1971

Lawson Supply Company v. General Plumbing & Heating, Inc., A Corporation, E. Keith Lignell and Burton M. Todd : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

LAWSON SUPPLY COMPANY,
a corporation,
Plaintiff-Respondent,

vs.

GENERAL PLUMBING & HEATING INC., a corporation, E. KEITH LIGNELL and BURTON M. TODD,
Defendants-Appellants.

RESPONDENT'S BRIEF

Appeal from Decree and Order of District
Third Judicial District in and for Salt
State of Utah, Honorable Ronald O.

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UTAH BANK NOTE

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Case No. 12362

RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This action was commenced by plaintiff-respondent to recover for materials supplied and incorporated in the apartment houses built for defendants-appellants Lignell and Todd at 247 South 7th East, Salt Lake City, Utah for which plaintiff had not been paid.

DISPOSITION IN THE LOWER COURT

Plaintiff was granted judgment against the defendant General Plumbing and Heating, Inc. for $9,435.51 plus interest from August 14, 1969 and costs. (R. 55).

The court denied enforcement of the mechanic's lien claimed against the property by plaintiff on the ground that the notice of lien was not timely filed. (R. 96-8, 75). The court granted judgment against owner defendants Lignell and Todd on the personal liability created by the provisions of 14-2-2 U.C.A. 1953 as amended by Laws of Utah 1965, Chapter 24, Sec. 1 et seq. because of their failure to require a bond of the contractor as required by 14-2-1 U.C.A. 1953 as amended. Judgment was in the amount of $8,200.20 plus interest of $615.00 to the date of judgment and costs in the amount of $140.90. (R. 75, 76, 99). Defendants Lignell and Todd's motion to amend the findings of fact, conclusions of law and judgment and to tax costs was denied.

RELIEF SOUGHT IN THIS COURT

Plaintiff seeks to have the judgment of the lower court awarding relief to the plaintiff against the defendants Lignell and Todd affirmed.

STATEMENT OF FACTS

Plaintiff is not in accord with some of the appellants' statement of facts and will accordingly re-state the facts as plaintiff understands them to be and as supported by the record.

Defendants E. Keith Lignell and Burton M. Todd entered into a contract with Clifford Berg to construct an

apartment complex on land owned by Lignell and Todd at 247 South 7th East in Salt Lake City, Utah. (R. 116 Ex. P.2). The contract was for a total consideration of $460,000.00. (Ex. P.2). Berg entered into a verbal subcontract with General Plumbing and Heating, Inc. to do the plumbing portion of the contract including installation of fixtures. (R. 212). Plaintiff made a quotation to supply certain of the materials necessary to the plumbing job to General Plumbing and Heating, Inc. (R. 182 Ex. P.6). Plaintiff supplied the materials called for to General Plumbing and Heating, Inc. at the prices on the revised quote. (R. 182 Ex. P.6). The material was invoiced to the particular job. (R. 146 Ex. P.4). The name Globe Enterprises or Investment refers to a partnership between Lignell and Todd. (R. 121). All of the material for which plaintiff seeks to recover from defendants Todd and Lignell was in fact delivered to and incorporated into the apartment complex constructed for said defendants. (R. 202,3). The invoices identifying the material and the job were carried by invoice number into the ledger accounts of plaintiff with General Plumbing and Heating, Inc. from which it was possible thereby to ascertain the job for which the material was supplied and used. (R. 161). Payments made by General Plumbing and Heating, Inc. were credited to oldest invoice on the ledger unless otherwise specified by General Plumbing and Heating, Inc. (R. 164). Utilizing this accounting system the General Plumbing and Heating, Inc. owed plaintiff nothing as of October 1968. (R. 197). The plaintiff credited to the job for defendants all payments made by General Plumbing and Heating, Inc. except the sum of $185.99 which was applied to charges for materials used on an-

other job. (R. 158). The material was furnished by plaintiff to the particular job and was not sold on simply the credit of General Plumbing and Heating, Inc. which, other than for this job, had not in many years purchased materials resulting in an account balance exceeding $2400.00. (R. 171). General Plumbing and Heating paid for part of the materials used on this job but did not pay for the balance of $8,200.20, and is now insolvent. (R. 186, 193 Ex. P-12, 155 Ex. P-5). Defendants Lignell and Todd as owners of the property improved had not required that bond be given as by 14-2-1 U.C.A. 1953 as amended, required. (R.3, 4 & 35, 115, 116, Appellants' Brief pg. 2).

