1971

J. Henry Jones, Co. v. Don Smith, dba Smith Plumbing and Heating Company : Brief of Plaintiff-Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

J. HENRY JONES CO.,
a Utah Corporation,
Plaintiff-Respondent,

vs.

DON SMITH, dba
SMITH PLUMBING AND
HEATING COMPANY,
Defendant-Appellant.

Case No. 12533

BRIEF OF PLAINTIFF-RESPONDENT

Appeal from Decision of
the Honorable Edward Sheya,
Seventh Judicial District Judge

GEORGE C. MORRIS
914 Kearns Building
Salt Lake City, Utah 84101
Attorney for
Plaintiff-Respondent

FRANK J. ALLEN
351 South State Street
Salt Lake City, Utah 84111
Attorney for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS Continued

CASES CITED

TEXTS CITED

MEMORANDUM

References to Smith or Defendant pertains to Appellant.
References to Jones or Plaintiff pertains to Respondent.
Reporter's transcript will be referred to as (T.....).
Reference to the Court's file will be indicated by (R.....).
Plaintiff's exhibits will be indicated by (Pl. Ex.....).
Defendant's exhibits will be indicated by (Def. Ex.....).

IN THE SUPREME COURT OF THE STATE OF UTAH

J. HENRY JONES CO.,
a Utah Corporation,
Plaintiff-Respondent,

vs.

DON SMITH, dba
SMITH PLUMBING AND
HEATING COMPANY,
Defendant-Appellant.

Case No. 12533

BRIEF OF PLAINTIFF-RESPONDENT

NATURE OF THE CASE

The nature of the case is accurately stated by the Appellant and for that reason will not be restated by Respondent.

DISPOSITION BY THE TRIAL COURT

Appellant's statement of the Disposition by the Trial Court is substantially accurate and will not be restated here.

STATEMENT OF FACTS

The first and third paragraphs of Appellant's statement of facts are reasonably correct. The second paragraph is also accurate except for the first sentence thereof, and Respondent submits the following statement in lieu thereof: "Appellant had prepared

an instrument on his stationery which is in evidence as *Plaintiff's* Exhibits 3 and 3A. The parties both signed the instrument on February 12, and each considered it to constitute *a part of* the contract — the remainder of which was attached thereto. (T 32)"

The equipment purchased was itemized on B-I-F quotation sheets. Printed on the bottom of the first page appears in bold type: "IMPORTANT READ CAREFULLY." Then followed on the bottom of the first page and on the back thereof: "Standard Terms and Conditions of Sale."

The first paragraph of the Appellant's cover letter states: "This is to be included as part of B-I-F quotation No. 871-40906-4-532 from J. Henry Jones Company, Inc." (Pl. Ex. 3 and 3A) The cover letter was attached to these quotations. The latter, however, did not itemize the price of each item of equipment. At the bottom of the cover letter retained by Smith, Smith wrote "All for a total of $40,969;" and on the copy retained by Jones, Jones wrote "Total $40,969."

At the trial Smith claimed for the first time that he intended the above figure to include sales tax. Jones claimed the figure was a basic price only and that the sales tax had not been computed nor added to this figure because it was expected that the purchaser may provide an exemption certificate acceptable to the State Tax Commission as provided in the terms and conditions of the sale. (Pl. Ex. 3A) Smith made

no objections to the printed matter attached to the cover letter at the time of signing. The printed parts of the contract in question read as follows:

"PRICES

. . .

The amount of any applicable present or future tax or other government charge upon the production, sale, shipment and/or use of the goods covered by this quotation shall be added to billing where applicable unless Purchaser provides us with an exemption certificate acceptable to the taxing authorities . . ."

DELIVERY

. . .

"In no event shall the Company be liable for consequential damages resulting from its failure to perform or delays in performing its obligations unless otherwise agreed in writing by an authorized Company officer."

Except for the first three paragraphs of Appellent's statement of facts, the remainder thereof appears to be largely conclusions of the Appellant but which were not accepted as facts by the Trial Court.

ARGUMENT

RESPONSE TO APPELLANT'S POINT I

THE TRIAL COURT PROPERLY RULED THAT THE APPELLANT WAS OBLIGATED TO PAY THE SALES TAX, AND WHETHER OR NOT A TAX EXEMPTION CERTIFICATE COULD HAVE BEEN OBTAINED WAS NOT IN ISSUE.

Whether or not Smith could actually qualify to obtain a tax exemption certificate was not an issue in this case. The Tax Commission would have had to

determine whether or not the equipment purchased retained its character as tangible personal property and did not become real property upon installation and to otherwise determine if Smith qualified for a tax exemption certificate. The Trial Court's statement that he could have obtained the same is mere dictum in the case at bar. The Trial Court stated the issue on this point as follows: "1. Whether the Defendant is liable for sales tax in the sum of $1,433.92 because of *failure to provide an exemption certificate* as provided for in the printed portion of the contract in question." (R 70) (emphasis added)

The printed portion of the contract required the tax to be paid unless an exemption certificate was furnished. Admittedly, n o n e was furnished; and there was no evidence that a request for one had been made to the Tax Commission.

