1964

Tucker Realty, Inc. v. L. Doyle Nunley : Brief of Plaintiff and Respondent

Utah Supreme Court

Horace J. Knowlton; Attorney for Appellant;
Barker & Ryberg; Attorneys for Respondents;

IN THE SUPREME COURT
of the
STATE OF UTAH

TUCKER REALTY, INC.
Plaintiff-Respondent,

vs.

L. DOYLE NUNLEY,
Defendant-Appellant.

Case No. 10066

BRIEF OF PLAINTIFF AND RESPONDENT TUCKER REALTY, INC.

Appeal From The Judgment of The Third District Court
For Salt Lake City, Utah

The Honorable Stewart M. Hansen, Judge.

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STATEMENT OF THE NATURE OF THE CASE

This is an action by Tucker Realty, Inc., the Plaintiff and Respondent herein, hereinafter referred to as Plaintiff, for money due and owing to the Plaintiff upon a Promissory Note executed by L. Doyle Nunley, the Defendant and Appellant herein, hereinafter referred to as Defendant. The Note was to be secured by a second mortgage on real property owned by the Defendant. The second mortage was never executed.

DISPOSITION IN LOWER COURT

Upon Motion of Plaintiff (R-34) the Default of the Defendant was entered because of Defendant's willful failure to produce time cards, W-2 Federal Income Tax forms,

employer's copy of Second Quarter Withholding Tax Return, job book, and all charge invoices or cash receipts for the period May and June of 1962 as ordered by the Court in a Pre-Trial Order entered November 19, 1963 (R-32, 33).

RELIEF SOUGHT ON APPEAL

Plaintiff seeks affirmance of the Judgment entered in its favor December 27, 1963 (R-38).

STATEMENT OF FACTS

Since the record of the case does not include the official report of proceedings held May 18, 1964, nor the deposition taken November 27, 1962, nor the file of the case presently in the Supreme Court, it will be necessary to refer to these documents by the page number of the document. The Plaintiff in the Statement of Facts will refer to the record on file with the Supreme Court as R; the official report of proceedings as PRP; the deposition as DEP; and the file in the Supreme Court as SCF.

On January 22, 1962, the Defendant executed a non-interest-bearing Note made payable to Tucker Realty, or to holder, for the sum of One Thousand Twenty Dollars ($1,020.00). The Note was to mature six (6) months from date of execution (R-3).

Prior to the date upon which the Note matured, the Defendant performed services and supplied material for the benefit of the Plaintiff by painting part of a duplex owned by the Plaintiff (R-13). The service rendered was the painting of one-half (½) of a living room, one-half (½) of a kitchen, kitchen cabinets, a hallway, and a bathroom (R-18). The agreed price was to be Three Hundred Dollars ($300.00) (R-18).

On July 22, 1962, the Note became due and payable. The Defendant failed to pay any sum and suit was instituted. A Default Judgment was later entered, but was set aside by the Court (R-21. The Order setting aside the Default Judgment was signed November 12, 1962. The basis of the Court's action was an Affidavit and Answer filed by the Defendant (R-13, 15). In the Answer filed, the Defendant alleges accord and satisfaction.

On November 27, 1962, pursuant to a "Notice of Deposition," the Defendant's Deposition was taken at the office of the Plaintiff. The Deposition above referred to has been published (ORD-9); however, it does not appear as a part of the official report of the proceedings held May 18, 1964, nor is it in the record. The date of the Deposition is of material importance in that the testimony of the Defendant given on that date was the basis of Plaintiff's Motion for the production of certain documents and records. The Order for the production of documents was signed March 12, 1963. However, the Defendant never at any time produced any of the documents set forth in the Order. It was not until after the Court had entered its Pre-Trial Order (R-33) that the Defendant was able to find the one invoice he left with Plaintiff's attorney in December 1963 (ORP 3, 4). Thereafter, upon Plaintiff's Motion, a Judgment was entered against the Defendant in favor of the Plaintiff, December 27, 1963, as per the Pre-Trial Order (R-33).