ARGUMENT

POINT I.

DEFENDANTS LIGNELL AND TODD ARE PERSONALLY LIABLE TO PLAINTIFF UNDER THE TERMS AND PROVISIONS OF 14-2-2 U.C.A. 1953 AS AMENDED FOR MATERIALS FURNISHED BY PLAINTIFF AND INCORPORATED INTO THE IMPROVEMENTS CONSTRUCTED ON LANDS OWNED BY DEFENDANTS UNDER AND BY VIRTUE OF A CONTRACT BETWEEN DEFENDANTS AND CLIFFORD BERG.

Defendants are the owners of land located at 247 South 7th East in Salt Lake City, Utah. (R. 114, 121). Defendants contracted with one Clifford Berg to construct for them upon the lands owned by them at the address aforesaid an apartment complex for a total contract consideration of $460,000.00. (R. 121 Ex. P-2). Berg, as

general contractor, entered into an oral sub-contract with General Plumbing and Heating, Inc. to do the plumbing portion of the contract. (R. 212). Plaintiff had supplied to General Plumbing and Heating a quote for some of the plumbing material on this particular job. (R. 159 Ex. P-6). The apartment complex was built and the General Plumbing and Heating, Inc. received materials from the plaintiff which were incorporated into the job for the defendants (R. 202, 3 Ex. P-4) upon which a balance remains due, owing and unpaid to plaintiff of $8,200.20. (R. 185,6, Ex. P-5). Defendants did not require a bond to protect labor and materialmen as required by 14-2-1 U.C.A. 1953 as amended. (R. 3, 4, 5, 35, 115, 116, Appellants' Brief pg. 2).

The applicable provisions of the Utah Code are: 14-2-1 U.C.A. 1953 as amended:

> "14-2-1. Bond to protect mechanics and materialmen. — The owner of any interest in land entering into a contract, involving $500 or more, for the construction, addition to, or alteration or repair of, any building, structure or improvement upon land shall, before any such work is commenced, obtain from the contractor a bond in a sum equal to the contract price, with good and sufficient sureties, conditioned for the faithful performance of the contract and prompt payment for material furnished and labor performed under the contract. Such bond shall run to the owner and to all other persons as their interest may appear; and any person who has furnished materials or performed labor for or upon any such building, structure or improvement, payment for which has not been made, shall have a direct right of action

against the sureties upon such bond for the reasonable value of the materials furnished or labor performed, not exceeding, however, in any case the prices agreed upon; which right of action shall accrue forty days after the completion, or abandonment, or default in the performance, of the work provided for in the contract.

"The bond herein provided for shall be exhibited to any person interested, upon request."

14-2-2 U.C.A. 1953 as amended by Ch. 24 Sec. 1 Laws of Utah 1965:

"14-2-2. Failure to require bond — Direct liability. — Any person subject to the provisions of this chapter, who shall fail to obtain such good and sufficient bond, or to exhibit the same, as herein required, shall be personally liable to all persons who have furnished materials or performed labor under the contract for the reasonable value of such materials furnished or labor performed, not exceeding, however, in any case the prices agreed upon."

The basic statutory provisions quoted have been part of the law of this state for many years and have been previously interpreted by this court. The case of *Liberty Coal and Lumber Co. v. Snow* decided by this court in 1919 stated the purposes of the legislative enactment in these terms:

"That agreement, as we construe the statute, comes clearly within its terms, and in failing to obtain a bond appellant became liable for the reasonable value of the materials furnished for,

and the labor performed on, the dwelling. In order to construe the statute so as not to cover a case like the one at bar the language thereof must be unreasonably restricted. The statute does not concern itself with the legal relationship of the parties; that is, it is quite immaterial whether the agreement to construct a building upon land is made between the owner thereof and the contractor, or between the owner and the builder, or between him and his tenant, or between him and any other person; but if the owner of the land contracts for the construction of a building on his land, the statute makes it his duty to comply with its terms if he desires to escape personal liability. The purpose of the statute is to prevent the owners of land from having their lands improved with the materials and labor furnished and performed by third persons, and thus to enhance the value of such lands, without becoming personally responsible for the reasonable value of the materials and labor which enhances the value of those lands. The owner may, however, escape personal liability by obtaining the bond required by the statute." *Liberty Coal and Lumber Co. v. Snow*, 53, Utah 298, 178 P. 341.

