1969

Leo R. Casey v. Nelson Brothers Construction Company : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

LEO R. CASEY,
Plaintiff and Respondent,

vs.

NELSON BROTHERS CONSTRUCTION COMPANY,
Defendant and Appellant.

Case No. 11721

BRIEF OF APPELLANT

Appeal from the Judgment of Third District Court for Salt Lake County Honorable Marcellus K. Snow, Judge

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TABLE OF CONTENTS

POINTS

AUTHORITIES

CASES

TEXTS

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STATEMENT OF THE KIND OF CASE

Plaintiff's complaint claims:

1. Rental for motor grader in the sum of $2,589.30.

2. Damages in the sum of $12,000.00 for the alleged failure and refusal of the defendant to use the motor grader after December 31, 1966.

3. Punitive damages in the sum of $15,000.00. (R28)

Defendant appellant by amended answer denied generally the allegations of the complaint, (R16) and by amended counterclaim, set forth payments made on account of plaintiff which defendant claimed as an offset. (R17-18)

The Fourth Cause of Action set forth in paragraph 13 of defendant's amended answer and amended counterclaim (R19) was stricken on motion of defendant. (R75)

DISPOSITION IN LOWER COURT

District Court held that a net amount due from defendant to plaintiff for rental of the grader to December 21, 1966 was $468.47. (R53) It further held that the defendant failed and refused to use said motor grader after December 21, 1966, and plaintiff was damaged by said failure in the sum of $6,123.00. (R53) Judgment was entered in favor of the plaintiff against the defendant in the total sum of $6,591.47, together with costs. (R42) Defendant appealed from that portion of the judgment based on damages in the amount of $6,123.00 "for defendant's breach of rental agreement on motor grader," from the order denying defendant's motion to amend proposed findings of fact and conclusions of law and judgment and from the order of the court denying defendant's motion for a new trial. (R61)

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of that portion of the judgment of the District Court based on damages in the amount of $6,123.00 "For defendant's breach of rental agreement on motor grader" from the order denying defendant's motion to amend proposed findings of fact and conclusions of law and judgment, or failing that, defendant requests an order remanding said action to District Court for a new trial on the single issue of damages.

STATEMENT OF FACTS. Plaintiff entered into a subcontract and equipment lease agreement with defendant Nelson Brothers Construction Company in August of 1966 (Exhibit P-1). In paragraph 16 of Exhibit P-1 it provides for leasing by plaintiff to defendant of one No. 12 Caterpillar Motor Grader to be operated exclusively by R. E. Casey (Exhibit P-1, paragraph 16). A provision that R. C. Casey be the sole operator was for the benefit of defendant. (R99, lines 3 to 6 and 29-30) Thereafter, the sub-contract was terminated by agreement of the parties (P-4) and a new lease agreement for the use of the motor grader was entered into on October 24, 1966 (Exhibit P-5). In this agreement, a stipulation was included that "the motor grader operator shall perform his duties to comply with Nelson Brothers Construction Company's superintendent," and further

provided that plaintiff could withdraw the machine from the job by giving two weeks' written notice. Complaints were made by the government inspectors of the work done by Robert Casey, Sr. as operator of the motor grader. (R142, lines 21 to 29, R143 lines 24 to 28) Some of Mr. Casey's work had to be done over (R144, lines 24 to 30) and the services of Robert Casey, Sr. were terminated on instructions of Mr. Orin Nelson to Mr. Wardle, superintendent and Mr. Wardle instructed Mr. Stone, his assistant, to terminate him. (R120, liens 7 to 13, and line 22) Mr. Robert Casey's services were terminated on November 18, 1966. (R145, lines 1 to 16) The plaintiff-respondent's motor grader was used by defendant four hours on the 19th of December, 1966, and for eight hours on December 20, 1966 and for four hours on December 21, 1966, when plaintiff came and took the motor patrol at 12:00 o'clock noon. (R146, lines 5 to 12) to an unannounced and undisclosed destination. (R140, lines 4 to 7, R170 lines 1 to 4) There was a conflict of testimony as to the reason for plaintiff taking the motor grader away from the job. The court found that defendant ordered the plaintiff to remove it from the job. (R44, paragraph 10) Plaintiff took the motor grader and parked it with the Massey-Ferguson dealer in Gallup, New Mexico. (R90, lines 22 and 23) At that time, the plaintiff had a deal pending with Hamilton Construction Company in Gallup, who were bidding on a job, and if successful, they would use plaintiff's equipment and in so doing would make a place for the motor grader.