Prior to this date, there had never been a hearing at which any testimony was taken (ORP-6). After entry of Judgment, Defendant filed Notice of Appeal (R-39). During April of 1964, Defendant filed a Motion with the Supreme Court "To Enlarge The Record." The Motion was accompanied by an Affidavit containing a statement of Defendant in lieu of stenographic report. (SFC). Defendant

claims in said Affidavit that on or about December 19, 1963, he appeared in the coutroom of the Honorable Stewart M. Hansen, Judge Third District Court, and after being sworn, testified concerning the one invoice he was able to find; also that most of the paint used in painting the duplex had come from a stock he had on hand at the time the job was started; also that the Defendant did not have any "records of employment"; and ". . . that any statement that he had made in his deposition of the above entitled matter to the contrary had been made by mistake, . . ." (SCF). Counter Affidavits were filed by the Plaintiff on April 30, 1964. One signed by the Honorable Stewart M. Hansen, Judge, denies that any sworn testimony was given at a hearing held in his courtroom December 19, 1963. The other Affidavit subscribed to by Robert Ryberg, Attorney for Plaintiff, is to the same effect. (SCF).

On April 20, 1964, Defendant filed with the Supreme Court a "Motion to be Releaved of Default and For an Extension of Time." The Motion was argued to the Court and additional time was granted. The Motion was granted by the Court based upon the first two reasons set forth in the above-referred-to Motion. The reasons are as follows: "(1) That his time was consumed attempting to obtain a proper settlement of the record; (2) That the Defendant supposed that his Motion for Permission to Enlarge the Record would stay the running of the time allowed for the filing of the Brief." (SCF). The Court specifically refused the third reason stated in the Motion, which is as follows: "(3) That an additional time is needed to procure a proper settlement of the record in the District Court of the Third Judicial District." (SCF) Contrary to the Supreme Court's Order as above noted, a hearing was held before the Honorable Stewart M. Hansen on the 18th day of May, 1964,

to which Plaintiff's attorney objected. Present were the Defendant, counsel for the Defendant, and Mr. Ryberg, counsel for Plaintiff. At the hearing the Defendant was sworn, examined and cross-examined.

ARGUMENT

POINT I.

THE EVIDENCE, RECORDS AND AFFIDAVITS FILED IN THE CASE CONCLUSIVELY SHOW THAT THE DEFENDANT WILLFULLY AND CONTEMPTUOUSLY REFUSED TO OBEY THE PRE-TRIAL ORDER AS WELL AS THE PREVIOUS ORDER OF THE COURT FOR THE PRODUCTION OF DOCUMENTS, AND THAT THE DEFENDANT HAD THE DOCUMENTS AT THE TIME THE COURT SIGNED BOH THE ORDER FOR PRODUCTION OF DOCUMENTS AND THE PRE-TRIAL ORDER.

On the 27th day of November, 1962, the deposition of L. Doyle Nunley, the Defendant, was taken before Joyce R. Heder, a certified shorthand reporter at the office of the Plaintiff at 68 East 21st South Street, Salt Lake City, Utah. At the time the deposition was taken, Mr. Horace J. Knowlton appeared with the Defendant, and Mr. Robert Ryberg was present representing the Plaintiff. In the deposition, Mr. Nunley testified as follows concerning the persons employed and the time spent by said persons:

> Q. (BY MR. RYBERG) Who worked on it (the duplex); who painted it?
>
> A. I worked on it, myself; my son, and my brother.

With reference to Mr. Nunley's son, he was asked:

> Q. How many hours did he put in on it?
>
> A. Roughly, about 60 hours — between 55 and 60 hours.

Then referring to Mr. Nunley's brother, the Defendant was asked:

Q. How many hours did he put in on it?
A. About the same amount. (55 to 60 hours).

Referring to the time Mr. Nunley spent on the job, he was asked:

Q. How many hours did you put in on it?
A. Well, I didn't exactly keep track of all my hours, right to the hour; but I, possibly, put in — from checking the job and all, 25 or 30 hours.

Q. Did you pay these men?
A. Yes.
Q. How much per hour to your son?
A. Our pay is on the union scale. We pay $3.50 an hour.
Q. Both your son and brother drew that?
A. Pardon me; $3.50 an hour is the base pay, plus taxes, insurance, and all additional costs.

The above quoted material appears on pages 4 and 5 of the deposition.

It should be called to the Court's attention that Mr. Nunley testified at the time the deposition was taken that he kept personal records of labor and costs. However, at a later hearing, the one held May 18, 1964, Mr. Nunley testified under oath that he had no records at all (ORD-3). On page 9 of the deposition Mr. Nunley was asked:

Q. How do you keep track of where a man puts time in?
A. That I keep track of *through my own personal records,* in checking the job as it progresses. Job is set

and the time is checked on the job till completion. The time is checked out to see how time compares on jobs. Then, the record is — that's all the need we have of those records is to check.

