

1965

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

Utah Supreme Court

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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

FILED

MAR 10 1965

APPELLANT'S BRIEF

Clerk, Supreme Court, Utah

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

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TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
STATEMENT OF POINTS:	
POINT I. THAT THE TRIAL COURT ERRED IN HOLDING PLAINTIFF'S MECHANIC'S LIEN INVALID.	7
POINT II. THAT THE TRIAL COURT ERRED IN HOLDING THE AGREEMENT AND ASSIGN- MENT BETWEEN THE PARTIES, DATED SEPTEMBER 1, 1962, TO BE A PENALTY RATHER THAN A FORFEITURE.	11
POINT III. THAT THE DEFENDANT, THROUGH ITS CONDUCT, HAS WAIVED THE RIGHT TO QUESTION THE VALIDITY OF THE AGREE- MENT AND ASSIGNMENT OF SEPTEMBER 1, 1962, AND IS ESTOPPED FROM CLAIMING THAT IT EXACTS PENALTY.	15
CONCLUSION	17

CASES CITED

L. E. Doane et al., Respondents, v. Jeter Clinton Z. Snow, et al., Appellants. 2 Ut. 417.	8-18
Dopp v. Richards, 43 Ut. 332, 135 P. 98	11
Farmers & M. Nat. Bank v. Taylor, (1897) Tex. 40 S.W. 876, 65 A. L. R. 303	10
Gilcrest v. Gottscholk, (1874) 39 Iowa 311	10
Gretchell v. Musgrove, (1880) 54 Iowa 744, 7 N.W. 154	10
Hale v. Burlington, C. R. & N. R. Co., (1881. C.C.) 2 McCrary, 558, 13 Fed. 203	11

TABLE OF CONTENTS—Continued

	Page
Grand Union Laundry v. Carney, 88 Wash. 327, 153 P. 5	11
Hoagland v. Lask, (1891) 33 Neb. 376, 29 Am. St. Rep. 485, 50 N.W. 162	10
Keeble v. Keeble, 85 Ala. 552, 5 S. 149	11
MacKeen v. Haseltine, (1891) 46 Minn. 426, 49 N.W. 195	10
K. P. Min. Co. v. Jacobson, 30 U. 115, 83 P. 728, 4 L.R.A. NA. 755	11
Perkins et al., vs. Spencer, Ut. 1952, 121 Ut. 468, 243, P. 2d. 446	13
Ravarino v. Price, et al., 123 U. 559, 260 P. 2d 570.....	16
Sun Printing, etc., Assoc. v. Moore, 183 U.S. 642, 22 S. Ct. 240, 46 L. Ed. 366	11

AUTHORITIES CITED

65 A.L.R. 283	9
57 C. J. 798 S. 226	9

IN THE SUPREME COURT
of the
STATE OF UTAH

GARY M. NAGLE,

Plaintiff - Appellant,

vs.

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corporation,

Defendant - Respondent.

Case No.
10198

APPELLANT'S BRIEF

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

Plaintiff seeks the reversal of those portions of the trial court's judgment which held the Plaintiff's mechanic's lien to be invalid and the Agreement and Assignment between the parties, dated September 1, 1962, to be a penalty and unenforceable.

STATEMENT OF FACTS

The Defendant is a non-profit corporation organized for the recreation of its members. It succeeded to the Buyer's position under a Uniform Real Estate Contract dated May 23, 1960, to purchase the real property commonly known as 1651 Vine Street, Salt Lake City, Utah. The Defendant retained for itself 6.35 acres of the land it was purchasing and sold the remainder to the Plaintiff for residential building lots. The Plaintiff, a general contractor, entered into a written agreement with the Defendant dated in April, 1960, but probably signed in May or June, 1960, whereby the Plaintiff agreed to move a cooler house and construct a water line, sewer line, roadway, and bridge adjoining and to connect with the real property of the Defendant. The Defendant agreed to pay the

Plaintiff a proportionate share of the cost of the improvements, varying between one-third and one-half of the total, with the Plaintiff to pay the other share since the Plaintiff would also benefit from the planned improvements. The Defendant agreed to pay the Plaintiff as the work progressed and invoices were submitted. The Defendant further agreed to deposit in trust \$1,000.00 within forty-five (45) days as evidence of its good faith and ability to pay. Such sum was never deposited.