That this is still the purpose of the statute is recognized by this court in the case of *Crane Co. v. Utah Motor Park Inc.* decided Feb. 27, 1959, 8 Utah 2d 413, 335 P2d 837 where the court, citing the Liberty Coal and Lumber Co. case stated:

> "The purpose of the mechanics' and materialmen's lien statutes and likewise the statutes quoted hereinabove, is to prevent the owners of land from having their lands improved with the materials and labor furnished and performed by

> third persons, and thus to enhance the value of such lands, without becoming personally responsible for the reasonable value of the materials and labor which enhance the value of those lands. The owner may escape personal liability by obtaining the bond as required by the statute."

Plaintiff's invoices and the testimony clearly showed that the material for which recovery is here sought against defendants Lignell and Todd was ordered for this particular job, delivered to the job and incorporated into the job. (R. 202, 203, Ex. P-4, P-5). Defendants do not dispute this fact. Defendants' entire defense in this action is based upon a misconstruction by defendants of the decision of this court in the case of *Crown Roofing and Engineering Company v. Robinson*, 19 Utah 2d 417, 432 P. 2d 47. Defendants find that case on all fours with the facts in the instant case. Plaintiff finds no similarity. In the Crown Roofing case the fact was that Crown Roofing supplied materials in great quantity to the Reliable Roofing Company on open account without reference to any particular use to be made of the product. Reliable Roofing was a large contractor and consumer of roofing supplies which were for the most part delivered to its warehouses by several different suppliers of which the Crown Roofing was one. After Reliable Roofing Company became insolvent and unable to meet the demands of its creditors the Crown Roofing claimed to have delivered a few shingles on a specific housing job being performed for the defendant in the action and by thereafter estimating the quantities of material which were required to do the job attempted to fix responsibility on the owners

under the bonding statute for the materials used on the job. This court said:

> "The foregoing evidence indicates the nature of the relationship between the subcontractor and the plaintiff. The subcontractor purchased the bulk of his materials from plaintiff, which he used in his business generally, and plaintiff, without regard to the subcontractor's use of them, simply maintained an open account to reflect the purchases. There is no evidence that the supplier was furnishing the material under any specific contract for the construction of a home. Under these circumstances, the fact that plaintiff delivered some shingles directly to the job site is not a controlling factor; therefore, the trial court was justified in finding plaintiff not to be a materialman."

In the instant case defendants seek to argue that because plaintiff did not maintain a separate ledger sheet on each job of the General Plumbing and Heating, Inc. that, therefore, this was an "open account" within the meaning of the language above quoted from the Crown Roofing Case and plaintiff is not entitled to the protection of the bonding statute. Such a distortion would negate the entire purpose of the bonding statute. In the case here presented every dollar's worth of material was charged out to the particular job. (R. Ex. P-4). The prices were determined from a particular quote made to the particular job. (R. Ex. P-6). The charges were carried into the ledger account with the invoice number from which it was possible to ascertain the job on which the material had been used. (R. 151-157, Ex. P-5, 7, 8, 9). The ledger showed that as late as October 1968 the

account of the General Plumbing and Heating, Inc. with plaintiff had been paid in full. (R. 197). The contract for this job is dated April 24, 1968. (R. Ex. P-2). Defendants cry loudly about the practice followed by plaintiff of crediting payments to the oldest invoice. The evidence is undisputed that there were only two payments made which were in question. On direct examination the secretary of the plaintiff testified,

> "Q. Now, can you tell us the date on which payment was made?
>
> A. Yes, I can.
>
> Q. Will you do so, please?
>
> A. There are only two payments involved. The first was made on February 25, 1969 by a General Plumbing Company check in the amount of $3000.
>
> Q. Now, to what was that applied?
>
> A. That was applied to the oldest balance, which resulted in following: Out of $3000 the invoices that were not on the Globe Job totaled $172.94. The invoices that were on the Globe job totaled $2827.06, which brings you back to the $3000.
>
> Q. Now, was there any other payment made?
>
> A. There was one other payment on June 16, 1969, a General Plumbing Company check in the amount of $858.16.
>
> Q. And how was that applied?
>
> A. That was applied to the oldest balance.
>
> Q. And what did that result in insofar as relates to the Globe Investment Company job?

