

1960

J. Lowell Platt dba Crystal Pools, Inc. v. C. L. Locke : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

FILED

JUN 7 - 1960

J. LOWELL PLATT, dba
CRYSTAL POOLS, INC.,
Plaintiff and Respondent,

Clerk, Supreme Court, Utah

— vs. —

C. L. LOCKE,
Defendant and Appellant.

Case
No. 9238

BRIEF OF APPELLANT

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IN THE SUPREME COURT OF THE STATE OF UTAH

J. LOWELL PLATT, dba
CRYSTAL POOLS, INC.,

Plaintiff and Respondent,

— vs. —

C. L. LOCKE,

Defendant and Appellant.

Case
No. 9238

BRIEF OF APPELLANT

STATEMENT OF FACTS

Between the pretrial of May 13, 1959, in this matter and the trial herein, and at the suggestion of the trial court, appellant submitted to respondent a communication dated September 25, 1959, containing eighteen proposed stipulations of fact. At the commencement of the trial the original of said letter was received by the court and filed (R. 122). This is the letter referred to by the court at the beginning of the trial (R. 29). It is necessary to

refer to the said proposed propositions to make sense of the judicial admissions of respondent.

The formal judicial admissions of fact of respondent are as follows:

1. That on or about April 1, 1958, the administrator acting under the direction and supervision of Commission of Business Regulation, and pursuant to the provisions of Section 58-23-5 (10), Laws of Utah 1957, had classified contractors building swimming pools into a specialty classification of contractors requiring a specialty contractors' license. That such classification was made and was effective prior to the first day of April, 1958. (R. 29, 30, 120)

2. That on or before the 1st day of April, 1958, the plaintiff was engaged in the business of planning and building swimming pools. (R. 30, 120)

3. That before April 1, 1958, the defendant was contacted by one Mr. Murdock, who represented that he was a sales agent for Crystal Pools, Inc., and the defendant and Murdock negotiated concerning the design and construction of a commercial pool. That on or about April 1, 1958, the defendant Locke did sign the purported agreement as shown by Exhibit "A" attached to plaintiff's complaint. (R. 30, 31, 120)

4. That a dispute arose between defendant and plaintiff concerning whether or not plaintiff was required to put in the water and gas lines; plaintiff refused and defendant stopped the work on the pool. (R. 31, 121)

5. That on or about April 1, 1958, a builder's contracting license had been issued to the plaintiff as an individual (R. 32, 121)

6. That on or about April 1, 1958, no specialty contractor's license had been issued to plaintiff. (R. 32, 121)

7. That on or about April 1, 1958, there was no such corporation in existence by the name of Crystal Pools, Inc. (R. 32, 121)

8. That on or about April 1, 1958, no contractor's license of any kind had been issued to any such entity by the name of Crystal Pools, Inc., nor had any contractor's license of any kind been issued in the name of Crystal Pools, Inc. (R. 32, 121)

9. That on or about April 1, 1958, the plaintiff had filed no affidavit with the County Clerk of Salt Lake County of doing business under an assumed name. (R. 32, 121)

10. That Mr. Joe Lamb is one of the persons in this area who is most experineced in the design and construction of swimming pools. (R. 34, 122)

In addition to the foregoing judicial admissions or stipulated facts we find in the record that the respondent intended to incorporate but failed to do so (R. 18, 22), and that he executed the contract (Ex. P-1) in a representative capacity, i. e., "Crystal Pools, Inc., *by* J. Lowell Platt. (R. 19)

It is significant in appellant's statement of facts that on May 13, 1958 (almost one and one-half months after the

contract in question had been executed) respondent applied for and received a specialty license to engage in the business activity of planning and constructing swimming pools.

It is further significant in appellant's statement of facts that the only expert witness, Joe Lamb, testified that experience and skill are necessary to this occupation (R. 48, 49); also that the record shows that appellant relied upon the fact that he was doing business with a proper and qualified corporate entity, Crystal Pools, Inc. (R. 52), and such is admitted to be false. (R. 32, 121)

On other factual issues on which there is disputed and contrary substantial evidence, appellant realizes that the trial court's finding (if such exist) are binding on this Court.

