1972

Merlin Jackson v. Lothaire R. Rich : Brief of Plaintiff-Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

MERLIN JACKSON,
Plaintiff and Respondent.
vs.
LOTHAIRE R. RICH,
Defendant and Appellant.

Case No.

BRIEF Of PLAINTIFF-RESPON

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

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This is to certify that on March 18, 1972, the undersigned mailed ten copies of the within brief to the Clerk of the Utah Supreme Court, Capitol Building, Salt Lake City, Utah; and that he mailed on the same date three copies to Counsel Lothaire R. Ri 2815 East 3365 South, Salt Lake City, Utah, 84109. That each was mailed with proper postage and in the regular course of handling.

Eldon A. Eliason

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Case No. 12602

STATEMENT OF FACTS

The facts of the within case are simple and uncontroverted, and they are that an oral agreement was entered into between the Plaintiff, (Respondent) and the Defendant, which agreement was described in three letters, from the Defendant (Ex. P-1, 2, 3) and in concise terms was: The plaintiff was engaged by the defendant to do remodeling and repair work on a building which the plaintiff proposed to lease. And also that the plaintiff would do certain repair work on an adjoining portion of the same building which the defendant was leasing to someone else, (Bradshaw Auto Parts). That the defendant agreed with the plaintiff to pay him $3.50 per hour for the said repair work and remodeling, both in the area to be rented by the plaintiff and in that portion of the building rented to others (Ex. P-1).

The labor supplied to the rental part of the unit at $3.50 per hourwas $1,093.57 (T 56 - 20). The number of hours per day and the days of the month that the labor was performed was detailed in testimony (T 50 - 19) and (Ex. P-6). The plaintiff furnished materials and supplies used in the remodeling which were also itemized by each invoice number and sales slip from Peterson Machine Co., and which materials and supplies totaled $708.71 (T63-22) (Ex. P-7). The plaintiff also provided repairs and improvements to unit of the building rented by others, which defendant (appellant) stipulated to be the sum of $179.16. (T 57-7) That the total amount due the plaintiff from the defendant on the unit to be rented by the plaintiff was and is $1,093.57 for labor; $708.71 for materials; and the sum of $179.16 for improvements to other portion of defendant's building by plaintiff. Accordingly, the defendant owed the plaintiff $1,980.87 as a result of labor and materials, per their oral agreement, which oral agreement was supported by defendant's written correspondence and other documents. (Ex. P-1, 2, 3, 4, & 5.)

The plaintiff rented the rental unit from the defendant with payments to begin February 1, 1969 (Ex. P-3, Par. 2, line 3) and concluded with eviction and the doors being locked on May 19, 1969, while the plaintiff was laid up with injuries. That the agreed rent was $140.00 per month. The parties agreed that one-half of the monthly rental ($70.00 per month) would be credited by the repair and improvements made. Defendant was to pay the plaintiff in cash for the repairs and improvements ($179.16) to the auto parts building and motel unit. The defendant

was to pay plaintiff for materials used at cost plus 10% (708.71). The defendant was billed for such improvements and materials on Mar. 20, 1969, on April 2, 1969. April 6, 1969 and April 9, 1969, none of which was paid by the defendant to the plaintiff (T 61 - line 20-30). Subsequently plaintiff credited the amount due as rental on the building and offset the payment as follows:

Total rental due Defendant	$490.00
One-half rental due in cash	245.00
Labor on Auto Parts Bldg., & Motel	179.18
Difference due Defendant	65.82
Total materials purchased from Peterson Machine Co. for Defendant's bldg., cost plus 10%	708.71
Balance due in cash on rental to Defendant	65.82
Net balance due Plaintiff from supplies	$642.89
Plus Plaintiff's labor on rental unit	1093.57
	1736.46
Less one-half rental due in work	245.00
Total amount due Plaintiff	$1491.46

The plaintiff testified as to the actual hours of work performed and a day by day itemized account of each day of labor was furnished the defendant. At the trial plaintiff presented three expert witnesses (T 104 - Mr. Frampton, T 114 - Mr. Vernon Peterson, T 133 - Mr. Brooks Anderson), which was corroboration of the work performed

as shown under plaintiff's Exhibit 6. Supplies including invoice numbers from Peterson's Machine Company were contained on Exhibit P-7 and corroborated by testimony of Lowell Peterson (T 108).

