

1960

Zion's Service Corporation v. H. A. Danielson : Brief of Respondent

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

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ZIONS SERVICE CORPORATION,
a corporation,

Plaintiff and Respondent,

— vs. —

H. A. DANIELSON,

Defendant and Appellant.

Clerk, Supreme Court, Utah

Case
No. 9232

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RESPONDENT'S BRIEF

UNIVERSITY OF UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

ZIONS SERVICE CORPORATION,
a corporation,
Plaintiff and Respondent,

— vs. —

H. A. DANIELSON,
Defendant and Appellant.

Case
No. 9232

RESPONDENT'S BRIEF

STATEMENT OF FACTS

The statement of facts set forth in Appellant's Brief is inadequate and in some respects misleading so that Respondent desires to restate the facts in respect to the matter now before the Court. Because of the designation used by Appellant in referring to the parties as Plaintiff and Defendant, Respondent (Plaintiff) will follow the same procedure.

Plaintiff Corporation was incorporated in 1955 by the Defendant and fourteen other masonry contractors

who had decided to form a corporation for the purpose of conducting "a service business for the masonry contractors; to do preliminary work, furnishing estimates and other information prerequisite of work." (Exh. 1) Not only was Defendant one of the original incorporators, but he was also one of the original Board of Directors, and continued to serve in the capacity of a director in Plaintiff Corporation until he allegedly resigned in the Summer of 1958. (Exh. 2, R. 63)

Immediately after the incorporation, two estimators were retained by the Company to furnish information to the members regarding materials which would be required for jobs available for bidding. (Ex. 3) On January 3, 1956, at the second meeting of the Board of Directors of the Corporation, at which the Defendant was present, it was unanimously agreed that the members would pay to the Corporation one per cent (1%) on all jobs received by the members up to \$10,000.00, two per cent (2%) on jobs up to \$25,000.00, and three per cent (3%) on any job over \$25,000.00. (Exh. 3)

The Defendant also seconded a motion (which was likewise unanimously carried), that the fees by the members to the corporation "be pro-rated and paid as the progress payments are received on the contract." (Exh. 3)

Shortly after this meeting, a Mr. Gerald Whitaker was employed full time by the organization to prepare and render the estimating service to the members. His duties

included preparing materials, estimates and other data on all known building jobs open for bids, and to furnish the same to the individual members of the organization. Such estimates were important as a basis for determining what material would be necessary in connection with any bid submitted or as a proof or check against the figures compiled by the individual member himself. In addition to this service, Mr. Whitaker was also required to furnish private estimates to any member seeking the same, and otherwise to render assistance to individual members when called upon to do so in respect to any job in which such member was interested. (R. 40) Particularly, Mr. Whitaker testified as to such personalized services rendered to Defendant. (R. 41-42) During the year 1956, Mr. Whitaker prepared 133 job estimates of which approximately 6 were for individual members and the balance of 127 were distributed to all of the members, including the Defendant herein. (Exh. 4) (R. 44-46) In the year 1957, 182 estimates were made with approximately the same number of private estimates, the balance being sent to the members, including the Defendant herein. (Exh. 5, R. 47)

During this period of time, Defendant obtained not less than six jobs and by reason of the agreement entered into with the Plaintiff Corporation became obligated to pay to Plaintiff the sum of \$5,288.00. (Exh. 7) Defendant actually paid the specific amount called for by the agreement on the first two jobs, (Exh. 2) and made additional payments on other jobs for a total payment of \$1,662.00, leaving a balance owing to the Corporation

of \$3,626.00 which he had not paid and for which legal action was instituted. (Exh. 8)

There is a dispute in the testimony with respect to certain conversations concerning his account. Mr. Whitaker testified that Defendant on several occasions acknowledged the obligation in full and made repeated promises to pay the same. Defendant, on the other hand, admitted that certain of these conversations took place, but denied that he knew how much was owing or that he had agreed to pay the whole amount. (R. 123)

However, there is one conversation which is not disputed by Defendant and which is actually corroborated by Defendant's witness. Mr. Whitaker testified that Defendant attended a meeting of the Board of Directors held at Harman's Cafe in October, 1958, at which time the President of the Corporation requested Mr. Whitaker to advise Defendant of the amount of his bill. The witness then did so, which bill included an additional item not now claimed. Defendant objected to this item as having accrued after he had "resigned" and thereupon the President instructed the witness to delete such item from the bill. As to the balance thereof, Defendant "said he would pay it, but he wanted equal treatment that everybody else got." (R. 63) As to what took place at Harman's Cafe on the occasion referred to by Mr. Whitaker, Defendant's witness, Calvin N. Ashton, testified:

