

1972

**Robert C. Reid And Ronald P. Nelson, Dba Custom Promotions v.
Nick M. Dodas And Rhoda Dodas : Brief of Appellants**

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Recommended Citation

Brief of Appellant, *Reid v. Dodas*, No. 12913 (1972).
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IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT C. REID and RONALD P.
NELSON, dba CUSTOM
PROMOTIONS,

Plaintiffs-Respondents,

vs.

NICK M. DODAS and RHODA
DODAS, his wife,

Defendants-Appellants,

Case No.
19818

BRIEF OF APPELLANTS

Appeal from the Judgment of Third District Court at
Salt Lake County, State of Utah,
Honorable Joseph G. Jeppson, Judge

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FILED

AUG 14 1972

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Defendants-Appellants,

Case No.
12913

BRIEF OF APPELLANTS

STATEMENT OF THE KIND OF CASE

This is an action on an oral contract for materials furnished and labor performed in construction and re-modelling of a restaurant and lounge known as Rhoda's Club Charade.

DISPOSITION IN LOWER COURT

The Third District Court, Joseph G. Jeppson, Judge, granted judgment to plaintiffs on their complaint after denying defendants' motion to dismiss the action of plaintiffs for the reason that plaintiffs had acted as a general contractor and performed construction work without first obtaining a license, as required by law; that the action was barred by the statute of limitations; and that the plaintiffs had failed to prove reasonable value of the materials furnished and services performed which would support the judgment against defendants.

STATEMENT OF FACTS

Defendant, Nick M. Dodas, was the owner and operator of a restaurant located at 947 South State Street, Salt Lake City, and known as Rhoda's Lunch. Defendant, Rhoda Dodas, is the wife of defendant, Nick M. Dodas, and worked with Mr. Dodas as a waitress. Sometime in June, 1964, Mr. Dodas contemplated opening a new and larger restaurant with a lounge. Plaintiffs heard of Mr. Dodas' plans and contacted him and requested that they be given opportunity to bid to do the interior decoration of the proposed new restaurant and lounge and part of the construction. An agreement was entered with Mr. Dodas in the latter part of June or early part of July, 1964, whereby plaintiffs, pursuant to plans and drawings made by them (R. 59-60), would do a portion of the construction, remodelling and interior

decoration on the new lounge and restaurant at an agreed contract price of \$1,600.00, which contract price is disputed. Mr. Dodas then paid to the plaintiffs \$600.00 cash in advance in July, 1964, prior to plaintiffs commencing work (R. 118). Plaintiffs then commenced to perform the work contracted for in the remodelling of the new restaurant, which consisted of furnishing of materials, subcontracting a portion of the work out to third parties, construction and installation of a back bar and canopy, installation of wall coverings, construction and installation of room dividers, partitions and panels, installation of a metal railing and the installation of acoustical finish on the dance floor ceiling. (Exhibit 5-P, page 129) At the time the work contracted for was completed by plaintiffs in October of 1964, defendant, Nick M. Dodas, paid to the plaintiffs the additional sum of \$1,000.00, which was the balance due on the contract. Mr. Dodas then commenced doing business in the new restaurant and lounge in November 1964, to 1967 when he suffered a heart attack which prohibited him from continuing in his business for several months. The restaurant was sold to Mrs. Dodas and incorporated by her under the name Rhoda's Restaurant on or about the 13th day of October 1967. (Exhibit 11-D)

No other payments were made by defendant, Nick M. Dodas, to the plaintiffs on the oral contract. Approximately four years later on or about April 5, 1968, plaintiffs received two checks drawn on the corporation's account, Rhoda's Restaurant, (Exhibits 7-D and 8-D) in payment for certain goods and a new bench purchased

by the corporation in the year 1968 (R. 134-135). Mr. Dodas had no ownership whatsoever in Rhoda's Restaurant, a corporation, from the time the restaurant was sold to Mrs. Dodas and incorporated, and did not contract with plaintiffs for the goods and bench. Plaintiffs, without first filing a certificate of doing business under assumed name, as required by law, commenced the subject action some five years after the contract with Mr. Dodas, which action resulted in a judgment against both defendants in favor of plaintiffs. The corporation, Rhoda's Restaurant, was never made a party to the action of plaintiffs.

