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Utah Steel & Iron Company v. Skyline Construction Company : Appellant's Brief

In The Supreme Court of the State of Utah

UTAH STEEL & IRON COMPANY
Plaintiff - Appellant

-vs-

SKYLINE CONSTRUCTION COMPANY
Defendant - Respondent

Case No.
11958

APPELLANT'S BRIEF

Appeal from the Judgment of the
Third District Court for Salt Lake County
Hon. Leonard W. Elton, Judge

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TABLE OF CONTENTS

STATUTES CITED

CASES CITED

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STATEMENT OF THE KIND OF CASE

This is an action by the plaintiff against the defendant for the collection of an account for the sum of $2,642.69, being the balance due and owing on a contract in writing for steel rails and their fabrition (R. 1).

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a reversal of the order and judgment of the lower court or a modification thereof.

STATEMENT OF THE FACTS

The defendant acknowledged a balance of $452.99 and during the course of the proceedings sent the plaintiff a check, which was refused and paid into court at the trial (R. 7 & 30). The major difference between the parties was a $1,097.70 backcharge for welding which the defendant set off against the plaintiff's account (R. 97). The contract provided for the fabrication in one piece, of 80 rocket rails 74 1/2 feet long (R. 91).

While the plaintiff was in the process of fabricating the rails, the defendant, by its superintendent, asked the plaintiff if it would be willing to send the rails in two pieces, which the plaintiff agreed to do, and in the execution of the contract, did do. The undisputed testimony on this point was, by Mr. Brewer, with the defendant's superintendent Jim Mahas:

> "Would it cost any more if you shipped these rails to us in two pieces instead of one piece?" And I said "No, it wouldn't effect the price one way or the other if we shipped them to you in one piece or two pieces," and he said, "Well, it would be easier for us to handle, because we have to drag these rails in the building. They are quite heavy, and the length of them, they may bend if we take them in one piece, and then we would have to straighten them, so if it won't cost any more, ship these rails in two pieces," and I said, "We'll do that. "(R. 37).

After the rails had been delivered, the defendant charged back to the plaintiff the cost of welding them together and that was the occasion for the controversy (R. 96).

The court awarded judgment to the plaintiff for the sum of $611.99, with interest at the rate of six percent per annum and costs. (R. 18). On motion of the defendant to tax costs and amend decree

(R. 19), the court excluded the **witness fee for** John C. Brewer and also excluded from interest the amount of $452.99, which was the amount of the defendant's check (R. 24).

ARGUMENT

POINT I.

THE COURT ERRED IN ALLOWING THE DEFENDANT THE $1,097.70 BACKCHARGE FOR WELDING.

In this case the defendant's superintendent, Jim Mahas, who did not bother to appear at the trial, induced the plaintiff to ship the rails in two pieces instead of one piece, at a time when the cost of the welding would have been minimal. If there was any loss or damage to the defendant, it was caused by the act of their own responsible agent and the results should be born by the defendant.

POINT II.

THE COURT ERRED IN DISALLOWING THE WITNESS FEE OF JOHN C. BREWER.

While John C. Brewer is the principle stockholder and is the president, he is not the corporation, and his witness fee should have been allowed.

Stratton v. West States Construction, 21 Utah 2d 60 at page 61, 440 P 2d 117:

> "The mere fact that Lords was president and major stockholder of defendant corporation through which he might derive an incidental benefit from the corporate default, does not indicate that he was acting for his individual benefit."

POINT III.

THE COURT ERRED IN REDUCING THE INTEREST ON THE AMOUNT FOUND TO BE DUE THE PLAINTIFF

Because the defendant had sent a $452.99 check to the plaintiff, which the plaintiff had refused and never cashed, but was returned to the defendant at the trial, the court reduced the principle amount for the purpose of charging interest from $611.99 to $159.00.

The tender of the check to the plaintiff did not in any way comply with the provisions of Rule 68(b) of the Utah Rules of Civil Procedure, "Offer Before Trial", and it should not have reduced the amount of the judgment for the purpose of interest.

CONCLUSION

The plaintiff respectfully submits that because the parties were not following the strict terms of the contract and because the defendant's superintendent was acting in the apparent scope of his authority, and because the court erred in cutting down the cost bill and the amount of interest, that a new trial should be ordered or in the alternative, the judgment should be modified.

Respectfully submitted,

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