1984

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

Utah Supreme Court

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	PETITION FOR REHEARING Case No. 18359

Pursuant to the provisions of Rule 76(e), Utah Rules of Civil Procedure, the Plaintiff-Respondent petitions the Court for a rehearing in this matter. The decision of the Court was filed August 29, 1983. In that decision, the Court erred in the following particulars:

1. The Court's decision recognizes and grants judgment in favor of the Defendant (i.e. a dismissal of the action) on the basis of "illegality" of contract, which affirmative defense must be pleaded. Defendant waived this "defense" by its failure to plead the same. See Rules 12(h) and 8(c), Utah Rules of Civil Procedure.
2. The decision assumes, incorrectly and contrary to the evidence adduced at trial, that the licensing statute afforded "protection" to the Defendant.
3. The decision misunderstands at least one significant fact which would otherwise bring the case within existing law so as to allow Plaintiff his recovery.
4. The decision fails to take into account the fact that the Plaintiff should be compensated for the value of the materials he "sold" to the Defendant (i.e. the water and sewer pipes), irrespective of his unlicensed status which is of importance only to recovery for personal services rendered in installing said pipes.

Respectfully submitted this 16th day of September, 1983.

Stephen G Homer

STEPHEN G HOMER
Attorney for Plaintiff-Respondent

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	PLAINTIFF-RESPONDENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REHEARING Case No. 18359

POINT I

THE DECISION ASSUMES, INCORRECTLY AND CONTRARY TO THE EVIDENCE PRESENTED AT TRIAL, THAT THE LICENSING STATUTE AFFORDED PROTECTION TO THE DEFENDANT

The Court's decision places great emphasis upon the assumption that the licensing statute [Section 58-23-1 et seq, Utah Code Annotated] provided the Defendant with "protection" and thus the Plaintiff should be precluded from any recovery. This is certainly an incorrect assumption, patently contrary to the evidence adduced at trial.

First, the "unlicensed" status of the Plaintiff was not even raised until on the eve of trial. The "defense" was raised only via the general "failure to state a claim upon which relief can be granted" basis. Plaintiff's Complaint does state a valid claim---irrespective of the "unlicensed" status; see Point II, below. This should be contrasted with the requirements of Rule 8(c), which requires the Defendant to affirmatively plead the following defenses: failure of consideratio illegality, license, and any other "matter constituting an avoidance or affirmative defense." The Defendant's failure to "affirmatively plead" these defenses, especially the "illegality" defense herein raised, operates as a waiver of

that defense. See Rule 12(h), Utah Rules of Civil Procedure.

Secondly, the evidence adduced at trial indicated that the Department of Business Regulation had NEVER INSPECTED subdivision work (i.e. the grading of roads and the installation of water and sewer lines) in Farmington City. See the testimony of Mr Walter Clock, Farmington City Building Inspector for five and one-half years. Transcript pp. 92-93.

This second point is particularly significant when one considers the FACT that the Defendant had the opportunity to present evidence showing that it was injured by the Plaintiff. Indeed, the Defendant took that opportunity! Much testimony was given by the Defendant's agents that the Plaintiff "delayed" performance of his end of the bargain. THESE CLAIMS WERE PRESENTED TO, BUT REJECTED BY, THE JURY. No authority is needed for the principle that a verdict, especially a jury verdict, is, on appeal, analyzed in a light most favorable to the prevailing party---the Plaintiff.

No evidence was presented by the Defendant to show that the Department of Business Regulation would have "protected" the Defendant in any particular. I submit that the Department would not take any action---with respect to the Plaintiff, had he been licensed---on the basis of the "alleged delay". In fact, by that time, the damage (that is, alleged "damage") to Defendant had already been committed and it would be left up to the judicial system (which has the appropriate tools and skills to resolve the dispute) to handle the matter. Had the Plaintiff been licensed, the "bond" he would have been required to post with the Department would have been so minimimal as to be insignificant when compared against the Defendant's counterclaim of FIVE HUNDRED THOUSAND DOLLARS! The licensing statute doesn't even come closing to providing the Defendant with that kind of "protection".

