2016

Dennis Cheek, Plaintiff/Appellant, v. Clay Bullock Construction, Inc., Ad Utah Corporation; And Cly Bullock, an Individual, Defendants/Appellees : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DENNIS CHEEK, Plaintiff/Appellant, v. CLAY BULLOCH CONSTRUCTION, INC., a Utah Corporation; and CLAY BULLOCH, an Individual, Defendants/Appellees.	Appellate Case No: 20150177-CA Civil No. 030500447 Judge: Paul D. Lyman

REPLY BRIEF OF APPELLANT CHEEK

This is an appeal from the five day bench trial involving construction and improvement of a commercial building, the Sears store in Cedar City, Iron County, Utah, the Honorable Judge Paul D. Lyman presiding, assigned as a district court judge for the Fifth Judicial District Court, the court finding no breach of contract or damages.

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I
JURISDICTION

Appellees agree with the Appellant that jurisdiction is appropriate before the Utah Court of Appeals pursuant to Utah Code Annotated, §78A-4-103(2) (j) (1953, as amended). The Utah Supreme Court transferred the appeal to the Utah Court of Appeals on or about the 13th day of March, 2015, pursuant Rule 42(a), Utah Rule of Appellate Procedure and neither party has objected to such transfer.

II
RESOLUTION OF STATEMENT OF FACTS

The Appellees do not appear to take issue with the Statement of Facts set forth in Appellant's brief, the Appellant making specific reference to that which was stated at trial and introduced as exhibits therein compared to Appellees' general characterization of statements made within the transcript to support its contention that there was no formal construction contract or that the supporting documentation, such as plans and instruction details, were not sufficient to build such a structure and that this in some way justified the

Appellees, a Utah State licensed building contractor, who secured a building permit, to not have to build the same according to the Uniform Building Code. They put forth the assertion that this in some way excused their responsibility to build the structure on the property owned by the Appellant or to build it in compliance with the permit requirements or the Uniform Building Code. They suggest that Appellant was a party to and participated in agreeing to build a portion of the structure, the concrete slabs for the air conditioning units, upon property owned by another and that this in some way excused them from their responsibility as a general contractor not to allow it. They suggest that the damage, the foundation failure of the building, was not the result of failing to over excavate before placing the footings as required by the geotechnical soils report prepared for the project but was the result of over saturation of soils due to a water line leak which they discovered during construction but finished the project anyway. However, due to that, they claim no responsibility for the failure of the building thereafter having completed construction thereof notwithstanding the saturation issue and having issued a certificate of completion relied upon by others to issue an occupancy permit and to allow for financing. The Appellant maintains that this does not excuse performance on the part of the Appellees for breach of contract and damages.

III
RESPONSE TO APPELLEES' ARGUMENTS

The Appellees assert that Appellant's claims on appeal should not prevail because the issues were not preserved at trial; the court's rulings were appropriate and Appellant

fails to marshal the evidence. However, Appellant asserts that Appellees have mischaracterized the facts and circumstances and that the appeal is proper and appropriately set forth. The Appellant submits the following points and authorities in response to Appellees' argument as follows:

POINT No. 1
APPELLEES CLAIM THAT CHEEK FAILED TO PERSERVE THE ISSUE OF FOR RECUSAL UNDER RULE 63(b).
HOWEVER, THIS IS NOT A FAIR CHARACTERIZATION OF THE CIRCUMSTANCES AND IGNORES THE CONSIDERATION GIVEN BY BY THE PARTIES AND BY JUDGE LYMAN IN ADDRESSING THE ISSUES FOR PRESERVATION PURPOSES.

