

1963

Joseph P. McCarren dba McCarren Plumbing and Heating Co. v. Charles S. Merrill : Brief of Respondent

Utah Supreme Court

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APR 16 1964

IN THE SUPREME COURT

of the

STATE OF UTAH

FILED
NOV 26 1963

JOSEPH P. McCARREN d/b/a
McCARREN PLUMBING AND
HEATING CO.,

Plaintiff and Respondent,

vs.

CHARLES S. MERRILL,

Defendant and Appellant.

Case No.
9857

BRIEF OF RESPONDENT

Appeal From a Judgment of the Third District Court
For Salt Lake County
Honorable Stewart M. Hanson, Judge

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Plaintiff and Respondent,

vs.

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Defendant and Appellant.

Case No.
9857

BRIEF OF RESPONDENT

STATEMENT OF KIND OF CASE

Charles S. Merrill, defendant below, has appealed from a judgment awarding to plaintiff \$1510.90 for services and materials furnished by the plaintiff at defendant's request on certain residential rental property owned by defendant in Salt Lake County. Plaintiff and respondent cross appeals for attorney's fees under the contract.

DISPOSITION IN LOWER COURT

Judge Stewart M. Hanson awarded judgment to the plaintiff in the sum of \$1510.90, dismissed defendant's counterclaim, and denied plaintiff any attorney fees.

RELIEF SOUGHT ON APPEAL

Respondent asks the court to affirm the judgment of Judge Hanson on the merits of the case and to reverse his decision insofar as he refused the plaintiff attorney's fees under the agreement.

CROSS APPEAL

Plaintiff hereby cross appeals to the Supreme Court of the State of Utah from that part of the decree of the court in the above entitled cause dated December 14, 1962 denying plaintiff a reasonable attorney's fee in accordance with the prayer of plaintiff's complaint.

STATEMENT OF FACTS

The statement of facts of the appellant in his brief is, to a large extent, the argument made by respondent and defendant below rather than a statement of the facts as found by the District Judge. It is necessary, therefore, to restate the facts in accordance with the lower court's ruling and the evidence.

Plaintiff Joseph P. McCarren is a licensed plumber in Salt Lake County, Utah, and was duly authorized under such licenses to perform plumbing services during the month of October, 1960 to and including the date of the trial (Findings of Fact No. 1, R. 20, 46, 47). Plaintiff has had 20 years experience as a plumber, but prior to the time in question had never dealt with the defendant (R. 47). Immediately prior to the time of the execution of the written agreement between the parties, in evidence as plaintiff's Exhibit 1, plaintiff called upon the defendant in response to a telephone call from J. Price Company at the defendant's residence at 1975 Millcreek Way and discussed with the defendant work which defendant required (R. 48).

Plaintiff testified that he explained to the defendant that on all his jobs he billed every 30 days and expected them to pay by the 10th of the month so that plaintiff could meet his obligations (R. 48). The defendant explained that he wanted the plumbing work done "right away". Plaintiff therefore commenced work immediately (R. 60). Plaintiff testified that it was not his custom to fill in the blank on the form contract he used under the heading "Payments to be Made as Follows", but that he customarily billed his customers monthly, and that he was not in the finance business and could not afford to finance construction (R. 60-61). Most of the longhand insertions on Exhibit 1 appear in plaintiff's handwriting, but Mr. Merrill examined the contract in detail and the language with respect to the water sprinkler and related infor-

mation on the right hand side of the page is in defendant's handwriting (R. 49). The court expressly found that "defendant and plaintiff agreed that the defendant would pay to the plaintiff for materials furnished and services rendered, pursuant to said contract, on or before the 10th [of the] month after the month in which the same were furnished, and the plaintiff would render a statement to the defendant at the end of such calendar month during the period of time such materials and services were furnished and performed." Thus the court expressly adopted plaintiff's version of the contract and rejected the defendant's testimony to the effect that there was no such conversation.

It was plaintiff's practice to require his employees to write up a job ticket at the end of each day describing the material installed and the time spent on the job. Where material is in addition to the work described in the contract, the word "extra" is placed on the ticket. These tickets are retained by the plaintiff in the normal course of the business as a normal part of his usual and ordinary business records. The information reflected on the tickets is tabulated and transmitted onto a ledger sheet. Plaintiff's job tickets on the defendant's building project were marked collectively as Exhibit 2. They reflect in detail the materials used and the work performed each day. They support the conclusion, taking into account plaintiff's normal practice and in the light of his twenty years' experience as a plumber, that the fair and reasonable value of the labor performed and materials furnished on the premises at 1975

Millcreek Way between October 5, 1960 and the middle of November, 1960, was in the sum of \$2110.90. The court found that \$288.14 of such amount was additional to the items contemplated by the parties as reflected in the written agreement, said items being designated as "extra" by plaintiff (Finding No. 3, R. 21).

