

1971

Merlin Jackson v. Lothaire R. Rich : Brief of Defendant-Appellant

Utah Supreme Court

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Eldon A. Eliason v. Attorney for Plaintiff & Respondent Lothaire R. Rich; Attorney for Defendant & Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

MERLIN JACKSON,

Plaintiff and Respondent,

vs.

LOTHAIRE R. RICH,

Defendant and Appellant.

} Case No.
12602

Brief of Defendant-Appellant

Appeal from District Court of the Fifth Judicial District
in and for Millard County, State of Utah
Honorable J. Harlan Burns, Judge

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FILED

DEC 17 1971

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

MERLIN JACKSON,

Plaintiff and Respondent,

vs.

LOTHAIRE R. RICH,

Defendant and Appellant.

} Case No.
12602

Brief of Defendant-Appellant

Statement of Kind of Case

This is an action by plaintiff on an express contract to recover for work and materials furnished on defendant's rental unit in a building owned by defendant in Fillmore, Utah, which the plaintiff occupied as a tenant, and a counterclaim by the defendant for unpaid rent and damage to the premises.

Disposition in Lower Court

The case was tried to a jury, and a verdict against the defendant on plaintiff's complaint in the sum of

\$1,229.00 was rendered, which was offset by the sum of \$490.00 in unpaid rent, with the net sum of \$739.00, from which verdict the defendant appeals.

Relief Sought on Appeal

Reversal of the judgment against the defendant in toto and the awarding of a judgment against the plaintiff in the sum of \$490.00 for unpaid rent, to be offset by the sum of \$179.18 for work done by the plaintiff, on other premises, at defendant's request.

Statement of Facts

This concerns a rental contract between plaintiff and defendant for the north half of a store at about 20 South Main Street in Fillmore, Utah. The plaintiff approached the defendant about the middle or latter part of October in 1968 (T 173-29) and asked if the store was for rent. The defendant told plaintiff that the north half was for rent at \$140.00 per month (T 173-9) Plaintiff stated that he was going to start a home improvement business, and that he was well-qualified in all phases of the building line (T 173-20 & 21), that he intended to put in electrical and plumbing appliances and install them, and was financially able to run such a place of business, and had already purchased supplies and paid cash for them (T 173-18 to 28)

Subsequently it was agreed that the plaintiff would rent the premises for the sum of \$140.00 per month. Since the premises were in need of repair and the plaintiff had represented himself to be well qualified to do any and all repairs required, it was agreed that the plaintiff would repair the building, and that defendant would allow the plaintiff one half of the monthly rental, or \$70.00 per month, as credit for the work done on the premises, said work done to be credited at the rate of \$3.50 per hour (Ex. P-1). The other half of the rent, or \$70.00 per month, was to be paid to the defendant in cash monthly by the plaintiff.

The plaintiff was to have completed the repairs to the building by December 1, 1968, during which time plaintiff could occupy the premises without payment of rent. Plaintiff subsequently was injured, so defendant extended the time for completion of the work until January 1, 1969. Because of the injury of the plaintiff, defendant authorized plaintiff's brother, William, to also work on the premises and have this work credited toward payment of the one half of the rent at the same rate of \$3.50 per hour, but no one else was ever authorized to work on the premises. It was also agreed that defendant would allow the sum of wholesale cost plus 10 per cent for materials furnished. (Ex. P-1) The time for completion of the work was again extended to February 1, 1969. (See letter of Jan. 30, 1969, Ex. P-2 and P-3) and plaintiff agreed to start paying the monthly rental on February 1, 1969. (See plaintiff's Answer to Counterclaim, para. 2, R 10).

Defendant authorized plaintiff to finish some work on other premises (See letter of Jan. 7th, Ex. P-2). Plaintiff did this work, and claimed \$179.18 (Complaint, para. 6, R-2), which defendant stipulated as credit to the plaintiff.

Plaintiff actually had possession of the premises from November 1, 1968, to May 16, 1969 (Ex. P-6) (See defendant's Notice to Quit and Vacate served May 19, 1969. Ex. P-5)

Plaintiff never did pay the \$70.00 cash per month as was agreed, even though defendant made a demand for the same in a letter of April 17, 1969. (Ex. P-4). Plaintiff never offered to pay rent at any time (T 181-3 and T 74 9 to 20), either before or after notice to vacate or pay rent (Ex. P-5). The defendant went to Fillmore for the first time since January, 1969, about June 5, 1969, and saw the condition of the building.

Defendant's letter of September 2, 1969, authorized plaintiff to move all of the equipment out of the building except the back partition, the sheet rock on the middle partition, and the two sheets of plywood in the window. Plaintiff moved out of the premises the 4th or 5th of September, 1969 (T 184-22), and removed everything from the premises, including the rugs in the windows, except those items above mentioned.

