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A. Z. Richards and A. H. Sorensen dba Caldwell, Richards & Sorensen v. Lake Hills : Brief of Appellant

Utah Supreme Court

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J. D. Skeen; E. J. Skeen; Attorneys for Plaintiff-Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

A. Z. RICHARDS and A. H. SORENSEN, Partners, doing business under the firm name of CALDWELL, RICHARDS & SORENSEN,
Plaintiff and Respondent
vs.
LAKE HILLS, a corporation
Defendant and Appellant

Case No. 9885

Appellant's Brief

Appeal from the Judgment of the Third District Court for Salt Lake County, Honorable Ray Van Cott, Jr., Judge

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STATEMENT OF KIND OF CASE

This is an action to recover for the value of engineering services rendered by the Plaintiff for the Defendant.

DISPOSITION IN THE LOWER COURT

The case was tried by the court without a jury. From a verdict and judgment for the Plaintiff, Defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment and judgment in its favor as a matter of law, or that failing, a new trial.

STATEMENT OF FACTS

A. Z. Richards, a partner in the Plaintiff firm was engaged by Charles Merrill, agent for the Defendant, to do the engineering for a cemetery. They had worked together before on other similar projects. (R5) The arrangements in this matter were discussed first in April, 1954. (R 14) Services were ren-

dered from that time until 1960 on the Lake Hills Memorial Park, 10101 South State, Salt Lake County. Many maps and drawings were prepared laying out the roads and various sections of the burial grounds. Much of the work was done at the home of A. Z. Richards. Arrangements as to time of payment were nebulous with the Defendant's agents Merrill and Jex contending that Richards agreed to do the work on his own time and to await payment until the land was paid. There was agreement that the services were to be billed at double the amount. (R 6) Statements were rendered accordingly, the first on December 1, 1955 regular price $4,198.20, then doubled.

Discussion of payment was had in July, 1960 and a $10,000.00 Debenture Bond was prepared, charged, tendered and received by the Plaintiff. (R 46) Defendant contends there was an accord and satisfaction with the bond. Plaintiff contends it was a tender only and Plaintiff was entitled to the reasonable value of the services within a reasonable time. The bond tendered was one payable by the Defendant from a proposed sinking fund to be payable in 1975.

The lower court entered judgment against the Defendant in the sum of $9,616.81.

ARGUMENTS

POINT I.

THE COURT ERRED IN FINDING QUANTUM MERUIT FOR THE PLAINTIFF.

POINT II.

THE EVIDENCE SUPPORTED A FINDING OF ACCORD AND SATISFACTION WHICH THE COURT SHOULD BE RENDERED.

POINT III.

THE COURT ERRED IN REFUSING TO ALLOW MR. HOMER R. DON TO TESTIFY CONCERNING THE DEBENTURE BOND AND ITS ISSUANCE.

POINT I.

THE COURT ERRED IN FINDING QUANTUM MERUIT FOR THE PLAINTIFF.

Where there is proof of a special agreement to pay a particular amount or in a particular manner, the law will not imply a promise to pay the value of services rendered.

58 Am. Jur. Work and Labor p 515
Gjurich vs. Fieg (Cal) 129 p 464

Here, there was a special agreement between the parties as to the time and method of payment. The Plaintiff, Richards, stated that he was not concerned about payment when he stated (R 6):

> " . . . we never talked about pay for a long time, quite a long time. I think several months–probably more. I wasn't concerned. I figured that he would treat me all right and I think the next time we talked, when I talked about it and he said, 'Well, you keep track of your time and you just consider it double your regular fee; your regular expense. You just keep track of it and make it double what you ordinarily would do', which I did."

The first discussion as to time of payment was had at the cemetery in April, 1954. Mr. Merrill said (R 41):

> "I'm trying to build a Memorial Park. I know you know how to set up the engineering. I cannot pay you, this is a non-profit park. We have no stockholders to get the money from. I am waiting for my money. I put money in this park and I am going to wait for my money. Now if you want to do the same as me, we will double your fee."

William R. Jex testified of a similar arrangement for himself and that Richards acknowledged and supported such an agreement (R 58):

> "I told him yes, I was interested in investing money. and told him that it looked like this would be a good thing; that it might take some time to develop and I

was going to put mine in and wait until it developed and get the ground paid for, and what not, before we realized any money out of it. And he said he was doing the same thing. He was going to do the work and he was waiting for the money the same as I was."

Richards' testimony was inconsistent. First he said he agreed to the double fee and to wait for his money. (See exhibit #2) Next he stated he sent the bond back because it did not cover the double fee. (R 69)

"Q: Now when you returned the bond to Mr. Merrill and stated that the bond of $10,000.00 didn't cover the cost incurred, you were referring to the double figure of $14,000.00 were you not?

"A: That's right."

This after he had stated his position and tried to change the arrangements between the parties (R 12):

"Q: Well, will you state then, Mr. Richards, the substance of that conversation you had in 1960 or 1961?

"A: I was concerned about my finances. I needed money and I called Charlie to see if he couldn't arrange to let me have some money on this account, so I could have something that I could raise some money on."

Under cross examination Mr. Richards further admitted the agreement to wait (R 15):

"Q: And do you recall at that time Mr. Jex making the statement to you that he had to wait for his money, too?

"A: Oh, he may have done, but I don't think he talked about salaries or me being paid. He may have said that.

"Q: Do you recall making a statement to him that you knew you were going to have to wait for your money for a while?

> "Oh, I don't remember saying it, but I could have said it very well. I had an understanding definitely with Charlie that we wouldn't be paid promptly as the work was done."

