1969

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

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 RESPONDENT

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

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DISPOSITION IN LOWER COURT

In awarding the plaintiff judgment, the lower court allowed the defendant an offset of $1256 for gasoline used by plaintiff in the performance of a subcontract despite an accord and satisfaction (R. 53).

RELIEF SOUGHT ON CROSS APPEAL

Plaintiff by its cross appeal seeks an increase in its judgment increasing the amount awarded by the sum of $1256 on the grounds that there was a settlement, compromise, satisfaction and release of defendant's claim in that amount (P. 4).

STATEMENT OF FACTS

The statement of facts contained in appellant's brief is inaccurate largely in that it omits facts upon which

the findings of fact made by the lower court were based. The facts can be briefly stated as follows:

In August 1966 the parties executed an instrument consisting of two agreements, one being a lease of a grader, and the other being a subcontract for construction work (Ex. P.1).

Under the grader lease and a later modification thereof $3513.25 accrued to plaintiff for the time it was used. Offsets totaling $1788.78 were allowed to which neither party is objecting herein. The grader lease provided that it would be used by defendant until a project for the Bureau of Indian Affairs was completed. Defendant failed and refused to use it after December 21, 1966, and ordered plaintiff to remove the grader from the job site (R. 90, 119, 120, 129, 146, 155). The agreed rental to be paid was $9.50 per hour. The project on December 21, 1966 was no more than one-third completed, insofar as motor grader work was concerned, and had said grader been used until the completion of the project, it would have been used at least an additional 697 hours (R. 93, 122). Plaintiff would have incurred expenses of 50¢ per hour had said machine been used the additional 697 hours. Plaintiff was damaged by defendant's failure and refusal to use said motor grader in the sum of $6123 (R. 53).

Under the subcontract agreement, plaintiff performed certain work, but on October 24, 1966 the parties entered into an accord and satisfaction terminating the subcontract (R. 54 Par. 8). Despite the accord and satis-

faction (Ex. P. 4), the court allowed defendant to offset, against plaintiff's claim on the grader lease, the value of gasoline made available by defendant to plaintiff in the performance of the subcontract in the amount of $1256 (R. 53).

Specific misstatements or implications in defendant's statement of facts are hereinafter commented upon.

It is stated complaints were made by government inspectors about work done by plaintiff's father, Casey, Sr., as operator of the motor grader and that some of the work had to be done over. Other work had to be done over also. This is to be expected on construction jobs (R. 155), but particularly was this not unusual on this job, because the inspectors were "going by the book" and requiring the "impossible" (R. 128-9). It is true that the motor grader operator was to perform his duties to comply with defendant's superintendent's requirements. The superintendent was Wardle (R. 114), and in Wardle's opinion, Casey, Sr.'s work was sastifactory (R. 117, 123, 128, 129).

It is stated that Orin Nelson, Vice President of the defendant, ordered the termination of Casey, Sr.'s employment. This was over the protest of the superintendent (R. 120). This order, and defendant's ordering plaintiff to remove his grader were for the selfish purpose of using a different grader, whose bankrupt owner was indebted to defendant, thereby liquidating an uncollectable account (R. 119, 120, 129, 146, 153).

When the superintendent objected, on the grounds that such business practice was unethical, Nelson's reply was he "had never had honor or ethics, either one, put a slice of bread on his table." (R. 122) This was one of many agreements on the Hunter's Point job that were "all being thrown to one side by Mr. Nelson" (R. 128).

It is stated that Casey, Sr.'s services were terminated on November 18, 1966. Casey, Sr. testified that he was then only laid off temporarily while all work was shut down (R. 108, 193).

It is stated that plaintiff came and took the motor grader to an unannounced and undisclosed destination. The court found (R. 54) that this was merely in compliance with the order of the defendant to "get this grader the hell off the job" (R. 90, 119, 120).

It is stated that plaintiff had a deal pending with a third party for the use of the grader on another job. The prospective deal was for the use of equipment other than the grader (R. 91).

