1966

L.B. Foster Company A Pennsylvania Corporation v. Nelson Brothers Construction Company, A Utah Corporation, and Industrial Indemnity Company, A Corporation : Appellant's Brief

IN THE SUPREME COURT
of the
STATE OF UTAH

L. . B. FOSTER COMPANY
a Pennsylvania corporation,
Plaintiff and Respondent,

vs.

NELSON BROTHERS CONSTRUCTION COMPANY, a Utah corporation, and INDUSTRIAL INDEMNITY COMPANY, a corporation,
Defendants and Appellants,

Case No.
10613

APPELLANT'S BRIEF

Appeal from the District Court of Salt Lake County,
State of Utah
Stewart M. Hanson, District Judge

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STATEMENT OF THE CASE

This is a civil action by a Pennsylvania corporation not authorized to do business in Utah against a general contractor and a bonding company. Plaintiff seeks the unpaid portion of the purchase price together with a reasonable attorney's fee, of materials supplied by the Plaintiff to a subcontractor for installation in the general contractor's project which is a

part of the Interstate Highway System. The complaint is in two counts:

I. Against both defendants under 14-1-6, Utah Code Annotated, 1953 as amended; and

II. Against the general contractor under separate indemnity and guarantee agreement.

DISPOSITION IN THE LOWER COURT

The case was tried to the court sitting without a jury. The court entered judgment against the general contractor for the unpaid purchase price together with a reasonable attorney's fee and held that the Pennsylvania corporation was not doing business in Utah within the contemplation of 16-10-120, Utah Code Annotated, 1953, as amended.

RELIEF SOUGHT ON APPEAL

Defendants-Appllants ask this court to reverse the trial court's determination that the Plaintif Respondent was not doing business in Utah and therefore is precluded from maintaining this action; or that failing, to reverse the trial court's holding that Nelson Brothers Construction Company is liable under the so-called indemnity-guaranty agreement.

or that failing, to reverse the trial court's award of a reasonable attorney's fee to Plaintiff-Respondent under Count II of its Complaint; and to award Defendant-Appellant, Industrial Indemnity Company, a reasonable attorney's fee as the prevailing party under Count I of Plaintiff's Complaint.

STATEMENT OF FACTS

The material facts are presented, substantially, in the argument. This statement of facts, therefore, represents a summary only of the facts and chronological events as they are developed in the record.

Plaintiff below, L. B. Foster Company, is a Pennsylvania corporation not authorized to do business in Utah.

L. B. Foster is engaged in numerous business enterprises throughout the country including the supplying of aluminum railing; steel cross-beams, waivers, sheet piling, etc. for use in construction projects (R. 104, 111, 127, 164, Exhibit D-8).

Defendant Nelson Brothers Construction Company is a Nevada corporation with its principal place of business in Salt Lake City, Utah.

Nelson Brothers, as prime contractor, was successful bidder and was awarded a contract with the

State of Utah to construct, as part of the Interstate Highway System, an overpass in Utah County known as the "North Lehi Project No. IG-15-6 (20) 277, 3rd Contract." Defendant Industrial Indemnity Company furnished the contractors bond on the project.

Bountiful Materials and Construction Company (also known as BOMACO) entered into a Subcontract Agreement dated April 18, 1963, with Nelson Brothers to furnish and install the aluminum railing on the project. (Exhibit P-4) Plaintiff-Respondent furnished the aluminum railing to Bountiful Materials and Construction Company who, in turn, installed them in the project and was paid the agreed sub-contract price except $1,128.00 which was held back pending the outcome of this suit and some set-offs claimed by Nelson Brothers Construction Company against Bountiful Materials and Construction Company (R. 162)

Bountiful Materials and Construction Company failed to pay $2,752.90 of the purchase price for said aluminum railing to L. B. Foster Company. (R. 1, 43)

Reuben Skogerboe was and is employed by Nelson Brothers Construction Company as a "job superintendent."

After completion of this project Plaintiff brought this action for the unpaid portion of the alu-

minum under two counts:

I. Against Nelson Brothers Construction Company and Industrial Indemnity Company under Section 14-1-6, Utah Code Annotated, 1953, as amended, commonly known as the "Little Miller Act"; and

II. Against Nelson Brothers Construction Company alone on the basis that Nelson Brothers Construction Company, by virtue of the fact that Reuben Skogerboe had signed the letter of June 10, 1963, which recites:

* * *

> ...in consideration of our delivery of aluminum bridge rail to BOMACO, INC. on your job site, we ask that you guarantee payment, of our invoice in accordance with the terms of your subcontract with BOMACO, INC. and that we be afforded protection under your bond,...

