript p. 4) that he knew Jack Sullivan some twenty years ago.

"Q And do you know a Mr. Jack or John Sullivan?

A Yes sir, I do.

Q Okay, how do you know him?

A I knew Jack Sullivan first as...a ... he lived in my neighborhood some twenty years ago."

When Sullivan was questioned about his connection with GEORGE, he responded (Transcript p. 114):

"A I had known Frank for a number of years. I considered him to be an honorable man."

When questioned more carefully about Sullivan's acquaintance with Mr. George, he said (Transcript p. 211-212):

"Q Now in your previous testimony, you said you had known Mr. George before you entered into this contract with him. What was the nature of your acquaintanceship with Mr. George?

A We were neighbors for about nine years, from late '57 up to '66.

Q All right. During that time did you ever contract with Mr. George?

A No.

Q Were you ever a shareholder or a partner of any business entities that contracted with Mr. George?

A No, I had no business dealings.

Q Did you know what his business was at that time?

A Yes, I understood that he was--

Q Had you ever had any conversations at that time with anyone who had done business with Mr. George?

A No particular discussions. I had an associate that George was doing a job for at Clearfield.

Q That was at a later time, was it not?

A No, that was just a little earlier time.

Q A little earlier than this contract?

A Yes, uh-huh.

Q All right. Now other than that, did you have any acquaintance with Mr. George?

A No.

Q You never had any financial dealings with him?

A None.

Q Well, would you have contracted with Mr. George had you known he was not licensed?

A Absolutely not."

The foregoing is not a summary but is the complete record of the knowledge and prior acquaintance which Mr. Joseph Kaplan and Mr. Jack Sullivan had with Plaintiff-Respondent Frank George.

Mr. George did not post a bond or other security (Transcript p. 64).

Mr. George had to take a competency exam to become licensed after 11-1/2 years of unlicensed status (Transcript p. 66).

Mr. George held himself out to be a contractor, submitted bids and otherwise engaged in contracting work for 11-1/2 years (Transcript pp. 5, 9, 17, 18 and others).

ARGUMENT

THE AMENDED COMPLAINT SHOULD HAVE BEEN DISMISSED, AS THE PLAINTIFF HAS NO CAPACITY TO SUE IN THE COURTS OF THE STATE OF UTAH AND IS THUS PRECLUDED FROM OBTAINING DAMAGES.

The Plaintiff seeks to recover for services and materials he rendered as a contractor. In order for the Plaintiff to state a claim, he must allege that at the time the work was performed and the materials furnished, he was licensed as a contractor under the laws of the State of Utah.

58-23-1 Utah Code Annotated, 1953 as amended, states:

> License required for contracting--Prima facie evidence of contracting.--It shall be unlawful for any person, firm, copartnership, corporation, association, or other organization, or any combination of any thereof, to engage in the business or act in the capacity of contractor within this state without having a license therefor as herein provided, unless such person, firm, copartnership, corporation, association, or other organization is particularly exempted as provided in this act. Evidence of the securing of any construction or building permit from a government agency, or the employment of any person on a construction project, or the offering of any bid to do the work of a contractor as herein defined, shall be accepted in any court of the state of Utah as prima facie evidence of engaging in the business or acting in the capacity of a contractor.

Also, 58-23-18 Utah Code Annotated, 1953 as amended, states:

> Acting as contractor without license--Misdemeanor.--Any person, firm, copartnership, corporation, association, or other organization, acting in the capacity of contractor within the meaning of this act, without a license as herein provided shall be guilty of a misdemeanor.

The above cited statutes have been almost uniformly interpreted by the courts of this and other states in such a way as to preclude enforcement of payment under a contract when the contractor was unlicensed.