"A. To my recollection the conversation concerned money owed by Mr. Danielson, the specific amount being read to him, how much he was owing, and his agreement to pay con-

ditioned upon the fact that all members owing pay all items — the same fee that he had been charged.” (R. 118)

The fees charged all members were computed on the basis of the fee schedule set up in the minutes of the Board (Exh. 3). The members were to report their jobs at the monthly meetings which were held. If the member reported what he owed, that was accepted unless it appeared to be contrary to the information available. If a member failed to report the amount owing, Mr. Whitaker had to make the computation himself from the information available to him using the same fee schedule, and leave it up to the member to question the amount if there was a dispute. Mr. Whitaker testified that he had never received any objection from the Defendant herein. (R. 49, 50)

STATEMENT OF POINTS

Appellant has listed five points of alleged error in connection with the judgment of the lower court. The first two points involve the question of whether the evidence is sufficient to sustain a finding that an agreement existed between the corporate Plaintiff and the individual Defendant. Point III alleges that the Plaintiff breached the agreement, if any, between the parties, and therefore cannot recover. Point IV sets out an alleged defense that the agreement violates the Statute of Frauds. Finally, Point V urges that the agreement is in violation of Section 50-1-6 U. C. A. 1953, as amended, and is void and unenforceable as being against public policy in that it is

in restraint of trade. Plaintiff will discuss the first three points together and the other individual points separately under the following headings:

I. Sufficiency of the evidence to support the finding of the Court as to the obligation of the Defendant.

II. Is Plaintiff precluded from recovery by reason of the provisions of Section 25-5-4, U. C. A. 1953 (commonly referred to as the Statute of Frauds)?

III. Is the alleged agreement against public policy and in violation of Section 50-1-6, U. C. A. 1953, as amended, and therefore void and unenforceable as an unlawful restraint of trade?

ARGUMENT

POINT I

SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE FINDING OF THE COURT AS TO THE OBLIGATION OF THE DEFENDANT.

The graveman of Plaintiff's Complaint against the Defendant in this action is set forth in the pre-trial order to the effect that "the Plaintiff sues the Defendant for services rendered of the agreed and reasonable value of \$3,626.00." (R. 8) Although the Plaintiff claims that the Defendant agreed to pay a specific sum for the services rendered to Defendant by Plaintiff, the Plaintiff nevertheless also seeks to recover on a quantum meruit basis. The Court determined that there was a contract whereby

Defendant agreed to pay a specific sum for the services rendered to him by the Corporation but also found that the reasonable value of the services rendered was “not less than \$7,000.00.” (R. 148, 149)

In arguing that there was no contract between the Plaintiff Corporation and Defendant, Defendant entirely overlooks the basic elements of a contract. A contract may be expressed by the statements, or implied from the conduct and actions of the parties. A good definition of express and implied contracts is contained in 12 *Am. Jur.*, “CONTRACTS,” Sect. 4, p. 498, as follows:

“4. EXPRESS AND IMPLIED CONTRACTS. Contracts are express or implied. Implied contracts are implied in fact or in law. Contracts are express when their terms are stated by the parties. They are often said to be implied when their terms are not so stated. 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, sealed or unsealed, 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 man-

ifested intention of the parties. An implied contract between two parties is only raised 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.” (Emphasis supplied)

Section 5 goes on to illustrate:

“Many illustrations of contracts implied in fact may be given. Where a person performs services, furnishes property, or expends money for another at the other’s request and there is no express agreement as to compensation, a promise to pay the reasonable value of the services or property or to reimburse for money expended may properly be implied where the circumstances warrant such an inference, but such a promise cannot properly be implied where the circumstances do not warrant an inference of such a promise. A promise will not be inferred where there are facts wholly inconsistent with the contract to be implied. Generally, there is an implication of a promise to pay for valuable services rendered with the knowledge and approval of the recipient, in the absence of a showing to the contrary.”

The *Restatement on the Law of Contracts*, Vol. 1, Sec. 5 states:

“A promise in a contract must be stated in such words either oral or written, or must be inferred wholly or partly from such conduct, as justifies the promise in understanding that the promisor intended to make a promise.”

In the comment following, the Restatement adds:

“Contracts are often spoken of as express or implied. The distinction involves, however, no dif-

ference in legal effect, but lies merely in the mode of manifesting assent.”