POINT I.

JUDGMENT SHOULD NOT HAVE BEEN GRANTED AGAINST DEFENDANT, RHODA DODAS, IN THAT SHE DID NOT CONTRACT WITH PLAINTIFFS, AND WAS NOT THE OWNER OF RHODA'S LUNCH.

Plaintiffs were under the mistaken assumption that the restaurant operated by Mr. Dodas under the name Rhoda's Lunch was a restaurant owned by the defendants jointly (R. 76). Mr. Reid stated on direct examination (R. 57), that he first met the defendants in the year 1963 in a restaurant owned by Mr. Dodas on South State Street; that as far as he knew, defendants both worked in the restaurant. The record is completely devoid of any actual knowledge on the part of plaintiffs as to the true ownership of the restaurant at the time of the

contract herein. The evidence clearly shows that the plaintiffs assumed that the restaurant was jointly owned by the defendants due to the use of the name "Rhoda's" (R. 76). The only significance of the use of the name "Rhoda's" is to the effect that this was the name of Mr. Dodas' wife (R. 115). The testimony of both Mr. and Mrs. Dodas is to the effect that Mr. Dodas was the sole owner of Rhoda's Lunch at the time the contract between defendant, Nick M. Dodas, was entered into with plaintiffs (R. 116, R. 143).

Plaintiffs had the burden of proving without speculation, by a preponderance of the evidence, that both defendants contracted for labor and materials for which plaintiffs sought judgment. (See *Alvarado v. Tucker*, 2 U.2d 16, 268 P.2d 986) The mere fact that Mrs. Dodas was an employee of Mr. Dodas and was present at a few of the meetings between plaintiffs and Mr. Dodas during negotiations subsequent to the oral contract between Mr. Dodas and plaintiffs would not of itself constitute a contract with Mrs. Dodas and plaintiffs, there being no meeting of the minds. The testimony of plaintiffs as to the alleged contract of Mrs. Dodas is based upon their assumption that she was a partner and co-owner of Rhoda's Lunch at the time the contract was entered into and not upon any factual proof to that effect. Both the defendants dispute plaintiffs claim that Mrs. Dodas in any manner contracted with the plaintiffs for the remodelling and construction of the restaurant and lounge. Further, the evidence presented showed that the payments admittedly received by the plaintiffs pur-

suant to the oral contract in the sum of \$1,600.00 were made by Mr. Dodas (R. 118, R. 132). The assumptions of plaintiffs are insufficient to prove a contractual relationship between themselves and Mrs. Dodas. (See 29 AmJur 2d, pg. 174, *Evidence* § 140) Plaintiffs failed to prove any contractual relationship between themselves and Mrs. Dodas by a proponderance of the evidence. The granting of a judgment against Mrs. Dodas by the lower court under the facts presented was error and the same should be reversed.

POINT II.

THE LOWER COURT ERRED IN GRANTING JUDGMENT AGAINST DEFENDANTS FOR THE AMOUNT PRAYED IN THAT THE PLAINTIFFS FAILED TO PROVE THE REASONABLE VALUE OF THE MATERIALS FURNISHED AND SERVICES RENDERED.