A. The invoice, by applying it to the oldest invoice, all the invoices were Globe with the exception of $13.05. So $845.11 went against the Globe job, and $13.05 went against some other job." (R. 158).

There was no dispute between plaintiff and defendants as to the value of the material furnished by plaintiff to the job and incorporated therein. There can be no doubt that the plaintiff in this case is a materialman within the meaning of the statutes cited and is entitled to recover against the defendants Lignell and Todd for the materials proved to have been supplied by plaintiff and which were incorporated into the job constructed on defendants' land, and for which plaintiff has not been paid. In the Conclusion of defendants'-appellants' Brief defendants assert that the Crown Roofing case was not properly understood by the trial judge. (App. Brief pg. 18). To the contrary, we submit that a reading of Judge Hyde's Memorandum Decision (R. 222, 224) clearly reflects his thorough and complete comprehension of that decision and that he correctly applied the law to the facts in the instant case. Plaintiff is entitled to the statutory protection.

POINT II.

PLAINTIFF IS ENTITLED TO THE JUDGMENT OF THE LOWER COURT TAXING COSTS AGAINST THE DEFENDANTS INCLUDING COSTS OF TAKING THE DEPOSITIONS OF BERG, AND LIGNELL AND TODD.

Plaintiff submitted a memorandum of costs to the lower court in which it claimed as taxable costs the ex-

pense of taking the depositions of Burton M. Todd, E. Keith Lignell and of Clifford M. Berg. Defendants assailed the ruling of the court so taxing the costs and filed an objection thereto seeking to have costs re-taxed by the court eliminating the cost of the depositions in question. Plaintiff relied on the case of *Thomas v. Children's Aid Society,* 12 Utah 2d 235, 364 P.2d 1029, wherein this court held:

> "With respect to the cross-appeal of the defendant, we have examined the items which the trial judge struck from the memorandum of costs amounting to $304.40. The items consisted of expenses incurred in the taking of depositions and securing certified copies of a marriage license and a divorce decree. No question was made as to the good faith of defendant in incurring these costs and they appear to be reasonable. They should have been allowed as a matter of course.
>
> "Judgment affirmed with instructions to reinstate the items of cost which were stricken from defendant's memorandum of costs. Costs awarded to defendant."

In attempting to defeat plaintiff's right to this item, the defendants overlook two most important factors. The depositions were all of value to all parties in the trial in question. Plaintiff sought to use the deposition of Dr. Lignell in cross examination of Dr. Lignell. But prior to any motion by plaintiff, the defendants moved the publication of all of the depositions. (R. 131). Dr. Todd did not testify at the trial and had it not been for the deposition which had previously been taken, the stipulation as

to his testimony would have been impossible. (R. 143). The deposition of Dr. Lignell was used in his cross examination. (R. 131-2).

From the standpoint of justice and equity it seems only right that when a deposition is required in good faith in preparation for litigation to obtain information which lies within the control and knowledge of the opponent or other witness, the cost of this preparation should be taxed as costs. Indeed unless the court does recognize that this should be the rule, the effectiveness of our entire system of jurisprudence may fail. In many cases the cost of preparation for litigation has become so substantial that even though the litigant is successful, if he may not be repaid for the costs of obtaining the information necessary to the proper presentation of his case to the court, he is the ultimate loser. This in effect deprives the successful litigant of his just dues. Litigants embarking upon litigation should be aware of the fact that in determining upon that course as a solution to their problem they may not only incur the expense of their own preparation but as well the expense they impose upon the opposing party. This would be a substantial deterrent to frivolous and unmeritorious litigation. Plaintiff believes that the decision of Judge Hyde as stated in his Memorandum Decision is correct and should be sustained:

> "In the phrasing of *Thomas v. Children's Aid Society of Ogden*, 12 U2d 235, 364 P2d 1029, 'No question was made as to the good faith of defendants in incurring these costs and they appear to be reasonable. They should be allowed as a matter of course.' " (R. 70).

CONCLUSION

The decision of the lower court correctly interprets and applies the law and is just and equitable. It should be sustained.

Respectfully submitted,

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