The plaintiff sued to recover for all of the work he claims was done on the premises by himself and others, plus the materials, at retail less 10% instead of whole-

sale plus 10%, without any credit for the items which were removed from the premises, even though, by plaintiff's own admission, there was never any agreement for defendant to pay him cash for the work. (T 94-20 to 24) Jury awarded the verdict to the plaintiff, from which the defendant appeals.

ARGUMENT

POINT I. THAT THE COURT ERRED IN REFUSING TO GRANT DEFENDANT'S MOTION TO DISMISS PRIOR TO TRIAL ON THE GROUND THAT THERE WAS NO JUSTICIABLE CONTROVERSY.

The plaintiff in the complaint alleged an express contract for the defendant to pay plaintiff \$3.50 per hour for services rendered.

In answer to Question No. 3 of defendant's Interrogatories, asking "Is it not also true that defendant never agreed to pay you any money for work done on the portion you were to occupy?" plaintiff answered: "Defendant (obviously an error — should be plaintiff) agreed to pay \$140.00 a month with one half of the rental costs to be credited upon the improvements made by the plaintiff on the building he was renting." (Also see R 22-25 to 27)

Thereby plaintiff admitted he was to take out the cost of improvements by credit at \$70.00 per month.

The defendant made a motion to dismiss the plaintiff's complaint on the grounds that there was no justifiable controversy, as the pleadings and facts show the payment for work done on the rental unit was to be paid by credit on the rent, which effectively refutes the plaintiff's specific allegation for payment (T 4-18 to T 5-15)

At the time this motion was made there was nothing in the record to indicate that the plaintiff was relying on quantum meruit as it hadn't been pleaded, and it was agreed that plaintiff had not paid the rent, and the defendant argued that a person in default had no standing before the court, and at this point there was no controversy. Also (T 5-20-22) he who seeks equity must do equity.

The plaintiff's attorney in his argument brought forth the theory of quantum meruit, but admitted he hadn't pleaded it. (T 6-5 to 12) He never asked to amend his complaint to include an alternative remedy at that time, and stated that he could show damages on specific agreement. (T 5-29, 30 and T 6-29 to T 7-9)

There was no pre-trial order in the file, although the minutes (R-27) show that the order should have been filed, and plaintiff's attorney had been ordered to prepare it (T 7-27 to T 8-6) It should also be pointed out that there was no order in the file setting aside the default of the plaintiff. (Pre-trial Order signed June 29, 1971, and Order setting aside default signed July 1, 1971 (R-29 and R-30.) Defendant submits that he

was entitled to a dismissal based on the file and all the facts, and it was error to proceed further. The motion was taken under advisement, but never ruled on.

POINT II. THE COURT ERRED IN SUBMITTING THE CASE TO THE JURY ON THE EXPRESS CONTRACT, AS PLAINTIFF HAD BREACHED THE CONTRACT AND HAD NO RIGHT TO RECOVER UNDER THE LAW.

On the contract proven as pleaded, the plaintiff was given three months to prepare the premises, then to start paying the rent, \$70.00 by credit on work done at \$3.50 per hour and materials furnished at wholesale cost plus 10%, and \$70.00 cash, commencing on February 1, 1969. The plaintiff breached the contract by failure to complete the work agreed upon, even though given three months free occupancy in which to complete it. In addition to the work that was done, plaintiff was supposed to have put in a restroom (T 47-14, 20), which he never did. Plaintiff also breached the contract as he never paid rent as agreed or even tendered or offered to pay (T 74-9 through 20).

17 Am. Jur. 2d on Contracts, Sec. 355, page 791, states:

An obligation to perform arises upon the making of a binding contract, notwithstanding it is not to be performed until a future date, and the rule is that for a party to recover he must establish his own performance, or his offer and ability to perform, or a valid excuse for his failure to perform.

Cited under the footnote, *Nees v. Weaver*, 222 Wis. 492, 107 A.L.R. 1405.

Performance in the true spirit and meaning of the agreement is expected in the law. Also cited: *Miller v. Young*, 1970 Okla. 503, 172 P.2d 994.

Performance by the obligee or excuse therefore is essential to the right to recover upon the contract having dependent covenants. Cites *Western U. Tel. Co. v. Yopst*, 118 Ind. 248, 20 N.E. 222.

A failure on the part of one party to a contract to comply with its terms destroys his right to enforce it against the other or to derive any statutory rights therefrom. ¶ Sec. 358 of the same volume at 797 on necessity of offer of performance:

The general rule is that where performance of an agreement is to be concurrent on both sides, neither can recover without showing performance or an offer or tender of performance on his part.
...

and cites a number of cases in the footnote.

Sec. 365, page 807 of the same volume states:

As a rule a first party guilty of a substantial or material breach of contract cannot complain if the other party thereafter refuses to perform. He can neither insist on performance by the other party nor maintain an action against the other party for subsequent failure to perform.