It is stated that Casey, Sr. said, "We're going to get it off the job before the Indian tears it up." This was Athol Stone's testimony, a witness for the defendant (R. 187). Casey, Sr.'s version of the incident was as follows: "Now, then I said to him, 'What's that Indian doing on that patrol?' and I said. 'Well, why ain't I on it?' and he said, 'Well, you don't need to worry about that job, that patrol.' He said, 'I'm laying it off anyway. I'm boing to use Mr. Stone's blade because he

owes me some and I'm trying to get a little caught up on it, a little of that money' " (R. 195).

It is stated that the location of the motor grader, after removal, was not disclosed. There is no evidence that defendant, after ordering the removal of the grader, ever changed its position that the grader would not be used on the job, and therefore there can be no inference that knowing or not knowing of the location of the grader made any difference.

It is stated that certain tonnages of material were used before and after defendant ordered the grader removed. The implication is that the court's finding of fact that the job was one-third completed (R. 53) is in error. Other witnesses testified that the job was only one-fifth completed (R. 93, 122). Furthermore, tonnage used is not the only criterion of work remaining. The grader was to be used not only to spread gravel, but also for mixing, shoulder work and ditch work (R. 122).

ARGUMENT

POINT I.

PLAINTIFF IS ENTITLED TO DAMAGES FOR FAILURE TO USE THE MOTOR GRADER.

Defendant argues that there was authority to terminate Casey, Sr.'s employment and that he was terminated. The implication is not stated, but we assume that the implication is that this somehow justifies the breach of contract to use the grader for the entire job.

Casey, Sr. was the employee of the defendant. His work was satisfactory to the superintendent, but the

vice president of the defendant ordered the superintendent to terminate him. Although the word apparently didn't get down to Casey, Sr. himself, who says he had been only temporarily laid off, even assuming he was fired, and that the firing was because of poor operation, which is also not supported by the evidence, Casey, Sr., was the defendant's employee and by its own voluntary act of firing its employee defendant can't justify his breach of contract to use the grader.

Defendant argues that it didn't know whether it had permission to continue to use the grader after the alleged firing of Casey, Sr., and assumably justifies its failure to use the grader because of its uncertainty as to whether it could be operated with another operator. The evidence is that plaintiff didn't care who operated it as long as defendant was satisfied (R. 99), and that it was the defendant who had wanted Casey, Sr., as an operator (R. 116). But, more importantly, according to defendant's own testimony, after defendant had fired Casey, Sr., and without any approval from plaintiff, defendant continued to use the grader with another operator (R. 178). It hardly, therefore, is believable that the grader was not used through the completion of the job because of uncertainty as to the right to do so without a particular driver. Furthermore, defendant's own superintendent testified that his vice president in charge, Orin Nelson, told him to fire Casey, Sr., and get rid of plaintiff's grader so that the claim the defendant had against the assistant superintendent's bankrupt company

could be worked out by using its grader (R. 90, 119, 120, 129, 146, 155).

Defendant argues that the evidence was conflicting as to whether or not defendant had ordered plaintiff to take the motor grader off the job. Conflicting evidence was resolved in palintiff's favor by the lower court (R. 54), and based thereon this court must affirm.

Defendant argues that negotiations by plaintiff with a third party for contract work *could* "have triggered the desire in plaintiff to remove the motor grader." The testimony was that plaintiff had no intent to use the grader on any other job until after defendant had breached the contract (R. 107). There were negotiations for or the use of *other* equipment and there thus was a possibility of using this grader also on that job after defendant told plaintiff to get the grader off its job (R. 90). In fact, that other job didn't materialize because the third party did not become the low bidder (R. 91). Yet, defendant asks this court to reverse the lower court because of a speculative possibility, when the lower court had positive evidence before it and made a finding theeron in opposition to defendant's contentions.