* * *

had agreed to indemnify and guarantee payment of the purchase price by Bountiful Materials and Construction Company. (R. 1, 2, 42-44)

Defendants denied liability under the "Little Miller Act" on the ground the Plaintiff had not complied with the provisions of said act, compliance being a condition precedent to recovery thereunder; and defendant, Nelson Brothers, denied liability under the so-called "agreement" on the ground that

Reuben Skogerboe did not have authority to bin Nelson Brothers Construction Company under tha agreement.

Both defendants asserted that Plaintiff wa precluded from maintaining this action by virtue o the fact that it was doing business in Utah without certificate of authority, contrary to Section 16-10- 120, Utah Code Annotated, 1953, as amended. (R. 3 5, 42, 44)

At the pre-trial the court dismissed Count as against Nelson Brothers Construction Compan (R. 43,44) and Plaintiff admitted that no certificat of authority was held by Plaintiff. (R. 44)

After trial to the court, Judge Stewart M Hanson gave judgment in the amount of $2,752.9 plus a reasonable attorney's fee to Plaintiff unde Count II of the Complaint and held that Plaintif was not doing business in Utah within the contem- plation of Section 16-10-120. (R. 49-54)

Defendants moved the court for a new trial o in the alternative for an order amending and makin additional findings and conclusions and amendin the judgment accordingly. (R. 55-59) The court de- nied Defendants' motion and this appeal was taken

ARGUMENT

POINT I. THE COURT ERRED IN HOLDING THAT THE PLAINTIFF WAS NOT "TRANSACTING BUSINESS" WITHIN THE STATE OF UTAH AND WAS NOT THEREBY BARRED FROM MAINTAINING THIS ACTION BY ARTICLE XII, SECTION 9, OF THE CONSTITUTION OF THE STATE OF UTAH AND SECTION 16-10-120, UTAH CODE ANNOTATED, 1953, AS AMENDED.

Article XII, Section 9, of the Constitution of the State of Utah Provides:

> No corporation shall do business in this State, without having one or more places of business, with an authorized agent or agents, upon whom process can be served; nor without first filing a certified copy of its articles of incorporation with the Secretary of State.

Section 16-10-120, Utah Code Annotated, 1953, as amended, provides in part:

> ...No foreign corporation transacting business in this State without certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this State, until such corporation shall obtain a certificate of authority....

The court found:

* * *

6. That plaintiff's business in the State of Utah was interstate in nature; that all materials from plaintiff to Bountiful Materials and Construction Company were shipped to Bountiful Materials and Construction Company from outside of the State of Utah and that plaintiff neither had an office in the State of Utah nor agents permanently established in the State of Utah; that plaintiff's salesman was only in the State of Utah two or three times during the year 1963. (R. 51)

* * *

From such finding the court concluded:

* * *

2. That plaintiff was not doing business within the State of Utah within the contemplation of the Statute barring plaintiff to act without first being qualified to do business under the laws of the State of Utah. (R. 52)

* * *

The court failed to make any finding with regard to Plaintiff's activities respecting the inventory of sheet piling although it was specifically requested to do so by the Defendants. (R. 55, 57 58) In so doing the court has ignored uncontroverted evidence that L. B. Foster Company:

1. Maintained a continuing inventory of sheet piling in Utah from before May of 1962 to the time of trial. (R. 104-106, 127, 131-135, 149-151, 158, Exhibits D-8, D-9, D-10, D-11, D-12, D-13, D-14,

D-15)

2. Retained title to all of said sheet piling. (R. 104, 127, 131-132, 149, Exhibit D-8)

3. On at least forty separate occasions from May, 1962, until the date of trial, engaged in transactions involving sheet pilings stored in Utah, either with Utah customers or out-of-state customers. (R. 105, 139, 142, 153, 157-158, Exhibits D-8, D-14, and D-15)

4. Negotiated and contracted for the sale or rental of sheet pilings with such customers and received payments from such customers direct. (R. 105, 109, 125, 139, 157, Exhibit D-8)

