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UNIVERSITY OF UTAH

OCT 1 4 1964

IN THE SUPREME COURT OF THE STATE OF UTAH

FILED
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Supreme Court, Utah

TUCKER REALTY, INC.,
Plaintiff and Respondent,

vs.

L. DOYLE NUNLEY,
Defendant and Appellant.

No. 10066

APPELLANT'S BRIEF

**Appeal from the Judgment of the Third District Court for Salt Lake County
Hon. Stewart M. Hanson, Judge**

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Attorneys for Respondents

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IN THE SUPREME COURT OF THE STATE OF UTAH

TUCKER REALTY, INC.,
Plaintiff and Respondent,

vs.

L. DOYLE NUNLEY,
Defendant and Appellant.

No. 10066

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action for a sum of money claimed to be due and owing to the plaintiff on a promissory note for a real estate commission, which amount the defendant claims was paid in full by the painting of the plaintiff's duplex by the defendant, as a painting contractor.

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DISPOSITION IN THE LOWER COURT

A default judgment was entered against the defendant for failure to comply with the pre-trial order and the defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment and an order remanding the case for trial.

STATEMENT OF FACTS

The pre-trial order provides among other things that:

> "The defendant is directed within 10 days from the date hereof, to furnish all the items that he has available, contained in the motion of the plaintiff filed herein on the 9th day of January, 1963.
>
> "In the event that the defendant has said documents and fails to supply the same within the 10-day period, judgment will be granted in favor of the plaintiff and against the defendant, together with additional attorney fees."

The motion of January 9th, 1963 referred to was supported by an order of Court dated March 5th, 1963. (R. 25). This order was fully complied with. On the 12th day of March, the defendant appeared before the plaintiff's attorney and explained that he was unable to find any of the things demanded. (R. 27). Excep-

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tion, however, was taken by the plaintiff and on the 19th day of March, 1963, the motion of the plaintiff seeking contempt proceedings against the defendant was heard. (R. 28-20). The motion was denied on the 18th day of June, 1963. (R. 30).

On the 19th day of June, 1963, a notice of readiness for trial was served and filed by the plaintiff certifying among other things:

> "3. That such use of the rules of discovery as counsel feels necessary for the trial of this cause has been completed, and that the case is at issue."

After the entry of the pre-trial order of November 19th, 1963, the defendant made another search for the records called for in the plaintiff's motion of January 9th, 1963, (T. 8) and found one only invoice for materials used on the plaintiff's duplex, which the defendant, within the time allowed, delivered to the plaintiff. (T. 3). This in turn, however, was not satisfactory to the plaintiff and motion for a default judgment was fully heard on the 19th day of December, 1963, wherein it was disclosed (T. 6) that the defendant had in compliance with the pre-trial order furnished to the plaintiff all of the items that were available to him.

ARGUMENT

POINT I.

THE EVIDENCE CONCLUSIVELY SHOWS A FULL COMPLIANCE WITH THE PRE-TRIAL ORDER.

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From the evidence before the Court at the time of the hearing of the plaintiff's motion for a default, it is conclusively shown that the defendant made a search of his records and that he gave to the plaintiff all of the records that were available to him. (T. 3-5):

Q. And did you make a search to find those records?

A. Yes.

Q. And what was the result of that search?

A. I found one record.

Q. What record was that?

A. This was a paint bill from Salt Lake Glass & Paint Company.

Q. Do you know in substance approximately what was the amount of the balance shown on that particular invoice was?

A. It was around $35.00. I am not sure of the amount exactly.

Q. Now what became of that invoice?

A. I received it from Salt Lake Glass, and I took it to your office, and you asked me to deliver it to Mr. Ryberg's office, which I did. He wasn't there at the time and I left it with his secretary, telling her this was the information or the records I have on that job.

Q. Did you leave it with his secretary?

A. Yes.

Q. Was that within the time provided by the Pretrial Order in this case?

A. Yes.

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Q. Now in fact, Mr. Nunley, does that invoice contain all of the information that you have on your records with reference to the material that was furnished on that job?

A. Yes.

Q. And do you know where the other—what was the source of other materials used on that job, if there were other materials used?

A. It was taken from our stock, the stock that we have to work jobs with, which we buy in advance, a number of gallons, sometimes six months in advance of this and use them up.

