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

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IN THE SUPREME COURT OF THE STATE OF UTAH

VERNAL STRATTON and
NEOLA STRATTON, his wife,
Plaintiffs-Respondents,

vs.

WEST STATES CONSTRUCTION,
a Utah corporation, and
JACK LORDS, et al.,
Defendants-Appellants.

Case No.

10841

RESPONDENTS' BRIEF

Appeal from Judgment of the 5th District Court for
Iron County, Honorable C. Nelson Day, Judge.

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FILE

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Clerk, Supreme Court

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STATEMENT OF FACTS

Plaintiffs do not concur in defendants' statement of facts. It omits significant details and states as fact matters which are not.

Richard Lee, agent of Western States Wholesale Supply, a corporation doing business as Western States Construction, without instructions or limitations on his authority (R. 268), represented to the plaintiffs that their home in Cedar City had been selected for a very

special offer. He stated to the plaintiffs that he was not a mere agent but was the company and desired to use plaintiffs' home for a special advertising project; he promised certain improvements, including aluminum siding, new windows, storm doors, and a roof, at a cost to plaintiffs of \$2,650, and that as a further consideration to the plaintiffs for the advertising use to be made of this special project, the plaintiffs were to be paid \$200 for each subsequent job done by the company up to 26 such jobs (referred to as units). The contract (Plaintiffs' Exhibit 1) was signed by the plaintiffs and by Lee for the company. (R. 16-18, 23, 29, 296, 298)

The contract provided that the plaintiffs could at their option pay off the entire amount at any time or pay monthly payments, the first such monthly payment not to be due until "60 days after completion of work." (Plaintiffs' Exhibit 1)

Defendant Jack Lords and others working for him took photographs of the home before and during work. (R. 32, 206, 278, 279)

The work was not done in a workmanlike manner, there being numerous defects. (R. 33-48, 110)

While the work was still in progress and despite the provisions of the contract that the plaintiffs' first payment was not due until 60 days after completion of the work, Lords went to Cedar City to get the plaintiffs to sign papers for third party financing. (R. 49, 274) There is evidence that at this time Lords repudiated that portion of the contract dealing with the \$200 credit for each of the 26 job units. (R. 49) Plaintiffs declined to

sign the requested financing papers. (R. 204) Shortly thereafter and while the work was still uncompleted to his knowledge, Lords caused a mechanics lien for the full contract price to be recorded against the property. (R. 204, 205, 209, 279) Laborers and materialmen also filed liens. (R. 284) There is evidence from which the jury could deduce that these other liens were also filed at the insistence of Lords. (R. 130) They are all on the same form, apparently the same typewriter, and all filed at the same time at the request of Lords' attorney. See, e.g., Defendants' Exhibits 4, 5, 6 and 7.

Advised that the liens subjected them to possible attorneys fees and costs, plaintiffs on the advice of their then attorney, Robert L. Gardner, agreed to make payments which would remove the liens to avoid these potentially large expenses. As part of this negotiation, Lords agreed to complete the improvements and to obtain releases of the liens. Plaintiffs withheld \$500 of the contract price pending such completion of the contract work. (R. 8, 11, 77, 89, 90, 178, 193, 198, 283)

Although the liens were released, neither Lords nor anyone else ever appeared to finish the work called for by the contract. (R. 48, 87, 90, 100, 102, 115, 189, 193, 206, 212)

Plaintiffs ultimately brought suit to enforce the contract. Defendants moved for summary judgments on the theory of an accord and satisfaction based on a letter sent by Robert L. Gardner to the defendants' attorney. At the hearing on the motion it developed that the letter was but one stage in a series of negotiations wherein the parties agreed on some things but not on others. Specifi-

cally the plaintiffs would pay certain moneys to the defendants; the defendants would release the liens and would complete the work under the contract, the plaintiffs holding \$500 pending such completion. The question of the 26 job units under the contract was discussed but not resolved. Defendants never, however, completed performance under the contract or these subsequent negotiations. (See Supplemental Transcript of Summary Judgment Proceedings) The motion was denied; it was renewed at trial and again denied.

