

1961

Lawrence Butterfield v. Donald G. Chaney : Brief of Respondent

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IN THE SUPREME COURT
of the
STATE OF UTAH

SEP 28 1961

Clerk, Supreme Court, Utah

LAWRENCE O. BUTTERFIELD,
Plaintiff and Respondent,

vs.

Case No.
9415

DONALD G. CHANEY,
Defendant and Appellant.

BRIEF OF RESPONDENT

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IN THE SUPREME COURT of the STATE OF UTAH

LAWRENCE O. BUTTERFIELD,

Plaintiff and Respondent,

vs.

DONALD G. CHANEY,

Defendant and Appellant.

} Case No.
9413

BRIEF OF RESPONDENT

STATEMENT OF FACTS

The plaintiff-respondent positively rejects the bulk of the statement of facts as given by defendant-appellant as being conclusions rather than statement of facts. Therefore, the plaintiff-respondent is constrained to restate the facts more completely.

In paragraph 1 on page 1 of defendant-appellant's brief, the defendant-appellant uses the words "extended the contract," which is a pure conclusion and not based on any facts. The

original contract was in writing, was entered into August 10, 1959, and reads as follows:

"I hereby contract for the construction of a patio and landscaping at 3270 Delmar Drive, Salt Lake County, Utah, and the work to be done and the price to be paid is as follows:

"1. To construct a retaining wall 8' by 8' by 16' of cement cinder blocks 4 blocks high and 85 feet long and to pay for the same \$150.00.

"2. To construct approximately 800 square foot patio of 4 inch standard concrete construction and to pay for the same \$238.00.

"3. To plant a lawn on the front, back, and sides of the property. Said planning (sic) to consist of 4 inches of top soil and multch (sic). The grass to be straight Kentucky Blue Grass with 10% White Dutch Clover and to pay for the same \$505.00.

"The total cost of \$893.00 to be paid upon the completion of the work or on completion of the work and before August 25, 1959. If the work is completed in a good workmanship manner and is not paid for by August 25, 1959, I agree to pay reasonable attorney's fees and costs.

"Dated this 10 day of August, 1959.

(signed) Donald G. Chaney

Exhibit P-1

Concerning the second agreement, which was oral, the defendant-appellant testified as follows:

"A Well, I talked to Mr. Butterfield the same day the redwood fence man was there, but I don't think he gave me the figure until the following day.

"Q When he gave you the figure on the following day of \$1,000.00, you agreed then to give him an oral contract to construct the block fence and the redwood fence for \$1,000.00?

"A We agreed that he was to do the job for \$1,000.00.

"Q And that was some time after the execution of the written agreement?

"A Yes." (R. 121)

Concerning the date the oral agreement was entered into, the Record at 128 reads as follows:

"The Court: That is about as close as we can get, Mr. King. The 13th or thereabouts is what the Court would believe it to be, from his testimony—the 13th of August or thereabouts."

The plaintiff-respondent, however, testified on cross-examination that this conversation took place August 20th (R. 69, line 14). Further, in relation to the oral contract of August 13th or 20th, defendant-appellant testified as follows:

"Q Now, you do recall when your deposition was taken, do you not?

"A Yes.

"Q Do you recall this question being asked you: 'So that the \$1,000.00 that was paid took care of the contract in dispute, is that right? Not the original contract?'

"Mr. Cardall: What page are you on?

"Q (By Mr. King) Page 10. And the answer: 'That is correct. The \$1,000.00 was for the wall.' Now, at the time of that conversation—this is line 28: 'A That

is correct. The \$1,000.00 was for the wall.' So you testified, did you not?

"A That I said that the —

"Q That the \$1,000.00 was for the wall?

"A Well, ahead of that I said I gave him the \$1,000.00 because the wall had been built and I felt that he had earned the \$1,000.00." (R. 130)

In regard to the third contract, the defendant-appellant testified as follows:

"A Well, we discussed the fact that the base was poured too high to the surface and it would be impossible to make any planting along the wall. And one of the things that we talked about was the possibility of building a planter wall higher than the footings and putting dirt on top so that we could plant there.

"Q And no design or no plan of anything was discussed?

"A That was then the footings were first poured, and we discussed it at that time—just the fact that something would have to be done.

"Q And at no time did you ever authorize or tell him to put in the planters?

"A We discussed it, the possibility for correcting an error; that was all.

"Q And then he just went ahead and did it?

"A Yes.

"Q Now, do you recall—Counsel, if you want to refer to the transcript, I am reading from page 11. line 16: 'Q Now, did you agree to pay him anything for putting the planter, a planter around?' 'A No. We said we'd take care of it when it was over with, but

something had to be done on that. There was never a price agreed upon. I came back one day, and it had been done.'

"A That is right, yes.

"Q Now, you had discussed in detail how it was to be done, had you not?

