1972

Plc Landscape Construction v. Piccadilly Fish 'N Chips, Inc. : Respondent's Brief

Utah Supreme Court

Harold A. Hintze; Attorney for AppellantC. Demont Judd, Jr.; Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

PLC LANDSCAPE CONSTRUCTION,

Plaintiff and Respondent,

vs.

PICCADILLY FISH 'N CHIPS INC.

Defendant and Appellant.

Case No. 12607

RESPONDENT'S BRIEF

Weber County

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STATEMENT OF FACTS

Respondent is a landscape construction company located at 1418 Wall Avenue, Ogden, Utah. Near the time of completion of the construction of the defendant's restaurant, defendant discussed with plaintiff the possibility of plaintiff providing the landscaping and exterior design for the restaurant. Negotiations commenced between the respective parties wherein various designs and their respective prices were discussed. The negotiations yielded an agreement which provided that the defendant pay the plaintiff the sum of $4581.30 and defendant must supply plaintiff with some hand labor if plaintiff was to complete the project for $4581.30. The defendant failed to provide all of the hand labor necessary if the project was to be completed on time. As a result it was necessary for plaintiff to perform the work. After the landscaping had been completed the respective parties met to adjust the price previously agreed upon. Because of the additional labor involved, total price of work and materials furnished was $6669.53. Defendant thereafter paid plaintiff the sum of $5500.00 but refused to pay an additional $1169.53 which he owed the plaintiff for work and materials furnished. Upon defendant's refusal to pay the additional amount due, plaintiff commenced an action to recover the $1169.53.

DISPOSITION IN THE LOWER COURT

This case was tried in Ogden on the 24th day of June 1971, before the Honorable Calvin Gould, one of the judges of the Second Judicial District. At the conclusion of the plaintiff's case, the court took under advisement defendant's Motion for Summary Judgment

said motion being based on the premise that plaintiff had filed to establish a prima facie case, stating, "I will take the motion under advisement. But at this point, Mr. Hintze, it would appear to me that except for the actions of your party, there was a contract. And it was their failure to perform that put the case into a quantum meruit type situation. If your parties had performed with respect to labor, we would be dealing with a contract case." On June 28, 1971, Judge Gould entered a Memorandum Decision finding the issues in favor of the plaintiff and against the defendant with judgment against the defendant in the sum of $1165.53, plus costs.

STATEMENT OF POINTS RELIED UPON

1. Court was correct in granting plaintiff judgment and in failing to grant defendant's Motion for Summary Judgment.

A. Defendant seeks reversal on grounds that court should have granted them Summary Judgment because it failed to prove quantum meruit should be denied.

B. Plaintiff proved that an express contract did exist between the parties. Plaintiff's evidence established reasonable value of the materials and labor provided.

C. Supreme Court has not reversed trial court when sufficient evidence exists to support court's ruling.

ARGUMENT

1. The court in its Memorandum Decision by grant-

ing the plaintiff's judgment in effect ruled against the defendant's Motion for Summary Judgment. Court by its ruling found sufficient evidence in the testimony by the witnesses to grant plaintiff's judgment.

A. Defendant's reversal on the grounds that the court should have granted them Summary Judgment because plaintiff failed to prove quantum meruit should be denied.

Rule 15 (b) of the Utah Code Annotated, 1953, states: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings; such amendment of the pleadings as may be necessary to cause to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance,if necessary, to enable the objecting part to meet such evidence."

Rule 15(b) clearly states that the plaintiff's election to proceed under a theory of express contract rather than a quantum meruit was the proper approach to take since it enabled them to make their pleadings conform more precisely to the evidence.

In Jackson v. Cope, 266 P 2d 500, 1 Utah 2d 330, (54) the court stated; "Where plaintiff's amendment to pre trial order was made to conform to evidence, and new issue introduced thereby was such as could be conveniently and effectively handled in trial without injury to substative rights, and defendants did not claim that they had been surprised by the evidence or had not been given an opportunity to meet it, amendment of pre-trial order was clearly in futherance of justice." In the case at hand this is clearly the circumstances which exist. Plaintiff proceeds in the manner which made his initial pleadings more concisely conform to the evidence. Further more, the defendant makes no objection to the Findings of Fact. In failing to take issue with the trial court's findings of fact, the defendant in effect acknowledges that they were not surprised by the evidence. As a result, we can only conclude that the procedure taken by the plaintiff was clearly in futherance of justice.

B. Plaintiff proved that an express contract existed between the parties and plaintiff's evidence established reasonable value of the materials and labor provided.

The court in its Memorandum Decision determined, "that it couldn't reconcile the testimony of the witnesses and determined the testimony of Mr. Dale Cook to be lucid and concise." Mr. Cook's background and record includes the following:

1. He is now employed by Research Homes.

2. Prior to this he was employed by PLC Landscape Construction full time for six years and part time for two years.

3. During the period he was employed by PLC he worked on construction crews until he eventually became a supervisor. He also did some designing as a Landscape Architect, made estimates and made some client contracts.