The Plaintiff furnished his first labor and materials on November 8, 1960. During March or April, 1961, the Plaintiff displayed various invoices for labor and materials to the Board of Directors of Defendant, but Defendant had no funds to make payment. In August, 1961, the Plaintiff submitted to the Defendant an itemized invoice in the amount of \$12,277.26, which was accepted and approved by Don E. Hammill, the President of the Defendant Club, but the Defendant was still not able to make a payment on account. The Plaintiff completed the moving of the cooler house and construction of the water line and sewer line, but did not complete the roadway and bridge until approximately October 15, 1962, due to the failure of the Defendant to make payment.

In January, 1961, the Plaintiff became a member of the Defendant, and in January, 1962, the Plaintiff was elected to its Board of Directors. The

Defendant desired to complete the construction of its basic improvements so that its members could enjoy the facilities, but did not have sufficient funds on hand for this purpose. The Defendant commenced a membership drive in March, 1962, to obtain the required funds and entered into a verbal contract with the Plaintiff to construct a club house and deck around the swimming pool. The Plaintiff was to receive the funds made available by the new memberships as well as labor to be donated by the members of the Defendant, so that the facilities would be ready by June 1, 1962. The membership drive was unsuccessful, the Plaintiff was not paid any funds, and the members did not donate the labor as promised; however, the Plaintiff completed sufficient of the construction work so that the facilities could be used during the month of July, 1962. The Plaintiff performed his last labor and furnished his materials on November 5, 1962, when several doors were hung in the club house and it was prepared for winter.

The Defendant was still not able to pay the Plaintiff for the construction of the club house and decking around the swimming pool, and on September 1, 1962, the Defendant executed and delivered to the Plaintiff its promissory note of even date in the original principal amount of \$11,000.00, payable to the order of the Plaintiff one year from its date, with interest at 6% per annum, in payment of labor and materials for the construction of the

club house and decking around the swimming pool, the Defendant having already approved Plaintiff's invoice of \$12,277.26 for the other work performed by Plaintiff. The promissory note contained an acceleration clause whereby the Plaintiff could mature the note upon deeming himself insecure. This promissory note was secured by an Agreement and Assignment of the same date, wherein the Defendant assigned to Plaintiff all of the Defendant's right, title, and interest in and to its Uniform Real Estate Contract of May 23, 1960, under which its real property was being purchased. The Agreement and Assignment provided, among other things, that in the event of default the Plaintiff could enter upon the premises and take possession thereof and any amounts paid him would be retained as liquidated damages and upon demand the Defendant would execute and deliver a Quit Claim Deed of its interest in the real property. Paragraph 4 of the Agreement and Assignment stated that the Plaintiff could file and prosecute any mechanic's or materialmen's liens he might have against the property. Since the Plaintiff had received no payment on either contract, and for the purpose of further protecting himself, the Plaintiff recorded his Notice of Lien in the County Recorder's office of Salt Lake County, Utah, on December 17, 1962, as Entry No. 1888590, in Book 1998, at Page 241, of Official Records. In March, 1963, the Plaintiff desired to obtain clear title to the acreage he was purchasing

from the Defendant and paid the Defendant \$10,-771.06 to enable the Defendant to in turn pay said sum to the fee title owners so that title could be obtained and in addition the Plaintiff received a credit of \$6,649.78 on the bill of \$12,277.26, owing to the Plaintiff, which credit was later corrected during the trial proceedings to \$5,649.78. This transaction between the parties is reflected in a written Credit Agreement, dated March 7, 1963, is one of the trial exhibits, and a part of the record. The Plaintiff later deemed himself insecure, accelerated the maturity date of the note and made written demand upon the Defendant on April 10, 1963, for payment in full. After considerable negotiations, the Defendant on May 10, 1963, offered to pay the note, but made no actual tender of the monies due and owing. The Defendant's offer did not include reasonable attorney's fees as provided in the promissory note and under the Utah Statutes on Mechanic's Liens, nor the cost of recording his Notice of Lien and was rejected by the Plaintiff. The Plaintiff then filed suit against the Defendant to enforce the terms of the Agreement and Assignment of September 1, 1962; also for the payment of the promissory note and for the foreclosure of his mechanic's lien. Plaintiff also included in his suit a demand for additional labor performed and personal services of the Plaintiff.

The value of the Defendant's real property would not exceed \$8,000.00 per acre. (Page 21, Line

17 of the Excerpts of Transcript of Proceedings)
The Defendant owes a balance under its contract
of May 23, 1960, to purchase the real property, of
approximately \$27,000.00.

ARGUMENT

POINT I.

THAT THE TRIAL COURT ERRED IN HOLDING
PLAINTIFF'S MECHANIC'E LIEN INVALID.