Cases which have discussed the difference between express and implied contracts and affirmed the principle that the difference lies merely with the manner of proof are as follows:

Weitzenkorn v. Lesser, et al., 40 C. A. 2d 778, 256 P. 2d 947; *Fred K. Caron v. Parley G. Andrew*, 133 C. A. 2d 412, 284, P. 2d 550. In the latter case the Court made the following observation:

“ ‘It is generally held that the existence of an implied contract is usually a question of fact for the trial court. Where evidence is conflicting or where reasonable conflicting inferences may be drawn from evidence which is not in conflict, a question of fact is presented for decision of the trial court.

* * * * *

“ ‘Further, on appeal we must draw all reasonable inferences in favor of the judgment.’ *Medina v. Van Camp Sea Food Co.*, 75 C. A. 2d 551, 556, 171 P. 2d 445, 448.”

Likewise, Defendant has failed to recognize the distinction between unilateral and bilateral contracts. A unilateral contract is defined by the *Restatement of Contracts* as one “in which no promisor receives a promise as consideration for his promise.” (Ibid., Vol. 1, Sec. 12)

In the Comment to this section, the Restatement goes on to state:

“a. In a unilateral contract the exchange for the promise is something other than a promise; in a bilateral contract promises are exchanged for one another.

“b. There must always be at least two parties to a contract, whether unilateral or bilateral, and there must usually be an expression or assent by each. In many cases, however, a promise becomes a contract even though no return promise is made by the promisee. In such cases the legal duty is unilateral, resting on the promisor alone. The correlative legal right is also unilateral, being possessed by the promisee alone. *The statement often made that unless both parties are bound neither is bound is quite erroneous, as a universal statement.*” (Emphasis supplied)

In the instant case, the Court found that one of the purposes for which Plaintiff Corporation was formed “was to furnish to its members and stockholders material analyses or quantity surveys on projects open to bid by such members.” (R. 148)

The Court likewise found that “in consideration of the agreement of the corporation to furnish such services to him and in consideration of the agreement of the other members of the corporation so to do, Defendant agreed to pay to the Plaintiff Corporation in cash. . . .” (R. 148)

The above findings and all others are adequately supported by the evidence in this case. In fact, there is no dispute with respect to the above items in the record. When Defendant was asked by his counsel if he had ever

entered into any agreement with the Corporation, he answered:

“Well, I don’t know just what you mean by that. I was maybe, you might say, one of the original incorporators, but no agreement.” (R. 122)

When called upon further to explain the matter, he said that he did not sign a formal agreement. (R. 122)

Defendant contends in his brief that the Corporation did not charge the members at the same rate. However, this is not in accordance with the evidence. It is true that counsel for Defendant referred to three different occasions where a specific amount was charged by the Corporation to a member, but there is no evidence as to the amount owing except by innuendo. When asked whether a certain sum was the amount of the bid, Mr. Whitaker testified that he did not know (R. 97) but that the amount charged was to his best judgment, the amount owing on the basis of the fee schedule. (R. 50) In one instance he said an error may have been made if the amount of the bid was as stated by counsel. (R. 94) However, the record does not show what the amount of the bid was and therefore, we cannot say whether an error was made by the computer or not.

Defendant likewise claims that the Corporation “could have, and did, fail to supply Defendant with many of the bids.” This is not in accordance with the evidence. The witness Whitaker testified that the bids were either delivered to Danielson personally, or that they were mailed to him, except the bids which were furnished

to individual members as a matter of personal information to them in accordance with the instructions which he had from the Board of Directors. (R. 45) Defendant never denied that he received the bids which the witness for the Plaintiff testified were prepared and mailed to the members. In fact, when asked by his counsel as to how many estimates he received, Defendant testified he didn't know. (R. 128) The most that can be said for Defendant's position is that he testified that he told the Board of Directors he would not pay the money he owed as long as a certain officer handled the funds. The record shows that this man was released within a few months after the incorporation and thereafter the Defendant proceeded to pay his initial subscription and some of the fees owing. Unfortunately, he did not pay all that he owed.

Defendant further attempts to avoid liability in this matter on the ground that in addition to the obligation to furnish services by way of materials estimates, the Corporation was to invest its surplus funds. The witness Whitaker, however, testified:

“To make an investment our Board of Directors felt that we should have a consistent and continuing income, and every time we found an investment that looked good to us, we figured we had to have money to go into it, and so we were struggling along saving money.” (R. 102)

Perhaps, if this Defendant had paid the amount owing by him at the time it was due and payable, there may have been funds available for investment. In any event, the Corporation would not be required to invest its

funds if it appeared necessary to have them on hand to pay its current obligations.

The fact that there was not sufficient funds to make any investments also negatives Defendant's claim that the charges were excessive for the services rendered. Defendant points to no testimony in the record to the effect that any part of the consideration for the fee charged by the Corporation was the investment of funds. Obviously, any organization would want to invest any surplus funds rather than to leave them idle, but would have to have funds before it could invest them.