The Appellees argue that the issue of recusal is not an issue preserved on appeal, notwithstanding the fact that although not characterized as a Rule 63(b) motion to recuse, the issue was addressed and reconsidered in the context of the circumstances that existed. This involved the voluntary recusal of the Honorable Judge J. Phillip Eves referring the matter to a "judge outside of the fifth district". See the record at 386, addendum, Exhibit "A" at 43 of Appellant's initial brief. There was also a motion filed for reconsideration which indicated that the court analyzed the matter under Rule 63(b) even though the record revealed that there was no such motion brought before Judge Eves who had recused himself *sua sponte* voluntarily. The pleadings filed for reconsideration considered the matter in the context of restraint and self-policing required by the Informal Ethics Advisory Opinion 98-14, in the record at 431, Exhibit "B" of the addendum to Appellant's initial brief. Judge Lyman's ruling, filed September 16, 2013, addressed specifically Rule 63(b), Utah Rules of Civil Procedure, stating the following:

Rule 63, Utah Rules of Civil Procedure, controls recusal matters. When a Rule 63(b) motion to disqualify a judge is filed, the judge against whom the motion is filed has two options: first, enter an order granting the motion or, second, certify the motion and affidavit to a reviewing judge Rule 63(b) (2). If the motion is granted the disqualified judge shall direct the presiding judge or the court to assign another judge. No other orders are authorized by this Rule.

In this matter, Judge J. Phillip Eves was asked to recuse himself. He granted the motion to disqualify himself, but added an unauthorized statement "the case will be referred to a judge outside of the fifth district." This directive was not allowed under the Rule and did not create an order.

Judge Lyman added a footnote to his decision which states the following:

If Judge Eves happen to be the fifth district presiding judge, than this directive may well have been authorized. However, the pleadings do not indicate whether he was the presiding judge. See the record 428-29, addendum, Exhibit "A", Appellant's initial brief.

Judge Lyman goes on to assert that he is assigned to handle district court matters in Beaver County, pursuant to Rule 3-108 Utah Rules of Judicial Administration and that this does not make judges under such assignments judges of the receiving district. Upon request for reconsideration the matter was addressed in the context of Informal Ethics Advisory Opinion 98-14 which by footnote states that the Administration of the Courts advises that the State Judiciary continues to rely upon this ethics opinion. It pointed out that the opinion is designed to address "appearances" as well as actual conflicts. See the record at 446-47. This advisory opinion makes clear that certain relationships, such as Clerks and Judges within the same district, require "automatic" self disqualification, are not subject to judicial discretion or requiring an affirmative motion. It does not distinguish between district judges or assigned district judges. The request further states

that the reason for Appellant characterizing the motion accordingly was out of respect for the court and the dignity of the judicial process which trial counsel, K. L. McIff, was sworn to uphold. See the record at 433.

Appellees fail to take into consideration the fact that the district court judge, the Honorable Judge J. Phillip Eves, had previously recused himself voluntarily and by referring the matter to a judge outside of the fifth district gave reason enough to indicate that the matter involved a relationship that by appearance alone was too close to simply assign to another judge in the district. Appellees argue this based upon Rule 63(b) but fails to take in consideration the cautionary approach required under the Informal Ethics Advisory Opinion 98-14. More to the point, however, the matter was properly briefed and addressed at the trial court and has been preserved for appeal. Although the trial court judge treated the matter summarily, procedure, by his own analysis, required that the motion be certified and reviewed by another judge in light of the circumstances involving voluntary recusal and a referral of the matter outside the district. This was not done. Rather, Judge Lyman simply ruled that there was no such conflict because there was no close working relationship involving Appellees' spouse, co-owner and officer, Carolyn Bulloch, who is the Clerk of the Fifth Judicial District Court. There was also raised for consideration the issue in the context of Rule 2.11, Utah Code of Judicial Conduct, and this offers the more appropriate application which was addressed both in the pleadings and in argument by Appellant and Appellees. The Appellees take the position that this requires a showing of a close working relationship and the Appellant takes the position

consistent with that set forth in the comment section that states that a judge is disqualified when his impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs 1-6 therein apply. It further notes that such disqualification is required regardless of whether or not a motion to disqualify is filed. Appellant takes the position that simply arguing that a Rule 63(b) motion for recusal was not directly filed is not a fair assessment of the circumstances and pleadings upon which a determination by the trial court was made and that this issue has been appropriately preserved for appeal purposes. The Appellant asserts that the trial court's decision fails to address the issue in proper context and attempts simply to limit the broader application of the policy to only apply to close working relationships even though the influence of the Clerk of the Court runs to much broader a circles and regions and requires disqualification whenever a judge's impartiality might reasonably be questioned. This is a decision that the Court of Appeals should afford no deference but review for correctness and it is further compromised by the fact that the trial court judge in this case did not follow the established procedure for review of such issue of recusal. It is a decision that would have a far more reaching impact when considered in light of the final ruling in the case.