(R90, lines 24 to 30; R91, line 1 to 12) An Indian operated the motor patrol on December 19, 20 and 21, 1966 and the door had been allowed to swing open and caught on one of the wheels and tore off the door and cracked the windshield, just prior to the removal of the grader. This caused Robert Casey to state when he was asked where he was going with the grader "We're going to get it off the job before that Indian tears it up." (R187, lines 1 to 11) This damage was later repaired at Nelson Brothers' expense. (R 187, lines 12 to 15) Neither the plaintiff nor his father Rober Casey ever told the defendant or any of its employees or disclosed the location of the motor grader after the removal. (R140, lines 4 to 7 and R198, lines 13 to 21) Prior to and at the time that the grader was removed from the defendant's construction site, plaintiff had a deal pending with Hamilton Construction Company in Gallup who were bidding on a job, and if they were successful, they would use plaintiff's equipment, and would thus make a place for the use of the grader. (R90, lines 19 to 30 inclusive, R91 lines 1 to 14)

Forty-one thousand six hundred twenty-three (41,623) tons of sub-base and some gravel was put down up to December 21, 1966 while plaintiff Casey's motor grader was used together with Stone's grader, (R184, lines 1 to 21) 12,381 tons on plaintiff's original subcontract and 29,242 more tons between October 24, and the 21st day of December, 1966. (R183, lines 27 to 30 and R184, lines 5 to 21) 47,000 tons were put down

after December 21, 1966 (R185, lines 3 to 5). 46.966% of the tons of the sub-base and gravel was laid down up to December 21, 1966. 47,000 tons or 53.034% of all sub-base and gravel was laid down after December 21, 1966. Tonnage-wise the gravel laid down after December 21, 1966 was 112.9% of the tonnage of sub-base and gravel laid down prior to December 21, 1966.

ARGUMENT

POINT NO. 1: THE DISTRICT COURT ERRED IN ALLOWING "DAMAGES FOR DEFENDANT'S BREACH OF RENTAL AGREEMENT ON MOTOR GRADER" IN THE SUM OF $6,123.00 OR FOR ANY SUM WHATEVER.

A. DEFENDANT HAD FULL AUTHORITY TO TERMINATE THE SERVICES OF R. E. CASEY.

The original subcontract and equipment lease covered the lease of the motor grader in paragraph 16 and provided that it "is to be operated exclusively by R. E. Casey, and that contractor shall pay $10.50 an hour for its use, but in the event that R. E. Casey was incapacitated or otherwise unable to operate, then the rate to be paid for use of said grader with another operator to be selected and paid by contractor would be reduced to $8.50 per hour." (Exhibit P-1) This was thereafter terminated (Exhibit P-4) and a "lease agreement" was entered into October 24, 1966 (Ex-

hibit P-5) This also provided that the grader was "to be operated exclusively by R. E. Casey, Sr., whose wages shall be paid by Nelson Brothers Construction Company. *The motor grader operator shall perform his duties to comply with Nelson Brothers Construction Company Superintendent.*" (Emphasis added) It thus appears clear that defendant could terminate the services of R. E. Casey, Sr., if he failed to perform his duties to comply with their requirement. In addition, the plaintiff stated "that's immaterial to me who operates it (the motor grader), as long as Nelson's were satisfied." (R99, lines 27 to 30)

R. E. Casey's services were terminated November 18, 1966. (R145, lines 2 to 16) Mr. Strong was the assistant superintendent and was instructed by superintendent, Mr. Wardle, to terminate Robert Casey. (R120, lines 18 to 22).