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT ERRED IN GRANTING JUDGMENT FOR RESPONDENT ON THE GROUND THAT AS A MATTER OF LAW APPELLANT WAS ENTITLED TO JUDGMENT FOR THE REASON THAT RESPONDENT WAS NOT A PROPERLY QUALIFIED AND LICENSED SPECIALTY CONTRACTOR AS REQUIRED BY LAW.

POINT II.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A SUMMARY JUDGMENT.

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FENDANT OR, IN THE ALTERNATIVE, TO SET ASIDE THE JUDGMENT ENTERED HEREIN AND GRANT A NEW TRIAL.

POINT IV.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO AMEND AND SUPPLEMENT FINDINGS OF FACT AND CONCLUSIONS OF LAW.

POINT V.

RESPONDENT WAS DOING BUSINESS UNDER AN ASSUMED NAME AND FAILED TO COMPLY WITH THE PROVISIONS OF SECTION 42-2-1, UTAH CODE ANNOTATED 1953 AND RESPONDENT'S ALLEGED CONTRACT IS VOID AND UNENFORCEABLE.

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AS THE CASE RESTED RESPONDENT FAILED TO PROVE ANY BASIS FOR RELIEF ON THE GROUND THAT THE EVIDENCE CONCLUSIVELY SHOWED THE CONTRACT WAS MADE BY RESPONDENT AS AN AGENT FOR A NON-EXISTENT PRINCIPAL.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN GRANTING JUDGMENT FOR RESPONDENT ON THE GROUND THAT AS A MATTER OF LAW APPELLANT WAS ENTITLED TO JUDGMENT FOR THE REASON THAT RESPONDENT WAS NOT A PROPERLY QUALIFIED AND LICENSED SPECIALTY CONTRACTOR AS REQUIRED BY LAW.

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The Legislature of the State of Utah, by the Laws of 1957, passed the following laws of the State of Utah:

“58-23-5. ADMINISTRATOR—POWERS AND DUTIES —EMPLOYEES — SEAL — MEETINGS — The administrator, acting under the direction and supervision of the commission of business regulation, and with the advice and counsel of the advisory board, is hereby charged with the responsibility of administering this act, and for that purpose the administrator shall have the following powers and duties:

* * * * *

“(10) To classify specialty contractors into separate classifications common in the trade and license each classification separately.”

“58-23-9. LICENSES — CLASSES — (1) Licenses issued under the provisions of this act shall be of the following classes:

* * * * *

“(b) GENERAL BUILDING CONTRACTOR’S LICENSE. A general building contractor is a contractor whose principal contracting business is in connection with any structure built, being built, or to be built for the support, shelter and enclosure of persons, animals, chattels or movable property of any kind requiring in its construction the use of more than two unrelated building trades or crafts or to do or superintend the whole or any part thereof, but does not include anyone who

merely furnishes materials or supplies without fabricating them into or consuming them in the performance of the work of the general building contractor.

“(c) SPECIALTY CONTRACTOR’S LICENSE. A specialty contractor is a contractor whose operations as such are the performance of construction work requiring special skill and whose principal contracting business involves the use of specialized building trades or crafts. The administrator shall classify specialty contractors into such classifications as are common in the trade and a separate license shall be required for each such classification of specialty contractor.

* * * *

“(3) Nothing in this act shall prohibit a specialty contractor from taking and executing a contract involving the use of two or more crafts or trades if the performance of the work in the crafts or trades other than those in which he is licensed is incidental and supplemental to the performance of work in the craft for which the specialty contractor is licensed.”