POINT II

IS PLAINTIFF PRECLUDED FROM RECOVERY BY REASON OF THE PROVISIONS OF SECTION 25-5-4, U. C. A. 1953 (COMMONLY REFERRED TO AS THE STATUTE OF FRAUDS)?

In presenting the argument that the agreement between the parties was in violation of Section 25-5-4, U. C. A. 1953, in that the agreement was not in writing, Defendant actually ignores the provisions of the statute which reads as follows:

“In the following cases, every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:

“1. Every agreement *that by its terms* is not to be performed within one year from the making thereof.” (Emphasis supplied)

By the very terms of the statute, the agreement must specifically provide that it is not to be performed within the provisions thereof. Our Court early held in the case of *Johnson v. Johnson*, 31 Utah 408, 88 Pac. 230, that a contract by a purchaser of land to pay the seller "for life, one-half of the crops produced on lands" was not within the above provision since death might occur within one year. Likewise, the *Restatement of Contracts* in interpreting a similar phrase states the rule to be:

"The words 'cannot be fully performed' must be taken literally. The fact that performance within a year is entirely improbable or not expected by the parties, does not bring the contract within this statute." (Sec. 198, Comment b.)

In the instant case, the witness Whitaker testified that "Any member of the corporation is free to leave the corporation if he will bring his stock into us and make it known that he wants to leave. No one has ever done it." (R. 103)

Based upon the foregoing, and other evidence in the case, the Court found that the agreement between the parties "was terminable by either party at any time," (R. 149) so that there is no basis for Defendant's contention that the contract in question was in violation of the Statute of Frauds.

Even if the contract had been within the Statute of Frauds, the corporation Plaintiff would be entitled to recover the reasonable value of the services rendered, and which the Court found to be in excess of the amount sued

for. In the case of *Fabian v. Wasatch Orchard Co.*, (1912) 41 Utah 404, 125 Pac. 860, the Court held a contract of employment to be within the Statute of Frauds but nevertheless went on to state that the Plaintiff was entitled to recover the reasonable value of the services rendered prior to the contract being repudiated by the other party.

A cursory reading of the cases cited by Defendant discloses that none of them are applicable, either to the facts of this case, or the law of this jurisdiction in respect thereto.

POINT III

IS THE ALLEGED AGREEMENT AGAINST PUBLIC POLICY AND IN VIOLATION OF SECTION 50-1-6, U. C. A. 1953, AS AMENDED, AND THEREFORE VOID AND UNENFORCEABLE AS AN UNLAWFUL RESTRAINT OF TRADE?

The Defendant asserts that the agreement between the Plaintiff corporation and its masonry contractor stockholders is in violation of public policy and violative of Section 50-1-6 of Utah Code Annotated, 1953, in that it is a restraint of trade.

He thereby raises two basic questions, the first of these is whether or not the agreement is violative of Utah's Little Sherman Act as contained in Title 50 of the Utah Code. Secondly, if it be found that it is not a violation of Utah's Little Sherman Act, the further question arises as to whether it is in violation of a broader concept of public policy than is presented by this Statute.

It would seem that the best way to dispose of the first of these questions — that of the Sherman Act Doctrine — would be to refer to the Supreme Court of the United States in the cases which it has handed down in relation to trade association activities. Perhaps one of the outstanding decisions rendered on this problem was handed down in the case of *Maple Flooring Manufacturers Association v. United States* (1925) 268 U. S. 563, 45 S. C. 578. In that case the Maple Flooring Association had been enjoined by the district court from continuing their activities. These activities consisted of a computation and distribution among the members of the association of the average cost to association members of all dimensions and grades of flooring, the compilation and distribution among members of a booklet showing freight rates, a gathering of statistics showing the quantity and kind of flooring sold and the prices received by the recording members, and the amount of stock on hand. The Supreme Court in reversing the decree of the district court, held that the activities of the association were not in restraint of trade:

“It is the consensus of opinion of economists and of many of the most important agencies of government that the public interest is served by the gathering and dissemination, in the rightist possible manner, of information with respect to the production and distribution, costs and prices in actual sales, of market commodities because the making available of such information tends to stabilize trade and industry, to produce fairer price levels and *to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise*. Free competition means a free and open

market among both buyers and sellers for the sale and distribution of commodities. *Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction.* General knowledge that there is an accumulation of surplus of any market commodity would undoubtedly tend to diminish production, but the dissemination of that information cannot in itself be said to be restraint upon commerce in any legal sense. The manufacturer is free to produce, but produce and business foresight based on that knowledge influences free choice in favor of more limited production. *Restraint upon free competition begins when improper use is made of that information to any concerted action of those who buy and sell.*