5. On a continuing basis, rented storage space in Utah from Bud A. Jensen Company, Shurtliff and Andrews, Inc., and F. B. Truck Line, for the aforesaid inventory of sheet pilings. (R. 104, 106, 127, 131 133, 135, 136, 140, 141, Exhibit D-8.); and

6. Issued periodic directives to Bud A. Jensen Company, Shurtilif and Andrews, Inc. and F. B. Truck Line to load or off-load, crop, maintain, tally, etc., the sheet pilings and compensated said companies therefore, according to a set schedule. (R. 105, 127, 131, 133, 135, 136, 140, 141, Exhibits D-8, D-14 and D-15)

Nelson Brothers Construction Company's sec-

retary-treasurer, Emery Nelson, testified that Nelson Brothers Construction Company paid L.B. Foster Company ~~$6,25.00~~ $6,256.00 for some of the transactions to which it was a party during 1962 and 1963. The witness testified that there would be more than that amount for all of the transactions between Nelson Brothers and L. B. Foster. (R. 158)

There is testimony that the value of the inventory stockpiled in Utah may have reached, at its highest point, "...between eighty and one hundred thousand..." dollars. (R. 138)

Plaintiff seeks to avoid the fact that these activities constitute "transacting of business" in Utah by introducing testimony to the effect that these transactions represent only a small percentage of the total business, or even of the business with Utah concerns done by L. B. Foster. Plaintiff cannot escape the conclusion that for the past four or more years, it has continued to maintain an inventory of goods within the State, has continued to deal with the goods in said inventory and has continued to engage in transactions involving parts of said inventory with customers, both local and out-of-state. Activities of this type have been consistently held to constitute the doing of business within this State. See Mud Control Laboratories vs. Covey, 2 U. (2d) 85, 269 P. (2d) 854. See also the

extensive annotation in What Constitutes Doing Business by a Corporation in States Foreign to the State of its Creation 1965. Corporation Trust Company, pp. 68-69. The authorities compiled therein lead Corporation Trust Company to conclude that:

> A foreign corporation which maintains a stock of goods within a state, from which it makes deliveries to customers in the state, is ordinarily regarded by the courts as doing business and required to qualify. It does not appear to be significant whether the stock is large or small, or whether it is located in a public warehouse, storeroom, office, freight car or any other place
>
> It has also been held that qualification is required where the foreign corporation maintains "spot" stocks strategically located so as to furnish customers with quick delivery. This is true although the bulk of the orders are filled from outside the state.

Moreover, the Plaintiff cannot escape the inevitable conclusion that it has, on numerous occasions, and on a continuing basis over the past four or more years, engaged in the business of leasing and selling personal property in this state. This conduct together with the other factors (retaining title to the sheet pilings, hiring storage facilities, contracting for the protection, maintenance, loading and off-loading of the sheet pilings, etc.) gives rise to the conclusion that I. B. Foster Company was transacting business

in Utah. Western Outdoor Advertising Company vs. Berbiglia, Inc., (Mo.) 263 S.W. (2d) 205. See also What Constitutes Doing Business By a Corporation in States Foreign to The State of Its Creation 1965 supra, pp. 62-63.

It is conceeded that L. B. Foster Company was not authorized to do business in the State of Utah. (R. 44).

Presumably, a substantial sum has accrued to the State of Utah and to the County of Salt Lake for license taxes, sales taxes from the sales and lease transactions conducted in this State, income taxes from the income derived from said sales and rentals, and property taxes on the inventory maintained in the State. Plaintiff's Sales Manager in Charge of Construction Products testified that he did not know if L. B. Foster Company had paid inventory, income or sales taxes in Utah. (R. 129)

The State of Utah has a substantial and legitimate right to tax and license foreign corporations transacting business in Utah and to this end has provided sanctions, penal in nature, to enforce compliance with its licensing requirements: It has denied access to the courts to corporations not in compliance. This court should uphold the State's right to compel compliance and should deny the Plaintiff

access to the courts in this case.

POINT II. THE COURT ERRED IN HOLDING THAT DEFENDANT, NELSON BROTHERS CONSTRUCTION COMPANY, WAS INDEBTED TO PLAINTIFF UNDER COUNT II OF PLAINTIFF'S COMPLAINT.