Defendant argues that plaintiff abandoned the contract when, upon being told by defendant, "you can get this grader the hell off the job," he did so.

We concede as a matter of law there *can* be an abandonment of a contract:

> "However, mutual abandonment, cancellation, or rescission must be clearly expressed, and acts and conduct of the parties to be sufficient must be positive, unequivocal, and inconsistent with the existence of the contract." 17 A, CJS, Contracts, Par. 389.
>
> "Where there has been a material breach of a bilateral contract, the injured party may ordinarily treat his own duty as discharged and enforce a right of action against the wrongdoer. Unless there is repudiation, or circumstances make such a course impossible, the injured party may, however, if he sees fit, continue performance of the contract and nevertheless enforce a right of action against the wrongdoer for the injury caused by the breach. Under the rule of the Section a third course is open to the injured party — the entire termination of the contract. As a matter of logical reasoning, it will always be more profitable to the injured party to accept his own discharge and retain a right of action against the wrongdoer than to assent to a termination of all duties arising from the contract —". 2 Restatement of the Law of Contracts, Par. 410, comment b.

Defendant argues that compliance with the order to remove the grader somehow became a mutual rescission. The court found

> "The rental agreement entered into August 1966, as amended October 24, 1966, relating to said motor grader was not terminated by plaintiff nor did plaintiff breach said agreement, nor did he elect to discontinue said agreement. — The removal of the motor grader from defendant's job was at the direction and instance of defendant. Plaintiff did not withdraw from the motor grader

> rental agreement and did not terminate same. Defendant ordered plaintiff to take the motor grader off the job" (R. 53-54, Pars. 7, 9, 10).

This is supported by the evidence and this being an action at law the findings of the lower court are conclusive.

POINT II.
DAMAGES ARE NOT EXCESSIVE.

It is argued by defendant that the "uncontroverted testimony of Mr. Orin Nelson" shows that only 53.04% of the job remained to be done whereas damages awarded were based upon the fact that two-thirds of the job remained unfinished at the time of the breach.

One fallacy is that the testimony of Orin Nelson was controverted. His own superintendent said that four-fifths of the work remained to be done (R. 122). Plaintiff also so testified (R. 93).

Another fallacy is that tonnage of material used thereafter is not the only criterion of grader work to be done. The grader work, in addition to spreading gravel, included mixing, shoulder work and ditch work (R. 122).

As shown by the findings of fact, the damages in the amount of $6123 were computed as follows:

> "Defendant failed and refused to use said motor grader after December 21, 1966. The agreed rental for the period after December 21, 1966 was $9.50 per hour. The project on December 21, 1966 was one-third complete insofar as motor grader work was concerned and had said

> grader been used until the completion of the project, it would have been used an additional 697 hours. Plaintiff would have incurred expenses of 50¢ per hour had said machine been used the additional 697 hours. Plaintiff used reasonable efforts to mitigate his damage and used the grader for snow removal from which he realized the sum of $150.00 which was the maximum amount he could have realized by the exercise of reasonable efforts. Plaintiff was damaged by defendant's failure and refusal to use said motor grader in the sum of $6123, which sum is owed by defendant to plaintiff."

The testimony supporting the various factors is found in the record, as follows:

> Rental of $9.50 per hour (Ex. P.5).
> Project only one-third complete (R. 93, 122).
> Additional future use at least 697 hours (R. 93-96).
>
> Expenses of 50¢ per hour (R. 94).
> Mitigation of damages (R. 91).
> (Computation: 697 X 9 = 6273 — 150 = 6123)

POINT III.
DEFENDANT'S MOTION FOR NEW TRIAL WAS PROPERLY DENIED.

The first ground for the motion is accident or surprise. The accident or surprise referred to is counsel's being surprised by the court's ruling (R. 43) that counsel's contention, that there was an abandonment of the contract by the plaintiff, was not so. By reading his citations, counsel would have found that, as he cites at page 11 of his brief: "It is generally held that it is a question of ultimate fact as to whether a contract has

been abandoned or mutually rescinded," and thus he should have been prepared for the court's ruling on the facts presented.

