

1963

Hyde T. Clayton v. Salt Lake City et al : Brief of Appellant

Utah Supreme Court

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APR 16 1964

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IN THE SUPREME COURT
of the
STATE OF UTAH

HYDE T. CLAYTON,

Appellant,

VS.

SALT LAKE CITY, SALT
LAKE COUNTY,
J. BRACKEN LEE, L. C.
ROMNEY, CONRAD
HARRISON, HERBERT F.
SMART, JOE L.
CHRISTENSEN, C. W.
BRADY, MARVIN JENSON,
and EDWIN Q. CANNON,

Respondents.

FILED

JUL 10 1963

Clerk, Supreme Court, Utah

Case No. 9903

BRIEF OF APPELLANT

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UNIVERSITY OF UTAH

APR 29 1965

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Respondents.

Case No. 9903

BRIEF OF APPELLANT

STATEMENT OF THE CASE

The above entitled case is appealed to this Court from a Judgment of the Third District Court in and for Salt Lake County, State of Utah. The case was filed in the Third District Court by a taxpayer against Salt Lake City, Salt Lake County, and the individual defendants as elected officials of Salt Lake City and Salt Lake County.

The action was initiated by the taxpayer to enjoin or prohibit Salt Lake City, Salt Lake County and the elected officials from proceeding with a contract alleged by the petitioner to be in excess of or in abuse of their discretion.

DISPOSITION OF CASE BY LOWER COURT

On April 8, 1963, the Honorable A. H. Ellett, one of the judges of the Third District Court, after hearing argument, granted a Motion on behalf of all of the defendants for a Summary Judgment. The judge's Order granted the Motion and dismissed the Petition with prejudice. It is from this Order of the District Court that appeal is taken to the Supreme Court of Utah.

RELIEF SOUGHT

The purpose of this appeal is to reverse the Judgment awarded in the District Court granting Summary Judgment, dismissing the plaintiff's Petition and sending this case back to the District Court for a trial upon the issues.

STATEMENT OF FACTS

The action initiated in the Third District Court resulted from a proposed plan jointly by Salt Lake City and Salt Lake County to build a new metropolitan Hall of Justice in Salt Lake City (R. 2). For the purpose of effecting the construction of a metropolitan Hall of Justice, Salt Lake City and

Salt Lake County operated jointly through their officers and commissioners as a joint authority (R. 2). In pursuance of the plan to build a metropolitan Hall of Justice specifications for jail equipment were published by and on behalf of the joint authority on or about October 30, 1962. (R. 2).

The cost of construction of the proposed metropolitan Hall of Justice was estimated by the joint City and County authority to be in the approximate sum of \$800,000.00 (R. 2).

As a result of the publication of "specifications for jail equipment" and an advertisement for bids, bids were received. Among these bids was one received from Southern Steel Company and another by Herrick Iron Works (R. 3). Other bids were received and all were opened on or about November 28, 1962. The bid of Herrick Iron Works was the sum of \$542,425.00 and the bid of Southern Steel Company was in excess of 597,000.00. The bid of Herrick Iron Works was more than \$55,000.00 lower than the bid of Southern Steel. The bids of the other companies participating were higher than either. (R. 3). On or about January 7, 1963, the joint authority of Salt Lake City and Salt Lake County accepted the bid of the Southern Steel Company and rejected the lower bid of Herrick Iron Works (R. 3).

The petitioner, a resident of Salt Lake City,

Salt Lake County, brought the action which results in this Appeal on behalf of himself and others similarly situated and on behalf of such other taxpayers as might wish to join in the petition. (R. 2).

The petitioner requested the District Court to make an Order requiring the individual defendants to appear and show cause why they should not be prohibited from proceeding in accordance with the contract entered into by them acting for the joint authority. The Petition further requested that they be required to show cause why they should not be prohibited from disbursing or dispensing public funds in connection with said contract pending a hearing and trial of the issues raised by the Petition in their District Court. The Petition also requested that upon a trial of the issues the Court make an Order permanently prohibiting and restraining the defendants and each of them from proceeding with the contract into which they had entered with Southern Steel. (R. 5).