B. PLAINTIFF WITHDREW FROM AND ABANDONED "LEASE AGREEMENT" DATED OCTOBER 24, 1966 BY REMOVING THE MOTOR GRADER FROM THE WORK SITE AND NEVER INFORMING THE DEFENDANT OF ITS LOCATION, OR THAT IT WAS AVAILABLE FOR USE BY DEFENDANT AND THUS FORECLOSING ANY POSSIBILITY OF DEFENDANT'S USE OF THE SAME.

Based on conflicting evidence, the court held that the defendant ordered plaintiff to take the motor grader off the job. (R54) Plaintiff removed the motor grader from the job on the 21st day of December, 1966. Mr. Robert Casey actually drove it from the site of the contract to an unannounced and undisclosed destination. (R145, lines 17 and 18, R146, lines 11 to 12, R140, lines 4 to 7, R170, lines 1 to 4)

The Findings of Fact do not specify the time that the defendant allegedly ordered plaintiff to take the motor grader off the job. The plaintiff testified it was on December 21st, 1966, the date that it was removed from the job. Other witnesses testified that Mr. Nelson was on the job on the 13th of December, but did not recall seeing him on th 21st of December, and thought that he would have known about it. Mr. Orin Nelson, officer of the defendant company, stated that he was there on the job on the 11th or 12th of December (R168, lines 8 to 13) and on the 17th of December, 1966. Defendant wanted to use the Casey grader but not being certain that they could use it without using Mr. Robert Casey as the operator, sent a letter addressed to Leo Casey, Casey Construction Company, c/o Zia Motel, Gallup, New Mexico, asking him generally about using the patrol. The original was never returned to the defendant. (R177) Receipt of this letter could have triggered the desire in plaintiff to remove the motor grader from the job. Plaintiff, at the time, was living at Zia Motel in Gallup. Plain-

tiff denies receiving the letter. (R108, lines 16 to 25) It clearly appears that the plaintiff had selfish reasons for removing the motor grader, and he stated on direct examination that he had a deal pending with Hamilton Construction Company in Gallup. They were going to bid on a job, and if they were successful in getting it, they would use plaintiff's equipment and in so doing could make a place for the motor grader. That negotiation was under way prior to December 21, 1966. (R90, lines 22 to 30, and R91, lines 1 to 8) In any event, plaintiff moved the motor grader and, unbeknown to defendant parked it at the Massey-Ferguson dealer in Gallup, (R90, lines 19 to 23, R140 lines 4 to 7, R170, lines 1 to 4) which was some thirty miles away from the job site. (R90, lines 19 to 23, R78, lines 2 and 3) Plaintiff never at any time informed the defendant or any of defendant's employees where the motor grader was taken, either the town or the premises within a town. (R140, lines 4 to 7, R170, lines 1 to 4, and R171, lines 14 to 16) It would have been impossible for defendant to use the motor grader after the 21st day of December, not knowing the lot where it was located, and in fact not even the town that it had been taken to. If the plaintiff claimed that the lease agreement was still in effect, it would be incumbent upon him to inform the defendant that he was holding the motor grader subject to the terms of the lease agreement, where it was located and that they could use the same as provided in the lease with any operator that was satisfactory to the defendant Nelson Brothers

Construction Company. Taking the motor grader to an unannounced and undisclosed destination was wholly inconsistent with the existence of the contract and defendant was powerless to do anything but acquiesce. This falls within the rule that a contract will be treated as abandoned where the acts of one party inconsistent with its existence are acquiesced in by the other. See *Monroe vs. Fetzer,* 350 P.2d 1012 (Wash.) The contract may be mutually abandoned by the parties at any stage of its performance or before any performance has commenced, and by such abandonment each party is released from any further performance, (as in the instant action) or each party is released from any performance at all. *Honda vs. Reed,* 319 P. 2d 728 (Calif.) See also *Ferris vs. Blumhardt,* 293 P. 2d 935 (Wash.) In the case of *Jensen vs. Chandler,* 291 P. 2d 1116 (Idaho) the court said in part as follows:

> "A contract may be discharged by conduct as well as by words. 12 Am. Jur. Contracts 1011, Sec. 431. An abandonment of a contract by consent may be implied from acts of the parties. *Thompson vs. Municipal Bond Company,* 23 Calif. App. 2d 402, 73 P. 2d 274. *Treadwell vs. Nickel,* 194 Calif. 243, 228 P. 25.
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> "A rescission by consent is implied by refusal of one party to comply with the contract, in which refusal the other party has acquiesced. Carter vs. Fox, 11 Calif. App. 67, 103 P. 910; *Mettler vs. Vance,* 30 Calif. App. 499, 158 P. 1044.
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> "A contract will be treated as abandoned where the acts of one party inconsistent with its exist-

ence was acquiesced in by the other party. *Hobbs vs. Columbia Falls Brick Co.*, 157 Mass. 109, 31 N. E. 756. *Herpolsheimer vs. Christopher,* 76 Neb. 352, 107 N. W. 382, 111 N. W. 359, 9 L.R.A., N. S. 1127; *Kingman Colony Irr. Co. vs. Payne,* 78 Or. 238, 152 P. 891; 17 C.J.S., Contracts, para. 389, P. 882.

"It is generally held that it is a question of ultimate fact as to whether a contract has been abandoned or mutually rescinded."

The above portion of the opinion in *Jensen vs. Chandler,* supra, was quoted with approval in the case of *Copenhaver vs. Lavin,* 448 P. 2d 774 (Idaho). The case of *Griffin vs. Beresa, Incorporated,* 300 P. 2d 31 (Calif.), has facts that are more similar to the case at hand than most of the cases above quoted. Griffin performed work, labor and furnished material to defendant for the construction of septic tanks and drains on defendant's property. There had been some misunderstanding as to financing and the quality of plaintiff's work was questioned and the defendant took over the job, including the personnel and equipment which Griffin had on the site. After Griffin went there and insisted that he had fully performed his contract and he was willing to go forward and complete it, nevertheless, he, after some conversation with appellant's supervising officers withdrew his equipment and surrendered the job. The court stated in part of its opinion as follows:

"An abandonment of a contract may be implied from the acts of the parties, [redacted]

[redacted] and this may be accomplished by the repudiation of the contract by one of the parties and the acquiescence of the other party in such repudiation, and words of the parties to the effect that they are mutually rescinding the contract are not necessary. *McCreary vs. Mercury Lumber Distributors,* 124 Cal. App. 2d 477, 486, 268 P. 2d 762."

Attention also is invited to 17 Am. Jur. 2d, paragraph 484, Abandonment, at page 954.

Findings of Facts state "defendant failed and refused to use said motor grader after December 21, 1966" (R53, para 6, lines 6 and 7) It appears that this was based on the Finding No. 10 that defendant ordered plaintiff to take the motor grader off the job. (R54) It must, however, be kept in mind that immediately after plaintiff took the motor grader off the job, defendant had to rent two more motor graders to complete the job, and if the plaintiff did not elect to discontinue the agreement, it was incumbent upon him to notify the defendant that the motor grader was available, and give the location of the same, and that it was available to carry out the terms of the lease agreement. In view of the fact that plaintiff took the motor grader and placed it in a town some thirty miles distance and never notified the defendant where it was located so that defendant would be able to use the same to complete the contract despite plaintiff's protestations now that he did not discontinue the agreement, his actions making it impossible for the defendant to use

