1968

Marcus W. Johnson Plumbing And Heating v. Joe Doctorman, Celia Doctorman And Harry J. Doctorman : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

MARCUS W. JOHNSON d/b/a
MARCUS W. JOHNSON
PLUMBING AND HEATING,
Plaintiff and Appellant,

vs.

JOE DOCTORMAN, CELIA DOCTORMAN and HARRY J. DOCTORMAN,
Defendants and Respondents.

Case No. 11442

RESPONDENT'S BRIEF

APPEAL FROM THE ORDER OF THE
THIRD JUDICIAL COURT, SALT LAKE COUNTY
STATE OF UTAH
HONORABLE JOSEPH G. JEPPSON,
DISTRICT JUDGE

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STATEMENT OF THE NATURE OF THE CASE

Plaintiff-Appellant appeals an Order by the trial judge vacating a Judgment and re-opening the hearing for further testimony prior to entry of modified Findings and final Judgment. Plaintiff-Appellant appeals on two grounds: 1) The trial court has no power to reverse itself or to modify its decision after entry of Findings of Fact, Conclusions of Law, and Judgment on a Motion for a new trial; and 2) The trial court was in error, if it had such power, in reversing or modifying its Judgment.

DISPOSITION IN THE LOWER COURT

The disposition is stated substantially in plaintiff-appellant's Brief.

RELIEF SOUGHT ON APPEAL

Respondents seek to have the decision of the lower court affirmed.

STATEMENT OF FACTS

Respondents, owners of certain real property located at 2910-2912 South Second West, Salt Lake City, Utah, held out to various builders and contractors in the area the offer to permit them to build structures for lease on the said property, provided any of them found tenants who, under lease, were willing to occupy the structures erected for them.

Quality Construction Company, by and through its president, Franz Stangl, presented to respondent two offers of lease wherein one, the plaintiff-appellant herein, a plumber, would agree to occupy under lease one of the structures to be built to his specifications under terms where his services, as plumbing subcontractor on both structures were to be applied as payment of the first six months and the last six months of a five-year period lease. A value equivalent to $3,000.00 of rent paid was established between the parties. Mr. Stangl, as a go between, ultimately procured the signatures of parties to the leases and the signature of respondents to a building contract specifying the construction of a building designed to appellant's specifications. The lease between appellant and respondents stated appellant was to have occupancy by October 1, 1964.

Appellant as subcontractor in construction, actually performed the first work of laying sewer pipes prior to the pouring of a concrete floor after October 1, and did almost the last work on the building, namely the installation of fixtures. Appellant contributed somewhat to the delay in the course of construction by withholding decisions affecting the construction to his desires and needs. During the period required for the construction, appellant either leased or purchased other quarters, but never notified either Mr. Stangl or respondents of such lease or of any intent on his part to terminate either the lease or his participation as a subcontractor in the structure being built to his specifications.

To the contrary, appellant continued to occupy his original premises to a date subsequent to his refusal to occupy the premises prepared for him on the Doctorman property.

He did not inform respondents of his intention not to occupy the premises until respondents made him a tender of possession when the building was completed. At that time, plaintiff-appellant, informed respondents, for the first time, of his intention not to occupy the premises, and instituted suit for the $3,000.00 specified in the lease. Thereafter, after amendment of appellant's Complaint, trial was held and Judgment was granted appellant for the reasonable value of his services.

Respondents, having filed their motion for a new trial, after hearing, the trial Court took the action of which appellant complains.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN VACATING THE JUDGMENT ENTERED BY IT IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANTS.

It is with some chagrin that respondents' attorney notes his failure to state the specifics of contended error to be grounds for a new trial under Rule 59(a) (6 & 7), of the Utah Rules of Civil Procedure, these being:

> (6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.
>
> (7) Error in law.

If the Motion as submitted is defective, the time to protest is long since gone. There is power in the Court to grant a new trial or vacate Judgment on its own initiative if the interests of justice could so best be served, regardless of the manner by which the error is brought to the Court's attention—Rule 59(d).

Respondent has no quarrel with the law as cited by appellant, in Uptown Appliance & Radio Co., Inc. vs. Flint et al., 122 Utah 298, 249 P.2d 826; and Tangaro vs. Marrero, 13 U.2d 290, 373 P.2d 390.

In the Uptown Appliance & Radio case, which dealt primarily with the issue of new trials, the Court declared at Page 302:

> "It is axiomatic in this State that the decision of the trial judge in reference to the granting or refusing of motions for new trials is a discretionary matter, provided there is not an abuse of discretion and there is reason to believe that a miscarriage of justice would result if refused."