The testimony of the witness Dale Cook clearly outlines the reasonable value of the materials supplied and the work performed. Mr. Cook's testimony also points out the fact that an express contract existed between the parties.

Mr. Cook had several contracts with Piccadilly's principal, Gary Smith, in which they discussed what design the defendant was interested in and relative costs.

Q. What was your estimate when you first went and talked to him about the plan and estimate?

A. It was Seven Thousand Three Hundred and something.

Q. Now when you presented the $7,413.00 estimate to him, you also presented a detailed blueprint, is that correct?

A. Yes.

After this initial estimate was made, further negotiations were necessary for the parties to reach a final agreement.

Q. At this point was there negotiation with respect to the ultimate price?

A. He told me when he saw the first price, "I can't spend that much . . . . . I think I can spend $4,500.00"

Q. And did you come back with a revised bid?

A. I went back to the office and proceeded to find a way to cut it down to $4,500.00. And as is the case usually when the client wants to cut it down, (he) wants to do some of the labor himself, we take out as much of the labor as we feel a layman can do competently with our supervision."

In addition to the defendant providing some hand labor, other changes were made including "cutting out some of the concrete work: and "the use of planting lawn with seed rather than using pre-grown sod, which is more expensive."

Q. So what was your final agreement with respect to the amount of net total bid that you would do the job for?

A. Now as I called him on the phone and we talked about it to tell him that we could get it down, I told him that we found we would do these things. I hold him on the phone what they were. If we could do that, then we could put the job as was talked about for $4,581.30.

Q. Now after, on the telephone, you agreed to do it for $4,581.30. Did you receive authorization to go forward?

A. He said, "Yes, let's get started on it . . . . . "

As a result of the negotiations and the agreements which were made between the parties, one must conclude that an expressed contract did exist between the parties, as the trial court found.

From the time of the agreement by the parties to have the job performed for $4,581.30, due to the defendant's failure to perform, the plaintiff was required to supply additional labor and material whos reasonable value resulted in a final bill of $6,669.53.

Defendant failed to do the labor which he had agreed to do and for which the original bid was lowered.

Q. After you began the work . . . . were there any changes made?

A. . . . . We started getting ready to a point where the labor he (defendant) was going to do hadn't been done, and it was almost to start holding us up . . . . I believe I talked with defendants occasionally, two or three times, I can't remember for sure. And he would say, well we have got to get it done, so you guys go ahead and we will work this out later.

Q. So that (fence) was taken out initially and put back in?

A. Yes.

Q. So that the $4,581.30 bid was increased by some labor and by a fence, is that correct?

A. Yes, it was.

Q. And were there any other increases?

A. Yes, there were . . . . . There were some concrete caps that we put on some of the brick wall around the front which was agreed upon to get it done.

Q. Did you submit a final bill?

A. Yes, we did. I got a first down payment right after we had started and a midway payment in the middle. And I kind of went over the cost of things a little bit then. I warned him that it was coming right back up to where the original bid was again because we were having to do all the labor that was supposedly taken out. And he said: "Well, we have got to get it done, you know, and we can't do it, so we will work it out as the final billing comes." And at the final billing I went over the whole job and showed him what happened . . . . . .

The trial court in "determining the testimony of Dale Cook to be lucid and concise," concluded from the evidence supplied by his testimony that the reasonable value of the additional materials and labor supplied by the plaintiff did in fact result in a final cost of $6,669.53.

E. The Supreme Court has not reversed the trial court when sufficient evidence exists to support the court's ruling.

It is clear from the court's Memorandum Decision that the testimony of Dale Cook provided it with sufficient evidence to determine that the defendant should pay the plaintiff the full amount of the final bill submitted.

In Leen Glazier and Sons, Inc. v Larsen, 491 P 2d 266 (Utah 1971), the court stated that "On appeal from judgments of no cause of action in action at law, Supreme Court would not review evidence or attempt to substitute its judgment for that of trial court." It was further stated that, "If there is substantial evidence to support judgment of court below in action at law, Supreme Court will affirm."

Also in First Western Fidelity v. Gibbons and Reed Co., 492 P 2d, 132 (Utah 1971) the Court declared that, "It will on appeal survey the evidence in a light favorable to trial court's findings."

CONCLUSION

The plaintiff was not required to proceed under a quantum meruit procedure because of Rule 15(d) of the Utah Code Annotated and because the Supreme Court has ruled in similar situations that amendment to the pre-trial order was in the furtherance of justice. And the plaintiff as indicated in the testimony of the witness, Dale Cook, which was accepted by the trial court, did prove the performance of work and the reasonable value thereof. As a result of the conclusions, the case should be upheld and judgment granted to the plaintiff.