The Plaintiff, a general contractor, is one of those persons entitled to a mechanic's lien as set forth in Title 38-1-3, U.C.A. Also, the Plaintiff is an original contractor as defined in 38-1-2, U.C.A., and recorded his Notice of Lien in sufficient detail and within the time required by 38-1-7. The Plaintiff's action was commenced within one year after he furnished his last labor and material and his Lis Pendens was recorded in the office of the County Recorder of Salt Lake County, Utah, in the manner specified in 38-1-11. Notice to other lien claimants of the pending action and the time for them to appear and exhibit their liens was published once per week for three successive weeks, pursuant to 38-1-12. No liens were exhibited nor appearances made by other lien claimants on the day appointed.

Although the Memorandum Decision of the trial court and the Findings, Conclusions and Judgment do not state the reason for the holding that the Plaintiff's mechanic's lien was invalid, the remarks of the trial judge during the trial proceed-

ings were to the effect that the Plaintiff's bill for labor and materials was paid by the Plaintiff accepting the \$11,000.00 promissory note of September 1, 1962, and in so doing the Plaintiff had waived his right to a mechanic's lien. It is respectfully submitted that such is not the law in the State of Utah, nor the law of a majority of the other jurisdictions in this country. In the Utah case of *L. E. Doane, et al., Respondents, v. Jeter Clinton Z. Snow, et al., Appellants*, heard by our Supreme Court while Utah was still a territory during the term from January, 1877, to June, 1880, reported in 2 U. 417, the Plaintiff accepted two promissory notes from one of the Defendants for the amount due for building materials and three months thereafter recorded his Notice of Lien to secure the amount due and owing. The trial court granted judgment in favor of the Plaintiff and for the foreclosure of his mechanic's lien, and one of the Defendants appealed. By a unanimous decision, the Chief Justice and both Associate Justices affirmed. In quoting from the Court's opinion, Justice Boreman stated, "It is claimed that by accepting these notes, the respondents received payment of the account. This certainly is not the law, where no intention to that effect is shown.

"We presume the appellants meant to say that the respondents waived their right to the lien by taking the notes. Our Statute says that the lien can be enforced by suit begun at any time within one year after the completion of the building. Both notes

fell due within the year, and there does not appear to have been any intention to relinquish the lien. There was, therefore, no waiver of the right to file the lien or to enforce it. Securities are in their nature cumulative, and there is no reason why the Court should consider that by taking one a party thereby released another, unless there was some stipulation or misunderstanding that such should be the case. *McMurry v. Taylor*, 30 Mo. 263; *Ashdown v. Woods*, 3 Mo. 465; *Green v. Ely*, 2 Greene, (Iowa), 508; *Mix v. Ely*, Ibid. 513; *Kinsley v. Buchanan*, 5 Watts, 118.

“We do not think that any different view is bourne out by the authorities cited by appellants.”

The Utah case cited has long been and still is the law in the State of Utah. This case has been cited many times by other jurisdictions to the same effect. In 65 A.L.R. 283, numerous cases representing the weight of authority are cited with the same holding as the Utah case above mentioned, being thirty-nine states in our country and also Canada and England. This position is further supported by 57 C.J.S. 798, Sec. 226.

The promissory note executed by the Defendant and delivered to the Plaintiff matured by its terms on September 1, 1963, being a time within the one-year period allowed by our Statute for the foreclosure of a mechanic's lien. Also, there is nothing in the note, nor in the facts and testimony showing an

intention of the parties that the Plaintiff in accepting the promissory note relinquished his rights to a mechanic's lien, and indeed show a contrary intent as will be mentioned below.

Nor does the fact that the Plaintiff accepted security for the note, being the Agreement and Assignment of September 1, 1962, alter the result. Although counsel for the Appellants could find no Utah law on this specific point, the general rule is that accepting notes secured by a mortgage or deed of trust does not amount to a waiver of a mechanic's lien unless the parties so intend. *Hale v. Burlington, C.R. & N.R. Co.* (1881; C.C.) 2 McCrary 558, 13 Fed. 203; *Gilcrest v. Gottscholk* (1874) 39 Iowa 311; *Gretchell v. Musgrove* (1880) 54 Iowa 744, 7 N.W. 154; *McKeen v. Haseltine* (1891) 46 Minn. 426, 49 N.W. 195; *Hoagland v. Lask* (1891) 33 Neb. 376, 29 Am. St. Rep. 485, 50 N.W. 162; *Farmers & M. Nat. Bank v. Taylor* (1897) Tex. 40 S.W. 876. 65 A.L.R. 303.

