1972

Neil Carlisle And Merrill Ewell Dba Carlisle And Ewell v. Clifford Cox And Allen Cox And v. Lewis Kofford : Respondent's Brief

In The Supreme Court of the State of Utah

NEIL CARLISLE and MERRILL EWELL dba CARLISLE AND EWELL, a partnership,
Plaintiff and Respondents,

vs.

CLIFFORD COX and ALLEN COX,
Defendants and Appellants,

and V. LEWIS KOFFORD,
Defendant.

RESPONDENT'S BRIEF

Appeal from a Judgment of the
Utah County
The Honorable Allen B.

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TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

CASES CITED

STATUTES CITED

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and V. LEWIS KOFFORD,
Defendant..

Case No. 12,802

RESPONDENT'S BRIEF

STATEMENT OF NATURE OF CASE

This is an action brought by the plaintiff and the respondents herein under the provisions of 14-2-1 and 14-2-2, Utah Code Annotated, to recover judgment against the defendant and the appellants herein, Clifford Cox and Allen Cox, for the reasonable value of materials installed and labor performed by the respondents as sub-contractors under a contract between th appellants as owners and the defendant V. Lewis Kofford, as general contractor, which contract called for construction of improvements upon property owned by the appellants and located in Utah County.

A second cause of action not involved in this appeal sought judgment against the defendant V. Lewis Kofford for the balance owing on his contract with the respondents herein.

DISPOSITION IN LOWER COURT

None of the parties requested a jury trial. Case was tried by the court with the Honorable Allen B. Sorensen presiding on November 17, 1971, and was concluded on that date and taken under advisement. On November 29, 1971, the Court entered its order granting judgment in favor of the respondents and against the appellants in the amount of $1551.00 from which judgment this appeal is taken. Judgment was further granted against the respondents and in favor of the defendant V. Lewis Kofford, no cause of action, from which judgment no appeal was taken.

RELIEF SOUGHT ON APPEAL

Respondents seek an order of this court affirming in total the decision of the trial court.

STATEMENT OF FACTS

The revelant facts are as follows:

In October, 1968, the appellant herein owned a vacant parcel of real property in Provo City, Utah County. Sometime shortly prior to October 24, of that year, they entered into a contract to construct thereon a

building to include a 160,000 BTU furnace for an unknown amount but which was always conceded to be in excess of $500.00. These facts were never disputed. (See page 5 of appellants' brief). On October 28th, 1968, the respondents herein, under a sub-contract entered onto the premisses and proceeded to install in the building under construction a furnace as described above, together with its related duct work, heat registers and thermostrats. With the exception of a heat register which could not then be obtained and installed, the respondents contract was completed on December 6th, 1968. The missing register, which because of its peculiar size, had to be specially ordered, was secured sometime subsequent to that date and was installed on February 19, 1969, thus completing the job. Respondents thereafter commenced this action on February 13, 1970, to recover $1551.00 from the appellants under the provisions of 14-2-1 of the Utah Code Annotated, 1953, the so-called bond law. The history of the action from that point is a matter of record. A pre-trial conference was held before the Honorable Allen B. Sorensen on October 8, 1971, at which time the Court entered a pre-trial order restricting the trial to essentially the single factual issue, so far as the parties to this appeal are concerned, of the applicability of the one-year statute of limitations set out in 14-2-2, Utah Code Annotated. The Court specifically found in granting judgment in favor of the respondents upon that issue, that the last materials were furnished and last labor performed within one (1) year prior to the time the respondents' action was commenced.

(See paragraph 8 of the Findings of Fact, Record on appeal Item 37) and that as a matter of law the action was commenced within the time required by the applicable statute of limitations (See paragraph I Conclusions of Law, record on appeal item 37).

Two weeks after the court entered its pre-trial order setting forth the issues to be tried, the appellant moved to amend the same to include the additional affirmative defense of estoppel, which was never pleaded, to go along with there affirmative defense of the statutes of limitations, which also was never pleaded. The motion was argued before the court and was denied.

The following portions of the statement of facts contained in the appellants' brief are disputed:

1. Appelllant's statement in the second paragraph of page 5 stating that "the plaintiff had the burden of showing that they were within the one (1) year statute of limitations, which meant that all work had to be completed on or prior to February 13, 1969.

Respondents dispute this as a matter of law.

2. The last paragraph of page 5 of the appellants brief stating that the plaintiff "conceded at trial that they did not consider the grill or register to be very important to the job." (see trial transcript pages 23-24).

3. Appellants statement on page 7 of their brief that they were unaware of the existence of Exhibit 5. This fact is unknown to the respondent and does not appear of record.

4. With reference to page 7 of appellant's brief, the Court should note that the "card" referred to is not evidence in this case as it was never identified or received by the trial court (see trial transcript page 75 line 27) although appellants brief implies to the contrary.