Based upon the verified Petition, the District Court ordered the defendants' named to show cause why they should not be prohibited during the pendency of the action from pursuing the contract into which they had entered with the Southern Steel Company.

When the matter came on for hearing, the Court entered an Order enjoining the defendants

from pursuing the contract until the trial of the action. It was further ordered that the petitioner post a \$1,000.00.

The trial court next considered the matter upon the defendants' Motion for Summary Judgment and entered the Order granting that Motion to dismiss the Petition April 8, 1963. (R. 46).

STATEMENT OF POINT

POINT I.

THE TRIAL JUDGE ERRED IN GRANTING THE MOTION OF THE DEFENDANTS FOR SUMMARY JUDGMENT BECAUSE THE RECORD BEFORE HIM CLEARLY DEMONSTRATED THERE WERE MANY GENUINE ISSUES OF MATERIAL FACT UNRESOLVED AND WHICH NECESSITATED A TRIAL.

ARGUMENT

POINT I.

THE TRIAL JUDGE ERRED IN GRANTING THE MOTION OF THE DEFENDANTS FOR SUMMARY JUDGMENT BECAUSE THE RECORD BEFORE HIM CLEARLY DEMONSTRATED THERE WERE MANY GENUINE ISSUES OF MATERIAL FACT UNRESOLVED AND WHICH NECESSITATED A TRIAL.

Identical Motions for Summary Judgment were filed on behalf of Salt Lake City and the Salt Lake City Commissioners and on behalf of Salt Lake County and the Salt Lake County Commissioners. (R. 24-27). These Motions were based upon Affidavits filed on behalf of the moving parties of Roy W. McLeese, Salt Lake City Engineer, and Harold

K. Beecher, the architect for the public safety and jail building. These Affidavits are found in the Record — Mr. McLeese's, R. 16-23, inclusive, and Mr. Beecher, R. 7-14, inclusive.

These Affidavits were traversed by an Affidavit made by Conrad R. Mader, Security Equipment Sales Engineer for the Herrick Iron Works. His affidavit is found in the Record, R-38-44, inclusive. It is scarcely necessary to refer to the provisions of Rule 56(c) relating to the basis upon which summary judgment may be granted.

The important portions of the rule upon which these motions were based reads as follows:

“The judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on file, give herewith the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law.”

Decisions construing this portion of the Utah Rules of Civil Procedure and the comparable Federal Rule are legion. The general tenor of these decisions is that summary judgment is a harsh and stringent remedy and is not to be granted unless it clearly appears that there are no genuine issues of material fact which require resolution and that the matter can be disposed of simply as a question of law.

Conversely stated, if from the records and documents before the Court, it appears that there are genuine issues of fact that require trial, summary judgment is not a proper remedy.

A representative statement of the principle for which the appellant contends and upon which the appellant relies is found in the opinion of Judge Hutcheson of the Fifth Circuit Court of Appeals in *Whitaker vs. Coleman*, 115 F. 2d 305:

"...The invoked procedure, valuable as it is for striking through sham claims and defenses which stand in the way of a direct approach to the truth of a case, was not intended to, it cannot deprive a litigant of, or at all encroach upon, his right to a jury trial.

"... To proceed to summary judgment it is not sufficient then that the judge may not credit testimony proffered or a tendered issue. It must appear that there is no substantial evidence on it, that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable minds, or that conceding its truth, it is without legal probative force . . .

"... Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists."

A further annunciation of the principle that the appellant believes applicable is found in the opinion of Judge Riddick speaking for the Eighth Circuit Court of Appeals in *Walling vs. Fairmont Cremery Company*, 139 F. 2d 318:

On a motion for a summary judgment the burden of establishing the nonexistence of any genuine issue of fact is upon the moving party, all doubts are resolved against him, and his supporting affidavits and depositions, if any, are carefully scrutinized by the court . . . On appeal from an order granting a defendant's motion for summary judgment the circuit court of appeals must give the plaintiff the benefit of every doubt."