“It is not the purpose or the intent of the Sherman Anti-Trust Law to inhibit the intelligent conduct of business operation, nor do we conceive that its purpose was to suppress such influences that might affect the operation of inter-state commerce through the application to them of the individual intelligence of those engaged in commerce, enlightened by accurate information as to the essential elements of the economics of a trade or business, however gathered or disseminated. Persons who unite in gathering and disseminating information in trade journals and statistical reports on industry, who gather and publish statistics as to the amount of production of commodities in interstate commerce, and who report market prices, are not engaged in unlawful conspiracies in restraint of trade merely because the ultimate result of their efforts may be to stabilize prices or limit production through a better understanding of economic laws and a more general ability to conform to them, for the simple reason that the

Sherman Law neither repeals economic laws nor prohibits the gathering and dissemination of information. Sellers of any commodity who guide the daily conduct of their business on the basis of market reports would hardly be deemed to be conspirators engaged in restraint of interstate commerce. They would not be any more so merely because they become stockholders in a corporation or joint owners of a trade journal, engaged in the business of compiling and publishing such reports.” (Emphasis supplied)

Certainly the awareness of the Supreme Court as to the economics of business conduct should carry greater weight than does the apparent lack of understanding expressed by the Supreme Court of Kansas in the case of *Master Builders Association of Kansas v. Carson* (1931) 132 Kan. 606, 296 Pac. 693, which is stressed by the Defendant in his Brief. The Kansas Court in that case, while striking down a contract distinguishable from the present one in several factors to be taken up later, used the following language:

“There cannot be this competition between contractors when all of them bidding on a certain job derive a large share of their information and their probiding (sic) engineering service from the same course. The engineers and other employees of the appellant may be ever so successful and ever so competent and efficient, but, if all the bidders of a certain job have secured the same service of that kind, from where is going to come the competition? The spirit of this type of legislation is that all bidders will strive in all departments of their work to outdo the others that are in the same field. This feature of the contracting business is just as important to a successful contractor

as the business of actually doing the work, and the spirit of the statutes is that each one will strive to outdo the other by shrewder engineering work, by closer observation of local labor conditions, by closer figuring on the places from where raw materials may be obtained, freight rates, and all the other myriad problems which enter into the successful handling of a bid for any job. Now, if this Court should approve a contract such as the one sued on here, the public would lose much of the benefit to be derived from this competition between contractors. In fact, about the only thing that makes competition between contractors would be gone.”

The Kansas Court here assumes that it is to the benefit to the public that contractors make mistakes in bidding. Certainly there is no restraint in trade if all the contractors were to be given the exact figure of X number of bricks and X hundred pounds of mortar which it would take to erect a building. Anyone who would deprive them of this right would say that the public is better off when some unsuspecting, perhaps negligent, contractor submits a bid mistakenly figuring only half the number of bricks actually required for the job. Certainly, this is not the intent nor purpose of competitive bidding. In fact, a review of cases will indicate that if the contractor makes a great mistake in this area that he will be relieved from his competitive bid. The recent Utah case *State v. Union Construction Co.* (1959) 9 Utah 107, 339 P. 2d 421 strongly bears this out. In that case a road contractor submitted a bid for road work in the southern part of the state. He made a mistake as to the direction in which the road would go and so submitted a bid of

some \$29,000.00 less than it should have been. The State of Utah accepted his bid, he refused to carry it out and sued the State to recover the amount of bid bonds he had put up. The court in allowing him to recover stated that an error such as he made should be excused and he should not be held to his contract.

In view of the doctrine set forth in that case, a group of contractors unable to hire individually the type of competent, efficient service needed to ascertain the exact amount of materials required for a job are well advised to pool their efforts to gain certainty. They can then decide individually what they, as an efficient operating enterprise with the type of machinery they use, the type of men they have working for them, and the amount of money they need for overhead, need to perform that job.

Certainly the presentment to all contractors of the exact amount of materials that will go into a job operates for the benefit of the public and not to its disadvantage. We re-emphasize the Supreme Court's language that *"competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all essential factors entering into the commercial transaction."*

Where no attempt is made to limit production, fix prices, or control commodities, contracts are generally valid. Certainly the sure knowledge of the amount of materials to go into a job does not fix the price nor control production of the commodity. Therefore, Defend-

ant's claim that the agreement with Plaintiff Corporation violates Section 50-1-1, U. C. A. 1953, as amended, is not well founded.

