1964

Build, Inc. v. John G. Italasano and Theo Italasano : Brief of Respondent

Utah Supreme Court

S. Mark Johnson; Attorney for Appellants;
Horace J. Knowlton; Attorney for Respondent;

IN THE SUPREME COURT
of the
STATE OF UTAH

BUILD, INC., a Utah Corporation,
Plaintiff and Respondent,

vs.

JOHN G. ITALASANO and THEO ITALASANO, his wife,
Defendants and Appellants,

No. 10093

BRIEF OF RESPONDENT

Appeal from the Judgment of the Second District Court for Davis County, Honorable Thornley K. Swan, District Judge

HORACE J. KNOWLTON
214 Tenth Avenue
Salt Lake City, Utah
Attorney for Respondent

S. MARK JOHNSON
170 West 4th South
Bountiful, Utah
Attorney for Appellants

TABLE OF CONTENTS

TEXTS CITED

IN THE SUPREME COURT
of the
STATE OF UTAH

BUILD, INC., a Utah Corporation,
Plaintiff and Respondent,

vs.

JOHN G. ITALASANO and THEO ITALASANO, his wife,
Defendants and Appellants,

No. 10093

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This is an action on a contract in the sum of $5,348.16, with interest and costs, (Pla. Ex. A and R. 1), as the balance on the amount due for the construction of a home on a cost-plus basis, and on the defendants' counter-claim.

DISPOSITION IN THE LOWER COURT

The case was tried to the court. From a judgment in favor of the plaintiff in the amount of $3,483.43, and costs, and no cause of action on the counterclaim, defendants appeal.

RELIEF SOUGHT ON APPEAL

The plaintiff seeks to have the judgment of the lower court reformed to include reasonable compensation for the plaintiff and for interest.

STATEMENT OF FACTS

The plaintiff agrees with the statement of facts set forth in the defendants' brief except the last paragraph. Schedule A contains a statement of all of the expenditures. It was made a part of the court's findings of fact (R. 30), and shows that the court took into account all of the expenditures. It is to be presumed also that the court took into account the contents of the appraisal which amply supports the position of the plaintiff. (Def. exhibit 4) .

The thing that the court did in reaching a decision was to deduct from the credits allowable to the plaintiff the item of $850.00, "Supervision Trucks and Tools", and the item of $514.53, "Overhead & Insurance 5% of $10,290.61." The court seems to have found

a lack of agreement between the parties and to have applied the rules of equity or of reasonable value to obtain substantial justice. In doing this the court has allowed the plaintiff to recover for its expenditures for materials and for labor, without interest, except for supervision, trucks, tools, overhead or insurance.

ARGUMENT

1. The court was justified in finding against the defendants' contention that there was a fixed sum contract to complete the home for $15,000.00.

Following is a comment of the court after the completion of the trial, from page 209 of the transcript:

> "Well, I will say this: that I am not able to find that, as contended by Mr. Italasano, that there was a contract to build the home for $15,000.00 or less. There are just too many circumstances that are not consistent with that theory. That may have been Mr. Italasano's understanding, it may have been his interpretation of the conversations that were had. Giving him that benefit of a doubt, if we do, would mean that there's not a cost-plus contract, then we could not find a contract as contended by Mr. Stromness.
>
> "I can see how the $15,000 constantly cropped up throughout the trial. Counsel and the witnesses were both concerned with the theory of the case, and certainly that figure was mentioned in the negotiations. And it was a goal of Mr. Stromness, even under his theory of the case. It

was a figure that he was aiming toward. He doesn't deny it. But he does deny that he guaranteed, or undertook to build the house for that amount or less.

"Without deciding at this point, it's my impression that the court will have to, in equity, fix a contract for the parties. I think I can do it with the figures that have been given me."

Here are some of the circumstances inconsistent with a fixed contract price of $15,000.00.

(a) The defendants were willing to cut down in quality to hold the price down after the work had commenced.

On direct examination by Mr. Johnson:

"Q. Now, you filed a counterclaim in this case. What was the basis of the counterclaim?

A. The basis of the counterclaim was, the $800.00 over and above the $15,000.00 I had paid, plus a fair, reasonable value for some of the omissions that were left out.

Q. Hardwood floors, et cetera?

A. Mr. Stromness and I discussed some of these omissions from time to time, when they were being left out. And, oh, the tiling for example, by omitting that, that would probably save $200.00. And the hardwood floors would probably save $200.00. And so these are actually figures from Mr. Stromness.

Q. After Mr. Stromness left, did you have to call any workmen back to finish?

A. Yes. I called his painter back, and paid for it out of my own pocket, which is not in the accounting." (T. 138).

On cross examination:

"Q. But you were willing that he should exclude about eight different things. Can you tell us what they are?

A. Oh, basically, I think I can remember a good portion of them.

Q. Well, name the first one.

A. Hardwood floors.

Q. All right. You were willing that he should exclude the hardwood floors.

A. Yes.

Q. Now, you knew when he excluded the hardwood floors that it would be a less item.

A. That's right.

Q. And yet you were willing to exclude that. Now, why were you willing to exclude that?

A. Because this would come off the cost of the $15.000." (T. 175).

(b) There was no provision for a profit to the plaintiff had the job been done for less than $15,000.00.

