

1970

A&M Enterprises, Inc., Et Al. v. Paul Hunziker, Et Al. And Gilmore Steel Corporation v. Paul Hunziker, Et Al. : Brief of Appellants

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In the Supreme Court of the State of Utah

A&M ENTERPRISES, INC., et al.,
Plaintiff-Appellant,

vs.

PAUL HUNZIKER, et al.,
Defendant-Respondent.

GILMORE STEEL CORPORATION
Plaintiff-Appellant,

vs.

PAUL HUNZIKER, et al.,
Defendant-Respondent.

} Case No. 12224

BRIEF OF APPELLANTS

Appeal from the Judgment of the
Third District Court for Salt Lake
County, State of Utah
Honorable Stewart M. Hansen, Judge

SUMMERHAYS, KLINGLE
& COHNE

Lowell V. Summerhays
1010 University Club Building
Salt Lake City, Utah

*Attorneys for Appellants
A&M Enterprises Inc.,
Cleaning by Tony, Inc.;
Midwest Electric.*

VAN COTT, BAGLEY,
CORNWALL & McCARTHY

141 East First South
Robert D. Merrill

*Attorneys for Appellant
Gilmore Steel Corporation*

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Clerk, Supreme Court, Utah

LEE W. HOBBS

1119 Continental Bank Bldg.
Salt Lake City, Utah

*Attorney for Respondent
Barrett Investment Company*

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GILMORE STEEL CORPORATION
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PAUL HUNZIKER, et al.,
Defendant-Respondent.

Case No. 12224

BRIEF OF APPELLANTS

STATEMENT OF NATURE OF CASE

This is a consolidated action to enforce liens brought under the Utah Mechanics' Liens Statutes (Title 38, Chapter 1, Utah Code Annotated, 1953) by several contractors and subcontractors against the owners and operators of property upon which improvements were made.

DISPOSITION IN LOWER COURT

Defendant Barrett Investment Company (hereinafter "Barrett") moved the court for summary judgment based upon the pleadings, depositions, answers to interrogatories, affidavits and exhibits on file. The court granted Barrett's motion for summary judgment.

RELIEF SOUGHT ON APPEAL

Plaintiffs (hereinafter "lien claimants") seek reversal of the judgment granting Barrett's motion for summary judgment, and remand of the case for further proceedings.

STATEMENT OF FACTS

(NOTE: The transcripts of the two consolidated cases are separate. Therefore the transcript in the case of Gilmore Steel Corporation vs. Hunziker, et al., will be referred to as "Gilmore R.," and the transcript in the case of A&M Enterprises, Inc., et al. vs. Hunziker, et al., will be referred to as "A&M R.")

Barrett owned certain real property in Salt Lake County and located up Big Cottonwood Canyon. This property, together with improvements, was known as the Solitude Ski Area. In October, 1967, Barrett entered into an Option and Contract of Sale (Gilmore R. 148-154) to

sell the ski area for \$2,000,000.00 to the defendant, Western Lift and Crane Corporation. The option never was exercised. Nevertheless, Western Lift and Crane Corporation, doing business with defendant Paul Hunziker, and jointly known as Mountain Empire Ski Resort (hereinafter "Mountain Empire") stayed in possession and embarked on an improvement program to expand the facilities at the ski area. During this period Mountain Empire ordered various building materials and supplies from the lien claimants which were delivered to Mountain Empire and were used in the actual construction of improvements at the ski area. The lien claimants were never paid despite their repeated demands to Mountain Empire for payment. Consequently the lien claimants filed actions to foreclose the liens against the property. These actions allege that Mountain Empire acted as the agent of Barrett in contracting for the materials and supplies, that Barrett failed to obtain a payment and performance bond as required by Section 14-2-1, Utah Code Annotated, 1953, and is therefore liable to the lien claimants, and that the materials and supplies furnished by the lien claimants have increased the value to Barrett of the subject premises and by reason of this unjust enrichment, Barrett is liable to the lien claimants for the value of said materials and supplies.

Subsequent to the commencement of these actions, a motion was filed to consolidate, and on April 6, 1970, the court entered an order consolidating the actions. (Gilmore R. 99.)

Barrett submitted interrogatories to the various lien claimants (A&M R. 96-99, Gilmore R. 86-88.) The Answers all set forth facts and issues. Some of the answers are briefly summarized as follows:

A&M ENTERPRISES, INC. (Gilmore R. 111-115)
Barrett allowed Mountain Empire to operate the ski area after payments were past due under the Option and Contract of Sale. Said claimant's work was done primarily inside the Lodge, and such extensive work could not have been done without Barrett's knowledge and permission.

CLEANING BY TONY, INC. (Gilmore R. 108-110)
The Option and Contract of Sale provided for automatic termination in the event of a failure to make a payment and it was the understanding and information of said lien claimant that Barrett allowed defendant Paul Hunziker to stay on the premises during 1968 in order to keep the business operating.

MIDWEST ELECTRIC. (Gilmore R. 116-126)
Mountain Empire was still in possession of the ski area during 1968 although no payment was made under the terms of the Option and Contract of Sale after December 1967. This led said lien claimant to believe that Mountain Empire had permission to be in possession after that date.

