

1972

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

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT C. REID and RONALD P.
NELSON, d/b/a CUSTOM
PROMOTIONS,

Plaintiffs-Respondents,

vs.

NICK M. DODAS and RHODA
DODAS, his wife,

Defendants-Appellants.

Case No.
12818

BRIEF OF RESPONDENTS

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

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Case No.
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BRIEF OF RESPONDENTS

STATEMENT OF FACTS

The facts that are stated in appellants' brief are disputed by the respondents in the following particulars.

At all times material hereto, the defendants both contracted with the plaintiffs to perform certain interior decoration work which included materials and services.

Said plaintiffs contracted only for the interior decoration. The parties entered into an oral agreement on or about August 15, 1964 for said decorating services and they agreed that the decorating services would not cost in excess of \$3,500.00.

The total indebtedness was the sum of \$3,363.75. In August of 1964, the plaintiffs were paid the sum of \$600.00. In October of 1964, the plaintiffs were paid an additional sum of \$1,000.00 and the third sum of \$150.00 was paid to plaintiffs in April of 1968. Defendants were indebted to the plaintiffs in the sum of \$1,613.75. After completion of said interior decorating, no other work was done by the plaintiffs in behalf of the defendants. No work was done by the plaintiffs in 1968 for the defendants.

The plaintiffs continued to send monthly statements after the completion of their work until legal action was initiated. Plaintiff Robert C. Reid repeatedly requested payment; defendants did not deny the obligation owing until the legal action was initiated.

The plaintiffs filed a certificate of doing business, under an assumed name, as required by law, on or about July 28, 1970.

POINT I

JUDGMENT WAS PROPERLY GRANTED AGAINST BOTH DEFENDANTS NICK M. DODAS AND RHODA DODAS, HIS WIFE.

ARGUMENT

The plaintiffs, on or about August 15, 1964, entered into an oral agreement to perform certain decorating services as requested by the defendants. The defendant Rhoda Dodas gave direction to the plaintiffs concerning the interior decorating and was present and took part during most of the conversations that took place between the parties.

As to all of the important issues of fact in this matter, there is conflicting testimony by all of the parties. The District Court, sitting without a jury, was able to observe each witness, hear the testimony and the demeanor of the witnesses through direct and cross examination. In determining whether, and to what extent, witnesses are to be believed, the court may consider appearance and general demeanor and impact of personalities of witnesses, in connection with reactions, manner of expression, and apparent frankness and candor or want of it in reacting to and answering questions on both direct and cross-examination. (See *Gittens v. Lundberg*, 284 P.2d 3 U 2d 392, 1115.)

The lower court believed the testimony of the plaintiffs rather than the defendants.

The appellants in their brief cite the Utah case of *Alvarado v. Tucker*, 2 U2d 16, 268 P2d 986. In reviewing the facts in this case, we have a case dealing with an automobile-pedestrian negligence case. In said case, there was a jury and the court was concerned with the question of contributory negligence. The facts and lan-

guage in said case do not apply to a contract case where we are dealing with the supplying of certain materials and decorating services.

POINT II

THE LOWER COURT DID NOT ERR IN GRANTING JUDGMENT AGAINST DEFENDANTS FOR THE AMOUNT PRAYED IN THAT THE PLAINTIFFS DID PROVE THE REASONABLE VALUE OF THE MATERIALS FURNISHED AND SERVICES RENDERED.

ARGUMENT

The lower Court did not err in allowing documents presented as exhibits by plaintiffs to be admitted since a proper foundation was layed prior to the offering of each exhibit.

The plaintiffs d/b/a Custom Promotions worked on several decorating jobs other than the defendants. On certain occasions, the plaintiffs would require materials for not only the defendants' decorating project but for other jobs. The plaintiff Robert C. Reid testified that some invoices that he had received for the purchase of materials included materials for other decorating jobs other than the defendants' project, but in each instance, he set forth the materials that were used on the defendants' job and the materials that were used on other

projects. The plaintiff did meet their burden of proof as to the reasonable value of the materials furnished and services performed in the sum of \$1,613.75.