Another statement of the principle particularly applicable to the situation presented by this appeal is found in *Sprague vs. Vogt*, 150 F. 2d 795, 801, in which Judge Woodrough of the Eighth Circuit Court of Appeals says the following:

"That one reasonably may surmise that the plaintiff is unlikely to prevail upon a trial, is not a sufficient basis for refusing him his day in court with respect to issues which are not shown to be sham, frivolous, or so unsubstantial that it would obviously be futile to try them."

Upon many occasions this Court has announced the same views as those expressed by the various Federal Circuits in construing and applying the comparable positions of the Federal Rules. Representative among these case is *In Re Williams Estate*,

348 P. 2d 683. This was an action by the petitioner, Gladys Williams, against the administrator of the Estate of the decedent to be included as an heir at law. The petitioners contention was based upon a claimed agreement by the decedent and the plaintiff's natural mother to adopt her. No Decree of Adoption was ever secured and the question was whether the purported agreement to adopt should be effective to permit the petitioner to participate as an heir at law.

The trial court granted a motion for summary judgment against the petitioner and in favor of the administrator of the estate. It was reviewed by this Court and its decision reversed the trial court upon the theory that if the proof which the plaintiff could produce in the light most favorable to her could justify a finding of an agreement to adopt, then she should have an opportunity to present the proof and summary judgment was an improper remedy.

Similarly in *Brandt vs. Springville Banking Company*, 353 P. 2d 460, 10 Utah 2d 350, this court said the following:

We are cognizant of the desirability of permitting litigants to fully present their case to the court and summary judgment prevents this. For that reason courts are, and should be, reluctant to invoke this remedy."

In *Bullock vs. Deseret Dodge and Truck Center*,

356 P. 2d 559, this Court expressed the principle involved as follows:

“A summary judgment must be supported by evidence, admissions and inferences which when viewed in the light most favorable to the loser shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Such showing must preclude all reasonable possibility that the loser could, if given a trial, produce evidence which would reasonably sustain a judgment in his favor.”

Tanner vs. Utah Poultry and Farmers Cooperative, 359 P. 2d 18, was an action against the Cooperative for the proceeds of marketing truck crops. A defense was asserted on the basis of a purported release of any claim by the plaintiff against the Cooperative. A Motion for Summary Judgment in favor of the defendant and against the plaintiff was granted and the trial judge was reversed by this Court. The case held that an issue of fact arose as a result of the pleadings and the contentions of the parties which necessitated a trial. The Court said, among other things:

“A summary judgment is appropriate only where the favored party makes a showing which precludes as a matter of law the awarding of any relief to the losing party.”

The problem presented by this appeal, as in most appeals, is not a delieniation of the principle which is controlling, but the application of the prin-

ciple or principles to the facts presented by the record which is before the Court.

As previously stated, the Motions of the defendants were based upon the affidavits of Roy W. McLeese and Harold K. Beecher. These were traversed in detail by an affidavit filed by Mr. Conrad Mader on behalf of the petitioner.

It is the position of the appellant that these affidavits clearly point out differences of opinion as to factual matters which are material to the determination of the lawsuit.

The following portion of the argument is a reference paragraph by paragraph to these affidavits demonstrating the factual issues which remained unresolved when the matter was argued before the trial court and which the appellant feels necessitated a trial.

The affidavit of Mr. Beecher and Mr. McLeese are identical therefore, the affidavit of Mr. Mader in contravention will be compared with that of Mr. Beecher.

Paragraphs 4 and 5 of Beecher's affidavit (R. 8) say in effect that the specifications called for both electrical and mechanical remote fully selective movement control. These paragraphs say that the bid of Herrick Iron Works was a permitted alternate but did not comply with the specifications.