The Court erred in allowing documents presented as exhibits by plaintiffs to be testified to before a proper foundation had been laid and admitted them improperly into evidence without a showing that the particular exhibits represented expenditures for materials that were actually furnished to Mr. Dodas and for labor that was actually performed in the remodelling and construction of the restaurant and lounge for Mr. Dodas (R. 62-73). (See 30 AmJur 2d, pg. 39, *Evidence* § 918) Testimony on vor dire of plaintiff, Mr. Reid, was to the

effect that there was no indication on any of the cancelled checks as represented by Exhibit 1-P, that the expenditures were for materials furnished to Mr. Dodas and labor performed on his restaurant-lounge (R. 67-68). Plaintiff Reid testified that he had expended some \$404.32 on foil paper. (See Exhibit 1-P) On cross-examination it was brought out that the expenditure for foil paper was not only for the Dodas job, but for other jobs which the plaintiffs were in the process of doing (R. 84-85). Plaintiffs had the burden to prove the "reasonable value for the materials and services" claimed by a preponderance of the evidence. That the materials furnished and labor performed for which they were claiming a sum due had actually been furnished and performed in the construction and remodelling of the restaurant-lounge. The documentary evidence presented by the plaintiffs was improperly admitted by the court without proper foundation, contained many discrepancies (R. 84-89), and were not properly identified as business records. For the reasons stated, the lower court committed an error in granting judgment against defendants based upon the improperly admitted evidence (Exhibits 1-P, 2-P, 3-P, 4-P) and that plaintiffs failed to meet their burden of proof as to the reasonable value of the "materials furnished and services performed" in the sum of \$1,613.75. Thus judgment should be reversed and judgment of no cause of action entered against the plaintiffs in favor of the defendants,

POINT III.

PLAINTIFFS WERE NOT ENTITLED TO A JUDGMENT AS A MATTER OF LAW, IN THAT THEY ACTED AS A CONTRACTOR WITHOUT FIRST OBTAINING A LICENSE AS REQUIRED BY LAW.

Title 58-23-3(3) defines a contractor as follows:

*“Contractor: Any person, firm, co-partnership, corporation, association, or other organization, or any combination of any thereof, who, for a fixed sum, price, fee, percentage or other compensation other than wages, undertakes with another for the construction, alteration, repair, addition to or improvement of any building, or any part thereof * * *, but shall not include anyone who merely furnishes materials or supplies without fabricating the same into, or consuming the same in the performance of the work of the contractors as herein defined.”* (Emphasis added.)

It is clear that the plaintiffs acted as contractors within the meaning of 58-23-3(3) of the Utah Code Annotated in that they employed subcontractors in the remodelling and construction of the restaurant-lounge for Mr. Dodas (R. 62-66, R. 78, R. 80); bid to do work for a fixed sum other than wages (R. 60, R. 84); purchased materials from suppliers and consumed the materials in the fabrication of dividers and partitions in the performance of the work contracted for (R. 81, 98, 99), without first obtaining a license pursuant to Title 58-23-1 of the Utah Code Annotated as amended (R. 64, 79).

Title 58-23-1 provides as follows:

“It shall be unlawful for any person, firm, co-partnership, * * * or other organization, or any combination of any thereof, to engage in the business or act in the capacity of contractor within the State without having a license therefore as herein provided, unless such person, firm, co-partnership, * * * or other organization is particularly exempted as provided in this act. *Evidence of * * * the employment of any person on a construction project, or the offering of any bid to do work of a contractor as herein defined, shall be accepted in any court of the State of Utah as prima facie evidence of engaging in the business or acting in the capacity of a contractor.*” (Emphasis added.)

Exhibit 5-P represents the charges claimed by plaintiffs for materials purchased and labor performed in completing the remodelling and construction of the restaurant-lounge for Mr. Dodas (R. 78-84). The charges for labor and materials are in addition to the amount charged by plaintiffs for design, consultation and preparation of plans for the interior design and decorating of the new restaurant-lounge for Mr. Dodas as set forth in the record at page 82. Plaintiffs claim that they expended the sum of \$877.38 for building materials; hired subcontractors to aid them in doing the work contracted (R. 98-99); and allegedly agreed to do the work for a bid price not to exceed \$3,500.00 (R. 60). These facts establish, prima facie, that, plaintiffs engaged in the business and acted in the capacity of a contractor. In light of the evidence presented by plaintiffs as set forth above, it is impossible for plaintiffs to escape the fact that they acted as contractors within the meaning of 58-