In Vol. 17A C.J.S., Contracts, Sec. 566:

Performance or Breach. A party seeking to enforce performance of a contract or to recover for

the breach thereof where the contract contains mutual covenants must not only allege but prove that he has performed his own part. . . . Otherwise he must allege and prove legal excuse for his non-performance. . . . In an action to recover for a breach of contract plaintiff must allege and prove his willingness to perform.

The footnote cites *Roseleaf Corp. v. Radis*, 264 P.2d 964.

Applying the above principles to the instant case, the plaintiff never alleged that he had performed and never proved it. He never alleged he paid or offered to pay the rent, and he admitted that he never completed the work to be done on the contract, and never offered any excuse for failure to complete the work. He never expressed a willingness to perform, and never offered to complete the work or pay the rent and continue in the premises. In fact, under the express contract proven by him and all the law, he had never done anything by which the law could let equity apply, in the form of quantum meruit or other remedy, and allow him a recovery. The instant case clearly shows that the plaintiff expected to get his payment for work done from the \$70.00 per month credit. (See plaintiff's Answer to Interrogatories R 22-19 to 24, also T 94-20 to 24 and T 69-3 through 12). Any recovery would have to be in direct conflict with the terms of the express contract.

POINT III. THE DEFENDANT DID NOT HAVE ADEQUATE TIME TO MEET THE ISSUE OF QUANTUM MERUIT.

The quantum meruit issue was discussed at pre-trial, but the pretrial order was not signed by the Judge until June 29, after the trial was started on the 28th, and was not received by the defendant until 2:45 p.m. on Wednesday, June 30, after the selection of the jury and the day before the trial was to proceed at 9:00 a.m. in Fillmore. The quantum meruit was discussed on June 28 prior to selection of the jury (T 6-6 through 15) but no attempt was made to amend the pleadings at any time to include quantum meruit itself or as an alternative remedy to the express contract.

As is well known, the parties have a right to meet the issues, and in this instance, at the pre-trial, it was ordered by the Judge that a pre-trial order be prepared if the case wasn't settled by the 20th of May, and that thereafter the case would be set for trial. However, the case was set for trial on June 29, without a pre-trial order having been submitted by plaintiff, giving the defendant no opportunity to meet the issues.

Am. Jur. Vol. 41 on Pleading, Sec. 383, states among other things:

There can be no recovery upon a cause of action however meritorious it may be or how satisfactorily proved that is substance variant from that which is made by the plaintiff unless an amendment be made to conform the pleading to the proof of the new cause of action.

The Utah court has held that it is necessary to properly apprise the defendant of the quantum meruit claim. See *Taylor v. E. M. Royle Corp.*, 264 P.2d 279, 1 Utah 2d 175.

Action was brought to recover money allegedly owed plaintiff by defendant for services performed by plaintiff as a manager for defendant. The Fourth Judicial District Court of Utah County, Joseph E. Nelson, J., entered judgment for plaintiff, and defendant appealed. The Supreme Court held that it was error to charge defendant with liability under quantum meruit, an issue which defendant was never called on to meet.

There was no attempt in the instant case to amend or conform the pleadings to the proof.

The submission to the jury was error on the above ground.

POINT IV. THE SUBMISSION OF THE CASE TO THE JURY ON A QUANTUM MERUIT BASIS WAS ERRONEOUS AS IT WAS NEVER PLEADED BY PLAINTIFF.

The theory of quantum meruit was never pleaded by the plaintiff (T 6-5 to 13) and no amendment was ever offered to conform the pleadings to the record (see whole record.)

Numerous courts hold that where there has been an express contract alleged, there can be no recovery on a quantum meruit. In the instant case the plaintiff alleges an express contract, stating it is both verbal and in writing (T 6-28 to 30) and all the evidence (Ex. P-1 through P-6) clearly indicates such to be the case. The evidence clearly establishes an agreement

by the plaintiff to rent the premises for \$140.00 per month, and other terms as previously set forth. This is clearly an express contract and was argued by plaintiff's counsel to be such.

In support of the theory that there can be no recovery on quantum meruit where an express contract is pleaded, we quote from Vol. 17A C.J.S., Contracts, Sec. 569, page 1095:

a. Allegation of Express, and Proof of Implied, Contract. Generally, a plaintiff cannot, in an action brought on an express or special contract, recover, or introduce evidence, on an implied contract or quantum meruit, unless, under some authorities, he amends his pleadings or fails to establish the express or special contract.

At page 1096 it states:

In an action brought on an express or special contract plaintiff cannot recover on proof of an implied contract or on quantum meruit.

This has a footnote with numerous cases cited from the U. S. Court and twenty-four state courts, from Arizona to Wisconsin.

In the same volume at 1099 it states:

Contract breached by plaintiff. In the absence of an alternative plea on quantum meruit plaintiff who declares on contract which is shown to have been breached by him may not recover on quantum meruit.

