1964

Gary M. nagle v. Club Fontainbleu : Brief of Respondent

Utah Supreme Court

Dansie, Ellett and Hammill; Attorneys for Respondent;
Halliday and Halliday; Attorneys for Appellant;

IN THE SUPREME COURT
of the
STATE OF UTAH

GARY M. NAGLE,
Plaintiff-Appellant,

vs.

CLUB FONTAINBLEU,
a Utah corporation,
Defendant-Respondent.

Case No.
10198

RESPONDENT'S BRIEF

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

DANSIE, ELLETT AND
HAMMILL
5085 South State Street
Murray, Utah
Attorneys for Respondent

HALLIDAY AND HALLIDAY
500 Executive Building
Salt Lake City, Utah
Attorneys for Appellant

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STATEMENT OF THE KIND OF CASE

This is an action commenced by the Plaintiff for the specific performance of an agreement and assignment or, in the alternative, for a judgment against the Defendant for monies due and owing on an agreed account for improvements to real property and for monies due on a promissory note and also for the foreclosure of the Plaintiff's mechanic's lien.

DISPOSITION IN LOWER COURT

The Plaintiff was awarded judgment against the Defendant in the amount of $19,738.48 and $52.70 costs of court, but the trial court held that

the Plaintiff's mechanic's lien was invalid and the Agreement and Assignment between the parties, dated September 1, 1962, provided for a penalty and could not be enforced.

RELIEF SOUGHT ON APPEAL

The Respondent seeks to have this Court sustain those portions of the trial court's judgment which held that Plaintiff's mechanic's lien was invalid and the Agreement and Assignment between the parties, dated September 1, 1962, to be a penalty and thus unenforceable.

STATEMENT OF FACTS

It is necessary for Defendant to set forth additional facts and to correct misstatement of some facts in Appellant's brief with respect to transactions between Appellant and Respondent and the relationship between these parties. Respondent, during 1960, purchased two parcels of land at or near 1651 Vine Street, Salt Lake City, Utah, and these two parcels were purchased under separate Uniform Real Estate Contracts and not as one parcel of land. The approximate six acres of land which was sold to the Plaintiff-Appellant for residential building lots was originally purchased by the Club and found to be too small for the Club purposes and was then sold to Appellant under a Uniform Real Estate Contract. The Respondent Purchased the present Club site of approximately 6.35 acres of

land under a separate transaction. The Defendant in approximately May, 1960 agreed to share proportionately with the Plaintiff for moving of a cooler house, construction of water-sewer line, roadway and bridge, and did request that invoices correctly showing the amount expended for these particular projects be submitted to the Defendant. The Plaintiff submitted a billing of $12,277.26 which purported to be an itemized invoice but there was no indication whether or not some of the materials invoiced were used by the Plaintiff for construction in his subdivision or whether the entire amount was used in connection with the projects under the agreement with the Defendant. The Defendant did accept the $12,277.26 figure as correct but at that time requested that the Plaintiff submit separate invoices showing the dates of delivery of concrete, asphalt, and other materials. The Defendant further agreed to deposit $1,000.00 in trust with respect to this contract but was verbally assured by the Plaintiff that this deposit was not necessary since the Club was in the midst of a promotion campaign and needed all of the money available for promotion and opening of the Club.

With respect to completion of the roadway and bridge, there was never any complaint from the Plaintiff to the Defendant that the roadway and bridge could not be completed until October 15, 1962 because Defendant failed to make payment to the plaintiff and, in fact, the only agreement was that

of participation in costs. The roadway in question was being put in by a subcontractor on behalf of the Plaintiff herein to serve the subdivision being built by the Plaintiff, and the work on the bridge was being done almost entirely by the Plaintiff personally or with the help of one or two of his workmen. The completion of the bridge in question was necessary for access to the subdivision of the Plaintiff but was not necessary at all for access to the Club property and was, in fact, farther north on the roadway from the entrance to the Club property and was not used by Club members for ingress to the Club property.

The Board of Directors of the Defendant in early 1962 had no understanding, verbal or otherwise, that Plaintiff was to receive funds as new memberships were sold and, in fact, the Plaintiff assured the Board of Directors that he could obtain materials and labor and complete the Clubhouse with little or no expenditure of money for a considerable length of time after the matter was first discussed in the early part of 1962. Considerable labor was donated by the members of the Club in this construction. Only one door in the Clubhouse was hung by the Plaintiff and was improperly hung so that it had to be corrected before winter, and the entire Clubhouse and pool area was prepared for the winter by the Club members.

ARGUMENT

POINT I

THAT THE TRIAL COURT DID NOT ERROR IN HOLDING PLAINTIFF'S MECHANIC'S LIEN INVALID.