Q. Are you a general painting contractor?

A. Yes. . . .

Q. Now, do you know who did the labor on that job?

A. Yes.

Q. Who?

A. Myself and my son, James D., and my brother, James Arthur Nunley.

Q. And you were unable to find any records of that labor on your record?

A. That is right.

POINT II.

THERE IS NO EVIDENCE IN THE RECORD THAT THE DEFENDANT HAD ANY OF THE RECORDS SOUGHT, AT THE TIME OF THE PRE-TRIAL ORDER.

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The entire case of the plaintiff is built on the answers of the defendant in his deposition taken on the 27th day of November, 1962. On page 8 of his deposition he is asked:

> Q. Do you have copies of the invoices for paint that went into this particular job.
>
> A. I could get them.
>
> Q. Do you have them?
>
> A. I don't have them with me.
>
> Q. Do you have them in your constructive possession—in your records and files?
>
> A. Maybe; I am not sure of it. I may have some of them. I am not sure I would have all of them.

On page 9, with reference to the matter of labor, he is asked:

> Q. What kind of records are these you keep?
>
> A. Just in the life of the job on it, we keep it. When that is through we destroy it; destroy that. We have no need for these after that. We know amount on what costs were; enter costs and that is it.
>
> Q. What do you mean "enter cost"; into what?
>
> A. In our book, what job cost us. We go over our materials. This we know; what we have left is profit.
>
> Q. Did you keep such a record on this particular job?
>
> A. Yes.

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Q. And you have the record—

A. Yes.

Q. —still available?

A. Yes.

On the 12th day of March, 1963, he is called upon to produce these records and he is unable to find them. On the 19th day of November, 1963, he is ordered by threat of default to make available to the plaintiff any of the records that he has and he does so.

POINT III.

THERE ARE GENUINE ISSUES OF MATERIAL FACT WHICH TO OBTAIN SUBSTANTIAL JUSTICE BETWEEN THE PARTIES SHOULD BE HEARD.

From an examination of pages 10 and 11 of the defendant's deposition it appears that a certain job would be done for the full payment and satisfaction of the note sued upon.

Considering the facts most favorable to the defendant as we must do in cases of this kind; Frederick May & Co., Inc. v. Dunn, 13 U2 40, 368 P2 266; we have a situation where the amount and cost of materials and the amount of labor is immaterial. The plaintiff says you do this job and I will cancel the note. The defendant in consideration that he will have his note fully paid does the job, and then the plaintiff, having

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received the benefits, disregards its agreement and brings an action for the full amount of the note.

> Q. Did you ever, at any time, on or about May 20, make any estimate of the cost to the Tucker Real Estate—what this job would be?
>
> A. No, I did not.
>
> Q. Did you tell him, at that time, that you would only do it if it was in full satisfaction of the note?
>
> A. This was my understanding that I was. (R. 10) .

POINT IV

IT WOULD BE INCONSISTENT TO PERMIT THE PLAINTIFF TO DEFAULT THE DEFENDANT AFTER THE PLAINTIFF HAD CERTIFIED THAT ITS NEEDS FOR THE RULES OF DISCOVERY HAD BEEN COMPLETED.

On the 12th day of March, 1963, the plaintiff was advised by the defendant that the defendant had none of the documents or records requested by the plaintiff. (R. 27). More than three months later, the plaintiff certified in its notice of readiness that "use of the rules of discovery . . . had been completed."

CONCLUSION

The record shows that the plaintiff, which held the defendant's note for $1,020.00, induced the defendant

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to paint the plaintiff's duplex inside and out with three coats of paint, including a double garage, with the understanding that by so doing the defendant would procure a full satisfaction of the note. Defendant's deposition was taken by the plaintiff and inquiry was made in great detail into such matters as the cost of the paint, and the amount and cost of the labor. Demand was subsequently made for copies of the defendant's time cards, W-2 Income Tax forms, withholding tax returns, job books, etc., and though it has been felt by the defendant and is respectfully submitted to the above entitled Court, that this inquiry was into immaterial matters, the real issue being was there a contract for the painting of a duplex for the satisfaction of a note, the defendant has conscientiously tried to provide the information and has fully complied with the provisions of the Court's pre-trail order. It is felt by the defendant that the default judgment of December 27th, 1963, here appealed from was entered by the Court by mistake. Certain it is that to obtain substantial justice between the parties the judgment should be set aside and the case remanded for trial.

Respectfully submitted,

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