In Vol. 35A of *Words and Phrases*, page 413, it sets forth, citing *Wade v. Nelson*, 95 S.W. 956, citing

Hutson v. Tyler, 36 S.W. 654, *McDonnell v. Stevenson*, 77 S.W. 760:

In an action on an express contract alleged to have been performed by the plaintiff there can be no recovery on quantum meruit.

Also in Vol. 8, *Pacific Digest* 2d, Sec. 346 at page 660 on Declaring on an express contract and recovering on quantum meruit, it cites a number of cases, some of which are:

Arizona, *Brown v. Beck*, 202 P.2d 528, 68 Ariz. 139.

Where plaintiff testified that there was a written contract on subject of his employment by defendant, but terms of contract were not established, plaintiff should not have been permitted to recover value of services rendered by him to defendant on quantum meruit theory.

Montana, *Puetz v. Carlson*, 364 P.2d 742, quoting 17 C.J.S. Contracts Sec. 569.

Express contract must be proven as alleged and failure to do so is not merely variance but failure of proof, and recovery may not be had on proof of implied contract.

Montana, *Arrow Agency v. Anderson*, 355 P.2d 929.

As a general rule, recovery cannot be had on quantum meruit under complaint alleging express contract.

New Mexico, *Cavez v. Potter*, 274 P.2d 308, 58 N.M. 662.

One cannot sue on express contract and recover on quantum meruit. Where complaint was for

breach of express contract, alternative prayer for judgment in quantum meruit could not authorize recovery in quantum meruit.

Oklahoma, *Oklahoma Natural Gas Co. v. Herren*, 195 P.2d 278, 200 Okl. 480.

Where petition declares alone on express contract to complete full performance thereof, no recovery can be had on quantum meruit.

Oregon, *Flaherty v. Bookhultz*, 297 P.2d 856, 207 Or. 462.

One cannot sue upon an express contract and recover upon a quantum meruit, and to recover upon a quantum meruit, it must be pleaded and proved.

Utah, *Morris v. Russell*, 236 P.2d 451, 120 Utah 545.

Where both parties to an action to recover for services rendered alleged same express contract, it is improper to submit the case to jury on quantum meruit.

Please note the above case is cited in 26 A.L.R. 2nd 947.

There are some courts that do allow recovery in certain instances, but they are distinguishable from the present case.

So it must be concluded that where a specific contract is pleaded and proven, as in the instant case, the plaintiff cannot recover on quantum meruit, and it was error to submit it to the jury.

POINT V. THE COURT ERRED IN SUBMITTING THE CASE TO THE JURY ON QUANTUM MERUIT AS THE EVIDENCE WAS NOT PREPONDERANT AS TO REASONABLE VALUE OF THE SERVICES.

Quantum meruit, which was introduced without pleadings or amendments offered, we find being defined in *Black's Law Dictionary*, 4th Ed. page 1408, as:

"As much as he deserved." The common count in an action of assumption for work and labor founded on an implied assumption or promise on the part of the defendant to pay the plaintiff as much as he reasonably deserved to have for his labor.

This is supported and is replete with citations from Vol. 35A of *Words and Phrases*, *Quantum Meruit*, page 413, from which we cite *Adams v. Smith*, 307 S.W.2d 525, 527:

"Quantum meruit" means "as much as he has deserved"; and in action on quantum meruit burden is on claimant to plead, prove and have jury instructed that his charges are fair and reasonable.

There was no showing in the present case that the charges were fair and reasonable, but were based on the specific contract. That the correct measure is the benefit conferred on the defendant is shown in the same volume and page, *Bouterie v. Carre*, La. App., 6 So.2d 218:

The amount recoverable on a "quantum meruit" depends upon the extent of the benefit conferred having reference to the contract for the entire

work, and this is usually the contract price *less the damages caused* by not complying with the exact terms of the contract. (Emphasis added)

Nearly all cases cite reasonable value as the amount of recovery, but it must be the reasonable value to the recipient, as in the case also cited on page 416 of 35A *Words and Phrases*. It cites the above case further:

Where a party derives any benefit from services rendered by another, the law reasonably implies a promise to pay on the part of the one who has received such benefit, such amount as it is *reasonably worth*, on the theory of “quantum meruit.” (Emphasis added)

Quantum meruit is based on the theory of unjust enrichment, which Black’s Law Dictionary, page 1705, states under this:

Doctrine that a person shall not be allowed to profit or enrich himself inequitably at another’s expense. *American University v. Forbes*, 88 N.H. 17, 183 Atl. 860.

This is also shown in Vol. 35A of *Words and Phrases*, page 417, under unjust enrichment, in *Ylijarvi v. Brockphaler*, 7 N.W.2d 314, 319, 213 Minn. 385:

The basis of a recovery on a “quantum meruit” is that the defendant has received a benefit from the plaintiff which it is unjust for defendant to retain without paying for.