At trial, defendant Lords admitted that there had been from 25 to 30 job units completed subsequent to the plaintiffs' contract.

At the conclusion of a two day trial, the jury rendered its unanimous verdict for the plaintiffs in the amount of \$6,900 which sum was reduced \$500 by the Court to compensate for the funds withheld earlier by the plaintiffs.

ARGUMENT

POINT I. THERE WAS NEITHER AN ACCORD NOR A SATISFACTION.

Defendants moved for summary judgment, and at trial, on the theory of an accord and satisfaction. They premised this on the letter sent by Gardner to Knowlton. (Def. Ex. 3) At this time the work had been only partially completed, and in an unworkmanlike manner at that; Lords had repudiated certain parts of the contract; Lords had filed a lien for the full contract price even though the work was not finished; and others had also

filed liens even though the work was not completed and the plaintiffs were not in default.

At the hearing, Robert L. Gardner, attorney for the plaintiffs at the time pertinent, testified that certain money was held out pending completion of the work by the defendants. (Transcript of Summary Judgment Proceedings, p. 11, 12) He testified that Lords was to complete the project. There were discussions about the \$200 per unit. Plaintiff Vernal Stratton testified that the promised work was never completed. (Transcript of Summary Judgment Proceedings, p. 16)

It is obvious from the record that the defendants failed to prove an accord. There was not agreement concerning the \$200 per unit for 26 units portion of the contract. It is undenied that the plaintiffs withheld \$500 from the contract price pending completion of the contract work by defendants, and it is equally undenied that the contract was never completed. This was the state of the evidence at the hearing on the motion for summary judgment and at trial.

Absent proof of a full settlement, intended as such, it would have been error for the jury to have found an accord, let alone a satisfaction. *Owens v. Hunter*, 91 Ariz. 7, 368, P. 2d 753 (1962).

It is elementary, hornbook law, requiring no lengthy citation of authorities that even had there been an accord, upon the failure of the defendants to perform thereunder, the plaintiffs would be entitled to pursue their remedies under the original contract. *Whitney v. Richards*, 17 Utah 226, 53 Pac. 1122 (1898); Restatement of Con-

tracts, §417; Williston on Contracts, § 1841 (Rev. ed. 1938).

Since there was no accord, and not even performance by the defendants of those acts which they did promise to do, and which they were already obligated to do, the trial court was correct in denying their motion for summary judgment. There is substantial competent evidence to support the verdict of the jury which rejected the accord and satisfaction theory also.

POINT II. THERE IS COMPETENT EVIDENCE TO SUPPORT THE JURY VERDICT AGAINST DEFENDANT JACK LORDS.

This case was tried to a jury which brought in a unanimous verdict against defendants West States Construction and Jack Lords. This was not error. There was ample, competent evidence to support the verdict.

The jury could hardly avoid finding that Lords participated personally from the outset with full knowledge of all the salient facts and as the prime mover in this unsavory affair. Richard Lee was sent out by Lords to get contracts, without, according to Lords either instructions or limitations. Lee represented that the house improvement transaction was to be used for selling other improvement contracts and that pictures would be taken for that purpose. (R. 24) Lords, himself, took some pictures.

Even though Lords knew full well that the contract provisions did not obligate plaintiffs to pay one cent until

60 days after completion of the work, Lords attempted to get the plaintiffs to agree to a third-party financing, and when he was unsuccessful, he personally undertook to place on the property mechanics' liens for the full contract price even though the work had not been completed. There is evidence that he was instrumental in getting others to file liens. They were all done at the same time, apparently on the same typewriter and placed of record by Lords' attorney. There is evidence that at the time of the negotiations with Robert L. Gardner that Lords personally ratified, adopted and assumed the obligations of the contract and undertook personally to see to their performance. (R. 90, 91, 114, 115, 93, 198, 283)