JURY VERDICT

The jury rendered verdict in the sum of $1,229.00 for repairs, improvements and remodeling performed by the plaintiff at the instance and request of the defendant, and offset the payment by the sum of $490.00 for rent due and unpaid, with a net verdict of $739.00. Evidence justified the jury crediting Defendant for $58, because of invoice error of $58, instead of $.58, and also crediting defendant for a counter and rug removed from the premises at defendant's request.

There was ample and conclusive testimony to support the verdict of the jury. The testimony of the three expert witnesses, Mr. Peterson, Mr. Anderson and Mr. Frampton, was not to change the theory from damages due on an oral contract to quantum meruit, but was supporting testimony that the services and the materials had in fact been furnished, which repairs and which materials and supplies the witnesses observed and examined.

ARGUMENT

POINT I.

THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH AN AGREEMENT BETWEEN PLAINTIFF and DEFENDANT.

Ex. "P" 1, a letter from defendant to the plaintiff refers to an oral agreement in which the defendant states "This will be perfectly satisfactory with me". P.S. "verifying $3.50 per hour for labor and wholesale plus 10% for materials." Ex. "P" 2. Letter dated Jan. 27, 1969, from the defendant, is quoted as follows: "I had been waiting for some weeks, as I told your wife the last time I was up that I was agreeable to the time and materials suggestion, providing you would tell me what it was. *You have now told me and we understand each other*". As I stated, I am perfectly willing to go ahead on that basis. I note you have pretty well put the back on the portion to the middle. We need to put in a partition in the front window which you started. I suggest you complete it, also put in a partition above the window by the ceiling and the top of the window. I need to have the rest of the partition on the south finished including hanging the door. I would be glad to pay you the $3.50 per hour if you will finish up the job." Further quoting paragraph 3, "I suggest that you take the rest of the month to do the job and let the rent start on the 1st of February." Quoting from paragraph 5, "incidently, besides finishing the partition, I need to have the rest of the wall on the inside perfa-taped as well as that which is put in the window. I will be glad to pay you for that if you will finish it up as I have been somewhat under the weather and it has been almost impossible for me to get this finished."

Plaintiff's Exhibit No. 4 further confirms the agreement and acknowledges invoices for materials and supplies in the sum of $142.00.

Paragraph No. 5 of Exhibit No. 4, written April 17, 1969, is quoted, for the purpose of showing that the agreement between the parties had continued with work and labor being performed and supplies being furnished by the Plaintiff to April of 1969. Quoting from Par. 5, defendant states, "I have been very short this year due to the fact that rentals for me were very bad last year, although it is working out fine now. But we must get on a basis where we can bill it once a month and I should have a full and total itemized bill for your work that you are claiming credit on, and of course I will give you credit on the work in other rooms such as 5, 13, etc."

Paragraph 6 acknowledges receipt of invoices dated Mar. 1969. It is quoted as follows: "I note that the invoice dated Mar. 1969 is a general bill and if this is a full bill then of course I am satisfied, if you are. In any event, let's get it straightened out right away so I will know where you are going."

Plaintiff's Exhibit No. 6 is a day by day itemization delivered to the defendant by the plaintiff of hours work by plaintiff on defendant's building, detailing the number of hours per day and by whom the work was performed. The total labor includes 369 hours for a total amount of $1272.75. Materials and supplies are itemized by invoices and included on Plaintiff's Ex. No. 7. Each invoice from Peterson's Machine Company was examined by the defendant. The plaintiff testified that each item was used

in the repair and improvement of the defendant's premises and none was used elsewhere.