This is especially true when the Defendant is given opportunity at trial to assert EVERY DEFENSE IT HAS against payment under the contract. If the workmanship

were (which, by reason of the jury verdict, the Court must conclude that it, in fact, was not) "faulty" in some particular, the Defendant has the opportunity to show it in trial and avoid payment. Indeed, the Defendant made such a claim: considerable time was spent presenting evidence concerning whether the sewer line had a leak at some unknown location. Obviously, the jury found in favor of the Plaintiff on that issue. But the point really is: the judicial forum affords the Defendant the "protection" he needs against faulty workmanship, etc., occurring in the job he has contracted for. The Defendant's "day in court", with his full panoply of rights (discovery, cross-examination of witnesses, representation by counsel, and lastly: a trial by jury), is much better "protection" than the licensing statute will ever afford the Defendant.

On the other hand, the Court's decision "slams the door in the face" of the Plaintiff on a hypertechnical interpretation of a statute, which, by its terms, isn't even applicable here. [The statute specifies that contracting without a license is a misdemeanor; a penalty of imprisonment and $299 fine is specified for its violation. That shows what the Legislature feels about the problem---and that's only after the offender, who is assumed to be innocent, is first prosecuted and then convicted. Yet the Court, by judicial decision, has now created a PENALTY TWO HUNDRED TIMES GREATER than the fine the Legislature has specified. As indicated earlier, the rule in Utah has been that the "law does not favor a forfeiture, and thus, statutes imposing such are to be strictly construed." The Court's decision certainly does not adhere to that principle.] While the Plaintiff's "unlicensed" status for the lengthy period of time is perhaps not to be encouraged, it is improper for the Court to fashion a decision which, by operating from an impractical theoretical basis divorced from the established realities of the situation, "punishes" the Plaintiff and "rewards" the Defendant---who some may say would be guilty of "theft" for having instructed

the Plaintiff to continue with the work, when the Defendant should have known there would be no money with which to pay the Plaintiff. [Indeed, the Defendant's agents, some eight months after the work (installation of water and sewer lines) was terminated in the fall of 1979, indicated to the Plaintiff to go to Farmington City to be paid for the work he had done. See Exhibit "K".]

Indeed, the licensing statute has become, in the words of Justice Wilkins speaking for a unanimous Court in Fillmore Products, "an unwarranted shield for the avoidance of a just obligation." 561 P.2d at 690. The instant decision---showing little flexibility and almost no recognition for equity and justice---is certainly a significant retreat from the more enlightened approach taken in Fillmore Products and Lignell.

The instant decision attempts to distinguish Fillmore Products and Lignell from the present factual and legal setting. It must be conceded that those two cases are different; it is highly unlikely that counsel would be able to come up with a case decision which was "on all fours" with the present situation. [Had there been such a case, there would have likely been no appeal.] But the fact that there are differences IGNORES THE PRINCIPLE that it is the similarities which are important: THE important similarity is the "protection" found by the trial judge and implicitly recognized by the jury. The fact that there was alternate "protection" for the Defendant (via the inspections and acceptance of Farmington City) is what is important in the application of the principles of law from Fillmore Products and Lignell; the factual differences as to how that protection is established is inconsequential.

On this point, the Court's decision, attempting to analyze the distinctions to be drawn between the former two cases and the instant situation, IS INCORRECT on a critical factual issue. The Court states, at p. 6 of the decision, in footnote 9:

> It is noted that in the instant case the City's project engineer designed the improvements to be installed by Plaintiff. The engineer

did not, however, inspect thw work and does not appear from the record to have had any responsibility, with respect to the project, beyond his designing function. In contrast, the the project engineer in the Fillmore Products case was a licensed private engineering firm known as Call Engineering, Inc., which did have an inspection responsibility with respect to the construction work.