Paragraph 3 of Mader's affidavit states that the Herrick Iron Works did comply with the specifications and included an additional amount of \$4,150.00 for the furnishing of emergency power.

Paragraph 12 of Beecher's affidavit states in effect that the system proposed by the Herrick Company could be bid only as an alternate. (R. 9).

Paragraph 7 of Mader's affidavit (R. 40) states that the full automatic selective system proposed by Herrick was acceptable pursuant to Paragraph 24-A of the specifications and was not an alternate proposal.

Paragraph 17 of Beecher's affidavit says that Drawing 71-A of the Herrick plans does not provide the type of construction specified (R. 10).

Paragraph 8 of Mader's affidavit (R. 40) says that 71-A clearly shows the type of door construction and is in conformance with Section 23 of the instructions to jail equipment bidders.

Paragraphs 20 and 21 of Beecher's affidavit (R. 11) claim that the Herrick bid did not set up the length of horizontal cover boxes.

Paragraph 10 of Mader's affidavit (R. 41) says that the Herrick bid sets out the specifications, the approximate width of cells from six feet to twenty-four feet and that the model was demonstrated with the covering boxes proposed.

Beecher's affidavit says in substance in Paragraphs 22 and 23 (R. 11-12) that the Herrick bid sets up a conflict and produces ambiguity as to the power requirement for the operation of independent sliding doors.

Mader's affidavit in Paragraph 11 (R. 41) states that this specification submitted by the Herrick Iron Company clearly shows the power source for independent sliding doors.

Beecher's affidavit in Paragraph 25 (R. 12) says that the drawing submitted by the Herrick Iron Works as it relates to "Sally Port Doors" does not conform to specifications.

Paragraph 12 of Mader's affidavit says in effect that the drawing submitted the Herrick Iron Works does conform to the requirements of the specifications. (R. 41)

Paragraph 26 of Beecher's affidavit (R. 12-13) says in effect that Drawing 71-A by Herrick does not provide the thickness, sizes and type of material for door jamb components.

Paragraph 13 of Mader's affidavit (R. 42) says the Drawing 71-A by Herrick Iron Works clearly shows the thickness, sizes and types of the door jam components.

Paragraph 27 of Beecher's affidavit (R. 13) states that Paragraph 23 of the Instructions to Bid-

ders require submission in duplicate of substitute specifications.

Paragraph 14 of Mader's affidavit (R. 42) states that the Iron Works did furnish the necessary alternate specifications and drawings in duplicate.

Paragraphs 29 and 30 of Beecher's affidavit (R. 13) state that aluminum cover, instead of steel, was provided on the model submitted by Herrick Iron Works, and, therefore, did not satisfy the requirement based upon the specifications.

Paragraph 15 of Mader's affidavit (R. 42-43) says that the model conformed to the specifications and that the aluminum cover was pointed out to those persons who examined it and that no objection was made and that no rejection of the bid was contemplated upon that basis.

Paragraphs 31 and 32 of Beecher's affidavit (R. 13-14) say that there was an ambiguity of quality of materials to be installed in the final Herrick Iron Company product.

Paragraph 17 of Mader's affidavit (R. 43-44) says that there was no ambiguity in the material proposed to be submitted by the Herrick Iron Works and that the model was the same as that proposed to be supplied by the Herrick Iron Works.

Paragraph 34 of Beecher's affidavit (R. 14) says that the instructions to jail equipment bidders did not permit any erasures or modifications. This

presumably implied the proposal of Herrick Iron Works did have erasures or modifications.

Paragraph 18 of Mader's affidavit (R. 44) states that the proposal of the Herrick Iron Works did not contain any erasures nor did the proposal require any modification subsequent to the opening of bids to "clearly describe the substitute functions and equipment".

What has been presented is a summary or a resume of these matters contained in these conflicting affidavits which in view of the appellant clearly shows in the evidence which would be presented at a trial disagreement relating to material matters of fact.