23-3(3) of the Utah Code Annotated in bidding and doing remodelling and construction of the new restaurant-lounge of Mr. Dodas. Further, plaintiffs cannot escape the fact that at the time they acted as contractors, they did not have any type of contractors license, whether it be a general contractors license or speciality contractors license, nor were they licensed at any time prior to the time they submitted a bid to Mr. Dodas, during the time that they claimed the work was performed or subsequent thereto (R. 79, R. 83, R. 107).

The law in the State of Utah is clear as to the right of persons to claim payment for material furnished and labor performed in connection with construction projects where such persons or firms have not first obtained a contractor's license as required by law. The statutory requirement to obtain a license for engaging in the work as a contractor is a police regulation for the protection of the public. (*Dow v. United States*, 154 F.2d 707, 710) A contract entered into by one such as the plaintiffs in this case, when he was not licensed as required by 58-23-1 of the Utah Code Annotated, is void and unenforceable since the statute is enacted for the protection of the public. (*Olsen v. Reese*, 117 U. 411, 200 P.2d 733; *Elk-lund v. Elwell*, 116 U. 521, 211 P.2d 849; *Lyman v. Taylor*, 12 U.2d 362, 384 P.2d 401; *Moseley v. Johnson*, 22 U.2d 348, 453 P.2d 149)

In order for the plaintiffs to have stated a cause of action on contract for labor performed and materials furnished, they must have alleged that they were licensed contractors as required by 58-23-1 of the Utah

Code Annotated at the time the contract was entered into. The complaint of plaintiffs, (R. 1), contained no such allegation in claiming on contract for an amount due for "materials and services," which consisted of "interior design, construction and installation of said materials for a restaurant and lounge known as Rhoda's Club Charade." Plaintiffs in failing to allege that they were licensed contractors, coupled with the facts that they acted as contractors and did not have a contractors license as required by law, failed to state a cause of action and the lower court should have dismissed the complaint of plaintiffs. (See *Smith v. American Packing and Provision Co.*, 102 U. 351, 130 P.2d 951, *Olsen v. Reese, Supra.*)

At no time during the course of the proceedings did the plaintiffs allege or claim an exemption from the act or present evidence to rebut the presumption of 58-23-1, except to state that they possessed a retail merchants license issued by the City of Salt Lake City and a Sales Tax License issued by the State of Utah (R. 107). This claim is without merit and would not exempt plaintiffs under the act. (See *Nickel v. Walker*, 1964 N.M. 395 P.2d 679).

It is clear under the law of the State of Utah as contained in Title 58-23-1 and 58-23-3(3) of the Utah Code Annotated, 1953 as amended, and the Utah cases cited, that the lower court should have dismissed the action of plaintiffs in that the same was void for the failure of the plaintiffs to have a valid contractors li-

cense as required by law. (See *Olsen v. Reese*, *Supra*, *Platt v. Locke*, 11 U.2d 273, 358 P.2d 95).

POINT IV.

THE LOWER COURT ERRED IN GRANTING JUDGMENT TO PLAINTIFFS IN THAT THEIR CLAIM WAS BARRED BY THE STATUTE OF LIMITATIONS.

The oral contract upon which plaintiffs based their cause of action against defendants arose some time in the early part of July, 1964. The period in which suit can be brought is governed by the provisions of 78-12-25 of the Utah Code Annotated, 1953, as amended, which provides, to wit:

“(1) An action upon a contract, obligation or liability not founded upon an instrument in writing; * * * also, on an open account for work, labor, or services rendered, or materials furnished; *provided that action in all of the foregoing cases may be commenced any time within four years after the last charge is made or the last payment is received.*” (Emphasis added.)