Defendant's second point — that based upon a broad general concept of "public policy" — is likewise untenable. Perhaps to tie this problem down to somewhat of a more concrete situation we might again quote from the Supreme Court of the United States:

"Public policy is to be ascertained by reference to the laws and legal precedents and not from general consideration of supposed public interest. There must be found definite indications in the laws of the sovereignty to justify the invalidation of a contract as contrary to public policy." (Muschany v. U. S., 324 U.S. 49)

The public policy is to be found in the Constitution and laws and decisions of the Courts, and when the Court is asked to declare a contract void as being against public policy, to justify sustaining the defense, the line of that policy must be clear and distinct. *United States v. Grace Evangelical Church of South Providence Ridge*, 137 F. 2d 460.

Turning to something a little closer to home in this regard we find the Supreme Court of Utah in the case of *Frailey v. McGarry* (1949) 116 Utah 504, 211 P. 2d 840, stating as follows:

"There can be no doubt concerning the duty of this court to invalidate contracts which have a tendency to be injurious to the public welfare . . . Although the legislature has given formal expres-

sion to this principle, the principle would be equally true in the absence of statute. *While contract obligations in controvention of public policy may ordinarily be avoided by the contracting parties, the law favors the right of men of full age and competent understanding to contract freely and before this right is denied on the grounds of public policy, there must be a showing free from doubt that the contract is against public policy and not merely one which has turned out unfortunately for one party or one that was imprudently made. If by any reasonable construction the contract can be declared lawful and not in controvention of public policy, it is our duty to so interpret it.*” (Emphasis supplied)

In support of the claim that the agreement is against public policy, Plaintiff relies upon the general statements appearing in *Williston on Contracts* and the *Restatement of the Law, Contracts*. The same principle is enunciated by both authorities to the effect that “a bargain not to bid at an auction, or any public competition, *having as its primary object to stifle competition*, is illegal.” (*Restatement of the Law, Contracts*, Vol. 2, Sec. 517. See also, *Williston on Contracts*, Revised Edition, Vol. 5, Sec. 1663).

We desire to point out to the Court the basic requirement that the primary object must be to stifle competition. We have carefully reviewed and analyzed the above statements and the cases cited by Defendant which purport to apply this principle of law to situations such as are now before the Court. Let us start with the illustration given by the Restatement that where “A, B, C, and

D, building contractors, argue with another to form the X association and that in future bids for the award of building contracts the successful bidder shall pay to the X association 2 per cent of the gross amount of the price fixed in the contract awarded" the agreement is void. In this illustration the only object of the agreement would be to stifle competition by sharing with each other the fruits of the successful bid. However, that is not the situation before this Court in the instant matter where the purpose of the fee is to pay for the services being rendered to the individual by the Corporation.

That this is a valid distinction is aptly demonstrated by the Court's comments in the case of *Associated Wisconsin Contractors v. Lathers*, 235 Wis. 14, 291 N.W. 770, cited by Defendant on page 16 of his brief. The Court stated there was "no allegation of facts that take the case out from under the rule." There no services were rendered but a mere "pool" of money was created for the members. Such also was the situation in the case of *Master Builders Association of Kansas v. Carson*, supra. In that case the fee was in fact a "kick back," one-half of which went to the next five low bidders and the balance into the association "pool." The Court there found that the effect of the agreement would "naturally result in an increase in the costs of the school building."

No one can deny the logic of the conclusion reached by the Court under the facts in that case. However, the case overlooks the basic and controlling fact that if the contractor receives a service and benefit from the infor-

mation furnished him, in adding this amount to his bid he is doing nothing different from what literally hundreds upon thousands of contractors do in submitting any bid. Submitting an estimate of what they feel it will cost them to do the job plus what they figure is a fair profit. If they have contracted to buy materials from "X" Company for \$2,000.00 and have contracted to pay for information received, which information was applied and used in the figuring of that job, both must be added into the price bid for the contract. But in both instances the amount added to the contract is for a necessary and justifiable expense entered into for the purpose of fulfilling the obligation of the contract.

The case of *Constructors Association v. Seeds* (1949), 142 Pa. Sup. 59, 15 A. 2d 467, also relied on by Defendant, discusses all of the cases cited in his Brief and points out the factors which obviously induced the courts in those cases to hold the several contracts void as against public policy. In the *Constructors Association* Case, the by-laws of the Association provided that each member should pay to the Association a certain percentage of each contract secured. "This percentage, one-half of one per cent, shall be included in any estimates for new work taken . . ." No provision was made for any services and no services were rendered by the Association for such dues. These were merely dues to belong to the organization.