The above referred to communication between Plaintiff and Defendant shows complete meeting of the minds of the parties, constituting a valid contractual agreement.

The primary test as to the actual character of a contract according to authorities and as is cited in Am Jur 2d, Vol. 17, pg. 333, is quoted as follows:

> The primary test as to the actual character of a contract is the intention of the parties, to be gathered from the whole scope and effect of the language used, and mere verbal formulas, if inconsistent with the real intention, are to be disregarded. It does not matter what name the parties chose to designate it. But the existence of a contract, the meeting of the minds, the intention to assume an obligation, and the understanding are to be determined in case of doubt not alone from the words used, but also the situation, acts, and conduct of the parties, and the attendant circumstances.

Quoting further from Am Jur 2d Vol. 17, pg. 334-335, the following language is helpful in determining that an agreement existed between the parties.

> Contracts are said to be either express, implied, or constructive. Contracts are express when their terms are stated by the parties, and they are often said to be implied when their terms are not so stated. Thus, an implied contract is one inferred from

the conduct of the parties, though not expressed in words.

Contracts may be implied either in law or in fact. Contracts implied in fact are inferred from the facts and circumstances of the case, and are not formally or explicitly stated in words. It is often said that the only difference between an express contract and a contract implied in fact is that in the former the parties arrive at their agreement by words, whether oral or written, while in the latter their agreement is arrived at by a consideration of their acts and conduct, and that in both of these cases there is, in fact, a contract existing between the parties, the only difference being in the character of evidence necessary to establish it. In other words, in an express contract all the terms and conditions are expressed between the parties, while in an implied contract some one or more of the terms and conditions are implied from the conduct of the parties.

The source of the obligation of express contracts and contracts implied in fact is the manifested intention of the parties. An implied contract between two parties is raised only when the facts are such that an intent may fairly be inferred on their part to make such a contract. All the pertinent circumstances must be taken into consideration.

According to authorities, an Agreement by conduct is just as binding as one made by words. Ahern vs. South Buffalo Railroad Company, 344 US 367.

The Supreme Court of the State of Utah has likewise held that the interpretation of an oral agreement is ascer-

tained by the meaning given to the words and manifestation of the parties in determining their intent. Fuhriman Inc., vs. Jarrell 445 Pac. 2d 136. In the Fuhriman case an oral agreement was had between the parties involving rent on a home occupied by defendant, while builder was constructing defendant's home. The Supreme Court upheld the interpretation of the trial court, stating "that it is a duty of the trial court to determine the meaning to be given words and intention of the parties."

In the instant case, there was adequate evidence and testimony to establish the intention of the parties and to justify the jury and their award for damages based upon the agreement of the parties. The figures on one invoice had been transposed and the change of $58.00 to $.58 was properly altered by the jury. The jury also credited defendant with a counter and rug plaintiff removed at defendant's request.

In determining the issues involved the Supreme Court has the duty to review the evidence in light most favorable to the trial court's findings. Lynch vs. McDonald 367 Pac. 2d, 464. Weenig vs. Manning 262 Pac. 2d 491. Parrish vs.Tahtaras 318 Pac. 2d, 642. In quoting from Lynch vs. McDonald Supra,

> "While some of the testimony is admittedly in conflict and not in complete harmony with testimony given in companion case, we find there is ample competent, substantial, clear and convincing evidence to support the facts therein."

And the same is applicable to the instant case. There is

ample competent, substantial, clear and convincing evidence to support the verdict of the trial jury and the judgment of the Court and neither, under the circumstances, should be disturbed.

RESPONDENT'S POINT II.

WAS DEFENDANT ABSOLVED FROM PAYING BECAUSE OF QUALITY OF THE WORK?