After the conclusion of all testimony and evidence, the trial court, by its Memorandum Decision, and the Findings of Fact and Conclusions of Law, and Judgment, held that the Plaintiff's mechanic's lien, Exhibit No. 10, was invalid. While the Memorandum Decision of the trial court does not state the reason for holding Plaintiff's mechanic's lien invalid, and the Appellant would have this Court believe that the trial court remarked to the effect that the $11,000.00 promissory note dated September 1, 1962 was given in payment of the claimed labor and material represented by the mechanic's lien, the facts of this case would indicate otherwise. Under the facts of the case it appears that all of the contract work done by the Plaintiff was completed during the spring of 1962, with the exception of the hanging of one door in November, 1962. It is admitted that the mechanic's lien was recorded on the 20th day of November, 1962 which, according to the testimony presented, was at least five months after the work done by the plaintiff. This, coupled with the fact that the Plaintiff was a member of the Board of Directors of the Defendant Club and had represented to the Board of Directors of the Club that he would do the work involved

for little or no money, as evidenced by Exhibits Nos. 15 and 16, and in view of the fact that much of the work performed was done by the Club members, and since the last work claimed to be done by Plaintiff in November was that which could be classified as trivial or minor, substantiates the position of the Defendant that the lien filed by the Plaintiff was not valid.

This Court has held that trivial or minor adjustments made casually or long after the main work has been completed cannot be used to tie onto as the last labor done or materials furnished in order to preserve or reinstate lien rights of a claimant. *Wilcox vs. Cloward, et al,* Utah 56 P2 1.

It has never been claimed that the issuance of the note with its coinciding agreement was done with the intention to deprive the Plaintiff of any lien rights that he may have had, but there is little question that the facts show the time for filing liens had long expired at the time that Plaintiff prepared and filed the lien claimed in this action. The court was therefore correct in ruling that the Plaintiff's mechanic's lien rights were not in effect and that his lien was invalid.

POINT II.

THAT THE TRIAL COURT DID NOT ERROR IN HOLDING THAT THE AGREEMENT AND ASSIGNMENT BETWEEN THE PARTIES, DATED SEPTEM-

BER 1, 1962, WAS A PENALTY RATHER THAN A FORFEITURE.

At the time of the trial of this matter, there was introduced into evidence as Exhibit P-25, a copy of the minutes of the Board of Directors' meeting of the Defendant Club, dated August 30, 1962. These minutes indicate that at that meeting a promissory note and Land Assignment Agreement had been submitted to the Board of Directors by the Plaintiff, Gary Nagle, for the Board's consideration. The promissory note submitted was in the sum of $20,000.00, and as a result thereof there was considerable discussion among the members of the Board of Directors. It was determined by the Board of Directors that a note in the sum of $11,000.00, together with the Land Assignment Agreement, would be given to the Plaintiff. The sum of $11,000.00, as indicated by Exhibit P-25, was a compromise figure and was given in order to satisfy the claim of Mr. Nagle. The note and Land Assignment were delivered to Mr. Don E. Hammill for redrafting in order that they conformed to the motions made and carried at the Board of Directors' meeting. This Land Agreement was not prepared by Mr. Hammill, to the detriment of Mr. Nagle, but was the agreement submitted by Mr. Nagle and was substantially the same agreement, except for the amounts involved, after the conclusion of the Board of Directors' meeting. Plaintiff's claim that he should be placed in an advantageous position by

reason of the fact that Mr. Hammill, who was a practicing attorney, prepared the agreement to the detriment of Mr. Nagle, cannot be considered by this Court in view of the true facts.

This Court has often held that the enforcement of a forfeiture provision allowing recovery, which bears no reasonable relationship to actual damages, should not be allowed. *Western Macaroni Mfg. Co. vs. Fiorre*, 71 Utah 274, 264 P 975; *Young vs. Hansen*, 218 P2 666; *Green vs. Nelson*, Utah, 232 P2 776. In the Utah case of *Perkins, et al, vs. Spencer*, 121 Utah 468, 243 P2 446, The Supreme Court reiterated this position when it stated:

> "This Court is committed to the doctrine that where the parties to a contract stipulate the amount of liquidated damages that shall be paid in case of a breach, such stipulation is, as a general rule, enforceable, if the amount stipulated is not disproportionate to the damages actually sustained."

The Court continued:

> "On the contrary, where enforcement of the forfeiture provision would allow an unconscionable and exhorbitant recovery bearing no reasonable relation to the actual damage suffered, we have uniformly held it to be unenforceable."

The Court, in addition to the holding of the Perkins case, held, in the case of *Jacobson vs. Swan*, 278 P2 298:

> "When the Trial Judge has made such determination, we will regard it as prima facie correct and will not disturb it unless it is plainly erroneous."