The Tangaro case does no more essentially than confirm the Uptown Appliance case where it declares in head note No. 2 at page 291:

> "Trial court has no discretion to grant new trial absent showing of one of grounds specified in rule. Rules of Civil Procedure, Rule 59."

In the instant matter, the Court on a motion for a new trial apparently determined that sufficient testimony had been taken on plaintiff's case to base a judgment; but that the decision made and the Judgment entered thereon were in error; that there was no need for an entirely new trial but simply a re-opening of the matter for testimony to be taken on defendants' Counterclaim.

The Court apparently felt that the Findings as made, and to the extent that they were made, were correct; and that only additional Findings would be required to support a new Judgment, essentially in favor of the defendants-respondents.

It was already a matter of evidence taken to the effect that plaintiff-appellant had given no notice of breach or intent to terminate because of it. Further, there was sufficient evidence before the Court to the effect that plaintiff-appellant continued to work for and on behalf of the project from which it sought to gain remuneration to the detriment of respondents.

For this reason, all that was required of the Court was to order the Judgment vacated so that the same be of no prejudice to the party respondents, and order further testimony to be taken on repondents' Counterclaim

and the adjudication of the equities of the parties against each other to the end that final Judgment may be achieved.

Rule 59 (a) of the Utah Rules of Civil Procedure adequately, succinctly, and pertinently deals with the power of the court to act as it was here; subject, however, to the requirements as set forth in the Uptown Appliance and the Tangaro cases:

> "(1) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties on all or part of the issues, for any of the following causes; *provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law, make new findings and conclusions and direct the entry of a new judgment*:"

In any case, the objection by the appellant to the action of the Court in its difference from the specific wording of Rule 59 (a, 1) is essentially an exercise in semantics. The Rules declares:

> ". . . the Court may *open* the Judgment if one has been entered, take additional testimony, amend the Findings of Fact and Conclusions of Law. . . "

The Court *vacated* the Judgment rather than *opened* the Judgment, and for this difference the appellant cries prejudicial error.

Appellant, on Page 12 of his Brief, insists that he has found no case where a trial Court reversed its Judgment without making new Findings of Fact or Conclu-

sions of Law, or without having vacated the Judgment and having taken additional testimony upon which to make new Findings and Judgment.

Respondents contend that this has not been done in the instant case. At this point, there has been no reversal of Judgment; only a vacating of the Judgment with the declared intention of the Court to take further testimony upon which additional Findings and a amended Judgment are to be based.

Appellant criticizes the action of the Court in sitting as a court of appeals with respect to its own action. Respondents call attention to compiler's notes in the Code of Civil Procedure under Rule 60(e) entitled Motion to Alter or Amend Judgment on Page 661 Volume 9, Utah Code Annotated, 1953:

> "This Rule had no counterpart in the former Civil Code. The Rule was added to the Fed. Rules as a result of the case of Boaz v. Mutual Life Ins. Co., 149 F. 2d 321 where it was contended that after the entry of its decision the trial court had no way of correcting it.
>
> "This Rule is similar to Fed. Rule 59 (e)."

Without such a rule or power in the Court to reverse itself where, in its wisdom, it saw fit to do so, the laborious and tedious procedure of appeal in each case would be required.

POINT II

WHERE EXAMINATION OF THE FACTS IS REQUIRED EITHER IN SUPPORT OR IN ATTACK OF A JUDGMENT, THEN THE PARTY ATTACKING SUCH JUDGMENT HAS THE BURDEN OF BRINGING THE TRANSCRIPT OF EVIDENCE ADDUCED AT TRIAL TO THE SUPREME COURT.

Essentially the support or rejection of the act of the trial court to determine its ultimate power to reverse its judgment in accordance with the standards set in the cited Uptown Appliance and Tangaro cases will require an examination of the transcript as a whole.

Without the transcript, the Supreme Court would have no more than the statements of facts in appellant's and respondents' Briefs from which to judge.

Bennett Leasing Company vs. David J. Ellison et al, 15 U. 2d; 387 P.2d 246 is a case where appellant attacked a judgment on the grounds that the evidence does not support the findings. The Utah Supreme Court on Page 74 declared:

> ". . . When the appellant attacks the judgment on the ground that the evidence does not support the findings, he has the burden of bringing a transcript of the evidence adduced at the trial to this court so the merit of his contention can be ascertained. The record brought to this court consists only of the court file containing the usual various pleadings, motions, orders, findings, and judgment; . . ."