The trial court in its memorandum decision held that "...the Plaintiff is entitled to recover under the Indemnity and Guaranty Agreement introduced in evidence and as set forth in Count II...." (R. 49)

In the Findings of Fact submitted by the Plaintiff and signed by the court, the court found:

* * *

> 3. That Defendant Nelson Brothers Construction Company executed an Idemnity and Guaranty Agreement under date of October 17, 1963 indemnifying the Plaintiff against failure of Bountiful Materials and Construction Company to make payment to the Plaintiff for materials furnished and sold to Bountiful Materials and Construction Company.
>
> 4. That the Defendant [sic] Reuben Skogerboe, was the superintendent of Nelson Brothers Construction Company and was vested with authority to sign said indemnity agreement...

* * *

At the trial, the court admitted into evidence over Defendants' objections Exhibit P-1, a purported Indemnity and Guaranty Agreement executed by Reuben G. Skogerboe, Supt., for Nelson Brothers

Construction Company under date of October 17, 1963. Defendants did not deny that Reuben Skogerboe signed said Exhibit or that said Reuben Skogerboe was employed by Nelson Brothers Construction Company as a "job superintendent." Defendants vigorously did deny, however, that said Reuben Skogerboe had authority to execute said exhibit or that Nelson Brothers Construction Company was bound thereby. (R. 40, 44, 80-81, 98 and Exhibit P-1) The following transpired in connection with the reception of said Exhibit P-1 into evidence:

> MR. MECHAM: We offer in evidence Plaintiff's Exhibit No. 1, your Honor.
>
> THE COURT: Any objection, Mr. Housley?
>
> MR. HOUSLEY: Your Honor, we object to its admission for the purpose of showing that Reuben Skogerboe had authority to enter into the agreement. If it has another purpose other than that, then I would like to know what it is.
>
> Mr. MECHAM: One of the purposes, your Honor, is that it is an agreement between L. B. Foster and Nelson Brothers Construction Company.
>
> THE COURT: He is going to have to show that Skogerboe had authority before it is binding. I will admit it with the understanding that he has to show it.
>
> MR. HOUSLEY: Very well. We have no objec-

tion except for that thing. (R. 93-94)

Plaintiff called both Reuben Skogerboe and Emery Nelson as witnesses, but failed to ask either of them whether Reuben Skogerboe had authority to execute Exhibit P-1.

Admittedly when a fact of agency is uncontroverted or admitted, and the agent was apparently acting for his principal as to the business in hand, the burden is on the principal to show that the agent exceeded his authority. 3 Am Jur (2d) 707, Agency Sec. 350. Defendants have sustained said burden by direct and unequivocable testimony.

Nelson Brothers Construction Company's secretary-treasurer, Emery G. Nelson, testified on direct examination by Defendants' attorney, that in his capacity as secretary-treasurer and one of the directors of the corporation that he had occasion to know the authority of Nelson Brothers Construction Company's superintendents. He testified that Nelson Brothers variously hired from two to eight "job superintendents" and that all the "job superintendents" had the same authority on work and the same place in the hierarchy of Nelson Brothers Construction Company as did Reuben Skogerboe. Moreover he testified that Reuben Skogerboe did not have corporate authority to sign subcontract agreements and did

not have corporate authority to sign guarantys or indemnities with suppliers or subcontractors. (R 154-155).

Mr. Nelson testified:

Q (by Mr. Housley) Will you tell the court what corporate authority Reuben Skogerboe had vis-a-vis these two exhibits, "Exhibit P-1 and P-2," which I believe you have already seen. "P-1, P-2, P-3 and P-4," will you tell the court what corporate authority Reuben Skogerboe had with reference to those?

A As preliminary to that I could say that job superintendents, in our company at least, have the general authority of negotiating the terms of the subcontracts. That is negotiating what type of work is to be done and determining what price will be charged, and sometimes they have the same authority to do that with materials and equipment. In general, they coordinate and plan the work.

However, ordinarily the formal written purchase orders and written subcontracts are made up in our central office and signed by a corporate officer. The job superintendent, of course, has authority to follow up on delivery of material, or when the subcontractor would be on the job, they are our contact man. However, they don't, of course, have authority to actually pay for materials except very minor things that have to be paid for immediately on the job when delivered, such as once in a while a freight bill.

Q Let me interrupt. Is there a separate account to pay those from?

A. Generally when we have a distant job we sometimes set up a small checking account that we allow the job superintendent to sign checks on, to pay for small things that have to be paid for immediately when delivered to the job. Everything else is paid for from the central office, after approval there, and that has been the general procedure in making up the subcontracts and the large purchase order.

