

1967

Vernal Stratton and Neola Stratton, his Wife v. West States Construction A Utah Corporation, and Jack Lords : Appellant's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

VERNAL STRATTON and NEOLA
STRATTON, his wife,

Plaintiffs and Respondents,

vs.

WEST STATES CONSTRUCTION,
a Utah Corporation, and JACK
LORDS,

Defendants and Appellants.

Case No.
10841

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action brought by the plaintiffs to enforce the provisions of a home improvement contract and for punitive and other damages.

DISPOSITION IN THE LOWER COURT

The case was tried to a jury on the 19th and 20th days of December, 1966, and from a jury verdict in the sum of \$6,900.00 this appeal is taken.

RELIEF SOUGHT ON APPEAL

The defendants seek a reversal of the order of the court denying the defendants' motion for a summary judgment heard on the 21st day of November, 1966, a reversal of the court's order denying the defendants' motion for dismissal of the individual defendant Jack Lords, for a directed verdict, to alter or amend the judgment, and for an order remanding the case back for dismissal.

STATEMENT OF FACTS

The corporate defendant is in the home improvement business. The individual defendant Jack Lords is its president. The action was brought against the salesmen and others, but these are the only two served. The contract sued upon was signed by both plaintiffs and by Richard Lee, named in the complaint but not served, for the corporate defendant. It contained a provision not in the copy of the contract furnished the corporate defendant in the following words: "Customer will receive total of 26 paid units—RC 200.00 each," a fact not known by the defendant until its work

had been substantially completed. Both contracts are in evidence exhibits 1 and 20.

After the plaintiffs had refused payment of the contract, the corporate defendant caused a lien to be recorded against the plaintiffs' property as did three other suppliers, exhibits 4 to 7 inclusive.

After some correspondence back and forth between attorneys the following letter was received from Robert L. Gardner, the attorney for the plaintiffs, dated February 4, 1966:

"After discussing the matter involving Mr. Stratton and the Western States Construction Company with Mr. Stratton, we have concluded that the best solution to the matter is to settle with Western States. With this view in mind, I am authorized to instruct you that we will place the \$2650.00 in escrow at the State Bank of Southern Utah here in Cedar City, or with such other escrow as we can agree upon with the understanding that Western States Construction Company is to furnish lien waivers from all of the materialmen and laborers involved to the escrow at which time the balance of the money will be paid over.

"In addition to that, we would like to have a copy of the contract which Western States Construction Company alleges was prefabricated by their salesmen and upon which they proceeded with the work.

"Your cooperation and prompt attention to this matter will be appreciated." (Exhibit 3).

An acceptance of this proposal was made by phone and Jack Lords met with Mr. Gardner and the plaintiff, Vernal Stratton, and fully complied with the conditions of the offer, (Tr. 242) February 17, 1966.

The plaintiffs caused the lien waivers that had been obtained from the corporate defendant to be placed of record on the 10th day of March, 1966, Exhibits 13 to 16 inclusive, and on or about the 7th day of July, 1966, caused this action to be filed.

The defendants' motion for summary judgment was heard on the 21st day of November, 1966, supported by the affidavit of Jack Lords and the testimony of Robert L. Gardner and Vernal Stratton, (R-21), the transcript of which testimony, though the entire record was designated, does not seem to have been filed as yet, nor the court's ruling though this attorney was advised by the court that the motion had been denied. (R-60).

After the presentation of the plaintiffs' proofs, a motion to dismiss as against Jack Lords personally was denied, and at the conclusion of the case the defendants' motion for a directed verdict was denied. A motion by the defendants to alter or amend the judgment as to the individual defendant Jack Lords was likewise denied. (R-60).

ARGUMENT

POINT I.

THE COURT ERRED IN FAILING OR REFUSING TO FIND THAT THERE WAS AN ACCORD AND SATISFACTION.

A settlement of the controversy between the parties was offered in the plaintiffs' letter of February 4th, 1966, (Ex. 3 and R-17 and Tr-177). It was accepted by the defendants (Tr. 242), and it was carried out on the 17th day of February, 1966 (Tr. 243). All of the elements of an accord and satisfaction were present.

The law is fully stated in the case of *Salisbury v. Tibbetts*, 259 Fed.2nd, 59, from pages 63 and 64:

“The general rule established by many of the adjudicated cases and followed in Utah is that a discharge by accord and satisfaction must rest upon a contract, express or implied, and the essentials to a valid contract generally must be present, that is (1) a proper subject matter, (2) competent parties, (3) an assent or meeting of the minds of the parties and (4) a consideration.