An application of the principal regarding propriety of granting summary judgment based upon the record before this court demonstrates that the judgment of the trial court based upon the motions was improperly granted; and should require a trial upon the issues.

Oral argument in the submissions for summary judgment was extensive. It is unfortunate that a complete stenographic record of the statements of counsel and the colloquy between court and counsel is not available.

At the request of the appellant, the reporter was present during a portion of the argument for the purpose of making a specific record relating to

the disposition of the motions for summary judgment on the basis of the written record before the court rather than the statements of counsel. In this connection the court's attention is invited to the stenographic record made during a part of the argument (R. 149-152). It appeared to the writer that the court, during the progress of the argument, became concerned with some matters which the writer believed to be evidentiary rather than directly related to those documents which were properly before the court. Although there is but a fragmentary record of a proceeding had upon argument, counsel for the appellant makes the following representations to this Court with respect to that argument and the comments of the trial judge.

During the argument, the learned trial judge seemed to be concerned with respect to the utility and quality of one inch steel bars as distinguished from 7/8th inch steel bars. The specifications and the bids submitted indicate, and the record is before this Court, that Southern Steel Company intended to employ one inch steel bars and Herrick Iron Works 7/8th inch steel bars.

As the trial judge evidenced some concern with respect to this difference and indicated that this might have some bearing on his ruling on the Motions then before him, his attention was invited to testimony of one of the members of the joint author-

ity, C. W. Brady, which appeared in his deposition. This deposition is designated as a portion of the record on appeal. The following portion of his deposition, under cross-examination by Mr. Crellin, representing Salt Lake City, is set forth verbatim (R. 137-138) :

"Q. Do you believe that the one inch steel proposed by Southern Steel in their bid actually involves a superior type of equipment to the seven eighths type steel proposed by Herick Iron Works? Doesn't this in fact provide a more substantial system?

"A. No, in my belief it does not. There you have it right there. (witness indicates) That is how interested I was. This is a piece of one inch. This is a piece of seven eighths. Now if you can see any great deal of difference in that piece of steel at the bottom and the piece of steel at the top. My main interest on this was the fact that the seven eighths piece of steel passed identically the same test as the one inch test and I maintained that we should go not on the size of the bar but the fact of what that bar would withstand. Now if this is true, then they could bid a piece of inch and a half if this would be any stronger but that seven eighths piece of steel would stand the same test as the one inch. As a matter of fact I think the seven eighths gives you greater visibility between them bars. I don't think this piece of steel (witness indicates) offers one bit more protection than this steel right there.

"Q. does it cost more?

"A. The one inch, yes, because you are pay-

ing for weight and it is bound to cost you more.

“Q. And the system is actually going to cost more, isn’t it, one inch steel in this jail facility is going to cost considerably more because of that one inch steel regardless of anything else?

“A. That is one of my arguments. Why should we be paying more for weight when we don’t need it, that is one of my arguments.”

Shortly before the trial judge announced his decision for summary judgment, he made a statement in substance and effect as follows:

“Jesus Christ in all His glory could never convince me that 7/8ths inch steel bars are as good as one inch steel bars.”

The writer is sure that even counsel for the respondents will recall this statement.

Since no findings of fact or conclusions of law were prepared, and were not required to be made by the trial judge in granting the Motions, it is difficult to determine from the record we have, upon what basis he made his decision to grant the Motions for Summary Judgment.

It is, however, the view of the appellant that the record clearly indicates disputed matters of fact, which require trial and that there is at least a possibility that some matters which would be the

subject of the submission of evidence upon the trial of the matter were taken into account by the trial judge in making his ruling on these Motions.

CONCLUSION

It is respectfully submitted, that, for the reasons asserted above the ruling of the trial judge in granting the Motions of the defendants and respondents for Summary Judgment and dismissing the plaintiff's petition should be reversed and that this case should be remanded to the Third District Court in and for Salt Lake County, State of Utah, for a trial upon its merits.

Respectfully submitted,

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