Now, small purchase orders we have allowed the job superintendent to write those. Ordinarily it is general procedure.

Q. When you say small purchase order, what range are you talking about?

A. Well, I would say a few hundred dollars. It would vary.

Q. When you say large purchase orders, what are you talking about there?

A. I am speaking of several thousand dollars, a thousand dollar order, several thousand.

Q. Now the question was vis-a-vis these specific documents, what was Reuben Skogerboe's corporate authority?

A. Well, he really had no corporate authority to execute this guarantee, whatever you call it, with L. B. Foster Company. He did have authority to work out the terms, and with BOMACO, the subcontractor. However, the subcontract itself should have been made out or signed by a corporate officer, that has been authorized by the corporation to enter into such agreements.

Q. So that as I understand your answer, he does not have that authority to execute that subcontract agreement, is that correct?

A. Not actually, no. (R. 155-157)

On cross-examination Mr. Nelson testified that Nelson Brothers Construction Company does not have a written job description for job superintendents. (R. 160)

In its effort to prove that Reuben Skogerboe was authorized to execute the so-called indemnity-guaranty agreement, Plaintiff established the fact that Reuben Skogerboe signed the original subcontract agreement with Bountiful Materials and Construction Company, which fact Defendants conceeded. Defendants, however, denied that Reuben Skogerboe had authority to execute the subcontract agreement. (R. 98)

In addition, the following testimony by Plaintiff's Sales was offered by the Plaintiff, apparently for the purpose of establishing customary authority:

Q. Now, with reference to the custom of the trade, in accepting orders from general contractors, what is the custom, if you know, with reference to dealing with superintendents?

MR. HOUSLEY: Objection, your Honor. No sufficient foundation.

THE COURT: O. K. Lay a foundation, Mr.

Mecham.

Q. (By Mr. Mecham) Mr. McClelland, when you deal with a general contractor to take an order, which is, as the one you took in this particular case, the Nelson order, or the BOMACO order, for materials that L. B. Foster furnishes, what procedure do you follow?

A. Well, in most of the cases we would, being out of state, call long distance, generally through the receptionist or the switch board operator, asking her who is handling a particular job. I would say that in most cases she will tell you that you will have to get in touch with the project superintendent, or the project manager, that he is handling this job. And the buying will be done from the jobsite or they may do it from the office, but he is the only man that can answer the questions that we would be after at that time.

MR. HOUSLEY: I object, your Honor. I don't think there is any basis laid for his statement that he is the only man that--

Would you read that back?

(The last answer was read by the reporter.)

MR. MECHAM: We are trying to establish what the custom of the business is, when he contacts a customer.

Q. (by Mr. Mecham) Would the same thing apply to Job Superintendents?

A. Yes. (R. 50-51)

It is clear from the foregoing that the court correctly required the Plaintiff to lay a foundation before permitting the plaintiff's witness to testify with regard to the custom in the trade, and it is equally clear that the Plaintiff failed to lay such foundation and further that the Plaintiff's witness's testimony falls far short of establishing that it is the custom in the trade that job superintendents have authority to execute indemnity-guaranty agreements with firms supplying materials to subcontractors. The evidence does not support the trial court's finding that Reuben Skogerboe had authority to bind Nelson Brothers Construction Company under the so-called indemnity-guaranty agreement.

POINT III. THE COURT ERRED IN GRANTING PLAINTIFF A REASONABLE ATTORNEY'S FEE IN CONNECTION WITH COUNT II OF PLAINTIFF'S COMPLAINT.

A. The court erred in permitting an amendment to the pre-trial order adding the issue of whether Plaintiff was entitled to a reasonable attorney's fee under the alleged indemnity-guaranty agreement.

Count II of Plaintiff's Complaint alleges the

Defendants agreed to indemnify and guarantee payment of aluminum bridge railing. The prayer of Plaintiff's Complaint asks for $2,752.90 plus a reasonable attorney's fee, plus interest thereon, together with costs of court under Count I, and for $2,752.00, plus interest and costs of court under Count II. There is no mention either in the body or in the prayer of Count II of a reasonable attorney's fee. (R. 2).