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POINT No. 2

THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER ARE FUNDAMENTALLY FLAWED AND DO NOT ACCOUNT FOR EVIDENCE PRESENTED AT TRIAL.

Appellees make the same mistake as the trial court in attempting to dodge the issue of integration and yet assume that there were sufficient terms to find an enforceable contract between the parties. The action of Appellees in constructing the building was consistent with one who believed that the terms were sufficiently detailed to commence and complete the project. This understanding has been assumed throughout the proceedings as well. It is upon this understanding that the parties performed notwithstanding the fact that the documentation involved in the transaction may have been rudimentary. The issue of integration comes to light because the trial court through its Findings of Fact and Conclusions of Law and Order determined the scope and definition of the contract between the parties without considering appropriately the documentation relied upon in building the structure or adding to it years later. In essence, the trial court attempted to interpret the contract, defining its terms and scope solely upon the testimony of the parties, ignoring or marginalizing the essential documentation prepared and generated for the project itself such as the building plans, structural notes and footing construction detail as well as failing to account for the geotechnical soils report that required over excavation and recompaction is a specified manner. Taking issue with whether or not the agreement was integrated because there was no comprehensive written document misses the point entirely. This is not an issue of form as

much as it is one of scope and performance determined by how the parties conducted themselves during construction. Appellees note that this court has ruled that an agreement is integrated when the parties thereto adopt a writing or writings (in whatever form they may take) as a final and complete expression of their agreement. See Bennett v Huish, 2007 Utah App 19, ¶ 15, 155 P. 3d 917; see also City of Grantsville v Redevelopment Agency of Tooele City, 2010, UT 38, ¶ 24, 233 P. 3d. However, as has been previously cited, an integrated agreement is one where its understanding often includes performance beyond that which is expressed but defined by the conduct of the parties. That is the case here. The course of performance suggests in this case that the contract terms written down together with site plans and structural notations as well as foundation detail were together sufficient to find an integrated agreement. This is undisputed and reflected in the way that the parties conducted themselves addressing the issues of breach and performance rather than whether or not there was a contract. However, Appellees seem to take the position that the lack of detail in some terms such as electrical installation offered a defense for them to ignore the detail provided in foundation and footing preparation. They present this as a defense to justify them building the building so that it encroached upon the property of another. This is not a case about electrical installation. It is a case about the general contractor of the project not building the building to meet the requirements of the Uniform Building Code, failing to follow the over excavation and recompaction requirements of the geotechnical soils report and failing to build the structure on Appellant's property without trespassing upon the property of another. The

Appellant contends that it is fundamental to any construction contract, whether expressed or simply understood by inference, that building construction will conform with the Uniform Building Code and that an owner has a reasonable expectation that the building will be built upon his property and not encroach upon the property of another. It is not a defense for the Appellees to claim that the contract lacks sufficient detail to be an integrated agreement. In fact, the trial court made findings accordingly. In paragraph 5 of its Findings of Fact and Conclusions of Law and Order, see the record at 559-71, Exhibit "G" of the addendum, Appellant's initial brief, as a part of its findings of fact, the trial court states that there were two agreements to construct a building between the parties, i.e., the original Sears building and the Sears building addition. The court also finds that the Appellant acquired a survey and a site plan from Bulloch Brothers Engineering. Noting that there is not relationship between the Appellees, Clay Bulloch and Bulloch Brother Engineering, Inc. the court notes further that the agreement was partially evidenced by documents and partially oral. It notes that Bulloch Brothers Engineering did a survey on the original site and they also prepared the survey and site plan for the Appellant. However, Judge Lyman then makes a finding inconsistent with the evidence presented at trial. The site plan shows that the corners of the *property* were staked and not the corners of the *building.* Moreover, the Appellees' testimony defies common sense. A surveyor would not stake the building. He would stake the corners of the property that he surveyed. The engineer preparing the site plans would not be out placing stakes on the property, especially when they would need to be removed in order to meet the conditions

of over excavation. The soils report required over excavation of five feet and this very point was addressed by Appellant's counsel on cross examination of Appellee which went as follows:

Q. There is no indication that I can see on Exhibit No. 3 of the other two--or the other--the corners of the building being located. Can you see anything on that Exhibit that would reveal that?

...

Q. By Mr. McIff: Alright. My question was, are you aware of any other survey that resulted in the marking of the other corner of the building other than the Bulloch Brothers survey? Are you aware of any other survey?
A. **When a survey comes out and surveys it, they do not produce a drawing that shows four points. You already got the plot plan here.**
Q. Okay.
A. I do not know the question you are asking me.
Q. Well I--
A. I do not understand the question you are asking.
Q. I am trying to find out if you are aware of any survey that would have resulted in stake on the corner other than the southeast corner?
A. There was four stakes in the area when I put the building on it.
Q. Oh alright. How many of those-- how many of those stakes would have been removed in your over excavation?
A. Well, you have to remove the stakes if you are going to over excavate, see the record at 635, pages 164-66, volume 3, attached as Exhibit "I" of the addendum, Appellant's initial brief (Emphasis added)

However, this position shifted when Appellees responded as follows:

Q. Look at Exhibit No. 5.
A. Okay.
Q. Site plan. You got that before you, Exhibit No. 5?
A. Yes, I do.
Q. You see the line that is at the property line on the east as well as the outside edge of the building?
A. Yes.
Q. The same is true of the south part of the way.
A. Okay.
Q. Correct?
A. Correct.

Q. When you over excavate five feet beyond the property line on the east and the south how would you have maintained those stakes on the property corners?
A. You cannot go five feet to the south. I am on someone else's property. That-- I do not understand what you are asking me.
Q. I am trying to understand how you over excavate five feet on the east and five feet on the south without wiping out those stakes.
A. The property stakes have to stay where there are at. I cannot be on someone else's property.
Q. So are saying that you did not go five feet outside of the building?
A. You cannot it is impossible.

...

A. I dug it right on the property line, the thickness of the baco.
Q. And that is it?
A. Yes.
Q. did you put the building-- or did you attempt to put the building right on the property line?
A. No.
Q. What did you attempt to do?
A. We went in the two feet I-- it was already prestaked. The reference point for the corners was there.
See the record at 635 Trial Transcript, Volume Three, pages 166-67, attached as Exhibit "I" of the addendum of Appellants initial brief. (Emphasis added)

In other words, the facts bare out that had Appellees over excavated as required by the geotechnical soils report and placed the footings accordingly, they would not have built the structure to encroach upon the property of another and the issue regarding redirecting the drainage pipe would not have involved encroaching upon the other adjoining property owner. More importantly, this is an issue that clearly shows that Judge Lyman erred in attempting to craft his findings based solely on the testimony of the parties without appropriately considering the documentation that was part of the integrated agreement which included the survey, site plan and soil's report. The findings reached by Judge Lyman in paragraphs 13-17 which found that there was an agreement

between the parties to encroach as to the placement of the air conditioning units, notwithstanding Appellant's denial of such agreement directly conflicts with the Supreme Court's long established position that a contract be interpreted in a way that gives reasonable, lawful and effective meaning to all of its terms rather than adopt an interpretation that leaves part unreasonable, unlawful or of no effect. See Peirce v Peirce, 2000 UT 7, ¶ 27; see also Restatements 2d of Contracts, Section 203 (1981). More importantly, however, Appellees are the general contractor on the project and have a duty and responsibility to conform construction to meet both the building permit and the Uniform Building Code. They are not relieved of that responsibility by attempting to gain approval of the owner to encroach upon the interests of another property owner. It is not an appropriate basis for Judge Lyman to conclude as he did the following:

> 18. Given the facts that are cited above this court finds that the Plaintiff has failed to meet his burden of proving the Defendants breached their agreement on either the constructed location of the building or the placement of the trespassing air conditioner. See the record at 561, see also Exhibit "G" of the addendum of Appellant's initial brief.