That pursuant to the authority granted by said Sections 58-23-5 (10) and 58-23-9 (C-(2) and (3)), the administrator of the department of contractors, appointed by the Department of Business Regulations, had classified contractors building swimming pools into a classification requiring a Specialty Contractor’s License and that said classification was made and was effective prior to the first day of April, 1958. (R. 2, 3, 120) The failure to hold such a license is admitted by respondent, but he attempts to justify his unlawful and void contract by the fact that, at the time, respondent held a General Build-

ing Contractor's License defined by Sec. 58-23-9 (b), as follows:

“(b) GENERAL BUILDING CONTRACTOR'S LICENSE. A general building contractor is a contractor whose principal contracting business is in connection with any structure built, being built, or to be built for the support, shelter and enclosure of persons, animals, chattels or movable property of any kind requiring in its construction the use of more than two unrelated building trades or crafts or to do or superintend the whole or any part thereof, but does not include anyone who merely furnishes materials or supplies without fabricating them into or consuming them in the performance of the work of the general building contractor.”

It is immediately apparent that a General Building Contractor's License is limited to specific *structures* for a specific purpose. This is a long cry from the problems involved in planning and building swimming pools which involve many technical factors, including safety and sanitation.

In spite of the admitted regulation of the administrator, acting under and pursuant to the authority of the Department of Business Regulations, the trial court, without any evidence or record, decided that anyone could build a swimming pool and no specialty license was required. (R 71) The trial court held, in effect, that the administrator, by and through the Department of Business Regulation, had no basis or authority for the specialty classification. The Court's attention is invited to the only evidence on this subject:

(Testimony of Mr. Lamb (R. 34), an admitted expert.)

“Q. Let me ask you this: Does it take any necessary or special skills to build a swimming pool?

“A. Well, I think so.”

The law ignored by the trial court is succinctly stated in *American Jur.*, Vol. 42, at page 621 :

“The court has nothing to do with the wisdom of expediency of the measures adopted by an administrative agency to which the formulation and execution of state policy has been intrusted, and must not substitute its judgment or notions of expediency and fairness or wisdom for those which have guided such agency, even where the proof is convincing that a different result would have been better. These are matters left by the legislature to the administrative ‘tribunal appointed by law and informed by experience.’ ”

This court has uniformly followed this doctrine. See

Utah Labor Relations Board v. Broadway Shoe Repair Co., 120 Utah 585, 236 P. 2d 1072.

Hotel Utah Co. v. Industrial Com., 116 Utah 443, 211 Pac. 2d 200.

Uintah Freight Lines v. Public Service Com., 119 Utah 491, 229 Pac. 2d 675.

Clayton v. Bennett, 3 Utah 2d 531, 298 Pac. 2d 531.

Bowline v. Gries (Cal.), 218 Pac. 2d 806.

Franklin v. Nat C. Goldstone Agency (Cal.) 204 Pac. 2d 37.

Fraenkel v. Bank of America Nat. Trust & Sav. Assn., (Cal.) 256 Pac. 2d 569.

It being admitted and established that respondent did not have the requisite license, we now look to the result of such failure. In *Olsen v. Reese*, Utah, 200 Pac. 2d 733, this court said:

“Contracts made by an unlicensed contractor when in violation of a statute passed for the protection of the public are held to be void and unenforceable. Our statute is so worded as to indicate a legislative intent to protect the citizens from irresponsible contractors. The statute, while not comprehensive, provides for a small license fee. Control over the contractor is given to the Department of Registration. Upon an appropriate hearing, the department may, for unprofessional conduct, suspend or cancel the license. Good reputation and integrity are essential to obtaining a license and the entire object of the statute is protection of the public against fraudulent and illegal practice, which have always been recognized as a distinct characteristic of statutes, which are not mere revenue measures. The statute being enacted for the protection of the public, plaintiff’s written contract is void unless it is competent and permissible for him to establish that the date when it was actually executed and delivered was later than the date of execution shown in the contract.”

Also, in the case of *Eklund v. Elwell*, 116 Utah 521 211 Pac. 2d 849:

“Neither the pleadings nor the findings of fact include any statement that plaintiff nor Empey was licensed as a contractor by the State of Utah, as required by Section 79—5a—1, U.C.A. 1943 which reads:

“ ‘It shall be unlawful for any person, firm, co-

partnership, corporation, association, or other organization, or any combination of any thereof, to engage in the business or act in the capacity of contractor within this state without having a license therefor as herein provided, unless such person, firm, copartnership, corporation, association, or other organization is particularly exempted as provided in this act.'