In the case of *Utah Concrete Products vs. Tax Commission*, 101 U. 513; 125 P. 2d 408, the Trial Court rejected Plaintiff's argument that road contractors were only instrumentalities of the state and as such were entitled to an exemption. In this case cited by Appellant the issue was whether "road contractors were only instrumentalities of the state and as such exempt under Section 6." The Court properly held that the contractor was liable for the tax.

RESPONSE TO APPELLANT'S POINT II

THE TRIAL COURT PROPERLY RULED THAT THE PREPONDERANCE OF THE EVIDENCE INDICATED THE STATED CONTRACT PRICE DID NOT INCLUDE THE SALES TAX.

The Trial Court's ruling that the contract price did not include the sales tax was based upon its weighing all of the evidence, the testimony, and considering the circumstances as a trier of the facts. The Trial Court properly concluded "Defendant Smith's claim that the language 'All for a total of $40,969' (which he endorsed on Plaintiff's Exhibit 3), means that said figure included the sales tax is not tenable. In the Court's view, such figure constituted the basic price; and in the absence of language showing that it included sales tax, it is not to be so interpreted." (R 71) On this issue the Court was acting as a jury to determine the intention of the parties and had the advantage of passing upon the credibility and the demeanor of the witnesses in the assertion of their conflicting claims.

The case of *Butler vs. State Tax Comission*, 1962, 13 U. 2d. 1; 367 P. 2d 852, very closely resembles the case at bar. In that case the contractor installed equipment furnished by B-I-F and Jones, in the Salt Lake water treatment plant. Butler claimed he intended the bid price to pay for all costs including any taxes imposed based on ". . . for the lump sum amount of $650,350." Also, evidence was offered to show that he may have been entitled to an ex-

eption from the use tax because of taxes having been paid in another jurisdiction. In that case, the Tax Commission had the duty of determining the facts. This Court held:

> "Where a taxpayer asserted that a transaction was exempted from the use tax under Sec. (d) 15-16-4, but the only representation the taxpayer offered to make was that it intended its bid price to pay for all costs to it, including any taxes imposed, and which may have been paid elsewhere, it was not reversible error for the Commission to exclude the proffered evidence."

The Utah Supreme Court further stated the law in the following language which should now be applied to our case and could be the basis of disposing of the appeal:

> "Where the evidence is in conflict and/or it's such that different inferences may reasonably be drawn therefrom, the Tax Commission must be allowed considerable latitude of discretion in performing its duty in determining the facts; and this Court will not disturbe its conclusions unless they appear to be clearly erroneous . . ."

The same rule of law was previously state by unanimous decision of this Court in the case of *McKendrick vs. State Tax Commission*, 1959, 9 U. 2d. 418; 347 P. 2d. 177.

A trial judge is frequently better qualified that a jury or even the Tax Commission in weighing conflicting evidence, and in the case at bar this not only

applies to the sales taxes but the claimed damages for alleged late delivery.

Although the following two cases also refer to delayed deliveries, the question of weighing the evidence by the trier of the facts is also presented.

It has been held "that the acceptance of goods after the time fixed for delivery may be considered by the jury as evidence of a waiver of damages sustained by the delay, but its weight must depend upon the circumstances of the case." *Medart Patent Pulley vs. Dubuque*, 96 NW 770.

The Court held in *Murmann vs. Wissler*, 92 SW 355: "That acceptance after the expiration of the time for delivery is but prima facie evidence of a waiver of a right to damages on account of the delay, and the question of waiver is in general for the jury."

In the *Montague case* cited on page 7 of Appellant's brief, there was clearly a counteroffer. This was not true in the case at bar. The case is further distinguished by the Court's stating, "The *only* reasonable construction that could be placed upon the counter offer *under the circumstances* was that sales tax would be included in the contract price . . ." (empahis added)

The quotation taken from the *Loeb case* quoted on page 8 of Appellant's brief appears to be taken out of context.

The Court further stated in that case, "Our con-

clusion is that the contractor as a purchaser of the materials used in the carrying out of his contract, must pay the sales taxes due on those purchases and that if it was his purpose to pass those taxes on to the Defendant [consumer] here, he should have so stated in the contract."

The Jones-Smith contract conditionally stated that the purchaser was to pay the taxes.

POINT III

THE TRIAL COURT PROPERLY RULED THAT THE PRINTED MATTER SETTING FORTH THE TERMS AND CONDITIONS OF THE SALE TOGETHER WITH THE LIST OF EQUIPMENT WAS A PART OF THE PURCHASE CONTRACT.

The Trial Court made its ruling in this case on on the basis that the printed portion itemizing the conditions were part of the contract. This was an important part of the contract as indicated in bold print at the bottom of the first page which reads "IMPORTANT READ CAREFULLY." (Pl. Ex. 3A) The first sentence in Smith's cover letter indicates the intention of the parties in this language: "This is to be included as part of B-I-F quotation No. 871-40906-4-532 from J. Henry Jones, Inc." (Pl. Ex. 3A) The printed matter contains the "STANDARD TERMS AND CONDITIONS OF SALE."