Unless there was a new agreement reached between the parties, the former agreement must stand. The substance of the first was that Richards would wait for his money until the land was paid and then he would get double the fee for waiting. The court has no right to make a new agreement for the parties. However, the parties, at Mr. Richards' insistence, discussed new arrangements and payment by bond was discussed. Mr. Richards, holding to the first agreement sent the bond back because it did not cover double the fee. Merrill alleged the satisfaction of $10,000.00 with a bond specifying a definite date of payment in 1975. Richards, after holding the bond several days unilaterally declared the new arrangements unsatisfactory and then refused to abide by the original arrangements which specifically covered the payment of the work.

Thus, the theory of Quantum Meruit was erroneously applied by the trial court.

POINT II.

THE EVIDENCE SUPPORTED A FINDING OF ACCORD AND SATISFACTION WHICH THE COURT SHOULD HAVE RENDERED.

From the testimony given to the Court it was clear that the parties herein agreed to a sum for the work done, that sum being $10,0000.00, and that the Debenture Bond presented by Mr. Merrill to Mr. Richards in that amount would constitute payment thereof. This agreement, of course, constituted satisfaction of the debt in a different medium from that called for by the original agreement of payment when land was sold, thereby bringing it within the general rule set forth in 1 Am. Jr. Accord and Satisfaction p 242:

> "It is well recognized that if a creditor accepts payment of a liquidated demand in a different mode or medium from that called for by the contract between

the parties, in full discharge of the demand, there is a sufficient new or additional consideration to support the transaction as an accord and satisfaction."

The following questions suggest themselves in this point: (1) Did the parties agree that the Debenture Bond would be accepted as payment of the account? (2) And, if so, was there consideration for this alleged agreement.

We believe that both questions must be answered affirmatively. The evidence shows that the sum of $10,000.00 was a figure discussed by the parties, based upon the actual services rendered and the agreed "double" price to be paid, as the compromised payment figure based upon acceptance of the bond. The same was adequate consideration for the agreement.

From the evidence it appears that the Plaintiff did accept the bond and that the matter then came under the general rule of accord and satisfaction. This general rule was set forth in *Reeves and Co. vs. Phillips* (Okla) 156 p 1179.

POINT III

THE COURT ERRED IN REFUSING TO ALLOW MR. HOMER R. DON TO TESTIFY CONCERNING THE DEBENTURE BOND AND ITS ISSUANCE.

The court sustained the objection of Plaintiff's attorney to Defendant's questioning of Mr. Homer R. Don concerning the issuance of the Debenture Bond issued to the Plaintiff Richards by the Defendant. The Appellant now argues that the Court, by sustaining this objection, erred.

The matter of the Debenture Bond, its issuance and acceptance, was testified to by the Plaintiff Richards, by the Plaintiff's witness Valle, and by the Defendant's witness Merrill. In the testimony of each of the witnesses, the matter of discussion concerning the acceptance of the bond, the amount of the bond, the type and nature of the bond, and its actual presentation were all heard by the court. In order to have the full facts of the manner in which the bond was actually issued, executed, and presented since the same was not denied by any

of the witnesses, the Court should have permitted the testimony of Mr. Don with reference to these items since he was the person who actually prepared the bond for signature and delivery. Failure of the court to permit this testimony after accepting the previous testimony of the witnesses, constitutes prejudicial error since the issuance, delivery, and acceptance of the bond was basic to the establishment of Defendant's position in the case before the court.

SUMMARY

From the evidence before the court it is apparent that the parties at the time of the original negotiations agreed that the Plaintiff Richards should perform the work involved and that he would, together with the other members of the Lake Hills organization, wait until the completion of the project for the payment of his funds. That as consideration for the delay in this payment he was to receive double the normal fees charged for the services rendered. This agreement was apparently acceptable to the Plaintiff since the matter continued for six years without demand for payment. Thereafter, the Plaintiff not making a formal demand for payment, but requesting that some evidence of payment be presented, discussed with the Defendant the acceptance of a Debenture Bond in a sum which sum was determined by the parties to be in the amount of $10,000.00 to represent payment of the account then existing. It appears that under the new agreement the figure of $10,000.00 was agreed upon by the parties as being an amount adequate to cover the expenses involved and that acceptance of the bond would give a specific date of payment rather than a non-specific date theretofore accepted by the parties, which date was the date that the land was paid for. The evidence further shows that the bond was accepted by the Plaintiff and held by Mr. Richards, which completes the requirements to show that the bond was accepted in the place of the money account carried by the Plaintiff Richards. The Plaintiff then tried to abbrogate all agreements between the parties and brought the action in the court below as a means of altering the agreements between the

parties. It is the opinion of the Appellant herein that there was an actual accord and satisfaction between the parties and that the Debenture Bond was accepted and received by the Plaintiff thereunder. It is further the opinion of the Apellant that the failure of the court to find an accord and satisfaction and the court's failure to permit all of the evidence in support of said position to be heard by the court constitutes error by the court and that the matter should be referred to the District Court for re-trial in order that the full disclosure of the facts and agreements of the parties can be made.

The Defendant-Appellant herein prays that this court reverse the judgment of the lower court and order judgment entered for the Defendant, or if such reversal not be granted that a new trial be ordered with instructions that the lower court permit all of the evidence to be presented to the court as set forth herein.

The Defendant-Appellant herein prays that this court re- of fact do not support a judgment for the Plaintiff and that exercise of this court's responsibility to review the record and evidence before the trial court will substantiate the Defendant's position that there was in fact an accord and satisfaction between the parties and that the account sued upon by the Plaintiff was in fact satisfied by the acceptance of the Debenture Bond.

Respectfully submitted,

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