The test is how much the defendant has been enriched or benefited, and the mere doing of work for another does not justify recovery, as is clearly shown on page

417 of 35A *Words and Phrases in Ylijarvi v. Brockphaler*, supra:

Where a contract for the drilling of a well provided for a 4-inch casing and was not thereafter modified, and contractor, after partial drilling of the well as specified, substituted a 2½-inch casing and after drilling to a further depth, but before completing the well ceased work and removed the 2½-inch casing and the contractor's equipment from the owner's premises and it was not shown that the part performance was of any benefit to the owner, it was not unjust for owner to retain the work performed and materials furnished without paying for them, and contractor could not recover on a "quantum meruit" for contractor's part performance.

Applying this result to the present case, the defendant should be able to take back the building without paying plaintiff anything as there was no showing of the benefit to the defendant, but there was actual showing of damage to defendant instead of benefit.

On this point the Utah court in *Young et ux. v. Hansen et ux.*, 117 Utah 591, 218 P.2d 666, allowed a plaintiff who had breached the contract to recover for the amount they contributed to the defendants *over and above* the amount of harm they caused the defendants by their breach. However, in *Young v. Hansen*, supra, the court left guidelines when it can be applied, among other things, if the breach was not deliberate. Here the breach was deliberate, as shown (T 309-4 to 15) when plaintiff said he deliberately did not put in the restroom or finish the back part.

So, if we assume for the sake of argument that this is a case for quantum meruit and apply the rule of *Young v. Hansen* to the instant case, by using the testimony of the plaintiff's own expert witnesses, when considered against the testimony as to damage costs which were unrefuted, we would find:

Plaintiff's witness— Vernon Peterson , expert (T. 114 to T. 122)	
Original Estimate in First	
Class Condition (T. 119-13 to 19)	\$1,495.00
Minus half of sheetrock estimate as he computed twice as much as actually was done -\$518.40 - ½ (T. 117-20 to T. 118-16)	- \$259.20
Minus \$108.00 on floor as he figured 2000 feet at 15c per foot, and Jackson claimed only 60x20 feet, \$288.00 total estimate (T 118-18 to 29)	- 108.00
	<hr/> 367.20
Total with Deductions off	\$1,127.80
Jackson claimed two coats of paint, 475 yards at 75c per yd. (T. 119-1 to 11) For extra coat (T. 119-1 to 11)	374.55
	<hr/> \$1,502.35
Total with two coats of paint	
Add credit for work done on other premises	179.18
	<hr/> \$1,681.53
Total credits	
Minus the amount for work which had to be redone. Jackson said he left holes in north wall (T 102-4 to 12) and sheet rock had to be sanded off on all seams, on all walls and ceiling scraped (T. 294-27 to T. 295-2). So all the work done on painting was of no benefit to defendant and couldn't be charged 2 coats @ \$374.55 each	- \$759.10
Minus time spent in repairing work done by Jackson so premises could be used damage deductible as can only recover for benefit	

over and above harm done (T.
291 to T. 295)

Keith Cole, 17 hrs. @ \$3.50	\$59.50
Sterling Rich, 6 hrs. @ \$4.50	27.00
Lothaire R. Rich, 17½ hrs. @ \$3.50	61.25

- 147.75

Minus rent @ \$140.00 per mo. from
Nov. 1, 1968 to May 16, 1969, 6½
mos. time shown in pleadings and
testimony—only recover on
amount above harm

910.00

Total to be Deducted

\$1,816.85

Net owing defendant by plaintiff
after deduction for harm done
and items where defendant
received no benefit by this
witness

\$ 135.32

Please note there was no breakdown shown from this witness
except as brought out on cross-examination.

Vernon Peterson testimony as applied to the particular situation
under the law, as set forth in Point V.

Plaintiff's witness—**Brooks Anderson**, expert taken from testi-
mony (T. 133 to T. 152) and breakdown as submitted by him on
Exhibit D-7.

\$ 684.20

Plus credit for work on other premises

179.18

Total Credit

\$ 863.38

Deduction for cost of painting which
had to be redone, so was of no benefit
as estimate on Ex. D-7
(See Peterson sheet for full
explanation)

\$210.00

Less cost of repairing work done by
Jackson so could be used, see
breakdown on Peterson explanation

147.75

Less value of rent not received @
\$140.00 per mo. from Nov. 1, 1968
to May 16, 1969—admitted by plaintiff
and shown in pleadings, 6½ mos.

910.00

Total to be Deducted

-\$1,267.75

Net owing defendant by plaintiff after
deducting for harm done and items
on which he received no benefit

\$ 404.37

Brooks Anderson testimony as applied to the particular situation
under the law in Point V.