The court pointed out that the same situation prevailed in the case of *Kentucky Association v. Williams*,

213 Ky 167, 280 S.W. 937, and the *Master Builders Association Case*, supra, relied upon by Defendant. After discussing these cases and the rule enunciated in the *Restatement of the Law, Contracts*, Sec. 517, the court, as the basis for determining the contract to be against public policy, concluded:

“It seems quite apparent that such a by-law has a direct tendency to injure the public and thus affect competitive bidding. *The percentage charged all members is obviously not a payment in the form of dues for services rendered by the association*, but gives to such members an interest in the contract as it results in making a distribution to them through the association of a portion of the contract price.” (Emphasis supplied)

In the instant case the facts establish, and the lower Court found, that the services rendered by the Plaintiff Corporation were substantially greater in value than what Defendant is required to pay.

Defendant argues that the cost of this service must be added to the bid submitted by a contractor. Obviously, any cost of operation must be absorbed by the contractor out of the moneys received by him for the work done or the contractor would go broke. If the contractor pays for 10 or 15 estimates without being successful in either of such bids, he will have to add the cost thereof to the next bid or bids in order to break even. Every bid must contain a sufficient margin to allow for contingencies, overhead costs when no work is being performed, taxes, accounting, insurance, legal expense, and a reasonable profit to the contractor. However, if the bid is not low

enough to be competitive with other contractors — who are not members of the Plaintiff Corporation (and we must keep in mind that there are less than 15 masonry contractors who belong to Plaintiff Corporation out of perhaps a hundred or more licensed in this state) some other contractor will walk off with the contract.

Defendant did not produce any evidence at the trial which would show or tend to show either (1) that the charges made for the services rendered were disproportionate or excessive; or (2) that the effect of the agreement would be to increase cost of construction in the industry or stifle competition.

Surely, these small masonry contractors may band together to save costs and expenses by jointly hiring an estimator and a computer without being subject to the claim that such has as its *primary object* the stifling of competition or the increasing of the cost of construction. Many large general contracting firms may have sufficient business to hire a full-time estimator or pay a “retainer” to a professional person. Is it any greater sin for a number of *small* sub-contractors such as masonry workers to share the cost of such service and pay on a contingent basis — that is only when such sub-contractor receives a job out of which he will have income with which to pay his bills?

It is also of interest to note that in the *Constructors Association Case*, *supra*, the Court ruled that the by-law in question “constitutes the agreement between the Association and its members and is subject to the same rules

of construction as a written contract signed by all the parties.”

The court further held:

“Like all by-laws it shall be deemed legal unless manifestly it tends to injure the public in some way.”

While there has been services rendered by the corporate organization or entity as a basis for the fees or assessments levied against the members, the courts have been uniform in holding that the contract or agreement to pay such fees or charges is not against public policy. See, *Electrical Contractors Association of the City of Chicago v. A. S. Schulman Electric Company*, (1945) 324 Ill. App. 28, 57 N.E. 2d 320; aff'd. 391 Ill. 333, 63 N.E. 2d 392, and annotated in 161 A.L.R. 787. The court in that case held that where services rendered by an association of electrical contractors to its members are legal in their purpose and intent the mere fact that a by-law affixed the dues of a member upon a sliding scale proportionate to the amount of business done by the members would not make that by-law pertaining to the dues violative of public policy on the theory that such arrangement gave each member an interest in business of the other members or as tending to suppress competition. The A.L.R. annotation on that case considers both sides of the question as to whether this type of an association contract should be declared violative of public policy. 161 A.L.R. 787.

In *Griffiths & Sprague Stevedore Co. v. Waterfront Emp. Ass'n of Pacific Coast* (C. A. 9) 162 Fed. 2d 1017,

the Court of Appeals expressly rejected the holding of the Kansas Court in the *Carson Case*, supra. In the *Griffiths & Sprague Stevedore Co. Case*, the Appellee brought an action against Appellant to collect the sum of \$74,471.04 owing as "dues" for the years 1943 and 1944. The evidence showed that Appellant had paid the dues for the two preceding years without question. The dues against member organizations were assessed on the basis of 2½ cents per ton on all offshore and intercoastal cargo *handled* by each member, payable at the end of each month.

In affirming the decision of the trial court which granted judgment to the Association, the Court of Appeals stated:

"Appellant contends that 'Appellee's claim is contrary to public policy and therefore void.' Appellee's claim is for the unpaid assessments mentioned above. These assessments were levied by the resolution mentioned above. *Assessments levied by the resolution were levied to cover the cost of services performed by appellee for its members. Services so performed by appellee were needed by its members in handling offshore and intercoastal cargo, including Army cargo.*" (Emphasis added)

In the instant matter, it is the belief of the Plaintiff that the contract was entered into for the purpose of gaining a very necessary and vital element which would enter into the bidding for masonry contracts. The information gained through Plaintiff Corporation enabled the contractors to be more assured of the correctness of

their bid. The amount paid for this service is actually somewhat nominal in effect and enables the contractor to proceed with confidence and assuredness that his bid includes an accurate computation of the actual amount of material which will go into the job. It enables him to actually lower his bid because he need not add any percentage for risk calculation.