Any guessing as to the intention of the parties with respect to the Plaintiff's lien rights was removed by Paragraph 4 of the Agreement and Assignment between the parties, where it provides, among other things, that the Assignee (Plaintiff), at his option, could file and prosecute any mechanic's or materialmen's lien he may have against said property. It would thus appear that there was no intention to relinquish or waive the mechanic's lien

rights of the Plaintiff and that the Utah case cited is controlling and the Plaintiff's mechanic's lien rights were still in effect and his lien was valid.

POINT II.

THAT THE TRIAL COURT ERRED IN HOLDING THE AGREEMENT AND ASSIGNMENT BETWEEN THE PARTIES, DATED SEPTEMBER 1, 1962, TO BE A PENALTY RATHER THAN A FORFEITURE.

Whether a sum named in a contract to be paid by a party in default on its breach is to be considered liquidated damages or merely a penalty, is one of the most difficult and perplexing inquiries encountered in the construction of written agreements. *Sun Printing etc., Assoc. v. Moore*, 183 U.S. 642, 22 S. Ct. 240, 46 L. Ed. 366.

It seems to be generally conceded, that each case must be permitted to stand pretty much on its own peculiarities and particular facts. *Keeble v. Keeble*, 85 Ala. 552, 5 S. 149, *Grand Union Laundry Co. v. Carney*, 88 Wash. 327, 153 P. 5. No general rules applicable to all contracts are deducible. *Dopp v. Richards* 43 U. 332, 135 P. 98. The question is one to be determined by the contract fairly construed. *Dopp v. Richards*, *K. P. Min. Co. v. Jacobson*, 30 U. 115, 83 P. 728, 4 L.R.A.N.S. 755.

At the time of the execution and delivery of the \$11,000.00 promissory note and Agreement and Assignment, both dated September 1, 1962, the Plaintiff had previously moved the cooler house, con-

structed the water and sewer lines, and substantially constructed the roadway and bridge, and the Defendant had previously accepted and approved the Plaintiff's invoice for said work, in the amount of \$12,277.26, but had made no payment on account, nor had the Plaintiff been paid for the construction work performed on the club house and pool deck. The Plaintiff was to have been paid for his work on the club house and pool deck from proceeds of a membership drive. Such drive was not successful and the Defendant did not obtain funds to pay the Plaintiff. At this time, the Defendant was indebted to the Plaintiff in the amount of \$23,277.26, and payment was long past due. The Plaintiff could have commenced an action against the Defendant to collect the monies due him, the effect of which would probably have been to close down the Defendant Club. The Defendant planned on making additional improvements and operating the facilities, which would probably have resulted in incurring new indebtedness, making it more difficult for the Plaintiff to receive payment. These special facts and circumstances were in existence and known to the parties at the time the promissory note and Agreement and Assignment were executed and delivered. The reason for the provision in the Agreement and Assignment that in the event of a default in payment of the note, the Plaintiff could enter upon the premises, take possession, together with all improvements and any amounts repaid to be retained

as liquidated damages, was for the protection and security of the Plaintiff for his forbearance. The Agreement and Assignment was prepared by Don E. Hammill, President of the Defendant and a practicing attorney, his name being imprinted in the lower left corner of this document.

In the Utah case of *Perkins et al. v. Spencer*, a 1952 case, 121 U. 468, 243 P. 2d 446, the Supreme Court of Utah had occasion to consider the matter of a penalty in connection with the buyer's default under a uniform real estate contract. Justice Crockett, who wrote the opinion of the Court, 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." Also, "On the contrary, where enforcement of the forfeiture provision would allow an unconscionable and exorbitant recovery bearing no reasonable relationship to the actual damage suffered, we have uniformly held it to be unenforceable." The Court commented on other Utah cases dealing with the same question and noted they were in accord with Sec. 339 of the Restatement of Contracts, which provides, "(1) an agreement made in advance of breach fixing the damages therefor, is not enforceable as a contract and does not affect the damages recoverable from the breach, unless (a) the amount so fixed

is a reasonable forecast of just compensation for the harm that is caused by the breach, and (b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation."

At page 21, line 17 of the Excerpts of Transcript of Proceedings, the president of the Defendant testified that some land near the Defendant's real property had been sold for \$8,000.00 per acre. The Defendant Club was purchasing 6.35 acres, which would be a value of \$50,800.00. The President of the Defendant also testified that the balance due and owing on the contract was approximately \$26,000.00, which would give the Defendant a net equity of approximately \$24,800.00. The Plaintiff's total judgement was for \$19,791.18, which total is not disproportionate to the net equity indicated, the amount of said equity being somewhat in question.