"Recently this court has had occasion to pass upon the necessity of such a license and held, *Olsen v. Reese*, Utah 1948, 200 P. 2d 733, that the possession of such a license is a necessary allegation in the pleadings; and that such a contract entered into without a license is void.

"Defendant demurred to plaintiff's complaint as not stating a cause of action. The demurrer should have been sustained. Plaintiff, however, contends that this error in the complaint was not called to the attention of the lower court, but was raised for the first time in this court. Quite aside from the fact that a failure to state a cause of action is an objection that may be raised at any time, the findings of fact on their face show the judgment is void for lack of a finding that plaintiff has such a license, and the testimony in the case is to the effect that plaintiff did not have a license.

"Plaintiff contends that Empey as his agent had a license, but, under plaintiff's theory, Empey was not the responsible party, the contractor; and such fact, if true, would not relieve the contractor from the requirements of the statute.

"We are of the opinion that the case cited above is decisive of this case. The judgment of the lower court is reversed and the cause remanded with directions to the lower court to dismiss the action."

Only a year ago, this court in the case of *Chase v. Morgan*, 9 Utah 2d 125, 339 Pac. 2d 1019, held that an unlicensed real estate broker was not entitled to recover, even though a Justice (concurring) asserted that "As to good conscience, this case was disturbing."

POINT IV.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO AMEND AND SUPPLEMENT FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Immediately upon the filing of the Findings of Fact and Conclusions of Law appellant moved to amend and supplement the Findings of Fact and Conclusions of Law. (R. 106-107) The motion to amend was based upon the initial admission that the respondent at the time of the contracting held only a general builders' contractor's license. The court refused to incorporate this material allegation in its findings of fact. Appellant further moved the making of additional findings of fact as follows:

"(a) That on or about April 1, 1958, the administrator acting under the direction and supervision of Commission of Business Regulation, and pursuant to the provisions of Section 58-23-5 (10), Laws of Utah 1957, had classified contractors building swimming pools into a specialty classification of contractors requiring a specialty contractors license. That such classification was made and was effective prior to the first day of April, 1958.

"(b) That on or before the 1st day of April, 1958, the plaintiff was engaged in the business of planning and building swimming pools.

“(c) That before April 1, 1958, the defendant was contacted by one Mr. Murdock, who represented that he was a sales agent for Crystal Pools, Inc., and the defendant and Murdock negotiated concerning the design and construction of a commercial pool. That on or about April 1, 1958, the defendant Locke did sign the purported agreement as shown by Exhibit “A” attached to plaintiff’s complaint.

“(d) That on or about April 1, 1958, no specialty contractors’ license had been issued to plaintiff.

“(e) That on or about April 1, 1958, there was no such corporation in existence by the name of Crystal Pools, Inc.

“(f) That on or about April 1, 1958, no contractor’s license of any kind had been issued to any such entity by the name of Crystal Pools, Inc., nor had any contractor’s license of any kind been issued in the name of Crystal Pools, Inc.

“(g) That on or about April 1, 1958, the plaintiff had filed no affidavit with the County Clerk of Salt Lake County of doing business under an assumed name.” (R. 106-107)

This was refused. These were facts which were the subject of judicial admission in this case, which has heretofore been discussed in the statement of facts and were material to a decision by the trial court.

POINT V.

RESPONDENT WAS DOING BUSINESS UNDER AN ASSUMED NAME AND FAILED TO COMPLY WITH THE PROVISIONS OF SECTION 42-2-1, UTAH CODE

ANNOTATED 1953 AND RESPONDENT'S ALLEGED CONTRACT IS VOID AND UNENFORCEABLE.

The respondent was doing business under an assumed name and failed to comply with the provisions of Section 42-2-1, Utah Code Annotated 1953, and respondent's alleged contract is unenforceable.