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 them after that. We know amount on what costs were; enter costs, and that is it.

Q. What do you mean "enter costs"; into what?

A. *In our book*, what job costs 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.

Q. *And you have the record —*

A. *Yes.*

Q. *— still available?*

A. *Yes.*

(Emphasis added).

It would appear, based upon the testimony of Mr. Nunley given on the day of the deposition, that he as of that date felt certain enough that he had all the records in so far as the duplex job was concerned. He, as above noted, indicated that he kept tax records, and it would be assumed from his answer, that these records also would include W-2 forms and Employer's Federal Income Tax forms that have to be filed with the Federal Government. However, in his Affidavit filed with the Supreme Court 18 months after the deposition was taken, Mr. Nunley claimed to have been able to find only one invoice (SCF). This record shows a

payment to Salt Lake Glass and Paint Company of $35.00 for paint purchased (ORP 3).

On page 7 of the deposition Mr. Nunley was asked:

Q. Where did you obtain the paint from?

A. We were buying pait, then, from DeHaan Paint Company; from Peck-Ash-Parry Company; various companies.

Q. *Where did you get your paint for this job?*

A. *Some come from Peck-Ash-Perry; some come from Salt Lake Glass and Paint Company; some come from DeHaan Company.*

Q. *What did you order from the first supplier, Peck-Ash-Parry?*

A. *From Peck-Ash-Parry, we used their wall paint.*

Q. Who was the other supplier — Salt Lake Paint?

A. Salt Lake Paint and Glass.

Q. *What did you get from Salt Lake Paint and Glass Company?*

A. *Well, we get our enamel from them.*

Q. *Did you get anything else for this particular job?*

A. *Well, we get spackle, sand paper, enamel and those sundries from there.*

Q. Those are — the items you just mentioned are the only items you received from Salt Lake Paint; is that right — *on this particular job?*

A. Yes.

Q. Who was the third supplier?

A. Well, we buy from Skyline Building Supply Company, and we bought some material from them.

Q. *For this particular job?*

A. Yes.

Q. What did you buy from Skyline Building?

A. Outside paint; this, we buy from them.

Q. Did you order all of these on open account?

A. No; some we pay cash for; some on open account.

Q. *Do you remember what you did on these particular ones?*

A. Salt Lake Glass and Paint, we are on dealership basis, and we pay cash for our materials there.

Q. What about Peck-Ash-Parry?

A. That was on open account.

Q. What about Skyline?

A. Skyline is open account.

Q. Do you have copies of the invoices for paint that went into this particular job?

A. I could get them.

(Emphasis added).

On the day of the heading held May 18, 1963, over the objection of Plaintiff's attorney, (ORP-2) and contrary to the Order of the Supreme Court entered April 30, 1964 (SCF), Mr. Nunley was allowed to take the stand and under oath testify concerning certain facts covered in the deposition taken 18 months previously. On the stand on May 18, 1964, Mr. Nunley testified as follows concerning the purchase of materials:

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

A. Yes.

Q. And do you know where the other — *What was the source of other material 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. (ORP-4)

(Emphasis added).

Concerning the amount of material used on the job, Mr. Nunley was asked on May 18, 1964, on page 4 ORP as follows:

Q. Could you tell us in substance, or approximately, the amount of material that was used on that job in dollars and cents?

A. *Well, it would amount to around $500.00, something around five hundred.*

(Emphasis added).

On line 7 page 5 of the deposition Mr. Nunley was asked:

Q. How much paint did you expend?

A. How much paint did we use? Was that your question? The amount of paint used on that job would amount to, *around $185.00.*

(Emphasis added).

On page 5 of the Official Reported Proceedings Mr. Nunley was asked by his attorney, Mr. Knowlton:

Q. Do you know approximately how much of the labor you personally furnished your own self?

A. I believe that I spent *about 20 hours* on the job.

(Emphasis added).

On page 11 of the deposition taken 18 months before the statement just quoted, Mr. Nunley was asked:

Q. Approximately, how many hours would you say you painted yourself?

A. I would say, possibly, I put 12 to 15 hours on the job, myself.

(Emphasis added).

On page 5 of the Official Report of Proceedings, Mr. Nunley was asked by Mr. Knowlton:

Q. And do you know approximately how much (labor) was furnished by your son?

A. My son was about *30 hours*, and my brother around *30 to 35 hours*.

(Emphasis added).