The court expressly found that on or about November 1, 1960, plaintiff rendered an invoice to the defendant in the sum of \$1800. (Finding No. 4, R. 21). This finding was in accordance with plaintiff's testimony. Plaintiff testified that Mr. Merrill visited the premises practically every day; that he did not make any objections concerning the status or quality of the work. It is not plaintiff's practice to keep copies of invoices because the information reflected by the invoice is simply taken from his ledger (R. 53). Plaintiff testified that on or about the 10th of November he called Mr. Merrill and inquired if he could draw some money on the job. Mr. Merrill responded that he could not pay him, that he was having trouble with the federal government but that he would send a check shortly. Plaintiff continued to work on the job until November 16 (R. 53, Exhibit 2). Approximately December 20 or 21, plaintiff discussed the question of payment at the Deseret Mortuary, and defendant promised plaintiff a check for \$1,000 "in the next day or so". "I told him I needed the money to pay my bills, and, well, things were tough in general, and he said he would have me a \$1,000 before Christmas" (R. 54). Plaintiff told the defendant at that time that he would put his men

back on the job as soon as he had the money. Finally, on January 12, plaintiff called upon Mrs. Merrill and she gave him a check for \$500. (Exhibit 4). Plaintiff called the defendant and told him that if he would pay him an additional \$500 he would go back to work (R. 55, 56). The court expressly found that between November 1, when the plaintiff's invoice was rendered, and January 12, plaintiff repeatedly demanded payment and the defendant consistently and repeatedly refused to pay any part of the amount due. The court expressly found "that the payment of the \$500 to plaintiff . . . was not on the condition that [plaintiff] immediately return to work . . . but said amount was paid with the understanding that the defendant would pay or cause to be paid to plaintiff an additional \$500 before plaintiff would return to work" (Finding No. 5, R. 21).

The value of the work done was \$2010.90. After the \$500 credit, there was due and owing plaintiff \$1510.90 for services rendered and materials furnished to that time (see Exhibits 2, 3; Finding No. 4). The court found that when the defendant failed to pay plaintiff's invoice of November 1, 1960, or at least when he failed and refused to pay the sum of \$1,000 which plaintiff had agreed to accept as a condition to returning to work, "such failure constituted a breach of the agreement between the parties and justified plaintiff in refusing to complete said work" (Finding No. 8, R. 23).

At approximately the time the plaintiff left the job, the "rough plumbing" was inspected by the inspector for Salt Lake County and the work was approved (R. 101).

At the trial, the defendant attempted to establish that the plaintiff stopped working because the sewer line immediately outside the house was higher than the location where the connection could be made from the pipes coming from one of the bathrooms. Plaintiff testified, however, and defendant did not deny that the sewer line was being dug by defendant's men and that they left the job before plaintiff had. Moreover, the practice in the industry is that a plumber extends the sewer pipeline only five feet from the building and the expense of connection from that point to the sewer is borne by the owner (R. 166). Of interest on this point is the fact that defendant wanted to charge plaintiff approximately \$460.00 for digging a trench to the point where the sewer could be connected (R. 94); whereas the normal charge was \$2.50 per foot, defendant admitting that he had paid that amount only two years previously on the same house. It is undisputed that defendant did not tell the plaintiff that the footings in which plaintiff was installing the plumbing were lower elevation than the sewer connections at the time the contract was signed.

Defendant testified that he had been required to pay at least \$2531.00 to complete the plumbing job. (This testimony is somewhat difficult to follow but

he was claiming at least the following amounts: \$1616.07 to Christensen (R. 93, 99; Exhibit 15); \$500.00 cash to Christensen, (R. 93, 53, 102, 105); \$255.00 to England Plumbing, (R. 93); and \$460.00 for the trench to Lake Hills Memorial (R. 94). His testimony, however, was consistently and substantially impeached. The court found that the defendant failed to establish that the failure of the plaintiff to complete the plumbing work contemplated by the agreement received as Exhibit 1 was the proximate result of any act or neglect of the plaintiff, and that the defendant failed to establish that the fair cost of completing the work described in the agreement would have exceeded the contract price. The court further found that the defendant had not fairly attempted to mitigate damages (Finding No. 6; R. 220). The evidence on these points will be discussed in more detail under Point II of this brief.

Although finding in accordance with plaintiff's testimony that plaintiff's failure to complete the contract resulted from defendant's breach, the court found that plaintiff was not entitled to recover any attorney's fees (Finding No. 7, R. 22). Exhibit 1 provides that "Purchaser agrees to pay any expense incurred by the Seller after Purchaser's breach of this contract, including cost of repossession and reasonable attorney's fees. Interest at 8% to be charged upon delinquent payments." (Exhibit 1, para. 6.)