At the pre-trial the only mention of attorney's fees was in connection with Count I of Plaintiff's Complaint and the pre-trial order made the question whether attorney's fees are due under the statute as one of the issues to be tried. No mention of attorney's in connection with Count II was made in the pre-trial order. (R. 43)

Plaintiff made a formal motion to amend the pre-trial order and noticed it up for hearing at 10:00 o'clock A. M. on the morning of the trial. Attorney's fees under Count II was not mentioned in Plaintiff's Motion To Amend Pre-Trial Order. (R. 46, 47) At 10:00 o'clock A.M. on the morning of the trial, Plaintiff orally moved the court to amend the pre-trial order to permit, as an issue to be tried, whether attorney's fees "under the agreement of June 10, 1963" should be allowed to Plaintiff. Over

Defendants' vigorous objections, Plaintiff's motion was granted. (R. 78,79)

Rule 54 (c), Utah Rules Of Civil Procedure, provides as follows:

> (c) Demand for Judgment.
>
> (1) Generally. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.
>
> * * *

It has been held that this rule should be liberally construed to allow parties considerable latitude in pleading and proof. But it has also been held repeatedly that this rule should not be used to work an injustice upon the opposing party and that the opposing party should always be accorded a fair opportunity to be apprised of and meet the issues so presented.

This Court in Taylor vs. E. M. Royle Corp. 1 U. (2d) 175, 264, 279; said:

> It is true that our new rule should be liberally construed to secure a just....determination of every action, but they do not represent a one-way street down which but one litigant may trav-

el. The rules allow locomotion in both directions by all interested travelers. They allow plaintiffs considerable latitude in pleading and proof, to a point where some people have expressed the opinion that careless legal craftsmanship has been invited rather than discouraged. Be that as it may, a defendant must be extended every reasonable opportunity to prepare his case and to meet an adversary's claims. Also he must be protected against surprise and be assured equal opportunity and facility to present and prove counter contentions, -else unilateral justice and injustice would result sufficient to raise serious doubts as to the constitutional due process guarantees.

The ultimate determination of the issue whether attorney's fees should be granted under Count II depends on the wording of Exhibit P-1, an instrument whose provisions are obscure to say the least. To allow the amendment requiring defendants to meet this issue without an opportunity to go into discovery on the question of the intention of the parties in the execution of the alleged instrument or even to do minimal research on the law governing the issue, is manifestly unjust. Taylor vs. E. M. Royle Corp., supra.

B. The evidence adduced at trial does not support the court's Findings and conclusions that Plaintiff is entitled to a reasonable attorney's fee under Count II.

The trial court's findings of fact include th following:

* * *

5. That the said Indemnity Agreement pro vided the same protection to Plaintiff agains loss as would have been provided under th Payment and Performance Bond issued by th defendant, Industrial Indemnity Company. (R. 5

* * *

The payment and performance bond issued b defendant, Industrial Indemnity Company for the pro ject under consideration here was never introduce into evidence at the trial nor was there any eviden adduced whatever pertaining to the provisions of sai bond. Moreover, the so-called indemnity-guarant agreement (Exhibit P-1) was only received into ev idence with the understanding that Plaintiff would b required to show Reuben Skogerboe's authority t Nelson Brothers Construction Company thereunde which authority was never shown. See the argume under Point II above.

Even if the so-called indemnity-guaranty agre ment (Exhibit P-1) shall be deemed to have been pr perly received, the words contained therein, "a that we be afforded protection under your bond," ca not be said to give rise to a right to attorney's fe without further evidence as to their meaning or to t intent of the parties in placing them there.

POINT IV. THE COURT ERRED IN REFUSING TO AWARD A REASONABLE ATTORNEY'S FEE TO DEFENDANT, INDUSTRIAL INDEMNITY COMPANY, AS THE PREVAILING PARTY IN CONNECTION WITH COUNT I OF PLAINTIFF'S COMPLAINT.

Section 14-1-8, Utah Code Annotated, 1953, as amended, provides as follows:

> In any action brought upon either of the bonds provided herein, or against the public body failing to obtain the delivery of the payment bond, the prevailing party, upon each separate cause of action, shall recover a reasonable attorney's fee to be taxed as costs. [emphasis added]

In the prayer contained in Defendants' Answer to Count I, Defendants pray that they be awarded a reasonable attorney's fee. (R. 4). Count I of Plaintiff's Complaint is brought under 14-1-6, Utah Code Annotated, 1953, as amended which provides under certain conditions that a materials supplier can sue on the payment bond for the value of the materials supplied but unpaid for. Clearly this is an action "brought upon either of the bonds provided herein" giving rise to attorney's fees under Section 14-1-8. The court at pre-trial dismissed Count I as against Nelson Brothers Construction Company. The pre-trial court further stated:

> The pleadings now stand with the dismiss of the first Count against Nelson Brother Plaintiff is suing on Count I against the Indus trial Indemnity Company and on Count II again Nelson Brothers Construction Company. (R. 4

The trial court's memorandum decision expres sly grants judgment to Plaintiff under Count II an impliedly, against Plaintiff under Count I. Th Findings of Fact and Conclusions of Law submitte by the Plaintiff for signature by the court do no make reference to any disposition under Count I (R. 50-52.) The judgment prepared by Plaintiff an submitted to the Court for its signature and signe by the court on March 16, 1966 expressly provide that it is:

> ORDERED, ADJUDGED AND DECREE
>
> * * *
>
> 2. Defendant Industrial Indemnity Compan is awarded judgment of no cause for actio (R. 53)
>
> * * *

That defendant Industrial Indemnity Compan is the prevailing party in an action brought upon on of the bonds under the Little Miller Act seems hardl disputable.

This court in Checketts v. Collings, 78 U. 93 1 (2d) 950 75 ALR 1393, cited the following langua from Ballard Transfer and Storage Company vs. S

Paul City Ry. Co., 129 Minn. 494, 152 N.W. 868, 869, with approval:

> The Plaintiff is the party who starts the lawsuit. The suit terminates on the verdict or decision. If thereby the one who instituted the action obtains nothing, he certainly does not prevail over his adversary. The defendant receiving the verdict in his favor, is acquitted of wrongdoing towards the plaintiff. In this case there was a counterclaim, but that can have no bearing...the jury found either both to blame or else neither. In the either event Plaintiff had no cause to bring suit and make expense for defendant. Had defendant been let alone, it may never have sought redress in court. In actions at law, whether for torts or upon contract, we think it has always been understood in this state that the party in whose favor the verdict goes recovers costs and disbursements against the other. And we so hold.

The fact situation in Checketts v. Collings was more extreme than the one in the case at bar. There, the defendant had brought a counter-claim and the court found upon the counter-claim against the defendant and in favor of the plaintiff, no cause of action. This court rejected the argument in the Checketts case that the result was more in the nature of a stand-off and held that defendant was the prevailing party, under a statute which allowed costs as a matter of course to the prevailing party, and the defen-

dant was therefore entitled to his costs.

Here, as opposed to the situation in th Checketts case, the victory is clear.

The present rule with regard to costs, Rul 54 (d)(1) Utah Rules of Civil Procedure, leaves th matter of the allowance of costs somewhat to th discretion of the court under the following languag

> Costs shall be allowed as of course to th prevailing party unless the court otherwis directs.

Section 14-1-8 does not, however, contain provision allowing the court discretion in t matter.

It is respectfully submitted that the allowan of attorney's fees to be taxed as costs to Industri Indemnity Company herein is not subject to t discretion of the court under Section 14-1-8.

It is urged that the legal services requir to defend an action under the Little Miller Act a just as extensive as those required to prosecute su action and that the attorney's fee which ought to allowed to Industrial Indemnity Company should the same as those which would have been allowed the plaintiff had it prevailed, which amount has be stipulated to be that recommended by the Utah St Bar in their Minimum Recommended Fee Schedu

SUMMARY AND CONCLUSION

The evidence clearly shows that Plaintiff was doing business in the State of Utah without having obtained a certificate of qualification to do business herein and is therefore prohibited from maintaining this action under Section 16-10-120, Utah Code Annotated, 1953, as amended, and this Court should reverse the trial court's determination to that effect and should order that judgment be entered for the Defendants accordingly.

Moreover, the evidence is insufficient to sustain the finding that Reuben Skogerboe was authorized to bind Nelson Brothers Construction Company under the so-called Indemnity-Guaranty Agreement.

Plaintiff's failure to raise timely the issue of attorney's fees in connection with Count II and the failure of the evidence to sustain the award of attorney's fees make it manifestly unjust that attorney's fees be awarded to Plaintiff under Count II of its Complaint.

Industrial Indemnity Company as the prevailing party under Count I of this action is entitled to a reasonable attorney's fee in connection therewith in the sum of $620.94 under Section 14-1-8, Utah Code Annotated, 1953, as amended.

Respectfully submitted this 13th day of July, 1966.

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