"A No; we didn't discuss it. We discussed that something had to be done in the way of the planter and getting top soil on the top of it so that we could plant around it.

"Q Now, was there anything discussed about price?

"A No.

"Q You didn't agree upon a price and didn't discuss price?

"A No, we didn't discuss the price. We agreed that something —

"Q What did you mean when you answered that 'We'd take care of it when it was over with.'

"A Getting the top soil in.

"Q No; I am asking you about what was to be paid for it.

"A That was not my understanding of it.

"Q I asked you about it and you said 'We said we'd take care of it when it was over with, but something had to be done on that.'

"A That is right, yes.

"Q But there was no discussion or no authorization for him to do this work?

"A No.

"Q And he went ahead on his own and did it with-

out any discussion with you as to how it was to be done—how high, or anything else?

"A That is right, yes." (R. 140 and 141)

In view of the above testimony, the court found (Finding No. 5):

"The court further finds that defendant received a benefit from the planter boxes and to avoid unjust enrichment plaintiff should be awarded payment of same based on quantum meruit, and the court further finds there were one hundred and seventy-five blocks placed in the planter and defendant should pay for said blocks the wholesale price of seventeen cents each for a total of \$29.75; the court further finds that top soil sells for \$12.50 per load, but that plaintiff agreed to furnish the top soil for the planters for \$10.00 per load, and plaintiff furnished two loads of top soil for a total of \$20.00; it required the time of two men for six hours to construct the planters, at a wage of \$2.50 per hour, for a total of \$30.00; and the court finds that plaintiff should be awarded in quantum meruit the sum of \$79.75 for the planters." (R. 31)

The court made a finding (No. 2) as follows:

"Under the written understanding, plaintiff was to prepare the ground and plant a lawn, and the court finds that plaintiff planted the lawn in a good, workmanlike manner, and that the lawn failed to mature and was blown away because of defendant's failing and neglecting to keep the new lawn watered and wet; and the court finds that plaintiff constructed, under the written understanding, a retaining wall which was satisfactory; the plaintiff also did cement work and constructed a patio to the plans and specifications provided by defendant; that part of the cement in the patio is cracking and no evidence was received by the court as

to the damages which defendant would suffer by reason of defective surfacing of the patio, but plaintiff and defendant stipulated at the pretrial that a reasonable amount to allow defendant would be the sum of \$50.00; and the court, therefore, finds that plaintiff is entitled to a judgment for the sum of \$893.00 as prayed for in his complaint, less the \$50.00 for the defective surfacing, or \$843.00 on the written agreement." (R. 30-31)

The above finding was based upon the testimony of a witness for the defendant-appellant, Willard Erickson, a Landscape Architect for Western Garden Center (R. 169, line 29).

In relation to the occupation of the plaintiff-respondent and as to what he represented himself to be, the defendant-appellant testified as follows:

"Q Now, how did you come to choose Mr. Butterfield?

"A Through the yellow pages of the telephone directory.

"Q What was he listed under?

"A I think it is L. O. Butterfield Landscaping." (R. 91)

STATEMENT OF POINTS

POINT I.

THE COURT WAS NOT IN ERROR IN ITS FINDING THAT THE WRITTEN CONTRACT WAS ENFORCEABLE.

POINT II.

THE COURT WAS NOT IN ERROR IN ITS FINDING THAT THE PLAINTIFF CAME UNDER THE EXEMPTION PROVIDED IN 58-23-2(2) (6), UTAH CODE ANNOTATED 1953, AS AMENDED BY SESSION LAWS 1957, CHAPTER 115, PARAGRAPH 2, AND SESSION LAWS 1961, CHAPTER 137, PARAGRAPH 2, AS FOUND IN THE 1961 POCKET SUPPLEMENT TO VOLUME 6, U.C.A. 1953.

POINT III.

THE COURT ERRED IN NOT ALLOWING PLAINTIFF ATTORNEY'S FEES.

POINT IV.

THE COURT ERRED IN REFUSING THE TENDER OF PLAINTIFF OF EVIDENCE WHICH WOULD HAVE FURTHER EXPLAINED AND STRENGTHENED THE POSITION OF PLAINTIFF.

ARGUMENT

POINT I.

THE COURT WAS NOT IN ERROR IN ITS FINDING THAT THE WRITTEN CONTRACT WAS ENFORCEABLE.

POINT II.

THE COURT WAS NOT IN ERROR IN ITS FINDING THAT THE PLAINTIFF CAME UNDER THE EXEMPTION PROVIDED IN 58-23-2(2) (6), UTAH CODE ANNOTATED 1953, AS AMENDED BY SESSION LAWS 1957, CHAPTER 115, PARAGRAPH 2, AND SESSION LAWS 1961, CHAPTER 137, PARAGRAPH 2, AS FOUND IN THE 1961 POCKET SUPPLEMENT TO VOLUME 6, U.C.A. 1953.