POINT I

THE TRIAL COURT DID NOT ABUSE THE AUTHORITY GRANTED TO IT UNDER RULE 16, UTAH RULES OF CIVIL PROCEDURE IN RESTRICTING THE ISSUES TO BE TRIED AND IN DENYING THE APPELLANTS' MOTION TO AMEND THE PRE-TRIAL ORDER.

The Court should keep in mind with reference to Point one of the appellants' argument that at no time did the Court ever eliminate as an issue anything over which there was any dispute so far as the pleadings are concerned. The relevant questions involving all points which would bring the case within the provisions of 14-2-1, Utah Code Annotated 1953, including the balance owing were specifically asked by the Court at the pre-trial hearing and answered, and the issues as framed are not inconsistent with those answers. (Pre-trial transcript).

The appellants sought to have reserved as an issue there affirmative defense of estoppel which is required, under Rule 8 (c), Utah Rules of Civil Procedure, to

be affirmatively pleaded. This was not something that the Court arbitrarily took away from them, but was an affirmative defense which they had failed to plead in the first place and which they had failed to clearly define, even at the pre-trial conference, and which they felt injustly deprived of because their motion to amend the pre-trial order to include their unpleaded defense was denied.

In judging the Court's attitude toward the appellant throughout the proceedings which the appellant implies was hostile, you should keep in mind that th one affirmative defense upon which the case turned was never pleaded affirmatively by the appellant as required by Rule 8 (c), Utah Rules of Civil Procedure, but was never-the-less reserved as an issue by the Court for the beneft of the appellants.

To have included the estoppel defense or counter claim in whatever form the appellants may have chosen would not only have been inconsistent wth the pre-trial order and the appellants representation made thereat, but would have created an entirely new lawsuit requiring discovery on issues never before contemplated although the case was, at that time, almost 20 months old, a senior citizen by Fourth District Court standards.

POINT II

THE JUDGMENT OF THE TRIAL COURT REJECTING THE APPELLANTS OFFER OF PROOF ON THE QUESTION OF ESTOPPEL UNDER THE ISSUES AS FRAMED BY THE

PLEADING AND THE PRE-TRIAL ORDER IS CORRECT.

Although the record of these proceedings is void of the evidence claimed to exist in Point II of the appellants argument it is respectfully submitted that as a matter of law a materialman who otherwise comes within the provisions of 14-2-1, Utah Code Annotated, has an absolute right to not only waive his lien rights and remain silent for a year, but to spend that year looking to his general contractor or not looking to him as he sees fit without jepoardizing his bond law rights, unless, of course, he accepts payment in the form of a note as was done in the Apex Lumber Case cited on page 14 of the appellants brief.

The appellants claim to have been damaged by the respondents silence and yet they set forth in their answers to interrigatories (See answer to Interrogatories No. 5, Record on Appeal 20) That the general contractor, prior to commencing construction of the building involved, already owed them more than the contract price for constructing the building and that they considered him paid in advance for its construction. It is difficult under those circumstances to see how they can accuse the respondents by their "sober silence to the everlasting damage of other creditors" (see page 16 of appellants' brief) of being responsible for any debts to them that Kofford didn't pay. On the contrary, that position appears to be nothing more than a complete fabrication.

POINT III

THE TRIAL COURT'S FINDINGS THAT THE RESPONDENT'S ACTION WAS TIMELY FILED IS SUPPORTED BY THE EVIDENCE AS A MATTER OF FACT AND IS CORECT AS A MATTER OF LAW.

The trial Court found as a fact that the last material was furnished by the respondents on February 19, 1969, and that the action was filed within one year from that date. If this finding is supported by any evidence which the Court could find to be true then it must stand on appeal. (See *DeVas vs. Noble,* 369 P.2d 290, 13 Ut. 2d, 133.).

The points claimed in support of Point No. III on page 17 of Appellants' brief alleging that the plaintiffs either considered the job complete prior to that time, or deliberately withheld the completion of the same, is pure conjecture and was not found by the Court to be the fact. On the contrary, respondents, at that time, would have no motive for intentionally delaying the job's completion because they had a full year before any bond law rights expired. It was not a matter of cooking up some additional unfinished work to renew those rights because they had not expired.

The words of 14-2-1 Utah Code Annotated are clear. The one year statute of limitations commences to run on the date "the last materials were furnished".

This language does not require any interpretation. Its meaning is clear, concise and unambligious.

It is not disputed that if the trial court had found that the installation of the materials was deliberately delayed to delay the expiration of a statute of limitations, and if such a finding could be supported by the records, which it could not, we might have a different case before this court, possibly one upon which some sort of "Scintilla of work theory" could be justified. You have no such case before you.

This court should keep in mind that the appellants have never paid anyone for the furnace yet. Kofford's debt that they claim was worked off by its installation already existed at the time the work was done by the respondents. All they do by resisting this action is seek to reduce the debt they allowed the Kofford Company to run up by letting the respondents hang for part of it, a position entirely inconsistent, it appears, with any theory of equity that they asked this Court to recognize on their behalf.

The decision of the trial court should be affirmed.

Respectfully submitted,

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