In a series of cases in the State of Utah, the Utah Supreme Court has held that an unlicensed contractor has no standing in the courts. Meridian Corporation v. McGlynn/ Carmaker Co., 567 P.2 1110, (Utah 1977) citing Smith v. American Packing & Provision Co., 130 P.2 951, 102 Ut. 351, (1942), and Olsen v. Reese, 220 P.2 733, 114 Ut. 411, (1948), Chief Justice Ellett, speaking for the court stated:

> This Court has held that the contracts of unlicensed contractors are void. In the case of Olsen v. Reese we held:
>
> The authorities are fairly uniform to the effect that failure to obtain a license which is required by a statute enacted solely for revenue purposes does render contracts made by the offending party void. On the other hand, contracts made by an unlicensed contractor when in violation of a statute passed for the protection of the public are held to be void and unenforceable. Our statute is so worded as to indicate a legislative intent to protect the citizens from irresponsible contractors. The statute, while not comprehensive provides for a small license fee. Control over the contractor is given to the Department of Registration. Upon an appropriate hearing, the department may, for unprofessional conduct, suspend or cancel the license. Good reputation and integrity are essential to obtaining a license and the entire object of the statute is protection of the public against fraudulent and illegal practice, which have always been recognized as a distinct characteristic of statutes, which are not mere revenue measures. The statute being enacted for the protection of the public, Plaintiff's written contract is void.

> The case of Smith v. American Packing & Provision Co. held that it was necessary for a plaintiff, where a license is required, to allege that he had the license in order to state a cause of action. A license in another state cannot be substituted for a license in Utah.
>
> The Plaintiff in this case is aware of our clear prior holdings; however, he urges us to overrule the case of Olsen v. Reese (supra, footnote 3). This we refuse to do. We think the case was properly decided, and we confirm the principles of law therein stated to be the law of this state.

In the case of Mosley v. Johnson, 22 U.2d 348, 453 P.2d 149 (1969), the Utah Supreme Court decided a case very similar to the one before the Court at this time.

In Mosely, the Court concluded that a contract entered into by an unlicensed welldriller was void and unenforceable. Regarding the Plaintiff's quantum meruit claim and lien claim, the Court in Mosely concluded by stating:

> "A court will no more assist one who fails to secure a required license to recover money by means of a lien foreclosure than it will in an action on the contract or on a theory of quantum meruit. Since there is nothing due plaintiff in this matter . . . ."

The foregoing interpretation of contractor collection efforts while in violation of State licensing laws is consistent with the law of most states.

51 Am Jur. 2d Licenses and Permits Sec. 64 states:

> Under a statute providing that a contractor cannot maintain an action unless he alleges and proves that he was duly licensed at all times during the performance of the contract or when his cause of action arose, it is commonly held that he cannot recover if he was not duly licensed at the time specified in the statute or if his license had expired or been revoked during the performance of the contract, regardless of whether he became duly licensed thereafter, and regardless of the period that elapsed between the time when he was not licensed and the time when he became licensed.

See also 82 A.L.R. 2d 1429, 1443. On some occasions and for specific purposes the rule laid down by the foregoing cases has been modified as in Fillmore Products v. Western Paving, 561 P.2d 682. In this case, while supporting the general rule, the court set forth some exceptions. In holding for the unlicensed contractor, Justice Wilkins, speaking for the Court said:

> We distinguish this case from those cited in note 2. In this case it is clear that an unlicensed subcontractor is dealing with a licensed general or original contractor. And the defendants have not disputed that the entire sewer project was under the supervision of a licensed project engineer, that all of the work had to meet the specifications and requirements of the general contract and that all of the work had to be approved and accepted by the project engineer before any payment was made by the Town of Ferron.

We distinguish the current case from the Fillmore Products case in that (1) the contractor was not acting as a subcontractor to a general; Defendant-Appellant was a subdivider; and (2) the project was not under the control or direction of a project engineer.