Note that neither testified that the work was well done and that there was no testimony by any of the plaintiff's witnesses who testified that the work was done well, and that even the plaintiff himself admitted that it was good enough for him, but wouldn't be good enough for Mr. Warner's store.

Mr. Brooks Anderson had a complete breakdown on the costs and figures for doing the whole job as told to him by Mr. Jackson, (T 136-6 to 14, T 138-18 to 21), but even though he had called Brooks Anderson as a witness, the plaintiff refused to use the figures and breakdown which Anderson had prepared, and it was necessary for the defendant to introduce the estimate as Exhibit D-7 (T 145-14 to 27). The total on this was shown in the above figures as computed by the adding machine tape, which tape is attached to the exhibit but was not a part of the exhibit at the time, as Mr. Anderson stated that he didn't add it as he thought it could be added.

It should also be noted that Exhibit P-6 shows three women and several men were used, none of which were shown to have any experience or ability along this line, and even the plaintiff himself admits that he was not experienced at putting on sheetrock and perfatape. The only direct evidence showing who could be used to work on the premises showed only that plaintiff's brother William could be used. Plaintiff testified that he was authorized to use anyone when he was in defendant's office in February (by defendant, and Jan.

or Feb. by plaintiff). Both were long after the contract was made and work had been started. All of the people used were paid the \$3.50 per hour which defendant agreed to pay only Jackson or his brother, regardless of ability.

From the above it can be seen that there was no benefit accrued to the defendant, as shown by the testimonies. Mr. Peterson never noticed the condition of the premises after the work done by Mr. Jackson, to testify whether it was a good or bad job, and Mr. Brooks Anderson did note the condition of the premises, even though there was a store in it and it had been repainted, and he testified:

But I don't think he done the best job in the world, and I told him that. (Referring to Mr. Jackson.) (T. 142-6 to 8)

Mr. Frampton, the other expert witness called by plaintiff, even though he testified he was asked to figure the cost of doing the work in the unit by Mr. Jackson, according to Mr. Jackson's own instructions, testified that he didn't figure it or check it as to the quality, and he didn't testify as to the quality of the workmanship. The testimonies of Keith Cole and Sterling Rich both show that the work was poorly done, and had to be redone. This was testified to by the defendant also, and Mr. Warner testified that the building was in poor condition, and Mr. Jackson himself testified that he left holes in the wall that had to be spackled, and of course spackling would require another paint job.

After all of the testimony by most of the witnesses saying that the work was poorly done, the plaintiff and his counsel changed tactics and began contending that while the work would not stand critical inspection for other people, and maybe not for a furniture store, put in by Mr. Warner, it was good enough for Mr. Jackson. (T 308-17 to 24 and T 314-7 to 15)

Plaintiff argued that he was building for himself and not for someone else. This was a store, and to be of benefit to defendant, it should have been built so that others could occupy it when Mr. Jackson left it, as was necessary here. The jurors, who were all friends or acquaintances of plaintiff's counsel, were obviously convinced that it was not necessary to build it for use by others.

This clearly indicates thinking diametrically opposed to the law, which requires defendant to pay for only the benefit received by him, so if it isn't fixed good enough so that it will benefit defendant in his rentals when the building is left vacant, then obviously defendant should not be required to pay anything. To do otherwise would not be equitable.

All of the plaintiff's evidence was for the purpose of showing the time and materials he had put in, not at any time showing what it would be worth to the defendant. The plaintiff testified as to the total cost he was billing, but he at no time testified as to the worth of the items that were taken out, such as the partition across the middle, plus a counter across the middle, also

the long counter on the north side, and the stand for the wash basins. These are shown in defendant's exhibits D-2 and D-5.

In fact, when questioned on cross-examination, Mr. Jackson specifically stated that he did not keep track of the amount of time or materials he had put in on any of the particular items, and he would have no way of knowing what they would be worth.

Further, the defendant pointed out that the total hours claimed by plaintiff for Ex. P-6 totaled 312½ hours, and did not check with the actual figures as checked, but no attempt was made to correct the same. The only situation where the price of the item taken out was known was where Jackson admittedly took out the carpeting, which cost \$47.00 by his testimony, but in presenting this to the jury, there was no deduction made from the total billing.

Except for a charge from the invoices of \$58.00 which should have been \$.58, there was no attempt in the discrepancies to make any allowance for the mistakes made on the figures (T 241-27 to T 242-4 and T 244-9 to 13) or for the property taken out of the premises, as shown in the invoices and the testimony.

So it would be impossible from the evidence presented to arrive at the net benefit to the defendant, and to submit this to the jury was error.

POINT VI. THAT THE JURY'S VERDICT WAS NOT SUPPORTED BY THE EVIDENCE.

There was not evidence in any manner preponderant which would support the verdict on a quantum meruit basis. In addition to the matters set forth in Point V, and which is all incorporated herein as a part of Point VI as if fully set forth herein, we point out that plaintiff's testimony was contradictory, ambiguous, evasive, and deliberately misleading.