In Plaintiff's brief, he states the value of his claim as against the property values, indicating that the net equity of the Defendant would be approximately $24,800.00, which is only $5,000.00 more than the claimed judgment of the Plaintiff. The Plaintiff, however, fails to advise the Court of the value of the improvements on the real property, which makes the claim fall within the rule in the *Perkins vs. Spencer* case, supra. Exhibit P-17 is a financial statement of the Defendant Corporation, which indicates that the land value of the Corporation is $35,756.78, and that the value of the buildings and improvements is $72,803.84, or a total value of $108,560.62. There is owing against the land purchase contract the sum of $26,200.00, leaving a net value of the assets at the sum of $82,360.62. This is the amount that was given to secure the claim of the promissory note to the Plaintiff in the sum of $11,000.00, and it would certainly appear that if the Plaintiff were allowed to assume the Defendant's position as regards the real property, for an $11,000.00 note, he would be obtaining real property and improvements worth $82,360.62. This certainly appears to be so grossly excessive as to be entirely disproportionate to any loss contemplated by the parties, and that its enforcement would certainly be so shocking to the conscience that the trial court could, in all equity, re-

fuse to enforce the provision for forfeiture on the basis that it constituted a penalty.

The Court's findings of a penalty is again supported by the evidence that at the time, in April, 1963, when Plaintiff advised the Defendant that he did not feel secure and was calling for payment of his note before its maturity date, he was advised by the Board of Directors of Defendant Club that they would honor the note and make payment upon it but would not pay attorney's fees since they did not concur in his conclusion that he was no longer secure in his position. This offer was refused by the Plaintiff, who a short time thereafter filed legal action to collect on the note, even though payment was offered.

The trial court decision in this matter certainly appears to be well within the rule of *Jacobson vs. Swan*, supra.

POINT III.

THAT THE DEFENDANT, THROUGH ITS CONDUCT, HAS NOT WAIVED THE RIGHT TO QUESTION THE VALIDITY OF THE AGREEMENT AND ASSIGNMENT OF SEPTEMBER 1, 1962, AND IS NOT ESTOPPED FROM CLAIMING THAT IT EXACTS A PENALTY.

The promissory note and Agreement and Assignment of September 1, 1962 were not prepared by the President of the Defendant Corporation, Mr. Don E. Hammill, a practicing attorney, as indicated by Plaintiff's brief. As heretofore stated and as shown by Exhibit P-25, the note and Land Assign-

ment Agreement were prepared by Mr. Nagle or Mr. Nagle's representatives and presented to the Board of Directors of the Defendant Corporation for their acceptance. The note and Land Assignment Agreement were not accepted by the Board of Directors by reason of the fact that the sum involved was far in excess of the amount that the Board of Directors felt to be due and owing and, as a result thereof, a compromise amount was agreed upon, and Mr. Hammill was requested to redraft the documents to reflect the compromised figure. The documents were redrafted in substantially the same form as when presented by Mr. Nagle and were executed in conformance with the decision of the Board of Directors. The purpose of the Agreement and the note was not to give the Club the sole benefit by reducing to a specific figure the undertermined amount theretofore existing between the parties hereto; there was also considerable benefit derived by the Plaintif in this action, since he received a note for a specific amount, wherein his claim prior to this time had been for an amount that was disputed by the Defendant Corporation. From the exhibits presented, it is apparent that there was considerable feeling and animosity between Mr. Nagle and the Board of Directors of the Defendant Club by reason of his statements that the work could be done with little or no cost when, in fact, he presented to them a bill of substantial size.

By executing the note and Land Assignment Agreement in this action, the Defendant did not designedly induce the Plaintiff to change his conduct or alter his condition in reliance upon any representation of the Plaintiff; in fact, the Defendant acted in accordance with the request of the Plaintiff; except for the amount to be paid, which amount was agreed upon by the parties.

The case of *Ravarino vs. Price*, 123 Utah 559, 260 P2 570, as cited by the Plaintiff, is distinguishable both on the facts and the law, since there were representations made in that case which were made for the purpose of influencing the conduct of the injured party, which facts are certainly not present here.

As further evidence of the fact that the Defendant, through its conduct, did not waive its right to question the validity of the Agreements involved herein, we must again point to the Court the fact that when the Plaintiff accelerated the maturity date of the note by reason of his claim of insecurity, that the Defendant Corporation offered to pay the face value of the note but refused to pay attorney's fees by reason of the fact that they did not concur in the necessity for the accelerated maturity date. This certainly seems to be within reason and would certainly substantiate the position of the Defendant Corporation that they were able to pay the note as it matured. To permit the Defendant to refuse pay-

ment and then stand upon the claim for forfeiture would not be just or equitable.

CONCLUSION

It is strongly urged by the Defendant herein that the trial court, having heard all of the testimony and reviewed all of the exhibits, and being fully advised of the facts as they existed in this matter, rightfully determined that the lien claim of the Defendant was invalid and that the Agreement and Assignment of September 1, 1962 was a penalty and not a forfeiture.

It is further urged that the trial court did not error in its decisions in this matter nor did it erroneously interpret the documents involved in this case. The relative positions of the parties during the entire period of their association indicates that such association was other than the normal contractor-owner relationship and that Plaintiff's position of innocence, as indicated by his brief, is not substantiated by the facts and evidence presented in this matter.

It is therefore submitted by the Defendant that the trial court's decision should stand.

Respectfully submitted,

DANSIE, ELLETT AND HAMMILL

Attorneys for Respondent
5085 South State Street
Murray, Utah