There is also competent evidence from which the jury could conclude that Lords was party to an attempt to deprive the plaintiffs of their contract rights by use of a forged contract, omitting the \$200 per unit for 26 units provision. Compare Plaintiffs' Exhibit 1 with Plaintiffs' Exhibit 29 and Defendants' Exhibit 20. The jury could well deduce personal participation in this portion of the transaction. The jury could find that Lords' personal participation, adoption and ratification of the contract obligations, and personal, intentional, imposition of the mechanics' lien even before completion of the work, all tied him personally into what is less than a savory transaction. On the basis of these numerous personal involvements and the logical implications to be drawn therefrom, the jury could well find, and were justified in so doing that Lords was personally liable, the company front being a mere alter ego.

That he should eschew personal liability and prefer the shield of the corporate veil for nefarious business activities is understandable. The jury, however, on competent evidence, determined otherwise. Being based on competent evidence, the verdict of the jury must stand, in accordance with well established principles of law. *Toomer's Estate v. Union Pac. R. Co.*, 121 Utah 37, 239 P. 2d 163 (1951); *Pace v. Parrish*, 122 Utah 141, 247 P. 2d 273 (1952).

POINT III. THERE WAS NO PREJUDICIAL ERROR IN THE JURY INSTRUCTIONS.

Defendants assert that instruction number 5 is erroneous as far as defendant Jack Lords is concerned. This is not so. Defendant Lords and his corporate co-defendant answered in the first instance by simply alleging the defense of a partially completed accord and satisfaction. (Answer, pleading file p. 11) By an amended answer first filed at the date of the trial, both defendants re-alleged the defense of accord and satisfaction "between the parties" and estoppel. (Amended Answer, pleading file, p. 23) In neither the original answer nor the amended answer is there a specific, intelligible denial of Jack Lords' implication and relationship with the shoddy transaction sufficient to raise the position defendant Lords now takes on appeal.

Since, in addition, there was competent evidence upon which the jury could impose liability on Lords, even if there be error in this instruction, it was nonprejudicial.

As a matter of note, but not noted by defendants,

the trial court in its instruction number 5 repeated almost verbatim the only portion of the defendants' amended answer which could be any stretch of the imagination be construed as a denial of Lords' involvement and liability. This is the last sentence of instruction number 5 which is almost identical with the last sentence in the defendants' amended answer prior to the prayer therein.

Considering this careful patterning of the court's instruction to the defendants' amended answer it is difficult to envision the basis for defendants' complaint about their own theory and authorship.

Defendants object to instruction number 14 which sets forth the law of private contractors bonds, alleging such instruction to be irrelevant, immaterial and prejudicial. They do not state how or why it might be prejudicial.

Plaintiffs contend that in view of the defendants' wrongful and intentional placing of a mechanic's lien on the property and their implication in getting others to do likewise, the law relative to such liens and contractors bonds is highly pertinent. Defendants had not even completed their work when they caused the lien to be recorded. Surely the jury was entitled to know the effect of this bad faith action. Defendants merely assert that there was error in the instruction; they do not point out how it could have been error. It was not.

Defendants further object to instruction number 17 which provided for the imposition of a single sum as damages, asserting that it permitted the jury to assess

punitive damages against defendant Lords. Since the jury verdict was less than the amount of possible actual damages, defendants were not prejudiced. However, even had the jury awarded punitive damages against defendant Lords there would have been no error considering that Lords was, undeniably in some instances, the prime mover in this deal and in other instances probably the prime mover — with full and calculating knowledge.

Plaintiffs contend there was no error in the jury instructions, and even were there error, in absence of proof of harm the verdict must be affirmed. *Mace v. Tingey*, 106 Utah 420, 149 P. 2d 832 (1944); *Hales v. Peterson*, 11 Utah 2d 411, 360 P. 2d 822 (1961).

CONCLUSION

For the reasons above stated, the plaintiffs respectfully pray this Court to dismiss the appeal and to affirm the judgment rendered on the jury verdict below.

Respectfully submitted,

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