Plaintiff testified that he was doing work for other people at this time (T 237-21 to 26 and T 236-12 to 15) and that he paid sales tax for materials which he was going to use in the defendant's building, but for other people he charged the sales tax when he sold it. Among those invoices charged to defendant there were two classes of bills, namely one with sales tax and one without, which were marked for resale. In his general testimony he stated that he wasn't charged sales tax on those items which were for resale, but when they were to be used by himself there was a tax charged. If all of the materials invoiced and charged to the defendant were in fact used in defendant's premises, there would have been no need to differentiate in the billing.

Plaintiff testified that part of the materials were used on other premises besides the rental unit (T 238-15 to 19, T 238-25 and 26, T 239-14 to 16, T 246-19 to 23, and T 247-21 and 22). However, in his final testimony he stated that all of the materials on the

invoices listed and charged to defendant were put into the rental unit, regardless of whether or not they were marked for resale (T 272-17 to T 273-3, and T 308-11 to 16), which is clearly contradictory.

POINT VII. THAT THE COURT ERRED IN ITS INSTRUCTIONS TO THE JURY, AS SET FORTH IN THE FOLLOWING INSTANCES.

A. On Instruction No. 15, the court erred in paragraph 2 of the instruction, in that the court instructed:

If you should further find that plaintiff provided labor and materials in remodeling and renovating defendant's business in an amount equal to or in excess of the rent required, then you may find that the plaintiff was not in default and would be entitled to require the performance of the defendant under the terms of the agreement.

This leaves a direct inference that no matter what the plaintiff had done, he would be entitled to recover the amount of work and labor performed which was in excess of the \$70.00 cash due for rent, due on the first of February, and that he would not be in default. Actually, even if this were true, under the law as applied in quantum meruit, the court should have pointed out that he had occupied the premises from Nov. 1, 1968, and so would have had to show that there had been work done in excess of the value of three months' rent, or \$420.00, plus the \$70.00, for a total of \$490.00 as the total harm done to the defendant from his occu-

pancy. In truth and in fact, plaintiff's time Exhibit P-6 shows that up to February 1, 1969, there were only 101 hours put in, or \$353.00, and plaintiff's Exhibit P-7 for materials does not show any dates on the charges, and therefore, under any theory, plaintiff would have to be in default, contrary to the instruction.

This is in direct conflict with the express agreement pleaded and proven by plaintiff.

Under this instruction, it would have allowed the plaintiff to stay in the premises without paying any cash on the rent, until all that he claimed was used up in rent, and he could then move out and the defendant landlord would get nothing for the time it was occupied.

This also does not take into consideration the fact of the plaintiff's breach of contract, and duty to perform before he can demand payment for any of the work done, or to give a reasonable excuse or be willing to complete performance. Instead, by his own admission, he deliberately did not complete the contract (T 309-4 to 15)

If the law as instructed in this paragraph were followed, then landlords would in effect have to guarantee the success of any tenant in business who had made any improvements, whether made with or without an agreement, as every improvement made would entitle the tenant to an offset regardless of whether or not he paid rent. This was error.

B. Instruction No. 16 states that the plaintiff

should be awarded such damage as will fairly and adequately compensate the plaintiff for money and damages sustained as a result of labor and materials furnished. This instruction is in error and contrary to law, as the test is not whether or not it will fairly and adequately compensate the plaintiff when he is relying on the application of quantum meruit, as was allowed here, but the true test is the reasonable value to the defendant for the work performed and materials furnished, over and above the harm or damage done to the defendant. This is clearly set forth in Point No. V, and it is supported and set out in *Young v. Hansen*, supra. Here it was held that plaintiffs could recover a judgment for the amount they contributed to the defendants over and above the amount of harm done defendants by their breach. The case previously cited in Point V, *Ylijarvi v. Brockphaler*, supra, also emphasises this fact.

In the instant case, there was no showing as to the benefit over and above the amount of harm, and in truth and in fact the only proof was as to the actual amounts claimed for work and materials, and not the reasonable worth or benefit over and above the amount of damage.

On quantum meruit, there should have been an allowance for all the rental time that the plaintiff occupied or had his equipment and inventory in the premises, namely from November 1, 1968, to September 2, 1969, at \$140.00 per month, as an offset, as this would be the amount of rent due for the time the plaintiff occupied or held up the use of the premises. Inasmuch as the

plaintiff had only pleaded express contract, the defendant's pleadings only set out the actual amount of the rent from when it was agreed that it would start, but based on the detriment as quoted in *Young v. Hansen*, previously cited, to the defendant, any recovery for the plaintiff would have to be over and above that amount. This also does not take into consideration the damage done and time spent in fixing the building, which was shown as \$147.75 plus the cost of the painting, \$210.00. This is shown to be the law under Point No. V, and the amounts shown on the information as set forth for Brooks Anderson and Vernon Peterson, plaintiff's expert witnesses.

