1969

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

IN THE SUPREME COURT OF THE STATE OF UTAH

LEO[redacted] R. CASEY,

Plaintiff-Respondent, and Cross-Appellant,

vs.

NELSON BROTHERS CONSTRUCTION COMPANY,

Defendant and Appellant.

Case No. 11721

Reply Brief of Defendant and Appellant

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

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Reed H. Richards
500 Kennecott Building
Salt Lake City, Utah
Attorney for Defendant and Appellant

John W. Lowe
1001 Walker Bank Building
Salt Lake City, Utah
Attorney for Plaintiff and Respondent

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PRELIMINARY STATEMENT

Defendant Appellant takes exception to the misleading statement made by Plaintiff-Respondent and Cross-Appellant under the heading "Disposition in the Lower Court" wherein Defendant-Appellant ends the statement with the words "despite an accord and satisfaction". There was no accord and satisfaction. There was a termination of the sub-contract, and this will be

referred to below under the heading "Statement of Facts".

STATEMENT OF FACTS

Plaintiff-respondent and cross-appellant mistakenly stated that parties "entered into *an accord and satisfaction* terminating the subcontract." (Emphasis added) The document is entitled "Termination of Subcontract and Release". (P. 4)

Paragraph 1 of Exhibit P. 4 rescinded the subcontract.

Paragraph 2 released the subcontractor from performance obligations.

Paragraph 3, the contractor and United States Department of Interior were released from all responsibility, financial or otherwise, to subcontractor under said subcontract, the contractor to be free to perform subcontractor's obligation's.

Paragraph 4, the contractor agreed to pay accounts payable *listed on recapitulation sheet,* Exhibit "A" attached, (emphasis added) and holding subcontractor harmless for amounts due said accounts as shown on the recapitulation sheet, Exhibit "A".

The strong intimation that the other motor grader on the job belonged to Athol Stone (See pages 4 and 5 of Plaintiff-respondent's Brief.) is in error as it was not his, but belonged to a corporation which had been forced

into bankruptcy. (R. 152, lines 28 to 30 and R 153 line 1)

When asked by Plaintiff respondent's counsel "Then you discussed with Mr. Nelson, didn't you, the fact that you could work out the debt by having your patrol used on that Hunter's Point Job?" He answered, "I couldn't do that. I had to account for every hour to the Bankrupt Court. We couldn't pay the debt that way." (R153, line 30 and R 154, lines 1 to 4) Again, when asked by Plaintiff respondent's counsel about such a discussion, Mr. Stone answered, "We couldn't talk about something like this." R 154, line 7) Again, Mr. Stone stated, "I think I told him I had to get permission from the Bankrupt Court and give them an accounting, which we did." (R. 154, lines 10 and 11)

ARGUMENT

POINT I

PLAINTIFF WITHDREW FROM AND ABANDONED "LEASE AGREEMENT" DATED OCTOBER 24, 1966

Attention is invited to the quotation in Plaintiff respondent's brief as follows:

> "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.*" (Emphasis added) 17 A CJS, Contracts, paragraph 389.

Plaintiff respondent's action in taking the motor grader to an unknown and undisclosed location and his refusal and failure to notify Defendant of its location was positive, unequivocal and inconsistent with the existence of the contract. It would have been impossible for the Defendant to have used the motor grader after Plaintiff removed it. This also would apply to the statement quoted by Plaintiff-respondent from Vol. II Restatement of Law of Contracts, paragraph 410, comment B.

POINT II

THE JUDGMENT OF THE LOWER COURT CORRECTLY ALLOWED DEFENDANT-APPELLANT AN OFFSET OF $1256.00

The termination of subcontract and Release (P. 4) is clear and unequivocal. Termination of the subcontract is provided in paragraph 1 of Exhibit P-4, Paragraphs 2 and 3 provide for releases. Paragraph 2 releases the subcontractor (Plaintiff-respondent) from any further performance obligations.

Paragraph 3 releases the contractor (Defendant-appellant) and the United States Department of Interior, Bureau of Indian Affairs from responsibility, financial and otherwise, to the subcontractor (Plaintiff-respondent and Cross-appellant) and the contractor (Defendant-appellant) was free to perform subcontractor's obligations.

Paragraph 4 states that the contractor (Defendant-appellant) agreed to pay the accounts payable, *listed on the recapitulation sheet, Exhibit A,* attached thereto. (Emphasis added) The two bills of American Oil Company against Plaintiff-respondent totaling $1,256.00 were not listed on the recapitulation sheet. This is accounted for by Exhibits "D-9" and "D-10" each for 2,000 gallons of gas. (R 150) Plaintiff-respondent Casey had a tank set up for his gasoline and one for his diesel fuel. (R150) Exhibit "D-9" was signed for by Plaintiff respondent Leo Casey. (R151, line 1) Exhibit "D-10" was recipted for by Rodney Stone (R 151), lines 3 to 8) and it was the usual procedure to have anyone available sign for gasoline delivered to Plaintiff or other subcontractors or Defendant. (R 151, lines 7 to 14 inclusive) Defendant Nelson Brothers paid to American Oil Company $1,256 covering gasoline shown delivered by Exhibits "D-9" and "D-10". (R 164)

The court found in its amended Findings of Fact and Conclusions of Law, paragraphs 4, that Defendant paid the sum of $1,256 for gasoline. Said gasoline was purchased by Plaintiff from American Oil Company for storage of Plaintiff's gasoline used on Plaintiff's subcontract, and that the Defendant is entitled to offset said $1,256 against the amount due as rental (R 56 and 571)

There was more than ample evidence to justify this finding. Attention is also invited to the Exhibit "A" attached to Termination of Subcontract and Release.

(P 4) This shows that the subcontract settlement was $3,200, and that the debits listed therein exceed the credits by $469.48 without considering subcontract settlement, and the $469.48 was subtracted from the $3,200, and Plaintiff-respondent was paid the difference amounting to $2,730.52. It is clear from the manner in which this settlement was arrived at that had the $1,256 been listed as a bill to be paid by Defendant in the future, that would also have been subtracted from the check and would reduce the amount paid to Plaintiff-respondent by that amount.

SUMMARY

Plaintiff - respondent's action in removing the motor grader from the job and taking it to an unknown and unannounced destination, and without ever informing the Defendant of the location of the motor grader was an act that was positive, unequivocal and entirely inconsistent with the existence of the contract. It is clear that Defendant-appellant paid the sum of $1,256 for gasoline sold to the Plaintiff-respondent, and that the Defendant is entitled to an offset in that amount as allowed by the lower court.

Respectfully submitted,

REED H. RICHARDS
Attorney for Defendant-
Appellant
500 Kennecott Building
Salt Lake City, Utah 84111