POINT I.

THE COURT CORRECTLY RULED THAT THE PARTIES AGREED THAT PLAINTIFF WAS TO BE PAID MONTHLY AS THE WORK PROGRESSED.

The written contract between the parties was left blank under the heading: "Payments to be Made as Follows:". The court therefor appropriately received evidence as to the parties' intentions on this term of the agreement. This court held in *Burt v. Stringfellow et ux* (1914) 45 Ut. 207, 143 P. 234; see also *Udy v. Jensen* (1924) 65 Ut. 95, 222 P. 597, that the function of the trial court was to determine the intentions of the parties. Since the written agreement did not have any provisions on this particular item, the intention of the parties must be determined by consideration of the circumstances of the parties and their testimony as to what occurred at the time the contract was signed (32 C.J.S. 1027, Evidence Section 1013). Respondents cite *Marx v. Noble* (1960) 10 Ut. (2d) 440, 354 P. (2d) 121, for the proposition that the contract should be construed against the plaintiff since he was its author. But the court held in that case that "The primary and fundamental rule is that the contract must be looked at realistically in the light of the circumstances under which it was entered into, and if the intent of the parties can be ascertained with reasonable certainty, it must be given effect." cf. *Craine v. Hagenbarth* (1910) 37 Ut. 69, 106 P. 945.

POINT II.

THE COURT'S FINDINGS OF FACT SHOULD BE SUSTAINED SINCE THEY ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

This court has stated many times that Findings of Fact by the trial judge will not be disturbed so long as they are supported by substantial evidence. *Lowe v. Rosenlof* (1961) 12 Ut. (2d) 190, 364 P(2d) 418; *Child v. Child* (1958) 8 Ut.(2d) 261, 332 P(2d) 981.

(a) *Appellant does not seriously challenge Judge Hanson's Findings of Fact.* It is significant that the appellant here does not suggest that Judge Hanson's Findings are not supported by the evidence. The appellant makes a broad argument on the facts *de novo* as though the factual conflicts had not been resolved at the trial level. Sustaining of the Findings by respondent therefore, is in a sense, superfluous.

It should be pointed out, however, that on the critical issue as to whether the parties agreed orally that defendant would pay plaintiff monthly, plaintiff's testimony was direct and clear. He stated unequivocally that he explained to defendant that he billed on his jobs every 30 days and expected customers to pay by the 10th of the month so that he could meet his own obligations (R. 38, 60-61). While Mr. Merrill's testimony was to the contrary, his statements were substantially and consistently impeached.

Plaintiff and the other witness called in his behalf, William J. Clawson, testified directly and positively as to the actual items of material and number of hours per day that he spent on the defendant's premises. The reasonable value of the work was in accordance with plaintiff's practice, buttressed by his 20 years as a licensed plumber. The witness called by the defendant, Mr. Christensen, admitted that the plaintiff's work was approved by the County Inspector and that the rough plumbing was usually approximately 65% of the total cost of a job. The contract price was \$2981.00. Sixty-five per cent of that amount would have been \$1937.65. The total amount of the work performed and materials furnished by the plaintiff was valued by him at \$2110.90. Of this sum, \$288.14 were extras. Thus the reasonable value placed by the plaintiff on the rough plumbing required by the contract was \$1802.72, approximately \$130.00 less than Mr. Christensen testified would have been a normal price for such services and materials.

Taken as a whole, the record sustains the findings of the trial court without regard to the fact that the defendant was thoroughly impeached.

(b) *The positions of the defendant were substantially conflicting and his personal testimony was impeached.* The positions and testimony of Mr. Merrill were in such conflict with each other that any findings based on them would have been subject to the most serious criticism. While not exhaustive, the following list of inconsistencies illustrate his total want of candor:

(1) Merrill testified on direct examination that the only conversations he had with plaintiff about money was when plaintiff called at the mortuary on or about January 12. He at first denied that he had ever received a statement from Mr. McCarren on November 1 (R. 135). On cross-examination, his counsel admitted for him that on his deposition he testified that he had received McCarren's statement of November 1 (R. 136, 137).

(2) Merrill claimed he had paid Mr. Christensen \$1616.07 for materials (R. 93; see also Exhibit 15); whereas, Mr. Christensen stated that the defendant furnished all of the materials (R. 99). The only amount that defendant paid Mr. Christensen was \$500 (R. 153), and that check bounced (R. 118; see also Exhibit 7). After Christensen's testimony, the defendant grudgingly admitted that he hadn't paid Mr. Christensen anything for materials (R. 102, 105).

(3) Merrill testified that he wrote plaintiff a letter telling him in substance and effect to do the work or he would hire somebody else (R. 156). Such a letter would have to have been written prior to the middle of January because that is when the defendant hired Mr. Christensen to complete the job. Yet defendant admitted that he had never complained to the defendant about the job in any way prior to March 7, after plaintiff had demanded

payment and referred the claims to counsel for collection (R. 137-138; Exhibit 15).