Respondents, however, while calling attention to this defect in appellant's appeal, would not oppose the action of the Supreme Court on the substantive issue raised by appellant's Point II.

POINT III

THE TRIAL COURT DID NOT ERR IN HOLDING THAT PLAINTIFF BREACHED ITS LEASE WITH DEFENDANTS.

Point 1, having dealt with the innate power in the Court to act, Point III is concerned with whether or not,

granting such power, the Court was correct in its decision to reverse itself and find for defendants-respondents herein.

Defendants have no substantial quarrel with appellant's recital in support of Point II except that respondents find little of it related to the issue appellant presents. Respondents accept for the purposes of this appeal the Court's finding of the breach of the Lease Agreement and that the said breach was material. Further, respondents do not question any statement of law submitted by appellant but contend that none is germane to the specific issue raised by the act and decision of the Court in its self reversal.

The issue specifically is resolved as follows:

Assume the contract to be of a continuing nature (a lease of 5 years duration). Assume a party to a contract is guilty of a breach of the contract. Assume further the breach to be sufficiently substantial to warrant a termination by the injured party.

Under these accepted facts, can the injured party abrogate that contract or rescind it without giving timely, unequivocal notice of his intent to rescind or terminate: Can he further proceed in such manner from which the breaching party may reasonably assume that the injured party intends to keep in force and effect the contract between the parties; reserving to himself the right to give notice of a rescission at his own convenience without regard to detriment to the breaching party? Respondents think not.

The law is fairly stated when it declares the injured party to a contract has an election at the time of the breach of contract, and for a reasonable time thereafter, within which to waive the breach for purposes of termination, and to continue with the contract, seeking reparations in damages for such damage as was caused it by the breach; or in the alternative, to rescind the contract by giving notice to the defaulting party of its intent to do so. This notice must be timely, clear unequivocal in meaning, but must not necessarily be in writing. It may be by act; it may be oral; it may be by action inconsistent with the purposes of the contract; it may be by filing an Action in Rescission.

Thereafter, much of the law which plaintiff cites in his Brief may apply. However, none of the cases cited by the plaintiff deal directly with what defendants consider the pertinent issue here, namely; what notice, if any, and what need of notice, if any, was given by the aggrieved party to the defaulting party of its intent and when was it given?

In each of the cases cited, an aggrieved party has declared to a breaching party in sustance; "You are breaching your contract; perform or else," and thereafter suit resulted on failure of the breaching party to correct his breach.

In Nakdimen vs. Baker (C.A. 8 Ark.) 111 F 2d 778; the defendant's agreement was to sell and Nakdimen's agreement was to buy 200 shares of stock at a stipulated price payable by an installment Promissory Note over a period of time, with certain assignments as security for

payment of the note. On default in payment, Baker immediately started suit for damages which were the stipulated price of the contract and prevailed. However, immediately after suit was instituted, Nakdimen reconsidered and offered the note and securities which were refused by Baker. Nakdimen alleged this tender as a defense. It was in this context that the Court held a party who breaches cannot insist on specific performance since the filing of the action was a clear termination of the contract.

In Buckman vs. Hill Military Academy, 190 Or. 194, 223 P.2d 172; plaintiff sued on a note, security for which was a tract of land. The terms on which the security was held provided that plaintiff would release a subdivided lot with each $350.00 paid. Plaintiff refused to release in accordance with this agreement after a demand by the defendant-payor. Upon such refusal, defendant failed to make any further payment. It was held in this case that there was a termination as a clear confrontation clearly delineating the breach on the part of the plaintiff.

In Dalton vs. Mullins (Ky.) 293 S.W. 2d 470; there was also a direct confrontation between the parties. In this case the Court declared "When Dalton refused to perform the contract as written, Mullins had the right to treat this action as a breach, to abandon the contract, to depart from further performance on his part, and finally, demand damages."

In Loudenback Fertilizer Co. vs. Tennessee Phosphate Co. (C.A.6) 121 F. 298; and in Lynch vs. McDonald, 12 Utah 2d 427, 367 P.2d 464; the tenor is essentially the same.

The same is true in the Yazoo & M. Valley R. Co. vs. Searles, 85 Miss. 520, 37 So. 939. In this case, suit resulted from a direct confrontation wherein Searles required of the railroad that it switch cars to a private siding. The railroad did so until Searles refused to pay switching and demurrage charges. Thereafter, the railroad refused to make special switching for Searles despite demands that they do so. This breach resulted in a law suit, and again the principal was affirmed that notice of some kind before termination is required after breach.