Section 42-2-1, Utah Code Annotated 1953, reads as follows :

“Affidavit of assumed and of true name—Filing. — No person or persons *shall carry on or conduct or transact business* in this state under an assumed name, or under any designation, name or style, corporate, partnership or otherwise, other than the real name or names of the individual or individuals conducting or transacting such business, unless such person or persons shall file in the office of the county clerk of the county in which the principal place of business is, or is to be, located, an affidavit setting forth the name under which such business is, or is to be, conducted or transacted, and the true full name or names of the person or persons owning, conducting or transacting the same, the location of the principal place of business, with the postoffice address or addresses of such person or persons. Such affidavit shall be executed by the person or persons so conducting or intending to conduct such business.” (Emphasis supplied)

Appellant is familiar with the fact that the majority view entertained by the courts is that the legislature did not intend to impose a penalty on the offender of refusing him relief on contracts or transactions without compliance. However, these general text statements are made without reference to the language of the statutes of the

various states. The language of the Utah statute is extremely forceable and demanding — “*No person shall carry on or conduct business * * **.”

This Court apparently had reservations on this subject. In the case of *Green v. Nelson*, 120 Utah 155, 232 Pac. 2d 776, Justice Wolfe, who, after holding the statute inapplicable for other reasons, stated:

“Holding as we do that section 58-2-1, U. C. A. 1943, has no application to a person doing business in this state under an assumed name but having no place of business here, it is unnecessary for us to here express any opinion whether the failure to comply with that section, when applicable, renders a contract made by a partnership in its assumed name unenforceable in the courts of this state.”

This is now the case where this Court should squarely face the language and demands of the Legislature in a definite opinion.

POINT VI.

AS THE CASE RESTED RESPONDENT FAILED TO PROVE ANY BASIS FOR RELIEF ON THE GROUND THAT THE EVIDENCE CONCLUSIVELY SHOWED THE CONTRACT WAS MADE BY RESPONDENT AS AN AGENT FOR A NON-EXISTENT PRINCIPAL.

An examination of Exhibit P-1 shows that the contract was made on behalf of Crystal Pools, Inc., and was executed in a representative capacity by respondent, i. e.,

CRYSTAL POOLS, INC.

By *J. Lowell Platt*

Name and Title

The final paragraph of Exhibit P-1 states: "This contract is not binding upon Crystal Pools, Inc., until the original is accepted in writing by an officer or general manager thereof." Appellant is conscious of the fact that the respondent testified that Mr. Locks knew that it was not incorporated for the reason that he had informed Mr. Locke. (R. 19) There was no evidence, however, as to when and under what circumstances this information was given to Mr. Locke. The interesting factor is that the trial judge paid no attention to this evidence and erroneously held that Platt would have been bound on the contract because he was an agent for a non-existent principal, and therefore Locke was bound, and that Locke could not have relied upon a corporation not in existence because it had no reputation and had only been in existence in contemplation of mind for two months or less (R. 71-72). The trial court made no finding that Locke was informed of the non-existence of the corporation prior to the execution of the contract.

Section 369 of Restatement of the Law of Agency, Second, reads as follows:

"AGENT WHO HAS ACTED WITHOUT AUTHORITY — A person who, without power to do so, purports to bind a disclosed or partially disclosed principal as a party to a contract cannot, even though he is a party thereto and offers to perform it, maintain an action thereon against the other party to it, unless the purported principal ratifies it."

It appears to appellant that if an agent without authority makes a contract with a disclosed principal, and

nence he cannot maintain an action thereon without ratification, that it necessarily follows that an agent who purports to make a contract on behalf of a non-existent principal can be in no better position. The Court will note that Exhibit P-1 is an unambiguous, integrated contract. Under the circumstances presented in this case the respondent is now estopped from denying the existence of "Crystal Pools," Inc.," which he dealt with as a corporation.

Cavaness v. General Corporation, (Tex.) 272 S.W. 2d 595, 602, affirmed, 283 S.W. 2d 33.

CONCLUSION

The judgment of the trial court ignored the previous announcements of this court concerning the necessity of holding appropriate license when the public interest is involved, and the court arbitrarily substituted its judgment for an administrative agency. The law is well founded in the State of Utah on the subjects involved, and appellant urges that such prior announcements cannot be disregarded.

Appellant submits that the trial court erred in the various rulings and acts set forth under the points herein presented and argued.

Respectfully submitted,

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