POINT No. 3
THE APPELLEES ERROR IN THEIR POSITION REGARDING MARSHALING OF THE EVIDENCE UNDER THE CIRCUMSTANCES OF THIS CASE.

Appellees consider Appellant's arguments to be those of sufficiency of evidence and to that extent claim that the Appellant has failed to marshal the evidence. Appellant points out that this was a five day bench trial and that had nearly one hundred exhibits and more than a dozen witnesses, construction plans and geotechnical soils reports,

surveys and photographs. This was to point out that it would be an overwhelming feat for any judge to articulate finding concerning each and every piece of evidence submitted at trial, but states that it was not overwhelming and would have been appropriate to address the Findings and Conclusions of Law and Order purposed by the Appellant's trial counsel which had been made a part of the record, particularly when the same was done as trial counsel's only option in lieu of closing argument. The proposed Findings of Fact and Conclusions of Law were made a part of Appellant's initial brief, Exhibit "F", to show that they were made a part of the record and made available to Judge Lyman at the time he prepared his own Findings of Fact and Conclusions of Law. A comparison shows that Judge Lyman disregarded Appellant's proposed findings. Appellant's proposed findings track the evidence, Judge Lyman's do not. That does not make this a sufficiency of the evidence case. Rather, Appellant contends that the issue is one of contract interpretation that requires more than weighing the credibility of the parties as witnesses and that the trial court erred in failing to make specific findings on undisputed evidence pertaining to the contract formation and performance and erred in not adopting the provisions addressed in Appellant's purposed Findings of Fact and Conclusions of Law. This is a simple issue of whether the court's action was appropriate more than an issue of determining sufficiency of the evidence. Notwithstanding, Appellees draw attention to one point that bears further consideration; that is, Appellees state that with respect to the certificate of completion issued by Appellees, Cheek omitted crucial facts regarding the purpose of the certificate. They state the Cheek requested the documents in connection

with Cheek's request for financing from the U.S. Small Business Administration at the request of Cheek's lawyer. That document indicates that construction was completed in accordance with the "final plans" but, as it is discussed above, the parties had no "final plans" for the building or addition. The Appellant agrees that this is a crucial fact but not for the reason inferred in Appellee's brief. See Appellee's brief at pages 28-29. What is relevant is that Appellees issued the certificate of completion and in doing so affirmatively asserted that construction was completed in accordance with the "final plans". This was a document relied upon by third parties for financing and occupancy. It was also an indication to the owner and all those that relied upon the same that construction had been completed in accordance with the plans that complied with the Uniform Building Code upon which Appellees represented that it had been. Yet no mention of the certificate of completion is made in Judge Lyman's findings when he concluded as a matter of law that Appellant failed to meet his burden on the issues of trespass, drainage, over excavation, compaction and damages caused by settlement. Appellees are right in assuming from that oversight that there are additional details, facts and circumstances of this case that point to breach of contract and damages that were not considered by the court in issuing its Findings of Fact and Conclusions of Law and Order.

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CONCLUSION

On the grounds and for the reasons set forth above, counsel for Appellant prays that this Court reverse and remand as it deems appropriate, together with such other and further relief as to this Court appears equitable and proper.

DATED this 21st day of January, 2016.

/s/ J. Bryan Jackson
J. BRYAN JACKSON
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I certify that in compliance with Rule 24(f)(1), Utah Rules of Appellate Procedure, this reply brief contains 4,175 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with Rule 27(b), Utah Rules of Appellate Procedure, this reply brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 13 point.

/s/ J. Bryan Jackson
J. BRYAN JACKSON
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 21st day of January, 2016, I mailed a true and complete photocopy of the forgoing, *CHEEKS' REPLY BRIEF*, by way of the U.S. mail postage fully paid to:

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