In our instant case, there was nothing in the nature of confrontation. Both parties conceded that they had never met face to face, or had any conversation about this contract until after construction was completed, and defendants demanded of plaintiff that he take possession.

On the contrary, every act of the plaintiff was consistent with compliance and conformity with the considerations of the contract by him to be performed, giving not notice of his disaffection to the defendants.

Plaintiff cites 17 Am. Jur. 2d, and particularly Secs. 365, 425, 512 et seq. Respondents, through their attorney, have no recourse but to approve heartily of the statements therein made, and to observe that if they were not good law, they would probably have not been made part of the text. However, the sections cited are not germane to the principal, crucial issue which the respondents present here. We particularly refer to 17 Am. Jur. 2d; Contracts, Secs. 508-509-510, which deal with the issue here presented.

The first sentence of Sec. 508, P. 988 of Contracts

declares, in substance, where one of the parties has not performed, and is not ready and able to perform his part of the agreement on the day fixed, the adverse party may consider it at an end.

Section 509, Pg 990 declares in the first three sentences:

> "The failure of a party to perform his part of a contract does not per se rescind it; the other party must manifest his intention to rescind. If the intention is manifested by a notice must be clear and unambiguous, conveying an unquestionable purpose to insist on the cancellation. A formal or written notice is not necessary, however, although the law requires, on the part of him who would rescind, some positive act which shows such an intention.
>
> "If a party means to rescind a contract because of the failure of the other party to perform it, he should give a clear notice of his intention to do so unless the contract itself dispenses with such notice or unless notice becomes unnecessary by reason of the conduct of the parties. Hennessy v. Bacon, 137 US 78, 34 L. ed 605, 11 S Ct 17."

The first sentence of Sec. 510 states:

> "Many cases have held that a right to rescind, abrogate, or cancel a contract must be exercised promptly on discovery of the facts from which it arises, and that it may be waived by unreasonable delay or by continuing to treat the contract as a subsisting obligation."

In Farrington v. Granite State Fire Ins. Co., et al, 120 Utah 109; 232 Pac. (2) 754 the plaintiff sued insurance company for compensation for fire damage. Defendant,

insurance company, refused payment, alleging recission. A pertinent fact was the acceptance of an unpaid balance of the annual premium by defendants after the event of loss. The Court declared on P. 119:

> "One who claims a right to recission must act with reasonable promptness, and if after such knowledge, he does any substantial act which recognizes the contract as in force, such as the acceptance of more than half of the premium would be, such an act would usually constitute a waiver of his right to rescind."

9 A.L.R. 993 deals with the subject of the waiver of the right to rescind for delay.

The trial court in its decision makes reference to Cox vs. Berry, 19 U(2)d 352, 431 P2d 575. In this case the court, while not spelling out specific estoppel, makes a holding entirely consistent with the equitable doctrine to the effect that one who is to receive the benefits of an agreement must bear its responsibilities.

CONCLUSION

It would seem that appellant and respondents have little if anything to quarrel about in appellant's Brief. Appellant admirably supports his contention that after substantial breach, an aggrieved party may institute action for termination in one of two various forms or affirm a contract and seek for recovery of damages resulting from the breach.

None may quarrel with such a statement of the law. However, respondents' view is that there is a requisite to successful suit and that is notice of breach to the

party breaching. There seems no question that institution of suit could be such a notice of breach since it certainly is an action which would apprize a breaching party of his dereliction, provided that such a suit is brought timely under circumstances where its delay would not in essence constitute a waiver of the right to act on the breach or an estoppel to so act under circumstances where the delay can result only in gains to the aggrieved party and added detriment to the party who has breached.

The appellant here having never by word or deed given notice of any kind to respondents of his intentions not to pursue the lease; and on the other hand, having proceeded to perform fully in terms of its contsruction commitments on the building being built specifically for him and even making decisions of a unilateral nature with respect to partition placements among other details, has certainly waived any rights to proceed after breach if any by the respondents or is estopped from contending for such a breach.

There should be no doubt of appellant's right to be granted the reasonable value of his plumbing services which the Court has found him nor is there any lesser doubt that respondents, being deluded to the tremendous loss of the entire construction cost of this building should be entitled to recover the lease stipulated rentals as contracted for between the parties.

It was for the purpose of establishing the dollar figure of such recovery against appellant that the Court properly exercised its function to reopen the Judgment and take further testimony.

Respectfully submitted,

Bernard L. Rose