It is not disputed from the evidence that the last payment received by the plaintiffs from Mr. Dodas on the oral contract was in October, 1964, in the sum of \$1,000.00; nor that the suit commenced by plaintiffs on the oral contract was commenced on or about June 19, 1970, more than four years from the date of last payment. It is the contention of plaintiffs that the last payment received from defendants was on or about April 5, 1968, as represented by Exhibits 7-D and 8-D. It is the conten-

tion of defendants that the April 5, 1968, payment was made by a corporation, for and on behalf of the corporation, and was not a payment on the oral contract sued upon by plaintiffs herein. Exhibits 7-D and 8-D clearly show that the payment was in fact made by the corporation, drawn on the corporation's bank account, and according to the testimony of Mrs. Dodas, was payment for goods purchased by the corporation, for the corporation account. The payment was not a payment for Mr. Dodas for the remodelling of the restaurant, he having paid plaintiffs in full (R. 95, R. 146). Plaintiffs admitted that additional cards and signs were purchased by Mrs. Dodas, but denied that Mrs. Dodas purchased a bench and that the payment was for those items. In any event, the payment by the corporation, a separate and new entity and not a party to be charged on the oral contract, was for new goods and merchandise purchased, and did not suspend the running of the statute of limitations against defendants Mr. and Mrs. Dodas. (See *Holloway v. Wetzel*, 86 U. 387, 45 P.2d 565, 98 ALR 1006; *Morris v. Russell*, 120 U. 545, 236 P.2d 451 distinguished in 1 U.2d 175, 176, 264 P.2d 279, 280, 26 ALR 947) In the case of *Holloway v. Wetzel, Supra.* the Supreme Court of the State of Utah stated:

“Part payment of either principal or interest by one of two or more joint and several obligors does not of itself suspend running of the statute of limitations against other co-obligors, *since the statute contemplates the making of payment by the party himself or by someone authorized by him.*” (Emphasis added.)

Both defendants testified that the payment made by the corporation on or about April 5, 1968, was not a payment for Mr. Dodas on the oral contract sued on by plaintiffs, in that Mr. Dodas had no ownership in the corporation or authority to transact business for the corporation. Without a proper showing by the plaintiffs that the payment was in fact a payment on behalf of Mr. Dodas on the oral contract and authorized by him, a tolling of the statute of limitations did not occur and the action was barred as a matter of law. If we assume that the lower court regarded the corporation as an assignee of the defendants, there being no evidence as to how the court regarded the corporate entity, payment by the corporation as assignee of defendants would not toll the statute of limitations. (See *Holloway v. Wetzel*, *Supra.*; *Upton v. Heizetl Construction Company*, 116 U. 83, 208 P.2d 945) The lower court should have denied the claim of plaintiffs against defendants for the reason that the same was barred as a matter of law by the statute of limitations.

CONCLUSION

Defendants assert that the action of plaintiffs should have been dismissed as to both defendants in that (1) there was insufficient evidence presented by plaintiffs to legally obligate Mrs. Dodas to the alleged oral contract between Mr. Dodas and plaintiffs; (2) that the complaint of plaintiffs alleged an action based upon open account for "materials and services" and quantum meruit, but the evidence presented was a claim for labor per-

formed and materials furnished on oral contract in the remodelling and construction of a restaurant-lounge without proof as to the reasonable value of the labor performed and materials furnished; (3) that plaintiffs' claim was void as a matter of law in that they acted as a contractor without first obtaining a contractors license as required by law under the provisions of Title 58-23-1 of the Utah Code Annotated, 1953 as amended; and (4) that action of plaintiffs was barred by the statute of limitations, Title 78-12-25 of the Utah Code Annotated, in that the action was commenced by plaintiffs more than four years from the date of last payment, October, 1964. For the foregoing reasons, the judgment rendered in favor of plaintiffs and against defendants should be reversed and a judgment entered against the plaintiffs for no cause of action.

Respectfully submitted,

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