This misunderstanding may have arisen because the parties to the litigation glossed over the issue because it was not in dispute and was, in essence, a "given". The project was designed by Jim Byrd of Byrd Engineering; he was the engineer selected by the Defendant to do the design and engineering work for the subdivision. Although the Farmington City engineer (Jim Byrd IS NOT the City Engineer) had to approve Mr Byrd's drawings and design, before construction could begin, it was THE DEFENDANT'S ENGINEER which designed the project. But the "design" is not critical to the "protection" issue, per se, although it does provide some relevance: the water and sewer lines had to be installed in only one way---the way shown on the drawings. Those drawings detailed the required materials and installation. Any variance therefrom by the contractor would have constituted a breach of the contract, or as a minimum justified some kind of set-off. Although the Defendant made such a claim, none was shown; the jury found in Plaintiff's favor. The major emphasis of the Defendant's claim of breach had to do with "time of performance", rather than the "quality" (or lack thereof) of Plaintiff's workmanship.

Once work was begun, the FARMINGTON CITY inspector took over; he did the inspections. The "design engineer" (Byrd) had nothing to do with the project. [See Transcript, p. 16]. This point is significant because Farmington City---which was going to be the intended future owner of the water lines and the sewer lines installed by the Plaintiff---did not want to "inherit" [the "subdivision" approval and development process, as implemented by Utah municipalities, requires that the developer install, at his expense, these

improvements, which are then "dedicated" to the municipality] a defective line which the City would thereafter have to maintain. Thus, the Farmington City inspector (not the project engineer[Byrd]) made the inspections. Certainly the City inspector [Mr Clock], acting at the direction and under the supervision of his employer---Farmington City---which has its own engineer, is going to be just as careful in inspecting the work as a "licensed private engineering firm" which made the inspections in Fillmore Products. In fact, the City inspector is going to actually be "more strict" in adhering to quality because his City is going to have to live with the problem, if he slips up and allows one to go by. That city inspector is not going to do that. Thus, the "protection" is present.

The trial judge recognized these facts and accepted this legal principle when he wrote [which is also quoted on p. 6 of the Court's decision], in part:

> . . . and defendant was adequately protected by reason of the fact that the project had to be tested and approved by the Farmington City Engineer.

Emphasis is mine.

The Court should base its decision UPON A CORRECT INTERPETATION OF THE FACTS. When that is done, it will be recognized that the instant situation comes within the parameters established by Fillmore Products and Lignell. The trial judge, in an advantaged position to hear the entire case, recognized such. This Court should reconsider the factual evidence and should base the decision upon those facts. As a minimum, page 6 of the Court's decision should be modified so as to correspond to the true facts.

POINT II

THE PLAINTIFF SHOULD BE ALLOWED TO RECOVER FOR THE VALUE OF THE "MATERIALS FURNISHED" TO THE DEFENDANT, REGARDLESS OF HIS "UNLICENSED" STATUS WHICH SHOULD PERTAIN ONLY TO RECOVERY FOR THE "SERVICES RENDERED" IN INSTALLATI

The Court's decision correctly framed the competing claims of the parties in this litigation. To quote from page 1 of the Court's decision:

> Plaintiff Frank R. George, dba George & Son Construction, brought this action to recover sums alleged due for services and materials provided in the installation of improvements upon defendant's property, and for a lien against the property so served. Defendant Oren Limited & Associates counterclaimed for damages upon a theory that plaintiff's alleged untimely performance constituted a breach of contract. . . .

Emphasis is mine. Yet the "bottom line" of the Court's decision is that the Plaintiff is DENIED ANY RECOVERY---ABSOLUTELY, NO QUESTIONS ASKED!! As such, this result is patently unfair.

Part of his claim for money was FOR THE COST OF THE MATERIALS ACTUALLY INSTALLED: the pipes for the water and sewer "lines".

Certainly his "unlicensed" status has no bearing on the fact that he has delivered to the Defendant a valuable product. The licensing statute only pertains to those who "engage in the business of contracting" (that is, who agree to do "work"). It does NOT APPLY to persons who sell PRODUCTS. There is an obvious reason why the licensing statute applies only to "contractors": the Legislature was aware that oftentimes the "workmanship" (being a subjective issue) was less than desirable. On the other hand, a tangible product (and the selling of such product) does not require state regulation because it is more "objective": the buyer can simply look to see what he is getting and may refuse to purchase it if disatisfied with the quality.