The Appellant's contention that the printed matter was only the terms of a contract between B-I-F and Jones ignores the fact Smith took advantage of

many of the printed terms and conditions. He made prorata payments as partial shipments were made. The compressor was returned, and Smith took advantage of the warranty as pertaining to the pumps. A factory-trained serviceman was used although the printing was enlarged by the typed portion. (T 62) The evidence and circumstances all justified the Trial Court's conclusion that the printed matter was a part of the Smith-Jones contract.

The printed matter together with the description of the equipment was directed to the city of Blanding and the City's project engineers and passed on to Smith prior to the signing of the Smith-Jones cover letter which was expressly "to be included as a part of the B-I-F quotation." Regardless of relations between B-I-F and Jones, the printed matter was intended and accepted as a part of the terms without further discussions or objection. (T 32)

POINT IV

THE TRIAL COURT PROPERLY HELD THAT THE CONTRACT PRECLUDED DAMAGES FOR LATE DELIVERIES AND SECONDLY THAT THERE WAS A SEASONABLE PERFORMANCE WHICH WAS ACCEPTED BY APPELLANT WITHOUT OBJECTION—INDICATING A WAIVER.

It is significant that the Trial Court prefaced its reasons for not allowing Defendant's claimed setoff for late deliveries by saying, "The Court finds from a *perponderance of the evidence* that Defendant is not entitled to a setoff by reason of late deliveries

of purchased equipment . . ." (R 75) (emphasis added)

Appellant's quotation from 46 Am. Jur. 447 qualifies the application to the case at bar and clearly indicates that it does not apply because of the following language: ". . . fails to deliver at the time *stipulated*, therefore, in the contract . . ." and further limits the rule as is pertains to the case at bar with this language: ". . . *in the absence of evidence of any facts or circumstances* . . ." (emphasis added). In the case now before the Court there were no delivery dates agreed to, and there were facts and circumstances showing seasonable performance. (R 72)

The parties stipulated that where a contract is made to deliver goods and no date is specified that the law implies that it will be within a reasonable time. (T 42) Reasonable time is a question of fact the Trial Court found in favor of Jones from a preponderance of the evidence. The Trial Court was very liberal in considering Defendant's theory and was certainly aware of its own duty to determine whether or not the claimed offsets "are justifiable and allowable." (T 108-T 109)

The rule is stated in 17 C.J.S. 1067-1068 and the several cases cited as to what constitutes reasonable time for performance of a contract which states no time:

> "Generally, reasonable time depends upon the nature of the contract and the particular cir-

cumstances — taking into consideration the difficulties attending it and the diligence used." (*Rosewell Drainage District vs. Dickey*, 292 Fed. 29, 32)

"In deciding whether an undertaking has been performed within a reasonable time the material difficulties and hazards attending it, the amount of diligence used, the frustrated attempts of performance should be considered." (*City of East Liverpool, Ohio vs. Pitt Construction Company*, 28 Fed. 236, 239; *Dennison vs. Ladd*, 54 Nev. 186; 10 P.2d)

Davis vs Fish, 48 Am. Dec. 387. Holding that the acceptance and use of property purchased by executory contract furnished strong presumption of a waiver of all objections on account of delay in delivery. Whether or not there was a waiver is ordinarily a question of intention and, therefore, a question of fact.

POINT V

THE TRIAL COURT CORRECTLY RULED THAT INTEREST SHOULD BE COMPUTED FROM DATES OF SHIPMENT BASED ON THE UNDISPUTED SCHEDULED SHIPMENT DATES BUT THAT INTEREST SHOULD NOT BE COMPOUNDED.

The evidence set forth the scheduled shipping dates. (Def. Ex. 5) The contract provides under the paragraph PAYMENTS: "Prorata payments shall become due as any partial shipments are made." (Pl. Ex. 3A and R 72) The evidence also showed invoice billings and credited installments. (Pl. Ex. 4) Jones

testified about the correlation of interest charges with debits and the invoices for payments due as shown by his financial records and shipping schedule. (T 47)

There was some question at the trial as to whether or not the interest was being compounded, and at the conclusion of the trial Jones was ordered to submit a detailed computation of simple interest. (R 73) In complying, Jones listed the shipping dates from copies of the invoices which he testified Smith had received. These are reasonably consistent with the schedule, and the Court set this forth in its findings of fact. (R. 76, 77, 78) It is to be noted that all of these dates were prior to November 1, 1964.

CONCLUSION

The Trial Court impartially and judiciously discharged its responsibility as the trier of the facts and the law. It was proper that the purchaser should be required to pay the sales tax. The contract did not specify delivery dates but expressly precluded damages for late deliveries. Deliveries of equipment made after the completion date set forth in the primary construction contract and not mentioned in the subcontract were made within a reasonable time. The purchaser should pay simple interest on the amounts found to be unpaid.

Respondent, J. Henry Jones Co., respectfully asks this Honorable Court to uphold the decision of the District Court.

Respecifully submitted,

GEORGE C. MORRIS
914 Kearns Building
Salt Lake City, Utah 84101
Attorney for
Plaintiff-Respondent