C. In regard to Instruction No. 17, this was in error for the same reasons as set forth regarding Instruction No. 16, as the \$490.00 claimed for unpaid rent was the express contract agreed price, but was not based on the quantum meruit as allowed in this particular suit. When quantum meruit applies, defendant is entitled to set off all of the damages against any claim of the plaintiff, as shown in Point No. V. To give this instruction was error.

D. Referring to Instruction No. 20, this instruction was erroneous in that the instruction combined the express and implied agreement together, while, if the implied agreement had been left out, and the plaintiff had relied on the express contract, he would have been entitled to recover the agreed price if he hadn't defaulted (as he did default he could not recover), under the law

for the value of the work done over and above the detriment suffered by the defendant. See the previous points covering this same postulate.

E. The court erred with respect to Instruction No. 22, as the second paragraph in the instruction is completely contrary to law and negates the first paragraph, which first paragraph was based on the express contract. If express contract was found, the first paragraph would cover it without the second paragraph. However, the second paragraph states that if improvements were placed in the building, that plaintiff is entitled to reimbursement, which is not in fact at all true, as he must show performance of his contract, reasonable excuse for failure to perform, or willingness to perform, and/or a tender of performance, before there can be recovery by the plaintiff. This is clearly set forth in the argument in Point No. II.

F. The court erred in failing to give defendant's requested Instruction No. 2. Title 78, Chapter 36, Sec. 3 of the 1953 *Utah Code Annotated*, as amended, gives a landlord the legal right to dispossess the tenant on a three-day notice to vacate or pay the rent when the tenant has defaulted in the payment of rent. The plaintiff assumed this risk when he went into the premises and didn't request a lease or any special provision for recovery for work if his tenancy was terminated. This was in spite of the fact that defendant offered to give plaintiff a lease (Ex. P-3).

G. The court erred in failing to give defendant's requested Instruction No. 6. This instruction was based on the premise that a defaulting party cannot recover where he has made no tender of performance, and is amply set forth under the citations under Point II and is complete and proper in all respects, and should have been given.

H. In failing to give defendant's requested Instruction No. 12, the court erred. This should have been given as there was evidence clearly showing that the work was poorly done, and had to be modified or redone because of the workmanship, and this could be used as an offset to reduce the benefit to the defendant, and all of the cases and authorities cited under Point V support the fact that the defendant can offset any and all damages or detriments which he incurs against any claim which is made under quantum meruit, to make the amount of recovery by the plaintiff, if any, reasonable.

POINT VIII. THAT THE COURT ERRED IN FAILING TO ADMIT DEFENDANT'S OFFER OF EXHIBITS.

That during the course of the trial, plaintiff's attorney repeatedly referred to exhibits and letters written by the defendant, cross examined defendant on them, and quoted from them, attempting to show bad faith on the part of the defendant for failing to object to the condition of the premises, even though defendant testified that he hadn't seen the property from January

until June of 1969, by taking excerpts out of context to try and impeach the defendant's testimony, where the whole letter as written would have explained the whole situation. But the defendant was not permitted to introduce the exhibits as offered, although plaintiff identified them and could have testified as to any misstatement he thought they contained.

This was particularly true with the letter as to the time of objection to the work done, and would have shown that the defendant had not inspected the premises and couldn't have objected prior to the time he did object. The letter regarding the permission to remove the materials from the premises, which was quoted from by the plaintiff, would have explained the general situation, but defendant was not allowed to introduce them. The exhibits not admitted were designated D-12, D-13, D-14, D-15, and D-16 (T 270-30 to T 271-1 to 5).

SUMMARY AND CONCLUSION

The defendant concludes that each and every point as set forth herein is sufficient in and of itself to set aside the verdict as rendered. The record and transcript reveal that the trial was in error from commencement to conclusion in numerous respects.

The plaintiff has invoked quantum meruit, or "as much as he deserves." Let us see what he deserves.

He entered into an express rental contract, which he never honored by payment of any money.

He agreed to repair and improve the premises, which he partially carried out, the balance of which he deliberately refused to complete.

The work he did was poorly done and to a large measure had to be redone.

He had possession of the premises from November 1, 1968, to May 16, 1969, without an offer to pay, or any excuse for his refusal, without alleging that he had performed or had been prevented from performing, or without being willing to perform.

He received from the work he had performed the movable improvements without crediting the defendant for anything which he had received.

So the question is what he deserves. The answer must clearly be that he deserves to have his verdict set aside and be required to pay the defendant the \$490.00 rent due on the express contract less the \$179.18 for work on other premises which plaintiff performed, as the defendant counterclaimed on the express contract and could not recover as defendant deserves on quantum meruit, and in addition to pay all costs of this appeal.

Respectfully submitted,

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