1983

Frank R. George v. Oren Limited and Associates : Petition for Rehearing

Utah Supreme Court

Stephen G. Homer; Attorney for Plaintiff-Respondent;
Lorin N> Pace; Attorneys for Defendant-Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

FRANK R GEORGE doing business as FRANK GEORGE AND SONS CONSTRUCTION COMPANY, Plaintiff-Respondent vs OREN LIMITED AND ASSOCIATES, a Utah partnership, Defendant-Appellant	Case No. 18359

PETITION FOR REHEARING

APPEAL FROM A JURY VERDICT AND JUDGMENT
OF THE SECOND JUDICIAL DISTRICT COURT IN AND FOR DAVIS COUNTY

The Honorable Calvin Gould, Judge

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IN THE SUPREME COURT

OF THE STATE OF UTAH

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

BRIEF IN OPPOSITION TO REHEARING

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IN THE SUPREME COURT

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

BRIEF IN OPPOSITION TO PETITION FOR REHEARING

STATEMENT OF THE NATURE OF THE CASE

This is Plaintiff-Respondents Petition for a Rehearing from a decision of this Court reversing a Jury Verdict and Judgment in the Second Judicial District Court, In and For Davis County, the Honorable Calvin Gould, Judge, against Defendant-Appellant.

ARGUMENT

THE UTAH SUPREME COURT DID NOT MISCONSTRUE THE FACTS OF THE CASE OR MISINTERPRET APPLICABLE LAW.

Plaintiff-Respondent in his Memorandum of Points and Authorities in Support of Petition for Rehearing raises the arguments that this Court either grossly misconstrued the facts of the case or misinterpreted the applicable laws, in as far as Defendant in the lower Court was required to raise the licensing statute as an Affirmative Defense, or that the applicable licensing statute does not protect the Defendant.

These arguments are incorrect, as a comparison of August 29, 1983, opinion with Plaintiff's arguments clearly revealed. Further Plaintiff misinterprets the public policy reasons behind the licensing statute and the protections it is designed to afford.

In a somewhat convoluted argument Plaintiff appears to wish to convince this Court that adequate protection and safeguards existed to insure the quality of Plaintiff's work so that the Utah Licensing Statute, Section 58-23-1 Utah Code Annotated, is nugatory. This is clearly wrong, also the opinion language clearly indicates that the Court was aware of what protections other than that statute were afforded the parties and considered them in overruling the Lower Court decision. See for example paragraph 2 of the Opinion, page 1, stating that the improvements were inspected by the city. Although Plaintiff controverts the statement that the improvements were designed by Farmington he states himself on page 5 of his Brief that the design is not critical to the protection issue, in other words the matter which the licensing statute is designed to protect.

Although footnote 9 does seem to create an inconsistency as to whether or not the city engineer inspected the work, the body of the Opinion itself acknowledges the fact as urged by the Plaintiff that the city did perform regular inspections upon the labor. However the Court finds that inadequate to fulfill the public policy reasons behind the licensing statute. The Court also faults Plaintiff for his willful disregard of that statute and the Court is unwilling to shift the burden of the protection contemplated by the statute to the inspector away from the contractor. (See pages 6 and 7 of the Opinion.)

Court in distinguishing Fillmore Products v. Western Paving, Inc. , Utah 1977, 591 P.2d 687 and Lignell v. Berg , 593 P.2d 800 (Utah 1979), from the instant case clearly grasps the factual situation but choses to limit the holding of those two cases which established exceptions to the general rule. The Court in page 5 of its Opinion cites Lignell to show that a litigant is not a member of the protected class if he can obtain the required protection through another means, but then goes on to interpret the facts of this case to establish that another means was not available. For all of Plaintiff's arguments of economic hardship or in equity, ignores the simple fact that all of these problems could have been avoided had he simply chosen to comply with the licensing statute and not chosen instead to attempt to make his ineffective statement against the "bureaucracy". The arguments that this Court made distinguishing the incident case from Lignell and Fillmore show that it must have had a workable grasp of the facts. Plaintiff next attempts to convince this Court that the lack of a license is an Affirmative Defense which must have been plead by the Defendant at the time of trial. In making this assertion he completely ignores the holding Meridian Corp. v. McGlynn Cardmaker Company , 567 P.2d 1110 (Utah 1977), the Court in that case stated "this Court has held that the contracts of unlicensed contractors are void" supra page 1110. Further that case cites Smith v. American Packing & Provision Co. , 102 Utah 351, 130 P.2d 951 (1942), stating that it necessary for the Plaintiff to allege that he had the license in order to state a cause of action. In other words license is a necessary element of Plaintiff's action it is not an Affirmative Defense. Plaintiff had no standing therefore this Court was correct in its dismissal of his cause of