On page 4 of the deposition taken 18 months prior to the last statement, Mr. Nunley was asked concerning his son:

Q. How many hours did he put in on it?

A. Roughly, about *60 hours — between 55 and 60 hours*.

(Emphasis added).

On this same page Mr. Nunley responded when asked concerning his brother:

Q. How many hours did he put in on it?

A. *About the same amount*. (55 - 60 hours).

(Emphasis added).

On page 5 of the Official Report of Proceedings when asked what was the going rate or what was paid to his son and his son and his brother for the work performed on the duplex job, Mr. Nunley answered:

A. *$5.00 per hour for labor.*
(Emphasis added).

On page 4 of the deposition taken 18 months prior to the above statement, Mr. Nunley was asked:

Q. How much per hour to your son?
A. Our pay is on the union scale. *We pay $3.50 an hour.*
(Emphasis added).

It should be called to the Court's attention that on page 4 of the deposition Mr. Nunley in his own hand crossed out $2.50, wrote in $3.50, and initialed the same.

On the 18th day of May, 1964, when Mr. Nunley was cross examined, he was asked:

Q. Mr. Nunley, you testified how many hours you put in?
A. I think it was 18 or 20, around 20.
Q. *Where did you get these hours from? Do you have records?*
A. *Yes, I have records of the time, about the time when I completed the job. I made a file of the amount of hours that was used.*
Q. *Do you still have these records?*
A. *Yes.*
(Emphasis added).

The above statement appears on pages 6 and 7 of the Official Report of Proceedings. Towards the bottom of page 7, Mr. Nunley again on Cross-Examination was asked:

Q. Did you keep time records on James D. Nunley likewise?
A. What we do is keep all records for a period of

a week. *When we make the check we have no need for the time record.* The time record just lasts for a week. The time records are only weekly.

Q. *Do you have at total number, a record of the hours put in per week?*

A. *Yes.*

Q. *Do you have copies of this?*

A. *Yes.*

Q. *Do you have it on James D. Nunley?*

A. *Yes.*

Q. *Do you have it on James Arthur Nunley?*

A. *Yes.*

(Emphasis added).

The Pre-Trial Order entered by the Court on November 19, 1962, provides in part as follows: "The Defendant is directed within ten (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" (R-33). The Order above referred to, and signed by the Court, (R-25) contains in part the following: "1. Any time cards filled out during the months of May and June, 1962, for James D. Nunley and James Arthur Nunley.... 4. Job book on paint job in issue. 5. All charge invoices or cash receipts during the period May and June of 1962 from Peck-Ash-Parry, Salt Lake Glass and Paint Company, DeHaan Paint Company, and Skyline Paint Company." The Defendant admitted having all of these records, as indicated by the testimony quoted from pages 6 and 7 ORP.

It is obvious from even a cursory examination of the testimony given by Mr. Nunley on May 18, 1964, as compared to the testimony given by Mr. Nunley on November

27, 1962, that Mr. Nunley has fabricated so many different stories that he cannot keep them straight and even when the truth would serve him best, he apparently cannot bring himself to state it. This is emphasized by the fact that the Court personally interjected himself into the hearing held May 18, 1964, and felt compelled to contradict Mr. Nunley as to certain statements he made on that day concerning testimony that was supposedly given at a prior hearing. On page 6 ORP the Court, referring to Mr. Nunley's statement, commented as follows: "I want the record to show that isn't a correct statement, that on December 19th Mr. Nunley and Mr. Knowlton both appeared at 8:30, and Mr. Knowlton made a profer of what Mr. Nunley has just testified to, but Mr. Nunley has never been sworn."

POINT II.

THE DEFAULT AND JUDGMENT ENTERED BECAUSE OF THE DEFENDANT'S FAILURE TO PRODUCE DOCUMENTS, AS ORDERED, WAS PROPER AND IN FULL COMPLIANCE WITH THE LAW AND RULE 37(b)(2)(iii) UTAH RULES OF CIVIL PROCEDURE, AND THE SUPREME COURT SHOULD SUSTAIN THE LOWER COURT IN ITS ACTION.

Under Point 4 of Appellant's brief there is raised for the first time an objection to the Pre-Trial Order as entered by the trial Court. The objection is based upon the fact that the Plaintiff's attorney on June 19, 1963, signed and submitted to the Court a "Notice of Readiness for Trial" wherein, the prepared form used, states under subparagraph 3, "That such use of the rules of discovery as counsel feels necessary for the trial of this cause have been completed, and that the case is at issue." (R-31). It should be called to the Court's attention that after the original Order had been signed by the Court ordering the production of

documents (Supra), the Defendant appeared at the office of Barker & Ryberg, Attorneys for Plaintiff, and stated as of March 12, 1963, that he was unable to find any of the papers, documents or records set forth in the Order (R-25).