The contract between the Plaintiff and Defendant was not breached by the Plaintiff. Even if some of the labor performed at the express request of the defendant, (Exs. 1, 2, and 3) ; and if some small repair item was not completed in the manner in which the defendant or his son or son-in-law would have completed it does not tend to breach the contract. So far as plaintiff could determine, the repairs, the labor and supplies furnished to the portion of the premises not leased by the plaintiff (Bradshaw Auto Parts and Motel room units) were completed as requested by defendant, and he acknowledges by stipulation (T 57-7) an amount owing of $179.18 for said repairs. The repairs in the portion of the building being leased by plaintiff were to make it tenantable for the plaintiff. Plaintiff testified that when he first discussed the proposed lease with the defendant, TR 32 line 4, that the building was loaded with junk, cans, lumber that had been torn out from the west end of the building where there had been a second floor, that there had been water damages through the ceiling to the Motel; that the floor was black in color from previous

waxing and stains; that partitions were required. All of these things were done as evidenced by Exhibits 6 & 7, and hours of work performed and invoices of materials furnished, to satisfy the tenant (plaintiff). Under such circumstances, Plaintiff could not have breached the contract and the payment for rent, which was due monthly, one-half in cash and one-half in labor was tendered when Plaintiff sent defendant vouchers for materials and supplies purchased for his building and credited the repairs on the non-rental unit with the materials and supplies to the defendant. The defendant was requested to acknowledge and credit the plaintiff in his rent with the items above mentioned. Plaintiff had expended in labor and materials and supplies for the defendant's building in excess of $1980.87, and had received approximately three months rent. Plaintiff was not in default and the jury were justified in determining as they did in their verdict, that the rent was a proper off-set against supplies and materials purchased for the building in the sum of $708.71 and in repairs to both leased and non-leased portion of the building.

POINT NO. III.
REPLY TO APPELLANT'S QUANTUM MERUIT

The defendant spends considerable time in his brief discussing the submission of the case to the jury on quantum meruit. Plaintiff submits that the case was submitted to the jury on express and implied contract clearly established by the evidence with itemized evidence to justify the jury in their award, with the help of three expert witnesses who helped to establish that work had in fact been

done; the supplies and materials had in fact been furnished and the value was in direct proportion to the itemized billing submitted to the defendant by the plaintiff.

Respondent represents that the instructions of the Court No. 15, to which the defendant objects, to-wit: "If you should further find that the 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", is a correct statement of the law. The jury could well find from the clear and convincing testimony in the case that defendant did owe for the labor and materials furnished and from the evidence were justified in making an adjustment as they found from the evidence in offsetting the amount of plaintiff's award by correcting the transposition of figures on the invoice from $58.00 to $.58 (T 241-27) and were further justified by allowing defendant credit for some property removed from the building by the plaintiff at the instance of the defendant, if they in fact found that it was a proper item to be deducted from plaintiff's award. Hence the verdict of $1,229.00 for total repairs and improvements (rather than $1,491.00 requested by the plaintiff) less $490.00 for rent, for a net verdict of $739.00.

Defendant in his brief excepts to the Court's instructions Nos. 16 & 29. The Court's instruction No. 16 is a correct statement of the law and the near identical quote is

found in Williston on Contracts or in the restatement of the law of contracts, and as is so quoted herein. AM Jur 2d, Vol. 17, pg. 334, 335. Also, Instruction No. 22 of the Court provides correctly for an offset and the jury correctly interpreted the instruction and applied the law in granting the defendant full credit as offset against the repairs and improvements.

POINT IV

BILATERAL PERFORMANCE

The further point raised in the Appellant's brief is that because $245.00 cash was not tendered to the defendant for one-half of the rental, even though the plaintiff had performed $179.18 in labor on other premises for the defendant, which defendant agreed to pay, and had purchased materials and supplies from Peterson Machine Company, used in defendant's building at a cost of $708.71, that Plaintiff was barred from claiming the amount due him, because of Plaintiff's breach. Plaintiff alleges that with these sums due from the defendant in cash, that there was not such a breach of the agreement by the plaintiff as would permit Defendant to refuse to make payment for the labor and supplies furnished as agreed upon by the parties.