POINT III

PLAINTIFFS WERE ENTITLED TO A JUDGMENT AS A MATTER OF LAW IN THAT THEY DID NOT ACT AS A CONTRACTOR AND WERE NOT REQUIRED TO HAVE A CONTRACTORS LICENSE.

ARGUMENT

The Plaintiffs did not act as a contractor as defined by Title 58-23-3(3), UCA, 1953, as amended. The plaintiffs did not bid competitively nor remodel and construct the restaurant-lounge as stated in Appellant's Brief.

The Plaintiffs were not acting as a contractor and were not required to allege that they were licensed contractors as required by Section 58-23-1, UCA, 1953 as amended.

The statutes and case law cited in Appellants Brief are true statements of the law, but it does not apply with the facts we have before us.

Section 58-23-2, UCA, 1953 as amended states certain exceptions to the act, particularly sub-section (6) where it is stated:

“Any person engaged in the sale or merchandising of personal property which by its design or manufacture may be attached, installed or otherwise affixed to real property who has contracted with a person, firm or corporation licensed under the provisions of this act to install, affix or attach the same.”

The Plaintiffs did not secure a building permit in that they were not acting as contractors but were decorating the premises and this required the attaching and installing of materials in the defendants restaurant-lounge. The Plaintiffs possessed a retail merchants license issued by the City of Salt Lake City and a Sales Tax License issued by the State of Utah.

The Appellants in their brief refer to the case of *Nickel v. Walkers*, 74 N.M. 546, 395 P.2d 679. This case held that a partnership, not licensed as such by the Contractors License Board, could not bring or maintain an action for balance allegedly due on contract to construct residence and to enforce mechanics lien, notwithstanding that one partner was licensed and that he in good faith had relied on telephone advice from a member of the board that since other partner would furnish merely clerical and financial assistance, no license for partnership would be required.

This case has no application to the facts before us whatsoever.

POINT IV

THE LOWER COURT DID NOT ERR IN GRANTING JUDGMENT TO PLAINTIFFS IN THAT THEIR CLAIM WAS NOT BARRED BY THE STATUTE OF LIMITATIONS.

ARGUMENT

The plaintiffs received a payment from the defendants in the amount of \$150.00 in April of 1968. The payment tolled the Statute of Limitations (Section 78-12-25, UCA, 1953 as amended). There is no dispute in the facts that the payment was made. The payment was acknowledged by the plaintiffs and deducted from the balance owing on the monthly statement that was sent to the defendants. The defendants claimed the payment was for a bench but the plaintiffs denied doing any work for the defendants in 1968.

The lower court once again believed the testimony of the plaintiffs and not the defendants.

At all times material the plaintiffs were dealing with the defendants and not a corporation. The corporation was not a joint obligor.

The defendants claim that in June of 1964, defendant Rhoda Dodas was an employee of Mr. Dodas. They subsequently claim that in October of 1967, the employee became the owner. Defendant Rhoda Dodas entered into the oral contract in August of 1964 and

payments were made up until April of 1968. I submit, that Defendant Rhoda Dodas and the corporation Rhoda's Restaurant are one and the same person. The lower court pierced the corporate veil.

The Appellants cite the case of *Holloway v. Wetzel*, 86 U 387, 45 P2d 568 in their brief. The rule of law stated in that case refers to a situation where there were one of two or more joint and several obligors and part payment by one of the obligors did not suspend the running of the statute of limitations against the other co-obligors. Rhoda's Restaurant, a corporation, was never a co-obligor. It is further stated in the case that the statute contemplates the making of payment by the party himself or by someone authorized by him to toll the statute.

Certainly the payment made by Rhoda's Restaurant, a corporation, in April of 1968 was made by the authorization of Defendant Rhoda Dodas in that the Appellants claim she purchased the restaurant from her husband in October of 1967 and incorporated it.

The Appellants also refer to *Upton v. Heiselt* Const. Co. 116 U. 83, 208 P2d 945, but in reviewing this case the facts and rules of law do not apply with the case we have before us.

CONCLUSION

Respondents submit their case on the facts in this case as disclosed by the record and the law applicable to

the issues of this case. The judgment rendered in favor of plaintiffs and against defendants should be affirmed.

Respectfully submitted,

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