GILMORE STEEL. (Gilmore R. 130-136) Said lien claimant was informed and believed that prior to and during the course of construction of the improvements upon the premises, Mountain Empire had a relationship with Barrett in the nature of a joint venture whereby it was understood and agreed that Mountain Empire would undertake the construction of the improvements for and on behalf and for the benefit of a joint venture. The materials and supplies furnished increased the value of the ski area.

In conjunction with and supporting Barrett's motion for summary judgment, affidavits were submitted which set forth facts conflicting with those set forth in the answers to interrogatories. Some of these affidavits may be briefly summarized as follows:

Ralph Goodrich. (Gilmore R. 139-140) Hunziker was attempting to pay off Barrett, and indicated he was raising some money. During this period Mr. Barrett, the principal of Barrett, remained in Idaho.

Ross S. Tyson. (Gilmore R. 141-142) Paul Hunziker advised the affiant, an employee of the bank which held a mortgage on the ski area property, that he was purchasing the property, and certain payments were made but the loan became delinquent.

Paul S. Grant. (Gilmore R. 143-145) Paul Hunziker said he hardly knew Mr. Barrett. Affiant called Mr. Barrett about the status of payments, and Mr. Barrett advised affiant that he would not push Hunziker too hard, but that he (Hunziker) should keep working.

George E. Bridwell. (Gilmore R. 146-147) Served as attorney for Mr. Hunziker and worked with Mr. Hobbs as counsel for Barrett, in preparing the Option and Contract of Sale. During this period Mr. Hunziker and Mr. Barrett did not deal directly with each other.

The consolidated cases were set for trial on June 15, 1970. However, because part of the records had been misplaced and not all Answers to Interrogatories had been filed, the court continued the matter to August 10, 1970. (A&M R. 154) However, the misplaced records were found and Barrett set for hearing on July 17, 1970, on the motion for summary judgment. The court heard the motion and upon arguments of counsel and the records granted the motion.

ARGUMENT

POINT I

BARRETT'S MOTION FOR SUMMARY JUDGMENT WAS IMPROPERLY GRANTED BECAUSE THE PLEADINGS, ANSWERS TO INTERROGATORIES AND AFFIDAVITS

SHOW THAT THERE ARE GENUINE ISSUES OF MATERIAL FACTS.

Rule 56(c), Utah Rules of Civil Procedure, sets forth the test for granting motions for summary judgment. In pertinent part this rule states:

“(c) *Motion and Proceedings Thereon . . .*
The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .”

The documents hereinabove summarized, and the transcripts as a whole, show clearly that genuine material issues exist on almost every point. For instance, the issue of whether Paul Hunziker and/or Mountain Empire were the agents of Barrett when ordering supplies and materials from the lien claimants is obviously set forth, but unresolved, throughout the records. The material question of whether Barrett was required to provide a bond pursuant to Utah Bonding Statutes (Section 14-2-1, Utah Code Annotated, 1953) is not resolved in the transcripts. The material issue of the unjust enrichment of Barrett is not resolved.

These unresolved issues require a trial. A motion for summary judgment pursuant to Rule 56, Utah Rules of Civil Procedure is not intended to provide a substitute

for the regular trial. This general principle is stated in *Dupler vs. Yates*, 10 Utah 2d 251, 351 P.2d 624 (1960) at 269:

“Rule 56 U.R.C.P. is not intended to provide a substitute for the regular trial of cases in which there are disputed issues of fact upon which the outcome of the litigation depends. And it should be invoked with caution to the end that litigants may be afforded a trial where there exists between them a bona fide dispute of material fact. . . .”

Further, the Court in *Dupler* at 269-270 stated:

“Upon a motion for summary judgment, the Courts ought to recognize, as a minimum, that the opposing party produce some evidentiary matter in contradiction of the movant’s case or specify in an affidavit the reason why he cannot do so.”

In this matter the answers to interrogatories provide ample affidavits to contradict to affidavits of Barrett on the issue of agency.

The parties were only a few days away from the scheduled trial and preparing to litigate the issues of agency, bonds and unjust enrichment. The granting of the motion (which appears to have been directed only at the question of agency), precludes inquiry into the issues of whether a bond was required and whether Barrett was unjustly enriched. Further, the issue of agency had not

been resolved by the affidavits before the court. Hence, the granting of the motion was improper as it deprived the lien claimants of a fair opportunity to present their contentions. See *Reliable Furniture Co. vs. Fidelity & Guaranty Ins. Underwriters*, 16 Utah 2d 211, 398 P.2d 685 (1965).

CONCLUSION

The record on appeal established clearly that there are genuine issues of material facts and therefore the order of the trial court should be reversed and the consolidated cases remanded for trial.

Respectfully submitted,

Lowell V. Summerhays
Summerays, Klinge & Colne
1010 University Club Building
Salt Lake City, Utah

Robert D. Merrill
Van Cott, Bagley, Cornwall &
McCarthy
141 East First South
Salt Lake City, Utah