Where two or more performances are promised by each party, promises of one or more of the performances on each side may be promises for an agreed exchange. The Court was following the general rule of constructive conditions in promises for an agreed exchange in the instructions to the Jury. A concise statement of the law applicable is found in the re-statement of the law of contracts, Sec. 266, pg. 382, from which we quote.

"There can be no doubt that the parties consider not only their promises in a bilateral contract as exchanged for each other, but also consider the performances promised as the subject of exchange. It cannot be supposed that parties would exchange unconditional promises, each promise being the consideration for the other, except on the assumption that they regarded the respective performances as also subjects of exchange. When parties enter into an ordinary bilateral contract, therefore, they contemplate a double exchange, first an exchange of promises and later an exchange of performances. The performances are not necessarily to be rendered at the same time, but the price of an automobile to which a bilateral contract of purchase and sale relates is the agreed exchange for the machine whether the price is payable before or after delivery of the machine or at the same time. It is so generally true also that the performances to be exchanged are treated by the parties as of equivalent value that any exceptions are disregarded in favor of a uniform rule.

The importance of the promises in a bilateral contract being promises for an agreed exchange is to produce a dependency between the duties of the respective parties. The result is in most respects the same as would be produced by inserting a requirement of the existence of appropriate conditions and, therefore, as matter of terminology, it might be said that such constructive conditions exist. There are, however, some consequences due to the promised exchange of performances which cannot without strain be described as due to a requirement of the existence of constructive conditions."

The restatement of the law under subsection (3) of the same paragraph deals with divisible contracts where a contract is divisible by its terms. The performance of each party by one party is the agreed exchange for a corresponding part by the other party. Quoting from the said Subsection (3):

> "If the performance of either party is inescapable of division interpretation is easy, but where performance due is stated as a number of units, usage in the performance of similar contracts is frequently the only guide in determining whether these units are to be separately performed as where the price promised for a piece of work is ten dollars a day, or for a quantity of lumber is $40 a thousand feet."

Section 267, page 386 gives the principle in the following language:

> "Promises for an agreed exchange are concurrently conditional, unless a contrary intention is clearly manifested, if the promises can be simultaneously performed and the parties can be assured that they are being so performed, where by the terms of the promises
>
> (a) the same time is fixed for the perform- of each promise; or
> (b) a fixed time is stated for the performance of one of the promises and no time is fixed for the other; or
> (c) no time is fixed for the performance of either promise; or

(d) the same period of time is fixed within which each promise shall be performed.

a. The treatment of promises as concurrently conditional is favored since each party is protected by the privilege of withholding his performance until he receives performance by the other party. How far such conditions are constructive rather than based on an interpretation of the manifested intention of the parties may be subject to dispute, and the answer may differ in different kinds of contracts. In some kinds long usage of treating promises falling within the rules of the Section as concurrently conditional has now resulted in making the inference natural and perhaps necessary that the parties intended simultaneous performance, and that neither performance should be rendered unless the other is also. It is immaterial, however, whether such an intention is manifested. Justice requires the result unless a contrary intention is clearly manifested."

Based upon this long accepted principle the defendant in the instant case cannot argue that lack of performance by the plaintiff had breached the Contract where defendant was required to perform concurrently on his agreement to pay for certain improvements, materials, supplies and repairs.

CONCLUSION

For the reasons stated herein, the Respondent respectfully requests this Court to affirm and uphold the verdict of the trial jury, and the judgment of the trial Court as being triers of the fact in the best position to determine the credability of the testimony and the sufficiency of the evidence to justify the award.

Respectfully submitted,

ELDON A. ELIASON