action. In addition in the case of Cheny v. Rucker , 14 Utah 2d 205 V 81 P.2d 86 (Utah 1963), establishes the standard in Utah that prejudice is necessary before a Court will rule that the other party failed to plead an Affirmative Defense. In the present case Plaintiff could not have been prejudice by Defendant's failure to plead the Affirmative Defense because he had no standing to be in Court in the first place. The Plaintiff also attempts to argue licensing statute in question does not really afford any protection to the Defendant. This argument completely ignores the fact that the statute has been ruled on over and over again by this Court in the cases cited in Appellants original Brief and in this Court's Opinion that the purpose of the statute is to insure the protection of the public. (See page 7 of the August 29th Opinion.) Thus Plaintiff's arguments on page 2 and 3 of his Brief that the judicial form allows Defendant adequate protection is in opposite, as Plaintiff has failed to prove or show that Defendant was even unprotected. As the Court states in page 3 of its Opinion citing Fillmore Products , supra , "the party who does not obtain a license, but is required to do so, can not obtain relief to enforce terms of his contract."

THIS CASE DOES NOT MEET THE UTAH STANDARD OF REVIEW FOR REHEARING

Utah Law dictates that no rehearing will be granted when nothing new or important is offered for consideration. Ducheneau v. House , 4 Utah 483, 11P618; Jones v. House , 4 Utah 484, 11P619. In the incident case Plaintiff has not offered any new facts for the consideration of this Court. He is once again merely urging his particular interpretation of the old facts previously viewed by this Court.

In the case of Cummings v. Nielson , 4 Utah 157, 129P619, the Utah Supreme Court cited the following four reasons justifying applying for a rehearing.

1. That the Court had misconstrued or overlooked some material fact or facts.

2. That the Court had overlooked a statute or decision

3. That the Court had based the decision on a wrong principle of law

4. The Court had either misapplied or overlooked something which materially affected the result.

In reading through the Opinion it can not be reasonably said that any of these reasons apply. The Court is aware of all of the facts in our action with the licensing statute, applied the proper legal principles and it is apparent from the language and the depth of the Opinion is conversant with all of the facts. Finally, Plaintiff's contention that he should be able to recover the pipe would not only lead to economic waste in this case, but is a new point first brought up to the Supreme Court's attention on this application for hearing, even though it was available on the origional hearing, thus it can not be considered. See Harrison v. Harker , 44 U. 541 142P. 716, further the language of the case is, supra , indicate that not just the contract is void and unenforceable if no license but that "no cause of action is stated unless a licensed is alleged." See Smith and Meridian Corporation , supra. The language that the contractor can not recover payment should be construed brcAdly, particularly struction contract where there is no reason to distinguish between the labor and materials. More importantly, of the Briefs already on record and from the facts given in the

Opinion it is obvious that the Plaintiff has been paid large sums already. He is now asking the Court to go back and determine how much of those funds, if any, paid for the pipes alone, what percentage or how many of the pipes could be removed etc., this is contrary to opinions indicating that either the rule applies and there is no compensation or that the exceptions apply and the contractor recovers. There is no middle ground allowing for a recovery off the contract. This is particularly true when the Plaintiff has already been paid some sums.

CONCLUSION

There is no real indication that the Supreme Court misconstrued the facts of the case or misapplied the applicable principles of law. The holding of a contractors license is a necessary requirement for the Plaintiff to state a cause of action. This Court's holding that no such license was held effectively bars the Plaintiff from any recovery for either services or materials provided, especially when he has already received large sums of money sufficient to pay him for his pipes. The arguments that the licensing statutes sole purpose is to protect the Defendant in this case ignores the public policy arguments of protecting the public in general and the contractors failure to be properly relicensed has been appropriately sanctioned by this Court by dismissing this cause of action. Plaintiff's Brief does not raise any points sufficient to allow a review or rehearing before this Court. The recovery of the pipes at this point is economic waste, is an issue raised for the first time on appeal or on this rehearing and can not be considered by this Court. Defendant therefore respectfully requests that

the Supreme Court reaffirm its opinion previously entered in this case.

Respectfully submitted this 6th day of October, 1983.

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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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