"Q. Well, suppose the job had been done for $12,000.00. If Mr. Stromness had then wanted $850.00 for his work, would you have given it to him out of the $15,000.00, the $3,000.00 that was left?

A. It would take some consideration." (T. 141).

C. The defendants by themselves and their relatives were to and did furnish some of the materials and some of the labor but no understanding was had as to the amount.

"Q. Did you say anything about your being willing to do some of the work?

A. I said that I would provide the flat cement work, and any other work that I was capable of doing.

Q. Now what does that mean to you?

A. That means the basement floors, that means the driveways, that means the patios. That would comprise the flat cement work.

Q. In fact, you didn't do quite all of that, did you?

A. We didn't do the basement, that Mr. Stromness brought out. And he didn't—he doesn't even know what he did. Because he did the garage, too, and he didn't bring that out, but he did that." (Tr. 153-154).

"A. I told him that I had a brother-in-law who was a cement finisher,and said he would do it for me. Mr. Stromness' comment was, 'That will save you considerable money.' (T. 159).

"Q. Did you say you had a father who would work, too?

A. I said, 'I'm sure my father would help me,' which he did.

Q. Did you say how much your father would do?

A. There was no, no mention of actual time to be put in. I was to do the work that I was capable of, that would hold the costs below $15,000." (T. 162).

2. The court should have applied the rule of reasonable value to determine the amount due the plaintiff.

Paragraph 587 of 13 C.J. page 585, sets out the rule as follows:

> "The express agreement may be to pay what the services rendered are reasonably worth, and such an agreement will be implied when there is no agreement as to compensation. So the reasonable value of services may be shown where the parties honestly differ as to the rate of compensation agreed on. Where there is an express agreement that compensation is to be made, but the price is not fixed, the party is entitled to a reasonable sum."

For the same rule see also paragraph 363 C.J. Sec. A at page 368. The rule is also stated in paragraph 324 of 12 A.J. page 878.

Following is the uncontradicted evidence on reasonable value in this case.

Mr. Stromness, the plaintiff, a builder with sixteen years experience, testified as follows:

> "Q. So you were simply charging for your actual time expended, is that so?
>
> A. That's right.
>
> Q. At $3 an hour.

A. That's my truck to get me there, and so forth.

Q. Do you have an opinion as to whether or not $3 an hour is reasonable?

A. Very conservative labor charges.

Q. Is that your opinion?

A. That is my opinion.

Q. Do you have an opinion as to whether or not the materials that were furnished on this job were reasonable, as to price and quality?

A. The materials furnished on this job were reasonable to price and quality.

Q. As to the workmanship that your men put on that job, was it workmanlike?

A. It was workmanlike and superior to ordinary workmen.

Q. Now, in this matter of cost-plus, has there grown up in the building trades a standard rate for cost-plus, as they call it, or for mark-up or overhead?

A. Yes.

Q. What is that standard rate?

A. The standard rate is ten per cent, plus five per cent for overhead, or a total of fifteen per cent.

Q. Now, did you charge that much to Mr. Italasano?

A. No, sir.

Q. Why didn't you?

A. I was interested in this man and his associates as friends and neighbors. I had done work for her employer, I had involved myself in his home primarily with the ultimate in mind of doing more work for his employer. I knew they were businessmen, I knew they were doing things, I knew my contacts depended on good will, and I launched into this project with Mr. Italasano to continue that association. And I was interested in this job meeting his $15,000 just as nearly as possible." (Tr. 39 and 40).

With reference to plaintiff's exhibit "A":

"Q. I will ask you if after having examined it you can tell me whether or not it is the original record that you showed Mr. Italasano or or about the date that you indicated, in his office on Third South and Main Street?

A. That is the record I showed him.

Q. And was this record kept by your accountant?

A. Yes, sir.

Q. Under your direction and supervision?

A. Yes, sir.

Q. And is it accurate, as far as you have been able to determine?

A. Yes, sir.

Q. And, as you have indicated, are the charges that are made there, in your opinion, reasonable?

A. They are."

Compare this with the testimony of Mr. Italasano:

"Q. Do you regard these payments for materials as reasonable?

A. I don't know honestly." (T. 183).

"Q. Was there any value to you of the labor, at all, any reasonable value?

A. Certainly there was." (T. 183).

CONCLUSION

Applying the rules of reasonable value for the services and materials furnished by the plaintiff to the defendants in this case, the judgment in favor of the plantiiff should be for the sum of $4,847.97 together with interest and costs.

There is certainly nothing reasonable in requiring the plaintiff to furnish "Supervision Trucks and Tools" and "Overhead and Insurance", without compensation, or in depriving the plaintiff of interest on its money.

The judgment of the lower court should be reformed to include the items of $850.00 for supervision trucks and tools and the sum of $514.53 for overhead and insurance, the 5% of $10,290.61. The judgment should be for the sum of $4,847.97 together with interest and costs. (R. 30).

Respectfully sumitted,

Horace J. Knowlton
Attorney for Plaintiff and Respondent
214 Tenth Avenue
Salt Lake City, Utah