Points I and II are so interrelated that they will be argued together.

As clearly shown by the evidence, the court was not in error in finding that the written contract was enforceable. The contract contained three separate jobs. Paragraph 3 provided for the planting of the lawn at a cost of \$505.00. This clearly comes within the exemption of 58-23-2(2), Utah Code Annotated 1953, as amended by Session Laws 1957, Chapter 115, paragraph 2, and Session Laws 1961, Chapter 137, paragraph 2, as found in the 1961 Pocket Supplement to Vol. 6, U.C.A. 1953:

"Any construction or operation incidental to the construction and repair . . . to farming, dairying, agriculture, viticulture, horticulture . . ."

Paragraph 1 provided for the construction of a retaining wall for \$150.00, and paragraph 2 of the contract provided for the construction of a patio at \$238.00. The total contract price for all three items was \$893.00. Items 1 and 2 come clearly under the definition of work for which a contractor must have a license, and were it not for the exemption provided in para-

graph 6 of 58-23-2(6), Utah Code Annotated 1953, as amended, *supra*, this contract would not be enforceable. The exemption is as follows:

"Any work or operation on one undertaking or project by contract or contracts performed directly or indirectly by one contractor, the aggregate contract price for which, for labor, materials and all other items is less than one thousand dollars, such work or operations being considered as of a casual, minor or inconsequential nature."

There cannot be any question that this written agreement, the first contract, came within the exemption, even without applying exemption (2) on the law. The total being \$893.00, it did not exceed the exemption in (6).

Now on the question of the second oral agreement for \$1,000.00, the record shows that at about the time the project which was contained in the written agreement was being completed, a contractor came up to bid on a chain link fence. Up to that time, defendant-appellant had planned on having a link fence. The bid for this type of fence was too high, and the defendant-appellant then asked plaintiff-respondent to bid on a cement block fence and a redwood fence with gates. Plaintiff-respondent gave him a bid of \$1,000.00. The trial court considered this oral agreement a new and separate project and one not contemplated at the time the written agreement was entered into (see argument under Point IV).

The facts and evidence show that even defendant-appellant considered this a different project; and as the block fence was satisfactorily completed, he paid for that work. This oral agreement was fully performed and fully paid for. No issues were

joined concerning this contract and it was never properly part of the litigation.

Defendant-appellant did not even consider the oral agreement as involved in this litigation until after his disposition was taken and they were apparently trying to find some legal basis for not paying a legitimate debt. They discussed that plaintiff-respondent was a landscaper and not a contractor. Building a cinder block fence constituted the work of a contractor. Hence, if the amount exceeded \$1,000.00 a license would be required. This theory in defense will not work unless they can bring in the block fence and lump all the projects together for a total amount in excess of \$1,000.00. When the original contract was entered into, it contained all the things then planned by defendant-appellant and constituted one plan and one project. When defendant-appellant learned that a link fence would cost more than he was prepared to pay, and having seen the good work plaintiff-respondent had done on the retaining wall, he asked for a bid on the block fence and redwood fence. The price being agreeable, they entered into the oral agreement. This was a completely new project not originally contemplated. This project was completed satisfactorily and was paid for and defendant-appellant should not now be permitted to slip it into the litigation for the sole purpose of avoiding payment of a legitimate debt.

Had defendant-appellant properly watered the lawn and it had matured, there perhaps would not have been any litigation. Through the neglect of defendant-appellant (as shown by the record and findings of the trial court), he tries to blame his neglect on plaintiff-respondent and so refuses to pay and this litigation is the result.

Defendant-appellant states in his brief on page 6, "The work agreed upon by the parties hereto was for the general landscaping and improvement of appellant's grounds." If this statement is true and it was all general landscaping, then it would come under exemption (2) set out above, and would not constitute a defense.

Further, on page 6 of defendant-appellant's brief, "while still on the premises with equipment and men and proceeding as agreed, was extended modifications which related to the contract." By no stretch of the imagination was the written agreement modified. The plaintiff-respondent performed the written agreement exactly as provided therein with no changes of any kind, and nothing which he did thereafter in any manner related to the original contract. On page 7 of defendant-appellant's brief, he states, "the Court had difficulty in holding that this was all more than one project." (R. 228) A careful reading of the record will show this was a misunderstanding. All the court was saying was that the written agreement was one project, not that all of the work done on the property was one project.

On the question of the word "project" as used by the statute, I was only able to find two cases, both from Montana. *State ex rel. Turner v. Patch et al.*, 210 Pac. 748 (1922). at page 748:

"The words 'single purpose,' as used in Const. art. 13, paragraph 5, limiting to \$10,000 the liability incurable by a county for a single purpose, means, according to approved usage, one object, project, or proposition; a unit isolated from all others made up of elements which constitute an entity; something complete in

itself, but separate and apart from other objects; 'single' meaning one only, being a unit; alone; detached; one which is abstracted from others; 'purpose' being that which one sets before him to accomplish; an end, intention, or aim, object, plan, proposition, project."