“In *Sullivan v. Beneficial Life Ins. Co.*, 91 U. 405, 64 P.2nd 351, 363, the court defined accord and satisfaction as follows:

“The definition of an accord and satisfaction is: An accord is an agreement whereby one of the parties undertakes to give or perform, and the other to accept in satisfaction of a claim, liquidated or in dispute and arising either from contract or from tort, something other than or

different from what he is or considers himself to be entitled to. And a satisfaction is the execution of such an agreement.'

"The evidence clearly established that Sanford and Tibbetts asserted that they were entitled to receive and demanded 1,200 shares of the voting stock. Salisbury denied that they were so entitled and stated that their demand was ridiculous. Even if we assume, although we have decided otherwise, that the inferences which the trial court drew from the conversations between the parties were permissible, there can be no doubt that such conversations fully warranted a good faith denial by Salisbury of the claims asserted by Sanford and Tibbetts. The evidence established a bona fide dispute between the parties. Salisbury made an unequivocal offer to settle the dispute by selling to Sanford and Tibbetts 100 shares each of the voting stock at \$10.00 per share. Sanford and Tibbetts unequivocally accepted such offer. The compromise agreement was carried out and thereupon there was an accord and satisfaction."

POINT II.

THE COURT IN DENYING THE DEFENDANTS' MOTION TO DISMISS AS AGAINST JACK LORDS INDIVIDUALLY AND IN DENYING THE DEFENDANTS' MOTION TO ALTER OR MODIFY THE JUDGMENT SO AS TO EXCLUDE HIM.

The contract sued upon in this case was on the printed form of the defendant, West States Construc-

tion, a dba of the Western States Wholesale Supply, which is a Utah Corporation. It was signed by Richard Lee, an independent agent of the Western States Wholesale Supply (Tr.-204), a named defendant who was not served. It was not signed by the defendant Jack Lords. He was not present when the contract was negotiated or signed. There is no evidence to tie him into the transaction personally. He was the president of the corporation but he did not own the controlling interest in its stock. (Tr.-202). He was an employee of the corporation.

A motion was made for the dismissal of the case against Jack Lords personally at the conclusion of the plaintiffs' case, a motion for a directed verdict at the conclusion of the controversy, (R-60) and a motion to alter or amend the judgment after the verdict had been entered (R-62). Each of the three motions was denied (R-60, R-63, 64).

POINT III.

THE COURT ERRED IN ITS INSTRUCTIONS TO THE JURY.

The defendants assert that the court's instructions to the jury, taken as a whole, were incorrect and prejudicial and especially in the following three particulars:

1. Instruction number 5 was submitted to the jury in part as follows (R-20):

“The defendants, and each of them by their pleadings in this case in substance and effect admit that a contract was entered into between the plaintiffs and the defendants for the furnishing of labor and materials for work upon the plaintiffs’ home in Cedar City, Utah.”

This is an incorrect statement so far as the individual defendant Jack Lords is concerned. It is submitted as being extremely misleading and prejudicial.

2. Instruction number 14, (R-39), having to do with the provisions of 14-2-2 of the U.C.A., 1953, is submitted as being irrelevant and immaterial in this case and very prejudicial to the defendants.

3. Instruction number 17 was submitted to the jury in whole as follows:

“If you should find that plaintiffs are entitled to recover against both defendants you may not allocate the damages between them, but you must deliver a verdict in one single sum against both defendants whom you find to be liable.” (R-42).

This instruction, especially in view of instruction number 16, (R-41), on punitive damages, ties the individual defendant Jack Lords to the corporate defendant in such a way as to be prejudicial against the individual defendant.

CONCLUSION

There was a completed accord and satisfaction in this case. The court erred in denying the defendants’

motion for summary judgment on the 21st day of November, 1966, (R-21), and again when the matter was called up on the defendants' motion for a directed verdict on the 20th of December, 1966 at the conclusion of the trial of the case. (R-60).

There was no evidence tying the individual defendant, Jack Lords, into the case. The court erred in denying the motion of the defendant to dismiss against him at the conclusion of the plaintiffs' case (R-60).

The court erred in its instructions to the jury, numbers 5, (R-29), 14, (R-39), and 17, (R-42).

The decisions should be reversed and the case remanded for dismissal.

Respectfully submitted,

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