the motor grader were inconsistent with his alleged declared desire to continue the agreement; and if it is true that defendant ordered plaintiff to remove the motor grader which defendant does not admit and states is not true, then if this be considered a repudiation of the contract, the taking of the machine which was the subject of the lease agreement, the motor grader, to an undisclosed location can only be an acquiescence by plaintiff in such repudiation. If the plaintiff wished to continue with the agreement and intended to charge the defendant with the rental to become due, it was incumbent upon the plaintiff to keep the motor grader available for use by the defendant. His failure to do this was clearly an acquiescence in the action of the defendant alleged by plaintiff that the defendant ordered him to remove the motor grader from the job. If the view is taken that defendant did not order the motor grader from the job, the results are the same. The motor grader was being used and was used up until noon of December 21, 1966, the day that it was removed from the job. This was known by the plaintiff because of the fact he questioned the ability of the operator who was handling the motor grader, and clearly the removal would be a breach by plaintiff and under these circumstances the action or non-action of the defendant would be considered acquiescence. In fact, the defendant was not sure that he had the right to use the motor grader when using another operator. Defendant also knew that plaintiff could terminate without cause just by giving notice.

It appears that the plaintiff deliberately moved the motor grader from the work site without informing the defendant of its location so that he would have it available for a job that he hoped would soon come up; that in doing this, he breached the agreement himself, and made it impossible for the defendant to continue using the motor grader, and this despite the fact that the grader was being used on the very day that it was taken from the job, according to the evidence, during the noon hour on December 21, 1966.

See cases cited in *Sauder vs. Dittmar,* 118 F. 2d 524, key numbers 9 to 12 inclusive at page 530. See also *Wallace vs. Build, Inc.,* 16 Utah 2d 401, 402 P. 2d 699, which cites the case of *Monroe vs. Fetzer,* supra. Also see *Pitcher vs. Lauritzen,* 18 Utah 2d 368, 423 P. 2d 491.

C. DAMAGES WERE EXCESSIVE EVEN IF IT WAS ASSUMED THE AGREEMENT WAS NOT ABANDONED NOR WITHDRAWN FROM BY PLAINTIFF.

Mr. Nelson testified that the completed tallies shown in charge-order No. 4 showed that 12,381.1 tons were laid down and were handled by the two graders up to the termination of the subcontract on October 24, 1966, and that 29,242 tons were laid down between October 24 and the 21st day of December, 1966, for a total tonnage of 41,623 tons handled by the Casey Motor grader and the other motor grader on the job

up to December 21st, 1966 (R184) There were 47,000 tons requiring the use of motor graders after the 21st of December, 1966, (R185, lines 1 to 7) for a total of 88,623 tons, and this makes 41,623 tons involved with the Casey and Stone motor graders, which amounts to 46.96% of the total. According to the uncontroverted testimony of Mr. Orin Nelson, the bulk of the grading was done when the Casey grader was used on the job, (R185, lines 14 to 17, R186, lines 1 to 9) but assuming that the same number of hours per ton would be required, which gives the advantage to the plaintiff, according to the only testimony on record in this respect, 53.04% of the job that was done after the 21st day of December would then require a total of 393.05 hours, and using plaintiff's figure of $9.00 an hour, damages would not be more than $3,537.45. The judgment given by the court for damages of $6,123.00 exceeds this by $2,585.55 and there is no testimony controverting the exact figures testified to by Mr. Nelson.

POINT NO. II: THE DISTRICT COURT'S ERRED IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL.

Defendant's motion for a new trial was based on (a) accident or surprise, which ordinary prudence could not have guarded against; (b) to newly discovered evidence, material for the defendant which it could not with reasonable diligence have discovered and produced at the trial under the circumstances; and (c)

excessive damages appearing to have been given under the influence of passion or prejudice. (R49) Affidavit in support of this motion of the attorney for defendant more fully sets forth the grounds of the motion for a new trial.

J. Royal Andreason prepared the original pleadings and handled the case originally until his death. The present attorney for defendant was ill at the time the matter came to him, and this cut short the time to prepare for the case. The grounds (a) and (c) are submitted on the affidavit above referred to.