As to the point of whether the Plaintiff's damages were incapable or very difficult of accurate estimation, the record and undisputed facts clearly show that the Defendant was in the financial position of being incapable of meeting its bills as they became due and owing and therefore was technically insolvent. Although the amount of money owing by the Defendant to the Plaintiff was known, the financial condition of the Defendant made the damage to the Plaintiff through a failure to pay one which was incapable or very difficult of accurate estimation. It is respectfully submitted to this Court that the question of damage is not just the simple mea-

surement of an amount due and owing, but includes as well the prospects of recovery. The question as to whether a provision is one for liquidated damages or a penalty seems based upon whether a party is to be allowed an unconscionable gain. Where no such unconscionable gain is present, it would be a miscarriage of justice to define damage in the narrow sense of just the amount due and owing, without including as is presented by this case, the chances of an ultimate recovery. Such a holding by this Court would be consistent with the prior Utah cases and would prevent a miscarriage of justice.

POINT III.

THAT THE DEFENDANT, THROUGH ITS CONDUCT, HAS WAIVED THE RIGHT TO QUESTION THE VALIDITY OF THE AGREEMENT AND ASSIGNMENT OF SEPTEMBER 1, 1962, AND IS ESTOPPED FROM CLAIMING THAT IT EXACTS PENALTY.

The promissory note and Agreement and Assignment of September 1, 1962, were both prepared by the President of the Defendant, Don E. Hammill, a practicing attorney. Mr. Hammill was a person trained in the law and had a superior knowledge of legal matters as compared with the Plaintiff, who was a layman. It could be safely stated that in reading these documents, the Plaintiff concluded that the wording meant exactly what it said and in accepting said document for further forbearance, the Plaintiff relied upon the remedies given to him in

the Agreement and Assignment. Upon the execution of these documents, the Defendant received a valuable benefit, i.e., time within which to further develop the Defendant Club and raise new capital. Where one receives the benefit from a contract, he is estopped from questioning the existence, validity and effect of the contract. 21 C.J. 1209, Sec. 211 (C).

In the Utah case of *Ravarino v. Price, et al.*, 1953, 123 U. 559, 260 P. 2d. 570, the Utah Supreme Court had occasion to consider the matter of an estoppel against the Defense of the Statute of Frauds. In considering this question, the Court held that a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee, and which does induce such action or forbearance, is binding if injustice can be avoided only by enforcement of the promise. Further, that a promissory estoppel is applied where the promise of the promisor as to his future conduct constitutes an intended abandonment of an existing right on his part. Should this Court consider the agreement in question to have provided for a penalty, it would appear that the document having been prepared by the Defendant's President, a legally trained individual of superior knowledge to the Plaintiff, the Defendant has waived and is estopped to claim that such document provides for a penalty where the Plaintiff relied upon the same in forbearance of

the monies due and owing to him, all to his detriment and loss.

CONCLUSION

It is earnestly contended by the Plaintiff that the provision in question in the Agreement and Assignment of September 1, 1962, is not a penalty for the reasons mentioned in the argument on Point I, and that this Court should so hold in its opinion and remand this cause to the trial court with instructions that the Defendant be ordered to Quit Claim its interest in the real property to the Plaintiff in accordance with the terms of said Agreement and Assignment.

Should this Court determine however, that such provision in the Agreement and Assignment is a penalty, that the Defendant has waived the right to claim the same and due to the special facts and circumstances present and the superior legal knowledge of the President of the Defendant and the benefits received of forbearance through the Plaintiff agreeing to accept the promissory and Agreement and Assignment, the Defendant is and has been estopped to assert the matter of a penalty as a defense.

Irrespective of the above, it is the Plaintiff's considered conclusion that he has a valid mechanic's lien which was not waived through his acceptance of the promissory note and Agreement and Assignment and all of the requisite, statutory and proce-

dural steps for its foreclosure were met. This conclusion is fully supported by the facts of this case, which can be interpreted in no other way, and especially is it supported by the case law of this State. (*L. E. Doane, et al., Respondents, v. Jeter Clinton Z. Snow, et al., Appellants*)

From the standpoint of the prompt administration of justice, the Appellant prefers the relief provided in the Agreement and Assignment, i.e., the right to take possession of the real property in question and receive a Quit Claim Deed of all of the right, title, interest and equity of the Respondent. However, if for some reason this Honorable Court does not agree with the contention that the provision in the Agreement and Assignment is not a penalty, or if it is that the Respondent has waived the right to assert the same and is estopped therefrom, then this matter should be remanded to the trial court with instructions that Appellant's mechanic's lien is valid and an Order to be entered by the trial court permitting its foreclosure and a Sheriff's Sale in the manner provided by law.

Respectfully submitted,

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