(4) Defendant denied that he knew that the County Inspector approved the basic plumbing and that he had discussed the matter with Christensen (R. 150).

(5) Merrill is claiming that he lost tenants from substantially the middle of December and that he was extremely anxious to have the job completed; yet he admits that he never complained to the plaintiff in any manner about plaintiff's performance on the job until after he had received a demand letter from plaintiff's counsel (R. 137-138; Exhibits 14 and 15).

(6) Merrill testified that he had built three or four million dollars worth of buildings (R. 132-133), yet he didn't know that the practice in the construction industry was that the elevation of sewers was determined by the general contractor rather than the plumber (R. 134; cf. R. 165).

(7) Merrill was forced, on cross examination, to admit that most of the items which he claimed he had paid for consisted of duplications of the items which were on the premises prior to the time when plaintiff quit the job. The duplication of items claimed by the defendant on his counterclaim were proved from his own exhibits (R. 140-147).

(8) After extensive cross examination where

defendant was required to identify numerous items in detail that he wanted credit for on his counterclaim in addition to the items that were listed in the contract between the parties (Exhibit 1; R. 139-147), defendant then denied that any items went into the premises in addition to those described in the original agreement (R. 158).

(9) Defendant repeatedly made inconsistent statements as to whether demand was made for payment (R. 161-162).

(10) Merrill, whose occupation was a mortician (R. 132) testified that plaintiff's work was improper and that charges were made by the plumbers to correct some of it (R. 92), but Merrill's expert witness, Christensen, who had been in the plumbing business for many years, testified as to the various items in dispute: "It wasn't the fault of the plumber" (R. 104-105), explaining that errors made by other subcontractors had required some changes in the plumbing.

(11) Merrill admitted that he did not tell plaintiff when the contract was signed that the elevation of the line running from one of the bathrooms was lower than the existing line to the sewer (R. 147); yet he now wants to charge plaintiff \$460.00 (R. 94) for the entire cost of running the line from five feet outside the house, which, according to industry practice, would terminate the plumber's responsibility (R. 166) to the point of

connecting the sewer, which Merrill testified to variously was "80 feet" (R. 94), "60 to 70 feet" (R. 122). The proposed charge was calculated at \$12 per hour credited by Lake Hills Memorial (R. 151, 152). His original cost for laying the sewer was only 50c per foot (R. 157) and the normal industry charge at the present time does not exceed \$2.50 per foot.

In sum, and taken as a whole, defendant's contentions are simply not believable. The trial judge's rejection of them was not only warranted; it was required by the record.

POINT III.

THE COURT ERRED IN FAILING TO AWARD PLAINTIFF AN ATTORNEY'S FEE.

The law is well settled that where a contractor completes a part of the work agreed upon and leaves the premises because of non-payment by the owner, the contractor is entitled to payment on a quantum meruit basis for the work he did perform, even though he is not entitled to all of the benefits of the contract. *Lowe v. Rosenlof* (1916) 12 Ut.) 2d) 190, 364 P (2d) 418; *Ryan v. Curlew Irrigation and Reservoir Co.* (1909) 36 Ut. 382, 104 P. 318; *Eckes v. Luce* () 70 Okl. 67, 173 P. 219, 17-A C.J.S. 828, Contracts, Section 511. When the defendant failed to pay the

amount of the November 1 billing, plaintiff had an immediate cause of action for the work performed at that time. The defendant was in default of the contract. Respondent does not contend that he should recover profits for the work which he did not perform. But, on the other hand, defendant should not be entitled to benefit from his own breach. It is submitted that the contract itself provides that in the event of breach, the defaulting party should pay collection costs, including attorney's fees, and that the court should have awarded attorney's fees in ratio to the damages sustained by the plaintiff at that time. Plaintiff should not be required to complete the job simply to enable himself to recover attorney's fees. Defendant has already breached. The argument has particular cogency where the defendant has repeatedly promised plaintiff money and then failed to perform.

It is suggested that this court can fix attorney's fees in accordance with the experience of the court or the schedule of the Bar Association without additional evidence, and that upon remand, the lower court could be instructed to amend the judgment fixing fees without a further hearing.

CONCLUSION

The Findings of Fact of the trial judge are supported by the evidence, and the decision rendered on the merits of the case was in accordance with applicable legal principles. Since the defendant violated the con-

tract and required plaintiff to sue to obtain recovery under its provisions, the defendant should be required to pay reasonable costs of collection, including counsel fees. With the modifications suggested by the respondent's cross appeal, the judgment of the trial court should be affirmed.

RESPECTFULLY SUBMITTED THIS
22nd day of November, 1963.

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