The comment contained in the annotation in 161 A.L.R. appears particularly appropriate. We quote:

“It is submitted that when a court holds, as a matter of law and without supporting evidence, that the payment of dues proportioned to business done has a tendency to raise prices, it ignores the facts. It ignores the probability that the association gives the dues-payer his money’s worth, and that it can perform services which actually result in reduced prices to the public. It assumes that businessmen are so stupid that they spend \$70,000,000 a year for association dues without receiving corresponding benefits.

“Let us assume the common case where one hundred or more manufacturers or other businessmen in the same field must sell on credit. If there is no central credit agency, each manufacturer must obtain his own information independently; but if there is an association which maintains a central credit agency the manufacturers may reduce the expense of one hundred credit departments. The dues paid for such a service would not ordinarily equal the expense to the individual of maintaining his own investigation service. And the central agency might be so much more efficient than his own service that it would enable him to avoid credit risks which his own limited facilities would not detect. There is noth-

ing in such a reduction of expenses and losses which would increase prices to the public.”

Defendant attempts to distinguish the above cases relied upon by Plaintiff by stating that those cases involved “non-profit” organizations. We cannot see how the form of the corporate entity makes any difference. In either event the members own the assets of the organization and upon liquidation are paid whatever reserves or surpluses are accumulated. In fact, during the time the organization continues to exist, if a sufficient undivided surplus is accumulated, it may be paid out in the form of dividends to stockholders or members in either case or it may be used up by reducing the fees or charges made.

The intent and purpose of the corporate entity is to be determined from the purposes declared in the Articles regardless of the form; and in the present instance the Articles specifically provide that the purpose for which the corporation was formed was first “to provide a service business for the masonry contractors.”

Defendant claims there are three conditions which result from the agreement involved here and which were present in the *Master Builders Association Case*, supra :

(1) The contractor is likely to add the costs of the service to the contract. The Court will note that Defendant concedes that it is a *cost of service* with which we are here involved. In the cases relied on by Defendant there were no *services* rendered for the alleged dues. Also,

the cost of all services rendered to a contractor in his business must be added in somewhere in his bid or he will not be able to break even in his business.

(2) Those who did not give any service would benefit in the winning contractor's business. In the Kansas Case each of the next 5 lowest bidders received a share of the successful bidder's bid. This *was* and *is* against public policy. But in the instant case only the corporation receives anything from the successful bidder and this is in payment of the services being continuously rendered by the corporation. No individual member or stockholder profits in any way except that all receive the same service and some may pay more than others because of having more business. It is a little like saying that an unsuccessful litigant whose attorney represents him on a contingent basis shares in the recovery of a successful litigant because the latter apparently pays the fees of the attorney while the former does not. Nevertheless such a contract is not against public policy and void.

(3) The service "would be an exceptionally high priced source." Defendant refers to the deposition of Mr. Whitaker on this point as well as elsewhere in his Brief. It must be remembered that the deposition was never read in court and is not a part of the record on appeal. However, the references to the testimony are not accurate. The witness Whitaker testified that a reasonable cost of giving each of the estimates to Defendant would have been between \$40.00 to \$50.00 where the estimates were being distributed on a volume basis. (R. 89) Since De-

fendant received in excess of 250 of these estimates during the period he was active the reasonable cost to him of such service was in excess of \$7,500.00. The Court actually found the reasonable value of the service to be not more than \$7,000.00. (Finding No. 6, R. 149)

We again emphasize, as did the Court in the Circuit Court in the *Griffiths & Sprague Stevedore Co.* Case, supra, that any member could withdraw whenever he chose to do so and save himself the cost of the services if he felt they were not adequate or the cost therefor was excessive. Defendant in this case did cease to be active; and although he did not formally resign the Plaintiff Corporation cancelled any obligation to pay for the services thereafter rendered to him even though it had no notice of his resignation.

SUMMARY

In conclusion, we respectfully submit that the Findings of the lower court in this case are amply supported by the evidence and that under the facts the agreement of the Defendant to pay for the services rendered to him by the Plaintiff Corporation does not have as its primary object the stifling of competition or the increasing of the cost of construction and is therefore not illegal as a restraint of trade.

Respectfully submitted,

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