In the instant situation, the Plaintiff is penalized in his "merchant" capacity merely because he had the misfortune of being "unlicensed" in his "contractor" capacity. There is no equitable reason why the Defendant should be allowed to retain the "product" (the pipe), merely because an "unclean" person (that is, the unlicensed contractor) has touched it. The Defendant simply should not be entitled to such a "windfall"; the Court should act to

such an unjust enrichment. Certainly the Defendant would not be allowed to retain possession of the pipe---without paying for the same---if the Defendant had purchased the pipe from another "merchant" and then permitted (i.e. "contracted with") the "unlicensed" Plaintiff to install it!

The Court should allow the Plaintiff to retrieve the water and sewer lines so installed. [It was these lines for which payment was not made and suit was brought. For the other improvements, such as the grading work, etc., payment was made.] The Court must not think that such a retrieval is not possible. The "subdivision" in this case is NOT presently what one normally thinks of when the word "subdivision" is mentioned: paved streets, sidewalks, kids riding bikes in the street lined with homes. That is not the present condition of the subdivision. The "subdivision" is [probably because of the lack of money on the part of the Defendant to continue with the installation of the improvements] in basically the same condition as it was in when the Plaintiff "pulled off the job" because he wasn't paid: there are NO paved streets; there are NO sidwalks; there are NO homes lining the streets; there are NO residents dependent upon the water and sewer lines. The "subdivision" is simply a field with a water line and a sewer line running through it. Retrieval of those pipes can be accomplished. It should be allowed. The Defendant should not be allowed to retain the pipe merely because the unlicensed contractor installed them.

CONCLUSION

As a minimum, the Court should amend its decision so as to accurately reflect and take into account the operative facts. When those facts are considered, it must be noted that the Defendant had considerably more "protection" afforded to it by virtue of the Farmington City inspections and acceptance than would be afforded via licensing with the state agency, which, as shown by the evidence, has nothing to do with subdivision work. Indeed, the entire

judicial process "protects" the Defendant against faulty or defective workmanship much more than any assumed protection via the licensing statute. The Defendant had a plenary opportunity to allege "faulty or defective" workmanship on the part of the Plaintiff; the jury verdict in favor of the Plaintiff must be construed to evidence the lack of merit to Defendant's claims on that issue. Indeed, the only "defense" really vigorously asserted pertained only to "time of performance", and not "quality". It is highly suspect to think the licensing statute afforded any "protection" on that issue, especially in light of the complete judicial proceedings and disposition.

Further, the Defendant has "waived" its right to assert the "illegality" and these other "defenses" by reason of its failure to "affirmatively plead" the same, as required by the Rules.

The Court should not retreat from the enlightened decisions recently-decided and return to the one adhering to "mechanical application" of techicalities which operate to frustrate justice and equity. The Defendant received exactly what it bargained for: a water and sewer line acceptable to Farmington City. The jury verdict found there was no unreasonable delay. The instant decision, if not modified, works a tremendous "forfeiture" upon the Plaintiff and exacts a financial penalty upon him two-hundred fold of that intended by the Legislature, while at the same time "rewarding" the certainly questionable (criminal? ethical? moral?) conduct of the Defendant of continuing to have the Plaintiff work when the Defendant knew there would be no funds for payment. The Court should remedy this situation. Equity and fairness demands such. The present decision has become "an unwarranted shield for the avoidance of a just obligation."

In the alternative, the Court should allow the Plaintiff to retrieve the pipe from the Defendant. The licensing statute was never intended to provide protection in the "merchant" capacity.

The judgment of the trial court, rendered upon the jury verdict received after two day's trial in which all relevant issues (i.e. defenses: defective and/or untimely performance justifies non-payment) were raised, should be affirmed. The Plaintiff should be awarded the amount determined by the jury, plus interest, costs and attorney's fees.

Respectfully submitted this 16th day of September, 1983.

STEPHEN G HOMER
Attorney for Plaintiff-Respondent

CERTIFICATE

I certify that I hand-delivered two copies of the foregoing PETITION FOR REHEARING and MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REHEARING to the office of Mr Lorin N Pace, Attorney for Defendant-Repondent, 136 E. South Temple Street, Salt Lake City, Utah 84111 this 16th day of September, 1983.