On page 750:

"We do not mean to intimate that commissioners may, by making arbitrary or artificial divisions of work which manifestly constitutes but one project, and by issuing separate warrants to separate contractors for separate units thus created, evade the prohibition of the Constitution, but we do say that in no proper sense of the terms can it be held that, as applied to this road-work, a culvert at Mondak, a cut at Froid, a fill at Culbertson, the removal of an obstruction at Poplar, the repair of a defect at Wolf Point, and the leveling of the surface at Bainville constitute one project, or that warrants severally issued for these separate pieces of work represent an indebtedness or liability for a single purpose, even though these points are all connected by the public roads of the county."

In the *State ex rel. Nelson v. Board of County Commissioners of Yellowstone County et al.*, 109 P.2d 1106 (1941), on page 1106:

"An emergency budget of \$15,000 for general relief purposes in county where 931 persons were dependent upon general relief was not an indebtedness or liability for any 'single purpose' within legislative and constitutional provisions that no county shall incur any indebtedness or liability for any single purpose to an amount exceeding \$10,000 without the approval of a majority of the electors thereof, since whether relief shall be extended to any particular person depends upon facts relating to him alone and not to other persons seeking relief."

POINT III.

THE COURT ERRED IN NOT ALLOWING PLAINTIFF ATTORNEY'S FEES.

The contract provided:

"If the work is completed in a good workmanship manner and is not paid for by August 25, 1959, I agree to pay reasonable attorney's fee and costs." (R. 2)

The pretrial order provided:

"The defendant denies liability, but in the event the Court finds that the plaintiff is entitled to attorneys fees from the defendant, 25% of any amount recovered by the plaintiff, it is admitted by the defendant, would be reasonable." (R. 28)

The purpose of providing for attorney's fees and costs is to provide relief where it is necessary to bring an action to enforce payment. The court awarded judgment for \$843.00 on the written contract and under the pretrial agreement plaintiff-respondent should be awarded judgment for attorney's fees in the amount of \$210.00. No attorney's fees should be allowed on the quantum meruit. Clearly, the intent of the parties was that an attorney's fee and costs would be paid if suit were necessary.

POINT IV.

THE COURT ERRED IN REFUSING THE TENDER OF PLAINTIFF OF EVIDENCE WHICH WOULD HAVE FURTHER EXPLAINED AND STRENGTHENED THE POSITION OF PLAINTIFF.

Defendant-appellant states in his brief, at page 7:

"The Respondent accepted the construction of the cement block wall a short time after he began work on the lawn. He stopped work on the lawn and proceeded with the fence. After completing the fence, he returned to finish the lawn. Appellant respectively submits that this clearly shows the interrelationship of the work."

This statement in defendant-appellant's brief strongly points up the importance of the tender which plaintiff-respondent made as shown in the record:

"Mr. King: It is our position, Your Honor, that this occurred at—this conversation in regards to the wall fence occurred considerably later than what Mr. Chaney testifies to and that the work was materially progressing and had progressed and that it was necessary for Butterfield to haul in clay and prepare the ground here in order to set the footings on it; that had he known that this fence was to be constructed, part of that three loads of material that they had to haul away, of course not the rocks—part of that three loads of material that they had to haul away, he could have taken and used down here as a base for this retaining wall and at a saving in expense and his testimony will be that he had to haul in clay and had to haul in material to form a base to set that cement on for that retaining wall.

"The Court: Well, he knew or should have known that when he signed this." (R. 203)

"Mr. King: My whole purpose in bringing this in was merely to show that had this been—this whole thing been one project, that the project could have been handled and would have been handled in a more economical manner and my purpose in introducing it is to show that it is not the entire thing—the entire thing is not a joint project.

"The Court: If they contended that the oral conversation which brought about the building of the block fence occurred in advance of or simultaneously with the signing of this, then I would permit you to go into it.

"Mr. Cardall: But we do not, Your Honor." (R. 205-206)

And further:

"The Court: Yes, and I must sustain the objection. You may now call Mr. Butterfield back.

"Mr. King: Mr. Reporter, you took the argument and so we make the statements which I made in my argument as a tender and object to the ruling of the Court.

"The Court: And as a tender, the tender is refused." (R. 206)

The purpose of the tender is set out above in the tender itself, and so further additional statements should not be necessary. Even without this evidence, the court correctly found that each of the transactions was a separate project and a separate undertaking, and arrived at the correct conclusion without the necessity of admitting the evidence.

Respectfully submitted,

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