The next basis for new trial is newly discovered evidence. The alleged newly discovered evidence relates to the time some other grader, which was used on the job, was operated. The excuse for not having such evidence at the time of the trial is that the attorney first handling the case died, and when trial counsel first took the case he had flu and pneumonia, "but despite the short time to prepare, it was decided to proceed with the trial at the regular setting" (R. 43). The affidavit does not indicate that at the time of trial that counsel was ill and, in fact, it shows that at the time of trial he deemed himself ready and made a decision to proceed. If counsel was not ready, he should have so stated before an unfavorable judgment resulted.

The third ground of the motion is that there were excessive damages, appearing to have been given under the influence of passion or prejudice. Damages well in excess of those awarded are well documented, as described above. Plaintiff's evidence was that 4/5 instead of 2/3 of the work was yet to be done. No damages were awarded for plaintiff's loss of the equipment although it was repossessed by the seller because of plaintiff's inability to keep up the payments, due to defendant's default (R. 91). The breach was intentional, and although punitive damages were sought, none were awarded.

POINT IV.
THE MOTION TO AMEND FINDINGS WAS PROPERLY RULED UPON.

It is argued by defendant that the court improperly denied its motion to amend the findings. Without taking the space to itemize each contention, it can be generally stated that the findings which defendant proposed were inessential, or were based upon conflicting testimony on which the court ruled against the defendant, or were not supported by the evidence. In most instances, the substitution of defendant's proposed findings for those as actually entered would have eliminated essential findings of fact. The court rejected the proposed amendments because it did not concur with defendant's contentions.

POINT V.
PLAINTIFF AS CROSS APPELLANT SHOULD RECOVER AN ADDITIONAL $1,256.

The court reduced the amount claimed by plaintiff by an offset of $1256. The $1256 represented the cost of gasoline ordered by defendant for use on the job at Hunter's Point. The gasoline was sold by American Oil to defendant, not to plaintiff, and was delivered to Hunter's Point where defendant had its contracting job on which plaintiff was a subcontractor. The dates of the sales were September 8 and 14, 1966 (D. 9-10). Both defendant as prime contractor, and plaintiff as subcontractor, had trucks which used gasoline (the grader of plaintiff which was involved in the lease used diesel fuel instead of gasoline) (R. 205). Although, initially, plaintiff furnished his own gas for his trucks, because of

longer hauls due to switching from one pit to another, defendant agreed to and did later furnish plaintiff his gasoline (R. 200, 207). There was some gasoline left in the tanks on October 24 (R. 201). The court found that P4, executed October 24, entitled Termination of Subcontract and Release, related to the subcontract and not to the equipment lease of the grader (R. 54). On October 24, by executing P4, plaintiff and defendant mutually agreed that obligations relating to the subcontract should be settled by the payment to plaintiff of an agreed sum which was received by him. In making this settlement there was no exception made of any bill to American Oil Company of $1256. The effect of letting defendant offset, against plaintiff's claim in relation to the grader, a sum which had been previously incurred in relation to the subcontract work, the accounts of which had been settled by mutual agreement, is to violate the terms of the agreement which the testimony shows, and the court found, settled the subcontract rights between the parties. By reducing plaintiff's recovery, the court has ignored the accord and satisfaction.

SUMMARY

The damages for failure to use the motor grader were supported by the evidence. Nelson's contention seems to be that, having breached the contract by ordering the grader to be removed, he need pay no damages because he didn't have the opportunity to change his mind. Even if the law were such that he was entitled to insist that plantiff keep the grader available in the event

of a change of heart, there is no evidence that he would have used the machine further.

The damages awarded, far from being excessive, are much less than the evidence would have supported.

The parties having already settled their accounts on the subcontract, defendant is not entitled to the offset which the court awarded of $1256 and the judgment should be increased by that amount.

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