On March 13, 1963, Plaintiff filed with the Third District Court a Motion under Rule 37(b)(2) for the Defendant and his Attorney to be held in contempt because of the failure to produce the documents as ordered (R-28). This Motion was denied (R-30). Since this objection made under Point 4 has never been presented to any Court before this appeal was taken, it is not proper and cannot be considered by this Court.

The original Motion for the Production of Documents made by the Plaintiff was made pursuant to Rule 34 Utah Rules of Civil Procedure. The purpose of Rule 34 is to provide for the direct, convenient and inexpensive discovery of documents and other tangible things in the other party's possession. *Mower vs. McCarthy*, 121 Utah 1, 245 P.2d 224. In the case of *United States vs. Alkali Export Ass'n., Inc.*, 7 F.R.D. 256 (D.C.N.Y. 1946), Judge Rifkin in construing the application of Rule 34, Federal Rules of Civil Procedure which is substantially the same as Rule 34 Utah Rules of Civil Procedure, noted that all documents pertaining to a particular subject matter are subject to discovery and should be produced when the proper motion has been made and the Court has entered an Order for such production. The Rule's purpose is to make relevant and non-priviliged documents in the possession of one party available to the other, *U.S. v. Proctor & Gamble Company*, D.C.N.J. 14 F.R.D. 230. 232; *Hickman v. Taylor*, C.C.A. 3rd, 153 F.2nd 212, aff'd 67 S.Ct. 385; and it makes broad and flexible a litigants right of discovery. A trial is no longer regarded as a sporting event, rather it is a search for truth,

and if there is any relevant information which may be of value in this search, the party in possession of such information is obligated to make known to the other side what the facts and documents are so that justice may be realized. *Comercio E. Industria Continental, S.A. v. Dressers Industries, Inc.*, D.C.N.Y. 19 F.R.D. 513. Though the rule was meant to provide for substantial justice, it permits the issues to be simplified and the trial of the matters to be expedited. The Courts have generally held that Rule 34 is to be liberally construed in order to make certain that its purpose is not subverted by falsehoods or deliberate misrepresentations. *June v. George C. Peterson Co.*, C.C.A. 7th, 155 F.2d 963.

The original Order signed by the Court for the production of documents was disobeyed by the Defendant, and as his deposition shows, when compared with the record of the hearing held May 18, 1964, it is obvious that the Defendant's refusal to produce the documents was intentional and this intent can only be construed as an overt effort to prevent a simplification of the matters before the Court and to subvert justice.

Because of the Defendant's failure to produce the records as ordered at the time of Pre-Trial, the Court again ordered the Defendant to produce his records in so far as the duplex job was concerned.

On May 18, 1964, the Defendant under oath testified that he had paid his employees by check (ORP-7) and kept additional books (ORP-7). There can be little question that the records and checks above referred to were within the scope of the Order issued by the Court, nor can there be any question that the Defendant's failure to produce them was nothing less than willful and contemptuous. Rule 34 authorized a sweeping access and inspection and

examination of all documents which are relevant and are not privileged and is much broader than an examination at the time of trial. *Vermilyea v. Chesopeak and Ohio Railroad Company*, D.C. Mich., 11 F.R.D. 255. *Hirshhorn v. Mine Safety App. Co.*, D.C. Pa., 8 F.R.D. 11.

Rule 37, Utah Rules Civil Procedure, provides for the sanctions that may be used where a party fails to make discovery. Rule 37 provides the teeth by which Rule 34 is made effective. Rule 37(b)(2)(iii) provides as follows: "An Order striking out the pleadings or parts thereof, or staying further proceedings until the Order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;" is proper if any party refuses to obey an Order made under Rule 34 for the inspection, copying or photographing of any documents, records or other things in his possession. The United States Supreme Court in the *Hammerice Packing Company v. State of Arkansas*, 29 S.Ct. 370. affirmed the lower court which had granted a default judgment against the Defendant after it had failed to produce certain documents as ordered by the Court at time of Pre-Trial.