The Court also deviated from the general rule in Lignell v. Berg, 593 P.2d 800. Again, while sustaining the general rule, the Court set forth exceptions to the rule:

> This Court has had frequent occasion to comment on the status of unlicensed contractors, and has persistently construed the cited statute as having been designed to protect the public and consequently to bar recovery by unlicensed contractors for services rendered under their contracts. The most recent Utah cases so holding

are Mosely v. Johnson, 22 Utah 2d 348, 453 P.2d 149, and Meridian Corp. v. McGlynn Carmaker Company, Utah, 567 P.2d 1110. The rationale of those cases is, however, that the party from whom the contractor seeks to recover is in the class the legislature intended to protect. A litigant is not a member of that class if the required protection (i.e., against inept and financially irresponsible builders) is in fact afforded by another means. . .

In this case, the denital of recovery to BBC would indeed impose unreasonable penalties and forfeitures, particularly because the Owners were never deprived of the kind of protection the licensing statute was designed to afford. We consider the following circumstances to be of controlling significance in this regard:

1. BBC has not failed to satisfy the licensing authority of its technical competence and financial qualification for license. It had inadvertently permitted its license to lapse. Restoration of licensed status involved no new demonstration of qualification, but only payment of fee.

2. The Owners didd not rely on any BBC competence they inferred from BBC's having advertised itself as a general contractor. They had previously employed BBC as a builder in apartment house construction. Moreover, the Owners unsurped the general contractor's prerogatives in constructing the Terrace Incline complex. They relied on their own competence.

3. BBC supplied a performance bond as well as a labor and material suppliers payment bond. The Owners were infinitely better assured or adequate and complete performance without financial exposure beyond the contact price than they would have been by BBC's mere compliance with the licensing statute.

The Lignell case is likewise distinguishable from the case before the Court. Consider the following:

(1) Plaintiff-Respondent GEORGE did not "just inadvertently" allow his license to lapse. He had rebelled against

the bureaucracy and for 11-1/2 years had practiced his trade as a contractor without a license, contrary to civil and criminal law. Licensing (it couldn't be called re-licensing) did not merely require payment of a fee--but required testing and examination. It did require a new demonstration of competence.

(2) In the Lignell case, the Owners knew contractor in his professional capacity and had done work with the contractor previously. Moreover, in Lignell the Owners became their own general contractor, a stature they had taken before with the unlicensed contractor.

In the case before the Court, the Defendants (one of whom was a foreigner) had not had previous subdivision experience and had had no professional or trade experience with Plaintiff-Respondent GEORGE. Defendant-Appellant KAPLAN knew him not at all. Defendant-Appellant SULLIVAN knew him from the neighborhood--and in no way professionally. Professionally, KAPLAN and SULLIVAN were "babes in the woods" as witness the agreements for a complicated construction project (Exhibits "B", "C", "D" and "E").

(3) In the Lignell case, the contractor supplied a materialmen's and labor bond. The Court said they were better off with a bond than by merely complying with the license (does a bond legitimize a non-licensed contractor?) In the case before the Court, no bond was posted.

Further, Plaintiff-Respondent GEORGE held himself out to be a contractor, submitted bids, met with Defendant-Appellant OREN LTD. at the engineer's office, and did those things characteristic of a licensed contractor.

Finally, in the 1981 General Session of the Utah State Legislature, the following statute was enacted: 58A-1-26, Utah Code Annotated, 1953 as amended:

> No contractor may act as agent or commence or maintain any action in any court of the state for collection of compensation for the performance of any act for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor when the contract sued upon was entered into and when the alleged cause of action arose.

We readily admit that this statute was not in existence at the time the acts occurred which are the subject matter of this lawsuit. However, the passage of the statute demonstrates a philosophical legislative intent and perhaps was occasioned by the same time deviation from the general rule.

Defendant-Appellant prays relief as set forth above.

Respectfully submitted this 30 day of June, 1982.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed two copies of the foregoing Brief on Appeal to counsel for Plaintiff-Respondent:

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postage prepaid, this 1 day of ~~June~~ July, 1982.

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