The newly discovered evidence, material for the defendant, consists of records which the affiant was not able in the limited time available to discover which show that one grader was rented from Russ Caterpillar for one month, December 22, 1966 to January 22, 1967, for $1,000.00 and was used for a total of 149 hours, in which time all of the balance of the work contemplated by the contract with plaintiff was completed, including all the gravel laid and graded to allow the subcontractor Wrockloff & Garner to complete the installation of the road mix bituminous surfacing on the road. If the Casey grader were used for the 149 hours required to finish the job at $9.00 per hour would make the total damages $1,341. Defendant submits that the plaintiff is entitled to no damages whatsoever, but that he could not justify damages in excess of $1,341.

POINT NO. III. THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MO-

TION TO AMEND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT AS SET FORTH IN PARAGRAPHS 3 TO 12 INCLUSIVE OF SAID MOTION.

Paragraphs 3 to 7 of said motion covered undisputed facts testified to at trial or contained in admitted exhibits. Paragraphs 8 to 12 of said motion had to do with the main issue of damages, which has been previously discussed in this brief.

It is submitted that paragraphs 3 to 7 of said motion should be granted as a matter of course because they covered undisputed facts testified to at the trial, or contained in admitted exhibits.

Paragraph 8 of said motion asked that the court find that the plaintiff had abandoned the contract. results would appear to be the same whether plaintiff abandoned the contract or acquiesced in the repudiation of the contract by defendant; and regardless of plaintiff's insistence that he did not withdraw from the contract, the fact still remains that plaintiff removed the motor grader to a city unknown and to an unknown location in the unknown city, and never at any time advised the defendant that it was available for its use. It appears that plaintiff's protestations that it didn't make any difference to him who operated the grader just so it satisfied the defendant, Nelson Brothers Construction Company, is not carried out by his action.

It is further pointed out that it was virtually impossible to get hold of the plaintiff, and if the plaintiff really intended to stay with the contract, it was incumbent upon him to notify the defendant that he was holding them on the contract, that the motor grader was available at the definite location for the defendant to use in accordance with the lease agreement. This was not done and the location of the motor grader on any lot or even the city it was located in was never divulged to the defendant. It is submitted that this is in fact abandonment of contract by the plaintiff, or it was an acquiescence in the repudiation by the defendant if plaintiff's testimony is believed. A motion to strike paragraphs 9, 10, 11, and 14 and to strike paragraph 15 of Conclusions of Law and substitute another paragraph therefor, and to amend paragraph 16 and the judgment are all based on the facts previously discussed.

SUMMARY

If the defendant did in fact tell plaintiff to get the motor grader off the job, then clearly the action of plaintiff in removing the same was acquiescence and with greater finality by the taking of the motor grader to an unannounced destination, either as to city or location within a city is an act that is wholly inconsistent with the existence of the contract. The same result is reached if the defendant's view is taken that defendant did not order the removal of the motor grader, and, therefore, the removal was an abandon-

ment by the plaintiff, which abandonment the defendant was forced to acquiesce in, first, because the location of the motor grader was unknown to defendant, and second, because the defendant was not certain that he had absolute right to use the motor grader when not using R. E. Casey as the operator. Furthermore, defendant was aware that under the terms of the lease agreement, plaintiff could withdraw by giving two weeks' notice in any event, so defendant was not certain that plaintiff would allow defendant to use the motor grader to complete the job. Defendant is entitled to a judgment reversing that portion of the judgment of the District Court based on damages in the amount of $6,123 "for defendant's breach of rental agreement on motor grader," or failing that:

A. That an order be entered remanding said action to the District Court for a new trial only as to damages suffered by plaintiff due to defendant's alleged failure and refusal to use said motor grader. Or failing that;

B. That an order be entered reducing the element of damages from $6,123 to $3,537.45 as the only amount supported by definite figures produced at the trial.

Respectfully submitted,

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