In the recent case of *Guinn Rasbury v. Marvin L. Bainum*, 387 P.2d 239, — Utah 2d —, this Court was called upon to assess the propriety of the lower court's order dismissing Plaintiff's first cause of action because of his failure to produce certain documents as ordered by the trial court. In the *Rasbury* case, the Defendant had made demand upon Plaintiff to produce certain books and records in the latter's possession relating to particular business. These were not produced and at the pre-trial conference the trial court ordered Plaintiff to "furnish the Defendant all books and records of the Defendant now in possession of the Plaintiff" with the provision that unless this was done at

least ten days prior to the date of trial, the Plaintiff would be denied the right to use any of the books and records in connection with the establishing of his case, or any defense to the Defendant's Counterclaim. The Court notes on page 240, "the Plaintiff did not comply with the foregoing Order and at the trial gave as an explanation that possibly the books and records had been stolen from his Houston office. *The lower court justifiably held that Plaintiff's excuse was not worthy of consideration.*" (Emphasis added).

It is not the purpose of the Plaintiff herein to belabor the facts nor to be overly burdensome in so far as this brief is concerned. However, it should be noted that the Defendant in this particular case refused to provide the records that he, on the day of deposition, said he had available, and claims only that he couldn't find. It is to be noted that the pregnant record made at the time of the hearing, May 18, 1964, discloses that the Defendant not only had cancelled checks for labor performed but also had other books in which he entered his costs and by which he was able to determine what the profit of each job was.

The defendant in his Answer has alleged that there was an accord and satisfaction in that the painting of the duplex was to be off-set against the Note for $1,020.00, and in effect satisfy said Note. This, of course, the Plaintiff emphatically denies. Under point 3 of the Defendant's brief, it is pointed out that the law of this State in so far as the Trial Court's action in entering a Judgment as it did requires that the evidence of the Defendant must be construed in its most favorable light. However, as is evident by reading the deposition, there is absolutely no evidence that the Defendant and Plaintiff at any time agreed that the plainting of the duplex was to be in full satisfaction of the Note.

On page 2 of the deposition Mr. Nunley was asked:

Q. What happened then?

A. Mr. Tucker called me in connection with this Note for $1,020.00. He told me it was — I believe, at that time, he told me it was coming due, or was due, right about then; and we discussed the Note. I told him I didn't have the money; I couldn't pay it right then; my financial condition was such, I couldn't pay the Note.

Q. What happened next?

A. Well, Mr. Tucker asked me if I was busy; I told him not too busy; he asked me if I would consider doing some work for him. I told him, "yes, in consideration for this Note," I said, "Yes, I would be happy to do the work for you, to pay off this Note."

On page 11 of the deposition Mr. Nunley was asked by Mr. Ryberg:

Q. Did he tell you that he would discharge the Note, and give it to you when you were finished with that job?

A. Not in so many words. *This was my understanding, that he would do that.*

Q. You are using the term "understanding"; let's break that down a little more; what do you mean? How did he give you this understanding; what did he say?

A. He simply said this: "Doyle," he called me, "I need this job done; you owe me; go do the job; go get it done. I have the duplex rented." (Emphasis added).

Taking Mr. Nunley's statements as above quoted and construing them in the light most favorable to Mr. Nunley, there is still no evidence nor testimony that Mr. Tucker representing Tucker Realty Inc. at any time agreed to do anything other than off-set the value of the services per-

formed against the Note due and owing. This the Plaintiff is still willing to do. The Plaintiff has allowed a credit of $300.00 as per the Affidavits filed in the case (R-18). It is interesting in that the Defendant has stated only that it was his understanding that the painting would be in full satisfaction of the Note and as indicated by the material previously quoted this understanding was the Defendant's only.

In light of the obvious failure of the Defendant's memory and his total inability to tell the truth, the entary of the Judgment against the Defendant was proper. Though the hearing held May 18, 1964, was contrary to the Order of the Supreme Court entered April 30, 1964, because of its complete impeaching of the Defendant's story, and that's all that it is, the Plaintiff has used it extensively even though the hearing was held over Plaintiff's objection and in the opinion of the Plaintiff, the record is not admissible in this hearing.

CONCLUSION

It is obvious that the Court's action in entering the Judgment against the Defendant because of his willful and contemptuous refusal to obey the Court's Order is proper and should be upheld by this Court. The Plaintiff, however, is committed to the fact that the Defendant is entitled to a $300.00 credit against said Note and, in fact, has already made such an entry on its records.

Respectfully submitted,

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I hereby certify that on this ..... day of ....., 1964, I mailed two copies of this Brief by United States mail, postage prepaid, to Horace J. Knowlton, Attorney at Law, at the address shown on the cover of this Brief.

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